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H.E. Heng Samrin
President of the National Assembly
National Assembly
Phnom Penh
Kingdom of Cambodia

7 June 2013

Your Excellency,

OPEN LETTER: FREEDOM OF EXPRESSION AND THE PROPOSED LAW TO CRIMINALIZE DENIAL OF CRIMES COMMITTED BY THE KHMER ROUGE

Amnesty International is concerned about reports of a planned new Law on Refusing to Recognise Crimes Committed in the Period of Democratic Kampuchea Law (hereinafter the “Khmer Rouge Crime Denial Law”). In the light of information about the bill so far available publicly, the organization recommends that the proposed law be scrapped.

According to media reports,¹ the bill was drafted in response to a proposal by Cambodia’s Prime Minister, and will be debated in Cambodia’s National Assembly today, Friday 7 June 2013.

The draft Khmer Rouge Crime Denial Law reportedly contains the following provisions:

- It will apply to anyone who “refuses to acknowledge, diminish, deny or challenge the existence of crimes or glorify crimes committed during the Democratic Kampuchea in accordance with criminal provisions.”²
- It will apply to communications including “a public announcement, ‘written correspondence or painting’ and ‘audio visual communications for the public’.”³
- “The scale of punishment will rely on how much she or he speaks and how big the audiences are.”⁴
- Punishments for denying crimes will range from “six months to two years in jail” for individuals, and a fine ranging from “about \$250 to \$1,000.”⁵
- It will allow for legal entities, which can include political parties, to be held criminally liable if their representatives are found guilty of breaking the law.⁶

¹ E.g. ‘Lawmakers Draft Genocide Denial Law, Will Debate Next Week’, Kuch Naren and Lauren Crothers, Cambodia Daily, 1-2 June 2013.

² ‘Genocide Not Included In Law On Denial Of KR Crimes’, Dene-Hern Chen and Phorn Bopha, Cambodia Daily, 5 June 2013.

³ Ibid.

⁴ ‘Lawmakers Draft Genocide Denial Law, Will Debate Next Week’, Kuch Naren and Lauren Crothers, Cambodia Daily, 1-2 June 2013.

⁵ ‘Genocide Not Included In Law On Denial Of KR Crimes’, Dene-Hern Chen and Phorn Bopha, Cambodia Daily, 5 June 2013.

⁶ ‘KR crimes denial law set to pass’, Abby Seif, Phnom Penh Post, 5 June 2013.

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Amnesty International recognizes the great suffering caused by crimes committed during the period of Democratic Kampuchea. The organization has for many years called for accountability for such crimes and for the prosecution and trials of those suspected of committing such crimes, in proceedings which meet international fair trial rights standards. We have welcomed the work of the Extraordinary Chambers in the Courts of Cambodia (ECCC), while raising a number of fair trial rights concerns.⁷

However, broad laws that criminalize the expression of opinions about historical facts, including whether crimes were committed during the period of Democratic Kampuchea, are not compatible with Cambodia's obligations under international human rights law, in particular to protect and respect the right to freedom of expression. Further, as experience in other countries has shown, such laws can have very negative, even if unintended, consequences.

FREEDOM OF EXPRESSION

Article 19 of the International Covenant on Civil and Political Rights (ICCPR), which is legally binding on Cambodia as a state party, guarantees the right to freedom of opinion – which may not be restricted or limited – and the right to freedom of expression. The right to freedom of expression is also expressly enshrined in Article 41 of Cambodia's Constitution.

The Human Rights Committee (the Committee), the UN expert body charged with overseeing the implementation of the ICCPR, has clarified in its authoritative General Comment on Article 19 that the right to freedom of expression encompasses “even expression that may be regarded as deeply offensive.”⁸

Paragraph 3, Article 19 of the ICCPR allows state parties to impose limits on freedom of expression, but only if provided for by law and in order to protect the rights of others, such as the right to be free from discrimination, and for the protection of national security, public order, public health and morals. Restrictions must be applied only for those purposes for which they were prescribed, must be directly related to the specific need on which they are predicated and must not have the effect of destroying the right itself.⁹

