

**TRIAL MANUAL FOR JUDGES:  
FIRST INSTANCE CRIMINAL COURTS**

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In the case newly appointed first instance judges find the manual of use in their daily work adjudicating criminal court cases, the Office stands ready to support the preparation of additional publications on similar topics in the future. The authors would like to thank in advance those who will kindly submit their comments as to how to improve the manual and/or have suggestions regarding similar publications to support the work of judges and other legal professionals in Azerbaijan.

## **Abbreviations**

CPC – Criminal Procedure Code of the Republic of Azerbaijan

CC - Criminal Code of the Republic of Azerbaijan

JLC - The Judicial-Legal Council of the Republic of Azerbaijan

CJE – Code of Judicial Ethics of the Republic of Azerbaijan, as approved by Order dated 22 June 2007, of the Judicial-Legal Council of the Republic of Azerbaijan

ECHR – European Convention for the Protection of Human Rights and Fundamental Freedoms

ECtHR – European Court of Human Rights

## **Introductory remarks: purpose, scope and methodology**

Since 2003, the Office continues to implement a Trial Monitoring Programme across the Republic of Azerbaijan to monitor Azerbaijan's compliance with its OSCE rule of law commitments, in particular the compliance of court proceedings' with the substantive and procedural requirements of domestic legislation and international legal obligations. Thus, through the Trial Monitoring Programme, the Office has identified some of the key systemic needs for improving Azerbaijan's justice sector's compliance.<sup>1</sup>

The Trial Monitoring programme's findings reflect that shortcomings often relate to simple procedural mistakes. Large caseloads, time constraints and a shortage of qualified defence lawyers remain some of the challenges that judges face when adjudicating court cases. Given that ensuring compliance with accused's rights is, ultimately the responsibility of the judge(s) adjudicating the case in question, the Office, in consultation with the Ministry of Justice, developed this manual for the benefit of Azerbaijan's *newly appointed* (emphasis added) judges involved in first instance criminal court proceedings.

Thus, the purpose of this publication is to provide practical guidance to assist judges when adjudicating first instance criminal cases, particularly judges who have not yet become familiar with or gained experience from the daily practice before the courts. The manual is based on applicable Azerbaijani legislation and includes references to domestic as well as ECtHR's case law in line with the requirements in the ECHR.

In this context, an important aspect of judges' responsibility is to ensure that all parties involved in the case clearly understand and follow the proceedings before the court. In particular, when the accused waives his right to defence lawyer, it is advisable that judges are less formal and legalistic given that accused persons are presumably not familiar with the legal terminology and the requirements for conducting court proceedings in accordance with domestic legislation.

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<sup>1</sup> See the latest 2010 Trial Monitoring Report at <http://www.osce.org/baku>.

The manual also includes detailed suggestions as to the precise wording that Azerbaijan's judges may use in the courtrooms in line with the provision(s) of domestic laws and particular the CPC and CC. The authors have also added practical advice on how to address specific procedural issues that may arise during court proceedings.<sup>2</sup>

Provided the judges consider this manual useful in their daily work, the Office stands ready to continue supporting the preparation of similar publications related to other courts' instances and/or jurisdictions<sup>3</sup> as well as specific aspects of the courts' work.<sup>4</sup>

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<sup>2</sup> The text in boxes includes the authors' specific suggestions on what judges might actually say in court in line with the applicable domestic legislation.

<sup>3</sup> Civil/Economic-Administrative.

<sup>4</sup> Production and presentation of evidence, drafting and pronouncing judgments etc.

## **1. The duties of judges under the Code of Judicial Ethics (CJE) of the Republic of Azerbaijan**

The CJE is a compilation of the ethical norms and standards governing the conduct of judges. The Code outlines judges' professional duties and obligations while adjudicating court proceedings as well as their responsibilities when they fail to comply with those duties.

