



**ANNUAL MEETING 2010**  
**Queenstown, New Zealand: 1 – 5 September 2010**

**2010 Audrey Ducroux Memorial Lecture**

**What impact do War Crimes tribunals have on the welfare of Victims?**

**By Dame Silvia Cartwright**

Nga hau e wha, nga iwi e tau nei, tena koutou katoa  
E nga mana, e nga reo, e rau rangatira ma, tena koutou tena koutou tena koutou

**Introduction**

I began my career as family practitioner and Judge.

I am now engaged as a trial judge in the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea. As a colleague said recently, Sierra Leone has a Special Court, but *this* one is Extraordinary. Known as the ECCC, the court has two parallel administrative processes, operates in the civil law system and has a trial bench comprising three Cambodian, one French, and one New Zealand judge. Based on the procedures used in domestic civil law courts, it has also introduced a comprehensive system of formal participation by victims at trial. This has been a fascinating experiment, and one which for me has raised many issues. It is this aspect of the ECCC trials that I wish to discuss today.

**Factual background**

The factual background is predictably tragic. Many of you will recall something of the period when Cambodia was ruled by the ruthless Khmer Rouge, a Marxist group led by a man called Pol Pot. It is estimated that at least 1.7 million people from a population of more than 7 million died through execution, starvation, disease, or overwork in the 3 years, 8 months and 20 days of the regime. Khmer Rouge ideology required that the country become self-sufficient. There was to be no conventional economy or formal education, no modern technology, and a reversal of the social order. Poor peasants were to become the elite and “new” people or city dwellers, the educated, intellectuals, those who had studied or worked

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abroad, anyone who might oppose this theory were to be eliminated as actual or potential enemies. Ironically, the country was renamed “Democratic Kampuchea”.

You will recall that after the Khmer Rouge gained control of the capital Phnom Penh in April 1975, it forced out all inhabitants (approximately 2 million people) at gunpoint, killing anyone who resisted. Families were separated, the elderly, sick and young perished immediately and many starved or succumbed to illness en route to the rural areas. Once there the survivors were put to work tilling the fields, planting rice, and building canals and dams using hand tools or equipment usually pulled by oxen. Not surprisingly, as the regime consolidated its power, there was a terrible death rate.

The first trial, in which the verdict was delivered a month ago, was of a man with the revolutionary name “Duch”. He is a well-educated, highly intelligent former teacher who excelled academically, particularly in mathematics. He cared deeply for the suffering of the poor people of Cambodia during the corrupt rule of General Lon Nol, the American-backed leader who had overthrown the popular, highly political Prince Sihanouk in 1970, and formed a republic. From the safety of Beijing, the Prince made a tragic miscalculation. He urged his mainly peasant followers to join the Khmer Rouge to oust Lon Nol.

Duch, a full member of the Communist Party of Kampuchea, the official name for the Khmer Rouge, was appointed to head S-21, one security prison of about 190 scattered through Cambodia. He was accused of establishing, in a former school, an apparatus that killed at least 12,000 men, women and children. Known survivors number only about 5-8, and include artists who were kept alive to sculpt or paint Pol Pot’s likeness, under constant threat of death. Other detainees were not so fortunate. They were shackled to a common iron bar, fed starvation rations, washed by being hosed, bitten by mosquitoes and tortured until they confessed, often to being members of the CIA or KGB, organizations many had never heard of, or until they died. Children were dispatched immediately, women interrogated only if they were important. Friends, relations and work colleagues of all those detained were themselves arrested on the principle that it is best to pull the rice plant up by its roots to avoid later revenge. The terror extended also to the young peasants employed as guards, interrogators and executioners. One mistake, like falling asleep on the job, and they joined the other detainees.

