ANNEX I

INTERNATIONAL STANDARDS AND DOMESTIC LEGAL FRAMEWORK

KAZAKHSTAN TRIAL MONITORING REPORT
(November 2022 – December 2023)

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ANNEX I - INTERNATIONAL STANDARDS AND DOMESTIC LEGAL FRAMEWORK

1. Considerations regarding the independence of judges and prosecutors.

1.1. International standards

1. A well-functioning and independent judiciary is an essential requirement for the fair and impartial administration of justice. The right to a hearing before an independent tribunal established by law, as a necessary precondition for the fairness of a trial, requires that hearings are conducted by judges who are and appear to be unbiased, and free of any undue influence.

2. According to the HRC, the requirement of independence and impartiality of a tribunal in the sense of Article 14, para. 1 of the ICCPR is an absolute right that is not subject to any exception.[1] For judges to be truly independent, there needs to be a clear separation of powers between the executive power and the judiciary. According to the HRC, "A situation where the functions and competencies of the judiciary and the executive are not clearly distinguishable or where the latter is able to control or direct the former is incompatible with the notion of an independent tribunal."[2]

3. The HRC also affirmed that, for a court or other tribunal to meet the requirements of independence under Article 14 of the ICCPR, the law must lay out some key elements, including "…the procedure and qualifications for the appointment of judges, and guarantees relating to their security of tenure until a mandatory retirement age or the expiry of their term of office, where such exist, the conditions governing promotion, transfer, suspension and cessation of their functions, and the actual independence of the judiciary from political interference by the executive branch and legislature".[3]

4. Moreover, the UN Basic Principles on the Independence of the Judiciary lay out guarantees to ensure that the judiciary is truly independent, foreseeing standards related to the appointment, tenure and transfer of judges, the assignment of cases to individual judges within a court, and the requirement that tribunals be established in accordance with national law.[4]

[1] HRC, General Comment No. 32, para. 19.
[2] Ibid.
[3] Ibid.
[4] UN, Basic Principles on the Independence of the Judiciary, adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.

5. OSCE participating States have repeatedly committed to ensuring the independence of the judiciary, including in the 1990 Copenhagen Document[5] and the 1991 Moscow Document.[6] In the 1999 Istanbul Document, OSCE participating States stressed that independent judicial systems "play a key role in providing remedies for human rights violations".[7]

6. The OSCE/ODIHR Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia ("Kyiv Recommendations") offer guidance on fair and transparent judicial administration, including on selection, appointment, promotion, transfer, evaluation, and disciplinary liability of judges, which is crucial to ensuring the independence and impartiality of the judiciary. This includes an obligation to clearly define in the law the procedure and criteria for judicial selection;[8] a to establish selection body that is independent, representative and responsible towards the public.[9] Where the final appointment of a judge is with the State President, the discretion to appoint should be limited to the candidates nominated by the selection body; refusal to appoint such a candidate may be based on procedural grounds only and must be reasoned.[10]

7. The 2023 OSCE/ODIHR Recommendations on Judicial Independence and Accountability ("Warsaw Recommendations")[11] articulate international standards and good practices with respect to further issues related to judicial administration, including related to judicial tenure, irremovability and the transfer of judges within and between courts. Judges should be transferred within or between courts only with their own freely given consent, except in exceptional circumstances. A perceived or actual lack of fairness and transparency in practices related to judicial transfers may weaken the internal independence of judges and may undermine the guarantees of their security of tenure and irremovability."[12]

8. Furthermore, the transfer of judges in the context of reorganization of courts should not serve as a mechanism for executive or legislative interference in the independence of the judiciary. Judicial transfers made in the context of court reorganization should respect the general principles of consent, fairness and transparency to the greatest degree possible." "In the extraordinary cases where a court is abolished or substantially restructured, all existing members of that court should, in principle, be reappointed to the replacement court (if applicable), or appointed to another judicial office of equivalent status and tenure. Where

[5] OSCE, Document of the Copenhagen meeting, 29 June 1990. Participating States agreed that "[. . .] the rule of law does not mean merely a formal legality which assures regularity and consistency in the achievement and enforcement of democratic order, but justice based on the recognition and full acceptance of the supreme value of the human personality and guaranteed by institutions providing a framework for its fullest expression" (para. 2).
[6] OSCE, Document of the Moscow Meeting of the Conference on the Human Dimension of the CSCE, 4 October 1991. Participating States committed to "respect the international standards that relate to the independence of judges […] and the impartial operation of the public judicial service" (para. 19.1) and to "ensure that the independence of the judiciary is guaranteed and enshrined in the constitution or the law of the country and is respected in practice" (para. 19.2).
[7] OSCE, Istanbul Document, Sixth OSCE Summit of Heads of State or Government, Istanbul, 18 - 19 November 1999.
[8] OSCE, Kyiv Recommendations, para. 21.
[9] Ibid.
[10] Ibid., para. 23.
[11] OSCE/ODIHR Recommendations on Judicial Independence and Accountability ("Warsaw Recommendations"), 27 October 2023.
[12] Warsaw Recommendations, para. 32.

this does not exist, the judge concerned should be given full compensation for the loss of office. [13]

9. While prosecutors do not enjoy the same level of independence as judges under international standards, they still require a certain degree of autonomy to carry out their duties effectively and impartially. The Rome Charter of the Consultative Council of European Prosecutors (CCPE), proclaims the principle of independence and autonomy of prosecutors, and recommends that the "[i]ndependence of prosecutors […] be guaranteed by law, at the highest possible level, in a manner similar to that of judges'". Thus, "prosecutors should be autonomous in their decision making and, while cooperating with other institutions, should perform their respective duties free from external pressures or interferences from the executive power or the parliament, having regard to the principles of separation of powers and accountability".[14] A hierarchical prosecution service that is directly answerable to the executive branch may lack sufficient autonomy to make decisions based solely on the law and the merits of each case.[15] Prosecutors should respect the independence of courts and should take all measures to protect their independence.[16]

10. Although a prosecution service may follow a hierarchical structure, prosecutors should be independent when making decisions on the assigned cases. No verbal or written instructions should be given as to the final outcome of an individual case; instructions should relate only to the correction of procedural deficiencies, decisions that are improper in law or not supported by available evidence, human rights violations or requirements to undertake additional investigative steps. All instructions should be reasoned, issued in writing, and should be legal. If these conditions are not met, prosecutors should have the right to relief from unlawful instructions and to challenge the instructions either in court or before an independent body.[17]

1.2. Domestic legal framework

11. The judicial system and guarantees for judicial independence, status and guarantees in Kazakhstan are primarily regulated by the 1995 Constitution and the 2000 Constitutional Law of the Republic of Kazakhstan on the Judicial System and Status of Judges of the Republic of Kazakhstan ("2000 Constitutional Law").[18]

12. According to the Constitution, "A judge in the administration of justice is independent and subject only to the Constitution and the law,"[19] and "Any interference with the court's administration of justice is unacceptable and punishable by law."[20] The 2000 Constitutional

[13] Warsaw Recommendations, para 33.
[14] CCPE, Rome Charter – Opinion no. 9 (2014) on European Norms and Principles concerning Prosecutors, para. 33, cited in ODIHR's Opinion on Draft constitutional Law of the Republic of Kazakhstan, of 22 October 2022, page 8.
[15] International Association of Prosecutors, Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors, 1999.
[16] Ibid, Opinion No. 13(2018) of the CCPE, para 38.
[17] See ODIHR, "Strengthening functional independence of prosecutors in Eastern European participating States: Needs Assessment Report", 4 March 2020, para. 38, see also IAP Standards of professional responsibility and statement of the essential duties and rights of prosecutors, in para 6 (i).
[18] Law No. 132-II, "On Judicial System and Status of Judges in the Republic of Kazakhstan", 25 December 2000 ("2000 Constitutional Law").
[19] Constitution, Article 77, para. 1.
[20] Constitution, Article 77, para. 2.

Law underscores that "No one may be deprived of the right to have his case heard by a competent, independent and impartial court meeting all the requirements of the law and justice."[21] The Constitution foresees that justice in Kazakhstan is carried out exclusively by courts,[22] and that "courts are composed of permanent judges, whose independence is protected by the Constitution and the law".[23]

13. The court system is composed of three tiers: courts of first instance, appellate courts, and courts for cassation review. Generally, district courts with territorial jurisdiction handle criminal justice at the first instance level, except for particularly grave offences, which are examined by specialized criminal courts based on territorial jurisdiction. Appellate review of first-instance decisions is conducted by the judicial panel on criminal justice within regional courts or city courts for cities with special status. The Supreme Court's judicial panel on criminal justice exercises cassation review of the legality of lower courts' decisions. Military courts handle offences committed by the military, with the Military Court of the Republic of Kazakhstan, based in Astana, reviewing their decisions on appeal.[24]

14. Article 83 of the Constitution and Article 1 of the Law of the Republic of Kazakhstan on Prosecution Service, [25] setting out the main role of the Prosecutor's Office, state that this body "supervises the observance of legality on the territory of the Republic of Kazakhstan, represents the interests of the state in court, and carries out criminal prosecutions on behalf of the state."

15. Article 3 of the Law on Prosecution Service envisages that the Prosecution Service undertakes its mandate based on the principles of independence from other state institutions and state officials, accountability only to the President of Kazakhstan, and of transparency. Articles 4 (4) and 6 of the Law on Prosecution Service state that the scope of tasks of the prosecution service can be extended by the acts by the President, while Article 8 states that the Prosecutor General and the deputies are directly accountable to the President.

2. Right to a public hearing

2.1. International standards

16. The public nature of hearings ensures the transparency of criminal proceedings and provides an important safeguard for the right to a fair trial. Both the UDHR and the ICCPR affirm everyone's right to a public hearing in the determination of any criminal charge against

[21] 2000 Constitutional Law, Article 1, para. 2.
[22] Constitution, Article 75.
[23] Constitution, Article 79.
[24] An amendment to the Constitution (Law on the Amendments and Additions to the Constitution, 8 June 2022), adopted through a referendum held on 5 June 2022, reintroduced the Constitutional Court into the judicial system of Kazakhstan, replacing the previously existing Constitutional Council. Citizens can now address the Constitutional Court to request a review of the constitutionality acts that directly affect their rights and freedoms.
[25] See Law of the Republic of Kazakhstan on Prosecution Service of 5 November 2022, No 155-VII.

them.[26] The ECHR contains an identical requirement.[27] The right to a public hearing is also firmly recognized in the OSCE Commitments.[28]

17. Public trials are not an absolute rule. The ICCPR provides that the public's participation may be excluded, *inter alia*, for reasons of "public order or national security in a democratic society [...] or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice".[29] However, any limitation is permissible only when strictly necessary and proportionate to the legitimate aim it should protect.[30]

18. OSCE participating States committed to ensuring that "proceedings may only be held *in camera* in the circumstances prescribed by law and consistent with obligations under international law and international commitments".[31]

19. Both the HRC and the ECtHR have stressed that the principles of necessity and proportionality are essential safeguards against arbitrary limitations on the right to a public trial. In its General Comment No. 32, the HRC stated that any restrictions on the public nature of a trial must be both necessary and proportionate to the legitimate aim pursued, such as protecting national security, public order, or the privacy of the parties involved. In *Gridin v. Russian Federation*, the HRC found a violation of ICCPR's Article 14(1) because the domestic courts failed to provide adequate reasons for excluding the public from the trial, emphasising that any restrictions must be supported by specific justifications. Similarly, the ECtHR has consistently held that any limitations on the public nature of proceedings must be strictly necessary and proportionate to the legitimate aims pursued, and that courts must provide detailed reasons for such restrictions.[32]

20. For instance, in *Riepan v. Austria* the ECtHR found that the exclusion of the public from an entire trial imposed as a security measure was a breach of Article 6 of the ECHR, finding that "cases in which security concerns justify excluding the public from a trial are rare".[33] In *Chaushev and Others v. Russia*, the ECtHR found that the failure of national courts to substantiate the decision on closing the trial refuted the subsequent justification of the limitation with security concerns, amounting to the violation of the right to a public hearing.[34] In *Belashev v. Russia*, the Court deemed that the mere presence of classified information in the case file does not automatically imply a need to close a trial to the public, without balancing openness with other public interest considerations.[35]

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[26] UDHR, Article 10; ICCPR, Article 14.
[27] ECHR, Article 6 para. 1.
[28] Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, 29 June 1990, para. 5.16.
[29] ICCPR, Article 14.
[30] See HRC, *Touron v. Uruguay*, 31 March 1981, para 12 and HRC, *Weisz v. Uruguay*, 8 May 1978, para 16. See also ECtHR, *Osman v. the United Kingdom*, 28 October 1998, paras 147–154; ECtHR, *Wait and Kennedy v. Germany*, 18 February 1999, paras 59–67.
[31] Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, 29 June 1990, para. 12.
[32] See e.g. ECtHR, *Riepan v. Austria*, 14 November 2000, and ECtHR, *Martinie v. France* [GC], 12 April 2006.
[33] ECtHR, *Riepan v. Austria*, cit., para. 34.
[34] ECtHR, *Chaushev and Others v. Russia*, 25 October 2016, para 24.
[35] ECtHR, *Belashev v. Russia*, 4 December 2008, para. 83. The Court held that "it may be important for a State to preserve its secrets, but it is of infinitely greater importance to surround justice with all the requisite safeguards, of which one of the most indispensable is publicity. Before excluding the public from criminal

