



## International Covenant on Civil and Political Rights

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### Human Rights Committee

#### Communication No. 1935/2010

##### Decision adopted by the Committee at its 110th session (10–28 March 2014)

<i>Submitted by:</i>	O.K. (represented by counsel, Tony Ellis, Barrister)
<i>Alleged victims:</i>	The author and the author's son, N.K. (deceased)
<i>State party:</i>	Latvia
<i>Date of communication:</i>	13 November 2009 (initial submission)
<i>Document references:</i>	Special Rapporteur's rule 97 decision, transmitted to the State party on 1 April 2010 (not issued in document form)
<i>Date of adoption of decision:</i>	19 March 2014
<i>Subject matter:</i>	Investigation of the circumstances of the death of the author's son
<i>Substantive issues:</i>	Right to life; effective investigation; torture
<i>Procedural issues:</i>	<i>Rationae materie</i> ; non-exhaustion of domestic remedies; abuse of submission
<i>Articles of the Covenant:</i>	6 and 7
<i>Article of the Optional Protocol:</i>	1, 3 and 5 (para. 2 (b))

GE.14-03732



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## Annex

### **Decision of the Human Rights Committee under the Optional Protocol to the International Covenant on Civil and Political Rights (110th session)**

concerning

#### **Communication No. 1935/2010\***

*Submitted by:* O.K. (represented by counsel, Tony Ellis, Barrister)

*Alleged victims:* The author and the author's son, N.K. (deceased)

*State party:* Latvia

*Date of communication:* 13 November 2009 (initial submission)

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

*Meeting on 19 March 2014,*

*Adopts the following:*

#### **Decision on admissibility**

1. The author of the communication is O.K., a former resident of Latvia, currently residing in New Zealand, acting on her own behalf and on behalf of her son, N.K., deceased in 1994, at the age of 15. The author alleges that her son died as a result of a beating by a gang of teenagers believed to be of Russian nationality. She claims that the failure of the Latvian authorities to investigate her son's death and prior ill-treatment constitutes a breach by Latvia of the her son, N.K.'s rights under article 6, and of her rights under article 7 of the International Covenant on Civil and Political Rights.<sup>1</sup> She is represented by counsel, Tony Ellis, Barrister.

#### **The facts as submitted by the author**

2.1 The author, O.K., a former citizen of the former Union of Soviet Socialist Republics (USSR) and former resident of Latvia, submits that until 1996, she lived in Riga, the capital city of Latvia, where she was a teacher of the Russian language. Her son, N.K., a "college"

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\* The following members of the Committee participated in the examination of the present communication: Mr. Yadh Ben Achour, Mr. Lazhari Bouzid, Ms. Christine Chanet, Mr. Ahmad Amin Fathalla, Mr. Cornelis Flinterman, Mr. Yuji Iwasawa, Mr. Walter Kälin, Ms. Zonke Zanele Majodina, Mr. Gerald L. Neuman, Sir Nigel Rodley, Mr. Victor Manuel Rodríguez-Rescia, Mr. Fabián Omar Salvioli, Ms. Anja Seibert-Fohr, Mr. Yuval Shany, Mr. Konstantine Vardzelashvili, Ms. Margo Waterval and Mr. Andrei Paul Zlatescu.

The text of a joint opinion by Committee members Fabián Salvioli and Víctor Rodríguez-Rescia is appended to the present Views.

<sup>1</sup> The Optional Protocol entered into force for Latvia on 22 September 1994.

student, studying art, lived with the author and his grandmother. On the evening before his death, he went out around 6 p.m. By 8 p.m., he had not returned home and the author was unable to locate him. Around 11 p.m., some local boys advised the author that her son had been taken to Hospital No. 1 in Riga, because four Russian boys had attacked him and he was bleeding severely. The author immediately went to the hospital, which was one hour travel time away. On her arrival, she was advised that her son was unconscious and attached to a respirator, and that she could not see him. The author was not allowed to see her son before he died, at approximately 1 a.m. the next day, from “massive head trauma”. At his funeral, the author observed that he was badly bruised about the head.

