

# Fair Trial Rights in Cambodia

First Bi-annual Report

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The Constitution of the Kingdom of Cambodia entrusts the Judiciary with the responsibility of upholding impartiality and protecting the rights and freedoms of Khmer citizens. This includes a duty to ensure that every citizen who is accused of a crime receives a fair trial.

A fair trial is essential, not only to protect the human rights of the accused and those of victims, but also to ensure the proper administration of justice, and to engender public trust and respect for the Judiciary as an independent and impartial guardian of the rights of Khmer citizens.

This Report sets out Cambodian and international law relating to the right to a fair trial. It presents data collected from the monitoring of 199 trials at Phnom Penh Capital Court and Kandal Court of First Instance between August 10 and December 31, 2009. Finally, it provides analysis of this data and sets out a series of recommendations to improve adherence to fair trial rights at the Court monitored.

# Fair Trial Rights in Cambodia

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## ABOUT THE CAMBODIAN CENTER FOR HUMAN RIGHTS

This 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 (the "CCHR"). The CCHR's vision is of a non-violent Kingdom of Cambodia ("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. The 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. The 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, the 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).

## ACKNOWLEDGEMENTS

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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 give any feedback, please email CCHR at [info@cchrcambodia.org](mailto:info@cchrcambodia.org).

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## DEFINITIONS

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“ASEAN”	Association of South East Asian Nations
“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
“CCP”	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
“Database”	The database in which CCHR trial monitors store trial data recorded on checklists
“EWMI”	East West Management Institute
“ICCPR”	International Covenant on Civil and Political Rights
“Kandal Court”	Kandal Provincial Court of First Instance
“Model Court Project”	A collaborate project aiming to improve the fairness and efficiency of trials in four courts – Phnom Penh, Kandal, Kompong Cham, and Banteay Meanchey – with the aim of providing a positive model for the court system throughout Cambodia
“Model Court Standards”	A set of court standards for fairness and efficiency compiled in conjunction with the Cambodian Model Court Project
“MOJ”	Ministry of Justice
“NGO”	Non-governmental Organization
“Penal Code”	The Penal Code of the Kingdom of Cambodia, 2009
“Phnom Penh Court”	Phnom Penh Municipal Court of First Instance
“Project”	Cambodian Trial Monitoring Project
“RAJP”	Royal Academy of Judicial Professions
“Report”	This biannual report on ‘Fair Trial Rights in Cambodia’
“Reporting Period”	The reporting period for the Report of August 10 to December 31, 2009
“RGC”	Royal Government of Cambodia

“SCM”	Supreme Council of Magistracy
“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 report on ‘Fair Trial Rights in Cambodia’ is an output of the Cambodian Trial Monitoring Project implemented by the CCHR. It presents data collected from the monitoring of 199 trials at Phnom Penh Municipal Court and Kandal Court of First Instance between August 10 and December 31, 2009. It also provides analysis of the data, and recommendations to improve adherence to fair trial rights at the Courts monitored.

The Cambodian legal system is based on civil law, with trials exhibiting an inquisitorial approach. The Constitution of the Kingdom of Cambodia guarantees the independence of the judiciary as well as the right to a fair trial. The Code of Criminal Procedure of the Kingdom of Cambodia (the “CCP”) sets out fair trial rights in more detail. A Code of Ethics for Judges and Prosecutors establishes professional and ethical standards for Cambodian judges and prosecutors. Cambodia is also bound by the international law that it has ratified. The Universal Declaration of Human Rights and International Covenant on Civil and Political Rights both guarantee the right to a fair and public hearing by an independent and impartial tribunal.

Judges at the Phnom Penh and Kandal Court appear to be doing a good job of adhering to fair trial standards in a number of areas. The Trial Monitors observed no instances in which the public were blocked from attending a trial. The judiciary at the two courts are also doing a good job of informing the accused of the nature of the charge with which they are faced. In 198 of the 199 trials monitored the Judge stated the charge and in 197 of the trials the Judge referred to the date and location that the alleged offense occurred. In 169 trials the Judge also stated the relevant law. The data is less impressive in the area of informing and explaining the rights of the accused – judges at the two courts are informing the accused of their rights in just over half of all trials.

Another positive area was the management of evidence and witnesses, with the data indicating that evidence was presented in most cases and that the parties generally had equal opportunities to present evidence and question witnesses. Evidence was presented in 153 or 77% of the trials monitored and on only three occasions was there anything to suggest that a party was denied the opportunity to present evidence. Similarly, in all but four trials both parties appeared to be given equal opportunities to summon witnesses and there were no instances in which it appeared that a party was denied the opportunity to examine a witness.

The most concerning data collected during trial monitoring was that relating to the perceived independence and impartiality of judges, lack of legal representation, and the frequency of pre-trial detention. In 32 of the 199 trials monitored – or 16% of trials – the prosecutor or another lawyer was observed entering the Judge’s deliberation room immediately after the end of a hearing, and prior to the judge reaching a verdict. After observing the frequent use of mobile phones in the courtroom, the Trial Monitors began monitoring the use of mobile phones by judges during proceedings. Of the 60 trials monitored after monitoring of this practice began, judges answered a mobile phone during proceedings on 17 occasions – 28 percent of those trials monitored. These observations raised

immediate questions about the independence and impartiality of the presiding judges and, at the very least, indicated that these judges had not adhered to the required ethical and professional standards.

Of the 199 trials monitored during the Reporting Period, the accused appeared without legal representation in 64 – or 32% – of all trials monitored. Both national and international law provide that legal representation should be available to those who do not have the resources to hire a lawyer of their choice. A vital component of this obligation is the duty to inform the accused of their right to legal representation. In five of the 105 trials in which the accused was charged with a felony, no legal representation was present at trial, in breach of Article 301 of the CCP which states that legal representation is compulsory in a trial involving a felony charge. Proceedings in these five trials were therefore conducted in breach of legal requirements. A majority – 62% – of those charged with a misdemeanor also appeared without representation, raising serious doubts about the fairness of these trials.

In at least 176 of the 199 trials monitored, the accused were detained in pre-trial detention, amounting to a pre-trial detention rate of at least 88%. These figures suggested that the presumption against pre-trial detention in Article 203 of the CCP was not being applied. Further, in eight of the trials monitored, the duration of the detention of the accused exceeded the maximum legal limits for provisional detention proscribed in Articles 208 and 209 of the CCP (in combination with Article 249). In one case an accused charged with a felony remained in detention pending trial for over three years.

It is important to recognize that the justice system relies upon the interaction of a number of actors, including police, prison authorities, investigating judges, trial judges, lawyers, clerks, and other court staff. The right to a fair trial involves a series of individual rights that begin from the moment a suspect is arrested, and continue throughout the legal process until the final appeal has been heard. In order to ensure that fair trial rights are adhered to at every stage of the process, cooperation is required from officials across the justice system. Pre-trial detention and legal representation are two areas in which greater cooperation could improve adherence to fair trial rights.

The Constitution entrusts the judiciary with a responsibility to “*guarantee and uphold impartiality and protect the rights and freedoms of citizens.*” Working to ensure adherence to fair trial standards in criminal trials will build trust and respect for the judiciary and improve the credibility of the court process. As this Report has noted in relation to the use of mobile phones and presence of lawyers and prosecutors during deliberation, perceptions matter when it comes to public confidence. Justice must not only be done but must also be seen to be done. The overriding responsibility of the judiciary is to provide justice for the citizens of Cambodia through impartially adjudicating the cases before the court in adherence with the law. It is hoped that the data and recommendations set out in this report will support those working to ensure that responsibility is met.

# 1. INTRODUCTION

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## TRIALS IN CAMBODIA

The Cambodian legal system is based on civil law, with trials exhibiting an inquisitorial approach.<sup>1</sup> There are courts of first instance throughout Cambodia and an Appellate Court and Supreme Court located in Phnom Penh. The Constitution of the Kingdom of Cambodia (the “Constitution”) guarantees the independence of the judiciary as well as the right to a fair trial.<sup>2</sup> International law and other national legislation also guarantee fair trial rights.

The Constitution provides in Article 31: “*The Kingdom of Cambodia shall recognize and respect human rights as stipulated in the United Nations Charter, the Universal Declaration of Human Rights, the covenants and conventions related to human rights, women’s and children’s rights.*” Specifically – in relation to fair trial rights – Article 31 provides: “*Every Khmer citizen shall be equal before the law...*” Article 128 (as amended) provides: “*The Judicial power shall be an independent power. The Judiciary shall guarantee and uphold impartiality and protect the rights and freedoms of the citizens.*” Other national law elaborates further on these guarantees. The Code of Criminal Procedure of the Kingdom of Cambodia (the “CCP”) was promulgated on August 10, 2007 and stipulates the procedure to be followed in criminal cases, including by the judiciary. Book Five - ‘Judgments’ - is the most relevant part of the CCP for the purposes of this Report. Of relevance also is the Code of Ethics for Judges and Prosecutors (the “CEJP”), which is binding on judges and prosecutors in Cambodia and was adopted by the Supreme Council of Magistracy (the “SCM”) – the body responsible for regulating and disciplining judges – on February 5, 2007.

The Universal Declaration of Human Rights (the “UDHR”) was adopted by the United Nations (the “UN”) General Assembly and proclaims a common standard of respect for rights and freedoms to be achieved for all people and all nations. Article 10 states: “*Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.*”<sup>3</sup> Article 11 of the UDHR elaborates on fair trial rights.<sup>4</sup> Much of the UDHR is regarded as having acquired legal force as customary international law<sup>5</sup> and it is binding on Cambodia pursuant to Article 31 of the Constitution.<sup>6</sup>

Article 31 of the Constitution also refers to “*covenants and conventions related to human rights, women’s and children’s rights,*” which includes the International Covenant on Civil and Political Rights (the “ICCPR”)

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1 Asian Human Rights Commission, *The State of Human Rights in Eleven Asian Nations – 2007* (Hong Kong: Asian Human Rights Commission, 2007), p 60.

2 Articles 128 – 132 of the Constitution. 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.

3 Universal Declaration of Human Rights, Paris, 10 December 1948.

4 For example, the right to be presumed innocent until proven guilty and the prohibition against retrospective penal legislation.

