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International Covenant on Civil and Political Rights

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Human Rights Committee

Decision adopted by the Committee under the Optional Protocol, concerning communication No. 2674/2015**, ***, ****

Communication submitted by:	K.J. (represented by counsel, Stanislovas Tomas)
Alleged victim:	The author
State party:	Lithuania
Date of communication:	5 February 2015 (initial submission)
Document references:	Decision taken pursuant to rule 92 of the Committee's rules of procedure, transmitted to the State party on 10 November 2015 (not issued in document form)
Date of adoption of decision:	19 October 2020
Subject matter:	Private life; procedure established by law; unlawful interference; fair trial
Procedural issues:	Exhaustion of domestic remedies; admissibility – manifestly ill-founded; abuse of right of submission
Substantive issues:	Right to a fair trial; right to privacy
Articles of the Covenant:	14 (1) and 17 (1)
Articles of the Optional Protocol:	2, 3 and 5 (2) (a) and (b)

* Reissued for technical reasons on 26 March 2021.

** Adopted by the Committee at its 130th session (12 October–6 November 2020).

*** The following members of the Committee participated in the examination of the communication: Yadh Ben Achour, Arif Bulkan, Furuya Shuichi, Christof Heyns, David H. Moore, Duncan Laki Muhumuza, Hernán Quezada Cabrera, Vasilka Sancin, José Manuel Santos Pais, Yuval Shany, Hélène Tigroudja and Gentian Zyberi.

**** Individual opinions by Committee members Vasilka Sancin (dissenting) and Furuya Shuichi (dissenting) are annexed to the present decision.

1.1 The author of the communication is K.J., a national of Lithuania born in 1960. He claims that the State party has violated his rights under articles 14 (1) and 17 (1) of the Covenant. The Optional Protocol entered into force for the State party on 20 February 1992. The author is represented by counsel.

1.2 On 11 January 2016, the State party submitted its observations on admissibility and asked the Committee to consider the admissibility of the communication separately from its merits. On 23 June 2016, the Committee, acting through its Special Rapporteur on new communications and interim measures, decided to refuse the State party's request.

Factual background

2.1 On 18 October 2013, the author was convicted of fraud by the Sirvintos Region District Court. That decision became final on 10 February 2014. V.S., who had been the former employee of the author, participated as a witness against the author in the criminal proceedings. At the investigation stage of the proceedings, the author was prohibited from establishing contact with V.S. in order to prevent him from influencing the witness before he testified in court.

2.2 On 4 May 2006, one day before the court hearing, V.S. contacted the pretrial investigation officer to inform him of attempts made by the author to meet with him. V.S. was questioned by the officer about the allegations and at that meeting, V.S. agreed to cooperate with the investigative authorities in the interest of the investigation against the author on the suspicion of having committed a criminal offence ("undue influence on a witness").

2.3 On 4 May 2006, the prosecutor submitted a request to the pretrial investigation judge for the authorization of secret acts to be taken against the author under two provisions of the Criminal Procedure Code of Lithuania: section 158 (1) ("the acts of pretrial investigation officers not disclosing their identity") and section 160 ("surveillance"). In order to substantiate the request, the prosecutor informed the trial judge about the author's attempts to meet V.S., stating that it was reasonable to assume that he would try to influence V.S. before he testified in court. The investigative measures would be aimed at gathering evidence to see whether that suspicion could be confirmed and at obtaining information with regard to two other suspects in the fraud case, who had absconded. The prosecutor's request was granted on 4 May 2006, explicitly authorizing V.S. to interact with the author and make video and audio recordings of their conversations in accordance with the provisions of section 158 (6) of the Criminal Procedure Code (authorization 1).[1] The authorization explicitly mentioned that V.S. had consented to cooperate with the investigative authorities, that recordings were to be made and that the necessary devices were to be installed on him. The period for the interference was limited to the period from 4 to 10 May 2006. The authorization further allowed the pretrial investigation officers to surveille the author within the period from 4 to 31 May 2006 and to make video and audio recordings of him in accordance with the provisions of section 160 of the Criminal Procedure Code (authorization 2).[2] On 9 May

[1] Section 158 (1) of the Criminal Procedure Code provides that pretrial investigation officers may perform investigations without disclosing their identities. The officers under a separate order prescribed for in section 159 of the Code may perform simulations of criminal acts. Section 158 (2) provides that the acts of pretrial investigation officers not disclosing their identities are authorized by the order of the pretrial investigation judge, and only in the event that enough data exist about the person in respect of whom the investigation is performed. The pretrial investigation judge grants the order upon receiving the prosecutor's request, the content of which must correspond to the order's content provided for in paragraph 3 of that section of the Code. The following elements must be included in the order: (a) persons performing secret acts; (b) person against whom the secret acts are to be performed; (c) data about the person's criminal offence; (d) specific acts that the persons are authorized to perform; (e) purpose of the measures; and (f) period of the secret acts. Section 158 (4) provides that incitement of a person to commit a crime is prohibited. Section 158 (6) provides that in exceptional circumstances, when there are no possibilities to detect persons committing crimes, investigation under the order prescribed in the article may be performed by persons who are not pretrial investigation officers.

