TRIAL MONITORING IN AZERBAIJAN 2006-07

Office in Baku

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Acknowledgements

The OSCE Office in Baku would like to thank all those who participated in this trial monitoring project, which was conducted from March 2006 to May 2007, and who contributed to the compilation of this report. The trial monitoring project was conducted under the supervision of Mr. Andreas Kirsch-Wood, head of the Rule of Law Unit of the OSCE Office in Baku, and the national legal officers Messrs. Kamran Bagirov and Mahammad Guluzade.

The OSCE Office in Baku is grateful for the sincere and passionate work of Ms. Leyla Madatova and Ms. Aynur Jafarova who, as national coordinators, provided daily guidance and direction to the 12 other national trial monitors who observed the trials in the courthouses.

The report, to a large extent, was compiled by Mr. Paul Garlick, Queens Counsel from the UK, who accompanied the work of the trial monitors during several visits to Baku.

The OSCE Office in Baku is grateful to the Government of Azerbaijan for its co-operation during the implementation of the Trial Monitoring Project in 2006-2007.

This trial monitoring programme was made possible through extra-budgetary contributions from Germany.

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EXECUTIVE SUMMARY

As part of Organization for Security and Co-operation in Europe ("OSCE") Human Dimension Commitments, and in order to enhance implementation of human rights and the rule of law, OSCE participating States have committed themselves to allow trials conducted within their territories to be monitored by international observers. In furtherance of this objective, the first phase of the Trial Monitoring Project in Azerbaijan was implemented jointly by the OSCE Office for Democratic Institutions and Human Rights ("ODIHR") and the OSCE Office in Baku between November 2003 and November 2004. This first phase was limited to an examination of 15 trials. The defendants were accused of various alleged offences relating to the post-election violence in Azerbaijan. The ambit of the second phase of the Trial Monitoring Project, which the present report covers, was widened to include the monitoring of over 500 criminal trials. More than 1,200 sessions of court hearings held in a variety of courts in Baku and Sumgait were observed. The second phase was conducted for almost two years beginning in March 2006. The monitoring of trials was carried out by two national coordinators and 12 local monitors, all of whom were specifically recruited, trained and supervised by the OSCE Office in Baku.

The second Trial Monitoring Report reveals that many of the trials fell short of OSCE and other international standards in regard to important rights and safeguards, specifically, the right to effective legal representation, the right to an impartial and independent tribunal, the right to a fair hearing, the right to assistance by an interpreter, and the right to a reasoned judgment.

However, there have been a number of noteworthy actions by the Ministry of Justice and other government bodies to strengthen the judiciary. Already two rounds of judge selection exams were conducted, and for those judge candidates who passed the exams intensive training was provided by the Judicial-Legal Council with the assistance of the Council of Europe, GTZ[1], the American Bar Association and the OSCE. The open and democratic process established by the judicial selection exam demonstrates a commitment to creating a transparent and fair legal system. The Ministry of Justice also reported that disciplinary actions were taken against judges who failed to adhere to norms regulating their conduct; 35 judges were dismissed due to non-professional conduct. During the reporting period a new Code of Conduct for Judges was adopted by the Judicial-Legal Council.

OSCE trial observers found that the physical conditions in which many of the courts function are unsatisfactory and are not conducive to proper monitoring or to members of the public being able to follow the court proceedings. Recently, the Ministry of Justice, with the support of the World Bank, launched a development programme on the construction of 18 new court buildings and refurbishment of other courts' facilities which would mean that the physical conditions will be improved significantly. However, presiding judges and other court officials often imposed additional restrictions and impediments that significantly interfere with the right of the public to attend and follow court proceedings. Moreover, in the majority of monitored cases, the proceedings did not commence at the scheduled time. OSCE trial monitors observed countless delays of up to several hours. The Report also mentions that dates of public hearings are not publicly

1 GTZ ("Gesellschaft für Technische Zusammenarbeit") is a German development assistance organisation.

available in many cases. For some courts, however, information on cases, including the hearing date/time and name of presiding judges, is available on the internet[2].

An important development has been the commencement of work of five courts of appeals in Azerbaijan in 2007. The effect of the establishment of these new appellate courts for the quality of conduct of criminal proceedings will become evident in the coming years. The Ministry of Justice reported that it also had made significant efforts to strengthen the independence of judges through new court administration mechanisms according to which cases will be allocated to judges not by decision of the President of the court but a system of depersonalised case assignment. These government efforts are particularly praiseworthy.

Progress also is noticeable in the extension of training for the professional development of judges. An education centre for judges and prosecutors was established under the Judicial–Legal Council. The training curriculum includes criminal procedure, international commitments of the Republic of Azerbaijan, the administration of juvenile justice, and mechanisms to prevent torture and mistreatment of suspects.

The Report mentions that many courts failed to provide translators during hearings. In fact, the Judicial-Legal Council has extended the list of court administrative staff, including translators for the courts in the regions populated by national minorities. Moreover, the Court of Grave Crimes and the Military Court of Grave Crimes have recently employed translators on a permanent basis. It should also be mentioned that the State Budget includes expenditures for translation services during trials. Each court is entitled to contract translators during hearings, and such expenses must be covered by the Ministry of Justice.

One matter of concern is the number of cases in which judges appear to be failing in their duty to carry out a full and effective examination of any allegation of torture or inhuman or degrading treatment, and to exclude any evidence found to have been obtained by such means of coercion. Judges repeatedly ignored defence motions to dismiss evidence allegedly extracted by torture or mistreatment facts or motions to investigate alleged misconduct by law enforcement agencies. In this regard, however, the Government of Azerbaijan is to be commended for the steps it has taken since the 2003-2004 Report to strengthen the law relating to the protection of the rights of suspects and accused persons held in detention facilities. The Government of Azerbaijan is in the process of preparing a draft new law on the custody of suspects and accused in detention facilities (“Draft Law”). The Government is urged to ensure that the Draft Law will make effective provisions for the protection of the rights of suspects and accused persons held in detention. Similarly, the Milli Majlis (Azerbaijan’s parliament) is urged to enact the Draft Law expeditiously and, thereby, put in place an effective mechanism for the protection of the rights of suspects and accused persons held in detention.

Moreover, the Plenum of the Supreme Court issued a decision “On Implementation of Provisions of the European Convention ‘On Human Rights and Fundamental Freedoms’ and Application of the Case-Law of the European Court of Human Rights in Trials”. According to this decision, the Supreme Court provided procedural guidelines to all judges to investigate any allegations of torture or mistreatment during the pre-trial period. The decision further envisages that judges should initiate all necessary measures to investigate such cases, including medical examinations and summoning witnesses.

2 For the Supreme Court see <www.supremecourt.gov.az>, for the Baku Court of Appeals see <www.bakuappealcourt.gov.az> and for the Ali Bayramli Court of Appeals see <www.alibayramli-appealcourt.gov.az>.

However, real commitment will only be seen when the courts of appeals and the Supreme Court reverse all judgments whenever doubt persist that the lower courts have not excluded evidence which may have been obtained by torture or other inhuman treatment. Where an allegation is raised by the defence that a confession or other incriminating evidence has been obtained by inhuman or degrading treatment, the burden must be on the prosecution to prove that the confession or other evidence was *not* obtained by torture or other inhuman or degrading treatment.

In conclusion it should be noted, however, that the Government has seen to it that NGOs whose role it has been to witness and report upon custody process have been permitted to do so[3]. This demonstrates a clear indication of developing trust between government and civil society, placing Azerbaijan at the forefront of nations affording such access and it is to be encouraged.

Another area of concern was the large number of cases where the application by the defence to call witnesses with relevant evidence was denied or just ignored by the court. Such practice deserves stronger reaction in the appellate decisions of the higher courts in the individual cases whenever such concern arises. Another problem is the orders for detention on remand during the pre-trial stage of criminal proceedings that appear to regularly be made by the courts without properly considering the grounds for such restrictive measures, and whether less restrictive measures than detention such as bail would be sufficient in each particular case.

It is also a matter of general concern that the legal services presently being provided by the criminal defence bar ("the Collegium") are not reaching the minimum professional standards to be expected of an independent bar association. Again, the Government of Azerbaijan is to be commended for the steps that it has taken to reform the defence bar. The Collegium leadership, however, continues to demonstrate a reluctance to implement the changes necessary to create an effective organisation that looks after its members and raises the standing of the profession. The Government is encouraged to continue to reform the criminal bar and ensure that the Collegium implements changes in its procedures for admission in a transparent and meaningful way. Reforming the admission procedure to the criminal bar will create the proper foundation for an independent and effective bar with sufficient members that can rely on the support of the bar association to service the needs of the population of Azerbaijan in a professional manner.

The Judicial-Legal Council is urged to continue its efforts to improve the standards within the judiciary by the implementation of effective and continuing training of judges, prosecutors and also defence counsels in all aspects of fair trial rights under national and international law.

The OSCE Office in Baku expresses its appreciation to the authorities of Azerbaijan for enabling the second phase of the Trial Monitoring Project to go forward. The OSCE remains ready to work with the Government authorities and civil society of Azerbaijan to strengthen the rule of law and administration of justice.

OSCE Office in Baku **Baku, April 2008**

3 There are a number of NGOs that monitor detention facilities under the aegis of the NGO Council established under the Minister of Justice; in particular the Azerbaijan Committee against Torture deserves to be mentioned.

INTRODUCTION

The right to a fair and public trial by an independent and impartial tribunal is enshrined in the Universal Declaration of Human Rights, as well as binding instruments of the United Nations and the Council of Europe, notably the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).[4] The OSCE has always recognised this right. In 1990, OSCE participating States committed themselves to accept court observers from other participating States and non-governmental organisations as a confidence building measure and in order to ensure greater transparency in the implementation of their commitments to fair judicial proceedings.[5] The OSCE Office in Baku initiated the Trial Monitoring Programme in Azerbaijan in furtherance of these commitments.

This report represents the second phase of the Trial Monitoring Programme. The first phase monitored 15 trials arising from violent disruption in Baku following the Presidential Election on 15 October 2003. In the second phase, the programme was widened to include the monitoring of over 500 criminal trials. More than 1,200 sessions of court hearings held in a variety of courts in Baku and Sumgait were observed for almost two years beginning in March 2006. The monitoring of trials in the second phase of the project was carried out by 2 National Coordinators and 12 local monitors, all of whom were specifically recruited for this programme and trained by the OSCE. The National Coordinators and the local monitors carried out their observations under the supervision and guidance of the Head of the Rule of Law Unit of the OSCE Office in Baku and an international expert, Paul Garlick, Queen's Counsel, Judge (United Kingdom).

The first period of training for the National Coordinators and the local monitors took place in Baku between the 1st and 8th of March 2006. Training on national and international fair trial standards, trial monitoring and reporting techniques was given by representatives of the OSCE Office in Baku, Mr. Paul Garlick, representatives of ABA CEELI and Mr. Intigam Aliyev (a representative of the Legal Education Society, a non-governmental organisation in Baku). A second further period of training took place between the 1st and 4th of November 2006, in Masalli. This training comprised a review and critical analysis of the work that the monitors had been carrying out to date, in order to ensure that monitoring of the trials was being carried out and recorded in an appropriate and accurate manner.

4 Done in Rome, 4.XI.1950. See http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/EnglishAnglais.pdf

5 Paragraph 12, Copenhagen Document 1990. See Annex 3.

PART I

A. The OSCE Trial Monitoring Programme

Summary of events leading up to the 2006/07 Trial Monitoring Programme

This project has its roots in the Trial Monitoring Project implemented jointly by the OSCE/ODHIR and the OSCE Office in Baku between November 2003 and November 2004, as a follow up activity to the presidential election of October 2003. That election sparked violent clashes in Baku between groups of demonstrators protesting about election fraud and security forces. The violence that ensued led to some 600 detentions and, eventually, 125 people were brought to trial on criminal charges in connection with the violence, including many prominent leaders of opposition political parties. All of those trials were observed under the programme in order to assess whether they complied with national law and international fair trial obligations. The report of the Trial Monitoring Project in Azerbaijan 2003-2004 ("2003-2004 Report") was published in February 2005 and can be downloaded from the OSCE website at www.osce.org/documents/odihr/2005/02/4233_en.pdf. In summary, the 2003-2004 Report expressed deep concern over extensive and credible allegations of torture and ill-treatment of detainees and the absence of any protection from such abuse by the courts. The conclusion of the report was that the conduct of some of the trials fell well short of OSCE and other international standards with respect to important rights and safeguards, including the right to legal counsel, the right to an impartial and independent tribunal, the right to a fair hearing, and the right to a reasoned judgment.

Efforts by the OSCE and the Government of Azerbaijan to foster legislative reforms dealing with the treatment of suspects and accused persons in pre-trial detention

In the wake of the 2003-2004 Report, an Expert Group was set up as an initiative of the OSCE and the Azerbaijani Government. The first meeting of the Expert Group took place in Warsaw on the 11th and 12th of April 2005. The Expert Group comprised of participants from relevant ministries and departments of the Government of Azerbaijan, representatives of the domestic NGO community dealing with legal issues, two independent legal experts, and members of the OSCE/ODHIR and the OSCE Office in Baku. During the first meeting, the Expert Group discussed a number of matters arising from the 2003-2004 Report, including the following:

(a) The right of defence counsel to have free access to his/her client without the necessity of obtaining permission from the prosecutor or any instrument of State;
(b) The possibility of adopting a new law regulating pre-trial detention;
(c) The provision of independent medical expertise in order to prevent or identify ill-treatment or torture;
(d) The need for uniform and effective mandatory rules of procedure for investigating allegations of torture or ill-treatment addressed to investigators, prosecutors, lawyers and judges;
(e) The exclusion from court proceedings of evidence obtained by torture or in violation of the right to legal representation.

Recommendations of the Expert Group

At the conclusion of the first meeting, the Expert Group agreed upon and issued the following recommendations:

> The Expert Group affirms the fundamental principle that access to a lawyer shall be guaranteed to all detained persons immediately after their arrest or detention and during all investigative measures, in accordance with the CPC and international standards.
>
> All steps necessary to implement and to guarantee that fundamental principle shall be taken expeditiously. The possibility of lodging an appropriate request with the Constitutional Court shall be considered.
>
> In particular the practice whereby defence lawyers are required to obtain permission from the courts, investigating or prosecuting authorities before gaining access to their clients shall end.
>
> The internal instructions and orders of investigating and prosecuting authorities shall comply with the spirit of the law and the fundamental principle set out above.

The Government of Azerbaijan, having expressed a clear commitment to taking constructive steps towards reforms in the treatment of suspects and accused persons in pre-trial detention held further meetings of the Expert Group in Baku in November 2005, June, October and November 2006, and several other meetings in 2007.

In the October 2006 meeting, the Expert Group considered a draft law on the Custody of Suspects and Accused in Detention Facilities ("Draft Law"). At a previous meeting on 28 and 29 November 2005, the Expert Group had produced 18 principal recommendations for the reform of the pre-trial and police detention system. The Expert Group confirmed its confidence that these principal recommendations would provide assistance to the Government of Azerbaijan in its efforts to fully realise best practices and achieve European and OSCE standards in relation to the detention and treatment of suspects and accused persons in Azerbaijan. The Expert Group further agreed that a sub-group of the Expert Group should meet with representatives of the Milli Majlis before the next meeting of the Expert Group to consider the proposed amendments to the Draft Law, and to agree on any further amendments necessary to give effect to the principal recommendations of the Expert Group.

OSCE Office in Baku's Briefing Paper on the draft law on police detention

Building on the progress that was made during the meetings of the Expert Group, in March 2007, the OSCE Office in Baku issued a Briefing Paper on the second reading of the draft law on police detention. The purpose of the Briefing Paper was to provide an outline of the contents and purpose of the draft law for parliamentarians, so that they would be better informed of the proposed legislation and would be able to debate the provisions of the draft law in a purposeful manner. The Briefing Paper restated the principal recommendations that the Expert Group had agreed upon in November 2005. In

particular, the Briefing Paper restated the duty of the Government of Azerbaijan to investigate thoroughly all allegations of torture or inhumane or degrading treatment in accordance with international and OSCE standards, and to provide an effective remedy for all established incidents of torture or inhumane or degrading treatment. The Briefing Paper reinforced the sentiments of the Expert Group that the draft new law was intended to be in the interests of not only suspects and accused in detention, but also the investigating police by establishing a system that could protect them against groundless allegations of mistreatment of detainees during interrogations. The Briefing Paper emphasised the following benefits that should accrue from the draft new law on police detention:

- The law will strengthen the credibility of the judiciary; and it will be in the interests of anybody who may be suspected of any crime, or involved in any criminal investigations, as there will be safeguards against any form of abuse.

- The law provides for the establishment of a police custody officer system. It describes all the elements of the custody officer's role, the reception, treatment, and welfare of people detained at police stations.

- The law aspires to introduce a balance between protecting the rights of individuals, protecting the public from serious harm, and ensuring that the police service carry out investigations in a professional and lawful manner.

- The law provides for comprehensive and transparent custody records, which can be easily checked by the courts. It imposes an obligation on the police and investigators to notify a suspect or accused person of his rights. It addresses the right to know the reason for detention, the right to medical treatment, and the right to notify a third party of one's arrest.

- The law also provides for the right to immediate access to a defence counsel of the detainee's own choice. Importantly, it also provides for the right to challenge the lawfulness of detention and sets limits on interrogation techniques.

- The law will both ensure proper treatment of suspects and accused persons in detention; and also protect police officers against groundless accusations.

- The law will be a comprehensive code of provisions regulating the treatment of suspects and accused persons in the custody of detention facilities. Its provisions will be clear and will be made readily accessible to suspects and accused persons at the moment they are taken into custody. To date, the regulations dealing with detention in custody have been derived from a number of sources: the Azerbaijani Criminal Procedure Code (CPC), "Internal Order Regulations" and other unidentified legal acts. Because they are addressed in different laws, neither the rights nor how to exercise those rights are easily ascertainable by defence counsel or, more importantly, by suspects or accused who have been taken into custody. Consequently, determining the full scope of the rights and obligations afforded to a detainee has been a cumbersome task.

- To eliminate unnecessary duplication or contradictions in laws, the proposed law will incorporate all of the elements of law governing the detention in custody of suspects and accused and it will become the primary legislation dealing with this crucially important matter.

B. Aim and methodology of the 2006-2007 Report

Under the second phase of the OSCE Trial Monitoring Programme, over 500 cases were monitored, covering more than 1,200 court sessions between March 2006 and November 2007.

The criteria for choosing cases to be observed were drawn very widely. OSCE trial monitors carried out observations in all courts in Baku, including the Court for Grave Crimes and the Court for Grave Military Offences. Access given to OSCE trial monitors to the latter two courts was very restricted and is discussed later in the report in the section dealing with public hearings. In general, OSCE trial monitors were allowed unhindered access to courts for monitoring purposes. The physical conditions in many of the courts, however, are unsatisfactory and not conducive to proper monitoring. The absence of sufficient seating and the lack of air conditioning in the summer months as well as the lack of heating in the winter months made it very difficult for monitors to carry out their work. The construction of many of the court rooms makes it very difficult to hear what is being said by the judges, prosecutors and defence advocates during the case.

The trials that were monitored included cases of various severity and types of charges. Cases involving a high public interest were observed, whenever possible, including the recent trial of the former Azerbaijani Health Minister, Mr. Ali Insanov.

The right to a fair trial is derived from a number of distinct yet inter-related rights that encompass the initial point of detention, the pre-trial period, the trial, and the appeal stage. The limitations placed upon access to hearings during the pre-trial stage (for example, hearings dealing with detention,[6] restrictive measures[7] and coercive procedural measures[8]) and to court materials (the indictment and the documents within the prosecution file[9]) made it necessary for the scope of this Trial Monitoring Project to be restricted to the trial period. Consequently, the Trial Monitoring Project focused on observing a breadth of cases during the trial period. On this basis, the cases were monitored from the perspective of their compliance with the standards and obligations set out in the following instruments and documents:

National law
- The Constitution of the Republic of Azerbaijan (1995)
- Criminal Procedure Code of the Republic of Azerbaijan (2000) (CPC)

Regional Obligations and Commitments
- OSCE Commitments[10]
- European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)[11]
- European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment[12]

6 Chapter XVI CPC

7 Chapter XVII CPC

8 Chapter XVII CPC

9 Article 52 CPC

10 In particular, the OSCE commitments on the Prohibition of Torture, Freedom from Arbitrary Arrest or Detention, Right to a Fair Trial and Independence of the Judiciary. The OSCE commitments, which have been adopted by all 56 OSCE participating States, are of a politically binding nature.

11 In particular Article 3 on the Prohibition of torture, Article 5 on the Right to liberty and security and Article 6 on the Right to a fair trial. Azerbaijan ratified the ECHR on 15 April 2002.

United Nations Obligations and Standards

- International Covenant on Civil and Political Rights (ICCPR)[13]
- United Nations Convention Against Torture (CAT)[14]

Trial monitoring as reflected in OSCE commitments

In recognition of the fundamental nature of the right to a fair trial, the OSCE participating States have committed themselves to permit observers sent by participating States, representatives of non-governmental organisations (NGOs), and other interested persons to monitor trials.

Paragraph 12 of the Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE provides:

"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."

The purpose of trial monitoring is to assess the fairness of the proceedings and whether they comply with OSCE commitments and other international standards. Trial monitoring is concerned only with the fairness of the trial, in accordance with international standards, and not with the guilt or innocence of the accused. One of the fundamental purposes is to provide participating States with the information gathered through monitoring the trials to use as a basis for reforms of the criminal justice system.

The OSCE trial-monitoring activities are based on an internationally accepted methodology developed by the OSCE Field Missions, the United Nations Office of the High Commissioner for Human Rights, Amnesty International and other credible human rights organisations. According to the methodology used by the OSCE, trial monitoring is based on as many of the following elements of the trial process as are possible and practicable in the circumstances of the particular monitoring project:

(a) Full access to information during the pre-trial stage, full access to confidential meetings with detainees;

(b) Full access to the pre-trial detention facility and registers kept by such institutions, as well as any relevant documents contained in case materials (including protocols on investigative activities, registers kept by police on detainees, certificates of medical examination during police detention and at the pre-trial detention facility);

12 Azerbaijan ratified the ECPT and its Protocols 1 and 2 on 15 April 2002.

13 Azerbaijan acceded to the ICCPR on 13 August 1992.

14 Azerbaijan acceded to the CAT on 16 August 1996.

(c) Full access to the courtroom;

(d) Full and confidential access to defendants;

(e) Full and confidential access to defence lawyers;

(f) Full access to the relatives of defendants,

(g) Full access to other relevant persons for the purposes of confidential interviews;

(h) Full access to relevant sites;

(i) Full access to relevant court documents (indictments, evidence, etc.).