Duch had a number of key responsibilities at S-21, including analyzing the confessions extracted under torture, as well as teaching the theory and practice of the Communist party of Kampuchea. He deliberately selected as guards, young, often illiterate peasants whom he considered like “blank paper” on which he could write anything he wanted. He taught a limited range of torture techniques but not how to kill the detainees, explaining “you don’t teach a crocodile how to swim”.

Although most of the detainees were Cambodian, there were other nationalities including a significant number from Vietnam with whom Cambodia was engaged in armed conflict. All were killed brutally after they had confessed to spying.

In most conflicts, rape and other violence against women is a usual and disastrous feature. In the Duch case, although it was very likely that young male guards and interrogators sexually abused the detainees, we had little evidence of such offences. There were two specific allegations, one of which, involving rape as a form of torture, was found proved. In future

trials there may be allegations of sexual violation but, at least in Duch's prison, either it was extremely uncommon or the evidence has died with the victim.

It was not relevant in Duch's trial, but I am aware of the many allegations of forced marriages during the regime. As described by one man who is still married to the woman, he was ordered to be a particular place at a fixed time, told the name of his wife-to-be and looked up and down the row of 18 young women, all with short hair and wearing identical black clothes. He considered himself fortunate that he already knew of the girl, who previously had lived in an adjoining village. They were married by an official in a mass ceremony and, after one or two days together, sent back to work separately. Ironically, I attended the recent wedding of their daughter. Its lavish style and hundreds of guests must have stimulated memories for her parents. At least some of the people required to marry, however are known to consider this type of marriage as institutionalized rape. The next trial will no doubt focus on this aspect of life under the harsh regime of Democratic Kampuchea.

Where so many have suffered, and been killed even when known to be innocent, there will be countless survivors related to them or otherwise victimized themselves. Youths forced to become guards, torturers and executioners, have been corrupted for life. Cambodia has been crippled by these events, leaving a nation with at least two generations illiterate or semi-literate, dirt poor, and burdened with physical, mental and psychological trauma. In this context, victims must be at the forefront of attempts to achieve justice.

## **Victim participation at the ECCC**

### *Role of victims in criminal justice systems*

Perhaps lost in the mists of time, is the reason that the State takes responsibility for controlling criminal proceedings. It has long been recognised that a justice system must provide a civilized alternative to personal vengeance; it should promote peace in a community and prevent vigilante justice, inter-generational feuds or blood-thirsty claims for reparation. The demand in the Merchant of Venice for a "pound of flesh", although foiled by a good lawyer, can still make us shudder. It is the judge's grave responsibility to do justice to all without discrimination. That includes taking responsibility for sentence.

This has been brought home to me since the Duch trial ended, by two incidents. The first, a general assumption that Duch is such an evil person that he should not have the benefit of legal safeguards, deployed in this case to grant him a reduction of sentence as compensation for more than 8 years of illegal detention. The second arose from a conversation I had with a world-renowned academic whose young daughter had been murdered. At the sentencing phase of her trial, he told the judge that his daughter had been a fierce opponent of the death penalty and asked him not to impose it. The judge explained that sentence was his responsibility to bear and imposed the death penalty, illustrating vividly that victims will not be called upon to make that determination – though it must be said, that unlike this grieving father, many would opt for harsher sentences than the courts think appropriate.

In recent years, particularly in common law jurisdictions where the victim is simply a witness in the criminal trial and must take independent action to recover reparation, there has been an increasing demand to focus more intensely on the victim experience. The call for justice for victims is often now made publicly. Calls for revenge, particularly in the form of increased

prison terms, are also common. Many conferences are held, academic papers written and government initiatives launched to ensure victims' voices are heard more clearly.

In the French domestic civil law system upon which the Cambodian judicial system is based, a victim, called a civil party, has a right to participate at all stages of the criminal process in order to assist in the ascertainment of the truth, and to seek reparation for injury caused by the offending. During the judicial investigation undertaken prior to trial, the victim may also offer evidence and material that will help the investigation as well as have access to all the confidential material collated. At trial the victim has the right to participate as a party and to seek reparation. The system is designed to put the victim in a central position during the criminal process, and to avoid the need for a separate civil action to recover compensation for injury, physical or otherwise.

