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Human Rights Committee

Decision adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 3313/2019*,**

Communication submitted by:	S. R. (represented by counsel, Stanislovas Tomas)
Alleged victims:	The author
State party:	Lithuania
Date of communication:	23 November 2017 (initial submission)
Document references:	Special Rapporteur's rule 92 decision, transmitted to the State party on 5 March 2019 (not issued in document form)
Date of adoption of Decision:	23 July 2021
Subject matter:	Violation of the right to fair trial; retroactive application of criminal law
Procedural issue:	exhaustion of domestic remedies; substantiation of claims; abuse of right to submission
Substantive issue:	fair trial; fair trial – witnesses; fair trial – undue delay; right to appeal; non-retroactivity
Articles of the Covenant:	14 (1), 14 (2), 14 (3) (c) and (e), 14 (5), 15 and 26
Articles of the Optional Protocol:	2, 3, 5 (2) (b)

1. The author of the communication is Mr. S.R., a Lithuanian national born on 20 January 1960. The author claims that the State party has violated his rights under articles 14 (1), 14 (2), 14 (3) (c) and (e), 14 (5), 15 and 26of the Covenant. The Optional Protocol entered into force for Lithuania on 20 February 1992. The author is represented by counsel, Mr. Stanislovas Tomas.

* Adopted by the Committee at its 132nd session (28 June – 23 July 2021).

** The following members of the Committee participated in the examination of the present communication: Tania Abdo Rocholl, Wafaa Ashraf Moharram Bassim, Yadh Ben Achour, Arif Bulkan, Mahjoub El Haiba, Shuichi Furuya, Kobauyah Tchamdja Kpatcha, Carlos Gómez Martinez, Duncan Laki Muhumuza, Photini Pazartzis, Hernán Quezada, Vasilka Sancin, José Manuel Santos Pais, Changrok Soh, Hélène Tigroudja and Gentian Zyberi.

The facts as submitted by the author

2.1 On 19 April 2004, the Office of the Prosecutor General in Lithuania began a pre-trial investigation against the author, due to the suspicions of the Lithuanian State Tax Inspection that three companies "influenced by the author" had not paid Value Added Tax (VAT). On 2 September 2005, the State Tax Inspection initiated a fiscal audit, ending in a decision dated 19 June 2006 that required the author to pay, for the period of 1 January 2000 to 31 December 2004, unpaid taxes and penalties of 86,486.33 Euros (for "natural person income tax"), and 190,409.23 Euros (for "resident income tax").

2.2 The author unsuccessfully challenged the Inspection's decision, first before the Vilnius Regional Administrative Court, which dismissed the author's complaint on 24 April 2010; and then the Lithuanian Supreme Administrative Court, which upheld the first instance court's decision on 6 October 2011.

2.3 On 30 December 2009, the prosecutor charged the author with several offences, including swindling under article 182 (2) of the Criminal Code. The offences related to the organization of a tax evasion group in the period between 25 August 2000 and 31 December 2004, that had allegedly evaded over 457,000 Euros of VAT. However, on 23 December 2011, the author was acquitted by a decision of the Vilnius City Second District Court.

2.4 On 12 January 2012, the prosecutor modified the indictment (increasing the unpaid VAT amount to 476,225.49 Euros), and appealed to the Vilnius Regional Court. On 10 May 2012, the prosecutor issued a Motion for Varying Factual Circumstances of the Deed as Stated in the Indictment of the Criminal Case, to increase the number of criminal tax evasion groups from one to eight.

2.5 Since the indictment was modified twice before the appellate court, and the author claimed to have lost a possibility to appeal on certain issues mentioned in the original indictment, the Vilnius Regional Court submitted a "preliminary reference" to the Constitutional Court to ask whether the principle of fair trial was compatible with a variation of indictment at the appeal instance. On 15 November 2013, the Constitutional Court entered a ruling interpreting that an indictment may be varied upon request of a prosecutor at the appeal instance, despite the fact that the charged person loses the right to appeal on the modified issues. On 27 February 2014, the Vilnius Regional Court granted the two modifications of the indictment.

2.6 On 30 December 2014, the Regional Court convicted the author on the basis of the modified indictment, sentencing him to 2 years and 6 months of imprisonment. On 3 March 2016, the Regional Court's decision was upheld by the Lithuanian Supreme Court.

The complaint[1]

3.1 The author claims that in violation of article 15 of the Covenant, the Vilnius Regional Court retroactively applied article 182 (2) of the Criminal Code, which entered into force on 5 July 2004, and convicted him of swindling on 30 December 2014. The fiscal evasion in question was allegedly committed between 2000 and 2004. Thus, the more lenient offence of swindling under article 274 (in force until 5 July 2004) should have been applied for the acts committed before the entry into force of article 182 (2) of the Code.[2] The author claims

[1] The claims appear in order presented by the author.

