# Re BYANSI (Fond)

[Rwanda SUPREME COURT – RS/INCONST/SPEC 00002/2021/SC (Mukamulisa, P.J., Nyirinkwaya, Cyanzayire, Muhumuza and Karimunda, J.) May 20, 2022]

*Constitution – Limitations of constitutional freedoms and liberties – Personal privacy – Freedom of press – Freedom of expression – Freedom of access to information – Immunity of journalist – The Constitution establishes the balance between the gravity of the effects of violation of the personal privacy as a result of the exercise of the freedom of press, of expression and of access to information, and effects resulting from the limitation of the freedom of press for reasons of protection of the personal privacy – The effects of limitation of freedom of press, of expression and of access to information are less severe – The journalist is forbidden to interfere with people's privacy.*

*Constitution – Limitations of the constitutional freedoms and liberties – Freedom of press, of expression and of access to information are not absolute – The dignity and honour of a person prevents any person including a journalist from any voluntary deed likely to lead to his/her denigration – The obligation to the journalist to indicate that the statements, photographs he/she published are different from the original version and be required to do it in good faith should not be perceived as violation of freedom of press, of expression and of access to information.*

*Constitution – Limitations of the constitutional freedoms and liberties – Freedom of press – Spread of harmful propaganda with intent to cause public disaffection against the Government of Rwanda – False information with intent to cause public disaffection against the Government of Rwanda – False information or spread of harmful propaganda with intent to cause public disaffection against the Government, which is an assault to democracy – False information or spread of harmful propaganda with intent to cause public disaffection against the Government would not be considered as part of freedom of press, of expression and of access to information, of which aim at promoting a democratic nation.*

*Constitution – Politicians are public figures ex officio and should therefore exhibit a certain level of patience and discipline than a simple ordinary citizen – A politician enjoys also legal protection of his dignity but without compromising broadcasts of general interests – The exception provided for by article 38 of the Constitution should not be extended to give some leaders the undeserved privilege covering them from being critically reported for fear of their positions or duties, without considering the relevance of the article.*

*Constitution – Fair justice – None should be held liable for the offence he/she did not commit and everyone has the obligation to denounce the commission of offences especially when it comes to felonies and misdemeanours – Freedom of press, of expression and of access to information should not prevail over the right to fair justice such that a journalist would let innocent people face prosecution for the offences they did not commit until their condemnation while he/she holds exculpatory evidence or be allowed to conceal the information about the offences of which he/she has had knowledge.*

**Facts:** Byansi Samuel Baker petitioned the Supreme Court requesting to declare of articles 155, 157, 194, 218 and 251 of the Law n° 68/2018 of 30/08/2018 determining offences and penalties in general inconsistent with the Constitution.

He alleges that article 156 of the Law determining offences and penalties should not treat a journalist as any other ordinary individual and punish him/her for listening or disclosing confidential conversations, taking or disclosing photograph, audio, visual recordings or private document without authorisation from the author.

He states that incriminating such acts prevents the journalist from undertaking investigative journalism and undercover journalism while such methods would contribute to the exposure of crimes or other illegal acts of strongmen.

He states in addition that since a journalist may face justice for such acts violates the freedom of press, of expression and of access to information provided for by article 38 of the Constitution.

He further states that article 157 of the Law determining offences and penalties in general should not penalise a journalist for modification of utterances, photographs or images without mentioning it because media relies primarily on editing.

He alleges that penalisation of editing deters cartooned articles, which limits the media on plausible articles only while viral articles vexing some individuals are protected by the freedom of press, of expression and of access to information as well.

Concerning article 194 of the Law determining offences and penalties in general, he states that journalists are not themselves authors of information because they get it from people who may tell them the truth or lie.

He contends that the initial words "any person" of such provision does not give a journalist the deserved special treatment as they rather confuse him/her with any other person which may lead journalist to be held liable for releasing an article of which the subject experienced discontent.

He adds that the word "propaganda" that is also in the provision was not defined by the Law, which makes it extensive to the extent that courts would interpret it in approximate way while in a democratic government, a person should not be liable for propaganda.

Regarding article 218 of the Law determining offences and penalties in general, he states that there is no ground for exempting the leaders provided for in the aforementioned article from being subject of stories freely.

For him, the provision of such article melts all efforts already made by the country in the context of protection of human rights because it promotes discrimination and hinder the freedom of access to information, of press and of expression.

He declares that a journalist should not be held liable for defamation, and would this happen, she/he must be prosecuted following the legislation on media or civil law.

Concerning article 251 of the Law determining offences and penalties in general, he states that a journalist has the duty to protect people who whisper him information even though it is not prohibited to collaborate with other organs.

He deems that a journalist should not be subject to the obligation to reveal the source of information for it can violate their freedom of expression.

**Held:** 1. The Constitution establishes the balance between the gravity of the effects of violation of the personal privacy as a result of the exercise of the freedom of press, of expression and of access to information, and effects resulting from the limitation of the freedom of press for reasons of

protection of the personal privacy. Noted that the effects of violation of freedom of press, of expression and of access to information are less severe, a journalist is not allowed to interfere personal privacy on the sole ground of finding a story.

2. The fact that a journalist is required to indicate the published statements, photographs or images different from original in good faith, should not itself be regarded as violation of the freedom of press, of expression and of access to information.

3. False information or spread of harmful propaganda with intent to cause public disaffection against the Government, which is an assault to democracy, would not be regarded as part of freedom of press, of expression and of access to information, of which aim at promoting a democratic nation.

4. Politicians are public figures ex officio and should therefore exhibit a certain level of patience and discipline than a simple ordinary citizen. A politician enjoys also legal protection of his dignity but without compromising broadcasts of general interests. Thus, the exception provided for by article 38 of the Constitution should not be extended to give some leaders the undeserved privilege covering them from being critically reported for fear of their positions or duties, without considering the relevance of such article.

5. Freedom of press, of expression and of access to information should not prevail over the right to fair justice such that a journalist would let innocent people face prosecution for the offences they did not commit until their condemnation while he/she holds exculpatory evidence or be allowed to conceal the information about the offences of which he/she has had knowledge.

**Article 156 of the Law nº68/2018 of 30/08/2018 determining offences and penalties in general is not inconsistent with article 38 of the Constitution;**
**Article 194 of the Law nº68/2018 of 30/08/2018 determining offences and penalties in general is not inconsistent with articles 15 and 38 of the Constitution;**
**Article 218 of the Law nº68/2018 of 30/08/2018 determining offences and penalties in general is inconsistent with article 38 of the Constitution, and is therefore invalid;**
**Article 251 of the Law nº68/2018 of 30/08/2018 determining offences and penalties in general is not inconsistent with article 38 of the Constitution.**

**Cases referred to:**

Judgment n° RS/SPEC/0002/15/CS; Re Democratic Green Party of Rwanda v. Government of Rwanda, pronounced on the bench on 29/07/2015.

Interlocutory judgment n° RPA 0061/11/CS; Prosecution v. Uwimana Nkusi et al rendered on 17/02/2012.

Judgment n° RCOMAA 00023/2017/SC, rendered on 06/10/2017, paragraph 16.

Judgment of the Cour de cassation 1re chambre civile, 20 décembre 2000, Bull. 2000, I, n° 341. 2000, I, n° 341.

Judgment Von Hannover c. Allemagne (N° 2), n° 40660/08 and n° 60641/08), 7/02/2012, paragraph 96.

Judgment Axel Springer AG c. Allemagne, n° 39954/08), 07/02/2012.

Judgment n° RS/INCONST/SPEC00002/2018/SC, Re Mugisha, rendered on 24/04/2019, paragraph 65.

Judgment Handyside c. Royaume Uni, n°5493/72, 7/12/1976, paragraph 49.

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Judgment n° RS/INCONST/SPEC 00002/2018/SC rendered on 24/04/2019, paragraph 65;
Judgment Aubrey v Vice-Versa (1998) 1 RCS 25.
Judgment Raphael Cubagee v Michael Yeboah Asare, K. Gyasi Company Limited, Assembly of God Church, n°. J6/04/2017, 28/02/ 2018, page 4.
Judgment Bernstein and Others v. Betsr and Others NNO 1996 (4) BCLR 449 (CC), paragraph 77.
Judgment of The Investigating Directorate: Serious Economic Offences v. Hyundai Motor Distributors (Pty) Ltd 2001 (1) SA 545 (CC), paragraphs 15 and 16.
Judgment Lohé Issa Konaté v. Burkina Faso, Communication n° 004/2013, judgment of 05/12/2014, paragraphs 135, 136 and 137.
Judgment R & M v. SABC TV 3, JOL 22643, paragraph 37 (2008).
Judgment MEC for Health, opposing Mpumalanga to M-Net (MEC for Health, Mpumalanga v. M-Net 2002 (6) SA 714 (T))
Judgment E.S. v Sweden n° 5786/08, 21/06/2012, paragraphs 57, 58 and 71.
Judgment Shulman v. Group W Productions, Inc. 18 Cal. 4th 200, Supreme Court of California, June 1, 1998.
Judgment n° Galella v. Onassis 487 F.2d 986 (2d Cir. 1973).
Judgment White v. Sweden, n° 42435,

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# Judgment

# I. BRIEF BACKGROUND OF THE CASE

[1] Byansi Samuel Baker initiated a petition before the Supreme Court on 02/05/2021 requesting it to declare articles 156, 157, 194, 218 and 251 of the Law n° 68/2018 of 30/08/2018 determining offences and penalties in general inconsistent with articles 15 and 38 of the Constitution of the Republic of Rwanda of 2003 revised in 2015.

[2] He explains that he is a professional journalist with the media card number no 17/726-1 since the year 2015, where he focusses mainly on investigative journalism as well as foreign reports. He states that following the publication of the Law n° 68/2018 of 30/08/2018 determining offences and penalties in general in the Official Gazette, he found that articles 156, 157, 194, 218 and 251 of the said act obstruct his job and violate the freedom of press as enshrined in article 38 of the Constitution of the Republic of Rwanda.

[3] He especially alleges that:

i. Article 156 forbids any person with bad faith to infringe the personal privacy of another person through listening to or disclosing a photograph, audio, visual recording or document without one's authorisation while there are pictures, audio or visual recordings that are taken in public gathering to the extent that it would not be easy to get the approval of everybody prior to the disclosure of the photograph, audio or visual recording.

ii. Article 157 prohibits the publication, in bad faith, of an edited version of a person's statements, or images and photos without explicitly stating that it is not the original version. However, a journalist as a professional may in the course of making his report, edit the audio, photographs or visual recordings to make the report appealing and clear. He explains that sometimes a report may rely on the editing of visual recordings or photographs, which is known as cartoon and that even the newspaper Charlie Hebdo has spent 200 years venturing in the publication of cartooned articles.

iii. Article 194 forbids any person to spread false information or harmful propaganda with intent to cause public disaffection against the Government of Rwanda or a hostile international environment against the Government of Rwanda. He argues that the fact that the expression "any person" is used in this provision, infringes the freedom of press as he/she is regarded as any other individual while he has a particular duty of publishing opinions that would not be unanimously welcomed, or publish a report based on statements from a person who did not tell him the truth. In addition to that, he alleges that since such provision does not provide the definition of the term "propaganda", this would induce every court to find its own interpretation and the journalist would face injustice from that.

iv. Article 218 forbids defamation or insult against foreign Heads of States or representatives of foreign States or representatives of international organizations in Rwanda in the performance of their functions, which amounts to discrimination with regards to protected officials and it infringes the freedom of access and publication of information, and of expression.

v. Article 251 penalizes a person in possession of evidence of the innocence of another person prosecuted or convicted of a felony or a misdemeanour, who deliberately refuses to give such evidence to judicial authorities. Nonetheless, a journalist has the obligation to refrain from revealing the source of information, therefore facing criminal charges amounts to violation of freedom of expression.

[4] The State Attorneys Mbonigaba Eulade and Habumuremyi Prosper state that articles 156, 157, 194, 218 and 251 of the Law n° 68/2018 of 30/08/2018 determining offences and penalties in general are not inconsistent with articles 15 and 38 of the Constitution of the Republic of Rwanda of 2003 revised 2015, because there exist actions of a journalist as an ordinary individual and his/her actions in the capacity of a journalist, which implies that they are not always confined in their actions as journalists. For this reason, they may do same deeds as ordinary individuals and be prosecuted for the same.

[5] The hearing was held in public on 13/12/2021, BYANSI Samuel Baker being assisted by Counsel Gakunzi Musore Valéry and Counsel RURAMIRA BIZIMANA Zébédée while the Government of Rwanda was represented by Counsel MBONIGABA Eulade and Counsel HABUMUREMYI Prosper.

[6] It was initially examined whether Byansi Samuel Baker has an interest to file the petition. In the interlocutory judgment rendered on 24/12/2021, the Court deemed Byansi Samuel Baker, as a journalist in Rwanda, has personal interest in the present case because the provisions of the article of which he seeks the Court to declare contrary to the Constitution concerns in particular way the press. In addition, articles 156, 157, 194, 218 and 251 of the Law n° 68/2018 of 30/08/2018 determining offences and penalties in general that he seeks to be declared repealed have to do with journalists as well as every person in Rwanda including journalists. For this reason, he has interest to seek their repealing because they may obstruct him at the moment or in the future. The hearing of the merits of the case was scheduled on 14/02/2022.

[7] At the hearing date, the hearing was held in public where Byansi Samuel Baker was assisted as before and the Government of Rwanda was represented by Counsel Mbonigaba Eulade. The Court started by examining the request of Centre for Rule of Law Rwanda (CERULAR), represented by Counsel Sebusandi Moses to appear in the capacity of amicus curiae where it stated in its letter of 19/01/2022 that it has expertise to share with the Court since it usually carries out research on the freedom of expression and of press and that it is part of different human rights activists' platforms.

[8] After examination of the documents submitted by CERULAR, the Court found that based on the position adopted in the judgment of Democratic Green Party of Rwanda vs Government of Rwanda1 as well as that between Uwimana Nkusi Agnès and MUKAKIBIBI Saidati vs Prosecution2, according to which even though the opinion of the amicus curiae can help to examine the facts and interpret the law concerning the case and need special knowledge or further research that the Court or parties would not do themselves easily; the participation in the case as an amicus curiae is decided by the Court upon its own discretion and in order to be admitted, the amicus

[1] See the judgment n° RS/SPEC/0002/15/CS pronounced on the bench on 29/07/2015.
[2] See the interlocutory decision n° RPA 0061/11/CS rendered on 17/02/2012

curiae should have sufficient knowledge to the extent that they will not be tempted to repeat the statements of the parties otherwise. It deemed the experience alleged by CERULAR as well as the research they allege to be carrying out are not supported by elements of evidence to substantiate the sufficient knowledge about the issues to be examined to believe that they will bring in some new ideas with respect to the present case; thus, the Court decided that it should not be allowed to appear in the capacity of amicus curiae, and the hearing should pursue without their appearance.

# II. LEGAL ISSUES AND THEIR ANALYSIS

## II.1. Whether article 156 of the Law n° 68/2018 of 30/08/2018 determining offences and penalties in general is inconsistent with article 38 of the Constitution

[9] Byansi Samuel Baker alleges that article 156 of the Law n° 68/2018 of 30/08/2018 determining offences and penalties in general forbids any person secretly to listen to or disclose people's confidential statements, to take a photo, audio or visual recording or disclose them without one's authorisation. He states that sometimes, the report may intend to dig out the modus operandi of the powerful individuals or suspects of offences, and in this case, it would be impossible to ask them the permission to report about them. He cites as an example where doing a report through open source journalism about a marijuana trader or a person who accepts bribes does not have same effects as reporting about them through investigative journalism by listening, taking photos, audio or visual recordings. He explains that reporting about such individuals nowadays requires accessing into their phones or computers which harbors information and that if done properly, it would help even other institutions including justice to get elements of evidence that may be based on to initiate criminal prosecution.

[10] Byansi Samuel Baker states that the importance of investigative journalism or undercover journalism does not consist of raising the journalist above the law, trying to put him/her in the position of the investigation and prosecution organs or entitling him with the power to control the communication. He adds that whenever a journalist discovers that something is about to be committed somewhere, he reaches the place first, prepares his/her devices in disguise in order to reach the goal of reporting. He adds that if you inform the suspects that you are going to install the camera in order to take their audio and visual recordings they would not consent to it, the reason why it is needed to hack the electronic devices where the information is being sought or use hidden cameras and microphones in order to facilitate the recording.

[11] He states that the investigative journalism and undercover journalism methods are common in other countries. He cites the example of Ghana and Kenya where such methods contributed to the case of university professors doing sexual intercourse with students in exchange of grades ((Sex for Grades: undercover inside Nigerian and Ghanaian universities)[3] as well as the case of babies stolen from their mothers while at the roads or from hospitals in Nairobi to be sold to sterile women or be killed to use their body parts for indigenous rituals. (The Baby Stealers).[4] He states that for such offences and those relating to cannabis trading or payment and receiving bribes, it is

[3] See BBC Africa Eye documentary, "Sex for Grades: undercover inside Nigerian and Ghanaian universities", https://www.youtube.com/watch?v=we-F0Gi0Lqs visited on 11/03/2022.

[4] See BBC Africa Eye documentary, "The Baby Stealers" https://www.youtube.com/watch?v=7ix5jbCmiDU consulted on 11/03/2022.

hard to conceive a story through open source journalism which is commonly used in Rwanda because they are not committed in public like in bus stations where journalists could take photos, audio and visual recording without prior authorisation.

[12] Counsel RURAMIRA Bizimana Zébédée and Counsel GAKUNZI Musore Valéry who assist Byansi Samuel Baker, argue that the reason article 156 of the Law nº 68/2018 of 30/08/2018 stated above is inconsistent with article 38 of the Constitution is that the legislator disregarded the fact that photos may be taken in the place where many people have gathered to the extent that it would not be easy to get the permission for every person. They state that there are three general principles that the instant Court should examine to decide that the article concerned by the petition is inconsistent with the Constitution would it find that they were not respected. Such principles are as follows: Whether article 156 of the Law nº 68/2018 of 30/08/2018 determining offences and penalties in general is relevant in a democratic country; whether the provisions of such article include also the photographs, audio or visual recordings of famous persons and whether it is convenient to punish a journalist for taking photos, audio or visual recordings and report them.

[13] They argue that punishing a journalist for taking a photo, visual or video recording and publish them is seen as interfering the freedom of press, and that the words "in bad faith" introduced in article 156 stated above, may be interpreted extensively while criminal law provisions are interpreted restrictively. They state that though journalists are regarded as performing their duties in good faith, but a person unhappy with the report would pretend that it was done in bad faith. They explain that the words "in bad faith" are common in civil cases, therefore that what is convenient is that a person unsatisfied with the report against them would seize civil court for damages, instead of seizing criminal court.

[14] They clarify that article 156 of the aforementioned Law pertains to offences against privacy, and that nowhere such law does provide a definition of personal privacy and that even article 23 of the Constitution does only protect privacy without providing its definition.[5] According to them, the definition of personal privacy provided for by article 3, subparagraph 6° of the Law nº 058/2021 of 13/10/2021 relating to the protection of personal data and privacy stating that "a fundamental right of a person to decide who can access his or her personal data, when, where, why and how his or her personal data can be accessed". They argue in addition that the text of this article corroborates the position adopted by the instant Court in the case that opposed GISA Frediane to BRALIRWA Ltd[6], where it found the claim for damages by Gisa Frediane with merit since the company known as EXP Rwanda passed his photos to BRALIRWA Ltd without her consent, which used them to market the Heinken beverage. They also state that this is different from a photo taken and published by a journalist. They explain that courts in other forums such as the Court of cassation in France, held that the report of the photograph of an injured victim of

[5] "The privacy of a person, his or her family, home or correspondence shall not be subjected to interference in a manner inconsistent with the law; the person's honour and dignity shall be respected. A person's home is inviolable. No search or entry into a home shall be carried out without the consent of the owner, except in circumstances and in accordance with procedures determined by the law. Confidentiality of correspondence and communication shall not be waived except in circumstances and in accordance with procedures determined by the law."

