

REPRESENTING MINORITY VICTIMS IN GENOCIDE TRIALS

PRESENTATION AT 14th BIENNIAL CONFERENCE OF THE CRIMINAL LAWYERS ASSOCIATION OF THE NORTHERN TERRITORY

CONFERENCE SUB-THEME: VICTIMS OF WAR

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The information in this paper derives from a powerpoint presentation by the same name, presented at the CLANT Conference in Bali on 25 June 2013. The paper was authored as a result of requests from conference participants who did not attend the presentation. The sub-headings in this paper roughly correspond to the topics presented in the powerpoint slides, and it is recommended that readers also refer to the slides at <http://www.clant.org.au/images/images/the-bali-conference/2013/Nguyen.pdf>.

ABSTRACT

In 2010, the Co-Investigating Judges of the Extraordinary Chambers in the Courts of Cambodia (ECCC) charged four senior leaders of the former Khmer Rouge regime with genocide against two minority groups, the Cham and the ethnic Vietnamese. This presentation examines the role of minority victims of mass crimes in a genocide trial, using the specific case study of a group of ethnic Vietnamese survivors who joined as civil parties before the internationalised criminal proceedings at the ECCC. From the personal perspective of an international *pro bono* civil party lawyer who has been involved with victim representation at the ECCC for five years, the presentation highlights the challenges involved with including minority narratives into a larger context of a mass atrocity trial. The description of the participation process for these civil parties to date also highlights how victim participation in a criminal trial can shed light on larger human rights issues affecting a minority group. In the present case, a number of ethnic Vietnamese civil parties have sought access to, or recognition of, Cambodian nationality through a request for “collective and moral reparations” under the Court’s Internal Rules.

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Since 2008, Lyma has also worked with victims and civil parties at the Extraordinary Chambers in the Courts of Cambodia (Khmer Rouge Tribunal). In 2009, she was admitted as International Counsel for Civil Parties. Together with national colleagues from Legal Aid of Cambodia, she has provided *pro bono* legal representation for victims across cases 002, 003 and 004, including for ethnic Vietnamese minority victims of Cambodia’s genocide, foreign nationals who are victims of crimes at S21, and members of the Cambodian diaspora. In 2013, Lyma received the Prime Minister’s Endeavour Executive Award for this work. For more information about Lyma’s work at the tribunal, including related publications and presentations, see www.civilparties.org.

Introduction

1. Three decades ago, I found myself in this very country, Indonesia. Not at the beautiful island of Bali where we now find ourselves, but at Kuku Island Refugee Camp, after my parents were rescued off an unseaworthy vessel on the high seas near the Indonesian mainland. My mother was specially heliported from a US oil rig out at sea, onto mainland Indonesia, to give birth to me.²
2. Having entered into the world from these humble beginnings, I once again find myself in Indonesia – only this time, in quite different circumstances! Coming full circle from a remote refugee camp to the Bali Hyatt Hotel, it is a real privilege, and a great honour to speak about “Victims of War” in the context of “Representing Minority Victims in Genocide Trials”. Through this presentation, I will share with you aspects about the work personal to me, whilst informing you about the civil party participation mechanism at the Extraordinary Chambers in the Courts of Cambodia, also known as the “ECCC” or the “Khmer Rouge Tribunal”.
3. My *pro bono* legal practice in Cambodia has developed across the span of five years. My clients are victims of the Khmer Rouge regime, who have sought to participate as Civil Parties in the tribunal’s proceedings in Cases 002, 003 and 004. This presentation will paint a picture of the participation of the ethnic Vietnamese minority group I represent at the Tribunal in Case 002, both at the investigative (2008 – 2011) and trial phases (2011 to date).

Background to ECCC

4. The Extraordinary Chambers in the Courts of Cambodia was established in 2003 through an agreement between the Government of Cambodia and the United Nations and the *Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia* (hereinafter, “ECCC Law”).³
5. The tribunal is a hybrid, internationalised court, based largely on a civil law (inquisitorial) model, within the domestic courts in Cambodia. Although in practice, the tribunal is infiltrated by common law (adversarial) influences, as practitioners come from both civil and common law backgrounds.
6. The tribunal operates in three languages (local language, Khmer, and the two international languages, English and French) and applies both substantive international and domestic law, as well as Cambodian procedural law. Cambodian and international legal professionals are engaged in each of the tribunal’s judicial

² Although this was considered by my parents to constitute an act of kindness, as a lawyer revisiting the situation now, I am rather suspicious that the intent in flying my parents to mainland Indonesia, was actually to avoid having my birth on a US-flagged ship, in order to prevent any potential future claims to US nationality. The story of my birth is published in “Boat People: Personal Stories from the Vietnamese Exodus 1975 – 1996”, (published 2011), a compilation of stories of refugees from Vietnam, compiled by former Kuku Island refugee, Carina Hoang. See <http://carinahoang.com/book>.

