

## 6 TRAUMA IN THE COURTROOM

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Addressing widespread trauma is crucial for any society emerging from mass atrocities. Advocates of criminal accountability processes contend that trials can help victims heal from trauma by providing justice and enabling at least some survivors to tell their stories. Numerous studies, however, suggest that involving victims in judicial proceedings carries real risks of retraumatization if the proceedings are not appropriately designed and conducted. Moreover, trauma can impact survivor testimony and thus the efficiency and credibility of the judicial proceedings. This chapter discusses and critiques the efforts of the Extraordinary Chambers in the Courts of Cambodia (ECCC) to deal with the multiple challenges of involving traumatized survivors in courtroom criminal proceedings.

We focus in particular on the ECCC's first trial against Kaing Guek Eav *alias* Duch, the former chief of office “S-21” (the Khmer Rouge torture and interrogation facility at Tuol Sleng), “S-24” (the prison work camp at Prey Sar), and the Choeung Ek Killing Fields. That proceeding involved the active courtroom participation of numerous survivors, including a handful of witnesses and some of the ninety Civil Party applicants<sup>379</sup>—individuals who joined the criminal proceedings to allege injuries as a result of Duch's criminal conduct. Many described suffering from trauma during the Pol Pot years. We examine some of the apparent immediate effects of courtroom participation on those survivors and analyze the ECCC's institutional efforts to balance the needs of trauma survivors against other goals of the criminal process, including the interests of pursuing the truth, conducting efficient trials, and upholding rights of the accused.

We find that legal innovations developed by women's and children's rights advocates regarding retraumatization should be expanded to include other categories of people who

require protection, including anyone testifying about extreme abuse. Moreover, the *Duch* proceedings have underscored the fact that mass crimes courts must be equipped with the staff and resources to administer meaningful psychological support for victims. It is unfortunate that the ECCC has not taken advantage of offers to provide psychosocial training to judges and staff thus far, and we strongly encourage them to do so as soon as possible.

### THE EFFECTS OF TESTIFYING ON TRAUMA SURVIVORS

There is significant scholarly debate regarding the effects of courtroom testimony—and participation in truth commissions—on trauma survivors. The available evidence is mixed, and the debate will be difficult to resolve without many more detailed empirical studies.<sup>380</sup> Nevertheless, key victims' rights groups have argued that survivor participation has therapeutic potential.<sup>381</sup> That argument has gained considerable currency among proponents of transitional justice,<sup>382</sup> and it encouraged the drafters of the Rome Statute of the International Criminal Court (ICC) to provide the first opportunity for victims to participate and seek reparations in international proceedings in addition to serving as witnesses.<sup>383</sup>

The ECCC takes the ICC model one step further by enabling trauma survivors to participate in the pre-trial and trial process as Civil Parties.<sup>384</sup> Unlike witnesses, Civil Parties have formal legal representatives who appear in the courtroom sessions beside the prosecutors. In the *Duch* case, the Court also reserved seats for selected Civil Parties at each hearing.<sup>385</sup> Civil parties may also seek remedies; although the ECCC does not provide them with the prospect of financial reparations, the Statute does allow for “collective and moral reparations.”<sup>386</sup> The ECCC Civil Party mechanism in the *Duch* case thus offered certain victims a particularly deep and extended form of participation in the courtroom process.<sup>387</sup>

### The Pain of Living with the Past

Mass atrocities leave deep physical and emotional scars on victims, and the Cambodian case is certainly no exception. Studies have shown that vast numbers of survivors of the Khmer Rouge regime suffer from post-traumatic stress disorder (PTSD) and related mental and physical ailments, such as depression, alcoholism, and domestic abuse.<sup>388</sup> Many Civil Parties who appeared before the ECCC—both survivors of the prisons over which Duch presided and relatives who lost loved ones there—complained of suffering acute emotional distress from trauma that they experienced during the Democratic Kampuchea period. Civil party Ly Hor described being “scared of other people” and “mentally ill” as a result of his severe beatings during the Khmer Rouge regime and said that he lived with “anger and traumatization.”<sup>389</sup> Civil party Chhin Navy, who lost her husband at S-21, referred to herself as “mentally ill” and expressed little interest in living. Ouk Neary, who was four years old when her father was detained at Tuol Sleng and then murdered, reported

experiencing suicidal thoughts much later in life:

[W]hen my son was three years old, when he was close to me and when my companion was speaking to me, I was thinking only of one thing; was to break away, to extricate myself from reality and jump out of the window for reasons I could not fathom myself.<sup>390</sup>

Civil party Chum Sirath, who lost two brothers and a sister-in-law in S-2I, described survivors' emotional dichotomy of wanting both to remember and to forget:

I have struggled constantly every day and night not to forget the suffering, the misery of my siblings because this is my obligation for the dead ones. However, at the same time I have tried to forget, to forget that because I also have the obligation for the survivors who are living with me. The feelings that I have on both sides have been continuing for 34 years. I could not separate the two feelings, or which side should I choose and forget the other one?<sup>391</sup>

He pointed out that while the stories shared by Civil Parties differed, they all “had the same point; that is the despair, the despair and the feeling of not understanding of what happened and the sorry and the pain which happened with us for more than 30 years.”<sup>392</sup> Indeed, almost all Civil Parties demanded to know the truth, sought explanations for abuses committed against them or their family members, and asked about the fate of lost loved ones.<sup>393</sup>

### Cathartic Courtroom Experiences

Arguments that courtroom participation benefits trauma victims are based on the notion that both justice and truth-telling are conducive to coping with psychological injuries. Some analysts argue that seeing justice done can help victims heal after they have suffered serious rights violations.<sup>394</sup> In addition, some contend that victim participation can be therapeutic by giving victims an opportunity to express their suffering, win acknowledgment (and perhaps modest reparations), and build a sense of solidarity and empowerment with other survivors.<sup>395</sup> Dr. Yael Danieli has found that “the ability to participate actively in the proceedings . . . may assist victims to take back control of their lives and to ensure that their voices are heard, respected, and understood.”<sup>396</sup>

For example, asked why she felt able to speak of her experiences at Tuol Sleng and Prey Sar, a witness who had had difficulty testifying a few days previously stated, “I tried to make myself strong in order to find justice for my parents, my siblings[,] and my uncles today.”<sup>397</sup> Witness Bou Thon, speaking of her abject grief at the loss of her family and her (thus far

failed) efforts to forgive and forget, likewise emphasized, “I tried to be here at the Court to find justice for my husband and my children.”<sup>398</sup> In response to a question asking how he copes mentally with the torture he suffered at Tuol Sleng, Chum Mey said that he pays attention to the Court and “would really like the court to find justice.”<sup>399</sup>

One refrain in the proceedings was the momentousness of victims' opportunity to express themselves directly to Duch—often to reject his pleas for forgiveness. For example, Ou Kamela, the daughter of an S-2I victim, said in a letter read in Court, “On behalf of my father, I refuse to express the slightest amount of pity. On behalf of my father, I request that justice be handed down.”<sup>400</sup>

Some victim-participants expressed optimism that participation in ECCC proceedings could help them heal from trauma, both by delivering justice and enabling them to engage in truth-telling. Chum Mey was among the most explicit, saying:

My feeling, after I received the summons to appear before this Chamber, was so exciting, so happy. I was so clear in my mind that I would testify to shed light before this Chamber, to tell the truth. I felt so relieved. If I were not able to come before this Court to testify. . . my mind [would be] so disturbed, so bothering, and I wanted to get it out of my chest.<sup>401</sup>

Ouk Neary also expressed the desire to achieve catharsis through truth-telling by quoting the documentary film-maker Rithy Panh, “The older you become, the more the history of the genocide comes back to you in an insidious way, a bit like a poison that has been distilled into your body bit by bit. The only way to relieve things is to testify.”<sup>402</sup>

S-2I survivor Bou Meng said that he had sought and received psychological counseling and medication, but found coming to the ECCC emotionally difficult, “I [could] not even eat my lunch today because I was overwhelmed.”<sup>403</sup> Nevertheless, he said toward the end of his testimony, “[M]y chest seems to be lighter. [After a]ll my statements to the Judges and to the lawyers and the rest, I [feel] much better now.”<sup>404</sup>

### Risks of Retraumatization

The evidence that courtroom participation helps traumatized survivors heal is subject to much dispute. A number of qualitative studies suggest that confronting tormentors in a formal judicial setting can re-traumatize victims and at least temporarily set back their recovery.<sup>405</sup> Confronting abusers can be frightening, and challenges and clarifying questions from judges and defense counsel can make traumatized witnesses feel that *they* are on trial rather than their tormentors. For example, during the *Duch* trial, defense counsel twice reminded a Civil Party of her oath to speak the truth while demanding to know why the

number of siblings she mentioned in her complaint and her testimony were inconsistent.<sup>406</sup> This appears to have unsettled the victim, who had already required courtroom support from the Transcultural Psychosocial Organization (TPO), a group working with the ECCC to provide mental health services. Moreover, victims' ability to participate is circumscribed by the judicial forum, where victims are constrained to providing information that is legally relevant instead of what they consider to be significant and the order and pacing of their accounts are controlled.<sup>407</sup>

