

Chapter 8

Trial observation

*Tor Bøhler, Trond Dolva, Donna Gomien
and Marit Mæhlum*

Contents

1 Introduction.	1
2 Assessing whether or not to observe a trial.	1
3 Objectives of a trial observation	2
4 Substantive preparations for a trial observation	3
5 Communication with defence counsel, presiding judge and prosecutor	4
6 Contacts with the media	5
7 The conduct of the observer during the trial	5
8 Report of the trial observation.	5
9 Evaluation of the fairness of the trial	7
10 International standards governing fair trial	7
Annex	
Selected legal references	15



**UNIVERSITY
OF OSLO**

Norwegian Centre for Human Rights

Tor Bøhler is a lawyer. He was formerly Chairman of the Committee on Human Rights of the Norwegian Bar Association (1984–1997) and Co-Chairman of the International Bar Association’s Human Rights Institute. He has observed trials in Kenya, Turkey and the former Soviet Union.

Trond Dolva is a former judge of the Supreme Court of Norway. He chaired the Human Rights Committee of the Norwegian Association of Judges from 1988 to 2000. He has participated in the Council of Europe’s Committee on Legal Cooperation (CDCJ) and chaired the Council’s Steering Committee on Human Rights (CDDH). He has also observed trials in Kenya.

Donna Gomien (retired) was Senior Lecturer in Human Rights at the Institute of Social Studies (The Hague, Netherlands) from 2003 to 2006. Previously, she was Deputy Ombudsperson in Kosovo (2001-2003), Human Rights and Legal Advisor to the OSCE Mission in Croatia (1998-2000) and Deputy Ombudsperson for Bosnia and Herzegovina (1996–1997). She was formerly Associate Professor at the Norwegian Institute of Human Rights.

Marit Mæhlum is a political scientist currently working in the Norwegian Refugee Council’s Internal Capacity Building Unit. She has formerly been desk officer for the NRC’s programmes in the Caucasus, the Balkans and in Asia. She worked as a human rights officer with the OSCE Mission to Bosnia and Herzegovina for one year in 1997. She also worked for several years with the Norwegian Resource Bank for Democracy and Human Rights (NORDEM), where she was responsible, inter alia, for project management and recruitment and training for human rights missions.

1. Introduction and background¹

This chapter aims to provide succinct and accessible guidelines for persons observing trials. It sets forth both basic principles governing trial observation missions and suggestions about ways and means to ensure the success of such missions. The guidelines describe the components of an 'ideal' trial observation. But various factors may militate against the achievement of this ideal, from a shortage of time for comprehensive preparations to a scarcity of information about a particular trial or the judicial system of the country where the trial is taking place. It should be noted that the guidelines discussed in this chapter have primary applicability to trial monitors sent by organisations/governments from outside the country at issue. Different principles might apply to local trial observers taking into consideration the political context in which they operate. Nevertheless, the substantive guidelines set forth in this chapter should be applied to the extent possible, whatever difficulties the observer or sending organisation might face. In particular, the underlying principles of respect for human rights and objectivity on the part of the trial observer should govern the conduct of a trial observation mission.

2. Assessing whether or not to observe a trial

Both an organisation considering sending an individual to observe a trial and the individual being considered for the observation mission must determine whether or not such a mission will be of value in protecting the rights of the accused or otherwise advancing the cause of human rights in the country where the trial is taking place. The following is a list of some of the factors to be taken into consideration when making such a determination:

- *The nature of the charge.* Is the charge based on criminal law provisions that fail to meet the international requirements of safeguard against abuses of power by governmental authorities, accessibility or foreseeability? Is the charge based on criminal law provisions that are retroactive in effect or that are discriminatory on their face?
- *The representative nature of the trial.* Would an evaluation of the conduct of the trial provide a reflection of the general human rights situation in a given country? If the trial is an aberration in normal domestic practice, are there other important human rights interests to be served by observing the trial?
- *The significance of the trial itself.* Is the accused a person of public importance (e.g., a politician, journalist, noted intellectual etc.)? Is the accused a member of a community or group whose members are known to face persecution and/or selective prosecution? If convicted, is it likely that the accused will face a sentence that is disproportionate to the crime or that the sentence might be applied in a discriminatory way? If convicted, will the accused face a possible death sentence?
- *The existence of structural irregularities.* (See Section 10 on international standards governing fair trial.) Are there preliminary indications that the tribunal has not been established by law? Are there preliminary indications that the judge or judges are not independent or impartial? In this context the selection of lay judges or jurors should also be considered.

