



INTERNATIONAL
COMMISSION
OF JURISTS

**REPORT OF THE APPEAL HEARING OF THE CASE OF
EVGENIY ZHOVTIS**

on 20 October 2009

BY THE INTERNATIONAL COMMISSION OF JURISTS'

OBSERVATION MISSION

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The International Commission of Jurists

The International Commission of Jurists (ICJ) is a non-governmental organisation working to advance understanding and respect for the Rule of Law as well as the legal protection of human rights throughout the world. It was set up in 1952 and has its headquarters in Geneva, Switzerland. It is made up of 60 eminent jurists representing different justice systems throughout the world and has 90 national sections and affiliated justice organisations. The International Commission of Jurists has consultative status at the United Nations Economic and Social Council, the United Nations Organisation for Education, Science and Culture (UNESCO), the Council of Europe and the African Union. The organisation also cooperates with various bodies of the Organisation of American States and the Inter-Parliamentary Union. The ICJ regularly intervenes before national and international courts including the European Court of Human Rights.

The Report

The ICJ decided to send a Mission of Observers to observe the appeal trial hearing of Evgeniy Zhovtis, a lawyer and one of Kazakhstan's leading human rights defenders, having received reports that his initial trial had failed to meet international fair trial standards. Mr. Zhovtis was convicted for unintentional manslaughter following a car accident in July 2009. The present Report gives an account of the process, in which Evgeniy Zhovtis himself was not allowed to participate. It describes the conduct of the trial and makes legal assessment of certain particularly problematic issues. The report does not aim to replace the court minutes, which were not kept in this case, but rather gives an overall assessment of the hearing as well as some events taking place outside the courtroom. The legal analysis is based on internationally recognised standards relating to fair trial guarantees, including the jurisprudence of major human rights bodies. The observers would like to express their gratitude to all the parties to the proceedings who facilitated the observation process.

1. Background Information

Legislative and International Law Developments

The Republic of Kazakhstan (RK) emerged as an independent state following the collapse of the Soviet Union at the end of 1991. The judicial system it inherited has been subject to various reforms throughout the last 20 years. In 1995, the RK adopted its new Constitution – which was subsequently amended in May 2007 – enshrining for the first time the principles of a democratic state with the rule of law and primacy of international law over domestic law (Article 4 of the Constitution).

The Criminal Procedure Code of the RK (CPC RK) is a relatively recent development. Adopted on 13 December 1997, the CPC RK has been amended and supplemented during the following 10 years, in order to ensure its conformity with international standards. Those amendments aimed at strengthening the adversarial nature of the proceedings, and include, among other reforms, the introduction of the jury trial and compulsory authorisation of arrests by the courts. In November 2005, Kazakhstan ratified the International Covenant on Civil and Political Rights (ICCPR) undertaking immediately to “respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the <...> Covenant”¹ and to adopt laws and take other measures necessary to give effect to the rights of the Covenant.”² In 2008 Kazakhstan ratified the First Optional Protocol to the ICCPR, whereby it recognised the competence of the Human Rights Committee to receive and consider communications from individuals.³

In December 2007, following a decision of the Council of Ministers of the Organisation on Security and Cooperation in Europe (OSCE), Kazakhstan became the first ex-Soviet state to assume the OSCE chairmanship for a term of one year beginning on 1 January 2010. This decision of the OSCE Council of Ministers, in particular, required the Government of RK to take additional measures in the run-up to the OSCE chairmanship to bring its legislation and implementation practices in conformity with international human rights standards. This process has generated increased attention to and scrutiny of RK’s human rights record by international organisations, NGOs and the mass media.

¹ ICCPR, Art. 2(1).

² ICCPR, Art. 2(2).

³ The instrument of ratification was deposited with the United Nations on June 30, 2009 and entered into force in Kazakhstan on 30 September 2009.

State of the Judiciary in Kazakhstan

To make an assessment of the context in which the trial took place, the observers familiarised themselves with various reports on the state of judiciary in Kazakhstan, which can be summarised as follows. Notwithstanding certain legislative changes, recent ratification of the ICCPR and the political success in obtaining the chairmanship of the OSCE, the contemporary justice system of Kazakhstan has reportedly preserved many Soviet era features. In particular, the executive continues “to play almost as dominant a role within the judiciary as it did under the previous regime, and this tendency has even increased”.⁴ The executive has ultimate control over the appointment of the judges,⁵ while the system of appointment is neither transparent nor fair or objective⁶ and reappointment is subject to abuse.⁷ The Soviet style “telephone justice”⁸ continues to erode the rule of law in Kazakhstan⁹ and judges are reportedly subject to political bias, bribery, and other corruption, which are evident throughout the judicial system.¹⁰ Moreover, the acquittal rate in Kazakhstan is around one percent,¹¹ which raises questions as to enforcement of the principle of the presumption of innocence.¹² The independent role of the courts is seriously hampered by the powers of the Prosecutor’s office and the predominant role it performs throughout the judicial process.¹³ At the same time, defence lawyers are said to constitute the weakest part of the judicial system¹⁴ which seriously hampers ensuring equality of arms in practice.¹⁵

⁴ Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy, Mission to Kazakhstan, 11 January 2005, E/CH.4/2005/60/Add.2, para. 69.

⁵ Judicial Reform Index for Kazakhstan, ABA/CEELI, February 2004, p. 7, 12; Concluding Observations of the Committee against Torture, 12 December 2008, CAT/C/KAZ/CO/2, para. 25.

⁶ Report of the Special Rapporteur on the independence of judges and lawyers, para. 33.

⁷ *Ibid.*, para. 32.

⁸ “Telephone justice” is an expression which stems from the Soviet practice of officials receiving or making phone calls during or just prior to a trial to request from a judge particular outcome, or otherwise making their wishes clear to the judge. It has more recently come to refer more generally to the practice of inappropriately influencing or applying pressure on the judiciary.

⁹ *Ibid.*, para. 66.

¹⁰ *Strengthening the Rule of Law in Kazakhstan*, Kazakhstan Judicial Assistance Project, Chemonics International, 27 August 2007, p.3.

¹¹ Report of the Special Rapporteur on the independence of judges and lawyers, para. 34.

¹² Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy, Mission to the Russian Federation, 23 March 2009, A/HRC/11/41/Add.2, para. 37.

¹³ *Strengthening the Rule of Law in Kazakhstan*, Kazakhstan Judicial Assistance Project, Chemonics International, 27 August 2007 p.3; *Judicial Reform Index for Kazakhstan*, ABA/CEELI, February 2004, p.16.

¹⁴ Report of the Special Rapporteur on the independence of judges and lawyers, para. 48.

¹⁵ *Kazakhstan, Summary of Concerns on Torture and Ill-treatment*, Amnesty International, November 2008, EUR 57/001/2008, para. 1.2.1.

2. Observers

Karina Moskalenko, Commissioner and Executive Committee member of the International Commission of Jurists; Director of joint projects of the International Protection Centre (Moscow, Strasbourg); Moscow City Bar lawyer, author of multiple publications on human rights law; defence attorney in cases of Mikhail Khodorkovsky, Garry Kasparov; representative of victims in Anna Politkovskaya murder case.

Yuri Dzhibladze, President of the Centre for the Development of Democracy and Human Rights (Moscow); Member of the Council for the Development of Civil Society Institutions and Human Rights under the President of the Russian Federation; Member of the Expert Council of the Ombudsman of the Russian Federation, author of several publications.

Karina Moskalenko received *Ordre de Mission* from the ICJ.¹⁶ Yuri Dzhibladze received *Ordre de Mission* from the Steering Committee of the World Movement for Democracy (“the WMD”) and joined the mission as a co-observer.¹⁷

3. Evgeniy Zhovtis

Evgeniy Zhovtis, Director of Kazakhstan International Bureau for Human Rights and the Rule of Law (Bureau), is a leading human rights defender in Kazakhstan, a prominent lawyer and expert in international human rights law. He also serves as an expert of the Office for Democratic Institutions and Human Rights of the OSCE. The Bureau aims at protecting and promoting human rights in the RK, improving domestic legislation and judicial practice, cooperating with inter-governmental organisations and international human rights NGOs, reporting on the human rights situation in the country, and undertaking strategic litigation in public interest cases and in cases involving alleged political persecution of members of the opposition.