2.2 While waiting in the hospital, the author was informed by the hospital registrar that the four Russian boys, whom she was told had beaten her son, had been drinking at a cheap local hotel. At an unspecified time, the author went to the closest police station to report the incident and provide the information that she had collected on the circumstances thereof. A police officer took the details and they went to the said hotel, but the suspects were not there. The author submits that the police failed to check the hotel register to ascertain the names of the four Russian boys or to make any attempt at a proper investigation. The author returned to the police station and made another statement, and was told to go home.

2.3 A post-mortem examination of the victim’s body was carried out on 2 January 1995. The cause of death of the author’s son was described as “massive head trauma; epidural hematoma caused by a fracture to the base of the skull; blunt head trauma”. After the funeral, the author took the death certificate to the police to assist their investigation. The Russian detective she dealt with, however, was unable to read the certificate. A year later, she was advised by phone by a detective from another police station that her son had died of asthma. Her son, however, had never suffered from asthma. The author maintains that the police officers investigating her son’s death had been bribed, an endemic problem in Latvia at the time.<sup>2</sup> Therefore, despite her complaint to the local police immediately after her son’s death, no prompt and impartial investigation was carried out. The author submits that she continues to suffer from post-traumatic stress disorder and is seeking some form of finality into the improperly investigated cause of her son’s death and the failure on the part of the authorities to bring any prosecution as a result of his beating.

2.4 The author submits that she had lost her husband in a train crash three months before her son’s death. She also submits that her mother suffered a stroke shortly thereafter and she had to take care of her until her death in May 1996. The author alleges that, due to that unfortunate sequence of tragic events, she had a nervous breakdown and developed severe psychiatric problems, from which she continues to suffer.<sup>3</sup> Regarding the exhaustion of domestic remedies, she claims that she lacked the capacity to further push the authorities in that regard. She adds that, being a citizen of the USSR at the time, and only possessing a residence permit in Latvia, she was unable to pursue the matter. Following her attempts to obtain answers from the authorities of the State party on the circumstances of her son’s death, in 1995, the author was allegedly “visited at home”, and received death threats against herself and her daughter.

2.5 The author further contends that as a result of her remarriage and emigration to New Zealand, in 1997, and her deteriorated mental health condition, she was both mentally and

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<sup>2</sup> In support of her allegations, the author annexed to her second petition of 11 March 2010 a press article (in *The Independent*) of 8 November 1999 on a former Latvian secret agent who was seeking asylum in the United Kingdom of Great Britain and Northern Ireland because he had allegedly uncovered corrupt links between senior officials in the Latvian Government and the mafia.

<sup>3</sup> The author submits medical records from 1999, 2000, 2001, 2002, 2004 and 2006 testifying that she is suffering from psychotic disorders, post-traumatic stress disorder and depressed moods.

physically unable to further follow up on the investigation into the death of her son in Latvia. Considering the time that had elapsed since the event, she considered it superfluous to follow up on the investigation with the Latvian authorities at the time of submission of the communication to the Committee. Although she has not exhausted all domestic remedies in Latvia, the author contends that her intentions to do so were clear and genuine in that regard,<sup>4</sup> but special circumstances prevented her from taking additional steps in that respect, and that it would be absurd to allow the State party to benefit from its failure to investigate. She claims that her son's death was a serious contributing factor to her trauma and ensuing inability to pursue the investigation.

### **The complaint**

3.1 The author claims that the failure on the part of the State party's authorities to investigate the circumstances of her son's violent death is a breach of their positive duty to protect life under article 6 of the Covenant, including through preventing, investigating and punishing killings by private individuals.<sup>5</sup> She further contends that she believes that the lack of investigation into her son's death was motivated by ethnic factors, since both the gang of suspects who beat her son and the police officers in charge of the investigation were ethnic Russians, not Latvians. She believes that the investigation was insufficient, and/or a cover-up and that corruption was also involved.

