



Court Observation

A) Function:

One of the most important functions of the public is to control the activity of courts. What happens “In the Name of the Khmer People” shall not happen behind closed doors but in the broad light of public interest. The reason is that the judges need some supervision and control by the public if they shall exercise their function well and in a fair manner. So at least they can be held accountable by the public opinion which can be a strong incentive for judges to stick to the proceedings rules, treat the parties fair and avoid obvious violations of the law.

B) Rights of the Public:

The right to observe a court and its performance is guaranteed to everyone by the **publicity of the trial** and **of the public announcement of the judgment (Article 14 I 2 and 3 ICCPR)**. Only in a very limited number of cases the public can be excluded from a trial to protect higher ranking interest of the parties or the witnesses.⁴⁶ To enable the public to exercise its right effectively some basic conditions must be secured:

- **No one needs a special invitation or permit** to attend a court trial and listen to the court proceedings. Furthermore it does not take a special function like being a law student or a member of a research team. Being a simple member of the public is already sufficient and entitles everyone to enter a court room and join a trial. And no one who wants to simply follow the case must disclose his/her identity or show a passport to the court or the court clerk **unless s/he is personally involved in the case and/or might be summoned as a witness to testify officially**. This is important because no one shall be deterred from exercising his/her right of public attendance.
- Moreover each court must ensure that the public has **sufficient space** to attend the trial. Without such a space or with only a small, cramped space provided the public would be illegally kept outside from the court. In certain cases that attract a lot of public interest it may be even necessary to hold the trial in a big hall or open space to allow a big crowd of people to attend.
- The court must also secure that the public is **appropriately informed in advance about what case will be on the trial** at which date and which judge is hearing the case. This can be done by publicly posting a timetable in the entrance hall or at the door of the court room which indicates what will happen when and where. At least all information about these facts must be given free of charge to any interested person by the court.
- An **oral court proceeding** is prescribed in the proceedings code. This ensures that the public can really follow the case. All relevant information must be exchanged orally so the public can follow the proceedings. If the prosecutor, the judges and the court clerks

⁴⁶ Further details on the publicity of a trial may be obtained from the “Fair Trial Manual” of amnesty international (see footnote 44), the Guide to Fair Trial of the Lawyers’ Human Rights Committee and by searching the www.bayefsky.com homepage for jurisdiction on Article 14 I 2 and 3 ICCPR.



just whisper or speak in such a low voice that no one of the audience can understand them or if they simply exchange written material they cut off the right of the public to control the proceedings. So every member of the audience has the right to claim that they speak up in a louder voice so s/he can understand.

C) Inspection of Documents:

The public has only the right to follow the oral proceeding. It does not have a right to see all related documents. **To see the documents and inspect the files is the privilege of the parties and their lawyers.** The public, especially the media, may have a right to obtain the full text of a written judgement deriving from the freedom of expression which includes free access to information. But if the court observers want to have access to the files they have to ask the parties and their lawyers if they are willing to let them look into their files. The parties normally should have a complete file containing not only its own documents but also those introduced to the trial by the opposite party. At least one party of the dispute will be normally willing to share information with a court observer. This will be normally the party which feels treated unjust by the opposite party or by the court and therefore feels a need to get some public support. It is always **recommendable to contact the lawyers of both parties and utter a wish for information.**

D) Recording of the Trial:

Normally proceedings rules do not allow videotaping, tape recording or filming court sessions because these sessions shall not be turned into theater plays which distract the trial actors who shall focus on their legal function.

Therefore it takes **precise minute taking** by the court observer to collect the relevant data. To support this task and to get a clear and properly ordered structure of the observation report it is recommended to follow a checklist such as it is for example in a very simple way provided on the following page. Such a **checklist** makes sure that the observer does focus on the weak spots of every proceeding and does not forget points of interest that can be relevant for the fairness of the trial.

Furthermore it ensures professionalism and makes it easier later on to use such reports as evidence against unfair judges. Especially when objection claims or complaints to the Supreme Council of Magistracy or the Court President shall be based on such a report it is important to keep it clear, structured and precise.



Basic Checklist for Court Observation Reports

Court	Case	Decision	Hearing	Comments/ Criticis
Name of court: ... Name of chamber/bench: ... Name of judge: ... Name of court clerk: ...	Name of parties: ... Name of their lawyers: ... Topic of claim: ... File number: ... Date of hearing: ...	Content of decision: ... Date of decision: ...	Course of hearing: ... Introduction of statements: ... Evidence raised: ...	Final Conclusion: ... Main points of criticism: ... Recommendation: ...
<ul style="list-style-type: none"> • Competence of court: <u>Example:</u> Military court can not try civilians. Provincial court can not decide beyond its regionally limited jurisdiction. • Court facilities and settings in general Are there any obstacles for public attendance or/and control? • Court room: Is there enough space for the public? • Acoustic in the courtroom: Voices of trial actors loud enough to be understood by the audience? Are loudspeakers necessary? • Entrance restrictions: Claims to reveal identity, to produce permission or invitation? (limitation of access only for accredited media member or specially qualified persons) body searches or filming of visitors? 	<ul style="list-style-type: none"> • Parties presence: in <u>criminal</u> cases: defendant can generally not be sentenced in absence! in <u>civil</u> cases: absence tolerable but only if duly informed about hearing date and about consequences of absence • Representation by lawyer: Necessity of representation in <u>criminal</u> cases. Did the court inform the defendant to have the right of a lawyer (Legal Aid)? • Claims of the party: In <u>civil</u> cases: what do the parties want from the court? Does the court deal with every claim or is it neglecting some of the expressed claims thus partly cutting off the right of judicial recourse? 	<ul style="list-style-type: none"> • Public announcement of judgement: Is the judgement announced publicly? Is its complete text available? • Reasoning of judgement: Does the judge give a clear reason for the judgement? What reasons are given in the written judgement? Are the reasons given sufficient to fulfill its function? • Fairness of decision: <ul style="list-style-type: none"> - disproportionate punishment? - double punishment for the same crime? - retroactive application of new law? • Constitutionality of decision: <u>Examples:</u> <ul style="list-style-type: none"> - Imprisonment for inability to pay debt (possible according to the Law on Physical Imprisonment) violates Article 11 ICCPR - Divorce order: (Only) divorced wife must stay 300 days “like widow” after divorce. This violates equality of men and women (Articles 31 II and 45 I and III CC) • Chance to appeal against decision: Was there sufficient information given about the right to appeal? 	<ul style="list-style-type: none"> • Fair chance to talk: Is there equal opportunity for both parties to speak? • Sufficient time to prepare procedural applications: How are applications for interruption or adjournments handled by the court? • Chance of party to examine witness: How are questions to the witness of opposite party handled by the court? • Admittance of illegally obtained evidence: Does the court admit confessions obtained by torture? How does the court react on pertinent allegations of the defender? • Full attention of court to the parties: <u>Examples:</u> Does the judge sleep, do the judge and the court clerk chat with each other, do they let their mobile phones interrupt the proceedings, etc.? • Presumption of innocence: Does the court show bias in its examination questions? Does it show bias in handling the hearing in favor or disfavor of one of the parties? Does the judge make despising remarks? Does the court have prepared texts of judgment on its table? 	