[6] See the judgment RCOMAA 00023/2017/SC, delivered on 06/10/2017, paragraph 16.

terrorist attack does in anyway violate the personal dignity since the journalist's intention is not a sensational report or indecency towards the victim.[7]

[15] They emphasize that the European Human Rights Court has also recalled that the right to privacy includes elements relating to the identity of a person, such as his name, his photo, his physical and moral integrit and that as far as photos or video recordings are concerned, the image of an individual is one of the main attributes of his personality, especially that it expresses his originality and allows him to differentiate himself from his peers, the reason why every individual has the right of control over them, which includes in particular the possibility for him to refuse their diffusion.[8] They add that they too admit that such right should respected by others and be protected by courts, but that this should be associated with the right of a journalist to freedom of press, of access to information and of expression as enshrined in article 38 of the Constitution, article 19[9] of the Universal Declaration of Human Rights of 1948 and article 19 of the International Covenant on Economic, Social and Cultural Rights of 1966, all indicating that no legal instrument or provision should contradict such principle.

[16] They clarify that in the case Axel Springer AG against the government of Germany, the European Court of Human Rights linked the freedom of expression and the right to private life, and found that the following six (6) factors should be considered in order for such right and freedom to be in correlation: Determine whether the story has the objective of contributing to the discussions or debates of public interests; determine the content of the story and whether the reported person is a famous person; examining the behaviour of a reporter in normal circumstances; examining the information access method; examining the veracity of the story, the content of the report, the modality of publication as well as the effects; and examining the penalties imposed for such offence.[10]

[17] They add that in the case Re Mugisha Richard, the instant Court has also held that the freedom of press, of expression and of access to information are recognized and guaranteed by the State but that they are subject to some limitations[11], and that such position is supported by different

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[7] "*C'est ainsi que la publication de la photo d'une victime, ensanglantée, de l'attentat du RER Saint Michel n'a pas été jugée contraire à la dignité humaine étant dépourvue de « recherche du sensationnel et de toute indécence".* See the judgment of Cour de cassation 1re chambre civile, 20 décembre 2000, Bull. 2000, I, n° 341.

[8] *"La Cour rappelle que la notion de vie privée comprend des éléments se rapportant à l'identité d'une personne, tels que son nom, sa photo, son intégrité physique et morale…"La Cour a souligné que l'image d'un individu est l'un des attributs principaux de sa personnalité, du fait qu'elle exprime son originalité et lui permet de se différencier de ses pairs. Le droit de la personne à la protection de son image constitue ainsi l'une des conditions essentielles de son épanouissement personnel. Elle présuppose principalement la maîtrise par l'individu de son image, laquelle comprend notamment la possibilité pour celui-ci d'en refuser la diffusion."* See the case Von Hannover c. Allemagne (N° 2), n° 40660/08 and n° 60641/08), 7/02/2012, paragraph 96.

[9] This article stipulates that "the freedom of opinion and expression includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers".

[10] "In order to balance the right to freedom of expression against the right to private life, the Court uses six criteria: the contribution to a debate of general interest; how well known the person being reported on is and the subject of the report; the person's prior conduct; the method used to obtain the information; the veracity, content, form and repercussions of the report; and the penalty imposed". Read the case law Axel Springer AG c. Allemagne, n° 39954/08), 07/02/2012.

[11] Judgment n° RS/INCONST/SPEC00002/2018/SC, Re Mugisha, rendered on 24/04/2019, paragraph 65

courts that held that the freedom of press applies not only to information or ideas received with favor, but also to those which offend, shock or disturb the State or any section of the population.[12]

[18] They state in addition that while analysing article 10 of the European Convention on Human Rights, the European Court of Human Rights,[13] found that the exception to the freedom of press is only admissible if the following conditions are met: 1) such exception or obstruction should be statutory, 2) with a legitimate goal, 3) whether the interference was necessary in a democratic society. According to them, the right to personal privacy and freedom of press should be respected equally, which requires the instant Court to hold that the freedom of press is necessary in democratic country even when the published story is unpleasant or annoying toward someone; the exception to such principle of freedom of press being that its interpretation should not be conjectured. They argue that the Court admits the exception when it is necessary and in the interest of people, which is where it relies to determine whether the interference to the freedom of press correlates with the protected goal considering the context of the claim at hand.

[19] They explain that the European Court of Human Rights has addressed similar issue while it was seized by victims who were photographed at road, the photos of which were published in newspapers. The victims requested the German Courts to halt the diffusion of such articles, which they denied, and they sued the German State to the European Court of Human Rights stating that the publication of their photographs violates their private life. The Court deemed that such photos were not offensive to the extent of halting their diffusion.[14] They however add that the instant court established the following principles: 1) the fact that their daily duties include the shooting of photos, videos and conversations and their publication to contribute to a debate of general interest, 2) the fact that taking photographs, audio and conversations of famous persons should not violate their private life comparing to that of ordinary citizens (the reputation of the person concerned and the purpose of the report), the fact that a journalist act professionally and for the good of all.

[20] They conclude by requesting the instant Court to hold that the punishment of a journalist who published a photograph, audio or video recording without the consent of the owner consists of interference with the right to freedom of expression and that it is not necessary in Rwanda as a democratic country, and therefore declare that article 156 of the Law n° 68/2018 of 30/08/2018 determining offences and penalties in general is inconsistent with article 38 of the Constitution.

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[12] " *vaut non seulement pour les "informations" ou "idées" accueillies avec faveur ou considérées comme inoffensives ou indifférentes, mais aussi pour celles qui heurtent, choquent ou inquiètent l'État ou une fraction quelconque de la population."* See the case law Handyside c. Royaume Uni, n°5493/72, 7/12/1976, paragraph 49.

[13] Such article reads that "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises. 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary".

[14] "La Cour note au demeurant, comme l'a relevé la Cour fédérale de justice, que les photos montrant les requérants en pleine rue à Saint-Moritz en hiver n'étaient pas en elles-mêmes offensantes au point de justifier leur interdiction". See the case law Von Hannover c. Germany (N° 2), n°40660/08 and n° 60641/08), 7/02/2012, paragraph 123.

[21] Counsel Mbonigaba Eulade, the State Attorney, avers that the statements of Byansi Samuel Baker according to which he should be allowed to use hidden cameras, the act is beyond the diffusion of information since that falls within the duties of the investigation or intelligence organs, and the fact that it is done elsewhere would not constitute a reason to allow the practice forbidden by the Rwandan legislation and Constitution especially that the constitution of the place where the practice exists, possibly permits them to do so.

[22] He explains that article 8, paragraph 2 of the Law regulating media provides that freedom of the media is recognized and respected by the State when exercised in accordance with the Law while article 9 of the same Law states that freedom of media shall not jeopardize the rights of the general public, the reason why the legislator introduced in the first part of article 156 of the aforementioned Law nº 68/2018 of 30/08/2018, the words "in bad faith" which exactly correlate with the restrictions put on the freedom of media by article 38, paragraph 2 of the Constitution.

[23] He contends that the concern of Byansi Samuel Baker and his legal counsel that there may be photograph, audio or video recordings taken in public to the extent that it would not be easy to get the consent of every person, should also not be considered to declare article 156 of the aforementioned Law nº 68/2018 of 30/08/2018 in contradiction with the Constitution because whenever those acts occur to the knowledge of the concerned persons but abstain themselves from opposing them, their consent is presumed. Again, concerning whether prohibition to eavesdrop the conversations violates the operations of a journalist, he retorts that this is not correct because the right a journalist is entitled by article 38 of the Constitution is restricted by the public order, and it is necessary to know that the rights and freedoms do not imply the violation of other people's rights, especially that article 41 of the Constitution[15] provides that freedoms are subject to legal limitations.

[24] He goes on to say that the legal scholars assert that the right of others is broad; it covers personality rights, among others, the right to moral integrity or the right of honour, the right to secrecy and respect for private life[16], and that article 156 of the aforementioned Law nº 68/2018 of 30/08/2018 is not a particularity of Rwanda. He cites an example in France where article 226, paragraphs one[17] and 2[18] of the Penal Code criminalizes the shooting and publication of a photograph, audio and video of events that happened in private without prior consent of the concerned persons. He explains that even article 179 bis of the Law determining offences and penalties in Switzerland states also that "any person who, without the consent of all participants,

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[15] Such article reads that "In exercising rights and freedoms, everyone is subject only to limitations provided for by the law aimed at ensuring recognition and respect of other people"s rights and freedoms, as well as public morals, public order and social welfare which generally characterize a democratic society."

[16] *La catégorie "droit d'autrui est large; elle recouvre les droits de personnalité entre autres , le droit à l'integrité morale ou droit d'honneur, le droit au secret et au respect de la vie privée, y compris le droit de l'oubli, le droit au nom, le droit à l'image et à la voix, le droit à la dignité"* See Bernard Dubuisson na Paul Jadoul (sous la dir.), La responsabilité civile liée à l'information et au conseil: questions d'actualité, Bruxelles, Presses Universitaires Saint Louis, 2019, p.235.

[17] *Le fait, au moyen d'un procédé quelconque, volontairement de porter atteinte à l'intimité de la vie privée d'autrui en captant, enregistrant ou transmettant, sans le consentement de leur auteur, des paroles prononcées à titre privé ou confidentiel* (article 226-1 du code pénal).

[18] « *Le fait de conserver, porter ou laisser porter à la connaissance du public ou d'un tiers ou d'utiliser de quelque manière que ce soit tout enregistrement ou document obtenu à l'aide de l'un des actes prévus par l'article 226- 1* » (article 226-2 du code pénal).

listens with the aid of a listening device or records a non-public conversation between other persons, any person who benefits from or gives knowledge to a third party of a fact which he knew or should have presumed to have come to his own knowledge by means of an offense will, on complaint, be punished with a custodial sentence not exceeding three years or with a monetary penalty"[19]. He states in addition that even the legal scholars assert that nobody could take a photograph of a person in relation to his private life without his prior consent[20], therefore, he finds that article 156 of the Law nº 68/2018 of 30/08/2018 determining offences and penalties in general is not contrary to article 38 of the Constitution.

[25] He closes the submissions by stating that article 156 of the Law no 68/2018 of 30/08/2018 determining offences and penalties in general as well as its other provisions that are subject of dispute in this case are new in Rwandan legislation. He explains that though he did not find the debates about them in the course of their adoption, they were adopted in the context of establishing the media guidelines in a bid to prevent it to be diverted as it was the case where it was used for the preparation of genocide against Tutsi.

## DETERMINATION OF THE COURT

[26] Article 38 of the Constitution states that: "Freedom of press, of expression and of access to information are recognized and guaranteed by the State. Freedom of expression and freedom of access to information shall not prejudice public order, good morals, the protection of the youth and children, the right of every citizen to honour and dignity and protection of personal and family privacy. Conditions for exercising and respect for these freedoms are determined by law."

[27] Article 156 of the Law nº 68/2018 of 30/08/2018 determining offences and penalties in general reads that "Any person who, in bad faith and in any way, infringes the personal privacy of another person by: 1º secretly listening to, or disclosing, people's confidential statements without authorisation; 2º taking a photo, audio or visual recording or disclosing them without one's authorisation; commits an offence. Any person who is convicted of any of the acts referred to in Paragraph One of this Article, is liable to imprisonment for a term of not less than six (6) months and not more than one (1) year and a fine of not less than one million Rwandan francs (1,000,000Frw) and not more than two million Rwandan francs (2,000,000Frw) or only one of these penalties. If the acts referred to in Paragraph One of this Article are committed in full view and knowledge of the persons concerned and without opposing the acts while they were able to do so, their consent is presumed. The penalties referred to in Paragraph 2 of this Article also apply to a person who, in bad faith, distributes in any way whatsoever, a photo, audio and video, recordings or documents obtained as a result of one of the acts referred to in Paragraph One of this Article."

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[19] "*Celui qui, sans le consentement de tous les participants, aura écouté à l'aide d'un appareil d'écoute ou enregistré sur un porteur de son une conversation non publique entre d'autres personnes, celui qui aura tiré profit ou donné connaissance à un tiers d'un fait qu'il savait ou devait présumer être parvenu à sa propre connaissance au moyen d'une infraction visée à l'al. 1, celui qui aura conservé ou rendu accessible à un tiers un enregistrement qu'il savait ou devait présumer avoir été réalisé au moyen d'une infraction visée à l'al. 1, sera, sur plainte, puni d'une peine privative de liberté de trois ans au plus ou d'une peine pécuniaire*".

[20] *En raison du droit à l'image propre à chaque individu, toute personne doit donner son accord avant d'être photographiée dans un endroit privé. En revanche, il est possible de photographier des personnes sans pour autant risquer de porter atteinte à leur vie privée".*Consulted from https://www.justifit.fr/b/guides/droit-propriete-intellectuelle/droit-image-atteinte-vie-privee/.

[28] In the case Re Mugisha Richard, recalled above by Byansi Samuel Baker and his legal counsel, the instant Court found that article 38 of Constitution establishes a principle that the freedom of press, of expression and of access to information are recognized and guaranteed by the State. Thus, any thing including the law or its provisions that are contrary to such principle should be regarded as inconsistent with the Constitution.[21] The text of article 38 of the Constitution corroborates also with the text of article 19 International Covenant on civil and political rights of 19/12/1966 ratified by Rwanda on 12/02/1975[22], that also provides that the right to freedom of expression, of press and of access to information include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers.

[29] The second paragraph of article 38 of the Constitution establishes the values attached to rights and freedoms stated in the first paragraph that should not be prejudiced:

i. public order;

ii. good morals;

iii. the protection of the youth and children;

iv. the right of every citizen to honour and dignity;

v. In addition, the third paragraph of the same article states that conditions for exercising and respect for these freedoms are determined by law.

[30] The provisions of paragraphs two and three of article 38 of the Constitution is recalled by article 19, paragraph 3 (a) and (b) of the International Covenant on civil and political rights stating that among the restrictions to which the exercise of the freedom of press is subject to include the respect of the rights or reputations of others, the protection of national security or of public order, or of public health or morals. Among the legal instruments stated in article 38 of the Constitution and article 19, paragraphs 3(a) and (b) of the International Covenant on civil and political rights include the Law nº 68/2018 of 30/08/2018 stated above.

[31] The prayer of Byansi Samuel Baker and his legal counsel consists of holding that the freedom of press has primacy over the right to privacy, therefore that article 156 of the Law nº 68/2018 of 30/08/2018 stated above that protects such right suppresses the right of a journalist to freedom of press, of expression and of access to information, which they regard as the reason of its inconsistency with article 38 of the Constitution.

[32] The right to the personal and family privacy is normally enshrined in article 23 of the Constitution stating that the privacy of a person, his or her family, home or correspondence shall not be subjected to interference in a manner inconsistent with the law; and that the person's honour and dignity shall be respected. Such right is also provided for by Article 17 of the International Covenant on civil and political rights of 19/12/1966 reading that "No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to

[21] Judgment n° RS/INCONST/SPEC 00002/2018/SC rendered on 24/04/2019, paragraph 65

[22] See the decree Law n° 8/75 of 12/02/1975.

unlawful attacks on his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks."[23]

[33] The fact that article 38, paragraph two of the Constitution recalls the right of a person not be subjected to interference in their personal and family privacy, is that the Constitution intended to establish the balance between the right to personal privacy and the freedom of press, of expression and of access to information. Both rights are protected by the Constitution. The respect of either right does not eliminate the obligation to respect the other. It implies that the person who listens, records or publishes audio, photographs, or video of other persons is barred to do so by the right entitled to the concerned persons. Indeed, even at the non-existence of such law, they are barred by good morals, public order and social order in general. Such limitations were also provided for by article 41 of the Constitution as well as article 19, paragraph three of International Covenant on Civil and Political Rights of 19/12/1966. Thus, the person who eavesdrops, records audio, takes photos or videos even if he/she is a journalist, he/she would not rely on the freedom of press, of express and of access to information to pretend that such rights are not subject to any limitation.

[34] The Court finds that article 9, paragraph two of the Law n°02/2013 of 08/02/2013 regulating media provides that the freedom of opinions and information shall not jeopardize the general public order and good morals, individual's right to honour and reputation in the public eye and to the right to inviolability of a person's private life and family; the freedom shall also be recognized if it is not detrimental to the protection of children. Again, article 4 of the Law n°04/2013 of 08/02/2013 relating to access to information provides for confidential information as follows:

"information withheld by a public organ or private body to which this Law applies shall not be published when it may:

1. 1° destabilize national security;
2. 2° impede the enforcement of Law or justice;
3. 3° involve interference in the privacy of an individual when it is not of public interest;
4. 4° violate the legitimate protection of trade secrets or other intellectual property rights protected by the Law;
5. 5° obstruct actual or contemplated legal proceedings against the management of public organ."

[35] When Article 9, paragraph 2 of the Law n°02/2013 of 08/02/2013 regulating media is read concomitantly with article 4 of the Law n° 04/2013 of 08/02/2013 relating to access to information, they imply that the freedom of press, of expression and of access to information have limitations, of which intend to protect the general interest and privacy of others.

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[23] "1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation. 2. Everyone has the right to the protection of the law against such interference or attacks."

[36] While the African Court on Human and People's Rights, in the case Lohé Issa Konaté vs Burkina Faso, analyzed the freedom of press stipulated by article 9 of the African Charter on Human and Peoples' Rights adopted on 27/06/1981[24], they realized that even though the said provision does nowhere clearly state about the limitations on the freedom of press as it is the case by other international conventions, the analysis of the wording "within the law" closing the second paragraph should rely on international principles establishing the limits of the freedom of press, of expression and of access to information, and they therefore concluded that such freedoms are circumscribed by the protection of personal interests such as the right to dignity and decency, general interest, security, public health as well as good morals.

[37] Regarding the issue of determining the definition of the personal privacy and the limits of the related right, the Court finds that though article 23 of the Constitution does not provide the detailed explanations, article 3, subparagraph 6 of the Law nº 058/2021 of 13/10/2021 relating to the protection of personal data and privacy initially defines the privacy as a fundamental right of a person to decide on the access of her personal data by others.

