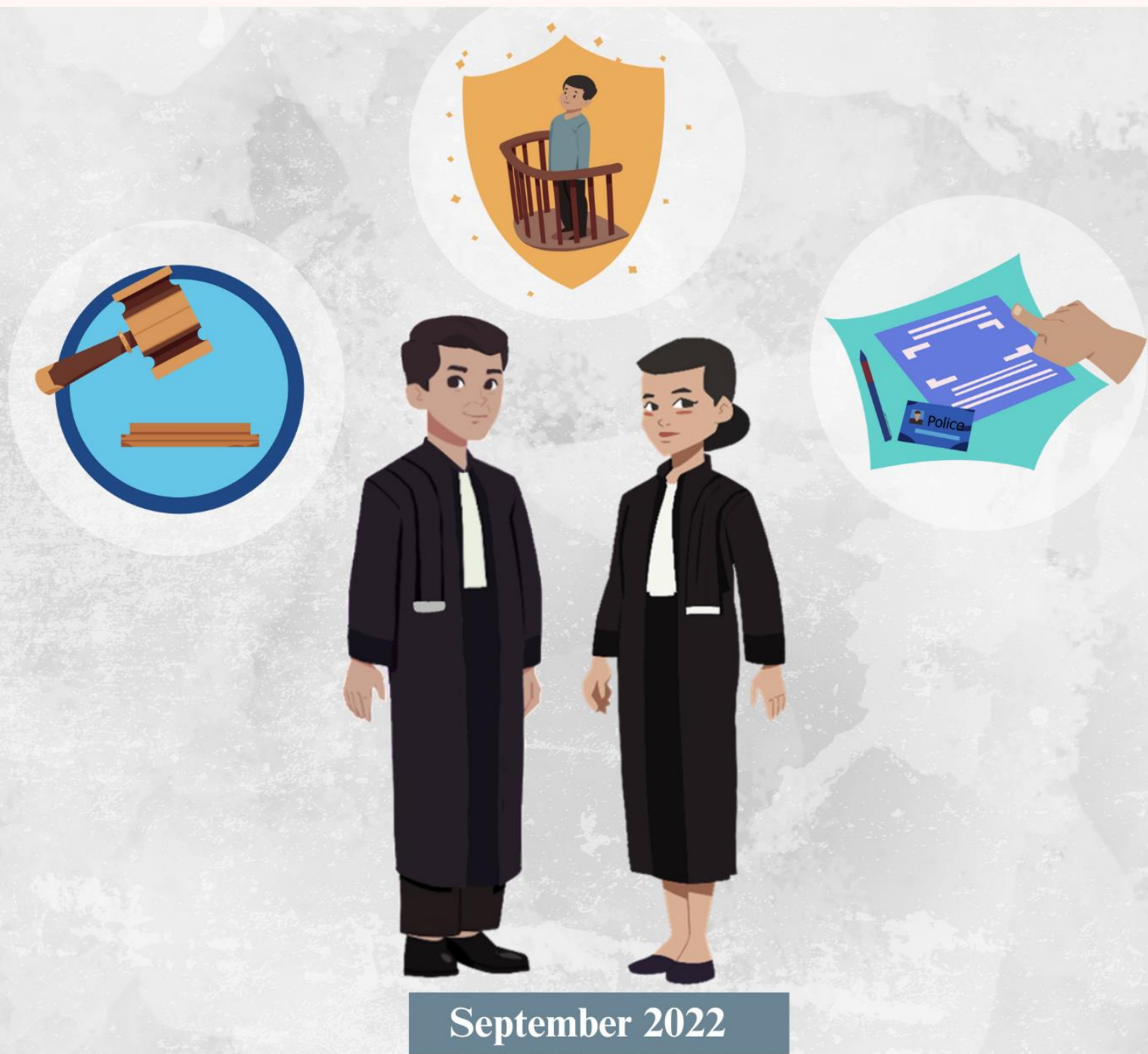


The Right to Defend Oneself in Person or Through Legal Representation and The Right to be Present at Trial



September 2022

About Cambodian Center for Human Rights

The Cambodian Center for Human Rights (“CCHR”). CCHR is a non-aligned, independent, non-governmental organization (“NGO”) that works to promote and protect democracy and respect for human rights – in particular civil and political rights – in the Kingdom of Cambodia (“Cambodia”).

CCHR’s vision is of a peaceful Cambodia in which all people can enjoy the fundamental human rights to which they are entitled, all are subject to the rule of law without impunity, all are treated equally without discrimination, all are empowered to participate fully in the democratic process, and all can share in the benefits of Cambodia’s sustainable economic development.

