REPORT

Results of Trial Monitoring in the Republic of Kazakhstan

2005-2006

OSCE Office for Democratic Institutions and Human Rights

OSCE Centre in Astana

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CONTENTS

LIST OF ABBREVIATIONS

UN – United Nations

UDHR – Universal Declaration of Human Rights

ICCPR – UN International Covenant on Civil and Political Rights

UN BP - UN Basic Principles on Independence of the Judiciary

ECHR –Convention for the Protection of Human Rights and Fundamental Freedoms (also known as the European Convention on Human Rights)

CSCE – Conference on Security and Co-operation in Europe

OSCE – Organization for Security and Co-operation in Europe

ODIHR – Office for Democratic Institutions and Human Rights

CC – Criminal Code of the Republic of Kazakhstan

CPC – Criminal Procedure Code of the Republic of Kazakhstan

EXECUTIVE SUMMARY

In order to advance human rights and the rule of law, OSCE participating States have committed themselves to opening their trials to international and national observers. On this basis, between November 2004 and September 2006, the Office for Democratic Institutions and Human Rights (ODIHR) of the Organization for Security and Co-operation in Europe (OSCE) implemented a trial-monitoring project in the Republic of Kazakhstan. This Project was carried out as part of the ODIHR's mandate to monitor the OSCE participating States' compliance with and implementation of their OSCE commitments, and assist them with their implementation, in this case commitments relating to standards for fair trials.

The trial-monitoring project was aimed at training representatives of civil society in the methodology of monitoring criminal trials, obtaining credible information as to the extent of compliance by the courts with fair-trial standards and, based on the result of the trial monitoring, producing recommendations for the relevant government authorities.

Generally, existing provisions on criminal procedure in Kazakhstan establish basic guarantees as prescribed by international fair-trial standards. It is commendable that the authorities of Kazakhstan ratified[1] the 1966 International Covenant on Civil and Political Rights (ICCPR) without reservations. Amendments to the national law on criminal procedure are, however, still necessary in order for it to comply fully with the ICCPR.

This report does not purport to provide an in-depth analysis of the existing legislative framework and its compliance with international fair-trial standards. Much has been already done or continues to be done in this regard by the ODIHR as part of its activities related to the rule of law in Kazakhstan.

Therefore, this report concentrates on the observations made by ODIHR trial monitors on how court procedures complied with international fair-trial standards and the applicable national laws.

During the period of monitoring, from February 2005 until April 2006, the trial monitors attended 730 first instance court hearings relating to a total of 385 criminal cases that were open for the general public in eight cities of Kazakhstan. These court sessions took place in 23 district and three regional (city) courts.

Monitoring was carried out in two ways: general monitoring, where monitors attended random court sessions, and complete monitoring, where monitors selected one criminal case from cases recently fixed for trial and followed it through from the time of the first hearing until the pronouncement of the final court decision. Fifty-three criminal cases were completely monitored, and 332 criminal cases were covered under general monitoring. The court sessions attended by the trial monitors were presided over by a total of 122 judges.

After each court session, the trial monitors completed a standard trial monitoring reporting form[2] and following quality control carried out by the ODIHR project co-ordinator based in Almaty, these reports were used for preparing the final report.

The structure of the report follows the sequence of questions contained in the trial monitoring reporting form. The results of monitoring presented here are supported by tables, diagrams and charts summarizing the findings and providing statistics based on the reported observations. It should be noted that any statistics in the body of the report relate only to the court sessions monitored.

[1] In conformity with the Law of the Republic of Kazakhstan of 28 November 2005, No. 91-III.
[2] See Annex 2.

The key findings and conclusions that were made under each of the monitored fair-trial standards are set out below.

The right to trial by an independent, competent and impartial tribunal established by law

All courts covered by the monitoring exercise were established by and operated in accordance with national law. The monitoring results relating to this fair-trial standard were mainly based on observation of external factors indicative of the courts' and judges' independence and competence, as well as observation of certain procedural requirements laid down by national law. With regard to the judges' impartiality an important element examined was judges' behaviour and their respect for the obligatory code of ethics.

The report provides statistics on how often judges complied with or breached procedures prescribed by law for the court, such as:

- The identifying by a judge of the court's composition and the trial participants (90.5% compliance and 9.5% non-compliance),
- Announcing the case that was being heard (96.1% compliance and 3.9% non-compliance),
- Consideration by judges of the defendant's development level, mental and physical state when explaining her/his rights (89.4% compliance, 3.3% non-compliance and in 7.3% of instances the rights were not even explained to the defendant),
- Announcing by the court of its retirement after the defendant's final address to the court (80.6% compliance and 19.4% non-compliance).

The report also shows that in the majority of instances (658 court sessions or 90.1%) the judges respected the judicial code of ethics. However, in 72 monitored court sessions (9.9%) the judges' conduct, predominantly towards the defence counsel, was deemed unethical and biased.

Another issue monitored was the presence of symbols of the judicial authority, as prescribed by national law. These play an important role in creating public respect for the judiciary and administration of justice, and must be strictly complied with by every court in the country. The report notes that not all courtrooms displayed state symbols, such as the flag and emblem of Kazakhstan; and in 120 monitored court sessions judges administered justice without wearing robes or lacked part of the uniform prescribed by law (in 560 monitored court sessions).

The right to a public hearing

The right to a public hearing is a fundamental guarantee of a fair trial and serves as the basis for any trial-monitoring activity. Without this right being put into practice, the ODIHR would have been unable to implement this trial monitoring project.

The ODIHR trial monitors observed public trials only and therefore no explicit permission from judicial authorities was required nor did any prior notification of the intention to monitor have to be communicated to the Supreme Court or other courts in Kazakhstan. Nevertheless, this was done as a confidence-building measure as part of the project's methodology and as a way of demonstrating a constructive approach and spirit of co-operation with the state authorities.

The principle of a public hearing gives members of the public the right to attend any hearing irrespective of whether they are personally involved in the case. As observed by the trial

monitors, participants in the trial did not usually have any problems in accessing the court buildings, courtrooms or judges' chambers where court sessions were being held.

However, the trial monitors themselves had problems accessing the courtrooms or judges' chambers where sessions were being held. In 159 instances the trial monitors had to produce their personal identification documents and register before entering the court building; in 125 instances they had to obtain the prior agreement of the clerk and in 59 instances of the judge in order to obtain access to the courtroom or the judge's chamber where the court session was being held.

In ten instances judges refused to allow the trial monitors to observe the court sessions, in two instances access was blocked by the court clerk, and in three instances by the bailiff. In such cases the OSCE/ODIHR trial monitors were instructed to send letters[3] to the chairpersons of relevant courts informing them of the violation of Article 29 of the Criminal Procedure Code (CPC).[4]

The schedule of hearings was available in 75.6% and not available in 24.4% of instances. Eighty-one monitored court sessions (11.1%) were held in judges' chambers rather than in courtrooms as required by the law. The space, furniture and equipment of these chambers were not suitable for holding court sessions. This made it difficult for the trial monitors to attend court sessions and amounted to an artificially created restriction on the right to a public hearing.

In 462 monitored court sessions (71.4%) there was no technical (audio or video) equipment available in the courtroom.

It should be noted that in all 128 court sessions where the judgment had to be pronounced, the judges complied with this legal requirement. This constitutes one of the elements of the right to a public hearing.

Occasionally court sessions did not take place on account of the failure to appear by one of the participants in the trial. In the majority of cases the absence was on the part of the victim (21 court sessions), witnesses (15 court sessions) or defence counsel (15 court sessions).

In nine instances trial monitors were unable to attend court sessions because they started earlier than shown on the schedule. In six instances the guards did not bring the defendant from the pre-trial detention centre in time for the court session to begin and in four instances the court sessions were adjourned because the defendant did not have an opportunity to inspect the indictment.

In 31 instances the trial monitors could not establish the reasons for the adjournment. In three out of ten instances when court sessions were announced to be held in camera, the trial monitors were unable to obtain or hear the reasoned decision made by the judge in this regard.

The right to a fair hearing

The fairness of hearings was assessed on the basis of several criteria, including an important element that characterizes the reliability of the court system, namely the timely commencement of scheduled court sessions. In the course of monitoring only 140 court sessions started on time.

[3] See Annexes for examples of letters sent by the OSCE/ODIHR trial monitors to the chairpersons of courts.
[4] Criminal Procedure Code of the Republic of Kazakhstan dated on 13 December 1997 № 206-I.

In the majority of cases, court sessions started later than indicated on the published schedule of hearings. In 423 instances the trial began with a delay of more than 15 minutes and in 159 instances the delay was up to 15 minutes. In eight instances the trials commenced earlier than scheduled. The early commencement of trials does not contribute to the efficiency of the judicial system but on the contrary may result in the failure by trial participants to attend the trial, if access to the trial is not allowed in case of a late arrival.

Of monitored court sessions that did not start on time, 27.6% were due to judges, 15.4% to state prosecutors, and 12.4% to the defence counsel.

In 76.5% of monitored court sessions the clerk reported to the court on the status of appearance of trial participants for the trial, but in 23.5% of instances this procedural rule was not complied with. In those court sessions where one of the participants did not appear, only in 32.4% of instances did the court consider whether the trial could go ahead in absence of the missing participant. In 67.6% of instances this issue was not even discussed by the court and the trial continued in the absence of one of the participants.

The right to a fair trial involves the consideration of all available case evidence, equal opportunities for the parties to submit evidence, equal opportunities for questioning witnesses and experts, as well as the impartial examination by the judge of the submitted evidence.

In all court sessions monitored, where the forensic enquiry, examination of sites or material evidence, identification of persons or material evidence and other types of judicial enquiry took place, the procedure prescribed by law was complied with.

With regard to the procedure of questioning witnesses, in 88 monitored court sessions (25.3%) witnesses were not asked to leave the court room before the trial commenced and in 70 court sessions (22.1%) the rights of witnesses were not explained to them by the judge. In 21 instances (6.6%) the court did not comply with the legal requirement not to question witnesses in the presence of those witnesses yet to be questioned. In 11.7% of cases the judge did not explain to the victim his/her rights, and the rules for questioning other participants in the trial were breached in 13.6% of cases.

The monitoring showed cases where judges breached their obligation to be neutral, fair and impartial, and exerted pressure on witnesses or victims during their questioning at the trial. The trial monitors reported that in 17 monitored court sessions judges exerted pressure on witnesses, and in five sessions on a victim.

Moreover, the national law of Kazakhstan obliges the court to explain to the parties when the trial has entered the stage of judicial pleadings and that judgment can only be based upon evidence submitted in court. This duty was not carried out in 62 out of 146 relevant court sessions. Further, the law requires judges to ask the parties if they wish to add anything to the results of the court investigation. This requirement was fulfilled by the court in only 108 out of 146 relevant court sessions.

The right to be present at trial and to defend oneself in person

The defendant appeared in all but five of the 730 court cases where the presence of the defendant was obligatory. In seven out of 179 court sessions where the identity of the defendant had to be established this procedural rule was disregarded.

In 28 out of the 179 relevant court sessions, the judge did not ascertain whether a copy of the indictment had been delivered to the defendant in time, and in 12 instances the

defendant was not asked by the judge for his/her response to the charge brought against him/her, although the national law contains such a requirement.

Defendants were questioned in 221 court sessions and in 89 instances the questioning was initiated by the defence counsel, in 76 instances by the judge, and in 56 cases by prosecutors, although the national law prescribes that the questioning of the defendant should be initiated by defence counsel.

In 121 out of 122 court sessions where defendants had a right to a final address to the court, this right was respected. However, in six cases the defendant refused voluntarily to exercise it. In four cases the defendant was interrupted during his/her final address and asked questions in violation of the legally prescribed procedure.

The right to be presumed innocent and the right not to be compelled to testify or confess guilt

The trial monitors did not record any systematic breaches of the presumption of innocence. However, in those court sessions where the judges were obliged to explain to the defendant his/her rights relating to the presumption of innocence, e.g. the right not to be bound by a confession or denial of guilt made at the pre-trial investigation, this requirement was not complied with in 46.6% of instances.

Moreover, in 41.6% of cases the court failed to explain to the defendant his/her right not to testify against himself/herself and his/her family. During questioning of defendants, in 19 court sessions (8.6%) the judges exerted pressure on them and in 10 court sessions (4.5%) explicitly pressurized defendants to confess guilt.

When the defendant was held on remand during trial (i.e. was in pre-trial detention), he/she was invariably brought into the courtroom in handcuffs and was put in a metal cage, where he/she remained throughout the trial. The use of metal cages in courtrooms clearly falls short of international standards and practice. Moreover, the trial monitors observed that on several occasions where the defendants were charged with crimes of lesser or middling gravity, in addition to being placed behind metal cage bars, they were also placed in hand-cuffs throughout the trial. Such practice is in violation of existing national laws and regulations.

Exclusion of evidence elicited as a result of torture or other duress

The exclusion of evidence elicited as a result of torture or other duress does not appear to be sufficiently established in judicial practice in the Kazakhstan. In 79 monitored court sessions, defendants complained about the use of torture or other forms of duress during the pre-trial stages with the aim of obtaining confessions.

When such allegations were made in the court, judges in 32 instances and prosecutors in 58 instances did not in any way react and did not take any action to investigate these allegations. The only reaction to any allegations was the calling of investigators and interrogators to the trial in order to question them. In all instances allegations were denied by the investigators and interrogators, and the court took no further action.

Equality of arms

In criminal proceedings the state prosecutor must be present at all stages of the main trial, except in cases of private prosecution. During the reported period a prosecutor was absent in 80 sessions. Ten of these (12,5%) were cases of private prosecution. In the majority of cases a prosecutor was absent for the final address by a defendant to the court and for the

pronouncement of the judgment (81%). Five (6.5%) other instances of state prosecutors being absent included the following stages of the trial: the preparatory stage, court investigation and the entering of the plea by the parties.

Equality of arms was observed not only during the course of the proceedings, but also when examining the material conditions of work available for the legal representatives. For example, courts provided a room for prosecutors for pre-trial preparations, whilst defence counsel had to await the start of the trial in the corridor.

In courtrooms or judges' chambers, prosecutors were occasionally (in 48 court sessions) seated closer to judges and this created a visual impression of inequality of arms. The monitors recorded cases when judges assumed the role of prosecutors and led the questioning of trial participants by posing leading questions of an accusatory nature to them.

In the course of monitoring, the monitors observed 195 applications (72.2%) submitted by the defence and 75 applications (27.8%) submitted by prosecutors. Out of the 195 applications submitted by the defence, 146 applications were granted, 31 were not granted with adequate reasoning given, and thirteen were not granted without any reasons given. Out of 75 applications submitted by prosecutors, 57 were granted, eight were not granted, and reasoning was given in all applications that were rejected save one.

The national law gives the parties an opportunity to make final remarks at the end of the court pleadings. In 8.8% of monitored court sessions this right was not respected.

The right to be defended by an experienced, competent and effective defence counsel

During the monitoring the trial monitors noted that ordinarily defence counsel was present during court sessions and the right to defence was thereby secured.

In 75 monitored court sessions defence counsel was absent.

The monitors reported cases where defendants submitted applications to refuse appointed defence counsel on grounds of inadequate legal assistance being provided to them, but judges continued hearing cases in the absence of a defence counsel and did not ensure that the defendants had an appropriate substitute.

In 119 court sessions (18.2%) monitors were of the opinion that defence counsel did not demonstrate a sufficient degree of professionalism or preparedness to defend their clients.

In 196 monitored court sessions (29.9%) the trial monitoring reports indicated that defence counsel did not enjoy necessary conditions for performing their duties; for example, during trials they were seated far from their clients and this impeded the ease of consultation in court.

The right to an interpreter and to translation

In the context of a multinational society such as in Kazakhstan, the importance of the right to an interpreter and to translation is undeniable. The number of languages used by national minorities, ethnic groups and foreign citizens on the territory of Kazakhstan is significant, and therefore, the state faces a task of creating a pool of translators and interpreters available for court proceedings.

In the course of monitoring, an interpreter was deemed unnecessary in the majority (689) of the cases. In those instances when an interpreter was required, in 17 court sessions one

was provided (53.1%). However, in 15 court sessions (46.9%) an interpreter was not provided, although necessary.

In the 17 cases where an interpreter was provided, in seven cases (41.2%) his/her rights were read out by the judge and in ten cases (58.8%) they were not read out, in violation of an existing legal requirement. In ten cases (58.8%) the interpreter was warned by the judge of criminal liability for willfully making false interpretation, but in seven cases (41.2%) this requirement was not met. In seven cases (41.2%) the parties were explained their right to reject the interpreter; however, in ten court sessions (58.8%) this explanation was not given.

Finally, out of the 17 court sessions with interpretation, the trial monitors were of the opinion that in only five of them (29.4%) was the interpretation satisfactory, whereas in nine cases (52.9%) it was not. In three sessions the monitors were unable to assess the quality of interpretation.

The right to a reasoned judgment and the right to a public judgment

In order to facilitate the parties' right to appeal, they should receive a reasoned judgment, which should be made available to them promptly after its public pronouncement. Reliable and full record-keeping is one of the ways to ensure that the judgment is reasoned and that the parties have better tools to support any appeal.

In 581 monitored court sessions record-keeping was performed without interruption. However, in 42 court sessions the court clerk was distracted from his/her duty of record-keeping and in 19 court sessions the record was not even kept.

Only in 27 court sessions (3.7%) was audio or video recording kept by the court. In only 43 out of 128 court sessions where the judge was obliged to explain to the parties their right to inspect the record of the judicial proceedings was this duty performed, whereas in 80 court sessions it was neglected.

In 106 out of 128 monitored court sessions where judgments were pronounced, the result was a conviction, and in 22 cases the court dismissed the case for reasons other than by reason of discharge. No acquittals were observed during the duration of the project. In 110 court sessions (85.9%) the judges explained to the parties their right of appeal, but in 18 cases (14.1%) this obligation was not fulfilled.

Judgments were pronounced publicly in all cases and in 106 cases (82.8%) they were pronounced in full as prescribed by law. However, in 17.2% of monitored sessions this legal requirement was not respected: in 21 monitored sessions the judges omitted the descriptive-reasoning parts of the judgment and in five cases the introductory part of the judgment was omitted when publicly pronounced by the judge. In 82% of monitored cases the judgment was pronounced distinctly, clearly and at a reasonable pace, whereas in 18% of monitored court sessions, understanding of the judgment was impaired by the manner in which it was delivered.

Recommendations

The report concludes with a set of recommendations based on the findings and conclusions of the trial monitoring activities carried out during the ODIHR trial-monitoring project. These recommendations are mainly aimed at improving implementation practice of the existing law in Kazakhstan. In several cases the recommendations suggest minor amendments to legal provisions and the introduction of new mechanisms that would ensure better safeguards for fair trial provisions contained in national laws and international standards.

Strict adherence to the legal procedures contained in the Criminal Procedure Code would be one step towards significantly improving compliance with fair trial commitments, and straightforward organizational and logistical changes would eliminate a number of current shortcomings in the administration of justice in the Kazakhstan.

These changes include the need to secure the unhindered access of the public to court buildings and courtrooms; the strict compliance as far as is reasonably possible with the published schedule of court hearings; and the need to hold court sessions only in courtrooms and to eliminate the practice of using judges' chambers for public hearings. The recommendations also include the need to raise awareness among judges of their duty to respect the judicial code of ethics and the need to promote respect on the part of court personnel towards members of the public wishing to attend trials, as well as the importance of eliminating the use of metal cages in courtrooms.

The recommendations also relate to other essential fair-trial standards, such as the responsibility of the judges and prosecutors to undertake a full and impartial investigation of any allegation of torture, the judges' and prosecutors' obligation to exclude all evidence obtained as a result of torture or other duress, as well as the duty of the state to secure effective legal assistance through appointed defence counsel.

It is hoped that implementation of the recommendations by the relevant authorities will result in greater compliance of the criminal-justice system with international fair-trial standards and OSCE fair-trial commitments.

INTRODUCTION

The ODIHR is an institution that monitors the OSCE participating States' compliance with their OSCE human dimension commitments.[5] The OSCE fair-trial commitments constitute an integral part of international standards related to the protection of the human rights of individuals involved in criminal-justice proceedings.

As part of their mandate to monitor OSCE participating States' compliance with and implementation of OSCE commitments, including those relating to fair-trial standards, and to assist them in implementing these commitments, the ODIHR and OSCE field operations may undertake trial monitoring projects.

Trial-monitoring activities are conducted on the basis of the Copenhagen Document of the Conference on Security and Co-operation in Europe (CSCE), where participating States made a commitment to accept court observers as a confidence-building measure and in order to ensure transparency in the implementation of their commitments to fair judicial proceedings[6]. Trial monitoring has been conducted or is being conducted in the majority of OSCE field operations.[7]

This report is a summary of the results of trial monitoring conducted in t Kazakhstan between February 2005 and April 2006[8] as part of an ODIHR trial-monitoring project that started in November 2004 and continued until the end of 2006. The trial-monitoring project was implemented by the ODIHR and the OSCE Centre in Almaty in co-operation with the Supreme Court of the Republic of Kazakhstan, and received financial support from the European Commission and the Governments of the Netherlands, Norway and the United States.

This report is aimed at the relevant state authorities, non-governmental organizations and other interested stakeholders working in the area of criminal justice in Kazakhstan. Its conclusions and recommendations are intended to assist in the strengthening and reform of the judicial system and enhancing Kazakhstan's compliance with its international obligations and OSCE commitments on fair trials.

Its analysis of the compliance by the criminal justice system of Kazakhstan with international fair-trial standards is especially important in relation to Kazakhstan's ratification of the ICCPR and the need to ensure that national laws and practice conform to the provisions of this treaty.

Part One of this report provides a description of the methodology of the project, including information on the aims, objectives, and subject of the monitoring, as well as the trial monitors, the monitoring procedure, and general information on key project activities.

Part Two provides information on compliance of Kazakhstan's criminal procedure law with international fair-trial standards, including OSCE commitments, and is comprised of two chapters;

[5] OSCE standards are not legally binding norms, but since they were adopted according to the principle of consensus by all OSCE participating States, they are political commitments to which the governments voluntarily agreed to adhere to.
[6] Para 12, the Copenhagen Document of the CSCE, 1990.
[7] OSCE field operations in Albania, Armenia, Bosnia and Herzegovina, Croatia, Kosovo, Macedonia, Moldova, Serbia and Tajikistan have ongoing projects.
[8] The full time span of all project activities relating to the trial-monitoring project covers the period of 2004-2006. At the same time, OSCE/ODIHR carried out a similar trial-monitoring project in the Kyrgyz Republic. The actual monitoring of trials under both projects was carried out during February 2005-April 2006.

Chapter One presents tables and diagrams and sets out general statistics from the project, *inter alia* the number of monitored court sessions, criminal cases, courts and judges.

Chapter Two sets out findings in relation to the following standards:

- The right to trial by an independent, competent and impartial tribunal established by law;
- The right to a public hearing;
- The right to a fair hearing;
- The right to be present at trial and to defend oneself in person;
- The right to be presumed innocent and the right not to be compelled to testify or confess guilt;
- Exclusion of evidence elicited as a result of torture or other duress;
- Equality of arms;
- The right to be defended by an experienced, competent and effective defence counsel;
- The right to an interpreter and to translation;
- The right to a reasoned judgment and the right to a public judgment.

Information under each of these standards is provided as follows:

First, there is a general description of the international standard itself and references to international documents, including OSCE documents, in which this standard may be found. Secondly, there is reference to the relevant national legislation relating to this standard. Thirdly, there is a brief description of factors examined by the trial monitors when assessing compliance with the relevant standard. Analysis of compliance with each standard did not take account of the pre-trial stages, interviews with participants of trials, or case materials. Finally, the actual analysis of each standard follows under a sub-heading entitled *Statistics and conclusions* and is presented in the form of tables, diagrams and charts prepared on the basis of information contained in the reports of the trial monitors. These statistics relate only to the cases monitored and should not be extrapolated to reflect Kazakhstan's criminal-justice system as a whole.

Additional explanatory text on factors examined by the trial monitors when considering the relevant fair-trial standard, supplementary references to national laws, and short conclusions analysing the statistics are given above and/or below the tables, diagrams and/or charts.

These sections are also complemented by case studies extracted from the trial-monitoring reporting forms submitted by the trial monitors during the project. These serve to illustrate and substantiate the findings.

Part Three concludes the report with the list of recommendations to the relevant authorities of Kazakhstan.

The Annexes provide additional documents relating to the trial-monitoring project.

The ODIHR and the OSCE Centre in Almaty wish to express their appreciation to the Supreme Court of Kazakhstan and all courts covered during the trial monitoring, as well as to the experts and monitors involved in the project for their support during the implementation of this project.

PART ONE

METHODOLOGY OF THE PROJECT

The ODIHR trial-monitoring project in Kazakhstan was implemented between November 2004 and October 2006. The actual monitoring of trials took place from February 2005 until April 2006.

The aim of the project – to determine the extent of courts' compliance with international fair-trial standards in criminal-trial proceedings in Kazakhstan.

Objectives of the project:

- To obtain credible information about the extent of compliance with fair-trial standards by the criminal courts;
- To process and analyse the results of the monitoring in order to produce recommendations;
- To present and discuss the results of the monitoring with the parties concerned;
- To train representatives of civil society in international fair-trial standards and methodology of monitoring criminal trials.

In the course of monitoring, observation focused on compliance with the following international fair-trial standards:

- The right to trial by an independent, competent and impartial tribunal established by law[9];
- The right to a public hearing[10];
- The right to a fair hearing[11];
- The right to be present at trial and to defend oneself in person[12];
- The right to be presumed innocent and the right not to be compelled to testify or confess guilt[13];
- Exclusion of evidence elicited as a result of torture or other duress[14];
- Equality of arms[15];
- The right to be defended by an experienced, competent and effective defence counsel[16];
- The right to an interpreter and to translation[17];
- The right to a reasoned judgment and the right to a public judgment[18].

The subject of monitoring

The subject of monitoring was criminal-trial proceedings. Monitoring took place in courts of general jurisdiction and covered only cases heard in courts of first instance. In conformity

[9] Art.14(1) ICCPR.
[10] Art.14(1) ICCPR.
[11] Art.14(1) ICCPR.
[12] Art.14(3)(d) ICCPR.
[13] Art.14(2), (3)(g) ICCPR.
[14] Art.7 ICCPR.
[15] Art.14(1), (3)(e) ICCPR.
[16] Art.14(3)(d) ICCPR.
[17] Art.14(3)(f) ICCPR.
[18] Art.14(1) ICCPR.

with the adopted project methodology there was no monitoring at the appeal stage or the reviewing of court verdicts and judgments.

Trial monitors

In November 2004, following a competitive process, 25 people with higher legal education or work experience in the area of the protection of human rights were selected as trial monitors. In December 2004 and July 2005 the trial monitors received training in trial monitoring, which was based on a specially developed trial-monitoring manual.[19] This explained the aims and the procedure of the trial monitoring as well as the principles of impartiality of reporting and non-interference in the course of the trial. All the participants received documents certifying their status as trial monitors for the ODIHR project. In September 2005 the number of trial monitors was reduced to 13.

The monitoring procedure

Before starting their monitoring all trial monitors had to acquaint themselves with the schedules of cases set for hearing that were displayed on information stands in court lobbies. Where this information was not available because of the absence of schedules, trial monitors were advised to obtain the equivalent information from the court secretariats for criminal cases.

Where appropriate conditions existed, the question of whether to conduct complete monitoring of cases was the independent decision of trial monitors. In such cases they carried out monitoring from the first court session to the pronouncement of the judgment.

General monitoring was implemented in conformity with the principle of random selection, meaning that court sessions were attended spontaneously and regardless of the stage of the trial. On average, the trial monitors had to attend eight court sessions a month.

In accordance with procedures for reporting on monitoring activities, a separate report had to be compiled for each court session attended. This report was forwarded to the co-ordinator of the project and was recorded for further use when compiling the final report.

Trial monitoring was limited to observing the course of court sessions without having access to the case materials. In order to elicit additional information on each court hearing the trial-monitoring manual advised the monitors to interview participants of the court proceedings with the questions listed in the trial-monitoring reporting form. However, in the majority of monitored cases participants of the trials did not agree to be interviewed, and, as a consequence, the amount of information elicited as a result of successfully conducted interviews was insufficiently representative and so was not taken into account during the drafting of this report.

The conclusions of this report do not claim to be flawless as it was impossible to carry out comprehensive monitoring during a limited period of time and with limited resources. Moreover, as information as to the total number of cases heard during the period of the trial monitoring was not publicly available, the statistical findings relate only to the court sessions monitored.

However, it should be noted that the substantial number of monitored court hearings, spanning most of the regions of Kazakhstan, and the quality control of the trial monitors'

[19] See Annex 1.

work provided by the project co-ordinator[20] ensure a high degree of credibility for the results and findings of the monitoring. This project was intended to be a standard human-rights monitoring exercise carried out in accordance with internationally accepted rules and procedures for trial monitoring.[21]

Information on the implementation stages of the project

In November 2004, the OSCE Centre in Almaty together with the ODIHR informed the Supreme Court of the Republic of Kazakhstan,[22] the Administration of the President;[23] the Office of the Prosecutor General and the Ombudsman[24] about the project, its aims and objectives, and invited representatives of these state authorities to take part in the first training session organized for the selected trial monitors.

In December 2004, the ODIHR in co-operation with the OSCE Centre in Almaty organized the first training session for trial monitors with the participation of international and national experts. Within the framework of the training the ODIHR organized a mock trial exercise with participation of a judge of the Almaty City Court.

In January 2005, pilot monitoring in district and oblast (city) courts was conducted. The trial monitors tested the trial-monitoring reporting form and submitted their recommendations for its improvement. The form was amended accordingly.

In January 2005, all the chairpersons of the oblast courts and equivalent courts where the pilot monitoring was carried out received a letter[25] informing them about the project, with a request for them to inform the chairpersons of the district courts about the project and encourage them to ensure unobstructed access for the trial monitors to court sessions. During an official visit to Kazakhstan from 16-19 January 2005, ODIHR Director Ambassador Strohal met with the Chairman of the Supreme Court Mr. Mami and informed him of the trial-monitoring project and the initial results of the pilot monitoring.

Between February and June 2005, the trial monitors began the first stage of monitoring, in pairs and individually, in district and oblast (city) courts of the following cities: Astana, Almaty, Pavlodar, Petropavlovsk, Taraz, Uralsk, Ust-Kamenogorsk and Shymkent.

In July 2005, a second training session took place in Almaty where participants discussed their experiences and exchanged opinions about the project. Changes were introduced to the reporting form, improving its layout. It was a joint training with participants from a parallel project in Kyrgyzstan.

In April 2006, upon completion of the monitoring, the ODIHR organized an expert meeting with ODIHR staff, national experts, the project co-ordinator and several trial monitors to discuss the results of the project and the first draft of the this report.

During the summer and autumn of 2006, the ODIHR co-ordinated the efforts of experts and the project co-ordinator to finalize the report. The Russian version of this report was completed at the end of October 2006.

[20] See the Trial Monitoring Manual in Annex 1 for a more-detailed explaination of the role of the project co-ordinator.
[21] The Trial Monitoring Manual incorporated rules and principles used by the UN, OSCE Missions as well several international NGOs, such as the International Commission of Jurists and American Bar Association during their work on trial monitoring.
[22] The letter of the OSCE Centre in Almaty of 16.11.2004 No. 538/11/04.
[23] The letter of the OSCE Centre in Almaty of 16.11.2004 No. 537/11/04.
[24] The letter of the OSCE Centre in Almaty of 25.11.2004 No 565/11/04.
[25] The letter of the OSCE Centre in Almaty of 10.01.2005 No 10/01/05.

PART TWO
COMPLIANCE WITH INTERNATIONAL AND NATIONAL FAIR-TRIAL STANDARDS

CHAPTER ONE. GENERAL STATISTICS OF THE PROJECT

This chapter presents information in the form of tables and diagrams and demonstrates general statistics of the project, *inter alia* the number of monitored court sessions, criminal cases, courts, and judges.

The number of court sessions attended and number of criminal cases monitored by trial monitors

Region	Total number of court sessions monitored	Total number of criminal cases monitored
Astana	32	13
Almaty	238	147
Pavlodar	89	38
Petropavlovsk	117	26
Taraz	66	45
Uralsk	66	38
Ust-Kamenogorsk	23	11
Shymkent	99	67
Total	**730**	**385**

Table 1.1.* The total number of criminal cases monitored and the number of cases of general and complete monitoring

Region	Total number of criminal cases monitored	Number of cases of complete monitoring	Number of cases of general monitoring
Astana	13	2	11
Almaty	147	17	130
Pavlodar	38	12	26
Petropavlovsk	26	10	16
Taraz	45	6	39
Uralsk	38	1	37
Ust-Kamenogorsk	11	4	7
Shymkent	67	1	66
Total	**385**	**53**	**332**

Diagram 1.2. Proportion of the number of cases covered by trial monitors during complete and general monitoring

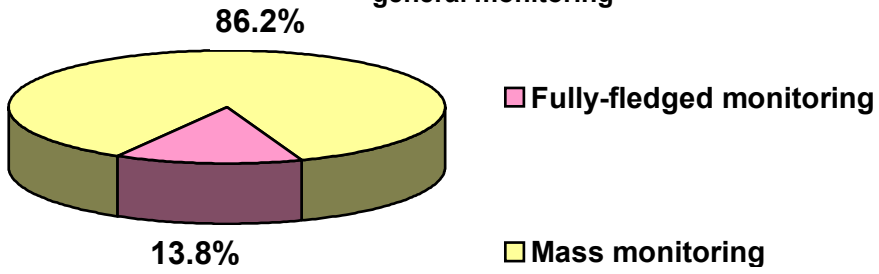


Table 1.3. The language of the monitored court sessions

Region	State language (Kazakh)	Russian language
	Number of court sessions	
Astana	-	32
Almaty	12	226
Pavlodar	-	89
Petropavlovsk	-	117
Taraz	12	54
Uralsk	-	66
Ust-Kamenogorsk	-	23
Shymkent	25	74
Total	**49**	**681**

Table 1.4. Courts monitored: number of attended sessions and judges

No.	Region/Court	Number of attended sessions	Number of judges whose court sessions were attended
	Astana		
1	Sary-Arka district court No.2	28	5
2	Almatinsky district court	4	1
	Total for Astana city	**32**	**6**
	Almaty		
1	Almaty city court	23	10
2	Almalinsky district court	64	5
3	Almalinsky district court No.2	18	3
4	Auezovsky district court	17	3
5	Auezovsky district court No.2	21	5
6	Bostandyksky district court No.2	49	4
7	Zhetysusky district court	3	1
8	Zhetysusky district court No.2	16	3
9	Medeusky district court	23	2
10	Turksibsky district court	4	1
	Total for Almaty city	**238**	**37**
	Pavlodar		
1	Pavlodar oblast court	8	3
2	City court No.1	19	6
3	City court No.2	62	8
	Total for Pavlodar city	**89**	**17**
	Petropavlovsk		
1	Petropavlovsk city court	117	15
	Total for Petropavlovsk city	**117**	**15**
	Taraz		
1	Taraz city court	51	5
2	Taraz city court No.2	15	4
	Total for Taraz city	**66**	**9**
	Uralsk		
1	Western-Kazakhstani oblast court	12	6
2	Uralsk city court	26	7
3	Uralsk city court No.2	28	4
	Total for Uralsk city	**66**	**17**
	Ust-Kamenogorsk		
1	Ust-Kamenogorsk city court	11	4
2	Ust-Kamenogorsk city court No.2	12	4
	Total for Ust-Kamenogorsk city	**23**	**8**
	Shymkent		
1	Al-Farabi district court (before 04.07.05 – Shymkent city court)	30	5
2	Abai district court (before 04.07.05 – Shymkent court No.2)	47	4
3	Enbekshinsky district court (before 04.07.05 – Shymkent court No.3)	22	4
	Total for Shymkent city	**99**	**13**
26	**Total**	**730**	**122**

Table 1.5. Number of monitored collegial and individual hearings by judges

Region	Collegial hearing	Individual hearing
	Number of monitored cases	
Astana	-	13
Almaty	6	141
Pavlodar	1	37
Petropavlov	-	26
Taraz	-	45
Uralsk	3	35
Ust-	-	11
Shymkent	-	67
Total	**10**	**375**

Table 1.6. Number of court sessions monitored at each stage of the main trial

Region	Preparatory part	Judicial investigation	Judicial pleadings and the defendant's final address to the court	Pronouncement of the judgment (judicial decision)
	Number of court sessions monitored			
Astana	9	26	7	3
Almaty	68	186	77	39
Pavlodar	17	59	24	18
Petropavlov	19	89	28	13
Taraz	12	41	23	18
Uralsk	20	52	17	8
Ust-	8	19	8	6
Shymkent	26	73	22	23
Total	**179**	**545**	**206**	**128**

Diagram 1.7. Proportion of monitored court sessions at each stage of the main trial

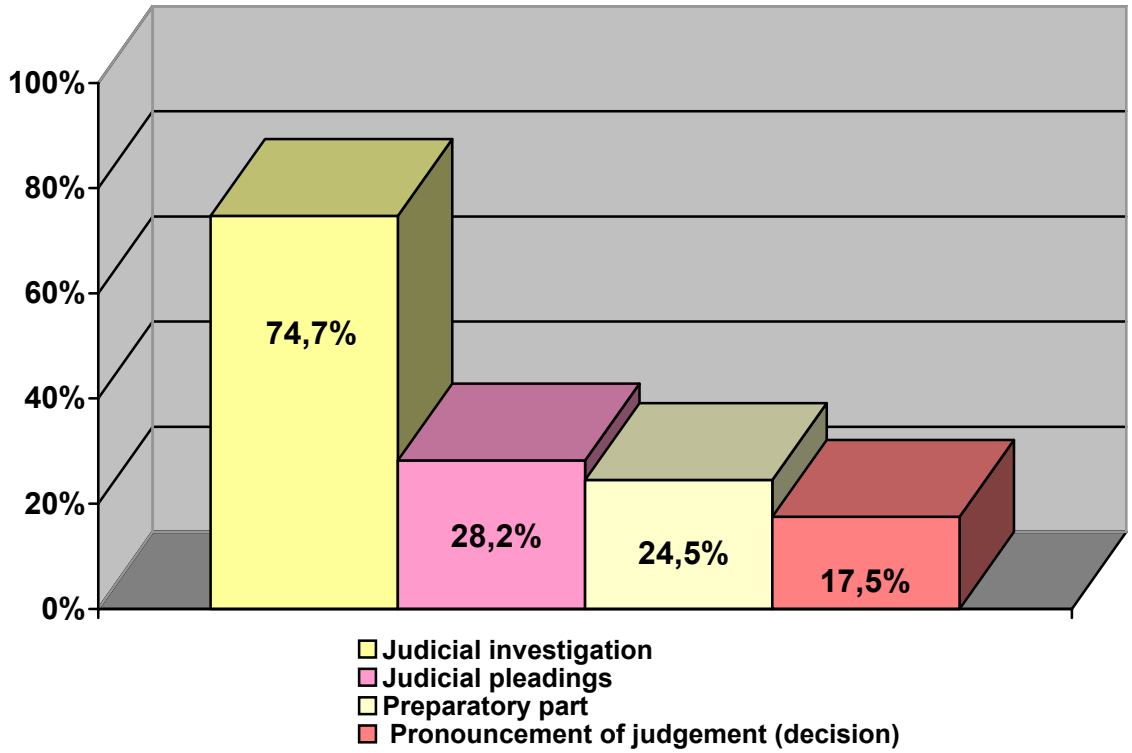


Table 1.8. Number of defendants involved in monitored court sessions

Region	Number of defendants						
	one	two	three	four	five	six	seven
	Number of cases						
Astana	7	2	1	3	-	-	-
Almaty	118	18	5	3	3	-	-
Pavlodar	27	6	2	2	-	1	-
Petropavlovsk	20	3	2	1	-	-	-
Taraz	34	7	2	1	-	1	-
Uralsk	27	5	2	3	-	-	1
Ust-Kamenogorsk	9	2	-	-	-	-	-
Shymkent	53	9	2	3	-	-	-
Total number of court sessions	**295**	**52**	**16**	**16**	**3**	**2**	**1**
Total number of defendants	**545**						

Table 1.9. Number of juvenile defendants present in monitored court sessions

Region	Number of juvenile defendants		
	one	two	three
	Number of cases		
Astana	-	1	-
Almaty	4	2	1
Pavlodar	4	-	-
Petropavlovsk	3	-	2
Taraz	-	-	-
Uralsk	2	-	-
Ust-Kamenogorsk	1	-	-
Shymkent	2	-	-
Total number of cases	**16**	**3**	**3**
Number of juvenile defendants	**31**		

Diagram 1.10. Proportion of juvenile and adult defendants

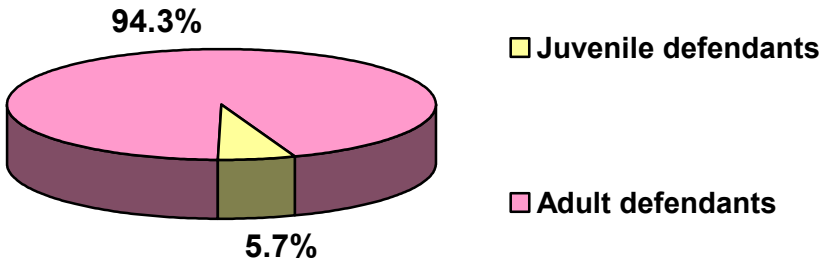


Table 1.11. Measures of judicial restraint and number of defendants they were applied to

Region	Judicial restraint							
	Detention	Written pledge not to leave a specified place and to behave appropriately	Personal guarantee	Transferring a serviceman to the supervision of a military unit command	Transfer of a minor to supervision	Bail	House arrest	Measure of restraint not established
	Number of defendants							
Astana	21	5	-	-	-	-	-	-
Almaty	153	41	-	-	2	-	-	-
Pavlodar	33	26	-	-	-	-	-	-
Petropavlovsk	22	13	-	-	-	-	-	1
Taraz	54	10	-	-	-	-	-	-
Uralsk	52	10	-	-	-	-	-	-
Ust-Kamenogorsk	5	8	-	-	-	-	-	-
Shymkent	71	18	-	-	-	-	-	-
Total	**411**	**131**	**0**	**0**	**2**	**0**	**0**	**1**

Diagram 1.12. The percentage ratio of the measures of restraint applied towards the defendants

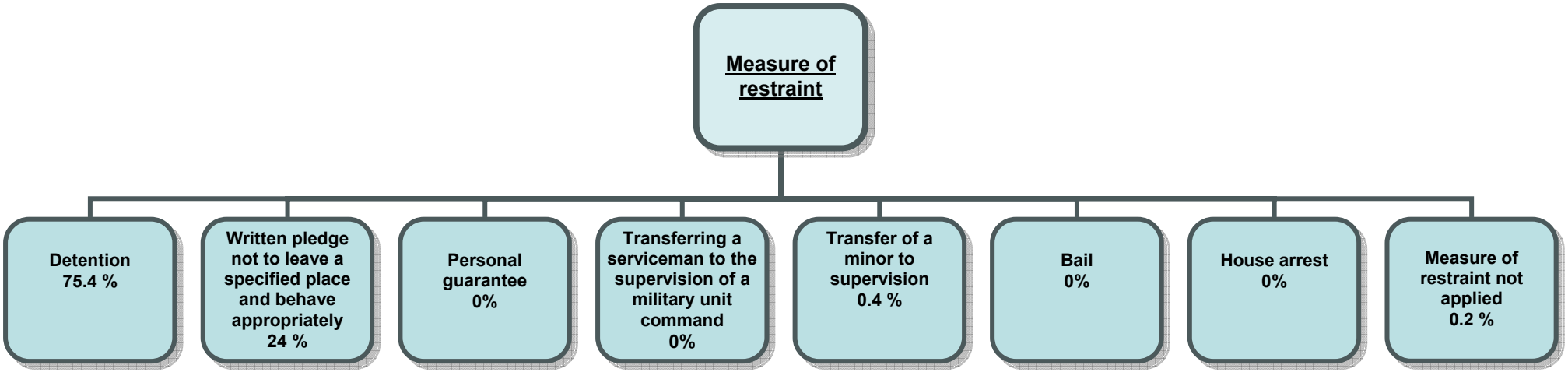


Table 1.13.(1) Articles of the Criminal Code of the Republic of Kazakhstan[26] (CC) that monitored cases were related to:

Section/Chapter of the	Article of the CC	Part/paragraph of CC Article
General part		
Section II. Criminal offence	Art. 24. Preparation for a crime and an attempted crime	Part 1 Part 3
	Art. 28. Types of accessories in a crime	Part 5
Special part		
Chapter 1. Crimes against a person	Art. 96. Murder	Part 1 Part 2, paras. «a, b,c,d,e,f,g,h,i,j,k»
	Art. 98. Murder committed in an emotional state	Part 1
	Art. 103. Deliberate causation of serious damage to health	Part 1 Part 2, paras. «a,b,c,d» Part 3
	Art. 104. Deliberate causation of medium-gravity damage to health	Part 1 Part 2, paras. «b,c,d»
	Art.105. Deliberate causation of slight damage to health	All
	Art. 121. Violent acts of a sexual character	Part 3, para. «c»
	Art. 125. Kidnapping	Part 3
	Art. 126. Illegal deprivation of freedom	Part 2, paras. «a,c,d,f,g»
	Art. 129. Libel and Slander	Part 1
	Art. 130. Insult	Part 1
Chapter 2. Crimes against the family and juveniles	Art. 131. Involvement of a juvenile in criminal activity	Part 1 Part 4
	Art. 136. Malicious evasion from payment of funds for maintenance of children or disabled parents	Part 1
Chapter 3. Crimes against constitutional and other rights and freedoms of the person and citizen	Art. 141. Violation of right to equality of citizens	Part 2
	Art. 145. Infringement of inviolability of the home	Part 2
Chapter 4. Crimes against peace and safety of mankind	Art.164. Incitement of social, ethnic, tribal, racial or religious enmity	Part 2
Chapter 6. Crimes against property	Art. 175. Theft	Part 1 Part 2, paras. «a,b,c» Part 3, paras. «b,c»
	Art. 176. Expropriation or embezzlement of entrusted property	Part 1 Part 2, paras. «b,c» Part 3, para. «b»
	Art. 177. Fraud	Part 1 Part 2, paras. «a,b,c» Part 3, paras. «a,b,c»
	Art. 178. Robbery	Part 1 Part 2, paras. «a,b,c»

[26] The Criminal Code of the Republic of Kazakhstan, as of 16 July 1997, No. 161-I, hereinafter referred to as the CC.