Criminal charges brought against Mr. Zhovtis on 14 August 2009 were not related to his professional human rights and lawyer’s activity, but were a result of the death of a pedestrian after a car accident described in section 5 of this report. However, both independent observers and mass media reported that his prosecution and conviction on 3 September 2009 were marred by

¹⁶ Annex 1 - *Ordre de Mission* issued by the International Commission of Jurists.

¹⁷ Annex 2 - *Ordre de Mission* issued by the Steering Committee of the World Movement for Democracy.

numerous procedural inadequacies. In addition, according to the Bureau, the organisation and Mr. Zhovtis personally had previously been subjected to pressure and harassment on the part of the Kazakhstan authorities.

4. The Trial Observation Mission

In October 2009, the ICJ decided to carry out a mission to observe the appeal hearing following concerns over allegations of violations of fair trial standards and likelihood of bias and politically motivated decisions against Mr. Zhovtis resulting from his public activity. Steering Committee of the World Movement for Democracy soon thereafter decided to have its representative join the mission.

The mission of the international observers was aimed at examination of the appeal proceedings against Evgeniy Zhovtis, which took place in the Regional Almaty Court in the city of Taldykorgan. The mission sought to examine the records of the case, including the records of the first instance trial in order to assess whether the trial was fair and whether the criminal proceedings were in compliance with international standards which are binding on Kazakhstan.

The observers did not attend the first instance trial proceedings. However, they examined the court record, as well as related procedural documents and other materials, including abundant publications following the case.

On October 19, 2009, Karinna Moskalenko arrived in Almaty, where she met Vera Tkachenko, public defender of Mr. Zhovtis and Director of Legal Policy Research Centre; his Counsel, Vitaly Voronov; and Aleksandr Rozentsveig, member of the Almaty City Bar Presidium. The Defence shared the most important procedural documents with the observer: the judgment delivered by the District Court, statements of appeal, the prosecutor's objection to the statements of appeal, all the motions filed during the trial and other relevant materials. Yuri Dzhibladze arrived in Almaty on 20 October 2009.¹⁸

¹⁸ See information on attempts to meet with other parties to the proceedings *infra* section 6(A).

5. Basic elements of the investigation and trial; Parties to the proceedings; Charges.

Investigation of the Accident

Following a two-day trial, Evgeniy Zhovtis was convicted on 3 September 2009 of unintentional vehicular manslaughter and was sentenced to a four-year deprivation of liberty to be served in a colony settlement (open prison). Based on a six-page verdict delivered 25 minutes after the close of the trial, he was charged with an offence punishable under Article 296(2) of the Criminal Code of the RK (manslaughter resulting from a traffic rules violation).

The accident took place on 26 July 2009 at about 22:10 hours, when it was already dark. At the 131st km of the Karoi-Almaty highway, the car Mr. Zhovtis was driving struck Kanat Moldabayev, a pedestrian walking on the carriageway, who was instantly killed. He was thus recognised to be the victim of an offence.

As Kanat Moldabayev was killed in the accident, his mother, Raykhan Moldabayeva, was also recognised as a victim. During the hearing at the first instance trial as well as at the appeal hearing, Ms. Raykhan Moldabayeva was represented by Mr. Marat Kabulov, who introduced himself as a lawyer.

Criminal proceedings (case no. 09193603100017) were initiated on 27 July 2009 by an official order, opening such proceedings on the account of the road accident with Mr. Zhovtis's involvement and information about Mr. K. Moldabayev's death on the spot. At this early stage, the investigating authorities already had determined, as recorded in this document, that the events in question disclosed sufficient features of a criminal offence punishable under Article 296(2) of the Criminal Code. On 28 July 2009, the inquiring officer of the Investigative Section of the Almaty Regional Police Department, police mayor M. Sadirbayev issued an order "On identification of the suspect" which, among other things, noted that Evgeniy Zhovtis was "identified as the suspect as a result of an inquiry" and that "E.A. Zhovtis shall be considered the suspect. All the records of investigative and other procedural actions which were carried out with participation of E.A. Zhovtis shall be regarded as valid and having legal force".¹⁹

Mr. Zhovtis participated as a witness in all the investigative actions performed by the inquiry officer, Mr. M. Sadirbayev, up to 14 August 2009,

¹⁹ Page 49 of the criminal case files.

when he was questioned for the first time as a suspect and a preventive measure – “undertaking not to leave and to behave appropriately”²⁰ – was applied to him. It was only then that Mr. Zhovtis was able to study all the materials of the case, including the order “On identification of the suspect” of 28 July 2009, and became aware that he had been, in fact, a suspect ever since 28 July 2009.

This fact was brought to the attention of the first instance court which decided that the rights of Mr. Zhovtis had not been violated because he confirmed his statements given as a witness and because Mr. Sadirbaev claimed that issuing the order on recognition of Mr. Zhovtis as the suspect in the case was the result of a technical error. The Court also noted that all the investigative actions had been carried out in the presence of Mr. Zhovtis’s defender. Hence, the Court failed to address the issue raised in one of the Defence motions, namely that Mr. Zhovtis could not enjoy numerous rights afforded to the suspect including the right to silence, the rights to present evidence, to submit motions, to seek recusals, and to give comments on records of all investigative actions.

A number of investigative actions were performed in the course of the inquiry: the witnesses and the victim were questioned, an investigative experiment was conducted on 29 July 2009 and an auto-technical examination no. 8001 was carried out on 14 August 2009.

First Instance Trial

As follows from the Record of Charges, on 14 August 2009 Mr. Zhovtis was officially charged with a criminal offence punishable under Article 296(2) of the Criminal Code of the RK. The case-file was forwarded to the court on 20 August 2009.

On 27 August 2009 and 2-3 September 2009, the trial was held by the Balkhash District Court of the Almaty Region. Mr. Zhovtis was convicted of a criminal offence punishable under Article 296(2) of the Criminal Code of the RK. He was sentenced to a four-year deprivation of liberty to be served in a colony settlement designed for unintentional offenders.²¹ He was also disqualified from holding a driving licence for the term of three years.

²⁰ A preventive measure under CPC RK.

²¹ It is to be noted that before the trial of Evgeniy Zhovtis there was only one colony settlement for unintentional offenders located in Astana. After the conviction of Mr. Zhovtis by the first instance court a regular prison in Ust-kamenogorsk (Oskemen) located 1100 km from Almaty opened a special sector for unintended offenders.

After the judgment was announced, Mr. Zhovtis was taken into custody immediately in the courtroom. He was then held at the detention centre of Taldykorgan (the Almaty Region) pending the appeal hearing.

Court of Appeal

On 11 September 2009 the defence counsel appealed against the judgment. In particular, they asked the Court of Appeal to “(q)uash the judgment of conviction delivered by the Balkhash District Court of the Almaty Region on 3 September 2009 against Mr. Zhovtis and to terminate the proceedings, as his actions disclosed no indication of any criminal offence”.

Judge Ch. M. Tolkunov was the trial Judge in the first instance trial proceedings. The Court of Appeal was sitting as a panel of three professional judges presided over by Judge Yer Khan Tottybay-Tegi. Ms. Onolbayeva participated in the appeal hearing as a court clerk.

Mr. A. A. Zhanibekov, the deputy prosecutor of the Balkhash District, represented the Prosecution at the first instance trial. Before the Court of Appeal, the Prosecution was represented by prosecutor Mr. M.S. Imangaliev.

At both levels, Mr. Zhovtis was represented by Mr. Vitaly Voronov, lawyer of the Almaty City Bar, and two public defenders, Ms. Vera Tkachenko and Mr. Dosmukhambet Koshim.