21. Apart from such exceptional circumstances, a hearing must be open to the general public, including members of the media, and must not be limited to a particular category of persons.[36] For instance, in the *Estrella v. Uruguay* case, the HRC concluded that, due to the State's failure to justify the need for limiting the right to a public hearing, the holding of an *in camera* trial breached Article 14 of the ICCPR.[37]

22. Even in cases in which the public is excluded from the trial, "the judgement, including the essential findings, evidence and legal reasoning must be made public".[38] As the ECtHR stated, "The publicity of judicial decisions aims to ensure scrutiny of the judiciary by the public and constitutes a basic safeguard against arbitrariness."[39]

23. Regarding public accessibility of hearings held in an online format, the ECtHR stated that holding a trial remotely, with parties connected online, does not necessarily violate the publicity of a criminal trial; however, as a rule, evidence should be produced at a public hearing, in the presence of the accused, with a view to adversarial argument.[40] In its Guidelines on videoconferencing in judicial proceedings, the European Commission for the Efficiency of Justice (CEPEJ) stressed that the court should ensure that the transmission can be seen and heard by those involved in the proceedings and by members of the public.[41] The court should create a comprehensive procedure for public participation for example, by allowing the public to join the remote hearing in real time or uploading the recordings to the court's website.[42]

24. The OHCHR stressed the need to uphold these principles also in online hearings, by making information regarding the time and venue of online hearings available to the public and media, when required, and provide for adequate facilities, notably the technological means, to ensure the attendance of interested members of the public to the on-line hearing.[43] In its Fair Trial Rights and Public Health Emergencies publication, ODIHR recommended inter alia that "online and hybrid hearings are made public to the extent possible. Public access to hearings can be ensured by allowing the public to attend the hearing in real-time or by uploading the audio/video recordings on the courts' website."[44]

proceedings, courts must make specific findings that closure is necessary to protect a compelling governmental interest and limit secrecy to the extent necessary to preserve such an interest" (ibid.).

[36] HRC, General Comment 32, para. 29. However, in line with para 28 of the HRC General Comment 32, the requirement of a public hearing does not necessarily apply to appellate proceedings which may take place on the basis of written presentations.

[37] HRC, *Miguel Angel Estrella v. Uruguay*, Communication No. 74/1980, para. 10.

[38] HRC, General Comment 32, para. 29. In the HRC's view, the only exception is where the interest of juvenile persons otherwise requires, or the proceedings concern matrimonial disputes or the guardianship of children (Ibid.).

[39] ECtHR, *Raza v. Bulgaria*, *11 February 2010*, para. 53.

[40] See, for example, ECtHR, *A.M. v Italy*, 14 December 1999, para. 25.

[41] European Commission for the Efficiency of Justice, Guidelines on videoconferencing in judicial proceedings, 1 July 2021, principle 7.

[42] Ibid., principle 12.

[43] OHCHR, On-Line hearings in justice systems, page 4.

[44] ODIHR, Fair Trial Rights and Public Health Emergencies, page 16.

2.2. Domestic legal framework

25. Kazakhstan's CPC foresees guarantees on the publicity of criminal trials, establishing that the trial of criminal cases in all courts and judicial instances shall be public[45] and that the court's judgement and decisions in the case shall be announced publicly.[46] In addition, courts are obliged to publish the schedule of hearings online, and provide such information upon written requests.[47]

26. However, the public can be excluded from trials involving sensitive criminal proceedings, including those where the safety of the victim, witness or other persons may be endangered.[48] Proceedings may also be held in a confidential setting "when it is contrary to the interests of the protection of State secrets and other secrets protected by law."[49] The defendant has the right to appeal decision to hold the trial behind closed doors in accordance with the procedure established by law.

27. The CPC further specifies that evidence containing information constituting State secrets *must* be collected in a closed court session,[50] whereas if it involves other secrets protected by law, the judge has discretion as to whether the session is open or closed.[51]

28. Contrary to the general rule that judgements and decisions in all cases shall be announced publicly,[52] in criminal trials which are held (entirely) in a closed court session, only the introductory and the enacting clause of the sentence shall be publicly proclaimed.[53] Moreover, although as a general rule courts must provide reasons for their decision to exclude the public from the trial,[54] in cases involving State secrets the reasoning of a judgement, whether of acquittal or of conviction, should not mention the circumstances that caused the trial to be held in a closed session.[55]

29. Practically, in such cases the court makes public only the personal details of the defendants, the criminal offence of which they were found guilty, and the sentence imposed.

3. Presumption of innocence

3.1. International standards

30. The presumption of innocence is a fundamental principle enshrined in international human rights law that protects the rights of the accused in criminal proceedings. Article 11 of the UDHR and Article 14 para. 2 of the ICCPR require that individuals be presumed innocent until proven guilty according to the law. OSCE participating States have also included this

[45] CPC, Article 29, para. 1, first sentence.
[46] CPC, Art 29, para. 3, first sentence.
[47] See Law on access to information, Article 11 para. 4, subpara. 6 and Article 16 para 5, subpara. 2.
[48] CPC, Article 29, para. 1, third sentence, and Article 98, paragraph 1.
[49] CPC, Article 29, para. 1, second sentence.
[50] CPC, Article 47, paragraph 5.
[51] CPC, Article 47, paragraph 6.
[52] CPC, Article 29, para. 3, first sentence.
[53] CPC, Article 29, para. 3, second sentence.
[54] CPC, Art 29, para. 1, third sentence.
[55] CPC, Article 397, para. 4, and Article 399, para. 3.

principle in their commitments as one of the essential elements of justice, by declaring that "everyone will be presumed innocent until proven guilty according to law".[56]

31. The HRC stated that the right to be presumed innocent is considered as a norm of customary international law, and therefore it applies at all times and in all circumstances.[57] According to the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, "a detained person suspected of or charged with a criminal offence shall be presumed innocent and shall be treated as such until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence."[58]

32. The right to be presumed innocent has a series of corollaries. First, authorities involved in the determination of criminal responsibility must refrain from making any statements or assessment regarding the guilt of the defendant before a determination on the criminal charges is made. The HRC has consistently held that public statements by judicial authorities implying the guilt of the accused before conviction violate the presumption of innocence.[59]

33. Second, as the HRC explained, the presumption of innocence imposes on the prosecution the burden of proving the charge, guarantees that no guilt can be presumed until the charge has been proved beyond reasonable doubt, and ensures that the accused has the benefit of doubt.[60]

34. Third, defendants must not be presented or treated in a manner that implies their guilt. According to the HRC, anyone accused of a crime should be treated in accordance with the presumption of innocence, which entails that "defendants should normally not be shackled or kept in cages during trials or otherwise presented to the court in a manner indicating that they may be dangerous criminals".[61] The HRC also emphasized that "treating all persons deprived of their liberty with humanity and with respect for their dignity is a fundamental and universally applicable rule", which should be applied to all accused without distinction of any kind.[62]

35. The HRC also held that the media should avoid covering news of investigations and trials in a way that potentially undermines the presumption of innocence.[63] Similarly, the ECtHR held that a virulent media campaign is in certain cases likely to harm the fairness of the trial, by influencing public opinion and, thereby, the courts called upon to rule on the guilt of an accused.[64]

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[56] OSCE, Copenhagen Document, 29 June 1990, paragraph 5.19.
[57] See HRC, General Comment No. 29, para. 11 and 16; General Comment No. 32, para. 6.
[58] UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, adopted by the UN General Assembly on 9 December 1988, principle 36, paragraph 1.
[59] HRC, *Gridin v. Russian Federation*, 20 July 2000, paras. 3.5 and 8.3: "[i]t is a duty for all public authorities to refrain from prejudging the outcome of a trial, e.g. by abstaining from making public statements affirming the guilt of the accused." See also ECtHR, *Daktaras v Lithuania*, 10 October 2000, para 43.
[60] HRC, General Comment No. 32, para 30. See also HRC, *Sobhraj v Nepal*, 27 July 2010, para 7.3. For additional considerations, see also Chapter 9.
[61] HRC, General Comment No. 32, para 30.
[62] HRC, General Comment No. 21, Article 10: Humane Treatment of Persons Deprived of Their Liberty, para 4.
[63] HRC, General Comment No. 32, para 30. For examples and recommendations on responsible media reporting that does not interfere with the defendant's presumption of innocence, see e.g. Arisa Project's publication "The presumption of innocence and the media coverage of criminal cases".
[64] See ECtHR, *Kuzmin v. Russia*, 18 March 2010, para. 62. See also ECtHR, *Viorel Burzo v. Romania*, 30 June 2009, para. 158.

3.2. Domestic legal framework

36. According to the Constitution of the Republic of Kazakhstan, "a person is considered to be innocent of committing a crime until his guilt is recognized by the court judgement that has entered into legal force".[65] The Supreme Court's 2018 Normative Ruling no. 4 "On Verdicts" also stresses that the courts are oriented towards strict and unwavering compliance with this principle. Moreover, the accused is not obliged to prove his/her innocence[66] and any doubts about the guilt of the person shall be interpreted in favour of the accused.[67] The Constitution prescribes that evidence obtained in an unlawful manner is not legally binding.[68]

37. Article 19 of the CPC outlines the principle of presumption of innocence in the context of criminal proceedings. It establishes, *inter alia*, that no one should be obliged to prove their own innocence,[69] and that any doubts regarding the guilt of the suspect, accused, or defendant should be interpreted in their favour.[70] It also emphasizes that a guilty verdict cannot be based on mere suppositions and must be substantiated by a comprehensive collection of admissible and reliable evidence.[71]

38. Article 23 of the CPC underlines that the burden of proof of guilt of a person in committing a criminal offence is on the prosecution.[72] The body conducting criminal proceedings has a duty to collect both inculpatory and exculpatory evidence.[73]

39. To preserve the court's appearance of impartiality and the presumption of innocence, the CPC mandates that prior to the announcement of the judgement, judges may not disclose their opinions that impact on the decision in the case.[74]

4. Court handling of allegations of evidence obtained through torture or other ill-treatment

4.1. International standards

40. The right not to give evidence against oneself or confess guilt is an essential protection closely linked to the right to a fair trial and the principle of the presumption of innocence. It is explicitly set out in Article 7 of the ICCPR which provides that an accused person must not "be compelled to testify against himself or to confess guilt."[75]

41. The HRC found a violation of this provision when the accused persons' confessions were obtained under duress and used as evidence against him or her. The Committee stressed

[65] Constitution, Article 77 para. 3, subpara. 1.
[66] Ibid., subpara. 6.
[67] Ibid., subpara. 8.
[68] Ibid., subpara. 9.
[69] CPC, Article 19, para. 2.
[70] Ibid., para. 3.
[71] Ibid. para 4.
[72] CPC, Article 23, para. 3.
[73] CPC, Article 24, para. 5.
[74] CPC, Article 389, para. 3.
[75] ICCPR, Article 14 para. 3, lett. g).

that the use of coerced confessions undermines the right to a fair trial and the principle of the presumption of innocence.[76]

42. A violation of this right is particularly concerning when the methods used to force the confession amount to serious human rights violations such as torture or other ill-treatment. Resort to such methods to compel an accused person to confess guilt is strictly prohibited: as the HRC clearly stated, "it is unacceptable to treat an accused person in a manner contrary to article 7 of the Covenant in order to extract a confession."[77] According to international standards, including the CAT, any statement which is established to have been made as a result of these actions shall not be invoked as evidence in any proceedings, except as evidence that the statement was made.[78] The HRC also endorsed this rule in relation to statements by both defendants and witnesses.[79]

43. The HRC also underlined the State's obligation to investigate allegations of torture, stating that the "criminal investigation and consequential prosecution are necessary remedies for violations of human rights, such as those protected by article 7 of the Covenant".[80] Investigations must be "prompt and impartial".[81] Similarly, the CAT prescribes that States should "ensure that the complainant and witnesses are protected against all ill-treatment or intimidation as a consequence of his complaint or any evidence given."[82]

44. According to the United Nations Guidelines on the Role of Prosecutors,[83] when prosecutors obtain evidence against suspects that they know or reasonably believe was procured through unlawful methods constituting severe violations of the suspect's human rights, particularly involving torture or other human rights abuses, they are obligated to refuse to use such evidence and take all essential measures to ensure that the individuals responsible for employing these methods are held accountable and brought to justice.[84]

45. At the Moscow Meeting in 1991, OSCE participating States committed to enact effective measures "to provide that law enforcement bodies do not take undue advantage of the situation of a detained or imprisoned person for the purpose of compelling him to confess, otherwise to incriminate himself, or to force him to testify against any other person".[85] Moreover, persons deprived of liberty must enjoy the right to make a complaint regarding

