ARTICLE 19

Cambodia: Law Against Non-Recognition of the Crimes Committed During Democratic Kampuchea

June 2013

Legal analysis

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Executive summary

In this brief, ARTICLE 19 examines the Law Against Non-Recognition of the Crimes Committed During the Democratic Kampuchea Period (the Law) that was approved by the National Assembly of Cambodia on 7 June 2013.

The brief analyses the substantive provisions of this particular law from an international human rights perspective. It also acknowledges the deeply flawed manner in which the Law passed through the legislative process at the National Assembly stage, the background context of the deteriorating human rights situation in the country and the danger that the Law will undermine on-going efforts towards achieving truth and reconciliation in Cambodia.

ARTICLE 19 finds that the Law clearly violates international human rights law on freedom of expression, particularly Article 19 of the International Covenant on Civil and Political Rights ("ICCPR"), and its interpretation by the Human Rights Committee through most notably General Comment No 34. The major flaws of the Law include:

- the criminalisation of a wide range of expressions considered as the "public non-recognition of the crimes committed during the Democratic Kampuchea period" and

- harsh regime of penalties, which includes, for individuals, imprisonment of up to 2 years and a fine of up to US$950, as well as other additional penalties.

ARTICLE 19 calls on:

- the Senate of the National Assembly to reject the further legislative passage of the Law

- the Cambodian Government to refrain from enacting a similar law in the future;

- civil society organisations and the media in Cambodia, the region and around the world to put pressure on Cambodia and other on states and intergovernmental organisations to use their leverage to persuade the Cambodian government and legislature to reject the Law at the earliest possible stage and to refrain from enacting a similar law in the future.

About ARTICLE 19 Law Programme

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

On the basis of these publications and ARTICLE 19's overall legal expertise, the Law Programme publishes a number of legal analyses each year, comments on legislative proposals as well as existing laws that affect the right to freedom of expression and develops policy papers and other documents. This 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 materials developed by the Law Programme are available at http://www.article19.org/resources.php/legal/.

If you would like to discuss this policy brief 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.

Introduction

In this brief, ARTICLE 19 examines the Law Against Non-Recognition of the Crimes Committed During the Democratic Kampuchea Period (Law) that was approved by the National Assembly of Cambodia on 7 June 2013.

The Law was approved at a critical time from a national perspective, coming just a few weeks before the national elections to be held on 28 July, but also from an international human rights perspective, as Cambodia prepares to undergo for the second time the peer scrutiny of states through the Universal Periodic Review Process at the UN Human Rights Council in early 2014.[1]

The analysis of ARTICLE 19 focuses on analysing the *substantive* provisions of this particular law from an international human rights perspective (Parts 5 and 6), rather than the human rights situation in Cambodia in general. At the same time, it is difficult to ignore the deeply flawed manner in which the Law passed through the legislative process at the National Assembly stage, the background context of the deteriorating human rights situation in the country and the danger that the Law will undermine on-going efforts towards achieving truth and reconciliation in Cambodia (Part 4).

ARTICLE 19 recognises the Law has yet to complete the legislative process and receive royal promulgation before it is properly enacted. Nonetheless, the organisation expresses its grave concern about the Law at this stage in order to positively influence the Upper House of the Cambodian legislature, the Senate, to properly review the Law according to the international legal standards, particularly on freedom of expression, as elaborated upon in this Comment (Parts 5 and 6). The Senate should prevent the further legislative passage of the Law because of the flawed procedure in the National Assembly, the inevitable counterproductive effects of the Law and also because its provisions violate Cambodia's international legal obligations on freedom of expression in various ways. Given the ruling Cambodian People's Party has a significant majority in the Senate, however, it is highly unlikely that the Law will be blocked by the Senate and it is likely to come into force in due course.

ARTICLE 19 calls on the Senate to reject the further passage of the Law. The Cambodian Government must refrain from enacting a similar law in the future.

ARTICLE 19 also calls on civil society organisations and the media in Cambodia, the region and around the world to put pressure on Cambodia directly and also other on states and intergovernmental organisations to use their leverage to persuade the Cambodian Government and legislature to repeal the Law at the earliest possible stage and to refrain from enacting a similar law in the future.

[1] Cambodia will be reviewed again by the Human Rights Council at its 18th session in early 2014. The Cambodian government's report is due to the Human Rights Council on 28 October 2013. For documents in relation to Cambodia's first cycle report in the Universal Periodic Review process see http://www.ohchr.org/EN/HRBodies/UPR/Pages/KHSession6.aspx

Background Context

Before this brief turns to the issue of the compatibility of the Law with international human rights standards on freedom of expression, this part sets out three important features of the background context which should also be taken into consideration when assessing the merits of the Law from a human rights perspective.

A flawed legislative process

First, the **Law was approved by the National Assembly following an obviously flawed legislative process.**

Prime Minister Hung Sen first proposed the idea of the Law on Monday 27 May 2013. This was after the acting President of the new opposition party Cambodian National Rescue Party (CNRP), Mr Kem Sokha, was alleged to have claimed that atrocities committed by the Khmer Rouge – specifically those at the notorious Tuol Sleng prison where 21,000 people died – were actually staged in Vietnam, an allegation he denies.

On 5 June, all twenty-seven representatives of the main opposition parties – the Sam Rainsy Party and the Human Rights Party – were stripped of their parliamentary status and their salaries on the basis of a vague provision in the Law on the Election of Members of the National Assembly.[2] This provision relates to the fact that the representatives from the two main opposition parties joined the new party, the CNRP. The provision states that when a parliamentarian leaves a party, he/she should be replaced by another candidate from the party up to six months before the national election. In this case, the twenty-seven opposition representatives and CNRP candidates were removed from their positions only eight weeks before the election. Notwithstanding whether or not the removal of these elected representatives was legally mandated under the Law on the Election of Members of the National Assembly, the timing of their expulsion – right before the vote on the Law – speaks volumes about the government's determination to ensure the Law's smooth passage and to curb political opposition. The opposition representatives' exclusion from the Assembly stopped them from voting against the Law's adoption on 7 June.[3] Eighty-four representatives of the Cambodian People's Party ("CPP") and two members of the Funcepec Party approved the Law following a brief, two-hour long extraordinary session of the National Assembly on 7 June.

Cambodian legal experts have condemned the exclusion of the opposition parties from the remarkably rushed parliamentary process and argued that it makes the Law unconstitutional and invalid, as well as illegitimate and unjust.[4] The National Assembly must have at least 120

[2] Phorn Bopha and Colin Beyn, "Opposition leaders stripped of posts, salaries", *The Cambodia Daily*, 6 June 2013 http://www.cambodiadaily.com/elections/opposition-lawmakers-stripped-of-posts-salaries-29309/

[3] On the eve of the Law's adoption, 6 June, the Cambodian National Rescue Party ("CNRP"), submitted a letter to the President of the National Assembly, Heng Samrin, requesting a delay in the debate of the Law until after the parliamentary elections in July – a request that was rejected by the government.

