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Working Paper on Acknowledging and Repairing the Moral and Collective Harm of Ethnic Vietnamese Victims of the Khmer Rouge Genocide

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ACKNOWLEDGING AND REPAIRING THE MORAL AND COLLECTIVE HARM OF ETHNIC VIETNAMESE VICTIMS OF THE KHMER ROUGE GENOCIDE



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I. Introduction

Ethnic Vietnamese faced some of the worst excesses of the Khmer Rouge regime, tens of thousands were killed, thousands more displaced and those who returned to Cambodia were forced to live on the margins of society, still plagued with the after effects of racism and discrimination. A number of these individuals are not participating as Civil Parties in the Extraordinary Chambers in the Courts of Cambodia (ECCC), where Nuon Chea and Khieu Samphan, two former senior leaders of the Khmer Rouge, are on trial for the atrocities perpetrated during the regime.

This paper is concerned with the harm caused to the ethnic Vietnamese Civil Parties by the Khmer Rouge policy of forced deportation. This policy directly caused the loss of important documentation, as a result of which ethnic Vietnamese Civil Parties are now unable to prove either their valid legal ties with Cambodia, including Cambodian nationality in certain cases, or their presence in the country pre-1975.¹ This inability has resulted in a continuation of harm which is acutely felt by the Civil Parties, preventing them from accessing their political and civil rights, and denying them the ability to meaningfully participate in Cambodian civic life. This harm suffered by the Civil Party victims falls under the terms of the Internals Rules of the ECCC and is directly linked and caused by the crimes for which the accused have been charged.

This connection or nexus gives rise to a right to appropriate collective and moral reparations for the ethnic Vietnamese victims, both at and beyond the ECCC. This submission therefore proposes a number of reparative measures: recognition of ethnic Vietnamese as a people or collective group; restitution of their civil and political rights; a legal aid programme; measures of satisfaction; and guarantees of non-repetition. These claims are framed within the more universal concerns of ensuring and respecting the human rights and human dignity of ethnic Vietnamese minority populations in Cambodia who were victimised by the Khmer Rouge. Before exploring these methods of reparation in greater detail, this paper outlines the harms experienced by the Civil Parties, explaining their nexus to the crimes charged, and demonstrating that their harm continues to the present day.

II. Nexus between Harm Experienced and Crimes Charged

In June 2011, following years of appeals over their status as victims of atrocity crimes and their admissibility as Civil Parties, the ECCC's Pre-Trial Chamber admitted a number of ethnic

¹ Lyma Nguyen and Christoph Sperfeldt, *Boat without Anchors* (Jesuit Refugee Service, 2012).

Vietnamese Civil Parties into proceedings in Case 002.² The Pre-Trial Chamber noted that its previous decisions - which had refused Civil Party Appeals filed against Co-Investigating Judges' orders on admissibility - had excluded numerous ethnic Vietnamese applicants on erroneous legal grounds. In granting them Civil Party status, the Pre-Trial Chamber recognised the ethnic Vietnamese survivors as victims with standing to seek 'moral and collective' reparations before the ECCC, having suffered personal and direct harm as a result of crimes committed by senior leaders of the Khmer Rouge regime.³ Altogether there have been 43 ethnic Vietnamese Civil Parties admitted by the Court from Kampong Chhnang province, with another 19 ethnic Khmer Civil Parties admitted as indirect victims of the 'treatment of the Vietnamese' on the basis of having experienced psychological harm under this category of admissibility. Ethnic Vietnamese Civil Parties have formally raised a claim for recognition of, or access to, Cambodian nationality as a reparative measure for damages suffered as a direct result of their forced deportation out of Cambodia, by the Khmer Rouge regime.⁴

During the Cambodian regime of 1975-1979, nearly two million people perished, among them many members of Cambodia's ethnic minority groups.⁵ Through the implementation of racially discriminatory policies,⁶ the Khmer Rouge sought to create a uniform state, one which had no place for minorities.⁷ Not only did the Khmer Rouge publicly ignore the existence of the minorities - claiming that the ethnic minorities in Cambodia totalled a mere 1%, while the other 99% of the population were purely Khmers⁸ - it carried out a systematic racial extermination of many minority groups.⁹ The following subsections consider the specific crimes charged against

² Case 002, Appeal Against Order on the Admissibility of Civil Party Applicants from Current Residents of Kampong Chhnang Province, 27 September 2010; Decision on Appeals against Orders of the Co-Investigating Judges on the Admissibility of Civil Party Applications, 24 June 2011; Corrigendum to Decision on Appeals against Orders of the Co-Investigating Judges on the Admissibility of Civil Party Applications, 8 July 2011; Direction on the reconsideration of the admissibility of Civil Party applications, 23 June 2011.

³ ECCC Internal Rules, Rule 23*quinquies*.

⁴ See Case 002, Premieres Indications sur la Nature des Reparations que les Co-Avocats Principaux pour les Parties Civiles entendent Solliciter – Audience du 19 October 2011, 12 March 2011, 88 – 93; Initial Specifications of the Substance of the Awards that the Civil Party Lead Co-Lawyers Intend to Seek – Hearing of 19 October 2011; Transcript of Hearing on Specification of Civil Party Reparations Awards and Accused Ieng Thirith's Fitness to Stand Trial, 19 October 2011, 48 – 53.

⁵ Ben Kiernan, *The Pol Pot Regime* (Yale University Press, 1996); Francois Ponchaud, *Cambodia Year Zero* (Henry Holt & Co, 1978); Karl D. Jackson, *Cambodia 1975-1978: Rendezvous With Death*, (Princeton University Press, 1992); David Chandler, *The Tragedy of Cambodian History* (Yale University Press, 1991).

⁶ Rochelle Braff, 'Sexual Violence Against Ethnic Minorities during the Khmer Rouge Regime' (CDP, 2014).

⁷ *Ibid.*

⁸ Ben Kiernan, 'The Survival of Cambodia's Ethnic Minorities' (*Cultural Survival*, 1990), www.culturalsurvival.org/ourpublications/csq/article/the-survival-cambodias-ethnic-minorities (accessed 31 October 2015).

⁹ *Ibid.*

the accused in relation to this policy of racism, before exploring the impact these crimes had on the ethnic Vietnamese Civil Parties. Finally, it will demonstrate that the harm caused by these crimes continues.

A. Crimes faced by the Accused Related to the Treatment of the Ethnic Vietnamese Civil Parties

In September 2010, the ECCC's Office of the Co-Investigating Judges charged Khieu Samphan and Nuon Chea with genocide against the Vietnamese,¹⁰ deportation of the Vietnamese as a crime against humanity¹¹ and crimes specific to the treatment of the Vietnamese.¹² Indeed, one of the five Khmer Rouge policies alleged before the Court was to implement and defend the Communist Party of Kampuchea (CPK) socialist revolution through the targeting of specific groups by whatever means necessary.¹³

The Closing Order of Case 002 sets out the factual evidence of the application of the Khmer Rouge policies of widespread and systematic expulsion and execution of the Vietnamese as constituting crimes against humanity. This factual evidence also establishes both the *actus reus* and *mens rea* elements of genocide, with the intention of the senior leaders inferred from the context of escalating deportations, persecution, incitement of hatred and anti-Vietnamese war propaganda directed by the CPK Centre.¹⁴ The *actus reus* element of genocide is satisfied through the fact that under the rule of the CPK those belonging to the ethnic Vietnamese minority were systematically identified, targeted and killed, solely due to their race and/or ethnicity.¹⁵ Steps were taken to ensure that those who they were killing were ethnically or racially Vietnamese, often identified through the use of pre-prepared statistical lists or registration¹⁶ The *mens rea* element is also satisfied through the obvious intentions of perpetrators to destroy, in whole or in part, the Vietnamese.¹⁷ Killings took place under specific orders that sought to physically erase the group entirely, for example in The Revolutionary Flag magazine the CPK publically called for further killing of Vietnamese.¹⁸

¹⁰ Case 002, Closing Order, 15 September 2010, 1343-1349.

¹¹ *Ibid*, 1397-1404.

¹² *Ibid*.

¹³ *Ibid*, 205-207.

¹⁴ *Ibid*, 1349.

¹⁵ *Ibid*; 791. The Closing Order refers to both ethnicity and race – i.e. the victims were ethnically Vietnamese, and were also perceived by Khmer Rouge to be racially Vietnamese.

¹⁶ *Ibid*.

¹⁷ *Ibid*, 1345-1349.

¹⁸ *Ibid*.

The Court is particularly seized of treatment of the Vietnamese in Prey Veng and Svay Rieng Provinces in the East Zone and during incursions into Vietnam.¹⁹ From 1973, the CPK expelled Vietnamese people from Cambodian territory and sent them back to Vietnam by foot, train and boat.²⁰ The Co-Prosecutors have noted that in the Kampong Chhnang province, April 1975 saw the relocation of ethnic Vietnamese to the Kampong Leang District, before being moved on to Vietnam.²¹ Those who resisted were often executed.²² The number of ethnic Vietnamese deported has been estimated as being up to 200,000.²³ The April 1976 issue of Revolutionary Flag addresses the expulsion of Vietnamese people from Cambodian territory and states that 'the great typhoon of our democratic revolution swept hundreds of thousands of these foreigners clean and expelled them from our country, got them permanently out of our territory.'²⁴

B. Harm Experienced by the Ethnic Vietnamese Civil Parties as a Result of the Crimes Charged.

In order to claim reparations, a link is required between the harm suffered by the Civil Parties, the crimes perpetrated by the accused, and the reparations sought. This is demonstrated in the ECCC Internal Rules; in order for a Civil Party application to be considered, the applicant shall 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.²⁵ The ECCC Supreme Court Chamber has found that the presence of the injury is conducive to the right to seek reparation.²⁶ Accordingly, once the Court is satisfied of the presence of injury and the Civil Party status of the applicant, eligibility for reparation is established. Thus, the ethnic Vietnamese, as accepted Civil Parties within Case 002, are eligible for reparations. As concerns the form of reparation, the Supreme Court Chamber has found that its relation with the harm lies in the form of reparation being aimed at, and suitable to, 'removing the consequences of the criminal wrongdoing, as well as restoring, to the extent possible, the prior lawful status'²⁷ On a policy level, the Supreme Court Chamber has also emphasised that ECCC

¹⁹ *Ibid*, 205 – 206.

²⁰ *Ibid*, 794.

²¹ Case 002, Co-Prosecutors 'Rule 66 Final Submission, 16 August 2010, 787-788.

²² *Ibid*.

²³ *Ibid*, 790.

²⁴ *Ibid*, 213.

²⁵ Rule 23 bis (1)(b)

²⁶ Case 001, Appeal Judgment, 3 February 2012, 669.