As mentioned above, because of the practical limitations arising from the monitoring of hundreds of cases over a variety of courts, the legal provisions of the national laws of Azerbaijan that prevent access by monitors to any pre-trial hearings in cases[15], and the lack of any access to court materials, the observations carried out under this monitoring project were limited to observations in the court room during the hearings of trials. A trial report form was completed for each case that covered compliance with national, regional and international standards of fair trials.

A standard questionnaire form was prepared by the OSCE monitoring team and distributed to defence counsel in each case observed by local monitors. Regrettably, in the vast majority of cases defence counsel did not return the questionnaires to the monitors. It has not, therefore, been possible to correlate any meaningful information from that source.

15 According to Article 447.1. of the CPC (Rules governing the court's examination of applications on matters concerning the compulsory conduct of investigative procedures, the application of coercive procedural measures or the conduct of search operations) applications on matters concerning the compulsory conduct of investigative procedures, the application of coercive procedural measures or the conduct of search operations shall be examined by a single judge at a closed court hearing.

PART II

C. Findings of the OSCE Trial Monitoring Programme 2006/07

The findings of the OSCE Trial Monitoring Programme 2006/07 are discussed under the various headings below. Each section reports on the standard of compliance by Azerbaijani courts with the fundamental rights guaranteed an accused person in a criminal trial.

1. The presumption of liberty during the pre-trial stage of criminal proceedings

Both international standards[16] and the Criminal Procedure Code of Azerbaijan[17] ("CPC") provide that the detaining of an accused person in custody during the pre-trial stage of criminal proceedings may only be ordered by the court in strictly limited circumstances prescribed by law; and only where lesser forms of restriction of liberty are not regarded as sufficient. Article 154.2 of the CPC provides for a range of restrictive measures, including: arrest[18]; house arrest; bail; restraining order; personal surety; surety offered by an organisation; and police supervision. Article 155.1 of the CPC sets out the strictly limited grounds upon which the court can order restrictive measures. Article 155.2 sets out the matters the court is obliged to take into account when considering whether restrictive measures are necessary in the particular case.

While the provisions of the CPC in this regard comply with international standards, OSCE trial observers noted that judges, prosecutors and defence counsel commonly acknowledge that orders for detention on remand during the pre-trial stage of criminal proceedings are regularly made by the courts without proper or adequate consideration to the grounds for restrictive measures. In addition, the courts fail to consider whether less restrictive measures would be sufficient in the particular case.

The decision of the Nizami District Court on 19 March 2007[19] exemplifies the court's failure to examine whether all the necessary grounds have been established before ordering detention on remand. In this case, the defendant was charged with hooliganism and battery, arising from a fight. The court ordered detention on remand for a period of two months. In its decision, the court stated that according to the evidence presented to the court there were sufficient grounds to suspect that a crime had been committed. The reason given by the court for the necessity of detention on remand, however, is cause for concern. The court stated:

> *The selection of custody on remand as a choice of preventive measure against Mr. A. complies with Articles 5.1(c) and 5.3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, as well as with precedents set by similar cases of the European Court of Human Rights.*

16 ECHR, Article 5(1); ICCPR, Article 9(3)

17 CPC Articles 14, 154, 155, 156, 157

18 "Arrest" denotes a remand in detention for a specified period (CPC Article 158)

19 Case of Huseyn Abdullayev

Taking into account the character and gravity of the crime, opportunity to hide from the organ conducting of the criminal proceeding, threat of committing new crime and avoidance from the criminal liability, I consider that the selection of the custody on remand as a preventive measure is necessary,

In addition, Mr. A. is being accused of committing crime which can be sentenced to more than 2 years of imprisonment.

On the basis of the aforementioned facts and pursuant to Articles 154-158, 446-448 and 452 of the Criminal Procedure Code of the Republic of Azerbaijan

I DECIDE

To select the custody on remand as a preventive measure against Mr. Huseyn Abdullayev for the period of 2 (two) months.

Article 156.1 of the CPC expressly requires that "the grounds for the need to apply a restrictive measure based on the preliminary evidence shall be indicated in the decision on the choice of restrictive measure." In total disregard of this strict obligation, the judge failed to identify any evidence upon which he could reasonably have come to the conclusion that the defendant would either: (i) go into hiding; (ii) commit new crimes; or (iii) avoid criminal liability. Instead he merely repeated selected phrases from Article 155 of the CPC without giving any reasoned decision. Furthermore, the judge gave no indication why less restrictive measures, such as bail, were not sufficient in the circumstances of the case.

The presumption that an accused person will not be deprived of his liberty pending his trial can only be displaced by clear and adequate reasons for coming to the conclusion: (i) that it is necessary to impose restrictions on the liberty of the accused in order to prevent him from committing an offence, absconding or interfering with witnesses or the investigation; and (ii) that lesser forms of restrictive measures are not sufficient. Judges must consider the circumstances of each case and must give reasons for their decisions and identify the particular circumstances of the case that caused them to reach those decisions.

2. The right to a public hearing

Public hearings are a core safeguard of fair trials. The ECHR and OSCE commitments provide that the public should have access to all hearings, except in a number of narrowly defined circumstances.[20] Further, as part of national law, Article 27 of the CPC, dealing with the right to public hearings, provides:

27.1. While safeguarding state, professional, commercial, personal and family secrets in accordance with this Code, court hearings in criminal cases and on other prosecution material shall be held publicly in all courts of the Azerbaijan Republic.

27.2. Court hearings in criminal cases and on other prosecution material may not be held in absentia, except in the circumstances provided for by this Code.

27.3. In all cases court decisions given during the proceedings shall be made public.

20 Article 6(1) of the ECHR, Copenhagen Document (1990) paragraph 5.16.

The majority of court hearings that were monitored were, ostensibly, held in public. As observed in the 2003-2004 Report, however, numerous restrictions and impediments are often imposed by the court or court officials that significantly interfere with this right. The Court for Grave Crimes and the Court for Serious Military Offences stood out as the worst violators of the right to a public hearing. Specific practices employed by those courts are provided below.

Even when trials were held in public, a number of factors contributed detrimentally to public access:

- In many of the courts, the public galleries were far too small to accommodate all those who wished to observe the hearings.

- Monitors and members of the public were often only admitted to the public gallery of courts after they provided court officials not only with their identification cards, but also documents showing their profession or occupation or special permission to monitor hearings.

- Many courts did not post information about the time and place of scheduled hearings or otherwise make this information known to the public.

- In some cases involving a high degree of public interest, including the recent trial of the former Azerbaijani Health Minister, Mr. Ali Insanov, certain members of the media were not admitted to the court - lack of space in the public gallery usually being cited as the reason.

- Even where monitors were given unimpeded access to courts, the physical dimensions of the court rooms make it is very difficult for those in the public gallery to hear what is being said by the judges, prosecutors and defence counsel. Further, lack of air-conditioning in the summer months and lack of heating in the winter months made the conditions difficult for monitors and was not conducive to effective observation of the trials.

Certain violations of the right to a public hearing, notably in the Court for Grave Crimes and the Court for Grave Military Offences, warrant particular mention.

OSCE trial monitors were permitted to observe proceedings in the Court for Grave Military Offences on only six occasions. Thereafter, they were refused permission to enter the court building. The attitude of the Court for Grave Military Offences towards monitoring of its trials was antagonistic and obstructive. This attitude can best be demonstrated by the actions of the Chairman of the Court the first time OSCE trial monitors attempted to enter the court. The OSCE trial monitors were summoned to see the Chairman of the Court who questioned them about the organisation they represented and the purpose of the trial monitoring. The Chairman informed the monitors that he required an official letter from the OSCE before he would allow monitoring to take place. When challenged by one of the monitors as to why this was necessary, the judge told the monitor that they had behaved disrespectfully and should have asked for permission to monitor the proceedings. On a subsequent occasion when an OSCE monitor attempted to gain access to the court, he was told by the court supervisor that he would only be allowed to enter the court building if he submitted a letter. The court supervisor informed the monitor that the

court was a strategic court where special cases were heard and not everyone could just enter the building..

While it may be justifiable and permissible, in exceptional cases, to exclude members of the public from all, or part, of a session of a court hearing on the grounds of national security or some other justifiable ground, it is improper to exclude a monitor, or any member of the public, without proper consideration of the circumstances of a particular case. Imposition of a blanket requirement to produce documentation and to seek prior permission to enter a court building in order observe trials is a disproportionate and arbitrary policy of exclusion and restriction that amounts to a serious violation of both national law and Article 6 of the ECHR.

Similar restrictions were placed on OSCE trial monitors at the Court for Grave Crimes. At this court, OSCE trial monitors were allowed to enter the court building and observe trials on only a very limited number of occasions. OSCE trial monitors made 117 attempts to gain access to the court to observe trials. They were only allowed to gain access on 40 occasions. On many occasions OSCE trial monitors were stopped by police and court supervisors and prevented from getting any closer than between 20 to 30 metres to the entrance of the court. The monitors were told that they were being refused entry because they did not have written permission from the Chairman of the Court to observe the trials. Consequently, the OSCE wrote to the Chairman of the Court asking him to fulfil the constitutional and international law rights of a public hearing and to allow the OSCE trial monitors access to observe trials. Regrettably, the Court for Grave Crimes replied that the court could only cooperate with international organisations through the offices of the Ministry of Justice. Thereafter, OSCE trial monitors continued to be denied access to the court on various grounds such as the requirement to obtain registration or permission to monitor proceedings at the court.

Three examples demonstrate the difficulties that OSCE trial monitors faced in gaining access to the Court for Grave Crimes:

First, on 15 June 2006, between 9:30 a.m. and 4 p.m., OSCE trial monitors attempted, unsuccessfully, on several occasions to gain access to the court building. When the hearing was about to commence, the court secretary called out the names of certain people and only those people were admitted in to the court building. The court secretary stated that no one could gain access to the courtroom without permission of the Presiding Judge. On the same day, the court secretary informed an OSCE monitor that only those who were participants in the trial could gain access to the courtroom. The monitor was told to ask the police officer standing near another entrance to the court for permission to enter the court. When the monitor asked the police officer permission, he was referred back to the court secretary who had first refused him permission and told that he should ask her after the judge gave permission. The monitor was then told that people were only being allowed to enter the courtroom after they received special permission by the Presiding Judge. When the monitor was subsequently refused access to the court, he asked the court officials to inform the Presiding Judge that he was a trial monitor from the OSCE Office in Baku. The monitor was told that the court officials could not tell the judge because the judge knew better than they did whom to let into the court building.

Secondly, on 22 June 2006, OSCE trial monitors were refused access to the court by the guards at the side entrance to the court (where the public is admitted in to the building). They were told to go to the main entrance at the front of the building and to obtain permission from the Chairman. The guards told the monitors that they should not have let

them enter the previous time they came to observe on 20-21 June 2006, and that they had only allowed them to observe on that occasion out of kindness towards them, but that they should not have done so. The guards then closed the entrance door to the court in the faces of the OSCE trial monitors.

Lastly, OSCE trial monitors had some success in gaining entrance to the Court for Grave Crimes in cases where the intense public and press interest made it more difficult for the court officials to exclude the monitors - like the trials of Mr. Haji Mammadov and Mr. Ali Insanov,. However, even in the Mr. Ali Insanov's case, OSCE monitors observed that the court officials were highly selective of the people they allowed into the courtroom. Everyone who wanted to enter the courtroom was obliged to hand over their identification cards and press cards 10-15 minutes before the court session. Shortly before the beginning of the court session, the court officials returned and, without any explanation of the method of selection, the names of the people who were allowed to enter the courtroom were announced. OSCE monitors reported in many instances that representatives of the independent and opposition media[21] were not allowed to enter the courtroom, while representatives of the media regarded as supportive of the government[22] were allowed to enter. Similarly, the court officials were selective of the NGO representatives admitted to the courtroom.

On more than three occasions OSCE trial monitors were denied access to the court hearing. Furthermore, on one occasion Paul Garlick experienced great difficulty in gaining access to the courtroom, despite having a letter of introduction from the Deputy Head of the OSCE Office in Baku and his passport. Paul Garlick was not admitted to the court until the National Coordinator succeeded in passing the letter of introduction to the court staff inside the building. Paul Garlick personally witnessed certain journalists being admitted to the court room and other members of the press and media not being. This incident corroborates complaints made by members of the media that they have been refused access to the courtroom because they represent news organisations that, ostensibly, are not sympathetic to the government. On several occasions during the trial, the presiding judge criticised the journalists in open court for articles they had written about the case. The antipathy of the court towards certain members of the media was clearly evident. Defence counsel complained a number of times about the exclusion of certain members of the media, but the court did not address the motions.

a. Publication of time and place of court hearings

One of the most important prerequisites for public access to trials is that the time and place of pending trials are suitably published, so that members of the public and interested parties can ascertain when and where to go to observe the trials. Unfortunately, this is not being done in some of the courts in Azerbaijan and OSCE trial monitors regularly experienced difficulty in obtaining information about court hearings. The worst offender in this regard is the Court for Grave Crimes. In this court, OSCE trial monitors found it almost impossible to obtain information from the court staff regarding the scheduling of hearings. There is no public notice board displaying details of when cases are going to be heard and members of the court staff were not helpful. The staff told monitors that they do not have a list of current cases. The Court of Appeal and the Supreme Court similarly,

21 For example: Yeni Musavat, Baki Habar, Gundalik Azerbaijan, Realniyi Azerbaijan, Azadlig, Xazri, Ayna-Zerkalo newspapers, Turan news agency, Voice of America and Liberty radios, the representative of the press service of Great Britain Embassy and the employees of the Ans News Information Agency.

22 For example: the Information Agency APA, the newspapers Kaspi, Ses, Iki Sahil, 525, Hafta Ichi, Zafar Galasy, Sharg

do not have a public notice board displaying the time and place of criminal court hearings .

Apart from the courts mentioned above, OSCE trial monitors found that most of the courts did display information about hearings to be scheduled during the week. But, often this information was not updated on a daily basis and it was difficult to ascertain which cases were going to be heard on a particular day. Furthermore, occasionally monitors found that cases had been omitted from the list. It was reported that the cases omitted from the list were frequently cases that had a high public interest or sensitivity. For example, a criminal case on defamation[23] was initiated by the head of one of the departments of the Ministry of Transport against the chief editor of the newspaper "24 saat." The trial sessions for that case were not included in the list of pending cases.

In some courts, the published list of trials did not include cases assigned to the Chairman of the Court. Monitors observed this practice in Yasamal,[24] Sabunchu,[25] and Binaqadi District Courts.[26] In Binaqadi District Court, the court clerk justified the omission based on the small number of cases tried by the Chairman. She further stated that she could not provide the monitor with the information. The Yasamal District Court, told OSCE trial monitors that it was the court's practice not to list cases that were going to be heard by the Chairman of the Court. If this is correct, it is a practice that should cease forthwith.

Public confidence in the criminal justice system will only be achieved if the business of the courts is conducted in a transparent manner. The present practice of closed courts is antiquated and inefficient. Poor information about the scheduling of pending cases causes frustration and engenders suspicion and mistrust in the judicial administration. Accordingly, steps should be taken to provide accurate and timely information regarding:

- the times when courts will be in session;
- the cases scheduled for hearing on a particular day;
- the court room the cases will be heard in; and
- the judge(s) that will hear the case.

This information should be made readily available to the public. It should be mentioned that websites like the Supreme Court's website currently gives some information about the function and business of the Supreme Court (http://www.supremecourt.gov.az/eng/newsm.shtml). No updated information regarding the scheduling of pending cases is provided. Strong consideration should be given to the establishment of a website where information about the scheduling of cases in all major courts in Azerbaijan can be accessed by the public. In any event, urgent consideration should be given to the proper use of public notice boards to give timely information regarding the sessions of the court and the cases that they will be dealing with.

b. Other hindrances to observing trials

As previously mentioned, the physical dimensions of the courtrooms often make it very difficult for those in the public gallery to hear what is being said by the judges, prosecutors and defence counsel. In many courts the microphone systems are totally

23 Nasimi District Court, Fikrat Faramazoghlu's case, Judge: Mr. M. Zulfugarov, articles: AR CC 147

24 Yasamal District Court, Judge – Abdullayeva Malahat N., Ganciyev Agashirin Elman case's, art. 177.1, 234.1, president of Yasamal district court was Ilqar Eyvaz Abbasov.

25 Sabunchu District Court, president of Sabunchu district court was Arzu Abilhasanov

26 Binaqadi District Court, Alakbarov Aziz Elchin's case, the Judge – Mrs. Aliyeva Asad Zoya, art. 228.4, the president of the court was Hasan Akbar Aliyev

inadequate and the public cannot hear the proceedings. This problem is exacerbated in the summer months when the lack of adequate air-conditioning in the courtrooms makes it necessary to open the windows increasing the level of noise. The seating accommodation for members of the public in courtrooms is inadequate. The lack of appropriate seating portrays the courts as having a low regard for the right of the public to have free and effective access to proceedings.

In summary, the majority of courtrooms in Azerbaijan provide poor conditions for members of the public and make it very difficult for them to follow court proceedings. The present conditions of the courtrooms actively discourage public attendance and make observing a trial both difficult and uncomfortable. Urgent consideration should be given to re-furbishing the courts to provide the public unhindered access and a reasonable amount of comfort. The courtrooms need adequate seating and proper microphone systems allowing the public to hear and follow the proceedings in a meaningful way.

It must be mentioned that some improvements have been made that should improve the physical conditions for persons attending court proceedings. The reorganisation of the judiciary envisaged by the Government is commendable and warrants the open support of the international community. By Presidential Decree on 17 August 2006, the number of courts and judges in Azerbaijan was substantially increased. Five additional regional appellate courts have been established: the Baku Court of Appeal; the Ali-Baramly Court of Appeal; the Ganja Court of Appeal; the Sumgayit Court of Appeal and the Sheki Court of Appeal. The number of domestic economic courts was also increased from three to six. In addition 153 new judges have been appointed, bringing the current total number of judges in the country to around 478. The process of reorganisation should have a beneficial effect on the conditions of the court.

3. The right of the accused to be present in the court

Everyone charged with a criminal offence has the right to be tried in their presence, in order to hear and challenge the prosecution's case and present a defence. The right to be present at the trial is an integral part of the right to defend oneself. Accordingly, a defendant, generally, has a right to be present during the proceedings, including proceedings where preliminary matters such as pre-trial detention or restrictive measures are being considered by the court.[27] The object and purpose of Article 6(1) ECHR presupposes that the accused person will be present at any hearing. This right is not an absolute right, as in special circumstances where witnesses have to be heard anonymously, or where the defendant is unruly. Occasions when a hearing takes place other than in the presence of the defendant, however, are exceptional. Moreover, the right of the defendant to be present is not considered respected if he/she has not been given the possibility of attending. The European Court of Human Rights ("ECtHR"), having regard for the prominent place that the right to a fair trial enjoys in a democratic society, has stated that the authorities must show requisite diligence in ensuring the defendant's right to be present in an effective manner.[28]

Access to preliminary applications and court hearings

Although the provisions of the CPC appear to give full protection of the right of the accused to be present at hearings, OSCE trial monitors observed that this right was

27 Under Articles 147 to 159 of the CPC

28 FCB v Italy (1992) 14 E.H.R.R. 909

regularly violated. With respect to preliminary procedures, Article 91.5.14. of the Criminal Procedure Code provides that a defendant shall have the right:

> to participate in investigative or other procedures or to refrain from participating in them unless this is prohibited by another provision of this Code.

Because of the procedures adopted in the courts, OSCE trial monitors where not able to observe hearings in relation to preliminary applications including applications for detention and other restrictive measures. Accordingly, the monitors were not able to provide any statistics in relation to the presence of the accused at those hearings. Defence counsel informed the OSCE trial monitors that in the majority of cases the accused persons are not present at such hearings, which is cause for serious concern.

The CPC does provide for the right of a defendant to be present at court hearings. The particular provisions of the CPC dealing with the presence of the accused are worthy of mention. Article 311 makes the following detailed provisions:

Article 311 Participation of the accused in the court's examination of the case and consequences of non-attendance

> 311.1. During the court's examination of the case, the accused shall participate in all the hearings of the court and shall enjoy the rights provided for in Article 91.5 and 91.6 of this Code.
>
> 311.2. A court may examine a case without the participation of the accused only in the following exceptional circumstances:
>
> 311.2.1. if the accused is outside the territory of the Azerbaijan Republic and intentionally avoids attendance at court;
>
> 311.2.2. if a person charged with an offence which does not pose a major public threat applies for the charges against him to be examined without his participation, on condition that this does not preclude a thorough, full, and objective examination of all the circumstances connected with the criminal prosecution.
>
> 311.3. If the court examines the case without the participation of the accused, the participation of his defence counsel in the hearing shall be compulsory.
>
> 311.4. Save in the circumstances provided for in Article 311.2 of this Code, if the accused fails to attend the hearing, the court's examination of the case shall be postponed and the hearing shall be conducted at another time.
>
> 311.5. If the accused fails to attend the hearing without good reason, he may be forcibly brought to the hearing by court decision, and if there are grounds for it under this Code, a restrictive measure may be applied to him or an existing restrictive measure may be altered to a more serious one.

In the trials that were monitored, the accused was generally present in the court. However, there were notable exceptions. In one trial, the defendant was not present when the trial

commenced.[29] The court reporter informed the judge that the defendant was not present. The court decided to continue in his absence because the witness was a police officer and was in a hurry. More alarmingly, the accused was not legally represented at this hearing.