3.2 Insofar as she has been deprived of the "right to know" the circumstances under which her son died, which is tantamount to inhuman or degrading treatment, the author also alleges a violation of article 7 of the Covenant on her own behalf.<sup>6</sup>

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

4.1 On 4 October 2010, the State party submitted a summary of the facts, as established by the competent authorities shortly after the incident concerned. The State party submits that around midday on 25 December 1994, the author's son together with acquaintances went to the centre of Riga to purchase food and beverages for a party, when he slipped on the ice and fell. In the evening of the same day, the author's son went to the hotel where the party was taking place and consumed about 200 ml of vodka. He then felt nausea, vomited and went to sleep around 9 p.m. Around 11 p.m., his acquaintances noticed that saliva with blood was coming out of his mouth and that his heart was beating unevenly. They tried to revive him, called an ambulance and informed his mother that he had been taken to a hospital. The author's son was admitted to hospital around 1.30 a.m. on 26 December 1994. In hospital, it was discovered that he had a head trauma, which had led to massive bleeding inside the brainpan and at 5 a.m., a trepanation was made.

4.2 The State party submits that, on the same day, the author filed a written complaint with the police, requesting them to search for the perpetrators, since her son was in a severe condition in the rehabilitation ward. She was questioned as a witness, and on the same day,

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<sup>4</sup> The author refers to communication No. 138/1983 *Ngalula Mpandanjila et al. v. Zaire*, Views adopted on 26 March 1986, and Committee against Torture communication No. 6/1990, *Parot v. Spain*, Views adopted on 2 May 1995, para. 6.1.

<sup>5</sup> The author refers to the Committee's general comment No. 6 (1982) on the right to life; communication No. 859/1999, *Vaca v. Colombia*, Views adopted on 25 March 2002, para. 7.3; European Court of Human Rights, *Yildirim v. Turkey*, application No. 40074/99, Chamber judgment of 19 July 2007, paras. 74 and 75; and *Yasa v. Turkey*, application No. 63/1997/847/1054, Chamber judgment of 2 September 1998, para. 100.

<sup>6</sup> The author refers to the Committee's jurisprudence in communication No 107/1981, *Quinteros v. Uruguay*, Views adopted on 21 July 1983.

the police interviewed the boys who were with the author's son the previous day and at the party. The boys were also repeatedly interrogated during the following days.

4.3 The author's son died on 28 December 1994 in hospital. On 30 December 1994, an autopsy was performed. It concluded that the cause of death was head trauma originating a few days before the death. On 2 January 1995, a decision was taken to open a criminal investigation under article 105, paragraph 2 (intentional infliction of serious bodily injuries), of the Criminal Code. On 6 January 1995, the officer responsible requested the medical records of the author's son; they were received on 16 January 1995 and indicated that he had already suffered a head trauma in 1993. On 15 January 1995, the hotel personnel who had worked during the night of the incident were questioned by the police. They testified that they had not witnessed a conflict between the individuals present in the hotel room, nor were there any signs of disturbance indicating that a fight had taken place. On 22 and 27 October 1997, the acquaintances who were with the author's son on 25 December 1994 were questioned again. They indicated that they had witnessed him slipping on the ice and falling backwards. On 16 March 2001, the criminal case was transferred to another police precinct in accordance with article 129 of the Criminal Procedure Code for further pretrial investigation. On 30 December 2004, the criminal investigation was closed because the statute of limitations for the alleged crime had expired.

