ARTICLE 19

Rwanda: Draft Penal Code

November 2011

Legal analysis

Executive summary

ARTICLE 19 has analysed the provisions of the Draft Penal Code for Rwanda (Draft Penal Code) that engage the rights to freedom of expression and information, to assess their compatibility with international standards. With this focus, ARTICLE 19 finds the reviewed provisions to be fundamentally flawed and incompatible with Rwanda's obligations under international law. The bill represents a significant regression in protections for the right to freedom of expression and information in Rwanda.

A general concern with the analysed provisions of the Draft Penal Code is that they are not specific enough in the terminology they employ. Most offences lack definitions of their essential elements and use ambiguous and overbroad phrases that potentially criminalise legitimate forms of expression. In places this creates the impression that international standards on the right to freedom of expression and information have been disregarded, potentially allowing state authorities to exploit their discretion to promote their own agenda through the criminal law.

The Draft Penal Code has a wide variety of provisions that affect freedom of expression and information. These include prohibitions on so-called "genocide-ideology", broad provisions on national security and public order, restrictions on academic freedom, and even provisions that severely limit the right of women to access information on reproductive health.

A number of criminal defamation provisions are also scattered throughout the Draft Penal Code which violate international standards on freedom of expression. These sections will prevent criticism of public officials and abstract nationalistic symbols. Uniquely, there are provisions that criminalise mere association with individuals preparing to defame a person, and a range of offences related to "threats" to harm an individual's reputation. These latter provisions essentially act as criminal prior-restraints on expression where no harm has been caused.

Moreover, the Draft Penal Code abandons the principles of proportionality in the sentences that it imposes. Custodial sentences are available for almost all of the offences, with minimum sentences often beginning at between one and three years, with maximum sentences up to life imprisonment. Fines of up to 10,000,000 Rwandan Francs (RF) are also provided for, roughly the equivalent of US$16,720; more than thirty times higher than the average annual income of $510.

ARTICLE 19 urges the President of Rwanda not to sign the Draft Penal Code. All stakeholders should withhold their support for the Draft Penal Code in its current form and advocate for more robust protections for the right to freedom of expression and information in Rwandan law.

Recommendations:

1. The President of Rwanda should not sign the Draft Penal Code into law and return it to Parliament for redrafting.

2. The provisions on criminal defamation, including those relating to insult of public officials and the denigration of symbols, should be removed.

3. The provisions on genocide ideology and sectarianism should be removed.

4. The provisions on discrimination should be amended to comply with international standards on hate speech as contained in Articles 19 and 20 of the ICCPR.

5. The provisions restricting freedom of expression and freedom of association to protect national security and public order should be amended to comply international standards in this area.

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About the Article 19 Law Programme

The ARTICLE 19 Law Programme advocates for the development of progressive standards on freedom of expression and access to information at the international level, and their implementation in domestic legal systems. The Law Programme has produced a number of standard-setting publications which outline international and comparative law and best practice in areas such as defamation law, access to information and broadcast regulation.

On the basis of these publications and ARTICLE 19's overall legal expertise, the Law Programme publishes a number of legal analyses each year, comments on legislative proposals as well as existing laws that affect the right to freedom of expression. This analytical work, carried out since 1998 as a means of supporting positive law reform efforts worldwide, frequently leads to substantial improvements in proposed or existing domestic legislation. All of our analyses are available online at http://www.article19.org/resources.php/legal/.

If you would like to discuss this analysis further, or if you have a matter you would like to bring to the attention of the ARTICLE 19 Law Programme, you can contact us by e-mail at legal@article19.org or call us at +44 20 7324 2500.

Introduction

In this analysis, ARTICLE 19 sets out its concerns about the Draft Penal Code for Rwanda (the Draft Penal Code).[1] The Draft Penal Code has been approved by Parliament but requires the signature of the President before it is enacted into law. This analysis outlines Rwanda's obligations under international standards on the right to freedom of expression and information and analyses those provisions in the Draft Penal Code which affect these rights. It arrives at the conclusion that the provisions analysed are so retrogressive that the President must refuse to sign the Draft Penal Code into law.

In recent years, ARTICLE 19 has provided a number of legal analyses to assist in the promotion of legal and policy reform in Rwanda on matters concerning the protection of freedom of expression and information.[2] ARTICLE 19 provided comments on the Law Relating to the Protection of Whistleblowers in Rwanda, and issued a series of reviews of drafts of Rwanda's Access to Information Bill. In 2009, we also expressed serious concerns regarding the Law Relating to the Punishment of the Crime of Genocide Ideology in Rwanda. In the present analysis, we note our disappointment that many of the worst features of these laws are replicated in the Draft Penal Code.

Indeed, this analysis finds that from a freedom of expression perspective, the Draft Penal Code contains few redeeming features, and if adopted will represent a significant regression in terms of these fundamental rights. A recurring theme throughout the analysis is the use of undefined and overbroad terms to criminalise expression that the government has no legitimate interest in suppressing. These offences will grant the government an excessive degree of discretion to insulate itself from criticism.

ARTICLE 19 is particularly concerned that the Draft Penal Code entrenches the genocide ideology crimes that we previously criticised, extending their flawed rationale with further prohibitions on discrimination and sectarianism. Overly broad national security and public order provisions that require no causal connection between the prohibited expression and harm protected against are contrary to international standards. Moreover, a number of provisions in the Draft Penal Code criminalise defamation, several being specifically engineered to protect public officials from criticism. Similar provisions protect the national anthem and Rwandan flag from various forms of disrespect, improperly attributing such objects with the characteristics of human beings. In sum, the Draft Penal Code significantly augments the legislative arsenal available to the government to suppress legitimate speech, prevent criticism and silence opponents.

ARTICLE 19 urges The President of Rwanda not to sign the Draft Penal Code into law. Civil society and other stakeholders must withhold their support from the law and advocate for more robust protections for the right to freedom of expression in Rwandan law.

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[1] This analysis is based on the English version of the Draft Penal Code that was provided to ARTICLE 19. We take no responsibility for the accuracy of these translations or for comments based on inaccurate translations. The text of the English version of the Draft Penal Code is available on request from ARTICLE 19.

[2] See: ARTICLE 19, Memorandum on the Draft Law Relating to the Protection of Whistleblowers in Rwanda, March 2011, available at http://www.article19.org/data/files/pdfs/analysis/rwanda-whistleblowers.pdf; ARTICLE 19, Comments on the Draft Rwandan Law on Access to Information, October 2009, available at http://www.article19.org/data/files/pdfs/analysis/rwanda-comments-on-draft-rwandan-law-on-access-to-information.pdf; ARTICLE 19, Comment on the Law Relating to the Punishment of the Crime of Genocide in Rwanda, September 2009, available at http://www.article19.org/data/files/pdfs/analysis/rwanda-comment-on-the-law-relating-to-the-punishment-of-the-crime-of-genocid.pdf.

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International Freedom of Expression Standards

The right to freedom of expression and freedom of information is a fundamental human right. The full enjoyment of this right is central to achieving individual freedoms and to developing democracy, particularly in countries transitioning to democracy. Freedom of expression is a necessary condition for the realisation of the principles of transparency and accountability that are, in turn, essential for the promotion and protection of all human rights.

The Draft Penal Code engages a number of international freedom of expression standards that form the basis of the legal analysis in the following section. This section identifies those standards that are most relevant to the protection of freedom of expression and in particular their relationship to the penal regulation of computer use.

Universal Declaration of Human Rights

Article 19 of the Universal Declaration of Human Rights (UDHR)[3] guarantees the right to freedom of expression in the following terms:

> "Everyone has the right to freedom of opinion and expression; this right includes the right to hold opinions without interference and to seek, receive, and impart information and ideas through any media and regardless of frontiers."

