



**International Covenant on  
Civil and Political Rights**

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**Human Rights Committee**

102<sup>nd</sup> session

11 to 29 July 2011

**Views**

**Communication No. 1756/2008**

<u>Submitted by:</u>	Turdukan Zhumbaeva (represented by counsel, Tair Asanov, with the assistance of the Open Society Justice Initiative)
<u>Alleged victim:</u>	The author and her deceased son, Tashkenbaj Moidunov
<u>State Party:</u>	Kyrgyzstan
<u>Date of communication:</u>	4 January 2008 (initial submission)
<u>Document references:</u>	Special Rapporteur's rule 97 decision, transmitted to the State party on 25 January 2008 (not issued in document form)
<u>Date of adoption of Views:</u>	19 July 2011

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\* Made public by decision of the Human Rights Committee.

<i>Subject matter:</i>	Death in police custody
<i>Procedural issue:</i>	N/A
<i>Substantive issues:</i>	Right to life, prohibition of torture, right to an effective remedy
<i>Articles of the Covenant:</i>	2 (3), 6 (1), 7
<i>Articles of the Optional Protocol:</i>	N/A

On 19 July 2011 the Human Rights Committee adopted the annexed text as the Committee's Views under article 5, paragraph 4, of the Optional Protocol in respect of communication No. 1756/2008.

[Annex]

## Annex

### **Views of the Human Rights Committee under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights (102<sup>nd</sup> session)**

concerning

#### **Communication No. 1756/2008\*\***

Submitted by: Turdukan Zhumbaeva (represented by counsel, Tair Asanov, with the assistance of the Open Society Justice Initiative)

Alleged victim: The author and her deceased son, Tashkenbaj Moidunov

State Party: Kyrgyzstan

Date of communication: 4 January 2008 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 19 July 2011,

Having concluded its consideration of communication No. 1756/2008, submitted to the Human Rights Committee on behalf of Mr. Tashkenbaj Moidunov (deceased) and Ms. Turdukan Zhumbaeva, under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, and the State party,

Adopts the following:

#### **Views under article 5, paragraph 4, of the Optional Protocol**

1. The author of the communication, dated 4 January 2008, is Ms. Turdukan Zhumbaeva, a Kyrgyz national. She submits the communication on her own behalf and on behalf of her deceased son, Mr. Tashkenbaj Moidunov, born in 1958. She claims that they are victims of violations by Kyrgyzstan<sup>1</sup> of articles 6, paragraph 1 and 7 read alone and in conjunction with article 2, paragraph 3, of the Covenant. The author is represented by counsel, Mr. Tair Asanov, who is assisted by the Open Society Justice Initiative.

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\*\* The following members of the Committee participated in the examination of the present communication: Mr. Lazhari Bouzid, Ms. Christine Chanet, Mr. Ahmad Amin Fathalla, Mr. Cornelis Flinterman, Mr. Yuji Iwasawa, Ms. Helen Keller, Mr. Rajsoomer Lallah, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Gerald L. Neuman, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabian Omar Salvioli, Mr. Krister Thelin and Ms. Margo Waterval.

<sup>1</sup> The Covenant and the Optional Protocol entered into force for the State party on 7 January 1995.

**Facts as presented by the author**

2.1 On 24 October 2004, Mr. Tashkenbaj Moidunov, the author's son, and his wife were quarrelling on the street, when a police car approached them and requested that they follow them to the Bazakorgon police station for public disturbance. At the police station, the author's son and his wife were questioned separately. According to the testimony by Mr. Moidunov's wife, she was pressured by the police officer to write a complaint against her husband stating that he was threatening her with a knife and saying that he was going to kill her. Being afraid of the police, she wrote the statement. She was released but soon thereafter she was called back to the police station and was asked whether she was aware that her husband had heart problems. When she arrived at the police station, she saw her husband's body lying on the floor.

2.2 An ambulance doctor was called with a message that Mr. Moidunov (the victim) had hanged himself at the police station. In the doctor's testimony dated 18 November 2004, she stated that she carefully examined the victim's neck but didn't observe any traces of a rope. She stated that she noticed red fingers marks on the victim's neck and that she asked whether the man was strangled, to which a police officer replied that the victim seemed to have heart problems. When she inquired as to the reason why it was reported to the ambulance dispatcher that a man had hanged himself, the officer replied that "they all panicked and told the ambulance about hanging".

