GUSTAVO MINERVINI. The crime of genocide as interpreted by the ECtHR and its compatibility with the principle of legality

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Abstract

In March 2019, the European Court of Human Rights issued its judgment in the case of *Drėlingas v. Lithuania*, concerning the application of the principle of legality with regard to the crime of genocide. The Court was called to review the compatibility of the conviction of Mr. Drėlingas – a senior official of the former Soviet Union's state security agency who, in 1956, took part in an operation against Lithuanian partisans – with Article 7 of the European Convention on Human Rights. The applicant, indeed, lamented that Lithuanian courts sentenced him for being an 'accessory to genocide' by retroactively applying a wider notion of genocide, which had no basis in international law at the relevant time. The Strasbourg judges, eventually, found by majority that the conviction did not violate the principle of legality. This paper questions that Lithuanian partisans could have been considered as a part of the Lithuanian national group for the purpose of the crime of genocide, thus arguing that the Court erred in concluding that there was no violation of the Convention, with a possible far-reaching impact on future cases.

Keywords: ethnopolitical genocide; principle of legality; substantiality of the part; Article 7 of the European Convention on Human Rights.

Introduction. On 12 March 2019, the European Court of Human Rights (hereinafter, the ECtHR or European Court) issued its judgment in *Drėlingas v. Lithuania* concerning the application of the principle of legality, enshrined in Article 7 of the European Convention on Human Rights (ECHR), in respect of the crime of genocide. The applicant, Mr. Stanislovas Drėlingas, had worked as a senior officer of the state security agency of the former Soviet Union – the MGB, which later became the KGB – at the time of the offence for which he was convicted. On 12 October 1956, he took part in an operation to seize two Lithuanian partisans: Adolfas Ramanauskas, code name "Vanagas", and his wife Birutė Mažeikaitė, code name "Vanda". The operation was extremely important for the Lithuanian section of the MGB inasmuch as Vanagas was the chairman of the Movement of the Struggle for the Freedom of Lithuania Council, the all-partisan organization established for the purpose of fighting against the Soviet occupation

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of Lithuania, which started during the Second World War and lasted until 1990. The operation was a success: the two partisans were seized and detained in Vilnius, where they were brutally tortured. Afterwards, both were sentenced by the Supreme Court of the Lithuanian Soviet Socialist Republic: Vanagas to death, while Vanda to deportation to Siberia. Both decisions were implemented.

When Lithuania finally regained its independence, the applicant was then prosecuted and found guilty of being an "accessory to genocide" in accordance with Articles 24, para. 6, and 99 of the 2003 Lithuanian Criminal Code. The Lithuanian courts concluded that the actions of Mr. Drėlingas contributed to the destruction of Lithuanian partisans, being that they were considered a political group representing a "significant part" of the Lithuanian national-ethnic group. On 18 May 2016, having exhausted domestic remedies in accordance with Article 35 of the ECHR, the applicant lodged a complaint before the European Court arguing that his conviction breached the principle of legality inasmuch as the interpretation of the crime of genocide provided by Lithuanian courts had no basis in international law.

Having ascertained the role of the applicant within the Lithuanian section of the MGB, as well as its involvement in the operation to capture the two partisans, the ECtHR proceeded to review the conviction of the applicant by Lithuanian courts. In this respect, the Court found that Mr. Drėlingas had served in the MGB unit which, as its main task, aimed to destroy part of Lithuanian population. That part was constituted by members of the armed group resisting Soviet occupation, i.e., Lithuanian partisans. Such a group represented a separate national-ethnic-political group, the destruction of which had a tremendous impact on the survival of the whole (national-ethnic) Lithuanian group. As far as the qualification of Lithuanian partisans, the European Court found that Lithuanian courts had clarified why they could be considered as a "significant part" (that is to say, a qualitatively relevant part) of the Lithuanian national-ethnic group. In light of the foregoing, by a majority of five to two votes, the Court rejected the application by Mr. Drėlingas, ruling in favour of the Lithuanian Government: the conviction of the applicant did not violate Article 7 of the ECHR.

