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***RECENT VICTIM PARTICIPATION AND MINORITIES IN INTERNATIONALISED
CRIMINAL TRIALS:
Ethnic Vietnamese Civil Parties at the Extraordinary Chambers in the Courts of
Cambodia***

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ABSTRACT

In 2010, the Co-Investigating Judges of the Extraordinary Chambers in the Courts of Cambodia (ECCC) charged four senior leaders of the former Khmer Rouge regime with genocide against two minority groups, the Cham and the ethnic Vietnamese. This article examines the role of minority victims in a genocide trial, using the specific case study of a group of ethnic Vietnamese survivors who joined as civil parties before the hybrid criminal proceedings at the ECCC. The article highlights the challenges that arise in the process of including minority narratives within the broader context of a mass atrocity trial, by describing the participation process civil parties have undertaken, to date. Importantly, the case of the ethnic Vietnamese survivors shows how victim participation in a criminal trial can shed light on larger, contemporary human rights issues affecting a minority group. In the present case, a number of ethnic Vietnamese civil parties have sought access to, or recognition of, Cambodian nationality, through a request for 'collective and moral reparations' under the Court's Internal Rules.

1. Background: The Khmer Rouge Trials and Victim Participation

The twentieth century has seen many violent conflicts and mass atrocities in Cambodia, with the worst occurring between 1975–79, during the period of Democratic Kampuchea, often referred to as the era of the Khmer Rouge regime. After decades of stalemate and many years of protracted negotiations, in 2003, the United Nations and the Royal Government of Cambodia concluded an agreement to establish the Extraordinary Chambers in the Courts of Cambodia (ECCC), also known as the Khmer Rouge Tribunal.¹ The court's mandate is to bring to justice 'senior leaders' and those most responsible for the crimes committed during the reign of the Khmer Rouge regime, 1975–79. The ECCC is a mixed hybrid court of national and international composition,² applying both international and Cambodian domestic law.³ Five individuals were initially charged in two proceedings before the ECCC, referred to as 'Case 001' and 'Case 002'.⁴ Additional prosecutions, referred to as Cases 003 and 004, are considered but have not yet proceeded beyond the preliminary investigative stage. Despite numerous problems and criticism throughout the ECCC's operation,⁵ the pronouncement in July 2010 of the first verdict against Kaing Guek Eav, the former head of the Khmer Rouge interrogation centre S-21, was for the Cambodian public a visible milestone for the delivery of some justice.⁶

The ECCC is distinct from other international or internationalised criminal courts because of its extensive victim participation scheme.⁷ The ECCC Internal Rules in 2007 introduced

¹ *Agreement between the United Nations and the Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crimes Committed during the Period of Democratic Kampuchea*, 6 June 2003.

² This article uses the terms internationalised criminal courts and hybrid courts interchangeably, both referring to mixed courts of national and international composition.

³ See, eg, Hanna Bertelman, 'International Standards and National Ownership? Judicial Independence in Hybrid Courts: The Extraordinary Chambers in the Courts of Cambodia', (2010) 79 *Nordic Journal of International Law*, 341; and John Ciorciari and Anne Heindel, *Hybrid Justice: The Extraordinary Chambers in the Courts of Cambodia* (University of Michigan Press, 2014).

⁴ Case 002 currently proceeds only against two defendants, Nuon Chea and Khieu Samphan, after Ieng Thirith was found by the Trial Chamber not to be fit to stand trial, and Ieng Sary died on 14 March 2013.

⁵ Refer to the various reports published by the Open Society Justice Initiative (OSJI) from 2006 to 2013.

⁶ Asian International Justice Initiative, 'Lessons Learned from the "Duch": A Comprehensive Review of the First Case before the Extraordinary Chambers in the Courts of Cambodia' (Report, Asian International Justice Initiative's KRT Trial Monitoring Group, December 2009) 6.

⁷ For more specific information about the ECCC's victim participation scheme, see for instance David Boyle, 'The Rights of Victims: Participation, Representation, Protection, Reparation' (2006) 4 *Journal of International Criminal Justice* 307; Patrick Kroker, 'Transitional Justice Policy in Practice: Victim Participation in the Khmer Rouge Tribunal' (2010) 53 *German Yearbook of International Law* 753; Brianne McGonigle, 'Two for the Price of One: Attempts by the Extraordinary Chambers in the Courts of Cambodia to Combine Retributive and Restorative Justice Principles' (2009) 22 *Leiden Journal of International Law* 127; Sarah Thomas and Terith Chy, 'Including Survivors in the Tribunal Process' in John Ciorciari and Anne Heindel (eds), *The Khmer Rouge Accountability Process* (Documentation Center of Cambodia, 2009) 214.

victim participation provisions based on domestic procedural law enabling survivors to file a complaint or an application to become a witness with the Co-Prosecutors, or to apply to the Co-Investigating Judges to become a civil party, with the prospect of claiming ‘moral and collective’ reparations.⁸ The possibility for victims to participate in the criminal trials as *parties civiles* or civil parties, where they can play an active role with extensive procedural rights was, at the time, an unprecedented mechanism in international criminal justice.⁹ These participation rights confer upon the survivors — themselves key beneficiaries of the ECCC process — direct access to justice and the opportunity to present their personal experiences, views and concerns within a criminal litigation process. Civil parties arguably have enjoyed — at least initially and prior to multiple amendments of the Internal Rules — more participatory rights than available to victims at the International Criminal Court (ICC), including the right to request investigations. However, adapting the traditional civil party mechanism designed to deal with national crimes to align with the purposes of internationalised proceedings dealing with mass crimes has been a gradual learning curve for the ECCC.¹⁰

In the ECCC’s second and largest trial (Case 002), the Courts’ Victims Support Section (VSS) received more than 8 200 victim application forms, out of which almost 4000 victims sought civil party status. Following admissibility appeals before the Pre-Trial Chamber the vast majority of applicants were admitted to join the proceedings in Case 002 — making this case one of the largest cases of victim participation before modern-day internationalised criminal courts.¹¹

Despite the broad appeal of the ECCC’s civil party scheme locally, victim participation in internationalised criminal proceedings is generally still a novel experience. A historical perspective reveals what Susanne Karstedt calls ‘a road from absence to presence, and

⁸ Extraordinary Chambers in the Courts of Cambodia, *Internal Rules (Ver 4)* (adopted 11 September 2009). Internal Rule 23 states that ‘the purpose of Civil Party action before the ECCC is to (a) participate in criminal proceedings against those responsible for crimes within the jurisdiction of the ECCC by supporting the prosecution; and (b) seek collective and moral reparations, as provided in Rule 23quinquies’.

⁹ More recently, the Extraordinary African Chambers, established to try former Chadian ruler Hissène Habré, introduced civil party participation, as existent under the Senegalese criminal procedure code. See art 14 of the *Statut des Chambres Africaines Extraordinaires*, cited in Human Rights Watch, *Statut des Chambres Africaines Extraordinaires* (30 January 2013) <<http://www.hrw.org/node/113271>>.

¹⁰ Christoph Sperfeldt, ‘From the Margins of Internationalized Criminal Justice. Lessons Learned at the Extraordinary Chambers in the Courts of Cambodia’ (2013) 11 *Journal of International Criminal Justice* 1111.

¹¹ The number of civil parties as of November 2011 was 3 866. See also ECCC, ‘Pre-Trial Chamber Overturns Previous Rejection of 98 Percent of Appealing Civil Party Applicants in Case 002’ (Press Release, 24 June 2011).

from invisibility to the visibility of victims'.¹² Since the adoption of the ICC Rome Statute,¹³ a number of international criminal courts have bolstered the position of victims in their proceedings, giving more weight to restorative justice principles in their processes.¹⁴ These first experiences have not come without challenges, and a vigorous debate rages among academics and practitioners about the purpose and feasibility of victim participation in international criminal trials.¹⁵ While these debates are akin to longstanding debates about the role of victims in domestic criminal proceedings,¹⁶ they also have distinct features.

At one end of the spectrum are scholars and practitioners who — after the first decade of victim participation in action — are mainly concerned that the inclusion of victim redress into an international criminal trial threatens a careful balance of long-established legal principles, particularly those relating to the fair trial rights of accused persons. Further there is concern that the still young international criminal justice institutions are overburdened with unreasonable expectations.¹⁷ The arguments in this group of literature are mostly pragmatic, and focus primarily on procedure and cost-effectiveness, and thus remain within the self-contained institutional framework of the international criminal justice system.

¹² Susanne Karstedt, 'From Absence to Presence, From Silence to Voice: Victims in International and Transitional Justice since the Nuremberg Trials' (2010) 17 *International Review of Victimology* 9, 9.

¹³ *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002).

¹⁴ See generally Brianne McGonigle Leyh, *Procedural Justice? Victim Participation in International Criminal Proceedings* (Intersentia, 2011).

¹⁵ See, eg, Brianne McGonigle Leyh, *Procedural Justice? Victim Participation in International Criminal Proceedings* (Intersentia, 2011); REDRESS, 'The Participation of Victims in International Criminal Court Proceedings: A Review of the Practice and Consideration of Options for the Future' (Redress Trust, October 2012); Valentina Spiga 'No Redress without Justice: Victims and International Criminal Law' (2012) 10 *Journal of International Criminal Justice* 1377; Christine van den Wyngaert, 'Victims before International Criminal Courts. Some Views and Concerns of an ICC Trial Judge' (2011) 44 *Case Western Reserve Journal of International Law* 475.

¹⁶ See, eg, Jonathan Doak, *Victims' Rights, Human Rights and Criminal Justice: Reconceiving the Role of Third Parties* (Hart Publishing, 2008). Refer also to the rich literature on restorative justice, such as John Braithwaite, *Restorative Justice and Responsive Regulation* (Oxford University Press, 2002); and Andrew Von Hirsch et al (eds), *Restorative Justice and Criminal Justice – Competing or Reconcilable Paradigms* (Hart Publishing, 2003).

¹⁷ See, eg, Christine Chung, 'Victims' Participation at the International Criminal Court: Are Concessions of the Court Clouding the Promise?' (2008) 6(3) *Northwestern Journal of International Human Rights* 459; Mirjan Damaska, 'What is the Point of International Criminal Justice?' (2008) 83 *Chicago Kent Law Review* 329; Brianne McGonigle Leyh, 'Victim-Oriented Measures at International Criminal Institutions: Participation and its Pitfalls' (2012) 12 *International Criminal Law Review* 375; Charles Trumbull IV, 'The Victims of Victim Participation in International Criminal Proceedings' (2008) 29(4) *Michigan Journal of International Law* 777.

At the other end of the spectrum, numerous scholars and activists advocate for a victim-oriented approach to international criminal justice.¹⁸ Ralph Henham and Mark Findlay are at the forefront of those arguing for positioning victims in a place of priority in international criminal justice.¹⁹ They oppose those advocating for a more minimalist approach, because 'this argument fails to understand ... that the eventual legitimacy of international criminal justice rests on much more than show trials'.²⁰ Taking into consideration factors such as legitimacy, relevance and the overall accountability of the international criminal justice system, these authors argue for transformation of the criminal trial process to recognise victims of mass atrocities as the 'rightful' constituency for international criminal justice, regarding the criminal trial itself as the locus for giving effect to victims' demands.

There are many more nuanced voices within the scholarly literature that cannot be readily consigned to any of these two groups. However, these arguments demonstrate the range of opinions that have shaped this debate thus far. Importantly, most of these contributions are normative in nature, and it is therefore important that they are accompanied by an analysis of the actual experiences of victim participation to date. The first judgments from the ICC and the ECCC provide an opportune time for reflection,²¹ including inquiring into the distinct experiences of different victim and survivor groups during their participation process.

Interestingly, there has been very little research into the experience of (ethnic) minority groups.²² Victim participation in internationalised criminal tribunals can provide a platform for minorities to give voice to, and present, the specificity of the harm they suffered as a result of mass atrocities. Nowhere is the specific nature of the crimes and the resulting harm more evident than in the case of deliberate persecution of minority groups, more so when it amounts to genocide. Victim participation schemes can provide an avenue for minorities to highlight the full extent of the crimes committed against their group and, at the same time, complement a society's mainstream narrative of mass historic crimes.

¹⁸ See, eg, Mariana Pena and Gaelle Carayon 'Is the ICC Making the Most of Victim Participation?' (2013) 7 *International Journal of Transitional Justice* 518.

