



## *The Principles of Fair Trial*



### **A) Introduction:**

Conducting a trial in a “fair” manner means to respect the human right of **equality before the law** (Article 31 II 1 CC) by treating both parties of a dispute in the same way. This basically means to give them the same chances to present their cause and communicate with the other actors of the proceedings in a transparent way.

Furthermore a “fair” trial proceedings means to respect the right of the parties **to be free of coercion or ill-treatment** and to respect some essential standards of justice as for example the prohibition of disproportionate sanctions or punishments.

Finally “fair” trial means to deliver justice not too fast and not too slow **by proceeding without undue delay** but still with sufficient time for both parties to prepare and present their cause.

Having this in mind the way trials are presently conducted in Cambodia before the Civil and Criminal Courts is still far from being fair. For example:

Documents submitted by one party to the court are sometimes not disclosed and forwarded to the other party.

Evidence is seldom raised and examined properly.

Lawyers do not enjoy a role equal in rank and reputation to the prosecutors or judges.

Reasons for judgements are rarely ever given.

The criminal proceedings still rely heavily on confessions of the accused thus causing that such confessions are frequently extracted by coercion or even torture whereas independent and thorough investigations are not much conducted by the police, the prosecutor or the investigation judge who in many cases do not care to find and examine evidence.

The 6 months limit for the pretrial detention period is often exceeded without justification.

There are different **reasons** for these current shortcomings of the fair trial principles in Cambodia: The killing of nearly all legally trained Cambodian under the Pol Pot regime



deprived the country of most human resources being able to understand and practice these principles. The ubiquity of corruption throughout all layers of the Cambodian judicial system results in the widespread disrespect for fair standards that are commonly perceived as being obstacles to a “smooth” and “well-paying” conduct of trials. Furthermore it is the legacy of the legal thinking that had been practiced during the 1980's to have judges and prosecutors who widely believed and accepted that the police and the prosecutor (that is the executive branch) shall have dominant influence on the criminal proceedings. According to that point of view the proceedings itself is seen as a means to publicly show the guilt of the accused person rather than a means to find out the truth and to achieve justice by examining the facts and the law step by step. Finally giving equal rights and chances to both conflict parties is hindered by the strict authoritarian structures and mindsets of Cambodian society that favors hierarchical social orders of unequal relations between strong, rich, powerful and superior members of society and the less respected weak, powerless and subordinate members of society<sup>43</sup>.

## **B) What Does “Fair” Trial Mean in Detail?**

### **I) Goal of Proceedings: Finding a Just Conflict Solution (Justice)**

The question what “fairness” of a trial means can not be answered without first answering the question: What is the purpose of a trial itself?

A trial is a proceeding which literally means “to go on **step by step**” to achieve a goal. The **goal** of a court proceeding (trial) is **to achieve justice**. Justice means a just solution of a legal dispute between the two disputing parties by a judgement.

This judgement is achieved by thoroughly **researching, finding and examining the facts and the law** and then applying the found law on the found facts. This has to be done step by step in the shape of a formalized legal procedure. That means the law (procedural rule) prescribes every single step that has to be taken. Each step has to be **recorded** carefully. After each step the proceedings stops for a while and a **procedural decision** is made about what step should be taken next or about **procedural claims or objections** of the parties.

#### Example:

- The defendant claims to hear a discharging witness. The court has to make a decision on this application first and then can continue to proceed.
- Or the defendant claims that the judge is biased and therefore objects the judge. The court has to halt the proceedings, must consider the complaint and decides whether the judge has to be withdrawn from the case or not.

This cutting of the proceedings into many little steps provides a clear structure for all actors and ensures that no necessary step is omitted.

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<sup>43</sup> For a detailed description and analysis of the lack of respect for the fair trial principle in Cambodia see:

- Sok Sam Oeun, in: “Decline of Fair Trial in Asia”, February 2000, page 129 -147
- Basil Fernando, “Problems Facing the Cambodian Legal System”, July 1998
- Jason Barber, “Less than Human -Torture in Cambodia”, LICADHO, June 2000

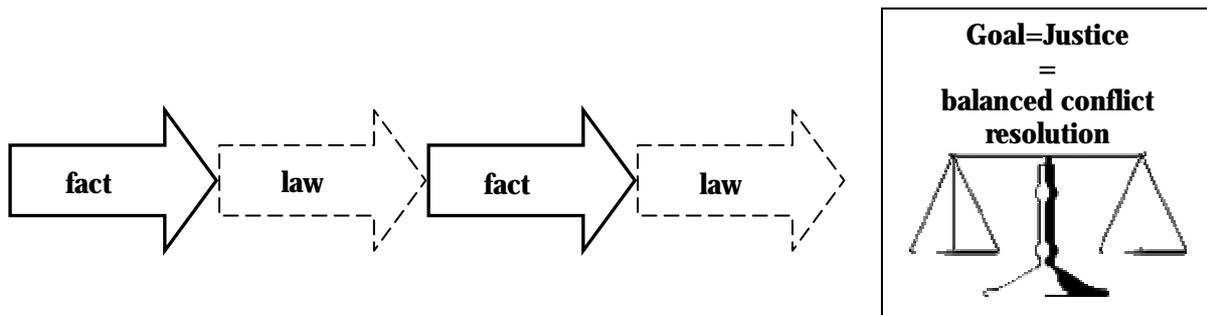


Many actors contribute to the proceedings.