[76] See for instance HRC, *Gridin v. Russian Federation*, 20 July 2000.
[77] See HRC, *Kurbonov v. Tajikistan*, 16 March 2006, paras. 6.2 – 6.4; *Shukurova v. Tajikistan*, 17 March 2006, paras. 8.2 – 8.3; *Singarasa v. Sri Lanka*, 21 July 2004, para. 7.4; *Deolall v. Guyana*, 1 November 2004, para. 5.1; *Kelly v. Jamaica*, 8 April 1991, para. 5.5.
[78] 1984 UN Convention Against Torture, Article 15. See also HRC, General Comment 32, paragraph 6, and General comment No. 29 (2001) on Article 4: Derogations during a state of emergency, para. 15.
[79] General Comment No. 32, para. 6: "any evidence obtained in violation of the rights set forth in the Covenant shall not be admissible in court."
[80] HRC, *Suleimanov v. Kazakhstan*, 21 March 2017, Para. 8.3. See also HRC, General Comment No. 20, On the prohibition of torture or other cruel, inhuman or degrading treatment or punishment, para. 14, and HRC, General Comments No. 31, "On the nature of the general legal obligations imposed on States parties to the Covenant", para. 18.
[81] HRC, *Suleimanov v. Kazakhstan*, cited above, Para. 8.4.
[82] Convention against Torture, Article 13.
[83] Guidelines on the Role of Prosecutors, Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990.
[84] Guidelines on the Role of Prosecutors, guideline 16.
[85] OSCE, Document of the Moscow meeting of the Third Conference on the Human Dimension of the CSCE, Moscow, 4 October 1991, Commitment (ix).

their treatment, including allegations of torture, which must be promptly dealt with and replied to without undue delay.[86]

4.2. Domestic legal framework

46. The Constitution of the Republic of Kazakhstan prohibits torture and violence, and states that evidence obtained in an unlawful manner is not legally binding.[87] The CPC stipulates that participants in criminal proceedings shall not be subject to torture, cruel, degrading treatment or punishment, and explicitly prohibits the use of torture, violence, threat, cruel treatment, and other actions endangering life and health in the conduct of investigation.[88]

47. The CPC clearly establishes that evidence, including the defendant's statements and witness testimony, is inadmissible if obtained in a manner that could affect its reliability.[89] Thus, evidence is inadmissible if obtained through a) the use of torture, violence, threats, deception, or other illegal acts and abuse; or b) misinformation to or deception of a person participating in criminal proceedings with respect to his/her rights and responsibilities arising from unexplained, incomplete or incorrect explanation of them to him/her.[90] The unlawfully obtained evidence may be used only to prove that the corresponding violations, i.e. torture or another crime, have been committed.[91]

48. The CPC obliges the institution conducting criminal proceedings, including courts, to bring to light and examine exculpatory circumstances and evidence in favour of the defendant, including on the possible use of illegal methods of investigation in collecting and securing evidence.[92] As of 1 January 2023, Prosecutors are exclusively responsible for investigations into torture,[93] while the Ministry of Interior has jurisdiction to investigate inhuman, cruel, degrading treatment. [94]

49. The CPC also clearly prescribes that if, during the investigation, the suspect claims to have been subjected to torture or other illegal activities, or if there are signs of violence on their body, the investigating judge shall instruct the supervising prosecutor to immediately investigate these allegations.[95] A complaint about the use of torture may be filed at any stage of the trial.

[86] OSCE, Document of the Moscow Meeting, cited above, paras 23.1(i)-(iv) and (vi).
[87] Constitution, Article 17, para 2; Article 77, para. 3, subpara. 9. UN CAT took note of the amendments to Article 146 of the Criminal Code, which distinguish the crime of torture from other forms of cruel, degrading or inhuman treatment, however remained concerned about the shortcomings, see CAT's Concluding observations on the fourth periodic report of Kazakhstan, 8 June 2023, para 9 and 10.
[88] CPC, Article 14 para. 5, and Article 197, para. 4.
[89] CPC, Article 112, paras 1 and 4; Article 197, para. 4.
[90] CPC, Article 112, para. 1, subparas 1 and 2.
[91] Ibid., para. 5. The Supreme Court's Normative Ruling no. 4 "On Verdicts" of 20 April 2018 further emphasises that when assessing evidence, courts must "keep in mind that evidence obtained in violation of the law has no legal force and therefore cannot be used as the basis for a conviction."
[92] CPC, Article 24, para. 5.
[93] CPC, Article 193, para. 1, subpara. 12-1, as amended by Law No 157-VII of 16 March 2022.
[94] CPC, Article 187.
[95] CPC, Article 56, para 5.

50. Witnesses must be warned that they must speak the truth, both during the investigation[96] and the trial.[97] When allegations of torture or compulsion to testify are made during the trial, the court is obligated to take specific actions. If the court discovers indications of a criminal offence during the proceedings, or uncovers facts related to the refusal to accept or register an application or report of a criminal offence, it must issue a private ruling to bring the matter to the attention of the prosecutor.[98]

51. The court must decide on any application to exclude the evidence as inadmissible, at the latest together with the verdict.[99] The trial record must, among other things, accurately document the findings arising from the examination of any allegations concerning the employment of torture, acts of violence, or any other forms of cruel or inhumane treatment, including a detailed account of the investigative procedures undertaken in response to such allegations.[100]

52. Compelling a defendant or a witness to provide a certain statement by threats, blackmail or any other illegal action is criminalised.[101] In any case, the confession by the defendant cannot be the only evidence supporting his/her conviction.[102]

5. Right to liberty

5.1. International standards

53. International human rights standards guarantee the protection of individual liberty of every person. Multiple human rights instruments establish a presumption of liberty, to ensure that no one is deprived of liberty in an arbitrary manner, or without due justification. The UDHR and the ICCPR states that no one shall be subjected to arbitrary arrest or detention.[103]

54. The concept of "arbitrary" in international law is generally understood to encompass a broad range of negative elements, including injustice, inappropriateness, and lack of predictability. The HRC, in its General Comment No. 35 on Article 9 ICCPR, emphasized that the term "arbitrary" is not limited to acts that are against the law but also includes elements of inappropriateness, injustice, and lack of predictability.[104]

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[96] CPC, Article 214 and 215.
[97] CPC, Article 370 para 2.
[98] CPC, Article 185 para 3. Furthermore, the Supreme Court's regulatory resolution of 28 December, 2009, No. 7, "On the application of the norms of criminal and criminal procedure legislation on the observance of personal freedom and inviolability of human dignity, countering torture, violence, and other cruel or degrading treatment and punishment" also obliges the courts to take measures for each identified case of cruel or degrading treatment and regulates in detail the procedure for courts to respond to statements by defendants and others about the use of torture and other forms of ill-treatment.
[99] CPC, Article 362, para. 2.
[100] CPC, Article 347, para. 3, subpara. 14.
[101] CC, Article 415, "Compulsion of evidence", a criminal offence carrying a fine or up to four years of imprisonment.
[102] CPC, Article 115, para. 3.
[103] Universal Declaration of Human Rights (UDHR), 1948, Article 9. ICCPR, 1966, Article 9 para. 1.
[104] HRC, General comment No. 35: Article 9 (Liberty and security of person)", 16 December 2014, para. 12. See HRC, *Gorji-Dinka v. Cameroon*, 17 March 2005, para. 5.1; HRC, *Van Alphen v. The Netherlands*, 23 July 1990, para. 5.8.

55. States can exceptionally derogate from the right to liberty only where objective reasons justify its deprivation.[105] Substantive grounds for arrest or detention must be prescribed by law and should be defined with sufficient precision to avoid overly broad or arbitrary interpretation or application.[106] The preconditions for the lawfulness of detention in the context of pre-trial proceedings are a reasonable suspicion of having committed a criminal offence and at least one of three permissible grounds for pre-trial detention, i.e. "the likelihood exists that the accused would abscond or destroy evidence, influence witnesses, or flee from the jurisdiction of the State party."[107]

56. Therefore, although individuals can be deprived of liberty only in accordance with procedural and substantive rules set forth by national law, the prohibition of arbitrariness extends beyond the lack of conformity with national law: a measure to deprive liberty may be lawfully imposed in domestic law, but still be deemed arbitrary and thus contrary to international human rights standards.[108]

57. To guarantee that the deprivation of liberty prior to a final criminal conviction is as brief as possible, the HRC held that remand in custody on criminal charges must be reasonable and necessary in all the circumstances[109] and detention shall not last longer than absolutely necessary.[110] To this end, "[p]rompt and regular review by a court […] is a necessary guarantee",[111] when pre-trial detention is extended. Defendants who are not released during the pretrial period must be tried as quickly as possible.[112]

58. The person detained has the right to trial within a reasonable time or to release.[113] This requirement applies to periods of detention between the time of arrest and the time of judgement at first instance.[114]

59. OSCE participating States have also envisaged safeguards that States must put in place when imposing any measure depriving an individual of liberty. These include the prohibition to deprive anyone of liberty except on legal grounds and in accordance with procedures established by law and the right to make a complaint regarding their treatment, which must be promptly dealt with and replied to without undue delay. [115]

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[105] See e.g. UDHR, Article 3; ICCPR, Article 9.
[106] See HRC, General Comment no. 35, para. 22. See also ECtHR, *Khlaifia and Others v. Italy* [GC], 15 December 2016, para. 91.
[107] See HRC, CCPR General Comment No. 27: Article 12 (Freedom of Movement), 2 November 1999, para 14.
[108] As the HRC explained, "unlawful" detention includes both detention that violates domestic law and detention that is incompatible with the requirements of article 9, paragraph 1, or with any other relevant provision of the Covenant. HRC, General comment No. 35, paras. 12 and 44.
[109] See, e.g., HRC, *Kulov v. Kyrgyzstan*, 26 July 2010, para. 8.3.
[110] See General comment No. 35: Article 9 (Liberty and security of person), 16 December 2014, paragraph 15. See also Concluding Observations in Bosnia and Herzegovina, 2012, para. 14.
[111] HRC, General comment No. 35: Article 9 (Liberty and security of person), 16 December 2014, paragraph 15.
[112] See HRC, General Comment No. 32, para. 35; see also HRC, *Sextus v. Trinidad and Tobago*, 16 July 2001, para. 7.2.
[113] HRC, General Comment No. 35: Article 9 (Liberty and security of person), para. 37.
[114] HRC, *Engo v. Cameroon*, para. 7.2. On the relationship between Article 9, para. 3, and Article 14, para. 3 lett. c), see HRC, General Comment No. 32, para. 61.
[115] OSCE, Document of the Moscow Meeting, 4 October 1991, cited above, paras 23.1(i)-(iv) and (vi).

5.2. Domestic legal framework

60. Under the CPC, preventive measures, including deprivation of personal liberty in the form of house arrest or pre-trial detention, can be applied only where there are "sufficient grounds to believe that the suspected, the accused would hide from criminal prosecution bodies or court, or prevent the objective investigation of the case or proceeding in court, or will continue to engage in criminal activity, as well as to ensure the execution of the sentence".[116]

61. Pre-trial detention is possible only for a crime for which the law prescribes a penalty of deprivation of liberty for a period exceeding five years and where it is impossible to apply other less stringent preventive measures.[117] Pre-trial detention is exceptionally possible also for less serious crimes.[118] Generally, the severity of the offence cannot be the sole basis for a preventive measure in the form of detention in custody.[119] For certain specifically listed crimes, mostly against the security or integrity of the State institutions, pre-trial detention is possible regardless of considerations of the existence of procedural risk.[120] This confirms that for all other crimes the court needs to ascertain a risk of flight, evidence tampering, likelihood for commission of other offences.[121] In any event, the least stringent measure should always be applied, unless a more severe one is necessary.[122] In establishing which measure is necessary, the Court should have regard to criteria including the gravity of the offence and the defendant's age.[123]

62. The period of detention between the time of arrest and the time of judgement at first instance may last up to three years. The judge may extend the detention up to four times, up to 18 months both at the pre-trial and main trial stages. The CPC entitles those unlawfully subjected to pre-trial detention or house arrest to compensation.[124]

[116] CPC, Article 136, first sentence.
[117] CPC, Article 147, first sentence.
[118] CPC, Article 147, second sentence.
[119] CPC, Article 138, para. 2.
[120] CPC, Article 136, para. 2.
[121] CPC, Article 138, para. 2. This interpretation is reaffirmed by the Supreme Court in its Normative Ruling of the Supreme Court of Kazakhstan No. 1, of 24 January 2020 "On certain issues pertaining to the sanctioning of preventive measures", where it states that in the absence of the grounds listed in Article 136 of the CPC, a preventive measure cannot be applied. In 2022, amendments were made to this regulatory resolution, requiring courts to verify not only the legality of selecting a preventive measure, but also the validity of a person's allegations of committing a crime and the reliability of the evidence. Additionally, a judge's failure to comply with this requirement is considered a serious violation, resulting in the annulment of the court's decision.
[122] CPC, Article 136, para. 1, subpara. 1.
[123] CPC, Article 138, para. 1. Other circumstances include state of health; marital status, presence of dependants in the family; the strength of social ties between the suspect and the accused; reputation of the suspect or accused; occupation; the suspect or accused has a permanent place of work or study; property status; presence of a permanent place of residence and other circumstances.
[124] CPC, Article 38: "The damage caused to a person as a result of illegal arrest, detention, house arrest, suspension from office, placement in a special medical organisation, conviction, application of compulsory medical measures shall be compensated from the budget in full, regardless of the guilt of the body, conducting criminal proceedings."