4.4 The State party submitted the text of the domestic legislation in force at the time that it deemed relevant to the case: article 220 of the Criminal Procedure Code,<sup>7</sup> articles 27, 38 and 39 of the Law on "the Police".<sup>8</sup>

<sup>7</sup> Article 220 of the Criminal Procedure Code reads as follows:

"Procedure for lodging complaints against the acts of a preliminary investigator

A suspect, accused and their representatives and legal representatives, witnesses, experts [...] may submit a complaint to a prosecutor against acts of a preliminary investigator. The complaints shall be submitted directly to a prosecutor or with assistance of a person, against whom the complaint is being submitted. Complaints may be both written and oral. In the latter case a prosecutor or a preliminary investigator shall record these complaints in the minutes, which shall be signed by the complainant. A complaint submitted to a preliminary investigator shall be forwarded together with his/her [...] to a prosecutor within 24 hours.

The submission of a complaint does not suspend the performance of the activities complained about, unless such suspension is considered necessary by the preliminary investigator or prosecutor." (Translation provided by the State party.)

<sup>8</sup> These articles read as follows:

"Article 27. Liability of Police Officers

A police officer shall be liable for an unlawful action in accordance with the procedures specified in regulatory enactments. If a police officer has violated person's rights and lawful interests, the police institution shall take measures to redress the violated rights and interests and compensate the damage caused. [...]

Complaints concerning the actions of subordinate police officers shall be reviewed and decided by the head of the police institution (subordinate unit); the decision by the head of the police institution (subordinate unit) is subject to appeal within the period of one month to a higher level police institution, prosecutor's office or court."

"Article 38. Control of Police Operations

[...] The Chief of the police department, his/her deputies and heads of subordinate units may revoke the decisions by subordinate police institutions, made within [...] criminal procedures [...], if said decisions are not in compliance with the law."

"Article 39. Supervision Regarding Observance of the Law in Police Operations

4.5 The State party further submits that the communication is inadmissible because it falls outside the scope of article 6 of the Covenant. The State party maintains that, contrary to the author's claims that her son was murdered, it firmly believes that his death was not a result of a criminal act, but rather resulted from a combination of unfortunate events — previous head trauma, weather conditions, slipping and falling on the ice. The State party concludes that the communication is inadmissible under article 1 of the Optional Protocol as it falls outside the scope of article 6 of the Covenant.

4.6 The State party further submits that the author failed to exhaust the available domestic remedies before submitting the communication to the Committee. It submits that the author could have submitted a complaint about the inaction of the police under article 27 of the Law on “the Police”, but she never did so. The State party further submits that the author, as a witness in the criminal case, also had an opportunity to complain about police actions to the Prosecutor's office in accordance with article 220 of the Criminal Procedure Code, but she did not avail herself of this right. The State party further notes that the author's lack of citizenship did not affect her right to complain, since that right was not dependent on citizenship, but was determined by her status in the criminal proceeding (i.e. witness). The State party finally submits that even if the author's mental state did not allow her to actively follow the investigation, she could have asked for legal assistance or for the help of someone she trusted, for example, her daughter. Furthermore, 13 years after the author's emigration to another country, the authorities of the State party did not have information regarding her address where official correspondence could be sent. Accordingly, the State party submits that the author did not express in a sufficiently clear manner her intention to follow the investigation actively by availing herself of her right to complain about the actions of police officers to different institutions, and therefore has not exhausted the domestic remedies before submitting her communication to the Committee.

4.7 With regard to the author's allegation of a violation of article 6 of the Covenant, the State party submits that in accordance with the Committee's jurisprudence “a criminal investigation and consequential prosecution are necessary remedies for violations of human rights such as those protected by article 6.”<sup>9</sup> The State party maintains that the investigation in the present case has established the cause of the death of the author's son and its circumstances, and that no crime had been committed. It acknowledges that the investigation did not end with a judicial decision; but maintains that, nevertheless, the acquired evidence sufficiently indicated that the death of the author's son was a tragic accident. Accordingly, the State party submits that no violation of article 6 of the Covenant has occurred.

