



International Commission of Jurists

TRIAL OBSERVATION MANUAL

PREFACE

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This manual which was prepared by the International Commission of Jurists (ICJ) aims to provide a practical tool for ICJ trial observers and other non-governmental organisations engaged in trial observation.

This manual was developed by *Bárbara Oliveira* and *Linda Besharaty-Movaed* and has drawn from the experience of already-existing resources on trial observation. The following sources were of particular use to the development of this manual:

- ◆ David Weissbrodt, *International Trial Observers*, Stanford Journal of International Law, 1982
- ◆ *Fair Trial Manual*, Amnesty International, 1998
- ◆ *Manual for Trial Observation*, Norwegian Institute of Human Rights, 1996
- ◆ *Trial Observation and Monitoring the Administration of Justice, Training Manual on Human Rights Monitoring*, Office of the High Commissioner for Human Rights, 2001
- ◆ *What is Fair Trial? A Practical Guide to Legal Standards and Practice*, Lawyer's Committee for Human Rights, 2000

We welcome any suggestions or comments on this manual. Please send your comments or suggestions to the International Commission of Jurists, P.O.Box 216, 81A Avenue de Chatelaine, CH-1219, Geneva, Switzerland, Fax: (4122) 979 3801, getinvolved@icj.org.

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INTRODUCTION TO THE MANUAL

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W WHY WAS THIS MANUAL DEVELOPED?

The aim of this manual is, above all, to provide a practical tool to ICJ trial observers.

The ICJ saw the necessity of developing a new manual on trial observation that would specifically address instances where the independence or impartiality of judges and lawyers is threatened or fair trial standards are not guaranteed.

This manual is based upon basic principles and guidelines identified by the ICJ and other organisations and individuals who have experience in trial observations.

T TO WHOM IS THIS MANUAL ADDRESSED?

This manual is primarily targeted to ICJ trial observers. However, the manual can also be used as a resource tool for other individuals and organisations undertaking trial observations as it incorporates generally recognised guidelines for trial observation.

H HOW TO USE THIS MANUAL

It is advisable that you read this manual thoroughly before undertaking the trial observation. Besides providing practical assistance the manual gives you a general view of the position of the ICJ and the ICJ's basic expectations for trial observations.

It is impossible to develop a set of fixed guidelines for each and every trial observation; each observation has to be tailored to the specific trial and the particular situation encountered by the observer. Consequently, your discretion and experience is vital for a successful trial observation.

The ICJ encourages you to try, as much as possible, to take into consideration these guidelines when making your decisions on the ground.

S STRUCTURE OF THIS MANUAL

The manual has 5 different main sections:

◆ Introduction to the Manual: lays the foundation and describes basic concepts applicable to trial observation.

- ◆ Before the Trial Observation: includes issues such as briefing, travel arrangements, etc.
- ◆ During the Trial Observation: includes issues as meetings, attendance in the courtroom, communications with the ICJ, etc.
- ◆ After the Trial Observation: provides guidelines on debriefing, report and follow up.
- ◆ International Standards: provides an easy reference to basic human rights standards applicable to fair trial and their basic interpretation under international law.

The first three sections - Before, During and After the Trial Observation - encompass the main body of the operational guidelines. These sections were developed following a timeline of possible situations and issues that could arise during the trial observation mission. However, certain issues might require more attention at different stages of the trial observation.

WHAT IS TRIAL OBSERVATION?

Human rights monitoring can broadly be described as the active collection, verification and immediate use of information to address human rights problems. Human rights monitoring includes gathering information about incidents, observing events (elections, trials, demonstrations, etc), visiting sites such as place of detention, refugee camps and others. It can also be used to evaluate whether international human rights standards or norms are met in domestic settings.

Trial observation is a type of human rights monitoring which is widely used. It is based on sending persons – observers – to a certain country to attend trials and conduct interviews in order to prepare a report for the sending organisation based on the fairness of proceedings. Trial observation may be part of a broad analysis of the administration of justice, including the actual functioning, qualifications and training of judges, court clerks, prosecutors, lawyers, other court personnel, police, prison officials and other law enforcement personnel.

Others organisations are also engaged in trial observations, such as the various agencies of the United Nations, Amnesty International, the Norwegian Institute for Human Rights, Lawyers Committee for Human Rights, International Helsinki Federation and the American Bar Association.

OBJECTIVES OF TRIAL OBSERVATION

The generally recognised objectives of a trial observation are to:

- ◆ Encourage the tribunal to provide a fair trial. The presence of an observer at a trial indicates that the tribunal is under scrutiny and, in this way, may positively influence the tribunal's conduct.
- ◆ Bring international attention to the proceedings.
- ◆ Provide moral support and/or international assistance to the defendant. The observer's presence often gives defendants a sense of renewed confidence.
- ◆ Provide the ICJ with first hand information necessary to encourage the government to provide fair trials.

- ◆ Prepare an independent, impartial and objective report on the fairness of the trial.

Conflict of Objectives

There is a possibility of conflicting objectives. Conflicts may arise for example regarding the objective of providing moral support and/or international assistance to the defendant and the objective of conducting an impartial observation.

You should use your own judgement when faced with conflicting objectives. However it is important to remember that your main role as a trial observer is to carry out the ICJ mandate and objectives.

Some trial observations may include additional objectives in order to fit the particular circumstance.

T TYPES OF TRIALS TO BE OBSERVED

Undertaking trial observations is one of the core activities of the ICJ's Centre for the Independence of Judges and Lawyers (CIJL).

The ICJ primarily observes trials or legal proceedings in respect of which a judge or lawyer is under prosecution or faces disciplinary sanctions on charges arising out of activities associated with the legitimate exercise of professional duties.

To illustrate, in 2001, the ICJ sent an observer to Gibraltar to observe the proceedings against the Chief Justice. The criminal charges were based on a violation of the Motor Vehicle Test Regulations and there were allegations that the trial could be politically motivated.

Early in 2002, the ICJ sent trial observer to observe disciplinary proceedings undertaken by the Judicial Service Commission against judges of the Malawi High Court. The ICJ was concerned that a debate in Parliament on the removal of the judges violated the principle of separation of powers and would negatively impact the disciplinary proceedings.

The ICJ may also observe criminal trials (including trials by special or military courts or tribunals) where there are reasons to believe that the judiciary may not be independent or impartial.

Occasionally, the ICJ may monitor certain civil proceedings. These will generally be a defamation suit brought against judges and/or lawyer by government bodies.

It is essential to know exactly what type of proceedings you will be observing, as differences may exist regarding the application of certain fair trial guarantees.

See Legal Standards for Fair Trial - chapter 5 - for information on applicable standards

The ICJ will not necessarily send an observer to every proceeding that falls under these categories. Others factors, such as the significance of the trial itself, the representative nature of the trial, the existence of structural irregularities, the possible negative effects of a trial observation and the ICJ's priorities, amongst others, play a role in the decision to send an observer.

T

TRIAL OBSERVERS

What is the profile of an ICJ trial observer?

- ◆ legal background (Common and/or Civil Law)
- ◆ experience as practising judge or lawyer
- ◆ experience in conducting fact finding missions and trial observations
- ◆ knowledge of legal system of country where trial observation will be held, including the structure and functioning of the judiciary
- ◆ preferably, knowledge of the language of the country to be visited
- ◆ human rights knowledge and experience, mainly with respect to the right to fair trial
- ◆ ability to work in a team
- ◆ sound judgement
- ◆ impartiality and objectivity
- ◆ promptness with deadlines

BEFORE THE TRIAL OBSERVATION



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BEFORE THE TRIAL OBSERVATION

BEFORE THE TRIAL OBSERVATION

The successful realisation of a trial observation is directly dependent on the preparation that goes into it.

This section provides the observer with information and guidelines on the steps that need to be taken in an ICJ trial observation.

Certain trial observations might require other arrangements that are not included in this section. In these cases, the ICJ will advise the observer on any additional steps to be taken.

BRIEFING

The ICJ will provide the observer with a Trial Observation Briefing Kit. Where possible a personal briefing will be arranged with relevant ICJ legal staff.

The rationale behind providing a Briefing Kit is to clarify the terms of reference of the trial observation and share with the observer all relevant legal and factual information pertaining to the trial to be observed.