	Art. 179. Robbery with violence	Part 1 Part 2, paras. «a,b,c,d,e» Part 3, paras. «a,b,c,d»
	Art. 181. Extortion	Part 1 Part 2, paras. «a,b,c» Part 3, paras. «a,b,c»
Chapter 6. Crimes against property	Art.182. Causation of property damage by way of fraud or abuse of trust	Part 2, para. «c»
	Art. 185. Taking and driving away without the owner's consent a car or other means of transportation without the intention to steal	Part 1 Part 2, para. «a»
Chapter 7. Crimes in the sphere of economic activities	Art. 192. Fraudulent business activity	All
	Art. 206. Manufacture or distribution of counterfeit money or securities	Part 3
	Art. 209. Economic contraband	Part 1
	Art. 218. Fraudulent accounting	All
	Art. 221. Evasion by a citizen of payment of tax	Part 1
	Art. 222. Evasion by organizations of payment of tax	Part 1
	Art. 224. Receipt of illegal remuneration	Part 1
	Art. 227. Illegal access to computer information, creation, use and distribution of harmful programmes for computers	Part 3
Chapter 9. Crimes against public safety and public order	Art.235. Creation and guidance of an organized criminal group or criminal association (criminal organization), participation in a criminal association	Part 1 Part 3 Part 4
	Art. 237. Gangsterism	Part 1
	Art. 242. Deliberate false communication about an act of terrorism	All
	Art. 250. Contraband of objects withdrawn from circulation or objects whose circulation is limited	Part 1
	Art. 251. Illegal purchase, transfer, sale, storage, transportation or carrying of arms, ammunition, explosives and explosive devices	All
	Art. 257. Hooliganism	All
Chapter 10. Crimes against health of population and morality	Art. 259. Illegal manufacture, purchase, storage, transportation, sending or sale of narcotic or psychotropic substances	Part 1 Part 2 Part 3, para. «c» Part 4, п. «b,c»
	Art. 271. Organization or running of brothels and pimping	Part 1
Chapter 11. Ecological crimes	Art. 285. Contamination of land	Part 3

Chapter 12. Transport crimes	Art. 296. Violation of traffic road rules and rules of vehicles' operation by people driving them	Part 1
Chapter 13. Corruption and other crimes against the interests of state service and state administration	Art. 307. Abuse of official powers	Part 2
	Art. 308. Exceeding power or official authority	Part 4, paras. «a,b,c»
	Art. 311. Receipt of a bribe	Part 2 Part 4, para. «a»
	Art. 312. Giving a bribe	Part 1
	Art. 314. Forgery by an official	Part 2
	Art. 316. Negligence	Part 1
Chapter 14. Crimes against state authority	Art. 321. Violence towards a representative of state authorities	Part 1
	Art. 324. Stealing or damaging documents, stamps and seals	Part 1 Part 2
	Art. 325. Forgery, manufacture or sale of forged documents, stamps, seals, blank forms and state awards	Part 1 Part 2 Part 3
	Art. 327. Arbitrary use of power	Part 2 Part 3
	Art. 328. Impersonating a figure of authority or an official holding a responsible state position	All
Chapter 15. Crimes against justice system and the execution of punishment	Art. 348. Falsification of evidence	Part 1
	Art. 354. Bribery or coercion leading to the provision of false evidence or avoiding giving evidence or to the provision of false conclusions or incorrect translation	Part 2
	Art. 358. Absconding from places of imprisonment, detention or custody	Part 1
	Art. 360. Malicious disobedience of the requirements of the administration of a penitentiary institution	All
	Art. 363. Concealment of crime	All
	Art. 362. Failure to execute a court judgment, a court decision or other judicial act	Part 2
	Art. 364. Failure to report a crime	All
Chapter 16. Military offences	Art. 368. Refusal to obey a superior or compelling a superior to violate official duties	Part 2, para. «a»

CHAPTER TWO: THE RESULTS OF MONITORING

2.1. The right to trial by an independent, competent and impartial tribunal established by law

International standard

The ICCPR secures everyone's right, in the determination of any criminal charge against him/her, to fair and public trial "by a competent, independent and impartial tribunal established by law".[27] The Universal Declaration of Human Rights (UDHR)[28], the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)[29] and the Convention of the Commonwealth of Independent States on Human Rights and Fundamental Freedoms[30] (hereafter referred to as the CIS Convention on Human Rights) require cases to be tried by independent and impartial tribunals. Similar provision can also be found in a number of CSCE/OSCE documents.[31]

Independence of judicial power is one of the most important principles of a fair criminal procedure. Independence is a major guarantee of the impartiality, competence and neutrality of the court. Since court independence should be ensured by the set up of the state's judicial system, through the system of checks and balances and the level of democratization of the existing state regime, the project did not provide special mechanisms to assess the actual independence of judges working in criminal justice. Technically, the judicial system shall guarantee the judge's independence and protect him/her from unreasonable interference in his/her work. Violations of this principle occur outside the actual court proceedings established by law and, as a rule, are not obvious for the general public due to their latent character. The trial monitors were not qualified to reveal such irregularities, and therefore this report does not contain any judgments on this aspect of the examined fair trial.

A competent court is a court that acts within the boundaries of its jurisdiction and has powers to try criminal cases. According to this standard, the jurisdiction of a criminal case shall be determined by law, judges shall exercise justice within the framework of their competence and within the boundaries of criminal procedure and a trial shall be conducted strictly within the timeframe established by law.

Impartiality is based on the lack of bias, on respect of neutrality and absence of prejudice. Its central pillar is a natural legitimate principle: nemo judex en su causa.[32] The judiciary shall decide matters before it impartially, on the basis of facts and in accordance with the law, without any direct or indirect restrictions, improper influence, inducements, pressures, threats and interferences, from any quarter or for any reason.[33]

This principle means that the court should meet the objective requirements of impartiality according to which both parties have equal standing in a trial. The degree of correspondence to this standard is considered at length in the chapter "Equality of arms".

[27] Art. 14(1) of the ICCPR.
[28] Art. 10 of the Universal Declaration of Human Rights adopted and promulgated by Resolution 217 A (III) of the General Assembly on 10 December 1948.
[29] Art. 6(1), adopted in Rome on 4 November 1950 (as amended on 21 September 1970, 20 December 1971, 1 January, 6 November 1990, 11 May 1994), ETS N 005,
[30] Art. 6(1), (Minsk, 26 May 1995).
[31] Para. 13.9 of the 1989 Vienna document of the CSCE, para. 5.16 of the 1990 Copenhagen document of CSCE.
[32] "No one can be judge in his own cause" (lat.).
[33] Para. 2 of the UN Basic Principles on the Independence of the Judiciary (hereafter UN Basic Principles).

The right for a case to be heard by a court established by law means that tribunals that do not use judicial procedures established by law and that replace normal courts should not be created.[34]

National laws

The principle for a case to be heard by a competent, independent and impartial court established by law is secured in the Constitution of the Republic of Kazakhstan,[35] in the Constitutional Law "On the judicial system and the status of judges in the Republic of Kazakhstan",[36] as well as in the Criminal Procedure Code.[37] The Constitution stipulates that justice shall be administered only by the court by way of following the procedural format established by law; the courts shall be the Supreme Court and local courts established by law; the establishment of special and extraordinary courts under any name shall not be allowed.[38] The judicial power shall be exercised on behalf of Kazakhstan[39] and extended to all cases and disputes arising on the basis of the Constitution, laws, other regulatory legal acts and international treaties.[40]

The competence of the court, the boundaries of its jurisdiction, and criminal procedure are determined by law and cannot be changed arbitrarily.[41] The CPC provides for the terms of jurisdiction according to a territorial principle, the seriousness of the crime, and other features established by law.[42] The powers of the judge on administering justice in a criminal trial are stipulated by the CPC.[43] Criminal cases should be tried within a period of one month; however, this period may be extended on the basis of a justified decision of a court.[44]

The CPC stipulates that the court shall not be the body responsible for criminal prosecution, it shall not take the side of the prosecution or the defence, and shall not express any other interests but the interests of law. The court, maintaining neutrality and impartiality, shall create the necessary conditions for the parties to fulfil their procedural obligations and to exercise the rights granted to them.[45]

According to the Code of Judicial Ethics 'during trials the judges shall not have the right to express in words or in actions any prejudice or lack of impartiality. Nor should they permit other participants in the trial to do likewise".[46]

[34] Art.14(1) of the ICCPR; para.5 of the UN Basic Principles, adopted in 1985 by the VIIth Congress of the UN on the Prevention of Crime and the Treatment of offenders, approved by resolutions of the General Assembly of the UN of 29 November 1985 No.40/32 and of 13 December 1985 No.40/136.

[35] Art. 77 of the 1995 Constitution

[36] Art. 1 of the Constitutional Law of 25 December 2000 No.132-II "On the Judicial System and the Status of Judges".

[37] Art. 57 para.2 of the Criminal Procedure Code of the Republic of Kazakhstan adopted on 13 December 1997 no 206-1, hereinafter - RK CPC.

[38] Art. 75 of the Constitution.

[39] Art. 76 of the Constitution.

[40] Art. 76, para. 2 of the Constitution.

[41] Art. 11, paras. 1, 3 of the CPC.

[42] Chapter 38 of the CPC.

[43] Articles 59-61 of the CPC.

[44] Art. 302, para.5 of the CPC.

[45] Art. 23, paras. 5,6 of the CPC.

[46] Art. 2 of the Code of Judges' Ethics of the RF of 19 December 1996, adopted at the I Congress of Judges (as in the language of the Resolution of the III Congress of Judges of the RF of 06.06.2001).

Elements examined by the trial monitors

Since the subject of monitoring was limited to the stages comprising the main trial, it was presumed that the courts' jurisdiction over monitored cases was correct. Moreover, the compliance with procedural deadlines and timeframe prescribed by law was not examined during the monitoring.

Therefore, the issues of court competence were considered from the point of view of compliance with the procedural format set up by law, proper implementation of rights of the trial participants and appropriate fulfilment of the judge's duties established by law when administering justice. The compliance of the main trial procedure with the requirements set out by the law was viewed as a criterion for assessing the court's competence, since in criminal proceedings the procedural format is a requirement that must be meticulously observed, and therefore a competent court should not allow deviations in its work from the criminal procedure established by law.

Statistics and conclusions:

Throughout the period of the project the trial monitors attended 730 court sessions on 385 criminal cases tried in 26 district (city), oblast, and equivalent courts of Kazakhstan. All these courts were created according to the procedure established by the legislation of the Republic of Kazakhstan. The results of the monitoring are presented in the sequence determined by the procedural format applicable to the main trials.

The trial monitors paid attention to the availability of visual attributes of the court of law in places where court sessions were held,[47] which according to the law of Kazakhstan are state symbols (state flag and emblem). They also noted whether or not the judges wore robes.

[47] Place where a court session is held – a venue or a place, where the first instance trial takes place (courtroom, judge's chamber, crime scene).

Table 2.1.1. Availability of symbols of state and judicial power

Region	State symbols						Judicial symbols			
	Emblem			Flag			Wearing judges' attire			
	available	not available	no information	available	not available	no information	wearing complete attire	not wearing attire	wearing partial attire (no headwear)	no information
	Number of court sessions									
Astana	26	2	4	17	11	4	-	-	28	4
Almaty	217	21	-	219	19	-	14	28	196	-
Pavlodar	84	1	4	79	6	4	1	17	71	-
Petropavlovsk	114	3	-	114	3	-	-	11	106	-
Taraz	60	6	-	57	9	-	27	4	35	-
Uralsk	65	1	-	59	7	-	-	12	54	-
Ust-Kamenogorsk	11	12	-	14	9	-	-	5	18	-
Shymkent	98	1	-	96	3	-	4	43	52	-
Total	**675**	**47**	**8**	**655**	**67**	**8**	**46**	**120**	**560**	**4**

Diagram 2.1.2. Availability of the state emblem in places where court sessions were held

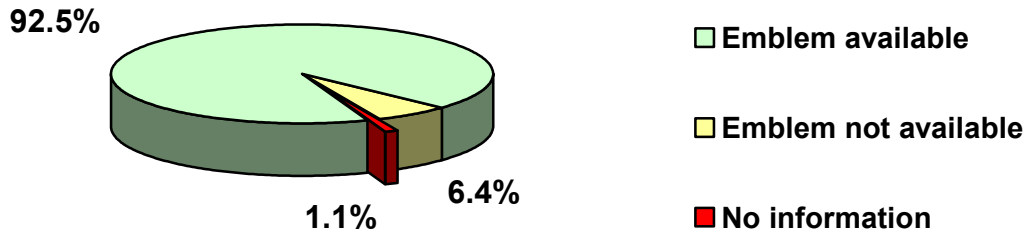
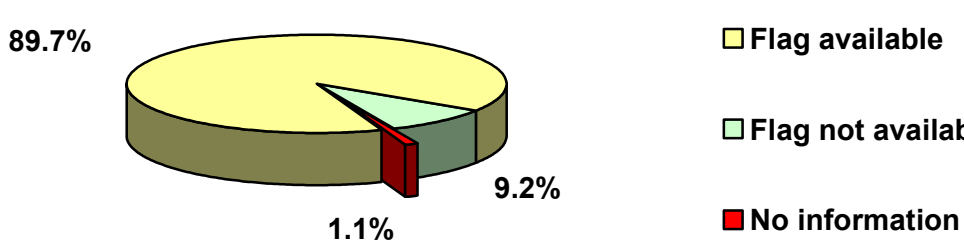
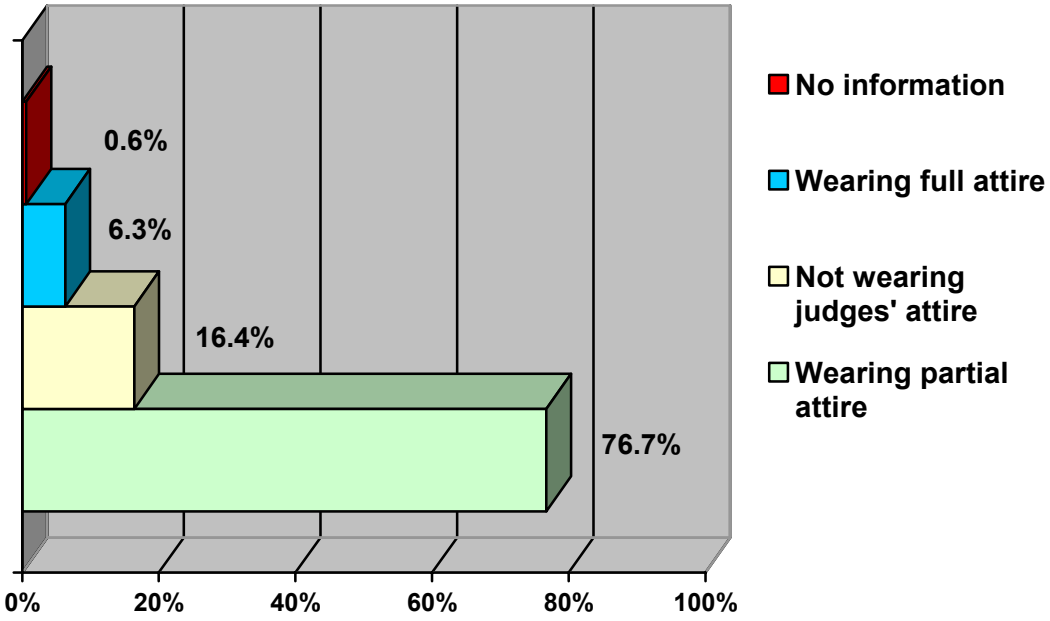


Diagram 2.1.3. Availability of the state flag in places where court sessions were held



In most cases in places where court sessions were held the state flag and emblem were present in full compliance with the requirements of the legislation.

Diagram 2.1.4. Compliance of judges with dress code in court sessions



Despite the fact that according to the current legislation judges were supposed to wear a robe and headwear,[48] the data obtained in the course of monitoring show countrywide violation of the judges' dress code. Only in 46 court sessions out of 730 were judges wearing full regalia.

The trial monitors recorded certain elements of the procedural format that characterize the competence of the court. These included: announcement by a judge of the court's composition and the trial participants, announcement by a judge as to what criminal case is being tried, consideration by judges of defendants' development level, their mental and physical state when explaining their rights, the announcement by the court of its retirement to the conference chamber after the defendant's final address to the court.

Table 2.1.5. The observance of certain elements of the procedural format characterizing the competence of the court at the preparatory stage of the main trial

Region	Stage did not match	Announcement by a judge of the court's composition and the trial participants		Announcement by a judge as to what criminal case is being tried	
		Compliance	Non-compliance	Compliance	Non-compliance
	Number of court sessions				
Astana	23	8	1	8	1
Almaty	170	60	8	64	4
Pavlodar	72	15	2	16	1
Petropavlovsk	98	19	-	19	-
Taraz	54	12	-	12	-
Uralsk	46	19	1	20	-
Ust-Kamenogorsk	15	8	-	8	-
Shymkent	73	21	5	25	1
Total	**551**	**162**	**17**	**172**	**7**

[48] In conformity with the Presidential Decree of 11 June 1998 No.4009 "On the approval of a design, description and the norm of wearing a judge's robe – special attire for the judges of the Republic of Kazakhstan".

Diagram 2.1.6. Announcement by a judge of the court's composition and the trial participants

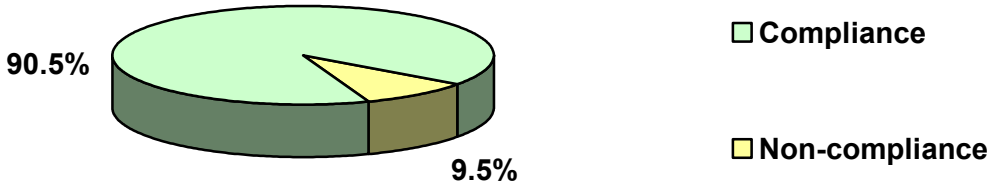
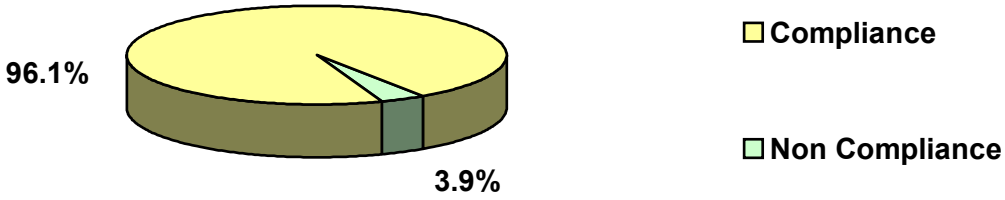


Diagram 2.1.7. Announcement by a judge as to what criminal case is being tried



The diagrams above take account only of the court sessions that were monitored starting from the preparatory stage of the main trial where the judges are required by law to announce the court's composition and the case being tried. Court sessions that were monitored starting from other stages of the main trial (where such an announcement is not meant to be made) were disregarded in these statistics.

CASE 1

When the case of defendant X came before the court according to Article 175 part. 2 paras. «a», «b», «c» and Article 178 part. 2 of the CC, and was heard in court No.2 of the city of Uralsk on 31 March 2006 before presiding judge S.X., the judge did not announce the court's composition and the participants in the trial.[49]

CASE 2

When the case of defendant X and defendant Y, charged under Article 105 of the CC, was heard in the Auezov district court of the city of Almaty on 4 April 2006 before presiding judge A.X., the judge did not announce what criminal case was being heard.[50]

CASE 3

When the case of defendant X, indicted under Article 175 part 1, part 2 «b»; Art. 177 part 2 of the CC, was heard in the district court of Sary-Arka district of Almaty on 5 February 2005 before presiding judge N.X., the judge announced neither the composition of the court and the trial participants, nor what criminal case was being heard.[51]

One of the important elements of the procedural format, according to the legislation of Kazakhstan, is the duty of the judge, when explaining to the defendant his/her rights, to take into consideration the defendant's level of intellectual development and his/her mental and physical state. In practice, the fulfilment of this duty should reveal itself in an attentive attitude towards the defendant and close monitoring of the defendant's reaction to the

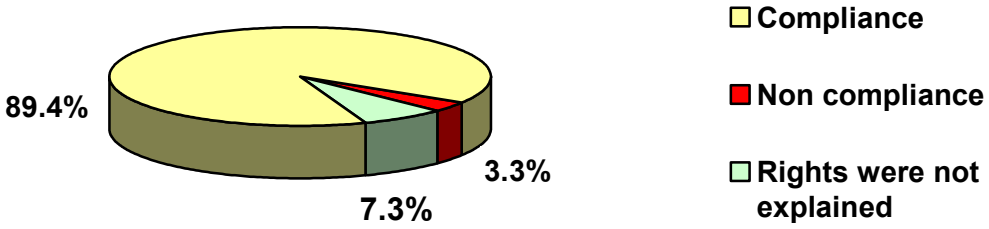
[49] REPORT No. 07/03/2006/Uralsk/18-19-KZ.
[50] REPORT No. 03/04/2006/ALMATY/5-KZ.
[51] REPORT No. 05/02/2005/Astana/8-18-KZ.

proceedings – these are the aspects of the judges' behaviour that were monitored in order to assess the degree of the judges' compliance with this procedural obligation. The rights are to be explained at the preparatory stage and also before the interrogation and before the beginning of the judicial investigation activities (ordering forensic investigation, conducting examination and so on).

Table 2.1.8. Consideration by judges of defendants' development level, their mental and physical state when explaining their rights

Region	Stage did not match	Consideration by judges of defendants' developmental level, and mental and physical state when explaining their rights at the preparatory stage		
		Compliance	Non-compliance	Rights were not explained
	Number of court sessions			
Astana	23	7	1	1
Almaty	170	60	1	7
Pavlodar	72	13	1	3
Petropavlovsk	98	18	1	-
Taraz	54	12	-	-
Uralsk	46	19	1	-
Ust-Kamenogorsk	15	8	-	-
Shymkent	73	23	1	2
Total	**551**	**160**	**6**	**13**

Diagram 2.1.9. Consideration by judges of the defendants' developmental level, and mental and physical state when explaining their rights



The trial monitors attended 179 sessions, where it was necessary to read the defendants their rights. In 160 cases the rights were explained, and the judges took into consideration the defendants' level of development and their mental and physical state. In several cases (3.3%) the judges explained to the defendants their rights disregarding their mental and physical state. In one in fourteen sessions that took place at the preparatory stage, the judges did not read the defendants their rights.

CASE 4

In hearing the case of defendant X charged under Article 103 part 3 of the CC in Petropavlovsk city court on 14 October 2005 before presiding judge A.X., not only did the judge not read the defendant all his rights but she also did not even look at him at all.[52]

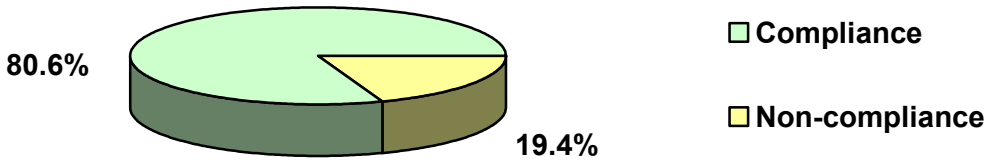
One more important procedural element that characterizes court's competence is the compliance with the requirement of the law to announce to the participants of the trial of its retirement to the conference chamber after the final address to the court by the defendant.

[52] REPORT No. 04/10/2005/Petropavlovsk/14-15-KZ.

Table 2.1.10. The announcement by the court of its retirement to the conference chamber after the defendant's final address to the court

Region	The stage did not match	The announcement by the court of its retirement after the defendant's final address to the court	
		Compliance	Non-compliance
	Number of court sessions		
Astana	28	4	-
Almaty	189	43	6
Pavlodar	71	17	1
Petropavlovsk	102	12	3
Taraz	49	14	3
Uralsk	58	6	2
Ust-Kamenogorsk	18	2	3
Shymkent	86	6	7
Total	**601**	**104**	**25**

Diagram 2.1.11. The proportion of the cases of compliance and non-compliance by the court regarding the requirement of mandatory announcement of the court's retirement to the conference chamber after the defendant's final address to the court



According to the results of the study conducted, the court did not announce its retirement for deliberation in 25 cases out of 129 (in every fifth case) although according to the current legislation[53] this is mandatory.

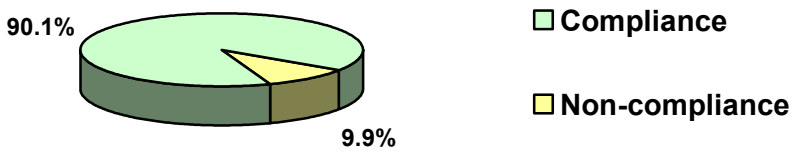
The format of reporting included several issues aimed at evaluating the impartiality of the judges. By and large this principle was evaluated on the basis of the judge's behaviour, external manifestations of politeness and ethics, as well as on his/her utterances reflecting general attitude towards the case heard.[54]

[53] Art.367 CPC.
[54] Questions No. 7-9 on the Trial monitoring form (Annex No.1).

Table 2.1.12. The observance of the principle of impartiality

Region	The observance by judges of the principle of impartiality	
	Compliance	Non-compliance
	The number of court sessions	
Astana	26	6
Almaty	216	22
Pavlodar	75	14
Petropavlovsk	101	16
Taraz	63	3
Uralsk	62	4
Ust-Kamenogorsk	23	-
Shymkent	92	7
Total	**658**	**72**

Diagram 2.1.13. Proportion of compliance and non-compliance cases with regard to the principle of impartiality



As a rule, in the course of the main trial the judges did not violate the judicial ethics code. Nevertheless, some trial monitors reported unethical and uncivil behaviour of judges at trials. Such behaviour manifested itself in utterances of accusatory nature, threats, pressure and unjustified limitations of rights, which demonstrated that in all the above-mentioned cases the judges violated the principle of impartiality. In the absolute majority of cases the victim of such behaviour was the party of the defence. The trial monitors noted just one single occurrence of unethical or uncivil behaviour with regard to the state prosecutor.

CASE 5

When a case of four defendants, charged under Article 175, part 2 of the CC, was tried in Shymkent district court No. 2 on 21 April 2005 before presiding judge A.X., the judge made unethical and uncivil remarks to the witnesses and victims, and showed rudeness and tactlessness. For example, a witness had difficulty understanding the question because the case was tried in the Kazakh language and an interpreter was not available. The judge snapped at him, using a disparagingly inappropriate form of the “you” pronoun: “Why are you keeping silent? Perhaps, you were also involved in stealing with them?”[55]

CASE 6

In a trial of three defendants, charged under Article 257, part 3, Article 103, part 2 and Article 131, part 1 of the CC in district court No.2 of the Sary-Arka district of Astana on 30 June 2005 before presiding judge A.X., the judge uttered remarks which put in doubt his neutrality and impartiality. For example, he said the following: “We shall find those who were with you as well, and I will put them behind bars together with you, you will sit in prison together”. The guilt of the defendants had not yet been proven. The judge clearly expressed

[55] REPORT № 7/04/2005/Shymkent/22-23-KZ.

a prejudiced attitude towards the defendants and conducted the trial with an accusatory bias.[56]

CASE 7

In the case of one defendant charged under Article 105 of the CC, tried in Pavlodar city court No.2 on 6 May 2005 before presiding judge A.X., the latter talked to the defendant in a harsh manner and raised his voice when addressing her. When the defendant tried to clarify the situation, he cut her short and demanded she keep to the point. As a result of such treatment the defendant became very nervous, could not concentrate and stopped answering questions.[57]

CASE 8

When the case of defendant X, charged on Article 178, part 3 "b", was tried in Petropavlovsk city court on 8 November 2005 before presiding judge K.X., the judge spoke in a disrespectful manner to the prosecutor and defence counsellor, addressed them using the inappropriate informal "you" pronoun, made insulting remarks to one of the witnesses, calling her a prostitute and saying that her mother was rude to the police and therefore "like mother, like daughter, what can one expect from her". He maintained this disparaging tone throughout the session. While conducting the court session the judge was doing other things at the same time: looking for something on his computer, making phone calls, and constantly answering incoming calls.[58]

[56] REPORT No. 7/06/2005/Astana/8-KZ.
[57] REPORT No. 1/05/2005/Pavlodar/24-KZ.
[58] REPORT No. 03/11/2005/Petropavlovsk/14-15-KZ.

2.2. The right to a public hearing

International standard

The Universal Declaration of Human Rights (UDHR) stipulates that: "Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him..."[59] The ICCPR also states that any person, in determination of any criminal charge against him, shall be entitled to a fair and public hearing.[60] At the same time a number of limitations on the trial's public character are allowed, namely "for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice."[61]

The European Convention on Human Rights (ECHR) also guarantees a defendant's right "to a public hearing" of a criminal charge.[62] The European Court of Human Rights (ECtHR)[63] in one of its decisions explicitly emphasized that "the public nature of trials protects parties from secret administration of justice lacking public control; and also constitutes a means to maintain public trust in courts."[64]

The Copenhagen document of the CSCE provides that trials may be held behind closed doors but only "in the circumstances prescribed by law and consistent with obligations under international law and international commitments."[65]

The rule of publicity also extends to judgments, thus "any judgment rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires…"[66]

National laws

The right to a public trial is secured in the legislation of Kazakhstan. In particular, it is set forth in the CPC: "Criminal trials in all courts and in all court instances shall be public"[67]; limitations are only allowed, "where it contradicts the interests of protection of state secrets""[68]. Certain categories of cases can be tried in camera by a reasoned court decision, namely: juvenile offences, sexual crimes and other cases with the purpose of preventing the disclosure of information about the private lives of parties involved in a particular case, where it is required in the security interests of the victim, a witness or other persons involved in a case, as well as those of their family members or close relatives. Appeals against the actions or decisions of the body engaged in criminal suit allowed by

[59] Art. 10 of the UDHR.
[60] Para. 13.9 of the 1989 CSCE Vienna document, paras. 5.12, 5.16 of the 1990 CSCE Copenhagen document contain a similar provision.
[61] Art.14(1) of the ICCPR.
[62] Art. 6(1) of the ECHR.
[63] The European Court of Human Rights is the international judicial body monitoring implementation of the ECHR by the member States of the Council of Europe.
[64] ECtHR judgment, Diennet v France (1995) 21 EHRR 554, para 33.
[65] Para. 12 of the 1990 CSCE Copenhagen document .
[66] Ibid. and in Art. 14 (1) of the ICCPR.
[67] Art. 29 of the CPC.
[68] Ibid.

the court at the pre-trial stage of judicial proceedings are considered in camera. Judgments in all cases are pronounced publicly.[69] (See also chapter 2.10).

Elements examined by the trial monitors

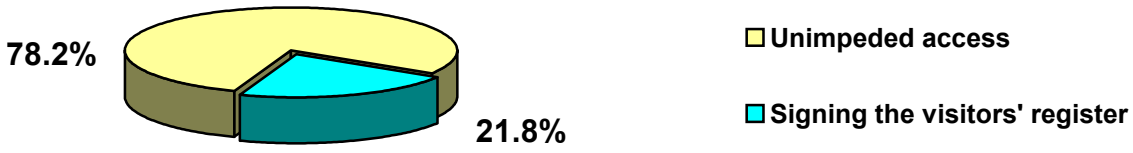
The right to a public trial makes it possible to carry out monitoring of court sessions.[70] The principle of the openness of court proceedings includes a variety of aspects that were considered by the trial monitors, namely: the availability of information about the venue and date of the hearing, transparency of information on whether the hearing is public or closed to the public, conditions appropriate for attending a session (material/technical equipment of the courtroom, lighting), the access provided to the general public to attend the hearing, and public pronouncement of decisions. The principle was considered violated where there were difficulties with access to the court building, access to the schedule of hearings, or access to the courtrooms or the judges' chambers where the court sessions were held.

Statistics and conclusions

Table 2.2.1. Possibility for the trial monitors to attend

Region	Access to the court building		Access to the courtroom/judge's chamber[71]		
	Unimpeded	Producing and registering documents in the register of court visits	Unimpeded	Required prior agreement with the clerk	Required prior permission of the judge
	The number of court sessions				
Astana	-	32	29	1	2
Almaty	128	110	146	61	43
Pavlodar	85	4	78	7	4
Petropavlovsk	116	1	105	10	2
Taraz	66	-	47	18	1
Uralsk	63	3	51	11	5
Ust-Kamenogorsk	23	-	6	17	2
Shymkent	90	9	99	-	-
Total	**571**	**159**	**561**	**125**	**59**

Diagram 2.2.2. Compliance with unimpeded access to the court building



In the majority of cases the trial monitors had unimpeded access to the courtroom/judge's chamber where the hearing took place. However, in 59 cases (17.1%) judges stopped the trial monitors near the courtroom entrance and asked about the purpose of their visit. Sometimes the trial monitors had to ask judges to give them permission to attend hearings. The behaviour of clerks to the courts who were often rude and disrespectful deserves

[69] Art.29 para.3 of the CPC.

70 Para 12 of the 1990 CSCE Copenhagen Document , "The participating States, wishing to ensure greater transparency in the implementation of the commitments (....) decide to accept as a confidence building measure the presence of observers sent by participating States and representatives of non-governmental organizations and other interested persons at proceedings before courts as provided for in national legislation and international law (....)"

[71] In a few cases the trial monitors had both to agree their visits with a clerk to the court and to receive prior permission from the judge.

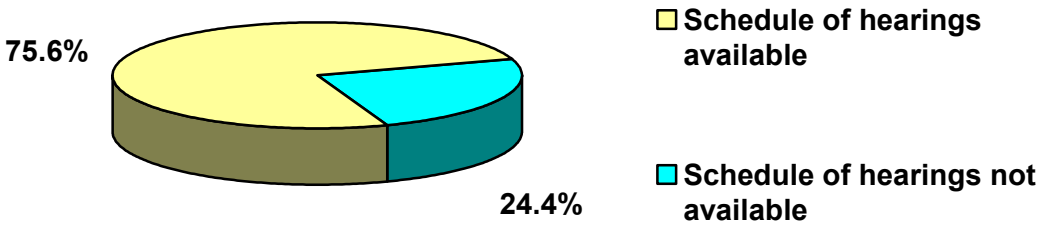
special mention. Clerks introduced additional restrictions, of their own volition, on access to the courtroom/judge's chamber, demanding it be agreed with them in advance (125 cases).

