

WHAT ARE FAIR TRIAL RIGHTS

..... ♦



September 2022



កម្មសាធារណៈសង្គមទុកស្សរក្នុង^{ជាតិ}
Cambodian Center for Human Rights



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About Cambodian Center for Human Rights

The Cambodian Center for Human Rights (“CCHR”) is a non-aligned, independent, non-governmental organization (“NGO”) that works to promote and protect democracy and respect for human rights – in particular civil and political rights – in the Kingdom of Cambodia (“Cambodia”).

CCHR’s vision is of a peaceful Cambodia in which all people can enjoy the fundamental human rights to which they are entitled, all are subject to the rule of law without impunity, all are treated equally without discrimination, all are empowered to participate fully in the democratic process, and all can share in the benefits of Cambodia’s sustainable economic development. CCHR’s logo shows a white bird flying out of a circle of blue sky – this symbolizes Cambodia’s bid for freedom.

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For more information about CCHR, please visit www.cchrcambodia.org.

About the Fair Trial Rights Project

The introductory Module on the Right to a Fair Trial or Fair Trial Rights (“FTR”) is part of a series of modules on fair trial rights produced by CCHR’s Fair Trial Rights Project (“the FTR Project”). The FTR Project is the first – and only one – of its kind in Cambodia, uniquely and innovatively working to promote and protect fair trial rights in practice. It overall aims to increase the impartiality and independence of Cambodia’s judiciary by supporting the right to a fair trial in Cambodia’s courts. In pursuit of this goal, the FTR project has two specific objectives: to socialize the concept of fair trial rights among the public by raising its awareness of fair trial rights and to increase compliance with fair trial standards within the judiciary through trial monitoring.

Acknowledgments

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Queries and Feedback

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The Right to a Fair Trial (or Fair Trial Rights)

1. Definition

The right to a fair trial is a human right that is a central pillar of any justice system. It applies to both civil and criminal legal proceedings. With respect to criminal proceedings, the right to a fair trial entitles each and every person charged with a criminal offense to be treated fairly and equally while the state determines their guilt or innocence.

The right to a fair trial is comprised of a number of different individual rights, commonly referred to as “fair trial rights” (“FTR”) which encompass the entire legal process, from the initial arrest of the suspect, through to the completion of the final appeal.

Fair trial rights are enshrined in international law, notably the Universal Declaration of Human Rights (“UDHR”) and the International Covenant on Civil and Political Rights (“ICCPR”), which guarantee the **right to a fair and public hearing by an independent and impartial tribunal**. The ICCPR further details the various components of a fair trial, which includes, but is not limited to, the following rights:

- The right to a public hearing;
- The right to the presumption of innocence;
- The right to be tried without undue delay;
- The right to understand the nature and cause of the charges;
- The right to adequate time and facilities to prepare a defense;
- The right to legal representation;
- The right to be present at trial;
- The right to be tried by a competent, independent, and impartial tribunal;
- The right not to be compelled to confess guilt or to testify against oneself;
- The rights to a public and reasoned judgment;
- The right to appeal to a higher court on the grounds of fact and law.



2. A Brief History of the Right To a Fair Trial

At the international level, the right to a fair trial was officially affirmed and recognized as a fundamental human right with the adoption of UDHR by the United Nations (“UN”) General Assembly in 1948, a milestone document in the history of human rights. The UN was founded by the international community in 1945 in response to the atrocities perpetrated during the Second World War. The UDHR was the first treaty adopted by the UN setting out fundamental rights to be universally protected.¹ All the States wishing to become members of the UN must adhere to the UDHR.

In 1966, the right to a fair trial was reaffirmed, along with other fundamental civil and political rights, in another instrument adopted by the UN: the ICCPR, which further elaborates on the various rights composing the right to a fair trial.

¹ United Nations, “Universal Declaration of Human Rights”, <https://www.un.org/en/about-us/universal-declaration-of-human-rights>; United Nations, “History of the Declaration”, <https://www.un.org/en/about-us/udhr/history-of-the-declaration>.

Today, the UN is composed of 193 member States, all legally bound by the UDHR and under the international obligation to uphold the fundamental rights that it enshrines, including the right to a fair trial. In addition, 173 members, including Cambodia, have ratified the ICCPR and are legally bound by its provisions and obligated to uphold all the fair trial rights recognized by this treaty.



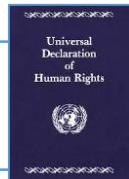
Since then, the right to a fair trial has been recognized in similar terms as the ICCPR in other UN treaties as well as other international and regional human rights instruments. These include, but are not limited to, the European Convention on Human Rights in 1950, the American Convention on Human Rights in 1969, the African Charter on Human and Peoples Rights in 1981, the International Convention on the Rights of the Child ("CHC") in 1989, or the European Charter of Fundamental Rights of the European Union in 2000.

3. Legal framework

3.1. International Law

The right to a fair trial is internationally recognized and enshrined in several international instruments, including the **UDHR**, the **ICCPR**, and the **CRC**. These three international human rights instruments are directly applicable in Cambodian law through Article 31 of the Constitution of the Kingdom of Cambodia ("the Cambodian Constitution").

- **Article 10 of the UDHR:** *"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."*



- **Article 14 (1) of the ICCPR:** *"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 [...]"*



- **Article 40 (2)(b)(iii) of the CRC:** *"[...] To this end, and having regard to the relevant provisions of international instruments, States Parties shall, in particular, ensure that: [...] (b) Every child alleged as or accused of having infringed the penal law has at least the following guarantees: [...]"*



- (iii) *To have the matter determined without delay by a competent, independent and impartial authority or judicial body in a fair hearing according to law, in the presence of legal or other appropriate assistance and, unless it is considered not to be in the best interest of the child, in particular, taking into account his or her age or situation, his or her parents or legal guardians; [...]"*

3.2. Cambodian Law

The right to a fair trial is also guaranteed in Cambodia through general and specific provisions set out in several legal instruments such as the Cambodian Constitution and the Criminal Code of the Kingdom of Cambodia (“Criminal Code”), the Code of Criminal Procedure of the Kingdom of Cambodia (“CCPC”). It is also protected under the Law on Juvenile Justice, which sets out the norms and procedures in dealing with minors who commit criminal offenses.

- **Article 38 of the Constitution:** “*The law guarantees there shall be no physical abuse against any individual.*

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

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

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.

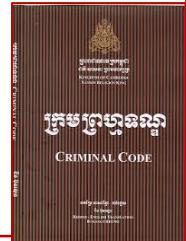
Confessions obtained by physical or mental force shall be admissible as evidence of guilt.

Any case of doubt, it shall be resolved in favor of the accused.

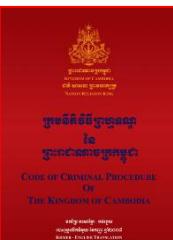
The accused shall be considered innocent until the court has judged finally on the case.

Every citizen shall enjoy the right to defense through judicial recourse”.

- The **Criminal Code** sets out classes of offenses, principles of criminal responsibility, principles of sentencing, the territorial jurisdiction of the courts and an extensive array of criminal offenses. It guarantees a number of fair trial rights and principles, including the principle of legality (Article 3), the protection against double jeopardy (Article 23), or the protection of juvenile defendants (Articles 39 and 40).

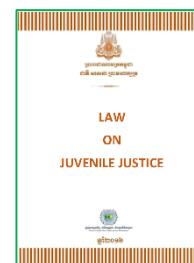


- The **CCPC** establishes in detail how suspects should be treated. It notably sets out the roles and responsibilities of judges, prosecutors and defense counsel from the initiation of an investigation to the time of arrest and throughout the entire criminal responsibility and principles of sentencing.



- **Article 6 of the Law on Juvenile Justice – Procedural rights of minor:** “*Every minor suspected or accused of having committed an offence shall have the following basic procedural rights:*
- *the right to refuse to answer questions with or without the presence of a lawyer*

- *the right not to be forced to give testimony against him/herself - the right to privacy*
- *the right to have medical care and treatment*
- *the right to be informed of the charge*
- *the right to be informed of the arrest to designated representative*
- *the right to be assisted by a lawyer and to be assigned a pro bono lawyer in accordance with the condition stipulated in Law on the Status of Lawyers from the earliest possible time of procedure*
- *the right to have designated representative participate in the case, unless it is contrary to the best interest of the minor*
- *the right to be assisted by pro bono interpreter, if necessary*
- *the right to present evidence - the right to request to call and pose questions to witnesses*
- *the right to request bail*
- *the right to ask for a revision of the court supervision*
- *the right to contact his/her embassy or consulate if a minor is a foreigner*
- *Other rights which stipulated in other legal instruments that are currently in force.”*



4. Importance



A fair trial is essential for protecting the rights of the accused and victims and for ensuring the **proper administration of justice**. The right to a fair trial is key to protecting **human rights** and safeguarding the **rule of law**.²

According to the rule of law, no one may be punished unless a competent and impartial court has decided that a law has been contravened. The rule of law also requires the courts to ensure that laws have been applied in an equal and non-discriminatory manner – this includes ensuring that fair trial rights are observed in all cases.³

Fairness underpins the entire judicial process, ensuring that justice prevails. Only the guilty are convicted and incarcerated and the innocent are able to freely participate in society without prejudice.⁴ The non-respect for fair trial rights can therefore lead to miscarriages of justice, especially to wrongful convictions.

² UN Human Rights Committee ('UNHRC'), "General Comment No. 32 – Article 14: Right to equality before courts and tribunal and to a fair trial", (CCPR/C/GC/32, 23 August 2007), para. 2, <https://www.refworld.org/docid/478b2b2f2.html> (UNHRC, General Comment No.32).

³ CCHR, "Fair trial rights and trial monitoring handbook", (February 2012), page 10, <https://sithi.org/medias/files/projects/tmp/publication/cchr-ftr-and-trial-monitoring-handbook-feb-eng2012-02-13.pdf>.

⁴ Ibid.

5. Limitations

The right to a fair trial knows no exceptions. Everyone accused of committing a criminal offense is entitled to a fair trial at all times, including during a state of emergency and an armed conflict.⁵

According to the **United Nations Human Rights Committee ('UNHRC')**, which oversees the proper implementation of the ICCPR, while Article 14 is not in the list of non-derogable rights⁶ set out in Article 4 of the ICCPR (Derogations during a state of emergency), a general reservation to the right to a fair trial is incompatible with the object and purpose of the ICCPR. Any deviation from fundamental principles of fair trial rights is therefore prohibited at all times.⁷



However, reservations to particular clauses of Article 14 can be acceptable.⁸ Indeed, some of the rights composing the right to a fair trial are not absolute and can be subjected to limitations in certain circumstances. The following modules cover the main rights composing the right to a fair trial and provide further detail on the limitations that can be imposed on some fair trial rights.

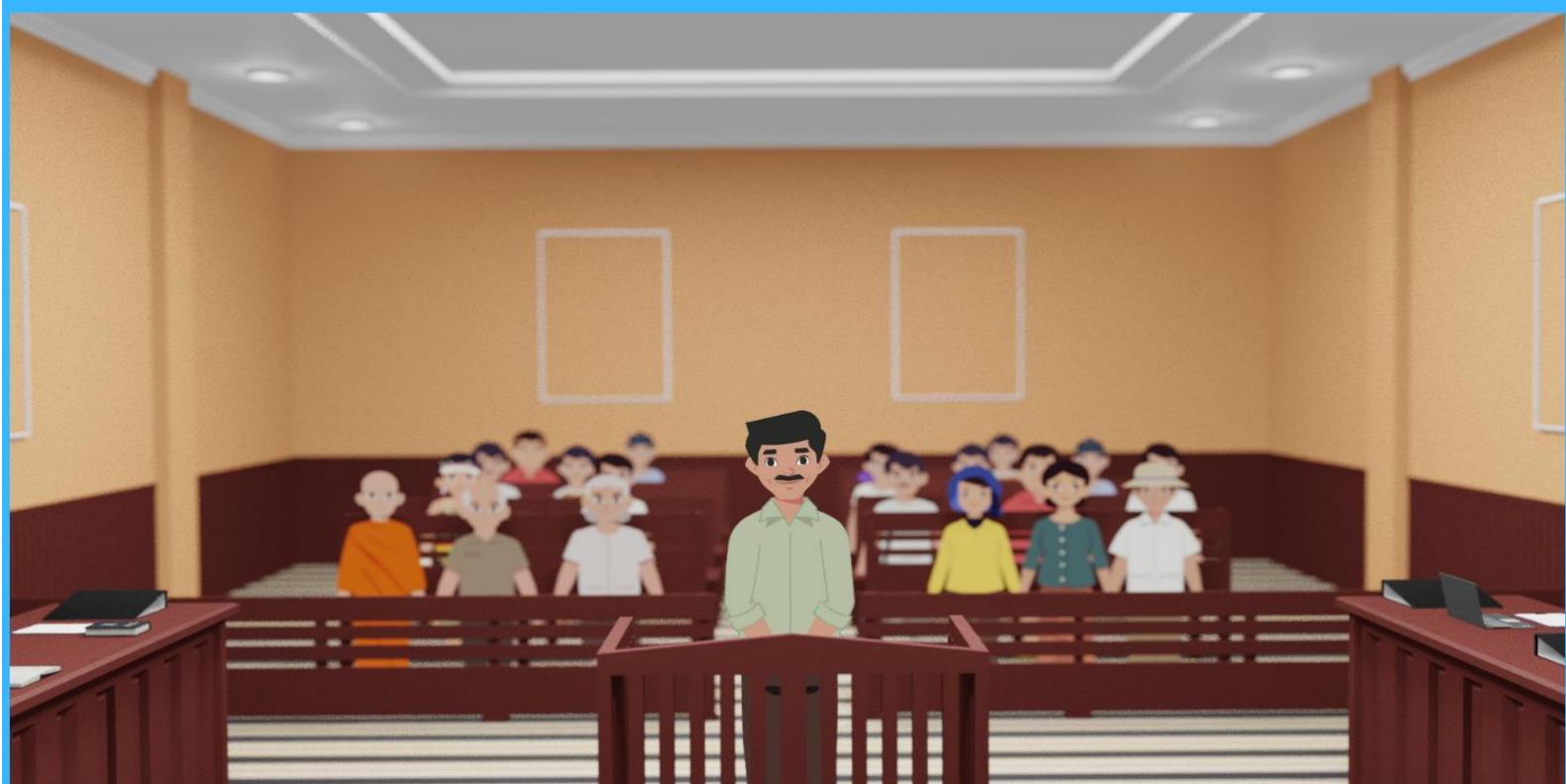
⁵ Amnesty International, "Fair Trial Rights Manual", Second Edition, (2014), page xvi, <https://www.amnesty.org/en/documents/pol30/002/2014/en/>.

⁶ A non-derogable right: A right whose application cannot be suspended by government in circumstances of "state of emergency under Article 4 ICCPR.

⁷ UNHRC, General Comment No. 32, para. 5 and 6; UNHRC, "General Comment No. 29 – Article 4: Derogations during a state of emergency", (CCPR/C/21/Rev.1/Add.11, 31 August 2021), para.11, <https://www.refworld.org/docid/453883fd1f.html>.

⁸ Ibid. para 5.

RIGHT TO THE PRESUMPTION OF INNOCENCE AND RIGHT TO REMAINED SILENT



September 2022



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**The Right to the Presumption
of Innocence**

and

The Right to Remain Silent

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1. Definition



1.1. The right to the presumption of innocence

The right to the presumption of innocence means that every accused is presumed innocent until proven guilty by law and through a final ruling.

The presumption of innocence applies at all stages of the proceedings, from the initial arrest, throughout the period of criminal investigation and trial proceedings, up to and including the end of the final appeal.¹

The right to the presumption of innocence provides that:

- Judges must be impartial and must refrain from pre-judging a case;
- Public officials (including police and prosecutors) should not make statements concerning the guilt or innocence of an accused before a trial has been completed;
- Authorities should prevent the media from influencing the outcome of a case by making judgements of an accused's guilt or innocence;
- The purpose of the criminal action is to examine the existence of an offense and prove the guilt of an offender. If there is any doubt about an accused's guilt, the accused must be found not guilty;
- No external indicators of guilt should be attributed to the accused.



The prohibition of external indicators of guilt, therefore, includes the accused's right to wear civilian clothes throughout a trial and not to be shackled or handcuffed during the trial. Every accused is entitled to be brought before a court **with the appearance and dignity of a free and innocent person**.

When an accused is forced to attend a hearing in prison attire or wearing handcuffs or shackles, it has the potential to create an impression that the accused is a guilty or dangerous criminal and risks affecting, consciously or unconsciously, the judgment of the trial judge, the manner in which the proceedings are conducted, and the outcome of the case.

Other factors that should not be taken as an indication of guilt are the length and degree of pre-trial detention. When excessive, pre-trial detention violates the presumption of



¹ Office of the High Commissioner for Human Rights ('OHCHR'), "The Right to a Fair Trial (Part I), Chapter 6," p. 219, <https://www.ohchr.org/Documents/Publications/training9chapter6en.pdf>; Amnesty International, "Fair Trial Manual" (2014) page 125, <https://www.amnesty.org/download/Documents/8000/pol300022014en.pdf> (Amnesty International's Fair Trial Manual).

innocence.² In the same way, the denial of bail or findings of liability in civil proceedings should also not be taken as an indication of guilt.³

1.2. The right to remain silent



The right to remain silent is rooted in the right to presumption of innocence.⁴ This right guarantees any individual the right to **refuse to answer questions** from law enforcement officers or court officials.

This right **safeguards against making self-incriminating statements**. It also includes the condition that unfavorable comments or inferences should not be made by the court because

the defendant refused to answer questions before or during a court trial.

Even if the accused says nothing and presents no evidence, they must be acquitted if the prosecution fails to present evidence reaching the requisite burden of proof for a conviction. In other words, it is not for the accused to present evidence to prove that they are innocent.

The right to remain silent must be respected **throughout the legal proceedings**, including at the investigation stage, when the defendant is interrogated by judicial police, prosecutor or investigating judge, and at the trial stage, when the defendant is questioned by the judge or prosecutor.⁵ Suspects must be informed of their right to remain silent throughout the legal proceedings from the moment they are placed under arrest.

2. Legal Framework

2.1 International Law



The right to the presumption of innocence is expressly protected by international human rights instruments, including the **Universal Declaration of Human Rights (“UDHR”)**, the **International Covenant on Civil and Political Rights (“ICCPR”)**, and the **Convention on the Rights of the Child (“CRC”)**. These instruments are directly applicable in Cambodian law through Article 31 of the Cambodian Constitution. While the right to remain silent is not expressly guaranteed in these international instruments, it has

² UN Human Rights Committee (“UNHRC”), “General Comment No. 32 – Article 14: Right to equality before courts and tribunal and to a fair trial”, (CCPR/C/GC/32, 23 August 2007) , para.30, <https://www.refworld.org/docid/478b2b2f2.html>, (UNHRC, General Comment No.32).

³ UNHRC, General Comment No. 32, para.30.

⁴ CCHR, “Fair Trial Rights and Trial Monitoring Handbook” (February 2012), p. 23, <https://sithi.org/tmp/publication/view/2012-02-13-fair-trial-rights-and-trial-monitoring-handbook>, (CCHR’s Fair Trial Rights Handbook).

