Organization for Security and Co-operation in Europe
Office in Baku

TRIAL MONITORING REPORT

AZERBAIJAN

2011

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I. Acknowledgements

The OSCE Office in Baku (the Office) wishes to thank all those involved in the preparation of the 2011 Trial Monitoring Report (the Report) from January to December 2011, including State Authorities, representatives from the Bar Association, Prosecutor's Office, Judicial Legal Council, civil society and members of the judiciary, *inter alia.*

The Office's Implementing Partner (IP), a local civil society member "Tender Monitoring Centre" headed by Mr Alovsat Aliyev, directly implemented the 2011 Trial Monitoring Programme (the Programme) and supported the Programme's Project Team, including sixteen trial observers and two co-ordinators, Ms Nigar Huseynova and Ms Leyla Madatli. The IP supervised directly, the collection of factual data from the court cases monitored during the reporting period, in close consultation with the Office's Rule of Law and Human Rights Unit's Trial Monitoring Team, including Ms Gumral Aslanova and Ms Natasa Rasic, under the supervision of Ms Monica Martinez, Head of the Rule of Law and Human Rights Unit. Both the Project Team and the Office`s Trial Monitoring Team carried out the Programme activities in accordance with the trial monitoring methodology developed by the OSCE Office for Democratic Institutions and Human Rights (ODIHR).[1]

The Office's Rule of Law and Human Rights Unit (the Unit) implemented the Programme in close co-operation with the Ministry of Justice (MoJ) and other stakeholders. In particular, the assistance of the Trial Monitoring Working Group that the Office set up in consultation with the MoJ,[2] considerably enhanced the substance of the Report. Thus, the Office reiterates its gratitude to the Trial Monitoring Working Group for consistently facilitating productive interactive discussions on the Programme's findings and recommendations.

In addition, the Office is thankful to the Governments of Finland and Norway for their generous extra-budgetary contributions and continuing support to the Programme.

[1] ODIHR *Trial Monitoring:A Reference Manual for Practitioners,* 2008, available at: http://www.osce.org/odihr/item_11_30849.html

[2] The trial monitoring Working Group includes representatives from the MoJ, the Judicial Legal Council, the Office of the Prosecutor General, the Bar Association, a senior member of the judiciary and the Office's Trial Monitoring Team.

II. List of Abbreviations

CPC	Criminal Procedure Code of the Republic of Azerbaijan
CC	Criminal Code of the Republic of Azerbaijan
CoE	Council of Europe
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
ECPT	European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment
ICCPR	United Nation's International Covenant on Civil and Political Rights
IP	Implementing Partner
JLC	Judicial Legal Council of Azerbaijan
LRC	Legal Resource Centre
MoJ	The Ministry of Justice of the Republic of Azerbaijan
ODIHR	The OSCE Office for Democratic Institutions and Human Rights
Office	The OSCE Office in Baku
OSCE	Organization for Security and Co-operation in Europe
PO	Prosecutor's Office
RoL Unit	The OSCE Office in Baku Rule of Law and Human Rights Unit
UN	United Nations
UDHR	Universal Declaration of Human Rights
UNCAT	United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

III. List of Tables

1. Introduction

The 2011 Trial Monitoring Report. In continuation of previous Trial Monitoring Programmes,[3] the OSCE Office in Baku Rule of Law and Human Rights Unit prepared the Report in close co-operation with Azerbaijan's State Authorities and members of the judiciary in accordance with the ongoing State Programme on the Development of the Justice Sector and newly adopted National Action Plan for Human Rights 2009-2013.[4] This Report is a follow-up to previous trial monitoring reports, and includes a legal analysis of factual findings related to selected court cases that the Office monitored during the reporting period of 1 January to 31 December 2011, as well as recommendations to address shortcomings which the Office identified in the justice sector.

The Programme relates to the accomplishment of the Office's 2011 programmatic objective: "to support Azerbaijan's justice and legislative reforms in accordance with OSCE commitments, other international standards and best practices in OSCE participating states."[5]

The main objectives of the Programme[6] are as follows:

(a) To improve the administration of justice and increase the population's confidence in the judicial system;
(b) To enhance compliance with the accused's right to a fair trial; and
(c) To follow up with the Authorities on court proceedings' compliance with applicable national laws and international standards.

The Office assisted the Authorities to implement the recommendations included in previous trial monitoring reports through building the capacity of members of the judiciary and other legal professionals. For example, the Office, through four Office's Legal Resource Centres (LRCs),[7] organized specialized training activities on international fair trial norms, standards and case law in close co-operation with the Judicial Legal Council (JLC) and other justice sector actors, in Baku and in the regions across the country.

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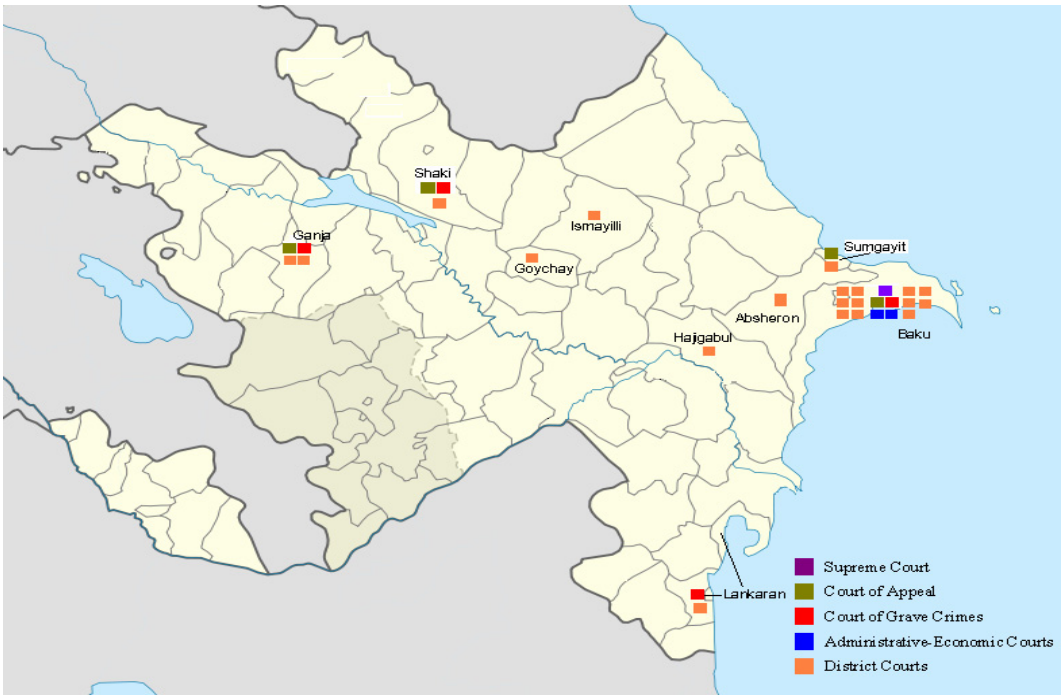
[3] The Office has implemented Trial Monitoring Programmes since 2003 and has issued four Trial Monitoring Reports so far: 2003/4; 2006/7; 2009 and 2010. The Reports are available at the Office's website: www.osce.org/baku.
[4] *State Programme on the Development of the Justice Sector, 2009-2013* and *National Program for Action to Raise Effectiveness of the Protection of Human Rights and Freedoms in the Republic of Azerbaijan*, approved by Presidential Decrees on 6 February 2009 and 27 December 2011, respectively.
[5] *2011 Unified Budget* approved by the OSCE Permanent Council on 23 December 2010.
[6] Project Proposal: *2011-2012 Trial Monitoring Programme in Azerbaijan*, project period from 3 January 2011 to 31 March 2013.
[7] The Office currently supports LRCs in Ganja, Lankaran, Shaki and Sumgayit. The LRCs provide free legal advice to the population, support training and public awareness raising activities for legal professionals and civil society as well as access to legal resources and materials. As a pilot project, the Office also supports a Centre in Baku that provides free legal assistance in connection with human rights complaints, mainly those addressed directly to the OSCE Office in Baku.

The Office's Trial Monitoring Programme. The Office has monitored trials in Azerbaijan since 2003 in line with its mandate to "promote the implementation of OSCE principles and commitments."[8] Among the OSCE commitments for protecting human rights and fundamental freedoms, the Programme assesses the compliance of Azerbaijan's administration of justice with the right of accused persons to a fair trial. The Government of Azerbaijan consistently co-operated with the Office in facilitating the Office's successful implementation of the Programme, and enabled the Office to develop the programme's scope and methodology to increase its effectiveness as an assessment tool for assisting the State Authorities in identifying shortcomings in the administration of justice. This report includes the reporting period from 1 January to 31 December 2011, and contains the Office's findings and recommendations pertaining to 520 criminal court cases including 2,094 court hearings in 31 courts of different instances across Azerbaijan.



2. Scope and Methodology

Scope of the Report. Similar to the focus the Office used for the 2010 Trial Monitoring Report, the findings of this Report identify trends in the justice sector's compliance with fair trial norms and standards in line with applicable domestic laws, the European Convention on Human Rights and jurisprudence of the European Court of Human Rights. Thus, the Report's introduction acknowledges the progress the Government and other stakeholders made in addressing the shortcomings that the Office identified in previous reports. It also clarifies areas where additional efforts are necessary to increase courts' full compliance with fair trial norms and standards. The

[8] See Annex - OSCE Commitments in the field of rule of law and criminal justice.

Office agreed on the precise scope of the Report with the MoJ from the early stages of the report's preparation. The MoJ assisted the Office with the organization of Trial Monitoring Working Group meetings to discuss the Office's factual findings and possible recommendations to address shortcomings on a regular basis.

Increasing consultations with the Government of the Republic of Azerbaijan and members of the judiciary. The Office's establishment of the trial monitoring Working Group[9] to facilitate the discussion among stakeholders of the Office's findings, shortcomings, root causes of these shortcomings and appropriate Government remedies to address them through legal and judicial reforms, considerably enhanced the transparency and impact of the Programme.

In 2011, the Office expanded the composition of the Working Group and invited representatives from the Prosecutor's Office (PO) and the *Collegium* of Advocates (Bar Association) to join the Working Group's discussions. The Office prepared three Interim Reports, which included the findings during the reporting period that the Working Group actively discussed as well as the recommendations to address shortcomings.

Monitoring methodology. The Office continued implementing the Programme through an IP, a local civil society member that the Office selected in January 2009 in line with the OSCE selection procedure.[10] The Office was also directly involved in the selection and training of the trial observers and co-ordinators.

The Trial Monitoring Team analyzed the factual data that the trial observers collected while monitoring court proceedings to identify courts' compliance with domestic legislation and international fair trial standards. The legal analysis of the factual data in line with the applicable provisions in the domestic legislation and international fair trial standards, constituted the baseline of the three Interim Trial Monitoring Reports that the Office discussed within the context of the Working Group. Upon these discussions, the Office compiled the Report incorporating also additional feedback on progress made in the justice sector during the reporting period that the Working Group's participants submitted to the Office.

In addition, the Office selected additional trial observers to replace those no longer available to work on the Programme and those who did not perform satisfactorily. The Office also organized two training activities on OSCE monitoring standards as well as domestic substantive and

[9] In 2010, the Working Group initially included representatives from the MoJ, JLC, senior member of the judiciary and the Office's Trial Monitoring team.
[10] OSCE Internal Administrative Instruction No. 15.

procedural criminal and administrative law for newly selected and existing trial observers and co-ordinators.

During the reporting period, sixteen trial observers monitored court proceedings in the capital city of Baku and the regions of Ganja, Sumgayit, Hajgabul, Ismayilli, Goychay, Absheron, Lankaran and Shaki. The trial observers collected the factual data related to courts' compliance with domestic legislation and international fair trial standards through a comprehensive questionnaire the Office developed in consultation with its IP. Following OSCE trial monitoring standards, trial observers collected the factual data in an objective and impartial manner, refraining from conducting any assessment in connection with the substance of the case.

In order to ensure diversity in the nature of the criminal proceedings that the Office monitored, the Office included 15 categories of crimes covering 70 criminal offences.

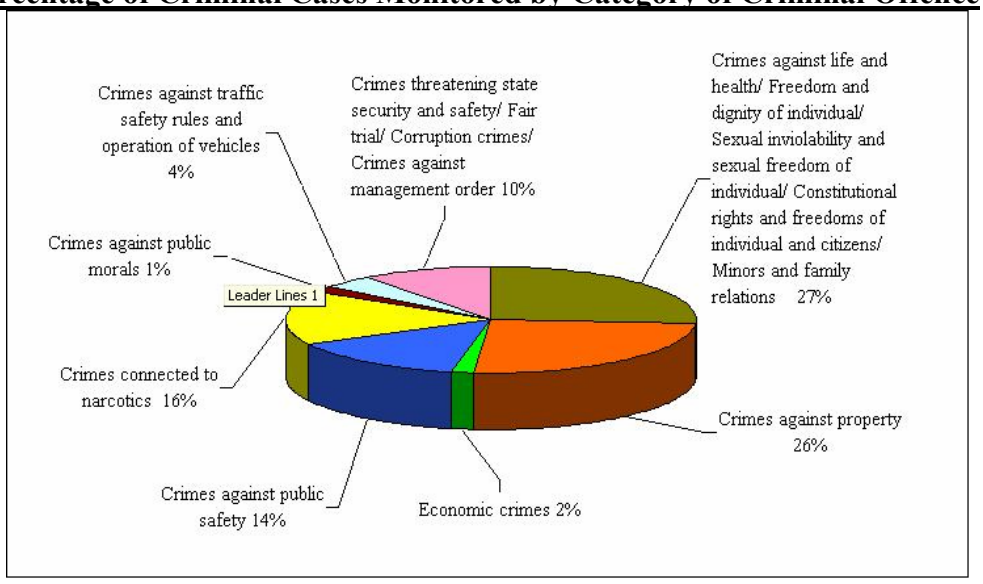
Category of Criminal Offences Monitored and Related Articles of the Criminal Code of the Republic of Azerbaijan

Category of Crimes	Articles of the Criminal Code
Crimes Against Life and Health	Art. 120. Deliberate murder Art. 124. Involuntary manslaughter Art. 126. Deliberate causing of serious harm to health Art. 127. Deliberate causing of less serious harm to health Art. 128. Deliberate causing of minor harm to health Art. 132. Battery Art. 134. Threat to murder or causing of serious harm to health
Crimes Against Freedom and Dignity of Individual	Art. 144. Kidnapping Art. 144-1. Human trafficking Art. 145. Unlawful deprivation of liberty Art. 147. Defamation Art. 148. Insult
Crimes Against Sexual Inviolability and Sexual Freedom of Individual	Art. 149. Rape Art. 150. Violent actions of sexual nature Art. 152. Sexual relations and other actions of sexual nature with the person who has not reached age 16
Crimes Against Constitutional Rights and Freedoms of Individual and Citizens	Art. 159. Interfering with the exercise of the rights to vote Art. 160. Interfering in or influencing the work of election commissions

Crimes Against Minors and Family Relations	Art. 170. Involving a minor in criminal activity Art. 176. Malicious evasion from rendering assistance to children or parents
Crimes Against Property	Art. 177. Theft Art. 178. Fraud Art. 179. Misappropriation or embezzlement Art. 180. Robbery Art. 181. Burglary Art. 185. Illegal occupation of automobile or other vehicle without an intention to plunder Art. 186. Deliberate destruction or damage of property
Crimes in the Sphere of Economic Activities	Art. 191. Registration of illegal land bargains Art. 193. Legalization (laundering) of money and other property acquired in a criminal way Art. 200. Deception of consumers or manufacture and sale of a poor-quality product Art. 206. Smuggling Art. 213. Evasion of payment of taxes
Crimes Against Public Safety	Art. 214. Terrorism Art. 216. Manifestly untrue report on terrorism Art. 217. Banditry Art. 221. Hooliganism Art. 225. Infringement of fire safety rules Art. 228. Illegal purchase, transfer, selling, storage, transportation and carrying of fire-arms, accessories, supplies, explosives Art. 229. Illegal manufacturing of a weapon Art. 230. Negligent storage of fire-arms Art. 232. Plunder or extortion of a weapon, supplies and explosives Art. 233. Organization of actions causing infringement of public order or active participation in such actions
Crimes Connected to Illegal Circulation of Narcotics and Psychotropic Substances	Art. 234. Illegal manufacture, production, acquisition, storage, carrying, sending or sale of narcotics, psychotropic substances or their precursors Art. 236. Applying force to an individual to consume narcotics or psychotropic substances Art. 237. Illegal cultivation of plants containing narcotic substances
Crimes Against Public Morals	Art. 242. Illegal distribution of pornographic materials or items Art. 243. Involvement in prostitution Art. 244. Maintenance of prostitution house
Crimes Against Traffic Safety Rules and Operation of Vehicles	Art. 263. Infringement of traffic rules and operation of vehicles Art. 264. Leaving a site of road and transport incident

Crimes Against Bases of Constitutional Power and Safety of the State	Art. 278. Violent takeover of power or violent limiting of power Art. 279. Creation of armed formations or groups, which are not provided by the legislation Art. 283. Incitement of national, racial, social or religious hatred and animosity
Crimes Against Fair Trial	Art. 289. Contempt of court Art. 296. Willful false denunciation Art. 299. Forcing or bribing to achieve refusal to testify, giving of false testimony or false opinion, or misinterpretation Art. 304. Escape from prison, from place of arrest or guarded place Art. 306. Non-execution of a judgment, decision or other act of a court
Corruption Crimes and Crimes Against State Power	Art. 309. Abuse of official powers Art. 310. Usurpation of Office. Art. 311. Acceptance of a bribe (passive bribery) Art. 313. Official forgery Art. 314. Negligence
Crimes Against Management Order	Art. 315. Resistance or application of violence against public officials Art. 317. Infringement of normal activities in detention facilities Art. 317-2. The preparation, keeping, carrying, transportation or use of prohibited items by a person held in a detention facility Art. 318. Illegal crossing of the state border of the Republic of Azerbaijan Art. 320. Counterfeiting, illegal production, sale of official documents, state awards, seals, stamps, forms or use of counterfeit documents Art. 321. Evading military service Art. 322. Arbitrariness Art. 326. Appropriation or destruction of official documents, stamps, seals

Table 1. Percentage of Criminal Cases Monitored by Category of Criminal Offence



The Office also requested trial observers to monitor on an *ad hoc* basis court proceedings in connection with alleged human rights violations brought to the attention of the Office, mainly related to OSCE commitments on the rights of freedom of expression, association and peaceful assembly.

