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

TRIAL MONITORING REPORT

AZERBAIJAN

2010

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Acknowledgements

The OSCE Office in Baku (The Office) would like to thank all those involved in the 2010 Trial Monitoring Programme (The Programme) from January through December 2010, as well as those who contributed to the preparation of this report.

An Azerbaijani NGO, the "Tender Monitoring Centre," led by Mr. Alovsat Aliyev, implemented the Programme in close consultation with the Office's Rule of Law and Human Rights Unit's Trial Monitoring Team, including Ms. Gumral Aslanova and Messrs. Kamran Baghirov and Rolf Merckoll, and under the supervision of Ms. Monica Martinez. These staff provided daily guidance and specialized training to a "Project Team" of trial monitors, who the Office's Rule of Law and Human Rights Unit staff selected and trained in specialized methods for gathering facts and grounds through daily monitoring of court proceedings. The Tender Monitoring Centre, as the Office's Implementing Partner, administered the Project Team. The Office is also grateful to the OSCE Office for Democratic Institutions and Human Rights (ODIHR) for developing the trial monitoring methodology, and to international expert Mr. Paul Garlick, who reviewed and edited this report.

The Office's Rule of Law Unit implemented the Programme in close co-operation with the Ministry of Justice and a specialised working group, which includes representatives from the Ministry, the Judicial Legal Council, the judiciary and the Office's Rule of Law and Human Rights Unit. This working group facilitated constructive exchange regarding the Programme's findings. The Office thanks the Azerbaijani authorities for their ongoing and productive co-operation and stands ready to continue assisting the Government, the judiciary and other legal professionals and civil society representatives to implement this report's recommendations to strengthen the rule of law and the respect for human rights in Azerbaijan.

In particular, the Office would like to extend special thanks and acknowledgement to the Ministry of Justice, the Judicial Legal Council, the Prosecution Office, and the Collegium of Advocates.[1] The Office is particularly grateful to the Governments of Finland, Germany, the United States, and the Netherlands, for their extra-budgetary contributions, which made this Programme possible.

[1] The Collegium of Advocates is Azerbaijan's equivalent to a Bar Association.

List of Abbreviations

CPC	Criminal Procedure Code of the Republic of Azerbaijan
CoE	Council of Europe
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
ECPT	European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment
ICCPR	International Covenant on Civil and Political Rights
JLC	Judicial Legal Council
LRC	Legal Resource Centre
ODIHR	the OSCE Office for Democratic Institutions and Human Rights
Office	the OSCE Office in Baku
OSCE	Organization for Security and Co-operation in Europe
UN	United Nations
UDHR	Universal Declaration of Human Rights
UNCAT	United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

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I. Introduction

The 2010 Trial Monitoring Report. The OSCE Office in Baku (the Office) produced this 2010 Trial Monitoring Report in co-operation with the Ministry of Justice and the Judicial Legal Council in line with the ongoing State Programme on the Development of the Justice Sector.[2] Thus the Report, as part of the Office's 2010 Trial Monitoring Programme, relates to the accomplishment the following Rule of Law and Human Rights Unit's 2010 programmatic objective: "to promote lawmaking processes and the application of relevant domestic legislation in line with international commitments and standards in the field of human rights and rule of law while contributing to the improvement of the professionalism of the judiciary and other legal professionals in the country."[3]

The objectives of the 2010 Trial Monitoring Programme[4] are to:

(i) improve the administration of justice, increasing the population's confidence in the judicial system;
(ii) enhance compliance with the accused's right to a fair trial;
(iii) follow up with relevant state authorities on court proceedings' compliance with applicable national laws and international standards; and
(iv) follow up with the legislative authorities on the national laws where amendments are needed in order to bring them into line with international standards.

In accordance with the ODIHR Trial Monitoring Methodology,[5] the Office in Baku implemented the Trial Monitoring Programme activities. These included the selection and training of trial observers,[6] monitoring of court proceedings, regular meetings with observers to assess progress, analysis of information and preliminary reports, and regular discussions of reported findings with relevant state authorities and other stakeholders. In addition, during the same project period in 2010, the Office utilized the recommendations of previous trial monitoring reports to support training for and build the capacity of the judiciary and other legal professionals. The Office's Legal Resource Centres (LRCs)[7] organized these activities in Baku and in the regions.

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[2] *State Programme on the Development of the Justice Sector*, 2009-2013.
[3] *2010 Unified Budget* approved by the OSCE Permanent Council in December 2009.
[4] *Project Proposal: Monitoring the Administration of Justice in Azerbaijan - 2010 Trial Monitoring Programme*, project period 1 January 2010 to 31 March 2011, approved on 24 September 2009.
[5] *Trial Monitoring: A reference manual for practitioners*, by the OSCE Office for Democratic Institutions and Human Rights, 2008. In 2010, the OSCE Office in Baku joined ODIHR's Trial Monitoring Advisory Board, as an active member involved in the development of a trial monitoring repository and legal digest for reinforcing the OSCE/ODIHR's institutional memory on trial monitoring issues.
[6] The words trial "monitor" and "observer" will be used interchangeably throughout the report.
[7] The Office developed support for Legal Resource Centres in four urban locations across Azerbaijan, including Sumgayit, Shaki, Ganja and Lankaran following the decentralisation of the court system and the associated need for additional legal

Multi-year Trial Monitoring Programme of the OSCE Office in Baku. In addition, the 2010 Trial Monitoring Report contributes to the larger multi-year collection of observations and recommendations, which the Office's Trial Monitoring Programme (the Programme) has developed using various methodologies and formats since 2003.[8] During the 2010 reporting period, the Trial Monitoring Programme employed qualified legal professionals to monitor a total of 361 cases and 1243 court proceedings. In essence, this Trial Monitoring Programme is the heart of the Rule of Law and Human Rights contribution to the accomplishment of the Office's long-term mandate to "promote the implementation of OSCE principles and commitments as well as the co-operation of the Republic of Azerbaijan within the OSCE framework."[9]

OSCE principles and commitments related to the Trial Monitoring Programme. The OSCE principles and commitments agreed by all OSCE participating States for protecting human rights and fundamental freedoms in relation to fair trail standards and guarantees as defined in the Document of the Copenhagen Meeting of the Conference of the Human Dimension and in the context of other international instruments are:[10]

> *(5.9) — all persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law will prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground;*
>
> *(5.10) — everyone will have an effective means of redress against administrative decisions, so as to guarantee respect for fundamental rights and ensure legal integrity;*
>
> *(5.11) — administrative decisions against a person must be fully justifiable and must as a rule indicate the usual remedies available;*
>
> *(5.12) — the independence of judges and the impartial operation of the public judicial service will be ensured;*
>
> *(5.13) — the independence of legal practitioners will be recognized and protected, in particular as regards conditions for recruitment and practice;*

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resources in the regions. The Centres provide free legal advice to the local population and support training activities for legal professionals in the regions. They also serve as resource facilities, and offer libraries and online access to legal databases.

[8] See 2009 Trial Monitoring Report for detailed information about the scope of previous Trial Monitoring Programmes: 2003-2004, 2006-2007 and 2009.

[9] Article I of the Memorandum of Understanding between the Organization for Security and Co-operation in Europe and the Government of the Republic of Azerbaijan on the Establishment of an Organization for Security and Co-operation Office in Baky, 19 June 2000.

[10] Article I, provisions 5.9-5.21 of the Document of the Copenhagen Meeting of the Conference of the Human Dimension of the CSCE (1990).

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

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

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

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

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

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

(5.20) — considering the important contribution of international instruments in the field of human rights to the rule of law at a national level, the participating States reaffirm that they will consider acceding to the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and other relevant international instruments, if they have not yet done so;

(5.21) — in order to supplement domestic remedies and better to ensure that the participating States respect the international obligations they have undertaken, the participating States will consider acceding to a regional or global international convention concerning the protection of human rights, such as the European Convention on Human Rights or the Optional Protocol to the International Covenant on Civil and Political Rights, which provide for procedures of individual recourse to international bodies.

Contents of the Report. The following 2010 Trial Monitoring Report describes of the Scope and Methodology the Office used for collecting the information elaborated in the Findings and Analysis of Trends, as well as Recommendations and Suggested Implementation Modalities.

Progress made through ongoing legislative and judicial reforms. During the reporting period, the Law on Courts and Judges and the Law on the Judicial Council, were amended[11] and the two Presidential Decrees dated 15 July 2010 and 9 August 2010 issued to facilitate the implementation of the said legislation introduced substantial changes to the judicial system. This included the

[11] 22 June 2010

establishment of new Courts at the regional level, including the Grave Crimes Courts[12] and the Economic Administrative Courts.[13]

In order to alleaviate existing workload in view of the establishment of new courts, the number of judges was increased to a total number of 600, including 78 candidates who successfully completed the selection processes during the reporting period. According to the Judicial Legal Council, the number of civil cases lodged with the courts during the reporting period increased by a 15 percent while the number of economic complaints increase constituted even 30 percent.

Moreover, Judges' candidates as well as practising Judges members of the judiciary joined specialised training courses held by the Judicial Legal Council, in co-operation with the Justice Academy and other national and international actors, including the OSCE Office in Baku.

II. Scope and Methodology

Advances of 2010 Trial Monitoring Programme over prior years. Through its 2010 Programme, the Office continued gathering facts and information about the courts' compliance with domestic legislation and international fair trial standards in the conduct of court cases. In earlier years, the Programme documented and reported shortcomings within *individual court proceedings* to demonstrate their level of compliance with fair trial standards. Comparatively, the 2010 Programme introduced a new focus on identifying positive and negative *systemic trends in the justice sector,* and on increasing the Office's level of *interaction and discussion* with justice sector authorities, members of the judiciary and other interested parties. For this reason, representatives from the Ministry of Justice, Judicial Legal Council, the judiciary, and the Office joined efforts to establish a working group, which meets on a regular basis to discuss the Programme's findings and to collaborate in the identification of possible solutions to shortcomings.

Co-operation with the Government of the Republic of Azerbaijan. Before beginning the 2010 Programme, the Office discussed the Programme's scope and objectives with the Ministry of Justice and informed the Ministry about the trial monitors the Office had selected to monitor the court proceedings. The Office also requested the Ministry's facilitation of the monitors' access to the courts.

[12] According to the Presidential decree dated 15 July 2010, the Court of the Republic of Azerbaijan on Grave Crimes became the Baku Court on Grave Crimes and three new Courts on Grave Crimes were established in Lankaran, Ganja and Sheki.

[13] New Administrative Economic Courts became fully operational in January 2011 in Naxchivan Autonomous Republic, Ganja, Sumqayit, Sheki, Shirvan and Baku (2).

Selection and assignment of Project Team of trial monitors. In earlier times, the Office had selected and trained the Project Team of trial monitors in line with OSCE trial monitoring standards. In 2010, the Office deployed the trial monitors to courts in various jurisdictions, including first instance, appeal and Supreme courts, throughout Azerbaijan. More specifically, the Office requested 14 monitors in the capital area of Baku to observe First Instance Courts, the Court of Grave Crimes and the Baku Court of Appeal, *inter alia*. Four additional monitors observed court proceedings in the regions of Shaki, Shirvan, Ganja, Lankaran and Sumgayit.

Format and other provisions for consistency of monitoring and reporting. The Office developed and provided the Project Team members with a comprehensive reporting form or questionnaire to use for collecting facts and grounds while monitoring court proceedings. The Project Team's task was to focus objectively gathering factual data and other information related to the courts' overall compliance with domestic legislation and fair trial guarantees, rather than any assessment or evaluation of the collected information. For example, Project Team members did not analyze the relevance of the evidence presented in court, the merits of the case, or the judges' determination of defendants' guilt or innocence.

Selection of cases and court proceedings. In general, the Project Team randomly selected the court cases they monitored. On a weekly basis, the observers collected the list of hearings from the courts and submitted them to the Implementing Partner's Co-ordinators. The Co-ordinators selected the cases to monitor based on the charges in order to ensure a variety of criminal offences. The monitors observed cases from the preparatory stage to the judge's delivery of the final judgment.

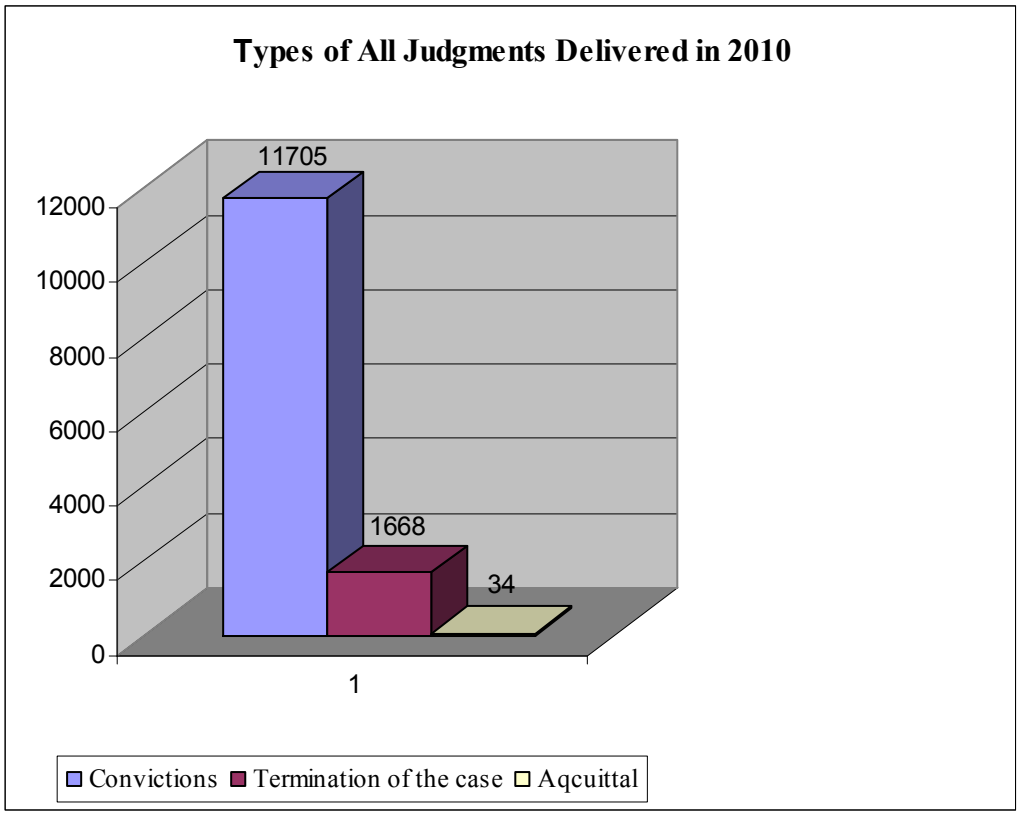
On a case-by-case basis the monitors observed court proceedings, which the Office selected based on the involvement of journalists, human rights defenders and political parties and other civil society leaders and members, as well as other cases brought to the Office's attention through individual human rights complaints. These cases are also relevant to other OSCE commitments that the Office addresses in relation to the rights of freedom of expression and information, right to freedom of association and peaceful assembly.

Basis for analysis of monitor reports. The Office subsequently analysed the facts and information collected by the Project Team for compliance with domestic legislation, fair trial standards according to OSCE principles and commitments, the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), and the case law of the European Court for Human Rights

(ECtHR). In addition, the Office analysed case details for their compliance with OSCE Commitments and related international standards, such as the International Covenant on Civil and Political Rights (ICCPR) and the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT).

Scope of cases and hearings monitored. According to the statistical data provided by the Ministry of Justice, the number of judgements delivered in criminal cases was the following:

Table 1: Types of court decisions delivered in 2010 in criminal cases



Overall, the Project Team monitored 330 criminal and 31 civil cases and observed 1,243 court hearings throughout Azerbaijan. Geographically, in Baku they monitored 201 criminal and 20 civil cases, and observed 968 hearings, while in the regions outside of the capital city of Baku, they monitored 98 criminal and 11 civil cases, and observed 275 hearings.

Additional limited information about preliminary proceedings. Notably, the scope of the 2010 Trial Monitoring Programme is limited to the trial stage of court proceedings. However, the right to a fair trial is not limited to the trial hearings; rather, the right provides for the protection of the rights of suspected or accused persons throughout the entire process of criminal investigations and proceedings, which includes both the pre-trial, trial and appeal stages. Thus, in some cases this report also includes

some references to preliminary proceedings, which are based on the Office's representatives monitoring of court proceedings and information gathered through their direct involvement in monitoring court cases as well as through the individual human rights advice they provide to the population upon requests directed to Legal Resource Centres.

Table 2: Number of Court Cases Monitored in Baku

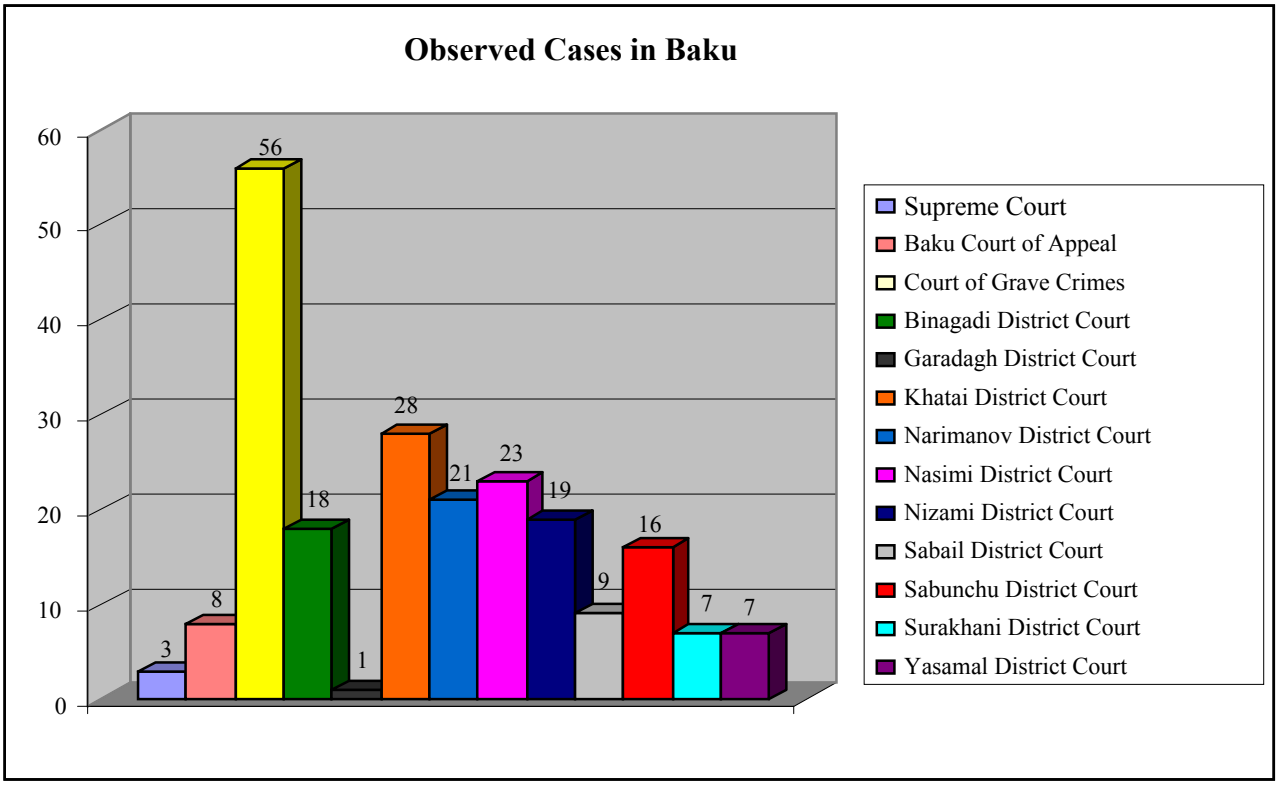
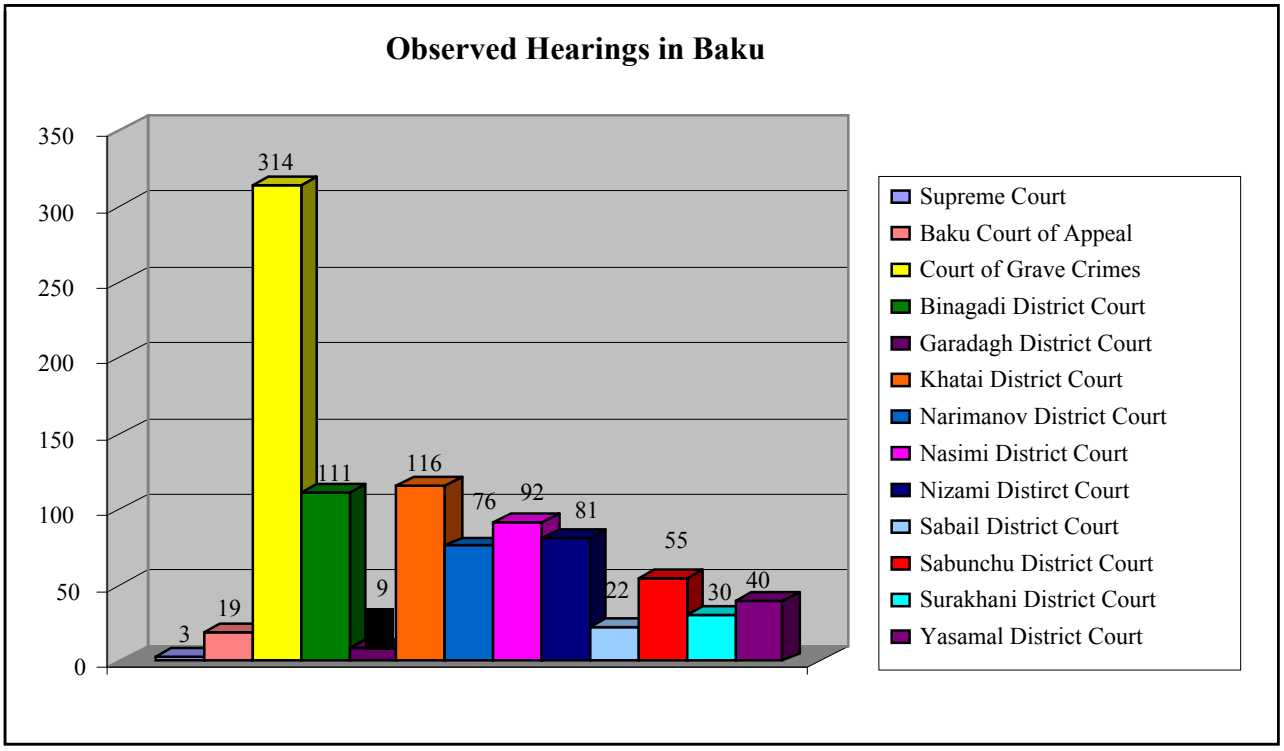


Table 3: Number of Court Hearings Monitored in Baku



Number of Cases and Court Hearings Monitored in Baku*

COURTS	CASES			HEARINGS		
	criminal	civil	all	criminal	civil	all
Supreme Court	0	3	3	0	3	3
Baku Court of Appeal	5	3	8	15	4	19
Court of Grave Crimes	56	0	56	314	0	314
Binagadi District Court	17	1	18	107	4	111
Garadagh District Court	1	0	1	9	0	9
Khatai District Court	28	0	28	116	0	116
Narimanov District Court	20	1	21	74	2	76
Nasimi District Court	19	4	23	86	6	92
Nizami District Court	18	1	19	79	2	81
Sabail District Court	6	3	9	18	4	22
Sabunchu District Court	16	0	16	55	0	55
Surakhani District Court	7	0	7	30	0	30
Yasamal District Court	8	4	12	25	15	40
TOTAL:	**201**	**20**	**221**	**928**	**40**	**968**

Table 4: Number of Cases Monitored in Regions

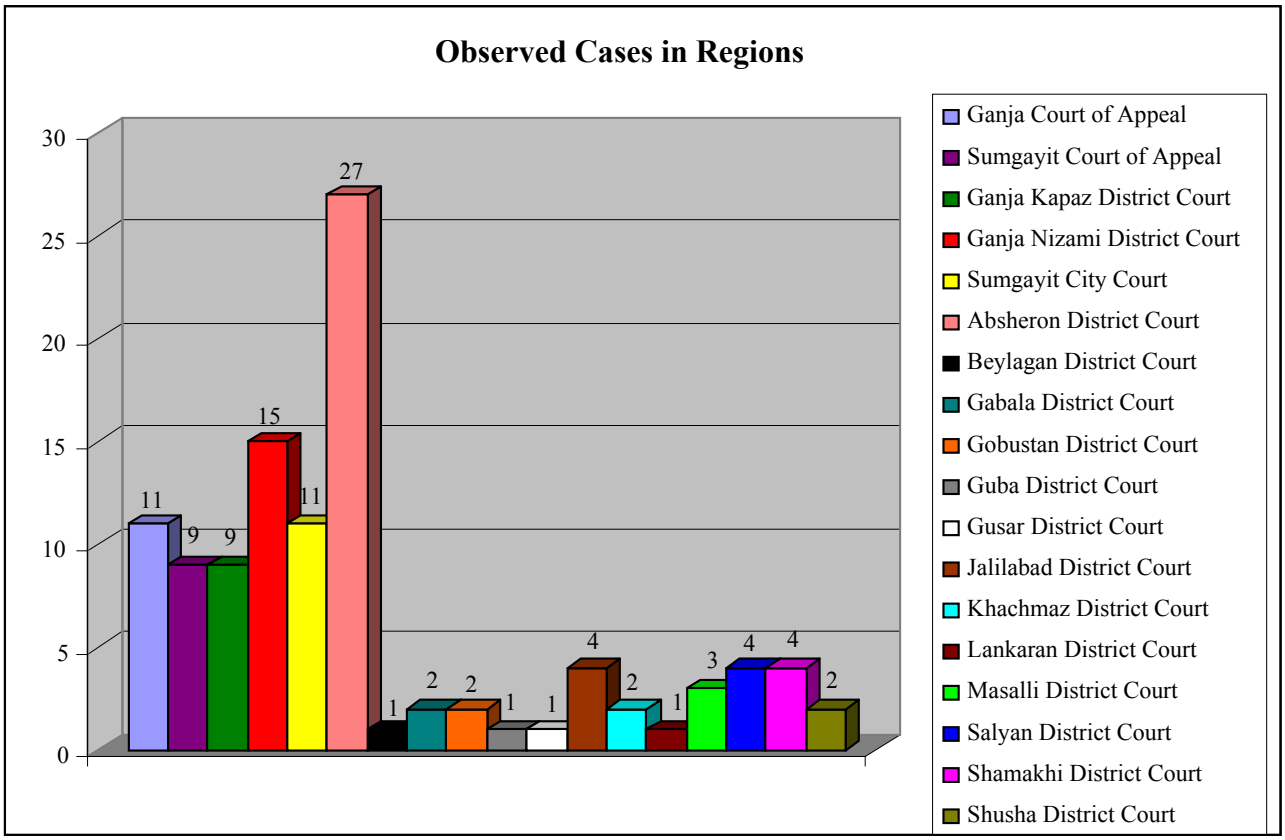
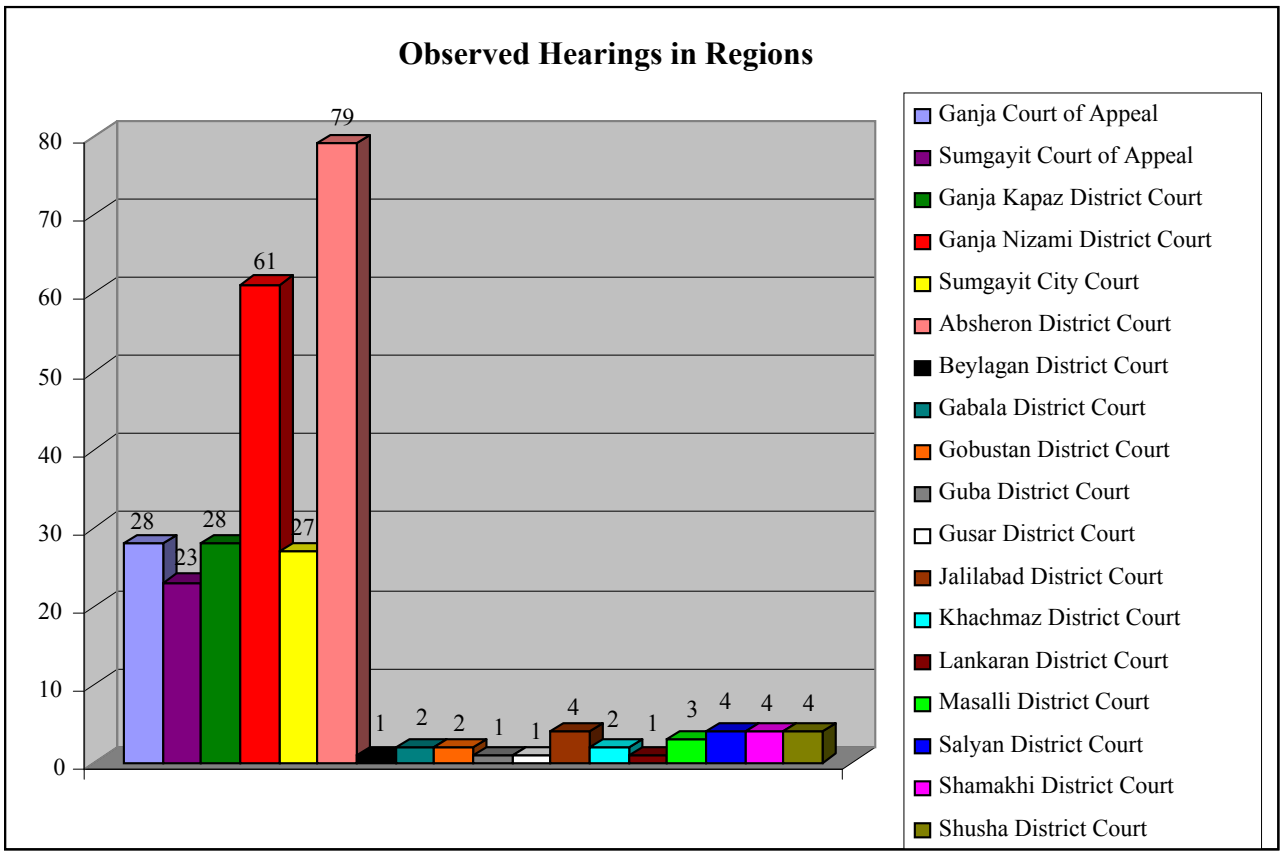


Table 5: Number of Court Hearings Monitored in Regions



Number of Cases and Court Hearings Monitored in Regions*

COURTS	CASES			HEARINGS*		
	criminal	civil	all	criminal	Civil	all
Ganja Court of Appeal	11	0	11	28	0	28
Sumgayit Court of Appeal	9	0	9	23	0	23
Ganja Kapaz District Court	9	0	9	28	0	28
Ganja Nizami District Court	15	0	15	61	0	61
Sumgayit City Court	11	0	11	27	0	27
Absheron District Court	27	0	27	79	0	79
Beylagan District Court	0	1	1	0	1	1
Gabala District Court	1	1	2	1	1	2
Gobustan District Court	2	0	2	2	0	2
Guba District Court	0	1	1	0	1	1
Gusar District Court	0	1	1	0	1	1
Jalilabad District Court	1	3	4	1	3	4
Khachmaz District Court	1	1	2	1	1	2
Lankaran District Court	1	0	1	1	0	1
Masalli District Court	2	1	3	2	1	3
Salyan District Court	2	2	4	2	2	4
Shamakhi District Court	4	0	4	4	0	4
Shusha District Court	2	0	2	4	0	4
TOTAL:	**98**	**11**	**109**	**264**	**11**	**275**

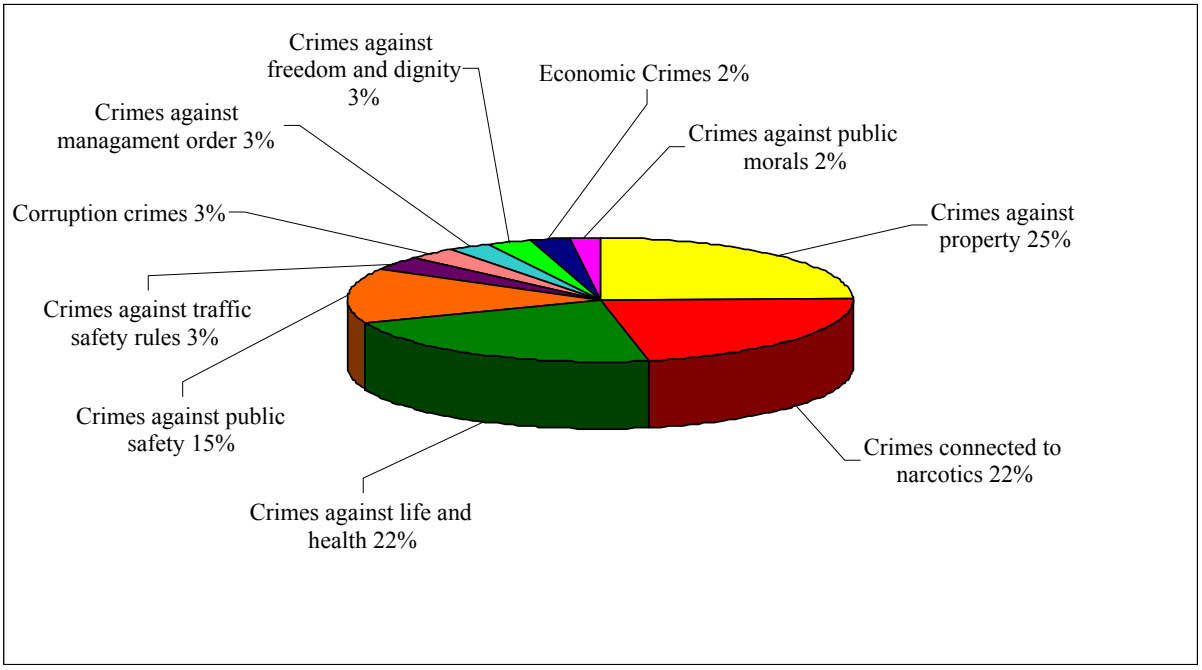
* The number of court hearings does not match the total number of criminal and civil cases because trial proceedings in criminal cases usually involve multiple court hearings. The types of criminal cases monitored included various categories of crimes ranging between grave crimes categories and minor crimes categories.

