



## International Covenant on Civil and Political Rights

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### Human Rights Committee

#### Communication No. 1911/2009

#### Decision adopted by the Committee at its 107th session (11–28 March 2013)

<i>Submitted by:</i>	T.J. (not represented by counsel)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Lithuania
<i>Date of communication:</i>	12 September 2009 (initial submission)
<i>Document references:</i>	Special Rapporteur's rule 97 decision, transmitted to the State party on 2 November 2009 (not issued in document form)
<i>Date of adoption of decision:</i>	25 March 2013
<i>Subject matter:</i>	Undue delay
<i>Substantive issues:</i>	Length of proceedings during pretrial investigation stages and court proceedings
<i>Procedural issues:</i>	Non-exhaustion of domestic remedies
<i>Article of the Covenant:</i>	14, paragraph 3 (c)
<i>Article of the Optional Protocol:</i>	5, paragraph 2 (b)

## Annex

### **Decision of the Human Rights Committee under the Optional Protocol to the International Covenant on Civil and Political Rights (107th session)**

concerning

#### **Communication No. 1911/2009\***

*Submitted by:* T.J. (not represented by counsel)  
*Alleged victim:* The author  
*State party:* Lithuania  
*Date of communication:* 12 September 2009 (initial submission)

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

*Meeting on 25 March 2013,*

*Adopts the following:*

#### **Decision on admissibility**

1. The author of the communication is Mr. T.J., a Lithuanian national, born in 1963, who claims to be a victim of a violation, by Lithuania, of his rights under article 14, paragraph 3 (c), of the International Covenant on Civil and Political Rights. He is not represented by counsel<sup>1</sup>.

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

2.1 On 12 April 1995, the activities of the author's limited liability company, Skiedra JSC, were suspended by the authorities and an official pretrial investigation was opened against the author on counts of fraud. The authorities seized the company's documentation.

2.2 On 10 April 1996, the Police Commissariat of Alytus Town and District initiated additional criminal proceedings against the author regarding the inappropriate use of a bank loan contracted in the name of the company. During that year, several contradictory decisions were adopted regarding the continuation or closure of the criminal case, and the closing or resuming of the investigation proceedings. On 27 November 1996, three criminal

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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, Ms. Zonke Zanele Majodina, Mr. Kheshoe Parsad Matadeen, Ms. Iulia Antoanella Motoc, 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 and Ms. Margo Waterval.

<sup>1</sup> The Optional Protocol entered into force for the State party on 20 February 1992.

cases against the author were merged into a single one. In this context, on 28 November 1996, the author was arrested and two days later he was released.

2.3 On 5 August 1997, the author was informed that the pretrial investigation was completed. On 18 August 1997, his criminal case under article 275(3) of the Criminal Code<sup>2</sup> was brought to court.

2.4 Between 1999 and 2001 the criminal case was several times referred back to have additional investigation acts carried out.

2.5 On 26 February 2003, the County Court of Alytus District found the author guilty under articles 35 and 275(3) of the Criminal Code and sentenced him to three and a half years' imprisonment, with a prohibition to engage in materially responsible work for a period of four years, and a fine of 5,000 Lithuanian litas (equivalent to some 1,450 euros at the time), with confiscation of his property.

2.6 On 17 March 2003, the author appealed the judgment of 26 February 2003. He requested to have the criminal case against him closed, claiming that his rights both under the Criminal Code and the Criminal Procedure Code had been violated. By decision of 2 March 2004, the Kaunas Regional Court partially satisfied the author's appeal, re-qualifying his acts under article 1845(2) of the Criminal Code (2000) instead of article 275(3) of the Criminal Code of 1961, and sentenced him to two and a half years' imprisonment. Pursuant to article 3 (2) (2) of a general amnesty law, this sentence was decreased by 20 per cent.

2.7 On 1 June 2004, the author submitted a cassation complaint to the Supreme Court, claiming that he was never notified of the date and place of the court hearing of his appeal proceedings as at the material time he was serving his sentence, whereas the summons was sent to his home address. On 12 April 2005,<sup>3</sup> the Supreme Court rejected his appeal. The author, who at the time was serving his sentence in a penitentiary facility, was not present when his appeal was examined by the court. The author was released on 12 April 2005. He received a copy of the above-mentioned judgment of the Supreme Court on 13 April 2005.

### **The complaint**

3.1 The author claims that the State party has violated his rights under article 14, paragraph 3 (c), of the Covenant, as the criminal proceedings against him lasted for nine and a half years. The pretrial investigation lasted for two years and four months; and the adjudication of his criminal case in court at the first instance stage lasted five years and 10 months, whereas the proceedings before the court of appeal lasted for almost a year. The proceedings before the Supreme Court lasted for more than four months.

