



**PRELIMINARY LEGAL ADVICE to KICK
KAZAKHSTAN REPRESSION (JAN. 2022): VIOLATIONS, CRIMES and LEGAL
AVENUES**

Excerpts, section 3

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1. INTRODUCTION

This document presents preliminary analysis on the violations of international law committed by Kazakhstan authorities in the context of the protests of January 2022 and legal avenues to pursue accountability in response.

Section 2 provides background facts regarding the events of January 2022 and responses to date, based on publicly available information, and broader contextual points of relevance to possible litigation and advocacy. Section 3 sets out relevant international obligations binding on Kazakhstan and violations that appear to have been committed based on the reported facts. Section 4 explains available mechanisms to respond to those violations. It includes requirements to access them, some key features of the procedure followed by each, with some preliminary conclusions on feasibility, strengths and weaknesses.

3. APPLICABLE LAW, VIOLATIONS AND CRIMES

3.1. INTERFERENCE WITH FREEDOM OF ASSEMBLY, EXPRESSION AND PROTEST

3.1.1. DISRUPTION OF PROTESTS

Kazakhstan is bound by the International Covenant on Civil and Political Rights (ICCPR or the Covenant)⁸¹, which it ratified on the 24th January 2006.⁸² Kazakhstan is also a party to the Optional Protocol to the ICCPR,⁸³ by which it recognises the Competence of the UN Human Rights Committee (UNHCR) to receive individual complaints from victims of violations of the rights protected by the Covenant.

Article 21 of the Covenant protects the right to peaceful assembly, while article 19 protects the right to freedom of expression. Together these rights constitute “the very foundation of a system of a participatory governance based on democracy, human rights, the rule of law and pluralism”.⁸⁴ The rights are not absolute (unlike e.g. the prohibition on torture, below) and can be restricted by the state, but only where certain conditions are met. These do not appear to be present in this case, suggesting violations.

Restrictions on these rights must be provided for in clear law and pursue a ‘legitimate aim,’ such as ‘national security or public safety, public order (*ordre public*)...’⁸⁵ They must therefore have a compelling justification.⁸⁶ If restrictions in fact seek to stifle expression of political opposition to the government,⁸⁷ or sanction participants or organisers,⁸⁸ they are unlawful.

Often more significant in practice is the requirement that an interference with the rights must be strictly necessary and proportionate. This must be narrowly interpreted,⁸⁹ and based on a differentiated or individualized assessment of necessity based on the conduct of particular participants, in context. Thus “blanket restrictions on peaceful assemblies are presumptively disproportionate”.⁹⁰

The right to *peaceful assembly* is protected, and violence may (or indeed must) be prevented by the state. Thus dispersal of an assembly may be resorted to “if the assembly as such is no longer peaceful, or if there is clear evidence of an imminent threat of serious violence that cannot be

⁸¹ International Covenant on Civil and Political Rights (1966): https://treaties.un.org/doc/Treaties/1976/03/19760323%2006-17%20AM/Ch_IV_04.pdf

⁸² List of States Parties: https://treaties.un.org/Pages/ViewDetails.aspx?chapter=4&clang=en&mtmsg_no=IV-4&src=IND

⁸³ Optional Protocol to the ICCPR (1966): https://treaties.un.org/doc/Treaties/1976/03/19760323%2007-37%20AM/Ch_IV_5p.pdf

List of States Parties: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtmsg_no=IV-5&chapter=4&clang=en

⁸⁴ UNHRC General Comment No. 37 (GC 37), para 1: https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fGC%2f37&Lang=en

⁸⁵ Art 21 ICCPR; GC 37 Para 36.

⁸⁶ GC 37 Para 8

⁸⁷ GC 37 Para 49.

⁸⁸ GC 37 Para 23.

⁸⁹ GC 37 Para 8.

⁹⁰ GC 37 Para 38.

reasonably addressed by more proportionate measures”.⁹¹ However, according to the UN Human Rights Committee (UNHRC), assemblies must be presumed to be peaceful unless or until proven otherwise. Moreover, it is important to note that where some protesters act violently this does not transform the nature of the protest as a whole; the UNHRC explained that *“isolated acts of violence by some participants should not be attributed to others, to the organizers or to the assembly as such. Thus, some participants in an assembly may be covered by article 21, while others in the same assembly are not”*.⁹²

It is also relevant that the state of emergency led to a blanket prohibition of mass gatherings, which appears on its face to be disproportionate.⁹³

In particular, the disproportionate use of force is a violation of Article 21. Use of force may be necessary in exceptional circumstances during riots or acts of violence during protest. However “any use of force must comply with the fundamental principles of legality, necessity, proportionality, precaution and non-discrimination”.⁹⁴

- According to the UNHRC, firearms “must never be used simply to disperse an assembly” and their use “must be limited to targeted individuals in circumstances in which it is strictly necessary to confront an imminent threat or death or serious injury”.⁹⁵
- Security forces “are obliged to exhaust non-violent means and to give prior warning”.⁹⁶
- Only the minimum force necessary to achieve a legitimate end may be used, and once any such imperative need for the use of force has passed, force is impermissible.⁹⁷
- As far as possible, force should only be directed against a specific individual or group engaged in or threatening violence.⁹⁸
- The type of weapons and the manner in which they are engaged is also relevant. For example, “it is never lawful to fire indiscriminately or to use firearms in fully automatic

mode when policing an assembly”.⁹⁹ When it comes to “less-lethal weapons”, like tear gas, they “should be used only as a measure of last resort, following a verbal warning, and with adequate opportunity given for assembly participants to disperse”.¹⁰⁰

- The UNHRC specific notes that *orders* to use “all necessary force”, that give unrestricted powers to security officers, are not covered by the Covenant.¹⁰¹

Several aspects of the facts set out above point to the interference as ‘disproportionate’ in this case, and therefore unlawful. These include: the timing of the disruption of protest (peaceful

⁹¹ GC 37 Para 85.