CCHR’s logo shows a white bird flying out of a circle of blue sky – this symbolizes Cambodia’s bid for freedom.

The Cambodian Human Rights Portal <http://www.sithi.org> is the 2011 winner of the Information Society Innovation Fund Award in the category of Rights and Freedoms and the 2013 winner of the Communication for Social Change Award awarded by the Centre for Communication and Social Change at the University of Queensland in Brisbane, Australia.

About the Fair Trial Rights Project

The Module on the Right to Defend Oneself In Person or Through Legal Representation and the Right to Be Present at Trial is part of a series of modules on fair trial rights produced by CCHR’s Fair Trial Rights Project (“the FTR Project”). The FTR Project is the first – and only one – of its kind in Cambodia, uniquely and innovatively working to promote and protect fair trial rights in practice. It overall aims to increase the impartiality and independence of Cambodia’s judiciary by supporting the right to a fair trial in Cambodia’s courts. In pursuit of this goal, the FTR project has two specific objectives: to socialize the concept of fair trial rights among the public by raising its awareness of fair trial rights and to increase compliance with fair trial standards within the judiciary through trial monitoring.

Acknowledgments

CCHR would like to express its sincere gratitude to Diakonia and Swedish donors for their generous contribution, which has made this module possible. The contents are the sole responsibility of CCHR and do not necessarily reflect the views of Diakonia and Swedish donors.

Queries and Feedback

Should you have any questions or require any further information about this module, please contact CCHR at:

Address: #798, Street 99, Boeung Trabek, Khan Chamkarmon, Phnom Penh, Cambodia

Tel: +855 (0) 23 72 69 01

Web: www.cchrcambodia.org



Contents

I. The right to defend onself in person or through legal representation

1. Definition	1
2. Legal Framework	2
2.1. International law	2
2.2. Cambodian law	2
3. Importance	3
4. Limitations	3

II. The Right to be present at trial

1. Definition	5
2. Legal Framework	6
2.1. International Law	6
2.2. Cambodian Law	6
3. Importance	7
4. Limitations	7

**The Right to Defend Oneself in
Person or Through Legal
Representation and The Right
to be Present at Trial**

I. The right to defend oneself in person or through legal representation

1. Definition



Every person charged with a criminal offense has the right to **defend themselves in person** or to **be defended by a legal counsel of their choice**.¹ These two types of defense are not mutually exclusive, which means that an accused who decides to be assisted by a lawyer has the right to provide their lawyer with instructions on the conduct of their case, within the limits of professional responsibility, and to testify on their own behalf.²

The right to defend themselves in person to which individuals charged with a criminal offense are entitled means that they have the **right to refuse to be assisted by a lawyer** to a certain extent. (See *limitations section*). To be able to defend themselves in person or to instruct their lawyer on the conduct of their case, the accused must be **allowed to be present at their trial**. (See Section II for more details).

For the right to defend oneself or to legal representation to be effective, individuals charged with a criminal offense must also **be informed** of this right³ sufficiently in advance to provide them with **adequate time and the facilities to prepare their defense** on their own or assisted by a lawyer.⁴ (See *module on the right to adequate time and facilities to prepare a defense for more details*).

Accused have the right to be **assisted by a lawyer** if they do not wish to defend themselves. This right applies at **all stages of the criminal proceedings**, from the preliminary investigation to the trial and appeal stages. Accused have the right to **choose the legal counsel** who will represent them. This is important to ensure **trust and confidence** between them and their lawyer and allow for an **effective defense**.

If they cannot afford a lawyer, accused individuals have the right to be assigned a lawyer free of charge whenever the **interests of justice** require it. For instance, the gravity of the offense and the existence of some objective change of success at the appeals stage are important factors to consider for the assignment of free counsel.⁵ The obligation to provide **free counsel** to indigent accused falls within the **responsibility of state authorities**. State authorities must also ensure that the representation provided by the assigned lawyer is **effective**. This means that the State can be held accountable for blatant misbehavior or incompetence of the assigned counsel if it was obvious to the court that the lawyer's behavior was incompatible with the interests of justice or if relevant authorities or courts hindered the appointed lawyer from fulfilling their task effectively.⁶ When assigning lawyers, state



¹ UN Human Rights Committee ("UNHRC"), "General Comment No. 32 – Article 14: Right to equality before courts and tribunals and to a fair trial," (CCPR/C/GC/32, 23 August 2007), para. 37, <https://www.refworld.org/docid/478b2b2f2.html> (UNHRC, General Comment No.32).

² Ibid.

³ Ibid.