Vague and sweeping laws that criminalize opinion and speech about historical facts contravene international human rights obligations and commitments to freedom of expression. The Committee has stated:

“Laws that penalize the expression of opinions about historical facts are incompatible with the obligations that the Covenant [ICCPR] imposes on States parties in relation to the respect for freedom of opinion and expression. The Covenant does not permit general prohibition of expressions of an erroneous opinion or an incorrect interpretation of past events. 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.”¹⁰

States are required, under Article 20(2) of the ICCPR, to prohibit advocacy of hatred that constitutes incitement to hostility, discrimination or violence. However, any such prohibitions which result in

⁷ E.g. ‘Khmer Rouge Tribunal: Last Chance to Salvage Justice’, commentary, 17 December 2012, Amnesty International.

⁸ Human Rights Committee, General Comment no. 34, Article 19: Freedoms of opinion and expression, UN Doc. CCPR/C/GC/34, 12 September 2011, para. 11.

⁹ *Ibid.*, paras. 21-2.

¹⁰ *Ibid.*, para. 49.

restrictions of freedom of expression must also comply with the three-part test for restrictions under Article 19(3), as set out above.¹¹

State parties to the ICCPR are permitted and indeed required, under Article 20(2), to prohibit “advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence”. Amnesty International considers that this provision extends equally to incitement to discrimination on any basis—whether gender, sexual orientation, indigenous status, disability, political opinion, language, or other status.

Prohibiting such advocacy of hatred towards victims of the Khmer Rouge – as towards any other group – could be a legitimate aim, including when such advocacy accompanies the denial of past crimes against them. However, protection measures must be targeted specifically and narrowly at such advocacy rather than prohibiting, still less criminalising, historic denials. The Committee has clarified that laws prohibiting the advocacy of hatred “should not go beyond what is permitted in paragraph 3 [Article 19 of the ICCPR] or required under article 20 [of the ICCPR].”¹²

Amnesty International is therefore concerned about the lawfulness under international human rights law of the proposed Khmer Rouge Crimes Denial Law.

NEGATIVE CONSEQUENCES

Aside from being incompatible with Cambodia’s obligations under international human rights law, broad laws that criminalize the expression of opinions about historical facts, including whether crimes were committed, can have negative, even if unintended, consequences, which include:

Damaging efforts aimed at truth and reconciliation

As Youk Chhang, a respected Cambodian civil society leader and victim of the Khmer Rouge, has pointed out: “While we may have nothing but the best intentions in mind when we prohibit speech that denies genocide, we inevitably denigrate the spirit of searching for the truth by using the instrument of law to dictate what happened and why ... the law carries great risks that far outweigh its perceived benefits.”¹³

Indeed, the ECCC has made strides in helping to create the space for discussing the Khmer Rouge period, and has devoted significant efforts in outreach to communities throughout the country and transporting citizens to Phnom Penh to see the trials unfold.

These efforts – and the work of those groups such as Youk Chhang’s Documentation Center of Cambodia – could be undermined by the proposed Khmer Rouge Crimes Denial Law, as people become scared of talking about the Khmer Rouge period for fear of saying anything that amounts to a crime under the proposed new law.

The proposed law may 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. As Youk Chhang said: “Historical inquiry is one of the key vehicles for understanding our past and it requires an atmosphere of free expression.”¹⁴

¹¹ *Ibid.*, para. 48.

¹² *Ibid.*, para. 49.

¹³ ‘The Law on the Denial of the Khmer Rouge Crimes: Truth Does Not Need the Law for Protection’, Commentary, Youk Chhang, Director, Documentation Center of Cambodia, 3 June 2013.

¹⁴ *Ibid.*

Undermining the Khmer Rouge trials

The proposed Khmer Rouge Crimes Denial 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.

Rule 28 of the Tribunal’s Internal Rules provides: “A witness may object to making any statement that might tend to incriminate him or her.”¹⁵ The Rule allows for assurances to be given to witnesses that their answers will be kept confidential and will not be used against them in any subsequent prosecution at the ECCC.¹⁶ But Amnesty International understands that witnesses and experts do not enjoy immunity for what they may say at the Tribunal; while the ECCC does not have the power to bind other courts in Cambodia or prohibit them from prosecuting such witnesses, including for alleged crimes under the proposed Khmer Rouge Crimes Denial Law if it was to become law.