[2] Section 160 ("surveillance") provides that the pretrial investigation judge, upon the request of the prosecutor, may authorize the surveillance of a person, vehicle or object. The following elements

2006, at the prosecutor's request, the pretrial investigation judge issued another authorization, approving a request to tap the author's telephone in the period from 9 May to 9 June 2006.

2.4 On 21 May 2006, a telephone conversation between the author and V.S. was intercepted in which the author invited V.S. to meet him. The surveillance of the meeting between the author and V.S., which took place at a gas station, was performed by the pretrial investigation officers on 24 May 2006 from 7.13 p.m. to 7.55 p.m. The interaction was recorded with a video and an audio recorder, and the microphone was worn by V.S. According to the transcript of the conversation, the author tried to convince V.S. not to testify against him in the then ongoing criminal proceedings in exchange for financial benefits. V.S. explicitly refused to distort his testimony in the interest of the author and refused to accept any financial reward from him. The surveillance was recorded by the pretrial investigation officer in accordance with the relevant protocol enclosing the recordings and the transcript of the surveilled conversation. The information gathered through the interception of the telephone conversations between the author and V.S., having no relevance to the criminal proceedings, was destroyed before the pretrial investigation came to an end.

2.5 On 12 March 2008, the author was convicted of witness tampering by the Alytus Region District Court and sentenced to pay a fine in the amount of 1,448 euros (approximately $2,241). The decision was upheld by the Kaunas Regional Court on 8 February 2009. On 21 September 2010, the Supreme Court of Lithuania rejected the author's cassation appeal.[3]

Complaint

3.1 The author claims that the State party has violated his rights under article 17 (1) of the Covenant since the domestic authorities have arbitrarily interfered with his private life. He submits that the authorization to record the conversation between V.S. and himself and to "imitate" and "instigate" a criminal offence had been in force only until 10 May 2006. Accordingly, from 11 May 2006 onwards, the author was fully protected by article 17 of the Covenant. Given that the surveilled conversation took place on 24 May 2006, however, he argues that the interference with his private life had no legal basis.

3.2 In this context, the author notes that the authorization of 4 May 2006 was very specific as to the conditions under which secret measures of surveillance and recordings thereof could be made by private persons who were not pretrial investigation officials. He explains that in his appeals, he referred to article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights), which is analogous to article 17 of the Covenant, and that the courts nonetheless rejected his applications, claiming that the impugned surveillance had been carried out in accordance with the authorization under section 160 of the Criminal Procedure Code valid until 31 May 2006. As a result, the day of surveillance, according to the domestic authorities, was covered by the authorization. The author argues, however, that section 160 cannot be applied to his situation since V.S., given the specific circumstances of the case, should be regarded as a person performing an investigative act requiring a special authorization under section 158 of the Criminal Procedure Code. He argues that an interpretation to the contrary would afford prosecutors with an unrestricted and disproportionate discretionary power to entrust any private person to carry out a secret measure of surveillance, including the "simulation" and "stimulation" of a crime, and to make recordings thereof without any impartial judicial control.

3.3 The author recalls that the permissible restrictions on private life must be interpreted strictly in order to be in harmony with article 17 of the Covenant.[4] He refers to the views of the Committee in *Rojas García v. Colombia*[5] and submits that even if accepting the position

must be included in the order: (a) the person, vehicle or object under surveillance; (b) the data justifying the measure; and (c) the duration of the surveillance. Section 160 (2) provides that it should be indicated whether audio and video recording are permitted.

[3] Although it is not claimed, it appears from the file that the incriminating evidence was also used against the author in the context of the criminal proceedings regarding the charges of fraud.

[4] The author refers to the Committee's concluding observations on the Russian Federation (CCPR/C/79/Add.54), para. 19, and Jamaica (CCPR/C/79/Add.83), para. 20.