The UDHR, as a UN General Assembly Resolution, is not directly binding on states. However, parts of it, including Article 19, are widely regarded as having acquired legal force as customary international law since its adoption in 1948.[4]

International Covenant on Civil and Political Rights

The International Covenant on Civil and Political Rights (ICCPR) elaborates upon and gives legal force to many of the rights articulated in the UDHR. The ICCPR binds its 167 states party to respect its provisions and implement its framework at the national level.[5] Article 19 ICCPR guarantees the right to freedom of expression in its first two paragraphs:

> 1. Everyone shall have the right to freedom of opinion
> 2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art or through any other media of his choice.

Rwanda acceded to the ICCPR on April 16 1975, and as a state party must ensure that any attempts to criminalise actions to seek, receive or impart information are compliant with Article 19 of the ICCPR.

The United Nations Human Rights Committee (HR Committee) as treaty monitoring body for the ICCPR issued General Comment No. 34 in relation to Article 19 on 21 June 2011.[6] General Comment No. 34 constitutes an authoritative interpretation of the minimum standards guaranteed by Article 19 ICCPR. ARTICLE 19 welcomed General Comment No. 34 as a progressive and detailed elucidation of international law related to freedom of expression and access to information.[7] It is contemporary to and instructive on a number of freedom of expression concerns raised by the Draft Penal Code.

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[3] UN General Assembly Resolution 217A(III), adopted 10 December 1948

[4] *Filartiga v. Pena-Irala*, 630 F. 2d 876 (1980) (US Circuit Court of Appeals, 2nd circuit)

[5] Article 2 ICCPR, GA res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 52, UN Doc. A/6316 (1966); 999 UNTS 171; 6 ILM 368 (1967)

[6] CCPR/C/GC/34

[7] ARTICLE 19 statement on Human Rights General Committee No. 34; available at

While the right to freedom of expression is fundamental, it is not guaranteed in absolute terms. Article 19(3) of the ICCPR permits limitations on the right that are necessary and proportionate to protect the rights or reputations of others, for the protection of national security or public order, or public health and morals. Restrictions on the right to freedom of expression must be strictly and narrowly tailored to achieve one of these objectives and may not put in jeopardy the right itself. Determining whether a restriction is narrowly tailored is often articulated as a three-part test. It is required that restrictions are prescribed by law, pursue a legitimate aim, and that they conform to the strict tests of necessity and proportionality.[8]

Article 19(3) of the ICCPR requires that restrictions on the right to freedom of expression must be prescribed by law. This requires a normative assessment; to be characterised as a law a norm must be formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly.[9] Ambiguous or overly broad restrictions on freedom of expression deficient in elucidating the exact scope of their application are therefore impermissible under Article 19(3).

Interferences with the right to freedom of expression must pursue a legitimate protective aim as exhaustively enumerated in Article 19(3)(a) and (b) of the ICCPR. Legitimate aims are those that protect the human rights of others, protect national security or public order, or protect public health and morals. General Comment No. 34 notes that extreme care must be taken in crafting and applying laws that purport to restrict expression to protect national security. Whether characterised as treason laws, official secrets laws or sedition laws they must conform to the strict requirements of Article 19(3). General Comment No. 34 also provides guidance on laws that restrict expression with the purported purpose of protecting morals. Such purposes must be based on principles not deriving exclusively from a single tradition but must be understood in the light of the universality of human rights and the principle of non-discrimination.[10] It would therefore be incompatible with the ICCPR, for example, to privilege one particular religious view or historical perspective by law.

States party to the ICCPR are obliged to ensure that legitimate restrictions on the right to freedom of expression are necessary and proportionate. Necessity requires that there must be a pressing social need for the restriction. The party invoking the restriction must show a direct and immediate connection between the expression and the protected interest. Proportionality requires that a restriction on expression is not over-broad and that it is appropriate to achieve its protective function. It must be shown that the restriction is specific and individual to attaining that protective outcome and is no more intrusive than other instruments capable of achieving the same limited result.

Regional Standards

Rwanda is also a party to the ***African Charter on Human and Peoples' Rights***,[11] which guarantees freedom of expression, at Article 9 in the following terms:

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.

The ***Declaration of Principles on Freedom of Expression in Africa*** (African Declaration), adopted by the African Commission on Human and Peoples' Rights in 2002,[12] in Article II also affirms that

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http://www.article19.org/resources.php/resource/2631/en/un:-article-19-welcomes-general-comment-on-freedom-of-expression.

[8] *Velichkin v. Belarus*, Communication No. 1022/2001, U.N. Doc. CCPR/C/85/D/1022/2001 (2005).

[9] Leonardus J.M. de Groot v. The Netherlands, No. 578/1994, U.N. Doc. CCPR/C/54/D/578/1994 (1995).

[10] Paragraph 32, HR Committee General Comment 34.

[11] Adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force Oct. 21, 1986

1. No one shall be subject to arbitrary interference with his or her freedom of expression.
2. Any restrictions on freedom of expression shall be provided by law, serve a legitimate interest and be necessary and in a democratic society.

In Article XII of the African Declaration, which deals with the protection of reputation, stipulates

1. States should ensure that their laws relating to defamation conform to the following standards:
   - No one shall be found liable for true statements, opinions or statements regarding public figures which it was reasonable to make in the circumstances;
   - Public figures shall be required to tolerate a greater degree of criticism; and
   - Sanctions shall never be so severe as to inhibit the right to freedom of expression, including by others.
2. Privacy laws shall not inhibit the dissemination of information of public interest.

Similarly, in Article XIII, on criminal measures, the African Declaration mandates states to review all criminal restrictions on content to ensure that they serve a legitimate interest in a democratic society. It also further affirms that freedom of expression should not be restricted on public order or national security grounds unless there is a real risk of harm to a legitimate interest and there is a close causal link between the risk of harm and the expression.

Other Standards

The Rwandan Government should consider also a number of other freedom of expression standards that were developed by ARTICLE 19 and international experts on the compatibility of content based restrictions on speech with the right to freedom of expression and on access to information. These standards detail the permissibility of restrictions on expression and provide guidance on balancing freedom of expression against other interests in the Penal Code.

The ***African Platform on Access to Information***, recently developed by groups across Africa including ARTICLE 19 and has been endorsed by the UN Special Rapporteur on Freedom of Opinion and Expression and the Special Rapporteur on Freedom of Expression and Access to Information of the African Commission on Human and Peoples' Rights.[13] These principles provide guidance to African states on the right to freedom of information, including the importance of protections for whistleblowers and access to health information; in particular the right of women to demand the enhanced delivery of services targeted at them.

The ***Johannesburg Principles on National Security, Freedom of Expression and Access to Information*** (Johannesburg Principles) are instructive on restrictions on freedom of expression that seek to protect national security.[14] Principle 2 of the Johannesburg Principles states that restrictions sought to be justified on the ground of national security are illegitimate unless their genuine purpose and demonstrable effect is to protect the country's existence or its territorial integrity against the use or threat of force, or its capacity to respond to the use or threat of force. The restriction cannot be a pretext for protecting the government from embarrassment or exposure of wrongdoing, to conceal information about the functioning of its public institutions, or to entrench a particular ideology. Principle 15 states that a person may not be punished on national security grounds for disclosure of information if (1) the disclosure does not actually harm and is not likely to harm a legitimate national

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[12] Adopted at the 32nd Session of the African Commission on Human and Peoples' Rights, 17-23 October 2002.

[13] Adopted September 2011. http://www.pacaia.org/images/pdf/apai%20final.pdf

[14] Adopted on 1 October 1995. These Principles have been endorsed by the UN Special Rapporteur on Freedom of Opinion and Expression and have been referred to by the United Nations Commission on Human Rights in each of their annual resolutions on freedom of expression since 1996. CHECK this. Commission replaced in 2006 by Council. Not sure they have cited it.

security interest, or (2) the public interest in knowing the information outweighs the harm from disclosure.