6. Court impartiality and equality of arms

6.1. International standards

63. The right to an impartial tribunal is a fundamental principle recognized *inter alia* in the UDHR[125] and the ICCPR.[126] As the HRC stated, "in order for a trial to satisfy the requirements of Article. 14 para. 1 of the Covenant, a trial "must also appear to a reasonable observer to be impartial".[127]

64. The requirement of impartiality has two aspects: first, judges must not allow their judgement to be influenced by personal bias or prejudice; second, they must also appear to a reasonable observer to be impartial.[128] To determine whether these duties are engaged, the test to be applied is whether the reasonable observer would view the situation as one in which legitimate doubt is raised as to the impartiality of the judicial officer(s). The HRC has stated that although the standpoint of those claiming that there is reason to doubt a judge's impartiality is significant, "[w]hat is decisive is whether the fear can be objectively justified".[129]

65. In the Copenhagen document, OSCE participating States committed to ensure "the impartial operation of the public judicial service".[130] Moreover, they recognized that "in the determination of any criminal charge […] everyone will be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law".[131]

66. The principle of "equality of arms" is closely related to the right to an impartial court, which implies, among other, that the prosecution and the defence should have equal access to the evidence and resources necessary to present their case. This essential aspect of a fair trial ensures that each party has an equal opportunity to argue their case and that the decision-making process is based on a fair and balanced presentation of the evidence.

67. The concept of equality of arms is mentioned in the ICCPR with specific reference to criminal proceedings.[132] The HRC emphasized that equality of arms necessitates equal procedural rights for all parties involved, with any distinctions being legally based and justifiable through objective and reasonable grounds, without leading to actual disadvantage or unfairness.[133]

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[125] UDHR, Article 10.
[126] ICCPR, Article 14, para. 1.
[127] HRC, General comment 32, para. 34.
[128] See e.g. HRC, General Comment No. 32, para 21; HRC, *Karttunen v Finland*, 23 October 1992, para 7.2; *Perterer v Austria*, 20 July 2004, paras 10.2–10.4; *Castedo v Spain*, 3 November 2008, para 9.5. In the judgement on the case *Piersack v. Belgium* (1 October 1982), the ECtHR held that to determine the existence of bias, "A distinction could be drawn in this context between a subjective approach, that is endeavouring to ascertain the personal conviction of a given judge in a given case, and an objective approach, that is determining whether he offered guarantees sufficient to exclude any legitimate doubt in this respect.".
[129] See HRC, *Castedo v Spain*, 20 October 2008, para 9.7.
[130] OSCE, Copenhagen Document, commitment 5.12.
[131] Ibid., commitment 5.16.
[132] ICCPR, Article 14, para. 3 addresses the idea of enjoying fair trial rights "in full equality" for all individuals involved in the process.
[133] HRC, General Comment No. 32, para. 13.

68. The **right to call and cross examine witnesses** is another corollary of the right to equality of arms principle, representing a fundamental guarantee for a fair trial and the effectiveness of the defence.[134] The ICCPR guarantees the defendant's right to "examine, or have examined, the witnesses against them and to obtain the attendance and examination of witnesses on their behalf under the same conditions as witnesses against them".[135] According to the HRC, it is a fundamental duty of the courts to ensure equality between the parties, including the ability to contest all the arguments and evidence offered by the other party.[136] This means that the accused must have "the same legal powers of compelling the attendance of witnesses and of examining or cross-examining any witnesses as are available to the prosecution".[137]

69. While there may be some limited exceptions to the right to cross-examination, they must not infringe the rights of the defence. In any case, it breaches international law when a conviction is based solely or in a decisive manner on the depositions of a witness whom the defendant has had no opportunity to examine or to have examined either during the investigation or at trial.[138]

70. In online hearings, the examination of the witnesses and experts during a remote hearing should follow as closely as possible the practice adopted when a witness or expert is present in the courtroom.[139]

71. The ICCPR provides that everyone has the **right to legal assistance**, and that anyone who is charged with a criminal offence has the right to be assisted by a lawyer, either of their own choosing or, if they cannot afford one, to be provided with legal assistance without charge.[140] The HRC considers the right to communicate with a lawyer of one's own choosing is an important element of the guarantee of a fair trial and an application of the principle of equality of arms.[141] Access to a lawyer for a person deprived of liberty must be prompt[142] and authorities must respect the confidentiality of all communications between lawyers and clients.[143] Furthermore, lawyers should be able to advise and to represent clients without intimidation, hindrance, harassment or improper interference.[144]

72. OSCE participating States recognize that the right to a fair and public hearing includes the right to be represented by legal counsel of one's choice.[145] participating States further

[134] HRC, General Comment No. 32, para. 39.
[135] ICCPR, Article 14 para. 3, lett. e).
[136] HRC, *Äärelä and Näkkäläjärvi v Finland*, 4 November 1997.
[137] HRC, General Comment No. 32, para 39. See also HRC, *Guerra de la Espriella v Colombia*, 11 May 2010, para 9.3. A corollary of the above principles is that, when witnesses are not able to attend a hearing in person, there is a duty for the judge to enquire whether their absence is justified and, if necessary, compel their attendance.
[138] ECtHR, *Saïdi v. France*, 20 September 1993, paras. 43-44.
[139] CEPEJ, Guidelines on videoconferencing in judicial proceedings, 1 July 2021, principle 14.
[140] ICCPR, Article 14, para. 3, lett. d).
[141] HRC, General Comment No. 32, para. 40.
[142] UN, Basic Principles on the Role of Lawyers, 07 September 1990, Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, Principle 7. HRC, General Comment 35, para 35.
[143] UN, Basic Principles on the Role of Lawyers, cited above, Principles 8 and 22.
[144] UN, Basic Principles on the Role of Lawyers, cited above, Principle 16.
[145] OSCE, Concluding document of the Vienna meeting 1986 of representatives of the participating States of the Conference on Security and Co-operation in Europe, held on the basis of the provisions of the final act relating to the follow-up to the conference, Vienna, 1989, para 13.9.

affirmed that, where violations of human rights and fundamental freedoms are alleged to have occurred, the effective remedies available include the right of the individual to seek and receive adequate legal assistance.[146]

73. Regarding **language of the proceedings**, the right to have the free assistance of an interpreter, expressed in Article 14 of the ICCPR, grants practical and effective enjoyment of the rights of the parties, ensuring that they are placed on an equal footing. In this respect, the right to have the free assistance of an interpreter enshrines another aspect of the principles of fairness and equality of arms in criminal proceedings.[147]

74. According to the United Nations Basic Principles on the Independence of the Judiciary, it is essential that judges decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect.[148]

75. The Bangalore Principles of Judicial Conduct state that "a judge shall disqualify himself or herself from participating in any proceedings in which the judge is unable to decide the matter impartially or in which it may appear to a reasonable observer that the judge is unable to decide the matter impartially".[149] According to the ECtHR, "a failure of the national courts to examine a complaint of a lack of impartiality, which does not immediately appear to be manifestly devoid of merit, may lead to a breach of Art. 6 para. 1 of the Convention, regard being had to the confidence which the courts must inspire in those subject to their jurisdiction".[150]

6.2. Domestic legal framework

76. The 2000 Constitutional Law foresees the right to an impartial court by prescribing that "No one may be deprived of the right to have his case heard by a competent, independent and impartial court meeting all the requirements of the law and justice."[151]

77. The CPC contains several provisions designed to ensure equality of arms between the parties. Articles 7 and 23 of the CPC emphasise that criminal proceedings are based on the equality between prosecution and defence, granting them equal opportunities to present their case.[152] The court must maintain objectivity and impartiality while creating necessary conditions for the parties to perform their procedural duties and exercise their rights.[153] The CPC further requires the presiding judge to ensure equality of the parties, maintain impartiality, and create conditions for an objective and complete investigation of the case.[154]

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[146] OSCE, Concluding Document of the Copenhagen Meeting, 1990, para. 11.1.
[147] HRC, General Comment 32, para. 40. The provision also stress that the right applies to aliens as well as nationals, and the test is whether or not defendants sufficiently understand what evidence is being presented to the court so that they are able to challenge the evidence and present their defence.
[148] UN, Basic Principles on the Independence of the Judiciary, 13 December 1985, para. 2.
[149] UN, ECOSOC, Bangalore Principles of Judicial Conduct, 2006, Value 2, Application 2.5.
[150] ECtHR, *Remli v. France*, 23 April 1996, para. 48. See also *Danilov v. Russia*, 1 December 2020, paras. 97-102.
[151] 2000 Constitutional Law, Article 1, para. 2.
[152] CPC, Article 7, item 45 and Article 23, para. 1.
[153] CPC, Article 23, para. 7.
[154] CPC, Article 23, para. 6 and Article 334, para 2.

78. The defendant has the right to be present at criminal proceedings both on first instance and on appeal.[155] With some very limited exceptions,[156] participation of the defendant in the court session is mandatory,[157] and the absence of the defendant is a significant violation of the criminal procedure that may lead to the annulment of the judgement.[158]

79. If a defendant dies, the criminal case against them shall be terminated.[159] However, the CPC also foresees that the **proceedings against deceased defendants** may continue upon the request of the deceased's relatives, if necessary, *inter alia* for the rehabilitation of the deceased or determining the criminal responsibility of other defendants.[160] If the Court affirms the deceased's criminal responsibility, it enters a "conviction without sentencing."[161]

80. Procedure for **examination and cross-examination of witnesses** is regulated by Article 354 and 370 of the CPC. These provisions instruct judges to check the identity of witnesses, ask witnesses to take an oath prior to testimony, interrogate them separately and in the absence of witnesses who are not testifying, and remove any witness from the courtroom who has testified.[162] The same rules apply to victims who are heard as witnesses.[163]

81. Witnesses are obliged to appear when summoned by the court, and they must give truthful testimony.[164] Witnesses who fail to appear at the scheduled hearing without good reason may be forcibly brought to court.[165] Witnesses must be warned that they must speak the truth and that giving false testimony or refusal to testify constitute criminal offences.[166] Failure to appear without good reason or to testify may also be sanctioned with a monetary penalty.[167]

82. All parties have the right to question witnesses, including the defendants and their defence attorneys. The first to ask questions is the party at whose request this witness was summoned. The judge asks questions to the witness after questioning by the parties.[168]

83. Although witness testimony should primarily be obtained through adversarial proceedings and the court may base its decision only on evidence examined at the trial,[169] all evidence collected during the investigation, including all incriminating evidence such as defendant

[155] CPC, Article 65, para. 6, no. 1.
[156] CPC, Article 335, para. 2.
[157] CPC, Article 335, para. 1.
[158] CPC, Article 436, para. 3.
[159] CPC, Article 35, para. 1, subpara. 11).
[160] *Ibid*. Other hypotheses include the need to define property obtained by illegal means, money and other valuables subject to confiscation, or providing compensation for damage caused by the defendant. See also Supreme Court Normative Ruling no. 4 of 20 April 2018 On Verdicts, para. 10.
[161] CPC, Article 393, para. 7.
[162] CPC, Article 370, para. 1 and 2 and Article 354, which prescribes that "The appeared witnesses are removed from the courtroom prior to their interrogation. The presiding judge shall take measures to ensure that witnesses, who are not interrogated by the court, do not communicate with the interrogated witnesses, as well as with other persons in the courtroom."
[163] CPC, Article 36.
[164] CPC, Article 78, para. 4.
[165] CPC, Article 157, para. 1.
[166] CC, Article 420 (false testimony) and Article 421 (refusal to give evidence).
[167] CPC, Article 78, para. 8.
[168] CPC, Article 370, para. 3.
[169] CPC, Article 331, para. 3.

statements, and witness statements, is already available to the judge from the very start of the trial itself.[170] Nevertheless, statements collected during the pre-trial investigation may be read out *in lieu* of live witness testimony only under exceptional circumstances,[171] such as the witness' or victim's inability to appear at the trial or the presence of significant inconsistencies between the pre-trial statement and the testimony given at the trial.[172]

84. The right to be assisted by counsel in a criminal case is recognized in the Constitution, whose Article 13 stipulates that "[e]veryone shall have the right to legal defence of his rights and freedoms. Everyone shall have the right to take qualified legal assistance."[173] In cases stipulated by law, legal assistance shall be provided free of charge. The Constitution also provides the right to be represented by a lawyer to "everyone detained, arrested and accused of committing a crime".[174] Article 27 of the CPC sets forth the right to legal assistance for individuals who are charged with a criminal offence. This right includes the right to be assisted by a lawyer of one's own choosing, or to be provided with legal assistance without charge if one cannot afford a lawyer.[175] Free assistance by a State-appointed lawyer is ensured in all criminal proceedings involving a public prosecutor.[176]

85. Regarding language of the proceedings, the CPC prescribes that while proceedings shall be in Kazakh, Russian can also be officially used.[177] Parties, including the defendant, who lack sufficient command of the language in which proceedings are held, have the right to free interpreter services.[178]

86. Parties have the right to challenge a court's impartiality if they perceive a violation of the principle of equality of arms. The 2000 Constitutional Law prescribes that a judge must "avoid anything that might disparage the authority and dignity of a judge or raise doubts about his honesty, fairness, objectivity, and impartiality".[179]

87. Article 87 of the CPC foresees a list of cases where a judge may not take part in criminal proceedings, including where the judge lacks jurisdiction on the case, if the judge participated in the examination of the case in other capacities (e.g. an investigating judge, considered complaints, petitions of the prosecutor against the decisions of the investigating judge, victim, plaintiff, witness, investigator, expert, specialist, translator, prosecutor, etc.), or is related to a party in the proceedings. The norm further provides that a judge cannot take part in proceedings "if there are other circumstances that give reason to believe that the

[170] CPC, Article 305, para. 1.
[171] CPC, Article 331, para. 2.
[172] CPC, Article 377 in conjunction with Article 372, para. 1, subpara. 1 and 2.
[173] Constitution, Article 13, paras 2 and 3.
[174] Constitution, Article 16, para. 3.
[175] CPC, Article 27, paras 1 and 2.
[176] According to the CPC and the 2018 Law on Advocacy and Legal Aid, professional legal aid is guaranteed for the suspect, accused, defendant, convicted, acquitted upon request; it is obligatory for those in pretrial detention and charged with grave crimes from the moment of detention or filing of charges, and in proceedings of public prosecution from the moment the case is transferred to the prosecutor. In cases, the defendant has not invited the defendant, the attorney is invited upon the order of the investigator, prosecutor or the court (CPC, Article 67 para. 3 and Article 68). See also the 2018 Law on Advocacy and Legal Aid, Article 18 and chapter 2, prescribing that participants in criminal proceedings are entitled to state funded legal aid. According to the 2015 Decree of the Minister of Justice No 10420, the entitlement for state funded legal aid for representation at court occurs with adoption of an indictment, verdict or decision.
[177] CPC, Article 30, para. 1.
[178] CPC, Article 30, para. 3.
[179] Constitutional Law, Article 28 para. 1, subpara. 2).

judge is personally, directly or indirectly interested in this case".[180] The provisions are clearly aimed at ensuring the court's impartiality and the appearance thereof.

