



# International Covenant on Civil and Political Rights

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## Human Rights Committee

### Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2716/2016\*, \*\*, \*\*\*

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| <i>Communication submitted by:</i>        | Eglė Kusaitė (represented by counsel, Erika Leonaitė, and represented previously by Jurate Guzeviciute, of the Human Rights Monitoring Institute)                      |
| <i>Alleged victim:</i>                    | The author   |
| <i>State party:</i>                       | Lithuania  |
| <i>Date of communication:</i>             | 30 October 2015 (initial submission)   |
| <i>Document references:</i>               | Decision taken pursuant to rule 97 of the Committee's rules of procedure (now rule 92), transmitted to the State party on 8 January 2016 (not issued in document form) |
| <i>Date of adoption of Views:</i>         | 24 July 2019   |
| <i>Subject matter:</i>                    | Scope of restrictions on freedom of expression; defamation laws  |
| <i>Procedural issues:</i>                 | Abuse of right of submission; victim status; same matter   |
| <i>Substantive issue:</i>                 | Freedom of opinion and expression  |
| <i>Article of the Covenant:</i>           | 19 (2)   |
| <i>Articles of the Optional Protocol:</i> | 1, 2, 3 and 5 (2) (a)  |

1. The author is Eglė Kusaitė, a national of Lithuania born in 1989. She claims that the State party has violated her rights under article 19 (2) of the Covenant. The Optional

\* Adopted by the Committee at its 126th session (1–26 July 2019).

\*\* The following members of the Committee participated in the examination of the communication: Tania María Abdo Rocholl, Yadh Ben Achour, Ilze Brands Kehris, Arif Bulkan, Ahmed Amin Fathalla, Shuichi Furuya, Christof Heyns, Bamariam Koita, Duncan Laki Muhumuza, Photini Pazartzis, Hernán Quezada Cabrera, Vasilka Sancin, José Manuel Santos Pais, Yuval Shany, Hélène Tigroudja, Andreas Zimmermann and Gentian Zyberi. In accordance with article 108 of the Committee's rules of procedure, Marcia V.J. Kran did not participate in the examination of the communication.

\*\*\* An individual opinion by Committee members José Manuel Santos Pais and Yadh Ben Achour (dissenting) is annexed to the present Views.



Protocol entered into force for Lithuania on 20 February 1992. The author is represented by counsel.

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

2.1 During the period 2009–2013, three criminal cases were initiated against the author in Lithuania on charges of terrorism. On 24 March 2011, during the court hearing in one of those cases, prosecutor M.D. requested the Vilnius Regional Court to order the pretrial detention of the author. During a break in the court hearing the author gave an interview to a television reporter and made the following comment with regard to the then present and now former prosecutors in charge of her criminal case: “Nonsense, the State of nonsense, prosecutor, to my mind, is ... commits crimes ..., how can they kill people, let them look at what they are doing to my aunt, relatives ... J.L. and M.D. are criminals.”

2.2 On 29 March 2011, prosecutor J.L. requested the Vilnius Prosecution Office to initiate a pretrial investigation against the author under article 290 of the Criminal Code. The article envisages criminal responsibility for insulting a civil servant or a person performing the functions of public administration in exercising his/her duties.

2.3 On 10 April 2012, the Vilnius District Court found the author guilty on the aforementioned charges and imposed a criminal fine of 1,300 litai (approximately 380 euros). On 28 June 2012, the Vilnius Regional Court upheld the decision of the court of first instance. On 22 January 2013, the Supreme Court of Lithuania, in cassation proceedings, rejected the appeal of the author.

2.4 The author submitted a complaint to the European Court of Human Rights, which, in a single-judge formation, declared it inadmissible on 31 October 2013.

### **The complaint**

3.1 The author claims that her criminal conviction for critical statements concerning the prosecutors in charge of the criminal proceedings conducted against her constituted a violation of her right to freedom of expression under article 19 (2) of the Covenant.

3.2 The author submits that article 290 of the Criminal Code refers exclusively to a civil servant or a person performing the functions of public administration, and that, according to the national legislation, prosecutors shall not be regarded as civil servants.<sup>1</sup> Consequently, the author argues that the national courts provided an overly broad interpretation of article 290, which does not meet the standards of a sufficiently precise and foreseeable law, and therefore the interference with her rights was not provided by law.

3.3 In addition, the author submits that the aim of the restriction on the freedom of expression enshrined in article 290 is to protect the activities of civil servants or persons performing the functions of public administration.<sup>2</sup> She argues that this objective is not compatible with any of the legitimate aims enumerated in article 19 (3) of the Covenant. The author insists that “public order” as a permissible ground for restricting freedom of expression shall not be interpreted broadly and that the protection of the activities of public officials does not fall into the category of public order. She also disagrees with the finding of the Supreme Court that article 290 aims to protect, *inter alia*, the honour and dignity of civil servants. She submits that article 155 of the Criminal Code indeed aims to protect a person’s dignity and honour, and thus criminal proceedings on the basis of article 155 require the filing of a criminal complaint by the victim of the case (private prosecution). However, instituting criminal proceedings under article 290, which was applicable in her case, does not depend on the victim’s explicit will to prosecute the perpetrator. Even if that were the case, she notes that prosecutor M.D. stated that he had not felt offended by the author’s comments. For these reasons, justifying her conviction in terms of the need to protect the prosecutors’ honour and dignity cannot be accepted either.

