AMERICAN BAR ASSOCIATION
CENTER FOR HUMAN RIGHTS
WASHINGTON, DC

I. Introduction[1]

This memo analyzes the extent to which the prosecution of activist Lena Hendry under Malaysia's Film Censorship Act ("FCA") contradicts human rights standards embodied in the Universal Declaration of Human Rights ("UDHR") and the International Covenant on Civil and Political Rights ("ICCPR"). In doing so, this memorandum analyzes the FCA under the ICCPR and compares the FCA to similar laws regarding freedom of expression and censorship from other countries and regions.

Our research suggests that while many, if not most, countries regulate the dissemination of films, they do so in a manner that is narrowly tailored to serve a compelling state interest. Limited allowable methods for regulating the dissemination of films include industry self-regulation and limited restrictions on films that may incite racial or religious hatred.

In prosecuting Ms. Hendry under the FCA for showing a film regarding the civil war in Sri Lanka, the Malaysian government has placed itself at odds with its own constitution and commitments to the ICCPR. Our analysis suggests that using the FCA to target Ms. Hendry for ostensibly political speech is inconsistent with Malaysia's commitment to honor the principles of the UDHR and ICCPR.

II. Background

Lena Hendry is an activist and staff member of a Malaysian human rights organization, Pusat Komas, which is dedicated to producing and disseminating human rights documentaries, hosting human rights film festivals, and publishing human rights reports.

On July 3, 2103, Pusat Komas held a private screening of the film "No Fire Zone: The Killing Fields in Sri Lanka." The film is an investigative documentary about the end of the Sri Lankan Civil War, depicting alleged war crimes committed by the Sri Lankan army. Prior to the screening, Kuala Lumpur and Selangor Chinese Assembly Hall ("KLSCAH") received a letter from the Sri Lankan High Commission urging the owner of the premises to disallow the film to

[1] The statements and analysis contained in this memorandum are the work of the American Bar Association Center for Human Rights, which is solely responsible for its content. The Board of Governors and House of Delegates of the American Bar Association has neither reviewed nor sanctioned its contents. Accordingly, the views expressed herein should not be construed as representing the policy of the ABA. In addition, this memorandum is intended as background information. It is not intended as legal advice on particular cases.

be shown. The Sri Lankan High Commissioner also called the chairman of KLSCAH, urging him to not screen the movie because he claimed it was factually inaccurate.

Shortly after the film began, thirty law enforcement officials from Ministry of Home Affairs, Immigration, and the police entered the hall. After the movie finished, the officials checked the identity cards of all the individuals who attended the event. Hendry and two of her colleagues from Pusat Komas were taken to the police station. At the police station, they were questioned for three hours and were told halfway through the interrogation that they were being arrested. The officials kept a copy of the film.

Hendry was subsequently charged under the FCA. The charging sheet stated: "you [Hendry] on the 3.07.2013 at approximately 9pm . . . screened the film No Fire Zone: The Killing Fields of Sri Lanka that has not been approved by the censorship board. Hence, you have committed the offence under section 6(1)(b) of the film censorship act 2002 and can be punished under section 6(2)(a) of the same act." § 6(1)(b) of the FCA prohibits the possession, exhibition, or display of films that have not been approved by the Film Censorship Board. Hendry has been released on bail. If convicted, Hendry would face a fine of 5,000-30,000 Malaysian Ringgit, a term in prison of up to three years, or both under § 6(2)(a).

The International Commission of Jurists ("ICJ") has called on the Malaysian government to immediately drop the charges against Ms. Hendry. The ICJ's Asia-Pacific Regional Director, Sam Zarifi, stated that "[s]ubjecting Lena Hendry to criminal prosecution simply for screening a documentary violates her rights and contravenes Malaysia's obligations to uphold freedom of expression." Zafiri further explained that Malaysia told the United Nations Human Rights Council that it was committed to upholding respect for human rights and, as Zafiri noted, "[t]hat commitment is inconsistent with prosecuting human rights defenders for disseminating documentary human rights information."

III. Applicable Law and International Standards

A. International Human Rights Standards

1. Universal Declaration of Human Rights (UDHR)

The UDHR was adopted by the United Nations ("UN") in 1948.[2] Malaysia is a member of the UN and is thus bound by the UDHR by virtue of the UN charter. The UDHR defines the terms "human rights" and "fundamental rights" in the charter and thus incorporates the standards contained in the UDHR into the obligations of all the members of the UN. Article 19 of the UDHR establishes that everyone has the right to freedom of opinion and expression.[3] Article 19 further states that everyone has the right to "seek, receive and impart information and ideas through any media regardless of frontiers."[4]

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[2] *See* Introduction to the Universal Declaration of Human Rights, *available at* www.ohchr.org/en/udhr/pages/introduction.aspx. The UDHR is a declaration and not a treaty, and thus lacks the legal force of a treaty.