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

Category of Crimes	Articles of the Criminal Code
Crimes Against Life and Health	Art. 120. Deliberate murder Art. 126. Deliberate causing of serious harm to health Art. 127. Deliberate causing of less serious harm to health Art. 128. Deliberate causing of minor harm to health Art. 132. Battery Art. 133. Torture Art. 134. Threat to murder or causing of serious harm to health

Crimes Against Freedom and Dignity of Individual	Art. 144. Kidnapping Art. 144-2. Human trafficking Art. 144-2. Forced labour Art. 146. Illegal placement in psychiatric hospital Art. 147. Defamation Art. 148. Insult
Crimes Against Property	Art. 177. Theft Art. 178. Fraud Art. 179. Misappropriation or embezzlement Art. 180. Robbery Art. 181. Burglary Art. 182. Extortion Art. 185. Illegal occupation of automobile or other vehicle without An intention to plunder Art. 186. Deliberate destruction or damage of property
Crimes in the Sphere of Economic Activities	Art. 206. Smuggling Art. 213. Evasion of payment of taxes
Crimes Against Public Safety	Art. 214. Terrorism Art. 221. Hooliganism Art. 228. Illegal purchase, transfer, selling, storage, transportation and carrying of fire-arms, accessories, supplies, explosives
Crimes Connected to Illegal Circulation of Narcotics and Psychotropic Substances	Art. 234. Illegal manufacture, production, acquisition, storage, carrying, sending or sale of narcotics, psychotropic substances or their precursors
Crimes Against Public Morals	Art. 243. Involvement in prostitution Art. 244. Maintenance of prostitution house
Crimes Against Traffic Safety Rules and Operation of Vehicles	Art. 263. Infringement of traffic rules and operation of vehicles Art. 264. Leaving a site of road and transport Incident
Corruption Crimes and Crimes Against State Power	Art. 308. Abuse of official powers Art. 312. Giving of a bribe (active bribery) Art. 313. Official forgery Art. 314. Negligence
Crimes Against Management Order	Art. 315. Resistance or application of violence concerning the representative of authority Art. 317. Infringement of normal activity on criminal – executive establishments or investigator isolators Art. 318. Illegal crossing of the state border of the Republic of Azerbaijan Art. 320. Counterfeiting, illegal production, sale of official documents, state awards, seals, stamps, forms or use of counterfeit documents Art. 321. Evasion serving in military

Table 6: Percentage of Criminal Cases Monitored by Category of Criminal Offence



III. Findings and Analysis of Trends

General observance of Fair Trial Standards and Compliance with the Rights of the Accused

Overview: effective legal representation, equality of arms and overall public trust in the administration of justice. Azerbaijan continues developing its justice system in line with OSCE principles, commitments and related international standards. The findings of the 2010 Programme show that while the justice system has achieved some progress, it still has some important key issues to address to comply with fair trial standards.

Even though the results of the Office's 2010 monitoring programme show general compliance with the accused's right to a public hearing, a section has been included in the report for the sake of comprehensiveness and continuity with previous trial monitoring reports.[14]

Delays in the commencement of court hearings remain an issue of concern and have a direct impact on the fundamental fair trial guarantee relate to the accused's right to trial within a reasonable time[15]. Therefore, the report includes as well a special section outlining the main reasons for delays, as observed during the reporting period. Also in connection with the right to trial within a reasonable

[14] 2006/7 and 2009.
[15] "Justice delayed, justice denied".

time or to release pending trial, the report touches upon the excessive use of pre-trial detention as a preventive measure by Azerbaijan's courts.

In addition, the report mainly highlights the judges' responsibility to dispense justice in a proper and fair manner by ensuring compliance with basic fair standards guarantees, including the principle of equality of arms by ensuring accused persons' active participation in court and access to qualified legal representation as a major safeguard for a fair trial.

For instance, while the access to defence lawyers has slightly improved in Baku and in the regions in terms of number of lawyers available, the poor quality of the advice they provide continues to jeopardise the accused's enjoyment of the right to effective legal representation. Correspondingly, ineffective legal representation could lead to the population's general lack of trust in the possibility for securing legal representation, which has the capacity to secure an effective remedy for a given claim and, ultimately, to the violation of the principle of equality of arms in court proceedings. The real and perceived lack of equality of arms could generate the public's lack of trust in the effectiveness of the administration of justice as a whole.

There has been an improvement in the number of judges, and in their skills and professionalism during the reporting period. However, judges' lack of compliance with procedural requirements under the domestic legislation and related international standards appears to be the least consistent and transparent in their rulings, particularly on cases involving journalists, human rights defenders, leaders and members of political parties and civil society.

Judges are the main guarantors of the fairness of court proceedings and are responsible for ensuring full respect for the accused's rights throughout court proceedings. As such, they are responsible for, inquiring at the beginning of the trial proceedings during the preparatory hearing about whether any violation occurred during the pre-trial stage, which relates to compliance with fundamental fair trial guarantees, including the right to effective legal representation.

In connection with the above and particularly the principle of equality of arms, judges shall also ensure compliance with presumption of innocence, which implies important safeguards for accused persons until there is a final conviction issued by a court of law. The Office remains concerned with the systematic use of metal cages, regardless of the accused's criminal records and the seriousness of the criminal offences at stake and has therefore included a related section in the report.

It would be beneficial to judges and would increase public confidence in the effectiveness of the administration of justice if judges could avoid actions, which appear to favour or disfavour either one of the parties to the proceedings. This kind of behaviour jeopardises the judge's independence and impartiality and brings their integrity into question.

Regarding judges' responsibility to ensure that accused persons are informed about their rights, of all cases observed during the reporting period, the Project Team noted that in more than 150 cases the accused were not aware of their rights. In addition, the Project Team reported cases when the judge(s) did not inform these accused about their rights during preparatory hearings. In more than 200 cases, the presiding judge publicly concluded that there had not been any shortcomings during the pre-trial investigation period without inquiring of the parties whether this was actually the case.

Given that ill-treatment allegations, happening particularly during the early stages of detention at police stations, remain an issue in Azerbaijan, the report also covers ill-treatment related cases. During the reporting period, the Project Team observed cases in which allegations involving ill-treatment during detention came to the attention of the court for further investigation. However, the judges did not refer them for an investigation, as required by the domestic legislation.

Finally, there is a section on the reasoning of court decisions, which also relates to due process and the ability of the parties to contest court judgements before appeal and cassation domestic courts, as well as ultimately bringing cases to the ECtHR.

Table 7: Percentage of Fair Trial Violations Monitored in 2010

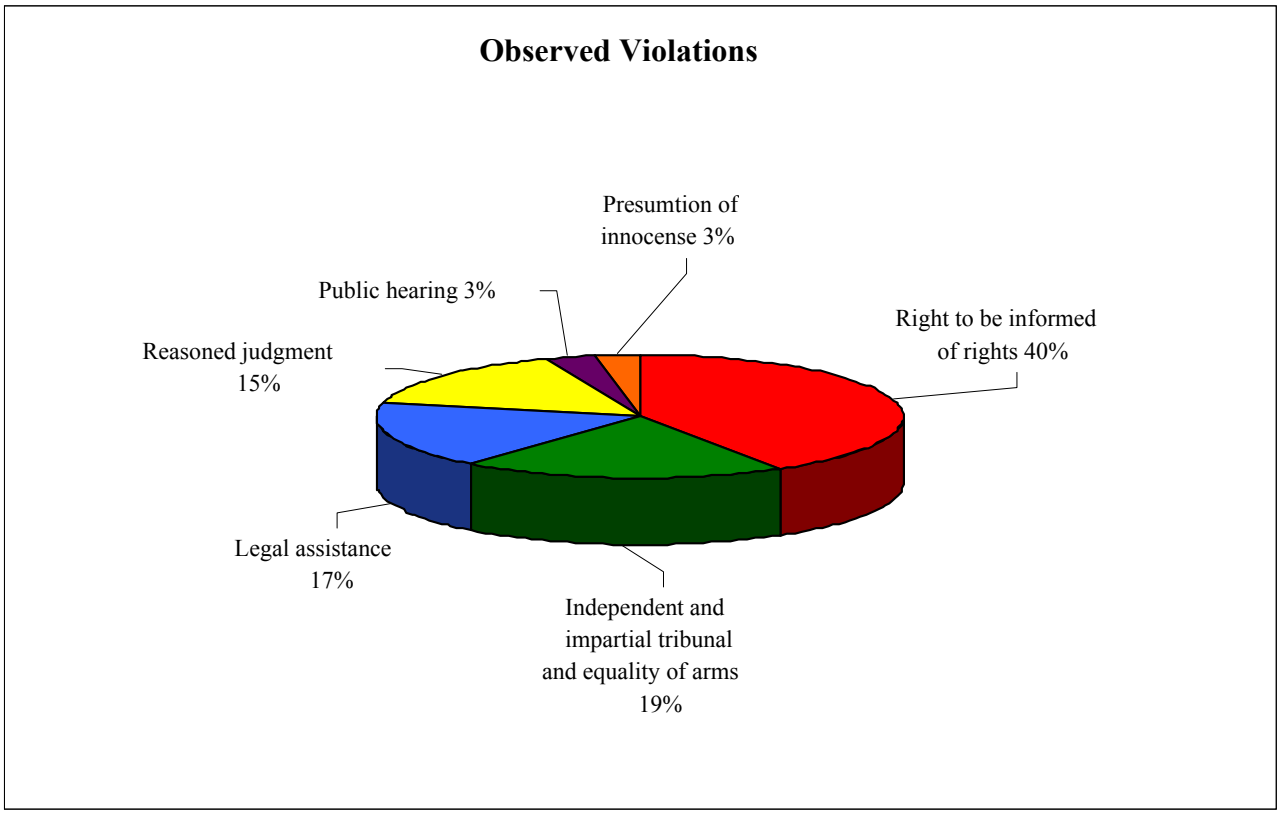
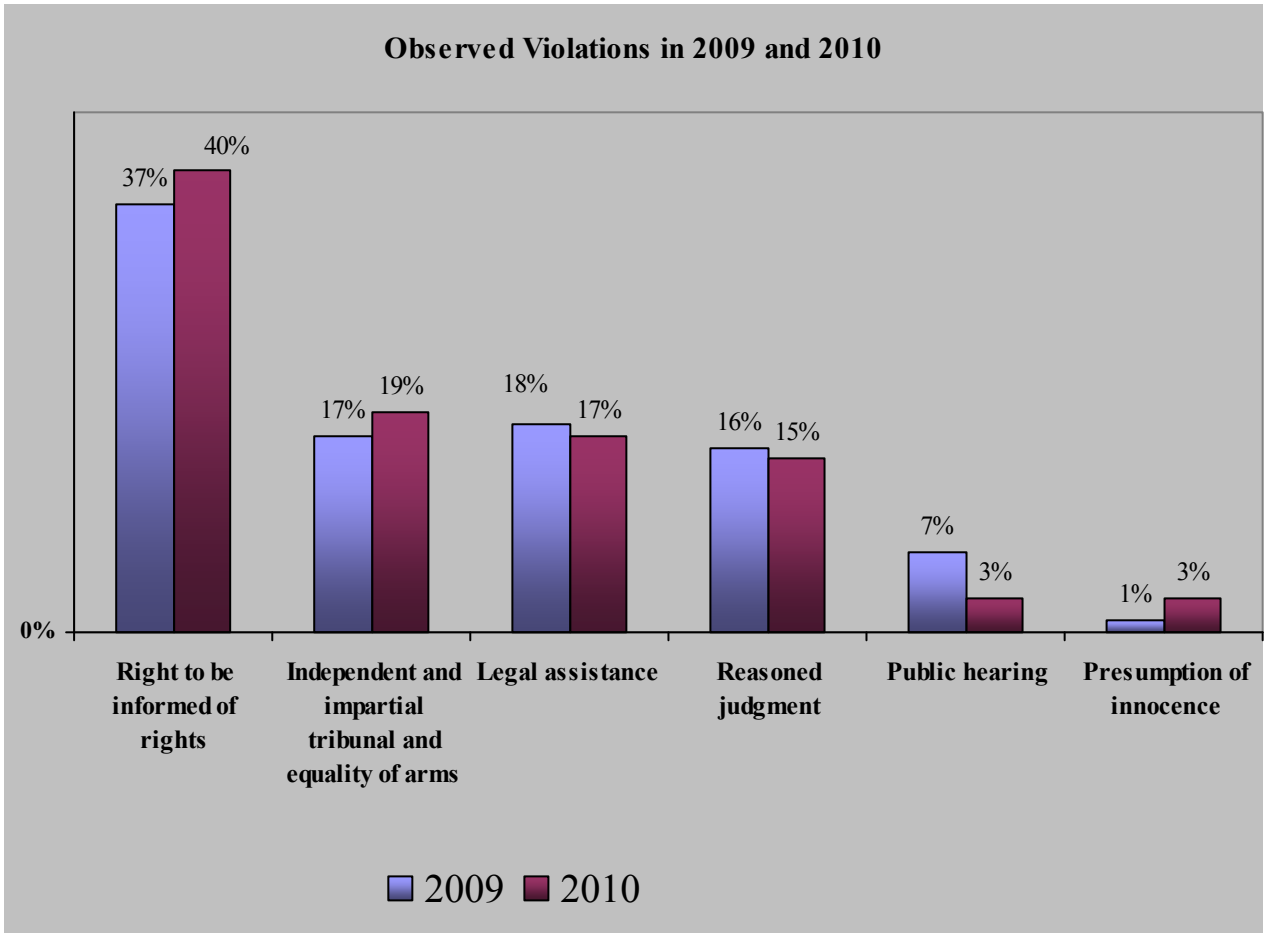


Table 8: Comparative Chart of Fair Trial Violations Monitored in 2009 and 2010



1. The right to a public hearing

Public hearings are a core safeguard of fair trials. The ECHR and OSCE commitments provide for public access to all hearings, except in a number of narrowly defined circumstances.[16] Further, according to Article 27 of the Azerbaijani Code of Criminal Procedure (CPC), court hearings in criminal cases shall be held publicly in all courts of the Azerbaijan Republic, unless it is shown to be necessary to have closed hearings in order to safeguard certain state, professional and commercial interests and/or personal or family privacy.

The right to a public hearing is generally observed with a few exceptions. According to the information gathered during the 2010 Programme, this right is duly observed in general. However, the right to a public hearing is often jeopardised because of the small size of the courtrooms. In addition, on an exceptional basis, several court hearings were held outside courtrooms, at facilities that could not provide easy access to the public, including within judges' offices. While the Project Team fully acknowledged that this conduct is the exception rather than the standard, trial monitors were in some cases not allowed to observe these court hearings and they reported more than ten court hearings when judges, without any explanation, did not allow members of the public to attend a named court hearing. In the majority of the courts the Project Team visited, information on the name, the court adequately displayed the time and venue of hearings. However, the Project Team did visit courts where the information displayed was not fully accurate and/or where no information at all was displayed. This indirectly jeopardises the transparency of judicial proceedings.[17]

Summary of positive and negative trends. The Project Team noted a significant improvement in the public accessibility of trials. In general, the Project Team did not observe any restrictions imposed by the court or court officials, which interfered with the right to a public hearing. However, many courtrooms remain too small to accommodate adequately those who wish to observe court hearings.

2. Delays in the commencement of court hearings

Delays in hearings as a court management issue. The ECHR provides for the right of everyone arrested or detained to be brought promptly before a judge or other officer authorized by law to exercise judicial power and the entitlement to be tried *within a reasonable time*.. Along with

[16] Article 6(1) of the ECHR, and Copenhagen Document (1990) paragraph 5.16.
[17] In some courts, the list of pending cases did not generally include the time of court hearings. Trial observers had to obtain this information from the court's registry.

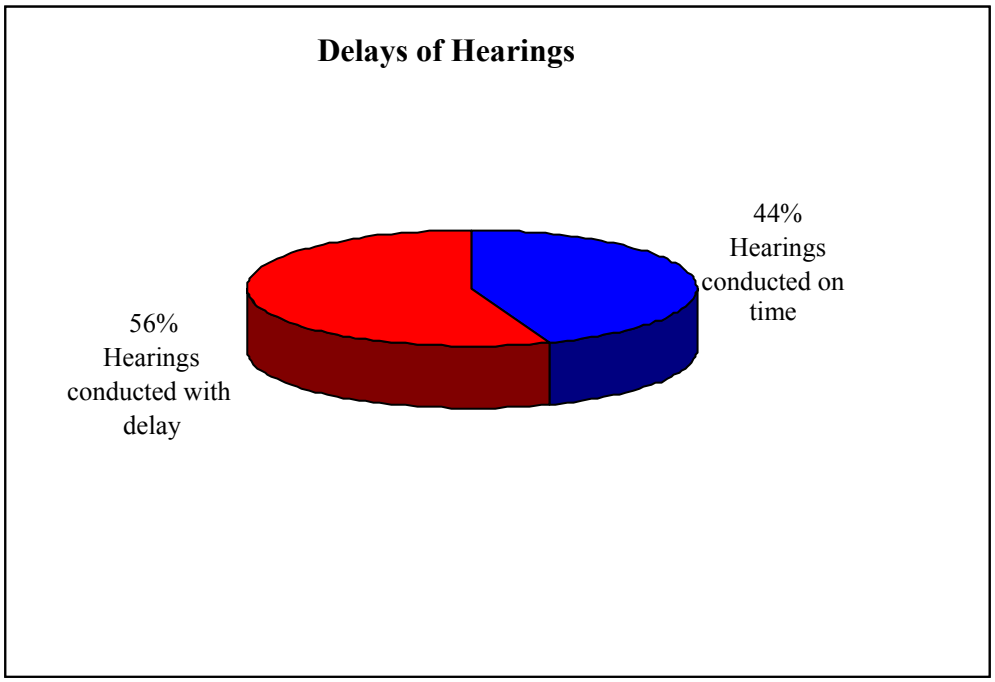
postponements of court hearings, often caused by the absence of one of the parties, the Project Team reported delays in the commencement of the actual court hearing as the most common problem observed regarding the effective management of the courts and the organisation of court proceedings.[18] Thus, delays in the commencement of remain a shortcoming. The reasons for these delays and the rescheduling of the hearings differed from case to case, and in some cases, they were not stated by the court. Moreover, judges' workload is also a contributing factor to delays.

Multiplier effect of delayed start times in heavily scheduled courtrooms. In addition, as different judges often use the same courtrooms on the same day, it is highly probable that a delayed start of one hearing causes delays in subsequent hearings scheduled in the same courtroom. Consequently, delays in the commencement of court proceedings in one case may influence due process and the proper examination of subsequent cases. For example, postponement of court hearings may inadvertently force judges into a position of non-compliance with the deadlines regarding adjudication of cases, as provided by the domestic legislation. Finally, widespread non-observance of the appointed time and date for the commencement of trials inevitably causes public dissatisfaction and reduces the justice system's capacity to function in an effective and timely manner, according to the schedule it sets for itself.[19]

[18] In Nizami District Court, only two out of the eleven scheduled hearings that the monitors observed, took place within a three-month period. The first hearing was postponed because the accused had not received the indictment. Two subsequent hearings were postponed because the accused was not brought to court. Another one was suspended because the prosecutor was sick. And another five times the trial was postponed because either the representative of the civil claimant or one of the witnesses failed to attend the court hearings. Moreover, one of the hearings that took place as scheduled was delayed for one hour and a half because the lawyer was late. These delays and postponements caused significant inconveniences to the accused, who was seriously ill. In another court case, the Project Team reported that two hearings were delayed for one hour and 45 minutes each. The reason for both delays was the absence of the prosecutor, who reported to be busy with another court case.

[19] The Project Team reported that the number of postponed hearings in a particular case was higher than the number of hearings, actually held. For instance, in one of the trials the Project Team observed, the observer was present at three consecutive hearings, all of which were postponed for different reasons. The first hearing was postponed due to one of the judges being absent. The second hearing was postponed due to failure of the parties to attend the hearing. The last observed hearing was suspended due to absence of one of the judges. The court did not notify the parties about the postponement of the case in advance and no efforts were made to reschedule the hearing, thus the hearings were postponed immediately after they had started.

Table 9: Delays in the beginning of court proceedings



Hearings conducted on time	429
Hearings conducted with delay	539
All hearings	968

Summary of positive and negative trends. According to the information reported by the Project Team, and directly gathered by the Office's staff directly involved in trial monitoring, over half out of the total cases monitored did not commence at the scheduled time and substantial delays in the commencement generally occurred.

3. Provisional release pending trial

Foundations of the right. The ECHR provides that, everyone has the right to liberty and security of person.[20] Further, according to Article 5(3), everyone arrested or detained shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release pending trial shall be subject to certain guarantees in order to ensure accused persons' appearance at trial proceedings.

Committee of Ministers of the Counsel of Europe recommends to limit the use of detention on remand, encouraging the use of alternative measures to custody wherever possible in view of the

[20] Article 5(1)

importance to promote compliance with fundamental guarantees such as the presumption of innocence and the right to the liberty of the person.[21]

Criteria for the selection of preventive measures. According to Azerbaijan's domestic legislation, home arrest and release on bail are alternative restrictive measures of detention on remand.[22] The danger of an accused's absconding cannot be gauged solely on the basis of the severity of the sentence risked. In order to decide whether to apply alternative measures to remand detention, the judges must assess the actual danger of escape with reference to a number of other relevant factors which may either confirm the existence of such a danger or make it appear so slight that it cannot justify keeping the accused in custody pending the beginning of trial proceedings.[23] The Office also would like to highlight the social and financial repercussions of keeping people in detention without duly justified grounds, which leads in some cases to overcrowding and other violations of the rights of detained persons.

In a landmark decision issued in November 2009[24], the Supreme Court requested lower instances courts to restrict the use of pre-trial detention as restrictive measure pending the beginning of trial proceedings. According to that decision, judges shall consider the possibility of applying other restrictive measures in accordance with the provisions in the CPC, including cases where the accused does not pose a threat to victims, witnesses or the public at large and when there is no risk of interfering with ongoing investigations. Judges need to be satisfied that the accused will appear for trial and, if released, will no pose a danger to any victim, witness or other person. To that end, they may impose such conditions upon the release of the accused as they may determine appropriate, including the execution of a bail bond and the observance of such conditions as are necessary to ensure the presence of the accused for trial and the protection of others.

Summary of positive and negative trends. Despite Azerbaijan's Supreme Courts important guidance in this regard, advising judges to apply detention on remand in exceptional cases and in a reasoned manner, the findings of the 2010 Programme show that courts commonly practice the systematic

[21] Recommendation Rec(2006)13 of the Committee of Ministers to member states on the use of remand in custody, the conditions in which it takes place and the provision of safeguards against abuse. See also *Kaszczyniec v Poland* (22 May 2007) 59526/00 para. 57

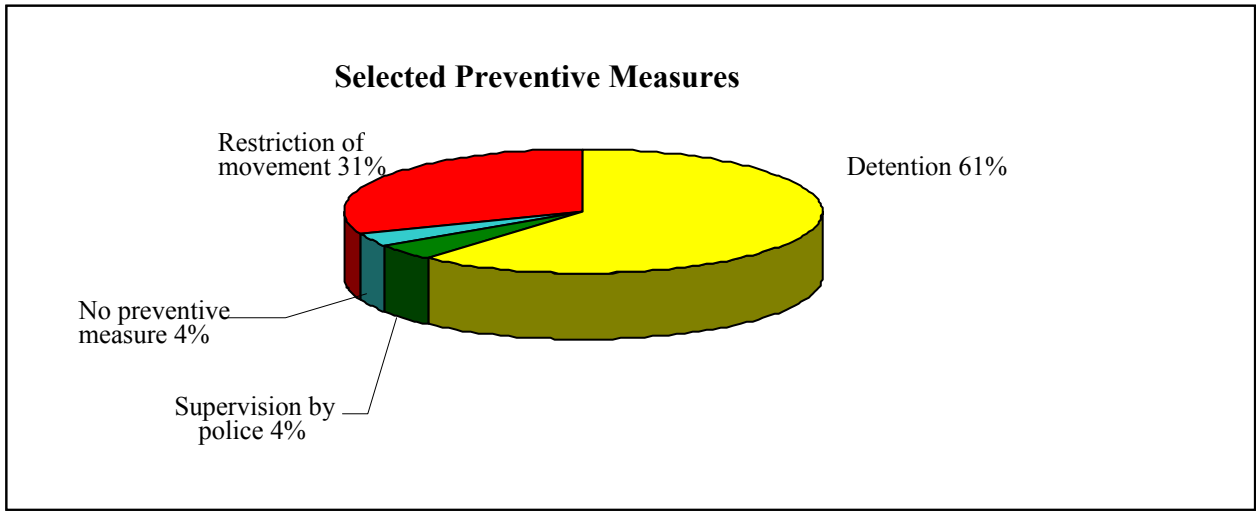
[22] Articles 154.4 and 156.2 of the CPC

[23] *Mansur v Turkey* (08 June 1995) 16026/90 para. 55

[24] Decision On the Use of Detention On Remand, dated 3 November 2009. According to para. 4: […] "*the courts shall be explained that when considering a submission to order the restrictive measure of arrest, they shall primarily examine the possibilities of ordering other restrictive measures as specified by Article 154 of the CPC of the Republic of Azerbaijan, and when the submission is granted, they shall justify why it is impossible to apply another restrictive measure but arrest."*

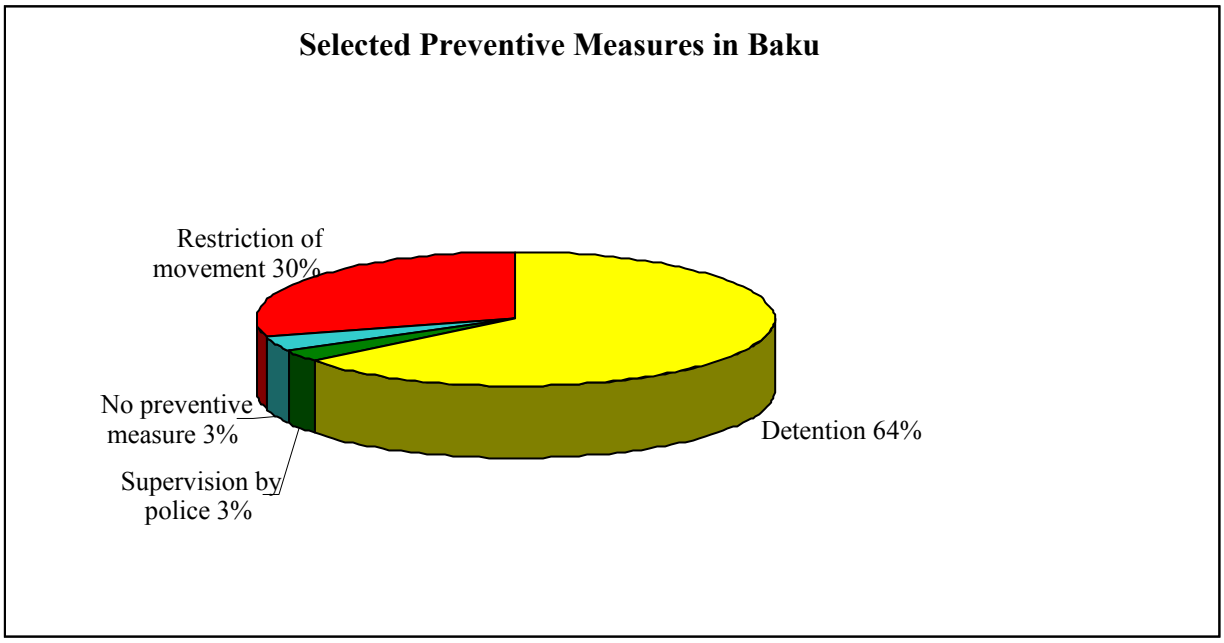
application of pre-trial detention as a restrictive preventive measure against the accused without sound legal reasoning. The Project Team reported that in some cases judges disregard defence motions seeking the application of alternative measures, failing to take into account all relevant factors in every case, such as the accused's lack of past criminal records and the likelihood that they may interfere with ongoing investigations or pose a threat to witnesses, in order to determine whether the accused should be kept in custody. During the reporting period, the Project Team reported that in approximately a quarter of the court hearings monitored, the courts selected other preventive measures, such as restriction of movement or supervision by police. The Office has observed similar negative trends reflecting the systematic use of pre-trial detention as restrictive measure through its previous trial monitoring programmes.

Table 10: Selection of Preventive Measures



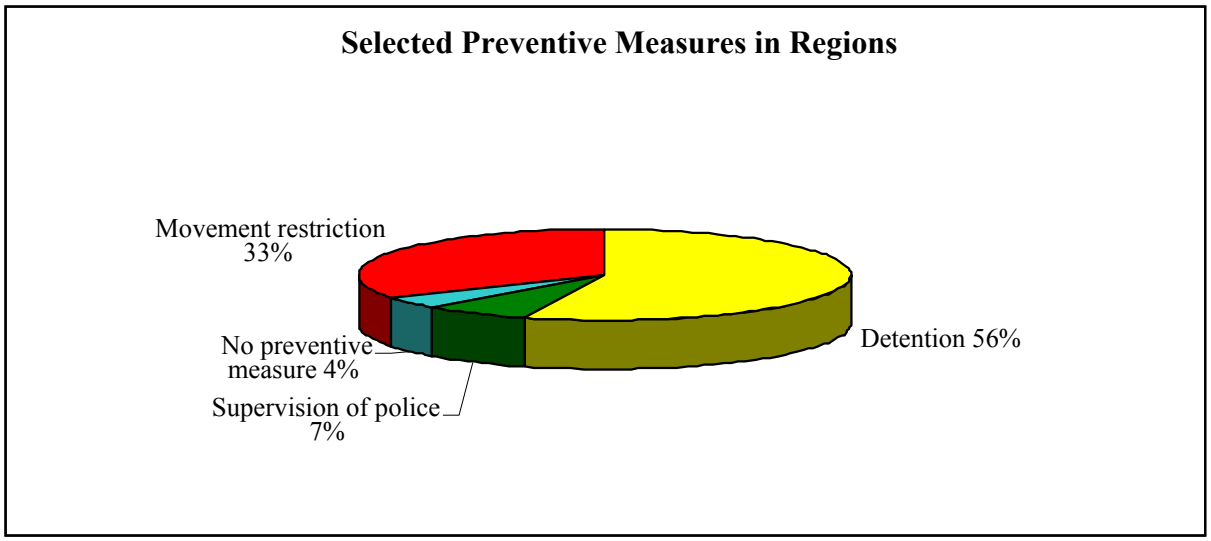
COURT	Detention	Bail	Supervision by police	Restriction of movement	Personal surety	Home arrest	No preventive measure
Baku Court of Appeal	3	0	0	0	0	0	3
Ganja Court of Appeal	10	0	1	0	0	0	0
Sumgayit Court of Appeal	3	0	0	4	0	0	4
Court of Grave Crimes	52	0	2	2	0	0	0
Binagadi District Court	7	0	0	10	0	0	0
Garadagh District Court	1	0	0	0	0	0	0
Khatai District Court	17	0	3	9	0	0	0
Narimanov District Court	13	0	0	6	0	0	1
Nasimi District Court	7	0	0	13	0	0	0
Nizami District Court	11	0	1	6	0	0	0
Sabail District Court	2	0	0	3	0	0	0
Sabunchu District Court	10	0	0	6	0	0	0
Surakhani District Court	4	0	0	3	0	0	0
Yasamal District Court	3	0	0	2	0	0	3
Ganja Kapaz District Court	3	0	3	2	0	0	0
Ganja Nizami District Court	12	0	2	1	0	0	0
Sumgayit City Court	3	0	0	7	0	0	0
Absheron District Court	12	0	1	12	0	0	0
Gabala District Court	1	0	0	0	0	0	0
Gobustan District Court	1	0	0	1	0	0	0
Jalilabad District Court	1	0	0	0	0	0	0
Khachmaz District Court	1	0	0	0	0	0	0
Lankaran District Court	1	0	0	0	0	0	0
Masalli District Court	2	0	0	0	0	0	0
Salyan District Court	2	0	0	0	0	0	0
Shamakhi District Court	1	0	0	3	0	0	0
Shusha District Court	0	0	0	2	0	0	0
TOTAL:	**183**	**0**	**13**	**92**	**0**	**0**	**11**

Table 11: Selection of Preventive Measures - Baku



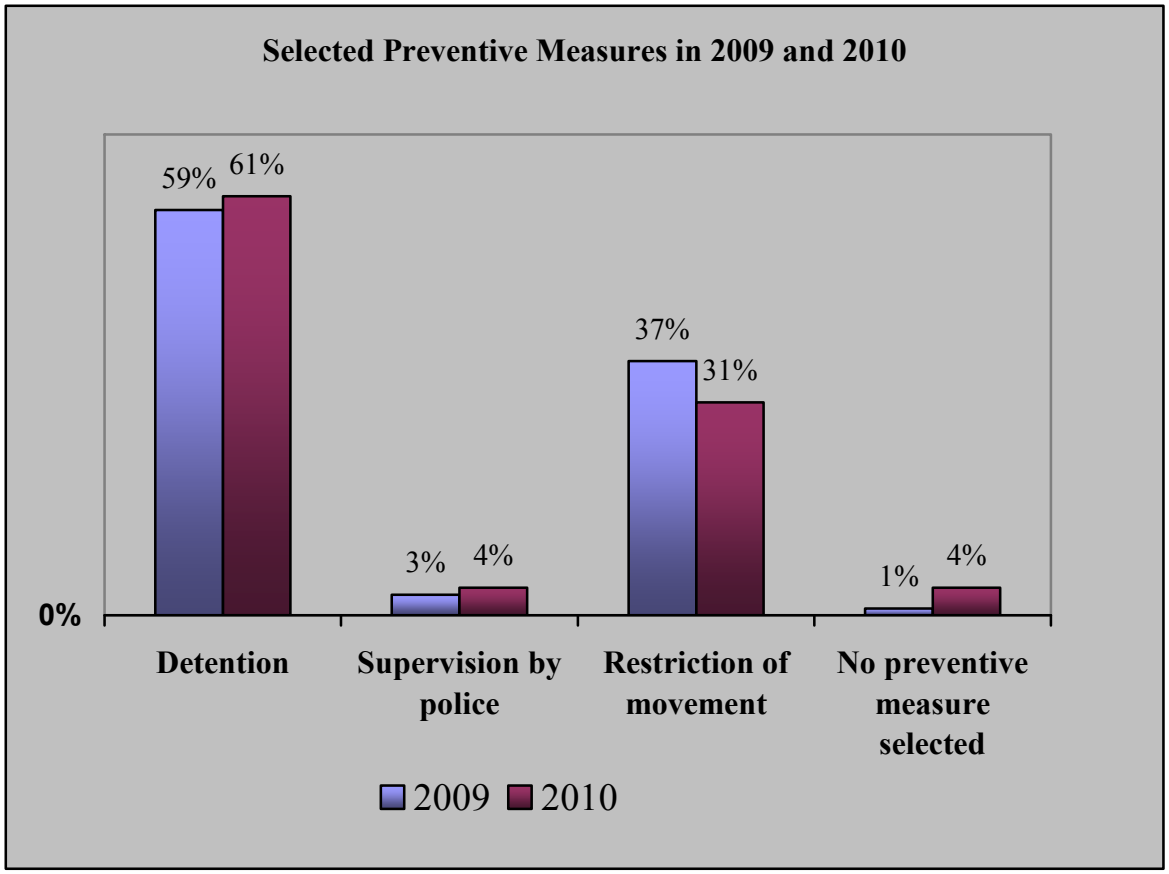
COURT	Detention	Bail	Supervision by police	Restriction of movement	Personal surety	Home arrest	No preventive measure
Baku Court of Appeal	3	0	0	0	0	0	3
Court of Grave Crimes	52	0	2	2	0	0	0
Binagadi District Court	7	0	0	10	0	0	0
Garadagh District Court	1	0	0	0	0	0	0
Khatai District Court	17	0	3	9	0	0	0
Narimanov District Court	13	0	0	6	0	0	1
Nasimi District Court	7	0	0	13	0	0	0
Nizami District Court	11	0	1	6	0	0	0
Sabail District Court	2	0	0	3	0	0	0
Sabunchu District Court	10	0	0	6	0	0	0
Surakhani District Court	4	0	0	3	0	0	0
Yasamal District Court	3	0	0	2	0	0	3
TOTAL:	**130**	**0**	**6**	**60**	**0**	**0**	**7**

