

*INTERNATIONAL STANDARDS FOR THE TREATMENT OF VICTIMS AND WITNESSES IN
PROCEEDINGS BEFORE THE EXTRAORDINARY CHAMBERS
IN THE COURTS OF CAMBODIA FOR THE PROSECUTION OF CRIMES COMMITTED
DURING THE PERIOD OF DEMOCRATIC KAMPUCHEA*

May 2004

**Presented by the Working Group on the Extraordinary Chambers* and
the Open Society Justice Initiative†**

Both the Agreement between the United Nations and the Royal Government of Cambodia concerning the Prosecution under Cambodian Law of Crimes Committed during the Period of Democratic Kampuchea (UN-Cambodia Agreement) and the 2001 Cambodian Law on the Extraordinary Chambers require the Extraordinary Chambers to “provide for the protection of victims and witnesses.” (UN-Cambodia Agreement, Article 23; 2001 Law on the EC, Article 33). The United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power adds in Principle 4 that “[v]ictims should be treated with compassion and respect for their dignity.”

These protections are important in all cases. Below is a list of standards that reflect the most recent thinking of the international community on the treatment of victims and witnesses before international and “hybrid” criminal justice mechanisms.

- **Create a separate Victim/Witness Unit to provide information, services, and protection to victims and witnesses.**

Victim/Witness Units have been created in other international tribunals, including the Special Court for Sierra Leone, the ad hoc tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR), and the International Criminal Court (ICC). These units provide logistical support in getting victims and witnesses to and from the tribunals and courtrooms, as well as services such as psychological counseling, protective measures and security arrangements.

- **Use existing NGOs already operating throughout the country to help with outreach.**

Existing non-governmental organizations (NGOs) have already established communication mechanisms with the people they serve. Establishing credibility and a positive working relationship with local NGOs will engender more trust with victims and witnesses. Partner NGOs must be informed about confidentiality practices to avoid compromising the security of victims and witnesses they are serving.

* **The Working Group on the Extraordinary Chambers** is an ad hoc coalition of international non-governmental organizations and individuals with expertise in international law and background working in Cambodia. The Working Group is dedicated to ensuring that the investigation and prosecution of Khmer Rouge crimes by the Extraordinary Chambers is fair, full and credible, and that it contributes to reconciliation efforts and advancement of the rule of law sought by Cambodians. Through collaborative efforts, the Group endeavors to provide legal, technical and other assistance to Cambodians, the Extraordinary Chambers and interested members of the international community.

† **The Open Society Justice Initiative** (www.justiceinitiative.org), an operational program of the Open Society Institute (OSI), promotes rights-based law reform, builds knowledge and strengthens legal capacity worldwide. Among its other programs, the Justice Initiative is committed to reinforcing mechanisms of accountability for international crimes.

- **Ensure that witnesses are “not prosecuted, detained or subjected to any other restriction on their liberty . . . or . . . subjected by the authorities to any measure which may affect the free and independent exercise of their functions.”** (UN-Cambodia Agreement, Article 22).

The Prosecution must be allowed to prepare and present its case, including by having victims and witnesses give evidence about alleged crimes to investigators and to the Extraordinary Chambers. If witnesses are threatened, detained or subject to restrictions on their liberty, they are unlikely to come forward. This is particularly true for witnesses in cases involving sexual violence. When a witness’ freedom and safety is not adequately protected, the damage will be done not only to that individual witness but also to all potential witnesses who may refuse to testify as a result. Defense witnesses and potential defendants before the court should also be allowed to provide evidence. They should not be prosecuted or detained for giving such evidence. Becoming a witness does not exempt a person from prosecution by the Extraordinary Chambers, however, if there is evidence that he or she has committed serious crimes within the jurisdiction of the tribunal during the period of Democratic Kampuchea.

- **Develop a confidentiality policy to keep all sensitive information secure.**

Confidentiality is extremely important. Experience with other tribunals has demonstrated that the release of sensitive information can place witnesses at risk of physical and mental harm. In light of those possible consequences, the Extraordinary Chambers should develop and effectively implement a confidentiality policy, authorizing sanctions for violations, whether they be by defendants, defense counsel, staff of the Extraordinary Chambers, or other persons. The policy should address organizational and structural factors that affect victim and witness security. For example, information should be stored in a way that ensures confidentiality, and the layout of court buildings should be evaluated with regard to victims’ and witnesses’ security needs.