The victim was represented by lawyer M. Sh. Kabulov in both instances. The basis of his authority to represent the victim remained unclear. When asked by the presiding Judge to produce his written credentials, he failed to do so, saying he would pass them on to the Court later. When presented with a request by the observers during a break in the proceedings to confirm his credentials as the victim’s legal representative and explain his formal role *vis-à-vis* the victim, the lawyer evaded any direct answer. During the pleading, the lawyer repeatedly departed from the victim’s position with a reference to an opinion expressed by some other unnamed relatives of the deceased. However, the victim, Ms. Moldabaeva, never questioned Mr. Kabulov’s credentials and his role during the trial proceedings.

6. Appeal hearing observation account

A. Before the court hearing

The appeal hearing before the Almaty Regional Court (located at 116, Ablaykhana street, Taldykorgan) was scheduled for 14.00, 20 October 2009. The hearing started at 14.15 and finished at 18.00.

On 20 October 2009, the two observers came to the courthouse and handed their credentials to the court bailiffs prior to the hearing. The bailiffs undertook to pass the documents to the President of the Court and included the names of the observers in the list of people to be let into the courtroom.

At 14.00 the observers were granted access to the courthouse. They were inside the building throughout the appeal hearing. The observers also handed their credentials to the representative of the Prosecution.

The observers had an opportunity to speak with the following participants of the proceedings:

1. the defence counsel;
2. the representative of the victim;
3. the representative of the Prosecution.

The defence council was very cooperative and briefly outlined to the observers the Defence's position and expressed hopes that the verdict would be overturned as ungrounded.

The prosecutor accepted credentials of the observers and communicated with them in a polite manner, making it clear that he believed the Prosecution's case was strong and was likely to prevail in the appeal hearing.

The representative of the victim responded to the introduction of the observers with some hostility and refused to explain his position at the hearings. As described above, when he was presented with a request of the observers to confirm his credentials as the victim's legal representative and explain his formal role *vis-à-vis* the victim, the lawyer evaded any direct answer and said that everything would be clear from his deposition during the proceedings.

Attempts of the observers to meet the President of the Regional Almaty Court in the city of Taldykorgan before the hearing, and the presiding Judge in the appeal case after the end of the hearing, failed, as they were systematically

undermined by the court officials. Despite numerous repeated requests for meetings made by the observers, Ms. Onalbayeva, the court clerk, referred the observers to the court bailiffs, while the court bailiffs – who refused to introduce themselves – referred them back to the court clerk. Nobody, in other words, had the authority to communicate the request to the presiding Judge. According to them, the President of the Regional Almaty Court was not available at all at that time, while the presiding Judge was busy with either deliberations, preparation of the verdict or other business and could not meet the observers for these reasons. After more than an hour of waiting after the end of the hearings and indefinite indications by the court clerk of a possibility of a meeting with the Judge, the observers were informed by the clerk that the presiding Judge had already left the building a while ago.

Prior to the court session, a crowd of some 200 persons that came to Taldykorgan to attend the hearing gathered in the courtyard. Those who came to support Mr. Zhovtis included members of Kazakh and Kyrgyz non-governmental organisations and political parties, journalists, observers representing foreign embassies: the Office of the UN High Commissioner for Human Rights; the OSCE; international and foreign NGOs, including Human Rights Watch, Open Society Institute, Friedrich Ebert Foundation; and observers from other international organisations, including the International Bar Association.

The neighbourhood adjacent to the courthouse was sealed off by the police; traffic on the adjacent streets was blocked. The guards allowed entry to the Defence, then to the victim, the representatives of foreign embassies and international organisations. Those who had filed a request to attend the hearing in advance, including many of the observers, were then allowed to enter the courthouse and the courtroom. In total there were some 50 persons in the courtroom, including a few newspaper journalists and several TV technicians. Most of the public did not have access to the courtroom. The number of chairs was considerably smaller than the room could accommodate, and therefore during the break requests were made to court officials to carry in more chairs. However, these requests were ignored. The court clerk said that the court bailiff was in charge of the matter, while the bailiff identified the court clerk as responsible. Both of them referred to the Judge who could not be contacted at the moment, as he was in the deliberations room. Despite the availability of the necessary equipment, there was no video transmission of the hearing to the neighbouring room. The observers received a collective appeal from the representatives of the public

who did not get access to the courtroom and complained that the hearing was not fully accessible to the public.

B. Positions of the Parties

The position of the Defence was that the proceedings should be terminated and the conviction should be quashed for several reasons which can be summarised as follows:

- 1) Article 67 of the Criminal Code makes it binding on the law-enforcement authorities and the court to drop the proceedings whenever the following three circumstances cumulatively obtain: a) the offence is minor; b) the parties have reached a peaceful agreement; and c) the defendant has made restitution for the damage caused. All the three conditions had been met in the present case.
- 2) The actions of Mr. Zhovtis did not disclose any indication of a criminal offence, as it was the victim's own gross negligence and a breach of traffic rules that lead to the accident and his death. The investigating authorities had established that the victim was on the roadway and was walking along the direction of traffic, not on the roadside and facing traffic, as prescribed by the traffic rules. However, the trial court had failed to give any legal assessment to the victim's actions. According to the alternative auto-technical examination initiated by the Defence, Mr. Zhovtis did not violate the traffic rules and did not have any technical possibility to prevent the crash. The Defence asked the Court to include the alternative auto-technical assessment in the case-file as proving the innocence of Mr. Zhovtis.
- 3) The conviction should be quashed, as it was counterfeited, which was a fundamental abuse of law. This followed from a comparison of the judgment announced in the courtroom (the Defence had provided a video and an audiotape) with a copy of the judgment enclosed into the case-file. There were considerable discrepancies between the transcript of the audio and videotape on the one hand, and a copy of the judgment on the other hand.

The position of the Prosecution may be summarised as follows:

The judgment was rendered in compliance with the law and should be upheld for the following reasons:

- 1) Article 67 of the CC RK requiring the court to drop the proceedings was not applicable, because Mr. Zhovtis had not asked for this relief himself.

- 2) Mr. Zhovtis's guilt in having committed traffic offence had been proved in full by the auto-technical examination performed in the course of investigation and trial. The expert assessment provided by the Defence could not be accepted by the Court, as it was not conducted in accordance with the law, according to which the Defence is not authorised to perform such an examination.
- 3) The accuracy of the judgment is beyond question. The video and audio-tapes presented by the Defence could not be examined by the Court as there was a risk that they could have been fabricated or tampered with.

The position of the representative of the victim was essentially the same as that of the Prosecution. In particular, the representative requested that the guilty judgment should be upheld, that there were no grounds for termination of the proceedings and that no additional material should be included in the file. This position, it should be emphasised, appeared contrary to the position of the victim herself as set forth in her application to the Court, where she noted that she had reached a peaceful agreement with Mr. Zhovtis; that he had compensated for the damage caused; and that she had forgiven him, and asked the Court to drop the proceedings against him. The observers cannot but note the difference in the positions and attitudes of the mother of the deceased and her representative (see part C *infra*).

C. The court hearing

The hearing started at 14.28.

No court minutes were kept.²²

The overall length of the appeal hearing including deliberations was four hours.

The hearing was opened in the absence of the victim, although the Court was aware that she was expected to arrive soon. The Court did not ask whether the parties deemed it possible to open the hearing in the absence of the victim. The purported representative of the victim did not insist on the victim's personal participation in the hearing.

²² Though Kazakhstan law does not require that minutes be kept in appeal proceedings, it is crucial that in proceedings where the court considers questions of facts and questions of law and where parties give their arguments including testimony of the victims that court minutes be kept in a regular manner.

According to Ms. Rosa Akylbekova, who accompanied the victim, the deceased's mother Ms. Raykhan Moldabayeva, a number of incidents raised suspicions that the authorities had sought to prevent her from participation in the appeal hearing. She mentioned that the police stopped them on several occasions on the way to Taldykorgan; a car hit their car while a policeman was checking their documents; and finally the police twisted the victim's arms and tried to take her away in their car until journalists intervened and prevented the police from removing her. Ms. Roza Akylbekova, the acting director of the Bureau, communicated a detailed account of these and other events to the observers.

