

Communication to the Human Rights Committee

Date: 4 January 2008

submitted for consideration under the Optional Protocol to the International Covenant on Civil and Political Rights

I. INFORMATION CONCERNING THE AUTHOR OF THE COMMUNICATION

Name: Zhumabaeva
First name(s): Turdukan
Nationality: Kyrgyz Republic
Profession: pensioner
Date and place of birth: 1930, Kyrgyz Republic, Zhalalabad oblast, village Bazarkorgan
Present address: village Komsomol, Bazarkorgan region, Zhalalabad oblast, Kyrgyz Republic

Address for exchange of confidential correspondence (if other than present address):

Alliance for Open Society International
050004 Almaty, Kazakhstan
97 Makataev str., office # 1
Tel: +7 7272 78 01 11/79 99 59
Fax: +7 7272 79 88 11
Email: nergalieva@aosi.kz

Submitting the communication as:

- (a) Victim of the violation(s) (set forth below), or
- (b) Appointed representative/legal counsel of the alleged Victim(s), or
- (c) Other:**

If box (c) is marked, the author should explain:

- (i) In what capacity she or he is acting on behalf of the Victim(s) (e.g. family relationship or other personal links with the alleged Victim):

The author of the communication, Zhumabaeva Turdukan, is the mother of the Victim. The author is represented by legal counsel Tair Asanov¹, from the Osh oblast collegiums of lawyers of the Kyrgyz Republic. The communication is drafted with the assistance of the Open Society Justice Initiative.²

¹ Please find enclosed the official authorization given to the lawyer Tair Asanov to represent Zhumabaeva Turdukan before the UN Human Rights Committee.

² The Open Society Justice Initiative (www.justiceinitiative.org), an operational program of the Open Society Institute (OSI), pursues law reform activities grounded in the protection of human rights, and contributes to the development of legal capacity for open societies worldwide. The Justice Initiative combines litigation, legal advocacy, technical assistance, and the dissemination of knowledge to secure advances in the following priority areas: national criminal justice, international justice, freedom of information and expression, and equality and citizenship. Its offices are in Abuja, Budapest, London, New York and Washington DC.

(ii) Why the Victim(s) is (are) unable to submit the communication her or himself (themselves): **The Victim of the violation is deceased.**

Note: An unrelated third party having no link to the Victim(s) cannot submit a communication on her or his (their) behalf.

II. INFORMATION CONCERNING THE ALLEGED VICTIM(S) (IF OTHER THAN AUTHOR)

Last name: Moidunov
First name(s): Tashkenbaj
Nationality: Kyrgyz Republic
Profession: Salesman at the agricultural market
Date and place of birth: 1958
Present address or whereabouts: deceased

III. STATE CONCERNED/ARTICLES VIOLATED/DOMESTIC REMEDIES:

3.1 Name of the state party (country) to the International Covenant and the Optional Protocol against which the communication is directed:

The communication is directed against the Kyrgyz Republic. The date of ratification of the ICCPR and the Optional Protocol is October 7, 1994.

3.2 Articles of the International Covenant on Civil and Political Rights allegedly violated:

Article 6 (1) - Right to life

Article 2(3) in conjunction with Article 6 (1) – Right to an effective remedy

Article 7 - Prohibition of torture and ill-treatment

Article 2(3) in conjunction with Article 7 – Right to an effective remedy

3.3 Steps taken by or on behalf of the alleged Victim(s) to exhaust domestic remedies-recourse to the courts or other public authorities, when and with what results (if possible, enclose copies of all relevant judicial or administrative decisions):

3.3.1 On 21 September 2005, the Suzak District Court of first instance found *Mantybaev E.*, the head inspector of Bazarkorgon District Division of Interior Affairs (“ the Bazarkorgon DDIA”), guilty of negligence under Article 316 of Criminal Code of the Kyrgyz Republic, which inadvertently resulted in the death of the Victim. The court ruled, however, that the defendant *Mantybaev E.* due to his reconciliation³ with the Victim’s family should be exempt from criminal liability. The terms of reconciliation included payment of compensation by the defendant to the Victim’s family in the amount of 30 000 Kyrgyz Som.⁴

3.3.2 The final decision in the case at the domestic level was delivered by the Supreme Court of the Kyrgyz Republic on 27 December 2006. The Supreme Court upheld the decision of the first instance court.

³ Article 66 of Criminal Code of KR. “Release from Criminal Responsibility in Connection with Reconciliation with the Victim”: A person who has committed a crime of small gravity for the first time may be released from criminal responsibility if he has reconciled with the victim and has made restitution for any damage inflicted on the victim. The Criminal Procedure Code fails to regulate the procedure of reconciliation and its application in practice.

⁴ 30,000 Kyrgyz Som (KGS) = 862.862 US Dollar (USD) Interbank rate +/- 0%

The Human Rights Committee's case law emphasizes the primacy of judicial remedies in cases of particularly serious violations of human rights, and the need for a full judicial investigation leading to the prompt criminal prosecution and conviction of the persons responsible.⁵

The Author asserts that she has exhausted all domestic remedies in the form of judicial decisions in the criminal case at all judicial instances.

If domestic remedies have not been exhausted, explain why:

IV. OTHER INTERNATIONAL PROCEDURES

Has the same matter ever been submitted for examination under another procedure of international investigation or settlement (e.g. the Inter-American Commission on Human Rights, the European Commission on Human Rights)? If so, when and with what results?

The case has not been submitted to any other international procedure of investigation or settlement. The UN Human Rights Committee is the only international body that has jurisdiction to consider individual applications from Kyrgyzstan.⁶

V. FACTS OF THE CLAIM

5.1 Summary of the facts:

On 24 October 2004 at approximately 17.00 hrs, Tashkebay Moidunov, aged 46, (further referred to as "the Victim") was taken to the Bazarkorgon DDIA on the asserted ground that he caused a public disturbance after the police found him quarrelling with his wife in the street while drunk. At around 18.00 hrs he was found dead in an administrative detention cell in the police station of the Bazarkorgon DDIA. An ambulance doctor, who was called immediately by the police, examined the body and found finger marks on the neck of the Victim. In their first report, the police officers stated that the Victim died of a heart attack. Then, the police officers made a record in the official registry that the body of the Victim was found in the street in the village of Bazarkorgon, without visible signs of violence. Twenty days later, the same police officers testified that they found the Victim's body hanging on the bars of the door to the administrative detention cell. The Victim is not known to have had any history of physical or mental health problems. A criminal investigation was initiated on 9 November 2004 against one police officer, who was charged with negligent performance of his duties, resulting in the death of a person. The first instance court exempted the police officer from criminal liability and consequently from criminal sanctions due to his reconciliation with the Victim's family. The Supreme Court upheld the first instance court's decision.

5.2 Detailed description of the facts:

5.2.1. On 24 October 2004 the Victim and his wife, Akmatova Salima, were quarreling in the street when a police officer's car drove by. According to the testimony of Akmatova S., the Victim had sometimes abused alcohol. Akmatova S. confirmed later that on that day the Victim had consumed alcohol. The police officers inquired of the reasons for the quarrel and after deciding that it was a public disturbance, ordered the couple to follow them to the regional police station of Bazarkorgon.

5.2.2. At the police station the Victim and his wife were questioned separately. According to the testimony of Akmatova Salima⁷, she was taken first to the duty officer's room where she was

⁵ Communication No. 563/1993; Communication No 612/1995.

