



**មជ្ឈមណ្ឌលសិទ្ធិមនុស្សកម្ពុជា**  
**Cambodian Center for Human Rights**

**December  
2015**

**Mini Report: Fair Trial Rights at the Court of  
Appeal**

## Cambodian Center for Human Rights

The Cambodian Center for Human Rights (“CCHR”) is a leading, non-aligned, independent, non-governmental organization (“NGO”) that works to promote and protect democracy and respect for human rights – primarily civil and political rights - throughout the Kingdom of Cambodia (“Cambodia”). CCHR’s vision is of a non-violent Cambodia in which people can enjoy their fundamental human rights, are empowered to participate in democracy, and share equally the benefits of Cambodia’s development. CCHR promotes the rule of law over impunity; strong institutions over strong men; and a pluralistic society in which variety is harnessed and celebrated rather than ignored or punished. CCHR’s logo – a dove flying in a circle of blue sky – represents the twin principles of peace and freedom.

This Mini Report – “Fair Trial Rights at the Court of Appeal” (the “Mini Report”) - is an output of the Judicial Reform Project (the “Project”).

## Acknowledgments

This Mini Report is made possible by the generous support of the Open Society Initiative (“OSI”). The contents are solely the responsibility of CCHR and do not necessarily reflect the views of OSI. CCHR would also like to express its appreciation for the continued cooperation of the Court of Appeal.

## Queries and Feedback

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Should you have any questions or require any further information about the Report, or if you would like to give any feedback, please email CCHR at [info@cchrcambodia.org](mailto:info@cchrcambodia.org). Alternatively please contact CCHR at:

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## Acronyms

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Cambodia	Kingdom of Cambodia
CCHR	Cambodian Center for Human Rights
Checklist	Trial-monitoring checklist
Constitution	Constitution of the Kingdom of Cambodia, 1993 (as amended)
Criminal Code	Criminal Code of the Kingdom of Cambodia
Criminal Procedure Code	Code of Criminal Procedure of the Kingdom of Cambodia, 2007
ICCPR	International Covenant on Civil and Political Rights
Mini Report	This Mini Report, entitled " <i>Fair Trial Rights at the Court of Appeal</i> "
NGO	Non-governmental organization
OSI	Open Society Initiative
Project	Judicial Reform Project
UDHR	Universal Declaration of Human Rights

## Executive Summary

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The right to a fair trial is a fundamental and universally recognized right, and one of the most important principles of national and international law, enshrined in almost all national constitutions and in many international treaties and declarations. While this may be the case, the functioning of the judiciary is among the major human rights concerns in the Kingdom of Cambodia (“Cambodia”), crucial as it is to the protection and enforcement of other rights and the establishment of the rule of law.

This Mini Report is an output of the Judicial Reform Project (the “Project”) implemented by the Cambodian Center for Human Rights (“CCHR”), and measures the adherence of the Court of Appeal to international fair trial rights standards based on data collected from daily monitoring of trials heard at the court between 01 July 2014 and 30 June 2015.

The first section of this Mini Report describes the international and domestic legislative landscape related to the right to a fair trial. The second section outlines the purpose, scope and methodology of the trial monitoring conducted by the Project at the Court of Appeal. The third sections, based on the Project’s trial monitoring data, analyzes adherence of the Court of Appeal to the most significant fair trial rights, and assesses whether their implementation has been improved since the last reporting period. Finally, the fourth section provides a series of recommendations to the Court of Appeal to comply with international standards.

# 1. Legal Protection of Fair Trial Rights

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The right to a fair trial is promoted under Cambodian law, protecting the rights of Khmer citizens to a fair trial, to an independent judiciary and to the separation of powers. Article 38 of the Constitution of the Kingdom of Cambodia (the “Constitution”) provides for a series of guarantees, such as the ban from every kind of physical abuse, coercion, ill-treatment and/or any other mistreatment. It provides for the basic principle of “*in dubio pro reo*”, which means that no one should be considered guilty until the final decision on the case.<sup>1</sup>

In addition, the Code of Criminal Procedure of the Kingdom of Cambodia (the “Criminal Procedure Code”), adopted in 2007, provides for a more substantial protection of fair trial rights, providing in detail roles and responsibilities of the main actors of a trial. Judges, prosecutors, lawyers and defendants must abide by the Criminal Procedure Code from the filing of a complaint until the final verdict. Tracing the French *civil law* system, the Criminal Code of the Kingdom of Cambodia (the “Criminal Code”), entered into force in 2010, identifies crimes, offenses, penalties and basic principles of the criminal law.

