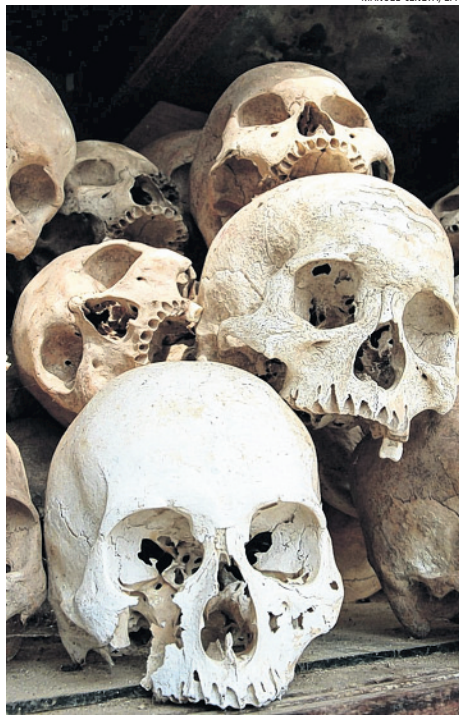


NHET SOKHENG/AFP/GETTY IMAGES



Kaing Guek Eav, above, was convicted of sending more than 12,000 people to their deaths during Pol Pot's regime



MANUEL CENETA/EPA

Beyond the Killing Fields – unlocking witness testimony

A London charity is helping to make sense of survivors' evidence, says **Grania Langdon-Down**

Last week the Khmer Rouge's chief jailer Kaing Guek Eav — the first senior figure to be convicted of crimes against humanity by the UN-backed genocide court in Phnom Penh — lost his appeal and was ordered to serve life imprisonment for sending more than 12,000 people to their deaths during Pol Pot's regime in the 1970s.

Trials of three other senior figures are still under way, with witnesses giving testimony of their roles in the atrocities that claimed the lives of more than a million Cambodians through torture, execution, disease and starvation. The story was powerfully depicted in the Oscar-winning film *The Killing Fields*.

The evidence of Eav's brutality was so harrowing that a small London research charity has been helping those involved to understand how reliving horrific memories can affect the quality of a victim's evidence.

Jane Herlihy, the director of the Centre for the Study of Emotion and Law (CSEL), has recently returned from Phnom Penh. "There is an assumption that if something dreadful happens to you, you will have a very clear memory of it," she says. "But when something traumatic happens, you store different kinds of memories, often sensory ones, and when they are triggered you are back there remembering the sights, sounds, smells, not necessarily the words or the details of the story."

Dr Herlihy and a colleague from the

charity were asked to run training programmes for law graduates who were monitoring the proceedings for a US war crimes study centre, to help them to cope with the disturbing details.

Drawing on the centre's work in training lawyers representing refugees in the UK, it also helped to run programmes for lawyers acting for victims. One witness, for example, was asked to recall looking up at his mother in the window of the prison run by Eav. "He started to describe seeing her face," Herlihy says. "Then he put his hands up, unconsciously recreating the image of his mother holding the bars at the window. It was the flash of that image that froze his testimony." Unable to continue, he was told by the court: "Please compose yourself. This is your chance to bring your evidence before the court." But after a brief recess the court moved on and the man's story was never heard.

"It is so important that lawyers and judges understand the symptoms of distress," says Herlihy, who also has a part-time clinical role at the Trauma Clinic in London. "We are not trying to tell them how to do their job. What we want is for them to understand what may be going through a witness's mind, why he is looking spaced out, why he can't give a coherent account of what happened so that they can deal with that in the context of an interview or trial."

The centre, established in 2007, grew out of the experiences of Herlihy and the centre's co-founder, consultant psychiatrist Dr Stuart Turner, in working with refugees who were recovering from traumatic experiences while applying to the UK for asylum. Herlihy stresses that CSEL is a neutral research body. "We aren't an advocacy or campaigning centre. Our aim is to bring together expertise on emotion and law so that legal decision-making is underpinned by the best available knowledge

about human behaviour and how people present themselves."

Clearly, some people make false claims. As Herlihy says: "Lawyers and judges have to be incredibly skilled — I wouldn't want their job making decisions that rest so heavily on the assessment of a person's credibility but, so often in refugee cases, there is no corroborating evidence."

Problems arise when decision-makers rely on assumptions about human behaviour — for instance that someone telling a true story will disclose what happened, give a richness of detail and be consistent — but this isn't borne out by research. "Those assumptions don't take account of the fear someone may have been living under, the shame they may feel about what happened. That understanding needs to be fed in to the decision-making process."