¹⁹ Ralph Henham and Mark Findlay, 'Introduction: Rethinking International Criminal Justice' in Ralph Henham, and Mark Findlay (eds.), *Exploring the Boundaries of International Criminal Justice* (Ashgate Publishing, 2011) 1; M Findlay, 'Activating a Victim Constituency in International Criminal Justice' (2009) 3 *International Journal of Transitional Justice* 183.

²⁰ Henham and Findlay, above n 19, 7.

²¹ See, eg, Lucia Catani, 'Victims at the International Criminal Court. Some Lessons Learned from the Lubanga Case' (2012) 10 *Journal of International Criminal Justice* 905; Sperfeldt, 'From the Margins of Internationalized Criminal Justice. Lessons Learned at the Extraordinary Chambers in the Courts of Cambodia', above n 11.

²² There is more research in relation to international human rights tribunals. See, eg, H Ketley, 'Exclusion by Definition: Access to International Tribunals for the Enforcement of the Collective Rights of Indigenous People' (2001) 8 *International Journal on Minority and Group Rights* 331.

At the ECCC, victim participation has provided an avenue for minorities to present the distinct nature of the harm they suffered as a result of crimes committed by the Khmer Rouge regime. Three groups have received particular attention: the Cham, the Khmer Krom, and the ethnic Vietnamese. While the ECCC's Closing Order has sought persecution and genocide charges in the case of the Cham and the Vietnamese, the Khmer Krom's plight has only been addressed more recently in the Court's investigations in Case 004. Much of this can also be attributed to active victim participation of Khmer Krom civil parties.²³

This article examines the role of minority victims in a genocide trial, using the specific case study of a group of ethnic Vietnamese survivors who joined as civil parties before the proceedings at the ECCC. The article highlights the various challenges that arise in the process of including minority narratives within the broader context of a mass atrocity trial, by describing the participation process civil parties have undertaken, to date. Finally, the case of the ethnic Vietnamese survivors highlights how victim participation in a criminal trial can shed light on larger human rights issues affecting a minority group. This is demonstrated through an analysis of these civil parties' collective reparations requests.

2. The Case Study: Research and Methodology

This article builds upon over five years of outreach and legal casework with ethnic Vietnamese civil parties, conducted between 2008–13.²⁴ Most of these survivors reside on floating villages along the Tonle Sap River and the Tonle Sap Lake in Kampong Chhnang province, Cambodia. Altogether there have been 43 ethnic Vietnamese civil parties admitted by the ECCC, jointly represented by national and international co-counsel.²⁵

Ethnic Vietnamese groups have lived in Cambodia throughout contemporary history. Nowadays, they are one of, if not the largest, minority group in Cambodia. Despite this, the group remains understudied and there has been little available public information about this minority.²⁶ In 2012, following the publication of the report 'A Boat Without Anchors', to be

²³ The Khmer Krom provide an interesting case study on how a group can articulate its collective suffering through victim participation, and to some degree, influence the investigations. For instance, crimes against the Khmer Krom now feature much more prominently in the investigations of Case 004. See Mahdev Mohan, 'Re-Constituting the "Un-Person": The Khmer Krom and the Khmer Rouge Tribunal' (2008) 12 *Singapore Yearbook of International Law* 43.

²⁴ For more information, refer to the website: www.civilparties.org.

²⁵ This number of civil parties is now lower as some civil parties have passed away. National counsel for this victim group has included Mr Ny Chandy (2009-2010) and Mr Sam Sokong (2011-2014), from Legal Aid of Cambodia, and international counsel has been Australian lawyer, Ms Lyma Nguyen.

²⁶ See, eg, Ramses Amer, 'The Ethnic Vietnamese in Cambodia: A Minority at Risk?' (1994) 16(2) *Contemporary Southeast Asia* 210; Ramses Amer, 'Cambodia's Ethnic Vietnamese: Minority Rights and

further discussed later, research interest over ethnic Vietnamese in Cambodia increased.²⁷ This article aims to contribute to existing research by highlighting the specific challenges faced by this minority civil party group, against the backdrop of the impending trial concerning the genocide of the group in Case 002/02 at the ECCC.

Over the period 2008–12, a number of inquiries arose from participation at the ECCC of ethnic Vietnamese minority populations: (1) First was a 2008 baseline survey involving 150 ethnic Vietnamese adults throughout three Cambodian provinces, conducted by the local NGO Khmer Kampuchea Krom Human Rights Association. This brought about an understanding of the composition and attitudes of the minority group, in order to prepare focussed ECCC-related outreach activities.²⁸ (2) In 2010, more in-depth follow-on interviews took place with approximately 25 ethnic Vietnamese individuals, providing further information about respondents' personal history, violence suffered by the community under different Cambodian administrations and the myriad of sociopolitical problems they face.²⁹ (3) The findings of this research resulted, in 2012, in the initiation of a research project, in collaboration with the Jesuit Refugee Service (JRS) Cambodia, to examine the legal status of eight individuals, the majority of whom belong to the civil party group. This project led to the publication of a report, 'A Boat Without Anchors', which provided an assessment of the claims of the persons interviewed, and analysis of the relevant laws.³⁰

As these research components were limited in the scope, geographical coverage and the representation of only a small number of persons affected, their findings do not allow for making broader generalisations about the situation of all ethnic Vietnamese subgroups across Cambodia. However, the few secondary sources available on this topic suggest that

Domestic Politics' (2006) 34(3) *Asian Journal of Social Science* 388; Jennifer Berman, 'No Place Like Home: Anti-Vietnamese Discrimination and Nationality in Cambodia' (1996) 84 *California Law Review* 817; Chou Meng Tarr, 'The Vietnamese Minority in Cambodia' (1992) 34(2) *Race and Class* 33; Annuska Derks, 'Diversity in Ethnicity: A Picture of the Vietnamese in Cambodia' in: Hean Sokhom (ed), *Ethnic Groups in Cambodia*, (Center for Advanced Studies, 2009) 535–58.

²⁷ See, eg, Ang Chanrith et al., 'Limbo on Earth. An Investigative Report on the Current Living Conditions and Legal Status of Ethnic Vietnamese in Cambodia' (Investigative Research Report No 2, Minority Rights Organisation, March 2014); Kristina Chhim et al 'Life Before Expulsion: Community History from Vietnamese Minorities in Kampong Chhang' (Report, Kdei Karuna, May 2014); and Rochelle Braaf, 'Sexual Violence against Ethnic Minorities during the Khmer Rouge regime' (Report, Cambodian Defenders Project, 2014).

²⁸ Christoph Sperfeldt (ed) with Ang Chanrith and Mychelle Bathazard, 'Survey among the Ethnic Vietnamese Minority in Cambodia' (2009) (conducted by the Khmer Kampuchea Krom Human Rights Association, unpublished paper).

²⁹ Lyma Nguyen, Jessica Pham, and Christoph Sperfeldt, 'Interviews with Ethnic Vietnamese Persons (names of interviewees suppressed; Kampong Chhnang and Pursat Provinces, Cambodia, 19-22 July 2010), Transcripts No. 1-25. All interviews were conducted in the Vietnamese language and were later translated into English.

³⁰ Lyma Nguyen and Christoph Sperfeldt, 'A Boat Without Anchors. A Report on the Legal Status of Ethnic Vietnamese Minority Populations in Cambodia under Domestic and International Laws Governing Nationality and Statelessness' (Report, Jesuit Refugee Service Cambodia, 2012) <<http://www.civilparties.org/?p=494>> ('A Boat Without Anchors').

the problems experienced by the respondents are a widespread phenomenon, not only limited to Kampong Chhnang province.³¹

3. The Context: Brief History of the Vietnamese in Cambodia

The relationship between mainstream Khmer society and the Vietnamese minority has been largely influenced by different interpretations of the historical relationship between the two groups. During the 18th and 19th centuries, when boundaries were fluid and largely undefined, numerous Vietnamese traders and fishermen moved up the Mekong River.³² New patterns of Vietnamese migration emerged during the French colonisation of Indochina (1863-1953), when the French staffed much of their colonial administration over the protectorate with Vietnamese civil servants and actively encouraged a large Vietnamese labor force to work on their plantations. The colonial census of 1921 puts the number of ethnic Vietnamese in the protectorate at almost 6 percent of the population.³³ Many of the fishing villages around the Tonle Sap Lake date back to that time.³⁴

After Cambodia gained independence from France in 1953, the Vietnamese found themselves in a new state, under the regime of Prince Sihanouk (1953–70).³⁵ The regime introduced new policies and laws attempting to regulate minority and immigrant communities in Cambodia. Discriminatory measures seemed to have primarily targeted the ethnic Chinese and Vietnamese. Measures taken against the Vietnamese can also be seen as being connected to the foreign policy context of that time, which was characterised by rising tensions with the two Vietnamese states and the Vietnamese war increasingly spilling into Cambodia. The historical development of the size of the Vietnamese minority community at that time is difficult to determine. The official 1962 census identified 217 774 Vietnamese ‘nationals’ within a total population of more than 5.7 million (almost 4 percent), while Poole estimated that 394 000 ‘ethnic’ Vietnamese lived then in the country.³⁶

³¹ See, eg, Stefan Ehrentraut, ‘Perpetually Temporary: Citizenship and Ethnic Vietnamese in Cambodia’ (2011) 28(4) *Ethnic and Racial Studies* 1.

³² Minorities Rights Group International, ‘Ethnic Policies under the New Cambodian Government’ (Report No 95/2, Minorities in Cambodia, 1995), 17.

³³ Amer, ‘The Ethnic Vietnamese in Cambodia’, above n 26, 213.

³⁴ Derks, above n 26, 536.

³⁵ Amer, ‘Cambodia’s Ethnic Vietnamese: Minority Rights and Domestic Politics’, above n 26, 389.

³⁶ Peter A Poole, ‘The Vietnamese in Cambodia and Thailand: Their Role in Interstate Relations’ (1974) 14(4) *Asian Survey* 325, 332–3. Likewise, Migozzi placed the estimated number of ethnic Vietnamese at around 450 000 out of a population of 7.3 million by end of the 1960s. Jacques Migozzi, *Cambodge Faits et Problemes de Populations* (Editions du Centre National de la Recherche Scientifique, 1973) 40–7.

Following the 1970 coup against Sihanouk and the establishment of the Khmer Republic (1970–75), political propaganda by the Lon Nol regime turned many of the negative sentiments towards the ethnic Vietnamese minority into violent persecution, mainly in Phnom Penh and other urban areas. The subsequent attacks and massacres resulted in the killing of thousands of ethnic Vietnamese.³⁷ In addition, according to observers and official statistics from the Republic of Vietnam, and as cited by Pouvatchy, some 200 000 to 250 000 Vietnamese fled or were forcibly repatriated to South Vietnam in 1970.³⁸

After further escalation of Cambodia's civil war, the Khmer Rouge captured Phnom Penh in April 1975. Under the Democratic Kampuchea (1975–79) the situation for the remaining members of the Vietnamese minority drastically deteriorated. Shortly after taking power, the new regime implemented policy measures with an aim to expel and forcefully deport the Vietnamese minority from Cambodia. After the large-scale exodus during the Lon Nol regime, most estimates put the number of ethnic Vietnamese in Cambodia at around 200 000 in the mid-1970s.³⁹ It is estimated that around 150 000 to 170 000 were forced out of the country between April and October 1975.⁴⁰ A more recent demographic expert report commissioned by the ECCC concluded that 100 percent of the remaining ethnic Vietnamese were systematically killed during the Khmer Rouge regime.⁴¹ By the end of 1978, the Vietnamese minority had completely disappeared from Cambodia.

Soon after the fall of Phnom Penh in January 1979, the People's Republic of Kampuchea (PRK, 1979–89) came into existence. The new regime relied on assistance from Vietnamese officials and military. In the early 1980s the flow of immigration reversed, and a new phase of immigration from Vietnam to Cambodia began. This soon became a major politicised subject in the discourse of Cambodian opposition groups and for those states concerned about growing Vietnamese influence in Cambodia in the context of the Cold War. Estimates of the number of immigrants therefore vary greatly.⁴² While the existing literature does not provide a reliable assessment of these claims, more credible estimates show that there were more ethnic Vietnamese in Cambodia than the authorities acknowledged, but fewer than the

³⁷ Chou Meng Tarr reports at least 4000 dead. Meng Tarr, above n 26, 33–47.

³⁸ Joseph Pouvatchy, 'L'Exode des Vietnamiens du Cambodge en 1970' (1976) *Mondes Asiatiques*, 340; Poole, above n 36, 328–31; Migozzi, above n 36, 44.