Chapter I of the Code, quoted below, regulates judges' main duties while adjudicating court cases. In accordance with Chapter IV of the Code, the Judicial Legal Council (JLC) is the national institution in charge of establishing and upholding the judicial standards that govern the work of judges as well as ensuring that judges' performance is up to the required high quality standards. Thus, the JLC is primarily responsible for ensuring fairness and transparency in judges' selection and performance assessment processes as well as for increasing the skills and professionalism of judges and administering effective disciplinary proceedings that guarantee full accountability.<sup>5</sup>

### ***CJE***

#### ***Chapter I. General provisions.***

***Article 1.*** *During their tenure, a judge shall remain faithful to the judicial oath that reflects his/her responsibility before the state, the citizen and the due process, and demonstrate conduct appropriate to the said oath in the performance of their duties as well as other judicial functions.*

***Article 2.*** *In all instances a judge shall observe the Constitution of the Republic of Azerbaijan, comply with the Law of the Republic of Azerbaijan «Courts and judges» and other normative legal acts, promulgate public confidence in judicial power, as well as exercise judicial independence and impartiality.*

***Article 3.*** *The first and foremost important characteristic of the judiciary is in the exercise of its impartiality during judicial proceedings.*

***Article 4.*** *A judge shall perform his/her duties with dignity and remain fair, impartial and incorruptible in the discharge of their judicial functions.*

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<sup>5</sup> See "Bangalore Principles of Judicial Conduct" (2002), according to which, judges are bound by the highest standards of conduct, including judicial independence, which is a pre-requisite to the rule of law and a fundamental guarantee of a fair trial.

*Article 5. A judge shall always uphold honour and dignity and refrain from engaging in activities, which can likely interfere with or affect the reputation of the judicial power and the name of the judge or cast doubt on judge's independence and objectivity during the course of judicial proceedings.*

## **2. Parties to first instance criminal court proceedings**

### **2.1. The prosecution**

#### **2.1.1. State prosecutor**

##### **Rights and duties during court proceedings: CPC, article 84**

The prosecutor in criminal proceedings relies on the results of the investigation and all evidence collected to substantiate the charges against the accused according to the required standard of proof, namely in order to determine that the accused is guilty beyond reasonable doubt.

If other parties and/or participants to the criminal proceedings raise an objection against the prosecutor, articles 322.1.14 and 322.1.15 of the CPC apply. Articles 112 and 109 of the CPC set out the reasons for the objection.

The prosecutor may withdraw all or some of the charges against the accused if during the course of the court proceedings he/she found that the evidence available did not substantiate those charges according to the standards of proof.

#### **2.1. 2. The victim**

**General reference, rights and questioning of victims: CPC, articles 87 and 330.**

**For victims bringing a private accusation: CPC, article 88.**

**For victims becoming civil parties: CPC, article 89.**

The victim, person bringing a private accusation or civil party in a criminal case, also has the status of a witness and must therefore take the witness' oath before giving any form of testimony either in oral, or in written form.

The judge/court is responsible for informing the victim about criminal responsibility for giving false testimony under the CC, article 297.

### **2.1.3. Private accusation**

**General reference: CPC, article 88.**

This is when a person alleges that he/she suffered pecuniary or non-pecuniary damages because of the alleged crime. The private accusation has the status of a victim and therefore he/she is required to take the witness oath before giving testimony in court proceedings.

### **2.1.4. Civil claimant**

**General reference, rights and duties: CPC, Article 89.**

**In many cases, a civil claimant is at the same time a victim and the judge/s may question him/her as a witness: CPC, Article 89.6.**

## **2.2. The defendant**

### **2.2.1. The accused**

**General reference: CPC, article 91.**

**Questioning the accused during trial proceedings: CPC, article 326.**

The judge informs the accused about the charges the prosecution brought against him/her and his/her fundamental rights in court. Accused persons may actively participate in court proceedings and give testimony on a voluntary basis. If the accused refuses to give testimony, the judge/court shall not interpret such refusal to the detriment of the accused under CPC, article 324.3.6. Besides, the accused is entitled not to testify against himself/herself or against his/her close relatives.

The judge/court shall also bear in mind that during trial proceedings the accused is not bound by his/her pre-trial testimony under CPC, article 324.3.4.

### **2.2.2. Defence counsel**

**General reference, rights and obligations: CPC, article 92.**

The accused has the right to contract privately a defence counsel(s) of his/her choice. If the accused cannot afford to pay a defence counsel, the judge/court is required to appoint a State funded defence counsel. The judge/court shall ensure the presence of defence counsel in the circumstances outlined in article 92 of the CPC.