[5] *Rojas García v. Colombia* (CCPR/C/71/D/687/1996), para. 10.3.

of the Supreme Court of Lithuania that the interference in his case had been in accordance with domestic law, it does not preclude a lawful interference from being considered arbitrary if it runs counter to the provisions of the Covenant.

3.4 The author requests the Committee to find a breach of article 17 (1) and to order the State party to reopen the author's criminal case and to pay damages to him.

State party's observations on admissibility[6]

4.1 In a note verbale dated 11 January 2016, the State party requested the Committee to declare the communication inadmissible for non-substantiation, for abuse of right of submission and for non-exhaustion of domestic remedies, under articles 2, 3 and 5 (2) (b) of the Optional Protocol, respectively.

4.2 The State party argues that the unlawfulness of secret investigative measures may constitute a basis for damages against Lithuania in accordance with section 6.272 of the Civil Code. The State party refers to a decision of the Vilnius District Court dated 4 October 2013, in which the court awarded compensation to the applicant for damages inflicted by the State by performing the unlawful simulation of a criminal act. The State party argues that since the author failed to make use of this legal avenue, his complaint should be declared inadmissible pursuant to article 5 (2) (b) of the Optional Protocol.

4.3 The State party is also of the view that the complaint should be declared inadmissible due to insufficient substantiation pursuant to article 2 of the Optional Protocol. In addition, the State party submits that the author is misleading the Committee about the exact content of the authorized and performed secret investigative measures by stating that there had been an order against him authorizing V.S. to simulate criminal acts, and that his rights have been violated because such an investigative act was performed after the expiry of the authorization.

4.4 Regarding the relevant domestic laws, the State party submits that they do provide for sufficient safeguards against unlawful and arbitrary interference with private life. The State party underlines that the Constitution of Lithuania articulates that any restriction on a person's private life requires judicial authorization. In the context of criminal investigations, the privacy of a person may only be restricted when and as it is foreseen in the Criminal Procedure Code. In order to comply with these requirements at all times, effective control is exercised by the prosecutor, the pretrial investigation judge and other judicial tribunals. The requirement of proportionality has also been acknowledged in the case law of the Supreme Court of Lithuania. It is noted in particular that actions of surveillance are to be authorized by a pretrial investigation judge, and the orders should provide sufficient reasoning and explicitly indicate the terms under which an investigative act may be carried out, such as its subject, duration and whether recordings may be made. The relevant laws also prescribe for the disposal of the information gathered if certain prerequisites are met.

4.5 Turning to the present case, the State party explains that section 158 of the Criminal Procedure Code, under which authorization 1 was granted, does not allow for performing a simulation of criminal acts, and it explicitly mentions that in order to carry out such an act, a separate authorization under section 159 is required. Such a special authorization had never been requested or granted in the case at hand, however, as the acts of V.S. did not require it. Furthermore, the State party underlines that the stimulation or instigation of criminal acts is strictly prohibited under sections 158 and 159 of the Criminal Procedure Code. Nevertheless, all of these claims by the author were thoroughly examined by the domestic courts, which concluded that the surveilled meeting had been initiated by the author himself. In addition, even though V.S. was willing to meet the author in the interest of the investigation, he neither requested financial benefits, nor agreed to distort his testimony in court. Accordingly, the allegations of the author regarding the simulation or stimulation of criminal acts by V.S. in the absence of a valid authorization are misleading and fully unsubstantiated.

4.6 In addition, the State party notes that the secret investigative measures authorized by the order of 4 May 2006 – namely the permission given to V.S. to meet and record his

[6] The State party submitted its observations on the admissibility of the communication; however, some of its arguments are intimately linked to the merits of the case.

conversations with the author (authorization 1) and the authorized surveillance of the author by the pretrial investigation officers with the possibility of making audio and video recordings (authorization 2) – conform to the requirements of lawfulness as established in the domestic law and in practice. It is further submitted that it appears from the prosecutor's request that the surveillance pursued permissible aims, namely to gather evidence confirming whether the author might try to influence V.S., and to obtain information with regard to two other suspects in the fraud case who had absconded. The State party underlines that the requests were granted by the pretrial investigation judge. It also underlines that the authorization, in accordance with the provisions of the relevant domestic law, indicated the scope, duration and aims of the permitted investigative acts and made reference to the consent of V.S. to cooperate with the investigative authorities. The authorization also indicated that recordings could made, and that the necessary devices could be installed on his person.