Table 2.2.3. Information about the conditions providing for compliance with the principle of public hearings

Region/Court	Schedule of hearings		Venue			Space	
	Available	Not available	Courtroom	Other place (scene of crime, remand prison)	Judge's chamber	Adequate	Inadequate
Astana	**Number of sessions**						
District court No.2 of Sary-Arka district	27	1	13	-	15	12	1
Almatinsky district court	4	-	-	-	4	-	-
Total for Astana	**31**	**1**	**13**	**0**	**19**	**12**	**1**
Almaty							
Almaty city court	-	23	23	-	-	23	-
Almalinsky district court	44	19	63	-	-	63	-
District court No.2 of Almalinsky district	18	-	18	-	-	18	-
Auezovsky district court	15	2	17	-	-	17	-
District court No. 2 of Auezovsky district	21	-	18	-	3	18	-
District court No.2 of Bostandyksky district	50	-	50	-	-	50	-
Zhetysusky district court	3	-	-	-	3	-	-
District court No. 2 of Zhetysusky district	8	8	2	-	14	2	-
Medeusky district court	18	5	16	1	6	16	-
Turksibsky district court	4	-	4	-	-	4	-
Total for Almaty	**181**	**57**	**211**	**1**	**26**	**211**	**0**
Pavlodar							
Pavlodar oblast court	-	8	8	-	-	8	0
City court No. 1	8	11	13	-	6	13	-
City court No.2	56	6	58	-	4	51	7
Total for Pavlodar	**64**	**25**	**79**	**0**	**10**	**72**	**7**
Petropavlovsk							
Petropavlovsk city court	106	11	108	-	9	103	5
Total for Petropavlovsk	**106**	**11**	**108**	**0**	**9**	**103**	**5**
Taraz							
Taraz city court	51	-	51	-	-	49	2
Taraz court No.2	15	-	15	-	-	15	-
Total on Taraz	**66**	**0**	**66**	**0**	**0**	**64**	**2**
Uralsk							
Western-Kazakhstani oblast	9	3	12	-	-	4	8

court							
Uralsk city court	26	-	24	1	1	22	2
Uralsk court No.2	28	-	28	-	-	28	-
Total for Uralsk	**63**	**3**	**64**	**1**	**1**	**54**	**10**
Ust-Kamenogorsk							
Ust-Kamenogorsk city court	10	-	6	-	4	6	-
Ust-Kamenogorsk court No.2	13	-	10	-	3	10	-
Total for Ust-Kamenogorsk	**23**	**0a**	**16**	**0**	**7**	**16**	**0**
Shymkent							
Al-Farabi district court (before 04.07.05 – Shymkent city court)	15	15	28	-	2	27	1
Abaisky district court (before 04.07.05 - Shymkent court No.2)	2	45	43	-	4	31	12
Enbekshinsky district court (before 04.07.05 – Shymkent court No.3)	1	21	19	-	3	19	-
Total for Shymkent	**18**	**81**	**90**	**0**	**9**	**77**	**13**
Total	**552**	**178**	**647**	**2**	**81**	**609**	**38**

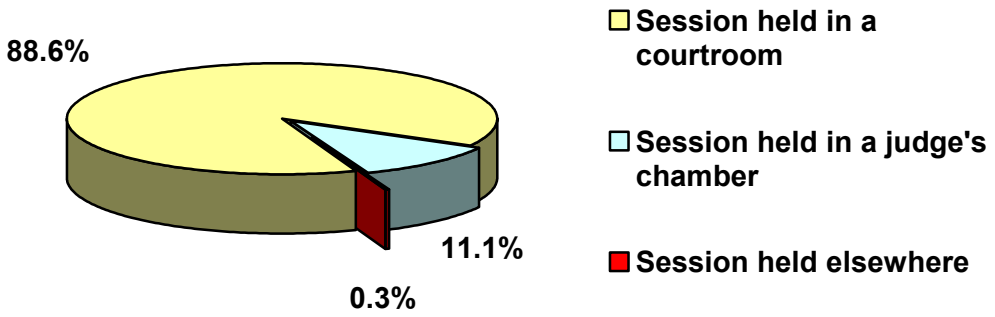
Diagram 2.2.4. Availability of information about the venue and time of court sessions



In 552 out of 730 cases attended the schedule of hearings was available and was accessible either in the court's lobby or in the court's records office. Schedules provided information on: the name/names of the defendant/defendants, the relevant article of the CC, the name of the judge trying the case, the time of the court session. The venue of the session was very rarely indicated. Clerks to the court announced the start of the session for its participants, indicating the venue just before it started.

In 178 cases (24.4%) schedules of hearings were not available. It should be noted that in Almaty city court and in Pavlodar oblast court the schedules of cases, heard as first-instance cases, were not displayed.

Diagram 2.2.5. The venue of a court session

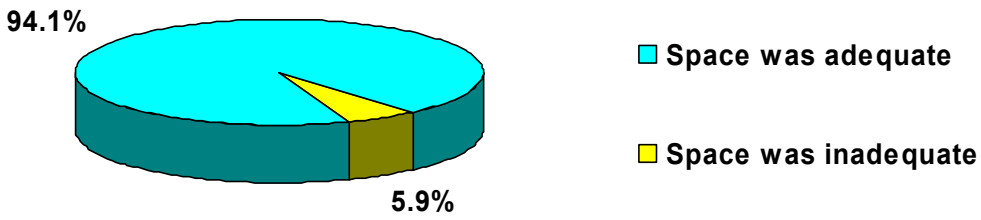


Court sessions shall be held in specially equipped rooms. Their space, furniture and technical equipment shall be optimal for administering justice. In particular, it is required to provide a sufficient number of seats not only for the persons directly involved in proceedings but also for persons wishing to attend a session.

Court sessions may be held outside the courtroom, which is either at the scene of a crime (one occasion recorded), or in a remand prison (one occasion recorded).

Contrary to the requirements of the legislation, a certain amount (11.1%) of court sessions attended by the trial monitors was held in judges' chambers. Such practice clashes with the essence of judicial power because administration of justice in criminal cases takes place on behalf of the state and has to be accompanied by the observance of all necessary formalities. While hearing criminal cases the court shall occupy the space appropriate to its status, with all the state symbols. Those participating in judicial proceedings shall have conditions guaranteeing their safety as well as respect for their rights and dignity. It should be borne in mind that hearing cases in judges' chambers creates additional obstructions for access to the public and does not promote appropriate respect for judicial power.

Diagram 2.2.6. Compliance with conditions necessary to accommodate the participants of proceedings and visitors



The space of judges' chambers where court sessions were held was not looked at since these chambers *a priori* are not designed to hold court sessions.

In 38 cases, visual examination of courtrooms found that there were clearly not enough seats for trial participants or that they were in uncomfortable and constrained conditions.

CASE 9

On 17 February 2005 in Petropavlovsk city court at a session in the case of two defendants charged under Article 178 part 2 paras. "a", "c", Art. 178 part 2 paras. "a", "b", "c" and Art. 181 part 1, held in courtroom No.1, the trial monitors recorded an inadequate number of seats for visitors. Some visitors had to share one chair between two.[72]

[72] REPORT No. 1/02/2005/ Petropavlovsk/14-15-KZ.

CASE 10

On April 5, 2006 one of the trial monitors wanted to attend a court session presided over by judge A.X. in Almaty Bostandyksky District court No.2, where the case of defendant X, charged under Article 259 part 1 of the CC, was being heard. The session was scheduled for 11 am. At 11.30 the trial monitor asked the clerk whether the session would take place. The clerk replied that the session would be held in the judge's chamber since there were no vacant rooms. In connection with this the judge did not allow the trial monitor to attend the session. The clerk said the following: "He said that if the session were held in a courtroom he would have allowed you to attend it. But since it will take place in his chamber he does not grant you permission to attend."[73]

CASE 11

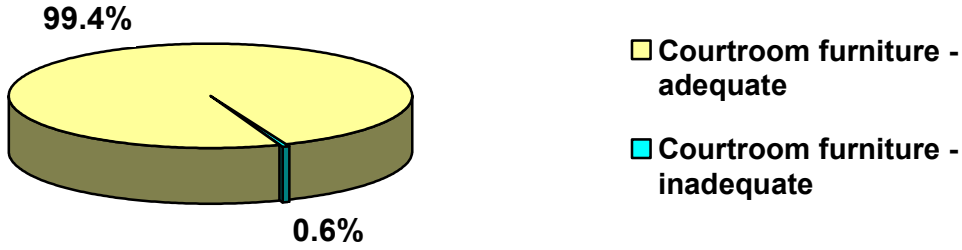
When the case of three defendants, charged under Art. 103 and Art. 257 of the CC, was heard in Pavlodar city court No. 2, before presiding judge N.X., on 6 April 2005, the court session, which was pronounced public, was held in a courtroom of about 25 square metres in size. Before the opening of the court session the judge entered the room and asked the public to leave the courtroom because it was small and had an inadequate number of seats. When asked by the trial monitor: "May I watch the proceedings?" the judge said politely "Come in". The public had gone, and there were only the judge, defendants, defence counsel, a clerk to the court, security officers and the trial monitor in the courtroom. The room had only one small window under the ceiling and therefore the natural light it was inadequate. The electric light was dim which impeded the normal work of the court.[74]

[73] Explanatory note/04/2006/Almaty/5-KZ.
[74] REPORT No.1/04/2005/Pavlodar/24-KZ.

Table 2.2.7. Logistics to provide for openness and attendance

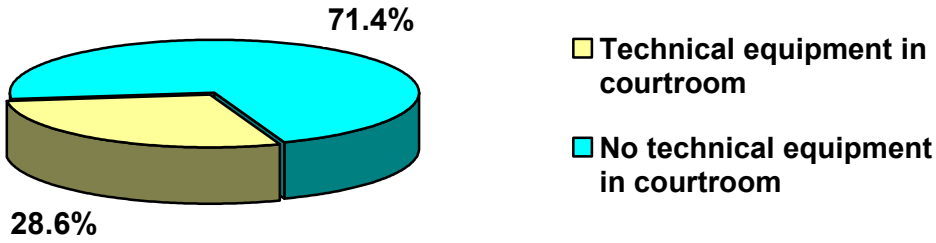
Region/Court	Necessary furniture in the courtroom		Technical equipment in the courtroom (audio and video equipment)		Courtroom lighting	
	Adequate	Inadequate	Available	Not available	Adequate	Inadequate
Astana	**The number of court sessions**					
District court No. 2 of Sary-Arka district	13	-	2	11	13	-
Almatinsky district court	-	-	-	-	-	-
Total for Astana	**13**	**0**	**2**	**11**	**13**	**0**
Almaty						
Almaty city court	23	-	23	-	23	-
Almalinsky district court	63	-	11	52	63	-
District court No. 2 of Almalinsky district	18	-	-	18	18	-
Auezovsky district court	17	-	-	17	17	-
District court No. 2 of Auezovsky district	18	-	18	-	18	-
District court No. 2 of Bostandyksky district	50	-	36	14	50	-
Zhetysusky district court	-	-	-	-	-	-
District court No. 2 of Zhetysusky district	2	-	-	2	2	-
Medeusky district court	16	-	1	15	16	-
Turksibsky district court	4	-	-	4	3	1
Total for Almaty	**211**	**0**	**89**	**122**	**210**	**1**
Pavlodar						
Pavlodar oblast court	8	-	-	8	8	0
City court No. 1	13	-	-	13	13	-
City court No. 2	56	2	-	58	45	13
Total for Pavlodar	**77**	**2**	**0**	**79**	**66**	**13**
Petropavlovsk						
Petropavlovsk city court	108	-	19	89	98	10
Total for Petropavlovsk	**108**	**0**	**19**	**89**	**98**	**10**
Taraz						
Taraz city court	51	-	-	51	51	-
Taraz court No.2	15	-	-	15	15	-
Total for Taraz	**66**	**0**	**0**	**66**	**66**	**0**
Uralsk						
Western-Kazakhstani oblast court	12	-	-	12	12	-
Uralsk city court	22	2	-	24	24	-
Uralsk court No.2	28	-	1	27	28	-
Total for Uralsk	**62**	**2**	**1**	**63**	**64**	**0**
Ust-Kamenogorsk						
Ust-Kamenogorsk city court	6	-	1	5	6	-
Ust-Kamenogorsk court No.2	10	-	-	10	10	-
Total for Ust-Kamenogorsk	**16**	**0**	**1**	**15**	**16**	**0**
Shymkent						
Al-Farabi district court (before 04.07.05 – Shymkent city court)	28	-	28	-	28	-
Abaisky district court (before 04.07.05 - Shymkent court No.2)	43	-	36	7	32	11
Enbekshinsky district court (before 04.07.05 – Shymkent court No.3)	19	-	9	10	19	-
Total for Shymkent	**90**	**0**	**73**	**17**	**79**	**11**
Total	**643**	**4**	**185**	**462**	**612**	**35**

Diagram 2.2.8. Equipment of courtrooms with furniture



To conduct court sessions in criminal cases it is important to have a table (or tables) for the judge(s), tables for the parties to the proceedings (prosecutor, defence), a witness box, and a dock for the defendant(s). In the majority of cases, the places where court sessions were held were equipped with the necessary furniture (99.4%). Only in four (0.6%) cases was there not enough furniture in the courtrooms.

Diagram 2.2.9. Technical equipment of courtrooms



In order to hold court sessions in criminal cases it is essential to have technical equipment, namely: television, video-recorder, microphone with amplifiers, audio-recording machinery. Such equipment is necessary in order to record accurately the course and results of court sessions, to study the submitted evidence, to have better understanding of what is going on not only by the parties directly involved in the proceedings, but by other persons as well. After attending the majority of court sessions, the trial monitors noted that technical equipment in courtrooms was either missing or inadequate. In only 185 cases was the appropriate technical equipment available in courtrooms.

Diagram 2.2.10. Adequacy of courtroom lighting

One of the parameters of courtroom technical adequacy, according to the trial monitors, was the quality of lighting. In 94.6% of cases the lighting was adequate.

Table 2.2.11. Compliance with the principle of public pronouncement of judgment

Region	Pronouncement of judgment/decision in a public hearing	Pronouncement of judgment/decision in camera
	Number of court sessions	
Astana	3	-
Almaty	39	-
Pavlodar	18	-
Petropavlovsk	13	-
Taraz	18	-
Uralsk	8	-
Ust-Kamenogorsk	6	-
Shymkent	23	-
Total	**128**	**0**

The principle of trial openness also extends to the ways of pronouncement of judgments and decisions. According to the legislation all judgments and decisions are to be pronounced publicly. The trial monitors did not encounter any violation of this principle.

In the course of mass monitoring the trial monitors did not manage to attend 162 criminal-case hearings.On each occasion an explanatory note indicating the data on the case, the judge/judges trying it, defendant/s and so on, as well as the causes for the court session being missed or not taking place, was put together. The main reasons listed by trial monitors for not attending court sessions were: the failure of people involved in the case to appear; court sessions that did not take place because of technical problems; court sessions held in camera; the refusal of judges, court secretaries, or court guards to provide access to the session. In several cases, no reasons were provided for missed court sessions.

Diagram 2.2.12. Reasons why court sessions were missed by the trial monitors or did not take place

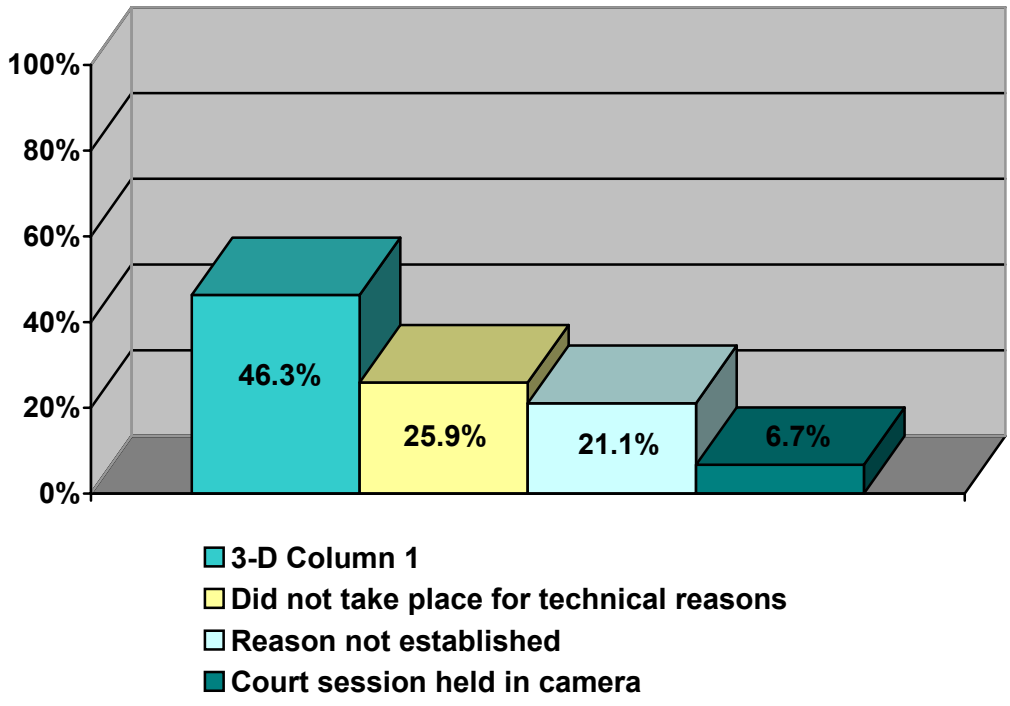


Table 2.2.13. Court sessions that did not take place because of the failure to appear by participants of hearings or other persons involved in the case

Region/Court	Failure to appear by participants of hearings or other persons involved in the case						
	Judge	Prosecutor	Defence counsel	Defendant	Victim	Witnesses	Clerk to the court
Astana	**Number of court sessions**						
District court No.2 of Sary-Arka district	-	-	-	-	-	-	-
Almatinsky district court	-	-	-	-	-	-	-
Total for Astana	**0**	**0**	**0**	**0**	**0**	**0**	**0**
Almaty							
Almaty city court	-	-	-	-	-	-	-
Almalinsky district court	1	-	2	3	5	5	-
District court No.2 of Almalinsky district	1	-	-	-	-	-	-
Auezovsky district court	-	-	-	-	-	-	-
District court No.2 of Auezovsky district	-	-	-	-	-	-	-
District court No.2 of Bostandyksky district	2	-	1	1	-	-	-
Zhetysusky district court	-	-	-	-	-	-	-
District court No.2 of Zhetysusky district	-	-	-	-	-	-	-
Medeusky district court	1	1	3	-	-	2	-
Turksibsky district court	-	-	-	-	-	-	-
Total for Almaty	**5**	**1**	**6**	**4**	**5**	**7**	**0**
Pavlodar							
Pavlodar oblast court	-	-	-	-	-	-	-
City court No. 1	1	-	-	-	7	1	1
City court No. 2	-	1	3	2	5	7	-
Total for Pavlodar	**1**	**1**	**3**	**2**	**12**	**8**	**1**
Petropavlovsk							
Petropavlovsk city court	-	-	1	1	1	-	-
Total for Petropavlovsk	**0**	**0**	**1**	**1**	**1**	**0**	**0**
Taraz							
Taraz city court	-	-	-	-	1	-	-
Taraz court No. 2	-	-	-	-	-	-	-
Total for Taraz	**0**	**0**	**0**	**0**	**1**	**0**	**0**
Uralsk							
Western-Kazakhstani oblast court	-	-	-	-	-	-	-
Uralsk city court	-	-	-	-	-	-	-
Uralsk court No. 2	-	-	1	-	-	-	-
Total for Uralsk	**0**	**0**	**1**	**0**	**0**	**0**	**0**
Ust-Kamenogorsk							
Ust-Kamenogorsk city court	-	-	1	-	2	-	-
Ust-Kamenogorsk court No. 2	-	1	-	-	-	-	-
Total for Ust-Kamenogorsk	**0**	**1**	**1**	**0**	**2**	**0**	**0**
Shymkent							
Al-Farabi district court (before 04.07.05 – Shymkent city court)	-	-	1	-	-	-	-
Abaisky district court (before 04.07.05 – Shymkent court No. 2)	-	-	2	-	-	-	-
Enbekshinsky district court (before 04.07.05 – Shymkent court No. 3)	-	-	-	-	-	-	-
Total for Shymkent	**0**	**0**	**3**	**0**	**0**	**0**	**0**
Total	**6**	**3**	**15**	**7**	**21**	**15**	**1**

Table 2.2.14. Court sessions that did not take place because of technical problems

Region/Court	Court sessions which did not take place because of technical problems						
	Judge in the deliberation room	Preliminary hearing	Guards did not bring the defendant	Session started earlier	Necessity to summon the witnesses	Courtroom does not have enough seats	Defendant has not inspected his indictment
Astana	Number of court sessions						
District court No.2 of Sary-Arka district	-	-	-	-	-	1	-
Almatinsky district court	-	-	-	-	-	-	-
Total for Astana	**0**	**0**	**0**	**0**	**0**	**1**	**0**
Almaty							
Almaty city court	-	-	-	-	-	-	-
Almalinsky district court	4	3	1	1	2	1	-
District court No.2 of Almalinsky district	-	-	-	-	-	-	1
Auezovsky district court	-	-	-	-	-	-	-
District court No.2 of Auezovsky district	-	-	-	-	-	-	-
District court No.2 of Bostandyksky distrcit	-	6	3	2	-	-	-
Zhetysusky district court	-	-	-	-	-	-	-
District court No.2 of Zhetysusky district	-	-	1	1	-	-	1
Medeusky district court	-	-	-	1	-	-	-
Turksibsky district court	-	-	-	-	-	-	-
Total for Almaty	**4**	**9**	**5**	**5**	**2**	**1**	**2**
Pavlodar							
Pavlodar oblast court	-	-	-	-	-	-	-
City court No. 1	-	-	-	-	-	-	1
City court No. 2	1	-	-	-	-	-	-
Total for Pavlodar	**1**	**0**	**0**	**0**	**0**	**0**	**1**
Petropavlovsk							
Petropavlovsk city court	-	-	-	4	1	-	1
Total for Petropavlovsk	**0**	**0**	**0**	**4**	**1**	**0**	**1**
Taraz							
Taraz city court	-	-	1	-	-	-	-
Taraz court No. 2	-	-	-	-	-	-	-
Total for Taraz	**0**	**0**	**1**	**0**	**0**	**0**	**0**
Uralsk							
Western-Kazakhstani oblast court	-	-	-	-	-	-	-
Uralsk city court	-	-	-	-	-	-	-
Uralsk court No. 2	-	-	-	-	-	-	-
Total for Uralsk	**0**	**0**	**0**	**0**	**0**	**0**	**0**
Ust-Kamenogorsk							
Ust-Kamenogorsk city court	-	-	-	-	-	-	-
Ust-Kamenogorsk court No. 2	-	-	-	-	-	-	-
Total for Ust-Kamenogorsk	**0**	**0**	**0**	**0**	**0**	**0**	**0**
Shymkent							
Al-Farabi district court (before 04.07.05 – Shymkent city court)	-	-	-	-	-	-	-
Abaisky district court (before 04.07.05 – Shymkent court No. 2)	-	-	-	-	-	-	-
Enbekshinsky district court (before 04.07.05 – Shymkent court No. 3)	-	-	-	-	-	-	-
Total for Shymkent	**0**	**0**	**0**	**0**	**0**	**0**	**0**
Total	**5**	**9**	**6**	**9**	**3**	**2**	**4**

Among other reasons for the sessions to be missed or not to take place the following were noted: failure of the judge to appear (6), failure of the participants and other persons involved in the case to appear (62), the necessity of summoning new witnesses (3), the discovery of the fact that the copy of the indictment had not been delivered to the defendant (4). In six cases guards did not bring the defendants from the remand prison. In nine cases the trial monitors did not manage to attend public hearings on the set date because sessions began earlier than was indicated in the time-schedule. Two sessions were missed due to the lack of space in the judge's chamber where the hearings took place.

Table 2.2.15. Court sessions missed by the trial monitors

Region	Reason not known	Court session held in camera	
		Decision reasoned	Decision not reasoned
	Number of court sessions		
Astana	-	-	-
Almaty	25	6	2
Pavlodar	-	1	-
Petropavlovsk	4	-	1
Taraz	-	-	-
Uralsk	1	-	-
Ust-Kamenogorsk	1	-	-
Shymlent	-	-	-
Total	**31**	**7**	**3**

Only seven sessions out of this number were held in camera; on three occasions judges did not give their permission to attend claiming that court sessions were to be held in camera. However, as far as the trial monitors knew, no decisions about hearing those cases in camera had been passed according to the procedure established by law.

CASE 12

On 25 February 2005 in Almaty city court, a trial monitor made an attempt to attend a public hearing in the criminal case of five defendants charged under Art. 235 part 1; Art. 181 part 3, paras/ "a", "c"; Art. 176 part 3, para. "b"; Art. 251 part 3; Art. 96 part 2, paras. "a", "b", "f", "g", "h", "i"; Art. 24 part 3 and Art. 316 part 1 of the CC. Prior to attending the hearing the trial monitor found out that the court presided over by judge S.X. had passed a decision to forbid any filming or photographing at the hearing with the aim of providing security for the victim and witnesses.

The court session began at 10.20 am. The prosecutor submitted an application to remove from the courtroom all persons not directly involved in the case since, according to him, the hearing, had to be held in camera. The trial monitor tried to explain that she was there working on the ODIHR trial-monitoring project, that she had nothing to do with the mass media and was not going to film or photograph at the hearing. In addition, the trial monitor pointed out that the hearing was a public one and she therefore had the right to be there.

The presiding judge asked for the opinion of the parties regarding the presence in the courtroom of persons wishing to watch the case. Two defence counsels pointed out that the right to be present at a public court hearing is a constitutional right of citizens of Kazakhstan. The victims agreed with the opinion of the prosecutor. Some defendants left the decision to

the discretion of the court; two defendants did not object to the trial monitor staying in the courtroom.

According to the decision taken by the full court presided over by the judge S.X. on 25 February 2005, the trial monitor together with a defence counsel's trainee were removed from the courtroom of the Almaty city court. In this connection the trial monitor filed a complaint to the Chairman of the Almaty city court (Annex No. 3). In his response the Chairman of the Almaty city court referred to the fact that the part of the hearing relating to examination of witnesses was closed for the press in order to safeguard their security. It is obvious, however, that the trial monitor was not a representative of the mass media and therefore that that restriction should not have been extended to her. The text of the judgment says that the case was heard in public court session.[75]

CASE 13

On 23 March 2006 the trial monitors visited the Almaty garrison Military Court.[76] When they arrived in the court they established that a public court hearing presided over by judge D. X. was scheduled for 3 pm in the case of three defendants, charged on Art. 177 part 1, Art. 177 part 2 and Art. 308 part 2 of the CC. Judge D. X. did not give his permission to the trial monitors to attend the session, referring to the insanity of one of the defendants. Limitation of transparency is only possible in cases stipulated by Art. 29 part 1 of the CPC. Criminal incapacity of a defendant shall not be a ground for conducting a court session in camera. The trial monitors wrote a letter to the Chairman of the Military Court of the RK Military Forces about this, which went unanswered.[77]

[75] Explanatory Note/02/2005/Almaty/7-KZ/.
[76] The Almaty garrison Military Court was visited twice but the trial monitors were not allowed to attend any of its sessions, which took place at that time.
[77] Explanatory Note/03/2006/Almaty/1-7-KZ.

Table 2.2.16. Refusal to grant trial monitors access to court sessions

No.	Region/Court	Refusal to grant access to a court session received from		
		Judge	Clerk to the court	bailiff
	Astana	**Number of court sessions**		
1	District court No. 2 of Sary-Arka district	-	-	-
2	Almatinsky district court	-	-	-
	Total for Astana	**0**	**0**	**0**
	Almaty			
1	Almaty city court	1	-	-
2	Almalinsky district court	1	1	1
3	District court No. 2 of Almalinsky district	-	-	-
4	Auezov district court	2	-	1
5	District court No. 2 of Auezovsky district	-	-	-
6	District court No. 2 of Bostandyksky district	2	1	1
7	Zhetysusky district court	-	-	-
8	District court No. 2 of Zhetysusky district	-	-	-
9	Medeusky district court	-	-	-
10	Turksibsky district court	-	-	-
11	Military court of Almaty garrison	2	-	-
	Total for Almaty	**8**	**2**	**3**
	Pavlodar			
1	Oblast court	-	-	-
2	City court No. 1	-	-	-
3	City court No. 2	-	-	-
	Total for Pavlodar			
	Petropavlovsk	**0**	**0**	**0**
	Petropavlovsk city court			
1	**Total for Petropavlovsk**	-	-	-
	Taraz	**0**	**0**	**0**
	Taraz city court			
1	Taraz court No. 2	1	-	-
2	City court No. 1	-	-	-
	Total for Taraz	**1**	**0**	**0**
	Uralsk			
1	Western-Kazakhstani oblast court	-	-	-
2	Uralsk city court	-	-	-
3	Uralsk court No. 2	-	-	-
	Total for Uralsk	**0**	**0**	**0**
	Ust-Kamenogorsk			
1	Ust-Kamenogorsk city court	-	-	-
2	Ust-Kamenogorsk court No. 2	-	-	-
	Total for Ust-Kamenogorsk	**0**	**0**	**0**
	Shymkent			
1	Al-Farabi district court (before 04.07.05 – Shymkent city court)	1	-	-
2	Abaisky district court (before 04.07.05 – Shymkent court No. 2)	-	-	-
3	Enbekshinsky district court (before 04.07.05 – Shymkent court No. 3)	-	-	-
	Total for Shymkent	**1**	**0**	**0**
27	**Total**	**10**	**2**	**3**

Over the reported period there were 15 cases of unjustified refusal to grant access to the courtroom/chamber. The trial monitors informed the chairpersons of the corresponding courts and the project co-ordinator about all those cases without delay.

CASE 14

On 23 May 2005 in Taraz city court an trial monitor tried to attend a public court session in a criminal case tried by judge C. X.. Questions about who she was and why she wanted to attend the session began as soon as she set foot in the court building. These questions were asked by a police officer who said that she could enter the courtroom only with permission from the judge. At the same time he explained to the trial monitor in a confident manner that "nobody has the right to attend the session unless he has a subpoena". Upon the trial monitor's insisting on entering the courtroom the policeman called the presiding judge. When talking to the judge the trial monitor was flatly refused permission to attend the hearing. The reason for the refusal was the fact that the trial monitor was not a party to the hearing. Additionally, the judge demanded that the trial monitor show her working identity card.

In relation to this the trial monitor filed a complaint to the Chairman of Zhambyl oblast court (See Annex 4). In follow up to the complaint the chairman of the Zhambyl oblast court ordered for the appropriate steps to be taken in order to secure unobstructed access of members of the public to the court's premises.[78]

CASE 15

On 27 September 2005, having come to Almalinsky district court of Almaty with the purpose of conducting general monitoring, a trial monitor learned of a court hearing set for 11.30 am before presiding judge G.X. that was not on the schedule of case hearings. Since the bailiff did not allow the trial monitor into the courtroom, the trial monitor did not manage to attend it. The bailiff explained his actions stating that the trial monitor was not a party to the proceedings and, accordingly, did not have the right to be present at the hearing. Later the trial monitor learned about another hearing conducted by the same judge at 2 pm, which was not on the schedule either. The judge did not allow the trial monitor to attend the hearing, justifying her refusal by the fact that the proceedings were coming to an end and that at that very session they were going to hear the defendants' final address to the court. The judge suggested that the trial monitor should go and attend other judges' sessions and come to hers only at the start of the preparatory part. On 20 March 2006 the trial monitors tried to attend a public court session in the case of defendant X., charged under Art. 96 part 1 and Art. 178 part 2 of the CC before the same presiding judge G.X. The clerk of the court, M.X., refused to let the trial monitors into the courtroom on the grounds that outsiders could not be present at a hearing without the prior permission of the judge.[79]

CASE 16

On 22 February 2005 in Shymkent city court trial monitors were not allowed into a public hearing by judge S.X. The refusal was based on the fact that the trial monitors should have had her prior permission. At first, the judge expressed her stance in a rude and overbearing manner, and then she began asking the opinion of parties to the proceedings about the presence of the trial monitors. The defendants, the state prosecutor and defence counsel agreed with the judge, referring to the fact that the hearing would be conducted in the Kazakh language. The trial monitors said that since the court session was public they had the right to be present. However, the judge did not accept these arguments and insisted that

[78] Explanatory Note/05/2005/Taraz/17-KZ.
[79] Explanatory Note/09/2005/Alamty/5-KZ, Explanatory Note/03/2006/Almaty/1-7-KZ.

the trial monitors leave the courtroom. In connection with this episode the trial monitors wrote a letter to the chairman of this court but he did not reply (Annex No. 5).[80]

2.3. The right to a fair hearing

International standard

Everyone has the right to a fair trial. This right is provided for in UDHR[81], ICCPR[82], ECHR[83] and OSCE documents.[84]

This standard covers various aspects of criminal proceedings including those relating to proper observance of the procedure and timeframe in criminal-case proceedings; checking on the appearance in court of persons summoned to the main trial and resolving the issue of a case to be heard in absentia; investigation of evidence according to the procedure established by law; compliance with the rules of interrogating witnesses, victims and other parties to the proceedings; giving of testimonies by witnesses and victims without duress; compliance with the rules of transition to the stage of judicial pleadings.

National laws

Unjustified delays and tardiness not only prolong the duration of proceedings and constitute a gross violation of Art. 331 of the CPC but also cause psychological, organizational, and material discomfort or inconvenience. Kazakhstani legislation provides for a number of guarantees for this right to be exercised. In particular, it concerns the timeframe for preliminary investigation and court proceedings.[85] "The main trial shall begin not earlier than the expiration of three days from the moment the parties have been informed of the date and venue of the court session and not later than fifteen days from the moment the decision fixing its date and venue has been passed. In exceptional cases this period can be extended by the decision of the judge but not more than up to thirty days … The main trial shall be completed within a month; in exceptional cases its duration can be extended by the reasoned decision issued by a judge."[86]

Elements examined by the trial monitors

The data presented below demonstrates to what extent legal procedures strictly prescribed by the criminal procedure legislation of Kazakhstan are complied with in practice by those involved in criminal proceedings. According to the principles of the administration of justice, procedures stipulated by law should be fully respected and upheld in practice, and any lack of compliance may raise reasonable doubts about the fairness of the judgment which can therefore be appealed to the higher court of instance.

Another important element of the proper administration of justice is the timely commencement of court sessions according to publicly displayed schedules. Failure to enter

[80] Explanatory Note/02/2005/Shymkent/22-23-KZ.
[81] Art. 10 of the UDHR.
[82] Art. 14(1) of the ICCPR.
[83] Art. 6(1) ECHR.
[84] Para. 13.9 of the 1989 CSCE Vienna document, para. 5.16 of the 1990 CSCE Copenhagen document.
[85] Art.196 of the CPC.
[86] Art.302 of the CPC.

the court room or the judge's chamber before the trial begins makes it impossible to attend the court session until the next break in proceedings. Therefore, the practice of delays or early commencement of trials undermines the right of parties involved in the case and the right of general public to be present at open trials. Compliance with the schedule for hearing cases is evidence of the parties' respect for the court and contributes to greater trust in the judicial authorities among the general public.

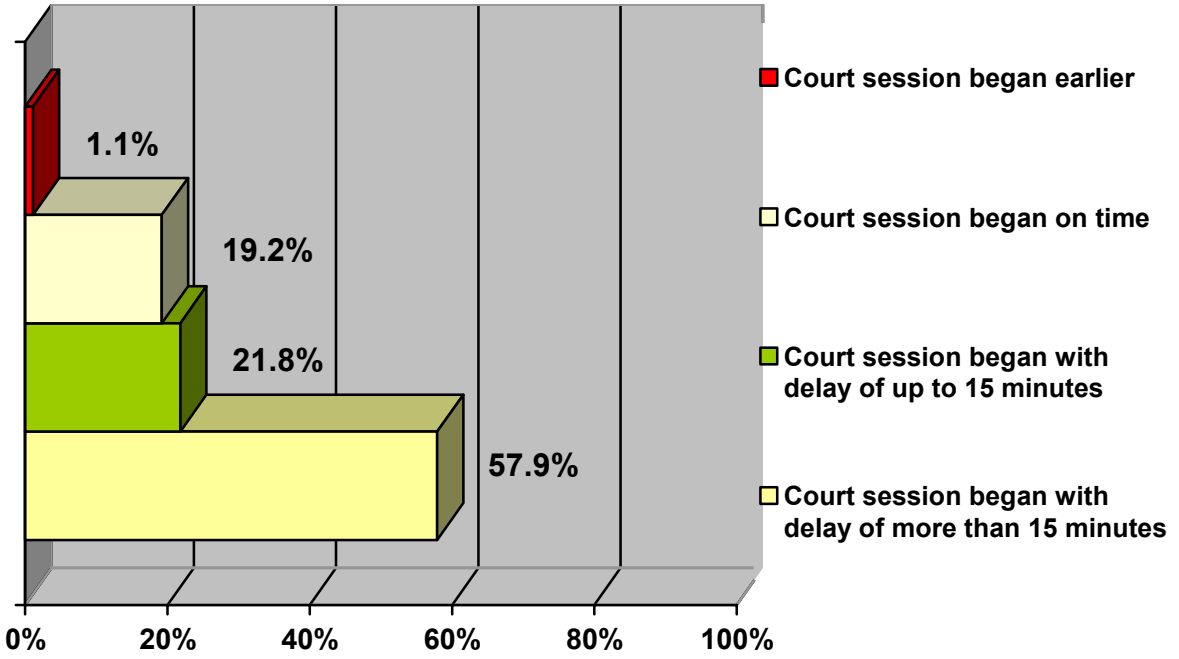
Statistics and conclusions

Table 2.3.1. Compliance with the timetable of court sessions

Region	Compliance with the timetable of court sessions				Reasons for court sessions not to be conducted on time					
	Started on time	Began earlier	Began with a delay of up to 15 minutes	Began with a delay of more than 15 minutes	Fault of state prosecutor	Fault of lay advocate/ defence counsel	Fault of the court	Fault of other parties to the proceedings	Technical reasons	Reason not explained
	Number of court sessions									
Astana	7	-	8	17	5	-	-	1	1	18
Almaty	62	8	34	134	8	12	30	18	26	82
Pavlodar	7	-	35	47	5	6	6	9	25	31
Petropavlovsk	13	-	37	67	10	7	43	9	13	22
Taraz	31	-	11	24	1	8	2	7	5	12
Uralsk	6	-	11	49	13	4	6	19	6	12
Ust-Kamenogorsk	3	-	8	12	1	2	1	2	-	14
Shymkent	11	-	15	73	14	7	14	9	15	29
Total[87]	**140**	**8**	**159**	**423**	**57**	**46**	**102**	**74**	**91**	**220**

[87] For the total number of cases monitored in each court, please see Chapter One. General Statistics of the Project.

Diagram 2.3.2. Compliance with the timetable of court sessions



The late starting of court sessions is common in all regions.

CASE 17

All eight court sessions that started earlier than scheduled were held in Almaty courts. In District Court No. 2 of Almaty Almalinsky district, two court sessions presided over by judge K.X. started earlier than had been indicated in the schedule of hearings. The court session in the case of defendant X., charged under Art. 103 part 3 and Art. 179 part 3 para. "b" of the CC, heard on 6 December 2005, started 40 minutes early.[88] The court session in the case of another defendant, charged under Art. 259 part 2 of the CC, heard on 16 June 2005 began 15 minutes earlier.[89]

Several sessions presided over by judge I.X., heard in District Court No. 2 of Almaty Bostandyksky district, began earlier than had been indicated in the schedule of hearings. The court session in the case of five defendants, charged under Art. 179 part 2, paras. "a", "c", "d"; Art. 257 part 2, paras. "a", "c", d"; Art. 178 part 2, para. "b" and part 3, para. "c" of the CC, heard on 30 January 2006, began 40 minutes early.[90] The court session in the case of defendant X., charged under Art. 259 part 2 of the CC, heard on 28 February 2006, began 2 hours 10 minutes early.[91]

In the same court, before presiding judge A.X., two other court sessions were conducted earlier than had been indicated. One of them, in the case of defendant X., charged under Art. 259 part 2 of the CC, was heard on 27 February 2006. This session began 15 minutes earlier than the time indicated in the schedule of hearings.[92] The second session, which started 25 minutes early, was in the case of defendant Y., charged under Art. 175 part 2 of the CC on 5 April 2006.[93]

In all these cases nothing was said about the reasons for the failure to adhere to the schedule of hearings.

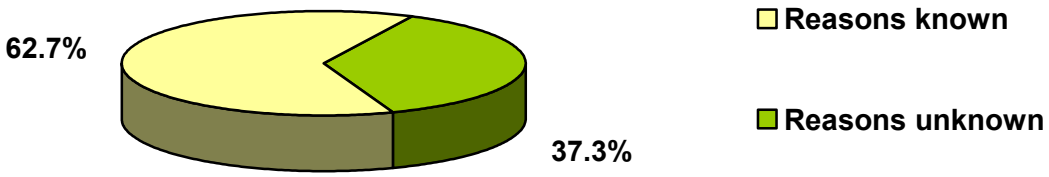
[88] REPORT No. 2/12/2005/ Almaty/1-5-KZ.
[89] REPORT No. 3/06/2005/Almaty/1-7- KZ.
[90] REPORT No. 02/01/2006/Almaty/5-KZ.
[91] REPORT No. 6/02/2006/Almaty/5-KZ.
[92] REPORT No. 8/02/2006/Almaty/5-KZ.
[93] REPORT No 03/04/2006/Almaty/1-7-KZ.