³⁹ Amer, 'Cambodia's Ethnic Vietnamese: Minority Rights and Domestic Politics', above n 26, 390.

⁴⁰ Nayan Chanda, *Brother Enemy: The War after the War* (MacMillan, 1986) 16; Amer, 'The Ethnic Vietnamese in Cambodia', above n 26, 218; Amer, 'Cambodia's Ethnic Vietnamese: Minority Rights and Domestic Politics', above n 26, 360; Ben Kiernan, *The Pol Pot Regime: Race, Power, and Genocide in Cambodia under the Khmer Rouge, 1975-1979* (Yale University Press, 1996) 296.

⁴¹ Ewa Tableau, 'Khmer Rouge Victims in Cambodia, April 1975 – January 1979. A Critical Assessment of Major Estimates' (Democratic Expert Report, Document D140/1/1 Public Redacted Version, Extraordinary Chambers in the Courts of Cambodia, 30 September 2009) 47–8.

⁴² See Amer, 'Cambodia's Ethnic Vietnamese: Minority Rights and Domestic Politics', above n 26, 390–1.

opposition groups claimed. Median estimates put the overall number at around a similar level as the Vietnamese population in Cambodia at the end of the 1960s.⁴³ Among those ‘immigrants’, Heuveline argues, ‘a majority ... were probably return migrants’.⁴⁴ Gottesman summarised the situation during the PRK period as follows: ‘[a]s a recognised minority in Cambodia, the ethnic Vietnamese enjoyed a certain civic equality ... The question of whether ethnic Vietnamese could become citizens was, however, never resolved’.⁴⁵

The presence of ethnic Vietnamese in Cambodia remained a contentious issue up to the Paris Peace Conference. The 1991 Paris Peace Agreement established the United Nations Transitional Authority in Cambodia (UNTAC) (1992–93), which carried out a large peacekeeping operation in order to organise free elections. The influx of donor funding and foreigners created new opportunities, and it is believed that this led to more recent immigration, predominantly to the urban centers of Cambodia.⁴⁶ Opposition groups stepped up their rhetoric against Vietnamese civilians, and the Khmer Rouge instigated a campaign of political violence against these civilians. In its final report, UNTAC’s Human Rights Component documented the killing of 116 ethnic Vietnamese persons between July 1992 and August 1993.⁴⁷ Prior to its departure, UNTAC organised country-wide elections. The peace agreements had stipulated that ‘every person who has reached the age of eighteen ..., and who was either born in Cambodia or is the child of a person born in Cambodia, will be eligible to vote in the election’.⁴⁸ Little is known about how many ethnic Vietnamese were registered for these elections, but field research indicates that a considerable number, amongst the long-term residents, were never registered.⁴⁹

⁴³ Amer, ‘The Ethnic Vietnamese in Cambodia’, above n 26, 220–2; Meng Tarr, above n 26, 40; David Chandler, *A History of Cambodia* (Silkworm, 2nd ed, 1993); Evan Gottesman, *After the Khmer Rouge: Inside the Politics of Nation Building* (Yale University Press, 2003) 163; Patrick Heuveline, ‘Between One and Three Million: Towards the Demographic Reconstruction of a Decade of Cambodian History, 1970-79’ (1998) 52 *Population Studies* 63–4; Berman, above n 26, 852.

⁴⁴ Heuveline, above n 43, 64. Likewise, Chou Meng Tarr writes ‘the reality is that many of these Vietnamese “settlers” were either Vietnamese who had lived for several generations in Cambodia prior to the 1970s, or were their descendants’. Meng Tarr, above n 26, 40.

⁴⁵ Gottesman, above n 43, 165–7.

⁴⁶ Minorities Rights Group International, above n 32, 23.

⁴⁷ United Nations Transitional Authority in Cambodia, ‘Human Rights Component: Final Report’ (Report, United Nations Transitional Authority in Cambodia, September 1993) 31.

⁴⁸ Agreement on a Comprehensive Political Settlement of the Cambodia Conflict, signed 23 October 1991, 1663 UNTS 56 (entered into force 23 October 1991) annex III para 4.

⁴⁹ An interview with a former officer of the UNTAC Human Rights Component confirmed that the Mission made little effort to assess whether or not individuals among the ethnic Vietnamese minority were eligible to vote under the electoral law. Interview with former UNTAC official, 15 April 2014.

Following the 1998 elections, violent attacks in Vietnamese communities decreased. Nevertheless, the legal status and living conditions of many ethnic Vietnamese in Cambodia remained insecure.⁵⁰ Sporadic anti-Vietnamese rhetoric continues to erupt during the times of elections, as was again observed during the 2013 national elections.⁵¹ There is little public information available as to the number and composition of today's ethnic Vietnamese population in the Kingdom of Cambodia. Most contemporary estimates place the Vietnamese population at around five to six percent of the country's population of around 15 million.⁵² This historical context is significant to the contemporary treatment of the Vietnamese minority in Cambodia, including the perception of Vietnamese civil parties before the ECCC.

4. The Civil Party Group: Characteristics and Collective Narrative

Based on the information compiled through the authors' research, this section provides a brief and much generalised account of the background and history of the minority civil party group. Whilst individual stories necessarily varied in detail, the congruence in the collective narrative was significant. All survivors were above 40 years old, with an average age of 50 to 60 years. The vast majority of people living in the civil parties' communities adhere to Buddhism. Most speak both Vietnamese and Khmer and few speak Vietnamese only. All civil parties resided on 'floating villages', and approximately one third of the respondents in the 2008 research claimed that their occupation was 'fishing'.

Although all civil party respondents indicated that they were born in Cambodia, some were not able to recall their exact date of birth. The majority of interviewees in the 2008 and 2010 research projects claimed that their parents were also born in Cambodia. Taking account of the average age of the respondents, it is apparent that these ethnic Vietnamese communities — although not necessarily of the current composition — existed at the time of the French protectorate, with many of the civil parties born on Cambodian territory, either before or shortly after the country's independence in 1953. This suggests that this group belongs to one of the longest existing ethnic Vietnamese communities in Cambodia, as distinct from more recent Vietnamese immigrants.

⁵⁰ See Chhay Channyda, Kevin Ponniah and David Boyle, 'Outcasts in Their Own Country', *Phnom Penh Post* (Phnom Penh), 13 August 2013.

⁵¹ See also Kevin Ponniah, 'Cambodia's Vietnamese Community Finds Voting is not Necessarily a Right', *The Guardian*, 4 September 2013.

⁵² See, eg, Central Intelligence Agency, *The World Fact Book. Cambodia* (2012) <<https://www.cia.gov/library/publications/the-world-factbook/geos/cb.html>>.

All survivors experienced similar stories of discrimination and violence before, during, and following the Khmer Rouge period. Respondents recounted that during the Sihanouk and Lon Nol regimes, it was difficult to engage in business or to earn a proper living, mainly because of the imposition of various government fees they faced.⁵³ 'Whatever they wanted to accuse us of, they could do (even if it was not true),' one respondent said. Few survivors reported any violent or armed attacks during the Lon Nol regime, confirming assumptions in the secondary literature that it was largely ethnic Vietnamese people residing in urban areas who were targeted by violence and the exodus during that time. None of the survivors reported to have left the country.⁵⁴

The consensus amongst all survivors was that the situation they experienced under the Khmer Rouge regime was considerably worse. At around the time of the fall of Phnom Penh in April 1975, most interviewees recounted that they were first separated from the Khmer population and then forcibly relocated to a temporary relocation site east of the Tonle Sap River.⁵⁵ Many survivors reported acts of violence and killing, and witnessing family members being killed at this site.⁵⁶ Following several months of being subjected to extreme deprivations, including starvation, forced labor, enslavement, ill-treatment and summary executions, all members of the minority group were deported *en masse*, down the Tonle Sap River, through several fleets, to Vietnam. These deportations occurred between July and September 1975. Survivors recounted that they had to leave behind all their belongings, resulting in most of them losing important identification documents during the forced deportations.⁵⁷ None of the Vietnamese who stayed behind were known to have survived the regime.

After having resided as refugees in Vietnam for a number of years, most survivors returned to Cambodia between 1980 and 1983. Generally, the returnees re-established their 'floating' communities around the same location or in close proximity to their previous location, along the Tonle Sap River and Lake. In *After the Khmer Rouge*, Evan Gottesman wrote about the re-emergence of these communities:

⁵³ For more information, see Chhim, above n 27.

⁵⁴ Jessica Pham, *The Ethnic Vietnamese Minority in Cambodia: The Fight for Citizenship* (unpublished paper submitted as part of coursework for 'Comparative Studies in Race and Ethnicity', Stanford University) 7–8.

⁵⁵ See facts about the forced deportation in Civil Party Co-Lawyers, '*Civil Parties' Request for Supplementary Investigations Regarding Genocide of the Khmer Krom and the Vietnamese*', Document D250/3 (3 December 2009) Extraordinary Chambers in the Courts of Cambodia <<http://www.eccc.gov.kh/en/document/court/civil-party-lawyers-request-supplementary-investigations-regarding-genocide-khmer-kro>>.

⁵⁶ Derks confirms these relocations through her own research. See Derks, above n 26.

⁵⁷ Pham, above n 54, 8–9.

Prior to 1975, tens of thousands of Vietnamese had lived on Cambodia's riverbanks and lakeshores, their lives organised around traditional fishing practices. [...] According to Vietnamese advisors, all but 20 percent of the ethnic Vietnamese fishermen died during the 1970s; almost all the rest fled to Vietnam. The reemergence of Vietnamese fishing villages – now called Fishing Solidarity Groups – was therefore presented to the Cambodians as a partial correction of earlier brutality.⁵⁸

Survivors recounted a rapid deterioration of the security situation in their communities following the withdrawal of the Vietnamese military from Cambodia and the arrival of the UN mission, particularly around the time of the UNTAC-organised elections. Some described armed attacks on their villages, allegedly conducted by the Khmer Rouge guerilla. One survivor recounted, '[t]hey came to shoot. They randomly shot into the neighborhood. [Many people] were injured. [They] died. Many people died in their homes.'⁵⁹ Sporadic violent attacks on these communities continued until 1997, when one of the clients lost her daughter through an armed attack by Khmer Rouge guerilla. Nowadays, members of the civil party group live a peaceful, albeit marginalised life on the floating villages, mostly centred around fishing. An array of economic, social and political disadvantages makes it difficult for these communities to access development opportunities, including basic education and health care.⁶⁰

5. Ethnic Vietnamese Civil Parties at the ECCC

This part highlights some selected key issues and challenges that have arisen during the participation process of ethnic Vietnamese civil parties before the ECCC.

5.1. The Challenge of Prosecutorial Selectivity

Shortly after the ECCC's establishment, the Office of the Co-Prosecutors (OCP) began their preliminary investigations. During this process, the OCP was able to rely on the substantial document archives kept since the mid-1990s by a Cambodian NGO, the Documentation Center of Cambodia (DC-Cam).⁶¹ The Co-Prosecutors utilised the materials held by DC-

⁵⁸ Gottesman, above n 43, 155.

⁵⁹ Pham, above n 54, 10–11.

⁶⁰ See, eg, Ang Chanrith, above n 27; See also H Forbes, 'We Are One. A Report on the Participation of Ethnic Vietnamese Families in the Area Development Programs of World Vision Cambodia' (Report, Prepared for the Peacebuilding Project of World Vision Cambodia, August 2005).

⁶¹ DC-Cam has provided the ECCC with databases containing over 50,000 documents, 400,000 pages of document copies, 19,000 pages of interviews, and other materials in response to requests <http://www.dccam.org/Projects/Tribunal_Response_Team/Tribunal_response.htm>.

Cam, which eventually formed a large part of the evidence for the allegations concerning crimes against the Vietnamese. The Co-Prosecutor's Introductory Submission focused on the treatment of ethnic Vietnamese in the former Eastern Zone, predominantly in Prey Veng province, and on crimes committed against the Vietnamese during incursions into Vietnam by Khmer Rouge armed forces. DC-Cam researchers had previously conducted extensive research and interviews in former Eastern Zone areas, focusing in particular on Pochen Dam village, Prey Veng province.⁶² A number of these interviewees were, to some extent, of Vietnamese descent and were able to provide testimony about the crimes committed against the Vietnamese or those perceived as Vietnamese in these areas, including against family members and relatives. However, most of these respondents identify themselves as being Khmer.⁶³ This research confirms how effective the Khmer Rouge had been with their policies of eliminating the ethnic Vietnamese populations from these areas.

