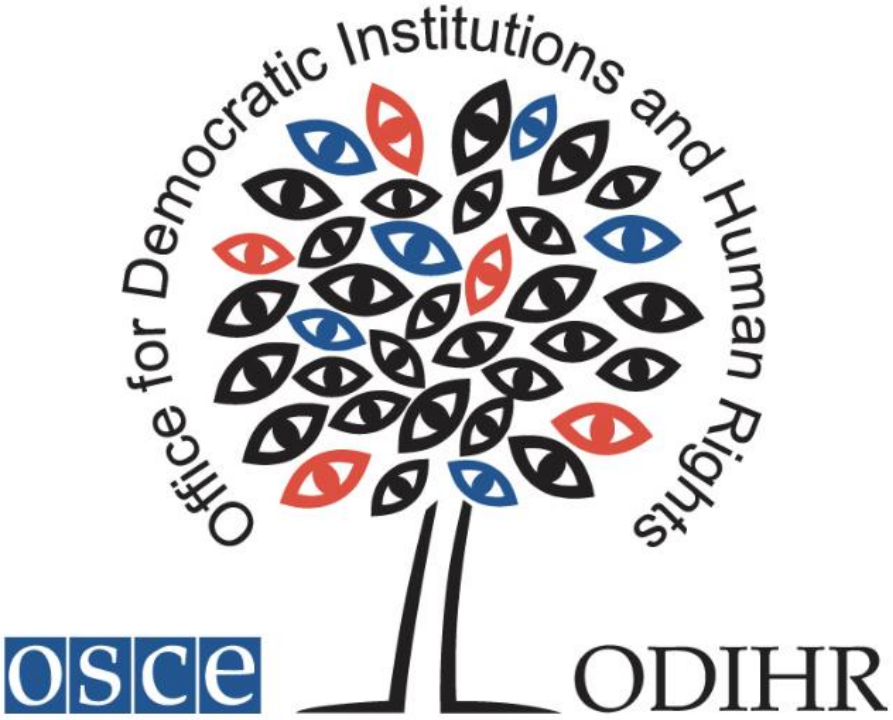
TRIAL MONITORING REPORT

KAZAKHSTAN

(November 2022 – December 2023)



Warsaw, May 2025

Contents

Glossary

CAT:	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CC:	Criminal Code
CCJE:	Consultative Council of European Judges
CEPEJ:	European Commission for the Efficiency of Justice
CPC:	Criminal Procedure Code
ECHR:	European Convention on Human Rights and Fundamental Freedoms
ECtHR:	European Court of Human Rights
HCHR:	UN High Commissioner for Human Rights
HRC:	UN Human Rights Committee
ICCPR:	International Covenant on Civil and Political Rights
LVCF:	Law on Victim's Compensation Fund
ODIHR:	Office for Democratic Institutions and Human Rights
OHCHR:	UN Office of the High Commissioner for Human Rights
OSCE:	Organization for Security and Co-operation in Europe
UDHR:	Universal Declaration of Human Rights

Executive summary

1. The OSCE Office for Democratic Institutions and Human Rights (ODIHR), in line with its mandate and upon invitation by Kazakhstan, conducted monitoring of trials connected to January 2022 events in Kazakhstan between 1 November 2022 and 31 December 2023. This Report presents the main findings, conclusions, and recommendations of ODIHR monitoring.

2. ODIHR highly appreciates that the Supreme Court of Kazakhstan accepted monitoring of trials connected to the January 2022 events, which represents a welcome step in increasing the transparency of judicial proceedings in line with international and regional standards and OSCE commitments. ODIHR also extends its gratitude to the judges and court staff who ensured the access of ODIHR monitors to trials, and allowed the monitors to make trials related observations. ODIHR appreciates the open and constructive dialogue it has with the authorities of Kazakhstan regarding the respect of the right to a fair trial in courts and hopes to continue this fruitful co-operation.

3. The purpose of ODIHR monitoring has been to assess the respect of the defendants' right to a fair trial and the right to an effective remedy for victims in trials connected to the January 2022 events in Kazakhstan. The findings of this Report can serve as a useful tool for the reform and improvement of the legislation and practice of courts, activity of judges, prosecutors and attorneys. ODIHR monitoring did not aim to assess the merits of an individual criminal case or performance of an individual judge or prosecutor. The monitoring rather looked into the way the procedural guarantees of the right to a fair trial are respected throughout different criminal cases, in different courts, at different stages of the proceedings in order to identify possible systemic challenges. Therefore, ODIHR recommendations aim to advise on how to address systemic challenges that the trial monitoring has identified, focusing mostly on aspects that require improvement. At the same time, the report attempts to emphasise good practices encountered in the work of courts that may also serve as a good basis for enhancing the justice system in line with international standards, taking into account the findings and recommendations of the Report.

4. Between November 2022 and December 2023, ODIHR monitored 35 criminal cases related to January 2022 events in Kazakhstan involving 139 defendants, and more than 400 court hearings, in first instance, appeal, and cassation proceedings conducted in the courts of Almaty, Kyzylorda, Semey, Taldykorgan and Taraz. ODIHR selected for monitoring criminal cases involving primarily state officials and civil society activists, which raised significant media attention or involved alleged serious human rights violations. ODIHR followed both in-person and online hearings that were open to the public. The monitoring team was comprised of two international trial monitors assisted by two national staff and an international expert - a trial monitoring analyst. At all times, ODIHR's monitoring team carefully observed the well-established trial monitoring principles of non-intervention in the judicial process, objectivity and impartiality.

5. The current Report is based on both quantitative and qualitative analyses of data collected through the direct monitoring of all 35 criminal cases observed by ODIHR, as well as on the analysis of indictments, judgments, and domestic legal provisions. ODIHR assessed compliance of observed trials with international fair trial standards and Kazakh legislation, insofar as it represents an incorporation of such standards into the domestic legal system.

As mentioned earlier, the Report endeavours to support the authorities of Kazakhstan in remedying the identified shortcomings to allow full enjoyment by defendants and victims of fair trial guarantees and the right to an effective remedy.

6. While ODIHR recognizes the significant challenges faced by the Kazakh justice system in handling the extensive scale of criminal proceedings stemming from the January 2022 events, and recognizes the efforts made to complete a large number of criminal investigations, bring cases to court, and impose punishments when deemed necessary, it also identified practices that are contrary to international fair trial standards and, in a number of cases, appeared in contradiction with domestic legal provisions. These include instances of undue limitations on public access to trials, undermining the principle of open justice; lack of respect for the principle of the presumption of innocence, compromising the fundamental rights of the accused; inequality of arms between prosecution and defence, hindering the ability of defendants to present an effective defence; and a dismissive attitude towards allegations of torture committed during the investigation of January 2022-related cases, raising concerns about the integrity of the proceedings and the admissibility of evidence obtained through such means.

7. Therefore, recognizing the significant efforts made by the Kazakh authorities in addressing the legacy of the January 2022 events, and acknowledging the reforms already undertaken to remedy some of the observed issues, the Report emphasises the need for effective measures to ensure that the rights of the accused are fully protected and that the principles of a fair trial are upheld. The Report provides a list of recommendations to assist the Kazakh authorities in strengthening the justice system, in addressing the identified shortcomings and need to ensure compliance with international standards.

8. In **Chapter 3,** following up on its previous ODIHR observations on the current legal framework and its reforms, which were already partly implemented, the Report highlights issues to be addressed to increase the **independence and credibility of the judiciary** in Kazakhstan, noting the still extensive power of the executive and legislator over the mechanisms of appointment, promotion, and removal of judges. The Report emphasises the need for further reforms to strengthen judicial independence, its credibility and reduce the potential for political interference in the administration of justice.

9. **Chapter 4** of the Report addresses the lack of transparency and **public access** to trials related to the January 2022 events in Kazakhstan, while also noting examples of courts maintaining a proper balance between the publicity of the trial and legitimate grounds for closed hearings. The Report notes that current legislation permits entire trials to be closed to the public when state secrets are involved. Although in specific circumstances limitations to the publicity of trials can be legitimately imposed due to, for example, national security concerns, the legislation currently in force appears overly broad, may lead to arbitrary restriction of public access to trials, including those of significant public interest. The requirement for judges and defence counsel to obtain security clearances in such cases raises questions about judicial independence and the right to choose one's lawyer. Moreover, even in cases not involving state secrets and despite the high level of public interest in these cases, ODIHR observed multiple instances where courts have unduly limited public access to both online and offline trials, for instance by holding trials in detention centres or by failing to facilitate public access to online trials, including through imposition of undue burdens on those wishing to attend trials, such as advance registration and the sharing of personal information.

10. **Chapter 5** of the Report addresses instances where judges and other public officials made remarks or engaged in practices violating the principle of **presumption of innocence**. These include judges making statements implying the defendant's guilt before the end of the trial, the practice of submitting as evidence documentaries on the January 2022 events, including films containing self-incriminating interviews of detained suspects, and the practice of using leading questions during the trials that presumed the defendant's guilt. Furthermore, the Report notes instances where defendants were placed in cages, handcuffs, or plastic boxes during trials, creating a prejudicial perception of guilt.

11. **Chapter 6** addresses the courts' handling of **allegations of torture and ill-treatment** made by defendants and witnesses during the trial. The Constitution and criminal procedure legislation of Kazakhstan contains significant human rights guarantees by prohibiting the use of torture and violence in criminal proceedings. Furthermore, the government acknowledged the widespread use of torture during the January 2022 events, and made efforts to bring to justice law enforcement officials charged with committing torture related crimes. However, ODIHR observed cases where prosecutors and judges did not respond effectively to detailed allegations of torture made by defendants or witnesses during their examination or cross-examination, which raises concerns with respect to compliance with norms of international law. The Report further highlights examples of cases when courts dismissed defendants' claims that their confessions were obtained through coercion; similarly, in several trials, courts did not take action when witnesses alleged that their incriminating statements were obtained through torture, false promises, or deception and routinely relied on the potentially tainted evidence to secure convictions. (Chapter 12).

12. In **Chapter 7** of the Report, ODIHR discusses the misapplication of legal provisions governing restrictions on defendants' **personal liberty**, particularly in the context of pre-trial detention. Positively, the legal grounds for pre-trial detention outlined in the criminal procedure of Kazakhstan are aligned with international human rights standards. The Report highlights instances where Courts have not properly considered or applied the necessary criteria when imposing or extending pre-trial detention, instead relying solely on the severity of the alleged crime. The Report also highlights inconsistencies in the application of pre-trial measures, with civilian defendants generally being subjected to more restrictive measures compared to police or military defendants. Furthermore, courts have not overall adequately addressed defendants' challenges to the legality of their detention, effectively rendering their right to appeal such measures ineffective.

13. **Chapter 8** assesses compliance of court practices with **the equality of arms** principle. The Report expresses concern about the practice of continuing criminal proceedings against deceased defendants, which contradicts the principles of fair trial. ODIHR also observed instances of trials where judges hindered or prevented the defence from questioning witnesses, accepted pre-trial statements without providing cross-examination opportunities, or limited the time available for examination. The use of online hearings often compromised the quality of cross-examination. The chapter also assesses the effectiveness of legal assistance provided to defendants. ODIHR observed instances of hearings conducted in the absence of defence counsel, suboptimal performance by State-appointed defence lawyers and deficiencies in the free legal aid system. In addition, ODIHR observed instances where courts prevented defendants from effectively defending themselves by muting their microphones during online hearings, denying them the

opportunity to make final statements, or interrupting them or their counsel, or not providing adequate interpretation services. Finally, this chapter also highlights issues observed in trials where parties, typically the defence, brought **challenges to court impartiality**. ODIHR observed several instances of dismissal of recusal motions without proper examination, and legislative ambiguities regarding the process for selecting judges to adjudicate these motions, particularly in cases where a single judge constitutes the court.

14. **Chapter 9** of the Report describes **deficiencies in the indictments**, such as inadequate individualization of each defendant's criminal conduct, missing evidence to support the charges, failure to disclose evidence to the defence, and the addition of new charges during the trial, resulting in limitations to the defendants' right to be informed of charges and the supporting evidence, and their right to adequate time to prepare their defence.

15. **Chapter 10** addresses the widespread use of **online trials** beyond the COVID-19 pandemic. ODIHR identified issues related to the courts' unfettered discretion in holding online or offline trials, the adequacy of technical infrastructure, and the difficulties in managing online trials, especially with numerous parties, questioning the overall fairness of proceedings.

16. **Chapter 11** evaluates compliance with **the right to a reasoned judgement**, including courts' tendency to endorse prosecution arguments without impartial assessment, disregard defence evidence and arguments, and provide unclear reasoning on the defendant's criminal responsibility. ODIHR also observed judgments that lacked detailed assessments of the evidence, failed to provide reasoning as to why prosecution evidence was believed over defence evidence, and did not individualize the criminal conduct of each defendant in cases involving multiple accused.

17. In **Chapter 12** the Report assesses the **right to an effective remedy for defendants**. ODIHR observed that appellate courts frequently dismissed appeals raised by the defence in a formalistic manner, often simply stating that no new issues were raised beyond those already addressed during the initial trial. This practice, although in compliance with the CPC, may result in an effective limitation of the right to a fair trial, making it all the more essential that the appellate process entails a substantive, and not merely formalistic, review by a second instance court.

18. **Chapter 13,** concerning the **right to an effective remedy for victims,** finds that investigations into allegations of violations of the right to life and the prohibition of torture and ill-treatment during the January 2022 events were not overall adequate. The number of prosecutions conducted for these violations remains disproportionately low compared to the scale of the alleged abuses. While noting a positive initiative of establishing State-funded compensation scheme, the Report highlights inconsistencies in the compensation awarded to victims in criminal trials and the lack of a comprehensive and transparent mechanism for providing adequate redress.

1. Factual background and purpose of the Report

19. This trial monitoring was launched pursuant to an agreement between the Supreme Court of the Republic of Kazakhstan and ODIHR. The agreement set out the modalities for ODIHR to monitor selected trials of individuals charged in relation to their alleged involvement in the events that occurred in Kazakhstan between 2 and 10 January 2022. In this period, initially peaceful protests took place in several cities in Kazakhstan, including Almaty, Shymkent, Aktobe, Taraz and Kyzylorda.

20. Media extensively reported on the actions committed during or in the aftermath of the protests, including looting, theft of weapons, arson, and harm to State property and to law enforcement personnel and other public officials [1] According to official figures, 238 individuals lost their lives during the January 2022 events, including 19 law enforcement officers and military personnel, and 219 civilians.[2] At least 12 police officers died in the clashes in Almaty alone.[3] There were reports on detention of about eight thousand individuals, as well as allegations of abuse of power, degrading treatment or torture by law enforcement officers.[4]

21. Kazakhstan's authorities acknowledged that during the January 2022 events, hundreds of people were arrested and held in detention and that there were occurrences of abuse and ill-treatment.[5] On 16 March 2022, the President of Kazakhstan acknowledged that law enforcement officers had used prohibited methods of interrogation, including torture, against detained civilians.[6] The General Prosecutor's Office of Kazakhstan in his address to the Parliament on 5 January 2023 stated that as many as 329 criminal cases had been initiated based on citizens' allegations of torture.[7]

22. While Kazakh authorities adopted measures to address the violent legacy of the January 2022 events, including administrative sanctions, victims' compensation, and amnesties, criminal prosecutions have been the primarily applied tool in order to address alleged criminal offences and to provide redress to those who suffered as a result, including torture survivors, family members of those killed, and all other victims of crimes.

23. Assessing the compliance of OSCE participating States with their human dimension commitments, monitoring the implementation of those commitments, and advising on how

[1] For a comprehensive international media account of the events see for instance BBC, "Kazakhstan Unrest", last updated on 21 January 2022; Al Jazeera, "Kazakhstan unrest: From Russia to US, the world reacts", 6 January 2022; CNN, "Kazakhstan is in turmoil and regional troops have been sent to quell unrest", 7 January 2022.
[2] Prosecutor General of Kazakhstan, Public statement to Parliament, 5 January 2023; see also Radio Free Europe, "Kazakh Authorities Raise Death Toll From January Unrest To 238".
[3] The Guardian, Dozens of protesters and police dead amid Kazakhstan unrest, 6 January 2022.
[4] France 24, "Moscow-led bloc to send 'peacekeeping forces' to protest-hit Kazakhstan". It is beyond the purpose of the Report to provide a full account of the January 2022 events. As an example, in the city of Almaty the offices of the city mayor were stormed and set aflame; firearms depots were looted by protesters; protests at the Almaty International Airport resulted in cancelled and rerouted flights
[5] Astana Times, "Prosecutor General's Office Discloses New Facts From Investigation Into January 2022 events, Provides Proof of Criminal Organization of Attacks", 22 June 2022.
[6] President of the Republic of Kazakhstan, "State-of-the-Nation Address by President of the Republic of Kazakhstan Kassym-Jomart Tokayev", 16 March 2022.
[7] Prosecutor General of Kazakhstan, Public statement to Parliament, 5 January 2023.

to remedy possible shortcomings is a core function of ODIHR to assist OSCE participating States in fulfilling their obligations to protect and promote rule of law, human rights and fundamental freedoms. Thus, ODIHR engaged with the authorities of Kazakhstan to propose a trial monitoring initiative to provide an impartial overview of a representative sample of criminal proceedings between 1 November 2022 and 31 December 2023.

24. The overall objective of the trial monitoring initiative is to observe selected criminal proceedings related to the January 2022 events in Kazakhstan to provide an overview of the Kazakh justice system's response from the perspective of Kazakhstan's international obligations and national legislation. In particular, the report assesses the monitored trials in light of defendants' right to a fair trial of defendants, and the right of remedy for victims.

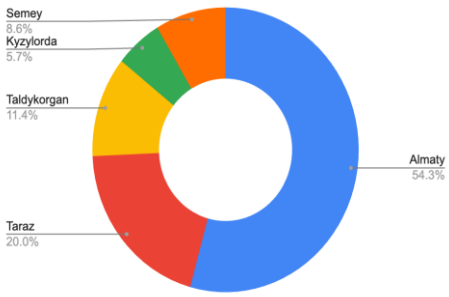
2. Methodology

25. ODIHR's observations outlined in this Report are primarily based on the monitoring of criminal trials related to the January 2022 events, which took place between 1 November 2022 and 31 December 2023 at the first instance, appeal, and cassation levels.

26. According to official data provided to ODIHR by the Supreme Court, as of 31 December 2023 courts had received in total 657 criminal cases related to the January 2022 events against 1,488 persons, of which 651 cases against 1,462 persons were completed.[8] Of these, 653 cases against 1,459 individuals are final, meaning that the appeal decisions have been rendered in these cases.

27. Most of these cases were decided in 2022 (589 cases against 1,254 defendants) and before ODIHR started the monitoring exercise. In 2023, courts decided 62 cases against 208 defendants. In the first three months of 2024, courts decided six cases against 12 defendants.

Chart 2.1 - Monitored proceedings by region



28. To the best of ODIHR's knowledge, during the monitoring timeframe, there were 105 on-going proceedings related to the January 2022 events, against 347 defendants. Of these, 281 were civilians and 66 were government officials. Most proceedings (almost 44 per cent) were on-going in the Almaty region, 20 per cent in Taraz and 16 per cent in Kyzylorda.

29. Based on predetermined prioritization criteria,[9] ODIHR selected a representative sample of 35 criminal cases in the first instance, appeal

[8] Official data was provided upon ODIHR's request by the Supreme Court of Kazakhstan on 17 May 2024.

[9] ODIHR established a set of criteria to prioritize cases for monitoring, which was prepared in advance of the observation process. The following types of cases were considered high priority: cases involving defendants who held senior positions in the public service; cases that include charges of torture or other forms of ill-treatment against civilians; cases that have garnered significant media attention; cases where allegations of witness intimidation or political pressure have been raised; cases against defendants who are known political activists (including prominent members of political parties), civic activists, or public figures; cases involving charges of high treason and/or abuse of power; cases against defendants who are accused of having an organisational or leadership role in the riots or criminal activities related to the January 2022 events. By focusing on these priority areas, ODIHR aimed to ensure that the monitoring process captured cases with the greatest potential impact on

and cassation stages, both in-court and online, in five cities: Almaty, Kyzylorda, Semey, Taldykorgan and Taraz, as shown in **Chart 2.1.**

30. The monitored criminal cases involved 139 defendants, both civilians and government officials, as shown in **Chart 2.2.** In these 35 cases, ODIHR's monitoring team, composed of two international trial monitors, two local language assistants and an international legal analyst, monitored over 400 trial sessions at both the first instance and appeal stages, as shown in **Chart 2.3.**

Chart 2.2 - Position of defendants in monitored proceedings

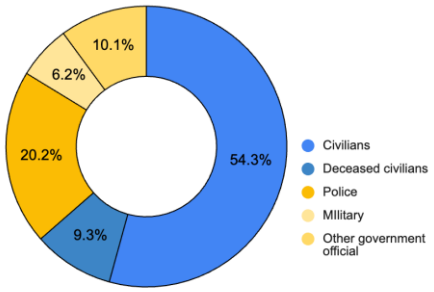
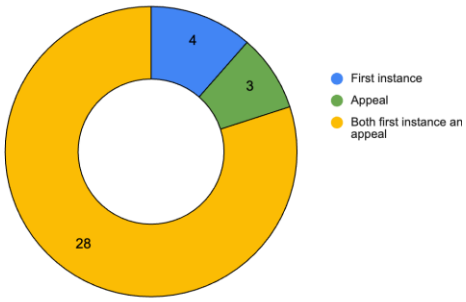


Chart 2.3 - Proceedings stages monitored



31. ODIHR also monitored some proceedings at the Cassation stage and it analysed a representative sample of the corresponding indictments and judgments. More detailed information and data about on-going and monitored trials can be found in **Annex II** to the present Report.

32. Additionally, to gain a better understanding of the general issues at hand, ODIHR conducted interviews with key stakeholders involved in the process, including Supreme Court representatives, members of the judiciary in Almaty, Taraz and Taldykorgan, Bar association members in Almaty and Taraz, and civil society actors, including victim representatives.

33. Trial monitoring focused only on the public phase of criminal proceedings, as per the agreement with Kazakhstan's Supreme Court. Since the trial monitoring methodology did not foresee access to pre-trial stages or to confidential proceedings, ODIHR was not in a position to monitor the compliance of pre-trial proceedings with due process standards.[10] Likewise, ODIHR could not make any assessment of the fairness of trials held behind closed doors.[11] However, ODIHR was able to provide some general observations on the above issues based on the limited publicly available information.

34. ODIHR was granted broad access to monitor trials provided in the agreement with the Supreme Court, encountering only occasional difficulties in accessing court proceedings that were open to the public. Court registry officers and judicial assistants were also generally cooperative, with ODIHR monitors occasionally excluded from attending in-

the fairness and integrity of the criminal justice system, as well as those that have drawn significant public interest and concern.

[10] See below, Chapter 4. This includes decisions to terminate cases at the investigation stage, including because of alleged lack of evidence or the entry into force of the Amnesty Law; decisions to impose, replace or remove restrictive measures such as pre-trial detention and house arrest.

[11] See below, Chapter 4.

person hearings.[12] In some instances, ODIHR also faced some difficulties in obtaining links to connect to online trials.[13]

35. ODIHR strived to monitor a significant portion of each of the monitored cases. While it was not feasible to observe every case from beginning to end, ODIHR managed to attend most hearings in the majority of cases. This approach allowed for a comprehensive understanding of the main issues involved in each trial and provided valuable insights into the overall fairness of the proceedings. By focusing on key aspects of the trials and maintaining a consistent presence throughout the monitoring process, ODIHR was able to gather sufficient information to draw meaningful conclusions and identify systemic patterns.

36. Domestic legislation, court proceedings, and available judicial acts such as indictments[14] were analysed on compliance with international standards applicable in Kazakhstan which, in addition to the OSCE commitments, arise *inter alia* out of the International Covenant on Civil and Political Rights (ICCPR), as interpreted by the relevant General Comments of the UN Human Rights Committee (HRC), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), as interpreted by the Committee against torture. ODIHR also referred to the European Convention on Human Rights and Fundamental Freedoms (ECHR) as interpreted by the European Court on Human Rights (ECtHR).[15]

37. ODIHR also assessed compliance of the monitored trials with standards set by Kazakh legislation, insofar as it represents an incorporation of the above-mentioned international standards into the domestic legal system.

38. Lastly, ODIHR obtained from the Supreme Court of Kazakhstan additional quantitative information, updated to 31 December 2023, and analysed disaggregated quantitative data on criminal proceedings related to the January 2022 events.

3. Considerations regarding the independence of judges and prosecutors.

39. The independence of the justice system, including of judges, prosecutors, and attorneys is an overarching aspect of the fairness of trials and any analysis of the respect of the right to a fair trial would be incomplete without analysing the independence of key trial actors. The lack of sufficient guarantees of independence of courts, prosecutors, and attorneys may determine the behaviour of professional trial participants at hearings and potentially lead to further violations of defendants' and victims' rights, or create a perception of such violations. This section focuses on the independence of judges and prosecutors, while independence of attorneys is addressed below in the section related to the right to effective defence.

[12] See below, Chapter 4.
[13] See below, Chapters 4 and 10.
[14] With the agreement of the Supreme Court of Kazakhstan, ODIHR obtained copies of indictments mostly from defence counsel.
[15] Although not directly binding on Kazakhstan, the status of ECHR and case law from ECtHR is considered relevant and persuasive.

3.1. International standards

40. A well-functioning and independent judiciary is an essential requirement for the fair and impartial administration of justice, that hearings are conducted by judges who are and appear to be unbiased, and free of any undue influence. 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. "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." According to the HRC, OSCE participating States have repeatedly committed to ensuring the independence of the judiciary, including in the 1990 Copenhagen Document and the 1991 Moscow Document, as well as 1999 Istanbul Document, stressing that independent judicial systems "play a key role in providing remedies for human rights violations".

41. Annex I, Section 1.1 offers the Report offers further overview of the reliant norms or international law and soft law norms, such as ICCPR, UN Basic Principles on the Independence of the Judiciary, OSCE/ODIHR Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia, OSCE/ODIHR Recommendations on Judicial Independence and Accountability (Warsaw Recommendations), the Rome Charter of the Consultative Council of European Prosecutors (CCPE), etc. Findings and conclusions the report should be read in the context of these norms.

3.2. Domestic legal framework

42. The judicial system and guarantees for judicial independence, status and guarantees in Kazakhstan are primarily regulated by the 1995 Constitution (Article 77, paras. 1 and 2.) 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", Article 1, para. 2). Annex I, Section 1.2 provides more detailed overview of the national legislation.