[4] See comments by Koul Panha, executive director of the Committee for Free and Fair Elections, Yeng Virak, executive director of the Community Legal Education Center; Phorn Bopha, "CRNP wants delay in Khmer Rouge Crime Law Debate" *The Cambodia Daily*, 7 June 2013 http://www.cambodiadaily.com/archive/cnrp-wants-delay-in-khmer-rouge-crime-law-debate-29812/

members according to the Constitution.[5] In response, the government has vigorously defended the Law as preventing people from diminishing the victims of the Khmer Rouge regime under the brutal dictatorship of Pol Pot who led the country from 17 April 1975 to 7 January 1979. During the Assembly debate, CPP representative Cheam Yeap reportedly said:

> To deny crimes shows critical contempt of the spirits of the victims who died in that regime, and will cause utmost pain to victims' families who are still alive.

He went on:

> The basic consciousness for the creation of this law, which includes those who refuse to acknowledge, diminish, deny or challenge the existence of crimes or glorify crimes committed during the period of Democratic Kampuchea cannot be considered as freedom of expression.[6]

Following the Law's approval, the Government warned, Mr Kem Sokha, that he would be punished under the Law if he continued to deny atrocities committed by the Khmer Rouge.[7]

A worsening human rights situation

Second, the **Law adds to an already deteriorating human rights situation, particularly with regard to freedom of expression**.

ARTICLE 19 notes that the Law's approval comes as international and domestic human rights NGOs have raised growing concerns about Cambodia's human rights situation. Various NGOs have criticised Cambodia's authorities in relation to the attacks, harassment and prosecutions of human rights defenders, activists and protestors as well as the culture of impunity for human rights abuses (including killings, torture and forced labour) committed since the 1980s.[8] For example:

- The report *Defending the Defenders: Security for Cambodian Human Rights Defenders*, which was released in June 2013 by the Cambodian Center for Human Rights (CCHR) and ARTICLE 19, emphasises that the "security situation and level of risk faced by Cambodian HRDs markedly deteriorated in 2012, a deterioration that continued into 2013". The report, which highlights how freedom of opinion and expression in its interplay with freedom of assembly and association is particularly threatened in Cambodia at this time, concludes that Cambodian human rights defenders "face a dangerously high level of risk in the context of their work.[9]

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[5] Article 76 of the Cambodian Constitution of 21 September 1993.

[6] "CPP-led Assembly approves KR Crimes Law" *The Cambodia Daily*, 8 June 2013 http://www.cambodiadaily.com/archive/cpp-led-assembly-approves-kr-crimes-law-29981/

[7] See Keo Ratanah and Sun Narin, "Proposed law against those who do not recognise the Khmer Rouge crimes has been approved", Voice of Democracy News, 7 June 2013 http://www.vodhotnews.com/en/news/830-proposed-law-against-those-who-do-not-recognize-the-khmer-rouge-crimes-has-been-approved

[8] See *Human Rights Watch World Report 2013*, Cambodia country chapter http://www.hrw.org/world-report/2013/country-chapters/cambodia; US Department of State, Country Reports on Human Rights Practices for 2012, Cambodia http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm#wrapper

[9] ARTICLE 19 and the Cambodian Center for Human Rights, *Defending the Defenders: Security for Cambodian Human Rights Defenders*, 19 June 2013 http://www.article19.org/data/files/medialibrary/37113/13-06-19-CR-cambodia.pdf This is the culmination of ARTICLE 19's recent work on Cambodia which also includes notably the following: ARTICLE 19, "Cambodia: The kingdom that cried wolf", Blog by Judy Taing, Asia Programme Officer,

- This is echoed by the joint submission of a group of NGOs – namely, ARTICLE 19, The Cambodian Center for Human Rights (CCHR), PEN International, Cambodian PEN, International Publishers Association (IPA), the Cambodian Center for Independent Media (CCIM), the Committee for Free and Fair Elections in Cambodia (COMFREL) and the Southeast Asian Press Alliance (SEAPA) – to the second cycle of the Universal Period Review process of Cambodia. The submission – which highlights shortfalls in the protection of freedom of expression and information, freedom of the media, freedom of the Internet and freedom of peaceful assembly and association – states:

> Rather than improving, the human rights situation in Cambodia has continued to deteriorate since 2009, and in particular, we are concerned about the state of freedom of expression. Since Cambodia's last UPR review, the Royal Government of Cambodia (RGC) has continued to stifle free expression and to suppress dissent with impunity. The RGC routinely targets journalists, non-governmental organizations (NGOs) and human rights defenders (HRDs) with legal and physical threats, which instil a deep sense of fear within the population and create a climate of self-censorship.[10]

The report and submission, thus, indicate that the Cambodian government has utterly failed to effectively respond to the recommendations of its first cycle review of the Universal Periodic Review process in 2009 – all of which it accepted at the time. These recommendations included ones to "[s]trengthen efforts to protect freedom of expression and the right of all human rights defenders, including those working on land rights issues, to conduct their work without hindrance or intimidation, including by way of safeguarding freedom of assembly and association (Sweden)" (Recommendation 51) and to "[e]nsure that the draft law on non-governmental organizations does not make their working conditions more difficult and respect their freedom of expression and association (France)" (Recommendation 56).[11]

Yet the procedure by which this Law was adopted by the National Assembly and its substantive content together raise further and fundamental questions about Cambodia's commitment to human rights, democracy and the rule of law, principles which are affirmed in numerous international human rights instruments. These principles are also referenced in the ASEAN Human Rights Declaration which was adopted in Phnom Penh during Cambodia's chairmanship of ASEAN on 19 November 2012.[12] Given the highly problematic nature of this

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17 November 2012; ARTICLE 19, "Cambodia: Twenty year jailing of radio journalist sends chilling message", Press release, 2 October 2012; ARTICLE 19, "Cambodia: Crackdown on free speech worsens as 13 female land activists arrested", Press release, 28 May 2012; ARTICLE 19, "Cambodia: Leading environmental activist gunned down", Press release, 30 April 2012; ARTICLE 19, "Cambodia: Government must lead ASEAN by adopting Law on Access to Information", Press release, 12 March 2012; ARTICLE 19, "Cambodia: Activists robbed of their homes and voices", Press release, 24 January 2012; ARTICLE 19, "Cambodia: Revise or abandon draft NGO law", Press release, 22 December 2011.

[10] ARTICLE 19, "Cambodia: Joint submission to the UN Universal Periodic Review", 24 June 2013 http://www.article19.org/resources.php/resource/37121/en/cambodia:-joint-submission-to-the-un-universal-periodic-review

[11] See also other the recommendations on freedom of expression, Recommendations 46, 47 and 48; Report of the Universal Periodic Review on Universal Periodic Review, Cambodia, A/HRC/13/4, 4 January 2010.

