Mykolas Romeris University

MYKOLAS ROMERIS UNIVERSITY LAW SCHOOL
INTERNATIONAL SCIENTIFIC CONFERENCE

"TWO YEARS AFTER DRĖLINGAS CASE: CHANGES AND PERSPECTIVES FOR THE FUTURE"

10-09-2021

Conference Proceedings

Edited by dr. Dovilė Sagatienė

ISBN 978-609-488-046-9

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This publication was produced as part of a joint project between MRU Law School and the Baltic-German University Liaison Officer.

Vilnius

2022

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LAW SCHOOL

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Approved by Mykolas Romeris University Law School Council on 1 of December 2022
by resolution No. 1T-41

CONTENT

Statement by the Deputy Minister for Foreign Affairs of the Republic of Lithuania dr. Mantas Adomėnas / 5

EGIDIJUS KŪRIS
Vasiliauskas, *Drėlingas* and beyond – an insider's view / 7

HENRY C. THERIAULT
The *Drėlingas* case, the limits of law, and new avenues for repair of and resistance to genocide / 15

ANDRES PARMAS
The role of national definitions of the crime of genocide in developing a definition of the crime of genocide in international law / 22

GUSTAVO MINERVINI
The crime of genocide as interpreted by the ECtHR and its compatibility with the principle of legality / 24

ELĪNA GRIGORE-BĀRA
Criminal prosecution as a component of transitional justice: dealing with Soviet genocide in Latvia / 31

JUSTINAS ŽILINSKAS
Closing the loophole? *Drėlingas* and *Vasiliauskas* cases from the crimes against humanity perspective / 33

MARK A. DRUMBL
Fragmentation and judging in international law: genocide as before different courts / 37

Statement by the Deputy Minister for Foreign Affairs of the Republic of Lithuania dr. Mantas Adomėnas

10 September 2021, Vilnius*

Madam Chair,

Ladies and Gentlemen,

I would like to thank the organisers of this conference for the opportunity to bring to mind the important ruling of the European Court of Human Rights in the Drėlingas case, which for the first-time supported Lithuania's right to treat the actions of the Soviet occupying power as genocide and recognised that the partisans were representatives of the Lithuanian nation. This was a landmark decision and an historical achievement which will have lasting consequences. It vindicated the historical truth that motivated and inspired Lithuania's fight for freedom for many decades.

It is very difficult for researchers now to analyse the crimes committed by the Soviet regime, as access to the Russian archives is hardly possible and changes to the Russian Federation do not make reassessing Soviet crimes any easier. Therefore, it is very important to ensure that the memory of Soviet crimes and repressions committed in Lithuania and other European countries after the Second World War is preserved and passed down to the new generation of researchers.

A couple of decades ago we used to talk a lot about the Nuremberg code. What a pity it is that there was no Nuremberg trial for the Soviet regime, and that, in fact, a totalitarian regime which was at that time committing crimes against humanity sat in judgement over other totalitarian regimes of the time. What we see now in the Drėlingas case is a sort of second Nuremberg coming piece by piece, trying to offer vindication and to serve this historical function that did not take place when it was due.

As all we know, resistance to the Soviet occupation in Lithuania lasted more than 10 years. Its key aim was to restore an independent Republic of Lithuania. Around 50,000 active members and 100,000 supporters of armed resistance participated in the fight for independence. During the most brutal period of Soviet occupation, more than 20,000 Freedom Fighters and their supporters were killed, and 120,000 Lithuanians were deported to Siberia and the areas in the Far North of Russia.

Such loss is more than painful for a country of 3 million. This war of Lithuanian citizens against the superior adversary was marked by exceptional determination and devotion to higher human values and ideals.

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* Special thanks to Kristina Vyšniauskaitė-Radinskienė, advisor of the United Nations, International Organizations and Human Rights Department of the Ministry of Foreign Affairs, for her important contribution.

In the Drėlingas case, the European Court agreed with the assessment of the Lithuanian national courts that partisans should be recognised as a significant part of the Lithuanian nation; therefore, their systematic murder should be considered a partial genocide of the Lithuanian nation. This was a significant victory two years ago, but it is also very relevant today, when we are witnessing severe violations of human rights and fundamental freedoms, threats to democracy, and even attempts to rewrite history.