3.3. ODIHR observations

43. ODIHR notes that the general guarantees of judicial independence in the legal framework of Kazakhstan are limited by legal provisions that grant extensive powers to the President of the Republic over the organization and functioning of the court system, as well as mechanisms of appointment, dismissal, promotion and transfer of judges.[16] As a positive measure, a new financing model for the judicial system was introduced in 2023, aimed at enhancing the financial autonomy and independence of the judiciary.[17] Furthermore, the Constitutional Law ensures that the courts' budget remains unaffected in the event of government spending cuts or sequestration.

[16] See OSCE, ODIHR Kyiv Recommendations, paras. 21-23 for further guidance regarding the international standards in this area.

[17] Kazakh authorities informed ODIHR on 31 December 2024 that a minimum funding threshold of 6.5 per cent of the total expenditures of all government agencies has been allocated exclusively to the judicial branch of government.

44. According to the Constitution, the President has significant power to form the High Judicial Council, the body in charge of selecting the candidates for the judiciary, and all decisions related to their qualification and disciplinary proceedings.[18] It is to be noted that international standards and good practice, as reflected in ODIHR recommendations, advise that "judicial councils and self-governing bodies, where they are established, should themselves be independent and impartial"[19] and that "judge members shall be elected by their peers and represent the judiciary at large" and "[T]he work of the Judicial Council shall not be dominated by representatives of the executive and legislative branch".[20]

45. The High Judicial Council selects the candidates to judicial positions meeting the requirements on a competitive basis and recommends them for the appointment to the President, except for the Supreme Court President and Supreme Court judges. These candidates are proposed by the President, also upon recommendation of the High Judicial Council, but then appointed by the Senate.[21] All other appointments are made by the President,[22] who is also entitled to submit a candidacy for a judge of the Supreme Court.[23] Positively, following recent reforms, the Minister of Justice and Chair of the Agency for Civil Service Affairs are ex officio excluded from membership of the High Judicial Council.

46. The regulatory framework governing the dismissal of judges raises concerns regarding judicial independence and the principle of irremovability. Article 79 para. 1 of the Constitution stipulates that a judge's powers may only be terminated or suspended for reasons specified by law. However, the implementation of this principle through the 2000 Constitutional Law and related presidential decrees reveals several problematic aspects connected to the role played by the executive branch. branch. As mentioned above, the President has broad powers to form the High Judicial Council, which oversees the assessment of judges' performance or misconduct. Additionally, disciplinary procedures are regulated and implemented by bodies within the Judicial Council, whose composition and operations are also determined by the President. To be noted that OSCE region's good practice recommends that "[…] Bodies deciding on cases of judicial discipline should not be controlled by the executive branch, nor should there be any political influence pertaining to judicial discipline".[24]

[18] Constitution, Article 44, para. 20. Article 4 of the Law on the High Judicial Council clarifies that the scope of the President's constitutional power extends to the determination of the number of the members of the High Judicial Council, besides the officials who are included ex officio, as well as the selection of individual membership. The current composition was established by the presidential Decree of 1 July 2022 on the High Judicial Council. The Chairperson of the High Judicial Council is appointed by the President with the consent of the Senate. It should however be noted the Senate is partially composed of members directly appointed by the President. Furthermore, the judge members of the High Judicial Council are appointed by the President from candidates elected by the expanded plenary session of the Supreme Court.
[19] Warsaw Recommendations, para. 1.
[20] Kyiv Recommendations, para. 7.
[21] See 2000 Constitutional Law, Article. 31, para. 1 and 5. The President also approves the regulation that determines the conditions and procedures for candidates judges to undergo and successfully pass a paid internship in the court (2000 Constitutional Law Article. 29, para. 8).
[22] 2000 Constitutional Law, Article 31, para. 2.
[23] 2000 Constitutional law, Article. 30 para. 4. In this case, the candidate is exempt from the competition.
[24] Warsaw Recommendations, para 17, Kyiv Recommendations, para 9.

47. The grounds for dismissal lack clear, objective, and detailed criteria. The 2000 Constitutional Law provides various grounds for potential termination, including decisions by disciplinary bodies.[25] Among other reasons, judges can be dismissed upon failing a "professional qualities" test conducted by the Commission for the Quality of Justice, which remains vaguely defined.[26] Termination of office is one of the four types of disciplinary sanctions, but the 2000 Constitutional Law fails to specify which violations warrant each particular sanction.[27] Moreover, the Presidential Decree regulating the assessment of professional requirements and disciplinary proceedings provides only broad, non-specific criteria for imposing sanctions, such as considering "the degree of violation by the judge's actions of the principles of the administration of justice".[28]

48. In this respect, OSCE good practice recommends that disciplinary proceedings against judges shall deal only with alleged instances of professional misconduct that are gross and inexcusable and that also bring the judiciary into disrepute, and should not extend to the content of their rulings or verdicts.[29] Decisions in disciplinary proceedings should be well-reasoned and state the essential findings, evidence and legal reasoning. They may be appealed to a competent court, and judges should be offered full guarantees of the right to a fair trial while being part of such proceedings.[30]

49. The formal decision-making process for terminating a judge's powers also allows for potential executive interference. While inter-judicial committees (such as the Commission for the Quality of Justice and the Judicial Jury) can make disciplinary decisions or recommendations, and the High Judicial Council examines these grounds on their merits,[31] the discretionary power to make final decision on termination appears to remain with either the Senate or the President, depending on the judge's level.[32] Crucially, the law does not specify the binding nature of the High Judicial Council's proposal, whether it can be disregarded by the Senate or President, or if a reasoned decision is required when deviating from the Council's recommendation. According to international norms, judges should only be discharged following a disciplinary body's decision or recommendation after a clear and fair procedure, limiting the role of the executive and legislature by the binding nature of the High Judicial Council's decision, while also guarantying independence of the judicial body in law and in practice.

50. The President has the authority to determine the structure of the judicial system by creating and abolishing district and regional courts,[33] and can establish specialized and military

[25] 2000 Constitutional Law, Article 34 para. 1.
[26] 2000 Constitutional Law, Article 34, para. 1, subpara. 8). The role and functions of the Commission on the Quality of Justice, created within the Supreme Court, are regulated in a Presidential Decree of 2001.
[27] *Ibid*., Article 40.
[28] Presidential Decree No 643 of 26 June 2001 as amended by 19 January 2023 On the Regulations on the Judicial Jury, para 44.
[29] Kyiv Recommendations, para 25
[30] Warsaw Recommendations, para 19.
[31] 2000 Constitutional Law, Article 34, paras 2-1 and 2-2.
[32] 2000 Constitutional Law, Article 34, para. 3 subpara. 1) and 2).
[33] 2000 Constitutional Law, Article 6, para. 1 and Article 10, para. 1. The President acts upon the proposal by a Special Agency, which has to consult with the Chairman of the Supreme Court in agreement with the High Judicial Council. The Agency is also established by the President (see 2000 Constitutional Law, Article 56). The judicial administration body is established by the presidential Decree no 1022 of 8 September 2022 On Measures for Modernisation of the Judicial Administration and the presidential Decree No 106 of 19 January 2023 On Judicial Administration.

courts operating at the first and second instance court levels.[34] The President also has the power to determine the overall number of judges on all levels of the judicial system,[35] including the Supreme Court,[36] while the latter establishes the number of judges in individual courts.[37] All the above-mentioned powers to create and abolish courts, and to decrease the number of judges in a certain region, may potentially result in termination of a judicial office and function by a decision of the President. Security of tenure and irremovability of judges are key preconditions and an essential aspect of judicial independence.[38] The exercise of such broad powers by the President, without the possibility to challenge such appointments or transfers before an independent body, creates in-balances in the separation of powers and raises questions regarding executive limitation of judicial independence.

51. The President can also influence the judiciary through other powers such as withdrawing the immunity of individual judges from criminal prosecution, upon the proposal of High Judicial Council,[39] and can grant substantial material benefits in case the President appoints judges to other civil service positions.[40] The President is the only State institution that can request the Constitutional Court to review its own decisions.[41]

52. While the 2000 Constitutional Law commendably stipulates that the consent of a judge is needed for their transfer,[42] the judge's refusal to accept a vacant position can be considered as a ground for discharge,[43] thus lacking sufficient guarantees against arbitrary transfer from one position to another. Moreover, it is unclear what authority can decide on the transfer of a judge and under what circumstances.

53. The President also has significant power over the prosecution, which is a separate division of the State apparatus with a hierarchical structure and is directly accountable to the President.[44] Moreover, Article 13 of the Law on the President grants the President powers with regard to appointment and dismissals of the Prosecutor General and deputies.[45] Furthermore, Article 17-1 of the Law on the President extends the presidential powers with a set of regulatory and decision-making functions with respect to the prosecutorial service as a body directly accountable to the President, including normative regulation of the status and structure, quantitative and functional regulation of personnel, and regulation of the functions, scope of actions and powers of the prosecution. The legislation envisages that the Prosecutor General "carries out orders by the President", without determination of the scope and natures of such orders.[46]

[34] 2000 Constitutional Law, Article 3, para. 3-1. Specialised courts' jurisdiction is regulated by Article 307-309 of the CPC.
[35] 2000 Constitutional Law, Article 6, para. 2 and Article 10, para. 2.
[36] 2000 Constitutional Law, Article 18, para. 1.
[37] 2000 Constitutional Law, Article 6, para. 3.
[38] Warsaw Recommendation, para 31, 32, 33.
[39] 2000 Constitutional Law, Article 27, para. 1.
[40] 2000 Constitutional Law, Article 35, para. 1-1.
[41] 2022 Constitutional Law on the Constitutional Court, Article 61.
[42] 2000 Constitutional Law, Article 31, para. 8.
[43] 2000 Constitutional Law, Article 34, para. 1 subpara. 8.
[44] Constitution, Article. 83 para. 2. See also Article 1 and 3 of Law of the Republic of Kazakhstan on Prosecution Service of 5 November 2022, No 155-VII.
[45] Upon the agreement of the upper chamber of the Senate, and the Prosecutor General, respectively. See Article13 of the Law on the President of the Republic of Kazakhstan, No 2733 of 26 December 1995.
[46] See Chapter 3 para 19 (12) of Presidential Decree No 563 of 13 October 2017, with amendments introduced by the Decree No 227 of 23.05.2023 "On certain issues of prosecutorial agencies of the Republic of Kazakhstan."

54. At the same time, the Law of the Republic of Kazakhstan on Prosecution Service[47] lacks sufficient guarantees for the functional independence of individual prosecutors, including on ensuring that instructions from superior prosecutors are issued only in writing and that there is a possibility to challenge illegal instructions to an independent body.[48]

55. The above mentioned Law on Prosecution Service lacks sufficient guarantees for prosecutors against arbitrary actions by superiors, such as the transfer of cases without explanation, the unjustified reduction of seniority or pay scales, the initiation of disciplinary proceedings or the forced transfer to a prosecution service in another region without operational necessity and without regard to the personal circumstances of the prosecutor.[49] Such actions can infringe on the independence of the prosecutor and negatively impact the morale of the individual prosecutor, which may ultimately impact the effectiveness of the prosecutor's office. In this context, the above-mentioned guarantees may in some cases need to be comparable to the guarantees applicable for judges so that prosecutors can take decisions independently.[50]

3.4. Conclusions

56. ODIHR's analysis revealed deficiencies in both the legislative framework and its practical application. The broad powers in the executive branch over judiciary and prosecution risks upsetting checks and balances necessary to ensure an independent and impartial administration of justice, guarantee full enjoyment of the right to an independent and impartial tribunal established by law.

57. Positively, in September 2022, the President initiated a set of judicial reforms, which were partially implemented in March 2023. Changes mainly focused on improving openness, competitiveness and transparency of procedures for appointment, dismissal, transfer, and promotion of individual judges, including Supreme Court ones.[51] While expansion of the judiciary's powers related to self-management and appointment may be seen as a positive development in this context, the impact of the current change appears to be partial since the final decision-making power still resides with the President, despite the requirements of international standards and longstanding key recommendations from ODIHR and the Venice Commission.[52]

[47] See Law No155-VII 3PK of 5 November 2022.
[48] ODIHR Opinion on the Draft Constitutional Law of Kazakhstan on the Public Prosecution Service, of 27 October 2022, para 40.
[49] ODIHR Opinion, idem, para 41.
[50] See CCPE, Opinion No. 13(2018) on the "Independence, accountability and ethics of prosecutors", para 24.
[51] The recent amendments introduced into the 2000 Constitutional Law on the Judicial System and the Status of the Judiciary on 27 March 2023, allow the plenary of regional courts to elect alternative candidates for district court chairs from those proposed by the Supreme Judicial Council, as well as from self-nominated candidates.
[52] See paras. 9 and 35, the recommendation 3.1.B of the 2011 OSCE ODIHR and the Venice Commission Joint Opinion on the Constitutional Law on the Judicial System and the Status of the Judiciary in Kazakhstan.

3.5. Recommendations

It is Recommended to the Legislature to:

a) Revise the conditions for appointment, transfer, promotion, and dismissal of judges by ensuring that these processes are carried out by bodies that are fully independent from the executive and legislative branches of power.
b) Reconsider the current role of the executive authorities in the creation, abolishment and reorganization of courts, implementing mechanisms to ensure that decisions regarding these matters are taken by an independent judicial body and are made through transparent and consultative processes.
c) Establish clear and objective criteria for the definition of disciplinary offences and application of disciplinary sanctions against judges, including dismissal of judges.
d) Reconsider the current role of the executive authorities in the work of prosecutors, promoting greater institutional autonomy, and accountability, and transparency in prosecutorial work.
e) Strengthen the functional independence of prosecutors by reassessing and enhancing guarantees against undue interference in individual cases.

To the High Judicial Council:

a) Elaborate policies and criteria for transparent and impartial decision-making processes of selection, appointment, and promotion of judges that are based on merit and promote greater independence and impartiality with respect to transfer and sanctioning of judges.

4. Right to a public hearing

4.1. International standards

58. 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 them.[53] 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".[54] 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.[55] 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. Annex I, Section 2.1 of the Report offers further overview of the relevant norms or international law and soft law norms.

[53] UDHR, Article 10; ICCPR, Article 14.
[54] Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, 29 June 1990, para. 12.
[55] OHCHR, On-Line hearings in justice systems, page 4.

4.2. Domestic legal framework

59. 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[56] and that the court's judgement and decisions in the case shall be announced publicly.[57] In addition, courts are obliged to publish the schedule of hearings online, and provide such information upon written requests.[58] 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.[59] 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."[60] The defendant has the right to appeal decision to hold the trial behind closed doors in accordance with the procedure established by law. Annex I, Section 2.2 provides more detailed overview of the national legislation

4.3. ODIHR observations

60. The right to a public trial is important in the context of criminal trials to ensure credibility of the process and guarantee the right of defense. Given the high level of public interest in the cases related to the January 2022 events, public access to trials becomes particularly important in order to enhance public confidence of the process, understanding of the charges, facts of the case and the roles of those found responsible.

61. ODIHR observed several instances where courts unduly limited the openness of both online and offline trials related to the January 2022 events, often without offering justification, resulting in lack of transparency and raising concerns about the public's ability to access information about these proceedings. Furthermore, the current legislation allowing for entire cases to be closed to the public when a State secret is involved is of concern as it is overly broad and may potentially be misused to restrict public access to trials of significant public interest.

4.3.1. Confidential proceedings in cases involving State secrets

Restrictive interpretations of the Law on State Secrets

62. According to official information received by the Supreme Court during the monitoring period, ODIHR is aware of at least eight trials related to the January 2022 events, on-going during the reporting period, that were held entirely behind closed doors. According to the available information, these trials primarily concerned former State officials charged with criminal offences, including treason, violent seizure of state power, abuse of power and official authority.[61]

63. ODIHR did not have access to such closed proceedings and cannot make further findings in this regard. However, an interpretation of the applicable domestic legislation authorising

[56] CPC, Article 29, para. 1, first sentence.
[57] CPC, Art 29, para. 3, first sentence.
[58] See Law on access to information, Article 11 para. 4, subpara. 6 and Article 16 para 5, subpara. 2.
[59] CPC, Article 29, para. 1, third sentence, and Article 98, paragraph 1.
[60] CPC, Article 29, para. 1, second sentence.
[61] CC, Article 175 part 1, Article 179 part 3, Article 351, Article 362 part 4(3).

the exclusion of the public from the entire trial and the entire judgement reasoning may not be necessary or proportionate.

64. The Law on State Secrets[62] regulates information to be considered a state secret, including when revealing details on intelligence, counterintelligence, and operative-investigative activities.[63] The Law foresees that this information can be classified, but only as long as it is not necessary to use it in a criminal proceeding as factual data relevant for the correct resolution of the criminal case.[64] Furthermore, the need to use the results of operational-search and counterintelligence activities in a criminal proceeding is a ground for declassifying the information.[65] Lastly, certain types of data and information cannot be kept secret, including information about crimes and the consequences of emergency situations, data concerning human rights violations, and information regarding violations of the law committed by State officials.[66]

65. Judges interviewed by ODIHR confirmed that the interpretation of this rule allows declassification of the information only for parties to the proceedings and provided they, including judges and lawyers, obtain a security clearance.[67] Furthermore, in their understanding, the decision of the investigative authority during the investigation to classify certain materials obliges the Court to close the entire trial to everyone else.

66. A literal reading of the provisions of the Law on State Secrets does not appear to suggest such a restrictive interpretation, limiting declassification only to parties to the proceedings and thus creating an obstacle to the public accessing the trial. It should be noted, however, that there may indeed be a justified need to restrict public access to information of a sensitive nature, which may legitimately be classified. Therefore, while declassification of such information only for the parties to the proceedings, in principle, may be justified, there is a need to provide a clearer guidance and more elaborated criteria for the courts on this matter. Furthermore, the state should guarantee access to the classified information to a defence lawyer of one's choice, establishing clear procedures regulating and granting security clearance.

67. Moreover, even when State secrets cannot be disclosed to the public in the context of a criminal proceeding, no CPC provision appears to impose the closure of the entire trial. Also, it would not be considered proportionate, from international law point of view, to close the entire trial solely because part of the information presented to the courts remains classified. Article 47 para. 5 of the CPC foresees that evidence containing information constituting State secrets must be collected in a closed court *session* - not *trial*. Article 29,

[62] Law No. 349-1 of 15 March 1999 on State Secrets (in Russian).
[63] See Article 1, 11-14, 17- 18, and Chapter 5 of the Law on State Secrets.
[64] Article 29 of the CPC states that "Criminal cases in all courts and judicial instances shall be heard openly. Limiting the publicity of a trial shall be permitted only when this is contrary to the interests of protecting state secrets and other secrets protected by law. [...] (3.) The court's verdict and decisions taken on the case shall in all cases be announced publicly. In cases considered in a closed court session, only the introductory and operative parts of the verdict shall be announced publicly.".
[65] Law on State Secrets, Article 22, para. 1 states that "the grounds for declassifying information are… the need to use the results of operational investigative and counterintelligence activities in criminal proceedings".
[66] Law on State Secrets, Article 17, para. 1 "the following information is not subject to classification: (1) emergency situations and disasters that threaten the safety and health of citizens, and their consequences, as well as natural disasters, their official forecasts and consequences; (6) facts of violation of human and civil rights and freedoms; (10) facts of violation of the law by state bodies and organizations, their officials".
[67] See the following paragraph.

paragraph 1, second sentence of the same law, appears to support this interpretation, as it refers to *limiting* the trial's publicity rather than *excluding* it entirely. A time limited closure when such issues are presented is therefore possible.

68. In the **Talipov** case, for example, the first instance court examined classified orders and regulations during three closed court hearings, while maintaining the remainder of the trial open to the public. By opting to hold a closed session to discuss classified material, the court demonstrated in a positive manner that it is possible to protect necessary secrets without broadly restricting public access to the trial, striking a balance between the right to a public trial and security considerations.

69. Alongside positive examples as the one described above, ODIHR observed that in other cases the legal provisions have been interpreted and applied in a restrictive manner, resulting in the closure of entire trials rather than just single hearings. In such cases, ODIHR is not aware of any publicly available formal ruling stating the reasons behind the decision to close the proceedings.

70. In the absence of a publicly communicated rationale for holding the trials behind closed doors, it is difficult to assess whether the limitations imposed in some cases were strictly necessary or violated the right to a public hearing.[68] ODIHR recalls that the HRC has previously found Kazakhstan in violation of its obligations under Article 14 para. 1 of the ICCPR for classifying entire cases and conducting trials in secret without adequately explaining the need for such measures.[69] In its jurisprudence, the HRC has identified several practices related to the classification and subsequent closure of cases involving classified information in Kazakhstan that breach Article 14 paras. 1 and 3 of the ICCPR, including the absence of public hearings, failure to provide timely security clearance for legal defenders, restricting defendants' and their lawyers' access to case files, including indictments and evidence, and the failure to pronounce entire verdicts publicly.[70]

71. ODIHR is also concerned about the CPC provision prescribing that, in cases considered in a closed court session, only the introductory and the enacting clause of the sentence shall be publicly proclaimed. This provision excessively restricts publicity by limiting the announced verdict to the defendants' personal data and, in the case of a guilty verdict, the crime committed and the sentence imposed, without any mention of the underlying facts or charges.

72. For instance, on 20 March 2024 media reported that a defendant was sentenced to 8 years of imprisonment for the crime of exceeding powers or official authorities[71] in a case related

[68] ODIHR recalls that the ECtHR has found a violation of Article 6 of the ECHR in a case where neither the first instance nor the Appeal Court gave any reasons for closing the trial to the public, see ECtHR, *Chaushev and Others v. Russia*, 25 October 2016, paragraph 24.
[69] See, *inter alia*, para 7.4 of the HRC views in communication *Dzhakishev v. Kazakhstan*, 6 November 2015. In para 9 of the views, as measure of reparation for such violations, the HRC prescribed "quash the […] conviction and release [...], and, if deemed necessary, conduct a new trial, subject to the principles of fair and public hearings, access to counsel and other procedural safeguards".
[70] See para. 11.3 And 11.4 of the HRC views in the communications *Esergepov v. Kazakhstan* 29 March 2016, and para. 7.4 of the *Mukhtar v. Kazakhstan*, 6 November 2015 , where violations of Article 14(1) and 14(3) of the ICCPR were established regarding the closed trials involving state secrets based on the analysis of practices, identical to those identified during the ODIHR trial monitoring.
[71] CC, Article 362 para. 4.

to the January 2022 events, and that the defendant's sentence was conditionally suspended.[72] No further details were made public as regards the nature of the crime or reasons for the court decision.

73. Although the existing legal framework seems to allow for this course of action, this approach deprives the public of any knowledge about the specific circumstances surrounding the crime and the basis for the defendant's criminal responsibility.

74. The ECtHR jurisprudence supports this view. In a case regarding a criminal trial with national security implications, it held that "even in indisputable national security cases, such as those relating to terrorist activities, the authorities of countries which have already suffered and are currently at risk of terrorist attacks have chosen to keep secret only those parts of their decisions whose disclosure would compromise national security or the safety of others [...] thus illustrating that there exist techniques which can accommodate legitimate security concerns without fully negating fundamental procedural guarantees such as the publicity of judicial decisions."[73]

75. ODIHR observed that although some trials were held entirely behind closed doors, due to the confidentiality of the proceedings, media broadcasts of the courtroom were allowed only to display defendants in cages or behind bars. In the absence of any other information on those cases, this manner of reporting risked compliance with the presumption of innocence,[74] portraying the defendants as guilty before the conclusion of the trial. The selective release of information, which focused solely on the defendants' detention without providing context or details about the charges and evidence, may have contributed to the public perception that these trials had a predetermined outcome to the detriment of the accused, thus undermining their right to a fair trial.

Judges and lawyers requiring security clearances

76. The Law on State secrets may limit the right to be tried by an independent court,[75] given the rules regarding how judges may obtain special authorizations or security clearances to preside over classified cases involving State secrets.[76] As confirmed by interviewed judiciary representatives, only specific judges can be granted this authority after complying with the clearance procedure under the Law on State Secrets, which involves the participation of secret services personnel. According to interviewed judiciary representatives, upper-level courts grant five- or ten-year clearances for specific judges based on formal agreements with the presidents of the respective lower-level courts. It is important to note that there is no application process for judges who may wish to handle confidential cases, which raises concerns regarding judicial independence. This mechanism may also affect the integrity of the justice system since it implies that the system does not trust all judges to handle sensitive information such as State secrets.

[72] See the media report on the case by *Radio Azattyq* of 20 March 2024. Although the case falls outside the timeframe covered in the present report, ODIHR finds this example particularly representative of the issue at stake, since despite the public relevance of the case, it is impossible to know what the defendant was found guilty of, and why the sentence was suspended.
[73] ECtHR, *Raza v. Bulgaria*, 11 February 2010, para. 53.
[74] See below, Chapter 5
[75] See Chapter 3.
[76] The rules are outlined in the Instructions for the Protection of State Secrets of the Republic of Kazakhstan which is not publicly available.

77. The secrecy of trials also affects the right to a defence counsel of one's own choosing. Similarly to judges, defence counsel participating in these cases need security clearance. According to the information provided by Almaty Bar association members, in cases involving State secrets, there is no longer a pre-approved roster of lawyers with security clearance. Lawyers must now submit an application including their biography, travels abroad and medical records, to the National Security Committee (i.e. Secret Services) through the local branches of the Ministry of Justice.[77] The latter then issues a decision based on binding opinion of the National Security Committee. A negative decision can be appealed to the administrative court.

78. The UN Working Group on Arbitrary Detention criticised the system in relation to the confidential criminal proceedings brought against Mr. Massimov, former Prime Minister of Kazakhstan and Head of the National Security Committee of Kazakhstan at the time of the January 2022 events.[78] The HRC also found that Kazakhstan violated the same provision in cases where lawyers chosen by defendants were denied security clearance, even if an alternative Court-appointed lawyer was provided.[79]

79. ODIHR observations suggest that the current system for granting security clearances to judges and lawyers in cases involving State secrets would benefit from revision, since it may compromise judicial independence, the right to choose one's lawyer, and the integrity of the justice system as a whole.

4.3.2. Exclusion of members of the public from offline trial hearings

80. In at least nine out of the 26 monitored trials that were held wholly or partially offline, ODIHR observed one or more instances where members of the public, including in some cases ODIHR observers, were prevented or limited in some way from accessing the proceedings. ODIHR monitors and other members of the public were excluded from two trials that, because of alleged security concerns, were held inside detention facilities in the Taraz region.