[12] The ASEAN Human Rights Declaration of 19 November 2012 has been criticized by the UN High Commissioner for Human Rights and human rights NGOs for falling far below international standards and being the product of a process that lacked transparency and meaningful consultation. A coalition of NGOs criticized, among other things, the "General Principles" which "include balancing the enjoyment of fundamental rights with government-imposed duties on individuals, subjecting the realisation of human rights to regional and national contexts, and broad and

declaration from a human rights perspective, however, it forms no part of the analysis of the Law undertaken below.)

Counterproductive to attempts at truth and reconciliation

Third, **the Law has a potential to damage efforts aimed at truth and reconciliation in Cambodia**, including the work of civil society organizations and the Extraordinary Chambers in the Courts of Cambodia (ECCC).

ARTICLE 19 believes that this is because people are likely to be afraid of speaking openly and freely about the Khmer Rouge regime in case such speech is caught by the Law. Furthermore, there have been also concerns that the Law

> [M]ay also thwart research into the Khmer Rouge period and the crimes that were committed, as academics and others fear uncovering anything that might upset the historical narrative approved by the government.[13]

Furthermore, the Law "may also have the effect of dissuading witnesses – already anxious about providing testimony – and experts from appearing at the ECCC, or impacting on what they may be prepared to say."[14] There is also the danger that the Law will be abused by members of the ruling party to attack political opponents. It is recalled that the Rwandan Genocide Ideology Law, which ARTICLE 19 analysed in 2009, was manipulatively used by the Rwandan government to curb legitimate political dissent in the run up to the 2010 elections.[15]

These points are particularly well emphasized in the letter from Polly Truscott, Deputy Director of the Asia-Pacific Programme of Amnesty International, to H. E. Heng Samrin, President of the National Assembly, which is dated 7 June 2013, apparently before the Law was actually approved.[16] The letter concludes:

> Cumulatively, the potential negative consequences of the proposed Khmer Rouge Crimes Denial Law could exert a chilling effect on numerous aspects of daily life, causing people to fear exercising their rights to freedom of expression and engaging in public debate and contributing their views around the development of Cambodia.

ARTICLE 19 shares Amnesty International's concerns as expressed by this letter.

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all-encompassing limitations on rights in the Declaration, including rights that should never be restricted." Further, "in many of its articles, the enjoyment of rights is made subject to national laws, instead of requiring that the laws be consistent with the rights". See UN News Centre, "UN official welcomes ASEAN commitment to human rights, but concerned over declaration wording" 19 November 2012; Joint Statement by 55 NGOs (including ARTICLE 19, Human Rights Watch and Amnesty International), "Civil Society Denounces Adoption of Flawed ASEAN Human Rights Declaration: AHRD falls far below international standards" 19 November 2012.

[13] Letter from Polly Truscott, Deputy Director of the Asia-Pacific Programme of Amnesty International, to H. E. Heng Samrin, President of the National Assembly, 7 June 2013 ASA 23/003/2013.

[14] *Ibid.*

[15] ARTICLE 19, "Rwanda: Comment on Genocide Ideology Law" 1 October 2009 http://www.article19.org/resources.php/resource/485/en/rwanda:-article-19-releases-its-comment-on-genocide-ideology-law. See also, Amnesty International, *Safer to stay silent: the chilling effect of Rwanda's laws on "genocide ideology" and "sectarianism"* Index: AFR 47/005/2010.

[16] Letter from Polly Truscott, Deputy Director of the Asia-Pacific Programme of Amnesty International, to H. E. Heng Samrin, President of the National Assembly, 7 June 2013 ASA 23/003/2013.

International standards on freedom of expression

This part outlines the relevant provisions international law on freedom of expression and the general principles applicable to them through the interpretation by the Human Rights Committee.

International treaty law on freedom of expression

ARTICLE 19's Comment of the Law is informed by international human rights law, in particular the right to freedom of expression as encompassed by Article 19 of the Universal Declaration of Human Rights ("UDHR"), as well as Articles 19 and 20 of the International Covenant on Civil and Political Rights ("ICCPR") and the authoritative interpretation of these provisions by the Human Rights Committee, most notably through General Comment No 34 of July 2011.[17] The ICCPR is a core international human rights treaty to which Cambodia acceded on 26 May 1992.[18] It is recalled that Article 19 of the ICCPR states:

> 1. Everyone shall have the right to hold opinions without interference.
>
> 2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
>
> 3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
>
> (a) For respect of the rights or reputations of others;
> (b) For the protection of national security or of public order (ordre public), or of public health or morals.

Article 20 of the ICCPR then states:

> 1. Any propaganda for war shall be prohibited by law.
> 2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

As a result of acceding to the ICCPR, Cambodia is not only bound as a matter of international law by the provisions of the ICCPR, but is obliged to give effect to that treaty, including Articles 19 and 20, through national laws and policies.[19]

[17] See Human Rights Committee, General Comment No 34 on Article 19: Freedoms of Opinion and Expression, CCPR/C/GC/34, 12 September 2011.
[18] See UN Treaties Collection Database at http://treaties.un.org/Pages/Treaties.aspx?id=4&subid=A&lang=en
[19] Articles 2(1)(b), 14(1) and 16, Vienna Convention on the Law of Treaties 1969.

Scope of freedom of expression

First, the right to freedom of expression is applicable to all human beings, not only citizens. Under international law, Article 19 of the UDHR, *"[e]veryone* has the right to freedom of opinion and expression" and Article 19 of the ICCPR similarly applies to everyone. Furthermore, Article 2 of the ICCPR requires states to ensure respect for the rights guaranteed by it for all persons "within its territory and subject to its jurisdiction", without distinction of any kind, including on the basis of national origin.

Therefore, the rights contained in the ICCPR, including under Article 19, apply to all persons physically within the territory of the state, as well as to persons under its jurisdiction (eg on a piece of territory which is under the effective control of the state although not belonging to it).

Second, international law protects the right to hold opinions as well as expression generally. Unlike the right to freedom of expression, the right to hold opinions is an absolute right under international law, in recognition of the illegitimacy of the state trying to either prohibit certain opinions or to force individuals to adopt certain opinions. Article 19 of the ICCPR protects all forms of opinion. Significantly, General Comment No 34 of the Human Rights Committee emphasises that international law protects opinions of a historical nature. The committee stated:

> 9. This is a right to which the Covenant permits no exception or restriction. Freedom of opinion extends to the right to change an opinion whenever and for whatever reason a person so freely chooses. No person may be subject to the impairment of any rights under the Covenant on the basis of his or her actual, perceived or supposed opinions. *All forms of opinion are protected, including opinions of a political, scientific, historic, moral or religious nature*. It is incompatible with paragraph 1 to criminalize the holding of an opinion.[20] The harassment, intimidation or stigmatization of a person, including arrest, detention, trial or impairment of the opinions they may hold, constitutes a violation of article 19, paragraph 1.[21]
>
> 10. Any form of effort to coerce the holding or not holding of any opinion is prohibited.[22] Freedom to express one's opinion necessarily includes freedom not to express one's opinion. (emphasis added)

