



**មជ្ឈមណ្ឌលសិទ្ធិមនុស្សកម្ពុជា**  
Cambodian Center for Human Rights

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# THIRD Bi-Annual Report: Fair Trial Rights – One Year Progress



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## ABOUT THE CAMBODIAN CENTER FOR HUMAN RIGHTS

This report on 'Fair Trial Rights in Cambodia' is an output of the Cambodian Trial Monitoring Project implemented by the Cambodian Center for Human Rights ("CCHR"). CCHR's vision is of a non-violent Kingdom of Cambodia, in which people enjoy their fundamental human rights, are treated equally, are empowered to participate in democracy and share the benefits of Cambodia's development. CCHR desires rule of law rather than impunity; strong institutions rather than strong men; and a pluralistic society in which variety is harnessed and celebrated rather than ignored or punished. CCHR's logo shows a white bird flying out of a circle of blue sky - this symbolizes Cambodia's claim for freedom. To realize its vision, CCHR works to promote and protect democracy and respect for human rights - primarily civil and political rights - throughout Cambodia. For more information, please visit [www.cchrcambodia.org](http://www.cchrcambodia.org).

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## QUERIES AND FEEDBACK

Should you have any questions or require any further information about this report, or if you would like to provide any feedback, please email CCHR at [info@cchrcambodia.org](mailto:info@cchrcambodia.org)

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## DEFINITIONS

“Bar Association”	The Bar Association of the Kingdom of Cambodia
“BPJC ”	Bangalore Principles of Judicial Conduct
“Cambodia”	Kingdom of Cambodia
“CAT”	Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
“CCHR”	Cambodian Center for Human Rights
“CCPC”	Code of Criminal Procedure of the Kingdom of Cambodia
“CEJP ”	Code of Ethics for Judges and Prosecutors
“Checklist”	The checklist used by CCHR trial monitors to record trial data when monitoring trials
“Checklist Guidance”	Comprehensive guidance notes to help CCHR Trial Monitors understand each question in the Checklist
“CLJR”	The Royal Government of Cambodia’s Council for Legal and Judicial Reform
“Code of Conduct”	A document outlining the obligations of non-interference, objectivity and confidentiality to which CCHR Trial Monitors are bound
“Constitution”	The Constitution of the Kingdom of Cambodia
“CRC”	Convention on the Rights of the Child
“Database”	The database in which CCHR trial monitors store trial data recorded on checklists
“ECCC”	Extraordinary Chambers in the Courts of Cambodia
“First Bi-annual Report”	CCHR Fair Trial Rights in Cambodia First Bi-annual Report, July 2010
“First Reporting Period”	The reporting period for the First Bi-annual Report of August 10 to December 31, 2009
“ICCPR”	International Covenant on Civil and Political Rights
“ICTY”	United Nations International Criminal Tribunal for the former Yugoslavia
“Kandal Court”	Kandal Provincial Court of First Instance
“MOJ”	Ministry of Justice
“NGO”	Non-governmental Organization
“NPM”	National Preventive Mechanism
“ODIHR”	Office for Democratic Institutions and Human Rights
“OPCAT”	The Optional Protocol to the Convention Against Torture
“OSCE”	Organization for Security and Co-operation in Europe
“Penal Code”	The Penal Code of the Kingdom of Cambodia, 2009
“Phnom Penh Court”	Phnom Penh Capital City Court of First Instance
“PRAJ”	Program on Rights and Justice
“Project”	Cambodian Trial Monitoring Project
“RAJP”	Royal Academy of Judicial Professions
“Report”	This Bi-annual report on ‘Fair Trial Rights in Cambodia’
“RGC”	Royal Government of Cambodia
“SCM”	Supreme Council of Magistracy
“Second Bi-annual Report”	CCHR Fair Trial Rights in Cambodia Second Bi-Annual Report, March 2011
“Second Reporting Period”	The reporting period for the Second Bi-annual Report of January 1 to June 30, 2010
“Strategy”	Legal and Judicial Reform Strategy
“Third Reporting Period”	The reporting period for the Report of July 1 to December 31, 2010
“Trial Monitors”	CCHR trial monitors
“UDHR”	Universal Declaration of Human Rights
“UN”	United Nations
“UNBPIJ”	United Nations Basic Principles on the Independence of the Judiciary
“UNBPRL”	United Nations Basic Principles on the Role of Lawyers
“UNTAC”	United Nations Transitional Authority in Cambodia
“UNTAC Law”	Provisions relating to the Judiciary and Criminal Law and Procedure applicable in Cambodia during the Transitional Period, 1992
“USAID”	United States Agency for International Development

## EXECUTIVE SUMMARY

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This bi-annual report on fair trial rights in Cambodia (the “Report”) is an output of the Cambodian Trial Monitoring Project (the “Project”), implemented by the Cambodian Center for Human Rights (“CCHR”). It presents and analyzes data collected from the monitoring of 585 trials involving 1029 accused at Phnom Penh Capital Court of First Instance (the “Phnom Penh Court”) and Kandal Provincial Court of First Instance (the “Kandal Court”) between July 1 and December 31, 2010 (the “Third Reporting Period”). This is the third bi-annual report from the Project and follows the release of the Project’s first bi-annual report (the “First Bi-annual Report”), in July 2010 and second bi-annual report (the “Second Bi-annual Report”), in March 2011.

### *Legal Framework*

The Constitution of the Kingdom of Cambodia (the “Constitution”) guarantees the independence of the judiciary as well as the right to be presumed innocent until proven guilty. The Code of Criminal Procedure of the Kingdom of Cambodia (the “CCPC”) sets out procedures for the investigation and hearing of criminal offences and includes provisions setting out the rights of accused persons. The Penal Code of the Kingdom of Cambodia (the “Penal Code”), which was promulgated in 2009 and came into force on December 10, 2010, sets out classes of offenses, principles of criminal responsibility and principles of sentencing. Cambodia is also bound by the international agreements to which it is a party. The Universal Declaration of Human Rights (the “UDHR”) and the International Covenant on Civil and Political Rights (the “ICCPR”) both guarantee the right to a fair and public hearing by an independent and impartial tribunal.

### *Methodology*

Trial Monitors from CCHR attend criminal trials at the Phnom Penh and Kandal Courts on a daily basis, using a trial monitoring checklist comprised of approximately 50 questions as a tool to measure adherence to fair trial rights at each trial. During the Third Reporting Period, the checklists were revised so that Trial Monitors also measured adherence to fair trial rights in respect of each individual accused. This is a break from the previous practice of monitoring adherence to fair trial standards by trial as opposed to by accused. The data that is collected is intended to serve as a reference for discussion about court practices and broader legal and judicial reform.

Following publication of each bi-annual report, Project staff seek meetings with representatives of the monitored courts as well as other justice sector organizations, bodies and institutions to which recommendations are addressed. The meetings serve as a basis for an exchange of ideas and provide insight into the challenges faced by those working to strengthen the justice system. The purpose of dialogue meetings is to promote the implementation of the recommendations set out in the bi-annual reports.

The data in this Report is compared to the data collected in the first reporting period between August 10 and December 31, 2009 (the “First Reporting Period”) and the second reporting period between January 1 and June 30, 2010 (the “Second Reporting Period”) for the purposes of identifying trends in adherence to fair trial rights at the two monitored courts. Specifically the data and analysis in this Report looks at the four rights examined in detail in the First Bi-annual Report – the right to be tried without undue delay; the right to a public hearing; the right to legal representation; and the right to be tried by an independent and impartial tribunal. Due to the timing of the release of the First Bi-annual Report, at the conclusion of the Second Reporting Period, positive trends

were not expected specifically during the Second Reporting Period as a result of the recommendations made in the First Bi-annual Report. This Report thus signifies the first opportunity for the Project to compare data and to assess the extent to which recommendations made in the First Bi-annual Report have influenced the data collected during the Third Reporting Period. Dialogue with stakeholders following the release of the First Bi-annual Report indicated a positive and constructive attitude from most institutions and a willingness to consider the recommendations made.

### ***Data Summary***

Judges at the Phnom Penh and Kandal Court appear to be doing a good job of adhering to fair trial standards with a number of positive achievements noted in the four areas relating to fair trial rights examined in the First Bi-Annual Report. There continued to be a reduction in the number of trials in which defense lawyers raised the issue of adequate time and facilities as a cause for concern. The data also indicates a positive handling of evidence and witnesses by the Courts.

There remained, however, a number of concerns. There has been a drop in the number of cases monitored in which judges have informed the accused of their basic rights. Notably in 18% of cases judges neither informed nor explained to the accused their right to legal representation. This may have contributed to the reduction in legal representation that was monitored during the reporting period, as discussed in further detail below. Accused persons continue to appear at court in prison uniforms and allegations of police misconduct were recorded, including the use of threats, violence and torture to extract confessions.

### ***Analysis –Right to be tried without undue delay***

The data collected by the Trial Monitors raises two concerns in relation to the right to be tried without undue delay - firstly, the prevalence of the use of pre-trial detention in the trials monitored, particularly with respect to juveniles, and secondly, the excessive pre-trial detention endured in eight cases monitored. There was a small decrease in the overall rate of pre-trial detention from 88% in the First Reporting Period to 80% in the Third Reporting Period. Analysis of the data suggests that this reduction may be the result of a decrease in the number of misdemeanor cases being sent to pre-trial detention. Such a development may point to a greater recognition on the part of officials of the legal justifications for provisional detention set out in Article 205 of the CCPC and due consideration of the rule in favor of liberty over provisional detention. However, the overall rate of pre-trial detention remained high, with 80% of trials monitored (involving 64% of individual defendants monitored having accused held in pre-trial detention, notwithstanding the statutory presumption against pre-trial detention.

There were eight trials in which the accused person was held in pre-trial detention for a period exceeding statutory limits. While this represented a drop in the overall cases of excessive pre-trial detention compared to the First Reporting Period, a high percentage of these trials - 62.5% -were misdemeanor cases. The data collected indicates that more needs to be done to ensure that the presumption against pre-trial detention is being applied to its fullest extent and that improvements are made to case-management to ensure that statutory limits for pre-trial detention are not exceeded.

### ***Analysis – Right to public hearing***

As in the First Reporting Period, no one was obstructed from entering, or dismissed from, the courtroom in any of the trials monitored. Whereas the First Reporting Period noted very few instances in which the court posted public notices giving the time and location of trials – 3% of all trials monitored - during the Third Reporting Period it was observed that in 234 - or 40% - of the trials monitored notice of the hearing was posted outside the



courtroom. The increase in public notifications of hearings was mostly the result of efforts by the Phnom Penh Court to provide such notice. The new approach of the Phnom Penh Court in this regard is an encouraging development. Conversely, Trial Monitors only observed one instance in which notification was provided at Kandal Court.

#### ***Analysis – Right to legal representation***

It is positive to note that in all felony trials monitored the right to legal representation was respected, an important improvement from the First Reporting Period. However, when monitoring adherence to this fair trial right in respect of individual accused in cases involving numerous accused, the percentage of accused who were represented by a lawyer fell to 91%. Despite the improvement in the incidence of legal representation of accused in trials involving felony charges, the overall rate of legal representation for all accused persons dropped slightly from 68% in the First Reporting Period to 67% in the Third Reporting Period. Furthermore, the majority of those trials involving a misdemeanor – 62% - found the accused appearing without representation (compared to 63% in the First Reporting Period), raising serious doubts about the fairness of these trials. While the law provides for the right of legal representation and in some cases makes it mandatory for such representation, the data continues to indicate a lack of funding and resources to allow for greater access to legal aid.

#### ***Analysis – Right to be tried by an independent and impartial judiciary***

As with the First Reporting Period, there were no trials in which the trial judge had also acted in another role on the same case. The percentage of trials in which a prosecutor, lawyer, court clerk or other person entered the judges' deliberation room – taken as an indication of the potential for outside influence on the verdict – declined from 16% to 7.5%. During dialogue based on recommendations from the First Bi-Annual Report, judges at the Phnom Penh court noted that it was sometimes necessary for court clerks to bring documents to deliberation rooms. Statutory provisions expressly provide that the prosecutor and clerk are barred from taking part in deliberations. While the observations made by Trial Monitors of different actors entering the deliberation room does not necessarily mean that these actors participated in deliberations, such instances can be taken as an indication, regardless of the professional capacity or motivation of those entering the room, of the potential for outside influence on the verdict.

The percentage of trials in which judges used mobile phones while presiding over a trial dropped slightly from 28% to 22%. Judges at the Phnom Penh Court indicated that according to the court's internal rules, mobile phones must either be turned off or put onto silent setting. However, it was noted that use of mobile phones in the court was sometimes "unavoidable" for expediting other cases through issuing instructions and granting approvals for investigative actions. While this may be the purpose of the majority of phone calls, access to justice in one trial should not be compromised in order to expedite another investigation.

#### ***Conclusion***

The data from the 585 trials monitored during the Third Reporting Period, involving 1029 individual accused, showed, as in previous reporting periods, mixed results. There were vast improvements in public notice of hearings. The rate of legal representation in trials involving felony charges hit the 100% mark for overall trials, though there was still a shortfall in legal representation for each of the individual accused in cases involving more than one accused. There were very few instances in which judges made statements that showed a lack of understanding of the presumption of innocence; the handling of evidence and witnesses by the court remained a positive area, with fair opportunities for presentation and examination afforded to both sides. However, concerns

remain in relation to high levels of pre-trial detention and low levels of representation for those charged with misdemeanors. Judges continue to use mobile phones in court.

The recommendations in this Report are addressed to a number of different bodies and institutions, highlighting the interconnectedness of the justice system. Though monitoring of trials takes place in the court room, improved adherence to many of the rights analyzed in this Report will require the cooperation, support and leadership of a number of actors including law enforcement agencies, prison authorities and NGOs. Pre-trial detention and legal representation, as shown in this Report, are two areas where greater cooperation could improve adherence to fair trial rights. It is hoped that the data and recommendations set out in this Report will help facilitate increased respect for fair trial rights and support those working to ensure that the justice system in Cambodia is fair and equal for all.

# 1. INTRODUCTION

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The right to a fair trial is a universally recognized human right, enshrined at the highest level of international law in both the Universal Declaration of Human Rights (the “UDHR”)<sup>1</sup> and the International Covenant on Civil and Political Rights (the “ICCPR”).<sup>2</sup> Fair trial rights are guaranteed in the Constitution of the Kingdom of Cambodia (the “Constitution”)<sup>3</sup> and, through various individual provisions of domestic laws.<sup>4</sup> The right to a fair trial is made up of a number of more specific individual rights, including pre-trial rights, which, when recognized and provided for, together ensure that a person charged with a criminal offense is treated fairly while the state determines their guilt or innocence.

Fair trials are essential to protect the rights of both the accused and victims to have all evidence tested thoroughly by an independent and impartial court and to ensure the proper administration of justice. Recognition and provision of fair trial rights and due process prevents arbitrary and unjust interference with the lives of citizens, the misuse of political or state power and the application of “summary justice”. As a general principle, regardless of the nature of the alleged offense, all accused persons must be given a genuine opportunity to answer charges; present and challenge evidence; examine and cross-examine witnesses and do so in a neutral and dignified setting.

## THE LEGAL FRAMEWORK

Cambodia is a party to the major universal human rights instruments, including the UDHR and the ICCPR. These instruments guarantee that individuals charged with a criminal offense are entitled to a fair and public hearing by an independent and impartial tribunal<sup>5</sup> and have the right to be presumed innocent until proven guilty according to law.<sup>6</sup> The UDHR and ICCPR are also incorporated into the domestic legal system. Article 31 of the Constitution states that Cambodia “shall recognize and respect human rights as stipulated in the [...] covenants and conventions related to human rights.” This was confirmed by a decision of the Constitutional Council dated July 10, 2007, which held that “international conventions that Cambodia has recognized” form part of the law, which trial judges must consider.<sup>7</sup>

The Constitution provides a number of guarantees that together provide the basic framework for fair trials. Article 31 guarantees: “Every Khmer citizen shall be equal before the law”. Article 38 sets out the rights of Khmer citizens: “Any case of doubt shall be resolved in favor of the accused. The accused shall be considered innocent until the court has finally judged on the case. Every citizen shall enjoy the right to defense through judicial recourse.” Article 128 guarantees that the judiciary shall be “an independent power” and shall “guarantee and uphold impartiality and protect the rights and freedoms of citizens.”

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<sup>1</sup>United Nations General Assembly, *Universal Declaration of Human Rights*, December 10, 1948, Article 10.

<sup>2</sup>United Nations General Assembly, *International Covenant on Civil and Political Rights*, December 16, 1966, Article 14.

<sup>3</sup>Article 31 of the Constitution guarantees fair trial rights through its incorporation of the UDHR and other international covenants and conventions, which include the ICCPR. Articles 38 and 128 of the Constitution also guarantee various fair trial rights.

<sup>4</sup>The Code of Criminal Procedure of the Kingdom of Cambodia sets out a number of procedural rights that help ensure a fair trial. For example, Article 300 states that the accused may be assisted by a lawyer of his/her own choosing.

<sup>5</sup>UDHR, Article 10; ICCPR, Article 14(1).

<sup>6</sup>UDHR, Article 11(1); ICCPR, Article 14(2).

<sup>7</sup>Constitutional Council of the Kingdom of Cambodia, Decision No. 092/003/2007, dated July 10, 2007.

Cambodia's criminal procedure was codified in 2007 with the introduction of the Code of Criminal Procedure of the Kingdom of Cambodia (the "CCPC"), which replaced sections of the Provisions relating to the Judiciary and Criminal Law and Procedure applicable in Cambodia during the Transitional Period, 1992 (the "UNTAC Law"). The CCPC sets out in detail the legal procedures for investigating and prosecuting criminal offences, as well as the rights of victims and those charged with a criminal offense. In 2009 the Penal Code of the Kingdom of Cambodia (the "Penal Code") was promulgated, a comprehensive law setting out classes of offenses, principles of criminal responsibility, principles of sentencing, the territorial jurisdiction of the courts and an extensive array of new criminal offenses. The general provisions contained in Book 1 of the Penal Code, were put into application on December 10, 2009, and were therefore applicable during the Third Reporting Period.<sup>8</sup> The remaining provisions of the Penal Code, including provisions creating new offenses, were largely put into application on December 10, 2010 in Phnom Penh and December 20, 2010 in the rest of Cambodia. As such they were not applicable in the majority of the trials monitored during the Third Reporting Period.

## THE POLICY CONTEXT

The Royal Government of Cambodia (the "RGC") has recognized the importance of legal and judicial reform as fundamental to Cambodia's growth, equity and efficiency.<sup>9</sup> The Special Rapporteur on the situation of human rights in Cambodia, Professor Surya Subedi, recently commented on the RGC's desire and political will to reform the legal and judicial sector encouraging the Government "*to push ahead with its legal and judicial reform agenda by building on the accomplishments already made in promoting and protecting human rights in the country.*"<sup>10</sup>

Legal and judicial reform in Cambodia is guided by the Legal and Judicial Reform Strategy ("Strategy") approved by the Council of Ministers of the RGC on June 20, 2003.<sup>11</sup> The Strategy identifies four guiding principles from the provisions of the Constitution to guide such reform – the rights of individuals, liberal democracy, the separation of powers and the rule of law.<sup>12</sup> The Strategy sets out seven strategic objectives, which form the basis of the Legal and Judicial Reform Action Plan, approved in 2005.<sup>13</sup>

In 2003, the RGC and the United Nations came to an agreement to create the Extraordinary Chambers in the Courts of Cambodia (the "ECCC") to prosecute those with the greatest responsibilities for the atrocities committed by the Khmer Rouge. The court is a Cambodian court with international monetary assistance and foreign personnel to help meet international standards of justice, and is intended to "*be a model court for Cambodia, serving to contribute to the overall process of legal and judicial reform.*"<sup>14</sup> It has, through its trial of Kaing Guek Eav, alias Duch, shown that fair trial rights apply to those accused of all criminal offences, no matter how shocking or abhorrent the alleged offense and no matter how strong the evidence available to the prosecution appears to be.

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<sup>8</sup> Article 672 of the Penal Code: "Except the general provisions of Book 1 (General Provisions) of the present *code*, which shall be immediately effective after this *code* comes into effect, other provisions shall be applicable in one year after this *code* comes into effect."

<sup>9</sup> Hun Sen, *Address on Rectangular Strategy for Growth, Employment, Equity and Efficiency Phase II*, First Cabinet Meeting of the Fourth Legislature of the National Assembly, Office of the Council of Ministers, Phnom Penh, September 26, 2008.

<sup>10</sup> Report of the Special Rapporteur on the situation of human rights in Cambodia, September 16, 2010, (A/HRC/15/46), p.16.

<sup>11</sup> Council for Legal and Judicial Reform, *Legal and Judicial Reform Strategy*, Adopted by the Royal Government of Cambodia at the Plenary Session on June 20, 2003.

<sup>12</sup> *Ibid.* p 3.

<sup>13</sup> Council for Legal and Judicial Reform, *Plan of Action for Implementing the Legal and Judicial Reform Strategy*, adopted by the Royal Government of Cambodia at the Plenary Session on April 29, 2005.

<sup>14</sup> Speech by His Excellency Sean Visoth, Director of the Office of Administration of the ECCC, "The Cambodian Approach: Finding the Truth and Reconciliation in Cambodia through the ECCC", International Conference: Dealing with a Past Holocaust and National Reconciliation: Learning from Experience, August 28-29, 2006, Phnom Penh, Cambodia, available at:

[http://www.eccc.gov.kh/sites/default/files/media/Finding\\_the\\_Truth\\_and\\_Reconciliation.pdf](http://www.eccc.gov.kh/sites/default/files/media/Finding_the_Truth_and_Reconciliation.pdf).

The Cambodian Center for Human Rights (“CCHR”) Trial Monitoring Project (the “Project”) has been an independent and impartial monitor of criminal trials in Cambodia for over a year. In this role as an independent and impartial monitor, the purpose of the Project is to collect data that can be analyzed to identify strengths and weaknesses in the justice system. By drawing attention to the areas in the trial process that require the greatest attention and making practical recommendations to the relevant justice sector institutions, CCHR supports efforts to strengthen and reform the justice system for the benefit of all citizens.

## **PURPOSE, AUDIENCE AND SCOPE OF THE REPORT**

This is the third bi-annual Report on Fair Trial Rights in Cambodia produced by the Project. The first bi-annual report was released on July 14, 2010 (the “First Bi-annual Report”) and the second bi-annual report was released on March 22, 2011 (the “Second Bi-annual Report”). The information presented in this Report serves as a reference from which to implement reform, and the data and recommendations will be shared with the intended audience of the Report – the Cambodian judiciary and other justice sector stakeholders – for discussion. In October 5, 2011, before the Report was finalized, a draft was sent to the respective Presidents of the Phnom Penh Capital City Court (the “Phnom Penh Court”) and the Kandal Provincial Court (the “Kandal Court”) to provide an opportunity to the monitored courts to give feedback, comments and additional recommendations.

Due to the timing of the release of the First Bi-annual Report, at the conclusion of the Second Reporting Period, positive trends were not expected specifically during the Second Reporting Period as a result of the recommendations made in the First Bi-annual Report. This Report thus signifies the first opportunity for the Project to conduct an in depth analysis of the impact of the recommendations made in the First Bi-annual Report and the subsequent dialogue that followed with key stakeholders on adherence to fair trial rights at the Phnom Penh and Kandal Courts.

