



The Right to Have Rights in the Mekong
*How Hannah Arendt and the Khmer Krom Illustrate the
Failures of the International Rights Regime*

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Summary

The Khmer Krom are an indigenous people living in the Mekong delta with a complex historical relation to the majority population. Vietnamese legal climate and treatment of minorities has been shaped by this complex history. Contemporary Vietnam has ratified several significant human rights treaties and voted in favour of the United Nations Declaration on the Rights of Indigenous Peoples. This thesis has through fieldwork set out to document some of the lived reality of the Khmer Krom with regard to the legal frameworks provided by indigenous and human rights and found that many several of their most significant rights are being denied. These are rights from both spectra, such as cultural, linguistic and religious rights as well as freedom of expression, association and assembly. Why are these rights being continually denied when, supposedly, the human rights regime is international? I argue that the framework of human rights have failed the most marginalized people by not taking the right to have rights into consideration. By exploring that concept, which was first formulated by Hannah Arendt, it becomes clear that in order to meaningfully institute rights, a political community that can enact those rights is necessary. In the case of the Khmer Krom, such a right could be meaningfully implemented by self-determination. Unfortunately, however, international law has instead used indigenous rights as remedial human rights and thus not realizing their emancipatory potential for instituting conditions where indigenous peoples have the right to have rights. In order to secure such a right, human rights need to be reassessed, focusing more on the material conditions of their implementation and less on a wishful full course menu.

Sammanfattning

Khmer Krom är ett vietnamesiskt urfolk i Mekongdeltat med en komplex historisk relation till majoritetsbefolkningen, vilket speglas i det rättsliga klimatet kring minoriteter. Vietnam har ratificerat flera betydelsefulla konventioner om mänskliga rättigheter och röstade för FN:s deklaration om ursprungsfolkens rättigheter. Den här uppsatsen har genom fältarbete dokumenterat hur Khmer Krom upplever sina rättigheter och har därigenom konstaterat att flera av deras rättigheter kränks. Det handlar både om urfolksrättigheter och mänskliga rättigheter, exempelvis kulturella, språkliga och religiösa rättigheter men också yttrandefrihet, organisationsfrihet och mötesfrihet. Hur kan dessa rättigheter förvägras när mänskliga rättigheter är universella? Jag menar att det nuvarande människorättsparadigmet har misslyckats med att inkludera de mest utsatta grupperna genom att inte ta ”rätten till rättigheter” i beaktande. Genom att utforska det konceptet, myntat av Hannah Arendt, blir det tydligt att för att på ett meningsfullt sätt konstruera rättigheter krävs ett politiskt ramverk för att utkräva desamma. För Khmer Krom vore det möjligt att implementera en sådan rättighet genom självbestämmande. Dessvärre har folkrätten istället använt urfolksrättigheter som ytterligare en typ av mänskliga rättigheter och därigenom gått miste om deras emancipatoriska potential genom etablerandet av en rätt till rättigheter för urfolk. För att uppnå detta bör fokus vara på mänskliga rättigheters materiella implementering istället för på ett kanoniserat ramverk av önskvärda rättigheter.

Foreword

The most important people for this thesis remain anonymous - they drove me around, gave me food and let me sleep in temples.

I am also indebted to all those who answered my oftentimes incoherent emails or helped me with administration: An, Nga, Taylor, Tung, Chomsky, Hydén, Cornelius, Gooch, Besemer, Häthen and Lundell to mention a few.

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Abbreviations

CAT Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment

CCHR Cambodian Center for Human Rights

CEACR Committee of Experts on the Application of Conventions and Recommendations

CEDAW Convention on the Elimination of all Forms of Discrimination against Women

CEMA Committee for Ethnic Minority and Mountainous Affairs

HRC Human Rights Committee

HRW Human Rights Watch

ICCPR International Covenant on Civil and Political Rights

ICERD International Convention on the Elimination of All Forms of Racial Discrimination

ICESCR International Covenant on Economic, Social and Cultural Rights

ICJ International Court of Justice

ILO International Labour Organization

OHCHR Office of the United Nations High Commissioner for Human Rights

PSNR Permanent Sovereignty over Natural Resources

TWAIL Third World Approaches to International Law

UNDRIP United Nations Declaration on the Rights of Indigenous Peoples

UNPO Unrepresented Nations & Peoples Organization

UNTS United Nations Treaty Series

VBS Vietnamese Buddhist Sangha

VCLT Vienna Convention on the Law of Treaties

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1. Introduction

At a time when the traditional international human rights paradigm is facing increasing critique over its effectiveness in protecting vulnerable groups, this thesis sets out to rethink some of the underlying assumptions of the human rights system by highlighting the failings surrounding the human rights situation of the Khmer Krom, a minority group in Southern Vietnam. Adopting the lens of Hannah Arendt's theory of a 'right to have rights', the thesis explores why human rights fail to be upheld for people on the margins, as well as how the theory of the 'right to have rights' could potentially act as a way to create more meaningful and effective implementation of rights at the local level through an increased emphasis on self-determination.

1.1 Background and Context

Researching the Vietnamese indigenous minority known as Khmer Krom is extremely challenging. Mistrustful questions from the authorities are common for both participants and researchers.¹ Rights research is even more difficult, with the most recent comprehensive report from Human Rights Watch (HRW) published nearly ten years ago and even at that time having only "limited ability" to present a full picture due to government constraints on research.² Constraints are many, recent examples include deportations of human rights workers.³ This demonstrates clearly the need and relevance of field research about the situation of Khmer Krom.

Vietnam's ethnic Khmers live in the southernmost part of Vietnam, the so called Mekong Delta. Once part of the Khmer Empire, they were separated from Cambodia when Vietnam annexed the land in the 18th century. Khmer Krom now face serious restrictions on freedom of expression, religion, assembly as well as other issues related to landlessness, poverty and dis-

¹Philip Taylor 2014, p. xv.

²Human Rights Watch 2009b, p. 12.

³Reuters 2018.

crimination.⁴ More so than the rest of the country.⁵ Like the HRW report, this thesis will not present a full picture of rights abuses, but has aspired to document how the Khmer Krom experience their lived reality and what rights they themselves think are significant.

Through my fieldwork, a discrepancy becomes visible between the rights Khmer Krom are supposed to have under international human rights treaties and their current situation. They do not possess many fundamental human rights and have no meaningful way to claim them. As for millions of other minorities, the rights regime is unresponsive to their needs. If human rights are truly universal, as they should be since most states have accepted them binding international legal norms, how come the Khmer lack so many rights?⁶ I argue that the best way to understand this discrepancy is Arendt's theory on the right to have rights, which she asserts is a precondition for meaningfully instituting rights for marginalized groups. This thesis employs Arendt's theory to understand why the human rights framework fails people like the Khmer Krom, who are on the margins of society.

"A right to have rights"⁷ is a term coined by Hannah Arendt shortly before 1950. Because she was stateless for almost 20 years, she is often defined by that statelessness, but she was first and foremost a political theorist and philosopher. Arendt did not consider her discussion on the rights to have rights to be particularly groundbreaking, for her the central premise of the theory was self-evident - namely that rights had prerequisites. Most importantly, rights require membership in some sort of political community.⁸ 50 years after Arendt's first formulation others started further developing the theory.⁹

Around the same time as Arendt wrote her chapter on the *End of the Rights of Man*,¹⁰ all of Cochinchina (now southern Vietnam) was ceded by France to Vietnam, without consulting the indigenous¹¹ Khmer Krom living there. "Khmer" hints at their affiliation with Cambodia, which has historically governed the land. But, the Khmer Krom are viewed with ambivalence by their northern neighbour. The Vietnamese, on the other hand, consider the Khmer Krom one of their 53 minorities and a part of the national heritage. Thus implying that the ways of Khmer

⁴Human Rights Watch 2009b.

⁵Human Rights Watch 2018, p. 2.

⁶Donnelly 2013, p. 94.

⁷In subsequent editions of *Origins* changed to "the rights to have rights".

⁸Arendt 1973, p. 301.

⁹DeGooyer et al. 2018, pp. 1,9.

¹⁰Arendt 1973, p. 267.

¹¹Vietnam disputes their indigeneity, motivation of terminology is to be found below in Chapter 4.

Krom are outdated and that they should assimilate into the present.¹² Feelings of not belonging to either community are common.^{13,14,15} One monk put the situation like this:

”It is very difficult to get visa for us. Difficult to travel abroad. We need to use Vietnamese passport. Regardless of ethnic group. So when we go abroad no one knows about Khmer Krom and think that we are Vietnamese. But we are Khmer. When we go to Cambodia they tell us ”you are Vietnamese.”¹⁶

The same monk was interviewed the day before, but we were interrupted after he noticed surveillance personnel listening as someone had likely called the police. For the monks, this was nothing out of the ordinary - they knew very well that the boundaries of their freedom of speech did not include talking to foreigners and that temples are under systematic surveillance.¹⁷ In Arendt’s formulation of a right to have rights, a central formulation is:

”We became aware of the existence of a right to have rights (and that means to live in a framework where one is judged by one’s actions and opinions) and a right to belong to some kind of organized community”¹⁸

From a perspective of rights, the monk was not judged by his actions or opinions because they were unknown to the onlooker. Rather, he lives in a framework where one is judged by one’s ethnicity rather than actions and opinions, something which entails significant restrictions on all other rights - he does not possess the right to have rights. In this thesis we will examine rights the Khmer Krom should possess, rights monks do not possess, and if there are any meaningful remedies.

1.2 Purpose

While all humans possess certain inalienable rights as protected under international human rights law, minorities and other vulnerable groups, such as the Khmer Krom, face much higher

¹²Philip Taylor 2014, pp. 2-3.

¹³Moore 2013, p. 122.

¹⁴Human Rights Watch 2009b, p. 77.

¹⁵Philip Taylor 2014, p. 3.

¹⁶Khmer Krom Interview nr. 6.

¹⁷UNPO 2018, p. 14.

¹⁸Arendt 1973, p. 296.

levels of violations. The purpose of this thesis is to examine the effectiveness of the contemporary human rights paradigm in protecting vulnerable groups by adopting Hannah Arendt's theory of a "right to have rights". This is done by investigating the current rights situation of the Khmer Krom and then applying a critical perspective.¹⁹

Although parts of this thesis could be interpreted only as a critique of the Vietnamese state, that is not the sole purpose. Rather, the Arendtian theory exposes difficulties for all minorities regardless of nation-state. The findings of this thesis are equally relevant in how Sweden has treated its minorities - the Sami. But rather than criticize individual states, it illustrates failings in the nation state-system and human rights framework as a whole - for which protection of rights has been shown to be fragile.

1.3 Research Problem

To focus my thesis, my overall research question is divided into three more or less intertwined parts:

1. How are the human rights and indigenous rights of the Khmer Krom being violated?
2. How can these violations be understood as inherent flaws in the international rights regime through Arendt's theory on a right to have rights?
3. Would respect for indigenous rights meaningfully institute a right to have rights for the Khmer Krom?

By doing that the thesis becomes an exploration of the nexus between the international human rights law, indigeneity and Arendtian theory. Furthermore, ways of moving forward are analyzed, one such is whether indigenous rights for the Khmer Krom can help meaningfully institute a right to have rights. In essence, to explore why the monk mentioned above does not have rights such as freedom of expression and how such rights can be meaningfully instituted for peoples on the margins.

¹⁹Arendt 1973, p. 269.

1.4 Method

The nucleus of this thesis is constituted by field research carried out in the Mekong Delta in October, November and December 2018. The fieldwork consists of interviews in the provinces of Can Tho, Vinh Long and Tra Vinh with mostly monks. Because participants risk physical abuse, interrogation, detention and so on,²⁰ identifying information has been withheld with original records encrypted on free²¹ software.

Due to the difficulty of gathering data there has not been any significant delimitation in which Khmer have been interviewed. Selection of participants has been based on willingness to participate and feasibility to interview without negative effects. Countless development aid organizations, NGOs, state agencies and branches of international organizations such as the UN have categorically declined requests for interview. Perhaps this hints at the sensitive nature of the subject. Either way, voices featured in this essay are exclusively Khmer with a majority of Theravada Buddhist monks. Monks of course, have much more to lose from participating in interviews than those working at international organizations. This was apparent and made it difficult to only rely on interviews due to stress and sometimes even interruptions by surveillance personnel. The fieldwork has therefore been contextualized by the few previous inquiries into the human rights of the Khmer Krom as well as rich ethnographic research.

International legal dogmatic method plays an important part in this project but is not sufficient. As a prerequisite in most legal analysis, the legal framework must be examined in order to properly discuss the rights. But since a textual method does not account for the fact that rights can be enacted in different ways depending on the social context, a method that examines rights beyond legal texts is required. The doctrinal approach has been complemented by fieldwork consisting of interviews to examine the discrepancy between professed rights and actual lived reality. Inspiration for this has been drawn from various handbooks of human rights monitoring²² and previous human rights fieldwork on the Khmer.²³

Interviews were conducted in varying settings but mostly inside temples, or on temple grounds. Privacy was a concern especially when interviewing higher ranking monks, as they were constantly surrounded by other monks and this may have impacted their ability to speak freely.

²⁰Human Rights Watch 2009b, p. 11.

²¹Free as in freedom, see <https://www.gnu.org/philosophy/>

²²for instance Bård A. Andreassen 2017.

²³Human Rights Watch 2009b.

Rank and file monks interviewed in private were indeed more outspoken, frequently contradicting the state narrative. Restricted access to satisfactory research environments has limited other Khmer Krom studies as well.²⁴

Considering epistemology, the choice to use a qualitative rather than a quantitative approach has been informed by what former research has demonstrated to be a feasible route in combination with the limited time available in a minor field study.²⁵ Feasibility in this case refers to the difficulty in gathering material due to the political sensitivity of the Khmer Krom in Vietnam.²⁶

For the more doctrinal parts of this thesis, the general legal dogmatic method in international law takes its departure point in the sources doctrine as codified in article 38(1) of the ICJ statute.²⁷ As the name implies, the article lists a number of sources, including conventions, custom and general principles of law recognized by civilized nations. It is widely regarded as the most authoritative and complete list of international legal sources.²⁸ Some have argued that it is indeed used as the definite manner in which international law is stabilized as actual law.²⁹

General rules are found in the 1969 Vienna Convention on the Law of Treaties (the VCLT).³⁰ For this reason, VCLT article 31 and 32 will be used as the method for treaty interpretation. Article 31 establishes that the treaty should be interpreted "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose".³¹ If the result produced is unclear, article 32 can act as a supplementary means of interpretation, which allows for travaux préparatoires to be used.³² For the purposes of this thesis it is noteworthy that some have argued that in human rights contexts, preparatory works are of use when establishing what constitutes "good faith". The main difference is their more decisive character under article 32.³³

²⁴Human Rights Watch 2009b, p. 12.

²⁵Besemer 2012, pp. 43-45.

²⁶Ibid., p. 63.

²⁷Statute of the International Court of Justice, 26 June 1945, UNTS 993

²⁸Shaw 2017, p. 70.

²⁹Parfitt 2014, p. 298.

³⁰Vienna Convention on the Law of Treaties, 23 May 1969, UNTS, vol. 1155, p. 331

³¹Sands and Peel 2012, pp. 130-131.

³²Ibid., p. 132.

³³Bård A. Andreassen 2017, p. 25.

1.5 Theory

Both the doctrinal approach and fieldwork fail to describe why the Khmer Krom lack rights - they only address what rights are granted through law and which of those rights are being violated. In order to examine why Khmer Krom lack rights and why that can tell us about the international rights regime, the fieldwork and doctrinal findings need to be critically assessed. That means the framework of human rights will be subjected to criticism because it is insufficient for vulnerable groups.³⁴ Subjects such as the antagonistic state-centrism, overemphasis on individual rights at the expense of communitarian rights thus neglecting the actual needs of many indigenous people have been explored before.³⁵ This thesis will cover similar criticisms but does so by taking Arendt's right to have rights theory as a departure point.

The right to have rights addresses the key problem of rights becoming out of reach and functionally meaningless for certain people, as has happened to Arendt and millions of other refugees, minorities and stateless people. Rights become void if they are removed from an organized community in which they can be claimed.³⁶ Many consider Arendtian questions, such as statelessness a part of international law and global histories on the subject have been critiqued for omitting it.³⁷

The right to have rights was originally theorized as a precondition for the ability of stateless refugees and minorities to claim human rights.³⁸ Therefore, it is applicable in a setting of indigenous rights and human rights.³⁹ Furthermore, the emphasis on community provides interesting links between human rights, indigenous rights and self-determination. As the right to have rights was not further developed by Arendt, Samuel Moyn has questioned if there is any justification for theorizing about the right to have rights within the confines of Arendt's own thinking.⁴⁰ For the purposes of this thesis, what is important is not a theological reading of Arendt, but critically assessment of gaps in the international rights regime. Therefore, subsequent theories drawing on the work of Arendt have been regarded as equally important.⁴¹ Another notable departure is that I have used a TWAIL (Third World Approaches to Interna-

³⁴Moyn 2018a.

³⁵Castellino and Bradshaw 2015.

³⁶Arendt 1973, pp. 296-297.

³⁷Hanley 2014, p. 322.

³⁸DeGooyer et al. 2018, p. 8.

³⁹Arendt 1973, p. 297.

⁴⁰Moyn 2018b, pp. 71-73.

⁴¹For instance Benhabib 2018.

tional Law) perspective on how the colonial encounter is reproduced by international law and then further reproduced in the post-colonial state's relation to minorities.⁴²

Arendt's relevance and the applicability of the theory will be further detailed in the chapter outlining her theory.⁴³ There I also confront aspects of Arendt's scholarship I reject. However, the critique of certain aspects of Arendtian thought is not a critique of other research using her theories or an imperative to always discuss such aspects of her work. It is the setting of practical application in relation to indigenous people that has caused me to conduct a thorough examination in order to construct a convincing theoretical framework by illuminating all relevant aspects.

But what are rights? For Arendt, economic and social rights exist outside of the spectrum of rights.⁴⁴ For the purposes of this thesis, as for other contemporary research,⁴⁵ such a strict limitation has not been made. Instead, I use rights to denote international legal entitlements, as did Arendt.⁴⁶ This thesis focuses on rights that are Arendtian in nature. I refer to them as Arendtian rights and although it is not a conventional category of rights, it is the most natural delimitation of rights. I use the term to signify rights that are important in the establishment of a rights regime or a right to have rights. Such rights focus on political community but are not exclusively political rights. In essence, if the removal of a right undermines the survival or creation of a political community - that is an Arendtian right. Arendt did not use these terms, but to facilitate understanding in a legal context, we can split the right into primary Arendtian rights such as self-determination, freedom of expression and assembly. They directly relate to the political community and the political practices in which rights are claimed.⁴⁷ Other rights such as language and religion are most often essential in creating a long-term framework where rights can be claimed (a political community) and therefore secondary Arendtian rights. These categories are not fixed but a spectrum where the primary rights are closer to the singular right in the phrase right to have rights.

These rights coincide with the rights Khmer participants highlight as important in fieldwork interviews. They transcend categories, but are mostly human rights and sometimes indigenous

⁴²Anghie 2007, p. 207.

⁴³See chapter 5.

⁴⁴Moyn 2018b, pp. 68-69.

⁴⁵See for instance DeGooyer et al. 2018.

⁴⁶In the context of a right to have rights, see Benhabib 2005, pp. 6-7.

⁴⁷Maxwell 2018, p. 50.

rights⁴⁸ expressed as remedial human rights in that they reinstate already existing human rights, but for indigenous peoples. Importantly, I have also included the right to self-determination in the discussion of rights and although it falls within these two categories, it has been assigned a central role and more fundamental role in this thesis, as is frequent in human rights treaties as well.⁴⁹

Engaging with marginalized peoples also poses theoretical challenges. Philip Taylor, who is likely the most knowledgeable non-khmer scholar in the world who has studied the Khmer Krom, refers to the prevailing image of the Vietnamese minorities as carceral, one of subjugation and discipline while limiting the analysis to that of the nation-state. Minorities have been described and spoken for within the confines of the state-system. Consequently, research has tended to reproduce this image. These are salient remarks that this thesis has tried to take into account in several ways. Such as focusing on the Mekong region rather than only Vietnam and trying to respect Khmer Krom agency by voicing the actual concerns of their community (albeit with some difficulties due to the research environment). What's more is that the Arendtian theory puts focus on agency and political community hopefully resulting in a thesis mindful of the carceral discourse and thereby not reproducing it.⁵⁰

1.6 Material

The thesis consists of international law, legal scholarship, and fieldwork interviews. The interviews have all focused on a similar set of questions but still differ in length and structure due to varying conditions of research. Many declined to be recorded which affects the level of detail, especially when in environments where the time for taking notes is limited. Being physically present in Vietnam has also enlightened me about the situation in ways that a literature review could not have done, by witnessing repression first hand as well as activist Khmer people fearing for their safety. There has been a general reluctance, if not outright aversion to discussion of topics of rights and equality on behalf of the Khmer Krom, especially from civil society and aid organizations in Vietnam.