⁹² GC 37 Para 17

⁹³ The Astana Times (19 January 2022): <https://astanatimes.com/2022/01/kazakhstan-ends-state-of-emergency-counter-terrorist-operation-continues/> ; EU Parliament Resolution on the situation in Kazakhstan (20 January 2022) (2022/2505(RPS)): https://www.europarl.europa.eu/doceo/document/TA-9-2022-0012_EN.html

⁹⁴ GC 37 Para 78.

⁹⁵ GC 37 Para 88.

⁹⁶ GC 37 Para 78.

⁹⁷ GC 37 Para 79.

⁹⁸ GC 37 Para 86.

⁹⁹ GC 37 Para 88.

¹⁰⁰ GC 37 Para 87.

¹⁰¹ GC 37 Para 79.

demonstrations in Almaty began to be disrupted on 4 January, before any violent act by rioters had taken place); the excessive use of force (see below), the sheer numbers of troops operationalized (as estimated, more than 2000 foreign troops alongside domestic);¹⁰² the range and indiscriminate nature of weapons used from the outset (even on 5 January, teargas canisters and stun grenades engulfed a mostly peaceful crowd). The use of detention, criminalization and of course lethal force are all violations in their own right (see below), but they are onerous forms of interferences with the freedom of protest and require serious justification by the state. In context, they make clear the ‘disproportionate’ nature of the force in this case.¹⁰³

3.1.2. INTERNET SHUTDOWN

As the internet plays an integral role in organising, participating in and monitoring assemblies,¹⁰⁴ blocking the internet may also violate article 21.¹⁰⁵ The UNHRC has explicitly expressed that States must not “block or hinder Internet connectivity in relation to peaceful assemblies”.¹⁰⁶ Internet blocking interferes with other rights, from free expression and access to information, to potentially access to basic services, and the ability to share information regarding violations in real time. Monitoring assemblies is an essential part of the right to freedom of assembly, and “even if an assembly is declared unlawful or is dispersed, that does not terminate the right to monitor”.¹⁰⁷

The internet shutdown in Kazakhstan lasted for five days.¹⁰⁸ In addition to preventing the organisation of demonstrations, it hindered the broadcasting of audiovisual material evidencing of the use of force by the security forces.

-Conclusion: the actions of the Kazakh authorities appear to amount to violations of articles 19 and 21 ICCPR, giving rise to several potential actions set out in the next section.

3.2. LETHAL FORCE AND THE RIGHT TO LIFE

Article 6 ICCPR prohibits the ‘arbitrary’ deprivation of life at all times, even “public emergency threatening the life of the nation.”¹⁰⁹ States obligations to protect the right to life under article 6 ICCPR have been made spelled out by the UNHRC recently in General Comment 36.¹¹⁰

¹⁰² BBC (10 January 2022): <https://www.bbc.com/news/explainers-59894266>

¹⁰³ HRW (26 January 2022): <https://www.hrw.org/news/2022/01/26/kazakhstan-killings-excessive-use-force-almaty>

¹⁰⁴ GC 37 Para 10.

¹⁰⁵ GC 37 Para 34.

¹⁰⁶ GC 37 Para 34.

¹⁰⁷ GC 37 para 30.

¹⁰⁸ BBC News (10 January 2022): <https://www.bbc.com/news/world-asia-59927267>

¹⁰⁹ Art 4 ICCPR The Astana Times (19 January 2022): <https://astanatimes.com/2022/01/kazakhstan-ends-state-of-emergency-counter-terrorist-operation-continues/>; EU Parliament Resolution on the situation in Kazakhstan (20 January 2022) (2022/2505(RPS)): https://www.europarl.europa.eu/doceo/document/TA-9-2022-0012_EN.html

¹¹⁰ UNHRC, General Comment no. 36 (GC 36), para. 12: https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fGC%2f36&Lang=en: prohibits the arbitrary deprivation of life. The notion of “arbitrariness”, includes elements of “inappropriateness, injustice, lack of predictability, and due process of law, as well as elements of reasonableness, necessity of proportionality”

The UNHRC has explained that “the deprivation of life of individuals through acts or omissions that violate provisions of the Covenant other than article 6 is, as a rule, arbitrary in nature. This includes, for example, the use of force resulting in the death of demonstrators exercising their right of freedom of assembly”.¹¹¹ The strictest necessity, and imminence of threats to life or serious injury, would be required to justify resort to ‘potentially lethal force.’¹¹²

In addition, states have ‘positive obligations’ to *prevent* loss of life and ensure lethal force is not used; this relates to instructions given, the planning and implementation of operations, training and arming of state officials, as well as the subsequent investigation where loss of life ensues.