CASE 18

In the case of defendant X., charged under Art. 259 part 1 of the CC, heard in Petropavlovsk city court No. 1 before presiding judge V.X., the session was delayed by 6 hours 25 minutes. The judge set the time and date for the final address to the court by the defendant for 11 am on 16 March 2005. The trial monitors had been waiting in the court lobby for the session to begin for 1 hour 20 minutes. At 12.20 the trial monitors asked the bailiff about the reasons for the delay. The bailiff called the judge and found out that there would not be any sessions before lunch time, and that they would give additional information about the time of the session after 14.30. In the afternoon the trial monitors came to the court again and asked the bailiff to call the clerk of the court to find out about the time of the beginning of the session.

At that moment the clerk to the court came downstairs and told the trial monitors that the final address to the court would be heard after another court session, which was scheduled for 14.30. The clerk did not indicate the exact time but said: "The judge wants the case of the defendant X. to be completed today, therefore, if you intend to attend the session, you may wait". Another session, which was set for 14.30, finished at 16.50. The clerk said that the judge needed at least half an hour of rest and then would hear the case of defendant X. The trial monitors asked what the reason was for the case not to have been dealt with in the morning. The clerk to the court said that the judge had requested the permission to absent himself for some personal reasons. At 17.20 the clerk to the court opened courtroom No. 2, and at 17.25 the court session began.[94]

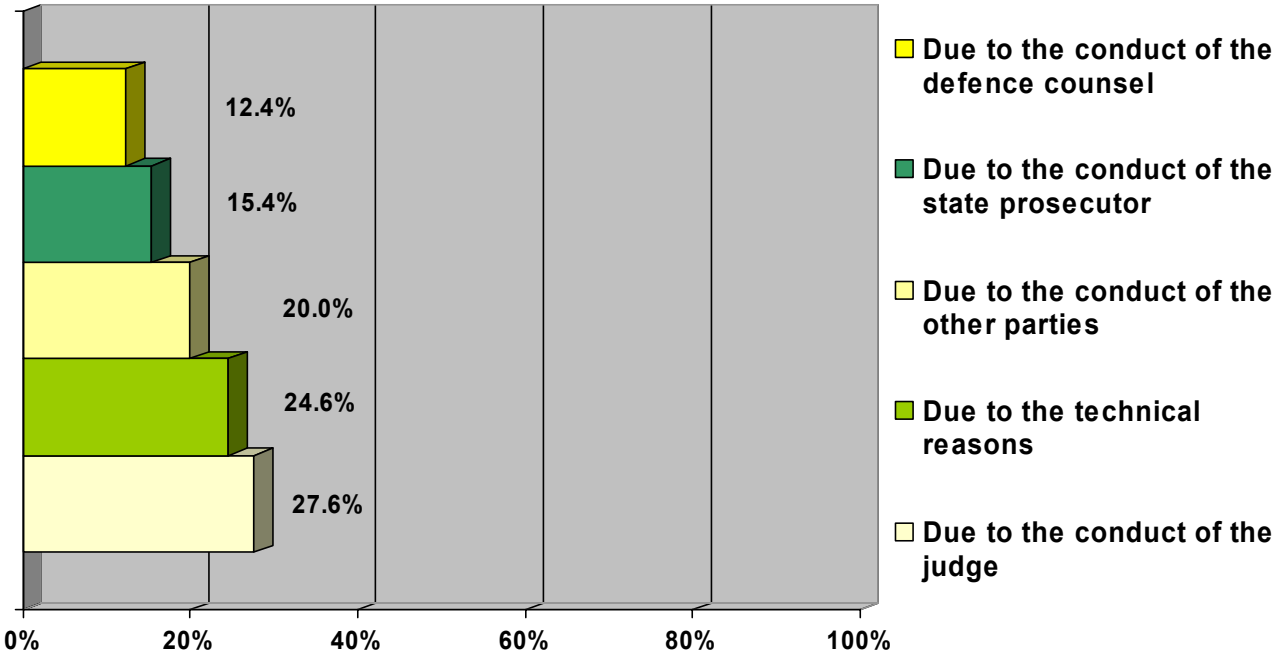
Diagram 2.3.3. Reasons for court sessions not to be heard on time



In 590 cases (74,7%) court sessions did not begin on time, and out of this number of cases in one third of the situations (37.3%) no reasons explaining non-compliance with the timetable were given.

[94]REPORT No. 6/03/2005/Petropavlovsk/14-15-KZ.

Diagram 2.3.4. Reasons established for not holding court sessions on time



"Technical reasons" for court sessions not being held on time include the following: security guards being late,[95] courtrooms occupied, power cuts, and so on.
In 27.6% cases, that is in the majority of the established cases, court sessions were not held on time for reasons related to judges' decisions or conduct.

CASE 19

In the case of defendant X., charged under Art. 141 part 2 of the CC, heard in Pavlodar city court No. 1 before presiding judge A.X., the court session held on 9 March 2005 and set for 9.30 am, began at 10.15 with a 45-minute delay. The delay was caused by the late appearance of the state prosecutor. When the state prosecutor appeared the judge reprimanded him for being late and warned that he would have to speak to his superiors with regard to his being repeatedly late.[96]

CASE 20

In the case of three defendants, charged under Art. 257 part 3 and Art. 103 part 2, para. "g" of the CC, heard in Petropavlovsk city court before presiding judge A.X. on 3 May 2005, two court sessions were held. The first one began after a 40-minute delay as all courtrooms were occupied. The clerk to the court had been looking for a free room all that time. The second session, which took place in the afternoon, began with a 25-minute delay although all its participants turned up on time. While everybody was waiting for the judge, a defendant from another case was brought into the room by mistake and the security guards began placing him behind the railings of a metal cage. At that moment the clerk to the court from another courtroom ran into the room shouting to the guards not to leave but to take "her defendant" to another room. At 14.45 the judge entered the courtroom, and the proceedings began without any explanation for the delay.[97]

[95] The order of MIA of 1 June 2002 No. 387 "On approval of the Rules of escorting the suspects and accused" states that "the routes of escorting the accused from the remand prison or the facility of temporary detention to the court and back are established using streets with the least traffic and movement of citizens. The escort shall leave the police escort unit (a body of the Interior) so as to take the accused from the remand prison (temporary detention facility) and to deliver them to their destination not later than thirty minutes before the beginning of a court session" (paras. 133, 134).
[96] REPORT No. 6/03/2005/Pavlodar/12-KZ.
[97] REPORT No 1/05/2005/Petropavlovsk/14-15-KZ.

CASE 21

In the case of defendant X., charged under Art. 175 part 3, para. "b" of the CC, heard in the Taraz city court before presiding judge K.Y. on 21 September 2005, the court session started after a 30-minute delay because the defendant did not turn up. The judge asked the parties to the proceedings to wait for 30 minutes but the defendant did not appear. The state prosecutor proposed that the judgment be pronounced without the defendant since she had probably absconded. As a result the judgment was indeed pronounced in absentia.[98]

CASE 22

On 23 June 2005 trial monitors visited Auezovsky district court of Almaty. From the schedule of hearings they found out that judge A.Y. had five court sessions set for the same time – 11.00. The trial monitors failed to attend two sessions because the clerk to the court refused to let them into the courtroom. After the trial monitors had spoken to the head of the court's records office about it they were given the judge's permission to attend.

The trial monitors managed to attend only the third court session out of those set for 11.00. The hearing in the case of defendant Y., charged under Art. 179 part 2 and Art. 327 part 2 of the CC, began after a 35-minute delay.[99] After this court session the trial monitors, not leaving the courtroom, attended the fourth session set for 11.00 in the schedule of hearings of the same judge. Evidently, the hearing in the case of defendant Y., charged under Art. 259 part 2 of the CC, was delayed by 48 minutes.[100]

Checking on the appearance in court of persons summoned to the main trial, stipulated in Art. 332 of the CPC, is a procedural guarantee of a fair trial because it provides for participation of all the parties concerned in a case hearing. Resolving the issue about the possibility of a case to be heard in absentia, stipulated in Art. 334 of the CPC, is important in order to provide for the directness and oral character of court proceedings as well as to consider the positions of the parties in the course of investigating the evidence on a case.

Table 2.3.5. Checking on the appearance in court of persons who were summoned to the main trial and resolving the issue of a case to be heard in absentia of one of the parties involved in criminal proceedings

Region	Non-corresponding stage of the main trial	Checking on the appearance in court of persons who were served with a summons		Issue of the possibility of a case to be heard in absentia	
		Clerk to the court reported it	Clerk to the court did not report it	Was dealt with	Was not dealt with
	Number of court sessions				
Astana	23	6	3	-	9
Almaty	170	45	23	18	50
Pavlodar	72	16	1	6	11
Petropavlovsk	98	17	2	10	9
Taraz	54	12	-	7	5
Uralsk	46	20	-	10	10
Ust-Kamenogorsk	15	7	1	5	3
Shymkent	73	14	12	2	24
Total	**551**	**137**	**42**	**58**	**121**

[98] REPORT No. 02/09/2005/Taraz/16-17-KZ.
[99] REPORT No. 4/06/2005/Almaty/1-7- KZ.
[100] REPORT No. 5/06/2005/Almaty/1-7- KZ.

Diagram 2.3.6. Checking on the appearance in court of persons who were summoned to the main trial

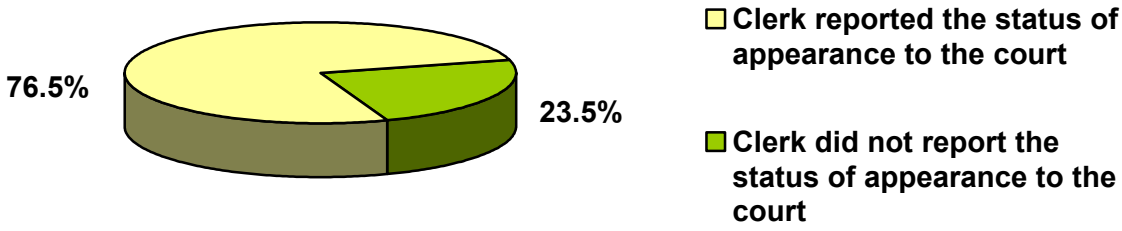
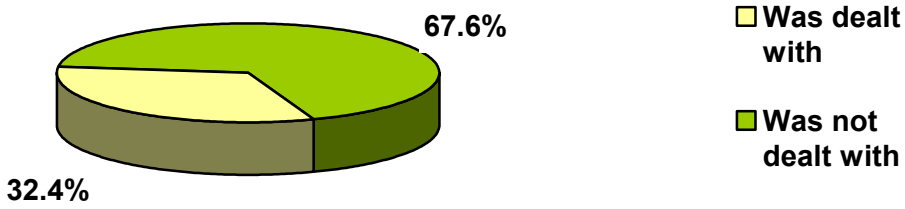


Diagram 2.3.7. Resolving the issue of a case to be heard in absentia of one the parties involved in criminal proceedings



The right to a fair hearing relates to such elements of the procedure as the investigation of all available case evidence, equal possibilities for submitting evidence by both parties, equal participation in the questioning of witnesses and experts, the impartial analysis of the submitted evidence by a judge.

Table 2.3.8. Investigation of evidence (forensic enquiry and examinations, identifications and other judicial activities) according to the procedure established by law

Region	Ordering and carrying out forensic enquiry			Carrying out examinations, identifications and other judicial activities according to the established procedure		
	Forensic enquiry took place		Forensic enquiry did not take place	Took place		Did not take place
	Procedure observed	Procedure not observed		Procedure observed	Procedure not observed	
	Number of court sessions					
Astana	-	-	32	-	-	32
Almaty	1	-	237	6	-	232
Pavlodar	1	-	88	2	-	87
Petropavlovsk	4	-	113	8	-	109
Taraz	-	-	66	2	-	64
Uralsk	1	-	65	-	-	66
Ust-Kamenogorsk	-	-	23	1	-	22
Shymkent	-	-	99	-	-	99
Total	**7**	**0**	**723**	**19**	**0**	**711**

Pursuant to Art. 351 of the CPC witnesses shall be removed before the beginning of a court session; witnesses shall not be questioned in the presence of those witnesses who have not been questioned yet.

Table 2.3.9. Investigation of evidence (testimony by witnesses and victims) according to the procedure established by law

Region	Removal of witnesses from the courtroom (chamber) before questioning them			Reading witnesses their rights		Mandatory requirement not to question witnesses in the presence of those witnesses who have not yet been questioned	
	Removed	Not removed	Witnesses not present	Rights were read	Rights were not read	Complied with	Not complied with
	Number of court sessions						
Astana	15	-	17	14	1	14	1
Almaty	71	44	123	68	34	95	7
Pavlodar	31	6	52	32	2	31	3
Petropavlovsk	50	15	52	40	24	63	1
Taraz	14	12	40	21	3	23	1
Uralsk	38	5	23	34	1	31	4
Ust-Kamenogorsk	13	-	10	11	1	12	-
Shymkent	28	6	65	27	4	27	4
Total	**260**	**88**	**232**	**247**	**70**	**296**	**21**

Diagram 2.3.10. Removal of witnesses from the courtroom (chamber) before the beginning of a court session

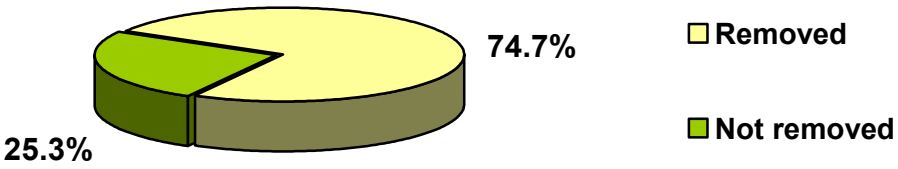
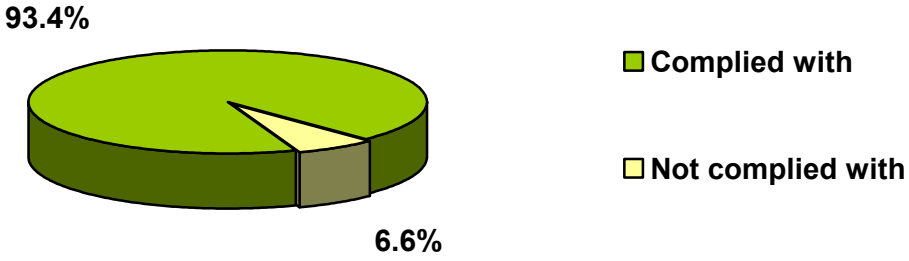
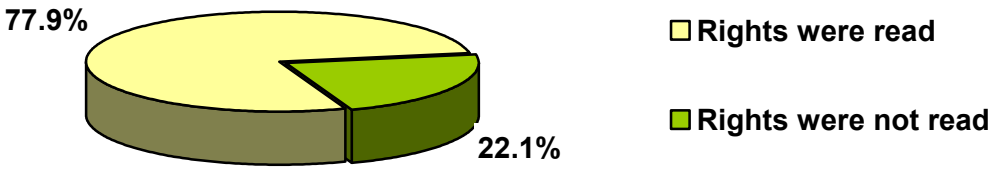


Diagram 2.3.11. Requirement not to question witnesses in the presence of those witnesses who have not yet been questioned



Out of 730 court sessions attended by the trial monitors, witnesses were questioned at 317 sessions. In 21 cases witnesses were not removed and were questioned in the presence of other witnesses, who had not been interrogated earlier, and other persons involved in a case, which is a violation of the current legislation.

Diagram 2.3.12. Reading witnesses their rights



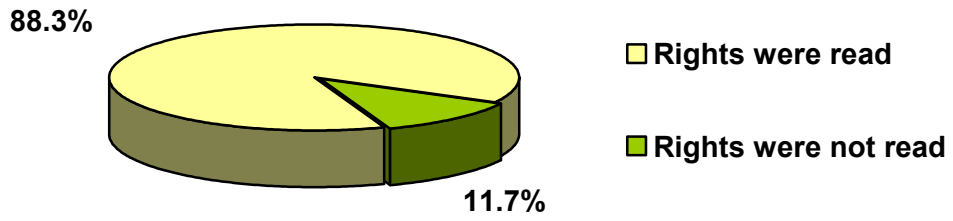
Out of 348 cases where witnesses came to testify, they were questioned only in 317 cases, in connection with which they had their rights either explained to them or not. Although in virtually all sessions witnesses had their obligations explained to them and were warned about criminal responsibility for providing false testimony, they did not always have their rights read to them. Only in 247 cases did this happen.

Art. 350 of the CPC provides for the procedure of questioning the victims and other parties to criminal proceedings. According to this provision the victims and other parties shall receive explanation of their rights and obligations, as well as criminal responsibility for providing false evidence, immediately before the interrogation begins. Other parties to the proceedings include plaintiffs, respondents, their representatives, legitimate representatives of minor defendants, private prosecutors and their representatives. Rights to these parties shall be explained in the preparatory part of the main trial in conformity with Art. 340 of the CPC.

Table 2.3.13. Compliance with the rules of interrogating victims and other parties to the proceedings

Region	Reading a victim his/her rights			Reading other parties to the proceedings their rights (plaintiff, respondent)		
	Rights read	Rights not read	Not interrogated at the session	Rights read	Rights not read	Not interrogated at the session
	Number of court sessions					
Astana	12	-	20	2	-	30
Almaty	48	12	178	3	2	233
Petropavlovsk	14	-	103	1	-	116
Pavlodar	17	3	69	-	-	89
Taraz	15	3	48	3	-	63
Uralsk	21	2	43	8	-	58
Ust-Kamenogorsk	6	1	16	2	1	20
Shymkent	33	1	65	-	-	99
Total	**166**	**22**	**542**	**19**	**3**	**708**

Diagram 2.3.14. Compliance with the rules of interrogating a victim



Victims were interrogated in the course of 188 sessions with the rights not being read to them only in 20 cases. This rule was violated most often in Almaty.

Diagram 2.3.15. Compliance with the rules of interrogating other parties to the proceedings

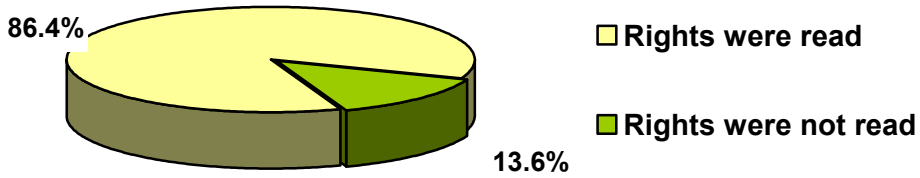


Table 2.3.16. Compliance with the right to summon and interrogate witnesses and victims[101]

Region	Pressure exerted on witnesses in the course of interrogation by someone from the parties to proceedings				Pressure exerted on a victim in the course of interrogation by someone from the parties to the proceedings			
	Exerted			Not exerted	Exerted			Not exerted
	By the defence	By the prosecution	By the judge		By the defence	By the prosecution	By the judge	
	Number of court sessions							
Astana	-	-	3	12	-	-	-	12
Almaty	3	2	3	96	4	-	-	56
Pavlodar	-	5	-	29	-	1	1	18
Petropavlovsk	2	3	2	59	2	-	-	12
Taraz	-	-	-	24	-	1	1	16
Uralsk	-	9	7	19	-	-	-	23
Ust-Kamenogorsk	-	-	-	12	-	-	-	7
Shymkent	-	1	2	28	-	2	3	29
Total	**5**	**20**	**17**	**279**	**6**	**4**	**5**	**173**

While interrogating witnesses no pressure shall be exerted by any of the parties to the proceedings including the judge. In the absolute majority of cases there was no such pressure. However, in those situations where pressure was exerted upon witnesses it was by and large exercised by the prosecution and the court.

No pressure shall be exerted during interrogation either on witnesses or victims. There was not any such pressure in 173 cases, which positively characterizes proceedings regarding this aspect. When pressure was exerted on victims the predominant part of it was exercised by the defence (6), the court (5) and the prosecution (4). In such circumstances it is possible to state that all parties violate the rule established by law. Serious concern is raised by the fact that such actions are performed by judges whose competence should be to ensure the neutrality, fairness and impartiality of trial.

[101] The number of sessions does not correspond to the general number of sessions where witnesses were interrogated (317) due to the fact that at one and the same session pressure could have been exerted by two subjects at the same time (for example, by the prosecution and the judge). For the examples of types of pressure exerted please see cases provided further in the text.

CASE 23

In the case of a defendant, charged under Art. 259 part 2 of CC, heard on 24 November 2005 in Auezovsky district court of Almaty before presiding judge A.Y., the judge together with the prosecutor began interrogating a witness, who was summoned at the insistence of the defendant. The judge decided that the witness was a credible witness basing her decision on his appearance and formulated her questions in such a way so that prosecution could get the answers it was interested in. Knowing that there was another witness in the courtroom (the mother of the defendant) who could supply the court with information supporting the position of the defendant, the judge did not remove the mother from the courtroom. However, the latter was called in as a witness and interrogated. During the interrogation the mother of the defendant was pressurized by the judge, who raised her voice when speaking to her and repeatedly emphasized that her son, the defendant, was an alcoholic. And when the mother of the defendant tried to identify the witness, the judge shouted again that she would not be able to identify her, because during the interrogation of the witness she was in the courtroom.[102]

CASE 24

In the case of three defendants, charged under Art. 103 part 3 and Art. 257 part 2, para. "a" of the CC, heard on 24 February and 10 March 2006 in Petropavlovsk city court before presiding judge Y.Y., the state prosecutor and the judge interrogated witnesses in a very harsh and clearly sceptical manner. At the session held on 24 February, during the interrogation of a witness the judge raised his voice, and on 10 March the judge again raised his voice during the interrogation of another witness. Moreover, in the course of this session the judge started shouting: "You have confused everything yourself. Why did you lie during the investigation? And now you are looking at me with honest eyes, like a young pioneer!" His voice was raised almost all the time while interrogating a witness. During the interrogation the judge started demanding that the witness tell him who had dictated for him his complaint to the prosecutor. He was almost shouting: "It is not your style. You make two or three mistakes in every word but phrases are constructed cleverly! Who dictated it to you? In any case this will not stay unpunished. You will be accountable for this or other testimony. You gave recognizance – so you will be punished!!!"[103]

At the end of the judicial investigation the court shall observe the provisions of Articles 362 and 364 of the CPC, namely: the presiding judge shall explain to the parties that they, in judicial pleadings, and the court, when passing a judgment, should only refer to the evidence considered during the judicial investigation; the presiding judge shall also ask the parties whether they wish to add anything to the judicial investigation and if so, what precisely; he shall also announce that the court is entering the judicial pleadings stage.

[102] REPORT No. 10/11/2005/Almaty/1-7-KZ.
[103] REPORTS No. 07/02/2006/ Petropavlovsk/14-15-KZ, No. 03/03/2006/ Petropavlovsk/14-15-KZ.

Table 2.3.17. Compliance with the rules of transition to the stage of judicial pleadings

Region	Obligation to explain to the parties that they, in judicial pleadings, and the court, when passing a judgment, have the right to refer only to the evidence considered in the judicial investigation			Obligation of the court to ask the parties about their wish to add anything to the judicial investigation and if so, what precisely		
	Explained	Not explained	Stage did not match	Parties asked	Parties not asked	Stage did not match
	Number of court sessions					
Astana	4	-	28	3	1	28
Almaty	19	36	183	41	14	183
Pavlodar	8	4	77	11	1	77
Petropavlovsk	6	8	103	6	8	103
Taraz	19	1	46	19	1	46
Uralsk	3	10	53	9	4	53
Ust-Kamenogorsk	10	-	13	8	2	13
Shymkent	15	3	81	11	7	81
Total	**84**	**62**	**584**	**108**	**38**	**584**

Out of the total number of court sessions attended by the trial monitors over the reporting period they managed to watch the transition to judicial pleadings only in 146 cases. In 62 cases out of that number judges did not explain to the parties that they, in judicial pleadings, and the court, when passing a judgment, had the right to refer only to evidence considered during the judicial investigation. At 38 sessions the parties were not asked whether they wished to add anything to the judicial investigation and if so, what precisely.

CASE 25

In the case of defendant V.Y., charged under Art. 259 parts 3 and 4 of the CC, heard in Uralsk court No. 2 on 29 April 2005 before presiding judge I.Y., the judge at the end of the judicial investigation and passing over to the stage of judicial pleadings did not explain to the parties that they, in judicial pleadings, and the court, when passing a judgment, had the right to refer only to evidence considered during the judicial investigation. Furthermore, the judge did not ask the parties whether they wished to add anything to the judicial investigation and if so, what precisely.[104]

2.4. The right to be present at trial and to defend oneself in person

International standard

Every person has the right to be tried in his presence so that he can listen to and dispute the accusatory speech and to defend himself in person or through legal assistance of his own choosing.[105] In addition, this right charges the authorities with an obligation to inform the accused and his defence counsel of the date and venue of the trial in advance and not to exclude him from trial without good cause.

[104] REPORT No. 5/04/2005/Uralsk/18-19-KZ.
[105] Art. 14(3) (d) ICCPR, para. 5.17 of the 1990 CSCE Copenhagen document.

National laws

The CPC stipulates mandatory participation of the defendant in a main trial. If the defendant fails to appear in court his case should be postponed. The court has the right to bring a defendant who failed to appear in court without good cause by force as well as to apply or alter measures of restraint. Trial in absentia can only be allowed in the following circumstances: 1) when the defendant charged with a crime of light gravity requests that his case be heard in his absence; 2) when the defendant is outside of Kazakhstan and is evading appearance in court.[106]

Statistics and conclusions

Table 2.4.1. Participation of the defendant in a case session

Region	Mandatory participation of the defendant		Establishing the identity of the defendant		
	Defendant was present	Defendant was absent	Established	Not established	Stage did not match
	Number of court sessions				
Astana	32	-	9	-	23
Almaty	237	1	63	5	170
Pavlodar	86	3	17	-	72
Petropavlovsk	117	-	19	-	98
Taraz	65	1	12	-	54
Uralsk	66	-	20	-	46
Ust-Kamenogorsk	23	-	8	-	15
Shymkent	99	-	24	2	73
Total	**725**	**5**	**172**	**7**	**551**

CASE 26

In Almaty Almalinsky district court in the case of defendant T.X., charged with committing a crime of light gravity (Art. 105 of the CC), the defendant requested permission not to appear in court as she had young children to care for. The judge, Z.X. agreed to this request, and consequently, on 2 February 2005 the court session was carried out in absentia.[107]

CASE 27

In Taraz city court at the session held on 21 September 2005 in the case of defendant X., charged under Art. 175 part 3, para "b" of the CC before presiding judge K.Y., the issue of hearing the case in absentia was discussed. The prosecutor did not object and said that the pronouncement of the judgment could take place without the defendant as she had probably absconded. The judgment was pronounced in absentia.[108]

CASE 28

In Pavlodar city court No. 2 at a court session held on 7 February 2005 in the case of defendant Y., charged under Art. 175 part 3, para. "c" of the CC, the defendant did not appear when the judgment was to be pronounced for reasons unknown. Despite the fact that the issue of conducting the session in absentia by judge Y.Y. had not been resolved, the judgment was pronounced.[109] At another session held in the same court on 7 November 2005 in the case of four defendants charged under Art. 179 part 2 of the CC, defendant Y. was absent because judge K.Y. had removed him from the courtroom "on the grounds of his bad behaviour" and said that defendant Y. (measure of restraint – custody) would be interrogated later when all the victims would be questioned in connection with other

[106] Art. 315 of the CPC.
[107] REPORT No. 8/02/2005/Almaty/3-5-KZ.
[108] REPORT No. 02/09/2005/Taraz/16-17-KZ.
[109] REPORT No 1/02/2005/Pavlodar/24 – KZ.

episodes.[110] At one more session held on 24 February 2006 in Pavlodar city court No. 2 in the case of one defendant, charged under Art. 179 part 2 of the CC, it was not possible to establish the reason for the defendant being absent; however, judge Y.Y. decided it was possible to pronounce the judgment in absentia. The judgment was pronounced.[111]

The judge shall ascertain that the copy of the indictment or the process of prosecution is delivered on time since this is the guarantee for the defence to be given adequate time to prepare for the proceedings.

Table 2.4.2. Compliance with the right to be given adequate time and conditions to prepare for the defence

Region	Ascertainment that the copy of the indictment or the process of prosecution was delivered on time		
	Judge ascertained	Judge did not ascertain	Stage did not match
	Number of court sessions		
Astana	9	-	23
Almaty	46	22	170
Pavlodar	17	-	72
Petropavlovsk	17	2	98
Taraz	12	-	54
Uralsk	19	1	46
Ust-Kamenogorsk	7	1	15
Shymkent	24	2	73
Total	**151**	**28**	**551**

CASE 29

In the case of defendant Y., charged under Art. 177 part 1 of the CC, heard on 11 March 2005 in Ust-Kamenogorsk court No. 2 before presiding judge M.X., the judge did not ascertain whether the defendant had received a copy of the indictment. Furthermore, the defendant was a minor, a schoolboy in the 9th form. The defence counsel appointed in this case did not have the case materials, nor did she make the appropriate effort expected of a defence counsel.[112]

CASE 30

In the case of several defendants charged under Art. 175 part 2 of the CC, heard on 24 January 2006 in Petropavlovsk city court before presiding judge V.Y., the judge did not ascertain with the juvenile defendants whether a copy of the indictment had been delivered to them on time and whether they themselves had examined the document.[113]

CASE 31

In the case of defendant Y., charged under Art. 24 part 3 and Art. 175 part 2, para. “b” of the CC, heard in District court No. 2 of Almaty Auezovsky district on 14 April 2005 before presiding judge R.X., the judge did not ascertain whether a copy of the indictment had been delivered to the defendant and whether it had been done on time.[114]

[110] REPORT No 3/11/2005/Pavlodar/12–KZ.
[111] REPORTNo. 6/02/2006/Pavlodar/12–KZ.
[112] REPORT No. 2/03/2005/Ust-Kamenogorsk/20-KZ.
[113] REPORT No. 2/01/2006/Petropavlovsk/14-15-KZ.
[114] REPORT No. 4/04/2005/Almaty/2-4-KZ.

CASE 2.32.

Judge S.Y. from the District court No. 2 of Almaty repeatedly violated the duty of the judge to ascertain whether copies of the indictment were delivered on time. In six sessions out of seven, held in different cases and presided over by him at the preparatory stage of the main trial, the judge did not ask about receipt of a copy of the indictment.[115]

CASE 2.33.

Judge I.Y. from the District court No. 2 of Almaty Bostandyksky district did not ascertain whether defendants had received copies of the indictment/process of prosecution on time. In eight sessions out of eleven held in different cases presided over by this judge at the preparatory stage, the procedure was violated with regard to this aspect.[116]

CASE 2.34.

Judge A.Y. from the Auezovsky district court of Almaty at three sessions out of five held at the preparatory stage of the main trial did not ascertain whether the defendants had received a copy of the indictment/process protocol on time. These facts were discovered at the court sessions in the cases of defendant X. (Art. 296 part 1 of the CC), defendant Y. (Art. 179 part 2 and Art. 327 part 2 of the CC), and two other defendants (Art. 105 of the CC).[117]

Table 2.4.3. Granting a defendant the opportunity to express his position in order to defend himself

Region	Ascertainment by a judge of a defendant's position on the charge brought against him		
	Ascertained	Not ascertained	Stage did not match
	Number of court sessions		
Astana	8	1	23
Almaty	56	6	176
Pavlodar	15	2	72
Petropavlovsk	19	-	98
Taraz	11	-	55
Uralsk	16	3	47
Ust-Kamenogorsk	8	-	15
Shymkent	24	-	75
Total	**157**	**12**	**561**

In line with Kazakhstan's current legislation the presiding judge shall ask the defendant whether he understands the charge against him, explain to him the essence of the charge and ascertain whether he wishes to inform the court of his attitude towards the charge brought,[118] which was done save in twelve cases.

[115] REPORTS No. 3/05/2005/Almaty/2-4-KZ, No. 2/05/2005/Almaty/2-4-KZ, No. 4/03/2005/Almaty/3-5-KZ, No. 5/03/2005/Almaty/3-5-KZ, No. 6/02/2005/Almaty/3-5-KZ, No.4/03/2005/Almaty/1-6-KZ.

[116] REPORTS No. 6/04/2005/Almaty/3-5-KZ, No. 5/04/2005/Almaty/3-5-KZ, No. 3/04/2005/Almaty/3-5-KZ, No. 1/02/2005/Almaty/3-5-KZ, No. 3/02/2005/Almaty/3-5-KZ, No. 4/02/2005/Almaty/3-5-KZ, No.3/01/2006/Almaty/5-KZ, No. 2/02/2006/Almaty/5-KZ.

[117] REPORTS No. 4/06/2005/Almaty/1-7-KZ, No. 3/04/2006/Almaty/5-KZ, No.14/03/2005/Almaty/1-7-KZ.

[118] Art.. 346 para.1 of the CPC.

Table 2.4.4. Granting a defendant the opportunity to express his position regarding a civil claim

Region	Ascertainment by a judge of the defendant's attitude towards a civil claim			
	Ascertained	Not ascertained	Was not subject to ascertainment	Stage did not match
	Number of court sessions			
Astana	5	1	3	23
Almaty	7	2	53	176
Pavlodar	8	-	9	72
Petropavlovsk	5	1	13	98
Taraz	1		10	55
Uralsk	6	1	12	47
Ust-Kamenogorsk	2	-	6	15
Shymkent	8	-	16	75
Total	**42**	**5**	**122**	**561**

The judge shall ask a defendant whether he admits (fully or in part) a civil claim brought against him. If the defendant answers the question, he has the right to justify it. Silence on the part of the defendant is interpreted as non-recognition of a civil claim.[119] Judges did not perform actions established by law in 5 out of 47 sessions when legal claims were brought.

Table 2.4.5. Reading a testimony provided by a defendant in the course of preparatory investigation

Region	Reading a testimony provided by a defendant in the course of preparatory investigation	
	Testimony was read	Testimony was not read
	Number of court sessions	
Astana	1	31
Almaty	23	215
Pavlodar	8	81
Petropavlovsk	8	109
Taraz	15	51
Uralsk	3	63
Ust-Kamenogorsk	1	22
Shymkent	8	91
Total	**67**	**663**

The reading of a testimony given by the parties to the proceedings at the pre-trial stages contradicts the fundamental principle of directness and oral nature of the court investigation into the circumstances of the case. Testimonies provided at the pre-trial stages are obtained by the prosecution under conditions that do not allow for the effective adversarial procedure and equality of arms to be exercised. Often pre-trial stages are characterized by violations of the rights of the accused.

Therefore, testimonies given during pre-trial interrogations should not be permitted in court as they give the prosecution an advantage and impose an investigative function upon the

[119] Art. 346 para. 3 of the RK CPC.

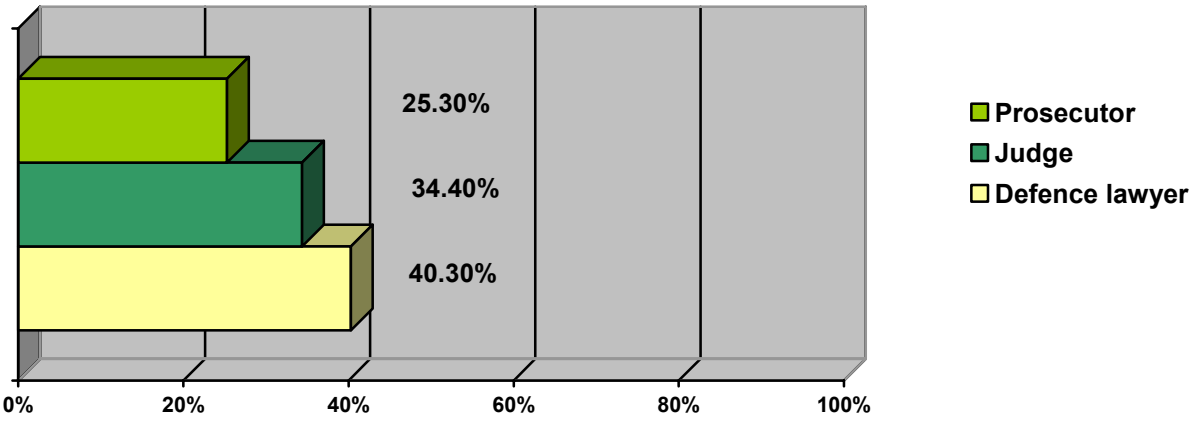
court – a function that is alien to the status of impartiality and fairness that courts have to uphold. Only testimonies given directly in a court room in presence of the defence counsel (when such presence is required by the law) shall be taken into account by the court.

The CPC provides for the rules of interrogating a defendant: "2. The defence counsel and parties to the proceedings acting for the defence shall be the first to interrogate the defendant; next shall be a state prosecutor and parties to the proceedings acting for the prosecution. The presiding judge shall rule out leading questions and questions that have nothing to do with the case. 3. The court shall question the defendant after he has been interrogated by the parties to the proceedings; however clarifying questions can be asked at any moment during interrogation".[120]

Table 2.4.6. Compliance with the rules of interrogating a defendant

Region	The first to interrogate a defendant was			
	State prosecutor	Defence counsel	Judge	A defendant was not questioned at the court session
	Number of court sessions			
Astana	-	5	1	26
Almaty	7	33	37	161
Pavlodar	-	21	1	67
Petropavlovsk	8	13	1	95
Taraz	7	4	13	42
Uralsk	9	1	10	46
Ust-Kamenogorsk	-	10	-	13
Shymkent	25	2	13	59
Total	**56**	**89**	**76**	**509**

Diagram 2.4.7. Parties who initiated questioning of the defendant



Defendants were interrogated in 221 sessions; in 89 cases the interrogation was initiated by the defence counsel, in 76 cases it was the judge/judges who was/were the first to ask questions, and at 56 sessions prosecutors.

Table 2.4.8. Granting the final address to the court to a defendant

[120] Art. 348 of the CPC.

Region	Granting the final address to the court to a defendant				Obstruction to a defendant's final address to the court	
	Granted	Not granted	Refusal to have the final address to the court	Not applicable (because the stage of the main trial did not foresee this action)	Interrupted, asked questions	Not interrupted, not asked questions
	Number of court sessions					
Astana	3	-	1	28	-	3
Almaty	45	-	4	189	1	44
Pavlodar	18	-	-	71	1	17
Petropavlovsk	14	-	-	103	1	13
Taraz	17	-	-	49	1	16
Uralsk	8	-	-	58	-	8
Ust-Kamenogorsk	5	-	-	18	-	5
Shymkent	11	1	1	86	-	11
Total	**121**	**1**	**6**	**602**	**4**	**117**

On one occasion only was a defendant not given the chance to make the final address to the court. This fact was recorded in Shymkent, in the case of defendant Y., charged under Art. 179 part 2 of the CC, heard on 3 April 2006 in Enbekshinsky district court before presiding judge A.Y.[121]

CASE 35

In four sessions the defendants were interrupted or asked questions during their final address to the court.

In the case of four defendants, charged under Art. 175 part 2 and Art. 324 of the CC, heard on 6 April 2005 in Taraz city court before presiding judge C.Y., during their final address to the court the judge repeatedly interrupted all four of them, did not give them the opportunity to finish what they wanted to say, and offered the floor to the next defendant when the previous had not finished his speech. As a result, the pronouncement of their final address to the court by the four defendants took only four minutes.[122]

CASE 2.36.

In the case of three defendants, charged under Art. 103 and Art. 257 of the CC, heard on 6 April 2005 in Pavlodar city court No. 2 before presiding judge N.Y., defendant Y. in his final address to the court asked that he should not be deprived of his freedom, said that he would not do again what he had done, and partially admitted his guilt. Contrary to the requirements of the legislation the judge interrupted his speech uttering the following: "For us it is difficult to understand what you have in your head; you had a different position, did not provide testimony and now you are showing remorse. If you have something to add, please, add it". The defendant said he had nothing to add. The judge asked why the defendant was remorseful, to which the defendant replied that he admitted his guilt in violating public order.[123]

[121] REPORT No. 3/04/2006/Shymkent/22-23-KZ.
[122] REPORT No. 3/04/2005/Taraz/16-17-KZ.
[123] REPORT No. 1/04/2005/Pavlodar/ 24-KZ.

CASE 2.37.

In the case of minors B. and R., charged under Art. 185 part 2, para. "a" of the CC, heard on 6 April 2006 in Almaty Auezov district court before presiding judge A.X., the judge literally forced the defendants to apologize to the victim when they were pronouncing their final address to the court. In so doing, she said to them in a raised voice: "Apologize, lazy bones!"[124]

2.5. The right to be presumed innocent and the right not to be compelled to testify or confess guilt

International standard

The right to be presumed innocent as a standard of criminal judicial proceedings is contained in the ICCPR: "Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law".[125] In addition, the principle of the presumption of innocence is also provided for by the UDHR,[126] OSCE documents[127] and other international acts.

According to this right, judges should refrain from expressing their opinions or comments regarding the outcome of the case until the moment of passing the judgment.