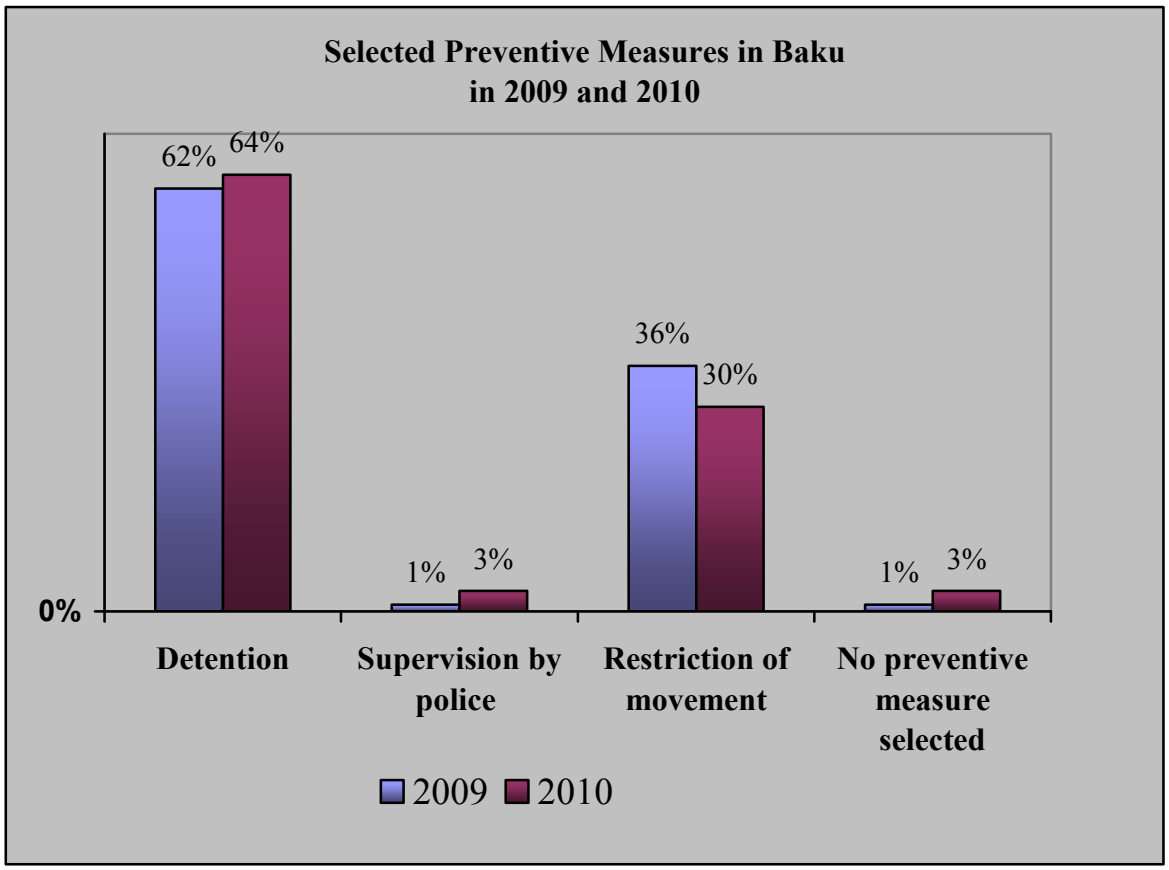
Table 12: Selection of Preventive Measures - Regions

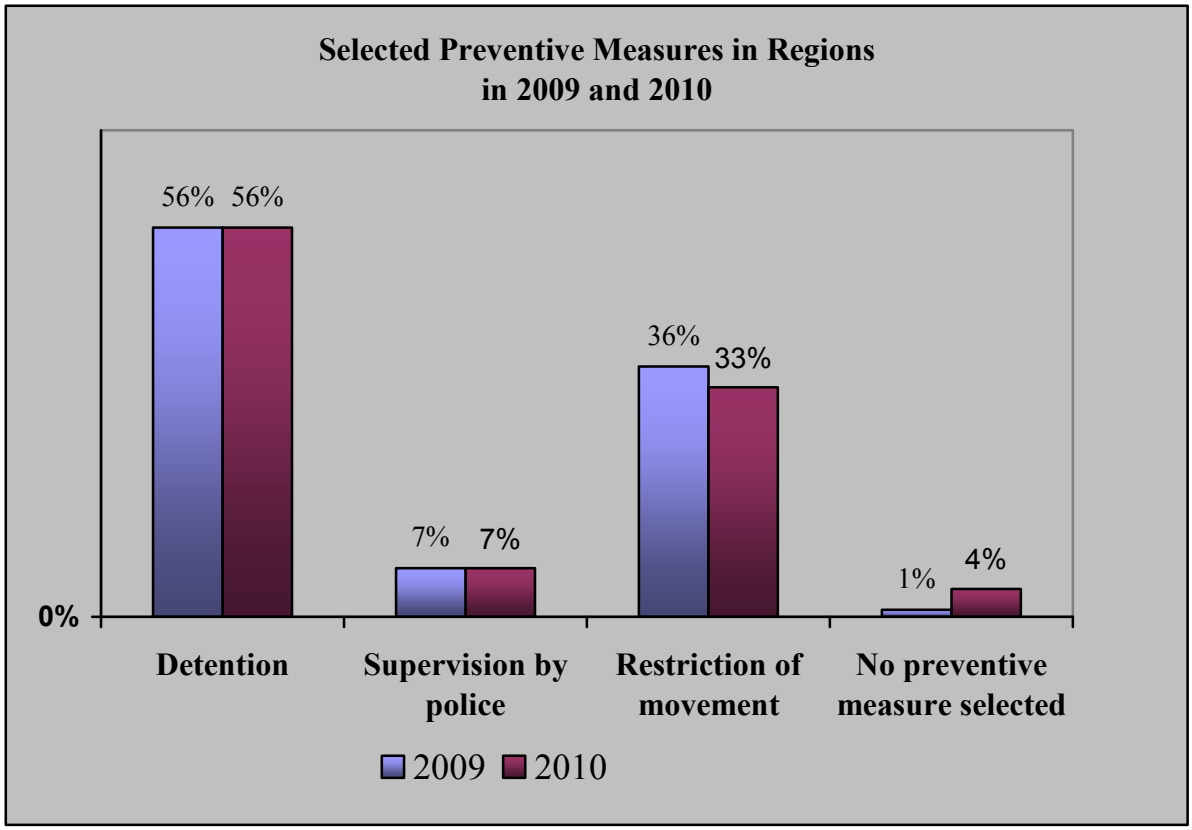


COURT	Detention	Bail	Supervision by police	Restriction of movement	Personal surety	Home arrest	No preventive measure
Ganja Court of Appeal	10	0	1	0	0	0	0
Sumgayit Court of Appeal	3	0	0	4	0	0	4
Ganja Kapaz District Court	3	0	3	2	0	0	0
Ganja Nizami District Court	12	0	2	1	0	0	0
Sumgayit City Court	3	0	0	7	0	0	0
Absheron District Court	12	0	1	12	0	0	0
Gabala District Court	1	0	0	0	0	0	0
Gobustan District Court	1	0	0	1	0	0	0
Jalilabad District Court	1	0	0	0	0	0	0
Khachmaz District Court	1	0	0	0	0	0	0
Lankaran District Court	1	0	0	0	0	0	0
Masalli District Court	2	0	0	0	0	0	0
Salyan District Court	2	0	0	0	0	0	0
Shamakhi District Court	1	0	0	3	0	0	0
Shusha District Court	0	0	0	2	0	0	0
TOTAL:	**53**	**0**	**7**	**32**	**0**	**0**	**4**

Table 13: Comparative Chart - Selection of Preventive Measures







4. The right to a trial by an independent and impartial tribunal

Foundations of the right. The right to a fair and public trial by an independent and impartial tribunal is enshrined in the OSCE commitments, the ICCPR and the ECHR. Article 127 of the Azerbaijani Constitution and Article 28 of the CPC confirms this right. The independence and impartiality of tribunals is based largely on the institutional framework of the judicial branch of government, whose independence from the executive and legislative branches of government and other influences is guaranteed through an effective separation of powers. However, the scope of the 2010 Programme was limited to an assessment of the appearance to the public of the independence and impartiality of judges in court. According to international law standards and the domestic code of professional ethics, judges shall not appear as having a preconceived idea as to the guilt of the accused or the result of the trial.

Judges' behaviour can raise reasonable doubts about their independence and impartiality. Accordingly, the 2010 Programme was concerned with examining whether the behaviour of judges was such that it could give rise to legitimate doubts regarding their independence and impartiality whilst adjudicating the court case. In this context, the Project Team reported several instances when the behaviour of judges could give rise to such reasonable doubts. These instances included cases in

which: (i) judges openly engaged in *ex parte* communications[25] with the prosecutors or received them into his/her office before or during the court's break; (ii) judges allowed prosecutors to accompany them into the deliberation room without any explanation; and, (iii) judges used their own offices for deliberations, instead of the special deliberation room.[26]

Judges' conduct raises questions of independence and impartiality of tribunal. In approximately ten court hearings observed, the judges' conduct during trial proceedings placed into question the independence and impartiality of the tribunal. This conduct includes: (i) the lack of any reaction by the judges to the prosecutors' manifestly improper behaviour towards the defendant; (ii) the appearance of prosecutorial bias while questioning the accused; and (iii) the judges' failure to inquire at the preliminary hearings about full and proper compliance with the accused's rights during the pre-trial stage.[27] Further, the Project Team observed other instances when the judges granted motions the prosecutor raised, yet refused almost all of the motions the defence counsel raised without any sound reasoning, unless the prosecutor was in agreement with them. In addition, the Project Team reported a substantial number of court hearings where the judges were negligent in investigating sound and serious allegations by the defendants regarding violations that allegedly took place during the pre-trial investigation. There were cases when judges even entered into an argument with defence counsel in support of the prosecution's arguments.[28] In 11 court hearings, the presiding judges interrogated the accused and witnesses using leading questions, including questions, which appeared to violate the principle of the presumption of innocence.[29]

Defendant's right to have evidence considered fairly in the adversarial system of trial. When judges engage in conduct during court proceedings that appears biased, especially in favour of the prosecution, they deprive the defendant of the opportunity and legal entitlement of having his evidence considered by the court fairly, independently and impartially. In addition, this conduct on the part of judges denies the defendant of the basic right provided by the underlying the adversarial system of trial of having an impartial judge see fair play in the conduct of the case against him. According to the standards of ECtHR case law and OSCE commitments, one lawyer (the prosecutor)

[25] Communications between the judge and one party to the proceedings, excluding the other party in the interests of justice.
[26] The Project Team observed in (i) over 20 court hearings; (ii) in 2 court hearings; and (iii) in more than 30 court hearings.
[27] This was observed in (i) more than 15 court hearings, (ii) in 7 court hearings, and (iii) in more than 200 court hearings.
[28] For example, in more than 15 court hearings the defendants alleged that the witnesses' testimonies supporting the indictment were given under duress. Notwithstanding that the witnesses supported these allegations, the judge(s) disregarded the allegations and continued adjudicating the cases.
[29] For example, the Project Team reported on cases where the presiding judge asked the accused, who had pleaded not guilty, the following type of questions: […] "*you are here because you have committed a murder"* […] and […] "*why did you kill that person?*."

makes the case against the accused, another lawyer (the defence advocate) makes his case in response, and a third lawyer (the judge) holds the balance between them. This separation of responsibilities between three different lawyers ensures that the case against the accused advances fairly in accordance with the rules of evidence and procedure. The core principle is that according to the adversarial system, the judge is required to remain detached from the dispute and neutral during the elicitation of the evidence.

In order to enhance the confidence of the population in the criminal justice system, it is imperative that both the defendants and the public observing the court proceedings have a perception of fair and equal treatment, particularly by the court allowing the presentation of exculpatory evidence and both parties to the case, defence and prosecution, to argue their cases fully.

Summary of positive and negative trends. Regrettably, the conduct of some judges continued to show clear signs that they did not have a clear understanding of their own role in ensuring a fair trial. Such behaviour also reflects badly on other judges who make significant effort to conduct hearings in accordance with fair trial standards. The 2010 Programme observations raise further concerns that there are still problems in securing the independence and impartiality of tribunals, particularly regarding politically motivated cases.

5. Presumption of innocence

The presumption of innocence is 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, "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 ICCPR similarly declares, "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 ECHR similarly mandates that "everyone charged with a criminal offence shall be presumed innocent until proven guilty according to law." According to the case law of the ECtHR, the presumption of innocence requires that […] "*when carrying out their duties, the members of a court should not start with the preconceived idea that the accused has committed the offence charged; the burden of proof is on the prosecution, and any doubt should benefit the accused"* […].[30] The presumption of innocence is also a core OSCE commitment.[31]

[30] See *Barbera, Messegue and Joabardo v. Spain*, ECtHR Judgment of 6 December 1988, para 77.
[31] Copenhagen Document (1990).

Further, the presumption of innocence is an inalienable part of Azerbaijan's body of legislation as reflected in its Constitution and CPC.[32]

Excessive use of metal cages and handcuffs. The Project Team assessed the behaviour of judges and prosecutors towards the accused during the court proceedings with regard to their observance of the right to presumption of innocence. They noted that frequently accused persons are held in metal cages and or in handcuffs while in the courtroom, which infringes upon the presumption of innocence.

The Project Team observed that these restrictive practices are widespread and seem to be systemic in Azerbaijan's courts, regardless of the gravity of the charges at stake and of any security considerations related to a real threat that accused could pose in the courtroom, which disregards the accused's dignity and may constitute excessive use of force. However, the Project Team reported a few commendable examples, when the judge(s), either on their own initiative or upon requests by the defendants, ordered the court bailiffs to release the accused from the metal cage. The Office has recommended in previous trial monitoring reports that the Ministry of Justice discontinue the use of metal cages in criminal hearings, particularly in the case of non-violent crimes, because their use implies that the accused requires confinement in a metal cage, an implication, which is a *de facto* violation of the presumption of innocence.

Prosecutors use inappropriate conduct and language. The Project Team also observed more than 40 instances of prosecutors, who used inappropriate conduct and language when addressing or speaking about the defendant, for example referring to the defendant as "a criminal." Prosecutors have the duty and obligation to present the prosecution case in a fair manner, without the use of intemperate language, which indicates anything other than presumption of innocence, or that characterising the accused as a convicted person before the court has issued its final ruling.

Summary of positive and negative trends. The findings in the 2010 report reiterate shortcomings which have not been solved yet, particularly in connection with political motivated cases. The Project Team reported that in these cases in particular, judges, prosecutors and court staff demonstrated a preconceived idea that the accused had committed the offence before considering the evidence, in violation of the judge's professional responsibility and the right of the accused to enjoy the presumption of innocence until proven guilty.[33] Further, regarding the detention of accused persons handcuffed and in cages in the courtroom, the external appearance of the presumption of innocence is

[32] Article 63 of the Constitution and Article 21 of the CPC.
[33] Monitors observed this in approximately 10% of the cases.

paramount and it is essential that the accused persons have restricted movement only as a last resort security measure and only in exceptional circumstances.[34]

6. Equality of arms

Equality of arms, in the sense of "fair balance" is one of the core elements of a fair trial. The equality of arms principle requires that all parties to the proceedings shall have equal opportunities to present their case to the court under conditions, which do not place them in disadvantage.[35] This means the parties to a criminal trial have the opportunity to become familiar with and comment on all evidence.[36] Of particular importance in this context is the appearance of the fair administration of justice.[37] The concept of equality of arms is also inextricable tied to the fundamental right to legal representation at all stages of the trial. The general fair trial requirement is that judges must allow defendants to present their evidence in court, including by calling and examining witnesses whose testimony is relevant to the case, and must allow defendants to examine any witness called by the prosecutor. The procedure for the summoning and hearing of witnesses must be the same for the prosecution as the defence. Thus, any conduct of a judge, which disallows witnesses from presenting exculpatory evidence on behalf of the defence, and prohibits the defence from cross-examining witnesses for the prosecution demonstrates bias against defendants.

ECtHR relevant case law. In the recently reported case of *Pirali Orujov v. Azerbaijan*[38] the ECtHR found Azerbaijan to be in violation of Article 6 of the ECHR on the ground that the Supreme Court heard the applicant's cassation appeal in his absence.[39] Thus, the conduct of fair proceedings requires,

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[34] Recidivists with past criminal records and depending on the gravity of the crimes at stake.
[35] See *De Haes and Gijsels v. Belgium*, ECtHR Judgement of 24 February 1997, para. 53.
[36] Ruiz-Mateos v. Spain, June 23, 1993, Series A, No. 262; 16 E.H.R.R. 505, para. 63.
[37] Bulut v. Austria, February 22, 1996, R.J.D. 1996-1, No.3; 23 E.H.R.R. 84, para. 47.
[38] Application no. 8460/073, February 2011.
[39] For example, paragraphs 42 to 46 of the judgment state:
"[...] 42. The Court reiterates that the concept of a fair trial includes the principle of equality of arms and the fundamental right that criminal proceedings should be adversarial. This means that both prosecution and defence must be given the opportunity to have knowledge of and comment on the observations filed and the evidence presented by the other party (see Brandstetter v. Austria, 28 August 1991, §§ 66-67, Series A no. 211).43. Moreover, Article 6 of the Convention, taken as a whole, guarantees that a person charged with a criminal offence should, as a general principle, be entitled to be present and participate effectively in the hearing concerning the determination of the criminal charges against him. This right is implicit in the very notion of an adversarial procedure and can also be derived from the guarantees contained in sub-paragraphs (c), (d) and (e) of paragraph 3 of Article 6 (see Colozza v. Italy, 12 February 1985, § 27, Series A no. 89, and Stanford v. the United Kingdom, 23 February 1994, § 26, Series A no. 282-A). It is difficult to see in the present case how the applicant could have exercised these rights without having prior notice of the hearing.44. Furthermore, the Court notes that a public prosecutor was present at the cassation appeal hearing and made oral submissions to the court. These submissions were directed at having the applicant's appeal dismissed and his conviction upheld. In such circumstances and having regard to the fact that the applicant was not legally represented, it was incumbent on the Supreme Court to take measures aimed at ensuring the applicant's presence in order to maintain the adversarial character of the proceedings. However, there is no indication that the Supreme Court, while deciding to proceed with the hearing in the applicant's absence, checked whether the summons had indeed been served on the applicant. The decision of the Supreme Court was silent on the issue of the applicant's absence from the hearing.45. The Court further observes

the active participation of the accused and in complex cases, when serious criminal charges are at stake, a defence lawyer is the only person who can effectively challenge these charges brought against the accused.

Judges' equal consideration of defendants' motions, witnesses and right to cross-examine. The Project Team reported a substantial number of cases were the judge(s) dismissed motions raised by the defendants without a sound consideration of the issues at stake and, more importantly, without issuing a qualified legal reasoning.[40] Further, in more than 30 court hearing judges refused requests by defence counsel to invite witnesses who were crucial for the defence also without any reasoning, but rather following the advice of the prosecution.

Judges create advantageous conditions for prosecution. In approximately 20% of cases, the prosecution appeared to be in an advantaged position compared to the defendant, for instance by proposing to the court to hold a preparatory hearing in the absence of the victim. When the prosecutor reacted negatively to the accused's request to postpone the hearing, the court disregarded the accused's request. In another case, the prosecutor interfered with the accused's examination of a circumstantial witness and the judge did not prevent him from doing so. In more than 70% of cases, the judges asked only the prosecutors if there had been any violations during the pre-trial investigation period and disregarded the accused's claims on this matter. The Trial Monitoring Team revealed 16 court hearings when judges, without any reasoning, granted the prosecutors' requests to have the witnesses' testimony read out at the a court hearing without the presence of these witnesses. These prosecutors' explanation as to the absence of the witnesses for the prosecution, were in most cases based solely on the prosecutor's allegation of the impossibility of summoning the witnesses to the court. Such practice breaches the principle of adversarial proceeding.

The Project Team also reported about court hearings when judges, without any reasoning, granted the prosecutors' requests to have the witnesses previously recorded testimony read out at the a court hearing without the presence of these witnesses, thereby making cross examination impossible. In approximately 3% of hearings observed, the judge overruled the objections by the defence without

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that in certain cases it has found that the presence in person of the accused at a hearing of an appeal where only points of law were considered was not crucial (see, for example, Kremzow v. Austria, 21 September 1993, Series A no. 268-B, and Kamasinski v. Austria, 19 December 1989, Series A no. 168). The Court considers, however, that the present case is distinguishable from the cases of Kremzow and Kamasinski, where the accused persons were represented by lawyers and in principle each had the opportunity to present his defence. In the present case, more fundamentally, the applicant was unable to do this because he had had no prior notice of the hearing (compare with Ziliberberg v. Moldova, no. 61821/00, § 41, 1 February 2005; Maksimov, cited above, § 41; and Abbasov, cited above, § 33).

46. It follows that the proceedings before the Supreme Court did not comply with the requirement of fairness. There has accordingly been a violation of Article 6 § 1 of the Convention.[…]"

[40] Defence motions related in many cases to the appointment of additional forensic evidence, other expertise and inviting additional witnesses.

any legal reasoning, which violates the principle of adversarial proceedings. In fact, fair trail standards require that the prosecution produce all evidence in the presence of the accused at a public hearing.[41] Only exceptional circumstances and with the judges fair and public reasoning do fair trial standards permit the prosecution to rely on evidence from a witness that the defendant has been unable to cross examine.

In more than five court hearings, judges permitted prosecutors to put pressure on the witnesses who retracted statements previously made against the accused during the pre-trial investigation. The Project Team also reported more than ten court hearings where witnesses retracted previously given testimonies. In several such cases, the witnesses stated in court that the investigation officers had forced them to testify against the accused during the pre-trial investigation. However, the judges disregarded these statements. This demonstrates not only an appearance of bias by the judges towards the prosecution, but a dereliction of the duty of judges to investigate fully the circumstances in which evidence was reportedly obtained during the pre-trial investigation when an allegation is made in court at the trial that a witness has been forced to testify against an accused.

There is a risk that the conditions and facilities within court buildings may have a negative impact on the adversarial nature of court proceedings and the equality of arms. Some courts do not have adequate facilities to accommodate witnesses individually, which may lead to irregularities, such as witnesses communicating with each other before being questioned at the court hearing. In some cases, the witnesses were present in the courtroom, and were able to hear the proceedings and other witnesses' statements before giving their own statements. This raises doubts about the objectivity of their statements. According to the Azerbaijani CPC,[42] witnesses shall be questioned separately during the trial and in the absence of those witnesses yet to be questioned. Full compliance with this rule is required to prevent undesirable and inappropriate influence of the witnesses.

Summary of positive and negative trends. The 2010 report reiterates an overall lack of compliance with the equality of arms principle and the existence of bias in favour of the prosecution, which may be due to the following shortcomings: (i) there are an insufficient number of duly qualified defence lawyers in Azerbaijan and further, State appointed lawyers can provide poor quality representation; and (ii) many judges appear to consistently disregard their duty to adequately inform the accused and witnesses about their rights and safeguard compliance with these rights.

[41] See Barbera, Messegue and Jabardo v. Spain, the ECtHR Judgment of 6 December 1998, para. 78.
[42] Article 328.1 of the CPC.

7. The right to effective legal representation

Basic definition of right to effective legal representation. According to Article 6 (3) of the ECHR, everybody charged with a criminal offence is entitled, as a minimum right, to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require. The right applies to all stages of criminal proceedings, including the criminal investigation phase. Defendants are entitled to (i) defend themselves; (ii) retain private legal assistance of their choosing at their own expense; or (iii) be provided with State appointed legal assistance free of charge (legal aid) in any case according to Azerbaijan's domestic legislation.

Judges are responsible for ensuring the defendant's effective legal representation. According to Azerbaijan's legislation, judges are not explicitly required to advise an accused of the importance of legal representation. However, the absence of legal representation for an accused inevitably leads to a lack of equality of arms, which is a violation of international fair trial standards. Thus, to be compliant with Azerbaijan's international legal obligations, judges are ultimately responsible for ensuring that defendants have access to representation and that State-provided legal assistance is practical and effective. Further, judges are responsible for informing the accused about their fundamental right to effective legal respresentation and ensuring its fulfilment in practice because the poor quality of the legal representation, particularly in case of State appointed lawyers, directly jeopardises the accused's fundamental right to effective legal representation throughout court proceedings[43]. The Project team further noted that the fundamental right to representation by a defence lawyer is in most cases either not properly understood, or underestimated by the accused.

Waiving the right to legal representation. In some court hearings, the Project Team noted that the accused refused legal assistance by signing a written waiver. Of these cases, the Project Team reported that the court's secretary requested the accused to sign the waiver before the court hearing started and before the judge had reasonable opportunity to explain to the accused his right to legal aid. In such situations the presiding judge, as a rule, did not take any action to explain to the accused the importance of having legal assistance, but instead proposed that the accused confirmed his refusal in writing. The Project Team also reported about court hearings where the defendants declined legal representation solely on the ground of lack of financial means and yet the judge failed to explain to

[43] The ECtHR has held that while the authorities can not be held responsible for every shortcoming of a legal aid lawyer, the mere nomination of a defence lawyer is insufficient. Consequently, as the main guarantors of compliance with fair trial standards, the judges must either replace a lawyer is not fulfilling his or her duties towards the client, for whatever reason, or require the lawyer to fulfil his or her obligations to the client. (Artico v. Italy (1981).

them that all accused persons have a constitutional right to counsel, irrespective of their financial situation.[44]

Barriers to effective State-appointed defence counsel and "free" legal aid. The Project Team observed that State-appointed lawyers do not render effective legal aid. The Project Team also reported that in some cases legal aid lawyers requested additional remuneration from the accused or his/her relatives to supplement legal aid allocated funds, which is a blatant violation of the accused person's right to free legal advice. In a substantive number of court hearings, the Project Team reported on the poor quality of the legal services provided by State appointed defence counsel and their failure to perform their duties competently.[45] The Project Team reported further that State appointed lawyers in most cases do not ask any relevant legal questions, raise motions or take any initiative to submit evidence. Rather, State appointed defence counsels often demonstrated a passive attitude, giving the impression that they were not interested in defending the accused.

Procedural problems with the assignment of State-appointed defence council. Among other factors, the procedure for appointing defence counsel in accordance with the requirements in the CPC, is in itself contributing to poor representation. In all reported cases involving State-appointed lawyers, the judges processed the appointment shortly before the beginning of the preliminary proceedings, allowing no time for counsel to prepare adequately the defence. Moreover, State-appointed representation was inconsistent when different State-appointed lawyers represented the accused at the pre-trial investigation and during trial proceedings. Replacing defence counsel in the middle of judicial proceedings is likely to affect negatively the quality and effectiveness of the legal services accused persons receive.

Legal representation and delays of court proceedings. The Project Team also observed the widespread practice of refusal by the lawyers to act on behalf of the accused, or cases where they felt to attend court hearings without sound reasons and, thereby, delayed trial proceedings. As a result, defence lawyers did not have sufficient time to prepare adequately the defence, both in the interests of

[44] For example, in a case decided at the appeal court level, the accused said that he had not been able to appeal to the Supreme Court because he had not been able to hire a lawyer due to lack of financial means. In response, the judge asked the lawyer: *"how much money do you take for writing a cassation appeal, if the person is poor?*" The advocate said: *"50 AZN."* This exchange between the judge and the lawyer confirms the inefficiency of the legal aid system when the accused cannot afford hiring a private lawyer.

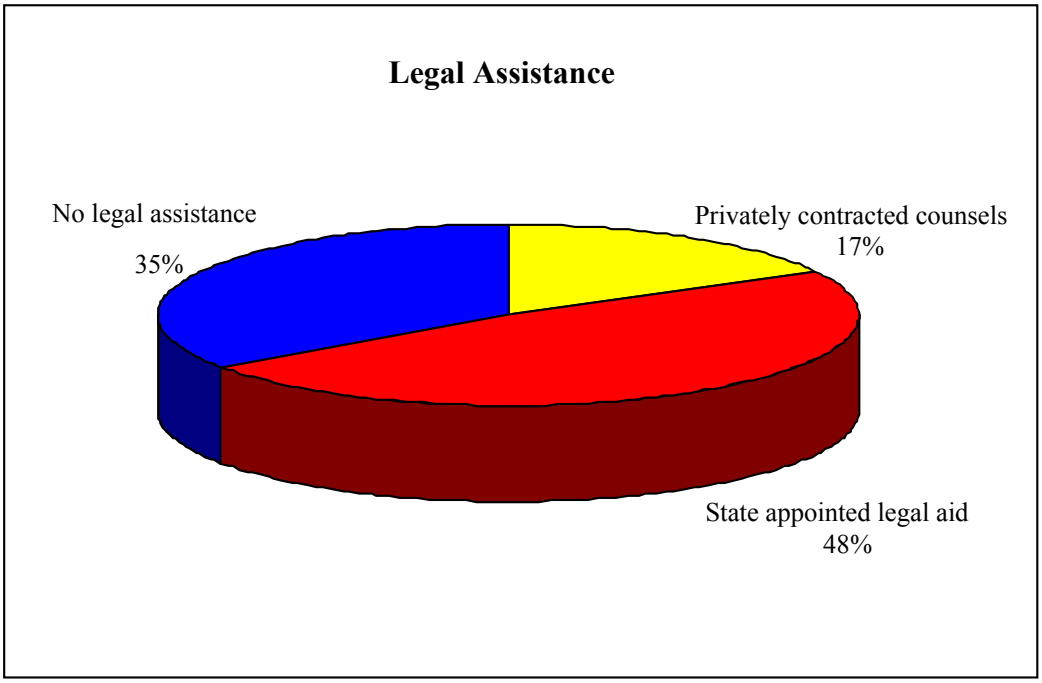
[45] For example: […] "*Lawyer: Your honour, the accused confessed the crime and plead guilty. At the last hearing, he asked to hasten the proceeding. I also support him in this and ask you to finish the trial. Judge: The important thing is not his confession. It must be proven by evidence that he had committed the crime.* Lawyer: *I also think that it was absolutely proved at the court investigation that the accused committed the crime." Lawyer: I think, we should continue the hearing. Judge: But as a rule, always defence side is interested in examination of a witness. Lawyer: Yes, but how many times should I come".*

justice and the accused. According to domestic legislation,[46] whenever defence counsel fails to attend a court hearing without justified reasons, without informing the court in advance and in cases when it is impossible to replace them in a timely manner, the examination of the criminal case shall be postponed. In contradiction to this legal requirement, in approximately 20% of the hearings the Project Team reported that the judge(s) preferred to hold the hearing in the absence of defence counsel or offered the accused to waive his right to defence counsel. [47]

Summary of positive and negative trends. It is a serious concern that during the trial observation conducted in 2010, the Project Team observed no noticeable improvement over prior report periods in the quality of service that State-appointed defence lawyers render or the judges' performance of their duty to ensure that accused persons enjoy their right to representation. Rather, the Project Team consistently observed the poor quality of State appointed lawyers in criminal cases during this reporting period.

On a positive note, the Project Team notes that State appointed legal aid has increased from 7% in 2009 to 20% in 2010 and that the number of cases where no legal assistance was provided has decreased from 74% in 2009 to 68% in 2010.