International fair trial standards. The Office monitored courts' compliance with procedural requirements in the applicable domestic legislation and international fair trial standards excluding any assessment of substantive law related issues. In addition to domestic laws, the Office's Trial Monitoring Team considered the relevant OSCE Commitments, the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) as well as the case law of the European Court for Human Rights (ECtHR). In addition, where appropriate, this Report also refers to the UN International Covenant on Civil and Political Rights (ICCPR) and the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT).

Overview of monitored cases. The Office monitored 480 criminal cases across the country, including 348 criminal cases in Baku and 132 criminal cases across the country. Furthermore, the Office monitored 40 civil and administrative cases on an *ad hoc* basis, including 37 civil cases in Baku and 3 civil cases in regions. The total number of monitored hearings was 2,094 of which the Office monitored 1,580 hearings in Baku and 514 court hearing across the country.

Since the Office deployed two trial observers in Ganja and Sumgayit and fourteen in the Baku capital area, the number of cases the Office observed in Ganja, Sumgayit and Baku capital area is higher in comparison with other regions across the country. Otherwise, when selecting the criminal cases to be monitored, the Office mainly considered the workload of the courts as well as the complexity of the cases, covering in particular criminal proceedings related to grave crimes.

Table 2: Number of Cases and Court Hearings Monitored in 2011

COURTS	CASES			HEARINGS		
	criminal	civil	total	criminal	civil	total
Supreme Court	2	6	8	2	6	8
Baku Court of Appeal	10	12	22	17	21	38
Ganja Court of Appeal	3	0	3	7	0	7
Ganja Court of Grave Crimes	30	-	30	199	-	199
Sumgayit Court of Appeal	2	1	3	13	1	14
Baku Court of Grave Crimes	84	-	84	483	-	483
Baku Administrative Economical Court #1	-	5	5	-	12	12
Baku Administrative Economical Court #2	-	2	2	-	3	3
Absheron District Court	29	0	29	73	0	73
Binagadi District Court	19	2	21	68	6	74
Garadagh District Court	13	0	13	32	0	32
Goychay District Court	2	0	2	5	0	5
Ganja Kapaz District Court	4	0	4	14	0	14
Ganja Nizami District Court	5	0	5	36	0	36
Hajigabul District Court	0	2	2	0	2	2
Ismayilli District Court	2	0	2	2	0	2
Khatai District Court	15	0	15	79	0	79
Khazar District Court	1	1	2	3	1	4
Lankaran Court of Grave Crimes	10	0	10	30	0	30
Lankaran District Court	2	0	2	2	0	2
Narimanov District Court	38	1	39	157	4	161
Nasimi District Court	43	2	45	190	3	193
Nizami District Court	36	0	36	126	0	126
Sabail District Court	11	5	16	56	7	63
Sabunchu District Court	34	0	34	150	0	150
Shaki Court of Appeal	3	0	3	8	0	8
Shaki Court of Grave Crimes	4	-	4	9	-	9
Shaki District Court	1	0	1	1	0	1
Surakhani District Court	33	0	33	131	0	131
Sumgayit City Court	35	0	35	112	0	112
Yasamal District Court	9	1	10	22	1	23
TOTAL:	**480**	**40**	**520**	**2027**	**67**	**2094**

Table 3: Number of Court Cases Monitored in Baku

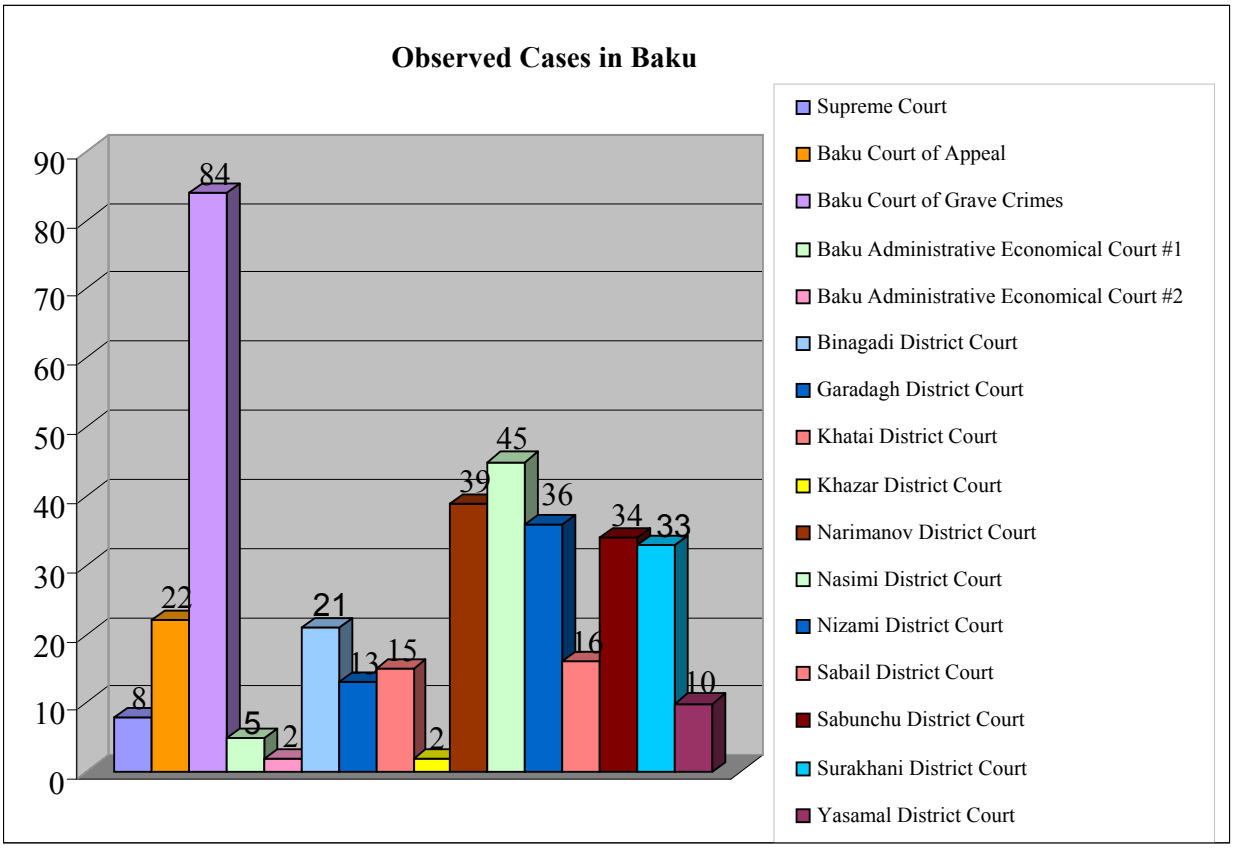


Table 4: Number of Hearings Monitored in Baku

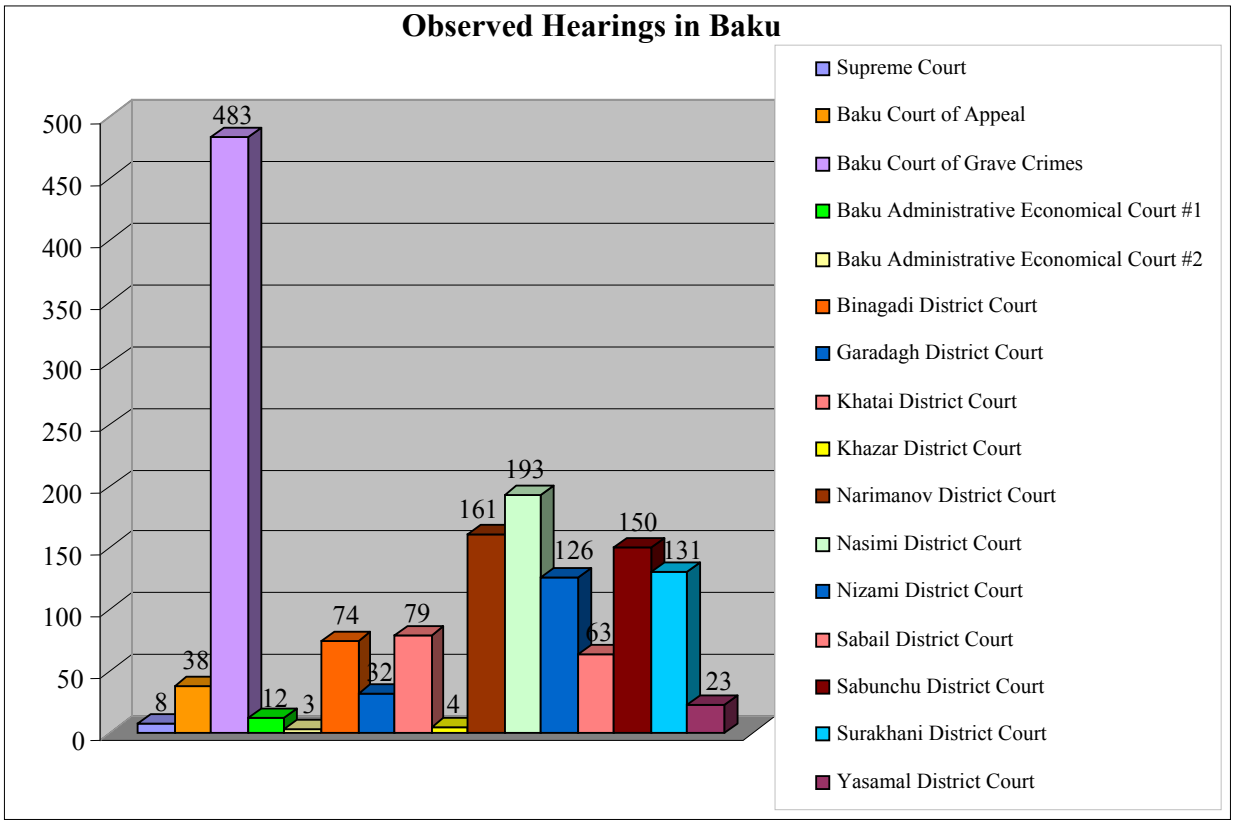


Table 5: Number of Cases and Court Hearings Monitored in Baku

COURTS	CASES			HEARINGS		
	criminal	civil	total	criminal	civil	total
Supreme Court	2	6	8	2	6	8
Baku Court of Appeal	10	12	22	17	21	38
Baku Court of Grave Crimes	84	-	84	483	-	483
Baku Administrative Economical Court #1	-	5	5	-	12	12
Baku Administrative Economical Court #2	-	2	2	-	3	3
Binagadi District Court	19	2	21	68	6	74
Garadagh District Court	13	0	13	32	0	32
Khatai District Court	15	0	15	79	0	79
Khazar District Court	1	1	2	3	1	4
Narimanov District Court	38	1	39	157	4	161
Nasimi District Court	43	2	45	190	3	193
Nizami District Court	36	0	36	126	0	126
Sabail District Court	11	5	16	56	7	63
Sabunchu District Court	34	0	34	150	0	150
Surakhani District Court	33	0	33	131	0	131
Yasamal District Court	9	1	10	22	1	23
TOTAL:	**348**	**37**	**385**	**1516**	**64**	**1580**

Table 6: Number of Court Cases Monitored across the country

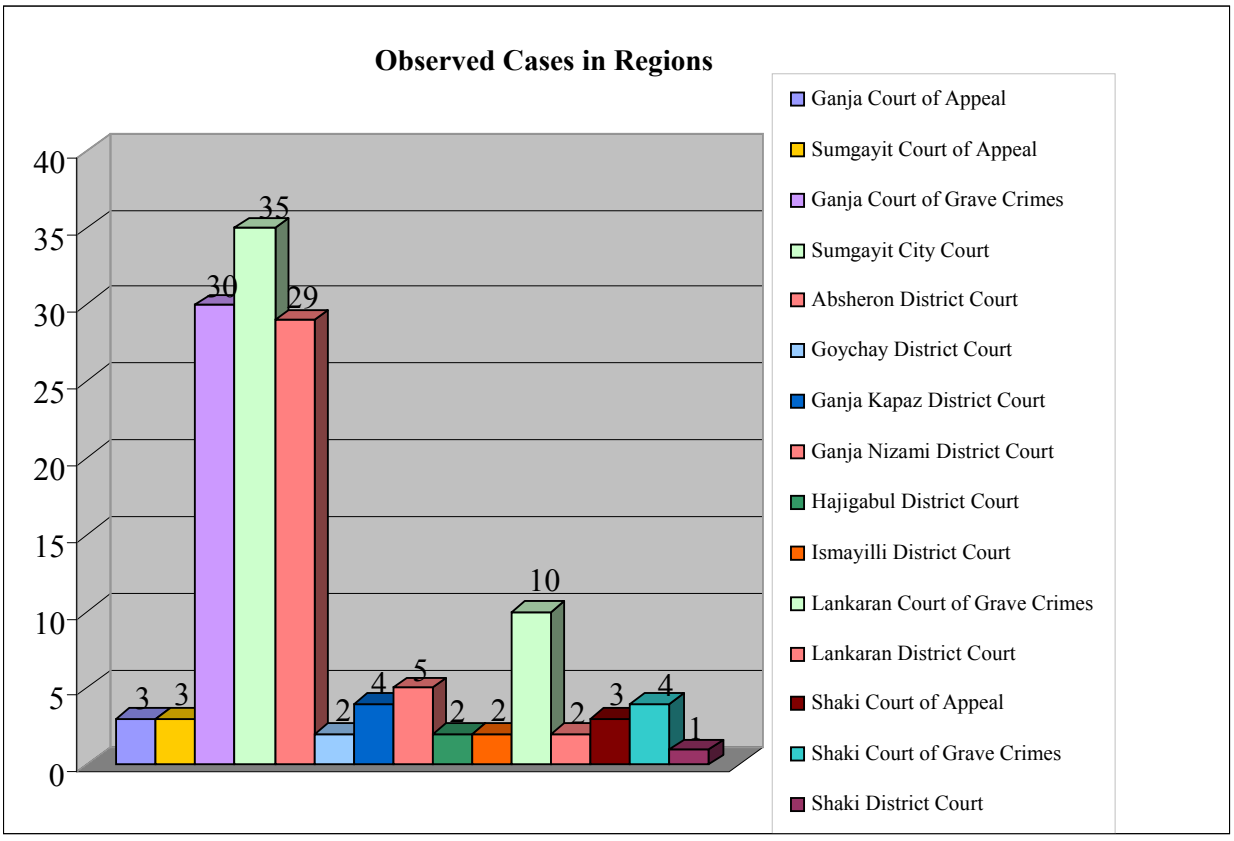


Table 7: Number of Court Hearings Monitored across the country

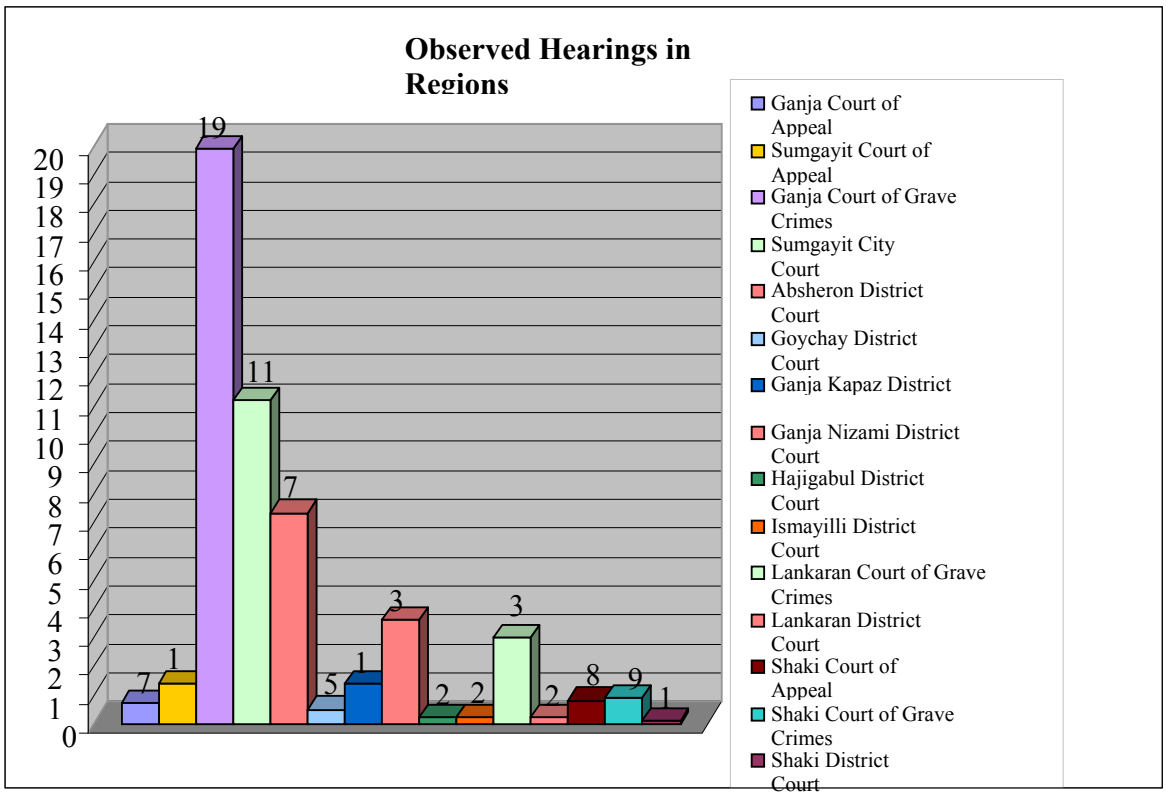
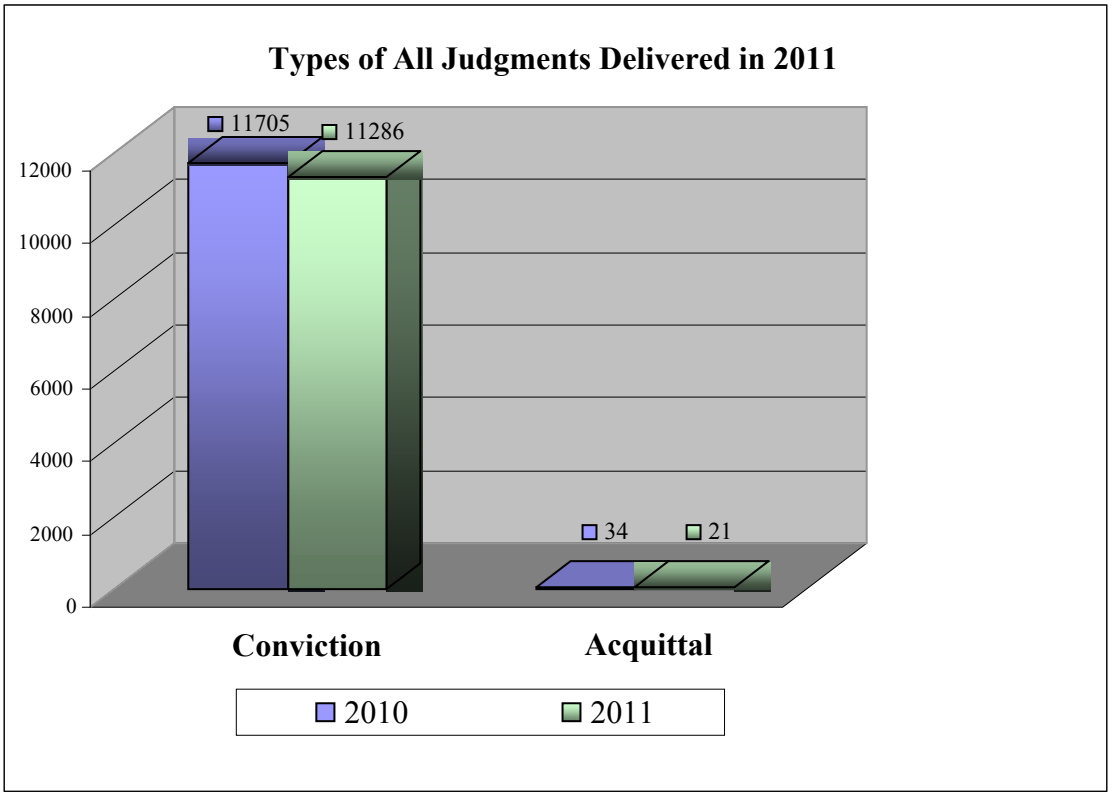