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<sup>1</sup> Article 4, para. 5 (2), of the Law on Civil Service of Lithuania explicitly provides that it shall not be applicable to prosecutors. The activities of public prosecutors are governed by a separate law, namely the Law on Prosecution.

<sup>2</sup> The purpose of the provision is indicated in the title of chapter XLI of the Criminal Code of Lithuania.

3.4 The author contests the idea that her conviction can be justified and submits that, according to the Committee's general comment No. 34 (2011) on the freedoms of opinion and expression, any restriction of freedom of expression must conform to the strict test of necessity and proportionality. She argues that article 290 of the Criminal Code of Lithuania does not comply with the requirement of necessity because, contrary to the existing jurisprudence of the Committee and the European Court of Human Rights, it guarantees greater protection for civil servants or persons performing functions of public administration compared to other individuals.<sup>3</sup> The author recalls that the crime of insulting a civil servant or a person performing the functions of public administration under article 290 is punishable, at a maximum, by imprisonment of up to two years, whereas insult under article 155 is punishable, at most, by imprisonment of up to one year. This is all the more problematic because the limits of permissible criticism should be wider when allegedly defamatory comments exclusively concern an individual's action in his/her public capacity and not his/her private affairs. She argues that her criticism was strictly limited to the prosecution's strategy, which, in the author's view, had been intended to put pressure on her in connection with the criminal proceedings conducted against her on charges of terrorism.

3.5 The author further adds that she uttered the impugned words immediately after she had learned of the prosecutor's motion to place her in pretrial detention. She recalls that international organizations expressed their position on several occasions that the conditions of detention in Lithuania amount to inhuman and degrading treatment. Since she had previously been detained in prison for a prolonged period, the mere possibility of being remanded again placed her under significant stress, triggering the critical statement. In this regard, the author takes note of the statement by prosecutor M.D. declaring that he did not feel insulted by the author's remark. Nevertheless, even if her statement could be considered provocative, she contends, in line with the Committee's general comment No. 34, that freedom of expression also provides protection for comments that are exaggerated or provocative to a certain extent.

3.6 As to the issue of proportionality, she adds that the nature and severity of the penalty imposed on her did not correspond to the gravity of the offense and the harm allegedly caused to the prosecution, and was therefore disproportionate. The author argues that the fact that she was sentenced to pay a fine did not ease the impact of a criminal sanction. The effects of the conviction continue for an additional three years after the fine is paid and a note of her conviction will be part of her criminal record, thereby restricting her chances in the labour market.

3.7 The author concludes that the domestic courts failed to give relevant and sufficient reasons for the restriction of her right to freedom of expression, which appears to be disproportionate and therefore unnecessary. Consequently, the author claims that the State party has violated her right under article 19 (2) of the Covenant.

#### **State party's observations on admissibility<sup>4</sup>**

4.1 In a note verbale dated 8 March 2016, the State party requested the Committee to declare the communication inadmissible for lack of victim status, for non-substantiation and for abuse of the right of submission under articles 1, 2 and 3 of the Optional Protocol to the Covenant, respectively.

4.2 As to the facts of the case, the State party submits that the criminal proceedings launched against the author on the charge of preparation of a terrorist act, in the course of which the author made the impugned statements, were widely followed by the public. The interview at issue was broadcast on the biggest commercial television channels at the time.

<sup>3</sup> The author, refers to, inter alia, *Bodrožić v. Serbia and Montenegro* (CCPR/C/85/D/1180/2003), para. 7.2; and European Court of Human Rights, *Lingens v. Austria* (application No. 9815/82), 8 July 1986, para. 42; *Dyundin v. Russia* (application No. 37406/03), 14 October 2008, para. 26; *Thoma v. Luxembourg* (application No. 38432/97), 29 March 2001, para. 47; and *Nikula v. Finland* (application No. 31611/96), 21 March 2002, para. 48.

<sup>4</sup> 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.

The State party also submitted that, although the author was acquitted of these charges by the final decision of the Supreme Court on 12 January 2016, it is to be noted that, in a decision dated 20 February 2011, the author, in addition to the conviction challenged by the present communication, was convicted of criminal acts as prescribed by articles 145 (threatening to murder or cause a severe health impairment to a person or terrorization of a person) and 290 (insulting a civil servant or a person performing the functions of public administration) of the Criminal Code of Lithuania. It was established that the author had sent several text messages to prosecutor J.L. threatening his bodily integrity. On 8 May 2013, the author was also found guilty of providing false information in relation to crimes allegedly committed against her by several State officers, including prosecutor J.L., under article 236 of the Criminal Code.

4.3 As to the admissibility of the complaint in terms of the alleged lack of victim status, the State party submits that the author, instead of challenging her conviction for being disproportionate, seems to challenge the compatibility of the relevant criminal provision with the Covenant in the abstract.<sup>5</sup> Therefore, the complaint should be deemed as an *actio popularis* and rejected under article 1 of the Optional Protocol. In this regard, referring to the well-established case law of the domestic courts and the Commentary of the Criminal Code of Lithuania, the State party argues that article 290 covers all persons performing public functions, including public prosecutors and excluding only certain groups of people that enjoy protection under separate articles of the Criminal Code.<sup>6</sup> The State party notes that the Supreme Court examined the argument of the author in this regard and found that the said provision must not be interpreted in isolation, but in the light of the legislature's intent, the legal system as a whole and, in addition, the jurisprudence of the European Court of Human Rights.<sup>7</sup> In addition, the exclusion of prosecutors from the scope of the article would leave a group of persons who perform public functions unprotected against defamatory statements. Accordingly, the interference was prescribed by law, which was clear and foreseeable.