This model has been adapted for use by the ECCC in its trials of senior leaders and those most responsible for the crimes committed in Democratic Kampuchea between April 1975 and January 1979, when the regime fell. In Duch's trial, 90 Civil Parties, represented by 17 lawyers, have participated; and up to 4000 have sought that right in possible future trials.

### *Profile of victims of the Khmer Rouge*

One of the features of the Cambodian tragedy is that the events and the people have been examined exhaustively by hosts of mostly foreign scholars, historians, authors, social scientists, psychiatric, psychological, legal and medical experts. The first question I wish to pose is whether these interventions can be translated into beneficial outcomes for the Cambodian people. If they cannot, then they must be unethical.

One series of studies on the mental health of Khmer Rouge survivors and their descendants<sup>1</sup>, undertaken several years before the trials started and conducted professionally and with appropriate support for the interviewees, provided useful information on their attitude to the ECCC trials.

The great majority had heard of the ECCC and appreciated its work. A bare majority thought that the trials might promote reconciliation. Those who wanted to participate felt the court might provide justice, allow them to release their anger, allow for revenge or provide a means of finding out the truth.

Can a trial achieve these objectives? If reparations are ordered within the trial process, they must follow a strict protocol. Whether the determinations deliver the **justice** to individuals that they seek is not a question that I can answer. 'Justice' is surely a purely subjective concept, with a different meaning for every participant. A court's task is to conduct a trial of an accused that is fair and expeditious, assess the material put before it and reach a determination of what evidence it considers the most reliable account of events. If it convicts an accused, the Court will weigh all aggravating and mitigating factors in reaching a balanced sentence.

Is a courtroom the right place for the release of anger?

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<sup>1</sup> Mental health and Readiness to Reconcile in the Context of the Khmer Rouge trials; study conducted by the Treatment Centre for Victims of Torture Victims Berlin (BZFO) in cooperation with Transcultural Psychosocial Organisation, Community Mental Health Programme (TPO) October 2008-May 2009. Nadine Stammel, Estelle Bockers, Sopheap Taing and Christine Knaerveldsrud.

Let me quote two statements made by Civil Parties during the trial of Duch.

This was from a man whose brother had been tortured and killed at S-21:

*Duch, at times I've wanted to smash you in the same way that you smashed so many others. At times, I've imagined you shackled, starved, whipped and clubbed viciously – viciously. ... I have wanted that to be your experience, your reality. I have wanted you to suffer the way you made [my brother and so many others suffer].*

*However ... I am trying to let go and this process part of that. Thank you for that. Today in this courtroom, I am giving you all that crushing weight of emotion -- the anger, the grief and the sorrow. I'm placing this emotional burden on your head, for it is you who created this burden which no-one deserves. It is you who should bear the burden alone ...*

The second is in two parts.

During the investigation, months prior to the trial, this man, who had been tortured and enslaved at S-21 listened to Duch's admissions of responsibility and expressions of remorse. After thanking Duch for admitting responsibility, and said he bore him no grudge. He said '*This is what I wanted*' – *freedom. Before I was not free to speak out or I would be tortured*'

Much later at trial, the same man, after describing the torture he suffered, told the court that Duch had not personally beaten him, but that if he had '*he would not see sunlight*'.

I am not qualified to assess the value to these victims of releasing their anger. Perhaps it was a therapeutic experience; perhaps not.

Is a trial the place where **revenge** might be sought? Certainly when the Duch's sentence was imposed, many victims and observers felt it was too compassionate for a man who had shown no compassion himself. However, international law prohibits the inclusion of revenge as a sentencing criterion. Punishment, deterrence and/or rehabilitation are the only relevant factors. Modern sentencing practice accepts that revenge is uncivilized, and unproductive.