Third, the scope of the right to freedom of expression is very broad and extends to almost everything intended to convey meaning. Article 19 of the ICCPR indicates refers to "information and ideas of *all* kinds", including speech that may be regarded as "deeply offensive speech".[23] As the Human Rights Committee has stated:

> 11. Paragraph 2 requires States parties to guarantee the right to freedom of expression, including the right to seek, receive and impart information and ideas of all kinds regardless of frontiers. This right includes the expression and receipt of communications of every form of idea and opinion capable of transmission to others, subject to the provisions

[20] Communication No 550/93, *Faurisson v France*, Views adopted on 8 November 1996.
[21] See Communication No 157/1983, *Mpaka-Nsusu v Zaire*, Views adopted on 26 March 1986; No 414/1996, *Mika Miha v Equatorial Guinea*, Views adopted on 8 July 1994.
[22] See Communication No 878/1999, *Kang v Republic of Korea*, Views adopted on 15 July 2003.
[23] Human Rights Committee, General Comment No 34 on Article 19: Freedoms of Opinion and Expression, CCPR/C/GC/34, 12 September 2011, para 11. See also *Handyside v United Kingdom*, Application No 5493/72, judgment of 7 December 1976 of European Convention on Human Rights, para 49.

> in article 19, paragraph 3, and article 20.[24] It includes political discourse,[25] commentary on one's own[26] and on public affairs,[27] canvassing,[28] discussion of human rights,[29] journalism,[30]cultural and artistic expression,[31] teaching,[32] and religious discourse.[33] It may also include commercial advertising. The scope of paragraph 2 embraces even expression that may be regarded as deeply offensive,[34] although such expression may be restricted in accordance with the provisions of article 19, paragraph 3 and article 20.[35]

Fourth, international law defines the modes of expression covered by freedom of expression broadly. Article 19 covers "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*" (emphasis added). The Human Rights Committee affirmed that these words require a very broad interpretation.

> 12. Paragraph 2 protects all forms of expression and the means of their dissemination. Such forms include spoken, written and sign language and such non-verbal expression as images and objects of art.[36] Means of expression include books, newspapers,[37] pamphlets,[38] posters, banners,[39] dress and legal submissions.[40] They include all forms of audio-visual as well as electronic and internet-based modes of expression. [41]

Permissible limitations on freedom of expression

While the right to freedom of expression is a fundamental human right, it is not guaranteed in absolute terms. We recall that Article 19(3) of the ICCPR permits the right to be restricted in the following terms:

> 3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
> (a) For respect of the rights or reputations of others;
> (b) For the protection of national security or of public order (ordre public), or of public health or morals.

Thus, restrictions on the right to freedom of expression must be strictly and narrowly tailored and may not put into jeopardy the right itself. In order to determine whether a restriction is

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[24] See Communications Nos. 359/1989 and 385/1989, *Ballantyne, Davidson and McIntyre . Canada*, Views adopted on18 October 1990.
[25] See Communication No 414/1990, *Mika Miha v Equatorial Guinea*.
[26] See Communication No 1189/2003, *Fernando v Sri Lanka*, Views adopted on31 March 2005.
[27] See Communication No 1157/2003, *Coleman v Australia*, Views adopted on 17 July 2006.
[28] Concluding observations on Japan (CCPR/C/JPN/CO/5).
[29] See Communication No 1022/2001, *Velichkin v Belarus*, Views adopted on20 October 2005.
[30] See Communication No 1334/2004, *Mavlonov and Sa'di v Uzbekistan*, Views adopted on19 March 2009.
[31] See Communication No 926/2000, *Shin v Republic of Korea*, Views adopted on 16 March 2004.
[32] See Communication No 736/97, *Ross v Canada*, Views adopted on 18 October 2000.
[33] Ibid.
[34] Ibid.
[35] *Supra* note 16.
[36] See Communication No 926/2000, *Shin v Republic of Korea*.
[37] See Communication No 1341/2005, *Zundel v Canada*, Views adopted on20 March 2007.
[38] See Communication No 1009/2001, *Shchetoko et al. v Belarus*, Views adopted on11 July 2006.
[39] See Communication No 412/1990, *Kivenmaa v Finland*, Views adopted on31 March 1994.
[40] See Communication No 1189/2003, *Fernando v Sri Lanka*.
[41] *Supra* note 16.

sufficiently narrowly tailored, the criteria of Article 19(3) of the ICCPR need to be applied. Any restrictions on freedom of expression must be: *first* prescribed by law; *second*, pursue a legitimate aim, such as respect of the rights or reputations of others, protection of national security, public order, public health or morals; and *third*, should be necessary to secure the legitimate aim and meet the test of proportionality.[42] It is important to note that this same test is incorporated in all regional human rights treaties[43] and applied by international and regional human rights bodies.[44]

Provided by law

Article 19(3) requires that restrictions on the right to freedom of expression must be prescribed by law. This requires a normative assessment; to be characterised as a law a norm must be formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly.[45] Ambiguous, vague or overly broad restrictions on freedom of expression which fail to set the exact scope of their application are therefore impermissible under Article 19(3).

General Comment No 34 further provides that for the purpose of Article 19(3) a law may not confer unfettered discretion for restricting freedom of expression on those charged with executing that law.[46] Laws must provide sufficient guidance to those charged with their execution to enable them to ascertain what sorts of expression are properly restricted and what sorts are not. The requirement that the law be sufficiently precise for this purpose is closely related to the requirements of necessity and proportionality. It ensures that restrictions on freedom of expression are only employed for legitimate protective objectives and limits the opportunity to manipulate those restrictions for other purposes. "Provided by law" part of the test for restrictions also means that laws should not grant authorities excessively broad discretionary powers to limit expression. This would again undermine one of the main purposes of this limitation on restrictions.

Legitimate aim

Interferences with the right to freedom of expression must pursue a legitimate protective aim as exhaustively enumerated in Article 19(3)(a) and (b) of the ICCPR. Legitimate aims are those that protect the human rights of others, protect national security or public order, or protect public health and morals. As such, it would be impermissible to prohibit expression or information solely on the basis that they cast a critical view of the government or the political social system espoused by the government.[47] General Comment No 34 provides further guidance on laws that restrict expression with the purported purpose of protecting morals. Such purposes must be based on principles not deriving exclusively from a single tradition but must be understood in the light of the universality of human rights and the principle of non-discrimination.[48] It would therefore be incompatible with the ICCPR, for example, to privilege one particular historical perspective or religious view.[49]

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[42] See Communication No 1022/2001, *Velichin v Belarus*, Views adopted on 20 October 2005.
[43] For example, see Article 13(2) of the ACHR or Article 10(2) of the ECHR.
[44] See, for example, the European Court of Human Rights in the case of *The Sunday Times v UK*, Application No 6538/7426, Judgment of April 1979, para 45.
[45] *Leonardus J.M. de Groot v The Netherlands*, No 578/1994, CCPR/C/54/D/578/1994 (1995).
[46] *Ibid*.
[47] Concluding observations of the Human Rights Committee on the Syrian Arab Republic CCPR/CO/84/SYR.
[48] *Supra* note 16, para 32.
[49] General Comment No 34 also notes that extreme care must be taken in crafting and applying laws that purport to restrict expression to protect national security. Whether characterised as treason laws, official secrets laws or sedition laws they must conform to the strict requirements of Article 19(3). Supra note 16, para 30.