⁵ The Center for Social Development (CSD), “Annual Report on the court watch project,” (February 2007).

been recognized as being implicitly enshrined in fair trial guarantees, especially in the right to be presumed innocent and the right not to self-incriminate.⁶



Article 11 of the UDHR: *"Everyone charged with a penal offense has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defense."*



Article 14 (2) of the ICCPR: *"Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law."*

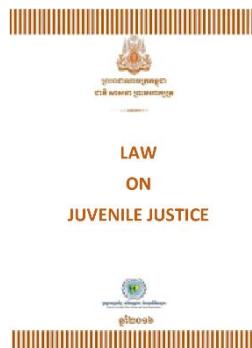


Article 40 of the CRC: *"To this end, and having regard to the relevant provisions of international instruments, States Parties shall, in particular, ensure that: [...] (i) To be presumed innocent until proven guilty according to law."*

2.2. Cambodian Law

The right to the presumption of innocence and the right to remain silent are protected under Article 38 of the Constitution of the Kingdom of Cambodia (“Constitution”), and Article 5 of Law on Juvenile Justice.

⁶ See UNHRC, “Concluding Observations: France,” (UN Doc. CCPR/C/FRA/CO/4, 31 July 2008), para. 14, <https://undocs.org/en/CCPR/C/FRA/CO/4>.



3. Importance

The **right to the presumption of innocence** is one of the most fundamental and well-established fair trial rights⁷ and an essential element of the rule of law.⁸

It ensures that no one is **arbitrarily punished** for an act that they have not committed by requiring that any alleged act of wrongdoing must be proven in a court of law before punishment can be imposed on an offender.⁹

The right to the presumption of innocence notably imposes on the prosecution the burden of proving the charge¹⁰ and guarantees that no guilt can be presumed until the charge has been proved **beyond a reasonable doubt**. If the prosecution does **not prove the charges true or if reasonable doubt as to the accused's guilt remains**,¹¹ the accused must benefit from this doubt and **be acquitted**.



The right to the presumption of innocence is also the source of **other rights**, notably the right not to be compelled to confess guilt or to testify against oneself, the right to remain silent and the presumption in favor of bail and release from pre-trial detention.¹² The exceptional character of pre-trial detention lies in the presumption of innocence, which demands that the deprivation of liberty only occurs under narrow circumstances and when strictly necessary.



The **right to remain silent** is essential to the protection of the presumption of innocence as it safeguards the accused's right not to be compelled to confess guilt or to testify against oneself (or right not to self-incriminate), a right that is also linked to the presumption of innocence and that is designed to prevent accused from being forced to testify against themselves and/or confess their guilt.

⁷ CCHR's Fair Trial Rights Handbook, page 12.

⁸ Amnesty International's Fair Trial Manual, page 125.

⁹ CCHR's Fair Trial Rights Handbook, page 12.

¹⁰ UNHRC, General Comment No.32, para. 30.

¹¹ UNHRC General Comment 32, para. 30; European Court, "Barberà, Messegué and Jabardo v Spain" (10590/83), (1988) §77, Telfner v Austria (33501/96), (2001) para. 15; See Ricardo Canese v Paraguay, Inter-American Court (2004) para. 153-154

¹² CCHR's Fair Trial Rights and Trial Monitoring Handbook, page 12.

Consequently, the non-respect of the right to presumption of innocence and of the right of the accused to remain silent creates the risk for the accused to be seen as guilty or dangerous and can affect, consciously or unconsciously the manner in which the proceedings are conducted, the judgment of the trial, and the outcome of the case. It can notably lead to wrongful convictions. Ensuring that these rights are respected is therefore fundamental to ensuring the accused a fair trial.

4. Limitations

The are **no limitations** to the right to the presumption of innocence. The presumption of innocence is a norm of customary international law that applies **at all times and in all circumstances**.¹³ It cannot be the subject of treaty reservation or **lawful restrictions** in times of war or other public emergency.¹⁴

The presumption of innocence must therefore be respected in all criminal cases, throughout the implementation of all criminal procedures and in the treatment of the accused throughout the entire legal proceedings, with no exception permissible.

While the presumption of innocence is unanimously considered an absolute right on which no limitations can be imposed, there are **divergent views on the absolute character of the right to remain silent.**

Some countries allow for adverse inferences to be drawn from the accused's silence during questioning, such as the United Kingdom. The UN Human Rights Committee ("UNHRC") has expressed its concerns regarding drawing negative inferences from the accused's silence and has advised States that are parties to the ICCPR to reconsider such practice to ensure that they comply with Article 14 of the ICCPR.¹⁵ The European Court of Human Rights ("ECHR") however considers that the right to remain silent is not absolute and that adverse inferences can be drawn from the accused's silence in certain circumstances.¹⁶ Such conclusions must however be taken with particular caution.¹⁷

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¹³ Amnesty International's Fair Trial Manual, page 125.

¹⁴ UNHRC, General Comment No. 24, (CCPR/C/21/Rev.1/Add.6), para 8, <https://www.refworld.org/docid/453883fc11.html>; UNHRC, "General Comment No. 29 – Derogations during a State of Emergency," (CCPR/C/21/Rev.1/add.11), para.11 -16, <https://www.refworld.org/docid/453883fd1f.html>; UNHRC, General Comment 32, para.6.

¹⁵ UNHRC, "Concluding Observations on United Kingdom and UK Overseas Territories", (UN Doc CCPR/CO/73/UK CCPR/CO/73/UKOT, 6 December 2001), para 17, <https://www.refworld.org/docid/3cbbec3d2.html>.

¹⁶ ECHR, "O'Halloran and Francis v. United Kingdom," (29 June 2007).

¹⁷ Amnesty International's Fair Trial Manual, page 131.

THE RIGHT TO LIBERTY, THE RIGHT TO BE TRIED WITHIN REASONABLE TIME (OR TO RELEASE) AND THE RIGHT TO BE TRIED WITHOUT UNDUE DELAY



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The Right to Liberty, the
Right to Be Tried Within
Reasonable Time (or To
Release) and the Right
to Be Tried Without
Undue Delay

I. The Right to Liberty

1. Definition



The right to liberty of person enshrines the essential human right of any individual to be **free from the confinement of their body**,¹ meaning not to be physically deprived of their liberty to come and go as they wish.

Deprivation of liberty can occur in various contexts. Deprivation of liberty in the criminal context commonly includes **police custody, pre-trial detention, imprisonment after conviction, or house arrest**.² It also includes further restrictions on a person who is already detained, such as solitary confinement or the use of physical restraining devices (e.g., handcuffs, chains).

Deprivation of liberty implies the **absence of consent**. An individual suspected or charged with a criminal offense who is arrested and placed in custody or pre-detention is deprived of their liberty. However, an individual who presents themselves voluntarily to a police station to take part in an investigation and knows that they can leave at any time is not being deprived of their liberty.



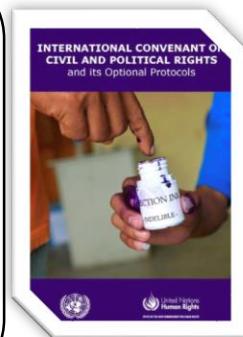
As a general rule, and in order to safeguard their right to liberty, individuals suspected or charged with a criminal offense should not be deprived of their liberty pending trial.³ However, in certain prescribed circumstances, detention of suspects or charged individuals can be lawful (*See limitations section*).

2. Legal Framework

2.1 International Law

The right to liberty is expressly protected by the **Universal Declaration of Human Rights (“UDHR”)** and the **International Covenant on Civil and Political Rights (“ICCPR”)**, which are directly applicable in Cambodian law through Article 31 of the Cambodian Constitution.

- **Article 3 of the UDHR:** “Everyone has the right to life, liberty and security of person.”
- **Article 9(1) of the ICCPR:** “1. 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 procedures as are established by law. [...]



¹ UN Human Rights Committee (“UNHRC”), “General Comment No. 35 – Article 9: Liberty and Security of Person”, (CCPR/C/GC/35, December 2014), para. 3, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G14/244/51/PDF/G1424451.pdf?OpenElement>, (UNHRC, General Comment No. 35).

² Ibid., para. 5.

³ Amnesty International, “Fair Trial Manual, Second Edition” (2014), page 3, <https://www.amnesty.org/en/documents/pol30/002/2014/en/>, (Amnesty International’s Fair Trial Manual).

2.2 Cambodian Law

The **Constitution of the Kingdom of Cambodia** (“the Constitution”) and the **Code of Criminal Procedure of the Kingdom of Cambodia** (“CCPC”) also protect the right to liberty. Further, the CCPC sets the rules for the detention of individuals in the context of criminal proceedings.



- **Article 32 of the Constitution:** *“Everyone has the right to life, liberty, and security of person [...].”*
- **Article 38 of the Constitution:** *“The prosecution, arrest or detention of any person shall not be done except in accordance with the law.”*
- **Article 203 of the CCPC:** *“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 of the CCPC:** *“Provisional detention may be ordered only in case of a felony or of a misdemeanor involving a punishment of imprisonment of one year or more.”*
- **Article 205 of the CCPC:** *“Provisional detention may be ordered when it is necessary to:*
 1. *Stop the offence or prevent the offence from happening again;*
 2. *Prevent any harassment of witnesses or victims or prevent any collusion between the charged person and accomplices;*
 3. *Preserve evidence or exhibits;*
 4. *Guarantee the presence of the charged person during the proceedings against him;*
 5. *Protect the security of the charged person;*
 6. *Preserve public order from any trouble caused by the offense.”*
- **Articles 208 to 214 of the CCPC:** Define the time limits of pre-trial detention, including for juvenile defendants.

3. Importance



In general, the right to liberty of person is of significant importance both for individuals and for society as a whole, as deprivation of liberty has historically been the principal means to undermine the enjoyment of other rights. In the criminal context, the right to liberty is critical to protecting the **presumption of innocence**.

innocence of charged individuals, a fundamental fair trial right requiring that they be treated as innocent of the charges held against them until proven guilty according to the law and finally convicted by a court and, therefore, that they continue to enjoy their liberty as any other individuals. (See *module on the right to the presumption of innocence for more details*).

Depriving a suspected or charged person of their liberty can therefore undermine their presumption of innocence and compromise the fairness of the trial.

4. Limitations



The right to liberty of person is **not absolute**. International human rights law permits the deprivation of an individual's liberty **in justified circumstances**, notably in the **enforcement of criminal laws**.⁴ This means that individuals can be arrested and detained on criminal charges. However, such arrest or detention must **not be arbitrary**, meaning that the detention must not be inappropriate, unjust, or unpredictable, as well as unreasonable, unnecessary, or disproportional. Arrest or detention **must also be lawful**, meaning that it must be carried out in accordance with procedures established by law and with respect for the rule of law.⁵ **Arbitrariness is broader than lawfulness** in the sense that detention can be authorized by domestic laws but still be arbitrary because it is not appropriate or is unreasonable, disproportional, or unnecessary,⁶ for instance. It is therefore crucial that **domestic law** permitting arrest and detention on criminal charges **conforms to international human rights standards**.⁷

Examples of unlawful arrest or detention include, but are not limited to:⁸

- Offences for which domestic law does not permit arrest;
- Arrests without warrants if warrants are required by domestic law;
- Holding individuals in custody longer than the maximum period of time authorized by domestic law;
- Arrests and detentions based on discriminatory grounds.

Examples of arbitrary arrest or detention include, but are not limited to:⁹

- Arrest or detention without a legal basis;
- Arrest or detention permitted under domestic law but which does not meet international standards(e.g. law violating other rights such as freedom of expression, assembly, etc.);
- If the arrest or detention violated the detainee's fair trial rights;
- Any enforced disappearances or secret detentions.

⁴ UNHRC, General Comment No.35, para.10.

⁵ Ibid., para.10.

⁶ Ibid., para. 12.

⁷ Amnesty International's Fair Trial Manual, page 31.

⁸ Ibid., page 33-34.

⁹ UNHRC, General Comment No 35, para. 16-18; Amnesty International's, Fair Trial Manual, (2014), page 33-34.

Arrest or detention must be carried out by people with the legal authority to do so, who must be identifiable.¹⁰ Overall, any detention must only last **as long as necessary** (i.e., **limited in time**) and be subjected to **periodic re-evaluation** of its necessity.¹¹

International human rights law also states that the deprivation of liberty that the detention of charged persons awaiting trial (pre-trial detention) constitutes must be the **exception and not the rule**. Pre-trial detention of charged individuals must be based on an **individual determination** that it is **reasonable and necessary**, taking into account **factors clearly specified in the law**, such as the risks of flight, interference with evidence, or recurrence of a crime that leaving the charged individuals at liberty would cause. Courts have the responsibility to examine the possibility of **any alternatives** to pre-trial detention before making any detention decision in each particular case, including bail, electronic bracelets, etc., if such alternatives would render the detention unnecessary. The pre-trial detention of charged juveniles must also be avoided to the fullest extent possible.¹²

For example, in Cambodia, domestic legislation permits pre-trial detention only in felony and misdemeanor cases involving punishment of imprisonment of one year or more and defines six factors that can justify placement in pre-trial detention. It also defines clear and strict time limits for pre-trial detention. (*See the legal framework section for more details*).

Anyone who is deprived of liberty by arrest or detention must be able to **challenge the lawfulness of this deprivation before a court**.¹³ Any victim of an unlawful or arbitrary arrest or detention must also have **the right to ask for compensation**.¹⁴ Any charged individual held in pre-trial detention must **be tried within a reasonable time or be released**. (See Section II for more details).

Finally, while Article 9 of the ICCPR - which guarantees the right to liberty- is not in the list of non-derogable rights¹⁵ of Article 4 (2) of the ICCPR (State of emergency) and can be subject to lawful derogation in the context of a state of emergency, the **guarantee against arbitrary detention** enshrined in Article 9 **cannot be derogated from**. This means that States cannot arbitrarily arrest or detain individuals during a state of emergency.¹⁶

II. The Rights to Be Tried Within a Reasonable Time and to Be Tried Without Undue Delay

1. Definition



The right to be tried within a reasonable time (or to release) and the right to be tried without undue delay both require that criminal proceedings be completed **within a reasonable timeframe**.¹⁷ However, it is also important to ensure that the need for speedy justice does not undermine the rights of the accused and fair trial rights in general.

¹⁰ UNHRC, General Comment No 35, para.23.

¹¹ UNHRC, General Comment No 35, para.12.

¹² UNHRC, General Comment No 35, para.38.

¹³ Ibid., para. 39.

¹⁴ Ibid., para. 49.

¹⁵ A non-derogable right: A right whose application cannot be suspended by government in circumstances of "state of emergency under Article 4 ICCPR.

¹⁶ Ibid., para. 65 and 68.

¹⁷ Amnesty International's Fair Trial Manual, page 143.

The **right to be tried within a reasonable time** (or to release) applies only to **individuals charged with a criminal offense and placed in pre-trial detention**, while the **right to be tried without undue delay** has a much broader scope. It applies to every individual charged with a criminal offense, **detained or not**.

The right to be tried within a reasonable time (or to release) applies specifically to the **periods of pre-trial detention**, i.e., detention between the time of arrest and the first instance judgment.¹⁸ The right to be tried without undue delay has a **broader application**. This guarantee applies **from the time of formal charging until the final judgment on appeal**. Both the first instance and appeal stages must take place without undue delay.¹⁹



There is **no fixed time limit** defining what a reasonable time or an undue delay is. The reasonableness of the time taken to bring charged individuals held in detention to trial or of any delay in the criminal proceedings must be assessed on a **case-to-case basis**, taking into consideration the circumstances of each case, including its **complexity** (e.g., the number of people involved in the alleged crime, the number of charges, the type of investigation required²⁰), the **conduct of the accused during the proceedings** (e.g., if the accused fled) and the **manner in which the case was dealt with by executive and judicial authorities**²¹ (e.g., negligence of authorities slowing down an investigation²²).



It is the role of state authorities to ensure that accused are brought to trial in a timely manner. This means that they must organize and make sufficient resources available for their legal systems²³ to ensure speedy justice. Should the authorities not bring charged individuals held in pre-trial detention to trial within a reasonable time, they must proceed to their release. This does not mean that the charges are dropped but that the accused must be allowed to await their trial at liberty. If any delays occur during the criminal proceedings, the authorities must ensure that they are justified.²⁴

2. Legal Framework

2.1 International Law

The right to be tried within a reasonable time (or to release) for detained charged individuals and the right to be tried without undue delay for all charged individuals are expressly guaranteed in Articles 9 and 14 of the **International Covenant for Civil and Political Rights (“ICCPR”)**, respectively.

¹⁸ UNHRC, General Comment No. 35, para.37.

¹⁹ UN Human Rights Committee (“UNHRC”), “General Comment No. 32 – Article 14: Right to equality before courts and tribunal and to a fair trial”, (CCPR/C/GC/32, 23 August 2007) , para.35, <https://www.refworld.org/docid/478b2b2f2.html>, (UNHRC, General Comment No.32).

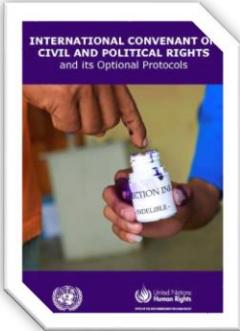
²⁰ Amnesty International’s Fair Trial Manual, page 145.

²¹ UNHRC, General Comment No. 32, para.36; UNHRC, General Comment No. 35, para.37.

²² Amnesty International’s Fair Trial Manual, page 146.

²³ UNHRC, General Comment No. 32, para. 27; Amnesty International’s Fair Trial Manual, page 144.

²⁴ Amnesty International’s Fair Trial Manual, page 143.



- **Article 9(3) of the ICCPR:** “*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*”.
- **Article 14(3)(c) of the ICCPR:** “*In the determination of any criminal charge against him, everyone shall be entitled: To be tried without undue delay*.”

2.2 Cambodian Law

The **Criminal Code of Procedure of Cambodia (“CCPC”)** guarantees the right to be tried within a reasonable time (or to be released) and the right to be tried without undue delay in several provisions.

- **Article 249 of the CCPC:** “[...] *The decision to keep the charged person in provisional detention ceases to be effective after four months. If the charged person has not been called to appear before the trial court within these four months, the charged person shall be automatically released. [...].*”
- **Article 283 of the CCPC:** “[...] *The president of the Investigation Chamber shall ensure that there is no unreasonable delay in the implementation of procedures. [...].*”
- **Article 305 of the CCPC:** “[...] *According to Article 249 [...], of this Code, the order to keep the accused in provisional detention will expire after four months. If the accused has not be brought before the court within this period, the accused shall be automatically released. A judgment on the merits of the case shall be made within a reasonable time. [...].*”
- **Article 387 of the CCPC:** “[...] *The Court of Appeal shall decide within a reasonable period of time. If an appeal is filed against a judgement of the court of the first instance with regards to the detention of the accused person, the Court of Appeal shall decide within the shortest period of time and within a maximum period of 15 days from the date of receiving the dossier.*”
- **Article 439 of the CCPC:** “*The Supreme Court shall make its decision not later than six months from the time of receiving the dossier, except under insurmountable circumstances.*”

3. Importance

The right to be tried within a reasonable time (or to release) and the right to be tried without undue delay enable to **protect other fundamental fair trial rights**. Both rights are particularly important to preserving the **right to liberty** and the **presumption of innocence** as they avoid extremely prolonged pre-trial detention and keeping individuals in detention longer than strictly necessary throughout the criminal proceedings. (*See modules on the right to liberty and the presumption of innocence for more details*).