The Briefing Kit will generally contain:

- ◆ Copy of the Trial Observation Manual
- ◆ Description of the observer's mandate
- ◆ Information on the trial to be observed
- ◆ Background information on the human rights situation in the country
- ◆ Guidelines on the mission's expenses and accounts
- ◆ Contact information of defence counsel and any other person or organisation with which the ICJ has relations
- ◆ Information on ICJ's previous missions in the country where the trial will take place (for example, when a trial observation is a follow up to previous fact-finding missions or trial observation)
- ◆ List of binding international instruments, principles and guidelines relevant to the case (extracts of important international standards will be annexed)
- ◆ Copies of relevant national laws (for example, criminal procedure codes/laws, laws establishing the judiciary, etc)
- ◆ *Ordre de Mission*
- ◆ Any other relevant documents

All efforts will be made to fully brief the observer and to provide him/her with as much relevant information as possible. However, short notice might prevent full briefing.

PRIOR RESEARCH

The observer should be informed of the history, politics, law and human rights conditions of the country where the trial observation is to be held. It may be necessary for the trial observer to undertake further research to complement the information in the Briefing Kit.

The amount of research needed depends on the particular situation. Irrespective of the observer's knowledge, it is always necessary to undertake a detailed study of the information contained in the Briefing Kit in an attempt to ensure that the trial observation is both as objective and as comprehensive as possible. The observer should make a preliminary checklist of key concerns and points to be covered in the final report (see Chapter 4 - After Trial Observation).

Remember!

The trial observation usually consists of a mission of a few days, making it difficult to undertake detailed research or preparation outside the courtroom while on mission! Being well prepared before going on mission will help you to accomplish a successful trial observation.

ORDRE DE MISSION

The *Ordre de Mission* is a formal authorisation issued by the ICJ stating the purpose of the mission and presenting the observer as the ICJ representative to the trial observation. It is comparable to a letter of credentials. The observer will receive several copies of the *Ordre de Mission*.

The *Ordre de Mission* is designed primarily to encourage the host government to co-operate with the mission rather than to outline the ICJ's specific needs. The mandate of the observer is detailed in the 'Description of Observer's Mandate' contained in the trial observation briefing kit.

The *Ordre de Mission* is also of importance for obtaining a visa and is usually attached to the visa application form.

TRAVEL ARRANGEMENTS

The general rule is that the ICJ is responsible for organising the mission's practical aspects (flight reservation, accommodation, etc), but in some situations it may be easier for the observer to take care of certain arrangements. For example, if the observer has already worked or lived in the country where s/he will undertake the trial observation, s/he would be likely to know of possible accommodation. In such situations, the observer would probably be requested to communicate this and other relevant logistic information to the ICJ.

VISA

The trial observer should contact the embassy or consulate of the country where s/he will be undertaking the mission to determine whether there are any visa requirements. The observer should then inform the ICJ of the institutional support needed in order to obtain the visa. As a general rule, the observer should not enter the country on a tourist visa. The type of visa required varies from country to country. Some countries issue business visas to trial observers. Failure to comply with immigration requirements may result in deportation.

VACCINATIONS

It is also important to ensure that all vaccinations are up to date when travelling to a developing country. The observer should consult with his/her doctor.

In certain countries, mosquito protection will often be essential because of the existence of diseases such as malaria.

ACCOMMODATION

The observer should, as a general rule, not stay in the residence or in the same hotel as the defence or the prosecutor to prevent any inference of impartiality.

The ideal place of accommodation should preferably be reasonably prestigious and near the courtroom.

INTERPRETERS

An observer is usually chosen by the ICJ, among other things, for his/her command of the local language used at trial.

Where the observer does not have a good command of the local language, s/he will need an interpreter during the mission.

Interpretation services should preferably be arranged prior to the observer's departure. The ICJ is, as a general rule, responsible for arranging interpretation services.

The interpreter should be a professional interpreter or a member or staff of a reliable organisation which is known to the ICJ. The interpreter should always have some legal knowledge and should also be trustworthy and independent.

The translation during the mission will often be simultaneous translation *sotto voce* (the so called "whispering interpretation").

Reasonable Understanding vs. Good Command

It is necessary to have a very good command of the local language in order to be able to undertake the trial observation without an interpreter. A reasonable understanding of the language will not be sufficient to carry out a proper trial observation.

If you only have a reasonable understanding of the local language, please inform the ICJ.

SECURITY RISKS

In some countries, there may be security risks for human rights defenders, including trial observers.

Though the ICJ cannot warrant the safety of the trial observer, the ICJ will always undertake a security risk assessment prior to the trial observation. This risk assessment will invariably be material to the preparation and conduct of the trial observation.

The risk assessment might recommend measures to improve the observer's security. These could include, for example, the establishment of a list of emergency numbers containing the telephone number of the observer while on mission, numbers of observer's relatives and numbers of ICJ staff including contact numbers during evenings and weekends. If necessary and when feasible the observer will be provided with a cellular phone during the mission. Another possible measure is the establishment of a system of daily communication between the observer and the ICJ.

If the situation so requires, the ICJ may send two observers, instead of one, or ensure that the observer is accompanied by a local lawyer or a staff of a human rights organisation.

The observer will be advised by the ICJ as to the appropriate security measures to be taken. If the risks are not reasonably manageable, it is unlikely that the ICJ will send an observer.

The ICJ will provide as much assistance as possible but that the overall responsibility for the trial observer's security lies with the trial observer him/herself.

INFORMING THE AUTHORITIES

Organisations sending trial observers, including the ICJ, have generally moved away from requesting permission to send an observer to simply notifying the authorities that an observer will be attending a certain trial subject to compliance with any visas requirements. There is no need to wait for permission to enter the country in question since the trial will generally be public and government silence after a reasonable lapse of time is taken as assent.

Certain cases, however, might require formal permission, as for example trials not being conducted in open court, certain trials of juveniles, certain cases before military tribunals or certain disciplinary hearings.

The ICJ's decision as to whether to notify the government or formally request permission is guided by the need to ensure that the observer will in fact be allowed to enter the courtroom during proceedings.

It is also standard practice to inform other appropriate governmental bodies, such as the Ministry of Justice, to obtain the co-operation from relevant bodies.

In addition, the trial observer should notify his/her own Diplomatic mission in the country where the trial observation will be held and indicate at which hotel s/he will be staying.

INFORMING THE MEDIA?

Informing the media, through press releases or public statements, is at the discretion of the ICJ. For example, if there are risks to the safety of the observer, the ICJ might choose to issue a press release in order to bring international attention to the matter and put pressure on the government to guarantee the observer's security.

The ICJ always issues a press release upon completion of mission and the trial observation's report.

DURING THE TRIAL OBSERVATION



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DURING THE TRIAL OBSERVATION

DURING THE TRIAL OBSERVATION

This section provides the observer with some guidelines on certain issues and circumstances that could arise during the trial observation.

REFUSAL AND DIFFICULTY IN ENTERING THE COUNTRY

The fact that the observer theoretically has the right to enter the country where the trial will be held, by having a visa or not needing one, does not necessarily mean that s/he will actually be allowed to enter the country. There have been cases where immigration officers prevented trial observers into the country.

Where there are concerns about observer's access to the country, the ICJ can arrange to have a person to greet the observer at the airport. The ICJ is responsible for identifying this person and requesting his/her assistance. S/he could be a prominent lawyer, a member of an ICJ section, affiliated organisation or representative of the embassy of the trial observer's home country, preferably someone with good reputation who could influence immigration personnel to allow the observer to enter the country.

Some trial observers have even been detained for several hours in the airport or detained until the end of the trial and only then allowed to enter the country. In many cases observers have been questioned on the purpose of their visit.

In the case of detention at the airport or refusal to allow the observer to enter the country, the person greeting the observer can be useful in informing the ICJ of the situation. The ICJ would then be able to respond immediately and make all efforts to ensure the observer's entry.

If questioned as to the purpose of the visit, the observer should indicate his/her terms of reference and avoid making any additional comments.

MEEETINGS

Prior to arrival in the country where the trial will be observed, the observer should have a good idea of whom to contact and interview.

The persons whom the observer should meet vary according to the circumstances, but attention should be paid to maintaining balance and impartiality at all times.

Trial observers differ greatly in the extent to which they seek contacts with officials and undertake investigations beyond the trial itself.