The available evidence suggests these benchmarks were not met in the present case. Factors pointing to a strong claim of disproportionate use of force, of relevance to violations of the right to life, include the following:

- the sheer numbers of persons killed (even according to official records by the Kazakhstan authorities 225 persons were killed during the January disturbances, and others in detention (see below).¹¹³
- the absence of a clear link to imminent threats to life by those individuals (according to HRW, “security forces at the president’s residence did not face imminent threats to their lives that would have justified resorting to lethal force during both attempts to enter the compound”).¹¹⁴
- the fact that so many deceased victims in Kazakhstan have wounds in vital organs such as the head or the chest appear to indicate shoot to kill,¹¹⁵ suggest the duty to minimize damage and injury, and respect and preserve human life were not respected.¹¹⁶

- the apparent lack of warnings by security forces before opening fire on several occasions at crowds conformed by both rioters and peaceful protesters, and endorsed by Toakayev.¹¹⁷
- the weapons used, their indiscriminate nature and use (tear gas and stun grenades are 'less lethal weapons' and later at Republic square reports suggest machine guns were used).¹¹⁸
- the orders given and public statements made by the president at the time, and since then, provide strong evidence of a failure to meet the duty of care to prevent and minimize loss of life. This includes remarkable reports that on 7 January President

¹¹¹ GC 36 para 17.

¹¹² Ibid para 12: "the use of potentially lethal force for law enforcement purposes is an extreme measure, which should be resorted to only when strictly necessary in order to protect life or prevent serious injury from an imminent threat"

¹¹³ "According to Kazakhstan authorities, at least 225 people were killed" in HRW (9 February 2022): <https://www.hrw.org/news/2022/02/09/kazakhstan-set-independent-inquiry-january-events>

¹¹⁴ Ibid.

¹¹⁵ See specific examples of victims shot in the head or chest in: Radio Azattyk (15 January 2022) (in Russian): <https://www.sibreal.org/a/semi-uchastnikov-protesta-v-kazahstane-nahodyat-ih-za-reshetkoy-i-v-morgah/31654918.html>

¹¹⁶ UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (1990) para 4(b): <https://www.ohchr.org/en/professionalinterest/pages/useofforceandfirearms.aspx>

¹¹⁷ HRW (26 January 2022)

¹¹⁸ Ibid.

Tokayev stated in a televised speech that he had given the order to shoot to kill without warning, which if verified is a significant smoking gun as to violations of the duty to protect life, whatever had happened next.¹¹⁹ On 11 January, UN human rights experts expressed their profound concern that President Tokayev gave such order to security forces of opening fire with lethal force against protesters whom he described as "bandits and terrorists". The UN experts emphasised that "the use of lethal force must be used solely in self-defence and when all other means have been exhausted, including non-lethal force".¹²⁰

- The government's labelling of protesters as 'terrorists', 'foreign terrorist fighters' and 'extremists' preceded the apparent targeting of protesters.¹²¹ UN experts have expressed their concern about the labelling of protesters as terrorists as "a way to use Kazakhstan's overly broad terrorism legislation that allows for the use of force, including a 'shoot to kill' policy, against any individual determined to be a 'terrorist'".¹²²

-Conclusion: the actions by the Kazakh authorities appear to amount to serious violations of article 6 ICCPR in conjunction with article 21 ICCPR. For further information about available procedures to challenge the rights violations, or crimes that may have been committed, see section 3 below.

3.3. DETENTION AND FAIR TRIAL

Responses to violations to the rights to liberty and fair trial, may involve ongoing violations,

some of which may yet increase in frequency or gravity of violations.

3.3.1. ARBITRARY DEPRIVATION OF LIBERTY?

Article 9 ICCPR guarantees the right to liberty and security, according to which “no one shall be subjected to arbitrary arrest or detention.”¹²³ According to the UNHCR core elements of article 9 and 14 are absolute, applicable even in situations of emergency (and cannot be derogated under article 4 ICCPR in time of a public emergency threatening the life of the nation).¹²⁴ An

¹¹⁹ Official Website of the President of the Republic of Kazakhstan (7 January 2022): <https://www.akorda.kz/en/president-kassym-jomart-tokayevs-address-to-the-people-of-kazakhstan-801221>; HRW (26 January 2022). ““I have given orders to law enforcement agencies and the army to, where necessary, open fire without warning.”

¹²⁰ OHCHR (11 January 2022): <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=28019&LangID=E>

¹²¹ HRW (26 January 2022)

¹²² OHCHR (11 January 2022): <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=28019&LangID=E>; see above on Kyrgyz musician dubbed an FTF and the purged officials in the aftermath of the protests dubbed extremist.

¹²³ Article 9(1) ICCPR

¹²⁴ UNHRC General Comment No. 35 (GC 35), para 66: https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR%2fGC%2f35&Lang=en : The fundamental guarantee against arbitrary detention is non-derogable, insofar as even situations covered by article 4 cannot justify a deprivation of liberty that is unreasonable or unnecessary under the circumstances.

arrest or detention¹²⁵ will be arbitrary if a) it does not have a valid legal basis and b) if procedural safeguards (such as being given reasons for detention, access to a court to challenge lawfulness and legal representation of choice), are not respected. More broadly, arbitrariness takes into account “elements of inappropriateness, injustice, lack of predictability and due process of law, as well as elements of reasonableness, necessity and proportionality”.¹²⁶

Valid Basis for Detention? Detention for participating in a protest is plainly impermissible. The UNHRC has repeatedly established that the arrest or detention as punishment for the legitimate exercise of rights such as freedom of expression or freedom of assembly is per se arbitrary.¹²⁷ Likewise, it notes “where criminal or administrative sanctions are imposed on organizers or participants in a peaceful assembly for their unlawful conduct, such sanctions must be proportionate, non-discriminatory in nature and must not be based on ambiguous or overbroadly defined offences, or suppress conduct protected under the Covenant”.¹²⁸ The UNHRC is explicit that the “mere act of organizing or participating in a peaceful assembly cannot be criminalized under counter-terrorism laws” (as has often been the case globally in recent years).¹²⁹