The actors are the disputing parties, their lawyers, the prosecutor, the police and finally the judge and the court clerk. The underlying logic of the **participation of various actors with different roles** is that it serves the purpose of finding the whole truth best by looking at the facts and legal arguments from different angles and different point of views. Like the public process of democratic debate among free individuals such a process is more likely to unveil the truth than a one sided way of proceedings. The judge who finally has to find a just solution for the disputing parties must collect all the facts and legal views from both parties. S/he then has to balance the facts and legal views from both sides. That means s/he has to weigh the facts and arguments and to assess what factors are in favor of one party and what factors are in favor of the other party.

### Procedure:

step by step **collecting facts and legal view points** from both conflict parties



## II) Basic Elements of “Fairness”<sup>44</sup>:

When can this step-by-step process of coming to a judgement be called “fair”? “Fair” means “equal” or “in the same way” or “with similar chances”.

### 1) Same Chance to Influence the Decision Making Process:

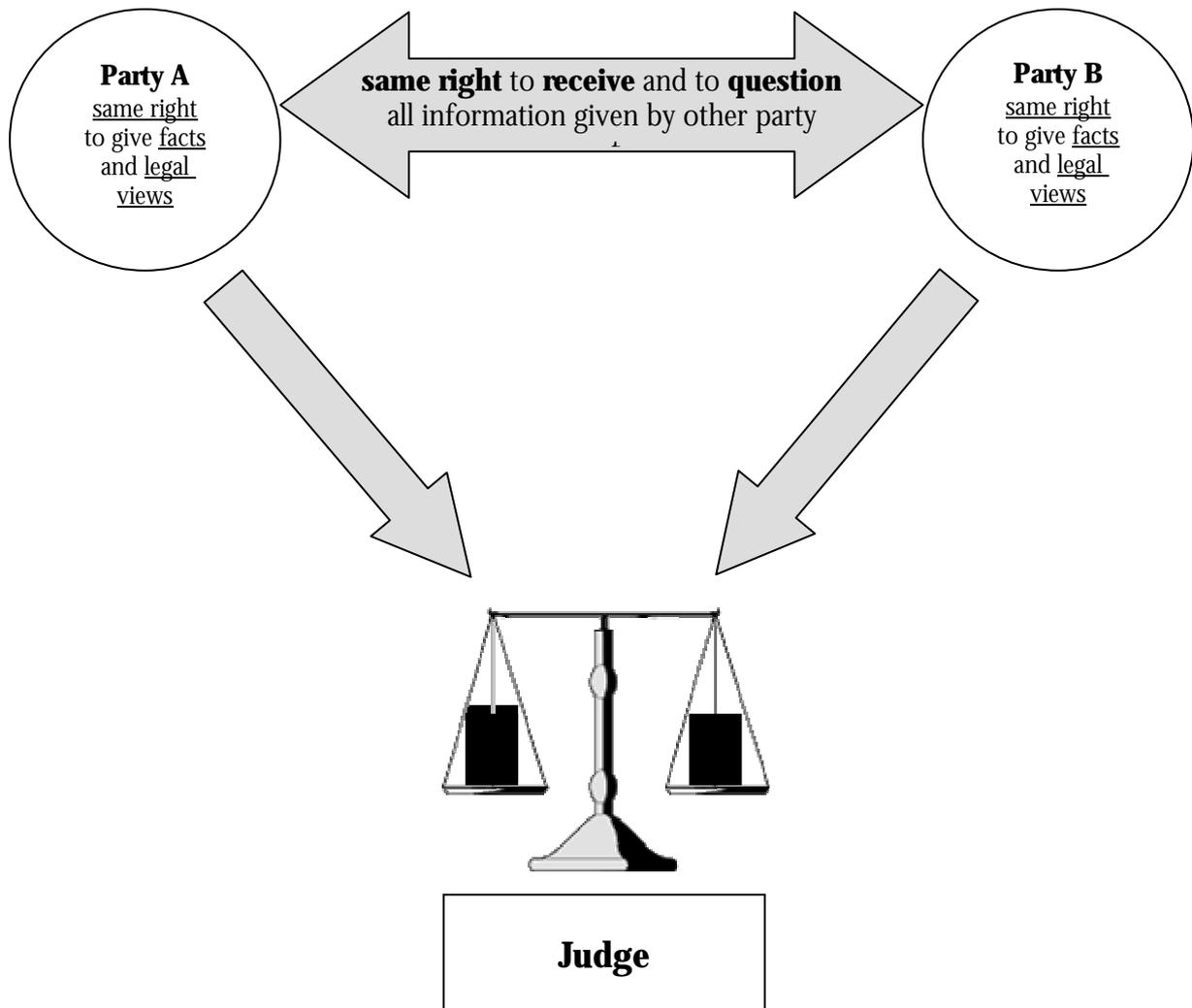
The process of the judge's decision making can be called “fair” when **both conflict parties** have the **same (equal) chances to influence the decision making process** of the judge. The parties can influence this decision making by presenting facts, evidence and legal points of view (arguments) to the judge. To do this properly each party needs to get information from the judge or from the other party and in return must provide itself information to the judge and to the other party.