As a general rule, the observer should meet the defence lawyer, the prosecutor and the judge. If the case is of great importance, the Minister of Justice, Attorney General or Prosecutor Director could also be a good source of information.

Some meetings, such as the meeting with defence lawyer and the presiding judge, should if possible, be arranged prior to the observer's departure to the country where the trial observation is to be held. Other meetings are more easily arranged once the observer has arrived and is aware of the trial schedule.

The observer's first obligation is to observe the trial, but during recess and on other occasions the observer should contact government officials and other relevant individuals outside the courtroom. These contacts can considerably increase the observer's impact on the trial proceedings.

The observer should endeavour to arrange meetings with relevant people. A list of contact persons is provided in the Briefing Kit. The contacts and meetings arranged by the observer do not need to be restricted to the persons included in the list provided by the ICJ. In many cases the observer becomes aware of additional contact persons once the trial observation has started and through information s/he has obtained from initial meetings.

The trial observer should be aware that s/he might face with different responses from the persons that s/he will meet. The response may vary, for example, from frank and open co-operation to disruptive and clearly misleading information. The observer has to be prepared for different responses and be able to handle the situation with care aiming at obtaining more reliable information as much as possible.

Attention!

When meeting with government officials be careful not to step beyond the boundaries of the mission for which you were briefed. For example, do not purport to represent the ICJ in a wider sense than of a trial observer.

MEETING WITH DEFENCE OR PLAINTIFF'S COUNSEL

Undoubtedly the defence counsel is generally the main source of information and is usually very helpful in providing assistance and information. This co-operation is often related to the defence's own interest in the outcome of the trial observation.

The trial observer should attempt to hold a meeting with defence counsel as soon as s/he arrives.

The defence counsel is usually the person who can provide the observer with copies of important documents, including the court file (or dossier).

The Court File

The importance of the court file (dossier) might differ depending upon whether the trial is a trial in a civil or common law system.

In a civil law system, the file created by the examining judge is ordinarily the central focus of the trial.

In common law countries, there may have been a preliminary hearing which will reveal a substantial portion of the prosecution's case and may shape the cross-examination of witnesses at the trial.

If defence counsel has been denied access to the court file, the observer can still use his/her influence as a representative of an international organisation to persuade the prosecuting authority or court clerk to allow access to the court file.

Meeting with the Accused

Often during a trial observation, it may not be necessary to meet with the accused (or defendant) as his/her legal representative might provide the information needed.

However, as the ICJ mainly sends observers to proceedings where the accused is a judge or a lawyer, it might be of great benefit to meet with the accused. Having legal training, the accused can also provide important information on any procedural irregularities.

It is a good idea to meet both the defence lawyer and the accused simultaneously as long as there are no reasons to believe that the lawyer is not fully representing his/her client's interests.

MEETING WITH PRESIDING JUDGE

Meeting with the presiding judge is significant for the overall success of the trial observation.

This meeting can be greatly useful in facilitating the observer's entry and appropriate location in the courtroom at the time of the hearing. The observer should introduce him/herself and inform the judge of his/her role (a copy of the *Ordre de Mission* might be handed to the presiding judge). At this time, the observer can also take the opportunity to arrange for specific seating and to indicate that s/he will be taking notes while in the courtroom. At this time the observer can also request permission to make use of whispering interpretation.

Even if the presiding judge is averse to a meeting or indeed refuses to meet the observer, the very fact that s/he is aware of the trial observer's request may be sufficient to impact on his/her conduct during the trial.

SECURITY RISKS

The nature and amount of risk as reflected in the ICJ's risk assessment can change during the trial observation mission and it is the observer who is in the best position to assess any changes. The observer should therefore maintain the ICJ informed of any perceived or real risks so as to guarantee a proper response in an emergency situation.

It must be reminded that the ICJ will provide as much assistance as possible, before and during the mission, but that overall responsibility for the trial observer's security lies with the trial observer him/herself.

Impact of Observer's Behavior on Security Risks

The conduct of the observer can, to a certain extent, impact on security risks during the trial observation mission. In order to minimise risks you should consistently demonstrate your impartiality and make it clear that your role is solely to observe.

ATTENDANCE IN THE COURTROOM

The observer's role during the hearing appears straightforward. However it is useful to keep a few guidelines in mind in order to guarantee respect for the principle of impartiality and ensure maximum effectiveness of the observation.

SEATING IN THE COURTROOM

Each courtroom has a different seating arrangement making it difficult to give precise directions as to where the observer should sit.

The two main considerations when choosing a seat in the courtroom are to ensure the observer's impartiality and optimise the impact of his/her presence.

The need to be impartial makes it unadvisable for the observer to sit with either the defence or the prosecution.

It is also not advisable to sit in the public gallery hall as the impact of the observer's presence would not be maximised. In addition, seating in the public gallery generally makes it difficult to hear and see the proceedings in a proper manner.

A possible seating location would be with disinterested local attorneys. This would demonstrate the observer's prestige and at the same time would avoid identification of the observer with any of the parties. Another possibility is to request a special seat in the courtroom. Such a request can possibly be made to the to the presiding judge or Ministry of Justice.

INTRODUCTION OF THE OBSERVER IN COURT

The introduction of the observer publicly in court can be an advantage in many aspects as it can help to ensure the impact of the observer's presence and bring public awareness to his/her presence. Whether the observer is to be introduced or not is within the observer's discretion. But it is not advisable to introduce the observer if s/he will not be attending the entire trial, as his/her absence would be noticeable if s/he leaves early.

You should try to be introduced by a neutral party in order to guarantee your impartiality. It is not advisable to be introduced by either the defence lawyer or prosecution.

TAKING NOTES

It is important that the observer take extensive notes while observing the trial. This indicates that close attention is being paid to the trial and that the judge and the prosecutor's conduct are under scrutiny. It also means that a record is being kept which will be used to compile the final report on the fairness of the proceedings.

But it first has to be ascertained whether the observer is allowed to take notes during the proceedings. In some countries, persons other than the media who are not parties to the proceedings are prohibited from taking notes. In this situation, the observer could be prevented from taking notes during the proceedings or any notes that s/he has taken could be confiscated at the end of the hearing.

Permission to Take Notes

If note-taking is generally prohibited, you should try to obtain permission for an exception to the rule. The meeting with the presiding judge, as indicated above, is a good opportunity for you to make this request.

In some circumstances, there might be a danger that notes could be subject to seizure or surreptitious review by the police. In this situation, observers should take very sketchy notes and begin preparing their reports only after departure. Confiscation of notes on the trial observation as well as notes taken in meetings outside the courtroom could result in exposing confidential information, including the name of informers and interviewees, possibly putting them at risk.

C COMMUNICATING WITH THE ICJ

During the course of the trial observation, the observer may need to consult with the ICJ on certain policy issues or maintain the ICJ informed of an urgent matter requiring the ICJ's prompt reaction. Thus, it is very important to establish the means of communication between the observer and the ICJ secretariat beforehand

The ICJ will establish guidelines on communications to be included in the Briefing Kit. The observer should be mindful of the risks of unintentionally leaking information.

P PUBLIC STATEMENTS

As a general rule it is the role of the ICJ Secretariat to make public statements. The observer should not make any public statements on the substance of the trial observation while in the country where the trial is being held. This principle is very important as public statements may jeopardise the mission, the appearance of neutrality or even the safety of the observer or the people s/he has met.

If there is an urgent need to make a public statement on the proceedings, the observer should contact the ICJ and obtain the ICJ's directions on how to proceed.

The observer should, however, be free to approach the media in order to inform them of his/her presence and the purpose of the mission. S/he should also be prepared to explain why comments on the substance of the observations cannot be made.

At the end of the mission the ICJ always issues a public statement or press release. For this reason, it is important that the observer submit his/her report promptly to the ICJ as a delay in issuing a press release would lessen the overall impact of the trial observation.

In some circumstances the trial observer might be requested to give public address, lectures or talks subsequent to the trial observation. The observer should keep in mind the guidelines stressed above and should feel free to accept the invitation. The ICJ only requests the trial observer to send a copy of the paper to the ICJ Secretariat.

AFTER THE TRIAL OBSERVATION



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AFTER THE TRIAL OBSERVATION

AFTER THE TRIAL OBSERVATION

D DEBRIEFING

Similar to the briefing, the ICJ will make all attempts to hold a personal debriefing session with the trial observer.