3.2 The author claims that his criminal case cannot be classified as a complex one because the activities for which he was sentenced were carried out within a very limited period of time (from 10 October 1994 to 29 June 1995); they were not carried out in an organized group, and their nature and contents were quite clear. He further states that all the significant information was known at an early stage of the pretrial investigation. The inactivity and malpractice of the pretrial investigation and courts caused the unreasonably long investigation and court proceedings in his case.

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<sup>2</sup> Appropriation or dissipation of high-value property which was entrusted to a person.

<sup>3</sup> It appears from the materials on file that the judgment was adopted on 12 October 2004 and not on 12 April 2005.

**State party's observations on admissibility**

4.1 By note verbale of 12 January 2010, the State party challenged the admissibility of the communication under both articles 2 and 5, paragraph 2 (b), of the Optional Protocol to the Covenant as, according to it, the author's allegations are non-substantiated and in addition the author's allegations raised in the present communication were never brought to the State party's authorities and thus domestic remedies have not been exhausted.

4.2 The State party recalls the facts of the case: the author – the director of a company named Skiedra Ltd. – was suspected of various offences, including financial fraud. On 25 August 1995, a criminal case concerning fraudulent book-keeping under article 323 of the Criminal Code applicable at that time was opened. Another criminal case was opened on 10 April 1996, concerning an inadequate use of a company loan, under article 314 of the Criminal Code. On 14 November 1996, a third criminal case was initiated, concerning the appropriation and embezzlement of the company's property, under article 275 of the Criminal Code. All three cases were merged into one on 27 November 1996. On 26 February 2003, the author was found guilty by Alytus District Court; this decision was upheld, on 2 March 2004, by the Kaunas Regional Court. The author was sentenced to two and a half years' imprisonment and this penalty in accordance with an amnesty law was reduced by 20 per cent. On 12 November 2004, the Supreme Court rejected the author's cassation appeal.<sup>4</sup>

4.3 The State party observes that, in accordance with the well-established principle of international law, reflected in the Optional Protocol to the Covenant, before resorting to international mechanisms one must first seek justice at home, but this principle was not respected in the present case. According to the State party, the author never complained in court regarding the length of the criminal proceedings, nor did he draw this claim to the attention of the court of appeal or of the Supreme Court. In these circumstances, the Committee should reject the communication for failure to exhaust domestic remedies.

4.4 The State party adds in this context that that the author was able to complain against the State in respect of allegedly prolonged criminal proceedings in accordance with the common grounds of liability for damages. Article 30 of the Lithuanian Constitution provides that "a person whose rights or freedoms are violated shall have the right to apply to court. Compensation for material and moral damage inflicted upon a person shall be established by law".

4.5 Further, in accordance with articles 483 and 484 of the Civil Code effective until 1 July 2001 and/or directly relying on the provisions of the European Convention on Human Rights or on the Covenant, as these international treaties have been part of Lithuanian domestic law since 20 June 1995 and 20 February 1992, respectively, when they came into force with regard to Lithuania, the author could have claimed compensation for damages caused by the unlawful acts of the court in a case. Under article 138, paragraph 2, of the Constitution, international treaties which are ratified by the parliament are constituent parts of the legal system.

4.6 In this regard the State party refers to a case against the national authorities for compensation of damages *inter alia* for undue delay, where the Supreme Court, on 22 November 2000, case No. 3K-3-1231/2000, applied directly the provisions concerning the "reasonable time" requirement of the European Convention on Human Rights, namely article 6, paragraph 1, in this regard. In the said civil case, the plaintiff had referred to article 6, paragraph 1, of the European Convention on Human Rights and claimed that his case for compensation of damages for his allegedly unlawful criminal prosecution and

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<sup>4</sup> According to the case-file materials, the correct date is 12 October 2004.

unlawful detention was not heard within a reasonable time; he asked a compensation for a non-pecuniary damage. The Supreme Court, upon assessing all particular circumstances of the case in the light of the criteria established in the case law of the European Court of Human Rights, rejected the plaintiff's claim.

4.7 The State party further stresses that, as of 1 July 2001, a new Civil Code is in force and it allows complainants to obtain redress for illegal acts of the State authorities in accordance with its articles 6.246 and 6.272. In this context, the State party refers to a ruling of the Constitutional Court of 19 August 2006 on the compliance of paragraph 3 of article 3 (wording of 13 March 2001) and paragraph 7 of article 7 (wording of 13 March 2001) of the Law on Compensation for Damage Inflicted by the Unlawful Actions of Interrogatory, Investigatory Bodies, the Prosecutor's Office and Court, with the Constitution of Lithuania. In this ruling, the Constitutional Court has held that the absence of redress for damage inflicted by an unlawful action of State institutions or officials (even if such redress for damage is not specified in any law) would be incompatible with the Constitution of the Republic of Lithuania.