- *The existence or prospects of irregularities in governmental conduct.* (See Section 10.) Are there any anticipated or documented procedural irregularities on the part of the prosecuting authorities and/or the judge(s) in the case? Are there allegations that the accused has been or will be subjected to torture or inhuman or degrading treatment?
- *The possible negative effects of a trial observation.* What are the possible negative implications of a trial observation for the fairness of the trial or for the safety of the accused or his or her family? What is the likelihood that the government of the country where the trial is taking place will use the presence of the trial observer as an excuse to pursue harsher measures than normal for the offence at issue? Will the accused or his or her family suffer from recriminations or persecution as a result of the trial observation mission? Are there any means by which the sending organisation or the observer can help to protect the accused or his or her family from such recriminations or persecution, should they occur?

3. Objectives of a trial observation

Once the sending organisation and the individual observer have agreed on the value of a particular trial observation mission, the planning and implementation of that mission should be aimed at fulfilling the following objectives:

Superior objective: To evaluate the fairness of the trial in the light of its conformity with the applicable domestic law and international human rights standards and its protection of the interests of the accused.

Additional objectives:

- To make known to the court, to the relevant authorities of the country and to the general public the international interest and concern in the trial in question;
- To contribute to an atmosphere that may encourage the court to ensure that all of the rights of the defence are properly protected (defence lawyers in all parts of the world have frequently commented on the change in the atmosphere in the court and the facilities afforded to the defence resulting from the presence of international observers);
- To provide moral support to the accused and/or the accused's family;
- To obtain information about the conduct of the trial, the nature of the case against the accused and the legislation under which he or she is tried;
- To collect more general background information about the political and legal circumstances leading to the trial.

4. Substantive preparations for a trial observation

Much of the substantive preparatory work for a trial observation mission should be done by the sending organisation.

Collecting information about the applicable international law. Determine which of the relevant international human rights instruments the country has ratified (see Annex for selected legal references and the website of the Office of the UN High Commissioner for Human Rights at www.ohchr.org for updated information on ratifications). In regard to a country against which an individual complaint and/or an inter-State complaint may be filed under one or more of the international treaties, collect any recent judgements/opinions relating to the conduct of fair criminal proceedings in that country. Contact the relevant intergovernmental organisations or other sources of information (e.g., the Foreign Ministry of the home country) for copies of any reservations or derogations currently in effect for the country. If the country has not ratified any of the relevant international human rights instruments, collect information about other sources of international law that may apply.²

Collecting information about the current state of human rights in the country. In addition to obtaining information directly relevant to the trial observation, the quality of the mission and the resulting report will often be enhanced if the observer has a broader knowledge of the human rights situation prevailing in the country as a whole. Therefore, if time allows, it is worthwhile collecting information from one or more of the following sources:

- Copies of any recent state report submitted to the Human Rights Committee (the treaty body that monitors implementation of the International Covenant on Civil and Political Rights) and the Committee’s statements/questions about that state report.
- Current/recent information about the human rights situation in the country from reputable non-governmental organisations (e.g., Amnesty International, Human Rights Watch) or intergovernmental organisations (e.g., Council of Europe, Organisation of American States).
- The relevant country chapter of the current U.S. Department of State’s Country Reports on Human Rights Practices.

Collecting information about the domestic law and practice in the country. Although both time and language constraints may make it difficult for an observer to obtain full information about the domestic law and practice in the country, it is useful to have as full a view as possible of them, preferably with assistance from a local lawyer.

Obtain copies of currently applicable law, both substantive and procedural. If possible, obtain copies of Rules of Evidence and/or Procedure governing criminal trials in the country. In some countries, Codes of Professional Responsibility for Lawyers and Judges can also provide insight into the operation of the criminal justice system. It may be possible to obtain translations of these materials into English or other major languages from non-governmental organisations working in the country. Consider the advisability of contacting defence counsel in the case.

Making preliminary preparations for the actual observation of the trial. In order to help ensure that the 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.

Collecting information substantiating the legal basis for the presence of the observer. One problem trial observers frequently face is being denied access to the trial they have come to observe. In order to be prepared for such an eventuality, it is worth having to hand the following:

- Domestic law provisions dictating public hearings;
- International law provisions requiring public hearings (UDHR 10, CCPR 14(1), ECHR 6(1), ACHR 8(5));
- International observers may also argue that they are permitted to attend a trial under customary international law;
- Customary international law arguments supporting public hearings (see, e.g., David Weissbrodt, “International Trial Observers”, *Stanford Journal of International Law* (1982)).