4.8 With regard to the author's allegation of a violation of article 7 of the Covenant, the State party submits that in the Committee's jurisprudence, violations of article 7 with regard to mental suffering and distress to indirect victims were found due to failure on the part of State authorities to provide said victims with sufficient information, i.e. violations of victims' “right to know”, thus subjecting them to anguish, stress and mental suffering.<sup>10</sup> The State party maintains that the present case may not be compared to such cases for the following reasons: the death of her son was not caused by a criminal activity; the State

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The Prosecutor General of the Republic of Latvia and prosecutors subordinate to him/her shall supervise the observance of the law in police operations.” (Translation provided by the State party)

<sup>9</sup> The State party refers to communication No. 1447/2006, *Amirov v. Russian Federation*, Views adopted on 2 April 2009, para. 11.2.

<sup>10</sup> The State party refers to communications No. 107/1981, *Quinteros v. Uruguay*, Views adopted on 21 July 1983, para. 14; and No. 886/1999, *Schedko v. Belarus*, Views adopted on 3 April 2003, para. 10.2.

authorities that were involved in the investigation “may not be blamed” for his death; the author failed to complain about the quality of the investigation to the Prosecutor’s office; and she did not inform the State authorities of her change of residence. The State party concludes that no violation of article 7 of the Covenant has occurred in the present case.

#### **Author’s comments on the State party’s observations**

5.1 On 9 March 2011, the author submits that the State party provided no explanation as to why the criminal investigation, opened on 2 January 1995 and which was still ongoing in 1997, was then stalled until 16 March 2001 when it was transferred to another police precinct. Neither does it provide any details or explanations about what happened between 16 March 2001 and 30 December 2004 when the decision was taken to dismiss the case. The author maintains that the only reasonable explanation is that there was no prompt and thorough investigation of the death of her son and that a breach of article 6 should be found.

5.2 Regarding the admissibility of the case, the author submits that, not having promptly investigated whether a crime (murder or other unlawful death) had occurred, the State party then proceeded to state that the communication was inadmissible because the death was not a result of criminal acts. She maintains that the State party’s belief that no murder was committed was based on a flawed investigation; that there was no judicial finding of the cause of death and that when her complaint was finally dismissed, 10 years after the start of the investigation, no attempt was made to notify her of the dismissal.

5.3 Regarding the issue of non-exhaustion of domestic remedies, the author maintains that she made a genuine complaint in order to exhaust the domestic remedies. She reiterates that she had serious mental health problems following the tragic death of her husband, the death of her son, and the serious illness and death of her mother, and that at the time she was unable to exercise her rights.

5.4 The author notes that the State party did not make any observations regarding her allegations of widespread corruption in the police that was prevalent at the time of the death of her son, nor regarding the death threats that she received against herself and her daughter, which also served as a deterrent to submitting any complaints to the authorities.

5.5 The author further submits that, on 3 October 1997, she informed the authorities of the State party that she had moved to New Zealand and that, in 2007, she sought advice as to whether she could receive a pension from Latvia and at that time again advised the authorities that she was living in New Zealand. She further submits that, at that time, she had a Russian passport and that the Russian authorities had her address in New Zealand. She maintains that the authorities of the State party were aware of that and if they had wanted to contact her, they could have forwarded correspondence to her through the Russian Embassy in Latvia. She maintains that the authorities never attempted to contact her in order to inform her of the development or the discontinuation of the investigation into her son’s death.

5.6 The author underlines that, according to the State party’s submission, no judicial decision concluded the investigation and that the investigation of a relatively simple assault case took 10 years. She maintains that a reasonable time within which to conclude such an investigation would have been one year at most, and that it is clear from the State party’s submission that there had been years of inactivity during the investigation. She reiterates that there no prompt and thorough investigation of her son’s death was carried out.<sup>11</sup>

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<sup>11</sup> The author again refers to European Court of Human Rights, *Yasa v. Turkey*, application No. 63/1997/847/1054, Chamber judgment of 2 September 1998, para. 100.

