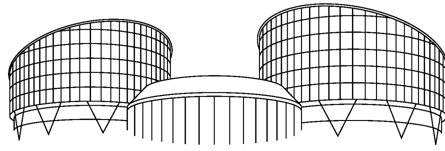

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

CASE OF ELBERTE v. LATVIA

(Application no. 61243/08)

JUDGMENT

STRASBOURG

13 January 2015

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

In the case of Elberte v. Latvia,

The European Court of Human Rights (Fourth Section), sitting as a Chamber composed of:

Päivi Hirvelä, *President,*
Ineta Ziemele,
George Nicolaou,
Nona Tsotsoria,
Zdravka Kalaydjieva,
Krzysztof Wojtyczek,
Faris Vehabović, *judges,*
and Fatoş Aracı, *Deputy Section Registrar,*

Having deliberated in private on 4 November and 2 December 2014,

Delivers the following judgment, which was adopted on the latter date:

PROCEDURE

1. The case originated in an application (no. 61243/08) against the Republic of Latvia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Latvian national, Ms Dzintra Elberte (“the applicant”), on 5 December 2008.

2. The applicant was represented by Ms I. Nikuļceva, a lawyer practising in Riga. The Latvian Government (“the Government”) were represented by their Agents, firstly Mrs I. Reine and subsequently Mrs K. Līce.

3. The applicant alleged, in particular, that the removal of her deceased husband’s tissue had taken place without her consent or knowledge and that he had been buried with his legs tied together.

4. On 27 April 2010 the application was communicated to the Government under Articles 3 and 8 of the Convention. On 9 July 2013 it was decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1 of the Convention).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1969 and lives in Sigulda. She is the wife of Mr Egils Elberts (the applicant’s husband), a Latvian national who was born in 1961 and who died on 19 May 2001.

A. Events leading to the applicant's knowledge of tissue removal

6. On 19 May 2001 the applicant's husband was involved in a car accident in the Allaži parish. An ambulance transported him to Sigulda Hospital but he died on the way there as a result of his injuries. He was placed in the mortuary at Sigulda Hospital. The applicant's mother-in-law, who worked at Sigulda Hospital and thereby learnt about her son's death immediately, stayed next to his body at Sigulda Hospital until it was transported to the State Centre for Forensic Medical Examination (*Valsts tiesu medicīnas expertīžu centrs*) ("Forensic Centre") in Riga.

7. At 5 a.m. on 20 May 2001 the body was delivered to the Forensic Centre in order to establish the cause of death. Between 1 p.m. and 3 p.m. an autopsy was carried out and numerous injuries were found to his head and chest, including several broken ribs and vertebrae. There were bruises on his right shoulder, thigh and knee. A forensic medical expert, N.S., classified the injuries as serious and life-threatening and established a causal link between them and his death.

8. According to the Government, after the autopsy N.S. had verified that there was no stamp in Mr Elberts' passport denoting his objection to the use of his body tissue and he had removed from the body of Mr Elberts tissue with a total area of 10 cm x 10 cm – the outer layer of the meninges (*dura mater*). According to the applicant, N.S. could not have checked whether or not there was stamp in Mr Elberts' passport because at that time it had been at their home in Sigulda. The applicant submitted that the area of removed tissue was larger than 10 cm x 10 cm and that it was not only *dura mater*.

9. On 21 May 2001 the prosecutor's office issued a permit to bury the body. According to the applicant, on 21 or 22 May 2001 her sister had arrived at the Forensic Centre with a view to obtaining the certificate showing the cause of death, in relation to which she had signed their registration log. On 22 May 2001 her sister submitted that document, together with Mr Elberts' passport, to the relevant authority in Sigulda to obtain the death certificate.

10. According to the Government, on 25 May 2001 the body of Mr Elberts had been handed over to a relative. According to the applicant, his body had been handed over to another person who was merely helping with its transportation prior to the funeral.

11. On 26 May 2001 the funeral took place in Sigulda. The applicant first saw her deceased husband when his remains were transported back from the Forensic Centre for the funeral. She saw that his legs had been tied together. He was buried that way. The applicant herself was pregnant at the time with their second child.

12. The applicant was not aware that tissue had been removed from her husband's body until about two years later, when the Security Police informed her that a criminal inquiry had been opened into the illegal

removal of organs and tissue, and that tissue had been removed from her husband's body.

B. Criminal inquiry into the illegal removal of organs and tissue

13. On 3 March 2003 the Security Police (*Drošības Policija*) opened a criminal inquiry into the illegal removal of organs and tissue for supply to a pharmaceutical company based in Germany ("the company") between 1994 and 2003. The following sequence of events was established.

14. In January 1994 the predecessor institution of the Forensic Centre concluded an agreement with the company to cooperate for the purpose of scientific research. Under the agreement various types of tissue were to be removed from deceased persons – selected by the Forensic Centre in accordance with international standards – and sent to the company for processing. The company modified the received tissues into bio implants and sent them back to Latvia for transplantation purposes. The Ministry of Welfare agreed to the content of the agreement, reviewing its compliance with domestic law on several occasions. The Prosecutor's Office issued two opinions on the compatibility of the agreement with domestic law and, in particular, with the Law on the Protection of the Bodies of Deceased Persons and the Use of Human Organs and Tissue ("the Law").

15. Any qualified member of staff ("expert") of the Forensic Centre was allowed to carry out the removal of tissue on his or her own initiative. The Head of the Thanatology Department of the Forensic Centre was responsible for their training and the supervision of their work. He was also responsible for sending the tissue to Germany. The experts received remuneration for their work. Initially, the tissue removal was performed at forensic divisions located in Ventspils, Saldus, Kuldīga, Daugavpils and Rēzekne. After 1996, however, tissue removal was carried out only at the Forensic Centre in Riga and the forensic division in Rēzekne.

16. Under the agreement, experts could remove tissue from deceased persons who had been transported to the Forensic Centre for forensic examination. Each expert was to verify whether the potential donor had objected to the removal of organs or tissue during his or her lifetime by checking his or her passport to make sure that there was no stamp to that effect. If relatives objected to the removal, their wishes were respected, but experts themselves did not attempt to contact relatives or to establish their wishes. Tissue was to be removed within twenty-four hours of the biological death of a person.

17. Experts were obliged to comply with domestic law but, according to their own testimonies, not all of them had read the Law. However, the content of it was clear to them as the Head of the Thanatology Department of the Forensic Centre had explained that removal was allowed only if there

was no stamp in the passport denoting a refusal for organs or tissue to be removed and if the relatives did not object to the removal.

18. In the course of the inquiry the investigators questioned specialists in criminal law and the removal of organs and tissue. It was concluded that, generally speaking, two legal systems exist for regulating the removal of organs and tissue – "informed consent" and "presumed consent". On the one hand, the Head of the Forensic Centre, the Head of the Thanatology Department of the Forensic Centre and the experts at the Forensic Centre were of the opinion that at the relevant time (that is to say, after the Law's entry into force on 1 January 1993) there had existed a system of "presumed consent" in Latvia. These persons were of the view that the system of presumed consent meant that "everything which is not forbidden is allowed". The investigators, on the other hand, were of the opinion that section 2 of the Law gave a clear indication that the Latvian legal system relied more on the concept of "informed consent" and, accordingly, removal was permissible only when it was (expressly) allowed, that is to say when consent had been given either by the donor during his or her lifetime or by the relatives.

19. More particularly, as regards the removal of tissue from the applicant's husband's body, on 12 May 2003 expert N.S. was questioned. Subsequently, on 9 October 2003 the applicant was recognised as an injured party (*cietušais*) and she was questioned on the same date.

20. On 30 November 2005 it was decided to discontinue the criminal inquiry into the activities of the Head of the Forensic Centre, the Head of the Thanatology Department of the Forensic Centre and the Head of the Rēzekne Forensic Division in respect of the removal of tissue. The above considerations were noted down in the decision (*lēmums par kriminālprocesa izbeigšanu*) and differences concerning the possible interpretations of domestic law were resolved in favour of the accused. Moreover, the 2004 amendments to the Law were to be interpreted to mean that there was a system of "presumed consent" in Latvia. It was concluded that sections 2-4 and 11 of the Law had not been violated and that no element of a crime as set out in section 139 of the Criminal Law had been established.

21. On 20 December 2005 and 6 January 2006 prosecutors dismissed complaints lodged by the applicant and held that the decision to discontinue inquiry was lawful and justified.

22. On 24 February 2006 a superior prosecutor of the Office of the Prosecutor General examined the case-file and concluded that the inquiry should not have been discontinued. He established that the experts at the Forensic Centre had breached provisions of the Law and that the tissue removal had been unlawful. The decision to discontinue was quashed and the case file was sent back to the Security Police.

23. On 3 August 2007 the criminal inquiry, in as far as it related to the removal of tissue from the body of the applicant's deceased husband, was discontinued owing to the expiry of the statutory limitation period of five years. However, the legal ground given for this discontinuation was the absence of any element of a crime. On 13 August 2007 the applicant was informed of this decision. On 19 September and 8 October 2007 in response to complaints lodged by the applicant, the prosecutors stated that the decision had been lawful and justified.

24. On 3 December 2007 another superior prosecutor of the Office of the Prosecutor General examined the case-file and concluded that the inquiry should not have been discontinued. She established that the experts at the Forensic Centre had breached provisions of the Law and that the tissue removal had been unlawful. The decision to discontinue was once again quashed and the case file was again sent back to the Security Police.

25. On 4 March 2008 a new decision to discontinue the criminal inquiry was adopted, based on the legal ground of the expiry of the statutory limitation period. On 27 March 2008, in response to a complaint from the applicant, the prosecutor once again quashed the decision.

26. A fresh investigation was carried out. During the course of that investigation it was established that in 1999 tissue had been removed from 152 people; in 2000, from 151 people; in 2001, from 127 people; and in 2002, from 65 people. In exchange for the supply of tissue to the company, the Forensic Centre had organised the purchase of different medical equipment, instruments, technology and computers for medical institutions in Latvia and the company had paid for these purchases. Within the framework of the agreement, the total monetary value of the equipment for which the company had paid exceeded the value of the removed tissue that was sent to the company. In the decision of 14 April 2008 (see immediately below) it was noted that the tissue was not removed for transplantation purposes in accordance with section 10 of the Law but was actually removed for modification into other products to be used for patients not only in Latvia, but also in other countries.

27. On 14 April 2008 the criminal inquiry was discontinued owing to the expiry of the statutory limitation period. In the decision it was noted that whenever an expert from the Rēzekne Forensic Division for example, had interviewed the relatives prior to the removal of organs or tissue, he had never expressly informed them about such potential removal or indeed obtained their consent. According to the testimonies of all the relatives, they would not have consented to the removal of organs or tissue had they been informed and their wishes established. According to the experts' testimonies, they had merely checked passports for stamps and had not sought relatives' consent as they had not been in contact with them. It was also noted that with effect from 1 January 2002, information was to be sought from the Population Record, which the experts had failed to do. It

was concluded that the experts, including N.S., had contravened section 4 of the Law and had breached the relatives' rights. However, owing to the five-year statutory limitation period (which started running on 3 March 2003) the criminal inquiry was discontinued, and on 9 May and 2 June 2008 the prosecutors upheld this decision in response to complaints lodged by the applicant. The applicant lodged a further complaint.