The UNHRC requires that “any 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”.¹³⁰ Laws such as Kazakhstan’s anti-terror laws are notorious in

their failure to meet standards of legality and clarity, and therefore provide a dubious basis for detention, or indeed for criminal accountability.¹³¹

Those detained for the purpose of criminal trial (in principle a valid reason), must be distinguished from those detained for broader security reasons or others related to the protests or unrest. The UNHRC has considered that ‘administrative’ or preventive detention - not in contemplation of prosecution on a criminal charge but on security grounds - “presents severe risks of arbitrary deprivation of liberty”.¹³² Such measure can only be taken under “the most exceptional circumstances”, where for example there was “a present, direct and imperative

¹²⁵ Basically any deprivation of liberty: “arrest” refers to any apprehension of a person that commences a deprivation of liberty, and the term “detention” refers to the deprivation of liberty that begins with the arrest and continues in time from apprehension until release” GC 35 para 13.

¹²⁶ GC 35 para 12.

¹²⁷ GC 35 para 17

¹²⁸ GC 37 para 67

¹²⁹ GC 37 para 68

¹³⁰ GC 35 para 22

¹³¹ On assembly law see: HRW (28 May 2020) <https://www.hrw.org/news/2020/05/28/kazakhstans-reformed-protest-law-hardly-improvement> . On anti terror law see: UNHRC, ‘Concluding observations on the second periodic report of Kazakhstan’ (2016), CCPR/C/KAZ/CO/2. Para 13: https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR/C/KAZ/O/2&Lang=En

¹³² GC 35 para 15

threat” justifying its use.¹³³ Moreover, detention must not last longer than absolutely necessary and the procedural guarantees provided in Article 9 must be respected in all cases.¹³⁴

In the scenario in question, evidence suggests mass detention went far beyond what was strictly necessary on security grounds. Reports show that during and after the protests, wounded protesters were arrested while they were being treated in the hospital.¹³⁵ According to local media, already on 4 January, one hundred peaceful protesters were arrested in Almaty.¹³⁶ Some activists were allegedly arrested even before they could join the protests, and some claim to have been arrested at their homes or at their workplace.¹³⁷

Where individuals are detained pursuant to criminal process, this is valid so far as the criminal law itself meets the requirements of legality, and the trial process is not flagrantly unfair (fair trial below). Unless there are compelling reasons not to, detainees should be released on bail pending a fair criminal trial (below).¹³⁸

Procedural Safeguards? The UNHRC notes “anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release”.¹³⁹ Procedural safeguards that States are obliged to guarantee under article 9 include being given reasons for arrest or detention, prompt and regular review by an independent and impartial court, access to independent legal advice (preferably selected by the detainee), and “disclosure to the detainee of, at least, the essence of the evidence on which the decision is taken”.¹⁴⁰ A key

safeguard applicable at all times is access to a lawyer upon detention; commentators note this has been systematically denied in the current context.¹⁴¹

Some of the victims interviewed by HRW claim to have been held in police custody for up to one week without being provided any explanation for their detention, as required by IHRL.¹⁴² Several victims have claimed to be held in detention for days and even interrogated without being granted access to lawyers of their own choosing. Similarly, Kazakh lawyers reported to HRW to have been denied access to their clients while in detention for periods longer than one week, during which it was nearly impossible to get any information about the detainees.¹⁴³ This was

¹³³ GC 35 para 15

¹³⁴ GC 35 para 15; See multiple opinions by the UNWGAD, e.g. Erzhan Elshibayev v. Kazakhstan (Op. no. 5/2021):

https://www.ohchr.org/Documents/Issues/Detention/Opinions/Session90/A_HRC_WGAD_2021_5.docx

¹³⁵ Radio Azattyk (15 January 2022) (in Russian): <https://www.sibreal.org/a/semi-uchastnikov-protesta-v-kazahstane-nahodyat-ih-za-reshetkoy-i-v-morgah/31654918.html>

¹³⁶ Radio Azattyk (4 January 2022) (in Russian): <https://rus.azattyq.org/a/31639265.html>

¹³⁷ HRW (1 February 2022): <https://www.hrw.org/news/2022/02/01/kazakhstan-protesters-arbitrarily-arrested-beaten>

¹³⁸ GC 35 para 38.

¹³⁹ Article 9(3) ICCPR

¹⁴⁰ GC 35 para 15

¹⁴¹ HRW (1 February 2022); Republican Bar Association (10 January 2022): http://advokatura.kz/zayavlenie-respublikanskoj-kollegii-advokatov-3/?fbclid=IwAR3EzCtSVY5ekIV_NnmfqmQvKZWd3L_IltBDdfI3c9rswGrthtGPrP6NtBY

¹⁴² HRW (1 February 2022)

¹⁴³ HRW (1 February 2022)

also reported by the Republican Bar Association on January 10.¹⁴⁴ According to reports by media and civil society, hundreds people participating in January's protests in Kazakhstan have allegedly been subject to arbitrary detention.¹⁴⁵ According to local sources, some of them remain in detention.¹⁴⁶