More than one year after the ECCC judges had adopted Internal Rules allowing for civil party participation, no ethnic Vietnamese survivor had applied to participate, and there was a real risk that this minority group — the crimes against whom the Co-Prosecutors had qualified as genocide — would not be represented among the victim composition before the ECCC. It was against this background that the Khmer Kampuchea Krom Human Rights Association (KKKHRA) began, from mid-2008, to carry out ECCC-related outreach in Khmer Krom and ethnic Vietnamese communities. With the support of KKKHRA outreach staff, ethnic Vietnamese survivors in these areas were able to submit complaints and civil party applications to the ECCC. By 2009, a sizeable group of ethnic Vietnamese survivors from Kampong Chhnang province had applied for civil party status. While these applicants considered themselves to be ethnically Vietnamese, they considered Cambodia to be their home, having lived for generations in Cambodia in areas around the Tonle Sap Lake.

It is important to note that during the investigative stage, survivors and the wider public did not know the scope of investigations undertaken by the OCP and subsequently by the Co-Investigating Judges (CIJs). However, lawyers representing these applicants were aware that the CIJs were predominantly investigating crimes against the Vietnamese in the former Khmer Rouge Eastern Zone, thereby excluding pertinent facts provided by the majority of ethnic Vietnamese applicants, having suffered harm in different geographical areas. As a result, in December 2009, civil party lawyers filed an extensive request to the CIJs for further

⁶² See also Elizabeth Do, *Treatment of the Vietnamese Minority in Democratic Kampuchea from a Comparative Perspective* (Senior Honors Thesis, Political Science Department, Stanford University, 2010) <http://www.d.dccam.org/Tribunal/Analysis/pdf/Treatment_of_the_Vietnamese_Minority_In_Democratic_Kampuchea_From_a_Comparative_Perspective.pdf>.

⁶³ See Documentation Center of Cambodia, *DC-Cam Holdings of Minority Groups: Interviews about Vietnamese* (18 August 2006) <<http://www.d.dccam.org/Publication/Research/Interviews/Interviews%20about%20Vietnamese.pdf>>. The list mentions 55 interviews being conducted by DC-Cam staff, with 39 individuals listed in the corresponding table, mostly from Pochen Dam or neighboring villages.

investigations covering crimes against the Vietnamese in Kampong Chhnang province.⁶⁴ The lawyers argued that the investigations set out in the Introductory Submission did not capture the extent of the crimes committed against this minority group in Cambodia. They found further that:

the policy of genocide and persecution of the ethnic Vietnamese was not limited to the Eastern Zone (Prey Veng Province), but extended to the Western Zone (Kampong Chhnang Province) where the ethnic Vietnamese were, *inter alia*, forcibly relocated, prevented from reproducing, forced into mixed marriages, enslaved and bartered for rice and salt, and executed as part of a similar pattern of conduct and in a concerted effort to physically eliminate all the Vietnamese. It is critically important to our clients, the historical/legal record, and the ECCC's legacy that the Co-Investigating Judges acknowledge that these crimes occurred, investigate the animus, nature and scope of these crimes, and include them in the charges to be preferred against the Charged Persons.⁶⁵

The civil parties' submission provided a detailed account of the crimes suffered by the applicants and the modalities of their forced transfer from Cambodia to Vietnam in 1975. The submission provided complementary evidence about the build-up of the genocidal dynamics against ethnic Vietnamese people in Cambodia – beginning with the deportation of the majority of the Vietnamese minority from Cambodian territory in 1975, and escalating in 1977–78 into the killing and elimination of almost all of the remaining Vietnamese in Cambodia. The submission argued that the deliberate infliction of certain conditions of life calculated to bring about the destruction of the group; and imposing measures to prevent birth within the group, were acts amounting to genocide, and that the forced deportation, persecution and enslavement of members of the group amounted to crimes against humanity.⁶⁶ The Co-Prosecutors recognised the value of this evidence by ultimately including it, in 2010, into their Final Submission for Case 002.⁶⁷

In January 2010, however, the CIJs rejected the civil party lawyers' request for further investigations on the basis that they had not been seized of the requested facts through the

⁶⁴ Civil Party Co-Lawyers, '*Civil Parties' Request for Supplementary Investigations Regarding Genocide of the Khmer Krom and the Vietnamese*', Document D250/3 (3 December 2009) Extraordinary Chambers in the Courts of Cambodia <<http://www.eccc.gov.kh/en/document/court/civil-party-lawyers-request-supplementary-investigations-regarding-genocide-khmer-kro>>.

⁶⁵ Ibid [8].

⁶⁶ Ibid.

⁶⁷ Co-Prosecutors, '*Rule 66 Final Submission*', Document D390, Case File No 002/19-09-2007-ECCC-OCIJ (Public redacted version) (16 August 2010) Extraordinary Chambers in the Courts of Cambodia <http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/D390_ENreadacted.pdf>. In particular, refer to paragraphs 785 and 790 within the part on 'Crimes against the Vietnamese' (paras 778–814; pages 236–245 of the Closing Order).

Co-Prosecutors' Introductory Submission. Still, the CIJs issued a Closing Order for Case 002 in September 2010 that charged Ieng Sary, Ieng Thirith, Khieu Samphan and Nuon Chea, the four Senior Leaders in the ECCC's largest case file at that time, with genocide against the Vietnamese, deportation of the Vietnamese as a crime against humanity and other crimes specific to the treatment of the Vietnamese.⁶⁸

The Co-Investigating Judges, in combination with rejecting the civil party lawyers' request for further investigations, also issued the first decision on civil party admissibility in Case 002. By declaring the facts of the request to be outside the scope of judicial investigations, and declining to expand the investigations, the CIJs consequently found that there was no basis for the applicants' civil claim, because the harm suffered by these applicants was not linked with the geographical scope of judicial investigations. Hence, the Judges declared the civil party applications of the first ethnic Vietnamese applicants to be inadmissible.⁶⁹ This first admissibility decision in Case 002 was made by the CIJs even before dealing with the admissibility of the broader set of civil party applications and establishing corresponding criteria and guidelines for civil party admissibility. The decision was appealed by civil party lawyers to the Pre-Trial Chamber, which initially upheld the decision of the CIJs.⁷⁰

Following this logic, the CIJs also declared all remaining Vietnamese civil party applicants from Kampong Chhnang inadmissible when, in September 2010, they published their Closing Order in Case 002. However, in June 2011, following mass appeals against these civil party admissibility decisions by the CIJ,⁷¹ the ECCC Pre-Trial Chamber not only

⁶⁸ *Prosecutor v Nuon* (Closing Order) (Extraordinary Chambers in the Courts of Cambodia, Office of the Co-Investigating Judges, Case No 002/19-09-2007-ECCC-OCIJ, 15 September 2010). The Closing Order recognised 68 Civil Parties in relation to the 'treatment of Vietnamese', many of them non-ethnic Vietnamese.

⁶⁹ 16 Vietnamese civil party applicants were affected by this decision. See *Prosecutor v Nuon (Order on the Admissibility of Civil Party Applications Related to Request)* (Extraordinary Chambers in the Courts of Cambodia, Office of the Co-Investigating Judges, Case No 002/19-09-2007-ECCC-OCIJ, 13 January 2010).

⁷⁰ See *Prosecutor v Nuon (Appeal Against Order on the Admissibility of Civil Party Applications Related to Request D250/3)* (Extraordinary Chambers in the Courts of Cambodia, Office of the Co-Investigating Judges, Case No 002/19-09-2007-ECCC-OCIJ, 12 February 2010); and *Prosecutor v Nuon (Appeal Against Combined Order on Co-Prosecutors' Two Requests for Investigative Action regarding Khmer Krom and the Civil Parties Request for Supplementary Investigations Regarding Genocide of the Khmer Krom and Vietnamese)* (Extraordinary Chambers in the Courts of Cambodia, Office of the Co-Investigating Judges, Case No 002/19-09-2007-ECCC-OCIJ, 12 February 2010). See also *Prosecutor v Nuon (Decision on Appeals against Co-Investigating Judges)* (Extraordinary Chambers in the Courts of Cambodia, Pre-Trial Chamber, Case No 002/19/2007/ECCC/OCIJ, 13 January 2010) and *Prosecutor v Nuon (Order on the Admissibility of Civil Party Applications Related to Request D250/3)* (Extraordinary Chambers in the Courts of Cambodia, Pre-Trial Chamber, Case No 002/19-09-2007-ECCC-OCIJ, 13 January 2010).

⁷¹ Civil Party Co-Lawyers, *Appeal Against Order on Admissibility of Civil Party Applicants from Current Residents of Kampong Chhnang Province, Document D417/2/3* (27 September 2010) Extraordinary Chambers in the Courts of Cambodia <http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/D417_2_3_EN.PDF>.

overruled the CIJ's decision, but also reconsidered its own previous decision and eventually admitted all ethnic Vietnamese civil party applicants from Kampong Chhnang province into the proceedings in Case 002, granting all survivors civil party status.⁷² A total of 43 ethnic Vietnamese survivors from Kampong Chhnang province were thus able to join the proceedings as civil parties.

The case of this minority survivor group not only highlights the considerable uncertainties with which survivors were confronted during their participation process, but also demonstrates how the reality of prosecutorial selectivity — a necessary feature of mass crimes investigations — could be at odds with the objective of safeguarding representativeness within and among the victim compositions participating in the judicial proceedings of an internationalised criminal court. While victims of mass crimes and victims advocates usually strive for the most comprehensive list of charges and inclusion of victim groups, usually for the purposes of establishing historical records for future generations, prosecutors at these tribunals need to be mindful of the available resources, the age of the accused and many other factors, when making prosecutorial decisions. However, given the direct link between the charges, harm and victims' admissibility, a narrow scope of investigations and prosecutions actually limits the access of survivors to justice and eventually — in the case of the ECCC — to reparations. This situation is often further aggravated by a lack of alternative or complementary transitional justice mechanisms, including truth-seeking or reparative justice schemes.

Although ECCC prosecutors considered the fate of the ethnic Vietnamese minority in their charges, the geographical limitations to their investigations threatened to adversely affect the group's representation at trial. In the case of this particular minority, the genocide against the group meant that, to start with, there were very few direct survivors remaining in Cambodia. Without admitting individuals from the minority group into the proceedings as civil parties, there was a real risk that — in spite of the accused persons being charged with genocide against the Vietnamese — the few surviving members of this genocide group were effectively excluded from having a voice among the many other groups represented in the pool of civil parties before the ECCC. It was only due to the Pre-Trial Chamber's appeals decisions that ethnic Vietnamese civil parties were able to have their specific interests represented in the criminal proceedings.

⁷² Extraordinary Chambers in the Courts of Cambodia, *Decision on Appeals against Orders of the Co-Investigating Judges on the Admissibility of Civil Party Application, Document D404/2/4* (24 June 2011) <http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/D404_2_4_EN-1.PDF>. See also *Prosecutor v Nuon (Corrigendum to Decision on Appeals against Orders of the Co-Investigating Judges on the Admissibility of Civil Party Applicants)* (Extraordinary Chambers in the Courts of Cambodia, Pre-Trial Chamber, Case No 002/19-09-2007-ECCC-OCIJ, 8 July 2011).

It appears that research has so far devoted little attention to the dilemma of the impact of prosecutorial decisions on victims' rights and remedies. Commenting about situations before the ICC, Cecile Aptel argued 'the direct consequences of the choice made by international prosecutors according to their discretionary powers is to simultaneously ascribe blame to the few instances, suspects and crimes they pursue, and take the attention away from others'.⁷³ Aptel also drew attention to the fact that international criminal justice has strong symbolic powers, in that 'its scope is ascribed a significant meaning: it recognises and acknowledges certain victims, and symbolically rejects others'.⁷⁴ While criminal justice frameworks cannot provide justice to every victim of mass atrocities, the question remains whether it is at all possible to reconcile the logic of prosecutorial selectivity with the aspiration of achieving representativeness among participating survivors, including minority groups, in the judicial process.

5.2. Issues surrounding Genocide against the Vietnamese Minority

Both inside and outside Cambodia — the use of the term 'genocide' and its scope in the context of Cambodia have been contentious. In the case of the Vietnamese minority, opposition against the use of the legal definition of genocide has arisen on both factual and politically oriented grounds, the latter stemming mostly from the difficult relationship between the Khmer majority and the Vietnamese minority in Cambodia.