In some countries, aliens must apply for permission to attend a particular trial. The observer or sending organisation should ask the appropriate Ministry of the country if such permission is necessary and if so, how to obtain such permission (the rules and guidelines will often appear in the rules of the court or court building).

5. Communication with defence counsel, presiding judge and prosecutor

The observer may contact the defence counsel to obtain detailed information about the case, copies of the indictment, transcripts or official minutes of proceedings (if available) and similar documentation. The observer may also discuss with defence counsel any peculiarities in the substantive or the procedural law governing the case. Should the country have accepted the right of individual petition under one of the relevant international human rights instruments, the observer should alert the defence counsel to the possibility of pursuing this avenue in the event that the domestic proceedings prove to be unfair under the applicable international standards. In particular, the observer should inform the defence counsel of any applicable deadlines that must be met on the exhaustion of all domestic remedies.

The observer should seek to be introduced to the presiding judge and the prosecutor and/or the procurator (if there is one), preferably prior to the formal opening of the court session, or failing that option, in the courtroom itself. These meetings are by way of courtesy visits, during which the observer should, if asked, explain the purpose of his or her mission and emphasize the widespread international interest in the trial. Should interpretation be required during the trial (see below), the observer should request permission from the presiding judge for this service to be allowed.

It may often be appropriate for the observer also to meet the accused and/or defence counsel in the case. But care should be taken in this regard, as in some cases such a meet-

ing may appear to show bias. The observer should also be sensitive to the possibility that contact with the accused or his or her family might put them in jeopardy.

6. Contacts with the media

The observer should inform representatives of the press of his or her presence as a trial observer, unless otherwise agreed with the sending organisation. If it appears that there is any matter in connection with the trial which calls for immediate comment, the observer may in his or her discretion give a statement to the press. Normally, however, it will be sufficient to answer press questions by saying that the observer will be reporting to the sending organisation. The observer should provide the organisation with a copy of any press statement issued.

Be aware that there may be television coverage of the trial.

7. The conduct of the observer during the trial

The observer, who should be appropriately dressed and behave in a dignified manner, should be in the courtroom well before the trial is due to start. If no seat has been reserved for the observer, he or she should try to sit in a prominent place in the courtroom. The observer should be seen to be taking extensive notes.

Necessary interpretation services should be arranged in a practical way, normally by the interpreter's sitting next to the observer and whispering simultaneously with the speeches of the parties. As this practice may disturb the court, however, it is important to ask the presiding judge for permission to proceed in this manner.

If the observer has enough time, it is worth preparing a short checklist of any specific points or problems identified during the meeting with defence counsel.

8. Report of the trial observation

The observer should report to the sending organisation as soon as possible after the completion of the mission. If it appears that any matter relating to the mission requires an urgent comment or action, the observer should contact the organisation informally prior to the submission of the formal report. If any parts of the report on the trial should remain confidential, either until the end of the trial or permanently, the observer should clearly identify those parts.

The following list indicates topics and issues that should be addressed in most reports of trial observations:

- *Background for the trial.* Include a brief description of the relevant socio-political conditions in the country, the nature of the substantive criminal law and the role of judicial proceedings in this context, etc. Should reports be available from previous observations of the same trial and/or similar trials, where there have been a number of them, these should be summarised here as well.

- *Information about the accused.* Provide relevant information about the personal history of the accused, including political affiliations or activities, past criminal record, etc. If Amnesty International has adopted the accused as a Prisoner of Conscience, mention this fact here.

The following items should be organised according to the international standards, but include an assessment of compliance with applicable domestic laws and norms as well.

