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International Covenant on Civil and Political Rights

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Human Rights Committee

Decision adopted by the Committee under the Optional Protocol, concerning communication No. 2726/2016*, **, ***

Communication submitted by:	A.P. (represented by counsel, Leila Ramazanova)
Alleged victim:	S.P.
State party:	Kazakhstan
Date of communication:	5 January 2015 (initial submission)
Document references:	Decision taken pursuant to rule 92 of the Committee's rules of procedure, transmitted to the State party on 12 February 2016 (not issued in document form)
Date of adoption of decision:	29 October 2021
Subject matter:	Inhuman or degrading treatment or punishment; effective investigation
Procedural issue:	Admissibility *ratione temporis*
Substantive issues:	Cruel, inhuman or degrading treatment or punishment
Articles of the Covenant:	6 (1) and 7, read alone and in conjunction with articles 2 (3), 9, 10 (1), 14 (1) and (2) and 26
Article of the Optional Protocol:	1

1. The author of the communication is A.P., a Kazakh national born in 1964, mother of S.P. (deceased). She claims that the State party violated her son's rights under articles 6 (1) and 7, read alone and in conjunction with article 2 (3), article 9, article 10 (1), article 14 (1) and (2), and article 26 of the Covenant. The Optional Protocol entered into force for the State party on 30 September 2009. The author is represented by counsel.

Facts as submitted by the author

2.1 On 25 April 2004 at around 6 a.m., the author's son was arrested by police officers, who wanted to check his identity. At 11.15 a.m. on the same day, he was admitted to an emergency ward in a hospital, escorted by police officers. Mr. P. was examined and

* Adopted by the Committee at its 133rd session (11 October–5 November 2021).

** The following members of the Committee participated in the examination of the communication: Wafaa Ashraf Moharram Bassim, Yadh Ben Achour, Arif Bulkan, Mahjoub El Haiba, Furuya Shuichi, Carlos Gómez Martínez, Marcia V.J. Kran, Duncan Laki Muhumuza, Photini Pazartzis, Vasilka Sancin, José Manuel Santos Pais, Soh Changrok, Kobauyah Tchamdja Kpatcha, Hélène Tigroudja, Imeru Tamerat Yigezu and Gentian Zyberi.

*** A joint opinion by Committee members Arif Bulkan, Marcia V.J. Kran and Hélène Tigroudja (dissenting) is annexed to the present decision.

diagnosed with “head trauma, haematomas on the forehead”. His blood analysis did not reveal any signs of alcohol intoxication.

2.2 On 28 April 2004, the author’s son was charged with “causing great bodily harm” under article 103, paragraph 1, of the Criminal Code of Kazakhstan. On 24 May 2004, Mr. P. submitted a complaint of torture to the police and the prosecutor’s office of the Almalinsky district. He claimed that he had been hit on the head immediately after his detention. On 23 June 2005, Mr. P.’s counsel filed a similar complaint.

2.3 On 18 May 2005, because Mr. P. had previously been diagnosed with schizophrenia, the investigator ordered a psychiatric examination of him. The examination showed that the author’s son was suffering from acute mental illness at the time that the alleged crime had been committed.

2.4 On 6 June 2005, the investigator filed a request with a court to order Mr. P.’s mandatory medical treatment in a psychiatric ward. On 27 July 2005, in a closed session, the Almalinsky district court granted the request. The court exempted the author’s son from criminal liability and ordered his transfer to a psychiatric ward for mandatory treatment. On 1 September 2005, the Almalinsky city court upheld that decision. On 8 May 2007, the Talgar district court decided to continue the author’s treatment, noting that Mr. P. could be a danger to himself and to others if released.

2.5 On 24 September 2007, Mr. P. died at the premises of the psychiatric ward. The death certificate listed “pulmonary embolism and myocardial infarction” as the cause of death. The author requested the hospital to provide her with her son’s medical history prior to his death, as well as the results of the autopsy, but her request was denied.

2.6 On 31 July 2009, at the author’s request, the Talgar district court ordered that Mr. P.’s body be exhumed. Despite this decision, the exhumation was not carried out at that time. The body was exhumed only on 15 January 2013, after numerous decisions to reopen and close the investigation into the exact circumstances of Mr. P.’s death. The exhumation did not identify the cause of Mr. P.’s death owing to the time that had elapsed since he died.