⁶ The information on the case was sent to the Special Rapporteur on Torture on December 15, 2004, alleging that the Victim's death in custody was the result of torture.

⁷ See Exhibit # 6. Witness interrogation protocol of Akmatova Salima", dated 16 November 2004.

pressured by the police officers to write a complaint against her husband, the Victim, stating that her husband was threatening her with a knife and saying that he was going to kill her. She alleged that she wrote such a statement because she was afraid of the police officers. When she came out of the duty officer's room, she saw that the Victim was standing in the corridor. At that moment she saw a police officer screaming abusive words at the Victim and twisting his arms behind his back. The police officer pushed the Victim into the last room down the corridor and locked the iron door from the outside. Akmatova S. felt dizzy and leaned against the wall. The police called for an ambulance. The ambulance dispatcher registered this call at 17.00 hrs.⁸ After being examined and given a sedative medicine, Akmatova S. refused to be hospitalized and left the police station to go home. While she was standing at a bus stop, close to the police station, a police officer came to find her and asked her to return back to the police station. On the way there the police officer asked Akmatova S. if she was aware of her husband's heart problems. When they arrived at the police station, she saw the body of the Victim lying on the floor in the corridor.

- 5.2.3. An ambulance doctor, Toktobaeva G., received a message from the dispatcher at 18.00 hrs on 24 October 2004 that a man had hanged himself at the police station and that ambulance help was needed immediately. Upon arrival, Toktobaeva saw the body of the Victim lying on his back on the corridor floor. She examined the body and confirmed the Victim's death. In her testimony, Toktobaeva stated: "Since I was told by the dispatcher that the person hanged himself, I carefully examined his neck 2-3 times, but I didn't observe any traces of the rope. I did see red finger marks on the neck, and that is why I asked whether the person had been strangled, but the officer Mantybaev said that the man seemed to have heart problems, because he clutched his chest and fell over on the floor. Then I asked why they reported to the ambulance that the man hanged himself. He replied that because they all panicked they told the ambulance about hanging."⁹
- 5.2.4. An examination of the Victim's body was conducted at 18.30 hrs on 24 October 2004 by the forensic expert Dr. Mamatov Z. The inspection report described the body of the Victim, its exact position and the clothes in which the Victim was dressed. The report indicated that "...the examination did not show any broken, scratch or cut wounds on the body".¹⁰ The report did not describe any other objects found next to the body and did not mention money or any other items of value found in the clothes of the Victim.
- 5.2.5. According to the testimony of the Victim's wife, the Victim had 6000 Kyrgyz som¹¹ in cash, which the Victim and his wife had planned to spend on grain crops.¹² This money was not discovered during the investigation, nor was any attention given to this issue by the investigators during the interrogations of the main suspects.
- 5.2.6. In his first statement written immediately after the incident on 24 October 2004, the head inspector of the police station, junior lieutenant Mantybaev E., wrote the following: "On 24 October 2004 I was on duty and approximately at 17.00 hrs officer Beshbakov A. brought a man, named Moidunov Tashkenbaj, born 1958, and Akmatova Salima, born 1960, to the Bazarkorgon DDIA as they were fighting at the road Osh-Bishkek. It was reported that Moidunov T. was under the influence of alcohol. Upon arrival at the police station, Moidunov and his wife were fighting in the corridor and pulling each other's clothes. I, together with the investigator Zhamankulov, separated them. We told Moidunov to stay away from his wife and took him to the corridor. Suddenly, Akmatova S. felt sick and fell on the floor. We called the

⁸ See Exhibit # 8. Witness interrogation protocol of Gulhumar Toktobaeva, dated 18 November 2004.

⁹ Ibid.

¹⁰ See Exhibit # 2. Inspection report, signed by Z. Mamatov on 24 October 2004.

¹¹ 6,000 Kyrgyz Som (KGS) = 172.572 US Dollar (USD) Interbank rate +/- 0%

¹² Statement of official interrogation of the witness, Akmatova Salima, dated 16 November 2004.

ambulance and helped her to recover. Since Akmatova S. was demanding to write a complaint against her husband, Moidunov T., we took her statement and registered it in the log. We told Akmatova S. that she could go home, and to Moidunov T. we said that he could wait there while his wife leaves to avoid contact with her. As soon as we saw off his wife after calming her down, we returned to him (Moidunov T.). He was sitting in the corridor and holding the left side of his chest, and then suddenly he fell on the floor. We immediately called the ambulance. The ambulance doctor confirmed the death.”¹³

- 5.2.7. In his first statement the police assistant at the Bazarkorogon DDIA, first sergeant Abdkaimov N., stated that on 24 October 2004, while he was on duty, officer Beshbakov A. brought a man who was under the influence of alcohol. His statement reads further as follows: “He [Beshbakov] reported that the man was fighting and beating his wife Akmatova Salima at the road Osh-Bishkek. Akmatova Salima wanted to write a complaint against her husband on her own will. Right in front of the duty officer’s room Moidunov T.S. and his wife, Akmatova S., started fighting again. Officers Zhamankulov M. and Mantybaev E. separated them. We said to the man that he should wait in the corridor and stay away from his wife. The wife wrote the complaint and we came out (of the duty officer’s room) to the corridor together with her. At that moment Moidunov T. clutched his chest and fell over on the floor. Together with officer Mantybaev, we tried to help him to stand up, but we failed. Mantybaev called for an ambulance. The ambulance doctor said that the man was dead. We informed the superior of the DDIA and the prosecutor. Akmatova S. lost consciousness, because she was quarrelling with her husband and we, together with the ambulance doctor, helped her to recover.”¹⁴
- 5.2.8. After a preliminary examination of the facts on 9 November 2004 the deputy prosecutor of the Bazarkorgon region opened a criminal investigation under Article 316 of the Criminal Code of the Kyrgyz Republic¹⁵ (“CC of KR”). The prosecutor characterized the actions of the police officers as negligent performance of duties. The decree read: “Upon the fact of discovering Moidunov T., [...] who hanged himself in the cell of the administrative detention at the regional division of interior affairs, I order the opening of a criminal case under art. 316 (2b) of the CC of the KR...”¹⁶
- 5.2.9. On 17 November 2004 junior lieutenant Mantybaev E was interrogated as part of the criminal investigation. He changed his statement of 24 October 2004 and provided a different account of the events. He testified that the Victim was sitting in the corridor outside of the duty officer’s room, where he and officer Abdkaimov were taking a statement from the wife of the Victim, Akmatova S. When Mantybaev E. finished with the paper work, he walked Akmatova S. out of the police station. When he returned, he asked Abdkaimov N. about the Victim, as he did not see the Victim in the corridor. Mantybaev E. started looking for the Victim. When passing by the administrative detention cell, Mantybaev E. noticed that the door was slightly opened. He couldn’t push it open as something heavy behind the door was blocking it. When he pushed the door open, he saw that the Victim was hanging by some sport trousers¹⁷ from the bars of

¹³ See Exhibit # 4. Explanation Note by Mantybaev E., dated 24 October 2004.

¹⁴ See Exhibit # 3. Explanation note by Abdkaimov N., dated 24 October 2004.

¹⁵ Article 316 of the Criminal Code of Kyrgyzstan - “Negligence”.

(1) Negligence, that is the omission to perform or inadequate performance by the official person of his/her duties caused by carelessness or inadvertence towards official duties, if it resulted in substantial violation of rights and lawful interests of citizens or organizations or the interests of the public or the state, protected by the law – is punished by a fine, equivalent to the amount of 100 up to 200 minimum wages or by detention of up to 6 months.

