

Truth can Overcome Denial in Cambodia without Restricting the Freedom of Expression
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The Cambodian government is seeking to combat the denial of crimes committed during the Democratic Kampuchea (DK) period by way of a law that would punish the public expression of such denial with fines and prison. Rather than curtailing the rights to the freedom of expression with criminal penalties, the Cambodian government should seek to end the denial of DK crimes by way of less punitive methods. By deferring to education, debate and rebuke, the Cambodian government can undermine foreign skepticism of the government's sincerity to fundamental human rights as well as build its reputation as a supporter of the truth-seeking process amongst the Cambodian people.

International law recognizes that all people have the right to the freedom of opinion and expression, but it also recognizes that certain restrictions on the freedom of expression may be necessary.¹ States must prohibit hate speech that advocates national, racial or religious hatred or encourages discrimination or violence.² States may also limit speech on other bases, but only insofar as such restrictions are genuinely necessary to protect and respect rights or reputations of others or to protect public order, health, morals, or national security.³

Many European states restrict certain forms of speech, including hate speech and Holocaust denial, by a careful balancing of the freedom of speech with the protection of human dignity and honor. The Holocaust denial laws in Europe began to develop shortly after World War II.⁴ At that time, some people sought to justify Nazi policies and rehabilitate the image of the Nazi party by denying the severity of the atrocities or by disclaiming responsibility.⁵ Numerous Eastern and Western European states, as well as Israel, have laws that directly criminalize the minimization, approval, justification or denial of the Holocaust.⁶ Some states, such as the Netherlands, consider Holocaust denial to be a form of spreading hatred and therefore a punishable offense.⁷

In particular, German law expressly criminalizes denying, approving of, and minimizing the Holocaust and Nazi crimes.⁸ German jurisprudence shows that the laws banning Holocaust denial are justified because such speech promotes racism and hatred against a particular group. The German Constitutional Court explained that while expressing one's opinion is protected under German constitutional law, opinions that are based on "demonstrably false facts" are not worthy of constitutional protection.⁹ Under this reasoning, the court determined that proscribing Holocaust denial is a permissible restriction on the freedom of expression.¹⁰ Problems arise, however, when a state uses its laws that prohibit genocide denial or hate speech in such a way as to persecute people with unpopular views or for political purposes.

Rwanda, for example, which enacted a law that makes denying the 1994 genocide a crime, has been criticized for using this law to convict political opponents and dissenters.¹¹ In January 2012, a Rwandan court convicted two journalists for disputing the official version of the events.¹² In essence, the journalists broke from the state-endorsed narrative of a one-sided genocide of the Tutsis by the Hutus when they suggested that both Tutsis and Hutus committed

murder.¹³ The journalists also criticized the president of Rwanda for not doing enough to punish the people who committed the genocide.¹⁴ In this light, it was clear the journalists were not prosecuted for genocide denial because they did not deny the existence of genocide in Rwanda. Rather, they were indicted for investigating and publishing a history that broke from the Tutsi narrative. Under the cloak of genocide denial, the Rwandan government prosecuted the publication of this counter-narrative as well as using the genocide denial law to silence political criticism and opposition against the Rwandan president.

In contrast to genocide denial laws in Europe and Rwanda, speech law in the United States does not prohibit Holocaust or genocide denial. In the United States, all speech is protected from censorship, unless the government can demonstrate that the restrictions are necessary to protect a compelling government interest. A compelling government interest in American jurisprudence has been found when the law is narrowly tailored toward preventing people from inciting crime, protecting minors, or upholding national security.¹⁵ The rationale is that allowing discussion of even unpopular or offensive ideas is more beneficial than enforcing silence.¹⁶

A United States Supreme Court decision demonstrated this interpretation of freedom of expression when the Court upheld the right for a neo-Nazi group to have a protest rally.¹⁷ Following that decision, the public mobilized and created a counter-protest that far outnumbered the neo-Nazis. In the years following that decision, residents of the town opened a Holocaust museum, education center, and monument.¹⁸ They even persuaded the state legislature to require Holocaust education in schools.¹⁹ In this way, the public remedied neo-Nazi racism by joining together and speaking out publicly against it. By creating education programs, the truth overcame denial.