During the trial of Haji Mammadov and others before the Court for Grave Crimes,[30] Mr. Mammadov requested to be removed from the courtroom stating that he was ill, and could not continue participating in the session. The court denied his request. Mr. Mammadov began to make noises and hinder the session. The court ordered him to be taken from the courtroom for showing disrespect to the court. After the next court session, Mr. Mammadov was not made aware of the evidence presented in his absence in violation of the CPC.

In another case, the judge announced a verdict in the absence of the defendant. When he noticed that the defendant was not present he asked the prosecutor whether he should announce the verdict. The prosecutor stated, "*Let us announce the verdict, let us assume that the defendant is here and then we will deliver it to him*". The judge announced the verdict saying, "*I can't wait for him (the defendant) for two hours.*"[31]

The requirement for a defendant to be present at an appellate hearing is less stringent but, the defendant must be given adequate notice of the hearing's time and place and the opportunity to be represented by counsel. In an appellate case observed by the OSCE trial monitors, the appellant was not present and only his defence lawyer took part in the hearing. The court proceeded with the appeal without stating why the appellant was not present or whether he had been informed of the hearing.[32] When no explanation is given for proceeding in the absence of an appellant, it does little to inspire public confidence in the judicial system.

4. Absence of prosecutor or defence counsel

The frequency of cases observed where the prosecutor or defence counsel was absent for some or all of the hearing is, equally, a matter of grave concern. In one case, neither the prosecutor nor the defendant was present when the court began hearing the case. The prosecutor arrived at the hearing 10 minutes later and was allowed in to court. When the defendant arrived even later, the judge had no intention of allowing him in to the court, but planned to proceed in the defendant's absence. However, other participants in the proceeding requested a break and the defendant was allowed to attend the proceedings thereafter.[33]

a. The absence of the prosecutor

When a prosecutor is not able to attend a hearing, Article 314.3 of the CPC provides:

> 314.3. If it is impossible for the public prosecutor to attend a hearing during the court's examination of the public or semi-public charges, with

29 Sabunchi district court, case of Ibrahimov Kainat Ibrahim, article: 244.1, judge: I. Asadov

30 Court for Grave Crimes , case of Haji Mammadov and others

31 Sabunchu District Court, Farajova Leyla Yagubovna and Hajiyeva Bikaxanim Rizvan gizi's case, article: Farajova Leyla 128 Hajiyeva Bikaxanim 132, Judge: Sevil Salimova

32 Court of Appeal, Ahmadov Elchin Yashar oghlu's case, article: 333.1, Court composition - Chairman: Mr. Gadir Hasanov; Judges: Mr. Rasul Safarov, Mr. Mubariz Zeynalov

33 Sumgayit City Court, Judge Adil Valiyev, defendant E.Quliyev and others

> good reason, he shall inform the court of the fact before the start of the hearing. If the public prosecutor fails to attend the hearing, with good reason, and if it is impossible to replace him with another public prosecutor, the court's examination of the case shall be postponed and conducted at another time. The newly appointed public prosecutor shall be given time to prepare the defence of the charge in court.

Article 314.4 of the CPC provides sanctions for the repeated absence of the prosecutor as follows:

> 314.4. If, during the court's examination of public or semi-public charges, the public prosecutor repeatedly fails to attend the hearing without informing the court in advance and without having good reason, and if his replacement at this hearing is impossible, the court shall have the right to raise the matter of the public prosecutor's disciplinary liability before the Principal Public Prosecutor of the Azerbaijan Republic.

It is undesirable for any part of a criminal case to be heard in the absence of the prosecutor. The prosecutor has obligations to the court and the defendant to ensure that the procedures under the CPC are complied with and that the trial is conducted in a proper and fair manner. It appears that the courts are not using their power, but instead are proceeding with cases in the absence of the prosecutors without complaint.[34] In one case the entire hearing was conducted in the absence of the prosecutor.[35] The courts' complacency leads to the appearance of acceptance of a practice that is inconsistent with the proper administration of justice.

One extreme example of the persistent failure of a prosecutor to attend court at the appointed time should be noted. At the Sabunchu District Court, hearings are scheduled to commence at 9:00 a.m. OSCE trial monitors observed the prosecutor persistently arrived at the court between 2 to 3 hours later. In one trial in this court, the judge remarked to the OSCE monitor, *"You are lucky that we managed to find the prosecutor here and are reviewing cases quickly."* Delays are not confined to the Sabunchu District Court, but were observed at many other courts, including the Sumgayıt City Court and the Azizbeyov District Court.[36]

OSCE trial monitors frequently observed that there were an insufficient number of prosecutors to handle all of the cases listed for the day. Consideration must be given to increase the number of adequately trained prosecutors.

b. The situation regarding the defence bar

The Report on the Situation of the Lawyers in Azerbaijan, prepared jointly by the OSCE Office in Baku and the American Bar Association Central European and Eurasian Law Initiative (ABA CEELI) in March 2005, was highly critical of the defence bar in

34 Sabayil District Court, Haziyev Mammadali Mushfiq's case, Article 180.1, 234.1, Judge: Mrs. Agasiyeva Ibrahim Furuza.

35 Yasamal District Court. Judge: S.Ismayilova. Accused: Tagiyev Tamerlan Djavanshir oglu. Article: 128. Court Composition (3rd session); Khatai District Court Huseynov Khagani Ildirim's case, Articles 127.2.3 and 221.3. Judge Aliyev R.A., Court of Appeal, Suleymanov Eldar Yusif's case, Article 221. Court composition: President Zeynalov Mubariz, Judges: Yusifov Shahin and Abdullayev Elmar.

36 Sumgaıt City Court, Nasirov Abudulla Ilkin, Judge M.Mammadov; Azizbeyov District Court, Prosecutor Elchin Nagiyev; Sabunchu District Court, Judge I.Asadov, Faxraddin Gahraman, Bayramov Mashadi Bahruz's case

Azerbaijan. The report noted that, although there had been reform to the law governing the defence bar, the manner in which the law had been implemented had merely maintained the status quo: a tightly controlled criminal defence bar. As the report noted, the international legal community has voiced its concern over this situation repeatedly. The way the criminal bar in Azerbaijan operates remains a major obstacle to the provision of effective legal representation in criminal cases. The result is that advocates are not able to provide an adequate professional service to their clients.

The March 2005 report highlighted the critical situation of the legal profession in Azerbaijan. The report assessed: the desirability of the inclusion of licensed lawyers in the Collegium of Advocates; the procedural aspects of the constitutive meeting of the new Collegium; the administration of the first bar exam; and, recent legislative changes that appear to broaden the scope of work reserved for Collegium members and, thereby, appear to restrict the legal profession and give the Collegium a monopoly on the word "attorney" ("vəkil").

As a result of the concerns expressed in the March 2005 report, four recommendations were made:

(1) the inclusion in the Collegium of all lawyers who have, at any time, obtained a licence to practice law pursuant to Presidential Decree No. 637, without any further requirements other than proof of their licence;
(2) the holding of a new constitutive meeting of the Collegium, to include all licensed lawyers, with a fair and democratic process;
(3) the holding of a second bar exam by September 2005 with improved methodology; and
(4) the establishment of an independent body to deal with all complaints related to the application process to sit for the bar examination and the examination itself.

Efforts have been made to implement the first recommendation. In August 2005, amendments to the Law on Advocates came into effect permitting all formerly licensed lawyers[37] to join the Collegium without taking the bar examination. Although the amendment was an attempt, made in good faith, to enable licensed lawyers to be included in the Collegium, it has been implemented in a peculiarly restrictive and arbitrary manner.[38] The Collegium requires licensed lawyers to provide extensive documentation not envisaged in the Law on Advocates. As a result, many licensed lawyers have not been persuaded to apply to the Collegium. To date, two years after the amendment to the law came into effect approximately 100 licensed lawyers out of 233 have been admitted through the application process. A number of licensed lawyers stated to the OSCE that they would not apply for membership in the Collegium because they do not wish to work under the rigid rule of the Collegium leadership.

In 2007, the OSCE observed the examination process for the admission of lawyers to the Azerbaijani Collegium of Advocates. Of the 384 candidates who participated in the written tests, 299 passed and obtained the right to participate in the oral interviews. Of those 299 candidates, 245 passed the oral examination (conducted between May and July

37 The Ministry of Justice provided the Collegium with a list of 233 licensed lawyers who should qualify for automatic admission. More information regarding the previous licensing practice can be found in the March 2005 report.

38 The amendment states, "All persons who were issued a special permit (license) to provide paid legal services, whose rights to establish a new Collegium of Advocates have not been recognised, are accepted as members of the new Collegium of Advocates by the Qualification Commission without passing the specialised examinations provided that they meet the requirements envisaged for candidate advocates." The Collegium leadership seemingly relies upon the last provision to continue restricting the membership of licensed lawyers.

2007) and were entitled to join the Collegium. OSCE observers assessed the conduct of the written examinations as being exemplary. The conduct of the oral examinations, however, was problematical and highly subjective. Some candidates who had gained high scores in the written examination, and who also gave competent answers in the oral exams, were, nevertheless, assessed as having failed the bar examination. In contrast, the answers given by some candidates were, perversely, evaluated as satisfactory and they were admitted to the Collegium, despite their inability to answer any of the interview questions. Of particular concern was the negative impression that the Chairman of the Collegium, Mr. Azer Tagiyev, gave about some of the candidates before they even entered the examination room. Those candidates were, subsequently, not admitted to the Collegium, regardless of the fact that most of their answers were proficient.

No steps have been taken to implement the second recommendation, and no general meetings of the Collegium have been held. The last recommendation has been implemented in so far as a candidate can file a complaint in court concerning the conduct of the examination and his/her rejection of membership to the Collegium.[39] In summary, while efforts have been made to reform the criminal defence bar, much still remains to be done to develop the bar and permit the free and independent practice of law.

The Ministry of Justice should be commended for its recent reform efforts within the judiciary. The open and democratic process established by the judges' selection exam demonstrates the commitment to creating a transparent and fair legal system. The process used for judicial selection is being extended to the qualifying exams for prosecutors. These efforts will go a long way towards establishing a strong legal environment based on the rule of law. Any progress, however, will be curtailed if the criminal defence bar is not equally a part of the reform process.

The international legal community continues to insist on reforming the Collegium, not just in the written law, but also in the implementation of the law governing the criminal defence bar.[40] To its credit, the Government of Azerbaijan has made efforts to comply with international demands via amendments to the law.[41] The current leadership of the Collegium, however, has demonstrated an unwillingness to implement the changes that are necessary to create an independent profession.

As a result of the restrictive practices in relation to the membership and operation of the Collegium, insufficient opportunities are being given to lawyers who represent a new generation of practising advocates, and who would change the way the Collegium functions. The old leadership of the Collegium has remained in power without change and, over the years, it has demonstrated a staunch opposition to the development of an independent criminal defence bar. The leadership restricts and controls its members, including restricting the physical location where an advocate can practise,[42] as well as the type and number of cases an advocate handles.

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39 Amendment to the Law on Advocates and Advocates Activities, 3.2.

40 For example, on 16-17 July 2005, the OSCE Office in Baku in cooperation with ABA CEELI, NED and AF sponsored a conference entitled "Advocacy: International Standards and Realities"; on 12 April 2005, NDI hosted a Forum on the Legal Defence System in Azerbaijan. Both conferences addressed many of the issues facing the criminal defence bar and recommended reform. ABA CEELI continues to offer assistance and request reform both formally and informally in its communications with the Collegium. Two ambassadorial letters on in March 2006 from the Embassies of the United States and the United Kingdom and another in April 2005 from the U.S.A., U.K., and Norwegian Embassies requested bar exams and expansion of the Collegium.

41 Amendments to the Law on Advocates and Advocates Activities became effective in August 2005 in an attempt to address certain complaints.

42 Article 5 of the Law on Advocates provides the right to freely choose how an advocate wishes to carry out his/her activities. Article 35 of the Constitution also guarantees the right to choose one's place of work. Contrary to the law, the Head of the Collegium stated that candidates passing the bar would be "distributed among the consultancies." (TURAN, 12 April 2005). In addition, the Head of the Collegium told an international observer that candidates who originated from the regions

Law offices authorised by the Collegium are known as legal consultancies (in Azerbaijani: "hüquq məsləhətxanası"). There are only 16 such consultancies in Baku.[43] The Collegium leadership requires advocates providing legal services to do so through the existing consultancy offices. The Collegium is extremely restrictive in permitting the establishment of other forms of offices where criminal law is practised, thereby considerably impeding the practice of law.[44] Only up to five private advocates offices have been permitted to operate so far.

The Law on Advocates provides in Article 22 that advocates may provide their professional services either individually, or through partnerships (for example legal consulting offices, advocate bureaux, or advocate firms) established in accordance with the legislation of the Republic of Azerbaijan. The Law on Advocates also provides that advocates can choose which organisational and legal form they wish to use in order to carry out the activities.[45] The Civil Code of Azerbaijan provides for various forms of business and commercial entities from which advocates should be able to choose to carry out their activities. Despite the unambiguous language of the law, the Collegium has taken the position that advocates can only establish firms with their approval which it has granted only in a few cases. Most advoctes are, therefore, required to provide criminal defence services exclusively through the existing legal consultancies.

It appears that the desire of the leadership of the Collegium to restrict the practice of law to members of its existing legal consultancies is motivated by maintaining control over those consultancies. The International Commission of Jurists described the situation of lawyers in the Collegium as follows: "Advocates working within the Collegium are influenced by the organisation's direct control over their work and pay. The Collegium controls the flow of casework from the criminal justice system. It requires lawyers to turn their fees over to the Collegium's accounting offices, from which they are then returned a percentage. Through its monopoly on criminal cases, advocates are dependent on the Collegium for their livelihood, as the majority of cases in Azerbaijan are criminal cases."[46]

Despite the financial investment made by the members to the Collegium, the Collegium fails to provide professional services to its members. For example, the Law on Advocates requires the Collegium to provide continuing legal education programmes.[47] No services have ever been provided. Because the Collegium does not have a transparent accounting system, the distribution of finances is not accountable. The current system of organisation of the Collegium appears to benefit only the leadership of the Collegium, and it is hard to escape the conclusion that this is the reason why it continues to oppose the establishment of firms that are independent of the existing consultancies.

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would be assigned to work in that region. It should also be noted that during the oral exam portion of the bar exam, if an applicant refused to live and work as an advocate in a certain region they were denied membership.

43 It is not known to the OSCE how many Collegium consultancies there are in the regions.

44 Some Collegium-advocates, however, have offices outside the consultancies but are nevertheless required to take criminal cases only from the consultancies. Also those advocates practising from an office outside the consultancies are required to pay the consultancies monthly to defray the costs of consultancies' building, supplies, etc.

45 Law on Advocates, Art. 5, Part V.

46 See Azerbaijan – Attacks on Justice 2002, Independence of Judges and Lawyers - Documents, International Commission of Jurists, 26 August 2002 (see <http://www.icj.org/news.php3?id_article=2650&lang=en>).

47 Law on Advocates, Art. 11, section III, part 8 "The Presidium of the Collegium organises awareness work in the field of legislation and court practice for advocates."

c. The absence of defence counsel

The number of cases where defence counsel was not present when the case was called by the court is disturbing. The concerns of the OSCE in regard to this issue is so important that it is highlighted here.

Article 312 of the CPC provides for the participation of defence counsel in the court's examination of the case and the consequences of non-attendance. The provisions of Article 312 are so fundamental that they are set out in full below.

> Article 312.1. At the request of the accused or in the circumstances provided for in Article 92.3.2-92.3.13 of this Code, defence counsel shall participate in all the hearings of the court during the latter's examination of the case, and shall exercise the rights and fulfil the duties provided for in Article 92.9 and 92.11 of this Code.
>
> 312.2. A defence counsel who fails to attend the hearing may be replaced with the consent of the accused.
>
> 312.3. A defence counsel who fails to attend the hearing, but with good reason, shall inform the court of this before the start of the hearing. If defence counsel fails to attend the hearing, with good reason, the court's examination of the case shall be postponed and the hearing shall be conducted at another time.
>
> 312.4. If the participation of the defence counsel appointed by the accused is not possible for a long period (in any case no longer than 10 (ten) days) with good reason, the court may postpone its examination of the case, suggest that the accused choose another defence counsel and, in the event of his refusal, appoint a new defence counsel with the assistance of the relevant branch of the bar association. In postponing its examination of the case and deciding the replacement of defence counsel, the court shall take into consideration the expediency of such a decision (the time already spent on the court's examination of the case, the complexity of the proceedings. the time which will therefore be required by the new defence counsel to become acquainted with the file and other circumstances). The court shall provide sufficient time for the new defence counsel to become acquainted with the whole file. A defence counsel newly involved in a criminal case may apply for any procedures already conducted during the court's examination of the case before his involvement to be repeated.
>
> 312.5. If defence counsel fails to attend without good reason and without informing the court in advance and if his replacement at this hearing is impossible, the examination of the criminal case shall be postponed and the hearing conducted at another time.
>
> 312.6. If defence counsel repeatedly fails to attend the hearings and if his replacement at this hearing is impossible, the examination of the criminal case shall be postponed and the hearing conducted at another time. In this case, the court, in deciding the replacement of defence counsel under the provisions of Article 312.4 of this Code may raise the matter of the

lawyer's disciplinary liability before the Bar Association of the Azerbaijan Republic.

These provisions are clear and unequivocal. Regrettably, they are not complied with in many cases. In several cases OSCE trial monitors observed that trials were being conducted in the absence of defence counsel.[48] In a number of these cases the judges did not carry out any adequate investigation of the reason for the absence of defence counsel and gave no reasons for continuing with the trial in their absence. In one multi-party case, the judge proceeded with the case in the absence of a number of defence counsel without asking the defendants whether they objected.[49] In another case, the judge started the hearing earlier than the scheduled time and examined some of the witnesses in the absence of defence counsel.[50]

In another case,[51] defence counsel reported that a court hearing took place in the absence of the defendant and in the absence of defence counsel. It was also reported that no notice had been given to defence counsel of the hearing. Only the prosecutor appeared in the case. At the final hearing, the defence counsel informed OSCE trial monitors that the judge issued a decision on a preventative punishment without either the defendant or his counsel being present. Defence counsel's name, however, was included in the order as having been present at the hearing. This is a gross violation of Article 311 of the CPC[52] and Article 6 of the ECHR.

In another case, the court proceeded in the absence of defence counsel where the defendant did not speak Azerbaijani.[53] Although the defendant pleaded guilty, he nevertheless was entitled to be represented by defence counsel and to be given the assistance of an interpreter. OSCE trial monitors observed that the defendant's counsel was only present at the end of one hearing and did not participate in any way in the court's investigation of the case, nor did he make a plea in mitigation on behalf of the defendant. The facts of this case violate the CPC and any recognised standards of fair trial procedure.

In contrast, OSCE trial monitors reported a number of other trials where judges properly adjourned the proceedings because defence counsel failed to attend the hearings, either on time or at all. In most other criminal jurisdictions, this practice would amount to professional misconduct and warrant sanctions against defence counsel.

5. Delays in commencement of court proceedings

In the majority of monitored cases, the proceedings did not commence at the scheduled time. OSCE trial monitors observed countless delays of cases varying from several minutes to several hours. A number of factors appear to contribute to these delays, including: the judge opening the court proceedings late; the parties arriving late (including

48 Sabail District Court, article 177.2.4, Judge: Kerimov Yusif Ali oglu, accused: Chubarova Irina Viktorovna; Khatai District Court,Huseynov Khaqani Ildirim oglu's case, artcle: 127.2.3, 221.3. Judge Aliyev R.A.

49 Court on Grave Crimes, Haji Mammadov and others' case, article: 144 and others, Court composition: Chairman: Mr. Ali Seyfaliyev, Judges: Mr. Alovsat Abbasov, Mr. Sadraddin Hajiyev

50 Appellate Court, judges Mr. R.Safarov (chairman), Q.Hasanov, A.Hasanov, A.Nuriyev, article 178.3.3 of CC

51 Defendants: Ismayilov Binnat Novruz, Ahmadov Mammadaga Mazahir, Court of Appeal, Court composition: Judges – Mr. Salman Huseynov, Mr. Tagizada M., Mr. Karimov G., articles 178.3.2, 179.3.2, 213.4

52 Supra

53 Sabail District Court, article 177.2.4, Judge: Kerimov Yusif, accused: Chubarova Irina Viktorovna

the late arrival of prosecutors and defence counsel as previously discussed), and a shortage of courtrooms.

An explanation was rarely given to the parties as to the reason for the delay. One notable exception, however, was observed at the Sumgayit City Court where one of the judges regularly informed the parties of the likely length of delays in their cases.[54] In one case in the Khatayi District Court, the judge specifically asked the OSCE trial monitors to report that the delays in the court proceedings were frequently caused by the late arrival or non-arrival of defence counsel.[55]

Instances of delay in the commencement of proceedings are not limited to the District Courts. The Court of Appeal often delayed proceedings for hours. This may be attributable to the fact that all of the cases to be heard on a particular day are scheduled to commence at the same time - 10:00 a.m. Accordingly, it was not uncommon for some cases not to be reached until late in the afternoon.[56]

The obvious frustration experienced by the parties (whether defendants, victims or witnesses) because of unexplained delays in cases is exacerbated by the fact that there are no proper waiting rooms. Often parties must wait in the street for hours without any information as the length of delay.

One court administration problem observed by OSCE trial monitors is the imbalance in the number of cases allocated to judges. Some courts some judges are allocated a disproportionately higher number of cases than other judges at the same court centre.[57] Improvements in the system of allocation of cases to judges sitting at court centres would reduce the burden on some of the judges and, thereby, reduce delays in their courtrooms.

OSCE trial monitors reported that it was common for cases to be postponed without any hearing taking place. The court secretary merely informs the parties that the case has been postponed. In some cases, no date for an adjourned hearing was fixed, leaving the parties with no information about when their case would come before the court. When cases are adjourned, there should be a hearing on the matter in open court and the adjournment should be handled by the judge. Reasons for the adjournment should be given and, when possible, a new date for the hearing should be appointed.

Better court administration and improved scheduling of cases would help alleviate some of the delays. The root cause of the delays, however, appears to be the chronic overload of the court system. The recent increase in the number of judges and courts, together with the plans to improve court administration along with better communication of court scheduling should provide the judiciary with the tools needed to rectify the systemic problem.

