

BEFORE THE UNITED NATIONS HUMAN RIGHTS COMMITTEE

Turdukan ZHUMABAEVA

and

Tashkenbaj MOIDUNOV

against

The Kyrgyz Republic

REPLY TO GOVERNMENT'S RESPONSE

A. Introduction

1. On 4 January 2008 the author submitted a communication to the Human Rights Committee with regard to the death of her son Tashkenbaj Moidunov who died on 24 October 2004 in custody at the police station in Bazarorkgon. The communication argued that (A) the death should be considered an arbitrary killing due to the lack of an effective investigation that might demonstrate any other plausible explanation, (B) there was no effective investigation into his death, (C) there was no redress for his death, and (D) his treatment amounted to torture, also with no effective investigation or redress.
2. On 16 June 2010 the Kyrgyz Government responded to the communication, forwarding observations from the Prosecutor General's Office and the Supreme Court. These documents merely reiterate that an individual had been charged with criminal negligence but absolved from criminal liability due to reconciliation with the victim's family. There is no argument presented with regard to the human rights violations alleged in the communication.
3. On reply to the government response, the original complaint is re-iterated. There has still not been an effective investigation into the death of Mr. Moidunov capable of establishing the truth and of bringing the perpetrators to justice. This case involves a man who died in police custody, and was found by the first response medical team to have finger-marks on his neck. The government pathologist agreed that he could have been strangled to death. The policemen on duty offered contradictory statements, initially stating that Mr. Moidunov had suffered a heart attack and had died in the street, then suggesting that he had hung himself. One of the policemen on duty that night has disappeared. The legal process against the other was terminated on the basis of an apparent payment of \$300 to assist with funeral expenses.

4. Human rights law governs the obligations of the State with regard to the individual, and when dealing with absolute rights such as the right to life and the prohibition of torture permits no exception. Where there is a death in custody that takes place in suspicious circumstances, the State cannot avoid its international legal obligations to conduct an effective and impartial investigation into the death and to hold accountable those responsible for it, by the application of a process that avoids criminal liability.

B. Circumstances of the Case

5. The facts are contained within the original communication, but pertinent matters are summarized here for the sake of clarity.
6. The policemen who were on duty on the night of Mr. Moidunov's death, Nurlan Kalmatovich Abdkaimov and Emilbek Ismailovic Mantybaev, both made statements on 24 October 2004 stating that they saw Mr. Moidunov fall to the floor holding the left side of his chest, and that they then called an ambulance. On the same day, Mantybaev entered into the official register that the body "was found on Mahmadiyeva street of Bazarkorgon village without traces of a violent death" (Exhibit 11 to the Communication, at page 3). On 15 November 2004, when interrogated by the prosecutor both policemen changed their story, saying that Mantybaev found Mr. Moidunov hanging in an administrative cell, took him down, and then attempted to resuscitate him, at which point Abdkaimov joined him. Abdkaimov hid the trousers which were supposedly used by Mr. Moidunov to hang himself, and he later returned them to the evidence room. The officers explained that they had initially lied as they were afraid of telling the truth, although they do not explain why they were afraid.
7. Medical assistance arrived in the form of an ambulance team but on examination the medical assistant Gulhumar Toktobaeva found Mr. Moidunov to be dead. Ms. Toktobaeva gave evidence to the prosecutor "I did see red finger mark 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" (Exhibit 8 to the Communication, at page 2).
8. Officer Mantybaev was charged with criminal negligence for failing to prevent a suicide. It appears that officer Abdkaimov disappeared and was not charged with any offence.
9. The two page judgment of the Suzak District Court of the Zhalalabad region of 21 September 2005 found Mantybaev guilty of the offence but exempted him from criminal liability on the basis that there had been reconciliation between him and the family of the victim. However, the judgment is entirely inconsistent in its consideration of the purported reconciliation. In summarizing the evidence of the accused, Emilbek Ismailovic Mantybaev, the judgment states that "he reconciled with the victim's representatives" (at page 2). However, in the next paragraph the judgment summarizes the position of the very same victim's representative, saying:

"A legal representative of the victim Moidunov Z [the brother of the deceased] testified in the court hearing that Moidunov Tashkenbaj was his younger brother and that if the assistant of officer Mantybaev [Abdkaimov] had been found, it would have been clear who had killed his brother and that was why he requested the court to return the criminal case for additional investigation and solve the case according to the law."

