ARTICLE 19

# Rwanda: Penal Code

June 2018

**Legal analysis**

# Executive summary

In June 2018, ARTICLE 19 reviewed the draft Penal Code of Rwanda (Penal Code) as updated following the government commissioned review of the law begun in 2015.

ARTICLE 19 has found that the Penal Code still retains a number of provisions that are extremely broad and vague and can be used to restrict expression. We are also concerned by the creation of offences under the law, as a replacement for other criminal laws, which should instead have been removed from the country's criminal laws.

The Penal Code has a broad and duplicative approach to incitement and discrimination, which covers specific genocide related offences, many of which go beyond the limits of international criminal law. It also lacks clear definitions around incitement provisions, which are further duplicated in ill-defined prohibitions on 'sectarianism.'

The law also contains a number of restrictive provisions related to women's reproductive rights, which in effect deny women access to information on reproductive health issues.

The amended law retains numerous provisions which restrict critical speech in an extremely broad way, and are subject to excessive penalties. Criminal provisions for defamation and insult, which are widely accepted to violate international standards, remain, as do insult provisions for those criticising public officials and heads of state, and sedition offences. These types of provisions are easily abused, and it is disappointing that the government has not sought to address them in this review.

Overall, ARTICLE 19 finds that the amended Penal Code has made limited improvements in its protection of the right to freedom of expression and information. We urge the government to amend the law in order to bring it fully into line with Rwanda's international obligations, and end the use of broad and vague legislation to criminalise legitimate expression.

**Summary of recommendations:**

- The Penal Code should be amended to ensure its jurisdictional limits are in accordance with international law;
- Restrictions on 'direct and indirect incitement to genocide' must be brought into line with international criminal law, by narrowing the provision to 'direct and public incitement to genocide,' as reflected in the jurisprudence of the International Criminal Tribunal for Rwanda;
- The concept of genocide ideology must finally be removed from Rwandan criminal law, as well as crimes of justifying or denying genocide. Not only are the potential goals of these provisions already covered by incitement provisions in the law, which should criminalize hateful speech which meets the threshold of international standards, but positive measures to promote tolerance, justice and understanding in the wake of the atrocities of 1994, would be a much more effective means to tackle issues of discrimination and divisions in society;
- Incitement provisions must be brought into line with Article 20(2) of the ICCPR to ensure all restrictions on speech fully meet international standards, while sectarianism provisions should be removed in their entirety as an unnecessarily broad duplication of discrimination provisions;
- Article 152 which limits access to information on reproductive health and rights should be repealed in its entirety as an unjustifiable restriction on the right of access to information;

- All articles criminalising defamation should be struck in their entirety, and replaced with appropriate civil remedies;
- Provisions protecting religious objects and ceremonies should be repealed entirely, as sufficient protections for incitement to discrimination on religious grounds exist elsewhere;
- Provisions on sharing personal data should be amended to ensure they apply only to specifically defined personal information, and that the harm to dignity or privacy is more clearly defined in the law;
- Offences related to the disclosure of state secrets should be amended to include a defence of public interest, to better protect whistle-blowers. They should also revise broadly worded concepts such as 'intent to hurt the interests' of Rwanda, to bring the provisions into line with international standards;
- Article criminalising the spread of 'false news' should be repealed in their entirety as an excessive restriction on freedom of expression in violation of international standards, which are clearly open to abuse. The Rwandan government should seek other means to counter the spread of disinformation online and offline, including through the support of effective self-regulatory mechanisms for the media;
- The government should repeal all provisions criminalising 'sedition' related offences;
- Article 240 of the penal code should be reformed to exclude references to undefined 'illegal demonstrations,' and to remove the requirement for authorisations on protests. The law should avoid placing blanket restrictions on the locations of protests.

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# Introduction

In June 2018, ARTICLE 19 reviewed the Penal Code of Rwanda (Penal Code), for its compliance with international standards on freedom of expression. The Penal Code was adopted by the Parliament of Rwanda on 28 June 2018 after being tabled in October 2017, and is awaiting ascension by President Paul Kagame.

ARTICLE 19 has a number of concerns with the Penal Code; this analysis does not detail all of ARTICLE 19's concerns; rather, it focuses only on the more important of these concerns and issues relevant to our mandate. We also note that the proposed changes to the Penal Code need to be considered in the broader contexts of restriction of freedom of expression in the country. Under the Presidency of Kagame, discussion of the 1994 genocide is severely restricted, meaning that genuine truth and reconciliation is limited. Media outlets are subject to closures and journalists have routinely been arrested for reporting critically. The silencing of both the media and political opposition is enabled by the existing broad provisions of the Penal Code, which can and are used to target any expression the government doesn't like.

ARTICLE 19 recognises that the horrific atrocities which took place during the 1994 genocide are undoubtedly a core contextual background to the country's approach to tackling discrimination and intolerance, and create a unique and challenging context to tackle issues of 'hate speech' and division. Nonetheless, instead of making genuine efforts to tackle these issues, the government has used excessively broad and repressive criminal laws to silence genuine discussion of the genocide, which, instead of targeting discrimination, is likely to silence victims of the genocide and discrimination. Instead of seeking to build stability and an open democracy through the embedding of human rights standards in the country's laws and policies, the government has reverted to silencing criticism and violating the right to free speech.

ARTICLE 19 has previously conducted reviews of both the former Penal Code and the Genocide Ideology Law, which the latest draft replaces. In October 2013, the Parliament adopted a revised version of the Genocide Ideology Law, which while making some amendments to bring it closer to international standards, retained its worryingly extensive restrictions on freedom of expression. ARTICLE 19 is concerned that sections of the latest version of the Penal Code continue to criminalise the vaguely defined concept of Genocide Ideology and violate international standards on freedom of expression, as well as restricting genuine debate on the country's past.