Before examining the case, the presiding Judge introduced the panel, the prosecutor, the defence counsel and the victim's representative. He spoke in such a low voice that many names could not be heard, and most of his words were indecipherable to the observers. The observers could only infer that the presiding Judge was explaining to the parties their right to request recusals and right to enter requests. No recusals were requested.

Before the Court proceeded to examine the appeal on its merits, lawyer Voronov, acting for the Defence, made an oral request to ensure the personal participation of Mr. Zhovtis in the hearing and asked for an explanation as to why he had not been brought before the Court. The Judge answered that the Court had discretionary power to decide on the convict's personal participation in the appeal hearing. The Judge noted that pursuant to Article 408(2) of the CPC RK, the personal participation of the defendant was only required if the prosecutor had requested the Court to increase the sentence of punishment. The Court, however, appeared to disregard the provisions of CPC PK articles 408(6) stating that:

“Persons who, in accordance with Article 396 of the present Code are granted the right of appeal, as well as defender of a convicted (acquitted) person, <...>, in all cases be allowed into the appeal court hearing. At their request, they are given the floor to speak in support of complaints filed or an objection or protests against them.”

and 396(1),

“Right of appeal to the sentence, ruling belongs to a convicted or acquitted person, their defenders, representatives and legal representatives <...>.”

The observers recognize that it is the task for the domestic courts generally and the judge in a particular case to interpret domestic law. The observers note, however, that a reading of the plain language of the two provisions would make clear that a convicted person has a right of participation in appeal hearing in all instances.

Lawyer Voronov, acting for the Defence, persisted on this point, asking the Court to “(i)ssue a separate decision stating reasons why Mr. Zhovtis (had) not been brought before the court or grant the request of Mr. Zhovtis to bring him before the court”. However, the lawyer was interrupted by the presiding Judge: “There will be such a decision, later we will issue a decision”. No decision however was issued in this regard during the trial and the grounds of the decision were never publicly disclosed.

Lawyer Voronov again asked the Court to issue a separate decision stating reasons for keeping Mr. Zhovtis in custody and not bringing him before the Court. However, he did not receive any response to this request, so the Defence had to proceed with their motions.

Prior to the examination of the statements of appeal, the Defence made the following statements:

1. The Defence submitted that the conviction had been counterfeited, as its text was substantially different from that reflected in the conviction announced by the Trial Court on 3 September 2009. The Counsel provided the panel with a comparative document with numerous and extensive alterations and amendments highlighted. The Counsel also submitted a transcript of the audio- and videotapes of the hearing where the judgment was announced. The Counsel asked the Court of Appeal to give a legal assessment of these circumstances. The position of the Defence regarding the counterfeited conviction had been set forth in its statement of appeal.

2. The Defence submitted that the case was characterised by a number of circumstances exempting the defendant from any criminal liability for the incriminated offence:

- a) the incriminated offence was a minor one;
- b) the parties had reached a peaceful settlement at the pre-trial stage of the proceedings;
- c) the defendant had compensated the damage caused by paying USD 15,000 to the family of the deceased.

The Defence pointed out that Article 67(1) of the CC RK provides that the aggregation of the above circumstances requires the Court to terminate the proceedings, even if it is not requested by the defendant. Already at the stage of investigation, the Defence had produced the evidence in substantiation of the fulfilment of all the three circumstances. A written application by Ms. Moldabayeva, the mother of the deceased, on reconciliation with Mr. Zhovtis, compensation for the damage caused and request not to prosecute him, was handed to the inquiring authority on August 6, but was not included by the investigator in the case-file. The Trial Court had included the application in the case-file, but failed to examine it, to apply to it any legal assessment, or to reflect it in the judgment.

For this reason, the Defence asked the Court to include in the case-file a certified copy of a written application signed by Ms. Moldabayeva, the mother of the deceased, dated 7 October 2009 on reconciliation, compensation of the damage caused, and request not to prosecute Mr. Zhovtis.

Ms. V. Tkachenko, Mr. Zhovtis's public defender, read out the motions, reiterated the motions that the first instance court refused to examine and argued that the Trial Court's failure to examine them was contrary to the law. In its first motion, the Defence asked to include the alternative auto-technical assessment in the file and to summon as witnesses the experts that had conducted the assessment and other experts who had given written expert conclusions. The same motion had been made during the trial, but the Trial Court and the inquiring authorities had disregarded it, so the Defence had to reiterate it before the Appeal Court. In their assessment, experts Mr. Zakharov and Mr. Grebenschikov refuted in full the expert assessment submitted by the Prosecution.

The prosecutor made the following objections to the statements and motion of the Defence:

- to dismiss the Defence's request to obtain the attendance of Mr. Zhovtis before the Court, as the Court of Appeal could not worsen his situation in the absence of a protest of by the Prosecution against the first instance court's verdict and its request to the Court of Appeal to issue a harsher verdict;
- that there were no grounds to grant the Counsel's request to include the alternative auto-technical examination in the case-file, as it had not been obtained in accordance with the procedure established by the Code of Criminal Procedure;

- the request to enclose the video and audiotapes into the case-file should be dismissed, as their producer, as well as the place and the means of their production, were unknown, and there was no evidence that the tapes were authentic.

The prosecutor did not object to the motion to include a certified copy of the application by the mother of the deceased in the case-file. However, he made the following comment in this respect: Mr. Zhovtis had not previously asked to apply Article 67 to his case. In the Prosecutor's opinion, the Court of Appeal was only in a position to apply that provision if the Trial Court had not applied it, in breach of law, which had not been the case.

The lawyer representing the victim made his pleadings. In his opinion, although according to the alternative auto-technical examination Mr. Zhovtis did not have any technical possibility to prevent the crash, former staff members of the bureau performed this examination. When performing the examination, the experts used copies, not original documents. For this reason, the examination should not be included in the case-file, and this issue should be abandoned definitively. As regards the statement that the conviction had been counterfeited, according to the representative of the victim, even if the trial judge had committed a minor mistake, it was not a reason to quash the judgment. As to the mother of the deceased, her statement regarding the peaceful settlement and the fact that she had forgiven Mr. Zhovtis, had not been submitted to the investigating authority in due fashion and therefore had lawfully not been included in the case-file by the investigators. Finally, during the trial, the mother of the deceased had left it to the Court's discretion as to whether to terminate the proceedings or not. For all those reasons, the representative of the victims supported the Prosecutor. This position flatly contradicted the victim's mother's statements as to the settlement and forgiveness of Mr. Zhovtis.

At the moment of the statement by the representative, the mother of the deceased, Ms. Moldabayeva, finally arrived. The Judge invited her to the courtroom. The Judge announced her rights and gave her the floor. The victim spoke in Kazakh. However, as the interpretation provided by the Court was of low quality, the observers and the public in the courtroom could understand very little of her statement, which caused protest. As a result, the only words of the mother that the observers could grasp were those in Russian "I have forgiven." At this point, the Judge was in haste to interrupt her, preventing her from explaining her position. He said: "Oh yes, we've got your application", after which he hastily rose and announced that the panel

was to retire to the deliberations room to render its judgment. Thus, the part of the written application by the mother of the deceased stating her request not to hold Mr. Zhovtis criminally liable, was not announced before the Court.

The Court retired for deliberations over the requests made by the Defence. The break was around one hour long.

During the break, the observers received a collective appeal from numerous representatives of the public who did not get access to the courthouse and complained that the hearing was not public. The access of the public was restricted by a reinforced police squad. Those who were not granted access to the hearing included representatives of international organisations.

After the break, the presiding Judge announced the Court's decision on the motions of the Defence.

The Court granted only one motion of the Defence, that requested inclusion of the victim's application in the file, and dismissed all the other motions, or left them "open-ended". This was exactly the position of the Prosecution, which had only agreed with this same motion satisfied by the Court. In particular, the Court decided:

- not to include the video-and audiotapes in the case-file, as their origin was unknown, and they could have been altered;
- not to include the alternative auto-technical assessment in the file and not to summon the experts as witnesses;
- to leave "open-ended" the rest of the requests until the end of the pleadings, to be decided on simultaneously with the merits of the case.