6. Inadequate records of evidence and court proceedings

54 Sumgayit City Court, Judge – Mr. M. Mammadov, defendants: Mustafayev Amir Polad, Mikayilov Murad Vusal, Mikayılov Murad Elchin, CC article 221.1

55 Khatai district court, judge I.V. Gasimov, case of S.Aliyev and K.Qurbanov, article 307.1 of CC

56 Court of Appeal, Yusifov Eduard, Aliyeva Natella, 243.2.1, 243.2.2, 320.1 228.4 171.2.1 171.2.2, Court composition: Chairman - Mr. Rasul Safarov, Judges - Mr. Allahveran Hasanov, Mr. Gadir Hasanov; Court of Appeal, Latafat Aliyeva's case, article: 308.2, Chairman: Mr. Rasim Isgandarov, Mr. Huseyn Alakbar

57 Khatai District Court, Pashazada Mushfig, article: 128, Javid Pashazada, article: 128, Rasim Mirzayev, article: 132, Judge: Mr. Tahir Ismayilov; Narimanov District Court, Taisa Nurislamovna Miftyakheddinovna and Rina Nuri Ahmadovna Miftyakheddinovna's case, articles: 132, 128, Judge: Mrs. L.A.Mavrina; Jamalov Raymis Allahverdi oghlu's case, Binagadi District Court, article: 263.1, Judge: Mr. Sariyev Ahmad; Narimanov District Court, Usanov Nikolay Olegovichin's case, articles: 234.1, 228.4, Judge: Mr. M.T.Ahmadova; Sabail District Court, Khomyakov Viktor's case, article 234.1, Judge: Mr. Karimov Yusif

An essential element of a fair trial is a full and accurate record of the proceedings. Without a record the court can not come to a reasoned decision based on the evidence. Furthermore, in the event of an appeal, the appellate court cannot properly review the case without a full and accurate record. To this end, Article 98.2.2. of the CPC imposes a duty on the court clerk "to record fully and accurately the course of the court proceedings, the court decisions, the applications, objections, evidence and submissions of parties to the proceedings and the other matters which must be mentioned in the record."

Judges are required to make important decisions regarding the facts of a case. They are required to assess the evidence of witnesses and make crucial decisions as to the veracity and accuracy of the evidence. This judicial function can only be discharged properly if a full and accurate record of the evidence is kept. Without a record it is impossible for a judge to assess the evidence of one witness against the evidence of another witness, which is often a determinative factor in the fact finding process of a trial. While the CPC places a duty on the court clerk to keep a record of the evidence, it is also incumbent upon judges to take notes on the evidence that they regard as important and relevant to their determination of the facts.

In some cases it was observed that no proper record of the proceedings was taken by the court clerk. In one case, the court clerk had only two sheets of notepaper and was only taking notes from time to time.[58] Paul Garlick also observed in many cases an inadequate record of the evidence was taken.

Only a few courts have video tape recording facilities. The Absheron District Court[59] should be recognized as an example of one court that ensures a proper video tape recording of the proceedings. Video cameras are installed in the courtrooms at Absheron District Court and the judges are able to review the tape-recorded evidence in their chambers.

In the recent trial of Mr. Ali Insanov, the former Minister of Health, before the Court for Grave Crimes, the proceedings, for the most part, were recorded by a video tape recorder. During one session, however, the proceedings were not recorded. But, the video recordings were resumed when defence counsel petitioned the court. The same cannot be said for a written record of the proceedings. There were complaints by defence counsel that the court secretary failed to record all of the evidence.

Based on the monitoring project, the procedures for recording evidence in trials in courts in Azerbaijan fall short of the standard required by the ECHR and OSCE commitments for a fair trial. Steps should be taken immediately to provide adequate training to both judges and court clerks to improve the skills in relation to the recording of evidence.

7. Right to a fair hearing

The right to a fair hearing is enshrined in Article 6 of the European Convention and is at the core of the OSCE commitments. The concept of a fair hearing is an overarching right and brings together a number of interrelated rights including:

1) the right to trial by an independent and impartial tribunal;

58 Binaqadi district court, judge Mrs. Z.Aliyeva, S.Abdullayev's case, articles 127, 128.1 of CC

59 Absheron District Court, Aliyeva Ganira's case, article: 178, Judge: Mr. Bashirov Chingiz.

2) the presumption of innocence;
3) the right to defend oneself in person or through legal assistance of one's own choosing;
4) the opportunity to present his/her case (including his/her evidence) under conditions that do not place him/her at a substantial disadvantage *vis a vis* his/her opponent (equality of arms);
5) to examine or have examined witnesses against him/her and to obtain the attendance and examination of witnesses on his/her behalf under the same conditions as witnesses against him/her;
6) to have the free assistance of an interpreter if he/she cannot understand or speak the language used in court.

a. Right to trial by an independent and impartial tribunal

Pursuant to the International Covenant on Civil and Political Rights, the European Convention, and OSCE commitments, everyone is entitled to a hearing by an independent and impartial tribunal established by law.[60] This right is confirmed in Article 127 of the Azerbaijani Constitution and Article 28 of the CPC.

With respect to independence, the recent reform efforts within the judiciary made by the Ministry of Justice should be acknowledged. Amendments to the law governing the selection of judges, which included a more rigorous exam procedure, came into effect in 2005. The open and democratic process established by the judicial selection examination demonstrates a commitment to creating a transparent and fair legal system. The process used for judicial selection is being extended to the qualifying exams for prosecutors. These efforts are to be encouraged as they go a long way towards establishing a strong legal environment based on the rule of law.

The requirement of independence and impartiality are interlinked and it is necessary to consider them together. A judge must be independent, in the sense that he/she is able to act objectively and independently, free from any pressure imposed upon him/her by the executive or Parliament or the parties. A judge must also be impartial. Ascertaining whether a tribunal is impartial involves both a subjective and an objective enquiry. As to the objective enquiry, the European Court has made clear that if there is a legitimate reason to question the lack of impartiality of a judge, he/she must withdraw.[61] If a defendant raises the issue of impartiality, it must be investigated unless it is "manifestly devoid of merit."[62]

For subjective impartiality to be proven, the European Court requires actual proof of bias; personal impartiality of a judge is presumed until there is evidence to the contrary. [63] In practice this is a very strong presumption. Even when a judge takes a strongly negative view of a defendant's case, or even his character, this is not sufficient to prove bias. Similarly, unduly harsh or oppressive behaviour is not necessarily a reflection of personal prejudice.[64] In a number of monitored cases, OSCE trial monitors reported that judges

60 Article 6(1) of the ECHR, OSCE Copenhagen Document (1990) paragraph 5.16

61 Piersack v. Belgium (1982)
http://cmiskp.echr.coe.int/tkp197/view.asp?item=2&portal=hbkm&action=html&highlight=Piersack%20%7C%20Belgium&sessionid=281511&skin=hudoc-en

62 Remil v. France 1996.

63 Hauschildt v. Denmark (1989)
http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Hauschildt%20%7C%20Denmark&sessionid=281511&skin=hudoc-en

64 Ransom v. UK, September 2, 2003.

demonstrated either a positive animosity towards defendants, or they were not interested in considering the defendant's case in a fair manner. The concept of impartiality requires that the bench shall not have a preconceived idea as to the guilt of the defendant or the result of the trial. Regrettably, in a number of cases OSCE trial monitors reported that the conduct of judges showed that they did have a preconception of guilt. It is not practicable to recite each instance of reported bias, but some illustrations are necessary.

In one case a defendant plead not guilty. The judge responded, *"There is sufficient evidence denouncing you in the investigation materials; I don't know why you plead 'not guilty.'"* The judge then addressed the defendant's brother and advised him to persuade the defendant to plead guilty. During the hearing, the panel of judges paid little attention to the proceedings and talked amongst themselves. At the conclusion of the proceedings, the judges retired to deliberate for just 3 minutes. When they returned to the court they delivered a judgment that appeared to have been prepared in advance.[65]

In a case before the Yasamal District Court, the defendant disputed the evidence of the single prosecution witness, a police officer, that he had been seen carrying 8 packets of Gillette razor blades. When the judge referred to the evidence of the police officer the defendant stated, *"He is lying, how could I carry 8 packets of Gillette razor blades in my pocket, he is lying."* The judge then interrupted the defendant and said, *"It means you threw them away when the police approached you."* This kind of remark made at the stage of the trial when the defendant is giving evidence on his own behalf, indicates that the judge had preconceived opinion regarding the defendant's guilt. Even if the judge was not actually biased in favour of the police, his conduct gives the appearance of bias.

In another case,[66] OSCE trial monitors observed a judge who was manifestly biased in favour of the prosecution and failed to take any steps to ensure that the defendant's rights were afforded to him during the preliminary investigation. The defendant was elderly, in poor health, and was unable to follow the court proceedings because he could not hear properly. During both the preliminary investigation and the trial, the defendant did not have legal representation. This is a clear violation of Article 92.3.2. of the CPC, which provides that the court must ensure that legal representation is provided to any suspect or accused that is "dumb, blind, deaf, has other serious speech, hearing, or visual disabilities, or because of serious chronic illness, mental incapacity or other defects cannot exercise the right to defend himself independently." The hearing of this case was postponed seven times on the grounds that witnesses were absent. When the trial was eventually heard, it lasted just 20 minutes and the court heard from just three witnesses - two police officers and a third person. The witness examinations were confined to confirming the testimonies they gave during the preliminary investigation. Throughout the hearing, the judge showed no interest in ensuring that the defendant's rights were afforded to him. The defendant was convicted under circumstances that were in violation of both domestic law and international standards for fair trials.

The 2003-2004 Report noted a number of examples that cast doubt on the impartiality of the bench. The 2003-2004 Report cited repeated instances where the court granted the motions raised by the prosecutor and refused almost all of the motions raised by the defence, unless the prosecutor agreed with them. OSCE trial monitors report that this state of affairs is still prevalent. In one case in particular (*Haji Mammadov and others*, heard in

65 Court of Azerbaijan Republic on Grave Crimes, Mammadov Maharram Elzabit's case

66 Sabunchu District Court

the Court for Grave Crimes[67]), OSCE trial monitors observed that, repeatedly, the question of whether to grant motions made on behalf of the defendants appeared to be decided on the basis of the attitude taken towards the motion by the prosecutor. Motions submitted on behalf of the defendants were rarely granted. Whereas those submitted on behalf of the prosecutor were, almost invariably, granted, even when all defence counsel raised objections. Conversely, when motions were supported by all (or the vast majority of) defence counsel, they were denied by the court if the prosecutor objected. It was observed that the court granted defence motions only in instances when the prosecutor did not object or was indifferent to the motion. The court's behaviour led one defence counsel to tell the court in frustration that he did not wish to be asked if he had any submissions to make in relation to motions because it was a useless exercise. It was also observed that, any dispute between the prosecutor and the defence was decided in favour of the prosecutor, regardless of the merits. The repeated instances of the court favouring the prosecutor portrays the court as biased against the defendants.

b. Presumption of innocence

The presumption of innocence one of the most fundamental aspects of a fair trial. Many of the international instruments to which Azerbaijan is a party provide for the presumption of innocence. Article 11 of the Universal Declaration of Human Rights declares that "everyone charged with a penal offence has the right to be presumed innocent until proven guilty according to law in a public trial at which he has had all the guarantees necessary for his defence." Article 14 of the International Covenant on Civil and Political Rights continues in the same vein: "Everyone charged with a criminal offence shall have the right to be presumed innocent until proven guilty according to law." Finally, Article 6 (2) of the European Convention similarly mandates that "everyone charged with a criminal offence shall be presumed innocent until proven guilty according to law." The presumption of innocence is also a core OSCE commitment. By becoming a party to these international instruments, the Republic of Azerbaijan has undertaken to implement them.

(i) The presumption of innocence in Azerbaijani national law

The presumption of innocence is an inalienable part of Azerbaijan's body of legislation Azerbaijan's commitment to the presumption of innocence is reflected in its Constitution and Criminal Procedure Code.

Article 63 of the Constitution provides:

> 1. Every person shall have the right to the presumption of innocence. Any person charged with a crime shall be considered innocent until he or she has been proven guilty as required by law and a court decision to that effect has been issued.
> 2. Suspicions as to an individual's guilt, however well-supported, do not constitute grounds for considering such individual guilty.
> 3. A person charged with a crime shall not be obliged to prove his or her innocence.
> 4. Evidence obtained by violating the law cannot be used in the exercise of justice.

67 Court on Grave Crimes, Haji Mammadov and others' case, article: 144 and others, Court composition: Chairman: Mr. Ali Seyfaliyev, Judges: Mr. Alovsat Abbasov, Mr. Sadraddin Hajiyev

> 5. Without a court decision, no one can be found guilty of committing a crime.

Article 21 of the Criminal Procedure Code provides:

> 21.1. Any person suspected of committing an offence shall be found innocent if his guilt is not proven in accordance with this Code and if the court has not delivered a final judgment to that effect.
>
> 21.2. Even if there are reasonable suspicions as to the guilt of the person, this shall not cause the latter to be found guilty. The accused (the suspect) shall receive the benefit of any doubts which cannot be removed in the process of proving the charge in accordance with the provisions of this Code, within the appropriate legal proceedings. He shall likewise receive the benefit of any doubts which are not removed in the application of criminal law and criminal procedure legislation.
>
> 21.3 The accused shall not be obliged to prove his innocence. It shall be for the prosecution to prove the charge or to refute the evidence given in defence of the suspect or the accused.

Similarly, Article 8 of the Code on Administrative Offences states:

> Any person suspected of committing an administrative offence shall be found innocent if his guilt is not proven in accordance with this Code and if the judge dealing with the case has not delivered a decision to that effect. A person brought to administrative responsibility shall not be obliged to prove his innocence. Any doubts regarding the guilt of the person brought to administrative responsibility shall be resolved in his favour.

In practice, however, the presumption of innocence in Azerbaijan is very different from the law. In November 2005, a group of Azerbaijani lawyers working in private practice were commissioned by the OSCE Office in Baku to produce a report evaluating the degree of compliance with the principle of the presumption of innocence in Azerbaijan ("2005 Azerbaijani Advocates Group"). A variety of methods were utilised to carry out this evaluation, including researching Azerbaijani media records, interviewing former defendants in criminal cases, conducting surveys, and establishing a complaint hotline. The 2005 Azerbaijani Advocates Group found the court's compliance with the presumption of innocence in Azerbaijan unsatisfactory. [68] The report stated:

> In Azerbaijan, however, the presumption of innocence just does not make allowances for how trials must be conducted. Azerbaijan's codes also guarantee that individuals accused of crimes cannot be deprived of their rights to housing, participation in elections, employment, education, or a variety of other goods while under suspicion. Moreover, the fact that an individual has been accused of a crime does not constitute grounds for publicly identifying him or her as a criminal. These are the everyday, practical consequences of the presumption of innocence; together, they ensure that those accused of crimes can live normal lives and expect fair,

68 See: http://www.osce.org/documents/ob/2006/08/20261_en.pdf

> unbiased trials. However, it is these everyday aspects of the presumption of innocence that have been most particularly abridged in Azerbaijani practice.

The 2005 Azerbaijani Advocates Group further noted that journalists, police officers, prosecutors, and judges in Azerbaijan often treat suspicion of guilt and proof of criminal behaviour as though they are functionally equivalent. They remarked that reports from prosecutors' offices and police departments combined with the coverage by television and other media formed public perceptions of guilt before the accused ever entered court. To tackle those failings, the 2005 Azerbaijani Advocates Group suggested that additional laws should be enacted to strengthen due process, state legal bodies should undergo internal reform, and speeches and reports concerning ongoing cases, whether produced by public officials or media representatives, should be regulated more closely.

(ii) Statements made outside of the courtroom prejudicing the presumption of innocence

The 2005 Azerbaijani Advocates Group summarised the situation regarding the presumption of innocence in Azerbaijan in the following terms:

> Without a final court decision, it should be unacceptable for public officials to make official statements and give media interviews testifying to the guilt of an individual under criminal suspicion; such statements and interviews damage the reputation and dignity of those accused, and make it difficult for judges and courts to independently rule on their cases. In Azerbaijan, though, such practices are common. The Prosecutor General, the Minister of Internal Affairs, representatives of the Presidential Apparatus, and the heads of other executive bodies often speak of suspects in high-profile cases as "criminals" and publicly discuss evidence that points to their guilt. Cooperation between the authorities and both government-controlled and private media outlets exacerbate the problem. Television and print media treat unproven allegations as facts in their coverage of criminal cases and broadcast accusatory speeches and interviews given by public officials. Perhaps most troublingly, videos and photos obtained by law enforcement authorities in the course of their investigations are routinely shared with media outlets for display on national television; such materials have even included footage of detainees being interrogated by police investigators.

Specific examples of the presumption of innocence being violated are cited in the 2005 Azerbaijani Advocates Group's report , including the case of Haji Mammadov, the former head of the Criminal Investigation Department at the Ministry of Internal Affairs, as well as the cases launched in October 2005 against Ali Insanov, former Minister of Health, Fikret Yusifov, former Minister of Finance, Farhad Aliyev, former Minister of Economic Development, and Rasul Guliyev, former Speaker of the Parliament.

While the 2006-2007 Trial Monitoring Project was not concerned directly with monitoring statements made outside of the courtroom in relation to the supposed guilt of accused persons, several instances of such prejudicial reporting were observed by OSCE trial monitors. The case against Mr. Ruslan Bashirli (a prominent member of the Yeni Fikir youth organisation) is a notable example of prejudicial reporting. On 4 August 2005, the day after Mr. Bashirli was accused, a number of state officials, including the General

Prosecutor of Azerbaijan, Zakir Qaralov, issued an official statement in the mass media referring to him as a criminal, and stating that he was guilty. On the same day, the General Prosecutor's Office released confidential video recordings of a meeting between Mr. Bashirli and alleged members of the Armenian secret agency, together with a recording of interrogations of members of Yeni Fikir conducted by the General Prosecutor's Office. For a period of 2-3 months, the State-run television station and Lider television channel regularly broadcasted this material. Similar videos were displayed on large advertising screens in the centre of Baku.

In the case of Haji Mammadov, the Ministry of National Security and the General Prosecutor's Office issued a joint statement on 27 January 2006, which clearly violated the presumption of innocence in his case. As of July 2007, the press release was still on the website of both the Ministry of National Security and the General Prosecutor's Office. In addition, the Ministry of National Security and the General Prosecutor's Office released video recordings of the interrogation of Haji Mammadov to TV channels. The State TV channel broadcasted special programmes adding its own comments to the video recordings and the alleged acts of Haji Mammadov.

Another serious violation of the presumption of innocence was reported by OSCE monitors in a case before the Sabunchu District Court.[69] In this case, the defence advocate complained to the court that the presumption of innocence had been violated. He stated that after the investigation began an article reporting information provided by the General Prosecutor and the press service of the Ministry of Internal Affairs was published in the Azerbaijan newspaper. In the article, the accused was referred to as a criminal and published that a weapon was found on him. The article was published in the Azerbaijan newspaper on 8 February 2006 - the day after the defendant was detained - and included a photograph of the accused showing him to be armed and aggressive.

The examples provided demonstrate that there is a need to bring practices in Azerbaijan in relation to the presumption of innocence up to international standards.

(iii) The presumption of innocence within the court proceedings

The presumption of innocence requires the court to not have a preconceived idea of whether the defendant has committed the charged offence. The burden of proof is on the prosecution, and any doubt should be decided in favour of the accused.[70]

In its report, the 2005 Azerbaijani Advocates Group observed that in Azerbaijan the mentality that "the police and prosecutor are never wrong" still exists. This sentiment was confirmed by the observations of OSCE trial monitors during this project. In many cases, OSCE trial monitors observed that judges demonstrating a preconceived idea that defendants had committed the offence charged before considering all the evidence.[71]

One of those cases was discussed previously where the judge told the defendant, *"There is sufficient evidence exposing your guilt in the pre-trial investigation files. I don't understand why you don't plead guilty."* [72].

69 Hasanov Macid Zulfu, Abbasov Shamil Famil, Zakiyev Zaki Faig, Cabrayilov Yashar Rizvan, Mursalov Mursal Ismayil, Mehdiyev Hamza Azar, Sarmanov Zeynal Fikrat's Case, 315.1, Sabunchu District Court, Judge Habib Ali Aliyev.

70 Barberà, Messegué and Jabardo v. Spain, December 6, 1988, Series A, No. 146 paragraph 77

71 Nasimi District Court, T.R.Dadashov's case, Narimanov Court

72 Court of the Grave Crimes, judges A.Aydinbeyov, M.Askarov, R.Sadixov (chairman), E.Məmmədov's case, articles 126.2.4 and 221.3 of CC

In another case, the accused plead not guilty and complained that he had been subjected to breaches of his rights in the pre-trial investigation phase of the case. According to the accused he was told that if he did not sign the confession he would be implicated in a graver crime. The judge told the accused, *"If you plead guilty here as you did during the pre-trial investigation phase of the case, your responsibility will be reduced. You are a clever man of 44 years of age; how is it possible that you signed a document that you did not read? I cannot believe that."* In the same case, while the accused was giving evidence the judge made two phone calls on his mobile phone. When the judge was on his mobile phone, the prosecutor told the accused, *"Plead guilty and we will release you."*[73]

Article 324.3.4. of the CPC specifically requires the president of the court, at the commencement of the court's investigation, to explain to the accused that he/she is not bound by any acknowledgement or denial of guilt that he/she made during the pre-trial investigation proceedings. OSCE trial monitors observed that judges frequently failed to inform accused persons of this right. OSCE trial monitors also observed cases where the accused was not informed of the right not to testify.[74] In many cases, the judges merely asked the accused, "*Do you know your rights?*"[75] In one case, the judge did not explain to the accused his rights until the end of the court proceedings.[76]

(iv) External appearances of the presumption of innocence

The external appearances of the presumption of innocence is extremely important in a court proceeding. In almost all monitored cases where the accused was kept in detention during trial, he/she was placed in a metal cage in the courtroom during the proceedings. Detention in the courtroom during proceedings is inconsistent with the presumption of innocence and should only be resorted to in exceptional circumstances. For example, when extreme restrictions are absolutely necessary for the preservation of security.