Necessity

States parties to the ICCPR are obliged to ensure that legitimate restrictions on the right to freedom of expression are necessary and proportionate. This part of the test is the most critical element and the basis upon which the vast majority of international and national cases are decided. Necessity requires that there must be a "pressing social need" for the restriction.[50] The party invoking the restriction must show a direct and immediate connection between the expression and the protected interest. Proportionality requires that a restriction on expression is not over-broad and that it is appropriate to achieve its protective function. It must be shown that the restriction is specific and individual to attaining that protective outcome and is no more intrusive than other instruments capable of achieving the same limited result.

Three distinct elements of the test can be discerned.

- *First*, the measures taken must be carefully designed to meet the objective in question. They should not be arbitrary, unfair or irrational.[51] If a government cannot provide any evidence to show that a particular interference with freedom of expression is necessary, the restriction will fail on this ground.[52] While States may, and should, protect various public and private interests, measures taken by them must be carefully designed so that they are effective in protecting those interests. It is a very serious matter to restrict a fundamental right and, when considering doing so, States are bound to reflect carefully on the various options open to them.[53]

- *Second*, the interference should be designed to impair the right to freedom of expression "as little as possible".[54] If there are various options to protect a legitimate interest, then the one which least restricts the protected right must be selected.[55] As such, restrictions must not be overbroad. This is further discussed below.

- *Third*, there must be proportionality between the harm caused by the measures taken to freedom of expression and the benefits to the legitimate aim. In particular, the harm to freedom of expression must not outweigh the benefits in terms of the interest protected. A restriction that provided limited protection to reputation but which seriously undermined freedom of expression, for example, would not pass muster.[56] Democratic societies depend on the free flow of information and ideas and it is only when the overall public interest is served by restricting that flow that such a restriction can be

[50] *Handyside v United Kingdom*, Application No 5493/72, judgment of 7 December 1976, of European Convention on Human Rights, para 48.
[51] See *R v Oakes* (1986), 1 SCR 103, pp. 138-139 (Supreme Court of Canada).
[52] See, for example, *Autronic v Switzerland,* Application No 12726/87 judgment of 22 May 1990 of European Court of Human Rights where the respondent State argued it needed to restrict the availability of satellite dishes in order to protect confidential satellite communications but could not provide any evidence that these signals could be picked up with ordinary satellite dishes.
[53] For example, in *Observer and Guardian v the United Kingdom*, the European Court of Human Rights found a violation of the newspapers' right to freedom of expression because the respondent government could have pursued other, less intrusive options and still have achieved the same result. *The Observer v Guardian v UK*, Application No 13585/88 judgment of European Court of Human Rights of 24 October 1991.
[54] *R. v Big M Drug Mart Ltd.*, note 99, p. 352 (Supreme Court of Canada).
[55] See the judgment of the Inter-American Court of Human Rights in *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, Advisory Opinion OC-5/85 of 13 November 1985, Series A, No 5, para. 46
[56] See, for example, *Open Door Counselling and Dublin Woman Well Centre and Others v Ireland*, judgment of 29 October 1992 of European Court of Human Rights, App Nos 1423/88 and 142335/88, para 73.

justified. This implies that, for a restriction to be justified, its benefits of must outweigh its costs.

Analysis of the Law

The Law is only five short articles long. Yet its brevity should not distract from its potentially far-reaching implications for free speech in Cambodia, particularly speech that concerns the atrocities committed under the Khmer Rouge regime. It is noted that the final provision of the Law, Article 5, indicates that the Law "is to be promulgated urgently" suggesting that the government that backed it and the National Assembly that approved it viewed its passage as a legislative priority and presumably in response to a real social harm. One can only presume that state authorities will seek to implement its provisions with a vigour that reflects this "urgency" and their own political interests.

Aim and scope

The aim of this law as indicated in Article 1 is to:

> ... [T]o *punish* individuals who do *not recognize or who downplay, deny or dispute the existence of the crimes or who laud the crimes* committed during the Democratic Kampuchea period as laid down in criminal provisions and the provisions being implemented by the Extraordinary Chambers in the Courts of Cambodia to prosecute the crimes committed during the Democratic Kampuchea period. (emphasis added)

Objectives of the Law

A number of points can be made about this provision on the objectives of the Law.

- *First*, two very broad categories of expressions about the crimes committed during the Democratic Kampuchea period thus appear to be the target of the Law: first, expressions which deny the existence or extent of those crimes; and second, expressions which praise those crimes.

- *Second*, the term "punish" indicates that the aim of the Law is to prohibit and apply criminal sanctions to such expressions.

- *Third*, the key terms used in this provision – "do not recognise", "downplay", "deny" or "dispute the existence" and "laud" – are vague in themselves not defined anywhere. They therefore conceivably catch a huge spectrum of speech about the crimes committed during the Democratic Kampuchea period.

- *Fourth*, the crimes referred to in this provision are those indicated in Cambodia's criminal law and in the statute of the Cambodia Tribunal, a hybrid tribunal established by the government of Cambodia and the United Nations.[57] Yet, there is an inconsistency with Article 2, relating to the scope of the Law, which is explained further below. Overall, the effect of this provision concerning the purpose of the Law on its future interpretation is therefore sweeping and highly detrimental to free speech. Significantly, the aims of the Law indicated in this provision fail to meet the criteria for "legitimate aim" in Article 19(3) of the ICCPR because they privilege a particular version of history, as indicated in the previous part.

[57] See http://www.eccc.gov.kh/en

Scope of the Law

Article 2 of the Law goes on to indicate its scope. Individuals and legal person will be punished for

> [a]ny and all non-recognition, downplaying, denial or disputing of the existence of the crimes or lauding of the crimes committed during the Democratic Kampuchea period that have been recognized by law or by finalized decisions of courts having the power to implement it on the territory of the Kingdom of Cambodia constitute the act of public non-recognition of the crimes committed during the Democratic Kampuchea period.

One or another of the following may constitute expressions of "public non-recognition of the crimes committed during the Democratic Kampuchea period":

> 1. By words of mouth, regardless of the type of their expression in a public place or venue of public gathering;
>
> 2. By correspondence or depiction, regardless of the type of their dissemination among the public or display to public view;
>
> 3. By any means of audio-visual telecommunication to the public.

Four preliminary remarks can also be made about this provision on the Law's scope.