2.3 A forensic expert conducted a preliminary examination the same day. He stated that the victim did not show any broken bones, scratch or cut wounds. On 25 October 2004, an autopsy was performed by the same forensic expert, who described injuries on the eyebrow, lower lip, and neck and concluded that the death was caused by mechanical asphyxiation by hanging on a soft fabric. Alcohol was found in the victim's blood and urine (3.27% in the blood and 3.49% in the urine). During an interrogation on 25 April 2005, the forensic expert stated that the injuries on the victim's neck could have been caused by any blunt object, including fingers; however that he did not find any strangulation marks on the victim's neck. The investigator asked if the mechanical asphyxiation could have been the result of strangulation, to which the forensic expert replied that the injuries on the neck could have been caused by human finger nails but that histological examination of some neck tissue did not reveal any signs of haemorrhaging, which would have been an indicator of strangulation. He also stated that the thyroid horn fracture could result from the application of force by hand.

2.4 In the first statement dated 24 October 2004, the head inspector of the police station, Mr. Mantybaev, stated that the victim and his wife had been brought in after a quarrel on the street, which continued in the premises of the police station and that the victim was under the influence of alcohol. He stated that the victim's wife wished to file a complaint against her husband and requested that her husband be kept in custody to avoid further contact. The victim, who was sitting in the corridor, suddenly fell on the floor after holding his chest in pain. The first sergeant, Mr. Abdukaimov, made the same statement, except that he said that the victim's wife had witnessed the author's death and thereafter lost consciousness.

2.5 On 9 November 2004, after a preliminary examination of the facts, the deputy prosecutor opened a criminal investigation under article 316 of the Criminal Code (negligent performance of duties). On 17 November 2004, the head inspector of the police station, Mr. Mantybaev, was interrogated and provided a different account of the facts, stating that when he came out of the room after taking the victim's wife's complaint, the victim was no longer sitting in the corridor. After some searching, they found him in the

administrative detention cell having hanged himself with his sport trousers<sup>2</sup>. After performing cardio-pulmonary resuscitation, an ambulance was called. Both the head inspector and the first sergeant had conspired to say that the victim had died of a heart attack and only decided to reveal the truth in the investigation, as they were afraid of the consequences. On 21 December 2004, the victim's wife testified that her husband never wore sport trousers and did not possess any.

2.6 On 16 May 2005, the head inspector of the police station Mr. Mantybaev, was charged with: 1) abuse of office, namely overstepping his official powers resulting in a person's death; 2) forgery while performing official duties and 3) negligence, which inadvertently led to a person's death. He was also charged with a violation of an order by the Ministry of Interior, which obliges a police officer on duty to organize a medical examination of a person who is in a state of intoxication. The forgery charge was based on Mr. Mantybaev's cover-up actions, namely the fact that he wrote in the official registry that the body of the victim was found on the street without traces of a violent death.

2.7 On 21 September 2005, the Suzak District Court found Mr. Mantybaev guilty of negligent performance of duties, which resulted inadvertently in the death of a person under article 316 (2) of the Criminal Code. The other charges were considered not applicable. According to the court, Mr. Mantybaev failed to organize a medical examination of the victim and to take measures to prevent the victim, who was under the influence of alcohol, from committing suicide. Due to the reconciliation between Mr. Mantybaev and the family of the victim, the defendant was exempted from criminal liability.<sup>3</sup> During the court hearing the brother of the victim confirmed having received compensation (30,000 Kyrgyz som, approximately 860 US\$) from the head inspector of the police station, however he insisted that the case be sent for additional investigation, as he believed that the victim was killed by the police officers.

2.8 The author filed an appeal to the Zhalalabad Regional Court. The Regional Court held that the first instance court had failed to evaluate the contradictions between the testimonies of Mr. Mantybaev and other witnesses. It also held that the first instance court when applying the reconciliation procedure, did not take into account, the position of the victim's family members. The Zhalalabad Court reversed the decision of the Suzak District Court and ordered a retrial of the case. This decision was appealed to the Supreme Court by Mr. Mantybaev.