81. In two such cases **(Sagintay, Zaurbekov)**, ODIHR monitors were initially able to observe offline hearings inside the prison premises. However, without prior notice or apparent reason, ODIHR monitors and other members of the public, including media

[77] In cases where some evidence is classified, attorneys without clearance may participate in the trials without access to the classified information, which limits the quality of the defence.
[78] The UN Human Rights Council, Working Group on Arbitrary Detention, Opinion No. 57/2022 concerning Karim Massimov (Kazakhstan), 25 October 2022, para. 66-67 and 113-115, stated that that upon arrest Mr. Massimov was appointed an *ex officio* counsel; he then appointed one of his own choosing, who was denied security clearance. Although the Kazakhstan Government argued that he could simply choose another one, the Working Group stressed that merely allowing the accused to select another lawyer from a restricted list of government-approved counsel does not satisfy the right to freely choose one's counsel. It also found that, because of the confidentiality protocols in place, his State-appointed lawyer was also unable to engage effectively in his defence. The Working Group recalled that all persons deprived of their liberty have the right to legal assistance by counsel of their choice at any time during their detention, including immediately after their apprehension, and such access is to be provided without delay. The Working Group recalled that all persons deprived of their liberty have the right to legal assistance by counsel of their choice at any time during their detention, including immediately after their apprehension, and such access is to be provided without delay. In the case of Mr. Massimov, this breached Article 14 para. 3, lett. d) of the ICCPR.
[79] HRC, *Mukhtar v. Kazakhstan*, 6 November 2015, para 7.5.

representatives, were subsequently denied access to the courtroom. In some instances, the court offered live streaming of the hearings as an alternative, but the poor audio and visual broadcast quality prevented the public, including ODIHR, from properly following the proceedings. ODIHR monitors were allowed to attend subsequent hearings only in one of the two mentioned cases.[80]

82. These trials were conducted within a prison facility, a location that evidently hinders the public's ability to be present during these proceedings. It should be noted that since trials in detention centres lack openness and transparency, and are difficult to access for the public, the ECtHR found that this violates the right to public hearing.[81] While holding a trial in a prison does not automatically violate the right to a public trial, the Court found that judicial authorities should thoroughly consider all possible alternatives to ensure safety and security in the courtroom and give preference to a less strict measure over a stricter one when it can achieve the same purpose.[82]

83. In the monitored cases, the specific security or logistical reasons that prompted the decisions to hold trials inside a detention facility, aside from general "security concerns", remain unclear and appear to be in potential conflict with the already mentioned international standards of necessity and proportionality concerning limitations to the right to a public hearing.[83]

84. ODIHR monitors also faced difficulties in accessing offline hearings in three additional trials, including the **Azanbayev** case, ODIHR monitors were denied access to two consecutive hearings held on 23 and 26 May 2023, without a proper explanation. Access was granted only after a written motion from the trial monitors, after the collection of evidence had already started. Furthermore, ODIHR monitors were denied connection to a subsequent online hearing held on 13 June 2023, for no apparent reason.

85. In instances where it encountered initial denials of access to trials, ODIHR was then able to gain access following the submission of written requests. This suggests a concern regarding the general public's access to court proceedings in Kazakhstan. ODIHR also monitored at least four instances of undue limitation of the attendance of trials by members of the public and/or media.

86. In the **Tleuzhanova** case, the judge decided to limit public access to the preliminary hearing that took place on 14 March 2023. It was purported that the hearing focused on addressing technical matters that the general public might not fully understand. The court announced its decision in the presence of several security officers, in the meantime were called by the court. Furthermore, approximately 14 military guards were present inside the courtroom, with several more stationed outside the premises, further limiting the ability of members of the public to attend the hearing. The Court provided no explanation for this seemingly unnecessary course of action, thus unduly limiting the publicity of the trial.

[80] A third case monitored by ODIHR was moved to the detention center, and thus closed to the public, only after the Appeal Court started hearing witnesses about a new circumstance, i.e., that one of the deceased defendants died of torture and was not shot during the protests.
[81] See e.g. ECtHR, *Hummatov v. Azerbaijan*, 29 November 2007.
[82] See ECtHR, *Krestovskiy v. Russia*, 28 October 2010.
[83] See section "International standards" above.

4.3.3. Exclusion of members of the public from online trials

87. ODIHR observed that at least three trials attracting significant public attention were held entirely or mostly online, despite requests for an offline format by the defence.

88. In one such case **(Mamai)**, the proceedings were initially conducted offline. However, after members of the public expressed interest in attending the trial and showing support for the defendant, the presiding judge decided to move the case online. The reasons behind this decision were not communicated by the court, raising concerns about the transparency and accessibility of the proceedings.

89. ODIHR notes that public access to online trials is subject to the availability of reliable internet connection and devices, which may not be readily available to certain categories of the public or in some geographical areas of Kazakhstan. This can result in difficulties for parties and members of the public to participate in the proceedings, unjustifiably restricting the overall publicity of the trial.

90. Generally, ODIHR observed that courts did not consistently facilitate public access to information about ongoing cases, such as by making case dockets readily available in courthouses or online, or making credentials available to access online hearings. In some cases, although links to online hearings were available upon request, access was occasionally limited by password requirements or denials of admissions to the online hearing platform.

91. Finally, ODIHR observed that members of the public who wish to attend these online trials were often required to register in advance and wait for the court registry to provide them with the necessary credentials. This process seems to impose an unnecessary burden on the public, while also disclosing the attendees' personal data to the court and to all other participants. The requirement for advance registration and the sharing of personal information to attend a public trial may deter some individuals from participating, potentially limiting public oversight and scrutiny of the proceedings. Moreover, the identifiability of attendees may create a chilling effect, discouraging people from attending particularly sensitive trials due to concerns about potential consequences.

4.4. Conclusions

92. ODIHR's observations reveal several practices that unduly limit the openness and transparency of trials related to the January 2022 events in Kazakhstan. The current legal framework and its interpretation by the judiciary appear to allow for overly broad limitations on the right to a public trial. The goal of preserving state secrets can be achieved by restricting only certain sensitive sessions and parts of public documents to the public, rather than closing the entire trial and announcing only the enacting clause of a judgement.[84] Necessity and proportionality of closure of entire proceedings in such cases, without publicly available court decisions justifying such measures, as well as grounds and procedure for judges and lawyers to obtain security clearances raises questions about compatibility with international norms.

[84] CPC Article 29, paragraph 1, second sentence, appears to support this interpretation, as it refers to "limiting" the trial's publicity rather than "excluding" it entirely.

93. To address these concerns, legislation should be clarified so as to explicitly allow some degree of publicity even in cases where full public access to the proceedings may be limited due to legitimate concerns such as national security. The courts should strive to find a balance between protecting sensitive information and upholding the principles of transparency and the right to a public trial, in line with international jurisprudence, exploring alternative measures to protect sensitive information while upholding the right to a public hearing to the greatest extent possible.

4.5. Recommendations

To the Legislature:

a) Ensure coordination between the Law on State Secrets and the CPC, to clarify that documents and information classified as a State secret cannot be used as evidence in a criminal trial to convict a defendant unless it has been declassified.

b) Revise the Law on State Secrets, repealing broad discretionary powers of the National Security Committee to grant or deny access of judges and lawyers taking part in criminal proceedings that involve state secrets. Repeal the provision contained in Article 29 of the CPC that currently permits criminal judgments to be announced without any mention of the underlying facts or charges to ensure that only specific parts of court proceedings related examining state secrets may be closed to the public, rather than the entire trial.

To the Ministry of Justice:

a) Establish a transparent and accessible system for the public to obtain access links and credentials for connecting to online court sessions. Consider online broadcasting of trials, particularly of high public interest to enhanced transparency

b) Implement measures that allow for less burdensome access to online trials which also ensure protection of personal data, such as providing login credentials without requiring personal information or making the proceedings available through a publicly accessible platform.

c) Ensure that courts are equipped with adequate audio and video devices to ensure that the public can access and follow online hearings.

To the Supreme Court:

a) Consider developing guidelines for judges to assess the necessity and proportionality of holding trials behind closed doors or restricting public access to hearings.
b) Consider developing guidelines on redacting state security related information from judgments.

To Judges:

a) Ensure that any limitations to publicity of trials are necessary, proportionate, and justified by compelling reasons.

b) In cases involving State secrets, ensure that any restrictions are strictly necessary and based on well-reasoned decisions that balance the interests at stake.

c) Consider alternative measures to protect sensitive information, such as holding closed sessions only for specific portions of the trial where classified materials are discussed, while keeping the remainder of the proceedings open to the public.

d) Move proceedings offline when the high quality of online hearings cannot be ensured, which undermines ability of participants to follow the proceedings.

5. Presumption of innocence

5.1. International standards

94. The presumption of innocence is a fundamental principle enshrined in international human rights law that protects the rights of the accused in criminal proceedings.[85] The principle requires the prosecution to prove guilt beyond a reasonable doubt, ensures the accused benefits from any doubt, prohibits presenting or treating defendants in a way that implies guilt, and bars authorities from suggesting guilt before a verdict is reached. A detailed overview of elements related to this principle is presented in Annex I, Section 3.1 to this report.

5.2. Domestic legal framework

95. 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".[86] 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. In the context of criminal proceedings, the CPC has provisions that outlines the principle of presumption of innocence and the burden of proof.[87] For a more detailed description of the national legislation related to the presumption of innocence, see Annex I, Section 3.2.

5.3. ODIHR observations

5.3.1. Statements by judges and prosecutors implying the defendant's guilt

96. ODIHR observed several statements by public officials, notably prosecutors and judges, which raise concern on the principle of presumption of innocence, including the public statement by the Prosecutor General at the Parliament on 5 January 2023,[88] presenting the

[85] 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 principle in their commitments as one of the essential elements of justice

[86] Constitution, Article 77 para. 3, subpara. 1.

[87] CPC Article 19 and Article 23.

[88] Prosecutor General's public statement on 5 January 2023, available on the official YouTube channel of the Prosecution General. A summary in English can be found here.

results on the investigations into the January 2022 events. In the statement, the Prosecutor General suggested that some individuals, whom he individually named, were "religious extremists" who had an "outstanding role in the events". Since the statement was made before some of the accused were even brought to trial or convicted, it appeared to create a public perception that they are indeed guilty and may be seen as an undue pressure on courts to find these individuals criminally responsible.

97. ODIHR also noted four cases where judges made remarks suggesting a prejudiced stance against the defendant.

98. In the **Amangeldiyev** case, at the 24 February 2023 hearing the judge repeatedly asked the representatives of a deceased defendant, who initiated criminal proceedings to prove their relative's innocence, to stop pursuing the case, which would result in the defendant being presumed guilty. Similarly, in the **Baidualiev** case, at a hearing held on 21 December 2022, the judge made repeated statements implying that the accused's testimony was not credible and that his refusal to plead guilty to charges of murder was reproachable. During the preliminary hearing on 30 March 2023, in the **Tleuzhanova** case, the judge made several remarks implying the guilt of the defendant, such as discouraging the defendant from filing a complaint on the premise that his eventual imprisonment would be "long enough to allow him time for complaining".

99. In all mentioned cases, the judge's statements before the trials had come to an end appear to violate the presumption of innocence, indicating that the prospective decision would be against the defendants. In the second example, the judge's stance also puts undue pressure on the defendant to plead guilty, a practice which raises questions as to the defendant's right not to incriminate himself.[89]

100. According to international fair trial standards, when courts or other public officials make or tolerate statements implying the accused persons' guilt before conviction, they may violate the presumption of innocence. As the HRC held, "it 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."[90] The ECtHR also repeatedly stated that for the presumption of innocence to be violated, it suffices, in the absence of a formal finding, that there is some reasoning suggesting that the court or the official in question regards the accused as guilty, while a premature expression of such an opinion by the tribunal itself will inevitably run afoul of the said presumption.[91]

5.3.2. Defendant's appearance suggesting guilt

101. ODIHR also observed practices of depicting defendants in a manner suggestive of their culpability, potentially compromising the presumption of their innocence. ODIHR monitored cases where the defendants sat together with their lawyers in the court room, notably in at least twelve monitored cases. At the same time ODIHR observed also cases where defendants were placed in cages or plastic boxes throughout the proceedings, even

[89] ICCPR, Article 14, para. 3, lett. g).
[90] HRC, *Gridin v. Russian Federation*, 20 July 2000, paras. 3.5 and 8.3.
[91] ECtHR, *Matjašević v. Serbia*, 19 September 2006, para. 45; see also ECtHR, *Allenet de Ribemont v. France*, 10 February 1995, paras. 35-36; and *Karakaş and Yeşilırmak v. Turkey*, 28 June 2005, para. 49; *Nešťák v. Slovakia*, 27 February 2007, para. 88; *Garycki v. Poland*, 6 May 2007, para. 66.

when there were no apparent security concerns or allegations of the defendants being particularly dangerous. Although the use of cages/plastic boxes during trials is not unique for the January 2022 cases, these practices create a perception of guilt; and furthermore, placing defendants in cages also limits their ability to communicate freely with their counsel, which in turn further undermines the presumption of innocence.

102. For instance, in the **Zaurbekov** case which took place in a detention centre, the defendants were kept at all times inside a plastic box. ODIHR is not aware of a court ruling establishing the reasons why a combination of two such restrictive measures were necessary. Throughout the trial in the **Atayev** case, the defendants, who were under house arrest, including some juveniles, were placed in a cage inside the courtroom alongside other defendants who were in pre-trial detention. This measure appeared unnecessary and disproportionate, particularly to the circumstances of the defendants, who were not in pretrial detention and thus were considered to pose no significant security risk.

103. ODIHR recalls that according to the jurisprudence of both the HRC and the ECtHR, placing and displaying a defendant in a cage behind bars or in handcuffs during the trial can violate the fundamental principle of the presumption of innocence and may even constitute a degrading treatment.[92] In this regard, the HRC found a violation of Article 14 ICCPR in a case where the defendant was kept in a cage during the trial, which was also broadcasted on the State media, [93] or for placing the author in a metal cage during the public trial, with hands handcuffed behind back, as unnecessary for the purpose of security or the administration of justice, and that no alternative arrangements could have been made to avoid presenting him in a manner indicating that he was a dangerous criminal. [94]

5.4. Conclusions

104. ODIHR's observations highlight a concerning pattern of practices that undermine the presumption of innocence in some trials related to the January 2022 events in Kazakhstan. Public statements by high-ranking officials suggesting the guilt of individuals before trial, the use of cages and restraints in courtrooms without clear justification, and the statements of prosecutors and judges during proceedings implying the defendant's criminal responsibility, all contribute to creating an impression of predetermined guilt. The extensive use of prolonged pre-trial detention for some defendants also undermined their presumption of innocence. The high conviction rate among the defendants in monitored cases raises additional questions with respect to fair trial guarantees and the presumption of innocence.

[92] See above, paragraph "international standards".

[93] HRC, *Pinchuk v. Belarus*, 24 October 2014.

[94] HRC, *Pustovoit v. Ukraine*, 20 March 2014, para. 9.3. See also ECtHR case law concerning the use of metal cages in courtrooms from the standpoint of the prohibition of degrading treatment. The Court viewed the treatment in question as "stringent" and "humiliating" (*Ashot Harutyunyan v. Armenia*, 15 June 2010). It assessed whether such treatment could be justified by security considerations in the circumstances of a particular case, such as the applicant's personality (*Ramishvili and Kokhreidze v. Georgia*, cited above, para. 101), the nature of the offences with which he was charged, though this factor alone was not considered sufficient justification (*Piruzyan v. Armenia*, 26 June 2012, para. 71), his criminal record *Khodorkovskiy and Lebedev v. Russia*, 25 July 2013, para 486. See also ECtHR, *Piruzyan v. Armenia*, 26 June 2012, para 69), his behaviour (*Ashot Harutyunyan v. Armenia*, 15 September 2010, para. 127.), or other evidence of the risk to safety in the courtroom or the risk of the applicant's absconding.

5.5. Recommendations

To ensure respect of the presumption of innocence, ODIHR recommends:

To Judges:

a) Refrain from making statements or engaging in conduct that may imply the defendant's guilt before the conclusion of the trial.
b) Use powers under Article 367 of the CPC to intervene when prosecutors ask leading questions that imply the defendant's guilt.
c) Ensure that any use of restraints on defendants during trial, such as placing them in cages or handcuffs, is strictly necessary and proportionate to the actual danger they may pose.
d) Provide clear justifications for holding trials inside detention centres, considering the potential impact on public access and the perception of defendants' guilt.

To Prosecutors:

a) Refrain from making public statements that imply the guilt of individuals before they have been brought to trial or convicted, to avoid creating undue pressure on the court and undermining the presumption of innocence.
b) Avoid asking leading questions during the trial that may put undue pressure on defendants by implying their guilt.

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

6.1. International standards

105. 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. Article 7 of the ICCPR explicitly provides that an accused person must not "be compelled to testify against himself or to confess guilt."[95] Furthermore, the HRC stressed that the use of coerced confessions undermines the right to a fair trial and the principle of the presumption of innocence,[96] and 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".[97] 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.[98] The HRC also endorsed this rule in relation to statements by both defendants and

[95] ICCPR, Article 14 para. 3, lett. g).
[96] See for instance HRC, *Gridin v. Russian Federation*, 20 July 2000.
[97] 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.
[98] 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.

witnesses.[99] 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, 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.[100]

106. 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".[101] Moreover, persons deprived of liberty must enjoy the right to make a complaint regarding their treatment, including allegations of torture, which must be promptly dealt with and replied to without undue delay.[102] Annex I, Section 4.1 of the Report provides further detailed overview of the relevant international norms.

6.2. Domestic legal framework

107. The Constitution of the Republic of Kazakhstan prohibits torture and violence, and states that evidence obtained in an unlawful manner is not legally binding.[103] 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.[104] The CPC further establishes that evidence, including the defendant's statements and witness testimony, is inadmissible if obtained in a manner that could affect its reliability,[105] and obliges the institution conducting criminal proceedings, to examine exculpatory circumstances and evidence on possible use of illegal methods of investigation in collecting and securing evidence.[106] Compelling a defendant or a witness to provide a certain statement by threats, blackmail or any other illegal action is criminalised.[107] In any case, the confession by the defendant cannot be the only evidence supporting his/her conviction.[108] Annex I, Section 4.2 provides more detailed overview of the national legislation.

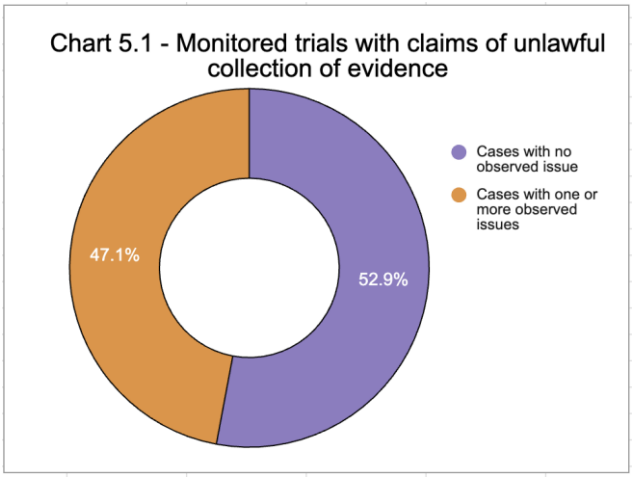
[99] General Comment No. 32, para. 6: "any evidence obtained in violation of the rights set forth in the Covenant shall not be admissible in court."
[100] Guidelines on the Role of Prosecutors, guideline 16.
[101] OSCE, Document of the Moscow meeting of the Third Conference on the Human Dimension of the CSCE, Moscow, 4 October 1991, Commitment (ix).
[102] OSCE, Document of the Moscow Meeting, cited above, paras 23.1(i)-(iv) and (vi).
[103] 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.
[104] CPC, Article 14 para. 5, and Article 197, para. 4.
[105] CPC, Article 112, paras 1 and 4; Article 197, para. 4.
[106] CPC, Article 24, para. 5.
[107] CC, Article 415, "Compulsion of evidence", a criminal offence carrying a fine or up to four years of imprisonment.
[108] CPC, Article 115, para. 3.

6.3. ODIHR observations

108. The Constitution and criminal procedure legislation of Kazakhstan contains significant human rights guarantees by prohibiting the use of torture and violence in criminal proceedings in order to obtain evidence and by stipulating that the evidence obtained in such a manner is inadmissible. The latest amendments in the legal framework in 2023, which mandated the prosecutors to investigate the acts of torture is also positive and has the potential to prevent acts of torture and to ensure that more defendants will be held accountable. Torture or other ill-treatment are among the most serious human rights violations, which requires immediate, effective and impartial investigation, as well as the utmost attention of all relevant authorities.

109. This is particularly crucial in the context of the January 2022 events, where Kazakhstan's authorities publicly acknowledged the systemic use of torture by law enforcement personnel in the context of the January 2022 events. In his address to the Parliament on 5 January 2023, the Prosecutor General stated that certain officers were responsible for the "cruel treatment of detainees" during the January 2022 events, stating, "[...] Nothing can justify this. Those who used torture, regardless of rank and position, will suffer the punishment they deserve."[109] The General Prosecutor's Office had previously acknowledged the torture techniques used by law enforcement officers, including subjecting detainees to hot irons during interrogations.[110] The Prosecutor General also stated that as many as 329 criminal cases have been initiated based on citizens' allegations of torture.[111]

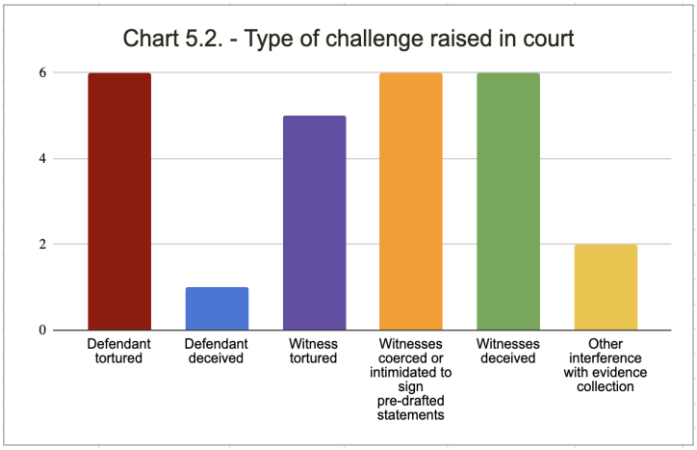
110. In almost half of the criminal trials it monitored, ODIHR observed at least one instance where defendants and/or witnesses alleged that they were coerced, including through torture, ill-treatment, duress, or deception to give statements inculpating themselves or others, as illustrated in **Chart 5.1**. In 16 out of the 34 cases where ODIHR monitored at least part of the evidence examination stage, ODIHR observed at least one challenge related to the admissibility of evidence because of unlawful means used by investigators.



111. As shown in **Chart 5.2**, in six instances such challenges included one or more defendants who claimed to have been tortured into confess guilt and in at least eleven instances, witnesses claiming to have been tortured to falsely obliged to incriminate others, either through torture or through other forms of coercion or intimidation.

[109] Prosecutor General's public statement on 5 January 2023, available on the official YouTube channel of the Prosecution General.
[110] See e.g. Astana Times, Prosecutor General's Office Releases New Data from Investigation into January Events, 5 April 2022; Astana Times, Government Ready to Work with Kazakh Human Rights Activists to Investigate Reports of Torture, 25 January 2022.
[111] See Astana Times, One Year on from the January Tragedy in Kazakhstan, 6 January 2023.

112. Despite serious allegations of torture and the authorities' acknowledgment of its widespread use, courts often refrained from ordering investigations or from excluding tainted evidence, raising concerns about the fairness of the proceedings.



6.3.1. Allegations of forced confessions by defendants

113. ODIHR monitored at least six proceedings where the Prosecution relied on self-incriminatory statements that defendants subsequently challenged as having been rendered as a result of torture or other ill-treatment at the hands of the investigative authorities. In one additional case, the defendant contended that this statement was procured under duress and because of misleading conduct by the investigators.

114. With a few exceptions of monitored cases, courts did not take steps to elicit more details on these claims in order to decide on whether allegedly forced confessions can be accepted as evidence admissible or not.

115. For instance, in the **Sultanbekov** case, at the 3 March 2023 hearing, the defendant complained about violations he suffered during his arrest and detention, including torture and other forms of ill-treatment. The judge only sporadically inquired about minor details such as the arrest time and the arrival of the defence lawyer, interrupting attempts by the defendant to provide further details. The defendant's request for the court to review video evidence of his and other civilians' arrest on 7 January 2022 was denied by the judge without providing justification for this decision. On 17 May 2023, two witnesses who had been detained with the defendant corroborated the allegations of torture and abuse they endured together in detention, but the judge did not ask questions to elicit more information about the events. The next day, several other witnesses testified in great detail about the torture they suffered while being detained in the aftermath of the January 2022 events in order to sign statements pointing to the defendant as one of the organizers of the mass riots. Despite the defendant's statement and corroborated witnesses' testimonies, the court did not undertake steps to shed light on torture allegations, using them as evidence in the verdict convicting him.

116. In the **Mukhambayev** case, during the 5 April 2023 hearing a defendant reported being forced to sign a self-incriminating statement under torture. He detailed the methods of torture employed by the interrogators, such as suffocation with a plastic bag, denial of food and access to sanitary facilities, and beatings resulting in fractured ribs. Additionally, the self-incriminating statement was drafted in Russian, a language the defendant does not

comprehend.[112] The court did not take steps in response to the detailed testimony provided by the defendant, and used the evidence in the verdict convicting him.[113]

117. The examples mentioned above raise concerns about the court's handling of the allegations. The court's decision not to properly address these allegations undermines the fairness and integrity of the proceedings, and runs in contrast with obligations under international human rights law.[114]

118. In should be noted that the HRC found that the practice by the courts of Kazakhstan not to examine the veracity of claims that evidence, including self-incriminating statements, were obtained under torture and accepting such evidence as admissible, violated Article 14 paras. 1 and 3 of the ICCPR.[115] Furthermore, when neglecting their responsibility to ensure that allegations of egregious human rights violations are thoroughly investigated, the court risked relying on potentially tainted evidence and undermined the defendants' right to a fair trial, in addition to allowing potential impunity for perpetrators of torture.