[3] Universal Declaration of Human Rights, G.A. Res. 217 (III) A, art. 19, U.N. Doc. A/Res/217(III) (Dec. 10, 1948).

[4] *Id.*

2. International Covenant on Civil and Political Rights (ICCPR)

The ICCPR, similar to the UDHR, articulates the right to freedom of expression, stating specifically that this includes the right to seek, receive and impart information and ideas "orally, in writing or in print, in the form of art, or through any other media".[5] The ICCPR states that the freedom of expression may be subject to certain restrictions, but only those that are provided by law and are necessary "for the respect of the rights or reputations of others" or "for the protection of national security or of public order, or of public health or morals."[6]

The United Nations Human Rights Committee ("Human Rights Committee" or "Committee") – the body charged with authoritative interpretation and enforcement of the ICCPR – has expressly stated that the criminalization of speech concerning historical facts violate Article 19 of the ICCPR: "[l]aws 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."[7]

Although Malaysia has not formally adopted the ICCPR, the Office of the Attorney General of Malaysia has stated that Malaysia responds and adheres to the principles laid down in a variety of human rights instruments, including documents it has not ratified, such as the ICCPR.[8] In 2009, Malaysia pledged to keep pace on the development of civil and political rights in the country.[9] Malaysia also pledged to "consider ratification" in 2009, but has not made any steps toward ratifying any of the international human rights instruments.[10]

a. Freedom of Opinion and Freedom of Expression

Chief among the rights protected under the ICCPR are the rights to freedom of opinion and freedom of expression.[11] As the Human Rights Committee has noted, "Freedom of opinion and freedom of expression are indispensable conditions for the full development of the person. They are essential for any society."[12]

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5 International Covenant on Civil and Political Rights, art. 19(2), Mar. 23, 1976, 999 U.N.T.S. 171 [hereinafter ICCPR];

6 *Id.* at art. 19(3)

7 Hum. Rts. Comm. General Comment No. 34, para. 49, U.N. Doc. CCPR/C/GC/34 (Sept. 12, 2011), *available at* http://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf.

8 *Human Rights*, The Official Portal of the Attorney General's Chambers (2011), *available at* http://www.agc.gov.my/index.php?option=com_content&view=article&id=408%3Ahuman-rights-&catid=65%3Aunits-and-sections&Itemid=334&lang=en.

9 *Malaysia Universal Periodic Review: Civil and Political Rights Lagging Behind*, Amnesty International, October 30, 2013, *available at* http://www.amnesty.org/en/library/asset/ASA28/010/2013/en/486a9928-97dc-4a3b-93c3-53ae8fa41ed1/asa280102013en.html.

10 There was no mention of any progress to ratify these treaties in Malaysia's 2013 Universal Periodic Review.

11 ICCPR, *supra* note 5 at art. 19

12 Hum. Rts. Comm. General Comment No. 34, para. 2, U.N. Doc. CCPR/C/GC/34 (Sept. 12, 2011).

Specifically, Article 19 of the ICCPR prohibits State Parties from limiting an individual's right to hold opinions even in a state of emergency.[13] In addition, the ICCPR states that individual freedom of expression includes the right to "seek, receive and impart information and ideas of all kinds," and that it may only ever be restricted as "provided by law[,]" and only where the restrictions imposed are "necessary…[f]or respect of the rights or reputations of others" or "[f]or the protection of national security or of public order…or of public health or morals."[14]

The Human Rights Committee's decisions consistently require that these standards be stringently met in order to be compatible with Article 19. The Committee has stated that three prongs must be satisfied: 1) it must be provided by law; 2) it must address one of the aims set out in paragraph 3 (a) and (b) of Article 19 (respect of the rights and reputation of others; protection of national security or of public order, or of public health or morals); and 3) it must be necessary to achieve a legitimate purpose.[15] The Committee has stressed the importance of strictly interpreting the purposes for restriction, stating "[t]he right to freedom of expression is of paramount importance in any democratic society, and any restrictions to the exercise of this right must meet a strict test of justification."[16]

b. Freedom from Arbitrary Arrest

Similarly, Article 9 of the ICCPR prohibits State Parties to the covenant from infringing on individuals' right to liberty.[17] This right includes a guarantee that authorities will only arrest or detain citizens pursuant to existing laws and that anyone arrested will be informed at the time of the arrest of the reason(s) the arrest was made and promptly informed of the charges against him.[18]

c. Freedom from Retrospective Application of Law

The ICCPR imposes an equally stringent prohibition on retrospectively imposed increases of criminal penalties through Article 15.[19] Parties to the treaty are forbidden from imposing "a heavier penalty…than the one that was applicable at the time when the criminal offence was committed."[20] Accordingly, the ICCPR prohibits imposing harsher penalties on convicted criminals than those allowed at the time of the original offense.