Recalling past abuses, even ones from so many years ago, can itself cause anguish. Many survivors who spoke at the *Duch* trial emphasized the difficulty of revisiting the past, saying that speaking and hearing about the Khmer Rouge brought back traumatic memories. Civil party Chum Mey, a survivor of S-21, said, "I cry every night. Every time I hear people talk about Khmer Rouge, it reminds me of my [deceased] wife and kids. I am like a mentally ill person now."<sup>408</sup> Chin Met, who survived beatings and other abuses at Prey Sar, said that in general, "I do not want to talk about my suffering to anybody or to my family members because every time I recall I suffer emotionally."<sup>409</sup>

A number of international authorities have emphasized the need for sensitivity to trauma victims in the courtroom. The UN Economic and Social Council has issued guidelines on protections for child victims and witnesses,<sup>410</sup> the UN Special Rapporteur on violence against women has encouraged courts to establish victim and witness units with expertise in trauma related to sexual violence,<sup>411</sup> and the UN High Commissioner for Human Rights has endorsed both positions.<sup>412</sup>

Other internationalized criminal tribunals have acknowledged the possibility of retraumatization and have sometimes taken this risk into account when issuing decisions. In the *Nsabimana* case, the International Criminal Tribunal for Rwanda (ICTR) denied the defendant's motion for a separate trial and affirmed the appropriateness of a joint trial both to increase efficiency and to "avoid the unnecessary pressure and trauma caused to victims and other witnesses who may be repeatedly called upon to testify in separate trials."<sup>413</sup> Prosecutors and defense attorneys have also invoked the risk of retraumatization to justify motions to make special arrangements for certain witnesses or keep them from being recalled.<sup>414</sup>

The ICC has been more explicit and forward-leaning than the *ad hoc* ICTR and International Criminal Tribunal for the Former Yugoslavia (ICTY) tribunals. The ICC Trial Chamber has held that "there are particular special[] needs to be taken into account for child and elderly victims, victims with disabilities, and victims of sexual and gender violence when they are participating in the proceedings," and chambers may order "special measures to facilitate [their] testimony."<sup>415</sup> The Chamber also held that "protective measures are not favours but

instead are the rights of victims."<sup>416</sup> Notably, the ICC Statute includes a provision indicating that special protective measures *shall* be implemented for victims of sexual violence or child victims or witnesses.<sup>417</sup> Thus, at the ICC, the defense bears the burden of showing that such protective measures should not apply.<sup>418</sup> Importantly, however, the Trial Chamber did acknowledge the need to balance such measures against the rights of the accused, particularly when considering requests for witness anonymity.<sup>419</sup>

Given the time elapsed since the demise of the Democratic Kampuchea regime, none of the witnesses or Civil Parties in the *Duch* trial was still a child at the time of the proceedings. Many Civil Parties were women, but allegations of sexual violence were not prominent in the case. Some Civil Parties were elderly and could merit special protective measures on that basis, but most did not fit neatly into the categories of vulnerable victims singled out by the ICC, other internationalized courts, and UN authorities. In that sense, the *Duch* trial exposed a blind spot in the existing normative regime for victim protection.

### Facing the Accused

Confrontations between survivors and the defendant present special risks of retraumatization, especially in cases involving acts of violence committed by the accused against the victim in question. International courts have tried to address this issue. The ICC does not explicitly protect victims from confrontations with the accused, but its Rules of Procedure and Evidence do require judges to be "vigilant in controlling the manner of questioning a witness or victim so as to avoid any harassment or intimidation," particularly in cases of sexual violence.<sup>420</sup> The ICTY and ICTR enable chambers to adopt protective measures, such as one-way closed circuit television screens or partitions in the courtroom, as the ICTY used in the *Delali* and *Tadi* cases.<sup>421</sup> The Special Court of Sierra Leone (SCSL) also enables witnesses to testify behind screens or from outside of the courtroom for similar reasons, and the court used that measure when involving child witnesses in the *Sesay* trial.<sup>422</sup> The SCSL Trial Chamber also acknowledged, however, that the use of screens and similar devices needs to be balanced against the accused's right to a fair and public hearing.<sup>423</sup>

The *Duch* trial provided further evidence of the difficulty that some survivors have facing the accused. In at least one instance at the ECCC, a potential Civil Party refrained from joining the proceedings out of fear of retraumatization. Hav Sophea, whose father was detained at S-21 and sent to the Killing Fields, explained that her mother was unwilling to be a Civil Party because "she does not want to face the accused."<sup>424</sup>

Duch's active engagement in the trial—as if he were his own expert witness—and freedom to comment in detail on the merits of each witness' account likely made testifying even more stressful.<sup>425</sup> While witness Bou Thon was on the stand, Duch issued a compelling and detailed confession, apparently moved by what he saw as her straightforward testimony, her

bravery in speaking, and her obvious suffering and pain.<sup>426</sup> Hearing the confession upset Bou Thon, who broke down, and a Civil Party lawyer requested that the Trial Chamber make Duch stop speaking. The Trial Chamber refused.<sup>427</sup> This was a prime example of how the interests of the legal process—here, the interest of obtaining Duch’s full expression of remorse—sometimes cut against the interests of sparing an individual victim from emotional distress.

### Hearing Graphic Details of Crimes

Graphic courtroom depiction of crimes can also heighten the risk of retraumatization. For some Civil Parties in the *Duch* case, observing the proceedings brought on considerable emotional distress. Seventy-year-old Civil Party Im Sunthy, whose husband was an S-21 victim, said, “[I]t has been more than 30 years, but time only intensifies my grief. I have never been happy[,] and I have been terrified and living with trauma.”<sup>428</sup> Her testimony had to be rescheduled because she passed out during the testimony of another Civil Party. She explained:

When I come to these hearings to be part—to observe the hearings at this Tribunal, I have visualized the brutality of the regime, and when [Civil Party] Robert Hamill put the photo of the person who was seen struggling in a pool of blood, it really shocked me, because I could imagine how difficult life could have been for my husband at that time, and I could not really control my feeling at that time, and [so] I passed out.<sup>429</sup>

Such episodes again present dilemmas for judges and prosecutors because details that unsettle survivors may in some cases be important in articulating the case for conviction and the magnitude of the crimes alleged.<sup>430</sup> The vulnerability of victims who are showed graphic evidence of past crimes underscores the need for psychological support inside and outside of the courtroom—a topic addressed later in this chapter. Judges and prosecutors should also be attuned to this possibility and take precautionary measures, such as providing for the ongoing presence of psychological support staff.<sup>431</sup>

### Having Veracity Questioned

Retraumatization may also occur when the truth of a victim’s account is questioned. As Jamie O’Connell has noted, “Judicial proceedings may challenge victims’ account of what happened, and thereby exacerbate their loneliness, alienation, confusion about what happened, and sense that they might be responsible for the horrors that befell them.”<sup>432</sup> During the Democratic Kampuchea period, as often happens in times of upheaval, many people’s family records and photos were lost or destroyed, making formal legal proof of events difficult. As a consequence, during the *Duch* trial there were numerous instances when the defense challenged victims’ stories due to a lack of documentation.

Civil party Lay Chan, an alleged survivor of S-21, said, “I never talk about my past experience. And it has been kept in my mind for so long, and every time it bursts out, I feel stuck.”<sup>433</sup> Due to a lack of documentary support, Duch’s defense lawyers challenged the veracity of Lay’s claim that he had survived imprisonment at S-21.<sup>434</sup> At least in this instance, however, the national defense lawyer notably exercised care in doing so, adding, “I don’t really contest your suffering during the Khmer Rouge regime.”<sup>435</sup>

During the S-21 trial, the primary source of documentation was the S-21 archive, originally compiled by Duch and with which he exhibited expert familiarity, putting witnesses in the disturbing position of having their veracity judged by the accused. For example, at trial, child survivor Norng Chanphal testified about his experiences at S-21. Duch responded by admitting that his mother and siblings had suffered, but expressed doubt that they had been detained at S-21 because there were no documents filed attesting to their detention there. Regarding Norng Chanphal’s father, Duch said, “[B]efore I saw this piece of document, I thought his father would have died somewhere else, at another security office, however, with this document I acknowledge that his father suffered and died in Tuol Sleng...”<sup>436</sup> When the prosecution later submitted Chanphal’s mother’s S-21 biography into evidence. Duch said, “I accept this document that it belongs to the S-21 document and also the handwriting.”<sup>437</sup>

When the Duch verdict was announced, the Trial Chamber also ruled on whether the admitted Civil Parties had proved that they were victims of harm as a consequence of Duch’s actions. The claims of two Civil Parties who asserted that they have been detained and tortured at S-21 were rejected due in large part to a lack of corroborating documentary evidence.<sup>438</sup> Several Civil Parties who claimed to have lost relatives at S-21 were likewise denied recognition on this basis.<sup>439</sup>

According to research conducted by the Transcultural Psychosocial Organization, the day after the verdict reading, those Civil Parties who were rejected “reacted with intense emotional distress” and viewed it as shameful and a personal failure “as they could not fulfill the felt obligation to seek justice for the spirits of their relatives.”<sup>440</sup> One Case 001 Civil Party said, “I feel so exhausted. I feel pain in my head, in my chest. I feel so much ashamed. I am here to find justice for my mother, who was killed at S-21. In the past, no one could understand my suffering. Now I smile, but inside there is a lot of pain.”<sup>441</sup> Significantly, the trauma went beyond those rejected. A Civil Party applicant in Case 002 expressed apprehension about his future participatory role, “We lost all evidence, because the prisons were destroyed right after the regime...We were so painful, but now we are painful again. I am suffering; I feel so much pain.”<sup>442</sup>

### EFFECTS OF TRAUMA ON TESTIMONY AND THE TRIAL PROCESS

As discussed above, judicial proceedings can affect victims’ emotional well-being in a variety

of ways. The converse is also true: survivors' emotional states can have important impacts on the proceedings by affecting their testimony and disrupting the trial. At times, revisiting traumatic memories may lead survivors to become confused or to suffer from memory loss. Emotional distress can give rise to anger or accusations that threaten the impartial tenor of the proceedings. Lastly, traumatized witnesses frequently (and understandably) break down or veer away from specific discussion of the defendant's alleged culpable conduct, challenging the efficiency of the trial and at least potentially prejudicing the proceedings against the accused. The ECCC has had to deal with all of these issues to some extent, seeking to balance the rights of trauma survivors against other important interests.