<sup>44</sup>You can find useful information on the “Fair Trial Principle” in the publication of the New York based “Lawyer’s Committee for Human Rights” called “What is a fair trial” on [www.lchr.org/pubs/descriptions/fair\\_trial.pdf](http://www.lchr.org/pubs/descriptions/fair_trial.pdf). For further details have a look into the “Fair Trial Manual” of Amnesty International (AI) on [www.amnesty.org/ailib/intcam/fairtrial/indxftm\\_a.htm](http://www.amnesty.org/ailib/intcam/fairtrial/indxftm_a.htm) (for pre-trial rights) and [www.amnesty.org/ailib/intcam/fairtrial/indxftm\\_b.htm](http://www.amnesty.org/ailib/intcam/fairtrial/indxftm_b.htm) (for rights during the trial)



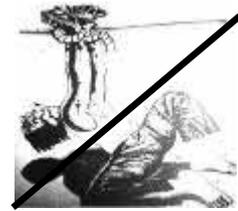
So both parties must have:

- the same **(fair) chance to present the facts** to the judge.
- the **right to be equally informed about all relevant facts.**  
The judge must provide both parties the same access to facts and files, inform them about all the facts, comments, arguments and evidence received from the other party or which the judge has raised him/herself.
- the same (fair) chance and right to **comment and question the facts given by the other party.**  
For example to question the evidence introduced by the other party.



## 2) **Publicity**<sup>45</sup> and **Freedom from Coercion:**

An additional requirement of fairness is that the process is **public** and **free of coercion**. If publicity is granted the public can observe a trial and check if both parties are really given



equal chances to actively take part in the process. Furthermore coercion to one of the parties must be excluded from the process of finding a “just” solution which by its very nature can not be a solution based on distorted information being forcefully extracted from the party (for example through torture or intimidation). On the contrary any such forced result puts a disadvantage to the forced party thus violating the principle of “fair” chances which means all parties enjoy the **same** rights.

## 3) **Fair Speed of Proceedings:**

The **speed of the proceedings** is also a crucial factor to consider when talking about “fair” proceedings. If the different single steps of the procedure to find justice are taken **too fast** this diminishes the chances of at least one of the conflict parties to actively participate and



Calendar

S	M	T	W	T	F	S
					1	2
3	4	5	6	7	8	9
10	11	12	13	14	15	16
17	18	19	20	21	22	23
24	25	26	27	28	29	30
31						

contribute to that process in the same way like the other party because it does not have sufficient time to receive, give and check information.

If on the other hand the proceeding is **too slow** and unduly delayed this as well can put a disadvantage to one party who can not be expected to bear unilaterally the burden of an unsolved legal situation for example by sitting in the prison and waiting for the trial.

## 4) **Requirements of “Fairness” to the Judge and His/Her Judgement:**

Not only the proceedings to achieve a judgement must be “fair” but the person of the judge and the judgement itself as the final result of the proceedings must also fulfill some requirements of fairness towards the conflict parties to ensure the equal protection of their rights.

a) The judge personally must be **impartial** which means not biased towards one party.

b) A judgement of a criminal court can only be made when there is enough charging evidence against the defendant. As long as there is not enough evidence a person must be considered innocent. The so called “**presumption of innocence**” is an underlying principle of any criminal proceedings and puts the burden of proof on the prosecutor. Another very important principle is the so called “**benefit of doubt**” (“**in dubio pro reo**”) which is in favor of the accused person. This principle means that if there are doubts that the witnesses presented by the prosecution are not credible the defendant then can not be convicted but has to be acquitted.

<sup>45</sup> see also “The Madrid Principles of the Relationship between the Media and Judicial Independence”: [www.law.murdoch.edu.au/icjwa/medind.htm](http://www.law.murdoch.edu.au/icjwa/medind.htm)



In civil cases law regulations must fairly balance the **burden of proof** between the parties.