²⁷ *Ibid*.

criminal proceedings ought to be considered as a contribution to the process of national reconciliation, possibly a starting point for the reparation scheme.²⁸ In Case 002's first judgment, the Trial Chamber further defined the purposes of reparations as contributing to 'nationwide and official acknowledgement of the harm suffered,'²⁹ aiming to 'restore the dignity of the victims'³⁰ and 'assist in healing the wounds of all victims by diffusing their effects far beyond the individuals who were admitted as Civil Parties.'³¹ As will be shown, the reparation programmes argued for within this submission constitute a range of appropriate measures through which to satisfy the goals of the ECCC.³²

The Civil Parties the subject of this paper submit that as a result of the crimes of deportation and genocide perpetrated against them by the Khmer Rouge, they have been deprived of the ability to prove their long-term legal status in Cambodia and therefore have been left stateless, resulting in a continuation of harm, both to themselves and their families. It should be noted that while only a small number of ethnic Vietnamese individuals participate as Civil Parties, their experiences are to some extent representative of what was suffered by the ethnic Vietnamese more broadly under the Khmer Rouge regime. It is therefore worth considering the experience of the ethnic Vietnamese population under the Khmer Rouge, while acknowledging that reparations are sought on behalf of those who participate at the ECCC, rather than the entire ethnic Vietnamese community.

As noted above, the two accused are charged with the deportation of the ethnic Vietnamese from Cambodia. There is no evidence to suggest that these individuals were not entitled or authorised to reside in the places from which they were displaced.³³ Indeed, there has been a historical pattern of human migration throughout the lower Mekong region since long before Cambodia obtained its independence.³⁴ Many of the fishing villages around the Lake Tonle Sap date back to pre-independence,³⁵ while the French protectorate was

²⁸ *Ibid*, 655.

²⁹ Case 002/01 Trial Judgement, 7 August 2014, 1152.

³⁰ *Idem*.

³¹ *Idem*; Case 001, Appeal Judgement, 683.

³² It is noted that the ECCC Internal Rules foresee a 'single request' with a 'limited number of awards' (Internal Rule 23 quinquies (1)-(3)). As such, this paper prioritises this particular reparation request from the ethnic Vietnamese Civil Party group, noting that the reparation proposal fits within a broader social justice/reparations program that could be taken up by state and non-state actors beyond the ECCC.

³³ Case 002, Appeal Judgement, 1398 – 1399.

³⁴ Setsuko Shibuya, *Living with Uncertainty: Social Change and the Vietnamese Family in the Rural Mekong Delta* (Institute of Southeast Asian Studies, 2015); Kristina Chhim et al., 'Life before Expulsion: Community History from Vietnamese Minorities in Kamping Chhnang (Kdei Karuna, 2014).

³⁵ Annuska Derks, 'Diversity in Ethnicity: A Picture of the Vietnamese in Cambodia' in Center for Advanced Studies, *Ethnic Groups in Cambodia* (2009), 536.

responsible for bringing a large number of Vietnamese into Cambodia for work.³⁶ Prince Sihanouk introduced a new typology for Cambodia's ethnic minority groups during his reign, which distinguished between groups that are part of the 'Khmer' nation (indigenous people, Cham, Khmer Krom) and groups that are excluded from it (in particular, the Chinese and ethnic Vietnamese).³⁷ Despite increased prejudice and the introduction of policies restricting their rights, it is estimated that there were about 450,000 ethnic Vietnamese in Cambodia by the end of the 1960s.³⁸ Under the Sihanouk and Lon Nol period, documentation such as birth certificates and identification papers were under the tight control of the authorities.³⁹ If the Vietnamese wanted access to these documents they were required to pay large amounts of money for them; often this was an unaffordable option for many ethnic Vietnamese. However, despite these obstacles, many of the ethnic Vietnamese owned important documents that proved they resided in Cambodia legally, some as citizens.⁴⁰ Hence, even though only a small number of ethnic Vietnamese victims joined the Case 002 proceedings as Civil Parties, their experience of harm is representative of other ethnic Vietnamese sub-groups who, similarly, resided in Cambodia prior to 1975, and experienced deportation and the consequences of genocide under the Khmer Rouge regime.

MIRO's 2014 study 'Limbo on Earth' provides additional evidence that many members of the ethnic Vietnamese Civil Parties' communities had been living peacefully within Cambodia prior to the Khmer Rouge and provides insights into the larger past and contemporary community context. The study features interviews with a number of ethnic Vietnamese living in Kampong Chhnang province. All Vietnamese respondents told MIRO that their family, community members and they themselves were born in Kampong Chhnang province and had lived there for many generations. They reported viewing Cambodia as their homeland, and the Cambodian government as their own. The study notes that the only period during which these individuals did not reside in Cambodia was when they were forcibly deported during the Khmer Rouge regime. It further notes that the Vietnamese did not consider this deportation as returning to their own country, but considered it an expulsion from their home within Cambodia. Indeed, evidence has shown that the ethnic Vietnamese were not treated by the Vietnamese

³⁶ *Supra* n.1, 11.

³⁷ Stefan Ehrentraut, 'Perpetually Temporary: Citizenship and Ethnic Vietnamese in Cambodia' (2011) 28(4) *Ethnic and Racial Studies* 5.

³⁸ Ramses Amer, 'Domestic Political Change and Ethnic Minorities – A Case Study of the Ethnic Vietnamese in Cambodia' (2013) 13 (2) *Asia-Pacific Social Science Review* 87, 88.

³⁹ *Supra* n1.

⁴⁰ *Ibid.*

government as returning nationals.⁴¹ Instead, they were seen as refugees, as demonstrated by Vietnam's request for assistance from the United Nations High Commissioner for Refugees (UNHCR) in 1978, in order to cope with the 341,400 refugees who had arrived from Cambodia since 1975.⁴² Among these refugees there were 170,300 ethnic Vietnamese.⁴³

Under the Khmer Rouge policy of expulsion, the Vietnamese were often told to leave immediately, refusal to do so could have fatal consequences.⁴⁴ As a result, many ethnic Vietnamese were forced to flee, leaving behind all of their belongings, including important identification documents that would prove their presence and prior legal status in Cambodia, and in some cases, Cambodian nationality.⁴⁵ Others had their documentation specifically confiscated by the Khmer Rouge. The policy of forced deportation under the CPK therefore directly caused the loss of important documentation held by the ethnic Vietnamese. As a result of their deportation, and the loss of this documentation, they are now unable to prove either their valid legal ties with Cambodia, including Cambodian nationality in certain cases, or their presence in the country pre-1975.⁴⁶ This harm suffered by the Civil Party victims falls under the terms of the Internals Rules of the ECCC and is directly linked and caused by the crimes for which the accused have been charged.

C. The Continuation of Harm

Following the defeat of the Khmer Rouge and the establishment of the People's Republic of Kampuchea (PRK) regime in 1979, Gottesman has acknowledged that 'as a recognized minority in Cambodia, the ethnic Vietnamese enjoyed a certain civic equality.' However, he also noted that 'the question whether the ethnic Vietnamese could become citizens was, however, never resolved.'⁴⁷ The issue remained unresolved throughout the 1980s, during which the exiled ethnic Vietnamese Civil Parties began to return, along with a number of new migrants.⁴⁸ Many of those who entered during this period, including the Civil Parties, had ties to Cambodia

⁴¹ Chanrith Ang 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* (MIRO, March 2014), 8.

⁴² N Ganesan and Ramses Amer (eds.), *International Relations in Southeast Asia: between Bilateralism and Multilateralism* (Institute of Southeast Asian Studies, 2010), 94.

⁴³ Ramses Amer, 'Cambodia's Ethnic Vietnamese: Minority Rights and Domestic Politics' (2006) 34 (3) *AJSS* 388.

⁴⁴ *Supra* n.10, 1378.

⁴⁵ *Supra* n.1.

⁴⁶ *Ibid.*

⁴⁷ Evan Gottesman, *After the Khmer Rouge: Inside the politics of Nation Building* (Yale University Press, 2003), 165-7.

⁴⁸ Jennifer S. Berman, No Place like Home: Anti-Vietnamese Discrimination and Nationality in Cambodia, (1996) 84(3) *California Law Review*.

going back for generations, and were refugees returning home, rather than migrants.⁴⁹ As such, they had a right to return to their home country, as provided for by the Universal Declaration of Human Rights.⁵⁰ However, due to the nature of the crimes perpetrated against them as detailed above, many of the Civil Parties had lost their identity papers or other forms of documentation that would have established their previous status in Cambodia.⁵¹ Some found that their citizenship was no longer recognised, and that without official papers, was difficult to prove.⁵² Thus, the crimes of the Khmer Rouge have caused, in part, their present day circumstances, as they are unable to demonstrate their ties to Cambodia, and access their legal rights as provided for in past and present legislation.⁵³ The situation is exacerbated by the complex and confusing nature of the current legislation surrounding nationality within Cambodia, and obtaining relevant documentation and therefore reasserting Cambodian citizenship has proven to be impossible for many of the returning ethnic Vietnamese.

The Constitution, the Nationality Law and the Sub-Decree on Khmer National Identity Cards are the relevant sources of law that deal with Cambodian identity. The Constitution is the supreme source of law in Cambodia and enumerates the rights and obligations of Khmer citizens.⁵⁴ Yet it remains silent on the rights of undocumented Cambodians, particularly ethnic minorities, to travel in or return to Cambodia.⁵⁵ This is a major issue for the ethnic Vietnamese. The Nationality Law explains who is defined as a Khmer citizen, granting citizenship to a child 'regardless of the place of birth' if the child is born from a parent of Khmer nationality or citizenship,⁵⁶ as well as to an individual 'born in the kingdom of Cambodia' including any child who is 'born and living legally in the Kingdom of Cambodia'.⁵⁷ The 1996 law does not specify what is meant by 'living legally' in Cambodia and what documents may be required to prove this, subsequently making it very difficult for parents of newborn children to prove they are actually 'living legally' in Cambodia. Furthermore, the 1996 Law on Nationality states that if

⁴⁹ *Ibid.*

⁵⁰ UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III), Article 13(2).

⁵¹ Leo Dobbs, *Cambodian Immigration Law is Bad News for Vietnamese*, *Deutsche Presse-Agentur*, 11 September 1994.

⁵² Chris Mueller and Khuon Narum, 'Without Citizenship, Vietnamese Remain Adrift' *The Cambodia Daily*, 4 February 2015.

⁵³ *Supra* n.1.

⁵⁴ *Ibid*, 22

⁵⁵ Jana Seng 'Cambodian Nationality Law And The Repatriation Of Convicted Aliens Under The Illegal Immigration Reform And Immigrant Responsibility Act' (2001) 10(2) *Pacific Rim Law and Policy Journal*, 443, 461.

⁵⁶ *Cambodian Law on Nationality*, 9 October 1996, Article 4(1).