### Inaccurate or Confused Testimony

Concerns about the reliability of testimony sometimes exist when trauma survivors take the stand. Ample scientific research has shown that victims of trauma often experience significant memory impairment after suffering severe emotional distress.<sup>443</sup> This may include losses of general memory function or the “dissociation” of traumatic memories into incoherent parts. Victims sometimes experience vivid flashbacks but have difficulty articulating what they are thinking and feeling.<sup>444</sup> This has obvious relevance in a criminal proceeding. Ironically, the very seriousness of the injury a victim suffers may impair his or her ability to recount the offense in an accurate and credible manner. The result can be a courtroom exchange that casts doubt on the victim's credibility and the defendant's culpability. Incongruent testimony raises the risk that guilty offenders will go free (or that defendants will be wrongly convicted) and complicates the effort to arrive at a definitive truth about episodes of mass atrocity.

The possibility that trauma impairs the accuracy of a witness's testimony has been raised at other tribunals. The very first witness in the *Lubanga* case at the ICC began to describe his experiences as a child soldier in Lubanga's Congolese militia but quickly recanted his testimony, later explaining, “A lot of things went through my mind. I got angry and wasn't able [to testify.]”<sup>445</sup> The episode precipitated a debate on the extent to which vulnerable victims should be prepared for the courtroom environment—a proposition that risks jeopardizing the rights of the accused if preparation veers into coaching witnesses.<sup>446</sup>

At the ICTY, the defense in the *Furundžija* case challenged a witness on the basis that PTSD impaired her ability to recall events correctly and that her testimony should therefore be expunged.<sup>447</sup> In the *Aloys Simba* case at the ICTR, defense lawyers sought to exclude the testimony of Witness KS, arguing that “the witness appeared visibly upset and traumatized, which calls into question her capacity to testify, including the validity of her oath and the reliability of her recollections.”<sup>448</sup> In both cases, the defense challenges were unsuccessful, as the courts found insufficient evidence that trauma had in fact impaired the reliability of the witnesses on the most crucial facts.<sup>449</sup>

The ICTY went even further in the *Kunarac* case, overlooking “minor discrepancies” among young witnesses alleging unlawful detention and sexual abuse due to the passage of time:

[T]he experiences which the witnesses underwent were traumatic for them at the time, and they cannot reasonably be expected to recall the minutiae of the particular incidents charged, such as the precise sequence, or the exact dates and times, of the events they have described.<sup>450</sup>

Thus, in certain cases, the appearance of trauma can lead courts to give witnesses (or Civil Parties) the benefit of the doubt rather than concluding that their testimony is unreliable.

In a few instances, Civil Party accounts at the ECCC have been inconsistent. The testimony of Civil Party Ly Hor was particularly confused. A confession transcript from S-2I provides strong evidence that Ly Hor was in fact a survivor of the prison at Tuol Sleng, as he alleged. He had difficulty, however, understanding questions from lawyers and judges in the courtroom, and his disjointed oral testimony contradicted his written statement. Judge Silvia Cartwright lamented, “This Civil Party has been very poorly prepared for this morning's experience.”<sup>451</sup> Afterward, Ly Hor said he did not know what happened during trial; he had become confused and could not think clearly.<sup>452</sup> Even though there were documents submitted attesting that someone named “Ear Hor”—the name Ly Hor allegedly went by at the time—was detained at S-2I, in its judgment the Trial Chamber expressed doubt whether they were one and the same person, and thus found Ly Hor's Civil Party application inadmissible.<sup>453</sup>

Civil party Chin Met suggested that her trauma was impairing her memory. She said, “Emotionally I am more forgetful now. I remember less at present . . . sometimes I [have been] blamed that because I think of the Khmer Rouge past a lot that's why I am now more forgetful.”<sup>454</sup> She did not specify whether her impairment related to short-term memory loss or memories from the DK era. Although defense lawyers did point out discrepancies between her testimony and written statement,<sup>455</sup> her Civil Party status was nevertheless recognized in the judgment.<sup>456</sup>

### Emotional Testimony: Concerns about Fairness and Efficiency

In addition to concerns about reliability, emotional testimony also raises issues related to the overall tenor and length of the courtroom proceedings. The interest in victim participation does not exist in isolation; it must be balanced against the defendant's right to a fair and speedy trial.<sup>457</sup> In some instances, trauma survivors experience powerful emotions that lead them to express rage or distress in the courtroom or to give lengthy accounts of their personal experiences and pain. While their outbursts or digressions may be understandable and morally justified, they can consume a considerable amount of time, lead

away from relevant facts, and jeopardize the impartiality of the courtroom atmosphere. Trials are not truth commissions, and fairness requires focusing on the guilt or innocence of the accused.<sup>458</sup>

One risk of emotional testimony is that it may bias the proceedings against the accused by appealing to impulses for revenge. In a number of instances, Civil Parties addressed Duch angrily during the trial. Chum Mey said, “So I would like to tell this to Duch; that Duch did not beat me personally, directly, otherwise he would not have the day to see the sunlight. I would just like to be frank.”<sup>459</sup> Robert Hamill, whose brother Kerry was killed at S-21, expressed his desire to see Duch suffer the type of anguish he inflicted on others:

Duch, at times I've wanted to smash you—to use your words—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 imagined your scrotum electrified, being forced to eat your own faeces, being nearly drowned, and having your throat cut. I have wanted that to be your experience, your reality. I have wanted you to suffer the way you made Kerry and so many others.<sup>460</sup>

Trial Chamber President Nil Nonn politely, but consistently reprimanded Civil Parties for issuing verbal attacks on Duch. For example, he asked Hamill to refrain from using harsh words toward the defendant, explaining that the courtroom was not the appropriate venue “for any revenge or abusive words.”<sup>461</sup> He asked Neth Phally to “avoid using this venue as the place where you seek vengeance.”<sup>462</sup> He reminded Civil Party Chum Sirath to “control your emotion” and “focus on the facts,” rejecting the argument by Sirath’s Civil Party lawyer that Sirath’s outburst was “part of the process of coping with the suffering...[and] is part of the story that he wants to tell ...”<sup>463</sup> President Nil explained his reasoning:

The Chamber of course acknowledges your emotion, your feeling and the suffering which you have been bearing for so many years, and the Chamber tries not to interrupt your statement...[but] the main focus of our proceedings is to find justice. It is not the opportunity to make revenge or to affront anybody, including the accused.<sup>464</sup>

In addition to changing the dynamics of courtroom discourse, emotional testimony can present efficiency concerns. In the *Duch* trial, some trauma victims found it difficult to testify in a concise and coherent fashion. President Nil acknowledged that difficulty when addressing Civil Party Bou Meng, who broke down when speaking of his torture at Tuol Sleng. Nil said:

Uncle Meng, please try to recompose yourself so that you would have the opportunity to tell your story. As you have stated, you have been waiting for this opportunity to tell your accounts, your experience[,] and the sufferings that you received from those unjust acts; from the torture committed by the Khmer Rouge, as well as the ill treatment on your wife. So please try to be strong, recompose yourself so that you are in a better position to recount what they did on you so that the public and the Chamber who are participating in this proceeding or the Cambodian people as a whole as well as the international community to hear, to understand the acts committed by the Khmer Rouge clique on you and that they would express the pityness on you as you received those ill treatment from them. So do not let your emotion overwhelm you. So try to grab the opportunity to tell your accounts to the Chamber as well as to the public. Uncle Meng, do you understand what I said?<sup>465</sup>

When Civil Party Lay Chan was asked what he did when he was thirsty, but dared not ask for water, Lay responded, “I cannot respond to the question” and broke down before completing another sentence. The Trial Chamber president asked Lay to “try to collect [him]self” and asked if he needed time to re-compose. Lay paused before recounting that he had to drink his own urine.<sup>466</sup> Civil party lawyers argued on a number of occasions for the Court to provide more time for their clients to cope with the emotional difficulty of the experience and to compose themselves. The judges explained that they would endeavor to do so within the time limitations.<sup>467</sup>

The judges in the *Duch* trial also had to manage the desire of some witnesses and Civil Parties to speak broadly about their families’ suffering during the Pol Pot era. In a few cases, Civil Parties provided eulogies for their lost loved ones,<sup>468</sup> departing from facts specifically related to S-21.<sup>469</sup> For example, Civil Party Touch Monin was cutoff by the defense because he recounted a long story of his family’s evacuation from Phnom Penh instead of events related to the accused and the harm he suffered as a result.<sup>470</sup> These digressions were not necessarily caused by trauma, but awareness that most testifying survivors had experienced trauma likely made it more difficult for judges and attorneys to impose limits without appearing callous. Indeed, efforts by the judges to explain the parameters of the proceedings, perhaps inevitably, sounded cold and mechanistic.<sup>471</sup>

Striking the right balance can be difficult. If judges interview witnesses in draconian fashion or allow lawyers to do so, they risk re-traumatizing survivors and compromising the public legitimacy needed to make any transitional justice mechanism successful. If judges are too *laissez faire*, they run the danger of presiding over a process that loses credibility for another reason—it appears to privilege the emotional accounts of survivors over the hard facts needed to establish the defendants’ culpability.