- *First*, the Law appears to cover the *public* non-recognition of crimes committed during the Democratic Kampuchea period through speech or words, writing or artwork, or through "audio-visual telecommunication". The term "correspondence" is most often associated with private communications, such as letters and emails. If the term is intended with this meaning, then the scope of the Law might be abusively extended to warrant the surveillance the private communications between individuals in order to detect expression which might fall foul of the Law.

- *Second*, the provision does not properly reflect the aim indicated in Article 1. More specifically, while Article 1 suggests the Law targets types of expression concerning "crimes committed during the Democratic Kampuchea period as laid down in criminal provisions and the provisions being implemented by the Extraordinary Chambers in the Courts of Cambodia to prosecute the crimes committed" during that time, Article 2 indicates that the Law criminalises types of expression such crimes "that have been recognised by law or by finalised decisions of courts having the power to implement it on the territory of the Kingdom of Cambodia". Thus, Article 2 is broader than the aims indicated in Article 1 would suggest because it covers not only legal provisions but also court decisions. This potentially includes the decisions of the Phnom Penh court to convict and sentence to death Pol Pot and Ieng Sary in absentia in August 1979, despite concerns about a lack of due process. The difference in language between Articles 1 and 2 may not have been intentional, but simply a result of lazy drafting.

- *Third* and relatedly, the difference between Articles 1 and 2 leads to uncertainty as to the reach of the Law and this ambiguity could be manipulatively used to apply the Law to the denial of any crime during the stated period. Moreover, the lack of precision of the law will undoubtedly heighten the chilling effect of the Law as individuals guard against saying anything which may be deemed to fall foul of the Law. The Law's failure

to clearly set the exact limits of its scope is incompatible with the requirements of Article 19(3) of the ICCPR, as indicated in the previous section.

- *Fourth*, the overriding problem with Articles 1 and 2 of the Law is the criminalisation of speech challenging historical facts and an official version of history concerning the crimes committed during the Democratic Kampuchea period. This is fundamentally incompatible with Cambodia's international legal obligations under Articles 19 and 20 of the ICCPR as discussed further below.

Prohibitions on expressions concerning historical facts incompatible with international law

ARTICLE 19 highlights that under international law, *only* types of expression that are covered by Article 20 of the ICCPR should be prohibited by law i.e. "propaganda for war" and "advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence". The Human Rights Committee's General Comment No 34 adopted in 2011 indicates that "[i]t is only with regard to the specific forms of expression indicated in article 20 that States parties are obliged to have legal prohibitions".[58] (The meaning of the prohibition of incitement to discrimination, hostility or violence under international law has recently been fleshed out through the *Rabat Plan of Action*, which was adopted in October 2012.)[59] Challenges to historical facts are *not* covered by Article 20 of the ICCPR and hence should not be prohibited, particularly through criminal sanctions.

Moreover, the Human Rights Committee also expressly stated in General Comment No 34 that the criminalisation of speech concerning historical facts is incompatible with Article 19 of the ICCPR. It stated:

> 49. 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.[60] The Covenant does not permit general prohibition of expressions of an erroneous opinion or an incorrect interpretation of past events. Restrictions on the right of freedom of opinion should never be imposed and, with regard to freedom of expression, they should not go beyond what is permitted in paragraph 3 or required under article 20.

Thus, the position in international law is straightforward: the criminalisation of expression about historical facts is simply impermissible. Any such law would go against Article 19 of the ICCPR, which does not allow such a general prohibition on expressions of erroneous opinions, or an incorrect interpretation of past events. The Law, with its criminalisation of such expressions, is therefore in flagrant violation of international law.

Paragraph 49 of General Comment No 34 (indicated above) supports the view that no "pressing social need" exists for the suppression of historical debate and laws that suppress such debates are not necessary in a democratic society and contrary to the ICCPR. The

[58] Para 52.
[59] *Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence*, Appendix, Annual Report of the United Nations High Commissioner for Human Rights, A/HRC/22/17/Add.4, 11 January 2013.
[60] So called "memory-laws", see communication No 550/93, *Faurisson v France*. See also concluding observations on Hungary (CCPR/C/HUN/CO/5) para 19.

Human Rights Committee's position in General Comment No 34 is consolidated in its concluding observations on Hungary's periodic report in 2010 in which it urged the state to review its "memory law" to ensure its compatibility with Articles 19 and 20 of the ICCPR. The Committee expressed concern "that the evolution of the so-called 'memory laws' in [Hungary] risks criminalizing a wide range of views on the understanding of the post- World War II history of the State party".[61]

The view of the Committee, exemplified by General Comment No 34 in particular, clarifies position in international law with respect to so-called "memory laws" – laws which prohibit the denial or minimizing of the importance of human rights atrocities, such as the Holocaust. In *Faurisson v France*, a case decided in 1996, the Human Rights Committee examined whether the French law on Holocaust denial, "the Gaussot Act", was necessary in a democratic society.[62] The author, Robert Faurisson, was an academic who had been convicted under the legislation after he argued that there had been no gas extermination chambers in Nazi death camps. According to the Human Rights Committee, the statements made by the author were of a nature as to raise or strengthen anti-Semitic feeling and accordingly the restriction on the author's freedom of expression served to respect the right of the Jewish Community to live free from the fear of anti-Semitism. The committee was satisfied that the restriction of Mr Faurisson was necessary to serve the struggle against racism since holocaust denial was one of the principle contemporary vehicles for anti-Semitism. This case would arguably be decided differently today, in the light of the Human Rights Committee's more contemporary view as expressed in General Comment No 34 and if the author had argued on such a basis.[63]

The Human Rights Committee's authoritative and express interpretation of Article 19 of the ICCPR as prohibiting the penalization of expression concerning historical facts is compelling. Support for the committee's position may also be gained from *The Camden Principles on Freedom of Expression and Equality* which also address to the legality of such laws.[64] These international standards were launched at the Durban Review Conference in 2009 and produced on the basis of discussions involving high-level experts on freedom of expression from the UN, regional organisations, civil society and academia. Since their adoption, they have accrued increasing attention and reliance by UN authorities in their official reports.[65] Principle 12(2) on the "incitement of hatred" states:

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[61] Human Rights Committee, Concluding Observations on Hungary, CCPR/C/HUN/CO/5, 16 November 2010 at para 19.

[62] Human Rights, Committee, Communication No 550/1993, views adopted on 8 November 1996.

[63] The Human Rights Committee noted: "[i]n the absence in the material before it of any argument undermining the validity of the State party's position as to the necessity of the restriction, the Committee is satisfied that the restriction of Mr. Faurisson's freedom of expression was necessary within the meaning of article 19, para 3, of the Covenant." Para 9.7, Ibid.