Moreover, Article 31 of the Constitution states that Cambodia shall recognize and respect the Universal Declaration of Human Rights (the “UDHR”) and the covenants and conventions related to human rights,<sup>2</sup> thereby incorporating the UDHR and the International Covenant on Civil and Political Rights (the “ICCPR”), ratified by Cambodia in 1992, into domestic law.<sup>3</sup> The right to a fair trial is enshrined in both the UDHR and the ICCPR. Article 10 of the UDHR, binding all members of the United Nations, states: “*Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him*”.<sup>4</sup> In 1966 the ICCPR developed the concept of a fair trial to include, as a minimum: the right to a public hearing; the right to be tried without undue delay; the right to understand the nature and cause of the charge; the right to adequate time and facilities to prepare a defense; the right to legal representation; the right to the presumption of innocence; the right against self-incrimination; and the right to appeal to a higher court on grounds of fact and law.<sup>5</sup>

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<sup>1</sup> The Constitution, Article 38 <<http://bit.ly/1Nfmxm7>>

<sup>2</sup> Ibid, Article 31

<sup>3</sup> As confirmed by the decision of the Constitutional Council dated 10 July 2007, Constitutional Council of the Kingdom of Cambodia, Decision No. 092/003/2007 (10 July 2007) <<http://bit.ly/1rmdbcj>>

<sup>4</sup> Universal Declaration of Human Rights (Adopted 10 December 1948, UNGA Res 217 A (III)) (UDHR), Article 10 <<http://bit.ly/1aRyxCs>>

<sup>5</sup> ICCPR, Article 14

## 2. Purpose, Scope and Methodology

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The purpose of this Mini Report is to assess the degree with which fair trial rights have been implemented at the Court of Appeal, the only appeal chamber in Cambodia. To this end, the Project has collected and analyzed data from trial monitoring conducted at the Court of Appeal over one year – between 01 July 2014 and 30 June 2015 - to identify which fair trial rights have been upheld by the Court of Appeal and which are at risk. During this period, the Project monitored 128 cases, of which, 46 were felonies, 77 were misdemeanors, and five were petty offenses.

This data was then compared to data collected in the previous period of monitoring at the Court of Appeal - between 01 March 2013 and 31 January 2014 - to assess whether adherence to fair trial rights has since improved or worsened. The aim is to assess improvements and shortcomings in order to file recommendations to decision makers and to improve the quality of the justice sector in Cambodia.

Several important rights related to a fair trial were taken into consideration in the trial monitoring, including: the right to a public hearing; the presumption of innocence; the right to be tried by an independent and impartial tribunal; the right to legal representation; the right to understand the nature of the charge; and the prohibition against retroactive application of penal legislation and double jeopardy. In addition, the rights of juvenile defendants were also assessed throughout the trial monitoring. To determine which rights would be considered, CCHR relied on external resources such as reports and studies on fair trial rights in Cambodia and on the Cambodian judicial system.

In order to accomplish its goal, the Project employed a comprehensive and well-tested tool, the trial-monitoring checklist (the “Checklist”) for use in the Court of Appeal. The Checklist, tailor-made for the Project, comprises of approximately 70 questions, which allow trial monitors to record adherence to national and international trial standards at various stages of the trial. The Checklist focuses on both procedural and substantive elements of the appeal hearing. Prior to the commencement of the trial monitoring, Court of Appeal personnel were informed and received a comprehensive explanation of the Checklist, in order to seek collaboration and to sustain constructive engagement.