The challenge of managing emotional testimony or digressions will likely be even greater in Case 002. The *Duch* trial involved a defendant who essentially entered a guilty plea, but still took nine months, including six months of in-court proceedings. Much of that time was spent on the twenty-four witnesses and twenty-two Civil Parties interviewed—before they testified, during their courtroom appearances, and in subsequent review of their testimony. In Case 002, the joint trial of four senior Khmer Rouge leaders who deny guilt, many more witnesses and Civil Parties will take part. All of the defendants are elderly and in ill health, and the trial will have to be managed efficiently if a judgment is to be rendered while they are still able to stand trial. Justice will likely be in tension with the desire to enable each witness to tell his or her story in detail.

## CONCLUSIONS & RECOMMENDATIONS

The experience of the ECCC to date suggests a number of important lessons related to trauma in the courtroom. It has reinforced what many other trials have demonstrated: in the aftermath of mass atrocities, victim participation in legal proceedings is an emotionally difficult process. Some degree of retraumatization is inevitable, and courts need to put measures in place to deal with its effects on both victims and the course of the proceedings. The *Duch* trial also showed that retraumatization is by no means limited to children or women who suffered sexual violence. Advocates for women's and children's rights have been pioneers in demanding that internationalized courts take due account of trauma. The resulting legal innovations, however, have tended to draw too sharp a distinction between the types of people who merit protection and those who do not. Courts should be cognizant of the special vulnerability of some groups of victims, but should also have the authority (and indeed the obligation) to put in place protections for other victims when special circumstances dictate.

At the same time, the *Duch* trial provided regular reminders that the needs of victims do not exist in isolation. They sometimes clash with other compelling interests, such as the prosecution's quest to build a focused and consistent narrative and the defendant's right to a fair and speedy trial. As this chapter has shown, international criminal courts have generally considered victims' rights when ruling on the credibility of witnesses and their requests for special courtroom protections. This likely reflects both the normative dispositions of the judges and the pressure applied by victims' advocacy groups. Courts have been explicit, however, about the balancing act they must undertake and have often denied requests for anonymous testimony and other measures that could unduly bias proceedings against the defense.

In the *Duch* trial, the ECCC did not confront the need to offer in-court protective measures—partly due to the lapse of time and diminution of the Khmer Rouge threat— or the need to substantially restrict the time allowed for victim testimony. It, however, will face greater

challenges in balancing victim protection against the rights of the accused in Case 002. In particular, the sheer number of Civil Parties and victim witnesses in that case and the advanced age of the defendants will add to the urgency of the proceedings, making time of the essence.<sup>472</sup> Judges will need to strike a difficult balance between the desire of victims to tell their stories and the need to focus on the criminal charges at hand. The prosecution's successful effort to charge the four defendants as part of a “joint criminal enterprise” may alleviate that tension to some degree, because it permits the prosecutors to paint a picture of broad and systemic abuse. The ECCC Trial Chamber will still need to be more demanding of witnesses and Civil Parties than it was in the *Duch* trial. As a consequence, training for judges and lawyers on trauma-related issues and psycho-social support for witnesses and Civil Parties will be that much more essential.

## The Importance of Training Judges and Lawyers

The difficulty of managing trauma effectively in the courtroom underscores the need for judicial sensitivity to the issue. Training of judges and lawyers working on mass crimes cases is a key part of the answer. Numerous national and international development agencies are now engaged in judicial training, sometimes assisting special criminal courts like the Special Iraqi Tribunal.<sup>473</sup> ECCC judges attended a number of legal training sessions organized by the UN Development Program before they took up their roles on the bench.<sup>474</sup> They, however, have rejected offers for psycho-social training.<sup>475</sup> Judicial training is not easy in courts like the ECCC, because the background of judges varies widely. Some require relatively basic instruction. Others require more, and trainers usually have limited time to devote to complex and nuanced issues such as how to optimize the goals of victims' rights and the conduct of a fair trial.

Nevertheless, the experience of the *Duch* trial shows that even a modest amount of exposure and learning can make a significant difference. Initially, President Nil Nonn of the ECCC Trial Chamber was criticized for appearing insensitive to the suffering of testifying Civil Parties. He and the other trial judges, however, quickly, if a bit gruffly, made an effort to handle such episodes more adroitly. For example, the President was criticized for repeatedly admonishing Chum Mey to compose himself (e.g., “Uncle Mey, please recompose yourself. This is the time we are conducting our trial.”)<sup>476</sup> Afterward, he apparently sought advice about how to handle such situations more appropriately in the future.<sup>477</sup> The next day when Bou Meng became overwhelmed, instead of merely hurrying him along, Nil Nonn made a lengthy speech in which he acknowledged Bou Meng's suffering and told him to be strong and “grab the opportunity” to share his story.<sup>478</sup> Nil Nonn's adaptation is to be commended, but going forward the judges should accept training before encountering traumatized witnesses in the courtroom. Indeed, due to its potential for reducing retraumatization of victims and for ensuring a fair trial for the accused, such training should be automatically provided to the judges and staff at mass-crimes tribunals.

### Support for Traumatized Courtroom Participants

Finally, the ECCC proceedings have underscored the fact that courts need to be equipped with the staff and resources to administer meaningful psychological support for victims. This is relevant to the protection of victims and has the potential to help manage the courtroom proceedings, because victims who are well supported are more likely to be able to offer composed and consistent testimony.

Advocates for women's rights have been influential in advancing measures to provide such services, especially in the context of violent sex offenses.<sup>479</sup> The ICTR Witness Support and Protection Programme and ICTY Victims and Witnesses Section provide psychological counseling to witnesses, focusing on trauma survivors.<sup>480</sup> The SCSL Rules of Procedure and Evidence provide that its Witnesses and Victims Section be staffed by experts in trauma related to sexual violence.<sup>481</sup>

The architects of the ICC likewise provided for a Victims and Witnesses Unit (VWU), which has staff members who specialize in trauma, psychological counseling, and crisis intervention.<sup>482</sup> In addition to out-of-court counseling, the VWU has the authority to assign staffers to support children through all stages of the proceedings, "in particular traumatized children."<sup>483</sup> It is tasked with familiarizing witnesses with the courtroom environment to dampen anxiety and with accompanying them during testimony if required.<sup>484</sup>

The ECCC also set up a Witness and Experts Support Unit (WESU) and a Victims' Support Section (VSS). WESU assists all persons who testify in court proceedings and, like the VSS, consults with the Co-Investigating Judges and Chambers about the appropriateness of protective measures.<sup>485</sup> The VSS, however, is the primary intermediary between Civil Parties or their representatives and the Court. Among its other responsibilities, the VSS is tasked with supporting the attendance of Civil Parties in court proceedings.<sup>486</sup> Although no ECCC provisions mention psychosocial support,<sup>487</sup> the ECCC website states that the VSS is responsible for its provision.<sup>488</sup> In practice, this work is undertaken entirely by the Transcultural Psychosocial Organization, which signed a memorandum of understanding with the Court in 2007.<sup>489</sup> TPO services for the Court include training ECCC staff and provision of "psychological briefing prior to the proceedings, monitoring participants' mental health condition, offering emotional support during the trial[,] and debriefing after the proceedings."<sup>490</sup>

For example, a representative from TPO was asked to sit beside Chum Neou, a Civil Party who survived S-24, while she testified at the Trial Chamber. She said:

It is extremely difficult. It's indescribable. I can recall one event after another[,] and

this is the first time after 32 years that I start talking. And every time now when I think of that event, my tears keep flowing.<sup>491</sup>

A TPO representative also sat beside Civil Party Nam Mon when she testified. Her lawyers cautioned that Nam Mon had never told her story before relating it to her lawyers shortly before the trial and that she was therefore "very excited, discomposed and nervous."<sup>492</sup>

The task of ensuring that Civil Parties are not traumatized by their experiences at the Court also inevitably falls heavily on the Civil Party legal teams, again highlighting the importance of providing lawyers with adequate training and information on how to refer troubled clients to trained medical professionals.<sup>493</sup> It is their responsibility to explain the proceedings and prepare their clients for the often mystifying and at times disappointing moments of a legal process. For example, before the *Duch* verdict was read, Civil Party Team I met with their clients to make clear that the Trial Chamber would likely reject some of their applications in the final judgment. They also met with their clients afterward to explain why some of them had in fact been rejected. This basic, but fundamental, task apparently helped soothe at least a few of those rejected, who told the team that they understood and accepted that the decision was based on a lack of documentation and not a belief that they had not suffered harm.<sup>494</sup>

Courts are not naturally equipped to deal with victims' psychological challenges, and in many post-conflict environments (including Cambodia), there are relatively few professionals who specialize in trauma and can communicate with victims in their native tongues. Developing that capacity needs to be a major priority for the Cambodian ministries of health and education and for donors interested in helping survivors cope with the legacy of conflict and abuse. Moreover, in the budgetary tug-of-war that determines resource allocation for internationalized courts, psychological support units have tended to get short shrift. Measures for victims are generally popular among donor countries, but concerns about the overall cost and length of proceedings abound, imposing broad constraints on courts' capacities to provide the support that traumatized victims require.