Let me return to the study series I mentioned before. Most respondents wanted reparation, with a leaning towards financial compensation. Unsurprisingly, over 60% were not ready to reconcile with the perpetrators or would prefer not to. A mere 3.2% were very ready to do so. Those interviewed who would become Civil Parties at trial were less ready than others to reconcile probably because they had suffered more trauma and were more severely impaired. It might also be a factor that they came largely from a higher income and educational bracket than other interviewees.

Do I think that their objectives might be met? **Financial compensation** is rarely recovered, even in domestic criminal trials. The convicted person frequently does not have the resources to reinstate the victim's physical or emotional losses.

At the ECCC, reparation is limited currently to moral and collective; financial reparation can be awarded only against a convicted person. It is obvious that many found responsible for crimes of the magnitude with which the ECCC is concerned will lack the financial resources to meet the claims of large numbers of victims. In any event, how does one put a price on the

loss of an entire family? Of the loss of an education? Of the destruction of physical or mental health?

Is there real prospect of **reconciliation** as an outcome of a trial? My conclusion is this: It may occur but a trial, even with the full participation of victims, does not and cannot offer therapeutic outcomes.

### *Organisational issues*

There are procedural issues for the Civil Parties. Certain criteria such as proof of relationship, or survivorship of S-21, must be fulfilled. They must also provide proof of a direct link between the criminal offending of the accused and their injuries. This is extraordinarily difficult in Cambodia. Duch's prison was run with chilling efficiency, registering all men and women (but not the children), photographing them, and retaining records of their forced confessions, and the date on which they were dispatched for execution. But many identities are camouflaged by revolutionary names, clerical errors and most importantly, by the fact that a significant portion of the record kept so meticulously has been lost, destroyed or is being held secretly. When the people were freed from the Khmer Rouge and tried to re-build their lives, many had no means of identifying themselves, lacking sometimes even confirmation of dates of birth.

There is also the impact of psychological or physical injury, and of the dislocation caused by the absence of a reason for arrest and being kept in a constant state of terror. Few knew that Pol Pot led the Khmer Rouge: 'Angkar' gave the orders and was used interchangeably for 'leader' or 'organisation'. We also know only a tiny number has survived – Duch confirmed that no one was to leave S-21 alive, even those arrested by mistake. Thousands of Cambodians each year visit Tuol Sleng museum, the site of the former S-21, in the hope of seeing a photograph of a family member displayed so they can finally know what happened. Poor, illiterate, traumatized people who have lost everything including their families, have little hope of satisfying admissibility criteria, and evidential requirements, necessary if reparation is to be ordered.

### *Advantages of victim participation*

In addition to any advantages personally for the victim, the testimony of Civil Parties is powerful. It can and does bring home to an accused of the full human cost of his conduct. It will often inform the public very directly of the experiences of the ordinary person during the regime. The part played by a victim is providing evidence which might lead to a conviction, can be pivotal at trial. Many victims also hope to use the trial as an opportunity to have the accused acknowledge responsibility, or to receive public recognition of their suffering. Often, they simply want to know why they were victimized, or what happened to their relations.

### *Disadvantages*

I know that many of the Civil Parties had hoped and waited for a trial for decades. Some wish simply to participate; but for those who sought reparation, there is bound to be a disappointment. There can be no Court orders for health care, provision of education, or restoration of housing or assets lost because of the Khmer Rouge regime. All this costs money, and there is none.

## **The future**

It is in the interests both of society and of the victims that a criminal proceeding be disposed of efficiently, and be as balanced and fair as possible. In a trial of mass crimes it is usually the case that only the most visible or apparently responsible is indicted. Many victims, however, will not have suffered directly at the hands of the leader of a faction, but at the hands of his subordinates. This severely limits their ability to participate in a trial as Civil Parties.