[2] Author provides the text of the two articles:
Article 274. Swindling. Valid until 05/07/2004:
Acquiring other's property or property rights by deceit (swindling) shall be punished by a custodial sentence for a term of up to three years with or without a fine.
Swindling committed […] in a group of persons who had agreed to do so in advance shall be punished by a custodial sentence for a term of up to five years with or without a fine.
Article 182. Swindling. Valid from 05/07/2004:
2. A person who, by deceit and for own benefit or for the benefit of other persons, acquires another's property of a high value or a property right or the valuables of a considerable scientific, historical or cultural significance or avoids a property obligation of a high value or annuls it or swindles by participating in an organized group shall be punished by a custodial sentence for a term of up to eight years.

that he was convicted for committing swindling "for the benefit of other persons", definition which was not included in the notion of swindling before 05/07/2004. Neither did this notion include "avoiding property obligation" (for instance, paying VAT) and was limited to acquiring property of other persons. The author claims that the prison sentence for swindling was increased from 5 to 8 years in the new article and that the courts therefore applied to him a more severe sanction.

3.2 The author claims that consideration by the appeal court of a modified indictment deprived him of the right to fair trial and the right to have his sentence reviewed by appeal court in violation of articles 14 (1) and 14 (5) of the Covenant. He claims that the Supreme Court, which reviewed the sentence issued by the Regional Court, was a court of cassation and by law, could only address points of law and could not evaluate the facts and evidence in his case.

3.3 The author further claims that he did not have an opportunity to comment on a decision of the prosecutor dated 23 January 2013, to discontinue pre-trial investigation in respect of Ms. J.S. – director of one of the three companies involved. The author submits that this decision was prejudicial to him and that the Regional Court used this document as evidence in its judgment. The author was not informed of the prosecutor's decision and learnt about it when it was mentioned by his co-defendant's lawyer during closing arguments in the Vilnius Regional Court on 9 December 2014.

3.4 The author submits that he was unable to cross-examine the then-deceased witness – Mr. S. – whose pre-trial statements were relied upon in the Regional Court's decision. Mr. S. testified that he was under impression that the author offered him a bribe to solve certain issues of one of the companies, to which the author had no formal connection. On the basis of these statements, the Court concluded that the author had an "informal interest" in the companies in question. He claims that failure of the Regional Court to exclude the testimony of Mr. S. violated article 14 (3) (e) of the Covenant.

3.5 The author further claims that in breach of article 14 (1), the statutory 10-year prescription period for conviction for a severe crime (swindling in his case), set forth in article 95 (1) (1) of the Criminal Code, was not applied. The author's last criminal act – submitting the tax declaration with false data, took place before 25 September 2004. In absence of any other actions by the author afterwards, the 10-year period began to run on that date. The Regional Court's finding that the VAT evasion took place from 19 July 2000 to 31 December 2004 was arbitrary.

3.6 In violation of article 14 (3) (c) of the Covenant, the criminal proceedings lasted over 12 years. The pre-trial investigation lasted 5 years and 8 months, from 19 April 2004 to 30 December 2009. The Supreme Court's final judgment was issued on 3 March 2016. The Supreme Court refused to reduce the sentence on the ground of unreasonably long proceedings.

3.7 The author asks for reopening of his criminal case and compensation of costs and damages.

State party's observations on admissibility and the merits

4.1 By note verbale of 30 July 2019, the State party submitted its observations. The State party expresses the position that the communication of the author concerning alleged violation of Articles 14 and 15 of the Covenant must be declared inadmissible due to insufficient substantiation pursuant to article 2 of the Optional Protocol. As concerns the claim concerning length of proceedings the State party submits that this part of the communication is inadmissible under Article 5 § 2 (b) of the Optional Protocol to the Covenant for non-exhaustion of domestic remedies.

4.2 The State party informs the Committee that the author's complaints were declared inadmissible by the European Court of Human Rights on 20 October 2016 and 6 April 2017. Due to the limited reasoning the decisions adopted by a single judge formation of the European Court of Human Rights may not have any impact on the Committee's examining the present communication. The State party considers that the author uses the international

mechanisms as the courts of the "fourth instance", being dissatisfied with the decisions of the domestic courts.

4.3 The State party summarizes, that the author was suspected of forgery of documents (Article 300 § 2 of the Criminal Code), fraud (Article 182 § 2 of the Criminal Code) in an organised criminal group (Article 24 §§ 3 and 4 and Article 25 § 3 of the Criminal Code) with an intention to acquire someone else's property of high value and fraudulent administration of accounts (Article 222 § 1 of the Criminal Code) of multiple companies between 2000 and 2004. The pre-trial investigation was opened on 19 April 2004 and the case was transferred to the court for trial on 30 December 2009. In the course of the pre-trial investigation numerous investigative actions were performed: witnesses and suspects were questioned several times, searches were sanctioned and conducted, restrictive measures were imposed, companies were inspected, documents were inspected, property rights of certain companies were limited, legal assistance requests were sent to Canada and the Russian Federation. On 23 December 2011, the Vilnius City 2nd District Court acquitted the applicant from all the charges. The court stated that it was not clear what economic activity united all the companies the author had been related with and how the companies were related, what was the specific mechanism of the appropriation of value added tax and the role of each company.

4.4 In January 2012, the prosecutor appealed asking to modify the factual circumstances of the case. During the hearing on 20 March 2012 the participants of the proceedings were informed about the prosecutor's position and did not express any opinion. The co-accused were given time to familiarise themselves with the modified charges. During a hearing of 10 May 2012 the prosecutor expressed his intention to modify the charges and to fully individualize the criminal activities. There were no new facts or no new criminal activities, the charges were individualized to make clearer the mechanism of the criminal activities and the calculation of the damage. The prosecutor asked to find the author guilty under the same articles as those examined by the first-instance court and to sentence him to 5 years in prison.