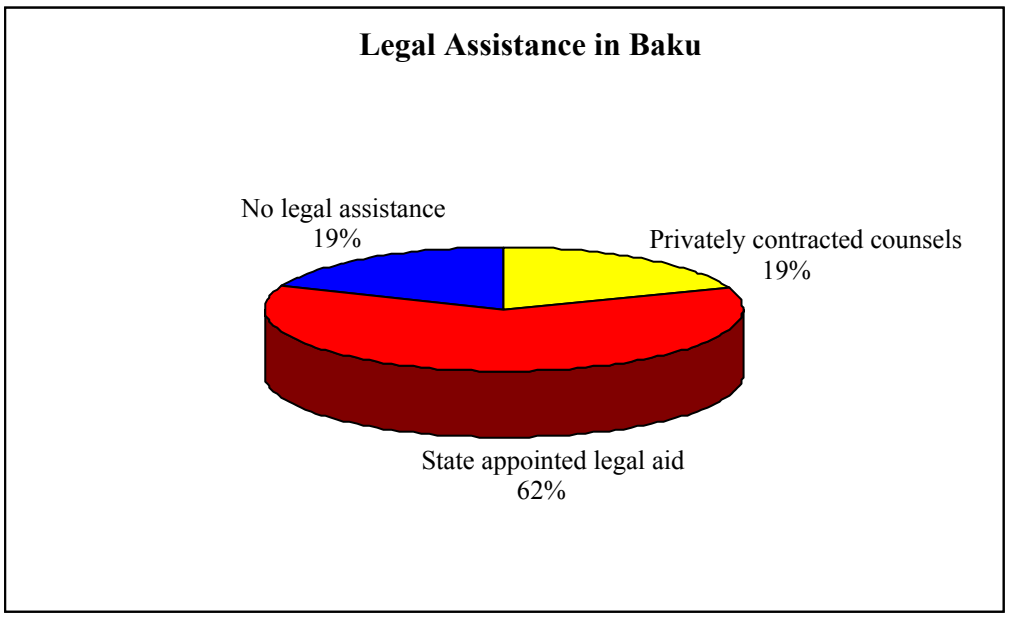
Table 14: Provision of Legal Assistance in Monitored Cases



[46] Article 312.5 of the CPC.
[47] For example: *Judge: Do you have a lawyer? Accused: No. Judge: Will you defend yourself? Accused: Yes. Prosecutor: I offer to postpone the hearing, provide him with lawyer and then hold the hearing. He will not be able to defend himself. Judge: We have appointed a lawyer, but he did not come. Judge: if you do not object, we will hold the hearing. Accused: I do not object. Judge: Then sign a waiver that you officially refuse defence counsel.*

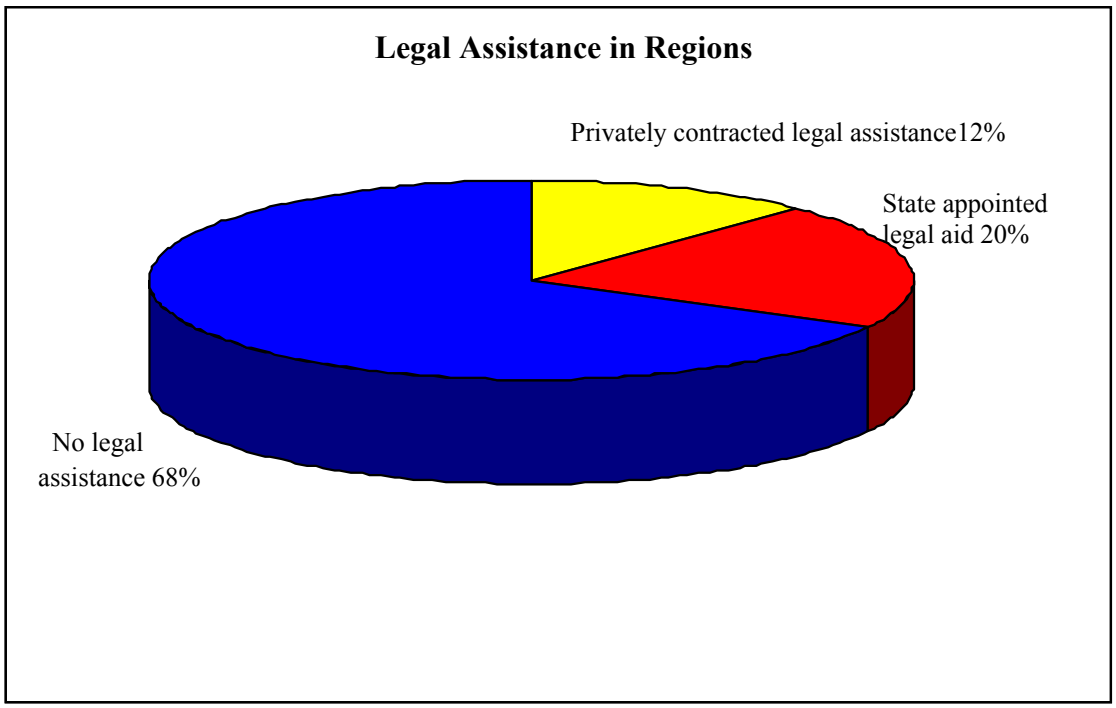
COURTS	privately contracted counsels	state appointed legal aid	no legal assistance provided
Baku Court of Appeal	4	0	1
Ganja Court of Appeal	3	3	5
Sumgayit Court of Appeal	2	1	6
Court of Grave Crimes	16	34	6
Binagadi District Court	3	10	4
Garadagh District Court	1	0	0
Khatai District Court	4	21	3
Narimanov District Court	1	7	12
Nasimi District Court	3	12	4
Nizami District Court	0	17	1
Sabail District Court	0	4	2
Sabunchu District Court	4	10	2
Surakhani District Court	0	6	1
Yasamal District Court	3	3	2
Ganja Kapaz District Court	0	3	6
Ganja Nizami District Court	0	12	3
Sumgayit City Court	0	0	11
Absheron District Court	3	0	24
Gabala District Court	0	0	1
Gobustan District Court	0	0	2
Jalilabad District Court	1	0	0
Khachmaz District Court	0	1	0
Lankaran District Court	1	0	0
Masalli District Court	0	0	2
Salyan District Court	0	0	2
Shamakhi District Court	0	0	4
Shusha District Court	2	0	0
TOTAL:	**51**	**144**	**104**

Table 15: Provision of Legal Assistance – Cases Monitored in Baku



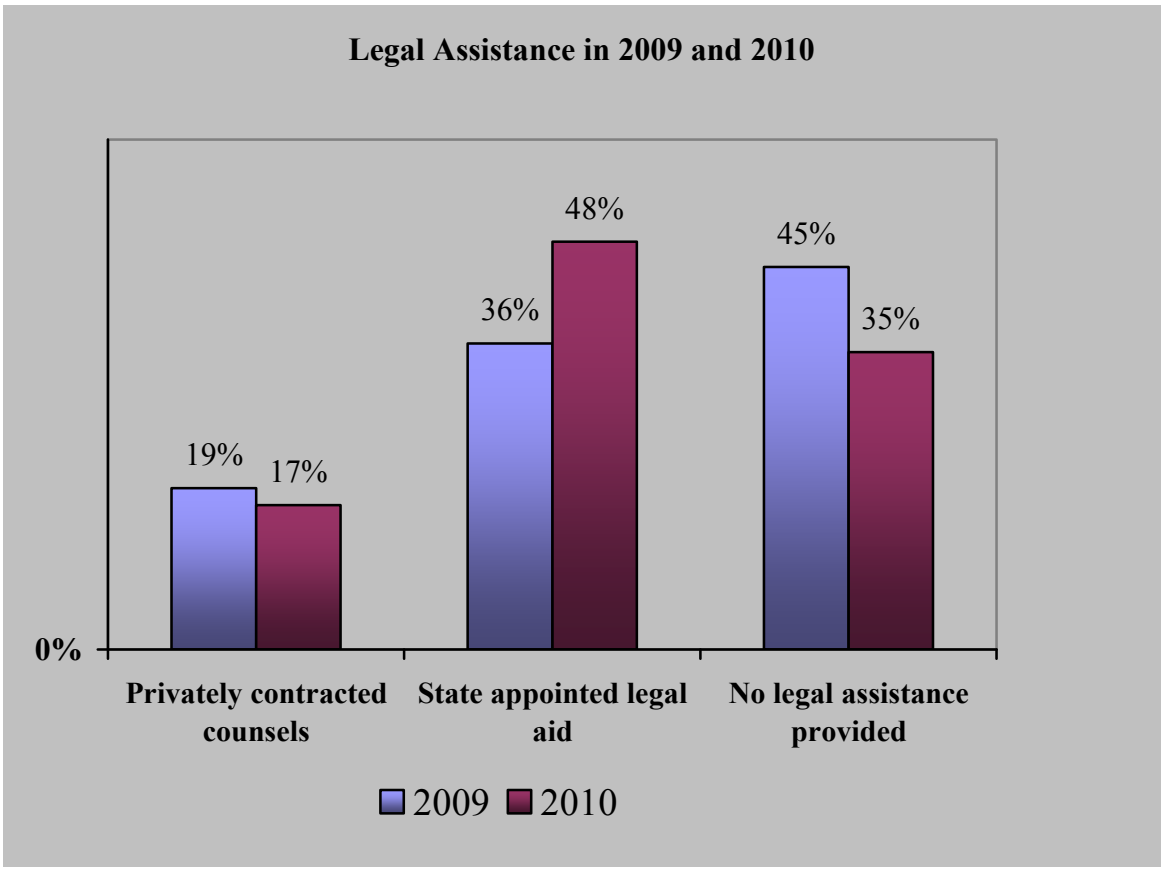
COURTS	privately contracted counsels	state appointed legal aid	no legal assistance provided
Baku Court of Appeal	4	0	1
Court of Grave Crimes	16	34	6
Binagadi District Court	3	10	4
Garadagh District Court	1	0	0
Khatai District Court	4	21	3
Narimanov District Court	1	7	12
Nasimi District Court	3	12	4
Nizami District Court	0	17	1
Sabail District Court	0	4	2
Sabunchu District Court	4	10	2
Surakhani District Court	0	6	1
Yasamal District Court	3	3	2
TOTAL:	**39**	**124**	**38**

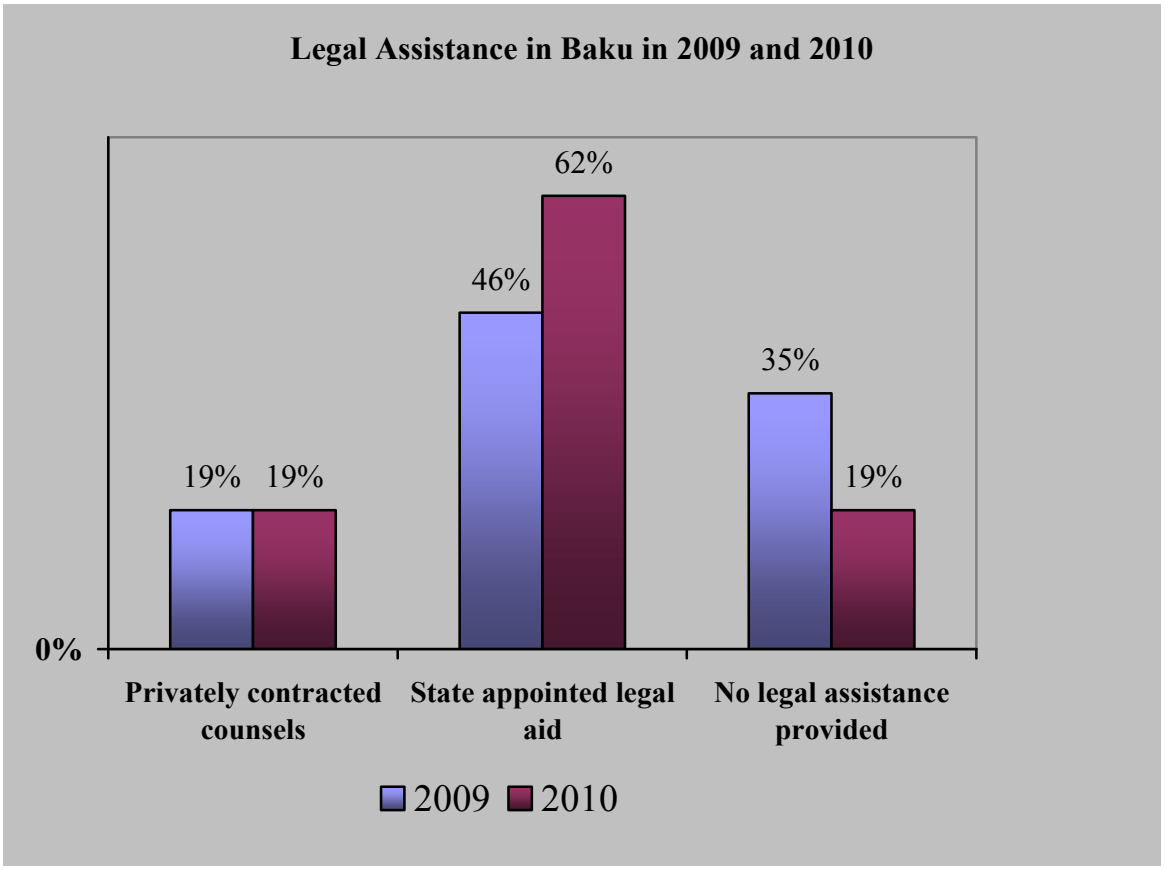
Table 16: Provision of Legal Assistance – Cases Monitored in Regions

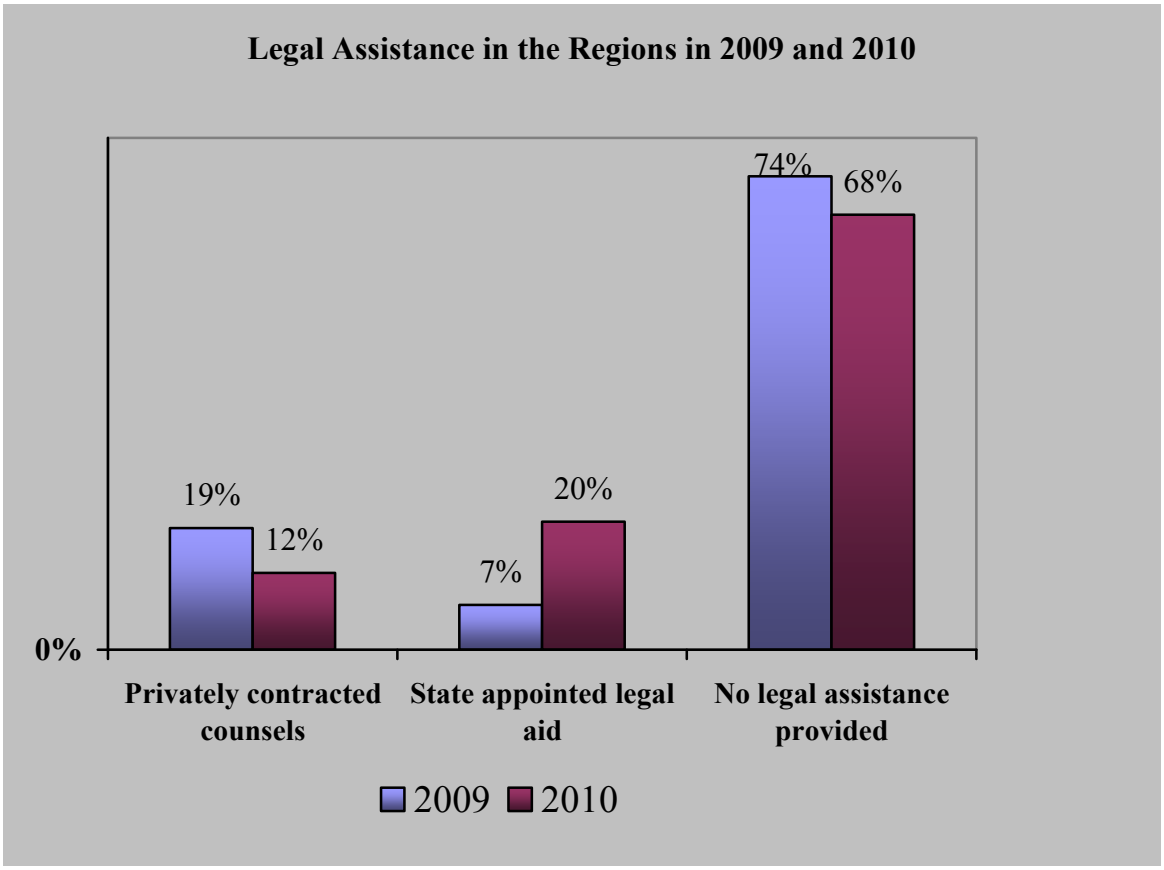


COURTS	privately contracted	state appointed legal aid	no legal assistance provided
Ganja Court of Appeal	3	3	5
Sumgayit Court of Appeal	2	1	6
Ganja Kapaz District Court	0	3	6
Ganja Nizami District Court	0	12	3
Sumgayit City Court	0	0	11
Absheron District Court	3	0	24
Gabala District Court	0	0	1
Gobustan District Court	0	0	2
Jalilabad District Court	1	0	0
Khachmaz District Court	0	1	0
Lankaran District Court	1	0	0
Masalli District Court	0	0	2
Salyan District Court	0	0	2
Shamakhi District Court	0	0	4
Shusha District Court	2	0	0
TOTAL:	**12**	**20**	**66**

Table 17: Comparative Chart Legal Assistance







8. The effective investigation of ill-treatment allegations

Legal obligations related to torture and other forms of ill-treatment. The UNCAT outlines the positive obligation of States to prevent torture and punish those responsible. OSCE Commitments and the European Convention for the Prevention of Torture (ECPT) explicitly clarify the importance of the role of prevention.[48] Specifically, the UNCAT requires states to conduct investigations of torture or other cruel, inhuman or degrading treatment even when there has not been a formal complaint. Further, individuals have the right to complain, to have their complaints investigated and to be protected from any consequent threats or ill-treatment.[49] OSCE commitments also address the right to lodge complaints against torture or other forms of ill-treatment and to have such complaints dealt with promptly.[50]

The UN Special *Rapporteur* on Torture has further stated that when a detainee, his/her relative or defence lawyer lodges a torture related complaint, an inquiry is always required. Moreover,

[48] ECPT, Council of Europe, European Treaties Series, ETS No. 126; OSCE commitments including the Copenhagen Document, (1990) paragraph 16, Budapest Document (1994), and Istanbul Charter for European Security (1999).
[49] Articles 12, 13 and 16 of the UNCAT.
[50] Moscow Document (1991) para. 23.1 (ix and x).

complaints about torture are to be dealt with expeditiously and should be investigated by an independent authority with no relation to that which is investigating or prosecuting the case against the alleged victim.[51]

The ECtHR has held that states are obliged to investigate all "arguable claims" of torture and that this is implicit both in the notion of the right to an effective remedy and the right to be protected from acts of torture.[52] According to ECtHR case law, [...]"where an individual raises an arguable claim that he has been seriously ill-treated by agents of the state, the authorities are obliged to carry out an effective and independent official investigation including the taking of witness statements and the gathering of forensic evidence capable of leading to the identification and punishment of those responsible."[53]

Judges often fail to provide for investigations of ill-treatment allegations. According to Azerbaijan's obligations noted above, the judiciary have a positive and absolute obligation to ensure that torture or other cruel, inhuman or degrading treatment is not justified under any circumstances. Further, law requires state authorities to ensure that torture is not used to obtain confessions and that any confessions obtained under such duress are not admitted in courts as evidence. Consequently, it is essential that judges fulfil their positive duty to investigate all allegations of torture or other forms of ill-treatment. However, the Project Team observed that defence lawyers and accused brought allegations of ill-treatment to the attention of the judges and in most instances, the judge did not ensure the sufficient investigation of such serious allegations. In several cases, the Project Team reported that the judge did not invite the police officers who the accused alleged had perpetrated the ill-treatment to the court for examination initially as witnesses who may become suspects in the case the accused's allegations are proved throughout the court proceedings.

Use of potentially inadmissible evidence and questionable forensic evidence. Azerbaijan's legislation, in line with the UNCAT, provides for sufficient guarantees to exclude any information, documents and other items from being admitted as evidence if they have been obtained by violence, threats, deceit, torture or other cruel, inhuman or degrading acts.[54] Consequently, judges may not consider any evidence, including particularly accused's confessions of guilt, in case they have reasonable grounds to believe that it may have been obtained forcibly, through torture or any other form of ill-treatment.

[51] Report of the Special *Rapporteur* on Torture, UN Doc.A/56/156, July 2001, para. 39(d).
[52] Assenov and others v Bulgaria ECtHR, Judgment 28 October 1998; Aksoy v Turkey ECtHR, Judgment 18 December 1996.
[53] Ribitsch v Austria, ECtHR, Judgment 4 December 1995; Aksoy v Turkey ECtHR, Judgment 18 December 1996; Assenov and others v Bulgaria ECtHR, 28 October 1998, Kurt v Turkey ECtHR, Judgment 25 May 1998, Gakici v Turkey, ECtHR, Judgment of 8 July 1999, Akdeniz and others v Turkey, ECtHR, Judgment 31 May 2001.
[54] Article 125.2.2 of the CPC and Article 15 of the UNCAT.

In some cases reported by the Project Team, judges did not question the admissibility of evidence allegedly obtained under duress, often relying on accused's pre-trial statements, which were conflicting with testimonies made during court hearings.[55] For instance, according to other Project Team observations, in some court hearings the judges did not react to the defence counsel's objections to the objectivity and impartiality of forensic examinations, which may lead to inaccurate results, and refused requests for new ones. In the same number of reported court hearings, the accused presented visible signs of ill-treatment despite contradictory forensic reports, which alleged that the accused did not present any signs of such ill-treatment.

Defence lawyers also questioned in some court hearings the quality of the medical examinations, as well as the independence and objectivity of the forensic expertise used by the authorities in cases involving allegations of ill-treatment. According to them, such examinations were not thorough enough to fully assess any injuries that may have been inflicted upon the accused.

Summary of positive and negative trends. The data gathered in 2010 reiterates shortcomings regarding the courts' obligation to ensure investigations of sound allegations of ill-treatment, or to exclude as evidence information allegedly obtained as a result of ill-treatment. Further, the Project Team reported shortcomings as to the independence or objectivity of forensic evidence.

9. The right to reasoned decisions

Legal obligation of judges to provide reasoning. In Article 6 (1) of the ECHR the notion of "fair hearing" requires judges to provide reasoning in their judgments. One of the functions of a reasoned decision is to demonstrate to the parties that they have been heard. Moreover, a reasoned decision

[55] For example: The judge*: Your testimony given here contradicts the one given in the pre-trial investigation stage. Had you been subjected to any pressure?* The accused*: Yes, there had been pressure against me.* The judge: *if you faced pressure, you would be indicted with the charges of terrorism, but you are not charged with that article.*
***
The accused: *The investigator coerced me to confirm the testimony given in the pre-trial investigation period.* The judge: *You are staying in the detention facility and your statements do not seem convincing.* The accused: *I urge you to take actions in this respect.*
***
The accused: *They hanged me naked for three days. They tortured me. Please, I have to speak; I have to call my witnesses. I have to share my troubles;* The judge*: you have to address the issues on ill-treatment when you give testimony. Only then we can appoint expertise.*

affords a party the possibility of appeal and review by an appellate body. It is only by giving a reasoned decision that there can be public scrutiny of the administration of justice.

Judges fail to provide reasoning The project team reported on cases where motions and submissions filed by the parties during the court proceedings, which required a reply by the judges, where the judges failed to address the issues. Judges' failure to dismiss the motions and submissions with sound reasoning creates the appearance that the judges have neglected their official duties. In most observed cases, when the judges dismissed motions, they did not provide any sound reasoning. However, in view of the context of the cases at stake, the submissions in question appeared to be decisive for the fair resolution of the case and could have lead in some cases to the termination of the criminal case due to lack of evidence. This applies in particular to preparatory hearings, which constitute a critical stage of court proceedings in terms of ensuring compliance with accused's most fundamental fair trial rights throughout other stages of court proceedings, including the right to effective legal representation and the presentation of exculpatory evidence.

Failure to provide written reasoning is an obstacle to appeal. According to the 2010 data, the Project Team's reported that the judgments read out by judges in court mostly lack an adequate reasoning part. Given that the deadline for appeal is contingent upon the date of issuance of the court judgment, the accused needs to know the main grounds for his/her conviction in order to file an effective appeal. In over half of the court hearings the Project Team observed, they noted that judges did not read out to the accused persons the full text of the judgments, as is mandatory in accordance with the domestic legislation, but only those parts related to the sanctions and excluding any information about the grounds for the conviction.

Summary of positive and negative trends. Based on the observations the Project Team considers that the majority of judgments continue to fall short of providing sound reasoning as required by domestic legislation and international fair trial standards. Moreover, in 2010, the Project Team observed that in the majority of cases judgments were only partially read out in court; and that both the acquittal rate (1%), and the incidence of judges' decisions to terminate court cases based on insufficient evidence to support the indictment (1%) remain extraordinarily low. However, on a positive note, the Project team noted a slight increase compared to prior reporting periods in the overall number of judges' decisions to terminate court cases based on insufficient evidence provided by the prosecution.

Table 18: Comparative Chart - Delivery of Judgments

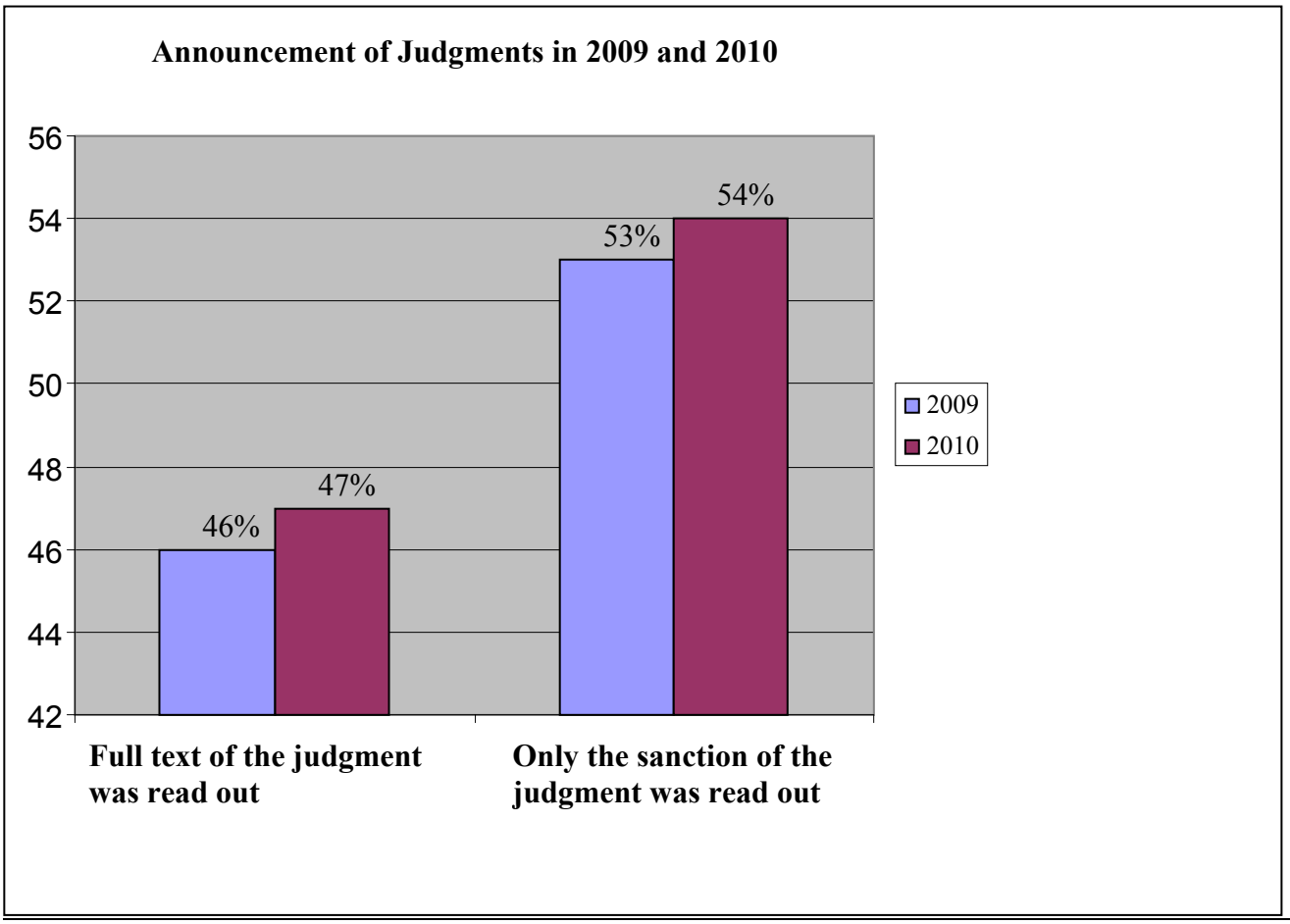
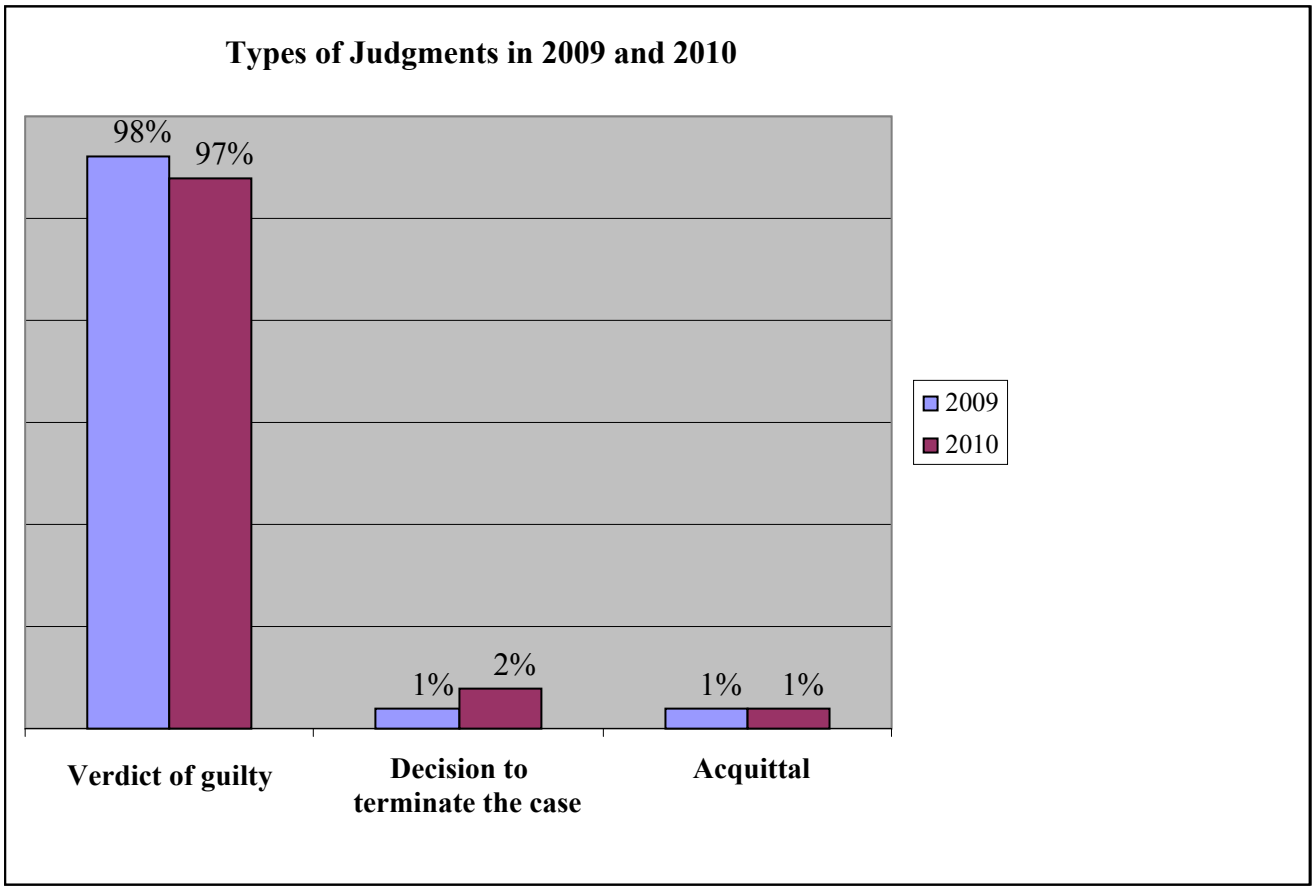
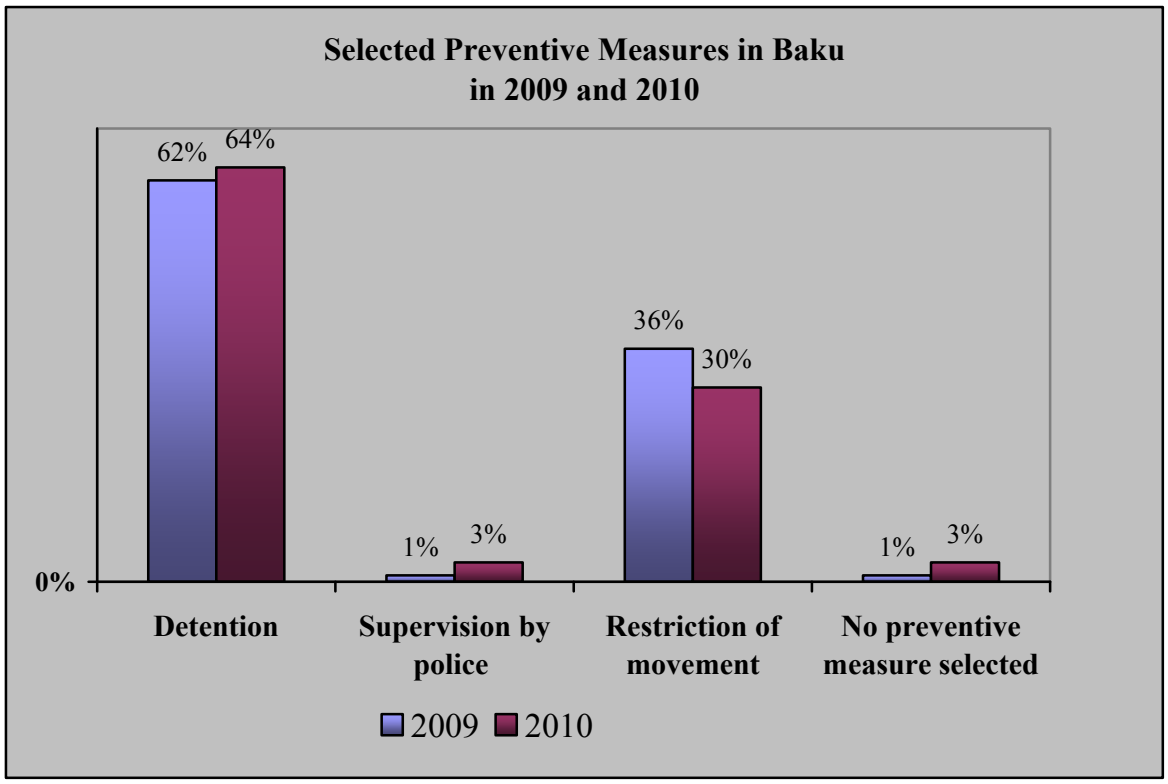


Table 19: Comparative Chart of the Judgements





IV. Recommendations

The Office in Baku presents the 2010 Project Team observations described above to assist the Republic of Azerbaijan promote the development of the effective administration of justice in accordance with OSCE commitments and related international and domestic legal obligations regarding fair trial standards. For this reason, the Office proposes the following recommendations and stands ready to continue assisting all stakeholders in their implementation.

To the Judicial Legal Council and the Judiciary

1. Increasing judges' accountability and rewarding cases of good performance[56]. The Office advises that the Judicial Legal Council continues effectively addressing complaints related to judges' failure to perform their duties, as initiated under the applicable domestic legislation, and applies disciplinary measures as a deterrent for preventing the recurrence of similar fair trial violations. Optimally, members of the judiciary would also be encouraged to perform their duties diligently and rewarded when they comply consistently with fair trial standards in their daily work.

2. Provision of further guidance to judges. The Plenum of Supreme Court is advised to increase its leadership role in continuing to issue guiding decisions for judges of lower courts about how to improve overall court compliance with fair trial standards according to applicable domestic and international legislation, ECtHR case law and good practices.

To the Bar Association

1. *Increasing defence lawyers' accountability and rewarding cases of good performance.* Similarly, the Bar Association is advised to increase its oversight functions to hold defence lawyers accountable for fulfilling their responsibilities. This includes their performance in court and their compliance with the applicable domestic legislation in line with international standards.

2. *Increasing the number of qualified defence lawyers.* The Bar Association is advised to increase its efforts to enlarge the number of duly qualified defence lawyers and improve their skills and professionalism through regular and specialised training and other capacity building activities.

[56] During the reporting period, the Judicial Legal Counsel promoted 8 Judges to the Supreme Court, 34 to Appeal Courts. It terminated the term of office of 18 Judges and applied disciplinary measures to 7 Judges due to shortcomings in their work performance.

Further, the Office advises that the minimum skills for attaining membership to the Bar Association include thorough knowledge of the basic principles and role of defence lawyers, legal argumentation in court, including examination methods of witnesses and the preparation of written submissions, ethical conduct, and applicable domestic legislation and international legal instruments regarding fair trial standards *inter alia.*

3. *Reforming the legal aid system.* The Bar Association, with the support of other Government authorities responsible for providing the necessary financial support, is advised to lead a thorough reform of the legal aid system in order to increase its effectiveness and to ensure quality legal representation in case of State appointed lawyers in the interests of justice. A more effective legal aid system would provide quality free-of-charge legal representation to the accused consistently throughout pre-trial investigation period and court proceedings and would provide for State appointed lawyers reasonable compensation for continuous engagement in court proceedings through all the stages and jurisdictions of Azerbaijan.

To the State authorities, particularly Ministry of Finance

Support the strenghtening of the Bar Association. As mentioned in recommendation no. 3 above to the Bar Association, the Government has also a responsibility to ensure effective legal representation in the case of State appointed lawyers in the interests of justice. Therefore, the Government is advised to provide the Bar Association with the necessary financial support in order to improve the quality of legal representation.

To the Parliament

Support legislative reforms. Also in connection with recommendation no. 3 to the Bar Association, the Office advises the Parliament to support the necessary legislative reforms to ensure effective legal representation in courts. This includes the Code of Criminal Procedure and the Law on Advocates, to provide for a functional legal aid system.