In ARTICLE 19's analysis of the former Penal Code, we found that the legislation was marked by broad and vaguely defined provisions that enabled abuse to silence critical and dissenting voices. The latest version of the Penal Code, despite seeking to consolidate the criminal legal framework, has retained numerous broad and vague provisions, which both duplicate existing provisions in their purpose and extend well beyond the scope of legitimate restrictions on expression under international standards Rwanda is bound by.

We strongly urge the President not to sign the law in its current form, as it violates Rwanda's international human rights obligations and will serve to restrict the space for important public debate. We recommend that the Rwandan government reviews the text of Penal Code and brings it into full compliant with international human rights standards. We stand ready to assist the government in this process.

# Applicable international standards

ARTICLE 19's comments on the Penal Code are informed by international human rights law and standards. The Penal Code should also comply with the guarantees of freedom of expression in the Rwanda Constitution.[1]

## The protection of freedom of expression under international law

The right to freedom of expression is protected by a number of international human rights instruments, in particular Article 19 of the **Universal Declaration of Human Rights (UDHR)**[2] and Article 19 of the **International Covenant on Civil and Political Rights (ICCPR)**[3] as well as in Article 9 of the African Charter on Human and Peoples' Rights.[4] Additional guarantees to freedom of expression are provided in the 2002 Declaration of Principles on Freedom of Expression in Africa (African Declaration).[5]

Importantly, **General Comment No 34**[6] explicitly recognises that Article 19 of the ICCPR protects all forms of expression and the means of their dissemination, including all forms of electronic and Internet-based modes of expression.[7] State parties to the ICCPR are also required to consider the extent to which developments in information technology, such as Internet and mobile-based electronic information dissemination systems, have dramatically changed communication practices around the world.[8] The legal framework regulating the mass media should take into account the differences between the print and broadcast media and the Internet, while also noting the ways in which media converge.[9]

## Limitations on the right to freedom of expression

Under international standards, restrictions on the right to freedom of expression must meet the conditions of the so-called "three-part test" which mandates that restrictions must be:

- **Provided for by law**: any law or regulation must be formulated with sufficient precision to enable individuals to regulate their conduct accordingly.
- **In pursuit of a legitimate aim**, which are listed exhaustively as: respect of the rights or reputations of others, or the protection of national security or of public order (*ordre public*), or of public health or morals.

[1] Article 38 of the 2003 Constitution of Rwanda guarantees freedom of expression and freedom of access to information where it does 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.
[2] UN General Assembly Resolution 217A(III), adopted 10 December 1948.
[3] GA Resolution 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 52, UN Doc.
[4] CAB/LEG/67/3 rev. 5 I.L.M. 58 (1982).
[5] Adopted at the 32nd Session of the African Commission on Human and Peoples' Rights, 17-23 October 2002, Article II.
[6] Human Rights Committee (HR Committee), General Comment no. 34, Article 19, Freedoms of opinion and expression, 12 September 2011, CCPR/C/GC/34
[7] *Ibid*, para 12.
[8] *Ibid*, para.17.
[9] *Ibid*, para. 39.

- **Necessary and proportionate in a democratic society**: i.e. if a less intrusive measure is capable of achieving the same purpose as a more restrictive one, the least restrictive measure must be applied.[10]

The same principles apply to electronic forms of communication or expression disseminated over the Internet.[11]

Additionally, Article 20 of the ICCPR sets out a number of specific types of expression which must be prohibited under the Covenant, namely 'propaganda for war' and 'any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.' While states are obliged to prohibit this type of expression under the law, restrictions must still be limited to ensure broad restrictions on expression are avoided. At the international level, the Rabat Plan of Action provides guidance on what constitutes incitement under Article 20(2) of the ICCPR.[12]

The Rabat Plan of Action states that prohibitions on incitement (as mandated by Article 20{2) of the ICCPR) must be focused on advocacy of discriminatory hatred targeting a protected group, with characteristics of a protected group to be interpreted on a broad basis, including such characteristics as sex, sexuality, gender identity, political belief or ethnic origin. It sets out that the speaker's intention or capability of inciting action by the audience against the target group must be considered.

In order to determine this, the Rabat Plan of Action sets out a six factors to consider:

- **Context**: considering the social, political or economic context of the speech, particularly any history of conflict or persecution of the protected group.
- **Identity of the speaker**: the position of authority or influence the speaker holds, such as whether they are a public official or religious leader.
- **Intent**: whether the speaker intended to engage in advocacy to discriminatory hatred, namely whether they intended to target a protected group on the basis of their protected characteristics, and whether they knew that their expression would likely incite the audience to discrimination, hostility or violence.
- **Content of the expression**: what was said, including consideration of the form and style of the expression and what the audience understood from this.
- **Extent and magnitude of the expression**: the public nature of the expression and the means of it, as well as its intensity or magnitude in terms of its frequency or amount.
- **Likelihood of harm occurring, including its imminence**: there should be a reasonable probability of discrimination, hostility or violence occurring as a direct result of the expression.

Other forms of 'hate speech' or discriminatory expression that does not meet the threshold of Article 20(2) according to these criteria may still be prohibited, however any such prohibition must pass the three-part test to conform to international standards on freedom of expression.

Additionally, Article 3(c) of the Genocide Convention[13] includes a specific expression offence, setting out 'direct and public incitement to genocide' as a punishable offence, for public officials, constitutional rulers or private individuals.[14] The role that discriminatory inciting

[10] HR Committee, *Velichkin v. Belarus*, Communication No. 1022/2001, UN Doc. CCPR/C/85/D/1022/2001 (2005).
[11] General Comment 34, *op.cit.*, para. 43.
[12] See UN Rabat Plan of Action (2012). In particular, it clarifies that regard should be had to six part test in assessing whether speech should be criminalised by states as incitement.
[13] UN Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, United Nations Treaty Series, vol. 78, p. 277
[14] Article 25(3)(e) of the Rome Statute of the International Criminal Court (UN General Assembly, Rome Statute of the International Criminal Court, 17 July 1998, ISBN No. 92-9227-227-6) likewise criminalises 'direct and public

expression, through media and other forms, can play in catalysing or fuelling genocide has long been acknowledged. This has been seen *inter alia*, in the *Nahimana* case at the International Criminal Tribunal for Rwanda (ICTR), which saw three media owners convicted of direct and public incitement to genocide during the 1994 Rwandan genocide, for the role they played in inciting violence against Tutsi people through media outlets.[15] The same offence of direct and public incitement to genocide was included in the statute establishing the ICTR in 1994[16] following the April – June 1994 genocide in Rwanda. A significant amount of modern international law on the crime of genocide was established or developed through the tribunal.

incitement' to commit genocide, however Rwanda is not a party to the Rome Statute and is thus not subject to the jurisdiction of the court without a UN Security Council referral.