2.9 On 27 December 2006, the Supreme Court quashed the decision of the Zhalalabad Regional Court and upheld the decision of the Suzak District Court. It held that the guilt of the defendant Mr. Mantybaev was established by the first instance court and that his actions were lawfully characterized as negligence. It considered that the author's arguments regarding the deficiencies of the investigation and the existence of evidence indicating a homicide were speculations.

### **The complaint**

3.1 The author submits that the State party is responsible for the death of the victim, who was arbitrarily deprived of his life while in police custody. The author recalls the Committee's jurisprudence, according to which the State party has a special responsibility of care for an individual's life when in custody and that it has to take adequate and

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<sup>2</sup> The term sport trouser is used to describe long underwear that is worn underneath trousers.

<sup>3</sup> Article 66 of the Criminal Code states that: "A person who has committed a crime of small gravity or misdemeanour can be exempt from criminal liability, if he has reconciled with the victim and indemnified inflicted damages."

appropriate measures to protect his/her life.<sup>4</sup> She also recalls the principle of the reversal of the burden of proof in cases of death in custody.<sup>5</sup> The author claims that the victim died in police custody as a result of the use of force by police officers, which was excessive and unnecessary and therefore in violation of article 6, paragraph 1, of the Covenant. The author recalls the autopsy report, in which it is stated that the victim died because of mechanical asphyxiation. During the investigation however, the forensic expert did not provide a conclusive view as to whether this mechanical asphyxiation was a result of hanging or manual strangulation. The author underlines that the victim was in good mental and physical health when he was taken to the police station and that the investigation did not gather any evidence to the contrary. The ambulance doctor who first examined the victim's body had noted that there were red finger marks visible on the victim's neck, which was confirmed by the autopsy report. She notes that these facts officially established by the investigation reveal the most probable explanation of the victim's death by manual strangulation. She also notes that the theory of suicide is not plausible, because the victim's wife had testified that he did not possess any sport trousers and no forensic examination was performed on the sport trousers that were allegedly used. The victim did not suffer from any mental condition making him prone to committing suicide; and in light of the high level of alcohol intoxication, the victim neither had the physical capacity, nor the time, as he was left unobserved for a very short period of time, to commit suicide. She also underlines that the police officers, who are the primary suspects made several efforts to mislead the investigation. They first informed the ambulance that the victim hanged himself, then reported that he had a heart attack, then made an official record that he was found dead on the street and then testified that he hanged himself on his sport trousers.

3.2 The author further claims that the State party failed to provide effective remedies for the victim's death. The author recalls the Committee's jurisprudence, according to which in circumstances that led to the loss of life, a thorough investigation needs to be carried out by an impartial body<sup>6</sup>, that perpetrators need to be brought to justice<sup>7</sup> and that compensation needs to be paid to the victim's family.<sup>8</sup> The author submits that the authorities never investigated the arbitrary killing of the victim but stated in the decree of 9 November 2004 ordering a criminal investigation that a criminal case was opened upon the fact of discovering the victim who hanged himself. The author contends that at that moment, no evidence suggesting the cause of death could have been suicide had been available, because the written statements by the police officers stated that the victim died of a heart attack. It was only on 13 December 2004, when the autopsy report stated that the mechanical asphyxiation could have been caused by hanging. Furthermore, the investigation gave full credit to the police officers' last testimony that the victim had hanged himself and did not take into account the testimonies by the author and the ambulance doctor. The author highlights that the investigation failed to obtain a detailed description of the position the victim's body during the alleged hanging, it failed to conduct a mock hanging reconstructing the act of the alleged suicide, it did not establish the exact timing and

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<sup>4</sup> See communication No. 84/1981, *Barbato et al. v. Uruguay*, Views of 21 October 1982; communication No. 30/1978, *Bleier v. Uruguay*, Views of 29 March 1982.

<sup>5</sup> See communication No. 30/1978, *Bleier v. Uruguay*, Views of 29 March 1982, para. 13.3; communication No. 458/1991, *Mukong v. Cameroon*, Views of 21 July 1994.