28. In the meantime, the experts, including N.S., lodged an appeal contesting the reasons for the discontinuation of the criminal inquiry (*kriminālprocesa izbeigšanas pamatojums*). They contested their status as the persons against whom the criminal inquiry concerning unlawful tissue removal was instigated because they had not at any stage been informed about this inquiry and argued that, accordingly, they had been unable to exercise their defence rights. On 26 June 2008 in a final decision the Riga City Vidzeme District Court upheld their appeal (case no. 1840000303), quashed the 14 April 2008 decision and sent the case file back to the Security Police. The court found as follows:

> "Notwithstanding the fact that a certain proportion of the transplants were not returned to be used for patients in Latvia, there is no evidence in the case file that they were used for processing into other products or for scientific or educational purposes. Therefore, the court considers that there is no evidence in the case file that the removed tissues were used for purposes other than transplantation...
>
> There is no evidence in the case file demonstrating that the removal of tissue for transplantation purposes had been carried out disregarding the deceased person's refusal, as expressed during his lifetime and recorded in accordance with the law in force at the relevant time, or with disregard for a refusal expressed by the closest relatives.
>
> Taking into account the fact that legislative instruments do not impose any obligation on the experts who carry out the removal of tissue and organs from deceased persons' bodies to inform persons about their rights to refuse tissue or organ removal, the court considers that the experts did not have any obligation to do so; by not informing the deceased person's relatives about their intention to remove tissue, the experts did not breach the provisions of the [Law], as effective from 1994 to March 2003. Section 4 of the [Law] provides for the right of the closest relatives to refuse the removal of the deceased person's organs and/or tissue, but does not impose an obligation on the expert to explain these rights to the relatives. Given that there are no legislative instruments which impose an obligation on the experts to inform relatives about their intention to remove tissue and/or organs and to explain to the relatives their rights to object by refusing their consent, the court considers that a person cannot be punished for a failure to comply with an obligation which is not clearly laid down in a legislative instrument in force. Therefore, the court finds that the experts, by carrying out the tissue and organ removal from the deceased, did not breach ... the [Law].
>
> ... The court finds that the experts' actions did not constitute the elements of a crime proscribed by section 139 of the Criminal Law; therefore, it is possible to discontinue the criminal proceedings for exonerating reasons – namely on the grounds of section 377 (2) of the Criminal Procedure Law – owing to the absence of the elements of a crime."

29. On 2 July 2008 the superior prosecutor responded to a complaint lodged by the applicant. She admitted that the inquiry had taken a long time owing to numerous complaints against the decisions. However, she did not find any particular circumstances which would indicate that it had been unduly protracted. At the same time, she informed the applicant that the court had quashed the 14 April 2008 decision upon the appeal by the experts. She further stated that a new decision to discontinue the criminal inquiry had been adopted on 27 June 2008 and that the applicant would soon be duly notified.

30. Indeed, the applicant received the 27 June 2008 decision a few days later. It was reiterated in that decision that the experts did not have any legal obligation to inform anyone about their right to consent to or refuse organ or tissue removal. Section 4 of the Law provided for the right of the closest relatives to object to the removal of the deceased person's organs and tissue, but did not impose any obligation on the expert to explain these rights to the relatives. A person could not be punished for a failure to comply with an obligation which was not clearly laid down in a legal provision; the experts had not breached the Law. The applicant lodged further complaints.

31. On 15 August 2008 the prosecutor replied, *inter alia*, that there were no circumstances indicating the desecration of a human body. At the same time, she explained that the experts had performed actions in connection with the unlawful tissue removal in order to use the tissue for medical purposes. After the removal of tissue, other material was commonly implanted to restore the visual integrity of dead bodies. Therefore, the criminal inquiry had concerned actions under section 139 of the Criminal Law and not under section 228 of the Criminal Law proscribing desecration of a dead body.

32. On 10 September 2008 a superior prosecutor replied that there were no grounds for examining the actions of the persons who proceeded with the tissue removal under section 228 of the Criminal Law as desecration of a dead body. The experts had proceeded in accordance with an instruction issued by the Ministry of Justice, implanting other material in the place of the removed tissue. According to the instruction, tissue was to be removed in such a way so as not to mutilate the body, and, if necessary, subsequent restoration was to be carried out.

33. On 23 October 2008 another superior prosecutor of the Office of the Prosecutor General replied with a final negative decision.

II. RELEVANT INTERNATIONAL DOCUMENTS AND DOMESTIC LAW

A. The Council of Europe documents

34. On 11 May 1978 the Committee of Ministers of the Council of Europe adopted Resolution (78) 29 on harmonisation of legislations of member states relating to removal, grafting and transplantation of human substances, which recommended that the governments of the Member States ensure that their laws conform to the rules annexed to the resolution or adopt provisions conforming to these rules when introducing new legislation.

Article 10 of this Resolution provides:

> “1. No removal must take place when there is an open or presumed objection on the part of the deceased, in particular, taking into account his religious and philosophical convictions.
>
> 2. In the absence of the explicit or implicit wish of the deceased the removal may be effected. However, a state may decide that the removal must not be effected if, after such reasonable inquiry as may be practicable has been made into the views of the family of the deceased and in the case of a surviving legally incapacitated person those of his legal representative, an objection is apparent; when the deceased was a legally incapacitated person the consent of his legal representative may also be required.”

35. The Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine (Council of Europe Treaty Series no. 164) is the first international treaty in the field of bioethics (“the Convention on Human Rights and Biomedicine”). It entered into force on 1 December 1999 in respect of the States that had ratified it. Latvia signed the Convention on Human Rights and Biomedicine on 4 April 1997, ratified it on 25 February 2010, and it entered into force in respect of Latvia on 1 June 2010. The Convention on Human Rights and Biomedicine is not applicable to organ and tissue removal from deceased persons. It concerns organ and tissue removal from living donors for transplantation purposes (Articles 19, 20).

36. In relation to organ and tissue removal from deceased persons, an Additional Protocol on Transplantation of Organs and Tissues of Human Origin was adopted (Council of Europe Treaty Series no. 186), to which the Government referred. On 1 May 2006 it entered into force in respect of the States that had ratified it. Latvia has neither signed nor ratified this Protocol.

37. The relevant Articles of the Additional Protocol read:

Article 1 – Object

> “Parties to this Protocol shall protect the dignity and identity of everyone and guarantee, without discrimination, respect for his or her integrity and other rights and

fundamental freedoms with regard to transplantation of organs and tissues of human origin.”

Article 16 – Certification of death

“Organs or tissues shall not be removed from the body of a deceased person unless that person has been certified dead in accordance with the law.

The doctors certifying the death of a person shall not be the same doctors who participate directly in removal of organs or tissues from the deceased person, or subsequent transplantation procedures, or having responsibilities for the care of potential organ or tissue recipients.”

Article 17 – Consent and authorisation

“Organs or tissues shall not be removed from the body of a deceased person unless consent or authorisation required by law has been obtained.

The removal shall not be carried out if the deceased person had objected to it.”

Article 18 – Respect for the human body

“During removal the human body must be treated with respect and all reasonable measures shall be taken to restore the appearance of the corpse.”

The relevant parts of the Explanatory Report to the Additional Protocol read:

Introduction

“2. The purpose of the Protocol is to define and safeguard the rights of organ and tissue donors, whether living or deceased, and those of persons receiving implants of organs and tissues of human origin.”

Drafting of the Protocol

“7. This Protocol extends the provisions of the Convention on Human Rights and Biomedicine in the field of transplantation of organs, tissues and cells of human origin. The provisions of the Convention are to be applied to the Protocol. For ease of consultation by its users, the Protocol has been drafted in such a way that they need not keep referring to the Convention in order to understand the scope of the Protocol’s provisions. However, the Convention contains principles which the Protocol is intended to develop. Accordingly, systematic examination of both texts may prove helpful and sometimes indispensable.”

Comments on the provisions of the Protocol
Preamble

“13. The Preamble highlights the fact that Article 1 of the Convention on Human Rights and Biomedicine protecting the dignity and the identity of all human beings and guaranteeing everyone respect for their integrity, forms a suitable basis on which to formulate additional standards for safeguarding the rights and freedoms of donors, potential donors and recipients of organs and tissues.”

Article 1 – Object

“16. This article specifies that the object of the Protocol is to protect the dignity and identity of everyone and guarantee, without discrimination, respect for his or her integrity and other rights and fundamental freedoms with regard to transplantation of organs and tissues of human origin.

17. The term ‘everyone’ is used in Article 1 because it is seen as the most concordant with the exclusion of embryonic and foetal organs or tissues from the scope of the Protocol as stated in Article 2 (see paragraph 24 below). The Protocol solely concerns removal of organs and tissues from someone who has been born, whether now living or dead, and the implantation of organs and tissues of human origin into someone else who has likewise been born.”

Article 16 – Certification of death

“94. According to the first paragraph, a person’s death must have been established before organs or tissues may be removed ‘in accordance with the law’. It is the responsibility of the States to legally define the specific procedure for the declaration of death while the essential functions are still artificially maintained. In this respect, it can be noted that in most countries, the law defines the concept and the conditions of brain death.

95. The death is confirmed by doctors following an agreed procedure and only this form of death certification can permit the transplantation to go ahead. The retrieval team must satisfy themselves that the required procedure has been completed before any retrieval operation is started. In some States, this procedure for certification of death is separate from the formal issuance of the death certificate.

96. The second paragraph of Article 16 provides an important safeguard for the deceased person by ensuring the impartiality of the certification of death, by requiring that the medical team which certifies death should not be the same one that is involved in any stage of the transplant process. It is important that the interests of any such deceased person and the subsequent certification of death are, and are seen to be, the responsibility of a medical team entirely separate from those involved in transplantation. Failure to keep the two functions separate would jeopardise the public’s trust in the transplantation system and might have an adverse effect on donation.

97. For the purposes of this Protocol, neonates including anencephalic neonates receive the same protection as any person and the rules on certification of death are applicable to them.”

Article 17 – Consent and authorisation

“98. Article 17 bars the removal of any organ or tissue unless the consent or authorisation required by national law has been obtained by the person proposing to remove the organ or tissue. This requires member States to have a legally recognised system specifying the conditions under which removal of organs or tissues is authorised. Furthermore, by virtue of Article 8, the Parties should take appropriate measures to inform the public, namely about matters relating to consent or authorisation with regard to removal from deceased persons (see paragraph 58 above).

99. If a person has made known their wishes for giving or denying consent during their lifetime, these wishes should be respected after his/her death. If there is an official facility for recording these wishes and a person has registered consent to donation, such consent should prevail: removal should go ahead if it is possible. By

the same token, it may not proceed if the person is known to have objected. Nonetheless, consultation of an official register of last wishes is valid only in respect of the persons entered in it. Nor may it be considered the only way of ascertaining the deceased person's wishes unless their registration is compulsory.

100. The removal of organs or tissues can be carried out on a deceased person who has not had, during his/her life, the capacity to consent if all the authorisations required by law have been obtained. The authorisation may equally be required to carry out a removal on a deceased person who, during his/her life, was capable of giving consent but did not make known his wishes regarding an eventual removal post-mortem.

101. Without anticipating the system to be introduced, the Article accordingly provides that if the deceased person's wishes are at all in doubt, it must be possible to rely on national law for guidance as to the appropriate procedure. In some States the law permits that if there is no explicit or implicit objection to donation, removal can be carried out. In that case, the law provides means of expressing intention, such as drawing up a register of objections. In other countries, the law does not prejudge the wishes of those concerned and prescribes enquiries among relatives and friends to establish whether or not the deceased person was in favour of organ donation.

102. Whatever the system, if the wishes of the deceased are not sufficiently established, the team in charge of the removal of organs must beforehand endeavour to obtain testimony from relatives of the deceased. Unless national law otherwise provides, such authorisation should not depend on the preferences of the close relatives themselves for or against organ and tissue donation. Close relatives should be asked only about the deceased persons expressed or presumed wishes. It is the expressed views of the potential donor which are paramount in deciding whether organs or tissue may be retrieved. Parties should make clear whether organ or tissue retrieval can take place if a deceased person's wishes are not known and cannot be ascertained from relatives or friends.

103. When a person dies in a country in which he/she is not normally resident, the retrieval team shall take all reasonable measures to ascertain the wishes of the deceased. In case of doubt, the retrieval team should respect the relevant applicable laws in the country in which the deceased is normally resident or, by default, the law of the country of which the deceased person is a national."

Article 18 – Respect for the human body

"104. A dead body is not legally regarded as a person, but nonetheless should be treated with respect. This article accordingly provides that during removal the human body must be treated with respect and after removal the body should be restored as far as possible to its original appearance."