⁴⁸The Khmer Krom constitute an indigenous group, see chapter 4.

⁴⁹See for instance Art. 1 ICCPR & ICESCR.

⁵⁰Philip Taylor 2008, pp. 5,33-34.

1.7 Limitations

Due to the difficulty of gathering data I have been dependent on the help of others in finding contacts. This has led to an unbalanced thesis with regard to women's perspectives as only one woman has been interviewed which is a major flaw unquestionably, but one that has its explanations. Women are excluded from Khmer Theravada⁵¹ monasticism, and it is primarily the monks who can discuss and mount resistance to the current state of affairs.⁵²

Many limitations have manifested through the reluctance and ambivalence toward being interviewed. One such example is that participants would often change their story as the interview progressed and trust was built. Another is that interviews were sometimes ended with participants requesting I find the objective truth myself by "observing reality" or similar wordings. Thus suggesting that the interview was not as outspoken as they would have liked.⁵³

1.8 Ethical Concerns

A focus on rights is invariably accompanied by issues of political sensitivity. But this is true to differing degrees depending on the methodology of the project. A doctrinal approach can cover areas that are controversial while posing significantly less risk of harm than fieldwork.⁵⁴

This project seeks to integrate ethical considerations into the methodology of the study itself by seeking guidance through human rights handbooks. Most importantly, the study is guided by the principle of non-maleficence (or No Harm).⁵⁵ The principle emerged against a backdrop of human rights abuses against already disadvantaged or discriminated groups in research settings.⁵⁶ Now it is codified in human rights instruments such as article 7 International Covenant on Civil and Political Rights (ICCPR)⁵⁷

All of this is applicable in this field study involving the Khmer Krom. The risk associated is not one of direct harm, i.e. that the study in itself subjects participants to harm, but rather

⁵¹Theravada is the Buddhism practiced by Khmer as opposed to the Mahayana Buddhism followed by the ethnic Vietnamese.

⁵²Reasons for this will be discussed below in the chapter on Khmer Krom.

⁵³Khmer Krom Interview nr. 1, Khmer Krom Interview nr. 2, Khmer Krom Interview nr. 3, Khmer Krom Interview nr. 5.

⁵⁴Bård A. Andreassen 2017, p. 192.

⁵⁵Ibid., pp. 193-195.

⁵⁶Ibid., p. 197.

⁵⁷ICCPR, 23 March 1976, UNTS 171.

that harm can come as an indirect consequence of participation due to risks of government repression or social tension.⁵⁸ In such a setting, it is vital to take measures to minimize such risks. Therefore, anonymity, careful data collection with encrypted storage as well as encrypted channels of communication whenever possible are central to the field study.

Another central concept is voluntary informed consent which entails that participants of the study are properly informed about the research method and aim as well as the voluntary nature and scope of their involvement. The latter also includes the possibility to cancel interviews whenever. Research has shown that a contractual approach to consent only partially gives participants the feeling that they can freely determine their level of involvement.⁵⁹ Participants were therefore repeatedly reassured of the voluntariness and did in fact cancel interviews when approached by surveillance personnel.

1.9 Outline

Following the introduction, the second chapter describes the historical events and the present shaped by those events, with regard to Vietnam, its minorities and legal climate.

The third chapter outlines the frameworks of rights relevant to the Khmer Krom.

The fourth chapter details the history, current situation and lived reality of the Khmer Krom. There is also an inquiry into how the rights framework discussed in the earlier chapter functions when applied to the Khmer Krom.

The fifth chapter motivates why the right to have rights is relevant and applicable in the situation of the Khmer Krom, followed by an explanation of the theory.

The sixth chapter analyzes what has been found by applying the Arendtian theory to the actual situation of the Khmer Krom, thereby tying the thesis together. Analytic perspectives also occur throughout the thesis.

⁵⁸Bård A. Andreassen 2017, p. 199.

⁵⁹Ibid., p. 206.

2. Historical Background and Context

This chapter provides an overview of Vietnam and its history in order to understand the situation of the Khmer Krom.

2.1 A Brief Legal History of Vietnam

The socialist neoliberal market economy is a prominent example of inherent historical contradictions in the Vietnamese state.^{60,61} Having moved away from collectivism, legitimacy now hinges on growth and poverty reduction. The state is therefore hesitant to use its powerful legislative capacities in some areas, due to fears of hindering development.⁶² Despite growth, Vietnam remains a closed country consistently ranked low in indexes of political freedoms. For press freedom Vietnam is ranked at 175 out of 180 by reporters without borders.⁶³

Vietnam has been subjected to three distinct legal periods. First the civilizing mission resulting from French imperial ambitions. Such colonial domination through imposing supposedly humanitarian objectives was explicitly racist with economic motives.⁶⁴ In Vietnam this is illustrated by introduction of some European laws while simultaneously denying Vietnamese individuals basic (Arendtian) rights such as assembly and association. Unfair trials, unpaid labour and an unequal taxes were common under French legal rule.⁶⁵ However, as Vietnamese people were unfamiliar with French law, the rule of neo-confucian customary law⁶⁶ was continued. At the same time, a parallel liberal rights based legal system was created for the French and a few Vietnamese elites.⁶⁷

⁶⁰The Constitution of the Socialist Republic of Vietnam, Art. 51.

⁶¹Schwenkel and Leshkovich 2012.

⁶²Ortmann 2017, pp. 2-3.

⁶³Reporters without Borders 2018.

⁶⁴Anghie 2007, pp. 96-97.

⁶⁵Boer et al. 2015, p. 64.

⁶⁶Codified law also existed, see the Nguyen Code for example.

⁶⁷Boer et al. 2015, p. 65.

In the second period, the 1960s and 70s, the Vietnamese party leadership borrowed unreflexively from the Soviet legal tradition, in opposition to figures such as Ho Chi Minh. Like the preceding imposed system, the Soviet legal culture was eurocentric and incompatible with the traditional Vietnamese conceptions of law.⁶⁸ Marx' himself displayed orientalist⁶⁹ tendencies in his concepts of Asian cultures as backwards and barbaric, which made Vietnamese legal conceptions undesirable.⁷⁰ Incompatibility is not a question of cultural difference, rather, some scholars have pointed out that many of the legal concepts were already developed in Asian societies. By blindly imposing their own legal traditions western states failed to bridge gaps and downplayed native legal theory and jurisprudence.⁷¹

The current legal regime is inextricably bound to the Đổi Mới reforms as the single most important factor in contemporary legal discourse.⁷² The hegemony of development has revised old Marxist orthodoxies. In conflict with traditional Marxist legal scholars such as Pashukanis,⁷³ it is now claimed that the economic base (the means of production) and superstructure (includes the law) can co-exist with relative autonomy, meaning that the central socialist principle of law as a reflection of class interests has been abandoned. This justifies the shift to laws promoting market rule.⁷⁴

Contemporary legal discourse ranges from neoliberal models of state intervention only in the case of market failure to state control over all matters.⁷⁵ It is important to note that the neoliberal view has been advanced by foreign donors, such as Sweden.⁷⁶ The Mekong region follows the general trajectory of the 1990 Washington Consensus, an array of principles emanating from the United States seeking to liberalize trade and leave the setting of prices to market rule.⁷⁷ But Vietnam is complex in this regard, even if it does not want to accept a free and autonomous civil society, donors have been able to influence policy significantly in regard to market access - making Vietnam join the world trade organization in 2007.⁷⁸

Developmental aid has been "instrumental" in the Đổi Mới reforms, paving the way for the

⁶⁸Gillespie et al. 2005, p. 50.

⁶⁹See for instance Said 1978.

⁷⁰Marx and Avineri 1968.

⁷¹Anand 1972, pp. 9-10.

⁷²Gillespie et al. 2005, pp. 55-56.

⁷³Pashukanis 1997, p. 66.

⁷⁴Gillespie et al. 2005, pp. 55-56.

⁷⁵Ibid., p. 57.

⁷⁶McGillivray, Carpenter, and Norup 2012, p. 25.

⁷⁷Chomsky 1998, p. 19.

⁷⁸Boer et al. 2015, p. 74.

”socialist-oriented market economy”⁷⁹ Aid therefore has to be understood through a lens of its possibility of impacting policy. Generally, for every dollar sent to the global south through aid, 24 dollars have been sent back in net outflows to the global north⁸⁰

Either way, once one of the poorest nations in the world, Vietnam is now ranked as lower middle income country by the world bank.⁸¹ The Khmer Krom, and many other minorities have not benefited from the growth associated with the reforms. The average Khmer Krom monthly income in 2017 was roughly 60 USD, less than half of the 150 USD mean income for the rest of the country.⁸² For a lot of people, the reforms married the authoritarian state structure with private capitalism. While lifting many above the around one dollar poverty line, this also pleased multinational companies in granting a labour force kept in line by a police-state machinery, unable to unionize, voice dissent, or affect the means of production.⁸³ This is an explicit selling point in the development policy to draw in foreign investment, as workers are claimed to be bound by “traditions emphasizing learning and respect for authority as well as low wages”.⁸⁴

2.2 Vietnamese Minorities in History

Minorities make up 53 of the 54 ethnic groups in Vietnam and are scattered across the country, with significant concentrations in the north, the highlands and the Mekong Delta.⁸⁵ They permeate many historically significant events. They fed Viet Minh for years leaders in the fight against French colonialism and helped secure the propagandized and important victory at Dien Bien Phu. Yet, when victory was certain and the self-proclaimed communist forces took over the significance of indigenous peoples were often downplayed. Promises made in war time could not be implemented immediately after the birth of the post-colonial state. It was argued that the population should rally behind the universalizing discourse of the socialist state-building project instead. This contradicted earlier commitments to regional autonomy as power consolidated with the ethnic majority.⁸⁶ The Khmer Krom were found on both sides of the Vietnamese Kinh majority in the colonial struggle. Through the free Khmer movement, some aligned with

⁷⁹McGillivray, Carpenter, and Norup 2012, p. 25.

⁸⁰Kar and Schjelderup 2016.

⁸¹World Bank 2014, p. 5.

⁸²Tung 2018, p. 237.

⁸³Van 2010, pp. xvii-xviii.

⁸⁴Human Rights Watch 2009a, p. 10.

⁸⁵CIA 2014.

⁸⁶Michaud and Forsyth 2011, p. 5.

communist forces such as Viet Minh. Others, including monks, were put into French sponsored militias.⁸⁷

But all post-war Vietnamese intentions were not necessarily bad. After reunifying the north and south, attention to minorities was brought through the class struggle. Quoting Lenin, the party frequently stated that violation of equal rights for minorities even through inattention or neglect were obstacles to class solidarity and development. Complete assimilation was also not a singular objective in the party hierarchy. Le Duan, the party secretary famously said that support for minorities would lead to the country becoming a flower garden of many colors and fragrances. But this was premised on the fact that solidarity did not mean solidarity with one's neighbours or ethnicity but with the state. What's more is that such struggles were subsumed under the ultimate goal of establishing communism.⁸⁸

Becoming communist was often indistinguishable from shedding indigenous identity as minorities (paradoxically) had to give up communal forms of living along with rituals deemed to be "backwards".⁸⁹ Other notable post-reunification policies include the land reforms discussed more in detail below,⁹⁰ but essentially lead to collectivization that in many cases impoverished and displaced minorities, including the Khmer Krom which has been reflected through field-work.^{91,92}

The mid-1980s brought explicitly repressive Khmer policies. Monks were imprisoned because they taught Khmer language, culture and provided monastic literature. The Vietnamese government supposedly believed Khmer monks were involved in a United States backed plot to reinstate the pre-communist regime. Buddhist scholar Ian Harris report that monks at this time were killed by having their stomachs cut open.⁹³ These policies were abandoned in the 1990s, although some claim that they shifted to covert and subtle form of control and repression.⁹⁴

Post-1990s history is inextricably bound up with the Đổi Mới economic reforms. The official narrative centers around a population pleased due to significant Vietnamese growth, but recall that Vietnam lacks press freedom.⁹⁵ Minority members who have went into exile and relocated to

⁸⁷Human Rights Watch 2009b, p. 15.

⁸⁸McElwee et al. 2004, pp. 196-197.

⁸⁹Ibid., p. 196.

⁹⁰See Chapter 4.

⁹¹Human Rights Watch 2009b, p. 18.

⁹²Khmer Krom Interview nr. 1.

⁹³Human Rights Watch 2009b, pp. 18-19.

⁹⁴Ibid., pp. 18-19.

⁹⁵Reporters without Borders 2018.

other countries, notably the so called Montagnards,⁹⁶ have compared to policies to genocide due to the resettlement programs bringing in ethnic Vietnamese who marginalize desperate groups even more.⁹⁷ These plans coincided with the launch of the Committee for Ethnic Minority and Mountainous Affairs (CEMA), the most authoritative source of minority policy. CEMA often describe rural areas as untouched frontiers, reproducing the colonial difference by ignoring the people living there.⁹⁸

As mentioned earlier, French colonialism played an instrumental part in producing the modern day situation but the Vietnamese were long settled in the area then. One Khmer woman told me about the history of ownership:

”The Mekong Delta used to be part of Cambodia. The Cambodian history said that Vietnam fights Cambodia to own this land. Vietnamese say that it was a gift. ”⁹⁹

The woman interviewed knows the official account from school. It emphasizes events in year 1757 and that the Cambodian monarchy withdrew its territorial claim to the Mekong Delta in favour of the Nguyễn Lords on their march to the south (nam tiến). Scholars question the unambiguous nature of such description as borders were not clearly demarcated and no formal act was signed.¹⁰⁰

2.3 Vietnamese Minorities in the Present

Vietnamese policy with regard to self-determination is contradictory. On the one hand the anticolonial forces saw the asserting of post-colonial sovereignty as their primary goal. They instituted autonomous zones for minorities in the north and Communist Party General Secretary Le Duan praised minorities for their solidarity. But autonomous zones were abandoned before even materializing in the south, an expression of the general fear of indigenous claims of self-determination .¹⁰¹ The resettlement programs are historical evidence of this. State policy encouraged people to move to the highlands which often resulted in land grabbing and conflict between the indigenous peoples and the Vietnamese settlers.¹⁰² The fear of self-determination

⁹⁶Montagnard is an umbrella term for indigenous peoples inhabiting the Central Highlands.

⁹⁷McElwee et al. 2004, p. 201.

⁹⁸Ibid., pp. 202-203.

⁹⁹Khmer Krom Interview nr. 8.

¹⁰⁰McHale 2013, pp. 369-370.

¹⁰¹McElwee et al. 2004, p. 195.

¹⁰²Ibid., pp. 200-201.

continues into the present with leaked government documents showing that the state believes the Khmer Krom are propagandizing self-government and separation by "taking advantage of land disputes [...] and democracy problems".¹⁰³

Such disputes have material consequences beyond the propaganda. Poverty reduction has not been effective for most of the 53 minorities. In 2016, 6,4 percent of the majority Vietnamese population lived below the poverty line of roughly 1,9 USD, compared to 76.2 percent among the H'mong minority and 23.7 percent among the Khmer. Only 24 percent of minorities had access to sanitation, compared to 80 percent of the majority population.¹⁰⁴ Minorities are often wrapped in a discourse of development and there are studies documenting inequalities in socio-economic status also from Vietnamese universities.¹⁰⁵ Such developmentalist accounts often fail to engage with questions like language barriers, adequate access to education suited to minority needs and discrimination in the labour market which is what research points to as effective.¹⁰⁶ Such problems could maybe be addressed with meaningful indigenous rights, but given the efforts to curb claims of self-determination by denying indigeneity, that seems unlikely. Fear of internal fragmentation of power trumps inclusive economic growth.¹⁰⁷

2.4 Who are the Khmer Krom?

The Khmer Krom inhabit the southernmost part of Vietnam. Historically a part of Cambodia and known in Khmer as Kampuchea Krom.¹⁰⁸ They are one of 53 ethnic minorities, scattered across Vietnam. In demographic counts their numbers vary, with official numbers from the Vietnamese state at a bit more than one million.¹⁰⁹

The 1949 cession of the French colony of Cochinchina is a familiar story of colonial incompetence coupled with inhumane motives and of central importance to the current situation of the Khmer Krom. France wanted to solve a territorial dispute with Cambodia in favour of the Vietnamese, fueling general Khmer hatred of Vietnam at the time.¹¹⁰ The cession shifts history from colonial to post-colonial, but it is not the singular most important event. It was preceded

¹⁰³Human Rights Watch 2009b, p. 75.

¹⁰⁴MOLISA and UNDP 2018.

¹⁰⁵Tung 2018.

¹⁰⁶Nguyen et al. 2017, pp. 160-161.

¹⁰⁷CESCR 2013, para. 27.

¹⁰⁸Philip Taylor 2014, p. 6.

¹⁰⁹General Statistics Office of Vietnam 2010, p. 134.

¹¹⁰McHale 2013, p. 368.

by long campaigns by the french to promote Vietnamese migration into the delta while at the same time encouraging the different groups to "stay apart".¹¹¹ Events that took place in the post-colonial era are arguably even more important. The Mekong delta was at that time subjected to a 30-year period of military conflict and violence including the French and American war,¹¹² as well as the border conflict with Cambodia. Khmer Krom are often marginalized in these histories but they suffered far reaching, negative consequences of the wars.¹¹³

One such consequence was the land reforms instituted by the post-colonial government in 1982, land was incorporated into collectively managed institutions which determined who would farm what and the wages. Roughly ten years later these collectivization policies were abandoned and the land was supposed to returned to its rightful owners, but according to multiple sources in O Mon District cited by Taylor, only a small fraction of the land belonging to Khmer Krom was returned, forcing them into a wage labour.¹¹⁴ Places close to O Mon, such as the Mekong Delta's largest city - Can Tho illustrate a general trend in which Khmer Krom communities experience an influx of ethnic Vietnamese which results in rapid expansion and growth of infrastructure. The Khmer population becomes poor and has to rely on wage labour, economic inequality is a fact.¹¹⁵

Violence between Vietnamese and Khmer occurred throughout the process of decolonization. Something which neither country is interested in pointing out. Focusing instead on nationalist histories in which neither country is interested in including the Khmer Krom, perhaps amplifying their sense of non-belonging. In short they are historically tied to Cambodia, but exist outside the borders, are and have been viewed with suspicion by the project of Cambodian nation-building. While the Vietnamese state on the other hand has failed to provide them with an sufficiently inclusive political culture that is receptive to minority rights. This is not only an historical account, as this "failed solution" continues to shape the policy to the present an in part informed the Khmer Rogue ideology.¹¹⁶ Notably, in the border conflict of 1978-1979 Khmer Krom farmers were driven from their land both by Vietnamese and Cambodian troops only to return to houses that were demolished and land occupied by Vietnamese. Landlessness

¹¹¹McHale 2013, pp. 371-372.

¹¹²Known in the west as The Vietnam War.

¹¹³Philip Taylor 2014, p. 25.

¹¹⁴Philip Taylor 2013, p. 535.

¹¹⁵Ibid., pp. 535-536.

¹¹⁶McHale 2013, p. 385.

is a theme throughout the history of the Khmer Krom.¹¹⁷

Taylor concludes that this questions the prevalent narrative of the Indochina wars as anti-colonial struggle leading to the indigenous people regaining control of their rightful lands, starting anew in prosperity. Contrary to this, in the example of O Mon, the Khmer Krom as indigenous inhabitants were displaced, rendered landless and had ties to their traditional communities severed. As we shall see below, effects of this are still in place.¹¹⁸ Contextualization for this is offered by TWAIL scholar Antony Anghie who claims that post-colonial states often emulate certain feature of the former colonizing states with regard to their own minorities. So, faced with minority groups such as the Khmer Krom, known for their own collective and distinct identity and thus the "threat" of claims of self-determination, the universalizing values of development become a way for the post-colonial state to assert unity. The universal interests represented by the new state would absorb minorities and assimilate them out of their "backwardness". The general dynamic of the colonial encounter is described as a dynamic of difference by Anghie:

"jurists using the conceptual tools of positivism postulated a gap, understood principally in terms of cultural differences, between the civilized European and uncivilized non-European world; having established this gap they then proceeded to devise a series of techniques for bridging this gap, of civilizing the uncivilized."¹¹⁹

The founding fathers of international law indisputably saw it this way. On the subject of "the mental incapacity of the barbarians" that indigenous people were not totally mad (sane enough to conclude treaties with the colonizers), but unsuited to governing their own household and much less their society. For their benefit, he argued, Spain had to take over administration.¹²⁰

The same dynamic, Anghie argues is present in the relationship of the post-colonial state and its own minority subjects. Minorities must be managed and controlled in order to create a modern and developed state.¹²¹ This pictures correspond to the Khmer Krom situation as the Vietnamese state openly refers to minority practices as backwards.¹²² Scholars claim that the insularity of the Khmer Krom hinders development. Such a picture is further reproduced in the discourse of many developmental organizations, the so called "agents of developmentalism" who

¹¹⁷Human Rights Watch 2009b, p. 19.