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

TRIAL MONITORING REPORT

AZERBAIJAN

2010

Table of Contents

Acknowledgements

The OSCE Office in Baku (The Office) would like to thank all those involved in the 2010 Trial Monitoring Programme (The Programme) from January through December 2010, as well as those who contributed to the preparation of this report.

An Azerbaijani NGO, the "Tender Monitoring Centre," led by Mr. Alovsat Aliyev, implemented the Programme in close consultation with the Office's Rule of Law and Human Rights Unit's Trial Monitoring Team, including Ms. Gumral Aslanova and Messrs. Kamran Baghirov and Rolf Merckoll, and under the supervision of Ms. Monica Martinez. These staff provided daily guidance and specialized training to a "Project Team" of trial monitors, who the Office's Rule of Law and Human Rights Unit staff selected and trained in specialized methods for gathering facts and grounds through daily monitoring of court proceedings. The Tender Monitoring Centre, as the Office's Implementing Partner, administered the Project Team. The Office is also grateful to the OSCE Office for Democratic Institutions and Human Rights (ODIHR) for developing the trial monitoring methodology, and to international expert Mr. Paul Garlick, who reviewed and edited this report.

The Office's Rule of Law Unit implemented the Programme in close co-operation with the Ministry of Justice and a specialised working group, which includes representatives from the Ministry, the Judicial Legal Council, the judiciary and the Office's Rule of Law and Human Rights Unit. This working group facilitated constructive exchange regarding the Programme's findings. The Office thanks the Azerbaijani authorities for their ongoing and productive co-operation and stands ready to continue assisting the Government, the judiciary and other legal professionals and civil society representatives to implement this report's recommendations to strengthen the rule of law and the respect for human rights in Azerbaijan.

In particular, the Office would like to extend special thanks and acknowledgement to the Ministry of Justice, the Judicial Legal Council, the Prosecution Office, and the Collegium of Advocates.[1] The Office is particularly grateful to the Governments of Finland, Germany, the United States, and the Netherlands, for their extra-budgetary contributions, which made this Programme possible.

[1] The Collegium of Advocates is Azerbaijan's equivalent to a Bar Association.

List of Abbreviations

CPC	Criminal Procedure Code of the Republic of Azerbaijan
CoE	Council of Europe
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
ECPT	European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment
ICCPR	International Covenant on Civil and Political Rights
JLC	Judicial Legal Council
LRC	Legal Resource Centre
ODIHR	the OSCE Office for Democratic Institutions and Human Rights
Office	the OSCE Office in Baku
OSCE	Organization for Security and Co-operation in Europe
UN	United Nations
UDHR	Universal Declaration of Human Rights
UNCAT	United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

List of Tables

I. Introduction

The 2010 Trial Monitoring Report. The OSCE Office in Baku (the Office) produced this 2010 Trial Monitoring Report in co-operation with the Ministry of Justice and the Judicial Legal Council in line with the ongoing State Programme on the Development of the Justice Sector.[2] Thus the Report, as part of the Office's 2010 Trial Monitoring Programme, relates to the accomplishment the following Rule of Law and Human Rights Unit's 2010 programmatic objective: "to promote lawmaking processes and the application of relevant domestic legislation in line with international commitments and standards in the field of human rights and rule of law while contributing to the improvement of the professionalism of the judiciary and other legal professionals in the country."[3]

The objectives of the 2010 Trial Monitoring Programme[4] are to:

(i) improve the administration of justice, increasing the population's confidence in the judicial system;
(ii) enhance compliance with the accused's right to a fair trial;
(iii) follow up with relevant state authorities on court proceedings' compliance with applicable national laws and international standards; and
(iv) follow up with the legislative authorities on the national laws where amendments are needed in order to bring them into line with international standards.

In accordance with the ODIHR Trial Monitoring Methodology,[5] the Office in Baku implemented the Trial Monitoring Programme activities. These included the selection and training of trial observers,[6] monitoring of court proceedings, regular meetings with observers to assess progress, analysis of information and preliminary reports, and regular discussions of reported findings with relevant state authorities and other stakeholders. In addition, during the same project period in 2010, the Office utilized the recommendations of previous trial monitoring reports to support training for and build the capacity of the judiciary and other legal professionals. The Office's Legal Resource Centres (LRCs)[7] organized these activities in Baku and in the regions.

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[2] *State Programme on the Development of the Justice Sector*, 2009-2013.
[3] *2010 Unified Budget* approved by the OSCE Permanent Council in December 2009.
[4] *Project Proposal: Monitoring the Administration of Justice in Azerbaijan - 2010 Trial Monitoring Programme*, project period 1 January 2010 to 31 March 2011, approved on 24 September 2009.
[5] *Trial Monitoring: A reference manual for practitioners*, by the OSCE Office for Democratic Institutions and Human Rights, 2008. In 2010, the OSCE Office in Baku joined ODIHR's Trial Monitoring Advisory Board, as an active member involved in the development of a trial monitoring repository and legal digest for reinforcing the OSCE/ODIHR's institutional memory on trial monitoring issues.
[6] The words trial "monitor" and "observer" will be used interchangeably throughout the report.
[7] The Office developed support for Legal Resource Centres in four urban locations across Azerbaijan, including Sumgayit, Shaki, Ganja and Lankaran following the decentralisation of the court system and the associated need for additional legal

Multi-year Trial Monitoring Programme of the OSCE Office in Baku. In addition, the 2010 Trial Monitoring Report contributes to the larger multi-year collection of observations and recommendations, which the Office's Trial Monitoring Programme (the Programme) has developed using various methodologies and formats since 2003.[8] During the 2010 reporting period, the Trial Monitoring Programme employed qualified legal professionals to monitor a total of 361 cases and 1243 court proceedings. In essence, this Trial Monitoring Programme is the heart of the Rule of Law and Human Rights contribution to the accomplishment of the Office's long-term mandate to "promote the implementation of OSCE principles and commitments as well as the co-operation of the Republic of Azerbaijan within the OSCE framework."[9]

OSCE principles and commitments related to the Trial Monitoring Programme. The OSCE principles and commitments agreed by all OSCE participating States for protecting human rights and fundamental freedoms in relation to fair trail standards and guarantees as defined in the Document of the Copenhagen Meeting of the Conference of the Human Dimension and in the context of other international instruments are:[10]

> *(5.9) — all persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law will prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground;*
>
> *(5.10) — everyone will have an effective means of redress against administrative decisions, so as to guarantee respect for fundamental rights and ensure legal integrity;*
>
> *(5.11) — administrative decisions against a person must be fully justifiable and must as a rule indicate the usual remedies available;*
>
> *(5.12) — the independence of judges and the impartial operation of the public judicial service will be ensured;*
>
> *(5.13) — the independence of legal practitioners will be recognized and protected, in particular as regards conditions for recruitment and practice;*

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resources in the regions. The Centres provide free legal advice to the local population and support training activities for legal professionals in the regions. They also serve as resource facilities, and offer libraries and online access to legal databases.

[8] See 2009 Trial Monitoring Report for detailed information about the scope of previous Trial Monitoring Programmes: 2003-2004, 2006-2007 and 2009.

[9] Article I of the Memorandum of Understanding between the Organization for Security and Co-operation in Europe and the Government of the Republic of Azerbaijan on the Establishment of an Organization for Security and Co-operation Office in Baky, 19 June 2000.

[10] Article I, provisions 5.9-5.21 of the Document of the Copenhagen Meeting of the Conference of the Human Dimension of the CSCE (1990).

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

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

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

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

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

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

(5.20) — considering the important contribution of international instruments in the field of human rights to the rule of law at a national level, the participating States reaffirm that they will consider acceding to the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and other relevant international instruments, if they have not yet done so;

(5.21) — in order to supplement domestic remedies and better to ensure that the participating States respect the international obligations they have undertaken, the participating States will consider acceding to a regional or global international convention concerning the protection of human rights, such as the European Convention on Human Rights or the Optional Protocol to the International Covenant on Civil and Political Rights, which provide for procedures of individual recourse to international bodies.

Contents of the Report. The following 2010 Trial Monitoring Report describes of the Scope and Methodology the Office used for collecting the information elaborated in the Findings and Analysis of Trends, as well as Recommendations and Suggested Implementation Modalities.

Progress made through ongoing legislative and judicial reforms. During the reporting period, the Law on Courts and Judges and the Law on the Judicial Council, were amended[11] and the two Presidential Decrees dated 15 July 2010 and 9 August 2010 issued to facilitate the implementation of the said legislation introduced substantial changes to the judicial system. This included the

[11] 22 June 2010

establishment of new Courts at the regional level, including the Grave Crimes Courts[12] and the Economic Administrative Courts.[13]

In order to alleaviate existing workload in view of the establishment of new courts, the number of judges was increased to a total number of 600, including 78 candidates who successfully completed the selection processes during the reporting period. According to the Judicial Legal Council, the number of civil cases lodged with the courts during the reporting period increased by a 15 percent while the number of economic complaints increase constituted even 30 percent.

Moreover, Judges' candidates as well as practising Judges members of the judiciary joined specialised training courses held by the Judicial Legal Council, in co-operation with the Justice Academy and other national and international actors, including the OSCE Office in Baku.

II. Scope and Methodology

Advances of 2010 Trial Monitoring Programme over prior years. Through its 2010 Programme, the Office continued gathering facts and information about the courts' compliance with domestic legislation and international fair trial standards in the conduct of court cases. In earlier years, the Programme documented and reported shortcomings within *individual court proceedings* to demonstrate their level of compliance with fair trial standards. Comparatively, the 2010 Programme introduced a new focus on identifying positive and negative *systemic trends in the justice sector,* and on increasing the Office's level of *interaction and discussion* with justice sector authorities, members of the judiciary and other interested parties. For this reason, representatives from the Ministry of Justice, Judicial Legal Council, the judiciary, and the Office joined efforts to establish a working group, which meets on a regular basis to discuss the Programme's findings and to collaborate in the identification of possible solutions to shortcomings.

Co-operation with the Government of the Republic of Azerbaijan. Before beginning the 2010 Programme, the Office discussed the Programme's scope and objectives with the Ministry of Justice and informed the Ministry about the trial monitors the Office had selected to monitor the court proceedings. The Office also requested the Ministry's facilitation of the monitors' access to the courts.

[12] According to the Presidential decree dated 15 July 2010, the Court of the Republic of Azerbaijan on Grave Crimes became the Baku Court on Grave Crimes and three new Courts on Grave Crimes were established in Lankaran, Ganja and Sheki.

[13] New Administrative Economic Courts became fully operational in January 2011 in Naxchivan Autonomous Republic, Ganja, Sumqayit, Sheki, Shirvan and Baku (2).

Selection and assignment of Project Team of trial monitors. In earlier times, the Office had selected and trained the Project Team of trial monitors in line with OSCE trial monitoring standards. In 2010, the Office deployed the trial monitors to courts in various jurisdictions, including first instance, appeal and Supreme courts, throughout Azerbaijan. More specifically, the Office requested 14 monitors in the capital area of Baku to observe First Instance Courts, the Court of Grave Crimes and the Baku Court of Appeal, *inter alia*. Four additional monitors observed court proceedings in the regions of Shaki, Shirvan, Ganja, Lankaran and Sumgayit.

Format and other provisions for consistency of monitoring and reporting. The Office developed and provided the Project Team members with a comprehensive reporting form or questionnaire to use for collecting facts and grounds while monitoring court proceedings. The Project Team's task was to focus objectively gathering factual data and other information related to the courts' overall compliance with domestic legislation and fair trial guarantees, rather than any assessment or evaluation of the collected information. For example, Project Team members did not analyze the relevance of the evidence presented in court, the merits of the case, or the judges' determination of defendants' guilt or innocence.

Selection of cases and court proceedings. In general, the Project Team randomly selected the court cases they monitored. On a weekly basis, the observers collected the list of hearings from the courts and submitted them to the Implementing Partner's Co-ordinators. The Co-ordinators selected the cases to monitor based on the charges in order to ensure a variety of criminal offences. The monitors observed cases from the preparatory stage to the judge's delivery of the final judgment.

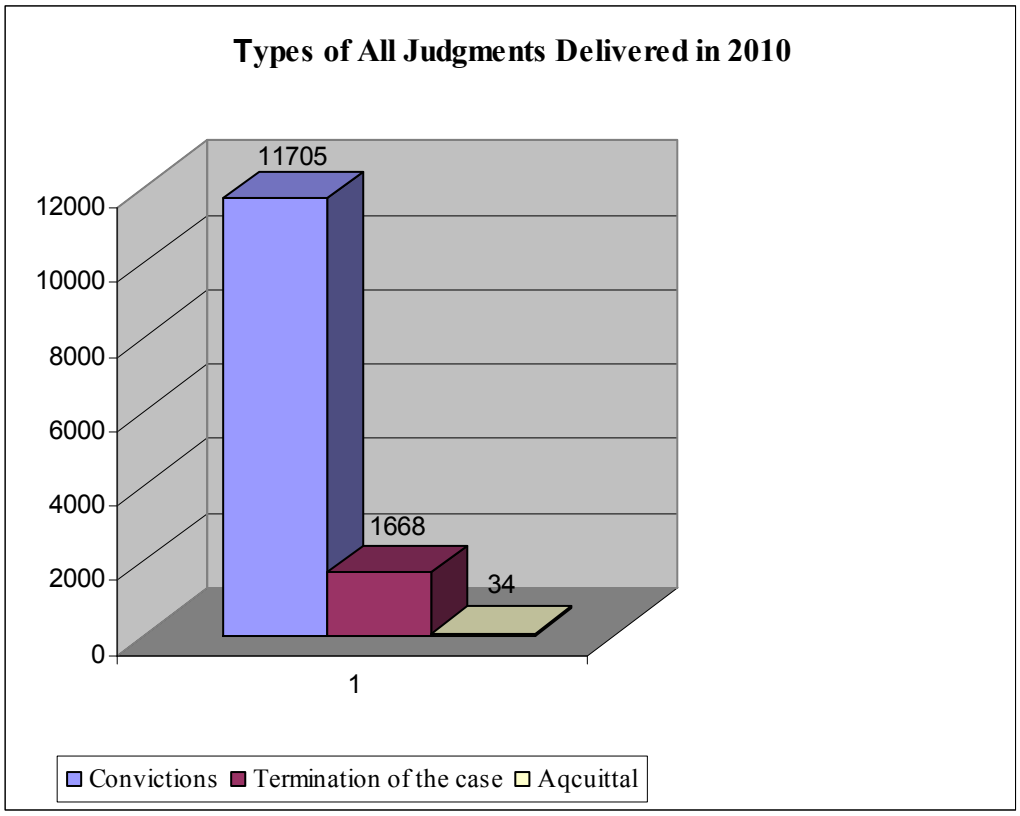
On a case-by-case basis the monitors observed court proceedings, which the Office selected based on the involvement of journalists, human rights defenders and political parties and other civil society leaders and members, as well as other cases brought to the Office's attention through individual human rights complaints. These cases are also relevant to other OSCE commitments that the Office addresses in relation to the rights of freedom of expression and information, right to freedom of association and peaceful assembly.

Basis for analysis of monitor reports. The Office subsequently analysed the facts and information collected by the Project Team for compliance with domestic legislation, fair trial standards according to OSCE principles and commitments, the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), and the case law of the European Court for Human Rights

(ECtHR). In addition, the Office analysed case details for their compliance with OSCE Commitments and related international standards, such as the International Covenant on Civil and Political Rights (ICCPR) and the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT).

Scope of cases and hearings monitored. According to the statistical data provided by the Ministry of Justice, the number of judgements delivered in criminal cases was the following:

Table 1: Types of court decisions delivered in 2010 in criminal cases



Overall, the Project Team monitored 330 criminal and 31 civil cases and observed 1,243 court hearings throughout Azerbaijan. Geographically, in Baku they monitored 201 criminal and 20 civil cases, and observed 968 hearings, while in the regions outside of the capital city of Baku, they monitored 98 criminal and 11 civil cases, and observed 275 hearings.

Additional limited information about preliminary proceedings. Notably, the scope of the 2010 Trial Monitoring Programme is limited to the trial stage of court proceedings. However, the right to a fair trial is not limited to the trial hearings; rather, the right provides for the protection of the rights of suspected or accused persons throughout the entire process of criminal investigations and proceedings, which includes both the pre-trial, trial and appeal stages. Thus, in some cases this report also includes

some references to preliminary proceedings, which are based on the Office's representatives monitoring of court proceedings and information gathered through their direct involvement in monitoring court cases as well as through the individual human rights advice they provide to the population upon requests directed to Legal Resource Centres.

Table 2: Number of Court Cases Monitored in Baku

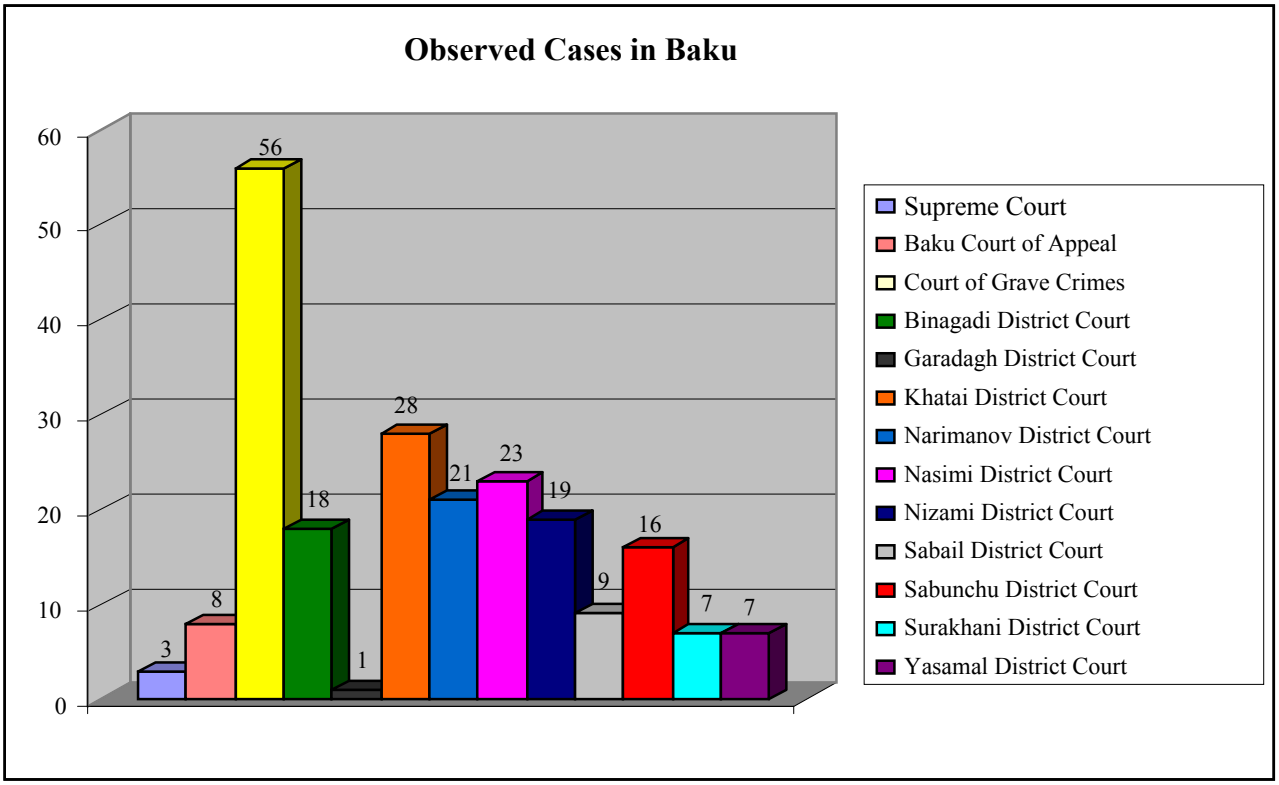
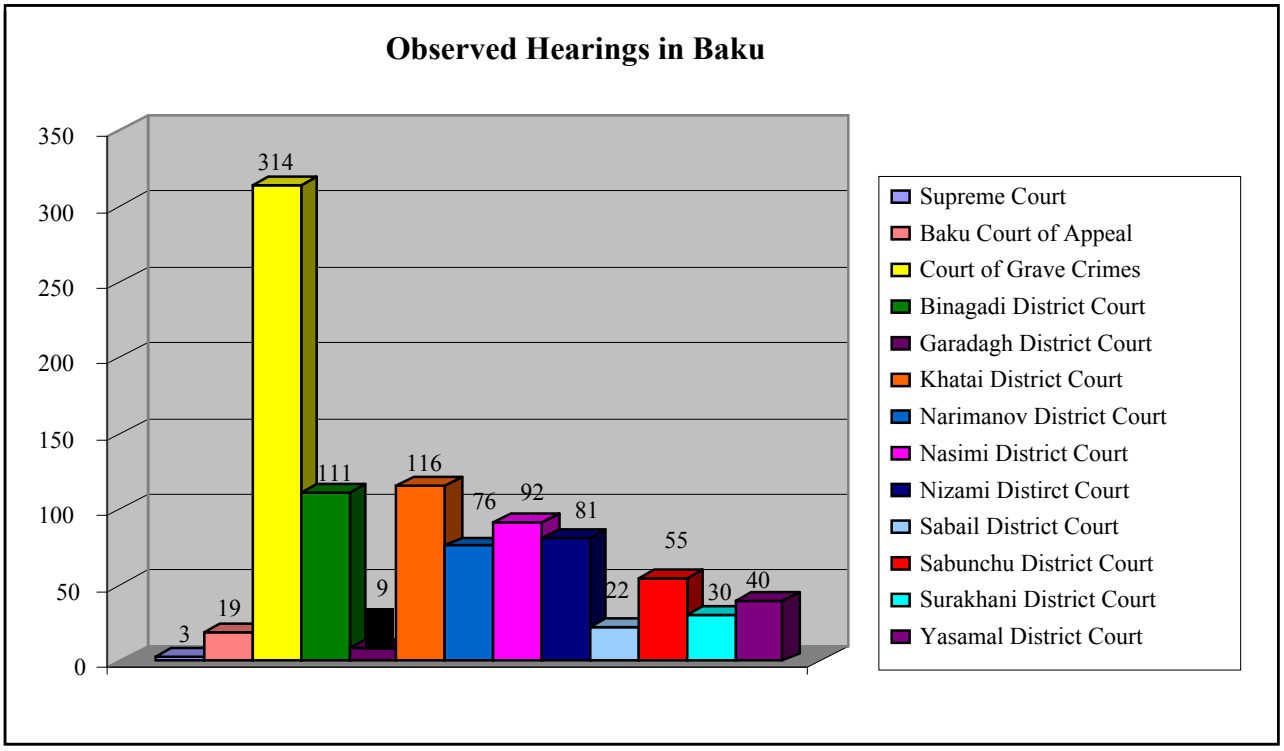


Table 3: Number of Court Hearings Monitored in Baku



Number of Cases and Court Hearings Monitored in Baku*

COURTS	CASES			HEARINGS		
	criminal	civil	all	criminal	civil	all
Supreme Court	0	3	3	0	3	3
Baku Court of Appeal	5	3	8	15	4	19
Court of Grave Crimes	56	0	56	314	0	314
Binagadi District Court	17	1	18	107	4	111
Garadagh District Court	1	0	1	9	0	9
Khatai District Court	28	0	28	116	0	116
Narimanov District Court	20	1	21	74	2	76
Nasimi District Court	19	4	23	86	6	92
Nizami District Court	18	1	19	79	2	81
Sabail District Court	6	3	9	18	4	22
Sabunchu District Court	16	0	16	55	0	55
Surakhani District Court	7	0	7	30	0	30
Yasamal District Court	8	4	12	25	15	40
TOTAL:	**201**	**20**	**221**	**928**	**40**	**968**

Table 4: Number of Cases Monitored in Regions

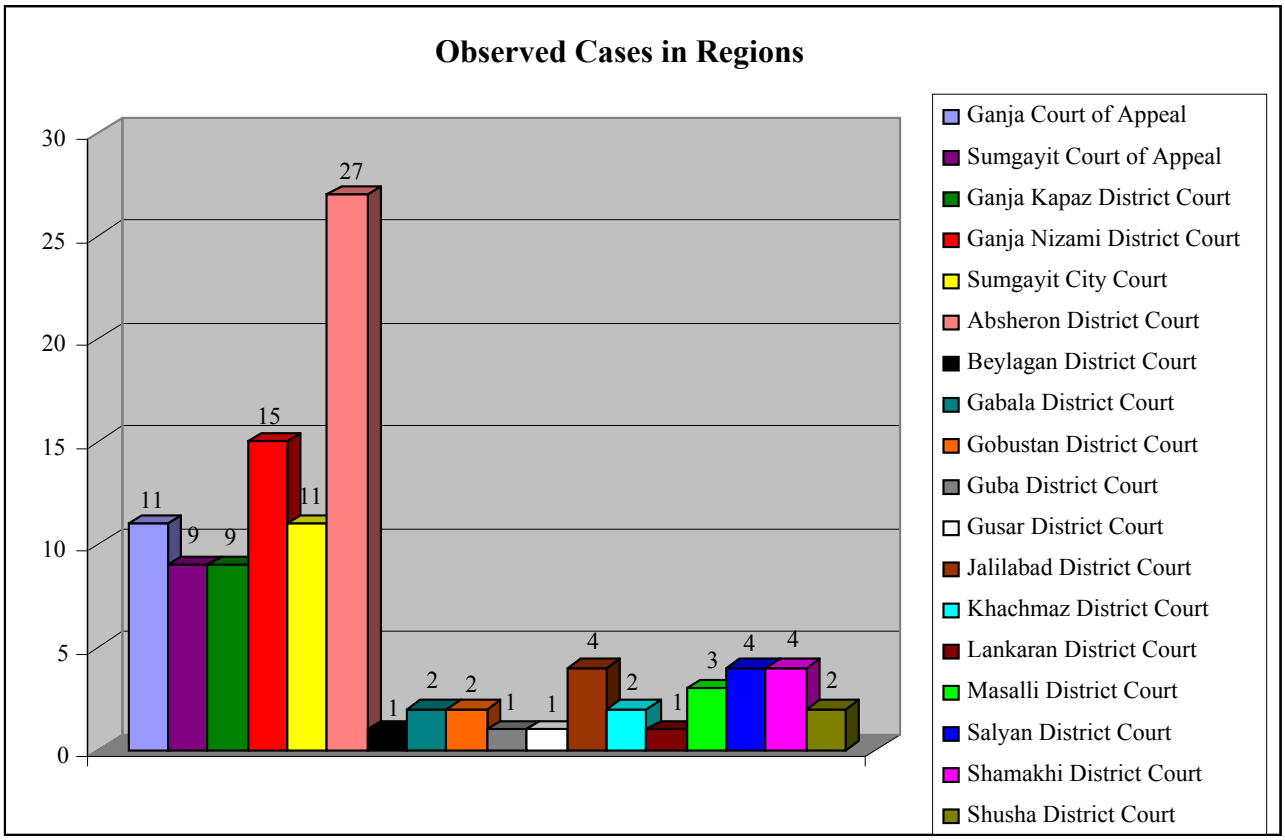
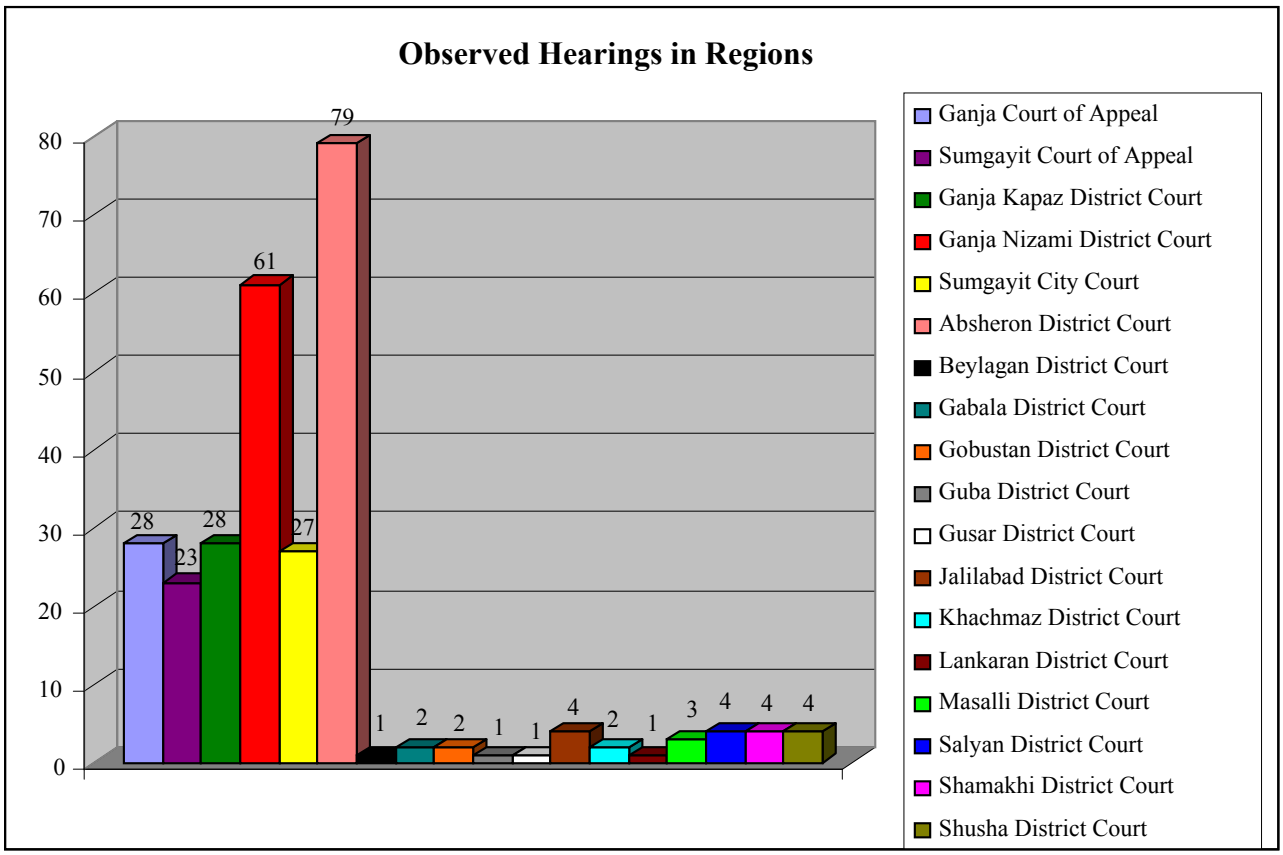


Table 5: Number of Court Hearings Monitored in Regions



Number of Cases and Court Hearings Monitored in Regions*

COURTS	CASES			HEARINGS*		
	criminal	civil	all	criminal	Civil	all
Ganja Court of Appeal	11	0	11	28	0	28
Sumgayit Court of Appeal	9	0	9	23	0	23
Ganja Kapaz District Court	9	0	9	28	0	28
Ganja Nizami District Court	15	0	15	61	0	61
Sumgayit City Court	11	0	11	27	0	27
Absheron District Court	27	0	27	79	0	79
Beylagan District Court	0	1	1	0	1	1
Gabala District Court	1	1	2	1	1	2
Gobustan District Court	2	0	2	2	0	2
Guba District Court	0	1	1	0	1	1
Gusar District Court	0	1	1	0	1	1
Jalilabad District Court	1	3	4	1	3	4
Khachmaz District Court	1	1	2	1	1	2
Lankaran District Court	1	0	1	1	0	1
Masalli District Court	2	1	3	2	1	3
Salyan District Court	2	2	4	2	2	4
Shamakhi District Court	4	0	4	4	0	4
Shusha District Court	2	0	2	4	0	4
TOTAL:	**98**	**11**	**109**	**264**	**11**	**275**

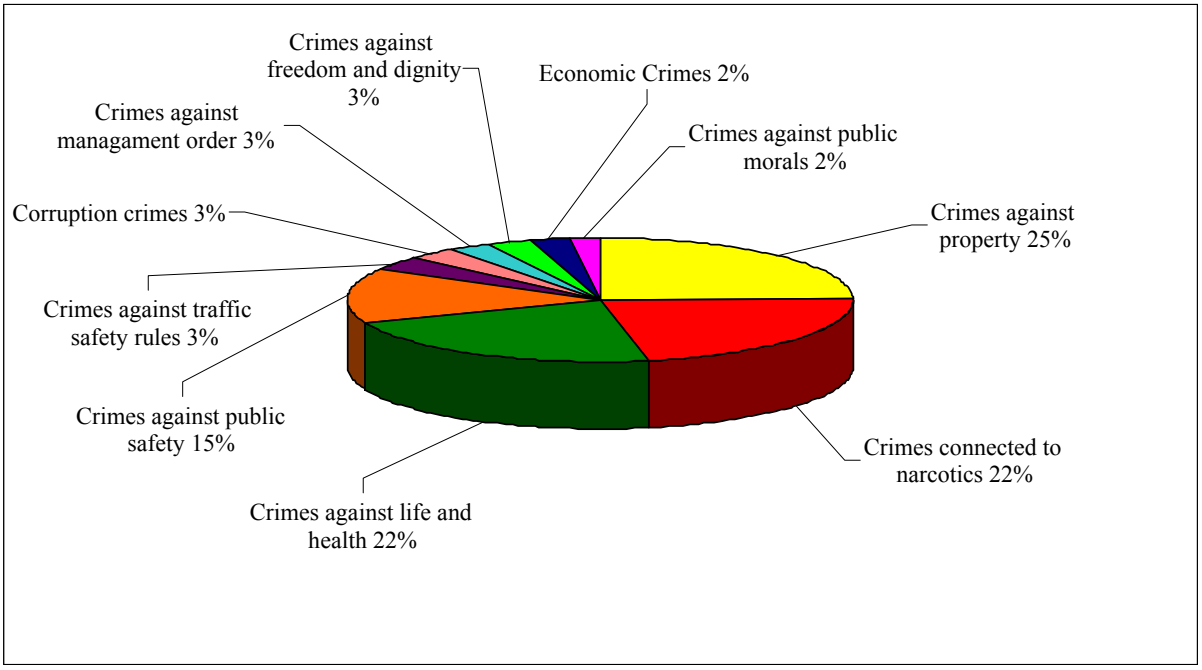
* The number of court hearings does not match the total number of criminal and civil cases because trial proceedings in criminal cases usually involve multiple court hearings. The types of criminal cases monitored included various categories of crimes ranging between grave crimes categories and minor crimes categories.