- **Provide detailed information about the investigation and trial process to potential witnesses so they can make an informed decision about whether and how to participate.**

The experience of other tribunals demonstrates how important it is to provide witnesses with information about the investigation and trial before they testify. Witnesses who are unfamiliar with the proceedings may be too frightened to participate. The information should include an overview of each stage of the trial process, a potential timeline, risks to the victim/witness, and protections that can or cannot be provided. Victims and witnesses should be told how the information they provide will be used and about the Extraordinary Chambers’ confidentiality policy. A line of communication between the Extraordinary Chambers and the victims should be established so victims and witnesses can ask questions as necessary. Of course, there may be instances where witnesses may have to be compelled to testify. There, as in all cases, every effort should be made to provide witnesses with as much information as possible about the proceedings, particularly where witnesses face a risk of self-incrimination. One way to ensure that victims understand their rights without significantly delaying the proceedings is to assign counsel to represent them (individually or as a group), a procedure that is contemplated by the statute of the International Criminal Court (ICC) and reflects the practice of many civil law countries. The ICC also permits victims or their legal representatives to present their views and concerns at certain stages of the proceedings, a practice which would likely encourage greater victim participation in the Extraordinary Chambers.

- **Consider the need for security when talking to victims and witnesses.**

The security situation in areas where investigations take place should be evaluated before proceeding. Statements should be taken in an accessible and safe location. Investigators should carry a badge clearly identifying them as personnel of the Extraordinary Chambers, including to persons who are illiterate. In most instances, investigators should not arrive at the home or office of potential witnesses, particularly in marked vehicles which would rouse suspicion that the person is giving or being solicited for evidence.

- **Institute protective measures to protect the integrity or security of a witness, including but “not . . . limited to, the conduct of *in camera* proceedings and the protection of the identity of a victim or witness.”** (UN-Cambodia Agreement, Article 24; 2001 Law on the Extraordinary Chambers, Article 33)

All international criminal justice mechanisms require that special measures be provided to protect the safety and well-being of witnesses, to the extent that such measures are consistent with the defendant’s right to a fair trial. In addition to *in camera* proceedings, international or “hybrid” tribunals have used measures such as pseudonyms, image or voice altering/shielding devices, and redacting identifying information from court documents.

- **Train investigators and other court personnel in dealing with traumatized victims, including survivors of sexual violence.**

Most international criminal justice mechanisms require that investigators and other professional staff have experience or receive specialized training in dealing with traumatized victims, victims of sexual violence, and child victims. Apparent insensitivity experienced by witnesses may not only aggravate the harm they have suffered, but could also discourage others from testifying. Such situations can cause delays and eventually undermine cases completely. The need for such special treatment continues, even many years after the events have taken place.

- **Ensure victims’ needs are addressed in the Extraordinary Chambers’ rules of procedure and evidence, including the needs of survivors of sexual violence.**

Most international criminal justice mechanisms have rules of procedure and evidence that provide for fair treatment of victims and witnesses. Additional protections are provided in cases involving sexual violence. For example, the Rules of Procedure and Evidence for the International Criminal Tribunal for the former Yugoslavia (ICTY) specify that a rape victim’s testimony does not have to be corroborated, that consent is not a defense if the victim has been subjected to such inherently coercive conditions as detention, and that evidence of the victim’s prior sexual conduct is inadmissible. Building on the ICTY Rules as well as on national models, the ICC Rules of Procedure and Evidence require that the Court be guided by specific principles in cases of sexual violence, such as not inferring consent from the victim’s silence, or from words or conduct where the victim is unable to give genuine consent. The rules also prohibit admitting evidence of the victim’s prior or subsequent sexual conduct. Comparable rules should be established for the Extraordinary Chambers in order to ensure fair treatment of victims of sexual violence.

- **Provide psychological support to victims and witnesses who testify.**

Because testifying and reliving traumatic events can be very upsetting to victims and witnesses, psychological care should be made available. Additionally, victims and witnesses should be permitted to bring family members or friends to the Extraordinary Chambers for emotional support.

- **Communicate with victims and witnesses regarding the progress of the trial and the eventual outcome.**

It is important to follow up with victims and witnesses throughout the trial and following the conclusion of the trial. Victims participating in a case where the defendant is acquitted or their testimony rejected may experience significant trauma. Support and psychological care should be provided in such situations in addition to security measures.

- **Establish procedures to protect victims and witnesses *after* the trial.**

Victims who have served as witnesses often suffer intense fear of being attacked once they return home. Such fear may be well-founded. Witnesses who have testified before other tribunals, particularly those belonging to relatively small communities where most people know one another, have been harmed, and in a couple of instances even killed, after the trial ended. Measures to protect witnesses before, during, and after their testimony should include a system to monitor threats to victims and to communicate such threats to relevant local authorities, where appropriate. These local authorities should be given information on protecting victims and witnesses post-trial. Victims and witnesses who are potentially at risk should be informed of relevant threats. These victims and witnesses should also be informed of the different security options that are available to them. Extraordinary Chambers personnel should look for services that NGOs can provide to augment the court's available post-trial assistance and should refer victims and witnesses to such services. Emergency contact information should be provided to victims and witnesses as well.