The structure of the Report is as follows. Section 2 sets out the methodology followed when collecting data and preparing this Report. In Section 3, ‘Data and Findings’, the data collected between July 1 and December 31, 2010 (the “Third Reporting Period”) is presented alongside the data collected between August 10 and December 31, 2009 (the “First Reporting Period”), and January 1 and June 30, 2010 (the “Second Reporting Period”) for the purpose of identifying trends in adherence to fair trial rights. In Section 4, Analysis, the data collected in relation to four fair trial issues is compared and analyzed against the data collected and analyzed in the First Reporting Period, with recommendations provided.

## 2. METHODOLOGY

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The Project is implemented by CCHR as part of our Policy and Advocacy Program. The Project is implemented and the Report written following the methodology set out in this chapter. It is hoped that this methodology can be shared and discussed with other organizations seeking to monitor trials in Cambodia, so as to enable increased collaboration in this field and facilitate constructive dialogue between all stakeholders seeking to improve respect for fair trial rights in Cambodia.

### TIME FRAME AND LOCATION

The Report presents and analyzes data from 585 criminal trials involving 1029 individual accused monitored at the Phnom Penh Court and the Kandal Court during the Third Reporting Period. The monitoring of the Phnom Penh Court and the Kandal Court by the CCHR began on August 10, 2009. The First Bi-annual Report covered 199 trials during the First Reporting Period and the Second Bi-annual Report covered 536 trials monitored during the Second Reporting Period. The Phnom Penh Court was selected for the purposes of the Project because, as the court of the capital city and the largest and most populated urban area in Cambodia, its activities are more wide ranging, its conduct is more widely reported and its influence is greater than those of other first instance courts in Cambodia. The Kandal Court was selected for its proximity to Phnom Penh, the large number of judges presiding there and the availability of three courtrooms for trial monitoring.

### FOCUS OF THE TRIAL MONITORING

The monitoring of trials focuses on certain fair trial rights due to their applicability in the Cambodian context. In order to determine which rights would be considered, the CCHR relied on external resources such as reports and studies on fair trial rights in Cambodia and on the Cambodian judicial system.<sup>15</sup> Neither positive nor negative inferences should be made from the omission of other fair trial rights within this Report.

The following rights were selected for monitoring purposes:

- Right to a public hearing;
- Right to be tried without undue delay;
- Right to understand the nature of the charge;
- Right to an explanation of rights owed to the accused;
- Right to adequate time and facilities to prepare a defense;
- Right to legal representation and to be present at trial;
- Right to the presumption of innocence;
- Right to be tried by an independent and impartial tribunal;

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<sup>15</sup>For example: International Commission of Jurists, *ICJ's Comments on the Initial Report of Cambodia on the implementation of the International Covenant on Economic, Social and Cultural Rights* (Geneva: International Commission of Jurists, April 2009); Richard Blue and Robert Underwood, *Evaluation of the Program on Rights and Justice ("PRAJ"): Final Report* (Washington DC: United States Agency for International Development (USAID), January 2008; and NGO Working Group, *Parallel Report on Cambodia 2009* (Phnom Penh: NGO Working Group, April 2009).

- Evidence rights (including the right to call and examine witnesses);
- Right to full disclosure of evidence for the preparation of the defense;
- Right against self-incrimination (not to confess guilt as a result of coercion or inducement);
- Prohibition against retroactive application of penal legislation (being tried for an offense that was not an offense at the time it was committed); and
- Rights of Juveniles.

## INFRASTRUCTURE

In order to effectively and efficiently record relevant trial data, the CCHR designed a trial-monitoring checklist (the “Checklist”) for use in court by the CCHR trial monitors (the “Trial Monitors”) (Appendix I). This checklist is tailor-made for the Project and includes approximately 50 questions, the answers to which indicate whether fair trial rights have been adhered to. Most questions have four possible answers: yes (“Y”), no (“N”) and either not applicable (“N/A”) or information unavailable (“I/U”). The CCHR has also developed a one-page annex to the Checklist for use in trials involving juveniles (Appendix II).

The development of the Checklist involved a pilot study whereby the Trial Monitors initially used a more comprehensive checklist. It was found that such an extensive checklist was too cumbersome and would therefore be impractical for use by the Trial Monitors. The resulting checklist was based on the results of our pilot study, and is a succinct Cambodia-specific document that addresses fair trial rights in a manner which is practicable for everyday use by our Trial Monitors. The Checklist has been revised and amended following both the First Reporting Period and Second Reporting Period to incorporate lessons learned during trial monitoring, analysis of data, and dialogue with justice sector stakeholders. During previous reporting periods, the Trial Monitors monitored adherence to fair trial rights throughout the trial as a whole, rather than monitoring fair trial rights for each individual accused. Consequently, for a question such as, “Was there pre-trial detention?”, where more than one accused appeared in the same trial, the Trial Monitors answered “No” only if none of the accused were placed in pre-trial detention. Following a review of the Checklist prior to the commencement of the Third Reporting Period, the Checklist was revised to focus on the fair trial rights of each individual accused. Consequently, for the Third Reporting Period, for a question such as question 3(d) – “Was there pre-trial detention?” – Trial Monitors monitored adherence to the right to be tried without undue delay for each individual accused. However, for questions such as 8(a) – “Was there anything to suggest that the judge had an interest in the case beyond their usual judicial role?” – Trial Monitors monitored adherence throughout the trial as a whole.

During the Third Reporting Period two Checklists were used. The first version was used from July 1, 2010 to September 30, 2010 and focused on fair trial rights, the link between data, the number of accused, victims and witnesses, the data of each individual accused and the practical use of the checklist in the courtroom. The content of the second version, used from October 1, 2010 to December 31, 2010, was largely the same as the first version, but questions were re-arranged by separating the general information from the information relating to each individual accused in order to make the Checklists more user-friendly for the Trial Monitors.

With consideration as to the brevity of the Checklist, the CCHR compiled comprehensive guidance notes (the “Checklist Guidance”) to ensure uniform interpretation of each Checklist question and understanding of the legal basis and purpose of each question. This Checklist Guidance is vital for ensuring comprehensive understanding of each question and serves to ensure consistency among Trial Monitors, present and future. Another tool, which outlines the relevant national and international law underpinning each question in the Checklist – the “Law Bank” (Appendix III) – was provided to the Trial Monitors to enable easy reference to the relevant international and national laws underpinning each of the fair trial rights monitored.

The CCHR is committed to the basic international principles applicable to trial monitoring<sup>16</sup> and has devised a code of conduct for our monitors, outlining the obligations of non-interference, objectivity and confidentiality to which our Trial Monitors are bound (the “Code of Conduct”) (Appendix IV).

## PERSONNEL AND TRAINING

The Project team is currently comprised of four experienced Trial Monitors with legal qualifications, expertise and experience. Both national and international legal consultants support the Trial Monitoring Team. As noted above, the Trial Monitors are bound by the Code of Conduct. Before the monitoring of trials began, the Trial Monitors participated in a thorough practical and theoretical training program that included training on:

- Trial monitoring and the use of the Checklist;
- The Code of Conduct and the importance of impartiality, non-interference, confidentiality and professionalism; and
- Fair trial standards in international and Cambodian law.

Trial Monitors spend most days in court monitoring criminal trials and have therefore acquired an intimate knowledge of the criminal justice process as it is regularly applied in Cambodia. The Trial Monitors have developed positive and constructive relationships with staff at the courts monitored, supporting the Project’s goal of working in partnership with the courts and other justice sector stakeholders to promote greater recognition of and provision for fair trial rights.

## MONITORING PROCEDURE

For the purposes of the Project, two Trial Monitors are assigned to Phnom Penh Court and two are assigned to Kandal Court, enabling the Trial Monitors to become familiar with the court to which they are assigned and to build relationships with judges and court staff. The usual practice of two Trial Monitors being present at each trial further ensures consistency and reliability of results. The CCHR monitored trials based on court schedules in order to produce objective data and an arbitrary sample of trials.

For each trial attended, data is recorded directly on the Checklist. The information sought is limited to the trial process itself and therefore no additional interviews or dialogue took place, with the exception of efforts made to record verdicts that were handed down after the trial.

## DATABASE

After each trial the data from the Checklist is entered into the CCHR Trial Monitoring Database (the “Database”).<sup>17</sup> The Database reflects the questions within the Checklist and was constructed using Microsoft

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<sup>16</sup> See: Amnesty International, *Amnesty International Fair Trial Manual* (London: Amnesty International Publications, 1998), AI Index POL 30/02/98; Jelena Pejic and Vanessa Lesnie, *What is a Fair Trial: A Basic Guide to Legal Standards and Practice* (New York: Lawyers Committee for Human Rights, 2000); Organization for Security and Co-operation in Europe (OSCE)/ Office for Democratic Institutions and Human Rights (ODIHR), *Trial Monitoring: A Reference Manual for Practitioners* (Poland: OSCE/ODIHR, 2008); Bárbara Oliveira and Linda Besharaty-Movaed, *International Commission of Jurists Trial Observation Manual* (Geneva: International Commission of Jurists, 2002).

<sup>17</sup>The Database is to be made available online for public access on the CCHR website: [www.cchrcambodia.org](http://www.cchrcambodia.org).



Visual Basic. In addition to storing the data extracted from the checklists, the Database is designed to analyze the stored data, for example, flagging pre-trial detention periods that exceed statutory limits. As the Project proceeds, the Database will be developed further. Over time, the Database will contain an extensive catalogue of data and become an invaluable resource for the CCHR and other organizations working to promote fair trials in Cambodia.

## ANALYSIS AND DIALOGUE

The CCHR analyzes the trial data recorded in the database, and identifies positive developments as well as areas for concern arising at trial. The data is based on the answers the Trial Monitors have given to the questions in the Checklist. Data is presented in bi-annual reports and compared to data collected during previous reporting periods to identify trends in the practices of the courts. Each bi-annual report contains an in-depth analysis of a sub-set of the fair trial rights monitored. The purpose of this analysis is to enable the CCHR to identify strengths and weaknesses in the practices of the courts and develop corresponding recommendations to the courts and other justice sector stakeholders for ways in which recognition and provision for fair trial rights in criminal trials can be improved.

The purpose of the Project is to provide objective data to serve as a reference for improvements in court practices and broader legal and judicial reform. Final drafts of the bi-annual reports are sent to the Presidents of the courts monitored for comments and recommendations prior to final publication. Once published, the CCHR distributes bi-annual reports to relevant stakeholders along with requests for meetings or presentations to provide further explanation of the data, analysis and recommendations. Project staff also request specific meetings with representatives of the courts monitored as well as other justice sector organizations, bodies and institutions to which recommendations are addressed. The meetings serve as a basis for an exchange of ideas and provide insight into the challenges faced by those working to strengthen the justice system. The purpose of dialogue meetings is to promote the implementation of the recommendations set out in the bi-annual reports or alternative measures that will address the concerns behind the recommendations.

Following the publication of the First Bi-annual Report and the Second Bi-annual Report, the CCHR sent 272 and 500 copies of the respective reports to stakeholders and requested dialogue meetings with the following organizations, bodies and institutions:<sup>18</sup>

- Council of Ministers
- Ministry of Justice
- Council for Legal and Judicial Reform
- Phnom Penh Court
- Kandal Court
- Appeal Court of the Kingdom of Cambodia
- Supreme Court of the Kingdom of Cambodia
- Supreme Council of Magistracy
- Bar Association of the Kingdom of Cambodia
- National Police Department
- Community Legal Education Center
- Center for Justice and Reconciliation

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<sup>18</sup> The dialogue process for the second bi-annual report is ongoing at the time of publication.

- Cambodian Defenders Project
- Legal Aid of Cambodia

Of these stakeholders, the CCHR conducted dialogue with seven judiciary stakeholders:

- Phnom Penh Court
- Kandal Court
- Council for Legal and Judicial Reform
- Appeal Court
- Cambodian Defenders Project
- Legal Aid of Cambodia
- United Nations Children's Fund (UNICEF)

The targets for dialogue are likely to differ slightly between reporting periods, reflecting the organizations, bodies and institutions towards which recommendations are addressed in each report. One of the challenges of the Project is engaging successfully with a broad range of stakeholders. The CCHR is appreciative of the positive and constructive discussions with stakeholders to date and the spirit of cooperation and partnership with which stakeholders have generally approached the Project.

### 3. DATA

During the Third Reporting Period, the Trial Monitors monitored 585 trials in total at the Phnom Penh and Kandal Courts involving 1029 accused. This section sets out the ‘raw’ data recorded by the Trial Monitors on the Checklist according to each individual right during the monitoring of each trial. The data from the Third Reporting Period is presented alongside the data from the First and Second Reporting Periods for the purpose of comparison and analyzing trends in the practices of the Courts. For the purposes of comparing data, the data included in the tables below for the Third Reporting Period is in respect of trials as a whole. Where Trial Monitors monitored fair trial rights in respect of each individual accused during the Third Reporting Period, this data is set out separately in this section and/or in the Analysis section.

**FIGURE 1: TRIALS MONITORED**

Phnom Penh Court						
Data	1 <sup>st</sup> Reporting Period		2 <sup>nd</sup> Reporting Period		3 <sup>rd</sup> Reporting Period	
	N <sup>o</sup>	%	N <sup>o</sup>	%	N <sup>o</sup>	%
Number of Trials	142		376		439	
Felony	84	59	190	51	223	51
Misdemeanor	58	41	186	49	216	49
Kandal Court						
Data	1 <sup>st</sup> Reporting Period		2 <sup>nd</sup> Reporting Period		3 <sup>rd</sup> Reporting Period	
	N <sup>o</sup>	%	N <sup>o</sup>	%	N <sup>o</sup>	%
Number of Trials	57		156		146	
Felony	21	37	55	35	52	36
Misdemeanor	36	63	101	65	94	64

Figure 1 above shows the number and location of criminal trials monitored by the Trial Monitors during the Third Reporting Period, and the classification of the charge at each trial. Article 46 of the Penal Code defines a felony as any offense for which the minimum penalty is imprisonment for five years or more. A misdemeanor is defined in Article 47 as any offense for which the maximum penalty is imprisonment for a term of more than six days and less than or equal to five years. A petty offense is defined as any offense where the penalty is a fine or less than or equal to six days imprisonment.<sup>19</sup> As noted above, the trials were chosen for monitoring on the basis of court schedules alone, with no consideration given to the subject matter of the hearing. The trials monitored therefore represent an arbitrary cross section of cases before the courts monitored. The data collected from the monitoring of 585 trials during the Third Reporting Period represents a significantly larger sample than the data

<sup>19</sup> Article 48 of the Penal Code.

collected in the 199 trials monitored during the First Reporting Period and a slightly larger sample than the data collected in the 532 trials monitored during the Second Reporting Period. This shows an increase in the representative nature of the data.

## RIGHT TO A PUBLIC HEARING

Everyone has the right to have their guilt or innocence determined in a public trial,<sup>20</sup> except in certain exceptional circumstances.<sup>21</sup> The right to a public hearing involves a number of elements: trials should generally be open to the public and conducted orally; information on the venue and date of the trial should be made available to the public; and there should be adequate facilities for public attendance.<sup>22</sup> Moreover, Article 317 of the CCPC states that in all trials the judgment must be announced in a public session. Similarly Article 14 of the ICCPR provides that “*any judgment rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children*”.

FIGURE 2: RIGHT TO A PUBLIC HEARING

2(a) Was notice of the hearing posted on a public notice board outside the courtroom?						
Data	1 <sup>st</sup> Reporting Period		2 <sup>nd</sup> Reporting Period		3 <sup>rd</sup> Reporting Period	
	N <sup>o</sup>	%	N <sup>o</sup>	%	N <sup>o</sup>	%
Yes	5	3	0	0	234	40
No	194	97	532	100	351	60
2(b) Were members of the public obstructed from entering or dismissed from the courtroom?						
Data	1 <sup>st</sup> Reporting Period		2 <sup>nd</sup> Reporting Period		3 <sup>rd</sup> Reporting Period	
	N <sup>o</sup>	%	N <sup>o</sup>	%	N <sup>o</sup>	%
Yes	0	0	0	0	0	0
No	199	100	532	100	585	100

The data for question 2(a) indicates a significant improvement in public notification of hearings at the Courts, with an increase from 3% of all trials monitored in the First Reporting Period having posted public notices giving details of the time and location of hearings to 40% in the Third Reporting Period. The introduction of a policy of posting details to a public notice board on a regular basis by the Phnom Penh Court has contributed to the improvements we have seen in adherence to this fair trial right. The right to public hearing is one of the rights that will receive closer analysis in the Analysis section, and will be discussed in further detail in that section.

<sup>20</sup>Article 316 of the CCPC; Article 10 of the UDHR; Article 14(1) of the ICCPR.

<sup>21</sup>Article 316 of the CCPC states that the court may order a complete or partial *in camera* hearing if it considers that a public hearing will cause significant damage to public order or morality, but a written explanation of such a decision must be included alongside the judgment on the merits of the case. Article 14(1) of the ICCPR provides that the press and public may be excluded from all or parts of a trial for reasons of “*morals, public order (ordre public) or national security in a democratic society*”, where publicity would prejudice the interests of justice or where the interest of the private lives of the parties so requires.

<sup>22</sup>United Nations Human Rights Committee, Communication No. 215/1986, *Van Meurs v. The Netherlands*, para. 6.2. Cited in supra Note 12.

The data for question 2(b) reflects no change from the First and Second Reporting Period. The data for this question must be read with the caveat that, once inside the courtroom for the commencement of the trial, the Trial Monitors' ability to observe obstruction of the public is limited. However, despite this limitation, it is encouraging that the Trial Monitors did not directly observe any person being excluded from a trial through either refusal of entry or ejection from the courtroom. Question 2(b) was removed from the Checklist used between July 1, 2010 and September 1, 2010 but was reinstated into the Checklist used between October 1, 2010 and December 31, 2010. Despite the question being removed for a short period of the Third Reporting Period, the Trial Monitors, by virtue of being at the trial to monitor, were still able to observe directly, subject to the caveat noted above, whether or not any person was being excluded from a trial.

## RIGHT TO LIBERTY AND TO BE TRIED WITHOUT UNDUE DELAY

There is a presumption in both Cambodian and international law against pre-trial detention; when charged with an offense, release pending trial should be considered as the default option as a matter of principle and pre-trial detention shall not be considered as the general rule.<sup>23</sup> The limited justifications for ordering pre-trial detention and the time limits for provisional detention under Cambodian law are set out in the CCPC.<sup>24</sup>

FIGURE 3: PRE-TRIAL DETENTION

13(d) Was there pre-trial detention?						
Data	1 <sup>st</sup> Reporting Period		2 <sup>nd</sup> Reporting Period		3 <sup>rd</sup> Reporting Period	
	N <sup>o</sup>	%	N <sup>o</sup>	%	N <sup>o</sup>	%
Yes	176	88	446	84	465	80
No	7	4	8	1.5	114	19
I/U	16	8	2	0.5	6	1
N/A	0	0	76	14	0	0

There has been a slight decrease in the percentage of cases in which there has been use of pre-trial detention from the First Reporting Period to the Second Reporting Period, and then from the Second Reporting Period to the Third Reporting Period. While the drop in the percentage of pre-trial detention is commendable, the overall rate of pre-trial detention has remained high. The prevalence of pre-trial detention throughout the Third Reporting period is concerning given the statutory presumption against pre-trial detention. When examining the use of pre-trial detention in respect of each individual accused, of the 1029 accused monitored, Trial Monitors recorded that 660 accused— or 64% of individual accused — had been placed in pre-trial detention. This data is analyzed in more detail in the Analysis section.

There were a number of trials monitored in which the pre-trial detention preceding the hearing exceeded statutory limits. Figure 4 below sets out the details of the eight individual accused in trials monitored during the Third Reporting Period in which the period of detention exceeded statutory limits.

<sup>23</sup> Article 203 of the CCPC states: "In principle, the charged person shall remain at liberty. Exceptionally, the charged person may be provisionally detained under the conditions stated in this section." Article 9(3) of the ICCPR states: "It shall not be the general rule that persons awaiting trial shall be detained in custody."

<sup>24</sup>See Articles 205 and 208-214 of the CCPC.

FIGURE 4: PRE-TRIAL DETENTION EXCEEDING STATUTORY LIMITS

3 <sup>rd</sup> Reporting Period							
N°	Case Number	Maximum days of legal pre-trial detention	Days in Pre-Trial Detention	Days in excess of pre-trial detention	Category of Charge	Legislation accused charged under	Length of eventual sentence
1	KD/07-07-2010	310	365	55	Mis	Battery with injury/UNT AC Law	18 months
2	KD/23-07-2010	682	684	2	Fel	Robbery/ Law on Aggravating Circumstances of felonies	7 years
3	KD/11-08-2010	682	684	2	Fel	Robbery / Law on Aggravating Circumstances of felonies	6 years
4	KD/11-11-2010	682	793	111	Fel	Robbery/ Law on Aggravating Circumstances of felonies	7 years
5	KD/18-11-2010	310	472	162	Mis	Battery with injury/UNT AC Law	16 months
6	KD/08-12-2010	310	388	78	Mis	Fraud/UNT AC Law	18 months
7	KD/14-12-2010	310	322	12	Mis	Incest/ Law on monogamy	1 year
8	PP/06-12-2010	310	396	86	Mis	Use of illegal weapon/ Law on the control of arms	14 months

For the purposes of Figure 4, pre-trial detention is deemed to start on the day of detention and end on the day of the trial or the day of the verdict, should the verdict be delivered at a later date.

The statutory limits on legal pre-trial detention in Figure 4 were calculated according to Articles 208 and 209 of the CCPC, which sets out the maximum legal duration of pre-trial detention for both felonies and misdemeanors. Article 249 of the CCPC provides for an additional four months of detention in anticipation of a trial following the closing of an investigation. This additional period has also been taken into account in the figures set out in the field titled “*Maximum days of legal pre-trial detention*” above. The maximum period of pre-trial detention for a felony is 22 months (or 682 days). The maximum for a misdemeanor is 10 months (or 310 days).

As will be discussed in further detail in the Analysis section, it is particularly concerning that five of the eight trials in which pre-trial detention prior to the hearing exceeded statutory limits, involved misdemeanor charges.

## RIGHT TO UNDERSTAND THE NATURE OF THE CHARGE

Accused persons have the right to understand the nature of the offence with which they are being charged.<sup>25</sup> This includes the criminal offence they are alleged to have committed and the alleged facts giving rise to the accusations. This information must be provided to a suspect in a language he or she understands.<sup>26</sup>

FIGURE 5: RIGHT TO UNDERSTAND THE NATURE OF THE CHARGE

3(a) Did the Judge announce the case to be heard?						
Data	1 <sup>st</sup> Reporting Period		2 <sup>nd</sup> Reporting Period		3 <sup>rd</sup> Reporting Period	
	N <sup>o</sup>	%	N <sup>o</sup>	%	N <sup>o</sup>	%
Yes	196	98	493	93	556	95
No	3	2	39	7	29	5
3(b) Did the Judge state the charge?						
Data	1 <sup>st</sup> Reporting Period		2 <sup>nd</sup> Reporting Period		3 <sup>rd</sup> Reporting Period	
	N <sup>o</sup>	%	N <sup>o</sup>	%	N <sup>o</sup>	%
Yes	198	99	503	95	545	93
No	1	1	29	5	40	7
3(c) Did the Judge state the relevant law?						
Data	1 <sup>st</sup> Reporting Period		2 <sup>nd</sup> Reporting Period		3 <sup>rd</sup> Reporting Period	
	N <sup>o</sup>	%	N <sup>o</sup>	%	N <sup>o</sup>	%
Yes	169	85	313	59	299	51
No	30	15	219	41	286	49
Did the Judge state the date and location that the alleged offense occurred?						