The purpose of the debriefing is to give the trial observer the opportunity to share his/her experiences and views while on mission for the ICJ. Experiences could range from the observer's attempts to identify contacts and organise meetings, to the co-operation (or lack thereof) from government officials, judiciary and the prosecution, security issues and any other practical problems faced by the observer during the trial observation.

The debriefing is a good opportunity for the ICJ to learn of the difficulties faced by the observer and, at the same time, an opportunity for the observer to reflect upon his/her conduct and approach during the trial observation.

R REPORT

The production of a report on the trial observer's findings is, in essence, the goal of the trial observation.

The report will be the ICJ's main resource for any further action that would need to be taken in an attempt to redress problems identified in the trial observation.

The report should be submitted promptly as a delay will negatively impact the effectiveness of the trial observation. The report must be submitted to the ICJ while the government is still sensitive to authoritative, independent criticism and public opinion.

The ICJ will agree with the trial observer on a date for the delivery of the report.

Possibility of Appeal

You do not have to wait for an appeal to be lodged or heard before writing the report of the trial you observed. As the report is based on findings on the fairness of the proceedings, it can be a useful source for identifying possible grounds for appeal.

However, the promptness of the report should not jeopardise the security of the observer and the security of the information collected. Thus, when there are major security risks, it is advisable not to start writing the report while the observer is still present in the country where the trial was held.

The report should remain confidential until the ICJ decides otherwise.

The ICJ has identified two main subjects that should be covered in the report: the substance of the trial observation, and practical issues related to the trial observation.

The report should also include an annex with copies of relevant documents.

The following list indicates the topics and issues that should generally be addressed in reports of trial observations organised by the ICJ. The right column of the tables below breaks down a list of issues that should be covered under each section of the report.

Part I: Report on the Substance of the Trial Observation

| | |
|--|--|
| Background Information | <ul style="list-style-type: none"> ◆ Brief description of the socio-political conditions of the country (information other than contained in the Briefing Kit) |
| Information about the Accused/Defendant | <ul style="list-style-type: none"> ◆ Relevant background information on the accused, including political affiliation, professional experience, etc |
| Charges and Indictment (grounds for disciplinary case) | <ul style="list-style-type: none"> ◆ Nature of the charges and indictment ◆ Evaluation as to whether the charges were clear and unambiguous and in a language that the accused could understand ◆ Legal basis for the case against the accused/defendant |
| Applicable Laws, Decrees or Regulations | <ul style="list-style-type: none"> ◆ Brief review of the applicable law, including relevant national and international laws (not included in the Briefing Kit) ◆ Copies to be included in Annex |
| Role of the Prosecution and Defence | <ul style="list-style-type: none"> ◆ The name and background of the prosecutor and defence counsel and the criteria for their selection ◆ Evaluation of the role of the prosecution and defence, in light of the principle of equality of arms ◆ Discussion on the role of the procurator, if existent |
| The Nature of the Prosecution/Applicant Case | <ul style="list-style-type: none"> ◆ Discussion of the law and practice governing evidence, rules of discovery, subpoena powers, etc (any evidentiary or procedural law that could possibly impact on the fairness of the trial) ◆ Discussion of the shifting or lowering of the burden of proof, if any ◆ Summary of the prosecution's evidence |
| Nature of the Defence/Defendant Case | <ul style="list-style-type: none"> ◆ Evaluation of the working conditions of defence counsel, including the discovery of documents, access to the court file, the right to call and cross examine witness and appropriate time for preparation ◆ Brief summary of the defence's evidence |
| Conduct of the Presiding Judge | <ul style="list-style-type: none"> ◆ Description of the conduct of the judge during the trial, including the attitude that the judge(s) has/have taken towards the prosecution and the defence ◆ Evaluation of any instructions given by the judge to the jury, if jury trial |
| Judgment and Sentence | <ul style="list-style-type: none"> ◆ Description of the judgment and sentence (or awards), if any (if judgment not yet delivered, information as to the expected date) |
| Appellate Proceedings | <ul style="list-style-type: none"> ◆ Information on the possibilities for appeal, including limitation for filing, need for leave from the lower court, etc ◆ Information on the appellate procedure (e.g. whether the appeal is made solely on written submission or based on oral hearings) ◆ Discussion of the power of the appellate court and the real effectiveness of the appeal ◆ Discussion of possible international review mechanisms and the criteria for exhaustion of local remedies |

| | |
|-----------------------------|---|
| Fairness of the Proceedings | <ul style="list-style-type: none"> ◆Description of the standards applicable to the trial, taking into account the treaties binding on the state, customary international law and national law ◆Specific evaluation on the compliance of identified applicable human rights guarantees <p>In most ICJ trial observations, the independence and impartiality of the judiciary might be the central issue. The main aspects to consider are:</p> <ul style="list-style-type: none"> ◆Description of the structure of the judiciary in general and the specific structure of the court where the trial was conducted ◆Information on the judge(s), including the criteria for selection for this specific trial or any other relevant information ◆Other important issues that should be taken into account when looking at the interpretation of the guarantee of an independent and impartial tribunal |
| Recommendations | <ul style="list-style-type: none"> ◆Recommendations on possible course of action that could be taken, such as follow up trial observations, restructuring of the judiciary, fact-finding missions, etc. <p>The ICJ has the discretion whether or not to adopt the observer's recommendations. The trial observer's recommendations are often the basis for ICJ's recommendations</p> |

The substantive sections dealing with guarantees for a fair trial on Part I of the report should be seen in the light of the information provided in Chapter 5.

Part II: Report on the Practical Issues of the Trial Observation

| | |
|----------------------------|---|
| Methodology of Observation | <ul style="list-style-type: none"> ◆Brief explanation of the working methodology during the trial observation ◆List of materials studied, persons interviewed ◆Brief description of issues discussed and information gathered in important meetings |
| Sensitive Material | <ul style="list-style-type: none"> ◆List of names and contact information which should be kept confidential |
| Additional Information | <p>It often happens that once in the country, the observer is able to obtain information related to other issues not strictly within the mandate of the trial observation. If the observer believes that the information could be useful to the ICJ s/he should include these in this section</p> |
| Other Guidelines Used | <ul style="list-style-type: none"> ◆Description of any practical guidelines used by the observer, not included in this Manual, that can be of guidance for future trial observers |

Part III: Annexes

The trial observer should include copies of important documents as annexes to the report. Copies of documents to be included:

- ◆ Relevant national legislation (for example, the constitution, criminal procedure code, rules of evidence, laws establishing the judiciary, etc) and judgments (case law which establishes important precedents) which were not included in the Briefing Kit.
- ◆ Charges, transcripts and judgments (if some of these documents are not available soon after the end of the trial, the observer should try to arrange to receive copies at a later date).
- ◆ Newspaper clippings referring to the trial or the observer's presence (include the name of the newspaper and date of publication).
- ◆ Any other relevant documents.

FOLLOW UP ACTIVITIES

Often there will be a need for follow up activities after the trial observation. These activities could be, for example, another trial observation to observe any further hearings or appeals or a future fact-finding mission in order to ascertain whether ICJ recommendations based upon the findings of the trial observation were adopted.

The ICJ will have to be closely informed of any developments or further issues related to the trial observed. In some cases, the ICJ may ask the same trial observer to undergo a follow up trial observation or fact-finding mission.

LEGAL STANDARDS FOR FAIR TRIAL

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INTERNATIONAL STANDARDS

The right to a fair trial is provided for in various international and regional treaties. These standards are to be considered binding on the States who have ratified (or acceded to) them.

Once a State has ratified an international instrument, its international obligations may be directly enforceable by national courts. Under these circumstances, the non-fulfilment of the guarantees provided for in the international instruments can be challenged during.

Alternatively, legislation may need to be enacted in order to give a State's international obligations the force of law at national level. If a State has not, in the first stage, ratified certain international treaty or not yet incorporated into national law, it is still possible to assess national court proceedings against international standards which have obtained the status of customary international law.