- *The charge or indictment.* State whether the charge or indictment was written in a clear manner in language the defendant could understand. The nature of the charge or indictment may also be appropriately addressed in the context of the background of the trial or information about the accused. Copies, if available, should be attached to the report as annexes.
- *Relevant laws, regulations or decrees.* Provide a brief review of the law applicable in the case. Mention which relevant international human rights instruments, if any, the country has ratified and include information about any relevant reservations or derogations. Attach as annexes to the report copies of any available domestic materials. As with discussion of the charge or the indictment, matters addressed in this section may also be appropriately addressed in the context of the background of the trial.
- *The independence and impartiality of the tribunal.* Describe the structure of the judiciary in general and the specific court conducting the trial, in light of the international standards governing independence and impartiality of the judiciary (see Section 10).
- *The roles of the prosecution and defence counsels.* Evaluate the roles played by the prosecutor and the defence counsel in light of the principle of the equality of arms. Some aspects of the operation of the judiciary may appropriately be discussed here, where the practice of the tribunal seems not to be impartial. Should the criminal justice system also utilise the procurator system, discuss this in this section.
- *The nature of the prosecution's case and a summary of the prosecution's evidence.* Describe the law and practice governing such matters as control of evidence, rules for discovery, subpoena powers, etc., and their possible effects on the fairness of the trial. Note any problems with low or shifting burdens of proof that require the defendant to help prove the charges against him or her (in violation of the right to be presumed innocent).
- *The nature of the defence and a summary of the defence's evidence.* Evaluate the working conditions of defence counsel, including such matters as timely and adequate access to files maintained by the prosecution and/or the procurator, the right to present and confront witnesses, etc.
- *The conduct of the trial.* Organise this section of the report according to international standards but include an assessment of compliance with the applicable domestic laws and norms as well. Consider the attitude and approach taken by the presiding judge or judges to the prosecution and the defence. In cases in which a procurator has taken part, evaluate his or her objectivity. In jury trials, assess the instructions given to the jury by the judge. Stress respect for the right to be presumed innocent until proved guilty according to law.

- *The judgement and sentence (if any) imposed at the first instance.* Copies, if available, should be attached to the report as an annex. Often the official texts of the judgement and sentence are not immediately available. The observer should therefore arrange for the court registrar or the defence counsel to send these documents either to the observer or directly to the sending organisation.
- *Availability and effectiveness of appellate proceedings.* State whether the defendant may appeal the judgement, the sentence or both to a higher instance court. Note whether the appeal is by right or by leave of the lower court. If possible, describe the procedures followed by appellate courts in the jurisdiction (whether review is conducted solely on written submissions by the parties, whether there are new hearings, etc.) and evaluate them in light of the principles governing the initial trial. Provide a brief description of the powers of the appellate level court (e.g., can the court reverse an acquittal, increase a sentence).
- *Availability of international review.* Given the frequent problems that arise with obtaining timely information about the ultimate disposition of a case, the observer should alert the sending organisation of the need to follow up the possibility of an international appeal. This point should also be raised with any other observers scheduled to attend the same trial.
- *Press clippings related to the trial.* If the domestic or international press has reported on the trial, attach any press clippings to the report as an annex.

9. Evaluation of the fairness of the trial

Compared to other types of human rights monitoring an assessment of the fairness of a trial is in many respects a more objective undertaking. The international legal standards governing the conduct of criminal trials not only demand ‘fairness’ but also dictate a list of procedural guarantees that are the minimum requirements of that ‘fairness’.

The observer therefore must remember that a violation of one or more of those procedural rights renders a trial ‘unfair’: it is not the observer’s task to evaluate the evidence or otherwise engage in balancing among the various considerations that arise in the course of any criminal trial (e.g., adopting a ‘harmless error’ or ‘actual prejudice’ approach to the observation). The observer’s final assessment of the fairness of the trial should therefore focus on the violation of the rights of the accused – whatever verdict has been reached.

10. International standards governing fair trial

This section outlines the standards governing the conduct of a fair trial. In part, these standards are based on general principles derived from the International Covenant on Civil and Political Rights (Article 14) and the general comments of the Human Rights Committee (the monitoring body for the Covenant).

For Article 14 of the International Covenant on Civil and Political Rights, Article 6 of the European Convention on Human Rights, Article 8 of the American Convention on Human Rights and Article 7 of the African Charter on Human and Peoples’ Rights, see the Annex.

Trial observers should be aware that there are two general dimensions in the evaluation of the fairness of a trial. The *institutional* dimension requires consideration of the structure of the judiciary in general, the tribunal in particular, and the legal profession in the country where the trial is taking place. The *procedural* dimension relates to the conduct of the trial itself, albeit in relation to the substantive criminal law as well as the procedural rules and practices of the tribunal. At the outset, it is worth noting that in its General Comment 13/21 (para. 15), the Human Rights Committee stated: “In order to safeguard the rights of the accused (...) judges should have authority to consider any allegations made of violations of the rights of the accused during any stage of the prosecution.”

Institutional concerns

Competent, independent and impartial tribunal established by law (ICCPR 14(1))

Circumstances surrounding the appointment and employment of judges

Judges should be chosen in a non-discriminatory way from among persons with personal integrity and appropriate training or qualifications.

Judges should have security of tenure, whether for a fixed term or until retirement.

Judges should have an adequate salary and guarantees that the salary cannot be reduced except by operation of law.

Judges should be prohibited from holding offices or jobs incompatible with the functions or independence of their judicial role.