3.3.2. FAIR TRIAL

As stated above, on 12 February, Kazakhstan's Prosecutor General Office announced that 3.024 criminal cases were being investigated, including 177 cases of riots and acts of terrorism that had been investigated by an interdepartmental investigation team.¹⁴⁷ By then, a total of 779 suspects were held in custody.¹⁴⁸ According to reports received by HRW, people were interrogated for hours in police stations then were taken into online hearings with administrative courts and sentenced for allegedly violation Kazakhstan's peaceful assembly law (under art 488 of the Administrative Code).¹⁴⁹

Several additional human rights violations may arise in relation to the trials underway and planned. First, prosecution for impermissibly vague crimes such as 'terrorism' or others related to assembly, may not meet the criteria in article 15 of clarity specificity and foreseeability of criminal law; in one of our recent cases, *Garzon v Spain* (2021), the UNHRC found the "conviction was arbitrary and unpredictable, since it was not based on provisions explicit, clear and precise enough which define with precision the prohibited conduct".¹⁵⁰

Second, criminal law must be applied in line with the basic principles upon the legitimacy of criminal law depend. These include: presumption of innocence; prosecution should be used as a 'last resort', and criminal law strictly interpreted, with punishment based only on evidence of *individual* culpability. The sheer scale of those being prosecuted raises doubts that the criminal law is being applied in accordance with these basic principles.

Third, Article 14 ICCPR protects the right to fair trial guarantees in criminal proceedings, including the right of the accused to have time and facilities to prepare a defense, to be represented promptly upon detention by a counsel of their own choosing, to confront the evidence against them, to have inadmissible evidence (eg that is obtained through torture) excluded, and to be tried before a fair and impartial tribunal.¹⁵¹ If these are not met the trial would be inherently unfair. While we as yet lack many facts as to the basis and nature of the criminal processes, what we do know about the terror law, and terrorism processes in the

¹⁴⁴ Republican Bar Association (10 January 2022): http://advokatura.kz/zayavlenie-respublikanskoj-kollegii-advokatov-3/?fbclid=IwAR3EzCtSVY5ekIV_NnmfqmQvKZWd3L_IltBDdfI3c9rswGrthtGPrP6NtBY

¹⁴⁵ HRW (1 February 2022); Vlast (17 January 2022): https://vlast.kz/obsshestvo/48250-zertvy-anvara.html?fbclid=IwAR0YzRpJBbZyj2cpCbZM3sJruF_4qt5qFAHpyJG5tPKmpw3qWwyMJgMMvAw

¹⁴⁶ See e.g. Qantar 2022 list.

¹⁴⁷ Mediazona (12 February 2022) (in Russian): <https://mediazona.ca/news/2022/02/12/170>

¹⁴⁸ Ibid.

¹⁴⁹ HRW (1 February 2022)

¹⁵⁰ See Garzón v. Spain (Comm. No. 2844/2016) (in Spanish): https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR/C/132/D/2844/2016&Lang=en

¹⁵¹ Article 15(3) ICCPR

region, do not bode well. Specific facts include allegations of dozens of the detained have allegedly faced hasty online hearings with court-appointed lawyers.¹⁵² Some facing trial now allege they were tortured into confessing during detention, and such evidence should be absolutely inadmissible (Art 15 UNCAT).

-Conclusion: the actions by the Kazakh authorities appear to amount to violations of article 9 and article 14 ICCPR. Consequently, an individual claim could be issued before the UN Human Rights Committee (UNHRC), to the Human Rights Council and to the UN Working Group on Arbitrary Detention (UNWGAD). For further information about these procedures, see section 3 below. It appears worthwhile to explore the facts and evidence, and ongoing violations, further.

3.4. TORTURE AND ILL-TREATMENT OF DETAINEES

The prohibition of torture is enshrined in article 7 of the ICCPR. According to Article 4 ICCPR, the prohibition of torture cannot be derogated from even in times of public emergency threatening the life of the nation. Kazakhstan is also party to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT).¹⁵³ Kazakhstan became a party to the UNCAT on the 26th August 1998, and recognises the competence of the Committee against Torture to receive individual complaints from victims.¹⁵⁴

Multiple NGOs, including HRW¹⁵⁵ and organisations based in Kazakhstan¹⁵⁶ as well as Kazakh media¹⁵⁷ have documented cases of ill treatment of detainees in Kazakhstan. Allegations include beatings (including with objects like batons and machine guns) to obtain false confessions, electric shocks, and hooding/sensory deprivation of detainees and death threats.

Considered together, and in context, these do appear to rise to the (high) threshold of ‘torture.’ In any event the absolute prohibition applies also to inhuman and degrading treatment or punishment. The prohibition of torture and ill treatment does not only relate to acts that cause physical pain “but also to acts that cause mental suffering to the victim”.¹⁵⁸ Media in Kazakhstan has also reported several deaths in detention,¹⁵⁹ which would entail a violation both of the

¹⁵² HRW (1 February 2022)

¹⁵³ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984): https://treaties.un.org/doc/Treaties/1987/06/19870626%2002-38%20AM/Ch_IV_9p.pdf

¹⁵⁴ List of States Parties: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9&chapter=4&clang=en

¹⁵⁵ HRW (1 February 2022): <https://www.hrw.org/news/2022/02/01/kazakhstan-protesters-arbitrarily-arrested-beaten>

¹⁵⁶ Kazakhstan International Bureau for Human Rights and Rule of Law (KIBHR): <https://bureau.kz/en/>

