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Your Excellencies:

The International Commission of Jurists is writing to express our deep concern about Article 217 of the draft Penal Code. Based on our assessment of the proposed legislation (Attachment 1), we believe the enactment of Article 217 would constitute a breach of Rwanda's obligations under international law, as provided for in treaties to which Rwanda is a party.

If adopted, Article 217 would impose a criminal penalty of five to ten years on any person who practices same sex sexual conduct or who encourages or sensitizes people to same sex sexual conduct. The criminalization of private adult consensual activity breaches the internationally recognized rights to be free from non-discrimination and to privacy. In addition, the criminalization of speech related to same sex sexual practices runs counter to the international guarantee of freedom of expression.

On December 10, 2009, U.N. High Commissioner for Human Rights Navi Pillay spoke in South Africa to denounce discrimination of all forms, including discrimination based on sexual orientation. On that same day, a representative of the Holy See made a statement at the U.N. General Assembly opposing "all forms of violence and unjust discrimination against homosexual persons, including discriminatory penal legislation which undermines the inherent dignity of the human person."

For these reasons, the ICJ respectfully urges the Government of Rwanda to honour its international commitments to human rights by not enacting Article 217.

We thank you in advance for your attention to this urgent matter.

Yours sincerely,


Jan Borgen
Director, International Law & Protection

I. Overview

The draft Article 217 would provide: *“Any person who practices, encourages or sensitizes people of the same sex, to sexual relation or any sexual practice, shall be liable for a term of imprisonment ranging from five (5) to ten (10) years and fine ranging from Two Hundred thousand Rwanda Francs (200.000 Rwf) to one million (1,000,000)Rwanda francs.”*

- Article 217 undermines the principle of **universality** enshrined in the Universal Declaration of Human Rights (UDHR), the African Charter on Human and People’s Rights (African Charter), and a number of other universal and regional instruments. As expressed in Article 1 of the UDHR, “All human beings are born free and equal in dignity and rights.”
- The criminalization of same sex sexual conduct violates guarantees of **equality, non-discrimination and privacy** provided for in Articles 2, 17 and 26 of the International Covenant on Civil and Political Rights (ICCPR), and Articles 2 and 3 of the African Charter. This principle is also reflected in articles 2, 7 and 12 of the UDHR. Arrest and detention on the grounds of consensual same sex conduct is also **arbitrary**, in violation Article 9 of the ICCPR, and Article 6 of the African Charter. This principle is also reflected in article 9 of the UDHR.
- The criminalization of the acts of “encouraging” and “sensitizing” people regarding same sex sexual conduct violates the right of **freedom of expression**, as provided by Articles 19 of the ICCPR, and Article 9 of the African Charter. This principle is also reflected in article 19 of the UDHR.

II. Human Rights are Universal

Article 217 carves out a category of Rwandans for separate and discriminatory treatment. By denying that everyone – including lesbians, gays, bisexuals, transgender and intersex individuals – has rights, Article 217 contravenes the principle of universality, as reflected in the Universal Declaration of Human Rights, the African Charter, the ICCPR, and many other international and regional instruments. Article 2 of the ICCPR, to which Rwanda acceded in 1975, requires States to “respect and to ensure to **all individuals** within its territory and subject to its jurisdiction the rights recognized in the present Covenant” (emphasis added).

The African Charter, which Rwanda ratified in 1983, grants rights to everyone without distinction. The formulation that “every individual” is entitled to the rights in the Charter is repeated in Articles 2, 3, 5, 6, 7, 9, 10, 11, 12, 15, 16, and

17. Article 4 guarantees to “every human being” the right to respect for life; Article 8 provides that the freedom of conscience of “no one” may be restricted; and Article 13 provides for the rights of “every citizen” to participate in public life.

Article 16 of the Rwandan Constitution guarantees: “All human beings are equal before the law. They shall enjoy, without any discrimination, equal protection of the law.” Similarly, Article 11 provides: “All Rwandans are born and remain free and equal in rights and duties.”

Human rights apply to everyone simply because they are born human. This means that human beings of all sexual orientations and gender identities are entitled to the full enjoyment of all human rights. As the Vienna Declaration and Programme of Action, agreed by all states including Rwanda in 1993, states, “Human rights and fundamental freedoms are the birthright of **all human beings**; their protection and promotion is the first responsibility of Governments” (emphasis added).¹ The principle of universality guarantees the specific human rights of privacy, non-discrimination, freedom from arbitrary arrest and detention, and freedom of expression. These are the rights that Article 217, if adopted into law, would violate.