The ECHR ruled that one of the elements of the presumption of innocence in criminal procedure is the judge's obligation not to commence the trial with the partial preconception that the defendant has committed the crime that is being charged to him, since the burden of proof lies with the prosecutor, and any doubt should be interpreted in favour of the defendant.[128]

Any public comment of an accusatory character made by a governmental official before the judgment is passed may violate the principle of presumption of innocence.[129]

The presumption of innocence implies a number of aspects including: presumption of release from custody during a trial; accordingly, a person accused of committing a criminal offence should not be in custody pending a trial save in accordance with established exceptions. The ECHR stipulates that: "Everyone arrested or detained … shall be entitled to trial within a reasonable time or release pending trial. Release may be conditioned by guarantees to appear for trial".[130]

Presumption of innocence also implies the right not to be compelled to testify or confess guilt, and the right to silence during the investigation and trial (the right to witness immunity). The ICCPR, in particular, stipulates that: "Everyone shall be entitled to… not to be compelled to testify against himself or to confess guilt".[131]

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[124] REPORT No. 5/04/2006/Almaty/5-KZ.
[125] Art. 14(2) of the ICCPR.
[126] Art.11 of the UDHR.
[127] Para. 5.19 of the 1990 CSCE Copenhagen document.
[128] ECtHR judgment, *Barberà, Messegué and Jabardo v. Spain*, Application no. 10590/83, 6 December 1988 г., para 77).
[129] In the ECtHR judgment , the court decided that comments in the press relating to the guilt of the defendant, made by senior police officers and the Minister of Interior a few days after his arrest, constituted violation of the principle of presumption of innocence. *(Allenet de Ribemont v. France*, Application No. 15175/89, Series A308, 10 of February 1995, paras. 16, 17, 36, 37, 41).
[130] Art. 5(3) of the ECHR.
[131] Art. 14(3) (g) of the ICCPR.

The ECtHR emphasized that "the right not to be compelled to testify or confess guilt, in particular, implies that the prosecution side in the criminal trial perseveres to prove its prosecution case without having recourse to the evidence obtained under duress where the will of the defendant is disregarded".[132]

National laws

The Constitution of Kazakhstan formulates this principle in the following way: "A person shall be considered innocent of committing a crime until his guilt is established by the court sentence which has come into force; the accused shall not be obliged to prove his innocence; any doubts about a person's guilt shall be interpreted in favour of the accused".[133]

The right to be presumed innocent as provided for in the CPC is extended to all stages of criminal proceedings, both at the pre-trial and trial stages – up to the moment when a court judgment comes into force.

The CPC states that: "1. Everyone shall be considered innocent until his guilt in committing a crime is proved according to the specified procedure and established by a court sentence that has come into force… . 3. Irremovable doubts about the guilt of the accused shall be interpreted in his favour. Doubts arising from the application of criminal law and criminal procedure law shall also be interpreted in favour of the accused… . 4. The judgment of guilt can not be based on assumptions and shall be confirmed by the adequate accumulation of credible proofs".[134]

Kazakhstan's national legislation envisages a measure of restraint in the form of detention[135] to be applied to the accused (suspects) who have committed deliberate crimes for which the punishment stipulated by law shall be in the form of imprisonment for the term of more than two years and who have committed negligent crimes for which the punishment stipulated by law shall be in the form of imprisonment for the term of more than three years.

According to CPC, the suspect, the accused and the defendant have the right to refuse to provide explanations and testimony.[136] Moreover, before the interrogation at the pre-trial stages an investigator shall explain to the accused (suspect) his right to refuse to give evidence.[137] It shall be explained to the defendant that he is not bound by the confession or denial of guilt made in the course of the pre-trial investigation or interrogation, is not obliged to answer the question as to whether he admits his guilt or not, and that the refusal of the defendant to answer questions can not be interpreted to his detriment. The defendant has the right to justify his answer. His silence shall be interpreted as a plea of not guilty.[138] Before the interrogation of the defendant the presiding judge shall explain to him his right to provide or not provide testimony with regard to the charge brought against him and other circumstances of the case, as well as the fact that everything the defendant says can be used against him.[139]

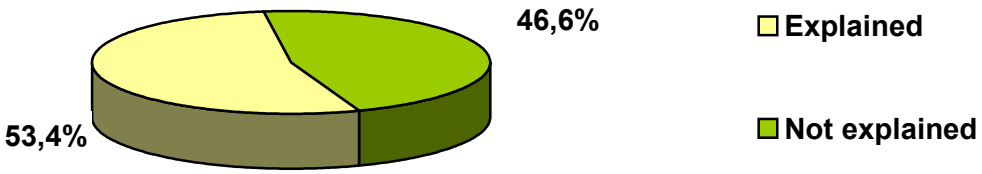
[132] ECtHR judgment, *Saunders v. United Kingdom,* (1996) 23 EHRR 313 para 68.
[133] Art. 77 paras.1, 6, 8 of the Constitution.
[134] Art.19 of the CPC.
[135] Art.150 of the CPC.
[136] Articles 68, 69 of the CPC.
[137] Articles 216, 217 of the CPC.
[138] Art. 346 part 2 of the CPC.
[139] Art. 348 part 1 of the CPC.

Statistics and conclusions

Table 2.5.1. Reading a defendant his basic rights relating to presumption of innocence

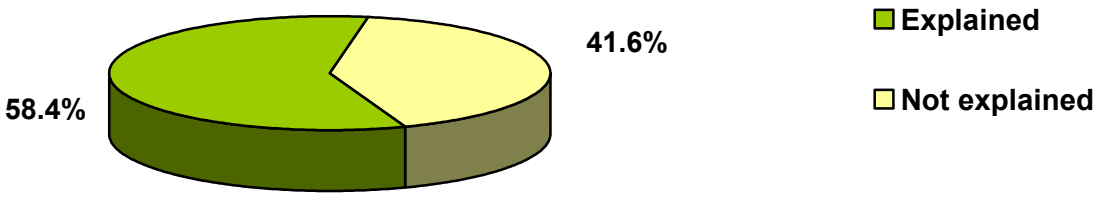
Region	Defendant not interrogated	Explaining to a defendant that he is not bound by confessing or denying guilt at pre-trial stages		Explaining to a defendant his right not to testify against himself or his family		Whether a defendant took advantage of his right not to testify against himself and his family	
		Explained	Not explained	Explained	Not explained	Took advantage	Did not take advantage
	Number of court sessions						
Astana	26	5	1	5	1	3	3
Almaty	161	37	40	40	37	36	41
Pavlodar	67	14	8	16	6	10	12
Petropavlovsk	95	19	3	19	3	9	13
Taraz	42	14	10	16	8	10	14
Uralsk	46	10	10	8	12	8	12
Ust-Kamenogorsk	13	7	3	7	3	1	9
Shymkent	59	12	28	18	22	17	23
Total	**509**	**118**	**103**	**129**	**92**	**94**	**127**

Diagram 2.5.2. Explaining to a defendant the right not to be bound by confession or denial of guilt made during pre-trial investigation



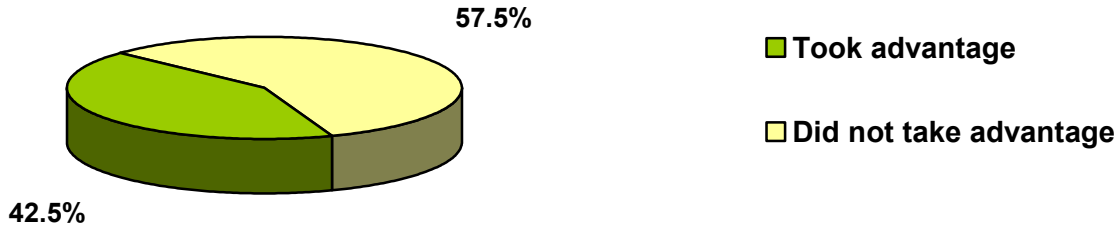
At sessions where the judge explained or had to explain to a defendant that he was not bound by confession or denial of guilt made during pre-trial investigation, judges fulfilled their duty in the majority of cases.

Diagram 2.5.3. Explaining to a defendant his right not to testify against himself and his family



At sessions where the judge explained or had to explain to a defendant his right not to testify against himself and his family, judges fulfilled their duty in the majority of cases.

Diagram 2.5.4. Whether a defendant took advantage of his right not to testify against himself and his family

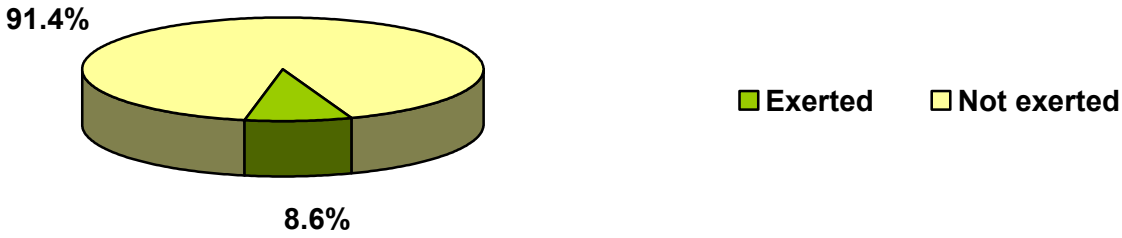


A defendant took advantage of his right not to testify against himself and his family in 94 cases or 57.5%, without considering the fact whether this right was explained to him or not.

Table 2.5.5. Compliance with the principle of defendants providing testimony of their own volition

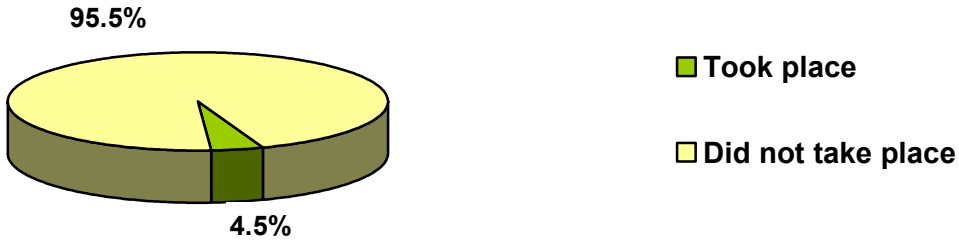
Region	Defendant not interrogated	Pressure on defendant at interrogation		Pressurising defendant by a judge to confess guilt	
		Exerted	Not exerted	Took place	Did not take place
	Number of court sessions				
Astana	26	1	5	-	6
Almaty	161	6	71	5	72
Pavlodar	67	2	20	-	22
Petropavlovsk	95	2	20	1	21
Taraz	42	1	23	1	23
Uralsk	46	3	17	-	20
Ust-Kamenogorsk	13	1	9	-	10
Shymkent	59	3	37	3	37
Total	**509**	**19**	**202**	**10**	**211**

Diagram 2.5.6. Pressure exerted on a defendant in the course of interrogation by any of the participants of the session



The trial monitors noted that in 19 cases or 8.6% of cases some form of pressure was exerted on a defendant at interrogation by a prosecutor, a judge or a victim, which manifested itself in threats, a raised voice or harsh utterances.

Diagram 2.5.7. Pressurising of a defendant by a judge to provide confessionary statements



In 211 cases (95.5%) there was no pressure exerted on a defendant by a judge to provide confessionary statements. However, in 4,5% of cases where violations were made such violations grossly breached fair-trial standards.

CASE 38

In the case of defendant Y., charged under Art. 175 part 2 of the CC, heard on 4 April 2006 in Enbekshinsky district court of Shymkent before presiding judge T.Y., the defendant denied his guilt. During his testimony he kept saying that he was only selling things, not stealing them. Prosecutor Y. spoke to him in a very rude manner, raised his voice, called him "a pathetic drug addict" and said the following: "… if it were up to me, I would sort you out!"[140]

CASE 39

In the case of defendant Y., charged under Art. 181 part 2, paras. "a", "c" of the CC, heard on 1 March 2005 in the District court No. 2 of the Sary-Arka district of Astana before presiding judge N.Y., the judge exerted pressure upon the defendant in the course of interrogation. In particular, the judge said the following in a raised voice: "As you see, everybody is sitting here: your mother, defence counsel, the victim with his mother, and you are playing the innocent. What relationship did you have with the victim?"[141]

CASE 40

In the case of defendant Y., charged under Art. 259 part 3, para. "c" and part 4, para. "b" of the CC, heard on 10 May 2005 in the District court No. 2 of the Almaty Zhetysusky district before presiding judge S.Y., the defendant refused to admit his guilt. However, during his interrogation the judge, trying to pressurize the defendant into confessing guilt, said the following: "If you take drugs it means that you also sell them, and it means that you are guilty." Furthermore, when the defendant refused to plead guilty, the judge responded in the following way: "If you

[140] REPORT No. 6/04/2006/Shymkent/22-23-KZ.
[141] REPORT No. 8/03/2005/Astana/8-KZ.

admit your guilt, the court will be able to take it into consideration as a mitigating circumstance."[142]

CASE 41

In the case of defendant Y., charged under Art. 178 part 2 of the CC, heard on 13 April 2005 in Taraz city court before presiding judge I.Y., the judge pressurized the defendant into confessing guilt. He said the following: "It is clear from the case that you are covering up for the other two people in the case; confess, tell us, who are they? They are outside, free, and you are in prison. Do you have any remorse? Do you plead guilty to the crime?"[143]

CASE 42

In the case of defendant Y., charged under Art. 175 part 3 of the CC, heard on 3 May 2005 in Shymkent court No. 2 before presiding judge G.X., the judge kept expressing distrust of the defendant's words. In spite of the fact that before the interrogation the judge explained to the defendant that he was not bound by the confession or denial of guilt made at the pre-trial stages of proceedings, she herself exerted psychological pressure on the defendant, compelled him to confess guilt, referring to the statements made by the defendant in the course of the pre-trial investigation.[144]

[142] REPORT No. 3/05/2005/Almaty/2-4- KZ.
[143] REPORT No. 6/04/2005/Taraz/16-17- KZ.
[144] REPORT No. 1/05/2005/Shymkent/22-23-KZ.

According to international standards such procedures as holding a defendant in hand-cuffs, in a metal cage (with bars) and presence of security guards may lead to the violation of the principle of presumption of innocence, if their application is unjustified and disproportional to the existing security threats. [145]

Table 2.5.8. Application of external factors in violating the presumption of innocence[146]

Region	Usage of hand-cuffs during a court session		Placing a defendant in cage with bars		Presence of security guards			
	Defendant hand-cuffed	Defendant not hand-cuffed	Defendant placed behind the bars of a metal cage	Defendant not placed behind the bars of a metal cage	Next to the cage	Near the courtroom/ chamber door	Elsewhere (in the courtroom, next to a defendant)	No security guards present
	Number of court sessions							
Astana	1	31	18	18	18	1	13	1
Almaty	51	189	148	106	145	30	60	40
Pavlodar	15	74	49	41	46	18	11	30
Petropavlovsk	8	109	86	48	84	10	7	24
Taraz	4	62	56	13	56	1	1	8
Uralsk	1	65	58	8	56	-	3	7
Ust-Kamenogorsk	-	23	8	15	8	-	-	15
Shymkent	22	77	64	37	62	4	21	16
Total	**102**	**630**	**487**	**286**	**475**	**64**	**116**	**141**

[145] In the case *of Sarban versus Moldova* heard by the European Court of Human Rights, the defendant "was always brought into the courtroom in hand-cuffs and placed in the metal cage during the hearings". The European Court of Human Rights found this to constitute a violation of Art. 3 of the ECHR which forbids the degrading treatment of persons. (*Sarban v. Moldova*, Application No. 3456/06, 4 October 2005, paras. 36, 45, 88, 90).

[146] The number of court sessions in Table 2.5.8 does not coincide with the total number of monitored court sessions due to the presence of several defendants in one court session.

Detention as a measure of restraint was applied to 411 defendants; a written pledge not to leave a specific place and behave appropriately as a measure of restraint was applied to 131 defendants; and such a measure of restraint as the transfer of a minor under supervision was applied to two defendants because of their age.[147] In all cases, when detention as a measure of restraint was applied to defendants, they were escorted into the courtroom hand-cuffed and during all court sessions were held in cages with bars guarded by security guards. When sessions were held not in a courtroom but, for example, in a judge's chamber where there was no cage, defendants wore hand-cuffs chained to a security guard throughout the session.[148]

In the course of monitoring the trial monitors also noted that sometimes the defendants charged with crimes of light or medium gravity wore hand-cuffs in addition to being placed behind the metal cage bars, which is a violation of the current laws and regulations.[149]

The universal practice of using hand-cuffs and metal fencing (bars) in courtrooms contravenes international fair-trial standards, violates the principle of presumption of innocence, and humiliates the honour and dignity of the parties to criminal proceedings. Legitimization of such practice in departmental regulations is unjustified because it serves to protect departmental interests to the detriment of the legal status of an individual.

CASE 43

In the case of the four defendants charged under Art. 175 part 2 and Art. 324 of the CC, heard on 6 April 2005 in Taraz city court before presiding judge C.Y., all the defendants were guarded. During their final address to the court and the pronouncement of the judgment on the case all the defendants were hand-cuffed in spite of the fact that they were sitting behind the cage bars guarded by security staff.[150]

CASE 44

In the case of four defendants, charged under Art. 178 part 2, paras. "a", "c" and "d" of the CC, heard on 17 May 2005 in District court No. 2 of Almaty Zhetysusky district before presiding judge S.Y., all the defendants were chained to each other by hand-cuffs although they were sitting behind the cage bars and guarded. During the interrogation when one of them stood up, the others had to sit in an uncomfortable position with their arms raised. At the next session in this case held on 23 May 2005 during the pronouncement of the judgment the defendants were still wearing hand-cuffs; they were listening to the judgment standing hand-cuffed in spite of being behind the cage bars and guarded by security staff.[151]

CASE 45

The case of defendant Y. charged under Art. 96 part 1 and Art. 24 part 3 of the CC, was heard on 4 April 2005 in Petropavlovsk city court before presiding judge Y.Y. Due to some confusion amongst the security guards they did not have time to remove the hand-cuffs from

[147] See Table 2.1.8 for more detailed information.

[148] This procedure has been defined by the Order of the RK Minister of Interior of 1 June 2002 No. 387 "On approval of the Rules of escorting the suspects and accused" according to which :"To restrict the freedom of movement of the escorted person the following shall be used: for regular escorting – hand-cuffs of the "Tenderness-1" and "Tenderness-2" type; for extra security escorting – of the "Tenderness-2" and "Bouquet" type; for high security escorting, in order to restrain the escorted person, hand-cuffs with a chain of the "Bouquet" and ""Prikol" type; combined hand-cuffs and bracelets connected by a chain which restrict the freedom of movement of the arms and the length of the stride." (para. 36 and para. 3 sub-para. 5).

[149] In particular, para. 61 of the Order of the RK Minister of Interior of 1 June 2002 No. 386 "The approval of Instructions on performing one's duty, provision of guarding suspects and accused held in temporary detention facilities".

[150] REPORT No. 3/04/2005/Taraz/16-17-KZ, REPORT No. 4/04/2005/Taraz/16-17-KZ.

[151] REPORT No. 5/05/2005/Almaty/2-4-KZ, REPORT No. 7/05/2005/Almaty/2-4-KZ.

the defendant before the beginning of the court session. In this court the cage is normally locked by using the hand-cuffs that are removed from the defendant prior to that. However, since the hand-cuffs were left on, the cage door was not locked. Security guards wanted to bring a lock or hand-cuffs for the door but the judge came in and started the session. During the session one of the guards stood next to the cage and held the door closed with his hand.[152]

CASE 46

The case of defendant Y., charged under Art. 296 part 1 of the CC, was heard on 13 December 2005 in Al-Farabi district court of Shymkent before presiding judge A.Y. Although the measure of restriction applied to the defendant was a written pledge not to leave the city and behave appropriately, throughout the whole session he sat behind the railings.[153]

2.6. Exclusion of evidence elicited as a result of torture or other duress

International standard

The prohibition of torture has been established by the UDHR[154] and ICCPR[155] as well by OSCE commitments.[156] The UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,[157] ratified by Kazakhstan,[158] has a special significance among international documents.

Pursuant to the Convention against Torture each State Party shall ensure that any individual who alleges he has been subjected to torture in any territory under its jurisdiction has the right to complain to its competent authorities and to have his case promptly and impartially examined by them. Steps shall be taken to ensure that the complainant and witnesses are protected against all ill-treatment or intimidation as a consequence of his complaint or any evidence given.[159]

In conformity with international practice if a defendant alleges during the course of the proceedings that he or she has been compelled to make a statement or confess guilt, then the judge has the authority to consider such an allegation at any stage of proceedings.[160] Indeed, the court is obliged to consider forced confessions even in the absence of an express complaint or allegation, if the person concerned bears visible signs of physical or mental ill-treatment.[161] All allegations about torture must be promptly examined by the competent authorities including judges who should order a forensic medical examination and to take all necessary steps to ensure that the allegation is fully, promptly and impartially

[152] REPORT No. 3/04/2005/Petropavlovsk/14-15-KZ.
[153] REPORT No. 08/12/2005/Shymkent/22-23-KZ.
[154] Art. 5 of the UDHR.
[155] Art. 7 of the ICCPR.
[156] Para. 23.4 of the 1989 CSCE Vienna document, para. 16.1 of the 1990 CSCE Copenhagen document, para. 21 of the 1999 OSCE Istanbul document.
[157] Adopted by the Resolution 39/46 of the UN General Assembly of 10 December 1984, also known as the Convention against torture.
[158] In conformity with the RK Law of 29.06.98 No. 247-1.
[159] Art. 13 of the Convention against torture, as well as para. 23.1. items ix), x) of the 1991 CSCE Moscow document.
[160] In conformity with para. 20 of the 1994 CSCE Budapest document, the OSCE participating States "commit themselves to inquire into all alleged cases of torture and prosecute offenders. They also commit themselves to include in their educational and training programmes for law enforcement and police forces specific provisions with a view to eradicate torture".
[161] Art. 14(3) g) of the ICCPR; as well as *Kelly v. Jamaica*, CCPR/C/41/D/253/1987, 10 April 1991, para. 5.5.

investigated. These standards apply not only to statements made by the defendants but also to statements made by witnesses.[162]

The Convention Against Torture commits each State Party to ensure "that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings except against a person accused of torture as evidence that the statement was made".[163]

According to the case law of the ECtHR the state is obliged to prove that torture was not applied; in other words, if the defendant alleges that he was subjected to torture, the fact of torture is assumed unless the state proves the contrary. The ECtHR stated that "in situations where circumstances of the case that is being reviewed have been in full or in their main part within exclusive control of the state, like in cases where people are held in detention by the state, there appears a strong presumption that injuries and death caused during detention occurred with state's involvement. In such circumstances, indeed, the burden of proof lies with the authorities that have to present satisfactory and convincing explanation".[164]

National laws

The CC contains Article 347 "Duress to provide evidence" and Article 347-1 "Torture". Complaints made in a courtroom shall have to be considered by the judge. If any facts of violating rights and freedoms of citizens as well as of other violations of the law in the course of inquiry or preliminary investigation have been revealed, the court may issue special court determinations,[165] including those of instituting separate court proceedings in cases of the revealed facts of torture.

The CPC stipulates that factual data be considered inadmissible as evidence if it was obtained in violation of the CPC, which by way of depriving or restricting the legitimate rights of the parties to proceedings or by violating other rules of criminal proceedings during investigation or judicial trial influenced or could influence the credibility of the factual data obtained, including those elicited as a result of torture, violence, threats, deception as well as other illegal actions.[166] Moreover, such factual data may be used as evidence to prove the fact of corresponding violations and guilt of persons who committed them.

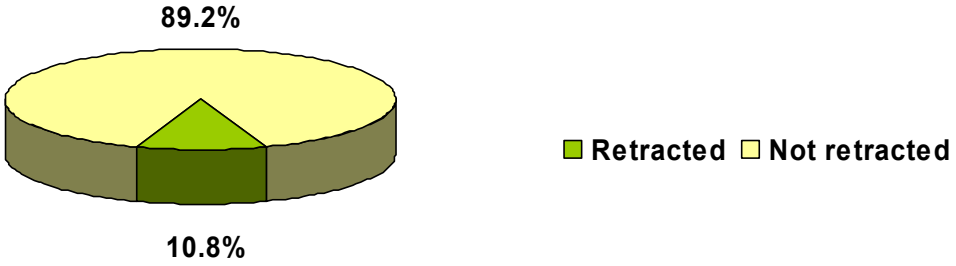
[162] Articles 13 and 16 of the Convention against torture.
[163] Art. 15 of the Convention against torture.
[164] ECtHR judgment, *Salman v. Turkey*, Application no. 21986/93, 27 June 2000, para100.
[165] Art. 59 of the CPC.
[166] Art. 116 of the CPC.

Statistics and conclusions

Table 2.6.1. Compliance with the principle of exclusion of evidence elicited as a result of torture or other duress

Region	Allegations by a defendant about statements given as a result of mental or physical coercion, torture, threats, deception applied to him during preliminary investigation (inquiry)		Actions by a judge to examine such allegations		Actions by a prosecutor to examine such allegations	
	Made	Not made	Undertaken	Not under taken	Undertaken	Not under taken
	Number of court sessions					
Astana	1	31	1	-	-	1
Almaty	24	214	14	10	9	15
Pavlodar	6	83	4	2	3	3
Petropavlovsk	15	102	13	2	3	12
Taraz	6	60	5	1	3	3
Uralsk	1	65	1	-	1	-
Ust-Kamenogorsk	-	23	-	-	-	-
Shymkent	26	73	9	17	2	24
Total	**79**	**651**	**47**	**32**	**21**	**58**

Diagram 2.6.2. Retraction by a defendant of statements given earlier made in connection with torture or other types of duress applied to him during a preliminary investigation (inquiry)



CASE 47

In the case of four defendants, charged under Art. 179, 251, 257, 237 and 259 of the CC, heard in Abaisky district court of Shymkent before presiding judge G.X., the defendants during all sessions repeatedly retracted statements made earlier, referring to torture and other types of duress applied to them during the preliminary investigation. They alleged that police officers had beaten them with batons, burned their back with cigarette ends, used electric shock, put cellophane bags over their heads as a result of which one of the defendants suffered damage to the spinal cord. The defendants alleged that they had been framed, and that they did not know each other well. The judge took note of these allegations and called in an investigator for interrogation having suggested that they should ask him

questions regarding the allegations they had made. But the defendants behaved rather passively. Since the defendants failed during the interrogation of the investigator to confirm their statements about the facts of torture, the judge and the prosecutor took no further steps to examine their allegations.[167]

CASE 48

In the case of defendant Y., charged under Art. 178 part 2, para. "a" of the CC, heard in Petropavlovsk city court before presiding judge A.Y., during all sessions the defendant repeatedly stated that mental and physical pressure had been exerted upon him, compelling him to confess to what he had not done. According to him, for three days in a row he was called to the First Police Department by a detective officer G. who cohabited with the victim, and tried to force the defendant to confess to a crime. He also showed him a sketch of the scene of the crime. On the night of 30 September 2004 the defendant was brought into the room where there were five people, who were laughing and threatening that they would send him to the temporary detention facility and lock him up with criminals, and who suggested that he plead guilty, and beat him, taking turns, on his head. Then one of the staff took him out of the room down to the police call centre and having stood him near the window ordered him to turn sideways-on, left and right. Suddenly the defendant noticed a woman and two or three men in police uniform standing near the entrance to the building.

On 2 October 2004 identification took place where the victim Y. identified the defendant without fail. He, in turn, identified her as the woman who had stood at the steps of the police building on 30 September 2004. Only the investigator was present at the identification session; the defence counsel came later. After the identification, the defendant was again beaten on the head, following which, unable to cope with the pressure, he incriminated himself. The investigator typed his confession statement and called in the defence counsel T. in whose presence the defendant signed the record of interrogation.

During the trial the defence counsel V. repeatedly submitted applications to summon the staff of the First Police Department as witnesses. In connection with the defendant's complaints the judge started asking questions: "Why didn't you tell your defence counsel about the pressure on you, why did you sign the record of interrogation in his presence, why did you agree to sign, why didn't you come to the prosecutor's office?", to which the defendant answered: "I was scared because they threatened me. However, I did go to the prosecutor's office on 13 October 2004". The prosecutor said that prosecutor's examination did not detect any violations in the course of identification. The lawyer on duty and the investigator did not receive any complaints from the defendant, and there is no record of his name in the register at the First Police Department for the period 27-30 September. The judge, during all sessions repeatedly asked the police officers whether they had exerted pressure on the defendant, to which they provided a negative answer. After every indignant answer of the police officers, the prosecutor, looking at the defence counsel, kept whispering: "You see, nobody exerted any pressure". No other actions to clarify specifically the circumstances described in the complaint, were undertaken.[168]

CASE 49

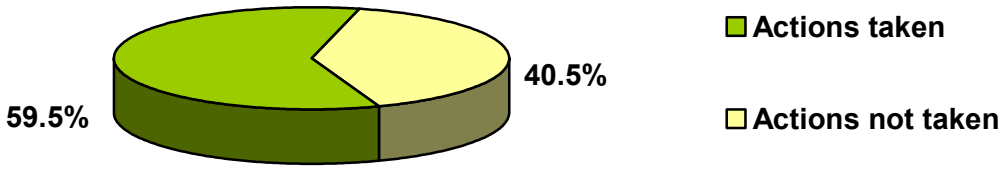
In the case of one defendant, charged under Art. 179 part 2, paras "a", "c", "d", Art. 24 part 3, Art. 96 part 2, paras. "d", "e", "g", "h", "l" of the CC, heard on 20 October 2005 in Almaty city court by the panel of 3 judges, A.Y., Y.Y. and S.Y., the defendant said that he went out with the detective officer to look for the instrument of the crime; the detective repeatedly kicked him in the stomach, threatened that he would kill him and would sort out his father. Fearing for the life and health of his family the defendant was forced to incriminate himself. When the defendant realized that his father was not in any danger, he provided truthful

[167] REPORTS No. 1/10/2005/Shymkent/22-23-KZ – No. 9/11/2005/Shymkent/22-23-KZ.
[168] REPORT No. 2/05/2005/Petropavlovsk/14-15-KZ, REPORT No. 4/05/2005/Petropavlovsk/14-15-KZ, REPORT No. 8/02/2005/Petropavlovsk/14-15-KZ.

testimony. The judge read out aloud the testimony that he had provided during preliminary investigation and asked in whose presence he had given it. The defendant said that he had given it in the presence of his defence counsel and his father (because at that moment he was a minor). When the judge asked why he had not told everything to his defence counsel, the defendant said that he had been scared and had not known what to do. At the end of the proceedings the prosecutor made a motion about interrogation of the staff of the law-enforcement bodies.

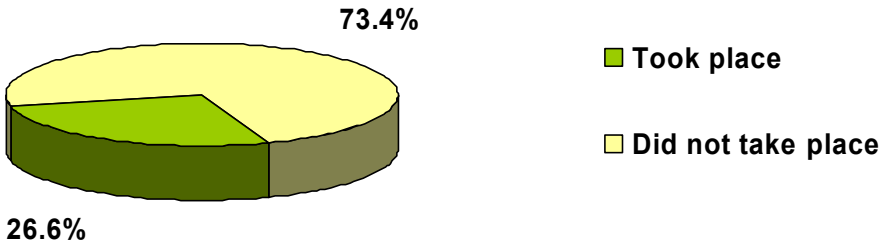
After that the judge requested the presence in court of the people mentioned. He asked the defendant for their names, to which the latter answered that he did not know their last names but would be able to identify them. On hearing that, one of the judges said: "How do you visualize that? Do we have to bring the whole District Board of Interior and the police sub-station here?" The defendant's father, a lay advocate, responded to that saying that he would go to the District Board of Interior and would try to find out the names of the officers his son had mentioned.[169]

Diagram 2.6.3. Actions of judges in response to allegations by a defendant about torture or other types of duress



In cases where defendants made allegations about the use of torture or other types of duress against them the trial monitors were instructed to pay attention to the actions of the judge and the prosecutor. In more than half of the cases judges performed the necessary actions pro forma: they called in investigators and inquiry officers to be interrogated as witnesses, where these flatly denied their implication in illegal methods of investigation. However, the judges did not undertake more active and efficient steps to examine allegations by a defendant.

Diagram 2.6.4. Actions of prosecutors in response to statements by a defendant about his retraction of testimony given earlier in connection with application of torture or other types of duress.



Prosecutors, who are officials authorized on behalf of the state to implement the highest level of supervision over the observance of legality, much more rarely than judges gave a proper response to the allegations by defendants about torture and other types of duress.

CASE 50

In the case of one defendant charged under Art. 96 part 1 and Art. 175 part 1, heard on 29 June 2005 in Almalinsky district court of Almaty before presiding judge Z.X., the defendant alleged that the testimony he had given during investigation had been elicited as a result of

[169] REPORT No. 2(1L)/10/2005/Almaty/7-KZ.

mental and physical pressure on the part of the police officers, who beat him. Moreover, physical injuries were still present on his face at the time of the trial. The judge interrogated the persons mentioned, as witnesses. The police officers said that the defendant had fought with someone the day before. To this the defendant said that he worked as a waiter and would not have been able to serve customers with his injuries, which showed that he had been beaten after he was delivered to the District Department of Interior since he was detained at his workplace. The defendant said that this fact could be corroborated by witnesses who worked with him. However, the court did not take steps to summon the witnesses whom the defendant was talking about. On the part of the prosecutor there was no reaction to the defendant's claim.[170]

CASE 51

In the case of one defendant charged under Art. 259 part 2 of the CC, heard on 16 March 2005 in Shymkent city court before presiding judge A.Y., the defendant in the course of the trial alleged that he had been compelled through use of physical violence to confess guilt. The prosecutor and defence counsels did not take any note of this complaint. The judge only asked one question clarifying the names of the individuals who had allegedly applied torture. The defendant could not answer this question, and the judge did not undertake any measures to ascertain these facts.[171]

CASE 52

The case of two defendants charged under Art. 96 part 2, paras. "a", "c", d", "e" of the CC, was heard on 5 April 2006 before the Almaty panel of three judges. While interrogating one of the defendants, the presiding judge raised his voice and kept reading out aloud the statements confessing guilt that the defendant had made during the preliminary investigation. The complaint about torture was completely ignored. The court only asked questions about the defendant's attitude towards his initial statements of confession, although the defendant had been read his right not to testify against himself and close relatives, and that he was not bound by confession or denial of guilt made at the pre-trial stages of the process.[172]

2.7. Equality of arms

International standard

"Equality of arms" means that both parties should be in an equal legal position in the course of the trial, namely, they are entitled to equal treatment before the court.[173] "Each party must be afforded a reasonable opportunity to present its case, under conditions that do not place it at a substantial disadvantage vis-à-vis the opposing party…Both parties are treated in a manner ensuring they have a procedurally equal position during the course of the trial…"[174] In general, this principle guarantees that the defence has access to all the facts that are in the possession of the prosecution, for preparing and carrying out the defence, the right to be present at a trial (where a prosecutor is present), the right to summon and question witnesses.[175]

[170] REPORT No. 7/06/2005/Almaty/3-5-KZ.
[171] REPORT No. 4/03/2005/Shymkent/22-23-KZ.
[172] REPORT No. 4/04/2006/Almaty1-7-KZ.
[173] Art.10 UDHR, Art.14(1), 14(3) (e) ICCPR.
[174] ECtHR judgment, *De Haes and Gijsels v. Belgium* (1997) 25 EHRR 1 para 53; O.I. Rabcevich, Right to a fair trial: international and national legal regulation, M.: Lex-Kniga, 2005, p.131.
[175] Fair Trial Manual. Amnesty International. M.: Human rights. 2003, p. 83.

National laws

According to national law, "criminal justice is carried out on the basis of the principles of adversarial procedure and equality of arms between prosecution and defence,"[176] "the court, remaining neutral and impartial, creates necessary conditions for the parties to carry out their procedural obligations and exercise the rights given to them".[177] "Parties involved in criminal proceedings are equal,"[178] which means that the Constitution and the Code endows them with equal opportunities to defend their positions.

The procedural equality means that whatever the prosecutor has authority to do in order to prove guilt, the defence has equal rights in order to refute the prosecutor's arguments.[179] The court shall base its procedural decision only on that evidence in the investigation of which both parties were provided equal opportunities to participate.

Elements examined by the trial monitors

In the course of monitoring the equality of arms was examined in relation to the following aspects: participation of the state prosecutor and defence counsel in the proceedings; position of the parties with regard to the judge; exercising of the parties' right to submit applications and granting by a judge applications submitted by the parties; observance of equal opportunities for the parties at the stage of judicial pleadings; predominance of the parties in the proceedings.

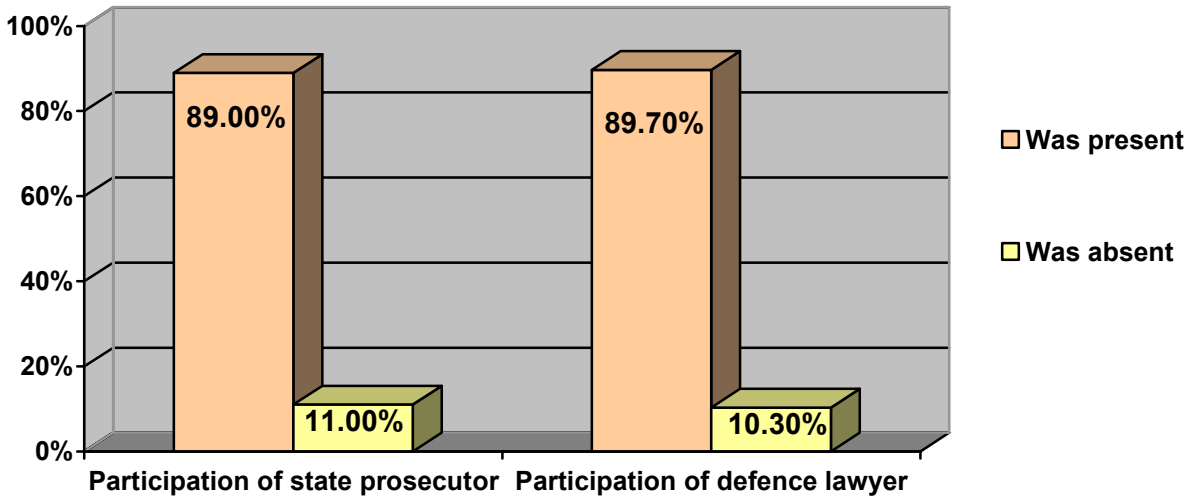
[176] Art.23 para 1 of the CPC.
[177] Art. 23 para. 6 of the CPC.
[178] Art. 23 para. 7 of the CPC.
[179] Criminal Procedure Code of the Republic of Kazakhstan. (General Part). Commentary. Almaty: Zheti Zhargy, 2002, p.65 (hereafter – Commentary).

Statistics and conclusions

Table 2.7.1 . Participation of state prosecutor and defence counsel in the process

Region	Participation of state prosecutor		Participation of defence counsel	
	Was present	Was absent	Was present	Was absent
	Number of court session			
Astana	32	-	32	-
Almaty	213	25	215	23
Pavlodar	84	5	83	6
Petropavlovsk	97	20	102	15
Taraz	55	11	58	8
Uralsk	61	5	57	9
Ust-Kamenogorsk	21	2	19	4
Shymkent	87	12	89	10
Total	**650**	**80**	**655**	**75**

Diagram 2.7.2. Participation of state prosecutor and defence counsel in the proceedings



The state prosecutor in criminal proceedings must be present at all stages of the main trial with the exception of cases of private prosecution.[180] During the reported period a prosecutor was absent from 80 sessions. Ten out of them (12.5%) were in cases of private prosecution. In the majority of cases a prosecutor did not come for the final address to the court by a defendant and for the pronouncement of the judgment (81%). At another five sessions (6.5%) state prosecutors were absent at the preparatory part, court investigation or pleadings by the parties.