119. ODIHR also observes that, under the CPC, defendant interviews during the investigation may be video recorded but only if the investigator decides so or at the request of the suspect, accused, witness or victim.[116] During the pretrial stage, the participation of the defendant lawyer's is ensured, but only where the defendant so requests.[117] These practices can lead to defendants being subjected to pressure to renounce their right to video recording or legal assistance, including during interrogations, thus leaving them more vulnerable to potential abuse UN CAT stressed that the burden of proof that torture or ill-treatment has been committed lies with the public authorities rather than the victims, under all circumstances and in all investigations of acts of torture and ill-treatment.[118]

120. Coercing defendants and witnesses to provide specific information or corroborate a particular version of events constitute a violation of Article 415 of the CC, "Compulsion of evidence." This offence carries a penalty of up to four years of imprisonment or a fine; the mere possibility of a fine as an alternative punishment may not provide a sufficient deterrent to prevent such violations. To effectively combat these practices and protect the rights of defendants and witnesses, it is essential that those found guilty of compelling evidence face appropriate consequences commensurate with the severity of the offence, which may include imprisonment in serious cases. Consistent enforcement of Article 415

[112] See additional reflections on this issue below in paras 282 – 289.
[113] In this case, the defendant also claimed that his prior complaints of torture and requests for investigation of the incidents and recognition of his status as a victim of torture were denied by the Agency for Corruption Prevention, the Prosecutor General's Office, and the Regional Prosecutors' Office.
[114] See HRC, *Suleimanov v. Kazakhstan*, 21 March 2017, para. 8.4. In para. 10, the HRC prescribed that such violations incur the requirement from the State of full reparation to the victims, including "a prompt and impartial investigation into the authors' allegations of torture and ill-treatment" and "adequate compensation".
[115] See HRC, *Tyan v. Kazakhstan*, para. 9.4, where the HRC found that such violations necessitate effective remedies, including a comprehensive and thorough investigation into the torture allegations and, if substantiated, the prosecution, trial, and punishment of those responsible for the torture. Furthermore, the HRC stated that the court's verdict in the case should be reviewed, excluding the confessions whose nature was not properly verified by the court.
[116] CPC, Article 210.
[117] CPC, Article 68, para. 2. Similar formulation is in Article 68 para. 5 with respect to withdrawal of legal fees.
[118] See CAT's Concluding observations on the fourth periodic report of Kazakhstan, 8 June 2023, para 14 (a).

and the imposition of meaningful penalties can help deter future violations and promote a more just and transparent criminal justice system.

6.3.2. Allegations of coerced witness statements

121. Trials related to the January 2022 events revealed a pattern of witness statements used as a primary source of evidence to establish guilt or innocence of defendants, and thus having a significant impact on the outcome of the cases. In this context, it is crucial that courts carefully assess the credibility and authenticity of their testimony, including by verifying any allegations that evidence may not be truthful or reliable.

122. ODIHR observed criminal trials where courts did not take action when confronted with witnesses who claimed to have been induced, forced or pressured, including through the use of torture, ill-treatment, duress or false promises, to provide or sign statements containing inculpatory evidence against certain accused individuals.

123. ODIHR observed five cases where witnesses claimed having given inculpatory statements as a result of torture.

124. In the **Sultanbekov** case, at least four witnesses testified that they had been arrested in the aftermath of the January 2022 events and tortured to falsely state that the defendant had organized the protests. Throughout the **Zhakypbaev** case, including at the 16 February 2023 hearing, over 20 witnesses testified that they gave pre-trial statements immediately after having been tortured while kept in detention.

125. In the above cases, court decided to take no further action to clarify these allegations. The pre-trial statements of these witnesses were not removed from the file and, to ODIHR's knowledge, neither the court nor prosecutor undertook actions to establish whether they had indeed been given as a result of torture.

126. ODIHR observed six proceedings where one or more witnesses claimed having been induced to sign inculpatory statements as a result of **coercion or intimidation** by the investigative authorities.

127. Throughout the **Talipov** case, multiple witnesses refused to confirm their pre-trial testimony, sometimes openly challenging the veracity of their previous statements. For instance, at a hearing held on 17 January 2023, one witness said that, when he was called to be questioned during the investigation, he was given a printed statement and told to sign it, without having a possibility to read it. At the hearings held on 19 and 26 January 2023, at least four witnesses, all of them police officers, stated that their pre-trial testimony was given under pressure by the investigators. One of them stated that investigators altered his declarations without his knowledge. However, there was no reaction from the court to the witness claims of coercion. In the **Mamai** case, on 10 February 2023, a witness stated during cross-examination that he was forced to sign a pre-drafted statement without being permitted to read it beforehand. The judge did not take measures to shed light on the situation, while also preventing the defence from asking the witness questions regarding the alleged pressures received. The judge provided no reasoning for stopping the defence line of questioning, or rejecting the defence motion, and eventually deemed the evidence

admissible. Similar practices were observed in cases of **Muratkhan, Tleuzhanova, Zhakypbayev and Amangeldiyev.**

128. ICCPR and CAT impose obligations on States to ensure fair trials by excluding evidence obtained through torture or coercion, as well as to provide effective legal redress to torture victims.[119] Moreover, it should be noted that Article 212 part 2 of the CPC also requires courts and other agencies leading the criminal process to examine all claims of inadmissible evidence, and according to para 4 of the same article, such evidence should be excluded from the case file. Witnesses' claims that they were forced to sign pre-drafted statements require proper assessment by the courts to determine credibility of such claims.

129. ODIHR observed six proceedings where witnesses claimed having been induced to sign inculpatory statements as a result of false promises or deception. ODIHR observed at least two proceedings where there were *prima facie* indications that investigative authorities may have interfered with an impartial and fair collection of witness testimony. In all the above cases, courts refused to consider allegations or establish whether they were truthful.

130. For instance, in the **Tleuzhanova** case, at the 23 May 2023 hearing two witnesses who were interrogated about the case having status of witnesses entitled to defence testified that they were not informed by the investigators of the specific nature of their status. They claimed that they were influenced by the investigation to give incriminating testimony against one of the defendants and signed their pretrial statements under threat of being imprisoned. At the hearing on 25 May 2023, a witness testified that investigators provided him a CD with video footage and requested him to falsely state that he voluntarily submitted the CD.

131. These incidents raise questions with respect to the integrity of the investigative process and the potential for manipulation of evidence. ODIHR did not observe efforts made by the courts to verify these allegations.

132. In such situations, the court has the ability to establish the credibility of the allegations. If found credible, the evidence should be ruled inadmissible. Alternatively, as provided by the national legislation, the matter maybe referred to the prosecutor for investigation,[120] suspending the trial until a determination has been made on the use of illicit means, including torture, during the investigative process. [121]

133. In this context, ODIHR finds merit in Step 5 of the Supreme Court of Kazakhstan's proposed steps on reforming the criminal process, which aims at making the current criminal procedure system more adversarial by ensuring that as a rule the judge's file, at

[119] See ICCPR Article 14 and Article 14 and Article 15 of the CAT. If the allegations were found to be credible, the investigating authorities' actions would have violated Articles 212 and 214 of the CPC, which establish rules for collecting witness statements during the pre-trial stage. Article 212 para. 5 entitles witnesses to make additional entries into the interrogation record, while Article 212 para. 6 states that the witness should be allowed to read the record and request amendments, changes, additions, and clarifications, which cannot be denied by the investigator. If courts had found that the rules were violated during the investigation, the evidence should have been deemed inadmissible, since Article 112 of the CPC stipulates that evidence obtained illegally, including through pressure, intimidation, or deceit, is inadmissible and cannot be used at trial.

[120] See also CAT's Concluding observations on the third periodic report of Kazakhstan 2014.

[121] Article 185 of the CPC.

the start of the trial, does not contain evidence collected during the investigation.[122] This proposed reform would protect judges from developing an accusatory attitude based on the investigation materials, which may include tainted evidence.

6.4. Conclusions

134. ODIHR's trial monitoring revealed a pattern of courts failing to address serious allegations of coercion, torture, and other unlawful means used to obtain statements from defendants and witnesses during the investigation process, accepting without examination evidences allegedly obtained though coercion. As0 noted by the UN Human Rights mechanisms, including in relation to other non-January 2022 cases, such practice falls short of obligations under the international human rights law and OSCE human dimension commitments and national legislation, as they undermine fundamental principles of criminal proceedings, such as the presumption of innocence, obligation to effectively prevent and investigate allegations of torture, coercion, inhuman or degrading treatment.

6.5. Recommendations

To the Legislature:

a) Amend the CPC to foresee that:

- any defendant interview during the investigation must always be video recorded;
- defence counsel must always be present during the interrogation of a defendant, even when the latter does not request one;
- requirement is established for a private ruling referring to the prosecutor any *prima facie* credible allegations of torture or ill-treatment made in court, as well as requiring initiation of a criminal investigation by the prosecution when credible allegations of torture or ill-treatment are raised in court.

b) Revise the Criminal Code to harshen the punishment for the criminal offence of Compulsion of evidence under Article 415 of the CC to reflect its gravity.

To the Ministry of Interior:

a) Provide comprehensive training to all law enforcement officials on the absolute prohibition of torture and ill-treatment, as well as on proper interrogation techniques that respect the rights of suspects and witnesses.

b) Provide guidelines on drafting records of defendants and witness statements, excluding possibility of potential manipulation and/or modification of the statements.

c) Establish effective internal oversight mechanisms to prevent, detect, and punish any instances of torture, ill-treatment or manipulation by law enforcement officials.

d) Promptly initiate disciplinary and criminal investigations into any instances of violence, threats, deception, coercion or fabrication of evidence by investigators.

[122] Available online in Russian. See Step 5 of the proposed reforms.

To Judges:

a) Ensure thorough examination of all allegations of torture, ill-treatment, coercion, deception or other unlawful means in obtaining confessions or witness statements; exclude any evidence where there is grounded suspicion that it has been obtained through such means.

b) Promptly issue private rulings referring any credible allegations of torture or ill-treatment raised in court to the relevant authorities for investigation, and take necessary steps to protect the safety and well-being of the individuals making such allegations.

c) Provide clear and reasoned decisions when ruling on the admissibility of confessions or witness statements, addressing any allegations of impropriety and explaining the basis for accepting or rejecting such evidence.

d) Ensure that defendants and witnesses are able to freely testify about any alleged torture, ill-treatment, or coercion without interruption or dismissal of their claims.

To Prosecutors:

a) Proactively conduct thorough and impartial investigations into all credible allegations of torture, ill-treatment or any other illicit investigative means, including with respect to allegations raised during court proceedings, and pursue appropriate criminal charges against those found responsible

b) Ensure that confessions or witness statements obtained through torture, ill-treatment, or coercion are excluded from the case.

To Bar Associations and Lawyers:

a) Provide training to criminal defence lawyers on how to effectively raise and substantiate allegations of torture or ill-treatment, and on strategies for challenging the admissibility of tainted evidence.

b) Encourage lawyers to promptly report any instances of torture or ill-treatment they become aware of to the competent Prosecution Office.

7. Right to liberty

7.1. International standards

135. 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.[123] 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.

[123] Universal Declaration of Human Rights (UDHR), 1948, Article 9. ICCPR, 1966, Article 9 para. 1.

136. States can exceptionally derogate from the right to liberty only where objective reasons justify its deprivation.[124] 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.[125] 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."[126] The person detained has the right to trial within a reasonable time or to release. OSCE participating States have also envisaged safeguards that States must put in place when imposing any measure depriving an individual of liberty. A detailed description of the international norms and standards related to the right to liberty is available in Annex I, Section 5.1.

7.2. Domestic legal framework

137. 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".[127] Further details about which situations pre-trial detention is possible and the length of the detention can be found in the Annex I, Section 5.2 of this report.

7.3. ODIHR observations

138. The legal grounds on pre-trial detention envisaged by the criminal procedure of Kazakhstan and the recommendations of the Supreme Court of Kazakhstan are aligned with the international human rights standards. Since ODIHR's mandate focused only on public trial hearings and written decisions, pre-trial detention hearings or decisions were outside the scope of its monitoring. However, during its monitoring of trial hearings ODIHR could observe which pre-trial measures, if any, were imposed on defendants, and did monitor trial sessions where the parties discussed, and the court ruled, on issues related to the defendant's deprivation of liberty. In these cases, it can make some observations on the verbal rulings rendered by the courts. Moreover, ODIHR can also make observations on the decision-making process by the court, including on the consistency in court practices on the imposition of restrictive measures against defendants, and it can make some general observations in relation to the overall duration of deprivation of liberty in trials related to the January 2022 events.

7.3.1. Seriousness of the crime as a sole basis for detention

139. Upon analysing cases related to the January 2022 events, ODIHR has identified a pattern of courts misapplying restrictions on defendants' personal liberty, particularly in the

[124] See e.g. UDHR, Article 3; ICCPR, Article 9.
[125] See HRC, General Comment no. 35, para. 22. See also ECtHR, *Khlaifia and Others v. Italy* [GC], 15 December 2016, para. 91.
[126] See HRC, CCPR General Comment No. 27: Article 12 (Freedom of Movement), 2 November 1999, para 14.
[127] CPC, Article 136, first sentence.

context of pre-trial detention. In some instances, courts appeared to not properly consider or apply the necessary criteria when making decisions about imposing or extending pre-trial detention. In at least three cases, courts imposed detention admittedly based on the gravity of the crime alone.

140. In the **Tleuzhanova** case, during a trial hearing which took place on 14 March 2023, the presiding judge ruled that pre-trial detention was necessary for four out of the five civilian defendants. The judge verbally justified this decision based on the severity of the crimes they were charged with. In the **Sembekov** case, when dismissing a defence request to terminate detention, the judge verbally stated that continued pretrial detention of the defendants is required based on the gravity of the crime.

141. In the above cases, the judge did not mention other criteria for pretrial detention, as instead required by the ICCPR and the CPC, such as the risk of flight, potential tampering with evidence, or the possibility of the defendants repeating their criminal conduct.

142. Some judges interviewed by ODIHR have expressed a view that it is customary for the court to impose pre-trial detention in cases where the alleged crime carries a severe punishment, which they defined as punishment of five years of imprisonment or more. This interpretation would contradict the provisions of the CPC, which allows detention based on the gravity of the crime alone exclusively in some of the most serious crimes foreseen in the CC. Moreover, it would contradict Normative Decision 1/2020 of the Supreme Court,[128] which explicitly prohibits crime gravity as the sole ground for detention.

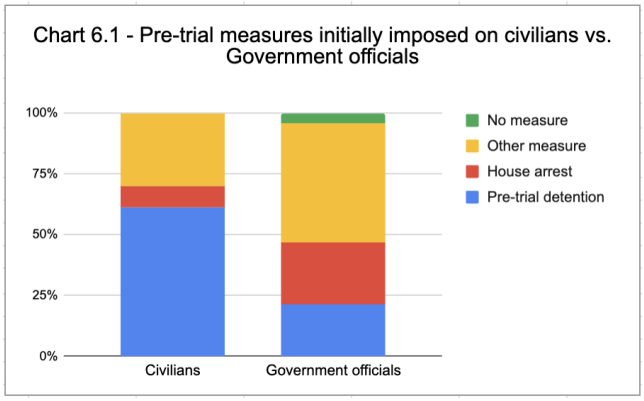
143. Such approach seems to be applied inconsistently. ODIHR monitored only two cases involving charges of aggravated torture, a very serious crime, where detention on remand was imposed from the outset of the trial; in one additional case a defendant was placed under detention on remand at a later stage in the proceedings, but only after he had fled the jurisdiction and was apprehended and extradited to Kazakhstan. In other cases involving the same charges, more lenient measures were imposed on the defendants.[129] Imposing preventive measures on account of gravity alone is not in line with international fair trial standards. As detailed in the HRC's General Comment No. 27, pre-trial detention needs to be justified not only by the seriousness of the offence but also by the presence of other grounds such as a substantial likelihood that the accused would abscond, destroy evidence, influence witnesses, or flee from the jurisdiction of the State party.[130]

[128] Normative Ruling of the Supreme Court of Kazakhstan no 1, of 24 January 2020 "On certain issues pertaining to the sanctioning of preventive measures".
[129] See below, paragraph "Consistency in applying preventive measures".
[130] See HRC, CCPR General Comment No. 27: "Article 12 (Freedom of Movement)", 2 November 1999, para 14.

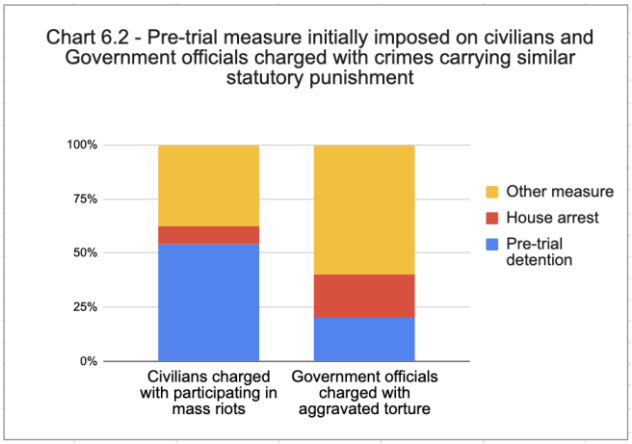
7.3.2. Consistency in applying preventive measures

144. ODIHR also observed that courts imposed restrictive measures, such as pre-trial detention or house detention, more often against civilian defendants than against police or military defendants.

145. In cases monitored by ODIHR, all of the 66 civilian defendants were subjected to some restrictive measure during the proceedings.[131] As **Chart 6.1** shows, in 61 per cent of the cases, the most restrictive measure (i.e., pre-trial detention) was imposed at some point during the trial.[132] Of note, courts replaced pre-trial detention with a more lenient measure during the course of the trial for five civilian defendants in four separate cases. The remaining ones remained in detention throughout the trial.



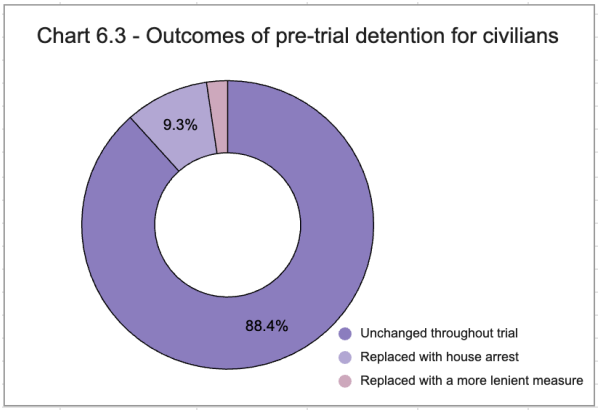
146. On the other hand, courts imposed pre-trial detention on 21 per cent of defendants who had been a governmental official, including from law enforcement, at the time of the offence. The measure of house arrest was imposed on 26 per cent of them, while the remaining 53 per cent received either a more lenient measure, such as the prohibition to leave their place of residence, or no measure at all. Of note, during the course of the proceedings in three cases, courts changed the preventive measure to detention for seven government officials. Additionally, in two more cases, courts altered the preventive measure from a more lenient one to house arrest for eight government officials. **Chart 6.2** highlights the application of restrictive measures between civilians and government officials charged with offences carrying similar statutory penalties under the Criminal Code of Kazakhstan.



147. While 53 per cent of civilians accused of participating in mass riots[133] were subjected to pre-trial detention, only 21 per cent of government officials charged with aggravated torture[134] faced the same measure. Despite the severity of the charges, more than 50 per cent of government officials indicted for torture

[131] For obvious reasons, this statistic does not include deceased defendants.
[132] House arrest was ordered against 9 per cent of the civilian defendants. The remaining 30 per cent were subjected to at least another, less stringent preventive measure.
[133] CC, Article 272, para. 2, carrying a statutory punishment of three to eight years of imprisonment.
[134] CC, Article 146, para. 2, carrying a statutory punishment of three to seven years of imprisonment

were not subjected to either pre-trial detention or house arrest, raising concerns about the consistency of the criminal justice system's response to these serious allegations.



148. It is unclear whether courts considered that defendants who hold positions of authority within law enforcement agencies may possess the capacity to exert a heightened level of intimidation of witnesses, i.e. one of the risks that preventive measures aim at mitigating.

149. The cases below exemplify overboard application of pre-trial detention, as well as diverging practices in this respect, identifying more lenient application of the restrictive measures with regard to law enforcement officers.

150. For example, in one case, the defendant, facing charges of hooliganism and illegal weapons possession, was detained throughout the entire trial – a period of one year and six months. This occurred despite documented medical conditions (epilepsy). The defendant was brought to court in handcuffs throughout the proceedings. The judge ultimately rejected the defence motion to impose a more lenient restrictive measure on the defendant even after the Appeal Court identified serious procedural violations affecting the key piece of evidence, necessitating a new investigation, the defendant remained in detention. On the other hand, in the **Zlunayev** case, which involved the killing of a civilian by a military person, the defendant was not placed in pre-trial detention and was able to defend himself at liberty throughout the trial. Similarly, in the **Yeginbayev** case, the defendant who was charged with exceeding authority resulting in the death of two people, remained free for the entire first instance trial. In the **Kendzebaev** case, five police officers charged with torture did not face any limitations on their freedom, despite the extreme seriousness of the charges against them. Furthermore, after allegations emerged during the trial that these officers had approached and intimidated both the victims and witnesses, the court still refrained from imposing any restrictive measures on most of them.

151. ODIHR's monitoring revealed that courts were reluctant to release civilian defendants from custody by replacing detention with a more lenient measure. In the cases observed by ODIHR involving civilian defendants, all but five of the 43 defendants who were initially subjected to pretrial detention remained in custody throughout their entire trial, as illustrated in **Chart 3.** ODIHR also noted that in at least four cases, the time the defendant spent in pre-trial custody eventually exceeded the criminal punishment imposed.

152. In one of the monitored cases, the court repeatedly denied defence requests for the change of preventive measure from detention to more lenient one, although the sanctions eventually imposed were not severe, and in one case the length of detention exceeded the term of the sanction. Similar outcomes were monitored in three different cases.

7.4. Conclusions

153. Positively, the legal grounds on pre-trial detention envisaged by the criminal procedure of Kazakhstan and the recommendations of the Supreme Court of Kazakhstan are aligned with the international human rights standards. At the same time, ODIHR assessment identified several concerns related to the imposition of preventive measures in January 2022-related trials which result from the practice of courts. In several instances, courts have relied solely on the severity of the alleged crime, in contrast with the provisions of the CPC and the Supreme Court's Normative Decision. ODIHR also observed inconsistencies in the application of restrictive measures between civilian defendants and those with acting officers and representatives of law enforcement, (KNB and the military), with the former being subjected to more stringent measures, such as pre-trial detention, more frequently.

7.5. Recommendations

To the Legislature:

a) Consider amending the CPC provisions to clarify that when deciding on pre-trial detention, courts must consider only relevant factors, such as the risk of flight, potential tampering with evidence, or the possibility of repeating criminal conduct.

b) Consider amending the CPC to clarify that courts need to provide detailed, written justifications for their decisions on imposing or extending pre-trial detention, explaining why less restrictive measures are not sufficient.

To the Supreme Court:

a) Provide additional guidance to lower courts on the consistent application of preventive measures, emphasising the need to ensure equal treatment of defendants, regardless of their civilian or official status, based on the specific circumstances of each case.

b) Encourage the exchange of best practices and statistical data among judges in determining and applying restrictive measures in criminal proceedings.

To Judges:

a) Refrain from imposing or extending pre-trial detention solely based on the seriousness of the alleged crime, and ensure that preventive measures applied on the basis of a comprehensive assessment of all relevant factors, such as the risk of flight, potential tampering with evidence, the possibility of repeating criminal conduct, etc.

b) Provide detailed, written justifications for decisions on imposing or extending pre-trial detention or other preventive measures, addressing each of the legal criteria and the specific circumstances of the case, to enable effective appellate review and ensure transparency.

c) Promptly adjudicate challenges to the lawfulness of detention raised by defendants or their legal representatives, providing reasoned decisions that address the specific concerns raised.

d) Regularly review the necessity and proportionality of pre-trial detention and other restrictive measures, taking into account any changes in the defendants' personal circumstances, such as deteriorating health conditions or parental responsibilities.

To Prosecutor General's Office:

a) Issue guidelines to prosecutors, emphasising that pre-trial detention should be requested only when strictly necessary and proportionate, based on a comprehensive assessment of all relevant factors, not solely the severity of the alleged crime.

b) Monitor prosecutors' practices in requesting pre-trial detention and other restrictive measures to ensure consistency and compliance with domestic and international legal standards.

To Bar Associations and Lawyers:

a) Provide training to defence lawyers on effectively challenging the imposition or extension of pre-trial detention, focusing on the legal criteria and the importance of presenting evidence and arguments related to the specific circumstances of each case.

b) Encourage defence lawyers to effectively challenge the lawfulness of detention when appropriate and to appeal decisions that fail to provide adequate justifications or address the concerns raised.

8. Court impartiality and equality of arms

8.1. International standards

154. The right to an impartial tribunal is a fundamental principle recognized *inter alia* in the UDHR, the ICCPR as well as in key OSCE commitments[135]. 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. The ICCPR also 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.[136] Another aspect of the principles of fairness and equality of arms in criminal proceedings is the **right to have the free assistance of an interpreter**, expressed in Article 14 of the ICCPR. More information about the right to an impartial tribunal and equality of arms, including which limitations may apply to these rights, can be found in the Annex I, Section 6.1 of this report

8.2. Domestic legal framework

155. 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."[137] The CPC also contains several provisions designed to ensure equality of arms between the parties,

[135] UDHR, Article 10, ICCPR, Article 14, para. 1, OSCE, Copenhagen Document, commitment 5.12.
[136] ICCPR, Article 14, para. 3, lett. d).
[137] 2000 Constitutional Law, Article 1, para. 2.

including Article 7 and 23 of the CPC. Parties have the right to challenge a court's impartiality if they perceive a violation of the principle of equality of arms. Article 87 of the CPC foresees a list of cases where a judge may not take part in criminal proceedings, including "if there are other circumstances that give reason to believe that the judge is personally, directly or indirectly interested in this case". Procedure for examination and cross-examination of witnesses is regulated by Article 354 and 370 of the CPC. The right to be assisted by counsel in a criminal case is recognized in Article 13 of the Constitution. Article 27 of the CPC also sets forth the right to legal assistance for individuals who are charged with a criminal offence. Finally, although in case of death of a defendant, the criminal case against them shall be terminated,[138] the CPC also foresees that the proceedings against deceased defendants may continue upon the request of the deceased's relatives.[139] Further details about which situations pre-trial detention is possible and the length of the detention can be found in the Annex I, Section 6.2 of this report.