Similarly, the ***Camden Principles on Freedom of Expression and Equality*** (Camden Principles) provide guidance on the conflict between these two rights.[15] The Camden Principles emphasise that the right to freedom of expression is not incompatible with the right to equality, but that both are foundational rights that are mutually supporting and reinforcing. Indeed, these provisions demonstrate that freedom of expression is essential to the effective realisation of equality. Principle 12 of the Camden Principles is particularly illuminating on the application of freedom of expression principles to "hate speech", especially on the relationship between Article 19 and Article 20 of the ICCPR. This relationship is explored in greater depth in the sections on "genocide ideology" and "discrimination and sectarianism".

Additionally, ***"Defining Defamation: Principles on Freedom of Expression and Reputation"*** (Defining Defamation) reflect international standards and elucidate the appropriate balance between the two rights.[16] Principle 4 requires states to replace all criminal defamation laws, where necessary, with civil defamation provisions. During this process of reform, Principle 4 requires that penalties only be imposed through criminal defamation laws if the party claiming injury proves beyond reasonable doubt the following elements of the offence. Firstly, the impugned statements must be proven to be false and made with actual knowledge or recklessness as to falsity, with the specific intention of harming the party claiming to be defamed. Secondly, the public authorities should take no part in initiating the prosecution of criminal defamation cases. Thirdly, prison sentences, suspension of one's right to freedom of expression, harsh fines and other harsh criminal penalties should never be available as a sanction for breach of defamation laws. Furthermore, Principle 8 states that under no circumstances should a defamation law provide any special protection for public officials, whatever their rank or status.

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[15] See *The Camden Principles on Freedom of Expression and Equality*; a progressive interpretation of international law and standards prepared by ARTICLE 19 in consultation with high-level inter-governmental officials, civil society representatives and academic expert; available at: http://www.article19.org/advocacy/campaigns/camden-principles/index.html.

[16] See *Defining Defamation: Principles on Freedom of Expression and Reputation*; These Principles are based on international law and standards, evolving state practice, and the general principles of law recognised by the community of nations; available at: http://www.article19.org/data/files/pdfs/standards/definingdefamation.pdf

Analysis of the Draft Penal Code

The Draft Penal Code contains 683 Articles that address all prosecutable offences in Rwanda. As noted above, the scope of this analysis is limited to those provisions that engage the rights to freedom of expression and information. The analysis identifies aspects of these rights thematically, and organises the Analysis according to how these themes are engaged. The structure of the analysis does not, therefore, reflect the structure of the legislation.

Criminal Defamation

Numerous criminal defamation provisions are scattered throughout the Draft Penal Code under a variety of headings. As outlined above, Article 19 of the ICCPR permits restrictions on freedom of expression to protect the rights of others, including the right to a reputation as protected by Article 17 of the ICCPR.

ARTICLE 19 has consistently advocated against criminal defamation laws for their failure to strike the appropriate balance between the right to free expression and the right to a reputation. The HR Committee has similarly urged all states party to the ICCPR to consider abolishing their criminal defamation laws.[17] In their 2002 Joint Declaration, four Special Rapporteurs on freedom of expression stated that criminal defamation laws were not justifiable and should be abolished and replaced, where necessary, with civil defamation laws.[18] General Comment No. 34 of the HR Committee affirms that all states parties to the ICCPR should consider the decriminalisation of defamation.[19] This advocacy position, reflected in the Defining Defamation principles, is strongly supported by a legal analysis of criminal defamation laws against the three-part test of Article 19(3) of the ICCPR. There is a general trend globally for countries to decriminalise defamation. In recent years, this has included Ghana, Togo, Mexico, the UK, Ireland, Sri Lanka, Georgia, and the Maldives. There are also states that have decriminalised libel offences partially, such as Uganda, which has decriminalised seditious libel, or have removed imprisonment for criminal libel, such as the Central African Republic.

This analysis first assesses the most generic of the defamation provisions in the Draft Penal Code for compliance with Article 19 of the ICCPR. Specific concerns are then raised in relation to provisions that seek to protect the reputations of public officials and religious leaders, followed by concerns related to laws that criminalise "threats" of defamation. The generic criticisms relating to the first category apply equally to the second and the third.

i. General Defamation Provisions: Article 298, Article 302, Article 305, Article 306, Article 307

Article 298 criminalises the publication of falsified words or images of a person "without mentioning" the fact that they are falsified. Article 305 "Defamation in public" criminalises expression that is "likely to offend the honour or estimation of this person in the eyes of a reasonable man, or expose him/her to public contempt." Similarly, Article 306 criminalises "public insult" and Article 307 criminalises "slander and abuse" that takes place in private. Article 302 on "publishing defamatory information", is potentially broader than each of these. None of these provisions satisfy the three-part test under Article 19 (3) of the ICCPR.

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[17] Concluding Observations on Italy (CCPR/C/ITA/CO/5); Concluding Observations on the Former Yugoslav Republic of Macedonia (CCPR/C/MKD/CO/2).

[18] Joint Declaration by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression, 10 December 2002. For more information, see: http://www.osce.org/documents/rfm/2004/10/14893_en.pdf.

[19] Concluding observations on Italy (CCPR/C/ITA/CO/5); Concluding observations on the Former Yugoslav Republic of Macedonia (CCPR/C/MKD/CO/2).

Each of the articles identified above lack clarity and accessibility and are therefore not provided for by law as required by the ICCPR. For example, key terms such as "defamation", "insult" and "slander" are not defined and are therefore left open to inconsistent interpretation and abuse. Articles 298, 306 and 307 are particularly ambiguous, as they do not provide a culpable mental state for the imposition of liability. This uncertainty grants too much discretion to law enforcement authorities and creates uncertainty among the general public as to what expression is permissible and what is not.

As stated above, these provisions purport to pursue the legitimate aim of protecting individuals' reputations. However, the provisions of the Draft Penal Code do not protect reputations but rather "feelings" (i.e. not the perception of a person in a community but an individuals' personal sensitivity). Article 298 does not even require "falsified" information to negatively impact a person's feelings or reputation. The notion of "insult" in Article 306 and 307 and the concept of "honour" in Article 305 potentially focus only on an individual's feelings or self-perception rather than their standing in the community. Article 302 provides a more objective standard, targeting expression that "would have the effect of lowering the estimation of the concerned person in the eyes of a reasonable man." The harm threshold is still far too low to justify the imposition of criminal penalties, however.

Moreover, to satisfy the requirements of Article 19 of the ICCPR, laws pursuing the aim of protecting reputation must be narrowly tailored in line with the principles of necessity and proportionality. The criminal defamation provisions of the Draft Penal Code do not meet this requirement since they are not "necessary" – the goal of protecting individuals' reputations can effectively be accomplished through the civil law. This is borne out by the experience of countries which have abolished or no longer use their criminal defamation laws. This raises serious doubts as to whether criminal defamation laws, by nature a more heavy-handed instrument, are justifiable since, as noted above, the least intrusive effective restriction must always be preferred. Moreover, since defamation is arguably a private matter between two individuals, it should not warrant the intervention of the state through the criminal law. Furthermore, a criminal conviction will usually not provide the defamed person with any compensation, since in most legal systems fines go directly to the State.

Finally, these five provisions each allow for excessive custodial sentences and fines to be imposed that further violate the principle of proportionality. They are prescribed as follows: for Article 298, 2 years to 5 years in custody or 200,000 RF – 800,000 RF; Article 302, 2 years to 5 years in custody or 500,000 RF – 1,000,000 RF; for Article 305, 2 months to 1 year in custody or 100,000 to 1,000,000; for Article 306, 2 months to 6 months in custody, or 100,000 RF to 500,000 RF; for Article 307, 1 month to 6 months in custody, and 50,000 to 300,000 RF.

ii. Protecting Political and Religious Leaders: Article 295, Article 481, Article 482, Article 461, Article 498

Several criminal defamation provisions in the Draft Penal Code give heightened protections to the reputations of public officials. Article 481 concerns "crimes against foreign Heads of State or their representatives"; Article 482 prohibits "slander against foreign Heads of State, other foreign officials and members of the diplomatic and consular corps who are in Rwanda"; Article 461 concerns "crimes against the established power or the President of the Republic"; Article 498 covers "contempt against public officials and security officers", and Article 295 concerns "abusing a religious leader."