⁴ Amnesty International, "Fair Trial Manual," Second Edition, (2014), page 146 - 148, <https://www.amnesty.org/en/documents/pol30/002/2014/en/> (Amnesty International's Fair Trial Manual).

⁵ UNHRC, General Comment No. 32, para.38.

⁶ Ibid.

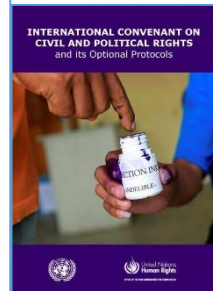
authorities should also give preference to counsels chosen by the accused, especially in capital cases, to ensure adequate and effective assistance.⁷

2. Legal Framework

2.1. International law

The right to defend oneself in person or through legal representation is expressly protected by the **International Covenant on Civil and Political Rights (“ICCPR”)**, which is directly applicable in Cambodian law through Article 31 of the Cambodian Constitution.

- **Article 14(3)(d) of the ICCPR:** *“In the determination of any charge against him, everyone shall be entitled: to be tried in his presence, and to **defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it.**”*



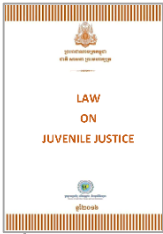
2.2. Cambodian law

The **Constitution of the Kingdom of Cambodia (“the Constitution”)**, the **Code of Criminal Procedure of the Kingdom of Cambodia (“CCPC”)** and the **Law on Juvenile Justice** also guarantee the right to legal representation.

	<ul style="list-style-type: none"> • Article 38 of the Constitution: <i>“Every citizen shall enjoy the right to defense through judicial recourse.”</i>
	<ul style="list-style-type: none"> • Article 143 of the CCPC: <i>“When a charged person, who is a minor appears for the first time, he/she “shall always be assisted by a lawyer. If a charged person does not choose a lawyer, the court shall appoint a lawyer according to the Law on the Bar.”</i>
	<ul style="list-style-type: none"> • Article 300 of the CCPC: <i>“The accused shall appear in person during the hearings at the court. The accused may be assisted by a lawyer chosen by himself. He may also make a request to have a lawyer appointed for him in accordance with the Law on the Bar.”</i> • Article 301 of the CCPC: <i>“The assistance of a lawyer is compulsory if (i) the case involves a felony; or (ii) the accused is a minor.”</i>



⁷ UNHRC, “Daniel Pinto v. Trinidad and Tobago,” Communication No. 232/1987, CCPR/C/39/D/232/1987, (1990), <http://hrlibrary.umn.edu/undocs/session39/232-1987.html>.



- **Article 6 of the Law on Juvenile Justice:** “Every minor suspected or accused of having committed an offence shall have the following basic procedural rights: [...] [t]he right to be assisted by a lawyer [...]”
- **Article 50 of the Law on Juvenile Justice:** “The minor shall be assisted by a lawyer during trial [...].”

3. Importance

Whether in person or through legal counsel, the right to defend oneself is central to ensuring a **fair trial**. An accused charged with a criminal offense must be allowed to challenge the accusations against them. The right to legal representation is one of the pillars that uphold **the equality of arms** between the defense and the prosecution, a key principle of a fair trial. Legal representation enables the accused to prepare the best and most effective defense with the help of someone with legal expertise, who can adequately explain the legal implication of the charges and to defend the accused’s interests in court. It also ensures that all accused have equal access to the law and that law is not dispensed discriminatorily.⁸

Denying the accused their right to defend themselves in person or through legal representation undermines the principle of equality of arms, the legitimacy of the trial, and the fairness of the verdict, thus increasing the risk of wrongful convictions.

4. Limitations

In accordance with the right to defend oneself, the right to legal representation can be **waived** if an accused wishes to defend themselves. However, this must be done **unequivocally** and **with adequate safeguards**. It must notably be ensured that any accused who decides to waive their right to legal representation understands the consequences of such a decision. The accused must also have the right to **revoke their waiver** during the criminal proceedings if they change their mind.⁹



Furthermore, the right to defend oneself in person is **not absolute**. An accused can be assigned a lawyer against their wishes when the **interests of justice** so require. This is, for example, the case:

- If the accused faces serious charges and the court decides that the accused is unable to act in their own best interest;
- If the accused consistently obstructs or disrupts the trial proceedings; or
- When it is necessary to protect a vulnerable witness from the distress or intimidation of being cross-examined by the accused.¹⁰

⁸ CCHR, “Fair Trial Rights and Trial Monitoring Handbook,” (2012), page 15, [file:///C:/Users/carol/Downloads/cchr-ftr-and-trial-monitoring-handbook-feb-eng2012-02-13%20\(7\).pdf](file:///C:/Users/carol/Downloads/cchr-ftr-and-trial-monitoring-handbook-feb-eng2012-02-13%20(7).pdf) (CCHR’s FTR Handbook).