4.4 Concerning the issue of whether the interference had a legitimate aim and in particular the author's arguments in relation to the alleged dichotomy between the criminal act "insult" under article 155 and the "insult of a civil servant" under article 290, the State party notes that the latter is an autonomous criminal act as prescribed by the Criminal Code. One of the differences between the aforementioned crimes is that in the case of "insult", the law aims to provide protection for the honour and dignity of a person, whereas in the case of "insult of a civil servant or persons performing functions of public administration" the objective of the law is to provide protection for a specific group of people in the course of performing their specific activities. By this autonomous criminal act, the law primarily aims to maintain public order rather than prevent personal harm, which serves only as a supplementary object of the said provision. The judgment of the Supreme Court explicitly indicates that the purpose of this article is to enable civil servants or persons performing functions of public administration to carry out their duties and to ensure their normal activities. The State party is of the view that the restriction of freedom of expression on such grounds falls within the category of permissible restrictions, in particular the protection of public order, under article 19 (3) of the Covenant.

4.5 With regard to the issue of proportionality, the State party submits that the author failed to sufficiently substantiate her allegations, and therefore her communication should be declared inadmissible under article 2 of the Optional Protocol. The State party submits that the domestic courts conducted a thorough analysis of the circumstances of the case, and

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<sup>5</sup> By this argument the State party challenges in particular the author's claim that the law lacks precision and foreseeability in terms of its personal scope, which had been interpreted too broadly by the domestic courts.

<sup>6</sup> See, for example, article 232 of the Criminal Code of Lithuania on insult of a court or a judge.

<sup>7</sup> In para. 54 of *Lesnik v. Slovakia* (application No. 35640/97), judgment of 11 March 2003, the European Court of Human Rights held that: "Public prosecutors are civil servants whose task it is to contribute to the proper administration of justice. In this respect they form part of the judicial machinery in the broader sense of this term. It is in the general interest that they, like judicial officers, should enjoy public confidence. It may therefore be necessary for the State to protect them from accusations that are unfounded."

some parts of the author's statement were even left out of the assessment because they were vague or inoffensive, and accordingly could not constitute elements of the crime under article 290 of the Criminal Code. In addition, while acknowledging the importance of forms of expressions contributing to public debate concerning public figures in the public domain and public institutions, the domestic courts found that the author's statements neither contributed to a public debate nor could the insulted prosecutors be considered public figures or politicians. The Supreme Court noted in that respect that public criticism can and should be expressed without the use of extreme, insulting words that do not contribute to the development of public discussion and pose a threat to the smooth functioning of officers, their honour and dignity. In that regard, the Supreme Court emphasized that the author was not convicted for criticizing the prosecutors, but for expressing it in an insulting way.

4.6 In addition, the State party insists that the courts considered the case in its entirety and duly weighed its aggravating and mitigating circumstances. Accordingly, the courts took note of the fact that the interview during which the author made her statement was widely aired on television and therefore reached an indefinite number of people. The courts also considered that the author's allegations were false. The Supreme Court's decision also states that presumed procedural violations, the seriousness of charges and punishment and the complexity of a case cannot serve as an excuse for the accused person to insult public officers in charge of his/her criminal case. Nevertheless, the domestic courts duly took into account that the author acted under significant stress when making the impugned statement.<sup>8</sup> Furthermore, the State party recalls that a fine was the most lenient sanction for this type of criminal act, the amount of which (approximately 377 euros) was also close to the minimum allowed by the relevant provisions of the law. The State party also observes that the author's claim regarding the long-term effects of her conviction are vague, as she failed to specify the occupations she cannot pursue and whether it is only her conviction preventing her from engaging in these activities. In addition, in contrast to the author's assertion, her criminal records will be expunged three years after her conviction.

4.7 Consequently, the State party is of the position that the domestic courts conducted a thorough analysis of the relevant factors of the case and adds that the Committee should not act as a "fourth-instance court" and review the domestic courts' assessment. In the light of the above considerations, the State party concludes that the sanctioning of the author was necessary in a democratic society and proportionate to the aims pursued. Therefore, the State party considers that the complaint should be deemed inadmissible for lack of sufficient substantiation.

4.8 Lastly, the State party submits that the author misled the Committee by: (a) falsely stating that the national courts expanded the interpretation of the law that served as the basis for her criminal liability; (b) stating that the aim of the law was to protect the honour and dignity of the prosecutors, which, however, does not correspond to the permissible grounds for restricting freedom of expressions; and (c) referring to the cases of the European Court of Human Rights, which are not relevant to her case owing to their divergent factual and legal circumstances. The State party is therefore of the view that the complaint should be declared inadmissible on the grounds of abuse of the right of submission under article 3 of the Optional Protocol.

4.9 In a subsequent note verbale dated 7 July 2016, the State party reiterated its position that the Committee should find the communication inadmissible under articles 1, 2 and 3 of the Optional Protocol. The State party also submitted that, should the Committee examine the merits of the complaint, it should consider the State party's observations dated 8 March 2016 in respect of both the admissibility and merits of the author's claims and find that there has been no violation of article 19 (2) of the Covenant for the reasons set out therein.