5 Antônio Augusto Cançado Trindade, *Universal Declaration of Human Rights*, United Nations Audiovisual Library of International Law, 2008, p2. Available at: [http://untreaty.un.org/cod/avl/pdf/ha/udhr/udhr\\_e.pdf](http://untreaty.un.org/cod/avl/pdf/ha/udhr/udhr_e.pdf)

6 Article 31 of the Constitution states: “The Kingdom of Cambodia shall recognize and respect human rights as stipulated in the...Universal Declaration of Human Rights”.

to which Cambodia acceded in 1992.<sup>7</sup> According to a decision of the Cambodian Constitutional Council dated July 10, 2007, all international Conventions that Cambodia has recognized form part of Cambodian law.<sup>8</sup> The provisions of the ICCPR expand on the fair trial rights in the UDHR. Article 14(1) states: “All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.”<sup>9</sup> The remainder of ICCPR Article 14 elaborates on fair trial rights. Further guidance on interpreting Article 14 can be found in the non-binding UN Basic Principles on the Independence of the Judiciary (the “UNBPIJ”)<sup>10</sup>; the UN Basic Principles on the Role of Lawyers (the “UNBPRL”)<sup>11</sup>; the Bangalore Principles of Judicial Conduct, 2002 (the “BPJC”); and UN Human Rights Committee General Comment No. 32: Article 14.<sup>12</sup> The authoritative statements and declarations made by the UN Special Rapporteur on the Independence of Judges and Lawyers are also relevant; while international jurisprudence in the courts of the three regional human rights instruments (in Europe, Africa and the Americas) has also emphasized the overriding importance of fair trial rights.

Currently, Cambodia is not bound by any relevant regional instruments that address fair trial rights. There is a possibility that an Association of South East Asian Nations (“ASEAN”) human rights instrument will follow the establishment of the new ASEAN Intergovernmental Commission on Human Rights. The Terms of Reference for this body refers to international human rights instruments.<sup>13</sup>

For the purposes of this Report, we refer also to the Standards and Criteria for the Cambodian Model Court Project (the “Model Court Standards”).<sup>14</sup> The Model Court Project is a collaboration between the Royal Government of Cambodia (the “RGC”) and a number of international donors, including USAID/EWMI. It seeks to improve the fairness and efficiency of trials in four courts – Phnom Penh Municipal Court of First Instance (the “Phnom Penh Court”), Kandal Provincial Court of First Instance (the “Kandal Court”), Kompong Cham Provincial Court of First Instance and Banteay Meanchey Provincial Court of First Instance – with the aim of providing a positive model for the court system throughout Cambodia. The Model Court Standards are a set of international and national standards for fairness and efficiency against which the four courts are measured.

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7 Office of the United Nations High Commissioner for Human Rights, Cambodia Country Office, *International Covenant on Civil and Political Rights and its Optional Protocols* (Phnom Penh: OHCHR, Cambodia Country Office, October 2009), p10.

8 Constitutional Council of the Kingdom of Cambodia, Decision No. 092/003/2007, dated July 10, 2007.

9 The International Covenant on Civil and Political Rights was adopted by the General Assembly on 16 December 1966 and came into force on 23 March 1976.

10 United Nations, *Basic Principles on the Independence of the Judiciary*, 1985.

11 United Nations, *Basic Principles on the Role of Lawyers*, 1990.

12 United Nations Human Rights Committee, *General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial*, 23 August 2007. Available at:

<http://www.unhcr.org/refworld/type,GENERAL,,,478b2b2f2,0.html>

13 ASEAN Secretariat, *ASEAN Intergovernmental Commission on Human Rights (Terms of Reference)*, (Jakarta: ASEAN Secretariat, October 2009), Article 1.6.

14 Cambodia Model Court Project, *Standards and Criteria for Cambodian Model Courts*. Available at:

<http://www.phnompenh.um.dk/NR/rdonlyres/C3FF25E2-1E56-4333-B9D9-82869FF97653/0/ModelCourtcriteria.pdf>

## AUDIENCE AND PURPOSE OF REPORT

The overarching goal of the Project is to monitor trials in Cambodia to assess their fairness against international and Cambodian standards and to use the findings to facilitate increased respect for fair trial rights. The Project is designed to complement the Model Court Project. The information presented in the Report serves as a reference from which to implement reform, and will be shared with the intended audience of the Report – the Cambodian judiciary and other justice sector stakeholders – for discussion. In early June 2010, before the Report was finalized, a draft was sent to the respective Presidents of the Phnom Penh Court and the Kandal Court to seek feedback, comments and additional recommendations. The President of the Kandal Court met with staff from the Project but felt that he was unable to provide any comments without authorization from the Ministry of Justice (the “MOJ”). The CCHR would like to thank the President of the Kandal Court for his efforts to cooperate with the Project and for taking the time to meet with Project staff. Judges at the Phnom Penh Court were unable to meet with staff from the Project to offer feedback on the Report.

## 2. METHODOLOGY

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The Project is implemented by the CCHR as part of its Research and Policy 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 monitoring of the Phnom Penh Court and the Kandal Court by the CCHR began on August 10, 2009. This Report covers a total of 199 trials monitored between August 10, 2009 and December 31, 2009 (the “Reporting Period”) – future reports will cover a six month period of trial monitoring. 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 other first instance courts in Cambodia. The Kandal Provincial Court of First Instance was selected for its proximity to Phnom Penh, the large number of judges presiding there and the availability of three courtrooms for trial monitoring. Importantly, both the Phnom Penh Court and the Kandal Court are ‘Model Courts’: two of four courts that are the focus of the Model Court Project.

During the Reporting Period, the CCHR also monitored a number of human trafficking trials as part of a sub-project focusing on human trafficking trials in Cambodia. A report providing an overview of this sub-project, data obtained from human trafficking trials (referencing the data in this Report also), and analysis of that data was published in July 2010 and is available on the CCHR website: [www.cchrcambodia.org](http://www.cchrcambodia.org). As some of the same fair trial concerns were evident in human trafficking trials, there is some overlap between the report on human trafficking trials and the current Report.

### FOCUS OF THE TRIAL MONITORING

Certain fair trial rights were given priority due to their direct applicability within Cambodia. 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 the Cambodian context 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:

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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); NGO Working Group, *Parallel Report on Cambodia 2009*, (Phnom Penh: NGO Working Group, April 2009).

- 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;
- 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 retrospective 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 Cambodian context and includes approximately 50 questions, the answers to which indicate whether fair trial rights have been adhered to. Most questions have three possible answers: yes (“Y”), no (“N”) and either not applicable (“N/A”) or information unavailable (“I/U”). 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 question 3(a) – 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.

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 Checklist now used is 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 CCHR has also developed two one-page annexes to the checklist for use in trials involving juveniles (Appendix II), and human trafficking trials.

With consideration as to the brevity of the revised Checklist, the CCHR compiled comprehensive guidance notes to help Trial Monitors understand each checklist question (the “Checklist Guidance”). This Checklist Guidance is vital for ensuring comprehensive understanding of each question and serves to ensure consistency amongst 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 ensure that they are clear as to which laws are relevant to the fair trial rights in question.

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 Trial Monitors with legal qualifications, expertise and experience. 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;
- Fair trial standards in international and Cambodian law; and
- The Model Court Standards.

## 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 therein. The usual practice of two Trial Monitors being present at each trial further ensures consistency and reliability of results. The subject of the trials monitored was random. The CCHR decided to monitor 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 or recorded in writing and later transferred to the checklist. The information was 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 Visual Basic. In addition to storing the data extracted from the checklists, the

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16 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).

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



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**

The CCHR analyses the trial data stored in the Database, applying international and national law, and identifies positive developments as well as areas for concern arising at trial. This analysis is included in this and future reports.

### 3. DATA

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During the Reporting Period, the Trial Monitors monitored 199 trials in total in the Phnom Penh Court and Kandal Court. This section of the Report sets out the ‘raw’ data collected by the Trial Monitors, providing clarification about the data and explanatory case studies where required. It is hoped that this data will be used by other organizations promoting fair trial rights in Cambodia. Analysis of this data is provided in the next chapter.

**FIGURE 1: TRIALS MONITORED**

Court Monitored	Number of Trials	Felony	Misdemeanor
Phnom Penh Court	142	84	58
Kandal Court	57	21	36

Figure 1 shows the number, location and type of criminal trials monitored by the Trial Monitors. 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. There was no general statutory definition of felony and misdemeanor when monitoring began at the beginning of the Reporting Period. Rather, offenses are categorized as either felonies or misdemeanors throughout a variety of criminal law statutes, for example, Chapters IV and V of the Provisions relating to the Judiciary and Criminal Law and Procedure applicable in Cambodia during the Transitional Period, 1992 (the “UNTAC Law”); the Law on the Aggravating Circumstances of Felonies; Law on the Control of Drugs; Law on the Suppression of Human Trafficking and Sexual Exploitation etc. The Penal Code of the Kingdom of Cambodia, 2009 (the “Penal Code”) contains new, general definitions of felony and misdemeanor. However, the full Penal Code does not come into force until late 2010.<sup>18</sup>

#### **RIGHT TO A PUBLIC HEARING**

Everyone has the right to be tried in public except in certain exceptional situations.<sup>19</sup> A public hearing generally requires the following minimum requirements: the hearing should - as a rule - be conducted orally and in public;<sup>20</sup> judgments should be made in public<sup>21</sup> and should be available to the public after they are delivered.<sup>22</sup> Additional factors that contribute to the accessibility of trials by the public include

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18 Penal Code of the Kingdom of Cambodia(2009), Article 672.

19 Article 10 of the UDHR; Article 14(1) of the ICCPR; Article 316 of the CCP.

20 Article 316 of the CCP.

21 Article 317 of the CCP.

22 Article 14(1) of the ICCPR.

the provision in a public place of information detailing the date and venue of hearings and the provision of adequate facilities to enable public attendance at trials.<sup>23</sup>

**FIGURE 2: RIGHT TO A PUBLIC HEARING**

Question 2: Right to a Public Hearing	Y	N	N/A
2(a) Was notice of the hearing posted on a public notice board outside the courtroom?	5	194	0
2(b) Were members of the public obstructed from entering or dismissed from the courtroom?	0	199	0

Question 2(b) of the Checklist requires some qualification. While on no occasion did the Trial Monitors notice anything to suggest that members of the public were obstructed from entering or dismissed from the courtroom, the Trial Monitors were invariably inside the courtroom for the commencement of the trial and therefore may not have always been able to determine if members of the public were obstructed from entering the courtroom.