Table 8: Number of Cases and Court Hearings Monitored across the country

COURTS	CASES			HEARINGS		
	criminal	civil	total	criminal	civil	total
Ganja Court of Appeal	3	0	3	7	0	7
Sumgayit Court of Appeal	2	1	3	13	1	14
Ganja Court of Grave Crimes	30	-	30	199	-	199
Sumgayit City Court	35	0	35	112	0	112
Absheron District Court	29	0	29	73	0	73
Goychay District Court	2	0	2	5	0	5
Ganja Kapaz District Court	4	0	4	14	0	14
Ganja Nizami District Court	5	0	5	36	0	36
Hajigabul District Court	0	2	2	0	2	2
Ismayilli District Court	2	0	2	2	0	2
Lankaran Court of Grave Crimes	10	0	10	30	0	30
Lankaran District Court	2	0	2	2	0	2
Shaki Court of Appeal	3	0	3	8	0	8
Shaki Court of Grave Crimes	4	-	4	9	-	9
Shaki District Court	1	0	1	1	0	1
TOTAL:	**132**	**3**	**135**	**511**	**3**	**514**

Table 9: Types of court decisions delivered in 2010 and 2011 in criminal cases



According to the information the Ministry of Justice provided to the Office on the number of judgements determining guilt or innocence of the accused delivered in criminal cases in 2011, the ratio between convictions and acquittals remained extremely low with convictions comprising up to 99.8% of all the judgements the courts rendered during the reporting period.

3. Developments in the justice sector

Judges and prosecutors. During the reporting period, according to the data provided by the Judicial Legal Council (JLC), upon the appointment of 26 new judges, the total number of judges in 2011 is 473. In addition, of 414 candidates who applied to become judges and underwent the interviewing process, 77 passed the oral exams and joined the required one-year mandatory training course required to become judge. The JLC dismissed two judges, applied disciplinary measures to seven judges due to shortcomings in their work performance and awarded medals for exceptional achievements to four judges.[11]

The Office of the Prosecutor General provided information on seven prosecutors who were subject to disciplinary measures and fourteen who were awarded for exemplary service during the reporting period.

[11] "Tərəqqi" medal , presidential Decree of 21 November 2011.

Judicial training. The JLC provided information to the Office on seventeen specialised training courses they organized in co-operation with the Justice Academy. Approximately 300 judges took part in those judicial training sessions.

New court buildings. According to the MoJ, in 2011 the Ministry continued its endeavours to improve the working environment in the courts' buildings and allocated new facilities for the newly established Administrative Economic courts[12] and Courts of Grave Crimes in the regions.[13] Additionally, within the framework of the Judicial Modernization Project,[14] the MoJ completed the Oguz District Court building in 2011. The MoJ also reported that the Baku City Yasamal District Court, Gedebey and Ganja City Nizami District Courts' buildings were under construction and they expect to complete them in 2012.

Use of metal cages. One positive development the Office observed in a number of court buildings is newly installed glass barriers that replaced the metal cages in the district courts in Agdash, Oquz, Qobustan, Kapaz District Court in Ganja and Lankaran Court of Grave Crimes.

Use of modern technologies in court management. The MoJ organized several exchanges of justice sector's staff, including judges, to introduce them to modern court management systems. The MoJ also developed a strategy[15] to unify court related data and establish interrelated communication system to exchange information and materials between the courts and with the MoJ.

The new court management system will considerable simplify the management of court materials and other relevant information, including readily accessible information on registration of documents online, correspondence, court statistics and assignment of cases to courts, *inter alia.* It will also provide access to legislation databases and case law.

New web portal. In November 2011, the MoJ launched a new web portal to facilitate the population's access to courts. The new website provides information about courts of different instances and jurisdiction, outlining the procedure for bringing cases to these courts.

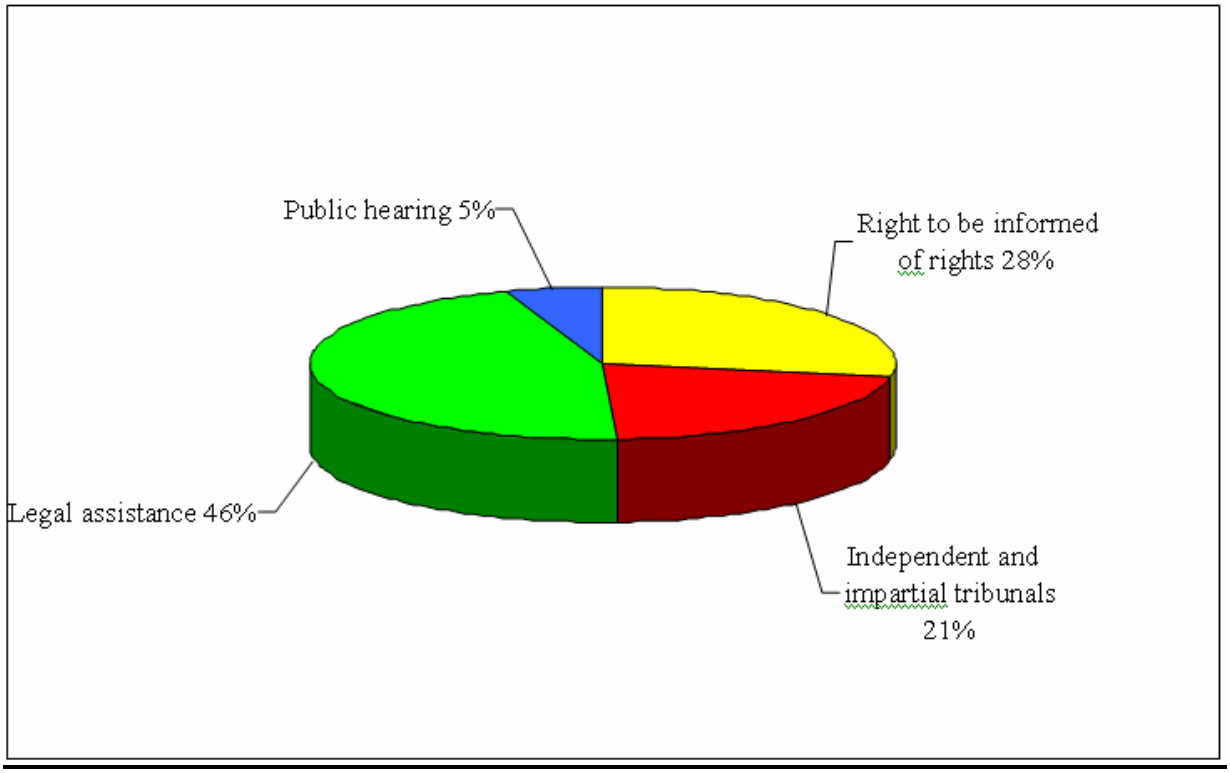
[12] Operational as of January 2011 in Baku (two courts), Shaki, Shirvan, Ganja, Sumgayit and Naxchivan Autonomous Republic.
[13] Lankaran, Ganja and Shaki.
[14] World Bank - as of 2006 - ongoing.
[15] According to the MoJ, the new electronic system will become operational by the end of 2012, early 2013.

4. Findings and Analysis of Trends

During the reporting period, the State Authorities and justice sector's officials continued increasing their endeavours to increase the justice sector's compliance with OSCE commitments and other international fair trial standards through capacity building activities, improving courts' material conditions and developing and e-justice system, *inter alia.*

The Report focuses on highlighting remaining shortcomings. It addresses in particular the accused's rights to effective legal representation, liberty and security, equality of arms and the right to a trial by an independent and impartial tribunal. In addition, the Report includes a general section on courts' compliance with other selected fair trial guarantees, including the right to a public hearing, the right to free assistance by an interpreter, freedom from self-incrimination, investigation of ill-treatment allegations and the right to a reasoned decision.

Table 10: Percentage of Selected Fair Trial Violations Monitored in 2011



i) The right to a trial by an independent and impartial tribunal

Foundations of the right. The ECHR and OSCE commitments provide for the right to a trial by an independent and impartial tribunal, as one of the main guarantees of a fair trial.[16] Article 127 of the Azerbaijani Constitution and Article 25 of the Criminal Procedure Code (CPC) regulate this right.

[16] Article 6.2 of the ECHR and Vienna Document 1989 (13.9), see Annex.

In particular, under the CPC[17], if a judge has reasons to believe that he/she may be influenced by any factors related to the case that may affect his/her independence, he/she should discontinue his/her involvement in the case. The parties to the proceedings are also entitled to seek the replacement of that judge.[18]

The Report addresses the question of whether the judges in the observed trials appeared as being independent and impartial in line with the requirements in the domestic legislation, international standards and the ECtHR case law.[19]

ECtHR relevant case law. In the case of *Fatullayev v. Azerbaijan*,[20] the ECtHR found a violation of the right to an impartial tribunal within the meaning of Article 6 (1) of the ECHR on the ground that the judge who heard the criminal case against the applicant was the same judge who previously examined the civil action against him. In reaching this conclusion, the ECtHR considered the fact that the judge dealt with the questions of the applicant's civil and criminal liability not simultaneously, but in two separate proceedings, the civil case preceding the criminal case. The Court found that both proceedings related to the same case and concluded that when examining the criminal case against the applicant the judge was prejudiced since he had already examined the same facts when adjudicating the civil case against the same applicant.

Perception of independence and impartiality. The Project Team reported some instances when the judges' behaviour gave rise to doubts regarding their independence and impartiality while adjudicating court cases. These instances included cases in which:

(i) the judges granted all motions the prosecutor raised and refused many of the motions the defence counsel raised without any sound reasoning, unless the prosecutor was in agreement with them;

(ii) the judges did not ensure an effective investigation of sound and serious allegations by the defendants regarding fair trial violations that allegedly took place during the pre-trial investigation phase of the case although this is an obligation incumbent on the judge under the CPC.[21]

(iii) the judges questioned the accused in a manner that could lead to an appearance of prosecutorial bias. For instance, in some instances, the presiding judges interrogated the

[17] Article 107.2 of the CPC.
[18] Article 109 of the CPC.
[19] "Justice must not only be done, but must be seen to be done." D*elcourt v Belgium*, ECtHR Judgement of 17 January 1970, para 31.
[20] See *Fatullayev v. Azerbaijan,* ECtHR Judgement of 22 April 2010, Application no. 40984/07.
[21] Articles 299, 300, 301, 303 and 355 of the CPC*, inter alia.*

accused and defence witnesses using leading questions, including questions, which appeared to violate the principle of the presumption of innocence.

(iv) During the monitoring monitors also observed cases where judges appeared as predetermining the guilt of the accused before the trial proceedings were completed. For instance, in one case in reply to the complaint of the accused about pre-trial detention the judge noted that the court would deduce the duration of pre-trial detention from the final sentence of imprisonment. In another case, during the first hearing on the merits, the judge asked about the accused's criminal record and made several remarks about it, which could lead to the conclusion that the judge had a preconceived idea that the accused had committed the crime before considering all the evidence.

ii) The right to liberty and security

Foundations of the right. Article 5 of the ECHR mandates that "everyone has the right to liberty and security of person."[22] Law enforcement officials when depriving a person of his/her liberty must do so in a lawful manner and in accordance with the procedure regulated in the laws. Moreover, only the competent Authorities adopt and execute measures depriving a person of his/her liberty in order to avoid arbitrariness. According to Article 5.3 of the ECHR, law enforcement officials shall bring arrested and detained persons promptly before a judge or other officer authorized by law to exercise judicial powers. Accused persons also have a right to speedy trials within a reasonable time and the court may release them pending the duration of trial proceedings under the circumstances regulated in the law. Further, Article 5.4 of the ECHR provides that everyone who is deprived of his/her liberty by arrest or detention shall be entitled to initiate proceedings by which the court decides on the lawfulness of his/her on a speedy manner and releases him/her if the detention was not lawful.[23] According to Article 5.3 of the ECHR, the court must examine thoroughly the arguments of the prosecution to justify the continued detention of the accused and the defendant's arguments advocating for his/her release, striking the right balance between the right to liberty and the protection of victims and witnesses in connection with ongoing investigations in the interests of justice.[24]

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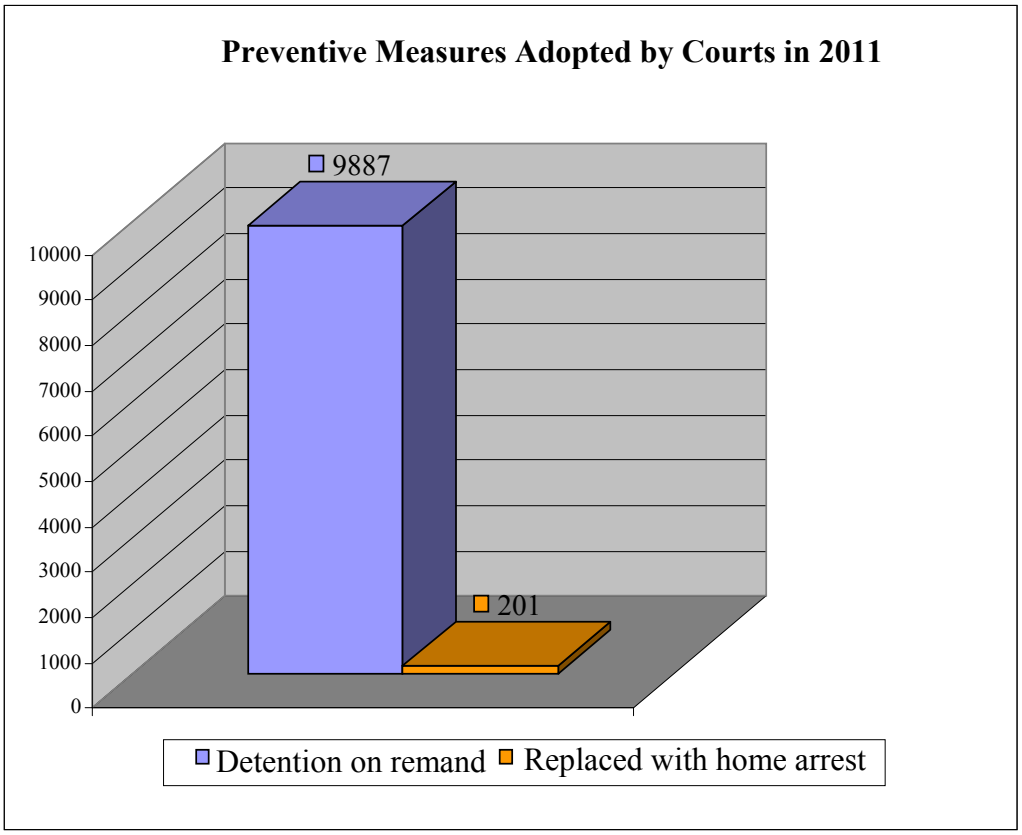
[22] Article 5.1 of the ECHR.
[23] *Habeas corpus* proceedings.
[24] According to Article 154.4 of the CPC, only courts may decide to apply restrictive measures, including detention on remand, home arrest and release on bail.

According to Azerbaijani legislation, judges should not extend unreasonably the detention of an accused person if it is no longer justified. Thus, upon having duly considered all circumstances and arguments put forward in connection to each case, judges may decide to replace detention on remand by home arrest and release on bail as alternative restrictive measures to remand in custody. The ECtHR has recognised four reasons as relevant for continuing keeping accused in remand detention, namely the risk of evading justice, interfering with the cause of justice, the need to prevent the commission of a crime and the need to preserve public order.

Table 11: MoJ statistical data on preventive measures adopted by courts in 2011



Thus, according to the statistical data that MoJ provided, detention on remand is the measure courts most frequently adopted in 2011 and only in approximately 2% of court cases the courts applied home arrest as restrictive measure.

ECtHR case law. In connection with the illegal detention of accused persons, in the case of *Farhad Aliyev v. Azerbaijan*,[25] the ECtHR analyzed the situation where the detention Authorities held the accused in pre-trial detention for an additional month after the court's detention order expired and until the court examined the issue of his detention at the court's preliminary court hearing. The

[25] See *Farhad Aliyev v. Azerbaijan*, ECtHR Judgement of 9 November 2010, Application no. 37138/0.

ECtHR ruled that referring to Article 158.4 of CPC[26] in justification of extending the accused's pre-trial detention without judicial authorization resulted in a violation of the accused's right to liberty under Article 5 of the ECHR.[27]

Furthermore, in a number of judgements the ECtHR found a violation of Article 5 of the ECHR on the ground that the applicants' continued detention was not duly justified in the relevant Azerbaijani court decisions by their personal circumstances. For example in the cases of *Rafig Aliyev v. Azerbaijan*[28] and *Muradverdiyev v. Azerbaijan*,[29] the ECtHR concluded that, by using a standard formula merely listing the grounds for detention without addressing the specific facts and arguments put forward by the applicants' defendants, the Authorities failed to give "relevant" and "sufficient" reasons to justify extending the applicants pre-trial detention.

