

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



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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.

CCHR’s logo shows a white bird flying out of a circle of blue sky – this symbolizes Cambodia’s bid for freedom.

The Cambodian Human Rights Portal <http://www.sithi.org> is the 2011 winner of the Information Society Innovation Fund Award in the category of Rights and Freedoms and the 2013 winner of the Communication for Social Change Award awarded by the Centre for Communication and Social Change at the University of Queensland in Brisbane, Australia.

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.

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Queries and Feedback

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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/pol30/002/2014/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/viewerng/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



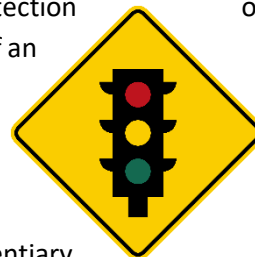
The right to adequate time and facilities to prepare a defense and the right to speak with a lawyer are critical to guarantee a fair trial and the application of the fundamental **principle of equality of arms**, which gives both the prosecution and the defense an equal opportunity to prepare and present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