In several monitored cases, a large number of accused persons were forced to sit in cages that were far too small to accommodate the accused comfortably. In one case, 7 accused persons in the courtroom cage and not enough seats forcing the defendants to take turns sitting.[77] In another case, 16 accused persons were detained in a cage that measured just 1 metre by 6.5 metres.[78] Similar conditions of detention were observed at hearings held at the Court for Grave Crimes. For example, in the Haji Mammadov case, Mr. Mammadov and 25 other accused persons were detained in a courtroom cage approximately 10 metres long and 2 metres wide.

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73 Sabail district court, judge A.Namazov, C.Qasimov's case, article 234.1 of CC

74 Yasamal District Court, defendants: Nargiz Yunis Rahimova, Elmira Rafiq Rəhimova, article: 132, 221.1, Judge: S. İsmayılova; Binaqadi District Court, K.I. Khankishiyeva's case, article: 132, Judge: Bagirova Madina; Binaqadi District Court, Raksana İsmayil İsmayilova;s case, article: 263.1, Judge: Sariyev Ahmad; Sabunchu District Court, Nəsimi Safarov's case, article: 222-2.1, Judge: İlham Asadov; Sabunchu District Court, Judge: Asadov İlham, defendant: Nariman Inqilab Narimanov, article: 234.1, Nizami District Court, R.B. Hasanov's case, articles: 263.2, 264, Judge: Ahmadova Svetlana; Nizami District Court, C.A. Manafov's case, article: 234.1, Judge: H.T.Huseynov; Sebail District Court, defendant, A.A.Muradov's case, article: 176.1, Judge: A.K. Namazov; Binagadi District Court, Najafov Miri oghlu Mammadkhan's case, article: 132, Judge: Mrs. Zoya Aliyeva; Nasimi District Court, Fikrat Faramazoghlu's case, Judge: Mr. M. Zulfugarov, articles: AR CC 147, 148; Nasimi District Court, Salimov Ismayil's case, articles: 177.2.2, 29, 177.2.3, Judge: Mr. Hilal Khalilov; Court of Appeal, Court composition: Chairing Judge - Mr. R.Safarov, Mr. G.Hasanov, Mr. A.Hasanov, articles 178.1, 322.1, defendant: Hajiyev Vagif Nuru oghlu;

75 Court of Appeal, Court composition: Chairing Judge - Mr. R.Safarov, Mr. G.Hasanov, Mr. A.Hasanov, articles 32.5,274, 338.1, 338.2, 274., defendant: Khudaverdiyev Ramin Ilyas;

76 Nasimi District Court, Fikrat Faramazoghlu's case, Judge: Mr. M. Zulfugarov, articles: AR CC 147, 148

77 Sabunchu District Court, 1.Hasanov Majid Zulfu, 2.Abbasov Shamil Famil, 3.Zakiyev Zaki Faiq, 4.Jabrayilov Rizvan Yashar, 5.Mursalov Mursal Ismayil, 6.Mehdiyev Hamza Azar, 7.Sarmanov Zeynal Fikrat's case, Article 315.1, Judge: Habib Ali Aliyev

78 Court on Grave Crimes, judges A.Aydinbeyov, M.Askarov, R.Sadixov (chairman), E.Mammadov's case, articles 126.2.4 and 221.3 of CC

Defendants often sit in a courtroom cage for periods of up to 5 to 6 hours. Courtroom cages violate the presumption of innocence and under the observed conditions, violate Article 3 of the ECHR prohibiting degrading treatment.

(v) Disruption of court proceedings

It is the court's duty to ensure that the proceedings are conducted without outbursts of prejudicial or provocative statements or personal views by members of the public in the court. This duty is an integral part of the presumption of innocence and the right to a fair trial.

In the case of Mr. Samir Sadagatoglu and Mr. Rafik Tagi, before the Nasimi District Court in Baku, OSCE trial monitors observed regular, disturbing outbursts of prejudicial and provocative statements by members of the public in the courtroom. When the defendants or their advocates addressed the court, members of the public frequently screamed and shouted curses at them, such as: *"You will die, God will punish you."* Several times members of the public were allowed to go up to the courtroom cage where the defendants were seated and shout insults at them. On one occasion the disruption and violent reaction by the public was so extreme that OSCE trial monitors were forced to leave the courtroom out of concern for their safety.

During the trial, the defendant Mr. Samir Sadagatoglu, asked to be removed from the courtroom because he feared for his own personal safety. He asked the judge to either remove him from the courtroom or remove the people in the courtroom who were threatening his life. The judge became angry and told Mr. Sadagatoglu that there were court controllers in the courtroom and to be patient. The only action taken by the judge took to restore order in the court was to adjourn the proceedings for five minutes. Neither the defendant, nor any members of the public were removed from the courtroom.

In general, OSCE trial monitors observed that throughout the trial the judge was either unable or unwilling to control the conduct of the offending members of the public. The judge would state, *"I am warning you for the last time; if this kind of conduct occurs again, you will be removed from the courtroom."* OSCE trial monitors observed only one occasion where an offending member of the public was actually removed from the courtroom.

The failure of the judge in this case to control the outbursts and threats by members of the public made it impossible for the defendants to present their defence. The Independent Expert has stated that, based on the OSCE trial monitors' observations, there is an overwhelming appearance that Mr. Samir Sadagatoglu and Mr. Rafik Tagi did not have a fair trial.

Among all of the courts that were monitored, one court should be applauded. OSCE trial monitors consistently observed that the Absheron District Court demonstrated outward signs of compliance with the presumption of innocence. Defendants were not restrained in handcuffs in court and there are no courtroom cages. OSCE trial monitors also observed the following conduct that supports a positive appearance of the presumption of innocence: the judges explained to the defendants their rights in clear terms, including the right not to testify against oneself and, crucially, that they were not bound by any confessions made during the pre-trial investigation.

Again, the recent reforms that have been made by the Ministry of Justice within the judiciary should go a long way towards establishing a strong legal environment based on the rule of law. The extension of the process used for judicial selection to the qualifying examinations for prosecutors is also to be commended. These efforts, together with rigorous judicial training, should strongly encourage the judiciary and prosecutors to fully embrace the presumption of innocence.

c. Equality of arms

Equality of arms, in the sense of "fair balance", is one of the core elements of a fair trial.[79] Each party must be given a reasonable opportunity to present his/her case (including his/her evidence) under conditions that do not place him/her at a disadvantage vis-à-vis his/her opponent.[80] This means the parties to a criminal trial are given the opportunity to become familiar with and comment on all evidence.[81] Of particular importance in this context is the appearance of the fair administration of justice.[82] The concept of equality of arms is also inextricable tied to the fundamental right to legal representation at all stages of the trial.

(i) The opportunity to receive and respond to submissions and the right to legal representation at all stages in the proceedings

In a criminal case the defence must be given an equal opportunity to have knowledge of and comment on the observations filed and the evidence adduced by the prosecution. This right is an integral part of both the principle of equality of arms and the right to have adequate time and facilities for the preparation of a defence.[83] There are two crucial aspects to this right: (1) ready access to legal representation at all stages of the proceedings, including before the trial and during any appeals; and (2) ready access to the court materials setting out the nature of the allegation and the evidence relied upon to prove the case against the accused.

Article 91.4 of the Criminal Procedure Code sets out the following crucial rights of an accused person:

> The investigator, prosecutor or court shall guarantee the rights of the accused, shall not prevent him from exercising his right of defence by all lawful means and methods and, if he so requests, shall allow him sufficient time for the preparation of his defence.

Article 91.5 provides certain safeguards for the accused, including the following rights:

> 91.5.1. to know what he is accused of (content, factual description and legal classification of the charge) and to receive a copy of the corresponding decision immediately after the charge is brought, the accused is remanded in custody or the decision on the choice of restrictive measure is announced;
>
> 91.5.2. to receive written notification of his rights from the person who detained or arrested him or from the preliminary investigator, investigator or prosecutor;
>
> 91.5.3. to acquaint himself with the record of detention and arrest immediately after it is drawn up and to make observations for inclusion in the record;

79 Delcourt v. Belgium, January 17, 1970, Series A, No. 11; 1 E.H.R.R. 355, paragraph 28

80 Dombo Beheer BV v. Netherlands, October 27, 1993, Series A, No. 274; 18 E.H.R.R. 213, paragraph 33

81 Ruiz-Mateos v. Spain, June 23, 1993, Series A, No. 262; 16 E.H.R.R. 505, paragraph 63

82 Bulut v. Austria, February 22, 1996, R.J.D. 1996-1, No.3; 23 E.H.R.R. 84, paragraph 47

83 Article 6(3)(b) ECHR

> 91.5.4. to have defence counsel from the time of the arrest or the announcement of the charge;
>
> 91.5.5. to have the help of defence counsel free of charge;
>
> 91.5.6. to inform his family, relatives, home, workplace or place of study immediately after detention, by telephone or other means;
>
> 91.5.7. to choose his defence counsel independently, to dismiss counsel and to conduct his own defence if he waives the right to defence counsel;
>
> 91.5.8. to have unlimited opportunities and time to meet his defence counsel in private and in confidence…

Although the provisions of Article 91 of the CPC embody the international standards and OSCE commitments in relation to fair trials, in many of the cases that were monitored those rights were not respected. Some examples from the monitoring project follow:

In the trial of Haji Mammadov and 25 other accused persons before the Court for Grave Crimes, almost all of the defence counsel complained to the court that they were being prevented from meeting freely with their clients, that restrictions on the number of meetings with their clients were being imposed, and that the conditions for their meetings were inadequate and not confidential. During one court session, the defendants complained that the judges were creating obstacles to confidential communications with their counsel. When one defence counsel requested permission to talk to his client during the court session, the judge replied, *"You can talk to each other only during the break."* Later in the case, one defence counsel requested the court to take steps to prevent the disrespectful attitude of employees of the Ministry of National Security (where the defendants were being detained) shown towards defence counsel. The judges ignored the request and did not investigate into the complaint.

In another case before the Court of Appeal, [84] the defendant alleged violations took place during the pre-trial stage of the proceedings. He complained that in July 2005, he was subject to administrative arrest for 7 days and then on August 2005, brought to Baku and detained for an additional 5 days without access to a lawyer. He stated that despite the fact that his wife had instructed a lawyer to represent him from 1 August 2005, and that the lawyer had submitted a letter to the authorities confirming that he had been instructed to represent the defendant, the lawyer was not allowed to communicate with him for 4-5 days. He was also not allowed to see any of the prosecution's materials. The lawyer was only allowed to see the defendant, who was being kept in custody at the Organised Crimes Unit of the Ministry of Internal Affairs, after making a written complaint to the Prosecutor's Office. The defendant told the court that he had been denied a lawyer throughout the period of time that he was detained under administrative arrest and during the investigation stage. Moreover, defence counsel informed the court that he had been threatened by people who came to his office and told him not to represent the defendant. The court replied, *"The problems in the pre-trial stage do not have any relationship to the court. All of these issues should have been raised previously before the pre-trial investigation body."*

84 Court of Appeal, Judges: Chairman Q.Hasanov, R.Safarov, Mubariz Zeynalov, accused Vaqif Nuru Hajiyev, articles 178.1, 322.1 of CC.

This decision is contrary to Article 355 of the CPC, which gives the court power to issue a special decision when, upon examination of the case, it finds that there has been a breach of the CPC regarding pre-trial proceedings. When the court finds that there has been a breach of the requirements of the CPC by an investigator, preliminary investigator, or employee of the investigating authorities, the court should send its special decision to the head of the relevant central government body.[85] In this case it appears that the court abrogated its responsibilities and ignored what is, on the face of the allegation, a very serious violation of the CPC and of human rights.

In a different case mentioned earlier,[86] OSCE trial monitors observed that a judge failed to ensure that the defendant's rights were afforded to him during the preliminary investigation. The defendant was elderly, in poor health, and hard of hearing. During both the preliminary investigation and the trial, the defendant did not have legal representation. This is a clear violation of Article 92.3.2 of the CPC, which provides that the court must ensure that legal representation is provided to any suspect or accused that is "dumb, blind, deaf, has other serious speech, hearing, or visual disabilities, or because of serious chronic illness, mental incapacity or other defects cannot exercise the right to defend himself independently."

OSCE monitors reported that in the majority of cases, defendants were provided with legal representation only after the completion of the pre-trial investigation stage. Steps should be taken to ensure that legal representation is made available at all stages of the criminal proceedings.

In another monitored case, the defendant was a minor and, contrary to Article 92.3.5 of the CPC, he was not provided legal representation during either the pre-trial stage or the preparatory court hearing.[87]

In a different case, the defendant informed the court that he was not legally represented during the preliminary investigation. He further stated that he had been advised by the inspector that he did not need legal representation. The judge interrupted and said, *"You did have defence counsel,"* and continued the case. At the conclusion of the court proceedings, OSCE trial monitors contacted the defendant's relatives and confirmed that the defendant did not have legal representation during the preliminary investigation.[88]

Article 292.1 of the CPC expressly provides that, after confirming the indictment, the prosecutor in charge of the procedural aspects of the investigation shall send the criminal case file without delay to the relevant court, adding sufficient copies of the indictment for the parties to the criminal proceedings. Article 292.3 of the CPC further states that the prosecutor in charge of the procedural aspects of the investigation shall also ensure that the accused and defence counsel are provided with certified copies of the indictment and additions. Under Article 298 of the CPC, the court has an obligation to send the defendant a copy of the indictment, the final record of the results of the simplified pre-trial proceedings or a complaint initiated under private prosecution, no later than 7 days before the preparatory hearing. OSCE monitors reported that in the majority of cases the courts

85 Article 355.3.2 of the CPC

86 Sabunchu district court, judge I.Asadov, N.Narimanov's case, article 234.1 of CC

87 Sabayil District Court, Dadashov Mahmud Orxan's case, Rustəmov Tofiq Elvin, Salahov Hasan Elnur, Nacafov Gadir Eldar's case, article 307.1, 307.3; Judge: Alim Knyaz Namazov. AR Constitution, Article 46.

88 Binaqadi District Court, Mammadova Farrukh Mehriban, Asgarov Habil Eldaniz, Dolqova Nadejda Vasilyevna's case, articles: 234.1 and 234.2, Judge – Mrs. Zoya Aliyeva; Nizami District Court, Tofig Mahar Hajiyev's case, Article 128, Judge - Mrs. Aygun Abdulla Abdullayeva; Sabayil District Court, Khomyakov Viktor's case, Article 234.1, Judge - Mr. Karimov Yusif; Kamila - Sabayil 15 - 2, Sabayil District Court, Khalilov Rail Jovdat's case, Article 128, Judge - Mr. Namazov Knyaz Alim

did not enquire whether[89] (and, if so, when[90]), the defendant received the indictment and other procedural materials.

In one case,[91] some of the defendants complained to the court that they did not understand the substance of the accusations against them because they were not provided with defence counsel and did not know the Azerbaijani language.

In another monitored case,[92] the defendant complained to the judge that he had not been provided with a copy of the indictment. When the judge informed the defendant that his signature was on the case materials indicating that he had received the indictment, the defendant replied, *"The inspector told me to sign it and that he would give it to me later. Later I did not contact him and he did not send it to me."*

The number of cases where the defendants complained that they were not served the indictment and case material is cause for concern. The Appellate Courts, including the Supreme Court, and the executive branch of the Government, including the Prosecutor General, are urged to take steps to ensure that prosecutors and courts comply with their obligations to supply defendants with these materials.

During the trial of the recent case of Ali Insanov before the Court for Grave Crimes, Mr. Insanov's defence counsel complained that they had not been given an opportunity to familiarise themselves fully with the court materials. They complained that the investigators did not provide adequate facilities for defence counsel to familiarise themselves with the case files. They complained that they had not been allowed to take photocopies of some of the case files, that they had not been shown photographs and videotapes, and that they had not been provided with the necessary equipment to view them. Defence counsel complained about these matters at the trial and presented a letter from the prosecution accepting that these difficulties had arisen but stating that during the trial the defence would be given an opportunity to make copies of the photographs and the case files. At the beginning of the trial defence counsel applied to the court to return the case file to the investigator, so that they could have an opportunity to consider the materials fully before the trial commenced. The prosecutor objected, saying, *"I completely disagree that the case should be returned to the investigator, because defence counsel can take copies of the case files and other necessary materials today."* The court accepted the prosecutor's submission and refused the defence application. By any standards of fair trial, a trial should not commence when defence counsel have not been afforded an opportunity to review all of the material to be relied upon in trial.

(ii) The opportunity to present or give evidence

The opportunity to present or give evidence is interconnected with the right to examine and call witnesses.[93] When the prosecution is permitted to make its submissions in a

89 Khatayi District Court, Karimov Hatam Shirazi; Mammadov Huseyn Uzeyir's case, Article 177.2.1, 177.2.3, 177.2.4, 29.177.2.1, 29, 177.2.2, 177.2.3, Judge - Mr. Isgandar Gasimov; Bayramova Firad Hijran, Taj Rashid Ali's case, 144.2.1, 144.2.5, Court of Appeal, Chairman –Mrs. Ramilla Allahverdiyeva, Judges: Mr. Latif Nabiyev, Mr. Elmar Abdullayev;

90 Nasimi district court, judge Mr. T.Mahmudov, Fuad Mammadxan Mamishov's case, article 221.1; Sabail district court, judge I.Agayev, A.Babayev's case, article 225.2. of CC; Binaqadi district court, judge Mrs. Z.Aliyeva, S.Abdullayev's case, articles 127, 128.1 of CC; Binaqadi district court, judge A.Sariyev, R.Cafarov's case, article 263.1 of CC

91 Court on Grave Crimes, judges Mr.Aydinbeyov (chairman), Askerov, Sadiqov, case of Shankayev, A.Abdulkərimov, I.İslamov, K.Abdulqamidov, J.Asadullayev, Q.Cankayev, Arsen, Articles 279, 228, 214, 318, 320 of CC

92 Sabunchu District Court, Nasimi Safarov's case, article: 222-2.1 of CC, Judge – Mr. Ilham Asadov

93 Article 6(5)(d) ECHR

summary fashion it deprives the defence of an effective opportunity to counter them and may be a violation of this right. Similarly, when the court limits the number of witnesses allowed by the defence, there is a violation of this right.

(iii) Right to examine witnesses

Everyone charged with a criminal offence has the right to examine witnesses against him or her, and to call witnesses on his or her behalf under the same conditions as witnesses against him or her.[94] Defendants must be allowed to call and examine witnesses whose testimony they consider relevant to their case, and must be able to examine any witness who is called by the prosecutor. This provision does not give the defendant an absolute right to call witnesses or a right to force the domestic courts to hear a particular witness; domestic law sets conditions for the admission of witnesses.

The procedure for the summoning and hearing of witnesses must be the same for the prosecution and the defence; equality of arms is required. All evidence relied on by the prosecution should be produced in the presence of the defendant at a public hearing with a view to adversarial proceedings. Only in rare and exceptional circumstances can the prosecution rely on evidence from a witness that the defendant has not been able to cross examine.

The 2003-2004 Report noted a number of cases where the defendants were denied the right to call and examine witnesses. OSCE trial monitors in this phase of the project continued to observe a lot of cases where the application by the defence to call witnesses with relevant evidence was denied by the court.

Again the recent case of Haji Mammadov and 25 other defendants before the Court for Grave Crimes is illustrative of the right to examine witnesses being violated. During the trial, the court frequently relied upon the written statements of witnesses against the defendants that had been taken during the pre-trial investigation. Defence counsel requested that the witnesses appear in court and the defendants be entitled to cross-examine them because their evidence was central to the case against the defendants, and the witnesses had given contradictory evidence at the pre-trial investigation. The witnesses were not compelled to appear before the court. OSCE monitors observed that the court did not give a sufficient reason for denying the defence request and allowed the statements of the witnesses to be read. The President of the Court explained the decision to allow the statement of one of the witnesses against the defendants by stating, *"Jahangir Hajiyev officially informed the court in writing that because of his service duties he can not appear at the court, and he confirms his testimony given to the investigation."* A decision on such a crucial issue, made on insubstantial grounds is manifestly a violation of fair trial rights and is unfair to the defence because it deprives them of the opportunity to cross-examine a witness and challenge the evidence presented.

At a later stage in the same case, defence counsel petitioned the court to call certain witnesses on behalf of the defence. Counsel informed the court that the witnesses had attended court on several occasions, but had not been called as witnesses by the court. It should be noted that many of the witnesses requested by defence counsel occupied important positions in State agencies. Included in the list were the Prosecutor General and the Minister of Internal Affairs, both of whom had been responsible for the issuing of a

94 ICCPR Article 14.3(e), Article 6(3)(d) ECHR

joint statement regarding the case on 27 January 2006. Understandably, the defence wanted the opportunity to examine these witnesses. Despite the petition, the court ignored the request and the witnesses were not called.

In the case of Ali Insanov before the Court for Grave Crimes, defence counsel for Mr. Insanov made frequent applications to call witnesses in support of the defence, which were ignored by the court. On one occasion the following exchange between the judge and defence counsel occurred:

> Judge: *"The Court has discussed this motion previously. We will not return to it again."*
> Defence Counsel: *"Then it is no use to continue to hear this case; sum up the trial and announce the judgment today, as you did not call any witnesses in support of the defence."*
> Judge: *"Sit down Mr. Togrul, don't blackmail the court."*

Another exchange concerning the application by defence counsel to call witnesses was recorded as follows:

> Judge: *"We will consider these petitions at the end."*
> Defence counsel: *"What does the end mean? Why do you delay our motions for an indefinite time?"*

During almost every session of the proceedings in the case of Ali Insanov, defence counsel made application for additional expert evidence to be called in support of the defence because of the discrepancies in the expert evidence rendering it unreliable. The expert evidence was crucially important because many of the charges were based on that evidence. The court denied the defence's application stating it would assess all of the issues, including the expert evidence, and saw no need to call additional expert testimony. The court ultimately relied upon the expert evidence as one of the most important pieces of evidence in the case.

OSCE trial monitors observed that, generally, any deliberations made by the court with respect to defence applications were perfunctory and superficial. On one occasion, defence counsel for Mr. Insanov complained that the court had taken just 15 minutes to deliberate on a 15 page motion.