38. In May 2002 the Secretary General of the Council of Europe sent a questionnaire to the Council of Europe member States concerning aspects of law and practice in relation to transplantation.[1] The Latvian Government replied in the affirmative to the question of whether removal from a living donor required authorisation and referred to Articles 19 and 20 of the Convention on Human Rights and Biomedicine and section 13 of the Law

[1]http://www.coe.int/t/dg3/healthbioethic/Activities/05_Organ_transplantation_en/CDBI_INF(2003)11rev2.pdf

on Protection of the Body of a Deceased Person and Use of Human Organs and Tissue. They noted that written consent was required. In their response to the question "What kind of relationships should exist between the living donor of an organ and the recipient?" they referred to Articles 19 and 20 of the Convention on Human Rights and Biomedicine. In their response to the question "What sanctions are provided for [organ-trafficking] offenders, in particular, for intermediaries and health professionals?" the Latvian Government referred to section 139 of the Criminal Law (see paragraph 53 below).

B. The European Union documents

39. On 21 July 1998 the European Group on Ethics in Science and New Technologies (EGE)[1] to the European Commission issued Opinion no. 11 "On Ethical aspects of human tissue banking". Its relevant parts read:

> "**2.3 Information and consent**
>
> The procurement of human tissues requires, as a principle, the prior, informed and free consent of the person concerned. This does not apply in the case of tissue procurement ordered by a judge in the context of judicial, in particular criminal, proceedings.
>
> While consent is a fundamental ethical principle in Europe, the procedures involved and forms of such consent (oral or in writing, before a witness or not, explicit or presumed, etc.) are a matter for national legislation based on the legal traditions of each country.
>
> ...
>
> 2.3.2 Deceased donors
>
> Consent of a donor for retrieval of tissues after death may take different forms depending on the national systems ("explicit" or "presumed" consent). However, no retrieval of tissues may take place, with the exception of judicial proceedings, if the party concerned formally objected while alive. Furthermore, if there has been no expression of will and the applicable system is that of "presumed" consent, doctors must ensure as far as possible that relatives or next of kin have the opportunity to express the deceased person's wishes, and must take these into account."

40. Directive 2004/23/EC of the European Parliament and of the Council of 31 March 2004 on setting standards of quality and safety for the donation, procurement, testing, processing, preservation, storage and distribution of human tissues and cells provides:

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[1] Established in December 1997, the EGE is an independent advisory body. Its predecessor was the Group of Advisers to the European Commission on the Ethical Implications of Biotechnology, an *ad hoc* advisory body.

Article 13 – Consent

“1. The procurement of human tissues or cells shall be authorised only after all mandatory consent or authorisation requirements in force in the Member State concerned have been met.

2. Member States shall, in keeping with their national legislation, take all necessary measures to ensure that donors, their relatives or any persons granting authorisation on behalf of the donors are provided with all appropriate information as referred to in the Annex.”

ANNEX - INFORMATION TO BE PROVIDED ON THE DONATION OF CELLS AND/OR TISSUES

B. Deceased donors

“1. All information must be given and all necessary consents and authorisations must be obtained in accordance with the legislation in force in Member States.

2. The confirmed results of the donor’s evaluation must be communicated and clearly explained to the relevant persons in accordance with the legislation in Member States.”

C. The World Health Organisation (“WHO”) documents

41. The WHO Guiding Principles on Human Cell, Tissue and Organ transplantation (endorsed by the sixty-third World Health Assembly on 21 May 2010, Resolution WHA63.22) provide, in so far as releveant:

Guiding Principle 1

“Cells, tissues and organs may be removed from the bodies of deceased persons for the purpose of transplantation if:

(a) any consent required by law is obtained, and

(b) there is no reason to believe that the deceased person objected to such removal.”

Commentary on Guiding Principle 1

Consent is the ethical cornerstone of all medical interventions. National authorities are responsible for defining the process of obtaining and recording consent for cell, tissue and organ donation in the light of international ethical standards, the manner in which organ procurement is organized in their country, and the practical role of consent as a safeguard against abuses and safety breaches.

Whether consent to procure organs and tissues from deceased persons is “explicit” or “presumed” depends upon each country’s social, medical and cultural traditions, including the manner in which families are involved in decision-making about health care generally. Under both systems any valid indication of deceased persons’ opposition to posthumous removal of their cells, tissues or organs will prevent such removal.

Under a regime of explicit consent – sometimes referred to as “opting in” – cells, tissues or organs may be removed from a deceased person if the person had expressly consented to such removal during his or her lifetime; depending upon domestic law,

such consent may be made orally or recorded on a donor card, driver's license or identity card or in the medical record or a donor registry. When the deceased has neither consented nor clearly expressed opposition to organ removal, permission should be obtained from a legally specified surrogate, usually a family member.

The alternative, presumed consent system – termed "opting (or contracting) out" – permits material to be removed from the body of a deceased person for transplantation and, in some countries, for anatomical study or research, unless the person had expressed his or her opposition before death by filing an objection with an identified office, or an informed party reports that the deceased definitely voiced an objection to donation. Given the ethical importance of consent, such a system should ensure that people are fully informed about the policy and are provided with an easy means to opt out.

Although expressed consent is not required in an opting-out system before removal of the cells, tissues or organs of a deceased person who had not objected while still alive, procurement programmes may be reluctant to proceed if the relatives personally oppose the donation; likewise, in opting-in systems, programmes typically seek permission from the family even when the deceased gave pre-mortem consent. Programmes are more able to rely on the deceased's explicit or presumed consent, without seeking further permission from family members, when the public's understanding and acceptance of the process of donating cells, tissues and organs is deep-seated and unambiguous. Even when permission is not sought from relatives, donor programmes need to review the deceased's medical and behavioural history with family members who knew him or her well, since accurate information about donors helps to increase the safety of transplantation.

For tissue donation, which entails slightly less challenging time constraints, it is recommended always to seek the approval of the next of kin. An important point to be addressed is the manner in which the appearance of the deceased's body will be restored after the tissues are removed."

D. Domestic law

1. Law on Protection of the Body of a Deceased Person and Use of Human Organs and Tissues

42. The Law on Protection of the Body of a Deceased Person and Use of Human Organs and Tissue (*likums* "*Par miruša cilvēka ķermeņa aizsardzību un cilvēka audu un orgānu izmantošanu medicīnā*" – "the Law"), as in force at the relevant time (with amendments effective as of 1 November 1995 and up until 31 December 2001), provides in section 2 that every living person with legal capacity is entitled to consent or object, in writing, to the use of his or her body after death. The wish expressed, unless it is contrary to the law, is binding.

43. Section 3 provides that only such refusal or consent to use one's body after death, which has been signed by a person with legal capacity, recorded in his or her medical record and denoted by a special stamp in his or her passport has legal effect. The Department of Health in the Ministry of Welfare is responsible for prescribing the procedure for recording refusal or consent in a person's medical record (contrast with situation following

legislative amendments effective as of 1 January 2002, *Petrova v. Latvia*, no. 4605/05, § 35, 24 June 2014).

44. Pursuant to section 4, which is entitled "The rights of the closest relatives", the organs and tissues of a deceased person may not be removed against his or her wishes as expressed during his or her lifetime. In the absence of express wishes, removal may be carried out if none of the closest relatives (children, parents, siblings or spouse) objects. Transplantation may be carried out after the biological or brain death of the potential donor (section 10).

45. More specifically, section 11 of the Law provides that organs and tissue from a deceased donor may be removed for transplantation purposes if that person has not objected to such removal during his or her lifetime and if his or her closest relatives have not prohibited it.

46. By virtue of a transitional provision of the Law, a stamp in a person's passport added before 31 December 2001 denoting objection or consent to the use of his or her body after death has legal effect until a new passport is issued or an application to the Office of Citizenship and Migration Affairs is submitted.

47. Section 17 provides that the State is responsible for protecting the body of a deceased person and for using organs or tissues for medical purposes. At the material time this function was entrusted to the Department of Health in the Ministry of Welfare (as of 1 January 2002 – the Ministry of Welfare, as of 30 June 2004 – the Ministry of Health). No organisation or authority can carry out the removal of organs and tissues and use them without an authorisation issued by the Department of Health (as of 1 January 2002 – the Minister of Welfare, as of 30 June 2004 – the Minister of Health).

48. Section 18 prohibits the selection, transportation and use of the removed organs and tissues for commercial purposes. It also provides that the removal of organs and tissues from any living or deceased person can only be carried out with strict respect for that person's expressed consent or objection.

49. Section 21 provides that the Prosecutor's Office is to supervise compliance with this Law (paragraph 1). The Department of Health of the Ministry of Welfare and other competent bodies are responsible for monitoring the legality of the use of human tissue and organs (paragraph 2). With amendments effective as of 1 January 2002, paragraph 1 is repealed; the remaining paragraph provides that the Ministry of Welfare is to bear responsibility for checking the compatibility of the use of human tissue and organs with law and other legislative instruments. As of 30 June 2004 this task is entrusted to the Ministry of Health. Lastly, as of 27 August 2012 this section is repealed in its entirety.

50. On 2 June 2004 amendments to sections 4 and 11 of the Law were passed in the Parliament, effective as of 30 June 2004. From that date

onwards, section 4 provides that if no information is recorded in the Population Register about a deceased person's refusal or consent to the use of his or her body, organs or tissue after death, the closest relatives have the right to inform the medical institution in writing about the wishes of the deceased person expressed during his or her lifetime. Section 11 provides that the organs and body tissue of a deceased person may be removed for transplantation purposes if no information is recorded in the Population Register about the deceased person's refusal or consent to the use of his or her organs or body tissue after death and if the closest relatives of the deceased have not, before the start of the transplantation, informed the medical institution in writing about any objection by the deceased person to the use of his or her organs and body tissue after death expressed during his or her lifetime. It is forbidden to remove organs and body tissue from a dead child for transplantation purposes unless one of his or her parents or his or her legal guardian has consented to it in writing.

2. *Regulation of the Cabinet of Ministers no. 431 (1996)*

51. This regulation (*Noteikumi par miruša cilvēka audu un orgānu uzkrāšanas un izmantošanas kārtību medicīnā*) provides that removal of organs and tissue may be carried out after the biological or brain death of a person if his or her passport and medical record contain a stamp denoting consent to such removal (paragraph 3). In the absence of such a stamp, the provisions of the Law (see above) are to be followed.

3. *Legal regulation of the MADEKKI*

52. Legal regulation of the Inspectorate of Quality Control for Medical Care and Working Capability ("MADEKKI") in Latvian law is summarised in *L.H. v. Latvia* (no. 52019/07, §§ 24-27, 29 April 2014). For the purposes of the present case it suffices to note that its regulations – approved by the Cabinet of Ministers (Regulation no. 391 (1999), effective from 26 November 1999 to 30 June 2004) – provided, *inter alia*, that one of the main functions of the MADEKKI was to monitor the professional quality of healthcare in medical institutions.

4. *Criminal law provisions*

53. Section 139 of the Criminal Law (*Krimināllikums*) provides that the unlawful removal of organs or tissues from a living or deceased human being in order to use them for medical purposes is a criminal offence if carried out by a medical practitioner.

54. Relevant provisions pertaining to the rights of civil parties in criminal proceedings under the former Code of Criminal Procedure (*Latvijas Kriminālprocesa kodekss*) (effective until 1 October 2005) are

described in *Liģeres v. Latvia* (no. 17/02, §§ 39-41, 28 June 2011) and *Pundurs v. Latvia* ((dec.), no. 43372/02, §§ 12-17, 20 September 2011).

55. In addition, the relevant provisions pertaining to the rights of civil parties in criminal proceedings under the Criminal Procedure Law (*Kriminālprocesa likums*) (effective from 1 October 2005) as in force at the material time read:

Section 22 – Right to compensation for damage

"A person who has sustained psychological distress, physical injury or pecuniary loss as a result of a criminal offence shall be guaranteed procedural opportunities to request and receive compensation for pecuniary and non-pecuniary damage."

Section 351 - Request for Compensation

"(1) An injured party shall have the right to submit a request regarding compensation for harm caused at any stage of criminal proceedings up to the commencement of a court investigation in a court of first instance. The request shall contain justification of the amount of compensation requested.