The defence counsel shall refrain from any action to the detriment of the accused and has an obligation to participate in all court's hearings under article 312.1 of the CPC.

### **2.2.3. Civil defendant**

#### **General reference, rights and duties: CPC, Article 93**

Victims may also initiate a civil lawsuit during criminal proceedings under Article 182.3 of the CPC, either against the accused, or against whoever bears financial responsibility for the actions of the accused person.

## **3. Other participants at criminal court proceedings**

### **3.1. The witness (es)**

**General reference and rights: CPC, article 94.**

**Circumstantial witnesses: CPC, article 95.**

**Questioning of witnesses: CPC, article 328.**

The judge/court ensures that the parties and participants to the court proceedings question witnesses separately in the absence of other witnesses under CPC, article 328.1.

Prior to giving testimony, the judge/court asks witness to take the oath and warns them about criminal responsibility for giving false testimony under CPC, article 328. par. 2 and 9 as well as CC, article 297.

If the judge/court calls a circumstantial witness to participate in criminal proceedings, the judge/court follows CPC, article 115. 1, regulating the legitimate reasons for the exclusion of a circumstantial witness, which are similar to the ones regarding the exclusion of a judge from the case due to conflict of interest as well as contamination in connection with the judge's involvement in related investigations and/or court cases, *inter alia*.

#### **The witness oath, CPC, article 328. 4:**

“I swear to tell the court the truth and all the circumstances known to me in connection with the criminal prosecution.”

### **3. 2. The specialist(s)**

#### **General reference: CPC, article 96.**

The specialist(s) provide additional expertise to assist the prosecution. They do not need to take the oath formally, but confirm the accuracy and completeness of the assistance they provide by signing their written opinions in line with CPC, article 96. 4.8.

Prior to the specialist(s) submitting their expertise to the court, it is advisable that the judge/court explains in court the rules regarding impartiality and possible conflict of interest, inquiring if any of the parties has objections in this regard as well as to the specialist(s)' qualifications and ability to provide the required expertise.

In case any of the parties raises objections as to the impartiality and/or the qualifications of the specialist(s), CPC, article 107, provides guidance as to how to proceed in order to replace the specialist(s).

### **3. 3. The expert(s)**

#### **General reference: CPC, article 97.**

The expert(s) does not take the oath formally. They however confirm the accuracy and completeness of their expertise by signing their written opinions, under CPC, article 97. 4.1 and 97.5.

Prior to the expert(s) submitting their opinion to the court, it is advisable that the judge/court explains in court the rules regarding impartiality and possible conflict of interest. The judge therefore inquires if any of the parties have objections in that regard. In addition, under Article 297 of the CC, the judge/court warns the expert(s) about his/her criminal responsibility for knowingly providing false information.

In case any of the parties raises objections on the impartiality and/or the qualifications of an expert(s), CPC, article 107, provides guidance as to how to proceed in order to replace the expert(s).

### **3. 4. The court clerk**

**General reference: CPC, article 98.**

The court clerk is in charge of keeping the record of the court hearings, and is responsible for the accuracy and completeness of such a record.

The judge/court introduces the court clerk to the parties and explains to them their right to challenge the impartiality or qualifications of the court clerk under CPC, article 322.1.7. In cases where a party raises objections in this regard, CPC, Article 107, provides guidance on how to proceed in order to replace the court clerk.

The court clerk does not take the oath formally. However, it is an absolute requirement under the CPC that the court clerk does not have any personal interest in the case. Therefore, if the judge/court or any of the parties to the court proceedings request it, the court clerk must confirm his impartiality and absence of personal interests in the case at stake.

The judge/court shall ensure that the court clerk takes accurate records of the court proceedings in accordance with the requirements in the CPC.

### **3. 5. The interpreter**

**General reference: CPC, article 99.**

Prior to offering his/her services, the interpreter provides documentation confirming his/her fluent and sufficient knowledge of the relevant foreign language.

The judge/court ensures the interpreter's impartiality, absence of personal interests in the proceedings as well as qualifications, warning the interpreter about criminal responsibility for knowingly providing wrong interpretation under CC, article 297.