Defence counsel was absent at a slightly smaller number of sessions – 75: 53 sessions were missed by defence counsel at stages of the final address to the court and pronouncement of the judgment; at ten sessions defence counsel was absent in violation of the requirements of Art. 71 of the CPC; in six cases defendants defended themselves, since

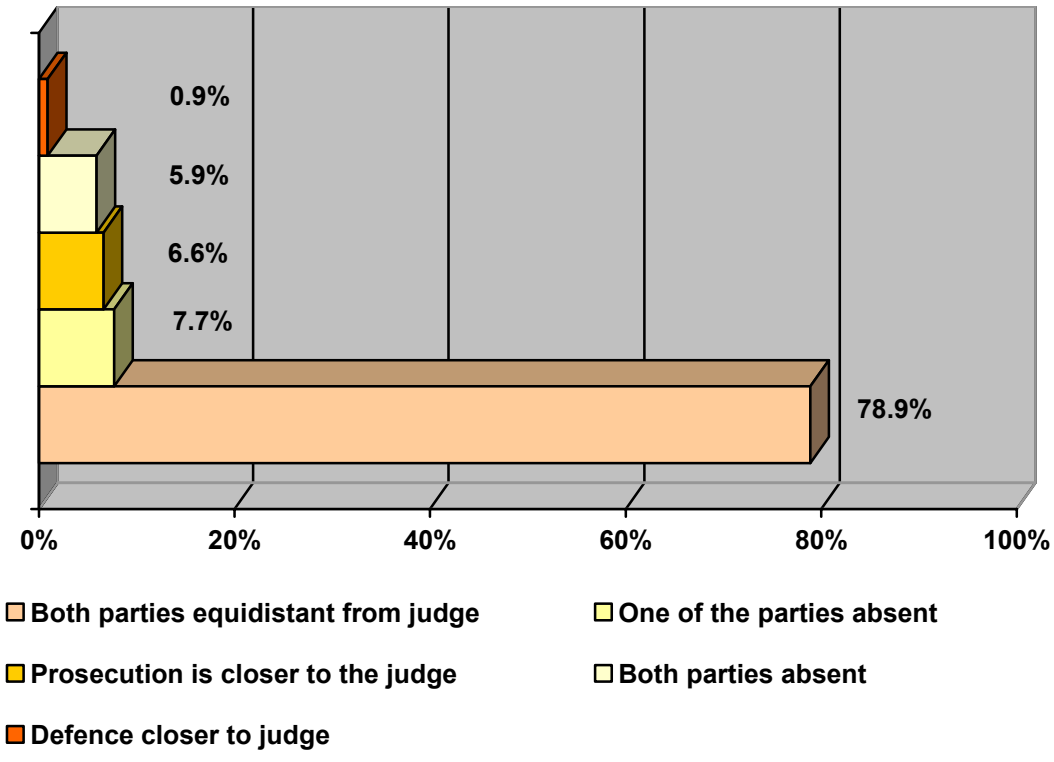
[180] Art. 317 para.1 of the CPC.

those were cases of private prosecution; in five cases defence counsel did not show up because they were busy at another session; in one case a defence counsel was absent from the preparatory part, and the judge passed a ruling about the appointment of another defence counsel to represent him.

Table 2.7.3. Position of the parties with regard to the judge

Region	Position of defence counsel and prosecutor with regard to the judge				
	At equal distance	Prosecution is closer	Defence is closer	One of the parties was absent	Both parties were absent
	Number of court sessions				
Astana	25	4	3	-	-
Alamty	190	23	2	14	9
Pavlodar	80	1	-	5	3
Petropavlovsk	81	15	-	7	14
Taraz	51	-	1	10	4
Uralsk	52	-	-	10	4
Ust-Kamenogorsk	13	5	1	2	2
Shymkent	84	-	-	8	7
Total	**576**	**48**	**7**	**56**	**43**

Diagram 2.7.4. Position of the parties with regard to the judge



Parties in a courtroom must be equidistant from the judge, visually demonstrating the equality of the parties in the court proceedings. In practice this tacit rule is observed in the majority of cases.

CASE 53

In the case of two defendants charged under Art. 172 part 2, para. "a" of the CC, heard in Ust-Kamenogorsk city court before presiding judge N.Y., during all six sessions that were observed, a state prosecutor was sitting much closer to the presiding judge than the defence.[181]

CASE 54

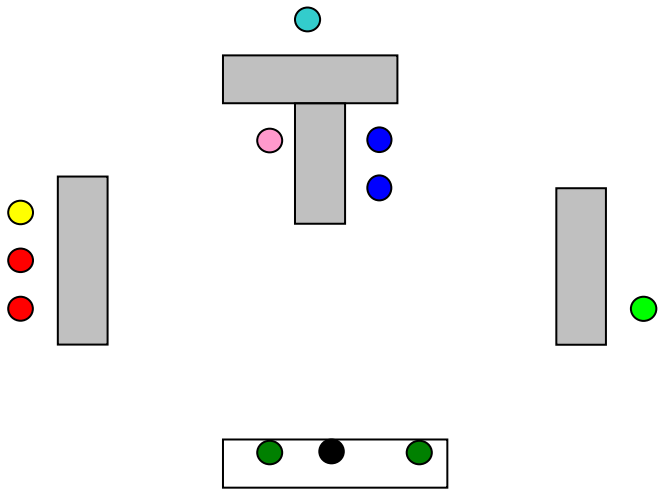
In the case of one defendant, charged under Art. 105 of the CC, heard on 11 May 2005 in Pavlodar city court No. 2 before presiding judge A.Y., the courtroom was not equipped with the necessary furniture. There was no table for the clerk to the court, and at that session a private prosecutor was sitting on the victim's seat, since the clerk to the court occupied the prosecutor's table. Consequently, the private prosecutor was sitting 1.5 metres from the judge, while the defence counsel sat at a 3-metre distance. Therefore, as a result of inadequate logistics of the courtroom the "equality of arms" was visually disturbed.[182]

CASE 55

In the case of one defendant charged under Art. 259 part 2 of the CC, heard on 16 March 2005 in District court No. 2 of Zhetysusky district of Almaty before presiding judge S.Y., the session was held in the judge's chamber. In spite of the fact that the room was equipped with the necessary furniture, its arrangement did not allow for the equal positioning of the parties in relation to the judge. When the defence counsel and the trial monitors entered the chamber, the judge was sitting at his table and two prosecutors were sitting next to him, and it looked as if they had been there for a long time. The parties were sitting at an unequal distance from the judge. The sketch below shows that the prosecutors were sitting next to the judge, while the defence counsel was at a greater distance.[183]

[181] REPORTS No. 1/04/2005/Ust-Kamenogorsk/20-KZ, No. 2/04/2005/Ust-Kamenogorsk/20-KZ, No. 3/04/2005/Ust-Kamenogorsk/20-KZ, No. 4/04/2005/Ust-Kamenogorsk/20-KZ, No. 5/04/2005/Ust-Kamenogorsk/20-KZ, No. 6/04/2005/Ust-Kamenogorsk/20-KZ.
[182] REPORT No. 2/05/2005/Pavlodar/24-KZ.
[183] REPORT No. 5/03/2005/Almaty/3-5-KZ.

Schematic diagram 2.7.5. Interior arrangement of the chamber of judge S. Kishkinov from District court No. 2 of the Zhetysusky district of Almaty



Legend:

- Judge
- Clerk to the court
- Prosecutors
- Defence counsel of the defendant
- Defendant
- Guards
- Witness
- OSCE trial monitors

Table 2.7.6. Exercising of the parties' right to enter motions[184]

Region	Submitting applications on a case by the parties		
	By defence	By prosecution	Applications submitted
	Number of court sessions		
Astana	8	1	23
Almaty	69	24	150
Pavlodar	24	17	59
Petropavlovsk	46	19	63
Taraz	15	6	48
Uralsk	18	5	46
Ust-Kamenogorsk	10	2	12
Shymkent	5	1	93
Total	**195**	**75**	**494**

[184] The number of sessions does not correspond to the general number of sessions because both applications by defence and applications by prosecution could be made at one and the same session.

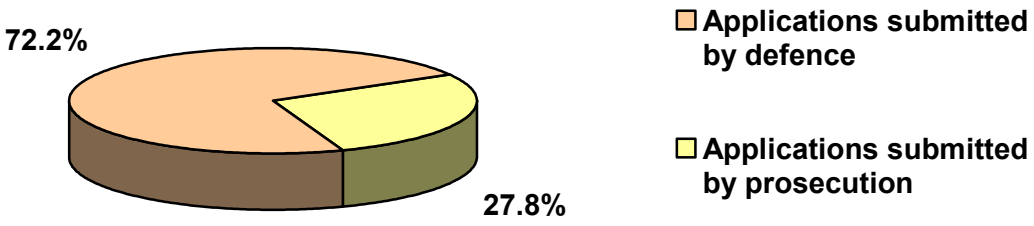
Table 2.7.7. Granting by a judge applications submitted by defence[185]

Region	Granting by a judge applications submitted by defence			Not considered
	Granted	Not granted		
		Justified	Not justified	
	Number of court sessions			
Astana	6	1	-	1
Almaty	49	15	5	9
Pavlodar	18	1	4	1
Petropavlovsk	38	7	1	8
Taraz	13	1	-	1
Uralsk	13	3	1	1
Ust-Kamenogorsk	7	1	2	1
Shymkent	2	2	-	1
Total	**146**	**31**	**13**	**23**

Table 2.7.8. Granting by a judge applications submitted by prosecution[186]

Region	Granting by a judge applications submitted by prosecution			Not considered
	Granted	Not granted		
		Justified	Not justified	
	Number of court sessions			
Astana	1	-	-	-
Almaty	17	2	-	5
Pavlodar	12	3	1	1
Petropavlovsk	16	2	-	2
Taraz	6	-	-	-
Uralsk	3	-	-	2
Ust-Kamenogorsk	2	-	-	-
Shymkent	-	1	-	-
Total	**57**	**8**	**1**	**10**

Diagram 2.7.9. Submission of applications on a case by the parties



[185] The number of sessions does not correspond to the general number of sessions when the defence made its motions, because at one and the same session several applications could have been submitted, some of which, for example, were granted, and others were rejected or their consideration was postponed until the next session.
[186] Same applies as with the granting of applications submitted by defence.

During the time of monitoring two and a half times more applications were submitted by the defence than by the prosecution, which shows the active position of defendants and their lawyers. The majority of applications were granted by the court.

The court decided to consider some of the applications later or to postpone issuing decisions on them until the next session. Thus, such decisions were made by judges in one in six sessions where applications were submitted by the defence, and in one in five sessions where applications were submitted by the prosecution.

At 31 sessions where applications were submitted by the defence, the court, having reasoned its decision, did not grant them. The number of sessions where the court rejected applications submitted by the prosecution and provided reasoning for that is considerably less and amounts to eight monitored sessions.

At 13 sessions the court rejected applications entered by the defence without providing any reasoning. Only one out of all applications submitted by the prosecution was rejected without reasoning provided.

CASE 56

In the case of two defendants charged under Art. 175 part 3, para. "b" of the CC, heard on 4 February 2005 in Almaty District court No. 2 before presiding judge S.X. the defence counsel entered a motion to record the interrogation of victims on audio-cassette. The judge asked for the opinion of the prosecutor and the victims. The prosecutor did not object. But the victims started to protest against it emotionally. The judge asked the victims why they were against it, to which the latter said that their testimony was in the case materials and they wanted the defence counsel to say why he wanted the interrogation recorded. The judge asked the defence counsel to justify his motion. The defence counsel explained that it was necessary to capture the testimony to avoid further contradictions since the clerk might not manage to keep up with the records.

The judge began explaining half-heartedly that it was permissible to make audio-recordings in court, and that sometimes when the mass media were present they not only made audio-recordings but also video-recordings of the proceedings. Moreover, the court may permit such actions where the court session is public, otherwise it may be accused of being prejudiced.

At first, the judge permitted audio recordings and asked the victims not to aggravate the situation and keep calm. However, later the judge rejected the motion by the defence counsel without providing the reasoning.[187]

CASE 57

In the case of one defendant charged under Art. 178 part 2, para "a" of the CC, heard on 17 May 2005 in Petropavlovsk city court before presiding judge A.Y., the defence counsel of the defendant made a motion for the case to be recommitted because the time of the burglary, according to the testimony of the victim, was "about 18.00" and the defendant at that time was at work. One of the witnesses said that the burglar had had a forelock on his head, but the defendant had always had his hair cut very short. One more witness said that the burglary was committed by a person of Asian ethnicity and the inquiry officer, who was questioned as a witness, said that she had taken a statement from the victim in which the latter described the burglar's appearance. However this explanation was missing from the case file.

[187] REPORT No. 10/02/2005/Almaty/2-4-KZ.

Proceeding from that the defence counsel drew the court's attention to the fact that there were grounds to institute criminal proceedings against other persons and asked for the measure of restraint for the defendant to be changed to a written pledge not to leave the place where the latter lived. The prosecutor objected to that. The judge attached the motion to the case, having issued no decision on it, in violation of the requirements of the law.[188]

CASE 58

In the case of two defendants, charged under Art. 103 part 3, Art. 175 part 2, paras "a", "b", "c", Art. 177 and Art. 179 of the CC, heard on 24 May 2005 in Pavlodar City court No. 2 before presiding judge K.Y., in one of the sessions one of the defendants kept claiming he had a motion to enter each time a witness had been interrogated. At one such moment the judge reprimanded the defendant in a raised voice, making clear that by his petitions he was creating inconvenience for the court, prolonging the course of the proceedings, and that applications could be submitted at the end of the proceedings and submitted in written form. The defendant explained that he could forget what he wanted to allege, since another witness would be questioned next. But the judge insisted on his words and ordered the defence counsel to give the defendant a pen to make notes.

Upon the interrogation of one witness, one of the defendants made a motion to check the books of customer registration in the temporary detention facility to confirm the fact of his unauthorized interrogation by the detective officers. The judge reiterated that those issues had already been examined by the Pavlodar prosecutor's office, which had issued its ruling that the facts mentioned had not been confirmed. The defendant kept insisting on the necessity to check the registers, referring to the fact that "the court is the highest level of justice", and asking the court to get to the bottom of things objectively.

The judge explained that everything the defendant was talking about was his personal stance. The prosecutor's office sent its reply, thus meaning that all avenues for checking those facts had been exhausted. The judge also added that those violations had taken place at the pre-trial stage of the proceedings and had nothing to do with the trial. Then he said: "What else do you want from me?" and rejected the defendant's motion.[189]

Later, at a different session, held in the case on 6 June 2006, the defendant made motions: 1) to draw the court's attention to the fact the judgment of conviction was put together in violation of the norms of the CPC; 2) to withdraw the testimony of two witnesses from the body of evidence since their testimonies were controversial; besides, one of these witnesses was illegally involved as an identifying witness because at the time he was under administrative arrest, that is, dependent on police officers; 3) to check the bank machine statement with indication of time of money withdrawal; 4) to demand and obtain from the detention facility a book of registering customers; 5) to interrogate in the presence of witnesses two police investigators who illegally interrogated him in the temporary detention facility in the absence of an investigator and a defence counsel. The court did not grant any of those applications and the rejection was not reasoned at all.[190]

CASE 59

In the case of one defendant, charged under Art. 259, parts 3 and 4 of the CC, heard on 27 April 2005 in Uralsk Court No. 2 before presiding judge I.Y., the defence counsel of the defendant in one of the sessions made a motion to call as witnesses the staff of the Uralsk City Board of Interior and to listen to the dictaphone recording of conversation between the defendant and another person. The court announced that it would issue a ruling on this

[188] REPORT No. 6/05/2005/Petropavlovsk/14-15-KZ.
[189] REPORT No. 7/05/2005/Pavlodar/12-KZ.
[190] REPORT No. 1/06/2005/Pavlodar/12-KZ.

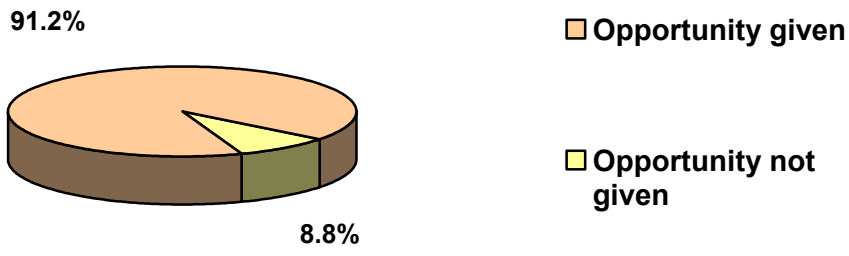
motion at the next session.[191] At the next session in the case, held on 29 April 2005, the defence counsel entered one more motion – to call one more witness. However, the court did not satisfy the applications submitted by the defence counsel and provided no explanation for that.[192]

Table 2.7.10. Observance of equal opportunities for the parties at the stage of judicial pleadings

Region	The first to speak in judicial pleadings		Restrictions on the parties to a session as to their opportunity to speak in judicial pleadings		Opportunity of the parties to a session to make remarks	
	State prosecutor/ representative of the victim	Defence counsel	Took place	Did not take place	Given	Not given
	Number of court sessions					
Astana	4	-	-	4	2	2
Almaty	58	-	-	58	51	7
Pavlodar	14	-	-	14	14	-
Petropavlovsk	16	-	-	16	16	-
Taraz	17	-	-	17	17	-
Uralsk	10	-	-	10	10	-
Ust-Kamenogorsk	6	-	-	6	5	1
Shymkent	12	-	-	12	10	2
Total	**137**	**0**	**0**	**137**	**125**	**12**

The order of priority when speaking in judicial pleadings was observed by the parties. The freedom of expression in judicial pleadings was not limited.

Diagram 2.7.11. Opportunity of the parties to a session to make remarks



Legislation guarantees the opportunity for the parties to make remarks in judicial pleadings.[193] However, in practice repeated occurrences of restricting this right took place.

[191] REPORT No. 4/04/2005/Uralsk/18-19-KZ.
[192] REPORT No. 5/04/2005/Uralsk/18-19-KZ.
[193] Art. 364 para. 7 of the CPC.

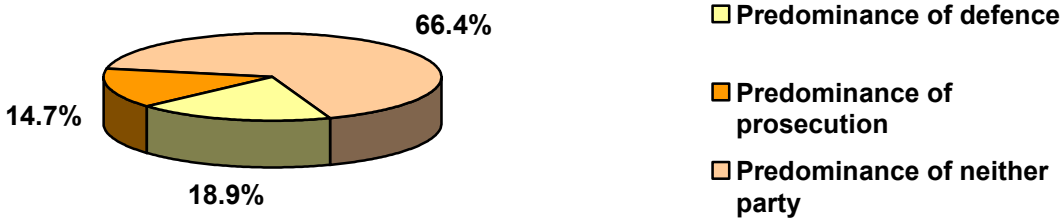
Table 2.7.12. Observance of equal opportunities for the parties at the stage of judicial pleadings when proposals on application of the criminal law and fixing punishment for the defendant are made

Region	Proposals in judicial pleadings on application of the criminal law and fixing punishment for the defendant			
	By state prosecutor		By defence counsel	
	Made	Not made	Made	Not made
	Number of court sessions			
Astana	4	-	2	2
Alamty	56	2	47	11
Pavlodar	13	1	13	1
Petropavlovsk	15	1	15	1
Taraz	17	-	14	3
Uralsk	7	3	2	8
Ust-Kamenogorsk	6	-	5	1
Shymkent	12	-	8	4
Total	**130**	**7**	**106**	**31**

Table 2.7.13. Predominance of the parties in the proceedings

Region	Predominance		
	Of the prosecution	Of the defence	Of neither party
	Number of court sessions		
Astana	2	12	18
Almaty	31	33	174
Pavlodar	13	13	63
Petropavlovsk	11	39	67
Taraz	4	11	51
Uralsk	23	2	41
Ust-Kamenogorsk	6	8	9
Shymkent	17	20	62
Total	**107**	**138**	**485**

Diagram 2.7.14. Predominance of the parties in the proceedings



The predominance of one of the parties in the proceedings was determined on the basis of the following criteria: activeness and preparedness to interrogate, the number and justification of applications submitted, promptness in responding to events happening in the courtroom, knowledge of the materials of the case, communicative skills, public-speaking skills, knowledge of legislation, persuasiveness, credibility of position represented.

As a rule the parties revealed their capabilities in equal degree, from which the trial monitors made the conclusion that neither of the parties was predominant. The assessed sessions also included those in which the parties were not in a position to take an active stance, for example, the final address to the court by a defendant or the pronouncement of the judgment.

2.8. The right to be defended by an experienced, competent and effective defence counsel

International standard

The right to defend oneself in person or to be represented by a defence counsel is secured in the ICCPR: "Everyone shall have the right … to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any case if he does not have sufficient means to pay for it."[194] Thus, an accused has the right to defence by a counsel and the right to choose him, or, in established cases, he also has the right to have a defence counsel assigned to him by the state.

International standards oblige the state to provide qualified, competent and efficient defence to the defendant.[195] The fact of mere nomination of a free defence counsel for a defendant is not sufficient. State authorities (judges and/or prosecutors)[196] must take appropriate measures if the defence counsel does not provide adequate defence.[197] Furthermore, if such behaviour of a defence counsel is noted by the court, the right to be defended by an experienced, competent and effective defence counsel in some cases may be considered violated.[198] Especially, this is relevant in relation to the appointed defence counsel. The ECtHR noted that "the right to legal assistance by an appointed defence counsel should be real and effective, and not theoretical and illusory. In particular, according to the ECtHR, this right implies "legal assistance", and not simply "appointed legal assistance". The mere appointment of the defence counsel does not guarantee the effective assistance, since the lawyer appointed to render legal assistance may die, get sick, be inaccessible for a lengthy period of time, or can wilfully avoid his duties. In such cases if state authorities are aware of such a conduct of the defence counsel, they are obliged to replace this defence counsel or should force him to fulfil his duties.[199]

Also, according to international standards, for the right to defence by a qualified, competent and efficient defence counsel to be exercised, the state must allow for adequate time and facilities to be available for confidential communication between the defence counsel and

[194] In Art. 14(3) d) of the ICCPR, Art. 6(3)(c) ECHR as well as para. 23.1. sub-para. (x) of the 1991 CSCE Moscow document.
[195] The 1990 CSCE Copenhagen document has a clause according to which an individual has the right "to seek and receive adequate legal assistance" (para. 11.1).
[196] Conor Foley, Combating Torture, A Manual for Judges and Prosecutors, Human Rights Centre, University of Essex, 2003.
[197] In the case *Kelly versus Jamaica* heard by the UN Human Rights Committee, the Committee stated that in connection with the fact that the defendant was not entitled to choose counsel provided to him free of charge, measures had to be taken to ensure that counsel, once assigned, would provide effective representation of the interests of the defendant, including consulting him on the case and informing him about the prospects of the appeal (*Kelly v. Jamaica*, CCPR/C/41/D/253/1987, 10 April 1991, para. 5.10).
[198] In the case *Kamasinski versus Austria*, heard by the European Court of Human Rights, the Court decided that the competent national authorities were required to respond and take the appropriate measures only in those cases where a failure by legal aid counsel to fulfil his obligations on providing effective and competent defence was clearly manifested. (*Kamasinski v. Austia*, Application No. 9783/82, 19 December 1989, para. 65).
[199] ECtHR judgment, *Artico v. Italy*, Application no. 6694/74, 13 May 1980, para 33.

the accused/defendant. Defence counsels should be able to counsel the accused and represent his interests in accordance with their established professional standards without any restrictions, pressures or interference from any quarter.[200] Thus, in particular, the ECtHR in one of its judgments ruled that "the defendant's right to consult with his/her defence counsel beyond hearing of the third party constitutes one of the fundamental requirements of a fair trial in a democratic society".[201]

National laws

The national legislation of Kazakhstan guarantees the right of a suspect/accused to use the services of a defence counsel. Article 72 of the CPC regulates the engagement, appointment, replacement of the defence counsel and payment for his work:

"The defence counsel shall be engaged by a suspect or accused, their legitimate representatives, as well as by other persons on behalf of or with the consent of the suspect/accused. The suspect/accused has the right to engage several defence counsels. At the request of a suspect/accused the participation of the defence counsel is provided by the body responsible for criminal proceedings.

In those cases when the participation of a chosen or nominated defence counsel is impossible within an extended (not less than five days) period of time, the body responsible for the criminal proceedings has the right to suggest that the suspect/accused engage another defence counsel or take measures for the defence counsel to be appointed through a professional organization of defence counsels or its structural affiliations. The body responsible for the criminal proceedings does not have the right to recommend a specific person to be engaged as a defence counsel.

"In case of detention or being taken into custody, when the appearance of a defence counsel chosen by a suspect or an accused is impossible within 24 hours, the body responsible for the criminal prosecution shall suggest that the suspect or the accused engage another defence counsel, and in case of a refusal shall take measures for a defence counsel to be appointed through a professional organization of defence counsels or its structural affiliations".[202]

Pursuant to the CPC everyone shall have the right to qualified legal assistance in the course of criminal proceedings.[203] It is obvious that qualified legal assistance in criminal cases can only be rendered by persons with the necessary professional skills and by members of defence-counsel organizations.

Elements examined by the trial monitors

In the course of monitoring the main indicators for assessing the compliance with the right to defence by a qualified, competent and efficient defence counsel were participation of a defence counsel; replacement of a defence counsel in the course of the trial; right to free legal aid; quality of rendered legal defence; proximity of the defence counsel to the defendant.

[200] Para. 9 of the General Recommendation No. 13, UN Human Rights Committee: "Equality before the court and the right to a fair and public hearing by an independent court established by law (Art. 14): 13/04/84".
[201] ECtHR judgment, *S. v. Switzerland, Application no. 12629/87; 13965/88,* 28 November 1991, para 48).
[202] Art. 72 of the CPC.
[203] Art. 28 of the CPC.

Statistics and conclusions

Table 2.8.1. Observance of the right to be represented by a defence counsel

Region	Participation of defence counsel		Replacement of defence counsel in the course of a trial		Observance of the right to free legal assistance[204]		
	Participated	Did not participate	Took place	Did not take place	Appointed defence counsel	Contracted defence counsel	Not established
	Number of court sessions						
Astana	32	-	-	32	8	16	8
Almaty	215	23	12	203	127	71	44
Pavlodar	83	6	3	80	59	23	7
Petropavlovsk	102	15	-	102	38	79	-
Taraz	58	8	2	56	38	6	22
Uralsk	57	9	1	56	19	45	2
Ust-Kamenogorsk	19	4	-	19	5	9	9
Shymkent	89	10	14	75	46	44	9
Total	**655**	**75**	**32**	**623**	**340**	**293**	**101**

Diagram 2.8.2. Participation of defence counsel

In 75 cases defence counsel was absent in the following circumstances: in 53 cases sessions were missed by defence counsels at stages of the final address to the court by a defendant and pronouncement of the judgment; in ten cases the absence of a defence counsel in violation of the requirements of Art. 71 of the CPC; in six cases defendants represented themselves in their defence because those were the cases of private prosecution; in five cases the defence counsels did not appear because they were engaged in another session; in one case a defence counsel was absent at the preparatory part, and the judge made a decision to appoint a new defence counsel for the defence. Sometimes, when a defendant submitted applications to refuse a defence counsel because the latter was not adequately qualified, the judge, not providing another defence counsel, continued to hear the case in his absence, which constituted the violation of the right to defence.

[204] At one and the same court session with several defendants there could be both appointed and contracted defence counsel.

The CPC[205] stipulates mandatory participation of a defence counsel in all cases when it is necessary. The number of sessions where legal assistance was rendered by defence counsels at the expense of the state budget exceeds by 47 sessions the number of sessions where there were defence counsels by consent.

CASE 60

In the case of one defendant charged under Art. 96 part 1 of the CC held on 7 February 2005 in Uralsk city court before presiding judge G.X., a defence counsel was nominated following the procedure stipulated by Art. 71 of the CPC. In the course of the court session there was a conflict between the defence counsel and the defendant. The defendant challenged the defence counsel, having written an application letter dictated to him by the clerk to the court. This challenge was resolved by the judge. The defence counsel left the courtroom when the resolution of the challenge was announced.[206] Subsequently, another defence counsel was not nominated for the defendant although, according to the requirement of Art. 71 of the CPC, the participation of a defence counsel was mandatory. At all other sessions the defendant represented himself in his defence.[207]

CASE 61

In the case of defendant Y., charged on Art. 259 part 1 of the CC, heard on 7 April 2006 in District court No. 2 of Bostandyksky district of Almaty before presiding judge I.Y., the judge at the beginning of the session informed everybody present that the defence counsel representing the defendant was delayed at another session and would come later. Having announced that, the judge asked the defendant if he did not object to starting the hearing without the defence counsel. The defendant answered: "The defence counsel is useless. He has not said anything in the course of the trial. He even does not greet me. I do not mind if we start without him". The judge was satisfied with the answer in spite of the fact that the session was in the stage of court investigation where witnesses were interrogated and the defendant was not in a position to represent himself in his defence appropriately. The defence counsel did not appear at all.[208]

Table 2.8.3. The right to qualified, competent and efficient defence

Region	Right to qualified, competent and efficient defence		
	Provided for	Not provided for	Insufficient information
	Number of court sessions		
Astana	17	1	14
Almaty	145	39	31
Pavlodar	50	14	19
Petropavlovsk	77	9	16
Taraz	34	13	11
Uralsk	40	12	5
Ust-Kamenogorsk	11	4	4
Shymkent	54	27	8
Total	**428**	**119**	**108**

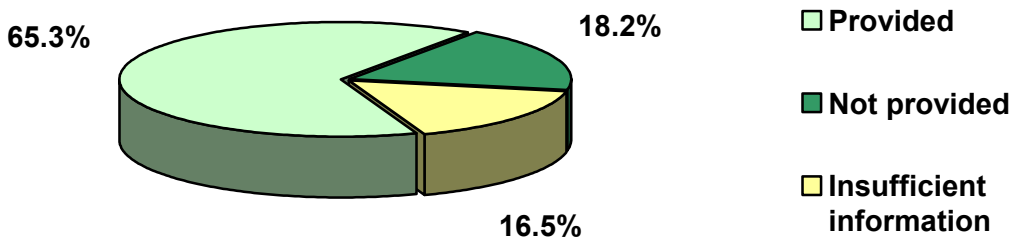
The trial monitors were asked to evaluate the work of defence counsel according to the following criteria: availability of clear-cut position on the case demonstrated during the court

[205] Art. 71 CPC.
[206] REPORT No. 2/02/2005/Uralsk/18-19-KZ.
[207] REPORTS No. 1/02/2005/Uralsk/18-19-KZ, No. 3/02/2005/Uralsk/18-19-KZ, No. 4/02/2005/Uralsk/18-19-KZ.
[208] REPORT No. 8/04/2006/Almaty/5–KZ.

hearings and the efficiency of the line chosen, knowledge of the materials of the case and legislation as demonstrated in the courtroom, and ability to defend one's own point of view on the case in the proceedings. In the majority of cases the trial monitors noted that the defence was qualified, competent and efficient.

In 119 cases the trial monitors decided that the defence was not sufficiently qualified, competent and efficient. In 96 of those cases, when the defence, in the trial monitors' opinion, was not competent and efficient, the defence counsels were nominated; in 12 cases they were appointed by consent and in the remaining 11 cases the basis for the participation of the defence counsel was not established.

Diagram 2.8.4. Distribution of provision of the right to qualified, competent and efficient defence



In 16.5% cases the trial monitors did not evaluate the quality of a defence counsel's work because of insufficient data to formulate credible conclusions (for example, monitoring at the stage of pronouncing the judgment).

CASE 62

In the case of one defendant charged under Art. 175 part 3 of the CC, heard on 23 February 2005 in Ust-Kamenogorsk Court No. 2 before presiding judge S.Y., when the judge was reading the defendant his rights, the latter said that he did not need representation by a defence counsel. The defence counsel K. wanted to leave, but the judge said that since the crime was serious the participation of the defence counsel was mandatory. Throughout the proceedings the defence counsel spoke as a prosecutor fully supporting the prosecution and made remarks, which showed her negative attitude towards the defendant.[209]

CASE 63

In the case of one defendant charged under Art. 103 part 2, para. "c" of the CC, heard on 22 June 2005 in the Sary-Arka district court of Astana before presiding judge N.Y., in the course of the session monitored by the trial monitor, the defence counsel was absolutely passive and did not ask a single question. The trial monitor came to the conclusion that the defence counsel came to the proceedings just to go through the motions. By so doing the defence counsel did not undertake any attempts to communicate with the defendant although the latter was sitting next to him. There were no documents on the defence counsel's table except for a newspaper and the CPC.[210]

CASE 64

The case of one defendant, charged under Art. 96 part 1 of the CC, was heard on 16 February 2005 in District court No. 2 of Bostandyksky district of Almaty before presiding judge I.Y. According to the trial monitors, the right to qualified, competent and efficient defence was not provided in this case, since the defence counsel K. had a poor command of the Russian language in which the proceedings were being conducted. When he delivered

[209] REPORT No. 3/02/2005/Ust-Kamenogorsk/20-KZ.
[210] REPORT No. 1/06/2005/Astana/8-KZ.

his speech he constantly confused pronouns and did not speak coherently. The impression was that it was difficult for him to speak Russian. When the trial monitors interviewed the defence counsel he did not always understand what it was they were asking about.[211]

The case of one defendant charged under Art. 251 part 1 of the CC, was heard on 23 February 2005 and tried in the same court with the same judge and defence counsel. The trial monitors noted that the right to qualified, competent and efficient defence was not provided either. The defence counsel, it was apparent, had very little interest in the case. When the trial monitors interviewed him he confessed that he had been asked to participate in the session thirty minutes prior to its beginning. The circumstances of the case were not known to him, but he was going to learn about them from the indictment. The defendant saw his defence counsel for the first time only at the session and did not even understand who he was. The defence counsel was not given time to familiarize himself with the materials of the case. Throughout the whole session he remained silent and in pleadings he only uttered two sentences. As at the previous session, he spoke incoherently and with gross grammatical mistakes.[212]

CASE 65

In the case of two defendants, charged under Art. 178 parts 1-2 of the CC, heard on 4 October 2005 in Pavlodar City court No. 1 before presiding judge A.Y., the trial monitor noted unsatisfactory work on the part of the defence counsel S. representing one of the defendants. At the session that was held on 11 October 2005 the defence counsel only introduced herself to the defendant and said that on that day she would represent his defence. However, the defence counsel did not have the necessary information on the case and asked no questions.[213] At subsequent sessions the defence counsel continued to adhere to the same line of behaviour. From the moment of appointment to the moment when the judgment was pronounced, throughout three sessions she did not take part in interrogations, did not communicate with the defendant, and did not have copies of the case materials and abstracts from them.[214]

CASE 66

In the case of one defendant charged under Art. 259 part 4 and Art. 358 part 1 of the CC, heard in Almalinsky district court of Almaty before presiding judge Z.X., the defendant during the interrogation asserted that there was another person involved in the case, “Sergei”. After the judge had made an attempt to find out from the defendant to what extent his testimony was trustworthy, the defence counsel said the following: “I have been working as a defence counsel for more than 15 years. Ask anybody. I am a meticulous defence counsel, and if you at the preliminary investigation had said that there had been a certain Sergei, I would have succeeded in having him found. It was me who entered a motion to re-categorise your charge, not you”. By so doing, the defence counsel tried to expose the alleged lie by the defendant. The defendant thanked his defence counsel for entering a motion. It was clear that there was no trust in the relations between the defendant and the defence counsel who was representing him. The behaviour of the defence counsel was strange. The judge even had to explain to the defence counsel that representing her client’s defence she should adhere to his position.[215]

In connection with the impossibility in the process of monitoring to establish the conditions of access of the defence counsel to their clients before trial, the attention of the trial monitors was drawn exclusively to the outward manifestation of the right to confidential

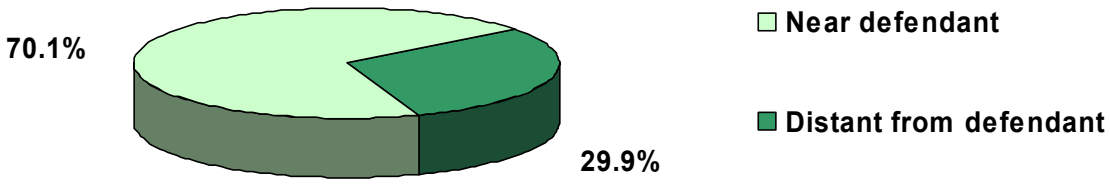
[211] REPORT No. 5/02/2005/Almaty/3-5-KZ.
[212] REPORT No. 1/02/2005/Almaty/3-5-KZ.
[213] REPORT No. 2/10/2005/Pavlodar/12-KZ.
[214] REPORTS No. 4/10/2005/Pavlodar/12-KZ, No. 8/10/2005/Pavlodar/12-KZ.
[215] REPORT No. 1/12/2005/Almaty/1-7-KZ.

communication with the defence counsel, and, in particular, to the distance between the defence counsel and the defendant in the courtroom.

Table 2.8.5. Proximity of the defence counsel's table to the defendant

Region	Proximity of the defence counsel's table to the defendant	
	Immediate proximity	At a distance from the defendant
	Number of court sessions	
Astana	29	3
Almaty	149	66
Pavlodar	39	44
Petropavlovsk	43	59
Taraz	54	4
Uralsk	57	-
Ust-Kamenogorsk	9	10
Shymkent	79	10
Total	**459**	**196**

Diagram 2.8.6. Proximity of the defence counsel's table to the defendant



During monitoring it became clear that in more than a quarter of all cases at court sessions defence counsel were sitting at a distance not allowing them free communication with their clients, which significantly restricted the right to defence.

CASE 67

In the case of one defendant charged under Art. 141 part 2 of the CC, heard in Pavlodar City court No. 1 before presiding judge A.Y., at all sessions the defendant was sitting at a remote distant from his lawyer, as a result of which they could not communicate throughout the proceedings. At all sessions the defence counsel was sitting near the opposite wall of the courtroom.[216]

CASE 68

In courtroom No. 5 of Almatinsky city court the defence counsel's table is situated at the opposite side of the premises, approximately 3 or 4 metres from the dock. The defence counsels communicated with their clients before the beginning of court sessions. In the

[216]REPORTS No. 8/05/2005/Pavlodar/12–KZ, No. 5/05/2005/Pavlodar/12–KZ, No. 4/05/2005/Pavlodar/12–KZ, No. №2/04/2005/Pavlodar/12–KZ, No. 4/03/2005/Pavlodar/12–KZ, No. 5/03/2005/Pavlodar/12–KZ, No. 6/03/2005/Pavlodar/12–KZ.

course of the sessions they did not have an opportunity to speak to the defendants.[217]

CASE 69

In the case of several defendants, charged under Art. 175 part 2 of the CC, heard on 24 January 2006 in Petropavlovsk city court before presiding judge V.Y., three defendants were sitting far from their defence counsels and did not have the opportunity to communicate with them. Furthermore, the defence counsels did not have any contact with the defendants before the session or after it. The trial monitors also noted that the defendants, except for entering one motion, did not utter one word throughout the whole proceedings. None of the defence counsel asked a single question even during the interrogation of the defendants.[218]

2.9. The right to an interpreter and to translation

International standard

In the determination of any criminal charge a defendant is entitled to a competent free-of-charge interpreter/translator from the language of the proceedings to his language and vice versa if he does not understand and speak the language of the court. This standard of fair trial is provided for in a number of international documents, including the ICCPR.[219]

In practice this international standard is considered satisfied if the state provides professional simultaneous interpretation at a court session as well as the services of a professional translator to produce a written translation of the key procedural documents necessary for the defendant as an adequate facility to prepare for the defence.[220]

National laws

In the norms of the current national legislation this standard is satisfied to a sufficient degree:

"3. Persons involved in a case and not having a command or having an insufficient command of the language of the legal proceedings in the case, shall have explained and ensured the right to file applications, give explanations and testimony, enter motions, deliver complaints, read the materials of the case and to speak in the court in their mother tongue or another language which they know; to have free access to the services of an interpreter/translator according to the procedure established by this Code.

"4. Persons involved in criminal proceedings shall be provided with free translation into the language of the court of the materials of the case necessary to them for the reasons of law and worded in a different language. Persons involved in criminal proceedings shall be provided with free interpretation into the language of the court of that portion of oral court proceedings which is produced in another language.

"5. Bodies responsible for criminal proceedings shall give the persons, involved in the proceedings, documents, which they are entitled to, according to this Code, in the language of the court. Persons who do not know the language of the court, shall be given a certified copy of the document presented in the court language of their choosing".[221]

[217] REPORTS No. 2/04/2006/Almaty/1-7-KZ, No. 4/04/2006/Almaty/1-7-KZ, No. 5/04/2006/Almaty/1-7-KZ, No. 4/10/2005/Almaty/1-5-KZ.
[218] REPORT No. 2/01/2006/Petropavlovsk/14-15-KZ.
[219] Art. 14(3) f) of the ICCPR.
[220] ECtHR judgment, *Harward v. Norway*, CCPR/C/51/D/451/1991, 15 July 1994, para. 9.4.
[221] Art. 30 of the CPC.

The suspects (accused) are entitled to "give testimony and explanations in their mother tongue or in the language he can speak and understand".[222]

"If the judicial judgment has been pronounced in the language which the convicted (acquitted) does not speak and understand, the pronouncement of the judgment shall be simultaneously or consecutively interpreted by the interpreter into the mother tongue of the defendant or another language which he speaks and understands".[223]

The judgment shall be subject to repeal in any case where "5) the right of a defendant to use his mother tongue or the language he speaks and understands, or the services of an interpreter is violated in the court".[224]

According to national legislation, if an interpreter is allowed to participate in the proceedings, the judge must perform a number of procedural actions relating to his participation, namely: to explain his rights, to warn about criminal responsibility for improper translation and to explain to the parties their right to raise an objection to an interpreter.