(2) The same action which inadvertently results in death of a person or damages of large proportions or other grave consequences shall be punished by deprivation of liberty of up to 5 years.

¹⁶ See Exhibit # 1. Order on institution of criminal investigation, by Deputy Prosecutor of Bazarkorgon Region, Akkozuev T., dated 9 November 2004.

¹⁷ “Sport trousers” were used in the investigation to indicate the long underwear bottoms, which are usually worn by men in cold whether underneath the regular trousers.

the door. He released the body from the noose, laid it on the ground and started to perform CPR. Abdkaimov N. came in to help. They decided to take the body outside the cell and place it in the corridor, as the cell was too dark. Then Mantybaev E. called for an ambulance and informed the ambulance dispatcher that a man had hanged himself. Mantybaev E. explained that he lied to his superior when he said that the Victim died of a heart attack because he was afraid of consequences. The other officer, Abdykaimov N., conspired with Mantybaev E. and helped him take the sport trousers from the scene of the incident and hide them. They agreed to give statements, saying that the Victim died of a heart attack. When a criminal investigation was opened, he decided to report the truth.¹⁸

5.2.10. Police officer Abdkaimov N. was also interrogated under the criminal investigation, and he also changed his testimony. During his interrogation on 15 November 2004, he provided a description of the events similar to the one given by officer Mantybaev. Abdkaimov N. testified that once Akmatova S. wrote a complaint against her husband, officer Mantybaev walked her out of the room and told her to go home. Abdkaimov N. was alone in the room when after some time he heard officer Mantybaev calling him. Abdkaimov walked out of the room into the corridor. He saw that Mantybaev E. was performing CPR on the Victim. When he asked officer Mantybaev what had happened, Mantybaev told him that the Victim had hanged himself. The two officers took the body to the corridor where there was more light and continued administering CPR. After those unsuccessful attempts to revive the Victim, officer Mantybaev called for an ambulance. Together with Mantybaev E., Abdkaimov N. took off the blue color sport trousers from the bars of the administrative cell door. They reported to the head of Bazarkorgon DDIA that the Victim had come to the police station drunk and died of a natural death. Abdkaimov N. said that he did that, as he was afraid to tell the truth. On the next day after consulting with Mantybaev E., he hid the Victim's sport trousers behind the women's outdoor toilet.¹⁹

5.2.11. The Victim's wife, Akmatova S., was questioned by the investigator for a second time on 21 December 2004. She confirmed her earlier statements that her husband, Moidunov T., did not wear sport trousers under his trousers on the day of his death, that he never wore such long underwear under his trousers and that he did not possess any sport trousers. She was shown 3 different blue color sport trousers and she stated that none of them belonged to her husband.²⁰

5.2.12. On 25 October 2004, an autopsy was performed on the body of the Victim by a forensic expert, Dr. Mamatov Z. The autopsy report described the following injuries: "At the inner end of the right eyebrow, there is an abrasion, size: 0.5 x 0.4 cm, which is below the level of the surrounding skin, covered with dark-red scab. On the lower lip mucosa, there are 5 spots of extravasations, size 0.2x0.1 cm, creating a red color abrasion with the total size of 1.5x 1cm. . On the front surface of the neck at the mental region there is an abrasion size 1.5cmx0.4 cm, covered by dark-red scab. Several similar abrasions are found on the front surface of the neck, one with the size 0.2x0.1cm, one with the size 0.3x0.1cm, one slightly to the right with the size 0.1x0.2cm, two on the left side of the neck with the size 4.5x0.4cm and 1.0x0.2 cm, all covered with dark red scab, appearing below the level of the surrounding skin. On the front-lef side of the neck, there is a bruise of pale red color size 2.5x1.5cm." The forensic expert concluded: "The death of Moidunov Tashkenbaj, born 1958, was caused by mechanical asphyxiation of the upper respiratory tract possibly by hanging on a soft fabric, which is confirmed by the following observation: abrasions at the front and front-side surface of the neck, bruise at left-side surface of the neck without hemorrhage to subdermic fat tissues, direct fracture of the horn of the thyroid cartilage on the right,..." The chemical examination of the blood and urine of

¹⁸ See Exhibit # 7. Witness interrogation protocol of Mantybaev E., dated 17 November, 2004.

¹⁹ See Exhibit # 5. Witness interrogation protocol of Abdkaimov N., dated 15 November 2004.

²⁰ See Exhibit # 9. Protocol of identification, dated 21 December 2004.

the body of Moidunov registered ethyl alcohol in the following concentration: 3.27 per mille in the blood and 3.49 per mille in the urine.”²¹

5.2.13. During the interrogation of the forensic expert Dr. Mamatov Z. on 25 April 2005, he testified that the injuries on the face and neck of the Victim could have been caused by any blunt object, including fingers. Dr. Mamatov Z. further said that he did not find a strangulation mark on the neck of the Victim. This could be explained, in his view, by the fact that the sport trousers, with which the Victim had hanged himself, were made of soft fabric. The investigator explicitly asked, whether the mechanical asphyxiation of the Victim could be the result of strangulation by hand. Dr. Mamatov Z. replied that the injuries on the surface of the Victim’s neck could have been caused by human finger nails. He further stated that he sent sample tissue from the neck of the Victim for a histological examination. The examination found no hemorrhaging in the sample neck tissue. Dr. Mamatov Z. suggested that had the Victim been strangled by hand, there should have been signs of hemorrhaging in the neck tissue and multiple wounds on the skin. Dr. Mamatov Z., further stated that the single thyroid horn fracture could also result from the application of force by hand.²²

5.2.14. With a prosecutorial decree issued by the Zhalabad oblast prosecutor on May 16, 2005, police officer Mantybaev E. was charged with: 1) abuse of office, namely overstepping his official powers resulting in a person’s death; 2) forgery while performing official duties; 3) negligence, which inadvertently resulted in the death of a person. He was charged under Articles 304²³ (2), 305²⁴ (2) p.5, 315²⁵, 316 (1) (2) of the CC of the KR. The prosecutorial decree stated that

²¹ See Exhibit # 18. Conclusion of the expertise No. 21, dated 13 December 2004.

²² See Exhibit # 10. Witness interrogation protocol of Mamatov Z., dated 25 April 2004.

²³ **Article 304 of Criminal Code of KR: “Abuse of Official Powers”**

1. Use by an official of his powers, contrary to the interests of the civil service, and if that led to substantial violation of the rights and lawful interests of individuals or organizations, or the legally-protected interests of the society or the State, shall be punishable by a fine in the amount of 100 to 200 minimum wages, or by deprivation of liberty for a term of three to five years with or without confiscation of property.

2. The same deed, committed out of mercenary or any other personal interests of the official or third persons shall be punishable by a fine in the amount of 200 to 500 minimum wages, or by deprivation of liberty for a term of three to six years with or without confiscation of property.

3. Deeds provided for in the second part of this Article and which were committed under the following circumstances:

- entailing grave damages
- in the interest of organized group or criminal society
- by an official of a high rank

shall be punishable by deprivation of liberty for a term of 5 to 8 years with or without confiscation of property

4. Deeds provided for in the second and third parts of this Article which have been committed repeatedly or have led to grave consequences, shall be punishable by deprivation of liberty for a term of 8 to 15 years, with confiscation of property.