4.7 Referring to the decision of the Supreme Court of Lithuania, the State party submits that even though the impugned order of 4 May 2006 included a separate authorization allowing a private person, namely V.S., to carry out secret measures of surveillance and to make recordings thereof, that point is redundant because the challenged investigative act does not fall within the ambit of section 158 of the Criminal Procedure Code. The State party reiterates the Supreme Court's reasoning establishing that section 158 is not to be confused with section 160 of the Criminal Procedure Code, as was erroneously done by the pretrial investigation judge. A mere recording of a surveilled conversation is not to be construed as an act falling within the scope of section 158 (6). The Supreme Court held that the recording of a conversation, even if performed by a private individual, should fall within the scope of section 160 of the Criminal Procedure Code. Hence, authorization 2 entitling the investigative authorities to subject the author to secret surveillance within the period of 4 to 31 May 2006 and to make recordings thereof provided a lawful ground for the interference. It is further recalled from the judgment of the Supreme Court that, considering the fact that the way in which a surveillance should be carried out from a technical point of view is not regulated in the Criminal Procedure Code, it was not relevant for the assessment of this case whether the communication was, technically speaking, recorded by the pretrial investigation officers or by a private individual entrusted by them. The State party agrees with the position of the Supreme Court and states that even though it had been established by an expert in the domestic court proceedings that the microphone used for the purposes of surveillance must have been installed on V.S., in the circumstances of the present case, he cannot be considered as a person performing surveillance himself but rather as a person assisting the authorized officers to perform the surveillance from a distance and record the relevant conversation.

4.8 In this regard, the State party also refers to the recommendations of the Attorney General of 12 October 2007 concerning the application of sections 158 and 160 of the Criminal Procedure Code. The recommendations indicate that under section 158, the following secret investigative actions may be carried out: secret surveillance of correspondence; secret search of premises or a person; secret seizure; secret entrance into premises, vehicles or objects in order to examine or seize certain documents or objects and/or to install certain devices; interaction with the person under investigation and the making of video and audio recordings thereof; and use of technical devices in the interest of monitoring conversations and other communication. It is further noted that actions under section 158 may be carried out in combination with investigative acts under section 154 ("monitoring and recording information transmitted through telecommunication networks"), section 159 ("simulation of criminal acts") and section 160 ("surveillance") of the Criminal Procedure Code. In such cases, the prosecutor may submit one combined request or a number of separate requests for the authorization. The recommendations further clarify that, under section 160, when observation is deemed necessary, it may cover the surveillance of a person, vehicle or object in order to secretly observe and make audio and video recordings of those actions. Usually, surveillance is performed from a distance, without direct contact with the subject of the surveillance and without installing any technical equipment inside any premises or vehicles.

4.9 The State party nonetheless argues that even if, as a general rule, surveillance is performed from a distance, entrusting V.S. with "facilitating" the audio recording in the interest of obtaining a better-quality recording should be considered lawful and reasonable. The State party insists that under section 160 of the Criminal Procedure Code private persons

may be retained by police officers to "facilitate" audio recordings, provided that the authorization allows for the making of audio recordings. In spite of the role of private persons in these scenarios, according to the State party, the surveillance is still to be considered as being performed by the pretrial investigation officers from a distance. The State party submits that there may be cases when an investigation carried out by a private person is unlawful; however, this is not the case here.[7] Accordingly, authorization 1 was not required under the circumstances of the present case and was therefore redundant. In such circumstances, even though the challenged investigative act was carried out after the expiry of authorization 1, that had no impact on the lawfulness of the surveillance in the light of the undisputed fact that authorization 2 was still in force at the time of the interference.

4.10 The State party further submits that having regard to the circumstances of the investigative act – namely that it pursued the above-mentioned aims, that it lasted only for a short period of time, that it was used for the intended purposes, thereby preventing the obstruction of the administration of justice, and that V.S. did not provoke the author to commit a crime – the interference has not only been lawful but also necessary and proportionate. It further states that, as explained above, the law prescribes sufficient safeguards against arbitrariness. In addition, it is argued that if someone commits a criminal offence, that person cannot expect to be afforded the same level of protection as persons observing the law.

4.11 Lastly, the State party notes that the author submitted an application to the European Court of Human Rights that was found inadmissible for being manifestly ill-founded. In spite of the limited reasoning provided by the Court, the State party argues that one may nevertheless presume that they found that the author's claims were not sufficiently substantiated.