[15] ICTR, *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.

[16] UN Security Council, Statute of the International Criminal Tribunal for Rwanda (as last amended on 13 October 2006), 8 November 1994, article 3(c).

# Analysis of the Penal Code

The Penal Code contains 361 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 text according to how these themes are engaged. The structure of the analysis does not necessarily reflect the structure of the legislation.

## Extra-territorial application

ARTICLE 19 notes that the Penal Code has an extensive extra-territorial application under Article 11, applying to any Rwandan national who commits an offence under the law outside of the country. This extensive extra-territorial reach not only raises issues under customary international law regarding jurisdiction, but it goes against international standards on freedom of expression, by applying provisions within the law which restrict this right to any Rwandan regardless of their location.

Likewise, Article 12 applies jurisdiction to any crime committed "against the interests of Rwanda" by a Rwandan or a foreigner regardless of whether the offence was committed in the country. Once again this extra-territorial application is unjustified under international law, but equally the vague and undefined term "against the interests" of Rwanda enables broad interpretation which could cover a range of legitimate expression online and offline.

**Recommendations:**

- Article 11 should be amended to reflect application of the law only within Rwandan jurisdiction;
- Article 12 should be removed in its entirety to avoid broad restrictions on expression.

## Genocide incitement and genocide ideology

ARTICLE 19 has previously expressed concern about legal provisions in the Rwandan Penal Code related to so-called 'genocide ideology' and incitement. We acknowledge the historical context of these provisions, in particular the responsibility of some media in propagating the 1994 genocide. However, we found that the extraordinarily broad concept of "genocide ideology" could encapsulate all manner of genocide related expression in a way that violates international law.[17] 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.

Under the latest draft of the Penal Code, while there have been improvements in narrowing the definition of genocide ideology, there remain serious flaws in the crimes set out under this section.

[17] For example, the HR Committee has also stated that "laws that penalize the expression of opinions about historical facts are incompatible with the obligations that the Covenant imposes on States parties in relation to the respect for freedom of opinion and expression. The Covenant does not permit general prohibition of expressions of an erroneous opinion or an incorrect interpretation of past events;" General Comment 34, *op.cit.*

***Incitement to genocide***

Article 94 of the Penal Code sets out the definition of the crime of genocide. The definition reflects that set out in the Genocide Convention, as well as under the Rome Statute.

However, under Article 96, the Penal Code deviates from international provisions, criminalising "direct and indirect incitement to genocide." This is much broader than provisions of the Genocide Convention and the statute establishing the ICTR. We note that the ICTR stated in the Appeals Judgement in *Nahimana*[18] that incitement under the law "*has to be more than a mere vague or indirect suggestion."* While the ICTR Chamber noted that direct and public incitement to commit genocide is often preceded or accompanied by 'hate speech,' it stated that the incitement crime went further than that, and must include a direct call to commit an act of genocide, as well as the requisite intent.[19] In upholding the view of the Trials Chamber, the ICTR Appeals Chamber also held that the specific context is a factor to consider in deciding whether expression constitutes direct incitement to commit genocide.[20]

While the role of some media outlets in incitement to genocide is clearly set out in the history of the country and the jurisprudence of the ICTR, the breadth of provision criminalising 'indirect' incitement goes much further than international standards allow and represents a worrying restriction on free speech, which could be used to criminalise discussion about the country's history.

Given that the ICTR has held that even euphemistic speech which has the requisite intent and direct connection to the acts incited can be considered within the scope of 'direct and public incitement,'[21] international standards are clearly able to apply even where statements may not be overly simplistic and explicit. The addition of 'indirect' therefore creates an unnecessarily broad addition to the existing international law on the issue, which already allows for an understanding of context and euphemism, and has been used to successfully prosecute those whose expression directly contributed to the atrocities in 1994.

The lack of the term 'public' in Article 96 of the Penal Code is also problematic. As the ICTR noted in *Kalimanzira*, the Travaux Preparatoires of the Genocide Convention show that private incitement was specifically removed from incitement provisions, which instead clearly set out the crime of incitement as pertaining specifically to mass communications, such as public speeches and expression communicated through the media.[22] Other private expression that might directly contribute to the commission of genocide is already covered by provisions of international criminal law reflected in the Penal Code on preparatory acts. Beyond this the provision's breadth will only serve to produce a chilling effect, stifling legitimate discussion and debate between individuals.

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[18] *Op.cit.*

[19] *Nahimana*, *op.cit.,* para 677, 692.

[20] *Ibid*., paras 698-715.

[21] *The Prosecutor v. Jean-Paul Akayesu (Trial Judgement)*, ICTR-96-4-T, International Criminal Tribunal for Rwanda (ICTR), 2 September 1998, paras 146 – 153, 671(iv). In this case, the ICTR held that, as it was clear to the speaker and the audience how the terms would be intended to be understood, terms such as Inkotanyi and Inyenzi could be understood in the context to refer to the Tutsi, and thus this speech could be considered direct and public incitement. See also *The Prosecutor v. Georges Ruggiu (Judgement and Sentence)*, ICTR-97-32-I, International Criminal Tribunal for Rwanda (ICTR), 1 June 2000, para 44.