²⁴ **Article 305 of Criminal Code of KR “Exceeding Official Powers”**

1. Commission by an official of actions which transcend the limits of his powers and which involve a substantial violation of the rights and lawful interests of individuals or organizations, or the legally-protected interests of society and the State, shall be punishable by a fine in the amount of 100 to 200 minimum wages, or by disqualification to hold specified offices or to engage in specified activities for a term of up to five years, or by deprivation of liberty for a term of up to four years.

2. The same deed, if they have been committed:

- 1) in the interest of organized group or criminal society;
- 2) by an official of a high rank;
- 3) with the use of violence or with the threat of its use;
- 4) with the use of arms or special means;
- 5) with the infliction of grave consequences,

shall be punishable by deprivation of liberty for four to eight years, with or without confiscation of property and with disqualification to hold specified offices or to engage in specified activities for a term of up to three years.

²⁵ **Article 315 of Criminal Code of KR “Official Forgery”:**

Official forgery, that is, the introduction of known false information into official documents by an official, and also by a civil servant or a local self-government employee, and likewise the introduction of corrections into said documents distorting their actual content, if these acts have been committed due to mercenary or any other personal interests, shall be punishable by a fine in the amount of 100 to 200 minimum wages with the disqualification to hold specified offices or to

Mantybaev E. violated Order No. 32 of the Ministry of Interior, according to which an officer on duty must organize a medical examination of a person who is in a state of alcohol intoxication. The decree stated that Mantybaev failed to follow this procedure and subsequently failed to set up the control measures regarding Moidunov T. that would have prevented Moidunov T. from harming himself. The forgery charge was based on Mantybaev's, cover up actions, namely the fact that he wrote in the official registry of the Bazarkorgon DDIA on October 25, 2004 the following: "Approximately at 17.30 on 24 October 2004 the body of Moidunov Tashkenbaj was found on the Mahmatalieva street of the Bazarkorgon village without traces of a violent death".²⁶

- 5.2.15. On 16 May 2005 police officer Mantybaev was charged and interrogated as a defendant. He pleaded not-guilty to all the crimes he was charged with and denied any use of force against the Victim. He also denied making the record about the body of the Victim being found in the street in the Bazarkorgon village.²⁷
- 5.2.16. The trial against officer Mantybaev was held by the Suzak Regional Court. Officer Mantybaev pleaded not-guilty to all charges and gave the same testimony as during his interrogation on 16 May 2005.
- 5.2.17. On 21 September 2005, the Suzak District Court found Mantybaev E. guilty of committing the crime under Article 316 (2)²⁸, negligent performance of his official duties, which resulted inadvertently in the death of a person. The trial court considered the charges under Articles 304 (2), 305 (2) p.5, 315 as not applicable in the circumstances of the case. According to the verdict, Mantybaev E. failed to organize the medical examination of the Victim and take measures to prevent the Victim, who was in a state of alcohol intoxication, from committing a suicide. Due to the reconciliation between the defendant and the Victim's family, the court ruled that the defendant Mantybaev E. should be exempted from criminal liability.²⁹
- 5.2.18. During the court hearing, the brother of the Victim confirmed that he received the sum of 30000 Kyrgyz som from the defendant Mantybaev. The Victim's brother, however, insisted that the case be sent for additional investigation, as he believed that the Victim was killed by the police officers.³⁰
- 5.2.19. The Author's lawyer filed a cassation appeal against the verdict of the Suzak District Court to the Zhalalabad Regional Court. The cassation appeal argued that the investigation failed to take into account all the relevant circumstances and that the evidence suggested that the death of the Victim was the result of homicide and not suicide. In the cassation appeal the Author's lawyer requested to repeal the decision of the Suzak District Court and to send the case to the prosecutor for further investigation.
- 5.2.20. In its decision on the appeal, the Zhalalabad Regional Court held that the first-instance court failed to evaluate the contradictions between the testimony of the defendant Mantybaev E. and testimony of other witnesses and to eliminate all doubts as to the objectivity of the investigation into the death of the Victim. The Zhalalabad Regional Court further held that the first-instance court failed to take into account the position of the family members, when applying the reconciliation procedure. The Zhalalabad Regional Court reversed the decision of

engage in specified activities for a term of up to three years, or by deprivation of liberty for a term of up to two years with the disqualification to hold specified offices or to engage in specified activities for a term of up to three years.

²⁶ See Exhibit # 11. Resolution on criminal charges, dated May 16, 2005.

²⁷ See Exhibit # 12. Protocol of interrogation of defendant, dated 16 May 2005.

²⁸ See footnote 14.

²⁹ See Exhibit # 13. Suzak District Court judgment, dated 21 September 2005.

³⁰ Ibid.

the Suzak District Court and ordered a retrial of the case, instructing the trial court to take into consideration the arguments raised in the cassation appeal.³¹

5.2.21. Mantybaev E. appealed the decision of the Zhalalabad Regional Court to the Supreme Court. He asked for the decision of the Zhalalabad Regional Court to be quashed and the decision of the first instance court upheld. In its decision of 27 December 2006, the Supreme Court held that the guilt of the defendant Mantybaev E. was established by the first instance court and his actions were lawfully characterized as negligence, resulting inadvertently in the death of a person. The arguments of the Author's lawyer as to the deficiencies in the investigation and the existence of evidence suggesting that the Victim was killed were evaluated by the Supreme Court as speculations. Consequently, the Supreme Court quashed the decision of the Zhalalabad Regional Court and upheld the decision of the Suzak District Court.³²

VI. ANALYSIS OF THE ALLEGED VIOLATIONS OF THE COVENANT

6.1 Violation of Article 6(1):

The Author respectfully submits that the State party is fully responsible for death of the Victim and that there has been a violation of Article 6 (1) of the Covenant. The Author asserts that the Victim was arbitrarily deprived of his life by police officers, while he was in police custody. In arguing this, the Author relies on a number of principles that were developed by the Human Rights Committee ("the Committee") in its jurisprudence, which are also well established universal principles of international law on the right to life.

The Human Rights Committee, in its General Comment 14, affirmed that the right to life enshrined in Article 6 (1) of the Covenant "is the supreme right from which no derogation is permitted even in time of public emergency."³³

"The protection against arbitrary deprivation of life which is explicitly required by the third sentence of Article 6 (1) is of paramount importance. The Committee considers that States parties should take measures not only to prevent and punish deprivation of life by criminal acts, but also to prevent arbitrary killing by their own security forces."³⁴

The Committee has described the deprivation of life by the authorities of the State as "a matter of the utmost gravity" and has stated that therefore, "the law must strictly control and limit the circumstances in which a person may be deprived of his life by such authorities".³⁵ The Committee had not drawn an exhaustive list of what would constitute an arbitrary deprivation of life. It has, instead, considered the term "arbitrary" in the specific circumstances of every individual case. Judging from the jurisprudence of the Committee, it is only in very limited circumstances, where deprivation of life by the authorities would not be considered arbitrary. Article 6 (1) has been generally interpreted to allow the use of force, that might cause loss of life, where the force was aimed at achieving very specific and limited goals, related to the protection of the life of others.³⁶ Such force should also be absolutely necessary, for the achievement of these goals.

³¹ See Exhibit # 14. Court Judgment of Zhalalabad Regional Court on appeal, dated 5 September 2006.

³² See Exhibit # 15. Judgment of the Supreme Court of KR, dated 27 December 2006.

³³ General Comment No. 14: The right to life, Article 6, 1984, para. 1.