4.5 Upon the request of the author's lawyer the Vilnius Regional Court applied to the Constitutional Court with a question whether the modification of indictment or formulation of new charges were in accordance with the Constitution. In its ruling of 15 November 2013 the Constitutional Court stated that when the essential circumstances of the offence were modified at the stage of appeal, a convicted person would still be able to submit an appeal on points of law claiming invalid application of law by the appellate court.[3] The Constitutional Court held that the same logic had to be followed when deciding on the ability of the appellate court to reclassify the charges. It concluded that the reclassification of charges at the appeal stage was not unconstitutional.

4.6 The Vilnius Regional Court resumed the proceedings and adopted the judgment on 30 December 2014. The prosecutor's request to modify the charges, submitted on 10 May 2012, was accepted by the Court on 27 February 2014. The Court considered the requests on the modification of charges as the first instance, as required by the Code of Criminal Procedure, and examined both, the original and the modified charges. The author was sentenced to two years and six months of imprisonment for fraud in an organized group.

4.7 The author submitted an appeal on points of law to the Supreme Court. He complained that the Regional Court had overstepped the margins of the appellate complaint because in the appellate complaint he had been accused of having committed criminal offenses in one organised criminal group and during the proceedings at the appellate court, the prosecutor

[3] Constitutional Court of the Republic of Lithuania, Case No. 12/2010-3/2013-4/2013-5/2013, On the Compliance of Paragraph 2 (Wording of 10 April 2003) of Article 255, Paragraph 1 (Wordings of 28 June 2007 and 22 December 2011) and Paragraph 4 (Wordings of 28 June 2007 and 22 December 2011) of Article 256, Paragraph 3 of Article 320, and Item 4 of Paragraph 1 (Wording of 28 June 2007) of Article 326 of the Code of Criminal Procedure of the Republic of Lithuania with the Constitution of the Republic of Lithuania, 15 November 2013, available at https://www.lrkt.lt/en/court-acts/search/170/ta903/content. The Constitutional Court reiterated the case-law of the European Court of Human Rights that the revision of the judgment could cover the issues of fact and law or could be limited solely to the issues of law (*Panou v. Greece*, no. 44058/05, 8 January 2009, *Krombach v. France*, no. 29731/96, 13 February 2001).

changed the accusation to committing criminal activities in several criminal groups. The author also complained that the limitation period had been applied incorrectly and the Regional Court failed to explain why it was set on 31 December 2004 and not 25 September 2004. The author raised the question of retroactive application of criminal law claiming that the crime of fraud had been defined more broadly after 30 April 2003. He also claimed that the appellate court should not have taken into account the evidence related to the decision to terminate the pre-trial investigation in respect of Ms J.S., that had not been examined during the hearings and the testimony of Mr.S., who died during the proceedings. The author claimed that the criminal proceedings had been excessively long. For more than five years he could not move freely and had to constantly ask for permissions to leave the country. He asked for a more lenient sentence than deprivation of liberty.

4.8 On 3 March 2016, the Supreme Court delivered the decision. As for the author's argument that he had been convicted on the basis of newly formulated accusations, the Supreme Court found that the modifications were necessary in order to clarify what common economic activity had united all the companies, how the companies had been related and what was the specific mechanism of the appropriation of the value added tax. The acquitted persons had been given time to familiarize themselves with the modifications and had not opposed them. The only request from them was to apply to the Constitutional Court. The Regional Court compared the initial and the modified charges and found that every modified charge had been individualized but still based on the same factual circumstances as provided in the initial act of indictment. The modifications had not influenced the qualification of the offence, imposition of the sentence and had not limited the defence rights of the accused.

4.9 As for the limitation period, the Supreme Court held that because the companies in question had failed to indicate the property, owned capital, obligations and costs correctly for the period between 2000 and 2004, it was impossible to establish the property, owned capital, size and structure of their obligations during that period. The pre-trial investigation was opened on 19 April 2004 and the criminal activity had become clearer only in May and June of 2005. Yearly profit declarations and advance profit declarations had to be submitted after the end of the fiscal period and before the first day after the 10th months from the beginning of the new fiscal period, thus before 1 October 2005. As a result, the end of the criminal activities in the present case was October 2005, when the declarations on the value added tax together with the forged invoices had to be submitted. The Supreme Court however stated that accepting October 2005 as the date of the end of the criminal activities would exceed the limits of the charges, thus it was decided to choose the period between 2000 and 2004. According to the Supreme Court, the most important issue was not the last bookkeeping operation but all the financial indicators of companies throughout the calendar fiscal year. The Supreme Court thus stated that appellate court made a reasoned conclusion that the criminal activities had ended on 31 December 2004 and the ten-year limitation period had to be calculated from that date.

4.10 As for the length of proceedings, the Supreme Court noted that the proceedings which lasted for over ten years were excessive and could constitute a basis for a more lenient sentence. The Court, however, had to assess the gravity of the crime, the positive and negative characteristics of the convicted person, reasons for committing the crime and other circumstances. In the author's case, the Court noted that the criminal activities committed by the author had caused a huge financial damage to the State. He had organized extremely complicated mechanism of value added tax fraud, coordinated and led activities of organized criminal groups. Moreover, he was suspected of another criminal activity on 6 March 2014 that he had committed on 6 December 2013 and had absconded from justice. As a result, the execution of sentence could not be suspended. Moreover, the sentence imposed by the Regional Court was already lower than the average for similar crimes.