<sup>6</sup> See communication No. 540/1993, *Laureano v. Peru*, Views of 25 March 1996; communication No. 449/1991, *Mojica v. Dominican Republic*, Views of 15 July 1994; communication No. 194/1985, *Miango Muiyo v. Zaire*, Views of 27 October 1987; communication No. 181/1984, *Rafael v. Colombia*, Views of 3 November 1989; communication No. 161/1983, *Rubio v. Colombia*, Views of 2 November 1987.

<sup>7</sup> See communication No. 563/1993, *Arellana v. Colombia*, Views of 27 October 1995.

<sup>8</sup> See communication No. 868/1999, *Wilson v. Philippines*, Views of 30 October 2003.

sequence of events, it did not request medical records to establish if the victim had any suicidal tendencies, it also did not order a forensic expertise of the sport trousers, which were allegedly used by the victim to hang himself and it did not locate the cash (6,000 Kyrgyz som, approximately 170 US\$) which, according to the author, the victim carried in his pocket. She submits that the police officers were never investigated for the killing of the victim. Mr. Mantybaev was punished for a far lesser crime of negligent performance of his duties and the police sergeant on duty, Mr. Abdukaimov, was never charged or prosecuted. The author submits that this amounts to a violation of article 2, paragraph 3 read in conjunction with article 6, paragraph 1, of the Covenant.

3.3 The author furthermore claims that the family of the victim never received appropriate compensation for his death. She states that the compensation paid by Mr. Mantybaev was inadequate. The victim's brother received compensation of 30,000 Kyrgyz som in the framework of the procedure of reconciliation before the Suzak District Court. The author explains that according to domestic law, state liability for the unlawful killing of the victim is dependent on the criminal conviction of the police officers acting on behalf of the State and that the two police officers were never charged or convicted for the killing of the victim. She could therefore not sue the State party for the violations of article 2, paragraph 3 read in conjunction with article 6, paragraph 1, of the Covenant.

3.4 The author further claims that the use of unlawful force by the police officers amounts to a violation of article 7, of the Covenant.<sup>9</sup> She notes the Committee's jurisprudence, according to which it is incumbent on the State party to provide a plausible explanation of how injuries occurred of a person deprived of liberty and produce evidence refuting the allegations.<sup>10</sup> The author claims that the evidence shows that the victim received numerous injuries on his face and neck and the competent authorities of the State party failed to give any explanation on how such injuries might have occurred and what would have been the legitimate law enforcement purpose for the use of force by the police officers. The author submits that the victim did not have any injuries on his neck and face prior to his detention and that the explanation of the death provided, namely suicide by hanging, does not explain the infliction of multiple bruises and injuries described in the autopsy report.

3.5 The author finally submits that the prosecution failed to investigate whether the victim's death was the result of torture and/or ill-treatment, despite strong evidence, such as multiple injuries on his face and body. She also submits that the large sum of money which the victim carried in his pocket (6,000 Kyrgyz som, approximately 170 US\$) has never been located. She claims that this amounts to a violation of article 2, paragraph 3 read in conjunction with 7 of the Covenant. She also notes that despite the criminalization of the crime of torture since 2003, the Suzak District Court had held that for charges of abuse of power the head inspector of the police station did not fall into the category of an "official person" and this decision was upheld by the Supreme Court. The police officers could therefore not be held accountable for the crime of torture.

#### **State party's observations on the admissibility and the merits**

4.1 On 16 June 2010, the State party submits information provided by the General Prosecutor's Office and the Supreme Court. The General Prosecutor's Office states that on 24 October 2004, at 17.00 o'clock, the body of the victim was found in the administrative holding cell of the Bazarkorgon police station. The body showed marks of someone having hanged himself. According to the autopsy, the death of the victim was caused by

<sup>9</sup> See communication No. 1416/2005, *Alzery v. Sweden*, Views of 25 October 2006.