Promotions and transfer of judges should be governed by objective factors that are clear and that are followed consistently.

Judges should only be subject to disciplinary action or removal on grounds of incapacity or behaviour that is incompatible with their integrity or independence.

Judges should not have been involved in the case prior to the trial and should not have commented on the case in public beforehand.

If the trial is by jury, jurors should be chosen by means that guarantee their independence and impartiality.

Independence of the judiciary as an institution

The independence of the judiciary requires its freedom from influence or control by the executive or legislative branches. This principle should be enshrined in every country's constitution.

Trial courts should be free from influence not only by the executive or legislative branches, but by judicial colleagues and superiors as well.

The tribunal must be independent from those responsible for bringing charges against the accused.

Any tribunals reviewing decisions taken by other tribunals should also be independent and impartial.

Human Rights Committee General Comment 13/21 (para. 3):

“States Parties should specify the relevant constitutional and legislative texts which provide for the establishment of the courts and ensure that they are independent, impartial and competent, in particular with regard to the manner in which judges are appointed, the qualifications for appointment, and the duration of their terms of office; the condition governing promotion, transfer and cessation of their functions and the actual independence of the judiciary from the executive branch and the legislative.”

Special courts

In general, no trials of civilians are permitted before military or special courts. If, in exceptional cases, civilians are tried by such courts, it is very important to afford the full guarantees of Article 14.

Human Rights Committee General Comment 13/21 (para. 4):

“The provisions of Article 14 apply to all courts and tribunals within the scope of that article whether ordinary or specialised. The Committee notes the existence, in many countries, of military or special courts which try civilians. This could present serious problems as far as the equitable, impartial and independent administration of justice is concerned. Quite often the reason for the establishment of such courts is to enable exceptional procedures to be applied which do not comply with normal standards of justice. While the Covenant does not prohibit such categories of courts, nevertheless the conditions which it lays down clearly indicate that the trying of civilians by such courts should be very exceptional and take place under conditions which genuinely afford the full guarantees stipulated in Article 14.”

Note that the Human Rights Committee has tied the operation of special or military courts to a reminder that if a derogation from Article 14 is declared during a public emergency, States are still bound by the strict interpretation of the derogations clause.

(Fair and) public hearing

Criteria governing the fairness of a hearing are discussed below in the subsection on procedural concerns.

As a general rule, all hearings are open to all members of the public, including the press, and not restricted to openness to certain categories of individuals. The only permissible exceptions to the requirement of a public trial are the possible exclusion of the press or the public in the interests of morals, public order (*ordre public*) or “national security in a democratic society”.

Less relevant to most trial observations are *in camera* proceedings in the interests of the private lives of the parties or when the court considers it necessary in special circumstances where publicity would prejudice the interests of justice.

Public pronouncement of the judgement

Except in children’s/family cases, all judgements must be pronounced publicly even if

the hearing itself was closed. However, written publication of a judgement in an official gazette may be considered as meeting this requirement, so trial observers may effectively be excluded even at this important phase.

Procedural concerns

Remember that the international instruments provide for *minimum* procedural guarantees (ICCPR 14(3)), the observance of which still does not guarantee that a hearing has been fair under Article 14(1).

The main problem in this area is that much of the procedural action in a given trial may take place behind closed doors, particularly when the defendant is in custody. In such circumstances, it is important to work closely with defence counsel while maintaining an objective and impartial attitude to the conduct of the proceedings.

All persons shall be equal before the courts and tribunals (ICCPR 14(1))

Most trial observations will be of trials that are ‘politically coloured’. If the observer has time, he or she should try to attend a ‘normal’ criminal trial in the same country in order to have a basis for comparing the two.

One aspect of ‘equality’ is the ‘equality of arms’ between the prosecution and the defence. An assessment of the equality of arms requires consideration of the cumulation of practice during the entire criminal proceeding. It can be difficult to ascertain whether the equality of arms has been respected during the investigative phase of a proceeding, as much of this work is done behind closed doors and, obviously, prior to the trial that is being observed. As noted above, the observer should gain a sense of the conduct of this phase of the proceeding through contact with defence counsel.

Every defendant is entitled to be treated the same way as any other similarly placed criminal defendant. This principle prohibits discriminatory treatment of any criminal defendant on any basis whatsoever, including the nature of the charges. One important aspect of the principle is also the prohibition of collective criminal convictions or punishments.