2.7 The author contends that before and after Mr. P.’s death, she and her counsel, acting on her and her son’s behalf, submitted numerous complaints to the prosecutor’s office and the courts. None of these complaints were considered or acted upon. The author therefore contends that she has exhausted all available domestic remedies.

Complaint

3.1 The author claims that her son was ill-treated following his arrest, not provided with safe conditions of detention while in the psychiatric ward and arbitrarily deprived of life, in violation of articles 6 (1) and 7 of the Covenant, read separately and in conjunction with article 2 (3).

3.2 The author argues that the conditions of her son’s detention in the psychiatric ward amounted to a violation of article 10 (1) of the Covenant.

3.3 The author also submits that the national courts, in violation of articles 14 (1) and (2) and 26 of the Covenant, failed to consider the circumstances of the criminal case, but chose to send the author’s son to mandatory treatment, without considering whether he was guilty or not.

State party’s observations on admissibility

4.1 In a note verbale dated 29 March 2016, the State party submitted its observations on the admissibility of the present communication.

4.2 The State party argues that the communication is inadmissible *ratione temporis* as a whole. The State party notes that neither Mr. P. nor his counsel raised any complaints of ill-treatment in the criminal proceedings before the domestic courts. The State party further submits that the documents relevant to the criminal proceedings against Mr. P. were destroyed when the statutory prescribed storage period of three years had expired.

4.3 The State party further indicates that the post-mortem medical examination of 23 October 2007 of the author's son did not reveal any signs of unnatural death. The cause of death was indicated as "pulmonary embolism, acute myocardial infarction". Between 2008 and 2013, several inquiries and medical examinations were carried out, following the author's complaints about the allegedly inadequate medical treatment of her son. The medical report of 11 March 2013 was unable to establish the exact cause of death because of the time that had elapsed. Nonetheless, it confirmed the lack of bodily injuries, alcohol or drugs in the body of the deceased. On 17 April 2013, the national authorities refused to open a criminal investigation into Mr. P.'s death. That decision was upheld by the domestic courts on 24 June and 12 July 2013. The State notes that a preliminary investigation into the alleged ill-treatment of Mr. P. was initiated on 18 March 2016. It also submits that the author and her counsel were informed that they could have access to and examine Mr. P.'s medical file.

4.4 The State party concludes that the author's communication is inadmissible under article 3 of the Covenant and rule 99 (d) and (f) of the Committee's rules of procedure.

Author's comments on the State party's observations on admissibility

5.1 On 31 January 2017, the author submitted her comments on the State party's observations on the admissibility of the communication.

5.2 The author argues that the communication is admissible *ratione temporis*, since the most recent decision not to initiate criminal proceedings into Mr. P.'s death was issued on 17 April 2013. The author notes that the alleged violations of the Covenant are continuing in nature and their consequences continued for over four years after the State party ratified the Optional Protocol.

5.3 The author reiterates that her son's lawyer filed complaints of ill-treatment with the domestic authorities. She also argues that the State party is unable to refute her claims of ill-treatment, as her son's body was exhumed seven years after his death and his criminal case file was destroyed.

State party's additional observations on admissibility and the merits

6.1 In a note verbale dated 7 July 2017, the State party submitted its observations on the admissibility and merits of the present communication. The State party reiterates the facts of the case and its position as to the inadmissibility *ratione temporis* of the communication.

6.2 The State party further notes that on 27 July 2005, the Almalinsky district court duly examined the charges brought against the author's son. It established that on 25 April 2005 Mr. P. assaulted a group of individuals and seriously injured one of them with a knife.

6.3 The State party contests the author's claim that Mr. P. filed a complaint of ill-treatment on 24 May 2004. The relevant domestic authorities have no records of such a complaint or any relevant decisions. Incoming correspondence logs for 2004 and 2005 have been destroyed. On 18 March 2016, the Office of the Prosecutor of the Almaty district initiated an investigation into the alleged ill-treatment of Mr. P. On 18 May 2016, the investigation was discontinued. The State party notes that the author's son did not complain about ill-treatment during the trial hearing and refused to make any statements. At the same time, an investigator in charge of Mr. P.'s case was questioned by the trial court. She stated that Mr. P. intentionally hit his head against the metal door following his arrest.