III. The Right to be Free from Discrimination

The enactment of Article 217 would violate the internationally guaranteed right to be free from discrimination. Speaking in South Africa, on 10 December 2010, High Commissioner for Human Rights Navi Pillay stated that “the fight against discrimination . . . lies at the very heart of human rights advocacy.”² She also recognized that victims of discrimination include those who due to their “sexual orientation are perceived as different.”

There are strong prohibitions on discrimination under international law, including with respect to legal obligations assumed by Rwanda. For example:

- Under Article 26 of the ICCPR, Rwanda must guarantee “to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or **other status**”(emphasis added).
- Under Article 2 of the African Charter on Human and People’s Rights, “Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, color, sex, language,

¹ Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights in Vienna, 25 June 1993, Part I, para. 1.

² Address by the High Commissioner for Human Rights, Navi Pillay, Freedom Park, Pretoria, South Africa, 10 December 2009, available at www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=9674&LangID=e.

religion, political or any other opinion, national and social origin, fortune, birth or **other status**" (emphasis added).³

- Under Article 2 of the ICESCR, to which Rwanda acceded in 1975, "The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or **other status**" (emphasis added).

Similarly, the second paragraph of Article 11 of the Rwandan Constitution provides: "Discrimination of whatever kind based on, *inter alia*, ethnic origin, tribe, clan, colour, sex, region, social origin, religion or faith, opinion, economic status, culture, language, social status, physical or mental disability or **any other form** of discrimination is prohibited and punishable by law" (emphasis added).

Sexual orientation is protected under the right to non-discrimination, as part of "sex" discrimination or under "other status." Although the instruments cited above do not list "sexual orientation" among the enumerated categories, these categories are clearly intended to be illustrative and not exhaustive. All of the non-discrimination provisions end with the phrase "or other status." The use of the phrase "or other status" means that the list of categories is intended to be open-ended. This phrase has repeatedly been interpreted by authoritative legal bodies to include sexual orientation.

Decisions of UN treaty bodies interpreting international treaties and regional bodies interpreting parallel non-discrimination provisions, make clear that discrimination on the basis of sexual orientation is prohibited under international law and, furthermore, that criminalization of same sex conduct is a form of prohibited discrimination.

In the 1994 case of *Toonen v. Australia*, the UN Human Rights Committee, the body mandated under ICCPR article 40 with monitoring states' compliance with its provisions, found that laws in Tasmania criminalizing consensual same sex conduct violated the privacy and non-discrimination provisions of the ICCPR. Specifically, the Human Rights Committee noted that the reference to "sex" in Articles 2 and 26 were taken as "including sexual orientation."⁴ Later decisions of the Human Rights Committee have also found that discrimination based on sexual orientation violated Article 26.⁵ Since 1994, the Human Rights Committee

³ In French, Article 2 of the African Charter uses the words: "sans distinction aucune, fondée notamment sur le sexe, la race, la couleur, la langue, la religion, les opinions politiques ou toutes autres opinions, l'origine nationale ou sociale, l'appartenance à une minorité nationale, la fortune, la naissance ou toute autre situation."

⁴ *Id.* at Para. 8.7. Article 17(1) provides: "No one shall be subjected to arbitrary or unlawful interference with his privacy, family, or correspondence, nor to unlawful attacks on his honour and reputation."

⁵ *Edward Young v. Australia*, Communication No. 941/2000, UN Doc. CCPR/C/78/D/941/2000 (12 August 2003); *X v. Colombia*, Communication No. 1361/2005, UN Doc. CCPR/C/89/1361 (30 March 2007). Relying on Articles 17 and 26 of the Covenant, the Human Rights Committee has urged Kenya to repeal laws that criminalized homosexuality. CCPR/CO/83/KEN, 28 March 2005, at para. 27.

has repeatedly called on countries to repeal laws that penalized consensual same sex activity.⁶

The UN Committee on the Elimination of Discrimination Against Women, which oversees the implementation of the Convention on the Elimination of All Forms of Discrimination Against Women, which Rwanda ratified in 1981, has also expressed concern about laws that classify sexual orientation as a sexual offence and has recommended that such penalties be abolished.⁷

The UN Committee on the Rights of the Child, which monitors States' compliance with provisions of the Convention on the Rights of the Child, which Rwanda ratified in 1991, issued a General Comment in 2003 explaining that under the non-discrimination provision of Article 2, prohibited grounds of discrimination included "adolescents' sexual orientation."⁸ Most recently, the UN Committee on Economic, Social and Cultural Rights, which monitors implementation of the ICESCR, stated that "'Other status' as recognized in article 2(2) includes sexual orientation" and gender identity.⁹

In the 1999 case of *Salgueiro da Silva Mouta v. Portugal*, the European Court of Human Rights concluded that the applicant had been discriminated against on the basis of his sexual orientation, "a concept which is undoubtedly covered by Article 14 of the [European] Convention. The Court reiterates in that connection that the list set out in that provision is illustrative and not exhaustive, as is shown by the words 'any ground such as' (in French 'notamment')."¹⁰ The same term 'notamment' appears in the list of protected categories in Article 2 of the African Charter.