Following the judgment issued by the Chamber of the European Court, Mr. Drėlingas requested that the case be referred to the Grand Chamber *ex* Article 41, para. 1, of the ECHR. This seemed a more than reasonable path to the extent that the decision clashed with the Grand Chamber's judgment in the case of *Vasiliauskas v. Lithuania*. Nevertheless, on 9 September 2019, the Registrar of the ECtHR declared that the screening panel of the Grand Chamber had rejected the referral request presented by the applicant. Accordingly, the judgment became final.

The present decision is noteworthy for two main reasons. First, it arguably expanded the scope of the crime of genocide, as interpreted in the jurisprudence of the European Court, with possibly far-reaching impact on future cases. Second, it chal-

lenged the well-established narrative according to which crimes committed by the Soviet occupational regime could not be considered as genocidal inasmuch as they were carried out on the basis of social and political attitudes, thus falling out of the scope of the 1948 Genocide Convention. This paper nevertheless questions that Lithuanian partisans could have been considered as a part of the Lithuanian national-ethnic group for the purpose of the crime of genocide, thus arguing that the European Court failed in addressing a violation of Article 7 of the ECHR.

Ethno-political genocide: Lithuanian partisans as part of the protected group. As pointed out in the former section, in the case of *Drėlingas* the European Court found, by majority, that the Lithuanian partisans – a "political" group for the purpose of the crime of genocide – represented a significant part of the Lithuanian national-ethnic group. To assess the reasoning of the Court, an analysis of Article II of the Genocide Convention is much needed. According to this, "[i]n the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such". The crime of genocide, as is well known, is a so-called "specific intent crime", that is to say a crime requiring that the author not only committed an act intentionally, but also specifically intended to cause a certain result when taking such a course of action. Indeed, the crime of genocide requires a further element: the intent to destroy, in whole or in part, the targeted victim group. Put otherwise, in order to find someone guilty of genocide, it is not enough that the person voluntarily committed their criminal act (e.g., killing members of the group or forcibly transferring children of the group to another group). Instead, it is necessary to ascertain that such conduct was performed with the specific purpose of destroying the protected group to which the victim(s) pertain(s).

However, not just any group is protected under the Genocide Convention. Quite the opposite, Article II of the Convention only lists four specific groups: national, ethnic, racial and religious. The European Court in both *Vasiliauskas* and *Drėlingas* acknowledged this point. Nevertheless, the Lithuanian Government argued – convincingly, according to the outcome of the *Drėlingas* judgment – that Lithuanian partisans were not only a political group, but also constituted a "significant part" of the Lithuanian national-ethnic group. That is because they had a pivotal role in protecting the national identity, culture and self-awareness of the Lithuanian nation in its struggle against the Soviet occupation. Accordingly, any attack carried out against Lithuanian partisans also constituted an attack against the ethnic-national group of Lithuanians. As argued by the minority judges, as well as by some scholars, the judgment of the European Court in the case of *Drėlingas* recognized ethno-political genocide. Ethno-political genocide actually means that the crime of genocide might be committed against a group which is identified by both ethnic (or national) and political features. Such a theoretical construction might be helpful in guaranteeing protection to groups which are not listed in Article II of the Convention. However, one cannot but wonder whether such a construction

is actually in line with the very definition of genocide. This is an issue which must be addressed in order to assess the reasoning of the European Court.

The starting point cannot but be to recognize the fundamental role that Lithuanian partisans played in the struggle of Lithuania to regain its independence. From this perspective, it seems apparent why Lithuanian courts, as well as the ECtHR, considered them as a significant part of the Lithuanian ethnic-national group. Nevertheless, such a stance cannot be the final point. Indeed, as pointed out by many commentators, the crime of genocide has its most characteristic element in the *mens rea* (i.e., the intent to destroy a group as such). Therefore, any analysis should move from a consideration of the *mens rea* of the perpetrator(s). In other words, it is not enough that Lithuanian partisans represented a qualitatively significant part of the national group: it must be ascertained that they were targeted precisely because they belonged to the protected group. This is indeed the interpretation that the wording "as such" has traditionally received. Such a wording would express the idea that the victims are targeted in order to attack the group. This actually means that the perpetrators selected their individual victims precisely because they were part of the targeted group, the destruction of which the perpetrators aimed towards.