### RIGHT TO BE TRIED WITHOUT UNDUE DELAY

Following an arrest, accused persons should be tried within a reasonable time.<sup>24</sup> The time limits for provisional detention under Cambodian law are set out in the CCP.<sup>25</sup>

**FIGURE 3: RIGHT TO BE TRIED WITHOUT UNDUE DELAY**

Question 3: Right to be Tried Without Undue Delay	Y	N	I/U <sup>26</sup>
3(b) Was there pre-trial detention?	176	7	16

As set out in Figure 4 below, on eight occasions pre-trial detention exceeded statutory limits and was therefore unlawful.

**FIGURE 4: UNLAWFUL PRE-TRIAL DETENTION (EXCEEDING STATUTORY LIMITS)**

Days in Pre-trial Detention	Maximum days of legal pre-trial detention	Category of Charge	Legislation accused charged under	Length of eventual sentence
			Law on Aggravating	

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

24 Articles 9(3) and 14(3)(c) of the ICCPR.

25 Articles 208-214 of the CCP.

26 "Information unavailable". See Section 2: Methodology, Infrastructure.

1232	682	Felony	Circumstances of Felonies	6 Years
520	331	Misdemeanor	UNTAC Law	8 Months
1030	331	Misdemeanor	UNTAC Law	6 Months
455	331	Misdemeanor	UNTAC Law	15 Months
1096	331	Misdemeanor	UNTAC Law	2 Years
1089	331	Misdemeanor	UNTAC Law	12 Years
521	331	Misdemeanor	UNTAC Law	18 Months
337	331	Misdemeanor	UNTAC Law	1 Year

The statutory limits on legal pre-trial detention in Figure 4 were calculated according to Articles 208 and 209 of the CCP, which set out the maximum legal duration of pre-trial detention for both felonies and misdemeanors. Article 249 of the CCP also 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. 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 331 days).

## RIGHT TO UNDERSTAND THE NATURE OF THE CHARGE

Accused persons have the right to understand the nature of the offense with which they are being charged.<sup>27</sup> This includes the criminal offense they are alleged to have committed and the facts giving rise to the accusation. This information must be provided to a suspect in a language he or she understands.<sup>28</sup>

FIGURE 5: RIGHT TO UNDERSTAND NATURE OF THE CHARGE

Question 4: Right to Understand Nature of Charge	Y	N	N/A
4(a) Did the Judge announce the case to be heard?	196	3	0
4(b) Did the Judge state the charge?	198	1	0
4(c) Did the Judge state the relevant law?	169	30	0
4(d) Did the Judge state the parties involved?	196	3	0
4(e) Did the Judge state the date and location that the alleged offense occurred?	197	2	0

<sup>27</sup> Article 14(3)(a) & (f) of the ICCPR; Articles 97 and 325 of the CCP.

<sup>28</sup> Article 14(3)(f) of the ICCPR; Article 330 of the CCP.

4(f) If required, was an interpreter provided?	0	0	199
4(g) If required, were provisions made for disabilities?	0	1	198

With reference to Checklist question 4(g), the accused in the case study below was placed at a disadvantage due to disability. The judges did not make provisions for this disability even though in the circumstances it would have required little effort to do so.

### Case Study 1: Provision for Disabilities

**Court:** Kandal Court

The accused was charged with Intentional Manslaughter under Article 4 of the Law on Aggravating Circumstances of Felonies after an electrical cable set up to protect his farm from mice electrocuted and killed the victim. All parties were present at the hearing. Statements from witnesses were relied upon for evidence. During the hearing the accused was having trouble hearing proceedings due to a hearing impediment. The judges did not make use of the microphone to make the speech louder, even though a microphone was available for use. The accused was convicted of Involuntary Manslaughter under Article 40 of the UNTAC law and sentenced to three years imprisonment (five years probation).

## RIGHT OF THE ACCUSED TO BE INFORMED OF THEIR RIGHTS AND HAVE THOSE RIGHTS EXPLAINED

The accused must be made fully aware of the legal rights owed to him/her so as to ensure the full exercise of his/her right to a fair trial.<sup>29</sup> 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. Four trials monitored were held with the accused *in absentia* and data for question 5 of the Checklist was therefore not recorded for these four trials.

**FIGURE 6: RIGHT OF THE ACCUSED TO BE INFORMED OF THEIR RIGHTS AND HAVE THOSE RIGHTS EXPLAINED**

Question 5: Explanation of Rights	I	I&E	Neither	I/U
5(a) Did the Judge inform (I) and explain (E) to the accused their right to legal representation or to self defense?	108	75	12	0
5(b) Did the Judge inform (I) and explain (E) to the accused their right to silence?	74	38	83	0
5(c) Did the Judge inform (I) and explain (E) to the accused their right not to self incriminate?	104	51	40	0

<sup>29</sup> Article 97 of the CCP states that when a person is placed in police custody, the judicial police officer shall inform the detainee about the rights provided in Article 98 (Assistance of Lawyers during Police Custody). Article 304 of the CCP states that the Royal Prosecutor must inform the accused of his right to a lawyer of his choice if the Prosecutor chooses to follow the procedure of immediate appearance. Also, amongst the minimum guarantees provided for in Article 14(3) of the ICCPR is the right to defend oneself in person or through legal assistance of one's own choosing and to be informed, if one does not have legal assistance, of this right.

5(d) Did the Judge inform (I) and explain (E) to the accused their right to change the judge?	121	63	11	0
5(e) Did the Judge inform (I) and explain (E) to the accused their right to have the last word?	121	67	7	0

## 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>30</sup> What constitutes ‘adequate’ time will depend on – amongst other things – the nature of the charge and the complexity of the case. There is an obligation to grant reasonable requests for adjournment, in particular, when the accused is charged with a serious criminal offense and additional time for preparation of the defense is needed.<sup>31</sup> The facilities owed to an accused under this right include access to documents and other evidence which the accused requires to prepare his case, as well as the opportunity to engage and communicate with counsel.

FIGURE 7: ADEQUATE TIME AND FACILITIES TO PREPARE A DEFENSE

Question 6: Right to Adequate Time and Facilities to Prepare a Defense	Y	N	N/A
6(a) Was the issue of adequate time and facilities for preparation raised by the defense?	60	135	4

Question 6(a) was not applicable on the four occasions when the accused was tried *in absentia* as neither the accused nor a lawyer were present at the trial to raise the issue. In Case Study 2 it appears that a lawyer was invited to represent the accused but was rushed into the trial without adequate time and facilities to prepare a defense.

### Case Study 2: Right to Adequate Time and Facilities to Prepare a Defense

**Court:** Phnom Penh Court

The accused was charged with Robbery under Article 6 of the Law on Aggravating Circumstances of Felonies. The police arrested the accused for the theft of a wallet. The offense was allegedly committed with an accomplice – a friend of the accused. The accused claimed that it was not him but rather his friend who had stolen the wallet. All parties were present at the hearing and documentary evidence was relied upon. The accused appeared at the hearing without a lawyer. The judge and clerk requested that a lawyer be provided immediately. However, once

<sup>30</sup> Article 14(3) (b) of the ICCPR; Article 8 of the UNBPRL.

<sup>31</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*, decision dated 23 January 2006, (CCPR/C/85/D/913/2000), para. 6.3; Human Rights Committee, *Admissibility: Communication No. 594/1992: Phillip v. Trinidad and Tobago*, decision dated 15 March 1996, (CCPR/C/56/D/594/1992), para. 6.8.

a lawyer was provided, the judge did not grant adequate time for the lawyer to prepare a defense. The accused was sentenced to six years imprisonment and ordered to pay 1,300,000 Riels in compensation.

## 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>32</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>33</sup>

FIGURE 8: RIGHT TO LEGAL REPRESENTATION

Question 7: Right to Legal Representation and to be Present at Trial	Y	N	N/A
7(a) Was the accused represented by a lawyer?	135	64	0
Felony	100	5	0
Misdemeanor	35	59	0
7(c) Was the accused excluded at any stage of the trial?	3	192	4

In relation to Question 7(a) the Trial Monitors answer ‘yes’ if there is a lawyer representing at least one accused in the trial monitored. Of concern are the five trials in which an accused was charged with a felony and was not represented by a lawyer, a breach of Article 301 of the CCP, which states that representation is compulsory in such circumstances. The accused also appeared without representation in a majority of cases in which the charge was a misdemeanor. For Question 7(c) the Trial Monitors observe whether any accused is refused entry into the courtroom by the Judge or whether any accused is removed from the courtroom at any point during the trial.

## RIGHT TO THE PRESUMPTION OF INNOCENCE

In criminal trials the accused person has the right to be presumed innocent of the charge against him/her until proven otherwise.<sup>34</sup> The data in Figure 9 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

Question 8: Presumption of Innocence	Y	N	N/A
8(b) Was the accused handcuffed throughout the trial?	0	195	4
8(c) Were statements made by the Judge about the guilt/innocence of the	20	179	0

32 Article 14(3)(d) of the ICCPR; Article 300 of the CCP.

33 Article 301 of the CCP.

34 Article 11(1) of the UDHR; Article 14(2) of the ICCPR; Article 38 of the Constitution.

accused before the verdict was delivered?			
8(d) Was there anything to suggest that the Judge discriminated against the accused because of their personal characteristics?	11	188	0

The figures for Question 8(b) are affected by the fact that four accused in four trials were tried *in absentia*. Therefore, the question was not applicable in 4 of the trials. In Case Study 3 below, there was evidence that the judge used words suggesting he had presumed the accused to be guilty of the offense charged. Case Study 4 below provides an example of a case involving discrimination against the accused due to personal characteristics.

### Case Study 3: Presumption of Innocence

**Court:** Kandal Court

Three accused, including one juvenile, were charged with theft under Article 43 of the UNTAC law. It was alleged that they had stolen money from the room of a monk. One of the accused was alleged to have lured the monk from his room by mentioning that people outside were picking mangoes. When the monk left the room, the others entered the room and stole money. All parties were present at the hearing. The evidence relied upon was the confession of the accused. The judge was heard to say during the hearing “the young boy has stolen money from a monk” prior to delivering a verdict, indicating that the judge was not applying a presumption of innocence. The adult accused were each sentenced to 12 months imprisonment, with the juvenile sentenced to six months.