[22] *Calixte Kalimanzara v The Prosecutor (Appeals Judgement*), ICTR-05-88-A, International Criminal Tribunal for Rwanda (ICTR), 20 October 2010, para 158. The Appeals Chamber also noted that: 'the definition adopted by the Sixth Committee resembled that originally proposed by the Secretariat of the UN (which was altered for some time to include private incitement to genocide, until this alteration was struck by the Sixth Committee). The proposal of the Secretariat differentiated acts such as instructions from officials to subordinates or heads of organizations to members from "direct public incitement." These acts were considered as "preparatory acts" and covered by other sections of the convention.'

***Genocide ideology***

Article 109 of the Penal Code sets out the definition of the crime of 'genocide ideology,' which carries the punishment of up to 10 years imprisonment.

The crime has existed on the statute books for some time, under the Genocide Ideology Law. We note that ARTICLE 19 has previously analysed the law, and has long advocated for its removal as a tool to suppress dissent and discussion of the country's past.[23] The Penal Code repeals the current Law and replaced it with the Article 109.

The Penal Code also sets out crimes for denying, justifying or minimizing the 1994 genocide against the Tutsi specifically under Articles 110 – 112.

ARTICLE 19 has previously noted that the idea of genocide ideology in Rwanda finds its legal basis in a number of provisions of the Rwandan Constitution, including Article 9 which commits the state to the promotion and enforcement of "*fighting the ideology of genocide and all its manifestations*," whilst not defining the scope of that term. In the current Genocide Ideology Law, it was stated that the law was intended to prevent the possibility of genocide recurring in the country, but provisions on the issue have been so broad and vague as to leave the law open to abuse, and used to stifle debate and silence opposition.

The crimes of genocide ideology in the Penal Code fail to meet international standards for the following reasons:

- The provisions criminalise expression 'that may show discriminatory ideologies, and includes the intent to advocate for genocide.' This is much less precise than the international crime of "direct and public incitement to genocide," which is already covered in the Penal Code, so it presents an unnecessary additional restriction on free expression, which is much less clearly drawn, and which could be used to criminalise a broad range of speech. Whereas international law, and to some extent Article 96 of the Penal Code, criminalise incitement to commit genocide, this provision covers all discriminatory speech which is meant to support genocide. International criminal law only allows for the criminalisation of speech that is directly intended to incite others to commission of this crime – criminalising support of the crime or positive endorsement of it sets a much lower threshold for criminalising speech.

- This type of expression could otherwise be justified under Article 20 of the ICCPR, which states it is permissible to restrict advocacy of hatred on national, racial or religious grounds that constitutes incitement to hostility, violence or discrimination. However, the provision on genocide ideology lacks any requirement for the expression to intend to incite actions in the audience to these outcomes. Criminalising expression that may show discriminatory ideologies, and includes the intent to advocate for genocide, fails to meet the standards required to justify limits on expression. The lack of clarity in defining 'support for genocide,' enabling it to potentially be used to target a range of expression, also means the provision fails the requirement of legality under the international law.

- ARTICLE 19 also notes that if the intention of the law is to ensure tolerance and defend against incitement to violence and discrimination, it should be noted that these aims are met elsewhere in the law in provisions criminalising incitement to discrimination, and incitement to genocide. We also note that all such laws must be accompanied by positive measures to promote tolerance, which is a preferable approach to a proliferation of broad legal provisions on the issue under the Penal Code. [24]

[23] ARTICLE 19, Comment on the Law Relating to the Punishment of the Crime of Genocide Ideology of Rwanda, September 2009.
[24] *C.f.* ARTICLE 19, Camden Principles on freedom of expression and equality, April 2009, Principle 12.2.

The provisions in the section of the Penal covering genocide ideology, like their predecessors in the Genocide Ideology Law, present an extremely broad and vague set of restrictions, with excessive prison sentences attached. The provisions clearly fail to meet the standards set by international law for legitimate restrictions on freedom of expression

**Recommendations:**

- Article 96 of the Penal Code should be amended to bring it into line with international criminal law, by narrowing the provision to 'direct and public incitement to genocide;'
- Articles 109 – 112 (relating to the concept of genocide ideology, or justification or denial of genocide) should be struck in their entirety. The incitement provisions of the Penal Code, combined with positive measures to promote tolerance, justice and understanding in the wake of the atrocities of 1994, would meet the goals of these provisions without presenting an unacceptable limit on rights.

## Incitement to discrimination and sectarianism

***Incitement to discrimination***

Article 119 of the Penal Code penalises discrimination as any act likely to prejudice or distinguish a person or group of persons on the basis of a defined list of characteristics. Further, Article 119(3) of the Criminal Code prohibits any act inciting another person to deprive a person or group of their rights on these bases.

These provisions do not meet international freedom of expression standards. As noted above, Article 20(2) 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. Article 20(2) of the ICCPR does not operate as a stand-alone prohibition on discrimination or 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(2) as an example of expression that may reach this threshold.

Provisions of Article 119 are broader than international standards require. ARTICLE 19 highlights in particular the following issues:

- The inclusion of acts which are 'likely' to have a discriminatory effect, but don't require specific intent or for this and don't necessarily have to lead to this result, could present an overly broad limit on expression, particularly if not supported by positive measures to encourage tolerance and educate the population on issues of discrimination. Acts of discrimination must be defined clearly and meet the three-part test in order to justify criminalisation.

- International standards require specific intent to incite others to discrimination, hostility or violence. Article 119 fails to require the incitement to discrimination to be intentional, and does not narrow what acts may constitute incitement. It therefore relies heavily on whether the target or audience is incited by the act, regardless of intention. Focusing on the reaction of the audience in this way makes the prohibition extremely vague in its scope.

The protected characteristics set out under Article 119, while appearing expansive, are limited and less expansive than those set out in the Rabat Plan of Action, which gives clear recommendations to states in assessing Article 20(2) prohibitions. The current list excludes sexuality and gender identity as protected characteristics in particular.

***Sectarianism***

Article 120 of the Penal Code prohibits the crime of "sectarianism" which is defined broadly as "any use of speech, writings, or any other act that divides people and which may spark conflicts or which may cause strife among the people based on discrimination." ARTICLE 19 notes that this provision not only appears to offer a duplication of the provisions in Article 119(3), but it is far too broad and vague to pass the three-part test.