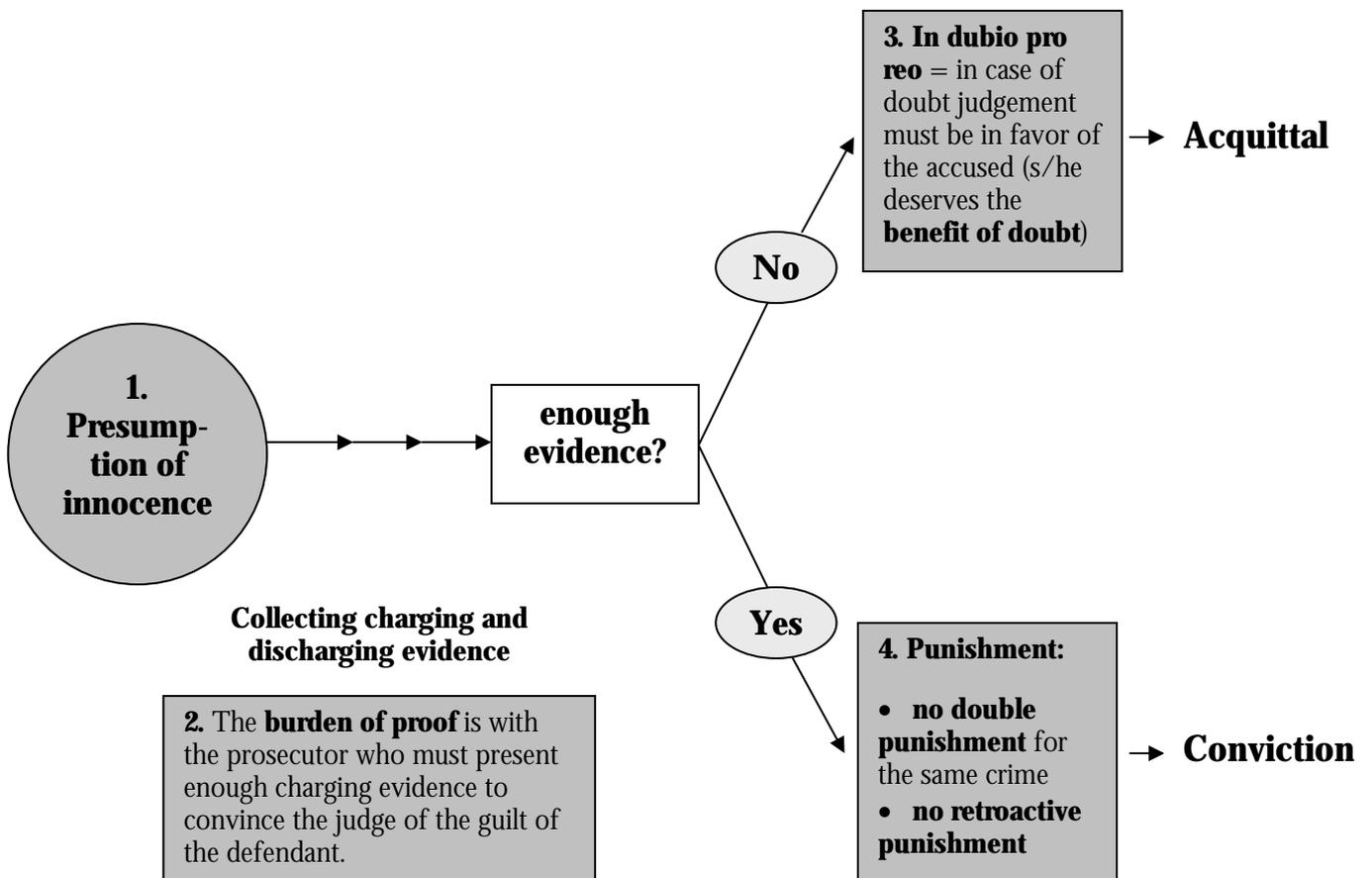
Example:

The plaintiff claims from the defendant to return the land which the defendant has occupied. The plaintiff's burden of proof is to verify to the court that s/he is the legitimate owner of the land and that the defendant has occupied it illegally. The defendant on the other hand must proof that s/he has acquired the land in good faith from a third party.

c) A criminal judgement must be balanced and fair. It shall not put disproportionate burdens on the sentenced party or duties that are impossible to fulfill. In this sense it would be un“fair” if a judgement imposes a **second (double) punishment** for the same crime or if it later applies a new criminal law on a past action that was not punishable under that law at that time. This **retroactive law application** would impose the duty on the accused to follow this law although s/he could not know this law at the time when s/he acted (= “**prohibition of retroactive punishment**”).

d) Finally both parties must have a chance to criticize the judgement and introduce more facts and evidence that may give a reason to change the judgement. Therefore both parties must have a right to appeal. To enable the parties to effectively appeal the reasons of judgement must be given in writing.

### 4 Basic Principles of a Fair Criminal Trial





### C) Most Important Law Texts on the “Fair Trial Principle”:

The following text shows the relevant law articles that enshrine the fair trial elements. Furthermore the text will give a systematic overview of some of the most important principles.

The above mentioned elements of a fair trial have been developed and codified especially for the criminal proceeding because this kind of proceeding intensely interferes with the rights of the accused party (right of free movement, freedom of action). But of course the **principle of fair trial also applies to civil law and administrative court proceedings.** (see also Article 14 I 2 ICCPR).

The International Convention on Civil and Political Rights (ICCPR) as well as the Cambodian Constitution (CC) provide the basic regulations which are necessary to ensure and safeguard a fair trial conduct. The most important provisions can be found in **Articles 9, 10 and especially 14 ICCPR and Article 38 CC.**

The basic right to ensure a “fair” (equal, balanced) conduct of a trial is the right of **“equal access to justice”** and of **“equality before the law”**. This basic guarantee shall make sure that both sides of a conflict are treated with the same respect and attention, get the same right to talk, and can receive and criticize information. Furthermore it protects the parties from impartial, biased judges and unbalanced, disproportionate measures, sanctions, judgements or punishments.