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13 ICCPR, *supra* note 5 at art. 19

14 *Id.* at art. 19(2), 19(3)

15 Kim v. Republic of Korea, U.N. Human Rights Committee, CCPR/C/64/D/574/1994, Communication No. 574/1994 (4 Jan. 1999)

16 Park vs. the Republic of Korea, U.N. Human Rights Committee, U.N. Doc. CCPR/C/64/D/628/1995, Communication No. 628/1995 (November 3, 1998); Vladimir Laptsevich v. Belarus, U.N. Human Rights Committee, U.N. Doc. CCPR/C/68/D/780/1997, para 8.2 (March 20 2000)

17 ICCPR, *supra* note 5 at art. 9

18 *Id.*

19 ICCPR, *supra* note 5 at art. 15

20 *Id.*

B. Malaysia Law

1. Film Censorship Act (FCA)

Malaysia's film censorship regime has generated a significant amount of national and international criticism. The Malaysian Film Censorship Board, consisting of three members appointed by the Minister of Home Affairs, has an extraordinary amount of control over films in Malaysia. Under the FCA, the Board must approve all films that are circulated, exhibited, distributed, displayed, manufactured, produced, hired, or sold in Malaysia.[21]

The FCA criminalizes possession, custody, or control of films or film publicity materials that have not been approved by the Board.[22] The FCA applies to all films within Malaysia, with a few exceptions carved out for special categories of films, including those sponsored by the government.[23]

2. Malaysian Constitution

Article 10 of the Malaysian Constitution provides a basic right to freedom of speech and expression, but also outlines several permissible restrictions to the freedom of speech.[24] Under Article 10, the Malaysian government may restrict speech as necessary or expedient in the interest of protecting national security, preserving friendly relations with other countries, or maintaining public order or morality.[25] Restrictions are also permissible if they are designed to protect the privileges of Parliament or of any Legislative Assembly or to provide against contempt of court, defamation, or incitement to any offense.[26]

Despite the Constitutional guarantee of freedom of expression, the availability of exceptions allows the government wide latitude in limiting speech. Freedom of expression is generally considered very limited in Malaysia.[27] In addition to the FCA, speech is regularly limited by the government's use of the Sedition Act and stringent defamation laws.

IV. Reasonable Restrictions on Freedom of Expression and Association

Most countries that adhere to the UDHR and ICCPR have developed permissible standards of regulation that are narrowly tailored to serve compelling government interests. Limited restrictions on the dissemination of films do not necessarily conflict with the basic principles of freedom of expression articulated in the UDHR and ICCPR when they are not used

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21 FCA, Act 620-(4); 6(1)(b).

22 *Id*. at 620 6(1)(a).

23 *Id*. at 620 2(2).

24 Malaysian Constitution, art. 10(1)(a).

25 *Id*. at art. 10(2)(a).

26 *Id.*

27 Freedomhouse.org gives Malaysia a rating of "Not Free" for the freedom of the press, *Malaysia*, FREEDOMHOUSE.ORG (2013), http://www.freedomhouse.org/report/freedom-press/2013/malaysia.

to constrain political speech. A few examples of the range of regulations and restraints are described below.

A. Regulation of Film in the United States

In the United States, any government regulation of the film industry is subject to the limitations of the First Amendment of the United States Constitution, which guarantees the freedom of speech and the freedom of the press.[28] The First Amendment substantially limits how, when, and to what degree the government can regulate the film industry. Despite the protections guaranteed by the First Amendment, the primary form of regulation occurs not through the government, but through a rating system administered by a private entity, the Motion Picture Association of America ("MPAA").