[38] Courts in other forums have also defined the role and importance of the right to personal privacy. In the case that opposed Aubry to Vice-Versa, the Supreme Court of Canada held that: "The notion of privacy is at the heart of freedom in a modern State. It is based on the notion of dignity and integrity of the person. The right to privacy protects, among other things, the limited sphere of personal autonomy in which inherently private choices are based. (*La notion de la vie privée est au coeur de la liberté dans un Etat moderne et se fonde sur la notion de dignité et d'intégrité de la personne. Le droit à la vie privée protège entre autres choses, la sphère limitée d'autonomie personnelle où se fondent des choix intrinsèquement privés*".)[25]

[39] In the case that opposed Raphael Cubagee to Michael Yeboah Asare delivered on 28/02/2018, the Supreme Court of Ghana, while it addressed the issue of whether a person who recorded the audio of another person they were talking to on the phone without his/her consent, would produce it as an element of evidence in the case against another person, it deemed that:

"Although the list of the full scope of the right to personal and family privacy cannot possibly be set out in the text of the Constitution, it should be understood that such right includes an individual's right to be left alone to live his life free from unwanted intrusion, scrutiny and publicity. It is the right of a person to be secluded, secretive and anonymous in society and to have control of intrusions into the sphere of his private life. It is a very important human right that inheres in the individual and ensures that he can be his own person, have self identity and realise his self worth. Such is the right that guarantees personal autonomy for the individual and, without it, public authorities would easily control and manipulate the lives of citizens and undermine their liberty. Considering the current trend of stories and technology facilitating the intrusion into the personal privacy, it is now that the right to personal privacy that needs to be protected than other rights. For this reason, almost all countries enact detailed legislation to protect the personal privacy…..".[26]

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[24]"1. Every individual shall have the right to receive information. 2. Every individual shall have the right to express and disseminate his opinions within the law."

25 See the case Aubrey v Vice-Versa (1998) 1 RCS 25.

[26] "Privacy is so broad a constitutional right that it defies a concise and simple definition. It comprises a large bundle of rights some of which have been listed in the article as privacy of the home, property, and correspondence or

[40] Concerning the limits of the right to personal privacy, the Constitutional Court of South Africa has clarified it in the case Bernstein and Others vs Bester and Others, where it found that a very high level of protection is given to the individual's intimate personal sphere of life and the maintenance of its basic preconditions and there is a final untouchable sphere of human freedom that is beyond interference from any public authority, unless the person concerned starts interacting with others outside such sphere.[27] In contrast, in the case The Investigating Directorate: Serious Economic Offences And Others vs Hyundai Motor Distributors (Pty) Ltd And Others, it further held that the respect of the right to personal privacy is similarly necessary even when people are in their office, in their cars or on their cellphones. In this case, no one is allowed to unlawfully interfere with the right to personal privacy, and that it should be accepted that person has the ability to decide what he or she wishes to disclose to the public and the expectation that such a decision will be respected as it entails the enjoyment of his/her right to privacy.[28]

[41] The Court finds thus that among the elements of the personal privacy include sounds, photographs, videos and personal correspondence since they are essential personal and distinctive identifiers. It is the reason why nowadays, a person has the right to quest the way his/her personal audio, photographs, videos or writings were recorded, are saved or diffused. Such rights include the fact that the subject may deny to be eavesdropped, refuse that sounds, photos, videos and personal correspondence be taken, saved, published, diffused or reproduced. Otherwise, there would be somebody's important information subject to surveillance by another person while the victim has no power to control how being eavesdropped, their sounds, photos, videos and personal correspondence would be used. Such reasoning concurs with the principles recalled in the case

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communication. This list is not exhaustive and the full scope of the right of privacy cannot possibly be set out in the text of the Constitution. However, under the right to privacy is covered an individual's right to be left alone to live his life free from unwanted intrusion, scrutiny and publicity. It is the right of a person to be secluded, secretive and anonymous in society and to have control of intrusions into the sphere of his private life. Privacy is a very important human right that inheres in the individual and ensures that she can be her own person, have self identity and realize her self worth. It guarantees personal autonomy for the individual and, without it, public authorities would easily control and manipulate the lives of citizens and undermine their liberty. It is one of the most widely demanded human rights in today's world for the simple reason that advancements in information and communication technology have made it extremely easy to interfere with privacy rights. As a result, almost all states have passed laws and detailed regulations to protect privacy rights and prescribe circumstances under which public authorities, private organizations and, in some countries, individuals may be permitted to interfere with privacy rights." See Raphael Cubagee v Michael Yeboah Asare, K. Gyasi Company Limited, Assembly of God Church, n°.J6/04/2017, 28/02/ 2018, paper 4.

[27] "A very high level of protection is given to the individual's intimate personal sphere of life and the maintenance of its basic preconditions and there is a final untouchable sphere of human freedom that is beyond interference from any public authority. So much so that, in regard to this most intimate core of privacy, no justifiable limitation thereof can take place. But this most intimate core is narrowly construed. This inviolable core is left behind once an individual enters into relationships with persons outside this closest intimate sphere; the individual's activities then acquire a social dimension and the right of privacy in this context becomes subject to limitation." Bernstein and Others v Betsr and Others NNO 1996 (4) BCLR 449 (CC), paragraph 77.

[28] "The right, however, does not relate solely to the individual within his or her intimate space. Ackermann J did not state that when we move beyond this established "intimate core", we no longer retain a right to privacy in the social capacities in which we act. Thus, when people are in their offices, in their cars or on mobile telephones, they still retain a right to be left alone by the state unless certain conditions are satisfied. Wherever a person has the ability to decide what he or she wishes to disclose to the public and the expectation that such a decision will be respected is reasonable, the right to privacy will come into play." See The Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd 2001 (1) SA 545 (CC), paragraphs 15 and 16.

Von Hannover vs Germany[29], on which Byansi Samuel and his legal counsel relied in their submissions.

[42] If the foregoing holdings are considered together with the provisions of the first paragraph of article 156 of the above stated Law nº68/2018 of 30/08/2018, the second paragraph of article 9 of the Law n°02/2013 of 08/02/2013 regulating media as well as article 4 of the Law n° 04/2013 of 08/02/2013 relating to access to information, it entails that eavesdropping, taking or diffusing audio, photographs, videos or personal documents in a way that interfere with personal privacy of the owner is only possible within the following circumstances:

i. If the owners consented to;

ii. If such acts occurred to the knowledge of the concerned persons but abstained themselves from opposing them while they were able to do so;

iii. If done in general interest.

[43] In the second paragraph of article 156 of the Law nº68/2018 of 30/08/2018 stated above, the legislator considered that in the event the persons whose conversations were eavesdropped, and sounds, photographs or videos were recorded with their consent or with their knowledge without opposing them, no offence is supposed to have been committed. Under Rwandan law, such offence exists for two following and cumulative reasons: 1) in the event the eavesdropping, the audio and video were recorded, the photographs and documents were taken or diffused without the consent of the owners or without their knowledge; 2) if the eavesdropping, the recording of audio, video and taking photographs or documents that are personal were done or diffused "with bad faith".

[44] The punishment of the persons responsible for eavesdropping, for taking, recording and diffusing audio, photographs or videos with bad faith and without the consent of and knowledge by the owners consists of the effective translation of "the right to prevent interference with personal and family privacy" stated in articles and the second paragraph 38 of the Constitution. The establishment of the limits to the constitutional rights is not the uniqueness of Rwanda. While the African Court of Human and peoples' rights was analyzing whether Burkina Faso overstepped the limits by introducing the legal provisions punishing people who violate the personal privacy in articles 109, 110 and 111 of the Law regulating media in Burkina Faso relating to the protection of the honour and dignity of a person and his/her profession, as well as article 178 of the criminal law of Burkina Faso for the protection of the honour and dignity of court staff in exercise of their duties, it found that the limits established by such instruments to the freedom of press, of expression and of access to information are founded on legitimate reasons and compliant with the

[29] See the case R Von Hannover v Germany n° 40660/08 and n° 60641/08, 07/02/2012, paragraph 96.

international principles with regard to such privacy[30]. The main objective is that the consequences form the limits established by the legislature should not prevail over the protected interests.[31]

[45] Concerning the fact that the freedom of press, of expression and of access to information have the limits was again recalled by the Broadcasting Complaints Commission of South Africa in the course of the analysis of personal privacy provided for by article 14 of the Constitution of South Africa[32], and the freedom of access to information that is also provided for by article 16 of the Constitution of South Africa[33], where it found that: "It is true that the freedom of the public to receive information is supported significantly by the freedom of the media, but the media are not free to convey information that intrudes upon the privacy of a person without a legitimate public interest being present."[34] In other words, the public freedom to access information does not allow a journalist go beyond the limits by doing what is not right or unlawful.

[46] Such position corroborates the position adopted by the European Court of Human Rights in the case E.S. vs Sweden,[35] according to which countries have obligations to take measures to protect the personal privacy even when individuals are concerned, and for this reason, it should be enacted legislation fighting the violation by individuals. It finds that even though the

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[30] "In the instant case, the aim of Articles 109, 110 and 111 of the Information Code of Burkina Faso is to protect the honour and reputation of the person or a profession; that of Article 178 of the Criminal Code of Burkina Faso is more specifically to protect the honour and reputation of Magistrates, jurors and assessors in the performance of their duties or in the course of perming the duty. The Court is of the view that this is a perfectly legitimate objective and therefore the limitation thus imposed on the right to freedom of expression by the Burkinabé legislation is consistent with international standards in this area."

[31] "Though in the African Charter, the grounds of limitation to freedom of expression are not expressly provided as in other international and regional human rights treaties, the phrase "within the law" under Article 9 (2) provides a leeway to cautiously fit in legitimate and justifiable individual, collective and national interests as grounds of limitation. Here the phrase "within the law" must be interpreted in reference to international norms which can provide grounds of limitation on freedom of expression. A restriction to be acceptable, … it must serve a legitimate purpose… the Court is of view that the reasons for possible limitations must be based on legitimate public interest and the disadvantages of the limitation must be strictly proportionate and absolutely necessary for the benefits to be gained…the legitimate purpose of a restriction …consists in respecting the rights and reputation of others or the protection of national security, public order, public health or public morality." See the case Lohé Issa Konaté v Burkina Faso, Communication n° 004/2013, judgment of 05/12/2014, from paragraph 129 to paragraph 135.

[32] Section 14 reads as follow: "Everyone has the right to privacy, which includes the right not to have— (a) their person or home searched; (b) their property searched; (c) their possessions seized; or (d) the privacy of their communications infringed".

[33] Section 16 (1) reads as follow: "(1) Everyone has the right to freedom of expression, which includes— (a) freedom of the press and other media; (b) freedom to receive or impart information or ideas; (c) freedom of artistic creativity; and (d) academic freedom and freedom of scientific research."

[34] "It is true that the freedom of the public to receive information is supported significantly by the freedom of the media, but the media are not free to convey information that intrudes upon the privacy of a person without a legitimate public interest being present." See the case R & M v SABC TV 3, JOL 22643, paragraph 37 (2008). Such position adopted in the year 2008 intervened to rectify the position adopted in 2002 in the case MEC for Health, Mpumalanga v M-Net 2002 (6) SA 714 (T) whereby the Court has said that the use of hidden cameras in hospital unbeknownst to patients as well as the hospital with the aim of indicating poor service delivery to aborting wives and girls, was done in public interest because it intended to shed the light to the discharge of the duties by the leaders and politicians in charge of that hospital.

[35] Such case arose from the fact that the court in Sweden deemed that hiding an operating camera in the female child bathroom is not criminalized by any law, and that no element of evidence indicates the existence of an action of a child whose images were taken because his/her mother had teared off that camera from the hands of the father and destroyed the cliche. Court have held that there is no basis to hold that there occurred sexual molestation or attempted child pornography, and thus, the accused was acquitted.

criminalization is not the only solution, it is necessary to enact severe criminal provisions with the objective of preventing serious acts likely to violate the basic values and standards of individual's life.[36] It finds in addition that the evolution of cinematographic, photographic, and communication technology stresses the need to tighten the protection of personal privacy.[37] The legal scholar William A. Schabas states that there are European countries that incorporated in the criminal instruments, acts relating to secretly or unlawfully taking photographs of individuals especially when done in violation of personal privacy.[38]

[47] The Court finds also that even in the case Shulman vs Group W. Productions, the Supreme Court of California deemed that a journalist who diffused the conversation and video of the patient and rescue medical personnel taken within the ambulance on the television without their consent, would not rely on the freedom of press, of expression and of access to information as the basis of discharging him/her of the liability because he/she violated the personal privacy of the patient by taking advantage of his/her trauma and weakness. It further found that while the press seeks for information, it is not entitled to immunity for the enforcement of laws, therefore the existent legal provisions protecting the general interests would limit its freedom since nowhere the first amendment of the Constitution of the United States of America does provide special treatment for a journalist while seeking for information as opposed to the way an ordinary citizen gets information.[39]

[48] In the case Galella vs Onassis[40], the Court of Appeal of America (2nd Circuit) has also found that Donald Galella who was a professional photographer who used to shoot famous persons and sell photos to the journals, would not rely on the freedom of press provided for (1st amendment) by the Constitution of the United State of America to encroach on the privacy of people since offences and faults are not protected by the Constitution. The Court deemed that even though the protection of general interest may prevail over the personal privacy, the protection of general interest should not extend beyond what is necessary. It deemed that though Onassis was a celebrity, the acts of Galella exceeded the limits of seeking information, and it held that requiring journalist to abide by the law does not in any case breach the freedom of press, of expression and of access to information.

[49] The Court finds therefore that the statements of Byansi and his legal counsel that the right to personal privacy is not an obstruct to the freedom of press, of expression and of access to

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[36] These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves …The states are to maintain and apply in practice an adequate legal framework affording protection against acts of violence by private individuals... While recourse to the criminal law is not necessarily the only answer, effective deterrence against grave acts where fundamental values and essential aspects of private life are at stake requires efficient criminal law provisions." See the case E.S. v Sweden n° 5786/08, 21/06/2012, paragraphs 57 and 58.

[37] The Court also observes the technical developments in the sphere of filming and photography and reiterates that increased vigilance in protecting private life is necessary to contend with new communication technologies which make it possible to store and reproduce personal data." See the case E.S. v Sweden n° 5786/08, 21/06/2012, paragraph 71.

[38] "In some European States, measures have been considered in order to address the phenomenon of illicit or covert filming of individuals, including criminalization where personal integrity is compromised." Read about William A. Schabas, The European Convention on Human Rights: A Commentary, Oxford University Press, 2015, p.377.

[39] See the case Shulman v Group W Productions, Inc. 18 Cal. 4th 200, Supreme Court of California, June 1, 1998.

[40] See the case n° Galella v. Onassis 487 F.2d 986 (2d Cir. 1973).

information, lack merit. The protection of the personal privacy is not only limited to ordinary persons though they need more protection than famous persons and politicians. Nonetheless, an article regarding such famous persons would only violate their personal privacy if it aims at protecting public interest. Before the eavesdropping, taking or diffusion of personal audio, video or documents of famous person or politician, a journalist should always ask him/herself if it is in the general interest to trigger the curiosity of the public on the topic, where if he/she finds that what he/she intended to do falls within the context of the secrecy of personal privacy, he/she refrains from doing it.

[50] Regarding this issue, the European Court of Human Rights explained that the instance of general interest consists of when an article aims at discovery of the commission of the offence, at exhibiting the political thoughts of the subject in order to stimulate the democratic debate or the debates relating to entertainment.[41] As a matter of fact, a story about the fact that a certain person is suspected to have committed an offence, about the problem of money owned by an artist or talking about the marital disputes involving a politician, should not be regarded as aiming at general interest.[42] The foregoing reasoning corroborates again the provisions of article 6 of the Law n° 04/2013 of 08/02/2013 relating to access to information stating that the general interest consists of something that is in the interest of the people considering the potential trouble to their lives, ensuring that any public authority with regulatory mission properly discharges its functions, ensuring that the expenditure of public funds is subject to effective management and oversight or promoting founded public debate.

[51] The Court deems that the foregoing grounds entail that the right of a journalist to seek for information does not entitle him/her the immunity. Article 38 of the Constitution should be perceived as having balanced the gravity of the consequences arising from the failure to respect the personal privacy for aspiring to respect the freedom of press, of expression and of access to information, as well as the consequences arising from failure to respect the freedom of press for aspiring to protect the personal privacy. It is evident that the consequences arising from failure to respect the freedom of press, of expression and of access to information when a journalist is barred from violating the personal privacy are fewer; and thus, a journalist is not allowed to encroach in personal privacy for only believing to have come across a story. Manuel Molina, a legal scholar, states clearly it in the following terms:

*"la liberté qui lui (le journaliste) est reconnue par la Constitution a dû être inscrite par la loi dans les limites nécessaires pour le maintien de la justice et de l'ordre social… C'est dire combien doivent être prudents les journalistes comme les éditeurs et les diffuseurs qui ne doivent pas croire que tout leur est permis au nom de cette liberté solennellement proclamée et oublier que des limites sont imposées pour éviter que la liberté des uns ne dégénère en dommages pour autrui."*[43]

[52] The Court finds that nowhere in the judgment Axel Springer AG vs Germany, it is said that the freedom of press is absolute to the extent that six principles that Byansi and his legal counsel

[41] See the case White v Sweden, n° 42435, 19/09/2006, paragraph 29.
[42] See the judgment Standard Verlags Gmbh V Austria (n°2), n° 21277/05, 04/06/2009, paragraph 48.
[43] See Manuel Molina, Les Journalistes: Statut professionnel, libertés et responsabilités, Victoire Editions, 1989, p.3.

allege to have been established by such judgment[44] would be regarded as totally limiting the right to personal privacy. It is nonetheless evident to the Court that in paragraph 110 of that judgment, the European Court of Human Rights found in contrast that the right to personal privacy consists of limitation to the freedom of press, but that in the context of exercising some of the said rights, proportionality should be exercised in order to avoid the potency of one over another in a way that eliminates the protected interest.[45] The Court reached such conclusion after recalling the position it adopted in the case Hachette Filipacchi Associés (ICI PARIS) vs France, raised by Byansi Samuel Baker and his legal counsel, according to which the freedom of press and the right to personal privacy should be equally respected.[46]

[53] The Court further deems that the method of investigative journalist or undercover journalism is very important to the country and population. Such methods may reveal the information about the decision making by the state organs, which would help to discover the commission of offences, especially the acts committed undercover such as corruption, gender-based violence, embezzlement and breach of trust. They can help uncover dysfunctions and ill decisions. However, all such benefits would not prevail over the right to personal privacy because the freedom entail also doing what does not obstruct others. Henri Ader recalls that every journalist, be it a writer, a photographer, an investigator, a radio or television presenter, should always wonder whether he/she does not encroach with the right of another or the limits set by the law by exercising his/her freedom.[47]

[54] The Court finds that in the instant case, Byansi Samuel Baker and his legal counsel state that the words "in bad faith" also limit the freedom of press, of expression and of access to information because journalists collect and diffuse information in the general interest, and thus in the event that a journalist does it in bad faith, he should be held liable before civil courts rather than before criminal courts.

[55] The importance of having legal provisions protecting the personal privacy in criminal instruments has been sufficiently explained above and it was indicated that it is not as a matter of fact the particularity of Rwanda, it is in any way inconsistent with the Constitution. The issue concerning the wording "in bad faith" and determination of whether such words are necessary in article 156 of the aforementioned Law n° 68/2018 of 30/08/2018.

[56] The Court finds that the words "in bad faith" translate the intent to commit the offence, and the legislator classified such intent to the higher category (special intent). Such words place the onus to demonstrate beyond reasonable doubt that the criminalized acts were committed with

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[44] The story's objective should be general interest, the story should involve a famous person who was prosecuted for crime, the conduct of a journalist, the method of information gathering, the veracity of the story and the sanctions to such an offence.

[45] See the case Axel Springer AG v. Germany, n° 39954/08, 7/02/2012, paragraph 110.

[46] "Indeed, as a matter of principle these rights deserve equal respect." see the judgment Hachette Filipacchi Associés (ICI PARIS) v. France, n°. 12268/03, 23/07/2009, paragraph 41.