The main binding instruments are:

- | | |
|-----------|---|
| Universal | ◆ International Covenant on Civil and Political Rights of 1966 (ICCPR) |
| | ◆ Convention against Torture of 1975 (CAT) |
| | ◆ Convention on the Rights of the Child of 1989 (CRC) |
| Regional | ◆ American Convention on Human Rights of 1969 (ACHR) |
| | ◆ (European) Convention for the Protection of Human Rights and Fundamental Freedoms of 1953 (ECHR) and Protocol No. 7 of 1984 |
| | ◆ African Charter on Human and Peoples' Rights of 1981 (ACHPR) |

There are also a variety of non-binding instruments, mainly principles, declarations and rules, that, in one way or another, are related to the right to fair trial. These instruments do not have the legal power of treaties; however they carry persuasive force as they were negotiated by governments and have been adopted by political bodies, such as the UN General Assembly. In addition, in many cases, non-treaty standards are a reaffirmation of principles already established by other binding instruments.

Some of the international non-treaty standards are:

- ◆ Universal Declaration of Human Rights of 1948 (UDHR)
- ◆ United Nations Basic Principles on the Independence of the Judiciary of 1985
- ◆ United Nations Basic Principles on the Role of Lawyers of 1990
- ◆ Guidelines on the Role of Prosecutors of 1990
- ◆ United Nations Safeguards guaranteeing protection of those facing the death penalty of 1984

SPECIFIC GUARANTEES

This section focuses on the guarantees during the trial period because the main characteristic of trial observation is the observation of the hearing itself. It is recognised that the non-compliance with certain guarantees during the pre-trial period can directly impact on the overall fairness of the trial.

In this section, each specific guarantee is developed based on the following structure:

- ◆ a brief interpretation of the guarantee
- ◆ specific implications of the guarantee to a disciplinary hearing, civil suit or a criminal case before a

military tribunal

- ◆ list of relevant provisions of international standards
- ◆ ‘check list’ of questions for trial observers

Right to Fair Trial : What is it?

The right to fair trial is considered as a set of distinct, even if interrelated, rights which taken together, make up a single right not specifically defined. It is a right broader than the sum of the individual guarantees usually provided for. The list of specific guarantees is not an exhaustive list. In some situations an additional guarantee not listed might be considered necessary in order to guarantee the right to fair trial.

THE RIGHT TO EQUALITY BEFORE THE LAW AND COURTS

Laws should not be discriminatory. Similarly, judges and officials must not act in a discriminatory way in enforcing the law, which consequently means that every accused person should be treated equally with other similarly placed persons.

The right to equality before the courts has two basic aspects: equal access to the courts and equal treatment by the courts.

The right to equality before the courts also means that the establishment of separate courts for different groups of people based on their race, gender, language, religion, political or other opinion, national or social origin, property, birth, sexual orientation or other status without reasonable grounds should be prohibited.

- ◆ Article 14(1) and 26 ICCPR
- ◆ Article 10 UDHR
- ◆ Article 8(2) and 24 ACHR
- ◆ Article 3 and 7(1) ACHPR

Check List

- ◆ Is the charge brought against the accused a charge that is usually brought against others accused in a similar position?
- ◆ Have the above listed grounds led to disparate treatment of the accused?

RIGHT TO A FAIR HEARING

The right to a fair hearing is the “heart” of the right to fair trial.

A very important criterion for any hearing to be considered a fair hearing is the principle of equality of arms. Each party must be afforded a reasonable opportunity to present his or her case under conditions which do not place him or her at a substantial disadvantage. In short, both parties must be guaranteed procedural equality.

It would be difficult to identify in advance every situation that could result in violation of the equality of arms principle.

In a criminal trial, whether in an ordinary court or military tribunal, the equality of arms principle further includes all the other specified guarantees, such as for example the right to be presumed innocent, the right to prepare a defence. These express guarantees are considered to be the minimum guarantees for a fair hearing and are based on the principle of equality of arms. Consequently, there often exists an overlap between the requirements imposed by the equality of arms principle and others guarantees.

- ◆ Article 14(1) ICCPR ◆ Article 8(1) of ACHR ◆ Article 6(1) ECHR
- ◆ Principle 27 Basic Principles on the Role of Lawyers
- ◆ Principle 17 Basic Principles on the Independence of the Judiciary

Check List

- ◆ Have the defence and prosecution had access to the same court documents?
- ◆ Were the defence and prosecution treated similarly by the presiding judge?
- ◆ Was the defence given the same opportunities as the prosecution to bring an objection, request adjournment, discovery of documents, etc?

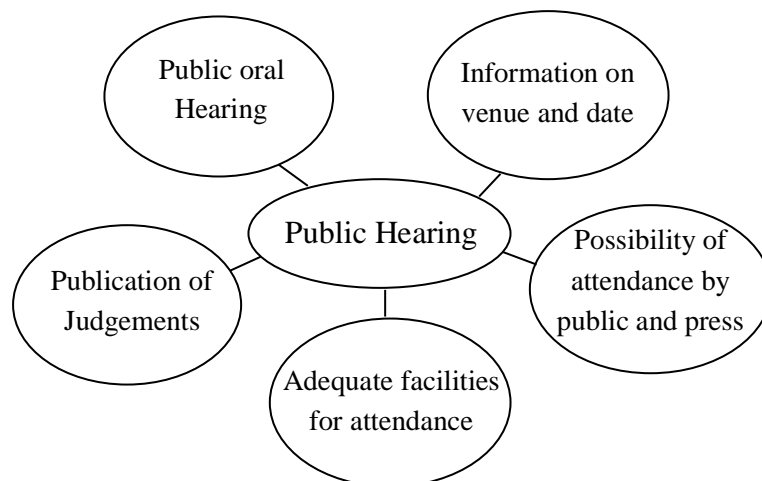
RIGHT TO A PUBLIC HEARING

The right to a public hearing of a trial applies to both the nature of the hearings and the judgment eventually rendered in a case.

In fulfilment of the right to a public hearing, procedures should as a rule be conducted orally and publicly. It is a right belonging to the parties, but also to the general public in a democratic society.

It is clearly a guarantee applicable to criminal cases before ordinary courts and civil suit cases.

The right for a public hearing is interpreted to be composed of different aspects as illustrated below.



The right to a public hearing is not an absolute right. Restrictions are provided for in the main international human rights treaties. The restrictions have been narrowly interpreted in an attempt to prevent abuses.

The grounds on which the public and the press may be excluded to attend a hearing are:

- ◆ morals in a democratic society : restriction usually used in cases involving sexual abuse
- ◆ public order in a democratic society : interpreted to relate primarily to order within the courtroom
- ◆ national security in a democratic society : interpreted as being applicable to hearings that would otherwise make public military secrets necessary to protect a country's existence or its territorial integrity
- ◆ interests of the private lives of the parties : interpreted as denoting family, parental and others relations, such as guardianship, which would be prejudiced in public proceedings
- ◆ interests of justice : restriction to be used only on special circumstances and to the extent strictly necessary in the opinion of the court

The restrictions on the publication of judgements are narrower than the restrictions on public hearings. A judgment can justifiably be prevented from publication only in respect of the interests of juveniles and a judgment related to proceedings of matrimonial disputes on the guardianship of children. The public judgment should provide reasons sufficient to allow the accused to lodge an appeal and must be delivered within a reasonable time of the hearing.

Secret trials are usually considered as violating the right to public hearing.

Trial Observation & Public Hearing

Generally trial observers rely on the guarantee of a public hearing as an argument to attend the trial proceedings.

This argument is also supported by article 3(b) of the UN Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognised Human Rights and Fundamental Freedoms of 1999 (often referred as Human Rights Defenders Declaration):

(...) [E]veryone has the right, individually and in association with others, inter alia: To attend public hearings, proceedings and trials so as to form an opinion on their compliance with national law and applicable international obligations and commitments.

DISCIPLINARY HEARINGS

Generally speaking, there is no requirement that a disciplinary hearing should be public. On the contrary, the initial stages of the disciplinary proceedings should generally be kept confidential so as to prevent unnecessary stigmatisation of the person being disciplined.

The decision of the disciplinary hearing should be made available in writing to the concerned person, including the reasons for the decision. It is often the practice that the decision of the disciplinary procedures is publicised within the judiciary and the bar association.

MILITARY TRIBUNALS

The same principle of a public trial applies to a military tribunal. The often invoked exception to exclude public access to hearings before the military tribunals is the ground of national security. In some situations this ground might be justifiably raised, but it should only be applied in strict accordance with the principle of necessity and proportionality.