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

Category of Crimes	Articles of the Criminal Code
Crimes Against Life and Health	Art. 120. Deliberate murder Art. 126. Deliberate causing of serious harm to health Art. 127. Deliberate causing of less serious harm to health Art. 128. Deliberate causing of minor harm to health Art. 132. Battery Art. 133. Torture Art. 134. Threat to murder or causing of serious harm to health

Crimes Against Freedom and Dignity of Individual	Art. 144. Kidnapping Art. 144-2. Human trafficking Art. 144-2. Forced labour Art. 146. Illegal placement in psychiatric hospital Art. 147. Defamation Art. 148. Insult
Crimes Against Property	Art. 177. Theft Art. 178. Fraud Art. 179. Misappropriation or embezzlement Art. 180. Robbery Art. 181. Burglary Art. 182. Extortion Art. 185. Illegal occupation of automobile or other vehicle without An intention to plunder Art. 186. Deliberate destruction or damage of property
Crimes in the Sphere of Economic Activities	Art. 206. Smuggling Art. 213. Evasion of payment of taxes
Crimes Against Public Safety	Art. 214. Terrorism Art. 221. Hooliganism Art. 228. Illegal purchase, transfer, selling, storage, transportation and carrying of fire-arms, accessories, supplies, explosives
Crimes Connected to Illegal Circulation of Narcotics and Psychotropic Substances	Art. 234. Illegal manufacture, production, acquisition, storage, carrying, sending or sale of narcotics, psychotropic substances or their precursors
Crimes Against Public Morals	Art. 243. Involvement in prostitution Art. 244. Maintenance of prostitution house
Crimes Against Traffic Safety Rules and Operation of Vehicles	Art. 263. Infringement of traffic rules and operation of vehicles Art. 264. Leaving a site of road and transport Incident
Corruption Crimes and Crimes Against State Power	Art. 308. Abuse of official powers Art. 312. Giving of a bribe (active bribery) Art. 313. Official forgery Art. 314. Negligence
Crimes Against Management Order	Art. 315. Resistance or application of violence concerning the representative of authority Art. 317. Infringement of normal activity on criminal – executive establishments or investigator isolators Art. 318. Illegal crossing of the state border of the Republic of Azerbaijan Art. 320. Counterfeiting, illegal production, sale of official documents, state awards, seals, stamps, forms or use of counterfeit documents Art. 321. Evasion serving in military

Table 6: Percentage of Criminal Cases Monitored by Category of Criminal Offence



III. Findings and Analysis of Trends

General observance of Fair Trial Standards and Compliance with the Rights of the Accused

Overview: effective legal representation, equality of arms and overall public trust in the administration of justice. Azerbaijan continues developing its justice system in line with OSCE principles, commitments and related international standards. The findings of the 2010 Programme show that while the justice system has achieved some progress, it still has some important key issues to address to comply with fair trial standards.

Even though the results of the Office's 2010 monitoring programme show general compliance with the accused's right to a public hearing, a section has been included in the report for the sake of comprehensiveness and continuity with previous trial monitoring reports.[14]

Delays in the commencement of court hearings remain an issue of concern and have a direct impact on the fundamental fair trial guarantee relate to the accused's right to trial within a reasonable time[15]. Therefore, the report includes as well a special section outlining the main reasons for delays, as observed during the reporting period. Also in connection with the right to trial within a reasonable

[14] 2006/7 and 2009.
[15] "Justice delayed, justice denied".

time or to release pending trial, the report touches upon the excessive use of pre-trial detention as a preventive measure by Azerbaijan's courts.

In addition, the report mainly highlights the judges' responsibility to dispense justice in a proper and fair manner by ensuring compliance with basic fair standards guarantees, including the principle of equality of arms by ensuring accused persons' active participation in court and access to qualified legal representation as a major safeguard for a fair trial.

For instance, while the access to defence lawyers has slightly improved in Baku and in the regions in terms of number of lawyers available, the poor quality of the advice they provide continues to jeopardise the accused's enjoyment of the right to effective legal representation. Correspondingly, ineffective legal representation could lead to the population's general lack of trust in the possibility for securing legal representation, which has the capacity to secure an effective remedy for a given claim and, ultimately, to the violation of the principle of equality of arms in court proceedings. The real and perceived lack of equality of arms could generate the public's lack of trust in the effectiveness of the administration of justice as a whole.

There has been an improvement in the number of judges, and in their skills and professionalism during the reporting period. However, judges' lack of compliance with procedural requirements under the domestic legislation and related international standards appears to be the least consistent and transparent in their rulings, particularly on cases involving journalists, human rights defenders, leaders and members of political parties and civil society.

Judges are the main guarantors of the fairness of court proceedings and are responsible for ensuring full respect for the accused's rights throughout court proceedings. As such, they are responsible for, inquiring at the beginning of the trial proceedings during the preparatory hearing about whether any violation occurred during the pre-trial stage, which relates to compliance with fundamental fair trial guarantees, including the right to effective legal representation.

In connection with the above and particularly the principle of equality of arms, judges shall also ensure compliance with presumption of innocence, which implies important safeguards for accused persons until there is a final conviction issued by a court of law. The Office remains concerned with the systematic use of metal cages, regardless of the accused's criminal records and the seriousness of the criminal offences at stake and has therefore included a related section in the report.

It would be beneficial to judges and would increase public confidence in the effectiveness of the administration of justice if judges could avoid actions, which appear to favour or disfavour either one of the parties to the proceedings. This kind of behaviour jeopardises the judge's independence and impartiality and brings their integrity into question.

Regarding judges' responsibility to ensure that accused persons are informed about their rights, of all cases observed during the reporting period, the Project Team noted that in more than 150 cases the accused were not aware of their rights. In addition, the Project Team reported cases when the judge(s) did not inform these accused about their rights during preparatory hearings. In more than 200 cases, the presiding judge publicly concluded that there had not been any shortcomings during the pre-trial investigation period without inquiring of the parties whether this was actually the case.

Given that ill-treatment allegations, happening particularly during the early stages of detention at police stations, remain an issue in Azerbaijan, the report also covers ill-treatment related cases. During the reporting period, the Project Team observed cases in which allegations involving ill-treatment during detention came to the attention of the court for further investigation. However, the judges did not refer them for an investigation, as required by the domestic legislation.

Finally, there is a section on the reasoning of court decisions, which also relates to due process and the ability of the parties to contest court judgements before appeal and cassation domestic courts, as well as ultimately bringing cases to the ECtHR.

Table 7: Percentage of Fair Trial Violations Monitored in 2010

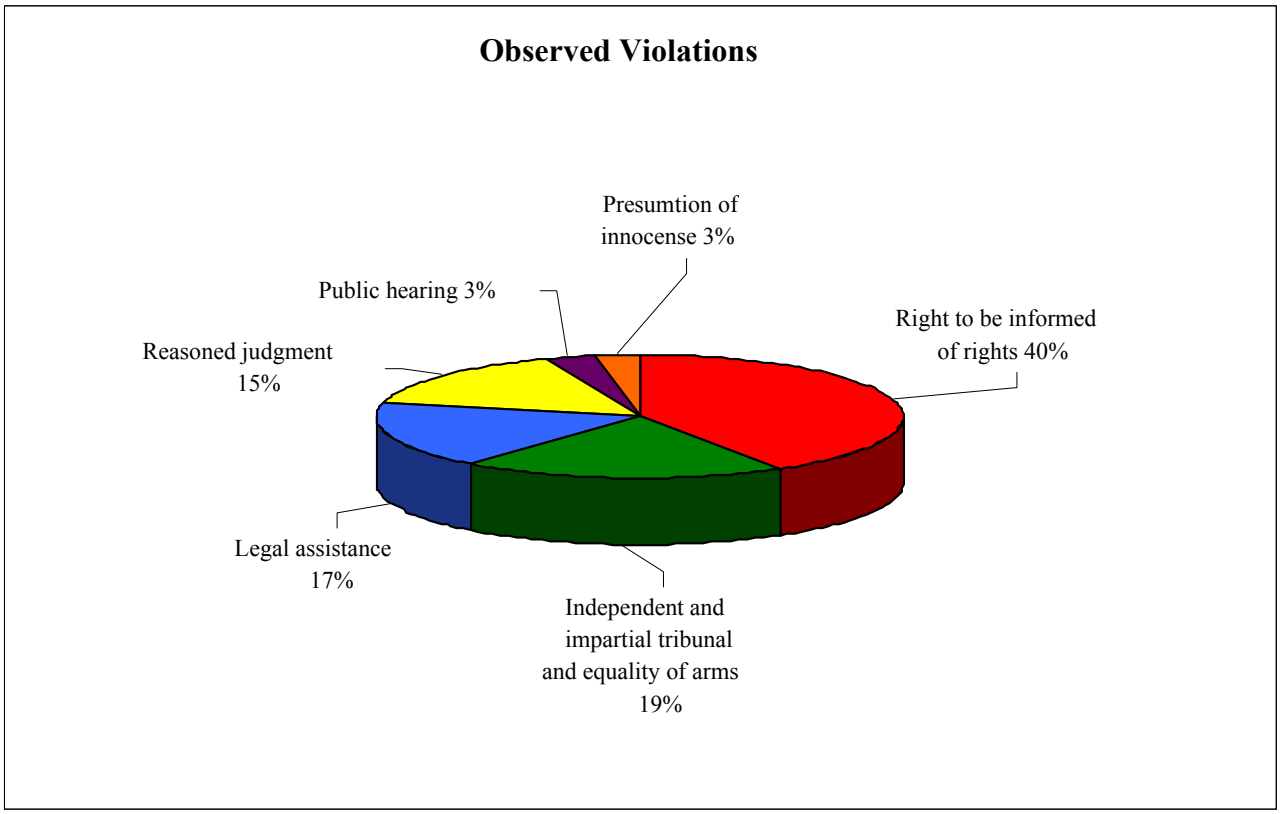
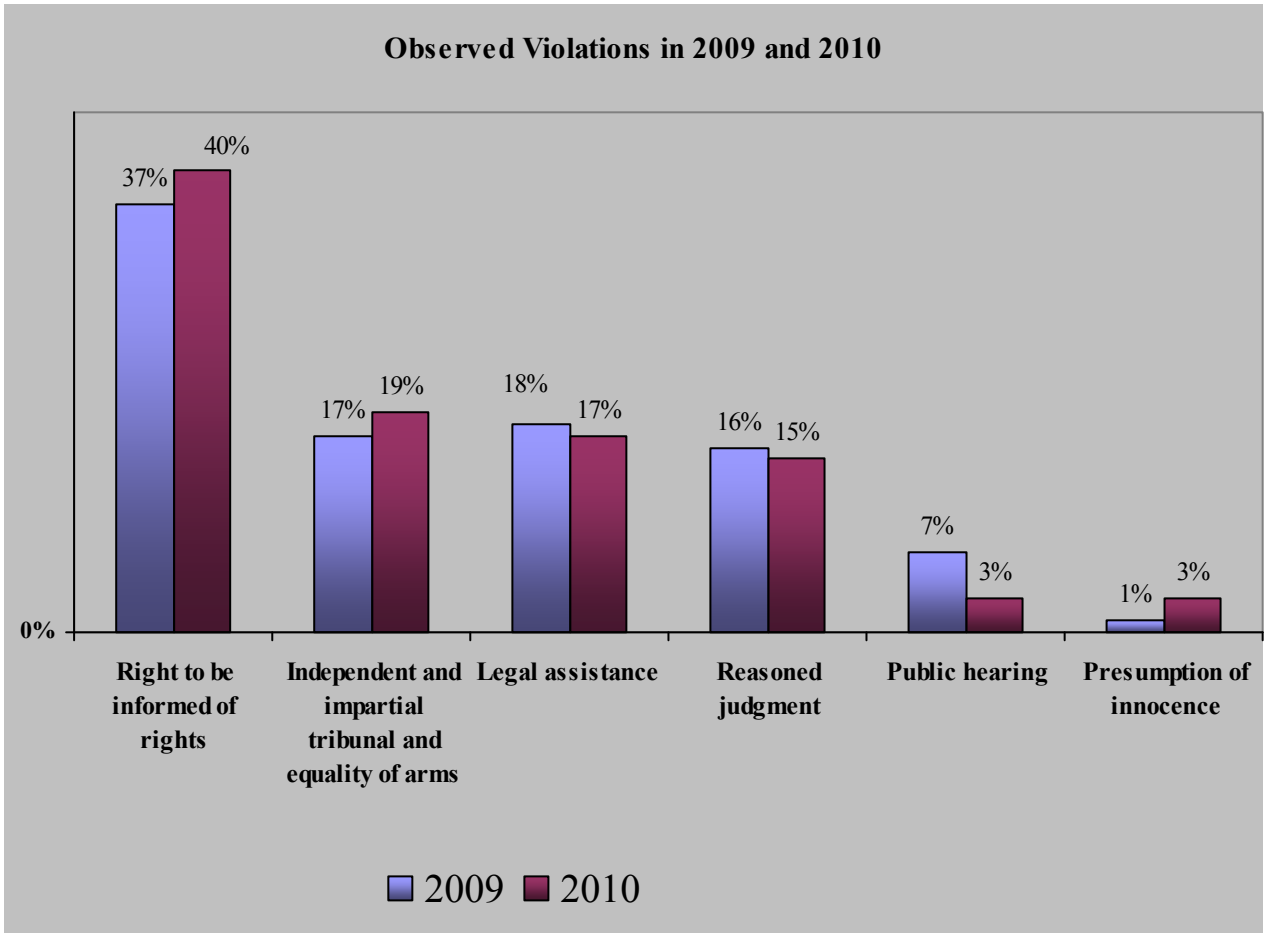


Table 8: Comparative Chart of Fair Trial Violations Monitored in 2009 and 2010



1. The right to a public hearing

Public hearings are a core safeguard of fair trials. The ECHR and OSCE commitments provide for public access to all hearings, except in a number of narrowly defined circumstances.[16] Further, according to Article 27 of the Azerbaijani Code of Criminal Procedure (CPC), court hearings in criminal cases shall be held publicly in all courts of the Azerbaijan Republic, unless it is shown to be necessary to have closed hearings in order to safeguard certain state, professional and commercial interests and/or personal or family privacy.

The right to a public hearing is generally observed with a few exceptions. According to the information gathered during the 2010 Programme, this right is duly observed in general. However, the right to a public hearing is often jeopardised because of the small size of the courtrooms. In addition, on an exceptional basis, several court hearings were held outside courtrooms, at facilities that could not provide easy access to the public, including within judges' offices. While the Project Team fully acknowledged that this conduct is the exception rather than the standard, trial monitors were in some cases not allowed to observe these court hearings and they reported more than ten court hearings when judges, without any explanation, did not allow members of the public to attend a named court hearing. In the majority of the courts the Project Team visited, information on the name, the court adequately displayed the time and venue of hearings. However, the Project Team did visit courts where the information displayed was not fully accurate and/or where no information at all was displayed. This indirectly jeopardises the transparency of judicial proceedings.[17]

Summary of positive and negative trends. The Project Team noted a significant improvement in the public accessibility of trials. In general, the Project Team did not observe any restrictions imposed by the court or court officials, which interfered with the right to a public hearing. However, many courtrooms remain too small to accommodate adequately those who wish to observe court hearings.

2. Delays in the commencement of court hearings

Delays in hearings as a court management issue. The ECHR provides for the right of everyone arrested or detained to be brought promptly before a judge or other officer authorized by law to exercise judicial power and the entitlement to be tried *within a reasonable time*.. Along with

[16] Article 6(1) of the ECHR, and Copenhagen Document (1990) paragraph 5.16.
[17] In some courts, the list of pending cases did not generally include the time of court hearings. Trial observers had to obtain this information from the court's registry.

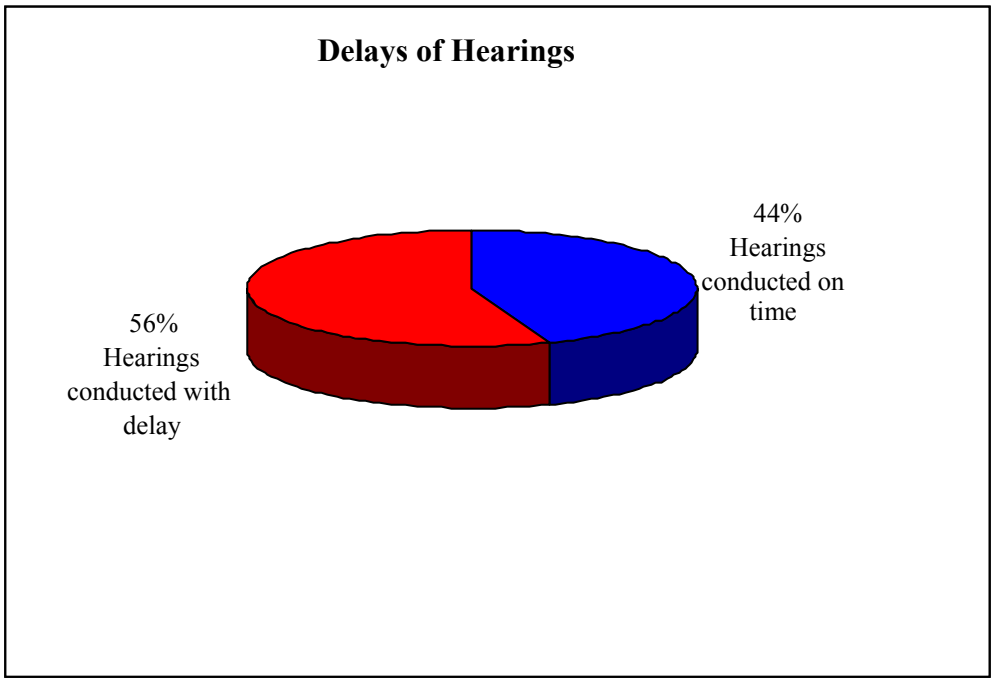
postponements of court hearings, often caused by the absence of one of the parties, the Project Team reported delays in the commencement of the actual court hearing as the most common problem observed regarding the effective management of the courts and the organisation of court proceedings.[18] Thus, delays in the commencement of remain a shortcoming. The reasons for these delays and the rescheduling of the hearings differed from case to case, and in some cases, they were not stated by the court. Moreover, judges' workload is also a contributing factor to delays.

Multiplier effect of delayed start times in heavily scheduled courtrooms. In addition, as different judges often use the same courtrooms on the same day, it is highly probable that a delayed start of one hearing causes delays in subsequent hearings scheduled in the same courtroom. Consequently, delays in the commencement of court proceedings in one case may influence due process and the proper examination of subsequent cases. For example, postponement of court hearings may inadvertently force judges into a position of non-compliance with the deadlines regarding adjudication of cases, as provided by the domestic legislation. Finally, widespread non-observance of the appointed time and date for the commencement of trials inevitably causes public dissatisfaction and reduces the justice system's capacity to function in an effective and timely manner, according to the schedule it sets for itself.[19]

[18] In Nizami District Court, only two out of the eleven scheduled hearings that the monitors observed, took place within a three-month period. The first hearing was postponed because the accused had not received the indictment. Two subsequent hearings were postponed because the accused was not brought to court. Another one was suspended because the prosecutor was sick. And another five times the trial was postponed because either the representative of the civil claimant or one of the witnesses failed to attend the court hearings. Moreover, one of the hearings that took place as scheduled was delayed for one hour and a half because the lawyer was late. These delays and postponements caused significant inconveniences to the accused, who was seriously ill. In another court case, the Project Team reported that two hearings were delayed for one hour and 45 minutes each. The reason for both delays was the absence of the prosecutor, who reported to be busy with another court case.

[19] The Project Team reported that the number of postponed hearings in a particular case was higher than the number of hearings, actually held. For instance, in one of the trials the Project Team observed, the observer was present at three consecutive hearings, all of which were postponed for different reasons. The first hearing was postponed due to one of the judges being absent. The second hearing was postponed due to failure of the parties to attend the hearing. The last observed hearing was suspended due to absence of one of the judges. The court did not notify the parties about the postponement of the case in advance and no efforts were made to reschedule the hearing, thus the hearings were postponed immediately after they had started.

Table 9: Delays in the beginning of court proceedings



Hearings conducted on time	429
Hearings conducted with delay	539
All hearings	968

Summary of positive and negative trends. According to the information reported by the Project Team, and directly gathered by the Office's staff directly involved in trial monitoring, over half out of the total cases monitored did not commence at the scheduled time and substantial delays in the commencement generally occurred.

3. Provisional release pending trial

Foundations of the right. The ECHR provides that, everyone has the right to liberty and security of person.[20] Further, according to Article 5(3), everyone arrested or detained shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release pending trial shall be subject to certain guarantees in order to ensure accused persons' appearance at trial proceedings.

Committee of Ministers of the Counsel of Europe recommends to limit the use of detention on remand, encouraging the use of alternative measures to custody wherever possible in view of the

[20] Article 5(1)

importance to promote compliance with fundamental guarantees such as the presumption of innocence and the right to the liberty of the person.[21]

Criteria for the selection of preventive measures. According to Azerbaijan's domestic legislation, home arrest and release on bail are alternative restrictive measures of detention on remand.[22] The danger of an accused's absconding cannot be gauged solely on the basis of the severity of the sentence risked. In order to decide whether to apply alternative measures to remand detention, the judges must assess the actual danger of escape with reference to a number of other relevant factors which may either confirm the existence of such a danger or make it appear so slight that it cannot justify keeping the accused in custody pending the beginning of trial proceedings.[23] The Office also would like to highlight the social and financial repercussions of keeping people in detention without duly justified grounds, which leads in some cases to overcrowding and other violations of the rights of detained persons.

In a landmark decision issued in November 2009[24], the Supreme Court requested lower instances courts to restrict the use of pre-trial detention as restrictive measure pending the beginning of trial proceedings. According to that decision, judges shall consider the possibility of applying other restrictive measures in accordance with the provisions in the CPC, including cases where the accused does not pose a threat to victims, witnesses or the public at large and when there is no risk of interfering with ongoing investigations. Judges need to be satisfied that the accused will appear for trial and, if released, will no pose a danger to any victim, witness or other person. To that end, they may impose such conditions upon the release of the accused as they may determine appropriate, including the execution of a bail bond and the observance of such conditions as are necessary to ensure the presence of the accused for trial and the protection of others.

Summary of positive and negative trends. Despite Azerbaijan's Supreme Courts important guidance in this regard, advising judges to apply detention on remand in exceptional cases and in a reasoned manner, the findings of the 2010 Programme show that courts commonly practice the systematic

[21] Recommendation Rec(2006)13 of the Committee of Ministers to member states on the use of remand in custody, the conditions in which it takes place and the provision of safeguards against abuse. See also *Kaszczyniec v Poland* (22 May 2007) 59526/00 para. 57

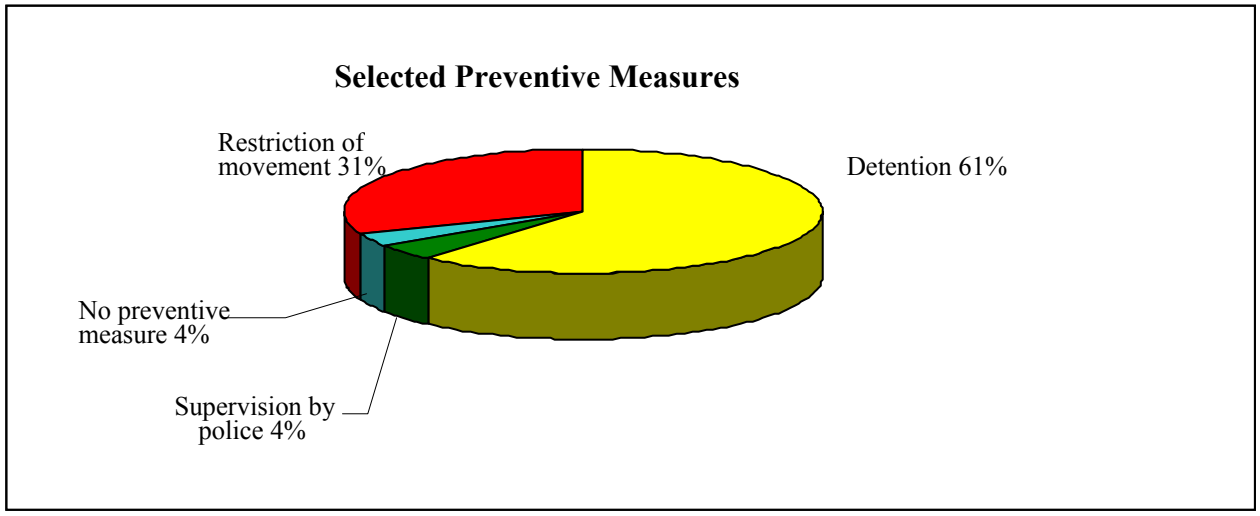
[22] Articles 154.4 and 156.2 of the CPC

[23] *Mansur v Turkey* (08 June 1995) 16026/90 para. 55

[24] Decision On the Use of Detention On Remand, dated 3 November 2009. According to para. 4: […] "*the courts shall be explained that when considering a submission to order the restrictive measure of arrest, they shall primarily examine the possibilities of ordering other restrictive measures as specified by Article 154 of the CPC of the Republic of Azerbaijan, and when the submission is granted, they shall justify why it is impossible to apply another restrictive measure but arrest."*

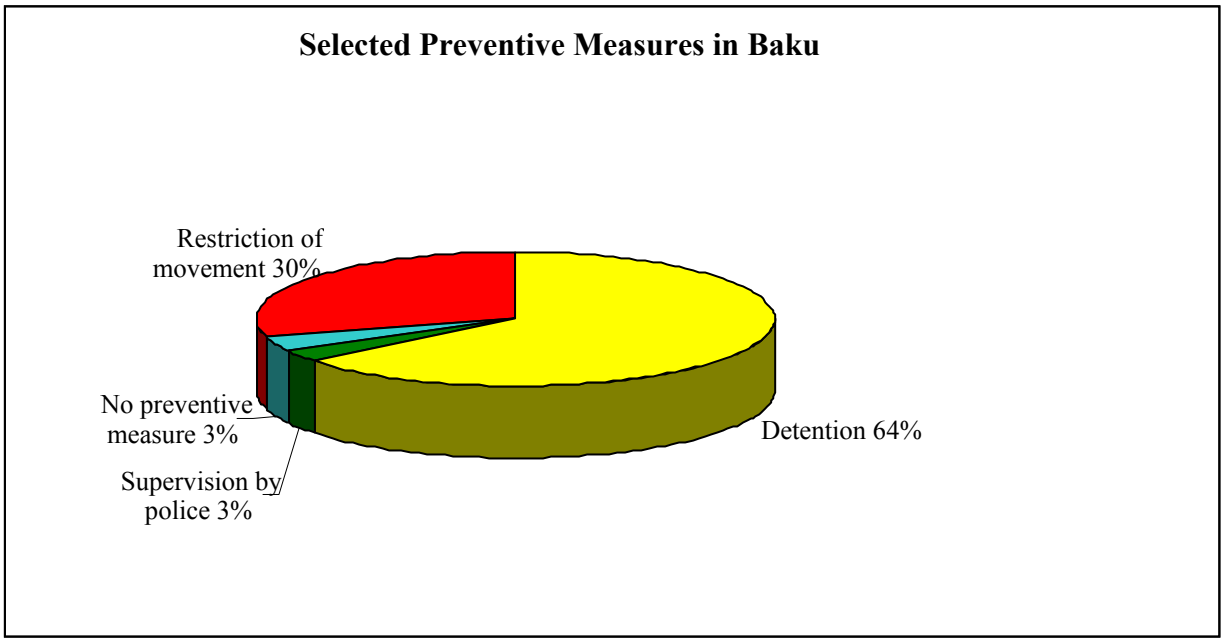
application of pre-trial detention as a restrictive preventive measure against the accused without sound legal reasoning. The Project Team reported that in some cases judges disregard defence motions seeking the application of alternative measures, failing to take into account all relevant factors in every case, such as the accused's lack of past criminal records and the likelihood that they may interfere with ongoing investigations or pose a threat to witnesses, in order to determine whether the accused should be kept in custody. During the reporting period, the Project Team reported that in approximately a quarter of the court hearings monitored, the courts selected other preventive measures, such as restriction of movement or supervision by police. The Office has observed similar negative trends reflecting the systematic use of pre-trial detention as restrictive measure through its previous trial monitoring programmes.

Table 10: Selection of Preventive Measures



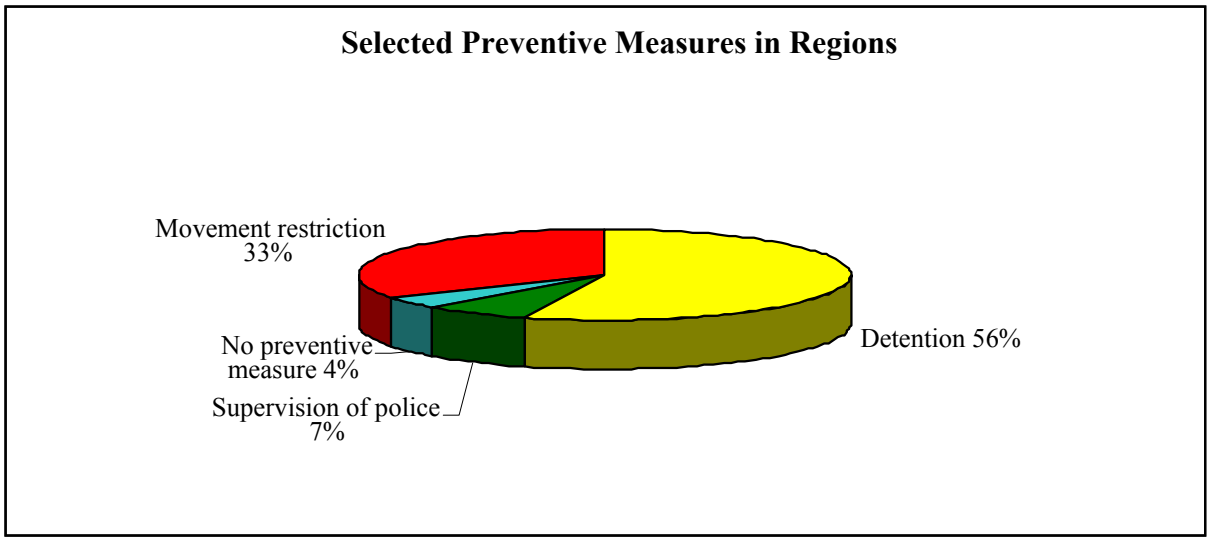
COURT	Detention	Bail	Supervision by police	Restriction of movement	Personal surety	Home arrest	No preventive measure
Baku Court of Appeal	3	0	0	0	0	0	3
Ganja Court of Appeal	10	0	1	0	0	0	0
Sumgayit Court of Appeal	3	0	0	4	0	0	4
Court of Grave Crimes	52	0	2	2	0	0	0
Binagadi District Court	7	0	0	10	0	0	0
Garadagh District Court	1	0	0	0	0	0	0
Khatai District Court	17	0	3	9	0	0	0
Narimanov District Court	13	0	0	6	0	0	1
Nasimi District Court	7	0	0	13	0	0	0
Nizami District Court	11	0	1	6	0	0	0
Sabail District Court	2	0	0	3	0	0	0
Sabunchu District Court	10	0	0	6	0	0	0
Surakhani District Court	4	0	0	3	0	0	0
Yasamal District Court	3	0	0	2	0	0	3
Ganja Kapaz District Court	3	0	3	2	0	0	0
Ganja Nizami District Court	12	0	2	1	0	0	0
Sumgayit City Court	3	0	0	7	0	0	0
Absheron District Court	12	0	1	12	0	0	0
Gabala District Court	1	0	0	0	0	0	0
Gobustan District Court	1	0	0	1	0	0	0
Jalilabad District Court	1	0	0	0	0	0	0
Khachmaz District Court	1	0	0	0	0	0	0
Lankaran District Court	1	0	0	0	0	0	0
Masalli District Court	2	0	0	0	0	0	0
Salyan District Court	2	0	0	0	0	0	0
Shamakhi District Court	1	0	0	3	0	0	0
Shusha District Court	0	0	0	2	0	0	0
TOTAL:	**183**	**0**	**13**	**92**	**0**	**0**	**11**

Table 11: Selection of Preventive Measures - Baku



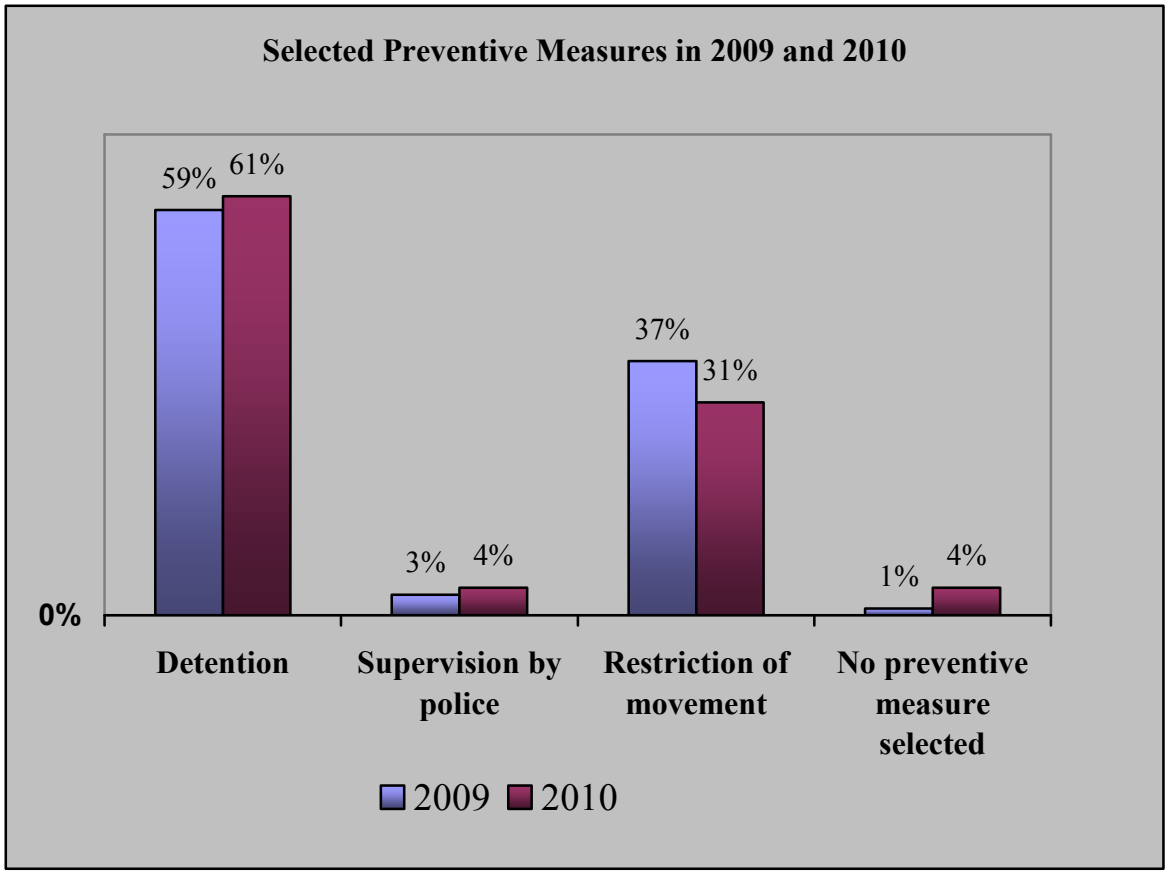
COURT	Detention	Bail	Supervision by police	Restriction of movement	Personal surety	Home arrest	No preventive measure
Baku Court of Appeal	3	0	0	0	0	0	3
Court of Grave Crimes	52	0	2	2	0	0	0
Binagadi District Court	7	0	0	10	0	0	0
Garadagh District Court	1	0	0	0	0	0	0
Khatai District Court	17	0	3	9	0	0	0
Narimanov District Court	13	0	0	6	0	0	1
Nasimi District Court	7	0	0	13	0	0	0
Nizami District Court	11	0	1	6	0	0	0
Sabail District Court	2	0	0	3	0	0	0
Sabunchu District Court	10	0	0	6	0	0	0
Surakhani District Court	4	0	0	3	0	0	0
Yasamal District Court	3	0	0	2	0	0	3
TOTAL:	**130**	**0**	**6**	**60**	**0**	**0**	**7**