The court further rejected the defence submissions that a prosecution witness should not be allowed to testify because he was sitting in the courtroom and heard all of the evidence that had been given during that court session. Although there is no strict rule that prohibits such a witness, it is significant because during the previous court session the court did not allow a witness in support of the defence to give evidence on the very same grounds. This contradictory conduct by the court raises the suspicion of partiality in favour of the prosecution.

OSCE trial monitors reported that during the course of the trial, there were several allegations that witnesses were intimidated during the pre-trial investigation and were coerced into giving evidence against the defendants. During the trial, the defendants called out the names of witnesses who were alleged to have been the victims of intimidation, together with the names of the investigators who were alleged to have intimidated the witnesses. Mr. Insanov complained to the court, *"One of the witnesses you have not called to the court was called by the investigators everyday for a month and he was told to*

give evidence against me and to accuse me of corruption. Why does the court not want him to come and inform the court how he was subjected to inhuman treatment?"

Defendants also alleged that many of the witnesses had been instructed to come to the court by the Ministry of National Security, rather than by the court, suggesting that improper pressure had been put upon the witnesses. On one occasion, Mr. Insanov complained to court that some of the witnesses had been brought to the court by force. He asked the court why witnesses for the prosecution were being called to the court by the police. More particularly, Mr. Insanov reported that one of the witnesses, Mr. Farman Abdullayev, was summoned to the General Prosecutor's Office and was told by the investigator that *"his situation could become worse."* Mr. Insanov then asked the court why it had not instructed the witness to come to the court to be examined. Mr. Insanov asked the court to instruct the investigator, Mr. Salahov, to come to the court and to examine him. He also asked the court why witnesses were called to the General Prosecutor's Office after the pre-trial investigation had been completed. He also asked the court to prevent pressure from being put on the witnesses.

OSCE trial monitors observed several witnesses informing the court that they had been instructed to come to the court by investigators from the Ministry of National Security or the General Prosecutor's Office. Moreover, one of the witnesses gave the following, disturbing account to the court: *"I remember that the investigator kept my sister in the interrogation room for a long time. He even said to her that he was going to keep her there. She left the interrogation room crying; she said to me to do what they want you to do, otherwise they will not leave us alone."*

None of the allegations were properly investigated by the court, which is a matter of deep concern. When defence counsel made applications to the court to call witnesses in order to substantiate the allegations of intimidation, the applications were ignored.

OSCE trial monitors also observed frequent occasions when the court interrupted defence counsel's submissions and speeches if they were critical of State officials or employees. The court showed partiality towards the prosecutor and rarely allowed applications that were made on behalf of the defence if the prosecution objected. There is an overwhelming appearance that Mr. Insanov and his co-defendants did not have a fair trial and that the judges were not impartial.

d. Right to legal assistance

Article 6, paragraph 3(c) of the ECHR provides that 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 insufficient means to pay for legal assistance, to be given it free when the interests of justice so require. This right is expressed in almost identical terms in OSCE commitments.[95]

The right to legal representation under Article 6, paragraph 3(c), is dependent upon a criminal charge having been brought, though once a criminal charge has been brought the right applies not only to the trial, but also to the pre-trial stages of the proceedings. Whether there is a violation of the right to legal assistance when a person is refused access to a lawyer immediately upon arrest will depend on the circumstances. However, when there are special features of the procedures in the early interrogation stage (for example

95 OSCE Human Dimension Commitments: Vienna 1989 (13.9); Copenhagen 1990 (5.17)

when inferences can be drawn from silence of from responses to questions, or when the accused is in a position where his defence could be inevitably prejudiced by answers given) any restriction on access to legal assistance amounts to a violation of Article 6, paragraph 3(c). In these circumstances, it is not necessary to show that the accused would have acted differently if he had had legal assistance at an early stage.

Article 92.4.2 of the CPC places a positive duty on the prosecuting authority to ensure that legal assistance is provided from the moment that a person is questioned for the first time; when he/she is informed of the prosecuting authority's decision to detain him/her; or if the record of his/her detention or choice of restrictive measure is made; or when charges are brought.

In the case of Ali Insanov before the Court for Grave Crimes, OSCE trial monitors reported a number of complaints regarding the right to legal representation. One of the defendants, Mr. A Maharramov, told the court that he was not advised of his right to legal representation and was not provided with defence counsel until after he was interrogated by the investigator. Another defendant, Mr. Umyashkin, complained that he was detained on 22 February 2006, but had no communication with his defence counsel until 5 days later.

During the trial of Mr. Insanov and co-defendants, it was not possible for defence counsel to have any communication with their clients. Accordingly, defence counsel requested permission for the defendants to sit with them to allow them to be able to communicate properly. The court refused the application but agreed to hold breaks during the court sessions to allow the defendants to communicate with their counsel. Although this did assist communications between the defendants and their counsel, it was still unsatisfactory under the law and international standards.

Mr. Insanov's counsel further complained that it was very difficult to gain access to his client both at court house and when he was being detained at the isolator. Mr. Insanov's counsel complained that every time he wanted to see him at the isolator, the officials at the isolator required a letter from the court before they would allow the meeting. It is unacceptable to require counsel to obtain permission from the court before they are allowed access to their client. It is a matter of grave concern that when these obstacles were brought to the attention of the court, the judge reacted by informing defence counsel that should complain to the head of the isolator and that it was not a matter for the court.

In general, OSCE trial monitors reported numerous cases where the right to have legal assistance and to be provided free legal assistance was either not explained to the defendant by the judge, or not explained to the defendant in such a way that he/she clearly understood those rights. In addition, in a large number of cases when the defendant declined to be legally represented, the judge did not carry out an investigation as to why the defendant refused legal assistance.

Article 92.14 of the CPC expressly provides that the preliminary investigator, investigator, prosecutor or court shall have no right to suggest that the suspect or the accused select a certain defence counsel. Instead, they must request the head of the bar association in the appropriate area to appoint defence counsel from the list of lawyers: (i) at the request of the suspect or the accused (Article 92.14.1); and (ii) in cases where the participation of defence counsel in the criminal proceedings is compulsory and the suspect or the accused does not have defence counsel (Article 92.14.2). OSCE trial monitors reported a number of cases where the judge informed the defendant that he would be defended by a particular

lawyer without giving the defendant the choice of counsel. In one monitored case the judge told the defendant, *"The court has appointed Mr. Sakhavat as your lawyer. Do you want a lawyer?"*[96] In another case, the judge told the defendant that the lawyer sitting beside the prosecutor would defend him.[97]

The failure to investigate why a defendant refused legal assistance is illustrated by another case. Instead of fully advising the defendant of his rights, the judge simply asked the defendant if he wanted defence counsel. When the defendant replied "no", the judge proceeded immediately, without any further enquiry, to instruct the court clerk to give the defendant a form to sign stating that he did not want defence counsel, saying: *"If he does not want it, we cannot force him."* [98]

Article 92.12 of the CPC makes specific reference to the duties of the court to investigate why a defendant has refused to accept defence counsel.

> 92.12. A refusal of the suspect or the accused to accept defence counsel shall be mentioned in the record. The preliminary investigator, investigator, prosecutor or court shall admit the refusal to accept the defence counsel only if the suspect or the accused makes the application on his own initiative, voluntarily and with the participation of defence counsel or the lawyer to be appointed as defence counsel. Refusal to accept defence counsel shall not be admitted if the suspect or the accused is unable to pay for legal aid or in the cases provided for in Articles 92.3.2-92.3.5, 92.3.8, 92.3.12 and 92.3.13 of this Code; defence counsel shall then be appointed for him compulsorily, or the lawyer appointed as defence counsel shall retain his authority.

The monitored cases revealed that the number of instances where a defendant accepted the services of a legal aid defence counsel was very low. In many cases it was not possible for the monitors to attribute a particular reason for this. But, due to the large of the cases where legal aid was rejected, two reasonable inferences can be drawn: (1) the defendants did not fully understand their rights or, (2) they did not have sufficient confidence in the competence and independence of the legal aid defence counsel.

It is recommended that preliminary investigators, investigators, prosecutors, and judges be given specific training and guidance regarding their duty to ensure that the rights of a defendant under Article 92 of the CPC and Article 6(3)(c) of the ECHR are complied with fully. This involves explaining to a defendant in a language that he is able to understand: (i) his right to have legal representation of his choosing and to be provided with such legal representation without charge if he does not have the means to pay for it; and (ii) the possible difficulties or disadvantages that a defendant may have if he elects to defend himself. Judges should satisfy themselves that defendants do understand their right to legal representation and they should make it clear to the defendants that they have a right to choose their defence counsel.

It is further recommended that urgent attention be given to the establishment of a group of defence lawyers who are prepared to deal with legal aid cases as part of their practice. Furthermore, steps should be taken to ensure that defence lawyers who take on legal aid cases receive reasonable remuneration for their services. Under the Decision # 31 of the

96 Khatai District Court, defendant: Khaqani İldirim Quseynov, articles: 127.2.3, 221.3, Judge: R.A.Aliyev;

97 Binaqadi District Court, defendants: Adalet Mahmud Mustafayev, Khatira Telman, article: 234.1, Judge: Zoya Aliyeva;

98 Sabunchu District Court, Farajova Leyla Yagubovna and Hajiyeva Bikaxanim Rizvan gizi's case, Article 128: Farajova Leyla, 132: Hajiyeva Bikaxanim , Judge: Sevil Salimova;

Cabinet of Ministers on amount of payments to defence counsels, translators, specialists and experts, dated 1 February 2001, government rate of remuneration for criminal cases (pursuant to articles 193.2 and 193.4 of the CPC) shall constitute 0.9 AZN per hour. Additional recommendations regarding the training of defence lawyers is provided in the following section of this report.

(i) Effective legal assistance

Legal assistance provided to an accused must be practical and effective. It is not enough for the State to appoint a legal aid lawyer; it must ensure effective legal assistance.[99] If the legal services rendered by defence counsel are inadequate, the court must take steps to cause counsel to fulfil his/her obligations or, if appropriate, to replace him/her. This duty is expressed in Article 114.4 of the CPC, which provides that if there is a doubt or other concern about the competence or honesty of the defence counsel or of the person appointed as a representative, the defence counsel or representative shall be removed from the criminal proceedings in response to an application by the defendant or the person represented. The court, however, should act on its own motion to ensure that defence counsel is competent and it should not be necessary for the accused person to make an application to the court.

The 2003-2004 Report criticised the defence bar for failing to argue on behalf of their clients in a strategic and advantageous manner. The 2003-2004 Report also noted the failure of the defence bar to make submissions to the court, effectively and in a professional manner, based on relevant provisions of national law and international law. The current monitoring programme showed no noticeable improvement in the quality of advocacy of the defence bar in Azerbaijan.

(ii) Legal aid (state aid) lawyers

OSCE trial monitors reported that in the vast majority of cases the quality of legal services provided by legal aid (State aid) lawyers was very poor and ineffective.[100] Generally, legal aid lawyers demonstrated a lack of professional skills and took a passive role in the hearings. They were often late for hearings or, more seriously, completely failed to attend. OSCE trial monitors observed that legal aid lawyers generally failed to make motions or legal submissions that obviously should have been made, and they frequently failed to present evidence, sometimes even remaining silent throughout the trial.[101]

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99 See: Artico v. Italy A.37 (1980) 3 EHRR 1

100 Agayev Adishirin Huseyin's case, Yasamal District Court, Judge – Mr. I.E.Abbasov; Nasimi District Court, Court Of Appeal, Chairman: Ramilla Allahverdiyeva; Judges: Latif Nabiyev, Elmar Abdullayev, Bayramova Firad Hicran, Tac Rashid Ali's Case, 144.2.1, 144.2.5; Binaqadi District Court, Mammadova Farrukh Mehriban, Asgarov Habil Eldaniz, Dolqova Nadejda Vasilyevna's case, articles: 234.1 and 234.2, Judge – Mrs. Zoya Aliyeva; Narimanov District Court, N.O. Usanov's case, articles: 234.1,228.4, Judge: M.T.Ahmadova; Sebail District Court, defendant, A.A.Muradov's case, article: 176.1, Judge: A.K. Namazov; Court on Grave Crimes, Mammadov Imran's case, articles: 181.2.2, 181.2.5, Court composition: Chairman – Mrs. Aghayeva Nushaba Farman gizi, Judges: Mr. Ahmadov Hasan Huseyn oghlu, Mr. Gasimov Faig Adil oghlu; Ismayilov Binnat Novruz, Ahmadov Mammadaga Mazahir, Court of Appeal, Court composition: Judges – Mr. Salman Huseynov, Mr. Tagizada M., Mr. Karimov G., articles 178.3.2, 179.3.2, 213.4; Narimanov District Court, N.O. Usanov's case, articles: 234.1,228.4, Judge: M.T.Ahmadova;

101 Narimanov District Court, N.O. Usanov's case, articles: 234.1,228.4, Judge: M.T.Ahmadova; Sabail District Court, defendant, A.A.Muradov's case, article: 176.1, Judge: A.K. Namazov; Sabail District Court, Judge: Karimov Yusif Ali oglu, defendant: Chubarova İrina Viktorovna, article: 177.2.4

In one case observed by OSCE trial monitors, the defence counsel was silent throughout the whole proceedings and did nothing at all to defend his client.[102] In another case, when the defendant testified that he was not guilty, defence counsel remarked to the judge, *"as if he [the defendant] would acknowledge that he committed the offence."* In yet another case, defence counsel had at least 15 days from the date of his appointment to prepare the defence case. Throughout the proceedings he did not question any of the witnesses, he did not submit any petitions, and in his closing address to the court he did not make any reference to the evidence in the case.[103] In another case, the questions asked by defence counsel actually harmed the defendant and the closing address to the court consisted of just two sentences, *"If the defendant says that he didn't do that, this means he didn't. Please discharge him."*

These examples are just a few of a long catalogue of cases where OSCE trial monitors reported woefully inadequate legal representation by defence counsel. In many cases, defence counsel did not even attempt to obtain a copy of the bill of indictment and showed a lack of interest in the cases.[104] In one case, the defence counsel was absent during the trial sessions, except for a short attendance at the end of one session. The court even adjourned the trial to allow the defence counsel to attend and make his closing address. Defence counsel failed, however, to appear and the court proceeded to consider its verdict without hearing a closing address on behalf of the defendant.[105]

The abysmal standard of legal services in legal aid criminal cases is caused, in part, by the very low level of remuneration. Although the Constitution and the Law on Advocates require the government to bear the costs of legal services for indigent criminal defendants,[106] ABA CEELI reported in 2005[107] that advocates receive an extremely low government rate of remuneration for criminal cases.

The current standards of defence advocacy are well below the minimum professional standards expected of an independent defence bar. Mere cosmetic reforms, such as the obligation to wear robes in court, are not sufficient. A radical reform of the training of the defence bar is long overdue. In addition to the recommendations already made as to the reform of the Collegium of Advocates, it is recommended that immediate to steps be taken to provide thorough training for advocates in:

- all relevant principles of national and international human rights law;
- the basic principles of defence advocacy (including cross-examination of witnesses and examination in chief of defendants);
- the preparation of written submissions and final submissions on behalf of the defence.

102 Court Of Appeal, Chairman: Ramilla Allahverdiyeva; Judges: Latif Nabiyev, Elmar Abdullayev, Bayramova Firad Hicran, Tac Rashid Ali's Case, 144.2.1, 144.2.5.; Binaqadi District Court, Mammadova Farrukh Mehriban, Asgarov Habil Eldaniz, Dolqova Nadejda Vasilyevna's case, articles: 234.1 and 234.2, Judge – Mrs. Zoya Aliyeva;

103 Sumgayit City Court, Judge: Mr. Mammadov Mammad Allahverdi oghlu, article 213.4, defendant: Nasibov Yashar Bahman oghlu;

104 Defendants: Ismayilov Binnat Novruz, Ahmadov Mammadaga Mazahir, Court of Appeal, Court composition: Judges – Mr. Salman Huseynov, Mr. Tagizada M., Mr. Karimov G., articles 178.3.2, 179.3.2, 213.4; Narimanov District Court, N.O. Usanov's case, articles: 234.1,228.4, Judge: M.T.Ahmadova;

105 Sabail District Court, Judge: Karimov Yusif Ali oglu, defendant: Chubarova İrina Viktorovna, article: 177.2.4

106 Constitution, Art. 61 (II); Law on Advocates, Art. 20, 2004 Law on Advocates, Art. 20.21

107 The Legal Profession Reform Index For Azerbaijan, February 2005

e. Assistance of an interpreter

Article 6(3)(e) of the ECHR provides every person who has been charged with a criminal offence the right to free assistance of an interpreter if he/she cannot understand or speak the language used in court.

(i) The provisions of Azerbaijani law in relation to interpreters

Article 26.1 of the CPC expressly provides that criminal proceedings in the courts of the Azerbaijan Republic shall be conducted in the official language of the Azerbaijan Republic or in the language of the majority of the population in the relevant area.

Article 26.2 of the CPC provides that where parties do not know the language used in court, the judicial authority shall guarantee the following rights:

- (26.2.1) the right to use their mother tongue;
- (26.2.2) the right to use the services of an interpreter free of charge during the investigation and court hearings, to be fully familiar with all documents relating to the case and criminal prosecution and to use their mother tongue in court.

Article 26.3 of the CPC provides that these rights shall be secured at the expense of the Azerbaijan Republic.

Finally, Article 26.4 of the CPC provides that the judicial authority shall provide the relevant persons with the necessary documents in the language used during the trial.

Article 99.1 of the CPC governs the appointment of interpreters:

> the interpreter shall be a person who has no personal interest in the criminal proceedings and is appointed with his consent by the prosecuting authority to translate the case documents as well as all the verbal exchanges held during court hearings and investigative or other procedures. The interpreter may be appointed from the list of interpreters proposed by the parties to the criminal proceedings.

Giving the prosecuting authority the right to appoint the person who translates the case documents and interprets the evidence in court is problematic because it offends the appearance of a fair trial by an independent and impartial tribunal. An accused person should have the right to select his own interpreter, and a list of properly-qualified interpreters should be maintained by the court or the Collegium.

OSCE trial monitors reported a large number of violations of both the provisions of the CPC and Article 6 (3) (e) of the ECHR. In a number of monitored cases where the defendant could not speak Azerbaijani, the judges conducted the proceedings in Russian,[108] an alternative that may be appropriate in some cases, but is not provided for in Article 26.1 of the CPC. From the observations carried out by OSCE trial monitors it appears that the courts either conduct the proceedings in languages other than Azerbaijani

108 Nasimi and Binagadi district courts

(principally in Russian) or are using the services of unqualified interpreters (often members of the court staff).[109]

In one case before the Sabayil District Court, Judge Firuza Agasiyeva conducted almost all of the case in Russian, despite the fact that the prosecutor lodged three motions for the appointment of an interpreter.[110]

In another case, one of the defendants was Russian speaking. The witnesses gave their evidence in Azerbaijani, while the judge, the prosecutor and the co-defendants were all speaking to the defendant in Russian.[111] In this case an interpreter was appointed, but he did not take an active part in the proceedings and failed to translate the evidence of the witnesses from Azerbaijani into Russian and failed to translate the evidence of the defendant from Russian to Azerbaijani.

In a similar case, the trial was conducted in both Azerbaijani and Russian[112]. In this case, two of the three defendants spoke Azerbaijani. The judge failed to explain to the defendant who did not speak Azerbaijani that she had the right to use her mother tongue and to be provided with an interpreter free of charge. During the opening stages of the trial, the judge used a person (whose identity and status was not made known) to attempt to interpret the proceedings. It was apparent that the defendant did not understand what the interpreter was saying and she had to ask other people in the courtroom to explain. When the witnesses began giving their evidence, the defendant did not have an interpreter and it was clear that she was not able to understand any of the evidence presented in Azerbaijani. Regrettably, her defence counsel did not file a single motion or make a complaint to the judge about the failure to provide an interpreter.

Reference has already been made to one of the monitored case where the court proceeded in the absence of defence counsel when the defendant did not speaking Azerbaijani.[113] Although this was a case where the defendant admitted guilt, the defendant nevertheless, was entitled to be legal representation and the assistance of an interpreter. OSCE trial monitors observed that the defendant's counsel was only present at the end of one hearing and did not participate in any way in the court's investigation of the case; nor did counsel make a plea in mitigation on behalf of the defendant.

Of further concern is the number of monitored cases where the interpreters were unqualified. There appears to be a complete absence of professional interpreters in the criminal courts. This may be attributed to the low rates of remuneration. Courts were observed using members of the court staff as interpreters. In many of the cases, the judges failed to remind the interpreters of their duty and liability to interpret faithfully and accurately.

(ii) Availability of interpreters during the pre-trial investigation stage

In some of the monitored cases, the judges did not investigate whether defendants who did not speak Azerbaijani were given the assistance of an interpreter during the pre-trial investigation stage of the proceedings.

109 Sabayil district court, chairman Y.Karimov (accused person A.N.Antirov)

110 Sabayil District Court, Burbenets Yuliy Iandnovich's Case, Article 234.1, Judge: Firuza Agasiyeva.

111 Yasamal District Court, Rahimova Yunis Nargiz, Rahimova Rafiq Elmira's case, article: 132, 221.1, Judge – Mrs. S.Ismayilova;

112 Binagadi district court

113 Sabail District Court, Judge: Karimov Yusif Ali oglu, defendant: Chubarova İrina Viktorovna, article: 177.2.4

For example, at the monitored trial[114] of Haji Mammadov and others, one of the defendants (Mr. Musa Dabuyev) informed the court that during the pre-trial investigation stage of the proceedings he was not able to follow what was being written down because it was being written in Azerbaijani. He informed the court that at the pre-trial investigation he demanded the assistance of an interpreter, but was told that the statements had been read and that he should have been listening. The Court for Grave Crimes judges made no response to this complaint by Mr. Dabuyev. In the same case the defence lawyer acting on behalf of another defendant (Ms. Guliyeva) submitted a petition to the court stating that because Ms. Guliyeva was a Russian speaker and did not speak Azerbaijani well, she should have been provided with the assistance of an interpreter during the pre-trial investigation stage of the proceedings. Her defence lawyer claimed that Ms. Guliyeva was forced to sign documents produced to her at the pre-trial investigation stage without understanding their contents. He went on to submit that for this reason the evidence given by Ms. Guliyeva during the pre-trial investigation was inadmissible and should be excluded. The prosecutor submitted that the court should reject the petition and the submissions of defence counsel on the grounds that because Ms. Guliyeva was an Azerbaijani citizen she must know the Azerbaijani language. The court then immediately decided that it would postpone consideration of the petition and make a decision on the issue later in the case if it considered that there was any need to do so. The court never dealt with the issue.