Elements examined by the trial monitors

Regarding the methodology used in monitoring, the trial monitors evaluated the quality of interpretation based on their knowledge of the language of the court, visual and audio perception of the skills of an interpreter and the reaction of the parties to the proceedings to the interpretation. In those cases where the trial monitors did not know the language into which the interpretation was performed, or where the environment was not conducive to hearing what was being said (when the words were inaudible, or the interpreter's speech was incomprehensible), they did not evaluate the quality of interpretation. The following aspects were, however, monitored: participation of an interpreter when necessary; reading of the rights to an interpreter and warning the interpreter about criminal responsibility for wilfully providing false interpretation; explaining to the parties their right to reject the interpreter.

[222] Art. 68 para. 7, 69, sub-para. 2 of the CPC.
[223] Art. 384 para. 2 of the CPC.
[224] Art. 415 para.3 sub-para.5) of the CPC.

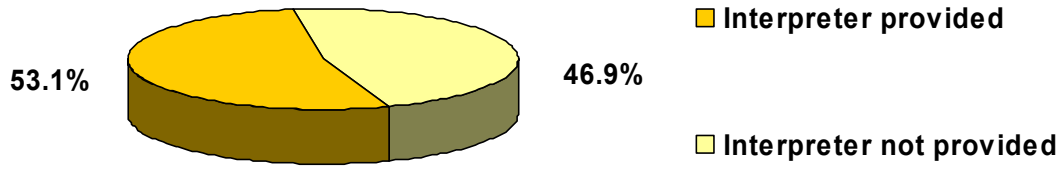
Statistics and conclusions

Table 2.9.1. Compliance with the right to an interpreter and to translation[225]

Region	Participation of an interpreter			Obligations of a judge						Quality interpretation		
				Reading of the rights to an interpreter		Warning the interpreter about criminal responsibility for wilfully making false interpretation		Explaining to the parties their right to reject the interpreter				
	Was provided	Was not provided	Not needed	Rights were read	Rights were not read	Interpreter was warned	Interpreter was not warned	The right was read	The right was not read	provided	Not provided	Trial monitors had difficulty in evaluating
	Number of court sessions											
Astana	-	-	32	-	-	-	-	-	-	-	-	-
Almaty	7	1	230	1	6	3	4	1	6	1	3	3
Pavlodar	1	-	88	1	-	1	-	1	-	1	-	-
Petropavlovsk	-	7	110	-	-	-	-	-	-	-	-	-
Taraz	3	2	61	3	-	3	-	3	-	2	1	-
Uralsk	4	-	62	2	2	3	1	2	2	1	3	-
Ust-Kamenogorsk	1	-	22	-	1	-	1	-	1	-	1	-
Shymkent	1	5	93	-	1	-	1	-	1	-	1	-
Total	**17**	**15**	**698**	**7**	**10**	**10**	**7**	**7**	**10**	**5**	**9**	**3**

[225] For the total number of cases monitored during the project, see Chapter One. General Statistics of the Project.

Diagram 2.9.2. Providing an interpreter when it was necessary



According to the trial monitors, in almost half of the cases when an interpreter was needed, this right was not upheld. The trial monitors collected this information by way of direct monitoring during court sessions or by way of questioning the parties to the proceedings.

CASE 70

In the case of four defendants, charged under Art. 175 part 2 of the CC, heard on 21 April 2005 in Shymkent court No. 2 before presiding judge A.Y., the proceedings were conducted in the Kazakh language, although three defendants were of Uzbek ethnicity and one was Tatar. The victims also did not know Kazakh. One of the victims said that he needed an interpreter. The clerk went out of the courtroom to look for an interpreter. In 15 minutes she brought a trainee, whom it took a lot of time to persuade to interpret.[226] At the next session of this case, held on 25 April 2005 there was still no interpreter.[227]

CASE 71

In the case of three defendants, charged under Art. 179 part 2, para. “a”, “b”, “c”, “d”, heard on 17 March 2005 in Shymkent city court before presiding judge T.Y., the proceedings were conducted in Kazakh. An interpreter was needed only for the victim but the judge himself interpreted for her.[228] A similar situation occurred in the case of two defendants, charged under Art. 179 part 2 of the CC, heard on 10 March 2005 in Shymkent city court before presiding judge S.X. The proceedings were conducted in Kazakh, although the victim did not understand the language of the court. The judge carried out the interpreting, and sometimes, at his request, it was performed by the defence counsel.[229]

CASE 72

In the case of one defendant charged under Art. 178 part 3, para. “c” of the CC, heard on 19 October 2005 in Petropavlovsk city court before presiding judge K.Y., the victim, who was Afghan by nationality, had a poor command of Russian. However, the judge, in order not to postpone the case one more time, continued the hearing without providing an interpreter for the victim.[230]

CASE 73

In the case of one defendant charged under Art. 96 part 1 of the CC, heard on 2 June 2005 in Shymkent court No. 2 before presiding judge G.Y., the proceedings were conducted in Kazakh, although the relatives of the defendant said that he had been educated at a Russian language school and did not understand everything. In addition, the defence counsel did not speak Kazakh well. However, the judge ignored those applications and said that since the case was initiated in Kazakh it would be heard in Kazakh.[231]

[226] REPORT No. 7/04/2005/Shymkent/22-23-KZ.
[227] REPORT No. 9/04/2005/Shymkent/22-23-KZ.
[228] REPORT No. 6/03/2005/Shymkent/22-23-KZ.
[229] REPORT No. 2/03/2005/Shymkent/22-23-KZ.
[230] REPORT No. 6/10/2005/ Petropavlovsk/14-15-KZ.
[231] REPORT No. 1/06/2005/Shymkent/22-23-KZ.

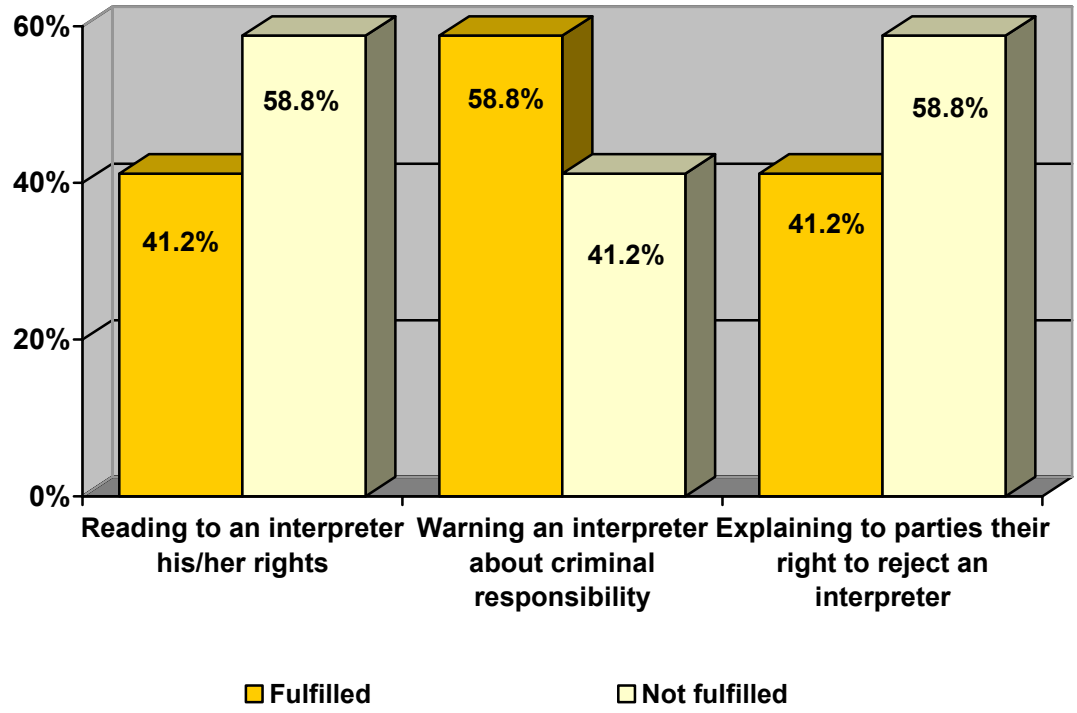
CASE 74

In the case of six defendants, charged under Art. 175, Art. 178 and Art. 181 of the CC, heard on 20 March 2005 in Taraz city court before presiding judge M.Y., an interpreter was not provided for one of the defendants who did not understand the language of the court since the proceedings were conducted in Kazakh.[232]

CASE 75

In the case of one defendant, charged under Art. 251 part 4 of the CC, heard on 23 February 2005 in District court No. 2 of Bostandyksky district of Almaty before presiding judge I.Y., the defendant said that he did not understand everything since he did not know the language of the court. The proceedings were conducted in Russian. The judge ignored this motion and continued to explain his rights in Russian. At the same time the defence counsel selectively explained the rights, read by the judge, to the defendant in Kazakh, shouting across the courtroom since they were sitting quite far from each other.[233]

Diagram 2.9.3. Fulfilling by judges of their obligations related to participation of an interpreter in a court session



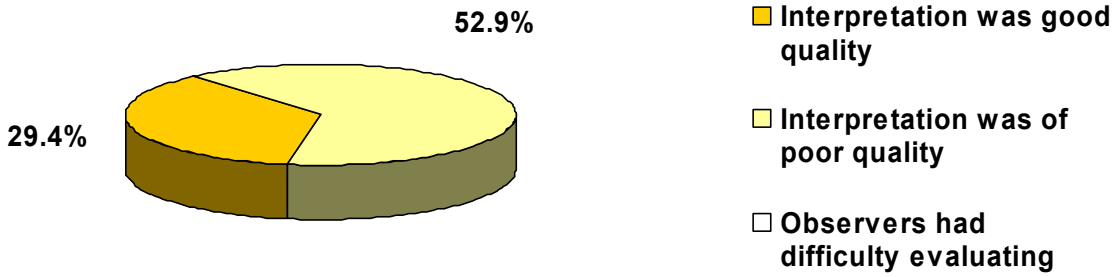
In the process of monitoring, the rights to an interpreter were not read in ten cases, an interpreter was not warned about criminal responsibility at seven court sessions, while the right to reject an interpreter was not explained to the parties in ten cases, that is, at more than half of sessions.

CASE 76

In the case of one defendant, charged under Art. 175 part 3 of the CC, heard on 23 February 2005 in Court No. 2 of Ust-Kamenogorsk before presiding judge Y.Y., an interpreter was involved in the proceedings because witnesses did not speak Russian, the language in which the proceedings were being conducted. The interpreter was not read his rights stipulated by the current criminal procedure legislation. The interpreter was not warned about criminal responsibility for wilfully making false interpretation. The parties were also not read their right to reject the interpreter involved in the proceedings.[234]

[232] REPORT No. 1/03/2005/Taraz/16-17-KZ.
[233] REPORT NO. 1/02/2005/ALMATY/3-5-KZ.
[234] REPORT No. 3/02/2005/Ust-Kamenogorsk/KZ.

Diagram 2.9.4. Implementation of quality interpretation



CASE 77

In the case of two defendants, charged under Art. 175 part 3, para. "b" of the CC, heard on 4 February 2005 in District court No. 2 of Almalinsky district of Almaty before presiding judge S.X., an interpreter was involved in the proceedings. The judge asked the interpreter to interpret personal details of the defendants for the victims. The interpreter had interpreted the personal details of the defendants only in part having said that he could not remember everything. Then the judge announced the composition of the court. All names were clearly voiced. The judge asked the interpreter to interpret but he could not manage that either. In the long run the judge herself began actively interpreting what was being said to the victims. The trial monitors noted that the interpreter's work was inadequate and he interpreted at a minimum, therefore the quality of interpreting was poor.[235]

CASE 78

In the case of one defendant, charged under Art. 175 part 3 of the CC, heard on 23 February 2005 in Court No. 2 of Ust-Kamenogorsk before presiding judge Y.Y., an interpreter was involved in the proceedings because witnesses did not speak Russian, the language in which the proceedings were being conducted. The trial monitors evaluated the quality of interpretation as sub-standard because the interpreter did not interpret some phrases at all.[236]

CASE 79

The case of one defendant, charged under Art. 259 parts 1 and 3 of the CC, was heard on 24 January 2006 in Taraz city court before presiding judge K.Y. The interpreter who was involved in the proceedings interpreted at the stage of the court investigation and parties' pleadings. The trial monitors noted low quality of interpretation, because the interpreter himself did not have a good grasp of Russian, the language in which the proceedings were conducted.[237]

CASE 80

In the case of two defendants, charged under Art. 179 part 2, paras. "a", "d" of the CC, heard on 22 April 2005 in District court No. 2 of Auezovsky district of Almaty before presiding judge R.Y. an interpreter was involved in the proceedings. He did not fully interpret what was said but only gave the gist of it, and the judge continually had to correct him.[238]

[235] REPORT No. 10/02/2005/Almaty/2-4-KZ.
[236] REPORT No. 3/02/2005/Ust-Kamenogorsk/KZ.
[237] REPORT No. 4/01/2006/Taraz/16-17-KZ.
[238] REPORT No. 6/04/2005/Almaty/2-4-KZ.

2.10. The right to a reasoned judgment and the right to a public judgment

International law

According to international law, court judgments should be reasoned,[239] that is, the persons concerned should see the connection between the circumstances of a specific case and the applied provisions of the criminal legislation. Although the ECHR does not explicitly refer to the reasoned judgment, decisions of the ECtHR explain that this right stems from the content of the ECHR fair trial provisions. Thus, in particular, the ECtHR ruled that courts in the member States of the Council of Europe are obliged to provide for clear explanation of the basis for their judgments. This is needed so that the defendant could appeal the judgment in those instances where it is prescribed by law.[240]

The principle of transparency of judicial proceedings also includes the right to a public pronouncement of judgment.[241] International documents, together with the openness of the whole criminal proceedings separately provide for the right to a public pronouncement of judgment with few exceptions to this right, "where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children".[242]

National laws

Contrary to international standards, the CPC does not have exceptions to the above-mentioned rule: "all court judgments and decisions, issued in a case, shall always be pronounced publicly".[243] The right to a public pronouncement of judgment includes the right to know the reasons for the judgment issued. The CPC stipulates that: "The court judgment shall be legitimate and reasoned. The judgment shall be considered legitimate if it has been issued in compliance with all the requirements of the law and on the basis of the law. The judgment shall be considered reasoned if it has been issued on the basis of comprehensive and neutral investigation in a court session of the evidence submitted to the court."[244]

Furthermore, this principle naturally implies the right to familiarization with the record of judicial proceedings also provided for by the norms of Kazakh legislation.[245] Kazakh legislation also provides for the obligation of a judge to explain to the parties their right to appeal the judgment.[246]

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[239] Para. 5.18 of the 1990 CSCE Copenhagen document. Further, in the case of *Becciev versus Moldova*, heard by the European Court of Human Rights, the Court found that the national court had based its decision on detention as a measure of restraint having referred to the law in abstracto, at the same time failing to give reasons as to how that legal norm applied to the factual evidence of that particular case (*Becciev v. Moldova*, Application No. 9190/03, 4 October 2005, para. 59-64).

[240] ECtHR judgment, *Hadjianastassiou v. Greece*, App. No. 12945/87, 16 December 1992, para.33.

[241] See also the Chapter 2.2. of Part II.

[242] Art.14(1) of the ICCPR.

[243] Art. 29 of the CPC.

[244] Art. 369 of the CPC.

[245] Art. 384 part 3 of the CPC.

[246] Art. 384 part 3 of the CPC.

Elements examined by the trial monitors

In order to effectively exercise the right to public judgment and the right to a reasoned judgment it is important to meticulously follow the requirement of the law according to which a record of the judicial proceedings should be kept uninterruptedly. It is possible to make this task significantly easier if audio or video recordings are made throughout the proceedings. Also, in order for the parties to be able to take advantage of their right to inspect with the record of the judicial proceedings, the judge must inform them of this right.

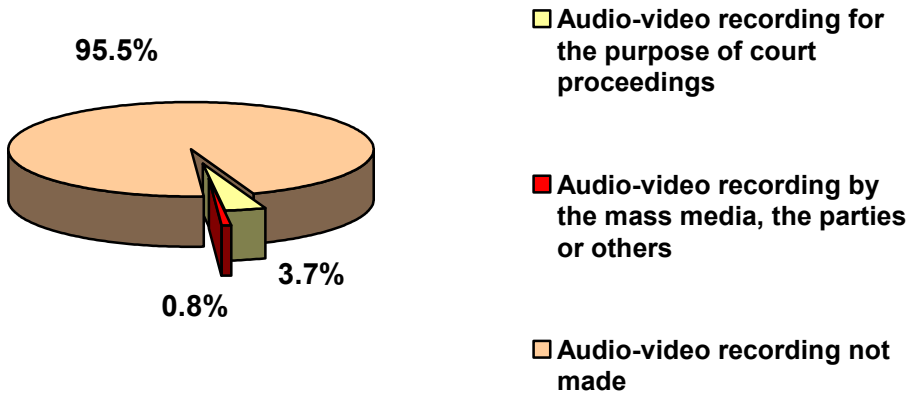
Statistics and conclusions

Table 2.10.1. Keeping the record of the judicial proceedings and compliance with the right to familiarization with the record of the judicial proceedings

Region	Keeping the record of judicial proceedings				Audio or video recording of the course of the court session			Explaining by a judge the right to familiarization with the record of the judicial proceedings			
	Kept uninterruptedly by the clerk	Clerk was distracted	Was not kept	Stage did not match	Was made for the purpose of the proceedings	Was made by representatives of the mass media, the parties or other persons	Was not made	Was explained	Was not explained	Stage did not match	Not established
	Number of court sessions										
Astana	27	2	-	3	-	-	32	2	1	29	-
Almaty	187	13	14	24	22	4	212	8	31	199	-
Pavlodar	73	3	1	12	-	-	89	6	12	71	-
Petropavlovsk	85	19	1	12	-	-	117	11	2	104	-
Taraz	42	5	2	17	-	1	65	8	5	48	5
Uralsk	58	-	1	7	-	1	65	3	5	58	-
Ust-Kamenogorsk	21	-	-	2	-	-	23	-	6	17	-
Shymkent	88	-	-	11	5	-	94	5	18	76	-
Total	**581**	**42**	**19**	**88**	**27**	**6**	**697**	**43**	**80**	**602**	**5**

Keeping the record of the judicial proceedings in compliance with national legislation should be executed at all stages of the main trial, except the pronouncement of the judgment. However, in 19 cases violations of this rule were noted. At 42 sessions the trial monitors noted that clerks to the court did not keep the records in full, stepped out of the courtroom or were distracted from their duty being engaged in other business.

Diagram 2.10.2. Audio and video recording of the course of a court session



In spite of the fact that many courtrooms are equipped with adequate technical means, audio and video recordings of court sessions, as a rule, are not made, and consequently, the parties to the proceedings do not have an opportunity to compare the contents of the records of the judicial proceedings with the information recorded by special equipment.

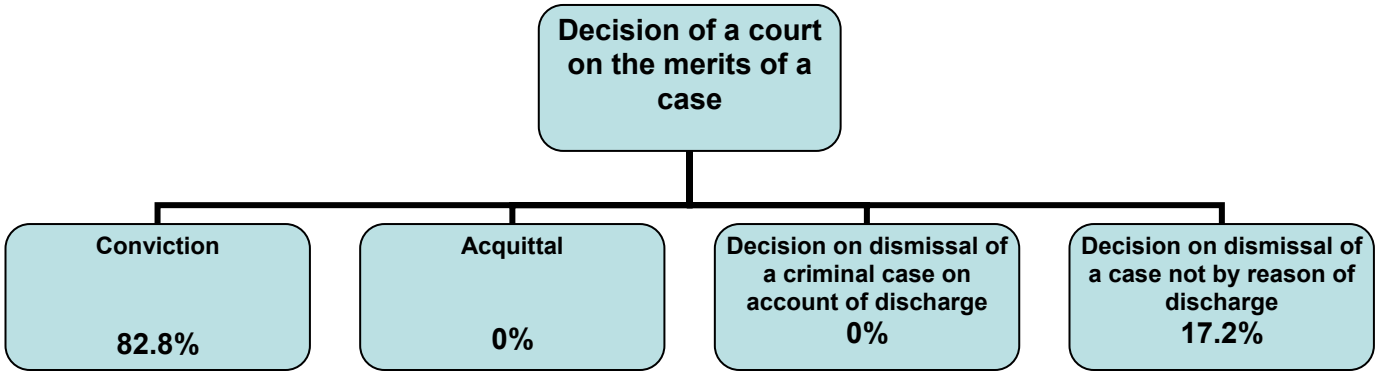
Audio-video recordings for the purposes of fair trial were made at 27 sessions, 21 of which were in Almatinsky city court, five in Enbekshinsky district court of Shymkent and one (Medeusky district court, Almaty) held away from the court premises. At six sessions audio-video recording was carried out either by representatives of the mass media or by representatives of the parties. In particular, at three sessions in Almaty, the course of the proceedings was audio- and video-recorded by TV journalists, and one particular session was recorded at the request of the prosecutor's office who wanted to use the recording in the future for educational purposes.[247] In Taraz city court the audio-video recording was carried out by the defence party, who used a dictaphone and video camera.[248] In Uralsk court No. 2 video recording was conducted by the prosecutor's trainee.[249]

[247] REPORT No. 8/05/2005/Almaty/1-7-KZ, REPORT No. 1/02/2006/Almaty/1-7-KZ, REPORT No. 3/04/2005/Almaty/3-5-KZ, REPORT No. 9/05/2005/Almaty/1-7-KZ.
[248] REPORT No. 10/09/2005/Taraz/16-17-KZ.
[249] REPORT No. 3/11/2005/Uralsk/18-19-KZ.

Table 2.10.3. Passing (pronouncement) of judgments (court decisions), and explanation by a judge of the right to appeal a judgment (court decision), procedure and timeframe

Region	The decision of a court on the merits of the case				Special court ruling in the case		Explanation by a judge of the right to appeal a judgment (decision), procedure and timeframe	
	Conviction	Acquittal	Decision on the dismissal of a criminal case		passed	Not passed	Explained	Not explained
			On reason of discharge	Not on reason of discharge				
	Number of court sessions							
Astana	3	-	-	-	-	3	3	-
Almaty	29	-	-	10	4	35	29	10
Pavlodar	14	-	-	4	1	17	17	1
Petropavlovsk	13	-	-	-	4	9	13	-
Taraz	17	-	-	1	1	17	18	-
Uralsk	7	-	-	1	1	7	7	1
Ust-Kamenogorsk	6	-	-	-	-	6	6	-
Shymkent	17	-	-	6	2	21	17	6
Total	**106**	**0**	**0**	**22**	**13**	**115**	**110**	**18**

Diagram 2.10.4. Passing (pronouncement) of judgments (decisions on dismissal of a criminal case)



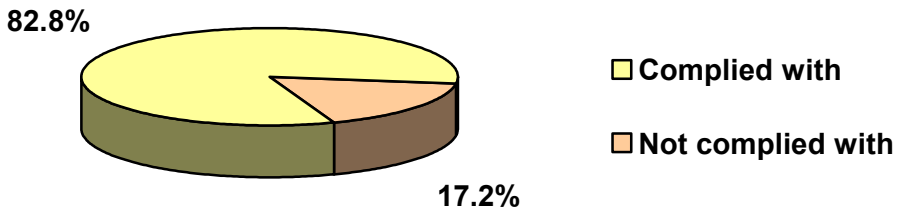
The results of monitoring allow for a conclusion to be drawn about the existence of accusatory trends in court activities. Having attended court sessions in eight regions of Kazakhstan the trial monitors did not record a single acquittal or decision of dismissing a case on reason of discharge.

Pursuant to the current legislation of Kazakhstan the judgment should be pronounced in full.[250] The official interpretation of Art.377 para 3 of the CPC stipulates that the verdict shall consist of introductory, descriptive-reasoning and resolution parts. "The verdict shall be written consistently, in a way where each new statement stems out from the preceding one and is logically linked to it".[251]

Table 2.10.5. Non-compliance with the requirement of pronouncing judgment (court decision) in full

Region	Pronouncement of a judgment (court decision) in full		Partial pronouncement of a judgment (court decision)	
	Complied with	Not complied with	Introductory part of a judgment (court decision) missing	The part of the judgment (court decision) containing a descriptive-reasoning statement missing
	Number of court sessions			
Astana	3	-	-	-
Almaty	34	5	1	4
Pavlodar	12	6	-	6
Petropavlovsk	11	2	-	2
Taraz	16	2	-	2
Uralsk	8	-	-	-
Ust-Kamenogorsk	6	-	-	-
Shymkent	16	7	4	7
Total	**106**	**22**	**5***	**21**[252]

Diagram 2.10.6. Pronouncement of a judgment (court decision) in full



During monitoring in 21 cases judgments were considered not reasoned by the trial monitors on the basis of what they had seen and heard in courts, that is, when the judgments/decisions on the dismissal of a criminal case were pronounced by judges they did not read out the descriptive-reasoning statements of those decisions.

250 Art. 377 para. 3, Art. 384 para.1 of the CPC.
251 Commentary, p.390.

252 The trial monitors noted cases when during the pronouncement of a judgment both the introductory and descriptive-reasoning statement were omitted.

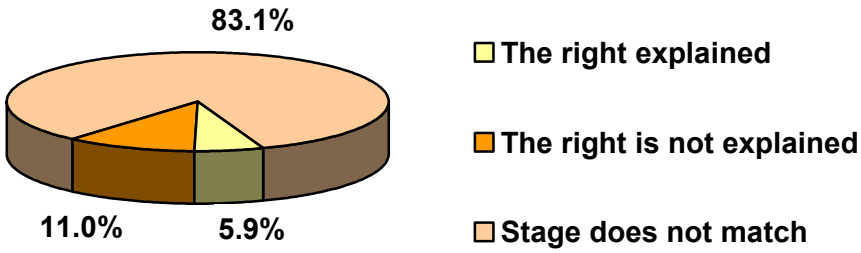
CASE 81

In the cases of one defendant, charged under Art. 136 of the CC (31 March 2005), another defendant charged under Art. 259 part 2 of the CC (31 March 2005), and another one charged under Art. 312 of the CC (1 April 2005), heard in Shymkent city court before presiding judge T.Y., when court judgments and a decision on the dismissal of a criminal case were pronounced, the judge only read the findings' part, referring to the fact that the reading of an introductory and descriptive-reasoning parts would take a lot of time.[253]

CASE 82

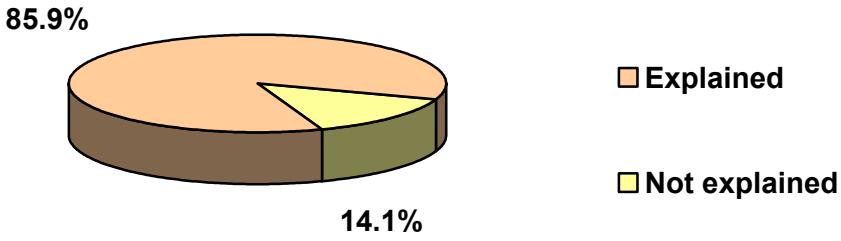
In the case of three defendants, charged under Art. 125 part 3, Art. 327 part 3 and Art. 103 part 2 of the CC, heard on 25 March 2005 in Taraz Court No. 2 before presiding judge K.X., the judge asked the defendants and the parties to the proceedings if she should read the whole judgment. The defendants said that there was no need for her to read it in its entirety, and the judge thus did not, omitting the descriptive-reasoning part of the judgment.[254]

Diagram 2.10.7. Explanation by a judge of the right to inspect with the record of the judicial proceedings



Following the pronouncement of the judgment, the judge must explain to the parties to the judicial proceedings the right to inspect with the record of the judicial proceedings.[255] This right was explained 43 times; in 80 cases the requirements of the legislation were not fulfilled.

Diagram 2.10.8. Explanation by a judge of the right to appeal a judgment (court decision), procedure and timeframe



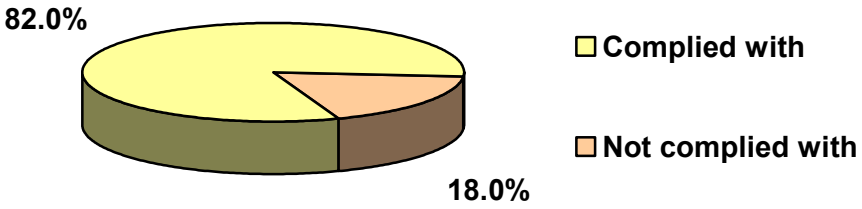
Following the pronouncement of the judgment, the judge must explain to the parties their right to appeal, the procedure and the timeframe.[256] This rule was observed 110 times. At 18 sessions the judge did not explain to the parties the right to appeal the judgment.

[253] REPORTS No. 7/03/2005/Shymkent/22-23-KZ, REPORT No. 8/03/2005/Shymkent/22-23-KZ, No. 1/04/2005/Shymkent/22-23-KZ,
[254] REPORT No. 8/03/2005/Taraz/16-17-KZ.
[255] Art. 384 part 3 of the CPC.
[256] Art. 384 of the CPC.

Table 2.10.9. Compliance with the requirements to the passing (pronouncement) of judgments (court decisions)

Region	Judgment pronounced distinctly, clearly and at a reasonable pace	
	Complied with	Not complied with
	Number of court sessions	
Astana	3	-
Almaty	33	6
Pavlodar	16	2
Petropavlovsk	10	3
Taraz	16	2
Uralsk	7	1
Ust-Kamenogorsk	6	-
Shymkent	14	9
Total	**105**	**23**

Diagram 2.10.10. Judgment pronounced distinctly, clearly and at a reasonable pace



In 105 cases, judgments/court decisions were pronounced distinctly, clearly and at a reasonable pace. However, in 23 cases judges read the judgments either too fast, mumbling, or in a very low and scarcely audible voice, which restricted normal comprehension by those present.

The impossibility to comprehend the pronounced judgment could affect the degree of compliance with the international standard of public pronouncement of a judgment, which leads to the conclusion that the judgment must be pronounced in such a manner that would allow everybody concerned to understand its nature and significance.

CASE 83

In the case of one defendant, charged under Art. 103 part 3 of the CC, heard on 26 April 2005 in Petropavlovsk city court before presiding judge G.X., when the judge was reading the judgment she kept stumbling, several times was distracted from reading, raised her head and looked in the direction of the trial monitors checking their reaction to the fragments read. According to the trial monitors, she was hesitant when speaking, mispronounced many words, then corrected herself, stumbling again. What she was reading was so badly structured, that all those who were present in the courtroom had great difficulty understanding what she was talking about.[257]

At another session, in the case of another defendant charged under Art. 257 part 3 of the CC, heard on 1 December 2005, presided by judge G.X., the judgment was read inaudibly and hastily in a quiet voice.[258]

[257] REPORT No. 13/04/2005/ Petropavlovsk/14-15-KZ.
[258] REPORT No. 1/12/2005/ Petropavlovsk/14-15-KZ.

CASE 84

In the case of five defendants, charged under Art. 179 part 2, paras “a”, “c”, “d”, Art. 257 part 2, paras “a”, “b”, “c” and Art. 178 part 2, para. “b” and part 3, para. “c” of the CC, heard on 28 February 2006 in District court No. 2 of Bostandyksky district of Almaty before presiding judge I.Y., the judge read the judgment in such a low voice and so quickly that nobody understood anything, and he had to explain again to each defendant what punishment had been imposed.[259]

In the same court, at the session in the case of a defendant charged on Art. 103 part 3 of the CC, heard on 27 March 2006 before presiding judge A.Y., the judge pronounced the judgment in such a low voice that the clerk of the court, who was sitting two metres from him, could barely hear what he was saying. In addition, the judge omitted the descriptive-reasoning statement of the judgment. Consequently, nobody in the courtroom understood the gist of the judgment. When the judge left the courtroom everybody began asking each other what punishment had been pronounced by the judge. Neither the defendant nor his mother heard anything.[260]

[259] REPORT No. 7/02/2006/Almaty/5-KZ.
[260] REPORT No. 6/03/2006/Almaty/5-KZ.

PART THREE

RECOMMENDATIONS

This section provides a list of recommendations that have been compiled based on the findings described in the main body of the report. They propose straightforward changes and improvements that may be adopted in order to ensure that the courts and criminal proceedings fully comply with the existing legal provisions.

Some of the proposed improvements may result in enhanced compliance of the law and practice with the relevant provisions of international fair trial standards and OSCE commitments relating to the administration of justice.

However, it should be noted that generally the proposed recommendations do not aim at offering detailed legal advice on making changes to the existing laws in order to bring them in line with the legally binding provisions of the ICCPR and other applicable international fair-trial standards, as this matter was not the purpose of this report and was not covered by the objectives of the project.

All recommendations are grouped under sub-headings that follow the structure of the report, i.e. the sub-chapters in Part Two that correspond to the selected international standards assessed during the trial-monitoring project.

The right to trial by an independent, competent and impartial tribunal established by law

- To pay attention to the necessity for judges to comply strictly with the rules of judicial ethics, to behave correctly towards the parties, to adhere to the principle of impartiality, and not to make any premature judgments or statements on the matter in question;
- In all instances when required the court must identify the composition of the court, parties to the proceedings and what case is being heard;
- To ensure that state symbols – the flag and the emblem – are always displayed at court sessions in all courtrooms;
- To ensure that when administering justice the judges wear judges' robes and headwear in conformity with the dress code established under existing legislation.

The right to a public hearing

It is essential to meet all the conditions necessary for public court hearings, namely:

- Unobstructed access to the court building without the need to produce one's ID or to register in the visitors' register;
- Unobstructed access to a courtroom when public trials are held, thus removing the existing practice of obtaining the prior permission of the judge, clerk to the court, bailiff, security guards and/or other persons;
- Displaying a detailed schedule of case hearings in a convenient place for all to see with an indication of the stage of the judicial proceedings reached, identification of the defendant, the language of the court, name and surname of the judge, the Article of the Criminal Code under which the case is being tried, time and venue (number of the courtroom) of the court session as well as indication of whether the court session is public or to be held in camera, and whether it has restricted public access and if so the reason for the restriction. This information should at the same time be available on the court's website;

- To eliminate the practice of holding court sessions in judges' chambers and ensure they only take place in specially equipped courtrooms that have the necessary space, furniture and technical equipment including microphones and other audio and video machinery;
- To put in place an effective system of planning hearings taking into account the number of participants and other persons present at the proceedings;
- To observe scrupulously the requirement to inform the participants of the date and venue of the court hearing; there should be mandatory confirmation in court that the parties to the proceedings have been properly notified;
- To set court hearings taking into account the time needed to transport detained persons from the pre-trial detention centre to court;
- To commence court hearings strictly according to the time indicated in the schedule/timetable of case hearings;
- To ensure that judges/clerks to the court always announce the reasons for any delay or postponement of court hearings in due time;
- To oblige the clerks to the court to uphold standards of etiquette and ethical behaviour with visitors to the court.

The right to a fair hearing and the right to be present at trial and to defend oneself in person

- To provide for scrupulous compliance with the procedure for the main trial in order to prevent any breaches of the rights of the parties; to establish procedural timeframes and keep accurate court records, by inter alia:
  - Checking the attendance of parties at every court session;
  - Addressing the issue of cases tried in absentia;
  - Reading the rights to a defendant upon her/his being questioned at the trial; in particular, the right not to give evidence;
  - Ensuring that if the defendant gives evidence the defence are the first to question the defendant;
  - Questioning the parties about the procedure of investigating the evidence;
  - Explaining to witnesses, victims and other parties to proceedings their rights;
  - Removal of witnesses from the courtroom prior to the beginning of a session and questioning witnesses in the absence of those witnesses yet to be questioned;
  - Ascertaining whether the copy of the indictment was delivered on time and verifying the defendant's attitude towards charges against him/her and civil suit;
- To eliminate any practice on the part of the court and/or any other party of applying inappropriate pressure on the defendant, victim or witnesses.

The right to be presumed innocent and the right not to be compelled to testify or confess guilt

- To eliminate the practice of compelling a defendant to confess guilt;
- To remove metal cages from the courtrooms;
- To use more frequently measures other than detention to secure the defendant's attendance at court;
- To reconsider the existing procedures for escorting defendants into court and the presence of security guards in the courtroom, so as to ensure sufficient safety for the parties whilst at the same time doing so in a manner which does not undermine the presumption of innocence. The use of any security measures or of any restraint should be based on the merits of each case.

Exclusion of evidence elicited as a result of torture or other duress

- To adjourn hearings in order to conduct an in-depth investigation of any complaint of illegal methods of investigation, and to exclude any evidence found to have been obtained in this manner.

Equality of arms

- To ensure the participation of a state prosecutor, defence counsel and a defendant at all stages of the trial when required by law;
- To secure genuine equality of arms and the adversarial nature of proceedings;
- To ensure that there is no apparent bias in the conduct of the court.

For the purposes of maintaining fairness:

- To exclude reliance on the defendant's testimony given at the pre-trial stage of the criminal proceedings;
- Not to allow the interruption of defendants when making their final address to the court;
- To rule expeditiously upon any applications submitted by the parties.

The right to be defended by an experienced, competent and effective defence counsel

- To introduce safeguards securing the right to be represented by experienced, competent and effective defence counsel, for instance, by providing the opportunity of applying to the court or the Collegium of Lawyers to replace counsel. Further, to allow for an appeal on grounds of defence counsel rendering incompetent and ineffective legal assistance;
- To introduce sanctions against unprofessional defence lawyers, for example expulsion or suspension from the Collegium of Lawyers in the case of sustained complaints from clients about the nature of assistance rendered.

The right to an interpreter and to translation

- To fully implement the right to interpretation and to warn the interpreter of criminal liability for wilfully making false interpretation/translation, as well as to explain to the parties to the proceedings of their right to refuse the services of the interpreter;
- To promote higher professional standards of court interpreters, for example, by promoting the creation of a professional association of court interpreters.

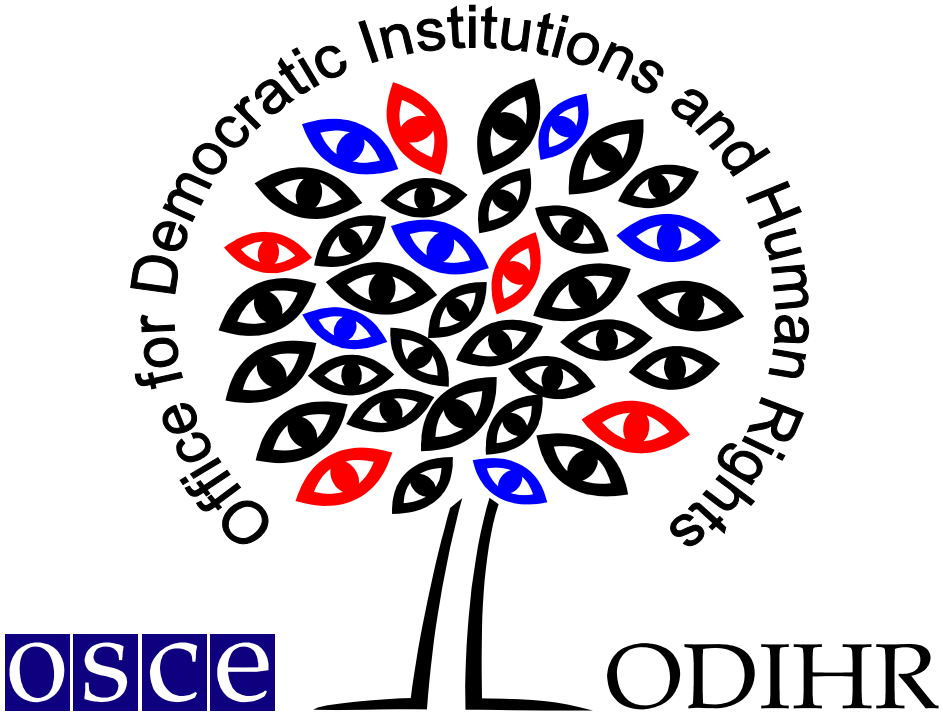
The right to a reasoned judgment and the right to a public judgment

- To provide full recording of court hearings and clearly regulate the status of audio and video recordings of the proceedings. To provide timely access to these materials by all parties;
- To ensure that court judgments are read out clearly and distinctly in their entirety;
- To place all judgments on courts' websites regularly and promptly.

TRIAL

MONITORING

MANUAL



CONTENTS

I. DESCRIPTION AND PURPOSES OF THE TRIAL MONITORING PROJECT[261]

The right to a fair trial is a fundamental norm of international and domestic law. In order to obtain information on the exercise of this right in practice, the OSCE member states have undertaken to allow local and international monitors to monitor trials (paragraph 12 of the 1990 Copenhagen document).

The OSCE/ODIHR Trial Monitoring Project trains members of civil society in national and international fair trial standards and trial monitoring methodology in criminal proceedings, co-ordinates their subsequent trial monitoring and reporting activities and aims at compilation of periodic reports that summarise the findings of monitoring.