Ultimately, the jury is still out on whether victims inevitably benefit from participation in mass crimes trials, or if the gap between their desire to speak and find the truth and the strictures of the legal process is too wide to overcome the potential for retraumatization. Regardless of the answer, it seems clear that victims will continue to seek opportunities to participate in trial proceedings. For many survivors, the impulse to seek justice and tell one's story is powerful. One victim of crimes in the former Yugoslavia found that although testifying at the ICTY "did nothing to calm his nightmares" he would absolutely do it again: "It is in the interest of us all who survived the tortures to tell the truth, to tell the world what it was like."<sup>495</sup> To a considerable extent, this is why internationalized courts like



the ECCC were created. Further innovations and adaptations will be required to ensure that witnesses and Civil Parties in the ECCC's second case and other internationalized proceedings are able to share their stories with minimum harm to themselves and minimum disruption to a fair and speedy trial.

## END NOTES

378 The authors would like to recognize the indispensable assistance of Della Sentilles in conducting research for this chapter, as well as the valued contributions of David Sukenik and George Tam.

379 As discussed below, twenty-four of these applicants were found not to meet the criteria for Civil Parties at judgment. See *Prosecutor v. Kaing Guek Eav alias Duch*, Case File No. 001/18-07-2007/ECCC/TC, Judgment, ¶¶ 647-49 (Trial Chamber 26 July 2010).

380 See, e.g., David Mendeloff, *Trauma and Vengeance: Assessing the Psychological and Emotional Effects of Post-Conflict Justice*, 31 HUM. RTS. Q. 592, 601-15 (2009); Marie-Bénédicte Dembour & Emily Haslam, *Silencing Hearings? Victim-Witnesses at War Crimes Trials*, 15 EUR. J. INT'L L. 151 (2004); Jamie O'Connell, *Gambling with the Psyche: Does Prosecuting Human Rights Violators Console Their Victims?* 46 HARV. INT'L L.J. 295, 319 (2005) (finding that "therapists writing about the effects of impunity do not describe actual instances of prosecutions helping victims psychologically. The large number of ways trials may positively or negatively affect victims...suggests that predictions of trials' effects based on victims' condition in their absence may be highly uncertain.").

381 See, e.g., VICTIMS' RIGHTS WORKING GROUP, VICTIM'S RIGHTS IN THE INTERNATIONAL CRIMINAL COURT 4 (2000); Yael Danieli, *Victims: Essential Voices at the Court*, VRWG BULL., at I (SEPT. 2004), available at <http://www.vrwg.org/smartweb/bulletins/past-issues>; WOMEN'S CAUCUS FOR GENDER JUSTICE, RECOMMENDATIONS AND COMMENTARY FOR AUGUST 1997 PREP COM ON THE ESTABLISHMENT OF AN INTERNATIONAL CRIMINAL COURT 33 (1997) (arguing that participation is important for "advancing the process of healing from trauma and degradation").

382 See Emily Haslam, *Victim Participation at the International Criminal Court: A Triumph of Hope Over Experience*, in THE PERMANENT INTERNATIONAL CRIMINAL COURT: LEGAL AND POLICY ISSUES 315 (Dominic McGoldrick et al. eds., 2004); Susana SáCouto & Katherine Cleary, *Victims' Participation in the Investigations of the International Criminal Court*, 17 TRANSNAT'L L. & CONTEMP. PROBS. 73, 76-78 (2008). But see Charles P. Trumbull IV, *The Victims of Victim Participation in International Proceedings*, 29 MICH. J. INT'L L. 777, 804-19 (2008) (arguing that the benefits of victim participation in domestic proceedings do not apply to mass crimes cases at international criminal tribunals because the large number of participants reduces their agency in and value to the proceedings, as well as the likelihood that they will receive meaningful reparations).

383 Criminal tribunals built on the Nuremberg model, including the tribunals for the former Yugoslavia and Rwanda, gave modest roles to survivors as witnesses. Victims' advocates, however, argued that they missed an opportunity to help victims heal by denying them a more central role in the proceedings. See, e.g., Yael Danieli, *Reappraising the Nuremberg Trials and their Legacy: The Role of Victims in International Law*, 27 CARDOZO L. REV. 1633, 1641-43 (2005-06); Int'l Fed'n for Hum. Rts. (FIDH), *Victims in the Balance: Challenges Ahead for the ICTR*, at 6 (2002), available at <http://www.iccnw.org/documents/FIDHrwVictimsBalanceNov2003.pdf>. In response to those critiques, the Rome Statute included provisions enabling victims to participate more directly at the ICC. David Donat-Cattin, *Article 68 Protection of the Victims and Witnesses and Their Participation in the Proceedings*, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL COURT 869, 871 (Otto Triffterer ed., 1999). If a victim's application to the ICC Registrar is approved, he or she may select or be assigned a representative, and that representative may participate by filing written submissions, joining courtroom proceedings (if the judges approve), and requesting reparations. Int'l Crim. Ct. (ICC), Rules of Procedure and Evidence, r. 89-93, ICC-ASP/1/3 (Sept. 3-10, 2002) [hereinafter ICC Rules of Procedure and Evidence]; ICC, Rome Statute of the International Criminal Court, arts. 68(3) & 75, U.N. Doc. A/CONF.183/9 (1998) [hereinafter Rome Statute].

384 Survivors may be selected to become witnesses based on complaints that they register with the ECCC pursuant to Internal Rule 50, or other information indicating that they have relevant information. Survivors may become Civil Parties pursuant to Internal Rule 23bis(1) if they can demonstrate injury suffered as the direct

result of one of the crimes alleged against a charged person. See Extraordinary Chambers in the Courts of Cambodia (ECCC), Internal Rules of the Extraordinary Chambers in the Courts of Cambodia (revised Feb. 23, 2011) [hereinafter ECCC Internal Rules]; *Kaing Guek Eav, supra* note 2, ¶¶ 639-43 (explaining the criteria for Civil Party status pursuant to an earlier version of the rules).

385 Nevertheless, most Civil Parties were unable to attend early trial proceedings due to a lack of financial support. See Michelle Staggs Kelsall et al., *Lessons Learned from the 'Duch' Trial*, at 31 (Dec. 2009), available at [http://socrates.berkeley.edu/~warcime/documents/Lessons%20Learned%20from%20the%20Duch%20Trial\\_MRSK\\_FINAL.pdf](http://socrates.berkeley.edu/~warcime/documents/Lessons%20Learned%20from%20the%20Duch%20Trial_MRSK_FINAL.pdf). This problem will be compounded in Case 002, which will include over 2000 Civil Parties, as the Court lacks the resources to fund their regular attendance.

386 ECCC Internal Rules, *supra* note 7, r. 23quinquies(1). In the Case 001 judgment, however, the ECCC Trial Chamber found that Duch was indigent and that most Civil Party requests either fell outside the Court's jurisdiction or lacked sufficient specificity. They therefore awarded only token reparations. *Kaing Guek Eav, supra* note 2, ¶¶ 664-75. In September 2010, the judges amended the rule, giving the chamber power to recognize specific projects designed in cooperation with the Victim Support Section that have secured sufficient external funding. ECCC Internal Rules, *supra* note 7, r. 23quinquies(3)(b). It is unclear if this change will enable the Court to award meaningful reparations in Case 002.

For information about the Cambodian public's reaction to the Case 001 reparation decision, see DOCUMENTATION CTR. OF CAMBODIA, *DUCH VERDICT: A DC-CAM REPORT FROM THE VILLAGES* (Sirik Savina & Richard Kilpatrick eds., 2010), available at [http://www.dccam.org/Projects/Living\\_Doc/pdf/The\\_Duch\\_Verdict-A\\_DC-Cam\\_Report\\_from\\_the\\_Villages.pdf](http://www.dccam.org/Projects/Living_Doc/pdf/The_Duch_Verdict-A_DC-Cam_Report_from_the_Villages.pdf), and in particular, Dacil Keo, *Disarray and Disappointment after Duch Verdict*, in *DUCH VERDICT: A DC-CAM REPORT FROM THE VILLAGES* 95-96, available at [http://www.dccam.org/Projects/Living\\_Doc/pdf/The\\_Duch\\_Verdict-A\\_DC-Cam\\_Report\\_from\\_the\\_Villages.pdf](http://www.dccam.org/Projects/Living_Doc/pdf/The_Duch_Verdict-A_DC-Cam_Report_from_the_Villages.pdf). See also BERLIN CTR. FOR THE TREATMENT OF TORTURE VICTIMS, *THE SURVIVORS' VOICES: ATTITUDES ON THE ECCC, THE FORMER KHMER ROUGE AND EXPERIENCES WITH CIVIL PARTY PARTICIPATION* 66 (Dec. 2010), available at [http://www.bzfo.de/images/stories/pdf/bzfo\\_cambodia\\_report\\_2010.pdf](http://www.bzfo.de/images/stories/pdf/bzfo_cambodia_report_2010.pdf) (finding evidence that the *Duch* trial "was observed on a broad basis, but only a small group of respondents showed a deeper understanding of the proceedings").