(2) A request may be submitted in writing or expressed orally. An oral request shall be minuted by the person directing the proceedings.

(3) During pre-trial proceedings, the public prosecutor shall indicate the submission of a request and the amount of compensation, as well as his or her opinion thereon in the document regarding the completion of pre-trial proceedings.

(4) Failure to ascertain the criminal liability of a person shall not be an impediment to the submission of a compensation request.

(5) An injured party shall have the right to withdraw a submitted compensation request at any stage of criminal proceedings up to the moment when the court retires to make a judgment. The refusal of compensation by a victim may not constitute grounds for the revocation or modification of charges, or an acquittal."

5. The right to receive compensation

56. Article 92 of the Constitution (*Satversme*) provides, *inter alia*, that "any person whose rights are violated without justification has a right to commensurate compensation".

57. Domestic legal provisions pertaining to compensation for pecuniary and non-pecuniary damage under the Civil Law (*Civillikums*) (before and after the amendments that were effective from 1 March 2006) are quoted in full in *Zavoloka v. Latvia* (no. 58447/00, §§ 17-19, 7 July 2009). Sections 1635 and 1779 are further described in *Holodenko v. Latvia* (no. 17215/07, § 45, 2 July 2013).

58. Under section 92 of the Administrative Procedure Law (*Administratīvā procesa likums*), in force since 1 February 2004, everyone has the right to receive commensurate compensation for pecuniary and non-pecuniary damage caused by an administrative act or action of a public authority. Under section 93 of the same Law, a claim for compensation can be submitted either together with an application to the administrative courts

to declare an administrative act or action of a public authority unlawful, or to the public authority concerned following a judgment adopted in such proceedings. Under section 188, an application to an administrative court regarding an administrative act or action of a public authority must be lodged within one month or one year depending on the circumstances. In relation to an action of a public authority, the one-year time-limit runs from the date on which the applicant finds out that such action has occurred. Lastly, under section 191 (1) an application will be refused if more than three years have elapsed since the applicant found out or ought to have found out that such action has occurred. This time-limit is not amenable to extension (*atjaunots*).

59. The amount of compensation and the procedure for claiming damages from a public authority on account of an unlawful administrative act or an unlawful action of a public authority is prescribed by the Law on Compensation for Damage caused by Public Authorities (*Valsts pārvaldes iestāžu nodarīto* zaudējumu atlīdzināšanas likums), in force since 1 July 2005. Chapter III of the Law provides for the procedure to be followed when an individual claims damages from a public authority. Under section 15 an individual is entitled to lodge an application with the public authority that was responsible for the damage. Pursuant to section 17 such an application must be lodged not later than one year from the date when the individual became aware of the damage and, in any event, not later than five years after the date of the unlawful administrative act or unlawful action of a public authority.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

60. The applicant complained in substance under Article 8 of the Convention firstly that the removal of her husband's tissue had been carried out without his or the applicant's prior consent. Secondly, she complained that – in the absence of such consent – his dignity, identity and integrity had been breached and his body had been treated disrespectfully.

61. Article 8 of the Convention reads as follows:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

62. The Government denied that there had been a violation of that Article.

A. Preliminary issues

63. The Court must start by examining whether it is competent *ratione personae* to examine the applicant's complaint; this issue calls for *ex officio* consideration by the Court (see *Sejdić and Finci v. Bosnia and Herzegovina* [GC], nos. 27996/06 and 34836/06, § 27, ECHR 2009).

64. The Court's approach as concerns direct and indirect victims has been recently summarised in *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania* ([GC], no. 47848/08, §§ 96-100, 17 July 2014) as follows (references omitted):

> "*(i) Direct victims*
>
> 96. In order to be able to lodge an application in accordance with Article 34, an individual must be able to show that he or she was "directly affected" by the measure complained of (...). This is indispensable for putting the protection mechanism of the Convention into motion, although this criterion is not to be applied in a rigid, mechanical and inflexible way throughout the proceedings (...).
>
> Moreover, in accordance with the Court's practice and with Article 34 of the Convention, applications can only be lodged by, or in the name of, individuals who are alive (...). Thus, in a number of cases where the direct victim has died prior to the submission of the application, the Court has not accepted that the direct victim, even when represented, had standing as an applicant for the purposes of Article 34 of the Convention (...).
>
> *(ii) Indirect victims*
>
> 97. Cases of the above-mentioned type have been distinguished from cases in which an applicant's heirs were permitted to pursue an application which had already been lodged. An authority on this question is *Fairfield and Others* (...), where a daughter lodged an application after her father's death, alleging a violation of his rights to freedom of thought, religion and speech (Articles 9 and 10 of the Convention). While the domestic courts granted Ms Fairfield leave to pursue the appeal after her father's death, the Court did not accept the daughter's victim status and distinguished this case from the situation in *Dalban v. Romania* (...), where the application had been brought by the applicant himself, whose widow had pursued it only after his subsequent death.
>
> In this regard, the Court has differentiated between applications where the direct victim has died after the application was lodged with the Court and those where he or she had already died beforehand.
>
> Where the applicant has died after the application was lodged, the Court has accepted that the next-of-kin or heir may in principle pursue the application, provided that he or she has sufficient interest in the case (...).
>
> 98. However, the situation varies where the direct victim dies *before* the application is lodged with the Court. In such cases the Court has, with reference to an autonomous interpretation of the concept of "victim", been prepared to recognise the standing of a relative either when the complaints raised an issue of general interest pertaining to "respect for human rights" (Article 37 § 1 *in fine* of the Convention) and the

applicants as heirs had a legitimate interest in pursuing the application, or on the basis of the direct effect on the applicant's own rights (...). The latter cases, it may be noted, were brought before the Court following or in connection with domestic proceedings in which the direct victim himself or herself had participated while alive.

Thus, the Court has recognised the standing of the victim's next-of-kin to submit an application where the victim has died or disappeared in circumstances allegedly engaging the responsibility of the State (...).

99. In *Varnava and Others* (...) the applicants lodged the applications both in their own name and on behalf of their disappeared relatives. The Court did not consider it necessary to rule on whether the missing men should or should not be granted the status of applicants since, in any event, the close relatives of the missing men were entitled to raise complaints concerning their disappearance (...). The Court examined the case on the basis that the relatives of the missing persons were the applicants for the purposes of Article 34 of the Convention.

100. In cases where the alleged violation of the Convention was not closely linked to disappearances or deaths giving rise to issues under Article 2, the Court's approach has been more restrictive, as in the case of *Sanles Sanles v. Spain* (...), which concerned the prohibition of assisted suicide. The Court held that the rights claimed by the applicant under Articles 2, 3, 5, 8, 9 and 14 of the Convention belonged to the category of non-transferable rights, and therefore concluded that the applicant, who was the deceased's sister-in-law and legal heir, could not claim to be the victim of a violation on behalf of her late brother-in-law. The same conclusion has been reached in respect of complaints under Articles 9 and 10 brought by the alleged victim's daughter (...).

In other cases concerning complaints under Articles 5, 6 or 8 the Court has granted victim status to close relatives, allowing them to submit an application where they have shown a moral interest in having the late victim exonerated of any finding of guilt (...) or in protecting their own reputation and that of their family (...), or where they have shown a material interest on the basis of the direct effect on their pecuniary rights (...). The existence of a general interest which necessitated proceeding with the consideration of the complaints has also been taken into consideration (...).

The applicant's participation in the domestic proceedings has been found to be only one of several relevant criteria (...)."

65. As regards the first part of the complaint, the Court considers that the applicant has adequately demonstrated that she has been directly affected by the removal of her deceased husband's tissue without her consent (see also *Petrova*, cited above, § 56). The Court is therefore satisfied that the applicant can be considered a "direct victim" in that regard (see paragraph 60 above). However, in so far as the applicant's complaint relates to the lack of the consent of her deceased husband, the Court considers that it is incompatible *ratione personae* within the meaning of Article 35 § 3 (a) of the Convention and must therefore be rejected in accordance with Article 35 § 4 of the Convention.

66. As regards the second part of the complaint, the Court notes that the applicant conceded that it concerned her deceased husband's rights. Accordingly, it must also be rejected as incompatible *ratione personae* in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

67. Lastly, the Court notes that in certain respects the second part of the complaint overlaps with the applicant's complaint under Article 3 of the Convention and the Court will, accordingly, examine it below in so far as it relates to the applicant's rights.

B. Admissibility

1. The Parties' submissions

68. The Government conceded that the applicant's complaint fell within the ambit of "private life" under Article 8 of the Convention, but they did not accept that it concerned "family life".

69. First of all, relying on the Court's decision in *Grišankova and Grišankovs v. Latvia* ((dec.), no. 36117/02, ECHR-2003 II (extracts)), the Government argued that the applicant had failed to exhaust the domestic remedies. They considered that the applicant should have lodged a complaint with the Constitutional Court since the removal of her husband's tissue had been carried out in accordance with the procedure laid down in sections 4 and 11 of the Law. She should have raised the issue of the compliance of these legal provisions with the Latvian Constitution.

70. Secondly, the Government argued that the applicant had not submitted a complaint to the MADEKKI. The Government pointed out that at the material time the MADEKKI had been the body with the competence to examine the applicant's complaints, since its function was to monitor the professional quality of healthcare in medical institutions. It was the Government's submission that an examination by MADEKKI of the compliance of the tissue removal procedure with domestic law was a necessary precondition for instituting any civil or criminal proceedings against those responsible. They did not provide any further information in this regard.

71. Thirdly, the Government submitted that the applicant could have relied on section 1635 of the Civil Law (as effective from 1 March 2006) and claimed compensation for pecuniary and non-pecuniary loss before the civil courts. The Government provided some examples of domestic case-law pertaining to the application of section 1635 in practice. They referred to the proceedings in case PAC-714 (instituted on 7 February 2005), where a claimant had sought compensation for non-pecuniary damage from a hospital where she had given birth and where tubal ligation (surgical contraception) had been performed without her consent (see *L.H. v. Latvia*, cited above, § 8). On 1 December 2006 that claim had been upheld and the claimant had been awarded compensation for physical injury and psychological distress in the amount of 10,000 Latvian lati (LVL) in respect of the unlawful sterilisation on the basis of section 2349 of the Civil Law. This judgment had taken effect on 10 February 2007. The Government also

referred to one of the "Talsi tragedy" cases (instituted on 15 September 2006), where on 16 March 2010 the appellate court had awarded compensation payable by the State in the amount of LVL 20,000 in connection with the incident of 28 June 1997 in Talsi where, among other children, the claimant's daughter had died. The final decision in this case was adopted on 28 September 2011. The Government did not provide copies of the decisions in the latter case.

72. The applicant disagreed. She considered that her complaint fell within the ambit of private and family life under Article 8 of the Convention.

73. In response to the first remedy cited by the Government – recourse to the Constitutional Court – the applicant pointed out that the court's competence was limited to reviewing compliance with the Constitution of laws and other legal instruments. The applicant argued that the tissue removal had been contrary to sections 4 and 11 of the Law; she did not consider these legal provisions to be contrary to the Constitution. The case of *Grišankovs and Grišankova* concerned the wording of the Education Law. The present case, however, concerned an individual action – tissue removal from her husband's body. Moreover, the applicant argued that if any provisions of the Law were indeed not compatible with the Constitution, the criminal court, the Prosecutor General or the Cabinet of Ministers should and could themselves have submitted an application to the Constitutional Court.

74. In response to the second remedy cited by the Government, namely a complaint to the MADEKKI, the applicant submitted that it would not have been the competent body. Tissue removal was not healthcare. The applicant referred to section 21 of the Law and explained that at the relevant time supervision had been the responsibility of the Prosecutor's Office (see paragraph 49 above).