³ *Agreement between United Nations and Cambodian Government regarding Prosecution under Cambodian Law of Crimes Committed During Period of Democratic Kampuchea* (signed 2003, amended 2004); and *Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea* (2001; amended 2004).

components (Prosecution, Defence, Civil Parties, Pre-Trial Chamber, Trial Chamber, and Supreme Court Chamber) as well as its administrative components (Office of Administration, Public Affairs Office, Victim Support Section and Defence Support Section). Each side of the court operates its own respective budget, financing and human resources.⁴

7. The tribunal is mandated to “try Senior Leaders of Democratic Kampuchea and those who were most responsible for the crimes and serious violations of Cambodian penal law, international humanitarian law and custom, and international conventions recognized by Cambodia, that were committed during 17 April 1975 to 6 January 1979”. These include genocide, crimes against humanity and grave breaches of the Geneva Conventions (war crimes) under the *Law on the Establishment of the ECCC* and domestic crimes under the *Cambodian Penal Code 1956*, such as homicide, torture and religious persecution.

Cases before the Tribunal

8. The ECCC has charged 5 individuals in two cases, known as Case 001 and Case 002.
9. The court’s first verdict against Kaing Guek Eav (alias “Duch”), following a trial lasting 72 days, involving 24 witnesses, 22 Civil Parties, and 9 experts, was issued on 26 July 2010. Duch was convicted and sentenced to effectively 19 years imprisonment (35, minus 5 years for illegal military detention, minus 11 years in pre-trial detention counted as served). The Prosecution initially sought only 45 years due to his cooperation and other mitigating factors, but following a Supreme Court appeal, Duch was given life imprisonment for his role as head of S21, the torture centre in Phnom Penh.
10. In Case 002, four former Senior Leaders of the Khmer Rouge regime were charged.⁵ However, following the death of Ieng Sary in March 2013 and a finding in September 2012 that his wife, Ieng Thirith, was unfit to stand trial, there remain only two accused in Case 002. The remaining two are Nuon Chea (Brother Number 2 to Pol Pot, Brother Number 1), 86 years old; and Khieu Samphan (Nominal Head of State), 81 years old.
11. Investigations against 5 additional suspects remain politically contested in Cases 003 and 004 (that is a whole topic on its own, for another presentation!).

Victim Participation at the ECCC

12. One of the most innovative features of the ECCC is its victim participation scheme, introduced in 2007, based on Cambodia’s domestic procedural law, founded on the civil law tradition.

⁴ The international community largely funds the international side of the court, and the Cambodian government is responsible for funding the national (human) resources of the court.

⁵ The charged persons are: Nuon Chea, 87, Former Chief Ideologue/Brother Number 2; Khieu Samphan, 81, Nominal Head of State; Ieng Sary, 87, Deputy Prime Minister, Foreign Affairs Minister (passed away 14 March 2013), and Ieng Thirith, 80, Minister for Social Affairs (found unfit to stand trial on 16 September 2012).

13. This was the very first time in international criminal law history that victims of crime were permitted to join the proceedings of an internationalised court as “civil parties”, with a mandate to support the prosecution, and to seek “moral and collective reparations” for harm suffered.
14. The procedural rights afforded to Civil Parties was unprecedented. These rights – similar to rights afforded to the prosecution and defence parties – were more extensive than rights given to victim participants at the International Criminal Court. They included rights to request further investigations at the investigative phase; rights to examine witnesses at the trial phase; and rights against self-incrimination when giving evidence.
15. The participation of over 90 civil parties at the trial phase in Case 001 was a huge learning curve for the ECCC. This led to substantial changes in the ECCC’s Internal Rules on victim participation to accommodate the 8,000 survivor participants in Case 002 – 4,000 of whom were ultimately admitted as Civil Parties.
16. The most significant change was the consolidation of all Civil Parties into one single group at trial phase, represented by court-appointed Civil Party Lead Co-Lawyers, who coordinate the work of 11 civil party legal teams, representing the 4,000 Civil Parties – including my clients.
17. As a Civil Party Lawyer, my role is to represent the best interests of my clients. The ethnic Vietnamese are a distinct group of victims, with specific and different interests and needs. As can be foreseen, the consolidated mode of participation in Case 002 has been somewhat of an impediment to drawing attention to the group’s distinct issues and interests.