### 3. Fair Trial Rights in Practice

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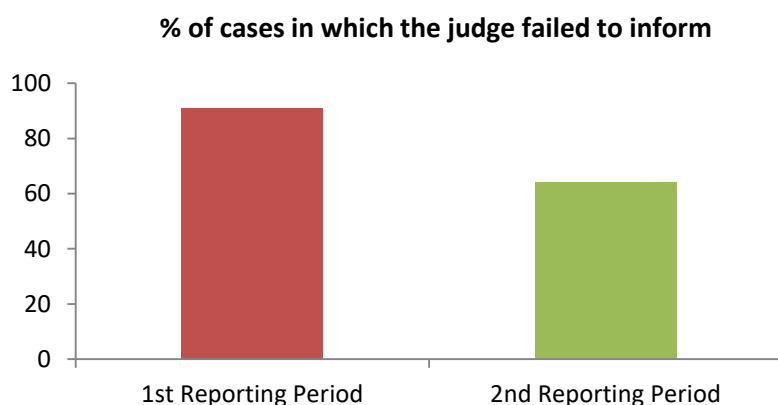
It was found in the last reporting period that while the Court of Appeal was generally adhering to the procedures that are meant to ensure fair trial rights, besides the overall concerns related to the lack of independence of the judiciary in Cambodia, a number of important issues to be addressed as a matter of priority were identified. These included the lack of public notice of hearings, the systematic failure of judges to inform and explain defendants of their rights, the high number of hearings where defendants were not present and, when present, the percentage of cases where they appeared in prison uniform. The data collected also revealed that the quality of evidence presented during trials was poor and threatened the right to be convicted beyond reasonable doubt and that judgments were, in the majority of cases, not based on law or evidence. In addition, the wider issues of juvenile justice and sentencing practices were found to require attention.

This section of the Mini Report assesses which fair trial rights were found to be at risk during the second reporting period, while the following section highlights those fair trial rights found to be upheld. Comparisons are made to data collected in the first reporting period to analyze whether overall, the Court of Appeal’s adherence to fair trial rights improved, remain unchanged, or worsened.

#### 3.1 Fair trial rights at risk

##### 3.1.1 Explanation of Rights

In the first reporting period at the Court of Appeal the judge failed to inform and explain to the defendant his or her right to legal representation or to self-defense in 89% of cases, and failed to inform and explain to the defendant his or her right not to answer in 91% of cases. As for the right to remain silent, there was a huge improvement in the second reporting period, insofar as the percentage decreased to 64% (see graph below). While the improvement is commendable, this figure still remains too high.



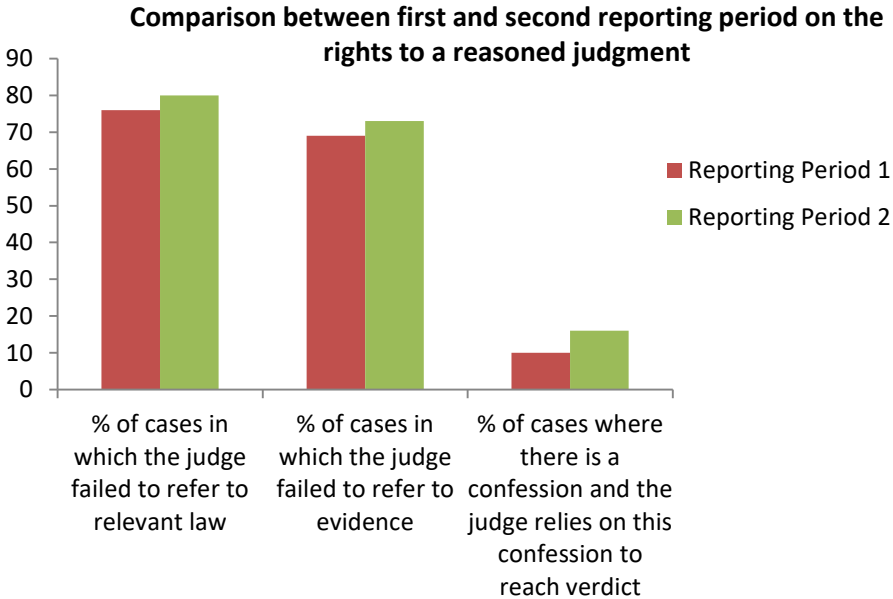
In the case of the right to legal representation and self-defense, the Project staff changed the way of measuring the data: in the first reporting period there were only three possible answers in the checklist: “Inform only”; “Inform and Explain”; or “Neither”, whereas in this reporting period the item “Represented by Lawyer” was added, since there is no need to inform the defendant of his/her right to legal representation/self-defense when he/she is already being represented. The monitoring



revealed that in only 30% of cases was a lawyer present, while in half of those cases the judge neither informed nor explained to the defendant his/her right to legal representation and self-defense.