<sup>25</sup>Articles 97 and 325 of the CCPC; Articles 14(3)(a) & (f) of the ICCPR.

<sup>26</sup>Article 330 of the CCPC; Article 14(3)(f) of the ICCPR.

Data	1 <sup>st</sup> Reporting Period		2 <sup>nd</sup> Reporting Period	
	N <sup>o</sup>	%	N <sup>o</sup>	%
Yes	197	99	398	75
No	2	1	134	25

### 3(d) Did the Judge state the date of alleged crime?

Data	3 <sup>rd</sup> Reporting Period	
	N <sup>o</sup>	%
Yes	417	71
No	168	29

### 3(e) Did the Judge state the place of alleged crime?

Data	3 <sup>rd</sup> Reporting Period	
	N <sup>o</sup>	%
Yes	394	67
No	191	33

### 3(f) Did the Judge state the parties involved?

Data	1 <sup>st</sup> Reporting Period		2 <sup>nd</sup> Reporting Period		3 <sup>rd</sup> Reporting Period	
	N <sup>o</sup>	%	N <sup>o</sup>	%	N <sup>o</sup>	%
Yes	196	98	443	83	512	88
No	3	2	89	17	73	12

### 3(g) If required, was an interpreter provided?

Data	1 <sup>st</sup> Reporting Period		2 <sup>nd</sup> Reporting Period		3 <sup>rd</sup> Reporting Period	
	N <sup>o</sup>	%	N <sup>o</sup>	%	N <sup>o</sup>	%
Yes	0	0	18	3	23	4
No	0	0	1	1	1	0.2
N/A	199	100	513	96	561	95.8

### 3(h) If required, were provisions made for disabilities?

Data	1 <sup>st</sup> Reporting Period		2 <sup>nd</sup> Reporting Period		3 <sup>rd</sup> Reporting Period	
	N <sup>o</sup>	%	N <sup>o</sup>	%	N <sup>o</sup>	%
Yes	0	0	0	0	2	1



No	1	1	3	1	0	0
N/A	198	99	529	99	583	99

The judge announced the case to be heard and the charge(s) facing the accused in 95% and 93% of trials monitored during the Third Reporting Period. This represents a slight decrease from the First and Second Reporting Periods. There were significant decreases in the percentage of trials in which the judge stated the relevant law, the parties involved, and the date of the alleged offense. In one trial involving a Vietnamese national who had a limited understanding of Khmer and who therefore had problems understanding the proceedings, an interpreter was required but not provided.

## EXPLANATION OF RIGHTS

In order to exercise one's rights, one must know that they exist. CCHR monitors whether judges inform accused of a number of basic rights. Whether or not a judge sufficiently informs an accused of basic rights is a particular issue with regards to those individuals charged with a misdemeanor who appear before a court without a lawyer capable of informing them of their basic rights at trial. Certain rights may require an explanation, particularly where they are legalistic in nature. The trial monitoring data distinguishes between informing the accused of a right and providing an explanation of a right. Sixty-seven trials were held with the accused *in absentia*; data for question 4 of the Checklist was therefore not recorded for these trials.

As Figure 6 below shows, judges either informed or informed and explained to the accused their basic rights in a significantly lower percentage of trials than in the First and Second Reporting Periods. The number of cases in which the judge neither informed nor explained tripled since the First Reporting Period. This is an extremely concerning development considering that the data collected by Trial Monitors indicates that the number of trials where the accused charged with a misdemeanor has legal representation has also decreased (see Figure 8, Right to Legal Representation). In the absence of a lawyer capable of informing them of their rights, individual accused are reliant on judges to ensure they have an understanding of their basic rights. Without such information or explanation, accused are vulnerable to violations of their basic rights and the integrity of the trial at hand is put into doubt.

FIGURE 6: EXPLANATION OF RIGHTS

4(a) Did the Judge inform (I) and explain (E) to the accused his/her right to legal representation or to self-defense?						
Data	1 <sup>st</sup> Reporting Period		2 <sup>nd</sup> Reporting Period		3 <sup>rd</sup> Reporting Period	
	N <sup>o</sup>	%	N <sup>o</sup>	%	N <sup>o</sup>	%
I	108	54	354	67	276	47
I&E	75	38	51	9	138	24
Neither	12	6	73	14	104	18
N/A	4	2	54	10	67	11

**4(b) Did the Judge inform (I) and explain (E) to the accused his/her right not to answer?**

Data	1 <sup>st</sup> Reporting Period		2 <sup>nd</sup> Reporting Period		3 <sup>rd</sup> Reporting Period	
	N <sup>o</sup>	%	N <sup>o</sup>	%	N <sup>o</sup>	%
I	74	37	80	15	55	9
I&E	38	19	11	2	29	5
Neither	83	42	387	73	434	75
N/A	4	2	54	10	67	11

**4(c) Did the Judge inform (I) and explain (E) to the accused his/her right to change the judge?**

Data	1 <sup>st</sup> Reporting Period		2 <sup>nd</sup> Reporting Period		3 <sup>rd</sup> Reporting Period	
	N <sup>o</sup>	%	N <sup>o</sup>	%	N <sup>o</sup>	%
I	121	61	281	53	189	32
I&E	63	32	39	7	149	26
Neither	11	5	158	30	180	31
N/A	4	2	54	10	67	11

**4(d) Did the Judge inform (I) and explain (E) to the accused his/her right to have the last word?**

Data	1 <sup>st</sup> Reporting Period		2 <sup>nd</sup> Reporting Period		3 <sup>rd</sup> Reporting Period	
	N <sup>o</sup>	%	N <sup>o</sup>	%	N <sup>o</sup>	%
I	121	61	337	63	298	51
I&E	67	34	40	8	111	19
Neither	7	3	101	19	109	19
N/A	4	2	54	10	67	11

**RIGHT TO ADEQUATE TIME AND FACILITIES TO PREPARE A DEFENSE**

An individual facing a criminal charge must be provided with adequate time and facilities to answer the charge against him/her.<sup>27</sup> What constitutes ‘adequate’ time will depend on – among other things – the nature of the charge and the complexity of the case. There is an obligation to grant reasonable requests for adjournments, in particular, when the accused is charged with a serious criminal offense and additional time for preparation of the

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<sup>27</sup>Article 14(3)(b) of the ICCPR; Article 8 of the UNBPRL.

defense is needed.<sup>28</sup> The facilities owed to an accused under this right include access to documents and other evidence, which the accused requires to prepare their case, as well as the opportunity to engage and communicate with counsel.

**FIGURE 7: RIGHT TO ADEQUATE TIME AND FACILITIES TO PREPARE A DEFENSE**

<b>15(a) Was there anything to suggest that the defense lawyer was assigned on the day of the trial?</b>						
Data			2 <sup>nd</sup> Reporting Period		3 <sup>rd</sup> Reporting Period	
	N <sup>o</sup>	%	N <sup>o</sup>	%	N <sup>o</sup>	%
Yes	8	1.5	15	3		
No	524	98.5	570	97		
<b>15(b) Was the issue of adequate time and facilities for preparation raised by the defense?</b>						
Data	1 <sup>st</sup> Reporting Period		2 <sup>nd</sup> Reporting Period		3 <sup>rd</sup> Reporting Period	
	N <sup>o</sup>	%	N <sup>o</sup>	%	N <sup>o</sup>	%
Yes	60	30	8	2	3	0.01
No	135	68	304	57	582	99.5
N/A	4	2	220	41		

Question 15(a) indicates whether there was anything said by the judge, court clerk or lawyers to suggest that the defense lawyer had been assigned to the case on the day of the trial. There were 15 trials in which it appeared that the defense lawyer had been appointed on the day of the trial and therefore may have had inadequate time and facilities to prepare a defense. In one case, involving three accused charged with robbery according to Article 6 of the Law on Aggravating Circumstances of Felony, all three accused were absent at the day of the trial and the Trial Monitors heard the court clerk assigning a lawyer on the day of the hearing.

## **RIGHT TO LEGAL REPRESENTATION AND TO BE PRESENT AT TRIAL**

All persons accused of an offense have the right to be present at their trial and to defend themselves in person or through legal representation of their own choosing.<sup>29</sup> The assistance of a lawyer is compulsory under Cambodian law where the case involves a felony or where the accused is a minor.<sup>30</sup> Legal procedures and the workings of a law court can be foreign and intimidating to those accused of an offense. To enable a fair trial it is vital to ensure that those accused of offenses have the opportunity to employ an expert advocate with the ability to explain the charges against them and their rights, guide them through the trial process, and represent and defend their interests in court.

<sup>28</sup>Human Rights Committee, *Views of the Human Rights Committee under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, Communication No. 913/2000: Chan v. Guyana* (CCPR/C/85/D/913/2000), January 23, 2006, para. 6.3; Human Rights Committee, *Admissibility: Communication No. 594/1992: Phillip v. Trinidad and Tobago* (CCPR/C/56/D/594/1992), March 15, 1996, para. 6.8.

<sup>29</sup> Article 14(3)(d) of the ICCPR; Article 300 of the CCPC.

<sup>30</sup>Article 301 of the CCPC.

FIGURE 8: RIGHT TO LEGAL REPRESENTATION AND TO BE PRESENT AT TRIAL

16(a) Was the accused present?						
Data					3 <sup>rd</sup> Reporting Period	
					N°	%
	Yes					518
No					67	11
16(b) Was the accused represented by a lawyer?						
Data	1 <sup>st</sup> Reporting Period		2 <sup>nd</sup> Reporting Period		3 <sup>rd</sup> Reporting Period	
	N°	%	N°	%	N°	%
Yes	135	68	312	59	392	67
No	64	32	220	41	193	33
In Felony Trials: 7(a) Was the accused represented by a lawyer?						
Data	1 <sup>st</sup> Reporting Period		2 <sup>nd</sup> Reporting Period		3 <sup>rd</sup> Reporting Period	
	N°	%	N°	%	N°	%
Yes	100	95	238	97	275	100
No	5	5	7	3	0	0
In Misdemeanor Trials: 7(a) Was the accused represented by a lawyer?						
Data	1 <sup>st</sup> Reporting Period		2 <sup>nd</sup> Reporting Period		3 <sup>rd</sup> Reporting Period	
	N°	%	N°	%	N°	%
Yes	35	37	74	26	117	38
No	59	63	213	74	193	62

Of the 67 trials held in absentia, 15 were felony trials, involving 15 accused, and 52 were misdemeanor trials, involving 76 accused. With regards to the right to legal representation, Trial Monitors recorded that of the 1029 accused monitored, 633 – or 62% of the individual accused, were represented by a lawyer. While it was recorded that in all felony trials there was legal representation, when looking at each of the individual accused in these cases, the figure drops slightly to 91%. With regards to trials involving accused charged with misdemeanors, 38% had legal representation. When this is examined in relation to each individual accused, the percentage drops to 30%. With regards to trials held in absentia, all accused charged with felonies were represented, whereas for individual accused tried for misdemeanors, only 33 accused or 43%, had legal representation. The data on the right to legal representation is discussed in more detail in the Analysis section of this Report.

## PRESUMPTION OF INNOCENCE

Everyone charged with a criminal offense has the right to be presumed innocent until proven guilty according to law.<sup>31</sup> This is a fundamental fair trial right that is recognized universally. It requires careful attention by those involved at all stages of the criminal justice system. The data in Figure 9 below indicates whether the accused may have been treated as guilty prior to the verdict and/or where factors may have influenced the judge to presume guilt.

FIGURE 9: PRESUMPTION OF INNOCENCE

17(a) Did the accused appear in prison uniform?						
Data			2 <sup>nd</sup> Reporting Period		3 <sup>rd</sup> Reporting Period	
	N <sup>o</sup>	%	N <sup>o</sup>	%	N <sup>o</sup>	%
Yes	318	60	331	57		
No	160	30	187	32		
N/A	54	10	67	11		
17(b) Was the accused handcuffed throughout the trial?						
Data	1 <sup>st</sup> Reporting Period		2 <sup>nd</sup> Reporting Period		3 <sup>rd</sup> Reporting Period	
	N <sup>o</sup>	%	N <sup>o</sup>	%	N <sup>o</sup>	%
Yes	0	0	0	0	1	0.2
No	195	98	478	90	517	88.8
N/A	4	2	54	10	67	11
17(c) Were statements made by the Judge about the guilt of the accused prior to the delivery of verdict?						
Data	1 <sup>st</sup> Reporting Period		2 <sup>nd</sup> Reporting Period		3 <sup>rd</sup> Reporting Period	
	N <sup>o</sup>	%	N <sup>o</sup>	%	N <sup>o</sup>	%
Yes	20	10	5	1	1	0.1
No	179	90	527	99	584	99.9

The data for question 17(a) indicates a slight drop in the overall percentage of trials in which defendants appeared before the court in prison uniform. While of the 1029 individual accused monitored, 478 - or 46% of them - appeared in prison uniform, defendants still appeared before the court in prison uniform in more than half of the overall trials monitored, which is prejudicial to the interests of those defendants as the wearing of prison

<sup>31</sup>Article 11(1) of the UDHR; Article 14(2) of the ICCPR; Article 38 of the Constitution. Article 38 of the Constitution specifically provides: "Any case of doubt, it shall be resolved in favor of the accused. The accused shall be considered innocent until the court has judged finally on the case."

uniforms implies guilt. Trial Monitors noted a correlation between those held in pre-trial detention and the wearing of uniforms, suggesting that those in pre-trial detention were more susceptible to situations affecting their presumption of innocence (see the Right to be Tried Without Undue Delay in the Analysis section).

In relation to 17(c) there were three individual accused whom the judge was observed to have made a statement about their guilt or innocence prior to delivering the verdict. This represents less than 1% of the accused monitored and is a decline from 10% from the First Reporting Period, a continuation of a trend observed in the Second Reporting Period. While any such statements are extremely concerning and their potential effect on an individual case significant, the decrease in instances of such statements is another positive development.

The data for question 17(b) indicates that there was one instance in the Third Reporting Period in which a defendant appeared before the court in handcuffs. This case involved six defendants, two of whom were handcuffed and was the first case that CCHR monitored in which the practice of handcuffing defendants was used. Defendants at trial should generally not appear in handcuffs unless it is strictly required for security purposes, as this creates the impression that the individual is guilty and a dangerous criminal. The prison officers, without any order or prompting from the judge, handcuffed the two defendants after they had finished answering questions, apparently because they were worried that given the number of accused in the courtroom, these two accused would try to escape. The Trial Monitor did not observe any reasons why the prison officers believed that the two accused would try to escape. It is hoped that this situation was a one-off and does not show a change in practice of the courts monitored that was not in existence during the First and Second Reporting Periods whereby prison officers or the police can make unilateral decisions about handcuffing prisoners without the judge considering the rights of the accused.

## INDEPENDENCE, IMPARTIALITY AND PROFESSIONALISM OF THE JUDGE

Every accused person has the right to be tried by an impartial body free from bias or influence.<sup>32</sup> The right is so fundamental that the UN Human Rights Committee has stated that it is “*an absolute right that may suffer no exception.*”<sup>33</sup> The Code of Ethics for Judges and Prosecutors (the “CEJP”), issued in 2007 by the Supreme Council of Magistracy (“SCM”) – the body responsible for regulating and disciplining judges – sets out ethical standards to which Cambodian judges must adhere. Article 2 states that all judges “*shall fulfill their duty independently with basis of evaluation of fact and legal knowledge without being subjected to such influences as persuasion, pressure, intimidation or interference*”. The data in Figure 10 below indicates whether any developments at trial could be perceived as calling into question the impartiality of the judge.

FIGURE 10: INDEPENDENCE AND IMPARTIALITY OF THE JUDGE

8(a) Was there anything to suggest that the judge had an interest in the case beyond their usual judicial role?				
Data			3rd Reporting Period	
			N°	%
Yes			0	0

<sup>32</sup>Article 10 of the UDHR; Article 14(1) of the ICCPR; Articles 1-7 of the BPIJ; Article 128 of the Constitution.

<sup>33</sup>Human Rights Committee, Views of the Human Rights Committee under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, Communication No. 263/1987; *M. Gonzalez del Rio v. Peru* (CCPR/C/46/D/263/1987), October 28, 1992, para. 5.2.

No					585	100
<b>9(b) Was there anything to suggest that any party spoke to the Judge during deliberation?</b>						
Data	<b>1<sup>st</sup> Reporting Period</b>		<b>2<sup>nd</sup> Reporting Period</b>		<b>3<sup>rd</sup> Reporting Period</b>	
	N <sup>o</sup>	%	N <sup>o</sup>	%	N <sup>o</sup>	%
Yes	32	16	34	6	43	7.5
No	167	84	498	94	92	15.5
N/A					187	32
I/U					263	45

Articles 55 and 288 of the CCPC prohibit a trial judge from sitting in adjudication of a case in which they have also acted as investigating judge, prosecutor or deputy prosecutor. The data for question 8(a) shows that there were no trials in which the trial judge had also acted in another role on the same case. This finding was the same during both the First and Second Reporting Periods.

The data for question 9(b) indicates a reduction in the percentage of trials in which a party to proceedings or the court clerk appeared to speak to the judge during deliberation compared to the First Reporting Period, though a slight increase in comparison to the Second Reporting Period. This data will be examined in further detail in the Analysis section of this Report.

Monitoring of judges' use of mobile phones during hearings began midway through the First Reporting Period, after Trial Monitors observed that this was a common practice. During the First Reporting Period, data was therefore only collected for 60 of the 199 trials monitored.

**FIGURE 11: JUDGES' USE OF MOBILE PHONES**

<b>8(e) Did the judge answer a mobile telephone during the hearing?</b>						
Data	<b>1<sup>st</sup> Reporting Period</b>		<b>2<sup>nd</sup> Reporting Period</b>		<b>3<sup>rd</sup> Reporting Period</b>	
	N <sup>o</sup>	%	N <sup>o</sup>	%	N <sup>o</sup>	%
Yes	17	28	151	28	126	22
No	43	72	381	72	459	78
<b>If yes, how did the judge respond?</b>						
Data	<b>1<sup>st</sup> Reporting Period</b>		<b>2<sup>nd</sup> Reporting Period</b>		<b>3<sup>rd</sup> Reporting Period</b>	
	N <sup>o</sup>	%	N <sup>o</sup>	%	N <sup>o</sup>	%
Answer briefly and hung up	11	65	82	54	82	65

Conducted conversation	a	6	35	69	46	44	34
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The data for question 8(e) indicates that while there has been a reduction in the percentage of cases involving instances of mobile phone use by judges, the practice remained common in the Third Reporting Period. As is discussed in the Analysis section, use of mobile telephones in court may influence public perceptions of the court by raising concerns that judges are open to influence from external parties during proceedings.

## EVIDENCE RIGHTS (INCLUDING THE RIGHT TO CALL AND EXAMINE WITNESSES)

The right to a fair trial is linked to equality of arms – the principle by which everyone who is a party to proceedings must have a reasonable opportunity to present their case to the court under conditions which do not place them at a substantial disadvantage vis-à-vis their opponent.<sup>34</sup> As the court is required to make its decision on the basis of evidence alone, all parties must have equal opportunity to present evidence in support of their case.<sup>35</sup> Evidence is usually provided in one or more of three ways, by: (1) witness testimony (such as a statement from a person who saw what happened); (2) presentation of documents (such as a land title certificate); and/or (3) physical evidence (such as a bloodied weapon).

FIGURE 12: EVIDENCE

6(a) Was evidence presented?						
Data	1 <sup>st</sup> Reporting Period		2 <sup>nd</sup> Reporting Period		3 <sup>rd</sup> Reporting Period	
	N <sup>o</sup>	%	N <sup>o</sup>	%	N <sup>o</sup>	%
Yes	153	77	512	96	569	97
No	46	13	20	4	16	3
7(a) Was there anything to suggest that any party was not given the opportunity to present evidence?						
Data	1 <sup>st</sup> Reporting Period		2 <sup>nd</sup> Reporting Period		3 <sup>rd</sup> Reporting Period	
	N <sup>o</sup>	%	N <sup>o</sup>	%	N <sup>o</sup>	%
Yes	3	2	3	1	0	0
No	196	98	529	99	585	100

The data for question 6(a) indicates that evidence was presented in a higher proportion of trials in the Third Reporting Period than in the First Reporting Period, with a slight increase from the Second Reporting Period, a

<sup>34</sup>Article 14(3)(e) of the ICCPR.

<sup>35</sup>Article 334 of the CCPC.



positive trend. There were no cases in which it appeared that a party was denied the opportunity to present evidence.

Related to the principle of equality of arms is the right of each party to proceedings to call witnesses in support of their case and to examine witnesses called by the other parties to the proceedings.<sup>36</sup> The accused has the right to call and examine witnesses on his behalf under the same conditions as witnesses against him.<sup>37</sup> The right should not be read as an unqualified right to force witnesses' attendance or as a right to call an indeterminate number of witnesses. Article 322 of the CCPC indicates that witnesses should retreat to a waiting room until they are called upon to testify and should not be able to see or hear anything taking place in the courtroom prior to giving testimony. While in the waiting room, witnesses are not allowed to communicate with one another.<sup>38</sup> These safeguards aim to avoid witnesses adapting or doctoring testimony to suit developments in the proceedings.

**FIGURE 13: RIGHT TO CALL AND EXAMINE WITNESSES**

<b>5(a) Was there anything to suggest that any party was not given the opportunity to call witnesses?</b>						
Data	1 <sup>st</sup> Reporting Period		2 <sup>nd</sup> Reporting Period		3 <sup>rd</sup> Reporting Period	
	N <sup>o</sup>	%	N <sup>o</sup>	%	N <sup>o</sup>	%
Yes	4	2	1	0.18	2	0.4
No	195	98	531	99.82	583	99.6
<b>7(b) Was there anything to suggest that any party was not given the opportunity to examine witnesses?</b>						
Data	1 <sup>st</sup> Reporting Period		2 <sup>nd</sup> Reporting Period		3 <sup>rd</sup> Reporting Period	
	N <sup>o</sup>	%	N <sup>o</sup>	%	N <sup>o</sup>	%
Yes	0	0	3	0.56	0	0
No	58	29	79	14.44	119	20
N/A	141	71	450	85	466	80
<b>5(b) Were the witnesses present in the courtroom before they were questioned?</b>						
Data	1 <sup>st</sup> Reporting Period		2 <sup>nd</sup> Reporting Period		3 <sup>rd</sup> Reporting Period	
	N <sup>o</sup>	%	N <sup>o</sup>	%	N <sup>o</sup>	%
Yes	10	5	28	5	22	4
No	48	24	54	10	97	16
N/A	141	71	450	85	466	80

<sup>36</sup> Article 14(3)(e) of the ICCPR; Article 298, 324 and 326 of the CCPC.

<sup>37</sup> Article 14(3)(e) of the ICCPR.

<sup>38</sup> Article 322 of the CCPC.

There remained very few cases – less than 1% overall – in the Third Reporting Period in which there was an indication that one of the parties was not given the opportunity to summon witnesses. In relation to question 7(b), in all the trials monitored parties were given the opportunity to examine witnesses.