### Case Study 4: Discrimination due to personal characteristics

**Court:** Phnom Penh Court

The accused was charged with robbery under Article 6 of the Law on Aggravating Circumstances of Felonies for an alleged robbery involving the theft of the victim’s car in Kampot Province. The victim called his friend and together they chased the stolen car, eventually catching up with and apprehending the accused. The accused was present at the hearing. The evidence relied upon was the confession of the accused and documentary evidence. During sentencing the judge said it was not possible for the accused to avoid a prison sentence as requested by his lawyer because the accused had a mental problem and therefore needed to go to prison. The accused was sentenced to 5 years imprisonment.

## RIGHT TO BE TRIED BY AN INDEPENDENT AND IMPARTIAL TRIBUNAL

Every accused person has the right to be tried by an impartial body free from bias or influence.<sup>35</sup> The CEJP, issued by the SCM in 2007, sets out an ethical standard 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

<sup>35</sup> Article 10 of the UDHR; Article 14(1) of the ICCPR; Articles 1-7 BPIJ; Article 128 of the Constitution.



presented in Figure 10 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**

<b>Question 9: Independence/Impartiality of the Judge</b>	<b>Y</b>	<b>N</b>	<b>N/A</b>
9(a) Did the Judge play any other role in the court proceedings?	0	199	0
9(c) Was there anything to suggest that any party spoke to the Judge during deliberation?	32	167	0
9(e) Was there anything to suggest that the Judge drew an inference of guilt from the silence of the accused?	3	196	0

Question 9(a) was designed to test compliance with Article 288 of the CCP, which states: “*The roles of sitting judges and those of Prosecutors or Deputy Prosecutors shall be absolutely incompatible with 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.*” The question is answered by reference to the inquisitorial system – a ‘yes’ answer requires that the trial judge actually played the role of investigating judge or prosecutor prior to or during the trial.

With respect to question 9(c) of the checklist, in a significant number of trials, the prosecutor or another lawyer entered the judge’s deliberation room immediately after the closing of a trial, and prior to the judge reaching a verdict, raising serious questions about the independence of the judge’s decision making.

### **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 of presenting his/her case to the court under conditions which do not place him/her at a substantial disadvantage vis-à-vis his/her opponent.<sup>36</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>37</sup> Evidence is usually provided in one or more of three ways: (1) by witness testimony (such as a statement from a person who saw what happened), (2) by presentation of documents (such as a land title certificate), and/or (3) by physical evidence (such as a bloodied weapon).

**FIGURE 11: EVIDENCE**

<b>Question 10: Evidence</b>	<b>Y</b>	<b>N</b>	<b>N/A</b>
10(a) Was evidence presented?	153	46	0
10(b) Was there anything to suggest that any party was not given the opportunity to	3	196	0

<sup>36</sup> Article 14(3)(e) ICCPR.

<sup>37</sup> Article 334 of the CCP.

present evidence?			
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The term “presented” in question 10(a) of the Checklist means a witness statement was read out or documentary or physical evidence was produced, for example. In other words, in order for this criterion to be met something amounting to more than the mere mention of the evidence is required.

With reference to question 10(b), Case Study 5 below sets out one case in which the judge seemed to prevent the full presentation of all evidence relevant to the case.

### Case Study 5: Presentation of Evidence

**Court:** Phnom Penh Court

The accused was charged with wrongful damage to property under Article 52 of the UNTAC law. The accused was a member of the Military Police. He came home from work one day to find his brother and the victim in a conflict, which eventually escalated into a fight. After the fighting had broken out the accused retrieved his gun and fired it at the victim’s property, intimidating the victim. At trial the accused asked the judge to speak with the victim to determine whether there was any evidence of wrongful damage to property. The judge declined to speak further with the victim, saying there was sufficient evidence to prove the case and no need to consult the victim. The accused was present at the hearing and was sentenced to 18 months imprisonment and compensation of 5 million Riels.

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>38</sup> The accused has the right to call and examine witnesses on his behalf under the same conditions as witnesses against him.<sup>39</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.

**FIGURE 12: WITNESSES**

Question 11: Right to call and examine witnesses	Y	N	N/A
11(a) Was there anything to suggest that any party was not given the opportunity to summon witnesses?	4	195	0
11(b) Was there anything to suggest that any party was not given the opportunity to examine witnesses?	0	58	141
11(c) Were the witnesses present in the courtroom before they were questioned?	10	48	141

<sup>38</sup> Article 14(3)(e) of the ICCPR ; Article 298, 324 and 326 of the CCP.

<sup>39</sup> Article 143(e) ICCPR.

In relation to question 11(a) above, the Trial Monitors answered ‘yes’ to this question if there was anything said during, before, or after the trial to suggest that any party was not given the opportunity by the Judge to call any witnesses that they would like to have called. The Trial Monitors record which party was denied this opportunity. In 141 of the 199 trials monitored, no witnesses were called. In relation to question 11(c), the Trial Monitors answered ‘yes’ to this question if they observed any witness present at the trial and listening to proceedings prior to being questioned and giving evidence.<sup>40</sup> Case Study 6 is one such example.

### Case Study 6: Witnesses

**Court:** Phnom Penh Court

Two accused were charged with robbery under Article 6 of the Law on Aggravating Circumstances of Felonies. Only one of the two accused was present at trial. It was alleged that one accused had stolen a chicken from a chicken cage located on the victim’s farm while the other waited outside throwing stones to intimidate the workers on the farm. Witness testimony and witness statements were relied upon as evidence. The Trial Monitors observed the witnesses sitting in the courtroom for the duration of the trial prior to delivering their testimony, including as the trial judge asked the accused questions about the alleged facts of the case. The accused was sentenced to five years imprisonment.

### RIGHT TO FULL DISCLOSURE OF EVIDENCE FOR THE PREPARATION OF THE DEFENSE

The right to full disclosure includes the right of the defense to the proceedings to have access to documents relevant to the trial. The fundamental document is the case file prepared by the investigating judge and 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 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>41</sup>

**FIGURE 13: RIGHT TO FULL DISCLOSURE OF EVIDENCE**

Question 12: Right to full disclosure of evidence	Y	N
12(a) Was there anything to suggest that the same evidence was not available to both sides?	3	196

Question 12(a) requires some qualification. While the issue of access to evidence was evidently rarely raised at trial, the fact that in 64 trials the accused did not have a lawyer would suggest that the accused

<sup>40</sup> Article 322 of the CCP suggests that witnesses should be removed from the courtroom prior to giving evidence.

<sup>41</sup> Article 319 of the CCP; Article 14(3)(b) of the ICCPR.

may not have had access to the evidence against him contained in the investigating judge’s dossier to the trial court president. The data must therefore be read with this qualification in mind.

## RIGHT AGAINST SELF-INCRIMINATION

The right against self-incrimination in this context refers to the right of an accused not to be compelled to testify against him or herself or to confess guilt.<sup>42</sup>

FIGURE 14: RIGHT AGAINST SELF-INCRIMINATION

Question 13: Right against self-incrimination	Y	N	N/A
13(a) Was there anything to suggest a confession was extracted from the accused through coercion?	6	112	81
13(b) Was there anything to suggest a confession was extracted from the accused through torture?	10	108	81

For questions 13(a) and (b), the Checklist Guidance states that Trial Monitors should tick ‘yes’ if they believe that the accused confessed to the offense because they were either coerced or tortured by another person. For question 13(a), the Trial Monitor notes in the comment box what type of coercion this was (e.g. a threat). For both questions, the Trial Monitors record why they believe that there was coercion or torture (e.g. it was raised at court, they were told by a family member, the accused displayed signs of torture). To distinguish between coercion and torture, the Trial Monitors employed a working definition whereby the concept of coercion was limited to threats, while torture was interpreted to include any form of serious violence. It is particularly alarming that where a confession seemed to have been extracted by either coercion in the form of threats or the actual application of violence or torture, the latter seemed to be the most common means employed.

Case study 7 below is the same case as that presented in Case Study 2. Here the case study is presented to demonstrate the serious concerns arising out of the data collected for question 13(b). The accused in this case study was sentenced to imprisonment for six years. During the trial he claimed he had been beaten by police in an attempt to elicit a confession.

### *Case Study 7: Right against self-incrimination*

**Court:** Phnom Penh Court

The accused was charged with robbery under Article 6 of the Law on Aggravating Circumstances of Felonies. The police arrested the accused for the theft of a wallet. The offense was allegedly committed with an accomplice - a friend of the accused. The accused claimed that it was not him but rather his friend who had stolen the wallet. All parties were present at the hearing and documentary evidence was relied upon. The accused alleged that the police had beaten him to get him to answer their questions. The accused confessed his guilt while he was being

<sup>42</sup> Article 14(3)(g) of the ICCPR; Article 3 of the CAT; Article 321 of the CCP; Article 38 of the Constitution.

beaten but at trial claimed that the confession was not genuine and was the result of coercion. Despite this claim, the judge accepted the police statement as evidence and the accused was sentenced to six years imprisonment and ordered to pay 1,300,000 Riels in compensation.

### PROHIBITION AGAINST RETROSPECTIVE PENAL LEGISLATION

Sometimes referred to as the principle of legality or *nullem crimen sine lege*, the prohibition against retrospective criminal legislation provides that no one shall be charged with an offense that was not an offense at the time that the act in question was committed.<sup>43</sup>

FIGURE 15: RETROSPECTIVE PENAL LEGISLATION

Question 15: Prohibition against retrospective penal legislation	Y	N	N/A
15(a) Was there anything to suggest that the offense was not an offense under national or international law at the time it was committed?	0	199	0

### RIGHTS OF JUVENILE ACCUSED

Children are of course entitled to all the fair trial guarantees and rights which apply to adults, and to some additional special protection. To protect the privacy of children, trials involving juveniles should generally be closed to the public and press as one of the permissible exceptions to the right to a public hearing.<sup>44</sup> Where trials are open to the public and press, the use of video link or screens should be employed to protect the privacy of the accused juvenile.