4.12 In the light of the foregoing, the State party concludes that the interference with the author's private life has been in accordance with the procedure prescribed by law and as a result, the author's allegations are misleading, lack substantiation and should therefore be declared inadmissible pursuant to articles 2 and 3 of the Optional Protocol. The State party further reiterates its position that the author failed to exhaust domestic remedies contrary to article 5 (2) (b) of the Optional Protocol.

4.13 In notes verbales dated 9 May 2016 and 24 October 2016, the State party reiterated its position that the Committee should find the communication inadmissible for lack of substantiation, for abuse of right of submission and for non-exhaustion of domestic remedies. The State party also submits that, should the Committee examine the merits of the complaint, it should consider the State party's observations dated 11 January 2016 in respect of both the admissibility and the merits of the author's claims, and establish that there has been no violation of article 17 (1) of the Covenant for the reasons set out therein. In its note verbale of 24 October 2016, the State party added that having regard to the author's failure to complain about the violation of the fair trial guarantees under article 14 of the Covenant, his request for the reopening of the criminal proceedings as a remedy for the alleged violation of his rights under article 17 (1) of the Covenant is unsubstantiated.

Author's comments on the State party's observations on admissibility

5.1 In a letter dated 3 March 2016, the author responded to the observations of the State party. The author maintains that the acts of V.S., who kept communicating with the author and eventually met him, are to be regarded as an imitation of a crime and for that reason, a separate authorization should have been obtained. In any event, the recording device had been installed on V.S., which has not been disputed by the State party. In that regard, the author notes that one has to differentiate between an investigative act that is being carried out by the pretrial investigation officers themselves, in which the persons under surveillance are not aware of the surveillance, and an investigative act in which a private person, like V.S., is actively involved in the investigative act. It is argued that in the case of the latter, the private

[7] The State party refers to a domestic case (Decision of the Supreme Court of Lithuania in case No. 2K-7-141/2008), in which the Supreme Court found it unlawful for a private person to record a conversation with equipment belonging to the police, when doing so prior to the official operational investigation and without any authorization.

person who is actively involved in the recorded conversation has, by definition, an impact on the dialogue or, more generally, on the course of events. That is why it is of the utmost importance that private persons be explicitly authorized to conduct such an investigative act. The author therefore insists that no recording by private persons that is intended to be used against a suspect may take place without a formal authorization.

5.2 The author requests that the Committee find a violation of article 17 (1) of the Covenant and order the State party to provide compensation for the damages suffered and to reopen the criminal case against him.

Additional comments from the author

5.3 In a submission dated 26 January 2017, the author reiterated the above-mentioned arguments. In addition, he submitted that the State party had acknowledged in its observations that the only order that had still been in force on 24 May 2006 exclusively authorized the pretrial investigation officers to carry out investigative acts. In that period, the author and V.S. were prohibited from communicating with each other. Despite that fact, V.S., knowing that the investigative authorities were about to record his interaction with the author, had been willing to meet him. The author claims that V.S.'s reactions were obviously different from those of a person who had no knowledge of the surveillance. Moreover, V.S. was the one carrying the microphone, which was not denied by the State party and was also confirmed by an expert opinion obtained in the domestic proceedings. These circumstances clearly go beyond a simple observation the authorities had been authorized to perform, and amounts to a disproportionate interference with his private life.

5.4 Referring to the observation of the State party dated 24 October 2016, the author claims that the facts of his case give rise to a violation of his rights not only under article 17 (1) but also under article 14 (1) of the Covenant on the ground of the unlawfulness of the gathered evidence that has been used against him.

Issues and proceedings before the Committee

Consideration of admissibility

6.1 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.

6.2 The Committee notes that the author brought a similar claim to the European Court of Human Rights, which declared it inadmissible in 2013. It recalls that the concept of "the same matter" within the meaning of article 5 (2) (a) of the Optional Protocol has to be understood as including the same claim concerning the same individual before another international body, while the prohibition in this paragraph relates to the same matter being under concurrent examination.[8] Even if the present communication was submitted by the same individual to the European Court of Human Rights, it has already been determined by that body. Furthermore, the Committee notes that the State party has not entered a reservation to article 5 (2) (a) to preclude the Committee from examining communications that have been previously considered by another body. Accordingly, it 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.

6.3 With regard to article 14 (1) of the Covenant, the Committee notes that the author raised the violation of his rights under the cited article only in his very last submission without justifying his delay, even though it seems that the facts giving rise to this claim were already evident at the time of his first submission. In any event, the Committee observes that the author failed to prove that he had brought this claim before the domestic courts, nor did he advance any reasons as to why he might have been unable to do so or why such remedies would not have been effective in his case. In such circumstances, the Committee concludes that the author has failed to exhaust the available domestic remedies with respect to the

[8] See, e.g., *Eglė Kusaitė v. Lithuania* (CCPR/C/126/D/2716/2016), para. 7.2.

alleged violation of article 14 (1) of the Covenant. This part of the complaint must therefore be declared inadmissible under article 5 (2) (b) of the Optional Protocol.