⁹ Amnesty International’s Fair Trial Manual, page 49-50.

¹⁰ UNHRC, General Comment No 32, para.37.

In **Cambodia**, domestic legislation provided for the **mandatory legal representation** of an accused person if they are a **minor** or if the charge is a **felony** offence.



Overall, any restrictions on the right to defend oneself must have an **objective and sufficiently serious purpose** and not go beyond what is **necessary** to uphold the interests of justice. States must avoid an absolute ban on the right of individuals charged with a criminal offense to defend themselves without the assistance of a counsel.¹¹

While it is important that the accused chooses a lawyer they trust to represent them, this **right of choice** is also **not absolute** and can be **reasonably and objectively restricted**, especially if the services of the counsel are paid by the State. The accused's wishes must always be considered but can at times be overridden in the interests of justice.¹² However, respecting the accused's choice of legal counsel is particularly important in **capital cases** to ensure effective and adequate legal assistance.¹³

II. The right to be present at trial

1. Definition



The **right to be present at trial** means that anyone charged with a criminal offense is entitled to be present during the entirety of their trial. Presence at their own trial permits the accused to **hear the case against them, challenge the prosecution's arguments, and present a defense**.¹⁴ It also enables the defendant to **make themselves heard**, notably by testifying at their trial if they wish, without being compelled to do so.¹⁵

This right is, therefore, an integral part of the right to defend oneself in person or through a counsel¹⁶ (*See module on the right to defend oneself or to legal representation for more details*) and of the right to a public hearing¹⁷ (*See module on the right to a public hearing for more details*).

To ensure that the right to be present at trial is upheld, **state authorities** are responsible for informing the accused and their legal counsel by notifying them of the time, date, and location of the hearing

¹¹ UNHRC, General Comment No 32, para.37.

¹² Amnesty International's Fair Trial Manual, page 150.

¹³ UNHRC, "UNHRC, Views on "Daniel Pinto v Trinidad and Tobago", Communication No. 232/1987, CCPR/C/29/D/232/1987, (21 August 1990), <http://hrlibrary.umn.edu/undocs/session39/232-1987.html>.

¹⁴ CCHR, "Fair Trial Rights Annual Report 1 November 2019- 31 December 2020," November 2021, page 34-35, <https://cchrcambodia.org/admin/media/report/report/english/FTR-Annual-Report-English-2019-2020.pdf>.

¹⁵ OSCE, "Legal Digest of International Fair Trial Rights," (2012), page 133, <https://www.osce.org/files/f/documents/1/f/94214.pdf> (OSCE's Legal Digest of International FTR).

¹⁶ Amnesty International's Fair Trial Manual, page 157.

¹⁷ OSCE's Legal Digest of International FTR, page 133.

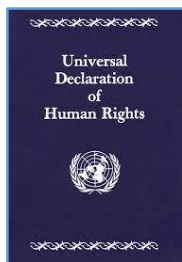
sufficiently in advance.¹⁸ State authorities must also refrain from wrongfully preventing or excluding the accused from their attendance.¹⁹

For child defendants, the right to be present at trial requires the presence of their parents or legal guardians unless their presence is considered not to be in their best interest.²⁰

2. Legal Framework

2.1. International Law

The right to be present at trial is expressly protected by the **International Covenant on civil and political rights (“ICCPR”)**, which is directly applicable in Cambodian law through Article 31 of the Cambodian Constitution.



- **Article 14(3)(d) of the ICCPR:** *“In the determination of any charge against him, everyone shall be entitled: to be tried in his presence, and to defend himself in person or through legal representation of his own choosing [...].”*

2.2. Cambodian Law

The **Code of Criminal Procedure of the Kingdom of Cambodia (“CCPC”)** and the **Law on Juvenile Justice** also guarantee the right to be present at trial. The CCPC contains provisions to facilitate the presence of the accused at their trial.