In case any of the parties to the court proceedings raises objections as to the impartiality and/or the qualifications of the interpreter under CPC, article 117, CPC, article 107, provides guidance as to how to proceed in order to replace the interpreter.

### **3. 6. Legal representatives and representatives**

#### **General reference: CPC, articles 101 through 105.**

If a victim, civil claimant, suspect, accused or defendant to a civil claim, lack full legal capacity to appear in court and do not have parents, adoptive parents or a guardian, the prosecution authority shall appoint the guardian person/institution as legal representative of that person.

The legal representative has the same legal status as a witness. The judge/court may question him/her in that capacity after the representative takes the witness' oath, which is required prior to testifying or otherwise addressing the court under CPC, article 328.4. The judge/court also warns him/her about criminal responsibility for giving false testimony before the questioning begins.

Moreover, victims, civil claimants and civil defendants can have a representative to defend his/her rights during criminal proceedings. A representative acts based on the power of attorney authenticated by a notary (CPC, Article 102).

## **4. Criminal proceedings before first instance courts**

### **4.1. Case Presentation**

Under article 12 of Azerbaijan's Constitution, OSCE commitments and related international fair trial standards, the overriding responsibility of the courts and members of the judiciary is to ensure that all persons charged with a criminal offence have the right to a fair trial by an independent and impartial tribunal.

According to CPC, article 2.3:

“If there are rules in the international agreements to which Azerbaijan is signatory that are different from those in this Code, the rules of the international agreements shall be applied.”

Thus, in order to ensure the primacy of Azerbaijan's international obligations and comply with international standards while adjudicating cases, judges are required to apply at their discretion the CPC in an independent and impartial manner under the guidance provided by

those standards, including in particular the ECHR given Azerbaijan's membership of the Council of Europe.

***Preliminary proceedings: opening the examination of the court case. CPC, Chapter XLII***

The presiding judge opens the examination of the case and follows the sequence outlined in article 322.1 of the CPC.

Regarding the publicity of court proceedings, as a general rule, the judges hold in public all proceedings, other than the court's deliberations, unless otherwise provided. The court may order that the press and the public be excluded from all or part of the proceedings for reasons of public order, for the protection of the privacy of the accused and/or his family as well as for the safety of victims or witnesses. The judge/court is required to explain the reasons for restricting the publicity of the proceedings.<sup>6</sup>

The court clerk, at the request of the presiding judge, informs the court about the parties present and other participants such as witnesses and victims and explains the reasons for their absence under CPC, article 322.1.2.

If the accused is not present, the judge/court may still examine the case in the exceptional circumstances mentioned in article 311.2 of the CPC. These circumstances include the accused's absence from Azerbaijan, his/her deliberate failure to attend the court hearings and when the accused of a minor crime that does not pose a serious public threat requests that the court examine the case in his/her absence. The judge/court must however ensure in the latter case that the absence of the accused does not jeopardize the best interests of justice, particularly regarding the presentation and examination of all relevant evidence.

The witness (es), other than the ones with the status of victim (s), leaves the courtroom at this time. The presiding judge instructs the court clerk to bring them to the witnesses' room in line with CPC, article 322.1.3.

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<sup>6</sup> See article 27 and Chapter VI of the CPC for additional information.

- “My name is [...]. I am a First Instance court judge and will be conducting this court hearing. I am not aware of any reasons why I should recuse myself. If any of the participants have objections (refer to article 109 of the CPC as to possible grounds and the recusal procedure), you can raise them now. In the affirmative, the parties submit their objections in written form. (See CPC, articles 322.1.8 and 109 on how to proceed).
- The judge asks the accused to stand up and state his full name, father’s name, place of birth and family status for the court record. (CPC, article 322.1.9.)
- The judge asks whether the accused has been provided with a copy of the indictment in the case against him/her and otherwise postpones the examination of the case as well as in the case the identity of the accused is not established under CPC, article 322.1.10.”

The judge is advised not to inquire about previous convictions at this stage given that the prosecution will document that later during the closing arguments.