Both rights allow for the **expeditiousness of justice**, which is an important aspect of a **fair trial**,²⁵ as speedy justice avoids keeping individuals too long in a state of uncertainty about their fate²⁶ and any stigma surrounding the accusations held against them.²⁷ The expeditiousness of justice that these two rights guarantee ensure **that the interests of justice are served**.²⁸ Delays may impact the quality or availability of evidence (i.e., disappearance, degradation, or destruction of evidence), the testimonies of witnesses or their availability (e.g., their memory can fade), thus increasing the chance of a miscarriage of justice or wrongful conviction.²⁹ A balance must, however, be found between the necessity to expedite justice and that to uphold other fair trial rights, such as the right of the accused to adequate time (and facilities) to prepare their defense. (*See module on the right to adequate time and facilities to prepare a defense for more details*).

Violating the right to be tried within a reasonable time (or to release) and the right to be tried without undue delay, therefore, undermines other fair trial rights and jeopardizes the proper administration of justice.

4. Limitations³⁰

The right to be tried within a reasonable time (or to release) and the right to be tried without undue delay **do not prohibit any delay in the criminal proceedings**. Some delays can be justified by the complexity of the case or the conduct of the accused, for instance. However, delays arising from court backlogs, lack of human resources (e.g., shortage of judges),³¹ or the negligence of authorities are not acceptable justifications for delays in criminal proceedings.



²⁵ UNHRC, General Comment No. 32, para. 27.

²⁶ UNHRC, General Comment No. 32, para. 35..

²⁷ Amnesty International's Fair Trial Manual, page 144.

²⁸ UNHRC, General Comment No. 32, para. 35.

²⁹ Amnesty International's Fair Trial Manual, page 144.

³⁰ Amnesty International's Fair Trial Manual, page 145-146.

³¹ Ibid., page 144.

THE RIGHT TO BE INFORMED OF THE NATURE AND CAUSES OF THE CHARGE(S)



September 2022



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For more information about CCHR, please visit www.cchrcambodia.org.

About the Fair Trial Rights Project

The Module on the Right to be Informed of the Nature and Causes of the Charge(s) is part of a series of modules on fair trial rights produced by CCHR’s Fair Trial Rights Project (“the FTR Project”). The FTR Project is the first – and only one – of its kind in Cambodia, uniquely and innovatively working to promote and protect fair trial rights in practice. It overall aims to increase the impartiality and independence of Cambodia’s judiciary by supporting the right to a fair trial in Cambodia’s courts. In pursuit of this goal, the FTR project has two specific objectives: to socialize the concept of fair trial rights among the public by raising its awareness of fair trial rights and to increase compliance with fair trial standards within the judiciary through trial monitoring.

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**The right to be informed of
the nature and causes of the
charge(s)**

1. Definition



The right to be informed of the nature and causes of the charge(s) entails that the accused and their counsel are informed promptly and with detailed information about:

- **The nature of the charge(s):** The law under which the accused has been charged.
- **The cause of the charge(s):** The alleged facts which form the ground of the accusation against the accused.¹

An individual accused of an offense must be informed as soon as they are formally charged under domestic law, or as soon as they have been publicly made a suspect.²

This right applies to all criminal cases, including those of charged individuals who are not held in detention.³

The information provided to the accused must be detailed enough to allow them the ability to prepare their defense and properly inform their lawyers of the nature and causes of the charge(s) laid against them. The information about charges can be provided either in writing or orally if it even if initially they were given orally, they must be confirmed in writing subsequently.⁴



It is also important that the defendant is provided with this information in language that they understand. This means that defendants who do not understand the language used by the authorities must be provided with a free interpreter. In addition, the relevant information should be provided to



defendants in a simple and non-technical language to ensure that the accused can understand the charges.⁵

While defendants must be informed of the nature and cause of the charges at the earliest possible opportunity in the legal proceedings judges are also obliged to remind the defendants of the charge(s) at trial by providing an adequate explanation to ensure they are aware of the nature and causes of the charge(s) against them.⁶

¹ Amnesty International, “Fair Trial Manual, Second Edition,” (April 2014), page 76, <https://www.amnesty.org/en/documents/pol30/002/2014/en/> (Amnesty International’s Fair Trial Manual).

² UN Human Rights Committee (‘UNHRC’), “General Comment No. 32 – Article 14: Right to equality before courts and tribunal and to a fair trial”, (CCPR/C/GC/32, 23 August 2007), para.31, <https://www.refworld.org/docid/478b2b2f2.html>, (UNHRC, General Comment No.32).

³ Ibid.

⁴ UNHRC, General Comment No 32, para.31.

⁵ Amnesty International’s Fair Trial Manual, page 38.

⁶ CCHR, ‘Fair Trial Rights Newsletter: The Right to Understand the Nature and Cause of the Charges and Explanation of Rights for Women Defendants’ (March 2021),

<https://docs.google.com/viewerng/viewer?url=https://cchrcambodia.org/admin/media/newsletter/newsletter/english/CC%20HR+Fair+Trial+Rights+Newsletter+on+Right-EN.pdf>.

They must ensure this by:

- Announcing the case to be heard.
- Explaining the charge(s), time, date and place where the alleged crime(s) was said to have been committed.
- Stating the parties involved.⁷

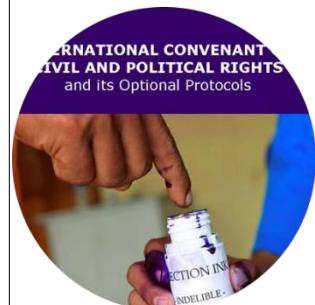
2. Legal Framework



2.1 International Law

The right to be informed of the nature and causes of the charge(s) is expressly protected by the **International Covenant on civil and political rights ("ICCPR")**, which is directly applicable in Cambodian law through Article 31 of the Cambodian Constitution.

- **Article 14(3)(a) of the ICCPR:** "*In the determination of any criminal charge against him, everyone shall be entitled to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him.*"
- **Article 14(3)(f) of the ICCPR:** "*In the determination of any criminal charge against him, everyone shall be entitled to have the free assistance of an interpreter if he cannot understand or speak the language used in court.*"



2.2 Cambodian Law

The **Code of Criminal Procedure of the Kingdom of Cambodia ("CCPC")** and the **Law on Juvenile Justice** also guarantee the right to be informed of the nature and causes of the charge(s) to adult and juvenile defendants.

- **Article 325 of the CCPC:** "*The presiding judge shall inform the accused of the charges he is accused of.*"
- **Article 330 of the CCPC:** "*If necessary, the presiding judge may seek the assistance of an interpreter/translator.*"
- **Article 331 of the CCPC:** "*When questioning a deaf and mute person, the court clerk shall write down the questions and ask the person being questioned to read the questions and answer them in writing. If the person cannot read or is illiterate, the presiding judge shall call on an interpreter/translator for him under the conditions stated in Article 330 [...] The presiding judge may call on any person who is able to communicate with the deaf and mute person.*"

⁷ CCHR, 'Fair Trial Rights and Trial Monitoring Handbook' (February 2012), page 18, <https://sithi.org/tmp/publication/view/2012-02-13-fair-trial-rights-and-trial-monitoring-handbook> (CCHR's FTR Handbook).

- **Article 396 of the CCPC:** “[T]he rules that apply to hearings of the Court of First Instance shall also apply to the Court of Appeal.”
- **Article 6 of the Law on Juvenile Justice:** “Every minor suspected or accused of having committed an offence shall have the following basic procedural rights: [...] The right to be informed of the charge(s) [...].”
- **Article 51 of the Law on Juvenile Justice:** “At the commencement of trial, the court shall advise the minor in a language that the minor can understand of the following rights: The rights at trial as stipulated in Article 6 (procedural right of minors) of this law [...].”

3. Importance

The right to be informed of the nature and causes of the charge(s) at both the pre-trial and trial stages of proceedings is essential in order to:

- Ensure that the accused understands why they are being prosecuted.
- Ensure that the accused is able to challenge any detention that they are subject to as soon as possible.
- Ensure that the accused has the opportunity to present the best possible defense. The right to be informed of the nature and causes of the charges is therefore an essential part of the **right to adequate time and facilities to prepare a defense.**⁸
- To guard the accused against unfounded criminal charges.⁹



The non-respect of this right by the authorities can therefore undermine the accused's ability to defend themselves adequately against the charged held against them and lead to wrongful convictions.

4. Limitations

The right to be informed of the nature and causes of the charges is enshrined in Article 14 of the ICCPR. Article 14 is not in the list of non-derogable rights¹⁰ set out in Article 4 of the ICCPR (Derogations during a state of emergency). However, the UN Human Rights Committee has stated that general reservation



⁸ OSCE, “Legal Digest of International Fair Trial Rights,” page 116, <https://www.osce.org/odihr/94214#:~:text=The%20Legal%20Digest%20of%20International,of%20OSCE%20trial%20monitoring%20operations>.

⁹ CCHR’s FTR Handbook page 17.

¹⁰ A non-derogable right: A right whose application cannot be suspended by government in circumstances of “state of emergency under Article 4 ICCPR.

to the right to a fair trial is incompatible with the object and purpose of the ICCPR. Any deviation from fundamental principles of fair trial rights is therefore prohibited at all times.¹¹

The right informed of the nature and causes of the charges only applies from the moment charges have been laid against the defendant and not to criminal investigations preceding the laying of charges.¹² The right to be notified of the reasons of the arrest during criminal investigations and before official charges are laid is guaranteed in another article of the ICCPR (Article 9 (2)).

¹¹ UNHRC, General Comment No. 32 paras. 5 and 6; UNHRC, “General Comment No. 29 – Article 4: Derogations during a state of emergency”, (CCPR/C/21/Rev.1/Add.11, 31 August 2021), para. 11, <https://www.refworld.org/docid/453883fd1f.html>.

¹² UNHRC, General Comment No. 32, para. 31.

The Right Not to Be Compelled to Confess Guilt or to Testify Against Oneself



September 2022



កម្ពុជាអង់គេងទិន្នន័យរដ្ឋបាល
Cambodian Center for Human Rights



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The Right Not to Be Compelled to Confess Guilt or to Testify Against Oneself

1. Definition



Every individual accused of a crime has the **right not to be compelled to confess guilt or to testify against themselves** (or the right not to self-incriminate). This right applies at the pre-trial and trial stage¹ and is twofold:

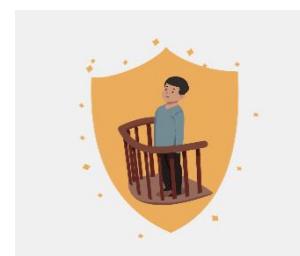
- The accused **cannot be compelled or forced to provide evidence against themselves.**

In practice, this means that when an accused person makes a confession, it must be done in the absence of any coercion, whether direct or indirect, physical or psychological.

- The accused **cannot be compelled to self-incriminate by testifying against themselves.** The **right against self-incrimination** is an essential element of judiciary proceedings, as it is difficult to imagine a fair trial in which an accused is forced to **give self-incriminating evidence.**

This right is, therefore, closely linked to the internationally recognized **prohibition of torture and cruel, inhuman, or degrading treatment or punishment**, enshrined in Article 7 of the International Covenant on Civil and Political Rights ("ICCPR"). Should any **confession or statement** be obtained through **coercion, torture, or other forms of ill-treatment**, it must be excluded from the evidence, except if it is used as evidence that such treatment occurred.²

It is important to distinguish this right from an accused's decision to offer a **voluntary confession**. The main distinguishing factor is the element of choice – whether a party chooses to impart incriminating statements or a confession or whether they are forced by an external entity to make an incriminating comment.³ Judges must verify whether a voluntary confession, such as a **guilty plea**, was accepted by the accused **without any pressure** and that the accused understands the nature of the charges and the consequences of such a voluntary confession.⁴



Overall, to ensure that **the right not to be compelled to confess guilt or to testify against oneself** is respected and that the accused is protected from coercion by the investigating authorities, it is crucial

¹ Amnesty International, "Fair trial manual", Second Edition, (2014), page 129, <https://sithi.org/tmp/publication/view/2014-04-10-fair-trial-manual-published-by-amnesty-international> (Amnesty International's Fair Trial Manual).

² CCHR, "Fair trial Rights Newsletter: The right not to be compelled to confess guilt or to testify against oneself", no 11, (2020),

https://cchrcambodia.org/admin/media/newsletter/newsletter/english/CCHR%20Fair%20Trial%20Rights%20Newsletter%20on%20the%20right%20not%20to%20be%20compelled%20to%20confess%20guilt%20or%20to%20testify%20against%20oneself_ENG.pdf (CCHR's newsletter No.11, 2020).

³ CCHR, "Fair trial rights and trial monitoring handbook," (February 2012), page 24, <https://sithi.org/tmp/publication/view/2012-02-13-fair-trial-rights-and-trial-monitoring-handbook> (CCHR's FTR Handbook).

⁴ Amnesty International's Fair trial Manual, page 130.

that defendants have access to a lawyer⁵ who will be present during any and all interrogations. A lawyer's presence can deter the judicial police from disregarding the fair trial rights of the defendant.⁶

2. Legal framework

2.1. International Law

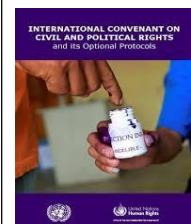


The right not to be compelled to confess guilt or to testify against oneself is expressly enshrined in the **International Covenant on Civil and Political Rights ("ICCPR")** and the **Convention on the Rights of the Child ("CRC")**. In addition, the **Universal Declaration on Human Rights ("UDHR")** and the **Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT")** prohibit torture and any other cruel, inhuman, and degrading treatment, which are essential to protecting this right. Article 31 of the Cambodian Constitution makes these treaties directly applicable in Cambodian law.

Article 14, (3) (g) of the ICCPR: *"In the determination of any charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: [...]*

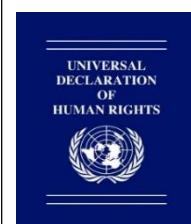
- (g) *Not to be compelled to testify against himself or to confess guilt."*

Article 7 of the ICCPR: *"No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation."*



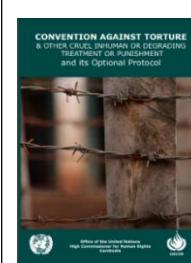
Article 40 (2)(iv) of the CRC: *"[...] To this end, and having regard to the relevant provisions of international instruments, States Parties shall, in particular, ensure that: [...]*

- (iv) *Not to be compelled to give testimony or to confess guilt; [...]."*



Article 5 of the UDHR: *"No one shall be subjected to torture or to cruel, inhumane or degrading treatment or punishment."*

Article 1 of the CAT: *"For the purposes of this Convention, the term 'torture' means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession [...]."*



Article 4 of the CAT: *"Each State Party shall ensure that all acts of torture are offences under its criminal law [...]. Each State Party shall make these offences punishable by appropriate penalties which take into account their grave nature."*

2.2. Cambodian Law

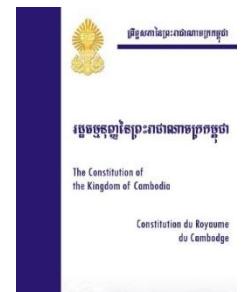
The right not to be compelled to confess guilt or to testify against oneself and the prohibition of torture and other forms of ill-treatment are also guaranteed in domestic law, including in the

⁵ UNHRC, "Concluding observations: France," (UN Doc CCPR/C/FRA/CO/4, 31 July 2008), para. 14, <https://undocs.org/en/CCPR/C/FRA/CO/4>.

⁶ CCHR's newsletter No.11, 2020.

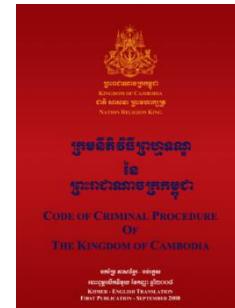
Constitution of the Kingdom of Cambodia (“The Constitution”), the Cambodian Criminal Procedure Code (“CCPC”), and the Law on Juvenile Justice.

Article 38 of the Constitution: “*The law prohibits all physical abuse of any individual [...]. Confessions obtained by physical or mental force shall not be admissible as evidence of guilt. Any case of doubt, it shall be resolved in favor of the accused [...].*”



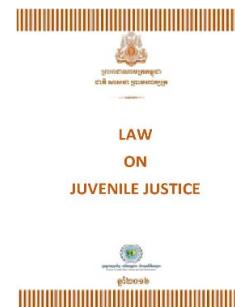
Article 145 of the CCPC: “[...] A charged person can be interrogated only in the presence of his lawyer. However, if the lawyer was properly summoned but does not show up on the specified date and time, the investigating judge can question the charged person without the presence of his lawyer. The absence of the lawyer shall be noted in the written record of the charged person’s interrogation [...]”

Article 321 of the CCPC: “[...] A confession shall be considered by the court in the same manner as other evidence. Declaration given under physical or mental duress shall have no evidentiary value [...]”



Article 5 of the Law on Juvenile Justice: “All persons performing any function concerning minors shall ensure the observance of the following principles: [...] Shall prohibit torture, corporal punishment, or other physical or mental treatments which is cruel, inhumane, or degrading to minors [...]”

Article 6 of the Law on Juvenile Justice: “Every minor or accused of having committed an offense shall have the following basic procedural rights: ‘The right not to be forced to give testimony against him/herself [...]’”



3. Importance



The right not to be compelled to confess guilt or to testify against oneself is a fundamental component of the principle of presumption of innocence, which places the burden of the proof on the prosecution.⁷ The presumption of innocence is one of the most fundamental and well-established fair trial rights⁸ as well as an essential element of the rule of law.⁹

This right also contributes to avoiding miscarriages of justice¹⁰ by protecting the accused from being forced to confess their guilt or testify against themselves regardless of their guilt or innocence through the use of coercion or torture.

Consequently, not respecting the accused's right not to be compelled to confess guilt or testify against oneself undermines their presumption of innocence and can lead to wrongful convictions based on confessions obtained through coercion or torture.

4. Limitations

The prohibition of torture that is encompassed in the right not to be compelled to confess guilt or to testify against oneself is absolute. Article 7 of the ICCPR, which prohibits torture and other forms of ill-treatment, is non-derogable¹¹ in its entirety. No circumstances or reasons can justify the use of torture or other ill-treatment to obtain someone's confession.



Consequently, no statements or confessions or, in principle, other evidence obtained in violation of this provision may be invoked as evidence in any proceedings covered by Article 14 of the ICCPR, including during a state of emergency.¹² Any self-incriminatory statement or confession involuntarily obtained has, therefore, no evidential value. The only exception lies in statements or confessions obtained in violation of Article 7 if they are used as evidence that torture or other treatment prohibited by this provision occurred.¹³ Suspects/accused, therefore, enjoy the unfettered right not to provide evidence that could be used against them.¹⁴

⁷ Amnesty International's Fair Trial Manual, page 129.