All juvenile accused in the trials monitored were in the age range 15-17. From the limited data collected on the treatment of juvenile accused during the Reporting Period, it does not appear that the courts have been particularly sensitive when dealing with juveniles. All trials involving juvenile accused were open to the public and on no occasion was a screen or other privacy device used to protect the juvenile from testifying in public.

FIGURE 16: OVERVIEW OF JUVENILE DATA

Total number of trials involving juveniles	Felony	Misdemeanor
26	16	10

43 Article 11(2) of the UDHR; Article 15 of the ICCPR; Penal Code (2009), Article 3.

44 Article 14(1) of the ICCPR states "...any judgement 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." Article 40(2)(b)(vii) of the Convention on the Rights of the Child states that every child alleged as or accused of having infringed the penal law has the right "to have his or her privacy fully respected at all stages of the proceedings".

**FIGURE 17: MAIN CHECKLIST DATA – TRIALS INVOLVING A JUVENILE**

<b>Question 2: Right to a Public Hearing</b>	<b>Y</b>	<b>N</b>	<b>N/A</b>
2(a) Notice of the hearing was posted on a public board	0	26	0
2(b) Were members of the public obstructed from entering or dismissed from the courtroom?	0	26	0

The data for question 2(b) suggests that the courts have not given adequate consideration to the privacy of juveniles.

**FIGURE 18: JUVENILE CHECKLIST DATA**

<b>Question 2: Right to be tried without delay</b>	<b>Y</b>	<b>N</b>	<b>I/U</b>
2(a) Was there pre-trial detention?	0	0	26
<b>Question 3: Pretrial</b>	<b>Y</b>	<b>N</b>	<b>I/U</b>
3(a) If held in pre-trial detention, was there anything to suggest that the accused was not separated from adults?	0	0	26
<b>Question 4: Trial</b>	<b>Y</b>	<b>N</b>	<b>N/A</b>
4(a) Did the judge wear less formal clothes?	0	26	0
4(b) Was there anything to suggest the accused wanted their parents present at the trial?	0	26	0
4(c) Was there a screen to protect the juvenile from testifying in public?	0	26	0
4(d) Was there anything to suggest that the judge considered imposing a non-custodial sentence before imposing a custodial sentence?	0	0	26

In relation to question 3(a) above, the Checklist Guidance states that Trial Monitors should tick ‘yes’ if anything is said before, during or after the trial to suggest that the accused was not separated from adults during pre-trial detention. The data for question 4(c) again indicates that the privacy of juvenile accused is not being taken into account and provided for.

## 4. ANALYSIS

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This section of the Report sets out the CCHR’s analysis of the data provided in the preceding chapter. To ensure that the analysis provided has depth and is presented in a manageable and useable form for use in dialogue with the judiciary, this section of the Report focuses on providing analysis vis-à-vis adherence to a limited number of the fair trial rights for which data has been collected. The rights chosen for analysis were of particular concern to the Trial Monitors during this Reporting Period. These rights are as follows: the right to be tried by an independent and impartial tribunal; the right to a public hearing; the right to legal representation and to be present at trial; and pre-trial detention and the right to be tried without undue delay. Analysis in future bi-annual reports will similarly focus on a limited number of fair trial rights, although the rights chosen are likely to vary.

### RIGHT TO BE TRIED BY AN INDEPENDENT AND IMPARTIAL TRIBUNAL

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>45</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.

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.*” Much of the UDHR is regarded as having acquired legal force as customary international law.<sup>46</sup> Furthermore, the UDHR is part of the domestic law of Cambodia pursuant to Article 31 of the Constitution.<sup>47</sup> Article 14(1) of the ICCPR also provides: “*All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.*”

The UNBPIJ were 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 6 states that independence “*requires the judiciary to ensure that judicial proceedings are conducted fairly and that the rights of the parties are respected*”. Article 7 states that it is the obligation of Member States “*to provide*

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45 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, 28 October 1992, (CCPR/C/46/D/263/1987), para 5.2.

46 Supra note 5.

47 Supra note 6.

*adequate resources to enable the judiciary to properly perform its function”.*

The BPEC 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 is an important consideration that will be returned to later in this subsection. Principle 2.1 states that a judge *“shall perform his or her judicial duties without favour, 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 CCP 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 argument 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 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 fact 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 this principle. Article 9 provides that *“judge and prosecutor shall not communicate with any party during the case proceedings with the absence of another party.”*

The independence and impartiality of the judiciary was generally not an issue at trial according to the data collected by the Trial Monitors. There were no cases of the judge taking an inappropriate role outside their judicial function.

However, one of the more frequent occurrences observed at trial 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. This happened in 32 out of 199 trials, or 16% of the trials monitored. The



impartiality of the judge in such instances is immediately called into question. As noted above, Article 337 of the CCP explicitly outlines the procedure for deliberation, noting that no further argument can be advanced and that the Prosecutor and court clerk are both barred from taking part in deliberations. Article 9 of the CEJP also states that judges should not communicate with one party in the absence of other parties. Decisions are to be made by the presiding judge or judges alone.

Another related observation made by the 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 proceedings. Monitoring of mobile phone use by judges began on 1 November 2009. Of the 60 trials monitored during this period, a judge answered a mobile phone during a trial on 17 occasions – 28 percent of the trials. While the conversations were invariably brief, the proceedings were interrupted and the evidence being presented was given inadequate attention. This conduct trivializes proceedings and damages public confidence in the professionalism of court staff. More seriously, the answering of phones during trials raises questions about independence and impartiality.

Deliberating with others involved in proceedings and answering phone calls from unknown parties both suggest – even if it is not the case – that the judge is open to influence by outside parties. This would be in breach of the binding national and international law set out above. As noted, the UNBPIJ states that judgments shall be based on facts and law without improper influence or interference. Improper communication with other court actors or with external parties undermines the notion of the judge's exclusive authority and of a trial based on evidence and law rather than arbitrary external considerations, personal bias, or political interference. Both the international BPJC and the domestic CEJP emphasize the importance of the maintenance of public confidence in the judiciary.

Regardless of whether inappropriate communication during trials relates to the proceedings and has an influence on the final result, it is incumbent on judges and lawyers to display greater professionalism and respect for the parties involved. It is vital that justice is not only done but is seen to be done.

## RECOMMENDATIONS

- The MOJ or other appropriate authority such as the Court Presidents should designate separate judges' deliberation chambers from other areas of the court and the courtroom, in accordance with CCP Article 337. Where this has been done, all persons should be prevented from entering the judges' deliberation chambers during deliberations.
- 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 CCP Article 337 prohibition on trial judges speaking with any person during their deliberations, including prosecutors, court clerks 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 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. Others found using phones during trials should be ejected from the court.

## RIGHT TO A PUBLIC HEARING

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 those involved in a trial, public scrutiny provides a check against arbitrary decision making and abuse of power. When a legal system is operating based on sound principles and codes of conduct, public hearings also engender public confidence in the ability of the State to deliver justice.

Article 10 of the UDHR guarantees that everyone is entitled to a fair and public hearing in the determination of their rights and obligations and any criminal charges against them. This right is echoed in Article 14(1) of the ICCPR, which also sets out limitations to the right to a public hearing: the press and public may be excluded from all or parts of a trial for reasons of “*morals, public order or national security in a democratic society*” or where publicity would prejudice the interests of justice. Regardless of these qualifications, judgments rendered in a criminal trial or any suit of law must be made public except in certain circumstances involving the interests of juveniles.<sup>48</sup>

Article 129 of the Constitution confirms that trials are to be conducted in the name of Khmer citizens – the administration of justice should serve the community, including victims, first and foremost – and that trials are to be conducted in accordance with legal procedures and laws in force. Article 316 of the CCP 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.

Standard 11 of the Model Court Standards – “Public Access and Transparency” – reinforces that all proceedings should be public trials and that judgments should be delivered at a public hearing, while noting that international standards of transparency require Courts to make information about the time and venue of the oral hearings available to the public and provide adequate facilities, within reasonable limits, for the attendance of interested members of the public.

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 within an adequate time; and there should be adequate facilities for public attendance.<sup>49</sup> Moreover, judgments should generally be published and made available to the public.

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 trials was made available on public notice boards and whether members of the public were obstructed from entering the courtroom or dismissed during proceedings. In 191 of 199 – or in 95% of trials monitored, details about the time and venue of the trial were not posted on a public notice board. Lack of information

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<sup>48</sup> Supra note 22.

<sup>49</sup> Supra note 23.

about when and where trials will be held hinders the ability of the public to attend hearings of interest. This is a case management issue and while it would appear to be reasonably simple to remedy – by preparing daily schedules of trials and posting them to court notice boards – the frequency of trial postponements and other unexpected delays likely contributes to difficulties in producing an accurate schedule.

The Trial Monitors recorded no instances of obstruction from entering the courtroom or dismissal from the courtroom during proceedings. As mentioned in the Data chapter, these results must be qualified by the observation that once Trial Monitors are inside the courtroom they may not be aware of what is going on outside and thus of any instances where members of the public have been obstructed from attending trials. However, the very fact that Trial Monitors were in attendance at the trials monitored 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 in an open, public forum. 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 used inappropriately to justify the expulsion of the public or the press at trials in Phnom Penh Court 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.

#### RECOMMENDATIONS

- The MOJ should instruct courts to post a daily schedule of hearings in a publicly-accessible area such as a notice board outside the court.
- The RGC should consider amending the CCP to include a provision creating a presumption in favor of closed hearings in cases involving juveniles. Alternatively, and in the interim, the MOJ should issue a nationwide policy outlining the considerations for courts when trials involve a juvenile accused, victim, or witness, including 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 when giving evidence.

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

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, guide them through the trial process, and represent and defend their interests in court.

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 their trial; the right to defend themselves in person or through legal representation of their 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 they do 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 their choice to protect and establish their rights and defend them in all stages of criminal proceedings. Articles 2 and 3 the UNBPRL also set out the obligations of 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 CCP provides that the accused shall appear in person during hearings at court and may be assisted by a lawyer of their choice or request to have a lawyer appointed for them. 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. Standard 2 of the Model Court Standards reiterates the rights guaranteed above by national and international law.