Again, these provisions protect political actors and religious leaders in ambiguous terms. Article 481 protects heads of state, their government representatives, their agents and "official personalities" from being "undermined". Article 482 protects the same from "slander" or "embarrassment", while Article 295 protects religious ministers from "offence."

International standards, including the African Declaration, require that public officials display a higher degree of tolerance toward criticism than other individuals. This ensures that individuals who have elected to serve the public in public office are subject to scrutiny, which is necessary for maximising the performance of public bodies. A similar rationale can be applied to religious leaders, as they hold particularly influential positions in Rwandan society. Thus, the more senior the post held or the more

influential an individual, the more that person ought to tolerate scrutiny, including non-malicious accusations that may be false. The Draft Penal Code inverts this logic and provides the most specific protections for the most senior political actors.

Furthermore, it is often the case that individuals in the public eye have alternative means available to them to seek redress for untrue statements made against them. For these reasons, for example, in Uganda, in August 2010, the Constitutional Court found a law criminalizing sedition to be in violation of the guarantees of free speech and freedom of the press under Article 29 of the Ugandan Constitution. This law made it a crime to say or publish statements that promoted hatred, contempt or disaffection for the Ugandan government, president or judiciary, with a conviction of a sentence of up to seven years imprisonment.[20]

Article 498 presents further problems by providing double penalties for "contempt" made against members of the legislative assembly during a Parliamentary session. This is an illegitimate restriction on speech in Parliament, and may also be applied to limit the speech of legislative members during a session. In most jurisdictions, such statements are subject to an absolute privilege, in recognition of the heightened importance of being able to speak freely without fear of legal consequences in such fora. Such free speech is essential for reaching the truth in these situations.

The punishments promoted by these Articles are even more severe and violate the principle of proportionality. The penalties are as follows: for Article 481, imprisonment between five and fifteen years; for Article 482, imprisonment for three to five years; for Article 461, life imprisonment; for Article 498, two to five years of imprisonment and a fine between 50,000 FR and 500,000 FR (which doubles if made during a Parliamentary session or against the Head of State). Article 295 provides for imprisonment between six months and two years.

iii. "Threats" of Defamation: Article 198, Article 199, Article 200, Article 201, Article 333

Chapter Three, Section 3 of the Draft Penal Code is broadly titled "Crimes committed through the use of verbal threats, gestures, writing and libel." This contains the offences of "verbal threats" (Article 198), "threats through gestures" (Article 199), "threats in writing" (Article 200), and "extortion" (Article 201).

The criminalisation of "threats" generally encompasses any expression of intent to engage in any activity, including lawful acts. This potentially targets free expression and cannot be squared with any legitimate bases for restrictions as enumerated in Article 19 (3) of the ICCPR.

The use of the term "libel" in the title to these provisions indicates that they may also be used to suppress threats to defame; i.e. any expression of intent to share information that would harm an individual's reputation. In this respect, ARTICLE 19 refers to the above discussion on incompatibility of criminal defamation provisions with the international standards. On the same grounds, threats of libel would not satisfy the requirements of necessity and proportionality.

Furthermore, these provisions are conceptually problematic in the way that they conflate threats to harm an individual's reputation with threats of physical violence, thereby inviting one to draw a moral equivalence between the two. Blurring the line between these distinct harms may be used to falsely legitimise the suppression of lawful expression.

Moreover, the crime of "extortion" in Article 201 targets the "threat of reporting and attributing to someone facts that could damage their reputation." It is required that the threat is purposive; to

[20] See *Andrew Mujunimwenda and the Eastern African Media Institute vs. Attorney General Uganda*, (Consolidated Constitutional Petitions No.12 of 2005 & No.3 of 2006) [2010] UGCC 5 (25 August 2010); available at
http://www.ulii.org//cgi-bin/uganda_disp.pl?file=ug/cases/UGCC/2010/5.html&query=sedition.

achieve vague outcomes such as the gaining of a "commitment", or the "disclosure of secrets." These purposes are so ambiguous that any inquiry into public conduct could be coloured with the label "extortion." This poses serious problems for whistleblowers and journalists who work in the public interest to expose wrongdoing or corruption. Also, Article 201 is unnecessarily replicated in Article 333 under the heading of "crimes against property."

The severity of the sentences imposed by these provisions violates the proportionality principle. Each provision allows for custodial sentences, with a minimum duration of two months for Article 198, six months for Articles 199 – 201 and two years for Article 333. Maximum durations are one year for Article 198, two years for 199 – 200, three years for Article 201 and five years for Article 333. Available fines range from 100,000 RF to 5,000,000 RF.

Defamation of Symbols and Religions

Provisions in the Draft Penal Code that defend the national flag, the national anthem, and official emblems and insignia are also incompatible with international standards on freedom of expression and information.

Articles 483, 491, 492, 493 and 503 protect the national flag of Rwanda as well as those belonging to foreign states from being "taken away", "destroyed", "replaced", "outraged", "made unrecognisable", "abused", "disrespected", "denigrated", "damaged", "used in a way contrary to law", or for an alternative flag to used by a person "considering it to be the national flag". Minimum sentences range from one month to one year with maximum sentences between one year and three years. Fines range between 50,000 RF to 200,000 RF. Articles 497 and 503 also protect insignia, official emblems, and the "sovereignty of the Republic." Minimum sentences are one month and six months respectively, with maximums set at six months and one year. Fines range from 50,000 RF to 1,000,000 RF.

Articles 494, 495, and 496 protect the national anthem from being "disrespected", "denigrated", the notes or lyrics from being "wilfully changed", and criminalises "singing any other anthem while considering it as the national anthem." Minimum custodial sentences are between six months and three years, with maximum sentences between one year and five years. Fines range from 50,000 RF to 500,000 RF.

Article 294, titled "disruption of public worship" includes the "desecration" of religious symbols or objects. Custodial penalties range from fifteen days to six months and between 50,000 FR and 500,000 FR.

These provisions fail to meet the requirement of Article 19 of the ICCPR that limitations on the right to freedom of expression be provided for by law; there are no definitions of the essential elements in each offence, and the anticipated harms are equally vague, containing lists of various synonyms for the concept of disrespecting symbols and objects. It is unclear why eleven separate articles are required to achieve this outcome, and what justifies the wide variations in sentences between each article.

Furthermore, these laws do not pursue a legitimate aim under Article 19 (3) of the ICCPR. Symbols and objects do not have financial interests to defend or the emotional capacity to be offended by false accusations of fact. It is submitted that the intention behind these provisions is to augment the power of the executive to target unpopular opinions and dissent. As such these provisions are illegitimate under international human rights law.

Contempt of Court

Article 536 and Article 537 attempt to preserve the reputation of the judiciary and the decisions that they issue. The administration of justice is not explicitly recognised as a legitimate basis for suppressing expression under Article 19(3) of the ICCPR.