As noted above, any restriction of freedom of expression on the basis of violence, hostility or discrimination must be strictly limited to specific *advocacy* of hatred that constitutes incitement. Article 120, while clearly targeted at certain forms of expression, appears to apply to an extremely broad range of actions which do not even have to have an imminent likelihood or intention to cause discrimination or violence. It refers to acts that *do* divide people, but also those that *may* spark conflict or cause strife, without requiring any imminent risk, intention, or even likelihood that the acts have that result. Such a provision is once again subjective in what those applying it deem to be a possible outcome of the action targeted, and extremely broad and vague, failing to define what concepts such as 'strife among the people' might mean. It therefore fails the three-part test for restrictions on free expression due to insufficient clarity. It is also difficult to see how the provision could pass the test of necessity or proportionality, particularly when Article 119(3) appears to be a more clearly set out provision sanctioning the same behaviour.

**Recommendations:**

- Article 119 should be reformed to bring it into line with international standards on incitement as set out in Article 20(2), including by requiring specific intention to incite discrimination, and broadening the list of protected characteristics in line with the recommendations of the Rabat Plan of Action to protect the right to equality. Discriminatory acts should be defined more clearly in the provision to avoid broad interpretation which could result in censorship.
- Article 120 should be repealed in its entirety, as an unacceptably broad and vague restriction on freedom of expression, the only acceptable aim of which is already covered by Article 119(3).

## Stigmatizing a sick person

Article 164 sets a prison sentence of up to 6 months and a fine for anyone who "stigmatises a sick person."

ARTICLE assumes that these provisions are intended to provide protection to persons with disabilities. However, we observe that although under international standards states are required to prohibit certain types of expression (under Article 20(2) of the ICCPR) and may prohibit certain speech (e.g. in order to protect the rights of others under Article 19(3) of the ICCPR), a broad range of expression that is concerning in terms of intolerance and discrimination should be protected from restriction under Article 19(3) of the ICCPR. ARTICLE 19 notes that this provision lacks sufficient clarity in what 'stigmatising' could encompass. The provisions also do not require the audience of the expression to be incited towards committing a harmful act against a "sick person" as outlined in Article 20(2) of the ICCPR. It also fails the test of necessity, as existing discrimination provisions cover acts distinguishing or disadvantaging people with disabilities, and other characteristics, which would incorporate illnesses not deemed 'disabilities' under the law. Other acts which could be covered by the law which resemble defamation provisions should not be addressed in the criminal law (see below).

**Recommendations:**

- Article 164 should be repealed in its entirety as an unnecessary duplication of discrimination provisions.

## Abortion

The Penal Code includes a series of provisions criminalising abortions, including the 'advertising' of means of abortion under Article 152.

ARTICLE 19 notes that under 10(h) of the Convention on the Elimination of Discrimination Against Women (CEDAW)[25] states parties must guarantee access to "specific educational information to help to ensure the health and well-being of families, including information and advice on family planning." Further, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) sets out the rights of women to education on family planning and access to information on healthcare.[26]

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. [27] Article 152 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 healthcare that already exist. Article 152 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.

**Recommendations:**

- Article 152 should be repealed in its entirety as an unjustifiable restriction on the right of access to information.

## Defamation and insult

The Penal Code contains various provisions criminalising defamation and insult of a range of public officials, other individuals, and religious ceremonies. The punishment for these ranges from 15 days to seven years, as well as significant fines. The punishments are higher dependent on the subject of the defamation.

### *Criminal defamation*

Article 169 contains provisions on criminal defamation. ARTICLE 19 notes that criminal defamation provisions are widely acknowledged to present an unacceptable restriction of freedom of expression, and have a serious chilling effect, particularly on journalistic expression. For example:

- The UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression (Special Rapporteur on FOE) has called for criminal defamation laws to be replaced by civil remedies28 due to the threat they pose to freedom of expression,

[25] UN General Assembly, *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, UN Treaty Series, vol. 1249, p. 13. Rwanda ratified the CEDAW in 1981.
[26] African Union, Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (Maputo Protocol), 11 July 2003, Article 14. Rwanda ratified the protocol in 2004.
[27] For further information on ARTICLE 19 policy on the right to information on reproductive and sexual health rights, see, e.g. Time for Change: Promoting and Protecting Access to Information and Reproductive and Sexual Health Rights in Peru, January 2006.
[28] Report by the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, submitted in accordance with Commission resolution 1999/36, E/CN.4/2000/63, 18 January 2000:

- The Human Rights Committee has called for the repeal of criminal defamation laws. It has stated that imprisonment is never a proportionate punishment for defamation under the ICCPR, and that any criminal penalties at all are only a proportionate restriction in extreme cases. Even where criminal provisions exist, the Committee noted that public interest must be recognised as a defence for such charges in order for them to be considered legitimate. The Committee also specifically called on Rwanda to decriminalise defamation in its Concluding Observations to the country's 2016 review.[29]

- The Africa Commission on Human and People's rights, in its Declaration on Freedom of Expression in Africa, stated that "sanctions to protect reputations shall never be so severe as to inhibit the right to freedom of expression" – again highlighting that the protection of reputation as a public interest goal cannot justify serious criminal sanctions such as imprisonment.

- The African Court on Human and People's Rights has held in *Konaté v Burkina Faso* that imprisonment for criminal defamation violates the right to freedom of expression in the Charter, and stated that criminal defamation convictions violate this right except in "serious and very exceptional circumstances."[30]

- There is both an international and regional trend towards the decriminalisation of defamation as a requirement for the protection of free expression – most recently recognised in the region by the decision of the Kenyan High Court to strike down the country's criminal defamation laws as unconstitutional. The African Commission on Human and People's Rights in 2010 adopted Resolution 169 on Repealing Criminal Defamation Laws in Africa, setting a clear projection for free expression standards in the region, explicitly noting the damaging effect of such laws on media freedom.[31]

The provisions of Article 169 of the Penal Code should be, therefore, abolished.