After announcing these decisions, the Court opened the pleadings. First, the statement of appeal by Mr. Zhovtis, who did not have an opportunity to participate in the hearing or to make any comments in this respect, was read out. His comments were read out by the public defender, Ms. Tkachenko.

The main arguments set out in the statement of appeal by Mr. Zhovtis were as follows:

- although the Trial Court had substantiation of all the three grounds to terminate the proceedings pursuant to Article 67(1) of the CC RK, it did not examine such a possibility;

- apparently, there was objective imputation and criminal liability for innocent infliction of damage, which was absolutely contrary to the law;
- at a distance of 100 m, he had not seen the pedestrian; he could not have seen him and could not have been expected to see him;
- in the judgement, the Court failed to give any legal assessment to the actions of the victim, who had committed a gross violation of the traffic rules;
- having regard to the foregoing, the Court of Appeal should quash the first instance court's judgment and terminate the proceedings due to the lack of *corpus delicti*.

Lawyer Voronov then explained the position of Mr. Zhovtis and the Defence. He referred to para. 3.1 of the Traffic Rules providing that a pedestrian is obliged to walk along the side of the road and in the direction opposite to that of the traffic. The lawyer demonstrated a scheme of the car accident showing what would have happened had the pedestrian followed these rules. Again, the lawyer recounted the grounds for a review of the judgment.

The mother of the deceased then spoke via an interpreter. She said that she had not seen the scene of the accident. At 1:00 a.m. her relatives told her that her son had died. The colleagues of Mr. Zhovtis had come to her home and asked her to forgive him. Afterwards Mr. Zhovtis had told her that he had not noticed her son on the road, that he had not seen him and asked her for forgiveness. The speech of Ms. Moldabayeva was repeatedly interrupted by interjections and statements of her representative. The meaning of his statements remained unclear to the observers. However, it was obvious from his manner that he expressed a vigorous disagreement with the words of Ms. Moldabayeva. To conclude her speech, the mother of the deceased said: "I forgive him, leaving the rest at the Court's discretion."

The representative of the victim started his speech with the following words: "(T)he mother of the deceased said: "I forgive him, leaving the rest at the court's discretion" – so I cannot tell her not to forgive him. If the mother, who had carried him for 9 months under her heart, has forgiven, I cannot make her not forgive!" The speech of the victim's representative abounded with colloquial expressions, such as "Everybody walks where they find it convenient – should you now crash into everybody?" and "I am not going to teach the distinguished judges by pointing to any articles." After that the victim's representative addressed the examination assessment:

- a) forensic examination regarding the origin of Mr. Moldabayev's death caused by a crash with the car of Mr. Zhovtis and establishing a fracture of neck-bones;
- b) the criminology examination – where the representative repeated his argument “If the pedestrian was walking on the road in the direction of the traffic, should you have crashed into him? Everybody walks where they find it convenient.” According to the lawyer, it followed from the assessment that the victim was walking in the roadway just 0.6 m away from the side of the road, i.e. at the “edge of the road”, not really on the roadway, which means that he had only committed a minor violation of the Traffic Rules.

According to the lawyer, Mr. Zhovtis had violated the Traffic Rules, as he had not stopped and had not complied with speed regulations. Moreover, the lawyer of the victim disagreed with the Defence stating that “(E)verybody, even the first person, shall respect the law.” The lawyer argued that Article 67 of the CC RK was not applicable, as this issue had not been raised during the trial.

The victim filed a written application with the Court where she indicated that she had reached a reconciliation agreement with Mr. Zhovtis; that he had compensated for the damage caused; that she had forgiven him and asked the Court to drop the proceedings against him. However, her representative persistently pleaded a position contrary to that set forth in her written application. As a result of apparent pressure, the victim left all the issues at the discretion of the Court. The representative's behaviour seemed to be supported by the presiding Judge, who repeatedly interrupted the victim in an abrupt manner and thus prevented her from stating orally her written application. He made brusque interjections such as for instance “We have read your application” and urged her to finish the speech. In addition, it was not possible to gain a clear idea of precisely what the victim was saying, as the interpretation from Kazakh into Russian was obviously inaccurate, which caused protest from the public gallery. The Court was requested to replace the interpreter, but to no avail.

The pleadings closed with the prosecutor's speech. His position can be summarised as follows:

- there were no grounds to apply Article 67 of the CC RK, as it had not been applied during the trial because Mr. Zhovtis had not so requested;
- during the accident, Mr. Zhovtis was tired. Since he is short-sighted, he violated para. 9.2 of the Traffic Rules requiring drivers “to take precautionary

measures, including a full stop.” Indeed, he is guilty, which cannot be doubted;

- the examination performed during the investigation delivered a correct assessment: the information it was based upon was collected from Mr. Zhovtis himself and was subsequently handed to the experts by the investigator. The investigator did not write anything simply out of his own head.

The Prosecutor asked the Court to uphold the judgment and to dismiss the Counsel’s complaints. Furthermore, the Prosecutor asked the Court to deliver a particular decision in respect of the inquirer, who had taken an alcohol blood test from Mr. Zhovtis only 22 hours after the accident.

Having heard the parties to the proceedings, the panel retired to the deliberations room. The judgement on appeal was announced by the presiding Judge at 18.00.

7. Outcome of the appeal proceedings

Having examined the appeal, the Almaty Regional Court sitting as a panel of three professional judges upheld the judgment delivered by the Balkhash District Court of the Almaty Region on 3 September 2009 against Mr. Zhovtis, whereby he was convicted of a criminal offence punishable under Article 296(2) of the CC RK (manslaughter arising from traffic offence), sentenced to a four-year deprivation of liberty in a colony settlement designed for unintentional offenders and disqualified from holding a driving licence for a term of three years.

The full text of the judgment on appeal was not announced in the courtroom. The public was not acquainted with the reasoning of the judgment. The Court only announced the operative provisions pursuant to which the conviction was upheld.

As Mr. Zhovtis did not attend the appeal hearing, he did not have an opportunity to hear the decision of the Regional Court. He believed the appeal hearing to have been adjourned. On 21 October 2009 his Counsel informed him that the appeal was examined in his absence, and reported to him the circumstances of the hearing and the decision of the Court.

The written decision subsequently issued dealt principally with the assessment of facts, medical forensic examination, motor-vehicle expertise,

witness statements and statements of Evgeniy Zhovtis. It upheld all the rejections of the motions submitted by the Defence and granted one supported by the Prosecution. In particular, it did not find a violation of Kazakhstan law in interrogating Mr. Zhovtis as a witness, while he was in fact a suspect; in changing the pronounced verdict contrary to Kazakhstan's legislation; rejecting a request for a forensic motor-vehicle examination; or in insufficiency of time to prepare the pleadings and final statement or other violations alleged. The Court also explained that Evgeniy Zhovtis was not allowed to take part in the proceedings because there was no issue of aggravating his position or increasing his sentence.

On 10 December 2009 the Supervision Collegium of the Almaty Regional Court rejected a supervisory review appeal.

THE OBSERVERS' ASSESSMENT OF COMPLIANCE OF THE TRIAL WITH INTERNATIONAL FAIR TRIAL STANDARDS

The observers take this opportunity to highlight the importance of the right to a fair trial as a key element of human rights protection which serves as procedural means to safeguard the rule of law.²³ The key elements of the right to a fair trial are encapsulated in Article 14 of the ICCPR, which provides:

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial 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; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.
2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.
3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: (a) To be informed promptly and in detail in a language which he understands of the

²³ General Comment No. 32, CCPR/C/GC/32, August 23, 2007, para. 2.