From a comparative perspective, it should be noted that the European Court of Human Rights has discussed the relationship between freedom of expression and the administration of justice in detail. Although the European Court has generally found that restrictions are "prescribed by law" and that ensuring a fair trial or maintaining the authority of the judiciary are "legitimate aims", the crux of the issue has been whether the restrictions are "necessary in a democratic society." However, even in these circumstances the European Court has stated that the courts "cannot operate in a vacuum" and indeed, matters that come before the court are frequently of public interest and it is therefore incumbent on the mass media to report on those issues.[21]

Article 536 "contempt of the judiciary" is drafted in broad terms, claiming to protect the dignity and respect that is invested upon judges. As such, it does not appear to be tailored at protecting the administration of justice, but rather seeks to insulate the judiciary from criticism. This may be more accurately regarded as a criminal defamation provision giving heightened protection to public officials, as discussed above. Judges, like government ministers, are public officials and as such must be expected to tolerate a higher degree of criticism. As such, Article 536 is an entirely illegitimate restriction on free expression. The fine of imprisonment from one to three years and a fine between 200,000 RF and 2,000,000 RF are excessive.

Article 537 protects decisions of courts from being "discredited … in a condition likely to cause contempt of court or independence of the judiciary." While protecting the independence of the judiciary is necessary in a democracy, it is not clear how "acts, works or imagery" discrediting rulings would be capable of undermining the ability of judges to act with impartiality. Indeed, discrediting poorly-reasoned decisions of the judiciary may be regarded as essential in a democracy.

Genocide Ideology

The title to Section 7 of the Draft Penal Code groups together the offences of "genocide ideology, discrimination and sectarianism practices." The genocide ideology provisions in this section replicate verbatim the provisions of *the Law Relating to the Punishment of the Crime of Genocide Ideology*, (the Genocide Ideology Law), which ARTICLE 19 provided a legal analysis of in 2009.[22]

In our 2009 analysis, ARTICLE 19 acknowledged the historical context of the Genocide Ideology Law, in particular the responsibility of the media in propagating the 1994 genocide in Rwanda.[23] However, our analysis emphasised that the right to freedom of expression is not incompatible with the right to equality, and that both are foundational rights that are mutually supporting and reinforcing. Indeed, freedom of expression is essential to the effective realisation of equality.[24] The analysis expressed concern that the extraordinarily broad concept of "genocide ideology" may encapsulate all manner of genocide related expression in a way that violates international law on genocide and hate speech. We also observed that the law was counter-productive to its objectives and was likely to act as a catalyst for future human rights violations. Following ARTICLE 19's call upon the government of Rwanda to repeal

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[21] *Sunday Times v. UK* (1979) 2 EHRR 245

[22] Law No. 18/2008, the Law Relating to the Punishment of the Crime of Genocide Ideology, adopted on 23 July 2008. To see ARTICLE 19's full analysis; available at http://www.article19.org/data/files/pdfs/analysis/rwanda-comment-on-the-law-relating-to-the-punishment-of-the-crime-of-genocid.pdf.

[23] See e.g. *Ferdinand Nahimana, Jean-Bosco Barayagwiza and Hassan Ngeze v The Prosecutor* (Case ICTR-99-52T), Judgment of the International Criminal Court for Rwanda, 3 December 2003; Ferdinand Nahimana, Jean-Bosco Barayagwiza and Hassan Ngeze v The Prosecutor (Case ICTR-99-52-A), Judgment of the Appeals Chamber of 28 November 2007. The appellate court upheld the Trial Chamber's conclusion on the constituent elements of the crime of direct incitement to commit genocide. (note sure how this relates to statement above)

[24] See Introductory Statement to *The Camden Principles on Freedom of Expression and Equality*; a progressive interpretation of international law and standards prepared by ARTICLE 19 in consultation with high-level inter-governmental officials, civil society representatives and academic experts; available at: http://www.article19.org/advocacy/campaigns/camden-principles/index.html

the Genocide Ideology Law in its entirety, we are disappointed to see its provisions further entrenched in the Draft Penal Code.

Article 134 of the Draft Penal Code replicates Article 2 of the Genocide Ideology Law by defining genocide ideology as an "aggregate of thoughts characterised by conduct, speeches, documents and other acts aiming at exterminating or inciting others to exterminate people based on ethnic group, origin, nationality, region, colour, physical appearance, sex, language, religion or political opinion, committed in normal periods or during war." Article 135 of the Draft Penal Code, replicating Article 3 of the Genocide Ideology Law, identifies three variations of this crime under the umbrella of "behaviour manifested by facts aimed at dehumanising a person or a group of persons with the same characteristics."

The third variation under Article 135 (3) of the Draft Penal Code concerns preparatory acts to murder, which is an unnecessary repetition of homicide provisions that exist elsewhere in the Draft Penal Code. ARTICLE 19 submits that its inclusion here is perhaps an attempt to draw a false causal connection between the propagation of so-called genocide ideology and the actual occurrence of genocide. It is this false connection, and the real horrific memories that it evokes, that may be exploited by authorities to suppress legitimate discussion of history, politics and personal experience.

The right to freedom of expression is engaged more directly by Articles 135 (1) and (2), which list ways that facts can "dehumanise" a person. The division of this list appears arbitrary, as both subsections articulate very similar undefined and remarkably broad concepts. Section one includes: "threatening, intimidating, degrading through defamatory speeches, documents or actions which aim at propounding wickedness or inciting hatred". Section two includes "marginalising, laughing at one's misfortune, defaming, mocking, boasting, despising, degrading, creating confusion aiming at negating the genocide which occurred, stirring up ill feelings, taking revenge, altering testimony or evidence for the genocide which occurred".

Firstly, we note that Article 134 and 135 of the Draft Penal Code do not reflect or comply with the 1948 Genocide Convention. Article 3(c) of this convention requires states to criminalise "direct and public incitement" to commit genocide. The International Criminal Tribunal for Rwanda has interpreted the equivalent provision in its foundational statute to require direct and public incitement to the commission of genocide to be accompanied by intent to directly and publicly incite others to commit genocide.[25] This is distinguished from 'hate speech' in general, which the Genocide Convention is not itself concerned with. Article 134 and 135 of the Draft Penal Code therefore have no basis in the international law on genocide.

Secondly, we note that efforts to prohibit hate speech more broadly than incitement to genocide must meet the thresholds contained in Articles 19 and Article 20 of the ICCPR. We recall that Article 20 imposes an obligation on states to prohibit only the advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence. In terms of the meaning of this in practice, Principle 12 of *The Camden Principles* offers helpful guidance on the interpretation of Article 20. It states:

> 12.1. All States should adopt legislation prohibiting any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence (hate speech). National legal systems should make it clear, either explicitly or through authoritative interpretation, that:
>
> i. The terms 'hatred' and 'hostility' refer to intense and irrational emotions of opprobrium, enmity and detestation towards the target group.
>
> ii. The term 'advocacy' is to be understood as requiring an intention to promote hatred publicly towards the target group.

[25] See *Ferdinand Nahimana, Jean-Bosco Barayagwiza and Hassan Ngeze* v *The Prosecutor* (Case ICTR-99-52- A), Judgment of the Appeals Chamber of 28 November 2007 para 692 of judgment and footnote 1658.

iii. The term 'incitement' refers to statements about national, racial or religious groups which create an imminent risk of discrimination, hostility or violence against persons belonging to those groups.

iv. The promotion, by different communities, of a positive sense of group identity does not constitute hate speech.

12.2. States should prohibit the condoning or denying of crimes of genocide, crimes against humanity and war crimes, but only where such statements constitute hate speech as defined by Principle 12.1.

12.3. States should not prohibit criticism directed at, or debate about, particular ideas, beliefs or ideologies, or religions or religious institutions, unless such expression constitutes hate speech as defined by Principle 12.1.

12.4. States should ensure that persons who have suffered actual damages as a result of hate speech as defined by Principle 12.1 have a right to an effective remedy, including a civil remedy for damages.

12.5. States should review their legal framework to ensure that any hate speech regulations conform to the above.

Articles 134 and 135 of the Draft Penal Code fail to meet these standards because they do not spell out the requirement for an intention to promote hatred publicly or an imminent risk of discrimination, hostility or violence. Also, these provisions are clearly at odds with Principle 12.2 of *The Camden Principles*.