***Insult***

Article 170 of the Penal Code criminalises insult. ARTICLE 19 notes that concepts such as insult and humiliation are inherently subjective and difficult to define in law, and likewise difficult to defend against in a criminal trial. The Penal Code fails to provide any clear definition of these terms, which leaves them open to broad interpretation and abuse. Equally, provisions restricting such ideas fail to fulfil the legitimate purpose of protecting reputation, instead protecting feelings, and thus are not an acceptable restriction on freedom of expression.

***Insult or defamation of public officials***

Several of the provisions of Articles 226, 254, 257 and 260 are relating to both insult and defamation relate to specific targets, including the head of state and foreign heads of state.

ARTICLE 19 notes that under international and regional standards, including the ACHPR's Declaration on Freedom of Expression in Africa, public officials must withstand a higher degree of criticism than others, reflecting a similarly acknowledged standard from the Human Rights

"criminal defamation laws represent a potentially serious threat to freedom of expression because of the very sanctions that often accompany conviction."

[29] General Comment 34, Op. cit.; UN Human Rights Committee, Concluding observations on the 4th periodic report of Rwanda, CCPR/C/RWA/CO/4, 2 May 2016, para 44.

[30] *Lohé Issa Konaté v. The Republic of Burkina Faso*, App no 004/2013, African Court on Human and Peoples Rights, 5 December 2014.

[31] ACHPR/Res.169 (XLV111)10*: Repealing Criminal Defamation Laws in Africa*

Committee.[32] This standard has also been reflected by the African Court, and a number of other regional courts.[33] The human rights committee has also stated that laws should not provide for more severe penalties solely on the basis of the identity of the person that may have been impugned.[34]

However, in the Penal Code the offences protecting high level public officials are instead stronger than those protecting the public under the law – protecting them not just from insult and defamation, but also from humiliation. These provisions clearly violate international standards. ARTICLE is also concerned that they would enable the Government to target dissenting or critical voices, particularly those criticising the political establishment or seeking to expose high level corruption, and represent an excessive restriction on freedom of expression which effects democratic accountability.

**Recommendations:**

- Articles 169 and 170, as well as Articles 226, 254, 257, 260, should be stricken out in their entirety. Criminal defamation provisions should be replaced with appropriate civil remedies, which fully comply with international freedom of expression standards.

## Protecting religious ceremonies from defamation

Article 162 of the Penal Code sets out protections from public defamation for religious ceremonies, symbols, and religious objects.

ARTICLE 19 notes that under international law, there is no right of abstract entities or objects such as religions, religious ceremonies, or religious objects, to be protected from offence, criticism or insult. Reputational rights in their limited form only attach to individuals, so offences such as Article 162 fail to meet a legitimate aim under international law.

Like blasphemy laws, this provision is in violations of free expression standards, and the Human Rights Committee has acknowledged this:

> Prohibitions of displays of lack of respect for a religion or other belief system, including blasphemy laws, are incompatible with the Covenant, except in the specific circumstances envisaged in article 20, paragraph 2, of the Covenant.[35]

The special mandates on freedom of opinion and expression have also explicitly stated that the concept of defamation of religions is not in line with international human rights standards on freedom of expression in a Joint Declaration.[36] The UN Special Rapporteur on freedom of religion or belief has likewise concluded that

> The right to freedom of religion or belief, as enshrined in relevant international legal standards, does not include the right to have a religion or belief that is free from criticism or ridicule, [and the right to freedom of religion] protects primarily the individual and, to some extent, the collective rights of the community concerned but it does not protect religions or beliefs *per se*. [37]

[32] General Comment 34, *op. cit.*, para 38.
[33] *Konaté*, *Op. cit.*, para 155; European Court *Lingens v. Austria,* App. No. 9815/82, 8 July 1986, para 42.
[34] General Comment 34, *op. cit.*, para 38.
[35] General Comment 34, *op. cit.*, para 48
[36] Joint Declaration on Defamation of Religions, and Anti-Terrorism and Anti-Extremism Legislation, International Special procedures on freedom of expression, 15 December 2008.
[37] UN Human Rights Council, Report of the Special Rapporteur on Freedom of Religion or Belief, Asma Jahangir, and the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related

**Recommendations:**

- Provisions protecting religious objects and ceremonies (Article 162) should be repealed entirely, as sufficient protections for incitement to discrimination on religious grounds exist elsewhere. The state should make positive efforts to promote religious tolerance in place of criminal sanctions.

## Privacy

Under Article 164, the Penal Code criminalises the malicious infringement of personal privacy by "secretly listening or disclosing to the public people's confidential statements without consent" or "taking a photo or audio-visual recording without one's permission." The offence also covers the distribution 'in any way whatsoever, [of] a photo, audio and video, recordings or documents' with intention to commit an offense, as a result of the above.

The Penal Code also criminalises collection of personal information in computers or other specialised equipment in a manner that is likely to adversely affect an individual's "dignity or privacy" under Article 168. The crime is punishable by six months to one year imprisonment or a fine.

ARTICLE 19 notes that the right to privacy, as set out in Article 17 of the ICCPR, and the right to freedom of expression are mutually reinforcing rights. Privacy violations, including arbitrary data retention or surveillance, have a chilling effect on freedom of expression. As highlighted in Global Principles on Protection of Freedom of Expression and Privacy:

> Laws protecting individuals from substantial harm, including but not limited to harassment, threats of violence, the malicious disclosure or distribution of private sexual content (including photographs or films), or malicious disclosure of sensitive personal information or personal information other than a person's name or other identifier without consent can constitute a legitimate restriction on the right to freedom of expression provided that they are narrowly drawn, contain sufficient defences for the protection of freedom of expression and do not impose disproportionate sanctions.[38]

We note that Articles 164 and 168 however fail to abide by these standards. Article 164 does not include any requirements that the information being shared is necessarily 'private,' and it lacks any public interest defences. Such a provision could easily be used to target investigative journalists exposing corruption or other wrongdoing by public officials for example, or photojournalists covering police crackdowns on protests. The provision is also potentially broad enough to encompass those sharing these types of reporting online, for example. Article 164 is therefore far too broad to be considered a legitimate restriction on free expression in pursuit of protecting privacy.