5.7 The author further submits that she had the right to know, within one year of her son's death, not only the real cause of his death, but also what the State party claims had happened to him. She should not have had to wait 10 years (which would have been the case, if she had been informed in 2004, which she was not) or 16 years, as was actually the case. The author maintains that complaints relating to death need to be determined expeditiously, otherwise failure to do so effectively may determine the merits of a communication; she refers by analogy to the Committee's jurisprudence in child custody cases.<sup>12</sup> She maintains that by taking so long to investigate and failing to inform her of the outcome of the investigation, the State party caused her to suffer continuing mental health difficulties, which amount to a breach of article 7 of the Covenant.

#### **State party's additional observations**

6.1 On 4 November 2011, the State party submitted that it had provided the Committee with all the materials that it was possible to acquire after such a long period of time since the events in question. With regard to the transfer of the investigation into the death of the author's son to another police precinct in 2001, the State party clarifies that that was done due to a reorganization within the State Police. The State party expresses regret that the author did not avail herself of the right to complain to the responsible authorities earlier, which is why there are no additional materials concerning the efficiency of the investigation into her son's death. The State party reiterates that, even if the author was afraid of threats from the State police, as she alleged, she could have made a request to the Prosecutor's office, thus turning the attention of the supervising institutions to possible investigation deficiencies. The State party also submits that it is difficult to imagine how the alleged threats could possibly have reached her in New Zealand. Therefore, the State party fails to see a reasonable explanation for the author's inactivity, that lasted 15 years, before she finally decided to submit a complaint to the Committee. It further refers to the Committee's practice that a reasonable explanation needs to be provided in order to submit a communication to the Committee with a considerable delay.<sup>13</sup> The State party maintains that, while the author has stated her mental health condition as an explanation for the delay, the medical documentation presented shows that she "is suffering from mental health problems periodically (i.e. not all the time)". The fact that the author decided to complain not in 1997 when she moved to New Zealand, but in 2010, leads the State party "to doubt the sincerity of the author's wish to know the details of her son's death".

6.2 The State party points out that the author had approached different State institutions about different questions and had contacted her relatives abroad; it therefore concludes that nothing prevented her from applying to and pursuing her communication before the Committee earlier. In addition, the State party maintains that the fact that the author had retained a counsel to represent her before the Committee "clearly indicates her ability to acknowledge consequences of her acts, her ability to formulate thoughts and opinion with a sufficient degree of clarity and consistency, notwithstanding her periodic health problems".

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<sup>12</sup> The author refers to the Committee's jurisprudence in communication No. 1368/2005, *E.B. v. New Zealand*, Views adopted on 16 March 2007, para. 9.3, which states:

"The Committee refers to its constant jurisprudence that 'the very nature of custody proceedings or proceedings concerning access of a divorced parent to [the parent's] children requires that the issues complained of be adjudicated expeditiously. The failure to so ensure may readily itself dispose of the merits of application, [...] and irreparably harm the interests of a non-custodial parent."

<sup>13</sup> The State party refers to communications No. 787/1997, *Gobin v. Mauritius*, decision of inadmissibility adopted on 16 July 2001, para. 6.3; and No. 1434/2005, *Fillacier v. France*, decision of inadmissibility adopted on 27 March 2006, para. 4.3.

6.3 The State party submits that the author's allegation of police bribery are only supported by a newspaper "spy story" and it will not comment further on those allegations.

6.4 The State party submits that the author's allegations that she had contacted the Latvian authorities shortly after moving to New Zealand are not supported by documentary evidence. It further refers to articles 3 and 15 of the Population Registry Law<sup>14</sup> and maintains that the author had the duty to inform the Office of Citizenship and Migration of her place of residence and address if she wanted the State authorities to be able to reach her (i.e. to inform her of the results of the investigation into her son's death).