75. In response to the third remedy cited by the Government, the applicant argued that the Forensic Centre was a State institution under the supervision of the Ministry of Health. Since the entry into force of the Administrative Procedure Law on 1 February 2004, administrative acts and actions of public authorities had been amenable to judicial review by the administrative courts. Thus, an appeal against an action of a public authority – the removal of tissue from the body of the applicant's husband – could only be lodged in the administrative courts. Referring to the Forensic Centre's regulations, the applicant noted that the actions of its employees were amenable to appeal before its Head, whose decisions or actions were further amenable to judicial review by the administrative courts. Appeals under the Administrative Procedure Law, however, would have been time-barred in the applicant's case by the time the final decision had been taken in the criminal proceedings. The applicant concluded that the expert's actions could not be subjected to judicial review by the civil courts.

76. The applicant also pointed out that the amount of compensation and the procedure for claiming damages from a public authority on account of an unlawful administrative act or unlawful action by a public authority was prescribed by the Law on Compensation for Damage caused by Public Authorities and not by the Civil Law. An action under the former law, however, would also have been time-barred.

77. Lastly, even if the applicant had lodged a civil claim under section 1635 of the Civil Law against the experts who had removed tissue from her husband's body, as suggested by the Government, it would have been bound to fail since in the criminal proceedings it had been established that they were not guilty. The applicant also pointed out that the examples of domestic case-law referred to by the Government were not comparable. In the first case the civil proceedings had been instituted against a private hospital and not against a State institution. The second case concerned events which dated back to 1997, long before the Administrative Procedure Law and the Law on Compensation for Damage caused by Public Authorities came into effect. In addition, at that time, the Code of Civil Procedure contained a chapter concerning litigation in matters arising from administrative relations, which was superseded by the entry into effect of the Administrative Procedure Law.

2. *The Court's assessment*

(a) Non-exhaustion

78. In so far as the Government refer to a constitutional complaint as a remedy relevant in the applicant's circumstances, the Court considers that such a complaint could not constitute an effective means of protecting the applicant's rights under Article 8 of the Convention for the following reasons.

79. The Court has already examined the scope of the Constitutional Court's review in Latvia (see *Grišankova and Grišankovs*, cited above; *Liepājnieks v. Latvia* (dec.), no. 37586/06, §§ 73-76, 2 November 2010; *Savičs v. Latvia*, no. 17892/03, §§ 113-117, 27 November 2012; *Mihailovs v. Latvia*, no. 35939/10, §§ 157-158, 22 January 2013; *Nagla v. Latvia*, no. 73469/10, § 48, 16 July 2013; and *Latvijas jauno zemnieku apvienība v. Latvia* (dec.), no. 14610/05, §§ 44-45, 17 December 2013).

80. The Court has noted that the Constitutional Court examined, *inter alia*, individual complaints challenging the constitutionality of a legal provision or its compliance with a provision having superior legal force. An individual constitutional complaint can be lodged against a legal provision only when an individual considers that the provision in question infringes his or her fundamental rights as enshrined in the Constitution. The procedure of an individual constitutional complaint cannot therefore serve as an effective remedy if the alleged violation resulted only from the

erroneous application or interpretation of a legal provision which, in its content, is not unconstitutional (see *Latvijas jauno zemnieku apvienība*, cited above, §§ 44-45).

81. In the present case, the Court considers that the applicant's complaint concerning the removal of tissue does not relate to the compatibility of one legal provision with another legal provision having superior force. The Government argued that the tissue removal had taken place in accordance with the procedure laid down in law. The applicant, for her part, did not contest the constitutionality of this procedure. Instead, she argued that the tissue removal from her husband's body constituted an individual action that was contrary to sections 4 and 11 of the Law. The Court finds that the applicant's complaint relates to the application and interpretation of domestic law, particularly in the light of the absence of any relevant administrative regulation; it cannot be said that any issues of compatibility arise. In such circumstances the Court considers that the applicant need not have exhausted the proposed remedy.

82. The Court understands the Government's argument in relation to the MADEKKI examination (see paragraph 70 above) as chiefly pertaining to civil remedies; the Court will examine it immediately below. It is not clear from the evidence on the case file whether the MADEKKI carried out any examination in relation to the criminal proceedings in the present case (contrast with *Petrova*, cited above, § 15). In any event, it does not appear that any examination by the MADEKKI was necessary in order to institute criminal proceedings. Be that as it may, it is irrelevant that the applicant did not lodge a separate complaint with the MADEKKI as long as she complained about all the decisions adopted by the investigating and prosecuting authorities, whose task it is normally to establish whether any crime has been committed (ibid., § 71).

83. As regards the possibility of lodging a civil claim for damages, in *Calvelli and Ciglio v. Italy* ([GC], no. 32967/96, § 51, ECHR 2002-I), the Court ruled:

> "In the specific sphere of medical negligence the obligation may for instance also be satisfied if the legal system affords victims a remedy in the civil courts, either alone or in conjunction with a remedy in the criminal courts, enabling any liability of the doctors concerned to be established and any appropriate civil redress, such as an order for damages and for the publication of the decision, to be obtained. Disciplinary measures may also be envisaged."

84. The Court has further stated that this principle applies when the infringement of the right to life or personal integrity is not caused intentionally (see *Vo v. France* [GC], no. 53924/00, § 90, ECHR 2004-VIII, and *Öneryıldız v. Turkey* [GC], no. 48939/99, § 92, ECHR 2004-XII).

85. However, the Court has also found that in the event of there being a number of domestic remedies which an individual can pursue, that person is entitled to choose the remedy which addresses his or her essential grievance

(see *Jasinskis v. Latvia*, no. 45744/08, § 50, 21 December 2010). The Court observes that the applicant was originally unaware of the fact that her husband's tissue had been removed; she learned about it only when the Security Police opened a criminal inquiry into these facts. Subsequently, she availed herself of the criminal avenue of redress – she was declared an injured party in these proceedings and she pursued them by lodging various complaints with the investigating and prosecuting authorities. The criminal-law remedy could have given rise to a finding that the removal of her husband's organs had been carried out contrary to the domestic procedure and that her rights as the closest relative had been breached. It could eventually have led to a compensation award, given that the Latvian legal system recognises victims' rights to lodge civil claims in criminal proceedings and to request compensation for damage suffered as a result of a crime (see paragraphs 54 and 55 above). In such circumstances, there is nothing to suggest that the applicant could have legitimately expected that the criminal-law remedy would not be an effective one in her case.

86. The Court is of the view that the applicant was not required to submit to the civil courts a separate, additional request for compensation, which could also have given rise to a finding that the removal of her husband's organs had been carried out contrary to the domestic procedure and that her rights as the closest relative had been breached (see also *Sergiyenko v. Ukraine,* no. 47690/07, §§ 40-43, 19 April 2012; *Arskaya v. Ukraine,* no. 45076/05, §§ 75-81, 5 December 2013; and *Valeriy Fuklev v. Ukraine,* no. 6318/03, §§ 77-83, 16 January 2014, where the applicants were not required to lodge separate civil claims for the alleged medical malpractice). The Court concludes that the applicant exhausted the available domestic remedies by pursuing the criminal-law remedy.

87. In the light of the above conclusion, the Court does not consider it necessary to address the Government's argument that an examination by the MADEKKI was necessary to institute civil proceedings. Nor does it consider it necessary to address the applicant's argument that her claim under the Administrative Procedure Law and the Law on Compensation for Damage caused by Public Authorities was time-barred or that her claim under the Civil Law was bound to fail.

(b) Applicability

88. The Court notes that while the Government did not accept that the applicant's complaint concerned "family life", they did not contest it fell within the ambit of "private life" under Article 8 of the Convention.

89. The Court reiterates that the concepts of private and family life are broad terms not susceptible to exhaustive definition (see *Hadri-Vionnet v. Switzerland*, no. 55525/00, § 51, 14 February 2008). In the case of *Pannullo and Forte v. France* (no. 37794/97, § 36, ECHR 2001-X), the Court considered the excessive delay by the French authorities in returning

the body of their child following an autopsy to be an interference with the private and family life of the applicants. It has also held that the refusal of the investigating authorities to return the bodies of deceased persons to their relatives constituted an interference with the applicants' private and family life (see *Sabanchiyeva and Others v. Russia*, no. 38450/05, § 123, ECHR 2013 (extracts) and *Maskhadova and Others v. Russia*, no. 18071/05, § 212, 6 June 2013). However, that issue does not arise in the present case and a similar complaint has not been made. The Court notes that there is no dispute between the parties that the applicant's right – established under domestic law – to express consent or refusal in relation to the removal of her husband's tissue comes within the scope of Article 8 of the Convention in so far as private life is concerned. The Court sees no reason to hold otherwise and thus considers that this Article is applicable in the circumstances of the case.

(c) Conclusion

90. The Court notes that the applicant's complaint – in so far as it concerns the removal of her deceased husband's tissue without her consent – is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

C. Merits

1. The Parties' submissions

91. The applicant considered that the removal of her husband's tissue without her consent had constituted interference with her private life. She argued that she had been prevented from expressing her wishes about the removal of tissue from her deceased husband's body. She had not even been informed of this intrusive fact. The applicant also submitted that the expert could not have verified the existence of a stamp in her husband's passport because it had been at their home in Sigulda and therefore unavailable for the expert.

92. First of all, relying on *Hokkanen v. Finland* (23 September 1994, § 55, Series A no. 299-A), the applicant argued that the interference had not been in accordance with the law and had not pursued a legitimate aim. The applicant referred to sections 4 and 11 of the Law and argued that in 2001 the system of "explicit consent" had operated in Latvia. The applicant was of the opinion that the experts should have enquired whether the closest relatives had agreed or objected to tissue removal and that they had been under an obligation to do so under the aforementioned provisions. She argued that the aim of the Law was to protect the body of a deceased person and that it was necessary for this aim to be taken into account when

interpreting its provisions. In this respect she also referred to international material (see paragraph 37 above). Lastly, the 2004 amendments to the Law demonstrated that previously the system of "explicit consent" had prevailed. The discussion regarding "explicit" and "presumed" consent systems in Latvia had only started at about the time that the criminal inquiry was opened in the present case. As a result, substantive legislative amendments had been passed in Parliament in 2004 (see paragraph 50 above). The applicant submitted that even after these amendments the relevant legal provisions were still not clear enough, but their wording had been changed to establish the system of "presumed consent".

93. The applicant furthermore argued that the domestic law was not foreseeable in its application because it provided for no possibility for the relatives to object to tissue removal. She referred to various findings by the domestic authorities that the legal provisions were unclear (see, for example, paragraph 28 above) and noted that several prosecutors had considered that the Law had indeed been breached (see, for example, paragraphs 22, 24 and 27 above). The applicant considered that the experts had exploited the lack of clarity for their own ends and had derived financial benefit. The applicant concluded that the removal of tissue from her husband's body had not been carried out in accordance with law.

94. Secondly, the applicant considered that "saving the lives of others" could not constitute a legitimate aim for removing tissue without consent. And, thirdly, she argued that it had not been sufficiently proved by the Government to be necessary in a democratic society.

95. The Government maintained that the interference with the applicant's private life by virtue of the removal of her husband's tissue without his or the applicant's prior consent had complied with the criteria set out in Article 8 § 2.

96. Firstly, the Government argued that the tissue removal had been carried out in accordance with domestic law. They specifically pointed out that the Court – if it were to reject their non-exhaustion argument as regards recourse to the Constitutional Court – ought to proceed on the assumption that national law was compatible with the standard laid down in Article 8 of the Convention.

97. They referred to paragraph 3 of Regulation no. 431 (1996) and sections 4 and 11 of the Law and argued that the tissue removal had been carried out in accordance with domestic law. No prior consent had been necessary, nor had it been necessary to seek permission from the deceased person's closest relatives. It had not been unlawful to proceed with the tissue removal without the consent of the deceased person or his or her closest relatives. The Government argued that under sections 4 and 11 of the Law only "an absence of any objection by the deceased person expressed prior to his death or an absence of explicit objection by [the closest relatives] expressed prior to the tissue removal" had been required. The

Government thus argued that the system of "presumed consent" had been operating in Latvia at the material time. They pointed out that the system of "presumed consent" was not innovative and that Latvia had not been the only country employing this system; it was also established in eleven other States.