<sup>10</sup> See communication No. 907/2000, *Sirageva v. Uzbekistan*, Views of 18 November 2005.

mechanical asphyxiation of the upper respiratory tracks. On 9 November 2004, the prosecution opened a criminal case against the head inspector of the police station, Mr. Mantybaev, on the grounds of negligence which resulted in the accidental death of a person. On 16 May 2005, the head inspector of the police station, Mr. Mantybaev, was charged with negligence, and abuse of power. On 21 September 2005, the Suzak District Court, sentenced Mr. Mantybaev for negligence. This decision was upheld by the Supreme Court.

4.2 The Supreme Court states that on 21 September 2005, Mr. Mantybaev was found guilty of negligence (article 316, paragraph 2 of the Criminal Code) and was exempted from criminal liability due to the reconciliation agreement with the victim's family (article 66 of the Criminal Code). The Court explained to the author the procedure for filing a civil suit for moral and material damages. Upon an appeal by the author, the second instance court considered the case. On 5 September 2006, the Zhalalabad Regional Court reversed the first instance decision and a retrial was ordered. The Zhalalabad Regional Court decision was challenged pursuant to the Supervisory Review Procedure before the Supreme Court. On 27 December 2006, the Supreme Court reversed the second instance court decision and upheld the first instance court judgment, which became final.

#### **The author's comments**

5.1 On 11 January 2011, the author submits her comments on the State party's observations and notes that the State party has merely reiterated that an individual had been charged with criminal negligence but had been absolved from criminal liability due to a reconciliation with the victim's family; however it does not present any arguments with regard to the alleged human rights violations. The author reiterates her initial complaint and states that there still has not been any effective investigation into the death of her son and that the legal proceedings had been terminated on the basis of payment to assist with the funeral expenses. She underlines that the State party cannot avoid its international legal obligations to conduct an effective and impartial investigation into the death of the victim and hold accountable those responsible for it, by the application of a process that avoids criminal liability.

5.2 The author notes that the Suzak District Court judgment is inconsistent in its consideration of the purported reconciliation between Mr. Mantybaev and the victim's family. In its summary of the evidence, it reflects Mr. Mantybaev's statement that he reconciled with the victim's family and also notes the victim's brother's statement, according to which the death of his younger brother could be clarified if Mr. Abdukaimov was found and therefore he requested that additional investigation be carried out to solve the case. Despite the contradiction, the Suzak District Court concluded that there had been a reconciliation and thus exempted the defendant from criminal liability. Upon appeal at the Zhalalabad Regional Court, the author testified that she believed that her son had been killed by Mr. Abdukaimov, who is on the run and requested that legal measures be taken to apprehend him. The author notes that there is no record that the prosecutor disagreed with her statement. The author further notes that the second instance court accepted that no reconciliation had been reached and requested a retrial requiring that discrepancies and drawbacks of the investigation needed to be clarified.

5.3 The author notes article 66 of the Criminal Code, on the basis of which Mr. Mantybaev was exempted from criminal liability and notes that both the District Court and the Supreme Court have accepted that charges arising from the death of a person in police custody can be qualified as a "crime of small gravity" and that a small payment to assist with the funeral cost was sufficient to cover financial losses arising of the death of a family member.

5.4 The author recalls the Committee's jurisprudence and notes that the State party has a duty to bring perpetrators to justice and to adapt the sentence to the seriousness of the human rights violation. Purely disciplinary or administrative remedies were not considered sufficient or effective by the Committee.<sup>11</sup> The author argues that she has not waived her rights to establish the truth of how her son died and to hold the perpetrators accountable. The fact that the family did not refuse a small payment to assist with the funeral expenses cannot be deemed to be an unequivocal waiver of their rights, on the basis of informed consent and in full knowledge of the facts. The author's pursuit of justice through appeals and her submission to the Committee make it clear that no waiver was intended.

5.5 In conclusion, the author reiterates that due to the failure to provide a plausible explanation for the death of her son by means of an independent and effective investigation, the Committee should find that the death of the victim was an arbitrary killing. She also reiterates the numerous failings in the investigation and adds that Mr. Abdukaimov was never located after his initial statement and it is not clear if any attempts were made to trace him. Furthermore, the large sum of money (6,000 Kyrgyz som) that had been in possession of the victim was never found. Moreover, the family were not involved in the investigation and the results of the investigation were never made public.