¹¹⁸Philip Taylor 2013, p. 538.

¹¹⁹Anghie 2007, pp. 206-207.

¹²⁰De Vitoria 1991, p. 290.

¹²¹Anghie 2007, pp. 206-207.

¹²²CESCR 2013, para. 30, 81, 598.

dominate the human rights discourse.¹²³ But it is a mistake to equate opposition to assimilation with insularity or backwardness as it is a conception of life competing for hegemony, in which the Vietnamese has asserted itself as an universalizing force for progress.¹²⁴

¹²³Castellino and Bradshaw 2015, p. 464.

¹²⁴Philip Taylor 2014, pp. 16-17.

3. The Khmer Krom and International Law - the Framework of Rights

This chapter will outline rights relevant to the building of a Khmer Krom political community. I use the word Arendtian to refer to such rights. The descriptions or listing of rights will not be exhaustive, it has been influenced by rights the Khmer Krom themselves have highlighted through interviews.

3.1 Introduction

3.1.1 What are rights?

The importance of a right is not always contingent on its discussion or enactment among rights-holders. Even if someone does not personally wish to express an opinion, that person would greatly benefit from, as Arendt would say, living in a framework where one is judged by one's opinions rather than race, class etc. Similarly, even if the right to privacy is not widely discussed, people radically change their behaviour in an environment of surveillance, thus removing such a right implies far reaching, negative consequences for political freedoms and ultimately the political community of enacting rights.¹²⁵ Rights are not rendered unimportant by lack of discussion. At the outset this thesis focused on environmental participation. Participation is similarly important for a number of reasons - sustainability, democracy, indigenous claims etc.¹²⁶ But when conducting fieldwork on a group facing mass violations of their rights, focusing on the rights they themselves want to highlight and discuss seemed like the most ethical and relevant approach. With some minor exceptions, this coincided with my delimitation and categorization of rights into Arendtian rights. As the right to rights involves discussion of political communi-

¹²⁵Greenwald 2014, p. 164.

¹²⁶Xanthaki 2007, p. 9.

ties to a significant extent, it must be anchored with the so called *demos*.¹²⁷ Such a delimitation of rights corresponds to Arendt's conception of the main difficulty of rightlessness not just of rights that hinges on lack of community - but actual hindrance of such community on the part of the state.¹²⁸ Which is why her theory has been chosen instead of other related and insightful critiques of rights.¹²⁹

3.1.2 Collective and Individual Rights

Collective rights are often discussed in regard to indigenous people. The United Nations Declaration on the Right of Indigenous Peoples (UNDRIP)¹³⁰ illustrates the importance of collective rights in its first two articles by stating that indigenous peoples have the right to enjoy freedom from discrimination and human rights *collectively*. The main reason for this is that some features of many indigenous societies are inherently collective. One example of official recognition of this matter is the *Mayagna (Sumo) Awas Tingi v. Nicaragua* case.¹³¹ The case concluded that indigenous people have communitarian tradition in which collective ownership of property must be understood as fundamental to their culture and economic survival, among other things. Therefore the court concluded that indigenous people have communal property rights to the lands they inhabit.¹³² If collective rights are not respected, indigenous people risk disappearing by being forced to assimilate into the dominant culture.¹³³ Furthermore, it is important to understand that collective rights are not only restricted to settings of indigenous peoples but also exist in conventional labour law. Rights to collective action such as striking, bargaining and organizing are and have been central in the establishment of a decent life for countless workers. But not only that, collective rights are often preconditions for the enactment and safeguarding of individual rights.¹³⁴ In essence, the insight that indigenous people should be able to shape their own lives with regard to subjects like education, language and land use materializes through

¹²⁷Benhabib 2005, p. 21.

¹²⁸DeGooyer et al. 2018, p. 30.

¹²⁹See for instance Goodale and Merry 2007.

¹³⁰United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (Sept. 13, 2007)

¹³¹*Mayagna (Sumo) Awas Tingni Community v Nicaragua*, Merits, reparations and costs, IACHR Series C No 79, [2001] IACHR 9, IHRL 1462 (IACHR 2001), 31st August 2001, Inter-American Court of Human Rights [IACtHR]

¹³²*Mayagna (Sumo) Awas Tingni Community v Nicaragua*, pp. 149-153.

¹³³OHCHR 2013, p. 15.

¹³⁴Chen 2007, p. 76.

collective rights.¹³⁵

Since Vietnam has an ambivalent stance toward its minorities, collective rights can be seen as troublesome because they are an obstacle to assimilation. Note the Vietnamese history of reproducing colonial relations toward its minorities.¹³⁶ There are inherent tensions in the liberal view that the state is inherently neutral in the face of individual claiming of rights and that collective rights interfere with individual autonomy. Because the state is not neutral nor a protector of indigenous rights, its function is rather to preserve status quo. Minorities such as the Khmer Krom do not possess the same opportunities as the majority population and therefore require special rights to equally access other rights.¹³⁷ The purpose of such special rights are to rectify disadvantages due to non-dominant status in society.¹³⁸

Thus, it is clear that indigenous people do not warrant special protection only to preserve their indigenous identity. Such an understanding misses the historical colonial background and depoliticizes the struggles into a smorgasbord of different identities. The current lived realities of indigenous people have been shaped and are still maintained by non-indigenous groups often with colonial features. For the Khmer Krom this is especially true since colonial events brought significant destruction, displacement and loss of land for them.¹³⁹ Indigenous rights therefore become tools which can address the current situation which stems from a history of oppression and replace that with decent lives.¹⁴⁰ It should be noted that not all agree with the idea that collective rights are the best means of improving the lives of indigenous people. France, former colonizer of Vietnam, considers collective rights non-existent in international law. But such a characterization is incomplete as collective legal elements occur outside the typical spectrum of indigenous law (such as UNDRIP and the ILO conventions 107 & 169) both in the UN Charter and the Genocide Convention, hardly fringe legal documents.¹⁴¹

¹³⁵Xanthaki 2007, p. 29.

¹³⁶CESCR 2013, para. 556.

¹³⁷This is a generalized argument which does not account for class. There have been prominent Khmer Krom member of the communist party, but who have shed their indigenous identity. Similarly, there are likely Kinh who are worse off due to atomizing neoliberal policies. They may also need special rights.

¹³⁸Xanthaki 2007, pp. 15-16.

¹³⁹Philip Taylor 2014, p. 25.

¹⁴⁰Xanthaki 2007, pp. 25-26.

¹⁴¹Ibid., p. 29.

3.2 General Human Rights situation in Vietnam

Vietnamese governance has prioritized "revolutionary morality" in their quest for realizing human rights. This means that legal instruments, such as human rights has been viewed as less important.¹⁴² According to Gillespie, citizens who pose no threat to political power are now entitled to freedom of religion, associations, opinions, businesses and from arbitrary arrest.¹⁴³ He also points out that the public has a rather high satisfaction with the political power as it is, preferring to pursue rights through personal connections instead of legal frameworks - at least for the Kinh majority. Ethnic minorities are a notable exceptions to this picture. They are excluded from the Kinh community and further marginalized by unequal growth.¹⁴⁴ Khmer Krom monks frequently employ a discourse of rights, because they do not have the possibility to enact them through personal connections in the face of state repression severing such connections.¹⁴⁵

The majority population also face difficulties due to the broad interpretation of what constitutes a threat to political powers. Vaguely worded penal sections punishing dissent are examples of this according to HRW, with a number of high-profile cases punishing bloggers for expressing opinions lately.¹⁴⁶ Intolerance is also reflected in the prohibitions on trade unions, human rights organizations and independent political parties. When people have assembled for such goals, they have met heavy police repression.¹⁴⁷ Religious freedom is contingent on practicing the correct religion as the indigenous Montagnards experienced first hand in April 2017 when they were sentenced to 8-10 years in jail for practicing religion not approved by the state.¹⁴⁸ Indigenous groups practicing religion, such as the Montagnard and the Khmer Krom are explicitly mentioned in Minority Rights International's report *Peoples Under Threat*.¹⁴⁹

Vietnamese remedies to indigenous problems are often not seeking permanent solutions. They tend to view assimilation as the only manner in which indigenous people can develop.¹⁵⁰ Such views are reflected in the Vietnamese state party reports before human rights committees. In their report to the Committee of Experts on the Application of Conventions and Recommen-

¹⁴²Gillespie 2006, p. 477.

¹⁴³Ibid., p. 477.

¹⁴⁴Ibid., p. 479.

¹⁴⁵Khmer Krom Interview nr. 5.

¹⁴⁶Human Rights Watch 2018, p. 1.

¹⁴⁷Ibid., p. 2.

¹⁴⁸Ibid., p. 4.

¹⁴⁹Minority Rights Group International 2018a.

¹⁵⁰Minority Rights Group International 2016.

dations, discussing Art. 15 ICESCR which is the right to take part in cultural life, the Vietnamese government explicitly states that it aims to only "preserve selectively" the ethnic minority culture, phasing out "the obsolete"¹⁵¹ Comments such as "Backward customs, superstition, bad habits and social evils shall be removed" are frequent.¹⁵² Of course, there is an intrinsic arbitrariness to what constitutes "backward customs", often it is a euphemism for, or indistinguishable from, hindering assimilation.¹⁵³ It is nevertheless a view that is irreconcilable with a serious implementation of indigenous rights because it does not seek to empower the native people on their own terms.

In sum, there can be relative enjoyment of rights as long as political power is left unchallenged. But this hinges membership in the Kinh majority or assimilation thereto. The Khmer Krom are a minority among others facing similar difficulties with varying scopes and details. But hardships also face ethnic Vietnamese with low socio-economic status and few contacts. The collective nature of labour organizing, such as trade unions, somewhat mirrors the indigenous situation in its perceived threat by the ruling class. Which is why severe restrictions are imposed on trade unions and activists punished.¹⁵⁴

3.3 Indigenous Rights

3.3.1 Ratification

Vietnam has signed neither ILO convention 107 nor 169. It did however, vote in favour of UNDRIP but in spite of this Vietnam still does not recognize any of the 53 ethnic minorities as indigenous.¹⁵⁵ Discussion of ILO conventions are still somewhat relevant as parts of them reflect customary international law, along with some other indigenous rights.¹⁵⁶

3.3.2 Content & Status

Although UNDRIP is generally regarded as part of the canon of indigenous rights law, it has actually been critiqued for lacking substantial indigenous rights provisions. Instead, UNDRIP

¹⁵¹CESCR 2013, para. 556.

¹⁵²CESCR 2013, para. 598.

¹⁵³McElwee et al. 2004.

¹⁵⁴Human Rights Watch 2009a, pp. 7-8,11.

¹⁵⁵IWGIA 2018, p. 324.

¹⁵⁶Anaya 2009, pp. 48-53.

takes rights that are of importance or relevant to indigenous people but treats them as human rights and civil rights within the general state-centric discourse. It is also important to note that some nations, such as the United States, consider the document to be only aspirational due to its supposed difficulties in realizing it, all while indigenous groups often consider it not far-reaching enough.¹⁵⁷ Still, it can be concluded that UNDRIP does in fact provide indigenous peoples with some tools in their fight for survival. It is important to note that even if it can be regarded a tool, it is not legally binding.¹⁵⁸ For clarity these will be addressed in this section, even if some provisions actually have more in common with the human rights regime.

The declaration opens by stating in Article 2 that indigenous peoples are equal to all others and should therefore be free from discrimination due to their origin. Article 3 connects to this by declaring that they should have the ability to freely pursue their economic, social and cultural development on the grounds of their right to self-determination. Here it is important to point out that although these rights are aimed at indigenous people, the declaration lacks an article defining indigeneity. A discussion of Vietnamese recognition of the Khmer Krom and the definition of indigenous peoples is to be found below in the main chapter on Khmer Krom. That aside, the discourse of UNDRIP reveals that it is not the radical instrument some nation-states argue, rather, the language surrounding the articles is remedial. In essence, UNDRIP tries to secure rights for indigenous peoples that are generally already possessed by the majority population. This has to be seen in the context of historical disadvantage and persecution discussed elsewhere in this thesis.¹⁵⁹

Self-determination is a *jus cogens* norm from which no derogation is possible.¹⁶⁰ But, its formulation in UNDRIP is not to be equated with a right to independent statehood. Rather than existing in a framework of "state's rights" it is informed by the language of human rights. This point was used to reassure hesitant states during the drafting process, which unfortunately hints at the larger, structural issues of the human rights regime. So what does self-determination entail in a human rights context? According to human rights lawyer James Anaya, the central content is "core values of equality and freedom that are relevant to all segments of humanity in relation to the social, political and economic configurations with which they live". It does not entail a separate state, rather there is a focus on participation and equal building of important societal

¹⁵⁷Champagne 2013, p. 10.

¹⁵⁸Ibid., pp. 10-11.

¹⁵⁹Anaya 2009, pp. 58-59.

¹⁶⁰Parker 1988, p. 440.

institutions which has been, and continues to be systematically denied to indigenous peoples.¹⁶¹ UNDRIP does in fact provide guidance on how such a right can be realized, namely through Article 38 which mandates that states need to cooperate and consult with indigenous peoples and take appropriate measures, such as legislative ones, to achieve the ends of the declaration. Such measures are also required in relation to safeguarding the rights of indigenous peoples to their lands as well as culture, language, religion etc.¹⁶²

UNDRIP is formally not legally binding (sometimes termed soft law) but that does not necessarily lead to the conclusion that its provisions do not represent actual law. As a result from taking the route through human rights law, many of the articles are found elsewhere in treaties that are generally described as hard law. Anaya argues that UNDRIP can be viewed as both reinstating human rights law for indigenous peoples and at the same time embodying customary international law. Customary international law is informed by two elements, state practice and *opinio juris*.¹⁶³ Voting in favour or against a declaration is an act of state practice, taken together, such votes may come to represent a consensus on an issue. Notably, the doctrine of the persistent objector is of relevance here as well. Although UNDRIP received a overwhelming amount of votes cast in its favour, should the states who voted against be exempted from its effects due to their objection? The United States, for instance, rejected any claims that the declaration could attain the status of customary international law.¹⁶⁴ Notably, one of the objectors, Australia, has since changed its stance. This has reinforced the view of some, including Anaya, that the declaration does in fact partly represent customary international law.¹⁶⁵ Customary international law examples of indigenous rights are also reflected in the *Awas Tingi* case discussed above, in which it was found that "indigenous peoples have a right to "demarcation, ownership, development, control and use of the lands they have traditionally owned or otherwise occupied and used."¹⁶⁶

In fact, much of the rights, if not all, outlined in UNDRIP are relevant to the Khmer Krom. Article 9 is surprisingly Arendtian in that it sketches out a right to belong to a community with no discrimination allowed in implementation. This right is perhaps best viewed as an extension of the self-determination article, which must be viewed as a pre-requisite for a right of instituting a community or nation. For the Khmer Krom, Article 8 of the declaration is an important,

¹⁶¹Anaya 2009, pp. 60-61.

¹⁶²See for instance Article 26, Article 14(1) UNDRIP.

¹⁶³Anaya 2009, pp. 79-80.

¹⁶⁴*Ibid.*, pp. 81-82, 99.

¹⁶⁵*Ibid.*, p. 98.

¹⁶⁶*Mayagna (Sumo) Awas Tingni Community v Nicaragua*, para. 149-153.

earlier uncodified right in pre-UNDRIP international law. It prohibits ethnocide, or forced assimilation.¹⁶⁷

Similar indigenous rights can be found in ILO Convention 169, but since it is not widely ratified it cannot be said to contribute as much to customary international law as UNDRIP does. However, it has had far-reaching consequences anyway, in outlining rights that have become a frame of reference in several other international instruments, not least impacting UNDRIP itself. Some important rights include political participation, ownership of traditional lands and some control over economic development.¹⁶⁸

3.4 Human Rights

3.4.1 Ratification

Vietnam has ratified several significant international human rights instruments according to the Office of the United Nations High Commissioner for Human Rights (OHCHR), most notable are the International Covenant on Civil and Political rights (ICCPR),¹⁶⁹ International Convention on the Elimination of All Forms of Racial Discrimination (ICERD),¹⁷⁰ Convention on the Elimination of all Forms of Discrimination against Women (CEDAW),¹⁷¹ International Covenant on Economic, Social and Cultural Rights (ICESCR)¹⁷² as well as the Convention on the Rights of the Child (CRC)¹⁷³ A quite recent ratification is the Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment (CAT).¹⁷⁴

3.4.2 Content & Status

This section will discuss important rights that the situation of the Khmer Krom touches upon. First of all, ICCPR & ICESCR common Article 1 contains a right to self-determination of peoples strikingly similar to Article 3 of UNDRIP, with perhaps the main difference being the lack of indigenous in common Article 1. What is meant by peoples without the adjectival "indigenous"?

¹⁶⁷Xanthaki 2009, p. 4.

¹⁶⁸Xanthaki 2007, p. 90.

¹⁶⁹24 Sep 1982.

¹⁷⁰09 Jun 1982.

¹⁷¹17 Feb 1982.

¹⁷²24 Sep 1982.

¹⁷³28 Feb 1990.

¹⁷⁴05 Feb 2015.

During the drafting process it was made clear that minorities are excluded from this definition and instead referred to Article 27 ICCPR, a minority rights article. But as has been made clear from the discussion above, the Khmer Krom are indigenous, not "just" a minority. The questions of whether indigenous people fit within has been indirectly commented on by the Human Rights Committee (HRC), which is a United Nations body established to consider compliance with the ICCPR. While they did not explicitly state that self-determination is a right which can be claimed by indigenous peoples through Article 1, they argued that it can bear relevance for other rights protected by the covenant, such as article 27. Xanthaki claims that a stretched interpretation implies the right to self-determination for some beneficiaries of Article 27, in our case indigenous peoples. She also notes that the use of "peoples" to denote indigenous in several other treaties signals that the meaning is shifting.¹⁷⁵ Still, commentaries to ICCPR conclude that it is a highly controversial topic to which states often voice concern.¹⁷⁶

Remaining in the spectrum of the ICCPR but moving beyond the first article, what protection is there that can be of relevance to the Khmer Krom? For collective rights, the outlook is rather poor. TWAIL scholar Anghie observes that ICCPR offers very little to those who seek to protect their rights as minorities. Article 27, which states that:

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

This focus is individual and therefore the article lacks collective elements indigenous people would benefit from, such as self-determination. This narrow description and weakness of Article 27 entails that the term "peoples" does not encompass indigenous peoples in the textual meaning of Article 1 ICCPR.¹⁷⁷ Such an interpretation is confirmed by the HRC, stating that Article 27 outlines a right for individuals as opposed to Article 1.¹⁷⁸ Anghie claims that the article only amounts to stipulating rights already possessed by the majority population are not denied certain minorities. This will lead to assimilation of minorities into the dominant or "universal" state.¹⁷⁹ Although this article fails to provide adequate ground for claims to self-determination, it

¹⁷⁵Xanthaki 2007, pp. 134-135.

¹⁷⁶Nowak 2005, p. 22.

¹⁷⁷Anghie 2007, p. 206.

¹⁷⁸U.N. Doc. CCPR/C/21/Rev.1/Add.S (1994)

¹⁷⁹Anghie 2007, pp. 206-207.

spells out significant rights for the Khmer Krom as individuals in the form of cultural, linguistic and religious entitlements. Indigenous peoples have been able to use Article 27 some domestic forums although its textual meaning refers to minorities thus further reinstating the fact that indigenous people are minorities within the dominant state.¹⁸⁰ Through the interpretation of the HRC, the article has come to embody indigenous land rights as well.¹⁸¹ Furthermore, the rights in 27 ICCPR have been extended to children through Article 30 of the CRC.

Not all human rights relevant to Khmer Krom are strictly indigenous in nature. Other significant ICCPR provisions for the Khmer Krom include Article 14 which prohibits arbitrary detention and arrests although the central content of the provision is equality before the court. It is an extension of the principle of equality before the law in general found in Article 26 which spells out several ground on which discrimination is prohibited. The most important ones in the context of the Khmer Krom are race, religion, political views as well as language.¹⁸² Further prohibitions against discrimination, including provisions on equality before the law, are to be found in ICERD which as its name, International Convention on the Elimination of All Forms of Racial Discrimination, suggests aims to combat racial discrimination. ICERD is of importance for several reasons. First, as detailed below, Vietnam's ethnic Khmer face various practices of the state that may well amount to racial discrimination. But ICERD does not only require states to respect negative rights - rights that only require non-interference on behalf of the state. Rather, ICERD has a so called "urgent action procedure" which acts through pressuring states into changing discriminatory policies affecting indigenous peoples. This can have synergic effects, such as pushing ratification of other treaties, such as ILO Convention 169.^{183, 184}

For religious freedom the central Article is 18 ICCPR, (1) lays out the freedom to adopt a religion, individually or collectively. Notably, (2) includes a prohibition on coercion which is interpreted as disallowing state exercise of coercing people into belonging to a certain religion. This does not only mean physical force, but also "impermissible incentives" that premiers membership to a certain religion.¹⁸⁵ (3) prescribes under which legal grounds the freedom to manifest one's religion may be limited.¹⁸⁶ It is similar in wording to Article 12 (3) ICCPR, which

¹⁸⁰Hadjioannou 2005, p. 199.