8.3. ODIHR observations

8.3.1. High-level of convictions by courts

156. According to ODIHR observations, 98.5 per cent of the defendants (127 out of 129 both civilians and government officials) charged with January 2022-related crimes were found guilty at first instance. Of these, only one was acquitted on appeal. Statistics provided by the Supreme Court on non-January 2022-related trials reveal a similar pattern, with approximately 98,5 per cent of defendants before courts of Kazakhstan convicted in 2022 and 2023.[140]

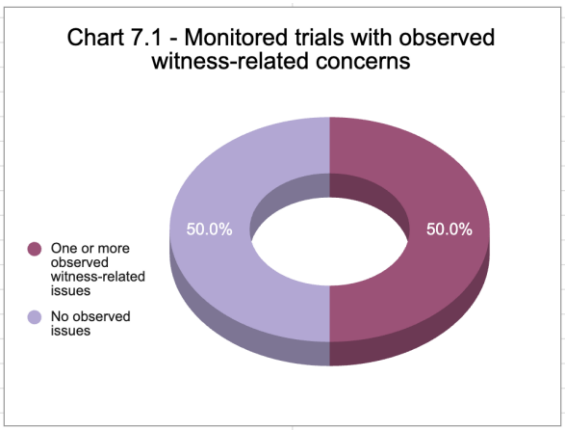
157. In light of these observations, ODIHR welcomes the Supreme Court of Kazakhstan's proposed steps on reforming the criminal process, which aims at making the current criminal procedure system more adversarial by ensuring that as a rule the judge's file, at the start of the trial, does not contain evidence collected during the investigation.[141] This proposed reform aims to protect judges from developing an accusatory attitude based on the investigation and the prosecutor's materials before the trial even begins. Under the proposed changes, the judge would only receive the indictment and the preliminary defence response in advance, without access to the entire case file, allowing each side to present and defend their position in the courtroom, in a public setting, fostering a more balanced and transparent process.

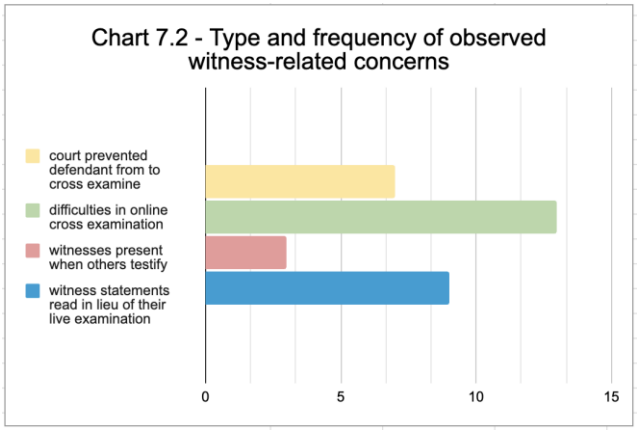
8.3.2. Right to call and cross examine witnesses

158. The right of the defendant to call and cross-examine witnesses is fundamental to ensuring equality of arms, since it allows the defence to challenge the prosecution's case and present their own evidence, thus safeguarding the defendant's right to effectively defend themselves.

[138] CPC, Article 35, para. 1, subpara. 11).
[139] *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.
[140] Document "Updated statistical data provided for completing the Trial Monitoring Report on January 2022 events" shared with ODIHR.
[141] See Step 5 of the proposed reforms.

159. This is particularly crucial in the context of many January 2022-related trials, where witness testimony often constituted the backbone of the prosecution case. However, as shown in **Chart 7.1**, in 50 per cent of the monitored cases, ODIHR observed one or more issues related to examination and/or cross examination of witnesses. **Chart 7.2** visualizes the type and frequency of the observed concerns, in which either defendants were being prevented from calling or cross-examining witnesses, or courts were unduly restricting their right.





Deprivation of right to examine or cross-examine witnesses

160. ODIHR observed seven cases where the court seemed to interfere with the defence's right to have an equal opportunity to present its case and challenge the prosecution's evidence.

161. In the **Bekmolda** case, at a hearing held on 16 November 2022 the presiding judge displayed visible irritation when prosecution witnesses deviated from their statements given during the investigation. Instead of examining the reasons for the change in testimony, the judge insisted they confirm their initial statements. Similarly, in the **Sultanbekov** case, during a trial hearing on 3 May 2023, a prosecution witness refused to answer some questions by the defence. The judge, instead of reminding the witness of his obligation to answer all questions truthfully, merely asked him to confirm that he did not intend to answer. In the **Sydykov** case, during the hearing on 4 May 2023, when the witness upon examination and cross examination started deviating from the statement given during the investigation, the judge interrupted further questioning by the parties and read out the witness' pretrial statement.

162. The court's insistence on the witnesses confirming their statements precluded the defence from exploring potential inconsistencies and discrepancies in their testimony, thereby infringing upon the defence's right to question the witnesses[142] evidence and challenge their reliability. The Court failed to ensure the defence right to cross examine the witness, thus seemingly favouring the prosecution and rendering the defendant's right to cross examine witnesses ineffective in practice. This created an apparent disparity between the parties, placing the defence at a substantial disadvantage in the proceedings.

[142] CPC, Article 370, para. 3.

163. Moreover, in nine cases (courts did not ensure the witnesses' presence at the trial and accepted their statements given during the investigation instead. In these cases, the court decided not to ensure the witnesses' presence, including having them forcibly brought to court,[143] especially when the witness statements have been questioned by the parties and it failed to articulate the "exceptional circumstances" that would justify, under the CPC, the admission of witness statements given during the investigation in lieu of their live testimony, such as the witnesses' impossibility to appear at trial.[144]

164. For example, in the **Zhakypbaev** case, at the 9 February 2023 hearing, several prosecution witnesses failed to attend a trial hearing. Instead of undertaking efforts to ensure their appearance, as requested by the defence, the court accepted their pre-trial statements as evidence, depriving the defence of cross-examination opportunities.[145] At the same hearing, the court permitted a prosecution witness to leave the courtroom before the defence counsel had the chance to cross-examine him.

165. Mere logistical difficulties or delays in securing witness attendance do not appear to meet the threshold acceptable under international law for replacing live testimony with the reading of statements that the defence does not have a possibility to challenge.[146] When failing to ensure this right, Courts created an imbalance of power between the parties, at the detriment of the defence, undermining the principle of equality of arms and raising concerns about the overall fairness of the proceedings.

Cross examination in online format

166. In eleven offline hearings observed, the examination of witnesses was conducted online only due to witnesses' immediate availability to join the proceedings online. There were no other apparent reasons that may have prevented witnesses to join the proceedings in person.

167. Article 370 of the CPC provides for the online examination of witnesses by summoning them to a court in the region where they reside. This provision appears to exclude the possibility of conducting an online interview with a witness who resides in the same region as the court where the proceedings are taking place. Additionally, the article seems to limit the locations for online witness interviews to courtrooms only, rather than allowing for interviews to be conducted from other suitable places.[147]

168. In the abovementioned cases, the court decision did not state the grounds why evidence could not be collected in-court, instead of via video-link. ODIHR observed that in these cases cross-examination was significantly compromised due to the online format of the

[143] CPC, Article 157 para. 1.
[144] See CPC, Article 331 and 372.
[145] Of note, in this case the Appeal Court did not grant the defence motion to cross examine a witness whom they did not have an opportunity to cross examine during the first instance trial, because, in the Appeal Court's reasoning, the pre-trial statement of that witness was available in the case files. The Appeal Court even disconnected from the online hearing the defence of one of the defendants in the case who was insisting on the cross examination of a witness. Both the first instance court and the Appeal Court's conduct effectively deprived the defence of an opportunity to test the witnesses' testimony.
[146] Another ground under the CPC for reading out pre-trial statements is the presence of material inconsistencies between the pre-trial statement and the testimony given at trial; however, this ground is inapplicable in the present cases, as the witnesses did not provide testimony during the trial proceedings
[147] CPC, Article 370, para. 8 and 9. See also Rules for the technical use of video conferencing tools, approved by the Registry of the Supreme Court on 7 June 2018.

witness examination. In some of the monitored trials, the audio/video quality was very poor making the witnesses' statements barely discernible.

169. For instance, in the **Sagintay** case, during the hearing on 22 February 2023 multiple witnesses were questioned over the phone, which resulted in poor sound quality and a lack of visual cues for the audience. The defendants protested against the cross-examination of witnesses via telephone, and the defence counsel filed motions requesting that the witnesses be cross-examined in person. However, the judge did not take a decision on these motions, and the cross examination continued online. In the **Khamit** case, several witnesses and a victim testified via WhatsApp, visible and audible only to the judge on his phone screen. The judge then relayed the testimony to other participants, but the public was unable to directly see or hear the testimonies. In another hearing of the same case, the judge and the victim were physically present in the courtroom, while all other participants joined through Zoom. The victim was not visible on the video feed, and the judge relayed their responses to the Zoom participants when questioned. This affected the defendant's right to test the witnesses' evidence.

170. Other cases were marred by inadequate Internet connectivity, which impeded the parties' ability to hear and comprehend the witnesses' testimony reliably. This placed the defence at a significant disadvantage, as the prosecution could rely on the pre-trial statements already incorporated into the judge's file, while the defence was deprived of the opportunity to elicit information to challenge the prosecution's evidence effectively. The difficulty, or in some extreme cases the inability, to hear the testimony of witnesses, which constitute the primary evidence in these criminal cases, also limited de facto the publicity of the trial.

171. In at least seven cases where witness testimony was collected online, witnesses testified in an informal setting that raised concerns as to the reliability of their testimony and the accuracy of their answers, restricting defendant's right to call and cross-examine prosecution witnesses.

172. For instance, in the cases of **Mamai, Valiyev, and Talipov,** witnesses testified online via their mobile phones and in circumstances that appeared inappropriate for criminal court proceedings. This includes testifying while driving, walking around the city, walking in the office corridors and while smoking cigarettes. One witness was not even requested to give an oath before testifying. Also, in at least two fully online cases (**Zhakypbaev**, **Amangeldiyev)** several witnesses testified in informal settings, such as driving, walking on the streets, or using public transport.

173. Although witnesses were engaged in driving, walking around the city, or travelling during their testimony, which could have impacted their concentration and ability to provide precise responses, the judge did not deem it necessary to request that any of them cease these activities. This resulted in an informal collection of witness testimonies that contributed to the impression that court proceedings were not properly managed, undermining public trust in the judicial process and the credibility of its outcomes.

174. More generally, ODIHR observed that whenever witnesses testified remotely, the judge's ability to clearly observe them and their demeanour was diminished. Identifying signs of pressure, intimidation, ill-treatment, or false testimony can be more challenging on a

screen than in person. Additionally, judges often have limited or no view of the party's surroundings, including the presence of other individuals or documents that could influence witness testimony. As an example, in one of the trials which ODIHR monitored, multiple witnesses were connected online from the same room of the investigator's office, an arrangement that compromised the physical separation between questioned and unquestioned witnesses, and could also have exposed witnesses to undue influence from the law enforcement authorities.

175. As a positive example, in the **Musin** case, after a witness failed to appear, the prosecutor filed a motion to cross-examine the expert online. Initially, the judge agreed with this request, but the defence objected, arguing that an in-person cross-examination of the expert was essential. After a short recess, the judge reconsidered his decision and stated that all experts will have to be examined in person. Throughout the proceedings, the judge exhibited strong management skills and maintained control over the courtroom. From the very beginning, the judge set clear courtroom rules, such as how to intervene in a proper and respectful manner, explaining the purpose of each stage of the trial, and specifying when parties could express their opinions. The judge also urged participants to respect one another.

176. ODIHR has previously recommended that in-person trials should be prioritized as much as possible, while online or hybrid hearings should be used as an alternative to in-person trials only if the latter are not safe or not possible.[148] Judges, court staff and other professional participants of online and hybrid hearings should be provided with sufficient training in IT solutions, as well as data protection and standards of human rights protection during online or hybrid hearings.[149]

8.3.3. Right to be assisted by counsel

177. The ICCPR prescribes the right to legal "assistance", thus implying that defence counsel must be present, and their activity must be effective and contribute to the defendant's case. ODIHR monitored four trials in which the defendants did not have legal representation during certain periods of the trial proceedings

178. In the **Zhakypbaev** case, despite the absence of several defence lawyers at the scheduled start time of an online hearing, the judge proceeded with the evidentiary proceedings. Consequently, multiple defendants were left without legal representation for up to 20 minutes during the witness testimony. In the **Sagintay** case, during at least two hearings, some defendants were not represented by defence counsel for a significant portion of the evidentiary proceedings. In the **Bekbau** case, the representatives of the deceased defendants were not provided with the free legal aid they are entitled to by law until after several hearings in the trial had already taken place.

[148] In other OSCE participating States such as the United Kingdom for for example, courts must be satisfied that giving evidence online is "in the interests of the efficient or effective administration of justice" (Criminal Justice Act 2003, section 51). For example, remote hearings might be considered particularly helpful for witnesses with health or mobility issues.

[149] ODIHR, Fair Trial Rights and Public Health Emergencies, page 11. For additional considerations on fair trial implications of online trials, see Chapter 11 of this Report.

179. The decision to continue hearings without ensuring the presence of all defence counsel raises concerns about the equality of arms and the defendants' right to effective legal representation, which are crucial in cases involving deceased defendants, where their interests must be protected by legal representatives.

180. Under the CPC, presence of a defence counsel is mandatory in a series of cases, including all cases where prosecution is carried out by a public prosecutor, as in all the monitored January-related trials.[150] If in such cases the defence attorney fails to attend a hearing, the court may find a temporary substitute, if the defendant consents, or must reschedule the hearing.[151]

181. While ODIHR noted that in some cases, defence counsels were late to online or offline hearings, it also noted that courts were often reluctant to accommodate lawyers' schedules when setting dates for following trial hearings.[152] At the same time, lawyers' belatedness or absence do not exempt the court from its obligation to ensure that defendants have legal representation present during the proceedings.

182. ODIHR also observed instances of deficient performance by State-appointed lawyers. However, to address potential unethical behaviour by defence counsel, instead of proceeding in their absence, courts may have considered reporting the misconduct to the relevant Bar association for disciplinary action. The HRC stated that a State can be held responsible for the conduct of a defence lawyer whose misconduct is "manifest", i.e. it is clear to the judge that the lawyer's behaviour is incompatible with the interests of justice, for instance in a case where counsel has been absent during the giving of evidence by a witness.[153]

183. In the **Atayev** case, some of the defendants and their representatives frequently complained that court-appointed defence counsel failed to perform their duties diligently. Some counsel even made discourteous remarks to their underage clients. During the **Sagintay** case, the court-appointed defence counsel for the accused were replaced twice throughout the trial and often kept a passive role. For instance, at a hearing on 2 March 2023, the defence counsel neglected to intervene when the prosecutor engaged in a clearly leading line of questioning, leaving the defendant vulnerable to potential harm.

184. Cases involving allegations of defendants being tortured raised particular concern in relation to the effectiveness of the assistance by State-appointed lawyers during the investigation.

185. In the **Mukhambayev** case, the defendant complained that his lawyer did not file a complaint regarding alleged torture while in detention. Similarly, in the **Zhakypbayev** case, both the defendant and witnesses who had been arrested claimed that they were

[150] CPC, Article 67, para. 1, subpara. 9.
[151] CPC, Article 336 para. 1 and 2.
[152] See para. 9.3 of the HRC views in *Chelakh v. Kazakhstan*, 7 November 2017, where the failure to provide due opportunity to the defence to familiarise with the case materials was considered to constitute violation of Article 14 para. 3 lett. b) of the ICCPR; in para. 11 the HRC underlined that Kazakhstan was under the obligation "to take all steps necessary to prevent similar violations from occurring in the future".
[153] See e.g. HRC, *Hendricks v Guyana*, 25 October 2002, para 6.4; *Brown v Jamaica*, 11 May 1999, para 6.6.

subjected to torture while detained, and that this issue was not properly addressed by the appointed counsel who failed to file a formal complaint.

186. These allegations suggest an inability by State-appointed lawyers to effectively protect their clients' rights and to bring forward allegations of mistreatment, by filing formal complaints or documenting signs of physical injuries. In some monitored trials, defendants raised concerns that appointed attorneys either did not appear at the procedural actions or did not effectively challenge potentially unlawful actions. ODIHR's interlocutors, including Bar associations and civil society representatives, confirmed that the issue of *ex officio* appointed attorneys failing to effectively represent their clients during the investigation and challenge potentially unlawful actions is systemic throughout criminal proceedings in Kazakhstan.[154]

187. The legal assistance mechanisms are further affected by the provision of the CPC that, at the pre-trial stage, the lawyer's participation is ensured only where the defendant so requests.[155] This practice may lead to defendants or witnesses with the right to defence being subjected to pressure to renounce their right to legal assistance, including during interrogations.

188. Moreover, although the legal framework in Kazakhstan guarantees the free assistance from State-appointed lawyers in all criminal proceedings involving a public prosecutor,[156] the CPC contains ambiguous provisions regarding the waiver of legal fees for defence services at the pretrial stage. While Article 174 para. 2 states that attorney services during the pre-trial proceedings shall be covered by the State budget, para. 3 grants discretionary power to investigators or prosecutors to decide whether to waive legal fees for defendants and other eligible participants. This ambiguity may lead to inconsistencies in the application of the law and could potentially result in some defendants being denied access to free legal assistance during the pretrial phase. Bar association representatives and practising attorneys interviewed by ODIHR criticized the requirement for State-appointed lawyers to receive approval from investigators for their performance reports to be remunerated for their services in assigned cases, arguing that this requirement can considerably undermine the independence and quality of services provided under state-sponsored legal aid.

8.3.4. Right to defend oneself

189. ODIHR observed three online trials where courts prevented defendants from effectively defending themselves, by not giving them the floor or by failing to ensure that they speak last.

190. In the **Tleuzhanova** case, starting from the 26 September 2023 hearing and throughout the entire appeal trial, at the court's request, the court registry consistently muted all participants connected via Zoom, including defence attorneys and defendants, and prohibited them from turning on their sound, preventing the defence and defendants from

[154] One of possible causes for this situation is low remuneration. According to the Decree by the Minister of Justice no. 434 of 30 June 2023, the hourly rate for state-provided legal services in 2024, including defence at trials and pretrial activities, ranges from around EUR 5.75 for grave crimes to EUR 7.3 for particularly grave crimes, which is significantly lower than the average commercial hourly legal fee of EUR 20-60 in Almaty in 2024.
[155] CPC, Article 68, para. 2. A similar formulation is in Article 68, para. 5 with respect to withdrawal of legal fees.
[156] See 2018 Law on Advocacy and Legal Aid.

effectively exercising their procedural rights. Moreover, the court continuously interrupted the statements of the defence lawyers and the defendants.

191. In two separate cases, the defendants were denied their right to make final statements before the court adjourned for deliberation. In the **Amangeldiyev** case, the Appeal Court did not allow the defendants to deliver their closing remarks. Similarly, in the **Yeginbayev** case, during the hearing on 31 August 2023, the defendant was prevented from having the last word, and the proceedings concluded with the prosecutor's statement instead.

192. The muting of defendants and defence attorneys, the denial of the opportunity to make final statements, and the undue interruption of defence presentations directly infringed upon the equality of arms.

8.3.5. Right to be tried in a language one understands

193. ODIHR observed five trials where defendants were not provided with interpretation, or were provided with an insufficient level of interpretation, making it difficult for them to follow criminal proceedings against them and exercise their right to defend themselves.

194. For example, in the **Tleuzhanova** case, where proceedings were conducted in Russian, at the hearing on 10 November 2023, the court failed to ensure the interpretation of the verdict announcement for the non-Russian speaking defendants. In the **Sultanbekov** case, although the trial was conducted in Russian, the judge was not fully fluent in the language. On occasion, the judge switched to Kazakh to explain a point when having difficulty doing so in Russian, without providing translation during the hearing on 2 June 2023.

195. The lack of an interpreter fundamentally undermined the defendant’s ability to participate in the proceedings and may have led to misunderstandings and affected the case outcome.

196. Ensuring the presence of an interpreter is not necessarily sufficient to ensure that a defendant is able to fully understand the criminal proceedings and exercise their right to a proper defence. To this end, the court must take active steps to ensure that the interpreter is able to effectively communicate with the defendant, and that the defendant is able to comprehend the information being conveyed. This may involve providing additional resources, such as translation of written materials or allowing for extra time for the interpreter to explain complex legal concepts. Ultimately, the goal should be to ensure that every individual has access to a fair and just legal process, regardless of language barriers or other challenges they may face.

197. In three monitored cases, the presence of an interpreter did not guarantee effective communication due to technical issues or time constraints.

198. In the **Talipov** case, the interpreter's remote participation via WhatsApp was marred by connectivity problems, leading to frequent interruptions and parts of testimonies left untranslated. Similarly, in the **Amangeldiyev** case, the interpreter struggled to translate all statements amidst the challenges posed by the large number of online participants, impeding the defendants' comprehension of the proceedings.

199. The lack of an adequate interpretation system appeared to hinder some defendants from fully understanding and participating in their trials, impeding their ability to mount an effective defence. In contrast, ODIHR noted that prosecutors appeared to face no language barriers, and were able to comprehend the proceedings. This disparity seemed to place the prosecution and the defence on unequal ground, undermining the equality of arms.

8.3.6. Court impartiality and handling of recusal motions

200. To ensure court impartiality, ODIHR noted positively that courts in Kazakhstan have an automatic case allocation system in place.[157] It consists of a software that allocates cases among judges considering a multitude of factors, including their workload, the complexity of the case, and the languages spoken by the judge. There are no special divisions within the criminal court which means that all judges can be assigned to January 2022-related cases. This helps to ensure that cases are allocated among a broad pool of judges and that no judges are pre-selected by Court Presidents to deal with these cases. The automatic allocation of cases contributes to increased guarantees for the respect of judicial independence and impartiality, and prevents possible conflicts of interest.

201. ODIHR identified deficiencies in both the legislative framework and the practical application of recusal procedures, with the CPC exercising trial judges' discretion in deciding whether to entertain a recusal motion submitted by the parties. ODIHR monitored one case where challenges to the court's impartiality were upheld, and five cases where judges summarily dismissed parties' challenges to their impartiality:

202. For instance, in the **Mamai** case, during the hearing on 10 February 2023, the defence submitted a motion of no confidence due to the judge having repeatedly excluded defence witnesses with no explanation, providing a detailed legal basis. However, the judge dismissed the motion as unfounded without examining or addressing the arguments presented by the defence. The defence again raised the same objection during another hearing monitored by ODIHR, without success.

203. The current wording of Article 87 of CPC does not seem to grant judges power to review recusal requests Interpreting this provision as granting judges unfettered discretion to determine whether or not to even entertain a recusal motion compromises the (appearance of) impartiality that the norm is intended to uphold.

204. Additionally, the CPC provisions concerning recusals are ambiguous regarding the process for selecting judges to adjudicate recusal motions, notably in scenarios where a single judge constitutes the court. In cases adjudicated by a single judge - a situation that represents the predominant composition of the courts[158] and encompasses all first instance cases observed by ODIHR - the decision on the motion falls to the court chairperson. If the chairperson is "unavailable", any other judge within the same court may be assigned the task.[159] In instances where this is also not feasible, the responsibility then shifts to a

[157] A description of use of the system in practice can be found here.
[158] CPC, Article 52, para. 1.
[159] CPC, Article 87, para. 11.

judge from a superior court.[160] The term "unavailable" concerning the President or another judge from the same court seems to lack clarity, leaving it uncertain which judge should be appointed in their stead. This ambiguity represents a significant deficiency, as certainty in this context is crucial for upholding impartiality. The impression that a judge was appointed to examine recusal requests without objective, pre-established criteria could undermine the perception of fairness and integrity in the judicial process.

205. For instance, in the **Tleuzhanova** case, during the appellate proceedings, the Court of Appeal frequently interrupted the defence attorneys while they were submitting their motions of no confidence towards the judicial panel. The panel itself assessed the motion for its recusal and dismissed it, deeming it unsubstantiated.

206. Furthermore, the CPC provisions outlining grounds for recusal are phrased vaguely and do not clearly define what evidence is sufficient to establish potential bias: Article 87, para. 1 no. 6 provides that a judge cannot take part in proceedings for a number of reasons, including "if there are other circumstances that give reason to believe that the judge is personally, directly or indirectly interested in this case".[161] However, no precise rules on the collection of evidence or the standard of proof are provided in order to establish whether there exists a conflict of interest or not. This ambiguity gives judges assigned to decide on recusal motions broad discretion in deciding what evidence to collect (if any) and what standard of proof is required to exclude a judge.

207. For instance, in a another monitored case, the defence challenged the judge's impartiality, claiming that he repeatedly allowed the prosecutor to ask leading questions to witnesses, thus showing a bias towards the prosecutor. However, the judge appointed to decide on the recusal did not properly evaluate the evidences about the alleged conduct or hear any opinion from the parties and, and quickly dismissed the recusal motion. Such conduct may undermine defendant's trust in the courts and the right to be tried by an impartial court were not respected.

208. ODIHR observed five additional cases where judges failed to properly assess impartiality concerns raised by parties. In two of them, the judge appointed to decide on the recusal himself showed a lack of impartiality towards the parties.

209. In the **Kendzebaev** case, the injured parties submitted a motion of no confidence in the presiding judge during a hearing. The judge assigned to review and decide on the motion dismissed it as unfounded and then publicly criticized the victims for submitting the motion, claiming they were merely trying to postpone the court proceedings.[162] In the **Tleuzhanova** case, at the hearing held on 30 March 2023, the judge assigned to decide on a defence motion to recuse the trial judge intimidated and disrespected the parties. The judge questioned a public defender's membership to the human species and understanding of his role, specifically inquiring whether he "belonged to homo sapiens" and could

[160] CPC, Article 87, para. 11. The CPC provides that if a member of a trial panel is challenged, the other panel members decide on his/her removal, after the challenged judge gets to present their defence before the others deliberate privately (CPC, Article 87, para. 11). A challenge against the entire panel is decided by the panel themselves, with a majority vote (CPC, Article 87, para. 10). A challenge against the pre-trial judge is decided by the same judge (CPC, Article 87, para. 10).
[161] CPC, Article 87, para. 1, no. 6).
[162] Of note, it is unclear to ODIHR why the victims would want to extend the criminal proceedings, particularly considering the practice of linking compensation to the outcome of the proceedings themselves.

"understand where his place was". Additionally, during the discussion of the motion, the judge told one of the defendants to "shut up" and warned that the defendant "will have a long time ahead to express his complaints".

8.3.7. Prosecutions of deceased defendants

210. According to information that ODIHR gathered as a result of the monitoring of case and from legal practitioners, criminal proceedings against deceased defendants in Kazakhstan are typically pursued only when family members request it "for their rehabilitation", one of the grounds for continuation of criminal proceedings foreseen in Article 35 of the CPC.[163] Based on interviews with judges and defence lawyers, practitioners seem to interpret this provision to mean that if proceedings are terminated upon the defendant's death without a trial, the deceased is not considered "rehabilitated."