## RIGHT TO FULL DISCLOSURE OF EVIDENCE

The right to full disclosure of evidence means that the defense has the right to have access to all documents and to be made aware of all evidence relevant to the trial. The fundamental document is the case file prepared by the investigating judge containing the indictment that is sent to the trial court president for the fixing of a date for trial. This dossier contains all of the evidence gathered and the conclusions made by the investigating judge. The investigating judge has an obligation to collect both inculpatory and exculpatory evidence during his or her investigation.<sup>39</sup> The right of full disclosure for the preparation of the defense includes the right of the lawyer for a defendant to examine the evidence against his client (under the supervision of the court clerk).<sup>40</sup>

FIGURE 14: RIGHT TO FULL DISCLOSURE OF EVIDENCE

7(c) Was there anything to suggest that the same evidence was not available to both sides?						
Data	1 <sup>st</sup> Reporting Period		2 <sup>nd</sup> Reporting Period		3 <sup>rd</sup> Reporting Period	
	N <sup>o</sup>	%	N <sup>o</sup>	%	N <sup>o</sup>	%
Yes	3	2	4	1	0	0
No	196	98	528	99	569	97
N/A					16	3

The data collected shows that there were no trials in which there were an indication that the same evidence was not available to both sides, a welcome development from the First and Second Reporting Period. It should be noted that unlike the First and Second Reporting Periods, the Checklist used during the Third Reporting Period allowed for Trial Monitors to indicate N/A with respect to question 12(a) in circumstances where no evidence was presented at trial; this occurred in 16 separate cases.

## RIGHT NOT TO BE COMPELLED TO CONFESS GUILT

The right not to be compelled to confess guilt encompasses the absolute prohibition against torture and cruel, inhuman or degrading treatment or punishment. It implies that no direct or indirect physical or psychological pressure should be inflicted on the accused by the investigating or judicial authorities in order to secure a confession of guilt.

<sup>39</sup>Article 127 of the CCPC.

<sup>40</sup>Article 319 of the CCPC; Article 14(3)(b) of the ICCPR.

FIGURE 15: RIGHT NOT TO BE COMPELLED TO CONFESS GUILT

<b>14(c) Was there anything to suggest that threats were made to coerce the accused into confessing to the alleged crime?</b>						
Data	1 <sup>st</sup> Reporting Period		2 <sup>nd</sup> Reporting Period		3 <sup>rd</sup> Reporting Period	
	N <sup>o</sup>	%	N <sup>o</sup>	%	N <sup>o</sup>	%
Yes	6	3	28	5	39	7
No	112	56	261	49	409	70
N/A	81	41	243	46	137	23

<b>14(d) Was there anything to suggest that violence or torture were used to coerce the accused into confessing to the alleged crime?</b>						
Data	1 <sup>st</sup> Reporting Period		2 <sup>nd</sup> Reporting Period		3 <sup>rd</sup> Reporting Period	
	N <sup>o</sup>	%	N <sup>o</sup>	%	N <sup>o</sup>	%
Yes	10	5	35	7	44	8
No	108	54	254	48	541	92
N/A	81	41	243	45		

In relation to question 14(d), “N/A” was removed from the Checklist used in the Third Reporting Period. Where no confession was presented at court, Trial Monitors checked “No” on the Checklist.

For the purposes of question 14(c), coercion was defined as improper psychological pressure such as threats, while question 14(d) was used to monitor whether there was anything to indicate that the accused had been pressured to confess to a crime through the application of violence or torture. Examples of indications noted by the Trial Monitors that the accused had been pressured to confess through violence or torture included specific allegations of improper treatment from the accused and observable signs of physical abuse. It should be noted that the data in this question is speculative as it is impossible for Trial Monitors to conclusively determine whether allegations made by an accused in court are genuine.

There were 346 trials in which a confession was presented as evidence against the accused, 59% of the total trials monitored during the Third Reporting Period. This is the same as the First Reporting Period and shows a slight increase from the Second Reporting Period, in which a confession was presented as evidence in 54% of trials respectively, with the reliance on confessions for convictions remaining high. Of the 346 trials in which a confession was presented as evidence, there were indications that the confession may have resulted from threats or psychological pressure in 39 – or 7% - of the total trials monitored, and indications that the confession may have resulted from pressure in the form of violence or torture in 44 – or 8% - of the total trials monitored. Both of these figures represent increases from the First Reporting Period, where the corresponding figures were 3% and 5% respectively, and from the Second Reporting Period, where the corresponding figures were 5% and 7% respectively. In one case involving an accused charged with robbery, the accused appeared to confess his guilt prior to the hearing. At the request of the accused no lawyer was present during his interrogation, however, the accused alleged that he was threatened and hit by the police to get his confession.

The right not to be compelled to confess guilt was one of the rights that received closer analysis in the Second Bi-annual Report, although as that report was released after the conclusion of the Third Reporting Period neither the courts or the police had an opportunity to respond to the recommendations made in that Report. At the time of writing, the Phnom Penh Court indicated that the use of cameras in the interrogation room, one of the recommendations proposed by the Second Bi-annual Report, was not a cost effective or practical means of addressing the issue. Representatives of the Phnom Penh Court suggested, in dialogue with the CCHR, that accused often claim that they are forced to confess when in fact no such force was ever used.

## PROHIBITION AGAINST RETROACTIVE APPLICATION OF CRIMINAL LAW

A fundamental principle of criminal law is that no one can be found guilty of a criminal offence for an act or omission that did not constitute a criminal offense at the time the alleged action or omission took place. Similarly, a heavier penalty may not be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of a lighter penalty, the lighter penalty shall apply. The prohibition against retroactive application of criminal law is provided for in international law by Article 11(2) of the UDHR and Article 15 of the ICCPR and reflected in Cambodian law in Article 3 of the Penal Code.

FIGURE 16: PROHIBITION AGAINST RETROACTIVE APPLICATION OF PENAL LEGISLATION

18(a) Was there anything to suggest that the accused has been tried for this crime previously?				
Data			3 <sup>rd</sup> Reporting Period	
			N <sup>o</sup>	%
Yes			1	0.1
No			1028	99.9

21(f) Was the sentence within the range of penalties applicable at the time the offense was committed?				
Data			3 <sup>rd</sup> Reporting Period	
			N <sup>o</sup>	%
Yes			166	60.1
No			0	0
N/A			110	39.9

Question 21(f) was added to the Checklist in October 2010 and thus only applied in respect of 276 trials monitored. The question was included as a result of the Penal Code coming into force which states that new

provisions which provide for less severe sentences are immediately applicable whereas new provisions which provide for more severe sentence will only be applicable to acts committed after the legislation comes into force.<sup>41</sup> “N/A” in this instance includes 88 trials where the verdict was unknown, 16 trials where the verdict was not guilty and 6 trials were the judge called for a reinvestigation. While the retrospective application of the Penal Code was not an issue during most of the Third Reporting Period given that the Penal Code only entered into force towards the end of the Third Reporting Period, it may become an issue in time as the judiciary applies the provisions of this new and extensive instrument.

Trial Monitors observed an accused being tried for a case that had already been heard on only one occasion. In that case the accused was charged with breach of trust according to Article 46 of the UNTAC Law. The victim gave the accused US\$5,000 to keep for her. Ten days later the accused told the victim that the money had been robbed. During the hearing, which took place in Kandal Court on October 15, 2010, the judge and the prosecutor were heard to say that this case had already been tried on May 5, 2010. The facts, parties to the proceeding and charges were all the same. The accused had been convicted of the offence and sentenced to one year in prison and \$5,000 compensation. The verdict of the new case is unknown.

## TRIALS INVOLVING JUVENILES

Juveniles who are accused of having committed a criminal offense are entitled to all the fair trial rights that apply to adults, as well as additional protections in recognition of their age, maturity, and intellectual development.

FIGURE 17: TRIALS INVOLVING A JUVENILE ACCUSED

Data	1 <sup>st</sup> Reporting Period		2 <sup>nd</sup> Reporting Period		3 <sup>rd</sup> Reporting Period	
	N <sup>o</sup>	%	N <sup>o</sup>	%	N <sup>o</sup>	%
Number of Trials	26		46		48	
Felony	16	62	33	72	30	62
Misdemeanor	10	48	13	28	18	38

In the Third Reporting Period, 48 of the 585 trials monitored involved juvenile accused – 8% of the total trials monitored. In total 59 individual juveniles were monitored over the course of the Third Reporting Period.

## JUVENILES – PRIVACY

Criminal trials involving adults should generally be held in public in order to provide for the right to a public hearing, an important safeguard whereby the public acts as a check on the exercise of authority by the judiciary. However, when a trial involves a juvenile it is legitimate to restrict those who attend the trial in order to protect the privacy of the juvenile and avoid stigmatization.

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<sup>41</sup> See Articles 9 and 10 of the Penal Code 2009.

FIGURE 18: JUVENILES – PRIVACY

<b>2(a) Was notice of the hearing posted on a public board?</b>						
Data	1 <sup>st</sup> Reporting Period		2 <sup>nd</sup> Reporting Period		3 <sup>rd</sup> Reporting Period	
	N <sup>o</sup>	%	N <sup>o</sup>	%	N <sup>o</sup>	%
Yes	0	0	0	0	21	44
No	26	100	46	100	27	56
<b>2(b) Were members of the public obstructed from entering or dismissed from the courtroom?</b>						
Data	1 <sup>st</sup> Reporting Period		2 <sup>nd</sup> Reporting Period		3 <sup>rd</sup> Reporting Period	
	N <sup>o</sup>	%	N <sup>o</sup>	%	N <sup>o</sup>	%
Yes	0	0	0	0	0	0
No	26	100	46	100	48	100
<b>24(a) Were any measures taken to protect the privacy of the accused juvenile during the hearing?</b>						
Data	1 <sup>st</sup> Reporting Period		2 <sup>nd</sup> Reporting Period		3 <sup>rd</sup> Reporting Period	
	N <sup>o</sup>	%	N <sup>o</sup>	%	N <sup>o</sup>	%
Yes	0	0	0	0	0	0
No	26	100	46	100	48	100

The data for questions 2(a) and (b) of the juvenile checklist indicates that the monitored courts have not restricted entry to trials involving juveniles and it is likely, therefore, that they have failed to consider the privacy of the juveniles tried. In trials involving both adult and juvenile accused there is a legitimate interest in ensuring that adult alleged co-offender(s) have their right to a public hearing provided for. In such instances the privacy of an alleged juvenile offender may be provided for through the use of a screen to protect the privacy of the juvenile during questioning and testimony. During the Third Reporting Period, there were no trials in which the court made use of a screen to protect the privacy of the accused when testifying in public.

## JUVENILES – PRE-TRIAL DETENTION

Even more so than is the case with adults, international standards discourage the pre-trial detention of juveniles. In most cases, the best interests of the child are protected by not separating them from their parents.<sup>42</sup> Detention of children, including after arrest and prior to trial, should be avoided whenever possible and used as a measure of last resort for the shortest appropriate period of time.<sup>43</sup> Both Cambodian law and international law standards specifically provide that in the exceptional cases in which juveniles are detained in pre-trial detention, they should

<sup>42</sup> Article 9 of the Convention on the Rights of the Child (CRC).

<sup>43</sup> Article 37(b) of the CRC; Articles 96 and 212 of the CCPC. Article 212 of the CCPC prohibits the detention of minors under 14, with Articles 213-214 setting out the maximum provisional detention times applicable for minors between 14 – 18 years of age who have committed a felony or misdemeanor.

be separated from adults.<sup>44</sup> Furthermore, juveniles should be brought as quickly as possible for adjudication and accorded treatment appropriate to their age and status.

FIGURE 19: JUVENILES – PRE-TRIAL DETENTION

23 Was there pre-trial detention?						
Data	1 <sup>st</sup> Reporting Period		2 <sup>nd</sup> Reporting Period		3 <sup>rd</sup> Reporting Period	
	N <sup>o</sup>	%	N <sup>o</sup>	%	N <sup>o</sup>	%
Yes	17	65	44	96	42	87.5
No	7	27	1	2	5	10.5
N/A	0	0	0	0	0	0
I/U	2	8	1	2	1	2
23(b) If held in pre-trial detention, was there anything to suggest that the accused was not separated from adults?						
Data	1 <sup>st</sup> Reporting Period		2 <sup>nd</sup> Reporting Period		3 <sup>rd</sup> Reporting Period	
	N <sup>o</sup>	%	N <sup>o</sup>	%	N <sup>o</sup>	%
Yes	0	0	0	0	0	0
No	18	69	44	96	43	90
N/A	8	31	2	4	5	10

Of the 48 trials monitored during the Third Reporting Period that involved a juvenile accused, the juvenile in question was detained in pre-trial detention in 87.5% of cases, accounting for 83% of individual juvenile accused. This is a rise from the First Reporting Period when 65% of cases involving juvenile accused involved pre-trial detention, though is a welcome decrease from the Second Reporting Period in which 96% of trials involving juvenile accused had the juvenile accused held in pre-trial detention. Of those held in pre-trial detention, 18 juveniles were charged with misdemeanors.

While there has been a decrease in the percentage of cases in which a juvenile accused was held in pre-trial detention from the Second Reporting Period, given the statutory presumption against pre-trial detention in Article 203 of the CCPC, particularly with regards to juveniles, and the limited number of justifications for ordering pre-trial detentions as set out in Article 205 of the CCPC, the overall rate remains high at 87.5%. Furthermore, the rate of pre-trial detention in trials involving juveniles was higher than pre-trial detention observed in all trials at the two courts during the Third Reporting Period.

## JUVENILES – SENTENCING

Article 166 of the Penal Code provides for the segregation of minors detained in prison: “The jailed minors are detained in the special quarters, separated from the adults.” See also Article 37(c) of the CRC and Rule 13.4 of the United Nations Minimum Rules for Administration of Juvenile Justice (The Beijing Rules), adopted by General Assembly resolution 40/33 on November 29, 1985.

The best interests of the child are to be a primary consideration when ordering or imposing penalties on juveniles found to have infringed the criminal law.<sup>45</sup> Penalties must be proportionate to the gravity and circumstances of the offense, and the age, diminished culpability, circumstances and needs of the young person, as well as the objective of promoting their rehabilitation and reintegration for the long-term benefit of society.<sup>46</sup> Imprisonment of juveniles found to have infringed the criminal law is to be considered a measure of last resort to be employed only in exceptional cases.<sup>47</sup>

FIGURE 20: JUVENILES – SENTENCING

25(b) Was there anything to suggest that the Judge considered imposed a non-custodial sentence before imposing a custodial sentence?						
Data	1 <sup>st</sup> Reporting Period		2 <sup>nd</sup> Reporting Period		3 <sup>rd</sup> reporting Period	
	N <sup>o</sup>	%	N <sup>o</sup>	%	N <sup>o</sup>	%
Yes	0	0	0	0	0	0
No	20	77	46	100	32	67
N/A	6	23	0	0	16	33

Trial Monitors observed no instances where there was anything to suggest that the judge considered imposing a non-custodial sentence before imposing a custodial one. The fact that Trial Monitors are continuing to observe this tendency towards custodial sentences is worrying. Article 39 of the Penal Code creates a statutory presumption against conviction and imprisonment of juveniles, stating that minors who commit offences are “*subject to measures of surveillance, education, protection and assistance.*” The court may pronounce a criminal conviction against a minor “*if the circumstance of the offense or the personality of the minor justify in doing so*”, however, the default option is that criminal prosecution will not be pursued, and other non-custodial responses will be pursued. These non-custodial responses are set out in Articles 40-41 of the Penal Code and include handing over the minor to his or her parent, handing over of the minor to a social service agency charged with the handling of minors or placement of the minor under judicial protection. The Second Bi-annual Report examined this issue in further detail setting out recommendations for improvement. The Second Bi-annual Report was only released following the conclusion of the Third Reporting Period, and as such, the Courts did not have an opportunity to consider these recommendations.

<sup>45</sup>Article 2(1) of the CRC. See also, Committee on the Rights of the Child, *General Comment No. 10: Children’s rights in juvenile justice*, paras 10 and 71.

<sup>46</sup>Article 40(1) of the CRC. See also, Committee on the Rights of the Child, *General Comment No. 10: Children’s rights in juvenile justice*, para 71.

<sup>47</sup>Article 37(b) of the CRC.



## 4. ANALYSIS

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This section of the Report sets out the CCHR’s analysis of the data collected in four areas relating to fair trial rights – pre-trial detention and the right to be tried without undue delay; the right to a public hearing; the right to legal representation and to be present at trial; and the right to be tried by an independent and impartial tribunal. These were the four different fair trial rights that were analyzed in detail in the First Bi-annual Report. As a year has passed since the completion of the monitoring for the First Reporting Period, with stakeholders having the opportunity to consider and implement the recommendations made in the First Bi-annual Report, this Report analyzes the difference in data between the First, Second and Third Reporting Periods and evaluates the impact of recommendations made in the First Bi-annual Report and dialogue undertaken in support of the recommendations in relation to these four rights.

### RIGHT TO LIBERTY AND TO BE TRIED WITHOUT UNDUE DELAY

The right to be free from arbitrary arrest or detention protects individuals from unwarranted state interference with personal freedom. Where an individual is charged with an offense, the state has a duty to bring the matter to trial as soon as possible so as to set out the evidence against the accused, allow the accused to address the evidence and present their own, and to determine the accused’s guilt or innocence. The presumption against pre-trial detention is an element of the fundamental right to be presumed innocent until proven guilty according to law. Where an individual is charged with an offense, all of the circumstances of the case must be taken into account when considering whether to order provisional detention.

The CCHR monitors both the prevalence of pre-trial detention and the duration that detainees are held in pre-trial detention.

#### Legal Basis

The presumption against pre-trial detention is reflected in both international and Cambodian law. Article 9(3) of the ICCPR states that anyone who is arrested or detained on a criminal charge must be brought promptly before a judge, or other judicial power, and is entitled to trial within a reasonable time or to be released. Article 9(3) further states: *“It shall not be the general rule that persons awaiting trial shall be detained in custody”*. Principle 38 of the United Nations Basic Principles on the Role of Lawyers (“UNBPRL”) states: *“A person detained on a criminal charge shall be entitled to trial within a reasonable time or to release pending trial.”*

Article 38 of the Constitution states that no person shall be detained unless the detention is in accordance with the law. Article 203 of the CCPC states: *“In principle, the charged person shall remain at liberty. Exceptionally, the charged person may be provisionally detained under the conditions stated in this section.”* Article 204 outlines that provisional detention may be ordered only in cases where the minimum punishment is imprisonment of one year or more. Article 205 of the CCPC sets out a limited number of justifications for ordering pre-trial detention, which are to: Stop the offence or prevent it from occurring again; prevent harassment of witnesses or victims or collusion with accomplices; preserve evidence or exhibits; guarantee the presence of the charged person during proceedings against them; protect the security of the charged person; or preserve public order from any trouble caused by the offence.

Articles 208 and 209 of the CCPC set out the legal duration of pre-trial detention for felonies and misdemeanors respectively. For an adult charged with a felony, provisional detention may not exceed six months. However,

following this period the investigating judge may extend provisional detention for a further six months with an order expressly stating proper reasons. This may only occur twice. For an adult charged with a misdemeanor, pre-trial detention may not exceed four months. The investigating judge may extend this period by a further two months on one occasion by an order stating express and proper reasons. However, the duration of the detention may not exceed half of the minimum sentence set by law for the charged misdemeanor. Article 249 also provides for an additional period of detention of four months at the discretion of the investigating judge upon conclusion of the investigation and in anticipation of a trial. However, if the charged person is not brought to trial within four months he/she is to be automatically released.

### Data

The data collected by Trial Monitors raises two concerns: the prevalence of pre-trial detention in the trials monitored, particularly with respect to juveniles, and the excessive pre-trial detention endured in a small number of cases.

#### *(a) The Prevalence of pre-trial detention*

With regards to the prevalence of pre-trial detention, the data for question 13(d) shows that the overall percentage of cases in which the accused was held in pre-trial detention has decreased from 88% during the First Reporting Period to 80% during the Third Reporting Period (this also represents a decrease from the Second Reporting Period where the percentage of cases in which the accused was held in pre-trial detention was 84%). An explanation for this drop may be attributed to a small reduction in the number of accused in misdemeanor cases being sent to pre-trial detention. The Second Bi-annual Report noted a concerning rate of pre-trial detention given the fact that in over half of the monitored trials the accused was charged with a misdemeanor. Data from the Third Reporting Period shows that this has fallen to just under half of the trials monitored, with 46% of the cases involving pre-trial detention concerning an accused charged with a misdemeanor. While the percentage rate remains high, the small drop in the percentage of accused in misdemeanor cases being held in pre-trial detention suggests some recognition on the part of officials of the recommendation made in the First Bi-annual Report, that is, that in misdemeanor cases the police and the courts should consider the least intrusive action as prescribed by the CCPC. However, when comparing the nature of defendants held in pre-trial detention who are accused of committing a felony and those who are accused of committing a misdemeanor, the vast majority are still charged with misdemeanor offenses. This indicates that there is much more to be done with regards to the judiciary recognizing the legitimate justifications for pre-trial detention and statutory limits to its duration.

While the reduction in pre-trial detentions is welcome, given the statutory presumption against pre-trial detention, the overall rate remains high at 80% of all trials monitored, or 64% of individual accused monitored. In response to a question about the prevalence of pre-trial detention posed by the Committee against Torture, Cambodia's 2009 state report to the Committee stated: "*Although pre-trial detention should not be the norm, the Cambodian courts use pre-trial detention to ensure the presence of the defendant at the court, in the absence of no other means. Furthermore, it is necessary for the security of the defendant and of society.*"<sup>48</sup> Article 205 of the CCPC sets out a limited number of justifications for ordering pre-trial detention which include to preserve public order from any trouble caused by the offense, to prevent harassment of witnesses or victims, or to guarantee the presence of the charged person during the proceedings. However, this should be weighed against the alternatives to pre-trial detention

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<sup>48</sup> Committee against Torture, Consideration of reports submitted by State Parties under article 19 of the Convention: Cambodia (CAT/C/KHM/Q/2), February 2, 2010, p 10.

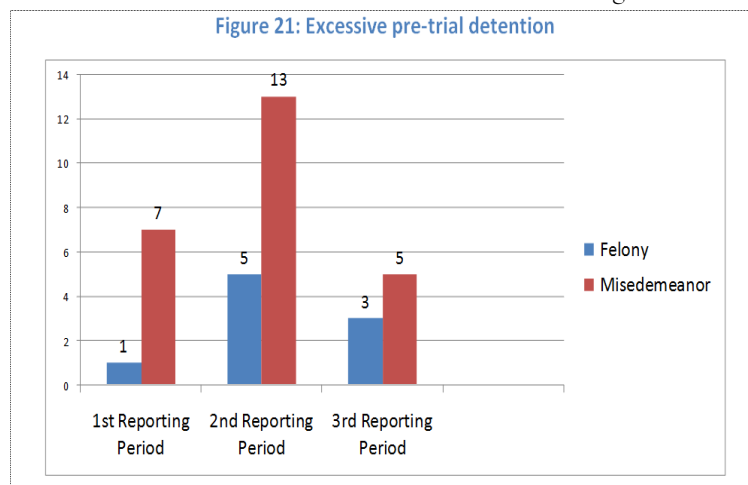
that are provided for, such as judicial supervision as found in Article 223 of the CCPC. Alternatives such as judicial supervision are less intrusive measures than pre-trial detention and can be equally effective in ensuring the presence of the defendant at the court, for example.

The fact that the rate of pre-trial detention is higher in trials involving juvenile accused (87%) than in trials involving adult (80%) accused is particularly worrying. International law requires the best interests of the child to be a primary concern throughout juvenile justice proceedings and provides that pre-trial detention should be avoided whenever possible, and used only as a measure of last resort.<sup>49</sup> The overall rate of pre-trial detention and its frequent use against juveniles when less intrusive alternatives may be available highlights a need for the Royal Academy of Judicial Professions (“RAJP”) to ensure appropriate training is provided to judges on these provisions, as recommended in the First Bi-annual Report. The Phnom Penh Court has stated that pre-trial detention of the juvenile accused is necessary since there have experienced difficulties when juvenile accused have been placed under judicial supervision. While this must be the case, the presumption must always be against the use of pre-trial detention, with more work done to develop and improve these less intrusive alternatives.