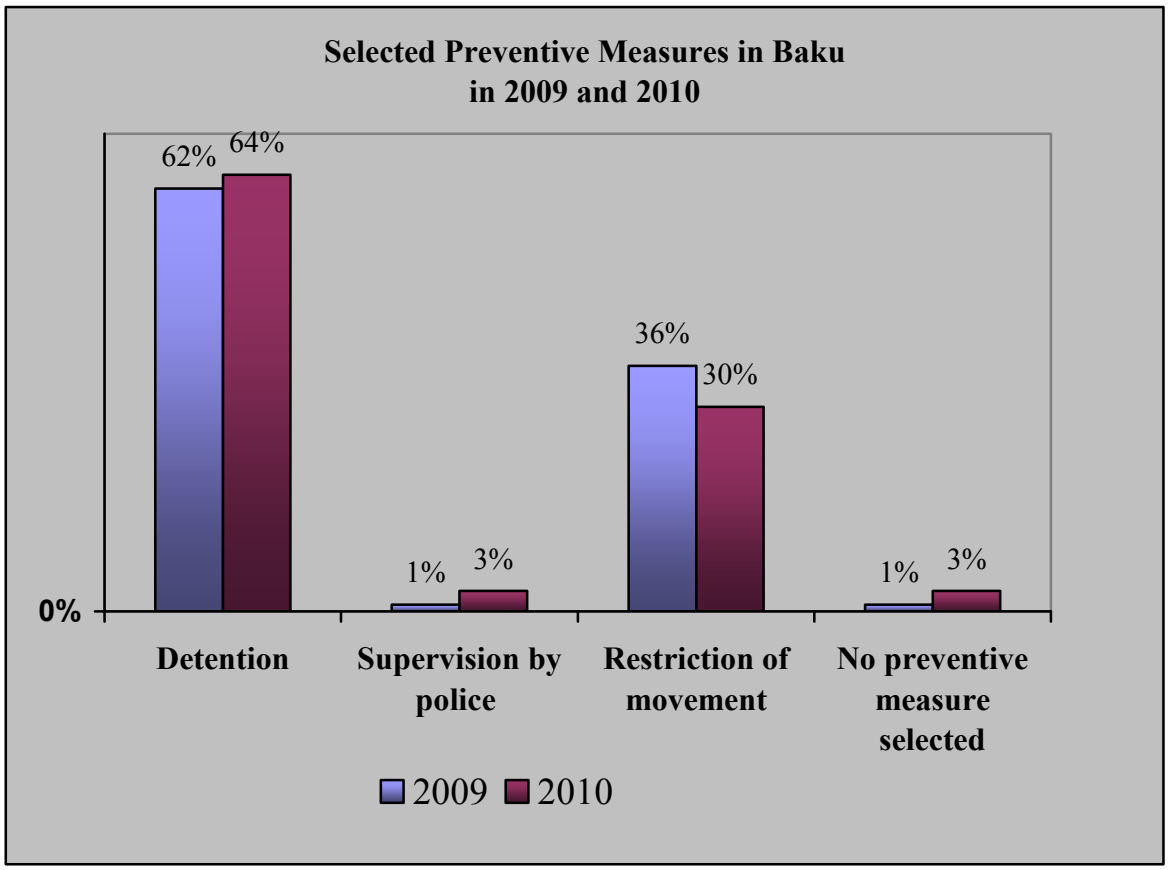
Table 12: Selection of Preventive Measures - Regions

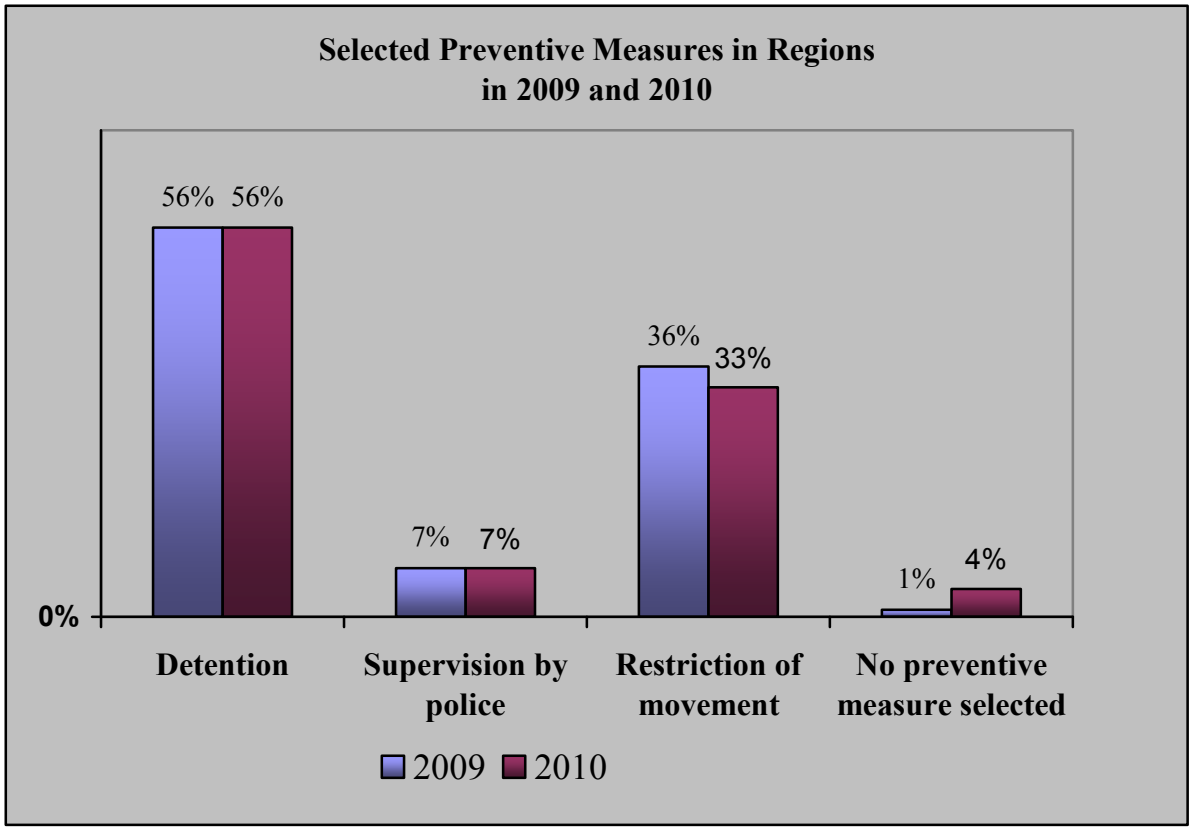


COURT	Detention	Bail	Supervision by police	Restriction of movement	Personal surety	Home arrest	No preventive measure
Ganja Court of Appeal	10	0	1	0	0	0	0
Sumgayit Court of Appeal	3	0	0	4	0	0	4
Ganja Kapaz District Court	3	0	3	2	0	0	0
Ganja Nizami District Court	12	0	2	1	0	0	0
Sumgayit City Court	3	0	0	7	0	0	0
Absheron District Court	12	0	1	12	0	0	0
Gabala District Court	1	0	0	0	0	0	0
Gobustan District Court	1	0	0	1	0	0	0
Jalilabad District Court	1	0	0	0	0	0	0
Khachmaz District Court	1	0	0	0	0	0	0
Lankaran District Court	1	0	0	0	0	0	0
Masalli District Court	2	0	0	0	0	0	0
Salyan District Court	2	0	0	0	0	0	0
Shamakhi District Court	1	0	0	3	0	0	0
Shusha District Court	0	0	0	2	0	0	0
TOTAL:	**53**	**0**	**7**	**32**	**0**	**0**	**4**

Table 13: Comparative Chart - Selection of Preventive Measures







4. The right to a trial by an independent and impartial tribunal

Foundations of the right. The right to a fair and public trial by an independent and impartial tribunal is enshrined in the OSCE commitments, the ICCPR and the ECHR. Article 127 of the Azerbaijani Constitution and Article 28 of the CPC confirms this right. The independence and impartiality of tribunals is based largely on the institutional framework of the judicial branch of government, whose independence from the executive and legislative branches of government and other influences is guaranteed through an effective separation of powers. However, the scope of the 2010 Programme was limited to an assessment of the appearance to the public of the independence and impartiality of judges in court. According to international law standards and the domestic code of professional ethics, judges shall not appear as having a preconceived idea as to the guilt of the accused or the result of the trial.

Judges' behaviour can raise reasonable doubts about their independence and impartiality. Accordingly, the 2010 Programme was concerned with examining whether the behaviour of judges was such that it could give rise to legitimate doubts regarding their independence and impartiality whilst adjudicating the court case. In this context, the Project Team reported several instances when the behaviour of judges could give rise to such reasonable doubts. These instances included cases in

which: (i) judges openly engaged in *ex parte* communications[25] with the prosecutors or received them into his/her office before or during the court's break; (ii) judges allowed prosecutors to accompany them into the deliberation room without any explanation; and, (iii) judges used their own offices for deliberations, instead of the special deliberation room.[26]

Judges' conduct raises questions of independence and impartiality of tribunal. In approximately ten court hearings observed, the judges' conduct during trial proceedings placed into question the independence and impartiality of the tribunal. This conduct includes: (i) the lack of any reaction by the judges to the prosecutors' manifestly improper behaviour towards the defendant; (ii) the appearance of prosecutorial bias while questioning the accused; and (iii) the judges' failure to inquire at the preliminary hearings about full and proper compliance with the accused's rights during the pre-trial stage.[27] Further, the Project Team observed other instances when the judges granted motions the prosecutor raised, yet refused almost all of the motions the defence counsel raised without any sound reasoning, unless the prosecutor was in agreement with them. In addition, the Project Team reported a substantial number of court hearings where the judges were negligent in investigating sound and serious allegations by the defendants regarding violations that allegedly took place during the pre-trial investigation. There were cases when judges even entered into an argument with defence counsel in support of the prosecution's arguments.[28] In 11 court hearings, the presiding judges interrogated the accused and witnesses using leading questions, including questions, which appeared to violate the principle of the presumption of innocence.[29]

Defendant's right to have evidence considered fairly in the adversarial system of trial. When judges engage in conduct during court proceedings that appears biased, especially in favour of the prosecution, they deprive the defendant of the opportunity and legal entitlement of having his evidence considered by the court fairly, independently and impartially. In addition, this conduct on the part of judges denies the defendant of the basic right provided by the underlying the adversarial system of trial of having an impartial judge see fair play in the conduct of the case against him. According to the standards of ECtHR case law and OSCE commitments, one lawyer (the prosecutor)

[25] Communications between the judge and one party to the proceedings, excluding the other party in the interests of justice.
[26] The Project Team observed in (i) over 20 court hearings; (ii) in 2 court hearings; and (iii) in more than 30 court hearings.
[27] This was observed in (i) more than 15 court hearings, (ii) in 7 court hearings, and (iii) in more than 200 court hearings.
[28] For example, in more than 15 court hearings the defendants alleged that the witnesses' testimonies supporting the indictment were given under duress. Notwithstanding that the witnesses supported these allegations, the judge(s) disregarded the allegations and continued adjudicating the cases.
[29] For example, the Project Team reported on cases where the presiding judge asked the accused, who had pleaded not guilty, the following type of questions: […] "*you are here because you have committed a murder"* […] and […] "*why did you kill that person?*."

makes the case against the accused, another lawyer (the defence advocate) makes his case in response, and a third lawyer (the judge) holds the balance between them. This separation of responsibilities between three different lawyers ensures that the case against the accused advances fairly in accordance with the rules of evidence and procedure. The core principle is that according to the adversarial system, the judge is required to remain detached from the dispute and neutral during the elicitation of the evidence.

In order to enhance the confidence of the population in the criminal justice system, it is imperative that both the defendants and the public observing the court proceedings have a perception of fair and equal treatment, particularly by the court allowing the presentation of exculpatory evidence and both parties to the case, defence and prosecution, to argue their cases fully.

Summary of positive and negative trends. Regrettably, the conduct of some judges continued to show clear signs that they did not have a clear understanding of their own role in ensuring a fair trial. Such behaviour also reflects badly on other judges who make significant effort to conduct hearings in accordance with fair trial standards. The 2010 Programme observations raise further concerns that there are still problems in securing the independence and impartiality of tribunals, particularly regarding politically motivated cases.

5. Presumption of innocence

The presumption of innocence is 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, "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 ICCPR similarly declares, "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 ECHR similarly mandates that "everyone charged with a criminal offence shall be presumed innocent until proven guilty according to law." According to the case law of the ECtHR, the presumption of innocence requires that […] "*when carrying out their duties, the members of a court should not start with the preconceived idea that the accused has committed the offence charged; the burden of proof is on the prosecution, and any doubt should benefit the accused"* […].[30] The presumption of innocence is also a core OSCE commitment.[31]

[30] See *Barbera, Messegue and Joabardo v. Spain*, ECtHR Judgment of 6 December 1988, para 77.
[31] Copenhagen Document (1990).

Further, the presumption of innocence is an inalienable part of Azerbaijan's body of legislation as reflected in its Constitution and CPC.[32]

Excessive use of metal cages and handcuffs. The Project Team assessed the behaviour of judges and prosecutors towards the accused during the court proceedings with regard to their observance of the right to presumption of innocence. They noted that frequently accused persons are held in metal cages and or in handcuffs while in the courtroom, which infringes upon the presumption of innocence.

The Project Team observed that these restrictive practices are widespread and seem to be systemic in Azerbaijan's courts, regardless of the gravity of the charges at stake and of any security considerations related to a real threat that accused could pose in the courtroom, which disregards the accused's dignity and may constitute excessive use of force. However, the Project Team reported a few commendable examples, when the judge(s), either on their own initiative or upon requests by the defendants, ordered the court bailiffs to release the accused from the metal cage. The Office has recommended in previous trial monitoring reports that the Ministry of Justice discontinue the use of metal cages in criminal hearings, particularly in the case of non-violent crimes, because their use implies that the accused requires confinement in a metal cage, an implication, which is a *de facto* violation of the presumption of innocence.

Prosecutors use inappropriate conduct and language. The Project Team also observed more than 40 instances of prosecutors, who used inappropriate conduct and language when addressing or speaking about the defendant, for example referring to the defendant as "a criminal." Prosecutors have the duty and obligation to present the prosecution case in a fair manner, without the use of intemperate language, which indicates anything other than presumption of innocence, or that characterising the accused as a convicted person before the court has issued its final ruling.

Summary of positive and negative trends. The findings in the 2010 report reiterate shortcomings which have not been solved yet, particularly in connection with political motivated cases. The Project Team reported that in these cases in particular, judges, prosecutors and court staff demonstrated a preconceived idea that the accused had committed the offence before considering the evidence, in violation of the judge's professional responsibility and the right of the accused to enjoy the presumption of innocence until proven guilty.[33] Further, regarding the detention of accused persons handcuffed and in cages in the courtroom, the external appearance of the presumption of innocence is

[32] Article 63 of the Constitution and Article 21 of the CPC.
[33] Monitors observed this in approximately 10% of the cases.

paramount and it is essential that the accused persons have restricted movement only as a last resort security measure and only in exceptional circumstances.[34]

6. Equality of arms

Equality of arms, in the sense of "fair balance" is one of the core elements of a fair trial. The equality of arms principle requires that all parties to the proceedings shall have equal opportunities to present their case to the court under conditions, which do not place them in disadvantage.[35] This means the parties to a criminal trial have the opportunity to become familiar with and comment on all evidence.[36] Of particular importance in this context is the appearance of the fair administration of justice.[37] The concept of equality of arms is also inextricable tied to the fundamental right to legal representation at all stages of the trial. The general fair trial requirement is that judges must allow defendants to present their evidence in court, including by calling and examining witnesses whose testimony is relevant to the case, and must allow defendants to examine any witness called by the prosecutor. The procedure for the summoning and hearing of witnesses must be the same for the prosecution as the defence. Thus, any conduct of a judge, which disallows witnesses from presenting exculpatory evidence on behalf of the defence, and prohibits the defence from cross-examining witnesses for the prosecution demonstrates bias against defendants.

ECtHR relevant case law. In the recently reported case of *Pirali Orujov v. Azerbaijan*[38] the ECtHR found Azerbaijan to be in violation of Article 6 of the ECHR on the ground that the Supreme Court heard the applicant's cassation appeal in his absence.[39] Thus, the conduct of fair proceedings requires,

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[34] Recidivists with past criminal records and depending on the gravity of the crimes at stake.
[35] See *De Haes and Gijsels v. Belgium*, ECtHR Judgement of 24 February 1997, para. 53.
[36] Ruiz-Mateos v. Spain, June 23, 1993, Series A, No. 262; 16 E.H.R.R. 505, para. 63.
[37] Bulut v. Austria, February 22, 1996, R.J.D. 1996-1, No.3; 23 E.H.R.R. 84, para. 47.
[38] Application no. 8460/073, February 2011.
[39] For example, paragraphs 42 to 46 of the judgment state:
"[...] 42. The Court reiterates that the concept of a fair trial includes the principle of equality of arms and the fundamental right that criminal proceedings should be adversarial. This means that both prosecution and defence must be given the opportunity to have knowledge of and comment on the observations filed and the evidence presented by the other party (see Brandstetter v. Austria, 28 August 1991, §§ 66-67, Series A no. 211).43. Moreover, Article 6 of the Convention, taken as a whole, guarantees that a person charged with a criminal offence should, as a general principle, be entitled to be present and participate effectively in the hearing concerning the determination of the criminal charges against him. This right is implicit in the very notion of an adversarial procedure and can also be derived from the guarantees contained in sub-paragraphs (c), (d) and (e) of paragraph 3 of Article 6 (see Colozza v. Italy, 12 February 1985, § 27, Series A no. 89, and Stanford v. the United Kingdom, 23 February 1994, § 26, Series A no. 282-A). It is difficult to see in the present case how the applicant could have exercised these rights without having prior notice of the hearing.44. Furthermore, the Court notes that a public prosecutor was present at the cassation appeal hearing and made oral submissions to the court. These submissions were directed at having the applicant's appeal dismissed and his conviction upheld. In such circumstances and having regard to the fact that the applicant was not legally represented, it was incumbent on the Supreme Court to take measures aimed at ensuring the applicant's presence in order to maintain the adversarial character of the proceedings. However, there is no indication that the Supreme Court, while deciding to proceed with the hearing in the applicant's absence, checked whether the summons had indeed been served on the applicant. The decision of the Supreme Court was silent on the issue of the applicant's absence from the hearing.45. The Court further observes

the active participation of the accused and in complex cases, when serious criminal charges are at stake, a defence lawyer is the only person who can effectively challenge these charges brought against the accused.

Judges' equal consideration of defendants' motions, witnesses and right to cross-examine. The Project Team reported a substantial number of cases were the judge(s) dismissed motions raised by the defendants without a sound consideration of the issues at stake and, more importantly, without issuing a qualified legal reasoning.[40] Further, in more than 30 court hearing judges refused requests by defence counsel to invite witnesses who were crucial for the defence also without any reasoning, but rather following the advice of the prosecution.

Judges create advantageous conditions for prosecution. In approximately 20% of cases, the prosecution appeared to be in an advantaged position compared to the defendant, for instance by proposing to the court to hold a preparatory hearing in the absence of the victim. When the prosecutor reacted negatively to the accused's request to postpone the hearing, the court disregarded the accused's request. In another case, the prosecutor interfered with the accused's examination of a circumstantial witness and the judge did not prevent him from doing so. In more than 70% of cases, the judges asked only the prosecutors if there had been any violations during the pre-trial investigation period and disregarded the accused's claims on this matter. The Trial Monitoring Team revealed 16 court hearings when judges, without any reasoning, granted the prosecutors' requests to have the witnesses' testimony read out at the a court hearing without the presence of these witnesses. These prosecutors' explanation as to the absence of the witnesses for the prosecution, were in most cases based solely on the prosecutor's allegation of the impossibility of summoning the witnesses to the court. Such practice breaches the principle of adversarial proceeding.

The Project Team also reported about court hearings when judges, without any reasoning, granted the prosecutors' requests to have the witnesses previously recorded testimony read out at the a court hearing without the presence of these witnesses, thereby making cross examination impossible. In approximately 3% of hearings observed, the judge overruled the objections by the defence without

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that in certain cases it has found that the presence in person of the accused at a hearing of an appeal where only points of law were considered was not crucial (see, for example, Kremzow v. Austria, 21 September 1993, Series A no. 268-B, and Kamasinski v. Austria, 19 December 1989, Series A no. 168). The Court considers, however, that the present case is distinguishable from the cases of Kremzow and Kamasinski, where the accused persons were represented by lawyers and in principle each had the opportunity to present his defence. In the present case, more fundamentally, the applicant was unable to do this because he had had no prior notice of the hearing (compare with Ziliberberg v. Moldova, no. 61821/00, § 41, 1 February 2005; Maksimov, cited above, § 41; and Abbasov, cited above, § 33).

46. It follows that the proceedings before the Supreme Court did not comply with the requirement of fairness. There has accordingly been a violation of Article 6 § 1 of the Convention.[…]"

[40] Defence motions related in many cases to the appointment of additional forensic evidence, other expertise and inviting additional witnesses.

any legal reasoning, which violates the principle of adversarial proceedings. In fact, fair trail standards require that the prosecution produce all evidence in the presence of the accused at a public hearing.[41] Only exceptional circumstances and with the judges fair and public reasoning do fair trial standards permit the prosecution to rely on evidence from a witness that the defendant has been unable to cross examine.

In more than five court hearings, judges permitted prosecutors to put pressure on the witnesses who retracted statements previously made against the accused during the pre-trial investigation. The Project Team also reported more than ten court hearings where witnesses retracted previously given testimonies. In several such cases, the witnesses stated in court that the investigation officers had forced them to testify against the accused during the pre-trial investigation. However, the judges disregarded these statements. This demonstrates not only an appearance of bias by the judges towards the prosecution, but a dereliction of the duty of judges to investigate fully the circumstances in which evidence was reportedly obtained during the pre-trial investigation when an allegation is made in court at the trial that a witness has been forced to testify against an accused.

There is a risk that the conditions and facilities within court buildings may have a negative impact on the adversarial nature of court proceedings and the equality of arms. Some courts do not have adequate facilities to accommodate witnesses individually, which may lead to irregularities, such as witnesses communicating with each other before being questioned at the court hearing. In some cases, the witnesses were present in the courtroom, and were able to hear the proceedings and other witnesses' statements before giving their own statements. This raises doubts about the objectivity of their statements. According to the Azerbaijani CPC,[42] witnesses shall be questioned separately during the trial and in the absence of those witnesses yet to be questioned. Full compliance with this rule is required to prevent undesirable and inappropriate influence of the witnesses.

Summary of positive and negative trends. The 2010 report reiterates an overall lack of compliance with the equality of arms principle and the existence of bias in favour of the prosecution, which may be due to the following shortcomings: (i) there are an insufficient number of duly qualified defence lawyers in Azerbaijan and further, State appointed lawyers can provide poor quality representation; and (ii) many judges appear to consistently disregard their duty to adequately inform the accused and witnesses about their rights and safeguard compliance with these rights.

[41] See Barbera, Messegue and Jabardo v. Spain, the ECtHR Judgment of 6 December 1998, para. 78.
[42] Article 328.1 of the CPC.

7. The right to effective legal representation

Basic definition of right to effective legal representation. According to Article 6 (3) of the ECHR, everybody charged with a criminal offence is entitled, as a minimum right, to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require. The right applies to all stages of criminal proceedings, including the criminal investigation phase. Defendants are entitled to (i) defend themselves; (ii) retain private legal assistance of their choosing at their own expense; or (iii) be provided with State appointed legal assistance free of charge (legal aid) in any case according to Azerbaijan's domestic legislation.

Judges are responsible for ensuring the defendant's effective legal representation. According to Azerbaijan's legislation, judges are not explicitly required to advise an accused of the importance of legal representation. However, the absence of legal representation for an accused inevitably leads to a lack of equality of arms, which is a violation of international fair trial standards. Thus, to be compliant with Azerbaijan's international legal obligations, judges are ultimately responsible for ensuring that defendants have access to representation and that State-provided legal assistance is practical and effective. Further, judges are responsible for informing the accused about their fundamental right to effective legal respresentation and ensuring its fulfilment in practice because the poor quality of the legal representation, particularly in case of State appointed lawyers, directly jeopardises the accused's fundamental right to effective legal representation throughout court proceedings[43]. The Project team further noted that the fundamental right to representation by a defence lawyer is in most cases either not properly understood, or underestimated by the accused.

Waiving the right to legal representation. In some court hearings, the Project Team noted that the accused refused legal assistance by signing a written waiver. Of these cases, the Project Team reported that the court's secretary requested the accused to sign the waiver before the court hearing started and before the judge had reasonable opportunity to explain to the accused his right to legal aid. In such situations the presiding judge, as a rule, did not take any action to explain to the accused the importance of having legal assistance, but instead proposed that the accused confirmed his refusal in writing. The Project Team also reported about court hearings where the defendants declined legal representation solely on the ground of lack of financial means and yet the judge failed to explain to

[43] The ECtHR has held that while the authorities can not be held responsible for every shortcoming of a legal aid lawyer, the mere nomination of a defence lawyer is insufficient. Consequently, as the main guarantors of compliance with fair trial standards, the judges must either replace a lawyer is not fulfilling his or her duties towards the client, for whatever reason, or require the lawyer to fulfil his or her obligations to the client. (Artico v. Italy (1981).

them that all accused persons have a constitutional right to counsel, irrespective of their financial situation.[44]

Barriers to effective State-appointed defence counsel and "free" legal aid. The Project Team observed that State-appointed lawyers do not render effective legal aid. The Project Team also reported that in some cases legal aid lawyers requested additional remuneration from the accused or his/her relatives to supplement legal aid allocated funds, which is a blatant violation of the accused person's right to free legal advice. In a substantive number of court hearings, the Project Team reported on the poor quality of the legal services provided by State appointed defence counsel and their failure to perform their duties competently.[45] The Project Team reported further that State appointed lawyers in most cases do not ask any relevant legal questions, raise motions or take any initiative to submit evidence. Rather, State appointed defence counsels often demonstrated a passive attitude, giving the impression that they were not interested in defending the accused.

Procedural problems with the assignment of State-appointed defence council. Among other factors, the procedure for appointing defence counsel in accordance with the requirements in the CPC, is in itself contributing to poor representation. In all reported cases involving State-appointed lawyers, the judges processed the appointment shortly before the beginning of the preliminary proceedings, allowing no time for counsel to prepare adequately the defence. Moreover, State-appointed representation was inconsistent when different State-appointed lawyers represented the accused at the pre-trial investigation and during trial proceedings. Replacing defence counsel in the middle of judicial proceedings is likely to affect negatively the quality and effectiveness of the legal services accused persons receive.

Legal representation and delays of court proceedings. The Project Team also observed the widespread practice of refusal by the lawyers to act on behalf of the accused, or cases where they felt to attend court hearings without sound reasons and, thereby, delayed trial proceedings. As a result, defence lawyers did not have sufficient time to prepare adequately the defence, both in the interests of

[44] For example, in a case decided at the appeal court level, the accused said that he had not been able to appeal to the Supreme Court because he had not been able to hire a lawyer due to lack of financial means. In response, the judge asked the lawyer: *"how much money do you take for writing a cassation appeal, if the person is poor?*" The advocate said: *"50 AZN."* This exchange between the judge and the lawyer confirms the inefficiency of the legal aid system when the accused cannot afford hiring a private lawyer.

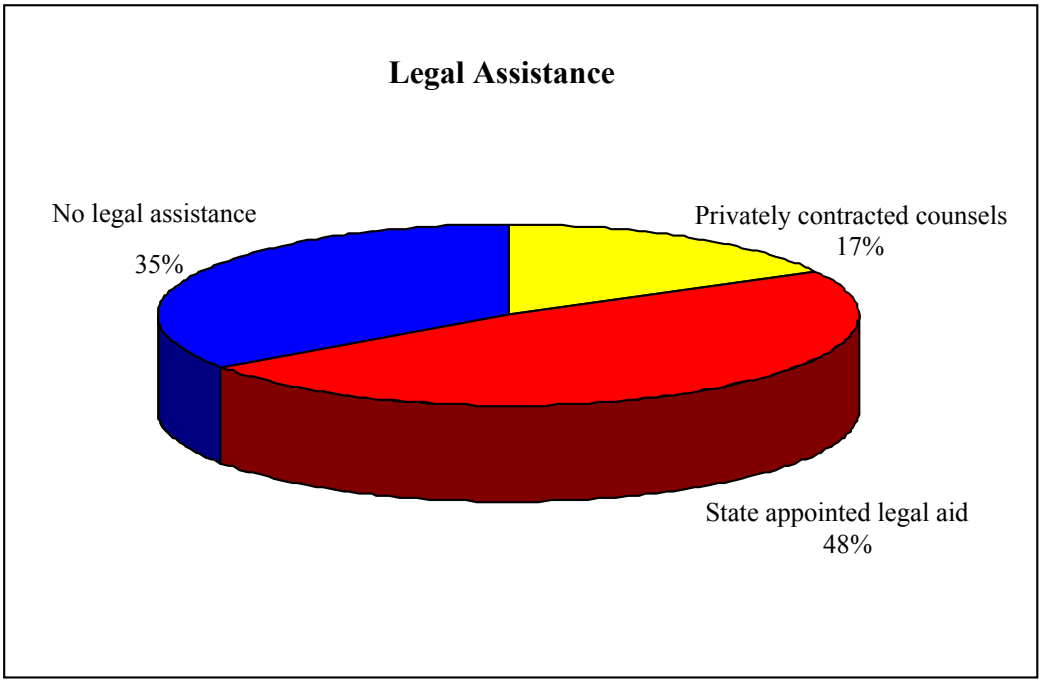
[45] For example: […] "*Lawyer: Your honour, the accused confessed the crime and plead guilty. At the last hearing, he asked to hasten the proceeding. I also support him in this and ask you to finish the trial. Judge: The important thing is not his confession. It must be proven by evidence that he had committed the crime.* Lawyer: *I also think that it was absolutely proved at the court investigation that the accused committed the crime." Lawyer: I think, we should continue the hearing. Judge: But as a rule, always defence side is interested in examination of a witness. Lawyer: Yes, but how many times should I come".*

justice and the accused. According to domestic legislation,[46] whenever defence counsel fails to attend a court hearing without justified reasons, without informing the court in advance and in cases when it is impossible to replace them in a timely manner, the examination of the criminal case shall be postponed. In contradiction to this legal requirement, in approximately 20% of the hearings the Project Team reported that the judge(s) preferred to hold the hearing in the absence of defence counsel or offered the accused to waive his right to defence counsel. [47]

Summary of positive and negative trends. It is a serious concern that during the trial observation conducted in 2010, the Project Team observed no noticeable improvement over prior report periods in the quality of service that State-appointed defence lawyers render or the judges' performance of their duty to ensure that accused persons enjoy their right to representation. Rather, the Project Team consistently observed the poor quality of State appointed lawyers in criminal cases during this reporting period.

On a positive note, the Project Team notes that State appointed legal aid has increased from 7% in 2009 to 20% in 2010 and that the number of cases where no legal assistance was provided has decreased from 74% in 2009 to 68% in 2010.