◆ Article 14(1) ICCPR

◆ Article 8(5) of ACHR

◆ Article 6(1) ECHR

Check List

- ◆ Is the hearing in fact public?
- ◆ Has any certain sector of society been excluded from attending the hearing?
- ◆ Was the time and venue of the hearing publicly announced?
- ◆ If the hearing was declared not to be public, was a justifiable reason given?

COMPETENT TRIBUNAL ESTABLISHED BY LAW

Both of these attributes are in fact aspects of the same requirement: while competence refers to the appropriate personal, subject-matter, territorial or temporal jurisdiction of a court in a given case, the court as such, including its competence, must have been established by law.

These guarantees are based on the rationale that trials should not be conducted by tribunals set up to decide a particular individual case at issue. Their overall aim is to prevent arbitrariness.

◆ Article 14(1) ICCPR

◆ Article 8(1) ACHR

◆ Article 6(1) ECHR

◆ Article 26 ACPHR

◆ Principle 5 Basic Principles on the Independence of the Judiciary

Check List

- ◆ Has the jurisdiction of the court in this case followed the jurisdiction as established in law?
- ◆ Was this specific tribunal established recently? Are there any factors that might point out to an ad hoc establishment of the tribunal to try the accused?

INDEPENDENCE AND IMPARTIALITY

« It is now universally recognised that fundamental rights and liberties can best be preserved in a society where the legal profession and the judiciary enjoy freedom from interference and pressure. »

Mr. Louis Joinet

Expert of the UN Sub-Commission on the Protection and Promotion of Human Rights
(E/CN.4/Sub.2/1990/15, para.1)

A principle underlying the independence and impartiality of the judiciary is the principle that “justice must not only be done, it must also be seen to be done”. The guarantee of an independent and impartial judiciary is based on a two- fold objective:

- ◆ to ensure that a person is tried by a tribunal that is based solely on the merits of the case before it according to the law
- ◆ to maintain the integrity of the judiciary by preventing any reasonable apprehension of bias

A clear distinction may be made between impartiality and independence. Some overlapping and/or interrelation can easily be found; judicial independence can be generally seen as a prerequisite to

impartiality and in practice it is difficult to examine the issues of independence and impartiality separately.

- ◆ Article 14(1) ICCPR
- ◆ Article 8(1) ACHR
- ◆ Article 6(1) ECHR
- ◆ Article 10 UDHR
- ◆ Basic Principles on the Independence of the Judiciary

INDEPENDENCE

Independence is a functional and structural safeguard against extraneous intrusion into the administration of justice. A separation of powers, based on a institutional protection of the judiciary against undue influence by, or interference from, the executive branch and, to a lesser degree, from the legislative branch, is the basis criteria for independence.

The main factors to take into account when analysing the independence of the judiciary are:

- ◆ the mechanism for appointment of judges: the procedure and qualifications necessary (Principle 10 of Basic Principles on the Independence of the Judiciary)
- ◆ the terms of office and the existence of a guaranteed tenure (Principles 11 and 12 of Basic Principles on the Independence of the Judiciary)
- ◆ the procedures for judges' removal, transfer and promotion (Principle 13 of Basic Principles on the Independence of the Judiciary)
- ◆ the establishment of efficient, fair and independent disciplinary proceedings regarding judges (Principle 17 to 20 of Basic Principles on the Independence of the Judiciary)
- ◆ the exclusive jurisdiction of the judiciary over all issues of judicial nature (Principle 3 and 14 of Basic Principles on the Independence of the Judiciary)
- ◆ the relationship between the judiciary and the prosecution (Guideline 10 of Guidelines on the Role of Prosecutors)
- ◆ whether the judiciary has adequate resources to properly perform its functions, for example adequate salaries and training (Principle 7 of Basic Principles on the Independence of the Judiciary)

In the determination of the independence of the judiciary, the issues listed above reflect the main areas that you could look into during the trial observation.

Independence is mainly assessed by analysing the legislation and regulations related to the judiciary.

Disciplinary Hearings and Military Tribunals

Guarantees of judicial independence also apply to disciplinary hearings and military tribunals, but with some variations.

Presiding judges in disciplinary hearings and military tribunals are often members of the institution bringing the case. In a disciplinary hearing against a judge or lawyer, the presiding judge is usually a member of the judiciary or the bar; the presiding judge in a military tribunal is often a serving member of the military.

It is recognised that the lack of institutional independence does not necessarily violate the guarantee of independence if other safeguards are met.

The independence in these cases is based on two main aspects:

- ◆ judges' appropriate training or qualification in law

- ◆ judges' autonomy, in their judicial capacity, from their superiors

IMPARTIALITY

Impartiality is based on open-mindedness, objectivity and absence of bias or ill will. The opinion of the court should only be based on objective arguments and evidence presented.

To be impartial as a judge is to avoid promoting the interests of one of the parties, and to adjudicate without favour or fear.

Impartiality is based on the natural law principle of *nemo iudex in sua causa* (no one should judge his own cause), often upheld in Commonwealth systems.

Differently from the issue of independence, the question of impartiality is based on a case-by-case

Check List

- ◆ Has the judge taken part in the proceedings in some prior capacity?
- ◆ Has the judge any personal interest on the outcome of the case?
- ◆ Has the judge any relationship with any of the parties that could influence his/her decision?
- ◆ Does the judge seem to have a pre-formed opinion that could weigh on the decision-making?

analysis.

The issue of impartiality should apply likewise in disciplinary, civil suit and military hearings.

PRESUMPTION OF INNOCENCE

In a criminal trial, the accused should be presumed innocent until proven guilty.

There are numerous consequences flowing from this guarantee, including the accused right to remain silent and the right not to be compelled to make a confession (see below). The right to be presumed innocent directly impacts on the burden of proof in a criminal trial.

The burden of proof lays with the prosecution. The general rule is that the burden of proof should be borne by the prosecution throughout the entire trial; few exceptions may be accepted where the onus can be shifted to the accused.

In order not to allow for arbitrary use of these exceptions certain requirements have to be fulfilled:

- ◆ established by law
- ◆ a reasonable limitation
- ◆ real possibility of rebuttal

It is considered as a principle of law that the standard of proof required is 'beyond reasonable doubt', which in practice means that the accused should be given the benefit of any doubt.

- ◆ Article 14(2) ICCPR
- ◆ Article 8(2) ACHR
- ◆ Article 6(2) ECHR
- ◆ Article 7(1)(b) ACHPR
- ◆ Article 11(1) UDHR

In addition, the presumption of innocence requires that all public authorities should refrain from prejudging the outcome of a trial and must not during the proceedings, amongst other things, invoke the guilt of the accused or treat the accused as s/he is already considered guilty.

Check List

- ◆ Did the prosecutor have to establish a prima facie case?
- ◆ Did the prosecutor have the burden of proof throughout the trial?
- ◆ If any shift of the burden took place, what were the reasons for it? Was it clear the reason why the burden was shifted? Was the shift a reasonable one?
- ◆ In the delivery of the judgement, did the judge made it clear that his/her findings were based on the standard of beyond reasonable doubt? Did the judge clarify the standard of proof when instructing the jury?

As in a civil suit, in a disciplinary proceeding the burden of proof is generally referred to as “on a balance of probabilities”. The burden of establishing the existence of a cause rests on the person or body bringing the claim. The respondent generally has only to reply to the claim made by the applicant and the judge will then decide which of the versions has more probability of being true.

RIGHT TO BE INFORMED OF THE CHARGE

The accused should be informed of the charge that s/he is facing. The rationale of this right is to provide sufficient information to allow the preparation of the defence.

In order to safeguard this guarantee three main conditions must be met:

- ◆ the information forming the basis of the charge needs to be promptly given; as soon as the charge is first made by a competent authority.
- ◆ the information given must include the nature (exact legal description of the offence) and cause (the

◆ Article 14(2)(a) ICCPR

◆ Article 8(2)(b) ACHR

◆ Article 6(3)(a) ECHR

Check List

- ◆ When was the accused informed of the charge against him/her?
- ◆ If the charge is based on a statutory crime, was the accused given information on the specific law and its provisions?
- ◆ Was the accused informed of an approximate date, time and place where the alleged crime occurred?
- ◆ Was the charge given to the accused in oral or in writing? Was interpretation provided?

facts upon which the allegation is based) of the charge.