By way of contrast, however, it is commendable that the Sumgayit City Court[115] refused to consider a case and sent it back to the prosecutor on the ground that the defendant had not been provided with the services of an interpreter during the pre-trial investigation stage.

OSCE trial monitors reported that in some cases defendants complained that although they could speak Azerbaijani they could not read or write using the Latin alphabet. The Latin alphabet was introduced into Azerbaijan in 1992. Monitors frequently encountered cases where defendants complained that they had signed statements during the pre-trial investigation stage without being able to read them. In one case, the defendant complained to the court that at the pre-trial investigation he had not written his statement himself but signed what had been given to him without being able to read it. The judge replied, *"Not knowing the grammar is your problem, you should have known."*[116] Putting aside the veracity of the statement, the court should have investigated whether the pre-trial investigation was carried out in a fair and proper manner. In any society it is crucially important that investigators are scrupulously fair in the conduct of interrogations when the investigator suspects, or has good reason to suspect, that the suspect or accused person may not be able to read or write in the language of the documents.

The examples given in this subsection are just a sample of the reported cases. Based on these examples, it is recommended that urgent steps are taken to improve the availability of qualified, independent interpreters and ensure that interpreters receive reasonable remuneration for their services. A list of qualified, independent interpreters should be maintained by the court or by the Collegium and defendants should be allowed to select an interpreter of their own choice.

114 Court on Grave Crimes, Haji Mammadov and others' case, article: 144 and others, Court composition: Chairman: Mr. Ali Seyfaliyev, Judges: Mr. Alovsat Abbasov, Mr. Sadraddin Hajiyev

115 Sumgayit City Court, F.V.Garayev's Case, Article 221. Judge: Camila Safiyeva

116 Binagadi District Court, Najafov Mammadxan Miri oglu's case, article: 132, Judge: Mrs. Zoya Aliyeva

8. The duty to effectively investigate allegations of ill-treatment

State authorities have an obligation to act when confronted with allegations of torture or ill-treatment and to prosecute offenders. Judges have particular responsibilities to follow up allegations of torture. The European Committee on the Prevention of Torture has spelt out the extent of this duty. When criminal suspects are brought before a judge at the end of police custody and they allege ill-treatment, the judge should record the allegations in writing, immediately order a forensic medical examination, and take the necessary steps to ensure that the allegations are properly investigated. This approach should be followed whether the person concerned bears visible external injuries. Even in the absence of an express allegation of ill-treatment, the judge should request a forensic medical examination whenever there are grounds to believe that a person brought before the court could have been the victim of ill-treatment.

Evidence of torture is often difficult to obtain, and the evidentiary principles applied in determining whether torture has occurred must account for the difficulties in substantiating allegations of torture and ill-treatment. With regard to the burden of proof, the Special Rapporteur on torture has recommended that when allegations of torture are raised by a defendant during a trial, the burden of proof should shift to the prosecution to prove beyond a reasonable doubt that the confession [or other incriminating evidence] was not obtained by unlawful means, including torture and similar ill-treatment. In the case of Aksoy v. Turkey, the European Court of Human Rights went even further holding, "where an individual is taken into police custody in good health but is found to be injured at the time of release, it is incumbent on the State to provide a plausible explanation as to the cause of the injury, failing which a clear issue arises under Article 3 [ECHR]." Finally, so far as evidentiary rules are concerned, Article 15 of the Convention against Torture provides that States should ensure that any statement that is established to have been made as a result of torture should not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made.[117]

a. Mammadov (Jalaloglu) v. Azerbaijan

The 2003-2004 Report expressed grave concerns that the authorities in Azerbaijan were not meeting their obligations with regard to the investigation of allegations of torture. The 2003-2004 Report catalogued many instances where the Court for Grave Crimes failed to discharge its duty to effectively investigate allegations of torture or inhumane or degrading treatment of suspects whilst in detention after arrest.[118] On 11 January 2007, the European Court of Human Rights (ECtHR) notified its judgment in the case of *Mammadov (Jalaloglu) v. Azerbaijan*.[119] In this case, the ECtHR confirmed the findings set out in the 2003-2004 Report. Specifically, the ECtHR unanimously held that there had been:

- a violation of Article 3 (prohibition of torture or inhumane or degrading treatment) regarding the ill treatment of the applicant in police custody;
- a violation of Article 3 regarding the lack of effective investigation into the applicant's allegations of ill-treatment; and
- a violation of Article 13 (right to an effective remedy) of the European Convention.

117 The three preceding paragraphs are so fundamentally important that they have been reproduced verbatim from the Report of the Trial Monitoring Project 2003-2004.

118 Report of the Trial Monitoring Project in Azerbaijan 2003-2004, pages 25-27 and Annex 4

119 Application no. 34445/04

The Principal facts as taken from the judgement of the ECtHR are set out below.

> The applicant, Sardar Jalaloglu Mammadov, is an Azerbaijani national who was born in 1957 and lives in Baku, Azerbaijan. More commonly known as Sardar Jalaloglu in political circles, he was the Secretary General of the Democratic Party of Azerbaijan, one of the opposition parties that considered the presidential elections of 15 October 2003 to be illegitimate. On 18 October 2003, several masked police officers, armed with machine guns, forced their way into the applicant's home, arrested him and took him into custody in order to interrogate him in connection with a demonstration two days earlier. The demonstration took place in the Azadliq Square in the centre of Baku to protest the results of the elections and turned violent.
>
> On 19 October 2003, the applicant was charged with "organising public disorder" and "use of violence against State officials." Banned from seeing his lawyer for three days, the applicant finally met with him on 22 October 2003, complaining that he had been ill-treated by police officers. The lawyer filed a petition requesting a medical examination. On 27 October 2003, having received no reply, the lawyer filed a complaint. The applicant alleged that he had been ill-treated during his arrest, while being transported to the detention centre and during police custody, notably on 19 October 2003, when he claimed to have been beaten on the soles of his feet (*falaka*) by two masked police officers with truncheons, tortured and threatened with rape. After the beating, he temporarily lost the ability to walk unaided and was placed in a poorly-ventilated cell where the threats of rape continued and from where he could hear the cries of other detainees being ill-treated.
>
> Following his transfer, on 22 October 2003, to a remand facility, he again complained of poor detention conditions and intimidation. Upon arrival at the remand facility, doctors observed two bruises on his right calf and right heel.
>
> On 29 October 2003, a medical examination was ordered, which concluded that the bruising observed on the applicant's left elbow joint, his right calf and right heel had been caused by a hard blunt object.
>
> On 8 January 2004, the investigation authorities found that the medical report did not establish conclusively that the applicant's injuries had been inflicted while in police custody and, having questioned four police officers who denied all the allegations of ill-treatment, refused to institute criminal proceedings.
>
> On 14 December 2003, the applicant filed a separate complaint with the Nasimi District Court, complaining that he had been unlawfully arrested and tortured in police custody. Specifically, he complained that during the interrogation in the office of the Deputy Chief of the Organised Crime Unit, for approximately four hours, he had been beaten with truncheons on the soles of his feet by two people in masks. He further noted that after the beating his cellmates had witnessed his injuries and provided some

assistance to him. He asked the court to bring the officials concerned to criminal responsibility.

On 28 January 2004, the Nasimi District Court refused to examine the complaint due to lack of territorial jurisdiction, finding that complaints against the Organised Crime Unit officials must be filed with the Narimanov District Court.

On 29 January 2004, the applicant filed a complaint of the same substance with the Narimanov District Court. This court also refused to examine the complaint due to lack of territorial jurisdiction. The matter was referred to the Court of Appeal, which decided that it was within the Nasimi District Court's territorial jurisdiction to examine the complaint.

Finally, on 18 February 2004, the Nasimi District Court examined the applicant's complaint concerning the unlawfulness of the Chief Prosecutor's Office's refusal to institute criminal proceedings and dismissed it as unsubstantiated. The court specifically noted that the forensic report did not rule out the possibility that the injuries could have been inflicted to the applicant during the public disorder on 16 October 2003, i.e. prior to the applicant's arrest. As such, the court did not consider this forensic report as conclusive evidence proving the applicant's beating in the Organised Crime Unit detention facility. The court found that the applicant did not produce sufficient evidence to support his allegations.

The applicant appealed, claiming that the Nasimi District Court failed to give proper legal assessment to the evidence showing that he had been tortured in police custody. On 17 March 2004 the Court of Appeal upheld the Nasimi District Court's decision. The full decision of the Court of Appeal was posted to the applicant's lawyer on 18 March 2004. No further appeal lay against this decision under the domestic law.

As observed by the ECtHR, the national law of Azerbaijan addresses allegations of ill-treatment:

The Constitution

Article 46 (III) of the Constitution of the Republic of Azerbaijan provides:

“No one shall be subjected to torture or ill-treatment. No one shall be subjected to degrading treatment or punishment. ...”

Criminal responsibility for torture and inhuman and degrading treatment

In accordance with the Criminal Code, torture of an individual who is under detention or otherwise deprived of his or her liberty is a crime punishable by imprisonment for a term of seven to ten years (Article 113). Infliction of physical or psychological suffering to an individual by way of systematic beating or other violent actions performed by a public official in his official capacity is a crime punishable by imprisonment for a term of five to ten years (Article 133).

In accordance with Article 37 of the CPC, criminal proceedings are instituted on the basis of a complaint by the victim of an alleged criminal offence.

Civil action against public authorities' unlawful act or omission

The Law *On Complaints against Acts and Omissions Infringing Individual Rights and Freedoms*, dated 11 June 1999 (hereinafter the "Law on Infringing Rights"), provides for judicial review of claims against public authorities. In accordance with Article 2 of the Law on Infringing Rights, any act or omission by a public authority infringing an individual's rights or freedoms may be challenged either (a) directly before a court; or (b) before a higher (supervising) public authority. If the complaint is first filed before a supervising public authority, the authority must inform the complainant in writing, within one month of receipt of the complaint, of the results of the examination of his or her complaint.

In accordance with Article 5 of the Law on Infringing Rights, a direct judicial complaint must be filed within one month from the date the complainant became aware of the infringement of his rights or freedoms. If the complainant has initially filed a complaint against acts or omissions of the subordinate public authority with a supervising public authority, a judicial complaint challenging the decision of the supervising authority must be filed within one month of its decision. The court may still accept a complaint after expiry of the deadline provided the complainant had good reason.

According to Article 6 of the Law on Infringing Rights, the court is entitled to declare the disputed act or omission unlawful, to lift the liability imposed on the complainant or to take other measures to restore the infringed right or freedom, and to determine the liability of the public authority for its unlawful act or omission. The court's finding of an infringement of the individual rights and freedoms gives rise to a civil claim for damages against the State.

The Civil Code contains similar provisions. Pursuant to the Civil Code, disputes between individuals and public authorities concerning individual rights and freedoms may be the subject matter for a civil action (Articles 2 and 5). Unlawful acts or omissions of a public authority or its officials give rise to a civil claim for damages against the State (Article 22). The State's civil liability is the same as that of an ordinary legal person (Article 43).

The Code of Civil Procedure provides the procedure by which an individual can sue the State for damages in civil proceedings.

The ECtHR unanimously held that the Azerbaijani courts (both the trial court and the Court of Appeal) failed to carry out an effective investigation of the applicant's allegations of ill-treatment and failed to provide him with an effective remedy. This case highlights the ineffectiveness of national law if judges (of both the trial court and Court of Appeal) are not prepared to act on allegations of torture or ill-treatment by organs of the State. Regrettably, to date there has been no proper investigation of the allegations of ill-treatment in this case and no charges have been brought against any of the perpetrators of the now proven acts of ill-treatment.

b. Observations of the OSCE trial monitors regarding the investigation by the courts of allegations of torture and inhuman or degrading treatment during the 2006-2007 Trial Monitoring Project

During the 2006-2007 Trial Monitoring Project, OSCE trial monitors observed a number of cases where allegations of torture and inhuman or degrading treatment were brought to the attention of the court by defence counsel, but the courts failed to carry out any proper investigation of the complaints. The following cases are some examples of this failure.

In one monitored case, the defendant testified that he had been beaten during the time that he was held at the Organised Crime Unit of the Ministry of Internal Affairs. In support of his complaint, he showed the court that his teeth were fractured. The court, however, did not investigate his complaint. On appeal, the defendant and defence counsel raised the same complaint. The defendant gave evidence to the Court of Appeal that during the preliminary investigation he was tortured, beaten, and subjected to detention to force a confession.[120] The defendant stated that, despite an order that he should be held at the remand prison, he was detained at the Organised Crime Unit where he was tortured. Equally disturbing matters were raised by defence counsel, who complained that during the preliminary investigation the investigating authorities had ransacked his office to intimidate him and cause him to abstain from acting as defence counsel in the case. The defence filed a motion requesting an investigation of these complaints and that proceedings should be initiated against the investigator. The Court took did not investigate. The Presiding Judge stated that the defence should confine its evidence to the essence of the case and that the complaints raised by the defence were not within the competency of the Court. The judge said, *"Speak on the substance of the case. You should have raised these issues before the investigators during the pre-trial investigation; now it is too late."*

In the Sabunchu District Court,[121] a defendant testified that after he was arrested he was taken to the basement of the Organised Crime Unit of the Ministry of Internal Affairs where he was tortured and beaten. He further testified that while he waited for the Ombudsman, Mrs. Elmira Suleymanova, he was threatened that if he made a complaint to her he would be subjected to further torture. Again, the court did not properly investigate the allegations.

In the Sabail District Court,[122] defence counsel filed a petition requesting the court to impose house arrest as an alternative to detention on remand. The defendant was charged with failing to inform the relevant state agency of the commission of a crime and concealing a crime (violating Articles 307.1 and 307.3 of the Criminal Code). He was held in detention on remand for 8 months. In support of the application, defence counsel informed the court that the defendant required surgical treatment for serious injuries that he had sustained while witnessing the alleged crime and that he had 40 splinters in his body that caused him constant serious pain and suffering. The court did not investigate the condition of the defendant, and did not order a medical examination of the defendant. The defendant remained in detention without proper consideration of the alleged inhuman treatment.

In the Court of Appeal,[123] a 14 year old female witness presented evidence that she was subjected to both physical and psychological pressure by a named inspector while she was

120 Court of Appeal, Court composition: Chairing Judge - Mr. R.Safarov, Mr. G.Hasanov, Mr. A.Hasanov, articles 178.1, 322.1, defendant: Hajiyev Vagif Nuru oghlu

121 Hasanov Madjid Zulfu, Abbasov Shamil Famil, Zakiyev Zaki Faig, Cabrayilov Yashar Rizvan, Mursalov Mursal Ismayil, Mehdiyev Hamza Azar, Sarmanov Zeynal Fikrat's Case, 315.1, Sabuncu District Court, Judge Habib Ali Aliyev.

122 Sabayil District Court, Dadashov Mahmud Orkhan's case, Rustəmov Tofiq Elvin, Salahov Hasan Elnur, Nacafov Gadir Eldar's case, article 307.1, 307.3; Judge: Alim Knyaz Namazov. AR Constitution, Article 46.

123 Court of Appeal, Huseynov Adalet's case, Court composition, Chairman: R. Allahverdiyeva, Judges: L. Nabiyev, E.Abdullayev.

held in the Regional Prosecutor's office in Goranboy on 21 October 2003. The girl reported that she was separated from her mother by the inspector and taken into a room where there were 5 men who were completely unknown to her. In this room she was interrogated by the inspector who threatened her saying, *You will write what we said, otherwise we will put bitter tasting medicine in your mouth and we will broadcast your naked picture on ANS TV channel."* The girl stated that when she told the inspector that she was illiterate, he forced her to write her evidence and he dictated every word letter by letter. He later forced the girl to testify against her uncle. Similar, supporting evidence was given by the defendant and other witnesses. The defendant presented evidence that while he was being kept at the Goranboy Regional Prosecutor's office he heard the girl screaming from a nearby room. Allegations of very serious violations of human rights were raised in this appeal, which required a full investigation. Instead, the judges in the Court of Appeal interrupted the witnesses and reminded them that during the pre-trial investigation and the trial (at the Court for Grave Crimes) different evidence was presented. When the witnesses complained that the previous evidence was not true, the judge replied, *"The court would never write lies."* As a means of resolving the dispute regarding the evidence, the defence requested the Court of Appeal to review a television recording made by ANS TV of the proceedings in the Court for Grave Crimes. The Court of Appeal refused to do so, stating that it would be useless. The manner in which the complaints of serious violations of human rights were handled by the Court of Appeal, illustrates the need for judicial training at all levels of the court system.

In the Court for Grave Crimes,[124] a defendant provided evidence that while being held for interrogation on 22 February 2006, he was taken by officers from the 39th police station to the 22nd police station where he was beaten and tortured over a period of 24 hours. The defendant stated that he confessed because of the torture. When asked by one of the judges to identify the perpetrator, the defendant gave an answer which clearly identified the alleged torturer, *"The deputy chief of the 22nd police station, Alovsat Aliyev."* The judges then asked the defendant if there were any physical signs of torture on his body and he showed the court marks on his wrists that he said had been caused by handcuffs when they were pressing his arms. Despite this clear allegation of torture, alleged to have been committed by a named individual, the court did not investigate the allegation.

In some cases the court carried out the appearance of an investigation into complaints of torture by making decisions to investigate the situation, but never following through with an investigation. In the Yasamal District Court,[125] a defendant told the court that on 26 February 2006, in the 27th police station he was bludgeoned on his heels and his abdomen. He stated that the deputy chief of the police station (who he was able to name as Nazar), and other officers of the criminal investigation department (who he was unable to name but would be able to recognise) tortured him. He stated that they tortured him to make him confess to crimes of theft that he did not commit. Another defendant gave evidence that he had witnessed the defendant being tortured. On hearing the allegation, the judge ordered the deputy chief of the police station (named as Nazar) to attend the court to be questioned about the allegation. Despite the judge's order, the deputy chief of the police station never appeared in court and was never questioned. The judge found the defendant guilty and issued a judgment without investigating the allegations of torture.

124 Court on Grave Crimes, Bakhishov Ramiz Rahid's case, article, 180.2.1. Court composition: Chairman – Mr. Yusif Javadov. Judges: 1. Mrs. Nushaba Agayeva, 2. Mr. Hasan Ahmadov;

125 Defendants: Nagiyev Nazim Elshad, Aliyev Umid Tural, Allahverdiyev Zahir Bahruz, Yasamal District Court, Judge – Mr. Agamirzayev Mansur Fakhraddin, article: 177;

In another case before the Court for Grave Crimes,[126] a witnesses presented evidence that he had been tortured into giving evidence against the defendant in the pre-trial proceedings and added that the evidence he gave during the pre-trial proceedings must not be considered admissible. Notwithstanding this allegation, the judge did not carry out an investigation into the claim. The significant number of cases in the Court for Grave Crimes where the judge failed to properly investigate allegations of torture and inhuman or degrading treatment should be a concern to the Government and the Courts.

In the Narimanov District Court,[127] a defendant plead not guilty and stated that he gave his previous testimonies during the preliminary investigation under pressure. He stated that he had been threatened by employees at the police station that he would be committed to a mental asylum if he did not confess to a crime. The judge enquired about the identity of the persons who put pressure on the defendant and asked the defendant why he had not put this complaint on record previously, No further investigation was made.

In another case,[128] when the defendant testified that the head of the commandant's office and investigator beat him and forced him to sign a document that he had not read, the judge ordered the alleged perpetrators to appear in court and be questioned. The court hearing was postponed for an indefinite period. Accordingly, it was not possible to confirm whether the order was enforced. While decisions to investigate are commendable, it is concerning that prompt action to investigate allegations of torture and inhuman or degrading treatment appear to be the exception rather than the rule.

Lastly, it should be noted that during the trial of Haji Mammadov and 25 other defendants, again held in the Court for Grave Crimes,[129] a number of the defendants provided evidence that during the preliminary investigations they were subjected to torture by employees of the Ministry of National Security. They complained that both physical and psychological pressure was imposed upon them and that they had given their testimony in the preliminary investigations as a result of such pressure. By way of example, defendant Farhad Mammabeyli stated that in addition to being physically beaten, they threatened his brother's life. He also stated that he had been detained in a small one-man cell with insufficient air for a period of two months, and as a result of that treatment, he had lost his ability to speak, which he recovered only after receiving medical care. Another defendant, Kamil Sadraddinov, also testified that he had been subjected to physical and psychological torture. OSCE monitors observed that in previous court sessions other defendants made similar allegations. Notwithstanding these numerous and similar allegations of torture and inhuman or degrading treatment, the court did not perform a proper or meaningful investigation in to the allegations.

c. Steps taken by the government of Azerbaijan since the 2003-2004 Report to strengthen the law relating to the protection of the rights of suspects and accused persons

It is hoped that the decision of the ECtHR in the case of Sardar Jalaloglu Mammadov and this report will highlight the need for the Azerbaijani authorities to continue their efforts to ensure the protection of the rights of suspects and accused persons by the courts. In this regard, the Government of Azerbaijan is to be commended upon the steps that it has taken

126 Court of Grave Crimes, defendant: Adısey Adalet Jamalov, articles: 120.1, 228.1, Court composition - Chairman: F.Qasımov, Judges: A.Orujov, H.Ahmedov

127 Narimanov District Court, Aghaveys Huseynov's case, article: 234.1, Judge: Mr. Aghababa Babayev;

128 Court of Appeal, Chairing Judge - Mr. R.Safarov, Mr. G.Hasanov, Mr. A.Hasanov, articles 32.5, 274, 338.1, 338.2, 274., defendant: Khudaverdiyev Ramin Ilyas;

129 Court of the Grave Crimes, Mammadov Haji Teymur oghlu's case, Chairman - Mr. Ali Seyfaliyev, Judges: Mr. Alovsat Abbasov, Mr. Sadraddin Hajiyev;

since the 2003-2004 Report to strengthen the law relating to the protection of the rights of suspects and accused persons held in detention facilities. Reference has already been made to the work of the Expert Group that was set up in the wake of the 2003-2004 Report as an initiative of the OSCE and the Azerbaijani Government. The Government of Azerbaijan is in the process of preparing a draft new law on the Custody of Suspects and Accused in Detention Facilities ("the Draft Law"). The Government is urged to ensure that the Draft Law will make effective provisions for the protection of the rights of suspects and accused persons held in detention. Similarly, the Milli Majlis is urged to enact the Draft Law expeditiously and, thereby, put in place an effective mechanism for the protection of the rights of suspects and accused persons held in detention.