¹⁵⁷ Radio Azattyk (15 January 2022): <https://www.sibreal.org/a/semi-uchastnikov-protesta-v-kazahstane-nahodyat-ih-za-reshetkoy-i-v-morgah/31654918.html>; Vlastkz (14 February 2022) (in Russian): <https://vlast.kz/novosti/48648-15-ugolovnyh-del-rassleduetsa-po-faktam-gosizmeny-prevysenia-polnomocij-i-popytke-zahvata-vlasti-v-kazahstane.html>

¹⁵⁸ UNHRC General Comment No. 20 (GC 20), para 5: <https://www.refworld.org/docid/453883fb0.html>

¹⁵⁹ Radio Azzatyk (15 January 2022) (in Russian): <https://www.sibreal.org/a/semi-uchastnikov-protesta-v-kazahstane-nahodyat-ih-za-reshetkoy-i-v-morgah/31654918.html>; Azzatyk TV (19 January 2022) (video in Russian): <https://www.youtube.com/watch?v=w3Hb8m7PdJk> ; Silk Road (17 January 2022) (video in Russian): https://www.youtube.com/watch?v=PJlpBUkjiXo&ab_channel=SilkRoad

prohibition of torture and of the right to life. The admissibility of torture evidence would render a trial inherently unfair, and violate states obligations under the UNCAT.¹⁶⁰

As noted above, the duty to investigate follows such allegations. Article 12 of the Convention against Torture establishes that States “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”. On early March, the General Prosecutor’s Office, announced that 203 criminal cases of torture and abuse of power had been filed.¹⁶¹ On March 14, Kazakhstan’s Commissioner for Human Rights announced that 243 criminal cases of torture and abuse of power have been catalogued.¹⁶² However, details of what these ‘investigations’ really entail, against whom, and whether they will ever lead to accountability of the range of high and low level officials remains to be seen.

-Conclusion: while evidence of torture in detention is notoriously difficult to obtain, reports suggest there could in principle be possible to establish that the actions of the Kazakh authorities could amount to violations of article 7 ICCPR, and violations of the UNCAT. Consequently, an individual claim could be issued before the UN Human Rights Committee (UNHRC), to the Human Rights Council, to the Committee against Torture, and to the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Moreover, as noted below, these

violations could potentially be prosecuted under Criminal Law. For further information about these procedures, see section 3 below.

3.5. THE MISSING/DISAPPEARANCE OF PERSONS

Kazakhstan became a party to the International Convention for the Protection of All Persons from Enforced Disappearance (CPED)¹⁶³ on the 27 February 2009.¹⁶⁴ However, it has not yet made a declaration recognising the competence of the Committee for Enforced Disappearances, so no individual complaint to that body is possible.¹⁶⁵ However its obligations under the Convention are relevant to other potential claims before other bodies so they are included here; they are also relevant to the crime against humanity of enforced disappearance noted below.

Under Article 2 of the Convention, “enforced disappearance” is described as “the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the

¹⁶⁰ UNCAT art. 15 ; Othman v UK ECHR, UNCAT General Comment 3.

¹⁶¹ The Astana Times (1 March 2022): <https://astanatimes.com/2022/03/general-prosecutors-office-releases-updates-on-ongoing-investigation-of-january-unrest/> ; Mediazona (28 February 2022) (in Russian): <https://mediazona.ca/news/2022/02/28/pytki>; KazInform (28 February 2022) (in Russian): https://www.inform.kz/ru/genprokuratura-rk-3-502-ugolovnyh-dela-rassleduyut-po-yanvarskim-sobytyam_a3905304 See also detention of police officer for torturing suspect in Nazarbayev monument demolition, in Mediazona (2 March 2022): <https://mediazona.ca/news/2022/03/02/batyrbaev-2>

¹⁶² The Astana Times (14 March 2022): <https://astanatimes.com/2022/03/kazakhstans-commissioner-for-human-rights-explains-how-punishment-for-riots-was-mitigated-where-appropriate/>

¹⁶³ International Convention for the Protection of All Persons from Enforced Disappearance (2007): https://treaties.un.org/doc/Publication/CTC/Ch_IV_16.pdf

¹⁶⁴ List of States parties: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-16&chapter=4&clang=en

¹⁶⁵ Ibid.

State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law”. It is a particularly grave violation, and crime, under international law as it entails the complete removal from the protection of the law, and has implications for families and societies as well as the individual directly targeted.

It is well established in international law that disappearance also *per se* amounts to torture and inhuman treatment of family members, as well as the immediate victim.¹⁶⁶

Following the repression of January 2022, hundreds of people were reported missing in Kazakhstan and official information was not forthcoming from the authorities.¹⁶⁷ Morgues in Almaty were reported to “have a lot of bodies with bullet wounds,” and family members of those disappeared have been visiting the different morgues trying to find their relatives.¹⁶⁸ Several local organisations have kept track of the names of the missing, according to the information provided by their families, and sought to ascertain whether the disappeared are in detention or were killed during the protests (and could be useful for follow up evidence-gathering).¹⁶⁹ By March, many of the ‘missing’ have been reported to be detained, some found dead and others continue to be missing.¹⁷⁰

-Conclusion: if sufficiently proven that persons have been held without their fate being confirmed by the state, this could amount to enforced disappearance. States also have ongoing positive obligations to clarify ‘the truth’ for families and society as a whole, and to investigate and hold to account those responsible, which as noted above does not appear to have been satisfied. Consequently, an individual claim could be issued by victims to the UN Human Rights Committee (UNHRC), the UNCAT, to the Human Rights Council and to the Working Group on Enforced or Involuntary Disappearances (not the Committee on Enforced Disappearances) and in principle, these violations could potentially be prosecuted under Criminal Law. For further information about these procedures, see section 4 below.