1. Self-Regulation and the Rating System

As a private entity, the MPAA's ratings system is not subject to the limits of the First Amendment. All films produced or distributed by MPAA members are submitted to the rating board for rating, and even non-members may submit a film for a rating. Although ratings are not required, most producers have their films rated because of the high number of theaters that cooperate with the MPAA and because failing to get a rating makes the film's opportunities for distribution much more limited.[29] The rating classifies the film into one level of a graduated system, ranging from the lowest level that is suitable for all audiences to the highest, which excludes children under seventeen from seeing the film because it contains too much vulgarity, violence, or sex.[30]

2. Government Restrictions on Films

Although initially films were not entitled to protection under the First Amendment, in 1952 the United States Supreme Court held that films are expression and thus entitled to protection under the free speech and free press guaranty of the First and Fourteenth Amendments.[31] The First Amendment covers publication, circulation, and distribution of films.[32] As protected speech, any law that limits the dissemination of a film is unconstitutional, unless it falls into an exception or can otherwise be justified. Further, any restriction must be narrowly tailored to afford the full protection of the First Amendment, otherwise the restriction will be considered overbroad and thus unconstitutional.[33]

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28 U.S. CONST. amend. I. ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.").

29 Richard P. Salgado, *Regulating a Video Revolution*, 7 YALE L. & POL'Y REV. 516, 519-20 (1989).

30 Alexander Lindey & Michael Landau, *Lindey on Entertainment, Publishing and the Arts* § 6.5 (3d ed. 2013).

31 *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 502 (1952).

32 *See The Purple Onion, Inc. v. Jackson*, 511 F. Supp. 1207 (N.D. Ga. 1981) (citing *Joseph Burston, Inc. v. Wilson, 343 U.S. 495* (1952)).

33 *Graham v. Hill*, 444 F. Supp. 584, 593 (W.D. Tex. 1978).

When films confront government regulation in the U.S., it is most frequently based on obscenity grounds. The Supreme Court has stated that obscenity is not constitutionally protected free speech; thus, an obscene film is not entitled to First Amendment protection.[34] In order to be considered obscene, the government must show that the film meets the court-defined standard for obscenity.[35] This standard is also known as the *Miller* test: 1) whether the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest; 2) the work depicts or describes in a patently offensive way under contemporary community standards sexual conduct specifically defined by the applicable state law; and 3) the work taken as a whole lacks serious literary, artistic, political, or scientific value.[36]

If the film is not obscene, a law punishing the dissemination of the film is presumptively unconstitutional.[37] Courts allow the government to overcome the presumption by showing that the restriction meets certain standards. If a restriction specifically targets certain types of speech because of the underlying message of the speech, then the restriction is considered "content-based".[38] For example, a law prohibiting the dissemination of any films about abortion would be a content-based restriction because it restricts a class of speech based on the content of speech.

A content-based speech restriction is presumptively unconstitutional. In order to overcome this presumption, the government must prove that the restriction meets strict scrutiny.[39] Strict scrutiny means that the government must show that there is a compelling government interest for the law and the restriction must be the least-restrictive (narrowly tailored) means for enforcing that law. Few challenges survive strict scrutiny.[40] For example, the U.S. Supreme Court found that a law that prohibited indecent communications to minors using the internet failed the strict scrutiny analysis. The Court found that, although the goal of protecting children from harmful materials was important, there were other ways to achieve that goal without such severe limits to adult-to-adult expression on the internet.[41]

3. The National Security Exception to Prior Restraint

If a restriction stops speech before it occurs, for example, preventing the dissemination of a film, then that limitation is known as a "prior restraint" and is presumptively unconstitutional.[42]

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34 *Miller v. California*, 413 U.S. 15 (1973).

35 *Id.* at 24.

36 *Id.*

37 Aside from obscenity, there are a number of other exceptions to First Amendment protection. *See, e.g. R.A.V. v. City of St Paul, Minnesota*, 505 U.S. 377, 383 (1992).

38 *See, e.g. Carey v. Brown*, 447 U.S. 455, 462-63 (1980).

39 *Ashcroft v. American Civil Liberties Union*, 535 U.S. 564, 585-86 (2002).

40 "Strict scrutiny leaves few survivors." *City of Los Angeles v. Alameda Books*, 535 U.S. 425, 455 (2002) (J. Souter, dissenting).

41 *Reno v. American Civil Liberties Union*, 521 U.S. 844, 876 (1997).

42 *Freedman v. Maryland*, 380 U.S. 51, 57 (1965); *see generally* Franic Amendola, *et al., 16B Corpus Juris Secundum Constitutional Law* § 862 (2013).