88. When a judge's personal situation or actions raise doubts about their ability to be impartial, parties can file a formal petition for their disqualification.[181] If the recusal motion is granted, a new judge is appointed. A decision to deny the recusal motion cannot be appealed.[182]

7. Right to be informed of the charges and prepare one's defence

7.1. International standards

89. Regarding the right to prepare a defence, Article 14 para. 3 lett. a) of the ICCPR guarantees the right of every person accused of a "criminal charge" or "criminal offence" to be informed promptly and in detail of the "nature and cause of the charge" - meaning the alleged facts and their legal characterization. It is fundamental that the defence has the opportunity to familiarise itself with the documentary evidence against an accused, by way of full and prompt disclosure, so that they have "adequate time and facilities" to prepare their defence, as recognized by Article 14, para. 3, lett. b) of the ICCPR.[183]

90. The ECtHR held that, read together with the principle of the equality of arms, the right to adequate facilities for the preparation of one's defence imposes an obligation on the prosecuting and investigating authorities to disclose any material in their possession, or to which they could gain access, which may assist the accused in exonerating her/himself or in obtaining a reduction in sentence.[184]

91. The HRC held that disclosure must include documents and other evidence that the prosecution plans to offer in court against the accused or that are exculpatory; this includes evidence that could assist the defence, such as indications that a confession was not voluntary.[185] In cases of a claim that evidence was obtained in violation of the prohibition of torture or other forms of cruel, inhuman or degrading treatment, information about the circumstances in which such evidence was obtained must be made available to allow an assessment of such a claim.[186]

92. The burden of proof for any criminal charge is on the prosecution: it follows that it is for the prosecution to inform the accused of the case that will be made against them, so that they may prepare and present their defence accordingly, and it is for the prosecution to adduce evidence sufficient to convict them.[187]

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[180] CPC, Article 87, para. 1(6).
[181] CPC, Article 87, para. 8.
[182] CPC, Article 87, para. 12.
[183] In *Bee v Equatorial Guinea*, 31 October 2005, for example, the HRC found a violation of Article 14 para. 1 and 3 of the ICCPR where defendants in a criminal hearing were not notified of the grounds for the charges against them until two days before the trial, depriving them of sufficient time to prepare their defence and making it impossible for them to select their defence lawyers.
[184] European Commission of Human Rights, *Jespers v Belgium*, 4 March 1981, para 58. See also ECtHR, *Rowe and Davis v the UK*, 16 February 2000, para 60.
[185] HRC, General Comment 32, para. 33.
[186] HRC, General Comment 32, para. 33.
[187] ECtHR, *Telfner v Austria*, 20 March 2001, para 15; see also ECtHR, *Barberá, Messegué and Jabardo v Spain*, 6 December 1988, para 77.

7.2. Domestic Legal Framework

93. As to the right to prepare a defence, Article 328 and 329 of the CPC ensure the parties' opportunity to study the case, access all materials, and receive copies thereof, the judge's decisions, including changes in preventive measures, the list of persons to be called to court, and the charges raised by the prosecutor.

94. The defendant has the right to obtain copies of all pre-trial witness statements upon the completion of the investigation and prior to the commencement of the trial.[188]

95. Article 302-1, which regulates the content of the indictment, requires the indictment to contain, among other things, a description of the criminal offence with an indication of the time, place, method of its commission, the degree of culpability, motives, goals, and consequences of the offence, as well as a list of evidence confirming the circumstances set forth in the indictment.[189] The Prosecutor must also indicate to the defence the available material evidence and the place of its storage.[190]

96. According to Article 337, the prosecutor has the power to amend or supplement the charges during the trial, until the end of the judicial examination of the case.[191] This can involve changes to the factual circumstances, legal qualification, or the severity of the charges.

97. If the charge is changed to a less serious one or part of the charge is waived, the prosecutor is obliged to present to the court a new, reasoned formulation of the charge in writing.[192]

98. If the prosecutor seeks to significantly change the charges in a way that would worsen the defendant's situation, they must remand the case for additional investigation and the court will establish a deadline for the preparation of a new indictment.[193] In any case, the court is obliged to provide the defendant and their lawyer with sufficient time to prepare their defence against the amended charges.[194] The amendments of charges is permitted only if this does not violate the defendant's right to defence.[195] These are positive legal provisions which ensure that the defendant's right to a fair trial and effective defence is not compromised by changes in the accusation.

[188] CPC, Article 70, para. 2, subpara. 5, and Article 65, para. 6, subpara. 2.
[189] CPC, Article 302-1, para. 3.
[190] CPC, Article 302-1, para. 7.
[191] CPC, Article 337 para. 6.
[192] CPC, Article 364, para. 2.
[193] CPC, Article 340, para. 5.
[194] CPC, Article 341, para. 2.
195 CPC, Article 340, para 2.

8. Right to a fair hearing in online trials

8.1. International standards

99. Defendants in criminal trials have the right to be tried in their "presence".[196] Although several countries' legislation allowed for remote hearings in criminal trials,[197] the practice of online hearings expanded during and after the Covid-19 pandemic, giving rise to additional challenges to the right to a fair trial. It is therefore crucial to introduce legislation in line with international standards that regulates online judicial proceedings, providing clear guidance to courts on grounds for moving trials online and applicable procedures. This is necessary to ensure full respect of the right to a fair trial, avoid inconsistencies in approach or arbitrary application of the procedure.

100. The OHCHR stressed that before using on-line hearings, judicial systems should start by considering the impact on the rights of the individual and not only on possible efficiencies that on-line hearings might bring to the administration of justice.[198] According to the OHCHR, challenges to the right of a fair trial include *inter alia* difficulty in identifying signs of torture or other ill-treatment; limited publicity; difficulty in having private and confidential communication with legal counsel; technical issues preventing defendants from making motions and presenting arguments; preventing witnesses or other parties from being influenced or receiving instructions from third parties while providing their testimony; difficulties in managing the parties to the proceedings and moderating the hearings.[199]

101. For these reasons, the OHCHR recommends that criminal trials should only be held on-line with the explicit free and informed consent of the accused.[200] At the same time, judicial criminal proceedings held online should be subject to the strict conditions and safeguards, including some of which are set out below.

102. In its Guidelines on videoconferencing in judicial proceedings,[201] the Council of Europe's Commission for the Efficiency of Justice (CEPEJ) reiterated the need for defendants' "free and informed consent" to participate online. The CEPEJ further underlined the need to ensuredefendants' effective participation, by ensuring that the video link allows them to see and hear the hearing clearly.[202] Although the court may warn and then mute or disconnect defendants who behave inappropriately, it must ensure that the defendant's legal counsel can still provide assistance during and outside the hearing.[203] The court must

[196] ICCPR, Article 14 para. 3 lett. d).
[197] For instance, countries like Italy, France, Russia and Lithuania have provisions for hearing witnesses via video-conference to ensure their safety, especially in cases involving organised crime or terrorism; in France and Italy, video-hearings are used to prevent the need to transfer dangerous criminals from secure prisons to courtrooms, reducing the risk of escape or re-establishing contact with other defendants; Lithuania allows video-hearings for questioning suspects or accused in detention, and for the sentenced person in an oral hearing on appeal. For a more detailed comparative analysis see Anne Sanders, Video-Hearings in Europe Before, During and After the Covid 19 pandemic, 2021.
[198] OHCHR, Briefer on On-Line hearings in justice systems.
[199] Ibid., page 2.
[200] Ibid., page 3.
[201] CEPEJ, Guidelines on videoconferencing in judicial proceedings, 1 July 2021.
[202] Ibid., guideline 23.
[203] Ibid., guideline 25.

guarantee the defendant's uninterrupted access to legal advice before and throughout the remote hearing; confidential communication between the defendant and their legal counsel must be protected, allowing for private discussions and the exchange of sensitive information via a secure system.[204] Additionally, the court is to address any technical issues flagged by the defendant promptly.[205] The court should suspend the hearing in case of a technical incident until it has been corrected, depending on its nature.[206]

103. In the context of the Covid-19 pandemic, ODIHR recommended in its publication that hybrid hearings should be used as an alternative to in-person hearings only if the latter are not safe or not possible.[207] In any case, this trial format "should not undermine the equality of arms; it should not become an extra hurdle for effectuating the procedural rights of the parties."[208]

104. In all criminal trials, including online ones, it is an essential aspect of a fair trial that judges properly manage the hearing so that each party has an equal opportunity to argue their case and that the decision-making process is based on a fair and balanced presentation of the evidence.[209]

105. It is thus a primary duty of a judge to ensure that a hearing is orderly and efficiently managed to maintain the overall fairness of a trial. According to the Bangalore Principles on Judicial Conduct, "a judge shall perform all judicial duties, including the delivery of reserved decisions, efficiently, fairly and with reasonable promptness."[210] Moreover, "A judge shall maintain order and decorum in all proceedings before the court and be patient, dignified and courteous in relation to litigants, jurors, witnesses, lawyers and others".[211]

8.2. Domestic legal framework

106. Online criminal trials in Kazakhstan have been a common occurrence since after the COVID-19 pandemic. The possibility to participate in trials online started before the outbreak of COVID-19 in Kazakhstan but became widespread after several courts closed during the pandemic and recommendations on restrictive measures were introduced. This practice continued after the abolition of the epidemiological measures, and the expiration of the regulation introducing the state of emergency related to the pandemic.[212]

107. The Supreme Court of Kazakhstan issued a Normative Ruling on online trials in the early days of the COVID-19 pandemic,[213] but did not issue follow-up guidelines as the state of health emergency was revoked. Positively, in January 2023, the President of the Supreme

[204] Ibid., guideline 27 and 29.
[205] Ibid., guideline 24.
[206] Ibid., guideline 9.
[207] OSCE, ODIHR Policy Brief Fair Trial Rights and Public Health Emergencies, 24 May 2021.
[208] Ibid., page 11.
[209] See Chapter 8.
[210] UN, ECOSOC Bangalore Principles, Value 6.5.
[211] UN, ECOSOC Bangalore Principles, Value 6.6.
[212] See also other recommendations on offline trials by the Supreme Court. Since November 2021, civil society has initiated campaigns for restricting online hearings due to violations of the right to defence and the publicity of trials.
[213] Supreme Court of Kazakhstan, "On the regime of work of courts of the Republic during the state of emergency", 16 March 2020.

Court made a public address to the members of the judiciary, calling to give preference to in-person trials.[214]

108. In both online and offline hearings, the presiding judge has primary authority to ensure the orderly conduct of criminal proceedings. According to Article 57 of the CPC, the presiding judge has a duty to govern the court proceedings, by taking "all measures to ensure a fair consideration of the criminal case and compliance with other requirements of this Code, as well as the proper behaviour of all persons present at the court session".

109. Article 334 para. 2 of the CPC specifies that "The presiding judge directs the court session, in the interests of justice takes all the measures provided for in this Code to ensure equality of rights of the parties, maintaining objectivity and impartiality, creates the necessary conditions for an objective and complete investigation of the circumstances of the case. […]." Article 346 gives the presiding judge powers to sanction parties. "In case of violation of the order at the court session, disobeying the orders of the presiding judge, as well as performing other actions (inaction), clearly demonstrating the contempt of court".