A law which criminalizes the denial of the crimes committed during the DK period raises similar concerns as those raised in Rwanda's case. As in Rwanda, the Cambodian media is often hesitant to report stories that oppose or criticize government actions.²⁰ Cambodian media coverage of the recent expulsion of opposition party politicians from the National Assembly prior to the vote on the DK crimes denial bill is an example of this reluctance. The expulsion was covered thoroughly in the foreign and English-language media, but was mentioned briefly in only two of eight major Khmer language newspapers.²¹ In this context, it should be clear that criminalizing the denial of Khmer Rouge atrocities may pose a risk of chilling investigation in the areas of historical inquiry, truth-seeking and education.

In addition, historical revisionism in Cambodia has never come close to the revisionist movement that arose in post-World War II Europe. The development of Holocaust denial laws in Europe was a response to this substantial movement to revise Nazi and Holocaust history. In post-WWII Europe there was a segment of society seeking to justify the actions of the Nazi regime or to deny the atrocities committed.²² One of the first people to deny the Holocaust, Maurice Bardèche, argued in *Nuremberg ou le Terre Promise* in 1948 that the Auschwitz gas chambers had been used only to disinfect clothing.²³ Another author, Paul Rassinier, argued that both the atrocities committed by Germans and the number of Jews killed were greatly exaggerated.²⁴ These authors sparked a fringe movement of Holocaust denial writings that continue even today.²⁵

In contrast, though there is some support for a revised history in some former KR strongholds, this does not appear to be the reason for the DK crimes denial law. In Cambodia's

northwestern provinces of Malai and Anlong Veng, there is some evidence suggesting that people view the Khmer Rouge as kind, generous people, who were great economists and rural developers.²⁶ But the proposed law did not correspond with reports on these conditions. Rather, the proposed law was drafted as a response to a statement made on May 20, 2013, by Kem Sokha, leader of the opposition party. Mr. Sokha was alleged to have stated that Tuol Sleng prison was staged by the Vietnamese after toppling the KR regime in 1979.²⁷ The speed with which the Cambodian General Assembly and Senate acted to pass this law in response to a single statement by an opposition party, despite the long-standing support for a revisionist view of the KR regime, suggests that this law may be used for political purposes.²⁸ The fact that elections are soon to be held in Cambodia raises further questions about the motives behind the legislation.

In this context, a DK crime denial law in Cambodia appears to be an unnecessary law that poses great risks. The proposed law poses a risk of politicizing the reconciliation process and stifling historical inquiry into the Khmer Rouge regime. Though not prohibited under international law, limiting the freedom of expression with a DK crime denial law in Cambodia is an inappropriate method to combat denial of the Khmer Rouge atrocities in Cambodia.

A more appropriate approach to combat the denial of such crimes is the use of public debate, rebuke and education. Public rebuke, instead of criminal sanction, could effectively combat the denial of DK crimes—while demonstrating the government’s commitment to upholding the freedom of expression. In contrast to other post-conflict societies that have used speech restrictions to combat genocide denial, Cambodia could choose to present itself as a model post-conflict state. Education programs, such as outreach efforts by the ECCC and civil society, can be an effective means for combatting denial, while avoiding the spectacle of criminal sanction. The ECCC’s outreach programs have allowed more than 70,000 Cambodians from across the country to visit the ECCC in 2012 alone and the media outreach activities, such as a weekly radio show, has reached thousands more.²⁹ The Khmer Rouge Tribunal Study Tour programme—which provides a visit to the ECCC, guided tours of Tuol Sleng Genocide Museum and Choeung Ek Killing Fields, and the opportunity to ask questions of ECCC court officials—has engaged more than 10,000 Cambodians.³⁰ ECCC-sponsored programs alone have brought more than 320,000 people to the Court since 2009. In addition there are many other outreach programs created by local and international NGOs, which have educated thousands more about the Khmer Rouge atrocities.³¹ On top of it all, the Cambodian Ministry of Education, Youth and Sport and the Documentation Center of Cambodia currently provide education on DK history throughout all Cambodian schools.