⁸CCHR's FTR Handbook.

⁹ Amnesty International's Fair Trial Manual, page 125.

¹⁰ OSCE, "Legal digest of international fair trial rights", (2012), page 99, <https://www.osce.org/odihr/94214> (OSCE's Legal Digest of International FTR).

¹¹ A non-derogable right: A right whose application cannot be suspended by government in circumstances of "state of emergency under Article 4 ICCPR.

¹² UN Human Rights Committee ("UNHRC"), "General Comment No. 32 -Article 14, Right to equality before courts and tribunals and to fair trial" (UN Doc CCPR/C/GC/32, 23 August 2007), para. 6, <https://www.refworld.org/docid/478b2b2f2.html> (UNHRC, General Comment No. 32).

¹³ Ibid.

¹⁴ CCHR, "Fair Trial right monitoring at appeal court annual report (1 November 2018-31 October 2020)," October 2020, page

However, the right not to be compelled to confess guilt or testify against oneself is enabled by, and therefore closely linked to the **right to remain silent**, which absolute character is subject to divergent views as some countries allow for adverse inferences to be drawn from the accused's silence during questioning. The United Nations Human Rights Committee ("UNHRC") has expressed its concerns regarding drawing negative inferences from the accused's silence and has advised States that are parties to the ICCPR to reconsider such a practice to ensure that they comply with Article 14 of the ICCPR.¹⁵ The European Court of Human Rights ("ECHR"), however, considers that the right to remain silent is **not absolute and that adverse inferences can be drawn from the accused's silence** in certain circumstances.¹⁶ Such conclusions must however be taken with particular caution.¹⁷



In addition, the right of the accused not to self-incriminate is restricted to the right to remain silent, which protects the accused from making self-incriminating statements and does not prevent the prosecution from producing material evidence at trial, such as documents, blood, or other bodily samples belonging to the accused and that can incriminate them.¹⁸

--END--

¹⁵ UNHRC, "Concluding Observations on United Kingdom and UK Overseas Territories," (UN Doc CCPR/CO/73/UK CCPR/CO/73/UKOT, 6 December 2001), para. 17, <https://www.refworld.org/docid/3cbbec3d2.html>.

¹⁶ ECHR, "O'Halloran and Francis v. United Kingdom," (29 June 2007).

¹⁷ Amnesty International's Fair Trial Manual, page 131.

¹⁸ OSCE's, Legal Digest of International FTR, page 99.

THE RIGHT TO ADEQUATE TIME AND FACILITIES TO PREPARE A DEFENSE AND THE RIGHT TO SPEAK WITH A LAWYER



September 2022

About Cambodian Center for Human Rights

The Cambodian Center for Human Rights (“CCHR”). CCHR is a non-aligned, independent, non-governmental organization (“NGO”) that works to promote and protect democracy and respect for human rights – in particular civil and political rights – in the Kingdom of Cambodia (“Cambodia”).

CCHR’s vision is of a peaceful Cambodia in which all people can enjoy the fundamental human rights to which they are entitled, all are subject to the rule of law without impunity, all are treated equally without discrimination, all are empowered to participate fully in the democratic process, and all can share in the benefits of Cambodia’s sustainable economic development.

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About the Fair Trial Rights Project

The Module on the Right to Adequate Time and Facilities to Prepare a Defense and the Right to Speak with a Lawyer is part of a series of modules on fair trial rights produced by CCHR’s Fair Trial Rights Project (“the FTR Project”). The FTR Project is the first – and only one – of its kind in Cambodia, uniquely and innovatively working to promote and protect fair trial rights in practice. It overall aims to increase the impartiality and independence of Cambodia’s judiciary by supporting the right to a fair trial in Cambodia’s courts. In pursuit of this goal, the FTR project has two specific objectives: to socialize the concept of fair trial rights among the public by raising its awareness of fair trial rights and to increase compliance with fair trial standards within the judiciary through trial monitoring.

Acknowledgments

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The Right to Adequate Time and Facilities to Prepare a Defense and the Right to Speak with a Lawyer



1. Definition

1.1 The right to adequate time and facilities to prepare a defense

The right to adequate time and facilities to prepare a defense lays out the criteria required to ensure that the accused has the time and means to be able to properly defend themselves.

This right applies at all stages of the legal proceedings and to all criminal charges, without taking account of their seriousness.¹

- **Adequate time:** The length of time that is “adequate” depends on the **circumstances of each case**.²

Relevant factors include the complexity of the case, the accused’s access to information, evidence, and time limits prescribed by national law, although these alone are not decisive. The guiding principle of the requirement of “adequate time” is to ensure that the accused is able to properly prepare to challenge the prosecution’s evidence, investigation, and to present defense witnesses.³ If the defense feels that they have not had sufficient time to prepare the defense adequately, they can request the adjournment of the trial.⁴



A balance must be found between the right to trial within a reasonable time and the right to adequate time to prepare a defense.⁵

- **Adequate facilities:** The necessary facilities required by the defense include:⁶

¹Amnesty International, “Fair Trial Manual,” Second Edition’ (2014), page 74, <https://www.amnesty.org/en/documents/poi30/002/2014/en/> (Amnesty International’s Fair Trial Manual).

² UN Human Rights Committee (“UNHRC”), “General Comment N°32 – Article 14: Right to equality before courts and tribunals and to a fair trial,” (CCPR/C/GC/32, 23 August 2007), para. 32 and 49, <https://www.refworld.org/docid/478b2b2f2.html> (UNHRC, General Comment No.32).

³ CCHR, “Fair Trial Rights in Cambodia Monitoring at the Court of Appeal: Annual Report Nov 2019 – Dec.2020” (November 2021), p.23, <https://docs.google.com/viewer?url=https://www.cchrcambodia.org/admin/media/report/report/english/FTR-Annual-Report-English-2019-2020.pdf>.

⁴ UNHRC, General Comment N°32, para. 32.

⁵ CCHR, “Fair Trial Rights and Trial Monitoring Handbook” (February 2012), page 16, https://cchrcambodia.org/admin/media/report/report/english/CCHR_FTR_and_Trial_Monitoring_Handbook_Feb%202012_EN_G.pdf.

⁶ UNHRC, General Comment N°32, para. 33.

- Access to case documents and evidence so that the accused can be fully aware of the charges against them and can provide full instructions to their lawyer. This right is therefore closely linked to the accused's right to be promptly informed of the nature and cause of the charge(s). (*See module of the right to be informed of the nature and causes of the charge(s) for more details*).
- **Access to all materials that the prosecution plan to present in court or that are exculpatory**, which means materials establishing innocence and evidence that could assist the defense.
- At the appeal stage, access to a **duly reasoned, written first instance judgement** and the **transcripts of their trial**. The right to a reasoned judgement is therefore critical to enable the accused to prepare an effective defense (*See module on the right to a reasoned judgement for more details*).



1.2 The right to speak with a lawyer

In order to prepare their defense, the accused must have time to **communicate with a counsel of their own choosing** and must therefore be **granted access to a lawyer promptly**. This right is granted to all accused but is particularly important when the accused is **detained or imprisoned**.⁷



Facilities enabling confidential communications between the accused and their counsel must be made available,⁸ especially when the accused is in detention. For this right to be effective, the accused must be able to **communicate confidentially and without restrictions, powers, or undue interference** with their counsel.⁹

2. Legal Framework



The right to adequate time and facilities to prepare a defense and the right to speak with a lawyer are expressly protected by the **International Covenant on Civil and Political Rights ("ICCPR")**, which is directly applicable in Cambodian law through Article 31 of the Cambodian Constitution.

⁷ OSCE, "Legal Digest of International Fair Trial Rights" (2012), page 120, <https://www.osce.org/odihr/94214#:~:text=The%20Legal%20Digest%20of%20International,of%20OSCE%20trial%20monitoring%20operations> (OSCE's Legal Digest of International FTR).

⁸ UNHRC, General Comment N°32, para. 34.

⁹ Amnesty International's Fair Trial Manual, page 75.

2.1 International Law

- Article 14(3)(b) of the ICCPR: "*In the determination of any criminal charge against him, everyone shall be entitled to have adequate time and facilities for the preparation of his defense and to communicate with counsel of his own choosing.*"



2.2 Cambodian Law

The **Code of Criminal Procedure of the Kingdom of Cambodia ("CCPC")** and the **Law on Juvenile Justice** also guarantee these rights to adult and juvenile defendants.

- Article 48 of the CCPC: "[...] If the accused requests such time or if the court finds that the case may not be tried immediately, the trial shall be adjourned to another trial date [...]."
- Article 145 of the CCPC: "When a charged person has a lawyer, the investigating judge shall summon the lawyer at least five days before the interrogation takes place. During that period, the lawyer may examine the case file [...]."
- Article 259 of the CCPC: "The General Prosecutor of the Court of Appeal and lawyers may examine the case file until the beginning of the hearing. The General Prosecutor of the Court of Appeal shall provide a written submission to the court clerk at least one day before the hearing date [...]."
- Article 319 of the CCPC: "Before the hearing, lawyers can examine the case file in the court clerk's office under the supervision of the court clerk [...]."
- Article 29 of the Law on Juvenile Justice: "Whenever the prosecutor decides to issue the initial charge, s/he shall promptly and directly notify the minor and, if appropriate, the minor's designated representative or support person and minor's lawyer of the initial charge in order to prepare the defense."

3. Importance



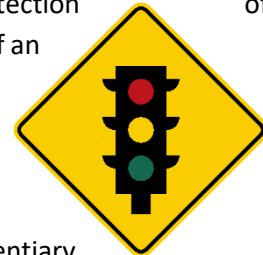
The right to adequate time and facilities to prepare a defense and the right to speak with a lawyer are critical to guarantee a fair trial and the application of the fundamental **principle of equality of arms**, which gives both the prosecution and the defense an equal opportunity to prepare and present their case.¹⁰

Ensuring a fair trial extends beyond the courtroom. Without providing the accused with adequate time and facilities to prepare their defense, there is a **risk of wrongful conviction** and **m miscarriage of justice**.

4. Limitations

The right of the accused to **adequate facilities** to prepare a defense, which entitles them to access all evidentiary materials that the prosecution plans to present in court or that are exculpatory, is **not absolute** and can therefore exceptionally be restricted.

In some cases, the court can permit the prosecution to withhold the disclosure of certain documents from the defense. However, this must only be in **exceptional circumstances** and to pursue a **legitimate aim**, such as the protection of the fundamental rights of another individual (e.g., the protection of witnesses at risk of reprisal), the protection of national security, or the safeguard of an important public interest (e.g., keep an investigation secret to ensure its effectiveness). The restrictions imposed must also be **strictly necessary** and **proportionate** to the legitimate aim.¹¹



In addition, the restrictions on the right of the defense to access all relevant evidentiary materials **must not jeopardize the fairness of the trial**. They must be **decided by the court** and not the prosecution. In doing so, the court must ensure that the **principle of equality of arms is preserved** and that the **fairness of the trial is protected**.¹² A court cannot convict an individual based on evidence to which the accused or their lawyer does not have full access.¹³ If the lack of disclosure of information to the accused risks resulting in unfairness, the charges may need to be dropped or the criminal proceedings terminated.¹⁴



The **right to speak with a lawyer** of detained or imprisoned individuals may be restricted or suspended in **exceptional circumstances**. These circumstances must be **specified by law** or **lawful regulations** and **considered indispensable** by a judicial or other authority to maintain security and good order.¹⁵ In any circumstances, communication with their counsel cannot be denied to a detained or imprisoned individual more than a few days.¹⁶

¹⁰ UNHRC, General Comment N°32, para.32; Amnesty International's Fair Trial Manual, page 74.

¹¹ Amnesty International's Fair Trial Manual, pages 78-79; OSCE's Legal Digest of International FTR, pages 123-124.

¹² Amnesty International's Fair Trial Manual , pages 78-79.

¹³ UNHRC, "Onoufriou v Cyprus", Concluding Observations, (25 October 2010), UN Doc. CCPR/C/100/D/1636/2007 (2010) §6.11, https://www.un.org/ga/search/view_doc.asp?symbol=CCPR/C/100/D/1636/2007.

¹⁴ Amnesty International's Fair Trial Manual, pages 78-79.

¹⁵ UN General Assembly, "Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment", Resolution 43/173 (9 December 1988), Principle 18, <https://www.ohchr.org/sites/default/files/Documents/ProfessionalInterest/bodyprinciples.pdf>.

¹⁶ Ibid., Principle 15.

The Right to Defend Oneself in Person or Through Legal Representation and The Right to be Present at Trial



September 2022



កម្មសាធារណៈជិតិមន្ត្រយកខ្មែរ
Cambodian Center for Human Rights



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The Right to Defend Oneself in Person or Through Legal Representation and The Right to be Present at Trial

I. The right to defend oneself in person or through legal representation

1. Definition



Every person charged with a criminal offense has the right to **defend themselves in person** or to **be defended by a legal counsel of their choice**.¹ These two types of defense are not mutually exclusive, which means that an accused who decides to be assisted by a lawyer has the right to provide their lawyer with instructions on the conduct of their case, within the limits of professional responsibility, and to testify on their own behalf.²

The right to defend themselves in person to which individuals charged with a criminal offense are entitled means that they have the **right to refuse to be assisted by a lawyer** to a certain extent. (See *limitations section*). To be able to defend themselves in person or to instruct their lawyer on the conduct of their case, the accused must be **allowed to be present at their trial**. (See Section II for more details).

For the right to defend oneself or to legal representation to be effective, individuals charged with a criminal offense must also **be informed** of this right³ sufficiently in advance to provide them with **adequate time and the facilities to prepare their defense** on their own or assisted by a lawyer.⁴ (See *module on the right to adequate time and facilities to prepare a defense for more details*).

Accused have the right to be **assisted by a lawyer** if they do not wish to defend themselves. This right applies at **all stages of the criminal proceedings**, from the preliminary investigation to the trial and appeal stages. Accused have the right to **choose the legal counsel** who will represent them. This is important to ensure **trust and confidence** between them and their lawyer and allow for an **effective defense**.

If they cannot afford a lawyer, accused individuals have the right to be assigned a lawyer free of charge whenever the **interests of justice** require it. For instance, the gravity of the offense and the existence of some objective change of success at the appeals stage are important factors to consider for the assignment of free counsel.⁵ The obligation to provide **free counsel** to indigent accused falls within the **responsibility of state authorities**. State authorities must also ensure that the representation provided by the assigned lawyer is **effective**. This means that the State can be held accountable for blatant misbehavior or incompetence of the assigned counsel if it was obvious to the court that the lawyer's behavior was incompatible with the interests of justice or if relevant authorities or courts hindered the appointed lawyer from fulfilling their task effectively.⁶ When assigning lawyers, state



¹ UN Human Rights Committee ("UNHRC"), "General Comment No. 32 – Article 14: Right to equality before courts and tribunals and to a fair trial," (CCPR/C/GC/32, 23 August 2007), para. 37, <https://www.refworld.org/docid/478b2b2f2.html> (UNHRC, General Comment No.32).

² Ibid.

³ Ibid.

⁴ Amnesty International, "Fair Trial Manual," Second Edition, (2014), page 146 - 148, <https://www.amnesty.org/en/documents/pol30/002/2014/en/> (Amnesty International's Fair Trial Manual).

⁵ UNHRC, General Comment No. 32, para.38.

⁶ Ibid.

authorities should also give preference to counsels chosen by the accused, especially in capital cases, to ensure adequate and effective assistance.⁷

2. Legal Framework

2.1. International law

The right to defend oneself in person or through legal representation is expressly protected by the **International Covenant on Civil and Political Rights (“ICCPR”)**, which is directly applicable in Cambodian law through Article 31 of the Cambodian Constitution.

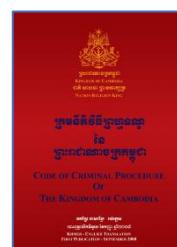
- **Article 14(3)(d) of the ICCPR:** “*In the determination of any charge against him, everyone shall be entitled: to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it.*”



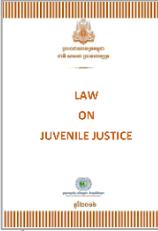
2.2. Cambodian law

The **Constitution of the Kingdom of Cambodia (“the Constitution”)**, the **Code of Criminal Procedure of the Kingdom of Cambodia (“CCPC”)** and the **Law on Juvenile Justice** also guarantee the right to legal representation.

	<ul style="list-style-type: none">• Article 38 of the Constitution: “<i>Every citizen shall enjoy the right to defense through judicial recourse.</i>”
	<ul style="list-style-type: none">• Article 143 of the CCPC: “<i>When a charged person, who is a minor appears for the first time, he/she “shall always be assisted by a lawyer. If a charged person does not choose a lawyer, the court shall appoint a lawyer according to the Law on the Bar.”</i>• Article 300 of the CCPC: “<i>The accused shall appear in person during the hearings at the court. The accused may be assisted by a lawyer chosen by himself. He may also make a request to have a lawyer appointed for him in accordance with the Law on the Bar.”</i>• Article 301 of the CCPC: “<i>The assistance of a lawyer is compulsory if (i) the case involves a felony; or (ii) the accused is a minor.”</i>



⁷ UNHRC, “Daniel Pinto v. Trinidad and Tobago,” Communication No. 232/1987, CCPR/C/39/D/232/1987, (1990), <http://hrlibrary.umn.edu/undocs/session39/232-1987.html>.



- **Article 6 of the Law on Juvenile Justice:** “Every minor suspected or accused of having committed an offence shall have the following basic procedural rights: [...] [t]he right to be assisted by a lawyer [...].”
- **Article 50 of the Law on Juvenile Justice:** “The minor shall be assisted by a lawyer during trial [...].”

3. Importance

Whether in person or through legal counsel, the right to defend oneself is central to ensuring a **fair trial**. An accused charged with a criminal offense must be allowed to challenge the accusations against them. The right to legal representation is one of the pillars that uphold **the equality of arms** between the defense and the prosecution, a key principle of a fair trial. Legal representation enables the accused to prepare the best and most effective defense with the help of someone with legal expertise, who can adequately explain the legal implication of the charges and to defend the accused's interests in court. It also ensures that all accused have equal access to the law and that law is not dispensed discriminatorily.⁸

Denying the accused their right to defend themselves in person or through legal representation undermines the principle of equality of arms, the legitimacy of the trial, and the fairness of the verdict, thus increasing the risk of wrongful convictions.

4. Limitations

In accordance with the right to defend oneself, the right to legal representation can be **waived** if an accused wishes to defend themselves. However, this must be done **unequivocally** and **with adequate safeguards**. It must notably be ensured that any accused who decides to waive their right to legal representation understands the consequences of such a decision. The accused must also have the right to **revoke their waiver** during the criminal proceedings if they change their mind.⁹



Furthermore, the right to defend oneself in person is **not absolute**. An accused can be assigned a lawyer against their wishes when the **interests of justice** so require. This is, for example, the case:

- If the accused faces serious charges and the court decides that the accused is unable to act in their own best interest;
- If the accused consistently obstructs or disrupts the trial proceedings; or
- When it is necessary to protect a vulnerable witness from the distress or intimidation of being cross-examined by the accused.¹⁰

⁸ CCHR, “Fair Trial Rights and Trial Monitoring Handbook,” (2012), page 15, [file:///C:/Users/carol/Downloads/cchr-ftr-and-trial-monitoring-handbook-feb-eng2012-02-13%20\(7\).pdf](file:///C:/Users/carol/Downloads/cchr-ftr-and-trial-monitoring-handbook-feb-eng2012-02-13%20(7).pdf) (CCHR’s FTR Handbook).