4.8 The case law of the Constitutional Court cited above has been followed by the domestic courts when dealing with compensation issues, inter alia, for prolonged proceedings. The Court of Appeal of Lithuania, for example, in a decision of 28 September 2006 (case No. 2-495/2006) had quashed the decision of a first instance court, which had not admitted the plaintiff's claim. The Court of Appeal had noted in particular that the claim for compensation regarding the alleged delay in the plaintiff's proceedings rose out of both the Constitution and the European Convention on Human Rights, which are both directly applicable acts. Consequently the plaintiff's claim for compensation of damages for prolonged proceedings was accepted.

4.9 In this context, the State party also notes that it is clear from the State party's courts' case law that lengthy criminal proceedings obviously constitute an unlawful action caused by the State institutions and officials for which the State must compensate those injured either under article 6.272 of the Civil Code together with article 30 of the Constitution and/or by directly applying article 6, paragraph 1, of the European Convention on Human Rights or article 14, paragraph 3 (c), of the Covenant.<sup>5</sup>

4.10 The State party submits that its Supreme Court had held on 6 February 2007 that article 6.272 of the new Civil Code was applicable retroactively to delays which occurred prior to its entry into force (in the case before the Supreme Court, the civil claimant was awarded compensation for damage caused by the unreasoned procedural delays in the criminal proceedings against her lasting for almost six years). The State party further provides numerous other examples of domestic case law whereby the national courts had awarded compensation for prolonged proceedings. In conclusion, the State party reiterates that the author had an opportunity, but failed, to avail himself of an effective domestic remedy offering reasonable prospects of success in line with the practice of the Human Rights Committee,<sup>6</sup> and he had thus failed to exhaust domestic remedies, in violation of the requirements of article 5, paragraph 2 (b), of the Optional Protocol.

4.11 The State party adds that the author's claims under article 14, paragraph 3 (c), of the Covenant are unsubstantiated, and the communication must be also declared inadmissible under article 2 of the Optional Protocol.

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<sup>5</sup> See, para 4.5 above.

<sup>6</sup> In this regard, the State party refers to, e.g., *Lukyanchik v. Belarus*, communication No. 1392/2005, Views adopted on 21 October 2009, para. 7.4

4.12 The State party admits that the criminal proceedings lasted relatively long at the stage of the judicial proceedings, but this was conditioned by the complexity of the case, the specific nature of the criminal acts, the author's conduct and other objective reasons, but it was not due to any ineffectiveness or lack of diligence of the domestic authorities whatsoever.

4.13 According to the State party, the requirement to respect the time limit in putting into practice the right to trial without undue delay is of a key importance in criminal cases and, in particular, when the person is in detention.

4.14 In substantiation, the State party points out that the period to be taken into consideration started on 24 October 1995 – when the author was first questioned – and ended on 12 October 2004, when the Supreme Court rejected the author's cassation appeal. The period to be taken into consideration thus encompasses around 8 years (excluding the period of approximately 11 months which are imputable to the author himself).

4.15 The State party adds that the Committee assesses the reasonableness of the length of the proceedings in the light of the particular circumstances of each case, its complexity and according to further criteria laid down in its case law.<sup>7</sup> It emphasizes the following considerations: the complexity of the case, the author's own conduct, the conduct and initiatives of authorities dealing with the case as well as endangered interests of the author and impact of the judicial proceedings on the author's situation during the examination of the case.

4.16 According to the State party, only delays caused by illegal acts or acts lacking diligence by the authorities breach article 14, paragraph 3 (c), of the Covenant. Delays caused by a private person party to the proceedings, cannot be directly imputed to the authorities. Further, the justification of the length of the proceedings depends on the analysis of the individual circumstances of each case.

4.17 In connection to the length of pretrial investigation, the State party notes that the relevant time period started to run on 24 October 1995, when the author was questioned and ended on 18 August 1997, when the indictment act was completed.