¹⁸¹Xanthaki 2009, p. 1.

¹⁸²Nowak 2005, p. 307.

¹⁸³Xanthaki 2009, p. 2.

¹⁸⁴Anaya 2009, p. 199.

¹⁸⁵See for instance Human Rights Committee, *Hudoyberganova v. Uzbekistan*, Communication No. 931/2000

¹⁸⁶Nowak 2005, pp. 416-418.

as it regards the right to leave one's own country, is relevant to the Khmer Krom. Permissible limitations are only those which are "provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights [in the ICCPR]". These requirements are typical for the ICCPR, as the HRC has concluded they are in force even where the covenant is less explicit.¹⁸⁷

ICCPR also contains important rights on freedom of expression, assembly and association in Article 19, 20 and 22 respectively. The freedom of expression (and opinion) found in 19 is generally viewed as a core right within the ICCPR, important for the realization of all others. It is quite extensive in its scope and includes the freedom to seek and receive information.¹⁸⁸ In the Arendtian sense (at least as she is interpreted by Maxwell below¹⁸⁹), the right to assembly is perhaps just as important from a democratic standpoint. Notably, only peaceful assemblies are protected. Peaceful in this case refers to the manner of protest or gathering and not the content of any views or opinions expressed.¹⁹⁰ However, it is important to note that peaceful should be interpreted broadly, as provocation from security forces in theory must be prevented by the state. In fact, state parties are under a positive obligation to take measures to materialize the right to assembly¹⁹¹ Closely related to this is the right of association in Article 22 ICCPR, in other treaties often found in the same provision, such as Article 20 of the Universal Declaration of Human Rights. As the freedom to association does not list any specific purposes for association, it is subject to a broad interpretation.¹⁹² All these rights share traits of being both civil and political rights - civil because they should grant protection against arbitrary interference and political because they are necessary for the proper functioning of democracy and therefore, in extension the creation of a political community.¹⁹³ However, there is little to no emphasis on those who are disenfranchised from the political community due to their status as indigenous peoples. Political rights are not absolute, in ICCPR they are not to be subject to unreasonable restrictions as states did not want to give up the practice removing prisoners from the body politic and were frightened of the consequences universal suffrage would bring to the colonial projects.¹⁹⁴

¹⁸⁷De Schutter 2010, p. 289.

¹⁸⁸Nowak 2005, p. 441.

¹⁸⁹See section 5.3.6.

¹⁹⁰Nowak 2005, p. 486.

¹⁹¹Ibid., p. 487.

¹⁹²Ibid., p. 497.

¹⁹³Ibid., p. 496.

¹⁹⁴Kesby 2012, pp. 69-70.

4. The Khmer Krom

”Their plight is not that they are not equal before the law, but that no law exists for them[..].”^a

^aArendt 1973, p. 293.

4.1 Who are they?

4.1.1 Indigenous or Minority?

”If you look at policy, government policy, you will see that it is policy of ethnic minorities. And in their language we are a minority. But if you ask us, we know that we are the natives of this land.”¹⁹⁵

In their report on the implementation of ICESCR before CEASR, Vietnam begins by stating that ”In Viet Nam, there are no indigenous people”, regarding the right to self-determination.¹⁹⁶ Recall discussions on the fear of self-determination above.¹⁹⁷ Several of the Khmer Krom interviewed stated that they were not ”just” minorities. They did not, however, as the various advocacy groups frequently do, use the word indigenous to describe themselves. This is not to say that Khmer do not consider themselves indigenous, in fact one well-educated woman I spoke to was not familiar with the word but showed strong appreciation for the concept after finding it in a dictionary, feeling empowered by it.¹⁹⁸ Not only does the Vietnamese state refrain from

¹⁹⁵Khmer Krom Interview nr. 1.

¹⁹⁶CESCR 2013, para. 27.

¹⁹⁷See section 2.3.

¹⁹⁸Khmer Krom Interview nr. 8.

using the term indigenous (they use the term minority), in 2007 they also published and spread a history claiming that Khmer were in fact not the original inhabitants or indigenous to Southern Vietnam, so called *Nam Bo*.¹⁹⁹ Vietnamese histories of Khmer Krom often lack descriptions of Khmer ties to Cambodia and other civilizations, such as Funan, which predate the arrival of the Vietnamese Kinh. Instead they describe unspoiled lands where the Vietnamese had to fight the wilderness and embodied a new lifestyle. Such descriptions leave no room for other groups with deep histories or connections to the land to be considered indigenous.²⁰⁰

Can Vietnamese definitions and histories impact the Khmer Krom's status as indigenous? Several documents of international law relate to the situation of indigenous people. The United Nations Declaration on the Right of Indigenous Peoples (UNDRIP) is notable in this regard.²⁰¹ UNDRIP does not present a formal definition of who is or is not indigenous.²⁰² According to OHCHR's manual for UNDRIP, such a definition is undesirable since indigenous people have suffered from definitions imposed on them by others.²⁰³ Commentaries to UNDRIP still outline three contextual factors to consider in the declaration's recognition of indigenous peoples:

1. self-identify as culturally and linguistically distinct from other groups in the region
2. form a non-dominant sector of society and
3. have a historical connection to a collective territory.²⁰⁴

During the drafting of UNDRIP, the working definition was the following:

”those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing on those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal system.”²⁰⁵

¹⁹⁹Human Rights Watch 2009b, p. 76.

²⁰⁰Philip Taylor 2014, p. 20.

²⁰¹United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (Sept. 13, 2007)

²⁰²Hohmann and Weller 2018, p. 8.

²⁰³OHCHR 2013, p. 6.

²⁰⁴Hohmann and Weller 2018, p. 245.

²⁰⁵Cobo 1986.

Other notable definitions include the ILO, who through convention no. 169 also focus on (1) habitation of an area during colonization, conquest or establishment of present state boundaries. As well as (2) retain some or all of their own social, cultural and political institutions.²⁰⁶ It also differed from earlier conventions, such as ILO convention no. 107, by introducing the criterion of self-identification which is a "fundamental criterion for determining the groups".²⁰⁷ Concerned states had to be reassured that this was not the sole criterion.²⁰⁸ Still, even if fundamental, universal definitions will necessarily face problems as peoples included in the ordinary meaning of the term "indigenous" experience vastly different conditions especially between continents. In the case of Africa it could be argued that most African people are in fact indigenous to it. To address such questions most working groups have in fact stressed the importance of self-identification.²⁰⁹ Self-identification was also emphasized by José Maritnez Cobo, whose working group authored the lengthy definition above, at the same time, there has been a shift toward also letting recognition by other indigenous groups play a role. Some argue that such recognition in combination with the working definition outlined above along with a nuanced conception of a requirement of historical continuity reflect the current customary practice.²¹⁰ Finally, even if UNDRIP does not explicitly define indigeneity, article 33 states that "Indigenous peoples have the right to determine their own identity or membership".

From this, we can conclude it established that indigenous people are indigenous regardless of their legal status with in the state, it is rather a question of the criteria outline above..²¹¹ We can also conclude that even if no strict definition exists - primacy is given to self-identification when determining indigeneity. According to OHCHR, lack of a formal definition or recognition by national governments should not hinder the addressing of human rights issues specific to indigenous peoples by human rights institutions.²¹² Assuming an Arendtian standpoint, however, it becomes clear that this is not an unassailable or infallible solution to the problem. What if large portions of the indigenous group are unfamiliar with the concept of indigeneity due to the actions of the state? The Khmer woman interviewed above illustrate that state measures to cut down the political community gaining traction around an identity of indigeneity have had an

²⁰⁶OHCHR 2013, p. 7.

²⁰⁷Hohmann and Weller 2018, pp. 20-21.

²⁰⁸Xanthaki 2007, p. 73.

²⁰⁹OHCHR 2013, p. 7.

²¹⁰Hohmann and Weller 2018, p. 19.

²¹¹Xanthaki 2007, p. 72.

²¹²OHCHR 2013, p. 8.

impact. Too much reliance on self-identification will benefit the ruling majority regime where there is no or a weak right to have rights - simply because lack of a political community will hinder the protection and retention of identity in the face of the efforts of a much larger state trying to negate that identity.

Where do Khmer Krom fit in this? Even if they do not use the word indigenous, they know that they are not "only" minorities which should suffice as evidence of self-identification. Furthermore, their relations with other indigenous groups are cordial, thus the inter-indigenous recognition indicator is met.²¹³ Their sector of society is non-dominant and there is consensus among historians as to their historical connection to collective territory.²¹⁴ The last point is easily visible by the extensive network of temples or *wats* found throughout the Mekong delta. Religious presence furthermore demonstrate their pre-colonial ties to the land. As we will see in the next chapter, distinct social institutions and cultural patterns are widespread among Khmer. Although, this point can be critiqued on the same Arendtian grounds as the emphasis on self-identification.²¹⁵ It is overwhelmingly clear that Khmer Krom constitute an indigenous people after taking the discussion above into account. Vietnamese conceptions of indigeneity are irrelevant in this regard.

4.2 Situation

Discrepancies in terminology are somewhat illustrative of the differing accounts of the situation with regard to the actual facts - historical and present. Facts that of course vary along ethnic lines, but more surprisingly also within the religious hierarchy of monks. An example of the former is that calling them a minority rather than indigenous is in line with Vietnamese historians avoidance of the subject of Khmer settlements before the Vietnamese march to the South, which eventually annexed large parts of the Khmer region know as Kampuchea Krom. Thereby downplaying the historical importance of the Khmer. Cambodian nationalist histories focus on old imperial ambitions while at the same time downplaying the resistance and cultural distinctness of the Khmer Krom. The group is faced with different but significant repression in Cambodia, often as refugees.²¹⁶

²¹³Khmer Krom Interview nr. 6.

²¹⁴See for instance Philip Taylor 2013.

²¹⁵These points will be expanded upon in the analysis.

²¹⁶Philip Taylor 2014, pp. 4-5.

A report issued by the Cambodian Centre for Human Rights (CCHR) in 2011 characterized the acquisition of Cambodian citizenship as facing "insurmountable obstacles" for the Khmer Krom. Estimates are that almost 40 percent of Khmer Krom in Cambodia lack national ID-cards, depriving them of the right to own property, receive social service, schooling etc.²¹⁷ A subsequent 2017 report concluded through a survey that 98.2 percent of Khmer Krom in Cambodia claim to face hardships and difficulties in Cambodia. The most pressing issue was discrimination from the general population and lack of recognition from the authorities. Only 12,5 percent of the surveyed held valid ID for voting. Meaning that access to the political sphere is significantly restricted also outside of Vietnam. Possible reasons for this include the fact that Vietnamese sounding names disqualifies them in the application process.²¹⁸ In light of this it is particularly distressing that Cambodia is not a party to either the 1954 Convention relating to the Status of Stateless Persons²¹⁹ or the 1961 Convention on the Reduction of Statelessness.²²⁰

4.2.1 Daily life

When asked about daily life answers have tended to be negative. One senior monk told me that the Khmer Krom are poor and in need of help, but was unwilling to talk about systemic discrimination, instead discussing individual responsibility. He furthermore equated the loss of land with short-term thinking on behalf of poor Khmer Krom of the region by focusing on the material conditions of poverty within the society.²²¹ This monk discussed events different from the land loss that took place after the collectivization of land, but cannot be fully isolated from that event. Taylor has documented how extensive loss of land happened in what is generally seen as struggles for post-colonial liberation where Khmer found their homes possessed by new, Vietnamese inhabitants.²²² Collectivization and de-collectivization proved a similarly expropriatory event which first instituted a policy of shared management of land and when that was scrapped, only returned a fraction of the former land to the original inhabitants.²²³

Still, the senior monk makes the point that even though there is no formal collectivization of land in place, Khmer people are still losing their land and being forced into a life of wage labour.

²¹⁷Cambodian Center for Human Rights 2011.

²¹⁸Cambodian Center for Human Rights 2017.

²¹⁹UNTS, vol. 360, p.117.

²²⁰UNTS, vol. 989, p. 175

²²¹Khmer Krom Interview nr. 1.

²²²Philip Taylor 2013, p. 538.

²²³Ibid., pp. 534-535.

²²⁴ This is consistent with research of the 1993 land law which stipulates that the farmers can use in accordance with their land use rights, which includes selling, occupying, transferring, inheriting etc, but the actual ownership is still with the state.²²⁵ Coupled with increasing stratification of income and decreasing rice prices, this coined the saying that being a rice farmer (as Khmer Krom)²²⁶ is a guarantee for losing your land.²²⁷

Disdain for wage labour is repeatedly presented throughout the interviews, as if its negative nature was self-explanatory. While it is true that monks do not partake in wage labour themselves, reasons for skepticism are likely not only religious.²²⁸ Rather, I think it is due to the fact that wage labourers in some marginalized communities get by on a day to day basis.²²⁹ There is still a significant gap between the Khmer Krom and the majority population in regard to income, with Khmer making less than half the pay in the general.²³⁰

One abbot I spoke to stated that there were indeed nothing special about the situation or daily life of the Khmer Krom and that it is the responsibility of the Khmer Krom to follow the law, which is equal for everyone. He praised the government for funding temples and was very clear on the fact that there are no restrictions on what can be taught in the temples.²³¹ Immediately, a significant discrepancy becomes visible in the way senior and the rank and file describe their situation, with the latter being much more skeptical and outspoken against the government. One monk being particularly Arendtian:

”They [Khmer laypeople] are kept in poverty. The Vietnamese government wants to keep it this way. They want to keep Khmer poor and uneducated. They want people to keep busy wage labouring. Just working.”²³²

The same monk cited his own monkhood as key to his speaking out. He had studied abroad and managed to learn about Khmer history in the *wat* (Khmer temple).²³³ Another well educated monk who has not advanced in the hierarchical system put emphasis on the fact that the general population is scared to speak of their daily life in any way that brings up systemic op-

²²⁴Khmer Krom Interview nr. 1.

²²⁵Trang 2004, pp. 114-115.

²²⁶Khmer Krom Interview nr. 8.

²²⁷Philip. Taylor 2004, pp. 247-248.

²²⁸See also Khmer Krom Interview nr. 2, 4, 5.

²²⁹Philip Taylor 2013, p. 536.

²³⁰Tung 2018.

²³¹Khmer Krom Interview nr. 4.

²³²Khmer Krom Interview nr. 2.

²³³Khmer Krom Interview nr. 2.

pression or discrimination. He, as other rank and file monks stated that the local government branch has as its policy to pick out monks sympathetic to their rule and handle all economic and regulatory business of the activities through them. These monks can also get a seat in local committees while all other monks are disregarded. The support is predicated on the abbot following what the communist party dictates. When asked what this entails for the relation between the abbot and the rest of the temple, the monk stated that:

”they [rank and file monks] cannot voice concerns against the abbot. Because this is the rule of Buddhism. Between the higher monk and the small monk. Small monk must always respect the higher monk.”²³⁴

Such a description is reflected in other fieldwork on religious freedom.²³⁵ Internal documents show that the Vietnamese state seek to thwart so called reactionary attempts at undermining unity with the final goal of forming an independent Khmer Krom state. In this they mention the transnational community²³⁶ as especially problematic and undermining the policy of great national unity.²³⁷

Poverty is by far the most common reason for leaving Vietnam and crossing the border to Cambodia. Most (over 80 percent) cross the border illegally due to lack of valid documentation.²³⁸ Many of the interviewed brought up the poverty even when not asked about it directly. Various reasons were cited such as the monk above seeing it as official policy of the party.²³⁹ Others saw it as result of general material conditions of society.²⁴⁰ The poor conditions available to Khmer Krom have been thoroughly researched and documented.²⁴¹ These conditions result in a noticeable lack of working age people in some places in Tra Vinh province, as they decide to go to Ho Chi Minh city and send money back. According to one monk, the social community and extensive network is highly dependent on the remittance economy of young people.²⁴²

For most Khmer, discrimination permeates their existence, noticeably in employment. Monks were very clear on the subject that only low-income jobs are available to Khmer Krom. Accord-

²³⁴Khmer Krom Interview nr. 5.

²³⁵Human Rights Watch 2009b, p. 51.

²³⁶Such as the *Khmer's Kampuchea Krom Federation* (KKF)

²³⁷Nguyễn 2005.

²³⁸Cambodian Center for Human Rights 2011, p. 16.

²³⁹Khmer Krom Interview nr. 2.

²⁴⁰Khmer Krom Interview nr. 3.

²⁴¹Tung 2018.

²⁴²Khmer Krom Interview nr. 5.

ing to one woman, only six percent of the local university have a Khmer background. When asked why, she was very clear in saying that it was due to the fact that most Khmer only have enough money to survive. Expenses such as university tuition are out of the question for many. Scholarships exist, but only to very few passing difficult exams in Vietnamese.²⁴³ The same woman also mentioned comments on the appearance of the Khmer Krom reproducing racist stereotypes and portraying them as undesirable.²⁴⁴

4.2.2 Religion

Religion is central to the long term survival of a Khmer Krom political community, an archetype of a secondary Arendtian right. Before virtually all Buddhist rites in Southeast Asia, refugee is taken in the triple gem which consists of the Buddha, the Dhamma and the sangha. Buddha needs no explanation, the Dhamma is the teaching he discovered and the Sangha is the collective who preserves and embodies it.²⁴⁵ The Sangha is supposed to represent a unified movement in harmony according to the Buddha's teaching but has in modern time come to legitimize and reproduce the nation-state in Buddhist countries, used as for instance "the Vietnamese Sangha" or "the Cambodian Sangha"²⁴⁶

In Vietnam the Sangha is embodied by the Vietnamese Buddhist Sangha (VBS) which consists of government appointed Buddhist officials, of which a majority are Mahayana Buddhists as opposed to the Khmer Theravada tradition.²⁴⁷ Khmer Monks express frustration toward being subsumed under the VBS. The Theravada tradition was granted the status of "religious organization" in 2008 but one monk still described the situation like this:

"If we look at the Human Rights, there are not enough for the Khmer Krom Buddhist monks to get or to receive the rights for themselves because the Vietnamese Buddhist monks who follow Mahayana Buddhism they do everything for the government policy. The Vietnamese government is ruled by the communist party which is divided into many sectors. So the communists they rule over the Buddhism - Mahayana Buddhism and Theravada Buddhism. They [Khmer Krom] want to divide it in the future, they don't want to have to do everything for the Vietnamese

²⁴³Khmer Krom Interview nr. 8.

²⁴⁴Khmer Krom Interview nr. 8.

²⁴⁵Buswell 2014, p. 714.

²⁴⁶Ibid., p. 744.

²⁴⁷Human Rights Watch 2009b, p. 6.

Buddhist monks. They want to have their own rights in the future.”²⁴⁸

Rights that are granted are inevitably aimed toward the majority Mahayana tradition. Furthermore Theravada remains under strict supervision from the party, which regards it as a possible threat which can undermine unity and the authority of the party. This means that they need to receive permission before conducting events.²⁴⁹ Religious teachings also need to be approved by the Vietnamese authorities.²⁵⁰ Khmer monks interpret as measures of control, that the government want to keep track of all their gatherings. This is a salient point as much of the Khmer community is organized around the temple.²⁵¹ Most people do not realize to which extent the pagodas are social centers in the Mekong Delta as young and old laypeople come to the temple grounds. When asked why there were several instances of sports equipment around the temple, a monk simply responded that the children had asked for it. Oversight of these areas are therefore very intrusive into many aspects of Khmer life. Examples such as these display inventiveness and resilience of the Khmer Krom community, acts of solidarity with laypeople are on display all over the network of Khmer Buddhist *wats*. These centra are important from an Arendtian standpoint.

But, Khmer people are very aware that their religious freedom is cut short. Since many are well educated, they are aware of these rights and that they lack ways of obtaining them. Two points were frequently brought up. First is the government’s singular focus on certain monks mentioned above: ☒

” [...] And I also want to tell you about the structure of power in the Khmer temple as instituted by the Vietnamese government. The government picks one monk which they focus on. This is the only one they communicate with and they give him all the money. He can sometimes get a good position in society, participate in local peoples committee etc. The single monks who get good position are then used to show off what appears to be a good policy, but it is a bad policy. Because it makes one monk very powerful. They only care about one monk. ²⁵²

Second is the fact that Theravada scriptures, the so called Pali cannon,²⁵³ is different from

²⁴⁸Khmer Krom Interview nr. 5.

²⁴⁹Human Rights Watch 2009b, p. 50.

²⁵⁰Minority Rights Group International 2018b.

²⁵¹Khmer Krom Interview nr. 2.

²⁵²Khmer Krom Interview nr. 4.