[47] *"La liberté consiste à faire tout ce qui ne nuit pas à autrui… Et du journaliste qui écrit ou dicte l'article qui doit paraitre tout à l'heure, du photographe qui vqa saiasir et figer l'instant fugitive qui deviendra, à cause de lui ou grace à lui, image sans fin reproduite, de l'nqueteur qui, pour la radio ou la television va amplifier aux limites de notre monde la parole fugace ou le geste éphèmere, chancun de se demander s'il demeure se faisant, dans les limites de la liberté de la presse ou s'il est n'est pas coupable de nuire à autrui et de ne pas respecter ces bornes (de la loi)"* See Manuel Molina, Les Journalistes: Statut professionnel, libertés et responsabilités, Victoire Editions, 1989, p.1-2.

intent to harm to the prosecution. They constitute also reasons that may decriminalize such acts based on that provision in the event of eavesdropping, taking, publication or diffusion of personal audio, photographs, video or documents were done by accident or without intent to harm. Eliminating them from such provision would extend its scope and the related effects being to rely on it for the punishment of the persons who committed such acts inadvertently or without intent to harm, as well as those who did it in general interest. This is what would in contrast be inconsistent with the freedom of press, of expression and of access to information provided for by article 38 of the Constitution.

[57] On the contrary, the Court further finds that the words "in bad faith" make the Rwandan law favorable as far as prosecuting the suspects of violation of article 256 is concerned because it punishes the person who committed the acts stated therein without being given prior consent of the concerned persons, and who does it with intent to harm. Article 226-1 of the penal code of France that Counsel MBONIGABA Eulade, the State Attorney, recalled above, indicates also that it is important to consider the objective of the person who did eavesdropping, took, published or diffused personal photographs, audio, video or documents. Such article reads that: "*Est puni d'un an d'emprisonnement et de 45.000 Euros d'amende le fait, au moyen d'un procédé quelconque, volontairement de porter atteinte à l'intimité de la vie privée d'autrui…*".[48] Again, article 162.1. (1) of the Penal Code of Canada also indicates that it is necessary for the suspect to have committed such offence with full knowledge. It reads: "*Quiconque sciemment publie, distribue, transmet, vend ou rend accessible une image intime d'une personne, ou en fait la publicité, sachant que cette personne n'y a pas consenti ou sans se soucier de savoir si elle y a consenti ou non, est coupable …*"[49]

[58] The Court finds that article 156, paragraph 2 of the Law n° 68/2018 of 30/08/2018 stated above, punishes the person convicted of the offences stated in the first paragraph or the person who, in bad faith, distributes in any way whatsoever, a photo, audio and video, recordings or documents obtained as a result of one of the acts referred to in Paragraph One as provided in paragraph three of that article is liable to imprisonment for a term of not less than six (6) months and not more than one (1) year and a fine of not less than one million Rwandan francs (1,000,000Frw) and not more than two million Rwandan francs (2,000,000Frw) or only one of these penalties.

[59] Concerning the penalties provided for by that provision, the Court notes that while the African Commission of Human Rights was addressing the dispute between Constitutional Rights Project and Nigeria, it realized that the protected aim was necessary and reasonable, and therefore the issue to be determined being whether the established measures were proportional. It put them in the following terms:

*"The only legitimate reason(s) for limitations of the rights and freedoms of the African Charter are … is that the rights of the Charter 'shall be exercised with due regard to the rights of others, collective security, morality and common interest. The justification for limitation must be strictly*

[48] See the Code pénal Français, modifié par la loi n°2020-936 du 30 juillet 2020.

[49] See the Code criminel L.R.C. (Loi Révisée du Canada) (1985), ch. C-46 (À jour au 4 avril 2022, dernière modification le 16 janvier 2022).

*proportionate with and absolutely necessary for the advantages which follow. Most important, a limitation may not erode a right such that the right itself becomes illusory."*[50]

[60] The Court finds that the penalties provided by article 156, paragraph 2 of the aforementioned Law n° 68/2018 of 30/08/2018 are proportionate comparing to the protected rights, and in addition to that, courts are not required to cumulate the imprisonment penalty with the pecuniary penalty. This further foretells that such part of the penalties that is in this provision does not turn the freedom of press, of expression and of access to information provided by article 38 of the Constitution illusory.

[61] Concerning the statements of BYANSI Samuel Baker according to which article 156 of the Law determining offences and penalties is inconsistent with article 38 of the Constitution would facilitate journalists to proceed through investigative or undercover journalism, the Court deems that the petitioned article does in no way prohibit journalists to resort to such methods. What is prohibited is the breach of personal privacy and with bad faith. Instead, it is clear to the Court that article 12 of the Law n°02/2013 of 08/02/2013 regulating media provides that "a journalist shall have free access to all sources of information and the right to freely inquire on all events of public life, and to publish them in respect of the provisions of this Law and other Laws." The free access to all sources of information and inquire means that a story may even be constituted in any form provided that a journalist remains within the limits set by the law.

[62] Based on the foregoing, the Court finds article 156 of the Law nº68/2018 of 30/08/2018 determining offences and penalties in general is not inconsistent with article 38 of the Constitution of the Republic of Rwanda of 2003 revised in 2015.

**II. 2. Whether article 157 of the Law nº68/2018 of 30/08/2018 determining offences and penalties in general is inconsistent with article 38 of the Constitution**

[63] Byansi Samuel Baker alleges that the work of a journalist relies on editing, therefore that concerning the investigated story, a journalist would be obliged to take a distance from the ordinary regulations and that the discovered evidence from the collected information are likely to help other organs including justice organs. He states that article 157 of the Law nº 68/2018 of 30/08/2018 determining offences and penalties in general does regard a journalist as any other person, which leads to the violation of his/her freedoms. He explains that in the course of preparation of an article, a journalist would modify it (editing/interpretation/analyze), alter the video, photograph or use the cartoon in order to be pleasant or attractive for the target audience since he/she may dramatize some personal traits to represent him/her as a reference.

[64] He explains that the magazine known as Charlie Hebdo in France which spent the last 200 years reporting through cartoons as a way of expressing their thoughts, and therefore, the fact that article 157 of the Law nº 68/2018 of 30/08/2018 determining offences and penalties in general punishes any person including journalists, contravenes article 38 of the Constitution because it obstructs the freedom of expression through any medium that a journalist may use in his/her profession.

[50] Constitutional Rights Project and Others v Nigeria (2000) AHRLR 227 (ACHPR 1999).

[65] He alleges that the freedom of expression through cartoons was penalized by foreign courts in the judgment where Charlie Hebdo was attacked by Société des Habous des Lieux Saints de l'Islam and l'Union des Organisations Islamiques de France to have insulted the leaders of Islam religion by cartooning the prophet Muhammad, the Court of Appeal of Paris found that freedom of press does not only concern plausible stories, but it also extends to viral report, account that upset some people or annoying narratives[51], and thus, the cartoons are sometimes designed voluntarily in the context of triggering public debate, and that even if such cartoons would themselves be controversial, it should be perceived as contributing to the exercise of freedom of expression that benefits the general interest.

[66] His legal Counsel MUSORE Gakunzi Valéry states that the punishment of the journalist who diffused statements or videos that are different from the source amounts to unnecessary violation of freedom of press in Rwanda as a democratic country, therefore that article 157 of the Law determining offences and penalties in general is inconsistent with article 38 of the Constitution. He explains that when the way in which the media operates is considered and how journalists do analysis by reducing the minutes of the conversations they had with interviewed persons, or change photos; this should not constitute an offence in itself. He states that the magazine known as Charlie Hebdo pleases the audience around the world by its cartoons, which is an example that Rwanda would borrow especially that it is not an island and that nothing prevents the practice elsewhere to apply in Rwanda. He argues that would there be a person who is discontent with the working conduct of a journalist, he has to seize the civil court for damages.

[67] Counsel Mbonigaba Eulade, the State Attorney, retorts that article 157 of the Law determining offences and penalties in general does in any way forbid to do editing, interpretation or analysis, as what is prohibited is to do it in bad faith or doing editing without indicating it as an edited version, which is likely to lead people to believe that the work of the journalist is original. He states that the role of such provision consists of preventing people who would alter stories, where people would believe that what they have been given is the true story. He raises an example of the recorded audio of Apostle Gitwaza Paul where he was alleged to have declared that the followers who do not worship in his church will not go to heaven, a citizen may take it to be true whereas the person who distorted it was of bad faith. In this case, it is necessary for a journalist to remain ready to disclose the original version.

[68] He states also that the modus operandi of the magazine Charlie Hebdo should not be basis for enacting Rwandan law, thus, the statements of Byansi Samuel Baker according to which article 157 of the Law n° 68/2018 of 30/08/2018 recalled above obstructs the freedom of press, are baseless because article 38 of the Constitution provides for limitations to such freedom, which means that in the event a journalist acts unlawfully, nothing stands against his/her punishment as it is the case for any other person.

## DETERMINATION OF THE COURT

[51] "*La liberté d'expression vaut pour les informations ou idées accueillies avec faveur ou considérées comme inoffensives ou indifférentes dans une société déterminée, mais aussi pour celles qui heurtent, choquent ou inquiètent … les caricatures litigieuses ont participé au débat d'intérêt général sur la liberté d'expression".* See the judgment rendered by the Cour d'Appel de Paris, 11è chamber, section A, 12 mars 2008, dossier n° 07/02873.

[69] Article 38 of the Constitution recalled above establishes a principle that freedom of press, of expression and of access to information are recognized and guaranteed by the State. However, such freedoms shall not prejudice public order, good morals, the protection of the youth and children, the right of every citizen to honour and dignity and protection of personal and family privacy. Conditions for exercising and respect for these freedoms are determined by law.

[70] Article 157 of the Law nº68/2018 of 30/08/2018 determining offences and penalties in general states that "Any person who, in bad faith, publishes in any way whatsoever an edited version of a person's statements, or images and photos without explicitly stating that it is not the original version, commits an offence". Upon conviction, he/she is liable to imprisonment for a term of not less than six (6) months and not more than one (1) year and a fine of not less than one million Rwandan francs (1,000,000Frw) and not more than two million Rwandan francs (2,000,000Frw).

[71] The foregoing provision regards any person who publishes an edited version of a person's statements, or images and photos without indicating to the audience that they have been edited. In other words, this provision criminalizes the deception of the publisher of statements, photos or images presented differently from the original version and where the public or the audience deceptively take them as original version. However, a person held criminally liable is the one acting with bad faith.

[72] Byansi Samuel Baker and his legal counsel states that a journalist should not be regarded as "any person" stated in article 157. The definition of a journalist is provided for by article 2, subparagraph 19 of the Law n°02/2013 of 08/02/2013 regulating media stating that "a professional journalist: a person who possesses basic journalism skills and who exercises journalism as his/her first profession. He/she shall exercise at least one of the following professions: a. collecting information, b. processing information, c. publish/broadcast information through a given media organ with intention to disseminate information or opinions". The term "a professional journalist" that the legislator used implies the existence of a non-professional journalist, who does not fulfill one or several requirements set by the foregoing provision such as the fact that he/she did not study journalism or where journalism is not his main occupation.

[73] The Court finds that based on the provisions of article 3, paragraph one of the aforementioned Law n°02/2013 of 08/02/2013, a journalist, whether exercising the profession of journalism in a registered media company or a freelance, or a representative of a foreign media organ in Rwanda, shall be given accreditation by the Media Self Regulatory Body or other competent organ for a foreign journalist.

[74] The second principle of the Rwanda media fundamental principles of 05/04/2014 states that: "A journalist should refrain from misinformation. He/she has the duty to publish the real scenario by seeking the truth, and he/she should keep in mind that the public has the right to receive accurate information. He/she should not disregard the substantial information or alter the statements made or any kind of documents."[52]

[52] See Rwanda Media Commission, Media professional principles in Rwanda, PGL, Kigali, Amended 5th April 2014.

[75] The Court finds that in the judgment *Couderc and Hachette Filipacchi Associés vs France*, the European Court of Human Rights established that the media professional principles and duties determine the exercise of their profession. It deems that the professional principles instruct journalists to fulfill their obligations in good faith and based on tangible and actual facts, and they have to publish credible stories and which are not misleading. It further found that acting professionally implies that a journalist should respect the way he accessed the information without disparaging the person from whom he got the information.[53]

[76] The instant Court finds that as recalled above that the freedom of press, of expression and of access to information are not absolute especially that one of the limitations thereto includes the honour and dignity of a person preventing any person including a journalist to do anything with the intent to disparage or dehumanize a person. Such freedom would also be limited by the interest to protect the person against whom lies would be told about and held liable for the diffusion of his/her untrue declarations, photos and images. Regarding the cartoons of which BYANSI Samuel Baker and his legal counsel they state that they are concerned by article 157 of the Law determining offences and penalties in general, the instant Court upholds the position adopted by the European Court of Human Rights where it held that the portrayals in the form of cartoons even though expressing the thoughts, they are themselves and the related descriptions regulated by the media professional principles; therefore, they should not violate the privacy of the cartooned person or defame him/her.[54]

[77] The instant Court notes that even the Supreme Court of Canada addressed the duties of the journalists to ethically exercise their profession where it held in the case Grant vs Torstar Corporation, that: Freedom does not negate responsibility. It is vital that the media act responsibly in reporting facts on matters of public concern, holding themselves to the highest journalistic standard."[55]

[78] In the Book titled Style Book: Bestselling Guide for Writing and Editing written by The Canadian Press, it is stated that photographs must always express the truth, indicate what the author saw and that a photograph may be rectified through different methods of burning, dodging, colour balancing and cropping but that person who makes alterations should avoid overdoing it since it is not permitted in journalism to dismiss important traits of the photo in favor of useless traits, and for this reason, editing should only be limited to clearing with the aim of erasing dust, dots and other small spots, whereas colour balancing should be done slightly by avoiding the modification

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[53] "*131…Le respect par les journalistes de leurs devoirs et de leurs responsabilités ainsi que des principes déontologiques qui encadrent leur profession. À cet égard, elle rappelle que l'article 10 protège le droit des journalistes de communiquer des informations sur des questions d'intérêt général dès lors qu'ils s'expriment de bonne foi, sur la base de faits exacts, et qu'ils fournissent des informations "fiables et précises" dans le respect de l'éthique journalistique… 132. La loyauté des moyens mis en œuvre pour obtenir une information et la restituer au public et le respect de la personne faisant l'objet d'une information … sont aussi des critères essentiels à prendre en compte. Le caractère tronqué et réducteur d'une publication est donc susceptible, lorsqu'il est de nature à induire les lecteurs en erreur, de limiter considérablement l'importance de la contribution de cette publication à un débat d'intérêt général*." See Couderc Et Hachette Filipacchi Associés v France, n° 40454/07, 10/11/2015, paragraphs 131 and 132.

[54] See the case Palomo Sanchez et Autres v Espagne n° 28955/06, 28957/06, 28959/06 and 28964/06, 2/09/2011, paragraph 66

[55] Freedom does not negate responsibility. It is vital that the media act responsibly in reporting facts onmatters of public concern, holding them-selves to the highest journalistic standards…" See the case Grant v Torstar Corp. [2009] 3 S.C.R., paragraph 52.

of originality of the photograph.[56] Nothing prevents the holdings of The Canadian Press about photographs to apply to statements or images which all corroborate to imply that a journalist who, publish edited photo, statements or images without indicating them as such, violates the principles stated previously by intending to falsely present them as original.

[79] The Court is of the view that the problem of not indicating the basis of the story whether they were modified or not, relies largely on the professionalism of the journalist. In addition to that, article 157 of the Law nº 68/2018 of 30/08/2018 stated above does not only protect the owner of the published photo, statements or images after modification of which the author did not indicate to be different from original versions. Instead, such provision averts the harm intended by the editor, that is likely to extend beyond the owner of modified photo, statements or images of which it was not indicated to be different from the original versions. The terms "with bad faith" that were used by the legislator concern the prejudice intended by the publisher of the photograph, statements and images.

[80] Every aspect of human rights plays its own role, and aims at promoting and respecting human dignity. Accordingly, no aspect of human rights should suffocate and suppress another, rather, all aspects should radiate in synergy in order to promote the human dignity. It implies that the fact that everybody, including a journalist, is required to indicate that the statements, photographs or video recordings he/she diffused are different from the original versions and should do it with good faith, is not what should be regarded as prejudicing to the freedom of press, of expression and of access to information. In addition to that, the fact of requesting a journalist to exhibit integrity and operating professionally without doing something with bad faith, and to indicate the changes he/she made to original versions, does in no way prejudice democracy or basic principles that would hamper democratic or people's progress.

[81] The foregoing demonstrates that the arguments of Byansi Samuel Baker and his legal counsel based on the judgment that opposed Handyside to England are not true because in contrast, the European Court of Human Rights found that any person that exercises his/her freedom of press admits to the associated onus and duties. It also explained that his/her freedom is restricted with the status of the circumstances at hand as well as the devices he/she chose to use, and that the Court would not disregard such onus and duties in the course of determining whether the limits and penalties established are necessary to promote the civil education in a democratic country.[57]

[82] The Court further finds that the right protected by article 157 of the Constitution constitutes one of the rights to privacy of which the exercise is preceded by the claim of the owner of the photo, statements or video recordings as provided by article 162 of such Law. It entails that whenever the owner did not file, the prosecution is not allowed to take action and file on his/her behalf. It follows that claims are submitted following the intention of the owner to prosecute for only some photos, statements or video recordings diffused after their modification, which is also a limitation to unnecessary claims.

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[56] Manuel Molina, Les Journalistes: Statut professionnel, libertés et responsabilités, Victoire Editions, 1989, p. 356

[57] "whoever exercises his freedom of expression undertakes "duties and responsibilities" the scope of which depends on his situation and the technical means he uses. The Court cannot overlook such a person's "duties" and "*responsibilities" when it enquires, as in this case, whether "restrictions" or "penalties" were conducive to the "protection of morals" which made them "necessary" in a "democratic society*". See the case Handyside v. The United Kingdom, n° 5493/72, 7/12/1976, paragraph 49.

[83] Considering the foregoing, the Court finds that article 157 of the Law determining offences and penalties in general, is not inconsistent with article 38 of the Constitution.

**II.3. Whether article 194 of the Law n° 68/2018 of 30/08/2018 determining offences and penalties in general is inconsistent with articles 15 and 38 of the Constitution**

[84] Byansi Samuel Baker alleges that article 194 of the Law n° 68/2018 of 30/08/2018 determining offences and penalties in general prejudices the freedom of press considering that journalists do not own information as they find it from people who would tell them the truth or lie to them. He explains that normally it is the investigative journalism that helps journalists to analyze whether the declarations made to them are reliable, therefore, a journalist should not be punished for publication of information, which is subsequently deemed to be false. He states that in their carrier, in the event of misconduct, a journalist is sanctioned with the withdrawal or rectification of the publication, which he finds satisfactory.