The ECtHR also found a violation of Article 5 of the ECHR on the ground of non-observance of the adversarial principle and equality of arms in the relevant court proceedings. In particular, in the case of *Rafiq Aliyev v. Azerbaijan*, the ECtHR established that the court violated Article 5 (4) of ECHR because the applicant was unable to attend personally the court hearings regarding extension of his pre-trial detention. The European Court found the court held those hearings as a formality without providing the defendant with an opportunity to present relevant facts and arguments justifying discontinuing the use of pre-trial detention.[30]

The practice of Azerbaijan's courts regarding the use of pre-trial detention. The findings of the trial observation show that courts do not always justify applications of pre-trial detention as a

[26] According to Article 158.4 of the CPC, the period during which the applicant and his lawyers had consulted the contents of the case file could not be taken into consideration in calculating the length of his pre-trial detention.

[27] See par. 176 of the ECtHR's ruling: […] "The Court reiterates that for the detention to meet the standard of "lawfulness", it must have a basis in domestic law and this law itself must be in conformity with the Convention […]. In the present case, the Government appeared to rely on Article 158.4 of the CPC to justify the applicant's continued detention after 19 April 2007 by the fact that he had been given access to the case file during the period in question. The Court cannot accept this argument. Firstly, it appears that, pursuant to Articles 284-289 and 292 of the CPC, defendants were given access to the case file following the termination of the pre-trial investigation, but prior to the issuance of the bill of indictment and the referral of the case to the trial court […]. The Government did not explain how, in such circumstances, the applicant's detention following the sending of the case for trial could be justified by Article 158.4 of the CPC. Secondly, in any event, having analysed this provision, the Court does not see how it could be interpreted as providing for the applicant's detention without a court order. Lastly, even assuming that this provision permitted the applicant's continued detention, it did so by reference to matters wholly extraneous to Article 5 § 1 […]. Therefore, detention based on that provision cannot be considered compatible with the requirements of Article 5 § 1" […].

[28] See *Rafig Aliyev v. Azerbaijan*, ECtHR Judgement of 6 December 2011, Application no. 45875/06.

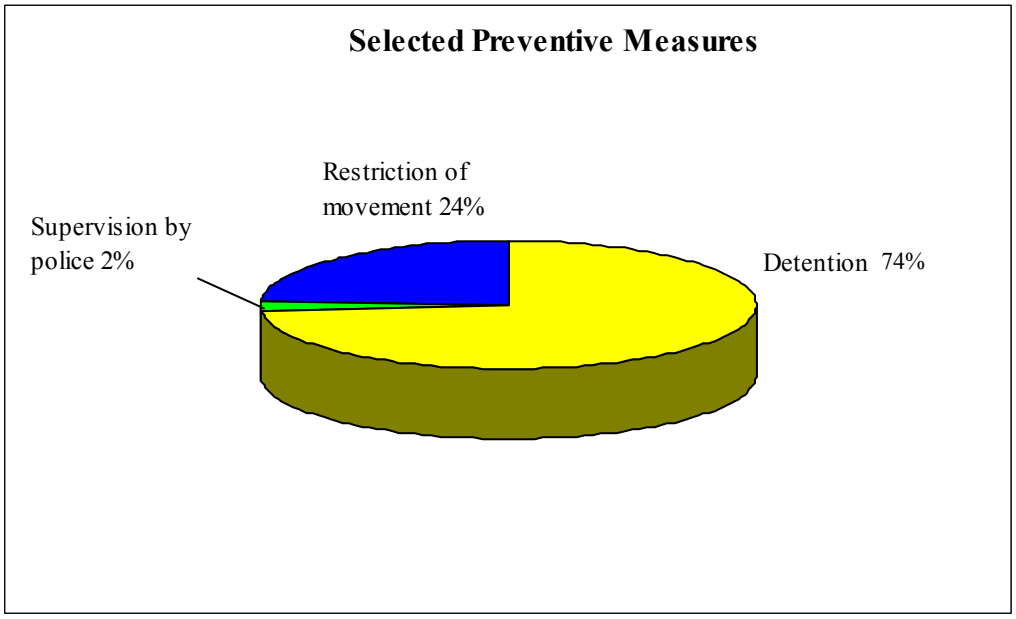
[29] See *Muradverdiyev v. Azerbaijan*, ECtHR Judgement of 9 December 2010, Application no. 16966/06.

[30] See *Rafig Aliyev v. Azerbaijan*, ECtHR Judgement of 6 December 2011, Application no. 45875/06 […]"It is true that the applicant's lawyers could make their submissions in writing by lodging their complaints on appeal, but this fact does not, in itself, mean that equality of arms was ensured. The Court notes that the prosecuting authority's submissions in support of the applicant's detention were not made available either to the applicant or his lawyers, depriving them of the opportunity to comment on those submissions, in writing or orally, in order to effectively contest the reasons invoked by the prosecuting authority to justify his detention. […] In any event, the courts did not address any of the specific arguments advanced by the applicant in his written submissions challenging his continued detention […], although those arguments did not appear to be irrelevant or frivolous"[…].

restrictive measure.[31] The Project Team did not observe any significant positive development compared to the court proceedings observed in 2010 regarding the extension of detention orders at preliminary hearings without assessing the reasonableness of such an exceptional measure. During the reporting period, judges often did not properly assess defence motions seeking the application of alternative measures and related arguments. Generally, in the observed preliminary hearings, the courts appeared as deciding to extend detention on remand without properly examining the specific situation of the accused and analysing possible grounds for continuing restricting the accused's liberty pending the beginning of the trial.

The following charts outline the selection of preventive measures in the cases the Project Team monitored.[32] Comparative charts for the years 2009, 2010 and 2011 show significant increase in the percentage of detention measures adopted as restrictive measures pending the beginning of trial proceedings.

Table 12: Selection of Preventive Measures in Monitored Cases[33]



[31] See requirements under Article 5 of t he ECHR.
[32] The analysis is based on data collected from 326 cases where information on selected preventive measures was available.
[33] Article 154 of the CPC provides for te following preventive measures: detention on remand, home arrest, release on bail, restriction of movement, personal warranty, organization's warranty, supervision by police, supervision by military commandment and removal from office. While the Courts only decide on applications for detention on remand, home arrest and release on bail, the other preventive measures may be applied by the investigator or prosecutor directly in charge or supervising the conduction of the investigation, respectively.

Table 13: Selection of Preventive Measures in Baku

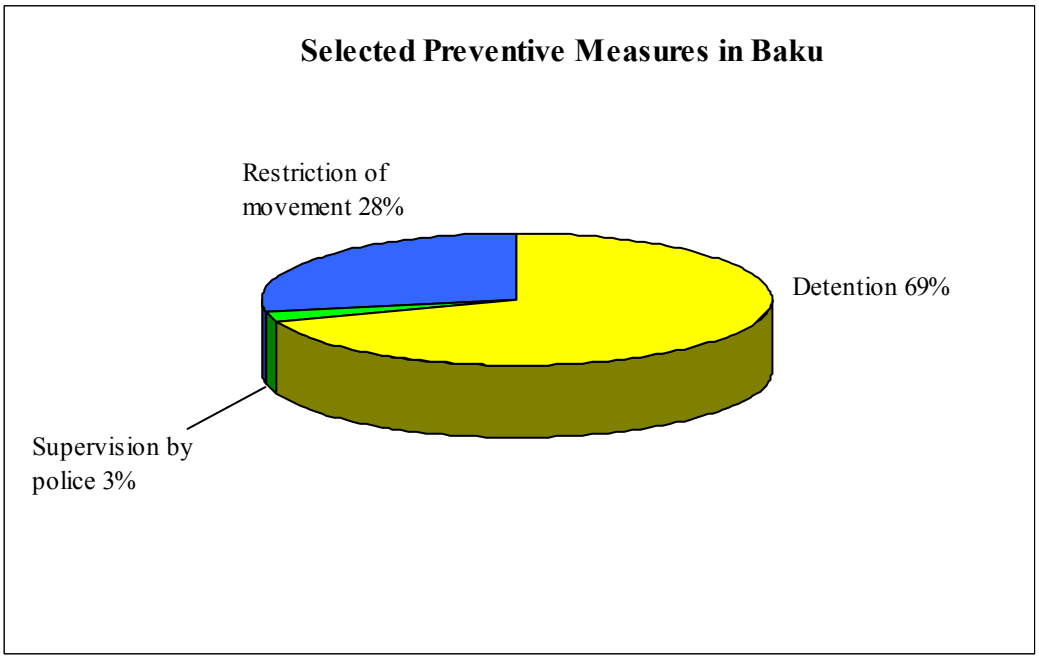


Table 14: Selection of Preventive Measures across the country

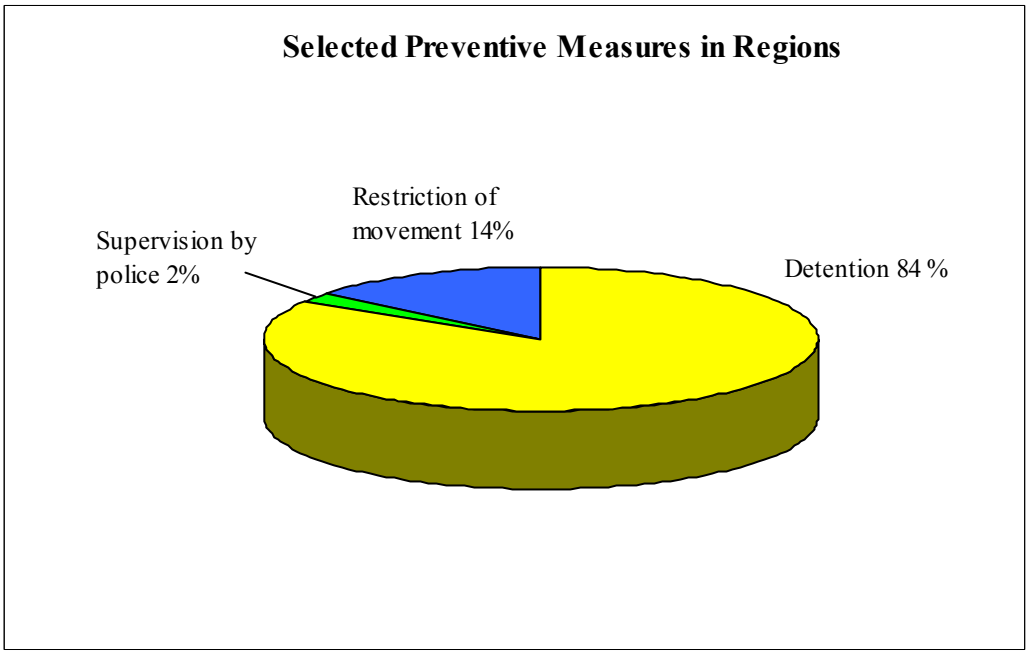


Table 15: Comparative Charts – Selection of Preventive Measures in 2009, 2010 and 2011

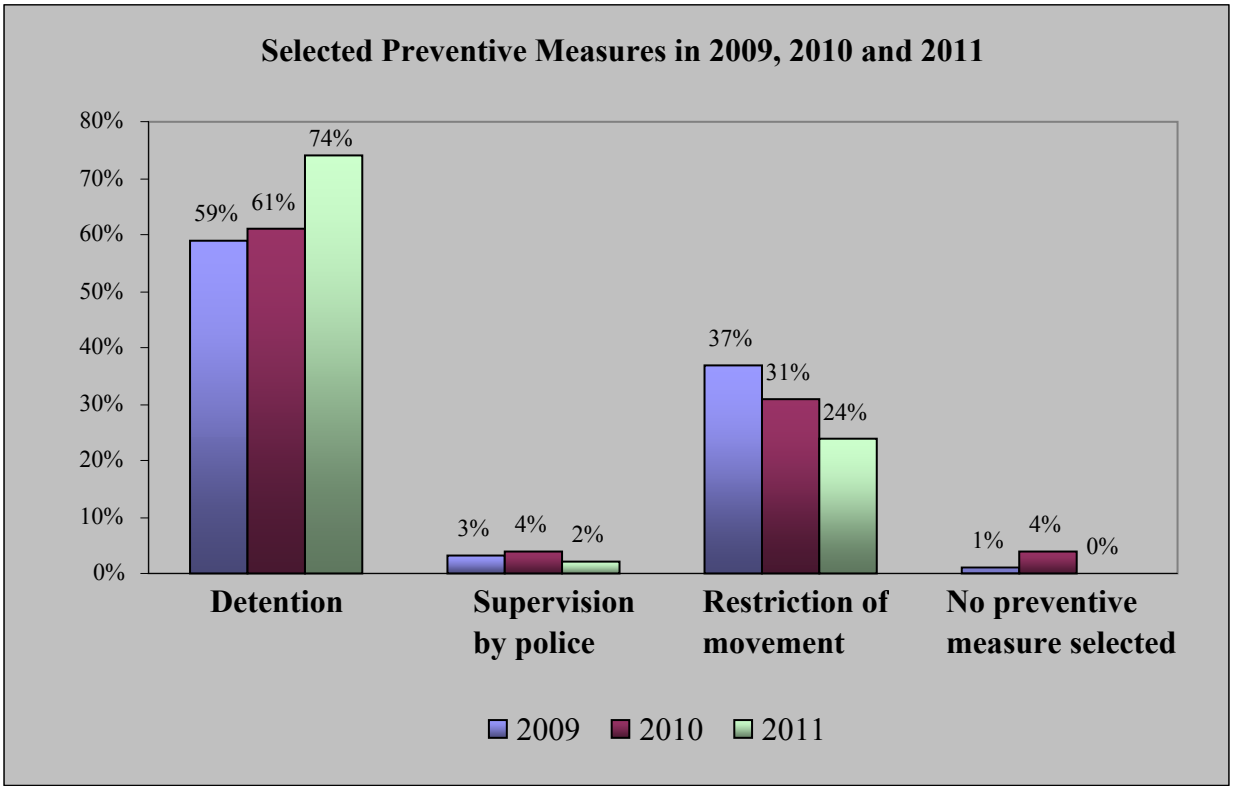


Table 16: Comparative Chart – Selection of Preventive Measures in Baku

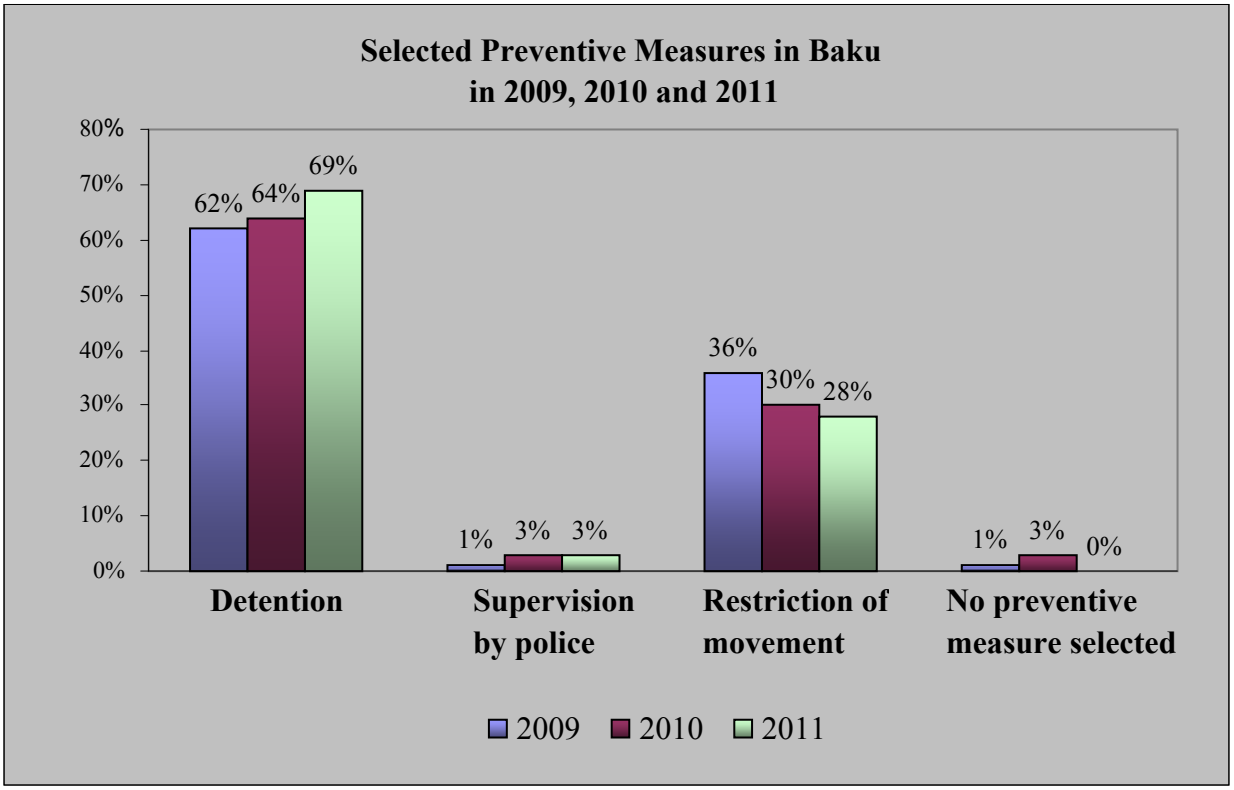
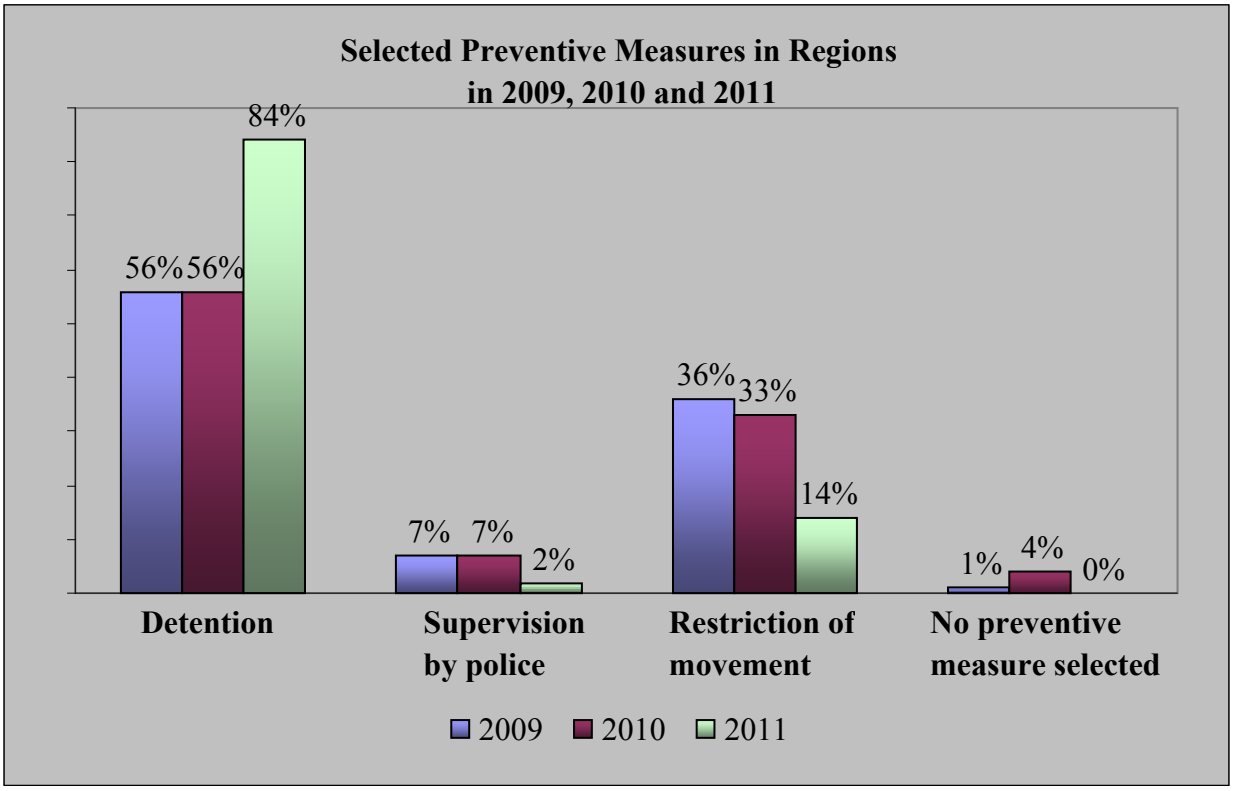


Table 17: Comparative Chart – Selection of Preventive Measures across the country



However, on a positive note, according to the statistical data provided by the Prosecutor's Office, the overall percentage of detention measures in comparison to other restrictive preventive measures at the national level in 2011 was 37.92%. The discrepancy between the Prosecution and the Office's statistical information is because the Office 2011 Programme mainly covered proceedings related to grave crimes, where the courts apply detention on remand more frequently than in other cases.

iii) The right to effective legal representation.