⁹ Amnesty International’s Fair Trial Manual, page 49-50.

¹⁰ UNHRC, General Comment No 32, para.37.

In Cambodia, domestic legislation provided for the **mandatory legal representation** of an accused person if they are a **minor** or if the charge is a **felony** offence.



Overall, any restrictions on the right to defend oneself must have an **objective and sufficiently serious purpose** and not go beyond what is **necessary** to uphold the interests of justice. States must avoid an absolute ban on the right of individuals charged with a criminal offense to defend themselves without the assistance of a counsel.¹¹

While it is important that the accused chooses a lawyer they trust to represent them, this **right of choice** is also **not absolute** and can be **reasonably and objectively restricted**, especially if the services of the counsel are paid by the State. The accused's wishes must always be considered but can at times be overridden in the interests of justice.¹² However, respecting the accused's choice of legal counsel is particularly important in **capital cases** to ensure effective and adequate legal assistance.¹³

II. The right to be present at trial

1. Definition



The **right to be present at trial** means that anyone charged with a criminal offense is entitled to be present during the entirety of their trial. Presence at their own trial permits the accused to **hear the case against them, challenge the prosecution's arguments, and present a defense**.¹⁴ It also enables the defendant to **make themselves heard**, notably by testifying at their trial if they wish, without being compelled to do so.¹⁵

This right is, therefore, an integral part of the right to defend oneself in person or through a counsel¹⁶ (*See module on the right to defend oneself or to legal representation for more details*) and of the right to a public hearing¹⁷ (*See module on the right to a public hearing for more details*).

To ensure that the right to be present at trial is upheld, **state authorities** are responsible for informing the accused and their legal counsel by notifying them of the time, date, and location of the hearing

¹¹ UNHRC, General Comment No 32, para.37.

¹² Amnesty International's Fair Trial Manual, page 150.

¹³ UNHRC, "UNHRC, Views on "Daniel Pinto v Trinidad and Tobago", Communication No. 232/1987, CCPR/C/29/D/232/1987, (21 August 1990), <http://hrlibrary.umn.edu/undocs/session39/232-1987.html>.

¹⁴ CCHR, "Fair Trial Rights Annual Report 1 November 2019- 31 December 2020," November 2021, page 34-35, <https://cchrcambodia.org/admin/media/report/report/english/FTR-Annual-Report-English-2019-2020.pdf>.

¹⁵ OSCE, "Legal Digest of International Fair Trial Rights," (2012), page 133, <https://www.osce.org/files/f/documents/1/f/94214.pdf> (OSCE's Legal Digest of International FTR).

¹⁶ Amnesty International's Fair Trial Manual, page 157.

¹⁷ OSCE's Legal Digest of International FTR, page 133.

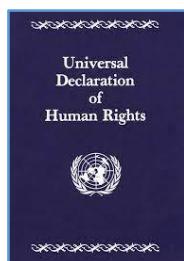
sufficiently in advance.¹⁸ State authorities must also refrain from wrongfully preventing or excluding the accused from their attendance.¹⁹

For child defendants, the right to be present at trial requires the presence of their parents or legal guardians unless their presence is considered not to be in their best interest.²⁰

2. Legal Framework

2.1. International Law

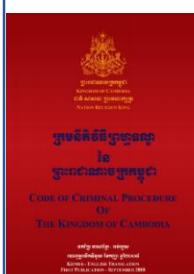
The right to be present at trial is expressly protected by the **International Covenant on civil and political rights (“ICCPR”)**, which is directly applicable in Cambodian law through Article 31 of the Cambodian Constitution.



- **Article 14(3)(d) of the ICCPR:** “*In the determination of any charge against him, everyone shall be entitled: to be tried in his presence, and to defend himself in person or through legal representation of his own choosing [...].*”

2.2. Cambodian Law

The **Code of Criminal Procedure of the Kingdom of Cambodia (“CCPC”)** and the **Law on Juvenile Justice** also guarantee the right to be present at trial. The CCPC contains provisions to facilitate the presence of the accused at their trial.



- **Article 300 of the CCPC:** “*The accused shall appear in person during the hearings at the court. The accused may be assisted by a lawyer chosen by himself. He may also make a request to have a lawyer appointed for him in accordance with the Law on the Bar.*”
- The CCPC also contains various provisions facilitating the presence of the accused at their trial, such as **Article 388** about the obligation of the prosecutor general to summon the accused person to their hearing; **Article 389** about the obligation to transfer an accused person under detention to the nearest prison or detention center to the office of the Court of Appeal; or **Articles 457 and 466** about the time period to be followed by the court between the delivery of the summon for direct hearing and summons to appear and the date to appear.
- **Article 365** of the CCPC also provides the possibility for a convicted person to file an opposition against a default judgment rendered against them. **Article 362** of the CCPC defines a default judgment as a judgment issued in the absence of the accused person if the accused person did not appear because he was not informed of their trial.

¹⁸ UNHRC, General Comment No. 32, para. 36.

¹⁹ CCHR’s FTR Handbook, page 21.

²⁰ UNHRC, General Comment No. 32, para. 42.

- **Article 51 of the Law on Juvenile Justice:** “At the commencement of the trial, the court shall advise the minor in a language that the minor can understand of the following rights: [...] The right to be present at trial [...].”



3. Importance

The right to be present at trial and in an oral hearing is a **crucial component of the right to defend oneself both in person or through legal counsel** and is therefore essential to ensuring a **fair trial**. The presence of the accused allows them to hear and challenge the evidence against them and to present their defense by calling witnesses and by testifying themselves at their trial if they wish so.

Therefore, holding a trial in the accused's absence undermines their fundamental right to defend themselves and renders the trial unlawful.

4. Limitations

The right to be present at trial is **not absolute**. Trials in the absence of the accused are permissible in some circumstances if the interest of the proper administration of justice demands it. Only under the following circumstances can the right to be present at trial be derogated from or temporarily restricted:

- If the accused chooses to waive their right to be present.²¹ The waiver must be done unequivocally, in writing, and with adequate safeguards;²²
- If the accused is so disruptive to the court proceedings that it is considered unfeasible to continue in their presence. In this case, the court is allowed to temporarily remove the accused from the courtroom. However, all the necessary measures to ensure that their right to a defense is preserved, notably by maintaining the presence of their counsel at the trial so that they can continue their client's defense;²³ or
- If the accused cannot be located or refuses to attend their trial despite receiving adequate and sufficient notice.²⁴



Under the circumstances that the accused waives their right or fails to attend despite adequate notice, the trial can occur ***in absentia***, meaning **in the absence of the accused**. A trial ***in absentia*** should be handled with extra caution by the court to be considered fair under international law. The court must consider whether there are extenuating circumstances that excuse the absence of the accused at their trial. It is the court's

²¹UNHRC, General Comment No. 32, para. 36.

²² Amnesty International's Fair Trial Manual, page 157.

²³ Ibid.

²⁴ CCHR's FTR Handbook, page 21.

responsibility to prove it and not a burden that should be placed on the accused. The court should confirm these circumstances before the trial begins.²⁵

In order for a trial *in absentia* to be considered fair under international law, the court must ensure that:²⁶

- All necessary provisions were undertaken to notify the accused of the charges and the impending proceedings;
- All necessary provisions were undertaken to ensure the accused was notified in sufficient time of the location and date of their trial and the request for their presence;
- All necessary provisions were taken to ensure the protection of the accused's defense rights at trial, notably that the accused was represented by a lawyer even in their absence;
- Accused convicted in absentia can appeal or seek remedy, including getting a retrial of their case in their presence.

At the appeal stage of criminal proceedings, the right of the accused to be present at trial depends on the nature of the appeal proceedings according to the European Court of Human Rights ("ECHR"). For instance, if the appeal hearing considers both matters of law and fact, the presence of the accused and their counsel is required. If the appeal hearing considers matters of law alone, then the accused does not necessarily have the right to be present. However, if the prosecution is present and is able to make a case on matters of law then the presence of at least the defense counsel will be required as well to safeguard the principle of equality of arms. The ECHR also takes a variety of other factors into account to decide whether the presence of the accused is required at the appeal stage, including whether there were public hearings during the trial, whether the accused was notified of the appeal hearing and asked to be present, or whether the accused's liberty is at stake, for instance.²⁷

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²⁵Amnesty International's Fair Trial Manual, page 158.

²⁶CCHR's FTR Handbook,page 21.

²⁷Amnesty International's Fair Trial Manual, page 158 – 159.

THE RIGHT TO BE TRIED BY A COMPETENT, INDEPENDENT, AND IMPARTIAL TRIBUNAL



September 2022



កម្មសាធារណៈជិតិចក្ខុល្យកម្ពុជា
Cambodian Center for Human Rights



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About the Fair Trial Rights Project

The Module on Right to Be Tried by a Competent, Independent, and Impartial Tribunal is part of a series of modules on fair trial rights produced by CCHR’s Fair Trial Rights Project (“the FTR Project”). The FTR Project is the first – and only one – of its kind in Cambodia, uniquely and innovatively working to promote and protect fair trial rights in practice. It overall aims to increase the impartiality and independence of Cambodia’s judiciary by supporting the right to a fair trial in Cambodia’s courts. In pursuit of this goal, the FTR project has two specific objectives: to socialize the concept of fair trial rights among the public by raising its awareness of fair trial rights and to increase compliance with fair trial standards within the judiciary through trial monitoring.

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Queries and Feedback

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The Right to Be Tried by a Competent, Independent, and Impartial Tribunal

1. Definition



In the criminal context,¹ anyone charged with a criminal offense has the right to have those charges determined in a hearing by a **competent, independent, and impartial tribunal established by law.**²

A **tribunal** is defined as a “*designated body, regardless of the denomination that is established by law, is independent of the executive and legislative branches of government or enjoys in specific cases judicial independence in deciding legal matters in proceedings that are judicial in nature.*”³

Tribunals must have been **established by law** to be able to hear cases, such as by the Constitution or any other legislation passed by lawmakers.⁴

In addition, tribunals must fulfil the **following three requirements** to be able to adjudicate criminal cases:

- **Tribunals must be competent.** A competent tribunal is a tribunal that **has jurisdiction to hear cases**, meaning that it has been **given the power** to make decisions over subject matters defined **by law.**⁵ If a subject matter is not covered by the jurisdiction of existing tribunals, States must establish such competent tribunals or extend the jurisdiction of existing courts in order to safeguard individuals’ right to access a tribunal.⁶ Tribunals must also be able to **make binding decisions** that cannot be altered by non-judicial authorities.⁷ Finally, tribunals must be **staffed by suitably qualified and experienced persons.**⁸ To ensure that those in charge of delivering justice are competent, procedures regarding their qualifications, appointment, recruitment, promotion, and retirement should be established. **Legal education for judicial staff** must also be ensured in a continuous manner⁹ to maintain their competency.

¹See UN Human Rights Committee (“UNHRC”), General Comment No.32 - Article 14: Right to equality before courts and tribunals and to a fair trial”, (CPPR/C/GC/32, 23 August 2007), para. 16, for more details, https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR%2FC%2FGC%2F32&Lang=en(UNHRC, General Comment No.32).

² UNHRC, General Comment No. 32, para. 15.

³ Ibid., para. 18.

⁴ Amnesty International, “Fair Trial Rights Manual,” 2nd Edition, (2014), p. 109, <https://www.amnesty.org/en/documents/pol30/002/2014/en/>(Amnesty International’s Fair Trial Rights Manual).

⁵ Ibid., p.110.

⁶ OSCE, “Legal Digest of International Fair Trial Rights” (2012), p.57, <https://www.osce.org/files/f/documents/1/f/94214.pdf>(OSCE’s Legal Digest of International FTR).

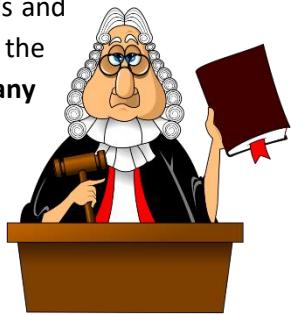
⁷ Ibid., p.57.

⁸ Ibid., p.56.

⁹ Amnesty International’s Fair Trial Manual, p. 108.

- **Tribunals must be independent.** This means that the judiciary must be **protected from political interference by the executive or legislative branches** in its proceedings and decision-making. This must be ensured through the constitution or adoption of laws **establishing clear procedures and objective criteria for the appointment, remuneration, promotion, suspension, and dismissal of judicial officers and disciplinary sanctions** taken against them.¹⁰ Functions and competencies of the judiciary must be clearly distinguished from those of the executive and legislative branches and judicial officers must be **free of any control or direction of the executive or legislative over them.**

Finally, judges must also be **protected against conflicts of interest and intimidation** and their **status** (i.e., term of office, independence, security, remuneration, conditions of service, pensions, and age or retirement) must be **adequately secured by law** to safeguard their independence.



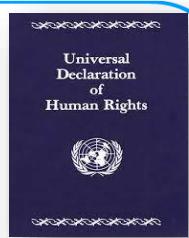
- **Tribunals must be impartial.** The requirement of impartiality is **two-fold**. **1.** Judges must **not let their judgment be swayed by personal biases or prejudices, have preconceptions** about the cases they adjudicate, or act in ways that favors the interests of one party at the detriment of the other. **2.** The tribunal must also **appear as being impartial** in the eyes of a reasonable observer.¹¹

2. Legal Framework

2.1. International law

The right to be tried by a competent, independent, and impartial tribunal is enshrined in the **Universal Declaration of Human Rights (“UDHR”)** and the **International Covenant on Civil and Political Rights (“ICCPR”)**, which are directly applicable in Cambodian law through Article 31 of the Cambodian Constitution.

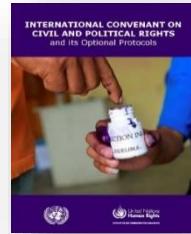
- **Article 14(1) of the ICCPR:** *“In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.”*



¹⁰ UNHRC, General Comment No. 32, para. 19.

¹¹ UNHRC, General Comment No. 32, para. 21.

- Article 14(1) of the ICCPR: “*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.*”



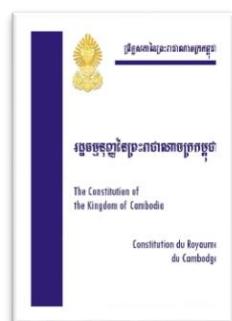
2.2. Cambodian law

The requirements of competence, independence, and impartiality of tribunals are also enshrined in the **Cambodian Constitution** and in various provisions of the **Law on the Statute of Judges and Prosecutors (“LSJP”)**, the **Law on the Organization of the Courts (“LOC”)**, the **Law on the Organization and Functioning of the Supreme Council of Magistracy (“LOFSCM”)**, the **Code of Criminal Procedure of the Kingdom of Cambodia (“CCPC”)**, and the **Cambodian Code of Judicial Ethics**.

Article 128 of the Constitution: “*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 129 of the Constitution: “[...] Only judges shall have the right to adjudicate. A judge shall fulfill this duty with strict respect for laws, wholeheartedly, and conscientiously.”

Articles 130 and 131 of the Constitution: “*The Judicial power shall not be granted to the legislative or executive branches*” and “*Only the Department of Public Prosecution shall have the right to file criminal suits.*”

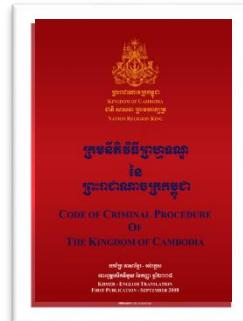


Article 132 of the Constitution: “*The King shall be the guarantor of the independence of the judiciary. The Supreme Council of Magistracy shall assist the King in this matter.*”

Article 55 of the CCPC: “A member of the Investigation Chamber may not participate in the trial of a criminal offense which he has knowledge of in his capacity as investigation judge. Otherwise, the judgment shall be null and void.”

Article 288 of the CCPC: “Any sitting judge who has been acting as a Prosecutor or Deputy Prosecutor or investigating judge upon a certain case may not participate in the adjudication of that case, otherwise the judgment shall be deemed null and void.”

Article 337 of the CCPC: “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 the court clerk are not authorized to participate in the deliberation.”



LOC: This law determines the organization and the functioning of all categories and levels of courts in Cambodia, the organization and functioning of prosecution offices attached to all levels of courts in Cambodia, and the jurisdiction of all types and levels of courts based on specialization. **Article 1** of this law states that the purposes of this law are to “ensure the independence of the judiciary, ensure impartiality and protect the rights and freedoms of citizens, ensure the good functioning of courts and prosecution offices, enhance the effectiveness and quick proceedings of public services, and ensure that justice is delivered in all cases to increase confidence from citizens and contribute to strengthening social safety.” **Article 6**, for instance, also provides that only judges have the right to adjudicate cases that they have to perform this duty “independently by obeying the law strictly, honestly, and in good conscience”.



LOFSCM: This law establishes and determined the organization and functioning of the Supreme Council of Magistracy in order to assist the King in his mission to guarantee the independence of the judiciary in accordance with the Cambodian Constitution (Article 1). This law applies to all judges and prosecutors of Cambodia (Article 2).

LSJP: This law determines the status of judges and prosecutors and other principles related to judges and prosecutors to ensure the independence of the judiciary.

- For instance, **Article 8** states that “All judges shall make decisions impartially, based upon legal principles, without pressure, threat or intimidation or order, whether direct or indirect, from any party to the case or any other person.”
- Similarly, **Article 77** states that “All prosecutors shall perform their functions and duties based upon legal principles, without pressure threat or intimidation, or order whether direct or indirect, from any party to the case or any other person.”

Note: The LOC, LOFSCM, and LSJIP were adopted in 2014 with the aim to ensure the independence of the judicial power. However, these laws were drafted without any prior publication or consultation with civil society, the public, or other stakeholders and have been criticized for weakening the separation of powers and the independence of the judiciary. These laws effectively give the executive branch direct control over the judiciary by increasing the level of influence of the Ministry of Justice over judges and prosecutors through its involvement in judicial budgets, appointments, promotions, tenure, and removal of judicial officers.¹²

Cambodian Code of Judicial Ethics: This Code complements the LSJP. Its provisions aim to strengthen the independence and dignity of judges and prosecutors as well as their behavior outside of work to ensure public trust in the judicial system and the reputation of judges and prosecutors.

- For instance, **Article 2** provides that “*The Judge shall be independent based on the evaluation of fact and knowledge of the law, without any influences such as lobby, pressure, threat, coercion, or intervention from individual or group or other reasons directly or indirectly. The Judge shall be free from any attempts to influence their decision-making.*”
- **Article 7** provides that “*Judges shall maintain a good behavior and preserve their impartiality at work but also outside of work in order to protect and enhance public trust, legal professionalism and parties in cases. Judges shall not participate in public discussions involving court cases because it can impact their impartiality. In decision-making, judges shall not manifest prejudice based upon race, color, sex, religion, political opinions, disabilities, age, or family status, economic and social status. The Prosecution shall evidence without bias to ensure fairness and effective prosecution.*”

3. Importance



The right to be tried by a competent, independent, and impartial tribunal is a **cornerstone of a fair trial** and essential to ensuring the **proper administration of justice** and **the rule of law**.