Finally, given that any law on hate speech is a direct interference with the right to freedom of expression, it must also meet the conditions of the three-part test contained in Article 19(3) of the ICCPR. The Genocide Ideology Law, however, fails to meet these standards for restrictions on freedom of expression that are reflected in Principle 11 of *The Camden Principles*. Restrictions should be provided by law, serve a legitimate interest and be necessary and proportionate. Articles 134 and Article 135 are illegitimate because they restrict speech in a wide and untargeted way that goes beyond the scope of hate speech.

Section 7 of the Draft Penal Law also replicates the sentencing provisions contained in the Genocide Ideology Law. It provides basic guidance on sentences in Article 136, allowing default custodial sentences of ten to twenty-five years with a fine of 200,000 RF to 1,000,000 RF. Supplementary provisions adjust sentences according to the identity of the convicted party. Articles 137 – 142 specify variations for political leaders, children, parents of convicted children, associations, political organisations, and NGOs. The worst of these extend sentences up to life imprisonment and increase fines up to 10,000,000 RF. As the crimes contained in Section 7 target expression that does not amount to incitement to racial hatred or discrimination by international standards, these sentences are grossly disproportionate and therefore violate Article 19 (3) of the ICCPR. Even for the legitimate suppression of expression, sanctions must be proportionate.

Discrimination and Sectarianism

Alongside the provisions on genocide ideology, Section 7 to the Draft Penal Code also criminalises discrimination and sectarianism. This aggregation of three distinct harms significantly expands beyond the scope of the Genocide Ideology Law to allow the authorities to target an even broader range of expression. This again appears to be an attempt to draw a false causal connection between certain forms of expression and the actual occurrence of genocide.

Article 145 of the Draft Penal Code concerns the offence of discrimination, defined as "any speech, writing, or actions based on ethnicity, religion, country of origin, skin colour, physical features, sex,

language, or ideas aimed at depriving a person or group of persons of their rights as provided by Rwandan laws in force and by International Conventions which Rwanda has ratified." Denial of a person's rights is defined in Article 147 as the "rights provided by Rwanda Law and by International Conventions ratified by Rwanda on the basis of discrimination and sectarianism."

As outlined above, Article 20 of the ICCPR imposes an obligation on states to prohibit only the *advocacy* of national, racial or religious *hatred* that constitutes *incitement to discrimination*, hostility or violence. Although Article 145 references Rwanda's commitments under the ICCPR, it does not reflect the specific legal terminology of that convention accurately, and is consequently over-broad.

Firstly, Article 20 of the ICCPR does not operate as a stand-alone prohibition on discriminatory speech; it only prohibits expression that reaches the threshold of "*advocacy to promote hatred publicly towards the target group*." Discrimination is only provided in Article 20 as an example of expression that may reach this threshold. The threshold is high; Camden Principle 12.1.i describes hatred as a reference "to intense and irrational emotions of opprobrium, enmity and detestation towards the target group." Article 145 is far too broad in this respect, as it prohibits any expression aimed at depriving a person or group of their "rights as provided by Rwandan laws," and is not specifically tailored to the promotion of public hatred. Furthermore, the definition of "rights" in Article 147 conflates discrimination with sectarianism (as defined in Article 146); which Article 20 of the ICCPR does not prohibit.

Secondly, Article 20 of the ICCPR applies only to "*advocacy*", which is distinct from the Draft Penal Code's prohibition on "any speech, writing or actions". The Camden Principles, at principle 12.1.ii, state that advocacy should be understood as requiring an *intention* to promote hatred publicly towards the target group. Article 145 does not indicate a mental component to the offence, as the phrase "*aimed at*" may encompasses expression not intended to promote public hatred.

Thirdly, Camden Principle 12.1.iii provides guidance on the term "incitement"; that it should be interpreted as only including expression that poses an "imminent risk" of discrimination, hostility or violence against persons. Article 145 does not require any causal connection to be shown between the expression and the imminent risk of inciting public hatred, and is therefore illegitimately broad.

For these reasons, Article 145 of the Draft Penal Code is incompatible with Rwanda's obligations under the ICCPR and should be substantially revised to accurately reflect Article 20 of the ICCPR.

Article 146 of the Draft Penal Code concerns the offence of "sectarianism", defined as "the use of any speech, written statement or action that causes conflict and is likely to result, or results in an uprising that may degenerate into strife among people based on discrimination." The concepts of "sectarianism", "conflict", "uprisings" and "strife" are broad and ill defined; they neither have the quality of law nor do they constitute advocacy of public hated that a state is required to prohibit under Article 20 of the ICCPR. Further violating this convention, there is no requirement to show a causal link that the expression poses an imminent risk of discrimination, hostility, or violence

Sentencing provisions for the crimes of discrimination and sectarianism are structured similarly to those for genocide ideology. Article 148 provides default custodial sentences of between two years and five years, with fines between 50,000 RF and 300,000 RF. Further variations are provided depending on the identity of the perpetrator. Article 148 states that current and former government officials and political party officials face increased custodial sentences between three and seven years and fines between 500,000 RF and 2,000,000 RF. Article 149 provides financial penalties of between 5,000,000 RF and 10,000,000 RF for private legal entities and political organisations. Article 150 and Article 151 increase the Article 148 limit on fines to 2,000,000 RF for people who "mastermind" discrimination or sectarianism or engage in "public" discrimination or sectarianism. Article 152, "sowing discrimination", provides exacerbated penalties for persons who "sow" discrimination or sectarianism through education, with custodial sentences of five years to life, and fines between 100,000 RF and 1,000,000 RF.

Article 156 of the Draft Penal Code prohibits political campaigns that use discrimination or sectarianism. Given the ambiguity with which these offences are defined, this provision could easily be used to limit opposition political parties' campaigns. Custodial sentences between ten and twenty-five years are available for the offence, and fines between 500,000 RF and 5,000,000 RF. Article 157 allows any person who won an election which "subsequently appears to have been secured by discriminatory and sectarian practices" to be punished by removal from office and banned from future elections as either a candidate or voter for a duration to be determined by a court.

Article 148 also includes a criminal defamation provision for those who commit slander or public insult by referencing a person on one of the discriminatory grounds identified above. These provisions are superfluous, as they provide lesser penalties than a number of alternative criminal defamation provisions that appear elsewhere in the Draft Penal Code. A person may be incarcerated for between six months and two years and fined between 200,000 to 3,000,000 RF for violating this law, or double that if the offence is "serious".

Article 154 of the Draft Penal Code provides a vague catchall for "other crimes based on genocide ideology, discrimination and sectarianism." This vague provision gives undue discretion to the authorities to extend the scope of the Penal Code. Article 160 seemingly provides conflicting guidance on custodial sentencing for "other crimes," dependent on whether the offence is petty, a misdemeanour or a felony.

Article 162 supplements the sentencing provisions within Section 7 of the Draft Penal Code, further providing that anyone convicted under this section will be deprived of his civil rights, and that any penalties will be made public. Article 158 states a person will be denied all "national" rights if that conviction is for the offence of discrimination, which is potentially broader than the term "civil rights".

National Security and Public Order

As outlined above, the protection of national security and public order is a legitimate ground for restricting freedom of expression where that restriction is prescribed by law, necessary in a democratic society and proportionate. The Draft Penal Code contains many provisions that justify restrictions on expression on the basis of protecting ambiguously framed national security or public order interests. These provisions all fail to comply with the three-part test of Article 19 of the ICCPR and the guidance provided by the *Johannesburg Principles*.[26]

Articles targeted at protecting national security include: Article 420 "propagating false information with intent to create a hostile international opinion against the Rwandan state"; Article 423 "provoking the national military forces [to] defect to the service of a foreign power"; Article 424 "exposing the republic of Rwanda to [the] hostility of a foreign power"; Article 437 "membership in a terrorist organisation"; Article 446 "possession of … writings indicating how chemical weapons are used"; Article 454 "propagating, financing and receiving property resulting from terrorism"; Article 455 "agreements facilitating terrorism"; Article 472 "obstructing the fight against an insurrectionary movement"; Article 485 "undermining the value of the state currency"; Article 486 "crimes against the credit of state currency."