Article 31 II CC:

Every Khmer citizen shall be equal before the law, enjoying the same rights, freedom and fulfilling the same obligations regardless of race, color, sex, language, religious belief, political tendency, birth origin, social status, wealth or other status.

Article 14 I 1 ICCPR:

All persons shall be equal before the court and tribunals.

All legal provisions also emphasize fair treatment and fair proceeding during the **pre-trial period**. During this critical phase of proceedings most investigation work is done by the police or the prosecutor. But also most of severe human rights violations like unlawful detention or coercion to confess (torture, intimidation, forced self-incrimination) happens during this period. For that reason the weak party (the defendant) needs special protection by giving him/her special rights to ensure his/her fair treatment.



Article 9 ICCPR:

I. 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.

II. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.

III. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgment.

IV. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

V. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

Article 10 ICCPR:

I. All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

**Article 38 CC** enshrines some very interesting and important minimum guarantees that even the international conventions sometimes do not describe in such an explicit manner.

Article 38 CC:

I. The law guarantees there shall be no physical abuse against any individual.

II. The law shall protect life, honor, and dignity of the citizens.

III. The prosecution, arrest, or detention of any person shall not be done except in accordance with the law.

IV. Coercion, physical ill-treatment or any other mistreatment that imposes additional punishment on a detainee or prisoner shall be prohibited. Persons who commit, participate or conspire in such acts shall be punished according to the law.



The most detailed regulation about the procedural rights that ensure a fair treatment during the trial can be found in **Article 14 ICCPR**:

Article 14 ICCPR:

I. All persons shall be equal before the court 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 press and the public may be excluded from all or part of a trial for reasons of morals, public order (order public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgment rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceeding concern matrimonial disputes or the guardianship of children.

II. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

III. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

- (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
- (b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;
- (c) To be tried without undue delay;
- (d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case if he does not have sufficient means to pay for it;
- (e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
- (f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;
- (g) Not to be compelled to testify against himself or to confess guilt.



Article 14 ICCPR (continuation):

IV. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.

V. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.

VI. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

VII. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

Article 15 ICCPR:

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.

### **D) How to React In Cases of Violations of the “Fair Trial Principle”?**

The judge, the lawyers of the two disputing parties (and in criminal cases the prosecutor) have to make sure that no violations of the fair trial principle occur. It is **their** responsibility to ensure fair proceedings. They have to watch the proceedings carefully and claim a procedural decision of the judge every time when they think a right of the party is not respected by the judge, by the prosecutor or by the other party.



If necessary the trial has to be interrupted for some time by the court to decide about such **procedural** questions. The court also has to interrupt the proceedings for a while in case the parties ask for some time to decide about their next procedural steps.

Example:

10 Minutes before the beginning of the trial the lawyer of the defendant learns about a new witness who could prove the innocence of his/her client. During the proceedings s/he applies to hear this witness. The judge decides to hear the witness but has to adjourn the trial as the witness lives in another town and can not be summoned right away.

The parties must make sure that their procedural claims as well as any rejection of such claims by the judge are carefully **recorded in the official minutes (protocol)** of the proceedings in writing. Otherwise in a later appeal they are not able to prove that the judgement was based on a procedural mistake and therefore needs to be revised. So the Appeal Court could not check if a mistake has been made or not.

It is the **Court Clerk's task** to keep well the protocol.



**Well kept and complete  
files, documents  
and trial protocols  
are essential for the fairness of  
a trial!**



In the following text some of the most common violations of the fair trial principle in Cambodia are listed and some possible reactions of the parties are described:

**I) Biased, Bribed and Partial Judge:**

Examples:

- The lawyer learns that the judge has been seen sitting together with the lawyer of the other party just one day before the trial and had been handed over an envelop (presumably with money).
- The judge uses insulting words against one party during the trial, or interrupts this party all the time or his/her remarks clearly reveal his/her bias to the party (“You talk nonsense all the time”).
- The lawyer discovers that the judge has an already prepared written judgement on his/her table before the trial ends.



The party has a right to an impartial judge (Article 128 I and II CC, Article 14 I 2 ICCPR).

### MEASURES OF REMEDY:

- In all these cases of violation of the “Fair Trial Principle” the lawyer of the affected party can **object the judge** and claim that another judge decides. The lawyer must file a procedural claim. It is the right of the party that another judge decides about this claim. The claim and a possible rejection of this claim must be recorded in the protocol!
- In a **subsequent appeal** the lawyer can claim that the **judgement has to be revised** due to the procedural mistake that the objection of the judge was not decided properly.

### II) Refusal of the Right to See Documents of Other Party:

#### Example:

One party submits its statements and documents of evidence to the judge. The judge does not send copies of these papers to the lawyer of the opposite party. Instead the judge keeps them in his/her court files. When the opposite party asks him/her to see these papers and to get copies of it the judge rejects it. The judge says that this is not possible because these papers are confidential “internal” court documents. Furthermore s/he says that the court can not afford making copies due to lack of funds.