Genocide Definition and Elements

18. Before launching into my work with a genocide minority group, I should express how genocide fits into the ECCC framework.
19. Genocide is an international crime legally characterised by *acts carried out with an intention to eliminate a national, ethnic, racial or religious group*, in whole or in part, through any of the following acts:
 - Killing of members of the group
 - Causing serious bodily harm, or mental harm, to members of the group
 - Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction, in whole or in part
 - Imposing measures intended to prevent births within the group and/or forcibly transferring children from one group to another group.
20. Article 4 of the ECCC Law gives the tribunal jurisdiction to try genocide, and provides for the different modes of liability that apply to this crime, including attempts to commit genocide, conspiracy to commit genocide, and participation to commit genocide. There is no statute of limitation for the crime of genocide.
21. Genocide is a crime that is rarely prosecuted, partly because the evidentiary threshold for establishing genocide is extremely high – the prosecution bears the

burden of proving not just the carrying out of at least one of the genocidal acts (outlined above), *and* the corresponding intention to engage in those acts, but *also* the *specific ulterior intention of destroying a group, in whole or in part, because of its ethnicity, nationality, race or religion*.

Genocide at the ECCC

22. In Case 002, the Co-Investigating Judges, in their Closing Order of 15 September 2010, charged the four accused Senior Leaders with committing genocide via a Joint Criminal Enterprise against two victim groups: the ethnic Vietnamese, and the Cham Muslims.
23. The Vietnamese case was based on evidence of mass deportations of the group; discriminatory treatment amounting to persecution; incitement of anti-Vietnamese hatred and war propaganda; mixed marriage policies whereby Khmer individuals in mixed Khmer/Vietnamese couples were ordered to kill their Vietnamese spouse and children; and a pattern of systemic and widespread execution of members of the group.
24. An ECCC's demographic expert report established that the Khmer Rouge regime achieved a 100% elimination of the ethnic Vietnamese from Cambodia by the time the regime collapsed in 1979.

Genocide Charges against the Vietnamese Minority

25. Although the genocide charges were a significant acknowledgement of the horrific and mass scale suffering endured by my clients – including damages spanning generations – there was a high level of politicization around the charges.⁶
26. Without elaborating on the details about the long and complicated historic tensions between Cambodia and Vietnam, it can be said that the genocide charges concerning treatment of the ethnic Vietnamese was not always positively received by many Cambodians. The larger political discourse around genocide charges, and the experience of the ethnic Vietnamese minority group became clearer to me when I examined their collective reparation request for “Cambodian nationality” (discussed later).

Building a Case with Genocide Survivors

27. By now, you may be wondering how an Australian lawyer became engaged in this work in Cambodia. Everything began with my first field mission to Phnom Penh in August 2008 – a mission I conducted in collaboration with a loose coalition of *pro*

⁶ The legal meaning of the term “genocide” and its everyday use by ordinary Cambodians connotes different concepts. In Cambodia, the word “genocide” is often used loosely to describe, in general terms, the crimes perpetrated by the Khmer Rouge regime against all people, including against Cambodian nationals. However, to meet the legal definition of genocide, there is a requirement to establish an intention to destroy a protected group (ethnic, racial, national or religious), and there has been no consensus internationally as to whether genocide could apply where both victims and perpetrators are members of the same group.

bono lawyers from Singapore (my Singaporean counterparts later formed to become the NGO, Access to Justice Asia LLP).

28. At this stage, the Internal Rules specified that victims of crime could apply to become Civil Parties if they could establish harm resulting from crimes within the court's jurisdiction. This definition covered a very broad scope of victims. The tribunal established a Victims Unit, which was starting to become operational. However, between 2007 and 2011, it was really civil society that covered the important role of outreach to victims who resided in regional Cambodia, informing those who would otherwise never know, about their rights to apply as a party to the criminal proceedings.
29. With the benefit of hindsight, it can be said that neither the drafters of the Internal Rules, nor the parties which established the court, were properly prepared for the masses of victims who had an interest in the proceedings. Most, if not all of the Cambodian population over the age of 30 were victims of the Khmer Rouge regime, the harm resulting from the crimes which were committed in a systemic and widespread manner throughout Cambodia.
30. During my August 2008 visit and another visit to Cambodia in November 2008, with the assistance of local NGOs, I came into contact with survivors belonging to the ethnic Vietnamese minority group, seeking to participate as Civil Parties in the tribunal's proceedings.
31. Following my admission to the Cambodian Bar in 2009, I began directly representing these survivors as an independent counsel representing Civil Parties. This was the beginning of my independent legal practice in Cambodia.
32. The first two years of my *pro bono* work focused on assisting my clients in the application process, and representing their cause during the investigations phase in Case 002. This involved multiple trips to Cambodia, to interview survivors who resided on the floating villages on the waters of the Tonle Sap River.⁷
33. One initial challenge was building trust with these victims of genocide in order to access their stories. Genocide victims do not simply trust everybody – and this is not without good reason. When I first met stakeholders with a role in victim participation at the tribunal in 2008, I discovered that the discrimination and anti-Vietnamese sentiment in social and political discourse was burrowed deep. Back then, even local human rights advocates and some few national lawyers were open in stating a view that they did not consider any ethnic Vietnamese in Cambodia to be “victims” of the Khmer Rouge regime.⁸
34. The Vietnamese people *trusted* me, because I was an *international* lawyer – but more significantly, they trusted me because they were able to communicate directly with me in the Vietnamese language, without interpreters and intermediaries.