The U.S. Supreme Court has stated that "any system of prior restraint or prior restraint of expression comes bearing a heavy presumption against its constitutionality."[43] Although there is not an absolute ban, any prior restraint must fall within one of a few narrow exceptions, one of which is a national security exception.[44]

Although there is a national security exception to the prohibition on prior restraint, it has been construed narrowly.[45] In *New York Times Co v. United States*,[46] the Court denied an injunction to restrain the publication of the Pentagon Papers, secret documents that were leaked regarding American involvement in the Vietnam War. The Court denied the injunction because even a temporary injunction based on the government claims that the Pentagon Papers threatened to harm national security were not enough of a justification to prevent publication.[47] Although its boundaries are not clear, it is well settled that there is a national security exception to prevent the dissemination of government secrets.[48]

B. Limited Government Regulation in Europe

In other countries, government regulations restrict the dissemination of films that could incite racial or religious hatred. For example, England enacted the Racial and Religious Hatred Act of 2006 that creates an offense for inciting hatred against a person on the grounds of religion or race.[49] France also has a similar law that allows for criminal prosecution for incitement of religious hatred.[50]

The European Court on Human Rights ("ECtHR") – the authoritative body for interpreting the European Convention on Human Rights – has repeatedly addressed whether

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43 *Bantam Books v. Sullivan*, 372 U.S. 58, 70 (1963).

44 The U.S. Supreme Court has stated that prior restraint is only allowable in "exceptional cases." *Near v. Minnesota*, 283 U.S. 697, 716 (1931). The Court noted that prior restraint might be acceptable in preventing the publication of obscenity or to protect against incitement to acts of violence and overthrow by force of orderly government. However, laws are rarely found to comport with the U.S. Constitution when using prior restraint. Even judicial gag orders are only sustained in exceptional circumstances. *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976); s*ee also* David L. Hudson, Jr., Legal Almanac: The First Amendment: Freedom of Speech § 2:10 (Oct. 2012).

45 The United States has successfully imposed gag orders in a variety of contexts, including under certain provisions of the Patriot Act and for convicted terrorists.

46 403 U.S. 714 (1973) (per curiam).

47 *Id.; see also* Kenneth J. Pierce, *Public Cryptography, Arms Export Controls, and the First Amendment: A Need for Legislation*, 17 CORNELL INT'L L.J. 197 (1984) (stating that six factors were important in the decision: 1) the type of individual liberty infringed, 2) the magnitude of the danger to be avoided, 3) the scope of Presidential power in this area of the restraint; 4) congressional approval of the restraint; 5) whether government employees or funds are to be involved; and 6) whether the speech discloses classified information).

48 *See, e.g.* David McCraw & Stephen Gikow, *The End to an Unspoken Bargain? National Security and Leaks in a Post-Pentagon Papers World*, 48 HARV. C.R.-C.L.L. REV. 473 (2013).

49 Racial and Religious Hatred Act 2006, *available a*t http://www.legislation.gov.uk/ukpga/2006/1/contents.

50 *See, e.g.* Michel Houellebecq relaxé, Le Monde (Paris), Oct. 24, 2002 (describing Houellebecq's acquittal); Philip Delves Broughton, "Rats" Slur Writer Is Facing Muslim Race Case, Daily Telegraph (London), Sept. 6, 2003, at 18; Susannah C. Vance, *The Permissibility of Incitement to Religious Hatred Offenses Under European Convention Principles*, 14 TRANSNAT'L L. & CONTEMP. PROBS. 201 (2004).

these laws violate free speech principles in the European Convention, which has a similarly phrased protection of freedom as speech as those of the UDHR and ICCPR.[51] The ECtHR employs a three-prong approach to address whether these statutes are a permissible restraint.[52] The first prong is whether the state interference with speech was "prescribed by law." This prong requires that a law limiting the freedom of expression must be, *inter alia*, "accessible and foreseeable" in its effects.[53] This essentially functions to eliminate vague laws. This prong can be satisfied by precision, access, clarity, and foreseeability.[54]

The second prong requires courts to assess whether the regulation contested serves a legitimate aim.[55] In order to serve a legitimate aim, the law must be narrowly tailored.[56] Legitimate interests are limited to those listed in Article 10 of the European Convention, which includes national security, public safety, protection of health or morals, protection of reputation, preventing disorder or crime, and others.[57] These exceptions, however, are meant to be narrowly interpreted and the necessity for such restrictions must be convincingly established.[58]

Lastly, the court asks whether the restriction is necessary for a democratic society. This prong requires the state to demonstrate that the restriction is justified by a relevant and sufficient goal.[59] The ECtHR has stated that the interference with freedom of expression must meet a pressing social need, while remaining proportionate, achieving a fair balance between various conflicting interests.[60] Under this prong, the court examines the content of the expression as a whole and the circumstances under which they were made.[61]

1. The National Security Exception to Speech Restrictions

Article 10(2) of the European Convention allows for restrictions on the freedom of expression if it is in the interest of national security, territorial integrity, or public safety.[62] Much

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51 Council of Europe, *Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November, 1950, ETS 5, art. 10 [hereinafter after ECHR].