The party has a right to get a chance for a sufficient preparation of the trial (Article 14 III b) ICCPR). This includes the right to be informed and see all the documents, statements and evidence submitted by the other party to the judge. These documents can never be just “internal” documents in the sense of being restricted for a privileged reading by the judge only. Normally it is the burden of the party that submits the documents to provide copies of it and the court forwards these copies to the other party. At least the court must give the opposite party the chance to make copies at its own expense.

### MEASURES OF REMEDY:

- In this case of violation of the “Fair Trial Principle” the lawyer should **file a procedural claim to see the documents**. S/he should have **this claim recorded in the court files**. The judge must give a **reasoned decision in writing** on this procedural claim.
- If the judge **refuses** to give a reasoned decision in writing the lawyer **can file a complaint against this judge** with the court president **because of misconduct**.
- The lawyer can even send a **copy of this claim to the Supreme Council of Magistracy** that is in charge of supervising the judge’s performance.
- If all this does not help the lawyer can **object the judge** for being biased even before the proceedings starts and can claim that **another judge decides**.
- Finally an **appeal against a judgement of this biased judge** can be based on the procedural mistake of violating the right to be equally informed about all statements of the opposite party.



### III) Defendant's Confession of Guilt Extracted by Torture:

#### Example:

During the court trial the defendant says s/he has been brutally beaten up by the police during pre-trial detention and the police forced him/her to confess that s/he committed the crime. S/he lifts his/her shirt and reveals some fresh bruises and scars on his/her body.

Torture is prohibited without any exemption. To torture someone is one of the worst crimes human beings can commit. Torturers have to be punished severely (see Articles 4 - 9 Convention against Torture). Evidence obtained by torture can not be used against a defendant. No one shall be forced to incriminate himself of having committed a crime (Article 38 I, III, IV CC and Articles 7, 10 I and 14 III g ICCPR).

#### MEASURES OF REMEDY:

- In this case of violation of the "Fair Trial Principle" the lawyer of the defendant has to file the procedural claim that his/her **client's confession must be excluded** from the proceedings **as evidence**.
- In case there is doubt about the allegation of his/her client the lawyer should at least request an interruption or adjournment of the trial to get enough time to investigate.
- The lawyer can additionally **request an official investigation of the torture incident**.
- The lawyer can **file a criminal complaint against the responsible police officers**.
- Moreover the lawyer can file a **civil claim against** these police officers with the civil court **for compensation**.
- Moreover the lawyer can send a **complaint to the Ministry of Interior and the Prison Department** requesting them to impose a **disciplinary sanction**.

All these actions can also be taken in case a suspect is held in pre-trial detention **exceeding the 6 months limit without reasons and further judicial order**. In this case the personal freedom of the detainee is unlawfully restricted.

### IV) No Evidence Raised by the Court:

#### Examples:

- The Court Clerk only reads a police report to introduce evidence against the defendant. Neither the police officers who have written the report nor the witnesses mentioned in the report have been summoned to show up in the court to testify personally. Or they have been summoned but did not appear.
- In a civil case the plaintiff simply alleges some facts but does not offer any evidence to prove it although the facts are disputed by the defending party.

No one can be sentenced without sufficient evidence. Disputed facts have to be proved by the party who introduces these facts (Principles of - presumption of innocence, - burden of proof, - benefit of doubt). Every party has the right to examine and question charging evidence that was introduced by the opposite party (Articles 14 II and III e ICCPR, Article 38 VI and V CC).



## MEASURES OF REMEDY:

- In this case of violation of the “Fair Trial Principle” the lawyer has to **file a procedural claim** to the court **requesting that the witnesses and the police officers are summoned**:
  - a) to appear,
  - b) to testify and
  - c) to be questioned not only by the court, the prosecutor but also by the lawyer him/herself.
- In case the witnesses and the police officers do not follow the summons the lawyer can claim that the court forces them to appear by threatening to impose a fine on them or to forcefully transport them to the court by the judicial police.
- When they finally appear the lawyer has the right to question these witnesses and to comment their testimony uninterruptedly.

## V) Judgement Without Reasons:

### Example:

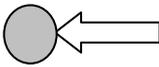
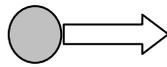
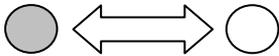
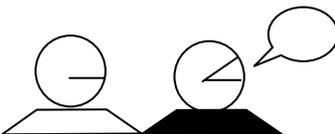
The judge writes a judgement by just mentioning the result of the trial (conviction, acquittal or rejection of a civil claim). The judgement only refers to “the pertinent laws” and “the collected facts and evidence” but does not show step by step which facts are undisputed, which ones are seen as disputed but proved by one of the parties and which law articles exactly were applied on these facts.

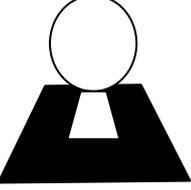
This sort of judgement cuts off the right of the parties to appeal effectively as it does not provide any chance to challenge it with an appeal (Article 14 V ICCPR). It opens all doors for the judge to hide his/her true motivation for making the judgement. The lack of a reasoning can hide an arbitrary decision as well as a decision influenced by bribes or it can simply hide the lack of legal knowledge of the judge.