387 In February 2010, the Internal Rules were amended to make the trial process more efficient for Case 002. Among the changes, a new rule gives two new Court-funded Civil Party Lead Co-Lawyers "[u]ltimate responsibility to the court for the overall advocacy, strategy[,] and in-court presentation of the interests of the consolidated group of Civil Parties during the trial stage and beyond." ECCC Internal Rules, *supra* note 7, r. 12ter(5)(b). This rule change appears to sever the Civil Party attorney-client relationship, as Civil Party lawyers are now unable to represent their clients interests in court, such as by making oral or written submissions, without agreement from the Civil Party Lead Co-Lawyers, whose obligation is only to "seek the views of Civil Party lawyers and endeavour to reach consensus in order to coordinate representation of Civil Parties at trial." *Id.* r. 12ter(3). Concomitantly, Civil Parties are unable to hire or fire the Lead Co-Lawyers, to determine the objectives of their legal representation, or to participate in deciding the means of carrying out those objectives, and the Lead Co-Lawyers have no clear responsibility to represent the interests of individual Civil Parties, in contrast to their obligations to the group as a whole. These changes are likely necessary and appropriate, as over 2,000 Civil Parties have been accepted in Case 002. The changes, however, reduce the robustness of the mechanism and thus the ability of victims to actively participate in the process, making the victims role look less like one of a "party," and more like one of a "participant," as at the ICC.

388 A 2001 study by international experts found a 28% prevalence of PTSD among over 600 Cambodians randomly surveyed in different parts of the country. Joop T.V.M. de Jong et al., *Lifetime Events and Posttraumatic Stress Disorder in 4 Postconflict Settings*, 286 JAMA 555 (2001). A more recent study found an incidence of roughly 11% overall. Within this group around 40% suffered from associated mental or physical disabilities. Jeffrey Sonis et al., *Probable Posttraumatic Stress Disorder and Disability in Cambodia: Associations With Perceived Justice, Desire for Revenge, and*

*Attitudes Toward the Khmer Rouge Trials*, 302 JAMA 527 (2009). See also Press Release, Nat'l Inst. of Mental Health, PTSD, Depression Epidemic among Cambodian Immigrants (Aug. 2, 2005), <http://www.nimh.nih.gov/science-news/2005/ptsd-depression-epidemic-among-cambodian-immigrants.shtml> (finding that among Cambodian refugees in the United States, "[s]ixty-two percent suffered from [PTSD] and 51 percent from depression in the past year—six-to-seventeen times the national average for adults"); Lauren Wagner, *Cambodian Women Confront Epidemic of Domestic Violence*, 43(15) PSYCHIATRIC NEWS 19 (Aug. 1, 2008), available at [www.cwcc.org/kh/wp-content/uploads/2010/11/psych.pdf](http://www.cwcc.org/kh/wp-content/uploads/2010/11/psych.pdf) (noting the legacy of mental illness, depression and sexual abuse in Cambodia). Relatively few survivors have been able to benefit from professional counseling due to the dearth of mental health care providers in the country—a topic addressed elsewhere in this volume.

389 ECCC, Transcript of Trial Proceedings—Kaing Guek Eav "Duch," Case File No. 001/18-07-2007-ECCC/TC, at 70-71 (July 6, 2009) [hereinafter Ly Hor transcript].

390 ECCC, Transcript of Trial Proceedings—Kaing Guek Eav "Duch," Case File No. 001/18-07-2007-ECCC/TC, at 64 (Aug. 17, 2009) [hereinafter Ouk Neary transcript].

391 ECCC, Transcript of Trial Proceedings—Kaing Guek Eav "Duch," Case File No. 001/18-07-2007-ECCC/TC, at 20-21 (Aug. 20, 2009) [hereinafter 20 Aug. 2009 transcript].

392 *Id.* at 20.

393 See, e.g., *id.* at 59 & 64 (Civil Party Ou Savrith); Ouk Neary transcript, *supra* note 13, at 66.

394 See, e.g., Jamie O'Connell, *supra* note 3, at 317-29; Richard J. Goldstone, *Justice as a Tool for Peace-Making: Truth Commissions and International Criminal Tribunals*, 28 N.Y.U. J. INT'L L. & POL'Y 485, 489 (1995-96) (arguing that justice and official acknowledgment are "usually the first step in [victims'] healing process").

395 See, e.g., Jamie O'Connell, *supra* note 3, at 328-31 & 337-38; Yael Danieli, *Victims: Essential Voices at the Court*, *supra* note 4, at 6 (arguing that "[o]n an individual level, acknowledgment at least begins to heal psychic wounds . . . in that it vindicates the victim by, *inter alia*, signifying the transfer of the responsibility to the wrongdoers."). See also Ervin Staub, *Genocide and Mass Killing: Origins, Prevention, Healing, and Reconciliation*, 21 POL. PSYCHOLOGY 367, 376 (2002) (summarizing research that suggests revisiting past experience in a safe environment, sharing empathy, and receiving acknowledgment all contribute to victims' healing).

396 Yael Danieli, *Victims: Essential Voices at the Court*, *supra* note 4.

397 ECCC, Transcript of Trial Proceedings—Kaing Guek Eav "Duch," Case File No. 001/18-07-2007-ECCC/TC, at 48-49 (July 13, 2009) [hereinafter 13 July 2009 transcript].

398 ECCC, Transcript of Trial Proceedings—Kaing Guek Eav "Duch," Case File No. 001/18-07-2007-ECCC/TC, at 26 (Aug. 12, 2009) [hereinafter 12 Aug. 2009 transcript].

399 ECCC, Transcript of Trial Proceedings—Kaing Guek Eav "Duch," Case File No. 001/18-07-2007-ECCC/TC, at 35 (June 30, 2009) [hereinafter Chum Mey transcript].

400 20 Aug. 2009 transcript, *supra* note 14, at 64.

401 Chum Mey transcript, *supra* note 22, at 67.

402 Ouk Neary transcript, *supra* note 13, at 69-70.

403 ECCC, Transcript of Trial Proceedings—Kaing Guek Eav "Duch," Case File No. 001/18-07-2007-ECCC/TC, at 74 (July 1, 2009) [hereinafter Bou Meng transcript].

404 *Id.* at 85.

405 Arthur J. Lurigio & Patricia A. Resick, *Healing the Psychological Wounds of Criminal Victimization: Predicting Postcrime Distress and Recovery*, in *VICTIMS OF CRIME: PROBLEMS, POLICIES AND PROGRAMS* 60 (Arthur J. Lurigio et al. eds., 1990); Karen Bronéus, *Truth-Telling as Talking Cure? Insecurity and Retraumatization in the Rwandan Gacaca Courts*, 39 SECURITY DIALOGUE 55 (2008); Jamie O'Connell, *supra* note 3, at 331-36.

406 13 July 2009 transcript, *supra* note 20, at 61-62. The Civil Party explained one younger brother was in fact

a god-brother. *Id.* at 62. Victim witnesses also may feel attacked when they are asked multiple repetitive questions, particularly about sexual violence. *See, e.g.*, Binaifer Nowrojee, *Your Justice Is Too Slow*, U.N. Research Institute for Social Development, at 23 (Nov. 2005); FIDH, *Victims in the Balance: Challenges Ahead for the International Criminal Tribunal for Rwanda*, at 8-9 (Nov. 2002) (describing distress caused by repetitive questioning). This is a major concern in joint trials with multiple defense teams, as will be the situation in ECCC Case 002.

407 Marie-Bénédicte Dembour & Emily Haslam, *supra* note 3, at 159 (pointing out that “judicial ‘effectiveness’ may mean for [witnesses] that significant events and emotions are glossed over”).

408 Chum Mey transcript, *supra* note 22, at 35-36. Chum called himself *chbkout*, a Khmer term that best translates as “crazy” but that is used in lieu of more technical terms to describe a wide range of mental infirmities. *Chbkout* is not necessarily considered derogatory.

409 ECCC, Transcript of Trial Proceedings—Kaing Guek Eav “Duch,” Case File No. 001/18-07-2007-ECCC/TC, at 93-94 (July 9, 2009) [hereinafter 9 July 2009 transcript].

410 ESCOR, Guidelines for Justice in Matters Involving Child Victims and Witnesses of Crime, ¶¶ 10-19, 29-34, & 38-46, Res. No. 2005/20 (July 22, 2005) (promoting the rights of children victims and witnesses to be treated with dignity and compassion, to be protected from discrimination, to be informed, to be heard and to express views and concerns, to affective assistance, to privacy, to protection from hardship during the justice process, to safety, to reparation, and to special preventative measures; as well as the corresponding need to make training, education, and information available to professionals who work with such children).

411 Report of the Special Rapporteur on Violence Against Women, Mission to Sierra Leone, ¶¶ 76 & 127, UN Doc. E/CN.4/2002/83/Add.2 (2002).

412 Report of the High Commissioner for Human Rights, pursuant to Human Rights Council Resolution 9/11, ¶¶ 60-61, UN Doc. A/HRC/12/19 (Aug. 21, 2009).

413 Prosecutor v. Nsabimana, ICTR-97-29A-T, Decision of the Defense Motion Seeking a Separate Trial for the Accused Sylvain Nsabimana, ¶42 (Sept. 8, 2000).

414 Such requests have met with limited success. In the ICTR *Ntabali* case, the prosecutor argued that questioning of two inconsistent witnesses on recall “should be very limited to avoid any further trauma.” Without explicitly mentioning trauma, the Trial Chamber agreed to a limited inquiry on recall. Prosecutor v. Ntabali, ICTR-97-21-T, Decision on Ntabali’s Motion for Exclusion of Evidence or for Recall of Prosecution Witnesses QY, SJ, and Others, ¶15 (Trial Chamber II Dec. 3, 2008). In the *Bagosora* case, the ICTY Trial Chamber denied the request of one witness to provide videoconference testimony partly on the basis of her past trauma. Prosecutor v. Bagosora, ICTR-98-41-T, Decision on Ntabakuze Motion to Allow Witness SK52 to Give Testimony by Video-Conference, ¶¶ 2 & 5 (Trial Chamber I Feb. 22, 2005).