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<sup>8</sup> The State party also remarks that the national courts duly considered the author's stressed condition regardless of the fact that the request of the prosecutor to place the author in detention was eventually dismissed by the Court of Appeal of Lithuania, which also shows that it is not for the prosecution but for the courts to decide on the necessity of detention. Accordingly, the author's fear, which she refers to in her defence, was not well founded.

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

5.1 In a letter dated 10 August 2016, the author responded to the observations of the State party. With regard to the State party's arguments under article 1 of the Optional Protocol, the author notes that her criminal conviction on the grounds of her statements criticizing public prosecutors undoubtedly affected her rights under article 19 of the Covenant. She insists that she does not wish to challenge the law *in abstracto*, but rather the way it was applied to her detriment in the present case. Thus, she claims to have victim status for the purposes of the proceedings before the Committee.

5.2 Concerning the State party's argument that the author's communication lacks substantiation, as her case was thoroughly examined by the domestic courts, the author submits that the mere fact that her case was examined by three courts in three instances substantiates her claim that she has exhausted domestic remedies. The examination of her complaint by the domestic courts cannot be used by the State party as an argument for inadmissibility. In relation to the State party's arguments as to the proportionality of the interference, she submits that these arguments ignore that her main complaint to the Committee is not about the severity of the sanction imposed on her but rather about the mere fact that she was subjected to criminal proceedings for a public critical statement.

5.3 Lastly, the author notes that simply because her arguments and interpretation of the law differ from those of the State party, they should not be considered by the State party as an attempt to mislead the Committee, but rather as an integral part of dispute resolution before an impartial tribunal. This cannot be considered an abuse of the right of submission.

5.4 On 18 April 2017, the author reiterated her position that her criminal conviction for a verbal insult of the prosecution constituted an interference with her right to freedom of expression under article 19 (2) of the Covenant, which does not satisfy the requirements under article 19 (3) and therefore cannot be justified. She further informed the Committee that both the criminal act "insult" under article 155 and "insult of a civil servant or a person performing the functions of public administration" under article 290 have been decriminalized in Lithuania, which also shows the lack of necessity and proportionality of criminal proceedings resulting in her conviction at the material time.

**State party's additional observations**

6.1 In a note verbale dated 19 May 2017, the State party reiterated its position that the Committee should find the communication inadmissible for lack of victim status, for non-substantiation and for abuse of the right of submission. With regard to the decriminalization of the then criminal behavior of the author and other acts, the State party submits that both the Criminal Code and the Code of Administrative Offences contained provisions related to the act of insult of persons performing public functions. In order to harmonize these provisions, and also to satisfy the requirements of the *ne bis in idem* principle, the legislature decided to repeal both provisions and to introduce a single, unified provision under article 507 of the Code of Administrative Violations.

6.2 Finally, the State party recalls that the author's case does not concern the relationship between free speech and the media, and also reiterates that the statements of the author are not to be seen as information or ideas about public or political issues and that the prosecutors in her case were not prominent public and political figures. Therefore, the judgments of the European Court of Human Rights dealing with similar issues and invoked by the author in order to show that her statements should enjoy greater protection under the right to freedom of expression are not relevant to the adjudication of the present complaint.

**Issues and proceedings before the Committee***Consideration of admissibility*

7.1 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.

7.2 The Committee notes that the author brought a similar claim to the European Court of Human Rights, which declared it inadmissible on 31 October 2012. 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 the other international body, while the prohibition in this paragraph relates to the same matter being under concurrent examination. 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 that the same matter is not being examined under another procedure of international investigation or settlement for the purposes of article 5 (2) (a) of the Optional Protocol.

7.3 The Committee also notes that domestic remedies have been exhausted, as required under article 5 (2) (b) of the Optional Protocol.

7.4 The Committee takes note of the State party’s argument that the communication is inadmissible on the grounds of abuse of the right of submission, stating that the author has purposely submitted misleading information about the extended interpretation of the law by the domestic courts and the illegitimate aims of the law. In addition, the author, according to the State party, made selective references to the case law of the European Court of Human Rights. The author contends that her arguments and interpretation of the law should not be considered an attempt to mislead the Committee, but rather an integral part of dispute resolution before an impartial tribunal. The Committee considers that the information provided by the author reflects a difference of interpretation as to the scope of the law and cannot be regarded as an abuse of the right of submission.

7.5 Regarding the State party’s argument that the author could not establish that she was a “victim” in the sense of article 1 of the Optional Protocol, the Committee recalls that a person may not claim to be a victim within the meaning of article 1 of the Optional Protocol unless his or her rights have actually been violated, and that no person may contest a law or practice which that person holds to be at variance with the Covenant in theoretical terms by *actio popularis*. However, the Committee is of the view that the author’s arguments as to the precision and foreseeability of the law are not to be seen as her challenging the law in the abstract but rather challenging the manner in which that legislation was applied to the author in the case, in particular whether the alleged interference was provided by law. Therefore, the Committee finds that the author has shown sufficient standing, in that she has sufficiently substantiated for the purpose of admissibility her claims under article 19 of the Covenant.

7.6 Concerning the State party’s claims that the complaint was not sufficiently substantiated, the Committee is of the view that these are intimately linked to the merits and should therefore be analysed in the context of the consideration on the merits of the case. Accordingly, the Committee declares the communication admissible and proceeds with its consideration of the merits.

#### *Consideration of the merits*

8.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, in accordance with article 5 (1) of the Optional Protocol.