As far as CCHR is aware, the MOJ has not issued a directive of guidelines or provided training regarding pre-trial detention and the strict parameters of its use. Such directive, guidelines or training can be invaluable in ensuring that those involved understand the nature of the limitations. The Phnom Penh Court during consultation on the Report noted that the President of the Court does issue letters every month to remind judges to examine the date of pre-trial detention. The prevalence of pre-trial detention though still needs to be addressed, particularly as Trial Monitors have noted a connection with the use of pre-trial detention and the presumption of innocence. In the Phnom Penh Court for example, defendants who are held in pre-trial detention are more likely to come to court in prison uniform than those who are released pending trial who are more likely to be in civilian clothing. This is potentially prejudicial to the interests of those defendants as the wearing of prison uniforms may imply guilt.

*(b) Excessive pre-trial detention*

The second major concern with regards to pre-trial detention relates to the eight accused held in pre-trial detention for a duration that exceeded the maximum legal limit for provisional detention proscribed in Articles 208 and 209 of the CCPC (in combination with Article 249). Although the percentage of accused held beyond statutory limits was low at 0.8% of the 1029 accused monitored, this illegal detention remains a cause for



<sup>49</sup> Article 37(b) of the CRC.

concern. The excessive – and illegal – pre-trial detention of these eight individuals is a clear violation of Article 9(3) of the ICCPR, which requires those charged with an offense to be tried without undue delay. Furthermore, it is a violation of Article 249 of the CCPC which provides that if a charged person is not brought to trial within the statutory time for pre-trial detention, then the “*charged person shall be automatically released.*”

CCHR monitored eight cases in which pre-trial detention exceeded statutory limits and where the charged person was not automatically released as prescribed by law. Of these eight cases, five – or 62.5% - involved misdemeanor charges. During the First Reporting Period, of the eight recorded occasions in which pre-trial detention exceeded statutory limits, seven involved misdemeanor charges. During the Second Reporting Period, of the 18 cases of excessive pre-trial detention recorded, 13 involved misdemeanor charges. While we have seen a drop in the proportion of excessive pre-trial detention being recorded in misdemeanor cases, the figure is still high.

There is potentially a correlation with the number of people held in pre-trial detention accused of a misdemeanor and the lack of legal representation. As shown in Figure 8 in the Data section of this Report, only 38% of those involved in misdemeanor cases were represented by lawyers. During discussions with the Phnom Penh Court following the release of the Second Bi-annual Report, Prosecutor Heng Bunchea acknowledged that the lack of lawyers affects detention procedures. The data collected by Trial Monitors suggests that the absence of a lawyer may make it easier to lose track of how long someone has been held in pre-trial detention. Indeed of the eight accused held in excessive pre-trial detention, three – all of whom were charged with misdemeanor offences – did not have legal representation. It was among these misdemeanor accused who had no legal representation that Trial Monitors recorded the longest pre-trial detention for the Third Reporting Period. The accused in question’s pre-trial detention exceeded the statutory limitation by 162 days (see Figure 4 in the Data Section).

In March 2010, Justice Minister Ang Vong Vathana reportedly acknowledged that lengthy pre-trial detention was an issue, particularly in rural areas where a shortage of lawyers often delayed proceedings. H.E. the Minister for Justice was reported to have indicated that he would like to “*avoid the problem and not let it take place,*” and added that more support was needed to train lawyers and court officials in criminal procedure.<sup>50</sup> The absence of legal representation may contribute to some accused persons being “*simply forgotten*”<sup>51</sup> and remaining in excessive pre-trial detention. Increasing the number of lawyers and improving legal representation will go some way in addressing this problem – particularly in ensuring that when pre-trial detention exceeds the statutory limits the charged person is released in accordance with the provisions of the CCPC. However, there equally needs to be manifest improvements in case management systems to ensure that the duration of pre-trial detention does not exceed statutory limits. As recommended in the First Bi-annual Report there is a clear need for a nationwide detention database to monitor pre-trial detention which can send alerts when detentions are coming close to the statutory limits.

In circumstances where excessive pre-trial detention does occur, and is discovered prior to the charged person going to trial, the courts need to ensure that the charged person is automatically released as provided for by Article 249 of the CCPC. In the event that the excessive pre-trial detention is only discovered once the charged person has gone to trial, the courts should use excessive pre-trial detention as a mitigating circumstance to reduce the length of a sentence. In the first verdict delivered by the ECCC, the Trial Chamber explicitly recognized a breach of the fair trial rights of the accused, Kaing Guek Eav, alias Duch, who was illegally detained by the

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<sup>50</sup>Phorn Bopha, “Lawyer Shortage Adds to Long Pretrial Detentions, Official Says,” *The Cambodia Daily*, March 23, 2010.

<sup>51</sup> ADHOC, CDP, LICADHO, TPO, CHRAC, Joint Cambodian NGO Report on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in the Kingdom of Cambodia – Presented to the UN Committee Against Torture (CAT) Prior to Cambodia’s Second Periodic Report at 45<sup>th</sup> session of CAT Held in Geneva From 1 to 19 November 2010, October 2010, p. 20.

Cambodian Military Court between May 10, 1999, and July 30, 2007.<sup>52</sup> This breach of the rights of the accused was cited as a contributing factor in mitigation of the final sentence (reduced by five years in total).<sup>53</sup> The approach of the ECCC sets a strong precedent to the Cambodian justice system for the universal recognition of fair trial rights and how violations of such rights should be acknowledged in sentencing.

#### Case Study 1: Sentence not mitigated by excessive pre-trial detention

**Court:** Kandal Court

**Date Monitored:** November 18, 2010

The accused was charged with a misdemeanor, battery with injury pursuant to Article 41 of the UNTAC Law. The accused and his mother beat the victim, who is his neighbor, to avenge a quarrel that took place at a restaurant. He was sentenced to a total of 16 months imprisonment.

The accused was provisionally detained on August 1, 2009 until the day of his trial. He spent a total of 472 days in pre-trial detention. This exceeded the statutory maximum prescribed by law by a total of 162 days (the statutory maximum is 310 days). The judge made no reference to the excessive pre-trial detention when passing the sentence and thus it is unclear to what extent the final sentence reflected any kind of reduction or mitigation on grounds of excessive pre-trial detention. The accused's pre-trial detention was almost commensurate with the time he was sentenced to serve in prison.

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<sup>52</sup>Case File/Dossier No. 001/18-07-2007/ECCC/TC, Judgment, July 26, 2010, para 632.

<sup>53</sup> See also: Cambodian Center for Human Rights, *The Duch Trial: A Good Example for the Cambodian Courts*, Press Release, July 26, 2010. Available at [www.cchrcambodia.org](http://www.cchrcambodia.org)

## RECOMMENDATIONS

- The RAJP should ensure that ongoing training is providing to future judges on the pre-trial detention provisions of the CCPC and on the practical meaning of the five justifications for pre-trial detention: to stop the offense or prevent it from occurring again; to prevent harassment of witnesses or victims or collusion with accomplices; to preserve evidence or exhibits; to guarantee the presence of the charged person during proceedings against them; to protect the security of the charged person; and/or to preserve public order from any trouble caused by the offense.
- The Investigating Chamber, President of the Court of Appeal (see CCPC Article 283, 285) and the Inspector-General of the MOJ should inspect investigating judges where it is apparent that they have knowingly or recklessly ignored pre-trial detention limits. The Disciplinary Committee of the SCM should use this as the basis for investigating and disciplining such investigating judges.
- The MOJ should establish a nationwide detention database to monitor pre-trial detention and ensure that it does not exceed statutory limits. The database should ensure that the date of pre-trial detention for each accused is recorded, that the last legal day of detention is highlighted, that there is systematic review of all detentions and that excessive detention is automatically flagged. Once the last legal day of detention has been reached, the charged person must be automatically released as per Article 249 of the CCPC. Any nationwide detention database system should also include a means of informing Legal Aid organizations and others of the accused held in pre-trial detention so that legal representation can be provided.
- A separate case-file and detention database system should be established for juvenile accused to monitor pre-trial detention and to ensure that it does not exceed statutory limits. In establishing this system, Judges should be reminded that minors are entitled to differential treatment compared to adult accused.
- Cases where the accused has remained in pre-trial detention for a period approaching the legal limit must receive priority for hearing.
- Lack of legal representation can contribute to excessive pre-trial detention with accused getting 'lost' in the system. Funding of legal aid organizations should be increased to ensure that those wanting and needing legal representation can access it. The Bar Association of the Kingdom of Cambodia (the "Bar Association"), in line with its statutory responsibility to provide legal aid, should work with lawyers and law firms to encourage the pro bono provision of legal aid services as a means of making up the deficit of legal aid lawyers, particularly for those held in lengthy detention.

## RIGHT TO A PUBLIC HEARING

Everyone has the right to have their guilt or innocence determined in a public trial, except in certain exceptional circumstances. The right to a public hearing involves a number of elements; trials should generally be open to the public and conducted orally; information on the venue and date should be made available with adequate time; and there should be adequate facilities for public attendance.<sup>54</sup>

Public hearings ensure that the administration of justice is transparent and that the judiciary remains accountable to the public for the decisions and judgments they make. For the parties involved in a trial, public scrutiny provides a safeguard against arbitrary decision-making and abuse of power, procedural violations, including inequality in the treatment of parties, and interference from external parties. When a legal system is operating in accordance with law and ethical purposes, public hearings also engender confidence in the ability of the State to deliver justice.

The Trial Monitors used two questions to determine whether the right to a public trial was being adhered to. They recorded whether information about the date, time and venue of the trial was made available on public notice boards and whether members of the public were obstructed from entering the courtroom or dismissed during proceedings.

### Legal basis

Article 10 of the UDHR guarantees that everyone is entitled to a fair and public hearing in the determination of his/her rights and obligations, and of any criminal charges against him/her. This right is also expressed in almost identical wording in Article 14(1) of the ICCPR, which also sets out limitations to the right to a public hearing such as that the press and public may be excluded from all or parts of a trial for reasons of “*morals, public order (ordre public) or national security in a democratic society*” or where publicity would prejudice the interests of justice or where the interest of the private lives of the parties so requires. Regardless of these qualifications, judgments rendered in a criminal trial or any suit of law must be made public except where the interests of juveniles otherwise requires.<sup>55</sup>

Article 316 of the CCPC states that trial hearings shall be conducted in public. The court may order a complete or partial *in-camera* hearing if it considers that a public hearing will cause significant damage to public order or morality, but a written explanation of such a decision must be included alongside the judgment on the merits of the case. Article 317 states that in all trials the judgment must be announced in a public session.

### Data

During the First Reporting Period there was a serious lack of information available about the time and venue of the trials, with no information posted publicly about the majority of trials – 194 of the 199, or 97% - of the trials monitored. The First Bi-annual Report recommended that courts post a daily schedule of hearings in publicly accessible areas such as notice boards outside the court in order to prompt the transparency of justice and to ensure that the judiciary remains accountable to the public for the decisions and judgments they make. There has subsequently been a dramatic improvement in the posting of public notices giving details of the time and location of hearings between the First Reporting Period and the Third Reporting Period. The number of trials which were

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<sup>54</sup>United Nations Human Rights Committee, Communication No.215/1986, *Van Meurs v The Netherlands*, para.62.

<sup>55</sup> Article 14(1) of the ICCPR: Also proceedings concerning matrimonial disputes or the guardianship of children.

not publicly announced was reduced from 97% in the First Reporting Period to 60% in the Third Reporting Period, with notice of the hearing posted on a public notice board in 234 of the 585 trials monitored (40%); an increase of 37%. It is important to note however that Trial Monitors only monitored one instance at the Kandal Court of notice of a hearing being posted on a public notice board, meaning of the 234 instances of Trial Monitors observing notices being posted, 233 took place at Phnom Penh Court.

The increase in the number of trials that are publicly announced is a welcome development and shows that the Phnom Penh Court is willing to implement international standards of public access and transparency with regards to hearings. Following dialogue with Judge Chaing Sinath, Judge Seng Neang and Prosecutor Hing Bunchea on July 29, 2010, the CCHR learned that the Phnom Penh Court has introduced a policy to post details to a public notice board on a regular basis. The implementation of the new policy at the Phnom Penh Court is a welcome improvement and has been the chief reason for the improvements seen in this data from the First Reporting Period to the Third Reporting Period. The Phnom Penh Court should continue its positive work to ensure that notices are posted daily without exception. The Kandal Court should look at the progress made by the Phnom Penh Court in moving towards adhering to these fair trial principles.

The Trial Monitors recorded no instances of obstruction of individuals from entering the courtroom or dismissal from the courtroom proceedings, reflecting no change from the First and Second Reporting Periods. As mentioned in the Data section, these results must be qualified with the observation that once Trial Monitors are inside the courtroom they may not be aware of what is going on outside and thus may be unaware of instances where members of the public have been obstructed from attending trials after the Trial Monitor has entered the courtroom. However, the fact that Trial Monitors were in attendance at the trials monitored in itself suggests that they were open to the public. It is encouraging that the Phnom Penh and Kandal Courts are for the most part, adhering to the legal requirements to conduct hearings open and publicly. During the Reporting Period, there was no evidence that the limitations to the right to a public hearing – made explicit in the ICCPR – were being inappropriately used to justify the expulsion of the public or the press at trials in Phnom Penh and Kandal Court. However, it was also noted that none of the trials involving juveniles resulted in a hearing closed to the public, one of the few justifiable reasons for holding a closed hearing. Phnom Penh Court did note that it has a policy of conducting juvenile trials relating to rape behind closed doors and that in the new court building there was a separate room which allowed for video conferencing for juveniles who cannot testify in the courtroom.

While Project staff have monitored the right to a public hearing in terms of public access to a hearing and notice of a trial, it is important to recognize that there are other aspects of the right to a public trial that still are not adhered to. For example, judgments of the court are not frequently made public or published. Access to legal judgments is fundamental as a mechanism of ensuring transparency of judicial proceedings and as a check on the administration of justice by the courts. The Strategy however includes as one of its specific objectives “*publishing of existing judgments and establishing a case-law digest for printing and dissemination of verdicts, decisions and rulings of courts and to ensure that court judgments are available on request.*”<sup>56</sup> The Courts should look at the ECCC and the Arbitration Council of Cambodia and their publication of judgments, decisions and awards as positive examples for the Cambodian judicial system in this regard. Commenting on the importance of publishing judgments Tuon Siphann, an arbitrator at the Arbitration Council, noted, “[a]ccess to information is the cornerstone of accountability and responsible decision-making. As arbitrators, we publish our judgments for everyone to read. Sometimes people criticize us but that is OK. It encourages us to improve our work. We try to set an example to a judiciary, which seems afraid to let the people

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<sup>56</sup> See Objective 3 of the Council for Legal and Judicial Reform’s, *Legal and Judicial Reform Strategy*, p.20.



*know how they decide.*<sup>57</sup> The publication of judgments encourages better legal arguments by the judges as well as providing a mechanism for transparency and accountability with regards to their decisions. For the judicial system in Cambodia, making judgments public does much to instill confidence in the judiciary. Justice must not only be done but must also be seen to be done. The publication of judgments in line with the objectives of the Strategy in Cambodia is crucial in this regard in showing how the judiciary is providing justice and that its adjudication of cases is impartial and in accordance with the law. In future monitoring the Project will consider ways to monitor whether court decisions are made available to the accused or other interested parties when requested.

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<sup>57</sup>Adler, Daniel, 'Access to Legal Information in Cambodia: Initial Steps, Future Possibilities', 2005 (2-3)The Journal of Information, Law and Technology (JILT) 5. Mr. Tuon Siphann provided this comment in an interview with Mr. Adler on 19 September, 2003. Available at: [http://www2.warwick.ac.uk/fac/soc/law/elj/jilt/2005\\_2-3/adler/#P86\\_17813](http://www2.warwick.ac.uk/fac/soc/law/elj/jilt/2005_2-3/adler/#P86_17813).

## RECOMMENDATIONS

- The Phnom Penh Court and Kandal Court should continue to work to ensure that daily schedules of all hearings are posted on notice boards outside the courts. As part of improving case-management, a registrar should be appointed at each court responsible for implementing a proper system of schedule and record keeping. The registrars should also take responsibility for putting up notices in respect of each case on a weekly and daily basis.
- The RGC should consider amending the CCPC to include a provision creating a presumption in favor of closed hearings in cases involving juveniles or ensure that such a provision is included in the draft Juvenile Justice Law. Alternatively, and in the interim, the MOJ should issue a nationwide policy outlining the considerations the courts should make when a trial involves a juvenile accused, victim or witness. Such a policy should include a directive that trial judges must always consider a closed hearing where a trial involves a juvenile accused, victim or witness and suggestions for other ways in which the court can maintain privacy for juveniles. For example, where other interests are found to outweigh the presumption in favor of a completely closed trial, a screen should be made available to protect the privacy of the juvenile giving evidence.
- The MOJ, Council for Legal and Judicial Reform and other judicial stakeholders should establish a working group to discuss the manner in which the judiciary can implement the Strategy's objective of providing better access to legal and judicial information, namely the publication of legal judgments, particularly making available more resources so that judgments can be more widely disseminated.

## RIGHT TO LEGAL REPRESENTATION AND TO BE PRESENT AT TRIAL

Legal proceedings and the workings of a law court can be foreign and intimidating to those accused of an offense. To enable a fair trial it is vital to ensure that those accused of offenses have the opportunity to employ an expert advocate with the ability to explain the charges against them, guide them through the trial process, and represent and defend their interests in court.

### Legal Basis

Article 14(3)(d) of the ICCPR provides that all those charged with a criminal offense have the right to a series of minimum guarantees, including: the right to be present at trial; the right to defend himself/herself in person or through legal representation of his/her own choosing, and to be informed of this right; the right to have legal assistance assigned where the interests of justice so require, and to have free legal assistance where he/she does not have the means to pay for such assistance. Article 1 of the UNBPRL states that all persons are entitled to call upon the assistance of a lawyer of his/her choice to protect and establish his/her rights and defend them in all stages of criminal proceedings. Articles 2 and 3 of the UNBPRL also sets out the obligations of the governments to ensure effective and equal access to lawyers for all persons within their territory, including through the provision of sufficient funding and resources to ensure legal services are accessible to the poor and other disadvantaged persons.

In Cambodia, Article 38 of the Constitution states that every citizen shall enjoy the right to defense through judicial recourse. Article 300 of the CCPC provides that the accused shall appear in person during hearings at court and may be assisted by a lawyer of his/her choice or request to have a lawyer appointed for him/her. Article 301 states that the assistance of a lawyer is compulsory where a trial involves a felony charge, or where the accused is a minor. If in either of these circumstances the accused has not selected a lawyer, a lawyer must be appointed upon the initiative of the court president.

### Data

Of the 585 trials monitored during the Third Reporting Period, the defendant was with legal representation in 392 – or 67% – of all trials monitored. This is a one-percentage point decrease from the First Reporting Period where in 68% of all trials monitored, the defendant was with legal representation (though an increase from the Second Reporting Period where the accused was represented by a lawyer in only 59% of all trials monitored). It is disappointing that the percentage of those accused tried without a lawyer has remained largely the same since the First Reporting Period. This trend raises questions about the extent to which the right to a defense through judicial recourse is being followed. It raises particular questions about the extent to which competent authorities are taking measures to ensure that, where required by law, the right of an accused to legal representation is not just respected but also facilitated by the keeping of directories of legal aid lawyers at police stations, prosecutors' offices and the Courts, as recommended in the First Bi-annual Report.

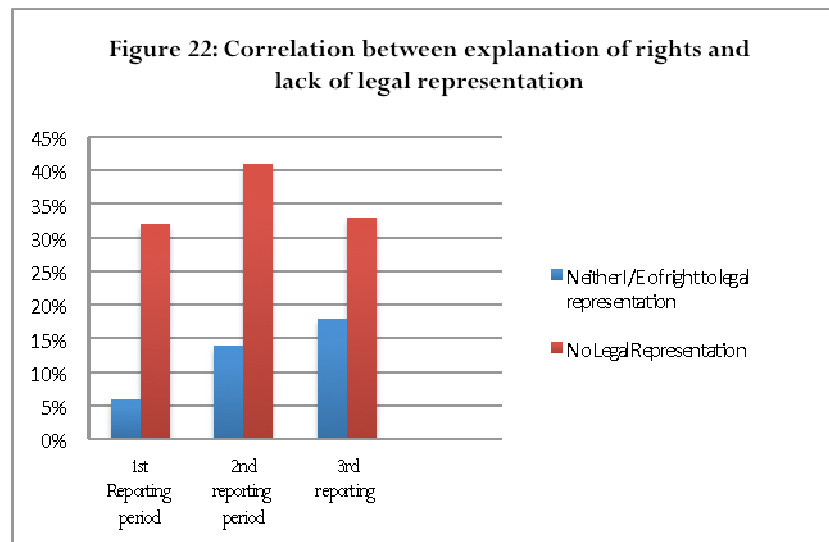
It is positive to note that in all felony trials monitored the right to legal representation was respected. However, when monitoring adherence to this fair trial right in respect of each of the individuals accused in these cases, the percentage of which are represented by a lawyer falls to 91%. The difference in the data when recording adherence to fair trial rights in the trial as a whole compared to monitoring adherence in respect of each individual accused, particularly in the area of legal representation, illustrates the merit in changing the Checklist to ensure that the data being collected is truly representative of the reality faced by individual accused. As a

result, we can see that more still needs to be done to ensure the rate of legal representation for individuals facing felony charges reaches the 100% required by law.

Trial Monitors found that in 62% of trials involving a misdemeanor the accused appeared without legal representation, compared to 63% in the First Reporting Period. This represents a very small improvement in the number of the misdemeanor trials in which there was legal representation compared to the First Reporting Period. When examining the data in respect of each individual accused being tried for a misdemeanor, only 150 of the 496 individual accused, or 30%, appeared with legal representation. While there is no legal requirement for those charged with misdemeanor offenses to have legal representation, unless they are minors, the fact that such a large proportion of misdemeanor cases are being tried with the accused not having legal representation raises questions about equality of arms. Article 319 of the CCPC for example provides that only lawyers have access to the case-file. This implies that where there is no lawyer appointed, the accused does not have the same opportunity to examine the case-file and therefore the same evidence is not available to both the court and the prosecutor, and the accused. As a result, those representing themselves in misdemeanor cases, or those who are unable to find legal representation, may be ill equipped to defend the charges against them. Article 14(3)(d) of the ICCPR provides the right of all accused of a criminal charge to defend themselves in person or through the legal counsel of their choosing. Jurisprudence has developed in other jurisdictions stating that in order to exercise the right to defend oneself in person, access to the case-file may be necessary, subject to certain qualifications for confidentiality, witness protection etc.<sup>58</sup> In order to increase equality of arms where legal representation is absent, it is important the CCPC is reviewed to accommodate for this access.

In addition to questions of fairness in proceedings by not having access to the case-file, data has shown that a drop in the number of trials in which the accused was represented by a lawyer correlates to a drop in judges failing to inform and explain to the accused their right to a lawyer.