415 Prosecutor v. Lubanga, Case No. ICC-01/04-01/06-II19, Decision on Victims’ Participation, ¶ 127, (Trial Chamber I Jan. 18, 2008).

416 *Id.* ¶ 129.

417 Rome Statute, *supra* note 6, art. 68(2). Such measures may include “conduct[ing] any part of the proceedings in camera or allow[ing] the presentation of evidence by electronic or other special means.” ICC Rules of Procedure and Evidence, *supra* note 6, r. 88(1); Colin T. McLaughlin, *Victim and Witness Measures of the International Criminal Court: A Comparative Analysis*, in *THE LAW AND PRACTICE OF INTERNATIONAL COURTS AND TRIBUNALS* 6, at 208-09.

418 This differs from the *ad hoc* tribunals, at which there is no presumption in favor of special protective measures, and the prosecution must apply and bear the burden of proof. Sam Garkawe, *Victims and the International Criminal Court: Three Major Issues*, 3 INT’L CRIM. L. REV. 352 (2003); ANNE MARIE DE BROUWER, SUPRANATIONAL CRIMINAL PROSECUTION OF SEXUAL VIOLENCE 243 (2005).

419 *Prosecutor v. Lubanga*, *supra* note 38, ¶¶ 130-32.

420 ICC Rules of Procedure and Evidence, *supra* note 6, r. 88(5).

421 Prosecutor v. Delalic, Case No. IT-96-21, Decisions on the Motions by the Prosecution for Protective Measures for the Prosecution Witnesses Pseudonymed “B” through to “M” (Int’l Crim. Trib. for the Former Yugoslavia Apr. 29, 1997).

422 Prosecutor v. Sesay, Case No. SCSL-2004-15-T, Decision on Prosecution Motion for Modification of Protective Measures for Witnesses (Trial Chamber July 5, 2004); Rules of Procedure and Evidence for the Special Court for Sierra Leone, r. 75 (2003) [hereinafter SCSL Rules of Procedure and Evidence].

423 Prosecutor v. Norman, Case No. SCSL-2004-14-T, Decision on Prosecution Motion for Modification of Protective Measures for Witnesses (Trial Chamber June 8, 2004).

424 ECCC, Transcript of Trial Proceedings—Kaing Guek Eav “Duch,” Case File No. 001/18-07-2007-ECCC/TC, at 49 (Aug. 18, 2009) [hereinafter 18 Aug. 2009 transcript].

425 *See, e.g.*, Michelle Staggs Kelsall et al., *supra* note 8, at 36 (noting that some witnesses appeared intimidated by Duch’s active role in the proceedings).

426 12 Aug. 2009 transcript, *supra* note 21, at 46-47.

427 *Id.* at 46-50.

428 ECCC, Transcript of Trial Proceedings—Kaing Guek Eav “Duch,” Case File No. 001/18-07-2007-ECCC/TC, at 20 (Aug. 19, 2009).

429 *Id.* at 22.

430 For example, some advocates for women’s rights have lauded the ICTR for being more explicit than previous tribunals in detailing cases of rape. *See* Lori A. Nessel, *Rape and Recovery in Rwanda: The Viability of Local Justice Initiatives and the Availability of Surrogate State Protection for Women That Flee*, 15 MICH. ST. J. INT’L L. 101, 113-14 (2007).

431 This was done at the ECCC, but only after Civil Party Im Sunthy broke down after viewing graphic evidence.

432 Jamie O’Connell, *supra* note 3, at 334 (citations omitted).

433 ECCC, Transcript of Trial Proceedings—Kaing Guek Eav “Duch,” Case File No. 001/18-07-2007-ECCC/TC, at 32 (July 7, 2009) [hereinafter Lay Chan transcript].

434 Lay Chan’s Civil Party application was rejected at judgment. The Trial Chamber highlighted the fact that “no evidence was provided to show that [the undoubted severe harm he suffered from detention, interrogation, and torture] occurred at S-21.” *Kaing Guek Eav*, *supra* note 2, ¶ 647.

435 Lay Chan transcript, *supra* note 57, at 48. *But see* 13 July 2009 transcript, *supra* note 20, at 62-63 (instructing defense co-lawyer Kar Savuth, at the request of a Civil Party lawyer, to “use a lower voice projection and make your speech gentle so that she can respond to your questions fully”).

436 ECCC, Transcript of Trial Proceedings—Kaing Guek Eav “Duch,” Case File No. 001/18-07-2007-ECCC/TC, at 87 (July 2, 2009).

437 ECCC, Transcript of Trial Proceedings—Kaing Guek Eav “Duch,” Case File No. 001/18-07-2007-ECCC/TC, at 4 (July 8, 2009) [8 July 2009 transcript]. Duch then offered his apology, “[T]hrough this Court I would like to seek forgiveness from Mr. Norng Chanphal because [before] I did not have the document and I would not accept it, but now I would accept it entirely.” *Id.* at 5.

438 *Kaing Guek Eav*, *supra* note 2, ¶ 647.

439 *Id.* at ¶¶ 648-649. Of the twenty-four Civil Party applicants rejected at the end of trial, eighteen were excluded at least in part due to a lack of documentation.

440 Transcultural Psychosocial Organization [TPO], Report on TPO’s After-Verdict Intervention with Case 001 Civil Parties, 27 July 2010, § 2.

441 *Id.*

442 *Id.* See also Charles P. Trumbull IV, *supra* note 5, at 810 n.224 (2008) (highlighting the unintended negative consequences on victims of having their participation applications rejected on technical grounds, such as a perception that they are being accused of untruthfulness or lack of injury).

443 See Julia A. Golier, Rachel Yehuda, & Steven Southwick, *Memory and Posttraumatic Stress Disorder*, in *TRAUMA AND MEMORY: CLINICAL AND LEGAL CONTROVERSIES* 225-42 (Paul S. Applebaum, Lisa A. Uyehara, & Mark R. Elin, eds., 1999).

444 Bessel A. van der Kolk, *Trauma and Memory*, 52 *PSYCHIATRY AND CLINICAL NEUROSCIENCES* S97 (1998).

445 Kathy Glassborow, *Lawyers Divided Over ICC Witness Preparation*, ACR (Mar. 9, 2009), available at <http://iwpr.net/report-news/lawyers-divided-over-icc-witness-preparation>.

446 *Id.* The ICC does not allow parties to engage witnesses in “discussion on the topics to be dealt with in court” due to the potential for the session to become “a rehearsal of in-court testimony.” See *Prosecutor v. Lubanga*, ICC-01/04-01/06, Decision Regarding the Practices Used to Prepare and Familiarize Witnesses for Giving Testimony at Trial, ¶ 51 (Trial Chamber Nov. 30, 2007). The ICC does, however, allow its Victims and Witnesses Unit to familiarize witnesses with court procedures and provide them the opportunity to read over their prior statements in order to refresh their memory prior to testifying. *Id.* ¶¶ 53 & 55. In contrast, the ICTY and ICTR allow parties to prepare their witnesses in advance by, for example, comparing prior witness statements and highlighting potential inconsistencies. See generally *Prosecutor v. Karemera et al.*, ICTR-98-44-AR73.8, Decision on Interlocutory Appeal Regarding Witness Proofing (Appeals Chamber May 11, 2007).

At the ECCC, which is governed largely by civil law procedures, the Witness and Expert Support Unit (WESU) takes time to familiarize all witnesses with logistical and process information before they testify; parties, however, are not supposed to prepare witnesses to the extent that lawyers do in an adversarial common-law trial. No ECCC provisions describe the parameters of witness preparation. In practice, due to the fact that “all witnesses are called by the Court and not by the parties, there is no possibility that they can be proofed by the parties.” E-mail from Anees Ahmed, former ECCC Assistant Prosecutor (March 10, 2011) (on file with author). Although it is theoretically possible that Civil Parties who are called by the Court to provide substantive information may be prepared by their attorneys, as they are not considered simple witnesses but interested parties, this was not the practice of at least one Case 001 Civil Party team due to the rules’ lack of clarity. Email from Alain Werner, Civil Party Lawyer Team I, Case 001 (March 23, 2011) (on file with author) (noting that the CPI team’s only client called to provide substantive information, Ly Hor, was not prepared in advance due to concerns underscored by the prosecution that it was an inappropriate practice in a civil law jurisdiction). See also ECCC Internal Rules, *supra* note 7, r. 23(4). As a result, a judge complained that the team’s lawyers had not sufficiently prepared their client to testify after he became confused. See *infra* n. 74-76 and accompanying text. See also Michelle Staggs Kelsall et al., *supra* note 8 (noting that ECCC parties’ inability to prepare witnesses likely prevented undue influence but also left some witnesses “ill prepared to take the stand”).

447 *Prosecutor v. Furundžija*, Case No. IT-95-17/I-T, Judgment, ¶¶ 90-107 (Trial Chamber Dec. 10, 1998).

448 *Prosecutor v. Aloys Simba*, ICTR-01-76-I, Decision on the Defence Motion to Exclude the Testimony of Witness KSM, ¶ 2 (Oct. 4, 2004).