The requirements of competence and impartiality ensure that the judicial officers who adjudicate criminal cases have the **adequate legal expertise and integrity** to make objective and neutral decisions based solely on the evidence and in accordance with applicable laws.¹³

¹²For more details, see CCHR, “Fair trial rights in Cambodia, Monitoring at the Court of Appeal: Annual report 1 November 2018 – 31 October 2019”, (October 2020), footnotes 22 on page 3, [https://www.cchrcambodia.org/admin/media/report/report/english/FTR%20Annual%20Report_ENG%20\(2018-2019\).pdf](https://www.cchrcambodia.org/admin/media/report/report/english/FTR%20Annual%20Report_ENG%20(2018-2019).pdf).

¹³ Amnesty International’s Fair Trial Rights Manual, page 115.

The requirement of independence ensures that judgments rendered by the judicial branch are not corrupted by political or personal motives. This requirement is rooted in the principle of the **separation of powers**. Essential in a democratic society, this principle ensures **checks and balances** between the executive, legislative and judicial branches and prevents any of them from becoming too powerful and abusing their power,¹⁴ thus enabling the rule of law to thrive.

Failure to uphold the right to be tried by a competent, independent, and impartial tribunal, therefore, undermines defendants' right to a fair trial and impedes the proper administration of justice as well as the exercise of the rule of law.

4. Limitations

The right to be tried by a competent, independent, and impartial tribunal is **an absolute right** that **cannot be subject to any exception**,¹⁵ including during emergency situations.¹⁶ The requirements of competence, independence, and impartiality further apply to all courts that fit the definition of a tribunal (See Section 1), whether ordinary or specialized, civil or military.¹⁷ They also apply to religious courts or courts based on customary law recognized by a State and entrusted with judicial tasks.¹⁸



¹⁴ Ibid., page 111.

¹⁵ UNHRC, Communication No. 263/1987; M. Gonzalez del Rio v. Peru (CCPR/C/46/D/263/1987), October 28, 1992, para. 5.2., <https://juris.ohchr.org/Search/Details/332>.

¹⁶ UNHRC, General Comment No. 29, para. 16, https://www.un.org/ga/search/view_doc.asp?symbol=CCPR/C/21/Rev.1/Add.11.

¹⁷ Ibid., para. 22.

¹⁸ Ibid., para.24.

THE RIGHT OF A PUBLIC HEARING



September 2022



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The Right of a Public Hearing

1. Definition



Everyone has the right to have their guilt or innocence determined in a **public hearing**, except in certain exceptional circumstances. This means that trials must in principle be conducted publicly and orally to ensure the transparency of the proceedings.¹

The right to a public hearing applies to **all trials in criminal matters** or related to a lawsuit. However, it does not necessarily apply to all appeal proceedings or to pre-trial decisions made by prosecutors and other public authorities.²

For the **right to a public hearing to be upheld**, trials should be open to the public - including the members of the media - and conducted orally. The public must also be informed of the venue and date of the trial and should be provided with adequate facilities to ensure their attendance within reasonable limits.³



In the exceptional circumstances in which the public is excluded from a trial, the judgement - including essential findings, evidence and legal reasoning - must be made public,⁴ except in specific cases (See Limitations section) to preserve the accused's **right to a public judgment** (*See module on the right to a public judgment for more details*).

2. Legal Framework

2.1 International Law



The **right to a public hearing** is expressly protected by the **International Covenant on Civil and Political Rights ("ICCPR")**, which is directly applicable in Cambodian law through Article 31 of the Cambodian Constitution.

- **Article 14(1) of the ICCPR:** “Everyone is entitled to a “fair and public hearing” [...]. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre 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. [...]”

¹ UN Human Rights Committee (“UNHRC”), General Comment No.32 - - Article 14: Right to equality before courts and tribunals and to a fair trial”, (CPPR/C/GC/32, 23 August 2007), para. 28, https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR%2FC%2FGC%2F32&Lang=en (UNHRC, General Comment No.32).

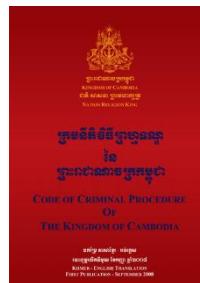
² Ibid., para.28.

³ Ibid., para.28.

⁴ Ibid., para.29.

2.2 Cambodian Law

The **Code of Criminal Procedure of the Kingdom of Cambodia** (“CCPC”) and the **Law on the Organization of the Court** (“LOC”) also guarantee the right to a public hearing.



- **Article 316 of the CCPC:** “*Trial hearings shall be conducted in public.*”
- **Article 7 of the LOC:** “*In all cases, the court shall announce the judgment during a public session.*”

3. Importance



The right to a public hearing is fundamental to ensuring the **transparency** of proceedings and the **accountability** of those delivering justice. It is an essential **safeguard for the interests** of both the **individual and society as a whole**.⁵



For the parties involved in a trial, including the accused, public scrutiny provides a **check** against arbitrary decision-making, abuses of power, procedural violations (including inequality in the treatment of parties), and the interference of and influence from external parties.⁶

For the public, including the media, public hearings give them the ability to **monitor** and **understand** how justice is both delivered and how decisions are reached within the judicial system.⁷ The publicity of hearing also engenders **confidence** in the ability of the State to deliver justice when they can see that the legal system is operating in accordance with laws and ethical principles.⁸



Preventing the public from being able to monitor justice is a threat to the principle of the rule of law. Denying the right to a public hearing allows the space for corruption and impunity to prevail, and undermines the accused's right to a fair trial as it exposes them to wrongful conviction and unfair sentencing.

⁵ Ibid., para.28.

⁶ CCHR, FTR and trial monitoring handbook, (February 2012) page 22, <https://sithi.org/tmp/publication/view/2012-02-13-fair-trial-rights-and-trial-monitoring-handbook> (CCHR’s FTR Handbook).

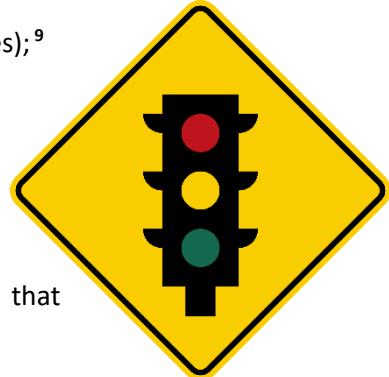
⁷ Amnesty International, ‘Fair Trial Manual, Second Edition’ (April 2014), page 121, <https://www.amnesty.org/en/documents/pol30/002/2014/en/> (Amnesty International’s Fair Trial Manual).

⁸ CCHR’s FTR Handbook, page 22.

4. Limitations

The law permits restrictions on the right to a public hearing in a number of specific and narrowly defined circumstances. According to Article 14 (1) of the ICCPR, the right to a public hearing can be restricted if the following are threatened:

- Morals (for example, if the case involves sexual offences);⁹
- Public order;
- National security in a democratic society;
- When the interest of the private lives of the parties so requires (for example protecting the identity of victims of sexual violence);¹⁰ or
- In special circumstances, when the court believes that publicity would jeopardize the interest of justice.



⁹ Amnesty International's Fair Trial Manual, page 123.

¹⁰ Ibid.

EVIDENTIARY RIGHTS

(Right to Call and Examine Witnesses)



September 2022



កម្មសាធារណជនិធនយកម្មសាធារណ
Cambodian Center for Human Rights



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About Cambodian Center for Human Rights

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About the Fair Trial Rights Project

The Module on Evidentiary Rights is part of a series of modules on fair trial rights produced by CCHR’s Fair Trial Rights Project (“the FTR Project”). The FTR Project is the first – and only one – of its kind in Cambodia, uniquely and innovatively working to promote and protect fair trial rights in practice. It overall aims to increase the impartiality and independence of Cambodia’s judiciary by supporting the right to a fair trial in Cambodia’s courts. In pursuit of this goal, the FTR project has two specific objectives: to socialize the concept of fair trial rights among the public by raising its awareness of fair trial rights and to increase compliance with fair trial standards within the judiciary through trial monitoring.

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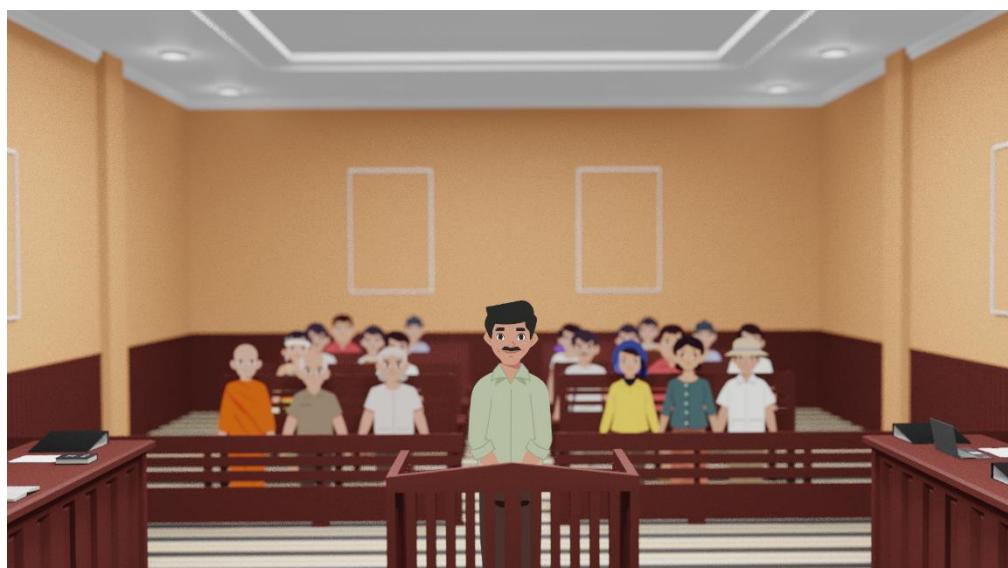
Evidentiary Rights – The Right to Call and Examine Witnesses

1. Definition



All the decisions made by the court must be based exclusively on evidence presented during the trial. It is therefore essential that each party is given the opportunity to present evidence and call witnesses in support of their case and to cross-examine witnesses called by other parties to challenge evidence that they do not accept.¹

Evidentiary rights, including the right to call and examine witnesses, give the defense the same legal powers to present evidence, as well as call, examine and cross-examine witnesses as the prosecution:²



Calling of witnesses: Witnesses can be called by the court on its own or at a party's request. This means that the defendant can compel the attendance of witnesses and present its own witnesses and experts to testify in their favor.



Examination of witnesses: Witnesses can be examined by the court regardless of who calls the witness. Each party, including the defendant, can question their own witnesses to support their case.



Cross-examination of witnesses: Each party is entitled to cross-examine witnesses presented by the other parties. This means that the defendant can question the prosecution witnesses in order to challenge the testimonies made against them. All the evidence presented at the trial may be challenged.

¹ UN Human Rights Committee ("UNHRC"), General Comment No.32 - Article 14: Right to equality before courts and tribunals and to a fair trial," (CPPR/C/GC/32, 23 August 2007), para. 13 and 39, https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR%2FC%2FGC%2F32&Lang=en (UNHRC, General Comment No.32).

² UNHRC, General Comment No.32, para. 39.

2. Legal Framework

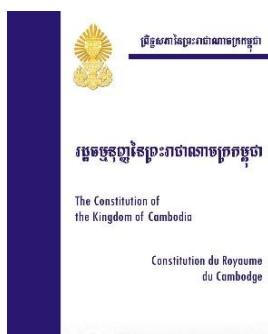
2.1 International Law

The **International Covenant on Civil and Political Rights (“ICCPR”)** protects this right and gives defendants the ability to call and examine witnesses.

A circular inset image showing a close-up of a person's hands holding a small white vial with a purple cap. The vial has the text "ELECTION INK INDELIBLE" printed on it. The background of the inset is a purple banner with white text that reads "INTERNATIONAL CONVENTION ON CIVIL AND POLITICAL RIGHTS and its Optional Protocols".

Article 14 (3) (e) of the ICCPR: *"In the determination of any criminal charge against him, everyone shall be entitled 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."*

2.2 Cambodian Law



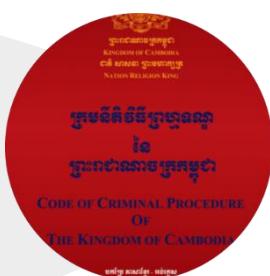
The right to call and examine witnesses is implicitly protected by Article 38 of the **Constitution of the Kingdom of Cambodia** (“the Constitution”), which states that “*Every citizen shall enjoy the right to defense through judicial recourse.*”

It is also explicitly protected under the **Code of Criminal Procedure of the Kingdom of Cambodia** (“CCPC”), which provides further details about who must be heard in the court and who may call and question witnesses.

Article 153 of the CCPC:

“The investigating judge may question any person whose response is deemed useful to the revelation of the truth [...].

“The investigating judge may also arrange a confrontation between the charged person [...] and witnesses.”



Article 154: “Before the interview, each witness shall swear in accordance with their religion or beliefs that he/she only speaks the truth. The formality of the oath shall be defined in the annex of this Code.”

Article 298: “At their expenses, the accused and civil party may summons witnesses who have not been summoned by the Prosecutor.”

Article 321: “Unless otherwise required by a law, any evidence in criminal cases is freely admissible. The court shall have a free choice to determine the value of the evidence submitted to the court on the ground of its true belief. The decision of the court shall be based only on the evidence which it has in the file or which has been presented at the hearing. A confession shall be submitted to the court for consideration in the same manner as other evidence. Answers given under the physical or mental duress shall have no evidentiary value. Communications between the accused person and his/her lawyers is not admissible as evidence.”

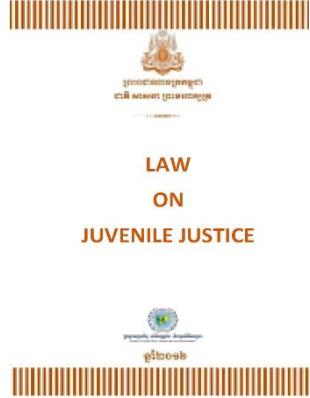
Article 324: “At the commencement of the trial hearing, each party may request the court to hear witnesses who are present in the court room but who were not properly summoned to testify. Taking the testimony of those witnesses shall be approved by the presiding judge. The court clerk shall record the identity of the witnesses and instruct them to retreat to the waiting room.”

Article 326: “[t]he presiding judge shall listen to the statements of civil parties, civil defendants, victims, witnesses and experts in the order which he deems useful [....] The Royal Prosecutor, the lawyers and all the parties may be authorized to ask questions. All questions shall be asked with the authorization of the presiding judge. Except for questions asked by the Royal Prosecutor and the lawyers, all questions shall be asked through the presiding judge. In case of objection to a question, the presiding judge decides whether the question should be asked.”

Article 328: “Before answering the questions, each witness shall swear according to their religion or believe that he/she shall only speak the truth.”

Article 394: “Following his questioning of the accused, the presiding judge shall hear the civil party and the civil defendants in the order he deems useful. Witnesses and experts will be questioned only if the court so orders.”

The Law on Juvenile Justice also provides children conflict with the law with the right to call and pose questions to witnesses in Article 6.



Article 6 of the Law on Juvenile Justice: “Every minor suspected or accused of having committed an offence shall have the following basic procedural rights: [...]. The right to present evidence. The right to request to call and pose question to witnesses [...].”

3. Importance



The right to call and examine witnesses provides the court with an opportunity to observe evidence and to hear legal arguments regarding their evidentiary value. It therefore assists the court in its **assessment of the presented various arguments** and in making its decision based on relevant evidence.³



This right enables the defense to investigate the credibility of the prosecution's witnesses or victims and the reliability of their evidence by questioning them and challenging their testimony.⁴ It also permits a defendant to respond fully to all arguments and evidence presented by other parties at the trial.⁵ The right to call and examine witnesses is therefore critical to ensuring the accused an **effective defense**.⁶

Finally, the right to call and examine witnesses is a fundamental component of the principle of **equality of arms**.⁷ Equality of arms requires that all parties are treated in a way that ensures equality at all stages of the trial and that no party is placed at a disadvantage over the others in presenting their case.⁸



Consequently, if the court does not allow the defense to call and examine witnesses and challenge the evidence presented against the accused in the same way as the prosecution, it will place them at a disadvantage during the trial. By doing so, the court will undermine the principle of equality of arms and deny the accused an effective defense. In addition, the court will not be able to hear all the relevant information and evidence it needs to make an accurate

³ CCHR's FTR Handbook, page 25.

⁴ The Center for Social Development (“CSD”), ‘Annual Report: The Court Watch Project’, (February 2007).

⁵ Ibid.

⁶ UNHRC, General Comment No. 32, para. 39.

⁷ UNHRC, General Comment No. 32, para. 39.

⁸ CCHR's FTR Handbook, page 25.

assessment of the facts. This will affect the court's verdict and/or sentence and most likely lead to an **unfair decision against the accused**, including their wrongful conviction.

4. Limitations



The right to call and examine witnesses is **not unlimited**, meaning that the accused cannot obtain the attendance of any witnesses, at any time or in any manner.⁹ This right gives the accused a right to call witnesses **whose testimonies are relevant for their defense** and to be **given a proper opportunity to question and challenge witnesses against them**.¹⁰ This means that if a defendant wants a certain witness to be called on their behalf, they have to explain to the court why they consider the testimony of a particular witness important for the case.

However, a violation of the defendant's rights would occur if the court allowed the prosecution to invite an important witness, but refused to invite an equally important and relevant witness the defendant proposed.

--END--

⁹ UNHRC, General Comment No. 32, para. 39; UNHRC, "Peart v Jamaica," Communications No. 464/1991 & 482/1991, UN Doc CCPR/C/54/D464/1991, (24 July 1995), para.11.5, <http://hrlibrary.umn.edu/undocs/html/464-482-1991.html>.

¹⁰ UNHRC, General Comment No.32, para. 39.

RIGHT TO A PUBLIC JUDGEMENT AND REASONED JUDGEMENT



September 2022



កម្មសាធារណៈសិទ្ធិទុន្យកម្ពុជា
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**The Right to a Public Judgment
&
The Right to Reasoned
Judgment**

1. Definitions

1.1. The right to a public judgment

The right to a public judgment means that judgments rendered in civil and criminal proceedings must be made public. This right is linked to the accused's right to a public hearing, which both aim to ensure public and open administration of justice.¹

This right is also applicable when trials are held in closed hearings. Even when the public is excluded from a trial, **the courts have an obligation to make their judgment public**, including the essential findings, evidence, and legal reasoning.²



A judgment is considered public when it is pronounced orally by the court in a public session **or provided in writing to the parties and made available to the public**, including through court registries or other avenues such as websites.³



If the accused does not speak the language used by the court, the court must ensure that the judgment is communicated to them **in a language they understand and ideally translated into such a language**, in compliance with the accused's right to an interpreter and to translation.⁴



1.2. The right to a reasoned judgment

The right to a reasoned judgment is inherent to the right to a **fair trial right**, and is included in the **right to a public judgment**.⁵

This right means that a criminal judgment rendered against an individual must **explain why and how the verdict has been reached and why the person was found guilty or innocent**.