6.4 With regard to article 17 (1) of the Covenant, the Committee notes the State party's argument that under section 6.272 of the Civil Code of Lithuania, the unlawfulness of an investigative act may serve as a basis for a claim for damages. The Committee recalls that article 5 (2) (b) does not oblige authors to exhaust judicial or other remedies which offer no reasonable prospect of success.[9] The Committee considers that even though the State party cites jurisprudence where the domestic courts awarded compensation on the ground of the unlawful simulation of a criminal act, it failed to show that such a remedy would have been indeed effective in the present case in the light of the circumstance that the domestic courts failed to acknowledge the unlawfulness of the impugned measure. Accordingly, on the basis of the information before it, the Committee cannot conclude that the author failed to exhaust domestic remedies. The Committee therefore considers that it is not precluded by article 5 (2) (b) of the Optional Protocol from examining the author's claims in relation to article 17 (1) of the Covenant.

6.5 The Committee further takes note of the State party's argument that the communication is inadmissible on the ground of abuse of right of submission, stating that the author has purposely submitted misleading information about the exact content of the authorized and performed secret investigative measures. The Committee considers that the information provided by the author reflects a difference of interpretation as to the scope and substance of the law and cannot be regarded as an abuse of the right of submission.

6.6 The Committee further takes note of the State party's argument that the complaint is not sufficiently substantiated under article 17 (1) of the Covenant. In that respect, the Committee observes the author's claim that the State party has violated his rights under article 17 (1) of the Covenant since the domestic authorities have arbitrarily interfered with his private life by carrying out a secret investigative measure, which went as far as imitating and instigating a criminal act, without a valid and relevant authorization. The Committee observes the author's arguments that the authorization of 4 May 2006 was very specific as to the conditions under which secret recordings could be made by private persons. Considering that, according to the author, the authorization allowing V.S. to perform an investigative act against the author and to record their interaction had been in force only until 10 May 2006, the surveillance carried out on 24 May 2006 with the active involvement of V.S. cannot be deemed to be covered by the authorization under section 160 of the Criminal Procedure Code still in force at the time, and the interference therefore had no legal basis.

6.7 On the other hand, the Committee observes the State party's argument, which was in line with the Supreme Court's decision, that section 158 is not to be confused with section 160 and that the recording of conversations, even if performed by a private individual, falls within the scope of section 160 of the Criminal Procedure Code since it is not relevant for the assessment of the case whether the communication was, technically speaking, recorded by the pretrial investigation officers or a private individual entrusted by them. The Committee takes note of the State party's position that authorization 2, which was still in force on the day of the impugned interference, provided sufficient legal basis for the interference and was necessary and proportionate to the pursued aims, namely the prevention of crime and the proper administration of justice.

6.8 The Committee further underlines the complexity of the issue at stake and takes note of the detailed analysis of the domestic courts of Lithuania, including that of the Supreme Court, as to the lawfulness of the impugned investigative measure. The Committee recalls that it is generally for the courts of States parties to the Covenant to review facts and evidence, or the application of domestic legislation in a particular case, unless it can be shown that such evaluation or application was clearly arbitrary or amounted to a manifest error or denial of justice.[10] In such circumstances, in view of the information in the case file, the Committee considers that the author has failed to sufficiently substantiate for purposes of admissibility that the application of domestic legislation by the domestic courts amounted to clear

[9] See, e.g., *Deepan Budlakoti v. Canada* (CCPR/C/122/D/2264/2013), para. 8.4.

[10] See e.g. *Lin v. Australia* (CCPR/C/107/D/1957/2010), para. 9.3.

arbitrariness, manifest error or a denial of justice. The communication is therefore inadmissible pursuant to article 2 of the Optional Protocol.

7. The Committee therefore decides:

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

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

Annex I

Individual opinion of Committee member Vasilka Sancin (dissenting)

1. I respectfully disagree with the majority's finding with respect to the alleged violation of article 17 (1) of the Covenant, for two reasons. First, I consider that the author has met the prima facie standard of sufficient substantiation of his claim for the purposes of admissibility. Second, the author's claim is intimately linked to the merits and should have therefore been analysed in the context of the consideration on the merits of the case, resulting in the finding of a violation for the reasons elaborated hereinafter.