As part of the completion strategy at the International Criminal Tribunal for Rwanda (ICTR), the ICTR Prosecutor proposed the transfer of five cases to Rwandan courts. But all Trial Chambers and Appeal Chambers at the ICTR that ruled on potential transfers to Rwanda ruled against transfer. This was partly due to the possibility that the threat, or perceived threat, of accusations of “genocide ideology” under Rwanda’s genocide denial laws may prevent witnesses coming forward and inhibit the right of defendants to a fair trial.¹⁷

Misuse for political gain

Also in Rwanda, broad and ill-defined laws have created a vague legal framework which is misused to criminalize criticism of the government and legitimate dissent. In the run-up to the 2010 elections, for example, legitimate political dissent was conflated with “genocide ideology”, compromising the freedom of expression and association of opposition politicians, human rights defenders and journalists critical of the government.¹⁸

While the Cambodian context and proposed law are different to those in Rwanda, the timing of the proposed Khmer Rouge Crimes Denial Law comes as the country prepares for national elections on 28 July 2013. Further, it has been reported that the law was proposed “only days after the government released audio of opposition leader Kem Sokha apparently claiming that the jailing and torture of thousands of Cambodians at the notorious Khmer Rouge prison of Tuol Sleng were fabricated by Vietnam.”¹⁹ This context does not bode well, with a risk that politicians would try to use the new law to attack opponents.

Wider chilling effect

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.

Amnesty International has described in detail the general chilling effect that Rwandan legislation, not dissimilar to the proposed law in Cambodia, has had in that country and has called for its repeal.²⁰

¹⁵ Rule 28, Internal Rules (Rev.8), Extraordinary Chambers in the Courts of Cambodia.

¹⁶ *Ibid.*, Rule 28(3).

¹⁷ Amnesty International, *Safer to stay silent: The chilling effect of Rwanda's laws on 'genocide ideology' and 'sectarianism'* (Index: AFR 47/005/2010).

¹⁸ *Ibid.*

¹⁹ E.g. ‘Officials Drop Genocide To Refer to KR Crimes’, Zsombor Peter and Phorn Bopha, Cambodia Daily, 6 June 2013.

²⁰ Amnesty International, *Safer to stay silent: The chilling effect of Rwanda's laws on 'genocide ideology' and 'sectarianism'* (Index: AFR 47/005/2010).

RECOMMENDATIONS

Amnesty International has not been able to review an official version of the proposed Khmer Rouge Crimes Denial Law, and as the proposed law is to be debated in the National Assembly just over one week since it was proposed by Cambodia's Prime Minister, we have not been able to undertake a complete analysis of the law.

However, based on the information about the proposed law that has been reported in the media, Amnesty International recommends that Cambodia's National Assembly sets aside the bill, scrapping the proposed law.

Should the National Assembly deem it necessary to introduce a law to deter hate speech, such a law must also protect the right to freedom of expression enshrined in international conventions. In particular, Amnesty International recommends that Cambodia's National Assembly:

- Undertakes a public consultation on the law to consider whether it is indeed required. Allow consultation between Cambodian lawyers, prosecutors and judges, international legal experts, civil society actors and international non-governmental organizations, and invite comments by the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression;
- Ensures that any such law is fully compatible with Cambodia's international human rights obligations, including the relevant provisions under the ICCPR, as explained and interpreted by the Human Rights Committee; and
- Ensures that adequate resources are made available for training police, prosecutors, judges and others on the correct implementation of the law, in line with Cambodia's international human rights commitments.

Amnesty International respectfully requests that Your Excellency provides copies of this letter to all members of Cambodia's National Assembly. In the interests of transparency, we will make a copy of this letter available on our website.

Should Your Excellency or members of Cambodia's National Assembly have any questions regarding Amnesty International's concerns, we would welcome the opportunity to discuss them.

Yours sincerely,

Polly Truscott
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