Article 168's reference to the protection of 'dignity' sets a particularly vague basis for punishment. Dignity is not defined in the law, and is an unclear legal concept on which to base criminal sanctions, which does not necessarily only refer to substantial harm as noted in the Privacy Principles. Likewise, the provision fails to define what it includes in 'personal information,' which must exclude information that is publicly available according to

Intolerance, Doudou Diène, further to Human Rights Council Decision 1/107 on Incitement to Racial and Religious Hatred and the Promotion of Tolerance, 20 September 2006, A/HRC/2/3, para 36.

[38] ARTICLE 19, Global Principles on Freedom of Expression and Privacy, 2017. The Principles – developed in cooperation with high-level experts from around the world – aim to guide policy makers, legislators, the judiciary and civil society on how to ensure that the rights to freedom of expression and privacy are protected and where the balance should lie when they are in conflict, both online and offline.

international standards. The law also fails to include a public interest defence in the provision, where the collection of such information could be part of a journalistic investigation, for example.

**Recommendations**

- Provisions of Articles 164, 168, 171 should be amended to ensure they apply only to specifically defined personal information, and that the harm to dignity or privacy is more clearly defined in the law. Provisions should ensure public interest defences are available, and we recommend the sanctions for such crimes be revised to be more proportionate to the harm caused.

## Whistle-blower protections

ARTICLE 19 believes that whistle-blowing is an essential element of freedom of expression and right to information. A growing number of international instruments recognise the importance of whistle-blowers and require or encourage states to adopt measures to protect disclosure. notes that the protection of whistle-blowers is recognised under international law. These include the UN Convention Against Corruption (UN CAC), which Rwanda ratified in 2006.[39] The importance of protecting whistle-blowers through public interest defences for the disclosure of information has also been set out by the UN Special Rapporteur on freedom of expression.[40]

Article 199 of the Penal Code contains several provisions criminalising the disclosure, intention to disclose or sharing of State secrets. State secrets are defined as 'any act or all acts, knowledge, any documents, where they may be, or any explanations prohibited by the law for purposes of defending the nation.' The offences carry prison sentences of 10 – 15 years in peace time and 20 – 25 years in wartime.

ARTICLE 19 notes that the Penal Code provides no public interest defence under these provisions. While a defence is available for those committing the acts set out in the provision 'due to negligence, recklessness or inattention,' the sanctions remain high even in spite of this, and those disclosing secret information in the public interest, whether related to corruption or human rights violations, remain subject to extremely heavy penalties.

Article 199(1) does require an intent to 'hurt the interests of the republic of Rwanda,' however this is not defined and is sufficiently broad to enable it to be applied to a broad range of disclosures, including those in the public interest.

**Recommendations**

- Article 199 should be amended to include a defence of public interest, to better protect whistle-blowers. The provision should also revise broadly worded concepts such as 'intent to hurt the interests' of Rwanda, to bring it into line with international standards.

## False news

Article 201 of the Penal Code criminalises the spreading of 'false information or harmful propaganda to cause a hostile international opinion against Rwandan Government.' A similar provision under Article 228 criminalises the spread of false allegations aimed at devaluing the national currency.

[39] UN General Assembly, UN Convention Against Corruption, 31 October 2003, A/58/422,
[40] Report of the Special Rapporteur on FOE, A/70/361, 8 September 2015.

ARTICLE 19 note with concern that false information provisions (also commonly referred to as 'fake news') are used around the world as a means to suppress dissenting or critical opinions, as they enable the government to become the ultimate arbiter of 'truth.' This provision of the Penal Code is similarly vague, with no clarification on how falsehood would be determined, or what 'harmful propaganda' would encompass. Such provisions are subjective and easily vulnerable to abuse by governments, and can be use in particular to target journalists reporting on critical or controversial issues.

The provision covers 'false information' which either intentionally or unintentionally will cause 'public disaffection' and hostility to the government. By criminalising false information that 'is likely' to have this effect, the provision is made even broader. Not only is 'public disaffection' an extremely vague and undefined term, this means the provision covers any information deemed false by the government which the government also deems may cause disaffection. The provision clearly fails the three part test in its ambiguity, and is likely to have a chilling effect on media reporting, particularly given the extreme severity of the punishment, set at a minimum of seven years imprisonment and maximum of 10 years in peace time, and life imprisonment in war time.

**Recommendations**

- Articles 201 and 228 of the Penal Code should be repealed in their entirety as an excessive restriction on freedom of expression in violation of international standards, which are clearly open to abuse. The Rwandan government should seek other means to counter the spread of disinformation online and offline, including through the support of effective self-regulatory mechanisms for the media.

## Seditious offences

Article 210 criminalises offences against the government or president, but is in parts so broad that it presents a threat to freedom of expression. It sanctions "any act against the President of the Republic with intent to harm the established Government or overthrowing it."

ARTICLE 19 notes that by failing to offer any clarity on what is included in such acts, or what constitutes 'harm' to the government, the provision fails the first part of the three-part test. Its breadth and ambiguity could enable it to be used to target journalistic reporting, political speech, and a range of other expression protected by international human rights law. The provision reflects 'sedition' provisions which have been widely used around the world to stifle dissent, and which, in 2012, the African Commission Special Rapporteur on freedom of expression Pansy Tlakula, launched a campaign to end the use of.[41]

A similar provision, under Article 212, criminalises anyone who "publicly, either by a speech, writings of any kind, images or any symbols, whether displayed, distributed, purchased or sold or published in any manner, incite the population not to work, or who incites the population to reject the established Government, or who causes unrest in the population with intention to incite citizens against one another in the Republic of Rwanda, commits an offence."