Presumption of innocence (ICCPR 14(2))

Respect for the right to be presumed innocent has three main aspects. First, it requires all public authorities to refrain from making public comments about the guilt or innocence of the accused. This requirement also places a particular obligation on the judges in the case to be seen to preserve their independence and impartiality. Second, it requires the operation of rules of evidence that guarantee that the prosecution retains the burden of proof. Third, it requires that the benefit of the doubt belongs to the defendant (the *in dubio pro reo* principle).

The observer should also be aware of any attributes of guilt existing in the country and to note if the accused bears any of them during the trial. The wearing of shackles or prison uniforms are obvious examples of this phenomenon, but others are less so (e.g., convicted criminals in China have their heads shaved).

Human Rights Committee General Comment 13/21 (para. 7):

“By reason of the presumption of innocence, the burden of proof of the charge is on the

prosecution and the accused has the benefit of the doubt. No guilt can be presumed until the charge has been proved beyond reasonable doubt. Further the presumption of innocence implies a right to be treated in accordance with this principle. It is, therefore, a duty for all public authorities to refrain from prejudging the outcome of a trial.”

Prompt and adequate information about the charge in language the defendant understands (ICCPR 14(3)(a))

This rule requires that the language in which the charge is presented is not only a language with which the accused is conversant, but that it is couched in clear enough terms that the accused is able to understand the substance of the charge against him or her.

Human Rights Committee General Comment 13/21 (para. 8):

“Article 14(3)(a) applies to all cases of criminal charges, including those of persons not in detention. The Committee notes further that the right to be informed of the charge ‘promptly’ requires that information is given in the manner described as soon as the charge is first made by a competent authority (...) [T]his right must arise when in the course of an investigation a court or an authority of the prosecution decides to take procedural steps against a person suspected of a crime or publicly names him as such. The specific requirements of subparagraph 3(a) may be met by stating the charge either orally or in writing, provided that the information indicates both the law and the alleged facts on which it is based.”

Adequate time and facilities for the preparation of the defence (ICCPR 14(3)(b))

In the absence of blatant violations of this provision, such as denying defence counsel any access at all to the files of a case or refusals to provide counsel any information about the case until the day of the trial, an evaluation of ‘adequate time and facilities’ is perhaps the most subjective of the international standards.

Human Right Committee General Comment 13/21 (para. 9):

“What is ‘adequate time’ depends on the circumstances of each case, but the facilities must include access to documents and other evidence which the accused requires to prepare his case, as well as the opportunity to engage and communicate with counsel.”

Communication with counsel of one’s own choosing (in conjunction with adequate time and facilities for the preparation of the defence)

- Defence of oneself or through legal assistance of one’s own choosing
- To be informed of the right to counsel
- Legal aid

This is one of the most important areas for the observer to examine carefully. It is the only right that extends throughout the entire proceeding, from the earliest stages of the investigation through all possible levels of appeal. It is also the chief means by which a criminal defendant protects all other procedural rights.

Although not specifically listed, this right encompasses the right to confidential communication with counsel as part of the facilities necessary for the preparation of the defence. Independence of the legal profession is also a key aspect of this right.

An individual providing legal representation must fully represent the interests of the accused and must act as his or her advocate.

An accused must be permitted to choose his or her own counsel, where the state is not providing counsel to an indigent accused under a legal aid scheme or similar arrangement. The nature of the crime for which an individual is being detained has no bearing on the right to counsel.

For example, even someone suspected of having committed terrorist offences is still entitled to exercise fully this right. Should an indigent accused request the court to appoint a lawyer to represent him or her, the court should ensure that the lawyer meets reasonable professional standards and is enabled to exercise his or her professional functions to the same degree as a lawyer acting as a free agent. In legal systems that have procurators, the existence of that function does not eliminate the accused's right to counsel.

The state is under an obligation to ensure that counsel appointed to represent the accused provides effective and not just formal representation. It is also important that appointed counsel has neither a duty of loyalty to the government nor a lower standard of professional obligation than any other legal representative.

Human Rights Committee General Comment 13/21 (para. 9):

“When the accused does not want to defend himself in person or request a person or an association of his choice, he should be able to have recourse to a lawyer. Furthermore, this subparagraph requires counsel to communicate with the accused in conditions giving full respect for the confidentiality of their communications. Lawyers should be able to counsel and to represent their clients in accordance with their established professional standards and judgement without any restrictions, influences, pressures or undue interference from any quarter.”

Right to be tried without undue delay (ICCPR 14(3)(c))

The right to be tried ‘without undue delay’ must be balanced with the adequate time and facilities provision mentioned above. Due to the time it takes to plan a trial observation mission and to the lengthy pretrial detention prevailing in many countries, an observer will be more likely to encounter a problem of ‘undue delay’ than lack of ‘adequate time’ to prepare the defence.