110. Even in trials held offline, the presiding judge may decide for a witness to give evidence remotely.[215] The CPC requires witnesses to have a specific reasoning for joining a hearing remotely, however no detailed instructions are given to judges on how to examine witnesses online.[216]

9. Right to a reasoned judgement

9.1. International standards

111. When rendering a judgement, the court should always state the reasons on which its decision is based. This is a key requirement of a fair trial, which acts as a safeguard against arbitrariness in judicial proceedings and contributes to legal certainty. It helps demonstrate to the parties that they have been heard, thereby contributing to a more willing acceptance of the decision.[217] This requirement contributes to certainty about the interpretation and application of the law, allows parties to judicial proceedings to determine whether or not there are grounds to appeal a court's decision, and allows public scrutiny of the administration of justice, among others.[218]

112. In the Concluding Document of the 1989 Vienna meeting, OSCE participating States affirmed the fundamental right of individuals to be "promptly and officially" informed of the legal grounds on which a judicial decision is taken.[219] This information must be provided in writing and in a way that will enable the individual to make effective use of further available remedies.[220]

[214] See the Report on the meeting of the President of Kazakhstan K.-J. Tokayev with the President of the Supreme Court A. Mergaliyev, 26January2023.
[215] CPC, Article 345, para. 1.
[216] CPC, Article 370, paras. 8 and 9.
[217] OSCE, ODIHR Legal Digest of International Fair Trial Rights, 26 September 2012, page 210.
[218] Ibid., pages 210-211. See also CoE, Consultative Council of European Judges (CCJE), Opinion no. 11 On the Quality of Judicial Decisions, 18 December 2008, para. 31.
[219] OSCE, 1986 Vienna Document, Principle 13.9.
[220] Ibid.

113. The HRC stated that the right to a reasoned judgement is a corollary to the right to appeal, foreseen in Article 14, para. 5 of the ICCPR.[221] The HRC stressed the need for any judgement to publicly pronounce "the essential findings, evidence and legal reasoning" of the court's decision.[222]

114. According to the CCJE, to render justice in a fair and equal manner, judicial decisions must be of high quality. In its opinion no. 11, the CCJE notes the need that judicial decisions be "of high quality" in the sense that they "must be perceived by the parties and by society in general as being the result of a correct application of legal rules, of a fair proceeding and a proper factual evaluation, as well as being effectively enforceable." Judicial decisions must be clear and intelligible, and they also must provide reasoning that may involve "... interpreting legal principles, taking care always to ensure legal certainty and consistency.[223]

115. According to established ECtHR case-law, judgements should adequately state the reasons on which they are based.[224] A well-reasoned judgement allows parties to understand and assess the court's reasoning, and thus determine whether or not there are grounds to appeal the decision.[225]

116. The right to a reasoned judgement also safeguards the presumption of innocence, which requires that the criminal responsibility of the accused may be affirmed only based on conclusive and admissible evidence. Evidence that does not specifically implicate the accused can undermine the fairness of the trial by placing an undue burden on the defence: the defendant may be thus forced to disprove the weak connections made by the prosecution, shifting the burden of proof and infringing upon the presumption of innocence.[226]

117. The ECtHR ruled that the presumption of innocence was violated in a case when the accused's conviction was based on evidence which, although voluminous, failed to establish his individual conduct.[227]

118. ODIHR recalls that according to the ECtHR, for a judgement to comply with fair trial guarantees under Article 6 ECHR, it must be clear from the decision that the essential issues of the case have been addressed[228] and that a specific and explicit reply has been given to the arguments, which are decisive for the outcome of the case.[229] An issue with regard to a

[221] The HRC stated that "The right to have one's conviction reviewed can only be exercised effectively if the convicted person is entitled to have access to a duly reasoned, written judgement of the trial court, and, at least in the court of first appeal where domestic law provides for several instances of appeal, also to other documents, such as trial transcripts, necessary to enjoy the effective exercise of the right to appeal." (General comment 32, para. 49). See also HRC, *Lumley v. Jamaica*, 31 March 1999, para. 7.5.
[222] HRC, General Comment 32, para 29. See also ECHR, *Karakasis v Greece*, 17 October 2000, para 27; *Tatishvili v Russia*, 22 February 2007, para. 58; and *Grădinar v. Moldova*, 8 April 2008, paras 107–108 and 116.
[223] Council of Europe, CCJE Opinion no. 11 (2008) On the quality of judicial decisions, 18 December 2008.
[224] ECtHR, *Moreira Ferreira v. Portugal* [GC], 11 July 2017, para. 84; *Papon v. France*, 25 July 2002.
[225] ECtHR, *Hadjianastassiou v. Greece*, 16 December 1992.
[226] ECtHR, *Barberà, Messegué and Jabardo v. Spain*, 6 December 1988, para. 77.
[227] ECtHR, *Telfner v Austria*, 20 March 2001, para 15.
[228] ECtHR, *Boldea v. Romania*, 15 May 2007, para. 30; *Lobzhanidze and Peradze v. Georgia*, 27 February 2020, para. 66.
[229] ECtHR, *Moreira Ferreira v. Portugal* [GC], 11 July 2017, para. 84.

lack of reasoning of judicial decisions will normally arise when the domestic courts ignored a specific, pertinent and important point raised by the applicant.[230]

9.2. Domestic legal framework

119. The requirement that a judgement must be adequately reasoned is clearly prescribed in the CPC. Article 388 of the CPC states that judgements must be lawful (i.e. comply with all legal requirements of the law) and reasoned (i.e. based on a comprehensive and objective examination of the evidence presented to the court). Article 393 of the CPC specifies that a guilty verdict "cannot be based on assumptions" and may be only pronounced when the defendant's guilt "is confirmed by a set of evidence, examined by the court."[231]

120. Before convicting the defendant, the court must verify that, *inter alia*, it is proved that the criminal act occurred[232] and that the defendant committed it.[233] When several co-defendants are charged with the same criminal offence, the court must establish each defendant's criminal responsibility individually, defining the role and the extent of their participation in the acts committed.[234] Crucially, the judgement must indicate the evidence on which the conviction of each defendant is based, and the reasons on which the court rejected other evidence.[235]

121. Article 395 of the CPC provides specific guidelines to judges on how to draft a judgement, by foreseeing that it should comprise an introduction, a factual background, a reasoning part, and an enacting clause.[236]

122. The elements for each judgement section are specifically listed in Articles 396-398. Notably, Article 397 specifies that the reasoning part must contain, *inter alia*, a description of the criminal offence recognized by the court as proved, and the mode of liability of the defendant. The Court may also re-qualify the offence in favour of the accused.[237]

123. The Supreme Court's 2018 Normative Ruling no. 4 "On Verdicts" further specifies that the judgement must contain "an assessment of each argument of the defence and prosecution",[238] and that it must assess the defendant's arguments in support of his position.[239] Furthermore, in the same Normative Ruling, the Supreme Court stated that

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[230] ECtHR, *Nechiporuk and Yonkalo v. Ukraine*, 21 April 2011, para. 280.
[231] CPC, Article 393, para. 3.
[232] CPC, Article 390, para. 1, no. 1.
[233] Ibid., no. 3.
[234] CPC, Article 390, para. 4. See also the 2018 Supreme Court Normative Ruling. no. 4, para. 16: "If a criminal offence is committed by a group of persons, a group of persons by prior conspiracy, or an organised group, the specific criminal acts committed by each of the defendants must be described."
[235] CPC, Article 397, para. 3.
[236] CPC, Article 395, para. 3.
[237] CPC, Article 397, para. 1. The 2018 Supreme Court's Normative Ruling no. 4 "On Verdicts" specifies that "If it is necessary to qualify a criminal offence under an Article of law under which the defendant has not been charged, the court must proceed from the fact that such a change in classification is permissible only on the condition that the actions of the defendant, classified under the new article of law, imputed to him, do not contain elements of a more serious criminal offence and do not differ significantly in fact from the final charge supported by the public prosecutor in the main trial, and the change in charge will not worsen the defendant's position or violate his right to defence" (para. 27).
[238] 2018 Supreme Court's Normative Ruling no. 4 "On verdicts", para. 16.
[239] Ibid., para. 17.

"When presenting evidence in the reasoning part of the verdict, the court should not limit itself to listing and citing its content, it is obliged to make a comprehensive analysis of it, to evaluate all the evidence, both incriminating and exonerating the defendant, both confirming the conclusions of the court and contradicting these conclusions."[240]

124. According to the CPC, a judgement can be quashed if the court's conclusions are not supported by the evidence examined during the court hearing or when the court accepts prosecution evidence over defence evidence without providing an explanation for its decision, when the conflicting evidence is significant for the court's conclusions.[241] Additionally, a verdict is subject to cancellation or modification if it is the result of an unjustified refusal to examine evidence requested by one party that may be relevant to the case or if the court examines evidence that is inadmissible.[242]

10. Defendant's right to an effective remedy

10.1. International standards

125. Article 14 para. 5 of the ICCPR guarantees that everyone convicted of a criminal offence has the right to have their case reviewed by a higher tribunal. This right is also enshrined in Article 2 of Protocol 7 to the ECHR[243]. OSCE participating States committed themselves to uphold "the right of the individual to appeal to executive, legislative, judicial or administrative organs."[244]

126. The overarching principle is that the appellant must have access to an effective appeal, rooted in the fundamental notion that the rights guaranteed by the ICCPR and ECHR must be substantive and not merely theoretical. This means that the appeal hearing must adhere to the same standards of fairness as the trial itself, ensuring that the appellant's rights are meaningfully protected. According to the HRC, Article 14, para. 5 of the ICCPR "imposes on the State party a duty to review substantively, both on the basis of sufficiency of the evidence and of the law, the conviction and sentence". Thus, "a review that is limited to the formal or legal aspects of the conviction without any consideration whatsoever of the facts is not sufficient under the Covenant".[245] The ECtHR has found violations of the right to access to court in instances where domestic law mandates a comprehensive review of the merits of the case on appeal, but such a review is not carried out in practice, rendering the appeal process ineffective.[246]

127. As the HRC repeatedly stated, the ICCPR requires an appeal to be capable of reviewing facts as well as law.[247] As explained in General Comment 32, the requirements of the right to review are satisfied "where a higher instance court looks at the allegations against a

[240] Supreme Court, 2018 Normative Ruling no. 4 "On Verdicts", para. 19.
[241] CPC, Article 433 para. 1; Article 435 para. 1 Nos. 1 and 3.
[242] CPC, Article 433 para. 1; Article 436 para. 2.
[243] It should be noted that jurisprudence from ECtHR says that that Article 6 (1) of the ECHR do not require there to be reviewal in two different levels of jurisdiction, see *Muller v Austria*.
[244] OSCE, 1989 Vienna Document, para 13.9.
[245] HRC, General Comment 32, para. 48. See also HRC, *Vásquez v Spain*, Communication 701/1996, para. 11.1.
[246] ECtHR, *Biondić v Croatia*, 8 November 2007, paras. 27–28.
[247] See e.g. HRC, *Pérez Escolar v. Spain*, 28 March 2006, para. 3; *Gelazauskas v Lithuania*, 17 March 2003, para 7.2; *Ratiani v Georgia*, 4 August 2005, paras 11.2–11.3.

convicted person in great detail, considers the evidence submitted at trial and referred to in the appeal, and finds that there was sufficient incriminating evidence to justify a finding of guilt in the specific case".

128. In order to meet the requirements of Article 2 of Protocol 7 to the ECHR, a review by an appellate court must be a "full and thorough evaluation of the relevant factors".[248] While an appellate court may, in principle, simply endorse the reasons for the lower court's decision,[249] when an issue arises as to the lack of any factual and/or legal basis of the lower court's decision, it is important that the higher court provides its own reasoning.[250] Moreover, in case of an explicit objection to the admissibility of evidence, the higher court cannot rely on that evidence without providing a response to such an objection.[251]

129. The ECtHR emphasised that the notion of a fair procedure requires that an appellate court that has given sparse reasons for a decision, whether by incorporating the reasons of the lower court or otherwise, must at least address the essential issues that were submitted to it, and must not merely endorse the earlier findings without further consideration.[252]

10.2. Domestic law

130. According to Article 414 of the CPC, all parties to the criminal proceedings are entitled to submit an appeal against the first instance decision.