Author's comments on the State party's additional observations

7. On 6 August 2017, the author submitted her comments on the State party's observations on the admissibility and merits of the communication. She reiterated the facts of the case and her previous statements. In particular, the author argued that her complaints were admissible *ratione temporis*, as the alleged violations were continuous in nature.

Additional observations from the parties

From the State party

8. In a note verbale dated 2 October 2017, the State party reiterated its position with respect to inadmissibility *ratione temporis* of the communication. It further submitted that the author had failed to provide any credible evidence in support of her allegations of ill-treatment. The State party notes that Mr. P. was duly treated in the psychiatric ward and he died of natural causes. It also argues that the author failed to appeal against the decision of 18 May 2016 to discontinue the criminal investigation into her son's death.

From the author

9. On 9 August 2018, the author reiterated her previous position. She noted that while her son's death happened before the Optional Protocol was ratified by the State party, she actively attempted to initiate a criminal investigation up until August 2013. She also argues that the domestic authorities intentionally delayed examination of her son's body and destroyed the relevant documents to conceal his ill-treatment. The author finally states that she only received the decision of 18 May 2016 to discontinue the criminal investigation on 10 July 2017. Moreover, she does not believe it necessary to appeal against that decision, as any investigation would be ineffective due to the considerable amount of time that has elapsed.

Issues and proceedings before the Committee

Considerations of admissibility

10.1 Before considering any claim contained in a communication, the Committee must decide, in accordance with rule 97 of its rules of procedure, whether the case is admissible under the Optional Protocol.

10.2 The Committee has ascertained, as required under article 5 (2) (a) of the Optional Protocol, that the same matter is not being examined under another procedure of international investigation or settlement.

10.3 The Committee notes that the alleged violation of articles 14 (1) and (2) and article 26 of the Covenant concerning the criminal proceedings against the author's son occurred prior to 30 September 2009, when the Optional Protocol entered into force for the State party. The Committee observes that it is precluded, *ratione temporis*, from examining alleged violations of the Covenant which occurred prior to the entry into force of the Optional Protocol for a State party, unless the violations continued after that date or continued to have effects which, in themselves, constitute a violation of the Covenant, or an affirmation of a prior violation.[1] In that regard, the Committee notes the author's claims under article 14 (1) and (2) and article 26 of the Covenant that the national courts failed to consider the circumstances of the criminal case and chose to send the author's son to mandatory treatment without considering whether he was guilty or not. However, the Committee also notes that those domestic proceedings were finalized before the entry into force of the Optional Protocol for the State party and therefore finds these claims inadmissible *ratione temporis* under article 1 of the Optional Protocol.

10.4 The Committee takes note of the author's claims under articles 6 (1), 7, 9 and 10 (1) of the Covenant concerning her son's ill-treatment following his arrest and the inadequate conditions of detention and medical care in the psychiatric ward, which resulted in his death. The Committee notes the State party's submission that the acts occurred prior to the entry into force of the Optional Protocol for the State party and therefore fall outside the Committee's competence *ratione temporis*. The Committee again recalls its jurisprudence according to which alleged violations of the Covenant that occurred before the entry into force of the Optional Protocol for a given State party may only be considered by the Committee if those violations continue after that date or continue to have effects which, in

[1] *M.Z. v. Kazakhstan*, (CCPR/C/119/D/2145/2012), para. 11.3.

themselves, constitute a violation of the Covenant.[2] Also, the Committee may regard an alleged violation as continuing in nature when there exists "affirmation, after the entry into force of the Optional Protocol, by act or by clear implication, of previous violations by the State party".[3] The Committee does not regard isolated acts of ill-treatment as giving rise to a continuous violation of the Covenant, even if such acts have resulted in lengthy consequences extending in time beyond the relevant date for entry into force of the Covenant or the Optional Protocol. Turning to the facts of the present case, the Committee observes that both the alleged ill-treatment and the detention of the author's son's in the psychiatric ward, where he ultimately died in September 2007, occurred before 30 September 2009, when the Optional Protocol entered into force for the State party. Accordingly, the Committee considers that the allegations presented by the author are inadmissible *ratione temporis* under article 1 of the Optional Protocol.