Among historians, Ben Kiernan and the Yale Genocide Program have gathered vast amounts of information about the crimes committed during the Khmer Rouge regime,⁷⁵ much of which provided the initial basis for the documentary collections at DC-Cam.⁷⁶ Ben Kiernan and colleagues have repeatedly stressed the genocidal nature of the crimes against the Vietnamese, highlighting ethnic policies and racial discourse during that time.⁷⁷ Kiernan portrays a vicious dynamic, which began in 1975 with the forcible removal of the majority of ethnic Vietnamese from Cambodian territory; followed in mid-1976 by a prohibition for the remaining Vietnamese from leaving the country; and culminating in 'Directive from 870', issued in April 1977, which called for local officials to arrest all ethnic Vietnamese and all Khmer who spoke Vietnamese or had Vietnamese relatives.⁷⁸ The scholar concluded, 'there

⁷³ Cécile Aptel, 'Prosecutorial Discretion at the ICC and Victims' Right to Remedy. Narrowing the Impunity Gap' (2012) 10(5) *Journal of International Criminal Justice* 1357.

⁷⁴ Ibid 1372.

⁷⁵ Kiernan, above n 40.

⁷⁶ See also Craig Etcheson, *After the Killing Fields: Lessons from the Cambodian Genocide* (Praeger Publishers, 2005).

⁷⁷ Liat Duong, 'Racial Discrimination in the Cambodian Genocide', (GSP Working Paper No 34, Yale University: Genocide Studies Program, 2006). See also the work of Gregory Stanton on this subject and refer to Tom Fawthrop and Helen Jarvis, *Getting Away with Genocide? Elusive Justice and the Khmer Rouge Tribunal* (UNSW Press, 2005).

⁷⁸ Kiernan, above n 40, 296–7.

is no question that Democratic Kampuchea waged a campaign of genocide against the ethnic Vietnamese'.⁷⁹ Similarly, the UN Group of Experts sent to Cambodia in 1998 to assess the modalities for the prosecution of those who committed crimes during the Khmer Rouge period recommended that genocide be included in the jurisdiction of the proposed tribunal:

In the view of the Group of Experts, the existing historical research justifies including genocide within the jurisdiction of a tribunal to prosecute Khmer Rouge leaders. In particular, evidence suggests the need for prosecutors to investigate the commission of genocide against the Cham, Vietnamese and other minority groups ... The Khmer Rouge subjected these groups to an especially harsh and extensive measure of the acts enumerated in the Convention. The requisite intent has support in direct and indirect evidence, including Khmer Rouge statements, eyewitness accounts and the nature and number of victims in each group, both in absolute terms and in proportion to each group's total population.⁸⁰

However, reactions were mixed when it became clear that the ECCC's Co-Prosecutors and Co-Investigating Judges would proceed with charging the accused in Case 002 with the crime of genocide.⁸¹ A number of scholars and observers disagreed with such a construction of the historical facts. Philip Short, although agreeing that the Vietnamese were indeed targeted and killed, called the genocide charges 'misconceived', arguing that these attacks were primarily motivated by political reasons rather than genocidal intent.⁸² The historian Henri Locard agreed with Short, arguing that these crimes would better be characterised as 'politicide'.⁸³ Prior to the commencement of investigations at the ECCC, William Schabas had argued that crimes committed under the Khmer Rouge regime would not be covered by the legal definition of genocide, but should rather be characterised as crimes against humanity. Whilst focusing much on crimes committed against the Khmer population and religious groups, Schabas makes little or no reference to the ethnic Vietnamese minority in Cambodia.⁸⁴ Most critics also highlighted the legal and procedural challenges associated with trying genocide, in light of the need for an expeditious trial.

Ultimately, the ECCC Co-Prosecutors – after reviewing all the available evidence – 'have alleged genocide against the Cham, as well as against Vietnamese, and ... believe that the

⁷⁹ Ibid 460, see also pages 296-298 and 423-427.

⁸⁰ Rajsoomer Lallah, Ninian Stephen and Steven R Ratner, *Report of the Group of Experts for Cambodia established pursuant to General Assembly Resolution 52/135* (18 February 1999) University of Minnesota Human Rights Library, [63] <<http://www1.umn.edu/humanrts/cambodia-1999.html>>.

⁸¹ See, eg, Brendan Brady, 'Cambodia Confronts the "G" Word' (2010) *Foreign Policy* <http://www.foreignpolicy.com/articles/2010/01/08/cambodia_confronts_the_g_word?page=full>.

⁸² See, eg, J Wallace, 'Tribunal Charges Two KR Leaders with Genocide', *Cambodia Daily* (Phnomh Penh), 17 December 2009, 1 and 32.

⁸³ Henri Locard, 'Not Only Questionable, Genocide Charge adds to Tribunal Imbroglio', Letter to the Editor, *Cambodia Daily*, 22 December 2009, 34.

⁸⁴ William A Schabas, 'Problems of International Codification: Were the Atrocities in Cambodia and Kosovo Genocide?' (2001) 35(2) *New England Law Review* 287, 289–3.

facts will support this conclusion when they are laid out in the Trial Chamber'.⁸⁵ International Co-Prosecutor Andrew Cayley describes the evolution of the persecution of ethnic Vietnamese under Democratic Kampuchea as unfolding in phases and ultimately culminating in genocide. Following the forcible expulsion of most Vietnamese from Cambodia to Vietnam in 1975, almost all of the remaining Vietnamese people 'were systematically hunted down and exterminated'.⁸⁶ The language employed by the Khmer Rouge, particularly in the Revolutionary Flag magazines of the Communist Party of Kampuchea, was described by the National Co-Prosecutor Chea Leang, as a 'language of genocide — explicit and direct, cold and clinical'.⁸⁷

Cayley consequently argues, 'there is little occasion in the case of Cambodia's ethnic Vietnamese population to engage in the usual academic debates about the 'in whole or in part' requirement, or how many victims it takes to trigger the Genocide Convention'.⁸⁸ Professional demographers employed by the ECCC concluded in relation to the ethnic Vietnamese who remained in Cambodia after the forced expulsion, 'all 20,000 of them died from the hands of the Khmer Rouge during the years from April 1975 – January 1979'.⁸⁹ As for genocidal intent, Cayley asserts, 'in the case of the Khmer Rouge genocide against the Vietnamese, we have a rare instance in which the special intent requirement need not be inferred. As early as January 1978, the leadership began exhorting cadres and troops to prepare to exterminate the entire Vietnamese race'.⁹⁰ These conclusions are also supported by the facts recounted in the statements of the ethnic Vietnamese civil parties, which provide important evidence about the build-up and escalation of the genocidal dynamic against the ethnic Vietnamese minority in Cambodia. None of the Vietnamese civil parties were able to give an account of anyone who remained in Cambodia in 1975, having survived the Khmer Rouge regime. Civil parties — both ethnic Vietnamese and Khmer nationals — also describe instances of mixed marriage policies being implemented, mainly through the killing of Vietnamese spouses. National Co-Prosecutor Chea Leang described the regime's mixed marriage policies as follows:

And the ethnic Vietnamese spouses of mixed marriages were slain, while their Khmer spouses were left unharmed. This policy demonstrates the racial targeting of the Vietnamese — a Vietnamese man married to a Cambodian woman would be killed, but

⁸⁵ Andrew T Cayley, 'Prosecuting Mass Atrocities at the Extraordinary Chambers in the Courts of Cambodia' (2012) 11(2) *Washington University Global Studies Law Review* 445, 455.

⁸⁶ *Ibid* 456.

⁸⁷ Chea Leang, 'Living with a Genocide Legacy. The Experience of the Extraordinary Chambers in the Courts of Cambodia: Challenges, Opportunities and Success' (Remarks at the Fourth Regional Forum on the Prevention of Genocide, Phnom Penh, 1 March 2013).

⁸⁸ Cayley, above n 85, 457.

⁸⁹ Tableau, above n 41, 47–8.

⁹⁰ Cayley, above n 85, 457–8. For a more detailed discussion about proving genocidal intent at the ECCC, see Ryan Park, 'Proving Genocidal Intent: International Precedent and ECCC Case 002' (2010) 63(1) *Rutgers Law Review* 129, 129–91.

his wife and children spared in most cases. But a Vietnamese woman married to a Cambodian man would be killed along with all of her children. Several witnesses addressed the Co-Investigating Judges on the reason behind this policy: to kill 'the Vietnamese genes or the Vietnamese blood line' because 'the Vietnamese race should neither exist anymore, nor should it be allowed to reproduce'.⁹¹

The genocide charges in Case 002 have not only been controversial among legal scholars and professionals — among the wider Cambodian population, there has also been much debate.⁹² Much of the past and contemporary situation of the ethnic Vietnamese in Cambodia relates to the aforementioned problematic historical relationship between the two states, as well as the prevailing attitudes and prejudices among the Khmer mainstream society towards its Vietnamese minority.⁹³ According to a 2007 survey on inter-ethnic relations in Cambodia, conducted by the Alliance for Conflict Transformation (ACT), out of more than 1 100 respondents in Cambodia, 58 percent thought that the Vietnamese had 'bad intentions towards Khmer people'. Data from the survey also indicated that a culture-based or ethnicity-based conception of citizenship continues to dominate the attitudes of the majority population. As a result, ethnic Vietnamese — even those who lived for generations in the country — are frequently not viewed as part of Cambodia's citizenry.⁹⁴

In the Cambodian context, where atrocity crimes affected both Khmer nationals and minorities, the genocide charges alleged by the ECCC's Co-Prosecutors and Co-Investigating Judges pose a social dilemma, insofar as the Khmer word for 'genocide' — literally meaning to 'destroy from the root' — has become the most commonly used term to refer generally to the atrocities committed by the Khmer Rouge. Whilst its mainstream meaning has become more widely used since the 1980s, the legal definition of 'genocide' is more technical and often conflicts with the prevailing understanding of the term. By charging the remaining senior leaders of the Khmer Rouge regime with 'genocide' only against two minority groups, the judicial process at the ECCC has also exposed the sensitive relationship between the Khmer majority and the Vietnamese minority in Cambodia.⁹⁵

Given these controversies surrounding genocide charges at the ECCC, does anything turn on the inclusion of the genocide charge? The lawyers for the Vietnamese civil parties stated that the inclusion of the genocide charge was important in that it would allow these survivors

⁹¹ Leang, above n 87.

⁹² See also Bridget Di Certo and Cheang Sokha, 2011, 'Vietnam Blame Game', *Phnom Penh Post* (Phnom Penh), 7 December 2011.

⁹³ See Meng Tarr, above n 26,33–47; Amer, 'The Ethnic Vietnamese in Cambodia', above n 26, 228–32.

⁹⁴ Meas Sokeo and Tania Miletic, *Understanding Inter-Ethnic Relations and National Identity in Cambodia* (Alliance for Conflict Transformation, 2007) 59–98.

⁹⁵ See also Stephanie Giry, 'The Genocide That Wasn't' on The New York Review of Books Blog (25 August 2014) <<http://www.nybooks.com/blogs/nyrblog/2014/aug/25/khmer-rouge-genocide-wasnt/>>.

to formally pursue the truth about why they were targeted and, in the process, ‘reconstitute their identity’ as a distinct group in Cambodia whose rights need to be respected.⁹⁶ Many members of the civil party group identify themselves strongly with a sense of their survivorship, both individually and collectively, specifically because they belong to a group that was positively targeted for extermination. In light of the sensitivities surrounding how the ethnic Vietnamese are currently perceived in Cambodian society, the genocide charges hold even more importance to the civil parties, because some mainstream Cambodians still consider it implausible that these Vietnamese hold a status as ‘victims’, mainly because of the mistrust levied at the Vietnamese in Cambodia, stemming from the complex history and politics between the two countries. Lawyers also argue that having the full extent of crimes placed on the historical record is a significant step towards bridging the gap between the atrocities suffered in the past by the client group and their ability to move forward into the future with a sense of closure.⁹⁷ According to this argument, because genocide charges reflect the full criminality of the defendants, a genocide trial would not only be a manifestation of justice for these survivors, but an international judicial measure against impunity for perpetrators of genocide.⁹⁸

These controversies, both inside and outside of Cambodia, have at times, appeared superfluous, particularly following a decision taken by the ECCC Trial Chamber to sever Case 002 into a number of sub-trials.⁹⁹ The first sub-trial, Case 002/01, dealt mainly with the crimes of forced transfers of Cambodian population groups, and the Trial Chamber ruled that crimes against the Vietnamese would not be covered in that sub-trial.¹⁰⁰ On account of the age and health of the two remaining accused and the difficult financial situation of the ECCC, the Co-Prosecutors and many observers had initially lowered expectations about the prospects of genocide charges proceeding to final determination and publically stated that future sub-trials are unlikely to proceed. In January 2013, international Civil Party Lead Co-Lawyer, Elisabeth Simmoneu-Fort stated, ‘it is likely there will not be more than Case 002/01 ... I assume that for a part of civil parties, it is difficult to admit that genocide will not be

⁹⁶ Integrated Regional Information Networks, *Cambodia: Khmer Rouge Genocide Charge Marks Milestone for Minorities* (24 May 2010) Refworld <<http://www.refworld.org/docid/4c0367cb1e.html>>. See also Brady, above n 79.