[85] His legal Counsel RURAMIRA Bizimana Zébédée states that being punished for published information which was later judged to be untrue, is unlawful. He explains that the terms "any person" that open out the article 194 of the Law n° 68/2018 of 30/08/2018 determining offences and penalties in general are inconsistent with article 38 of the Constitution because it does not accord a journalist with any special treatment, and that it disregards that the duties of a journalist consist of expressing opinions that would not be sometimes welcomed equally by all individuals. He states that a journalist diffuses an information he/she deems true depending on the source of information, which would be discovered to be false later; therefore, being subject to prosecution amounts to prejudice to freedom of expression. He further states that in the course of analysis of article 10 of European Convention on Human Rights, the France Court of Cassation deemed that the publication of untrue story does not consist of an offence,[58] thus, a journalist who published false story would rather be required to make adjustments, rectifications or the reported subject be give the opportunity to reply as provided for by article 21 of the Law n°02/2013 of 08/02/2013 regulating media.[59]

[86] Concerning the spread of propaganda, he explains that nobody should be punished for that in a democratic country, and that in countries like France, a journalist may reveal in an article that he/she supports an opposition party without being regarded as causing public disaffection against the Government. He states that since articles 15 and 38 of the Constitution provided for the principle of equality before the law and the freedom of press and further stresses on the freedom of expression and of access to information respectively, other legal instruments should also give a

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[58] "*Viole par fausse application l'article 10 de la Convention européenne des droits de l'homme, la cour d'appel qui interdit la reproduction de propos litigieux sur un site internet au motif que ceux-ci revêtent un caractère mensonger, alors que la liberté d'expression est un droit dont l'exercice ne revêt un caractère abusif que dans les cas spécialement déterminés par la loi, et que les propos litigieux reproduits, fussent-ils mensongers, n'entrent dans aucun de ces cas;"* France, Cour de cassation, Chambre civile 1, 10 avril 2013, 12-10177

[59] Such article specifies that "Every individual, associations, public entities and organizations with legal personality shall have the right to request for correction, reply or rectification of an article or a story published in a media organ. Request for correction, reply or rectification shall be submitted to the Publishing Director of media organ in a registered mail, letter delivered with acknowledgement of receipt or electronic mail with acknowledgment of receipt. The Media Self Regulatory body shall determine modalities for correction, reply and rectification. If the applicant for correction, reply or rectification is unsatisfied with the decision made, the person may file a case with the Media Self Regulatory Body. In the absence of amicable settlement, the person may file a case with the competent court.

special treatment to and protect a journalist. Because should not this be the case, it would amount to unconstitutionality, since as for him, such article bars a journalist from expressing his/her opinions freely.

[87] He alleges that nowhere the Law defines "propaganda", the situation that may lead to make judgment by analogy while it is forbidden by article 4 of the Law n° 68/2018 of 30/08/2018 determining offences and penalties in general. He cites examples of Legal scholars[60] and foreign courts[61], where they concur that the term "propaganda" is broad and implies different modes of expressing opinion that may vary depending on the content of the story, its interpretation, medium of publication as well as its adverse effects.

[88] He states that in the judgment Sabuncu and others vs Türkiye, the European Court of Human Rights was seized by journalists from Türkiye alleging that the prosecution holds them liable for their article that it qualified to instigate the political organisations including the opposition party PKK. He explains that they were detained for spreading propaganda of such organisations, the reason they initiated a claim with the objective of criticising their government that opted to detain them instead of resorting to media and answer about the opinions of the criticizers, and for them, the foregoing consists of the hindrance to the freedom of press. He explains that such Court found indeed that the provisional detention of a journalist for their profession consists of the interference with the freedom of press.[62]

[89] Counsel Musore Gakunzi Valéry who also assists BYANSI Samuel Baker states that there are some main principles that should be considered before interfering with the freedom of press including prior stance of whether in a democratic country, it is necessary to interfere with such freedom and determination of whether the purpose would not be achieved otherwise. He argues that the Court, within its discretion, should determine whether the way the story was made breaches the law and determine whether it disrupts the public, therefore, a journalist should not be sentenced to jail for having made critiques; rather, would faults have been committed, they should be mended through legal remedies provided for by the Law regulating media or civil law.

[90] Byansi Samuel Baker and his legal counsel request the instant Court to consider their submissions as founded and hold that article 194 of the Law n° 68/2018 of 30/08/2018 determining offences and penalties in general is inconsistent with articles 15 and 38 of the Constitution.

[91] Counsel Mbonigaba Eulade, the state attorney, states that the worry that a journalist may be punished for his/her article is baseless because when a story is well prepared and published, and

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[60] "Propaganda is a sufficiently broad notion to cover a range of different types of expression which vary in terms of the harmfulness of their content, the sophistication of their presentation and strategies of dissemination and the gravity of their effects." See Tarlach McGonagle, Minority Rights, Freedom of Expression and of the Media: Dynamics and Dilemmas, Cambridge, Intersentia, Research Series, Volume 44, 2011, p.272.

[61] "The right to freedom of expression is applicable not only to "information" or "ideas" that are favorably received or regarded as inoffensive or as a matter of indifference but also to those that offend, shock or disturb the State or any section of the community." See the case Handyside v. the United Kingdom, n° 5493/72, 7/12/1976, paragraph 49.

[62] "*La Cour estime que la détention provisoire qui a été imposée aux requérants dans le cadre de la procédure pénale engagée contre eux pour des crimes sévèrement réprimés et directement liée à leur travail journalistique consiste en une contrainte réelle et effective, et qu'elle constitue donc une " ingérence" dans l'exercice par les requérants de leur droit à la liberté d'expression garanti par l'article 10 de la Convention."* See the case SABUNCU ET AUTRES c. TURQUIE, n° 23199/17, 10 /11/ 2020, paragraph 226.

the author indicates the source, this is an indication that he/she did not have the intention to spread rumors, thus, he/she should not be held liable since criminal liability is personal. He explains that a journalist is required to know whether a story is inoffensive and he/she should bear in mind that having the source of information does not exonerate him/her from the obligation of diligence to the extent that as a person of influence to the society, whenever he deems that such story would be compromising, he/she should refrain from broadcasting it. He explains that when there happen to be inadvertent or lack of precautions in whatever we do, the responsible person is held liable.

[92] He states that the publications by journalists are considered as true by the population. Thus, he finds that the instant Court should reiterate that no provision of the law obligates journalists to publish any information they come across, and holds that they are required to exercise discernment in their duties. He further argues that article 194 of the aforementioned Law n° 68/2018 of 30/08/2018 concerns all persons, and implement the principle expressed by article 38 of the Constitution. For this reason, it would not set a particularity to journalist or any other person because its provisions intend to protect the Rwandan sovereignty and public order. He states that the freedom of press does not entail talking about what is not allowed; rather, the freedom of expression and of access to information should be allowed by all country's legislation as provided for by article 41 of the Constitution[63] as well as article 9, paragraph 2 of the Law nº 02/2013 of 08/02/2013 regulating media.

[93] He explains that article 38, paragraph 2 of the Constitution provides for the exception where it states that freedom of expression and freedom of access to information shall not prejudice public order, good morals, the protection of the youth and children, the right of every citizen to honour and dignity and protection of personal and family privacy, the text which corroborates the provisions of article 194 of the stated Law n° 68/2018 of 30/08/2018, and therefore, such article is not inconsistent with the Constitution. He further states that nowhere article 38 of the Constitution prevents a journalist to publish an investigated story as it rather prohibit the publication of lies or irrelevant information he/she comes across regardless of their source, and that though article 21 and 22 of the Law nº 02/2013 of 08/02/2013 regulating media provides for the persons having the right to request the correction, reply to or rectification of the published article or story in the media, such request and correction does not eliminate the problems and challenges arose from such published false information, and that for this reason, the rectification would not bring any remedy as long as the public order is disturbed.

[94] Counsel Mbonigaba Eulade pursues that the provision alleged to be inconsistent with the Constitution provides that the criminalised spread of propaganda is that intending to cause public disaffection against the Government of Rwanda or where it is likely or calculated to cause public disaffection or a hostile international environment against the Government of Rwanda, therefore that it is not necessary to dig out other explanations for such term from legal scholars opinions or foreign precedents. He adds that even if the penalty for the offence provided under such provision be reduced, it would not concern a journalist for the consequences of the published story since most people consider it to be true because the audience think that he/she has done deep research, which leads to their reading and being listened to by many people.

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[63] Such article provides that "In exercising rights and freedoms, everyone is subject only to limitations provided for by the law aimed at ensuring recognition and respect of other people's rights and freedoms, as well as public morals, public order and social welfare which generally characterise a democratic society".

[95] He states that even international law establishes limitations to every body's rights, whit an example of article 19, paragraph 2 of International Covenant on civil and political rights stating that Everyone shall have the freedom to seek, receive and impart information and ideas through any media of his/her choice, but such freedom subject to restrictions for respect of the rights or reputations of others depending on the legislation of every country[64], while article 9 of African Charter on human and peoples' right provides that Every individual shall have the right to receive information and to express and disseminate his opinions within the law; which implies that even a journalist has no right to impart any kind of information or article[65]. He concludes his submissions by requesting the instant Court to hold that nowhere article 194 of the Law n° 68/2018 of 30/08/2018 determining offences and penalties in general is inconsistent with article 38 of the Constitution.

## DETERMINATION OF THE COURT

[96] Article 15 of the Constitution reads that: "All persons are equal before the law. They are entitled to equal protection of the law."

[97] Article 38 of the Constitution that was recalled above establishes a principle according to which the freedom of press, of expression and of access to information is recognised and guaranteed by the State. However, such freedoms shall not prejudice public order, good morals, the protection of the youth and children, the right of every citizen to honour and dignity and protection of personal and family privacy. Conditions for exercising and respect for these freedoms are determined by law.

[98] Article 194 of the Law nº 68/2018 of 30/08/2018 determining offences and penalties in general provides that: "Any person who spreads false information or harmful propaganda with intent to cause public disaffection against the Government of Rwanda, or where such information or propaganda is likely or calculated to cause public disaffection or a hostile international environment against the Government of Rwanda commits an offence. Upon conviction, he/she is liable, in wartime, to a term of life imprisonment. In peacetime, he/she is liable to imprisonment for a term of not less than seven (7) years and not more than ten (10) years."

[99] Article 194 punishes "any person" who spreads false information or harmful propaganda:

i. with intent to cause public disaffection against the Government of Rwanda;

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[64] "*Toute personne a droit à la liberté d'expression ; ce droit comprend la liberté de rechercher, de recevoir et de répandre des informations et des idées de toute espèce, sans considération de frontières, sous une forme orale, écrite, imprimée ou artistique, ou par tout autre moyen de son choix". Indeed, the 3rd paragraph states that "l'exercice des libertés prévues au paragraphe 2 du présent article comporte des devoirs spéciaux et des responsabilités spéciales. Il peut en conséquence être soumis à certaines restrictions qui doivent toutefois être expressément fixées par la loi et qui sont nécessaires : a) Au respect des droits ou de la réputation d'autrui; b) A la sauvegarde de la sécurité nationale, de l'ordre public, de la santé ou de la moralité publiques".* See article 19 of International Covenant on civil and political rights.

[65] " toute personne a le droit d'exprimer de diffuser ses opinons dans le cadre des lois et des reglements". See article 9 of African Charter on human and peoples' rights.

ii. or where such information or propaganda is likely or calculated to cause public disaffection or a hostile international environment against the Government of Rwanda.

In other words, what is criminalised by this article is not the information or propaganda themselves, it is rather the intent of the person who spreads information or propaganda to cause public disaffection or the effects such information had or is likely to have on peoples' or countries' relations vis-a-vis the Government of Rwanda.

[100] The Court finds that another aspect on which this article shed light is that it says "spreading false information", of which words would not be confused with "publication of an untrue story". As provided for by article 2, subparagraph 8 of the aforementioned Law n° 02/2013 of 08/02/2013, *"the news consists of print, audio, visual or audio-visual elements that are prepared for media purposes*." The Diffusion of information leads to the transmission of news to many people or to the public in unprofessional way.

[101] Byansi Samuel Baker and his legal counsel states that according to article 194 of the Law determining offences and penalties in general, a journalist should not be confused with any other person, because doing so is inconsistent with article 15 of the Constitution which establishes the right to equality before the law. However, they do not indicate how the words "any person" lead to inequality. Rather, it is evident to the Court that such words treat all people equally either Rwandans or foreigners who do not abide by this provision. The distinction of journalists from others who are likely to evenly commit offences without indicating reasonable grounds would rather make such article inconsistent with article 15 of the Constitution. The instant court recalled it in the case of Uwinkindi Jean where it held that "grouping people in categories should be done with the aim of achieve a reasonable and justifiable objective, and with legitimate purpose under the covenant and criteria for such differentiation should be groundful and in general interest."[66]

[102] The Court further deems that the objective of such article is not to criminalise the false information or propaganda themselves as alleged by Samuel Baker and his legal counsel. The words "bigamije/with intent to/avec l'intention de" indicate that the offence occurs once false information or propaganda intend to cause public disaffection against the Government of Rwanda or where such information or propaganda is likely or calculated to cause public disaffection or a hostile international environment against the Government of Rwanda. The words "bigamije/with intent to/avec l'intention de" indicate that the offence occurs once false information or propaganda intend to cause public disaffection against the Government of Rwanda or where such information or propaganda is likely or calculated to cause public disaffection or a hostile international environment against the Government of Rwanda. It is the motive behind the person who spreads such information or propaganda that the law intends to fight. Article 194 of the Law determining offences and penalties in general does not include false information or propaganda imparted by a person with no intention to cause public disaffection against the Government or devoid of anything likely to cause public disaffection or hostile international environment against the Government.

[103] Regarding whether the prosecution of people who incite public disaffection or hostile environment against the Government through false information or propaganda, violates the freedom of press, of expression and of access to information, the Court finds that article 9 of the

[66] See the judgment n° RS/INCONST/PEN 0005/12/CS rendered on 22/02/2013, paragraph 16.

Law n°02/2013 of 08/02/2013 regulating media leaves journalists the obligation to refrain themselves from disrupting the public order while article 4 of article of the Law n°02/2013 of 08/02/2013 on access to information prohibits journalists to impart information, even when it is not false, if it is likely to destabilize national security or impede the enforcement of Law or justice. Such provisions imply in addition that national security, law enforcement and justice consist of some of the limitations to the rights provided by article 38, paragraph one of the Constitution.

[104] The Court finds that Byansi Samuel Baker and his legal counsel allege that Rwanda should follow the example of other countries including France because in those countries, a journalist may be a partisan of the opposition party and produce a story that does not please the government without being prosecuted. Nonetheless, as recalled above, the offence does not rely on the veracity of falseness of the news, it is rather based on the false information of propaganda with **intent** to cause or likely to cause public disaffection or hostile international environment against the Government. From 29/07/1881, France has enacted the law criminalising what the call "délit de fausse nouvelle", which law was amended on 06/05/1944 by adding aggravating circumstances, and the last amendment occurred on 19/09/2000.[67] In general, such law criminalises false information whether it is based on fabrications or not, violating or likely to violate public order.68 It punishes also the person who spread such information with bad faith which provoke the misconduct in the army, demoralize it or block the assistance accorded to the State during wartime.69France has gone beyond the provisions of the aforementioned law and established the punishment for people who lies about potential terrorist attacks70 or spread rumors with the intent to lift or lower the value of the currency.[71] And again, the offence of spreading false information willingly or likely to cause public to rebel against the law, cause its weakness or with the intent to misdemean public institutions, is criminalised by article 255 of the penal code of Sénégal.[72]

[105] The Court finds that spreading false information or propaganda with intent to cause disaffection against the government which ruins democracy, therefore, should not be considered as violating the freedom of press, of expression and of access to information of which the

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[67] See the Ordonnance n°2000-916 du 19 septembre 2000 - art. 3 (V) JORF 22 septembre 2000 en vigueur le 1er janvier 2002.

[68] "*La publication, la diffusion ou la reproduction, par quelque moyen que ce soit, de nouvelles fausses, de pièces fabriquées, falsifiées ou mensongèrement attribuées à des tiers lorsque, faite de mauvaise foi, elle aura troublé la paix publique, ou aura été susceptible de la troubler, sera punie d'une amende de 45 000 euros.*"

[69] "*Les mêmes faits seront punis de 135 000 euros d'amende, lorsque la publication, la diffusion ou la reproduction faite de mauvaise foi sera de nature à ébranler la discipline ou le moral des armées ou à entraver l'effort de guerre de la Nation."*

[70] "*Le fait de communiquer ou de divulguer une fausse information dans le but de faire croire qu'une destruction, une dégradation ou une détérioration dangereuse pour les personnes va être ou a été commise est puni de deux ans d'emprisonnement et de 30 000 euros d'amende. Est puni des mêmes peines le fait de communiquer ou de divulguer une fausse information faisant croire à un sinistre et de nature à provoquer l'intervention inutile des secours."* See article 3, Ordonnance n°2000-916 du 19 septembre 2000, JORF 22 septembre 2000 en vigueur le 1er janvier 2002

[71] *"Est puni des peines prévues au premier alinéa de l'article L. 465-1 le fait, pour toute personne, d'exercer ou de tenter d'exercer, directement ou par personne interposée, une manoeuvre ayant pour objet d'entraver le fonctionnement régulier d'un marché réglementé en induisant autrui en erreur. Est puni des peines prévues au premier alinéa de l'article L. 465-1 le fait, pour toute personne, de répandre dans le public par des voies et moyens quelconques des informations fausses ou trompeuses sur les perspectives ou la situation d'un émetteur dont les titres sont négociés sur un marché réglementé ou sur les perspectives d'évolution d'un instrument financier admis sur un marché réglementé, de nature à agir sur les cours."* See article 30, Loi n°2005-842 du 26 juillet 2005, JORF 27 juillet 2005.

[72] See the Loi de base b° 65-60 du 21 Juillet 1965 portant code penal.

objectives contribute to the edification of a democratic country. Even if the objective of the preventing the spreading of such information or propaganda would be achieved through other means, the Supreme Court of Canada explained clearly that it is so important to consult various legal instruments in order to establish that it is not permitted and to deter people intending to venture into such practice.[73] The legal scholar William Schabas also explains that since the adoption of the universal declaration of human rights, it was established measures to cab the spread of propaganda especially extremism[74]. In the case of James Keegstra, the Supreme Court of Canada explained that the reasons the legislator criminalised ill propaganda that are enough in order to secure the freedom of press, of expression and of access to information. It noted that the ill propaganda does not benefit Canada and Canadians neither in the determination of the truth, for development nor the promotion and support of sustainable and inclusive democracy[75].

[106] Such position was again reiterated by the European Court of Human Rights in the case that opposed SÜREK to Türkiye. Such case arose from the fact that SÜREK published in the newspaper articles criticising the government army's fight to PKK rebels[76] as well as the repression of the opposition by government organs. The Court deemed that although the freedom of press is necessary in a democratic country and for the protection of stories and unpleasant or scary opinions, the punishment of SÜREK was adequate because it was aimed at protecting substantial national interests.[77]

[107] The Court finds that article 194 of the Law determining offences and penalties in general protects relevant interests for reasons of general interests and national security; thus, the instant Court deems it to be a relevant exception which is equitable to the freedom of press, of expression and of access to information, the reason why such article is not inconsistent with article 38 of the Constitution.

**II.3. Whether article 218 of the Law n° 68/2018 of 30/08/2018 determining offences and penalties in general is inconsistent with articles 15 and 38 of the Constitution**

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[73] *"…bien qu'il existe d'autres moyens, non pénaux, de lutte contre la propagande haineuse, il est éminemment raisonable de recourir à plus d'un type d'instrument législatif pour chercher à empêcher la diffusion de l'expression raciste et le préjudice qui en résulte."* See the judgment R. v KEEGSTRA [1990] 3 R.C.S, sheet no 700 h.

[74] William A. Schabas, The European Convention on Human Rights: A Commentary, Oxford University Press, 2015, p. 448.

[75] *"L'objectif visé par le législateur de prévenir le mal causé par la propagande haineuse est d'une importance suffisante pour justifier la supression d'une liberté garantie par la Constitution…La propagande haineuse apporte peu aux aspirations des Canadiens et du Canada, que ce soit dans la recherche de la vérité, dans la promotion de l'épanouissement personnel ou dans la protection et le dévelopment d'une démocratie dynamique qui accepte et encourage la participation de tous."* See the case R. v KEEGSTRA [1990] 3 R.C.S, Sheet no 699 e and 701 a.