Foundation of the right. Under the OSCE commitments and the ECHR, everyone charged with a criminal offence has the right 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.[34]

This right applies to all stages of the criminal proceedings, including the pre-trial investigation stage. According to Azerbaijan's legislation, suspects are entitled to legal assistance from the moment of their arrest.[35] The ECtHR established that according to Article 6 (3) (c) of the ECHR, accused are entitled to legal assistance, which is "practical and effective and not theoretical or illusory." In particular, the ECtHR noted that the ECHR refers to "assistance" and not to

[34] The ECHR, Article 6.3 (c) and Document of Moscow Meeting 1991 (23.1), Annex
[35] Article 90.7.2 of the CPC.

"nomination" and, therefore, the mere nomination does not ensure effective legal representation since a lawyer may be either prevented from providing effective legal assistance, or not sufficiently qualified to perform their duties.

In this regard, the ECtHR further ruled that […] "A State cannot be held responsible for every shortcoming on the part of a lawyer appointed for legal-aid purposes. However, if a failure by legal-aid counsel to provide effective representation is manifest or is sufficiently brought to the Authorities' attention in some other way, the Authorities must take steps to ensure that the accused effectively enjoys the right to legal assistance"[…].[36]

ECtHR relevant case law. Even though Azerbaijan's Constitution[37] and Law on Advocates and Advocacy Activities[38] set out the basis for the provision of effective free legal assistance in Azerbaijan, the ECtHR's case law has highlighted existing shortcomings in practice.

In the case of *Huseyn and others v. Azerbaijan*,[39] the ECtHR considered that the restriction on the first, third and fourth applicants' right of access to a lawyer during the first few days of the pre-trial investigation infringed their defence rights and entailed a violation of article 6. 3 (c) of ECHR. The ECtHR ruled that […]"As the Court has further clarified, in order for the right to a fair trial to remain sufficiently practical and effective, Article 6.1 of the ECHR requires that, as a rule, access to a lawyer should be provided from the first interrogation of a suspect by the police, unless it is demonstrated in the light of the particular circumstances of each case that there are compelling reasons to restrict this right. Even where compelling reasons may exceptionally justify denial of access to a lawyer, such restriction – whatever its justification – must not unduly prejudice the rights of the accused under Article 6" […].

The Court prejudices the defendant's rights when considering incriminating statements that the suspect made during police interrogation without access to a lawyer as incriminating evidence leading to a conviction.[40] Even in cases where an accused person remained silent and was not

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[36] See *Artico v. Italy*, ECtHR Judgement of 13 May 1980, para 33-37, Series A No. 37, and *Kamasinski v. Austria*, ECtHR Judgement of 19 December 1989, para 65, Series A No. 168.
[37] Under Article 61.2 of the Constitution, "In specific cases envisaged by the legislation, legal advice shall be rendered free at the governmental expense." In addition, according to Article 61.3 of the Constitution, "Every citizen has the right to be assisted by a lawyer from the moment of detention, arrest and accusation by the competent state bodies."
[38] Under Article 20 of the Law on Advocates and Advocacy Activities, "Persons suspected or accused on administrative and criminal cases and indigent persons shall without any restriction have the assistance of an advocate at the State expense in accordance with the procedure regulated in the legislation of the Azerbaijan Republic."
[39] See *Huseyn and others v. Azerbaijan*, ECtHR Judgement of 26 July 2011, Applications Nos. 35485/05, 45553/05, 35680/05 and 36085/05. pars 171 to 173.
[40] See *Salduz v. Turkey* [GC], No. 36391/02, para 55, ECHR 2008.

questioned while in detention, a restriction of his or her right to legal assistance from the time of the arrest may fall short of the requirements of Article 6 pars.1 and 3 (c) of the European Convention.[41]

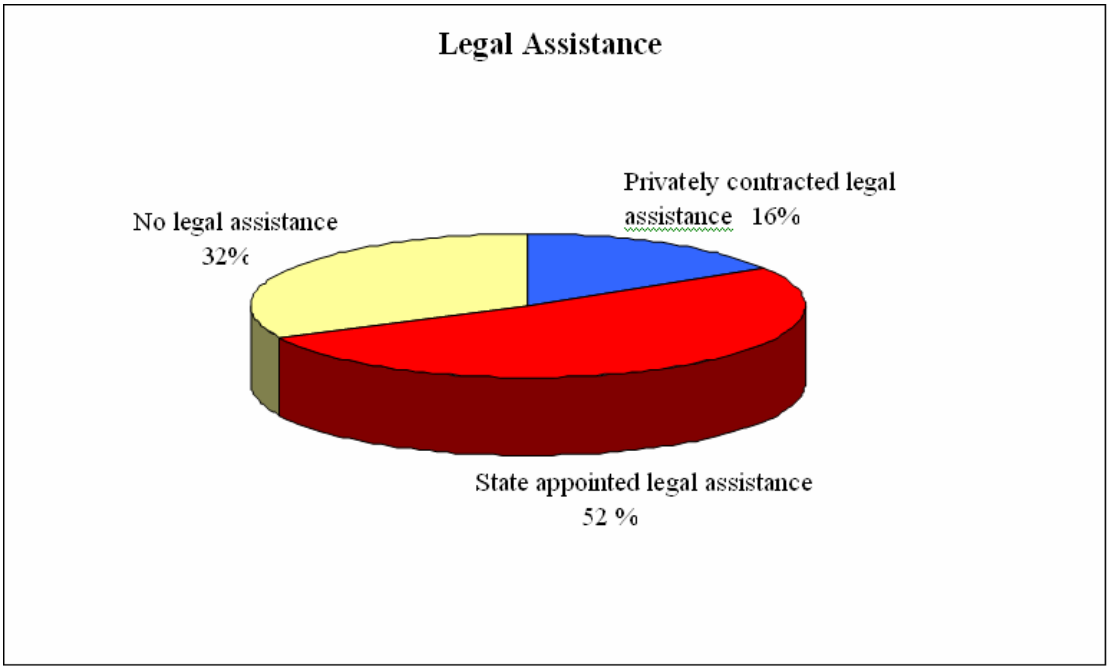
Moreover, in the case of *Huseyn and others v. Azerbaijan* the European Court found that […] "It appears that, in the first few days of their detention, the first, third and fourth applicants were questioned without the benefit of legal assistance and made certain statements that were included in the criminal case file. It does not appear that any of them had expressly waived their right to a lawyer after their arrest. Having regard to the information available on this matter, the Court cannot speculate on the exact impact which the applicants' access to a lawyer during that period would have had on the ensuing proceedings and whether the absence of a lawyer during that period irretrievably affected their defence rights. Nevertheless, the Court notes that such a restriction on initial access to legal assistance affected the applicants' defence rights. Consequently, the Court considers that the restriction on the first, third and fourth applicants' right of access to a lawyer during the first few days of the pre-trial investigation infringed their defence rights […]."[42]

Access to legal aid. In its previous reports, the Office has already recommended that the Bar Association strive to increase the number of qualified defence lawyers. According to the Bar Association, in 2011, there were 738 advocates:[43] 544 based in the capital area of Baku and 194 in other regions across the country. Thus, approximately one-fourth of the lawyers members of the Bar Association provided legal assistance to more than three-fourths of the population of Azerbaijan.[44]

In the cases the Project Team observed in 2011, accused persons had state appointed legal assistance in 52% of the cases, of which 57% in Baku capital area and 39% other regions across the country. The number of cases in which there was no legal assistance provided also differs widely from Baku capital area: 28% and the regions: 46%.

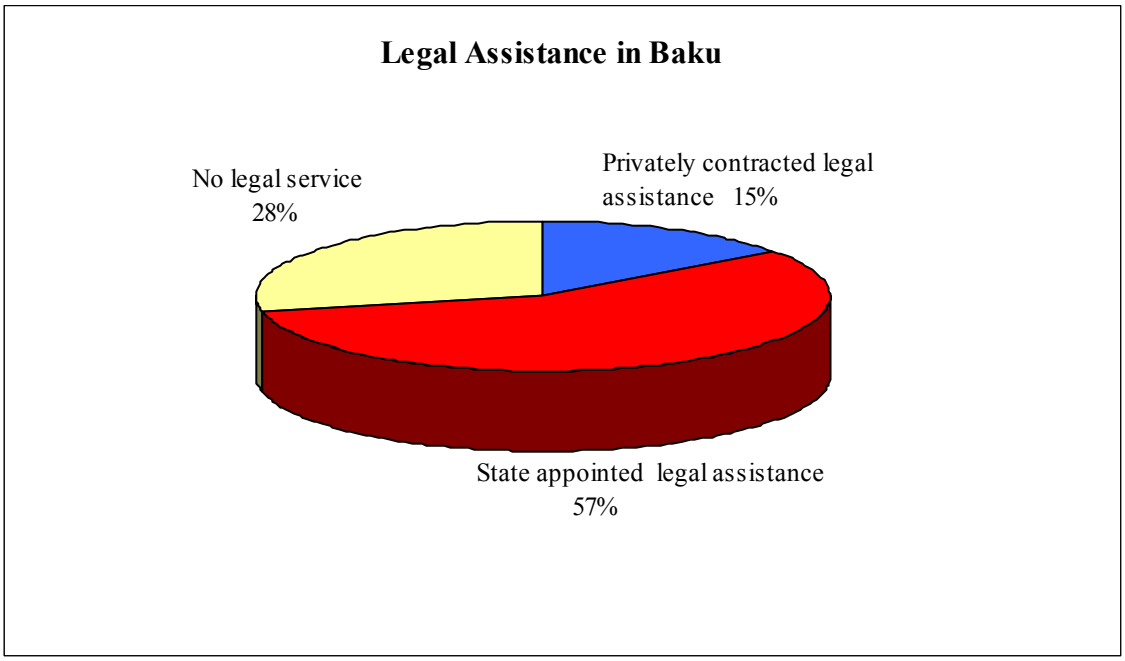
[41] See *Dayanan v. Turkey*, No. 7377/03, pars 32-33, ECHR 2009.
[42] See *Huseyn and others v. Azerbaijan*, ECtHR Judgement of 26 July 2011, Applications Nos. 35485/05, 45553/05, 35680/05 and 36085/05, ECHR 2011.
[43] Members of the Bar Association, which is a requirement under Azerbaijani legislation to represent clients in criminal cases.
[44] Population of Azerbaijan in 2011: 9,111,000 persons. http://en.president.az/azerbaijan/population/
and population of Baku: 2,045,818 persons. http://www.azstat.org/region/az/002shtml

Table 18: Provision of Legal Assistance in Monitored Cases



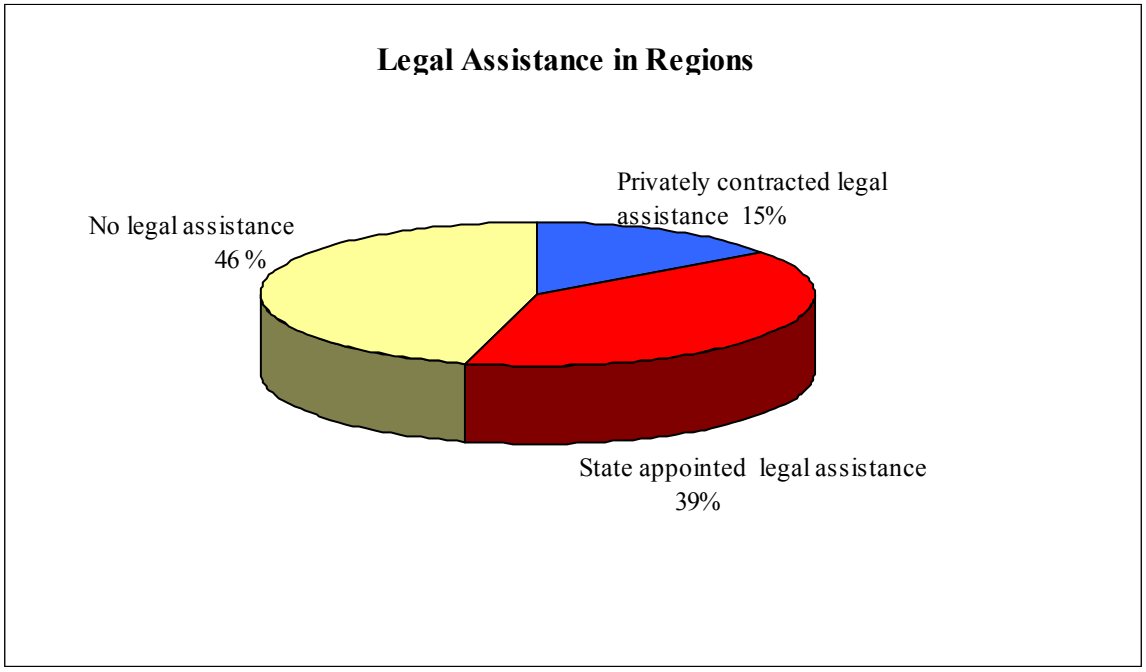
COURTS	contracted	state funded	no defense provided
Supreme Court	7	0	0
Baku Court of Appeal	7	1	13
Ganja Court of Appeal	2	1	0
Ganja Court of Grave Crimes	6	22	4
Sumgayit Court of Appeal	1	0	2
Baku Court of Grave Crimes	20	46	18
Baku Administrative Economical Court #1	0	0	5
Baku Administrative Economical Court #2	1	0	1
Absheron District Court	0	8	21
Binagadi District Court	2	11	9
Garadagh District Court	2	7	4
Goychay District Court	2	0	0
Ganja Kapaz District Court	0	4	0
Ganja Nizami District Court	1	1	3
Hajigabul District Court	0	0	2
Ismayilli District Court	0	0	2
Khatai District Court	1	11	4
Khazar District Court	0	1	1
Lankaran Court of Grave Crimes	3	5	2
Lankaran District Court	0	1	1

Table 19: Provision of Legal Assistance in Cases Monitored in Baku



COURTS	privately contracted counsels	state appointed legal aid	no defense provided
Baku Court of Appeal	7	1	13
Baku Court of Grave Crimes	20	46	18
Binagadi District Court	2	11	9
Garadagh District Court	2	7	4
Khatai District Court	1	11	4
Khazar District Court	0	1	1
Narimanov District Court	6	35	4
Nasimi District Court	10	20	14
Nizami District Court	2	26	8
Sabail District Court	4	10	16
Sabunchu District Court	1	22	12
Surakhani District Court	1	31	2
Yasamal District Court	2	3	5
TOTAL:	**58**	**224**	**111**

Table 20: Provision of Legal Assistance in Cases Monitored across the country



COURTS	contracted	state funded	no defense provided
Ganja Court of Appeal	2	1	0
Ganja Court of Grave Crimes	6	22	4
Sumgayit Court of Appeal	1	0	2
Absheron District Court	0	8	21
Goychay District Court	2	0	0
Ganja Kapaz District Court	0	4	0
Ganja Nizami District Court	1	1	3
Hajigabul District Court	0	0	2
Ismayilli District Court	0	0	2
Lankaran Court of Grave Crimes	3	5	2
Lankaran District Court	0	1	1
Shaki Court of Appeal	3	1	0
Shaki Court of Grave Crimes	0	0	4
Shaki District Court	0	0	1
Sumgayit City Court	3	12	21
TOTAL:	**21**	**55**	**63**

Table 21: Comparative Charts – Legal Assistance in Baku and the regions in 2009, 2010 and 2011

