

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



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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.

CCHR’s Cambodian Human Rights Portal, accessible at <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.

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

About the Fair Trial Rights Project

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



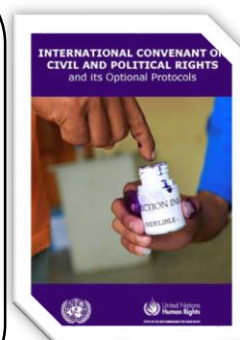
As a general rule, and in order to safeguard their right to liberty, individuals suspected or charged with a criminal offense should not be deprived of their liberty pending trial.³ However, in certain prescribed circumstances, detention of suspects or charged individuals can be lawful (*See limitations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

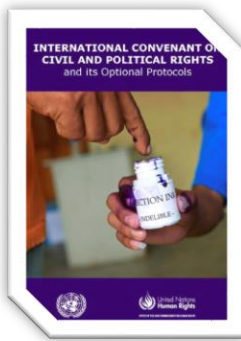
²⁰ Amnesty International's Fair Trial Manual, page 145.

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.