Along a similar theme, the following provisions appear alongside those listed above and appear targeted at preserving public order. Article 463 "inciting insurrection, trouble amongst the population"; Article 468 "individuals caught in a seditious meeting place"; Article 469 "participation in sedition or band meetings"; Article 504 "disrupting deliberations of the national assembly"; Article 505 "penetrating premises of the National Assembly with intention to cause harm" (including by words); Article 506 "disrupting deliberations of the Presidency of Republic or the cabinet meeting"; Article 508 "opposing implementation of public works commissioned by a competent authority"; Article 608 "formation of a gang"; Article 609 "establishing and organising a gang", and Article 610 "contribution to formation of

[26] Ibid, Note 10.

a gang."

These provisions share a number of deficiencies from a freedom of expression perspective. Firstly, none of the Articles listed above meet the requirements of clarity and precision, as their scope is made indeterminable by the vague language employed and the lack of definitions given of key terms. There are numerous threshold questions that law enforcement are given the discretion to determine. What does one have to do to "demoralise the army"; how does one determine the "credibility of the Rwandan currency" and whether someone has undermined it; how does one quantify the hostility of "international opinion"; what does it look like for the population or be "excited" or "alarmed"? The answers to each of these questions raise a multitude of further questions. Additionally, few of provisions outlined above indicate the requisite mental state required for the imposition of liability. ARTICLE 19 believes that to leave these determinations to law enforcement, or even to the judiciary, would lead to arbitrary results that would consequently chill free expression on these issues.

To fit within the rubric of protecting national security or public order, and to meet the requirements of necessity and proportionality under Article 19(3) of the ICCPR, the interests pursued by these provisions must be more narrowly tailored. In their current form, the state would be given the power to control information and expression across an entire spectrum of issues related to security, the military, and even the implementation of public works. The provisions relating to the Rwandan currency potentially restrict all discussion on economic issues. We recall that the HR Committee in General Comment No. 34 states that it is not "generally appropriate to include in the remit of [laws protecting national security] such categories of information as those relating to the commercial sector, banking and scientific progress."[27]

The *Johannesburg Principles* provide authoritative guidance on narrow tailoring for provisions related to national security. Principle 2 states that the genuine purpose and demonstrable effect of a provision must be to protect the country's existence or its territorial integrity against the use or threat of force, or its capacity to respond to the use or threat of force. In violation of these standards, these provisions do not meet this high threshold, instead protecting illegitimate and vague concepts such as the state's "reputation", its generic "integrity", its "safety" and its "stability."

ARTICLE 19 points out that "public order" must be defined in a similarly narrow fashion to "national security". The Draft Penal Code employs vague concepts such as "cause trouble", "excite", "alarm", "stir up" (Article 463); "sedition" (Article 468); "aids and abets in any way whatsoever the formation of a gang" (Article 610), and the "carrying of a flag or other symbols of rally" associated with an insurrectionary movement (Article 472). These fall beneath the threshold of public disorder that would legitimately necessitate restrictions on free expression and free association. From a comparative perspective, the European Court of Human Rights has held that interference with the right to freedom of association was not justified for avoiding the risk of "causing tensions between communities."[28] Instructive guidance can also be found in the decisions of national courts. For example, in the United Kingdom's Public Order Act, at section 5, threatening, abusive or insulting speech is restricted. However, in order to restrict speech, it must be shown that the speech is more than merely offensive or annoying, and that it was intended or likely to cause violence or alarm or distress.[29]

International standards, reflected in the *Johannesburg Principles*, also require that there be a causal link between the prohibited expression and the national security threat that is averted by that prohibition. Principle 6 provides a model three-part test for this purpose, allowing expression to be punished as a threat to national security only if a government can demonstrate that: (a) the expression is intended to incite imminent violence; (b) it is likely to incite such violence; and (c) there is a direct and immediate connection between the expression and the likelihood or occurrence of such violence.

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[27] HR Committee General Comment No. 34, para 30.

[28] *Ouranio Toxo v Greece* (2007) 45 EHRR 277, ECtHR.

[29] *Percy v. DPP* [2002] Crim LR 835, DC.

Provisions that purport to safeguard public order must also demonstrate this causal connection between the prohibited expression and the prevention of public disorder.

Specifically in relation to restrictions on expression that aim to avert terrorist attacks, the four Special Rapporteurs on freedom of expression have provided guidance on the meaning of "incite" that is also centred on causality. Incitement should be understood as a "direct call to engage in terrorism which is directly responsible for increasing the likelihood of a terrorist act occurring, or to actual participation in terrorist acts ... Vague notions such as providing communications support to terrorism or extremism, the "glorification" or "promotion" of terrorism or extremism, and the mere repetition of statements by terrorists, which does not itself constitute incitement, should not be criminalised."[30]

The Draft Penal Code prohibitions concerning national security and public order do not require a showing of this causal link between the expression prohibited and the harm averted. Indeed, the provisions related to terrorism do exactly what the Special Rapporteurs advise against; they equivocally prohibit the promotion of ideology through "propagating terrorism" (Article 454), and the publishing of information relating to various terrorist practices through "possession of … writings indicating how chemical weapons are used" (Article 446). By failing to tolerate subversive speech that falls beneath the threshold of incitement and neglecting to require a causal connection between the prohibited expression and the protective outcome, the provisions fail to meet international standards on freedom of expression.

Penalties must also conform to the requirements of necessity and proportionality. The provisions of the Draft Penal Code outlined above provide for custodial sentences up to life imprisonment in addition to fines up to 5,000,000 RF. Life imprisonment and fines of this magnitude for offenses that do not require a showing of actual harm or threat of harm are certainly excessive and would violate the proportionality requirement in all but the gravest of cases.

With this legislative arsenal, law enforcement authorities could claim the legal authority for censoring any critical commentary contrary to official government policy or innocuous expression that poses no actual threat to national security or public order as narrowly defined.

The Protection of Whistleblowers

In April 2011 ARTICLE 19 provided an analysis of a Draft Law Relating to the Protection of Whistleblowers.[31] Although this draft law has a number of shortcomings, we welcomed it as a good-faith effort by the Rwandan government to enact freestanding legislation on the protection of whistleblowers. We are therefore disappointed to find that the Draft Penal Code contains a number of provisions criminalising the disclosure of secrets that do not indicate any exceptions for the protection of whistleblowers.

The importance of protecting whistleblowers is recognised in international law. Article 33 of the United Nations Convention on Anti-Corruption[32] provides that each state party shall consider incorporating into its domestic legal system measures to protect against the unjustified treatment of persons who report in good faith and on reasonable grounds facts concerning offences established in accordance with the Convention. Rwanda signed the Convention on November 30 2004 and ratified the it on 4 October 2006. In their 2004 Joint Statement, the four Special Rapporteurs on freedom of expression called on governments to provide better protections for those who release "information on violations of the law, on wrongdoing by public bodies, on a serious threat to health, safety or the environment, or on a breach

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[30] Joint Declaration on defamation of religions, and anti-terrorism and anti-extremism legislation; available at http://www.osce.org/fom/35639

[31] For the analysis of the Draft Law Relating to the Protection of Whistleblowers, see: http://www.article19.org/data/files/pdfs/analysis/rwanda-whistleblowers.pdf.