2. In the present case, there was no contradiction between the parties that the investigative step, carried out on 24 May 2006 with the involvement of both V.S. and the pretrial investigation officers, amounted to an "interference" with the author's right to privacy for which a valid legal basis was required. Thus, the question remains whether such interference was arbitrary or unlawful under article 17 of the Covenant.

3. Any interference with the right to privacy, in order to be permissible under article 17, must cumulatively meet conditions set out in paragraph 1. In other words, it must be provided for by law; be in accordance with the provisions, aims and objectives of the Covenant; and be reasonable in the particular circumstances of the case.[1] An interference is not "unlawful" if it complies with the relevant domestic law, as interpreted by the national courts, and the Committee correctly recalled that it is generally for the courts of States parties to the Covenant to review facts and evidence, or application of domestic legislation in a particular case, unless it can be shown that such evaluation or application was clearly arbitrary or amounted to a manifest error or denial of justice (see para. 6.8).

4. Additionally, lawfulness also relates to the quality of the law, requiring it to be accessible to the person concerned and foreseeable as to its effects. Foreseeability in the special context of secret measures of surveillance requires that the law be sufficiently clear, in order to give citizens an adequate indication as to the circumstances and conditions on which public authorities are empowered to resort to any such secret measures.[2]

5. The relevant procedural and substantive requirements for secret investigative acts in the present case are defined in sections 158 ("the acts of pretrial investigation officers not disclosing their identity") and 160 ("surveillance") of the Criminal Procedure Code of Lithuania. Section 158 (6) provides that in exceptional circumstances, when there are no possibilities to detect persons committing crimes, investigation under the order prescribed in the article may be performed by persons who are not pretrial investigation officers. In addition, it is indicated that the incitement of a person to commit a crime is prohibited under the surveillance warrant granted under that section. Under section 160, the surveillance of a person, vehicle or an object may be authorized, but in contrast to section 158, it contains no provision allowing for the authorized acts to be carried out by private persons and is also silent about the simulation and stimulation of criminal acts while performing investigative acts under the authorization granted thereunder.

6. Thus, the investigative act with the involvement of V.S. in my view falls within the ambit of section 158 for which the domestic authorities no longer had a valid authorization at the time of the interference. The State party's interpretation – claiming that it is not relevant for the assessment of the case whether the communication was, technically speaking, recorded by the pretrial investigation officers or a private individual entrusted by them – seems to me disproportionally broad and therefore arbitrary. Had the lawmaker envisaged a possibility of having any direct contact under section 160 between the suspect and the person who was aware of the circumstance that they were being surveilled, it would have, similarly

[1] See, e.g., *Van Hulst v. Netherlands* (CCPR/C/82/D/903/1999), para. 7.3.

[2] See, e.g., European Court of Human Rights, *Khan v. United Kingdom* (application No. 35394/97), judgment of 12 May 2000, para. 26.

to section 158, explicitly prohibited the instigation of criminal acts. Therefore, surveillance under section 160 of the Criminal Procedure Code seems to be limited to observation of the suspect from a distance, which was also supported by the recommendations of the Attorney General of Lithuania, holding that whereas secret investigative actions under section 158 may involve interaction with the person under investigation, under section 160, usually, surveillance is performed from a distance (see para. 4.8). If no private person affiliated with the authorities had been directly involved in the surveilled interaction, the present case would indeed be covered by section 160 of the Criminal Procedure Code. The circumstances of the present case, however, suggest differently.

7. The State party also argued that, as established by the Supreme Court of Lithuania, authorization 1, which was granted for a shorter period of time, specific to V.S., was redundant, and the pretrial investigation judge erred in granting it (see para. 4.7). This could be understood as revealing a different and even conflicting interpretation between the domestic authorities as to the scope of sections 158 and 160 of the Criminal Procedure Code, which raises doubts as to the clarity and foreseeability – the two quality requirements of lawfulness – of domestic laws.

8. In the light of the above, I conclude that the State party failed to present a proper legal basis and an authorization for the impugned interference, since the relevant provisions did not leave any discretion to the authorities to decide on whether to conduct the impugned investigative act with the assistance of a private person under one provision (sect. 160) instead of the other (sect. 158).

9. For all these reasons, I am of the opinion that the communication should have been admitted and that the State party's conduct discloses a violation of article 17 (1) of the Covenant.