## MEASURES OF REMEDY:

- In this case of violation of the “Fair Trial Principle” the lawyers of both parties can **file a procedural claim requesting a written reasoning** for the judgement within a set time.
- If the requested reasoning is not given by the judge the lawyers **can file a complaint against the judge** with the
  - a) **Court President** and
  - b) with the **Supreme Council of Magistracy**.
- Finally an **appeal against this judgement** can be based on the simple fact that a judgement without reasons is a severe mistake that renders the whole judgement **null and void**. Such a judgement must be turned over and declared null and void. The Appeal Court must refer the case back to the lower court for new proceedings because the original trial is still open as it has not been closed with a proper judgement.

## *Checklist of Fair Trial Rights*

Fair Communication	Special Right	Relevant Articles
Right to <b>get</b> information  	equal right to: <ul style="list-style-type: none"> <li>• <b>know the charges</b> (or the claim of plaintiff in a civil law dispute)</li> <li>• <b>see all documents, files and evidence</b> produced against own party (this derives from the right to prepare own defence)</li> </ul>	Article 9 II and Article 14 III a ICCPR Article 14 III b ICCPR
Right to <b>give</b> information    (in <u>criminal</u> cases <u>no duty</u> to give information! See below: Right to remain silent and not be forced to confession or self incrimination )	equal right to: <ul style="list-style-type: none"> <li>• <b>talk</b> (uninterrupted talk, last word of accused person)</li> <li>• <b>be present</b></li> <li>• <b>introduce evidence</b> (also discharging evidence for example calling a witness of the defence)</li> </ul>	Article 14 I 2 ICCPR (fair “hearing”)  Article 14 III d ICCPR  Article 14 III e ICCPR
Right to <b>examine</b> information of other party  	equal right to: <ul style="list-style-type: none"> <li>• <b>question the witness</b> of the prosecution (or of the other party)</li> </ul>	Article 14 III e ICCPR
Right to <b>support communication</b>  	equal right to get: <ul style="list-style-type: none"> <li>• <b>translation/interpreter</b></li> <li>• <b>lawyer (legal aid)</b></li> </ul>	Article 14 III a and f ICCPR Article 14 III b and d ICCPR
Safe and Open Communication	Special Right	Relevant Article
Right to a <b>public</b> trial  	equal right to have a: <ul style="list-style-type: none"> <li>• <b>public</b> hearing</li> <li>• judgement made <b>public</b></li> </ul>	Article 14 I 2 ICCP  Article 14 I 3 alternative 2 ICCPR
Right <b>not</b> to be <b>coerced</b>  	equal right not to be: <ul style="list-style-type: none"> <li>• <b>ill-treated or tortured</b></li> <li>• <b>coerced to confession or self-incrimination</b></li> <li>• sentenced on base of <b>evidence obtained by torture</b></li> </ul>	Article 38 I, III, IV CC; Articles 7, 10 I ICCPR  Article 38 IV 1 CC Article 14 III g ICCPR  Article 38 V CC

Due Speed of Proceeding	Special Right	Relevant Articles
<p>Right to have a <b>speedy</b> trial (trial shall not be too slow)</p> 	<p>right to:</p> <ul style="list-style-type: none"> <li>• be <b>promptly informed</b> about charges</li> <li>• receive <b>prompt judicial control</b> of arrest</li> <li>• get <b>judgement without undue delay</b> (in case of juveniles: as fast as possible)</li> </ul>	<p>Article 9 II and Article 14 III a) ICCPR</p> <p>Article 9 II and III ICCPR</p> <p>Article 14 III c ICCPR and Article 10 II b ICCPR</p>
<p>Right to have <b>sufficient</b> time (trial shall not be too fast)</p> 	<p>right to:</p> <ul style="list-style-type: none"> <li>• <b>talk</b> uninterruptedly = fair “hearing”</li> <li>• <b>prepare the defence</b> and talk with lawyer</li> </ul>	<p>Article 14 I 1 ICCPR</p> <p>Article 14 III b) ICCPR</p>
Requirements to Fairness of the Judge	Special Right	Relevant Article
	<p>right to</p> <ul style="list-style-type: none"> <li>• <b>impartial/unbiased/unbribed</b> judge</li> <li>• <b>presumption of innocence</b> (as long as there is no evidence judge has to treat the accused as being innocent)</li> <li>• <b>benefit of doubt</b> (burden of proof is with the prosecutor or with the plaintiff, only if there is no doubt left but all facts are proved by evidence the judge can sentence the accused)</li> </ul>	<p>Article 128 I and II CC Article 14 I 2 ICCPR</p> <p>Article 38 VI CC and Article 14 II ICCPR</p> <p>Article 38 V CC</p>
<p><b>Fairness of the Judgement</b></p> 	<p>right not to be:</p> <ul style="list-style-type: none"> <li>• <b>punished twice</b> for the same action because this would be <b>disproportionate (= too strong)</b></li> <li>• punished for a past act that was not punishable by the law at the time when the act was committed (<b>“prohibition of retroactive punishment”</b>)</li> </ul> <p>right to:</p> <p><b>appeal</b> the judgement (this includes the right to get reasoning of judgement: what facts did the judge accept as proved and what laws did s/he apply?)</p>	<p>Article 14 VII ICCPR</p> <p>Article 15 I ICCPR</p> <p>Article 15 V ICCPR</p>



### **Study Question 15**

Are Cambodian judges bound by the articles of the International Covenant on Civil and Political Rights (ICCPR)?