- The judge to the accused: “Later during the trial court proceedings you will have an opportunity to address the court and give your own statement if you wish.”
- The judge: I will go now through a procedure to explain the rights and duties of other interested parties connected to this case. Subsequently, I will explain to the accused his/her rights and duties. If you have any questions I will address them after all introductions are completed.”

The victim(s) is at the same time a material witness in the case. Thus, they may only testify later on during the court case after having taken the witness oath in line with CPC, articles 328 and 330.

- “The prosecution is represented by [Insert name of State Prosecutor] (See CPC, article 322.1.14 and list the grounds for possible objections).
- Are there any objections to the State prosecutor? (See CPC, articles 107, 112, 322.1.15, for the requirements and how to proceed if the parties raise objections)
- The defence counsel for the accused is [Insert name of defence lawyer] (See CPC, article 322.1.16, listing the reasons for possible objections).
- Are there any objections to the defence counsel?” (See CPC, articles 107, 114, 322.1.18, for the requirements and how to proceed if the parties raise objections).

The judge may require the accused to be confined in the metal cage only for duly justified security reasons if the accused poses a threat to the parties, other participants to the court proceedings and the public, and after having heard the prosecutor' and the defence counsel's arguments on the issue of security concerns.

The judge explains to the accused his/her rights and duties under articles 91 and 322.1.11 of the CPC. Of those rights, the judge is responsible for ensuring the accused's right to effective legal representation. Thus, the judge informs the accused about the extent of his/her right to defence counsel, including a State appointed lawyer as well as the possibility of signing a written and informed waiver of his/her right to legal representation. Given the importance of ensuring this particular right and the fact that failure to ensure compliance may constitute a sound ground for overturning the first instance court decision on appeal, the judge is required to suspend the preliminary court hearing in all cases when the accused does not have a defence lawyer, provided he/she did not waive this right voluntarily in writing. .

The jurisprudence of Azerbaijan's domestic courts also highlights the importance of ensuring compliance with the accused's right to effective legal representation.<sup>7</sup> In a recent landmark decision, the Baku Appeal court overturned the judgement by the first instance court and ruled that under article 91.5.5 of the CPC, the judge should have either confirmed whether the lawyer chosen by the accused was indeed available to defend him, or appoint another lawyer funded by the State budget under the legal aid system.

If there are legal representatives in civil claims by victims, defendants and others:

The judge: "Are there any objections to the legal representatives?" (See CPC, article 114, for the grounds and 322.1.20 and 107, on how to proceed if the parties raise any objections).

If there are specialists and/or experts assigned to the case, the judge introduces them to the parties to the case and other participants and explains to the latter their right to object under CPC, articles 117 and 118. The judge also explains the rights and duties of the specialists and/or experts in accordance with CPC, articles 96 and 97, respectively. The judge warns them about the criminal responsibility for knowingly disclosing false information under article 297 of the CC.

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<sup>7</sup> See Baku Appeal Court Decision dated 11 February 2011, on the complaint brought by Abbasov Husamaddin Asif regarding the right to effective legal representation.

The judge: “Do the parties and/or other participants have any objections to the specialists and/or experts?” (See CPC, articles 322.1.23 and 107 on how to proceed if the parties raise any objections).

The judge: “Does anyone have any further applications to introduce new evidence before we start the actual examination of the case?” (See CPC articles 323.1.1. through 323.1.4).

If any of the parties files an application for introducing additional evidence, the judge proceeds in accordance with CPC articles 323.3 through 323. 6. Moreover, if the judge deems it necessary in order to establish the facts of the case, the court can order the production of additional evidence by calling its own witnesses, submitting experts’ reports, etc., in line with CPC, articles 146 and 323.7.

#### **4.2. Rules of evidence**

##### **Opening statements and examination of evidence. CPC chapter XLIII**

The judge follows CPC, article 324:

- “The court will now start the examination of the evidence.
- Could the prosecutor please read out the concluding part of the indictment?
- To the accused: The court has charged you with the following crimes [...]
- Your previous statement does not bind you at this stage of the court proceedings. You have the right to make your own statement here in court but no obligation to do so. If you decide not to make a statement, that will not be used against you. If you want to answer questions and make statements, you have the right to justify your answers.
- You might make your own statement after the initial opening by the prosecutor.
- You also have the right to challenge all the evidence brought against you.
- Now you have to enter a plea, guilty or not guilty.”