Since the First Reporting Period, there has been a drop in the percentage of hearings in which judges have informed an accused of his/her right to legal representation from 54% to 47%, and a drop from 38% to 24% in the percentage of trials in which a judge has informed and explained to an accused his/her right to a lawyer. Most significantly, the percentage of hearings in which a judge neither informed nor explained to an accused his/her



<sup>58</sup> See *Foucher v France*, No. 22209/93, §36, ECHR1997-II, where the court held that self-represented applicants “should have been allowed access to their case file in order to prepare their defence”, and that the refusal of such access to the case file denied the applicants equality of arms, and breached Article 6 of the European Convention on Human Rights. See Also Articles 77 of the International Criminal Court Rules of Evidence and Procedure; and Article 66 of the Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia (“ICTY”). Both provide that, subject to certain conditions, the prosecutor must make available to the defense copies of the supporting material which accompanied the indictment, and permit the defense to inspect any books, documents, photographs and tangible objects in the Prosecutor’s custody or control, which are material to the preparation of the defense, or are intended for use by the Prosecutor as evidence at trial or were obtained from or belonged to the accused. The defense is defined at Article 2 of the ICTY Rules of Procedure and Evidence as “the accused, and/or the accused’s counsel.”

right to legal representation has increased three-fold, from 6% to 18% of cases. The correlation between an explanation of rights and the right to legal representation cannot be ignored. Many defendants have only basic education with minimal understanding of the judicial system, and perhaps do not understand that they have a right to a lawyer. If a judge fails to inform an accused of this basic right, the accused may be left vulnerable to the complexities of legal jargon and a judicial system that he/she does not understand. This effectively denies those accused their right to equality of arms. The case study below is representative of an occasion where an accused would have greatly benefited by the representation of an expert legal advocate.

The lack of legal representation points to continued shortfalls in resources that are undermining the fairness of these trials. While there is a lack of “resources to provide legal counsel, and most defendants [seek] assistance from NGOs or [go] without legal representation,”<sup>59</sup> the Bar Association has a statutory duty to fund lawyers to defend poor people.<sup>60</sup> The RGC has in the past made contributions to this fund.<sup>61</sup> Free legal representation is also provided by non-governmental organizations (“NGOs”) such as Legal Aid Cambodia, International Bridges to Justice, the Cambodian Defenders Project and Legal Support for Children and Women, but these services are limited. There continues to be an absence of a “comprehensive legal, institutional and policy framework at the national level to guide the provision and regulation of legal aid services.”<sup>62</sup>

During dialogue with judicial stakeholders following the publication of the First Bi-annual Report, it was noted that there is a general lack of lawyers to ensure all accused have legal representation. It was also noted that there was a long process involved in requesting legal aid lawyers which at times resulted in lawyers being appointed at the very last minute. As a result lawyers and legal aid organizations argued that they were often absent from hearings because they do not have sufficient advance notice that they were required at court. Equally, during dialogue with members of the judiciary, it was relayed that some lawyers informed the court of their absence on the day of the trial, making the court unable to find a replacement lawyer. Delays caused by the absence of legal representation can increase the time of pre-trial detention, where the accused is held in pre-trial detention, and may even contribute to the accused remaining in pre-trial detention in excess of the statutory time limits. The Courts, Bar Association and Legal Aid NGOs must work together to ensure effective and equal access to lawyers for all persons so that those accused of offences have an expert advocate to explain the charges against them and defend their interests in court.

## Case Study 2: Right to Legal Representation

**Court:** Phnom Penh Court

**Date monitored:** 13 Sept 2010

The case involved three accused; 2 adults and 1 juvenile (17 years old). They were caught and arrested by police on 11 May 2010 using drugs together. All 3 accused were present throughout the hearing. None of the accused, including the juvenile who by law is required to have legal representation, were represented by lawyers. They were charged with distribution of drugs according to the Article 36 of the Law on the Control of Drugs 1996. Two of the accused were sentenced to 8 months imprisonment, with the third accused sentenced to 1 year and 6 months imprisonment.

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<sup>59</sup>US State Department Report on Human Rights in Cambodia, March 2010. Available at: <http://www.state.gov/g/drl/rls/hrrpt/2009/eap/135988.htm>

<sup>60</sup> Law on the Bar (1995), Article 29; see also Internal Regulations of the Bar Association, Articles 6 and 7.

<sup>61</sup>Committee Against Torture, *Consideration of reports submitted by State parties under Article 19 of the Convention: CAMBODIA*, October 29, 2009, (CAT/C/KHM//2), p.5. In an answer to a question about how the Government had contributed to legal aid services, the response stated that the Government “has contributed in cash 200,000,000 Riels (two hundred million Riels) per year to the Bar Association to support the free lawyer provision service to the poor individuals.” Available at: <http://www2.ohchr.org/english/bodies/cat/docs/AdvanceVersions/CAT-C-KHM-2.pdf>

<sup>62</sup> Council for Legal and Judicial Reform, *Legal Aid in Cambodia: Practices, Perceptions and Needs* (Phnom Penh: Council for Legal and Judicial Reform, December 2006), p. 10.

## RECOMMENDATIONS

The CCHR acknowledges that problems in this area may relate to resource shortcomings rather than capacity or competency. Nevertheless, given the importance of this right in ensuring an accused receives a fair trial:

- The MOJ should remind judges of the importance of informing defendants of their basic rights, particularly their right to legal representation.
- Articles 145, 254, 304, 319, 391 and 428 of the CCPC should be amended to ensure that, in the absence of legal representation, all accused have the opportunity to view relevant parts of their case file to assist them in answering the charge(s) against them and preparing a defense.
- At every stage of the criminal procedural process, the competent authorities, being the police, prosecutor, investigating judge and trial judge should take measures to ensure that, where necessary, the right of an accused to legal representation is respected and facilitated, including:
  - Keeping directories of legal aid lawyers at police stations, prosecutors' offices and Courts.
  - If not already in place, establish working relationships with the Bar Association and with legal aid NGOs in order to provide free legal representation to those accused who cannot afford it.
- In light of the delay often experienced in the court filing the application for a lawyer, the MOJ should work with the Courts in developing a policy for the filing of applications for legal representation. Such policy should ensure that Bar Association and legal aid NGOs are informed at the earliest possible time of the need for a lawyer. The Courts, the Bar Association and legal aid NGOs must work together to ensure that representation is available to as many defendants as possible and with as little delay as possible.
- The Bar Association should create educational materials to help the public understand how to access legal aid assistance through the Bar Association legal aid fund and legal aid NGOs.
- The RGC must recognize the importance of legal aid in guaranteeing fair trial rights. The RGC should develop a national policy on legal aid, including a funding strategy for legal aid and funding for an annual audit of the Bar Association's legal aid fund.
- The CLJR should work with legal aid stakeholders to implement the recommendations in its 2006 report, *Legal Aid in Cambodia: Practices, Perceptions and Needs*, including the development of a central coordinating body to fund and develop a national infrastructure for legal aid.
- The MOJ should work with international donors to launch an education and awareness campaign to create greater knowledge about the meaning and availability of legal aid. The campaign should adopt a strategy capable of delivering information to the local level, for example, through providing training and information to commune council and village authorities.

## INDEPENDENCE, IMPARTIALITY AND PROFESSIONALISM OF THE JUDGE

The right to be tried by an independent and impartial tribunal is so fundamental that the Human Rights Committee has stated that it “*is an absolute right that may suffer no exception.*”<sup>63</sup> The fairness of any judicial system relies on the independence and impartiality of the arbitrating body. Judicial independence requires decision-making to be transparent, well reasoned, and based on sound criteria such as legislation, jurisprudence, judicial guidelines and codes of ethics. In order to maintain such independence, political considerations, personal interests and relationships must not be allowed to influence judicial decision-making.

### Legal Basis

Article 10 of the UDHR guarantees: “*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.*” The UNBPIJ was specifically formulated to assist UN Member States in securing and promoting the independence of the judiciary. Article 2 of the UNBPIJ provides: “*the judiciary shall decide matters before them impartially, on the basis of facts and in accordance with law without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter for any reason.*” Article 7 states that it is the obligation of Member States “*to provide adequate resources to enable the judiciary to properly perform its function.*”

The BPJC are also relevant. Principle 1.1 provides: “*A judge shall exercise the judicial function independently on the basis of the judge’s assessment of the facts and in accordance with a conscientious understanding of the law, free of any extraneous influences, inducements, pressures, threats or interference, direct or indirect, from any quarter or for any reason.*” Principle 1.3 provides: “*A judge shall not only be free from inappropriate connections with, and influence by, the executive and legislative branches of government, but must also appear to a reasonable observer to be free therefrom.*” The appearance of justice being done is an important consideration. Principle 2.1 states that a judge “*shall perform his or her judicial duties without favor, bias or prejudice.*” Principle 2.2 adds that a judge should ensure “*that his or her conduct, both in and out of court, maintains and enhances the confidence of the public, the legal profession and litigants in the impartiality of the judge and of the judiciary.*”

Cambodia’s fundamental law enshrines the separation of powers and guarantees judicial independence. Article 51 of the Constitution provides: “*The Legislative, Executive and the Judicial powers shall be separate.*” Article 128 stipulates: “*The Judicial power shall be an independent power. The Judiciary shall guarantee and uphold impartiality and protect the rights and freedoms of the citizens.*” Article 130 states that “*Judicial power shall not be granted to the legislative or executive branches,*” while Article 132 states that the King is the guarantor of the independence of the judiciary and that the SCM is to assist the King in this matter.

The CCPC provides detailed guidance as to how independence should be maintained in a procedural manner on a day-to-day basis. Article 337 sets out the procedure for the deliberation of the Court and provides: “*The court shall retreat to deliberate in a deliberation room to reach its verdict. No further request may be submitted to the court; no further arguments may be raised. The Royal Prosecutor and court clerk are not authorized to participate in the deliberation.*” Article 288 states: “*The roles of sitting judges and those of Prosecutors or Deputy Prosecutors shall be absolutely incompatible with*

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<sup>63</sup> Human Rights Committee, Views of the Human Rights Committee under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, Communication No.263/1987: *M.Gonzalez del Rio v. Peru*, October 28, 1992, (CCPR/C/46/D/263/1987), para 5.2.

*each other. Any sitting judge who has been acting as a Prosecutor, Deputy Prosecutor or investigating judge may not participate in the adjudication of that case, otherwise the judgment shall be deemed null and void.”*

A large part of the CEJP also relates directly to impartiality and independence. Article 2 provides: “*Judge and prosecutor shall fulfill their duty independently with basis of evaluation of facts and legal knowledge without being subjected to such influences as persuasion, pressure, intimidation or interference*”. Article 4 states that Judges and Prosecutors should be neutral in political matters. Article 7 refers to the requirement for “*impartiality*” and the importance of promoting public trust in the principles. Article 9 provides that “*judge and prosecutor shall not communicate with any party during the case proceedings with the absence of another party*”.

#### Data

##### *(a) Entry into the judge’s deliberation room*

One of the most frequent occurrences observed at trial during the First Reporting Period was that of the prosecutor or another lawyer entering the judge’s deliberation room immediately after the ending of a hearing, and prior to the judge reaching a verdict. In such instances the judge’s impartiality is immediately called into question. The First Bi-annual Report called for separate judges’ deliberation chambers, with all persons being prevented from entering the judges’ deliberation chambers during deliberations.

The data collected during the Third Reporting Period indicates a reduction in the percentage of trials in which another party appeared to speak to the judge during deliberation from 16% of the trials monitored in the First Reporting Period to 7.5% of the trials monitored in the Third Reporting Period. While this is a significant reduction from the First Reporting Period, it represents a slight increase from the Second Reporting Period where data recorded that there was a suggestion that any party spoke to the judge during deliberation in 6% of all trials monitored. Further to dialogue that was completed following the publication of the First Bi-annual Report, it has been confirmed that both the Phnom Penh Court and the Kandal Court have separate deliberation rooms, though the old courtroom in the Kandal Court does not. The fact that the Courts do have separate deliberation rooms already suggests that the reduction in occurrences of any party speaking to the judge during deliberation is borne from an increase in compliance with the provisions of Article 337 of the CCPC.

During a meeting between representatives of the Project and staff from the Phnom Penh Court on July 29, 2010 to discuss the findings and recommendations of the First Bi-annual Report, the data and recommendations made in relation to question 9(b) (*Was there anything to suggest that any party spoke to the judge during deliberation?*) were considered. During this dialogue, the judges indicated that aside from clerks, who were sometimes required to bring documents to the deliberation room for the judge to consider, no other parties were admitted to the deliberation room before the judge delivered the verdict. However, data collected from our monitoring shows that since the First Reporting Period to the end of the Third Reporting Period a variety of different actors have been seen to enter the deliberation room. While clerks may need to enter the deliberation room to ensure that the judge has all the relevant documentation he/she may need before retiring to deliberate upon his/her decision, the entry of the prosecutor, defense and/or any other court



official or staff into the judge's deliberation room while he/she is deliberating calls into question the judge's impartiality. Such instances can be taken as an indication, regardless of the professional capacity or motivation of those entering the room, of the potential for outside influence on the verdict. A judge must ensure that his or her conduct at all times maintains and enhances the confidence of the public, the legal profession and litigants in the impartiality of the judge and of the judiciary.

*(b) Use of mobile phones*

During the First Reporting Period, another issue of concern noted by Trial Monitors was the frequency with which judges, lawyers and court staff – such as the court clerks – answered mobile phones during the proceedings. After observing this trend, the Trial Monitors began monitoring the use of mobile phones by judges during court proceedings from November 1, 2009. Data was therefore collected for only 60 of the 199 trials monitored, and found that judges answered a mobile phone during a trial on 17 occasions – 28% of the trials. Such conduct raises concerns as to whether a judge who is answering or speaking on a phone is paying sufficient attention to the arguments of the parties and the evidence being presented. Such conduct further suggests – even if it is not the case – that the judge is open to influence by outside parties. As a result of this observation, the First Bi-annual Report recommended that the MOJ issue an order to ensure that internal rules of each court include a ban on the use of telephones inside the courtroom, that these are read by the court clerk at commencement of each trial and that court officials set an example with regards to this conduct.

There was a small drop in the percentage of trials in which judges used mobile phones while presiding over a trial, from 28% to 22% of trial monitored. In response to the data and recommendations relating to mobile phone use during hearings, the staff from the Phnom Penh Court indicated that according to the court's internal rules, mobile phones must either be turned off or put onto silent setting. However, Project staff were informed that the use of mobile phones in court was “*unavoidable*” in some urgent cases and was often a matter of expediting other cases through issuing instructions and granting approval for investigative action. For example, it was stated that a prosecutor might need to answer his phone in order to receive orders from the General Prosecutor. Furthermore, it was argued that judges needed to remain accessible during hearings because they are often acting as investigating judges on other cases and need to be contacted by judicial police for approval of investigatory actions. The justifications given by judges at the Phnom Penh Court help explain why there has only been a slight shift in the practice of using mobile phones while presiding over trials.

The practice of judges using mobile phones during hearings continues to raise concerns. While the conversations were invariably brief – with the judges in 65% of the cases answering briefly and hanging up - this conduct trivializes proceedings. Furthermore, in over a third of these cases the judge was noted to have conducted a conversation. The answering of phones during trials raises questions about independence and impartiality of the judiciary, and may influence public perception of the court by raising concerns that judges are open to influence from external parties during proceedings. While it may be that the majority of phone calls relate to the work of the judge in an investigatory action, access to justice in one case should not be compromised in order to expedite proceedings in another. Messages for judges could be collected by other court staff while judges are in court and responded to at the conclusion of the trial.

### Case-Study 3: Suggestions that a party spoke to the judge during deliberation

**Court:** Kandal Court

**Date Monitored:** July 22, 2010

The accused was charged with rape under Article 5 of the Law on Aggravating Circumstances of Crimes. He was accused of raping a 78 year old man, while the man went into a public rest room. At the hearing the accused confessed his guilt. The hearing lasted 25 minutes. The prosecutor was observed going into the deliberation room while the Judge was deliberating on the case and remained in the room for a while. The accused was sentenced to 10 years in jail and ordered to compensate the victim 550,000 Riels.

### Case-Study 4: Judge uses mobile phone during hearing, leaves the court in the middle of the trial

**Court:** Phnom Penh Court

**Date Monitored:** December 8, 2010

The accused was charged with the act of selling and buying or exchanging a person for cross-border transfer pursuant to Articles 4 and 16 of the Law on Suppression of Human Trafficking and Sexual Exploitation. The accused, a foreigner, had returned to Cambodia having fallen in love with a Cambodian girl. He wanted to marry her and bring her to South Africa with him. The accused took a trip to Thailand with the victim and her sister. While there, the group went to a club where there were a number of female prostitutes. The victim decided to escape from the accused and phoned her mother in Cambodia in order to find intervention in the case. The victim had no passport as the accused had kept it with him. When the accused could not find the victim, he returned to Cambodia in search of her. He was arrested following a complaint to the police filed by the victim's mother. The accused argued that he had no intention of selling the victim, and that he loved her and wanted to marry her. He had returned to Cambodia worried about her and wanted to know that she was safe. The victim and her sister were helped by the police at the Poipet border.

Before the trial started, the court clerk read out some of the internal rules of the court, which included "*a mobile phone should be turned off or put on vibrate...conversations on the phone were not allowed in the court room.*" During the course of the trial, the judge answered his phone and conducted a conversation. At a later point, while the hearing was still underway, the judge left the courtroom.

## RECOMMENDATIONS

- The MOJ or other appropriate authority such as the President of the Supreme Court should issue a written instruction to trial judges and to prosecutors to remind them of the CCPC Article 337 prohibition on trial judges speaking with any person during their deliberations, including court clerks, prosecutors and lawyers. The violation of this instruction should be grounds for reporting of the delinquent judge or prosecutor to the Inspector General of the MOJ and to the Disciplinary Committee of the SCM.
- The MOJ should issue best practice guidance which discourages court clerks, prosecutors, other lawyers, court officials or any other party to enter the judge's deliberation room once deliberation has begun. Such best practice guidance should highlight that working to ensure that others do not enter the deliberation room during deliberation is important with regards to countering questions as to the independence and impartiality of judges and their susceptibility to outside influence.
- The MOJ should issue an order requesting that all Court Presidents ensure the following:
  - The internal rules of each court must include a ban on the use of all telephones inside the courtroom.
  - The relevant provisions of the internal rules must then be read by the court clerk prior to the commencement of each trial.
  - Court officials – including judges, prosecutors and lawyers – must set an example. Presiding judges should enforce order in the court as required under Article 318 of the CCPC by ejecting from the court those found using phones during trials.
- Courts should implement a proper system through a court appointed registrar whereby court clerks are able to take messages for judges who are sitting in court.

## 5. CONCLUSION

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The data from the 585 trials monitored during the Third Reporting Period – involving 1029 individual accused - showed mixed results much like the First and Second Reporting Periods. There was a reduction in the number of trials in which the issue of adequate time and facilities was raised as a concern by defense lawyers and the rate of legal representation in trials involving individuals charged with a felony edged closer to the 100% required by law. There was a reduction in the number of instances where someone spoke to the Judge during deliberation, increasing the appearance of independence and impartiality of the judges. There were very few instances in which judges made statements that showed a lack of understanding of the presumption of innocence and the handling of evidence and witnesses by the court remained a positive area, with fair opportunities for presentation and examination afforded to both sides.

However, major concerns remain in relation to high levels of pre-trial detention, showing a continued lack of application of the principle that a charged person shall remain at liberty and a measured approach to the five principles that justify the use of pre-trial detention. Low levels of legal representation for those charged with misdemeanors remains a challenging issue in ensuring the fairness of those trials. Judges continue to use mobile phones in court, conduct that may be linked to high caseloads and genuine efforts to expedite investigations and trials in other cases but which nevertheless may also influence public perceptions of the court by raising concerns that judges are open to influence from external parties during proceedings. Allegations of police misconduct including threats and the use of violence and torture continued to affect a small but significant number of trials.

The full Penal Code entered into force during the end of this reporting period and is likely to have a major impact on the next reporting period. There will be a far greater variety of criminal offences available to the prosecutors and investigating judges. It will be important for judges and lawyers to familiarize themselves with the details of the new law, particularly the provisions abolishing an offence, the provisions which provide for less severe sentences that are immediately applicable and the provisions which provide for more severe sentences to be applied to acts committed after the Penal Code has come into full force and effect.<sup>64</sup>

The recommendations in this Report are addressed to a number of different bodies and institutions, highlighting the interconnectedness of the justice system. Though monitoring of trials takes place in the court room, improved adherence to many of the rights analyzed in this Report will require the cooperation, support and leadership of a number of actors including law enforcement agencies, prison authorities and NGOs. Pre-trial detention and legal representation, as shown in this Report, are two areas where greater cooperation could improve adherence to fair trial rights. It is hoped that the data and recommendations set out in this Report will help facilitate increased respect for fair trial rights and support those working to ensure that the justice system in Cambodia is fair and equal for all.

Cambodian Center for Human Rights

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Phnom Penh

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<sup>64</sup> See Articles 9 – 10 of the Penal Code.