⁵⁷ *Ibid*, Article 4(2)

foreign parents hold refugee and/or stateless status, they are not considered to have 'legal' residence.⁵⁸

This non-nationality status therefore transfers down to their children, regardless of the child's birth in Cambodia, thereby encouraging trans-generational statelessness and discrimination⁵⁹ Furthermore, a lack of Cambodian identification documents also results in the inability to register births, deaths or marriages for the ethnic Vietnamese. This inability to prove births perpetuates the cycle of a lack of citizenship in new generations, and thereby increases the risk of inter-generational statelessness.⁶⁰The 'Identity Card Law' provides guidance about what kind of evidence is sufficient to demonstrate citizenship,⁶¹ including birth certificates, proof that such person were born from fathers or mothers who have Khmer nationality, Royal- Decrees, evidence proving that the concerned persons were born in Cambodia from fathers or mothers who were born in Cambodia, evidence proving that the concerned persons used to have Khmer nationality, evidence proving that the concerned persons were born from fathers or mothers who had Khmer nationality, and any other documents that could prove that such person is a Khmer citizen.⁶² Yet it is such documentation that was lost to the ethnic Vietnamese Civil Parties.

Without being able to prove their nationality and/or pre-1975 legal status in Cambodia, the ethnic Vietnamese Civil Parties are held in a limbo of statelessness,⁶³ despite having lived in Cambodia since birth (excluding their period of expulsion). Without Identity Cards, the ethnic Vietnamese Civil Parties and their families face many problems; legal, political, economic and social. These include difficulties in accessing employment, education, health care, legal protection, registration of births and marriages, an inability to travel, own property or open a bank account, and higher taxes for fishing.⁶⁴ Ethnic Vietnamese Civil Parties, considered non-citizens, do not hold the right to land ownership in Cambodia, so subsequently live on 'floating houses', as the definition of land ownership does not include water sources by law.⁶⁵ This directly violates the Pinheiro Principles of the Right to adequate housing,⁶⁶ and the right to

⁵⁸ *Ibid*, Article 4.

⁵⁹ *Supra* n.1, 62.

⁶⁰ *Supra* n.1, 75.

⁶¹ *Supra* n.55, 460.

⁶² *Sub-Decree on Khmer Nationality Identity Cards*, 26 July 1996, Article 4.

⁶³ A 'stateless' person is defined by the 1954 Stateless Convention as 'not considered to be a national of any state, under the operation of its law' UN General Assembly, Convention Relating to the Status of Stateless Persons, 28 September 1954, United Nations, Treaty Series, vol. 360, p. 117, Article 1.

⁶⁴ *Supra* n.1, 72.

⁶⁵ *Supra* n.1, 73

⁶⁶ UN Sub-Commission on the Promotion and Protection of Human Rights, *Principles on Housing and Property Restitution for Refugees and Displaced Persons*, 28 June 2005, Principle 8.

freedom of movement,⁶⁷ signifying not only lack of redress to victims for the past crimes, but also continuing discrimination and deprivation from their rights. Furthermore, their living conditions leave them particularly vulnerable to forced evictions, indeed thousands of Vietnamese people in floating villages on the Tonle Sap River from the Civil Parties' communities, including many Civil Parties themselves, have been forced to relocate under a five-year master plan, to 'improve Kompong Chhnang's image and beautify the riverfront area'.⁶⁸ This move affects around 1,000 families, mostly ethnic Vietnamese who have lived there since the end of the Khmer Rouge in 1979, and 1,486 floating houses.⁶⁹ Along with eviction notices, residents were notified that they would have to pay USD\$60 tax, or 250,000 Riel every two years to remain in Cambodia.⁷⁰ With the fishing economy already struggling, this is a further sum residents will struggle to pay. There are concerns around the new temporary resettlement site, both for safety and economic reasons. The old location was safe as trees surrounded it, however, if a large storm hits, a disaster is imminent as the new resettlement site is free from protection. There is also no electricity or clean water and the new settlement is far from the market, making it difficult for people to travel and trade fish, the main economic income.⁷¹ Such occurrences demonstrate the ongoing vulnerability of the ethnic Vietnamese Civil Parties and their families.

The inability of ethnic Vietnamese Civil Parties to open or access a bank account or borrow money from financial institutions creates a serious problem for their ability to develop a peaceful and profitable existence and contribute to Cambodian life. With no way to save money, burglaries become a major threat for communities with no mechanism for banking.⁷² This is a real obstacle hindering development, infrastructure, and education in an already impoverished society. Without identification, the ethnic Vietnamese Civil Parties are unable to vote and influence government issues and policies, depriving them of many social benefits that the rest of society can enjoy. It is believed that government jobs and formal private jobs are almost impossible to get without the required Cambodian nationality documentation.⁷³ The vast majority of ethnic Vietnamese minorities in the Civil Parties' communities uphold fishing as their main employment, yet they find themselves subjected to higher taxes on fishing than

⁶⁷ *Ibid*, Principle 9.

⁶⁸ Ben Sokhean 'On Tonle Sap, Vietnamese Families Face Mass Eviction' *Cambodia Daily*, 6 October 2015.

⁶⁹ 'Cambodia to displace thousands of Vietnamese people on Tonle Sap River: report' *Thanh Nien News*, 7 October 2015.

⁷⁰ James Reddick 'Floating Away' *Khmer Times*, 29 October 2015.

⁷¹ Ben Sokhean, Kang Sothear 'More Families to be Evicted from Floating River Homes' *Cambodia Daily*, 26 October 2015.

⁷² *Supra* n.1, 74.

⁷³ *Ibid*, 73

Cambodian nationals, which are further enforced by corrupt officials.⁷⁴ However, a lack of access to the judicial process leaves the victims unable to file complaints or appeal for justice in the way Cambodian citizens would. Access to healthcare and schools is also restricted. The government provides few services to ‘non-citizens’, making medical services rare, apart from a few irregular vaccination programs.⁷⁵ In Kampong Chhnang only nine percent of ethnic Vietnamese children attend state schools,⁷⁶ with one main issue being the lack of documents, specifically a birth certificate, required to enroll in school.⁷⁷ This issue is of major concern to the Civil Parties and their communities, and continues the harm suffered by the Civil Parties into subsequent generations.

Cambodia is a state party to a range of international human rights treaties.⁷⁸ The UN Human Rights Committee has recently, in its Concluding Observations on Cambodia’s second periodic report, expressed its concern ‘about reports of discriminatory and violent acts perpetrated against ethnic Vietnamese persons’⁷⁹ It recommends that the state should ‘strengthen its efforts to combat racist attacks against ethnic Vietnamese persons’.⁸⁰ It also states:

The Committee is concerned about the situation of Khmer Krom and ethnic Vietnamese people who have been residing in Cambodia for generations and who have been left stateless or lack Cambodian identity documents. The Committee is also concerned about the insufficient safeguards to ensure that children born in Cambodia who would otherwise be stateless acquire Cambodian nationality and have access to identity documents (arts. 2, 24 and 26).⁸¹

Thus, despite having a history within Cambodia which spans generations, ethnic Vietnamese Civil Parties find themselves marginalised within Cambodian society and denied access to economic, social and political life.⁸² The policy of forced deportation as part of a systematic and

⁷⁴ *Ibid*, 72

⁷⁵ *Ibid*.

⁷⁶ *Supra* n.41, 11.

⁷⁷ UNICEF supports Cambodian commune councils to provide birth certificates’ *UNICEF Cambodia*, 31 July 2013, unicefcambodia.blogspot.co.uk/2013/07/unicef-supports-cambodian-commune.html (accessed 27 April 2016).

⁷⁸ See, for example, UN Human Rights Committee, *Concluding Observations on the Second Periodic Report of Cambodia*, CCPR/C/KHM/CO/2, 27 April 2015; *Report of the Special Rapporteur on the situation of human rights in Cambodia*, UN Human Rights Council, A/HRC/30/58, 20 August 2015.

⁷⁹ Concluding Observations, *ibid*, 8.

⁸⁰ *Ibid*;

⁸¹ *Ibid* 27.

⁸² *Supra* n.41.

nation-wide policy of persecution and elimination (amounting to genocide) of this minority group by the Khmer Rouge has led to the continuous denial of the fundamental human rights to which the ethnic Vietnamese Civil parties are entitled, but which they are unable to access without appropriate documentation. It is submitted here that a reparations mechanism that provides assistance in the Civil Parties' attempt to access citizenship documentation would noticeably improve the living conditions and daily lives of the Civil Parties by assisting them in claiming much needed protection under the law, including access to property ownership as well as to financial and social services. This is an important provision of redress for the harm experienced by this group under the Khmer Rouge regime, assisting them in obtaining the status they had prior to the commission of the crimes charged. In the long-term, such a process has the potential to contribute to reducing the friction and misperceptions that exist between the ethnic Vietnamese Civil Parties' communities and the Khmer majority population,⁸³ thereby contributing to the goal of national reconciliation, as advocated by the ECCC.

There is an increasing body of psychological research demonstrating the transgenerational impact of collective violence that remains unaddressed, whether in terms of economic hardship, the psychological impact on physical health and even carer responsibilities for children and grandchildren of direct victims.⁸⁴ Transgenerational or intergenerational harm has been noted in the children and grandchildren of those who have suffered from political repression or conflict, in particular genocide.⁸⁵ The collective harm caused to ethnic Vietnamese Civil Parties and their communities since the Khmer Rouge regime, has already transmitted to the children and grandchildren of those killed or displaced during the genocide, and is likely to continue. Appropriate reparations should therefore not only include the direct harm caused to the ethnic Vietnamese, but also the indirect transgenerational harm suffered by children and grandchildren of those killed or displaced.

III. Collective and moral reparations

The right to reparation is incorporated within a number of human rights treaties as a means of providing a remedy to vindicate and alleviate victims' harm suffered as a result of human rights

⁸³ *Supra* n.1.

⁸⁴ Marie Breen-Smyth, *The needs of individuals and their families injured as a result of the Troubles in Northern Ireland* (Wave, 2012); Yael Danieli, Massive Trauma and the Healing Role of Reparative Justice, in C Ferstman et al. (eds) *Reparations for Victims of Genocide, Crimes Against Humanity and war crimes: Systems in place and systems in the making* (Martinus Nijhoff, 2009) 41-78.