If there is more than one charge in the indictment, the accused shall enter a plea regarding each charge.

The judge subsequently explains to the parties and other participants in which sequence the court will examine the evidence under article 325 of the CPC. Chapter XLIII of the CPC further outlines the details of the procedure to examine evidence.

- “The court now gives the floor to the State prosecutor to present his/her views regarding the sequence of presentation and examination of the evidence.
- Does the defence counsel agrees, or has different views as to the evidence submitted by the Prosecution?”

The judge decides on the sequence for the presentation and examination of evidence. The judge also explains to the parties and other participants to the court case article 325.2 of the CPC, outlining the sequence of examination of evidence depending on which party presents the evidence.

### **Questioning of the accused under article 326 of the CPC**

If there are several charges in the indictment, it is advisable to ask the accused specific questions in connection with each charge.

The judge to the accused:

- “We have now come to the questioning of the accused.
- Do you want to make your own statement and answer questions?”

If the accused wants to give testimony and answer questions, the State prosecutor will question the accused first. Subsequently, with the permission of the presiding judge, the victim and civil party, the latter if there is one, may also question the accused, followed by the defence counsel. If there are other accused and civil defendant(s), upon consent by the judge, they as well as their defence counsel and/or legal representatives may question the accused. Finally, the judge questions the accused and the accused’s defence counsel has the right under article 326 of the CPC to ask the last question to his/her client.

After the accused gives testimony, the parties to the case disclose the evidence in their possession and the judge the one contained in the judicial files. The parties may raise motions contesting the inclusion of evidence in the case file.

## Questioning of witnesses and victims under articles 328 and 330 of the CPC, respectively

- “We will now start the examination of the victim(s) and witness(es)
- We will begin with the witness. Please state your full name. You have the right to refuse to testify against yourself. Are you related to the accused? (If yes, the witness has the right to refuse to testify against his/her close relatives, mentioned in article 7.0.32 of the CPC).
- It is your duty to disclose truthfully all the circumstances in the case that you may know of.
- You have a duty under the law to testify. To give knowingly false testimony under solemn declaration is a crime and may lead to criminal responsibilities in accordance with CC, article 297.”

The witness(es) signs a form acknowledging that the presiding judge has informed them about the requirements for testifying, including the warning against giving false testimony.

The judge and the parties question the witnesses separately and in the absence of other witnesses yet to testify, following the order in CPC, article 328.6. However, after a witness has given his/her testimony, he/she may stay in the courtroom and follow the proceedings. The party who called that particular witness shall question the witness first. However, the State prosecutor questions the victims first, then the defence lawyer and the judge/court.

Even though the victim also has legal status as a witness, the victim has the right to be present in the courtroom during the whole trial. The judge must ensure that the victim does not say anything related to the case unless he/she has sworn has taken the witness oath and signed the form.

### **Witnesses’ solemn declaration (oath), CPC, article 328. 4:**

“I swear to tell the court the truth and all the circumstances known to me in connection with the criminal prosecution.”

If the parties to the proceedings have more evidence to present, the judge follows CPC, articles 331 through 336, regarding expert opinions, questioning of experts, material evidence and the examination of the location where the alleged crime was committed, *inter alia*. The judge concludes then the presentation of evidence inquiring whether the parties want to present additional evidence under article 338 of the CPC.

- “We have now concluded the examination of evidence and we will move on to the oral submissions.
- The court will only take into account the evidence presented during the court examination.
- Does anyone want to make an application for the examination of additional evidence?”

If any of the parties wants to present additional evidence, the court must decide on the relevance of the proposed evidence in a fair and unbiased matter and considering the best interests of justice. If the court refuses the application, the judge/court must provide a clear reason for the decision.

### **Closing submissions under CPC, articles 339 through 343**

The judge hears the oral submissions in the following order under CPC, article 340.1:

- "I give the floor to the prosecutor for his/her oral submission."
- "I give the floor to the witness. (or his/her representative) for his/her oral submission"
- "I give the floor to the civil party (or his/her representative) for his/her oral submission"
- "I give the floor to the accused. Before defence counsel (only if he/she does not have a lawyer) for his/her oral submission"
- "I give the floor to the defence counsel for his/her oral submission."