8.2 The Committee notes the author’s claim that her criminal conviction for having publicly criticized the actions of the public prosecutors in charge of the criminal proceedings conducted against her constitutes an unjustified restriction on her right to freedom of expression as protected by article 19 (2) of the Covenant. The Committee considers that the conviction of the author indeed constituted an interference with her right to freedom of expression and must therefore examine whether the restriction imposed on the author’s rights in the present case is justified under any of the criteria set out in article 19 (3) of the Covenant.

8.3 The Committee recalls that article 19 (3) of the Covenant allows certain restrictions only as provided by law and necessary for respecting the rights and reputations of others or for the protection of national security or public order (*ordre public*) or public health or morals. The Committee refers to its general comment No. 34, in which it stated that those freedoms are indispensable conditions for the full development of the person and are essential for any society. They constitute the foundation stone for every free and democratic society. Any restriction on the exercise of those freedoms must conform to the strict tests of necessity and proportionality. Restrictions must be applied only for those purposes for which they were prescribed and must be directly related to the specific need on which they were predicated. The Committee recalls that it is for the State party to demonstrate that the restrictions on the author's rights under article 19 were necessary and proportionate.<sup>9</sup>

8.4 Regarding the issue of whether the interference was provided by law, the Committee notes that the parties disagree over the interpretation of domestic law, in particular whether article 290 of the Criminal Code, in terms of its scope, includes public prosecutors within the ambit of civil servants who are protected from insult. In this regard, the Committee notes the State party's arguments claiming that the interference occurred in accordance with article 290 of the Criminal Code, which was in force at the material time, and that it had been interpreted in compliance with the Commentary of the Criminal Code of Lithuania.<sup>10</sup> The Committee also notes the State party's argument that the Supreme Court of Lithuania thoroughly examined this issue and established that the author's interpretation of the law would leave public prosecutors unprotected, which would be inconsistent with the jurisprudence of domestic courts as well as the European Court of Human Rights,<sup>11</sup> and would run counter to the legislature's intent.

8.5 The Committee recalls its jurisprudence that considerable weight should be given to the assessment conducted by the State party, and that it is generally for the organs of the States parties to the Covenant to review and evaluate facts and evidence in order to determine whether such risk exists, unless it can be established that the evaluation was clearly arbitrary or amounted to a manifest error or denial of justice.<sup>12</sup> Here it cannot be said that the Supreme Court's evaluation was arbitrary or that it amounted to a denial of justice, in that the interference in question had a legal basis and the application of the said legal provision to the applicant's case did not go beyond what could be reasonably foreseen in the circumstances. Accordingly, the Committee is of the view that the interference was provided by law within the meaning of article 19 (3) of the Covenant. As to the author's arguments concerning the criminal nature of the defamation law and that providing greater protection for public officials against defamation compared to others should be deemed discriminatory, they relate, in substance, to the question of whether the interference resulting from the application of the relevant law in the present case was necessary and proportionate.

8.6 Regarding the issue of whether the interference in question pursued a legitimate aim, the author maintains that the State party failed to explain on specific grounds how her statement would jeopardize the prosecutors' activity for the purposes of one of the legitimate aims set out in article 19 (3) of the Covenant. The Committee also takes note of her argument that article 290 could not possibly be aimed at the protection of the honour and dignity of others, as it is the separate act of "insult" under article 155 of the Criminal Code which has such a purpose. The State party contests these claims. It argues that the provision aims to enable civil servants to carry out their duties, although the protection of their honour and dignity may also serve an auxiliary purpose in terms of permissible restrictions.

8.7 The Committee observes that, in the interest of the proper administration of justice, restrictions on the right to freedom of expression have previously been recognized to pursue

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<sup>9</sup> See, for example, *Sudalenko and Poplavny v. Belarus* (CCPR/C/122/D/2190/2012), para. 8.3.

<sup>10</sup> According to the Commentary, the provision covers all persons performing public functions and excludes only certain groups of people that enjoy protection under separate articles of the Criminal Code.

<sup>11</sup> See European Court of Human Rights, *Lesnik v. Slovakia*.

<sup>12</sup> See *Z.H. v. Australia* (CCPR/C/107/D/1957/2010), para. 9.3.



legitimate aims in several cases challenging criminal convictions for contempt of court.<sup>13</sup> The Committee recalls its general comment No. 34, in which the Committee states in paragraph 47 that:

Defamation laws must be crafted with care to ensure that they comply with paragraph 3 [of article 19], and that they do not serve, in practice, to stifle freedom of expression. All such laws, in particular penal defamation laws, should include such defences as the defence of truth and they should not be applied with regard to those forms of expression that are not, of their nature, subject to verification. At least with regard to comments about public figures, consideration should be given to avoiding penalizing or otherwise rendering unlawful untrue statements that have been published in error but without malice. In any event, a public interest in the subject matter of the criticism should be recognized as a defence. Care should be taken by States parties to avoid excessively punitive measures and penalties.

At the same time, the Committee acknowledges that public prosecutors are not on the same footing as public figures and, like judicial officers, require a measure of public confidence for the effective performance of their functions. The Committee is mindful of the State party's argument that article 290 of the Criminal Code of Lithuania is aimed at providing protection for public prosecutors when performing their specific functions, which contributes to maintaining public trust in the administration of justice in general. In the light of these considerations, the Committee is satisfied that article 290 could be justified as promoting the legitimate aim of protecting public order.