#### **Additional information by the State party**

6. On 18 July 2011, the State party provided additional information. It recalls extensively the facts and the proceedings concerning the death of the son of the author, reiterates its previous observations on the merits<sup>12</sup> and contends that there are no grounds to review the court's decisions in the present case.

#### **Issues and proceedings before the Committee**

##### *Consideration of admissibility*

7.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with article 93, of its Rules of Procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

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

7.3 Concerning the requirement of exhaustion of domestic remedies, the Committee notes that according to the information submitted by the author, all available domestic remedies, including the Supreme Court, have been exhausted. In the absence of any objection by the State party, the Committee considers that the requirements of article 5, paragraph 2 (b), of the Optional Protocol have been met.

7.4 In the Committee's view, the author has sufficiently substantiated, for purposes of admissibility, her claims under articles 6, paragraph 1 and 7 read alone and in conjunction with article 2, paragraph 3, of the Covenant and therefore proceeds to their examination on the merits.

<sup>11</sup> See communication No. 778/1997, *Coronel et al. v. Colombia*, Views of 29 September 1996, para. 6.2; see also communication submitted to the Committee against Torture, No. 212/2002, *Guridi v. Spain*, Views of 8 February 2002, para. 6.7.

<sup>12</sup> The State party's submission consists of information prepared by the Ministry of Interior, the State party's Committee on National Security, and the General Prosecutor's Office.

*Consideration of the merits*

8.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as required under article 5, paragraph 1, of the Optional Protocol.

8.2 The Committee notes that, whilst the State party has provided information regarding the domestic proceedings and the facts of the communication, it has not provided any information about the merits of the specific claims made by the author. In the circumstances, due weight must be given to the author's allegations to the extent that they have been substantiated.

8.3 The Committee notes that, on 24 October 2004 in the afternoon (16.30 according to the resolution on criminal charges of 16 May 2005 ), the victim and his wife were requested to follow the police officers to the Bazarkorgon police station after a quarrel that was qualified as a public disturbance. The victim was kept in custody, while his wife was released. According to the information provided by the State party, the author's son died on 24 October 2004 at 17.00 o'clock (17.20 according to the Suzak District Court judgment). The Committee notes from the testimony by the ambulance doctor dated 18 November 2004, that she concluded that the victim did not have any strangulation marks but red finger marks on his neck. The Committee also notes from the interrogation testimony by the forensic expert dated 25 April 2005, who examined the victim's body on 25 October 2004, in the presence of doctors and two of the victim's relatives, that scratches on the eyebrow, under the chin, on the neck and the right upper arm, as well as a bloody wound on the left side of the victim's neck were observed. The forensic expert stated that the wounds could appear from something hard such as fingernails or a wrist and that the histological examination of body tissues led to the conclusion that the victim died of mechanical asphyxiation. The mechanical asphyxiation could have been caused by hanging from a soft fabric. When asked if manual strangulation could have been the cause of the victim's death, the forensic expert mentioned that no scratches on the cervical fabrics or skin were found but that the fracture of the horn of the thyroid could result from pressure by hands.

8.4 The Committee further notes the Suzak District Court decision of 21 September 2005, which relied on the testimony of Mr. Mantybaev holding that the victim had hanged himself on his sport trousers in the administrative detention cell. The decision however does not indicate if other evidence has been evaluated and does not reconcile the different statements by Mr. Mantybaev. It notes that the victim's brother insisted that the assistant police officer be found and that the case be retried. Nevertheless, the court concluded that there has been reconciliation between the defendant and the victim's family exempting Mr. Mantybaev from criminal liability. On appeal, the Zhalalabad Regional Court found, on 5 September 2006, that during the preliminary investigation, Mr. Mantybaev, Mr. Abdukaimov and the victim's wife had given different versions of the victim's death, and that these contradictions had not been resolved during the court proceedings. It also held that the victim's family did not appear to agree with the reconciliation as they requested a retrial. It concluded that the case should be retried based on a complete and objective study of all circumstances. The Committee notes that the Supreme Court in its judgment of 27 December 2006, found that the fact of criminal negligence had been proven by testimonies of the victim's representative, witnesses, medical expertise and other materials in the case file, without however explaining further how the court evaluated the material it considered. The Supreme Court also noted that by payment of 30,000 Kyrgyz som to the victim's family, reconciliation was reached between the defendant and the victim's family and that the arguments by the victim's counsel about the discrepancies in the investigation were speculations.

