

SECURING PROTECTION AND COOPERATION OF WITNESSES AND WHISTLE-BLOWERS

*Ms. Philippe Nil**

I. INTRODUCTION

Witnesses and whistle-blowers' cooperation is a significant component in the conviction of offenders, especially in cases of corruption and organized crime, which damage the development of a country, its national economy, the rule of law, and the security and values of society. Witnesses and whistle-blowers give evidence and information in the investigation and trial of criminal offences and sometimes require protection due to the intimidation or threat of harm they may face in cooperating with the authorities to prosecute dangerous or powerful persons involved in corruption or organized crime. The government should pay more attention to this issue and provide effective laws and regulations and strengthen law enforcement, while fulfilling its fundamental legal obligations to its citizens. Especially, the government should establish effective mechanisms to protect both witnesses and whistle-blowers, including building the capacity of law enforcement personnel who implement these mechanisms.

II. EFFECTIVE LEGISLATION AND MEASURES

A. Effective Legislation

1. Legal and Judicial Reform

The Legal and Judicial Reform Strategy is a priority reform programme of the government of Cambodia. The strategic objectives of the Legal and Judicial Sector, in accordance with Constitutional values and the overall goals of supporting development and poverty reduction, are identified as:

- Improve the protection of personal rights and freedoms;
- Modernize the legislative framework;
- Provide better access to Legal and Judicial information;
- Enhance the quality of legal processes and related services;
- Strengthen judicial services, i.e. the judicial power and the prosecutorial services;
- Introduce alternative dispute resolution methods;
- Strengthen Legal and Judicial sector institutions to fulfill their mandates.

2. Fundamental Laws

In response to The Legal and Judicial Reform Strategy, Cambodia adopted fundamental laws to improve the legal system, such as the Law on Civil Procedure, the Law on the Civil Code, the Law on Criminal Procedure, and the Law on the Criminal Code. Other laws adopted were the Law on Anti-Corruption, the Law on Anti-Human Trafficking, and the Law on Terrorism.

Currently, some other necessary laws are being drafted and amended to national and international standards. The amending Law on Anti-drug Trafficking is currently under such amendment. Moreover, the Ministry of Justice will draft the Law on Protection of Witnesses as soon as possible.

3. Ratification of Conventions

Cambodia has already ratified or acceded to essential conventions: it ratified the the United Nations

* Director, Legal Education and Dissemination Department, Ministry of Justice, Cambodia.

Convention against Transnational Organized Crime on 12 December 2005, and acceded to the United Nations against Corruption on 5 September 2007.

4. Effective Mechanisms to Protect Witnesses and Whistle-blowers

Cambodian law does not mention in detail securing the protection of witnesses and whistle-blowers. But the law does provide for police protection of witnesses and whistle-blowers as well as other ways of ensuring their safety. Furthermore, Article 24 of the United Nations Convention against Transnational Organized Crime (UNTOC) specifies that States Parties shall take appropriate measures to protect witnesses from potential retaliation or intimidation. As a result, measures for witness protection are identified as:

- Procedures for the physical protection of witnesses;
- Relocation and non-disclosure;
- Limiting the disclosure of information concerning their identity;
- Evidentiary rules to permit witnesses to testify in a manner that ensures their safety; such as via video link or other adequate means.

Articles 32 and 33 of the United Nations Convention against Corruption (UNCAC) also require States Parties to take appropriate measures to provide effective protection for witnesses. Article 33 requires States Parties to consider incorporating into their domestic legal systems appropriate measures to protect whistle-blowers from any unjustified treatment as they are frequently important in detecting offences in the public and private sectors.