10.5 The Committee finally notes the author's claims under article 2 (3) of the Covenant, invoked in conjunction with articles 6 (1) and 7, which it understands to concern the continuing violation stemming from the failure to duly investigate her son's alleged ill-treatment and death. The Committee reiterates that the events which could have constituted substantive violations of articles 6 (1) and 7 of the Covenant and in respect of which remedies could have been invoked fall outside its competence *ratione temporis*. At the same time, article 2 (3) of the Covenant may give rise in certain circumstances to a continuing obligation to investigate violations that occurred before the entry into force of the Covenant.[4] It remains for the Committee to ascertain whether such circumstances exist in the present case. To do so it considers it necessary to ascertain whether most key investigation steps took place or ought to have taken place before or after the Optional Protocol entered into force for the State party.[5]

10.6 The Committee notes the author's claim that her son was allegedly hit on the head following his arrest in April 2004 and that he brought a complaint of ill-treatment only on 24 May 2004. The State party contests this and argues that neither Mr. P. nor his counsel raised such a complaint in criminal proceedings before the domestic authorities. The Committee further notes the State party's arguments that there are no records of complaints from the events that occurred in 2004 and 2005, and that between 2008 and 2013, several inquiries and medical examinations were carried out and eventually discontinued. The Committee further observes that, regardless of whether the complaint was effectively filed with the competent authorities, they had an obligation to act ex officio on the visible injuries to the author's son. However, the Committee also notes that all key procedural steps ought to have taken place shortly after the alleged incident and therefore years before the Optional Protocol was ratified by the State Party. The Committee notes, in this regard, that while procedural steps were taken after 2009, they were futile from the outset, as all evidence and relevant documents had been destroyed by then, as the author herself notes in her submission. Equally, the Committee considers, with respect to the author's claims about the inadequate conditions and medical care in the psychiatric ward, that only the initial post-mortem medical examinations of Mr P. in 2007 were able to produce any credible results, but they came to the conclusion that Mr. P. had died from natural causes. The Committee notes that the subsequent examinations of the Mr. P.'s remains were unable to provide any new reliable information because of the amount of time that had elapsed since his death. On the basis of the information contained in the file, the Committee is unable, within the specific circumstances of the present case, to conclude that the alleged violations gave rise to a continuing obligation for the State party to investigate after its ratification of the Optional Protocol. The Committee therefore declares this part of the communication inadmissible *ratione temporis* under article 1 of the Optional Protocol.

[2] *Huseynov v. Azerbaijan* (CCPR/C/111/D/2042/2011), para. 6.6.

[3] Ibid.

[4] *K.K. and others v. Russian Federation* (CCPR/C/127/D/2912/2016), para. 6.4.

[5] For a similar approach, see *Mocanu and others v. Romania*, judgment of the Grand Chamber of the European Court of Human Rights, 17 September 2014, para. 206.

11. The Committee therefore decides:

(a) That the communication is inadmissible under article 1 of the Optional Protocol;

(b) That the present decision shall be transmitted to the State party and to the author.

Annex

Joint opinion by Committee members Arif Bulkan, Marcia V.J. Kran and Hélène Tigroudja (dissenting)

1. We regret that we cannot join the majority of the Committee in its conclusion that this communication is inadmissible, specifically in relation to the author's claim under article 6 (1), read alone and in conjunction with article 2 (3), concerning her son's inadequate conditions of detention and medical care in the psychiatric ward, which resulted in his death on 24 September 2007. While the general principle of non-retroactivity of treaties codified by article 29 of the Vienna Convention on the Law of Treaties applies, it is also clear that the temporal jurisdictional bar has certain well-established exceptions. We disagree with the refusal of the majority to apply these exceptions to the present facts, which risks diminishing the obligations of States to investigate ill-treatment and death, especially for persons in situations of vulnerability, such as persons with disabilities.