⁸⁵ Michael A. Simpson, 'The Second Bullet: Transgenerational Impacts of the Trauma of Conflict within a South African and World Context', in Y Danieli (ed) *International Handbook of Multigenerational Legacies of Trauma* (Plenum, 1998), 681; Danieli, *ibid*.

violations.⁸⁶ Importantly, Cambodia has signed and ratified a number of those human rights treaties.⁸⁷ As the Inter-American Court (IACtHR) has declared, the obligation to make adequate reparation also reflects a customary norm that constitutes one of the basic principles of contemporary international law on state responsibility.⁸⁸ Operating in a criminal law context, the ECCC Rules stipulate that collective and moral reparations are to serve two purposes:

a) acknowledge the harm suffered by Civil Parties as a result of the commission of the crimes for which an Accused is convicted; and

*b) provide benefits to the Civil Parties which address this harm.*⁸⁹

The Supreme Court Chamber has interpreted the term ‘moral’ to mean repairing moral damages rather than material ones, and ‘collective’ as confirming the unavailability of individual financial awards.⁹⁰ The Trial Chamber, in its judgment in Case 002/01, provided guidance on the current reparation mechanism. It noted that the Chamber had no jurisdiction to order the implementation or the payment of reparation measures against Cambodian or other national authorities or international bodies. Nor can it properly impose obligations on persons or entities that were not parties to the proceedings before it.⁹¹ However, it reasserted the ability to recognize externally funded awards, and stressed that it was for the Lead Co-Lawyers to indicate whether a reparative measure was to be funded by the accused or through an external source (as these sources were mutually exclusive).⁹² In view of limited donor funds and finite human resources in both the Lead Co-Lawyers’ and Victims Support Sections, the Chamber in Case 002/01 also urged the Lead Co-Lawyers to ‘prioritize for development a small number of reparations awards out of the totality [initially] contemplated pursuant to [sub-Rule 23 quinquies (3)(b)], and commence preparation for their implementation as soon as possible.’⁹³ It also emphasized the need to ensure that reparations receiving external funding had secured full

⁸⁶ UNGA, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, UNTS, vol. 1465, 85, Article 14; UNGA, *International Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965, UNTS, vol. 660, 195, Article 6; UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, 171, Article 2; UNGA, *Rome Statute of the International Criminal Court* (last amended 2010), 17 July 1998, Article 75.

⁸⁷ *Ibid.*

⁸⁸ *The Pacheco Tineo Family v. Plurinational State of Bolivia*, Judgment of November 25, 2013 (Preliminary objections, merits, reparations and costs), para. 238.

⁸⁹ Internal Rule 23 quinquies.

⁹⁰ *Supra* n. 31, 658.

⁹¹ Case 002/01 Trial Judgement, 1116.

⁹² *Ibid.*, 1118.

⁹³ Scheduling of Trial Management Meeting to enable planning of the remaining trial phases in Case 002/01 and implementation of further measures designed to promote trial efficiency, 3 August 2012, 19.

rather than partial funding, as well as any proof of any third party consent or cooperation.⁹⁴ It is within these parameters that we frame appropriate collective and moral reparations to remedy the harm suffered by the ethnic Vietnamese in relation to Case 002/02. However, in order to contribute to the broader discussions surrounding addressing the harm of the ethnic Vietnamese, we make a number of suggestions that may be taken up by organisations in the future, even if not included within the ECCC's reparations awards.

Collective reparations are meant to provide 'benefits conferred on collectives in order to undo the collective harm that has been caused as a consequence of a violation of international law.'⁹⁵ The harm flowing from international crimes is not limited to individuals, but causes collective harm as it is committed in a discriminatory way or through indiscriminate attacks against groups or civilian populations, for example through the commission of crimes against humanity and genocide.⁹⁶ The collective nature of harm and the ECCC's reparations mandate has been acknowledged by the Pre-Trial Chamber in its decision on the appeals of Civil Parties against inadmissibility orders in Case 002. In this judgment, the Pre-Trial Chamber noted that the Co-Investigating Judges had been overly restrictive in their approach towards the concept of 'injury', particularly in relation to the psychological aspect of such.⁹⁷ They found that a restrictive approach failed to take into account the widespread and systematic nature of the crimes alleged against the accused. There was a need to place the injury caused by isolated incidences within the context of mass atrocities committed in a widespread and systematic manner, as well as within the societal and cultural context of Cambodia, where policies were likely to affect whole families and communities.⁹⁸ As they observed:

Collective reparations also stem from collective injury which has an individual effect as well. It would be unrealistic to see the injury caused from alleged mass atrocities only on individual basis because it encompasses individual parameters. Mass atrocities result from a systematic and widespread implementation of policies directed towards the whole of the community as well as particular groups

⁹⁴ Case 002, Trial Chamber's Response to the Lead Co-Lawyers' Initial Specification of Civil Party Priority Projects as Reparations pursuant to Rule 80bis(4), 1 August 2013, 6; see also, Case 002, Trial Chamber's Subsequent and Final Order on the Updated Specifications of the Civil Party Priority Projects as Reparations pursuant to Rule 81bis(4), 11 September 2013, 3 (requesting additional information, such as sketches and/or pictures and budget plans of proposals)

⁹⁵ Friedrich Rosenfeld, 'Collective Reparation for Victims of Armed Conflict' (2010) 92 (879) *International Review of the Red Cross* 731, 732.

⁹⁶ Luke Moffett, *Justice for Victims at the International Criminal Court* (Routledge, 2014) 11-12.

⁹⁷ Case 002, Decision on Appeals against Orders of the Co-Investigating Judges on the Admissibility of Civil Party Applications, 24 June 2011, 44.

⁹⁸ *Ibid* at 86.

*and individuals within the community.*⁹⁹

The ECCC Pre-Trial Chamber took a broad approach with respect to accepting that harm experienced by victims from certain crime-based charges, is representative of the type of harm experience by victims from similar crimes, including those outside the scope of judicial investigations.¹⁰⁰ Outside the ECCC, the Appeals Chamber of the International Criminal Court (ICC) has identified that any individual beneficiary of collective reparations should come within the definition of a victim based on the crime of which the perpetrator is convicted.¹⁰¹ In other words those individuals who want to claim collective reparations should provide sufficient evidence of their harm in relation to the crimes as a member of a collective group, such as a child soldier in the *Lubanga* case.¹⁰²

There is a danger that collective reparations can appear to be charity or development aid, assisting the general affected community or society rather than redressing the harm of specific groups or individual victims.¹⁰³ Dixon argues that from a bottom-up perspective victims may not distinguish collective reparations from assistance where they are delivered in the same form, i.e. monetary awards or collective development. Reparations carry a strong symbolic component that brings them into the 'politics of recognition' of who is seen as deserving of publicly acknowledged redress.¹⁰⁴ Contreras-Garduño suggests that collective reparations should be complemented with symbolic measures, such as apologies and memorials, to more clearly associate such reparations as a measure of justice.¹⁰⁵ As such, collective reparations have to be carefully crafted to ensure that they are 'aimed at conferring official recognition upon victims, and assisting to restore dignity and preserve the collective memory'.¹⁰⁶ This position is acknowledged within the ECCC's Internal Rules, through the definition of reparations as both collective and moral. Collective and moral reparations can deliver a number of benefits. Moral reparations can vindicate the 'moral status'¹⁰⁷ of victims as human beings who have suffered unlawful and undeserved harm, and can send important moral messages about the

⁹⁹ *Ibid* at 70.

¹⁰⁰ *Supra* n.97.

¹⁰¹ *Prosecutor v. Thomas Lubanga Dyilo*, ICC Appeals Chamber, Judgment on the appeals against the "Decision establishing the principles and procedures to be applied to reparations", 7 August 2012, 211.

¹⁰² *Ibid*.

¹⁰³ *Supra* n.96, 147.

¹⁰⁴ Peter J. Dixon, 'Reparations and the Politics of Recognition' in C. Stahn, C. de Vos and S. Kendall (eds.), *Contested Justice: The Politics and Practice of International Criminal Court Interventions*, (CUP, 2015).

¹⁰⁵ Diana Contreras-Garduño, 'Defining Beneficiaries of Collective Reparations: The experience of the IACtHR' (2012) 4(3) *Amsterdam Law Forum* 40, 48.

¹⁰⁶ Case 001, *Trial Judgement*, 26 July 2010, 661.

¹⁰⁷ Conor McCarthy, 'Reparations under the Rome Statute of the International Criminal Court and Reparative Justice Theory' (2009) 3(2) *International Journal of Transitional Justice* 250, 271.

wrongfulness of their continued suffering. Collective moral reparations can also provide recognition of the lived reality of specific groups of victims, while also delivering broader societal benefits by reaffirming the legal order and raising public awareness of the victimisation. In doing so, collective moral reparations may contribute to the prevention of future victimisations.¹⁰⁸

We believe that five main areas of collective and moral reparations are appropriate in remedying the harm suffered by ethnic Vietnamese Civil Parties:

- A. Recognition as a people or collective
- B. Restitution of civil and political rights
- C. Legal assistance programme
- D. Measures of satisfaction
- E. Guarantees of non-repetition

These are set out more below. At this juncture, it is worth noting that the collective harm suffered by ethnic Vietnamese Civil Parties and similar affected communities meant that such individuals were targeted because of their ethnic and/or racial grouping by the Khmer Rouge.¹⁰⁹ As such, these proposed reparation measures seek to publicly acknowledge and attempt to repair the consequences of genocide. The ethnic Vietnamese Civil Parties have been disenfranchised and discriminated against as a result of a genocide, and require recognition of this harm, as well as the ripple effects which compound their harm today. While the reparative measures proposed undeniably have individual benefits for specific civil parties, the benefits of such measures would be felt by the Civil Parties' broader communities, as well as the younger generation of indirect victims who are also denied Khmer citizenship due to the harm inflicted on their parents. In assisting ethnic Vietnamese Civil Parties in their pursuit of a full active role in Cambodian civic life, such reparations may also further the Court's goal of contributing to national reconciliation.

A. Recognition as a People or Collective

As noted above, the ethnic Vietnamese Civil Parties, who have returned to Cambodia following their deportation, are seen as outsiders, regardless of their personal circumstances. National defence lawyer Son Arun stated that the Cham people, who live in Cambodia, are considered

¹⁰⁸ Luke Moffett, *Transitional Justice and Reparations*, in D. Jacobs, L. Moffett and C. Lawther (eds.), *Research Handbook on Transitional Justice* (Edward Elgar, forthcoming 2016).

¹⁰⁹ Closing Order, *supra* n.10.

as Khmer people.¹¹⁰ As for Vietnamese, they are perceived by Cambodians as two groups: legal Vietnamese immigrants and illegal Vietnamese immigrants.¹¹¹ The root of such perception dates back to the Sihanouk Regime, and the Prince's typology,¹¹² which Ehrentaut argues 'continue to be widely used today and shape Cambodian thinking about nation and citizenship'.¹¹³ We believe it is important that the Court acknowledges the status of the ethnic Vietnamese Civil Parties and their communities in Cambodia as a people in their own right, whether as members of a minority group targeted by genocide or as stateless persons. Considering them as a 'people' is important in responding to and recognising their collective harm suffered as a community. The IACtHR has recognised that a community member can suffer 'emotionally, psychologically, spiritually and economically' from social exclusion and targeted attack against their members.¹¹⁴ Therefore it is important to morally and legally acknowledge their collective identity within a state and ensure that the harms caused during the Khmer Rouge are now alleviated.