8.8 Regarding the proportionality of the measure, the Committee takes note of the fact that the author challenges the criminal nature of the defamation law on the basis that, by providing greater protection to public officials against defamation as compared to other individuals, it is discriminatory. The Committee also notes her claim that the limits of permissible criticism should be wider when a given statement concerns an individual's action in his/her public capacity, and that the right to freedom of expression also provides protection for statements that are, to a certain extent, exaggerated or even provocative. In addition, the Committee also notes the author's statement that she was exposed to significant stress at the time when she uttered the critical words. Furthermore, the Committee observes the author's alleged grievances regarding the negative impacts of her criminal sanction.

8.9 On the other hand, the Committee notes the State party's defence that the domestic courts thoroughly analysed the circumstances of the case and concluded that the need for the protection of public order, namely, the protection of the prosecutors' activity contributing to the proper administration of justice as well as the need for protection of their rights and reputation, outweighs the author's interests in the case. The Committee further observes the State party's argument that, in the course of their assessment, domestic authorities took into account that the author's statements were broadcast on television and could reach an indefinite number of people, thereby aggravating the harms caused to the rights and values protected by the aim of the challenged legislation. The authorities also duly considered that the author could not prove the truth of her statements. The Committee further notes the State party's argument that, as it appears from the Supreme Court's judgment, the author was not convicted for phrasing criticism of the prosecutors per se, but for expressing it in an insulting way. Lastly, the Committee notes the State party's defence that, despite the fact that the author's statement entailed criminal liability under the relevant laws of Lithuania effective at the time, the punishment was not criminal in nature, the imposed fine was close to the minimum amount and the criminal records would be expunged after three years.

8.10 In assessing the necessity and proportionality of the interference in the present case, the Committee has carefully considered the arguments advanced by both parties. The Committee is mindful of the reasoning of the Supreme Court that the author was not convicted for phrasing criticism of the prosecutors per se, but for expressing it in an insulting way. The Committee notes, however, that some parts of the author's statement

<sup>13</sup> See, for example, *Fernando v. Sri Lanka* (CCPR/C/83/D/1189/2003).

were even left out of the assessment of the domestic courts because they were vague or inoffensive, that only a truncated version of what the author said was given and that no context was provided, rendering the entire statement ambiguous. Furthermore, the Committee is not satisfied that due weight was given to the circumstance that the statements were made in the context of criminal proceedings adjudicating on serious criminal charges against the author, and were a spontaneous reaction upon learning that she would be placed in pretrial detention. The case attracted wide public attention and may have had political aspects, and therefore the threshold for criticism contributing to a public debate may be reasonably considered higher. The Committee also notes that even though the author was sentenced to pay only a fine and that her criminal record will be expunged, the author was nonetheless subjected to criminal proceedings for statements made in relation to her own criminal case. In addition, the imposition of a fine could amount to an excessive burden on the author, considering her young age and unemployment at the time. In carrying out its assessment, the Committee further recalls its general comment No. 34, in which it states in paragraph 47 that: "States parties should consider the decriminalization of defamation and, in any case, the application of the criminal law should only be countenanced in the most serious of cases and imprisonment is never an appropriate penalty." In this respect, the Committee notes that article 290 of the Criminal Code of Lithuania was repealed as at 1 January 2017 and article 507 of the new Code of Administrative Violations, applicable to cases similar to that of the author, prescribes only administrative sanctions instead of criminal liability. In the light of these considerations, the Committee is of the view that this particular case cannot be regarded as the "most serious of cases", and concludes that the restrictions on the author's rights were disproportionate and therefore not shown to be justified pursuant to the conditions set out in article 19 (3) of the Covenant.

9. In the light of the above considerations, the Committee is of the view that the State party failed to justify the restriction imposed on the author and concludes that the author's rights under article 19 (2) of the Covenant have been violated.

10. The Committee, acting under article 5 (4) of the Optional Protocol, is of the view that the facts before it disclose a violation by the State party of article 19 (2) of the Covenant.

11. Pursuant to article 2 (3) (a) of the Covenant, the State party is under an obligation to provide the author with an effective remedy. This requires it to make full reparation to individuals whose Covenant rights have been violated. Accordingly, the State party is obligated, *inter alia*, to take appropriate steps to provide the author with adequate compensation and reimbursement of any legal costs incurred by her. The State party is also under an obligation to take all steps necessary to prevent similar violations from occurring in the future.

12. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective remedy when it has been determined that a violation has occurred, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the present Views and to have them widely disseminated in the official languages of the State party.

## Annex

### Individual opinion of Committee members José Manuel Santos Pais and Yadh Ben Achour (dissenting)

1. We regret not being able to join the other members of the Committee in finding a violation of the author's rights under article 19 (2) of the Covenant.

2. In the present case, we are dealing with an insult to a judicial officer, specifically a prosecutor. We are not dealing with a public figure or a political person, but with a judicial officer intervening in court proceedings. In many countries, this case would be seen as contempt of court or disrespect towards a judicial officer in the exercise of his/her functions. Therefore, to conclude a violation of article 19 (2) of the Covenant in this case may unfortunately lead to abusive interpretations, particularly in times where, in many countries, the judiciary is under severe criticism or suffering undue interference. Instead of contributing to preserve a court's autonomy and independence, namely, ensuring due respect for judges and prosecutors and upholding the rule of law, the Committee seems, with the present Views, to pave the way in a different direction.

3. In many judicial systems, the prosecutor is seen as a member of the judicial power, alongside with judges, acting on behalf of society and in the public interest.