- nature and cause of the charge against him;
- (b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;
 - (c) To be tried without undue delay;
 - (d) 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 such case if he does not have sufficient means to pay for it;
 - (e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
 - (f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;
 - (g) Not to be compelled to testify against himself or to confess guilt.
4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.
5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.
6. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.
7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

Noting that Kazakhstan has recently ratified the ICCPR, the observers recall that all of the elements provided for under Article 14 ICCPR²⁴ are to be strictly observed in domestic proceedings. In addition to securing the right to a fair trial, implementation of these guarantees is critical, as 'the way criminal proceedings are handled may affect the exercise and enjoyment of rights and guarantees of the Covenant unrelated to Article 14'.²⁵ The right to a fair trial is

²⁴ The requirement of fair trial is enshrined in most generalized human rights instruments, including the International Covenant of Civil and Political Rights (Article 14); the European Convention for the Protection of Human Rights and Fundamental Freedoms (Article 6); the OSCE Human Dimension Commitments (See footnote 26 *infra*); American Convention on Human Rights (Article 8); American Declaration of the Rights and Duties of Man (Article 18); African Charter on Human and Peoples' Rights and the Arab Charter on Human Rights (Article 13).

²⁵ General Comment No. 32, para. 63.

similarly protected under the OSCE human dimension commitments undertaken by Kazakhstan.²⁶

The right to a fair trial includes *inter alia* the guarantees of equality of arms and independence and impartiality of courts. The principle of *equality of arms* requires that the defendant be given an opportunity to present his or her case on an equal basis with the State party in the adjudication of a hearing. Moreover, 'it is for the State party to show that any procedural inequality was based on reasonable and objective grounds, not entailing actual disadvantage or other unfairness to the author'.²⁷ The principle of *independence of the courts* includes such aspects as procedure and qualification for the appointment of judges and guarantees related to security of tenure, conditions governing promotion, transfer, suspension and cessation of their functions, and practical independence of the judiciary from political interference by the executive branch and legislature.²⁸ The principle of *impartiality of courts* entails that judges must not allow their judgment to be influenced by personal bias or prejudice, nor harbour preconceptions about the particular case before them, nor act in ways that improperly promote the interests of one of the parties to the detriment of the others. The Court must also appear to a reasonable observer to be impartial.²⁹ Courts must make information regarding the time and venue of the oral hearing available to the public and provide for adequate facilities for the attendance of interested members of the public, within reasonable limits, taking into account *inter alia* the potential interest in the case and the duration of the oral hearing.³⁰

Bearing in mind the aforesaid and having completed the examination of the hearing and all the relevant materials of the case, the observers conclude that:

1. Some positive aspects of the case are to be noted.

The observers acknowledge certain positive aspects in relation to observing the right to a fair trial in the proceedings against Evgeniy Zhovtis. In particular, the observers note with satisfaction that Mr. Zhovtis was at liberty pending the first instance trial, which is in accord with the ICCPR standards on this issue; the investigation was conducted in a speedy manner and the

²⁶ This includes OSCE commitments with regard to fair trial such as Concluding Document of the Vienna Meeting (1989) para. 13(9); Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE (1990) para. I 5(12)(16)(19); Charter of Paris for a New Europe (1990); Document of the Moscow Meeting of the Conference on the Human Dimension of the CSCE (1991) para. 19(2).

²⁷ *Lucy Dudko v Australia*, Communication No. 1347/2005, CCPR/C/90/D/1347/2005, 29 August 2007, para. 7.4.

²⁸ General Comment No. 32, para. 19.

²⁹ *Ibid.*

³⁰ *Ibid.* para. 28.

right to have a lawyer of one's own choice was guaranteed. The observers also take note of the fact that during the appeal trial, the Judge for the most part respected the procedural requirements prescribed by the Criminal Procedural Code of Kazakhstan.

2. Evgeniy Zhovtis was misinformed about his actual legal status during the investigation

At the pre-trial investigation, Mr. Zhovtis participated as a witness in all the investigative actions up to 14 August 2009, when he was interrogated as a suspect and a preventive measure – “undertaking not to leave and to behave appropriately” - was ordered in his respect. It was only then that Mr. Zhovtis studied all the materials of the case, including the decision of 28 July 2009 and became aware that he had been a suspect ever since 28 July 2009.

It is well-established that fair trial guarantees apply not only to criminal court hearings, but also to pre-trial stage proceedings, as an initial failure to guarantee due process in such proceedings before a case is sent for trial may jeopardise its fairness.³¹ Thus fair trial standards set out in Article 14 of the ICCPR are available to the defendant as well as an accused person before filing a criminal charge.³²

The fact that Mr. Zhovtis was misinformed as to his actual status had effectively deprived him of a number of rights guaranteed to a suspect under the Criminal Procedure Code of Kazakhstan. These guarantees, in particular, include the rights to know the grounds of suspicion, to remain silent, to present evidence, to file motions, to take part in investigative actions, to have the capacity to familiarise oneself with records of investigation and to participate and give comments on them.³³ Notwithstanding the existence of an article in the CPC providing for a right of a witness not to give self-incriminatory evidence,³⁴ a witness cannot refuse to testify at all, in contrast to the right enjoyed by a suspect. This right is closely linked to the right to

³¹ *Imbrioscia v Switzerland*, Application no. 13972/88, Judgement of 24 November 1993, para. 36; *John Murray v The United Kingdom*, Application no. 18731/91, judgment of 8 February 1996, para. 62; *Berlinski v Poland*, Application no. 27715/95; 30209/96, judgment of 20 June 2002, para. 75.

³² Manfred Nowak, U.N. Covenant on Civil and Political Rights CCPR Commentary, citing Norr Muhammad, Due Process of Law for Persons Accused of Crime, in Henkin 138 ff, at. 150; van Dijk, The Right of the Accused to a Fair Trial under International Law, SIM Special No. 1.1 f.1 (1983) (Utrecht) at 41; Frowein & Peukert 183 ff.

³³ Criminal Procedure Code, Art. 68(7).

³⁴ Criminal Procedure Code, Art. 82(3).

silence, a generally recognised international standard which is key to a fair procedure and linked to the presumption of innocence.³⁵

At the appeal instance, the Court failed to remedy the above defects, finding no violation in the failure to inform Mr. Zhovtis of his status as a suspect, as “from the moment of the criminal proceedings he had a lawyer”. The observers maintain that purposeful or unintended misinformation leading to non-enjoyment of the rights aimed at protecting a person in criminal proceedings is highly problematic. Moreover, the courts of both instances used the expert opinion made at that stage as evidence in support of their findings that Mr. Zhovtis was guilty of committing a crime and to convict him of the offence. Failure to find or at least give serious consideration to an apparent violation of domestic legislation at the pre-trial stage, when evidence of a person’s guilt used for his conviction had been obtained in violation of procedural rights, gives rise to concerns over ensuring the guarantees under Article 14 ICCPR, including the presumption of innocence, the right to be informed of the right to counsel, the right to be effectively represented by a lawyer, and the right to silence.

3. Attempts to prevent witness to testify on behalf of Evgeniy Zhovtis were taken

The appeal hearing was opened in the absence of the victim. Moreover, the authorities appear to have taken active steps to prevent the victim from appearing before the Court, where she was expected to inform the Court of the settlement agreement the parties reached, which was a ground for termination of the criminal proceedings. The actions of the authorities involved apparent ill-treatment of the victim by the police.

Every person in the determination of a criminal charge against him has a right to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against them.³⁶ This guarantee is important to ensure effective Defence by the accused and his or her counsel, as an application of the principle of equality of arms.³⁷ While the guarantee to secure presence of witnesses is not an unlimited one³⁸ and it is not for a state

³⁵ *Saunders v The United Kingdom*, Application no. 19187/91, judgment of 17 December 1996, para. 68.

³⁶ ICCPR, Article 14(3)(e), the European Convention on Human Rights, Art. 6(3)(d).

³⁷ General Comment 32, para. 39.