If one accepts this premise, it should have been proved that the Lithuanian partisans were targeted because of their nationality or ethnicity, thus it not being sufficient to demonstrate that they were a quantitively or qualitatively relevant part of the Lithuanian national-ethnic group. Otherwise, a very element of the crime of genocide – *viz.*, that one of the four protected groups is targeted "as such" – would fail, with a consequential expansion of the crime of genocide. Indeed, if it is accepted that a political group can be identified as a targeted group, while also being considered as a sub-group of a national and/or ethnic group, this means that any group might actually be protected under the Genocide Convention. The only condition would be that the group is quantitatively or qualitatively relevant. In other words, if a criminal campaign aimed at targeting all of the supporters of the main football team of a State, such a campaign could be considered genocidal as long as the group was quantitatively relevant in respect of the national group. The fact that football supporters are not covered by the Genocide Convention, indeed, would be irrelevant. The group would only have to be substantial in number, as was the case with Lithuanian partisans.

In conclusion, it is thus argued that, under a strict yet well-established reading of the Genocide Convention, Lithuanian partisans could not have been considered as a significant part of the Lithuanian ethnic-national group for the purpose of the crime of genocide. That is because they were not targeted simply because of their membership of the protected Lithuanian national-ethnic group, but because of their political allegiance to the Lithuanian nation in its struggle against the Soviet regime.

Lithuanian partisans as a "significant part" of the protected group: a clash with the

principle of legality. In the previous section, it has been argued that Lithuanian partisans should not have been considered as a significant part of the protected national-ethnic group for the purpose of the crime of genocide to the extent that they were (at least, also) targeted because of their political struggle against the Soviet occupation. However, even if it were assumed, for the sake of argument, that they actually constituted a part of the protected group, there would still be an issue to be considered: the meaning of the wording "in part" enshrined in Article II of the Genocide Convention.

In this respect, it must be pointed out that, since the adoption of the Convention in 1948, the interpretation of "in whole or in part" has generated a vigorous debate inasmuch as the wording leaves unclear what "in part" means. According to jurisprudence and the majority of scholars, two main hermeneutical options have to be considered. The first requires the addition of the word "substantial". Accordingly, in order to reach the threshold of genocide, the intent to destroy must be directed towards a quantitatively (*recte*, numerically) relevant part of the group (the so-called quantitative approach). The second option requires the addition of the word "significant". In this case, in order to reach the threshold, the intent must involve a part of the victim group, the destruction of which would have an irreparable impact on the chances of survival of the protected group (the so-called qualitative approach). Having said that, by reading the judgment of the European Court in the case of *Drėlingas*, it is apparent that Lithuanian courts mainly relied on the qualitative approach so as to construe the Lithuanian partisans as a (significant) part of the protected Lithuanian national-ethnic group. This is confirmed by the conclusions of the European Court itself, according to which Lithuanian authorities had demonstrated that the partisans – in their struggle against the Soviet occupational regime – were significant for the survival of the entire national group.

Nevertheless, in order to deem a conviction entered on the basis of such an interpretation as consistent with the principle of legality enshrined in Article 7 of the ECHR, the European Court should have ascertained whether, at the time of the commission of the crime (i.e., 1956), the applicant could have reasonably foreseen the qualitative interpretation of the wording "in part". That is because a correct understanding and application of the *nullum crimen sine lege* principle requires judges to apply the law as interpreted at the time when the conduct took place. The attention should therefore be on whether in 1956 the idea that genocide could be committed by intending to destroy a small, but relevant, part of a targeted group was accepted or, better, foreseeable. If one looks at the *travaux préparatoires* of the Genocide Convention, there is nothing to support such an interpretation. Similarly, there seems to be no reference to the qualitative approach in the scholarship of that time. Moreover, using an historical argument, one could contend that – at least at the time of the commission of the crime – the crime of genocide had an intrinsic and prevalent quantitative dimension which was strictly linked to its archetype(s), namely the Nazi genocide of the Jews and the Turkish genocide of the Armenians. In this sense, it is not surprising that the first reference to such an