### **Study Question 16**

Both the Cambodian Constitution (CC) and the ICCPR enshrine many articles about the same human rights (like for example about freedom of expression: Article 19 ICCPR and Article 41 CC).

- a) Why can it still be useful for a Cambodian judge to apply the ICCPR article additionally to the Cambodian Constitution article (for example in a case which is related to freedom of expression)?
- b) Can a Cambodian judge base a procedural decision directly on Article 14 ICCPR?



### **Study Question 17**

Article 31 I CC explicitly mentions the “Universal Declaration of Human Rights” (UDHR) although this declaration is not a binding international convention but only a non-binding declaration.

What may be the sense of this reference to the UDHR regarding the application of human rights by Cambodian judges?



### **Study Question 18**

What can a Cambodian judge do if s/he thinks the applicable Cambodian law is unconstitutional (=not compatible with the human rights articles of the Cambodian Constitution)?

Example:

An article in the Family Law violates Article 31 III CC which stipulates equal rights of women and men.



### Study Question 19

The exercise of human rights can only be restricted by a law (Article 29 II UDHR).

How does a Cambodian judge have to decide if the authority imposes a restriction on the exercise of a human right but there is no Cambodian law that allows such a restriction?

Example:

The Ministry of Information prohibits a radio station to broadcast foreign radio programs but a Media Law does not yet exist although the Cambodian Constitution calls for such a law (Article 41 II CC).



### Study Question 20

According to the ICCPR restrictions on human rights can only be imposed when they are “necessary”. This means restrictions are only legal if there is no softer measure (“**principle of proportionality**”).

Can a Cambodian court rule that an administrative decision is illegal because the authority has not chosen the softest possible measure from a catalogue of measures provided by the law?

Example:

The authority totally bans a demonstration to protect the street traffic although it would be possible to temporarily divert the traffic and allow the demonstration under the condition that it only takes part on a certain time on a certain street.



### Study Question 21

Labor case:

An employee was dismissed by the employer because he allegedly regularly came late to work and took money from the company.

The employee denies the allegations, engages a lawyer and files a claim to the court to be reemployed or to get compensation.

**a)** The employer also engages a lawyer who prepares a counterplea and at the same time applies for getting a copy of the employee’s claim.

The judge does not grant a copy to the employer’s lawyer saying that s/he has no right of inspection of files because this is an internal affair.

Is this statement of the judge right or wrong? Please do not just answer the question with “yes” or “no” but give an explanation for your opinion!

**b)** The employee presents colleagues who shall testify as witnesses that he did not come late to work and did not take money from the company.

The judge calls the witnesses, interviews them in his/her room and writes a report on the statements of the witnesses.

Was the action of the judge correct or not? Please do not just answer the question with “yes” or “no” but give an explanation for your opinion!



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### **Study Question 22**

Case:

A high ranking official is accused of murder. The witness of the prosecution does not want to give her/his identification because s/he fears about her/his personal security. Therefore, the prosecution applies to the court to hear the testimony of the witness in an anonymous way.

Imagine you are the judge and you have to make a decision on the prosecutor's application. How do you decide? Give reasons for your decision and quote the relevant article(s).

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### **Study Question 23**

Why must the court hearing be held in public?  
Please explain your answer and quote the relevant article(s).

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### **Study Question 24**

Are there any exceptions to the principle of public hearing?  
If yes, what are they?

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### **Study Question 25**

Open the "Fair Trial Manual" on the internet home page of "amnesty international" = [www.amnesty.org/ailib/intcam/fairtrial/indxftm\\_b.htm](http://www.amnesty.org/ailib/intcam/fairtrial/indxftm_b.htm) and look at Chapter 17.1. of the "Fair Trial Manual".

What article of the Cambodian Constitution stipulates a regulation which is similar to the regulations that are quoted in Chapter 17.1. of the "Fair Trial Manual"?

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### **Study Question 26**

What has the judge to do if the only charging evidence presented to him/her is a confession of the defendant which was extracted by beatings and torture?  
Give reasons for your answer and quote the relevant articles!



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**Study Question 27**

The right to get a reasoned judgement is based on what other essential right of the defendant?

Quote the relevant section of Article 14 ICCPR.

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**Study Question 28**

Why does the defendant need to know the reasons of the judgement?

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**Study Question 29**

Why is it important that the defendant is informed early enough before the trial about the witnesses called by the prosecution?

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**Study Question 30**

A judge can order to keep an accused person in pre-trial detention.

What are the only two possible reasons a judge can give such an order?

Name these reasons and quote the relevant article!

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**Study Question 31**

What order has a judge to issue in case the pre-trial detention period of 6 months is exceeded?

Quote the relevant article(s)!

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**Study Question 32**

Why is it problematic that Article 47 Criminal Proceedings Code and Article 13 UNTAC Code allow a detention of suspects by the police for 48 hours **without** judicial approval?