131. The appellate court is responsible for scrutinising the decision of the lower court to ensure its fairness, legality, and validity. This involves examining the case materials and any additional evidence presented during the appeal hearing to assess whether the first instance court correctly established the facts of the case, properly applied the relevant criminal law, and adhered to the procedural norms throughout the proceedings.[253]

132. The appellate court has the duty to comprehensively review the legality, validity, and fairness of the sentence and court ruling, regardless of whether the specific grounds for appeal were raised in the complaint or the prosecutor's petition. The appellate court has the authority to review the lower court's decision and, on its own initiative, extend the review to elements not included in the appeal from either the defendant and prosecutor, provided that such changes do not result in a worsening of the convicted person's situation.[254]

133. If it is necessary to verify the claims raised by the parties in their appeal, the Appeal Court must conduct evidentiary proceedings, including hearing witnesses and examining evidence. In such cases, within ten days of receiving the case, the court must issue a resolution outlining the preparation of the case for consideration by the appellate court, specifying the actions required, such as summoning and questioning the defendant, victims,

[248] ECtHR, *Lalmahomed v the Netherlands*, 22 February 2011, para 37.
[249] ECtHR, *García Ruiz v. Spain* [GC], 21 January 1999, para. 26; *Stepanyan v. Armenia*, 27 October 2009, para. 35.
[250] ECtHR, *Tatishvili v. Russia*, 22 February 2007, para. 62.
[251] ECtHR, *Shabelnik v. Ukraine*, 19 February 2017, para. 50-55.
[252] ECtHR, *Helle v Finland*, 19 December 1997, para. 60.
[253] CPC, Article 424.
[254] CPC, Article 426, para. 1. The court also reviews the contested verdict with respect to the convicted who had not appealed, in case the violations established in the verdict affect their rights and it is necessary to align the qualifications of their actions and those of the appellant (CPC, Article 426, para. 2).

witnesses, or experts; requesting additional materials; or performing any other necessary actions.[255]

134. Similarly to the first instance judgement, the appeal judgement must consist of an introductory part, a factual background, a reasoning and an enacting clause.[256]

135. The Appeal Court's judgement should include a concise overview of the main points of the judgement under review, the arguments presented in the defendant's appeal and the prosecution's appeal, and any objections raised against them. The arguments made by persons participating in the appellate court hearing should also be included. Lastly, the judgement must clearly state the reasons for the decision reached by the appellate court, taking into account all the relevant information presented during the proceedings.[257]

136. According to CPC Article 443, if an appeal is rejected because of the lack of new arguments, the appeal judgement shall indicate only the absence of the grounds provided for by the Code for amending the judgement or repealing it.[258]

11. Victims' right to an effective remedy

11.1. Criminal prosecutions of human rights violations

11.1.1. International standards

137. The ICCPR requires States parties to ensure that all individuals within their territories and subject to their jurisdiction enjoy the rights recognized in the Covenant.[259] As the HRC noted, this means that States parties must not only refrain from violating the rights recognized by the Covenant, but also take positive steps to promote and protect them. [260]

138. The right to an effective remedy, established *inter alia* by Article 2, para. 3 of the ICCPR, is a corollary to such positive obligations, and has been interpreted to include the obligation to investigate all allegations of violations "promptly, thoroughly and effectively through independent and impartial bodies."[261] In particular, they must investigate violations recognized as criminal and bring to justice those who are responsible.[262]

139. This obligation is particularly cogent when such violations entail rights that cannot be derogated from, such as the right to life and the prohibition of torture and cruel or inhumane treatment. According to the HRC, acts prohibited by Article 7 of the ICCPR must be

[255] CPC, Article 427.
[256] CPC, Article 433 para. 1.
[257] CPC, Article 443 para. 3. See also para. 16-17 of the 2018 Supreme Court Normative Ruling No 4 "On Verdicts".
[258] CPC, Article 443 para. 4.
[259] ICCPR, Article 2, para. 1.
[260] HRC, General Comment No. 31 "The Nature of the General Legal Obligation Imposed on States Parties to the Covenant", 29 March 2004, paras 5-7.
[261] HRC, General Comment No. 31, para. 15.
[262] See, for example HRC, *Abubakar Amirov v. Russian Federation*, 2 April 2009, para. 11.2; *Orly Marcellana and Daniel Gumanoy v. The Philippines*, 30 October 2008, para. 7.2; *Vadivel Sathasivam and Parathesi Saraswathi v. Sri Lanka*, 8 July 2008, para. 6.4.

investigated promptly and impartially by competent authorities to make the remedy effective.[263] Failure to discharge these obligations according to the HRC, "could in and of itself give rise to a separate breach of the Covenant."[264]

140. The OHCHR further stated that States have an obligation to investigate such human rights violations, observing that "In addition to being inextricably associated with the obligation to prosecute, the obligation to investigate is also linked to the right to the truth, which includes the right to know about the circumstances of, and the reasons for, gross human rights violations, the progress and results of the investigation carried out into the violations, the identity of the perpetrators and, in cases of enforced disappearances, the fate and whereabouts of the victims".[265]

141. According to the United Nations Guidelines on the Role of Prosecutors,[266] prosecuting authorities shall give due attention to the prosecution of crimes committed by public officials, particularly grave violations of human rights and other crimes recognized by international law.[267]

142. With particular reference to the **right to life**, enshrined in Article 6 of the ICCPR, according to the HRC States have an obligation "to investigate and, where appropriate, prosecute the perpetrators of […] incidents involving allegations of excessive use of force with lethal consequences".[268] The Committee stressed that criminal investigations should not be limited to ground-level perpetrators, but "should explore, *inter alia*, the legal responsibility of superior officials with regard to violations of the right to life committed by their subordinates."[269] Lastly, the Committee emphasised that considering the gravity of the allegations and the importance of the right to life, "States parties must generally refrain from addressing violations of Article 6 merely through administrative or disciplinary measures, and a criminal investigation is normally required."[270]

143. The ECtHR constantly held that the obligation to protect the right to life under Article 2 of the Convention "requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force. The investigation must be, *inter alia*, thorough, impartial and careful".[271]

144. The UN Committee against Torture stated that the prohibition of torture enshrined in Article 2, para. 2 of the CAT "is absolute and non-derogable" and that, according to Article 12 of the CAT, "Each State Party shall ensure that its competent authorities proceed to a

[263] HRC, General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment), 10 March 1992, para. 14.
[264] HRC, General comment No. 31, para. 15.
[265] UN, Report of the United Nations High Commissioner for Human Rights on the obligation of States to investigate serious violations of human rights, and the use of forensic genetics, 4 July 2011, para. 15.
[266] UN, Guidelines on the Role of Prosecutors, Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990.
[267] UN, Guidelines on the Role of Prosecutors, guideline 15.
[268] HRC, General comment No. 36: Article 6 (Right to life), 3 September 2019.
[269] Ibid.
[270] Ibid.
[271] ECtHR, *Mustafa Tunç and Fecire Tunç V. Turkey* [GC], 14 April 2015, para. 169; see also *McCann and Others v. United Kingdom*, 27 September 1995, para. 161-163.

prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction."[272]

145. Under the ECtHR's case-law, there is a well-established principle that when an individual suffers injuries or ill-treatment while in detention, the burden of proof shifts to the authorities to provide a plausible explanation for the cause of those injuries[273]

146. At the Copenhagen Meeting of 1990, OSCE participating States clearly affirmed their commitment to prohibit torture and other cruel, inhuman or degrading treatment or punishment, and take effective legislative, administrative, judicial and other measures to punish such practices.[274] In the Budapest Document in 1994, they committed themselves to inquire into all alleged cases of torture and to prosecute offenders.[275] A similar commitment to "prevent torture as well as to prosecute its perpetrators, thereby preventing impunity for acts of torture" can be found in the Ministerial decisions adopted at the conclusion of the Ljubljana meeting of 2005.[276]

11.1.2. Domestic legal framework

Substantive law

147. Article 15 of the Constitution of the Republic of Kazakhstan prescribes that "Everyone shall have the right to life" and that "No one shall have the right to deprive life of a person arbitrarily". The Constitution also prohibits torture, violence or other cruel or degrading treatment or punishment.[277]

148. The Criminal Code of Kazakhstan defines murder as "unlawful intentional infliction of death of another person", which is penalized with an imprisonment term ranging from eight to fifteen years.[278] Mass riots or other emergency situations are explicitly recognised by the Criminal Code as aggravating circumstances for murder, along with cruelty and endangering public safety, which incur increased imprisonment terms ranging from 15-20 years to a lifetime.[279] Infliction of bodily injuries during the mass riots or state of

[272] UN Committee against Torture, General Comment No. 2 On the Implementation of Article 2 by States Parties, 24 January 2008, para. 5. Moreover, according to Article 13 of the CAT, "Each State Party shall ensure that any individual who alleges he has been subjected to torture in any territory under its jurisdiction has the right to complain to, and to have his case promptly and impartially examined by, its competent authorities. Steps shall be taken to ensure that the complainant and witnesses are protected against all ill-treatment or intimidation as a consequence of his complaint or any evidence given."
[273] For instance, in the ECtHR case, *Selmouni v. France* [GC], 28 July 1999, para. 87, the Grand Chamber held that where an individual is taken into police custody in good health but is found to be injured at the time of release, there is a presumption that the person was subjected to ill-treatment, and it is incumbent on the State to provide a plausible explanation of how those injuries were caused, failing which a clear issue arises under Article 3 of the Convention. See also EctHR, *Tomasi v. France*, 27 August 1992, paras. 108-111; *Ribitsch v. Austria*, 4 December 1995, para. 34.
[274] OSCE, Copenhagen Document, 1990, Commitment 16.1.
[275] OSCE, Budapest Final Document, 1994, Commitment no. 20.
[276] OSCE, Decision No. 12/05 on Upholding Human Rights and the Rule of Law in Criminal Justice Systems.
[277] Constitution, Article 17 para. 2.
[278] CC, Article 99 para 1, Articles 102 and 103 CC stipulate the responsibility for the murder committed in excess of defence and in apprehension of a criminal, Article 104 CC penalises causing death by negligence. These are sanctioned with limitation of freedom or imprisonment terms of two, three, or five years respectfully.
[279] CC, Article 99 para 2 (5), (6), (15).

emergency is also considered committed under aggravating circumstances, increasing the sanction from a 3-8 year imprisonment to a 6-10 year imprisonment.[280]

149. Crimes committed by the military are under a special regime under the Criminal Code of Kazakhstan, which criminalises the abuse and excess of power (Articles 450 and 451, respectively).[281] Actions that fall within the excess of power during a combat situation, including those leading to serious consequences, e.g. injury or death, are sanctioned with a 7-15 year imprisonment term. Normative Ruling of the Supreme Court No 6 of 2005 clarifies that the scope of Articles 450 and 451 CC extends to intended actions against a person that lead to unintended death, and therefore do not necessitate cumulative qualification under other provisions of the Criminal Case, except for cases when the intent extended to the infliction of death, which necessitate additional qualification under Article 99 of the Criminal Code (murder).[282]

150. At the time of the January 2022 events, Article 146 of the Criminal Code only sanctioned torture, not other forms of ill-treatment at the hands of State officials. A new law entered into force on 17 March 2023,[283] amended Article 146 of the Criminal Code to equate, for the purpose of criminal punishment, torture and cruel, inhuman, and degrading treatment.

151. The provision in question contains a "Note" stating that physical and/or psychological suffering resulting from lawful actions by officials, persons acting in an official capacity, or other individuals is not considered "cruel, inhuman, or degrading treatment or torture."

152. The legal status and implications of this Note are ambiguous for several reasons. First, the Note is not incorporated into the main body of Article 146 as a numbered paragraph, which raises questions about its intended legal force. The unclear status of the Note within the legal framework may lead to inconsistent application and interpretation by courts and law enforcement. Second, it appears superfluous, since general principles of criminal law already exclude criminal responsibility when State officials use force for instance to defend themselves or others from an imminent danger, in a state of necessity or when executing a lawful order.[284] Third, the Note's wording could potentially be used to justify or excuse actions that might otherwise be considered abusive, depending on how "lawful actions" are defined and interpreted. Potentially, it could provide a blanket justification for the use of torture or cruel, inhuman, or degrading treatment, as long as the "actions" are carried out by officials or persons acting in an official capacity, and are deemed "lawful". The note fails to acknowledge that even if an action, such as a house search, interrogation, or arrest,

[280] CC, Article 106. See also CC, Article 107 for regulation on light bodily injuries. Para 16 of the 2009 Normative Ruling No 7 of the Supreme Court excludes cumulative application of Articles 106 or 107 for actions by officials or committed upon their incitement; such actions are prescribed to be qualified exclusively by Article 146 CC.
[281] CC, Articles 450 and 451. Excess of power by the military is classified as "actions that clearly go beyond the limits of his rights and powers, resulting in a significant violation of the rights and legitimate interests of citizens or organizations or legally protected interests of society or the state".
[282] The 2005 Normative Ruling of the Supreme Court No 6 "On judicial practice in cases of military criminal offenses" (para 11).
[283] Law No. 212-VII of 17 March 2023 On introducing amendments and additions to the legislative acts of the Republic of Kazakhstan on human rights issues in the field of criminal proceedings, execution of sentences, as well as consideration of torture and other cruel, inhuman or degrading treatment.
[284] CC, Article 32, 34 and 36. Similarly, Article 14 para. 1 no. 8 of the 2011 Law on Law Enforcement Service states that "Employees are not responsible for harm caused in connection with the use of firearms and other weapons, special means and physical force if their actions were carried out in accordance with this Law and other legislative acts of the Republic of Kazakhstan".

is considered "lawful," the means employed in carrying out these actions may still amount to torture or ill-treatment, the prohibition of which, as mentioned above, is absolute and non-derogable and hence cannot be considered lawful. Fourth, the Note falls short from the standard established under Article 1 of the CAT, which limits the exemption to lawful "sanctions", as opposed to any "actions" provided under the domestic legislation. Last, the scope of persons covered by the exemption is unduly wide, extending not only to those acting in official capacity, but also to "others", failing to provide legal certainty and potentially leading to discretionary interpretation.

153. Conclusively, the Note's wording could be misused to shield perpetrators from accountability, undermining the absolute prohibition of torture and the effective investigation and prosecution of such acts, regardless of the purported lawfulness of the overall action.