1. As a 'Group' for the Crime of Genocide

The understanding of the crime of genocide and its particular elements such as the protected group (national, ethnic, racial, or religious one) has been significantly enhanced in the jurisprudence of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). In the *Akayesu* case the ICTR Trial Chamber indicated that an ethnic group is generally defined as a group the members of which share a common language or culture.¹¹⁵ An important recognition was made that national groups are identified with a specific nation, while ethnic groups refer to cultural or linguistic groups within or outside the state.¹¹⁶ Another factor, used by the ICTR to define an ethnic group, was its 'stability', indicating that the membership of such group is determined by birth and is constituted in a permanent fashion.¹¹⁷ The Trial Chamber in *the Krstić* case found that stigmatization by the perpetrators can be used as a supplementary criterion when defining

¹¹⁰ Transcript of Proceedings, *Hearing on Specification of Civil Party Reparations Awards and Accused Jeng Thirith's Fitness to Stand Trial*, 20 October 2011.

¹¹¹ *Ibid.*

¹¹² *Supra* n.1, 11.

¹¹³ Stefan Ehrentaut, 'Perpetually temporary: citizenship and ethnic Vietnamese in Cambodia' (2011) 28(4) *Ethnic and Racial Studies* 5.

¹¹⁴ *Moiwana community v Suriname*, IACtHR, 15 June 2005.

¹¹⁵ *Prosecutor v. Jean Pierre Akayesu*, ICC Trial Chamber, 2 September 1998, 512–515.

¹¹⁶ Agnieszka Szpak, 'National, Ethnic, Racial, and Religious Groups Protected against Genocide in the Jurisprudence of the ad hoc International Criminal Tribunals' (2012) 23 (1) *European Journal of International Law*.

¹¹⁷ *Akayesu*, *supra* n.115, 511.

targeted groups.¹¹⁸ It is noteworthy that all three characteristics of an ethnic group are visible in the case of ethnic Vietnamese, who suffered the committed atrocities. Ethnic Vietnamese have their own distinctive culture and language differences; membership of such group is determined by birth, rather than individual voluntary commitment; ethnic Vietnamese have long experienced stigmatization by the Khmer Rouge, and previous regimes, as not being part of Cambodian society. Importantly, national, ethnic, religious and linguistic groups are recognized by the UN General Assembly in the class of protected groups because each group has historically been the target of animosity and each group is characterized by cohesiveness, homogeneity, inevitability of membership, stability, and tradition.¹¹⁹ As an ethnic group, ethnic Vietnamese have belonged to this class. Indeed, their status as a group for the purposes of the crime of genocide has been recognised by the Co-Prosecutors and Co-Investigating Judges at the ECCC, as evidenced by the inclusion of genocide charges within the Case 002 Closing Order.¹²⁰ Any reparations offered should therefore recognise this reality.

2. Stateless Persons

The ethnic Vietnamese Civil Parties and their communities in Cambodia have additional protection as a group vulnerable to statelessness. Stateless persons are those who are 'not considered as a national by any State'.¹²¹ The UN Human Rights Committee has stated that the general obligations under the International Covenant on Civil and Political Rights are equally applicable to citizens and stateless persons within the jurisdiction of a state, thus respecting and ensuring all rights to such individuals.¹²² Moreover, with stateless persons who have no identification to nationality, it is an obligation on states to assist them in obtaining nationality.¹²³ As stated by the IACtHR 'nationality is a juridical expression of a social fact that connects an individual to a State. Nationality is a fundamental human right ... [and] non-derogable'.¹²⁴

As a vulnerable minority, stateless persons should have access to adequate education, healthcare and rights for children, women and other vulnerable individuals.¹²⁵ The IACtHR has

¹¹⁸ *Prosecutor v. R. Krstić*, ICC Trial Chamber, 2 August 2001, 557.

¹¹⁹ UNGA, *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*, 18 December 1992, A/RES/47/135, Article 1.

¹²⁰ *Supra* n.10, 332-335 and 791.

¹²¹ *Supra* n. 63, Article 1(1).

¹²² UN Human Rights Committee, *General Comment No. 31 on The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, CCPR/C/21/Rev.1/Add. 13 (26 May 2004), para.10.

¹²³ *Supra* n.63, Article 32.

¹²⁴ *Case of the Girls Yean and Bosico v. Dominican Republic*, IACtHR, 8 September 2005, 136. See also '*Nottebohm Case (Liechtenstein v Guatemala)*', 6th April 1955, I.C. J. Reports 1955, 4, 23.

¹²⁵ *Ibid.*

stipulated that states 'should comply with [their] obligation to guarantee access to free primary education for all children, irrespective of their origin or parentage, which arises from the special protection that must be provided to children.'¹²⁶ In particular regarding children the ICCPR stipulates that 'every child has the right to acquire a nationality'.¹²⁷ While not ratified by Cambodia, the Stateless Convention 1954 sets down minimum requirements for the treatment of stateless persons including:

- juridical status (including personal status, property rights, right of association, and access to courts);
- gainful employment (including wage-earning employment, self-employment, and access to the liberal professions);
- welfare (including rationing, housing, public education, public relief, labour legislation, and social security); and
- administrative measures (including administrative assistance, freedom of movement, identity papers, travel documents, fiscal charges, transfer of assets, expulsion, and naturalization).¹²⁸

It is acknowledged that the ECCC is limited in that it cannot order the Cambodian government to fulfil its international legal obligations in relation to stateless individuals. However, the status of the ethnic Vietnamese Civil Parties and the broader minority population as a vulnerable group, both due to their statelessness, and due to their history of being targeted for genocide, should be reflected and recognised within the reparations recognised by the ECCC. Such acknowledgment would provide moral reparations, through the recognition of their harm, and the reassertion of their human dignity. Indeed, there is a clear connection here to the legal recognition in international law of the human rights of everyone, and the role that reparations can play in establishing formal recognition that states must not systematically deny the human dignity of individuals and groups. Such a step provides necessary acknowledgement of the human rights of everyone to recognition as a person before the law, and underlines that denial of citizenship (in all its senses) must not be determinative of what rights any group or individual enjoys.

The rights outlined within this section are explored more in the following sections, in relation to restitution, legal aid programmes and guarantees of non-repetition.

¹²⁶ *Ibid.*

¹²⁷ ICCPR, Article 24(3); and UNGA, *Convention on the Rights of the Child*, 20 November 1989, UNTS, vol. 1577, 3, Article 7.

¹²⁸ Articles 12-32. See UNHCR, *Guidelines on Statelessness No. 3: The Status of Stateless Persons at the National Level*, 17 July 2012, HCR/GS/12/03 www.refworld.org/docid/5005520f2.html (accessed 9 November 2015).

B. Restitution of Civil and Political Rights

Restitution should, whenever possible, restore the victim to the original situation before the gross violations of international human rights law or serious violations of international humanitarian law occurred.¹²⁹ However, in the present case, restoration of ethnic Vietnamese' situation before the forced deportations, violent attacks and massacres perpetrated by the Khmer Rouge would not provide victims an opportunity to reduce their experienced harm and take control of their lives. It would, rather, return them to a similar position of social exclusion to that which they currently find themselves in.

Restitution of civil and political rights could be a way of developing transformative reparations that seek to tackle the causes of violence. Collective reparations of this nature seek to 'recognise unjust distributions of resources and seek to redistribute accordingly, ensuring that underlying causes of injustice are addressed.'¹³⁰ Accordingly transformative reparations aim to 'provide a platform for transformative change ... that emphasizes local agency and resources, the prioritization of process rather than preconceived outcomes and the challenging of unequal and intersecting power relationships and structures of exclusion at both the local and the global level.'¹³¹

The most horrific crimes against ethnic Vietnamese were committed between 1975 and 1979 during the Khmer Rouge regime but discriminatory measures and subsequent attacks targeting this community started long before and lasted long after. It was as early as Cambodia's independence from France in 1953, when discriminatory measures against ethnic Vietnamese were introduced, which later turned into violent persecution. Such violent discrimination continued until as late as 1992-1993, when ethnic Vietnamese suffered a campaign of political violence, including within the communities where Civil Parties resided.¹³² Furthermore, their legal status and living conditions remained insecure after attacks decreased.

¹²⁹ *Ibid.*

¹³⁰ Anne Saris and Katherine Lofts, 'Reparation Programmes: A Gendered Perspective' in Ferstman *supra* n.84, 93. See also *Nairobi Declaration on Women's and Girls' Right to a Remedy and Reparation*, March 2007, para.4 'reparation must drive post-conflict transformation of socio-cultural injustices, and political and structural inequalities that shape the lives of women and girls; that reintegration and restitution by themselves are not sufficient goals of reparation, since the origins of violations of women's and girls' human rights predate the conflict situation.'

¹³¹ Paul Gready and Simon Robins, 'From Transitional to Transformative Justice: A New Agenda for Practice' (2014) 8 *International Journal of Transitional Justice* 339, 340.

¹³² Lyma Nguyen and Christoph Sperfeldt, 'Victim Participation and Minorities in Internationalized Criminal Trials: Ethnic Vietnamese Civil Parties at the Extraordinary Chambers in the Courts of Cambodia' (2014) 14 *Macquarie Law Journal* 97.

Although the original situation of the Civil Parties is therefore undesirable due to long-term discrimination against them before the gross human rights violations of the Khmer Rouge regime took place, there is one condition that dramatically changed after *en masse* deportations, resulting in a significantly worse situation for the voluntarily returned ethnic Vietnamese Civil Parties. Forced deportations, persecution and genocidal policies resulted in victims' loss of identity. As noted above, some victims were forced to leave behind their documentation, while others had their documents destroyed or otherwise lost.¹³³ As a result of such loss, victims suffered greater harm in that, upon their voluntary return to Cambodia in the 1980s, they could not establish their identities and were, instead treated as 'immigrants' or 'foreign residents'.¹³⁴ As has been demonstrated within this report, the lack of Cambodian nationality has resulted in a lack of access to basic social, economic, political rights. Such serious personal harm the survivors live with is a direct consequence of the committed crimes against them, as charged by this Court. A legal aid programme would be key to assisting in the restitution of civil and political rights to ethnic Vietnamese.

C. Legal assistance programme

A legal assistance programme would provide free legal advice and aid to ethnic Vietnamese Civil Parties. In doing so, it would assist them in gaining an understanding of Cambodia's legal framework in relation to civil registration, documentation and citizenship. It would help them establish their individual legal status (including nationality or stateless status) and fully inform them of their rights. It is acknowledged that this would be of benefit to individuals. Yet this does not exclude such measures from having a collective nature. Necessarily, individual harm is bound up with collective harm, groups are composed of their individual members.¹³⁵ Nor does the individual benefits of such measures preclude their being recognized as collective and moral in nature, if they also satisfy the requirements of addressing collective and moral harm.¹³⁶ A legal aid programme would be specifically focused on delivering assistance to the collective group of ethnic Vietnamese Civil Parties to enfranchise their rights and help them fully participate in Cambodia society. The UN Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul has stated that states should:

¹³³ *Supra* n.1 at 28.