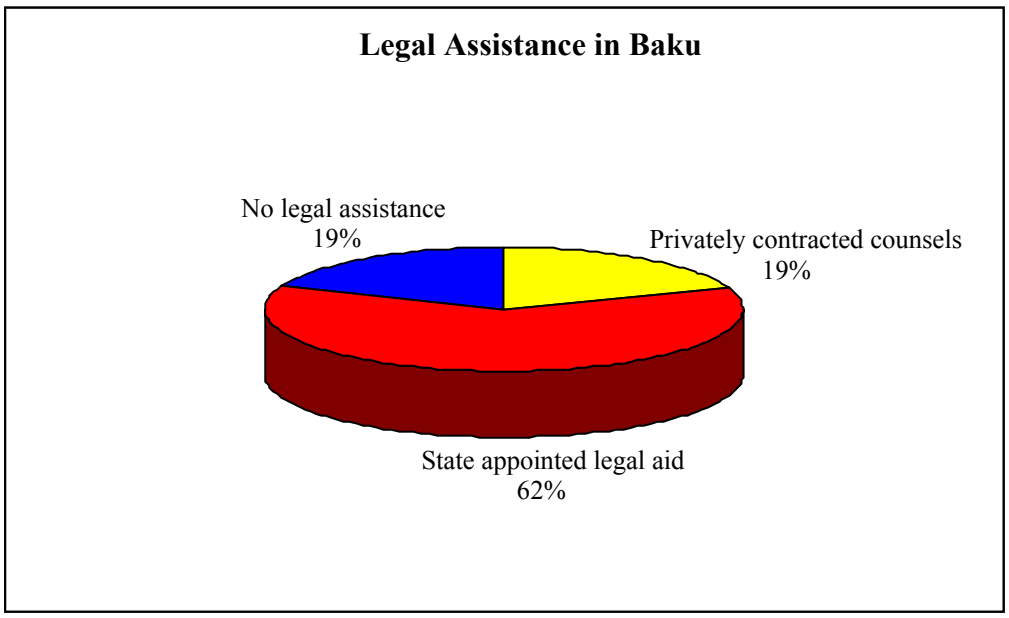
Table 14: Provision of Legal Assistance in Monitored Cases



[46] Article 312.5 of the CPC.
[47] For example: *Judge: Do you have a lawyer? Accused: No. Judge: Will you defend yourself? Accused: Yes. Prosecutor: I offer to postpone the hearing, provide him with lawyer and then hold the hearing. He will not be able to defend himself. Judge: We have appointed a lawyer, but he did not come. Judge: if you do not object, we will hold the hearing. Accused: I do not object. Judge: Then sign a waiver that you officially refuse defence counsel.*

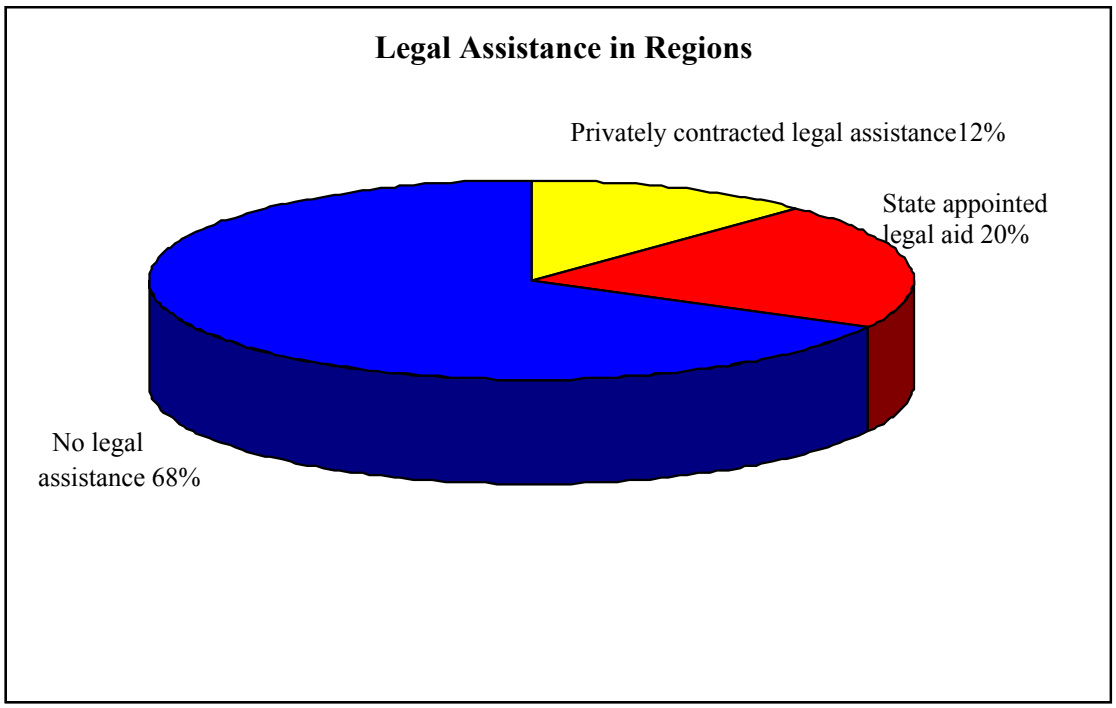
COURTS	privately contracted counsels	state appointed legal aid	no legal assistance provided
Baku Court of Appeal	4	0	1
Ganja Court of Appeal	3	3	5
Sumgayit Court of Appeal	2	1	6
Court of Grave Crimes	16	34	6
Binagadi District Court	3	10	4
Garadagh District Court	1	0	0
Khatai District Court	4	21	3
Narimanov District Court	1	7	12
Nasimi District Court	3	12	4
Nizami District Court	0	17	1
Sabail District Court	0	4	2
Sabunchu District Court	4	10	2
Surakhani District Court	0	6	1
Yasamal District Court	3	3	2
Ganja Kapaz District Court	0	3	6
Ganja Nizami District Court	0	12	3
Sumgayit City Court	0	0	11
Absheron District Court	3	0	24
Gabala District Court	0	0	1
Gobustan District Court	0	0	2
Jalilabad District Court	1	0	0
Khachmaz District Court	0	1	0
Lankaran District Court	1	0	0
Masalli District Court	0	0	2
Salyan District Court	0	0	2
Shamakhi District Court	0	0	4
Shusha District Court	2	0	0
TOTAL:	**51**	**144**	**104**

Table 15: Provision of Legal Assistance – Cases Monitored in Baku



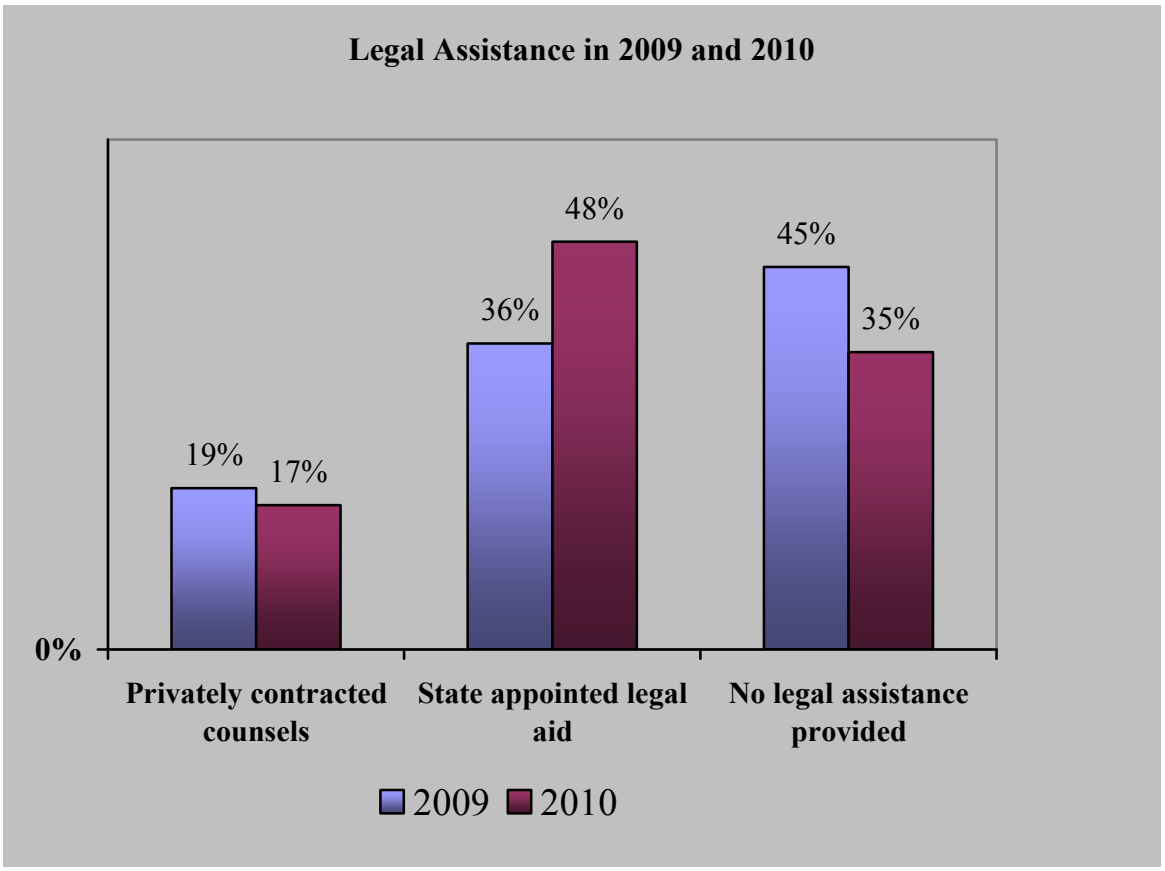
COURTS	privately contracted counsels	state appointed legal aid	no legal assistance provided
Baku Court of Appeal	4	0	1
Court of Grave Crimes	16	34	6
Binagadi District Court	3	10	4
Garadagh District Court	1	0	0
Khatai District Court	4	21	3
Narimanov District Court	1	7	12
Nasimi District Court	3	12	4
Nizami District Court	0	17	1
Sabail District Court	0	4	2
Sabunchu District Court	4	10	2
Surakhani District Court	0	6	1
Yasamal District Court	3	3	2
TOTAL:	**39**	**124**	**38**

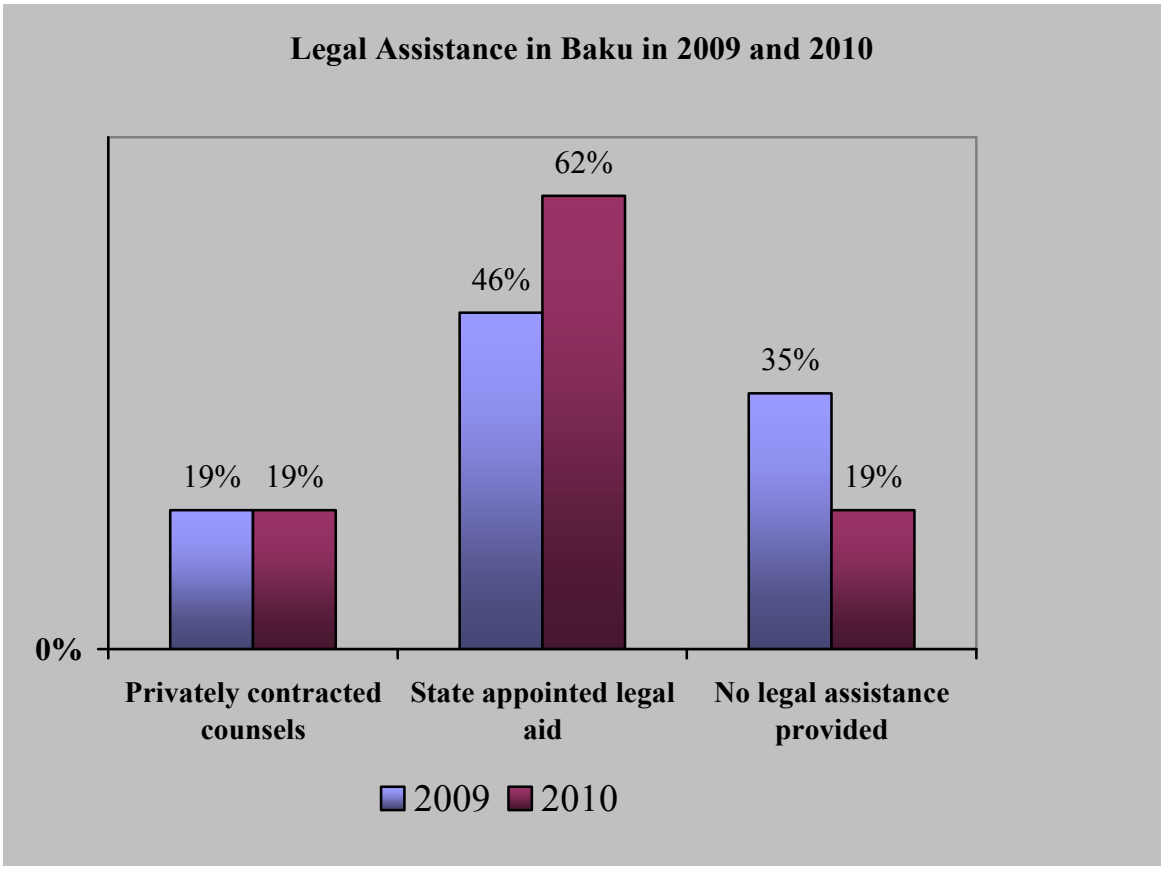
Table 16: Provision of Legal Assistance – Cases Monitored in Regions

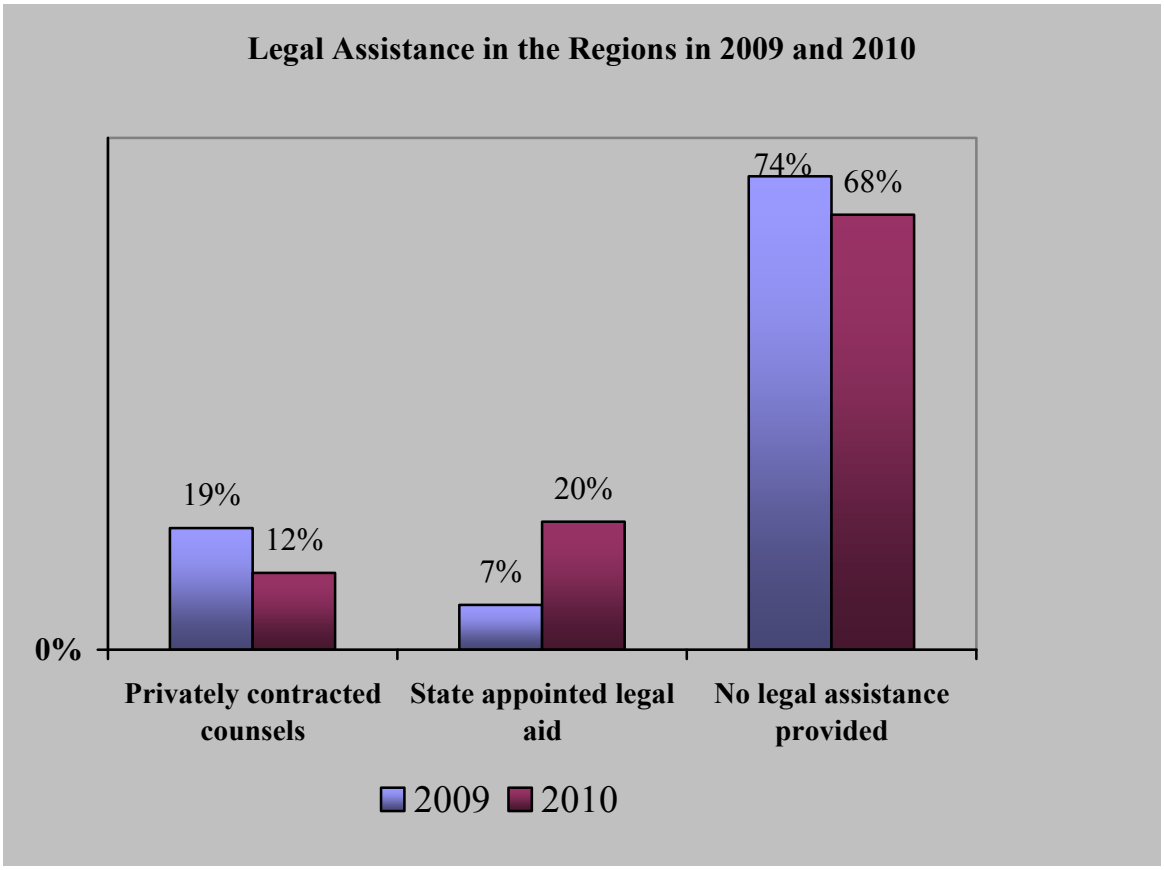


COURTS	privately contracted	state appointed legal aid	no legal assistance provided
Ganja Court of Appeal	3	3	5
Sumgayit Court of Appeal	2	1	6
Ganja Kapaz District Court	0	3	6
Ganja Nizami District Court	0	12	3
Sumgayit City Court	0	0	11
Absheron District Court	3	0	24
Gabala District Court	0	0	1
Gobustan District Court	0	0	2
Jalilabad District Court	1	0	0
Khachmaz District Court	0	1	0
Lankaran District Court	1	0	0
Masalli District Court	0	0	2
Salyan District Court	0	0	2
Shamakhi District Court	0	0	4
Shusha District Court	2	0	0
TOTAL:	**12**	**20**	**66**

Table 17: Comparative Chart Legal Assistance







8. The effective investigation of ill-treatment allegations

Legal obligations related to torture and other forms of ill-treatment. The UNCAT outlines the positive obligation of States to prevent torture and punish those responsible. OSCE Commitments and the European Convention for the Prevention of Torture (ECPT) explicitly clarify the importance of the role of prevention.[48] Specifically, the UNCAT requires states to conduct investigations of torture or other cruel, inhuman or degrading treatment even when there has not been a formal complaint. Further, individuals have the right to complain, to have their complaints investigated and to be protected from any consequent threats or ill-treatment.[49] OSCE commitments also address the right to lodge complaints against torture or other forms of ill-treatment and to have such complaints dealt with promptly.[50]

The UN Special *Rapporteur* on Torture has further stated that when a detainee, his/her relative or defence lawyer lodges a torture related complaint, an inquiry is always required. Moreover,

[48] ECPT, Council of Europe, European Treaties Series, ETS No. 126; OSCE commitments including the Copenhagen Document, (1990) paragraph 16, Budapest Document (1994), and Istanbul Charter for European Security (1999).
[49] Articles 12, 13 and 16 of the UNCAT.
[50] Moscow Document (1991) para. 23.1 (ix and x).

complaints about torture are to be dealt with expeditiously and should be investigated by an independent authority with no relation to that which is investigating or prosecuting the case against the alleged victim.[51]

The ECtHR has held that states are obliged to investigate all "arguable claims" of torture and that this is implicit both in the notion of the right to an effective remedy and the right to be protected from acts of torture.[52] According to ECtHR case law, [...]"where an individual raises an arguable claim that he has been seriously ill-treated by agents of the state, the authorities are obliged to carry out an effective and independent official investigation including the taking of witness statements and the gathering of forensic evidence capable of leading to the identification and punishment of those responsible."[53]

Judges often fail to provide for investigations of ill-treatment allegations. According to Azerbaijan's obligations noted above, the judiciary have a positive and absolute obligation to ensure that torture or other cruel, inhuman or degrading treatment is not justified under any circumstances. Further, law requires state authorities to ensure that torture is not used to obtain confessions and that any confessions obtained under such duress are not admitted in courts as evidence. Consequently, it is essential that judges fulfil their positive duty to investigate all allegations of torture or other forms of ill-treatment. However, the Project Team observed that defence lawyers and accused brought allegations of ill-treatment to the attention of the judges and in most instances, the judge did not ensure the sufficient investigation of such serious allegations. In several cases, the Project Team reported that the judge did not invite the police officers who the accused alleged had perpetrated the ill-treatment to the court for examination initially as witnesses who may become suspects in the case the accused's allegations are proved throughout the court proceedings.

Use of potentially inadmissible evidence and questionable forensic evidence. Azerbaijan's legislation, in line with the UNCAT, provides for sufficient guarantees to exclude any information, documents and other items from being admitted as evidence if they have been obtained by violence, threats, deceit, torture or other cruel, inhuman or degrading acts.[54] Consequently, judges may not consider any evidence, including particularly accused's confessions of guilt, in case they have reasonable grounds to believe that it may have been obtained forcibly, through torture or any other form of ill-treatment.

[51] Report of the Special *Rapporteur* on Torture, UN Doc.A/56/156, July 2001, para. 39(d).
[52] Assenov and others v Bulgaria ECtHR, Judgment 28 October 1998; Aksoy v Turkey ECtHR, Judgment 18 December 1996.
[53] Ribitsch v Austria, ECtHR, Judgment 4 December 1995; Aksoy v Turkey ECtHR, Judgment 18 December 1996; Assenov and others v Bulgaria ECtHR, 28 October 1998, Kurt v Turkey ECtHR, Judgment 25 May 1998, Gakici v Turkey, ECtHR, Judgment of 8 July 1999, Akdeniz and others v Turkey, ECtHR, Judgment 31 May 2001.
[54] Article 125.2.2 of the CPC and Article 15 of the UNCAT.

In some cases reported by the Project Team, judges did not question the admissibility of evidence allegedly obtained under duress, often relying on accused's pre-trial statements, which were conflicting with testimonies made during court hearings.[55] For instance, according to other Project Team observations, in some court hearings the judges did not react to the defence counsel's objections to the objectivity and impartiality of forensic examinations, which may lead to inaccurate results, and refused requests for new ones. In the same number of reported court hearings, the accused presented visible signs of ill-treatment despite contradictory forensic reports, which alleged that the accused did not present any signs of such ill-treatment.

Defence lawyers also questioned in some court hearings the quality of the medical examinations, as well as the independence and objectivity of the forensic expertise used by the authorities in cases involving allegations of ill-treatment. According to them, such examinations were not thorough enough to fully assess any injuries that may have been inflicted upon the accused.

Summary of positive and negative trends. The data gathered in 2010 reiterates shortcomings regarding the courts' obligation to ensure investigations of sound allegations of ill-treatment, or to exclude as evidence information allegedly obtained as a result of ill-treatment. Further, the Project Team reported shortcomings as to the independence or objectivity of forensic evidence.

9. The right to reasoned decisions

Legal obligation of judges to provide reasoning. In Article 6 (1) of the ECHR the notion of "fair hearing" requires judges to provide reasoning in their judgments. One of the functions of a reasoned decision is to demonstrate to the parties that they have been heard. Moreover, a reasoned decision

[55] For example: The judge*: Your testimony given here contradicts the one given in the pre-trial investigation stage. Had you been subjected to any pressure?* The accused*: Yes, there had been pressure against me.* The judge: *if you faced pressure, you would be indicted with the charges of terrorism, but you are not charged with that article.*
***
The accused: *The investigator coerced me to confirm the testimony given in the pre-trial investigation period.* The judge: *You are staying in the detention facility and your statements do not seem convincing.* The accused: *I urge you to take actions in this respect.*
***
The accused: *They hanged me naked for three days. They tortured me. Please, I have to speak; I have to call my witnesses. I have to share my troubles;* The judge*: you have to address the issues on ill-treatment when you give testimony. Only then we can appoint expertise.*

affords a party the possibility of appeal and review by an appellate body. It is only by giving a reasoned decision that there can be public scrutiny of the administration of justice.

Judges fail to provide reasoning The project team reported on cases where motions and submissions filed by the parties during the court proceedings, which required a reply by the judges, where the judges failed to address the issues. Judges' failure to dismiss the motions and submissions with sound reasoning creates the appearance that the judges have neglected their official duties. In most observed cases, when the judges dismissed motions, they did not provide any sound reasoning. However, in view of the context of the cases at stake, the submissions in question appeared to be decisive for the fair resolution of the case and could have lead in some cases to the termination of the criminal case due to lack of evidence. This applies in particular to preparatory hearings, which constitute a critical stage of court proceedings in terms of ensuring compliance with accused's most fundamental fair trial rights throughout other stages of court proceedings, including the right to effective legal representation and the presentation of exculpatory evidence.

Failure to provide written reasoning is an obstacle to appeal. According to the 2010 data, the Project Team's reported that the judgments read out by judges in court mostly lack an adequate reasoning part. Given that the deadline for appeal is contingent upon the date of issuance of the court judgment, the accused needs to know the main grounds for his/her conviction in order to file an effective appeal. In over half of the court hearings the Project Team observed, they noted that judges did not read out to the accused persons the full text of the judgments, as is mandatory in accordance with the domestic legislation, but only those parts related to the sanctions and excluding any information about the grounds for the conviction.

Summary of positive and negative trends. Based on the observations the Project Team considers that the majority of judgments continue to fall short of providing sound reasoning as required by domestic legislation and international fair trial standards. Moreover, in 2010, the Project Team observed that in the majority of cases judgments were only partially read out in court; and that both the acquittal rate (1%), and the incidence of judges' decisions to terminate court cases based on insufficient evidence to support the indictment (1%) remain extraordinarily low. However, on a positive note, the Project team noted a slight increase compared to prior reporting periods in the overall number of judges' decisions to terminate court cases based on insufficient evidence provided by the prosecution.

Table 18: Comparative Chart - Delivery of Judgments

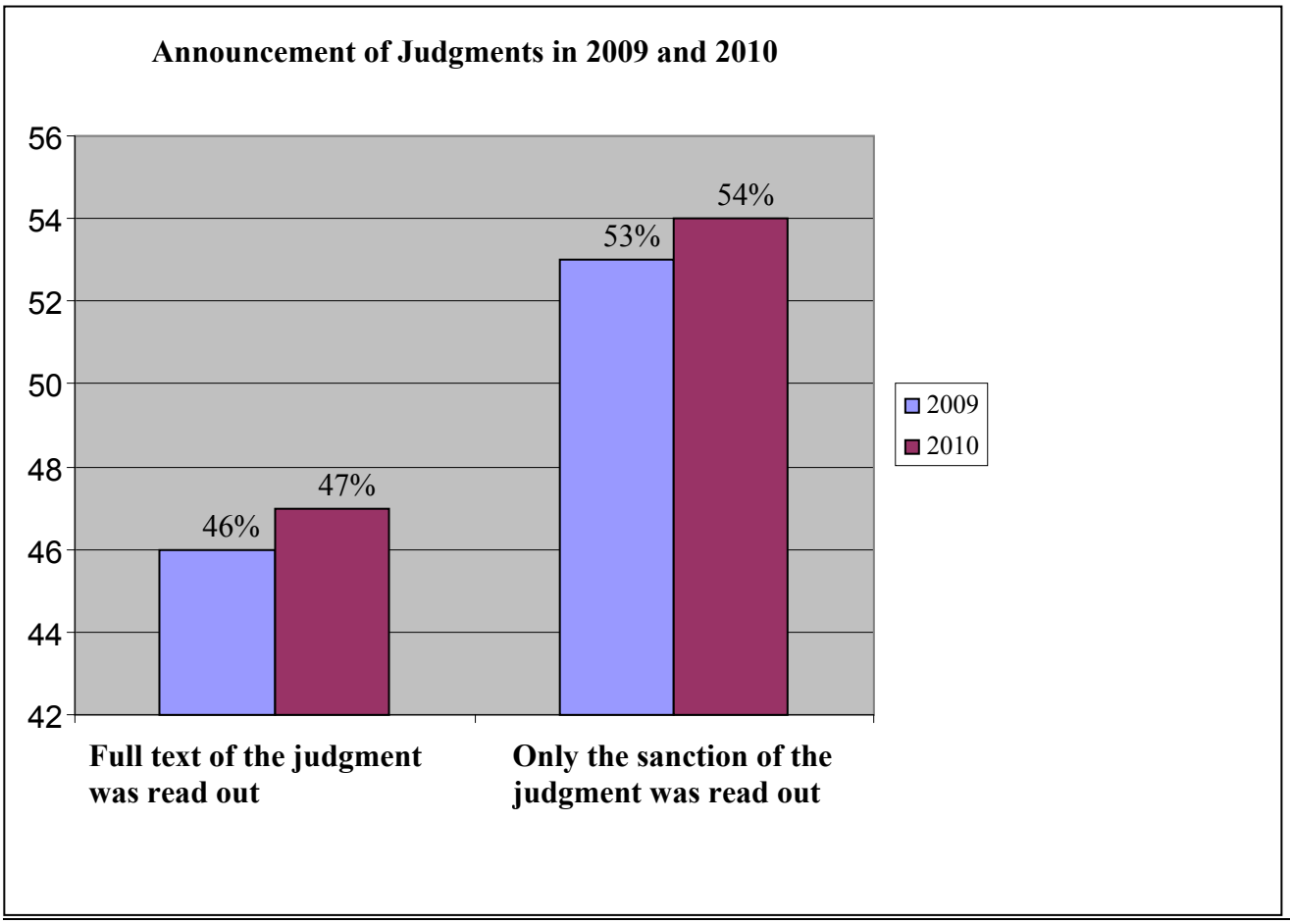
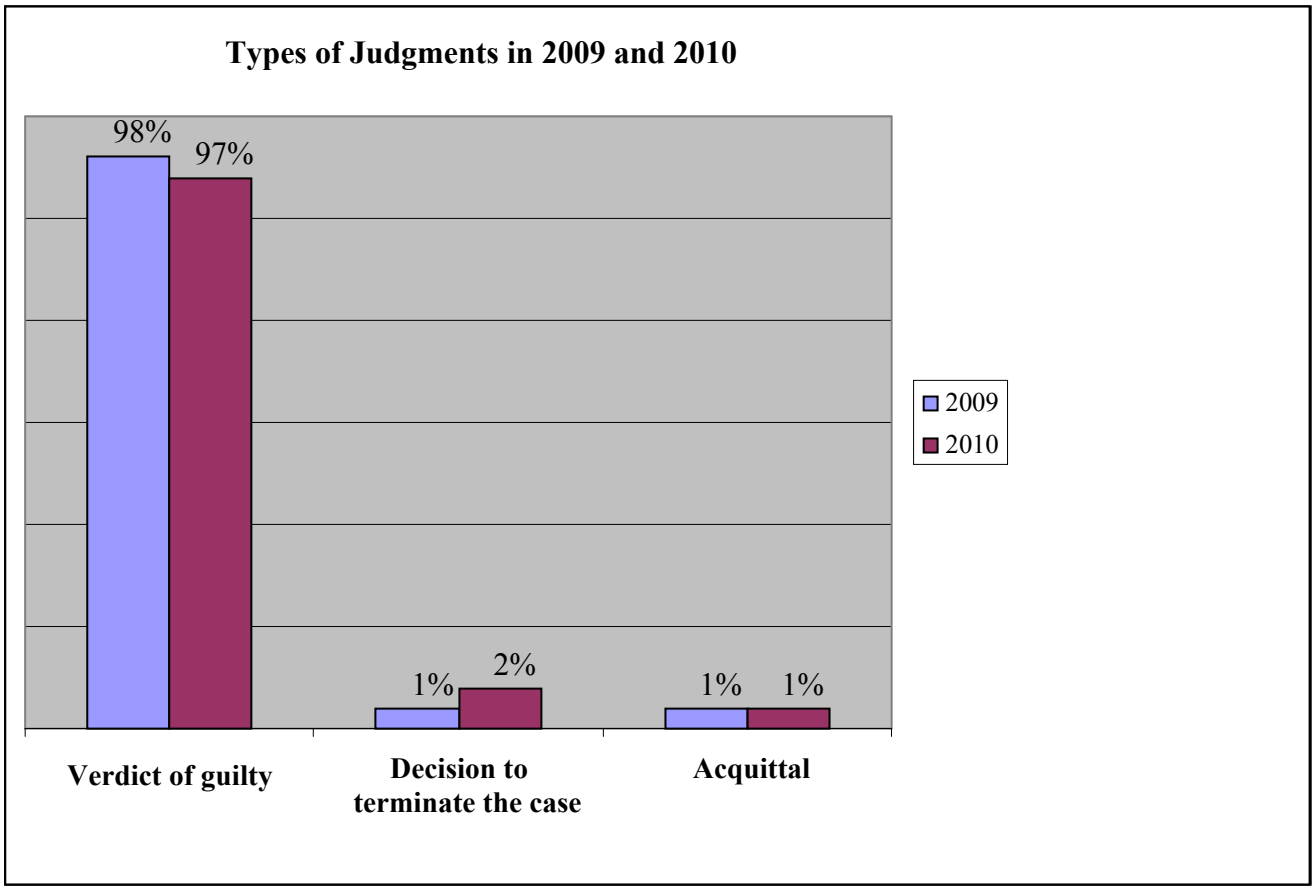
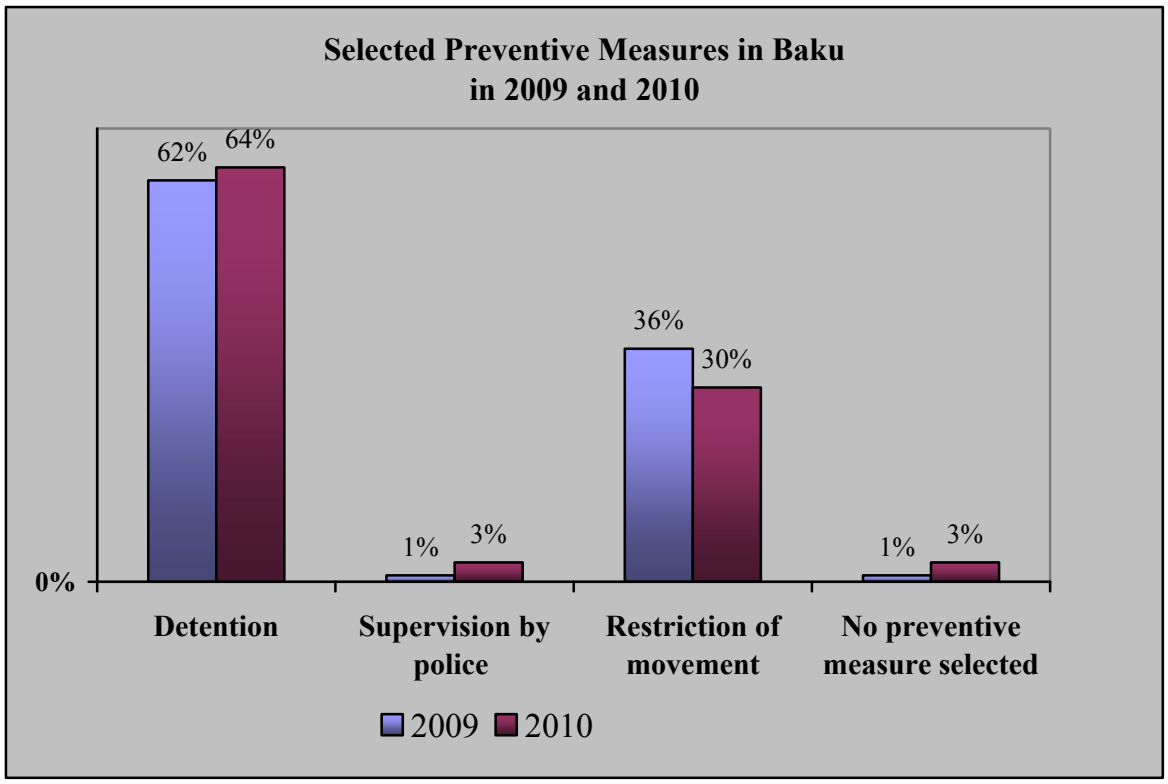


Table 19: Comparative Chart of the Judgements





IV. Recommendations

The Office in Baku presents the 2010 Project Team observations described above to assist the Republic of Azerbaijan promote the development of the effective administration of justice in accordance with OSCE commitments and related international and domestic legal obligations regarding fair trial standards. For this reason, the Office proposes the following recommendations and stands ready to continue assisting all stakeholders in their implementation.

To the Judicial Legal Council and the Judiciary

1. Increasing judges' accountability and rewarding cases of good performance[56]. The Office advises that the Judicial Legal Council continues effectively addressing complaints related to judges' failure to perform their duties, as initiated under the applicable domestic legislation, and applies disciplinary measures as a deterrent for preventing the recurrence of similar fair trial violations. Optimally, members of the judiciary would also be encouraged to perform their duties diligently and rewarded when they comply consistently with fair trial standards in their daily work.

2. Provision of further guidance to judges. The Plenum of Supreme Court is advised to increase its leadership role in continuing to issue guiding decisions for judges of lower courts about how to improve overall court compliance with fair trial standards according to applicable domestic and international legislation, ECtHR case law and good practices.

To the Bar Association

1. *Increasing defence lawyers' accountability and rewarding cases of good performance.* Similarly, the Bar Association is advised to increase its oversight functions to hold defence lawyers accountable for fulfilling their responsibilities. This includes their performance in court and their compliance with the applicable domestic legislation in line with international standards.

2. *Increasing the number of qualified defence lawyers.* The Bar Association is advised to increase its efforts to enlarge the number of duly qualified defence lawyers and improve their skills and professionalism through regular and specialised training and other capacity building activities.

[56] During the reporting period, the Judicial Legal Counsel promoted 8 Judges to the Supreme Court, 34 to Appeal Courts. It terminated the term of office of 18 Judges and applied disciplinary measures to 7 Judges due to shortcomings in their work performance.

Further, the Office advises that the minimum skills for attaining membership to the Bar Association include thorough knowledge of the basic principles and role of defence lawyers, legal argumentation in court, including examination methods of witnesses and the preparation of written submissions, ethical conduct, and applicable domestic legislation and international legal instruments regarding fair trial standards *inter alia.*

3. *Reforming the legal aid system.* The Bar Association, with the support of other Government authorities responsible for providing the necessary financial support, is advised to lead a thorough reform of the legal aid system in order to increase its effectiveness and to ensure quality legal representation in case of State appointed lawyers in the interests of justice. A more effective legal aid system would provide quality free-of-charge legal representation to the accused consistently throughout pre-trial investigation period and court proceedings and would provide for State appointed lawyers reasonable compensation for continuous engagement in court proceedings through all the stages and jurisdictions of Azerbaijan.

To the State authorities, particularly Ministry of Finance

Support the strenghtening of the Bar Association. As mentioned in recommendation no. 3 above to the Bar Association, the Government has also a responsibility to ensure effective legal representation in the case of State appointed lawyers in the interests of justice. Therefore, the Government is advised to provide the Bar Association with the necessary financial support in order to improve the quality of legal representation.

To the Parliament

Support legislative reforms. Also in connection with recommendation no. 3 to the Bar Association, the Office advises the Parliament to support the necessary legislative reforms to ensure effective legal representation in courts. This includes the Code of Criminal Procedure and the Law on Advocates, to provide for a functional legal aid system.