The centre wants to expand its research into other areas of legal procedure and to a wider group, such as victims of sexual assault, as well as to develop more training programmes.

But attracting funding is time-consuming, Herlihy says. CSEL is coming to the end of a three-year research grant from the Big Lottery Fund and Comic Relief funding for a project aimed at improving the way rape, torture and sexual violence against women are dealt with in the asylum-seeking process. But new funding from human rights bodies includes £40,000 of core funding over two years from the Esmée Fairbairn Foundation and a two-year £70,000 grant from the New York-based Unbound Philanthropy.

Herlihy says CSEL is looking for funding for a project drawing on what it has learnt in Cambodia to help to understand the effect that working with the traumatic stories of refugees has on lawyers and decision-makers here. "What really interests me is where the quality of justice goes wrong," she says. "These are such important issues that bear heavily on our immigration policies and border control as well as being potentially crucial for the individuals involved."



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There is a way to say good riddance to Abu Qatada

David Pannick, QC



Obnxious people tend to have good lawyers." That observation was made by a former Home Secretary, Lord Hurd of Westwell — and he will have had good reason to know.

Certainly Abu Qatada has extremely good lawyers. Edward Fitzgerald, QC, and Gareth Peirce have persuaded the European Court of Human Rights that his removal to Jordan to face terrorism charges would breach the European Convention on Human Rights. The Home Secretary, Theresa May, told the House of Commons last week that "the right place for a foreign terrorist is a foreign prison cell, far away from Britain". So what can the Home Secretary do now to achieve that result?

The judgment of the European Court delivered on January 17 did not dispute the facts found by the Special Immigration Appeal Commission and upheld by the Appellate Committee of the House of Lords in 2009. (I declare an interest: I represented the organisations Justice and Human Rights Watch.)

Abu Qatada was convicted

'Terrorist violence constitutes, in itself, a threat to human rights'

in Jordan in his absence of involvement in terrorist attacks, including bombings of the American School. He is a danger to the national security of this country because he has given influential advice to many terrorist groups and individuals supplying "a religious justification" for attacks on civilians and suicide bombings.

The European Court rejected Abu Qatada's contention that for the Home Secretary to return him to Jordan would involve a risk that he would be tortured there by agents of the State. The court was satisfied, as the House of Lords had been, by assurances given by Jordan in a Memorandum of Understanding with this country as to his treatment if returned there.

The court emphasised that Jordan is a country with historically strong relations with the United Kingdom and the assurances had been approved at the highest levels of the Jordanian Government (with the express support of the King).

But Abu Qatada nonetheless won his case in Strasbourg because the court found there was "a real risk" that the criminal proceedings against him in Jordan would rely on

evidence previously obtained by the torture of others. The House of Lords had rejected this complaint because it applied a stricter test: Abu Qatada could not show, on the balance of probabilities, that the Jordanian court would act on evidence obtained by torture.

Is the Government now powerless to act? There are two steps it could take. The first is to seek to persuade the Grand Chamber of the European Court to hear this case and consider whether there is a difference between returning a terrorist suspect to face the risk of torture (where a real risk would prevent removal) and returning that person to face proceedings where evidence might be used that was obtained by torturing third parties.

When looking at whether the trial process abroad would involve a fundamental breach of the fair trial guarantee, it is arguable that the proper test should not be "real risk" but the stricter criterion of balance of probabilities. Even so, the Government is unlikely to succeed: the Grand Chamber would be reluctant to adopt a test that requires proof of facts that are very difficult to establish. As Lord Bingham of Cornhill said in a similar case in the House of Lords in 2005: "The foreign torturer does not boast of his trade."

The other step that the Government can take, and is taking, is to try to agree with the Jordanian Government additional protections in the Memorandum of Understanding. This has much greater prospects of success, given the co-operation previously shown by the Jordanians and the contents of the European Court judgment. The Jordanian Government should be asked to give further commitments in relation to Abu Qatada, adding to the substance of existing provisions of Jordanian law that prohibit the use of evidence obtained by torture.

The European Court was satisfied by the Memorandum of Understanding that Abu Qatada would not himself be tortured in Jordan. So it would be surprising if the court were not satisfied by specific provisions in a revised memorandum that guarantee that the Jordanian court would assess whether evidence was obtained by torture and, if so, refuse to rely on it.

The court has said that it is "acutely conscious of the difficulties faced by States in protecting their populations from terrorist violence, which constitutes, in itself, a grave threat to human rights".

So if the Government can reach a further agreement with Jordan, the Home Secretary and this country should soon be able to wave goodbye and good riddance to Abu Qatada.

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