211. Article 35, para. 1, no. 11) of the CPC stipulates that a case is terminated due to the death of the accused. Termination of a case when no criminal offence has been committed is foreseen by other provisions, i.e. Art, 35, paragraph 1 no. 1) or no. 2). However, in most cases, it is not feasible to conclusively determine the absence of a criminal offence without a trial. Consequently, it seems that when a defendant passes away and if the family opts not to continue the criminal proceedings, the deceased may be presumed guilty, despite the lack of a formal adjudication of guilt through the trial process. Judges interviewed by ODIHR confirmed that if defendants die before a court decision on their criminal guilt, they are considered guilty for all purposes, even in the absence of a criminal judgement that affirms their criminal responsibility.

212. Secondly, the termination of proceedings without a trial seems to impact the determination of responsibility for other individuals charged in the same case or in separate ones. Since the termination of the case because of the defendant's death may be interpreted as an implicit acknowledgment of their guilt, even without a formal trial and verdict, this can have repercussions for other defendants, particularly in cases involving killings of civilians during the January 2022 events

213. For example, if a deceased civilian defendant is not cleared of charges, then he/she may be implicitly considered responsible for acts such as attacking buildings[164] (as in one of the monitored cases) or stealing weapons[165] (as in two other cases), it may bolster the defence of those accused of causing the civilian's death. The alleged perpetrators may argue that they acted in self-defence or to protect others, using the deceased defendant's assumed guilt as justification.

214. The **Pirzhada** case starkly illustrate the fundamental incompatibility of trying a deceased defendant with the right to a fair trial. In this case, the main evidence supporting the charges against the defendant consisted of statements made by the very officers responsible for his death, casting serious doubt on the objectivity and credibility of such evidence. This inherent conflict of interest undermines the fairness of the proceedings and violates the defendant's right to challenge the evidence against them effectively.

[163] CPC, Article 35, para. 1, subpara. 11).
[164] CPC, Article 269 para. 2.
[165] CC, Article 291.

215. This practice of tying a deceased defendant to the pursuit of criminal proceedings raises concerns about the fairness and impartiality of the proceedings themselves. Moreover, it can lead to a distortion of justice, where the assumed guilt of a deceased defendant is used to shield those responsible for their death from accountability.[166] Ultimately, the current legal framework on prosecutions of deceased defendants may effectively undermine the presumption of innocence and the equality of arms, as it allows for a finding of guilt without the necessary procedural safeguards and evidentiary standards that a trial would provide.

8.4. Conclusions

216. Positively, the practice of automatic allocation of cases to judges contributes to courts impartiality, however challenges remain with respect to the guarantees of a fair trial and impartiality of the court in criminal cases. ODIHR also notes the initiative of the Supreme Court on allowing the defence and prosecution to present their case in court without having a pre-determined view of a case from prosecution file. This may contribute to a more impartial assessment of cases by courts. The poor performance of *ex officio* appointed lawyers and the ambiguity of legislation and courts practice on solving recusals, which overall give a perception of lack of equality of arms between the defence and prosecution and of courts not being impartial.

217. The court's course of action in response to the recusal request, in the cases observed, failed to dispel the doubts that had been raised about its impartiality, ultimately affecting the defendant's right to be tried by a tribunal that appears to a reasonable observer to be impartial.

8.5. Recommendations

To the Legislature:

a) Reconsider the provisions in the CPC that allow for the continuation of criminal cases against deceased defendants, as this practice is fundamentally incompatible with the right to a fair trial.

b) Consider implementing Step 5 of the Supreme Court's proposed reforms, ensuring that at the start of the trial the judges can familiarise themselves with the evidence put forward by both parties: the prosecution and defence.

c) Foresee that, in offline trials, witnesses must always come to court to be examined and cross examined in person save for exceptional circumstances.

[166] In case of ECtHR, *Magnitskiy and Others v. Russia* the ECtHR stated that "A trial of a dead person inevitably runs counter to the above principles, because by its very nature it is incompatible with the principle of the equality of arms and all the guarantees of a fair trial. Moreover, it is self-evident that it is not possible to punish an individual who has died, and to that extent at least the criminal justice process is stymied. Any punishment imposed on a dead person would violate his or her dignity. Lastly, a trial of a dead person runs counter to the object and purpose of Article 6 of the Convention, as well as to the principle of good faith and the principle of effectiveness inherent in that Article." (ECtHR, *Magnitskiy and Others v. Russia*, 27 August 2019, para. 281). See also ECtHR, *Grădinar v. Moldova*, 8 April 2008, para. 90-104, concerning proceedings after the death of an accused conducted upon the request of his wife with an intention to obtain confirmation that her husband had not committed the offence, which the Court examined under the civil limb of Article 6 of the ECHR

d) Consider amending the CPC to establish clear and objective criteria for determining the admissibility of recusal motions, limiting the discretion of trial judges in this respect, providing a more detailed and specific definition of what constitutes bias or lack of impartiality, and establish clear evidentiary standards.

To the Supreme Court:

a) Consider issuing guidelines to ensure that any limitations to the defendant's right to examine and cross-examine witnesses are based on exceptional circumstances clearly defined by law.

b) Provide clear guidelines on how to manage witness examination and cross-examination in online trials, including by addressing technical issues that may arise during such proceedings and postponing any hearing where the parties are not able to exercise their right to examine and cross examine witnesses.

c) Consider providing training to judges on the proper handling of recusal motions, including on how to assess concerns raised by parties thoroughly and impartially, and how to refrain from engaging in conduct that may undermine the appearance of impartiality.

To the Ministry of Justice:

a) Provide resources and training for judges and court staff on the management of court proceedings, including the use of technology for remote testimony.

b) Develop and implement training programmes for legal aid providers to enhance their competence and professionalism in representing indigent defendants.

c) Ensure proper compensation for legal aid providers to attract and retain qualified and competent lawyers in the free legal aid system.

d) Monitor and report on the performance of legal aid providers in the justice system, to identify areas for improvement and support advocacy for necessary reforms.

e) Ensure that the remuneration for interpreters is sufficient to attract and retain highly qualified professionals in the field.

f) Establish a system for monitoring the quality and adequacy of interpretation services provided in criminal proceedings and provide training and resources to improve the skills of court interpreters.

To the High Judicial Council:

a) Issue guidance for judges on maintaining orderly proceedings and ensuring equal opportunities for all parties to present their case.

b) Develop and implement training programmes to improve judges' understanding of trial management, evidentiary rules, and provisions ensuring equality of arms.

To Judges:

a) Ensure that no procedural activities are carried out if defence counsel for one or more defendants are absent.

b) Protect the defendant's right to defend themselves by allowing them to speak and present evidence without undue interruption, and ensure that they have the opportunity to speak last before the court adjourns for deliberation.

c) Ensure that the defendant and their counsel have a fair opportunity to examine and cross-examine witnesses.

d) Rule on defence motions to call witnesses without undue delay and ensure that all relevant witnesses are heard.

e) Ensure, whenever possible, that witnesses testify in person; limit remote hearing of witnesses as a measure of last resort. Provide clear and well-reasoned decisions when ruling on parties' motions to have offline hearings or in-person witness examinations.

f) Take steps to ensure that witnesses are excluded from the trial before giving testimony and that witnesses do not communicate with each other before testifying.

g) Guarantee that defendants have access to adequate interpretation and translation services throughout the criminal proceedings, including during online hearings.

h) Proactively monitor the quality of interpretation during proceedings and intervene when necessary to ensure that defendants can fully understand and participate in the process; suspend or postpone hearings when the defendant is unable to follow court proceedings.

i) Consider all recusal motions submitted by parties carefully and objectively, and refrain from summarily dismissing such motions without proper examination of the arguments and evidence presented.

j) Provide clear and well-reasoned decisions on recusal motions, addressing the specific arguments and evidence presented by the parties, and explaining the basis for the decision.

To the Bar Association:

a) Establish clear professional standards and a code of conduct for legal aid providers to uphold the integrity and professionalism of the legal profession.

b) Establish a monitoring mechanism to assess the performance of legal aid providers and ensure they adhere to the established professional standards and code of conduct.

c) Develop and deliver capacity-building initiatives for lawyers providing free legal aid, promoting knowledge of criminal law and procedure, and ethics. Provide training to defence lawyers on effective strategies for examining and cross-examining witnesses, both in traditional and online trial settings.

d) Develop best practices and guidelines for defence lawyers on how to effectively participate in online trials, including strategies for ensuring effective examination and cross-examination of witnesses.

e) Advocate for the provision of adequate interpretation and translation services for defendants throughout criminal proceedings and raise objections when the quality or sufficiency of the interpretation is lacking.

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

218. The principle of equality of arms encompasses the right for both the prosecution and the defence to adequately prepare their respective cases. This is particularly crucial for the defence, as they rely on the prosecutor to disclose the charges and evidence, including any exculpatory evidence that may support the accused's innocence or mitigate their culpability.

219. Fair trial principles, therefore, require that the accused have access to sufficient information about the charges brought against them and the evidence supporting those charges. This information must be provided in a timely manner, allowing the defence adequate time to review the materials, conduct their own investigations, and develop an effective defence strategy. Without proper access to this information, the accused's ability to defend themselves is severely hampered, undermining the fairness of the proceedings.

220. Moreover, the principle of equality of arms demands that the defence be given the opportunity to challenge the evidence presented by the prosecution and to present their own evidence in support of their case. This can only be achieved if the defence is fully informed of the allegations and the evidence upon which the prosecution relies. Any failure to disclose relevant information or evidence to the defence constitutes a breach of the principle of equality of arms and undermines the accused's right to a fair trial.

9.1. International standards

221. 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". Furthermore, 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. 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. As the burden of proof for any criminal charge is on the prosecution, 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. More details about the international standards can be found in Annex I, Section 7.1 of this report

9.2. Domestic Legal Framework

222. 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. Furthermore, Article 302-1 of the CPC regulates the content of the indictment and the CPC also has specific provisions concerning which situations the prosecution can amend or supplement the charges during the trial. Annex I, Section 7.2 provides a more detailed overview of the national legislation.

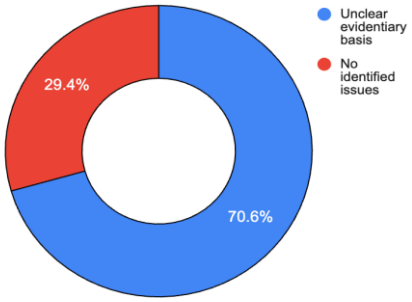
9.3. ODIHR observations

9.3.1. Inadequate description of evidence in the indictment

223. During its monitoring, ODIHR observed a lack of clarity in indictments as to the evidence that supports the charges raised. In 12 out of 17 analysed indictments ODIHR observed that, as a general rule, prosecutors were unable to demonstrate the link between the specific charges and submitted evidence, or to provide a clear explanation as to how the submitted evidence proved the criminal responsibility of the defendant(s). At the same time, there were also some positive examples of judges addressing lack of evidentiary basis as it is shown below.

224. ODIHR noted that in multiple cases, prosecutors provided courts and the defence with complete investigative files containing multiple documents and pieces of evidence, however the indictments did not explain how this evidence was relevant for the specific charges. This practice puts the defence in a difficult situation when it needs to guess which evidence the prosecutor plans to rely on for which charge, placing an unfair burden on them.[167]

Chart 8.1 - Indictments analysed



225. In all the mentioned cases, judges did not use powers under the CPC to request the Prosecutor to remedy these deficiencies. Instead, shown below in Chapter 11, judges often relied on the factual and evidentiary allegations by the prosecution as reasons to find the defendants guilty.

226. The **Zaurbekov** case demonstrates a more positive practice of, a judge issuing a private ruling pointing out serious deficiencies in the investigation and prosecution, many of which were deemed to be against the law. The ruling acknowledged that the indictment was based on flawed and deficient evidence. In the **Rashiduly** case, the judge issued a private ruling criticizing the prosecutor's conduct of the investigation.[168] In the **Mukhambayev** case, the judge suspended the proceedings and returned the indictment to the prosecution to address its deficiencies. In the latter case, the indictment was accepted by the court following the changes introduced by the prosecution, however it was highlighted during several hearings that the document remained deficient.

227. In all other monitored cases, poorly drafted indictments hindered the defendants' ability to understand the charges, prepare a comprehensive defence strategy, and effectively challenge the allegations against them. This lack of transparency and the inadequate description of evidence presented in the indictments undermined the defendants' right to defend themselves effectively, as they were unable to fully understand the basis of the charges and prepare a comprehensive defence strategy.

[167] For instance, in the case, *Barberà, Messegué and Jabardo v. Spain*, 6 December 1988, para. 77, the ECtHR criticised the use of bulk evidence without specific reference to the accused or the charge in question; in a case, the Prosecutor had relied *inter alia* on 1,600 pages investigation file, the bulk of which did not concern the defendants, without specifying in detail the particular evidence on which he based his account of the facts in relation to the defendants, thus making the defence's task more difficult

[168] Notably, despite the highlighted positive initiative taken by the judges, in both the case of **Rashiduly** and **Zaurbekov**, the judge found the defendant guilty despite the deficiencies.

9.3.2. Disclosure obligations

228. ODIHR observed five cases where the defence did not obtain the materials that constituted the evidentiary basis of the accusations against them in a timely manner.

229. For example, during the **Sultanbekov** trial, the defence repeatedly complained that they did not receive a copy of the indictment. Despite these objections, the court proceeded with several trial sessions. The defence acknowledged that they only obtained the indictment approximately three months after the trial had begun and this significantly undermined their ability to prepare an effective defence. During the **Bekbau** appeals proceedings, two defence lawyers raised concerns that their requests to access the pre-trial statements of all witnesses and to watch the video recordings, that were the primary evidence used by the court of first instance to find the defendants guilty, were repeatedly denied. The Appeal Court failed to address or respond to these complaints.

230. The denial of access to indictments and/or evidence impaired the defence's capacity to contest the evidence presented in support of the charges. By withholding crucial information from the defence, the Prosecution may have undermined the defendants' capacity to effectively challenge the evidence against them, thereby compromising the overall fairness of the criminal proceedings.

9.3.3. Addition of new charges or claims during the trial

231. In five monitored cases ODIHR observed that the Prosecutor changed the indictment during the trial and, in at least one case, included a new claim for material damage even during the appeal stage, without giving the defence time to prepare a defence on the new charges. In certain cases, such violations were remedied at the appeal stage.

232. For instance, in the **Mukhambayev** case, the Prosecution amended the indictment at least four times during the trial. The final version of the indictment was submitted on the very day the court adjourned to deliberate the case. This last-minute change was substantial, as the indictment was expanded to incorporate an additional charge. The court eventually convicted the defendant based on these late-introduced charges, which had not been duly considered during the trial. On a positive note, the Appeal Court later withdrew these charges and amended the verdict accordingly.

9.4. Conclusions

233. ODIHR observed deficiencies regarding the defendants' right to be informed of the charges against them and to prepare an adequate defence. However, also observed positive examples of first instance and/or court of appeal addressing the shortcomings in an appropriate manner. Furthermore, positively, the criminal procedure legislation contains safeguards to ensure that the right to effective defence is respected in cases when the prosecutor amends the charges worsening the defendant's situation.

234. The prosecution's non-compliance with its disclosure obligations, impaired the defendants' capacity to challenge the evidence effectively. Moreover, the prosecution's practice of

amending indictments and introducing new charges or claims late in the proceedings deprived the defendants of adequate time to prepare a defence.

235. These findings highlight the need for stricter adherence to the provisions of the CPC by the prosecution. Furthermore, the courts should play a more proactive role in identifying and remedying violations of defendants' rights.

9.5. Recommendations

To Judges:

a) Exercise the court's powers to scrutinise indictments and require prosecutors to remedy any deficiencies, such as lack of evidence, unclear reasoning, or failure to establish a clear connection between the evidence, the defendant's action and the charges.
b) Ensure that the defence is provided with indictments and their amendments in a timely manner.
c) Ensure that the defence has timely access to all evidence, including exculpatory evidence, and take appropriate measures when prosecutors fail to comply with their disclosure obligations, such as adjourning the trial to allow the defence adequate time to prepare.
d) Carefully consider any requests by prosecutors to amend charges during trial, ensuring that such amendments do not violate the defendant's right to defence.

To the Prosecutors General's Office

a) Develop guidelines and training programmes for prosecutors on drafting comprehensive and well-reasoned indictments that clearly link the evidence to the charges and the actions of the individual defendant and ensure that all elements of the alleged crimes are adequately supported by evidence.
b) Establish internal review mechanisms to ensure that indictments meet the required standards of clarity, specificity, and evidentiary support before being submitted to the court.
c) Issue directives to prosecutors emphasising the importance of timely disclosure of all evidence, including exculpatory evidence, to the defence, and outlining the consequences for failure to comply with disclosure obligations.
d) Provide guidance to prosecutors on the limited circumstances in which charges may be amended during trial and the procedures that must be followed to ensure the defendant's right to defence is not violated.
e) Regularly review and analyse the quality of indictments and the practices of evidence disclosure to identify and address any systemic issues or training needs among prosecutors.

To Prosecutors:

a) Ensure that indictments provide a clear and detailed analysis of the evidence supporting each charge, establishing a logical nexus between the defendant's actions and the alleged criminal offences.

To Bar Associations and Lawyers:

a) Provide training to defence lawyers on strategies for challenging deficient indictments, including how to identify and argue issues related to lack of evidence, unclear

reasoning, or failure to establish a clear connection between the evidence, the defendant's actions and the charges.

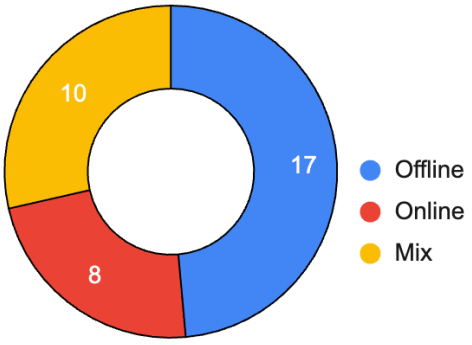
b) Encourage defence lawyers to actively seek disclosure of all evidence, including exculpatory evidence, and to raise timely objections when prosecutors fail to comply with their disclosure obligations.

c) Develop resources and best practices for defence lawyers on how to respond to and challenge amendments to charges during trial, ensuring that defendants' rights are protected and that adequate time is provided to prepare a defence against new charges.

10. Right to a fair hearing in online trials

236. As shown in **Chart 10.1**, out of the 35 trials ODIHR monitored related to the January 2022 events, eight were conducted entirely online, while another ten followed a mixed or hybrid format, combining online and in-person proceedings, for instance, by holding in-person hearings but collecting witness testimony online. Some courts opted to conduct appeal hearings strictly online.

Chart 10.1 - Format of monitored trials



10.1. International standards

237. Defendants in criminal trials have the right to be tried in their "presence".[169] Although several countries' legislation allowed for remote hearings in criminal trials,[170] 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. 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.[171] OHCHR also recommends that criminal trials should only be held on-line with the explicit free and informed consent of the accused.[172]

238. 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. At the same time, judicial criminal proceedings held online should be subject to strict conditions and safeguards to address challenges such as difficulty in identifying signs of torture or other ill-treatment; limited publicity; difficulty in having private and

[169] ICCPR, Article 14 para. 3 lett. d).

[170] 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.

[171] OHCHR, Briefer on On-Line hearings in justice systems.

[172] *Ibid.*, page 3.

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.[173] Annex I, Section 8.1 of the Report offers detailed overview of the relevant norms and recommendations. Findings and conclusions the report should be read in the context of these norms.

10.2. Domestic legal framework

239. Online criminal trials in Kazakhstan have been a common occurrence since after the COVID-19 pandemic. The Supreme Court of Kazakhstan issued a Normative Ruling on online trials in the early days of the COVID-19 pandemic,[174] but there were no follow-up guidelines as the state of health emergency was revoked. CPC provides basis for orderly conduct of criminal proceedings, which are applicable to online trials, such as Article 57, Article 334 para. 2, Article 345, para. 1. Article 377, paras. 8 and 9.[175] Annex I, Section 8.2 provides more detailed overview of the national legislation.

10.3. ODIHR observations

240. Generally, ODIHR observed that trials or hearings held in an online modality exacerbated concerns discussed in the preceding chapters, related to equality of arms, defendants' rights to defend themselves effectively, and the publicity of trials.

241. ODIHR observed that online trials often resulted in disorderly trial environments, hindering the proper presentation of evidence, impairing effective witness examination, and undermining defendants' abilities to present a robust defence. For example, in three cases**,** the court registry failed to distinguish the witnesses to be questioned from the public, which resulted in unquestioned witnesses being present at the hearing as members of the public while other witnesses were testifying. There were other instances where parties failed to connect on time to the hearings or left the hearings before the official closure (see other examples in the sub-chapters below)

10.3.1. Court discretion on holding online trials or collecting online testimony

242. The court has a wide discretion in deciding when to hold a trial online. This is demonstrated by the fact that the practice of online trials, during the monitored period, was particularly common in courts in the Almaty region,[176] while in other regions, such as

[173] *Ibid*., page 2.
[174] Supreme Court of Kazakhstan, "On the regime of work of courts of the Republic during the state of emergency", 16 March 2020.
[175] For example, by requiring from presiding judge to take "all measures to ensure a fair consideration of the criminal case" (Article 57), "direct the court session, in the interests of justice 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 334 para. 2 of the CPC), etc.; regulating grounds for a witness to give evidence remotely (Article 345, para. 1, Article 377, paras. 8 and 9).
[176] This seems to be dictated by court practice rather than objective reasons; according to judges interviewed in Almaty, there is no legal reason why online hearings are much more common in Almaty; the only reason is the size of the city, traffic jams, and convenience. The judges believe that online trials are more cost-effective, and lawyers as well as other parties have become accustomed to this format.

Jetisu, Jambyl, Abay and Kyzylorda, the standard format was predominantly used with none of hearings related to the January 2022 events conducted fully online.

243. ODIHR observed that judges decided to hold trials entirely online for disparate reasons, sometimes not clearly stated, such as the orderly conduct of the proceedings, or at the parties' request.[177] In practice, it appeared that the presiding judge's decision whether to hold hearings or the entire trial online was discretional. ODIHR also observed cases where defendants explicitly requested hearings to be held offline, but courts rejected their motion seemingly without sufficient consideration for the potential impact on the fairness of the proceedings.

244. In the **Mamai** case, the defence filed several motions requesting offline hearings, but the judge repeatedly rejected these motions. Initially, the court justified the denials citing health concerns. However, as the epidemiological situation improved with time, the court's rejections of the defence's motions were merely substantiated by referencing the previous negative decisions, without providing any further reasoning or considering the changed circumstances. Similarly, in the **Sagintay** case, witnesses were sometimes cross-examined over the phone using the loudspeaker, rather than being physically present in the courtroom, despite hearing taking place offline. The lawyers filed motions objecting to this practice and requesting that the witnesses be brought to court for cross-examination. However, the court denied these motions without providing clear justification. During the appellate proceedings in the case of **Tleuzhanova** case, the consistent requests by the defendants and their attorneys to hold the trial offline were rejected by the court, with the court eventually requesting disciplinary sanctions and the withdrawal of the attorneys' licences to practise the law for lodging such motions.

245. In its publication "Fair Trial Rights and Public Health Emergencies", ODIHR recommended that when deciding whether to hold a hearing online, "the presiding judge needs to consider the implications of a possible delay on the rights of the parties, the nature of the hearing, access and availability of necessary equipment, the need to physically examine the evidence, as well as vulnerabilities of the parties and witnesses." ODIHR concluded that "[...] online or hybrid hearings might not be possible in all cases and should be used only if appropriate." In any case, "The presiding judge should consider the opinion of the parties and of the witnesses in this respect and decide in the form of a reasoned judgement".[178] In the monitored January 2022-related online trials, ODIHR observed a lack of proper justification for the continued use of online means, particularly when the defence raised legitimate concerns, thus appearing to undermine the transparency and integrity of the judicial process.

[177] According to Almaty judges, when a party requests an online or offline trial, the court hears the opinions of the other parties before making a decision, just as they would with any other motion. The court is not obligated to follow the parties' agreement and does not issue a separate reasoned decision on the matter.
[178] ODIHR, Policy Brief Fair Trial Rights and Public Health Emergencies, 2021, page 11.

10.3.2. Adequacy of technical infrastructure

246. Despite the existence of a platform to hold online trial sessions exists,[179] ODIHR monitors observed trials held on other unofficial ones such as Zoom and WhatsApp, depending on the judge's decision.[180]

247. In at least ten trials observed by ODIHR, held in online or hybrid format (including some appeals) courts utilised trial versions of a given software, resulting in connection interruptions or limitations on the number of participants. Due to a lack of specialised equipment or insufficient internet speed and quality, audio and video connections were often poor, hindering the efficiency of judicial proceedings and the ability of the parties and the public to follow properly.

248. In the **Mamai** case, the Appeal Court's use of a trial version of Zoom software for the hearing led to significant disruptions in the proceedings. The constant interruptions caused by the expiration of the free 40-minute conference time undermined the defence's ability to present their arguments in a coherent and uninterrupted manner. In the **Sultanbekov** case, despite the judge's acknowledgment of the high public interest in the case and the decision to use Zoom as an online platform for the trial, several trial sessions were still conducted on WhatsApp. During at least two of the monitored hearings, the audio quality was so poor that it was nearly impossible to hear the parties and witnesses, hindering the effective participation of all involved.

249. The courts' failure to address this issue and provide a suitable platform for the trial to take place and for the defence to present their case without interruptions appeared to undermine the principle of equality of arms and the defendant's right to a fair trial.

250. In some cases, the use of personal numbers and devices of the court staff, parties to the case and the public fails to ensure privacy and the protection of personal data, in particular mobile phone numbers of participants in the trials held via WhatsApp. In other cases, the decision to use unstable and unreliable platform for the online hearings had a detrimental impact on the fairness of the proceedings and the defendant's right to an effective defence.

251. During monitored hearings before the Supreme Court, the Court attempted to conduct hearings using the authorised TrueConf platform. The platform consistently malfunctioned, making it impossible to proceed with the hearings as intended. As a result, the court resorted to connecting participants via alternative video conferencing applications, such as WhatsApp or Zoom, to ensure the continuity of the proceedings.

10.3.3. Trial management and fair hearing

252. ODIHR observed multiple instances where presiding judges struggled to manage trial sessions conducted online due to a high number of participants, technical equipment issues, or poor court organisation, appearing to undermine the defence's ability to

[179] See Supreme Court of Kazakhstan, "On the regime of work of courts of the Republic during the state of emergency", 16 March 2020.
[180] The choice of the platforms is not based on any objective reasons but is primarily grounded on subjective preferences of the judge or availability of the software.

effectively represent their clients and the court's capacity to maintain order and fairness in the proceedings.