Delays caused by the active participation of large numbers of Civil Parties will inevitably result one day in such an extended trial time that an accused dies or becomes incapacitated. Moreover equality of arms is a crucial factor in criminal trials, so the visual spectacle of a multiplicity of victims against an accused, the time taken to accommodate their participation and the stark fact that no trial of mass crime can ever give them all the information or justice they seek, suggests to me that there is a need to find a better way.

## **Another model?**

It has occurred to me that in employing the current model, we may be confusing the objectives of a criminal trial – the conduct of a fair and expeditious hearing which at its end imposes a balanced sentence on any person convicted – with the human rights impetus to learn the wider truth of why an event has occurred, to reinstate the victims' health or assets lost due to the crimes and to find a resolution that might prevent a recurrence. The absence of a clear line delineating the justice from the human rights objective can lead to confusion and disappointment.

Assuming that victims primarily seek 'justice', information and reparation for losses caused by the criminal offender, they may be better served by a complementary process perhaps analogous to the Truth and Reconciliation model used in South Africa. This might enable greater numbers to participate in a search for answers. Such a process could also involve more perpetrators from all levels of the regime, who possess valuable information but will not be tried for their crimes. In the Duch trial, the most frequently asked question was 'What happened to my relation?' That question may more readily be answered by a low-level guard or executioner, than by the leaders.

Full victim participation in the criminal trial might also be continued, but the claim for reparation heard after trial, when, with the greater clarity provided by the summary of factual findings, reparation claims could be more focused and prospectively a less stressful exercise for victims.

## *A search for the truth*

I will stray a little from my focus on victims of S-21 to explore another victim-related issue. The civil law system deploys markedly different procedures to those we common lawyers are familiar with. The judges take the burden of questioning the accused, and for this reason must be fully familiar with the material gathered during the preliminary judicial investigation, collated in a case file. This file is often voluminous, and contains most of what in the common law system would become exhibits at trial. The case file is accompanied by a Closing Order which sets out in great detail the factual allegations against the accused, already tested by the investigating judge, as well as the indictment. Rumour has it that the

case file for the next trial will have about 1 million pieces of paper, and the Closing Order will run to several hundred pages. There is, of course, no cross examination as we know it; and judges' questions must cover all evidence, whether inculpatory or exculpatory. Prosecutors, and lawyers for the defence and CPs, may then put supplementary questions.

I have no real difficulty adapting to differing procedures; but what puzzles me is that the prosecutors, whose role can be reduced to that of onlookers during trial, retain the responsibility of proving the charges to the required standard. I mention these issues as I am aware that the Minister of Justice is looking for better ways to try cases of sexual violation in NZ. The so-called inquisitorial model, known also as a search for the truth, has glamour and sense of mystery to those of us who have long toiled in our common law systems, and may well be a means of improving the victim experience during such trials. But think carefully about the ramifications of having the judge ask the bulk of the questions. This will require a number of procedural changes including:

- Access to much more material pre-trial including witness statements and exhibits.
- Time to prepare questions pre-trial.
- Consideration of the role of the jury – technically the jury is the decider of fact. Does this mean that the jury might also ask questions? Or would we abolish jury trials for trials of sexual violation?
- What about the prosecution's burden of proof where he/she has no major part to play in planning the strategy for questioning?
- And finally, hesitantly, does every lawyer in this room share my doubt that judges are sufficiently skilled to ask delicate questions of a potentially traumatized witness?

## **Conclusion**

Few, if anyone listening today will have suffered the terror, deprivation and indignities experienced by those imprisoned at S-21 and the suffering of those who learn the fate of relations. So as we remember why trials for mass crimes are convened often well after the events and what many victims are seeking, and as we remember the victims, I will leave you with the words of some who testified at the trial of Duch.