Lithuania continues to draw the attention of the international community to the recent actions of the Russian Federation which, as the legal successor of the Soviet Union, raises grave concerns about international law and international human rights norms.

Russia has covertly initiated proceedings against Lithuanian judges, prosecutors and investigators of the January 13th case that was launched to investigate Soviet aggression against civilians in 1991 in Vilnius. On that date, Soviet military troops brutally murdered 14 peaceful demonstrators, injuring several hundred more. Former Soviet officials were found guilty and sentenced for war crimes and crimes against humanity for their involvement in Soviet aggression.

During this investigation, Russia has taken all possible measures to pro-actively hide and protect the perpetrators of this act of armed aggression against Lithuania's civilians, thus helping them to avoid liability. Lithuania considers these criminal investigations instituted by Russia against Lithuanian officials as politically motivated acts of open pressure on Lithuania, its judicial system and its law enforcement officials.

In the international community, where the rule of law is one of the main pillars of democracy, such actions of direct interference in the judicial procedures of a sovereign state should not be tolerated or justified. Therefore, Lithuania continues to request that interference with its judiciary and its judicial procedures stop, along with the harassment of its judges and other officials for exercising their constitutional functions.

In the current difficult times of hybrid wars and disinformation, it is our duty to raise awareness of Soviet crimes for our future generations in order to not allow these crimes to be committed again.

I wish you all interesting discussions in this international conference.

Thank you.

EGIDIJUS KŪRIS. *Vasiliauskas*, *Drėlingas* and beyond – an insider's view

Professor, Law Faculty, Vilnius University, Lithuania*

ORCID: 0000-0002-9235-6658

Abstract

The judgment of the European Court of Human Rights Chamber in *Drėlingas v. Lithuania* (2019) is usually seen as the antithesis of *Vasiliauskas v. Lithuania* (2015). In *Vasiliauskas*, which involved an applicant convicted for the (Soviet) genocide of Lithuanian partisans in the post-war years, the Court found a violation of Article 7 of the Convention for the Protection of Human Rights and Fundamental Freedoms, whereas in the very similar *Drėlingas* case such a violation was not established. This article, authored by a judge of the Court who sat in both of these cases, deals with a peculiar set of circumstances pertaining to the procedure of the examination of *Drėlingas*. Not yet paid heed by any commentator (and hardly noticeable to an outsider), these circumstances, and especially their sequence, allow hypothetical questions to be raised as to what the outcome of *Drėlingas* could have been if the sequence of events dealt with had been different, let alone if some of the events had not taken place.

Keywords: European Court of Human Rights, Lithuania, genocide, Committee of Ministers of the Council of Europe

The European Court of Human Rights (ECtHR) Chamber judgment in *Drėlingas v. Lithuania*[1] has not been widely commented on – at least much less than the Grand Chamber judgment in *Vasiliauskas v. Lithuania*,[2] from which it departed.[3] In Lithuania, most comments in the (non-specialised) media were informational and political. The judgment was hailed as a political victory – an unexpected one, especially given that *Vasiliauskas*, perceived as Lithuania's historical and geopolitical defeat, was considered settled law. *Drėlingas* is antipodal to *Vasiliauskas*. In *Vasiliauskas*, the ECtHR was not convinced by Lithuanian courts' reasoning underlying the conviction of the applicant, a former NKVD officer, for participation in the Soviet genocide of Lithuanian partisans in the post-war years. On the contrary, in *Drėlingas* the ECtHR accepted a very simi-

* The author is a judge of the European Court of Human Rights (2013–) and former Justice (1999–2008) and President (2002–2008) of the Lithuanian Constitutional Court. The views expressed are those of the author and must not be attributed to any institution.

[1] Judgment of the European Court of Human Rights (Chamber of the Fourth Section) of 12 March 2019 in the case of *Drėlingas v. Lithuania*, no. 28859/16, ECLI:CE:ECHR:2019:0312JUD002885916.

