



# ELDH European Association of Lawyers for Democracy & World Human Rights

WITH LAWYERS  
IN 18 COUNTRIES

EJDM Europäische Vereinigung von Juristinnen & Juristen für Demokratie und Menschenrechte in der Welt  
EJDH Asociación Europea de los Juristas por la Democracia y los Derechos Humanos en el Mundo  
EJDH Association Européenne des Juristes pour la Démocratie & les Droits de l'Homme  
EGDU Associazione Europea delle Giuriste e dei Giuristi per la Democrazia e i diritti dell'Uomo nel Mondo

Equality Privacy Social Rights  
No Racism Peace No Torture No War  
Self-Determination of Peoples Democracy  
Human Rights Rights of Migrants

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## TRIAL OBSERVATION GUIDE

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This manual is supposed to help lawyers, from the ELDH and other organisations, to perform trial observations effectively and without unnecessary risks.

It deals with the question how a trial observation mission should be prepared and carried out in practice. Since trial observers may be—but often are not—litigation lawyers, this guide has been written and structured so as to provide brief yet clear guidelines on how to conduct a trial observation mission, in both substantive and practical terms.

The guide is the result of various trial observations e. i. France, Morocco, Spain and Turkey and of a workshop on trial observation in 2012 in Bern (Switzerland), organised by ELDH together with the Swiss Association of Democratic Lawyers (DJS-JDS). To a large extent it is based on the excellent work done by the “International Commission of Jurists” TRIAL OBSERVATION MANUAL (Geneva, 2002) and by the “Lawyers Committee for Human Rights” WHAT IS A FAIR TRIAL? A Basic Guide to Legal Standards and Practice (New York, 2000)

We would very much welcome any suggestions for improvements that NGOs and individuals with trial monitoring experience may wish to make.

Düsseldorf, 2013

## TRIAL OBSERVATION

### TO WHOM IS THIS MANUAL ADDRESSED?

By this manual ELDH tries to give answers to the most frequent questions of trial observers. The answers given reflect the experience of many lawyers and their organisations who have organized or who have participated at trial observations.

However each trial and each observation may follow different principles. Monitors need a certain flexibility and must use their own judgement in responding to the different situations they may encounter. Consequently, the discretion and experience of trial observers are vital for a successful trial observation. The ELDH encourages you to try, as much as possible, to take into consideration these guidelines when making your decisions on the ground.

### WHAT IS TRIAL OBSERVATION?

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 is often done by lawyers, but by journalist, human rights activists or other interested persons. Usually it is easier for lawyers due to their professional training and experience to understand the procedure and to judge if the principles of a fair trial are violated.

Many NGOs are organizing trial observations. Usually ELDH tries to organize joint observations together with lawyers and human rights activists from other associations.

## 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 ELDH with first-hand information for its analysis of the trial, for a report and for its conclusions

If there are specific objectives for a certain trial observation, ELDH will inform the observers

## TYPES OF TRIALS TO BE OBSERVED

The ELDH usually observes 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 or that the principles of a fair trial will be violated. Many of the trials observed are against alleged terrorists (i.e. PKK, KCK, ETA, and Polisario) or other politically motivated trials.

## CHOICE OF TRIALS

The choice of a trial to be observed will primarily depend on the ELDH's general field of activity and the interest it might have in a particular case. Factors which may influence a decision to send trial observers are: the stature of the person on trial, the political or human rights significance of the proceedings, the historical relevance of the trial, the media attention generated by the case, anticipated irregularities in the proceedings, etc., or any combination of these and other concerns. There simply can be no exhaustive enumeration.

Since ELDH personnel and financial resources are very limited only very few trial observations are possible every year. There are far more trials which deserve monitoring than trial observers are available.

## FINANCING OF TRIAL OBSERVATIONS

The ELDH may in cases where it is necessary pay a contribution to the travel expenditures of an observer. A large part of her/or his expenditures will have to be paid by the observer her/himself, by his national organisation or by funding.

## **CHOICE OF TRIAL OBSERVERS**

The ELDH depends on the readiness of colleagues to participate at a specific trial observation.

What should be the profile of an ELDH trial observer? The more of these criteria are fulfilled the more efficient the monitoring will be.