[76] Partiya Karkerên Kurdistan (The Kurdistan Workers' Party).

[77] *"La liberté d'expression constitue l'un des fondements essentiels d'une société démocratique, l'une des conditions primordiales de son progrès et de l'épanouissement de chacun. …, elle vaut non seulement pour les « informations » ou « idées » accueillies avec faveur ou considérées comme inoffensives ou indifférentes, mais aussi pour celles qui heurtent, choquent ou inquiètent : ainsi le veulent le pluralisme, la tolérance et l'esprit d'ouverture sans lesquels il n'est pas de « société démocratique »…(Néanmoins) la sanction infligée au requérant en sa qualité de propriétaire de la revue peut raisonnablement être considérée comme répondant à un « besoin social impérieux », et que les motifs avancés par les autorités pour justifier la condamnation de l'intéressé sont « pertinents et suffisants ».* See the case SÜREK v. TURQUIE (n° 1), n° 26682/95), 8/07/1999, from paragraph 58 to 65.

[108] Byansi Samuel Baker states that there is no reason preventing free coverage about the officials referred to in article 218 of the Law n° 68/2018 of 30/08/2018 determining offences and penalties. Counsel Musore Gakunzi Valéry and Counsel Ruramira Bizimana Zébédée who assist him, argues that the text of such article hampers the steps made by the country in relation to the respect of human rights because it gives rise to discrimination and violation of the freedom to seek and impart information and freedom of expression. They explain that even if defamation and humiliation against any person should not be supported, the author must not be prosecuted before criminal courts because the legislation for the protection of journalists and civil laws provide for other remedies to serve justice to the victim of defamation or humiliation.

[109] They state that the fact that it is forbidden to talk about the persons stated in article 21778 of the Law n° 68/2018 of 30/08/2018 determining offences and penalties in general, it is inconsistent with the Constitution because such provision protects some people. They explain that a journalist may, in the course of his work, use a certain word and be considered as defamatory to an individual depending of the person who heard it. They state that in the case Uj v. Hungary, the European Court of Human Rights clarified that the use of the defamatory expressions should not in itself considered as such as long as using them consists of the mode of exercise of the freedom of expression.[79] They allege that in the case of Mugisha Richard, the instant Court noted that article 233 of the Law no 68/2018 of 30/08/2018 determining offences and penalties in general to be inconsistent with the Constitution, and for this reason, they request that the grounds relied on in that case would also be considered for declaring article 218 inconsistent with the Constitution especially its articles 15 and 38.[80]

[110] They add that while a journalist exercises his/her profession, he/she can release a story that may be perceived as defamation or insult to one of the officials stated above, and therefore that if he is punished, it would amount to obstruction to the freedom of expression, an indication that article 218 of the Law n° 68/2018 of 30/08/2018 determining offences and penalties in general is contrary to the Constitution and that such move is not necessary in a democratic country especially that defamation or humiliation is emotional and close to the right to make critiques (les notions d'outrage et d'injure sont en partie subjectives et parfois d'appréciation difficile car très proches du droit de critique). They pray the instant Court to rely on article 56, 62, 63, 65 and 68 of the case Colombani and others vs France,[81] where such Court held that a journalist should not be punished for defamation.

[111] Counsel Mbonigaba Eulade, the State Attorney, avers that it should not be allowed to any person to pray to be permitted to commit defamation and that nowhere articles 15 and 38 of the Constitution authorises a journalist to do whatever pleases him to the extent that criminal acts with respect to others would become a right to him/her. He states that article 218 of the Law n° 68/2018

[78] Such article provides that "any person who physically assaults: 1 º a foreign Head of State; 2 º representatives of foreign countries or international organisations while in Rwanda in the performance of their functions; commits an offence".

[79] "The use of vulgar phrases in itself is not decisive in the assessment of an offensive expression as it may well serve merely stylistic purposes. For the Court, style constitutes part of the communication as the form of expression and is as such protected together with the content of the expression" See the case UJ v. HUNGARY, Application n° 23954/10, rendered on 19/07/2011 by the European Court of Human Rights, paragraph 20.

[80] In the judgment n° RS/INCONST/SPEC 00002/2018/SC, Re MUGISHA Richard, rendered on 24/04/2019.

[81] See the case Colombani et Autres c. France, n° 51279/99, 25/06/2002.

of 30/08/2018 determining offences and penalties in general does not forbid the foreign heads of state or representative of foreign countries or international organisations in Rwanda to be the subject of critiques; that rather, what is forbidden is public defamation and humiliation against them.

[112] He explains that the prayers of the legal counsel for Byansi Samuel Baker that the grounds based on in the judgment of Mugisha Richard that article 233 of the Law no 68/2018 of 30/08/2018 is inconsistent with the Constitution would also serve as the basis to hold that article 218 of the same law be repealed from the Rwandan penal code, should be rejected. He states that article 233 of the Law no 68/2018 of 30/08/2018, criminalised suspects who humiliated Heads of State and public officials and that it was general, therefore that it has no link with article 218 of which the repeal is sought now because this one criminalises the offences of defamation and humiliation, and is also specific because it involves the Head of State of a foreign country, representatives of foreign countries or international organisations while in Rwanda in the performance of their functions, and this is coupled with the fact that both provisions do not have the same weight.

[113] He states that bringing action for defamation before civil courts is not enough, as it would rather be an additional resort by demanding damages in a criminal case especially that defamation may carry gravity in different ways. He alleges that sometimes defamation may amount to disturbance of public order, which would become an offence. He requests the Court to decide about it within its discretionary power. Regarding in which circumstances defamation may affect the public order, he states that in the event a journalist tell a lie toward the Head of State of a foreign country or another leader stated in the provision attacked for unconstitutionality, is likely to cause public unrest and as nobody could predict the context of defamation, it would lead competent authorities to commit violence against other authorities while in stay in the country where defamation occurred.

[114] He rests the case by stating that article 218 of the Law n° 68/2018 of 30/08/2018 determining offences and penalties in general should not be regarded as discriminatory because its rationale is to protect diplomatic relations and mutual respect of countries, and failure to do so would affect Rwanda and her leadership.

## DETERMINATION OF THE COURT

[115] Article 15 of the Constitution establishes the principle of equality before the Law and equal protection of the Law.

[116] Article 38 of the Constitution recalled above establishes a principle that the freedom of press, of expression and of access to information are recognised and guaranteed by the State. However, such freedoms shall not prejudice public order, good morals, the protection of the youth and children, the right of every citizen to honour and dignity and protection of personal and family privacy. Conditions for exercising and respect for these freedoms are determined by law.

[117] Article 218 of the Law nº 68/2018 of 30/08/2018 determining offences and penalties in general reads that: "Any person who publicly humiliates or insults one of the persons referred to under Article 217 of this Law commits an offence. Upon conviction, he/she is liable to imprisonment for a term of not less than three (3) years and not more than five (5) years."

[118] Article 218 of the Law nº 68/2018 of 30/08/2018 determining offences and penalties in general recalled above punishes any person who publicly humiliates or insults one of the persons referred to under Article 217 of this Law to imprisonment for a term of not less than three (3) years and not more than five (5) years.

[119] Article 29 of the Vienna Convention on Diplomatic Relations of on 18 April 1961 and article 40 of the Vienna Convention on Consular Relations of 24 April 1963, provide that the receiving State of dignitaries referred to in such articles shall treat them with due respect and shall take all appropriate steps to prevent any attack on their person, freedom or dignity.[82] Such texts corroborates the provisions of article 29 of the New York Convention on special missions of 8 December 1969.[83]

[120] Article 2 of the 14 December 1973 New York Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents reads on the basis of international law that:

"1. The intentional commission of:

(a) A murder, kidnapping or other attack upon the person or liberty of an internationally protected person;

(b) A violent attack upon the official premises, the private accommodation or the means of transport of an internationally protected person likely to endanger his person or liberty;

(c) A threat to commit any such attack;

(d) An attempt to commit any such attack;

(e) An act constituting participation as an accomplice in any such attack;

shall be made by each State Party a crime under its internal law.

2. Each State Party shall make these crimes punishable by appropriate penalties which take into account their grave nature.

3. Paragraphs 1 and 2 of this article in no way derogate from the obligations of States Parties under international law to take all appropriate measures to prevent other attacks on the person, freedom

[82] "…The receiving State … shall treat (the diplomatic staff) with due respect and shall take all appropriate steps to prevent any attack on their persons, freedom or dignity."

[83] "The persons of the representatives of the sending State in the special mission and of the members of its diplomatic staff shall be inviolable…. The receiving State shall treat them with due respect and shall take all appropriate steps to prevent any attack on their persons, freedom or dignity."

or dignity of an internationally protected person."[84] Rwanda has ratified such convention on 04/10/1977.[85]

[121] Article 217 of the Law determining offences and penalties in general punishes any person who physically assaults one of the victims stated in the preceding paragraph or Any person convicted of intentionally compromising safety or integrity of official buildings of such officials, their private residences or their means of transport. It is evident that such provision implements the first and second paragraphs of aforementioned international convention. In contrast, article 218 criminalises public humiliation or insults against a foreign Head of State or representatives of foreign countries or international organisations while in Rwanda in the performance of their functions; and that reflects the provision of the third paragraph of the second of such.

[122] Though article 218 recalls initially article 217, Byansi Samuel Baker and his legal counsel do not have any concern about article 217. The article against which they petitioned for violating the freedom of media, of expression and of access to information is 218th. Article 218 lies mainly on the 3rd paragraph of article 2 of the 14 December 1973 New York Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons. Such paragraph requires member States to enact implementing legal instruments of their international obligations. However, the issue to be determined by the instant Court is not to know whether article 218 complies or not with the international obligations of Rwanda; rather, what is to be determined in the context of unconstitutionality cases, is to determine whether or not the attacked article is inconsistent with the provisions of the Constitution stated above.

[123] The Court finds that article 3 of the Constitution specifies it to be the supreme law of the country. Any law, decision or act contrary to this Constitution is without effect. Among the specified legal instruments include the international agreements. They are ranked 3rd of the hierarchy of laws established by article 95 of the Constitution.[86] It follows from the foregoing that the arguments of the State Attorney Mbonigaba Eulade that the repealing of the offence of humiliation or insults against a foreign Head of State or representative of foreign country from the

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[84] "Article 2

1. Le fait intentionnel:
   a) De commettre un meurtre, un enlèvement ou une autre attaque contre la personne ou la liberté d'une personne jouissant d'une protection internationale;
   b) De commettre, en recourant à la violence, contre les locaux officiels, le domicile privé ou les moyens de transport d'une personne jouissant d'une protection internationale une attaque de nature à mettre sa personne ou sa liberté en danger;
   c) De menacer de commettre une telle attaque;
   d) De tenter de commettre une telle attaque; ou
   e) De participer en tant que complice à une telle attaque; est considéré par tout Etat partie comme constituant une infraction au regard de sa législation interne.
2. Tout Etat partie rend ces infractions passibles de peines appropriées qui prennent en considération leur gravité.
3. Les paragraphes 1 et 2 du présent article ne portent en rien atteinte aux obligations qui, en vertu du droit international, incombent aux Etats parties de prendre toutes mesures appropriées pour prévenir d'autres atteintes à la personne, la liberté ou la dignité d'une personne jouissant d'une protection internationale."

[85] See the Decree-Law n° 31/77 of 04/10/1977.

[86] "The hierarchy of laws is as follows: 1° Constitution; 2° Organic Law; 3° International treaties and agreements ratified by Rwanda; 4° Ordinary Law; 5° Orders. A law cannot contradict another law that is higher in hierarchy…"

law determining offences would cause unease in international relations, would not be the basis of the decision to maintain article 218 of the law determining offences and penalties in general in Rwandan legislation. The reason for maintaining it is that it is not inconsistent with the Constitution for the reason that values, principles and standards enshrined in the Constitution of which Rwandans as an independent people resolved to be guided; thus, anything that is contrary to that is invalid.

**i. Whether article 218 of the Law n° 68/2018 of 30/08/2018 determining offences and penalties in general is inconsistent with the Constitution**

[124] Regarding whether article 218 of the Law determining offences and penalties in general is inconsistent with article 15 of the Constitution which establishes the equality before the Law, Byansi Samuel Baker and his legal counsel refutes that article 218 affects the development of the Country because it promotes discrimination even against the leaders that are stated therein, and prevents journalists to fulfill their duties having regard to them as they do to others.

[125] While the instant Court was analysing the issue of whether article 233 of the Law determining offences and penalties in general that used to criminalise humiliation of some of the civil servants is inconsistent with article 15 of the Constitution, it realised that such provision protects only authorities and persons in charge of public service, and it found that such article is silent about humiliation of other people who do not fall within such category or who are not civil servants. The Court held that there is no reason to establish a provision that criminalises one act against some individuals while it is not to others depending only on the status of their service or the position they have in such service. The instant Court recalled that distinction of people does not amount to discrimination in itself, because it may be done for tangible, necessary and rational purposes like protection of vulnerable people, but which should be done with transparency, and it therefore found that since such grounds were not indicated, that leads to the conclusion that article 233 is inconsistent with article 15 of the Constitution.[87]

[126] The Court finds that article 218 of the Law determining offences and penalties regards foreign heads of states and representatives of foreign countries or international organisations while in Rwanda in the performance of their functions. Such is in itself the category of leaders of foreign countries governed by Vienna Convention on Diplomatic Relations of 18/04/1961 ratified by Rwanda on 17/02/1964,[88] Vienna Convention on Consular Relations of 24/04/1963 ratified by Rwanda on 22/04/1974,[89] and the Conventions on the privileges and immunities of the United Nations, Specialized Agencies and the International Atomic Energy Agency approved by the United Nations on 13/02/1946 and on 21/11/1947, ratified by Rwanda on 17/02/1964.[90]

[127] The Court notes that while it was analysing whether article 236 of the Law determining offences and penalties in general that provided for defamation or humiliation of the Head of State, is inconsistent with article 15 of the Constitution, it deemed that it was necessary for the competent authority to assimilate the imprisonment penalty ranging from five to seven years that was provided for such offence with an imprisonment for a term of not less than fifteen (15) days and

[87] See the judgment n° RS/INCONST/SPEC 00002/2018/SC, rendered on 24/04/2019, paragraphs 87-91.
[88] See the Law of 17/02/1964.
[89] See the Decree-law of 22/04/1974.
[90] See the Law of 17/02/1964.

not more than two (2) months provided for by article 161 of the said Law for any person who commits public insult against any person.[91] Regarding whether the provision criminalising humiliation of the President of the Republic is inconsistent with article 15 of the Constitution, the instant Court noted in paragraph 113 of the Mugisha case that "Humiliation of the President of the Republic and humiliation of the foreign Heads of States or representatives of foreign countries or international organisations while in Rwanda are the only criminalised acts in Rwanda. Humiliation of other individuals other than the persons mentioned is not an offence. Rather, the humiliated person may file a claim for damages".[92]

[128] In that case, the Court realised that the paragraph relating to defamation that is part of article 236 makes a distinction between the President of the Republic and other people but such distinction is not an issue in itself because it is founded; thus, it finds that considering the magnitude of the responsibilities of the President of the Republic especially the guaranteeing of national unity, of which he/she incarnates to the extent that humiliating him/her would affect such unity. One of the consequences thereto consists of divisionism based on the publication made against him/her. Consequently, stories over him/her should refrain from his/her defamation to debar disinformation of the public. The instant Court held that the fact that the election, removal, immunity and prosecution of the President of the Republic are governed by special provisions coupled with the amplitude of his/her duties, differentiate him/her from other individuals and the enactment of special provisions that govern or protect such office is rational.

[129] The Court notes however that subsequent to such judgment, the legislator realised that there was no reason, as far as defamation is concerned, that a special provision of the law be established for the President of the Republic and for this reason, it adopted in article 10 of the Law nº 69/2019 of 08/11/2019 modifying the Law n° 68/2018 of 30/08/2018 determining offences and penalties in general, the repeal of article 236.

[130] Regarding article 218 of the Law against which the petition was initiated in the instant case, the Court finds that the issue to be determined consists of whether there are reasons for giving special treatment to foreign Heads of States, Representatives of foreign States or Representatives of international organizations in Rwanda to the extent of maintaining their humiliation in Rwandan criminal legislation. It is evident on the basis of international law such as Article 29 of the Vienna Convention on Diplomatic Relations of 18 April 1961 and article 40 of the Vienna Convention on Consular Relations of 24 April 1963, article 29 of New York Convention on special missions of 8 December 1969 or article 2 of New York Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons of 14 December 1973 that they no where explicitly provide that they intend to require member states to enact provisions criminalising humiliation or public insult of foreign Heads of States, Representatives of foreign States or Representatives of international organizations in Rwanda while in their functions.

[131] The Court finds that as it recalled it in Uwinkindi Jean's case, grouping people in categories does not amount to discrimination especially when such categories were established to achieve a clear, rational and legitimate objective and on the basis of rational ground in public interest.[93]

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[91] See the case n° RS/INCONST/SPEC 00002/2018/SC, delivered on 24/04/2019, paragraph 112.
[92] See the case n° RS/INCONST/SPEC 00002/2018/SC, delivered on 24/04/2019, paragraph 113.
[93] See the judgment n° RS/INCONST/PEN 0005/12/CS rendered by the Supreme Court on 22/02/2013, paragraph 16.

As fas as the instant case is concerned, it is evident that the officials stated in article 218 of the Law determining offences and penalties in general belong to a special category of foreign heads of states and representatives of foreign states and international organisations in Rwanda. Such category should not be regarded as including vulnerable people or, regarding the offence of defamation, as including people that need special protection by the law than others, the reason why the fact that such article does not provide equal protection of the persons it mentions vis-a-vis others leads to inconsistency with article 15 of the Constitution providing that all persons are equal before the law. They are entitled to equal protection of the law.

**ii. Whether article 218 of the Law n° 68/2018 of 30/08/2018 determining offences and penalties in general is inconsistent with article 38 of the Constitution**

[132] Concerning whether article 218 of the Law determining offences and penalties in general prejudices the freedom of press, of expression and of access to information, the Court finds that in the case that opposed Jam to Netherlands, the Netherlands Supreme Court held that defamation of the foreign head of state through media humiliates him/her, but that such act would only be regarded as failure to abide by the duty to protect his dignity because no where in international conventions, it is provided that it amounts to the offence of defamation or insult.[94]

[133] The legal scholar Alexander Heinze[95], also states that the analysis of the provisions of the international conventions stated above infers that countries are no where required to adopt the provision criminalising defamation and insult against foreign heads of states in their penal legislations. For him, the fact that article 2, paragraph 3 of the New York Convention of 14 December 1973 on the Prevention and Punishment of Crimes against Internationally Protected Persons provides that its implementation is effected by complying with the member states' obligations under international law, which means that countries have intentionally suppressed the obligation of protection of the dignity of the head of state in such international convention; therefore, nothing obliges a member state to criminalise defamation or insult under such convention.[96]

[134] Regarding the issue whether there is international customary law that criminalises them despite that nowhere defamation or insult is criminalised by international conventions ; the Court notes that there are some countries that repealed provisions relating to the offence of defamation

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[94] See the judgment JAM v Public Prosecutor, Netherlands Supreme Court, 21 January 1969, YBIL 222-273 (1970).