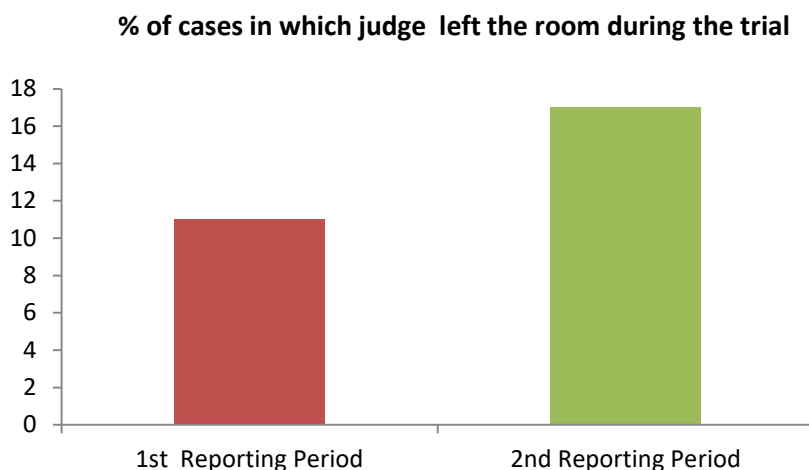
**3.1.2 Right to a public and reasoned judgment**

There was no improvement in the implementation of the right to a public and reasoned judgment during the second reporting period (see graph below). In fact, worryingly, the data showed a slight deterioration in this area. While verdicts were almost always made in public, judges regularly failed to refer to the relevant law (80% of the time, up from 76% in the first period) or refer to evidence (73% of the time, up from 69%). Moreover, in 16% of cases in which there was a confession the judges relied on the confession to reach the verdict – an increase of six percent from the first period. Finally, the defendants’ lawyers were present during the verdict in only 23% of cases (24% before).



**3.1.3 Independence, impartiality and professionalism of the judge**

The second reporting period saw a worsening in the percentage of judges leaving the room during the trial: 17% versus 11% of trials in the first reporting period (see graph below). The percentage of judges (and lawyers) that answered a telephone remained the same – in two percent of cases in both reporting periods. However it is worth noting that judges almost never behaved in an intimidating manner, and did not make discriminatory comments about any party.



### *3.1.4 Right not to be compelled to confess guilt, rights during interrogation and prohibition against torture*

On five occasions (three percent), the monitoring team noted that threats had been made to coerce the defendant into confessing to the alleged crime; while in seven cases (four percent), there were indications that violence or torture was used to coerce the defendant into confessing to the alleged crime. The prohibition of torture in all forms is embedded within a number of major human rights instruments including the United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, the UDHR, and the ICCPR, thus its prohibition is widely accepted to form part of customary international law as *jus cogens*, under which no derogation is ever permitted.<sup>6</sup> Therefore further efforts must be made to eliminate cases where torture is used; even one case is one too many.

### *3.1.5 Trials involving juveniles*

Among the 161 defendants of the 128 trials, 11 were juvenile defendants. All were between 16 and 17 years of age at the time of the trial. Six of them went through an appeal hearing. In all of those cases, no measures were taken to protect the privacy of the juvenile during the hearing. Furthermore, the judge did not cite either Article 38 (Legal Age of Criminal Responsibility) or Article 39 (Measures to Apply against Minors) of the Criminal Code when sentencing the juveniles, and there was nothing to suggest that the judge considered imposing a non-prison sentence as per Article 40 of the Criminal Code.<sup>7</sup>

### *3.1.6 Sentencing*

Analyzing the data relative to sentencing, it is worrying that in 95% of the cases the judge sentenced the defendant to imprisonment, without taking into consideration any alternative sentence, which would help to comply with the rehabilitative function of the punishment, especially for minor crimes. In addition, in 80% of the cases provisional detention was applied during the trial.