- legal background (Criminal Law, Human Rights Law)
- experience as practising judge or lawyer
- knowledge and experience with respect to the right to fair trial
- knowledge of legal system of country where trial observation will be held, including the structure and functioning of the judiciary
- experience in conducting fact finding missions and trial observations
- familiarity with a case
- ability to work in a team
- promptness with deadlines
- preferably, knowledge of the language of the country to be visited

If an observer is being sent to monitor a trial abroad, his or her nationality, ethnicity or gender may be relevant criteria.

His or her ability to enter a particular country with or without a visa will also be significant.

## PREPARATION OF 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 a trial observation.

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

### BRIEFING

The ELDH will try to provide the observer with some basic information on the trial. Where possible a personal briefing will be arranged by local lawyers

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 basis information can include

- Copy of the ELDH Trial Observation Guide
- 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 ELDH has relations. These can be local organisations as well as other organisations that send observers and with whom ELDH cooperates.
- Information on ELDH'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)
- Order of mission (Formal authorisation issued by ELDH of the mission stating the purpose of the mission and presenting the observers as an ELDH representatives to the trial observation. The document may be presented to Judges and Government officials). It is designed primarily to encourage the judges and the host government to co-operate with the mission. In some cases it may be important to obtain a visa.
- 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

If available the observer will be informed by ELDH of the history, politics, the law and human rights conditions of the country where the trial observation is to be held. Usually it will be necessary for the trial observer to undertake further research to complement the information in the Briefing Kit.

### VISA

As far as ELDH members from EU Member States are concerned there will be no visa requirements inside the European Union. Trial observers from the EU who intend to observe a trial in Turkey do not need a visa either. They just have to present their passport or identity card.

If the trial takes place in other countries outside the European Union 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. In countries like Morocco or USA a tourist visa may be sufficient.

#### TRAVEL ARRANGEMENTS AND FINANCING

The general rule is that the ELDH trial observers take care of their own travel arrangements. ELDH and local partners may assist with the choice of a hotel near the courtroom.

In general the costs of a trial observation are covered by the trial observers themselves, by their national organisation or by funding. If necessary, ELDH may pay a contribution to the travel expenditures.

#### KNOWLEDGE OF THE LANGUAGE - INTERPRETERS

The trial observation only makes sense if the observer has a good knowledge of the language which is spoken at the trial or if she/he has an interpreter. In general ELDH will not be able to provide interpreters. In many cases local partners help with the translation.

#### SECURITY RISKS

If the risks are not reasonably manageable, it is unlikely that the ELDH will send an observer. The ELDH 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.

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. In general ELDH observers should avoid unnecessary provocation of government officials and judges.

#### INFORMING THE AUTHORITIES

ELDH will not request permission to send an observer. However ELDH may notify the authorities that an observer will be attending a certain trial. The ELDH'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. Usually the local partners will inform ELDH about the conditions for a trial observation.

It may also be useful to inform other appropriate governmental bodies, such as the Ministry of Justice, to obtain the co-operation from relevant bodies. In certain cases when a security risk is not excluded the trial observer may 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 ELDH. For example, if there are risks to the safety of the observer, the ELDH 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 ELDH usually issues a press release upon completion of mission and the trial observation's report.

## **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 (only outside the European Union) where immigration officers prevented trial observers into the country.

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

### **MEETINGS**

Usually ELDH may try to arrange meetings with relevant organizations and people, such as defence lawyers, lawyer's organisations, victims. Judges, public prosecutors, and government officials should only be met, if this is esteemed useful by the defence lawyers. 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 ELDH in a wider sense than of a trial observer.

#### **MEETING WITH THE DEFENCE LAWYERS**

Very often the defence councils, sometimes local human rights organisations, will organise a briefing before the trial starts. 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 she/he arrives.

#### **MEETING WITH THE ACCUSED**

If 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.

#### **MEETING WITH REPRESENTATIVES OF OTHER ORGANISATIONS**

At the place of the trial the observers will also meet with observers from other organisations. They can try to develop a common strategy with the other observers and their organisations. But this will not always be possible and should not have the result that the mission cannot be fulfilled in the way it was intended.