8.5 The Committee notes the author's claim that the victim died in police custody as a result of the excessive and unnecessary use of force by police officers, given that the victim

was in good physical and mental health before being taken into custody, that according to his wife he did not possess any sports trousers which had allegedly been used to hang himself, that the sport trousers used as evidence were never forensically examined and that due to the victim's high alcohol level, he neither had the physical capacity nor the time to hang himself. The Committee further notes the author's statement according to which the acceptance of a small payment to assist with the funeral cost has not waived her rights to establish the truth of how her son died and to hold perpetrators accountable.

8.6 As to the author's claim in relation to the arbitrary deprivation of her son's life, the Committee recalls its General Comment No. 6 on the right to life<sup>13</sup> and its jurisprudence, that the State party by arresting and detaining individuals takes the responsibility to care for their life<sup>14</sup>, and that criminal investigation and consequential prosecution are necessary remedies for violations of human rights such as those protected by article 6.<sup>15</sup> It further recalls its General Comment No. 31, that where investigations reveal violations of certain Covenant rights, States parties must ensure that those responsible are brought to justice.<sup>16</sup>

8.7 The Committee recalls that the burden of proof cannot rest alone on the author of the communication, especially considering that the author and the State party do not always have equal access to evidence and that frequently the State party alone has access to relevant information.<sup>17</sup> It is implicit in article 4, paragraph 2, of the Optional Protocol that the State party has the duty to investigate in good faith all allegations of violations of the Covenant made against it and its authorities, and to furnish to the Committee the information available to it.

8.8 The Committee observes that the State party and its judicial authorities have not explained on which basis the conclusion was drawn that the victim had committed suicide in police custody. This in particular considering the testimony by the forensic expert, who stated that fracture in the horn of the thyroid could have been caused by hanging from a soft fabric or by pressure by hands, as well as the testimony of the ambulance doctor who did not find any signs of strangulation but observed red finger marks on the victim's neck. It also notes that Mr. Mantybaev gave three different versions of the victim's death; however the State party's first instance court and the Supreme Court appear not to have evaluated the discrepancies in these statements and relied solely on the last statement indicating that he found the victim in the administrative detention cell having hanged himself from his sport trousers. The Committee further observes that the State party's judicial authorities did not consider any testimony from the first sergeant, Mr. Abdukaimov. The Committee concludes that, in the circumstances of the present case and in the absence of persuasive arguments by the State party rebutting the suggestion by the author that her son was killed in custody and in light of the information in the forensic expertise inconsistent with the State party's

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<sup>13</sup> General Comment No. 6 on the right to life, 1982, *Official Records of the General Assembly, Thirty-seventh Session, Supplement No. 40 (A/37/40)*, annex V, para. 1.

<sup>14</sup> See communication No. 763/1997, *Lantsov v. the Russian Federation*, Views of 26 March 2002, para. 9.2.

<sup>15</sup> See communication No. 1436/2005, *Sathasivam v. Sri Lanka*, Views of 8 July 2008, para. 6.4; communication No. 1275/2004, *Umetaliev and Tashtanbekova v. Kyrgyzstan*, Views of 30 October 2008, para. 9.2.

<sup>16</sup> General Comment No. 31, Nature of the General Legal Obligations on States parties to the Covenant, CCPR/C/21/Rev. 1/Add. 13 (2004), para.18.