98. According to the Government, the expert had verified – prior to the tissue removal – that there was no stamp in Mr Elberts' passport denoting his objection to the use of his body tissue and this had allegedly been noted in the form of an abbreviation ("*zīm. nav*") in the registration log. However, in the copy of the registration log provided to the Court no such legible abbreviation could be seen.

99. At the same time, the Government acknowledged that national laws did not impose any obligation on a doctor to make specific inquiries in order to ascertain if there were any closest relatives and to inform them of possible tissue removal. In this connection they referred to the court's decision in the criminal proceedings (see paragraph 28 above).

100. Secondly, the Government considered that the tissue removal had been carried out in order to "save and/or improve the lives of others". They referred to the court's decision in the criminal proceedings (see paragraph 28 above), which had noted that "tissues [were] removed in the name of humanity with the aim of improving the health of others and prolonging their lives". They also referred to the Preamble of the Additional Protocol on Transplantation of Organs and Tissues of Human Origin to the effect that the practice of tissue donation and tissue removal for transplantation purposes "contributes to saving lives or greatly improving their quality" and that "transplantation of [...] tissues is an established part of the health services offered to the population". The Government concluded that the tissue removal had had a legitimate aim – namely the protection of health and the protection of the rights of others.

101. Thirdly, the Government reiterated that the States enjoyed a margin of appreciation when determining measures to be taken in response to the pressing social need to protect the health and the rights of others. The Government relied on *Dudgeon* and argued that it was for the national authorities to make the initial assessment of the pressing social need in each case and that the margin of appreciation was left to them (*Dudgeon v. the United Kingdom*, 22 October 1981, § 52, Series A no. 45). Tissue removal and transplantation contributed to saving lives and could greatly improve their quality. Thus, there was a "pressing social need" for tissue donation because tissue transplantation had become an established part of the health services offered to the whole population. They reiterated that Mr Elberts' tissue had been removed in order to secure bio material for transplantation purposes to potentially improve and/or save the lives of others.

102. It was primarily the duty and responsibility of the deceased's closest relative to duly inform the medical personnel in good time of the

deceased person's objection to his or her tissue removal. The national law at the time had not prevented either Mr Elberts or the applicant, as his closest relative, from expressing their wishes in relation to tissue removal. They could have objected to the donation of tissue. However, neither of them had done so before the tissue had been removed in accordance with the Law. The Government concluded that a fair balance had been struck between the applicant's "right to private life under the Convention – as national laws envisaged the closest relative's right to object to the removal of the deceased person's tissue prior to the removal procedure (which had not been exercised either by Mr Elberts or by the applicant) – and the pressing social need to secure bio implants for tissue transplantation as part of the health services offered to the whole population".

2. *The Court's assessment*

(a) General principles

103. The essential object of Article 8 is to protect the individual against arbitrary interference by public authorities. Any interference under the first paragraph of Article 8 must be justified in terms of the second paragraph, namely as being "in accordance with the law" and "necessary in a democratic society" for one or more of the legitimate aims listed therein. The notion of necessity implies that the interference correlates with a pressing social need and, in particular, that it is proportionate to one of the legitimate aims pursued by the authorities (see *A, B and C v. Ireland* [GC], no. 25579/05, §§ 218-241, 16 December 2010).

104. The Court refers to the interpretation given to the phrase "in accordance with the law" in its case-law (as summarised in *S. and Marper v. the United Kingdom* [GC], nos. 30562/04 and 30566/04, §§ 95-96, ECHR 2008). Of particular relevance in the present case is the requirement for the impugned measure to have some basis in domestic law, which should be compatible with the rule of law, which, in turn, means that the domestic law must be formulated with sufficient precision and must afford adequate legal protection against arbitrariness. Accordingly the domestic law must indicate with sufficient clarity the scope of discretion conferred on the competent authorities and the manner of its exercise (see, most recently, *L.H. v. Latvia*, cited above, § 47).

(b) Application in the present case

105. As to the alleged interference, turning to the circumstances of the present case, the Court notes that following a car accident the applicant's husband sustained life-threatening injuries of which he died on the way to the hospital. On the following day, his body was transported to the Forensic Centre, where an autopsy was carried out. Subsequently, some of his body tissue was removed and later sent to a company in Germany to be modified

into bio implants; it was intended that it be sent back to Latvia for transplantation purposes. The applicant, who was one of his closest relatives, was not informed of this and could not exercise certain rights established under domestic law – namely to express consent or refusal in relation to the removal of her husband's tissue. She learned about the tissue removal only some two years later, when the Security Police opened a criminal inquiry into the illegal removal of organs and tissue between 1994 and 2003 and contacted her.

106. The Court notes that it has not been contested that the Forensic Centre was a public institution and that the acts or omissions of its medical staff, including experts who carried out organ and tissue removal, were capable of engaging the responsibility of the respondent State under the Convention (see *Glass v. the United Kingdom*, no. 61827/00, § 71, ECHR 2004-II).

107. The Court considers that the above-mentioned circumstances are sufficient for it to conclude that there has been an interference with the applicant's right to respect for her private life under Article 8 of the Convention.

108. As to whether the interference was "in accordance with the law", the Court observes that Latvian law at the material time explicitly provided for the right on the part of not only the person concerned but also his or her closest relatives, including spouses, to express their wishes in relation to the removal of tissue after that person's death (see paragraphs 44 and 45 above). The parties did not contest this. However, their views differed in so far as the exercise of this right was concerned. The applicant considered that the experts were obliged to establish the wishes of the closest relatives. The Government argued that the mere absence of any objection was all that was required to proceed with tissue removal. It is the Court's view that these issues reflect the quality of domestic law, in particular the question of whether the domestic legislation was formulated with sufficient precision and afforded adequate legal protection against arbitrariness in the absence of the relevant administrative regulation.

109. In this context, the Court observes that the principal disagreement between the parties is whether or not the law – which in principle afforded the closest relatives the right to express consent or refusal in relation to the tissue removal – was sufficiently clear and foreseeable in its application as regards the exercise of this right. The applicant argued that there was no possibility for her as the closest relative to object to the tissue removal, but the Government was of the view that she could have nonetheless exercised that right as nothing had prevented her from expressing her wishes or her objection.

110. The Court reiterates, however, that where national legislation is in issue it is not the Court's task to review the relevant legislation in the abstract. Instead, it must confine itself, as far as possible, to examining the

issues raised by the case before it (see *Taxquet c. Belgique* [GC], no. 926/05, § 83 *in fine*, ECHR 2010). The Court observes that the parties argued at some length whether the system of "explicit consent" or "presumed consent" had been operating in Latvia at the material time (see also divided views of experts and investigators in paragraph 18 above). It has to be borne in mind, however, that the issue before the Court in the present case is not the general question of whether the respondent State should provide for a particular consent system. The issue is rather the applicant's right to express wishes in connection with the removal of her husband's tissue after his death and the domestic authorities' alleged failure to ensure the legal and practical conditions for exercise of that right.

111. The starting point for the Court's analysis is the fact that the applicant was not informed about the removal of her husband's tissue when it was carried out. Domestic authorities established that it was common practice at the time for the experts at the Forensic Centre who carried out such removal not to attempt to contact relatives of the deceased persons (paragraph 16 above); there was also evidence that, even where the experts did have some contact with the relatives, they neither informed them of the imminent removal of tissue nor obtained their consent (paragraph 27 above).

112. As to whether or not the domestic law was formulated with sufficient precision, the Court observes that domestic authorities themselves held conflicting views as to the scope of obligations enshrined in national law. On the one hand, while the Security Police considered that tissue removal was allowed only with prior express consent and that its absence rendered the removal unlawful, they also accepted – referring to the views held by the experts – that different interpretations of domestic law were possible, thus rendering it impossible to arrive at a conviction (paragraphs 18 and 20 above). On the other hand, various supervising prosecutors concluded that by removing the tissue without prior express consent the experts had breached the law and were to be held criminally liable (paragraphs 22 and 24, 25 above). Eventually, the Security Police accepted the prosecutors' interpretation of the domestic law and found that the rights of the closest relatives, including the applicant, had been breached. However, any criminal prosecution had in the meantime become time-barred (paragraph 27 above). Lastly, a domestic court, while accepting that the closest relatives had the right to express consent or refusal in relation to the removal of tissue, overruled the view adopted by the prosecution and found that the domestic law did not impose an obligation on the experts to inform the closest relatives and explain their rights to them. The experts could not be convicted of breaching an obligation which was not clearly established by law (paragraph 28 above).

113. The Court considers that such disagreement as to the scope of the applicable law among the very authorities responsible for its enforcement

inevitably indicates a lack of sufficient clarity. In this regard, the Court refers to the domestic court's finding that, although section 4 of the Law provided for the right of the closest relatives to refuse the removal of the deceased person's organs and/or tissue, it did not impose an obligation on the expert to explain these rights to the relatives (see paragraph 28 above). The Government also relied on this statement to argue that the tissue removal had not been unlawful (see paragraphs 97 and 99 above). It allows the Court to conclude that although Latvian law set out the legal framework allowing the closest relatives to express consent or refusal in relation to tissue removal, it did not clearly define the scope of the corresponding obligation or the margin of discretion conferred on experts or other authorities in this respect. The Court notes, in this connection, that the relevant European and international documents on this matter accord particular importance to the principle that the relatives' views must be established by means of reasonable enquiries (see paragraph 34 et seq. above). More specifically, as noted in the Explanatory Report to the Additional Protocol, whichever system a State chooses to put in place – be it that of "explicit consent" or that of "presumed consent" – appropriate procedures and registers should also be established. If the wishes of the deceased are not sufficiently clearly established, relatives should be contacted to obtain testimony prior to tissue removal (see, in particular, commentary to Article 17 of the Additional Protocol, paragraph 37 above).

114. Furthermore, the Court reiterates that the principle of legality requires States not only to respect and apply, in a predictable and consistent manner, the laws they have enacted, but also, as a necessary element, to assure the legal and practical conditions for their implementation (see *mutatis mutandis Broniowski v. Poland* [GC], no. 31443/96, §§ 147 and 184, ECHR 2004-V). Following the death of the applicant's husband on 19 May 2001, an expert from the Forensic Centre was authorised to remove his body tissue within twenty-four hours of verification that his passport did not contain a special stamp denoting objection (paragraph 16 above). However, it appears that at the material time there was no common register of stamps that had been entered in passports in order to denote refusal or consent to the use of the passport-holder's body after death (contrast with the situation following legislative amendments effective as of 1 January 2002 and inclusion of this information in the Population Register described in *Petrova*, cited above, § 35). Moreover, it appears that there was no procedure for the State institutions and experts to follow in order to request and obtain this information. The Government argued that the expert had physically checked Mr Elberts' passport prior to removing the tissue, but the applicant claimed that her husband's passport was at home. Therefore, the procedure followed by the expert to verify the information contained in his passport remains unclear. Irrespective of whether or not the expert checked Mr Elberts' passport, it remains unclear how the system of consent,

as established under Latvian law at the material time, operated in practice in the circumstances in which the applicant found herself, whereby she had certain rights as the closest relative but was not informed how and when these rights might have to be exercised, still less provided with any explanation.

115. As to whether the domestic law afforded adequate legal protection against arbitrariness, the Court notes that the removal of tissue in the present case was not an isolated act as in the above-cited *Petrova* case, but was carried out under a State-approved agreement with a pharmaceutical company abroad; removals had been carried out from a large number of people (paragraphs 13, 14 and 26 above). In such circumstances it is all the more important that adequate mechanisms are put in place to balance the wide margin of discretion conferred on the experts to carry out removals on their own initiative (paragraph 15), but this was not done (see also the international material cited in paragraph 34 et seq. above). In response to the Government's argument that nothing had prevented the applicant from expressing her wishes in relation to tissue removal, the Court notes the lack of any administrative or legal regulation in this regard. The applicant was, accordingly, unable to foresee what was expected from her if she wished to exercise that right.

116. In the light of the foregoing, the Court cannot find that the applicable Latvian law was formulated with sufficient precision or afforded adequate legal protection against arbitrariness.