[2] Judgment of the European Court of Human Rights (Grand Chamber) of 20 October 2015 in the case of *Vasiliauskas v. Lithuania*, no. 35343/05, ECLI:CE:ECHR:2015:1020JUD003534305.

[3] I do not have in mind the comments in the Russian media, which were abundant immediately after the delivery of *Drėlingas*, but most of which do not merit citation in any serious publication owing to their hysterical tone, insulting language, and lack of legal (or any other) analysis.

lar reasoning as not violating the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). In that case, an international court recognised for the first time that Lithuania might qualify the post-war Soviet repressions as genocide and punish its remaining perpetrators (although today the number of those remaining to be prosecuted approaches zero).

Drėlingas may be seen not only as the antithesis of *Vasiliauskas* but also as a judgment for which *Vasiliauskas* was a prelude and, paradoxically, a precondition. This aspect, to the best of the author's knowledge, has not been discussed by commentators.[4] Although in *Drėlingas* no violation of Article 7 of the ECHR was found on the merits of that case, the author finds it worthwhile to consider whether what also might have contributed to such a finding was not a peculiar set of various circumstances, coincidences, and even happenstances. To wit, one may wonder (even if this question is purely speculative and cannot be answered with any reliability) whether the outcome of *Drėlingas* could not have been different, had the sequence of events been different. These events include some seemingly insignificant, procedural fragments unrelated to the essence of the case, not spotted by "external" analysts, but having not escaped the attention of the author, an insider in both cases. Further, I discuss these events in chronological order, but do not discuss the content of the judgment or the Court's reasoning. Instead, I raise some questions, rhetorical as they may seem, which pertain to what could be called (perhaps too pretentiously) alternative history.

1) *The case of Vasiliauskas*. The applicant, Vytautas Vasiliauskas, complained about his conviction for participation in the killing of Lithuanian partisans, which Lithuanian criminal law equated to genocide. The Criminal Code[5] defines genocide in wider terms than the 1948 Convention on the Prevention and Punishment of the Crime of Genocide[6] (the Genocide Convention). The application was lodged with the ECtHR in 2005 and was pending for eight years – four years before a notice of the case was given to the Government and four years after that. In September 2013, the Chamber of seven judges relinquished the case in favour of the Grand Chamber. A public hearing was scheduled for early April 2014. At the request of the Government, it was postponed, pending the Constitutional Court ruling in an abstract constitutional review case, where the constitutionality of the Criminal Code provision on liability for genocide was challenged. That case was initiated by six courts examining genocide cases, in one of which the same V. Vasiliauskas was a defendant. His case pending in Strasbourg was the one in which he was already convicted, while the Constitutional Court was about to examine a case where the court that initiated it was yet in a position to convict him

[4] I deal with this matter also in Egidijus Kūris, "Cases against Lithuania in the European Court of Human Rights (2019–2021): In Search of Landmark Judgments", in *The Law of European Union and Administrative Justice of Lithuania*. Skirgailė Žalimienė et al. (eds). (forthcoming). The present article echoes to a certain extent that longer publication.

[5] No. 1001010ISTAIII-1968 in the Register of Legal Acts.

[6] United Nations, Treaty Series, Vol. 78, 277.

in another criminal case. The offence was the same – genocide, but committed against other persons, in another place, at a different time. The Constitutional Court adopted the ruling on 18 March 2014.[7] It was acknowledged, *inter alia*, that Article 99 of the Criminal Code[8] "insofar as it establishes that actions aimed at physically destroying, in whole or in part, persons belonging to any national, ethnical, racial, religious, social, or political group are considered to constitute genocide", was not in conflict with the Constitution. Thus, a broader concept of genocide, including actions aimed at destroying people belonging to social and political groups, than that enshrined in the Genocide Convention was upheld. At the same time, Article 3 § 3 of the Criminal Code,[9] "insofar as this paragraph establishes the legal regulation under which a person may be brought to trial under Article 99 of the Criminal Code for the actions aimed at physically destroying, in whole or in part, persons belonging to any social or political group, where such actions had been committed prior to the time when responsibility was established in the Criminal Code for the genocide of persons belonging to any social or political group", was found unconstitutional.