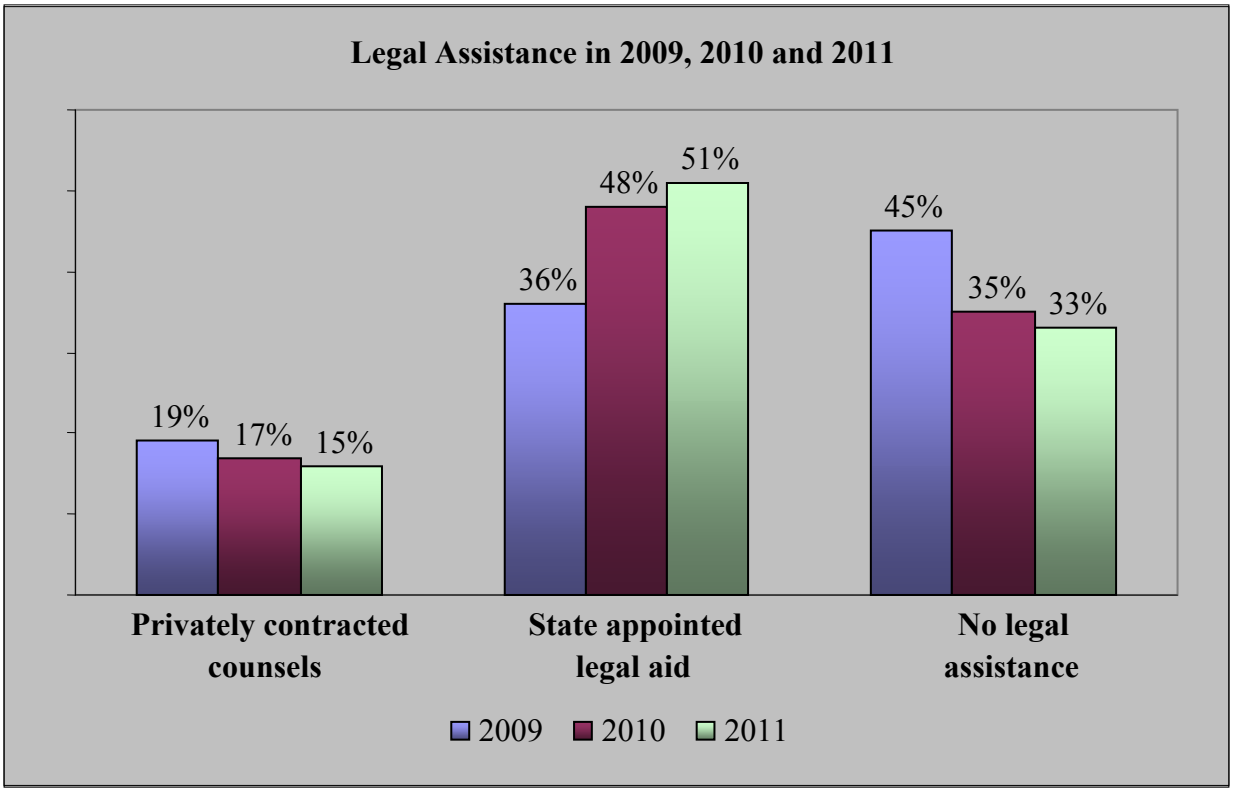


Table 22: Comparative Charts – Legal Assistance in Baku

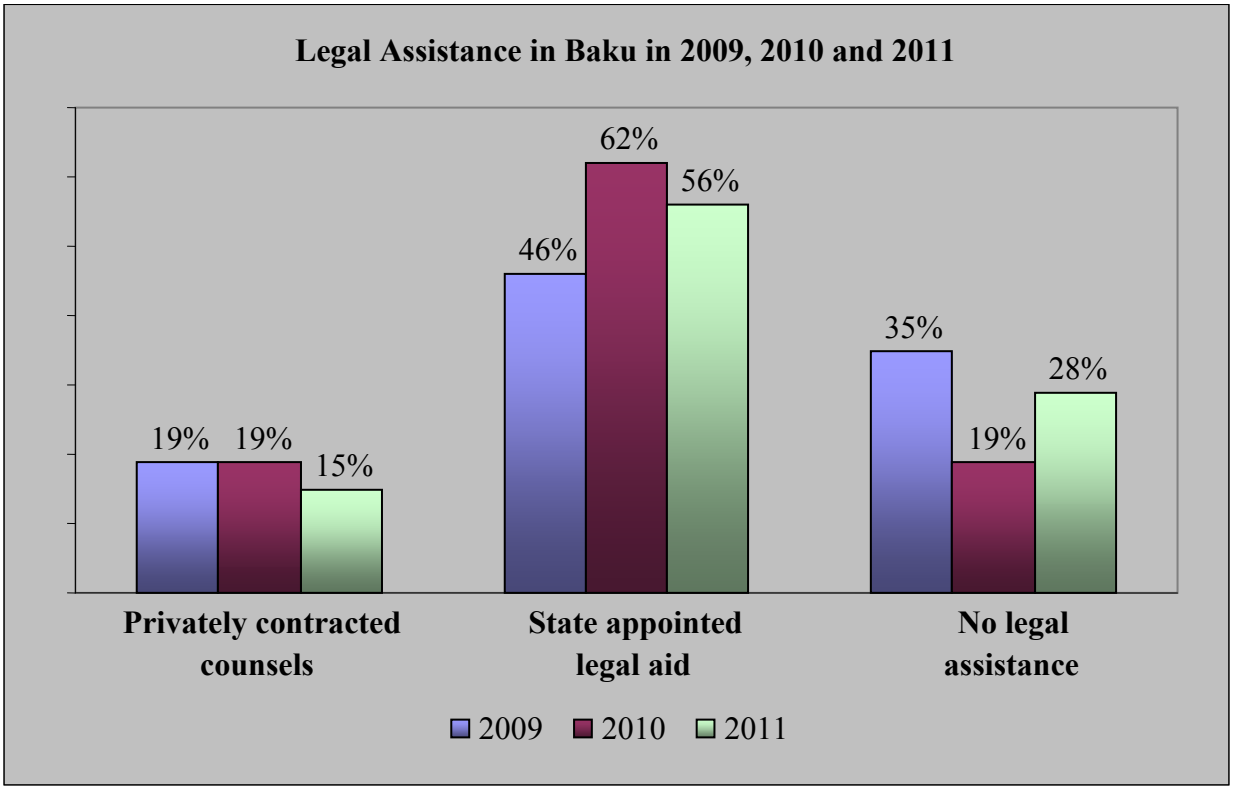
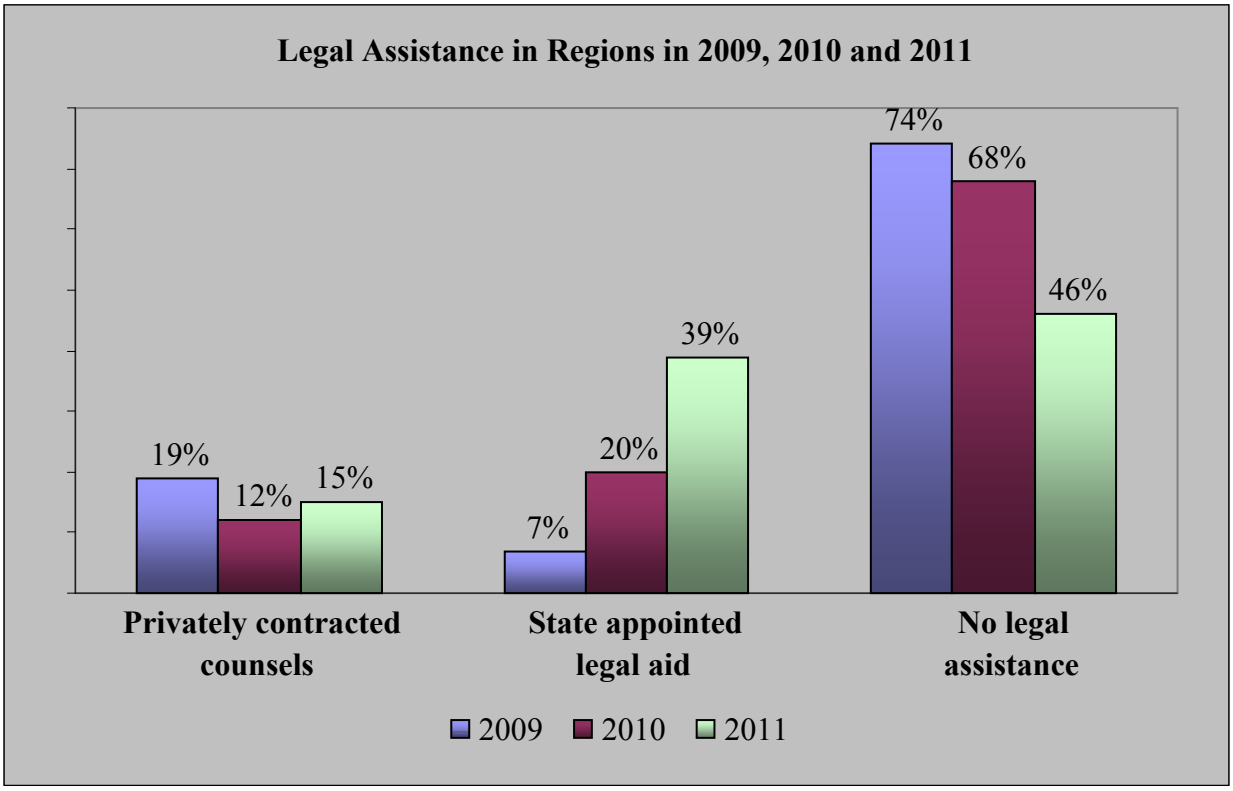


Table 23: Comparative Chart – Legal Assistance across the country[45]



The right to legal assistance of the defendant's own choosing. According to Article 91.5.7. of the CPC, the accused has the right to choose freely his/her defence counsel and to terminate his/her activities. The OSCE participating States recognize that the right to a fair and public hearing includes the right to be represented by legal counsel of one's choice.[46] The right to legal representation can also be waived but when this is the case, the ECtHR requires that the waiver be established in an […]"unequivocal manner and be attended by minimum safeguards commensurate to its importance" […].[47]

In a number of cases, judges did not explain to the accused the right to choose his/her defence lawyer. The Project Team observed in two court hearings that judges presented a state-appointed lawyer to the accused, even though the latter explicitly requested to have a lawyer of their choice. In another court hearing, the judge did not allow the lawyer of the accused's own choice to represent him at the hearing because that lawyer did not have a document authorising him to represent his client in court. Instead of postponing the hearing to secure the right of the accused to have a lawyer of his own choice, the judge proposed that the accused had a state-appointed lawyer who was already present at the hearing. In another case, the judge did not allow the accused to have a lawyer of his choice since the court hearing took place late at night. Although the judge provided the

[45] In the regions of Ganja, Sumgayit, Hajgabul, Ismayilli, Goychay, Absheron, Lankaran and Shaki.
[46] Concluding Document of the Vienna Meeting, Vienna 1989, para 13.9.
[47] See *Annanyev v.Russia* [2009] ECHR 1241, para 38.

accused with a state-appointed lawyer, the accused requested to have a private lawyer of his own choice representing him. However, the judge did not postpone the hearing in order to secure the presence of the lawyer chosen by the accused.

Quality of legal aid by state appointed lawyers. As in previous years, the Project Team reported that the quality of the legal aid rendered by the state-appointed lawyers was not of sufficient quality. In some of the observed cases, the judges secured the right to legal aid only formally and the legal aid rendered by state-appointed defence counsels was of poor quality and therefore ineffective. On many occasions, the judge introduced state-appointed lawyers to the accused persons for the first time during the process of the hearing and the judge did not allow sufficient time for defence lawyers to become familiar with the case.

The Project Team reported about a case where the defence lawyer explicitly stated during the hearing that he was not acquainted with the case. The defence lawyer however proposed that the accused testified at the same court hearing. The Project Team also observed cases where the accused explicitly complained about the assistance provided by state-appointed lawyers and the judge did not take any action to replace the lawyer in question. In many of these cases, the state-appointed lawyers did not raise any motion during the trial, remaining rather passive throughout the court proceedings. The Project Team also reported instances where the state-appointed lawyers failed to attend to trial proceedings or left the courtroom before the judge pronounced the final judgment. Moreover, in some cases the state-appointed lawyers openly made incriminatory comments regarding the accused, which were incompatible with the presumption of innocence and lawyers' professional ethics.[48] In one case, the lawyer publicly expressed her opinion about the outcome of the trial and anticipated that the court would find the accused guilty. In the same case, when the accused complained about the length of the proceedings, the lawyer indicated that the court would deduct the period of his detention from the final imprisonment sentence. The Project Team also observed cases where the behaviour of the state-appointed lawyers contradicted the interests of their clients. In particular, in one case the state-appointed lawyer, whom the judge introduced to the accused at the preliminary hearing, expressed his surprise about the non-application of detention on remand as a restrictive measure to the accused.

[48] In one case the state appointed lawyer made the following incriminatory statement: […] If you (the accused) did not get involved in the fight, what you are doing here (at the trial)?" […] In another case where the accused did not plea guilty, the state appointed advocate stated: […] "In fact, he (the accused) pleads guilty, but he simply does not understand the legal term." […].

In connection with the judges' duty to ensure a fair trial by ensuring an effective legal representation, as far as the Project Team is aware, in none of the cases mentioned above, did the judges address with the Bar Association the serious violations by the lawyers of their professional ethics and duties towards their clients.

iv) Equality of arms

Foundation of the right. Under the principle of equality of arms, each party must have a reasonable opportunity to present his or her case under conditions that do not place him or her at a substantial disadvantage vis-à-vis the other party.[49] Thus, the court allows both parties to present their evidence, legal arguments and comment on the evidence and arguments presented by the other party.[50] In the context of criminal proceedings, it includes the right of the accused 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/her.[51] This also applies to all incriminatory and exculpatory evidence.

Under Article 6 of the ECHR, anyone charged with a criminal offence, as a general principle, should be entitled to be present and participate effectively in the hearing concerning the determination of the criminal charges against him/her.[52] Furthermore, accused persons charged with a criminal offence have the right to have adequate time and facilities for the preparation of their defence.[53] Therefore, defence counsel should have the opportunity to acquaint himself/herself about the indictment and all case related materials, including incriminatory and exculpatory evidence.[54]

ECtHR relevant case law. In the case of *Huseyn and others v. Azerbaijan*,[55] the ECtHR found Azerbaijan to be in violation of Article 6 of the ECHR. The European Court noted that the applicants were unable to exercise their right to present their closing arguments in court, which

[49] See *Nideröst-Huber v. Switzerland*, ECtHR Judgement of 18 February 1997, para 23, Reports 1997-I.
[50] See *Lobo Machado v. Portugal*, ECtHR Judgement of 20 February 1996, para 31, Reports 1996-I.
[51] These specific rights are also provided for by Article 6.3 (d) of the ECHR, which states that "Everyone charged with a criminal offence has the following minimum rights: […] (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." […]
[52] See *Colozza v. Italy*, ECtHR Judgement of 12 February 1985, para 27, Series A No. 89, and *Stanford v. the United Kingdom*, ECtHR Judgement of 23 February 1994, para 26, Series A No. 282-A.
[53] Article 6.3 (b) of the ECHR
[54] See *Jespers v Belgium* , ECtHR Judgement of 14 December 1981, 27 DR 61.
[55] See *Huseyn and others v. Azerbaijan*, ECtHR Judgement of 26 July 2011, Applications nos. 35485/05, 45553/05, 35680/05 and 36085/05.

placed them in disadvantage in relation to the prosecution, since the latter fully exercised that right.[56]

The right of the accused to examine or have examined witnesses against them. The Project Team observed that in some court hearings, the prosecution's key witnesses failed to attend the court hearings and the prosecution party did not provide sufficient justification for their absence, as a result the court deprived the accused of the opportunity to examine them. In such cases, the explanation as to the absence of prosecution witnesses was in most cases based on insufficient grounds. The judges, instead of postponing the court hearings to secure the witnesses' attendance, granted the prosecution's requests to have their written testimonies read out in court and thus depriving the defendants of the opportunity to directly examine and interrogate the witnesses.

As in previous reports, there were court cases where judges did not consider defendants' motions related to the presentation and examination of evidence timely for unknown reasons, noting that, if needed, the court would examine these motions at a later state in the trial. Thus, in such cases, the court only relied on the evidence presented by the prosecution. As a result, in some of these cases the only witnesses who appeared in court and testified during trial proceedings, only made incriminatory statements and the court did not allow the examination of exculpatory evidence.

The right to adequate time and facilities for preparing the defense. The Project Team reported on cases where the prosecution appeared to be in a more advantageous position than the defence. In particular, the Project Team observed cases where the judges interrupted the accused either when he/she was giving statements, or did not take action to prevent prosecutor's interference with the testimony of the accused and/or the latter's witnesses. However, the Project Team has not observed any case where the judge did not allow the prosecutor to present evidence and legal arguments during the trial. In one case, the judge did not disclose to the defence evidence that the police presented against the accused. In another case, the judge did not disclose to the defendant an expert

[56] Ibid Note 55 above. Par. 190 of the judgement: […]" The Court notes that in the present case the hearings were adjourned twice in order to allow the prosecution to prepare their closing address, which they subsequently delivered in full during two hearings, without any interruption or objection by the court or the defence. On the other hand, the first, second and third applicants were not able to exercise their right to give a closing address, because their lawyers refused to do so on their behalf. As discussed above, the lawyers' refusal was indicative of their inability to provide effective legal assistance, a matter, which was inadequately addressed by the domestic court. As such, the lawyers' de facto withdrawal cannot be considered to amount to a waiver by the applicants of the right to a closing address. On the contrary, the applicants insisted on exercising this right in person, but their request was denied. Accordingly, in the absence of any express or implicit waiver of the right to give a closing address, the applicants cannot be held responsible for this defect in the proceedings. In view of the above, the Court considers that the applicants, having been unable to exercise their right to a closing address for the defence, were put at a significant disadvantage vis-à-vis the prosecution, who were able to exercise this right to the fullest extent possible. Accordingly, the applicants' defence rights were restricted in that they were not given an opportunity to present their case under the same conditions as the prosecution" […].

report presented by the Prosecution, depriving the accused of the opportunity to comment on incriminatory evidence.

The Project Team further reported that in some cases the accused were not able to prepare properly their defence due to the fact that they received the indictment just before the beginning of the preparatory court hearing and the judges did not allow the defence additional time to become acquainted with the substance of the indictment. Moreover, in a number of cases the judges did not clarify whether the accused had timely received the indictment prior to the commencement of trial proceedings.[57]

v) Compliance with other selected fair trial guarantees

The right to a public hearing. Pursuant to Article 27 of the CPC, court hearings are public in all courts of the Azerbaijan Republic, unless there are sound reasons justifying to hold closed hearings in order to safeguard privacy or protect specific professional, commercial or State interests.