3.6. VIOLATIONS AGAINST OTHER GROUPS, INCL. MINORS AND WOMEN

Kazakhstan is party to the Convention on the Rights of the Child (CRC)¹⁷¹ but not party to the Optional Protocol on a communications procedure,¹⁷² in which States recognise the competence

¹⁶⁶ See e.g. OHCHR, Fact Sheet No. 6 (Rev 2) ‘Enforced or Involuntary Disappearances’: <https://www.ohchr.org/Documents/Publications/FactSheet6rev.2en.pdf>

¹⁶⁷ Radio Azattyk (15 January 2022) (in Russian): <https://www.sibreal.org/a/semi-uchastnikov-protesta-v-kazahstane-nahodyat-ih-za-reshetkoy-i-v-morgah/31654918.html>

¹⁶⁸ Ibid.

¹⁶⁹ See Annex 2 for the lists of victims being updated by human rights organisations. Local organisations like Qantar are keeping track of those who disappeared during January events.

¹⁷⁰ Qantar 2022 missing persons list: https://qantar2022.org/index?PersonSearch%5Bfull_name%5D=&PersonSearch%5Bcity_id%5D=&PersonSearch%5Bdate%5D=&PersonSearch%5Bstatus_id%5D=

¹⁷¹ Convention on the Rights of the Child (1989): https://treaties.un.org/doc/Treaties/1990/09/19900902%2003-14%20AM/Ch_IV_11p.pdf List of States Parties: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&clang=en

¹⁷² List of States Parties: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11-d&chapter=4&clang=en

of the Committee on the Rights of the Child.¹⁷³ It is a party to the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and has accepted both the individual complaint procedure and the inquiry procedure under the Optional Protocol.¹⁷⁴

These treaties protect against discrimination and violence against women. Should the facts reveal the relevance of resort to CEDAW, it has an enquiry procedure and a complaint procedure. Therefore it would be advisable to gather more information about potential violations of the rights of women. Because Kazakhstan’s does not recognise the competence of the Committee on the Rights of the Child, an individual claim could not be made there, but it could strengthen claims before the claims discussed in section 3 below.

There are reports of at least two minors being shot dead by the authorities during the protests,¹⁷⁵ and Kazakhstan’s Commissioner for Human Rights has declared that at least 29 minors had been detained and charged with serious crimes (28 of which have already been released on parental bail).¹⁷⁶ These are relevant to other procedures; the minority of the children may also be an aggravating factor in a case concerning violations or criminal responsibility.

If there are allegations of discriminatory intent or impact, this should be considered as it may

give rise to further violations; and to a specific duty to investigate discriminatory intent.¹⁷⁷

3.7. OBLIGATION TO INVESTIGATE

Kazakhstan, as a state party to the ICCPR, has the obligation to investigate the serious alleged violations of human rights including the use of force by the security forces during January's disturbances. The investigation must be meaningful and meet certain criteria: it must be prompt, independent, effective and thorough. UNHRC General Comment 37 establishes that "States have an obligation to investigate effectively, impartially and in a timely manner any allegation or reasonable suspicion of unlawful use of force or other violations by law enforcement officials."¹⁷⁸ Thus, "individual officials responsible for violations must be held accountable under domestic and, where relevant, international law, and effective remedies must be available to

¹⁷³ Optional Protocol to the CRC on a communications procedure (2011): <https://treaties.un.org/doc/Treaties/2011/12/20111219%2003-15%20PM/CTC%204-11d.pdf>

¹⁷⁴ OHCHR, Kazakhstan's ratification status: https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=89&Lang=EN ; Optional Protocol to the CEDAW: <https://www.ohchr.org/EN/ProfessionalInterest/Pages/OPCEDAW.aspx>
¹⁷⁵ See cases of Sultan Kamshybek (12 years old), shot in the head on January 5, and Nurai (15 years old), shot with her family in their car on January 8. In Vlastkz (17 January 2022) (in Russian): https://vlast.kz/obsshestvo/48250-zertvy-anvara.html?fbclid=IwAR0YzRpJBbZyj2cpCbZM3sJruF_4qt5qFAHpyJG5tPKmpw3qWwyMJgMMvAw ; Radio Azattyk (15 January 2022): <https://www.sibreal.org/a/semi-uchastnikov-protesta-v-kazahstane-nahodyat-ih-za-reshetkoy-i-v-morgah/31654918.html>

¹⁷⁶ The Astana Times (14 March 2022): <https://astanatimes.com/2022/03/kazakhstans-commissioner-for-human-rights-explains-how-punishment-for-riots-was-mitigated-where-appropriate/>

¹⁷⁷ For a feminist approach on January's events see e.g. interview to activist Zhanar Sekerbayeva by Open Democracy (19 January 2022): <https://www.opendemocracy.net/en/odr/kazakhstan-protests-zhanar-sekerbayeva/>

¹⁷⁸ GC 37 Para 90; See also GC 36 para. 13.

victims"¹⁷⁹. in principle where individuals are identified they should be prosecuted and subject to penalties proportionate with the gravity of the crimes. It should include material and intellectual authors of the wrongs.

In international proceedings, the onus falls on the state that claims it has an effective investigation to demonstrate this.