Thus, according to the Constitutional Court, criminal prosecution is permissible for the "more widely defined" crime of genocide, but only for actions committed after the definition of genocide was expanded in the above-said manner in the Criminal Code. This was of no relevance to the applicant's case in Strasbourg, because he was convicted not for actions against members of a social or political group not mentioned in the Genocide Convention *per se*, but for actions against Lithuanian partisans, i.e., as the Court of Appeal of Lithuania and, subsequently, the Supreme Court of Lithuania explained before the Constitutional Court, against members of such a social or political group which constituted such a significant part of the national, ethnic, racial or religious group that its destruction would affect the entire national, ethnic, racial or religious group, i.e., the Lithuanian nation. It transpires from the *Vasiliauskas* judgment that the interpretation by the Constitutional Court did not convince the majority of the Grand Chamber. The fact that the ruling of the Constitutional Court was adopted already after the conviction of the applicant and, moreover, "only" in an abstract constitutional review case, which was not related to the case regarding which the applicant applied to ECtHR (although it was related to another case in which the same person was tried), also had some bearing. The Court found violation of Article 7 of the Convention by a minimal margin (9:8). One of ECtHR Grand Chamber's reproaches to Lithuanian courts was that their judgments did not provide a broader historical explanation of the significance of the partisans for the Lithuanian nation.[10] It can be debated whether the *Vasiliauskas* judgment was to be understood as the prohibition for Lithuania to treat

[7] Ruling of the Constitutional Court of the Republic of Lithuania of 18 March 2014 "On the compliance of certain provisions of the Criminal Code of the Republic of Lithuania that are related to criminal responsibility for genocide with the Constitution of the Republic of Lithuania". No. 2014-03226 in the Register of Legal Acts.
[8] Wording of 26 September 2000; Official gazette *Valstybės žinios*, 2000, No. 89-2741.
[9] Wording of 22 March 2011; Official gazette *Valstybės žinios*, 2011, No. 38-1805.
[10] Cf. the separate opinion of the author in *Vasiliauskas v. Lithuania* (footnote 2 *supra*).

participation in the massive killing of partisans as participation in the genocide of the Lithuanian nation or as an assessment of Lithuanian courts' decisions as insufficiently substantiated. Judging by the publicly expressed frustration of politicians and commentators in Lithuania and the triumph in the media of Russia (which had joined the case as a third-party intervener), there was an almost universal adoption of the first of these interpretations.[11]

2) *The Supreme Court 25 February 2016 ruling*.[12] In this ruling, having provided numerous references to the ECtHR *Vasiliauskas* judgment, the Supreme Court acquitted M. M., who was charged with genocide. That person was accused of participating in an operation aimed at detaining the last Lithuanian partisan in hiding, which resulted in the death of the latter. These actions were committed in 1965, i.e., more than a decade after the Lithuanian partisan movement had long been suppressed. For this reason, his case was regarded as having a "political lining".

One may legitimately ask: what course would the events have taken if M. M. had not been acquitted?

3) *Reopening of the proceedings in the case of Vasiliauskas*. V. Vasiliauskas died some two weeks before the delivery of ECtHR judgment in his case. At the request of his heirs, his case was reopened. The Supreme Court, in its 27 October 2016 ruling,[13] in an emphatically gentlemanly manner, acquiesced to the reproaches stated by the ECtHR in the case of *Vasiliauskas* regarding insufficiency of reasoning by national courts. It even admitted its own fault that it had allegedly failed to sufficiently explain the particular significance of the partisans for the Lithuanian nation. According to the Supreme Court, the violation of Article 7 of the Convention, as found by the ECtHR, could only be rectified by modifying the charges against V. Vasiliauskas. As the defendant had already passed away, this was impossible. Therefore, V. Vasiliauskas' criminal conviction was annulled, and the criminal case was discontinued.

One may ask: if V. Vasiliauskas had still been alive and the charges against him had been modified, could this have had any effect on other genocide cases examined by Lithuanian courts (the number of which seems to have been a single digit at that time)? If not, what would the position of the ECtHR have been, had it received new applications similar to that of V. Vasiliauskas, regarding other criminal convictions similar to those by which that person was convicted?