- ◆ the charge must be provided, orally or in writing, in a language that the accused understands.

From the guarantee of a fair hearing, in a civil or disciplinary hearing the defendant needs to be aware of the claim against him/her in order to be able to respond to the claim.

RIGHT TO ADEQUATE TIME TO PREPARE THE DEFENCE

The right to adequate time and facilities for the preparation of a defence applies not only to the defendant but also to his or her defence counsel. The right to prepare the defence applies in all stages of the proceeding.

What constitutes “adequate” time will depend on the nature of the proceedings and the factual

circumstances of a case. Factors to be taken into account include, *inter alia*, the complexity of the case, the defendant's access to evidence, the time limits under domestic law for procedural requirements.

The term "facilities" has been interpreted to mean that the accused and defence counsel must be granted

- ◆ Article 14(2)(b) ICCPR
- ◆ Article 8(2)(c) ACHR
- ◆ Article 6(3)(b) ECHR
- ◆ Principle 21 of Basic Principles Role of Lawyers

Check List

- ◆ If the defence lawyer was a lawyer appointed or provided by the state, was s/he appointed with sufficient time prior to the hearing?
- ◆ Was there sufficient time for the preparation of the defence, taking into account the amount of preparation needed?
- ◆ How often did the lawyer meet with the accused? Were the number of meetings a result of difficulties faced by the defence, as for example, need to request permission to visit the accused in detention?
- ◆ Did the defence have access to documentation needed to prepare the defence?

access to appropriate information, files and documents necessary for the preparation of a defence, including statements made by witnesses and police memoranda which are in the possession of the police. The defendant must be provided with facilities in order to enable communication, in confidentiality, with defence counsel.

"Justice delayed is justice denied."

Excessive delay in the administration of justice constitutes a danger to the rule of law and to the credibility and effectiveness of the whole system.

The guarantee of a trial within a reasonable time (or without undue delay) is based on a balance of different interests. These interests include: sufficient time to prepare the defence, the need to preserve evidence (for example, the unavailability of witnesses, the destruction or disappearance of evidence) and the need to determine the accused's guilt or innocence as soon as possible in order to prevent the adverse effect of stigmatisation carried by a criminal accusation.

The determination of what constitutes undue delay depends on the circumstances of each case. The main issues to be considered are:

- ◆ the complexity of the case: analysis of the nature and seriousness of offence, the number of charges faced by the accused, the nature of the evidence, the number of witnesses, etc
- ◆ national legislation: analysis of time limits for different stages of the criminal procedure under national legislation.
- ◆ whether the accused is detained: if the accused is detained, the delay should be absolutely minimised if the accused were at liberty
- ◆ the conduct of the accused: any deliberate uncooperative or obstructive conduct of the accused should be taken into account.

In analysing whether the trial under observation is being conducted within a reasonable time, the issues listed above reflect the main areas that you could look into during the trial observation.

◆ the conduct of the authorities: to avoid unnecessary delay, a degree of efficiency by the court's staff is necessary.

The clock starts when the suspect is informed that the authorities are taking specific steps to prosecute him/her.

All stages of the trial must be completed within a reasonable time, including sentencing procedures,

- ◆ Article 14(3)(c) ICCPR
- ◆ Article 8(1) ACHR
- ◆ Article 6(1) ECHR
- ◆ Article 7(1) ACHPR
- ◆ Principle 17 Basic Principles on the Independence of Judiciary
- ◆ Principle 27 Basic Principles on the Role of Lawyers

delivery of the written judgment and any appeals.

Generally speaking, the need to hold a trial within a reasonable time is also applicable to civil cases. All the main regional instruments expressly provide for this guarantee. Under the ICCPR provisions the guarantee of unreasonable delay refers to criminal trials only.

DISCIPLINARY HEARINGS

Disciplinary proceedings of judges and lawyers should be conducted expeditiously. This guarantee is important in preventing the use of disciplinary proceedings to threaten the independence and impartiality of judges and lawyers.

The right to defence includes the following components:

◆ right to be present at trial

- ◆ Article 14(3)(d) ICCPR
- ◆ Article 8(2)(d) ACHR
- ◆ Article 6(3)(c) ECHR
- ◆ Article 7(1)(c) ACHPR

- ◆ right to defend oneself in person or with the assistance of a lawyer
- ◆ right to be informed of the right to be legally represented
- ◆ right to choose one's lawyer
- ◆ right to receive free legal assistance, if interests of justice require

RIGHT TO BE PRESENT AT TRIAL

This guarantee is based on the need for the accused to fully hear the prosecution's case, to put forward

his/her defence or to assist his/her counsel in doing so, to refute or provide information to enable his/her counsel to refute evidence and to examine witnesses (or advise his/her counsel in the examination of witnesses).

A consequence of the right to be present at the trial is that court authorities have the duty to notify the accused of the date and location of the hearing with due time.

This guarantee, however, is not absolute and exceptions may be allowed for trials conducted without the accused's presence (trial *in absentia*). The three generally recognised exceptions are:

- ◆ the accused's disruption of the proceedings
- ◆ the accused's unjustifiable failure to appear, after having been duly notified
- ◆ the accused's unambiguous waiver of this guarantee

If the accused is not present during the hearing, the right to legal representation is essential in order to guarantee a fair hearing

The application of the other aspects of the right to defence can be summarised as follows:

An accused can choose to conduct his/her defence personally or to delegate this task to a defence counsel. In order to make this choice, the court must inform the accused of the right to legal representation.

If the accused chooses to have legal representation, s/he should be able to choose a lawyer with his/her means. Where the accused cannot afford to have a private lawyer, s/he has the right to have a court

Defence Lawyer

The issue of the independence of lawyers is many times overlooked. Challenges to the lawyer's independence arising from doubts as to whether a lawyer is in a position to fully represent his/her client without any external interference, may be present in certain situations, as for example in some systems for appointment of lawyers by the state.

A lawyers' independence is an essential guarantee of fair trial. The Principles on the Role of Lawyers is the principal source of guidelines relating to the independence of lawyers.

Check List

- ◆ Has the accused been excluded at any of the stages of the trial? If so, what was the reason given by the court? Was it an important stage of the hearing which could negatively impact on the overall right to defence?
- ◆ Is the accused legally represented? Was the accused represented by a state appointed lawyer? How was the appointment of the lawyer (if any) made?
- ◆ What is the structure of the legal aid system?
- ◆ Are there allegations of lawyers, including legal aid lawyers, not fully representing their clients?
- ◆ Looking at the context of the country, are there incidents of threats and intimidation towards lawyers who defend certain persons?

appointed lawyer at no cost, if the interests of justice require. If a lawyer is appointed by the state, the accused's right to choose the lawyer is generally not applicable.

When an accused faces charges punishable by death, the case should not proceed unless the accused is assisted by competent and effective counsel.

DISCIPLINARY HEARINGS

The right to defence as illustrated above, including the right to examine witnesses, does not necessarily apply to disciplinary and civil trial in the same way as it applies to criminal trials.

Nevertheless, the fundamental juridical principle *audi alteram partem* (hear the other side) is always applicable in order to give the defendant the opportunity to answer the claims brought against him/her.

The *audi alteram partem* rule is based on the principle of equality of arms and fair hearing. The guarantees following the application of this principle should be tailored to each specific situation.

In relation to legal representation in disciplinary hearings, a lawyer can be represented by another lawyer during the disciplinary proceedings, as denoted in Principle 27 of the Basic Principles on the Role of Lawyers.

A straightforward right to legal representation of judges facing disciplinary hearings is not provided under the Basic Principles on the Independence of Judiciary. The right of legal representation of a judge in a disciplinary hearing depends on the law of the country and the disciplinary procedure in question. In some countries, the disciplinary proceedings are of an informal and inquisitorial nature, possibly excluding legal representation in order to maintain the informality of the hearing. In cases possibly resulting in a serious charge against judge being disciplined, a lawyer may be required in order to guarantee the fairness of the proceedings.

The accused should be given the opportunity to call his/her witnesses and to challenge the witnesses brought by the prosecution. This right is a corollary of the right to defence and the principle of equality of arms.