After the presentation of the initial closing arguments, all parties have a right to reply.

- "Does the prosecutor want to reply?"
- "Does the victim (or his representative) want to reply?"
- "Does the civil party (or his representative) want to reply?"
- "Do the accused (only if he/she does not have a lawyer) want to reply?"
- "Does the defence counsel want to reply?"

In accordance with article 342 of the CPC, after the closing arguments, the judge must allow the accused to make a final statement on a voluntary basis.

- "Does the accused wish to make a final statement?" (CPC, article 342).
- "The examination of the case is now completed and the court will deliberate in private."

### **Deliberations and issuance of the judgement under Chapter XLV of the CPC, articles 344 through 358**

It is not a requirement under the CPC, but it is advisable that the court, prior to deliberating in private, gives the parties an exact date when the judgment will be completed and ready to be announced.

Judgements must be reasoned and thus reflect that the conclusion reached by the court is based on the evidence presented during the court case and outline the reasons why other evidence was not considered under articles 349.3 and 5 and 353.2.2. of the CPC.<sup>8</sup>

## **5. Proceedings related to the use of detention as a restrictive measure**

Chapter XVII of the CPC regulates the types and grounds for applying restrictive measures. Articles 154.2.4 through 154.2.10 of the CPC outline the type of restrictive measures that the court may consider, including arrest. The following relates to the court proceedings the judge is required to follow under the CPC in order to decide on applications to apply arrest as a restrictive measure prior to the commencement of the trial proceedings.

- “The prosecution is represented by [Insert name of State Prosecutor] (see CPC, article 322.1.14 on what information to include about the prosecution)
- Are there any objections to the prosecutor? (See CPC, article 112 for the requirements and article 322.1.15 on how to proceed if objections are raised)
- The defence counsel for the accused is [Insert name of defence lawyer] (See CPC, article 322.1.16 on what information to include about the defence lawyer).
- Are there any objections to the defence counsel?” (See CPC, article 114 for the requirements and article 322.1.18 on how to proceed if the parties raise objections).
- “Will the prosecutor please read out the charges against the accused?”
- (To the accused): “The court will not decide on the question of guilt today. The court will decide on whether the prosecutor proved your guilt during the main hearing on the merits if the prosecutor upholds the charges against you and the case goes to trial.”
- “During today’s hearing, the court will only assess if there are sufficient grounds to grant the prosecutors’ application on arrest as a restrictive measure against you pending the beginning of trial proceedings
- You are not bound by your previous statement. You have the right to make your own statement here in court, but no obligation to do so.
- If you want to answer questions and give statements you have the right to justify your answers.”

It is important that the judge do not imply in any way and/or express his/her opinion as to the guilt of the accused. If he/she does, this may constitute grounds for the accused to challenge the judge’s impartiality.

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<sup>8</sup> The ECHR requires that judgements are reasoned as a precondition for ensuring fair trials. Thus, if courts disregard evidence that is relevant to determine the accused’s criminal responsibility according to the required level of proof, this is inconsistent with fair trial standards.

- “I give the floor to the prosecutor to present his/her arguments and to ask questions to the accused.
- I give the floor to the defense to present his/her arguments and to ask questions from the accused”

The judge inquires with the prosecutor if he/she has considered alternative restrictive measures to arrest, and if not, ask him/her to reason the decision.

- “I give the floor to the prosecutor to present his/her arguments for the use of arrest as a restrictive measure”
- I give the floor to the defense to reply to such arguments.”

- “Does the prosecutor want to reply?
- Does the defence counsel want to counter - reply?”

- “Does the accused want to address the court for a final statement?”
- “The hearing is now completed and the court will deliberate in private”.

The judge may only consider arrest as a restrictive measure when the suspect becomes accused upon having been charged with a crime under CPC, article 154.3.