⁷ The powerpoint contains a photo of the floating villages where my clients reside, and a paddle boat – our mode of transport for client visits.

⁸ This deeply entrenched hostility was further exemplified by recent election violence and anti-Vietnamese propoganda throughout Cambodia (August 2013 elections).

35. Some of these survivors had not spoken, in over thirty years, about what they had experienced during the Khmer Rouge period. The Vietnamese were a vulnerable minority group that had suffered much discrimination throughout various regimes (not just the KR regime), and many simply did not feel that they had a voice, or any standing to speak.
36. When they did speak, they spoke of horrific crimes – mass deportation to Vietnam, torture, cannibalism, rape, the singling out of members of their group, mass executions of family members, details about the methods of killing and torture; things that would make any ordinary person wretch and cry. These stories, I collected, and offered to the prosecution, in line with the mandate of Civil Parties to “support the prosecution” under the ECCC’s Internal Rules.
37. This evidence was also made available to the ECCC’s Co-Investigating Judges, who were mandated to engage further investigations, and to draft a Closing Order, outlining the alleged facts and an Indictment. I also ensured that the narratives with legal relevance were transformed into witness statements for the case 002 trial.
38. A further challenge in working with this minority group was that the victims feared repercussions for speaking out about their stories – some of my clients faced continued targeted killings by Khmer Rouge guerilla members into the 1990s, even after the collapse of the Khmer Rouge regime. Although the brutality was no longer state sponsored, the risk of repercussion was real.
39. This was a risk that I took very seriously. I did not want to advocate for my clients’ participation at the tribunal, if this participation could result in further harm, or possibly death, for themselves or their family members. This led me to explore possible protective measures for the group as a whole, with the court’s Witness Protection Unit.
40. At the end of 2009, I represented over 100 clients, 43 of whom were ethnic Vietnamese. With time, some of my clients have passed away, taking with them important evidence of the genocide against the group, which – apart from the statements I took – were otherwise etched in their memories. That is the nature of historical crimes – when victims and witnesses pass away, evidence is also lost.

Importance of Local NGO Support

41. All this work would have been impossible without extensive support from my Cambodian colleagues from the local NGOs.
42. A partnership with the Khmer Kampuchea Krom Human Rights Association enabled me – a foreigner from Australia – to gain initial access to these communities, and to maintain regular communication with my clients, particularly since most of my *pro bono* work was conducted whilst I was physically in Australia. At that stage, I had an online relationship with my Cambodian colleagues, and instructed NGO staff about the conduct of our own investigations, in order to ensure that the materials collected were relevant and meaningful to the allegations against the accused.

43. Since 2009, I also built a strategic partnership with Legal Aid of Cambodia. From 2010, I was able to maintain a small office at their premises, from which my legal practice operates with the assistance of volunteer lawyers, assistants and interns.⁹

The Challenge of Prosecutorial Selectivity

44. One of the main features of the prosecution of mass crimes is the selectivity and limitations on the scope of judicial investigations, which ultimately has significant impact on the choice of suspects, charges, and crime sites. These limitations are necessary, because the extent and scale of crimes do not allow for a thorough investigation of all offences.¹⁰
45. At the ECCC, the prosecution pursued genocide charges, but only in relation to a very limited geographical area, this being the Eastern Zone, where almost no ethnic Vietnamese survived.
46. The prosecution's genocide case was largely based on the Khmer Rouge's mixed marriage policies, based on eliminating the Vietnamese bloodline in mixed Khmer/Vietnamese families. The policy and its implementation was good evidence of the requisite specific intention to eliminate a group based on its race or ethnicity. However, this meant that the prosecution case was based largely on the witness accounts of Khmer spouses who lost their Vietnamese spouse pursuant to the policy, rather than any direct ethnic Vietnamese witnesses.

Collective Factual Narrative of Client Group

47. One of the key elements of my clients' stories is that they were targeted for elimination because of their ethnicity and race. I had, by now, gathered a vast amount of information about the collective story of this particular group. There were two main phases to their treatment:

Phase I: Immediately following the Khmer Rouge take-over of their residential areas in 1975, the ethnic Vietnamese were separated from their Khmer neighbors and forcibly relocated to a single temporary work site where they undertook forced agricultural labour. Many lost family members and relatives here due to mass and summary executions.

Phase II: After approximately four months of forced labour, starvation, enslavement and ill-treatment, the ethnic Vietnamese, as a group, were forcibly deported *en masse*, in several fleets down the Tonle Sap River, to Vietnam.