#### **MEETING WITH PRESIDING JUDGE**

Meeting with the presiding judge can be significant for the success of the trial observation. After consultation with the defense lawyers ELDH will decide if such a meeting should be undertaken by the ELDH observers.

The meeting with the judge can be 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 "Order of the 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.

Instead of meeting the judge it might be useful to announce the trial observation by a letter sent to the court or the Ministry of Justice. This has to be done by ELDH.

#### ATTENDANCE IN THE COURTROOM

Each courtroom has a different seating arrangement making it difficult to give precise directions as to where the observer should sit. A possible seating location would be with disinterested local attorneys. Another possibility is to request a special seat in the courtroom. Such a request can possibly be made to the the presiding judge or Ministry of Justice.

#### INTRODUCTION OF THE OBSERVER IN COURT

In some cases 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. Together with the defense lawyers ELDH observers will decide if, how and by whom an introduction of the observers can be done.

#### SPECIAL ROLE OF LAWYERS AS TRIAL OBSERVERS ?

There exist no special procedural rules for lawyers who observe trials. During the hearing they have no right to address the tribunal, to give public statements or to communicate with the defense lawyers and the defendants.

Usually ELDH trial observers have only access to trials which are held publicly. In such cases they may sit mixed with other observers, very often relatives of the defendants, as well as journalists and human rights activists. In order to become visible for the tribunal and for the public, lawyers who observe the trial wear their robes.

#### TAKING NOTES

It is important that the observer take extensive notes while observing the trial which will serve for the final report on the fairness of the proceedings.

In the countries where ELDH representatives participated in trial observations in recent years, taking notes was possible without permission. However recordings and also using a notebook or similar technical equipment may not be permitted. ELDH will try to inform the observers in advance which are the conditions for taking notes in a specific country and at a specific case.

If note-taking is generally prohibited, observers may 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. The local lawyers may also be ready to help getting a special permission for taking notes.

Taking pictures during the hearing is almost always prohibited and should not be attempted secretly.

## COMMUNICATING WITH THE ELDH

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

## PUBLIC STATEMENTS

As a general rule it is the role of the ELDH Executive Committee and of the ELDH President and the ELDH Secretary General 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, unless this is requested by the defense lawyers.

If there is an urgent need to make a public statement or to hold a press conference on the proceedings, the observer should contact the ELDH and obtain the ELDH'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 ELDH usually issues a public statement or press release. For this reason, it is important that the observer submit his/her report promptly to the ELDH as a delay in issuing a press release would lessen the overall impact of the trial observation.

## AFTER THE TRIAL OBSERVATION

After the trial observation the ELDH will make all attempts to evaluate the trial together with the trial observers.

The purpose of the evaluation is to give the trial observer the opportunity to share his/her experiences and views while on mission for the ELDH. 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 evaluation is a good opportunity for the ELDH 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.

## 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 ELDH'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 ELDH while the government is still sensitive to authoritative, independent criticism and public opinion.

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

Together with the observers and perhaps local partners the ELDH will decide if and when the report can be published.

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

Background Information	Brief description of the socio-political conditions of the country (information other than contained in the Briefing Kit)
Information about the Accused/Defendant	Relevant background information on the accused, including political affiliation, professional experience, etc
Charges and Indictment (grounds for disciplinary case)	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	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	The name and background of the prosecutor and defence counsels. 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	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 and Summary of the prosecution's evidence
Nature of the Defence/Defendant Case	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	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	Description of the judgment and sentence (or awards), if any (if judgment not yet delivered, information as to the expected date)

Appellate Proceedings	<p>Information on the possibilities for appeal, including limitation for filing, need for leave from the lower court, etc</p> <p>Information on the appellate procedure (e.g. whether the appeal is made solely on written submission or based on oral hearings)</p> <p>Discussion of the power of the appellate court and the real effectiveness of the appeal</p> <p>Discussion of possible international review mechanisms and the criteria for exhaustion of local remedies</p>
Fairness of the Proceedings	<p>Description of the standards applicable to the trial, taking into account the treaties binding on the state, customary international law and national law</p> <p>Specific evaluation on the compliance of identified applicable human rights guarantees</p> <p>In most ELDH trial observations, the independence and impartiality of the judiciary might be the central issue. The main aspects to consider are: Description of the structure of the judiciary in general and the specific structure of the court where the trial was conducted</p> <p>Information on the judge(s), including the criteria for selection for this specific trial or any other relevant information</p> <p>Other important issues that should be taken into account when looking at the interpretation of the guarantee of an independent and impartial tribunal</p>
Recommendations	<p>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> <p>The trial observer's recommendations are often the basis for ELDH's recommendations.</p>