If the Draft Law is to be an effective mechanism for the protection of the rights of suspects and accused persons held in detention, it is imperative that training the police, prosecutors and judges are knowledgeable of their respective duties and obligations under national and international law. The case of Sardar Jalaloglu Mammadov demonstrates that laws are no more than hollow shells if they are not implemented by the courts. It is recommended that a comprehensive training programme for the police, prosecutors, and the judiciary be put into place immediately to provide effective guidance and instruction as to the duties and obligations of each pillar of the criminal justice system in this area.

The Collegium of Advocates (the defence bar) cannot escape its responsibility in this regard. The 2003-2004 Report commented adversely upon the failings of defence counsel to make submissions to the court, effectively and in a professional manner, as to the relevant provisions of national law and international law on behalf of their clients. Paul Garlick in the current trial monitoring project noted and expressed deep concern that since the 2003-2004 Report, no noticeable improvement in the quality of advocacy of the defence bar has occurred.

9. The right to a public and reasoned judgment

Everyone has the right to receive a public and reasoned judgment within a reasonable time.[130] The right to receive a public judgment contributes to the right to a fair trial by enhancing public scrutiny while the right to a reasoned judgment is an essential element of the right to appeal.

a. The right to a public judgment

The Criminal Procedure Code provides that all judgments should be read in court.[131] In almost all of the cases that were monitored, the judgments were only partially read in court - the reading usually being confined to the resolution parts of the judgment. An additional difficulty observed by the OSCE trial monitors was that in many cases the judge read the judgment so quietly that people in the public gallery could not hear or follow what was being said. Another problem observed by OSCE trial monitors was that it was extremely difficult to obtain copies of the judgments. Typically, the courts stated that only the parties to the proceedings were entitled to receive the judgments. Many of the courts would not distribute copies of their judgments until an official written request was made by the OSCE or the Legal Education Society ("LES"). After a written request was made by the

130 Article 6(1) of the ECHR and Article 27 and Article 349 of the CPC. See also Van de Hurk v. Netherlands (1994).
http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Van%20%7C%20de%20%7C%20Hurk%20%7C%20Netherlands&sessionid=281511&skin=hudoc-en

131 Article 356 of the CPC.

LES, some courts (notably, Nasimi and Sabayil District Courts) did provide OSCE trial monitors with copies of their judgments. Certain judges[132] at the Yasamal District Court, however, continued to refuse to provide copies of their judgments. Given that it is a requirement of Azerbaijani law that judgments are read in public, the refusal of some courts to supply members of the public with copies of their judgments seems incompatible with this law. In addition, according to the Law on Obtaining of Information, dated 30 September 2005, court decisions are considered public accessible information. Consequently, this law obligates the courts to provide copies of the court judgment upon request.

b. The right to a reasoned judgment

The Criminal Procedure Code states that the judgment should be lawful and well-founded. In order for a judgment to be considered lawful, it must fulfil the requirements of the Constitution and the Criminal Procedure Code of Azerbaijan. In addition, four key requirements must be satisfied for a judgment to be considered well-founded or reasoned:

1) It must be based upon sufficient evidence;[133]

2) It must be based solely on evidence that was examined during the court investigation;[134]

3) It must be consistent with the evidence that was examined during the court investigation;[135] and

4) It must be based solely on evidence that was secured and examined with the equal participation of both parties.[136]

Courts are not obliged to give detailed answers to every question raised in the course of the proceedings. Nevertheless, if an issue of fact or law arises in the case that is fundamental to the ultimate decision in the case, then the court must specifically deal with it in its judgment. The 2003-2004 Report drew attention to serious shortcomings and flaws in the reasoning of judgments. The trials monitored in this second phase of the project similarly show that the majority of judges continue to fall short of the national and international standards required for a reasoned judgement. The following shortcomings are of particular concern:

- The judges continue to fail to consider adequately, or some times fail to consider at all, the previous inconsistent statements that prosecution witnesses may have made in the course of the investigation.

- The judges continue to fail to attach sufficient importance to the evidence that is called in support of the defendants, dismissing the evidence of many of the defence witnesses on spurious and inadequate grounds.

132 Judges Isa Ismayilov and Fakhraddin Agamirzayev.

133 Article 349 of the CPC.

134 Article 349 of the CPC.

135 Article 349 of the CPC.

136 Article 32 of the CPC.

- In their judgments, the judges continue to deal with the evidence in a superficial manner and often reject the evidence of defence witnesses without giving any separate or detailed analysis of the grounds for rejecting that evidence.

- The frequently inadequate recording of the evidence of witnesses makes it impossible for the judges to come to a reasoned decision based upon the evidence; and makes it impossible, in the event of an appeal, for the appellate court to properly review the case.

The following case is an example of a large number of cases where OSCE trial monitors observed that the judgments of the court were not reasoned and rational.

In the Sabunchi District Court,[137] a defendant denied the charge against him and his defence was one of alibi (i.e. that he was not the person who committed the offence and that he was elsewhere at the time of the offence). The defendant complained to the court that his rights had been violated during the preliminary investigation. Specifically, the defendant claimed that the investigator did not explain his rights to him and that he did not examine witnesses that would confirm his alibi. He also complained that he was not provided with legal representation and that he had been threatened and coerced into signing incriminating statements. After hearing these allegations the judge told the prosecutor, *"This is another case of the investigator Natig Jafarov. I am fed up with his cases and this time I will certainly need to issue a special decision about him."* After the judge said this, the prosecutor approached the judge and discussed something with the judge so quietly that no-one else could hear what was being discussed. Thereafter, no evidence was given by the victim or the witnesses incriminating the defendant in the commission of the offence. Despite the lack of evidence, the court convicted the defendant and sentenced him to three years imprisonment. The judgment of the court lacked sufficient evidence to base a well founded or reasoned opinion.

As previously mentioned, the recent reforms by the Ministry of Justice within the judiciary provide an opportunity for tangible reform. To ensure sustainability, the Ministry of Justice is urged to implement rigorous training of judges to improve the methodology used in assessing evidence and preparing a reasoned judgment based upon the evidence given in the trial.

137 Sabunchi district court, case of Orujov Vugar Jumshud, article 221.3, judge: Sevil Salimova

Part III - Conclusions and recommendations

Based on the findings documented in this report, the following recommendations have been compiled. They begin with general recommendations and then follow the same structure of the report.

General recommendations for immediate action

The 2003-2004 Report from the Trial Monitoring Project identified crucial aspects of the trial process that were not in compliance with the Government of Azerbaijan's OSCE commitments on human rights and rule of law.

The second phase of the Trial Monitoring Project revealed that many of the deficiencies in fair trial rights that existed in the first phase continue to exist throughout the criminal justice system in Azerbaijan. Many of the trials fell short of OSCE and other international standards in regard to important rights and safeguards, including the right to effective legal representation, the right to an impartial and independent tribunal, the right to a fair hearing, the right to assistance by an interpreter, and the right to a reasoned judgment.

Of continuing, deep concern is the number of cases where credible allegations of torture or inhuman or degrading treatment of accused persons and witnesses continue to be raised, but no proper or adequate investigation of the allegations is carried out by the court. In addition, the courts continue to accept evidence unlawfully obtained through means of coercion. In this regard, the appropriate authorities should take prompt steps to give effective training to judges to increase their awareness of their duties and obligations to carry out a full and effective examination of any allegation of torture or inhuman or degrading treatment and to exclude any evidence obtained by such means. Moreover, rigorous training should be given to the police, investigators and prosecutors as to their respective duties and obligations under national and international law

Also of deep concern is that the legal services presently being provided by the criminal defence bar ("the Collegium") continue to be well below the minimum professional standards expected of an independent defence bar. Extensive reform of the recruitment and training of the defence bar is long overdue. To its credit, the Government of Azerbaijan has made efforts to reform the defence bar. The Collegium, however, has demonstrated an unwillingness to implement the changes. The Government is urged to continue the process of reforming the criminal bar and to ensure that the Collegium implements changes in its procedures for admission in a transparent and meaningful way, in order to estalish an independent and effective bar with sufficient members to service the legal needs of the population of Azerbaijan in a professional manner.

The presumption of liberty during the pre-trial stage of criminal proceedings

International standards and the CPC of Azerbaijan provide that the detaining of an accused person in custody during the pre-trial stage of criminal proceedings may only be ordered by the court in strictly limited circumstances prescribed by law; and only where lesser forms of restriction of liberty are not regarded as sufficient.

While the provisions of the CPC in this regard are in accord with international standards, OSCE trial monitors reported that judges, prosecutors and defence counsel acknowledge that orders for detention on remand during the pre-trial stage of criminal proceedings are regularly made without proper or adequate consideration for the grounds or whether less restrictive measures other than detention would be sufficient.

Decisions by judges relating to the application of restrictive measures, like detention on remand, are directly concerned with fundamental human rights. Accordingly, judges must be trained to deal with restrictive measures in compliance with international standards and the requirements of the CPC.

The presumption that an accused person will not be deprived of his/her liberty pending his/her trial can only be displaced by clear and adequate reasons concluding: (i) that it is necessary to impose restrictions on the liberty of the accused in order to prevent him/her from committing an offence, absconding or interfering with witnesses or the investigation; and (ii) that lesser forms of restrictive measures are not sufficient. Judges must consider the circumstances of each case and must give reasons for their decisions identifying the particular circumstances of the case that have caused them to reach those decisions.

The right to a public hearing

OSCE trial monitors encountered numerous restrictions and impediments imposed by the court or court officials that significantly interfered with the right to a public hearing. Two courts, the Court for Grave Crimes and the Court for Serious Military Offences, were the worst violators of the right to a public hearing. Specific reference to the practices employed by those courts has been previously discussed in the report.

Even when trials were held in public, a number of factors contributed detrimentally to public access:

- In many of the courts, the public galleries were far too small to accommodate all those who wished to observe the hearings.

- Monitors and members of the public were often only admitted to the public gallery of courts after they provided court officials with a copy of their identification cards.

- Many courts did not post information about the time and place of scheduled hearings or otherwise make this information known to the public.

- In some cases involving a high degree of public interest, some members of the media were not admitted to the court – usually citing the lack of space in the public gallery as the reason.

- Even when monitors were given unimpeded access to courts, the physical dimensions of the court rooms makes it is very difficult for those in the public gallery to hear what is being said by the judges, prosecutors and defence counsel. Further, lack of air-conditioning in the summer months and lack of heating in the winter months made the conditions very difficult for monitors and was not conducive to effective observation of the trials.

Publication of time and place of court hearings

The time and place of pending trials are not adequately published, making it is extremely difficult for members of the public and interested parties to ascertain when and where trials will be held. OSCE trial monitors regularly experienced difficulty in obtaining information about court hearings.

Specifically, information is not updated on a daily basis. It is difficult to ascertain which cases are going to be heard on a particular day. As a regular practice, some courts do not include trials that are to be heard by the Chairman of the Court on the published list of trails.

The present practice of closed courts is antiquated and inefficient. Poor information about the scheduling of pending cases causes frustration and engenders suspicion and mistrust in the judicial administration. Steps should be taken immediately to provide accurate and timely information regarding:

- the times when courts will be in session;
- the cases scheduled for hearing on a particular day;
- the courtroom the cases will be heard in; and
- the judge(s) that will hear the case.

This information should be made readily available to the public. Consideration should be given to the establishment of a website where information about the scheduling of cases in all major courts in Azerbaijan can be accessed by the public.

Strong consideration should also be given to re-furbishing courtrooms to bring them up to the standard required for the public to have unhindered access with a reasonable amount of comfort. Adequate seating and proper microphone systems are needed so that members in the public gallery can hear and follow the proceedings.

The right of the accused to be present in the court

In the trials that were monitored in this project, the accused was generally present in the courtroom with a few notable exceptions. Due to the restrictions on monitoring preliminary hearings, no statistics are available. The anecdotal evidence, however, suggests that the courts may not be fully protecting the rights of defendants in preliminary proceedings.

Absence of prosecutor or defence counsel

The frequency of cases observed where the prosecutor or defence counsel was absent for some or all of the hearing is a matter of grave concern. The relevant Azerbaijani authorities are urged to take the various steps recommended in this report to reform the criminal defence bar and strengthen the role of defence counsel to properly represent defendants in criminal trials. In addition, the courts must exercise their powers to ensure that defence counsel and prosecutors do not routinely fail to appear in court.

Delays in commencement of court proceedings

The majority of the cases that were monitored did not commence at the scheduled time. OSCE trial monitors observed countless delays in the commencement of cases varying from several minutes to several hours.

Better court administration and improved scheduling of cases will help alleviate some of the delays. Improved court administration and better communication of court scheduling will also be necessary to deal with this systemic problem.

Inadequate records of evidence and court proceedings

In some cases OSCE trial monitors observed that a proper record of the proceedings was not taken by the court clerk. Only a few courts are provided with video tape recording capabilities. The procedures for recording trial evidence fall short of the standard required by the ECHR and OSCE commitments for a fair trial.[138]

Right to trial by an independent and impartial tribunal

In a large number of cases, OSCE trial monitors reported that the judges demonstrated either positive animosity towards defendants, or that they were not interested in considering the defendant's case in a fair manner. The concept of impartiality requires that the bench shall not have a preconceived idea as to the guilt of the defendant or the result of the trial. Again, regrettably, in a great number of cases OSCE trial monitors reported that the conduct of judges showed signs that they did have a preconception of guilt.

OSCE trial monitors observed repeated instances that cast doubt on the impartiality of the judiciary, where the court granted motions raised by the prosecutor, yet refused almost all of the motions raised by the defence, unless the prosecutor agreed with them.

Presumption of innocence

The 2003-2004 Report observed that in Azerbaijan the mentality that "the police and prosecutor are never wrong" has yet to lapse. This sentiment was confirmed to still exist based on the observations of OSCE trial monitors in the second phase of the project.

In many cases, OSCE trial monitors reported that judges were demonstrating a preconceived idea that defendants had committed the offence charged before considering all of the evidence.

External appearances of the presumption of innocence

The external appearances of court hearings are extremely important in relation to the presumption of innocence. In almost all of the cases where the accused was kept in pre-trial detention, during the proceedings the accused would be placed in a metal cage in the courtroom. Such conditions of detention in the courtroom are inconsistent with the

138 In this regard, Absheron District Court should be held up as an example of one court which does ensure that a proper video tape-recorded record of the proceedings is made and kept.

presumption of innocence and should only be resorted to in exceptional circumstances when extreme restrictions are absolutely necessary for the preservation of security.

As noted in the report, the Absheron District Court should be recognized as a positive example of a court that demonstrated outward signs of compliance with the presumption of innocence. There are no cages in the courtrooms. OSCE trial monitors also noted that, at this court there was a positive appearance of the presumption of innocence. The judges explained to defendants their rights in clear terms, including the right not to testify against themselves and, crucially, that they were not bound by any confessions that they had made during the pre-trial investigation.

The reforms recently initiated by the Ministry of Justice within the judiciary, together with rigorous judicial training, should encourage the judiciary and prosecutors to embrace the concept of presumption of innocence.

The opportunity to receive and respond to submissions and the right to legal representation at all stages in the trial

OSCE monitors observed that in the majority of cases, defendants were only provided with legal representation after completion of the pre-trial investigation stage of the proceedings. This is in violation of the law and steps should be taken to ensure that legal representation is made available at all stages of the proceedings.

OSCE monitors also observed that in the majority of cases, the courts did not enquire whether (and, if so, when), the defendant received the indictment and other procedural materials.

The opportunity to present or give evidence

In a number of cases, defendants were denied the right to call and examine witnesses. OSCE trial monitors observed many cases where the defence made application to the court for additional witnesses to be included in the case who, arguably, could provide relevant evidence to undermine the prosecution case or support the defence case, but the court declined to allow such witnesses to be called in the case.

The right to legal assistance

OSCE trial monitors have reported numerous cases where the right to have legal assistance and to be provided free legal assistance was either not explained to the defendant by the judge, or was not explained in a way that the defendant clearly understood those rights. In addition, in a large number of cases where the defendant declined legal representation the judge did not carry out an investigation as to why the defendant refused legal assistance.

It is recommended that preliminary investigators, investigators, prosecutors, and judges be given specific training and guidance on their duties to ensure that the rights of a defendant under Article 92 of the CPC and Article 6(3)(c) of the ECHR are complied with fully.

It is also recommended that urgent attention be given to the establishment of a group of defence lawyers who are prepared to deal with legal aid cases as part of their practice.

Furthermore, steps should be taken to ensure that defence lawyers who take legal aid cases receive reasonable remuneration for their services.

Effective legal assistance

Defence counsel often failed to argue cases for the defence in a strategic and advantageous manner. Defence counsel failed to make submissions to the court, effectively and in a professional manner, as to the relevant provisions of national law and international law on behalf of their clients. OSCE trial monitors observed no noticeable improvement in the quality of advocacy of the defence bar in Azerbaijan in this regard since the 2003-2004 Report.

OSCE trial monitors reported that in the vast majority of cases the quality of legal services provided by legal aid (state aid) lawyers was poor and ineffective. Generally, they demonstrated a lack of professional skills and took a passive role in the hearings. They were often late for hearings or, more seriously, failed to attend the hearings. OSCE trial monitors observed that legal aid lawyers generally failed to make motions or legal submissions that obviously should have been made, and they frequently failed to present evidence, sometimes even remaining silent throughout the trial.

The present standards of defence advocacy are well below the minimum professional standards expected of an independent defence bar. Mere cosmetic reforms, such as the obligation to wear robes in court, are not sufficient. Extensive reform in the admission of new members to the bar and training of all advocates is long overdue. In addition to the recommendations already made as to the reform of the Collegium of Advocates, it is recommended that immediate steps be taken to provide thorough training of the defence bar in:

- all relevant principles of national and international human rights law;
- the basic principles of defence advocacy (including cross-examination of witnesses and examination in chief of defendants); and
- the preparation of written submissions and final submissions on behalf of the defence.

Recommendations on Advocates Issues

In November 2007 the OSCE Office in Baku invited advocates and other practising lawyers and representatives of the Council of Europe, the US Embassy, the World Bank and ABA CEELI to discuss the situation of the advocacy in Azerbaijan.

A. Summary of main Concerns and Recommendations

The main concerns and recommendations raised by the participants of the roundtable are summarised as follows:

- The participants stressed that the Collegium should not exert any interference with an individual **advocate's choice** or that of several advocates jointly **to establish a practice** in any legal form and in any place they wish.

- The participants also pointed out that the system regulating **legal aid** should be reformed. One of the main issues in this regard is to raise the fees for advocates who work on legal aid cases.
- To enable active participation of the advocates in matters of concern and to enable them to have an advocates' forum for discussions on points of interest, they also underlined that the Collegium should hold **general meetings every year**.

B. Bar Examinations

The participants also discussed the admission practice of new advocates to the Collegium. Generally they stated that the last written exams for advocate candidates were held in a professional manner. However, participants that monitored the oral stage of the exams stated that the outcomes were highly arbitrary.

- Therefore the participants suggested discontinuing **the practice of holding oral examinations**.
- To attract more young people to take the bar exam, participants recommended **allowing law graduates to sit the exams immediately after completing university**. Those who pass the exams should be able to get the necessary **practical experience after the exams** as paralegals in law offices or government institutions.
- Likewise, the requirement of three years practical experience was deemed too long by the participants; one year experience after the exams should be sufficient.
- Finally, **bar exams** should be conducted **every year** at a set period of time so that those willing to sit in them can plan their participation and prepare themselves accordingly.

Assistance of an interpreter

OSCE trial monitors reported a large number of violations of both the CPC and Article 6(3)(e) of the ECHR. In a number of cases where the defendant could not speak Azerbaijani, the judges used the services of unqualified interpreters (often members of the court staff). There appears to be a complete absence of professional interpreters in the criminal courts most likely caused by the low rates of remuneration for interpreters working in the courts.

The duty to investigate allegations of ill-treatment effectively

It is a matter of continuing deep concern that during the 2006-2007 Trial Monitoring Project, OSCE monitors observed a number of cases where allegations of torture and inhuman or degrading treatment were brought to the attention of the courts, but the courts failed to carry out a proper investigation of the complaints.

The Government of Azerbaijan is to be commended for the steps that it has taken since the 2003-2004 Report to strengthen the law relating to the protection of the rights of suspects and accused persons held in detention facilities. Reference has already been made above to the work of the Expert Group that was set up in the wake of the 2003-2004 Report as an initiative of the OSCE and the Azerbaijani Government. The Government of Azerbaijan is in the process of preparing a draft new law on police and pre-trial detention ("the Draft Law"). The Government is urged to ensure that the Draft Law contains effective provisions for the protection of the rights of suspects and accused persons held in

detention. Similarly, the Milli Majlis is urged to enact the Draft Law expeditiously to ensure an effective mechanism for the protection of the rights of suspects and accused persons held in detention.

The right to a public and reasoned judgment

The Criminal Procedure Code provides that all judgments should be read in court. In the majority of cases, the judgments were only partially read in court - the reading usually being confined to the resolution section of the judgment.

OSCE trial monitors found it extremely difficult to obtain copies of the judgments. Some courts were prepared to supply trial monitors with copies of their judgments, while other courts refused to do so. The law requires all courts to supply interested members of the public with copies of their judgments upon request.

In addition, the majority of judgments continue to fall short of the national and international standards required for a well-founded and reasoned opinion. The Ministry of Justice is urged to implement rigorous training for judges to improve the methodology used in assessing evidence and preparing a reasoned judgment based upon the evidence given in trial.