4.11 The State party continues its observations by addressing each of the author's claims. The State party submits that the author's claim under article 14 (1) of the Covenant that the Regional Court used the prosecutor's decision to discontinue pre-trial investigation against Ms. J.S. as evidence in its judgment, and added this decision to the case file without reopening the examination of evidence, is unsubstantiated. The State party submits that the Regional Court did not explicitly refer to this decision in its judgment and did not use it as evidence. The name of Ms. J.S. is mentioned throughout the judgments of the national courts in respect

of the author because she was a director of one of the companies and managed the accounting documents of several of the other companies. However, the prosecutor's decision had no factual connection to the author's case and could not have had prejudicial value assessing the issue of the author's criminal responsibility.

4.12 As regards the ten-year limitation period, the State party refers to a detailed analysis in the Supreme Court decision of 3 March 2016. The courts decided that the last day of criminal activities was 31 December 2004 - the day of the end of the fiscal year. The calculation of ten-year limitation period was reasonable and does not appear clearly arbitrary or amounting to a manifest error or denial of justice.

4.13 Regarding the author's claim under article 14 (3) (c) of the Covenant, concerning the length of proceedings in the criminal case against him, the State party notes that there is an effective domestic remedy in cases of excessively long proceedings in Lithuania. Article 6.272 of the Civil Code provides for the possibility to claim damages for the unreasonable length of proceedings.[4] The European Court of Human Rights has acknowledged that as of 6 February 2007, claims for damages under Article 6.272 of the Civil Code have become an effective domestic remedy (see *Savickas and Others v.* Lithuania (dec.), nos. 66365/09 and 5 others, 15 October 2013 and the domestic-case law cited therein).[5] The author failed to apply to the domestic courts claiming excessive length of proceedings and had not exhausted domestic remedies as required by article 5 § 2 (b) of the Optional Protocol. On the merits of this claim the State party notes that the Supreme Court acknowledged that the pre-trial investigation was lengthy because it had lasted for over five years. However, the Supreme Court did not state that the authorities had failed to act or that there had been long periods of inactivity. It rather stated that the actions of the authorities were not of good quality because there was a need to clarify the charges and to individualise the criminal activities. Taking into account the complexity of the organised criminal groups and their schemes, as well as the financial consequences to the State, which amounted to EUR 476 225, the State party considers that the Supreme Court's decision not to suspend the execution of the author's sentence had been reasonable.

4.14 The State party notes that the pre-trial investigation lasted until 30 December 2009. The first-instance decision was taken on 23 December 2011. During the proceedings at the appellate court, it was decided to refer the issue on the modification of charges at the appeal to the Constitutional Court. The ruling of the Constitutional Court was adopted on 15 November 2013 and the Vilnius Regional Court then adopted its judgment on 30 December 2014. The Supreme Court adopted its decision on 3 March 2016. The Government reiterates

[4] Article 6.272. Liability for damage caused by the unlawful actions of preliminary investigation officials, prosecutors, judges and the courts:
1. Damage resulting either from unlawful conviction, unlawful arrest as a suppressive measure, unlawful detention, application of unlawful procedural measures in enforcement proceedings, or unlawful imposition of an administrative penalty (arrest) shall give rise to full compensation by the State irrespective of the fault of the preliminary investigation officials, prosecution officials or courts.
2. The State shall be liable for full compensation in respect of the damage caused by the unlawful actions of a judge or a court trying a civil case, where the damage is caused through the fault of the judge himself or of any other court official.
3. In addition to pecuniary damage, the aggrieved person shall be entitled to non-pecuniary damage.
4. Where the damage arises from an intentional fault on the part of preliminary investigation, prosecution or court officials or judges, the State, after compensation has been provided, shall have the right to take action against the officials concerned for recovery, under the procedure established by law, of the sums in question in the amount provided for by the law.

[5] The State party explains that the domestic courts assess all the relevant criteria and award compensations in cases of excessive length of proceedings (for example, the case no. e2-1139-264/2018 of the Kaunas Regional Court of 5 June 2018 where a person was awarded EUR 2 000 in compensation for the excessive length of proceedings; in a case no. e2A-1822-264/2018 the Kaunas Regional Court awarded EUR 3 500 in respect of non-pecuniary damage for the total length of proceedings of 5 years; in a case no. e2A-411-264/2016 the Kaunas Regional Court awarded a person EUR 5 304 in respect of non-pecuniary damage for almost 7 years of the length of criminal proceedings; in a case no. 2A-893/2013 of 4 November 2013 the Court of Appeal awarded the claimant LTL 7 000 (EUR 2 027) for the length of proceedings that amounted to 7.5 years).

that the excessive length of the pre-trial investigation has already been remedied by imposing a more lenient sentence on the author. As a result, the the author's claim is unsubstantiated.

4.15 The State then addresses the author's claim under article 14 (3) (e) of the Covenant, concerning the impossibility to cross-examine a witness – Mr. S. – who died during the proceedings and acceptance of his testimony as evidence by the Regional Court. The State party notes that the testimony of Mr. S. was corroborated by other evidence and was only one of the elements on which the author's conviction was based. The author had a possibility to contest that evidence and to present his arguments, which were duly examined by the domestic courts. The sole fact that the witness died could not exclude the use of his testimony as one and not the sole source of evidence. The State party considers this claim unsubstantiated and inadmissible under article 2 of the Optional Protocol.