²⁵³Pali is the language the Buddha spoke.

the scriptures and suttas used in Mahayana Buddhism. In some cases Theravada scriptures are in conflict with the policies of the government. The most frequently cited example is the 2007 demonstrations, both by monks and laity interviewed. Although the perception of the events from a laywoman I spoke to does not correspond to the picture presented by Monks and HRW.²⁵⁴ The protests are described by HRW as having the purpose of calling for religious freedom in Vietnam. While this is likely the larger, overarching goal, monks I talked to rather focused on the fact that the annual *Kathin* festival was only allowed a heavily restricted number of days.²⁵⁵

Protests started with around 150 monks having gathered at a pagoda outside Soc Trang for planning a protest but plans changed when police blocked the exit of a pagoda in Soc Trang out of fear that 200 Pali students would join in protests. But the police were then also around 100 monks from going to collect alms. As news of this spread, the original 150 monks headed into Soc Trang along with other monks. As the group arrived in town they gathered outside the police station demanding rights such as Khmer themselves running their pagodas. Later the same day, several high level officials arrived and persuaded the monks to leave, which they did.²⁵⁶

Subsequent repression did not take long. Action was immediately taken to identify and punish those responsible. What monks feared at this point, and what indeed happened to several protesters was defrocking. Defrocking is the punishment of being removed from the Sangha often by forcibly removing one's robe, something which is viewed as extremely humiliating and demeaning in the monk community.²⁵⁷ HRW reports that one of the monks was ready to self-immolate were he to be defrocked.²⁵⁸ Around 20 monks were defrocked as result of the protest.²⁵⁹ Five of those monks were arrested, facing harsh conditions and beatings. On May 10th the monks were sentenced to prison with imprisonment time varying from two to four years.²⁶⁰

4.2.3 Relation to the government

"I saw many people treated like that. I remember when I was a student, one of my relatives played cards with a group of people, also Vietnamese people there. But

²⁵⁴Khmer Krom Interview nr. 2, Khmer Krom Interview nr. 8.

²⁵⁵Human Rights Watch 2009b, p. 30.

²⁵⁶Ibid., pp. 30-32.

²⁵⁷Khmer Krom Interview nr. 2.

²⁵⁸Human Rights Watch 2009b, p. 7.

²⁵⁹Ibid., p. 34.

²⁶⁰Ibid., p. 39.

when the government discovered they punished Khmer people higher than Vietnamese.”²⁶¹

Stories about a discriminatory criminal justice system are frequent. Often they are not as outspoken as the woman cited above but rather a self-evident, presupposed fact in interviews. According to HRW, the legal system remains firmly in the hands of the government thereby rendering discrimination an extension of the relation to the authorities in general for the Khmer.²⁶²

Many Khmer Krom interviewed assume ill will and racial prejudice informs the way in which the government interacts with them. For the Khmer laypeople, monks often point out the fact that they are afraid to speak out and that finding out the truth from them is difficult compared to the monks because monks “live in the temple and have some rights to do for the religion”. Still, fear is mentioned throughout interviews and as a reason for not being able to act.²⁶³

4.2.4 Political Community

The Khmer Krom are not helpless. In fact, they have a strong community that has resisted assimilation and destruction of collective identity for hundreds of years. But as Taylor rightly points out in his discussion on the carceral discourse (“subjugated, disciplined, and circumscribed”) of Vietnamese minorities, seeing resistance to inclusion in the official structures of the nation-state as the only form of agency available to Khmer Krom confines them and risks to reproduce a picture of hopelessness.²⁶⁴ The agency of the Khmer Krom manifests in several ways, such as the demonstrations mentioned above. They also have a large and extensive international network consisting of advocacy groups and organization such as Unrepresented Nations and Peoples Organization. These span over several countries such as Cambodia, France and the United States. Transnational contacts are vital since the possibilities for expression are severely limited in Vietnam²⁶⁵ Much of my own fieldwork materialized through contacts in other countries who forwarded me to local participants as I did not want to put Vietnamese Khmers through unnecessary risks. Some of the interviewed Khmer monks, especially those who have managed to study abroad are very aware of such transnational networks and conclude that they are the main possibility of affecting their situation. One monk stated that the best way to gain rights was:

²⁶¹ Khmer Krom Interview nr. 8.

²⁶² Human Rights Watch 2018, p. 4.

²⁶³ Khmer Krom Interview nr. 5.

²⁶⁴ Philip Taylor 2008, pp. 32-33.

²⁶⁵ Ibid., pp. 18-19.

”For the Khmer Krom people, they hope that in the future the Khmer Krom who live abroad will find and advise to the United Nations and look back to the Khmer Krom in South of Vietnam. Because the government, if the United Nations, or the Khmer Krom who live abroad don’t oppose or take something to the UN, other countries won’t know about the Khmer Krom.”²⁶⁶

Even if we can conclude that Khmer Krom do have transnational networks and agency, these are qualities that the government seeks to thwart. Such sentiments are mirrored in other research.²⁶⁷ Therefore it is necessary, especially when examining rights, how the possibilities of agency and ultimately access to a political community are deliberately undermined. This discussion will be further expanded on in the analysis as it is a central concept in Arendt’s right to have rights theory.

The 2007 Soc Trang demonstrated discussed above from a viewpoint of religious freedom are central to understanding the opportunities and limitations of the Khmer Krom political community as well as how those limitations are imposed. On the one hand, monks interviewed argue that they affected meaningful change in changing policy in different ways.²⁶⁸ Although I have not seen any human rights research going as far as the monks in positive assessment of protest impact, it is clear that the government instituted some change, such as an academy for Theravada in Can Tho as well as expanding the Pali language school that was the site of the protest.²⁶⁹ Still, it is important to remember the harsh repression, violence and degrading treatment with which the government initially answered the protests.²⁷⁰ Orwellian charges, such as ”abusing democratic rights” are not uncommon and highlight the dangerous lack of rule of law one is exposed to when trying to correct discrimination.²⁷¹ Thus, trying to enact rights based change through forming a polity of protest is extremely costly to those involved, with some having fled Vietnam and now living in exile.²⁷² It is also questionable what role the protests have played in the minds of the general Khmer population. One woman cited them as an example of why Vietnamese ”hate” Khmer which she believed was because Khmer has a tendency to voice concerns more than other minorities which in turn is why they are under close watch, neither

²⁶⁶Khmer Krom Interview nr. 5.

²⁶⁷Philip Taylor 2013.

²⁶⁸Khmer Krom Interview nr. 2, Khmer Krom Interview nr. 5.

²⁶⁹Leo 2010, p. 191.

²⁷⁰Human Rights Watch 2009b, pp. 34,39.

²⁷¹Minority Rights Group International 2018b.

²⁷²Khmers Kampuchea-Krom Federation 2010, p. 2.

did she have any insight into the actual aims of the protest. This is perhaps a sweeping assumption, but the interviewed woman was very well-educated which could be taken to illustrate the lack of independent reporting and restrictions on education.²⁷³

The main difference between that woman and the surprisingly large number of well-educated monks I met was that all of the monks had obtained their education outside of Vietnam. Even though most of the degrees were Buddhist-oriented, other subjects, such as psychology were not uncommon. Young people I spoke to were very aware that they were not being taught Khmer history at school and that this was a deliberate policy on the part of the Vietnamese state.²⁷⁴ Monks were particularly distressed about this fact:

” [...] the KK feel bad and the children don’t know about their own rights. And don’t know about their history because most of the Khmer Krom children just study Vietnamese history, so the people who live in the world, they must know their own history and tradition. If they don’t know about their history, they won’t know where they came from - who they are.”²⁷⁵

Wrapping of history into a discourse of rights shows how the monks are aware of their transnational context. But it is at the same time reflective of their feelings of powerlessness and frustration with their inability to act. The context for the quote above was what the future hold for the Khmer Krom, in which the general feeling was that it is up to the transnational community as the Vietnamese Khmer Krom face severe restrictions.²⁷⁶

The opportunity for studying abroad has been in a constant flux for Khmer monks. It was closed down in 1975 as authoritarian regimes came to power throughout the region, such as the Khmer Rouge in Cambodia. As noted elsewhere in this thesis, the Khmer Rouge targeted Khmer Krom in their genocidal policies. When their reign came to an end and Cambodian monastic education resurfaced Khmer Krom monks started gaining interest in crossing the border but that was almost impossible as passport were denied and applications ignored. Going anyway was illegal and monks who did were arrested and defrocked upon their return. What one monk told Taylor in 1990 is strikingly similar to explanations given to me in 2018 about why there are restrictions on travel for monks - which is that they have the time to form opinions and engage

²⁷³Khmer Krom Interview nr. 8.

²⁷⁴Khmer Krom Interview nr. 8

²⁷⁵Khmer Krom Interview nr. 5.

²⁷⁶Khmer Krom Interview nr. 5.

in politics, in short - become aware of their rights.²⁷⁷ It should be noted that restrictions now are likely less harsh, but one monk still reported being questioned repeatedly by police for a long time upon returning.²⁷⁸ Another monk expressed frustration toward the fact that it is easier for Vietnamese people to travel abroad because Khmer Krom have a harder time obtaining a passport.²⁷⁹ Clearly, such restrictions on education and movement aim to limit the Vietnamese Khmer's possibility of forming a political community.

One monk reported having written a linguistic book relating to a Khmer subject which could be of use in the monastic setting of the temple. He wrote it abroad and when he brought copies back with him into Vietnam they were almost all confiscated. He emphasized that there was nothing political about the book, its singular use was Khmer language learning.²⁸⁰ Monks eagerly demonstrated their language classes for young Khmer, for which they think language is essential. One monk accentuated the responsibility of the monks to keep the Khmer language alive and well. He held that official policy of learning Khmer in Vietnamese school was a smoke-screen as the already discriminated Khmer students would then miss other valuable subjects which was something that they would not be willing to.²⁸¹ Satisfactory education mindful of Khmer's bilingual reality is still a significant problem. Khmers also lack state services provided in their own language even in areas where they form the majority of the population.²⁸²

4.3 Rights violations

This section relates directly to the first part of the research question. Detailing how the lived reality of Khmer people, especially monks, translates into human rights violations becomes an almost absurd endeavour due to the vast scope of denials. I argue that in order to meaningfully institute human rights for people who have been systematically discriminated, Hannah Arendt's right to have rights is a prerequisite. In this case, such a right presupposes substantially implemented indigenous rights. Such rights do not exist in Vietnam despite the fact that Vietnam voted in favour of UNDRIP. A larger discussion of this is featured in the analysis, but it can be helpful to keep in mind as we go through the most substantial violations. The purpose here is

²⁷⁷ Philip Taylor 2016, pp. 282-285.

²⁷⁸ Khmer Krom Interview nr. 9.

²⁷⁹ Khmer Krom Interview nr. 7.

²⁸⁰ Khmer Krom Interview nr. 9.

²⁸¹ Khmer Krom Interview nr. 1.

²⁸² Minority Rights Group International 2018b.

not to provide definite legal analysis or conclusively determine what constitutes human rights violations. There is neither place in thesis nor sufficient fieldwork for that, instead that should be left to international legal bodies. Observations and interviews do highlight that some rights not being respected *prima facie* from the standpoint of the Khmer Krom. As such, this section is just that - a *prima facie* inquiry into what rights the Khmer Krom are being denied. Such an approach fits with the theoretical framework of the thesis and is consistent with human rights monitoring from which significant inspiration has been drawn.²⁸³ But writing human rights based critique always carries risk due to the selective application of such norms by powerful countries. Human rights are frequently employed as moral narrative used to justify intervention in official enemies while similar or worse violations in states which are allies are glossed over.²⁸⁴ Similarly, even though this is an examination of conditions in Vietnam, I argue that these are problems particular to the human rights regime in general, not only the Vietnamese context. Minorities suffer in many places throughout the world, oftentimes in Europe and its offshoots, where governments refuse to sign ILO convention 169 (Sweden) or vote against UNDRIP (United States) for which they have been criticized by international organizations.²⁸⁵

First looking to the general picture, it becomes clear that the Khmer Krom are nowhere near self-determination. Neither does Vietnam consider this something which they should be granted, as they are not indigenous peoples according to domestic Vietnamese policy.²⁸⁶ This is incompatible with common Article 1 ICCPR & ICESCR as well as Article 3 of UNDRIP. Note well that self-determination is not the same as secession or independent statehood, it has more to do with core notions of equality and freedom, notions that can be realized through independent statehood but need not necessarily be. Self-determination is rightly referred to as a cornerstone right as it makes the realization of other rights possible.²⁸⁷ The reason for focusing on it so explicitly in the case of indigenous people like the Khmer Krom is that they have historically been denied such rights while they are currently constituting a non-dominant segment of society which means they need special rights to equate them with the dominant population.²⁸⁸ Their disenfranchisement from the political sphere in the form of repression of rights to association, assembly and expression are perhaps the most glaring examples of this. As described

²⁸³See for instance Human Rights Watch 2009b.

²⁸⁴Anghie 2007, p. 292.

²⁸⁵Kesby 2012, p. 82.

²⁸⁶CESCR 2013, para. 27.

²⁸⁷Xanthaki 2007, p. 131.

²⁸⁸Ibid., p. 150.

above, this takes several forms and shapes such as control of religious organizations, repression of peaceful protests and constant fear of expressing oneself to foreigners due to the risk of surveillance. The feeling of imposed poverty and hopelessness in the face of rights abuses, and calls to the transnational community, expressed by rank and file monks are the opposite of self-determination.

Lack of proper legal mechanisms for self-determination lead to difficulties in other rights as well. Rights found in articles on non-discrimination such as Article 2 UNDRIP (general), Article 14 ICCPR (arbitrary arrests and detentions), Article 26 (equality before the law), as well as large portions of ICERD are not possessed by significant portions of Khmer Krom society *prima facie*. It is also clear that the expression, assembly and association rights in Article 19, 20 and 22 ICCPR are withheld from the Khmer Krom as clear from the instances of protest, fear or expression, confiscated Khmer literature and lack of political organizational presence in Vietnam, these denials are likely applied on grounds of discrimination. Legislation does not need to use explicitly discriminating language, because if it has a discriminatory effect it will come within the scope of 1(1) ICERD.²⁸⁹ Discrimination in the legal system, as mentioned by several interviewed Khmer further removes them from a meaningful political community. Imprisonment has historically been a way for the state to manage deviant and superfluous population. In this case the Khmer do not fit into the universal narrative of development as conceived by the government because their marginalization disenfranchises them from the free market. They also threaten the illusion of national unity with their rights claims and transnational community. This makes them a lot of them, especially monks, superfluous (if not worse) to the government.²⁹⁰

As for cultural, linguistic and religious rights as outlined in Article 27 ICCPR, it is clear that the lack of self-determination and discrimination in general put such individual rights out of reach. Some religious rights have been given, but the lack of an own Sangha which the Khmer Krom can determine how to organize themselves undermines meaningful religious freedom. Furthermore, defrocking as it is used to deter and frighten protesters may constitute cruel and inhuman treatment in violation of CAT, if done violently or in an especially degrading way. It can also constitute a limitation to religious freedom when it lacks due process and is carried out by state officials.²⁹¹ For linguistic rights, language classes are provided, which is a first step, but they give student the impossible choice of missing other class or developing their mother tongue.

²⁸⁹ Kesby 2012, p. 82.

²⁹⁰ Ibid., p. 85.

²⁹¹ Human Rights Watch 2009b, p. 47.

Such a choice is nowhere near the standard that is found in Article 27 ICCPR or Article 26, 14(1) UNDRIP or other provisions declaring the equality of indigenous people to the majority population.

Vietnamese limitations on freedom of assembly follows the legacy of authoritarian socialist states which during the drafting of the ICCPR suggested that freedom of assembly only be respected when done in the interests of democracy. It is against this backdrop that crimes such as "abusing democratic rights" should be viewed.²⁹² The same is true for restrictions on freedom of expression, and although it affects all Vietnamese, those on the margins and in need of political community to affect policy suffer disproportionately.²⁹³ The future looks bleak as a new cybersecurity law comes into effect in 2019. While Lieutenant General Hoang Phuoc Thuan, Director of the Public Security Ministry's Cyber Security Department have said that such fears of limiting expression are unfounded, he almost immediately went on to state that "under no circumstances, acts of instigating demonstrations will be subject to punishment in real life but exempt from liability in cyberspace".²⁹⁴ By claiming that freedom of expression is granted as long as violations do not occur, a rather narrow conception of freedom of expression becomes visible.²⁹⁵

²⁹²Nowak 2005, p. 483.

²⁹³Reporters without Borders 2018.

²⁹⁴Vietnamese Law and Legal Forum 2018.

²⁹⁵Ibid.

5. The Right to Have Rights

As we saw in the previous chapter, the Khmer Krom lack a significant number of rights. This chapter provides a theoretical framework explaining that lack of rights by using Hannah Arendt's concept of a right to have rights.

5.1 Why Arendt?

There is no such thing as absence of theory. All studies follow some sort of commitment to a set of goals, beliefs or analysis of society whether explicit or not. If one leaves the paradigm of what is deemed value-neutral, it becomes necessary explain the underlying motive.²⁹⁶ Thus, what relevance does a twentieth century philosopher and political theorist hold for issues of indigenous and human rights in a legal setting? The points of tangency are many. Arendt frequently engaged with international law and making use of her legacy in theorizing about international legal phenomena is not a novel approach. As an example of the former, Arendt's scholarship has covered a wide array of subjects including statelessness, minorities, totalitarianism, imperialism and human rights.²⁹⁷ With such a list of subjects traceable to the present and in many cases just as important today as they were when being formulated by Arendt - it should not be surprising that international lawyers have indeed made use of her theories. One notable example of Arendt's ideas in the mainstream of international legal scholarship is *Possible Islands of Predictability* by prominent international lawyer Jan Klabbers. He explores an Arendtian view on law and its relation to politics.²⁹⁸

Looking beyond the strict partitioning of academic fields, a lot of Arendtian perspectives exist in political science, perhaps this is only natural since Arendt was first and foremost a political theorist. But the subsequent research carries meaning for international lawyers in the same

²⁹⁶Chomsky 2003.

²⁹⁷Whitehall 2012, pp. 231-232.

²⁹⁸Klabbers 2007, p. 1.

manner Arendt's ideas do, even if they are termed political science. Seyla Benhabib, likely the most influential scholar to engage with Arendt, has written extensively about questions of statelessness and rightlessness.²⁹⁹ All of these are subjects that exist, or should exist at the core of international legal research since they are fundamental problems for the viability of the international legal regime and that of human rights especially. At the same time, they are problems that do not only pertain to the past, rather, they permeate our time as much as the one Arendt inhabited.³⁰⁰ Therefore, this is not the place for hermeneutics - there has been no attempt to make a perfect interpretation of what Arendt would have thought about the present. In fact, she would likely have strongly objected to some of the descriptions both from contemporary researches and this thesis. For instance, Arendt completely rejected economic and social rights.³⁰¹ The concept of a right to have rights did not endure in Arendt's own writing, which makes Moyn question if there is anything to justify thinking about it within the confines of Arendt's own thinking.³⁰²

Rightlessness should not be understood only as the extreme persecution of Arendt's time, such as the de-naturalization of Jews. If we understand it only in terms of citizenship we fail to properly grasp the situation of millions of people carrying the passport of a nation they do not identify with, such as one of the monks interviewed above.³⁰³ Situations that are less dramatic and take place not through brutal acts of violence but by bureaucratic means such as the land dispossession mentioned above.³⁰⁴ Rightlessness of this type is particularly prevalent in settings inequality, as rights become vulnerable without collective strength, which is the case for the Khmer Krom.³⁰⁵

5.2 Arendtian International Law in Asia?

What about the geographical scope and legal focus of the theory? The Rights to Have Rights is a theory that was informed by events taking place in Europe and its offshoots, in a sense it was a reaction against those events which Arendt experienced first hand due to her Jewish identity. But this does not mean that her scholarship is free from colonial conceptions of race and culture.

²⁹⁹Benhabib 2018.

³⁰⁰Hanley 2014, p. 322.

³⁰¹Moyn 2018b, pp. 68-69.

³⁰²Ibid., pp. 71-73.

³⁰³A. Taylor 2018, p. 110.

³⁰⁴Philip Taylor 2013.

³⁰⁵A. Taylor 2018, p. 110.