52 Roger Kiska, *Hate Speech: A Comparison Between the European Court of Human Rights and the United States Supreme Court Jurisprudence*, 25 REGENT U. L. REV 107 (2012-13).

53 *See*, *e.g.*, *Toniolo v. San Marino and Italy*, Eur. Ct. H.R. App. No. 44853/10 (2012).

54 *See Ezelin v. France*, 202 Eur. Ct. H.R. (ser. A), App. No. 11800/85 at 21-22 (1991).

55 Susannah C. Vance, *The Permissibility of Incitement to Religious Hatred Offenses Under European Convention Principles*, 14 TRANSNAT'L L. & CONTEMP. PROBS. 201 (2004).

56 *See Thoma v. Luxemborg*, 2001-III Eur. Ct. H.R. 67, 84 (2001).

57 ECHR, *supra* note 51.

58 *See*, *e.g.*, *Thorgeirson v. Iceland*, Eur. Ct. H.R. App. No. 13778/88 (1992).

59 *See* Susannah C. Vance, *The Permissibility of Incitement to Religious Hatred Offenses Under European Convention Principles*, 14 TRANSNAT'L L. & CONTEMP. PROBS. 201 (2004); Jonathan Cooper & Adrian Marshall Williams, *Hate Speech, Holocaust Denial and International Human Rights Law*, EUR. HUM. RTS. L. REV., vol. 6 1999, at 593, 602.

60 *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (ser. A) at 24 (1981).

61 *Zana v. Turkey*, 1997-VII Eur. Ct. H.R. 2533, 2548 (1997).

62 Convention for the Protection of Human Rights and Fundamental Freedoms art 10.

like the national security exception in U.S. constitutional law, cases concerning the national security exception generally center on the publication of government secrets.[63] For example, the ECtHR found that there was a legitimate threat to national security in revealing the illegal activities of the British Security Service.[64] However, the limit was only permissible before publication; once the book had been published, a continuing restriction violated Article 10 because news is a perishable commodity and the delay of publication may deprive it of all of its value and interest to the public.[65]

C. Restraints on Expression and Film Censorship in Asia

The human rights protections in Asia vary widely from country to country. As a general matter, freedom of speech tends to be more limited in many Asian countries than in the United States and Europe, and it is common for governments to take steps to prevent or punish speech that criticizes the government.[66] Some countries in Southeast Asia have taken more affirmative steps to ensure protection of human rights. A number of Malaysia's neighbors, including Indonesia, the Philippines and Thailand, have already ratified the ICCPR.[67]

As in the United States and Europe, some form of restrictions on the film industry are present in most Asian countries. For example, India uses a censorship system of government-controlled ratings and all films that are to be publically viewed must be approved by the Censor Board.[68] Despite these restrictions, films covering controversial topics have been approved and shown throughout India. For example, the films "Fire" and "Girlfriend" both center on lesbian themes and were both released within India with the approval of the Censor Board, despite opposition from India's conservative wing.[69]

Thailand also uses a Film Censorship Board to review films before they may be shown in Thai theaters or on television. The Board, made up of representatives from various departments in the Thai government, will frequently censor films and require that portions of films be removed before release. Grounds for removal include "violating moral and cultural norms and disturbing the public order and national security."[70] Despite these broad limitations, few films

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63 *See also Vereniging Weekblad Bluf! v. Netherlands*, 306 Eur. Ct. H.R. 1 (1995) (finding a violation of Article 10 when an article concerning confidential information regarding the Dutch internal security service was seized prior to publication, even though the seizure was a legitimate interference in the interest of national security).

64 *Observer and Guardian v. United Kingdom*, 216 Eur. Ct. H.R. (ser. A) at 28-29 (1991).

65 *Id.*

66 Randall Peerenboom, *Show Me the Money: The Dominance of Wealth in Determining Rights Performance in Asia*, 15 DUKE J. COMP. & INT'L L.75 (2004).

67 *See* ICCPR, UN Treaty Collection *available at* http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en#EndDec (listing all the countries that have joined the treaty through accession, succession, or ratification, including Thailand, the Philippines, and Indonesia).

68 Ross Carbone, *Streets of Fire: Shiv Sena and Film Censorship in Contemporary India*, 13 RUTGERS J. L. & RELIGION 455 (2012).