[64] These experts included the UN Special Rapporteurs on freedom of opinion and expression and on contemporary forms of racism, racial discrimination, xenophobia and related intolerance. The development of the principles was facilitated by ARTICLE 19. See the Camden Principles on Freedom of Expression and Equality, April 2009 http://www.article19.org/data/files/medialibrary/1214/Camden-Principles-ENGLISH-web.pdf The Camden Principles have been referred to the following documents of UN human rights bodies: The Rabat Action Plan on the prohibition of incitement to national, racial or religious hatred in the Report of the United Nations Human Rights on the expert workshops on the prohibition of incitement to national, racial or religious hatred, 11 January 2013, A/HRC/22/17/Add.4; Report of the Special Rapporteur on freedom of religion or belief, Heiner Bielefeldt, 22 December 2011, A/HRC/19/60; Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue, 10 August 2011, A/HRC/66/290.

[65] The Camden Principles have been referred to the following documents of UN human rights bodies: The Rabat Action Plan on the prohibition of incitement to national, racial or religious hatred in the Report of the United Nations Human Rights on the expert workshops on the prohibition of incitement to national, racial or religious

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

Thus, from the perspective the *Camden Principles*, the prohibition of expression concerning historical facts, including laws on the denial genocide, crimes against humanity and war crimes, are incompatible with international law on freedom of expression unless the speech qualifies as "incitement" under Article 20 of the ICCPR.

Value of free expression about historical facts

It is important that freedom of expression encompasses the right to free expression about historical facts as "freedom for history".[66] Two arguments for this position may be discerned from the case-law of the European Court of Human Rights, in particular: first, concerning the importance of expressions about historical facts as part of the "discovery of truth"; and second, concerning the importance of such expressions in any democracy as political speech. These arguments reflect two key underpinning justifications for freedom of expression generally.[67]

State restrictions on expression concerning historical events interfere with open discussion, historical debate within society and the discovery of truth, including the truth about historical personalities and events. As such, prohibitions on false arguments distorts debates amongst historians and others in society and crucially presumes that states are better placed to discover and identify the truth.

For a comparative perspective, ARTICLE 19 notes that the European Court of Human Rights has highlighted this "discovery of truth" argument for freedom of expression in its relevant jurisprudence on painful historical events.[68]

- In the case of *Chauvy v France,* concerning the conviction of the applicant for defamation in relation to statements in a book in which he questioned the "official version" of the history of the French resistance during the Second World War, the European Court of Human Rights stated that "it is an integral part of freedom of expression to seek historical truth" and has recognised the right of individuals to be informed of the circumstances of historical events.[69]

- In *Lehideux and Isorni v France*, the applicants were convicted for publicly defending the "crimes of collaboration with the enemy" by means of an advertisement promoting Marshal Petain's achievements. The European Court of Human Rights recognized that

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hatred, 11 January 2013, A/HRC/22/17/Add.4; Report of the Special Rapporteur on freedom of religion or belief, Heiner Bielefeldt, 22 December 2011, A/HRC/19/60; Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue, 10 August 2011, A/HRC/66/290.

[66] See generally, "Freedom for history: the case against memory laws", Free Speech Debate, 3 April 2013 http://freespeechdebate.com/en/discuss/freedom-for-history-the-case-against-memory-laws/

[67] See Andrew Nicol, Gavin Millar and Andrew Sharland, *Media Law and Human Rights* (Oxford: OUP, 2009) 2-4.

[68] The argument in support of freedom of expression relating to the importance of discovery of truth is associated with the philosopher John Stuart Mill and his work Areopaditica: A Speech for the Liberty of Unlicensed Printing (1644).

[69] *Chauvy and Others v France*, Application No 64915/01, judgment of the European Court of Human Rights of 29 September 2004, para 69.

> the applicants' expression concerned a particularly "grim page of the history of France", "a very painful part of the collective memory".[70] But the court concluded that the convictions did not meet a pressing social need but were instead disproportionate restrictions. In doing so, the court referred to the "efforts that every country must make to debate its own history openly and dispassionately," including by taking into account the "lapse in time" between events and remarks about them.[71]

International law particularly safeguards expression concerning matters of public interest because of its essential role for democracy, in particular democratic self-government.[72] As the Human Rights Committee stated in General Comment No 34, the "value placed by the [ICCPR] upon uninhibited expression is particularly high in the circumstances of public debate in a democratic society concerning figures in the public and political domain".[73] The European Court of Human Rights has also repeatedly stated that: "there is little scope under Article 10(2) for restrictions on political speech or on debate of matters of public interest."[74] Accordingly, it has established that "*very strong reasons* are required to justify restrictions on political speech" (emphasis added).[75]

Again, from a comparative perspective, the European Court of Human Rights has recognised that debates on historical issues justify higher protection with respect to the right to freedom of expression as they relate to matters of general interest.[76] Indeed, the judgment in *Lehideux and Isorni v France* shows the European Court of Human Rights' concern that the provision permitting restrictions on freedom of expression in the European Convention on Human Rights, Article 10(2), is not used to interfere with political expression where controversial areas of a state's history are being discussed.[77] In so doing, the decision reinforces the importance of open debate even on the most painful parts of a state's history.

Further, the European Court of Human Rights has consistently held that material deemed to be offensive by the national courts should be protected by the right to freedom of expression because of its value to democracy. In one of the most often cited cases, the Court stated:

> Freedom of expression constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every man. Subject to [legitimate restrictions] it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no 'democratic society'. [78]

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[70] *Lehideux and Isorni v France*, Application No 24662/94, judgment of the European Court of Human Rights of 23 September 1998, paras 43, 55.
[71] Para 55.
[72] Alexander Meikeljohn, *Political Freedom: The Constitutional Powers of the People* (Oxford: OUP, 1965) at 27.
[73] General Comment No 34, supra 16, para 34. See communication No 1180/2003, *Bodrozic v Serbia and Montenegro*, Views adopted on 31 October 2005.
[74] *Surek v Turkey (No 4)*, App No 24762/94, Judgement of 8 July 1999 of European Court of Human Rights, para 57.
[75] *Feldek v Slovakia*, App No 29032/95 Judgment of 12 July 2001 of European Court of Human Rights.
[76] *Chauvy v France supra* para 68.
[77] Andrew Nicol, Gavin Millar, Andrew Sharland, supra note 66 at p 134.
[78] *Handyside v United Kingdom*, Application No 5493/72,European Convention on Human Rights, judgment of 7 December 1976 para 49.

Decision of the French Constitutional Court

In the context of this discussion on the compatibility of "memory laws" with international and regional human rights law, it is relevant to mention a relatively recent decision of the French Constitutional Council irrespective of France's position as the former colonial power in Cambodia.[79]

On 28 February 2012, the French Constitutional Council declared unconstitutional a law making it a crime to deny that Armenians suffered genocide under the Ottoman Empire in 1915.[80] The French president at the time, Nicolas Sarkozy, intended to ratify the law by the end of February 2012 after the French National Assembly approved the law on 22 December 2011 and the Senate on 23 January 2012.[81] The Constitutional Council had been requested by MPs and senators to review the law and found that the law's provisions allowing the imposition of a €45,000 fine, a one-year prison sentence, or both, on those who deny the genocide violates freedom of expression as protected by the French Constitution, the Declaration of Human and Civil Rights and other national laws.[82]

In July 2012, President Hollande announced that his government would seek to push through a similar law that would make it a crime to deny the killing of Armenians by the Ottoman Empire in 1915 constituted genocide. However, no such law has yet been submitted for consideration to the French legislature.