6.5 The State party further submits that if the author's allegation about her Russian citizenship is true, than she "misleads the Committee and the Government as regards her nationality". The State party also states that "the facts of the present case disclose that the author has previously abused the right to receive State benefits from Latvia", because information provided by the State Social Security Insurance Agency indicates that, for almost three years following her son's death, she was receiving "State benefits granted for her minor son".<sup>15</sup> The State party submits that the above facts "raise serious doubts as to her true intentions when submitting the present communication to the Committee" and it maintains that the communication should be declared inadmissible pursuant to article 3 of the Optional Protocol (abuse of rights).

6.6 The State party concludes that the communication should be declared inadmissible pursuant to articles 1 to 3 of the Optional Protocol and invites the Committee to conclude that no violations had occurred.

## Issues and proceedings before the Committee

### *Consideration of admissibility*

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

<sup>14</sup> The respective articles read as follows:

"Section 3.

The main task of the Register shall be to ensure the records of Latvian citizens, Latvian non-citizens, as well as of aliens, stateless persons and refugees who have received residence permits in Latvia in accordance with the procedures specified in the Law, by including and updating information in the Register regarding such persons."

"Section 15.

(1) The duty of the persons referred to in Section 3 of this Law shall be to provide the Office with information regarding the person for inclusion in the Register. The legal representatives of the relevant persons shall provide information regarding persons who are under the age of 16 or subject to guardianship or trusteeship to the Office.

(2) If a person who has Latvian nationality resides outside Latvia for a period exceeding six months, the person has a duty to notify the Office of the address of the place of residence thereof in the foreign country, as well as of other changes in the information included in the Register regarding himself or herself, his or her children who are under the age of 16 and regarding persons who are subject to the guardianship or trusteeship thereof (through the diplomatic or consular representation of Latvia), if these changes have been made in foreign institutions."

Available from [www.vvc.gov.lv/export/sites/default/docs/LRTA/Likumi/Population\\_Register\\_Law\\_.doc](http://www.vvc.gov.lv/export/sites/default/docs/LRTA/Likumi/Population_Register_Law_.doc). Link provided by the State party.

<sup>15</sup> The State party refers to annex 1 of its submission to the Committee, which is in Latvian without translation.

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

7.3 The Committee notes the State party's submission that the communication is inadmissible under article 1 of the Optional Protocol, as it falls outside the scope of article 6 of the Covenant, because the State party believes that the death of the author's son was not the result of a criminal act, but rather resulted from an accident. The Committee, however, observes that the above conclusion is not based on an official conclusion of the investigation conducted by the authorities of the State party, since the criminal investigation initiated by the State party was under article 105, paragraph 2, of the Criminal Code (intentional infliction of serious bodily injuries) and the investigation was discontinued after the statute of limitation had run out, thus leaving open the possibility that the death of the victim resulted from a crime. In the circumstances, the Committee considers that it is not precluded by the requirements of article 1 of the Optional Protocol from examining the present communication.

7.4 With regard to the requirement set out in article 5, paragraph 2 (b), of the Optional Protocol, the Committee notes the State party's argument that the author has not exhausted the available domestic remedies, namely, by submitting a complaint about the inaction of the police under article 27 of the Law on "the Police", or a complaint about the lack of police actions to the Prosecutor's office, in accordance with article 220 of the Criminal Procedure Code. The Committee notes that the author acknowledges that she has failed to exhaust domestic remedies, but she argues that due to her mental health problems, she was unable to exercise her rights; that the widespread corruption prevalent in the police at the time of the death of her son and the death threats that she received against herself and her daughter served as a deterrent to submitting any complaints to the authorities. The Committee, however, observes that, other than her initial complaint to the police, the author did not make any other attempt to contest the alleged ineffectiveness of the investigation, apart from making oral inquiries, the latest of which she made a year after the death of her son. The Committee also observes that she has failed to substantiate any concrete instance of corruption associated with the investigation into the death of her son and that she has not provided any information on the alleged death threats. In those circumstances, the Committee considers that the author has not argued that the domestic remedies available to her were ineffective, nor that she was otherwise exempt from availing herself of those remedies. The Committee therefore concludes that the communication is inadmissible under article 5, paragraph 2 (b), of the Optional Protocol.