The Trial Monitoring Project aims to:

- Assist in the collection of reliable information on the criminal trial practice to support the reforms implemented in the Republic of Kazakhstan and to identify the issues that need to be resolved.
- Train members of civil society in national and international standards of fair trial and trial monitoring methodology within the framework of criminal proceedings.
- Reinforce skills of the Project monitors in monitoring and reporting on criminal trials by coordinating the activity of monitors.
- Obtain independent and impartial reports on criminal trials from the perspective of compliance with national and international fair trial standards.
- Publish periodic reports summarising the findings of monitoring.
- Present findings of monitoring to the relevant authorities and discuss with them in order to develop recommendations.

II. CONTEXT, SCOPE AND TYPES OF MONITORING

- **CONTEXT**

The OSCE/ODIHR Project is implemented with an aim of facilitating the ongoing legal reforms in the Republic of Kazakhstan which relate to the work of courts, criminal counsels, ensuring by the state of access to free legal assistance, and possible judicial sanctioning of arrest.

In connection with the ongoing reforms a need emerged to collect objective information which can be used primarily by state bodies in charge of implementation of the existing concepts and suggested reforms to practice.

The organizers of the Project hope that results of the Project will contribute to further improvement of the criminal procedure law in the Republic of Kazakhstan and implementation practices in line with international standards. In particular, it is presumed that preparation of impartial reports will help all the interested parties in discussing the advisability of the reforms.

Monitoring will specifically focus on the following aspects of the fair trial standards: openness of court proceedings for the general public, presumption of innocence, observation of the principle of equality of parties and adversarial character of proceedings, access to justice including the right to defend oneself, including through a counsel.

Project organisers developed a monitoring Report form which contains detailed questions on compliance with fair trail standards.

- **SCOPE**

Monitoring within the OSCE/ODIHR Project will be held in selected rayon (district) and oblast (region) courts. 24 Project monitors cover the following cities of Kazakhstan: Almaty, Astana, Pavlodar, Petropavlovsk, Taraz, Uralsk,

[261] The information below is a brief description of the OSCE/ODIHR Project. The Project participants should be guided by this information as well as by the Information Brochure prepared by the Project organisers when informing the state authorities about the Project. Project participants should always inform the Project co-ordinator on any inquiries from government bodies.

Ust-Kamenogorsk, Shymkent. The participants were selected upon consideration of the applications submitted following the circulation of the relevant information on the Project through the NGO network.

TYPES

Monitoring will be held by 24 monitors, trained by the OSCE/ODIHR from the 19 December to the 22 December, 2004. Monitors work in pairs or individually.

Each pair of monitors or an individual monitor shall monitor criminal cases from the first court session till a sentence is issued. Prior to the commencement of monitoring monitors should find out the schedule of trials in the secretariat of a target court. When selecting a case monitors should consult the Project co-ordinator and follow the established criteria of selecting cases.

The Project minimum requirements contemplate attending of all hearings of the selected criminal case, but no less than two hearings a week. In case there are less than two hearings a week on the selected criminal case monitors should, in order to comply with the Project minimum requirements, carry out "mass monitoring". In any case the number of court hearings attended in a week shall not be less than two.

Mass monitoring implies attending randomly selected hearings without regard to the stage of a case and filling out of the respective sections of the Report form.

III. TIME FRAME OF THE PROJECT

During January 2005, pilot monitoring was conducted to test the Trial Monitoring Manual and the Monitoring Report form.

In February 2005 after processing the received comments and proposals and amending the Reporting form, monitors started monitoring within the Project.

Working plan:

February – June 2005 – the first five months of monitoring.

June – July 2005 – preparing for and holding the second training session.

July – August 2005 – commencement of work on the initial group of interim findings on monitoring and conducting a round table with state authorities to discuss these findings.

August – December 2005 – the second five months of monitoring.

December 2005 – January 2006 – starting preparations of the second set of interim findings based on the monitoring results.

February – April 20 – final 3 months of monitoring.

April – September 2006 – preparation of the Final report on the Project.

December 2006 – organising and conducting a conference/a series of roundtables to discuss the results of the Project, development of recommendations on further improvement and reforming of the judicial system in cooperation with the interested state bodies.

IV. BASIC PRINCIPLES FOR PROJECT MONITORS

- **THE RIGHT TO MONITOR**

All OSCE member states have committed themselves to allow monitors at trials in order to increase transparency of trial proceedings and as a means of increasing public trust in the administration of justice. The right to monitor trials ensues from the right to a fair and public trial, which is enshrined in the International Covenant for Civil and Political Rights, the European Convention on Human Rights and domestic laws of the OSCE member states.

- **PRELIMINARY NOTIFICATION OF STATE BODIES**

The OSCE/ODIHR and the OSCE Centre in Almaty have informed the Administration of the President of the Republic of Kazakhstan, the Supreme Court of the Republic of Kazakhstan, the Ministry of Foreign Affairs of the Republic of Kazakhstan and the General Prosecutor's Office of the Republic of Kazakhstan of the commencement of the Project by letters sent in November 2004.

The Chairman of the Supreme Court of the Republic of Kazakhstan in his letter to the chairmen of the courts of all levels recommended to assist the OSCE/ODIHR Project monitors in their monitoring.

The OSCE/ODIHR developed Information brochures about the Project to be distributed by monitors in courts and among state officials on request.

Monitors should also try to distribute the Information brochures through their NGOs.

- **ACCESS TO COURT BUILDING AND COURT ROOMS**

Free access to a court building and a courtroom in the case of a public hearing is a constitutionally guaranteed right under national legislation. Compliance with this legal norm in practice is one of the aspects of monitoring.

Accordingly, monitors should primarily try to get into a court building and a courtroom without drawing attention and keeping a low profile. The only visually distinguishing sign of a monitor at this stage will be a bag with the Project name and logos of the Project organisers.

In case any problems arise with free access, a monitor should take the following actions:

In the event that access to a court building is denied, a monitor should request a meeting with the Chairman of a court to explain the purposes of the Project.

In the event access to a courtroom is denied, a monitor should request to explain to the presiding judge the purpose of his presence.

In the event access is still denied upon conversation with the presiding judge, a monitor should request to meet the Chairman of a court or his/her representative.

If a meeting with the Chairman of a court is allowed, a monitor should present the identification badge and a copy of the letter from Project organisers to chairmen of the oblast or equally ranking courts. The identification badge indicates the status of the Project monitor in the OSCE/ODIHR Project on Trial Monitoring.

A monitor can inform the Chairman of a court about the purposes of the OSCE/ODIHR Project.

The information provided to the Chairman of a court should be strictly limited to the information contained on page three of this Manual.

If the Chairman of a court denies access to a hearing a Project monitor should record the reasons in the Report form and immediately inform the Project co-ordinator of this incident.

Project monitor should not under any circumstances demand access to a trial and should remain composed and courteous at all times.

- **NON-INTERVENTION**

One of the fundamental principles underlying trial monitoring is respect for the independence of judicial process. Accordingly, the Project monitors must never interfere with, or attempt to influence, trials in any way whatsoever.

In accordance with the principle of non-intervention, monitors should:

- Never interrupt a trial. In the event a monitor is asked by any of the participants of a trial to respond to a question, a monitor must explain his/her role and the principle of non-intervention and decline to comment.

- Never make recommendations to the participants of a trial on the merits of a case. If a monitor has concerns over the conduct of some participants of a trial information on this should be included in the Report form. Monitors shall avoid confrontations and discussions with trial participants.

- Never publicly express opinion on a case they attend, either inside or outside a courtroom.

- Under no circumstances intentionally contact the mass media or give comments on behalf of the OSCE/ODIHR or the OSCE in general.

- If mass media attempts to find out the opinion of a monitor on a certain case under monitoring, a monitor may only inform of his/her intention to monitor and of the Project purposes. Further, a monitor should refer a journalist to the Project co-ordinator, who upon consultations with the OSCE/ODIHR and the OSCE Centre in Almaty will make relevant comments in exceptional cases.

- **PROCEDURAL FOCUS**

The OSCE/ODIHR Trial Monitoring Project focuses on procedural issues and not on the merits of cases under monitoring.

Accordingly, monitors should pay particular attention to violations of criminal procedural law.

A Project monitor has no obligation to evaluate evidence or otherwise resolve various issues that arise in the course of a trial.

- **CONFIDENTIALITY**

Project monitors can provide information on the purposes of the Project as described on page three of this Manual to court officials, participants of a trial and other interested parties.

However, Project monitors are not authorised to make comments to court officials, parties to a case, or any other third party on their observations or findings in relation to procedure or substance of a case, or the criminal justice system in general.

- **SECURITY OF MONITOR**

Monitors participate in the OSCE/ODIHR Trial Monitoring Project; they do not have the status of staff members of the OSCE.

Project monitors should not take any action which may be detrimental to their security. In this regard, they should:

- Report all incidents threatening their security to the Project co-ordinator.
- Discontinue their monitoring immediately and inform the Project co-ordinator, if any threat exists in relation to a monitor.
- Avoid contacting any of the parties to a case, if that might entail a possibility of affecting the security of a monitor.

V. CODE OF CONDUCT

- **PREPARATION TO MONITORING**

- If possible, find out well in advance the exact date, time and venue of a trial that is planned for monitoring. It should be described in the Report how and when such information was obtained, and if it was true.

- If possible and expedient, contact parties of a trial and make yourself familiar with the background of a case prior to monitoring. Monitors can attach the most interesting procedural documents to the Report form.

- Arrive in court in advance to allow sufficient time to gain access to a court, locate the courtroom and find a seat. This should be described in detail in the Report form.

- **IDENTIFICATION**

- Carry the monitor identification badge at all times and produce it upon demand of court officials. Monitors should not misuse their identification badges.

- **CONDUCT IN COURT**

- Maintain polite, composed and dignified demeanour with all court officials and parties to a case.

- Wear appropriate clothing.

- Publicly make extensive notes during court sessions.

- Ensure safety and confidentiality of the notes.

- **DEMONSTRATION OF INDEPENDENCE AND IMPARTIALITY**

- Find seating in a court room which allows one to observe, hear and follow all aspects of a hearing. In order to comply with the principles of independence and impartiality, it is important that monitors do not sit next to either the defence or prosecution.

- Avoid interfering with the course of a hearing.

- Do not express any views on the course of a trial either inside or outside a courtroom.

- Do not discuss the merits of a case with any of participants of a case.

- If necessary to obtain additional information on preliminary investigation, request (but do not insist on) a meeting with defence to get detailed information about: a defence counsel (full name, membership in the college of advocates, relation with the defendant (contractual, assignment); about a case (at what stage a defence counsel was involved, if he submitted applications on violations encountered, what was the reaction to such motions, other procedural details of the pre-trial stages of a case). During the meeting, the Project monitor should not comment on any procedural aspects or merits of a case. Moreover, in order to avoid doubts as to impartiality of a monitor the meeting should not be held in front of any other parties.

VI. ROLE OF PROJECT MONITORS

In accordance with the purposes of the OSCE/ODIHR Trial Monitoring Project and the Trial Monitoring Principles as described above, the role of monitors is to attend court sessions regularly, to prepare and provide prompt objective and detailed reports on monitoring of criminal trials attended.

VIII. REPORTING

All monitors working in pairs or individually shall prepare a report on each monitored court hearing in accordance with the Report form. Thus, at the end of each week each pair of monitors or individually monitors should submit to the project coordinator two reports minimum.

- **Reporting requirements:**

- To make detailed notes of everything taking place in a court building and in a court room.

- To copy the materials of a case, minutes of a trial, sentence (if copying of such documents is possible).

- To fill out the Report form.

- To produce Reports in a prompt manner based on the notes and personal findings attaching copies of documents (if available).

- To ensure that the information contained in trial Reports is accurate and consistent.

- The major part of information contained in a trial Report should be based upon what a monitor has directly observed. Where information from other sources is used, it is important to accurately reference these sources (interview with a defence counsel). In addition, facts should be clearly distinguished from third parties' opinions and assessments.

- To include in the Report recommendations on eliminating systematic violations which monitors encounter during the monitoring process.

- To include in the Report the examples of observing the fair trial standards («best practices»), and recommendations on eliminating systematic violations which monitors encounter during the monitoring process.

- To include in the Report the quotations from interview with defence counsels, which illustrate systematic problems or exemplify best practices (it is required to indicate precisely and double-check name and position of the interviewee).

- If possible, monitors should address in their Reports the issue of material conditions and technical equipment of courts.

- To submit reports weekly by e-mail upon monitoring of at least 2 court sessions.

- At the end of each calendar month a separate report should be prepared elucidating compliance with a specifically selected standard or standards of fair trial with examples from monitored criminal cases. The Project co-ordinator notifies all monitors of the selected standard/s at the beginning of each month.

- The Project co-ordinator upon receiving weekly and monthly Reports contacts monitors for clarification of details of the Reports.

VIII. PROJECT CO-ORDINATION

Project co-ordinator has the following objectives:

- Maintaining regular contact with monitors for the purpose of exchanging information and discussing problems

- Facilitating contacts between monitors and the OSCE/ODIHR, as well as keeping the OSCE Centre in Almaty updated on the course of the Project

- After consultations with the OSCE/ODIHR, informing mass media and representatives of state bodies on the Project purposes

- If necessary, arranging contacts with the chairmen of courts informing them of monitoring (after consultations with the OSCE/ODIHR)

- Organising the work of monitors, including identifying, after consultations with the OSCE ODIHR and the OSCE Centre in Almaty, cases to be monitored

- Attending hearings with monitors

- Co-ordinating the work of monitors and maintaining a chart of monitoring activities to account for the amount and quality of work of monitors

- Collating reports and processing them

- Providing prompt comments on reports received from each monitor and clarifying unclear and incomplete data

- Entering data and comments on reports received from monitors into a special chart which will be maintained separately for each pair of monitors or an individual monitor

- Preparing of monthly analytical reports on monitoring results describing all fair trial standards, with an additional emphasis on compliance with the specifically selected fair trial standard/s to be supported by data from the monitors' weekly and monthly Reports (case studies)

- Providing expert advice and recommendations

- Making payments to monitors for good quality reports, according to agreements entered into between the OSCE/ODIHR and monitors

- Reimbursing the operational expenses (overheads) of monitors

- Book-keeping and preparing of financial reports.

For immediate co-ordination of the activity of monitors in Kazakhstan the OSCE/ODIHR has appointed Ms Gulnara Kuanysheva as the Project co-ordinator.

At the OSCE Centre in Almaty the co-ordinator is Mr. **Bjorn Halvarsson, Head of the Human Dimension Department.**

At the OSCE/ODIHR office in Warsaw the Project is managed by Ms **Natalya Seitmuratova, the Human Rights Officer in the HR section.**

ANNEX #2

TRIAL MONITORING REPORTING FORM
USED DURING THE PROJECT

REPORT№ 01/07/2005/ALMATY_3-5-KZ

ON TRIAL MONITORING

Surname, given name and patronymic of the OSCE monitor/s:	**1.** **2.**	
Monitoring date:		
Report submission date:		
Time spent in court:		
Type of monitoring	**general**	**Total (qualitative)**

GENERAL INFORMATION:

Surname, given name and patronymic of the defendant/s:	**1.** **2.**
Gender of the defendant/s:	**1.** **2.**
Date of birth of the defendant/s:	**1.** **2.**
Ethnicity of the defendant/s:	**1.** **2.**
Qualification of the alleged conduct of the defendant/s under the Criminal Code of the Republic of Kazakhstan:	
Type of proceedings:	
Name of the court where the case is tried:	
Surname(s), given name(s), patronymic(s) of the judge(s) who consider/s the case on merits:	**1.** **2.** **3.**

Surname, given name, patronymic of the public prosecutor:	
Surname, given name, patronymic of the victim:	**1.** **2.**
Surname, given name, patronymic of the defense counsel:	**1.** **2.**
Time of opening and closing the hearing:	
Stage of trial:	
How did you learn where the hearing would take place:	
Please indicate the language the hearing was conducted in:	

Preventive punishment measure applied:	
A written undertaking not to leave a place	**Yes**
Detention	**Yes**
Personal bail	**Yes**
Leaving a military person under supervision of military unit management	**Yes**
Leaving a minor under supervision	**Yes**
Deposit	**Yes**
Domestic detention	**Yes**

Is there any additional information on the defendant? (Place of work, marital status)	

COMPLIANCE WITH FAIR TRIAL STANDARDS

THE RIGHT TO TRIAL BY A COMPETENT, INDEPENDENT AND IMPARTIAL COURT ESTABLISHED BY LAW

note: **please leave the correct answer**

1	What state symbols were placed in the court room?	**Flag of the RK**		**National Emblem of the RK**	
2	Was the judge wearing a robe?	**Yes**	**No**		**Partially**
3	Did the judge announce what criminal case was to be heard?	**Yes**		**No**	
4	Did the judge announce the composition of the court, did he/she name the prosecutor, defense counsel, victim and other participants of the case?	**Yes**		**No**	
5	Was the right to make challenge explained by the court?	**Yes**		**No**	
	Were any challenges made in the case?	**Yes**		**No**	
		By whom?			
		In relation to whom?			
		Satisfied?	**Yes**	**No**	
6	Did the judge take into consideration the age, general level of capacity, physical and mental condition of the defendant when elucidating his/her procedural rights?	**Yes**		**No**	
7	In your opinion, did the judge maintain impartiality while trying the case?	**Yes**		**No, that was expressed in:**	
8	Did the judge speak or act tactlessly or allow unethical statements or actions in respect of any of the participants of the process?	**Yes, that was expressed in:**		**No**	
9	Did the judge raise his/her voice at anyone of the participants of the process?	**Yes**		**No**	

10	Did the judge go into deliberation chambers at the conclusion of the questioning? ?	**Yes**, it was declared	**No**, it wasn't declared. **No,** stage doesn't correspond.

THE RIGHT TO A PUBLIC HEARING

11	Describe how you entered the court building (were any ids presented, were you registered as visitors)		
	and the court room (agreement with secretary, permission of judge)		
12	Was the schedule of cases to be considered (time and place) available on the information board at the entrance of the court building?	**Yes**	**No**
13	Where did the court session take place?	**Courtroom**	**Office of judge, because there no court rooms were available** **Office of judge, although there were available**
14	Were the room size adequate to accommodate all of the participants of the case?	**Yes**	**No**
15	Was the court room equipped with the necessary furniture?	**Yes**, namely:	**No**
	and technical means?	**Yes**, namely:	**No**
16	Was the lighting sufficient?	**Yes**	**No**
17	In the event it was determined to try the case in a closed hearing, what were the legal grounds for such decision?	1. 2.	

THE RIGHT TO A FAIR TRIAL

18	Did the hearing start on time?	**Yes**	**No**				
			earlier, namely:	**Up to 15 minutes late**, namely:			**More than 15 minutes late**, namely:
		Cause of late start:		**Prosecutor**	**Counsel**	**Judge**	**Other case participants**	**Technical**
19	In what sequence did the participants of the						

	case appear in the court room?		
20	Did secretary of the court session announce about presence of the participants of the case?	**Yes**	**No**
21	Was the issue of hearing in the absentia considered?	**Yes,** and party absent was:	**No,** although party absent was
			No, all parties were present
22	Was there any procedural conflict between the parties, between anyone of the representatives of the parties and the judge during the trial?	**Yes,** namely between	**No**

THE RIGHT TO BE PRESUMED INNOCENTAND THE RIGHT NOT TO BE COMPELLED TO TESTIFY OR CONFESS GUILT

23	Was/were the defendant/s handcuffed during the hearing?	**Yes**	**No**
		Yes, besides defendant/s was/were held behind the bar	
24	Was/were the defendant/s held behind the bar?	**Yes**	**No**
25	Where was the bailiff during the hearing?		
26	Did anyone of the participants of the case put moral or other pressure on the defendant during the examination?	**Yes**, this was shown in:	**No**
27	Was the defendant's right not to testify against himself/herself or close relatives explained to him/her? Did the defendant exercise this right?	**Yes,** and the defendant/s exercised this right	**No,** but the defendant/s didn't testify against himself/herself or close relatives
		Yes, but the defendant/s didn't exercise this right	**No,** and the defendant/s testified against himself/herself or close relatives

28	Was it explained to the defendant that he/she is not bound by any confession or denial of guilt made during pre-trial stages of the case?	**Yes**	**No**
29	Did the judge pressure the defendant to confess?	**Yes**, this was shown in:	**No**

THE RIGHT TO OBJECTIVE AND COMPREHENSIVE EVALUATION OF EVIDENCE

30	Were witnesses removed from the court room before they were questioned?	**Yes**		**No,** as there was no witnesses	
				No, as there was lonely witness	
				No, although there were several witnesses	
31	Were the witnesses examined in the absence of other witnesses not previously examined?	**Yes**		**No**	
32	How was the order of presentation of evidence determined? Was the opinion of parties taken into consideration?	**Parties were questioned, their opinions were taken into consideration**	**Parties were not questioned**	**The order wasn't determined**	
		Parties were questioned, their opinions were not taken into consideration			
33	Who was the first to examine the defendant/s?	**Defense**	**Prosecution**	**Judge/s**	**None, as the stage doesn't correspond**
	Who conducted the main part of examination of the defendant/s?	**Defense**	**Prosecution**	**Judge/s**	**None, as the stage doesn't correspond**
34	Were the rights of the witness in connection with his/her testimony explained?	**Yes**	**No**	**Частично**	
			No, there was no witnesses		
			No, as the stage doesn't correspond		
	Was the witness warned of criminal responsibility for giving false evidence?	**Yes**	**No**		
			No, there was no witnesses		
			No, as the stage doesn't correspond		

35	Provide brief description of the testimony of the witnesses.			
36	Were the rights of the victim explained to him/her in connection with testimony to be given?	**Yes**	**No** **No, there was no victim** **No, as the stage doesn't correspond**	**Partially**
37	Provide a brief summary of the testimony of all victims.			
38	Were the rights of other participants explained?	**Yes, namely:**	**No, there were no other participants** **No, as the stage doesn't correspond** **No, namely:**	
	To civil plaintiff	**Yes**	**No**	**Partially**
	To civil defendant	**Yes**	**No**	**Partially**
	To expert	**Yes**	**No**	**Partially**
39	Was expert examination made during the trial?	**Yes, the initiative was of:**	**No**	
40	Was the procedure of commissioning and conducting of the expert examination complied with?	**Yes**	**No, there was no expert examination made** **No, this was shown in:**	
41	Did the expert testify?	**Yes. Namely:**	**No**	
42	Were the records of the investigation that are contained in the case file declared in full?	**Yes**	**No**	
43	Were the examination, identification and other judicial actions made according to the established procedure?	**Yes**	**No, this was shown in:** **No, as the stage doesn't correspond**	

44	Did the judge explain to the parties upon the close of examination of evidence that parties may make closing arguments and that the court when passing judgment may refer only to evidence examined during judicial investigation?	**Yes**	**No, as the judicial investigation is not closed yet**
			No, although the court stepped to pleadings
45	Did the judge ask the parties whether they wish to make statements to add to the judicial investigation and what statements?	**Yes**	**No, as the judicial investigation is not closed yet**
			No, although the court stepped to pleadings

EXCLUSION OF EVIDENCE ELICITED AS A RESULT OF TORTURE OR OTHER COMPULSION

46	Did the defendant challenge any pre-trial statements made earlier due to any alleged psychological or physical pressure, tortures, threats or deception used in relation to him/her during the preliminary investigation (inquiry)?	**Yes**	**No**
47	What was the reaction of the judge?		
	Did the judge take any actions to examine such allegations?	Yes, namely:	No
			No as there was no statement
48	What was the reaction of the public prosecutor?		
	Did the public prosecutor take any actions to examine such allegations?	Yes, namely	No
			No as there was no statement

EQUALITY OF ARMS

49	Was the public prosecutor present at the trial?	**Yes**						**No, as the public prosecutor doesn't participate**	
								No, although the public prosecutor doesn't participate	
50	Was the public prosecutor replaced during the trial?	**Yes**						**No**	
51	Describe the demeanor of the public prosecutor and his/her reaction to the courtroom events?								
52	Were any applications (statements) submitted in the case?	**Yes, namely:**						**No**	
		By the Defense			**By the Prosecution**				
	Please provide a short summary of these motions?								
	Were the applications granted?	**Yes**	**No**		**Yes**	**No**			
	Were the grounds on denial sufficient?		**Yes**	**No**		**Yes**	**No**		
53	What party of the trial was nearer to the judges at the court room: the defense counsel or the public prosecutor?	**Defense**			**Prosecution**			**Both Parties were in equal distance from the judge/s**	
54	Did any of the parties present evidence in the court room?	**Yes**						**No**	
		Defense			**Prosecution**				
55	Did the judge assist any of the parties in collecting evidences?	**Yes**						**No**	
		Defense			**Prosecution**				
56	Were all of the witnesses called?	For the Defense			**For the Prosecution**			**There was no witness**	
		Yes		**No**	**Yes**		**No**		
57	Did anyone of the participants of the case put moral or other pressure on the witnesses	**Yes, this was shown in:**						**No, there was no such pressure put**	

	during examination?			**No, witnesses were not examined**	
				No, there was no witness	
58	Did anyone of participants of the case put moral or other pressure on the victim during examination?	**Yes, this was shown in:**		**No, there was no such pressure put**	
				No, victims were not examined	
				No, there was no victim	
59	Who spoke first during the pleadings?	**Defense**	**Prosecution**	**There were no pleadings**	
60	Was anyone of the participants of the hearing restricted in his/her ability to speak in pleadings?	**Yes, this was shown in:**	**No**	**There were no pleadings**	
61	Did the prosecutor make proposals on how to apply the criminal law and as to the type of the punishment in respect to the defendant during the pleadings?	**Yes, namely:**	**No**	**There were no pleadings**	
62	Did the defense counsel make proposals on how to apply the criminal law and as to the type of the punishment in respect to the defendant during the pleadings?	**Yes, namely:**	**No**	**There were no pleadings**	
63	Were the participants of the hearing allowed to make final remarks?	**Yes**	**No**	**There were no pleadings**	
64	What party dominated during the hearing?	**Defense**	**Prosecution**	**none**	**There were no pleadings**

THE RIGHT TO DEFEND ONESELF IN PERSON OR THROUGH A COUNSEL

65	Did the judge determine whether a copy of the indictment or charge was handed over in time?	**Yes**		**No**
66	Was the defense counsel present?	**Yes**		**No**
		Assigned	**Invited by the defendant**	
67	Was the defense counsel replaced during the	**Yes**		**No**

	trial? If yes, how many times?		
68	Was the defense counsel provided with copies of or transcripts from the case materials?	**Yes**	**No**
69	Was table of the defense counsel located closely to the defendant?	**Yes**	**No**
70	Please describe the style of communication of the defense counsel with the defendant during the trial.		
71	In your opinion was the right to qualified, competent and effective defense counsel ensured?	**Yes, because**	**No, because**

THE RIGHT TO BE PRESENT AT TRIAL

72	Was the defendant present?	**Yes**	**No**	
73	Was the identity of the defendant established?	**Yes**	**No**	
74	Was the defendant explained his/her rights?	**Yes**	**No**	**Partially**
75	What are the essence and material provisions of the charges brought against the defendant (according to the public prosecutor or private accuser)?			
76	Did the judge determine the position of the defendant?	**Yes**	**No**	
77	Was attitude of the defendant towards a civil suit determined?	**Yes**	**No, as the civil suit is not brought**	

				No, although the civil suit is brought
78	Please provide brief summary of the testimony of all defendants.			
79	Were the pre-trial depositions read into evidence?	**Yes**		**No**
80	Do these depositions contradict testimony given during the hearing?	**Yes, namely:**	**No**	
81	Was the defendant allowed to make a final statement?	**Yes**		**No**
82	Did anyone interrupt the defendant when he/she was speaking his/her final statement? Did anyone ask him/her any questions?	**Yes**		**No**
		Who?		

THE RIGHT TO AN INTERPRETER AND TO TRANSLATION

83	Is translator/interpreter involved in the trial?	**Yes**		**No**
	Did the judge explain to the translator/interpreter his/her rights?	**Yes**	**No**	
	Was the translator/interpreter warned about the criminal responsibility for knowingly false translation?	**Yes**	**No**	
84	Was the right to challenge the translator/interpreter explained to the parties?	**Yes**		**No**
85	Was written translation of trial documents provided?	**Yes**		**No**
86	In your view, was the translation of good quality?	**Yes**		**No**

THE RIGHT TO A PUBLIC JUDGMENT AND THE RIGHT TO A REASONED JUDGMENT

KEEPING RECORDS OF THE TRIAL

87	Were the records of the hearing kept?	**Yes**	**No**
	Describe the procedure of keeping the records by the secretary of the court session?		
88	Were audio or video records made during the hearing?	**Yes**	**No**
89	Did the judge explain the right to familiarize themselves with the records of the hearing?	**Yes**	**No**
90	Were the participants of the trial allowed to familiarize themselves with the records of the hearing?	**Yes**	**No, because**

RENDERING AND ANNOUNCEMENT OF THE JUDGMENT (TO FILL IF NECESSARY)

91	What verdict was passed on the merits of the case?	**Accusatory, the punishment is:**	**"Not guilty"**		**Resolution on closure of the case**
			Did the judge explain to the acquitted person the right to reparation for unlawful acts of the authorities conducting the criminal proceedings?		
			Yes	**No**	
92	Was the verdict announced in full?	**Yes**		**No, the part was omitted.**	
93	Was the verdict read out clearly, distinctly and rhythmically?	**Yes**		**No**	
94	Was the verdict well reasoned from your point of view?	**Yes**		**No**	

95	Did the judge explain the procedure and terms of appeal of the verdict?	**Yes**	**No**
96	Did the judge explain the right to petition for a pardon?	**Yes**	**No**
97	Were any court resolutions passes during the case?	**Yes,** on the following matters**:**	**No**
98	When did the defense counsel and the defendant obtain a copy of the verdict?	**Yes**	**No**

PRE-TRIAL RIGHTS[262]

THE RIGHT TO LIBERTY

99	When was the defendant detained?		
100	Where and how long was he/she detained?		
101	Was he/she interrogated within one day of detention?	**Yes**	**No**

RIGHT OF PEOPLE IN CUSTODY TO INFORMATION

102	Were his/her rights explained on his/her detention?	**Yes**	**No**
103	Was the defendant informed of the reasons for detention in the language he understands?	**Yes**	**No**
	When?		
104	When were the charges brought?		
105	Was a translator/interpreter involved when necessary?	**Yes**	**No**

[262] Issues to be clarified when interviewing the defense counsel.

THE RIGHT TO LEGAL COUNSEL BEFORE TRIAL AND THE RIGHT TO ADEQUATE TIME AND FACILITIES TO PREPARE A DEFENCE

106	When was the attorney allowed on the case?		
107	Indicate the surname, given name and patronymic of the attorney		
108	Legal counsel on pre-trial stage	**Assigned**	**Invited by the defendant**
109	Did the criminal investigator recommend his/her attorney?	**Yes**	**No**
110	Did the defense counsel experience any difficulties in obtaining permission from the criminal investigator to meet his/her client?	**Yes, а именно:**	**No**
111	Did the accused have meeting with his/her defense counsel confidentially and alone without limitation in their time and number?	**Yes**	**No**
112	Was the defense counsel allowed an opportunity to read the case files?	**Yes**	**No**
113	Was the defense counsel provided with a copy of the case files or with any conditions to make transcripts from the case files?	**Yes**	**No**
114	Was he/she allowed adequate time to prepare a defense?	**Yes**	**No**

THE RIGHT TO HAVE ACCESS TO THE OUTSIDE WORLD

115	Were the detainee's relatives informed?	**Yes**		**No**
116	Was the right to make a phone call provided?	**Yes**		**No**
117	Did the defendant request any medical aid?	**Yes**		**No**
		Request is met	**Request is left without attention**	
118	In case the detainee is a foreign citizen was he provided with the right to contact his	**Yes**		**No, the detainee is the RK citizen**

	consulate?		**No, although the detainee is foregner**

THE RIGHT TO BE BROUGHT PROMPTLY BEFORE A JUDGE OR OTHER JUDICIAL OFFICER AND RIGHT TO CHALLENGE THE LAWFULNESS OF DETENTION

119	Was the accused interrogated by the public prosecutor when selecting the measure of the preventive punishment?	**Yes**	**No**
120	Did the accused or his defense counsel challenge the lawfulness of detention? If yes, then	**Yes**	**No**
	When, to who and what was the result?		

RIGHTS DURING INTERROGATION

121	Were the rights of the suspect/the accused explained to him/her before interrogation?	**Yes**	**No**
122	Did the accused exercise his/her right to refuse to testify?	**Yes**	**No**
123	Was the defense counsel present during all interrogations conducted?	**Yes**	**No, because**
124	Was a legal representative, a mentor, a psychologist present during interrogation of a minor?	**Yes**	**No**
			No, accused is an adult

THE RIGHT TO HUMANE CONDITIONS OF DETENTION AND FREEDOM FROM TORTURE

125	Were any complaints on use of torture or other cruel treatment submitted?	**Yes**			**No**
	Who filed these complaints?	Defense counsel	Suspect/the accused	Relatives	
	describe the nature of the complaints				
	What actions were taken by the public prosecutor take to examine such statement?				

ANNEX #3
UNOFFIICAL TRANSLATION OF THE COMPLAINT LETTER WRITTEN BY THE TRIAL MONITOR TO THE CHAIRMAN OF THE ALMATY CITY COURT

To: the Chairman of Almaty city court
Mr. M.Y.

Copy: Head of Human Dimension of
the OSCE Centre in Almaty
Mr. Bjorn Halvarsson

Copy: Coordinator of OSCE/ODIHR Trial
Monitoring Project
Ms. G. Kuanysheva

From: the monitor under
OSCE/ODIHR Trial Monitoring Project
city of Almaty

I am writing to let you know that I, the public monitor, performing my duties under OSCE/ODIHR Trial Monitoring Project, on 25 February 2005 in Almaty city court made an attempt to attend a public hearing in the criminal case of two defendants charged on murder attempt, creation and guidance of an organized criminal group, extortion and storage of weapons; of two defendants, charged on murder attempt, and of another defendant , charged on extortion.

The court session began at 10.20 am. The prosecutor made a motion to remove from the courtroom all persons not directly involved in the case since, according to him, the hearing, allegedly, had to be held in camera due to decision to forbid any filming or photographing at the hearing with the aim of providing security for the victim and witnesses which was passed by prising judge S. X..

The judge asked for the opinion of the parties regarding the presence in the courtroom of persons who were not involved in the case. Two defence counsels pointed out that hearing of the case was public and only filming and photographing was forbidden. The right to be present at a public court hearing is a constitutional right of all citizens of the Republic of Kazakhstan. The victims agreed with the opinion of the Prosecutor. Some defendants left the decision to the discretion of the court; two defendants did not object to the trial monitor staying in the courtroom. The prosecutor insisted on removal of all persons not parties to this case.

At the same time according to the Article 29 of the Criminal Procedural Code of the Republic of Kazakhstan “Criminal case hearings in all courts shall be public. There may be restrictions in openness of the court proceedings in cases when this contradicts the interests of state secrecy protection. Besides, a close court proceeding shall be permissible in response to a decision based on good cause by a court when relating to crimes committed by minors, matters relating to sexual crimes and other matters in order to prevent divulging of information on the intimate aspects of life of persons participating in the matter, and also in cases when this is required by the interests of maintaining the safety of the victim, a witness or other participants, as well as members of their families or close relatives…”.

I tried to explain that I was there working on the OSCE/ODIHR Trial Monitoring project, that I had nothing to do with the mass media and was not going to film or photograph at the hearing. In addition, I was aware that the hearing was a public one and I therefore had the right to attend. It is worth noticing that I didn't allow any misbehaviour including late arrival.

However, according to the decision taken by the court presided over by S. X. on 25.02.2005, I together with a defence counsel's trainee was removed from the courtroom #2.

Sincerely,
/signed/ OSCE/ODIHR trial monitor
02.03.2005

ANNEX #4
UNOFFIICAL TRANSLATION OF THE COMPLAINT LETTER WRITTEN BY THE TRIAL MONITOR TO THE CHAIRMAN OF THE TARAZ CITY COURT

To: the Chairman of Taraz city court #1
Mr. A.Y.

Copy: the Chairman
of Zhambyl oblast court
Mr. E.Y.

Copy: Head of Human Dimension of
the OSCE Centre in Almaty

Mr. Bjorn Halvarsson
Copy: Coordinator of OSCE/ODIHR Trial

Monitoring Project
Ms. G. Kuanysheva

From: the monitor under
OSCE/ODIHR Trial Monitoring Project
city of Taraz

I am writing to let you know that I, the public monitor, performing my duties under OSCE/ODIHR Trial Monitoring Project, have had very unpleasant experience.

On 23 May 2005 in Taraz city court #1 I made an attempt to attend a public hearing in the criminal case where the presiding judge was Mr. K.Y., which I failed to attend although I had information that the hearing was public. Questioning on who I was and why I needed to attend the hearing began as soon as I set foot in the court building. These questions were asked by one of the security guards who told that I could attend the trial only if the judge gives permission.

At the same time he earnestly and "with knowledge" of Republic of Kazakhstan legislation explained to me that I had no right to attend the session unless I had a subpoena. Such kind of behaviour of security guard arouses my deep grief and regret that our court is guarded by such a person who worked on 23 May this year. However after I strongly insisted her finally called the judge K.Y. to ask the permission to let me in. When talking to the judge I was flatly refused permission to attend the hearing. At the same time according to the Article 29 of the Criminal Procedural Code of the Republic of Kazakhstan "Criminal case hearings in all courts shall be public. There may be restrictions in openness of the court proceedings in cases when this contradicts the interests of state secrecy protection.

Besides, a closed court proceeding shall be permissible in response to a decision based on good cause by a court when relating to crimes committed by minors, matters relating to sexual crimes and other matters in order to prevent divulging of information on the intimate aspects of life of persons participating in the matter, and also in cases when this is required by the interests of maintaining the safety of the victim, a witness or other participants, as well as members of their

families or close relatives…". The judge K.Y. motivated the reason for the refusal by the fact that I was not a party to the case and he had no interest in the fact that the attendance at the public hearing was constitutional right of all citizens. Additionally, the judge demanded that I show my identity card as a proof of my status of OSCE/ODIHR trial monitor and didn't want to see my Kazakhstani ID.

Can I really need any additional documents and ids which prove my belonging to one or another group in order to use rights guaranteed by the RK Constitution? Isn't this discrimination (which is prohibited by the RK Constitution) if public hearing can be attended by certain people holding ids from OSCE, and other people being entitled for the same right to be present can't use this right because they can't present necessary documents asked by the judge K.Y. and security guard.

It is very hard to get in any hearing In Taraz city court #1 as security guards exceed their duties to provide for security of the court building by deciding to let me in or not. Also I would like to draw attention to secretaries' behaviour – they should come to the hall and declare what hearing is to start. However, if they see me or my colleague they gather participants of particular hearing in person so that we couldn't notice that the hearing is about to start.

Such kind of situation might have settled after oral instruction of judges in order to hamper our visits by all means. This state of affairs very much discredited all our judicial system and is subject to doubt of implementation of right to fair trial which is fundamental legal norm.

I think that this kind of situation in Taraz city court #1 should be improved in order not to give rise of distrust to all judicial system of RK among population.

Sincerely,
/signed/
OSCE/ODIHR trial monitor
21.06.2005

ANNEX #5

UNOFFIICAL TRANSLATION OF THE COMPLAINT LETTER WRITTEN BY THE TRIAL MONITOR TO THE CHAIRMAN OF THE SHYMKENT CITY COURT

To: the Chairman of Shymkent city court
Mr. A.Y.

Copy: Head of Human Dimension of
the OSCE Centre in Almaty
Mr. Bjorn Halvarsson

From: the monitors under
OSCE/ODIHR Trial Monitoring Project

city of Shymkent

Dear A.Y.!

We are writing to let you know that we, the public monitors, performing our duties under OSCE/ODIHR Trial Monitoring Project, were denied access to a public trial at 11.25 on 22 February 2005 by the judge S. X. She motivated her denial by the fact that monitors should have gotten her prior permission. At first, the judge expressed her stance in a rude and overbearing manner, and then she began asking the opinion of parties to the proceedings about the presence of the trial monitors. Defendants, defence counsel and public prosecutor agreed with the judge referring to the fact that the hearing would be conducted in the Kazakh language. At the same time according to the Article 29 of the Criminal Procedural Code of the Republic of Kazakhstan "Criminal case hearings in all courts shall be public. There may be restrictions in openness of the court proceedings in cases when this contradicts the interests of state secrecy protection.

Besides, a close court proceeding shall be permissible in response to a decision based on good cause by a court when relating to crimes committed by minors, matters relating to sexual crimes and other matters in order to prevent divulging of information on the intimate aspects of life of persons participating in the matter, and also in cases when this is required by the interests of maintaining the safety of the victim, a witness or other participants, as well as members of their families or close relatives…".

The trial monitors said that since the court session was a public they had the right to be present. However, the judge did not accept these arguments and insisted that the trial monitors leave the courtroom. It is worth noticing that we didn't allow any misbehaviour including late arrival.

Sincerely,
/signed/
OSCE/ODIHR trial monitors
22.02.2005