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## 7. APPENDICES

### APPENDIX I: TRIAL MONITORING CHECKLIST

#### General Trial Information

1. OVERVIEW					
1(a) Date of Trial:	Start Time:				
1(b) Monitors:					
1(c) Court:	<input type="checkbox"/> PPC	<input type="checkbox"/> KPC	<input type="checkbox"/> SRC	<input type="checkbox"/> BBC	<input type="checkbox"/> Other Please specify: _____
1(d) Judge:	1 <sup>st</sup> 2 <sup>nd</sup> 3 <sup>rd</sup>	<input type="checkbox"/> Other Please specify:			
1(e) Clerk:					
1(f) Number of Accused <sup>65</sup>	Total:				
	Adult:	Male:	Present:	Absent:	
		Female:	Present:	Absent:	
	Juvenile:	Male:	Present:	Absent:	
		Female:	Present:	Absent:	
	Legal Person Representative:	Male:	Present:	Absent:	
		Female:	Present:	Absent:	
1(g) Number of Victims	Total:				
	Adult:	Male:	Present:	Absent:	
		Female:	Present:	Absent:	
	Juvenile:	Male:	Present:	Absent:	
		Female:	Present:	Absent:	
	Legal Person Representative:	Male:	Present:	Absent:	
		Female:	Present:	Absent:	

<sup>65</sup>If more than one accused, please see Annex I

## TRIAL RIGHTS

### 2. RIGHT TO A PUBLIC HEARING

2(a) Was notice of the hearing posted on a public board outside the courtroom?	<input type="checkbox"/> Yes <span style="margin-left: 150px;"><input type="checkbox"/> No</span>
2(b) Were members of the public or media prevented from entering or dismissed from the courtroom?	<input type="checkbox"/> Yes <span style="margin-left: 150px;"><input type="checkbox"/> No</span> Details:

### 3. RIGHT TO UNDERSTAND THE NATURE OF THE CHARGE

3(a) Did the Judge announce the case to be heard?	<input type="checkbox"/> Yes <span style="margin-left: 50px;"><input type="checkbox"/> No</span>
3(b) Did the Judge state the charge?	<input type="checkbox"/> Yes <span style="margin-left: 50px;"><input type="checkbox"/> No</span>
3(c) Did the Judge state the relevant law?	<input type="checkbox"/> Yes <span style="margin-left: 50px;"><input type="checkbox"/> No</span>
3(d) Did the Judge state the date of the alleged crime?	<input type="checkbox"/> Yes <span style="margin-left: 50px;"><input type="checkbox"/> No</span>
3 (e) Did the Judge state the place of the alleged crime?	<input type="checkbox"/> Yes <span style="margin-left: 50px;"><input type="checkbox"/> No</span>
3(f) Did the Judge state the parties involved?	<input type="checkbox"/> Yes <span style="margin-left: 50px;"><input type="checkbox"/> No</span>
3(g) If required, was an interpreter provided?	<input type="checkbox"/> Yes <span style="margin-left: 50px;"><input type="checkbox"/> No</span> <span style="margin-left: 100px;"><input type="checkbox"/> N/A</span>
3(h) If required, were provisions made for those with disabilities	<input type="checkbox"/> Yes <span style="margin-left: 50px;"><input type="checkbox"/> No</span> <span style="margin-left: 100px;"><input type="checkbox"/> N/A</span>
If yes, what disability was provided for?	<input type="checkbox"/> Hearing <span style="margin-left: 100px;"><input type="checkbox"/> Sight</span> <span style="margin-left: 100px;"><input type="checkbox"/> Other</span> Comment:

### 4. EXPLANATION OF RIGHTS N/A

4(a) Did the Judge inform (I) and explain (E) to the accused their right to legal representation or to self-defense?	I only <input type="checkbox"/> <span style="margin-left: 50px;">I and E <input type="checkbox"/></span> <span style="margin-left: 50px;">Neither I nor E <input type="checkbox"/></span>
4(b) Did the Judge inform (I) and explain (E) to the accused their right not to answer or answer?	I only <input type="checkbox"/> <span style="margin-left: 50px;">I and E <input type="checkbox"/></span> <span style="margin-left: 50px;">Neither I nor E <input type="checkbox"/></span>
4(c) Did the Judge inform (I) and explain (E) to the accused their right to change the judge?	I only <input type="checkbox"/> <span style="margin-left: 50px;">I and E <input type="checkbox"/></span> <span style="margin-left: 50px;">Neither I nor E <input type="checkbox"/></span>
4(d) Did the Judge inform (I) and explain (E) to the accused their right to have the last word?	I only <input type="checkbox"/> <span style="margin-left: 50px;">I and E <input type="checkbox"/></span> <span style="margin-left: 50px;">Neither I nor E <input type="checkbox"/></span>

**5. RIGHT TO CALL AND EXAMINE WITNESSES**

5(a) Was there anything to suggest that any party <i>was not</i> given the opportunity to call witnesses?	<input type="checkbox"/> Yes <input type="checkbox"/> No  If yes, which party? <input type="checkbox"/> Prosecutor <input type="checkbox"/> Defense <input type="checkbox"/> Civil Party Comment:
5 (b) Were the witnesses present in the courtroom before they were questioned?	<input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> N/A

**PLEASE GIVE A BRIEF EXPLANATION OF THE FACTS OF THE CASE:**

**6. PRESENTATION OF EVIDENCE:**

6(a) Was evidence/witness presented?	<input type="checkbox"/> Yes <input type="checkbox"/> No  If yes, by which party and what type of evidence was presented?						
	Party/ type	P		D		CP	
	Witnesses:	P:	A:	P:	A:	P:	A:
	Physical Object:						
	Documentary:						
	Confession:						
	Comment:						
6(b) Was there anything to suggest that testimony presented by a witness constituted hearsay?	<input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> N/A  If yes, please explain:						
6(c) Did the judge rule that any of the evidence presented was inadmissible?	<input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> N/A  If yes, please explain:						

**7. RIGHT TO FULL DISCLOSURE/ EQUALITY OF ARMS**

<p>7(a) Was there anything to suggest that any party <b>was not</b> given the opportunity to present evidence?</p>	<p><input type="checkbox"/> Yes <input type="checkbox"/> No</p> <p>If yes, which party?</p> <p><input type="checkbox"/> Prosecutor <input type="checkbox"/> Defendant <input type="checkbox"/> Civil Party</p> <p>Comment:</p>
<p>7 (b) Was there anything to suggest that any party <b>was not</b> given the opportunity to question witnesses?</p>	<p><input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> N/A</p> <p>If yes, which party?</p> <p><input type="checkbox"/> Prosecutor <input type="checkbox"/> Defendant <input type="checkbox"/> Civil Party</p> <p>Comment:</p>
<p>7(c) Was there anything to suggest that any party did not have an opportunity to view the case file prior to the hearing?</p>	<p><input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> N/A</p> <p>If yes, which party did not have the evidence?</p> <p><input type="checkbox"/> Prosecutor <input type="checkbox"/> Defendant <input type="checkbox"/> Civil Party</p> <p>Comment:</p>
<p>7(d) Was the defense given chance to have the last word?</p>	<p><input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> N/A</p> <p>If no, comment:</p>

**8. INDEPENDENCE, IMPARTIALITY AND CONDUCT OF THE JUDGE**

<p>8(a) Was there anything to suggest that the Judge had an interest in the case beyond their usual judicial role?</p>	<p><input type="checkbox"/> Yes <input type="checkbox"/> No</p> <p>If yes, what is the nature of the perceived interest?</p> <p><input type="checkbox"/> Family <input type="checkbox"/> Political <input type="checkbox"/> Financial <input type="checkbox"/> Other</p> <p>What suggests that such an interest exists?</p> <p>Please explain:</p>
<p>8(b) Did the Judge behave in an intimidating manner towards a party?</p>	<p><input type="checkbox"/> Yes <input type="checkbox"/> No</p> <p>If yes, please explain:</p>
<p>8(c) Did the Judge used impolite word toward any party?</p>	<p><input type="checkbox"/> Yes <input type="checkbox"/> No</p> <p>If yes, please explain:</p>
<p>8(d) Did the judge leave the court room during the trial?</p>	<p><input type="checkbox"/> Yes <input type="checkbox"/> No</p> <p>If yes, please explain reason: <input type="checkbox"/> I/U</p>

8 (e) Did the Judge answer a mobile telephone during the trial?	<input type="checkbox"/> Yes <span style="margin-left: 200px;"><input type="checkbox"/> No</span> If yes, did they: <input type="checkbox"/> Respond briefly and hang up <span style="margin-left: 50px;"><input type="checkbox"/> conduct a conversation</span> If yes, was the ring tone: <input type="checkbox"/> Audible <span style="margin-left: 150px;"><input type="checkbox"/> On silent</span>
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**9. DELIBERATION**

Finish time: \_\_\_\_\_

9(a) Was there a deliberation?	<input type="checkbox"/> Yes <span style="margin-left: 50px;"><input type="checkbox"/> No</span> <span style="margin-left: 50px;"><input type="checkbox"/> Next day</span> <span style="margin-left: 50px;"><input type="checkbox"/> I/U</span> If yes, how long: If no, comment:
9 (b) Was there anything to suggest that any party spoke to the judge during deliberation?	<input type="checkbox"/> Yes <span style="margin-left: 100px;"><input type="checkbox"/> No</span> <span style="margin-left: 100px;"><input type="checkbox"/> N/A</span> <span style="margin-left: 50px;"><input type="checkbox"/></span> I/U If yes, which party? <input type="checkbox"/> Prosecution <span style="margin-left: 50px;"><input type="checkbox"/> Defense</span> <span style="margin-left: 100px;"><input type="checkbox"/> Civil Party</span> <span style="margin-left: 50px;"><input type="checkbox"/></span> Court Official

**10. VERDICT**

10(a) Was a verdict delivered on the day of the hearing?	<input type="checkbox"/> Yes <span style="margin-left: 200px;"><input type="checkbox"/> No</span> If no, was the date that the verdict would be delivered announced during the hearing? <input type="checkbox"/> Yes <span style="margin-left: 150px;"><input type="checkbox"/> No</span>
10(b) Date of verdict:	_____ <input type="checkbox"/> N/A
10(c) How many judge while the verdict was delivered?	<input type="checkbox"/> 1 <span style="margin-left: 100px;"><input type="checkbox"/> 2</span> <span style="margin-left: 100px;"><input type="checkbox"/> 3</span> <span style="margin-left: 100px;"><input type="checkbox"/> 5</span> <span style="margin-left: 100px;"><input type="checkbox"/> 9</span>
10(d) Was the verdict announced in public?	<input type="checkbox"/> Yes <span style="margin-left: 200px;"><input type="checkbox"/> No</span> If no, please comment:
10(e) Did the judge inform (I) and explain (E) the procedure and terms of opposition motion?	<input type="checkbox"/> Inform <span style="margin-left: 100px;"><input type="checkbox"/> Inform and explain</span> <span style="margin-left: 100px;"><input type="checkbox"/> Neither informed nor explained</span> <span style="margin-left: 50px;"><input type="checkbox"/> N/A</span>
10(f) Did the judge inform (I) and explain (E) the procedure and terms of appeal?	<input type="checkbox"/> Inform <span style="margin-left: 100px;"><input type="checkbox"/> Inform and explain</span> <span style="margin-left: 100px;"><input type="checkbox"/> Neither informed nor explained</span> <span style="margin-left: 50px;"><input type="checkbox"/> N/A</span>

**TOTAL TIME OF HEARING:** \_\_\_\_\_

**SPECIAL NOTE:**

## Individual Accused Information

### 11. CRIMINAL RESPONSIBILITY

Accused	Accused 1	Accused 2	Accused 3	Accused 4	Accused 5
11(a) Was the accused a juvenile at the time the offense was committed? (Please complete annex 1 for each juvenile accused)	<input type="checkbox"/> Yes <input type="checkbox"/> No	<input type="checkbox"/> Yes <input type="checkbox"/> No	<input type="checkbox"/> Yes <input type="checkbox"/> No	<input type="checkbox"/> Yes <input type="checkbox"/> No	<input type="checkbox"/> Yes <input type="checkbox"/> No

### 12. LEGAL BASIS OF CHARGES

Accused	Accused 1	Accused 2	Accused 3	Accused 4	Accused 5
12(a) Criminal proceedings were conducted through?	<input type="checkbox"/> Judicial Investigation <input type="checkbox"/> Citation <input type="checkbox"/> Immediate Appearance <input type="checkbox"/> I/U	<input type="checkbox"/> Judicial Investigation <input type="checkbox"/> Citation <input type="checkbox"/> Immediate Appearance <input type="checkbox"/> I/U	<input type="checkbox"/> Judicial Investigation <input type="checkbox"/> Citation <input type="checkbox"/> Immediate Appearance <input type="checkbox"/> I/U	<input type="checkbox"/> Judicial Investigation <input type="checkbox"/> Citation <input type="checkbox"/> Immediate Appearance <input type="checkbox"/> I/U	<input type="checkbox"/> Judicial Investigation <input type="checkbox"/> Citation <input type="checkbox"/> Immediate Appearance <input type="checkbox"/> I/U
12(b) Charge against accused	<input type="checkbox"/> Felony <input type="checkbox"/> Misdemeanor <input type="checkbox"/> Petty Offense	<input type="checkbox"/> Felony <input type="checkbox"/> Misdemeanor <input type="checkbox"/> Petty Offense	<input type="checkbox"/> Felony <input type="checkbox"/> Misdemeanor <input type="checkbox"/> Petty Offense	<input type="checkbox"/> Felony <input type="checkbox"/> Misdemeanor <input type="checkbox"/> Petty Offense	<input type="checkbox"/> Felony <input type="checkbox"/> Misdemeanor <input type="checkbox"/> Petty Offense
Offense: <sup>66</sup> Relevant law: Relevant article of the law:					

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<sup>66</sup> If human trafficking please see Annex II: Human Trafficking Trial



**PRE-TRIAL RIGHTS**

**13. RIGHT TO LIBERTY AND TO BE TRIED WITHOUT UNDUE DELAY**

<b>Accused</b>	<b>Accused 1</b>	<b>Accused 2</b>	<b>Accused 3</b>	<b>Accused 4</b>	<b>Accused 5</b>
13(a) Date of alleged offence:	Date: _____ <input type="checkbox"/> I/U	Date: _____ <input type="checkbox"/> I/U	Date: _____ <input type="checkbox"/> I/U	Date: _____ <input type="checkbox"/> I/U	Date: _____ <input type="checkbox"/> I/U
13(b) Date of arrest:	Date: _____ <input type="checkbox"/> I/U <input type="checkbox"/> N/A	Date: _____ <input type="checkbox"/> I/U <input type="checkbox"/> N/A	Date: _____ <input type="checkbox"/> I/U <input type="checkbox"/> N/A	Date: _____ <input type="checkbox"/> I/U <input type="checkbox"/> N/A	Date: _____ <input type="checkbox"/> I/U <input type="checkbox"/> N/A
13 (c) Was there judicial supervision?	<input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> I/U	<input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> I/U	<input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> I/U	<input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> I/U	<input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> I/U
13 (d) Was there provisional detention?	<input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> I/U	<input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> I/U	<input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> I/U	<input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> I/U	<input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> I/U
If Yes, what date did provisional detention begin?	Date: _____ <input type="checkbox"/> I/U	Date: _____ <input type="checkbox"/> I/U	Date: _____ <input type="checkbox"/> I/U	Date: _____ <input type="checkbox"/> I/U	Date: _____ <input type="checkbox"/> I/U
What date did provisional detention finish?	Date: _____ <input type="checkbox"/> I/U	Date: _____ <input type="checkbox"/> I/U	Date: _____ <input type="checkbox"/> I/U	Date: _____ <input type="checkbox"/> I/U	Date: _____ <input type="checkbox"/> I/U

**14. RIGHTS DURING INTERROGATION AND THE PROHIBITION AGAINST TORTURE**

<b>Accused</b>	<b>Accused 1</b>	<b>Accused 2</b>	<b>Accused 3</b>	<b>Accused 4</b>	<b>Accused 5</b>
14(a) Was there anything to suggest that the accused confessed to the offence prior to the hearing?	<input type="checkbox"/> Yes <input type="checkbox"/> No	<input type="checkbox"/> Yes <input type="checkbox"/> No	<input type="checkbox"/> Yes <input type="checkbox"/> No	<input type="checkbox"/> Yes <input type="checkbox"/> No	<input type="checkbox"/> Yes <input type="checkbox"/> No
If yes, please explain:	Notes:	Notes:	Notes:	Notes:	Notes:
14(b) Was there anything to	<input type="checkbox"/> Yes	<input type="checkbox"/> Yes	<input type="checkbox"/> Yes	<input type="checkbox"/> Yes	<input type="checkbox"/> Yes

suggest the accused was interrogated without a lawyer present?	<input type="checkbox"/> No	<input type="checkbox"/> No	<input type="checkbox"/> No	<input type="checkbox"/> No	<input type="checkbox"/> No
If yes, please explain:	Notes:	Notes:	Notes:	Notes:	Notes:
14(c) Was there anything to suggest that threats were made to coerce the accused into confessing to the alleged crime?	<input type="checkbox"/> Yes <input type="checkbox"/> No	<input type="checkbox"/> Yes <input type="checkbox"/> No	<input type="checkbox"/> Yes <input type="checkbox"/> No	<input type="checkbox"/> Yes <input type="checkbox"/> No	<input type="checkbox"/> Yes <input type="checkbox"/> No
If yes, please explain:	Notes:	Notes:	Notes:	Notes:	Notes:
14(d) Was there anything to suggest that violence or torture were used to coerce the accused into confessing to the alleged crime?	<input type="checkbox"/> Yes <input type="checkbox"/> No	<input type="checkbox"/> Yes <input type="checkbox"/> No	<input type="checkbox"/> Yes <input type="checkbox"/> No	<input type="checkbox"/> Yes <input type="checkbox"/> No	<input type="checkbox"/> Yes <input type="checkbox"/> No
If yes, please explain:	Notes:	Notes:	Notes:	Notes:	Notes:

**15. PRE-TRIAL RIGHT TO SPEAK WITH A LAWYER AND RIGHT TO ADEQUATE TIME AND FACILITIES TO PREPARE A DEFENSE**

<b>Accused</b>	<b>Accused 1</b>	<b>Accused 2</b>	<b>Accused 3</b>	<b>Accused 4</b>	<b>Accused 5</b>
15(a) Was there anything to suggest that the lawyer of the accused was assigned on the day of the trial?	<input type="checkbox"/> Yes <input type="checkbox"/> No	<input type="checkbox"/> Yes <input type="checkbox"/> No	<input type="checkbox"/> Yes <input type="checkbox"/> No	<input type="checkbox"/> Yes <input type="checkbox"/> No	<input type="checkbox"/> Yes <input type="checkbox"/> No
If yes, please explain:	Notes:	Notes:	Notes:	Notes:	Notes:
15(b) Was the issue of adequate time and facilities for preparation raised by the defense?	<input type="checkbox"/> Yes <input type="checkbox"/> No	<input type="checkbox"/> Yes <input type="checkbox"/> No	<input type="checkbox"/> Yes <input type="checkbox"/> No	<input type="checkbox"/> Yes <input type="checkbox"/> No	<input type="checkbox"/> Yes <input type="checkbox"/> No
If yes, please explain:	Notes:	Notes:	Notes:	Notes:	Notes:

**TRIAL RIGHTS**

**16. RIGHT TO BE PRESENT AND TO LEGAL REPRESENTATION**

Accused	Accused 1	Accused 2	Accused 3	Accused 4	Accused 5
16 (a) Was the accused present?	<input type="checkbox"/> Yes <input type="checkbox"/> No	<input type="checkbox"/> Yes <input type="checkbox"/> No	<input type="checkbox"/> Yes <input type="checkbox"/> No	<input type="checkbox"/> Yes <input type="checkbox"/> No	<input type="checkbox"/> Yes <input type="checkbox"/> No
16 (b) Was the accused represented by a lawyer	<input type="checkbox"/> Yes <input type="checkbox"/> No	<input type="checkbox"/> Yes <input type="checkbox"/> No	<input type="checkbox"/> Yes <input type="checkbox"/> No	<input type="checkbox"/> Yes <input type="checkbox"/> No	<input type="checkbox"/> Yes <input type="checkbox"/> No
16(c) Did any of the lawyers represent more than one accused?	<input type="checkbox"/> Yes <input type="checkbox"/> No	<input type="checkbox"/> Yes <input type="checkbox"/> No	<input type="checkbox"/> Yes <input type="checkbox"/> No	<input type="checkbox"/> Yes <input type="checkbox"/> No	<input type="checkbox"/> Yes <input type="checkbox"/> No
If yes, was there a conflict between the interests of two or more of the accused represented by the same lawyer	<input type="checkbox"/> Yes <input type="checkbox"/> No	<input type="checkbox"/> Yes <input type="checkbox"/> No	<input type="checkbox"/> Yes <input type="checkbox"/> No	<input type="checkbox"/> Yes <input type="checkbox"/> No	<input type="checkbox"/> Yes <input type="checkbox"/> No

#### 17. PRESUMPTION OF INNOCENCE

Accused	Accused 1	Accused 2	Accused 3	Accused 4	Accused 5
17(a) Did the accused appear before the court in prison uniform?	<input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> N/A	<input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> N/A	<input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> N/A	<input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> N/A	<input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> N/A
17(b) Was the accused handcuffed throughout the trial?	<input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> N/A	<input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> N/A	<input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> N/A	<input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> N/A	<input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> N/A
17(c) Were any statements made by the judge about the guilt of the accused prior to the delivery of the verdict?	<input type="checkbox"/> Yes <input type="checkbox"/> No	<input type="checkbox"/> Yes <input type="checkbox"/> No	<input type="checkbox"/> Yes <input type="checkbox"/> No	<input type="checkbox"/> Yes <input type="checkbox"/> No	<input type="checkbox"/> Yes <input type="checkbox"/> No
If yes, please provide details:	Details:	Details:	Details:	Details:	Details:
17 (d) Was there anything to suggest that the judge drew an inference of guilt from the silence of the accused?	<input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> N/A	<input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> N/A	<input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> N/A	<input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> N/A	<input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> N/A

If yes, please explain:	Details:	Details:	Details:	Details:	Details:
17 (e) Did the judge say anything to suggest that s/he was placing the burden of proof on the accused?	<input type="checkbox"/> Yes <input type="checkbox"/> No	<input type="checkbox"/> Yes <input type="checkbox"/> No	<input type="checkbox"/> Yes <input type="checkbox"/> No	<input type="checkbox"/> Yes <input type="checkbox"/> No	<input type="checkbox"/> Yes <input type="checkbox"/> No
If yes, please explain:	Details:	Details:	Details:	Details:	Details:

#### 18. PROHIBITION AGAINST DOUBLE JEOPARDY

Accused	Accused 1	Accused 2	Accused 3	Accused 4	Accused 5
18(a) Was there anything to suggest that the accused had been tried and sentenced for this offense previously?	<input type="checkbox"/> Yes <input type="checkbox"/> No	<input type="checkbox"/> Yes <input type="checkbox"/> No	<input type="checkbox"/> Yes <input type="checkbox"/> No	<input type="checkbox"/> Yes <input type="checkbox"/> No	<input type="checkbox"/> Yes <input type="checkbox"/> No
If yes, please explain:	Details:	Details:	Details:	Details:	Details:

#### 19. PROHIBITION AGAINST THE RETROSPECTIVE APPLICATION OF PENAL LEGISLATION

Accused	Accused 1	Accused 2	Accused 3	Accused 4	Accused 5
19(a) Was there anything to suggest that the charged offense was not an offense at the time it was allegedly committed?	<input type="checkbox"/> Yes <input type="checkbox"/> No	<input type="checkbox"/> Yes <input type="checkbox"/> No	<input type="checkbox"/> Yes <input type="checkbox"/> No	<input type="checkbox"/> Yes <input type="checkbox"/> No	<input type="checkbox"/> Yes <input type="checkbox"/> No
If yes, please explain:	Details:	Details:	Details:	Details:	Details:

#### 20. VERDICT

Accused	Accused 1	Accused 2	Accused 3	Accused 4	Accused 5
20(a) Was the accused in provisional detention prior to the verdict?	<input type="checkbox"/> Yes <input type="checkbox"/> No	<input type="checkbox"/> Yes <input type="checkbox"/> No	<input type="checkbox"/> Yes <input type="checkbox"/> No	<input type="checkbox"/> Yes <input type="checkbox"/> No	<input type="checkbox"/> Yes <input type="checkbox"/> No
20(b) Verdict:	<input type="checkbox"/> Guilty <input type="checkbox"/> Not guilty <input type="checkbox"/> Re-investigated <input type="checkbox"/> Pre-trial	<input type="checkbox"/> Guilty <input type="checkbox"/> Not guilty <input type="checkbox"/> Re-investigated <input type="checkbox"/> Pre-trial	<input type="checkbox"/> Guilty <input type="checkbox"/> Not guilty <input type="checkbox"/> Re-investigated <input type="checkbox"/> Pre-trial	<input type="checkbox"/> Guilty <input type="checkbox"/> Not guilty <input type="checkbox"/> Re-investigated <input type="checkbox"/> Pre-trial	<input type="checkbox"/> Guilty <input type="checkbox"/> Not guilty <input type="checkbox"/> Re-investigated <input type="checkbox"/> Pre-trial
20(c) Did the judge refer to the article of the law under which the accused had been charged?	<input type="checkbox"/> Yes <input type="checkbox"/> No	<input type="checkbox"/> Yes <input type="checkbox"/> No	<input type="checkbox"/> Yes <input type="checkbox"/> No	<input type="checkbox"/> Yes <input type="checkbox"/> No	<input type="checkbox"/> Yes <input type="checkbox"/> No
20(d) Did the judge refer to the evidence presented?	<input type="checkbox"/> Yes <input type="checkbox"/> No	<input type="checkbox"/> Yes <input type="checkbox"/> No	<input type="checkbox"/> Yes <input type="checkbox"/> No	<input type="checkbox"/> Yes <input type="checkbox"/> No	<input type="checkbox"/> Yes <input type="checkbox"/> No
If the accused confessed to the alleged offense at any stage prior to or during the trial, did the judge rely on the confession as evidence? (if no confession – N/A)	<input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> N/A <input type="checkbox"/> I/U	<input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> N/A <input type="checkbox"/> I/U	<input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> N/A <input type="checkbox"/> I/U	<input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> N/A <input type="checkbox"/> I/U	<input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> N/A <input type="checkbox"/> I/U