Through education, rebuke and debate, the government can clearly address the trivial few individuals who may still deny Khmer Rouge atrocities. The Cambodian people can be encouraged to speak out against such individuals and efforts can be focused toward greater education and debate. With continued education and more speech, a law to criminalize the denial of such crimes would be unnecessary. Cambodia stands at a critical point in its post-reconciliation process, and it should not use criminal sanctions to address what can be resolved through greater speech and education.

¹ See UNIVERSAL DECLARATION OF HUMAN RIGHTS, Dec. 10, 1948, G.A. Res. 217A, U.N. Doc. A/810 art. 19; INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, Dec. 16, 1966, 999 U.N.T.S. 171 arts. 19, 20 [hereinafter “ICCPR”].

² ICCPR, art. 20.

³ ICCPR, arts. 19, 20.

⁴ See, e.g. Verbotsgesetz 1947 [Prohibition Act of 1947] BGBl No. 25/1947, amended BGBl No. 148/1992, §3(g), (h) (Austria).

⁵ Peter R. Teachout, *Making "Holocaust Denial" a Crime: Reflections on European Anti-Negationist Laws from the Perspective of U.S. Constitutional Experience*, 30 *Vt. L. Rev.* 655, 661 (2006).

⁶ Jacqueline Lechtholz-Zey, *The Laws Banning Holocaust Denial – Revised from GPN Issue 3*, (Genocide Prevention Now, Jerusalem, Israel), Issue 9, Winter 2012, available at http://www.genocidepreventionnow.org/Portals/0/docs/Holocaust_Denial_Updated_2.8.pdf.

⁷ *Id.* at 3.

⁸ See Strafgesetzbuch [StGB] [Penal Code] 1960, Bundesgesetzblatt [BGBl] 11, 418, as amended, §130 Volksverhetzung [Public Incitement], available at http://www.gesetze-im-internet.de/stgb/___130.html.

⁹ Entscheidung des Bundesverfassungsgerichts [BVerfGE] [Federal Constitutional Court] Apr. 13, 1994, 90, 241 (trans., Raymond Youngs) available at http://www.utexas.edu/law/academics/centers/transnational/work_new/german/case.php?id=621.

¹⁰ *Id.*

¹¹ Owen Bowcott, *Rwanda Journalists Jailed for Genocide Denial Launch Supreme Court Appeal*, *The Guardian*, January 29, 2012, available at <http://www.guardian.co.uk/world/2012/jan/29/rwanda-journalists-genocide-denial-appeal>.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *United States v. Alvarez*, 132 S. Ct. 2537, 2544 (2012); See also, Teachout, *supra* note 6.

¹⁶ *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).

¹⁷ *Nat'l Socialist Party of Am. v. Skokie*, 432 U.S. 43, 43 (1977). After the National Socialist Party of America won its case allowing their neo-Nazi demonstration in Skokie to proceed, the group rescheduled its protest in Chicago, but the media attention that the case received mobilized the public into organizing counter-protests to oppose the neo-Nazi message. See Jon Bertran-Harris & Daniel Ketchell, *Skokie: For All or for None*, <http://digbig.com/4rgaf> (last visited June 10, 2013).

¹⁸ Howard Reich, *Reawakening the Ghosts of Skokie*, *Chicago Tribune*, Jan, 16, 2013., available at http://articles.chicagotribune.com/2013-01-16/opinion/chi-perspec-reawakening-the-ghosts-of-skokie-20130115_1_illinois-holocaust-museum-survivors-skokie.