³⁴ General Comment No. 6: The right to life, Article 6., 30/04/82, para. 3.

³⁵ Ibid.

³⁶ Such a list of permissible grounds for the use of absolutely necessary force, that might lead to deprivation of life by State organs, is explicitly listed in Article 2 (2) of the European Convention on Human Rights, and includes self-defense, or defense of a third person from unlawful violence, arrest, or the prevention of escape of a person lawfully detained, and suppression of a riot or insurrection.

The Committee has also held that a State has a special obligation to account for an individual held in custody. Where a State Party had detained an individual, it assumes a special responsibility to care for that individual's life and it has to take adequate and appropriate measures to protect his/her life.³⁷

The Committee has also acknowledged that where a person had died in custody, applicants face particular evidentiary difficulties in proving whether the death was the result of use of force that was "arbitrary". Thus, the Committee has stated that where an individual had died in custody "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 the evidence and ... frequently the State party alone has access to relevant information."³⁸ Further, it held that "in cases where the author has submitted to the Committee allegations supported by substantial witness testimony ... and where further clarification of the case depends on information exclusively in the hands of the State party, the Committee may consider such allegations as substantiated in the absence of satisfactory evidence and explanations to the contrary submitted by the State party."³⁹ This principle of reversal of the burden of proof in cases of death in custody has also been adopted by the Inter-American Court of Human Rights and the European Court of Human Rights and has in fact become the universal principle of the international law. It has been very succinctly formulated by the ECtHR, which has held that "where an individual is taken into police custody in good health but is later found dead, it is incumbent on the State to provide a plausible explanation of the events leading to his death, failing which authorities must be held responsible under Article 2."⁴⁰

Taking into consideration the above mentioned principles, the Author alleges that the State party has violated its obligations set forth in Article 6(1) of the Covenant. The Author claims that the explanation of the death of the Victim Mr. Moidunov given by the authorities is entirely implausible. On the basis of all the available evidence, 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, the Victim was arbitrarily deprived of his life.***

The official cause of the death of the Victim, stated in the autopsy report, was mechanical asphyxiation, caused by constricting the airflow through the upper respiratory tract. The medical opinion given in the course of the investigation did not provide a conclusive view as to whether this mechanical asphyxiation was the result of hanging or manual strangulation, stating that both explanations were probable. If all the other evidence is taken into consideration, however, the suicide by hanging theory provided by the authorities is clearly implausible, and the manual strangulation becomes the only reasonable explanation of the death of the Victim. The following facts support this claim:

- a) The Victim, Tashkenbai Moidunov and his wife, Akmatova Salima were taken to the district police station of Bazarkorgon on 24 October 2004 at around 17.00 hrs in good mental and physical health. Prior to his detention the Victim had no injuries. He also had no history of mental illness. No evidence to the contrary was gathered in the course of the investigation of the Victim's death.
- b) At around 18.00 hrs Moidunov T. was found dead in the corridor of the same district police station of Bazarkorgon, as reported by the ambulance dispatcher (see para. 5.2.3 supra).

³⁷ Barbato et al. v. Uruguay (84/81), Bleier v. Uruguay, R.7/30,

³⁸ See Bleier v. Uruguay, R.7/30, para. 13.3, 29 March 1982; *Albert Womah Mukong v. Cameroon*, Views on Communication No. 458/1991, of 21 July 1994

³⁹ Bleier v. Uruguay, Ibid.

⁴⁰ Velikova v. Bulgaria, Application No. 41488/98, 18 May 2000

- c) The ambulance doctor, who was the first to examine the body of Moidunov, explicitly noted that there was no strangulation mark on the surface of the Victim's neck. The doctor observed and reported that there were red finger marks visible on the neck of the Victim (see para. 5.2.3 supra).
- d) Following the Victim's death, a significant number of injuries were found on his face and on his neck, described in the autopsy report as follows:

“At the inner end of the right eyebrow, there is an abrasion, size: 0.5 x 0.4 cm, which is below the level of the surrounding skin, covered with dark-red scab. On the lower lip mucosa, there are 5 spots of extravasations, size 0.2x0.1 cm, creating a red color abrasion with the total size of 1.5x 1cm. . On the front surface of the neck at the mental region there is an abrasion size 1.5cmx0.4 cm, covered by dark-red scab. Several similar abrasions are found on the front surface of the neck, one with the size 0.2x0.1cm, one with the size 0.3x0.1cm, one slightly to the right with the size 0.1x0.2cm, two on the left side of the neck with the size 4.5x0.4cm and 1.0x0.2 cm, all covered with dark red scab, appearing below the level of the surrounding skin. On the front-left side of the neck, there is a bruise of pale red color size 2.5x1.5cm.” (see para. 5.2.11 supra).
- e) The Victim was in a heavy state of alcohol intoxication. The autopsy report indicated that the level of alcohol in his blood was 3.27 ‰ and 3.49 ‰ in the urine.
- f) The police officers who arrested the Victim and his wife were prone to abusive and unlawful behavior. They used threats to force the Victim's wife to write a formal complaint against her husband, in an apparent effort to justify the Victim's detention and used abusive language and unnecessary force to lock the victim in the cell (see para. 5.2.2 supra).

The Author argues that these facts officially established by the investigation reveal that the most probable explanation of the death of the Victim is manual strangulation. The author alleges that the police officers, who detained the Victim and later claimed to have found his body, used excessive force against the Victim either in an effort to calm him down, if he was aggressive, or in an effort to force him into submission.

This version of the events is supported by the statements of the ambulance doctor, the Victim's wife and the other evidence outlined above. The ambulance doctor did not find a strangulation mark but instead observed red finger marks on the Victim's neck, which typically result from hand pressure. The numerous injuries on the Victim's face and neck are signs of struggle, characteristic of manual strangulation. The thyroid horn fracture, which can either be the result of hanging or manual strangulation, in the presence of multiple bruises and abrasions on the face and neck, scratches on the surface of the skin and finger marks would most likely be associated with strangulation by hand. This explanation becomes all the more probable, if the high level of alcohol intoxication of the Victim and the tendency for abusive and unlawful behavior of the police officers are taken into consideration. Under such circumstances, it is highly probable that the police officers used force against the Victim, which became excessive and resulted in Victim's death.

The theory of suicide by hanging, adopted by the investigation, according to which Moidunov hanged himself, is not plausible for the following reasons:

- i) the Victim did not possess sport trousers and had no access to any sport trousers, which he allegedly used to hang himself. The sport trousers, on which he allegedly hanged himself, were not found during the inspection of the scene of the death and the dead body;
- ii) the Victim did not suffer from a mental condition making him prone to suicide, had never displayed suicidal tendencies, and there was no reasonable explanation why he would commit suicide on that particular occasion;⁴¹

⁴¹ See Exhibit # 16, # 17. Statements of the Victim's family concerning his mental health.

- iii) the Victim did not have the physical capacity and time to commit suicide by hanging in the circumstances suggested by the investigation. He was in a condition of high intoxication and did not have sufficient time to perform the whole sequence of steps, which he must have performed, if the official explanation was true;
- iv) the official explanation provided by the authorities eventually rests only on the testimony of the police officers, who are the prime suspects for the killing of the Victim, and whose testimony is highly unreliable, as it is contradictory and incomplete.