Neth Phally's brother Bunthy was detained and killed at S-21. The last time he saw his brother, a soldier injured on the battlefield, was when he visited him secretly in hospital. After the fall of the regime, he looked for his brother for months. In 2004, when he saw his biography in S-21 archives, he finally lost hope of ever finding him alive. He was deeply shocked that his brother, who had been totally loyal to the Party and had devoted his life to the revolution, was detained, tortured and killed at S-21. With his remaining arm he held up his picture during the hearing, and said :

*I would like to show a photo of my brother. Here it is like he is now sitting close or next to me. I hope he is now with me and knowing that the accused is being trialed, and I believe that my brother will be at peace, having learned that justice is achieved through this Court.*



*And may the dead soul of my brother who perished at S-21 realize that and know that now justice is done for you. At that time you were taken to S-21 while you were being blindfolded and when you were taken out to be killed you remained blindfolded. Now the Court revealed the faces of those people who committed the atrocity.*

*I can never find the dead body of you and this is the only photo, the photo which really represents the ashes and the body of you.”*

Chum Mey survived S-21. He was beaten and tortured for 12 days and nights before being assigned to repair mechanical equipment. When S-21 was evacuated he was marched off, and by some miracle came across his wife who had been imprisoned elsewhere. She had with her their baby, born while in prison. He was able to carry it for a short period but soon after, while trying to flee the Khmer Rouge, they were shot at. His wife and baby died. He said this:

*Whenever the word Tuol Sleng (S-21) prison comes into my mind I could not hold my tears. It drops automatically. Every single day when I hear about Tuol Sleng or S-21 about torture, then my tears just keep flowing ... I was told because of the anger of the trauma I suffered during the Khmer Rouge regime that I need to keep my mind free from those feelings. However, how hard I try, my tears still drop’.*

Bou Meng last saw his wife as she was being photographed at S-21. He was shackled before being released to paint likenesses of Pol Pot. He still bears the scars of his months of torture. He said :

*I thought that if I could live to give my story to the Chamber ... that the ECCC would find justice for me. And I feel so happy even if 100 percent of justice cannot be provided by the Chamber, 50 or 60 percent of justice to me is fine because I determined from the prison where I was detained that I had not committed any mistake or offence and that I prayed just to be survived.*

Vann Nath, also assigned to paint or sculpt Pol Pot, was captured, and tortured before being taken to S-21 to be held in a large cell shackled to a common iron bar. To this day he does not know why. He has painted many scenes from S-21 observed by him or described to him by other detainees. He said:

*I determined if one day I survived ..., I would compile the events to reflect on what happened so that the younger generation knew -- would know of our suffering ... those who came along with me to S-21, the majority of them did not know anything or any offence that would lead to their arrest. ... So I had to reveal, I had to write, I had to compile, and it can be served as a mirror to reflect to the younger generation of the lives of those who were accused with no reason, who committed no wrong, and that they were punished that way.*

Norng Chanphal was only eight when he was taken with his mother and small 4 year old brother to S-21. He watched, terrified, as his mother was pushed, threatened and photographed. After a night in a cell with some other women, five children, of whom he was the eldest were taken to a place behind the kitchens. His mother told him to care for the children. One breast feeding baby died in spite of him trying to feed it rice gruel. When the Vietnamese came he hid himself and the surviving children in a pile of clothes, refusing to join the fleeing staff in case his mother couldn't find him. We now know that he was taken to

S-21 just days before it was evacuated, in the chaos escaping inevitable killing. His mother died in those few days. While trying to find his mother after the staff had fled, he saw what he thought was a nightmare – dead, bleeding bodies on beds around the prison complex.

These are the people who deserve the right to tell their stories, have some of their questions answered and their desire for retribution assuaged. We can do so little in the context of a criminal trial, with its formal requirements for fairness and objectivity. The Extraordinary Chambers is attempting to achieve justice for these people, but it cannot do all that is asked of it: fair, expeditious trials which allow full victim participation as well as the determination of claims for reparation. Our experiences however, will enrich the discourse surrounding victims' rights.