4.18 The State party next notes that the duration of the pretrial investigation in the case was reasonable given the complexity of the case. Together with the author, the two accountants of the company were also investigated. The State party also notes that three separate sets of proceedings concerned the author regarding finance-related criminal acts constituting serious crimes under the law (article 8 of the Criminal Code). In addition, investigation and examination of cases of economic/financial nature objectively requires much more time. The State party notes that a number of actions were carried out during the preliminary investigation, such as review of all the economic/financial activities of the company, questioning of 44 witnesses, financial audit, etc. The State party thus insists that the investigation was effective and prompt. Additional investigation acts were needed only in order to ensure the objective and thorough investigation of all circumstances of the case. In addition, the new pretrial investigations were carried out within reasonable time frame, i.e. in six or four months (from 3 June to 4 December 1999 and 4 September 2001 to 3 January 2002), which cannot be seen as breaching the requirements of article 14, paragraph 3 (c), of the Covenant.

4.19 In addition, in the present case, the author's arrest lasted only two days (from 28 November 1996 to 30 November 1996), and only on 1 July 1997 was the author asked to sign a written undertaking that he would not leave the country.

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<sup>7</sup> *Hill v. Spain*, communication No. 526/1993, Views adopted on 2 April 1997, para. 12.4.

4.20 As to the length of the proceedings in court, the State party reiterates that the case was brought to court on 18 August 1997, ending on 12 October 2004, when the final decision in the case was adopted, thus totalling a period of 5 years and 4 months (excluding the period of approximately 11 months imputable to the author himself and another 10 months when the case was returned for additional pretrial investigation).

4.21 In addition, the examination of the case was adjourned on a number of occasions as the author or his lawyer had failed to appear in court. The resulting delay, attributable to the author was, according to the State party, equal to some 11 months.

4.22 Regarding the conduct of the authorities, the State party maintains that the court of first instance acted in an effective, diligent and prompt manner for the purposes of fair and thorough examination of the criminal case. While attempting to conduct the judicial proceedings within the reasonable time and observing the provisions of the Code of Criminal Procedure, the courts are also obliged to respect the rights of the parties, including the defence rights, in accordance with article 14, paragraph 1, of the Covenant. In this case, there were 11 witnesses. A number of adjournments of the trial were related to failure of the defendant and his representative to appear in court, while others were due to objective reasons, such as failure of a witnesses or a witnesses' or accused's representatives to appear, judge's and experts' sickness, etc. Nevertheless, the court of first instance used all possible available means to prevent further delays, e.g. on 4 December 2000 the court adopted the decision to bring witnesses who failed to arrive to the court's hearing; on 9 May 2001 the court adopted decision to fine witnesses who did not arrive and to bring them to the next court's hearing; on 16 September 2002 the court again adopted the decision to fine witnesses who failed to appear in court.

4.23 With regard to the examination of the case on appeal, the State party notes that the proceedings lasted for a year, however this period was due to objective reasons, i.e. the repeated failure of a witness to appear in court or sickness of the author representative.

4.24 The State party concludes that the criminal proceedings complied with the requirement of the "reasonable time" established in article 14, paragraph 3 (c), of the Covenant. According to it, the author failed to submit sufficient factual and legal argumentation to demonstrate the contrary, and his allegations under article 14, paragraph 3 (c), of the Covenant are non-substantiated. In addition, the author has failed to exhaust available domestic remedies. Thus, the communication must be declared inadmissible under articles 2 and 5, paragraph 2 (b), of the Optional Protocol.

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

5.1 On 9 April 2010, the author rejected the State party's observations. As to the domestic remedies he notes that the availability, adequacy and effectiveness of remedies are to be evaluated not only in the light of the facts regarding the law and procedures related to the remedies as such, but in the context of the specific case. The adequacy of a remedy is, thus, to be determined with reference to its suitability for redressing the type of violation to which it applies, and with reference to the prospect to provide the relief. If in the circumstances of a given case, an individual is unable to meet the substantive requirements necessary for using a particular remedy or that a person lacks legal standing, that remedy is de facto unavailable.

5.2 The author further lists a number of exceptions excluding the necessity to exhaust a particular remedy and provides a general description of these exceptions. Thus, a remedy should not be exhausted if it is unduly prolonged or it is unlikely to bring effective relief. In this connection, the author refers to the notion of "existence of a reasonable prospect of

success<sup>8</sup>, as developed in the Committee's case law. He further notes that effectiveness of a remedy is to be assessed in the light of the circumstances in advance of resorting to the remedy (ex ante), rather than in the light of the actual outcome of the case.<sup>9</sup> He submits that the effectiveness of a remedy depends on the nature of the violation;<sup>10</sup> the correlation between a remedy and the nature of the violation may be assessed by reference to the nature of the right violated, the gravity of violation, the suitability of the remedy to provide relief and the specific circumstances of the case. Facts that may indicate the ineffectiveness of a remedy include defects in the functioning of the judicial system, the existence of widespread or severe human rights violations, the remedy's unsuitability to redress a specific type of violation and other factors indicating ineffectiveness of a remedy in general.<sup>11</sup>

5.3 The author further refers to the case law of the European Court of Human Rights,<sup>12</sup> noting that only available and effective remedies should be exhausted<sup>13</sup> and that it is incumbent on the States parties invoking non-exhaustion to demonstrate that the remedy in question was effective, available, and accessible.