[95] Alexander Heinze, "L'État, c'est moi!" The Defamation Of Foreign State Leaders In Times Of Globalized Media And Growing Nationalism", Journal of International Media and Entertainment Law, Vol 9, n° 1, p. 56.

[96] "(It) is at least sufficiently plausible to conclude that an obligation to specifically sanction the defamation of state representatives cannot be deducted from article 29 (VCDR)… The same holds true for the Protection of Internationally Protected Persons Convention, specifically regarding its Article 2. Article 2 Paragraph 1, however, only refers to attacks on the person and liberty of protected persons and omits any dignity protection. Only Article 2 Paragraph 3 states that obligations derived from this convention do not in any way derogate from other existing obligations under international law "to take all appropriate measures to prevent other attacks on the person, freedom or dignity of an internationally protected person" (emphasis added). Since Article 2 Paragraph 3 explicitly attributes the protection of dignity to other international treaties, it can be concluded that the contracting parties deliberately excluded the obligation to protect dignity from this Convention and that, consequently, no obligation to enact any type of libel law can be derived from it." See Alexander Heinze, "L'État, c'est moi!" The Defamation Of Foreign State Leaders In Times Of Globalized Media And Growing Nationalism", Journal of International Media and Entertainment Law, vol 9, n° 1, pp. 56-57.

or insult against a foreign head of state, representative of foreign state or international organisation from their penal legislations. For instance Germany has repealed article 103 of the penal code that imposed a term of imprisonment from three months to five years any person that humiliates a foreign head of state, the Representative of a foreign state or a diplomate accredited to Germany.[97] As of the justification of the repeal of such provision, some of the members of parliament of such country declared that such article criminalise the offence of *lèse-majesté* consists of the relic from the time of monarchy (relic from time when Germany was still a monarchy), while others state that it sows anachronistic cooperationist understanding of states which even burdens individual citizens with fulfilling the state's duties.[98]

[135] The Court finds that France also used to punish any person for defamation or insult against foreign Heads of States or governments and Ministers of foreign affairs of other countries on the basis of article 36 of the Law 29/07/1881 on freedom of media.**[99]** In the case Colombani and others against France, the European Court of Human Rights upheld the decision of the Intermediate Court of Paris that being held liable for defamation or insult against a foreign head of state is inconsistent with the freedom of press where it found that criminalizing such acts accord the protected persons the undue immunity which eludes them from facing public critique like other individuals due to only their position, without considering the importance of such critique, the move that is outdated vis-à-vis the present political trend. The Court dicided that even though it is understood that every Country has interest to protect diplomatic relations vis-a-vis other countries, the act of punishment of the liable persons of defamation or insult against foreign Heads of States or their representatives goes beyond what is necessary to achieve such diplomatic relationship.[100]

[136] This judgment triggered France to adopt the amendment law where article 36 of the Law of 29/07/1881 on freedom of media was modified to the effect that the imprisonment penalty for such offence was repealed and the penalty was maintained in the form of fine amounting to 45,000

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[97] "Whosoever insults a foreign head of State, or, with respect to his position, a member of a foreign government who is in Germany in his official capacity, or a head of a foreign diplomatic mission who is accredited in the Federal territory shall be liable to imprisonment not exceeding three years or a fine, in case of a slanderous insult to imprisonment from three months to five years." See article 103 of Strafgesetzbuch.

[98] See Alexander Heinze, "L'État, c'est moi!" The Defamation of Foreign State Leaders in Times of Globalized Media and Growing Nationalism", Journal of International Media and Entertainment Law, vol. 9, n° 1, p. 52

[99] "§ 4-Délits contre les chefs d'Etats et agents diplomatiques étrangers

Art. 36. - L'offense commise publiquement envers les chefs d'Etat étrangers sera punie d'un emprisonnement da trois mois à un an et d'une amende de 100 fr, à 3,000 fr., ou de l'une de ces deux peines seulement.

Art. 37. - L'outrage commis publiquement envers les ambassadeurs et ministers plénipotentiaires, envoyés, chargés d'affaires ou autres agents diplomatiques accrédités près du Gouvernement de la République, sera puni d'un emprisonnement de huit jours à un an et d'une amende de 50 fr. à 2. 000 fr ou de l'une de ces deux peines seulement." See the Journal Officiel de la République Française n° 206 du 30/07/1881.

[100] "*La Cour rélève par ailleurs que depuis un jugement du Tribunal de grande instance de Paris du 25 avril 2001, les juridictions internes commencent à reconnaitre que le délit prévu par l'article 36 de la loi du 29 juillet 1881 et son interprétation par les tribunaux constituent une atteinte à la liberté d'expression garantie par l'article 10 de la Convention… La Cour observe que l'application de l'article 36 de la loi du 29 juillet 1881 portant sur le délit d'offense tend à conférer aux chefs d'Etats un régime exorbitant du droit commun, les soustrayant à la critique seulement en raison de leur fonction ou statut, sans que soit pris en compte son intérêt. Elle considère que cela revient à conférer aux chefs d'Etats étrangers un privilège exorbitant qui ne saurait se concilier avec la pratique et les conceptions politiques d'aujourd'hui. Quel que soit l'intérêt évident, pour tout Etat, d'entretenir des rapports amicaux et confiants avec les dirigeants des autres pays, ce privilège dépasse ce qui est nécessaire pour atteindre un tel objectif."* See the judgment Colombani et Autres c France, n° 51279/99 rendered on 25/06/2002, paragraphs 67 and 68.

Euros.[101] However, in the year 2004, article 52 of the Law of 09/03/2004 repealing definitely the offence that was provided for by article 36 of the Law of 29/07/1881 on the freedom of media was adopted.[102]

[137] The Court notes that in Sweden, the offence of defamation is generally subject to the fine. With respect to foreign Heads of States and the Representatives of foreign Countries, article 5 of the Law relating to criminal procedure provides that such offences are prosecuted under government request.**[103]** Nonetheless, the document titled Defamation and Insult Laws in the OSCE Region: A Comparative Study indicates that in Europe, countries such as Belgium, Greece, Netherlands and Monaco still criminalise defamation of foreign Heads of State on the basis of archaic laws that establish the offence of *lèse-majesté*.[104]

[138] It is evident to the Court that practices of Countries are different despite that they are called to implement the same international conventions. This is the reason why in the case that opposed Aziz to Aziz in which Sultan of Brunei intervened, the Supreme Court of England found that neither international convention requires member states to adopt measures to prevent an act of attack on the dignity of a head of state, nor there is the existence of a rule of customary international law requiring states to take steps to prevent individuals from insulting foreign heads of state abroad.[105]

[139] The Court finds that regarding the provisions of international conventions recalled above, the obligations of the member states including Rwanda consist of guaranteeing honor and dignity as appropriate to the foreign heads of states, Representatives of foreign countries and international organisations while in Rwanda in the performance of their functions. Even though the worthiness of the Country affects her population and even the officials cited above should also be protected in their dignity, the instant Court concurs with the analysis made in the judgment of Colombani stated above**[106]** according to which the duties of politicians turns them into public figures, which attracts the follow up of their deeds and conduct by journalists to the extent that it sometimes becomes hard to determine the limits to the stories in their regard. For this reason, a politician is required to be more patient than an ordinary citizen and should exercise caution whenever he must talk or take decisions on controversial matter. A politician has the right to protection of his/her dignity, but that cannot be done in a way to censor the debates on political issues in general interest,

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[101] "*L'offense commise publiquement envers les chefs d'Etats étrangers, les chefs de gouvernements étrangers et les ministres des affaires étrangères d'un gouvernement étranger sera punie d'une amende de 45 000 euros."* See Ordonnance n°2000-916 du 19 septembre 2000 - art. 3 (V) JORF 22 septembre 2000 en vigueur le 1er janvier 2002.

[102] "*L'article 36 de la loi du 29 juillet 1881 précitée est abrogé."*

[103] "A person who identifies someone as being a criminal or as having a reprehensible way of life, or otherwise provides information liable to expose that person to the contempt of others is guilty of defamation and is sentenced to a fine… If, in committing an offence referred to in Sections 1–3, a person insults a foreign power by abusing its head of state who is in Sweden or one of its representatives in Sweden, a prosecution for the offence may be brought by a prosecutor notwithstanding the first paragraph. However, a prosecution may not be brought without authorisation by the Government or whoever is empowered by the Government to give such authorisation." See Chapter 5, Section 5 ya Act 2018:540, amending The Swedish Criminal Code (brottsbalken, SFS 1962:700).

[104] OSCE, Defamation and Insult Laws in the OSCE Region: A Comparative Study, March 2017, p.16.

[105] "What matters is that the obligation is not an absolute one to prevent an attack on the dignity of a head of state… far from convinced of the existence of a rule of customary international law requiring states to take steps to prevent individuals from insulting foreign heads of state abroad." See the judgment Aziz v. Aziz and Others, Sultan of Brunei Intervening [2007] EWCA Civ 712.

[106] See the judgment Colombani et Autres v France, n° 51279/99 rendered on 25/06/2002, paragraph 56.

the reason why the exception on the freedom of press, of expression and of access to information provided by article 38, paragraph two of the Constitution should not be too widened.

[140] The Court finds that no where in article 218 of the Law determining offences and penalties in general or in the Law nº 027/2019 of 19/09/2019 relating to criminal procedure, it is provided the requirements for the initiation of criminal proceedings. Nonetheless, there are instances in other countries where the initiation of criminal proceedings for humiliation against Heads of States or Representatives of Countries or International organisations depends on the plaint of the victims as well as the existence of diplomatic relations between both countries. For instance, article 104 a) of Germany Penal code reads that :

> "Offences under this chapter shall only be prosecuted if the Federal Republic of Germany maintains diplomatic relations with the other state, reciprocity is guaranteed and was also guaranteed at the time of the offence, a request to prosecute by the foreign government exists, and the Federal Government authorizes the prosecution."[107]

[141] The Court is of the stance that since there is no special provision on the prosecution of the offence provided for by article 218 of the Law determining offences and penalties in general, it is likely to lead to the prosecution of every simple act including irrelevant one, and it may be possible that the Head of Rwanda, the Representative of Rwanda abroad or a Rwandan representing an International organisation while abroad could be victim of similar acts provided by such article without the author being punished for that by criminal court of that Country given that they are not considered to be criminal acts.

[142] The Court finds therefore that article 218 of the Law determining offences and penalties in general accords an undue special treatment the foreign head of states and Representatives of foreign countries and international organisation in Rwanda, which prevents the critique stories in their regards for only their positions or duties without considering the relevance of such story, which makes such provision inconsistent with the freedom of press, of expression and of access to information provided for by article 38, paragraph one of the Constitution.

[143] Considering the foregoing, the Court finds that article 218 of the Law determining offences and penalties in general, is inconsistent with articles 15 and 38 of the Constitution.

### II.3. Whether article 251 of the Law n° 68/2018 of 30/08/2018 determining offences and penalties in general is inconsistent with article 38 of the Constitution

[144] Byansi Samuel Baker and his legal counsel, state that a journalist has a duty to protect his/her informants though it is not forbidden to collaborate with other organs. They explain that the work of a journalist is distinctive for keeping information confidential, therefore article 251 of the Law n° 68/2018 of 30/08/2018 determining offences and penalties in general should not consider him/her as any ordinary person; thus, imputing the onus of revealing the source of information to him/her would affect his freedom of expression. They base their submissions on

[107] "Offences under this chapter shall only be prosecuted if the Federal Republic of Germany maintains diplomatic relations with the other state, reciprocity is guaranteed and was also guaranteed at the time of the offence, a request to prosecute by the foreign government exists, and the Federal Government authorizes the prosecution." See Strafgesetzbuch (Penal Code), former article 104 a.

the precedents that upheld the immunity of journalists with regard to giving testimony. They cite the case law Branzburg vs Hayes, where the Supreme Court of the United States that found that journalists are immune from the request to testify.[108]

[145] They submit that the holdings by the Supreme Court of the United States corroborate the provisions of article 13 of the Law nº 02/2013 of 08/02/2013 regulating media in Rwanda that entitles a journalist the right to remain confidential with respect to the source of information in the context of abiding by the professional secrecy.[109] They state that prosecuting and carrying out investigation against a journalist for remaining confidential prejudices the freedom he/she is entitled by the Constitution and the Law regulating media. They add that remaining confidential about the source of information by a journalist, is necessary and should be protected as one of the ways allowing him/her to fulfill his/her duties.

[146] They pursue that article 12 of the Law n° 02/2013 of 08/02/2013 regulating media states that "a journalist shall have free access to all sources of information and the right to freely inquire on all events of public life, and to publish them in respect of the provisions of this Law and other Laws". They submit that such provision is not the novelty of Rwanda because like in Canada, there exists a legal instrument on the protection of journalistic source "la Loi sur la protection des sources journalistiques",[110] where its article 39.1 (2) provides that a journalist may oppose to reveal the source of his/her information,[111] and would only reveal it under Court injunction and in case such information could not be found otherwise, and in the interest of justice in relation to relevant issue of the case, and after assessment of consequences of revealing the source of information by the author.[112]

[147] They also state that this is an indication that in Canada, a journalist indicates rarely the source of information and that it is the duty of the applicant of the source of information to prove that it is clearly provided for by the law.[113] They argue that such position was also adopted by the European Court of human rights where in the case SANOMA UITGEVERS B. v. Netherlands, it

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[108] See the judgment Branzburg v. Hayes, 408 U.S. 665 (1972).

[109] Such article provides that "Professional journalist confidentiality shall be guaranteed in respect of his/her sources of information, notes, audio or audiovisual recordings or film shooting as well as any information collected and stored electronically. However, the court may order a journalist to reveal his/her sources of information whenever it is considered necessary for purposes of carrying out investigations or criminal proceedings."

[110] See L.C. 2017, ch. 22, Sanctionnée 2017-10-18, available on https://www.canlii.org/fr/ca/legis/loisa/lc- 2017-c-22/derniere/lc-2017-c-22.html.

[111] "*Sous réserve du paragraphe (7), un journaliste peut s'opposer à divulguer un renseignement ou un document auprès d'un tribunal, d'un organisme ou d'une personne ayant le pouvoir de contraindre à la production de renseignements pour le motif que le renseignement ou le document identifie ou est susceptible d'identifier une source journalistique".* See article 39.1(2) of the "la Loi sur la protection des sources journalistiques" (L.C. 2017, ch. 22, Sanctionnée 2017-10-18).

[112] "*Le tribunal, l'organisme ou la personne ne peut autoriser la divulgation du renseignement ou du document que s'il estime que les conditions suivantes sont réunies: 1) le renseignement ou le document ne peut être mis en preuve par un autre moyen raisonnable; 2) l'intérêt public dans l'administration de la justice l'emporte sur l'intérêt public à préserver la confidentialité de la source journalistique, compte tenu notamment : (i) de l'importance du renseignement ou du document à l'égard d'une question essentielle dans le cadre de l'instance, (ii) de la liberté de la presse, (iii) des conséquences de la divulgation sur la source journalistique et le journaliste*". See article 39.1 (7), of the "la Loi sur la protection des sources journalistiques" (L.C. 2017, ch. 22, Sanctionnée 2017-10-18).

[113] Il incombe à la personne qui demande la divulgation de démontrer que les conditions énoncées au paragraphe (7) sont remplies. See article 39.1 (9), of "la Loi sur la protection des sources journalistiques" (L.C. 2017, ch. 22, Sanctionnée 2017-10-18).

held that the right of a journalist to protect the source of information is one of essential element that prevents the interference with the freedom of press.[114] They add that in such case, the Court held that the protection of the source of information is necessary in a democratic society because interfering with the freedom of press defies the stipulations of article 10 of the European convention on human rights, and is only permitted for legitimate reasons of public interest.[115]

[148] They stress that the Declaration of Principles on Freedom of Expression and Access to Information in Africa of 2019 adopted by the African Commission on Human and Peoples' Rights, has set the leading position. They state that the 25th principle intending to protect the source of information and other journalist's devices, provides that journalists are not required to reveal the source of information or any other belonging in their possession for reasons of their work unless they are instructed by the Court to do so, and even in this case, it should be necessary for investigation purpose in relation to felonies, where information would not be found through other means and it should be done in general interest. They declare that such principle add that the Government should not deviate the principle of confidentiality of the source of information and inspect the technology used by journalists without being authorised by the court and being established necessary measures for the respect of the freedom of expression.[116]

[149] They rest this issue by stating that subjecting a journalist to punishment for refusing to testify or hand elements of evidence he holds on the commission of a felony or misdemeanor to justice institutions, prejudices the freedom of expression including the confidentiality on the source of information, and therefore, article 251 of the Law n° 68/2018 of 30/08/2018 determining offences and penalties in general is inconsistent with article 38 of the Constitution.

[150] Counsel MBONIGABA Eulade, the State Attorney, states that the prohibitions or conditions that apply to people apply to journalists as well, but specifically the latter are required to assist in fighting and preventing felonies and obstructions to criminal prosecution. He states that article 13 of the Law n$^{o}$ 02/2013 of 08/02/2013 regulating media does nowhere forbid a journalist

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[114] *Le droit pour les journalistes de protéger leurs sources fait partie de la liberté de « recevoir ou de communiquer des informations ou des idées sans qu'il puisse y avoir ingérence d'autorités publiques » consacrée par l'article 10 de la Convention et il en constitue l'une des garanties essentielles. Il s'agit là d'une pierre angulaire de la liberté de la presse, sans laquelle les sources pourraient se montrer réticentes à aider la presse à informer le public sur des questions d'intérêt général. La presse pourrait alors être moins à même d'assumer son rôle vital de chien de garde, et sa capacité à fournir des informations précises et fiables au public pourrait s'en trouver amoindrie*. See the case Sanoma Uitgevers B.V. c. Pays-Bas, n° 38224/03, 14 /09/2010.

[115] "*Eu égard à l'importance de la protection des sources journalistiques pour la liberté de la presse dans une société démocratique, une ingérence ne peut être jugée compatible avec l'article 10 de la Convention que si elle est justifiée par un impératif prépondérant d'intérêt public … »,* See the case Sanoma Uitgevers B.V. c. Pays- Bas, n° 38224/03, 14/09/2010, paragraph 54.

[116] "*1. Les journalistes et autres professionnels des médias ne sont pas obligés de révéler leurs sources d'informations confidentielles ou de révéler tout autre matériel détenu à des fins journalistiques, sauf lorsque cette révélation a été ordonnée par un tribunal, après une audience publique complète et équitable. 2. La révélation de ces sources d'information ou matériels journalistiques telle qu'ordonnée par un tribunal, ne peut intervenir que lorsque : a. l'identité de la source est nécessaire à l'enquête ou à l'instruction concernant un crime grave ou à la défense d'une personne accusée d'une infraction pénale ; b. l'information ou les informations similaires menant au même résultat ne peuvent pas être obtenues ailleurs ; etc. dans le cas de la révélation des sources, l'intérêt public prime sur l'entrave à la liberté d'expression. 3. Les États ne contournent pas la protection des sources d'informations confidentielles ou des matériels journalistiques par la surveillance des communications, sauf lorsque cette surveillance est ordonnée par un tribunal impartial et indépendant et est soumise à des garanties appropriées*".

from testifying, and that confidentiality does not entail refusal to testimony before competent organs, especially that such organs are bound with the confidentiality with respect to such declarations and the witness.