10. Despite this clear statement from the family seeking additional investigation, the Court concluded that there had been a reconciliation and thus exempted the defendant from criminal liability.
11. Rather than agreeing that he had reconciled with the accused, the victim's brother, Zuldamidin Moidunov, appealed the decision to the Zhalalabad Regional Court. His lawyer argued that there had been no reconciliation at the earlier hearing, and that the policemen were "directly related to his brother's death" given the discrepancies in their evidence. The judgment of the Regional Court of 5 September 2006 (Exhibit 14 to the Communication) indicates that Mrs. Zhumabaeva gave evidence to the Court that "she suspected that her son had been killed by N. Abdukaimov, who is on the run now, and asked to take appropriate legal measures to apprehend him" (at page 3). There is no record that the prosecutor disagreed with this statement.
12. On appeal by Mr. Moidunov's family, the second instance Regional Court accepted that no reconciliation had been reached between the victim's brother, Zuldamidin, and the defendant police officer, and referred the case to be tried again, with the requirement that the court "must clarify the discrepancies and drawbacks of the investigation" (at page 3).
13. On appeal by the accused officer Mantybaev, on 27 December 2006 the third instance Supreme Court reinstated the decision of the district court on the basis that according to a statement by Mrs. Zhumabaeva, Mantybaev paid the sum of 30,000 soms (approximately \$300 USD) for her son's funeral, and on that basis they upheld the exemption from criminal liability.

B. Relevant Legal Standards

14. In this case, the relevant domestic law with regard to the exemption of criminal liability appears to have been applied without legal or factual basis. This is not appropriate in any case, let alone one involving a death in police custody, where the strictest interpretation should apply in order for the judicial authorities to satisfy their duties under international human rights law to protect the right to life, and where a waiver of the right to pursue justice is therefore permissible only in the most limited of circumstances.

1. Relevant Domestic Law

15. Article 66 of the Criminal Code states:

"A person, who has committed a crime of small gravity or misdemeanor can be exempt from criminal liability, if he has reconciled with the victim and indemnified inflicted damages".
16. "Victim" is defined by Article 49 of the Criminal Procedure Code as "the person who has suffered moral, physical or material damages as result of a crime. Victim is recognized as such by an order of investigator." It is not known whether any order recognizing victim status was made in this case.
17. In this case, both the first instance District Court and the third instance Supreme Court appear to have accepted that charges arising from a suspicious death in police custody can be classed as a "crime of small gravity" with no discussion of the appropriateness of such a classification. They also appear to have accepted that the small payment to cover the funeral costs of Mr. Moidunov was sufficient to cover all financial losses, including physical damages, material damages arising out the death of a family member, and also the moral damages payable for a death in suspicious circumstances in police custody. Neither

the District Court nor the Supreme Court appears to have addressed the question of whether a payment to one member of the family is sufficient to exempt criminal liability, clarified to whom the payment was made, or considered the small scale of the payment. Certainly neither Court considered whether such a payment was sufficient to avoid the need for a proper investigation or that the perpetrators were adequately punished.

2. Relevant International Law

18. The communication submitted in January 2008 makes clear (at page 9) the significance of the right to life, which is of “paramount importance” and which is “a matter of the utmost gravity.” This Committee has described the right to life under Article 6(1) as the “supreme right”¹ which “cannot be understood in a restrictive manner, and the protection of this right requires that states adopt positive measures.”² As General Comment 14 makes clear, the right to life is an absolute right which permits of no exceptions, and from which no derogation is permitted even in time of public emergency. Page 10 of the original communication details the particular legal standards that apply to a death in custody, where there may be limited evidence available to demonstrate how the death occurred, thus transferring the burden of proof to the State. There is a heightened duty to protect vulnerable individuals such as prisoners, whom the Committee has recognized as “particularly vulnerable”,³ imposing a special responsibility on the State to adopt adequate and appropriate measures to protect them.⁴
19. Human Rights law requires that the perpetrators are punished. This Committee has explained that “[a]s with the failure to investigate, failure to bring to justice perpetrators of such violations could in and of itself give rise to a separate breach of the Covenant”, and that this is an obligation which applies in particular to violations of Articles 6 and 7.⁵ The Inter-American Court has interpreted this duty as meaning that the State is under a legal duty “to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victims adequate compensation.”⁶ This duty “requires punishment not only of material authors, but also of the intellectual authors of those acts.”⁷
20. The duty to bring perpetrators to justice means that an appropriate sentence must be passed. This Committee has recognized that “if the violation that is the subject of the complaint is particularly serious . . . remedies of a purely disciplinary and administrative nature cannot be considered sufficient or effective.”⁸ The Committee has also recognized that the sentence of punishment imposed must reflect the seriousness of the human rights violation,

¹ UNHRC, *General Comment 14, The right to life, Article 6*, 1984, at para. 1.

² UNHRC, *General Comment 6, Right to Life*, 1982, at para. 2.

³ UNHRC, *General Comment 21, Right to Humane Treatment and Respect for Human Dignity*, 1992, para. 3.