³⁸ *Gordon v Jamaica*, Communication No. 237/1987, CCPR/C/46/D/237/1987, 5 November 1992, para. 6.3; *Peart and Peart v Jamaica* Communications Nos. 464/1991 & 482/1991, CCPR/C/54/D/464/1991 & 482/1991, 19 July 1995, para 11.3.

to secure the presence of a witness e.g. *ex officio*,³⁹ a state must facilitate rather than take steps to prevent an appearance of a witness who is in a position to testify in favour of a defendant. More generally, it is the duty of each State party to the ICCPR to “respect” the rights recognised in the Covenant,⁴⁰ meaning it must refrain from restricting exercise of those rights where such restriction is not allowed.⁴¹

The Kazakhstan authorities as well as the Court were aware of the intent of the mother of the deceased to present testimony containing a statement forgiving Mr. Zhovtis, which she had submitted in written form. The statement of the mother of the deceased should have been considered a statement of a witness, as it is irrelevant as to what procedural status she had under Kazakhstan law, as long as the statement she made was taken into account by the Court.⁴² Furthermore, since reconciliation is one of the necessary elements for dismissing criminal charges, the statement of the mother of the deceased could have been of primary importance to the case.⁴³ As the evidence was potentially of such decisive importance, attempts to prevent her from attending the trial could amount to “serious obstruction of the Defence <...> therefore precluding a fair trial of the defendant”.⁴⁴ The victim’s mother managed to appear before the Court. However, it should be noted that when Mr. Zhovtis’s Defence brought the Court’s attention to the attempts to prevent her from coming, the Court refused to consider the matter.

The difficulties the victim’s mother confronted in attending the hearing raise concerns about state interference in the judicial process. Furthermore, the Court’s impartiality may be called into question by its treatment of these allegations, and by its handling of the examination of her testimony.

³⁹ *Van Meurs v Netherlands*, Communication No. 215/1986, 13 July 1990, para. 72.

⁴⁰ ICCPR, Article 2(1).

⁴¹ Manfred Nowak, ICCPR Commentary, p. 37.

⁴² *Artner v. Austria*, Application no. 13161/87, judgment of 28 August 1992, para. 19; *Isgrò v. Italy*, Application no. 11339/85, 19 February 1991, para. 33.

⁴³ In accordance with Article 67 of the Criminal Code, a person who committed a non-grave crime is to be free from criminal liability if he reconciles with a victim and repairs the harm inflicted. Non-grave crimes include those crimes committed with carelessness, which are punished by up to 5 years of imprisonment (Criminal Code, Art. 10(2)). Under Article 296(2) a violation of traffic rules resulting in a death of a person is punished by up to five years of imprisonment.

⁴⁴ *Peart and Peart v Jamaica*, *supra*, para. 11.5.

4. The majority of the public were not allowed to attend the hearing

A reinforced police squad restricted the access of the public. Although the Court had at its disposal the necessary technical facilities, there was no transmission of the hearing to the neighbouring room.

The publicity of a trial, provided for under Article 14 (1) ICCPR, ensures an important safeguard for the interest of the individual and of society at large.⁴⁵ Although there are no strict requirements as to the precise number of people to be allowed to attend a hearing, courts must provide adequate facilities for the attendance of interested members of the public within reasonable limits, taking into account *inter alia* the potential interest in the case.⁴⁶ Summoning a reinforced police patrol to the Court during the hearing indicates the Court's awareness of the interest of the public. While the presence of police might be justified under certain circumstances, it is important that arrangements be made to ensure proper satisfaction of the public interest in the case. Among other things, such arrangements might have included a larger courtroom, providing additional chairs, letting more people into the room or using TV broadcasting available in the Court.

5. Motions dismissed indicate a lack of equality of arms and bias of the Court

The overwhelming majority of the requests made by the Defence were dismissed, while the rest were "left open-ended" to be implicitly dismissed at the end of the hearing. For instance, the Court failed to take due regard to the auto-technical assessment that had been procured by the Defence following a procedure prescribed by law, while the assessment submitted by the Prosecution was accepted by the Court evidently without any question and was used as a basis for the conviction.

The purpose of the fair trial guarantees is *inter alia* "to place the 'tribunal' under a duty to conduct a proper examination of the submissions, arguments and evidence adduced by the parties, without prejudice to its assessment of whether they are relevant to its decision."⁴⁷ It is especially so with regard to a possibility to comment on evidence, which has a decisive importance for the outcome of the proceedings.⁴⁸ The Court when exercising its judicial powers must ensure an equal opportunity to challenge the arguments of the opposing party in the process,⁴⁹ while "each party must be afforded a reasonable

⁴⁵ General Comment 32, para. 28; *Van Meurs v The Netherlands*, *supra*, para 6.2.

⁴⁶ *Ibid.*

⁴⁷ *Kraska v. Switzerland*, Application no. 13942/88, judgment of 19 April 1993, para. 30.

⁴⁸ *Feldbrugge v. The Netherlands*, Application no. 8562/79, judgment of 29 May 1986, para. 44; *Ruiz-Mateos v Spain*, Application no. 12952/87, Judgment of 23 June 1993, paras. 61-68.

⁴⁹ *Hentrich v. France*, Application no. 13616/88, judgment of 22 September 1994, para. 56.

opportunity to present his case – including evidence – under conditions that do not place him at a substantial disadvantage *vis-à-vis* his opponent”.⁵⁰

At this trial, unreasoned repeated refusals to grant motions or to merely consider them in all but one case raise concerns with regard to ensuring the principle of equality of arms. When the Defence cannot present its case by means prescribed by law including by calling witnesses, experts, presenting expert opinion in response to those endorsed by the Prosecution, while the Prosecution is privileged to do so, the Court’s actions puts the Defence at a disadvantage *vis-à-vis* the state Prosecution. The motions of the Defence regarding allegations of procedural violations at the initial hearing, requests to summon witnesses, as expert opinions about violations of traffic rules and other documents relevant to the case are *prima facie* of a decisive importance for the outcome of the proceedings. Unreasoned refusal to satisfy or consider all of the submitted motions raises serious concerns of equality of arms, presumption of innocence and impartiality of the Court.

Furthermore, the observers are concerned over the Court’s failing to take account of the arguments put forward by the Defence that Mr. Zhovtis had not violated the traffic rules and that it had been established that the rules had been violated by the deceased. The calls by the Defence to give legal assessment to the behaviour of the deceased were ignored both by investigation and the Court.⁵¹ Motions to invite experts on the side of Defence were not satisfied, while an expert opinion of the Prosecution was taken as a basis for conviction.

Mindful of the fact that it is generally for the national courts to assess and evaluate the facts of a case,⁵² the observers recall that when the conduct of the trial or the evaluation of facts and evidence or interpretation of legislation is manifestly arbitrary or amounted to a denial of justice, concerns as to the satisfaction of guarantees under Article 14 may arise.⁵³ As has been previously noted, the Appeal Court upheld the refusal to satisfy the motions submitted at the initial hearing, including the request to consider an alternative expert opinion, stating that “objectiveness of the motor-vehicle expertise raises no doubts due to its substantiation”. The only exception to the denial of Defence

⁵⁰ *Dombo Beheer B.V. v. The Netherlands*, Application no. 14448/88, judgment of 27 October 1993, para. 33.

⁵¹ For Article 296(2) to be applied, death must be a result of violation of traffic rules by the person charged of the offence (See Art. 296 CC RK).

⁵² *Romanov v. Ukraine*, Communication No.842/1998, CCPR/C/79/D/842/1998, 30 October 2003, para. 6.4.

⁵³ *Arutyuniantz v. Uzbekistan*, Communication No. 971/2001, CCPR/C/83/D/971/2001, 13 April 2005, para. 6.5.

motions at the appeal level was the one motion to which the Prosecution did not object. The Defence thus was denied an opportunity to present evidence on an equal basis with the Prosecution. The observers are of the opinion that repeated unreasoned denial of consideration of relevant documents at the first instance trial, and their blanket support for non-consideration with no or *pro forma* reasons at the appeal level, raise concerns over impartiality of the Court and its possible interest in the outcome of the case.