IV. The Rights to Privacy and Dignity

Just as individuals are protected from discrimination on grounds of sexual orientation, sexual activity between consenting adults is protected from interference by the rights of privacy and dignity. Article 217, if enacted, would violate these rights.

⁶ CCPR/CO/83/KEN, 28 March 2005, at para. 27 (Kenya); CCPR/C/BRB/CO/3, 11 May 2007, at para. 13 (Barbados); CCPR/CO/76/EGY, 28 November 2002, at para. 19 (Egypt); CCPR/C/79/Add.111, 28 July 1999, at para. 16 (Romania); CCPR/C/79/Add.106, 18 April 1999, at para. 13 (Lesotho); CCPR/C/79/Add.104, 30 March 1999, at para. 20 (Chile); C/79/Add.85, 29 July 1997, at para. 8 (Sudan).

⁷ Concluding Observations on Kyrgyzstan, A/54/38, 20 August 1999, at para. 128. CEDAW has also stated for enacting laws protecting against discrimination on the basis of sexual orientation. Concluding Observations on Sweden, A/56/38, 31 July 2001, at para. 334; Concluding Observations on Ecuador, CEDAW/C/ECU/CO/7, 2 November 2008, at para. 28.

⁸ CRC, General Comment 4, para. 6, CRC/GC/2003/4, 1 July 2003.

⁹ CESCR, General Comment 20, para. 32, E/C.12/GC/20, 10 June 2009.

¹⁰ Judgment of 21 December 1999, Case of *Salgueiro da Silva Mouta v. Portugal*, Application No. 33290/96, para. 28.

- Article 17 of the ICCPR provides: “No one shall be subjected to arbitrary or unlawful interference with his privacy, family, or correspondence, nor to unlawful attacks on his honour and reputation.”
- Article 5 of the African Charter provides: “Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status.”

Similarly, Article 22 of the Constitution of Rwanda provides: “The private life, family, home or correspondence of a person shall not be subjected to arbitrary interference; his or her honour and good reputation shall be respected.”

Privacy is both spatial – the home, including the bedroom – and decisional, reflected in the choices made about intimate aspects of private life. As the U.S. Supreme Court explained in the case of *Lawrence v. Texas*: “Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct.”¹¹ According to the Supreme Court, decisional privacy involves “the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy.”¹²

Laws that criminalize same sex conduct violate the related rights of privacy and dignity. As long ago as 1981, the European Court found that such laws violated the privacy provision of the European Convention. Specifically, in *Dudgeon v. United Kingdom*, the European Court held that laws that criminalized sexual acts between consenting adult males constituted an “unjustified interference with [the applicant’s] right to respect for his private life” and thus breached Article 8 of the European Convention.¹³ The European Court has consistently reaffirmed this holding.¹⁴

In 1994, in finding that the Tasmanian penal code was inconsistent with Australia’s human rights obligations under the ICCPR, the Human Rights Committee noted, “[I]t is undisputed that adult consensual activity in private is covered by the concept of ‘privacy.’”¹⁵

Dignity, recognized in many national constitutions as well as the African Charter and closely related to privacy, is also important in protecting private adult consensual activity. Thus in the 1998 case of *National Coalition for Gay and Lesbian Equality v. Minister of Justice et al.*, the Constitutional Court of South Africa, relying on international guarantees of privacy and non-discrimination, as well as domestic constitutional values of dignity and equality, declared invalid

¹¹ *Lawrence v. Texas*, 539 U.S. 558, 562, 26 June 2003 (striking down Texas sodomy statute on grounds that it violated the privacy protections of the 14th Amendment).

¹² 539 U.S. at 574.

¹³ Para. 63, *Dudgeon v. United Kingdom*, Application No. 7525/76, Judgment dated 23 September 1981. Article 8 provides: “Everyone has the right to respect for his private and family life, his home and his correspondence.”

¹⁴ See, e.g., *Norris v. Ireland*, Application No. 10581/83, Judgment dated 26 October 1988; *Modinos v. Cyprus*, Application No. 15070/89, Judgment dated 22 April 1993.