¹³⁴ *Ibid.*

¹³⁵ Christoph Sperfeldt, Collective Reparations at the Extraordinary Chambers in the Courts of Cambodia, (2012) 12 *International Criminal Law Review* 457, 472-475.

¹³⁶ For example, note the recognition of psychological services in the Case 002/01 Judgment, 1154-1155.

*develop and implement effective and sustainable legal aid schemes to enable individuals to exercise and enjoy a number of human rights, including the rights to a fair trial and to an effective remedy. ...that legal aid should be ensured both in criminal and in non-criminal cases, and encompass all stages of judicial or extrajudicial procedures, thus contributing to the elimination of obstacles that hamper access to justice through the provision of assistance to people otherwise unable to afford legal counsel, representation and access to the court system.*¹³⁷

Moreover, special measures should be made to provide ‘meaningful access to legal aid for women, children and groups with special needs, including, but not limited to, the elderly, minorities, persons with disabilities, ... indigenous and aboriginal people, stateless persons, asylum seekers, foreign citizens, migrants and migrant workers, refugees and internally displaced persons.... [so as] to ensure that these individuals have prompt access to the tools necessary to claim their rights.’¹³⁸ The Special Rapporteur also highlighted that ‘legal aid *must* be available to all individuals, regardless of nationality or statelessness, including asylum seekers, refugees, migrant workers and other persons, who may find themselves in the territory or subject to the jurisdiction of the State party.’¹³⁹ Legal aid would be necessary for the ethnic Vietnamese Civil Parties and their communities in helping them to establish identification documentation and access procedures on citizenship, as well as providing more general legal assistance. As noted above, this would potentially bring transgenerational benefits through the delivering of citizenship to the younger generations, thereby addressing the transgenerational harm perpetrated against the families of the ethnic Vietnamese Civil Parties. In allowing the ethnic Vietnamese Civil Parties to integrate more fully into Cambodian life, such measures may also further national reconciliation.

1. Identification Documentation

Some ethnic Vietnamese Civil Parties claim to have had Cambodian identification papers during previous regimes, but lost them during subsequent unrest and the Khmer Rouge genocide and displacement.¹⁴⁰ The IACtHR has stated that where identification documents are unavailable for claimants, the state is obliged to provide further evidence on such individuals’

¹³⁷ Gabriel Knaul, *Report of the Special Rapporteur on the Independence of Judges and Lawyers*, 15 March 2013, A/HRC/23/43.

¹³⁸ *Ibid.*

¹³⁹ *Ibid.*, 43, emphasis added.

¹⁴⁰ Jennifer S. Berman, ‘No Place like Home: Anti-Vietnamese Discrimination and Nationality in Cambodia’ (1996) 84(3) *California Law Review* 817, 854.

documentation, i.e. to issue new documentation or verify the individual(s) identity.¹⁴¹

There is growing state practice in South-East Asia to tackle statelessness. States can conduct large-scale naturalisation programmes for stateless persons in their territory. Following its independence, Indonesia granted citizenship to 110,000 Chinese migrants by decree, many of whom lacked documentation to establish their longstanding ties to Indonesia.¹⁴² In Nepal some 2.6 million certificates were issued for stateless persons on its territory in 2006.¹⁴³ Vietnam in 2008 passed a law to tackle statelessness, enabling those persons permanently residing in Vietnam for twenty years to acquire Vietnamese nationality.¹⁴⁴ Individuals only need to make an application, with the normal naturalisation fee waived for stateless persons.¹⁴⁵

According to the UN High Commissioner for Refugees, the following non-exhaustive list of types of evidence may be relevant in determining an individual or a group's status as a victim of harm for reparations or as stateless:

- testimony of the applicant (e.g. written application, interview);
- response(s) from a foreign authority to an enquiry regarding nationality status of an individual;
- identity documents (e.g. birth certificate, extract from civil register, national identity card, voter registration document);
- travel documents (including expired ones);
- documents regarding applications to acquire nationality or obtain proof of nationality;
- certificate of naturalization; • certificate of renunciation of nationality;
- previous responses by States to enquiries on the nationality of the applicant;
- marriage certificate;
- military service record/discharge certificate;
- school certificates;
- medical certificates/records (e.g. attestations issued from hospital on birth, vaccination booklets);
- identity and travel documents of parents, spouse and children;
- immigration documents, such as residence permits of country(ies) of habitual residence;

¹⁴¹ *Ituanga Massacre v Colombia*, IACTHR, Judgment of 1 July 2006, 94; *Mapiripán Massacre v Colombia*, IACTHR, Judgment of 15 September 2005, 255.

¹⁴² Similar collective decrees have been used in the Philippines in 1975-76 for ethnic Chinese. UN High Commissioner for Refugees, *Regional Expert Roundtable on Good Practices for the Identification, Prevention and Reduction of Statelessness and the Protection of Stateless Persons in South East Asia*, 2 March 2011, 20.

¹⁴³ *Ibid*, 21.

¹⁴⁴ *Law on Vietnamese Nationality*, Order No. 22/2008/L-CTN, 2008, Article 8.

¹⁴⁵ *Decree No. 78/2009/ND-CP* of September 22, 2009, Article 2(c).

- other documents pertaining to countries of residence (for example, employment documents, property deeds, tenancy agreements, school records, baptismal certificates); and
- record of sworn oral testimony of neighbours and community members.¹⁴⁶

It is possible to construct a mechanism within the current Cambodian legal framework to help ethnic Vietnamese Civil Parties and similarly affected populations document births. In the case of Khmer nationals seeking birth certificates after the usual period for their issuance, Article 43 of sub-decree 103 provides that local officials, may, in the absence of other documentation, rely on attestations by two individuals from the community where the birth in question would have taken place as sufficient evidence to issue a birth certificate. An identical sub-decree could direct that this practice be followed in the case of ethnic Vietnamese seeking to document births. There is some state practice to support this. After the Second World War Germany offered former German citizens who between 30 January 1933 and 8 May 1945 were deprived of their citizenship on political, racial or religious grounds, and their descendants, the opportunity to apply to have their citizenship restored.¹⁴⁷ Such legal provision acknowledges victims that had been deprived of their citizenship due to discriminatory policies in the past. However, a legal aid programme is needed to assist ethnic Vietnamese (Civil Parties) to access such systems, given their stateless nature and lack of identification documentation.

2. Identification Procedure

The burden of proof in determining whether a person is stateless is shared between the state and the applicant, both collaborating to establish the facts of the person's nationality or lack thereof.¹⁴⁸

*the applicant has a duty to be truthful, provide as full an account of his or her position as possible and to submit all evidence reasonably available. Similarly, the determination authority is required to obtain and present all relevant evidence reasonably available to it, enabling an objective determination of the applicant's status.*¹⁴⁹

¹⁴⁶ UN High Commissioner for Refugees, *Handbook on Protection of Stateless Persons*, 30 June 2014, 84.

¹⁴⁷ Basic Law for the Federal Republic of Germany in the revised version published in the Federal Law Gazette Part III, classification number 100-1, as last amended by the Act of 11 July 2012 (Federal Law Gazette I p. 1478), Article 116(2).

¹⁴⁸ *Supra* n.146, 89.

¹⁴⁹ *Ibid.*

Standard of proof is that of a 'reasonable degree' of proof that an individual is not considered as a national by any State under the operation of its law.¹⁵⁰ Enquiries to the Vietnamese government over the nationality of applicants could help to determine their civil status, including whether they are stateless. An NGO or civil society organization funded by the legal aid programme could facilitate such inquiries. Similar practices can be seen in other contexts, for instance in Ivory Coast the Norwegian Refugee Council assists in late birth registration and documentation through its Information, Counseling and Legal Assistance programme.¹⁵¹ Assessment procedures do not have to be individual applicants, but can be based on the determination of the status of stateless groups and individual's membership of such groups.¹⁵² These procedures can be facilitated by the UNHCR, whether through disseminating information or providing training or technical advice to the government.¹⁵³

The IACtHR has held that in claiming reparations a victim should present a 'birth certificate, death certificate, or identification card' or appear before a competent national authority with similar evidence to support their claim.¹⁵⁴ In identifying further victims it may be worthwhile working with local intermediaries such as community leaders. In the *Moiwana Community* case the IACtHR accepted a statement before a competent state official by a recognised community leader as well as witness statements by two further individuals. The court accepted such statements as sufficient for evidencing the person's identity and harm, given that the tribal community did not possess any formal identification documentation and were not included in any national registry.¹⁵⁵ The ICC has accepted signed statements by two credible witnesses, who have identification documents, on the identification of the undocumented individual.¹⁵⁶ In Rwanda beneficiaries of government assistance after the genocide who had no identification were brought before a mixed panel of government officials and other survivors of the genocide.¹⁵⁷ The European Court of Human Rights has held that:

if the applicant's application was not deemed complete, it was the national authorities' task to elucidate the applicable legal requirements and thus give the

¹⁵⁰ *Ibid*, 90.

¹⁵¹ See www.nrc.no/?aid=9137054#.VkCa0GThAy4. See also Rights in Exile Programme www.refugeelegalaidinformation.org/statelessness (accessed 28 April 2016).

¹⁵² *Supra* n.146, 39-40.

¹⁵³ UNHCR Executive Committee, *Conclusion on Identification, Prevention and Reduction of Statelessness and Protection of Stateless Persons*, Conclusion 106 (LVII) of 2006.

¹⁵⁴ *Case of the Plan de Sánchez Massacre v Guatemala*, IACtHR, Reparations, 19 November 2005; and *Mapiripán massacre*, *supra* n.141, 257.

¹⁵⁵ *Moiwana Community v Suriname*, *supra* n.114, 178.

¹⁵⁶ *Prosecutor v Lubanga*, Decision on Victim's Participation, 18 January 2008, 88.

¹⁵⁷ Heidy Rombouts, *Victim Organisations and the Politics of Reparation: A Case-study on Rwanda*, (Intersentia, 2004).