Human Rights Committee General Comment 13/21 (para. 10):

“This guarantee relates not only to the time by which a trial should commence, but also the time by which it should end and judgement be rendered: all stages must take place ‘without undue delay’. To make this right effective, a procedure must be available in order to ensure that the trial will proceed ‘without undue delay’, both in first instance and on appeal.”

General prohibition on trials in absentia (ICCPR 14(3)(d))

As a general rule, an accused has the right to be present during his or her trial. Exceptions to this rule may be permissible, however, as long as blame for the absence can be placed on the defendant and as long as means exist either to retry or to appeal the case on the appearance of the defendant.

Human Rights Committee General Comment 13/21 (para. 11):

“The accused or his lawyer must have the right to act diligently and fearlessly in pursuing all available defences and the right to challenge the conduct of the case if they believe it to be unfair. When exceptionally for justified reasons trials *in absentia* are held, strict observance of the rights of the defence is all the more necessary.”

Equal access to and confrontation of witnesses (ICCPR 14(3)(e))

Where confrontation of witnesses occurs during the trial itself, respect for this right will be relatively easy to ascertain. It is much more difficult in those instances where confrontation may occur during preliminary phases of the proceedings through the exchange of written materials (e.g., depositions). The latter situation is yet another in which liaison with defence counsel must be balanced against the maintenance of objectivity in the trial observation.

Human Rights Committee General Comment 13/21 (para. 12):

“This provision is designed to guarantee to the accused the same legal powers of compelling the attendance of witnesses and of examining or cross-examining any witnesses as are available to the prosecution.”

Free assistance of an interpreter if the defendant cannot understand or speak the language used in court (ICCPR 14(3)(f))

The key issue that often arises in connection with this principle is its attempted nullification by governmental declarations that a particular language is ‘official’ and therefore is understood and/or spoken by the defendant.

Human Rights Committee General Comment 13/21 (para. 13):

“[I]f the accused cannot understand or speak the language used in court he is entitled to the assistance of an interpreter free of any charge. This right is independent of the outcome of the proceedings and applies to aliens as well as to nationals. It is of basic importance in cases in which ignorance of the language used by a court or difficulty in understanding may constitute a major obstacle to the right of defence.”

Not to be compelled to testify against oneself or to confess guilt (ICCPR 14(3)(g))

Note the dual aspect of this provision – it prohibits any form of compulsion, not just ‘torture’; and it applies to any form of testimony, not just confessions.

Human Rights Committee General Comment 13/21 (para. 14):

“In considering this safeguard the provisions of Article 7 [prohibition of torture etc.] and Article 10, paragraph 1 [humane treatment of anyone deprived of liberty], should be borne in mind. In order to compel the accused to confess or to testify against himself frequently methods which violate these provisions are used. The law should require that evidence provided by means of such methods or any other form of compulsion is wholly unacceptable.”

It is worth noting that both the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Article 15) and the Inter-American Convention to Prevent and Punish Torture (Article 10) declare inadmissible evidence gained under torture.

Criminal trials of juveniles (ICCPR 14(4))

Although most trial observations will be of trials of adults, in some instances the accused may be a juvenile. The observer should find out the age of criminal responsibility in the country, where it differs from the age of majority, and the domestic law governing criminal proceedings against juveniles being tried as adults.

Human Rights Committee General Comment 13/21 (para. 16):

“[I]n the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation. (...) Juveniles are to enjoy at least the same guarantees and protection as are accorded to adults under Article 14.”

The right to appeal convictions and sentences (ICCPR 14(6))

Although the issue of appeals does not normally arise in connection with an international trial observation, an observer should be aware of the right for an individual who has been convicted of a criminal offence to have both his or her conviction and his or her sentence reviewed by a higher tribunal.

Human Rights Committee General Comment 13/21 (para. 17):

“[E]veryone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law. Particular attention is drawn to the other language versions of the word ‘crime’ (*‘infraction’, ‘delito’, ‘prestuplenie’*) which show that the guarantee is not confined only to the most serious offences.”

The prohibition against retrial for the same offence (ICCPR 14(7))

The ‘double jeopardy’ provision in international law is not usually relevant to international trial observation missions. In some instances, however, an observer may find that the prosecuting authorities have recharacterised an offence or filed additional and related charges against an individual in order to detain him or her in custody after an acquittal or to rearrest him or her on release after completing a prison sentence. The observer should make a clear distinction between resumption of a trial justified by exceptional circumstances and a retrial prohibited pursuant to the principle of *ne bis in idem*.