69 *Id.*

70 Country Reports on Human Rights Practices: Thailand, U.S. Department of State, Bureau of Democracy Human Rights, and Labor, http://www.state.gov/j/drl/rls/hrrpt/2003/27790.htm (Feb. 25 2004).

are outright banned.[71] The Censorship Board even approved a film that openly critiqued the unpredictable and inconsistent nature of the Thai film censorship system, transparently named "Censors Must Die." [72]

The evolution of freedom of expression in Hong Kong provides a useful regional example for comparison purposes. Article 27 of Hong Kong's Basic Law establishes that Hong Kong residents have the right to freedom of speech, press, and publication.[73] These rights are generally upheld by the independent courts of the territory.[74] However, freedom of expression has been more constrained in the last 15 years, a result of China's occupation of the territory starting in 1997. Specifically, within the past year, freedom of the press has eroded by increased government restrictions on access to information, and violent attacks on the media entities' offices.[75]

Hong Kong's modern system of film censorship was adopted in 1988 and establishes a system of classifying films into categories of appropriate audiences for viewing.[76] These classifications, however, mean little in terms of what films may be shown: even films with the most restricted classification (category III films) are regularly shown in theaters where other, category I and II films are shown.[77]

V. Analysis

A. The Malaysian government's absolute control over films directly undermines the principles in the UDHR and the ICCPR

Malaysia's FCA directly undermines the principles articulated in the UDHR and the right to freedom of speech guaranteed by the ICCPR. Specifically, preventing a human rights group

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71 The most common reason for banning a film is that the film criticizes the monarchy. For example, in 2012, the Film Censorship Board banned an adaptation of Macbeth because of anti-monarchy tones. *Thailand's Film Censor Bans 'Divisive' Macbeth Film*, BBC, http://www.bbc.co.uk/news/world-africa-17613674 (April 4 2012).

72 Patrick Brzeski, *Thai Documentary 'Censors Must Die' Gets Screening Approval from State Censorship Board*, Hollywood Reporter, http://www.hollywoodreporter.com/news/thai-documentary-censors-die-gets-607248 (Aug. 15 2013).

73 Article 27 of Basic Law of Hong Kong; s*ee also* Article 16 of the Bill of Rights.

74 *Hong Kong: Freedom of the Press*, Freedom House (2013), *available at* www.freedomhouse.org/report/freedom-press/2013/hong-kong.

75 World Press Freedom Index 2011-2012, Reports Without Borders for Freedom of Information, Dec 1 2012, *available at* http://en.rsf.org/IMG/CLASSEMENT_2012/C_GENERAL_ANG.pdf; Hong Kong: Freedom of the Press, Freedom House 2013, www.freedomhouse.org/report/freedom-press/2013/hong-kong. Although recently there have been some high profile examples of the Chinese government censorship , far more common is the Hong Kong media's self-censorship. A 2012 survey of Hong Kong journalists indicate that 79% believe that censorship has raised since the Chinese takeover and 36% admit to themselves engaging in self-censorship from pressures from the mainland.

76 Film Classification and Control of Obscene Articles, The Government of Hong Kong Special Administrative Region, 2013, http://www.cedb.gov.hk/ctb/eng/film/film_1.htm.

77 Jacques deLisle and Kevin P. Lane, *Hong Kong's Endgame and the Rule of Law (I): The Struggle Over Institutions and Values in the Transition to Chinese Rule*, 25 U. PENN. J. INT'L ECON. L. 1497 (2004).

from showing an investigative documentary concerning political issues in the region violates one of the purposes underlying the freedom of speech guarantee, namely to encourage the free flow of ideas and allow individuals to criticize the government.

The preamble of the UDHR notes the importance of the freedom of speech, stating that "the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people…"[78] Protecting the right to freedom of speech allows for a free exchange of thoughts and ideas. Particularly, opening the discourse to permit discussion of political ideas is crucial in protecting other freedoms of the people subject to the power of their government. Pusat Komas is an organization that seeks to bring light to issues concerning fundamental human rights. Ms. Hendry was furthering this goal by showing a film concerning relevant current events in the region.

The film that was screened, "No Fire Zone", is a film concerning the events of the Sri Lankan Civil War. The U.N. Human Rights Committee has expressly stated that laws that penalize expression of opinions about historical facts violate the principles of the ICCPR.[79] This documentary, and thus the screening, contains an expression of opinions about what occurred during the Sri Lankan Civil War. The ability to openly discuss past political events is a fundamental part of the values established by the ICCPR.