4. According to joint opinions No. 12 (2009) of the Consultative Council of European Judges and No. 4 (2009) of the Consultative Council of European Prosecutors (the "Bordeaux Declaration"):

"3. The proper performance of the distinct but complementary roles of judges and public prosecutors is a necessary guarantee for the fair, impartial and effective administration of justice. Judges and public prosecutors must both enjoy independence in respect of their functions and also be and appear independent from each other.

...

6. The enforcement of the law and, where applicable, the discretionary powers by the prosecution at the pretrial stage require that the status of public prosecutors be guaranteed by law, at the highest possible level, in a manner similar to that of judges. They shall be independent and autonomous in their decision-making and carry out their functions fairly, objectively and impartially."

5. In the explanatory note to the Bordeaux Declaration, it is further stated that:

"10. The independence of the public prosecution service constitutes an indispensable corollary to the independence of the judiciary. The role of the prosecutor in asserting and vindicating human rights, both of suspects, accused persons and victims, can best be carried out where the prosecutor is independent in decision-making from the executive and the legislature and where the distinct role of judges and prosecutors is correctly observed. In a democracy based on the rule of law, it is the law that provides the basis for prosecution policy (Declaration, paragraph 3).

...

27. The independence of public prosecutors is indispensable for enabling them to carry out their mission. It strengthens their role in a state of law and in society and it is also a guarantee that the justice system will operate fairly and effectively and that the full benefits of judicial independence will be realized (Declaration, paragraphs 3 and 8). Thus, akin to the independence secured to judges, the independence of public prosecutors is not a prerogative or privilege conferred in the interest of the prosecutors, but a guarantee in the interest of a fair, impartial and effective justice that protects both public and private interests of the persons concerned.

...

34. The independence of the judge and of the prosecutor is inseparable from the rule of law. Judges as well as prosecutors act in the common interest, in the name of the society and its citizens who want their rights and freedoms guaranteed in all their aspects. They intervene in areas where the most sensitive human rights (individual freedom, privacy, protection of possessions, etc.) deserve the greatest protection.”

6. According to opinion No. 9 (2014) of the Consultative Council of European Prosecutors (the “Rome Charter”) on European norms and principles concerning prosecutors:

“V. Prosecutors should be autonomous in their decision-making and should perform their duties free from external pressure or interference, having regard to the principles of separation of powers and accountability.”

And in the explanatory note to the Rome Charter:

“36. States must ensure that prosecutors are able to perform their functions without intimidation, hindrance, harassment, improper interference or unjustified exposure to civil, penal or other liability.”<sup>1</sup>

7. Opinion No. 13 (2018) of the Consultative Council of European Prosecutors on independence, accountability and ethics of prosecutors further states, regarding the concept of independence of prosecutors:

“15. ‘Independence’ means that prosecutors are free from unlawful interference in the exercise of their duties to ensure full respect for and application of the law and the principle of the rule of law and that they are not subjected to any political pressure or unlawful influence of any kind.”

8. In the present case, the Committee considered that the conviction of the author constituted an interference with her right to freedom of expression (para. 8.2), but held the interference was provided by law within the meaning of article 19 (3) of the Covenant (paras. 8.4 and 8.5). The Committee further accepted that article 290 of the Criminal Code of Lithuania aimed at providing protection for public prosecutors when performing their specific functions, thereby contributing to the maintenance of public trust in the administration of justice in general. Therefore, this provision could be justified as promoting the legitimate aim of protecting public order (para. 8.7), which comprises respect for judges and prosecutors.

9. However, the Committee concluded the restrictions on the author’s rights were disproportionate and therefore not shown to be justified under article 19 (3) of the Covenant. We consider this conclusion difficult to understand and not reflecting accurately the facts in this case.

10. As the Committee acknowledges (para. 8.10), the Supreme Court of Lithuania held that the author was not convicted for phrasing criticism of the prosecutors per se, but for expressing it in an insulting way. However, the way this reasoning is presented by the Committee is not entirely truthful. In fact, the State party states that domestic courts conducted a thorough analysis of the circumstances of the case, and some parts of the author’s statement were even left out of the assessment because they were vague or inoffensive, and accordingly could not constitute elements of the crime under article 290 of the Criminal Code (para. 4.5). In addition, while acknowledging the importance of forms of

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<sup>1</sup> See also Committee of Experts on the Role of Public Prosecution in the Criminal Justice System, “The role of public prosecution in the criminal justice system”, Recommendation Rec(2000)19 of the Committee of Ministers of the Council of Europe, para. 11; Conference of Prosecutors General of Europe, “European guidelines on ethics and conduct for public prosecutors: the Budapest Guidelines” (2005), guidelines I and II; United Nations, “Guidelines on the role of prosecutors” (1990), para. 4; International Association of Prosecutors, “Standards of professional responsibility and statement of the essential duties and rights of prosecutors” (1999), para. 6; and United Nations Office on Drugs and Crime, “The status and role of prosecutors: a United Nations Office on Drugs and Crime and International Association of Prosecutors Guide”, *Criminal Justice Handbook Series* (New York, 2014).

expressions contributing to public debate concerning public figures in the public domain and public institutions, domestic courts found that the author's statements neither contributed to a public debate nor could the insulted prosecutors be considered public figures or politicians (see also para. 6.2). The Supreme Court noted in that respect that public criticism can and should be expressed without the use of extreme, insulting words that do not contribute to the development of public discussion and pose a threat to the smooth functioning of officers, their honour and dignity. In that regard, the Supreme Court emphasized that the author was not convicted for phrasing criticism of prosecutors, but for expressing it in an insulting way. We agree with this conclusion by the domestic courts of Lithuania.