4.16 Regarding the author's claim under article 14 (5) of the Covenant concerning the modification of the act of indictment and of the charges before the appellate court, the State party submits that the Committee has not held that the cassation itself does not meet the requirements of Article 14 (5).[6] By examining whether the criminal law was applied correctly, the cassation court verifies, inter alia, the question of the legality of the evidence examined by lower courts. If errors have been committed by the lower courts, the cassation court has multiple possibilities to correct them, and, if they are related to the interpretation of facts and evidence, it can return the case to the lower court for fresh examination.[7]

4.17 The Supreme Court addressed the author's allegations about the modification of charges in detail and determined that, firstly, the parties to the proceedings were informed about the modification and had had enough time to prepare their defence, and, secondly, the modification of charges had merely been a modification and not a complete change and it had not influenced the qualification of the offence or the imposition of sentence. This issue was referred to the Constitutional Court, which found that the participants of the proceedings had not lost their right to appeal. The State party adds that the author has not indicated which specific aspects of his appeal were not subject to review because of the limitations of the appeal in cassation. The State party concludes that the author has not sufficiently substantiated his claim and that it should be found inadmissible under Article 2 of the Optional Protocol.

4.18 As to the author's complaint that the domestic courts had to apply article 274 (1) or (2) of the 1961 Criminal Code, since that provision was in force when most of the criminal acts had been allegedly committed, the State party notes that the author was found guilty of the crime of fraud under the provision that came into force on 1 May 2003. The author failed to mention Article 274 (3) of the 1961 Criminal Code, which provided that large-scale fraud was punishable by imprisonment of between one and ten years. In the author's case, the fraud had been of large-scale, thus the provisions of the 1961 Criminal Code and the new Criminal Code were very similar. One could even argue that Article 182 (2) of the new Criminal Code provided for a more lenient sentence. The author claims that the provision "for the benefit of other persons" did not exist in the 1961 Criminal Code and that because Article 182 (2) of the new Criminal Code was applied to his criminal activities, he was in a less favourable position. However, the author was not found guilty for acquisition of property or a property right of high value for the benefit of another person, thus his claim is groundless. Finally, the State party submits that the author's sentence of 2 years and 6 months is way less than the

[6] The Committee noted on multiple occasions that when reviewing the conviction in the cassation proceedings the requirements set under Article 14 (5) were met (see Committee's decisions in cases *Cuartero Casado v. Spain* (no. 1399/2005), C*arvallo Villar* v. Spain (no. 1059/2002), *Pérez Escolar v. Spain* (no. 1156/2003), *Herrera Sousa v. Spain* (no. 1094/2002), *J.A.B.G. v. Spain* (no. 1891/2009), *J.J.U. v. Spain* (no. 1892/2009)).

[7] The Supreme Court has several possibilities when examining an appeal on points of law: to dismiss it; to annul the judgment of the lower court and terminate the case; to annul the judgment and the judgment or decision of the appellate court and to remit the case back to the first-instance for fresh examination if the first-instance court had been arbitrary or the case had been examined by breaching rules on jurisdiction; to annul the judgment or decision of the appellate court and to uphold the first-instance judgment or decision with or without amendments; to annul the judgment or decision of the appellate court and to remit the case for fresh-examination at the appeal; to change the judgment or a decision adopted by a lower court.

maximum possible sentence of eight years of imprisonment established in Article 182 (2). The State party concludes, that the author's allegations under article 15 of the Covenant should be declared inadmissible under Article 2 of the Optional Protocol as insufficiently substantiated.

Author's comments to the State party's observations

5.1 On 7 October 2019, the author submitted his comments to the State party's observations. The author reiterates that the separation of the criminal case of Ms. J.S. from his case, as well as the discontinuing of the criminal investigation against her violated his right to fair trial. He claims that since she was found not to have acted knowingly when forging the documents, he was then viewed as the person who knowingly directed her actions. On this basis, the author alleges a link between the case of Ms. J.S. and his own case and claims that the fact that he could not access the documents in her criminal case and unable to cross-examine her, violated his rights under article 14 (1) of the Covenant.

5.2 The author notes the State party's acknowledgement that he has not committed criminal acts after 25 September 2004. The conclusion to take 31 December 2004 for calculating the 10-year prescription period is speculative and violates article 14 (1) of the Covenant.

5.3 On the claims under article 14 (3) (c) of the Covenant, the author argues that he was not looking for a monetary compensation for unreasonably long proceedings. He wanted to establish a precedent that in case of protracted criminal proceedings a sentence imposed should be more lenient, which civil courts could not provide. Besides, since the domestic courts refused to recognise that the proceedings were unreasonably long, civil courts would treat such finding as res judicata and would deny him compensation. The author argues that the fact that the opinion of the Constitutional Court was sought should not be considered as justification of delay in proceedings. He also claims that the information requested from other countries during the investigation was not used as evidence by the courts and should not serve as justification for delay either. At the stage when he had served his sentence, the author is interested in monetary compensation and requests 30 Lithuanian minimum wages as compensation for violation of article 14 (3) (c) of the Covenant. The author mentions that when deciding on his sentence, the Supreme Court took into account that he was suspected of committing another crime in 2014. The author claims that reliance on an unproven crime in the decision of the Supreme Court violated his right to presumption of innocence under article 14 (2) of the Covenant.