2. The standard position, often repeated in its Views, where relevant and found to be applicable, is that the Committee is precluded, *ratione temporis*, from examining alleged violations of the Covenant which occurred prior to the entry into force of the Optional Protocol for a State party (the "critical date"). This bar does not apply where a violation continues after the critical date or continues to have effects which, in themselves, constitute a violation of the Covenant, or where there is an affirmation of a prior violation after the entry into force of the Optional Protocol.[1] In the present decision, the majority finds that both the alleged ill-treatment and the detention of the author's son in the psychiatric ward, where he ultimately died in September 2007, occurred prior to the relevant date (see para. 10.4 above). From this, they conclude that the claim is inadmissible *ratione temporis*. Lacking in this analysis is any consideration of whether any of these exceptions applies, and especially whether the State party had a continuous obligation to investigate the alleged ill-treatment and death of the author's son, which occurred while he was in a psychiatric institution.

3. The majority did find as inapplicable a well-established exception to the non-retroactivity principle of the Committee's competence, premised on a continuing, detachable procedural obligation to investigate violations occurring prior to the entry into force of the Covenant. In so deciding, the majority reasons (para. 10.6 above) that all key procedural steps "ought to have taken place shortly after the alleged incident" and certainly "years before" the State party ratified the Optional Protocol in September 2009; where procedural steps were taken after September 2009, these have been deemed futile and disregarded by the majority. The majority analysis is not supported by the facts of this communication. Indeed, they are only able to arrive at an inadmissibility decision by ignoring relevant facts submitted by the author, which are unanswered by the State party, but which bring this communication squarely within the Committee's jurisdiction.

4. On the nature of the violation itself, it is far from clear that the author's son was the victim of a single, isolated act of ill-treatment. In addition to the circumstances of his initial arrest on 25 April 2004, which resulted in him being admitted to a hospital emergency ward later that same day and diagnosed with "head trauma, haematomas on the forehead" (para. 2.1 above), from sometime in 2005 until his death he was mandatorily confined in a psychiatric ward under questionable circumstances. According to the author's complaint, her son was not provided with safe conditions while on the ward. From before his death, she sought redress for this situation but to no avail. After her son's death, the author sought access to his medical history and autopsy report, but her requests were denied and the records kept from her. Nonetheless, the author persisted and from the time of her son's death until 2013, a period beginning from before and lasting until after the critical date, there were "numerous" court decisions to reopen and discontinue the investigation into the exact circumstances of her son's death. In that way, the decision to investigate was frustrated and ultimately stalled

[1] *Huseynov v. Azerbaijan* (CCPR/C/111/D/2042/2011), para. 6.6; *Djahangir oglu Quliyev v Azerbaijan*, (CCPR/C/112/D/1972/2010), para. 8.3.

for more than five years, so that when eventually her son's body was exhumed any proper forensic examination was impossible given the amount of time that had elapsed.

5. As noted above, where an alleged violation occurs before the critical date, the Committee will nonetheless assume jurisdiction if, subsequent to that date, there is an "affirmation" of the prior violation. In the case of *Tyan v. Kazakhstan*, the author was arrested, tried and convicted prior to the entry into force of the Covenant for the State party; after that date, however, his claims of torture were raised in the domestic courts but dismissed in a manner which compounded the prior violation. For that reason, the Committee concluded that it had jurisdiction to consider the allegations, even though they related to events that had occurred prior to the critical date.[2] The justification for this stance is that administrative or judicial decisions after the critical date may bring the communication within the body's jurisdiction because, when those procedures are invoked, the national courts have the opportunity to consider the complaints and thereby "put an end to the alleged violations and potentially provide redress".[3] Their failure to do so is what compounds, or "affirms", the prior violation.[4] That was precisely the situation in this case, where the author repeatedly sought redress on behalf of her son. However, by their decisions between 2009 and 2013, the national authorities, including the courts, even while acknowledging that the death should be investigated, never followed through with action or provided any redress to the author. Since these steps occurred after the critical date, they amount to an affirmation of the prior violation and thus the committee is not precluded from examining the author's allegations.