6. The text of the judgment had been amended, which is prohibited under Kazakhstan's criminal law.

While there are no strict international standards as to the amendments of judgements after they have been pronounced at the Court, Kazakhstan law sets clear rules in this regard. Under the Criminal Procedure Code, corrections in the verdict should be specified and certified by a signature of a judge on the relevant page of the verdict before proclamation.⁵⁴ Changes in the sentence after the proclamation are not allowed.⁵⁵ The Court of Appeal failed to assess the Trial Court's actions in this respect. Failure of the Appeal Court to properly examine the claims of a violation of this provision of the Kazakhstan law was explained by the fact "it was based on an audio recording the authenticity and identity of which is unknown, which is why it is impossible to establish its authenticity, identity to the events that took place and presence of distortions". The observers recall that although the Defence presented both audio and video materials to the Judge, the Court failed to mention the existence of the video recording. It is not clear why the Court came to such conclusions, as it also failed to order expert examination or to at least watch or listen to the events recorded on the materials presented by the Defence. Moreover, the first instance trial was closely observed by a significant number of journalists, observers and other members of the public, hence an investigation of the allegation could have been carried out with sufficient evidence. The Court's failure to examine the claims of violations of the provisions of Kazakhstan law raises further questions as to the impartiality of the Court.

7 In breach of the domestic legislation, the appeal hearing was held in the absence of the defendant whose appeal was examined by the Court.

During the hearing, the Court, referring to its discretionary powers, refused to allow Mr. Zhovtis to participate in the appeal hearing and to present his statement of appeal in person, in disregard of the repeated requests to ensure his participation or to give reasons for not allowing his participation. In its

⁵⁴ Article 377 (5) CPC RK.

⁵⁵ Article 377 (6) CPC RK.

final ruling, issued after the hearing had finished the Court determined that Mr. Zhovtis's request to be present during the appeal hearing was not satisfied because the parties did not demand "worsening of the convicted person's situation" which, in the Court's opinion, should be the basis for obligatory participation of the defendant.

The right of a person to be tried in his presence and to defend himself in person in the appellate level depends on the nature of the appeal system,⁵⁶ the scope of the Court's powers and the manner in which the applicant's interests are actually presented and protected before the Court, particularly in light of the nature of the issues to be decided by it.⁵⁷ Exceptions can be made when a person was present at the first instance trial. However,

"... where an appellate court has to examine a case as to the facts and the law and make a full assessment of the issue of guilt or innocence, it cannot determine the issue without a direct assessment of the evidence given in person by the accused for the purpose of proving that he did not commit the act allegedly constituting a criminal offence. The principle that hearings should be held in public entails the right for the accused to give evidence in person to an appellate court. From that perspective, the principle of publicity pursues the aim of guaranteeing the accused's defence rights."⁵⁸

The observers note that in the present case the Court mostly dealt with questions of facts and their assessment. Mr. Zhovtis's lawyers filed a motion requesting his participation in the appeal hearing based on CPC RK article 408(6) providing for a right of those who can file an appeal under CPC article 396 to participate in person in the appeal hearing in all cases. A defendant is mentioned among persons who can file an appeal under CPC article 396, meaning that Mr. Zhovtis had a right to participate in a hearing in every instance. The Judge, however, failed to mention this provision referring to article 408(2) which states that "the question of summoning a convicted person in custody is decided by the Court of Appeal". The observers are surprised at the Court's reading of the law, which is clear on the right of a convicted person in custody to attend the hearing in every instance while

⁵⁶ *Monnel and Morris v The United Kingdom*, Application nos. 9562/81 ; 9818/82, judgement of 2 March 1987, paras. 56-70.

⁵⁷ *Helmerts v. Sweden*, Application no. 11826/85, judgment of 29/10/1991, para. 32.

⁵⁸ *Tierce and Others v. San Marino*, Applications nos. 24954/94, 24971/94 and 24972/94, 25 July 2000, para. 95.

“questions of summoning” seem to refer to timing and other practical arrangements as to the Court’s discretion to allow the defendant’s presence.

Moreover, the Court failed to give proper and adequate reasons for refusing Mr. Zhovtis to take part in the proceedings, while the mother of the victim, his relatives, the prosecutor were present. This position runs contrary both to the domestic regulations Article 408(6) and Article 396(1) of the CPC RK and Article 14(1) and (3) of the ICCPR in so far as it provides for the defendant’s right to defend himself in person and to present his case. It also raises questions regarding general fairness of the proceedings and the principle of equality of arms.

CONCLUSIONS

The observers conclude that there are strong indications that the proceedings against Evgeniy Zhovtis failed to meet international fair trial standards, including those which Kazakhstan must respect pursuant to its obligations under the ICPPR and commitments pursuant to OSCE instruments. The overall manner in which proceedings were conducted as well as particular inadequacies described above give rise to doubts regarding ensuring the presumption of innocence, equality of arms, and the impartiality of the Court. The observers especially stress the striking disparity in treatment of the evidence and witnesses in this case. It is regrettable that the Court of Appeal failed to remedy the deficiencies of the first instance trial and to give an opportunity to the Defence equal to that of the Prosecution to present its case.

The observers recommend that Kazakhstan take appropriate measures to ensure that fair trial standards are effectively guaranteed in practice, that Kazakhstan ensures in full the rights afforded to everyone under both Kazakhstan’s laws and its international obligations, including the ICCPR. For the purposes of the case against Evgeniy Zhovtis, the appropriate authorities should act to remedy the deficiencies in the proceedings in contravention of the right to a fair trial.



INTERNATIONAL COMMISSION OF JURISTS

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" dedicated since 1952 to the primacy, coherence and implementation of international law and principles that advance human rights "

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Justice E. Raúl ZAFFARONI, Argentina
Prof. Leila ZERROUGUI, Algeria

The International Commission of Jurists (ICJ) hereby appoints

**Ms Karinna Moskalenko,
Moscow, Russian Federation**

as its official representative on mission.

Ms Moskalenko will travel to Kazakhstan on 17 October 2009 to observe the trial on 20 October of Mr. Evgeniy Zhovtis at the appeals court in Taldykorgan.

The observer of the ICJ will remain in Kazakhstan until all necessary information to assess the case is collected, and will report directly to the ICJ on the proceedings.

The International Commission of Jurists would be grateful to the government and authorities of Kazakhstan for all facilities and usual courtesies which may be extended to Ms Moskalenko for the accomplishment of her mission, including facilitation of meetings with relevant officials.

The ICJ would also appreciate any assistance which the Members of the Bar and Judiciary can provide.

This Ordre de Mission has been delivered on behalf of the International Commission of Jurists to Ms Karinna Moskalenko.

Wilder Tayler
Acting Secretary-General

Geneva, 13 October 2009



WORLD MOVEMENT *for* DEMOCRACY

Confronting the Challenges to Democracy in the 21st Century

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14 October 2009

To Whom It May Concern:

The Steering Committee of the World Movement for Democracy hereby appoints

**Mr. Georgy Dzhibladze,
Moscow, Russian Federation,**

as its official representative on mission.

Mr. Dzhibladze will travel to Kazakhstan on 19 October 2009 to observe the trial on 20 October of Mr. Yevgeniy Zhovtis at the appeals court in Taldykorgan.

As the observer of the World Movement Steering Committee, Mr. Dzhibladze will remain in Kazakhstan until all necessary information to assess the case is collected, and will report directly to the World Movement Steering Committee on the proceedings.

The Steering Committee would be grateful to the government and authorities of Kazakhstan for all facilities and usual courtesies, which may be extended to Mr. Dzhibladze for the accomplishment of his mission, including facilitation of meetings with relevant officials and all parties to the process.

The Steering Committee would also appreciate any assistance that the Members of the Bar and Judiciary can provide.

This Ordre de Mission has been delivered on behalf of the World Movement for Democracy Steering Committee to Mr. Georgy Dzhibladze.

On behalf of the Steering Committee of the World Movement for Democracy:

***The Rt. Hon. Kim Campbell
Chair and Member (Canada), Former Prime Minister of Canada
Steering Committee***

The World Movement for Democracy is a global network of democrats, including activists, practitioners, academics, policy makers, and funders, who have come together to cooperate in the promotion of democracy.

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