5.4 Under article 14 (3) (e) of the Covenant, the author comments that Mr. S. was the only witness of the alleged attempt of the author to offer a bribe for the benefit of a company where the author was not a director or a shareholder and that his testimony was decisive. In such circumstances, due to his inability to cross-examine the witness, the statement of Mr. S. had to be excluded. The author requests the reopening of the case and reconsideration of the evidence without the testimony of Mr. S.

5.5 The author reiterates his position that modification of charges by the prosecutor before the appellate court, and not in the court of first instance, denied him a possibility to have facts and evidence re-evaluated by a higher court and thus deprived him of the right to appeal under article 14 (5) of the Covenant. He adds that the absence of a full appellate instance on points of facts and reassessment of evidence could also be seen as a breach of the right to fair trial under Article 14(1) of the Covenant, since the trial is unfair when the accused loses one appellate instance and other people do not; and as a discrimination in the sense of Article 26 of the Covenant, since the author was treated differently from ordinary accused persons who have an appellate instance on establishing and reassessing facts.

5.6 The author disagrees with the State party on application by the courts of article 182 (2) of the 1961 Criminal Code instead of article 274 valid as of 5 July 2004. He claims that the new qualifications "avoid monetary obligation" and "for the benefit of other persons" were applied retrospectively and caused him the main damage. He adds that article 182(2) of the new Criminal Code sets the maximum sanction of 8 years, while the maximum sanction under the old Criminal Code was 5 years and claims that the lower maximum sanction would also have reduced the sanction applied in his case. The argument of the State party that the

old Criminal Code previewed a sanction of 10 years of imprisonment for a large scale fraud is not pertinent, since the new Criminal Code deleted the concept of large scale fraud. The concept of high value monetary obligation is different from large scale fraud. Establishment of avoidance of a high value monetary obligations does not mean automatically that the fraud is of a large scale.

5.7 The author asks for reopening of his case, for a compensation for violations of his rights in the amount of 50 minimum salaries, which equals to 30,350 Euros and for reimbursement of legal expenses in the amount of 10,000 Euros.

State party's additional observations

6.1 In a Note verbale dated 6 December 2019, the State party provided its additional observations where it reiterates its original position on the inadmissibility of the communication on the basis of articles 3 and 5 (2) (b) of the Optional Protocol. The State party notes that the author raised new claims under articles 14 (2) and 26 of the Covenant in his comments and that since these claims have been brought up after the submission of the observations by the State party, and not in the original submission, they should be found inadmissible.

6.2 The State party reiterates that the decision to terminate criminal investigation in the case of Ms. J.S. had no effect on the author's trial. The decision to separate one criminal case from another is based on multiple grounds and is not in itself a violation of article 14 (1) of the Covenant. The issue of termination of investigation against Ms. J.S. was assessed by the Supreme Court, which did not find any procedural violations. The author had not raised the issue of impossibility to cross examine Ms. J.S. before the domestic authorities or in his initial communication. Neither did the author ask to reopen the examination of evidence. He did not avail himself of two more opportunities to express his opinion about the termination of the pre-trial investigation against Ms J.S.: during the closing arguments and during his trial, when he could have requested the court to call Ms. J.S. as a witness, under article 270 of the Criminal Procedure Code. The State party considers that the author failed to exhaust domestic remedies on these accounts.

6.3 The State party reiterates its original position of lack of substantiation of claims under article 14 (1) of the Covenant regarding the limitation period applied, article 14 (3) (e), 14 (5) and 15 of the Covenant. It also maintains its position that the claims under Article 14 (3) (c) of the Covenant about the length of the proceedings should be dismissed for non-exhaustion of domestic remedies and in any event as unsubstantiated. The State party notes that the author's claim that "the internal courts refused to recognise that the proceedings were unreasonably long" is wrong and that the Supreme Court clearly stated that "in the present case the proceedings had not been finished within a reasonable time" and that "the proceedings were too long". The State party also submits information and examples of domestic court decisions to show that the civil courts assess evidence on their own and can come to a different conclusion than the courts in criminal proceedings concerning the length of proceedings and possible damage caused by it.

Author's additional comments

7.1 The author submitted additional comments on 13 January 2020. Regarding the State party's observation that the new claims raised by the author under articles 14 (2) and 26 of the Covenant should be considered inadmissible because they were not raised in his initial communication, the author submits, that the claims before the Committee can be brought within 5 years after the exhaustion of domestic remedies. He therefore, can raise any new claims he wishes until these 5 years expire on 3 March 2021. He could also lodge a new communication, but did not do so in order not to burden the procedure.

7.2 The author proceeds with comments on the matters covered in his submission dated 7 October 2018.[8]

Issues and proceedings before the Committee

Considerations of admissibility

8.1 Before considering any claim contained in a communication, the Committee must decide, in accordance with rule 97 of its rules of procedure, whether the communication is admissible under the Optional Protocol.