## **LEGAL STANDARDS FOR A FAIR TRIAL**

### **International and Regional Treaties**

- International Covenant on Civil and Political Rights (ICCPR) (ratified i.e. by France, Israel, Morocco, Spain, Turkey (with restrictions concerning Art. 27))
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)
  
- African Charter on Human and Peoples Rights (not by Morocco)
- American Convention on Human Rights (not by USA)
  
- European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and Protocol No. 7 of 1984 (also ratified by France, Spain, Turkey)
- Charter of Fundamental Rights of the European Union (only member states of the EU)

### **Other international Standards**

- Basic Principles on the Role of Lawyers
- Universal Declaration of Human Rights
- Standard Minimum Rules for the Treatment of Prisoners
- Basic Principles for the Treatment of Prisoners
- Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment
- Basic Principles on the Independence of the Judiciary

### **Jurisprudence**

Human Rights Committee (ICCPR), General Comments

Human Rights Committee (ICCPR), Individual Communications

European Court of Human Rights, Judgements

European Committee for the Prevention of Torture, reports, recommendations

Court of Justice of the European Union, Judgements

Inter-American Court of Human Rights, judgements and interpretations

Inter-American Commission on Human Rights, reports, recommendations

African Commission on Human Rights, interpretations, recommendations

## **Specific Guarantees for a fair trial**

### **PRE-TRIAL RIGHTS**

1. The Prohibition on Arbitrary Arrest and Detention
2. The Right to Know the Reasons for Arrest
3. The Right to Legal Counsel
4. The Right to a Prompt Appearance Before a Judge to Challenge the Lawfulness of Arrest and Detention
5. The Prohibition of Torture and the Right to Humane Conditions during Pre-trial Detention
6. The Prohibition on Incommunicado Detention

### **B. THE HEARING**

1. Equal Access to, and Equality before, the Courts
2. The Right to a Fair Hearing
3. The Right to a Public Hearing
4. The Right to a Competent, Independent and Impartial Tribunal Established by Law
5. The Right to a Presumption of Innocence
6. The Right to Prompt Notice of the Nature and Cause of Criminal Charges
7. The Right to Adequate Time and Facilities for the Preparation of a Defense
8. The Right to a Trial without Undue Delay
9. The Right to be Present at Trial and to Defend Oneself in Person or through Legal Counsel.
10. The Right to Call and Examine Witnesses
11. The Right to an Interpreter
12. The Prohibition on Self- incrimination
13. The Prohibition on Retroactive Application of Criminal Laws
14. The Prohibition on Double Jeopardy

### **C. POST-TRIAL RIGHTS**

1. The Right to Appeal
2. The Right to Compensation for Miscarriage of Justice

## **Guarantees for the functioning of lawyers**

### **Basic Principles on the Role of Lawyers**

Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990, Art. 16 - 22

1. No intimidation, hindrance, harassment or improper interference of lawyers who perform their professional functions
2. No prosecution or administrative, economic or other sanctions for any action taken in accordance with recognized professional duties, standards and ethics
3. Lawyers shall not be identified with their clients or their clients' causes as a result of discharging their functions
4. Lawyers shall enjoy civil and penal immunity for relevant statements made in good faith in written or oral pleadings or in their professional appearances before a court, tribunal or other legal or administrative authority.
5. It is the duty of the competent authorities to ensure lawyers access to appropriate information, files and documents in their possession or control in sufficient time to enable lawyers to provide effective legal assistance to their clients. Such access should be provided at the earliest appropriate time.
6. Governments shall recognize and respect that all communications and consultations between lawyers and their clients within their professional relationship are confidential.