⁹ I work with two national co-lawyers, and represent clients in Cases 002, 003 and 004. Cases 003 and 004 are at Pre-Trial phase, and the work has involved admissibility appeals to the Pre-Trial Chamber, against decisions of the Co-Investigating Judges concerning my clients' admission as civil parties.

¹⁰ The powerpoint includes a "Map of the Killing Fields", from the Documentation Centre of Cambodia, Mapping the Killing Fields Project (2004). This map depicts the widespread scale of worksites, security centres and execution centres throughout Cambodia. However, the scope of judicial investigations was necessarily limited and focused only on approximately 20 crime sites and five or so crimes against specific population groups.

48. This forced deportation was, in fact, the only reason these people were still alive to tell their story. Most of those who stayed behind were in mixed marriages, and none of the Vietnamese who remained inside Cambodia, survived.
49. Apart from my client group, no other Vietnamese survivors had applied to become Civil Parties at the end of 2009. Much of the facts surrounding the collective narrative of the Vietnamese in Kampong Chhnang province supported the overall case constructed by the prosecution in relation to genocide of the Vietnamese.
50. Because the prosecution had not conducted investigations directly with ethnic Vietnamese survivors, the narratives offered by the Vietnamese victims in Kampong Chhnang Province added value to the prosecution case. This narrative was ultimately used in the Prosecution's Final Submission¹¹, which was forwarded to the Office of Co-Investigating Judges for further judicial investigations.¹²
51. In December 2009, my national co-counsel and I decided to submit a request for further investigations to the Co-Investigating Judges in order to shed light on the Kampong Chhnang story, and in particular, to highlight evidence of the systematic, widespread, ill-treatment and deprivation of the human rights of the Vietnamese minority, as evidenced by acts amounting to genocide and crimes against humanity (crimes against a targeted civilian population which were executed in a widespread and systematic manner).
52. In particular, we submitted that the deliberate infliction of certain conditions of life calculated to bring about the destruction of the group; and imposing measures to prevent birth within the group, were acts of genocide. We submitted that the forced deportation, persecution and enslavement of members of the group amounted to crimes against humanity.¹³
53. Unfortunately, the Co-Investigating Judges ruled not to expand the scope of investigations, and as a result, also rejected my Vietnamese clients, on the basis that the harm they suffered was not linked with the scope of judicial investigations.
54. This decision was appealed to the Pre-Trial Chamber a number of times, and ultimately, was successful.¹⁴

¹¹ Co-Prosecutors, 'Rule 66 Final Submission', 16 August 2010 (D390), Case File No. 002/19-09-2007-ECCC-OCIJ (Public redacted version) at:

http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/D390_ENreadacted.pdf.

¹² Office of Co-Investigating Judges, 'Closing Order', 15 September 2010 (D427), Case File No. 002/19-09-2007-ECCC-OCIJ at <http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/D427Eng.pdf>.

¹³ Civil Party Co-Lawyers, 'Civil Parties' Request for Supplementary Investigations Regarding Genocide of the Khmer Krom and the Vietnamese', 3 December 2009 (Document D250/3), at: <http://www.eccc.gov.kh/en/document/court/civil-party-lawyers-request-supplementary-investigations-regarding-genocide-khmer-kro>.

¹⁴ Civil Party Co-Lawyers, "Appeal against Order on the Admissibility of Civil Party Applicants from Currents Residents of Kampong Chhnang Province (D417)", 27 September 2010 (D417/2/3), at: http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/D417_2_3_EN.PDF.

See also: Civil Parties Co-Lawyers, 'Appeal Against Order on the Admissibility of Civil Party Applications Related to Request D250/3', 12 February 2010 (D250/3/2/1/1); and Civil Party Co-Lawyers, 'Appeal against Combined Order on Co-Prosecutors' Two Requests for Investigative Action regarding Khmer Krom and the Civil Parties Request for Supplementary Investigations Regarding Genocide of the Khmer Krom and Vietnamese', 12 February 2010 (D274/4/1).