ECtHR relevant case law. In the case of *Hummatov v. Azerbaijan*,[58] the ECtHR held that there was a violation of Article 6 (1) of the ECHR due to the lack of a public hearing during the appellate proceedings, which the court held at a prison. In reaching its conclusion, the ECtHR considered the fact that the Court of Appeal failed to adopt adequate compensatory measures to counterbalance the detrimental effect of holding the applicant's appellate proceedings at a prison. The ECtHR also held that the Court of Appeal did not provide sound reasons justifying holding the proceedings in closed session outside a courtroom.

Observance of the right to a public hearing in practice. As in previous reports, in 2011 the Project Team reported that the courts generally observed the right to a public hearing. However, in a limited number of cases, the limited capacity of the courtrooms, or the fact that the judges held the hearings at their offices, prevented the public from attending the hearings.[59]

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[57] According to Article 322.1.10 of the CPC, during the preliminary hearing the presiding judge shall clarify whether the accused has received the indictment. If the accused has not received it, the court has to postpone the hearing.

[58] See *Hummatov v. Azerbaijan*, Judgment of 29 November 2007, Applications Nos. 9852/03 and 13413/04.

[59] For instance in one case of public interest involving four accused persons, the court room could accommodate only twenty people, which jeopardise the accused's right to a public trial. As a result , the accused's family members had limited access to the courtroom.

In connection with the above, regarding the publicity of court hearings, the majority of the monitored courts displayed the list of upcoming hearings, lacking in most cases information on the relevant the Chairpersons. However, in some cases the list did not specify the time of the hearings.

The right to free assistance of an interpreter. The right to a fair trial includes the right of everyone to be informed promptly, in a language that he/she understands and in detail, of the nature and cause of the accusation against him/her and the right to have the free assistance of an interpreter if he/she cannot understand or speak the language used in court.[60] In some court hearings, the Project Team reported that the judges did not respect the right of the accused to have the assistance of an interpreter. The Project Team reported about a case where the accused complained that she did not have an interpreter during the preliminary investigation and about a few cases where the interpreters' assistance was limited to translating the indictment verbally to the accused in the course of the court hearing.[61]

Freedom from self-incrimination and investigation of ill-treatment allegations. OSCE commitments and the ECHR refer to the prohibition of any form of ill-treatment as one of the most fundamental values of a democratic society.[62] The judiciary has therefore a positive and absolute obligation to ensure an effective investigation of allegations of torture or other cruel, inhuman or degrading treatment, particularly in connection with the admission of incriminatory evidence, i.e. confessions that the accused may have made under duress during the investigation phase.[63] Under the domestic legislation, the court may not admit confessions obtained under duress as evidence.[64]

ECHR relevant case law. In the case of *Mammadov v. Azerbaijan*, the ECtHR found *inter alia* a violation of the procedural requirement of Article 3 of the ECHR due to lack of effective investigation of the applicant's ill-treatment allegations. In reaching its conclusion, the ECtHR referred to the failure of the national Authorities to secure forensic evidence in a timely manner as one of the key factors contributing to the ineffectiveness of the investigation.[65]

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[60] Articles 6.3 (a) and 6.3 (b) of the ECHR.
[61] According to Article 26.2 of the CPC, if the accused does not understand the language in which criminal proceedings are conducted, the court provides interpretation into a language the accused understands and ensures that the relevant case materials are available to the accused in that language.
[62] Article 3 of the ECHR, OSCE Commitments including the Copenhagen Document (1990) paragraph 16, Budapest Document (1994) and Istanbul Charter for European Security (1999).
[63] Article 15.2 of the CPC.
[64] Article125.2.2 of the CPC.
[65] See *Mammadov v. Azerbaijan*, ECtHR Judgement of 11 January 2007, para 73, Application no. 34445/04. The ECtHR noted in this regard that […] "allegations of torture in police custody are extremely difficult for the victim to substantiate if he or she has been isolated from the outside world, without access to doctors, lawyers, family or friends who could provide support and assemble the necessary evidence. […] The Authorities must take whatever reasonable steps they can to secure the evidence concerning the incident, including inter alia forensic evidence. Any deficiency in the investigation which undermines its ability to establish the cause of injury or the person responsible will risk falling

Investigation of ill-treatment allegations in practice. The Project Team reported that in many observed cases the judges did not ensure that the competent Authorities genuinely carried out an investigation and/or prosecution of ill-treatment allegations. Even though in some cases the judges ordered an investigation, they did not take the necessary measures to follow-up and ensure the effectiveness of such investigation. In other cases, pre-trial judges did not confirm whether the prosecution respected accused's right to counsel during the questioning, neither judges inquired as to whether law enforcement officials complied with suspects' rights upon apprehension and arrest in order to prevent ill-treatment, such as medical examinations, recording and reporting possible injuries.

Use of metal cages and handcuffs. Safety measures should be justified by the circumstances of the case and proportionate to the needs of security, otherwise, if excessive, they may amount to degrading treatment. Although the Project Team noted an improvement in this area, additional efforts are still necessary to end fully the current practice of confining the accused in a metal cage without sufficient justification for this stringent security measure.

ECtHR relevant case law. Handcuffing a person or imposing other security measures may give rise to a violation of Article 3 of the ECHR in a situation where no serious risk to security exists.[66] The European Court noted that the defendant's status as a public figure, lack of earlier convictions and orderly behaviour during the criminal proceedings are relevant factors in assessing security interests and the risk of absconding or resorting to violence during the transfer to the courthouse or at the hearings.[67] In line with this case law, only in exceptional duly justified circumstances, the court should place the accused in metal cages and/or handcuffed in order to ensure compliance with the presumption of innocence. In particular, the ECtHR found a violation of Article 3 of ECtHR in a case where the accused was kept in the metal cage without sufficient justification. The Court established that placing the accused in the cage humiliated him.[68]

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foul of this standard). The Court therefore considers that the failure to secure the forensic evidence in a timely manner was one of the important factors contributing to the ineffectiveness of the investigation in the present case. […] Furthermore, the ensuing criminal investigation in the present case was not satisfactory. The investigation Authorities limited themselves to studying the forensic report and questioning four police officers who had been in contact with the applicant in the OCU. No other witnesses were interrogated. The investigator took the denial of the police officers at face-value and refused to institute criminal proceedings, despite the applicant's statements and his undisputed bodily injuries."[…]

[66] See *Mouisel v. France*, ECtHR Judgment of 14 November 2002, para 47; *Henaf v. France*, ECtHR Judgment, of 27 November 2003, para48, *Istratii and Others v. Moldova*, ECtHR Judgment of 27 March 2007, para 57; *Gorodnichev v. Russia*, ECtHR Judgment, of 25 May 2007, pars 105-109.

[67] See *Sarban v. Moldova*, ECtHR Judgment of 4 October 2005, para 89.

[68] See *Piruzyan v. Armenia*, ECtHR Judgment of 26 June 2012 and *Ashot Harutyunyan v. Armenia*, ECtHR Judgment of 15 June 2010.

Practice observed in monitored cases. The Project Team noted that in the majority of the observed cases accused persons were held systematically in metal cages inside the courtrooms, regardless of the gravity of the crimes they allegedly committed and/or whether they had already a criminal record*, inter alia.*

The right to reasoned judgements. This right, as one of the core elements of the right to a fair trial is the guarantee of accused's protection against courts' arbitrariness. In line with ECtHR case law, although "courts are not obliged to give detailed answers to every question raised during trial proceedings, if a submission is fundamental to the outcome of the case, the court must specifically deal with it in its judgment."[69] A first instance judgment must include sufficient reasoning, notably in connection the assessment of incriminatory and exculpatory evidence presented during court proceedings in order to allow the parties the possibility of eventually contest it before an appellate court. Further to the publicity of court hearings, it is only by giving a reasoned judgement that there can be public scrutiny of the administration of justice.

According to the CPC, judges must reason judgments.[70] A judgment is reasoned if the court's decision as to the innocence or guilty of the accused is based only on the evidence examined during the trial, which is sufficient to determine whether the Prosecution sufficiently proved the charges the prosecution brought against the accused.[71] Thus, the judgment shall explicitly refer to the evidence that is the basis for the court's determination of the guilty or innocence of the accused in line with the relevant standard of proof, explaining the reasons for not considering other evidence.[72]

ECtHR relevant case law. In the case of *Huseyn and others v. Azerbaijan*,[73] the ECtHR found Azerbaijan to be in violation of Article 6 of ECHR on the ground that the court failed to address inconsistencies related to the evidence presented by the prosecution and that the defendant brought to the attention of the court through a number of substantiated motions. In particular, the ECtHR found that the Azerbaijani courts did not provide any reasons as to why the court did not examine the defence's objections concerning the prosecution witnesses and why the courts considered the

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[69] See Council of Europe's *Guide to the Implementation of Article 6 of the ECHR*, August 2006, p.49.
[70] Article 349.3 of the CPC.
[71] Article 349.5 of the CPC.
[72] Article 353.2.2 of the CPC.
[73] See *Huseyn and others v. Azerbaijan*, ECtHR Judgement of 26 July 2011, Applications Nos. 35485/05, 45553/05, 35680/05 and 36085/05.

alleged inconsistencies in the testimonies of prosecution witnesses to be irrelevant for the resolution of the case.[74]

The Project Team reported that in selected judgments,[75] that judges failed to address specific issues raised by the defence during court's hearings, leaving key motions and objections raised by the defence unanswered. In such cases, the position of the judges regarding the motions and issues brought by the defence remained unclear and the courts' judgements lacked any explanation regarding the conclusions drawn by the court.

For instance, in one case the final judgement did not refer to the motions the defence submitted during trial proceedings in connection with irregularities and inconsistencies in the testimony of prosecution witnesses. In addition, the defence raised a substantiated motion regarding the medical expert's opinion, noting that it was inconsistent and therefore the court should exclude it from the evidence. In reply to the objections raised by the defence, the judge noted that he would address this issue in the final judgement. However, the judgement only referred to the testimonies of prosecution witnesses as well as the medical expert's opinion in question and convicted the accused.

[74] Idem as note no. 74 above. Extract of the judgement: […] "The Court notes that inconsistencies between a witness's own statements given at various times, as well as serious inconsistencies between different types of evidence produced by the prosecution, give rise to a serious ground for challenging the credibility of the witness and the probative value of his or her testimony; as such, this type of challenge constitutes an objection capable of influencing the assessment of the factual circumstances of the case based on that evidence and, ultimately, the outcome of the trial. The Court notes, however, that in its judgment the Assize Court remained silent as to the defence's objections in this regard and, as appears from the documents in the case file, never attempted to take into account any of the defence's allegations concerning the inconsistencies in the testimonies of those prosecution witnesses"[…] "In such circumstances, the Court cannot but conclude that, given the nature and substance of the defence's objections raised against the above-mentioned group of witnesses, the domestic court was required to give answers to those objections and that, in the absence of any such answers, the applicants' rights to an adequate opportunity to challenge the witnesses against them and to receive a reasoned judgment were breached" […].

[75] The Project Team did not have access to final court's judgements in all of the observed cases. Thus, the analysis in this section of the report is based on seven judgements that the Project Team selected based on the complexity of the case and the number of the accused persons*, inter alia.*

5. Recommendations

To the Judiciary

1. Investigation of any form of ill-treatment allegations

The Office advises that courts ensure the effective investigation of ill-treatment allegations and exclude systematically as evidence testimonies if there are any signs that they may have been extracted under duress.

The Office encourages judges to discontinue the current practice of placing the accused in a metal cage without sufficient justification of this stringent security measure, based for instance on the gravity of the crime and whether the accused has a prior criminal record.

2. The right to liberty and security of a person

The Office advises that courts discontinue systematically using pre-trial detention as a restrictive measure pending the beginning of trial proceedings and, in line with the provisions in the CPC, allow the provisional release of accused in cases where the court is satisfied that the accused will appear for trial and will not pose a danger to any victim, witness or other person*, inter alia*.

The Office recommends discontinuing the courts' current practice of automatically extending the use of pre-trial detention as a restrictive measure, without thoroughly considering the initial reasons for applying the restrictive measure as well as possible new developments in the investigation and court case.

3. The right to a fair trial

The Office advises that judges ensure the accused's right to access defence counsel throughout the duration of court proceedings as well as to allocate sufficient time for the preparation of the accused's defence. If the accused cannot afford to pay for the expenses related to legal representation and does not waive his/her right to State appointed legal representation, the judges are advised to ensure that State funded lawyers represent the accused in a professional and effective manner throughout the court proceedings in order to ensure equality of arms.[76]

[76] See the section on recommendations to the Bar Association on the quality of legal aid.

In order to ensure that State-provided legal assistance is effective, the Office recommends that judges refer cases where lawyers manifestly fail to perform his/her duties to the Bar Association seeking their timely replacement by competent lawyers.

The Office advises that courts consider on equal terms in line with the CPC and the circumstances of each court case, the evidence submitted by the prosecution and the defendant in order to eliminate any perception of prosecutorial bias.

The Office recommends that judges ensure the presence of prosecution witnesses in the court hearings as much as practicable in order to provide the defendant with the opportunity to challenge incriminatory evidence to the maximum degree permitted by law.

The Office recommends that the courts specifically address in their judgements the arguments and evidence relevant for determining the guilty or innocence of the accused, including all incriminating and exonerating evidence. This includes the reasons for excluding evidence admitted and presented during trial proceedings that appears decisive for the fair resolution of the case.

To the Investigative Authorities[77]

1. Preventing any form of ill-treatment[78]

The Office advises that the investigative Authorities and in particular the Ministries of Internal Affairs and Justice, ensure that suspects upon arrest:

- Notify a person of their choice about their detention and the reasons thereof;
- Undergo a medical check-up immediately after suspects claim to be ill and/or present any injuries, or if the management of the detention facility observes any injuries. The latter must ensure comprehensive recording of the medical examination in case of injuries and report to the suspect's defence lawyer and to the competent Authorities in charge of investigating whether the suspect may have been ill-treated while being

[77] According to Articles 214 and 215 of the CPC and Presidential Decree, dated 25 August 2000, on implementing the "Law on adoption and operation of Criminal Procedural Code and related regulation issues," investigative Authorities include the Prosecutor's Office, Ministries of Internal Affairs, National Security, Justice, Taxes and Emergency situations as well as State Border Service and State Custom Service.

[78] The Office welcomes the adoption of the new Law of the Republic of Azerbaijan on ensuring rights and freedoms of the individuals kept in detention facilities that entered into force on 11 July 2012. If effectively implemented, the new Law shall assist in improving detention conditions and increasing compliance with the rights of suspects and accused persons (The new Law on the rights of detainees).

apprehended by law enforcement officials and/or during the questioning by the investigators.

The Office advises that the investigative Authorities ensure proper and timely investigation of all ill-treatment allegations, holding law enforcement officials accountable, including criminal responsibility, in case that the investigation confirms the allegations. The Office further advises law enforcement officials and/or courts to undertake investigations at their own motion if there are sound reasons to believe that detainees were subject to any kind of ill-treatment.

2. The right to liberty and security of a person

The Office recommends that investigative Authorities discontinue their current practice of extending accused's pre-trial detention without judicial authorisation, under Article 158.3 of the CPC, pending the beginning of trial proceedings.

3. The right to a fair trial

The Office advises the investigative Authorities, in particular the Prosecutor's Office, to ensure detained persons' access to a lawyer of their choice or State appointed lawyer, upon arrest and particularly during the questioning of suspects and accused, other than in cases where they formally waived their right.

To the Bar Association

The Office advises the Bar Association to develop and implement effectively high quality standards and rules of ethical and professional conduct for advocates.

In connection with the above, the Office recommends that the Bar Association streamlines its disciplinary proceedings to ensure accountability in cases of advocates,' particularly State appointed defence lawyers, manifest failure to comply with their duties towards their clients.

The Office recommends to the Bar Association to continue its ongoing efforts to increase the number of defence lawyers and improve the quality of the legal advice and representation they provide, including mandatory continuing legal education Programmes, to be developed and implemented in co-operation with the Justice Academy and other stakeholders.

The Office advises the Bar Association to engage in a constructive and consistent dialogue with relevant stakeholders, including defence lawyers, prosecutors, judges, parliamentarians, representatives from the Ministry of Justice, civil society and international experts, to develop and implement an operational legal aid system that increases the quality and effectiveness of State supported legal representation.

To the Parliament

In connection with the recommendations to the Bar Association, the Office advises the Parliament to adopt new legal aid legislation in line with international good practices to enable and encourage the development and implementation of an operational legal aid system.

The Office recommends that Parliament amend the relevant provision in the CPC in order to speed up suspects' right to a defence lawyer immediately upon arrest and detention.

To the State Authorities

In connection with the recommendations to the Bar Association, the Office advises the State Authorities, and the Ministry of Finance in particular, to support with the necessary financial resources a reform of the legal aid system as well as capacity building activities for defence lawyers to increase the overall quality of legal representation.

The Office commends the Authorities for their on-going efforts to address the use of metal cages in newly built court buildings with glass barriers instead of cages and recommends to the Ministry of Justice in particular, removing remaining metal cages from all courtrooms other than those adjudicating grave crimes.

ANNEX

OSCE TRIAL MONITORING RELATED COMMITMENTS

VIENNA 1989 (Questions Relating to Security in Europe: Principles)

(13) (…) [the participating States] will

(13.9) - ensure that effective remedies as well as full information about them are available to those who claim that their human rights and fundamental freedoms have been violated; they will, inter alia, effectively apply the following remedies:

• the right of the individual to appeal to executive, legislative, judicial or administrative organs;

• the right to a fair and public hearing within a reasonable time before an independent and impartial tribunal, including the right to present legal arguments and to be represented by legal counsel of one's choice;

• the right to be promptly and officially informed of the decision taken on any appeal, including the legal grounds on which this decision was based. This information will be provided as a rule in writing and, in any event, in a way that will enable the individual to make effective use of further available remedies.

(23.2) - ensure that all individuals in detention or incarceration will be treated with humanity and with respect for the inherent dignity of the human person;

(23.3) - observe the United Nations Standard Minimum Rules for the Treatment of Prisoners as well as the United Nations Code of Conduct for Law Enforcement Officials;

(23.4) - prohibit torture and other cruel, inhuman or degrading treatment or punishment and take effective legislative, administrative, judicial and other measures to prevent and punish such practices;

(23.5) - consider acceding to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, if they have not yet done so;

(23.6) - protect individuals from any psychiatric or other medical practices that violate human rights and fundamental freedoms and take effective measures to prevent and punish such practices.