The right to call and examine witnesses is composed of four main components:

◆ accused's possibility to call witnesses

◆ Article 14(3)(e) ICCPR

◆ Article 8(2)(f) ACHR

◆ Article 6(3)(d) ECHR

Check List

◆ Was the accused informed of the names of witnesses called by the prosecution? Did the accused or his/her lawyer receive this information with enough time to prepare the defence?

◆ Did the court provide the defence with the possibility to summon and cross-examine witnesses?

◆ accused's knowledge of the witnesses to be called by the prosecution

◆ accused's presence during the testimony of prosecution witnesses (only in exceptional circumstances may the accused justifiably be taken out from the court, such as in situation of fear of reprisal of witnesses by the accused).

◆ the opportunity to cross-examine witnesses called by the prosecution

This guarantee may be jeopardised by the non-disclosure of the identity of prosecution witnesses ("anonymous witnesses"). The use of anonymous witnesses prevents the defence from challenging the witness' reliability and credibility, consequently undermining the right to cross-examination.

The right to interpretation is crucial to the fairness of proceedings, where the accused has difficulty in speaking, understanding or reading the language used by the courts.

◆ Article 14(3)(f) ICCPR ◆ Article 8(2)(a) ACHR ◆ Article 6(3)(e) ECHR

Check List

- ◆ Did the accused need an interpreter? Was interpretation provided expeditiously?
- ◆ Was the interpreter involved in all hearings where the accused was present?
- ◆ Were there suspicion of bias or lack of competence of the interpreter?
- ◆ Was the defence lawyer able to speak and understand both the languages of the court and the language spoken by the accused?

To a certain extent, the right to interpretation should also include the translation of essential documents. Oral translation of documents is often accepted when there are resource restrictions.

In order to provide a meaningful guarantee, it is necessary that interpretation be accurate, competent and free of charge.

RIGHT NOT TO BE COMPELLED TO TESTIFY OR CONFESS GUILTY.
This guarantee applies equally to nationals and non-nationals of the country where the trial takes place.

The accused or his/her defence lawyer should inform the court of the accused's inability to speak or understand the language used in court and request interpretation and translation.

This right is in line with the presumption of innocence and the prohibition of self-incrimination.

An important guarantee flowing from this right is the right to remain silent, coupled with the right to be informed of this right. If the accused chooses to remain silent, no adverse inferences against the accused

◆ Article 14(3)(g) ICCPR ◆ Article 8(2)(g) and 8(3) ACHR ◆ Article 3 CAT
◆ Article 8 Inter-American Convention on Torture
◆ Principle 21 Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment

should, as a general rule, be drawn.

The accused should not be coerced to testify or confess. Coercion can take numerous forms, including physical or psychological, torture, inhuman or degrading treatment, various methods of extortion or duress and the imposition of judicial sanctions. In addition, the accused should be given the opportunity during the proceedings to bring an allegation that evidence was obtained under coercion. If such allegation is raised, an enquiry should be established in order to determine its veracity. Once shown that coercion took place, the evidence extracted under coercion should not be admissible against the accused.

This guarantee should be given at all stages of proceedings.

Check List

- ◆ Has the accused been advised of the right to remain silent?
- ◆ Were there any allegation that information was extracted from the accused under coercive measures? If so, what was the procedure followed by the court?
- ◆ Were the reasons for the judgement based on the lack of explanation from the accused? If so, would, in these circumstances, the right to remain silent be contravened?

DISCIPLINARY HEARINGS

~~In a disciplinary hearing this guarantee is not necessarily applicable. Rather, in these hearings the defendant is often willing to give an explanation of the case brought against him/her and in many situations indeed requests the right to be heard.~~

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|----------------------|----------------------|------------------|
| ◆ Article 15 ICCPR | ◆ Article 9 ACHR | ◆ Article 7 ECHR |
| ◆ Article 7(2) ACHPR | ◆ Article 11(2) UDHR | |

PROHIBITION OF DOUBLE JEOPARDY

This guarantee is based on the principle *nullum crimen sine lege* (no crime exists if no law provides for it). This prohibition is an attempt to prevent arbitrariness where laws could be adopted in order to hold a person or a group criminally liable for a conduct not previously classified as a criminal act.

The evaluation of this guarantee should, in practice, be undertaken when analysing the charge against the accused.

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| ◆ Article 14(7) ICCPR | ◆ Article 4 of Protocol 7 to the ECHR |
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The prohibition of double jeopardy has the objective of preventing a person from being tried - and punished - more than once for the same crime in the same jurisdiction.

Check List

- ◆ Is the actual charge based on similar on which the accused was previously tried?

This guarantee becomes only applicable once a final judgment of conviction or acquittal is rendered and all the appeals have been finally exhausted.

R **DISCIPLINARY HEARINGS** **RIGHT TO APPEAL**

The guarantee of double jeopardy only applies in relation to criminal cases.

The facts as established in a criminal case already judged can justifiably be used as the basis for a disciplinary or civil suit proceeding.

Every person convicted of a criminal offence has the right to have the conviction and sentence reviewed by a higher tribunal.

The right to appeal extends to all applicable appellate levels as established by national law.

This right belongs to all convicted persons irrespective of the severity of the offence and the sentence given by the court of first instance.

The review undertaken by the appeal tribunal must be genuine. The appeal court should be able to review the law, the procedure and the facts raised by a first instance judgment and should have, generally, the power to reverse the decision of a lower court.

Appellate proceedings must be undertaken within a reasonable time. Unreasonably short time frames should not be established in order to lodge an application for appeal.

All the guarantees of a fair trial must be observed in the appellate proceedings.

- ◆ Article 14(5) ICCPR
- ◆ Article 8(2)(h) ACHR
- ◆ Article 2 of Protocol 7 of ECHR
- ◆ Principle 20 Basic Principles on the Independence of Judiciary
- ◆ Principle 28 Basic Principles on the Role of Lawyers

Check List

- ◆ Is there the possibility of bringing an appeal of a possible conviction in this case?
- ◆ Is the decision to grant a leave for appeal (if no automatic leave of appeal is applicable) at the discretion of the judiciary? Or is there any need for approval by an executive body?

MILITARY TRIBUNALS AND DISCIPLINARY HEARINGS

The right to appeal applies also to military tribunals and disciplinary hearings.

An accused charged before a military tribunal should have the right to have his/her appeal heard in a higher ordinary court.

Disciplinary hearings of lawyers and judges are subject to independent judicial review, which invariably

International Human Rights Mechanisms

The international human rights mechanisms are an option in a search for redress for human rights violations once all attempts at the national level have been exhausted.

The main international human rights mechanisms to whom an individual can bring a communication (or a complaint) against a state party are:

- ◆ **Human Rights Committee:** A United Nations body established under the optional protocol to the ICCPR, with the competency to receive individual communications on violations of the rights contained in the ICCPR. Out of the 148 state parties to the ICCPR, 101 states have accepted the jurisdiction of the Human Rights Committee.
- ◆ **European Court of Human Rights:** This body can receive complaints of violations of the rights guaranteed in the ECHR. All members' states of the Council of Europe are subjected to the jurisdiction of this court. It has the power to give binding judgements.
- ◆ **Inter-American Commission of Human Rights:** This body can receive individual communications on violations of the ACHR. If a human rights violation is established, it can give recommendations to the country concerned to guarantee that the victim's rights are respected
- ◆ **African Commission on Human and Peoples' Rights:** The main supervisory body of the ACPHR. It has a role similar to the Inter-American Commission.

Each of these mechanisms has their procedures to consider communications or complaints against states parties that have accepted their jurisdiction.

At the United Nations level, special mechanisms have been established in order to look at specific human rights issues. These mechanisms are mainly special rapporteurs, special representatives, independent experts and working groups. Some of these mechanisms can receive information on allegations of human rights violations in their area of work aiming at establishing communication with states or issuing urgent actions (or appeals) in an attempt to address the problem. The special mechanisms related to the right to fair trial or to some threats against judges and lawyers in the performance of their duties are:

- ◆ Special Rapporteur on the Independence of Judges and Lawyers, Mr. Param Cumaraswamy
- ◆ Special Rapporteur on the Question of Torture, Mr. Theo van Boven
- ◆ Special Representative of Secretary-General on Human Rights Defenders, Ms. Hina Jilani

means that the case could be reviewed by ordinary high courts.