117. The Court accordingly concludes that the interference with the applicant's right to respect for her private life was not in accordance with the law within the meaning of Article 8 § 2 if the Convention. Consequently, there has been a violation of Article 8. Having regard to this conclusion, the Court does not consider it necessary to review compliance with the other requirements of Article 8 § 2 in this case (see, for example, *Kopp v. Switzerland*, 25 March 1998, § 76, *Reports of Judgments and Decisions* 1998-II, and *Heino v. Finland*, no. 56720/09, § 49, 15 February 2011).

II. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

118. The applicant also complained under Article 3 of the Convention about the fact that the removal of her husband's tissue had been carried out without her prior consent or knowledge and that she had been forced to bury him with his legs tied together.

119. Article 3 of the Convention reads as follows:

> "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

120. The Government contested that argument.

A. Admissibility

121. The Government raised the same preliminary objections pertaining to non-exhaustion of domestic remedies as already referred to above and the applicant disagreed (paragraphs 69-77 above). In this regard the Court refers to its above assessment (paragraphs 78-87 above) and considers it applicable also under this head.

122. Furthermore, the Government referred to an instruction issued by the Ministry of Justice (effective until 1 January 2002) concerning the procedure for post-mortem forensic examinations and the Law on the Order of Examination of Applications, Complaints and Suggestions by State and Municipal Institutions (effective until 1 January 2008). They argued that the applicant could have lodged a complaint about the condition of her deceased husband's body. The applicant disagreed. The Court notes that the Government did not specify the manner in which the proposed remedy could provide redress in respect of the applicant's complaint. The Court considers it sufficient to refer to its above assessment to the effect that the applicant's recourse to a criminal-law remedy was appropriate (paragraph 85 above). The Court would add here that the applicant also complained about acts of desecration on her husband's body after the tissue removal in the criminal proceedings concerning the allegedly unlawful tissue removal. Prosecutors at two levels examined her complaints and dismissed them, holding that there was no evidence of desecration (see paragraphs 31-32 above). The Government's objection is therefore dismissed.

123. The Government argued that the applicant had failed to comply with the six-month time-limit, given that the applicant had found out about the condition of her deceased husband's body on 26 May 2001, the day of his funeral. The Court notes, however, that on that date the applicant was not yet aware of the removal of tissue from her husband's body; she learned about it only two years later when the criminal inquiry was opened. She subsequently became a party to this investigation. The Court therefore regards the final decision in respect of the applicant's complaint as having been issued on 23 October 2008, when the criminal inquiry was discontinued with a final decision. It dismisses the preliminary objection in this respect.

124. The Government, relying on *Çakıcı v. Turkey* ([GC], no. 23657/94, § 98, ECHR 1999-IV), argued that the applicant could not be considered a victim under Article 3 of the Convention since neither she nor her husband had ever objected to the removal of tissue. They also argued that since the applicant had never lodged a complaint at the domestic level that she had been forced to bury her husband with his legs tied together, she could not claim to be a victim before the Court now. The applicant pointed out that *Çakıcı* was a disappearance case, whereas she had herself seen the remains of her husband before the funeral and his legs had been tied. She had been

shocked, but at the time she was unaware of the tissue removal. The Court considers that in the present case the question of whether or not the applicant can be considered a victim is closely linked to the merits of the case. It should therefore be joined to the merits.

125. Lastly, the Government maintained that the applicant's complaint was incompatible *ratione materiae* with the provisions of the Convention. The Government argued that only the outer layer of the meninges (*dura mater*) was removed. While they agreed that the removal of tissue from a deceased person without the consent or knowledge of that person's closest relatives might on an individual and subjective basis give rise to distress, they did not consider that – in itself – it raised an issue under Article 3 of the Convention. The Government submitted that the latter provision did not lay down a general obligation to obtain consent or to inform the closest relatives about the tissue removal. The Government considered that the applicant's complaint fell to be examined solely under Article 8 of the Convention. The Court considers that in the present case the question of whether or not the applicant's complaint falls within the scope of Article 3 of the Convention is closely linked to the merits of the case. It should therefore be joined to the merits.

126. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds, subject to the questions joined to the merits. It must therefore be declared admissible.

B. Merits

1. The Parties' submissions

127. The applicant submitted that the minimum level of severity for Article 3 of the Convention to apply had been reached in the present case. She had witnessed the condition of her husband's body – with the legs tied – after the tissue removal. She had also been pregnant at the time with their second child. The applicant considered that the unlawful tissue removal amounted to inhuman and degrading treatment prohibited by Article 3 of the Convention – it had caused shock and suffering to her. In support, she provided a written statement from her sister, who stated that she had seen Mr Elberts' body in Sigulda, after it had been transported from the Forensic Centre prior to the funeral, and that his legs had been tied together with dark tape; she had assumed that it had been due to the car accident.

128. Furthermore, the applicant stressed that throughout the criminal inquiry she had been denied the possibility of finding out which organs or tissue had been removed from her husband's body. At first, she had thought that his legs had been tied together to prevent consequences of the car accident. Later, she had assumed that they had been tied together following

the removal of tissue from the legs and because other material had been inserted. The applicant was finally able to discover what specific body tissue had been removed from her husband's body only when she received the Government's observations in the present case.

129. The applicant, relying on *Labita v. Italy* ([GC], no. 26772/95, § 131, ECHR 2000-IV), argued that there had been no effective investigation. The inquiry had lasted for five years; it had been terminated due to the expiry of the statutory time-limit. The applicant pointed out that she had lodged some 13 complaints and that 4 decisions had been quashed. She considered that the inquiry had not been completed within a reasonable time and that it had been unduly prolonged. The applicant, together with other victims, had been left with no redress and the experts had received no punishment.

130. The Government insisted that the tissue removal had been carried out in accordance with domestic law. The applicant had failed to demonstrate that the removal of tissue from her husband's body had amounted to inhuman or degrading treatment. With reference to *Selçuk and Asker v. Turkey* (24 April 1998, § 78, *Reports* 1998-II) the Government argued that the applicant had failed to demonstrate "anguish and suffering" on account of the removal of tissue without her prior consent. With reference to *Ireland v. the United Kingdom* (18 January 1978, § 167, Series A no. 25) they likewise argued that she had failed to demonstrate that she had "feelings of fear, anguish and inferiority capable of humiliating and debasing". The Government reiterated that only *dura mater* had been removed from the body. Even if the applicant might have experienced a certain level of emotional suffering and distress on account of the tissue removal without her consent or knowledge, which was accompanied by the inherent suffering and distress in losing a close family member, that did not attain the minimum level of severity required for it to fall within the scope of Article 3 of the Convention. The Government also argued that during the autopsy, the heart had also been removed from the applicant's husband's body and that *dura mater* had in any event had to be removed and examined in order to assess whether his skull had been damaged. This could also be said to have caused emotional suffering, but would not attain the minimum level of severity required for Article 3 to apply.

131. The Government pointed out that the applicant had not been present at Sigulda Hospital and that it had been the responsibility of the closest relatives to inform the medical staff of their whereabouts and to contact them if they wished to object to tissue removal. They further emphasised that the removal had taken place under the agreement with the company, that tissues had been sent to the company for modification into bio implants and then sent back to Latvia for transplantation purposes, and that the aim behind this had been to improve and save the lives of others. The Government emphasised that tissue removal had to be carried out "very

quickly" and that even the most insignificant of delays would have meant losing some of the precious time during which tissue removal was possible. The Government, relying on the fact that during his lifetime the applicant's husband had not objected to tissue removal or expressed such a view to the applicant, argued that she could not claim that it had been carried out contrary to his or her wishes.

132. The Government further submitted that the applicant's allegations that her deceased husband's legs had been tied together were false since they were not substantiated by any credible evidence. In their submission, according to the information provided by the Forensic Centre, his body had been tidied, cleansed and washed after the autopsy. They reiterated that no complaints had been registered about the condition of his body. According to the autopsy report, his legs had not been damaged in the car accident. In the present case, the standard of proof "beyond reasonable doubt" was not fulfilled as the applicant's allegations concerning the condition of her deceased husband's body had not been substantiated by any evidence.

2. *The Court's assessment*

(a) General principles

133. In the case of *Svinarenko and Slyadnev v. Russia* ([GC], nos. 32541/08 and 43441/08, §§ 113-118, 17 July 2014) the Court has recently summarised the applicable principles as follows:

> "113. As the Court has repeatedly stated, Article 3 of the Convention enshrines one of the most fundamental values of democratic society. It prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the circumstances and the victim's behaviour (see, among many other authorities, *Labita v. Italy* [GC], no. 26772/95, § 119, ECHR 2000-IV).
>
> 114. Ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum is relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim (see, for example, *Jalloh v. Germany* [GC], no. 54810/00, § 67, ECHR 2006-IX). Although the question whether the purpose of the treatment was to humiliate or debase the victim is a factor to be taken into account, the absence of any such purpose cannot conclusively rule out a finding of violation of Article 3 (see, among other authorities, *V. v. the United Kingdom* [GC], no. 24888/94, § 71, ECHR 1999-IX).
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> 115. Treatment is considered to be "degrading" within the meaning of Article 3 when it humiliates or debases an individual, showing a lack of respect for, or diminishing, his or her human dignity, or when it arouses feelings of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance (see *M.S.S. v. Belgium and Greece* [GC], no. 30696/09, § 220, ECHR 2011, and *El-Masri v. the former Yugoslav Republic of Macedonia* [GC], no. 39630/09, § 202, ECHR 2012). The public nature of the treatment may be a relevant or aggravating factor in assessing whether it is "degrading" within the meaning of Article 3 (see, inter alia, *Tyrer v. the United Kingdom*, 25 April 1978, § 32, Series A no. 26; *Erdoğan Yağız*

v. Turkey, no. 27473/02, § 37, 6 March 2007; and *Kummer v. the Czech Republic*, no. 32133/11, § 64, 25 July 2013).

116. In order for treatment to be “degrading”, the suffering or humiliation involved must in any event go beyond that inevitable element of suffering or humiliation connected with a given form of legitimate treatment (see *V. v. the United Kingdom*, cited above, § 71). ...

118. Respect for human dignity forms part of the very essence of the Convention (see *Pretty v. the United Kingdom*, no. 2346/02, § 65, ECHR 2002-III). The object and purpose of the Convention as an instrument for the protection of individual human beings require that its provisions be interpreted and applied so as to make its safeguards practical and effective. Any interpretation of the rights and freedoms guaranteed has to be consistent with the general spirit of the Convention, an instrument designed to maintain and promote the ideals and values of a democratic society (see *Soering v. the United Kingdom*, 7 July 1989, § 87, Series A no. 161).

134. The Court further notes that in assessing evidence in connection with a claim of a violation of Article 3 of the Convention, it adopts the standard of proof “beyond reasonable doubt”. Such proof may, however, follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact (see *Farbtuhs v. Latvia*, no. 4672/02, § 54, 2 December 2004, and *Bazjaks v. Latvia*, no. 71572/01, § 74, 19 October 2010).

(b) Application in the present case

135. Turning to the circumstances of the instant case, the Court observes that the applicant alleged emotional suffering on account of the fact that the removal of her husband’s tissue had been carried out contrary to domestic law without her prior consent or knowledge and that she had been forced to bury her husband with his legs tied together; the Government argued that the first of these allegations did not reach the level of severity for Article 3 of the Convention to apply and that the second was not proved “beyond reasonable doubt”.

136. The Court notes the applicant learned about the fact of tissue removal two years after her husband’s funeral and that some five further years elapsed before the final conclusions were reached as to the possibility of criminal acts in this respect. The applicant alleged, and the Government did not deny, that during this entire time she had not been informed what organs or tissue had been removed from her deceased husband’s body; she had learned it only upon receiving the Government’s observations in the present case. Also, the applicant had come up with several reasons as to why her husband’s legs had been tied together and her submissions were further corroborated by written evidence from a family member. In view of these facts the applicant, as her husband’s closest relative, may have endured emotional suffering.