253. For instance, in the **Amangeldiyev** case, which involved numerous defendants, defence counsels, public defenders, and the public, the online hearing held on 9 January 2023, was disorganised, hindering the defence's ability to effectively perform their duties. Defence counsel frequently interrupted other participants, and the judge had difficulty maintaining an orderly sequence of speakers. On another occasion, on 23 January 2023, although the hearing was officially held online, some defendants and the prosecutor appeared in the courtroom, resulting in a mixed modality that the court had not priorly authorised. At the 30 January 2023 hearing, the prosecutor became disconnected, and the judge's attempts to contact him were unsuccessful. During the same hearing, the judge inquired about witnesses needing to testify, showing that the court and prosecution lacked a clear witness list or questioning order; the judge also allowed a lawyer to cross-examine a witness while the lawyer was driving.

254. As highlighted in Chapter 10, in five monitored trials courts collected evidence while permitting the use of informal procedures or attitudes (such as witnesses driving, walking around the city, smoking, or using public transport during their testimony) that appeared to undermine the formal and serious nature of the judicial process

10.4. Conclusions

255. The wide discretion exercised by courts and inconsistencies in practice when deciding to hold trials online, often without proper justification or consideration of the parties' opinions, undermines the transparency and integrity of the judicial process. This is especially concerning when trials were held online in absence of the defendant's consent. Furthermore, the inadequacy of the technical infrastructure supporting online trials, hindered the efficiency of the proceedings and the ability of the parties and the public to follow the trials properly.

256. Finally, trend of courts rejecting motions for offline hearings or in-person witness examinations without sufficiently considering the potential impact on the fairness of the proceedings undermined the defence's ability to represent their clients effectively.

10.5. Recommendations

To the Legislature:

a) Criminal trials are held (partially or wholly) online on the basis of court’s reasoned decision only in case of defendant’s informed consent or when it is absolutely indispensable for the protection of public health, right to life, liberty, and security of defendant, witnesses and victims of crimes.

To the Supreme Court:

a) Monitor that the guidelines and Normative Rulings on the use of online trials in criminal proceedings are adequately implemented by the lower-level courts, including the circumstances under which online hearings may be held or witness testimony can be collected online.

b) Issue guidelines and Normative Rulings on how to ensure cyber security and data protection during the use of online trials in criminal and civil court proceedings.

To the Ministry of Justice

a) Develop a secure, reliable, and user-friendly platform specifically designed for conducting online trials, with features that facilitate the effective participation of all parties, the proper presentation of evidence, and the maintenance of an orderly and dignified trial environment.
b) Upgrade the technical infrastructure of courts to ensure that online hearings can be conducted seamlessly and without technical difficulties, including providing courts with adequate equipment, stable internet connections, and technical support staff.
c) Implement training programs for judges and court staff on the effective management of online trials.

To Judges:

a) To hold online trials (partially or wholly) in criminal cases only when clearly defined by law and when required for the protection of public health, right to life, liberty, and security of witnesses and victims of crimes. Issue reasoned decision when witnesses are permitted to testify online.
b) Avoid using personal devices for holding online trial sessions witnesses remotely.
c) Ensure that all parties have access to the necessary technical equipment and support to effectively participate in online hearings, and take appropriate measures to address any technical issues that arise during the proceedings.
d) Take proactive steps to maintain an orderly and dignified trial environment during online hearings, using the powers granted under the CPC to ensure the proper conduct of all participants and to sanction any behaviour that demonstrates contempt for the court or undermines the seriousness of the proceedings.
e) Implement strategies for effectively managing online trials with a large number of participants, such as establishing clear rules for communication, utilising virtual breakout rooms for private consultations between defendants and lawyers, and employing court staff to assist with technical and organisational aspects.

To Bar Associations and Lawyers:

a) Request that, as a rule, trials are held offline, unless the best interest of the defendant requires otherwise.
b) Provide training to lawyers on how to effectively represent their clients in online trials, including strategies for presenting evidence, examining witnesses, and addressing technical challenges.

11. Right to a reasoned judgement

257. As part of its monitoring, ODIHR analysed the formal structure and external coherence of judicial reasoning in some selected court judgments rendered at the end of monitored trials. ODIHR's examination is limited to assessing how judgments are constructed and articulated, without evaluating the merits of cases or the sufficiency of evidence. The analysis aims to determine whether judgments meet basic standards of logical structure, clarity, and coherence in their legal reasoning. By concentrating on these formal aspects,

ODIHR seeks to evaluate the judiciary's adherence to the principle of providing adequately reasoned judgments, independent of the substantive correctness of the decisions.

11.1. International standards

258. Well-reasoned court judgement is one of the key requirements of a fair trial, which acts as a safeguard against arbitrariness in judicial proceedings and contributes to legal certainty, contributing to credibility and acceptance of a decision by parties to the case.[181] 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.[182] 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.[183] This information must be provided in writing and in a way that will enable the individual to make effective use of further available remedies.[184] According to the CCJE, judicial decisions need to 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." Annex I, Section 9.1 of the Report offers further overview of the relevant international norms, including the ECHR standards and cases.

11.2. Domestic legal framework

259. 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."[185] Article 395 offers provides that judgement must indicate the evidence on which the conviction of each defendant is based, and the reasons on which the court rejected other evidence.[186] Articles 396-398, as well as Supreme Court's 2018 Normative Ruling no. 4 "On Verdicts" provides further guidance in this respect.[187] Annex I, Section 9.2 provides more detailed overview of the national legislation.

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[181] OSCE, ODIHR Legal Digest of International Fair Trial Rights, 26 September 2012, page 210.
[182] 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.
[183] OSCE, 1986 Vienna Document, Principle 13.9.
[184] *Ibid*.
[185] CPC, Article 393, para. 3.
[186] CPC, Article 395, para. 3.
[187] 2018 Supreme Court's Normative Ruling no. 4 "On verdicts", paras. 16 and 17; CPC, Article 395, para. 3.
[187] 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).

11.3. ODIHR observations

260. ODIHR observed that 26 of the 31 judgements it analysed provided reasoning which was either incomplete or lacked clarity. Positively, in a number of cases courts accurately offered thorough and reasoned analysis of submitted evidence and charges brought against defendants.

261. ODIHR observed that several judgements lacked a detailed assessment of the evidence; in most analysed judgments, judges simply listed and cited the evidence collected at the trial, without explaining its value, credibility and its relevance for establishing the criminal responsibility of the accused. Judges also occasionally failed to explain why they found the evidence proving the responsibility of the accused more credible than evidence presented by the defence. In cases involving multiple defendants, judgements often failed to provide reasoning individualising their criminal conduct.

262. ODIHR observed that the shortcomings in judgements often mirrored the same shortcomings present in the indictments – an approach that is evident from the factual descriptions frequently reproducing the indictment verbatim (see above, Chapter 9). This practice became particularly evident in judgments that contained extensive and general descriptions of the incidents related to the January 2022 events, despite this being irrelevant to the court's primary task of establishing the defendant's role in the events.

11.3.1. Judgements disregarding defence evidence or arguments

263. The Supreme Court's 2018 Normative Ruling no. 4 "On Verdicts" stipulates that verdicts must contain reasoned decisions addressing parties' requests for additional evidence, explicitly evaluating relevance, admissibility, and reliability if such requests were not previously ruled upon during trial.[188] ODIHR observed six judgements which did not address some or all arguments or evidence put forth by the defence during the trial.

264. The judgement in the **Baymagambetov** case contains no analysis of any evidence provided by the defence. In the **Azanbayev** case, the judgement did not even make any reference to any evidence provided by the defence. In the judgement rendered in the **Rashiduly** case, the judge acknowledged that the investigating authority and the prosecution committed procedural violations during the investigation, but failed to address any of the arguments raised by the defence in this regard.

265. In the above cases, rather than impartially weighing the evidence and reasoning presented by both sides, courts appeared to have effectively deprived the defendant's submissions of any effect. This approach casts doubt on whether the analysed judgments and the trials upheld adversarial principles and the presumption of innocence enshrined in both domestic laws and international standards.

11.3.2. Judgements endorsing inculpatory evidence versus exculpatory evidence

266. In criminal cases heavily relying on witness testimony, such as most cases related to the January 2022 events, it is crucial that judgments provide rigorous reasoning as to the

[188] Supreme Court, 2018 Normative Ruling no. 4 "On Verdicts", para 18.

credibility of such evidence. This requires that the court provides a comprehensive rationale when giving decisive weight to inculpatory - and not to exculpatory - evidence, addressing the credibility, relevance, and corroborative value of the evidence. The court should also address the consistency and plausibility of the prosecution's evidence in comparison to the defence's statements, and thoroughly examine any potential biases or discrepancies in the evidence.

267. This scrutiny is particularly vital in the January 2022 related cases where defendants and/or witnesses changed their statements at trial, citing reasons like torture, undue pressure, or evidence tampering for the discrepancies.[189] Under the CPC evidence obtained through unlawful means including torture, violence, threats, deception or misinformation is inadmissible[190] and may be used only to prove that the corresponding violations have been committed.[191]

268. ODIHR's analysed nineteen judgments where courts either accepted prosecution evidence at face value, without providing a rationale for its sufficiency in establishing guilt, or failed to adequately justify their reliance on defendants' and witnesses' pre-trial statements over their in-court testimony, even when allegations of torture or other unlawful investigative methods were raised.

269. In eight monitored cases, the court convicted defendants without explaining why evidence submitted by the Prosecution was deemed sufficient to establish the defendant's guilt. In at least two cases, the prosecution itself was unable to establish the origin or authorship of certain videos that were either not shown during the trial or were of uncertain origin or authorship. Nonetheless, the courts proceeded to deem this evidence admissible, without apparent scrutiny of its reliability and provenance.

270. In seventeen analysed judgments courts did not provide reasoning for their decisions to believe defendants' and/or witness statements given during the pre-trial stage over the statements made by the same witnesses in court, seemingly dismissing claims that such pre-trial statements were obtained through torture or other unlawful investigative means.[192]

271. For instance, in the **Atayev** case, the court gave credibility to the pre-trial statements of the defendants over the conflicting in-court testimonies, reasoning that the defendants changed testimonies in an attempt to avoid responsibility. The court did not address the defendants' claim that the pre-trial statements were a result of pressure by investigators.

11.3.3. Judgements containing unclear reasoning on the defendant's responsibility

272. A recurring issue ODIHR observed in fifteen judgements is the absence of reasoning on the individual criminal liability of defendants, either due to an absence of explanation of how the collected evidence proved the criminal responsibility of the defendant or by failing to address one or more key components of criminal responsibility, i.e. *actus reus* and *mens rea*.

[189] See above, Chapter 6.
[190] CPC, Article 112, para. 1, subpara. 1 and 2.
[191] *Ibid*., para. 5.
[192] See Chapter 6.

273. Positively, one concrete case involving several defendants offers an example of the court's ability to carefully evaluate all evidence and provide clear justification for each charge against every defendant. Some evidence was excluded due to procedural issues during the investigation, and several charges were withdrawn due to a lack of direct evidence.

274. The lack of specific findings, comprehensive analysis, and transparent evaluation of evidence in the court's reasoning raises concerns about the judicial decision-making process and its compliance with international fair trial standards. When the court fails to deliver a duly motivated judgement that clearly links the evidence to the accused's individual conduct, it creates an ambiguous connection between the defendant and the alleged criminal activity. This ambiguity undermines the principles of due process and the right to a fair trial.

275. The use of indistinct evidence may lead to a violation of the right to an effective remedy, since the defence might face significant challenges in contesting such evidence on appeals particularly when it lacks clear and specific details linking the accused to the crime. It is crucially important for courts to properly address the key elements of the defendant's criminal responsibility, including *actus reus* and *mens rea*, particularly in cases involving the alleged responsibility of civilians charged with participating in mass riots, the most commonly charged criminal offence in the trials monitored by ODIHR.

276. Interpreting this criminal offence in a particularly broad manner, as punishing whoever takes part in the crowd committing disorders, regardless of any causal contribution to the actions perpetrated by the crowd, or defendant's awareness of the crowd's violent actions, undermines the principle of individual responsibility and makes it virtually impossible to organize the defence.

277. For instance, in the **Tleuzhanova** case, involving several defendants including some charged with both participating in mass riots[193] and attack on buildings,[194] the court convicted some defendants for both criminal offences. However, the court limited its reasoning to the finding that such defendants took part in the crowd involved in the disorders (a reasoning that may at most support a conviction for the crime of participating in mass riots), without providing any that, at most, may support a conviction for the crime of participating in mass riots), without providing any reasoning as to whether they individually directed any specific actions towards the building, or the causal link between the defendants' actions and the attacks. In the judgement in the **Denishev** case, the court found the defendant guilty based on his mere presence at the location where the mass riots occurred, without providing any reasoning about the defendant's participation in the crowd, or intent.

11.4. Conclusions

278. ODIHR's analysis revealed examples when courts accepting prosecution evidence without providing thorough assessment, critically examination of their credibility, relevance, or probative value. At the same time, there were positive examples when courts demonstrated the ability to provide thorough analysis of the evidence submitted by the prosecution

[193] CC, Article 272 para. 2.
[194] CC, Article 269.

(applying principles regarding burden of proof, presumption of innocence, etc.), albeit mainly with respect to the defendants who were law enforcement officials.

279. This lack of rigorous scrutiny was particularly evident in cases related to claims that their pre-trial statements were obtained through torture or other unlawful means.

280. Notably, many judgments lacked clear reasoning establishing the individual criminal responsibility of defendants, either by failing to articulate a coherent nexus between the evidence and the specific conduct alleged or by disregarding essential elements of the crimes charged, such *as actus* reus and *mens rea*. Defence lawyers also have a crucial role to play in actively challenging judgments and presenting compelling arguments on the essential elements of the crimes charged, seeking appropriate remedies through the appellate process.

11.5. Recommendations

To the Supreme Court:

a) Disseminate practical instructions and, if necessary, judgement templates setting out clear standards for assessing evidence, addressing defence arguments, and establishing individual criminal responsibility.
b) Establish a mechanism for monitoring the quality of judgements in cases related to the January 2022 events, to identify and address any systemic issues or deficiencies in judicial reasoning. Any such mechanism should fully respect the principle of judicial independence.
c) Provide guidance to judges on the interpretation of the criminal offence of participation in mass riots under Article 272 para. 2 of the Criminal Code, specifying the required elements of *actus reus* and *mens rea*, to ensure that courts apply the law consistently and in accordance with the principles of individual criminal responsibility and assessing the defendant's individual actions and intent.

To Judges:

a) Ensure that judgements provide a thorough and well-reasoned analysis of the evidence presented, clearly explaining the court's findings and the basis for its conclusions, as well as establishing a clear nexus between the evidence and the defendant's criminal responsibility.
b) Address and provide reasoned decisions on all key arguments and evidence presented by the defence, demonstrating that the principles of equality of arms and the right to a fair trial have been upheld throughout the proceedings.
c) Exercise independent judicial reasoning in supporting factual descriptions taken from indictments with evidence collected at the trial.
d) Avoid factual descriptions and unnecessary characterizations of events, including verbatim repetition of indictments, that bear no relevance to establish the criminal responsibility of the accused.
e) When assessing criminal responsibility for participation in mass riots under Article 272 of the Criminal Code, provide clear reasoning on how the defendant's individual actions and intent meet the legal requirements for *actus reus* and *mens rea*; conduct a thorough analysis of the defendant's specific actions, intent, and awareness of the crowd's violent actions.

To Defence Lawyers:

a) Actively challenge judgements that fail to provide well-reasoned analysis, address key defence arguments, or establish a clear nexus between the evidence and the defendant's criminal responsibility, and seek appropriate remedies through the appellate process.
b) Present clear and compelling arguments on the elements of *actus reus* and *mens rea* in cases involving participation in mass riots under Article 272 of the Criminal Code, where the court appears to be relying solely on the defendant's presence at the scene of mass riots as sufficient evidence of guilt, without properly assessing the defendant's individual actions and intent.

To Bar Associations:

a) Provide trainings to defence lawyers on how to identify defective judgements, under insufficient legal reasoning, and how to draft appeals to effectively contest it.

12. Defendant's right to an effective remedy

281. The right to a fair trial extends to the appeal process when challenging a conviction or sentence, as it is an integral part of the determination of a criminal charge against an individual.

12.1. International standards

282. 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 overarching principle is rooted in the fundamental notion that the rights guaranteed by the ICCPR must be substantive and not merely theoretical. 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".[195] OSCE participating States committed themselves to uphold "the right of the individual to appeal to executive, legislative, judicial or administrative organs."[196] Annex I, Section 11.1 of the Report provides more detailed overview of the relevant international norms, including the ECHR standards and cases.

12.2. Domestic law

283. According to Article 414 of the CPC, all parties to the criminal proceedings are entitled to submit an appeal against the first instance decision. 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 procedural norms throughout the proceedings.[197] 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

[195] HRC, General Comment 32, para. 48. See also HRC, *Vásquez v Spain*, Communication 701/1996, para. 11.1.
[196] OSCE, 1989 Vienna Document, para 13.9.
[197] CPC, Article 424.

convicted person's situation.[198] Annex I, Section 11.2 provides further overview of the national legislation.

12.3. ODIHR observations

284. In at least fourteen out of the 24 appeals judgments analysed, ODIHR noticed that the second instance courts failed to address the issues raised by the parties in the lower instances decisions.

285. Article 443, para. 4 of the CPC states that if an appeal is rejected due to the absence of new arguments, the appeal judgement only needs to indicate the lack of grounds provided by the CPC for amending or repealing the judicial act.

286. By allowing appellate courts to reject appeals solely on the basis of a lack of new arguments, without requiring a thorough examination of the merits of the case or a clear articulation of the legal reasoning, this provision may encourage a formalistic approach to appellate review.

287. Article 443, para. 4 may not be the sole cause of the observed court practices: in some of the observed cases the court did not even allow the parties to present their arguments or rejected the defence arguments as "unfounded", not as "repetitive" of arguments already raised.

288. In the **Mamai** case, the Appeal Court did not assess the defence's arguments, simply deferring to the first instance court's decision without an independent analysis. The Appeal Court also rejected the defence's request to examine new evidence on the mere ground that the first instance court had already denied a similar request. Similarly, in the **Kurdzhiyev** case, the Appeal Court ruled that the defence's arguments were unfounded without providing any reasoning for this conclusion. In the **Zhakypbaev** case, the Appeal Court only reviewed and commented on some arguments raised in the defence's appeal, but failed to address others. The court also denied reviewing new evidence submitted by the defence and declined to re-evaluate the merits of the case without providing an explanation.

289. By avoiding addressing the defence's arguments and re- evaluating the findings of the lower courts, the Appeal Courts rendered the initial decisions virtually unchallengeable, substantially limiting the defence's ability to meaningfully contest the lower courts' verdicts.

290. In other cases, ODIHR also observed a formalistic approach to judicial review by the Appeal Courts, which issued written decisions immediately after a single appeal hearing, which sometimes were very brief, only lasting for several minutes.[199]

[198] 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).

[199] In this case, the appeal hearing was online and lasted 15-20 minutes; in another case, the appeal hearing was formalistic and lasted 17 minutes, including the announcement of the decision. In a different case, monitors observed appeal hearings of only 5 minutes; similar issue was monitored in two other cases formalistic appellate proceedings were observed in eleven other cases.

291. For instance, in the **Khamit** case, the appeal hearing was conducted online via WhatsApp and lasted only approximately 20 minutes. Immediately after this brief hearing, the Appellate Court upheld the decision of the first instance court without any reasoning. The short duration of the hearing raised concerns about the thoroughness and effectiveness of the appellate review process.[200] In the **Denishev** case, the appeal proceedings did not involve any discussion of the case or the grounds for appeal raised by the defence. Similarly, in the **Valiyev** case, the appeal judgement neglected to substantively consider or review several grounds raised by the defence in their written appeal and during the oral hearing. The appellate court merely stated that the first instance court had not violated any legal norms, without providing detailed analysis or reasoning for this conclusion.

12.4. Conclusions

292. This Chapter highlights practices and shortcomings affecting negatively the accused's right to an effective remedy, as well as appearance of prejudice in favour of guilty verdicts. It is essential that the appellate process entails a substantive, and not merely formalistic, review by a second instance court, against potential miscarriages of justice, which may require revision of legislative amendments and/or practices.

12.5. Recommendations

To the Legislature:

a) Amend Article 443, para. 4 of the CPC to require appellate courts to provide comprehensive and well-reasoned judgements, even when rejecting arguments raised on first instance.
b) Introduce legal provisions that mandate appellate courts to address all substantive arguments raised by the parties in their appeals, providing detailed analysis and reasoning for their conclusions.

To the Supreme Court:

a) Issue guidelines clarifying the standards for effective appellate review, emphasising the importance of substantive analysis, independent reasoning, and addressing all relevant arguments raised by the parties.
b) Provide training to appellate court judges on the proper conduct of appellate proceedings, focusing on the need for thorough and well-reasoned judgements, substantive review of the merits of the case, and addressing all key arguments raised by the parties.

To Appellate Court Judges:

a) Conduct a thorough and substantive review of the merits of each case, examining the evidence, the lower court's decision, and the arguments raised by the parties in their appeals.

[200] Similar approach was monitored in the appellate proceedings in three cases. In two other cases, the proceedings also included the announcement of the texts of the complaints, however, without a discussion.

b) Provide comprehensive and well-reasoned judgements that address all substantive arguments raised by the parties, clearly articulating the legal reasoning and the grounds for the court's decision.
c) Avoid relying on formalistic interpretations of Article 443 para. 4 of the CPC, such as merely stating that the lower court did not violate any legal norms.
d) Allocate sufficient time for appellate hearings to ensure a thorough examination of the case and the parties' arguments, and refrain from making decisions that appear to be pre-determined or hastily reached.
e) Independently assess the evidence and the lower court's findings, and provide clear reasoning when rejecting arguments or evidence presented by the parties.

13. Victims' right to an effective remedy

293. ODIHR's mandate to monitor January 2022-related criminal trials for compliance with international fair trial standards includes examining the state's obligations regarding criminal prosecutions and compensation for victims of serious human rights violations.

294. The right to a fair trial, including the right to an effective remedy for victims, is intrinsically linked to the effective protection of other human rights and is essential for ensuring accountability for past abuses.

295. The right to an effective remedy for victims of serious human rights violations is key to a number of international human rights instruments,[201] including the Universal Declaration of Human Rights,[202] the CAT,[203] the ICCPR,[204] the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power[205] and the 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.[206]

296. OSCE participating States have a long-standing commitment to "ensure that law enforcement personnel, when enforcing public order, […] use ways and means commensurate with the circumstances, which will not exceed the needs of enforcement" and that "law enforcement acts are subject to judicial control, that law enforcement personnel are held accountable for such acts, and that due compensation may be sought, according to domestic law, by the victims of acts found to be in violation of the above commitments."[207]

[201] See, for example, UDHR, Article 8; ICCPR, Article 2 para. 3; CAT, Article 14; UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, para. 4.
[202] UDHR, Articles 5 and 8.
[203] CAT, Article 14.
[204] ICCPR, Article 2, para. 3.
[205] UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, principles 4 and 5.
[206] 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, principles 7, 8, 9.
[207] OSCE, Moscow document, 1991, commitment 21.1 and 21.2.

13.1. Criminal prosecutions of human rights violations

13.1.1. International standards

297. The right to an effective remedy, established *inter alia* by Article 2, para. 3 of the ICCPR, has been interpreted to include the obligation to investigate all allegations of violations "promptly, thoroughly and effectively through independent and impartial bodies."[208] In particular, they must investigate violations recognized as criminal and bring to justice those who are responsible.[209] 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, which must be investigated promptly and impartially.[210]

298. 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".[211] Furthermore, the UN Committee against Torture stated that "Each State Party shall ensure that its competent authorities proceed to a 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."[212] Finally, 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.[213] They have also committed to inquire into all alleged cases of torture and to prosecute offenders.[214] Annex I, Section 11.1.1 of the Report offers detailed overview of the relevant international norms.

13.1.2. Domestic legal framework

299. 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". Article 83 of the Constitution defines responsibility to investigate and prosecute violations of these fundamental rights which lies with the Prosecutor's Office,[215] which also has the duty to protect and restore rights and freedoms of all citizens.[216] The Constitution also prohibits torture, violence or other cruel or degrading treatment or

[208] HRC, General Comment No. 31, para. 15.
[209] 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.
[210] HRC, General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment), 10 March 1992, para. 14.
[211] HRC, General comment No. 36: Article 6 (Right to life), 3 September 2019.
[212] 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."
[213] OSCE, Copenhagen Document, 1990, Commitment 16.1.
[214] OSCE, Budapest Final Document, 1994, Commitment no. 20.; OSCE, Decision No. 12/05 on Upholding Human Rights and the Rule of Law in Criminal Justice Systems.
[215] Law on the Prosecutor's Office, 30 June 2017, No. 81-VI, Article 1.
[216] *Ibid.*, Article 4.

punishment.[217] The Criminal Code of Kazakhstan contains relevant provisions and definitions guaranteeing right to life and liberty, [218] as well as norms defining aggravating circumstances for murder, along with cruelty and endangering public safety.[219]

300. Annex I, Section 11.1.2 provides further detailed overview of the national legislation, including of the Articles 450 and 451 of the Criminal Code and Normative Ruling of the Supreme Court No 6 of 2005 clarifying the scope these articles, Articles 146 and 147, as well as of the legislative amendments enacted in late 2022.[220] It also reflects on important sub-laws, decrees and regulations, such as electronic form for documenting traces of injuries and psychological traumas,[221] and requiring documenting all signs of bodily injury as a result of torture using the Istanbul Protocol standards.[222]

13.1.3. ODIHR observations

Prosecutions for violations of the right to life

301. ODIHR monitored potential violations of the rights of victims of the January 2022. While undertaking this monitoring, ODIHR was unable to identify many criminal cases on violations of the right to live. As already mentioned, 238 individuals lost their lives during the January 2022 events. It is unclear if this figure includes civilians that were detained in relation to the unrest in January 2022 and who died as a consequence of torture.[223]

302. According to the Prosecutor General of Kazakhstan, 19 of the 238 persons who lost their life during the January 2022 events were law enforcement officers, including police officers, servicemen and cadets of the National Guard.[224] The remaining 219 victims (over 90 per cent) were civilians. On 16 August 2022 Kazakhstan's Prosecutor General reportedly stated that "a comprehensive investigation is being carried out to determine the circumstances of their deaths" and that "200 criminal cases linked to their deaths" were under investigation.[225]

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[217] Constitution, Article 17 para. 2.
[218] 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.
[219] CC, Article 99 para 2 (5), (6), (15).
[220] CPC, Article 193, para. 1, subpara. 12-1, as amended by Law No 157-VII.
[221] 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.
[222] 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).
[223] The initial official number of such victims was six, then raised to eight.
[224] Prosecutor General's public statement to the Parliament, 5 January 2023.
[225] The Prosecutor General, as reported in the media, also published a list with names of the 238 victims.