This right aims to ensure that those found guilty are done so in **accordance with legislated principles**. A **reasoned judgment also provides an avenue of appeal** should the reasoning contained in the judgement be inconsistent with the law.

Respecting the right to a reasoned judgment requires the court to examine each of the charges and arguments presented during the trial and to respond to **the written arguments submitted by any party**.

¹ Amnesty International, "Fair Trial Manual" (Second edition, 2012), page 172, <https://www.amnesty.org/download/Documents/8000/pol300022014en.pdf> ("Amnesty International's Fair Trial Manual").

² UN Human Rights Committee, "General Comment No.32: Article 14, right to equality before courts and tribunals and to a fair trial", (UN Doc CCPR/C/GC/32, 23 August 2007), para. 29, <https://www.refworld.org/docid/478b2b2f2.html> ("UNHRC, General Comment No. 32").

³ Amnesty International's Fair Trial Manual, page 172, section 24.1; OSCE, "Legal Digest of International Fair Trial Rights," (26 Sep 2012), Chapter IV, page 208, <https://www.osce.org/odihr/94214#:~:text=The%20Legal%20Digest%20of%20International,of%20OSCE%20trial%20monitoring%20operations> ("OSCE's Legal Digest of International FTR").

⁴ Amnesty International Fair Trial Manual, page 172.

⁵ OHCHR, "Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers", Chapter 7, (2003) page 293, <https://www.ohchr.org/Documents/Publications/training9chapter7en.pdf>. (" OHCHR Manual").

In their judgments, judges must explain both the facts and the law on which they based their decision.⁶

- **The Facts:** the judgment must set out the facts for which the person is convicted as clearly as possible, including the date, the location, and the actual event(s). In doing so, the judges must ideally refer to the piece(s) of evidence on which they relied in order to reach the finding, for instance, a confession or a specific witness' testimony, and explain why they relied on it.
- **The Law:** the judgment must also include the legal basis on which the ruling is based, both in terms of substantive law (the crime) and of criminal liability (the mode of liability: direct perpetrator, accomplice, etc.).



2. Legal framework

2.1. International Law

The **right to a public judgment** is explicitly guaranteed in the **International Covenant on Civil and Political Rights** ("ICCPR"), which is directly applicable in domestic law through Article 31 of the Cambodian Constitution.

The **right to a reasoned judgment** is not explicitly enshrined in the ICCPR but is inherent to the right to a fair trial (Article 14), including the right to a public judgment (Article 14(1)) and the right to appeal (Article 14 (5)).⁷



Article 14(1) of the ICCPR: "[...] But 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 proceeding concern matrimonial disputes or the guardianship of children."

Article 14(5) of the ICCPR: "Everyone convicted of crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law."

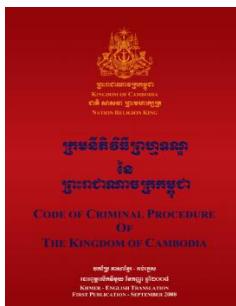
2.2. Cambodian Law

The **rights to public and a reasoned judgment** are also explicitly protected under Cambodian law.

The **right to a public judgment** is guaranteed in the Code of **Criminal Procedure of the Kingdom of Cambodia** ("CCPC") and the **Law on the Organization of the Court** ("LOC"), as outlined below:

⁶ CCHR, "Fair trial rights newsletter: the right to a Reasoned Judgment,"(2018), derived from: https://cchrcambodia.org/admin/media/newsletter/newsletter/english/CCHR%20Fair%20Trial%20Rights%20Newsletter%20On%20Right%20to%20Reasoned%20Judgement_Eng.pdf ("CCHR's FTR newsletter on the right to a reasoned judgment 2018").

⁷ OHCHR Manual, Chapter 7, (2003) page 293.



Article 317 of the CCPC: "In all cases, the court shall announce the judgment during a public session."

Article 7 of the LOC "[...] In all cases, a judgment shall be announced publicly [...]."

- The right to a reasoned judgment is also guaranteed in the CCPC:

Article 357 of the CCPC: "Every judgment shall have two parts:

- *The ground means the arguments of facts and laws which lead the court to make decision;*
- *The enacting term means decision of the court.*

The fact shall be clear and beyond a reasonable doubt. The court shall examine all charges and arguments raised during the hearing.

In the ground judgment, the court shall note the offense committed by an accused person which is not permissible by any applicable legal texts and any civil remedy."

Article 403 of the CCPC: "The rules governing the form and signature of the judgment of the court of the first instance shall apply to the judgment of the Court of Appeal."

3. Importance

The right to a public judgment and the right to a reasoned judgment are both essential to guarantee an **open, transparent, and accountable justice system** that people can trust, which is fundamental to the **rule of law**. A public and reasoned judgment allows for **public scrutiny of the administration of justice** and **for the accountability of the judiciary for the decisions** they make.⁸



People must be able to see justice being delivered and how it is delivered to ensure that justice is administered properly. The necessity to render reasoned judgments and make **them public compels the judge to explain their decision** and ensures that the accused know why and what they are being convicted for, which protects them **against arbitrariness and abuses of the judiciary**.

⁸ Amnesty International's Fair Trial Manual, page 173.

Furthermore, the right to a reasoned judgment is necessary for the enjoyment of another key fair trial right: the **right to appeal**.

According to international standards, in order to enjoy the effective exercise of the **right to have convictions and sentences reviewed by a higher tribunal**, a convicted person is entitled to have, within a reasonable time, access to a written judgment duly reasoned for all instances of appeal.⁹ Reasoned judgments indeed allow the parties to see how the judges evaluated the evidence, how they reached their factual and legal conclusions, and therefore, allow them to identify points that they wish to challenge before the higher court.¹⁰ They also allow the upper courts to properly review and analyze the decisions of lower courts. The judges must be able, on the basis of the judgment, to see which evidence has been relied upon for the conviction and why. Access to other necessary documents, such as trial transcripts, should also be made available to the parties in a timely manner for them to meaningfully exercise their right to appeal.¹¹ If one does not have access to a written and reasoned judgment, explaining the various grounds for the conviction or sentence, then the right to appeal is rendered meaningless, which violates fair trial rights.¹²



Finally, public and reasoned judgments enable the **public to access legal information and to understand what type of behavior** is or is not prohibited under the law.¹³ They are also important for the development of **jurisprudence** and for legal certainty about the interpretation and application of the law.

4. Limitations

The right to a public judgment is not absolute and can be restricted under certain circumstances. Article 14 (1) of the ICCPR provides an exhaustive list of the permissible restrictions on this right. The right to a public judgment can be restricted where the interest of juvenile persons requires it or in proceedings that concern matrimonial disputes or the guardianship of children.

The right to a reasoned judgment must be respected at all times and in all cases. However, judges are not required to answer each of the arguments made by the accused.¹⁴

For the United Nations Human Rights Committee (“UNHRC”), the court must publicly pronounce the essential findings, evidence and legal reasoning of its decisions.

For the European Court of Human Rights (“ECHR”), the extent to which the court’s duty to provide the reasons for its decision varies according to the nature of the decision and must be determined in light of the circumstances of the case. The judge must, therefore, at least address the arguments that are crucial to the outcome of the case.¹⁵

⁹ UNHRC, General Comment No. 32, para. 49; UNHRC, “V. Francis v. Jamaica,” Communication No. 320/1988, (1993), para. 12.2, <http://hrlibrary.umn.edu/undocs/html/320-1988.html>.

¹⁰CCHR’s FTR newsletter on the right to a reasoned Judgment 2018; ECCC, Appeal Judgment in Case 002/01, paras 205, 207; Amnesty International Fair Trial Right Manual, page 173, Section 24.2

¹¹ CCHR’s FTR newsletter on the right to a reasoned judgment 2018; UNHRC, General Comment No. 32, para.49.

¹² CCHR’s FTR newsletter on the right to a reasoned judgment 2018; UNHRC, General Comment No. 32, para. 8.4.

¹³ CCHR, “Fair Trial Rights Monitoring at Appeal Court Annual Report (1 November 2018-31 October 2019),” CCHR, October 2020, page 14,

[https://www.cchrcambodia.org/admin/media/report/report/english/FTR%20Annual%20Report_ENG%20\(2018-2019\).pdf](https://www.cchrcambodia.org/admin/media/report/report/english/FTR%20Annual%20Report_ENG%20(2018-2019).pdf).

¹⁴ OHCHR Manual, Chapter 7, pages 293-295.

¹⁵ OHCHR Manual, Chapter 7, page 293-295; OSCE Legal Digest of International Fair Trial Rights, page 210.

PROHIBITION AGAINST RETROACTIVE APPLICATION OF CRIMINAL LAW



September 2022



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Cambodian Center for Human Rights



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About Cambodian Center for Human Rights

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About the Fair Trial Rights Project

The Module on the Prohibition Against Retroactive Application of Criminal Law (or Principle of Legality) is part of a series of modules on fair trial rights produced by CCHR’s Fair Trial Rights Project (“the FTR Project”). The FTR Project is the first – and only one – of its kind in Cambodia, uniquely and innovatively working to promote and protect fair trial rights in practice. It overall aims to increase the impartiality and independence of Cambodia’s judiciary by supporting the right to a fair trial in Cambodia’s courts. In pursuit of this goal, the FTR project has two specific objectives: to socialize the concept of fair trial rights among the public by raising its awareness of fair trial rights and to increase compliance with fair trial standards within the judiciary through trial monitoring.

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The Prohibition Against Retroactive Application of Criminal Law

(or Principle of Legality)

1. Definition



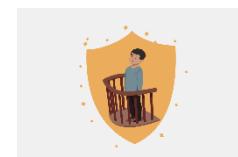
The prohibition against retroactive application of criminal law prohibits the application of law to events that took place before the law was introduced. In other words, newly adopted criminal laws only apply to acts committed after they came into force and criminalized such acts.

This prohibition derives from the general **principle of legality**, which is composed of the following doctrines:

- The doctrine *Nullum crimen sine lege*, which literally translates as “no crime without law,” provides that a person cannot commit a crime unless it is an act prohibited by law at the time it was committed.¹
- The doctrine *Nulla poena sine lege*, which literally translates as “no punishment without law,” provides that only a penalty provided by law can be imposed on a convicted person. In addition, courts cannot impose a penalty that is heavier than the one applicable at the time the criminal offense was committed.²

The principle of legality overall means that only the law can define crime and prescribe penalties. Consequently:

- No one may be prosecuted and can be found guilty of a criminal offense for an act or omission that did not constitute a criminal offense at the time the alleged action or omission took place.
- If found guilty of an existing criminal offense, the convicted person cannot be imposed a sentence that is not provided by law and that is heavier than the penalties provided by law at the time the offense was committed.



The rationale behind the principle of legality and the prohibition against retroactive application of criminal law is that individuals cannot be held responsible for committing an offense for an act they undertook unless they could reasonably find out that this act was a criminal offence at the time it was undertaken.

The principle of legality requires that the State **defines precisely criminal offenses and their penalties within the law** to enable individuals to know for what acts and omissions they can be held criminally liable.³



However, this requirement does not mean that the State must prove that the individual knew that the act in question was illegal to prosecute them for committing a criminal offense as this would place an undue burden on the State. The State must only ensure that individuals have access to the information that enables them to know what acts are prohibited or not, notably through the **publication of laws**.⁴

¹ CCHR, ‘Fair Trial Rights and Trial Monitoring Handbook’ (February 2012), page 28, <https://sithi.org/tmp/publication/view/2012-02-13-fair-trial-rights-and-trial-monitoring-handbook> (CCHR’s FTR Handbook).

² Ibid.

³ Amnesty International, “Fair Trial Manual”, (Second edition, 2014), chapter 18, page 138-141, <https://www.amnesty.org/en/documents/pol30/002/2014/en/> (Amnesty International’s Fair Trial Manual).

⁴ CCHR, ‘Fair Trial Rights and Trial Monitoring Handbook’ (February 2012), page 28.

It is also important to highlight that the prohibition against retroactive law applies to acts that constitute criminal offenses both under **national or international law**. This means that even if national criminal law does not criminalize certain acts at the time they were committed but international law does, then these acts can be prosecuted. This is for example the case for genocide, crimes against humanity, war crimes, etc.⁵

2. Legal Framework



2.1. International Law

The retrospective application of criminal law is expressly prohibited under international law, including under the **Universal Declaration of Human Rights** ("UDHR") and the **International Covenant on Civil and Political Rights** ("ICCPR"). It is also enshrined in the **Convention on the Rights of the Child** ("CRC").



Article 11 (2) of the UDHR:

"No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal 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 the penal offence was committed."

Article 15 of the ICCPR:

"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. Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations."

Article 40 (2) (a) of the CRC:

"[...] 2. To this end, and having regard to the relevant provisions of international instruments, States Parties shall, in particular, ensure that:

- (a) *No child shall be alleged as, be accused of, or recognized as having infringed the penal law by reason of acts or omissions that were not prohibited by national or international law at the time they were committed; [...]."*

⁵ Amnesty International Fair Trial Manual, page 138.

2.2. Cambodian Law

The prohibition against retrospective application of criminal law is guaranteed under the **Criminal Code of the Kingdom of Cambodia** ("Criminal Code").

Article 3 of the Criminal Code: "Conduct may give rise to criminal conviction only if it constituted an offence at the time it occurred."

Article 9 of the Criminal Code: "A new provision which abolishes an offense shall be applicable immediately. An act committed before the new provision came into force shall no longer be subject to prosecution. Any ongoing prosecutions shall be terminated."

Article 10 of the Criminal Code: "A new provision which prescribes a lighter penalty shall be applicable immediately. However, final judgments shall be enforced regardless of the severity of the relevant penalties. A new provision which prescribes a heavier penalty shall be applicable only to acts committed after the provision came into force."

3. Importance



The prohibition against retroactive application of criminal law is crucial as it underpins one of the most fundamental principles of criminal justice: **the principle of legality**, which requires that criminal offenses be prescribed by law. This principle is a cornerstone of the **rule of law**.

By providing a framework for the exercise of the judicial power, the prohibition against retroactive application of criminal law protects individuals **against State abuse**, notably **against arbitrary and unlawful prosecution, conviction and punishment**,⁶ and thus ensures the **fairness of the judicial authority** and the **foreseeability of the law**.⁷ By knowing which acts and omissions can make them criminally liable and the penalties they face as well as when such acts or omissions start or stop being criminalized, individuals are able to adapt their behavior accordingly.

Any violations of this prohibition therefore threaten the fairness with which individuals must be treated by the judiciary and can lead to abuses, especially to the unlawful prosecution, conviction and punishment of individuals for acts or omissions that did not constitute criminal offenses at the time they were undertaken.

4. Limitations

Article 15 of the ICCPR, which guarantees the prohibition against retroactive application of criminal law, is in the exhaustive list provided by Article 4 of the ICCPR of rights and principles that cannot be derogated from during a state of emergency.



⁶ Amnesty International's Fair Trial Manual, page 139.

⁷ OSCE, "Legal Digest of International Fair Trial Rights," (2012), pages 185-186, <https://www.osce.org/odihr/94214#:~:text=The%20Legal%20Digest%20of%20International,of%20OSCE%20trial%20monitoring%20operations> (OSCE's Legal Digest of International FTR).



However, international law sets out an exception by providing that any provisions imposing a lighter penalty must benefit offenders. The retroactive application of criminal law is therefore allowed for more lenient criminal law which favor the accused. This means that if criminal laws change after the time the offense was committed but before any final judgment is rendered, then the courts must apply the criminal laws that are the most favorable to the accused.⁸



Similarly, an individual can no longer be prosecuted for an act that constituted a criminal offense at the time it was committed but that was decriminalized before the individual was finally convicted. The United Nations Human Rights Committee (“UNHRC”) has indeed affirmed that Article 15 (1) of the ICCPR provides the retroactive effect of a lighter penalty and that the scope of this article must not be interpreted narrowly. Consequently, this retroactive effect also applies to laws abolishing a penalty for an act that no longer constitutes an offense.⁹



In addition, the prohibition of retroactivity of criminal law only applies to changes in laws impacting the criminalization of a conduct and not to changes in procedural or evidentiary rules that do not affect the nature of the offense.¹⁰

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⁸ Ibid., page 139.

⁹ UNHRC, “Jean-Pierre Cochet v. France: Communication No. 1760/2008”, (UN Doc CCPR/C/100/D/1760/2008, 2010), para. 7.2 to 7.4, <http://hrlibrary.umn.edu/undocs/1760-2008.html>

¹⁰ OSCE’s Legal Digest of International FTR, Section 8.1.3, page 188; Also see UNHRC, “David Nicholas v. Australia: Communication No. 1080/2002”, (UN Doc CCPR/C/80/D/1080/2002, 19 March 2004), para.7.7, http://www.worldcourts.com/hrc/eng/decisions/2004.03.19_Nicholas_v_Australia.htm.

PROHIBITION AGAINST DOUBLE JEOPARDY



September 2022

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About the Fair Trial Rights Project

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The Prohibition Against Double Jeopardy

1. Definition



The prohibition against double jeopardy protects individuals from being prosecuted twice for the same crime.

This prohibition embodies the principle of *ne bis in idem*, which literally translates as “*not twice about the same*” and guarantees any individual the right to remain free from being tried or punished again for an offense for which they have already been finally convicted or acquitted in accordance with the law and the penal procedure of each country.¹

This principle of *ne bis in idem* is closely related to the doctrine of *res judicata*, which literally translates as “*already judged*” and means that a final adjudication by a competent court or body is conclusive. New proceedings involving the same subject matter, the same legal grounds and the same parties cannot be conducted.² The prohibition against double jeopardy therefore applies only when judgments are final, or in other words, when all venues of appeal have been exhausted.



In addition, this prohibition applies to **criminal offenses and not only to the court that adjudicated the case in the first place but also to any other tribunal**. For example, an individual acquitted by a civilian court cannot be tried again for the same offence by a military court or special tribunal.³

2. Legal Framework

2.1. International Law

The prohibition against double jeopardy is expressly protected under the **International Covenant on Civil and Political Rights (“ICCPR”)**, which is directly applicable in Cambodian law through Article 31 of the Cambodian Constitution.

Article 14(7) of the ICCPR: “*No one shall be liable to be tried or punished again for an offence for which he has already been convicted or acquitted in accordance with the law and penal procedure of each country.*”



2.2. Cambodian Law

The prohibition against double jeopardy is also embodied in the **Code of Criminal Procedure of the Kingdom of Cambodia (“CCPC”) and Cambodia Criminal Code (“CCC”)**.

¹ UN Human Rights Committee (“UNHRC”), “General Comment No.32 - Article 14, right to equality before courts and tribunals and to a fair trial,” (UN Doc CCPR/C/GC/32, 23 August 2007), para. 3 and 54, <https://www.refworld.org/docid/478b2b2f2.html>. (UNHRC, General Comment No. 32).