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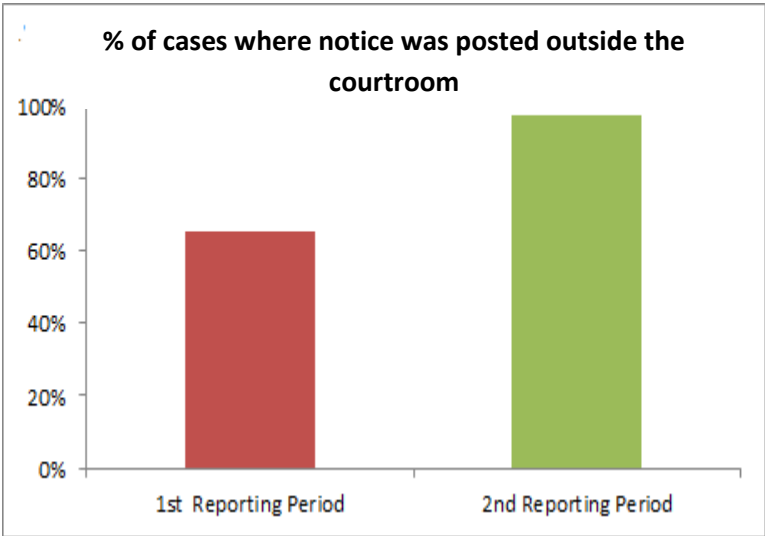
<sup>6</sup> Human Rights Watch, 'The Legal Prohibition Against Torture' (March 2003) <<http://bit.ly/1e17Fyl>>

<sup>7</sup> Criminal Code, Articles 38, 39 and 40 <<http://bit.ly/1MHKLnm>>

## 3.2 Fair trial rights upheld

### 3.2.1 Right to a public hearing

In the first reporting period a notice was posted outside the courtroom for 65% of trials, which increased to 97% in the second reporting period (see graph below). While this improvement is considerable, it should be noted however that in both reporting periods the notices often did not include all the necessary information, and generally only included the date, and the name of the judge. In both reporting periods the public were almost never prevented from entering the courtroom.



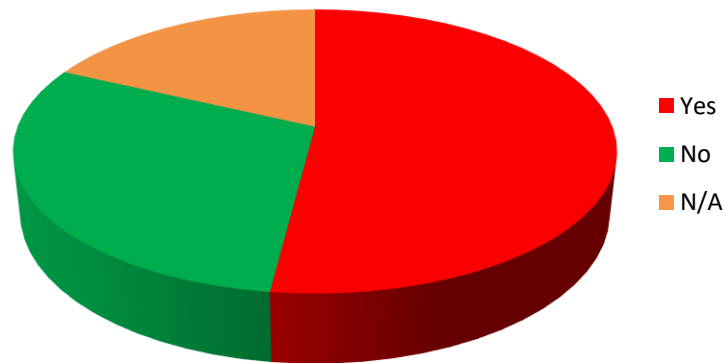
### 3.2.2 Presumption of Innocence

In the first reporting period 52% of defendants wore a prison uniform at their trial, which was significantly reduced to four percent in the second reporting period (see graphs below). In late 2013 an orange uniform was introduced to distinguish between defendants and convicted prisoners, who wear blue uniforms. While this is a positive advancement, it must be emphasized that individuals on trial should be permitted to appear in civilian clothing in order to truly uphold the right to presumption of innocence in line with international standards.