⁹⁷ Wallace, above n 82, 32.

⁹⁸ Robert Carmichael, ‘Khmer Rouge Trial Opens. Key Charges Might Never be Heard’, *DPA* (Hamburg), 21 November 2011.

⁹⁹ *Prosecutor v Nuon (Severance Order Pursuant to Internal Rule 89ter)* (Extraordinary Chambers in the Courts of Cambodia, Trial Chamber, 22 September 2011).

¹⁰⁰ *Prosecutor v Nuon (Decision on Severance of Case 002 Following Supreme Court Chamber Decision of 8 February 2013)* (Extraordinary Chambers in the Courts of Cambodia, Trial Chamber, Case No 002/19-09-2007/ECCC/TC, 26 April 2013) [159]. This decision was appealed to the Supreme Court Chamber, both by the Prosecution and the Nuon Chea defence team.

examined at all.¹⁰¹ The verdict in Case 002/01 against the two remaining Senior Leaders, Khieu Samphan and Nuon Chea, was handed down on 7 August 2014.¹⁰²

Meanwhile, the Trial Chamber's severance decision was further litigated through appeals to the Supreme Court Chamber, which ordered, in July 2013, that 'evidentiary hearings in Case 002/02 shall commence as soon as possible after closing submissions in Case 002/01, and that Case 002/02 shall comprise at minimum the charges related to... genocide.'¹⁰³ The ECCC Trial Chamber complied with the decision and, through a second severance decision issued in April 2014, confirmed that genocide charges against the ethnic Vietnamese minority would form part of Case 002/02.¹⁰⁴ With the trial hearings in Case 002/02 having commenced in October 2014, victims still hold hopes that Cambodia will eventually see this long-awaited genocide trial.

5.3. Legal Representation and the Importance of Local NGO Support

Most survivors in Cambodia have required assistance to participate in the ECCC's legal proceedings. Some difficulties faced by survivors wishing to apply to participate at the Court — particularly for those residing in rural Cambodia — have included inadequate outreach, the complexity of the required Victim Information Form, and illiteracy. In this context, Cambodian NGOs have played a critical role in providing outreach to victims and acting as intermediaries between victims and the Court.¹⁰⁵ The principal intermediary for interested survivors among the ethnic Vietnamese minority was the KKKHRA. KKKHRA worked with a number of Vietnamese communities alongside their main work with Khmer Krom communities in a few selected provinces in Cambodia. Given that the ethnic Vietnamese had thus far not been included in the many ECCC-related outreach programs conducted by both the Court and local NGOs, KKKHRA decided to conduct a baseline survey among Vietnamese communities with whom it worked. The purpose of the survey was to develop an understanding of the minority group in order to effectively prepare targeted ECCC-related outreach activities.¹⁰⁶ As a result of this initial survey, KKKHRA decided to focus its outreach

¹⁰¹ Quoted in Bridget Di Certo, 'Rest for the wicked', *Southeast Asia Globe* (Phnomh Penh) 7 January 2013.

¹⁰² ECCC Public Affairs, 'Judgment in Case 002/01 against Khieu Samphan and Nuon Chea to be Pronounced on 7 August 2014' (Press Release, 29 May 2014).

¹⁰³ *Prosecutor v Nuon (Decision on Immediate Appeals against Trial Chamber's Second Decision on Severance of Case 002 - Summary of Reasons)* (Extraordinary Chambers in the Courts of Cambodia, Supreme Court Chamber, Case No 002/19-09-2007-ECCC, 23 July 2013) [13].

¹⁰⁴ *Prosecutor v Nuon (Decision on Additional Severance of Case 002 and Scope of Case 002/2)* (Extraordinary Chambers in the Courts of Cambodia, Trial Chamber, Case No 002/19-09-2007-ECCC/TC, 4 April 2014).

¹⁰⁵ See also Christoph Sperfeldt, 'Cambodian Civil Society and the Khmer Rouge Tribunal' (2012) 6(1) *International Journal of Transitional Justice* 149; Christoph Sperfeldt, 'The Role of Cambodian Civil Society in the Victim Participation Scheme of the Extraordinary Chambers in the Courts of Cambodia' in Thorsten Bonacker and Christoph Safferling (eds), *Victims of International Crimes: An Interdisciplinary Discourse*, (TMC Asser Press) 345..

¹⁰⁶ Sperfeldt (ed) with Chanrith and Balthazard, above n 28.

efforts on Kampong Chhnang province, where interest among survivors in the ECCC's victim participation scheme was highest.

Following a few ECCC-related outreach missions, a number of survivors asked KKKHRA to assist them to apply as complainants or civil parties to the ECCC. KKKHRA was able to rely on the services of a permanent field staff in Kampong Chhnang to assist in the application process, whereby each applicant was required to complete the ECCC Victim Information Form, which was only available in Khmer, English and French. Although most of the survivors in the client communities were able to speak Khmer, many were illiterate or unable to understand the complex language used in the form. Without assistance from an intermediary NGO or lawyer, most would not have been able to submit an application to the ECCC in Phnom Penh. Likewise, the ECCC and its underfunded Victims Unit relied heavily on intermediary NGOs to effectively undertake the Court's notification obligations vis-à-vis complainants and civil party applicants.

In a country where most survivors lack the means and a level of education necessary to enable them to engage the proceedings on their own, the lack of legal representation soon became a major obstacle to active participation. Since the Court did not initially offer a legal aid scheme for civil parties, the procurement of legal representation became an additional area of NGO support.¹⁰⁷ Intermediary organisations, fearing that civil parties were not able to exercise their rights to participate, reached out to external partners. Some NGOs actively sought national and international pro bono lawyers or mobilised their traditional relationship with Cambodian legal aid NGOs, such as Legal Aid of Cambodia (LAC).¹⁰⁸ Cambodian lawyers from LAC were amongst the first to represent civil parties before the ECCC, implementing a unique framework for professional development for Cambodian lawyers, typically in cooperation with international pro bono civil party lawyers. This combination enabled both the sharing of local knowledge with international lawyers and formal and on-the-job training and capacity-building to national lawyers and support staff.

In the case of the ethnic Vietnamese minority, collaboration emerged between national counsel from LAC and an international lawyer from Australia, acting on a pro bono basis.¹⁰⁹ One initial challenge was building trust with these survivors – victims of mass atrocity crimes do not always find it easy to trust people in positions in government or law, and the ethnic Vietnamese survivors were no exception. The history of discrimination and persecution against the Vietnamese minority in Cambodia resulted in many survivors holding a real fear of repercussions for speaking out about their experience of crimes. Some individuals from

¹⁰⁷ Erika Kinetz and Prak Chan Thul, 'ECCC Struggling To Cover Victims' Legal Costs', *Cambodia Daily* (Phnom Penh), 15 February 2008, 1–2.

¹⁰⁸ See also Christoph Sperfeldt, Oeung Jeudy and Daniel Hong, 'Legal Aid Services in Cambodia: Report of a Survey among Legal Aid Providers', (Report, Cambodian Human Rights Action Committee, November 2010).

¹⁰⁹ Initially, the engagement was facilitated through the NGO Access to Justice Asia, and later through Ms Nguyen's independent work as a *pro bono* civil party lawyer. Support was provided at times through the Australian Volunteers International's (AVI) Lawyers Beyond Borders program, and the Australian Prime Minister's Executive Endeavour Award. See more at www.civilparties.org.

the minority group had continued to face armed attacks and killings by Khmer Rouge guerilla into the mid-1990s, long after the Khmer Rouge regime had collapsed. In combination with the relationship built with the minority communities by KKKHRA, trust was built with the international civil party lawyer, who was able to communicate directly with the clients in the Vietnamese language, without interpreters or intermediaries. Because of the actual and structural violence against the group, civil party lawyers took also great caution to explore suitable protective measures with the ECCC Witness and Expert Support Unit, to ensure, as far as possible, the anonymity of clients.

As a result of these efforts, ethnic Vietnamese participants have benefited from active legal representation of their specific interests during the pre-trial phase, most visibly manifested in their ultimate admission as civil parties in Case 002, following several admissibility appeals launched by their lawyers. However, in 2010, the ECCC Judges Plenary amended the Internal Rules to impose common legal representation of civil parties at the trial phase of proceedings by two court-employed Civil Party Lead Co-Lawyers. These Lead Co-Lawyers draw their powers from the Internal Rules and represent a ‘consolidated group’ of civil parties, with a mandate to file one single claim for collective reparations at the end of trial proceedings.¹¹⁰ Although primarily aimed at enhancing the efficiency of trial management, these amendments raise challenges to the representation of special interest groups, including but not limited to civil parties from minority groups.¹¹¹ For common legal representation of such a large and diverse group of survivors to be representative and at the same time non-discriminatory, regular communication and appropriate consultations between the Lead Co-Lawyers, civil party lawyers and their clients are required.

The outreach and legal representation of the Vietnamese civil parties highlights the indispensable role local partners play in supporting an internationalised criminal justice process. The proximity of local NGOs to the survivor communities further provided some comparative advantages in NGO-organised outreach, over court-organised activities. These NGOs, through their provincial networks and longstanding local presence, had developed trust with rural communities and were able to reach out to survivors residing in those areas.¹¹² The representation of Vietnamese civil parties before the ECCC benefited from the combination of KKKHRA’s networks and associated local knowledge with proactive legal representation. These advantages enabled a more active and inclusive participation process for this group of minority civil parties. Ultimately, the strategic mobilisation of local partners also means that this endeavour can become part of a longer-term sustainable effort, as some NGOs plan the continuation of their work beyond the life of the ECCC.

¹¹⁰ Extraordinary Chambers in the Courts of Cambodia, *Internal Rules (Ver 8)* (adopted 3 August 2011) r 12ter.

¹¹¹ Some of the Internal Rule amendments provoked strong opposition from lawyers, civil parties and certain NGOs, as civil parties were not consulted in the choice of a common legal representative. Further, the civil party lawyers, who hold the direct power of attorney with their clients, ultimately have a limited say in their representation. See also Andrew F Diamond, ‘Victims Once Again? Civil Party Participation before the Extraordinary Chambers in the Courts of Cambodia’ (2011) 38 *Rutgers Law Record* 34 http://lawrecord.com/files/38_Rutgers_L_Rec_34.pdf.

¹¹² Sperfeltdt, ‘Cambodian Civil Society and the Khmer Rouge Tribunal’, above n 105, 157–9.

5.4. Meaningful Participation in a Context of Legal and Procedural Uncertainty

The ECCC became the first internationalised criminal court to incorporate victim participation on the basis of a civil party system. This ‘experiment’ in international justice was characterised both by a large number of civil parties seeking to participate in the ECCC’s proceedings, and by numerous legal and procedural uncertainties associated with the implementation of such an ambitious scheme.¹¹³ These problems were further complicated by the fact that the ECCC did not budget for victim participation during its early years, leading to many shortcomings in the outreach programs, delays in the processing of applications, untimely notifications to applicants and the need to procure external legal representation for civil parties. Despite the assistance of local intermediary NGOs, designing a meaningful participation process for survivors under such circumstances was challenging. A few examples of the participation of ethnic Vietnamese civil parties — both at the pre-trial and trial phases — may highlight some of these challenges.

Maintaining direct access between lawyer and client within the frameworks of very limited resources is the first challenge. It was only through funding and services provided by intermediary NGOs, as well as the engagement of pro bono lawyers that regular outreach and client meetings could be arranged. Since the ECCC did not offer any outreach materials in the languages of minority groups, outreach was conducted predominantly in the Khmer language, with the use of Khmer language materials. However, dialogues at the meetings were conducted in both Khmer and Vietnamese and, where necessary, interpretation was made available for clients. From 2008–12, there were, on average, two to three outreach meetings per year in the civil parties’ communities. In addition, lawyers and intermediary NGOs organised at least one trip per year to Phnom Penh, with a view to providing each client the opportunity to visit the ECCC at least once. From 2010 onwards, the Victims Support Section (VSS) was also able to assist by having civil parties visit the Court during trial proceedings and/or for court update meetings.