¹⁵ Para 8.6., *Toonen v. Australia*, Communication No. 488/1992, U.N. Doc. CCPR/C/50/488/1992.

laws that criminalized consensual same sex conduct. In *National Coalition*, the Constitutional Court held that “the constitutional protection of dignity requires us to acknowledge the value and worth of all individuals as members of our society.” The Court then concluded:

Just as apartheid legislation rendered the lives of couples of different racial groups perpetually at risk, the sodomy offence builds insecurity and vulnerability into the daily lives of gay men. There can be no doubt that the existence of a law which punishes a form of sexual expression for gay men degrades and devalues gay men in our broader society. As such it is a palpable invasion of their dignity and a breach of section 10 of the Constitution.¹⁶

Similarly, the High Court of Delhi at New Delhi recently found that a provision of the Indian Penal Code which criminalized consensual same sex conduct was incompatible with the right to live with dignity and the right of privacy, both of which were protected by the Constitution.¹⁷ And in *Lawrence v. Texas*, the United States Supreme Court invalidated a Texas sodomy statute, holding that the “petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime . . . It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter.”¹⁸

Even the Catholic Church has recognized that criminalizing consensual same sex conduct is contrary to human dignity. On 10 December 2009, at the General Assembly, a representative of the Holy See issued the following statement: “The Holy See also opposes all forms of violence and unjust discrimination against homosexual persons, including discriminatory penal legislation which undermines the inherent dignity of the human person.”¹⁹

V. The Right to be Free from Arbitrary Detention

Arresting or detaining someone under Article 217 would breach Rwanda’s international legal obligations. Arrest or detention on the basis of sexual orientation constitutes an arbitrary deprivation of liberty. Article 6 of the African Charter provides: “Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained.” Article 9 of the ICCPR and Article 9 of the UDHR also guarantee freedom from arbitrary arrest and detention. On several

¹⁶ *National Coalition for Gay and Lesbian Equality and the South African Human Rights Commission v. Minister of Justice et al*, Constitutional Court of South Africa, Case CCT 11/98, 9 October 1998, para. 28.

¹⁷ *Naz Foundation v Government of NCT of Delhi and Others*, High Court of Delhi at New Delhi, WP(c) No. 7455/2001, 2 July 2009 at para. 48.

¹⁸ *Lawrence v. Texas*, U.S. Supreme Court, 539 U.S. 558, 578, 2003.

¹⁹ Statement of the Reverend Philip J. Bené, J.C.D., legal attaché to the Permanent Observer Mission of the Holy See to the United Nations. See Human Rights Watch, “UN: Landmark Meeting Denounces Rights Abuses Based on Sexual Orientation, Gender Identity,” 11 December 2009.

occasions, the UN Working Group on Arbitrary Detention has explained that the detention and prosecution of individuals “on account of their homosexuality” is arbitrary because it violates the ICCPR’s guarantees of “equality before the law and the right to equal legal protection against all forms of discrimination, including that based on sex.”²⁰

VI. The Right to Freedom of Expression

Article 217 would criminalize forms of expression related to “encouraging” same sex conduct or “sensitizing” others to same sex conduct. This provision would appear to encompass a broad range of activity, including speech and other expression by and about LGBT individuals, education about sexuality, and the work of human rights defenders and civil society organizations. For example, an HIV/AIDS awareness campaign directed toward men who have sex with men might be outlawed under Article 217. A mental health counsellor who responded supportively to a client might risk prosecution under the provision.

Freedom of expression, including the right to receive and impart information, is protected in the international instruments to which Rwanda is a party.

- Article 19 of the ICCPR provides: “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.”
- Article 9 of the African Charter provides: “Everyone shall have the right to receive information” and that “Every individual shall have the right to express and disseminate his opinions within the law.”

Article 34 of the Constitution of Rwanda also protects freedom of speech and freedom of information. The African Commission has stated that the right to freedom of expression is “a basic human right, vital to an individual’s personal development and political consciousness, and participation in the conduct of public affairs of his country.”²¹

Although both the Rwandan Constitution and the ICCPR provide that freedom of expression may be limited for certain purposes, including public order and morals, Article 217 cannot be justified as a permissible limitation under international law.

In the case of *Article 19 v. The State of Eritrea*, the African Commission rejected Eritrea’s argument that its restriction on Article 9 was provided for by domestic

²⁰ Report of the Working Group on Arbitrary Detention, E/CN.4/2004/3, 15 December 2003, para. 73; see also Working Group on Arbitrary Detention, Opinion No. 7/2002 (Egypt), para. 27, UN Doc. E/CN.4/2003/8/Add.1; Opinion No. 22/2006 (Cameroon), para. 19, UN Doc. A/HRC/4/40/Add.1.