6. The alternative ground on which admissibility potentially rests is even clearer. The right to life guaranteed in article 6 of the Covenant has been interpreted as including a distinct procedural element, namely to investigate any loss of life that occurs in suspicious circumstances or is otherwise unnatural.[5] In its general comment No. 36 (2018), the Committee states that the duty to investigate must involve measures that are independent, prompt, thorough, effective, credible and transparent, so as "to establish the truth relating to the events leading to the deprivation of life" (para. 28). As developed also by the European Court of Human Rights, the procedural obligation to investigate "has evolved into a separate and autonomous duty", which "can be considered to be a detachable obligation arising out of Article 2 capable of binding the State even when the death took place before the critical date".[6] This does not impose an open-ended obligation on the State party, for the duty to investigate only applies where there is a "genuine connection" between the time of the death in question and the entry into force of the obligation, such as where this period is reasonably short.[7] The State's due diligence obligation is all the more important when the victim of alleged ill-treatment and suspicious death suffers from disabilities, as the author's son did. Such persons are "entitled to specific measures of protection" under article 6 of the Covenant.[8]

7. When assessed against this standard, the facts of this communication point to a continuing obligation to investigate, which remained unfulfilled. The author's son was in the care of the State at the time of his death in 2007. Even before then, the author had been raising questions as to the conditions of his detention. The official version regarding his cause of death was natural causes, yet the author's requests for disclosure of his medical history and the results of the autopsy were denied, without explanation. National authorities acknowledged that something was amiss, with court decisions to exhume and investigate that were made (but not implemented) over a number of years. Notably, in its general comment No. 36 (2018) the Committee stipulates that any investigation into loss of life must be, inter alia, "prompt" and "transparent", and any autopsy should be conducted in the presence of a

[2] *Tyan v. Kazakhstan* (CCPR/C/119/D/2125/2011), para. 8.4. See also *Sviridov v. Kazakhstan* (CCPR/C/120/D/2158/2012), para. 9.4.

[3] *M.L.B. v. Luxembourg* (E/C.12/66/D/20/2017), para. 7.2.

[4] *Yusupova v. Russian Federation* (CCPR/C/114/D/2036/2011), para. 6.6.

[5] See *Zhumabaeva v. Kyrgyzstan* (CCPR/C/102/D/1756/2008 and CCPR/C/102/D/1756/2008/Corr.1).

[6] Case of *Šilih v. Slovenia*, judgment of the Grand Chamber of the European Court of Human Rights, 9 April 2009, para. 159. Article 2 of the European Convention on Human Rights deals with the right to life.

[7] Case of *Mocanu and others v. Romania*, para. 206.

[8] Committee on Human Rights, general comment No. 36 (2018), para. 24.

representative of the victim's relatives (para. 28), requirements that were wholly ignored in the present case. In light of these facts, we disagree with the majority's reasoning that any procedural steps ought to have taken place "years before" the critical date and that those taken thereafter were futile from the outset, as it is inconsistent with the chronology of events and the secrecy maintained around the official version.

8. In addition, the period of time between the death of Mr. P. and the entry into force of the Optional Protocol was fairly short – only two years. During this time, the author persisted in her efforts to secure an investigation, but was constantly frustrated by the national authorities. In July 2009, only two months before the critical date, one court (the Talgar district court) ordered the exhumation of the author's son's body. The failure or refusal to comply with this court order was entirely that of the national authorities and can hardly now be dismissed as an obligation that expired after only two months. The author persisted and we know that thereafter there were "numerous decisions to reopen and close the investigation into the exact circumstances" surrounding the death, (para. 2.6 above) which were only acted upon in 2013. That these steps were possibly futile from the outset was due to the refusal or failure of the authorities to comply with the initial court order. To invoke this now, as the majority does to deny jurisdiction, allows the State party to benefit from its own failures. Given all these facts, it is plain that the State party did not fulfil its obligation to carry out an investigation in the present case. Since that obligation persisted (and was acknowledged) after the critical date, we find that the Committee is not barred *ratione temporis* and does have jurisdiction to consider this communication.

9. We would therefore find this communication admissible and we would also conclude that the author's son's rights under articles 6 (1) of the Covenant were violated, as claimed. The death of the author's son while in the State's care, combined with his previous ill-treatment and the unexplained secrecy as to his cause of death belie the official explanation of natural causes. Because of the stonewalling that occurred from 2007 onwards, however, the truth will forever remain hidden. Given the facts as submitted and considered in the light of the Committee's jurisprudence, and in the absence of relevant explanations from the State party, we would therefore find a violation of the author's son's rights under article 6 (1), read alone and in conjunction with art. 2 (3).