Logistically, this work relied on the indispensable support of provincial NGO staff, lawyers and their legal assistants. In the case of the Vietnamese client group, financial support from the Civil Peace Service program of the German Development Service, provided since 2007, was key to funding local NGO-organised services to survivor participants and to cover the cost of travels and client conferences.¹¹⁴ Focal persons were appointed in each of the client communities, and a simple prepaid telephone card was sufficient to enable regular communication and the possibility for consultation with clients, as required. This communication and outreach network was also used by the ECCC, which did not initially have the logistical capacity to deliver court notifications to applicants and civil parties, and therefore relied primarily on intermediary NGOs and civil party lawyers to assist.

¹¹³ See also John D Ciorciari and Anne Heindel, ‘Experiments in International Criminal Law. Lessons from the Khmer Rouge Tribunal’ (2014) 35 *Michigan Journal of International Law* 369.

¹¹⁴ Joern Dosch, Duong Virorth and Kim Sedara, ‘Evaluation of the Civil Peace Service, Cambodia Case Study’ (Unpublished evaluation report, Bonn: German Federal Ministry for Economic Cooperation and Development (BMZ), 2010).

Second, it is noteworthy that during the investigative phase in Case 002, survivors and the wider public were not made aware of the scope of investigations undertaken by the OCP and subsequently, by the CIJs. Although it was recognised that investigations in civil law systems are generally confidential, a lack of *any* public information for interested survivors – for more than three years and over almost the entire investigations in Case 002 – was criticised.¹¹⁵ As a result, little information was available to inform consideration of the criteria for civil party admissibility, being the need for civil party applicants to “demonstrate as a direct consequence of at least one of the crimes alleged against the Charged Person, that he or she has in fact suffered physical, material or psychological injury upon which a claim of collective and moral reparation might be based”.¹¹⁶ Thus, applicants in Case 002 could not deliberately set out crimes they experienced and place them within the scope of crimes judicially investigated by the Court, in order to meaningfully link the harm they suffered to the criminal acts with which the accused were charged. An NGO worker at the time likened this situation to driving a car in the dark without any lights or directions. Since the ECCC did not initially provide any legal aid scheme for civil parties, the few available pro bono lawyers were unable to represent the interests of the many unrepresented applicants.

In November 2009 — less than three months before the announced closure of investigations and a corresponding deadline for the filing of applications from survivors — the CIJs, for the first time, made publicly available information about the scope of judicial investigations.¹¹⁷ Although the CIJs granted existing applicants an additional three months to provide supplementary information in support of their claims, it was for many applicants and intermediary organizations, too late, and — given the need for coordinated outreach to victims in rural Cambodia — logistically impossible, to provide additional information within that timeframe. Recognising these difficulties, the CIJs eventually extended the deadline for the submission of supplementary information to the end of June 2010.¹¹⁸

¹¹⁵ See International Federation for Human Rights, *Victims’ Rights before the Extraordinary Chambers in the Courts of Cambodia. A Mixed Record for Civil Parties* (2012) FIDH, 23–4 <http://www.fidh.org/IMG/pdf/eccc_victrights_rep_nov2012_en_web.pdf>.

¹¹⁶ Extraordinary Chambers in the Courts of Cambodia, *Internal Rules (Ver 8)* (adopted 3 August 2011) r 23bis(1).

¹¹⁷ ECCC Public Affairs, ‘Co-Investigating Judges Release Information about Scope of Investigation in Case 002’ (Press Release, 5 November 2009). In January 2010, the CIJs officially notified of the closing of their investigations, bringing into effect a deadline for civil party applications no later than 15 days after the notification, according to the previously revised Internal Rules.

¹¹⁸ This deadline only concerned applications that had already been submitted before the initial application deadline at the end of January 2010. Many other survivors interested in applying for civil party status benefitted little from the belated release of public information about the scope of investigations in Case 002. Importantly, for the 16 Vietnamese applicants whose civil party status had earlier been rejected by the CIJs, the additional time granted to provide supplementary documentation in support of their claims was meaningless. The CIJs did not address how this new deadline would apply to applicants whose claims had already been deemed

For Vietnamese civil party applicants, there was a widespread perception among NGO workers and some lawyers, that individuals belonging to the two minority groups affected by genocidal policies — the Cham and the ethnic Vietnamese — would ultimately be eligible for civil party status, simply because the Khmer Rouge’s genocidal policies per se sought to eliminate these groups, in whole or in part, throughout the territory of Cambodia. The CIJ, however, reiterated that the geographical focus of investigations regarding the treatment of Vietnamese was limited to the former Eastern Zone. As described earlier, this led to the initial rejection of Vietnamese civil party applicants who suffered harm outside this narrow geographical scope.¹¹⁹

Following the CIJs’ initial rejection of these applicants, intermediary NGOs and lawyers decided to take further measures to manage the expectations of the remaining Vietnamese applicants and to avoid further traumatising among those Vietnamese survivors. Eric Stover stated, ‘war crimes trials, like most criminal trials, have the potential for producing the unexpected at any stage of the proceedings. ... This constant state of uncertainty places witnesses in an intimidating position and throws into doubt the very idea that bearing witness can be therapeutic.’¹²⁰ Similar observations can be made about civil party participation at the ECCC, which developed in a context of continual legal and procedural uncertainty. To counter any potential negative side effects from participating in the ECCC process, intermediaries and lawyers began to collaborate with the Transcultural Psychosocial Organization (TPO), an NGO specializing in psychosocial support with an emphasis on survivors of the Khmer Rouge regime. TPO also provided training to NGO workers on the symptoms of trauma and strategies to deal with survivors of mass atrocities.

One cultural adapted trauma treatment approach developed by TPO was ‘testimonial therapy’, in which survivors are invited to talk about their traumatic experiences and, together with a counsellor, transform the testimony into a written document. The testimony is read aloud and delivered during a Buddhist ceremony in the presence of other survivors. This practice allows victims to express and process traumatic experiences, to honour the

inadmissible. Arguably, this amounted to an instance of a lack of due process for these minority victims at the early pre-trial stages.

¹¹⁹ The practice of informing interested survivors about the scope of investigations improved with the application processes in the politically-contested Cases 003 and 004, where general information about crime sites under judicial investigation was provided at an earlier stage. See unilateral press releases in relation to Case 003 by the International Co-Prosecutor in May 2011, and more recently by International Co-Investigating Judge Mark Harmon in February 2013.

¹²⁰ Eric Stover, *The Witness. War Crimes and the Promise of Justice in The Hague* (University of Pennsylvania Press, 2005) 82.

spirits of the dead and to document human rights violations.¹²¹ Following the CIJs' 2010 decision deeming the first lot of Vietnamese minority civil party applicants to be inadmissible, lawyers approached TPO to conduct testimonial therapy sessions with some of these survivors, in an attempt to compensate the Court's rejections through a non-judicial measure that could potentially provide some closure for the survivors. The participating clients reacted extremely positively to the session, highlighting the importance of involving psychosocial support measures suitable to the cultural context, in victim participation processes.¹²²

In mid-2011, the judicial roller coaster gained new momentum when most ethnic Vietnamese applicants were re-admitted as civil parties, after the Pre-Trial Chamber reconsidered and reversed its previous ruling, in which had initially upheld the CIJs' decision to deem a small group of Vietnamese applicants inadmissible. The multiple appeals, and various judicial decisions during the admissibility process — both adverse and favourable — has at times, been conceptually difficult to communicate with clients. However, regular communication through outreach activities, combined with accompanying psychosocial support measures seem to have made this participation process more acceptable for these individuals. This experience suggests that attention to the process taken with victim participation — including regular communication and consultation with survivor participants — may be as important to the victim participants as the ultimate judicial outcomes. The management of client expectations during these communications is key to dealing with the intrinsic complexities and uncertainties involved in the criminal litigation of mass crimes, as the survivors' experiences and memories of the judicial process have great impact on victims of crime.

6. Collective Reparations and the Broader Human Rights Context

Alongside the International Criminal Court, the ECCC is one of the few international or hybrid criminal courts with an explicit reparations mandate.¹²³ However, the Court's Internal Rule 23 limits the scope of reparations to 'collective and moral reparations' only – presumably as opposed to individual or material reparations. In addition, the first Internal Rules provided that these reparations were to be borne exclusively by the convicted person. The limitations in the first Internal Rules led, in effect, to there being no substantial reparations for civil

¹²¹ Judith Strasser et al, 'Engaging Communities – Easing the Pain: Outreach and Psychosocial Interventions in the Context of the Khmer Rouge Tribunal' in Katharina Lauritsch and Frank Kernjak (eds), *We Need the Truth. Enforced Disappearances in Asia* (ECAP, 2011) 146.

¹²² Information gathered through feedback questionnaires in 2010.

¹²³ See, eg, Christoph Sperfeldt, 'Collective Reparations at the Extraordinary Chambers in the Courts of Cambodia' (2012) 12(3) *International Criminal Law Review* 457; Hao Duy Phan, 'Reparations to Victims of Gross Human Rights Violations. The Case of Cambodia' (2009) 4 *East Asia Law Review* 277. For a more general discussion of the issue, see Liesbeth Zegveld, 'Victims' Reparations Claims and International Criminal Courts. Incompatible Values?', (2010) 8(1) *Journal of International Criminal Justice* 79.

parties in the first trial, against Kaing Guek Eav, alias Duch.¹²⁴ It was only in 2010 that the ECCC Judges amended the Internal Rules with a view to providing more flexibility in designing and implementing moral and collective reparations applicable to Case 002 and beyond. The amendments involved two significant changes: (i) the Internal Rules now provide that the ECCC judges may recognize that a project — identified and designed in collaboration with the VSS — gives effect to a reparations award sought by civil parties, and (ii) the VSS is entrusted with the development and implementation of non-judicial measures, which benefit not only civil parties but also the broader interests of victims generally.¹²⁵ In both cases, the VSS is required to seek external funding.

In granting the ethnic Vietnamese minority group civil party status, the ECCC, in 2011, recognised them as victims who have a standing to seek ‘moral and collective’ reparations, having suffered personal and direct harm as a result of crimes committed by senior leaders of the Khmer Rouge regime.¹²⁶ During the application process, a significant number of Vietnamese civil parties indicated in their Victim Information Forms, that they sought ‘Cambodian nationality’ as a moral and collective reparation. These requests were further discussed and clarified during consultations with the group, as civil party lawyers focussed on assessing the civil claims within the framework of the ECCC’s ‘moral and collective reparations’ mandate. Overall, clients were able to establish that the crimes they were subjected to, caused, in part, their present-day harm, in that during the various occasions in which they were forcibly relocated by the Khmer Rouge, victims were forced to leave behind, destroy or otherwise lost, important documentation demonstrating their ties to Cambodia. As a result of this loss, clients suffered harm, in that, upon their voluntary return to Cambodia in the 1980s, these individuals could not establish their identities and were, instead, treated as ‘immigrants’ or ‘foreign residents’ by Cambodian officials. The lack of Cambodian nationality results in lack of access to basic social, economic, political and human rights,¹²⁷ and forms the basis of the group’s civil claims, having established that the direct and personal harm is linked with crimes with which the accused persons in Case 002 are charged — namely, forced deportation, persecution and genocide.

¹²⁴ The Trial Chamber granted only two reparations requests in Case 001: to include in its judgment the names of civil parties and their relatives who died at S-21, and to compile statements of apologies by the convicted person.

¹²⁵ See Extraordinary Chamber in the Courts of Cambodia, *Internal Rules (Ver 6)* (adopted 17 September 2010) rr 12*bis* (2) and (3), 23*quinquies*.

¹²⁶ Extraordinary Chambers in the Courts of Cambodia, *Internal Rules (Ver 8)* (adopted 3 August 2011) r 23 provides that: (1) The purpose of Civil Party action before the ECCC is to: (a) Participate in criminal proceedings against those responsible for crimes within the jurisdiction of the ECCC by supporting the prosecution; and (b) Seek collective and moral reparations, as provided in Rule 23*quinquies*.