B. Measures

There are several measures to protect witnesses to serious crime:

- Measures to protect witnesses should include whistle-blowers, victims, and individuals who have been involved in criminal activity but who cooperate with police, prosecution, or the court, as well as their families;
- Police carefully protect witnesses from intimidation;
- Procedural protection of witnesses needs to be implemented via the Law on Criminal Procedure or in specific legislation or specific provisions (to allow for trial detention of the alleged perpetrator; to prevent interference with the witnesses and others by alleged perpetrator; to order non-disclosure and testimony from witnesses);

The Law on Criminal Procedure and Law on the Criminal Code of Cambodia mention the procedure of witness protection, but not in great detail. Mention is restricted to the appearance of witnesses and investigation of evidence.

III. CRIMINALIZATION AND PUNISHMENT

A. Criminal Prosecution of Offenders who threaten Witnesses and Whistle-blowers

Those who commit corruption and organized crime use their wealth and power to undermine justice. Justice cannot be done if witnesses are threatened. Furthermore, serious crimes like corruption cannot be detected and punished if the investigators, prosecutors and the courts cannot prove guilt because evidence is suppressed. Therefore, under the Law on the Criminal Code of Cambodia, offenders who threaten witnesses are subject to criminal prosecution.

For example, in the Law on the Criminal Code of Cambodia Article 546 *Intimidations against a Witness*: “Any act of intimidation committed by a perpetrator alone or with consent of a third party to instigate a witness not to give any statement or to provide false oral or written testimony is punishable by an imprisonment from 2 (two) years to 5 (five) years and a fine from 4,000,000 (four million) Riels to 10,000,000 (ten million) Riels.

It is punishable by an imprisonment from 5 (five) years to 10 (ten) years if the offence produces an

effect. (*Unofficial translation*)”

And Article 548 *Bribery given to a Witness*: “It is punishable by an imprisonment from five years to 10 (ten) years any person who gives directly or indirectly donation, present, promise or any interest to a witness in order:

1. not to testify as a witness;
2. to provide false testimony. *Unofficial translation*”

Article 23 of the United Nation Convention against Transnational Organized Crime (UNTOC) and Article 25 of the United Nation Convention against Corruption (UNCAC) require States Parties to address the problem of “obstruction of justice” by enacting legislation or other measures to criminalize enforcement, threats, or inducements to interfere with witnesses.

Unfortunately, Cambodian law does not mention criminal prosecution of offenders who threaten whistle-blowers.

B. Criminal Prosecution for Assisting Perpetrators, Co-Perpetrators, Instigators and Accomplices

The Criminal Code of Cambodia penalizes assistance to perpetrators, co-perpetrators, instigators and accomplices. Involvement in criminal activities causes many dangers to society and the economy, and is contrary to social values. Thus, the Law on the Criminal Code of Cambodia penalizes those who support criminals.

For example, Article 544: “It is punishable by an imprisonment from one year to three years and a fine from 2,000,000 (two million) Riels to 6,000,000 (six million) Riels for any act of providing to a perpetrator, co-instigator, instigator or accomplice of a felony with:

1. a lodging;
2. a hiding place;
3. means for living;
4. all means which facilitates the evasion or escape from an investigation (*Unofficial translation*).”

C. Criminal Prosecution of Witnesses and Whistle-blowers for False Testimony

Witnesses can be prosecuted for giving false testimony and for accepting a bribe to produce false testimony. As these actions obstruct justice, the Law on the Criminal Code of Cambodia provides for prosecution of such actions.

For example, Article 545 *Penalties for False Testimonies*: “False testimonies made after taking an oath before the court or a judicial police officer who acts under the framework of a rogation commission order is punishable by an imprisonment from 2 (two) years to 5 (five) years and a fine from 4,000,000 (four million) Riels to 10,000,000 (ten million) Riels. (*Unofficial translation*)”

And Article 547 *Bribery taken by a Witness to Produce False Testimonies*: “It is punishable by an imprisonment from 5 (five) years to 10 (ten) years for the act of any witness who directly or indirectly solicits or accept donation, present, promise or any interest in order:

1. not to testify as a witness;
2. to provide false testimony. (*Unofficial translation*)”

IV. MITIGATION OF PUNISHMENTS AND/OR IMMUNITY GRANTS

A. Mitigation of Punishments of Witnesses

Witnesses to corruption and organized crime may include whistle-blowers, victims, and perpetrators who have become state witnesses. All should receive mitigation of punishment.