Notes

¹ The present chapter is a slightly adjusted version of the Manual on Trial Observation that the authors originally prepared at the joint initiative of the then Norwegian Institute of Human Rights and the Human Rights Committees of the Norwegian Bar Association and the Norwegian Judges Association. The authors would like to acknowledge other organisations and individuals working in this area who were most generous in sharing their information. In particular, we would like to mention Amnesty International, the International Bar Association and the participants at the January 1995 meeting on trial observation held at the Norwegian Institute of Human Rights. We should also mention Professor David Weissbrodt’s 1982 article in the *Stanford Journal of International Law*, “International Trial Observers”, which provided us with many useful ideas.

² See, e.g., Pieter van Dijk, “Universal Legal Principles of Fair Trial in Criminal Proceedings”, in Rosas and Helgesen, *Human Rights in a Changing East/West Perspective* (Pinter Publishers, 1990).

ANNEX: Selected legal references***International Covenant on Civil and Political Rights****Article 14*

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (*ordre public*) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.
2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.
3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:
 - a) to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
 - b) to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;
 - c) to be tried without undue delay;
 - d) to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;
 - e) to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
 - f) to have the free assistance of an interpreter if he cannot understand or speak the language used in court;
 - g) not to be compelled to testify against himself or to confess guilt.
4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.
5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.
6. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground

that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

The European Convention on Human Rights

Article 6

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgement shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.
2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
3. Everyone charged with a criminal offence has the following minimum rights:
 - a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
 - b) to have adequate time and facilities for the preparation of his defence;
 - c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
 - d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
 - e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

American Convention on Human Rights

Article 8

1. Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labour, fiscal, or any other nature.
2. Every person accused of a criminal offence has the right to be presumed innocent so long as his guilt has not been proven according to law. During the proceedings, every person is entitled, with full equality, to the following minimum guarantees:

- a) the right of the accused to be assisted without charge by a translator or interpreter, if he does not understand or does not speak the language of the tribunal or court;
 - b) prior notification in detail to the accused of the charges against him;
 - c) adequate time and means for the preparation of his defence;
 - d) the right of the accused to defend himself personally or to be assisted by legal counsel of his own choosing, and to communicate freely and privately with his counsel;
 - e) the inalienable right to be assisted by counsel provided by the state, paid or not as the domestic law provides, if the accused does not defend himself personally or engage his own counsel within the time period established by law;
 - f) the right of the defence to examine witnesses present in the court and to obtain the appearance, as witnesses, of experts or other persons who may throw light on the facts;
 - g) the right not to be compelled to be a witness against himself or to plead guilty; and
 - h) the right to appeal the judgement to a higher court.
3. A confession of guilt by the accused shall be valid only if it is made without coercion of any kind.
 4. An accused person acquitted by a non-appealable judgement shall not be subjected to a new trial for the same cause.
 5. Criminal proceedings shall be public, except insofar as may be necessary to protect the interests of justice.

African Charter on Human And Peoples' Rights

Article 7

1. Every individual shall have the right to have his cause heard. This comprises:
 - a) the right to an appeal to competent national organs against acts of violating his fundamental rights as recognised and guaranteed by conventions, laws, regulations and customs in force;
 - b) the right to be presumed innocent until proved guilty by a competent court or tribunal;
 - c) the right to defence, including the right to be defended by counsel of his choice;
 - d) the right to be tried within a reasonable time by an impartial court or tribunal.
2. No one may be condemned for an act or omission which did not constitute a legally punishable offence at the time it was committed. No penalty may be inflicted for an offence for which no provision was made at the time it was committed. Punishment is personal and can be imposed only on the offender.

The Norwegian Centre for Human Rights aims to contribute to the realisation of internationally recognised human rights, through research and reporting, teaching, advisory services, information and documentation. The Centre was founded in 1987 and is organised as an interdisciplinary centre under the Faculty of Law at the University of Oslo. Since 2001 the Centre has been designated as the National Institution for Human Rights in Norway.

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The first edition of the Manual on Human Rights Monitoring was developed at the request of the United Nations High Commissioner for Human Rights and published in 1997. The Manual is integral to the generic training provided to members of the NORDEM Stand-by Force in order to prepare them for human rights field operations. This is the third, revised edition (2008). The new edition includes one new chapter (Chapter 10) and three rewritten chapters (Chapters 2, 5 and 11). The remaining chapters are updated according to events and new developments in the field of human rights since the second edition in 2001.

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