8.2 The Committee has ascertained, as required under article 5 (2) (a) of the Optional Protocol, that the same matter is not being examined under another procedure of international investigation or settlement. The Committee notes information provided by the State party, that on 20 October 2016 and 6 April 2017, the European Court of Human Rights declared the author's applications inadmissible by a single judge decision. The Committee recalls its case law relating to article 5 (2) (a) of the Optional Protocol, according to which, when the European Court bases a declaration of inadmissibility not solely on procedural grounds but also on grounds arising from some degree of consideration of the substance of the case, then the matter should be deemed to have been examined within the meaning of the respective reservations to article 5. However, the Committee also recalls that, even in cases where applications have been declared inadmissible for lack of an appearance of a violation, the limited reasoning outlined in some decisions of this sort do not enable the Committee to assume that the European Court has examined a case on the merits.[9] In the present case, the Committee notes that the letter from the European Court, provided to it by the State party, only confirms to the State party that the applications of the author were declared inadmissible, without providing the grounds for the decision. In this light, the Committee considers that it is not precluded from examining the present communication under article 5 (2) (a) of the Optional Protocol.

8.3 The Committee notes the State party's observations that the author's claims under article 14 (3) (c) of the Covenant, concerning excessive length of criminal proceedings against the author should be found inadmissible for non-exhaustion of domestic remedies. The Committee notes the information from the State party on article 6.272 of the Civil Code, which provides for the possibility to claim damages for the unreasonable length of proceedings, as well as examples of successful application of this article by the domestic courts. The Committee also notes the author's argument that a monetary compensation for the length of proceedings was not appropriate for him. He wanted the courts to admit that the excessive length of proceedings should be remedied with a more lenient sanction in his criminal sentence, something that civil proceedings could not achieve.

8.4 In this regard, the Committee notes that in his submission the author requests compensation from the State party for the alleged violation of article 14 (3) (c) of the Covenant. Regarding the author's claim that the Supreme Court refused to reduce his sentence on the ground of excessively long proceedings, the Committee notes that it cannot replace the domestic courts in interpreting and applying domestic law and in deciding on a sanction to be applied in a particular case. The role of the Committee is to assess whether the process through which the courts reached their verdict was in accordance with the standards set out in article 14 of the Covenant. The Committee notes, in this regard, the argument by the State party that the author failed to apply to the domestic courts claiming excessive length of proceedings. The Committee also notes that the Supreme Court acknowledged that the proceedings in the author's case were excessively long, but did not state that the authorities

[8] The part of the comments concerns the author's counsel. This part was taken into account by the Committee for information, and is not considered to form part of the author's submission. The part of comments which concerns the author himself was not taken into consideration because it exceeded the limits for additional comments allowed by the Committee's Special Rapporteur on New Communications and Interim Measures under the rule 92 (7) and (8) of the Committee's rules of procedure (2018).

[9] See, inter alia, the Committee's Views in *Achabal Puertas v. Spain*, para. 7.3, and *A.G.S. v. Spain* (CCPR/C/115/D/2626/2015), para. 4.2.

had failed to act or that there had been long periods of inactivity. At the same time, it came to a reasoned conclusion that the sentence of 2 years and 6 months imposed on the author could not be replaced with a non-custodial sanction, due to the following facts: the criminal activities committed by the author had caused a huge financial damage to the State; he had organized an extremely complicated mechanism of value added tax fraud, coordinated and led activities of organized criminal groups; he was suspected of another criminal activity and had absconded from justice (para 4.10). The Committee notes in this regard, that the sanction sought by the prosecutor was 5 years in prison and that according to the State party, the excessive length of the pre-trial investigation has already been remedied by imposing a more lenient sentence on the author (paras 4.14 and 4.18). On the basis of the facts before it, the Committee does not see any manifestation of arbitrary or biased behaviour by the domestic courts. Neither does the sanction imposed on the author seem disproportionate to the gravity of the offences he has committed and for which he was ultimately convicted and sentenced. In such circumstances, the Committee accepts the submission of the State party that the author had an effective domestic remedy in the form of civil suit for damages caused by the excessive length of the proceedings. The Committee notes that the author chose not to use this remedy at domestic level and instead to turn to the Committee for monetary compensation. In such circumstances, the Committee concludes that the author has not exhausted domestic remedies and that his claim under article 14 (3) (c) is inadmissible under article 5 (2) (b) of the Optional protocol.

8.5 The Committee notes the author's claims under article 14 (1) of the Covenant, concerning termination of the pre-trial investigation against Ms. J.S. and use of the respective prosecutor's decision in proceedings against him. The Committee also notes the author's claim under article 14 (1) that the choice by the domestic courts of 31 December 2004 as the final date of criminal activities for the purposes of calculating the ten-year limitation period was arbitrary. The Committee further notes the author's claim under article 14 (3) (e) of the Covenant, that the courts used testimony of Mr. S., who died during the proceedings and whom the author was not able to cross-examine. The Committee notes that these claims concern evaluation of the facts and the evidence by domestic courts, which the Committee does not review, unless it can be ascertained that the evaluation was clearly arbitrary or amounted to a denial of justice, or that the court failed in its duty to maintain independence and impartiality.[10] The information provided by the State party indicates that the domestic courts thoroughly reviewed the claims in these regards raised by the author. The Committee notes, in particular, the State party's observations that the Regional Court did not refer to the decision to end criminal proceedings against Ms. J.S. and did not use this decision as evidence against the author (para. 4.11); that the Supreme Court established 31 December 2004 as the end of criminal activities having interpreted information provided by the investigation in the light of the domestic fiscal law (para 4.9 and 4.12); and that the testimony of Mr. S. was corroborated by other evidence, which the author did not refute, and was only one of the elements for the author's conviction (para. 4.15). Nothing on file indicates that the court proceedings suffered from any defect which would amount to a denial of justice.[11] The Committee therefore, finds the author's claim under articles 14 (1) and 14 (3) (e) insufficiently substantiated and inadmissible under article 2 of the Optional Protocol.