The Victim did not possess sport trousers. His wife clearly testified to the fact that he never had and never used underwear sport trousers. The trousers, on which he allegedly hanged himself, were initially not found at the scene of the Victim's death. Eventually, the police officers stated that they hid the sports trousers from the scene of the incident and later presented them to the investigation. The investigation further failed to establish beyond any doubts that the trousers, submitted by the police officers as evidence, were exactly those which were allegedly used by the Victim to hang himself. To the contrary, the testimony of the Victim's wife, the protocol of identification of evidence (see para 5.2.11) and lack of any forensic examination of the sport trousers all cast significant doubts on the validity of this evidence and consequently on the plausibility of investigation's theory of suicide.

The Victim did not suffer from any mental condition that would make him prone to committing suicide and had no history of suicidal tendencies. Despite the clear failure of the domestic investigation to collect evidence in that respect, it is evident from his wife's testimony, that there was no such issue in the Victim's life. The wife of the Victim also testified that on the day of the Victim's death they had acquired a substantial amount of money from selling produce and were planning to purchase grain crops. The Victim's family also confirms that the Victim was a cheerful person with long-term life plans to buy a house and raise children.⁴² In such circumstances, it is apparent that the Victim faced no hardships or challenges, putting him in a position to consider taking his life. The grounds for the Victim's arrest were also trivial to be a possible explanation for such a drastic step. Finally, the official investigation completely failed to address the issue of the motive, furnishing no explanation at all, let alone a plausible one, as to why the Victim would take his life under the given circumstances.

The Victim did not have the time and the physical capacity to hang himself, as described by the official explanation. The Victim was in a heavy state of alcohol intoxication. The autopsy report indicated that the level of alcohol in his blood was 3.27‰ and 3.49‰ in his urine. The forensic expert classified it as a heavy level of intoxication, with the clinical symptoms being heavily distorted movement and neuromuscular disorder (i.e. inability to stand without assistance and conduct deliberate movements among others). In addition to this fact, the Victim had a relatively short time span, during which he was not observed by anyone. The time during which the Victim was left unobserved was never precisely established by the investigation. However, from the timing of the delivery to police station, the timing of the call to the ambulance, the testimonies of the Victim's wife and the police officers, it is apparent that the Victim was left unobserved for only a short time period, if at all. In the physical condition he was in and for the relatively short time span he had, it was highly improbable that the Victim would have been able to quickly locate the detention cell, seize the opportunity when the detention cell is not monitored, locate a suitable place to hang the noose, take off his trousers, then take off his underwear sport trousers, put back his trousers on, use the sport trousers to make a noose that would endure his weight, attached the noose to the bar above the door, put the noose around his neck and hang himself. These numerous actions require a good level of coordination and speed, which the Victim, because of his high level of intoxication, clearly did not have.

⁴² Ibid.

The official explanation of the death of the Victim rests only on the testimony of the police officers, who are the primary suspects for the death of Mr. Moidunov. Their testimony is highly unreliable. The police officers, Mantybaev and Abdkaimov, made several efforts to mislead the investigation, by giving different versions of the incident. First, they informed the ambulance doctors that the Victim hanged himself. Then, they reported that Moidunov had a heart attack. Then they made a record in the official registry that the body of the Victim was found in the street of the village of Bazarkorgon. Finally, they testified that Moidunov hanged himself on his own sport trousers. Under those circumstances, the testimony given by officer Mantybaev that he discovered the body of Moidunov hanging from the door of the cell and the supporting testimony of officer Abdkaimov are highly questionable and could not be credited.

In conclusion, giving due weight to all the facts in the present case and in the absence of a plausible explanation of the death of the Victim by the authorities, the Author submits that the Victim was arbitrarily deprived of his life by police officers of the State party. The fact that the Victim died in a police station, with no immediate witnesses, makes it difficult to determine whether the killing was negligent or deliberate. In either case, however, he died of the use of force by police officers, which under the circumstances was absolutely not warranted, which makes his death arbitrary and therefore, in violation of the right to life, protected by Article 6 (1) of the Covenant.

The Author also wishes to bring to the attention of the Committee the fact, that this particular event took place against the background of wide spread abuse of force by the police in Kyrgyz Republic. Police abuse remains one of the most serious and divisive human rights violations in Kyrgyzstan. The excessive use of force by police officers, including severe beatings, fatal choking, and rough treatment, persists according to the reports by human rights organizations. Police violence is perpetuated because overwhelming barriers to accountability make it possible for officers who commit human rights violations to escape due punishment and often repeat their offenses.⁴³

6.2 Violation of Article 2 (3) in combination with Article 6(1)

The Author also alleges that the Respondent State Party has failed to provide effective remedies on account of the death of the Victim and that as a result there has been a violation of Article 2 (3) in conjunction with Article 6 (1) of the Covenant. More specifically, the Author raises two separate claims of violations of Article 2 (3) in conjunction with Article 6 (1) of the Covenant, namely that the State party:

- A. failed to conduct an impartial and effective investigation into the death of the Victim and as a result failed to prosecute those responsible and impose on them punishments, proportionate to the gravity of the violation; and
- B. failed to award the relatives of the Victim adequate compensation for his death.

In arguing this, the Author relies on a number of principles that were developed by the Human Rights Committee (“the Committee”) in its jurisprudence. Article 2, paragraph 3, requires that in addition to the duty to give effective protection of Covenant rights, State parties must ensure that individuals are provided with effective remedies to vindicate those rights. Where the right to life or the prohibition of cruel, inhuman or degrading treatment are at stake, these remedies include a general obligation to investigate allegations of violations promptly, thoroughly and effectively through independent and impartial bodies, bring those responsible for the violations to justice, impose punishments in accordance with the gravity of the crime and make reparation

⁴³ US State Department Report for Kyrgyzstan 2006. Amnesty International Report for Kyrgyzstan 2007.

to individuals whose rights have been violated.⁴⁴ The Committee has also explicitly held that where the suspects are law enforcement personnel, “the accused should be subject to suspension or re-assignment during the process of investigation”.⁴⁵

In reviewing individual communications the Committee has held on numerous occasions that in circumstances which had led to the loss of life, State parties to the Covenant must have the necessary facilities and procedures allowing them to carry a thorough investigation through an impartial body.⁴⁶ The Committee has concluded that where a State party did not take the necessary measures against persons responsible for murder, it had failed to guarantee the right to life.⁴⁷ The Committee has also clearly spelled out that States are under an obligation to bring the perpetrators to justice, meaning criminal liability and not merely disciplinary or administrative sanctions.⁴⁸ In addition to carrying out a thorough investigation and prosecution of cases of loss of life, States should provide the payment of compensation to the surviving relatives⁴⁹ including the compensation by the State, where the State is responsible for the violation.⁵⁰

A. Failure to conduct an impartial and effective investigation, to prosecute and to punish:

In arguing that the investigation and prosecution authorities of the State party failed to conduct an impartial and effective investigation into the death of the Victim and as a direct consequence failed to prosecute those responsible and impose on them a proportionate punishment, the Author relies on the following facts and arguments.

The Author argues that the investigation and prosecution authorities demonstrated a lack of impartiality from the very start of the investigation. In fact, an investigation of the arbitrary killing of the Victim was never carried out. Despite numerous evidence to the contrary, the authorities accepted at the very start the suicide theory and opened an investigation on that basis. Thus, the decree of the Deputy prosecutor of the Bazarkorgon region, who initiated the criminal investigation on 9 November 2004 stated that, “[u]pon the fact of discovering Moidunov T.,... who hanged himself in the cell for administrative detention at the regional division of interior affairs, I order to open a criminal case under the art. 316 (2b) of the CPC of KR...”.