*applicant clear notice how to prepare the documents in order to be able to obtain residence registration.*¹⁵⁸

The IACtHR has ordered states to adopt domestic laws, whether legislative or administrative to allow late declaration of birth for nationality, requiring the procedure to be ‘simple, accessible and reasonable’ to prevent individuals from remaining stateless.¹⁵⁹ In the *Yean and Bosico v Dominican Republic* case the Court stipulated that the state should take into consideration the ‘particularly vulnerable situation’ of stateless children. Requirements determining nationality should be based on establishing that the birth occurred on the territory of the state, rather than as an obstacle for registration.¹⁶⁰

Special measures should be provided to children within stateless groups, which should include ‘priority processing of their claims, provision of appropriately trained legal representatives, interviewers and interpreters as well as the assumption of a greater share of the burden of proof by the State.’ Similar consideration should be given to those with disabilities and women.¹⁶¹ While Cambodia is not a signatory of the 1954 Convention on Statelessness, these measures outlined provide best practices in how to address stateless groups, particular read in light of Cambodia’s obligations under the ICCPR and Convention on the Rights of the Child. The IACtHE has also ordered states to implement a human rights training programme, with a special emphasis on the right to equal protection and non-discrimination, to state officials responsible for registering births, ‘during which they should receive guidance on the special situation of children, and a culture of tolerance and non-discrimination is fostered.’¹⁶²

3. Legal Assistance

In light of these evidential requirements and intricate procedures we would recommend a legal assistance programme as collective reparations, whereby NGOs in collaboration with the UNHCR could assist in the collection of evidence from ethnic Vietnamese individuals and to verify they are stateless with no nationality records for them in Vietnamese or Cambodia. There is growing recognition that states should not just provide compensation, restitution and apologies, but also provide more procedural redress through legal assistance to victims, such

¹⁵⁸ *Tatishvili v Russia*, (Application no. 1509/02) 22 February 2007, 52.

¹⁵⁹ *Case of the Girls Yean*, *supra* n.124, 239; and *Expelled Dominicans and Haitians v. Dominican Republic*, IACtHR, Judgment, 28 August 2014, 469-470.

¹⁶⁰ *Case of the Girls Yean*, *supra* n.124, 240.

¹⁶¹ UNHCR Handbook, *supra* n.146, 120-121.

¹⁶² *Case of the Girls Yean*, *supra* n. 124, 242.

as in cases of human trafficking, domestic violence and torture.¹⁶³ Legal aid has been ordered as a form of reparations in a number of cases.

The reparations request put forward by the Civil Party Lead Co-Lawyers in June 2011 states the fact that it is beyond the mandate of an internationalized criminal court to order a government to grant nationality and makes clear that the ethnic Vietnamese Civil Parties do not intend to circumvent the discretion or authority of the Cambodian government to grant or recognize citizenship. Instead, the Civil Parties request a project, 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.¹⁶⁴

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.¹⁶⁵ A legal assistance service could be created in the Civil Parties' home area, to assist in collecting the application materials, filling in the applications and submitting them to the competent Cambodian authorities.¹⁶⁶ Legal aid could also address challenges the community is currently facing:

- Lack of access to direct legal representation;
- Lack of resources;
- Lack of outreach materials in the languages of minority groups;
- Lack of access for those especially living in the rural areas;
- Illiteracy,¹⁶⁷

The legal aid programme would serve to also inform ethnic Vietnamese of their rights under international human rights and refugee law, assist in documentation of their date of birth for late registration, help them to obtain access or title to the land on the Tonlé Sap river and settlements, and protect their rights to fish as a natural resource.¹⁶⁸ In order to ensure access to children, women, those with disabilities and the elderly, community engagement, radio or other information disseminating programme could be used to notify the ethnic Vietnamese of the

¹⁶³ *Concluding Observations Japan*, UN doc. CCPR/C/JPN/CO/5, 18 December 2008, 23; CEDAW Committee, *Ms A. T. v Hungary*, Communication No. 2/2003, 26 January 2005, 9.6.II.g; *Question of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, A/55/290, 11 August 2000, para. 29; *United Nations Report of the Special Rapporteur on violence against women, its causes and consequences, a framework for model legislation on domestic violence*, E/CN.4/1996/53/Add.2, 2 February 1996, 61.

¹⁶⁴ *Supra* n.132, 29.

¹⁶⁵ *Supra* n.4, 90-93.

¹⁶⁶ *Ibid.*

¹⁶⁷ *Supra* n.1, at 24.

¹⁶⁸ *Saramaka People v. Suriname*, IACtHR, Judgment, 28 November 2007.

legal aid programme available to them in their local language.¹⁶⁹

In general terms the legal aid programme will help to determine the nationality of the members of the ethnic Vietnamese community. This will enable them to fully participate in Cambodian society and enjoy their rights and freedoms as human beings, including the rights to purchase land, attend school and avail of healthcare, fulfilling numerous obligations of Cambodia under international human rights law. These will need to be backed up with guarantees of non-repetition to ensure the causes of ethnic Vietnamese victimisation do not reoccur in the future.

Specifically lessons can be learnt in how to run a legal aid programme for stateless persons through initiatives such as the Norwegian Refugee Council's ICLA programme discussed above. Similarly, the International Refugee Assistance Project provides fact-finding and legal advice on processing visas or residential status for refugees and stateless persons.¹⁷⁰ Such programmes would require proficient and trained Cambodian lawyers familiar with refugee and stateless legal regulations, domestic and international. Moreover, it may be appropriate that the UNHCR or Norwegian Refugee Council train such a group of lawyers on best practices in dealing with stateless person cases. It may be appropriate that the work be divided up between those giving legal advice, fact-finding and research in Cambodian and Vietnamese nationality repositories.

D. Measures of Satisfaction

Measures of satisfaction are intended to repair the moral damage suffered by victims, by reaffirming the victim's dignity and acknowledging their suffering.¹⁷¹ They can also 'awaken [. . .] public awareness to avoid repetition', and 'maintain remembrance of the victim'.¹⁷² This can help to counter the ideological element of genocide and impunity for such crimes, challenging the view that the victims deserved to be harmed by publicly and officially recognising their harm and reaffirming their trust in the state and society.¹⁷³ In international law, satisfaction involves a

¹⁶⁹ *Mapiripán Massacre*, *supra* n.141, 306.

¹⁷⁰ See refugeerights.org/our-work/mission-values/ (accessed 28 April 2016).

¹⁷¹ *Plan de Sánchez Massacre*, *supra* n. 154, 93; Dinah Shelton, *Remedies in International Human Rights Law* (OUP 2005, 2nd edn) 78.

¹⁷² UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, UNGA Res 60/147, 16 December 2005, Principle 22; *19 Tradesmen*, paras.272–273; *Myrna Mack-Chang*, para.286.

¹⁷³ Cristian Correa, 'Reparations for Victims of Massive Crimes: Making Concrete a Message of Inclusion', in Rianne Letschert et al., *Victimological Approaches to International Crimes: Africa* (Intersentia, 2011) 185–234, 189–190.

variety of measures that endeavour to repair the moral damage of a state, i.e. the ‘honour, dignity and prestige’ caused by a violation or crime that cannot be redressed by restitution or compensation, due to its intangible and unquantifiable nature.¹⁷⁴ Measures of satisfaction are therefore symbolic and include ‘an acknowledgement of the breach, an expression of regret, [or] a formal apology’.¹⁷⁵ Accordingly a judgment by the ECCC against an individual for the crime of genocide can also be a measure of satisfaction as it attributes and determines their responsibility.¹⁷⁶ Such a judgment recognising the harm suffered by the ethnic Vietnamese Civil Parties should be publicly disseminated in Cambodia to inform the broader population of the experiences of the victims. It may be also appropriate that a memorial or museum be built to remember and increase public awareness of how ethnic Vietnamese as residents in Cambodia were singled out like many other Cambodians.¹⁷⁷

E. Guarantees of Non-Repitition

Guarantees of non-repetition are forward-facing remedies designed to protect the continuing relationship between parties, and to safeguard against potential future breaches. Where states have committed internationally wrongful acts they are obliged under secondary rules of responsibility to cease those acts, and to offer appropriate assurances and guarantees of non-repetition, if circumstances so require.¹⁷⁸ Guarantees of non-repetition are generally offered as statements by the wrongdoing party, while guarantees of non-repetition involve ‘positive measures the State must adopt to ensure that the harmful acts... are not repeated’.¹⁷⁹ These steps can include reviewing and reforming laws, providing human rights and international humanitarian law education to all sectors of society, training for law enforcement and military officials, strengthening the independence of the judiciary, and promoting mechanisms for preventing and monitoring social conflicts.¹⁸⁰

¹⁷⁴ *Case concerning the difference between New Zealand and France concerning the interpretation or application of two agreements, concluded 9 July 1986 between the two states and which related to the problems arising from the Rainbow Warrior affair*, 30 April 1990, UNRIIAA, vol. XX, 215–284, 267–273; *Corfu Channel Case (United Kingdom v. Albania)*; *Assessment of Compensation*, 15 XII 49, *International Court of Justice (ICJ)*, 15 December 1949; International Law Commission Commentary on Articles on Responsibility of States for Internationally Wrongful Acts (RSIWA) (A/56/10), 2001, 105; Arrest Warrant of 11 April 2000 (*Democratic Republic of the Congo v Belgium*) [2002] ICJ Reports 3, 75.

¹⁷⁵ RSIWA, *ibid*, Article 37(2).

¹⁷⁶ *Corfu Channel case*, *supra* n.174, 35; *Rainbow Warrior affair*, *supra* n.174, 272–273.

¹⁷⁷ *Case of Myrna Mack Chang v. Guatemala*. IACtHR, Judgment, 25 November 2003, 284; *Moiwana Community*, *supra* n.114, 218; *Pueblo Bello Massacre v Colombia*, IACtHR, 31 January 2006, 278; UN Basic Principles, *supra* n.172, Principle 22(g).

¹⁷⁸ RSIWA, *supra* n.172, Article 30.

¹⁷⁹ *Case of the Plan de Sánchez Massacre*, *supra* n.154, 54.

¹⁸⁰ Basic Principles, *supra* n.172, Principle 23

In the *Case of the Moiwana Community v Suriname* for instance, members of the armed forces of Suriname attacked the village of Moiwana, leaving survivors in exile or internal displacement. Although the massacre itself fell outside the Court's jurisdiction, having occurred prior to Suriname becoming a State Party to the American Convention, the Court found that the subsequent persistent failure to investigate the massacre in the Moiwana Village, and the conditions thereby imposed upon the survivors constituted continuing breaches of the Convention, which were justiciable. The Court ordered Suriname to send representatives to Moiwana Village monthly for the first year after their return to their lands to consult with residents, and required that the State take appropriate measures designed in strict consultation with community members if they expressed concern.¹⁸¹ The Court also ordered a public ceremony to apologise for the massacre which would constitute a 'measure of satisfaction to the victims and [an] attempt to guarantee the non-repetition of serious human rights violations',¹⁸² as well as a monument to be established to memorialise the events and to 'prevent the recurrence of such dreadful events in the future'.¹⁸³ Guarantees of non-repetition therefore address the causes of human rights and humanitarian law breaches, to provide redress to existing victims as well as avoiding repeated violations.

Guarantees of non-repetition can be thought of as transformative reparations, aiming to tackle the structural causes of violence and victimisation, such as racial discrimination, rather than the symptoms. There is a clear connection to the effective implementation and enforcement of international human rights standards. For example, many of the existing recommendations of international human rights mechanisms, including the recent observations of the UN Human Rights Committee, would go so far as to promoting this transformative agenda. In order to prevent recurrence of violence to ethnic Vietnamese and tackle the causes of discrimination and violence against them appropriate guarantees of non-repetition as collective reparations are needed. We believe this should take four forms:

- Human rights training;
- Public acknowledgement that ethnic Vietnamese suffered like many Cambodians, but that they were specifically targeted as an ethnic minority by the Khmer Rouge; and
- Public information programme.