8.6 The Committee further notes the author's claim that the modification of charges by the prosecutor at the stage of appeal violated his right under article 14 (5) of the Covenant because the Supreme Court, acting as a cassation instance, reviewed his appeal on matters of law only and did not carry out a substantive review of the facts and evidence of the case. In this regard the Committee recalls that article 14 (5) imposes on the State party a duty to review substantively, both on the basis of sufficiency of the evidence and of the law, the conviction and sentence, such that the procedure allows for due consideration of the nature of the case.[12] In the present case, the Committee observes that the author presents a general claim that the modification of charges at the appeal stage, in itself deprives him of an effective appeal. The Committee also notes, that the prosecutor did not change the charges or the

[10] See, for example, Vovchek *v. Belarus* (CCPR/C/129/D/2337/2014), para. 6.6.

[11] Regarding article 15 claims, *cf.*, communication *J.O. v. France* (CCPR/C/101/D/1620/2007/Rev.2), para. 9.8.

[12] General comment No. 32, CCPR/C/GC/32, para. 48.

investigated criminal activities, but only individualized them, while factual circumstances, as well as articles of the Criminal Code on which the charges were based, remained the same. Moreover, the parties to the proceedings were informed about the modification, did not oppose them and had enough time to prepare their defence (paras 4.4, 4.5, 4.8 and 4.17). The Committee notes its jurisprudence that article 14 (5) does not require that a court of appeal proceeds to a factual retrial, as long as the court fully reviews the judgment and all arguments by the applicant.[13] The Committee notes, that at no point does the author specify which substantive claims he was not able to raise before the Supreme Court or which claims raised in the appeal were not addressed by the court. The Committee also observes that the Supreme Court did engage into a thorough evaluation of claims raised by the author, which, judging from information on file, concerned application of law by lower courts rather than establishment of facts and evidence. The Committee also takes into account information provided by the State party concerning the detailed evaluation of the author's claim by the Supreme Court and by the Constitutional Court, as well as information on possible steps for a full reconsideration of a case if cassation court finds errors in application of law by lower courts. In the absence of specific claims from the author, the Committee finds his allegations under article 14 (5) of the Covenant to be of general nature and insufficiently substantiated. It considers this part of complaint inadmissible under article 2 of the Optional Protocol.

8.7 The Committee further notes the author's claim under article 15 of the Covenant that the newer version of the Criminal Code (article 182 (2)) was applied to him wrongly, and that the old version of the Criminal Code (article 274 (3)) was more lenient. In this regard, the Committee notes that both articles envision sanctions for the crime of fraud, which consist of imprisonment, with or without imposition of a fine, for up to 5 and 8 years, respectively. The Committee considers, that as long as the same type of penalty is provided for in the old and the new law, the question of whether the penalty is lighter or heavier does not arise, unless the penalty rendered by the court exceeds the maximum of the more lenient provision applicable. [14] The sentence imposed on the author, namely 2 years and 6 months in prison, does not exceed the maximum sanction of 5 years in prison, envisaged by the more lenient provision. In the present case, the courts interpreted the national law on the basis of facts before them. The Committee does not see from information before it that such interpretation was clearly arbitrary or amounted to a denial of justice.[15] The Committee therefore, finds this part of communication insufficiently substantiated and inadmissible under article 2 of the Optional Protocol.

8.8 The Committee finally notes that in his comments dated 7 October 2019 the author raises two new claims under articles 14 (2) and 26 of the Covenant. The Committee also notes the author's interpretation of a five-year limitation rule in his additional comments dated 13 January 2020 that at any point before expiration of the five-year period from exhaustion of domestic remedies the author can submit additional claims in his communication or even a new communication. The Committee notes that indeed, under the rule 99 (c) of its rules of procedure, a communication should be submitted within five years after the exhaustion of domestic remedies.[16] At the same time, the Committee notes its jurisprudence, that all claims must be raised by the author in his initial submission, before the State party is asked to provide its observations on admissibility and the merits of the communication, unless the author can demonstrate why he could not raise all the claims at the same time.[17] Since the author has not demonstrated why his new claims could not have been raised at an earlier stage of the pleadings, it would be an abuse of process for the new claims to be addressed by the Committee. The Committee thus finds the authors claims under articles 14 (2) and 26 inadmissible under article 3 of the Optional Protocol.

9. The Human Rights Committee therefore decides that:

[13] See communications Perera *v. Australia* (CCPR/C/53/D/536/1993), para. 6.4, *Rolando v. the Philippines* (CCPR/C/82/D/1110/2002), para. 4.5 and *H.K. v. Norway* (CCPR/C/112/D/2004/2010), para. 9.3.

[14] *Cf.*, communication *J.O. v. France* (CCPR/C/101/D/1620/2007/Rev.2), para. 9.8.

[15] *Supra*, note 12.

[16] CCPR/C/3/Rev.11

[17] See, *mutatis mutandis*, communication *Jazairi v. Canada* (CCPR/C/82/D/958/2000), para 7.2.

(a) The communication is inadmissible under articles 2, 3 and 5 (2) (b) of the Optional Protocol;

(b) The decision be transmitted to the State party and to the author.