She has for instance been criticized for how *The Origins of Totalitarianism* depicts indigenous people from Southern Africa as "savages", using them as a tool to illustrate dehumanization of "civilized" (meaning European) people.³⁰⁶ Regardless of whether this was an acceptable view or not in the 1960s, there is no doubt that Arendt's humanism is universalizing values of European civilization.³⁰⁷ Another example is her claim that the frightened Boer settlers could never accept the Khoikhoi as "fellow men" for reasons of "human dignity" and "human pride". While Arendt likely intends to describe the Boers racist tendencies, she herself also expresses racial tropes in her way of doing this.³⁰⁸

At the center of Arendt's narrative we find the destruction of the Jews in the second world war which despite its name represented a particularly eurocentric war. It has been argued the focus on the international Jewish persecution made her overlook her own construction of colonized identity and by doing so, she reproduced the "other". But that must be seen in the light of the overarching message of her book, namely that the imperialist expansion of capitalism and race ideology and thereby the civilizing mission, did violence to the margins while simultaneously destroying its own European core.³⁰⁹ In this thesis, that message is seen through a TWAIL lens where the dominant ethnic group of the state, in this case the Vietnamese, is seen as reproducing the colonial dynamic toward their own minorities, in this case the Khmer.³¹⁰ Fittingly, earlier fieldwork on the Khmer Krom by HRW goes by the name "On The Margins".³¹¹

Origins has also been characterized as reflecting an antiprimitivism rather than *only* internalized prejudicial notions about race. The sentiment would then be traced back to a strain of German philosophy representing culture as *bildung*, which is self-cultivation that ultimately unifies the self with broader society.³¹² This, according to antiprimitivists, leads to a separation of nature and culture, in which history determines what can be regarded as the latter.³¹³ By ignoring cultural phenomena operative in a non-European context Arendt engages in antiprimitivism and thereby upholds the values of *bildung* as the highest form of culture.³¹⁴ This is especially problematic for the conclusions drawn about the necessity of the nation-state in the

³⁰⁶Casas Klausen 2010, p. 394.

³⁰⁷Arendt 1973, p. 300.

³⁰⁸Ibid., p. 192.

³⁰⁹Moruzzi 1991, pp. 113,117.

³¹⁰Anghie 2007, p. 207.

³¹¹Human Rights Watch 2009b.

³¹²Casas Klausen 2010, p. 406.

³¹³Ibid., p. 411.

³¹⁴Ibid., p. 416.

context of rights. Can they be viewed as isolated from Arendt's discourse on "savages"? Edmund Burke, who inspired the critique of human rights as isolated from the nation and to some extent Arendt herself, came to the conclusion that natural rights are granted even to savages, much rather wanting to have the "rights of an Englishman" than that of the "naked savage".³¹⁵ Arendt echoes these sentiments, and the antiprimitivism of such statements obscures the validity of her thoughts on whether national rights are to be considered a precondition for all other rights.³¹⁶ It is also problematic in the face of the Vietnamese antiprimitivist discourse levied against the Khmer Krom discussed above.³¹⁷

Writing to critique the current rights regime in the hopes that it can be improved would not be a serious endeavour if these currents underpinning the theory were not confronted. To clarify, I do not consider the loss of a right to have rights to be intrinsically comparable to the situation of various indigenous people, nor is such a comparison desirable. More importantly, the central premise which this rests upon, that indigenous peoples are without history is demonstratively false, many such histories exist.^{318,319} Rather than features particular to certain groups, statelessness and rightlessness are imposed. Some of Arendt's comments appear inconsistent with her stated purpose. It has been argued that they stem from Arendt's lack of a coherent methodology of engaging with history while assigning history a central role in what it means to be human.³²⁰ In other contexts Arendt saw how the state was responsible for the qualification (as opposed to statelessness as an inherent feature) very clearly, such as when the dominant ethnic groups began to practice mass denaturalization of citizens thereby imposing new categories on people (Recall our discussion on Vietnamese refusal to grant indigenous status to the Khmer Krom). For the purposes of this thesis it is the actions of the state which create the Arendtian categories of statelessness, refugees and minorities.³²¹ This view is in line with the contemporary usage of the concept of statelessness outlined by Arendt. One notable example is Judith Butler, who lists normative categories such as age, gender, race and labour status and that these do not disqualify them for an active citizenship, but rather qualifies them for statelessness. As such, statelessness is *produced* as a person is removed from juridical modes of belonging.³²²

³¹⁵Burke 1830, See Introduction.

³¹⁶Arendt 1973, p. 300.

³¹⁷See for instance CESCR 2013, para. 598.

³¹⁸Haebich 2011.

³¹⁹Philip Taylor 2014.

³²⁰King 2008, p. 251.

³²¹Benhabib 2005, p. 4.

³²²Butler, Spivak, et al. 2007, pp. 15-16.

Still, bearing the critique above in mind, Arendtian perspectives would not make up the theoretical framework of this thesis if *Origins* and the theories it has given rise to were not relevant. Arendt was first and foremost a theorist of minority rights, statelessness, refugees and deported people, of which the first two are the focus of this essay.³²³ Drawing inspiration from Arendt's own methodological approach, the history of philosophy should not be dogmatically treated as eternally axiomatic but as a repository of categories and arguments that can orient one in the present. This so called "activity of the pearl diver" can be applied to Arendt's own theories by disregarding some of the aspects discussed above while trying to expand on questions of relevance.³²⁴ Part inspiration of and part inspired by Arendt, Chomsky makes use of history in a similar way discussing Marx.³²⁵ In this thesis such a departure is that some of Arendt's thought are washed through a TMAIL perspective.³²⁶

Even if some aspects can be left out through pearl diving, the right to have rights was still developed from a European lens. What would a eurocentric discourse entail for this thesis? Whereas the disclaimers above are true, it is also a fact that the territorially bound nation state system is the result of European conquest, exemplified in part by the model of sovereignty afforded to post-colonial states, which is a replica of the European archetype.³²⁷ Also, as can be seen in this thesis' section on legal ideology,³²⁸ much of contemporary legal constructs have been imposed on Vietnam from Europe.³²⁹ But for the purposes of this study, international law is even more important. Not only has the limited and eurocentric scope of the international legal regime been well documented,³³⁰ international legal concepts continue to reproduce this unequal power dynamic inherent in the colonial encounter, which is a natural but important distinction from *Origins* on the subject of when imperialism "ended".³³¹ Rather we today see colonial continuities with examples running from the encounter up until the present.³³²

³²³Benhabib 2002, p. 543.

³²⁴Ibid., p. 539.

³²⁵Chomsky 1970.

³²⁶Anghie 2007, p. 207.

³²⁷Ibid., p. 213.

³²⁸See chapter 2

³²⁹See chapter 2.

³³⁰Lorca 2012, p. 1035.

³³¹Gines 2008, p. 38.

³³²Anghie 2016, p. 165.

5.2.1 Post-Colonial Colonial Continuities

Western powers negated all efforts of the former colonies to mould legal concepts in ways that would suit their specific needs. The doctrine of permanent sovereignty over natural resources (hereinafter PSNR) exemplifies how western states met post-colonial efforts with arguments about violations of classical principles of international law or, ironically, themselves formulating new doctrines which they claimed were established legal theory.³³³ In doing this, they were ignoring legal scholars from Asia who were claiming that Asian states had a long and rich history of international law. These legal traditions were not necessarily set apart by cultural difference but often had already developed concepts that were often corresponding to western perceptions of legal constructs, such as rule of law.³³⁴

In the case of human rights, Vietnam and especially the anticolonial struggle of Hồ Chí Minh illustrate the discrepancy in priorities between the West and peoples of the colonized world, clearly represented in his own Vietnamese declaration of Independence:

”All men are created equal, they are endowed by their Creator with certain inalienable rights; among these are Life, Liberty, and the pursuit of Happiness.”

Importantly, more than an actual statement of rights, Hồ Chí Minh recycled the American declaration of independence for the same purpose it had been used the first time, namely to serve as a proclamation of postcolonial sovereignty, globally. Freedom from such domination seemed to many people not part of Europe or its offshoots much more significant than a canonized framework of human rights.³³⁵

Rather than using the concept of human rights that Arendt was discussing as a stepping stone, Hồ Chí Minh and his contemporary anticolonial comrades focused on the concept of self-determination in their speeches and propaganda. The concepts did somewhat empower each other in the sense that collective self-determination eventually incorporated human rights. The internationalism of anticolonialism, however, did not spring out of the human rights movement. Instead, it was the result of alternative national liberation struggles that were more concerned with collective economic development than rights in the sense of classical liberties or social rights.³³⁶ Contrast this with the origins of human rights which do not share this back-

³³³ Anghie 2007, p. 198.

³³⁴ Anand 1972, pp. 9-10.

³³⁵ Moyn 2010, pp. 84-85.

³³⁶ Ibid., pp. 85-86.

ground in the slightest. They are rather traced back to a reinvention of West European conservatism. Moyn argues that it is a mistake to assume that human rights either emerged as an antidote to antisemitic atrocities (universal understanding of this came much later) or had revolutionary roots. Grounded in personalism, human rights were expressions of the view that the person is an irreducible reality, emphasizing free will and the moral value of each person.³³⁷ Although personalism still plays a part in human rights, it is rather peripheral. The contemporary human rights system has more of a relation to Vietnam. In order to seriously break through US hegemony, Moyn contends human rights took off in the 1970s as criticism of the Vietnam invasion and resulting war due to politicians not trusting the UN, leaving it up to the US to "forcefully" propagate human rights norms.³³⁸ The trauma of subjecting another country to 25 years of terror with few historical parallels coincided with dissident movements in the eastern block, making human rights even more attractive as a liberal alternative to other utopias, the so called last utopia. It was a politics of liberal internationalism.³³⁹ In fact the personalist conception of human rights might have been more beneficial to minorities and indigenous peoples as it viewed the individualistic and communitarian tendencies as complimentary rather than exclusionary. This leads to less opposition to collective rights than the current liberal hegemony in international law, recall how self-determination and other indigenous rights in UNDRIP have taken the route through human rights.³⁴⁰

Moyn's narrative is not universal, Chomsky claims that when the US finally left Vietnam after leading it close to extinction as a cultural and historical entity, US policymakers had to find a way to manage the domestic and international outrage.³⁴¹ According to Arendt herself, the ultimate goal for the Vietnam War "was neither power nor profit ... [nor] ... particular tangible interests," instead it was "image-making" - a sort of violent display of power and ownership of the world.³⁴² Chomsky views liberal internationalism and human rights as tools for US hegemony, pointing out that American intellectuals reserved the term dissidents for enemy domains, letting their counterparts in Latin American client states face much worse violence and state terror, especially for those who resisted state repression.³⁴³ Moyn has since nuanced his claims,

³³⁷Moyn 2011, pp. 87, 105.

³³⁸Moyn 2010, p. 151.

³³⁹Ibid., pp. 160-161.

³⁴⁰Xanthaki 2007, p. 24.

³⁴¹Fall 1967.

³⁴²Arendt 1972.

³⁴³Chomsky 2015, See preface.

accounting more for the global neoliberal backdrop against which this took place, in order to account for the changes in superstructure where human rights are found, he now accounts for the capitalist base.³⁴⁴ As discussed above, Đổi Mới introduced neoliberal capitalism to Vietnam. Unexpectedly perhaps, Moyn would face criticism from some of the Vietnamese legal scholars, who argues that the superstructure is relatively autonomous in relation to the base.³⁴⁵

Arendt was also skeptical of the sociological currents of her time that painted politics as a superstructure resulting from social forces. To her, politics were a distinct realm.³⁴⁶ Although we can establish that Arendt's work exhibit some questionable traits traceable to Europe, her genius is that her work can somewhat bridge the gap between these competing ideological underpinnings. In *Origins* Arendt uses the right to have rights to explain that without any collective membership naturally granting a right to have rights, assertions about human rights, focusing on those in Universal Declaration, ring hollow. Earlier rights were predicated on belonging to a political or cultural community, human rights are not and therefore differ substantially. Rights presuppose political community, and such community were not available to the groups that needed it most.³⁴⁷ A catalogue of individual rights has little to offer those who are in the "abstract nakedness of being human", whether that nakedness is due to colonial oppression or racist persecution in Europe.³⁴⁸

The rights regime, as we have seen above, is not modular but instead permeated with legal ideology stemming from Europe. Even if Arendt managed to somewhat traverse the divide with a few weak points and failings, some of the other eurocentric theoretical underpinnings of her work are not necessarily problematic since this thesis is a critique of legal concepts traceable to Europe. The issues above have been confronted in order to utilize Arendt's theory as intended. That is, as a truly progressive critique of how the rights regime functions for those most in need of it - the stateless, minorities and the persecuted.

³⁴⁴Moyn 2018a, p. x.

³⁴⁵See chapter 2.

³⁴⁶Canovan 1983, p. 287.

³⁴⁷Moyn 2010, p. 12.

³⁴⁸Arendt 1973, p. 297.

5.3 The Concept of a Right to Have Rights

5.3.1 The Origins of Totalitarianism

Who is the subject of the "Rights of Man", asks Jaques Ranciere in his widely cited critique of Hannah Arendt. Are they perhaps "the rights of those who have not the rights that they have and have the rights that they have not"?³⁴⁹ Are human rights simply rights for the rightless and thus by definition void? For Arendt, it is more practical as rights are for:

"[...] a new kind of human being - the kind that are put in concentration camps by their foes and in interment camps by their friends."³⁵⁰

The focus on minorities, refugees and the stateless is due to their shared element of rightlessness. Recall how the Khmer Krom lack several significant rights, documented in the previous chapter. Thus, the right to have rights is not only a theory that describes the hardships of certain persecuted groups who had existed prior to the second world war but whose numbers were greatly multiplied - it also critiques the notion of international rights. It is important to note that in this case the "subjects" might not be textually "rightless" they may have carried some rights at Arendt's time of writing and could most likely find some favourable stipulations in contemporary human rights treaties (again, recall the previous chapter). The calamity Arendt identifies is not that the subject of the rights, a stateless person for instance, does not possess a right to equality before the law, freedom of opinion or any other such rights - but that these rights are construed in such a way that they require a community to solve certain issues whereas the main issue for the stateless person is their lack of community in itself.^{351,352}

As her first example of rightlessness, Arendt discusses the loss of social texture and a place in the world which might be most applicable in the case of refugees. For minorities, this carries meaning if viewed as restrictions on the freedom of movement - it is first and foremost a problem of political organization. Second is the loss of government protection. Often resulting in statelessness.³⁵³ But what about protection afforded by international bodies? Arendt preempts arguments about the ability of international human rights courts to offer meaningful protection

³⁴⁹Rancière 2004, p. 302.

³⁵⁰Arendt 2017, p. 111.

³⁵¹Arendt 1973, p. 295.

³⁵²See more contemporary perspectives below.

³⁵³Arendt 1973, pp. 293-294.

for minorities. Such organizations are bound to fail in the larger context due to the natural opposition of nation-states to encroachments on their sovereignty. Arendt claims that minorities often knew this at her time of writing and instead focused on international solidarity or national rights.³⁵⁴

This is true in the case for refugees as well. Even though there are conventions with the purpose of affording certain rights to refugees, such as the possibility to seek asylum, non-refoulement etc.³⁵⁵ Arendt claims this has no impact on their fundamental state of rightlessness since there is no enforceable law in the case of these rights, which renders such rights a form of charity. Accepting this premise, incarcerated people from a majority population enjoy more rights than the stateless even if they have had their right to freedom rescinded for they still belong to a political community which offers them a platform. The perceived rights of the stateless are illusory.³⁵⁶

Thus, the foundational aspect to the theory is that human rights need a platform where opinions are "significant and actions effective". When belonging to the community is not a natural course of action and one's treatment is detached from actions and instead reliant on factors such as age, class, labour status, race, religion one is truly removed from the spectrum of human rights. Arendt makes an important distinction between certain rights in this regard - the subjects of the theory may have the rights to:

- freedom/freedom of speech

But not the rights of:

- action/opinion

Why is it significant to distinguish between these categories? The right to have rights means to live in a framework where one is judged by one's actions and opinions as well as the right to belong to some kind of organized community. Comparing it to slavery, Arendt finds similarity not in the manner in which slaves lost freedom (because that can happen in many situations) but in the sense that they too were excluded from a struggle for freedom due to lack of community. But their plight cannot be directly equated to that of the rightless because slaves still possess "a distinctive place in society". The definite description is therefore not the loss of individual

³⁵⁴Arendt 1973, p. 292.

³⁵⁵Convention Relating to the Status of Refugees, 28 July 1951, UNTS, vol. 189, p. 137. Art.

³⁵⁶Arendt 1973, p. 296.

rights, such as freedom - but a community which is "able and willing to guarantee any rights whatsoever". This lack of a political community is the most significant aspect of Arendt's theory - more than any individual right.³⁵⁷

Deconstructing the term is helpful for understanding it. The first instance of "right" is used to demonstrate a call to membership of a community, which according to Arendt is the only thing capable of affording rights. The second instance, the plural of "rights", refers the ordinary use of the word rights. That is, a claim to something which shall either obligate the corresponding party to take some sort of positive action or refrain from hindering a certain act the. In other words it is the common legal usage of the term.³⁵⁸ It can be illustrated like this:

right - a moral entitlement possessed by all humans.

rights - legal entitlements possessed only by citizens.³⁵⁹

Arendt's point is that the discourse of rights exists within the community. The possibility to bear rights is determined by membership to a group. Who is the corresponding party of such a right - i.e who is it addressed to? From a legal standpoint it is not clear where to put such an obligation. For Arendt it was rather simple, she addressed it to "humanity".³⁶⁰

Clearly, the legal implementation of such a right is complex, as is Arendt's own thoughts on how such a right can be applied in practice, not to say contradictory. First of all it cannot be guaranteed on the basis of reciprocal, treaty-based international law since it exists in a "sphere" above nations with the ability to enforce such a law. While pointing out this issue, Arendt explicitly rejects the notion of a single political entity exercising authority over all of the world, a "world government" due to the risk of totalitarian tendencies and the arbitrariness of what is right and an argument expressing fear of the tyranny of the majority - which is a situation that the theory is especially concerned with. Therefore, not much guidance is provided in the way of how to construct an international legal right to have rights regime, rather it is as a critical theory we find the real possibilities of the idea.³⁶¹

As an idea, the emphasis on political community is predicated on the necessity of such a community to be able to produce equality through organization. In her dismissal of rights, Arendt

³⁵⁷ Arendt 1973, pp. 296-297.

³⁵⁸ Benhabib 2005, pp. 6-7.

³⁵⁹ DeGooyer et al. 2018, p. 13.

³⁶⁰ Benhabib 2005, pp. 6-7.

³⁶¹ Arendt 1973, pp. 298-299.

even states that we are not born equal, but instead become equal when we become members of groups that can ensure our mutually equal rights.³⁶²

This was of course not the first time human rights were met with criticism. Edmund Burke had earlier concluded that all rights stem from the nation and characterized them as abstractions.³⁶³ Pragmatically, Arendt agrees by stating that the conception of human rights broke down when those championing such a right were confronted with those who did not possess the right to have rights and for which the only remaining quality was being human.³⁶⁴ Here, we encounter antiprimitivist tendencies again, as the point that confirming natural rights would be to "reduce civilized nations to the status of savagery" is brought up. These elements of Arendt's work are briefly discussed above but for the sake clarity such views are rejected in this thesis and, as we will see, by most researchers making use of the right to have rights as an analytic tool.³⁶⁵ Still, it is important to point out that Arendt was not in favour of the nation-state either which she saw as bound to reproduce the disenfranchisement and persecution of minorities she witnessed in the second world war.³⁶⁶

As DeGooyer notes with great clarity, Arendt was somewhat informed by Burke's theory when she constructed the right to have rights. But Arendt did not just restate what Burke had already concluded or offer a definitive solution to the problem of rights outside of the traditional frameworks of political community. Instead the right to have rights should be read as a means for diagnosis of contemporary situations of rightlessness. Arendt is in fact quite skeptical of the idea that solutions exist in law altogether, especially international law as it has been repeatedly shown that the protection of rights has been jettisoned in favour of treaties reinforcing sovereign rights. Arendt illustrates how nation-states collectively reproduce conditions which can, and as we have seen, frequently acts as a fertile soil for persecution of rightlessness. For minorities and other groups running the risk of being subjugated to such treatment, the nation-state system is not a protector of rights.³⁶⁷

³⁶² Arendt 1973, p. 301.

³⁶³ Burke 1830, p. 71.

³⁶⁴ Arendt 1973, p. 299.

³⁶⁵ *Ibid.*, p. 300.

³⁶⁶ Butler, Spivak, et al. 2007, p. 25.

³⁶⁷ DeGooyer et al. 2018, pp. 35, 38-39.