The fact that the investigation assumed from the very start that the cause of Moidunov’s death was suicide was not only decisive for its overall effectiveness, but also demonstrated clear bias. The decree of 9 November 2004 was issued before any evidence suggesting that the cause of death could have been the suicide became available to the investigating authorities. The written statements of the police officers available at that stage asserted that the Victim died of a heart attack (see paras. 5.2.5 and 5.2.8 supra). It was only after the official autopsy report, released on 13 December 2004, that the evidence suggesting hanging as a possible explanation became available. The autopsy report stated that the Victim died of asphyxiation, which could have been caused by hanging (see para. 5.2.11 supra). More than a month before that, however,

⁴⁴ See among others the country Reports of the Human Rights Committee on Brazil and the United States, July 2006. In the Report on the United States the Committee stated that the “State party should conduct prompt and independent investigations into all allegations concerning suspicious deaths, torture or cruel, inhuman or degrading treatment or punishment inflicted by its personnel The State party should ensure that those responsible are prosecuted and punished in accordance with the gravity of the crime.”

⁴⁵ See the Committee country report on Brazil, July 2006.

⁴⁶ Laureano v. Peru (540/93), Mojica v. Dominican Republic (449/91), Miango Muiyo v. Zaire (194/85), Rafael v. Columbia (181/84), Rubio v. Columbia (161/83).

⁴⁷ Coronel et al. v. Columbia (778/97).

⁴⁸ Arellana v Colombia, Communication no 563/1993 of 27 October 1995.

⁴⁹ Baboeram et al. v. Suriname (146, 148-154/83).

⁵⁰ Albert Wilson v. Philippines, (868/99). 30 October 2003.

in stark contradiction to the available evidence, the investigation authorities opened the criminal case into the “suicide” of the Victim. And even though the forensic expert did not exclude strangulation by hand, the investigation continued working only on the suicide theory.

The investigation lacked impartiality also because of the full credit it gave to the version of the events provided by the police officers Mantybaev and Abdkaimov after the forensic report became available. Those two officers were the prime suspects for the death of the Victim. Despite this and despite the numerous changes in their account of the events, the official investigation gave full credit to their last testimony, which conveniently followed the autopsy report, both in time and substance. The official investigation did not give appropriate weight to the testimonies of the Victim’s wife and the ambulance doctor and provided no explanation why their testimony was not taken into account.

The Author’s claim that the authorities did not carry an impartial and effective investigation is also substantiated by the failure to take crucial investigation steps. The authorities failed to collect additional forensic evidence, failed to draw a description of the scene of the alleged hanging, failed to establish the mechanism of the hanging and failed to establish the precise timing of events. The specific omissions of the investigation were as follows:

- i) the investigation failed to obtain a detailed description by officer Mantybaev of the position of the Victim’s body during the alleged hanging. The investigation failed also to draw an independent description of the scene of the hanging. Crucial facts were never established. Among them the distance between the door bars, where allegedly the noose was attached and the floor and the length of the noose. No description of the shape of the door frame and the mechanism of attaching the noose to door bars was made. These facts could have easily been collected, and were crucial for both the analysis of the forensic expert and for establishing whether the explanation that the Victim hanged himself was plausible;
- ii) the investigation failed to conduct a mock hanging, reconstructing the act of the alleged suicide. This reconstruction would have provided invaluable information on how the Victim made a noose with the sport trousers, tied it to the bars on the cell door, put it on his neck and suspend himself with sufficient distance between his feet and the floor. Such reconstruction, again, would have helped the investigation significantly in establishing whether the police officers’ claim that Moidunov hanged himself was plausible or not. Their failure to describe the scene of the alleged hanging and organize a mock hanging could only be explained with the investigation’s unwillingness to establish the truth about the Victim’s death;
- iii) the investigation failed to establish the exact timing and sequence of the events. The investigation failed to address discrepancies in the testimony given by different witnesses regarding the time and sequence of the arrival of the Victim, the taking of a statement from his wife, the placing of the Victim in the corridor or in the cell, the discovery of the body and the informing of the ambulance dispatcher. The exact timing and sequence of the events was crucial for the purpose of establishing whether the assertion made by the police officers that Moidunov hanged himself was plausible;
- iv) the investigation failed to request a forensic report on the psychological/psychiatric profile of the Victim based on available medical records, testimony of family and friends, in order to establish whether the Victim had any suicidal tendencies and could have a motive to plan and commit suicide;
- v) the investigation failed to order a forensic examination of the sport trousers, which were presented to the investigation by the police officers and which the Victim allegedly used as underwear and then as ligature to hang himself. These sport trousers were never examined for any traces of skin, hairs or body liquids, which might have established their use by the Victim. In light of the testimony given by the Victim’s wife, that he never used such underwear, such examination was of particular importance, yet never done.

vi) the investigation failed to take any steps to locate the money in cash, which the Victim was carrying in his pockets according to the testimony of his wife. The amount of money the Victim had according to the testimony of his wife was significant by Kyrgyz standards, and could well be the motive or part of the motive for the killing of the Victim. This question, however, was never addressed by the investigation.

The Author argues that as a result of those significant failures of the investigation, rendering it neither impartial nor effective, the prosecution of the two police officers Mantybaev and Abdkaimov for the killing of the Victim and the imposition of a punishment proportionate to the seriousness of the crime was made impossible. Police officer Mantybaev was charged with negligent performance of his duties, which allegedly allowed the Victim to commit suicide and the second police officer, Abdkaimov, who was on duty together with the officer Myntybaev was never charged or prosecuted. Though found guilty as charged by the Suzak District Court at trial, police officer Mantybaev E. was exempted from criminal liability and consequently criminal sanctions, due to his alleged reconciliation with the Victim's family.

In conclusion, police officers Myntybaev and Abdkaimov were never investigated for the killing of the Victim, never charged, indicted and punished for it. Officer Mantybaev was never punished even for the far lesser crime of negligent performance of his duties. Thus, the State party has clearly failed in its duty to conduct an impartial and effective investigation, to prosecute and to punish those responsible in violation of its obligations under Article 2 (3) in conjunction with Article 6 (1) of the Covenant.

B. Failure to award the family of the Victim an appropriate compensation for his death:

The Author claims that the family of the Victim was denied an appropriate compensation for his death. She argues that the compensation effectively paid was completely inadequate and that she had no available procedures to claim compensation from either the individual police officers responsible for the death of the Victim, nor from the State party. This is in clear violation of Article 2 (3) taken together with Article 6 (1) of the Covenant, as the Committee has held that in accordance with the provision of Article 2 (3) of the Covenant, State parties are responsible to afford reparation for human rights violations when there is a breach of rights guaranteed under the Covenant. The Committee has also held that the "compensation due to the author should take due account both of the seriousness of the violations and the damage to the author caused."⁵¹

The Author argues that the compensation effectively paid by officer Myntybaev was completely inadequate. The Victim's brother received a compensation in the amount of 30 000 Kyrgyz som (approximately USD 860) within the procedure of reconciliation in front of the Suzak District Court. Such compensation, however, is negligible and could not be considered an adequate Compensation for the death of the Victim.

The Author also filed a civil law suit to the Bazarkorgon Regional Court on 14 August 2006 to claim compensation from the officer Myntybaev for the death of a family member. The Author, however, was refused to have her civil suit officially registered and thus, was effectively denied her right for compensation as established by a competent judicial authority.⁵²

Finally, the Author claims that she could not sue the State party for compensation for the death of the Victim and the other violations of rights guaranteed by the Covenant. Under domestic law, state liability for the unlawful killing of the Victim is dependent on the criminal conviction

⁵¹ Albert Wilson v. Philippines, (868/99), 30 October 2003.