449 See *Furundžija*, *supra* note 70, ¶¶ 108-09.

450 *Prosecutor v. Kunarac*, Case No. IT-96-23-t & IT-96-23/I-T, Judgment, ¶ 564 (Trial Chamber Feb. 22, 2001).

451 Ly Hor transcript, *supra* note 12, at 55.

452 Interview with Terith Chy, Team Leader Victim Participation Project, Documentation Center of Cambodia (Nov. 04, 2010) (on file with author).

453 *Kaing Guek Eav*, *supra* note 2, ¶ 647.

454 8 July 2009 transcript, *supra* note 60, at 93-94.

455 *Id.* at 40-47.

456 *Kaing Guek Eav*, *supra* note 2, ¶ 645.

457 Sam Garakwe, *Victims and the International Criminal Court: Three Major Issues*, 3 *INT’L CRIM. L. REV.* 345, 357 (2003); Gioia Greco, *Victims’ Rights Overview Under the ICC Legal Framework: A Jurisprudential Analysis*, 7 *INT’L CRIM. L. REV.* 531, 546 (2007).

458 See Marie-Bénédicte Dembour & Emily Haslam, *supra* note 3, at 168-69 (arguing that victim testimony in war crimes trials, which often relates only indirectly to the defendant, has the effect of shocking the public conscience and seems to serve “not so much to decide the guilt of the accused but to contribute to ‘a national saga that would echo through the generations’”) (quoting TOM SEGEV, *THE SEVENTH MILLION: THE ISRAELIS AND THE HOLOCAUST* 336 (1993)). But see also Mark J. Osiel, *Ever Again: Legal Remembrance of Administrative Massacre*, 144 *PENN. L. REV.* 463, 505-20 (1995) (acknowledging tension between liberal norms of culpability and the interest of conveying a broader historical narrative but arguing that “the orchestration of criminal trials for pedagogic purposes—such as the transformation of a society’s collective memory—is not inherently misguided or morally indefensible”).

459 Chum Mey transcript, *supra* note 22, at 12.

460 Ouk Neary transcript, *supra* note 13, at 104-05.

461 *Id.* at 107.

462 18 Aug. 2009 transcript, *supra* note 47, at 108.

463 20 Aug. 2009 transcript, *supra* note 14, at 26.

464 *Id.* at 26-27.

465 Bou Meng transcript, *supra* note 26, at 14.

466 Lay Chan transcript, *supra* note 57, at 37-38.

467 See, e.g., Bou Meng transcript, *supra* note 26, at 1-3.

468 See, e.g., ECCC, Transcript of Trial Proceedings—Kaing Guek Eav “Duch,” Case File No. 001/18-07-2007-ECCC/TC, at 28-29 (Aug. 19, 2009) (in which Phung Guth details the character of her father).

469 See, e.g., 20 Aug. 2009 transcript, *supra* note 14, at 60-66.

470 ECCC, Transcript of Trial Proceedings—Kaing Guek Eav “Duch,” Case File No. 001/18-07-2007-ECCC/TC, at 93-96 (Aug. 24, 2009) [hereinafter 24 Aug. 2009 transcript].

471 *Id.* at 97 (accepting a defense objection, President Nil stated, “I myself made it clear of the 11 facts alleged on the accused that you received as a result of the establishment and operation of S-2I from the 17<sup>th</sup> April ’75 to the 6<sup>th</sup> of January ’79, which leads you to being joined as a Civil Party in this case. . . . So Mr. Civil Party, please only focus on the relevant part in relation to the facts and the accused”).

472 In recognition of the added efficiency challenges in Case 002, the Internal Rules have been amended to limit victim participation. See discussion *supra* note 10.

473 See, e.g., Michael P. Scharf & Ahran Kang, *Errors and Missteps: Key Lessons the Iraqi Special Tribunal Can Learn from the ICTY, ICTR, and SCSL*, 38 *CORNELL INT’L L.J.* 911, 912-13 (2005).

474 Suzannah Linton, *Safeguarding the Independence and Impartiality of the Cambodian Extraordinary Chambers*, 4 *J. INT’L CRIM. JUST.* 327 (2006).

475 Interview with Judith Strasser, TPO Clinical Psychologist Consultant & Supervisor (March 9, 2011) (noting that an offer by TPO and team of experts from the University of Zurich to provide training on psychological issues in the courtroom was rejected by the judges, but accepted by the Civil Party Lawyers in Case 002).

476 Chum Mey transcript, *supra* note 22, at 68. Although this repetition is not reflected in the transcript, it is discussed in trial monitor reports. See, e.g., Laura MacDonald, *Traumatized Survivor Painted Pol Pot Amidst Screams for Help*, *CTM*

BLOG (July 1, 2009), [http://cambodiatribunal.org/images/CTM/ctm\\_blog\\_7-1-2009.pdf](http://cambodiatribunal.org/images/CTM/ctm_blog_7-1-2009.pdf).

477 Bou Meng transcript, *supra* note 26, at 4-5 (noting the emotional testimony of Chum Mey the day before, Nil Nonn said, “after having examined how we could control the witness when he or she is very emotional...we also checked to see whether there are doctors or psychiatrists on standby, then the Court would seek their assistance to help that witness before we proceed further”).

478 *See supra* note 88 and accompanying text.

479 Patricia M. Wald, *Dealing with Witnesses in War Crime Trials: Lessons from the Yugoslav Tribunal*, 5 YALE H.R. & DEV. L.J. 217 (2002). For an early argument that special protective measures should be put in place when taking testimony from victims of sexual offenses in the Balkans, see Diane Ortenlicher, *No Justice, No Peace: Accountability for Rape and Gender-Based Violence in the Former Yugoslavia*, 5 HASTINGS WOMEN'S L.J. 89, 111-16 (1994).

480 Michael Bachrach, *The Protection and Rights of Victims Under International Criminal Law*, 34 INT'L L. 7, 12-13 (2000).

481 SCSL Rules of Procedure and Evidence, *supra* note 45, r. 34(B).

482 ICC Rules of Evidence and Procedure, *supra* note 6, rules 17(2)(iii)-(iv) & 19(d)-(j).

483 *Id.* r. 19(f).

484 HUMAN RIGHTS WATCH, *COURTING HISTORY: THE LANDMARK INTERNATIONAL CRIMINAL COURT'S FIRST YEARS* 156-58 (2008); Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Victims and Witnesses Unit Recommendations on Psycho-social In-court Assistance (Jan. 31, 2008).

485 ECCC Internal Rules, *supra* note 7, r. 29(3).

486 *Id.* r. 12bis(g).

487 This is all the more surprising since the ICC, which was created shortly beforehand, includes two provisions in its core document, the Rome Statute, authorizing it to take measures necessary to protect the psychological well-being of witnesses. *See* Rome Statute, *supra* note 6, arts. 68(1) & 87(4).

488 According to the ECCC website, “VSS ensures the safety and well-being of Victims who participate in the proceedings. This involves ensuring that Victims properly understand the risks sometimes inherent in such participation, as well as providing them with protective measures and other assistance, like psychosocial support.” ECCC, Victims Support Section, [www.eccc.gov.kh/en/victims-support/victims-support-section](http://www.eccc.gov.kh/en/victims-support/victims-support-section).

489 It was renewed on July 22, 2010. *See* Cambodian Hum. Rts. & Dev. Ass'n et al., *Joint Cambodian NGO Report on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in the Kingdom of Cambodia, Presented to the UN Committee Against Torture*, ¶ 37 (Oct. 2010), [www2.ohchr.org/english/bodies/cat/docs/ngos/Joint\\_Cambodian\\_NGO\\_Report\\_Cambodia45.pdf](http://www2.ohchr.org/english/bodies/cat/docs/ngos/Joint_Cambodian_NGO_Report_Cambodia45.pdf) [hereinafter Joint Cambodian NGO Report on Torture].

490 TPO, Justice and Healing in Times of the Khmer Rouge Tribunal, [http://www.tpocambodia.org/index.php?option=com\\_content&view=article&id=48:krt&catid=14:programs&Itemid=60](http://www.tpocambodia.org/index.php?option=com_content&view=article&id=48:krt&catid=14:programs&Itemid=60). *See also* Joint Cambodian NGO Report on Torture, *supra* note 112, ¶ 37. TPO speaks to witnesses about possible psychological reactions they may experience and offers suggestions for stress management prior to their testimony. A representative is also available outside of the courtroom during breaks or should a witness need a rest. Upon a witness's request, a TPO representative may also sit with them during their testimony. After testimony is completed, a representative is on hand; moreover, in Case 001 TPO followed up with all Civil Party and fact witnesses by phone every three weeks until the end of 2010. In follow-up interviews with Civil Party witnesses, they identified the presence of a TPO representative in the courtroom as the most valuable trial assistance they received. Interview with Judith Strasser, *supra* note 98.

491 24 Aug. 2009 transcript, *supra* note 93, at 10.

492 9 July 2009 transcript, *supra* note 32, at 50. Judge Cartwright replied that the ECCC had done an emotional assessment of the victims and had training in how to handle episodes of emotional distress. *Id.* at 53.

493 Lawyers also need to be aware of available psychosocial services and make appropriate referrals to mental health professionals.

494 Interview with Terith Chy, DC-Cam Victim Participation Project Team Leader (Nov. 4, 2010).

495 Diane F. Orentlicher, *The Impact of the ICTY in Bosnia*, Open Soc'y Just. Initiative, at 87 (2010).