⁴ *Dermit Barbato v. Uruguay*, UNHRC, Views of 21 October 1982, U.N. Doc. CCPR/C/17/D/84/1981, at para. 9.2. *Bleier v. Uruguay*, UNHRC, Views of 29 March 1982, U.N. Doc. CCPR/C/15/D/30/1978, at para. 11.2 & 13.3.

⁵ UNHRC, *General Comment 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, 2004, para. 18; see also UNHRC, *General Comment 20, Article 7 concerning prohibition of torture and cruel treatment or punishment*, 1992, para. 15.

⁶ *Velásquez-Rodríguez v. Honduras*, IACtHR, Judgment of 29 July 1988, at para. 187.

⁷ *Corumbiara Massacre v. Brazil*, IACtHR, Case 11.566, Report No. 32/04, at para. 256.

⁸ *Coronel et al. v. Colombia*, HRC, 67th Session, Comm. No. 778/1997, 29 September 1996, para. 6.2. Available at: <http://www.wfrrt.net/humanrts/undocs/778-1997.html>.

and there will be a violation of the Covenant if the sentence is too low or where a pardon is granted. The Committee has recommended amendment of national laws that do not provide for appropriate penalties for those convicted of torture.⁹ In *Guridi v. Spain*, a sentence given to three civil guards of four years imprisonment for torture was initially reduced to one year, and then abrogated entirely by a pardon. The Committee recalled the duty of State Parties to impose appropriate penalties and found that “the imposition of lighter penalties and the granting of pardons to the Civil Guards are incompatible with the duty to impose appropriate punishment.”¹⁰ Prominent commentaries to the CAT have indicated that sentences as long as three years are insufficient punishment for the offense of torture.¹¹

21. In *Okkali v. Turkey*, the ECtHR reached similar conclusions on the obligation of Member States to prosecute violations of the prohibition of torture. In a case where police officers received a minimum penalty of one year imprisonment and three months suspension from duty, the Court found that the judges had “exercised their discretion more in order to minimize the sentence of an extremely serious unlawful act than to show that such acts can not be tolerated” and held that the criminal system was not sufficiently dissuasive and the “outcome of the disputed proceedings did not provide appropriate redress.”¹²
22. Mrs. Tashkenbaj remains a victim within the meaning of Article 1 of the Optional Protocol. By her continued litigation both domestically and before this Committee she has made clear that she has not waived her rights. Indeed, when considering a human rights violation as serious as a death in custody it is not possible for those rights to be waived, except in certain limited circumstances, which are not established here. The European Court of Human Rights has considered this question and the case law makes clear that “the waiver of a right guaranteed by the Convention – in so far as such a waiver is permissible – must be established in an unequivocal manner, and be given in full knowledge of the facts, that is to say on the basis of informed consent and without constraint”.¹³ In that case the Court found that “In view of the fundamental importance of the prohibition of racial discrimination, the Grand Chamber considers that, even assuming the conditions referred to in paragraph 202 above were satisfied, no waiver of the right not to be subjected to racial discrimination can be accepted, as it would be counter to an important public interest” (at para. 203).

⁹ Committee against Torture, Concluding Observations on the Republic of Korea, CAT/C/KOR/CO/2, 25 July 2005, at para. 7 & 8; Committee against Torture, Concluding Observations on Tajikistan, CAT/C/TJK/CO/1, 7 December 2006, at para. 5; Committee against Torture, Concluding Observations on South Africa, CAT/C/ZAF/CO/1, 7 December 2006, at para. 13 & 14 (recommending that South Africa should “include appropriate penalties that take into account the grave nature of the offense, in order to fulfill its obligations under the Convention to prevent and eliminate torture and combat impunity”). See also: concluding observation on the *Czech and Slovakian Federal Republic Reports*, (cited in “Nowak CAT Commentary,” *Ibid.*, at A4 para. 34).

¹⁰ *Guridi v. Spain*, Decision of the CAT, 8 February 2002, U.N. Doc. CAT/C/34/D/212/2002, at para. 6.7. Available at: <http://www1.umn.edu/humanrts/cat/decisions/212-2002.html>.

¹¹ Nowak CAT Commentary, see note 1 above, at A4 para. 34 (citing CAT/C/SR.51 at para. 31, CAT/C/SR.78 at para. 4).

¹² *Okkali v. Turkey*, ECtHR Judgment of 12 February 2007, at para. 78.

¹³ *D.H. and Others v Czech Republic*, ECtHR (GC), Judgment of 17 November 2007, at para.203.