ARTICLE 19 notes that while parts of the offence appear to fit under the legitimate aim of public order, the incitement crimes recognised under international law are already recognised elsewhere in the penal Code, so this provision is an unnecessary duplication and broadening of those provisions. It is also clear that criminalising inciting people to strike or to reject the

[41] See Committee to Protect Journalists, A bid to rid Africa of criminal defamation, sedition laws, 12 July 2013.

current government violates free speech standards which protect political speech around elections and campaigning, as well as international law protecting the right to form a trade union and strike, under Article 8 of the ICESCR and under the right to freedom of association in the ICCPR's Article 22.

In addition to this, Article 2016 criminalises those 'caught in a seditious group.' Aside from the fact, as noted above, that sedition offences don't meet the threshold of international law as a legitimate restriction on expression, this creates an extremely wide offence of simply associating with groups deemed undesirable by the government, with an equally wide 'intent to cause harm' to the government or President. This once again restricts freedom of association, but it also is likely to have a significant impact on press freedom. Journalists reporting on conflicts or human rights violations could be charged merely for interviewing people involved in activities the government disapproves of, and would face a hefty sentence of 15 to 20 years imprisonment. Even if the term 'seditious group' were to be more clearly narrowed, this would present a hugely disproportionate restriction on expression, which would have a chilling effect on the media in particular.

Elsewhere in the Penal Code, similar restrictions are in place to prevent the 'desecration' or 'contempt for' the national flag (Articles 228 and 247-249), and similar forms of supposed disrespect for the national anthem (Articles 250-252). The Human Rights Committee has stated that, under their obligations under Article 19 of the ICCPR, states parties must not 'prohibit criticism of institutions, such as the army or the administration.'[42] Such offences fail the three part test by failing to pursue a legitimate aim, as the protection of state emblems from disrespect, criticism or contempt is not an admissible restriction on free expression under international law, and only serves to target opposing voices.

**Recommendations**

- All provisions criminalising 'sedition' related offences, in particular Articles 210 and 216, should be repealed. Article 212 should also be repealed – it is moreover a duplication of existing (problematic) incitement provisions. Additionally, the government should ensure the right to work is supported by the right to form a trade union, as set out under international law. Articles 228, 247-249, and 250-252 should be repealed in their entirety.

## Protest (Articles 240, 258, 260, 263)

Article 240 of the Penal Code stipulates that "any person who illegally holds a demonstration or a public meeting or who demonstrates on a public highway without prior authorization of the competent authority commits an offence."

Articles 258 and 260 include similar references to 'illegal demonstrations,' specifically in the vicinity of parliament or President, while Article 263 restricts those that 'may obstruct trade.' Failure to attain authorisation and the holding of such 'illegal' demonstrations results in a minimum of eight days or up to six months in prison, and a fine of 500,000 to 1,000,000 Rwandan francs under Article 240, and up to three years' imprisonment and a fine of up to 5,000,000 francs under the others.

ARTICLE 19 notes that the right to protest is a vital element to the right to freedom of expression, and is also specifically protected under Article 21 of the ICCPR, which protects the freedom of peaceful assembly, and Article 11 of the Banjul Charter, which protects the right of people to assemble freely. The right to freedom of peaceful assembly protects any intentional

[42] General Comment 34, op. cit., para 38

and temporary presence of a number of individuals in a private or public space for a common expressive purpose.[43] The UN Special Rapporteur on freedom of assembly and association has noted the interdependence and interrelatedness of the rights to freedom of expression and to freedom of peaceful assembly.[44]

The UN Special Rapporteur has also made clear that it is never legitimate for states to require authorisation for individuals to exercise their right to protest, only that they require notification, in line with the public order aims set out in the three-part test.[45] All notification requirements, as a restriction on the right to protest, must conform to the three part test. ARTICLE 19's Principles on the Protection of Human Rights in Protest similarly make clear that all notification requirements must be voluntary and adhere to specific aims and scope.[46]

Under the Penal Code, it is not clear what an "illegal demonstration" is, and if this refers to one without authorisation, however demonstrations and public meetings are defined in broad terms, similar to those used to describe peaceful assembly under international law. The requirement for authorisation for such gatherings is a violation of the right to protest as protected under international standards.

Restrictions on the location of protests must also conform to the three-part test, and blanket restrictions on protests taking place in certain areas, particularly parliament which is often a key point of political speech, present a disproportionate restriction to the right. The Protest Principles note the importance of states facilitating the location of protests, particularly that they may be in sight or sound of their target – which in many circumstances is the government or parliament.

**Recommendations**

- Article 240 of the Penal Code should be reformed to exclude references to undefined 'illegal demonstrations,' and to remove the requirement for authorisations on protests. Articles 258 – 259 should be revised, to avoid placing blanket restrictions on the locations of protests, and Article 263 should be revised to ensure a balance can be struck on a case by case basis between the rights of protestors and the interests and rights of others. The government should ensure it takes active measures to fulfil its duty to facilitate protests, ensuring there is a presumption in favour of the right to protest and that any restrictions on this right pass the three-part test.

[43] Based on the proposals of the 2012 annual report of the UN Special Rapporteur on the rights to freedom of peaceful assembly and association (Special Rapporteur on FOAA) ('an intentional and temporary gathering in a public space for a specific purpose'), Report of the Special Rapporteur on FOAA, A/HRC/20/27 para 28; and the OSCE guidelines on Freedom of Peaceful Assembly ('the intentional and temporary presence of a number of individuals in a public space for a common expressive purpose').
[44] *Ibid.,* A/HRC/20/27, para 12
[45] *Ibid.*, para 28
[46] ARTICLE 19, The Right to Protest: Principles on the protection of human rights in protests, December 2016, Principle 8(7).

# About ARTICLE 19

ARTICLE 19 advocates for the development of progressive standards on freedom of expression and freedom of information at the international and regional levels, 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, freedom of expression and equality, access to information and broadcast regulation.

On the basis of these publications and ARTICLE 19's overall legal expertise, the organisation 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 at www.article19.org.

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.

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