Notably, the ICCPR provides a few narrow exceptions to the freedom of speech. The ICCPR states that restrictions are permissible if they are necessary for the respect of the rights or reputations of others or for the protection of national security or of public order or of public health or morals. The restrictions set by the FCA go far beyond these acceptable restrictions. There is no evidence that the screening was intended to or likely to incite violence. International law does not permit Malaysian officials to arbitrarily deny the screening of a film based on hypothetical concerns that the discussion of matters of public interest may endanger national security or public order.[80]

B. The FCA is far more restrictive than the restraints in the U.S., Europe, and Asia

Comparatively, the FCA creates speech limitations that go far beyond the acceptable limitations in Asia and throughout the world. The FCA is much more restrictive than the U.S. system of self-censorship. The U.S. system classifies the films that are distributed within the U.S., and, in some ways, exercises control by limiting the viewership for films with more restrictive ratings. Although there are economic pressures to comply, the participation in the ratings system in the U.S. is not an absolute requirement for distribution, let alone private ownership. Contrastingly, the FCA allows the government, through the Film Censorship Board, complete control over every film within the region. Under the FCA, the Film Censorship Board

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78 Preamble, UDHR, http://www.ohchr.org/en/udhr/pages/Language.aspx?LangID=eng.

79 *See* supra n. 6.

80 General Comment 34, para. 35, *supra* note 6 (noting that States "must demonstrate in specific and individualized fashion the precise nature of the threat, and the necessity and proportionality of the specific action taken, in particular by establishing a direct and immediate connection between the expression and the threat.").

has the power of absolute prohibition of even private ownership of films. Additionally, the FCA is a criminal statute. Beyond any economic or social pressures that might exist under the U.S. system, failing to comply with the FCA can result in criminal liability, including both monetary fines and prison time.

The FCA is also a much more rigorous restraint on speech than the European regulations that prohibit speech, in film or otherwise, that causes the incitement of racial or religious hatred. These laws are criminal in nature and thus carry the same threats to free speech as the FCA, but are much narrower in scope. These laws carry specific limits, namely that the speech must have the possibility of inciting hatred and the hatred must be based on religious or racial grounds. Instead, the FCA allows for complete discretion to censor, allowing the government to circumvent international law, which requires any restriction on freedom of speech to be narrowly tailored to achieve a legitimate aim.

The FCA is also much more restrictive than other forms of censorship within Asia. Despite the prevalence of film censorship within the region, few countries have as much power over the films within their country as Malaysia. Malaysia's unique control over films that are not just publicly screened but also those that are privately owned makes Malaysian law uniquely restrictive.

Much of the restraint on films in Asia focuses not on censorship, but on classification or review prior to distribution to theaters within the country. India and Thailand, despite having film review boards, frequently permit the showing of controversial films. Even under Chinese control, Hong Kong still allows films to be shown with restricted ratings. Malaysia's restrictions on films are harsh considering the standards for the region.

C. Using the FCA to prosecute Hendry and stop Pusat Komas is a form of selective enforcement to silence political discourse.

Malaysia's use of the FCA to prosecute Ms. Hendry evinces an attempt to silence activists based on the content of their speech. If it can be demonstrated that the film censorship law is only or primarily used against individuals advocating particular opinions – such as concern about human rights – then it could be argued that Malaysia has also violated the prohibition on discrimination enshrined in Article 2 of the ICCPR.[81] The selective enforcement of laws against activists like Ms. Hendry is a hallmark of the type of conduct that violates international human rights standards.[82]

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[81] Article 2 requires "[e]ach State Party to the present Covenant [to] undertake[] to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in this Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

[82] Leading human rights organizations have expressed concern with scenarios in which government authorities use a law as a form of repression against human rights defenders, activists, minorities, or any other group with whom the state disagrees or considers a political opponent. Robert Bradtke, *USOSCE on Democratic Lawmaking, Independence of the Judiciary, Right to a Fair Trial*, Oct. 2, 2013, http://www.humanrights.gov/2013/10/18/usosce-on-democratic-lawmaking-independence-of-the-judiciary-right-to-a-fair-trial/. Similarly, Human Rights Watch has stated that Russia used selective enforcement of antipiracy laws to quiet dissent. The organization stated that a series of ten cases evidenced an intention of the government to stop the exercise of free speech, based on the identities of the individuals targeted, the important nature of the topics at issue, and the timing of the government

Using laws like the FCA to target activists is exactly one of the dangers that the UDHR and the ICCPR seek to avoid. By creating laws limiting expression that are overly broad, the government has the power to choose to enforce those laws only against those with whom they disagree or wish to silence. This selective enforcement severely limits the availability of different sides of discourse and creates an environment in which others will be afraid to speak about unpopular ideas in fear of criminal prosecution.

action to silence the individuals before they were able to get their message out. *A Campaign Against Dissent: Selective Enforcement of Antipiracy Laws in Russia*, February 2011, http://www.humanrightsfirst.org/wp-content/uploads/pdf/HRF-Msoft-Russia-report.pdf.