² Victor Barin Chaharbakhsh and Seyed Asgher Jafari, ‘The Principle of Res Judicata in International Law’ Vol 7 Issue 8 Journal of Critical Reviews, 2020.

³ UNHRC, General Comment No.32, para 54.

Article 12 of the CCPC: “*In applying the principle of res judicata, any person who has been acquitted by a court judgement cannot be prosecuted once again for the same act, even if such act is subjected to different legal qualification.*”

Article 23 of the CCC: “*No one may be prosecuted for the same conduct for which he or she has already been tried abroad and who, in the event of conviction, establishes that he or she has already served the penalty or that the penalty has been extinguished by statute of limitation.*”

3. Importance



The prohibition against double jeopardy provides judicial **protection for individuals against State abuse**. It preserves the principle of **res judicata**, which gives finality and integrity to criminal proceedings.⁴ The finality of judgments prevents individuals from living in fear they could face constant threats of persecution and harassment through repeated investigations and prosecutions by the judiciary for the same facts.

This prohibition safeguards the principle of **legal certainty**, which strengthens the judicial system. It also avoids **wasting vital legal resources**⁵ by impeding multiple proceedings by the same or different courts for the same criminal offenses.



It is therefore a principle that is crucial to the **proper administration of justice** and to **avoid miscarriages of justice**.

4. Limitations

The prohibition against double jeopardy can be subjected to a number of limitations, which can vary between international and regional jurisdictions. For the **United Nations Human Rights Committee** (“UNHRC”) which oversees the implementation of the ICCPR, the prohibition does not:

1. Prohibit the retrial of a person convicted in absentia who requests it;
2. Prohibit the retrial of an individual after a higher court overrules a conviction;
3. Prohibit the resumption of a criminal trial if justified by “*exceptional circumstances*”, such as the discovery of new evidence;
4. Guarantee an individual will not be criminally tried with respect to the national jurisdictions of two or more states. States are however encouraged to prevent retrial for the same criminal offense through international conventions⁶ and
5. Protect against other disciplinary measures that do not amount to a criminal sanction for the same offense. The prohibition against double



⁴ OSCE, “Legal digest of International fair trial rights”, (2012), Section 8.4, page 197-198, <https://www.osce.org/odihr/94214#:~:text=The%20Legal%20Digest%20of%20International,of%20OSCE%20trial%20monitoring%20operations>.

⁵ CCHR “Fair Trial Rights in Cambodia Monitoring at the court of Appeal: Annual Report (1 November 2018-31 October 2020”, (October 2020), page 16, [https://www.cchrcambodia.org/admin/media/report/report/english/FTR%20Annual%20Report_ENG%20\(2018-2019\).pdf](https://www.cchrcambodia.org/admin/media/report/report/english/FTR%20Annual%20Report_ENG%20(2018-2019).pdf).

⁶ UNHRC, Comment No. 32, para.57.

jeopardy applies to criminal offenses only,⁷ meaning that it does not apply to administrative or civil proceedings.

In addition, the **Extraordinary Chambers in the Courts of Cambodia (“ECCC”)** have affirmed that the principle of **ne bis in idem** does not prohibit the prosecution of international crimes such as crimes against humanity.⁸

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⁷ UNHRC General Comment No.32, paras. 54 - 57.

⁸ OHCHR, “Annotated Cambodia Code of Criminal Procedure: Annotations to ECCC and Select International Jurisprudence”, OHCHR, Second edition (December 2015), Article 12: Res Judicata p.7 referring to ECCC, TC, “Decision on Ieng Sary’s rule 89 preliminary objections,” (3 November 2011), paras 33 to 36, <https://cambodia.ohchr.org/~cambodiaohchr/sites/default/files/FINAL%20Updated%20Annotated%20Code%20of%20Criminal%20Procedure%20%5BEN%5D%20Master%2002112015.pdf>.

The Rights of Children in conflict with the law



September 2022



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The Rights of Children in Conflict with the Law

1. Definition



A child is defined internationally as a human being **under the age of 18 years old**. In **criminal proceedings**, children accused of an offense are entitled to **all the same fair trial rights as adults**.² However, they also need **special protection³ and care** which takes into account their age, maturity, and intellectual and emotional development.

This translates by the particular necessity for State authorities to:⁴

- *Protect the presumption of innocence of children in conflict with the law throughout the criminal proceedings by refraining from making assumptions of guilt based on their suspicious behavior.* This is important as children's behavior might seem suspicious due to their lack of understanding of the process, immaturity, fear, or other reasons.⁵



- *Inform accused children directly and as soon as possible of the charges and procedural steps against them, or where appropriate, through their parents or legal guardians.*⁶ Providing a document to the child is not sufficient. Authorities must explain the charges, options, and processes to accused children orally to make sure they understand.⁷ The relevant information must also be presented in a **language they can understand** and with **words that are adapted to their age and maturity**, i.e., use more simple words than formal legal jargon.

¹ Article 1 of the Convention on the Right of the Child ("CRC").

² UN Human Rights Committee ("UNHRC"), "General Comment No.32 - Article 14, right to equality before courts and tribunals and to a fair trial," (UN Doc CCPR/C/GC/32, 23 August 2007), para. 42, <https://www.refworld.org/docid/478b2b2f2.html>. (UNHRC, General Comment No. 32).

³ Ibid., para.42.

⁴ Article 40 of the CRC; UNHRC, General Comment No. 32, para.42.

⁵ Committee on the Rights of the Child ("CRC Committee"), "General Comment No.24 (2019) on children's rights in the child justice system (replacing Comment No. 10 (2007)) CRC/C/GC/24, para. 43, <https://www.ohchr.org/sites/default/files/Documents/HRBodies/CRC/GC24/GeneralComment24.pdf>, (CRC Committee, General Comment No. 24).

⁶ CRC Committee, General Comment No. 24, para. 47.

⁷Ibid., para. 48.

- Provide children in conflict with the law with **free and appropriate assistance in the presentation of their defense**. Children must also be provided with **adequate time and facilities to prepare a defense**, and confidentiality of communications with their assistants must be guaranteed to protect their privacy.⁸



- Bring children in conflict with the law before a competent, independent, and impartial authority or judicial body “**without delay**.” This means that the response of the criminal justice system to a criminal offense allegedly committed by a child must be as short as possible and much **faster than that provided for adults**, especially when the child is deprived of their liberty, while respecting their rights.⁹ This is crucial to ensure that the response has a **positive, pedagogical impact** and **prevents the stigmatization** of children in conflict with the law. The **presence of the child's parents or legal guardians** throughout the proceedings is recommended as they can provide **general psychological and emotional support** to the child and contribute to **effective outcomes**. However, judges or competent authorities can limit, restrict or exclude their presence in the proceeding at the request of the child or their legal or other appropriate assistant or because it is not considered to be in the child's best interests. Other genuine caregivers who are not the child's parents or legal guardians should also be allowed to assist children in criminal proceedings if their parents are not available.¹⁰



- Protect the right of children not to be compelled to give testimony or to confess their guilt. Like adults, children must be **protected against torture, cruel, inhuman, or degrading treatment** to obtain their admission or confession.¹¹ As it is easier to convince a child to confess through less violent ways, the term “**compelled**” must be **interpreted more broadly than for adults** and not be limited to physical force or other apparent violations of human rights. It is crucial that children be **assisted by a legal counsel or another appropriate representative when being questioned** and be allowed to request the **presence of their parents during questioning**.



⁸ Ibid., paras.49 to 53.

⁹ Ibid., paras 54 and 55.

¹⁰ Ibid., paras 56 and 57.

¹¹ Article 37 (a) of the CRC.

- Respect the principle of equality of arms by allowing child defendants to call and cross-examine witnesses. States must conduct the proceedings in a manner that allows children to understand and participate, including modifying courtroom procedures and practices according to their age and maturity, if necessary.¹²



- Ensure the privacy of accused children is respected at all stages of the proceedings to avoid harm caused by undue publicity or labeling. Authorities must not release any information that can lead to the identification of children in conflict with the law to prevent their stigmatization, and the possible impact such published information can have on their ability to access education, work, and housing or on their safety. Hearings of children must be held behind closed doors as a general rule and be public as an exception, meaning only in particular and limited cases clearly defined by law. Judgments must be pronounced publicly but in a way that does not reveal their identity.¹³



- Respect accused children's right to be heard¹⁴ directly, and not only through a representative, at all stages of the proceedings¹⁵. This implies providing adequate information to children about the charges, the child justice process, and possible measures imposed on them to enable them to effectively participate in the proceedings.



- Prevent unlawful and arbitrary deprivation of liberty of children at all times and use arrest, detention, or imprisonment of children in conformity with the law and only as a last resort and for the shortest appropriate time.¹⁶ In detention, children must be separated from adults, unless it is considered in their best interests not to do so, in separated facilities for children deprived of their liberty, with adequately trained personnel and operating according to child-friendly policies and practices. This is critical to safeguard their well-being and their future ability to remain free of crime and to reintegrate.¹⁷ Detained children must be able to maintain contact with their family through correspondence and visits, except in exceptional circumstances, and be detained in facilities as close as possible to their family's homes.¹⁸



¹² CRC Committee, General Comment No.24, para. 46.

¹³ Ibid., paras 66 and 67.

¹⁴ Article 12 of the CRC.

¹⁵ CRC Committee, General Comment No.24, paras.44.

¹⁶ Article 37 (c) of the CRC.

¹⁷ CRC Committee, General Comment No.24, para. 92.

¹⁸ Article 37 (3) of the CRC; CRC Committee, General Comment No.24, para 94.

- **Prohibit capital punishment and life imprisonment** without the possibility of release for children¹⁹ as they are against the aims of promoting the reintegration of the child into society pursued by child justice.



States are also strongly encouraged to **establish a comprehensive child justice system**, with **laws, procedures, authorities, and institutions specifically applicable to children** to ensure that they are treated in a manner corresponding to their age.²⁰ Specialized units are required within the police, the judiciary, the court system, and the prosecutor's office, as well as specialized defenders and representatives who can provide adequate legal or other assistance to children in conflict with the law.²¹ Child courts, either as separate units in their criminal justice system or as part of existing courts, should be established, or specialized judges for dealing with child justice cases should at least be appointed.²²

States must also set a **minimum age of criminal responsibility** that takes into account the physical and mental immaturity of children²³ and under which they cannot be held criminally responsible by the criminal justice system. If there is any doubt as to the age of an accused individual, they should be granted the benefit of the doubt and benefit from the child justice system.²⁴

Where possible and appropriate, States must **prioritize measures** that **do not require resorting to criminal proceedings against children** who committed a criminal offense (i.e., care, guidance, supervision orders, counseling, probation). These measures must be appropriate to the children's well-being and proportionate both to their circumstances and the offense committed.²⁵

To ensure the **proper administration of child justice, all professionals working with children or involved in child justice** (e.g., police officers, prosecutors, judges, probation officers) must **undergo systematic and ongoing training** about the child and their physical, psychological, mental, and social development and about the special needs of children in the most vulnerable situations.²⁶

2. Legal Framework

2.1. International Law

The International **Covenant on Civil and Political Rights (“ICCPR”)** and the **Convention on the Rights of the Child (“CRC”)** set out specific provisions for the treatment of children in criminal justice proceedings. These international instruments are directly applicable in Cambodian law through Article 31 of the Cambodian Constitution:

¹⁹ Article 37 (a) of the CRC.

²⁰ Article 40(3) of the CRC; UNHRC, General Comment No. 32, para.43.

²¹ CRC Committee, General Comment No.24, para. 106.

²²CRC Committee, General Comment No.24, para. 107; UNHRC, General Comment No. 32, para.92 to 95.

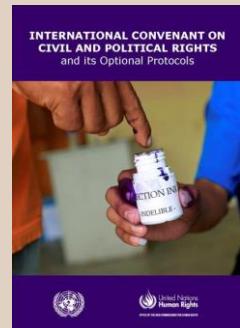
²³ Article 40 (a) of CRC; UNHRC, General Comment No. 32, para. 43.

²⁴ Amnesty International’s Fair Trial Rights Manual, Second Edition, (2014), p. 192, <https://www.amnesty.org/en/documents/pol30/002/2014/en/>.

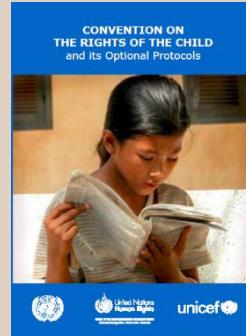
²⁵ Article 40 (b) of the CRC; UNHRC, General Comment No. 32, para. 44.

²⁶ CRC Committee, General Comment No.24, para. 112.

- **Article 14 (4) of the ICCPR:** “*In the cases of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.*”
- **Article 24 (1) of the ICCPR:** “*1. Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State [...].*”



- **Article 1 of the CRC:** “[...], a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.”
- **Article 3 of the CRC:** “*1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.*



- 2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures. [...]*
- **Article 12 (2) of the CRC:** “[...] the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.”
 - **Article 37 of the CRC:** “*States Parties shall ensure that:*

(a) *No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age;*

(b) *No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time;*

(c) *Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances;*

(d) Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action."

- **Article 40 of the CRC:** "1. States parties will recognize the right of every child accused of a criminal offense to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and takes into account the child's age and the desirability of promoting the child's reintegration and the child assuming a constructive role in society.

2. To this end, and having regard to the relevant provisions of international instruments, States Parties shall, in particular, ensure that:

(a) No child shall be alleged as, be accused of, or recognized as having infringed the penal law by reason of acts or omissions that were not prohibited by national or international law at the time they were committed;

(b) Every child alleged as or accused of having infringed the penal law has at least the following guarantees:

(i) To be presumed innocent until proven guilty according to law;

(ii) To be informed promptly and directly of the charges against him or her, and, if appropriate, through his or her parents or legal guardians, and to have legal or other appropriate assistance in the preparation and presentation of his or her defence;

(iii) To have the matter determined without delay by a competent, independent and impartial authority or judicial body in a fair hearing according to law, in the presence of legal or other appropriate assistance and, unless it is considered not to be in the best interest of the child, in particular, taking into account his or her age or situation, his or her parents or legal guardians;

(iv) Not to be compelled to give testimony or to confess guilt; to examine or have examined adverse witnesses and to obtain the participation and examination of witnesses on his or her behalf under conditions of equality;

(v) If considered to have infringed the penal law, to have this decision and any measures imposed in consequence thereof reviewed by a higher competent, independent and impartial authority or judicial body according to law;

(vi) To have the free assistance of an interpreter if the child cannot understand or speak the language used;

(vii) To have his or her privacy fully respected at all stages of the proceedings.

3. States Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law, and, in particular:

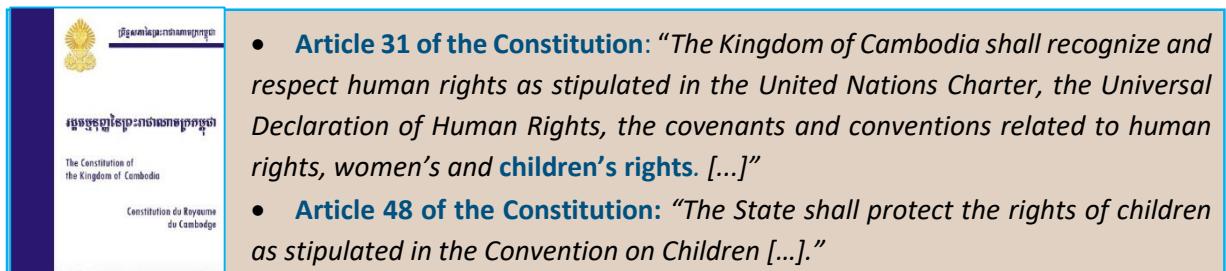
(a) The establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law;

(b) Whenever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected.

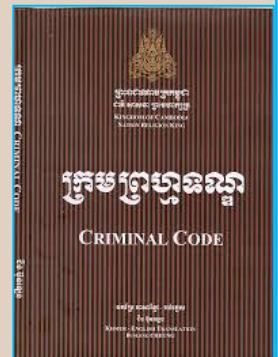
4. A variety of dispositions, such as care, guidance and supervision orders; counselling; probation; foster care; education and vocational training programmes and other alternatives to institutional care shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence.”

2.2 Cambodian Law

The **Cambodian Constitution** expressly protects children’s rights. The **Criminal Code of Cambodia** and **Code of Criminal Procedure of Cambodia (“CCPC”)** contain several provisions related to children in conflict with the law. Finally, the **Law on Juvenile Justice** adopted in 2016 sets out specific rules for the treatment of children in conflict with the law.



- **Article 39 of the Criminal Code:** “Minors who committed offenses shall be subject to supervision, education, protection, and assistance. However, a court may impose a criminal penalty on a minor of fourteen years and over if warranted by the circumstances of the offense or the character of the minor.”
- **Article 40 of the Criminal Code:** “Supervisory, educational, protective and assistance measures shall include: returning the minor to his or her parents, guardian, custodian, or to another person who is trustworthy; committing the minor to a social service agency which cares for minors; committing the minor to a private organization that is qualified to receive minors; committing the minor to a specialized hospital or institution; placing the minor under judicial protection.”
- **Article 100 of the CCPC:** “When a detained person is a minor, the judicial police officer shall use all means to notify the parents, legal representatives or any person who is responsible for that minor.”
- **Articles 212 – 214 of the CCPC** – Specific rules regarding the detention of minors.
- **Law on Juvenile Justice** – Its provisions aim to safeguard the rights and best interests of minors who have committed criminal offenses.



3. Importance

Children are one of the most **vulnerable** segments of the population due to their age and development. Their **best interests and well-being** must be a primary consideration in **all actions**, including those taken by public or private government institutions and courts of law.²⁷

It is even more essential to provide special protection to children confronted with the criminal justice system to **assist them throughout the traumatic experience** that legal proceedings can be, **protect their human rights, and avoid their stigmatization**. **A child justice system with rules and measures adequately treating children in conflict with the law**, taking into account their **age, development, and maturity** is therefore critical. This ensures that the lives of children **who committed offenses in conflict with the law** are not permanently impacted by acts committed at an age when they may have been too young to have understood or have been in control of their actions, or perhaps by acts they may not have committed at all. Child-friendly justice is critical to promoting their **sense of dignity and worth, reinforcing their respect for the human rights and freedoms of others**, and **ensuring their successful reintegration into society in which they can assume a constructive role in the future**.²⁸

If children in conflict with the law do not benefit from special protections of their fair trial rights in adequation with their age and maturity, they can be stigmatized and suffer the consequences of criminal acts committed at a young age for the rest of their lives, thus preventing their successful reintegration in society.

4. Limitations

The child justice system **should apply to all children at or above the minimum age of criminal responsibility but under 18 years old at the time of the alleged offense**. International human rights standards call on States to not limit the applicability of their child justice legislation and procedures to children under the age of 16 years old or lower, and to not exceptionally allow the criminal justice system to treat 16 or 17-year-old children in conflict with the law as adults, in order to prevent discrimination against them. Moreover, the application of the child justice system to persons aged 18 and older is accepted as a general rule or exceptionally.²⁹



²⁷ Article 3 of the CRC.

²⁸ Article 40 of the CRC.

²⁹ CRC Committee, General Comment No.24, para.32.