Of the 199 trials monitored during the Reporting Period, the defendant was without legal representation in 64 – or 32% – of all trials monitored. Both national and international law provide that legal representation should be available to those who do not have the resources to hire a lawyer of their choice. A vital component of this obligation is the duty to inform the accused of their right to legal representation. The Bar Association of the Kingdom of Cambodia (the “Bar Association”) has a statutory duty to fund lawyers to defend poor people.<sup>50</sup> The Government has in the past made contributions to this fund.<sup>51</sup> Free legal representation is also provided by non-governmental organizations (“NGOs”) such as Legal Aid Cambodia, the Cambodian Defenders Project and Legal Services for Children and Women. However, a 2006 report by the RGC’s Council for Legal and Judicial Reform (the “CLJR”) found that there was “*no comprehensive legal, institutional and policy framework at the national level to guide*

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<sup>50</sup> Law on the Bar (1995), Article 29; see also Internal Regulations of the Bar Association, Articles 6 & 7.

<sup>51</sup> Committee against Torture, *Consideration of reports submitted by States parties under article 19 of the Convention: CAMBODIA*, 29 October 2009, (CAT/C/KHM/Q/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.”

*the provision and regulation of legal aid services.*<sup>52</sup> The report was based on a survey which found that 80% of potential legal aid client respondents had never heard of legal aid.<sup>53</sup>

The fact that almost one third of defendants in the trials monitored appeared without legal representation in itself suggests that the right to legal representation is unlikely to be communicated to all accused. In five of the 105 trials in which the accused was charged with a felony, no legal representation was present at trial. Article 301 of the CCP states that legal representation is compulsory in a trial involving a felony charge; if the accused has not selected a lawyer, a lawyer must be appointed upon the initiative of the court president in accordance with the provisions of the Law on the Bar.<sup>54</sup> While it is encouraging that these five trials represent such a small percentage of the total trials monitored involving felonies, these specific trials were conducted in clear breach of law. A majority – 62% – of those charged with a misdemeanor also appeared without representation, raising serious doubts about the fairness of these trials.

The lack of legal representation in 64 trials raises questions about the access of the accused in those cases to the evidence against them. The provisions of the CCP provide that the lawyer of an accused may examine the case file,<sup>55</sup> read parts of it to their client,<sup>56</sup> and make copies at their own expense.<sup>57</sup> However, the legislation does not provide for access to the case file by accused that appear without legal representation, potentially denying those accused of the chance to prepare their own defense.

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52 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.

53 *Ibid.*, p 19.

54 Article 301 of the CCP.

55 Articles 145, 254, 304, 319, 391 and 428 of the CCP.

56 Article 149 of the CCP.

57 Articles 319 and 428 of the CCP.

## 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 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.
- 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.
- The Courts, the Bar Association and legal aid NGOs must ensure that they are working together to ensure that representation is available to as many defendants 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 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.
- Articles 145, 254, 304, 319, 391 and 428 of the CCP 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.
- The MOJ should remind judges that – in the absence of exceptional circumstances – courts should not go ahead with trial proceedings in the absence of the accused. Article 300 of the CCP should be amended to set out criteria for holding trials in the absence of the accused and a process for determining whether this is justifiable, including opportunities for all parties to be heard.

## PRE-TRIAL DETENTION AND THE RIGHT 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 in order to set out evidence against the accused, allow the accused to address the evidence and present their own, and to determine guilt or innocence. The rights to be free from arbitrary detention and to be tried without undue delay are enshrined in international law and specific legal restrictions in relation to pre-trial detention are set out in Cambodian law.

Article 9 of the UDHR states that “*No one shall be subjected to arbitrary arrest, detention or exile*” and Article 10 states that everyone is entitled to a fair and public hearing. The ICCPR expands on these rights. Article 9(1) provides: “*Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.*” Article 9(3) also 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 release. Article 9(3) further notes that “*(i)t shall not be the general rule that persons awaiting trial shall be detained in custody*”. Principle 38 of the UNBPIJ 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 CCP sets out the general rule: “*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 one year or more of imprisonment. Article 205 sets out the legal justifications for provisional detention. Provisional detention may be ordered to: stop the offense 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 offense.

Articles 208 and 209 of the CCP set out the legal duration of provisional detention for both felonies and misdemeanors. 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, provisional 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 additional 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 they are to be automatically released.



The data collected by the Trial Monitors and set out in Chapter 3 of the Report raises two concerns: the prevalence of pre-trial detention across the trials monitored, and the excessive pre-trial detention endured in a small but significant number of cases. In at least 176 of the 199 trials monitored, the accused were detained in pre-trial detention (information was unavailable for 16 trials). This amounts to a pre-trial detention rate of at least 88%. These figures suggest that the presumption against pre-trial detention in Article 203 of the CCP is not being applied.

The second major concern is that in eight cases the duration of detention exceeded the maximum legal limits for provisional detention proscribed in Articles 208 and 209 of the CCP (in combination with Article 249). In one case an accused charged with a felony remained in detention pending trial for over three years. The maximum period of pre-trial detention in such circumstances is 22 months. This requires two formal extensions of the initial six month period and express legal reasons for doing so. There was also one further case involving detention of over three years, while another fell just short. The excessive – and illegal – pre-trial detention of a number of 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.

## RECOMMENDATIONS

- The MOJ should issue a directive to investigating judges instructing them to ensure that legal limits of pre-trial detention are not exceeded. This should be accompanied by short guidelines summarizing the provisions in the CCP that outline the legitimate justifications for pre-trial detention and statutory limits to its duration.
- The Investigating Chamber and President of the Court of Appeal (see CCP 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 and 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.
- Cases where the accused has remained in pre-trial detention for a period approaching the legal limit must receive priority for hearing.
- The MOJ should ensure that the RAJP is providing training to future judges on the pre-trial detention provisions of the CCP 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; or to preserve public order from any trouble caused by the offense.

## 5. CONCLUSION

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The data collected during the Reporting Period provided evidence of areas in which the judiciary of the Phnom Penh Court and Kandal Court appear to be adhering to fair trial standards and ethical and professional obligations, however, the data also raised a number of concerning issues in relation to the fair trial rights of the accused in the 199 trials monitored. The most concerning data collected was that relating to the independence and impartiality of judges, lack of legal representation, and the frequency of pre-trial detention. Judges at Phnom Penh and Kandal Courts do, however, appear to be informing the accused of the nature of the charge and, in just over half of the trials monitored, the accused was informed of their various rights during the trial (for example, the right to legal representation and the right to change the judge). Another positive area was the management of evidence and witnesses, with the data indicating that evidence was presented in most cases and that the parties generally had equal opportunities to present evidence and question witnesses. During the Reporting Period, no instances were observed in which the public was blocked from attending a trial.

It is important to recognize that the justice system relies upon the interaction of a number of actors, including police, prison authorities, prosecutors, investigating judges, trial judges, lawyers, clerks, and other court staff. The right to a fair trial involves a series of individual rights that begin from the moment a suspect is arrested, and continue throughout the legal process until the final appeal has been heard. In order to ensure that fair trial rights are adhered to at every stage of the process, cooperation is required from officials across the justice system. Pre-trial detention and legal representation are two areas in which greater cooperation could improve adherence to fair trial rights.

The judiciary is also responsible for ruling on the legality of the actions of other state actors such as the police and prison authorities. If the rights of the charged person have been breached, for example if a confession had been obtained through the use of violence or torture, the judge must recognize this breach of law by excluding the evidence obtained by violence or torture as inadmissible. Strengthening the justice system requires initiative and leadership from senior authorities, particularly judges and prosecutors as well as officials in the MOJ and other justice institutions such as the RAJP, SCM and CLJR.

The judiciary is entrusted with a responsibility to “*guarantee and uphold impartiality and protect the rights and freedoms of citizens.*”<sup>58</sup> Working to ensure adherence to fair trial standards in criminal trials will build trust and respect for the judiciary and improve the credibility of the court process. As this Report has noted in relation to the use of mobile phones and the presence of lawyers and prosecutors during deliberation, perceptions matter when it comes to public confidence. Justice must not only be done but must also be seen to be done. The overriding responsibility of the judiciary is to provide justice for the citizens of Cambodia through impartially adjudicating the cases before the court in adherence with the law. It is hoped that the data and recommendations set out in this report will support those working to ensure that responsibility is met.

Cambodian Center for Human Rights  
July 2010  
Phnom Penh

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58 Article 128 of the Constitution.

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## 7. APPENDICES

### APPENDIX I: TRIAL MONITORING CHECKLIST

GENERAL INFORMATION			
1(a) Date of Trial:			
1(b) Monitors:			
1(c) Court:	PPC <input type="checkbox"/>	KPC <input type="checkbox"/>	OTHER <input type="checkbox"/>
1(d) Judge:	1st	2nd	3rd
1(e) Clerk:			
1(f) Charge:	Felony <input type="checkbox"/> Misdemeanor <input type="checkbox"/>		
	Details <sup>59</sup> :		
	Relevant Law:		
1(g) Are any of the accused juveniles?	Yes <input type="checkbox"/>	No <input type="checkbox"/>	
	If yes please complete Juvenile Annex		

RIGHT TO A PUBLIC HEARING		N/A <input type="checkbox"/>
2(a) Was notice of the hearing posted on a public notice board outside the courtroom?	Yes <input type="checkbox"/>	No <input type="checkbox"/>
2(b) Were members of the public obstructed from entering or dismissed from the courtroom?	Yes <input type="checkbox"/>	No <input type="checkbox"/>
	Comment:	

RIGHT TO BE TRIED WITHOUT DELAY	
3(a) Date of arrest:	
3(b) Was there pre-trial detention?	Yes <input type="checkbox"/> No <input type="checkbox"/> I/U <input type="checkbox"/>
	If yes, did pre-trial detention last until trial?
	Yes <input type="checkbox"/> No <input type="checkbox"/>
	If no, what date did pre-trial detention finish?