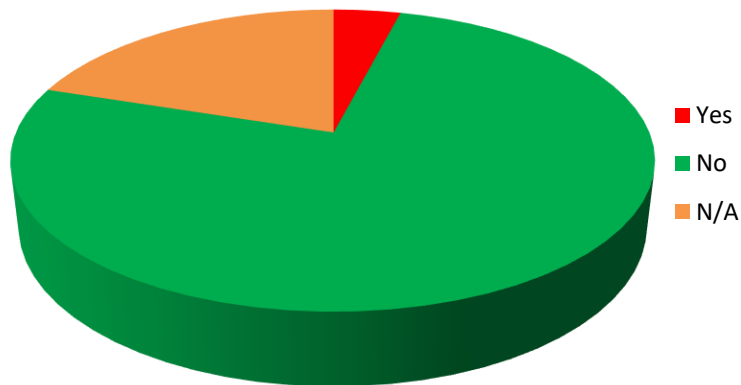
No defendant was tried whilst handcuffed in either of the reporting periods, and the judge refrained from making statements about the guilt of the defendants prior to the delivery of the verdicts.

**Did the accused appear before the court in prison uniform? (%)**

*1st Reporting Period*

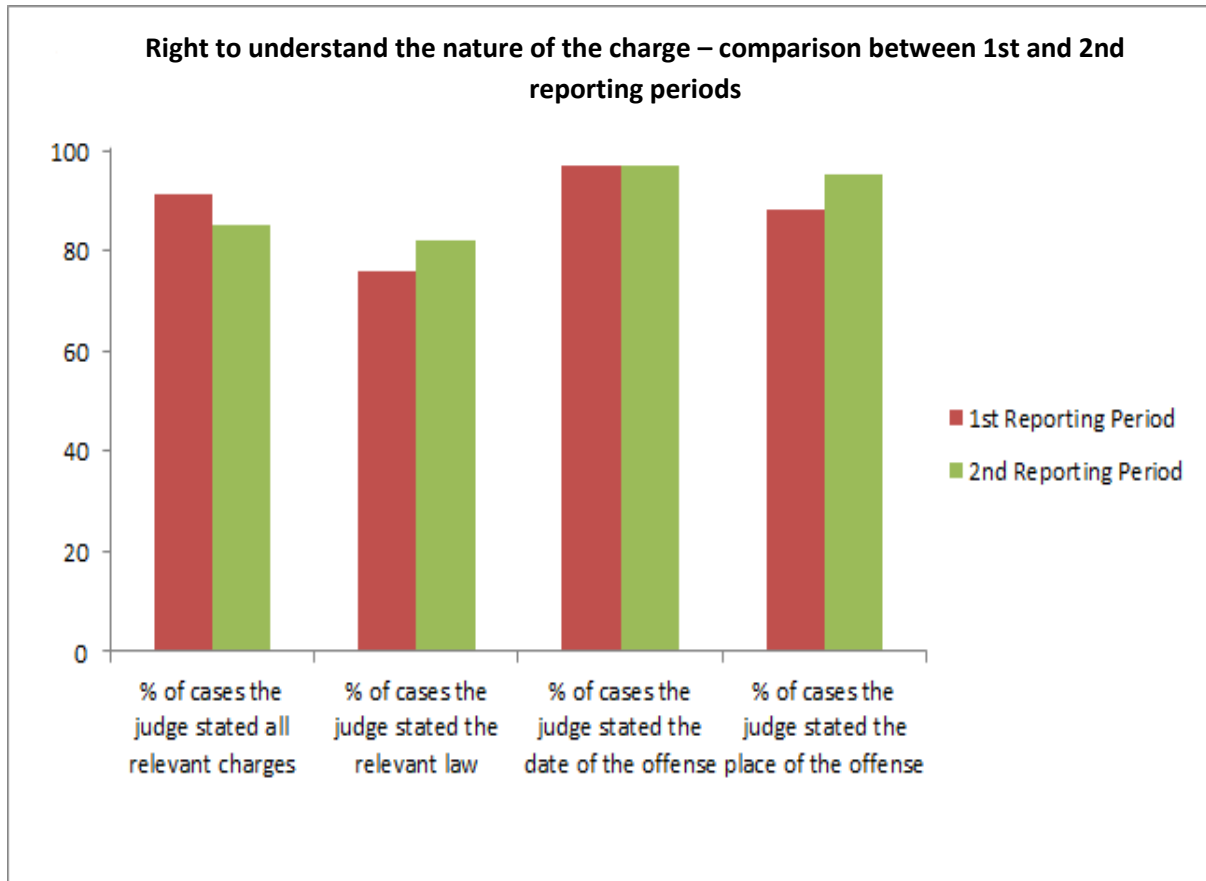


*2nd Reporting Period*



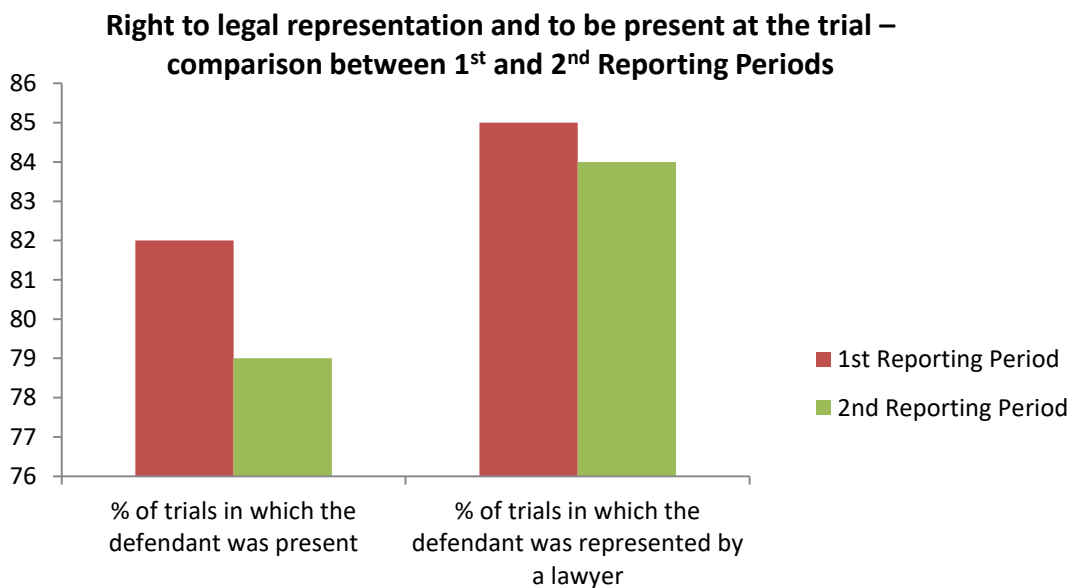
**3.2.3 Right to understand the nature of the charge**

In the first reporting period the judge stated the relevant law in 76% of the cases, which improved to 82% in the second reporting period. In both the first and second reporting periods, the judge stated the date of the offense in 97% of cases. . In the first reporting period the judge stated the place of the offense in only 88% of cases, but this improved to 95% in the second reporting period. As for the charges, the judge stated all relevant charges against all defendants in 85% of cases, showing a slight decrease if compared to the 91.2% for the first period. The differences between the two data sets are displayed graphically below:



**3.2.4 Right to legal representation and to be present at the trial**

In this reporting period, defendants were present at their trials 79% of the time, compared to 82% in the first reporting period. In 84% of the trials a lawyer represented the defendant, compared to 85% in the first reporting period. The comparison between the first and second reporting periods is presented in the following graph:



### *3.2.5 Right to adequate time and facilities to prepare a defense*

In both reporting periods there were no cases in which there was anything to suggest that a defendant's lawyer was assigned on the day of the appeal. Furthermore, the defense never raised the issue of inadequate time and facilities to prepare a defense.

### *3.2.6 Prohibition against double jeopardy*

In both the first and the second reporting periods there were no cases of double jeopardy.

### *3.2.7 Prohibition against retroactive application of criminal law*

In both the first and the second reporting periods there were no cases of retroactive application of criminal law.

### *3.2.8 Announcement of verdicts*

The verdict was consistently announced in public throughout both reporting periods, and there were always three judges present.