Mass Admissibility Appeals

55. After one year of visiting Cambodia multiple times on my annual leave from the Australian public service, my *pro bono* work was already rendering me substantially out of pocket. In 2009, I approached the Australian Volunteers International (AVI), which was starting up a “Lawyers Beyond Borders” program. With AVI’s support for a seven months placement as International Criminal Law Advisor to my partner organisation, Legal Aid of Cambodia, I was able to continue independent legal representation of over 100 survivors across various victim compositions full-time, and in-country.
56. To do this, I took leave without pay from my Australian employer, the Commonwealth Director of Public Prosecutions, and by the time the AVI placement was over, my legal practice was running from the premises of Legal Aid of Cambodia.
57. During my placement in Cambodia, the Co-Investigating Judges decided on the status of the 4000 victims who had applied to become Civil Parties. The Co-Investigating Judges rejected about 2000 civil party applicants, mostly on the basis that the harm suffered was not directly connected with matters under the scope of the court’s judicial investigations.
58. I, together with Silke Studzinsky, an international lawyer from Germany, led a mass effort to appeal the rejection of these 2000 civil party applicants.
59. We were notified of decisions rejecting hundreds of civil party applicants every day for a period of about three weeks. Our biggest challenge was that the Plenary of Judges had changed the Internal Rules so that Civil Party Lawyers only had 10 days from date of notification, to appeal in two languages.
60. No one anticipated that the Civil Party Lawyers, collectively, would seriously appeal for this number of victims within such a short timeframe, and within such resource limitations. It appeared that the rules had been amended to ensure that we would be deterred from appealing. But we worked endlessly, and we – two international *pro bono* lawyers working with our national colleagues – were not to be undermined.
61. Ms Studzinsky and I prepared template legal grounds of appeals, based on the statutory interpretation of the definition of “victim”, the interpretation of “harm”, the construction of “judicial investigation” as well as taking instructions from hundreds of clients, in order to ensure that the facts they alleged could be argued to fall within the tribunal’s criteria for admissibility. We held training workshops on how to apply these grounds to the myriad of facts raised by victims, and had the standard arguments translated into the Khmer language. Our legal teams grew as we took on a number of interns on an *ad hoc* basis, and worked intensively over a two month period, doing nothing but mass appeals.
62. As a result of our efforts, the success rate was unprecedented with our national legal colleagues taking ownership of the drafting and appeals process. These efforts ultimately resulted in 98% of rejected applicants being admitted by the Pre-Trial Chamber in June 2011.

63. All my rejected clients – included my entire Vietnamese group – were finally admitted as Civil Parties, with standing equal to the prosecution and the defence, within the criminal process. The Pre-Trial Chamber admitted almost all civil party applicants, finding that it was not necessary for applicants to link their injuries to crime sites specified in the Indictment, which “serve only as examples in order to demonstrate how all these centres and sites functioned throughout Cambodia” through the alleged Joint Criminal Enterprise.

Collective Reparations at the ECCC

64. Having a status as a Civil Party under the Internal Rules means having standing to seek “moral and collective reparations” within the tribunal’s mandate.¹⁵ “Moral and collective reparations” excludes individual and monetary reparations.

65. In the ECCC’s first trial, the traditional civil claim mechanism under Cambodia’s domestic law was left untouched, leaving the individual convicted person responsible to bear all costs of reparations. When Kaing Guek Eav (accused in Case 001) was found to be indigent, no tangible reparations were awarded to the Civil Parties.

66. Amendments to the Internal Rules now allow the court’s Victims Support Section to implement projects (with external funding) to give effect to the reparation claims of civil parties. The Victims Support Section is also mandated to design and implement “non-judicial measures”, which are measures that recognise a greater number of victims, and which are not linked to the securing of a conviction.¹⁶

Clients’ Request for Access to Cambodian Nationality

67. One of the most interesting components about my legal representation work emerged from consultation with my clients about their collective reparations claims. This aspect of the work highlights how victim participation in a criminal trial can shed light on larger human rights issues affecting a minority group.

68. When analysing their Victim Information Forms, I found that a large number of my clients had written “Cambodian nationality” in the field for reparation requests. I did not know what they meant – did they want a grant of Cambodian citizenship? Or were they claiming that they had acquired Cambodian nationality prior to the Khmer Rouge regime, which they wanted to be acknowledged or restored? Was it, in fact, a legitimate request? And was it within the ECCC’s jurisdiction or powers?

69. The claim was too politically sensitive, and consideration was made as to whether it was in the clients’ best interests to drop the claim. However, this was the single most important pursuit for the group, and my clients ardently pressed for the claim to be pursued.

¹⁵ Internal Rule 23 states that “[T]he purpose of Civil Party action before the ECCC is to (a) Participate in criminal proceedings against those responsible for crimes within the jurisdiction of the ECCC by supporting the prosecution; and (b) Seek collective and moral reparations, as provided in Rule 23quinquies”.

¹⁶ Internal Rule 23quinquies 3(b).