303. ODIHR was able to identify, and monitor, four cases where victims lost their lives and where the charges involved murder or "excess of power" (leading to death). In one case, charges involved a civilian who was prosecuted for killing another civilian who assaulted a bank where the defendant worked. According to the official data provided by the Supreme Court of Kazakhstan, there are no cases involving government officials charged with the criminal offence of murder in relation to the January 2022 events. In addition, ODIHR monitored three cases involving members of the military accused of killing one or more civilians. However, in these cases, the indictment qualified the defendants' conduct as, "exceeding authority which led to grave consequences."[226]

304. According to official data provided by the Supreme Court of Kazakhstan, as of 31 December 2023 there are three additional January 2022-related cases involving defendants charged with excess of powers or official authorities[227] and five involving defendants charged with exceeding authority.[228] These trials were not monitored by ODIHR. The overall number of trials related to the killings that occurred in January 2022 is disproportionately low compared to the overall figure of civilians that lost their lives during the events.

305. ODIHR recalls that the Supreme Court's 2005 Normative Ruling no. 6, states that when an individual dies as a result of a military person's actions, the conduct must be qualified as *both* exceeding authority *and* murder.[229] Qualifying such cases as only exceeding authority may fail to encompass the gravity of the alleged conduct.

306. In one of these monitored cases (**Yeginbayev)**, involving the killing of three civilians the evidence presented during the trial indicated that multiple soldiers fired at the civilian vehicle. However, only one soldier faced prosecution, while the others were merely called as witnesses. The commanding officers, who had issued the orders to shoot, testified that they merely followed directives applicable to state of emergency and accompanying anti-terrorist measures.[230] It is unclear whether there was further investigation into the lawfulness of the order, and the related criminal responsibility of those who gave and executed it. It also remains unclear why only one individual was prosecuted while the others were not.

307. ODIHR notes that, when providing additional quantitative data on the civilians who lost their life during the January 2022 events, the Prosecutor General of Kazakhstan categorised them as follows: "67 were recognized as attackers, that is, suspected of participating in mass riots; 142 are violators of the state of emergency and anti-terrorist operation; 4 died while committing other crimes."[231] However, these categories do not automatically imply that the use of lethal force against these individuals was lawful, necessary, or free from criminal liability.[232]

[226] CC, Article 451.
[227] CC, Article 362.
[228] CC, Article 451.
[229] Supreme Court, 2005 Normative Ruling No. 6 On judicial practice related to adjudication of military criminal offences, para. 11.
[230] See Radio Azattyq, "Tokayev said that he ordered the security forces to shoot 'without warning to kill'", 7 January 2022.
[231] Prosecutor General's public statement to the Parliament, 5 January 2023.
[232] Participating in mass riots or violating a state of emergency does not, in and of itself, justify the use of lethal force by law enforcement officers. On 5 January 2023, the Prosecutor General also added that 41 of the deceased

Prosecutions for violation of the prohibition of torture and other cruel, inhuman or degrading treatment

308. Regarding investigations into allegations of torture and other cruel, inhuman or degrading treatment, in the immediate aftermath of the events, officials of the General Prosecutor's Office of Kazakhstan and of the Ministry of Internal Affairs stated 148 complaints had been received about the use of unlawful methods of investigation and abuse of power.[233] The General Prosecutor's Office of Kazakhstan also acknowledged the torture techniques used, which included subjection to hot irons by investigators during interrogations.[234]

309. Kazakh civil organizations collected a substantial number of complaints and testimony by citizens claiming to be survivors of torture or other ill-treatment at the hands of Kazakh authorities. For instance, the Coalition Against Torture[235] documented 172 cases of alleged torture, while claiming that many more victims did not file a complaint against their abusers or made an agreement in exchange for reduction of charges brought in relation to their alleged participation in the protests.[236]

310. In July 2022, a coalition of international civil society organizations, including Amnesty International and Human Rights Watch, joined by the World Organisation against Torture (OMCT), called on Kazakhstan to establish a fully independent investigation.[237] On 31 January 2023, a joint report by the OMCT and several non-governmental partners,[238] presented concerns about the widespread use of torture and ill-treatment in relation to people involved in the January 2022 events.

311. The widespread practice of subjecting defendants to coercion or maltreatment during detention was also reported by members and representatives of the Almaty Bar Association.[239]

312. In response to these allegations, Kazakh authorities launched investigations. As early as 5 February 2022 officials of the General Prosecutor's Office of Kazakhstan and of the Ministry of Internal Affairs stated that 105 criminal files were opened into cases of alleged torture and other ill-treatment by State officials.[240] However, in an update on the progress of the investigations, in April 2022, the General Prosecutor's Office and of the Ministry

civilians had been "previously convicted for some criminal offences" – a circumstance that is manifestly irrelevant to whether or not their killing was lawful.

[233] See press release of the Ministry of Foreign Affairs of the Republic of Kazakhstan, 5 February 2022.

[234] Cfr. Astana Times, "Prosecutor General's Office Discloses New Facts From Investigation Into January Events, Provides Proof of Criminal Organization of Attacks, 21 June 2022, and Radio Free Europe, "Kazakh Authorities Raise Death Toll From January Unrest To 238", 16 August 2022.

[235] Coalition against torture, press statement of 18 July 2022.

[236] Central Asian Bureau for Analytical Reporting, "Kazakhstan: Post-Riot Show Trials", 10 August 2022.

[237] Human Rights Watch and other civil society organisations, "Kazakhstan: Joint Statement on January 2022 events", 29 July 2022.

[238] World Organisation against Torture (OMCT), International Partnership for Human Rights (IPHR), Kazakhstan International Bureau for Human Rights and the Rule of Law (KIBHR), and Kazakhstan's NGO Coalition against Torture (NGO Coalition), "We don't even cry anymore" – Torture, ill-treatment and impunity in Kazakhstan in connection with the 'Bloody January' events".

[239] During interviews with ODIHR, they claimed that this practice, which persisted even after the cessation of the state of emergency prompted by the events in January 2022, is employed to elicit admissions of guilt from their clients or to have them implicate other individuals in criminal activities.

[240] See Ministry of Foreign Affairs of the Republic of Kazakhstan, "Update on Investigation into Kazakhstan's Tragic January, Alleged Rights Violations", 5 February 2022.

of Internal Affairs did not mention cases of torture or ill-treatment,[241] and neither did the official statistics on investigation progress released on the same occasion.[242] The Commissioner for Human Rights of the Republic of Kazakhstan reportedly stated that six detained civilians died as a result of torture and that, at some point, there were 200 open investigations into claims of abuse.[243]

313. In his address to the Parliament on 5 January 2023, the Prosecutor General stated that as many as 329 criminal cases have been initiated based on citizens' allegations of torture.[244] On 22 December 2022, the Prosecutor General's Office had allegedly announced that investigations were "nearing completion" suggesting few new cases should be expected.[245]

314. However, throughout the monitoring period covered by ODIHR, the number of prosecutions remained low. Data on ongoing trials disseminated by the Supreme Court, suggest that between November 2022 and 31 December 2023 there were only ten cases against 36 defendants charged with torture.[246] Therefore, over 95 per cent of the investigations allegedly opened into cases of torture did not result in criminal prosecution.

315. Since ODIHR's monitoring did not include an analysis of pre-trial stages of criminal proceedings, ODIHR is not in a position to present findings as to the reasons why most of these investigations have not resulted in criminal charges and proceedings.

316. In the **Sultanbekov** case, involving charges of participating in mass riots, the defendant extensively testified about having been tortured, ill-treated and subjected to other violations of his rights during his arrest and detention. However, the judge did not deem it necessary to fathom the events by asking additional questions; on the contrary, he repeatedly cut the defendant's answers short. At a subsequent hearing, a witness also testified that he saw when the defendant was tortured. Another witness described in detail the torture he and the defendant were subjected to; he also reported that the police officers congratulated them on surviving the injuries. A number of other witnesses, including women, testified in great detail about their torture when arrested and/or detained after the January 2022 events, providing very vivid details about their treatment and the threats they received to falsely incriminate the defendant. In the **Zhakypbaev** case, the defendants were charged with torturing one civilian. However, the evidence presented at trial indicated that at least three other officers were present at the crime scene when the victim was tortured. These officers allegedly failed to report the crime or take action to prevent it, but no charges for inaction in service were brought against them. Moreover, on 28 March, 2023, a witness testified about being tortured alongside the victim. Despite this revelation of an additional victim, the Prosecutor did not undertake action to expand the charges to include this person.

[241] See Ministry of Foreign Affairs of the Republic of Kazakhstan, "Update by Law Enforcement on Investigation into Kazakhstan's Tragic January: Events are Becoming Clearer", 11 April 2022.
[242] See Government of the Republic of Kazakhstan, "Summary of the latest information and statistics on investigation into January's unrest in Kazakhstan", 11 April 2022.
[243] See Eurasianet, "Kazakhstan: Prosecutors confirm at least six tortured to death in custody", 23 February 2022.
[244] The full recording of the Prosecutor General's public statement on 5 January 2023.
[245] Astana Times, "January Events Investigation Nears Completion as Prosecutor General's Office Submits New Reports", 23 December 2022.
[246] ODIHR monitored six of these cases, involving 25 defendants.

317. In the **Azanbayev** case, involving police officers charged with torture that caused the death of a civilian detainee, at the hearing held on 2 June 2023, the judge instructed a witness, a police commander, to state that he lacked knowledge regarding the detainee's death. Throughout multiple hearings, the judge exhibited a pattern of interrupting witnesses, specifically police officers, before they could fully complete their responses on these circumstances, thus interfering and influencing the witness statements. On 12 June 2023, the court abruptly disconnected a witness who was providing online testimony concerning detainee torture by police.

318. ODIHR, however, also monitored a positive example of the opposite approach in the **Bekbau** case, the representative of a deceased defendant reported that medical examinations confirmed the cause of death as torture, noting multiple injuries including six broken ribs. This contradicted the initial court finding, which attributed the defendant's death to being shot during protests. Following these allegations, the Appeal Court and the prosecutor held to undertake actions to shed light into the death circumstances, scheduling expert testimonies, demonstrating a response to serious allegations of torture. This example proves the system's capacity, under the current legal framework, to fathom and address torture claims that were previously ignored.

319. When it comes to the hierarchical position of government officials charged with serious human rights violations, ODIHR noted that during the reporting period there were three criminal cases against ten mid- or high-ranking defendants from within military or police structures, for ordering, endorsing, authorizing, or failing to prevent or punish the commission of grave human rights violations such as killings or torture during the January 2022 events.[247]

320. Limiting prosecutions to those identified direct perpetrators with little or no supervisory authority may lead to more straightforward cases; however, this approach appears to fall short of providing full accountability for the January 2022 events.

321. ODIHR notes that the Amnesty Law may have a detrimental impact on the impunity gap for grave crimes committed during the January 2022 events. While torture is explicitly excluded from the crimes that can be amnestied, other forms of ill-treatment are not, such as certain forms of Intentional infliction of grievous bodily harm,[248] Intentional infliction of average-gravity harm to health,[249] Infliction of grievous bodily harm upon use of excessive force in self-defence[250] and Infliction of grievous bodily harm during detention of a person who committed a crime.[251]

[247] These include prison directors and military and police chiefs, who may have failed to discharge their official duties such as being present at the workplace during a time of extreme emergency, ensuring that video recordings are made available, that all detainees admitted to prison are logged, that medical screenings are carried out, or that medical care is provided. In such cases, even though the investigation could not establish the identity of those who committed the criminal acts, it would have seemed possible to investigate and prosecute those in supervisory positions.
[248] CC, Article 106 para. 1 and 2.
[249] CC, Article 107.
[250] CC, Article 112.
[251] CC, Article 113.

13.1.4 Conclusions

322. In light of publicly available information, from the government of Kazakhstan,[252] media,[253] and civil society organizations [254] regarding serious human rights violations, committed during the January 2022 events, multiple international organizations, requested an independent investigation into the alleged use of lethal force against protesters.[255] To ensure accountability and uphold the right to an effective remedy for the victims and their families, all allegation of lethal force by law enforcement officers must be thoroughly investigated and subjected to judicial scrutiny to determine whether it was necessary, proportionate, and justified.

323. While acknowledging positive examples of the justice system's response to the human rights violations, ODIHR observed stark disparity between the high number of civilian deaths, widespread allegations of torture and ill-treatment and the low number of prosecutions for these killings. The qualification of charges in cases involving civilian deaths, does not reflect the gravity of the alleged offences, or creates an impression of lack of effective investigation in the chain of command.

13.2. Compensation for victims of human rights violations

13.2.1. International standards

324. International legal standards call on States to create an adequate national mechanism for victims that provides them with fair and appropriate compensation.[256] 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.[257] 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.[258] 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, prosecuted or

[252] On 16 March 2022, the President of Kazakhstan acknowledged that law enforcement officers had used prohibited methods of interrogation, including torture, against detained civilians. The General Prosecutor's Office of Kazakhstan during his address to Parliament on 5 January 2023 also acknowledged some of the torture techniques used.
[253] See for instance Radio Liberty, "Full Chronicle of the January 2022 events", January 2022.
[254] Documentation Center of the Human Rights Alliance for the defence of Fundamental Rights, "Shoot to kill", 6 May 2023; Joint NGO Submission to the 76th Session of the United Nations Committee Against Torture on Kazakhstan, 21 March 2023; Human Rights Watch, Preliminary report on the January 2022 events, 31 January 2022; Human Rights Watch, "Kazakhstan: Protesters Arbitrarily Arrested, Beaten – End Abuses, Interference with Lawyers; Investigate Torture Allegations", 1 February 2022; Human Rights Alliance for Fundamental Rights, Report on the Anniversary of the "Bloody January", 16 January 2023.

[256] 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.
[257] See, for example, European Commission, Strengthening Victims' Rights: From Compensation to Reparation. For a New EU Victims' Rights Strategy 2020-2025, 2019, p 17.
[258] 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.

convicted";[259] furthermore, "the victim's claim for reparation should not be dependent on the conclusion of a criminal proceeding". 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."[260]

13.2.2. Domestic Legal Framework

325. Under the CPC, a victim of a criminal offence, including torture, has the right to seek compensation from the perpetrator of that criminal offence.[261] Such compensation will be ordered by the relevant court and can cover both physical and moral harm.[262] 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).[263] 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. Victims can also seek 'full compensation' from the offender through a separate civil proceeding.

13.2.3. ODIHR observations

Court-awarded compensation

326. ODIHR's analysis of the cases involving compensation to victims of the January 2022 events revealed inconsistencies in the amounts awarded and a lack of clear reasoning behind the determination of these amounts.

327. For instance, in a monitored case involving the death of the victim as a result of torture, the court sentenced the defendants to pay the victim's wife and five children approximately EUR 6,500 each (a total amount of EUR 40,000 divided between the defendants). In another case which included similar circumstances, each sibling was awarded EUR 3,000. In a third case, the court sentenced the defendants to pay to both the wife and brother of the deceased victim EUR 15,000 each, although the widow of the deceased was left in sole custody of underaged children. In a fourth monitored case, the court awarded a mere EUR 2,000 as moral damage compensation to the family of the deceased victim, which was claimed by the brother on behalf of the victim's widow and underage children. None of the judgments provides any reasoning as to the criteria used for determining the compensation amounts. In two monitored cases involving torture survivors, defendants were sentenced to pay EUR 1,500 and EUR 3,000 as damages to the victim. Although the court cited legal provisions and principles governing the adjudication of moral damages claims in criminal proceedings, it failed to provide a well-reasoned decision on the determination of the compensation amounts, merely stating that the awarded amounts were considered just and adequate in the particular cases.

[259] UN Committee against Torture, General comment No. 3, para. 3.
[260] OSCE, Istanbul Document 1999, Commitment 21.
[261] CPC, Article 34 para. 2 and Articles 38-39.
[262] 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".
[263] Law No. 131-VI On the Victims' Compensation Fund, 10 January 2018.

328. While it is positive that the court considered and granted the compensations in these cases, ODIHR notes that no publicly available, comprehensive guideline on amounts of compensation exists, which may have resulted in divergency in approach. Judges interviewed by ODIHR confirmed that there are no guidelines on how to calculate compensation. A Supreme Court's Normative Ruling No 7 of 2015 provides some general guidelines, but no precise criteria for the determination of the compensation to be awarded.[264]

Compensation under the Law on Victim's Compensation Fund (LVCF)

329. The LVCF introduced significant positive changes to the situation of crime victims to obtain compensation in Kazakhstan, making victims' rights enforceable and, commendably, providing them with a clear legal basis to seek monetary compensation from the State. This includes victims of any criminal acts, including survivors of torture or other violent crimes.

330. At the same time, ODIHR observed several weaknesses in how the victims' compensation scheme functioned in practice in relation to compensation for crimes committed during the January 2022 events

331. Crime victims do not appear to have an active role in, let alone ownership of, the process. Reportedly, it is the same investigating authority that, after recognizing a person as a victim, will instruct them how to seek monetary compensation from the LVCF. If the investigating authority believes there are no grounds for compensation, they will not inform victims of the possibility.

332. The responsibility for the administration of the Fund under the LVCF rests entirely with the prosecution authority, with no external oversight.[265] This raises issues regarding the independence and ability make impartial decisions, particularly in cases involving the responsibility of State officials.[266]

333. Experiences from jurisdictions in other OSCE participating States show that an independent and impartial body administering the national compensation scheme ensures that the rules are interpreted and applied in a more uniform manner and increases fairness, accountability and predictability.

334. Further steps taken by OSCE participating States to make decision-making processes more transparent and accessible include publishing details of awarded compensations,[267] developing a user guide for applicants,[268] and allowing applicants to appeal a decision on compensation before a court to examine whether authorities have decided according to national law, both on criteria for awarding compensation and the fairness of the awarded amount.

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[264] Supreme Court of the Republic of Kazakhstan, Normative Ruling No. 7, "On the application by the courts of legislation on compensation for moral damage", 27 November 2015.
[265] LVCF, Articles 4, 8(5), (7)(5); Order of the Acting Prosecutor General of 13 July 2020 No. 87 "On authorised persons to make decisions on compensation to victims", Articles 1, 2.
[266] See, for example, UN Committee against Torture, General comment no. 3, para. 25.
[267] For example, in the form of an annual report. For the United Kingdom (England and Wales): Victims Commissioner (2023), 'Annual reports'.
[268] For example, about how to report a crime, a victim's entitlements, how to appeal a compensation decision. For England and Wales, Victims Commissioner, 'What to expect from the justice system'.

335. ODIHR monitoring identified a lack of clarity on how the applications for compensation under the LVCF are processed and how they are decided. The LVCF grants authorities considerable discretion in deciding upon compensation claims due to ambiguous language and imprecise formulations when defining eligibility restrictions.[269] This lack of specific criteria may result in inconsistent decisions regarding compensation under the LVCF.

336. ODIHR observed that victims who are public officials have been recognized per se as victims entitled to compensation for damages suffered in relation to the January 2022 events,[270] while some civilian victims of the January 2022 events were not recognized as such for various reasons, including termination of criminal proceedings because the offender could not be identified, lack of a guilty verdict, or commission of a criminal offence by the victim claiming compensation.

337. ODIHR recalls that a victim-centred approach requires that the process of seeking state-funded compensation under the LVCF be conducted regardless of whether an offender is identified or convicted. While the LVCF does not require the criminal conviction of a defendant, it does require that the person is recognized as a victim in a criminal proceeding. Other national jurisdictions in the OSCE region allow for compensation to crime victims even if the offenders are unknown, cannot be prosecuted or punished.[271]

338. ODIHR observed that the amount of compensation awarded to victims, particularly to victims of torture, under the LVCF appears inadequate to provide an effective redress. Pay-outs under the LVCF are based on 'monthly calculation indices', using maximum awards of compensation.[272] The amounts of compensation for victims of torture range from 91,890 tenge (approx. 200 EUR) for 'minimal' and 'moderate' harm to 122,520 tenge (approx. 250 EUR) for serious harm, and 153,150 tenge (approx. 300 EUR) for a victim's death. By law, applications for compensation should be processed within two months and there is a three-year time limit to apply for compensation.

339. The amounts currently foreseen in the LVCF, based on 'monthly calculation indices',[273] appear to be symbolic rather than effective; moreover, they do not specify how the severity of injuries is assessed to calculate an award, which in any case, even in its highest amount, appears to be manifestly insufficient.

340. Lastly, it appears from the LVCF that monetary compensation is the only available measure.[274] However, monetary compensation alone may not be sufficient redress for

[269] See e.g. LVCF, Article 8 para. 7, no. 1), 3) and 5). Applications may be rejected for several reasons, including 'absence of the grounds stipulated' in the LVCF, the applicant having submitted 'unreliable documents' or having her/his participation as victim in the criminal process being 'terminated'.
[270] Rules for compensation for damage caused to health and property of a law enforcement officer, civil protection authority, state courier service of the Republic of Kazakhstan, as well as damage caused to health and property of family members and close relatives of a law enforcement officer, civil protection authority, state courier service of the Republic of Kazakhstan in connection with in the performance of their official duties, Decree No 1024 of the Government of the Republic of Kazakhstan of 19 December 2022.
[271] UN Committee against Torture, General comment no. 3, paras. 26 and 38. See also European Convention on the Compensation of Victims of Violent Crimes, 1983, Article 2 para. 1, lett. b) and para. 2. 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, principle 17.
[272] LVCF, Article 7.
[273] LVCF, Article 7.
[274] See LVCF, Article 1 para. 3 and 4, Article 11 para. 1 and 2.

healing the trauma victims, particularly victims of torture.[275] International legal instruments call on States to opt for a broader definition of 'compensation' that also covers non-monetary compensation, including treatment and rehabilitation for physical and psychological injuries.[276] The UN Voluntary Fund for Victims of Torture, for example, moved away from monetary compensation, preferring to fund CSOs that provide 'psychological, medical, legal, humanitarian, social, vocational assistance' or other forms of support to victims of torture and their dependants.[277] ODIHR has no information that any victim rehabilitation programme, including psychological help, was ever established or is planned to be established.

13.2.4 Conclusions

341. While being a positive initiative, the compensation mechanisms for victims, in practice demonstrates shortcomings, such as lack of consistency and clear reasoning in court case-law, opaque processes with Victim Compensation Fund, broad discretionary powers, and inadequate payouts. Furthermore, the requirement for victims to return compensation if perpetrators are amnestied contradicts international standards and undermines the purpose of redress.

13.3. Recommendations

To the Legislature:

a) Revise Law on the Victim Compensation Fund to:
   - establish clear and objective criteria for determining compensation amounts, taking into account factors such as the severity of the harm suffered, the impact on the victim's life, and the need for ongoing support and rehabilitation.
   - remove the requirement for victims to return compensation if the offender is granted amnesty, ensuring that victims' rights to redress are not undermined by decisions unrelated to the offender's guilt or responsibility.
   - expand the definition of compensation to include non-monetary measures, such as access to psychological support, medical treatment, and rehabilitation services for victims, particularly those who have suffered torture or other serious human rights violations.

b) Consider establishing independent investigation bodies, such as a specialised prosecution office mandated to investigate all cases of torture and ill-treatment.

To the Supreme Court:

a) Provide guidance to judges on the proper application of the law in cases involving allegations of torture and other ill-treatment, emphasizing the importance of thoroughly investigating such claims and excluding any evidence obtained through coercion or maltreatment.

b) Monitor the outcomes of cases related to the January 2022 events and take appropriate measures to address any systemic issues or deficiencies in the administration of justice, while also taking measures to ensure judicial independence.

[275] See for example, UN Committee against Torture, General comment no. 3, para. 9.
[276] CoE, Recommendation Rec (2006) 8 of the Committee of Ministers to member states on assistance to crime victims, 14 June 2006, Article 8 para. 6; UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, principle 14.
[277] UN Voluntary Fund for Victims of Torture, Mission Statement, para. 3.

c) Issue guidelines or a Normative Ruling providing clear and comprehensive criteria for courts to determine compensation amounts in cases related to serious human rights violations, ensuring consistency and fairness in the compensation granted to victims.
d) Provide guidelines to judges on the importance of providing well-reasoned decisions when determining compensation amounts, taking into account factors such as the severity of the harm suffered, the impact on the victim's life, and the need for ongoing support and rehabilitation.

To the Prosecutor General's Office:

a) Ensure that prosecutors conduct thorough, impartial, and effective investigations into all allegations of violations of the right to life and the prohibition of torture and other cruel, inhuman, or degrading treatment during the January 2022 events.
b) Ensure that investigations into cases of torture and other ill-treatment are not prematurely closed due to a lack of direct evidence against perpetrators, and explore all avenues for gathering evidence, including the responsibility of superior officers who may have failed to prevent or punish such acts.
c) Implement stricter protocols for investigating torture allegations and handling potentially tainted evidence. Develop comprehensive training programs for prosecutors on international standards related to the prohibition of torture and the presumption of innocence, and introduce mechanisms to hold prosecutors accountable for failures in these areas.
d) Prosecute all individuals, including high-ranking officials, suspected of ordering, endorsing, authorising, or failing to prevent or punish the commission of grave human rights violations during the January 2022 events.
e) Provide regular public updates on the progress and outcomes of investigations and prosecutions related to the January 2022 events, ensuring transparency and accountability in the process.
f) Ensure that all victims, regardless of their status as civilians or public officials, are informed of their right to seek compensation under the LVCF and are provided with the necessary support and assistance to navigate the application process.
g) Refrain from making a guilty verdict a precondition for victims to seek compensation from the state fund, in line with the provisions of the LVCF and international standards on victims' rights to redress.

To the Ministry of Justice:

a) Develop and implement a comprehensive victim rehabilitation program, including access to psychological support, medical treatment, and other forms of assistance, to address the needs of victims of torture and other serious human rights violations.

To Civil Society Organizations:

a) Monitor the implementation of the LVCF and other compensation mechanisms for victims of the January 2022 events and other serious human rights violations, documenting any inconsistencies, gaps, or barriers to access.
b) Provide support and assistance to victims in navigating the compensation application process, including legal advice, psychological support, and referrals to other relevant services.
c) Engage in public awareness campaigns to inform victims of their rights to compensation and other forms of redress, and to promote a victim-centred approach to justice and accountability.