RIGHT TO UNDERSTAND NATURE OF CHARGE		
4(a) Did the Judge announce the case to be heard?	Yes <input type="checkbox"/>	No <input type="checkbox"/>
4(b) Did the Judge state the charge?	Yes <input type="checkbox"/>	No <input type="checkbox"/>
4(c) Did the Judge state the relevant law?	Yes <input type="checkbox"/>	No <input type="checkbox"/>
4(d) Did the Judge state the parties involved?	Yes <input type="checkbox"/>	No <input type="checkbox"/>
4(e) Did the Judge state the date and location that the alleged offense occurred?	Yes <input type="checkbox"/>	No <input type="checkbox"/>

<sup>59</sup> If human trafficking please see Annex II: Human Trafficking Trial



4(f) If required, was an interpreter provided?	Yes <input type="checkbox"/>	No <input type="checkbox"/>	N/A <input type="checkbox"/>
4(g) If required, were provisions made for disabilities?	Yes <input type="checkbox"/>	No <input type="checkbox"/>	N/A <input type="checkbox"/>
	If yes, type of provision?		
	Hearing	Vision	Other

<b>EXPLANATION OF RIGHTS</b>			
5(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"/>	I and E <input type="checkbox"/>	Neither I nor E <input type="checkbox"/>
5(b) Did the Judge inform (I) and explain (E) to the accused their right to silence?	I only <input type="checkbox"/>	I and E <input type="checkbox"/>	Neither I nor E <input type="checkbox"/>
5(c) Did the Judge inform (I) and explain (E) to the accused their right not to self incriminate?	I only <input type="checkbox"/>	I and E <input type="checkbox"/>	Neither I nor E <input type="checkbox"/>
5(d) Did the Judge inform (I) and explain (E) to the accused their right to change the judge?	I only <input type="checkbox"/>	I and E <input type="checkbox"/>	Neither I nor E <input type="checkbox"/>
5(e) Did the Judge inform (I) and explain (E) to the accused their right to have the last word?	I only <input type="checkbox"/>	I and E <input type="checkbox"/>	Neither I nor E <input type="checkbox"/>

<b>RIGHT TO ADEQUATE TIME AND FACILITIES TO PREPARE DEFENSE</b>	
6(a) Was the issue of adequate time and facilities for preparation raised by the defense?	Comment:

<b>RIGHT TO LEGAL REPRESENTATION AND TO BE PRESENT AT TRIAL</b>	
7(a) Was the accused represented by a lawyer?	Yes <input type="checkbox"/> No <input type="checkbox"/>
7(b) Was there more than one accused?	Yes <input type="checkbox"/> No <input type="checkbox"/>
	If yes, was there a conflict between the statements of the accused? Yes <input type="checkbox"/> No <input type="checkbox"/>
	If yes, were the accused represented by different lawyers? Yes <input type="checkbox"/> No <input type="checkbox"/>
7(c) Was the accused excluded at any stage of the trial?	Yes <input type="checkbox"/> No <input type="checkbox"/>
	Comment:

<b>PRESUMPTION OF INNOCENCE</b>			
8(a) If the accused was held in pre-trial detention, did they appear before the court in prison uniform?	Yes <input type="checkbox"/>	No <input type="checkbox"/>	N/A <input type="checkbox"/>
8(b) Was the accused handcuffed throughout the trial?	Yes <input type="checkbox"/>	No <input type="checkbox"/>	
	If yes, was there a good reason?		
	Yes <input type="checkbox"/>	No <input type="checkbox"/>	
	Comment		

8(c) Were statements made by the Judge about the guilt / innocence of the accused before the verdict was delivered?	Yes <input type="checkbox"/>	No <input type="checkbox"/>	Comment:
8(d) Was there anything to suggest that the judge discriminated against the accused because of their personal characteristics?	Yes <input type="checkbox"/>	No <input type="checkbox"/>	
	If yes, which characteristic?		
	Age	<input type="checkbox"/>	
	Gender	<input type="checkbox"/>	
	Profession	<input type="checkbox"/>	
	Marital Status	<input type="checkbox"/>	
	Nationality	<input type="checkbox"/>	
	Ethnicity	<input type="checkbox"/>	
	Religion	<input type="checkbox"/>	
	Family Name	<input type="checkbox"/>	
	Other	<input type="checkbox"/>	Details:

INDEPENDENCE / IMPARTIALITY OF THE JUDGE			
9(a) Did the Judge play any other role in the court proceedings?	Yes <input type="checkbox"/>	No <input type="checkbox"/>	
	If yes, which party?		
	P <input type="checkbox"/>	D <input type="checkbox"/>	
	CP <input type="checkbox"/>	IJ <input type="checkbox"/>	
9(b) Was there anything to suggest that the Judge had an interest in the case beyond their usual judicial role?	Yes <input type="checkbox"/>	No <input type="checkbox"/>	Comment:
9(c) Was there anything to suggest that any party spoke to the Judge during deliberation?	Yes <input type="checkbox"/>	No <input type="checkbox"/>	
	If yes, which party?		
	P <input type="checkbox"/>	D <input type="checkbox"/>	
	CP <input type="checkbox"/>		
	Comment:		
9(d) Was there anything to suggest that the Judge behaved in an intimidating manner towards any party?	Yes <input type="checkbox"/>	No <input type="checkbox"/>	
	If yes, which party?		
	P <input type="checkbox"/>	D <input type="checkbox"/>	
	CP <input type="checkbox"/>		
	Comment:		
9(e) Was there anything to suggest that the Judge drew an inference of guilt from the silence of the accused?	Yes <input type="checkbox"/>	No <input type="checkbox"/>	
	Comment:		

**EVIDENCE**

10(a) Was evidence presented?	Yes <input type="checkbox"/> No <input type="checkbox"/> If yes, by which party? <hr/> P <input type="checkbox"/> D <input type="checkbox"/>  CP <input type="checkbox"/>  If yes, what type of evidence was presented?  Physical object: <input type="checkbox"/> Documentary: <input type="checkbox"/>  Witness Testimony: <input type="checkbox"/> Confession: <input type="checkbox"/>  Other: <input type="checkbox"/>
10(b) Was there anything to suggest that any party was not given the opportunity to present evidence?	Yes <input type="checkbox"/> No <input type="checkbox"/> If yes, which party? P <input type="checkbox"/> D <input type="checkbox"/> CP <input type="checkbox"/> Comment:

**RIGHT TO CALL AND EXAMINE WITNESSES**

11(a) Was there anything to suggest that any party was not given the opportunity to summon witnesses?	Yes <input type="checkbox"/> No <input type="checkbox"/> If yes, which party? P <input type="checkbox"/> D <input type="checkbox"/> CP <input type="checkbox"/> Comment:
11(b) Was there anything to suggest that any party was not given the opportunity to examine witnesses?	Yes <input type="checkbox"/> No <input type="checkbox"/> N/A <input type="checkbox"/> If yes, which party? P <input type="checkbox"/> D <input type="checkbox"/> CP <input type="checkbox"/> Comment:
11(c) Were the witnesses present in the courtroom before they were examined?	Yes <input type="checkbox"/> No <input type="checkbox"/> N/A <input type="checkbox"/>

**RIGHT TO FULL DISCLOSURE**

12(a) Was there anything to suggest that the same evidence was not available to both sides?	Yes <input type="checkbox"/> No <input type="checkbox"/>
	If yes, which party did not have the evidence? P <input type="checkbox"/> D <input type="checkbox"/> CP <input type="checkbox"/>

	Comment:
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**RIGHT NOT TO SELF INCRIMINATE**

13(a) Was there anything to indicate a confession was extracted from the accused through coercion?	Yes <input type="checkbox"/>	No <input type="checkbox"/>	N/A <input type="checkbox"/>	Comment:
13(b) Was there anything to indicate a confession was extracted from the accused through torture?	Yes <input type="checkbox"/>	No <input type="checkbox"/>	N/A <input type="checkbox"/>	Comment:

**PROHIBITION AGAINST DOUBLE JEOPARDY**

14(a) Was there anything to suggest that the accused has been tried for this offense previously?	Yes <input type="checkbox"/>	No <input type="checkbox"/>	Comment:
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**PROHIBITION AGAINST RETROSPECTIVE PENAL LEGISLATION**

15(a) Was there anything to suggest that the offense was not an offense under national law / international law when it was committed?	Yes <input type="checkbox"/>	No <input type="checkbox"/>	Comment:
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**VERDICT** I/U

16(a) Date:			
16(b) Was the accused in Pre-trial detention between trial and verdict?	Yes <input type="checkbox"/>	No <input type="checkbox"/>	I/U <input type="checkbox"/>
16(c) Type:	Guilty <input type="checkbox"/>	Not Guilty <input type="checkbox"/>	
16(d) Legal Reasoning:	Yes <input type="checkbox"/>	No <input type="checkbox"/>	I/U <input type="checkbox"/>
	Please Specify:		
16(e) Evidential Reasoning:	Yes <input type="checkbox"/>	No <input type="checkbox"/>	I/U <input type="checkbox"/>

## APPENDIX II: JUVENILE CHECKLIST

AGE	
1(a) Age	<14 <input type="checkbox"/> 15-17 <input type="checkbox"/>
1(b) In the case of an accused juvenile found to be less than 14 years old, did the judge order an immediate acquittal of the case??	Yes <input type="checkbox"/> No <input type="checkbox"/> N/A <input type="checkbox"/>  Comment:

RIGHT TO BE TRIED WITHOUT UNDUE DELAY	
2(a) Date of Arrest:	
2(b) Was there pre-trial detention?	Yes <input type="checkbox"/> No <input type="checkbox"/> I/U <input type="checkbox"/>  If yes, did pre-trial detention last until trial?  Yes <input type="checkbox"/> No <input type="checkbox"/>  If no, what date did pre-trial detention finish?