Penalties

Under the Law, acts which constitute the "public non-recognition of the crimes committed during the Democratic Kampuchea period" are punishable through a system of harsh penalties. The "basic" punishment, as indicated in Article 2 of the Law, is "imprisonment of from six months to two years *and* a fine of 1,000,000 to 4,000,000 riel [sic]". The range of the fine is US$238 – US$950 in current terms.[83] To put this into context, Cambodia is a low-income country with a GDP per capita is US$2,400, 185th in the list of 229 countries.[84] The minimum fine would therefore be around 1/10 of the average person's income in Cambodia. In addition to a prison sentence and a fine, any individual convicted of the crime of "public non-recognition of the crimes committed during the Democratic Kampuchea period" may also be subject to the three further penalties indicated in Article 3 of the Law: "(1) display of the conviction; (2) dissemination of the conviction in the media; (3) dissemination of the conviction in by all audio-visual telecommunication means for a maximum period of eight days". This potentially adds a sense of public humiliation to the offence of the "public non-recognition of crimes", as if the criminal conviction, prison sentence and fine were not in and of themselves enough of a punishment already.

Article 4 of the Law makes clear that it is not only individual persons but also legal persons who may be held criminally responsible under the Law. Any legal entity, such as a corporation

[79] Cambodia was established as part of the French Colonial Empire in South East Asia in 1863. Cambodia finally gained independence in 1953.
[80] Décision n° 2012-647 DC du 28 février 2012.
[81] ARTICLE 19, "France: Genocide-denial law declared unconstitutional", Press release, 29 February 2012.
[82] See more at: http://www.article19.org/resources.php/resource/2976/en/france:-genocide-denial-law-declared-unconstitutional#sthash.2PGTJiFg.dpuf
[83] As of 24 June 2013.
[84] See CIA World Factbook https://www.cia.gov/library/publications/the-world-factbook/geos/cb.html

or political party, should be punished if one of its representatives violates the Law with a fine of up to "50,000,000 to 500,000,000 riel as well as by one or many of the additional penalties stipulated in Penal Code Article 168 (Additional Penalties for Implementation Vis-à-vis Legal Entities)". The range of fines for companies amounts to around US$11,884 to US$118,844 in current terms.

ARTICLE 19 is seriously concerned about the severity of the penalties imposed by the Law because they in themselves are likely to have the effect of silencing individuals in relation to forms of expression which fall within the scope of "public non-recognition of the crimes committed during the Democratic Kampuchea Period". We observe that the European Court on Human Rights has noted that excessive sanctions exert an unacceptable chilling effect on freedom of expression.[85] In cases involving any form of expression, the imposition of a penalty – whatever the character of that sanction – engages the right to freedom of expression. This restricts the type of penalties or sanctions that may be imposed, their amount in the case of fines or length in the case of custodial sentences.

The Law's regime of penalties – with the significant prison sentences, fines and further penalties – is incompatible with international human rights law. When restricting the right to freedom of expression, states should use the least restrictive means available, and the limitation must be proportionate to the aim pursued. The proportionality principle must be respected not only by the law imposing the restriction, but also by the administrative and judicial authorities in applying the law.[86] In General Comment No 34, the Human Rights Committee has warned states against the imposition of overbroad restrictions on freedom of expression. It has stated:

> Care should be taken by States parties to avoid excessively punitive measures and penalties … States parties should consider the decriminalization of defamation[87] and, in any case, the application of the criminal law should only be countenanced in the most serious of cases and imprisonment is never an appropriate penalty. It is impermissible for a State party to indict a person for criminal defamation but then not to proceed to trial expeditiously – such a practice has a chilling effect that may unduly restrict the exercise of freedom of expression of the person concerned and others.[88]

Although the above statement relates principally to the area of defamation, it is perfectly possible to see how imprisonment and high fines could have a chilling effect on those who express their disagreement with the officially endorsed version of historical events.

[85] See *Tolstoy Miloslavsky v the United Kingdom*, App No 18139/91, Judgment of 13 July 1995 of European Court of Human Rights, para 51.
[86] General Comment No 34 at para 34; General Comment No 27, para. 14. See also Communications No 1128/2002, *Marques v Angola*; No 1157/2003, *Coleman v Australia*.
[87] Concluding observations on Italy (CCPR/C/ITA/CO/5); concluding observations on the Former Yugoslav Republic of Macedonia (CCPR/C/MKD/CO/2).
[88] See communication No 909/2000, *Kankanamge v Sri Lanka*, Views adopted on 27 July 2004.

Appendix: The Law Against Non-Recognition of the Crimes Committed During the Democratic Kampuchea Period

Article 1

The objective of this law is to punish individuals who do not recognize or who downplay, deny or dispute the existence of the crimes or who laud the crimes committed during the Democratic Kampuchea period as laid down in criminal provisions and the provisions being implemented by the Extraordinary Chambers in the Courts of Cambodia to prosecute the crimes committed during the Democratic Kampuchea period.

Article 2

Any and all non-recognition, downplaying, denial or disputing of the existence of the crimes or lauding of the crimes committed during the Democratic Kampuchea period that have been recognized by law or by finalized decisions of courts having the power to implement it on the territory of the Kingdom of Cambodia constitute the act of public non-recognition of the crimes committed during the Democratic Kampuchea period;

Which is to be punished by imprisonment of from six months to two years and a fine of 1,000,000 to 4,000,000 riel; this act of public non-recognition of the crimes committed during the Democratic Kampuchea period being by one or another of the following means:

1. By words of mouth, regardless of the type of their expression in a public place or venue of public gathering;

2. By correspondence or depiction, regardless of the type of their dissemination among the public or display to public view;

3. By any means of audio-visual telecommunication to the public.

Article 3

The following additional penalties as stipulated in the Penal Code may be pronounced with regard to this offence:

1. Display of the conviction;

2. Dissemination of the conviction in the media;

3. Dissemination of the conviction in by all audio-visual telecommunication means for a maximum period of eight days.

Article 4

A legal entity may be pronounced as having criminal responsibility for the offence stipulated in Article 2 above, in accordance with the conditions stipulated in Penal Code Article 42 (Criminal Responsibility of Legal Entities). A legal entity is to be punished by a fine of 50,000,000 to 500,000,000 riel as well as by one or many of the additional penalties stipulated in Penal Code Article 168 (Additional Penalties for Implementation Vis-à-vis Legal Entities).

Article 5

This law is to be promulgated urgently.