## 4. Conclusions and Recommendations

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Comparing the data of the second reporting period with the first, CCHR noticed that in some areas the implementation of rights improved. This strongly indicates that the Court of Appeal received and implemented recommendations contained in the previous report published in June 2014<sup>8</sup>. The massive decrease in the number of prisoners who wore a uniform during the trial and the huge increase in the number of notices posted outside of the courtroom are gladly welcomed by CCHR. At the same time, the improved efforts into the explanation of rights, even if still not satisfactory, are remarkable. Unfortunately, the data collected during the course of the reporting period highlights the need for reform in a number of areas in order to improve the quality of the trials and enhance people's enjoyment of rights and freedoms.

The lack of clarity during the verdict is one of those areas requiring urgent reform. In the absence of the statement of the relevant law, or the referral to evidence, the defendant is often condemned on the base of very weak arguments, undermining his/her right to be convicted beyond reasonable doubt. Furthermore, the number of cases in which the defendant does not have legal representation is still an issue, as well as lawyers' inveterate absence during the verdict. Of great concern is the alleged violence and torture perpetrated against defendants to coerce them into confessing to alleged crimes. The use of torture violates both the national and international obligations of the State, and thus urgently needs to be eradicated completely.

A much stronger effort should be made in order to lower the cases in which provisional detention is applied, and to reduce the percentage of imprisonment sentences. The principle of the rehabilitative function of punishment imposes on the judge a much more sensible application of his/her powers, which takes into consideration the imposition of alternative sentences. This is even more important in juvenile trials, where the particular condition of the defendant requires the judge to be more careful in condemning him/her to imprisonment.

In addition, which regard to the practical and substantial aspects of the trials, there are other concerns related to the lack of independence of the judiciary in Cambodia, an issue exacerbated further by the recent adoption of the Law on Organization of the Courts, the Law on Organization and Function of the Supreme Council of Magistracy, and the Law on the Statute of Judges and Prosecutors. The three laws undermine further the independence of the judicial body, and were passed despite the lack of public consultations, revealing a strong link between the judiciary and executive power.

While many improvements can be seen from the second period of trial monitoring at the Court of Appeal, there are still many rights that have not been upheld, thus necessitating continued monitoring and engagement. As a result, CCHR makes the following recommendations to the Court of Appeal:

- Consistently post public hearing notices that include detailed information, including:
  - The offense(s) with which the defendant is charged and the relevant law

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<sup>8</sup> CCHR, 'Fair Trial Rights at the Court of Appeal' (June 2014) <<http://bit.ly/1MN4G0Y>>

- The date, time, and location of the alleged offense and parties
- The names of the judges
- The Court of First Instance from which the trial arrives
- Create a website where anybody can check the data of ongoing trials, as it happens for the Supreme Court;
- Ensure that the parties are explained their trial rights. Failure to read out the information related to the trial and the inherent rights of the parties should constitute grounds for an appeal;
- Ensure an independent commission is appointed to analyze and investigate the cases in which violence, threats and torture were allegedly used to coerce the defendant into confessing to the crime;
- Coordinate with the General Department of Prisons in order to guarantee the presence of jailed defendants and avoid deferments. Furthermore, the court must, before the beginning of any trial, be aware whether a defendant tried for a felony has a lawyer or not, to avoid worthless deferments;
- Ensure that defendants do not attend hearings of trials different from their own. While waiting for their trial, the defendants should remain in the waiting room;
- Ensure that the lawyer assigned by the court meets the defendant prior to the hearing;
- Ensure that judges give a comprehensive briefing of the trial, in order to inform the public of the main issues and actors in the case;
- Ensure witnesses do not enter the courtroom before they are questioned, to make sure they are not influenced by other evidence and testimony presented during the trial;
- Guarantee that individuals on trial wear civilian clothes or orange uniforms, and not blue uniforms assigned to convicted prisoners. Unfortunately, defendants coming from the provinces continue to be made to wear blue uniforms, strongly undermining the presumption of innocence;
- Review the code of conduct for judges, in order to put a definitive ban on the use of phones during the trials, and apply disciplinary action in instances of violations;
- Consider implementing alternative methods of punishment to prison sentences focusing on rehabilitation, especially in cases involving juveniles; and
- Use the videoconference system available for juvenile trials, which protects the vulnerability and sensitivity of youths.



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