## 21. SENTENCE

Accused	Accused 1	Accused 2	Accused 3	Accused 4	Accused 5
21(a) Was the accused sentenced to imprisonment?	<input type="checkbox"/> Yes <input type="checkbox"/> No	<input type="checkbox"/> Yes <input type="checkbox"/> No	<input type="checkbox"/> Yes <input type="checkbox"/> No	<input type="checkbox"/> Yes <input type="checkbox"/> No	<input type="checkbox"/> Yes <input type="checkbox"/> No
Length:	Details:	Details:	Details:	Details:	Details:
Prison:	Details:	Details:	Details:	Details:	Details:
Probation:	Details:	Details:	Details:	Details:	Details:
Pre-trial detention taken into account?	<input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> I/U <input type="checkbox"/> N/A	<input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> I/U <input type="checkbox"/> N/A	<input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> I/U <input type="checkbox"/> N/A	<input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> I/U <input type="checkbox"/> N/A	<input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> I/U <input type="checkbox"/> N/A
21(b) Was the accused ordered to pay a fine?	<input type="checkbox"/> Yes	<input type="checkbox"/> Yes	<input type="checkbox"/> Yes	<input type="checkbox"/> Yes	<input type="checkbox"/> Yes

	<input type="checkbox"/> No	<input type="checkbox"/> No	<input type="checkbox"/> No	<input type="checkbox"/> No	<input type="checkbox"/> No
Amount:	Details:	Details:	Details:	Details:	Details:
21(c) Was the accused ordered to pay compensation?	<input type="checkbox"/> Yes <input type="checkbox"/> No	<input type="checkbox"/> Yes <input type="checkbox"/> No	<input type="checkbox"/> Yes <input type="checkbox"/> No	<input type="checkbox"/> Yes <input type="checkbox"/> No	<input type="checkbox"/> Yes <input type="checkbox"/> No
Amount:	Details:	Details:	Details:	Details:	Details:
21(d) Was there any other alternative sentence?	<input type="checkbox"/> Yes <input type="checkbox"/> No	<input type="checkbox"/> Yes <input type="checkbox"/> No	<input type="checkbox"/> Yes <input type="checkbox"/> No	<input type="checkbox"/> Yes <input type="checkbox"/> No	<input type="checkbox"/> Yes <input type="checkbox"/> No
	Details:	Details:	Details:	Details:	Details:
21(e) Was there anything to suggest that the judge based his or her verdict on evidence that was not in the case file or presented at trial?	<input type="checkbox"/> Yes <input type="checkbox"/> No	<input type="checkbox"/> Yes <input type="checkbox"/> No	<input type="checkbox"/> Yes <input type="checkbox"/> No	<input type="checkbox"/> Yes <input type="checkbox"/> No	<input type="checkbox"/> Yes <input type="checkbox"/> No
If yes, please provide details:	Details:	Details:	Details:	Details:	Details:
21(f) Was the sentence within the range of penalties applicable at the time the offense was committed?	<input type="checkbox"/> Yes <input type="checkbox"/> No	<input type="checkbox"/> Yes <input type="checkbox"/> No	<input type="checkbox"/> Yes <input type="checkbox"/> No	<input type="checkbox"/> Yes <input type="checkbox"/> No	<input type="checkbox"/> Yes <input type="checkbox"/> No
If no, please provide further details:	Details:	Details:	Details:	Details:	Details:

## APPENDIX II: JUVENILE ACCUSED

### 22. AGE

22(a) Age at the time of the offense	<input type="checkbox"/> <14	<input type="checkbox"/> 14 – 15	<input type="checkbox"/> 16 – 17
22(b) If under the age of 14 at the time of the offense did the judge immediately acquit the accused?	<input type="checkbox"/> Yes	<input type="checkbox"/> No	<input type="checkbox"/> N/A

### 23. PRE-TRIAL DETENTION N/A

23(a) Age at the time of pre-trial detention?	<input type="checkbox"/> <14	<input type="checkbox"/> 14 – 15	<input type="checkbox"/> 16 – 17
23 (b) Was there anything to suggest that the accused was not separated from adults?	<input type="checkbox"/> Yes	<input type="checkbox"/> No	Comment:

### 24. TRIAL N/A

24(a) Were any measures taken to protect the privacy of the accused juvenile during the hearing?	<input type="checkbox"/> Yes	<input type="checkbox"/> No	Details:
24 (b) Did the judge give the accused juvenile the chance to express his or her views freely, either personally or through a representative such as a lawyer or parent?	<input type="checkbox"/> Yes	<input type="checkbox"/> No	

### 25. SENTENCE N/A

25(a) Did the judge cite Article 38 or 39 of the Penal Code when sentencing the accused?	<input type="checkbox"/> Article 38	<input type="checkbox"/> Article 39	<input type="checkbox"/> Both	<input type="checkbox"/> Neither
Was there anything to suggest that the Judge considered imposing a non-prison sentence?	<input type="checkbox"/> Yes	<input type="checkbox"/> No	Comment:	

|

**APPENDIX III: LAW BANK**

		Criminal Code of Procedure	UNTAC	Constitution	Code of Ethics for Judges and Prosecutors	International Convention on Civil and Political Rights	Basic Principles of the Independence of the Judiciary	Basic Principles on the Role of Lawyers	Convention against torture	Bangalore Principles	UN Declaration of Human Rights	GOOD PRACTICE / IDEAL	Comments
Right to a public hearing	2(a)	Was notice of the hearing posed on a public board outside the courtroom?	X	X	X	X	Art 14(1)	X	X	X	Art 10	Good Practice	Internal Rules of Court - need to check
	2(b)	Were members of the public or media prevented from entering or dismissed from the courtroom?	Art 316	Art 23	Art 129	X		X	X	X		X	X
Right to understand nature of the charge	3(a)	Did the judge announce the case to be heard?	X	X	X	X	Art 14(3)(a)	X	X	X	X	X	X
	3(b)	Did the judge state the charge?	Art 325	X	X	X	14(3)(a)	X	X	X	X	X	X
	3(c)	Did the judge state the relevant law?	X	X	X	X	X	X	X	X	X	Good Practice	X
	3(d)	Did the judge state the date of the alleged crime?	Art 325	X	X	X	Art 14(3)(a)	X	X	X	X	X	X
	3(e)	Did the judge state the place of the alleged crime?	Art 325	X	X	X	Art 14(3)(a)	X	X	X	X	X	X



			Criminal Code of Procedure	UNTAC	Constitution	Code of Ethics for Judges and Prosecutors	International Convention on Civil and Political Rights	Basic Principles of the Independence of the Judiciary	Basic Principles on the Role of Lawyers	Convention against torture	Bangalore Principles	UN Declaration of Human Rights	GOOD PRACTICE / IDEAL	Comments	
	3(f)	Did the judge state the parties involved?	Art 322	X	X	X	X	X	X	X	X	X	X	X	
	3(g)	If required, was an interpreter provided?	Art 330	X	X	X	Art 14(3)(f)	X	X	X	Principle 5	X	X	BUT 330 wording is "may provide" NOT "should provide"	
	3(h)	If required, were provisions made for those with disabilities?	Art 331	X	X	7	X	X	X	X		X	X	X	
Explanation of Rights	4(a)	Did the judge inform (I) and explain (E) to the accused their right to legal representation or to self-defense?	Art 301	Art 1(2) Competent, Art 1(3), Art 24(3) Right not to self-incriminate	Art 128 (states Judge should respect rights), Art 129 competent	Art 128 (Competent)	Art 14(3)(d)	X	Art 1, 5	X	X	X	Good Practice		
	4(b)	Did the Judge inform (I) and explain (E) to the accused their right not to answer or to answer?	Art 321				X	X	X	X	X	X	X	Good Practice	
	4(c)	Did the Judge inform (I) and explain (E) to the accused their right to change the judge.	X				X	X	X	X	X	X	X	Good Practice	

			Criminal Code of Procedure	UNTAC	Constitution	Code of Ethics for Judges and Prosecutors	International Convention on Civil and Political Rights	Basic Principles of the Independence of the Judiciary	Basic Principles on the Role of Lawyers	Convention against torture	Bangalore Principles	UN Declaration of Human Rights	GOOD PRACTICE / IDEAL	Comments
	4(d)	Did the Judge inform (I) and explain (E) to the accused their right to have the last word?	Art 335				X	X	X	X	X	X	Good Practice	
Right to call and examine witnesses	5(a)	Was there anything to suggest that any party <i>was not</i> given the opportunity to call witnesses?	Art 298	Article 24(4), 24(5)	X	X	14(3)(e)	X	X	X	X	X	X	
	5(b)	Were the witnesses present in the courtroom before they were questioned?	Art 324	X	X	X	X	X	X	X	X	X	X	
Presentation of evidence	6(a)	Was evidence/witness presented?	Art 321 and 324	Art 24	X	X	X	X	X	X	X	X	X	
	6(b)	Was there anything to suggest testimony presented by a witness constituted hearsay?	Art 321 and 324	X	X	X	X	X	X	X	X	X	X	

			Criminal Code of Procedure	UNTAC	Constitution	Code of Ethics for Judges and Prosecutors	International Convention on Civil and Political Rights	Basic Principles of the Independence of the Judiciary	Basic Principles on the Role of Lawyers	Convention against torture	Bangalore Principles	UN Declaration of Human Rights	GOOD PRACTICE / IDEAL	Comments
	6(c)	Did the judge rule that any of the evidence presented was inadmissible?	Art 321	X	Art 38	X	X	X	X	X	X	X	X	
Right to full disclosure/Equality of arms	7(a)	Was there anything to suggest that any party was <i>not</i> given the opportunity to present evidence?	Art 321 and 334	Article 24(4)	X	X	Art 14(3)(e)	X	X	X	X	X	X	
	7(b)	Was there anything to suggest that any part was <i>not</i> given the opportunity to question witnesses?	Art 326	Art 24(1)	X	X		X	X	X	X	X	X	
	7(c)	Was there anything to suggest that any party did not have an opportunity to view the case file prior to the hearing?	Art 319	X	X	X	X	X	X	X	X	X	X	

			Criminal Code of Procedure	UNTAC	Constitution	Code of Ethics for Judges and Prosecutors	International Convention on Civil and Political Rights	Basic Principles of the Independence of the Judiciary	Basic Principles on the Role of Lawyers	Convention against torture	Bangalore Principles	UN Declaration of Human Rights	GOOD PRACTICE / IDEAL	Comments
	7(d)	Was the defense given chance to have the last word?	Art 335	Art 1(2) Competent, Art 1(3),	Art 128, Art 129	Art 29 (Competent)	X	X	X	X	X	X	Good Practice	
Independence, Impartiality and Conduct of the judge	8(a)	Was there anything to suggest that judge had an interest in the case beyond their usual judicial role?	Art 5556 and 557	Art 1	Art 128, 129, 132	Art 2,3,8,11, 12, 14, 17, 20	Art 14(1)	Art 1-7	See all	X	Principle 1 & 2.5.3	Art 10	X	Art 3 raft Law on Statute of Judges
	8(b)	Did the judge behave in an intimidating manner towards a party?	X						Art 8	X	X		Principle 3.1 and 5	X
	8(c)	Did the judge use impolite word toward any party?	X	X	X	X	X	X	X	Principles 3 and 5	X	X		
	8(d)	Did the judge leave the courtroom during the trial?	X	X	X	X	X	X	X	Principles 1,2,3, 6.1, 5.2	X	X		
	8(e)	Did the judge answer a mobile telephone during the trial?	X	X	X	X	X	X	X	X	X	X	X	
Deliberation	9(a)	Was there a deliberation?	Art 337	X	X	X	X	X	X	X	X	X	X	
	9(b)	Was there anything to suggest that any party spoke to the judge during deliberation?	Art 337	Art 1	Art 128, 129, 132	Art 9	Art 14(1)	Art 1-7	X	X	Principle 1 & 2.4	Art 10	X	

		Criminal Code of Procedure	UNTAC	Constitution	Code of Ethics for Judges and Prosecutors	International Convention on Civil and Political Rights	Basic Principles of the Independence of the Judiciary	Basic Principles on the Role of Lawyers	Convention against torture	Bangalore Principles	UN Declaration of Human Rights	GOOD PRACTICE / IDEAL	Comments	
Verdict	10(a)	Was a verdict delivered on the day of the hearing?	Art 357, 359, 347	Art 26(2)	X	X	X	X	X	X	X	X	Old law gives 15 day limit between trial and verdict - need article and name of law. Law on Criminal Procedure 1993 Art 128	
	10(b)	Date of verdict?	Art 347	X	X	X	X	X	X	X	X	X		
	10(c)	How many judge while the verdict was delivered?	X	X	X	X	X	X	X	X	X	X		
	10(d)	Was the verdict announced in public?	Art 359	Art 26(2)	X	X	X	X	X	X	X	X		
	10(e)	Did the judge inform (I) and explain (E) the procedure and terms of opposition motion?	Art 375, 376, 382	X	X	X	X	X	X	X	X	X	X	
	10(f)	Did the judge inform (I) and explain (E) the procedure and terms of appeal?		X	X	X	X	X	X	X	X	X	X	

			Criminal Code of Procedure	UNTAC	Constitution	Code of Ethics for Judges and Prosecutors	International Convention on Civil and Political Rights	Basic Principles of the Independence of the Judiciary	Basic Principles on the Role of Lawyers	Convention against torture	Bangalore Principles	UN Declaration of Human Rights	GOOD PRACTICE / IDEAL	Comments
Criminal Responsibility	11(a)	Was the accused a juvenile at the time the offense was committed?	Art 38	Art68(2)	X	X	Art 14(4)	X	X	X	X	X	X	See also Article 1 of the United Nations Convention on the Rights of the Child
Legal Basis of Charges	12(a)	Criminal proceedings were conducted through?	Art 43-47; 122; 252	X	X	X	X	X	X	X	X	X	X	
	12(b)	Charge against accused?	Art 46-48	X	X	X	X	X	X	X	X	X	X	
Right to Liberty and to be tried without undue delay	13(a)	Date of alleged offense?	X	X	X	X	X	X	X	X	X	X	X	
	13(b)	Date of arrest?	X	X	X	X	X	X	X	X	X	X	X	
	13(c)	Was there judicial supervision?	Art 220-230	X	X	X	X	X	X	X	X	X	X	
	13(d)	Was there provisional detention?	Art 203-218	Art 14	Art 38	X	Art 9	X	X	X	X	Art 9	X	

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Rights during interrogation	14(a)	Was there anything to suggest that the accused confessed to the offense prior to the hearing?	X	X	X	X	X	X	X	X	X	X	X	
	14(b)	Was there anything to suggest that the accused was interrogated without a lawyer present?	Art 145	X	X	X	X	X	X	X	X	X	X	
	14(c)	Was there anything to suggest that threats were made to coerce the accused into confessing to the alleged crime?	Art 321	Art 12(1), 24(3)	Art 38	X	Art 14(3)(g)	X	X	3, 15	X	X	X	
	14(d)	Was there anything to suggest that violence or torture were used to coerce the accused into confessing the alleged crime?				X	X	X	X	All	X	Art 5	X	

			Criminal Code of Procedure	UNTAC	Constitution	Code of Ethics for Judges and Prosecutors	International Convention on Civil and Political Rights	Basic Principles of the Independence of the Judiciary	Basic Principles on the Role of Lawyers	Convention against torture	Bangalore Principles	UN Declaration of Human Rights	GOOD PRACTICE / IDEAL	Comments
Right to lawyer and to adequate time and facilities to prepare a defense	15(a)	Was there anything to suggest that the lawyer of the accused was assigned on the day of the trial?	X	X	X	X	Art 14(3)(b)	X	X	X	X	X	X	
	15(b)	Was the issue of adequate time and facilities for preparation raised by the defense?	Art 319, 149	Art 17(2), 21(2)	Art 38	X	Art 14(3)(b)	X	Art 8	X	X	X	X	
Right to be present and to legal representation	16(a)	Was the accused present?	Art 300	X	X	X	14(3)(d)	X	X	X	X	X	X	
	16(b)	Was the accused represented by a lawyer?	Art 300, 301	Art 10	Art 38	X	Art 14(3)(d)	X	Art 1, 5, 7	X	X	X	X	
	16(c)	Did any of the lawyers represent more than one accused?	X	X	X	X	X	X	X	X	X	X	X	
Presumption of innocence	17(a)	Did the accused appear before the court in prison uniform?	X	Art 25	Art 38	X	Art14(2)	X	X	X	X	Art 11(1)	Good Practice	



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Presumption of innocence continued	17(b)	Was the accused handcuffed throughout the trial?	X			X		X	X	X	X			
	17(c)	Were any statements made by the judge about the guilt of the accused prior to the delivery of the verdict?				Art 2,7,8,9							X	
	17(d)	Was there anything to suggest that the judge drew an inference of guilt from the silence of the accused?	Art 321	Art 1	Art 128,129, 132	X	Art 14(1)	Art 1-7	X	X	X	Art 10	X	
	17(e)	Did the judge say anything to suggest that s/he was placing the burden of proof on the accused?	X	X	Art 38	X	Art 14(2)	X	X	X	X	X	X	
Prohibition against double jeopardy	18(a)	Was there anything to suggest that the accused had been tried and sentenced for this offense previously?	Art 12	X	X	X	Art 14(7)	X	X	X	X	X	X	

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Prohibition against retroactive application of penal legislation	19(a)	Was there anything to suggest that the charged offense was not an offense at the time it was allegedly committed?	X	X	X	X	Art 15	X	X	X	X	Art 11(2)	X	
Verdict	20(a)	Was the accused in provisional detention prior to the verdict?	Art 203-218	Art 14	Art 38	X	Art 9	X	X	X	X	Art 9	X	
	20(b)	Verdict?	Art 357	X	X	X	X	X	X	X	X	X	X	
	20(c)	Did the judge refer to the article of the law under which the accused had been charged?	Art 357	Art 26	X	X	X	X	X	X	X	X	X	
	20(d)	Did the judge refer to the evidence presented?	Art 357	X	X	X	X	X	X	X	X	X	X	
	20(e)	If the accused confessed to the alleged offense at any stage prior to alleged offense at any stage prior to or during the trial, did the judge rely on the confession as evidence?	Art 321	Art 26	Art 38	X	X	X	X	X	X	X	X	

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Sentence	21(a)	Was the accused sentenced to imprisonment?	Art 43,44,51	X	X	X	X	X	X	X	X	X	
	21(b)	Was the accused ordered to pay a fine?	Art 43	X	X	X	X	X	X	X	X	X	
	21(c)	Was the accused ordered to pay compensation?	Art 355, 14	X	X	X	X	X	X	X	X	X	
	21(d)	Was there any other alternative sentence?	Art 39,40,53, 55,72,76, 104,117	X	X	X	X	X	X	X	X	X	
	21(e)	Was there anything to suggest that the judge based his or her verdict on evidence that was not in the case file or presented at trial?	Art 321	X	X	X	X	X	X	X	X	X	
	21(f)	Was the sentence within the range of penalties applicable at the time the offense was committed?	X	X	X	X	X	X	X	X	X	X	See individual sentencing provisions for each offense

## APPENDIX IV: TRIAL MONITORS CODE OF CONDUCT

### Preparation and prerequisites<sup>67</sup>

#### General Duties

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##### *Confidentiality*

- The monitoring project respects full confidentiality with respect to the release of non-public information.
- Monitors must have a comprehensive understanding of the confidentiality principles in relation to trial monitoring with respect to information obtained at court, as well as operational and organizational information relevant to CCHR.

#### Prior to Implementation of the Trial Monitoring Project

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##### *Preliminary assessments*

Trial Monitors must have a thorough understanding of the following prior to court attendance as a Monitor:

- The judicial mechanisms in Cambodia;
- Court hierarchy and corresponding jurisdictions;
- Level of cooperation and/or involvement that is expected from a) Judge; b) Prosecutor C) Defense Counsel and e) Government.

##### *Notification*

- The decisions as to who will receive formal and/or informal notification of the Trial Monitoring must be made prior to monitoring the trials and be approved by the Project Coordinator in line with the project objectives;
- If the CCHR notifies the Court of the trial monitoring it must be in accordance with general practices;<sup>68</sup>
- Monitors must record who has been informed and/or consulted prior to, and/or during, the trial. This includes the details and form of the notification;
- Whether a Memorandum of Understanding (“MOU”) has been signed between CCHR and the Ministry of Justice.

#### Prior to Each trial to be monitored

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##### *Preliminary Assessments*

The following information is collected prior to each trial, or, where unable to do so, it is noted and the research is conducted after or during the trial:

- Whether there are relevant reports on similar trials in Cambodia;
- Which binding international laws and treaties, if any, pertain to the case;

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<sup>67</sup> This section will be provided as an additional document and will apply for all trials to be monitored

<sup>68</sup> Attach copy of notification/agreement with relevant court

- What are the domestic laws, substantive and procedural, relevant to the case;
- The relevant Constitutional provisions.

#### *Notification*

- Trial Monitors must document in detail any dialogue with a) government; b) Defense Counsel; c) Prosecutor; d) Judge; e) Court Clerk or f) any other relevant party.

#### *Access*

- The Trial Monitors must register with the court prior to monitoring and, if a request for documents or access was made, Trial Monitors must keep copies of all official documentation.

### **During the Trial**

#### *General*

- Arrive in court ahead of time to allow sufficient time to gain access to the court, locate the courtroom, and find a seat. This should be described in the Report form.
- Monitors must be prepared and able to clearly articulate the legal basis, purposes, and objectives of the program to all court officials and legal actors.

#### *Identification*

- Carry the monitor-identification badge at all times, and produce it if requested by court officials.
- If there are concerns about access, carry acknowledgement for local officials of trial monitoring project.

#### *Conduct in court*

- Monitors must display professionalism at all times.
- Must possess a high standard of legal knowledge, including international human rights law.
- Monitors must decide where to sit, attempting to secure an appearance of impartiality and to facilitate observation of the trial. The observer should choose to sit in a prominent, neutral location in the courtroom. Maintain polite and composed demeanor with all court officials and parties to a case.
- Wear appropriate clothing.
- Arrive promptly at court.
- Maintain a respectful approach during all interactions with court officials and actors.
- Visibly make extensive notes during hearings based on the CCHR checklist, irrespective of whether the trial is being recorded.
- Monitors must be familiar with and fully understand the checklist and guidelines for trial monitoring.
- Ensure the safety and confidentiality of notes.
- Get a neutral party to give introduction to court (only if staying the entire time) to increase visibility.

### *Impartiality and non-interference*

- Occupy a convenient seat in a courtroom that allows you to observe, hear and follow all aspects of a hearing.
- Do not sit next to either the defense or prosecution.
- Never ask legal actors their opinions on a case or offer advice.
- Avoid interfering during the course of a hearing.
- Never interrupt a trial proceeding or speak with legal actors or participants during the trial.
- Never intervene in a trial or attempt to influence the outcome of trial proceedings in any way.
- At no time express any bias or preference in relation to the parties in a case.
- Do not express any views on the course of a trial either inside or outside a courtroom. When asked specific questions, respond by explaining the role of the monitor and the code of impartiality.
- Trial Monitors should make no public statements.
- Where possible, Trial Monitors should take note of related newspaper articles referring to the trial and be aware of practical observations for future trial monitors.