- “My name is [...]. I am a First Instance court judge [...]. I am conducting this hearing. I do not know of any reasons why I should recuse myself. If any of the participants have any objections (the judge must explain article 109 of the CPC), you can object now. Are there any objections?” (The parties present objections in written form under Articles 322.1.8 and 107 of the CPC). In case the parties raise objections, the judge suspends the court hearing to consider the matter.
- If no objections are raised: the judge asks the accused to stand up and state his/her full name, father’s name, place of birth and family status for the court record. (CPC, article 322.1.9)
- “Have you been provided with a copy of the indictment and informed of the charges against you?” See CPC, article 322.1.10 on how to proceed if the accused claims that he/she does not know the charge(s).

The judge reaches its decision shortly upon completion of the court hearing. Before adjourning, the judge informs the parties at what time during the same day he/she will announce the court’s decision. The judge reasons the decision in line with CPC, article 156.2.

When deliberating, the judge bears in mind the following regarding the grounds for applying arrest as a restrictive measure under CPC, article 155 par. 1 through 5.<sup>9</sup>

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<sup>9</sup> This article is in line with Article 5 of the ECHR.

In accordance with article 154 of the CPC, judges may apply alternative preventive measures, including house arrest and release on bail. Arrest can only be used against an accused person as a restrictive measure if the evidence and all case materials submitted by the parties as well as the accused's oral arguments, gives sufficient grounds to prove that the accused:

- may hide from the prosecuting authority;
- may interfere with the pre-trial investigation or trial proceedings by illegally influencing the parties or by interfering with evidence;
- may re-offend or otherwise pose a danger to the public;
- may escape and thus fail to appear before the court and/or prosecuting authority without good reason or otherwise evade criminal responsibility and punishment;
- may hinder the execution of a court judgment.

In its decision dated 3 November 2009,<sup>10</sup> the Plenum of the Supreme Court of the Republic of Azerbaijan further emphasized the responsibilities of lower instances' courts when deliberating on applications to apply arrest as a restrictive measure against an accused.

See below some relevant extracts from the Plenum of the Supreme Court decision:

**Page 2, par. 3:**

*[...] "In accordance with the applicable legislation, there shall be both material and procedural legal grounds to order the restrictive measure of arrest in respect to the accused person.*

*When ordering the restrictive measure of arrest, the courts shall not confine themselves to formally mentioning the procedural grounds specified in Article 155 of the CPC, they shall specifically examine and confirm each ground in respect to the accused and whether the evidential materials in the criminal case support them." [...]*

**Page 2, par. 4:**

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<sup>10</sup> Decision "On the practice of application of the legislation regarding the court decisions upon submissions in respect to the remand in custody of accused persons."

*[...] “The courts shall primarily examine the possibilities of ordering other restrictive measures as specified by Article 154 of the CPC, and when the submission is granted they shall justify why it is not possible to apply another restrictive measure but arrest.” [...]*

**Page 3, par. 5:**

*[...]“Unless the accused is charged with a crime that poses a serious public threat, the courts shall only grant a submission and order the use of the restrictive measure of arrest if one of the following circumstances are present in the case:*

- the accused does not have a permanent place of residence in the territory of the Republic of Azerbaijan;*
- his/her identity cannot be established;*
- he/she has violated the terms of another restrictive measure previously ordered against him/her;*
- he/she illegally exerts influence on the other persons involved in the criminal procedure;*
- he/she hides or falsifies the materials that are important for the criminal prosecution;*
- he/she obstructs the normal course of the investigation or court hearing;*
- he/she hides from the preliminary investigation;*
- and he/she commits a new crime.” [...]*

The judge announces its decision to the accused in the courtroom with both the prosecutor and the defence counsel present.

Under CPC, article 453, if the accused or the prosecutor appeals the decision, the first instance court must immediately forward the decision and all supporting documents to the relevant Appeal court. The Appeal court must hold a hearing to verify the legality and grounds of the first court decision within three days.

**Annexes:**

1. *Code of Judicial Ethics*;
2. *European Convention for the Protection of Human Rights and Fundamental Freedoms*, articles 1 through 18;

3. *Plenum of the Azerbaijani Supreme Court's Decision dated 03 November 2009, on the practice of application of the legislation regarding the court decisions upon submissions in respect to the remand in custody of the accused persons.*