5.4 The author further submits that article 6.272 of the Civil Code prescribes that damages arising from the mishandling of the criminal case are compensated only in case of unlawful conviction, or unlawful arrest as a measure of restraint, or unlawful detention, or in case of unlawful procedural measures of restraint or unlawful administrative arrest.

5.5 Further, the author explains that according to the Code of Criminal Procedure,<sup>14</sup> a criminal case may be re-examined only in three situations – if new evidence or circumstances have emerged; if a person is convicted under an incorrect article, and in case the European Court of Human Rights or the United Nations Human Rights Committee has established that the respective criminal proceedings violated international human rights treaties. The author further elaborates extensively on the scope of these three situations.

5.6 The author further mentions that, according to article 228 of the Code of Criminal Procedure, a civil servant or other person in official capacity maybe held criminally liable for abusing his/her official authority or exceeding official powers if such acts cause serious damage to the State, an international public organization or a legal or a natural person. In this connection, the author maintains that if a victim proves that the pretrial investigation and the court proceedings were unreasonably prolonged, but fails to prove that judges and/or pretrial investigators committed a deliberate offence, a criminal case may not be re-examined.

5.7 In the light of the above, the author contends that, in the present case, exhaustion of domestic remedies as indicated by the State party, would unlikely bring effective relief to him, as recourse to such remedies would not result in the possibility to have the criminal case re-examined. The eventual finding of a violation, by the Committee, in this case would serve as grounds to have the criminal case re-examined.<sup>15</sup>

<sup>8</sup> See, e.g., *De Dios Prietro v. Spain*, communication No. 1293/2004, decision on admissibility adopted on 25 July 2006, paragraph 6.3.

<sup>9</sup> The author refers to *Gilberg v. Germany*, communication No. 1403/2005, decision on admissibility adopted on 25 July 2006, para. 6.5.

<sup>10</sup> See, e.g., *Sankara v. Burkina Faso*, communication No. 1159/2003, Views adopted on 28 March 2006, para. 6.4.

<sup>11</sup> The author refers to communication No. 1403/2005 para. 6.5.

<sup>12</sup> *Handyside v. United Kingdom*, judgement of 7 December 1976, para. 27, Series A No. 24, p. 22.

<sup>13</sup> See, e.g., *Vernillo v. France*, judgement of 20 February 1991, para. 45, Series A No. 198, pp. 11-12.

<sup>14</sup> The author refers to article 444 of the Code of Criminal Procedure.

<sup>15</sup> The author refers to article 456 of the Code of Criminal Procedure.



## Issues and proceedings before the Committee

### *Consideration of admissibility*

6.1 Before considering any claim contained in a communication, the Human Rights Committee must decide, in accordance with rule 93 of its rules of procedure, whether the communication is admissible under the Optional Protocol to the Covenant.

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

6.3 The Committee notes the author's claim of a violation of his rights under article 14, paragraph 3 (c) as, according to him, his criminal case suffered from undue delay both at the stages of pretrial investigation and regarding the court proceedings. It also notes that the State party has challenged the admissibility of the communication for non-exhaustion of domestic remedies, given the author's failure to complain about the length of proceedings during the pretrial investigation or during the court trial and, subsequently, his failure to file a claim for compensation of damages incurred as a result of length of criminal proceedings before the courts of general jurisdiction within the statutory deadlines. The Committee further notes the author's objections as to the remedies to be exhausted, but also notes the numerous examples of domestic case law demonstrating an opportunity to submit such a claim before national courts as provided by the State party.<sup>16</sup> It finally notes that the author has not advanced any reasons as to why he did not complain about the length of proceedings during his criminal proceedings, including at the appeal and cassation appeal stages, as well as for his failure to pursue the remedy in respect to these claims later on, before the ordinary courts. In the circumstances, the Committee considers that the author has failed to exhaust the available domestic remedies and declares the communication inadmissible under articles 2 and 5, paragraph 2 (b), of the Optional Protocol.

7. Therefore, the Human Rights Committee decides that:

(a) The communication is inadmissible pursuant to articles 2 and 5, paragraph 2 (b), of the Optional Protocol; and

(b) The present decision shall be communicated to the author and to the State party, for information.

[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.]

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<sup>16</sup> See paragraphs 4.8–4.9.