[32] Adopted in General Assembly Resolution 58/4 of 31 October 2003.

of human rights or humanitarian law should be protected against legal, administrative or employment-related sanctions if they act in good faith."[33]

The Draft Penal Code criminalises the disclosure of secrets in two sections. At Article 299, under the heading "crimes against privacy", custodial penalties between one and three years and fines between 500,000 RF and 2,000,000 RF are available for the "breach of secrecy by a custodial thereof." The provision applies to a person who learns "secrets" of any nature through work in the private or public sector. As written, this section appears to apply much more broadly than just personal information received in confidence to all information received by officials and others. Article 300 provides limited exceptions for this rule; allowing an individual to report to the judiciary, medical or administrative authorities any ill treatment inflicted on a minor or person unable to protect them self. Physicians may also release evidence of sexual violence to the judiciary if they have the consent of the victim. It is unclear why only these two narrow scenarios are provided for, while many other public interest reasons for disclosure are not covered.

A number of provisions are geared specifically towards the protection of state secrets, which are defined in Article 417 as "all facts, objects, knowledge, writings, or information which, in the interest of National defence, must not be revealed to a foreign government, institution or any of their employees in the interest of national defence." However, the offences in this section are not confined to protecting the national defence of Rwanda. Article 416 criminalises any disclosure of state secrets that is an "attack on the interests" of the country. Similarly, Article 418 contains seven subparagraphs that each ambiguously outlaw the unauthorised disclosure of state secrets. Examples include prohibitions on "undermining" diplomacy or "essential economic interests". These offences carry sentences ranging from 10 to 20 years imprisonment during peacetime and up to life imprisonment during war. No exceptions are provided for disclosures that are made in good faith and in the public interest.

Protection of Privacy

Several provisions in the Draft Penal Code purport to protect individuals' privacy, including in relation to communications. The concept of privacy is expansive, representing a number of interests that a person may wish to protect. However, a number of these interests are issues between individuals that do not give rise to severe harms that would warrant the intervention of the state through the criminal law; civil remedies such as damages or injunctions are frequently sufficient.

Article 297, states that privacy may be violated by (1) "listening in, recording, publishing or broadcasting any information of another person uttered in privacy, without their consent;" or (2) "taking a picture or record the voice of anyone without their permission." Article 303 essentially replicates this provision for the Internet, criminalising the collection or use of information "concerning an individual" despite his or her opposition. It is unclear why the internet is particularly singled out since the highly personal information that this section is probably intended to protect is more likely to be found in other places such as government databases and records of banks, hospitals and other companies. It would effectively prohibit journalists from gathering public information found on the internet in public spaces.

Essentially, a person can be incarcerated for between two and five years in prison and fined between 200,000 RF and 800,000 RF for the most innocuous infringements of personal privacy and information security. Indeed, the offences appear to apply even when an individual would not have a legitimate expectation of privacy such as non-personal information that is already publicly available. There is no public interest defence to either of these offences to protect violations of privacy where there is an overriding public interest such as the media recording conversations to reveal corruption or political misdeeds in seeking or sharing that information.

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[33] Joint Declaration by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression. December 2004.

Public Morals

Article 224 of the Draft Penal Code targets the production or reproduction of printed works, exhibitions, sales of and distribution of objects that constitute "indecent assault" which is defined in Article 208.

As outlined above, Article 19 of the ICCPR permits restrictions to be imposed on expression to protect public health or morals. However, Article 208 does not comply with the requirement of narrow tailoring, as the concepts of "customs", "morality", "dignity", and "cultural identity" are not adequately defined and no guidance is offered on their interpretation. Premising criminal laws on such fluid concepts allows the executive to exploit their ambiguity to censor dissent or impose its own subjective values system without regard for the diversity of views held in society. The phrasing of Article 208 in conjunction with Article 224 indicates that these provisions may be targeted at artistic expression, which frequently explores the boundaries of concepts of identity, dignity, morality and custom.

Article 224 provides for sentences of between one month and two years imprisonment, and 500,000 RF and 3,000,000 RF in fines. If a person produces or prints any writing, figure, image or reproduces them, he shall be liable to imprisonment for two to five years and a fine between 1,000,000 RF and 5,000,000 RF. These sentences are grossly disproportionate responses to conduct that may simply be innocuous transgressions of social customs and norms.

Access to Reproductive and Sexual Health Information

Article 187 of the Draft Penal Code criminalises the "publicity of means of abortion", placing severe restrictions on women's right to family planning and reproductive health information. The prohibition applies to any individual who "publicises drugs, materials and any other substances believed to induce abortion." The term "materials" potentially includes all forms of information on abortion. The penalties provided are severe, with custodial sentences between six months and two years and fines of 1,000,000 RF to 3,000,000 RF.

ARTICLE 19 believes that women can only make and act upon informed decisions in respect of their reproductive health with accurate information and full access to medical services.[34] Article 187 serves to obstruct women's access to health services by limiting access to information, creating additional obstacles to the social and economic barriers to reproductive and sexual health care that already exist. Article 187 may also be used to suppress information on abortion more generally to stifle debate on reproductive and sexual health issues in the country. These chilling effects are likely to have a detrimental impact on public health in Rwanda.

Article 187 violates Rwanda's international standards on the right to freedom of information. The limitation it imposes on these rights cannot be squared with any legitimate purpose as enumerated by Article 19(3) of the ICCPR. More specifically, Article 187 violates the Convention on the Elimination of Discrimination Against Women, which at Article 10(h) requires States to "take all appropriate measures to … ensure, on a basis of equality of men and women, access to … information and advice on family planning." From a comparative perspective, we note that the European Court of Human Rights has ruled that a state's interference with the right to provide and seek reproductive health information is an unlawful interference with the right to information.[35] Furthermore, the Court outlined reasons why such state action creates a risk to the health of women seeking abortions and pregnancy counselling.

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[34] For further information on ARTICLE 19 policy on the right to information on reproductive and sexual health rights, please see: http://www.article19.org/data/files/pdfs/publications/peru-time-for-change.pdf

[35] *Open Door Counselling and Dublin Well Woman Centre and Others v. Ireland* 29 October 1992, Application No. 14234/88 and 14235/88 (European Court of Human Rights).

Moreover, Article 187 of the Draft Penal Code provides a blanket prohibition on the publication of information on abortion services, even though Articles 185 and 186 of the same law provide various circumstances under which seeking and obtaining an abortion is legal. Article 187 therefore prohibits publication of information relating to lawful activity. These circumstances include when continuing the pregnancy would endanger the woman's health; where the foetus would not survive the pregnancy; or if the pregnancy is a result of rape, traditional practices, forced marriage, or incest. For the effective operation of these liability exemptions, it is critical that women have access to the appropriate information so they ensure that they act legally to protect their own health.

Academic Freedom

Article 400 prohibits a person from undertaking "illegal research … in valuable minerals" and provides for custodial sentences between six months and two years and fines between 1,000,000 RF and 3,000,000 RF.

It is difficult to discern the purpose that Article 400 serves. It may just be a poorly drafted provision intended to prohibit illegal test drilling, mining, and other means of locating valuable minerals. However, its ambiguity could potentially be exploited to suppress any discussion, journalistic or academic investigations into extractive industries. Any attempt by the government to control information surrounding these industries is illegitimate, and has no basis under Article 19 (3) of the ICCPR.

Conclusion

ARTICLE 19 believes that all of the provisions of the Draft Penal Code that we have reviewed in the course of this analysis are irretrievably flawed from a freedom of expression perspective. Freedom of expression is critical to the realisation of all human rights; the regression in standards that would result from the enactment of this law would therefore threaten all human rights, and potentially act as a catalyst for further human rights abuses and conflict in the region.

We remind the Rwandan President of his responsibility to ensure that Rwanda complies with its obligations under international law, and urge him to refuse to sign the Draft Penal Code. Instead, it should be resubmitted to Parliament so that all the provisions indicated in this analysis can be removed and robust protections for the right to freedom of expression and information inserted in their place.