⁵² See Exhibit # 17. Statement of the Author.

of the police officers acting on behalf of the State and as for the other violations it is not available at all. As the two police officers were never charged and convicted for the killing of the Victim, the Author could not sue the State for compensation for his death. She also could not sue the State for the other violations of Covenant rights, raised in the present communication.

6.3 Violation of Article 7

The Author respectfully submits that in the present case there has been a violation of Article 7 of the Covenant by the State party. The Author asserts that the Victim was subject to the use of unlawful force by police officers, while he was in police custody and that this use of force amounted to torture and/or ill-treatment. In arguing this, the Author relies on a number of principles that were developed by the Human Rights Committee (“the Committee”) in its jurisprudence

Article 7 of the Covenant prohibits in absolute terms torture and ill-treatment, stating that “[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.” The Committee, accordingly, has given utmost attention to the protection of the right to be free from torture and ill-treatment in its jurisprudence. While stating the importance of such protection, it has refused to draw sharp distinctions between different types of treatment falling under Article 7, stating in its General Comment 20 that “(the) Covenant does not contain any definition of the concepts covered by article 7, nor does the Committee consider it necessary to draw up a list of prohibited acts or to establish sharp distinctions between the different kinds of punishment or treatment; the distinctions depend on the nature, purpose and severity of the treatment applied.” The Committee has held in clear terms, however, that use of force by a police officer, where the force was disproportionate to any legitimate law enforcement purpose, would amount to a breach of Article 7 of the Covenant.⁵³

The Committee has also acknowledged that applicants face particular evidentiary difficulties in proving that a person has suffered torture or ill-treatment while in custody, as most of the relevant information is in the hands of the authorities. Taking into consideration the utmost importance of the right to be free from torture and ill-treatment and in order to provide adequate protection, the Committee has held that “a State party is responsible for the security of any person it deprives of liberty and, where an individual deprived of liberty receives injuries in detention, it is incumbent on the State party to provide a plausible explanation of how these injuries occurred and to produce evidence refuting these allegations.”⁵⁴

In the present case, the Author claims that police officers used force against the Victim while he was in police custody. This fact is evidenced by the numerous injuries on the Victim’s face and neck, which could be the result of struggle during strangulation. The competent authorities of the State party failed to give any explanation as to how such injuries might have occurred. In light of this failure to provide an explanation, and in light of the fact that no legitimate law enforcement purpose existed for the use of force by the police officers, the Author claims a violation of the Article 7 of the Covenant. The following facts and circumstances support this claim:

- a) the Victim had no injuries on his neck and face prior to his detention. According to the testimony of Akmatova Salima, the Victim’s wife, he was last seen by her when the police officer, screaming abusive words at him, twisted his arms behind his back and pushed him into a room with a metal door, locking the door from the outside (see para. 5.2.2 supra);

⁵³ Mohammed Alzery v. Sweden (2005)

⁵⁴ Sirageva v. Uzbekistan, 907/2000, 18 November 2005.

b) in less than one hour later, the body of Moidunov was found in the police station with multiple injuries on his face and neck (see para. 5.2.12 supra) and a broken horn of the thyroid cartilage. These injuries are irrefutable evidence of the use of physical force against the Victim, in circumstances that gave no indication of any legitimate need to use force against the Victim;

c) The State party never tried and never provided any explanation of the causes of such injuries and their connection to the death of the Victim. The explanation of the death of the Victim provided by the State party, namely suicide by hanging, does not explain the infliction of the multiple bruises and injuries, described in the autopsy report.

6.4. Violation of Article 2 (3) in conjunction with Article 7

The Author also submits that the State party breached its obligation under Article 2 (3) in conjunction with Article 7 to investigate, prosecute and punish those responsible for acts of torture and/or ill-treatment and provide compensation.

In its jurisprudence, the Committee has noted that Article 7 should be read in conjunction with Article 2, paragraph 3, of the Covenant, requiring effective remedies against torture and ill-treatment. The Committee has laid down the following remedies, which a State party is obliged to provide: “[t]he State party should take firm measures to eradicate all forms of ill-treatment by law enforcement officials and ensure prompt, thorough, independent and impartial investigations into all allegations of torture and ill-treatment. It should prosecute perpetrators and ensure that they are punished in a manner proportionate to the seriousness of the crimes committed, and grant effective remedies including compensation to the victims.”⁵⁵

In this regard, the Author claims that prosecution failed to investigate whether the death of the Victim was the result of torture and ill-treatment despite the presence of strong evidence, supporting such a claim. Such evidence includes:

- a) the testimony of the Victim’s wife, Akmatova S., which described the abusive behavior of the police officers towards the Victim and herself;
- b) the presence of multiple injuries on the face and the body of the Victim and their connection to the cause of the death;
- c) the state of the Victim, who was under heavy influence of alcohol and the fact that he allegedly had in possession a large sum of money, which were not located after the death of the Victim.

The Author argues that the investigation of the death of the Victim adopted from the very start, without reference to the existing evidence, the theory that the Victim hanged himself. As a result, the torture and/or ill-treatment of the Victim were never investigated, and those responsible were never prosecuted and punished with a sanction proportionate to the seriousness of their offence. As the police officers responsible for the torture or ill-treatment of the Victim were not investigated and prosecuted, the Author and the Victim’s family have also been denied the right to claim compensation in that respect. For more detailed arguments on the failure of the authorities to conduct an impartial and effective investigation and the inability of the Author to receive compensation, the Author refers to para. 6. 2 infra.

The Author further claims that the present violation of Article 2 (3) in conjunction with Article 7 took place against a background of systemic problems in the legislation of the State party. The current legal framework in Kyrgyzstan effectively prevents bringing appropriate charges against officials for conduct in violation of Article 7 of the Covenant. Kyrgyzstan criminalized the crime of torture in 2003 by introducing in the Criminal Code a specialized Article No. 305-

⁵⁵ Concluding observations of the Human Rights Committee on Albania, [CCPR/CO/82/ALB \(HRC, 2004\)](#), para 13.

1 in accordance with the Article 1 of the UN Convention Against Torture. Article 305-1 is classified under the section of the Criminal Code dealing with abuse of office crimes, applied to the illegal acts or omissions committed by official persons.

In this particular case, the first instance court held that the position of the officer Mantybaev E., which is the head inspector of the Bazarkorgon District Division of Interior Affairs, does not fall under the category of “official person”.⁵⁶ The decision was upheld by the Supreme Court. The narrow judicial interpretation of the term “official person” implies that the police inspectors can not be officially held accountable for any crimes of office, including the crime of torture and consequently, bear the appropriate punishment for such a grave violation of human rights.

Despite its entry into force in 2003 and numerous complaints and reports on allegations of torture and ill-treatment (source), the article 305-1 on Torture has never been applied in a single criminal case to date.⁵⁷

Respectfully submitted,

by Tair Asanov
Legal counsel of the Author Zhumabaeva Turdukan

Date

Enclosed with the present communication are 17 Documents, in Kyrgyz, translated into English, Exhibits 1 through 17.

⁵⁶ See Exhibit # 13.

⁵⁷ US State Department for Kyrgyzstan 2006. Amnesty International Report for Kyrgyzstan 2007.