<sup>17</sup> Communications No. 30/1978, *Bleier v. Uruguay*, Views of 24 March 1980, para. 13.3; No. 84/1981, *Dermit Barbato. v. Uruguay*, Views of 21 October 1982, para. 9.6.

arguments, the State party is responsible for arbitrary deprivation of the victim's life, in breach of article 6, paragraph 1, of the Covenant.<sup>18</sup>

8.9 The Committee notes that author's claim that the autopsy report of her son's body revealed various injuries on the victim's face and neck and that the State party has not explained how such injuries may have occurred in police custody. The Committee notes that the author's allegations of the victim's injuries are confirmed by the post mortem autopsy report of 25 October 2004. It also notes that the State party's authorities have not addressed the cause for such injuries. The Committee recalls that a State party is responsible for the security of any person in custody and, when an individual is injured while in detention, it is incumbent on the State party to produce evidence refuting the author's allegations.<sup>19</sup> The State party did not provide any information as to whether any inquiry was undertaken by its authorities both in the context of the criminal investigations or in the context of the present communication to address the specific allegations advanced by the author in a substantiated way. In these circumstances, the Committee concludes that the author's claims are substantiated and have been corroborated by the official autopsy report and finds, therefore, that there has been a violation of article 7, of the Covenant with regard to the author's son.

8.10 As to the claims under articles 6, paragraph 1 and 7 on the ground that the State party failed in its procedural obligation to properly investigate the victim's death and allegations of torture, and to take appropriate investigative and remedial measures, the Committee recalls its constant jurisprudence that criminal investigation and consequential prosecution are necessary remedies for violations of human rights such as those protected by articles 6, paragraph 1 and 7, of the Covenant.<sup>20</sup> The Committee observes that the investigation order of 9 November 2004 considers as established that the victim had hanged himself and therefore does not take into account the author's position that the victim was killed arbitrarily. The head inspector of the Bazarkorgon police station, Mr. Mantybaev, was sentenced for criminal negligence, but was exempted from criminal liability due to presumed reconciliation between the defendant and the victim's family. The Committee notes the author's allegations regarding the authorities failure to obtain a detailed description of the position of the victim's body, that a mock hanging was not conducted, that the exact timing and sequence of events was not established, that medical records to establish if the victim had any suicidal tendencies were not requested, that a forensic expertise of the sport trousers was not ordered, that the cash the victim allegedly carried in his pocket was never located and that it was never established if the victim's death was a result of torture or ill-treatment. The Committee further notes that the police sergeant, Mr. Abdukaimov was never charged or prosecuted. In the absence of any explanation by the State party on discrepancies in the criminal investigation and the reason why one of the alleged perpetrators was never charged or prosecuted and in view of the detailed material placed before it, the Committee concludes that the State party failed to properly investigate the circumstances of the author's son's death and the allegations of torture and ill-treatment and thus effectively denied the author a remedy, in violation of her rights under article 2, paragraph 3 read in conjunction with articles 6, paragraph 1 and 7.

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<sup>18</sup> See communication No. 1436/2005, *Sathasivam and Sarawathi v. Sri Lanka*, Views of 8 July 2008, para. 6.2; communication No. 1186/2003, *Titahonjo v. Cameroon*, Views of 26 October 2007, para. 6.2, communication No. 888/1999, *Teltsina v. Russian Federation*, Views of 29 March 2004, para. 7.6, communication No. 84/1981, *Dermi Barbatov v. Uruguay*, Views of 21 October 1982, para. 9.2.

<sup>19</sup> Communications No. 907/2000, *Siragev v. Uzbekistan*, Views of 1 November 2005, para. 6.2; and communication No. 889/1999, *Zheikov v. Russian Federation*, Views of 17 March 2006, para. 7.2.

<sup>20</sup> See general comment No. 20 (1992) on the prohibition of torture and cruel treatment or punishment, para. 14; General Comment No. 31, Nature of the General Legal Obligations on States parties to the Covenant, CCPR/C/21/Rev. 1/Add. 13 (2004), para.18.

9. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation by Kyrgyzstan of the author's son's rights under article 6, paragraph 1, and article 7, and of the author's rights under article 2, paragraph 3 read in conjunction with articles 6, paragraph 1 and 7, of the Covenant.

10. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy. The remedy should include an impartial, effective and thorough investigation into the circumstances of the author's son's death, prosecution of those responsible, and full reparation including appropriate compensation. The State party is also under an obligation to prevent similar violations in the future.

11. Bearing in mind that, by becoming a State party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to its Views. The State party is also requested to publish the Committee's Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

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