5.3.2 A Performative Interpretation

The right to have rights is still actively used to understand our present. Conditions have changed since the time of formulation, but so has the theories and the ways in which we can understand them. Importantly, the central premise of the theory has remained true despite a more global framework and application of human rights. Some of the subsequent critique and improvements on the theory have been discussed above.³⁶⁸ When assessing changes wrought by international human rights law to the situation of the rightless everywhere, keep in mind that the system of human rights gives primacy to the domestic sphere for enforcement - rights bearing is thus still largely confined to the nation-state.³⁶⁹

It is helpful to think about the developments as divided into two critical interpretations - **performative** and **normative**. This is suggested by Stephanie DeGooyer in the collaborative and aptly titled book "The Right to have Rights". The first interpretation is represented by Judith Butler, explained in more detail below. Butler's interpretation is performative in that it regards the first "right" as hollow and lacking actual legal authority in the face of reality. Only by performance, such as collective protest, can a claim to the right to have rights be made. The normative interpretation is best characterized by Benhabib (also discussed below in more detail) who does not read the first, singular "right" in the term as existing within a legal context. Rather, it conveys the moral idea that we should have universal rights for all humans.³⁷⁰

In our case, an important development is that the categories have been significantly broadened by Butler (among others). Age, gender, race and labour status can all qualify a person for statelessness in a state-centric process. In this, Butler also confirms the notion of statelessness as something which is *produced* rather than an inherent quality in a person (or non-person). This can all take place within the state, as incarceration, enslavement, illegal residence or work can (but of course not in all instances) be seen as forms of statelessness, or being deprived of the right to rights.³⁷¹ Arendt especially points out "the slave" as epitomizing certain characteristics of statelessness/rightlessness but regards them as not passing the threshold.³⁷² To this Butler objects that Arendt fails to elaborate on and properly divide the public and private spheres. The public sphere (where politics take place) is often reliant on a depoliticized private sphere (which

³⁶⁸See section 5.2.

³⁶⁹Kesby 2012, p. 97.

³⁷⁰DeGooyer et al. 2018, pp. 24-15.

³⁷¹Butler, Spivak, et al. 2007, pp. 15-17.

³⁷²Arendt 1973, p. 297.

is home, for instance). Failure to recognize the divide is probably the main reason for the lack of economic motive in the explanation for the enforcement of the categories qualifying statelessness. Since it precisely the lack of access to polity (the public sphere) that is the defining feature for those who do not have the right to rights, an extensive definition seems more stringent.³⁷³

Another small but important point for the purposes of this thesis is made by Butler. It does not introduce new categories of stateless or rightless but rather widens the overall scope of the Arendtian concepts. In the context of Israel/Palestine, Arendt argues that the solution to the so called "Jewish question" proved to be insufficient because it failed to solve the problem of the stateless and rightless, instead merely producing another category of rightless, the stateless Palestinians. This was repeated by partitioning of other countries, and the issue of stateless and refugees attached themselves like a curse to all newly created nation-states, which includes post-colonial states such as Vietnam.³⁷⁴ Butler uses this example to illustrate that the nation-state actually implies statelessness, confirming that it can exist within the borders of nations.³⁷⁵

5.3.3 Bare Life

Butler notes that these notions can be discussed from different perspectives and mentions Giorgio Agamben, who draws from statelessness to develop the related concept of bare life in relation to states of exception. He further develops the concept of the polity or political community discussed by Arendt. According to Agamben, the power of the nation-state exercises itself as sovereign power by the ability to exclude from the polity, that is make part of its population into bare life, a term coined by Walter Benjamin.³⁷⁶ Recall how attempts of the Khmer Krom to form a political community are thwarted.³⁷⁷

Arendt was familiar with Benjamin's work.³⁷⁸ Benjamin used the concept of bare life as a tool for analyzing the "irreducible" link between law and violence. Before delving into Agamben's theory of bare life it might be necessary to explain what connects law and violence. Benjamin defines the link by seeing the law-making as the end and the violence as the means.³⁷⁹ Another, more helpful account of this is made by Anthropologist David Graeber who clarifies that violence

³⁷³Butler, Spivak, et al. 2007, pp. 17,20-22.

³⁷⁴Arendt 1973, pp. 289-290.

³⁷⁵Butler, Spivak, et al. 2007, pp. 54-55.

³⁷⁶Ibid., pp. 35-38.

³⁷⁷See

³⁷⁸Benjamin 1986.

³⁷⁹Benjamin 2016, p. 198.

of this type is not some sort of conceptual or metaphysical violence. It is rather violence of that type that involves "one person hitting another over the head with a wooden stick". All law is both enforced by and preserved by people hitting others with wooden sticks as well as the threat of such violence. Therefore it is clear that the structure of the current system of allotment of resources as well as property rights can only be maintained through violence.³⁸⁰

Benjamin, Agamben and Arendt all discuss the sacred character of life. But how is life defined? Agamben highlights the difference between *zoë* which is an individual form of living common to all life, for which no plural exists and *bios* which is much more reminiscent of the political sphere (polity, political community) which has been outlined by Arendt throughout this chapter.³⁸¹ This corresponds to the categories of bare life and political existence, which are the terms Agamben makes use of. He claims this division is natural feature of state sovereignty that continues up to the present. Accordingly, those who do not fit within the spectrum of what the state deems necessary or desirable as are rendered bare life and thereby excluded from the political sphere.³⁸² Recall our discussion on the Khmer Krom and backwardness.³⁸³

The exclusion is expanded upon in Agamben's work on states of exception, wherein Agamben claims that states of exception are what ultimately binds law together with politics. More relevant for the purposes of this thesis is his discussion on how states of exception allows for the reduction of people to bare life. It attempts to explain the underlying cause of the statelessness in Arendt's theory by viewing the Third Reich as an extended state of exception by suspending articles of personal liberties. Such an act gives the state power to qualify anyone for bare life.³⁸⁴ More recently, Agamben brings an extreme example of the reduction to bare life by taking the example of how the US treated the Afghan Taliban after the introduction of the so called Patriot Act. First of all ignoring the international legal rights outlined in the Geneva Convention relevant to their statuses as prisoners of war. Second, they were not afforded any new rights and especially not the rights of the nationals of the state who had captured them resulting in a situation of indefinite detention.³⁸⁵ Butler refers to this as Guantanamo Limbo.³⁸⁶ At the time of writing (2019), the US President has promised to keep it open indefinitely.³⁸⁷ It is questionable if this is an anomaly,

³⁸⁰Graeber 2015, pp. 58-59.

³⁸¹Agamben 1998, p. 42.

³⁸²Ibid., pp. 10,66.

³⁸³See chapter 4.

³⁸⁴Agamben 2005, p. 2.

³⁸⁵Ibid., pp. 3-4.

³⁸⁶Butler 2002.

³⁸⁷Savage 2018.

or a feature of the state-system. A right to have rights needs to be resilient to such acts.

5.3.4 A Normative Interpretation

It is likely that the most perceptive description and use of Arendtian theory comes from Seyla Benhabib. As mentioned above, she represents a **normative** interpretation, meaning that the term is addressed to humanity as equals which in consequence leads to the universality of rights, not premised on nationality or citizenship.³⁸⁸ She does this by assigning Arendt's view that we are not born equal but become equal through membership of a group, so called *political existentialism*. As we now know, this is what affords us rights, but points out an important distinction between Burke's view of rights (discussed above). While they agree on the fact that rights are tied to a certain locale, contrary to Burke's anti-egalitarian "right of the englishman", the right to have rights is a critique of the status quo, nation-state/sovereignty. Which is exactly what Burke seeks to defend.³⁸⁹

If we return for a moment the question posed by Ranciere about the subject of Arendt's theory, Benhabib can offer insight. Rancière interprets the right to rights as a lack of rights - a reduction to bare life. But an important distinction is to be made here. It is having no place in the world that denies one the right to action and opinion or as Benhabib puts it, the loss of a public framework of membership. These distinctions are important when we bear in mind the expansion of the normative categories that can qualify one for statelessness. According to Benhabib, statelessness is not necessarily equivalent to "the poor, depoliticized individual" as these can belong to a polity. This is what Arendt wants to underline with her provocative comments about slaves - they fill a function in the community while the stateless do not. This does not entail that for the purposes of this thesis slaves are not to be considered as deprived of the right to have rights. When the European Union implements Mediterranean pushbacks of refugees so that they end up in Libyan slave markets,³⁹⁰ are the refugees then having their right to have rights reinstated? Of course not, rather, it is the precise and definition of statelessness that is important.³⁹¹ Benhabib expresses similar ideas when she critiques Rancière for not taking into account that there might be variations in the ability of a person to assert rights (Rancière views the enactment of rights as entitlement of rights). Rightly, Benhabib points out that relying to

³⁸⁸DeGooyer et al. 2018, p. 25.

³⁸⁹Benhabib 2018, pp. 105-106.

³⁹⁰Kirkpatrick 2017.

³⁹¹Benhabib 2018, pp. 116-117.

heavily on the agency of the individual risks putting too much responsibility on the victims. Similar reasoning would apply analogously to the example of the slave.³⁹² But there is still an important distinction to be made, slavery, in Arendt's example is within the bounds of the law, even though it is considered morally reprehensible today. For the stateless there is no law, what provokes action on their behalf is their bare life, existence. Although laws may exist today, we must consider their enforceability and whether it is possible to claim any rights flowing from them, this is done below.³⁹³

5.3.5 The Contemporary Right to Have Rights

The legal landscape of today is clearly different from Arendt's time of writing. International treaties such as ICCPR³⁹⁴ and ICESCR³⁹⁵ which carry some compliance mechanisms and are near global in their scope did not exist when *Origins* was written. Benhabib points out that this has implications for Arendt's theory, through article 15 of the Universal Declaration on Human Rights, rendering a person stateless violates international human rights law - but what about people who are already rendered stateless or if a violation does occur? The sovereign rights of the state-system causes a corresponding right to belong to a polity to be an impossibility.³⁹⁶ She further notes the arbitrariness and restrictivity in the 1951 Refugee Convention, clearly displayed in the extremely high threshold in gaining refugee status due to social and material deprivation.³⁹⁷

Alison Kesby discusses the right to have rights in five stages: a place in the world, nationality, citizenship, humanity and politics of human rights. For the purposes of this thesis, it is the third category which is most relevant as that is the right to a political community outlined by Arendt and concerns participation. Kesby notes that even though international law considers the related and arguably more established concept of political participation a "keystone" right - derogation from this norm is still possible in lots of cases. Humans can become excluded from the political community by being convicted criminals for instance. Such disenfranchisement removes them from public sphere and thus their equality as human beings, according to Arendt.³⁹⁸

But human rights also fail in their protection. In discussing the paradoxical nature of the

³⁹²Benhabib 2018, pp. 119-120.

³⁹³Heuer 2007, pp. 1162-1163.

³⁹⁴International Covenant on Civil and Political Rights, 23 March 1976, UNTS 171.

³⁹⁵International Covenant on Economic, Social and Cultural Rights, 16 December 1966, UNTS 993, p. 3

³⁹⁶Benhabib 2018, p. 112.

³⁹⁷Ibid., p. 114.

³⁹⁸Kesby 2012, pp. 70-72, 78.

subject of human rights, namely the rightless, Kesby mentions the Australian High Court case *Goodwin vs. Al-Kateb*³⁹⁹ in which the indefinite detention of a stateless person was ruled as lawful as he could not be removed to any other country due to his statelessness. This was consistent with the Australian migration act which displaced the persons status as "human" and thereby protection from arbitrary detention in international law. It is clear in this case that the rights of the rightless often becomes figments of imagination, trumped by domestic conception and the state bureaucracy of migration, citizenship and identification that epitomizes the banality of evil, to borrow another of Arendt's phrases.⁴⁰⁰

5.3.6 Rights as Possessions

What is the Arendtian perspective on **having** rights? This thesis is premised on the fact that the Khmer Krom (and indeed all humans) possess certain rights, such as freedom of assembly or expression. Such rights are the subject of the second and plural **rights** in Arendt's right to have rights terminology, see the discussion above. But it is not immediately clear what Arendt meant by having rights. According to Lida Maxwell, it is unlikely that we possess any rights at all. Maxwell claims that Arendt was skeptical of the notion having or possessing rights articulated as natural possessions attached to human or because they were belonging to a political community.⁴⁰¹ Having rights is directly linked to participation because only through our participation can we meaningfully create a "a common political world" where it becomes possible for everyone, including minorities and refugees to claim their rights equally. Participation should be interpreted broadly as Maxwell mentions protest, legislation, an collective action - notably practices that range all over the spectrum of politics. But even if that is the case, Arendt's theory has emancipatory aspects because it transcends the baseline of legal activism ensuring that states live up to their commitments by instead focusing on creating a world in which all can make legitimate rights claims.⁴⁰²

The Arendtian understanding of rights is that accepting the full menu of human rights as natural possessions risks obscuring the lived reality of millions of people. Rights are not sacred or inviolable as displays of the abstract nakedness of being human have repeatedly shown. This means that there cannot be a perfect realization of rights, they will always be imperfect and frag-

³⁹⁹*Al-Kateb v Godwin & Ors* (2004) 219 CLR 562; [2004] HCA 37.

⁴⁰⁰Kesby 2012, pp. 115-116.

⁴⁰¹This is indeed the function of the whole phrase, but not the isolated "have".

⁴⁰²Maxwell 2018, pp. 47-48.

ile iterations of politics, frozen in time. Evidently, this is not reflected in the everyday discourse of rights, in which they are frequently seen (or used) as a means of transcending politics by signaling irrefutableness and moral imperative.⁴⁰³ Similar to what Dworkin refers to as "rights as trumps",⁴⁰⁴ Arendt argues that perceiving rights in such a political light is the best way of addressing the fact that people are losing the rights they should have as humans.⁴⁰⁵

For Arendt, her own turbulent time made it evident that rights were not naturally attached to humans as possessions. Parallels can easily be drawn to our present time when minorities such as the Khmer Krom face obvious rights violations, and have done so for a long time, without any viable means of rectification. This amounts not just to a loss of the individual plural rights contained in the second part of the phrase - but to a loss of the status as a rights bearer. Throughout history, the ability to bear rights has been contingent on one's membership in a political community. Reinforcing the idea that rights are not naturally attached, Ayten Gündođdu calls them "Political Practices" which means that they rely on struggle, not just for their conception but also in order to exist whatsoever. This struggle can take the form of action, popular support and demands-making, different forms of pressure.⁴⁰⁶

As has been pointed out elsewhere, Although Arendt pointed toward the historical importance of the nation-state in securing rights, she was highly skeptical of the very same. With regard to the bearing of rights, Burke's phrase "rights of the Englishman" illustrates the anemic nature of the state as protector of rights. It is not the rights of those in England or all the colonial subjects throughout the world, rather, it is premised on nationality. By this historical alignment of rights with a specific nationality, minorities such as the Khmer Krom will always face difficulties in claiming equal rights as it will depend on how beneficial the political nature of the current regime or majority population is, in the similar but perhaps more extreme situation of statelessness after the second world war- Arendt claimed "the prolongation of their lives is due to charity and not to right". Here, the rights of minorities are due to charity, and not to right.⁴⁰⁷ Thus, national rights fail to address the citizenship status for millions of people inside the nation-state whose national rights are more insecure than other, effectively qualifying individuals for a life in statelessness or rightlessness.⁴⁰⁸

⁴⁰³Brännström 2017, p. 72.

⁴⁰⁴Dworkin and Waldron 1981.

⁴⁰⁵Maxwell 2018, p. 48.

⁴⁰⁶Ibid., p. 50.

⁴⁰⁷Arendt 1973, p. 296.

⁴⁰⁸Maxwell 2018, pp. 51-52.

In associating the loss of rights-bearing status with the loss of a political community, Arendt invites us to think about rights as collective phenomena. She does not think that it is enough for governments to follow a baseline of moral imperatives, but rather calls for the creation of a world where rights can be had in the way of political achievements, which would lead to the ability for equal rights claiming whether you are Khmer Krom in Southern Vietnam or an undocumented migrant on a ship across the mediterranean.⁴⁰⁹ Maxwell also points out that Arendt's critique positions itself among contemporary researches who are critical of rights with regard to their universalizing function. There are several examples of this, for instance the discussion on TWAIL and international law above, which is also applicable to a rights discourse. Others, notably Wendy Brown, has critiqued the focus on rights as obscuring alternative, more progressive conceptions. Arendt's critique of rights as a natural possession (and certainly Maxwell's understanding of it) manages to bypass these colonial and homogenizing tendencies while still offering a meaningful way forward. That is, to create the conditions for a world where all rights claims can be understood to be equally legitimate, by political practices.⁴¹⁰

5.3.7 A Human Right to Membership?

Arendt's unrelenting emphasis on membership and political community permeates all of her political and legal thought. Due to her opposition to representative politics and electoralism she has been termed a "participationist", tackling the problems of one's time was part of what it meant to be human to her.⁴¹¹ She imagined a world governed by small scale "councils" that were then federated into larger bodies. This rejects certain state-centric Marxist currents, such as Marxism-Leninism and in Vietnam, Hồ Chí Minh-thought because they repressed spontaneous assemblies that sprung up outside their totalitarian party structures.⁴¹² Instead her writings share affinity with left- or council-communists such as Anton Pannekoek and Rosa Luxemburg and some strains of libertarian socialism, most notably anarcho-syndicalism. Arendt is complex, though and in some ways such as isolating the social question from politics and rejecting social and economic rights she starkly disagrees with most "utopian socialists" as she calls them.⁴¹³ Other ways which she shares affinity with anarchists is the critique of state charity, in-

⁴⁰⁹Maxwell 2018, p. 54.

⁴¹⁰Ibid., pp. 56,58.

⁴¹¹Canovan 1983, p. 287.

⁴¹²Van 2010, p. 143.

⁴¹³Moyn 2018b, p. 68.

stead favouring self-styled solidarity over charity solutions.⁴¹⁴ However, a legal framework of the Mekong region produced from utopian socialist theory seem unlikely in the immediate future. If we instead shift our focus to the global human rights framework - also of utmost importance to the Khmer Krom, is it possible to construct a right that makes other rights possible - one that focuses on membership?⁴¹⁵

In fact that right already exists. It is codified in Article 9 UNDRIP and purportedly gives indigenous groups the right to belong to a nation or community. But it is nowhere to be seen in the lived reality of the Khmer Krom because while they do have a community, it has not been given to them as a right - rather it has been undermined by the state. Benhabib has also tried to outline such a right, albeit a bit more radically. Against the backdrop of the Kantian tradition of cosmopolitan federalism she claims that after first admission there is in fact a right to membership. Derogation to such a right should only be possible when grounds are reciprocally acceptable. Grounds that are inherent to a certain person's being are not acceptable in this case, for example race, sexuality, gender, religion, ethnicity as these are features that were not chosen but rather "given". Only criteria that do not violate the *communicative freedom* of a person are acceptable. Benhabib defines communicative freedom as "to accept or reject on the basis of reason"⁴¹⁶ this respects the personal autonomy of humans. The focus here is explicitly on liberal states, with the concept of communicative freedom being an attempt to formulate a mechanism that is in line with the general liberal theory of states. This lacks Arendt's more destabilizing critique of the nation state.⁴¹⁷

DeGooyer, on the other hand, is quite skeptical towards the idea of implementing such a right. Rather than a solution to a problem, she considers the right to have rights to more of a helpful tool of conceptualizing the loss of rights. In this way, the right to have rights represent conditions that must be met before human rights can be meaningfully instituted. This reading of Arendt, together with the one of Rancière, forms the most distressing outlook on the situation for the rightless in essentially painting it as a "permanent institution" and quoting Arendt saying that the stateless can never be "renormalized" once they have been removed from the political community.⁴¹⁸

⁴¹⁴Arendt 1973, p. 326 note 27.

⁴¹⁵Arendt 1990, pp. 267-268.

⁴¹⁶Benhabib 2004, p. 133.

⁴¹⁷Ibid., pp. 137-142.

⁴¹⁸DeGooyer et al. 2018, pp. 41-42.

5.4 Arendt and Minorities

How does the loss of rights and citizenship relate specifically to the normative category of the minority? In some cases, as discussed above, not fitting into the collective identity of citizenship can cause the state to qualify one for rightlessness. From reading the account above in chapter 4, this has happened to large portions of the Khmer Krom. Even if there is significant overlap between the Arendtian perspective on statelessness/rightlessness and minorities it is necessary to elaborate on the latter concept.

Arendt considers the element of collective identity found in citizenship a dangerous aspect of the nation-state. As sovereignty becomes bound to the ethnic majority this would cast doubt upon the rights of minorities. This positioning of a part of the population as holding a special status ran the risk of easily revoking that status altogether - effectively rendering people stateless. Again, Arendt returns to the fundamental problem of the nation-state by taking the minority treaties as an example. Because the representatives writing this treaty were unwilling to revise old doctrines of sovereignty, they knew that "minorities within the nation-state must sooner or later be either assimilated or liquidated".⁴¹⁹ This is a consistent point made by Arendt, even before her experience of being a stateless refugee, she wrote "All minority policies, not only those affecting Jewish minority, are doomed to failure as a result of the continued existence of state sovereignty".⁴²⁰

To grasp the underlying meaning of this poor outlook we need to revisit the Arendtian view of the nation-state as having gone from a state of law to a state of national interest. This did not coincide with the rise of German fascism but is an intrinsic part of the national structure.⁴²¹ There are countless examples of this, some can be found in Agamben's discussion on states of exception above. The near destruction of Vietnam as a cultural entity at the hands of the United States no doubt provided necessary backdrop for such developments to take place in Vietnam. Carrying with them devastating effects for some minorities, regardless of their status according to the constitution.⁴²²

Arendt suggests minorities are inherently half-stateless since they *de jure* belong to some sort of political community. Again Arendt is confronted with the boundaries of her own concept, her

⁴¹⁹Arendt 1973, p. 273.