¹²⁷ See Kevin Ponniah, ‘Cambodia’s Vietnamese Community Finds Voting is not Necessarily a Right’, *The Guardian*, 4 September 2013.

The Civil Party Lead Co-Lawyers first put forward this reparations request in June 2011 — during the Initial Hearings in Case 002, prior to the severance of that case, and later provided specifications about the reparation request on 19 October 2011. In their submission on the initial specification of the reparation awards sought by civil parties, the Civil Party Lead Co-Lawyers proposed a ‘project to facilitate acquisition of Cambodian citizenship’.¹²⁸ The lawyers emphasised that the civil parties’ claim is ‘moral and collective’ in nature, and that it is linked to the harm suffered by survivors as a result of their forcible expulsion from Cambodia. Importantly, the reparations request is framed around loss of identity resulting from crimes committed pursuant to genocidal policies aimed at eliminating an ethnic group based on its ethnic identity, leading to the loss of identification documents and consequential adverse treatment as ‘immigrants’ in a country they consider to be their home. The reparation award proposed by lawyers representing these civil parties was outlined as followed:

nationality applications could be facilitated through an outreach project on Cambodia's citizenship law and on the legal requirements that the applicants must satisfy when applying for citizenship in accordance with Cambodian procedures. A pertinent project might be to create a legal assistance service in the civil parties' home area, assist in collecting the application materials, filling in the applications and submitting them to the competent Cambodian authorities ... In any event, applications for nationality under this reparation award must be processed by the competent Cambodian authority. The project is only aimed at *facilitating* [emphasis added] the application process, and it is for the government to decide the status of these individuals through the normal process.¹²⁹

Aware of the fact that it is beyond the mandate of an internationalised criminal court to order a government to grant or provide access to nationality, the request makes clear that the ethnic Vietnamese civil parties do not intend to circumvent the discretion or authority of the Cambodian government to grant or recognise citizenship. Instead, the civil parties request a project — designed in collaboration with the VSS and with possible external funding — which would *facilitate* an assessment and application process, leaving any decision on the merits with the Cambodian authorities to determine in accordance with the relevant Cambodian laws.

When presenting these requests at the ECCC, the civil parties and their lawyers were well aware of the controversies around the topic. The topic of access to Cambodian nationality and ID cards for Vietnamese ‘immigrants’ has been fiercely debated in the Cambodian public, regardless of how many generations individuals of ethnic Vietnamese origin had lived in the

¹²⁸ *Prosecutor v Nuon (Initial Specification of the Substance of the Awards that the Civil Party Lead Co-Lawyers Intend to Seek - Hearing of 19 October 2011)* (Extraordinary Chambers in the Courts of Cambodia, Trial Chamber, Case No 002/19-09-2007-ECCC, 12 March 2012) [88]–[93]

¹²⁹ Civil Party Lead Co-Lawyers 2012, Initial Specification, paras. 90-93.

country. These sensitivities also became apparent during the presentation of the initial specifications, when three of the national defence lawyers reacted only to this request over the many others presented by the Lead Civil Party Co-Lawyers. National defence lawyers Son Arun stated, ‘as for the Cham people, I can say that when they are as they are living here in Cambodia they are considered as Khmer people. And as for Vietnamese, they have two groups of Vietnamese; one is legal Vietnamese immigrants and another one is illegal Vietnamese immigrants. So in this regard I would like to submit that the Chamber consider whether reparations can be awarded to those illegally migrated into the country.’¹³⁰ Apart from misinterpreting the request as being for a wider group of Vietnamese than the minority civil party group, the defence lawyers’ comments highlight the problematic relationship between the Khmer majority and the Vietnamese minority, depicting that it is difficult for many commentators to conceive of these longterm residents as being a part of the Cambodian citizenry, much as the Cham are, in spite of also being a minority in Cambodia.

Following the subsequent severance of Case 002, crimes against the Vietnamese minority were not addressed in the first sub-trial, neither were the reparation claims of the affected civil parties. This enabled time for civil party lawyers representing ethnic Vietnamese clients to initiate a research project to further assess these nationality claims. The JRS Cambodia, an organisation that possesses extensive experience with refugees and other displaced populations, became involved in supporting a pilot project, jointly implemented throughout 2012 by JRS and the legal team representing the Vietnamese civil parties. Following in-depth interviews with members of the civil party group, a comprehensive legal assessment report, ‘A Boat Without Anchors’ was published.¹³¹ In assessing the nationality status of the focal group, this report (i) considered the status of the members of the civil party group under the applicable Cambodian and Vietnamese nationality laws; (ii) examined documentation available among the focal group to establish or prove their civil status; and (iii) considered how the national authorities of Cambodia and Vietnam view and treat members of the group under the operation of their respective laws. This legal assessment was intended to be of use beyond the specific purpose of the ECCC’s legal proceedings.

The report made a number of important findings. Firstly, even though Cambodia’s current Nationality Law governs access to Cambodian nationality today, it is the nationality laws applicable under earlier administrations that remain relevant to the determination of citizenship for members of this group, all of whom were born and resided in Cambodia many years before the current law came into force. Most members of the survivor group have a strong claim for recognition of a previous acquisition of Cambodian nationality, which they automatically acquired on the basis of the *jus soli* provisions of the earlier 1954 nationality

¹³⁰ Transcript of Proceedings, *Prosecutor v Nuon (Hearing on Specification of Civil Party Reparations Awards and Accused Ieng Thirith's Fitness to Stand Trial)* (Extraordinary Chambers in the Courts of Cambodia, Trial Chamber, Case No 002/19-09-2007-ECCC, 20 October 2011).

¹³¹ *A Boat Without Anchors*, above n 30.

laws. Secondly, and importantly, Cambodian authorities do not regard members of the client group as Cambodian nationals under the operation of Cambodia's laws, but rather have treated them as 'immigrants' or 'foreign residents'.¹³² In addition, the group has no effective access to civil registration in Cambodia, including birth registration for children born in Cambodia. From the Vietnamese authorities' treatment of the focal group during their exile in Vietnam, and of others who emigrated permanently to Vietnam in more recent times, it appears that Vietnamese authorities do not currently view the focal group as Vietnamese citizens — however, the state leaves open an avenue for naturalisation. Based on these findings, the report concludes that the ethnic Vietnamese group the subject of the research, including civil parties, appear to be stateless.¹³³ It is hoped that other researchers and local NGOs will further investigate these preliminary findings. They have already encouraged more public debate in Cambodia and beyond.¹³⁴

The reparations request of these minority survivors highlights how victim participation in a criminal trial can shed light on larger human rights issues affecting a minority group. Reparations generally combine both backward-looking and forward-looking elements in their aim to remedy harm resulting from violent conflict and severe abuse on a mass scale.¹³⁵ Often conflicts build upon or reinforce existing dynamics of inclusion and exclusion — minority groups are particularly affected by such dynamics. Criminal trials and associated reparations programs may therefore provide a forum to expose larger human rights issues affecting marginalised minority communities in a post-conflict society. Collective reparations specifically have the potential to draw attention to collective harm, or harm shared by an entire group of individuals, as demonstrated by the case of the Vietnamese minority civil parties. However, it is often difficult for judicial mechanisms to conceive of, and bring about, reparative measures that, while addressing a specific harm, also address the larger structural causes of the violations. In a recent guidance note, the UN Secretary General stressed, 'reparations have the potential to be transformative and to assist in overcoming

¹³² See Abby Seiff and Chhay Chanida, 'A People Left in Limbo. Ethnic Vietnamese Still Adrift in Cambodia', *Phnom Penh Post* (Phnom Penh), 14 February 2013, 1–2.

¹³³ *A Boat Without Anchors*, above n 30, Executive Summary. Looking into the future, the report discusses ways for reducing and preventing statelessness among this group, including recognition of nationality acquired under previous laws, and made recommendations to relevant stakeholders.

¹³⁴ See, eg, Ang Chanrith, above n 27; and Kevin Ponniah, 'Ethnic Vietnamese not in School: Study', *Phnom Penh Post* (Phnomh Penh), 19 March 2014; and Lauren Crothers, 'Lack of ID Root Cause of Ethnic Vietnamese Problems', *Cambodia Daily* (Phnom Penh), 19 March 2014. See also CEDAW's 'Concluding Observations on the Fourth and Fifth Periodic Report of Cambodia', where the Committee expressed concern "that women of Vietnamese origin undergo considerable difficulties in registration of birth and the acquisition of Cambodian citizenship, which places them at risk of statelessness." Committee on the Elimination of Discrimination against Women, *Concluding Observations on the Fourth and Fifth Periodic Report of Cambodia*, UN Doc CEDAW/C/KHM/CO/4-5 (18 October 2013), paras 30–1.

¹³⁵ See Pablo de Greiff, *The Handbook of Reparations* (Oxford University Press, 2008).

structures of inequality and discrimination'.¹³⁶ Such 'transformative' reparations have also become part of the scholarly debate.¹³⁷

In July 2014, the Civil Party Lead Co-Lawyers renewed the ethnic Vietnamese civil parties' reparations request during the Initial Hearing for Case 002/02.¹³⁸ While it is not expected that the ECCC's collective reparations mandate could provide a complete remedy to address the exclusion of the civil parties from Cambodia's citizenry, the Case 002/02 trial may yet be an additional avenue to raise awareness of the historical disenfranchisement of these communities and promote further social and political discourse about the past and future of Cambodia's long-standing Vietnamese minority.

7. Conclusion

In this article, the authors examined the role of minority victims in a genocide trial, using the specific case study of a group of ethnic Vietnamese survivors who joined as civil parties before the internationalised criminal proceedings at the ECCC. In particular, the article highlighted the challenges involved in the inclusion of minority narratives into a larger context of a mass atrocity trial, depicted in part through the challenges relating to prosecutorial selectivity, the debates surrounding genocide charges at the ECCC and the civil parties' collective reparation request for recognition of and/or access to Cambodian nationality. In her examination of law, state crime and genocide, Jennifer Balint provides an account of similar cases that unveils the ambiguous nature of a genocide trial, such as the Cambodian proceedings, taking place in a complex historical and cultural context. She writes, 'it is at these times that we see the schism within law most vividly. Law can include and exclude. It can be a site for justice and for injustice. It is what we appeal to, yet what may not hear us. It can be a basis for change, yet entrench existing prejudices.'¹³⁹

With Case 002/02 having progressed to trial phase in October 2014 at the time of writing, a final assessment of the participation of Vietnamese civil parties in the ECCC process would

¹³⁶ United Nations, *Guidance Note of the Secretary-General: Reparations for Conflict-Related Sexual Violence* (June 2014) Office of the High Commissioner for Human Rights, 6
<<http://www.ohchr.org/Documents/Press/GuidanceNoteReparationsJune-2014.pdf>>.

¹³⁷ This is particularly true in relation to gender-based and sexual violence. See also Paul Greedy and Simon Robins, 'From Transitional to Transformative Justice: A New Agenda for Peace' (2014) 8 *International Journal of Transitional Justice* 339.

¹³⁸ 'Transcript of Proceedings, *Prosecutor v Nuon (Initial Hearing)* (Extraordinary Chambers in the Courts of Cambodia, Trial Chamber, Case No 002-02/19-09-2007-ECCC/TC', 30 July 2014) 18.

¹³⁹ Jennifer Balint, 2012, *Genocide, State Crime and the Law: In the Name of the State*, Routledge, 10.

be premature. Despite the continuation of trial proceedings, uncertainties with the ECCC justice process remain. National Co-Prosecutor, Chea Leang, concluded earlier, 'it is not clear whether the charges of genocide will proceed to trial at all. At the same time, it is an *opportunity* to establish an accurate historical record of the genesis, escalation and culmination of genocide.'¹⁴⁰ The Vietnamese civil parties and survivors before the Court await answers as to why the regime created and implemented genocidal policies and practices, which to this day, have impacted upon the societal status and human rights of the members of the group. While they are aware that the ECCC alone cannot accomplish the longterm task of social reconstruction in the wake of conflict and mass atrocities, the Court can create space for new possibilities. For this reason, the ECCC participation process for the ethnic Vietnamese survivors holds significance not only for the past and present generation, but also future generations, who were able to exist only because of the survival of these victims who were deported from Cambodia in 1975, prior to the mass killings of Vietnamese within Cambodia. Hence, many Vietnamese civil parties view their involvement as being part of an effort to spare their children from a repetition of these atrocities and to provide future generations of their minority group equal rights and development opportunities in Cambodian society.

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¹⁴⁰ Leang, above n 87. *Italic in the original.*