70. Upon further instructions, I found that my clients were deprived of basic human, economic and social rights in Cambodia – the reason they lived on the floating villages was because they were not allowed to own land or property, and a loophole in the law meant that water is not considered to be “land”. They were living on the margins of society, unable to find gainful employment, or to access health and education, or even open a bank account or borrow money. Without access to these basic social services, their futures, and the future of their children, looked bleak.
71. These disadvantages existed because they did not have Cambodian nationality. Not only did they *not* have Cambodian nationality, they also did *not* have any nationality under the operation of any state’s laws, including Vietnam. Prima facie, the group was stateless under the principles of international law on statelessness.¹⁷
72. The statelessness issue was only uncovered because of my representation of the interests of this group before the Cambodian tribunal. It was my assessment that the facts upon which my clients instructed me gave rise to a legitimate reparation claim before the tribunal, in accordance with the ECCC’s Internal Rules, which required the establishment of harm suffered as a result of crimes.
73. It was necessary to articulate the crime: Many of my clients had lost vital documentation during the forced deportation to Vietnam in 1975 and, upon returning to Cambodia in the 1980s, were unable to prove their previous civil status in Cambodia. In fact, upon their return to Cambodia, they were treated as “immigrants”, despite all of them having been born in Cambodia, resided in the country for generations, or having acquired Cambodian nationality by operation of past nationality laws, which were in effect during the years they were born.
74. It was necessary to properly articulate the harm: the loss of important documents rendered them unable to prove their identities, their birth in Cambodia, their ties to Cambodia, or any previous acquisition of Cambodian nationality. This harm was caused as a direct result of crimes committed against them by the Khmer Rouge – but most directly, their forcible relocations within Cambodia and ultimately, their deportation out of Cambodia.
75. An assessment of these reparation claims led to a whole new phase in my work with the client group. With the collaboration of the Jesuit Refugee Service Cambodia and United Nations High Commission for Human Rights, Human Rights and Reparations Advisor, Christoph Sperfeldt and I engaged a pilot project, to research the issues surrounding the nationality status of this minority group.
76. Clients were interviewed in multiple phases about their circumstances in Cambodia and the documentation they currently held. The nationality laws in effect in Cambodia during the time they were born were collected and analysed. These included laws under the French Protectorate, the Sihanouk regime, and the current administration.

¹⁷ See Shane Worrell and Khouth Sophak Chakrya, ‘A People left in Limbo: Ethnic Vietnamese still adrift in Cambodia’, Phnom Penh Post, 14 February 2013, pages 1 and 4, available online at: <http://www.phnompenhpost.com/2013021461361/National/ethnic-vietnamese-still-adrift-in-cambodia.html>.

77. In 2012, the main findings were published in “A Report on the Legal Status of Ethnic Vietnamese Minority Populations in Cambodia under Domestic and International Laws Governing Nationality and Statelessness”.¹⁸ The reparation request was ultimately framed as a request for recognition of, or access to, Cambodian nationality.¹⁹

Outlook: Will there be a genocide trial?

78. After 5 years of *pro bono* work with representing the ethnic Vietnamese victims and intermittent appearances at the trial, where is the case going now?²⁰

79. In September 2011, the ECCC’s Trial Chamber severed Case 002 into sub-trials. As a result, the current proceedings (known as Case 002/01) deal only with the crimes associated with forced transfer of the population from Phnom Penh on 17 April 1975.

80. Although the Trial Chamber has indicated that genocide of the Cham and Vietnamese is envisaged for a future Case 002/02, a continuation of proceedings looks highly uncertain given the age and health of the remaining two accused and the length of time required for a final determination in Case 002/01, including hearing any defence or prosecution appeals on conviction or sentence. Further, there are legal problems in using evidence in Case 002/01 for Case 002/02 prior to the trial judgment being rendered and/or prior to a final determination on any defence appeals against conviction, and finally, donor fatigue contributes to uncertainty around the tribunal’s future funding.²¹

¹⁸ Nguyen, Lyma & Sperfeldt, Christoph (2012), ‘A Boat Without Anchors: A Report on the Legal Status of Ethnic Vietnamese Minority Populations in Cambodia under Domestic and International Laws Governing Nationality and Statelessness’, available online at: <http://www.civilparties.org/?p=494>. The Legal Report has received interest from UNHCR Cambodia and regionally, and touches upon a very politically sensitive matter in Cambodia, particularly now amidst preparations for the government elections.

¹⁹ The reparation claim is envisaged to be a project which seeks to *facilitate* the applications for nationality from ethnic Vietnamese victims, who, as a direct result of crimes committed by the Khmer Rouge - namely, forced deportation out of Cambodia - lost any documentation or means of verifying or establishing their connections with the land of Cambodia, upon their return to Cambodia. The fact that such victims could not verify the number of years they had previously lived in Cambodia, or the fact of their birth or their ancestors’ birth in Cambodia, meant that they suffered further harm, in not being able to establish the criteria for a grant of nationality under Cambodian domestic law. As a result of not having the documents to verify that they meet (or can meet) the requirements for a grant of citizenship, they are at a very real risk of statelessness, and essentially live on the margins of society. Facilitation of citizenship applications may mean, for example, a project which raises awareness about the Cambodian Nationality Law and legal criteria that applicants must satisfy for a grant of citizenship. It may also mean a service/project in the community to assist with collecting documentation from applicants, helping them fill out the application forms, and helping them submit these applications etc. It may mean liaising with local government officials to inform them of the situation of the ethnic Vietnamese so that the local authorities exercise their discretion in the grant determination process, in accordance with the Nationality Law.