[151] He states that article 15 of the Constitution reads that "All persons are equal before the law. They are entitled to equal protection of the law", while articles 41, 43 and 48 of the same Constitution provide that individual rights and freedoms are subject to limitations with respect to other people's rights and freedoms, as well as public morals, which implies that the fact that a journalist was not distinguished from others is a justification of the compliance of article 251 of the Law n° 68/2018 of 30/08/2018 determining offences and penalties in general with the Constitution. He adds that Courts, as guarantors of human rights and freedoms, are competent to determine the circumstances in which the denial of deposition of the testimony or submission of evidence should be criminalised.

[152] He explains that article 83 of the Law nº 68/2018 of 30/08/2018 determining offences and penalties in general provides that Criminal liability is incurred by the offender, whereas article 9 of the Law nº 02/2013 of 08/02/2013 regulating media reads that the freedom of opinions and information shall not jeopardize the general public order and good morals, which implies that BYANSI Samuel Baker should not be worried that he would be prejudiced by his publications that would be misinterpreted or be held responsible for the information of which he is not the author. He rests his arguments by stating that according to article 8, paragraph 2 of the Law nº 02/2013 of 08/02/2013 regulating media, "Freedom of the media and freedom to receive information are recognised and respected by the State. Such freedom shall be applicable in accordance with the Law." It entails that he is also subject to article 251 of the Law n° 68/2018 of 30/08/2018 determining offences and penalties in general as well as other legal instruments, which implies that such provision and others against which the petition was initiated do nowhere contravene the Constitution.

## DETERMINATION OF THE COURT

[153] Article 38 of the Constitution that was recalled above establishes the principle according to which freedom of press, of expression and of access to information are recognised and guaranteed by the State. However, such freedoms shall not prejudice public order, good morals, the protection of the youth and children, the right of every citizen to honour and dignity and protection of personal and family privacy. Conditions for exercising and respect for these freedoms are determined by law.

[154] Article 251 of the Law nº 68/2018 of 30/08/2018 determining offences and penalties in general provides that: "Any person in possession of evidence of the innocence of another person prosecuted or convicted of a felony or a misdemeanor, who deliberately refuses to give such evidence to judicial authorities, commits an offence. Upon conviction, he/she is liable to imprisonment for a term of not less than one (1) year and not more than two (2) years and a fine of not less than three hundred thousand (300,000Frw) Rwandan francs and not more than five hundred thousand (500,000Frw) Rwandan francs. Any person who possesses evidence on the commission of a felony or misdemeanor and who deliberately refuses to report such evidence to

judicial authorities is liable to the same penalties as those provided for in Paragraph One of this Article."

[155] Article 5 of the Law n°02/2013 of 08/02/2013 regulating media establishes the following main obligations of a journalist :

1° to inform;

2° to educate population and promote leisure activities;

3° to defend the freedom of information, analyse and comment on information.

In contrast, article 13 of the said Law provides that "professional journalist confidentiality shall be guaranteed in respect of his/her sources of information, notes, audio or audiovisual recordings or film shooting as well as any information collected and stored electronically. However, the court may order a journalist to reveal his/her sources of information whenever it is considered necessary for purposes of carrying out investigations or criminal proceedings."

[156] The Court deems that article 251 of the above mentioned Law determining offences and penalties in general, establishes a principle of fair trial where no person should undergo injustice and that a felony or a misdemeanor should not be covered, they rather have to be punished. The first paragraph concerns a person under prosecution or whose prosecution for felony or a misdemeanor is closed by justice organs while being innocent. It therefore punishes a person who is aware of such injustice without contributing to its disclosure in order to acquit the suspect or convicted person. The second paragraph concerns a situation where a person is in possession of evidence on the commission of either the felony or misdemeanor, and who deliberately refuses to report it to help judicial authorities to effectively prosecute or punish it.

[157] The Court finds when articles 5 and 13 of the Law n°02/2013 of 08/02/2013 regulating media are read concomitantly, they lead to the understanding that the main duty of a journalist consists of promoting general interest by informing the public, teaching the population, promoting entertainment and making efforts to promote the media profession. The way of seeking and collecting such information is the action that is subject of protection through journalist confidentiality in the context of promotion of media. Thus, the issue consists of determining the extent of such confidentiality with respect to felonies or misdemeanors reported about by a journalist or that came to his/her knowledge while on her/his duty. Another issue consists of determining whether article 251 of the Law determining offences and penalties in general orders a journalist to comply with its text without requiring the court order provided for by article 13 of the Law regulating media.

[158] The court finds that the right to due process of law encompasses the prohibition to be held liable for the offence a person did not commit provided for by article 29 of the Constitution. In the judgment of Kabasinga Florida, the instant Court clarified that the principle of due process of law is comprised of two parts: procedural due process and substantive due process.[117] Article 29 of the Constitution is one of the implementing provisions of the objectives that Rwandans have committed to in the preamble of such legal instrument that is "building a State governed by the

[117] See the judgment RS/INCONST/SPEC 00003/2019/SC rendered on 4/12/2019, paragraph 13.

rule of law based on the respect for human rights, freedom and on the principle of equality of all Rwandans before the law as well as equality between men and women".

[159] The Court is of the view that the confidentiality about the source of information that is protected by article 13 of the Law regulating media, consists of the one in relation to his/her profession. However, the professional secrecy is not the uniqueness of journalists. It concerns all professions where confidentiality is involved due to their nature such as medical, lawyering, financial managers' and so on… Regarding whether the duty of confidentiality of an advocate forbids him/her from disclosing the commission of offences, in the judgment that opposed People to Francis Belge, Robert Garrow informed his legal counsel that apart from one person of which he is prosecuted to have killed, he killed other persons, and he gave them traces of the place where he buried them, and when they arrived there, they found the corps of the victims but they refrained from denouncing it to the competent authority for reason of professional secrecy. The Supreme Court of New York found that the secret between an advocate and his client does not protect all aspects, and that though it should be taken into account, an advocate has the duty based on the traditional principles of humanity to protect the interest of justice and of public.[118] Such principle that the professional secrecy is not absolute was also addressed in the case Jespers vs Belgium, where the European Court of Human Rights held that providing information about elements of evidence that may benefit the accused is in the interest of justice, and should be produced earlier to be given proper consideration.[119] In contrast, in the judgment A and others vs England, the said Court found that the matter concerning the state security consists of an exception to the professional secrecy because it lies in public interest.[120]

[160] The Court notes that the legal scholar Jonathan Herring states also that concerning medical profession, the secrecy may be disclosed to protect the general interest, and in such case, it should be evaluated the importance between the general interest and individual interest of the patient as well as the interest of collaboration between the patient and the medical practitioner.[121] Jo Samanta and Ash Samanta state also that the denunciation of the commission of the felony such as sexual violence, murder, assault or battery, violence against children, treason or any other offence that is likely to bring about people's suffering, is of public interest. They explain that such crimes consist of exception that would allow investigation organs to be given information that was normally protected by secrecy.[122] In the judgment Hunt vs Mann, the Supreme Court of England deemed that a medical practitioner who treated a patient injured due to the road accident he voluntarily caused, which is known as hit and run, should not take cover behind the professional secrecy and deny to provide information that would help police organs given that such information is in public interest.[123]

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[118] "We note that the privilege (attorney-client) is not all encompassing and that in a given case there may be conflicting considerations. We believe that an attorney must protect his client's interests, but also must observe basic human standards of decency, having due regard to the need that the legal system accord justice to the interests of society and its individual members." See the case of People v Belge, 50 AD 2nd 1088, 377 NYS 2d 771 (1975) at 41.
[119] Jespers v Belgium n° 8403/78, 16/12/1992.
[120] See the case of A and Others v United Kingdom, n° 3455/05, 11/01/2011, paragraph 206.
[121] Jonathan Herring, Medical Law and Ethics, Oxford University Press, 2013, p. 231 and 241.
[122] Jo Samanta and Ash Samanta, Medical Law, London, Palgrave, 2015, p. 76
[123] See the case Hunter v. Mann [1974] 1QB 767.

[161] Therefore, the Court is of the view that the commission of offences and their prosecution would be reported, because the interest of the suspect that would be reported about should not prevail over general interest in relation to prosecution and repression of offences or prevail over the interest of the convicted of a crime he/she did not commit. The explanations provided in the foregoing paragraphs entail that a professional, be it a journalist, advocate, medical practitioner or any other person should not abet any person in the commission of the offence or cover it up since such acts do not fall under the professional secrets protected by the law in the matter. Indeed, freedom of press, of expression and of access to information should not be given consideration over the right to due process of law to the extent of allowing a journalist to abandon innocent people accused of offences they did not commit until they are punished for that while he/she holds exculpatory evidences.

[162] The Court finds that concerning media in particular, in the case Cornellisen vs the Prosecution and Zeelie, the Supreme Court of South Africa held that journalists do not enjoy immunity allowing them to refrain from testifying before the Courts about the information they came across in the course of their work.[124] In addition, in the case Nel vs le Roux, the Constitutional Court of South Africa holds that the interest to protect the constitutional rights including the freedom of press should be regarded together with the interest of the prosecution organ to find the relevant information for accusations, and where possible it be relied on the trending principle in other countries like America whereby the Supreme Court held in the judgment of Branzburg that the public has the right of access to elements of evidence in the hands of any individual.[125]

[163] The Court finds that in such case that opposed Branzburg to Hayes, the Supreme Court of the United States of America has held that the first constitutional amendment that adopted the principle of freedom of expression does not in any way forbid a journalist to testify before the Court for the information he collected in secret by explaining that, the submissions of journalists according to which the interpretation of the Constitution leading to the assertion that the testimonies by journalists should constitute an exception as opposed to ordinary citizens, lack merit.[126]

[164] Considering the position adopted in the foregoing case, it is evident that Byansi Samuel Baker and his legal counsel misinterpret such case because nowhere it does state that journalists should be given special treatment allowing them to refrain from testifying or denouncing the offences about which they have information. In addition to that, a short time after the delivery of such case, another plaint was filed in the case Zurcher vs Stanford Daily in which it was also

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[124] "…there is no legal privilege in terms of which journalists have immunity from the compulsory giving of evidence on information which they have obtained in the course of their work." See the case S v Corelissen; Cornelissen v Zeelie No en andere 1994 (2) SACR 41 (W).

[125] "In balancing these interests (right to equality, right to privacy, right to freedom of speech and expression), regard must be had to both the right asserted and the state's interest in securing information necessary for the prosecution of crimes- an interest recognized in other democratic societies including the United States, where it is accepted that the investigative authority of the grand jury rests largely on "the long standing principle that 'the public has a right to every man's evidence (Branzburg v Hayes, 408 U.S. 655, 689-693 (1972)" See the case Nel v Le Roux No and Others 1996 (1) SACR 572 (CC).

[126] "We are asked to create another (privilege) by interpreting the First Amendment to grant newsmen a testimonial privilege that other citizens do not enjoy. This we decline to do." See the case Branzburg v Hayes, 408 U.S. 655, 689-693 (1972).

requested that journalists be accorded immunity over the search by investigation organs. In that case, Stanford Daily was suspected to store photo of individuals who fought police while in protest, and the Supreme Court has again noted that given that the said newspaper is not personally under prosecution, that would not prevent the act of search as long as it is believed that the documents that should be searched or seized were in its custody.[127]

[165] The instant Court finds that in the case Cohen vs Cowless Media Co, the Supreme Court of the United States of America has also held that it should not be regarded as if the generally applicable laws violate the first constitutional amendment for the sole reason that their enforcement would obstruct journalists while fulfilling their duties of collecting and imparting information.[128] The similar position was adopted by the Supreme Court of Canada in the judgment that opposed National Post to the Prosecution authority, where it clarified it as follows:

> *"…lorsque les circonstances le requièrent, les tribunaux respectent la promesse de confidentialité faite à une source secrète par un journaliste ou un directeur de la rédaction. L'intérêt du public à ce que lui soit communiquée l'information sur des sujets susceptibles de n'être mis au jour qu'avec la collaboration de sources secrètes n'est toutefois pas absolu. Il doit être mis en balance avec d'autres intérêts publics importants, comme la conduite d'enquêtes criminelles. Dans certaines situations, des intérêts publics opposés l'emporteront sur l'intérêt public à protéger la source secrète contre toute divulgation et, en pareil cas, une promesse de confidentialité ne justifiera pas la rétention de la preuve."*[129]

[166] The position set in the National Post case indicates that the statements of BYANSI Samuel Baker and his legal counsel according to which article 39.1. (2) of the "Loi sur la protection des sources journalistiques" that accords journalists in Canada the immunity to testify about the source of the information they collected or be required to disclose the evidence of the offences in their custody, lack merit. Rather, paragraph 7 of that article explains how a journalist is required to testify or produce elements of evidence in his/her custody.[130] The subparagraph b) states that the public interest embedded in fair justice prevails over general interest that is attached to the protection of professional secrecy over a story produced by a journalist. Other explanations provided by such provision and the basis of disclosure of the secret include the importance of the

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[127] A State is not prevented …from issuing a warrant to search for evidence simply because the owner or possessor of the place to be searched is not reasonably suspected of criminal involvement. The critical element in a reasonable search is not that the property owner is suspected of crime, but that there is reasonable cause to believe that the "things" to be searched for and seized are located on the property to which entry is sought." See the case Zurcher v Stanford Daily 436 U.S. 547, 553-560 (1978).

[128] "generally applicable laws do not offend the First Amendment simply because their enforcement against the Press has incidental effect on its ability to gather and report the news." See the judgment Cohen v Cowless Media Co, 501 U.S. 663 (1991).

[129] See the case R. v. National Post [2010] 1 R.C.S. at p. 480.

[130] "*Le tribunal, l'organisme ou la personne ne peut autoriser la divulgation du renseignement ou du document que s'il estime que les conditions suivantes sont réunies:*

- *a) le renseignement ou le document ne peut être mis en preuve par un autre moyen raisonnable;*
- *b) l'intérêt public dans l'administration de la justice l'emporte sur l'intérêt public à préserver la confidentialité de la source journalistique, compte tenu notamment:*
  - *(i) de l'importance du renseignement ou du document à l'égard d'une question essentielle dans le cadre de l'instance,*
- *c) de la liberté de la presse,*
  - *(ii) des conséquences de la divulgation sur la source journalistique et le journaliste."*

information needed in the trial, determination of whether they would prevail over freedom of expression and evaluation of the effects of disclosure of such confidential information on the author and the journalist to whom it was whispered. All the foregoing grounds should not be regarded as forbidding a journalist to testify or produce evidence of the committed offence as they rather establish the outline on how it should be done.

[167] The Court finds that the repression of a person for the offence he/she did not commit being contrary to article 18 paragraph one, subparagraph 8 of the Constitution, it should also not be tolerated in the current world. Thus, a journalist could not claim for the right to contribute to the building of a State that promote the freedoms, rights and the rule of law, and at the same time claim the right to refrain from producing evidence indicating that there is a person denied such rights and freedoms unfairly. In addition to that, the obligations of a journalist and his/her part in the edification of the State governed by the rule of law require him/her not to remain silent in the event he/she comes across the information about the commission of a felony or misdemeanor because it negates such rights and freedoms as well as the principles of a State governed by the rule of law that the same journalist aspires to. The failure to do that would obstruct the country development due to the fact that the suspects of such offences would not be prosecuted despite that someone has information about their role.

[168] The Court finds that the duties of testifying and denouncing the committed offences are not only limited to journalists because it is in the general interest of justice and benefit the country, the reason why the exception established by article 251 of the Law determining offences and penalties in general is necessary, and for these reasons it should not be regarded as contrary to the freedom of expression, of press and of access to information enshrined in article 38 of the Constitution.

## III. GENERAL HOLDING

[169] On the basis of the foregoing grounds on every legal issue, the Supreme Court finds that article 156 of the Law n° 68/2018 of 30/08/2018 determining offences and penalties in general is not inconsistent with article 38 of the Constitution. As of the foregoing explanations, among the elements of personal privacy include photographs, documents, audio and video recordings since they are part of essential distinctive element and personal identifiers. Every person has therefore the right to pursue on how they were recorded, saved and diffused. Such right encompass also the right to refute to being eavesdropped, reject photographs shooting, audio and videos recording, saving, diffusion, broadcast or reproduction. Otherwise, there would be a necessary facet of the owner that would be controlled by another person while he/she would not be able to oversee the usage of his/her eavesdropped information, photographs, audio and video recordings and persona documents. Such state of affairs give rise to a situation where the right to personal privacy becomes an obstruction to the freedom of press, of expression and of access to information.

[170] The Court finds article 157 of the Law n° 68/2018 of 30/08/2018 determining offences and penalties in general is not inconsistent with article 38 of the Constitution. As explained above, a journalist who, in bad faith, discloses a photo, audio or visual recording after their modification without reporting it, contravenes the professional duties and it is likely to affect the owner because the public believes the diffused information to be original while it is not the case.

[171] The Court finds that article 194 of the Law n° 68/2018 of 30/08/2018 determining offences and penalties in general is not inconsistent with article 38 of the Constitution. Per the explanations above, spreading false information or harmful propaganda with intent to cause a hostile international opinion against the Government, should not be regarded as part of the aspects of freedom of press while they tear down democracy and the country. For these reasons, it should be referred to different legal instruments including criminal laws in order to signal that it is not permitted and discourage persons wishing to venture in.

[172] The Court finds that article 218 of the Law n° 68/2018 of 30/08/2018 determining offences and penalties in general, is inconsistent with articles 15 and 38 of the Constitution. On the basis of international conventions and customary law, the duties of countries consist of granting to Heads of States, representatives of foreign States or international organizations in service in Rwanda the dignity they deserve. A politician is entitled the right to be protected in his/her dignity, but this should not be done in a way that limits the conversations on political issues or issues of general interests. Article 218 of the Law determining offences and penalties in general entitles an extra special treatment to a Head of State, Representatives of foreign States or representatives of international organizations in Rwanda, which prevents critic report in their regard for the only reason of their positions or attributions without considering the importance of such report; the reason why such provision contravenes the freedom of press, of expression and of access to information.

[173] The Court finds that article 251 of the Law nº68/2018 of 30/08/2018 determining offences and penalties in general is not inconsistent with article 38 of the Constitution. It is true that offences and their prosecution should be reported. However, the interest of the suspect of whom a media report was diffused should not prevail over general interest of prosecution and repression of offences or over the interest of serving justice to the person convicted for the offence they did not commit. A professional, be it a journalist, an advocate, a medical practitioner or any other person should not abet any person in the commission of the offence or cover it up since such acts do not fall under the professional secrets protected by the law in the matter.

## IV. COURT RULING

[174] Finds the petition initiated by BYANSI Samuel Baker requesting the Court to declare articles 156, 157, 194, 218 and 251 of the Law nº68/2018 of 30/08/2018 determining offences and penalties in general contrary to articles 15 and 38 of the Constitution of the Republic of Rwanda, with merit in parts;

[175] Holds that article 156 of the Law nº68/2018 of 30/08/2018 determining offences and penalties in general is not contrary to article 38 of the Constitution;

[176] Holds that article 157 of the Law nº68/2018 of 30/08/2018 determining offences and penalties in general is not contrary to article 38 of the Constitution;

[177] Holds that article 194 of the Law nº68/2018 of 30/08/2018 determining offences and penalties in general is not contrary to articles 15 and 38 of the Constitution;

[178] Holds that article 218 of the Law nº 68/2018 of 30/08/2018 determining offences and penalties in general is contrary to article 38 of the Constitution, and is therefore devoid of effects;

[179] Holds that article 251 of the Law nº 68/2018 of 30/08/2018 determining offences and penalties in general is not contrary to article 38 of the Constitution.

[180] Instructs the publication of this ruling in the Official Gazette of the Republic of Rwanda.