²¹ *Communication 141/94, Civil Liberties Organisation v. Nigeria*, AHG/222 (XXXVI) Annex V, at para. 36.

law. The Commission interpreted the “so-called claw-back clauses as constituting a reference to international law, meaning that only restrictions on rights which are consistent with the Charter and with States Parties’ international obligations should be enacted by the relevant national authorities. The lawfulness of Eritrea’s actions must therefore be considered against the Charter and other norms of international law, rather than by reference to its own domestic laws alone.”²²

Similarly, Article 217’s restriction on freedom of expression is incompatible with international law and thus it cannot be justified as a permissible limitation. The restriction is incompatible with international law because it amounts to discrimination on the basis of sexual orientation.²³ A number of experts, mandated by the UN Human Rights Council under the Special Procedures system, have made clear that the right to freedom of opinion and expression is a right held by everyone, regardless of sexual orientation or gender identity. The Special Representative of the Secretary-General on the situation of human rights defenders, Hina Jilani, commenting on draft legislation in Nigeria that introduced penalties for public advocacy or associations supporting the rights of lesbians and gay people said: “In particular, serious concern is expressed in view of the restriction such law would place on freedoms of expression and association of human rights defenders and members of civil society, when advocating the rights of gays and lesbians.”²⁴ In his report on the visit to Colombia, the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Ambeyi Ligabo, wrote that “all citizens, regardless of, inter alia, their sexual orientation, have the right to express themselves, and to seek, receive and impart information.”²⁵

Finally, Article 217, if adopted, would present significant health risks. The Special Rapporteur has noted the connection between widespread access to information and an effective response to HIV/AIDS. He has called on “Governments to disseminate information addressing all HIV/AIDS-related issues, its modes of transmission and the means of protection. In particular, information on topics that may be considered as taboo or private – such as safe

²² *Communication 275/2003, Article 19 v. State of Eritrea*, EX.CL/364 (XI), Annex II, para. 91-92.

²³ See, e.g., *Baczowski and Others v. Poland*, Application No. 1543/06, Judgment dated 24 September 2007. The European Court found that the denial of a parade permit to LGBT individuals and groups was a violation of both the right to peaceful assembly (which is closely related to the right of freedom of expression) and the right to be free from discrimination on the basis of sexual orientation.

²⁴ *Report of the Special Representative of the Secretary-General on the situation of human rights defenders, Hina Jilani, Addendum: Summary of cases transmitted to Governments and replies received*, U.N. Doc. A/HRC/4/37/Add.1, 27 March 2007, para. 511.

²⁵ *Report of the Special Rapporteur on the right to freedom of opinion and expression, Ambeyi Ligabo – Addendum Mission to Colombia*, UN Doc. E/CN.4/2005/64/Add.3, of 26 November 2004, paras. 75 and 76. See also *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Abid Hussain, submitted in accordance with Commission resolution 2000/38*, UN Doc. E/CN.4/2001/64, of 13 February 2001, para. 176 (transmitting urgent appeal to Kuwait where three individuals were sentenced to prison terms for writings “that were said to cause harm to religion and to morality since they mentioned lesbian relationships”). For further examples, see *Sexual Orientation and Gender Identity in Human Rights Law: References to Jurisprudence and Doctrine of the United Nations Human Rights System* (ICJ 2007). /

sex or drug use – should be explicit and made available in formats adapted and accessible to the society.”²⁶ As Michael Sidibé, the Director of UNAIDS, stated recently:

I can assure you that UNAIDS will resolutely oppose discrimination against men who have sex with men, or draft laws whose purpose is to fan hatred, such as that in Uganda. Let us be clear, criminalizing homosexuality is an attack on the entire AIDS response. It violates the human rights principles on which UNAIDS, and indeed the United Nations, was founded.²⁷

VII. Conclusion

The ICJ believes that Article 217, if adopted, would constitute a grave threat to the lives of LGBT Rwandans and their allies and would seriously undermine the commitment of Rwanda to universal human rights standards. By subjecting Rwandans to arrest and imprisonment on the basis of their sexual orientation, Article 217 would violate the rights to universality, non-discrimination, and privacy, rights that are contained in international treaties to which Rwanda is a party. By imposing penalties for speech that “encourages” or “sensitizes” people about same sex conduct, Article 217 would violate the international guarantee of freedom of expression.

For these reasons, the ICJ respectfully recommends that the Rwandan Parliament reject Article 217.

²⁶ Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Ambeyi Ligabo, A/HRC/7/14, 28 February 2008, at para. 59.

²⁷ Michael Sidibé, Speech before UNAIDS Programme Coordinating Board, 8 December 2009, available at www.unaids.org.