7.5 Having come to that conclusion, the Committee decides not to examine the State party's claim that the author had abused her right to submission.

8. The Committee therefore decides:

(a) That the communication is inadmissible under article 5, paragraph 2 (b), of the Optional Protocol; and

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

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

## Appendix

### **Joint opinion of Committee members Fabián Salvioli and Víctor Rodríguez-Rescia (dissenting)**

1. We regret that we cannot concur with the decision of the Human Rights Committee concerning communication No. 1935/2010, which concluded in paragraph 8 (a) “that the communication is inadmissible under article 5, paragraph 2 (b), of the Optional Protocol”. We do not agree with the Committee’s reasoning for a finding of inadmissibility on the grounds that the author “has not argued that the domestic remedies available to her were ineffective, nor that she was otherwise exempt from availing herself of those remedies”.
2. Rather, we are of the opinion that, inasmuch as it was a question of pursuing criminal proceedings, the author took such steps as were necessary in order for an investigation into her son’s death to be opened *ex officio*, as is to be expected once a publicly actionable offence is reported. Accordingly, it was the State’s responsibility to conduct the entire criminal investigation process with due diligence. However, it did not do so in this particular case, which, after a decade had gone by and with no court ruling on the merits, was eventually closed under the statute of limitations.
3. The facts set out in the communication relate to the failure to investigate the death of the author’s son, which was reportedly the result of a beating by a gang of teenagers believed to be of Russian nationality. The case file indicates that the author lodged a complaint within a few hours of the incident at the closest police station, where her statement was taken (see para. 2.2). She also took steps to assist the police with the investigation, such as taking the death certificate to the police station. The author continued to follow the case until, about a year after the incident, a detective from another police station informed her that her son had died of asthma, even though the victim had never suffered from that condition and the report of the initial post-mortem examination had described the cause of death as “massive head trauma; epidural hematoma caused by a fracture to the base of the skull; blunt head trauma”.
4. According to the State, the author did not exhaust the available domestic remedies before submitting the communication to the Committee because she failed to submit a complaint regarding the inaction of the police under article 27 of the Police Act and she failed to file a complaint about police inaction with the Prosecutor’s Office in accordance with article 220 of the Code of Criminal Procedure. The State party did not deny that the author’s mental state did not allow her to follow the investigation actively, but claimed that she could nonetheless have asked for legal assistance or for the help of someone she trusted, for example her daughter.
5. For the authors of this joint opinion, the police investigation initiated on 2 January 1995 and closed on 30 December 2004 under the statute of limitations was the *ex officio* responsibility of the State, given the fact that it was a criminal investigation (as it related to a publicly actionable offence). Criminal proceedings, unlike, for example, civil proceedings, do not require an application by the party concerned in order for them to go forward and be resolved by a court ruling, irrespective of the outcome. The criminal complaint filed by the author – the victim’s mother – and the results of the forensic medical examination were sufficient grounds for initiating an in-depth investigation into the facts of the case. During the 10 years that it took for the case to expire under the statute of limitations, there was a failure to investigate with due diligence and, for long periods of time, no substantive proceedings of any sort were pursued.

6. The investigation was not swift, thorough or prompt, which resulted in an unreasonable prolongation of the proceedings. Under article 5, paragraph 2 (b), of the Optional Protocol, that is precisely one of the grounds which exempts a person from the obligation to exhaust domestic remedies. Given the criminal nature of the proceedings, and the State's obligation to initiate such proceedings ex officio, we do not consider it necessary to determine whether or not the author and complainant had mental health problems as a result of the tragic death of her husband, the death of her son and the serious illness and death of her mother.

7. The Committee should have, at least, declared the case admissible so that it could have been examined on the merits; the outcome of such an examination is not prejudged in any way by the authors of this opinion.

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

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