-Conclusion: the lack of investigation by the Kazakh authorities could amount to violations of the ICCPR, and treaties prohibiting torture and enforced disappearance. Consequently, an individual claim could be issued before the UN Human Rights Committee (UNHRC), to the Human Rights Council and to the Special Rapporteur on the rights to freedom of peaceful assembly and of association and the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism for such failure. For further information about these procedures, see section 4 below. However, an assessment of whether current investigation(s) (referred to above) meet these criteria requires further research.

3.8. POTENTIAL VIOLATIONS COMMITTED BY OTHER/CSTO STATES

When a State assists another State in breaching an international human rights law rule, the assisting State is considered to be responsible for the breach.¹⁸⁰ Moreover, if CSTO state directly commit violations, eg of the right to life of protesters, their states or personnel are responsible, notwithstanding that the violations arising on another states territory.

The degree of involvement of CSTO troops may require further information. What is noted already is that after President Tokayev's request for help,¹⁸¹ an estimated that 2500 soldiers, mainly from Russia, started arriving in Kazakhstan between 5 January and at least 11 January¹⁸² - the most intense period of violence and alleged abuse.¹⁸³ According to the Statement, the CSTO have suffered "no casualties of personnel, weapons or military equipment", of potential relevance to the degree of resistance they encountered.¹⁸⁴

Among the States Parties to the CSTO¹⁸⁵, the sources consulted indicate that the following States sent troops to Kazakhstan in January: Armenia, Belarus, Kyrgyzstan, Russia and Tajikistan.¹⁸⁶ The legal avenues explored below (such as UNHRC, special procedures or OSCE) could in principle be

¹⁷⁹ GC 37 Para 90.

¹⁸⁰ See ICCPR art 2, Universal Declaration of Human Rights art 30, ARSIWA art 16.

¹⁸¹ HRW (26 January 2022); Al Jazeera (16 January 2022): <https://www.aljazeera.com/opinions/2022/1/16/a-coup-a-counter-coup-and-a-russian-victory-in-kazakhstan>

¹⁸² On 19 January, the CSTO issued a statement informing of the completion of the withdrawal. CSTO (19 January 2022): https://en.odkb-csto.org/news/news_odkb/generalnyy-sekretar-odkb-proinformiroval-glav-gosudarstv-chlenov-odkb-o-zavershenii-vyvoda-mirotvorch/#loaded

¹⁸³ Ibid. BBC (10 January 2022): <https://www.bbc.com/news/explainers-59894266>

¹⁸⁴ Ibid.

¹⁸⁵ Azerbaijan, Uzbekistan and Georgia are parties to the CSTO, but we have not seen indications that their troops were sent to Kazakhstan and have not included, focusing instead on those States which did send troops.

¹⁸⁶ Al Jazeera (16 January 2022): <https://www.aljazeera.com/opinions/2022/1/16/a-coup-a-counter-coup-and-a-russian-victory-in-kazakhstan>

used against all 5 intervening states (see below regarding legal avenues available for these States' responsibility).

3.9. POTENTIAL CRIMES

In addition to human rights violations, some of the actions describe above could also amount to both national offenses and international crimes.

The Kazakhstan's Penal Code classifies as national offenses the acts of murder, torture, illegal imprisonment and illegal interference in demonstrations.¹⁸⁷ These crimes are included in most national criminal laws, which may open up the possibility of transnational prosecution (see below).

Moreover, article 7 of the Rome Statute¹⁸⁸ includes murder, torture and enforce disappearance as crimes against humanity "when committed as part of a widespread of systematic attack directed against any civilian population, with knowledge of the attack".¹⁸⁹ The Rome statute also requires that the acts are "pursuant to or in furtherance of a State or organizational policy to

commit such attack.” Consequently, crimes against humanity carries a high threshold and address crimes of a very serious nature that target the civilian population. While a full investigation would be required to reach any conclusion on this, it is noted that the nature of the widespread, coordinated and multi-faceted attacks on protesters, and dissenters, highlighted in part 1 suggest this threshold may be met. Any individual would need to have knowledge of the attack, and the necessary intent, to be responsible for crimes against humanity.

Although Kazakhstan is not party to the Rome Statute, the prohibition of crimes against humanity is considered a general peremptory norm of general international law (*jus cogens*), i.e. a norm which is universally applicable as it is accepted and recognised by the international community as a whole.¹⁹⁰ Multiple state around the world have these crimes enshrined in national law.

Torture is also a crime under international law, reflected in the Convention against torture ratified by Kazakhstan and almost all other states. Many states also have the possibility to exercise universal jurisdiction over torture as required by the Convention (see Section 4).

Conclusion: The conduct described in this report would most obviously amount to myriad national criminal offenses that could be prosecuted both in Kazakhstan and in the domestic courts of other States, if a sufficient jurisdictional link is proven (section 4 - jurisdiction of national courts). Moreover, torture is an international crime, and acts of murder, torture and

¹⁸⁷ Penal Code of the Republic of Kazakhstan (2014 as amended in 2016) (English version): https://www.legislationline.org/download/id/8260/file/Kazakhstan_CC_2014_2016_en.pdf

¹⁸⁸ Rome Statute of the International Criminal Court (1998): <https://www.icc-cpi.int/resource-library/documents/rs-eng.pdf>

¹⁸⁹ Rome Statute Article 7.

¹⁹⁰ Report by the International Law Commission, UN Doc. A/74/10, Chapter V, para 56: <https://undocs.org/en/A/74/10>

enforce disappearance may well also amount to crimes against humanity under international criminal law when certain criteria are met.

...section 4 and 4 removed only for the purpose of this summary.