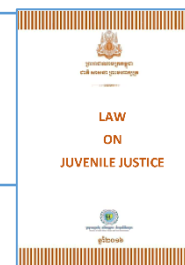
- **Article 300 of the CCPC:** *“The accused shall appear in person during the hearings at the court. The accused may be assisted by a lawyer chosen by himself. He may also make a request to have a lawyer appointed for him in accordance with the Law on the Bar.”*
- The CCPC also contains various provisions facilitating the presence of the accused at their trial, such as **Article 388** about the obligation of the prosecutor general to summon the accused person to their hearing; **Article 389** about the obligation to transfer an accused person under detention to the nearest prison or detention center to the office of the Court of Appeal; or **Articles 457 and 466** about the time period to be followed by the court between the delivery of the summon for direct hearing and summons to appear and the date to appear.
- **Article 365** of the CCPC also provides the possibility for a convicted person to file an opposition against a default judgment rendered against them. **Article 362** of the CCPC defines a default judgment as a judgment issued in the absence of the accused person if the accused person did not appear because he was not informed of their trial.

¹⁸ UNHRC, General Comment No. 32, para. 36.

¹⁹ CCHR’s FTR Handbook, page 21.

²⁰ UNHRC, General Comment No. 32, para. 42.

- **Article 51 of the Law on Juvenile Justice:** “At the commencement of the trial, the court shall advise the minor in a language that the minor can understand of the following rights: [...] The right to be present at trial [...].”



3. Importance

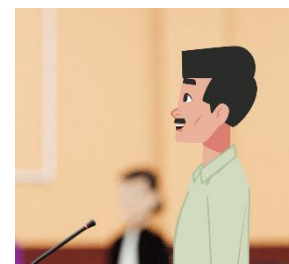
The right to be present at trial and in an oral hearing is a **crucial component of the right to defend oneself both in person or through legal counsel** and is therefore essential to ensuring a **fair trial**. The presence of the accused allows them to hear and challenge the evidence against them and to present their defense by calling witnesses and by testifying themselves at their trial if they wish so.

Therefore, holding a trial in the accused’s absence undermines their fundamental right to defend themselves and renders the trial unlawful.

4. Limitations

The right to be present at trial is **not absolute**. Trials in the absence of the accused are permissible in some circumstances if the interest of the proper administration of justice demands it. Only under the following circumstances can the right to be present at trial be derogated from or temporarily restricted:

- If the accused chooses to waive their right to be present.²¹ The waiver must be done unequivocally, in writing, and with adequate safeguards;²²
- If the accused is so disruptive to the court proceedings that it is considered unfeasible to continue in their presence. In this case, the court is allowed to temporarily remove the accused from the courtroom. However, all the necessary measures to ensure that their right to a defense is preserved, notably by maintaining the presence of their counsel at the trial so that they can continue their client’s defense;²³ or
- If the accused cannot be located or refuses to attend their trial despite receiving adequate and sufficient notice.²⁴



Under the circumstances that the accused waives their right or fails to attend despite adequate notice, the trial can occur ***in absentia***, meaning in **the absence of the accused**. A trial *in absentia* should be handled with extra caution by the court to be considered fair under international law. The court must consider whether there are extenuating circumstances that excuse the absence of the accused at their trial. It is the court’s



²¹UNHRC, General Comment No. 32, para. 36.

²² Amnesty International’s Fair Trial Manual, page 157.

²³ Ibid.

²⁴ CCHR’s FTR Handbook, page 21.

responsibility to prove it and not a burden that should be placed on the accused. The court should confirm these circumstances before the trial begins.²⁵

In order for a trial *in absentia* to be considered fair under international law, the court must ensure that:²⁶

- All necessary provisions were undertaken to notify the accused of the charges and the impending proceedings;
- All necessary provisions were undertaken to ensure the accused was notified in sufficient time of the location and date of their trial and the request for their presence;
- All necessary provisions were taken to ensure the protection of the accused's defense rights at trial, notably that the accused was represented by a lawyer even in their absence;
- Accused convicted in absentia can appeal or seek remedy, including getting a retrial of their case in their presence.

At the appeal stage of criminal proceedings, the right of the accused to be present at trial depends on the nature of the appeal proceedings according to the European Court of Human Rights ("ECHR"). For instance, if the appeal hearing considers both matters of law and fact, the presence of the accused and their counsel is required. If the appeal hearing considers matters of law alone, then the accused does not necessarily have the right to be present. However, if the prosecution is present and is able to make a case on matters of law then the presence of at least the defense counsel will be required as well to safeguard the principle of equality of arms. The ECHR also takes a variety of other factors into account to decide whether the presence of the accused is required at the appeal stage, including whether there were public hearings during the trial, whether the accused was notified of the appeal hearing and asked to be present, or whether the accused's liberty is at stake, for instance.²⁷

---END---

²⁵Amnesty International's Fair Trial Manual, page 158.

²⁶CCHR's FTR Handbook, page 21.

²⁷Amnesty International's Fair Trial Manual, page 158 – 159.