137. The Court’s task is to ascertain whether in view of the specific circumstances of the case that suffering had a dimension capable of bringing

it within the scope of Article 3 of the Convention. The Court has never questioned in its case-law the profound psychological impact of a serious human rights violation on the victim's family members. However, in order for a separate violation of Article 3 of the Convention to be found in respect of the victim's relatives, there should be special factors in place giving their suffering a dimension and character distinct from the emotional distress inevitably stemming from the aforementioned violation itself (see *Salakhov and Islyamova v. Ukraine,* no. 28005/08, § 199, 14 March 2013). Relevant elements include the closeness of the familial bond and the way the authorities responded to the relative's enquiries (see, for example, *Çakıcı*, cited above, § 98, where this principle was applied in the context of enforced disappearance; *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, no. 13178/03, § 61, 12 October 2006, where the Court further relied on this principle in consideration of a mother's complaint about her suffering on account of her five-year old daughter's detention in another country; and *M.P. and Others v. Bulgaria*, no. 22457/08, §§ 122-124, 15 November 2011, where the respective complaint concerned the suffering of the relatives of an abused child). In the cited cases the Court attached weight to the parent-child bond. It has held that the essence of a violation lay in the authorities' reactions and attitudes to the situation when it was brought to their attention (see *Salakhov and Islyamova*, cited above, § 200). Similar considerations may be said to be applicable in the present case involving the applicant and her deceased husband.

138. The Court would distinguish the present case from the cases brought before the Court by family members of the victims of "disappearances" or extra-judicial killings committed by the security forces (see, for example, *Luluyev and Others v. Russia*, no. 69480/01, §§ 116-118, ECHR 2006-XIII (extracts)) and from the cases where people were killed by actions of the authorities in contravention of Article 2 of the Convention (see, for example, *Esmukhambetov and Others v. Russia*, no. 23445/03, §§ 138-151 and 190, 29 March 2011). Nor is there any suggestion of mutilation of the body (see *Akkum and Others v. Turkey*, no. 21894/93, §§ 258-259, ECHR 2005-II (extracts), and *Akpınar and Altun v. Turkey*, no. 56760/00, §§ 84-87, 27 February 2007) or that the corpse had been dismembered and decapitated (see *Khadzhialiyev and Others v. Russia*, no. 3013/04, §§ 120-122, 6 November 2008) in the present case.

139. While it cannot be said that the applicant was suffering from any prolonged uncertainty regarding the fate of her husband, the Court finds that the applicant had to face a long period of uncertainty, anguish and distress as to what organs or tissue had been removed from her husband's body, and in what manner and for what purpose this had been done. In this context, the Government's argument that only *dura mater* was removed is of no relevance here. In any event, the applicant discovered that only during the proceedings before the Court. At the time of events, the applicant had no

reason to question the activities carried out in the Forensic Centre, as her husband's body had been delivered there to establish the cause of death. Subsequently, a criminal inquiry was opened in respect of the legality of the tissue removal carried out in the Forensic Centre and it was revealed that tissue had been removed not only from her husband's body but also from hundreds of other persons (nearly 500 people in only 3 years, by way of example) over a time-span of some nine years (see paragraphs 13-33 above). It was also established that removals had been carried out under the State-approved agreement with the pharmaceutical company abroad. This scheme had been implemented by State officials – forensics experts – who in addition to their ordinary duties of carrying out forensic examinations had carried out removals on their own initiative (see paragraph 15 above). These are special factors which caused additional suffering for the applicant.

140. The Court considers that the applicant's suffering had a dimension and character which went beyond the suffering inflicted by grief following the death of a close family member. The Court has already found a violation of Article 8 of the Convention because, as the closest relative, the applicant had a right to express consent or refusal in relation to tissue removal but that the corresponding obligation or margin of discretion on the part of domestic authorities was not clearly established by Latvian law and that there was no administrative or legal regulation in this respect (see paragraphs 109-116 above). While there are considerable differences between the present case and the above-cited *Petrova* case as concerns the scale and magnitude of the organ or tissue removals, the Court has nonetheless noted in both cases certain structural deficiencies which have prevailed in the field of organ and tissue transplantation in Latvia. These factors are also to be taken into account in the Latvian context in so far as Article 3 of the Convention is concerned. In addition, not only were the applicant's rights as the closest relative not respected, but she was also faced with conflicting views on the part of the domestic authorities as to the scope of the obligations enshrined in national law. Furthermore, while the Security Police and various prosecutors had disagreements as to whether or not domestic law was sufficiently clear to allow a person to be prosecuted on the basis thereof, they all considered that removal without consent was unlawful (see paragraphs 18, 20, 22, 24-25 above). However, criminal prosecution had become time-barred by the time their disagreement had been resolved (see paragraph 27 above) and, in any event, the domestic court would not allow such a prosecution because the law was not sufficiently clear (see paragraph 28 above). These facts demonstrate the manner in which the domestic authorities dealt with the complaints brought to their attention and their disregard vis-à-vis the victims of these acts and their close relatives, including the applicant. These circumstances contributed to feelings of helplessness on the part of the applicant in the face of a breach of her personal rights relating to a very sensitive aspect of her private life, namely,

giving consent or refusal in relation to tissue removal, and were coupled with the impossibility of obtaining any redress.

141. The applicant's suffering was further aggravated by the fact that she was not informed about what exactly had been done in the Forensic Centre. She was not informed about the tissue removal and, having discovered that her deceased husband's legs were tied together on the day of the funeral, assumed it to be a consequence of the car accident. Two years later she was informed about the pending criminal inquiry and the potentially unlawful acts in respect of her deceased husband's body. It is clear that at this point the applicant experienced particular anguish and realised that her husband might possibly have been buried with his legs tied together as a consequence of the acts that had been carried out in the Forensic Centre on his body. The Government's argument that it was not proved "beyond reasonable doubt" is misplaced, since the applicant's complaint relates to the anguish resulting from precisely that uncertainty regarding the acts carried out at the Forensic Centre in respect of her deceased husband's body.

142. In the special field of organ and tissue transplantation it has been recognised that the human body must still be treated with respect even after death. Indeed, international treaties including the Convention on Human Rights and Biomedicine and the Additional Protocol, as noted in the Explanatory Report to the latter, have been drafted to safeguard the rights of organ and tissue donors, living or deceased. The object of these treaties is to protect the dignity, identity and integrity of "everyone" who has been born, whether now living or dead (see paragraph 37 above). As cited in paragraph 133 above, respect for human dignity forms part of the very essence of the Convention; treatment is considered "degrading" within the meaning of Article 3 of the Convention *inter alia* when it humiliates an individual, showing a lack of respect for human dignity. The applicant's suffering was caused not only by the breach of her rights as the closest relative and the ensuring uncertainty about what had been done in the Forensic Centre, but was also due to the intrusive nature of the acts carried out on her deceased husband's body and the anguish she suffered in that regard as his closest relative.

143. In these specific circumstances the Government's objections that the applicant's complaint does not fall within the scope of Article 3 of the Convention and that she cannot be considered a victim in that regard are dismissed. The Court has no doubts that the suffering caused to the applicant in the present case amounted to degrading treatment contrary to Article 3 of the Convention. It, accordingly, finds a violation of that provision.

III. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

144. Lastly, the applicant relied on Article 13 of the Convention in connection with the fact that there were several possible interpretations of domestic law.

145. The Government contested that argument.

146. The Court notes that this complaint is linked to the complaint examined above under Article 8 of the Convention and must therefore likewise be declared admissible.

147. The Court, however, considers that it has already examined the lack of clarity of the domestic law under Article 8 of the Convention above. Accordingly, it does not consider it necessary to examine this complaint separately under Article 13 of the Convention.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

148. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

149. The applicant claimed 40,000 euros (EUR) in respect of non-pecuniary damage.

150. The Government argued that the applicant had not sufficiently demonstrated that she had sustained non-pecuniary damage to the extent claimed and deemed the amount claimed by the applicant excessive and exorbitant. With reference to the case of *Shannon v. Latvia* (no. 32214/03, § 84, 24 November 2009), the Government considered that the finding of a violation alone would constitute adequate and sufficient compensation.

151. Having regard to the nature of the violations found in the present case and deciding on an equitable basis, the Court awards the applicant EUR 16,000 in respect of non-pecuniary damage.

B. Costs and expenses

152. The applicant also claimed EUR 500 for the costs and expenses incurred before the Court.

153. The Government did not contest the applicant's claim under this head. They considered it sufficiently substantiated and reasonable.

154. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown

that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the sum of EUR 500 covering costs under all heads.

C. Default interest

155. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Joins to the merits* the Government's objections that the applicant's complaint under Article 3 is incompatible *ratione materiae* and *ratione personae* with the provisions of the Convention and *dismisses* them;

2. *Declares* the applicant's complaint under Article 8 in so far as it relates to the removal of her deceased husband's tissue without her consent and the complaint under Article 13 admissible and the remainder of the complaint under Article 8 of the Convention inadmissible;

3. *Declares* the applicant's complaint under Article 3 admissible;

4. *Holds* that there has been a violation of Article 8 of the Convention;

5. *Holds* that there has been a violation of Article 3 of the Convention;

6. *Holds* that there is no need to examine the complaint under Article 13 of the Convention;

7. *Holds*
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts:
      (i) EUR 16,000 (sixteen thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
      (ii) EUR 500 (five hundred euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a

rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

8. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 13 January 2015, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Fatoş Aracı
Deputy Registrar

Päivi Hirvelä
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judge Wojtyczek is annexed to this judgment.

P.H.
F.A.

CONCURRING OPINION OF JUDGE WOJTYCZEK

1. In the instant case, I have voted with the majority; however I have certain doubts about part of the reasoning.

2. I have already expressed my views concerning rights in respect of transplantation in my concurring opinion in the *Petrova* judgment (*Petrova v. Latvia*, no. 4605/05, 24 June 2014). I should like to add some further explanations here.

In my view, the applicant's right to oppose the transplantation of her deceased husband's organs is not an autonomous right which could be exercised *ad libitum*. This right is derived from the right of the deceased man to decide freely on the transplantation of his organs. The surviving relative acts as the depositary of the rights of the deceased. Therefore, the applicant may agree or object to the transplantation of her deceased husband's organs only insofar as she expresses the wishes of the deceased. Holding otherwise would transform the body of a deceased person into an object of arbitrary decisions by relatives.

3. The fact that the applicant indeed exercises a right protecting the wishes of her deceased husband does not mean that – under the Convention – this right has identical status with her husband's right. However close the connection between the two rights in question, the protection afforded to them under the Convention may be different. As I explained in my concurring opinion in the *Petrova* case, an individual's right to express the wishes of a deceased relative in respect of transplantation comes within the scope of family life, within the meaning of Article 8 of the Convention. The right under consideration ensures a multidimensional protection, since it protects not only the wishes of the deceased person but also those of the deceased person's relatives themselves, and relationships within the family. Whether the right to decide freely on the transplantation of one's own organs comes within the scope of Article 8 of the Convention is a separate issue.

4. The Court's case-law has constantly extended the scope of private life within the meaning of Article 8. Recent judgments may suggest that protection of private life is to be identified with the general freedom of decision in personal or private matters. The meaning of "private life" is thus gradually being transformed into a general freedom of action, a notion which is known as *allgemeine Handlungsfreiheit* in German legal science. In my view, such an extensive interpretation of Article 8 in the Court's case-law does not have a sufficient legal basis in the Convention. The provision in question is sometimes misused to fill lacunae in the Convention protection.

5. In the present case the Court has declared the complaint brought by the applicant on behalf of her deceased husband inadmissible. This is

explained in the reasoning on the ground that this part of the complaint is "incompatible *ratione personae*".

I accept the view that Article 8 of the Convention is not applicable to the deceased husband's rights, at stake in the instant case. Such a restrictive interpretation of the Convention corresponds more closely to the applicable rules of treaty interpretation. However, in my view the application should be considered inadmissible *ratione materiae* rather than *ratione personae*. I do not see sufficiently strong arguments to consider that decisions concerning the transplantation of one's own organs are covered by the notions of private life or family life as understood under the rules of treaty interpretation established in international law. To sum up, rights in respect of transplantation are only partially protected by the Convention.