¹⁹ *Id.*

²⁰ Surya P. Subedi, *Statement by the United Nations Special Rapporteur on the situation of Human Rights in Cambodia*, 4 (Phnom Penh, May 25, 2013).

²¹ Stuart White & Sophak Chakrya, *Expulsion Makes No Waves in Media*, *Phnom Penh Post*, June 12, 2013.

²² U.S. Holocaust Memorial Museum, *Combating Holocaust Denial: Origins of Holocaust Denial*, <http://www.ushmm.org/wlc/en/article.php?ModuleId=10007273> (last visited June 19, 2013).

²³ The Danish Center for Holocaust and Genocide Studies, *Holocaust Denial: Historical Overview*, <http://www.holocaust-education.dk/eftertid/holocaustbenaegtelseh.asp#> (last visited June 19, 2013); Wikipedia, Maurice Bardèche, http://en.wikipedia.org/wiki/Maurice_Bard%C3%A8che#After_World_War_II (last visited June 19, 2013); *Denying the Holocaust*, *The Week*, Feb. 26, 2009, <http://theweek.com/article/index/93693/denying-the-holocaust>.

²⁴ Danish Center for Holocaust and Genocide Studies, *supra* note 27; *Denying the Holocaust*, *The Week*, *supra* note 27; Ben S. Austin, *A Brief History of Holocaust Denial*, Jewish Virtual Library, <http://www.jewishvirtuallibrary.org/jsource/Holocaust/denialbrief.html>.

²⁵ Deborah Lipstadt, *Denying the Holocaust*, *BBC History*, Feb. 17, 2011, http://www.bbc.co.uk/history/worldwars/genocide/deniers_01.shtml#five; *Denying the Holocaust*, *The Week*,

supra note 27. See, e.g. Institute for Historical Review, <http://www.ihr.org/> (Institute dedicated to challenging “the myth” of the Holocaust).

²⁶ Neou Vannarin & Julia Wallace, *Ieng Sary Support High in Malai as Trials Loom*, The Cambodia Daily, Sept. 15, 2010, available at <http://www.cambodiadaily.com/archive/ieng-sary-support-high-in-malai-as-trials-loom-2873/>.

²⁷ Abby Seiff, *The Denial Law Dilemma*, The Phnom Penh Post, June 7, 2013. (Mr. Sokha reportedly stated the following day that his words had been taken out of context and he had no doubt “about the torture and cruelty that the Khmer Rouge inflicted on the Khmer people.” His party, the Cambodia National Rescue Party, stated, “Mr. Sokha has never denied that there was torture and killing of Cambodian people by the KR at Tuol Sleng prison. Mr. Kem Sokha openly condemns the KR genocidal regime because he himself and his family were also victims.”); Neou Vannarin & Zsonbor Peter, *Hun Sen Calls for Law Against Denial of KR Crimes*, The Cambodia Daily, May 28, 2013, available at <http://www.cambodiadaily.com/archive/hun-sen-calls-for-law-against-denial-of-kr-crimes-27128/>.

²⁸ Mr. Sokha allegedly made the statement on May 20, 2013, Prime Minister Hun Sen called for legislation on May 27, 2013 and the legislation passed unanimously in the National Assembly on June 7, 2013. Kuch Naren & Lauren Crothers, *CPP-led Assembly Approves KR Crimes Law*, The Cambodia Daily, June 8, 2013, available at <http://www.cambodiadaily.com/news/cpp-led-assembly-approves-kr-crimes-law-29981/>.

²⁹ *The Year in Review: ECCC Reached Out to Nearly 100,000 People in 2012*, The Court Report, The Extraordinary Chambers in the Courts of Cambodia, Feb. 2013 at 1,6, available at http://www.eccc.gov.kh/sites/default/files/publications/February%202013%20Court%20Report_FINAL.pdf.

³⁰ *Id.* at 6.

³¹ *Id.*