¹⁸¹ *Case of the Moiwana Community v Suriname*, IACtHR, Judgment, 15 June 2005, 212. See also *Case of the Afro-descendant communities displaced from the Cacarica River Basin (Operation Genesis) v. Colombia*, IACtHR, Judgment, 20 November 2013, 460

¹⁸² *Ibid, Moiwana*, 216.

¹⁸³ *Ibid, Moiwana*, 218.

1. Human rights training

Although the restoration of Cambodian nationality is essential to the legal status of ethnic Vietnamese as well as their access to basic civil, political and socio-economic rights, additional measures are needed to help shift the negative social perception, which had led to the social exclusion of this community in the first place. An intensive education and training programme of state agents could help address such perception, as well as act as a guarantee of non-repetition of human rights violations.¹⁸⁴ This was suggested in a similar stateless persons case before the IACtHR where representatives asked the Court to order the state to implement ‘an intensive education and training program for state agents, including immigration and civil registry officials at all levels, on standards for equality and non-discrimination.’ This was ordered by the Court to those in the armed forces, border control and those responsible for immigration and judicial proceedings.¹⁸⁵ This training would incorporate the full range of international human rights standards, policy and practice.

Bespoke training could be provided by NGOs on human rights to the Cambodian judiciary, immigration or police, such as workshops on recent international jurisprudence on stateless persons, how to process nationality checks for stateless persons and enable their access to legal systems could facilitate the work of the legal aid programme and help pave the way for restitution of the rights of the ethnic Vietnamese. To help guide this process and ensure future compliance it may be worth establishing an equality and human rights commission in Cambodia that can monitor and bring legal proceedings against government institutions that fail to respect the rights of individuals and minorities. The experience of the Equality Commission and Human Rights Commission in Northern Ireland may be instructive.¹⁸⁶

2. Public Acknowledgement

An important part of addressing the harm suffered by the ethnic Vietnamese Civil Parties and to prevent its recurrence will be public acknowledgement by the convicted persons in Case 02/002 and from the Cambodian state, which the responsibility of the Khmer Rouge regime transfers upon state succession.

In order for a public acknowledgement of responsibility to be considered a measure of reparation and justice, it must publicly acknowledge the responsibility of the responsible party

¹⁸⁴ *Expelled Dominicans and Haitians v. Dominican Republic*, IACtHR, Judgment, 28 August 2014, 464.

¹⁸⁵ *Ibid*, 463.

¹⁸⁶ See Colin Harvey and Sarah Spencer, ‘Advancing Human Rights and Equality: Assessing the Role of Commissions in the United Kingdom and Ireland’ (2012) 35 *Fordham International Law Journal* 1615.

and the harm they have caused to the victims.¹⁸⁷ Public acknowledgement of responsibility to the ethnic Vietnamese should include public expressions of recognition of their harm by those convicted in Case 002/02 and/or the Cambodian government and the continuing stateless situation the ethnic Vietnamese find themselves. This can be carried out through audio, video recorded or written statements. This can be disseminated through public publication of statements or judgment in national newspapers, radio and other media outlets in Cambodia in both Khmer and Vietnamese. It may also be useful that such information is disseminated in more nuanced and accessible ways, such as comics or television programmes.

Further, the recognition of a reparation programme which addresses the specific harm experienced by the ethnic Vietnamese, such as those outlined above, could do much to acknowledge the suffering of the ethnic Vietnamese. The ongoing harm experienced as a result of the crimes perpetrated by the Khmer Rouge is particularly acute in the case of the ethnic Vietnamese, and they continue to face intense discrimination within Cambodia. The ECCC's acknowledgment of their harm, and their right to seek the citizenship which was lost to them, may have significant moral value to the Civil Parties. As a public pronouncement which acknowledges that the Civil Parties have historically had a claim to Cambodian citizenship, which has been lost to them, the Court's recognition of these measures as official reparations may also contribute to the spirit of reconciliation, through lessening the discrimination the ethnic Vietnamese Civil Parties occasionally face from both officials and the public within Cambodia.

3. Public Information Programme

Public acknowledgements and human rights training programmes should be accompanied by a national awareness-raising campaign, focused principally on the fundamental nature of the principles of non-discrimination and equal protection of the law and its relationship to respect for human dignity.¹⁸⁸ This programme should focus on key state actors and facilitators in the Cambodian legal system, who would be in contact with ethnic Vietnamese, such as members of the judiciary, immigration, legal practitioners, and police officers. In order to reach a wide section of Cambodian society and to be accessible to different audiences, information should be disseminated through a range of activities and mediums, such as community workshops, radio programmes, or comic strips. Disseminating the judgment of the ECCC and the genocide acts committed against the ethnic Vietnamese could help tackle the underlying racism and discrimination against them and prevent future victimisation. In order to make this accessible

¹⁸⁷ See Pablo de Greiff, 'Report by the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence' A/69/518, 8 October 2014, 4.

¹⁸⁸ *Supra* n.184,463 and 465.

and increase the impact of such measures as much as possible, it is submitted that the judgment, or a summary of the judgment which focuses on the experiences of minorities, should be distributed in minority languages, including Vietnamese. The provision of copies that the Civil Parties themselves could keep would also be beneficial.

IV. Conclusion: Human Rights and Dignity of the Ethnic Vietnamese

Although we have detailed the harm suffered by ethnic Vietnamese as a result of crimes charged, and have proposed appropriate collective and moral reparations, there are also wider human rights implications of the current plight of ethnic Vietnamese, that reinforce the importance of collective reparations and can guide its implementation. Stateless persons or those groups targeted by genocide are left in a very vulnerable position and marginalised in society. This can have a compounding effect of harm on victims. As held by the European Court of Human Rights, failure to recognise the harm suffered by victims can amount to inhumane and degrading treatment, which 'lies in the authorities' reactions and attitudes to the situation when it has been brought to their attention'.¹⁸⁹

The IACtHR has held that '[s]tatelessness deprives an individual of the possibility of enjoying civil and political rights and places him in a condition of extreme vulnerability'.¹⁹⁰ As the IACtHR stated in relation to stateless persons 'that the failure to recognize juridical personality harms human dignity, because it denies absolutely an individual's condition of being a subject of rights and renders him vulnerable to non-observance of his rights by the State or other individuals'.¹⁹¹ Similar in cases involving asylum seekers the European Court of Human Rights has stated that as a 'particularly underprivileged and vulnerable' population group, asylum seekers require 'special protection'.¹⁹² In the case of one asylum seeker who was left:

for several months, living in the street, with no resources or access to sanitary facilities, and without any means of providing for his essential needs. The Court considers that the applicant has been the victim of humiliating treatment showing a lack of respect for his dignity and that this situation has, without doubt, aroused in him feelings of fear, anguish or inferiority capable of inducing desperation. It considers that such living conditions, combined with the prolonged uncertainty in which he has remained and the total lack of any prospects of his situation

¹⁸⁹ *Varnava and Others v Turkey* (Applications 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90, and 16073/90) ECtHR, 18 September 2009, 200.

¹⁹⁰ *Girls Yean*, *supra* n.124, 142.

¹⁹¹ *Ibid*, 179.

¹⁹² *Tarakhel v Switzerland* (Application no. 29217/12), ECtHR, 4 November 2014, 118.

*improving, have attained the level of severity required to fall within the scope of Article 3 of the Convention.)*¹⁹³

The vulnerability is particularly acute for children due to their age and for states to,

*ensure that those conditions do not 'create ... for them a situation of stress and anxiety, with particularly traumatic consequences' ... Otherwise, the conditions in question would attain the threshold of severity required to come within the scope of the prohibition under Article 3 of the Convention [inhuman and degrading treatment].*¹⁹⁴

*By their 'erasure' the applicants were de facto deprived of their legal personality, because they had been simply and ruthlessly 'erased' from the legal order of Slovenia. They ceased to exist as 'legal subjects' – that is, as 'natural persons' in the Slovenian legal system. They were treated as disposable objects and not as subjects of the law. Needless to say, this runs counter to the applicants' inherent human personality and dignity.*¹⁹⁵

The IACtHR has went as far as finding that vulnerable communities' right to life is intimately bound up with 'vida digna', the right to a dignified existence, incorporating for example access to and quality of water, diet, healthcare services, education and environment.¹⁹⁶ For such vulnerable groups '[c]ultural identity is a component of, or an addition to, the fundamental right to life in its wider sense'¹⁹⁷ This is consistent with the ICCPR and minorities' right to enjoy their own culture.¹⁹⁸ As such there are important considerations for ensuring the rights of the ethnic Vietnamese, it is hoped that appropriate reparations here based on their harmed suffered as a result of the genocide proved before the ECCC can help to alleviate their continuing harm.

This paper has sought to highlight the ongoing harms experienced by the ethnic Vietnamese as a result of crimes Nuon Chea and Khieu Samphan have been accused of, and to outline the importance of appropriate reparation measures. There are the wider human rights

¹⁹³ *M.S.S. v Belgium and Greece*, (Application No. 30696/09) ECtHR, 21 January 2011 para.263.

¹⁹⁴ *Supra* n.192, 119.

¹⁹⁵ *Kuric and others v Slovenia*, (Application no. 26828/06) ECtHR, 26 June 2012, Partly Concurring, Partly Dissenting Opinion of Judge Vučinić.

¹⁹⁶ See Thomas M. Antkowiak, 'Rights, Resources, and Rhetoric: Indigenous Peoples and The Inter-American Court' (2013) 35(1) *University of Philadelphia Journal of International Law* 113-1; *Yakye Axa Indigenous Community. v. Paraguay*, IACtHR, Judgment, 17 June 2005, 167.

¹⁹⁷ Separate opinion of Judge Cançado-Trindade, *Sawhoyamaxa Indigenous Community v Paraguay*, IACtHR, 29 March 2006.

¹⁹⁸ Article 27.

implications of the current plight of ethnic Vietnamese, which reinforce the importance of collective reparations and can guide its implementation. Reparations ordered by the ECCC can help to contribute to wider goals of reconciliation and rebuilding Cambodian society. We hope this can promote the broader development of a human rights based society in Cambodia, thereby tackling the underlying causes of conflict and preventing the recurrence of violence. Importantly reparations ordered by the ECCC can help to restore the dignity of Civil Parties and alleviate their continuing suffering through officially acknowledging their experience and fostering greater public awareness of the seriousness of their harm. By enabling ethnic Vietnamese Civil Parties to reassert their citizenship and legal status it can help put an end to the transgenerational harms caused by continuing statelessness.