COPENHAGEN 1990

(2) [The participating States] are determined to support and advance those principles of justice, which form the basis of the rule of law. They consider that the rule of law does not mean merely a formal legality, which assures regularity and consistency in the achievement and enforcement of democratic order, but justice based on the recognition and full acceptance of the supreme value of the human personality and guaranteed by institutions providing a framework for its fullest expression.

(5) They solemnly declare that among those elements of justice which are essential to the full expression of the inherent dignity and of the equal and inalienable rights of all

human beings are the following:
(…)

(5.7) - human rights and fundamental freedoms will be guaranteed by law and in accordance with their obligations under international law;
(…)

(5.9) – all persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law will prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground;

(5.10) – everyone will have an effective means of redress against administrative decisions, so as to guarantee respect for fundamental rights and ensure legal integrity;

(5.11) – administrative decisions against a person must be fully justifiable and must as a rule indicate the usual remedies available;

(5.12) - the independence of judges and the impartial operation of the public judicial service will be ensured;

(5.13) - the independence of legal practitioners will be recognized and protected, in particular as regards conditions for recruitment and practice;

(5.14) - the rules relating to criminal procedure will contain a clear definition of powers in relation to prosecution and the measures preceding and accompanying prosecution;

(5.15) - any person arrested or detained on a criminal charge will have the right, so that the lawfulness of his arrest or detention can be decided, to be brought promptly before a judge or other officer authorized by law to exercise this function;

(5.16) - in the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone will be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law;

(5.17) - any person prosecuted will have the right to defend himself in person or through prompt legal assistance of his own choosing or, if he does not have sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

(5.18) - no one will be charged with, tried for or convicted of any criminal offence unless the offence is provided for by a law which defines the elements of the offence with clarity and precision;

(5.19) - everyone will be presumed innocent until proved guilty according to law;

(12) The participating States, wishing to ensure greater transparency in the implementation of the commitments undertaken in the Vienna Concluding Document under the heading of the human dimension of the CSCE, decide to accept as a confidence building measure the presence of observers sent by participating States and representatives of non-governmental organizations and other interested persons at proceedings before courts as provided for in national legislation and international law; it is understood that proceedings may only be held in camera in the circumstances

prescribed by law and consistent with obligations under international law and international commitments.
(…)

(16.2) - intend, as a matter of urgency, to consider acceding to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, if they have not yet done so, and recognizing the competences of the Committee against Torture under articles 21 and 22 of the Convention and withdrawing reservations regarding the competence of the Committee under article 20;

(16.3) - stress that no exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture;

(16.4) - will ensure that education and information regarding the prohibition against torture are fully included in the training of law enforcement personnel, civil or military, medical personnel, public officials and other persons who may be involved in the custody, interrogation or treatment of any individual subjected to any form of arrest, detention or imprisonment;

(16.5) - will keep under systematic review interrogation rules, instructions, methods and practices as well as arrangements for the custody and treatment of persons subjected to any form of arrest, detention or imprisonment in any territory under their jurisdiction, with a view to preventing any cases of torture;

(16.6) - will take up with priority for consideration and for appropriate action, in accordance with the agreed measures and procedures for the effective implementation of the commitments relating to the human dimension of the CSCE, any cases of torture and other inhuman or degrading treatment or punishment made known to them through official channels or coming from any other reliable source of information;

(16.7) - will act upon the understanding that preserving and guaranteeing the life and security of any individual subjected to any form of torture and other inhuman or degrading treatment or punishment will be the sole criterion in determining the urgency and priorities to be accorded in taking appropriate remedial action; and, therefore, the consideration of any cases of torture and other inhuman or degrading treatment or punishment within the framework of any other international body or mechanism may not be invoked as a reason for refraining from consideration and appropriate action in accordance with the agreed measures and procedures for the effective implementation of the commitments relating to the human dimension of the CSCE.

MOSCOW 1991

(21) The participating States will

(21.1) - take all necessary measures to ensure that law enforcement personnel, when enforcing public order, will act in the public interest, respond to a specific need and pursue a legitimate aim, as well as use ways and means commensurate with the circumstances, which will not exceed the needs of enforcement;

(21.2) - ensure that law enforcement acts are subject to judicial control, that law enforcement personnel are held accountable for such acts, and that due compensation

may be sought, according to domestic law, by the victims of acts found to be in violation of the above commitments.
(…)

(23.1) The participating States will ensure that

(i) no one will be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law;

(ii) anyone who is arrested will be informed promptly in a language which he understands of the reason for his arrest, and will be informed of any charges against him;

(iii) any person who has been deprived of his liberty will be promptly informed about his rights according to domestic law;

(iv) any person arrested or detained will have the right to be brought promptly before a judge or other officer authorized by law to determine the lawfulness of his arrest or detention, and will be released without delay if it is unlawful;

(v) anyone charged with a criminal offence will have the right to defend himself in person or through legal assistance of his own choosing or, if he has not suffiecient means to pay for legal assistance, to be given it free when the interests of justice so require;

(vi) any person arrested or detained will have the right, without undue delay, to notify or to require the competent authority to notify appropriate persons of his choice of his arrest, detention, imprisonment and whereabouts; any restriction in the exercise of this right will be prescribed by law and in accordance with international standards;

(vii) effective measures will be adopted, if this has not already been done, to provide that law enforcement bodies do not take undue advantage of the situation of a detained or imprisoned person for the purpose of compelling him to confess, or otherwise to incriminate himself, or to force him to testify against any other person;
(viii) the duration of any interrogation and the intervals between them will be recorded and certified, consistent with domestic law;

(ix) a detained person or his counsel will have the right to make a request or complaint regarding his treatment, in particular when torture or other cruel, inhuman or degrading treatment has been applied, to the authorities responsible for the administration of the place of detention and to higher authorities, and when necessary, to appropriate authorities vested with reviewing or remedial power;

(x) such request or complaint will be promptly dealt with and replied to without undue delay; if the request or complaint is rejected or in case of inordinate delay, the complainant will be entitled to bring it before a judicial or other authority; neither the detained or imprisoned person nor any complainant will suffer prejudice for making a request or complaint;

(xi) anyone who has been the victim of an unlawful arrest or detention will have a legally enforceable right to seek compensation.

BUDAPEST 1994 (Towards a Genuine Partnership in a New Era: The Human Dimension)

Paragraph 20 Prevention of Torture

20. The participating States strongly condemn all forms of torture as one of the most flagrant violations of human rights and human dignity. They commit themselves to strive for its elimination. They recognize the importance in this respect of international norms as laid down in international treaties on human rights, in particular the United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment and the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment. They also recognize the importance of national legislation aimed at eradicating torture. They commit themselves to inquire into all alleged cases of torture and to prosecute offenders. They also commit themselves to include in their educational and training programmes for law enforcement and police forces specific provisions with a view to eradicating torture. They consider that an exchange of information on this problem is an essential prerequisite. The participating States should have the possibility to obtain such information. The CSCE should in this context also draw on the experience of the Special Rapporteur on Torture and other Cruelly Inhuman or Degrading Treatment or Punishment established by the Commission on Human Rights of the United Nations and make use of information provided by NGOs.

LJUBLJANA 2005 (Decision No. 12/05 Upholding Human Rights and the Rule of Law in Criminal Justice Systems)

The Ministerial Council,

Recognizing that full respect for human rights and fundamental freedoms and the development of societies based on pluralistic democracy and the rule of law is a prerequisite for achieving a lasting peace, security, justice and stability,

Reaffirming the rule of law commitments contained in the 1975 Helsinki Final Act, the 1989 Concluding Document of Vienna, the 1990 Copenhagen Document, and the 1991 Moscow Document, those undertaken at the 1994 OSCE Summit in Budapest, and other relevant OSCE commitments and recalling relevant international obligations, including the International Covenant on Civil and Political Rights and the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,

Reiterating that the activity of the government and the administration as well as that of the judiciary will be exercised in accordance with the system established by law and in line with relevant OSCE commitments and international obligations of the participating States, and that respect for that system must be ensured,

Considering that the rule of law does not mean merely a formal legality which assures regularity and consistency in the achievement and enforcement of democratic order, but justice based on the recognition and full acceptance of the supreme value of the human personality and guaranteed by institutions providing a framework for its fullest expression,

Recognizing that rule of law must be based on respect for internationally recognized human rights, including the right to a fair trial, the right to an effective remedy, and the right not to be subjected to arbitrary arrest or detention,

Recognizing that an impartial and independent judiciary plays a vital role in ensuring due process and protecting human rights before, during and after trials,

Recognizing that defence lawyers play a critical role in ensuring the right to a fair trial and in the furtherance and protection of other human rights in the criminal justice system,

Underlining the need to speak out publicly against torture, and recalling that all forms of torture and other cruel, inhuman or degrading treatment or punishment are and shall remain prohibited at any time and in any place whatsoever and can thus never be justified, and stressing the need to strengthen procedural safeguards to prevent torture as well as to prosecute its perpetrators, thereby preventing impunity for acts of torture, and calling upon participating States to give early consideration to signing and ratifying the Optional Protocol to the Convention against Torture,

Decides to:

- Increase attention to and follow up on the issues of the rule of law and due process in criminal justice systems in 2006, inter alia, by encouraging participating States to improve the implementation of existing commitments, also drawing on the expertise of the ODIHR, and in close co-operation with other relevant international organizations in order to avoid unnecessary duplication;

Tasks the ODIHR and other relevant OSCE structures to:

- Assist the participating States to share with one another successful examples, expertise and good practices to improve criminal justice systems;

- Assist the participating States upon their request to strengthen the institutional capacity of defence lawyers to protect and defend the rights of their clients.

BRUSSELS 2006 (Brussels Declaration on Criminal Justice Systems)

We, members of the Ministerial Council, reaffirm the commitments related to the administration of criminal justice, especially those contained in the Helsinki Final Act (1975), the Vienna Final Document (1989), the Copenhagen Document (1990), the Charter of Paris for a New Europe (1990), the Moscow Document (1991), the Budapest Document (1994), and the Charter for European Security (1999).

We recall Ministerial Council Decisions No. 3/05 on combating transnational organized crime and No. 12/05 on upholding human rights and the rule of law in criminal justice systems (Ljubljana, 2005).

We further recall the proceedings of the Human Dimension Seminar on Upholding the Rule of Law and Due Process in Criminal Justice Systems (Warsaw, May 2006).

We also recall relevant UN instruments, including the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

We recall the commitment of the participating States to ensure the independence of the judiciary.

We recognize that nothing in this document shall undermine or diverge from Participating States' existing commitments or obligations under international law, while we also acknowledge that each participating State, consistent with its legal tradition, determines the appropriate ways to implement them in its national legislation.

We consider that:

- Judicial independence is a prerequisite to the rule of law and acts as a fundamental guarantee of a fair trial;

- Impartiality is essential to the proper discharge of the judicial office;

- Integrity is essential to the proper discharge of the judicial office;

- Propriety, and the appearance of propriety, are essential to the performance of all the activities of a judge;

- A guarantee of equality of treatment to all before the courts is essential to the due performance of the judicial office;

- Competence and diligence are prerequisites to the due performance of the judicial office.

We consider that:

- Prosecutors should be individuals of integrity and ability, with appropriate training and qualifications;

- Prosecutors should at all times maintain the honour and dignity of their profession and respect the rule of law;

- The office of prosecutor should be strictly separated from judicial functions, and prosecutors should respect the independence and the impartiality of judges;

Prosecutors should, in accordance with the law, perform their duties fairly, consistently and expeditiously, and respect and protect human dignity and uphold human rights, thus contributing to ensuring due process and the smooth functioning of the criminal justice system.

We consider that:

- Law enforcement officials should at all times fulfil the duty imposed upon them by law, by serving the public and by protecting all persons against illegal acts, consistent with the high degree of responsibility required by their profession;

- In the performance of their duty, law enforcement officials should respect and protect human dignity and maintain and uphold the human rights of all persons;

- Law enforcement officials should use force only to the extent necessary and appropriate to accomplish their mission and to ensure the safety of the public;

- Law enforcement officials, as members of the broader group of public officials or other persons acting in an official capacity, should not inflict, instigate, encourage or tolerate any act of torture or other cruel, inhuman or degrading treatment or punishment;

- No law enforcement official should be punished for not obeying orders to commit or conceal acts amounting to torture or other cruel, inhuman or degrading treatment or punishment;

- Law enforcement officials should be cognizant and attentive to the health of persons in their custody and, in particular, should take immediate action to secure medical attention whenever required.

We consider that:

- All necessary measures should be taken to respect, protect and promote the freedom of exercise of the profession of lawyer, without discrimination and without improper interference from the authorities or the public;

- Decisions concerning the authorization to practice as a lawyer or to join the profession should be taken by an independent body. Such decisions, whether or not they are taken by an independent body, should be subject to a review by an independent and impartial judicial authority;

- Lawyers should not suffer or be threatened with any sanctions or pressure when acting in accordance with their professional standards;

- Lawyers should have access to their clients, including in particular to persons deprived of their liberty, to enable them to counsel in private and to represent their clients according to established professional standards;

- All reasonable and necessary measures should be taken to ensure the respect of the confidentiality of the lawyer-client relationship. Exceptions to this principle should be allowed only if compatible with the rule of law;

- Lawyers should not be refused access to a court before which they are qualified to appear and should have access to all relevant evidence and records when defending the rights and interests of their clients in accordance with their professional standards.

We consider that the enforcement of custodial sentences and the treatment of prisoners must take account of the requirements of safety, security and discipline, while also ensuring prison conditions which do not violate human dignity and which offer meaningful occupational activities and appropriate treatment programmes to inmates, thus preparing them for their reintegration into society.

We call on the participating States to fully implement their commitments and international obligations to ensure fair and effective operation of their criminal justice systems.

HELSINKI 2008 (Further Strengthening the Rule of Law in the OSCE Area)

The Ministerial Council,

Reaffirming the OSCE participating States' commitments to the rule of law and to the Principles Guiding Relations between participating States in the 1975 Helsinki Final Act, as well as to the fulfilment in good faith of obligations under international law and reiterating the OSCE participating States' determination to foster strict respect for these principles,

Recalling the OSCE documents adopted in Vienna 1989, Copenhagen 1990, Moscow 1991, Budapest 1994 and Istanbul 1999 and Ljubljana Ministerial Council Decision No. 12/05 on Upholding human rights and the rule of law in criminal justice systems,

Recalling also the Universal Declaration of Human Rights and taking note of the International Covenant on Civil and Political Rights,

Recalling also other relevant United Nations documents affirming, inter alia, the need for universal adherence to and implementation of the rule of law at both the national and international levels, the commitment to an international order based on the rule of law and international law,

Underlining the importance we attach to human rights, the rule of law and democracy, which are inter-linked and mutually reinforcing,

Underlining also the importance of the rule of law as a cross-dimensional issue for ensuring the respect for human rights and democracy, security and stability, good governance, mutual economic and trade relations, investment security and a favourable business climate as well as its role in the fight against corruption, organized crime and all kinds of illegal trafficking including in drugs and weapons as well as trafficking in human beings, thus serving as a basis for political, economic, social and environmental development in the participating States,
Underlining also the importance of the rule of law in the implementation of OSCE decisions and documents in the politico-military sphere,

Taking into account activities related to the rule of law of relevant OSCE executive structures, in particular, the Secretariat, the ODIHR and the OSCE field operations, to assist participating States to enhance rule of law capacities, and taking also into account the role of the OSCE Parliamentary Assembly to promote respect for the rule of law in the OSCE area,

Taking into account relevant OSCE events concerning rule of law, in particular the 2008 OSCE Human Dimension seminar on the issue of Constitutional Justice as well as relevant Supplementary Human Dimension Meetings,

Taking into account participating States' ongoing and envisaged bilateral activities regarding the rule of law,

Underlining the importance of providing the OSCE with a legal personality, legal capacity, privileges and immunities and thus strengthening the legal framework of the OSCE,

1. Calls on the OSCE participating States to honour their obligations under international law and to observe their OSCE commitments regarding the rule of law at both international and national levels, including in all aspects of their legislation,
administration and judiciary;

2. Calls on participating States to contribute, where appropriate, to OSCE projects and programmes supporting the rule of law;

3. Encourages the relevant OSCE executive structures, in accordance with their mandates and within existing resources, in cooperation with relevant international organizations, to further identify and use synergies in assisting participating States, upon their request, in strengthening of the rule of law;

4. Encourages participating States, with the assistance, where appropriate, of relevant OSCE executive structures in accordance with their mandates and within existing resources, to continue and to enhance their efforts to share information and best practices and to strengthen the rule of law, inter alia in the following areas:

- Independence of the judiciary, effective administration of justice, right to a fair trial, access to court, accountability of state institutions and officials, respect for the rule of law in public administration, the right to legal assistance and respect for the human rights of persons in detention;

- Honouring obligations under international law as a key element of strengthening the rule of law in the OSCE area;

- Adherence to the principle of peaceful settlement of disputes;

- Respect for the rule of law and human rights in the fight against terrorism according to their obligations under international law and OSCE commitments;
- Prevention of torture and other cruel, inhuman or degrading treatment or punishment, including through co-operation with the applicable intergovernmental bodies;

- Efficient legislation and an administrative and judicial framework in order to facilitate economic activities, trade and investments in participating States and between them;

- Respect for the rule of law with regard to the protection of the natural environment in the OSCE area;

- Awareness-raising for issues related to the rule of law in courts, law enforcement agencies, police and penitentiary systems as well as in training for legal professionals;

- Education on the rule of law as well as interaction and exchange opportunities for legal professionals, academics and law students from different participating States in the OSCE region;

- The role of constitutional courts or comparable institutions of the participating States as an instrument to ensure that the principles of the rule of law, democracy and human rights are observed in all state institutions;

- The provision of effective legal remedies, where appropriate, and the access thereto;

- The observation of rule of law standards and practices in the criminal justice system;

- The fight against corruption;

5. Tasks the relevant OSCE executive structures, in close consultation and cooperation with participating States and within existing resources, to organize a seminar focussing on rule of law in 2009 which could serve as a platform for exchanging best practices between the participating States on issues related to the rule of law.

ASTANA 2010 (Astana Commemorative Declaration)

6. […] We value the important role played by civil society and free media in helping us to ensure full respect for human rights, fundamental freedoms, democracy, including free and fair elections, and the rule of law.

7. […] Respect for human rights, fundamental freedoms, democracy and the rule of law must be safeguarded and strengthened. […]