Annex II

Individual opinion of Committee member Furuya Shuichi (dissenting)

1. I am unable to concur with the majority's conclusion, namely that the author has failed to sufficiently substantiate his claim under article 17 (1) and therefore, that this part of the communication is inadmissible pursuant to article 2 of the Optional Protocol.

2. Article 17 (1) provides that no one is to be subjected to arbitrary or unlawful interference with regards to privacy, family, home or correspondence. Thus, in determining a violation of article 17 (1), the Committee must decide two elements. It must first decide whether the conduct constitutes an interference with the author's privacy, family, home or correspondence; if so decided, it must then decide whether the interference was arbitrary or unlawful.[1] In my view, as the second step relates to the legal evaluation of the conduct in question, it is in principle to be examined at the stage of the merits.

3. In particular, I cannot accept the reasoning adopted in the decision in the present case. The main ground for the conclusion of the decision is that it is generally for the courts of the State party to review facts and evidence, or the application of domestic legislation in a particular case, unless it can be shown that such evaluation or application was clearly arbitrary or amounted to a manifest error or a denial of justice. The majority decision also finds that the author failed to demonstrate that the interpretation by the domestic courts of the State party, including that of the Supreme Court, in terms of the lawfulness of the impugned investigative measures amounted to clear arbitrariness, manifest error or a denial of justice. If a State party argues that a measure interfering with privacy was provided by law, an author would have to rebut that argument by demonstrating that the application of the law in question was clearly arbitrary or amounted to a manifest error or denial justice. However, this appears extremely disadvantageous for the author at the stage of admissibility, and it is contrary to the wording of article 17, which prohibits mere "unlawful" interference. Under article 17, in my view, the threshold of proof is not to be higher than the "unlawfulness" in an ordinary sense, and the threshold for the purpose of admissibility should be lower than that for the merits.

4. In the present case, the author claims that the interaction between himself and V.S. was recorded with a video and audio recorder without his consent, and that fact was not contested by the State party. Thus, it follows that the author has sufficiently substantiated the existence of interference. Furthermore, there is a clear difference of interpretation between the author and the State party as to the scope and substance of the domestic law relating to the "lawfulness" of the interference. It seems to me that, while the interpretation by the State party is understandable, the interpretation by the author is not so unreasonable in terms of the involvement of private persons. In this regard, I believe that the author has demonstrated that the investigative measures taken by the State party were prima facie unlawful for the purpose of admissibility.

5. Furthermore, even if the Committee finds that the author has failed to demonstrate the unlawfulness of the measures taken by the State party, it must also decide whether the measures were arbitrary. According to the jurisprudence of the Committee, the notion of "arbitrariness" is not to be equated with "against the law". Rather, it must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law, together with elements of reasonableness, necessity and proportionality.[2] In fact, the author submits that even if accepting the position of the Supreme Court that interference in his case had been in accordance with the domestic law, it does not preclude a lawful interference from being considered arbitrary if it runs counter to the provisions of the

[1] *A.B. v. Canada* (CCPR/C/117/D/2387/2014), para. 8.7.

[2] Ibid.; and *Ilyasov v. Kazakhstan* (CCPR/C/111/D/2009/2010), para. 7.4.

Covenant (para. 3.3). Nonetheless, the Committee failed to examine the alleged arbitrariness of the impugned measures.

6. In my view, the necessity and proportionality of the measures taken are to be considered in evaluating the arbitrariness. In the present case, the State party submits that the recording was aimed at gathering evidence to confirm whether the author might try to influence V.S. and to also obtain information with regards to two other suspects in the fraud case who had absconded. As for the first purpose, it is true that the author was prohibited from establishing contact with V.S. in order to prevent him from influencing the witness before he testified in court. However, if the real purpose was to prevent the author from influencing V.S., the most effective way of doing so was not by recording the conversation between the author and V.S., but rather by requesting that V.S. refrain from meeting with the author. Nonetheless, the investigative authorities requested that V.S. contact the author and record their conversation. In that regard, I have to think that the recording was not necessary for preventing the author from exercising influence over V.S., nor proportionate to that purpose. Compared with the first purpose, the second purpose – that of obtaining the information with regards to two other suspects who had absconded – seems to satisfy the necessity test. The State party, however, has not provided the Committee with any information on whether and to what extent the recording of the author's conversation was proportionate to that purpose.

7. For all of these reasons, I have to conclude that the author's claim concerning his right under article 17 (1) is admissible. In addition, as the State party has failed to sufficiently demonstrate the necessity and proportionality of recording the author's conversation with V.S., it constitutes a violation of article 17 (1).