interpretation is to be found in the 1985 *Revised and Updated Report on the Question of the Prevention and Punishment of the Crime of Genocide*, authored by Benjamin Whitaker. According to the latter, "in part" could indeed refer to a significant section of a group, such as its leadership. Such an interpretation was later accepted and further developed in the jurisprudence of the International Criminal Tribunal for the Former Yugoslavia and the International Court of Justice.

In light of the foregoing, it is contended that – as affirmed by the Grand Chamber of the European Court in the *Vasiliauskas* judgment – the qualitative interpretation of the wording "in part" could not have been foreseen by the applicant at the time of the commission of the crime. Therefore, no conviction for genocide, as interpreted in 1956, could be entered on the basis of this interpretation without clashing with the fundamental principle of legality *ex* Article 7 of the ECHR.

Three years after Drėlingas: some remarks looking at the future. Three years on, the *Drėlingas* judgment is still sparking debate. Leaving aside the issue as to whether the conviction of Mr. Drėlingas did represent a violation of Article 7 of the ECHR – an issue which has received an affirmative answer in this paper – one cannot but wonder about the legacy of the case.

A first point concerns the well-established exclusion of, *inter alia*, political groups from the list of protected groups under Article II of the Genocide Convention. Historically, this has represented one of the most discussed compromises in the drafting of the Convention, which already in 1948 was deemed to crystallize customary international law. Several cases have testified to the problematic nature of this loophole. The Katyn massacre has been traditionally labelled as a series of mass executions rather than several genocidal acts because the Soviet Union targeted the Polish *intelligentsia*, rather than the Poles as such. Similarly, the qualification of crimes committed by the Khmer Rouge against its own population has generated a huge debate: on the one hand, part of the scholarship has excluded that self-genocide could be recognized under the Genocide Convention, arguing that the crimes were actually motivated by a political intent; on the other hand, some recent decisions of the Extraordinary Chambers in the Court of Cambodia have found that these crimes were actually genocidal. Again, the crimes committed by the Soviet occupation regimes in the Baltic States have generally been categorized as crimes against humanity, rather than genocide, because of the political aim that guided these regimes. All these cases move in the same direction: the need to (at least consider whether to) widen the list of protected groups for the purposes of the crime of genocide. While some authors have proposed to amend the Genocide Convention – even resorting to an *inter se* agreement in accordance with Article 41 of the Vienna Convention on the Law of Treaties – the most effective way might actually be that of national legislation. The Genocide Convention, indeed, does not prevent any State party from actually widening the scope of its provisions. Many States have followed this path by enlisting political and social groups. While such a strategy will not permit redress of

the crimes of the past, it can represent an important tool for the future.

A second point rather concerns the impact of the *Drėlingas* judgment on the jurisprudence of the ECtHR, as well as on that of other international courts and tribunals. To date, such an impact is hard to measure or even predict. As far as the European Court is concerned, there is a stark contrast between the *Vasiliauskas* and the *Drėlingas* judgments, which could have been solved if the screening panel had not rejected the referral request by Mr. Drėlingas. From this point of view, one cannot but wait until a similar case will come back before the Court. Indeed, the interpretation provided by the Chamber vis-à-vis the principle of legality might actually prompt other States – such as Poland – to start proceedings for the crimes committed by the former Soviet Union. With regard to the jurisprudence of other international courts and tribunals, it seems easier to argue that the precedent of the *Drėlingas* case will probably be overlooked. Indeed, unless further developments occur, to endorse an interpretation widening the crime of genocide would not only be problematic inasmuch as it neglects the "as such" requirement, but would also contravene the well-established principle that, in case of ambiguity, the definition shall be interpreted in favour of the person being prosecuted.