⁴²⁰Heuer 2007, p. 1159.

⁴²¹Arendt 1973, p. 275.

⁴²²Philip Taylor 2013.

usage of *de jure* hints at the fact that minorities, as the example with the slave discussed above, are actually very much facing the same issues as the stateless. Arendt also provides guidance in that it emphasizes the actual and practical belonging to a political community as the central concept which is in line with Butler's discussion of categories above. It might resemble Rancière's theory of rights as enactment at first glance, but it is reversed - the onus is on the state to provide the individual with a political community rather than on the individual itself.⁴²³

There is significant affinity between Arendt and the TWAIL researcher Antony Anghie. Both study imperialism and have put notable effort into taking the position of the victims of imperialism, in Anghie's case this refers to the third world. Interestingly, Anghie also puts emphasis on sovereignty and minorities. He considers it inevitable that post-colonial states such as Vietnam reproduce similar imperial dynamics as the former colonizing state. When confronted with minorities making claims for independence, Anghie claims they invariably resorted to a discourse on development and its benefits. This is the case in Vietnam, as we have seen in our discussion on legal ideology. There are several intertwined objectives in this. First, development provides a universal language to organize the all of the state behind. Second, it was expected that with modernization and industrialization, ethnic identity would dissolve.⁴²⁴ But, as we have seen in the case of Vietnam, this is not the case, as the development premiers some ethnic groups and leaves others behind.⁴²⁵ What's more is that the institutions built to represent this modern and universal nation-state easily could be claimed by the majority population and those who assimilated into it, in the Vietnamese context the Kinh majority make up around 85 percent of the population. According to Anghie, there is significant risk in perpetuating colonial relations under these conditions, wherein the ethnic minorities are viewed as backward and need to be managed by a universal state.⁴²⁶ In its report before CESCR, Vietnam claims that it is aware of the importance of self-determination given its own history of independence struggle.⁴²⁷ But then quickly proceed to deny the existence of any indigenous people in Vietnam⁴²⁸ and explicitly describe the ethnic minorities in terms of backwardness.⁴²⁹

According to Anghie, the protection offered to minorities through international law is sparse.

⁴²³ Arendt 1973, p. 276.

⁴²⁴ Anghie 2007, pp. 205-206.

⁴²⁵ Tung 2018.

⁴²⁶ Anghie 2007, p. 207.

⁴²⁷ CESCR 2013, para. 24.

⁴²⁸ CESCR 2013, para. 27.

⁴²⁹ CESCR 2013, para. 30, 81, 598.

Article 27 of the ICCPR is surprisingly Arendtian because it states that one should not be denied membership to a community. But, lack of enforcement and the general "half-statelessness" of minorities still haunt the practical relevance of such a provision.⁴³⁰

If the right to have rights takes the perspective of the minorities and the rightless, what are the strategies employed by the nation-state system? The last chapter of *Origins* describes how isolation and loneliness are preconditions for rightlessness. Isolation is the inability to meaningfully act in the political sphere as power always stems from "men acting in concert". To be isolated then means to have political ties severed, making collective action difficult. Contrast this with loneliness which describes a similar situation in the social sphere. The two need not necessarily coincide, one can experience isolation without loneliness and vice versa. You could for instance live a rich social life without any capacity for political action. Nonetheless, both phenomena affects the possibilities of forming a political community.⁴³¹

⁴³⁰Anghie 2007, p. 207.

⁴³¹Arendt 1973, p. 474.

6. Analysis and Conclusion

6.1 Analysis

”What imperialists actually wanted was expansion of political power without the foundation of a body politic.”⁴³²

6.1.1 The Current Situation

The question of whether the Khmer Krom possess a political community overshadows other theorizing about their rights, especially if we wish to understand the situation through an Arendtian lens. Regardless of which specific interpretation of the right to have rights we choose to focus on, we will find that the central premise is that rights are functionally void and meaningless if they cannot be enacted or claimed. Discriminated and persecuted minorities such as the Khmer Krom actually claim rights in the same manner as others, that is, through a framework of political community where they can be judged not by who they are, but by their actions and opinions. Many indigenous peoples are de facto caught in a limbo of half-statelessness since they belong to some sort of political (interpreted broadly) community, but one that is considered superfluous by the dominant population or ruling party.

Such is the case for the Khmer Krom as they do not fit into the discourse of development promoted by the Vietnamese state and the free market. Worse, their stalwart resistance to assimilation and historical expressions and ambitions of self-determination make them a living obstacle to modern Vietnamese constructions of history. They threaten the fragile veil of universal development behind a state of national unity. However, it is important to note that not only the authoritarian nature of the Vietnamese government that hinders the claiming of rights of the Khmer Krom. They have also been failed by liberal legal theory. First, the nation has

⁴³²Arendt 1973, p. 135.

not been able to provide them with the neutral protection of rights, not due to communism or authoritarianism, but because the role of the state is to preserve status quo even in liberal democracies. To remedy this, significant provisions like the ones found in UNDRIP are necessary (self-determination, community, language) - but at the same time UNDRIP has little actual impact without a political community to claim such rights. This is true both from an Arendtian perspective and mainstream international legal research, with scholars suggesting UNDRIP is a "tool" even as non-binding. Thus, the human rights regime and its liberal foundation in individual rights rather than collective rights has also failed the Khmer Krom.

Vietnamese state policy, such as the refusal to accept the Khmer Krom as indigenous, is built upon these conceptions. They want political power over the Mekong delta but none of its body politic - the superfluous Khmer Krom. They know that the Khmer cannot enact or have their rights without a political community so they undermine efforts to create one through international law, such as self-determination through indigenous rights, supported by model liberal democracies. This essay has illustrated a significant number of rights are being denied the Khmer Krom. Discrimination facing the Khmer does not mean that they can never succeed in society or that class mobility is impossible but it does mean that they cannot enjoy equality with the rest of society without shedding their collective identity. Monks are well aware of Vietnamese efforts to keep them docile in violation of human rights. Examples of this include the lack of what I refer to as secondary Arendtian rights such as linguistic, cultural and religious provisions, seized linguistic books and the difficulty in going abroad to study for Khmer. When they do study abroad they are arbitrarily punished by daily interrogations upon return, making it obvious that attempts to form a political community unwelcome. But many monks have still managed to become aware of their rights thanks to the transnational community and the solidarity fostered between Khmer communities, notable examples include the overseas communities and how monks frequently claim that it is up to those who are outside Vietnam to make a difference. This has direct parallels in Arendt's writing where she concludes that minorities often knew that they had little to nothing to gain from international human rights, instead putting their hopes to international solidarity or rights existing in the framework of the nation-state. In the case of the Khmer Krom, however, that is not an option because they are excluded from the body politic of the nation-state. Human rights have failed to provide a solution to this problem.

So do the Khmer Krom constitute a political community of some sort? Being mindful of the carceral discourse surrounding Vietnamese minorities, we can claim that their protests and

transnational network is actually a political community for our present time. But this does not mean that they have a fully realized right to have rights. In fact, the central question here for human rights advocates should not be whether the Khmer Krom possess a rights to have rights through their political community but how Vietnam is undermining such efforts at every instance. For example the qualification of Khmer Krom for rightlessness and statelessness (on a spectrum from unresponsiveness to the impossibility of return once you as Khmer leave Vietnam illegally). A plethora of violations are to be found above, but Article 14(1) UNDRIP about control of educational system is an example of this or Article 15(1) about the transmission of indigenous history. Maybe states signing UNDRIP were aware of its impotence against the backdrop of a lack of right to have rights, maybe they were not, but the fact that it takes the route through human rights without asserting meaningful possibilities for the Khmer Krom and other indigenous peoples to found a body politic gives it little value in an Arendtian sense. The human rights found in UNDRIP can only be asserted by the political community and political practices of the Khmer and those who wish to show solidarity with them. Failure to provide sufficient circumstances for such practices is an inherent flaw in the international rights regime.

Recalling Arendt's discussion on the Boer settlers and history, we find that there is significant emphasis on history in the creation of a political community capable of enacting rights. Arendt did not consider native peoples to have history but as this is not hermeneutics we can conclude that the Khmer Krom possess rich histories and cosmologies, documented by Taylor and others. But perhaps more importantly recent history kept under tight control by the Vietnamese government in violation of Article 14 and 15 UNDRIP mentioned above. Monks were particularly distressed by this fact because it amounts to an attempt to erase indigenous identity, ethnocide which can be found in Article 8 UNDRIP. How can you enact a right of self-determination if you lack the collective history and identity necessary? History is of utmost importance and its inclusion in UNDRIP hints at an understanding that in order to have a political community, or any community, such rights are necessary. This is the only progressive way of understanding Arendt's remarks about how lack of history affects the right to have rights, an insight Arendt shares with many of the Khmer Krom monks.

From an Arendtian perspective, the current legal framework (ICCPR, UNDRIP, ICERD) for protection of indigenous peoples in Vietnam would not amount to law. For human rights abuses to cease they are *de facto* dependent on several external actors such as non-governmental organizations, development agencies, embassies etc. Often the two latter are demotivated by

market forces expanding political power without the body politic. No foreign country has raised the issue with Vietnam as it does not fit into any moral narrative which they can benefit from. Naming and shaming, such as HRW reports, appear futile faced with this reality. As mentioned above, Vietnam is now a middle-lower income country because of significant growth after Đổi Mới reforms. But growth is unequal and has not had any significant impact on the indigenous Khmer wanting to retain their identity. Worse, increased development for the dominant state has resulted in less overall aid from development organizations such as Sida and others. Even if charity from the west is crucial, it can be system-affirming in Arendtian analysis because it does not strike at the fundamental deprivation of human rights, namely a place in the world where actions and opinions matter. Neither western nor Vietnamese aid has assisted in creating favourable conditions for such a place in the world to spring up because that requires significant self-determination. Arendt herself considered state aid and human rights organizations poor in comparison to what refugees and minorities themselves could accomplish when given satisfactory conditions.

Recall Arendt's thoughts on how isolation and loneliness are preconditions for rightlessness - the Khmer Krom have been described as poor and isolated. But that is of course not an intrinsic trait they all bear, it is the result of global and regional policy that has tried to marginalize them if they do not assimilate. The enormous resilience they have developed in the face of this is impressive. But even if we as Taylor wish to escape the carceral discourse surrounding the Khmer Krom, the fact is that they demonstratively do not live in a framework where they are judged by their actions or opinions but by who they are. As long as Khmer Krom retain their identity they are viewed with suspicion and met with intrusive measures of control, seeking to isolate them. Their cosmopolitanism and the resulting education helps them resist assaults on their culture and history but their transnational community cannot substitute a functioning political community or right to have rights, just mitigate the intensity of the situation. Monks in Vietnam do feel like their political ties are severed with far reaching negative consequences for their agency. I am not only talking about political parties here but more generally any expression of political action such as protest or voicing resistance. Arendt and other refugees also relied on the international solidarity of their communities and while this was better than regular state charity, it did not come close to reinstating the right to have rights.

Human rights without the right to have rights is what gives us invasions and arbitrary doctrines such as responsibility to protect. When the rightless and stateless become stuck in carceral

discourse by being stripped of their agency and instead spoken for by others there is significant risk of becoming part of moral narratives of geopolitical ambitions whether it is "protecting" ethnic Russians in Crimea, drone striking Yemeni weddings or calling for intervention in Iran. All this discourse infantilizes the actual peoples into incompetent passive others in need of rescue when the first step should be affording them conditions to focus on their own community so that they can meaningfully enact rights. But what are satisfactory conditions for the right to have rights?

6.1.2 Indigenous Rights as a Right to Have Rights?

This is not theology. In this thesis, Arendt's theories are not used to arrive at the same conclusion she would have arrived at. First, she was a normal human being and thus had ideas that we consider wrong or distasteful today, as discussed above. Second, her writings cover another time and were never intended to be used textually in the future. Rather, she can lead us to think in meaningful ways even when disagreeing with her conclusion. This is not only due to her general skepticism toward the human rights regime, instead preferring national rights. Another example is indigenous rights, which she did not discuss and if she did, would likely be critical of not only because they took the route through human rights in UNDRIP but since they somewhat resemble the economic and social rights she rejected. The resemblance lies in the right to education and other similar provisions found in UNDRIP. But if we break with Arendt's narrow conception of what a rights is, can we envision properly implemented indigenous rights as the condition that gives Khmer Krom the possibility to claim all their other rights? Can sufficient self-determination constitute a right to have rights?

This thesis has covered differing interpretations of the relationship between self-determination and human rights. We can note that it has come to be included in instances of international human rights law (ICCPR, ICESCR, UNDRIP) which is how it is described in Moyn's writing as well. But in treaties, self-determination often, if not always occupies a central place removed from the rest of the rights. This suggests that it is construed as something more than a "mere" human right, this might be to the fact that it is a *jus cogens* norm, but not only that. The fact that the legal text of those articles state that it is by virtue of self-determination that people freely pursue their economic, social and cultural development rings especially true in the case of UNDRIP, which is non-binding and justified by human rights advocates as a tool and a means. But is the inverse also true then? Does lack of self-determination make the pursuit of devel-

opment and human rights impossible? If we return to the Vietnamese post-colonial history as outlined above, we see that to Hồ Chí Minh and others representing the emerging Vietnamese state, human rights were of little importance compared to post-colonial sovereignty. Perhaps Vietnamese revolutionaries had reached the same insight as Arendt that liberal rights advocates continually fail to grasp - that a full course menu of rights has little to offer those that exist on the margins and in their abstract nakedness of being human. It is not a surprising insight to reach after coming close to total destruction as cultural and historical entity at the hands of the so called free world, Iraqis would likely make a similar assessment. Human rights are futile as protection against the whims of the leaders produced by the same liberal world order that conceived this canonized framework of rights. A life on the margins without self-determination, whether as a dominant ethnic group or as an indigenous people is an almost insurmountable obstacle in securing the right to have rights.

Indigenous rights can meaningfully institute a right to have rights if their focus is the exact opposite of UNDRIP. Whereas UNDRIP was made into a collection of human rights provisions found elsewhere and applicable to all - what is actually required for indigenous rights to be meaningful is strong materializations of self-determination, only then can a right to have rights be realized. Without grounding human rights in a right to have rights they become figments of liberal imagination, therefore the self-determination of indigenous peoples need to be treated as other inviolable rights. Rejection of self-determination for indigenous peoples should be seen as a rejection of all rights for indigenous peoples. This is especially the case of the Khmer Krom, where we can see how resilient their community has been through all the hardships they have faced. Their transnational community is admirable but has little offerings to counter the Vietnamese growth onto which western nations have put their focus. HRW released "On The Margins" roughly ten years ago and still few even of the intended audience of embassy personnel and state development agency workers are familiar with the violations they face, if you look at their focus. Again, such a view of human rights amounts to little more than charity which without the Arendtian component actually disempowers those it purports to help.

Similarly, for minority rights, Article 27 of ICCPR takes important steps toward realizing a right to have right by explicitly stating that they have the right to enjoy culture, language and religion in community. But as has been pointed out by Anghie, the article fails by addressing individuals and not the collective of Khmer Krom. This is not due to aversion toward collective rights as the Article 1 ICCPR is addressed collectively but because the international human rights

regime is unresponsive to the need of indigenous peoples. Rights for them are not anchored in reality if they only affirm rights that the majority population possess also apply to minorities. If they need to be reasserted, there is likely a material problem with their application to minorities. But if asserting them once did not help, it is unlikely to help the second time unless the reason is that states mistakenly presume the existence of some kind of racist qualification of the human rights regime (which is almost the case when whether "Peoples" in Article 1 ICCPR includes indigenous people is an actual question). The real material reason for the denial is that the rights regime is not tailored to the need of Khmer Krom and other indigenous peoples because it does not account for the material conditions necessary to have rights. In the case of indigenous people one such material condition is community, which can be realized through meaningful self-determination for indigenous peoples and minorities.

6.1.3 Ways forward

We have hitherto focused on the lack of meaningful, tangible rights to a political community in the human rights regime and concluded that a collective right to self-determination is crucial in securing the right to have all other rights. The Mekong delta mirrors the world at large with on the one hand increased growth and on the other increased stratification of income. So what are the ways forward? How can self-determination for indigenous peoples go from being an aspirational article in UNDRIP to materializing in the lived reality of the Khmer Krom?

Benhabib constructs a right to membership that could mirror indigenous self-determination but is still quite entrenched in liberal state theory. While Kantian cosmopolitanism is not without merit, I do think that there is more to Arendt's discussion of spontaneous councils that have sprung up not only in Vietnam but along working class people everywhere. Meaningful self-determination is then likely better enacted in the form of councils which also better reflects the emancipatory potential found in Maxwell's interpretation of what it means to "have" rights—namely to participate in actions of a political community, which can take the form of legislation, protest, direct action etc. If having rights materializes through political practices, through struggle, it becomes obvious that the Khmer Krom are not bearers of rights. The right to have rights becomes to ensure that Khmer Krom have the possibility to engage in political practices because it is then that they aim where all rights claims are equally legitimate regardless of who is making them. This somehow overlaps with Rancière's theory of rights as enactment which is meaningful in that it does not attempt to speak for indigenous peoples such as the Khmer Krom, instead fo-

cluding on their own agency. It is therefore a way of escaping the carceral discourse surrounding Vietnamese minorities outlined by Taylor.

Neoliberalism has undermined the right to have rights for everyone by hindering large segments of the population from participating in the economy. One can of course claim that it is possible for people to affect the realm of production by using market forces. But then people's democratic options are predicated and determined by ability to sell their labour. This preserves status quo by being an enormous disadvantage for historically oppressed groups like indigenous people and women. Recall how the authoritarian machinery is kept in place even though the economy has been liberalized.

Securing the right to have rights will become more important as authoritarian currents sweep the world. If we aim to provide all humans with basic rights we need to realize that the contemporary framework for such rights is extremely fragile and sensitive to whims of Bushes, Trumps, Bolsonaros and others who do not even pretend to care about the international law. Not only Khmer Krom, but central American refugees, drug addicts in the Philippines and Yeminis are right now, in our time being reduced to bare life - removed from juridical modes of belonging. Human rights organizations neither have the funding or the structure to deal with situations of mass rightlessness whether they are the result of racism, war or perhaps increasingly environmental catastrophe. The focus needs to shift from human rights as a charity to human rights as something that we can enact ourselves given the structural preconditions of a right to have rights. Even if human rights are in decline due to authoritarian tendencies, this thesis shows that even a model liberal human rights regime is insufficient in granting human rights for peoples on the margins. For indigenous peoples a right to have rights consists of significant indigenous rights that focus on the formation of a body politic and political community. To make a difference we need to view the right to have right as being just as important as foundational doctrines of sovereignty and treat them accordingly. Seeds of this already exist in Article 9 UNDRIP. In the implementation of human rights, we cannot lose sight of the economic incentives discouraging such progress, recall that net outflows are 24 times higher than aid (see historical background). Thus leaving post-colonial states to reproduce colonial relations toward their own minorities, paint others as backwards and in need of saving. But the right to have rights rejects the idea of the saviour or the civilizing mission, instead realizing that most people are in fact competent humans that given satisfactory conditions will prosper. It is the impotence of human rights in the face of inequality that is the problem - be it due to class, citizenship or ethnicity. We need to

think in terms of justice before aid and in terms of indigenous self-determination before human rights. If human rights need to lose their liberal and imperial heritage if they are to be properly realized.

6.2 Conclusion

Below are summarized answers to the research questions.

1. The human and indigenous rights of the Khmer Krom are *prima facie* being violated in in several ways which are further detailed in chapter four. Human rights such as freedom of expression, freedom of assembly and association are severely restricted. Arbitrary arrests and punishment occur and they face significant discrimination in their daily life. As indigenous peoples they are denied the possibility to freely practice Theravada Buddhism, their linguistic rights are cut short as are their rights to freely transmit their cultural knowledge in the temples and pagodas. They are not recognized as indigenous by the Vietnamese state and lack any meaningful self-determination.
2. These violations can be understood through the lens of Hannah Arendt's theory as taking place because the Khmer Krom do not possess the material conditions necessary to enact their rights. Their lack of a right to have rights is in part manufactured by the Vietnamese state by negating attempts of the Khmer to shape their own history and form a political community. Vietnam reproduces colonial relation toward the Khmer. This takes several forms and significantly impacts the lives of the Khmer most notably by undermining their self-determination. It is also due to the failure of the human rights regime to meaningfully consider that the material conditions are more important than a canonized framework of rights by itself. By using indigenous rights only to reassert humans rights and not as a means of providing indigenous peoples like the Khmer Krom with adequate self-determination - human rights are inadequate as protection.
3. Indigenous rights are currently insufficient but could be meaningful if their aim is to institute self-determination for the Khmer Krom. Self-determination could form the basis for the political community necessary for the enactment of all other rights - the right to have rights. Article 9 UNDRIP hints at possibilities of this in the future, but then the material conditions of implementation need to be seriously considered.

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