PRE-TRIAL	
3(a) If held in pre-trial detention, was there anything to suggest that the accused was not separated from other adults?	Yes <input type="checkbox"/> No <input type="checkbox"/> N/A <input type="checkbox"/>  Comment:

TRIAL	
4(a) Did the Judge wear less formal clothes?	Yes <input type="checkbox"/> No <input type="checkbox"/> Comment:
4(b) Was there anything to suggest that the juvenile wanted their parents present at the hearing?	Yes <input type="checkbox"/> No <input type="checkbox"/>  If yes were, the parents present?  Yes <input type="checkbox"/> No <input type="checkbox"/>
4(c) Was there a screen to protect the juvenile from testifying in public?	Yes <input type="checkbox"/> No <input type="checkbox"/>  Comment:
4(d) Was there anything to suggest that the Judge considered imposing a non-custodial sentence before imposing a custodial sentence?	Yes <input type="checkbox"/> No <input type="checkbox"/> Comment:

### APPENDIX III: LAW BANK

			Criminal Code of Procedure	UNTAC Law	Constitution	Code of Ethics for Judges and Prosecutors	ICCPR	Basic Principles on the Independence of the Judiciary	Basic Principles on the Role of Lawyers	Convention against Torture	Bangalore Principles	Universal Declaration of Human Rights	Model Court Standards	Comments
Right to a public hearing	2(a)	Was notice of the hearing posted on a public notice board outside the courtroom?	Art. 316	X	X	X	Art 14(1)	X	X	X	X	Art 10	X	Specifically referred to as an element contributing to a public hearing in Human Rights Committee General Comment 32.
	2(b)	Were the public obstructed from entering or dismissed from the courtroom?	Art .316	Art. 23	X	X	Art 14(1)	X	X	X	X	Art 10	Standard 11	
Right to be tried without undue delay	3(a)	Date of Arrest?	Book 3, Chapters 3: Police Custody and Book 4, Chapter 3, Section 5: Provisional Detention	Art. 13, 14, 21	Art 38	X	Art 14(3) (c)	X	X	X	X	Art 9	Standard 4, Standard 10	
	3(b)	Was there pre-trial detention?	Art. 13, 14, 21		Art 38	X	Art. 9(3)	X	X	X	X	Art 9	Standard 4, Standard 10	Article 38 of the Constitution refers only to the legality of detention.  UDHR refers only to arbitrary detention

		Criminal Code of Procedure	UNTAC Law	Constitution	Code of Ethics for Judges and Prosecutors	ICCPR	Basic Principles on the Independence of the Judiciary	Basic Principles on the Role of Lawyers	Convention against Torture	Bangalore Principles	Universal Declaration of Human Rights	Model Court Standards	Comments	
Right to understand the nature of the charge	4(a)	Did the Judge announce the case to be heard?	X	X	X	X	Art 14(3) (a)	X	X	X	X	X	Standard 5 (competent)	
	4(b)	Did the Judge state the charge?	Art 325	X	X	X	X	X	X	X	X	X	Standard 2	
	4(c)	Did the Judge state the relevant law?	X	X	X	X	X	X	X	X	X	X	Standard 5 (competent)	
	4(d)	Did the Judge / Clerk state the parties involved?	Art 322	X	X	X	X	X	X	X	X	X	Standard 5 (competent)	
	4(e)	Did the Judge state the date and location that the alleged offense occurred?	Art 325	X	X	X	Art 14(3) (a)	X	X	X	X	X	Standard 2	
	4(f)	If required, was an interpreter provided?	Art 330	X	X	X	Art 14(3) (f)	X	X	X	Principle 5	X	Standard 2	Art. 330 wording is "may" provide
	4(g)	If required, were provisions made for disabilities?	Art 331	X	X	Art. 7	X	X	X	X		X	Standard 7, 9	

			Criminal Code of Procedure	UNTAC Law	Constitution	Code of Ethics for Judges and Prosecutors	ICCPR	Basic Principles on the Independence of the Judiciary	Basic Principles on the Role of Lawyers	Convention against Torture	Bangalore Principles	Universal Declaration of Human Rights	Model Court Standards	Comments	
Explanation of Rights	5(a)	Did the Judge inform (I) and explain (E) to the accused their right to legal representation or to self defense?	Art. 301 (right to legal rep.)	Art. 10 (1)	Art. 128 (Judges should protect the rights and freedoms of citizens)		Art. 14(3) (d)	X	Art. 1 and 5	X	X	X	Standard 5 (competent)		
	5(b)	Did the Judge inform (I) and explain (E) to the accused their right to silence?	X	X		X	X	X	X	X	X	X			
	5(c)	Did the Judge inform (I) and explain (E) to the accused their right not to self incriminate?	X	X		X	Art. 14(3) (g)	X	X	X	X	X	X	Standard 5 (competent)	
	5(d)	Did the Judge inform (I) and explain (E) to the accused their right to change the judge?	Art. 556 and 557	X		X	X	X	X	X	X	X	X	Standard 5 (competent)	
	5(e)	Did the Judge inform (I) and explain (E) to the accused their right to have the last word?	Art. 335 (right to last word)	X		X	X	X	X	X	X	X	X	Standard 2 and 5	



			Criminal Code of Procedure	UNTAC Law	Constitution	Code of Ethics for Judges and Prosecutors	ICCPR	Basic Principles on the Independence of the Judiciary	Basic Principles on the Role of Lawyers	Convention against Torture	Bangalore Principles	Universal Declaration of Human Rights	Model Court Standards	Comments
Right to adequate time and facilities to prepare a defense	6 (a)	Was the issue of adequate time and facilities for preparation raised by the defense?	Art. 149, 304 319	Art.17 (2), Art. 21(2)	X	X	Art 14(3) (b)	X	Art. 8	X	X	X	Standard 2	
Right to legal representation and to be present at trial	7 (a)	Was the accused represented by a lawyer?	Art. 301	Art. 10	Art. 38	X	Art. 14(3) (d)	X	Art. 1, 5, 7	X	X	X	Standard 2	
	7(c)	Was the accused excluded at any stage of the trial?	Art. 300	X	X	X	Art. 14(3) (d)	X	X	X	X	X	Standard 2	

			Criminal Code of Procedure	UNTAC Law	Constitution	Code of Ethics for Judges and Prosecutors	ICCPR	Basic Principles on the Independence of the Judiciary	Basic Principles on the Role of Lawyers	Convention against Torture	Bangalore Principles	Universal Declaration of Human Rights	Model Court Standards	Comments
Presumption of Innocence	8(a)	If the accused was held in pre-trial detention, did they appear before the court in prison uniform?	X	Art. 25	Art. 38	X	Art. 14(2)	X	X	X	X	Art. 11(1)	Standard 2,9	If the accused is held in pre-trial detention prior to the hearing they should not appear in prison uniform.
	8(b)	Was the accused handcuffed throughout the trial?	X			X		X	X	X	X		Standard 2,9	Unless strictly necessary for security reasons, the accused should not appear in handcuffs
	8(c)	Were statements made by the judge about the guilt/innocence of the accused before the verdict was delivered?	Art. 351			X		X	X	X	Standard 2, 7, 9			
	8(d)	Was there anything to suggest that the judge discriminated against the accused because of their personal characteristics?	X			Art. 28		Art. 31	Art. 7	X	X		X	X

		Criminal Code of Procedure	UNTAC Law	Constitution	Code of Ethics for Judges and Prosecutors	ICCPR	Basic Principles on the Independence of the Judiciary	Basic Principles on the Role of Lawyers	Convention against Torture	Bangalore Principles	Universal Declaration of Human Rights	Model Court Standards	Comments	
Independence/Impartiality of the Judge	9(a)	Did the Judge play any other role in the court proceedings?	Arts. 55 and 288	Art.1	Art. 128, 130, 132	Art. 14(1)	Art. 1-7	X	X	Principle 1 and 2.5.2	Art. 10	Standard 7		
	9(b)	Was there anything to suggest that the Judge had an interest in the case beyond their usual judicial role?	X					Art. 2, 3, 8, 11, 12, 14, 17, 20	See all	X		Principle 1 and 2.5.3	Standard 3, 6, 7, 9	
	9(c)	Was there anything to suggest that any party spoke to the Judge during deliberation?	Art. 337					Art. 9	X	X		Principle 1 and 2.4	Standard 3, 7	
	9(d)	Was there anything to suggest that the Judge behaved in an intimidating manner towards a party?	X					Art. 8	X	X		Principle 3.1 and 5	Standard 7	
	9(e)	Was there anything to suggest that the judge drew a negative inference from the silence of the accused?	X					X	X	X		X	Standard 7	

		Criminal Code of Procedure	UNTAC Law	Constitution	Code of Ethics for Judges and Prosecutors	ICCPR	Basic Principles on the Independence of the Judiciary	Basic Principles on the Role of Lawyers	Convention against Torture	Bangalore Principles	Universal Declaration of Human Rights	Model Court Standards	Comments
Evidence	10(a)	Was evidence presented?	Art. 321, 334	Art. 24	X	X	X	X	X	X	X	X	
	10(b)	Was there anything to suggest that any party was not given the opportunity to present evidence?	Art. 326 and 334	Art. 24(4)	X	X	Art 14(3) (e)	X	X	X	X	Standard 8	
Right to call and examine witnesses	11(a)	Was there anything to suggest that any party was not given the opportunity to summon witnesses?	Art. 298	Art. 24(4), 24(5)	X	X	Art. 14(3) (e)	X	X	X	X	Standard 8	
	11(b)	Was there anything to suggest that any party was not given the opportunity to examine witnesses?	Art. 326	Art. 24(1)	X	X	Art. 14(3) (e)	X	X	X	X	Standard 8	
	11(c)	Were the witnesses present in the courtroom before they were examined?	Art. 322	X	X	X	X	X	X	X	X	X	

			Criminal Code of Procedure	UNTAC Law	Constitution	Code of Ethics for Judges and Prosecutors	ICCPR	Basic Principles on the Independence of the Judiciary	Basic Principles on the Role of Lawyers	Convention against Torture	Bangalore Principles	Universal Declaration of Human Rights	Model Court Standards	Comments
Right to full disclosure	12(a)	Was there anything to suggest that the same evidence was not available to both sides?	Art. 319	X	X	X	X	X	X	X	X	X	X	
Right not to self-incriminate	13(a)	Was there anything to indicate a confession was obtained through coercion?	Art. 321	Art. 12(1), Art. 24(3)	Art. 38	X	Arts. 7 and 14(3) (g)	X	X	X	X	X	X	
	13(b)	Was there anything to indicate a confession was extracted through torture?				X	Arts. 7 and 14(3) (g)	X	X	All	X	Art.5	X	
Double jeopardy	14(a)	Was there anything to suggest that the accused had been tried for this offense previously?	Art. 12	X	X	X	Art. 14(7)	X	X	X	X	X	Standard 9	
Prohibition against retrospective legislation	15(a)	Was there anything to suggest that the offense was not an offense under national or international law at the time it was committed?	X	X	X	X	Art. 15	X	X	X	X	Art. 11(2)	Standard 9	

## APPENDIX IV: CODE OF CONDUCT

### Preparation and prerequisites<sup>60</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>61</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>60</sup> This section will be provided as an additional document and will apply for all trials to be monitored

<sup>61</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.