For example, the Law on the Criminal Code of Cambodia provides for mitigating circumstances in

Articles 93-95, which leave decisions to the courts' discretion. Article 93 *Definition of Mitigating Circumstances*: "When the nature of the offences or the personality of the perpetrator justifies, the court may provide the accused the benefit of mitigating circumstances. The mitigating circumstances may also be granted to the convicted person even he/she is declared as an individual who is in recidivism." Article 94 *Impact of Mitigating Circumstances*: "When the court grants the accused the mitigating circumstances, the minimum of the principal penalties imposed upon for a felony or a misdemeanor is reduced according to the following scale:

1. If the minimum of the penalty for imprisonment imposed upon is equal to or more than 10 (ten) years, it is reduced to 2 (two) years;
2. If the minimum of the penalty for imprisonment imposed upon is equal to or more than 5 (five) years and less than 10 (ten) years, it is reduced to 1 (one) year;
3. If the minimum of the penalty for imprisonment imposed upon is equal to or more than 2 (two) years and less than 5 (five) years, it is reduced to 6 (six) months;
4. If the minimum of the penalty for imprisonment imposed upon is equal to or more than 6 (six) days, and less than 2 (two) years, it is reduced to 1 (one) day;
5. The minimum of the fine imposed upon is reduced to a half."

Article 95 *Penalty of Life Imprisonment and Mitigating Circumstances*: "When an offender is sentenced to life imprisonment, the judge who grants mitigating circumstances may pronounce the penalty of imprisonment of between 15 (fifteen) years and 30 (thirty) years. (*Unofficial translation*)."

B. Immunity Grants with Witness Protection Measures

Witnesses to corruption and organized crime may include whistle-blowers, victims and perpetrators who have become state witnesses. They and their families should get immunity from prosecution. Therefore, current legislation on witness protection needs to be amended to include clear provision for immunity grants.

V. INSTANCES OF SUCCESSFUL AND UNSUCCESSFUL IMPLEMENTATION

A. Implementation of Securing Protection of Witnesses and Whistle-blowers

As mentioned earlier, the Criminal Procedure Code and the Criminal Code of Cambodia briefly mention legal protection of witnesses and whistle-blowers. Other measures to secure protection of witnesses are also in place, but need to be elaborated.

Effective legislation and measures or mechanisms to protect witnesses and whistle-blowers are especially necessary to protect against revelation of witnesses' identity, ensure their permanent safety, and protect their families.

B. Implementation of Cooperation of Witnesses and Whistle-blowers

Cooperation of witnesses, whistle-blowers, victims, as well as former perpetrators is essential to ensure successful prosecutions and justice.

VI. RECOMMENDATIONS

Recommendations relate to securing protection and cooperation of witnesses and whistle-blowers:

- Establish effective legal measures or mechanisms to protect witnesses and whistle-blowers to improve the legal system and civil society of Cambodia;
- Expedient law enforcement as well as upholding of the fundamental legal obligations of the State;
- Build and strengthen the capacity of law enforcement personnel;
- Protect witnesses and whistle-blowers as well as their families (make them safe);

- Witnesses and whistle-blowers protection programmes to be co-ordinated by the police;
- Establish procedural protection measures;
- Policy strategies (training in standard investigation; development of police officers; and importance of the investigation of witness reports).

VII. CONCLUSION

To sum up, the protection and cooperation of witnesses and whistle-blowers is essential to ensure successful prosecution of corruption and organized crime. Cambodia already has legislation and other measures to protect witnesses and whistle-blowers and this is also a matter of government policy. In my opinion, existing Cambodian legislation and measures are insufficient in dealing with these matters. Effective legislation and measures to protect witnesses and whistle-blowers should be enacted as soon as possible, as well as strengthening law enforcement and building the capacity of law enforcement personnel who will implement these mechanisms.