23. The European Court of Human Rights has explained in a number of cases involving other interests that any waiver “must not run counter to any important public interest”,¹⁴ and that any purported waiver “must be attended by minimum safeguards commensurate to the waiver’s importance”.¹⁵ In addition, for the waiver to be unequivocal and informed, “it must be shown that [the applicant] could reasonably have foreseen what the consequences of his conduct would be”.¹⁶
24. The importance of preventing deaths in custody is a similarly important public interest. Both this Committee and the European Court have emphasised the importance of establishing the truth and punishing those responsible in cases of arbitrary killings or torture. This Committee has explained that the obligation to provide reparation or compensation is separate from the obligation to investigate and bring to justice perpetrators of arbitrary killings, and has emphasised that “States Parties concerned may not relieve perpetrators from personal responsibility”.¹⁷ The European Court of Human Rights has similarly explained that cases of ill-treatment

“cannot be remedied exclusively through an award of compensation [...] because, if the authorities could confine their reaction to incidents of wilful ill-treatment by State agents to the mere payment of compensation, while not doing enough to prosecute and punish those responsible, it would be possible in some cases for agents of the State to abuse the rights of those within their control with virtual impunity, and the general legal prohibition of torture and inhuman and degrading treatment, despite its fundamental importance, would be ineffective in practice”.¹⁸

25. It is clear that the family of Mr. Moidunov had no intention of waiving their rights to establish the truth of how he died and to hold the perpetrators accountable. The fact that the family did not refuse a small payment to assist with the cost of 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. Their pursuit of justice through multiple appeals and through a petition to the Human Rights Committee makes clear that no such waiver was intended.

D. Conclusion

26. In the light of the above, the author re-iterates the arguments made in the Communication:
- *Arbitrary killing.* Due to the failure to provide a plausible explanation for the death through an independent and effective investigation, the Committee should find that the death of Mr. Moidunov was an arbitrary killing. There is strong evidence that he was strangled to death which has never been properly considered by a Court.

¹⁴ *Sejdovic v. Italy*, ECtHR (GC), Judgment of 1 March 2006, para. 86; *Håkansson and Sturesson v. Sweden*, ECtHR Judgment of 21 February 1990, para. 66; *Panovits v. Cyprus*, ECtHR Judgment of 11 December 2008, para. 68.

¹⁵ *Salduz v Turkey*, ECtHR (GC), Judgment of 7 November 2008, para. 59; *Sejdovic v. Italy*, ECtHR (GC), Judgment of 1 March 2006, para. 86; *Panovits v. Cyprus*, ECtHR Judgment of 11 December 2008, para. 68.

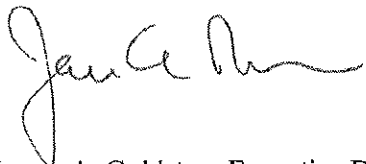
¹⁶ *Panovits v. Cyprus*, ECtHR Judgment of 11 December 2008, para. 68.

¹⁷ UNHRC, *General Comment 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, 2004, paras. 16 and 18

¹⁸ *Romanov v Russia*, ECtHR Judgment of 24 July 2008, para. 78 and cases cited therein. See also *Shilbergs v. Russia*, ECtHR Judgment of 17 December 2009, paras. 66-79, where even though domestic courts awarded compensation for unlawful imprisonment and acknowledged that there had been a violation, the applicant still qualified as a “victim” before the ECtHR because the amount of compensation was not adequate in light of the fundamental nature of the right which had been violated.

- *Failure to investigate.* There were numerous failings in the investigation which demonstrate that it was neither effective nor impartial, and was not for the purpose of bringing the perpetrators to justice. No record was made of the scene of the death. No photographs were taken. The trousers supposedly used to commit suicide were not seized, preserved, or scientifically examined for evidence that would demonstrate they had been in contact with Mr. Moidunov, an important point given his wife's evidence that they were not his. The clear evidence of the medical assistant in the ambulance crew that he had fingermarks on his neck was never investigated or followed up. The policeman Abdkaimov was never located after he made his initial statement, and it is unclear what attempts were made to trace him. The large sum of money that had been in the possession of Mr. Moidunov was never found. No psychiatric expertise was sought to investigate whether he had cause to commit suicide. The family were not involved in the investigation, and neither were the results of the investigation made public. The investigation lacked impartiality by accepting without question the evidence of the police officers. Even though one police officer was charged with a criminal offence, a charge of negligence was insufficient considering the evidence of strangulation.
- *No remedies available.* The family has been unable to obtain remedies appropriate to the severity of the violation. They have only been given an *ex gratia* payment of a small sum equivalent to approximately \$300 to assist with the costs of the funeral. Only a criminal conviction is sufficient to remedy such a serious human rights violation.
- *Torture.* The treatment of Mr. Moidunov also amounts to torture, for which there has also been no effective investigation and no adequate remedy.

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James A. Goldston, Executive Director
Masha Lisitsyna, Program Manager
Open Society Justice Initiative
New York



pp. Tair Asanov
Collegium of Lawyers
Osh Oblast
Kyrgyzstan