²⁰ I have appeared a number of times at trial, including for preliminary legal argument and to examine the convicted person of Case 001, Kaing Guek Eav, when he gave evidence against the four co-accused in Case 002, in relation to general aspects of the administrative and military structures of the Khmer Rouge regime.

²¹ At the time of writing this paper, the Supreme Court Chamber, in deciding upon the Prosecution’s second appeal against the Trial Chamber’s severance of the Closing Order into sub-trials, has insisted

Conclusion

81. Representing a minority group that has faced persecution, deportation and genocide, in a country that has been ravished by atrocity crimes and war – as sexy as it sounds – has literally amounted to thousands of *pro bono* hours, and an enormous responsibility. But the hard reality is that victims of atrocity crimes do not have the capacity to pay for legal representation – and without it, these victims who already live on the margins of society, would not have access to justice, and would remain without a voice.
82. In 2013, my work continues, with some support from the Prime Minister’s Endeavour Executive Award. I continue to maintain an office and an Assistant Lawyer in-country, funded by AVI for the financial year 2012 – 2013, whose position is continued by a *pro bono* Assistant Lawyer from the United States (self-funded).
83. Beyond the first case, there is a great deal of uncertainty about the continuation of trial proceedings. The ECCC faces continual funding problems, donor fatigue, political interference and structural problems.
84. Many victims of the Khmer Rouge regime identify themselves, first and foremost, as a *survivor* of the regime. That they are still *alive* is core to their identity.
85. The Khmer Rouge targeted the ethnic Vietnamese for elimination from the Cambodian population – a crime which in legal terms, amounts to genocide as it involves the additional element of an intention to destroy their group, either in part or in whole, on the basis of ethnic and racial identity. The ethnic Vietnamese minority victims I represent have a strong sense of their survivorship, *because* of the fact that they belonged to a group that was *positively* targeted for extermination from Cambodia. Therefore, it was my view, at the beginning of the Case 002 trial, that it is of utmost importance that the crimes for which this group were singled out are heard in one way or another – whether it be ultimately manifested in the form of a genocide trial or a crimes against humanity trial (depending on the evidence).
86. Such a trial would have great impact on the history and future of my clients and their communities, since they are the only direct survivors belonging to the ethnic Vietnamese minority group, and would have a chance to participate as Civil Parties before the ECCC.
87. However, given their enormous losses and suffering, including damages spanning generations, it has always been extremely important to manage my clients’ expectations about any hearing on the crimes against the ethnic Vietnamese minority group, or any reparation award, which necessarily requires a conviction being secured in relation to the relevant criminal allegations.

that the ECCC’s Office of Administration look to the possibility of recruiting a second panel of Trial Chamber judges, to commence hearings in Case 002/02 (second sub-trial) once a judgment is rendered from Case 002/01. The second sub-trial is to include genocide of the Vietnamese. However – funding and other logistical problems aside – there are foreseeable potential legal problems about hearing Case 002/02 pending any potential appeals, particularly appeals concerning any factual conclusions made by the first Trial Chamber panel, in Case 002/01.

88. With time, as the accused grow older, and pass away one by one, it is clear to me that with the inclusion of mass victims in mass crimes trials, it is important not to rely solely on the legal proceedings – which may be affected by delay, loss or lack of evidence and other legal technicalities inflicting the process – but that complementary activities beyond the advocacy work is necessary to ensure that, even if the crimes against this group does not make its way into the legal record, it will make its way into the historical record.
89. Given that my clients are the only Vietnamese *survivors* from this minority group to have applied to participate as civil parties in the proceedings, the significance of hearing genocide is not just for legal accuracy, but to put the facts on the historical record.
90. Internationally, crimes depicted in "genocide" charges should never be forgotten, and a genocide trial would not only be a manifestation of justice for my clients but a reminder, internationally, that there will not be impunity for perpetrators of genocide. Proper acknowledgment of the extent of crimes is essential for the historic record. A trial on genocide charges would afford my clients – the victims of genocide – an opportunity to seek justice for the unspeakable crimes they suffered, and in that process, discover the truth about the defendants' role in those atrocities. Importantly to the ethnic Vietnamese clients I represent, genocide charges reflect the full criminality of the defendants.
91. History is often written by those in positions of success, or those who otherwise have access to the historical record – often, this includes those who have a voice on the legal record. Because crimes of the nature and magnitude such as those suffered by this minority victim group can never be forgotten, it is important to ensure that all voices and perspectives are given an opportunity to be heard, if the world is to learn anything from atrocities of the past.