11. The Committee also considered that only a truncated version of what the author said was given and that no context was provided, rendering her entire statement ambiguous (para. 8.10). We dispute this conclusion.

12. The "truncated" version was supplied by the author herself and she even gives the context of her statement (para. 2.1): three criminal cases were initiated against her in Lithuania on charges of terrorism, a serious offense.<sup>2</sup> On 24 March 2011, during the court hearing in one of these cases, a prosecutor requested the court to order pretrial detention of the author.<sup>3</sup> During a break in the court hearing the author gave an interview to a television reporter and made a statement in which she suggested the prosecutor committed crimes, could kill people and was a criminal.

13. The author's statement, contrary to the conclusion of the Committee, can hardly be seen as a mere spontaneous reaction. She had already been the object of three criminal cases on charges of terrorism and, as the State party states (paras. 4.2 and 4.6), the interview during which the author made her statement was widely aired on the biggest commercial television channels at the time, thereby reaching an indefinite number of people, and the author's allegations were false. Presumed procedural violations, the seriousness of the charges and punishment and the complexity of a case cannot serve as an excuse for an accused person to insult public officers in charge of his/her criminal case. In spite of this, domestic courts took duly into account that the author may have acted under significant stress when making the impugned statement.

14. On the other hand, the author was not a first time offender,<sup>4</sup> since she had been convicted for criminal acts as prescribed by articles 145 (threatening to murder or cause a severe health impairment to a person or terrorization of a person) and 290 (insulting a civil servant or a person performing the functions of public administration) of the Criminal Code of Lithuania. It was established that the author had sent several text messages to a prosecutor threatening his bodily integrity. On 8 May 2013, the author was also found guilty of providing false information in relation to crimes allegedly committed against her by several State officers (para. 4.2). The statement of the author in the present case therefore must be seen as hampering the prosecutor's integrity and impartiality in the exercise of his functions, in a particularly sensitive and serious criminal case, with a wide public impact.<sup>5</sup>

15. The Committee also places great emphasis on the fact that a criminal sanction – a fine – was imposed on the author, which constituted "an excessive burden on the author, considering her young age and unemployment at the time" (para. 8.10). There is, however, no reference in the present Views to the situation of unemployment of the author. Furthermore, since we are dealing with the application of article 290 of the Criminal Code of Lithuania, it is natural that the sanction imposed would be criminal in nature. However, the fine imposed (1,300 litai, or approximately 380 euros) was, according to the State party,

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<sup>2</sup> She was allegedly recruited by Russian citizens to commit an act of terror at a military base in Moscow.

<sup>3</sup> The request of the prosecutor to place the author in detention was later dismissed by the Court of Appeal of Lithuania. Accordingly, the author's fear was not well founded (see footnote 9).

<sup>4</sup> The author herself acknowledges she had been detained previously (para. 3.5).

<sup>5</sup> In Lithuania, public prosecution acts on the basis of the principle of legality: any reported criminal offense has to be investigated, and so the prosecution had to bring charges against the author under article 290 of the Lithuanian Criminal Code.

the most lenient sanction for this type of criminal act and also close to the minimum allowed by the relevant provisions of the law (para. 4.6). In other countries, the very same sanction would have been considered a mere administrative violation. It is a disturbing argument that a criminal sanction, such as a fine, should be considered “an excessive burden”, and not be imposed if the person is not able to pay it. What of the deterrent effect of criminal sanctions? This argument is particularly misplaced, since article 47 (6) of the Criminal Code of Lithuania foresees that the fine may be replaced with community service if the person is not able to pay it. Moreover, if they were not to enforce the relevant provision of the Criminal Code, what else could the authorities do? Should the concerned prosecutor himself file a civil suit against the author? We don’t think so.

16. We also fail to see the argument relating to the later repealing of article 290 of the Criminal Code. The State party has explained why the changes were introduced (para. 6.1). Both the Criminal Code and the Code of Administrative Offences contained provisions related to the act of insult of persons performing public functions. In order to harmonize these provisions, and to satisfy the requirements of the *ne bis in idem* principle, the legislature decided to repeal both provisions and to introduce a single, unified provision under article 507 of the Code of Administrative Violations. The fact remains, however, that article 290 of the Criminal Code was in force at the material time and so had to be enforced by the prosecution, since the system in Lithuania follows the principle of legality and all reported crimes must be investigated.

17. We would therefore have concluded, in the present case, that the author’s complaint was insufficiently substantiated or, if considered admissible, concluded that article 19 (2) of the Covenant was not violated.

18. In this respect, the decision of inadmissibility the Committee reached in the same session (*X. v. Australia*, communication No. 3580/2019), is quite illuminating. In that case, the Committee concluded, in the face of language much less offensive than the one in the present case, that the information suggested that the measures taken by the State party were based on law and aimed at protecting the integrity of the judiciary as an element of public order, and that the sanction imposed on the author<sup>6</sup> was proportionate to the professional misconduct of which he was found guilty.

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<sup>6</sup> Because he was a lawyer, the author had been reprimanded for professional misconduct and was ordered, at his own expense, to take and pass a course in legal ethics, in addition to paying fines.