154. The UN Committee against Torture in its last concluding observations recommended that Kazakhstan as a matter of priority should bring the legal definition of torture contained in Article 146 of the Criminal Code and other relevant pieces of legislation into line with Article 1 of the CAT, namely by including the elements that distinguish the crime of torture from other forms of ill-treatment, and by adjusting the wording of the exclusion clause relating to "lawful sanctions" so as to minimize the possibility of it being misinterpreted. The State party should ensure that penalties for torture and ill-treatment are appropriate to the gravity of the crime, as set out in Article 4 (2) of the Convention. It should also take legislative steps to exclude the possibility of plea bargaining and parole for crimes of torture and ill-treatment.[285] Torture is not subject to a statute of limitations[286] and evidence tainted by torture or other ill-treatment is inadmissible.[287]

155. On 2 November 2022, the Parliament approved an Amnesty Law[288] which provides relief from criminal prosecution and reduces sentences for individuals charged and convicted in connection with the January 2022 events. The Amnesty Law however excludes certain categories of crimes from its scope, including "terrorist" and "extremist" crimes,[289] the organisation of mass riots,[290] torture and intentional murder. The Amnesty Law extends to a wide range of offences committed between 4 and 7 January 2022.[291] For crimes of minor and medium seriousness, the Act relieves individuals from criminal liability or from serving the remaining sentence if already convicted.[292] For serious and very serious offences, the Act reduces sentences by three-quarters and one-half respectively.[293]

Procedural law

156. The responsibility to investigate and prosecute violations of these fundamental rights lies with the Prosecutor's Office, which according to Article 83 of the Constitution "supervises the observance of legality on the territory of the Republic of Kazakhstan" and "carries out

[285] See Concluding Observations of the UN Committee against Torture, of 8 June 2023, paragraph 10.
[286] CC, Article 69, para. 6.
[287] CPC, Article 112. For more detailed analysis, see above, Chapter 6.
[288] Law of the Republic of Kazakhstan No. 152-VII ZRK, "On Amnesty" of 2 November 2022.
[289] United Nations' experts have earlier expressed concerns about misuse of the term "terrorist" in relation to protesters and political activists in Kazakhstan: UN Office of the High Commissioner for Human Rights: 'Kazakhstan: UN experts condemn lethal force against protesters, misuse of term 'terrorists'', 11 January 2022.
[290] CC, Article 272 para. 1, except for defendants who are minors.
[291] Amnesty Law, Article 1.
[292] Amnesty Law, Article 3, paras. 1 and 2.
[293] Amnesty Law, Article 3, para. 3.

criminal prosecutions on behalf of the State."[294] The Prosecutor's office has the duty to protect and restore rights and freedoms of all citizens.[295] In particular, it is mandated by law to supervise the legality of the activities of the State,[296] particularly the activity of law enforcement and special state bodies in the spheres of pre-trial investigation[297] and implementation of coercive measures.[298]

157. The Prosecution, contrary to judges, does not enjoy any guarantee of independence or autonomy, since by Constitution it is hierarchically organised,[299] and answers directly to the President of the Republic.[300]

158. Investigations into cases of torture related to the January 2022 events were initially carried out by the Anti-Corruption Agency; however, the legislative amendments enacted in late 2022 ensured that as of 1 January 2023 Prosecutors are exclusively responsible for investigations into torture.[301] The Ministry of Interior has jurisdiction to investigate inhuman, cruel, or degrading treatment.[302] The division of jurisdiction based on the legal qualification of the offense is problematic, as it may not be evident in the early stages of an investigation whether the threshold for torture has been met. Qualifying the offence at an early stage is often difficult, as not all the evidentiary elements have been collected, and unnecessary, as the primary concern should be ensuring the integrity and impartiality of the investigation. This formal division of jurisdiction may also result in the transfer of cases between the prosecutor and the Ministry of Interior, fragmenting competencies and knowledge, potentially hindering the effectiveness and coherence of the investigation. Moreover, since some of the suspects who may have committed the alleged torture may be employees of the Ministry of Interior, entrusting the investigation of all criminal offenses under Article 146 to the prosecutor's office would offer greater guarantees of impartiality.

159. Article 101, para. 2 of the CPC obliges the administration of detention facilities to forward complaints from arrested or detained individuals regarding torture or other cruel, inhuman, or degrading treatment to the body conducting criminal proceedings.[303] Complaints about investigators, interrogating officers, heads of inquiry bodies, or prosecutors' actions and decisions should be sent to a higher prosecutor. All other complaints must be submitted to the appropriate person or body no later than the day following their receipt.[304]

160. After the January 2022 events the Government of Kazakhstan enacted regulatory measures to prevent or at least diminish future occurrences of torture. The Government informed the UN Committee against Torture that regulations were being amended to inform the prosecutor about each fact that a medical worker has identified bodily injuries on a person held in pre-trial detention centres or penitentiary institution.

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[294] Law on the Prosecutor's Office of November 5, 2022, No. 81-VI, Article 1.
[295] Ibid., Article 4.
[296] Ibid., Article 6.
[297] Ibid., subpara. 1.
[298] Ibid, subpara. 1.
[299] Constitution, Article 83, para. 2.
[300] Constitution, Article 44, para. 1, subpara. 4. See also Law on Prosecutor's office, Article 3, para. 2.
[301] CPC, Article 193, para. 1, subpara. 12-1, as amended by Law No 157-VII.
[302] CPC, Article 187.
[303] Depending on the stage of the criminal proceedings, this may entail the court and the body conducting the investigation, i.e. prosecutor and the competent investigative body (See CPC, Article 7 para. 26). 44.a).
[304] CPC, Article 101, para. 1.

161. As a positive development, in July 2022, the Ministry of Health approved an electronic form for documenting traces of injuries and psychological traumas[305] based on the principles of the Istanbul Protocol.[306] Doctors of primary health care organisations, such as trauma clinics and outpatient clinics, are now required to document signs of bodily injury as a result of torture using the Istanbul Protocol standards.[307]

11.2. Compensation for victims of human rights violations

11.2.1. International standards

162. International legal standards call on States to create an adequate national mechanism for victims that provides them with fair and appropriate compensation.[308] Such mechanisms should recognise victims of crimes and add to their healing process, helping them recover from crime and restoring their confidence in the State.[309]

163. In the Istanbul Document of 1999, OSCE participating States committed to "assist the victims [of torture] and co-operate with relevant international organisations and non-governmental organisations as appropriate."[310]

164. The CAT, the ICCPR and other international legal instruments require that State compensation is made available for victims of torture. To this end they must enact legislation that actually makes it possible for survivors of torture and their dependents to obtain redress.[311]

165. The UN Committee against Torture emphasised that "a person should be considered a victim regardless of whether the perpetrator of the violation is identified, apprehended,

[305] The Ministry of Health's Regulation "About the approval of forms of accounting documentation in the area of health care, as well as instructions for filling them out", of 30 October 2020 provides forms according to which the torture and bodily injuries should be documented, according to the Istanbul Convention.
[306] UN OHCHR, Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 2022.
[307] CPC, Article 101, para, 2, last sentence: "The administration of places of detention shall send other complaints no later than the day after their receipt to a person or body, dealing with the case." Moreover, in pursuance of the Presidential Decree No. 622 of 19 July 2021 On measures to further improve the public administration of Kazakhstan, the functions and powers of the Ministry of Internal Affairs (hereinafter referred to as the Ministry of Internal Affairs) in the field of medical support for persons held in pre-trial detention centres and correctional institutions of the penal system, transferred to the jurisdiction of the Ministry of Health. Medical workers are independent from the administration of institutions. See UN Committee against Torture, Consideration of reports submitted by States parties under Article 19 of the Convention, Responses from Kazakhstan to the list of issues in connection with the consideration of its fourth periodic report, received on 15 February 2023.Presidential Decree No. 622 of 19 July 2021 On measures to further improve the public administration of Kazakhstan (see here the announcement made by the Ministry of Interior).
[308] CAT, Article 14; ICCPR, Article 2 para. 3 lett. B) and 7. See also OHCHR, Reporting under the International Covenant on Civil and Political Rights: Training Guide, 2021, p. 33 and 46.
[309] See, for example, European Commission, Strengthening Victims' Rights: From Compensation to Reparation. For a New EU Victims' Rights Strategy 2020-2025, 2019, p 17.
[310] OSCE, Istanbul Document 1999, Commitment 21.
[311] UN Committee against Torture, General comment No. 3 (2012) on the implementation of article 14 by States parties, 13 December 2012, para. 27; ICCPR, Article 2 para. 3, and 7. See also CoE Resolution (77) 27 on the compensation of victims of crime, Article 1; CoE, Recommendation Rec(2006)8 of the Committee of Ministers to member states on assistance to crime victims, 14 June 2006, Article 8 para. 1; UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, 29 November 1985, principle 12.

prosecuted or convicted";[312] furthermore, "the victim's claim for reparation should not be dependent on the conclusion of a criminal proceeding. The UN Committee against Torture considers that compensation should not be unduly delayed until criminal liability has been established."[313] In fact, States should "ensure that victims obtain redress, even in the absence of a complaint, when there are reasonable grounds to believe that torture or ill-treatment has taken place."[314]

166. The UN Committee against Torture also underlined that States should not create obstacles that impede an effective redress for victims. Such obstacles include "inadequate national legislation, discrimination with regard to accessing complaints and investigation mechanisms and procedures for remedy and redress; inadequate measures for securing the custody of alleged perpetrators, State secrecy laws, evidential burdens and procedural requirements that interfere with the determination of the right to redress; statutes of limitations, amnesties and immunities; the failure to provide sufficient legal aid and protection measures for victims and witnesses; as well as the associated stigma, and the physical, psychological and other related effects of torture and ill-treatment.[315]

167. The UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, which lays down international standards on ways to provide victims with compensation, frames access to compensation as an entitlement of all crime victims who should be able to access compensation with ease and efficiency.[316] Key to ensuring access to compensation is to keep administrative procedures simple and minimise formalities.[317] Thus, national legislation should describe precisely when, and when not, a victim is eligible for compensation, to ensure that decisions on compensation are fair and not arbitrary.

168. When it comes to the amount of the compensation, according to the UN Committee against Torture, this must be sufficient "to compensate for any economically assessable damage resulting from torture or ill-treatment, regardless of whether, whether pecuniary or non-pecuniary".[318] This may include: reimbursement of medical expenses and provision of funds to cover the costs of future medical or rehabilitation services necessary for the victim to achieve the fullest possible rehabilitation; compensation for material or non-material damage as a result of physical and mental harm; compensation for losses in the form of earnings and possible earnings due to disability resulting from the use of torture or ill-treatment; and compensation for lost opportunities such as employment and education. In addition, adequate compensation awarded by State Parties to a victim of torture or ill-treatment should provide for the provision of legal or professional assistance to the victim and other costs associated with filing a claim for redress.[319]

169. While the nature and extent of awards of compensation depends on the financial resources of each country and therefore is likely to vary greatly across jurisdictions, compensation

[312] UN Committee against Torture, General comment No. 3, para. 3.
[313] Ibid., para. 26.
[314] Ibid., para. 27.
[315] Ibid., para. 38.
[316] UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, 29 November 1985, principles 4 and 5.
[317] See, for example, EU Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, Article 3.
[318] UN Committee against Torture, General comment no. 3, para. 10.
[319] UN Committee against Torture, General comment no. 3, para. 10.

should be 'fair and appropriate' reflecting the gravity of the injuries in a specific case.[320] Fair and appropriate compensation does not necessarily require the complete reparation of all losses suffered, but it should represent a contribution to the reparation of the suffering to which the victim has been exposed.[321] It should remedy the losses suffered by victims and their dependents, to the extent that money can do this.

11.2.2. Domestic Legal Framework

170. In Kazakhstan, rules on victim compensation are laid out in several legal documents. Under the CPC, a victim of a criminal offence, including torture, has the right to seek compensation from the perpetrator of that criminal offence.[322] Such compensation will be ordered by the relevant court and can cover both physical and moral harm.[323] Victims can also seek 'full compensation' from the offender through a separate civil proceeding.

171. Moreover, victims of serious crimes including torture have the right to obtain a lump-sum payment from a State Fund established through the 2018 Law "On the Victim Compensation Fund" (LVCF).[324] Through the Fund, the State advances part of the compensation to the victim, with the idea of later recovering from the offender any amounts paid. The Fund therefore acts as a guarantee that victims receive at least some compensation.

172. To obtain compensation, the victim must submit *inter alia*, a statement alleging the grounds for compensation, copy of a decision by the body conducting the criminal proceedings on recognizing the person as a victim,[325] and medical documents confirming the nature and severity of the harm caused to the health of the victim (in the event of the death of the victim - copies of the death certificate or other document confirming the death of the victim).[326]

173. Victims can claim monetary compensation from the Fund,[327] in the form of one lump sum payment.

[320] UN Committee against Torture, General comment no. 3, para. 10. See also UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, 15 December 2005, principle 20.
[321] Ibid.
[322] CPC, Article 34 para. 2 and Articles 38-39.
[323] According to the Supreme Court's Normative Ruling no. 7, of 27 November 2015, moral harm as a manifestation of moral or physical suffering always accompanies torture, because torture, according to Article 146 of the Criminal Code, is "intentional infliction of physical and (or) mental suffering".
[324] Law No. 131-VI On the Victims' Compensation Fund, 10 January 2018.
[325] LVCF, Article 8 para. 1, and Article 6 para. 4.
[326] LVCF, Article 8, para. 6.
[327] See LVCF, Article 1 para. 3 and 4, Article 11 para. 1 and 2.