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[11] For a broader analysis, see Egidijus Kūris, "On Lessons Learned and Yet to Be Learned: Reflections on the Lithuanian Cases in the Strasbourg Court's Grand Chamber", in *East European Yearbook on Human Rights* 2019 (2) 1, ch. 6.

[12] Ruling of the judicial panel of the Criminal Division of the Supreme Court of Lithuania of 25 February 2016 in criminal case No. 2K-5-895/2016.

[13] Ruling of the Supreme Court of Lithuania (Plenary Session) of 27 October 2016 in criminal case No. 2A-P-8-788/2016.

4) *Closure of the procedure of supervision of the execution of the Vasiliauskas judgment*. On 7 December 2017, the Committee of Ministers of the Council of Europe closed the procedure of supervision of the execution of the *Vasiliauskas* judgment.[14] In the Committee's assessment, the Lithuanian authorities took all necessary individual measures "to put an end to violations established and erase their consequences so as to achieve as far as possible *restitutio in integrum*", as well as general measures "preventing similar violations". The general measures mentioned by the Committee included that the Supreme Court and the Constitutional Court "have significantly developed ... the case-law on genocide ... since [V. Vasiliauskas'] conviction". Truth to tell, the Constitutional Court had had its case-law developed before the case of *Vasiliauskas* was examined by the ECtHR; however, this did not help to obviate the finding of a violation of Article 7 of the Convention. Nonetheless, the judgment of the Supreme Court in M. M.'s case was certainly conducive to this very positive assessment: the CM was of the opinion that the Supreme Court demonstrated a balanced, differentiated judicial response to genocide charges, as not all the accused were convicted – some were acquitted. Needless to say, the Committee's assessment was as favourable to Lithuania as one could be.

Again, one may hypothetically ask: what would the evaluation by the Committee of Ministers have been, had the Supreme Court not acquitted M. M.?

5) *The giving of the notice of the case of Drėlingas to the Government.* Stanislovas Drėlingas lodged an application with the ECtHR in May 2016. The Court gave notice of it to the Lithuanian Government on 29 January 2018. The element of time merits special attention: the application was communicated to the Government a little less than two months after the Committee of Ministers adopted the resolution on the closure of the procedure of supervision in *Vasiliauskas*. It is obvious that the Committee of Ministers, when closing the procedure of supervision, was not aware of the case of *Drėlingas*, of which notice was not yet given to the Lithuanian Government. In addition, not only was the respondent state ignorant about that case, but also the state that had joined the case of *Vasiliauskas* as a third-party intervener, Russia (it did not request to be granted leave to join the case of *Drėlingas* as a third-party intervener).

Another hypothetical question: would the Committee of Ministers 7 December 2017 resolution have been so unambiguously favourable for Lithuania had the Committee had any knowledge of S. Drėlingas' application at that time?

6) *The second case of Vasiliauskas*. With hindsight, this "small" case was of utmost importance in the events leading to the *Drėlingas* judgment, but it "slipped by" completely unnoticed. The case originated from a criminal case in which the Constitutional Court was applied to with a request to investigate the compliance of the Criminal Code

[14] The resolution on execution of the judgment of the European Court of Human Rights in *Vasiliauskas v. Lithuania* (adopted by the Committee of Ministers on 7 December 2017 at the 1302nd meeting of the Ministers' Deputies), Council of Europe, accessed on 15 November 2021, https://rm.coe.int/native/09000016807647ff.

provisions on genocide with the Constitution, and in which it adopted its 18 March 2014 ruling. The ruling, in which it was explained that the Lithuanian partisans constituted a very significant part of the Lithuanian nation, the destruction of which would affect the entire Lithuanian nation as a national group (using a term employed in the Genocide Convention), did not prevent but effectively allowed V. Vasiliauskas' conviction in that new criminal case. In August 2015, V. Vasiliauskas filed his second application with the Strasbourg Court, i.e., at the time when the judgment in his first case was not yet delivered. He died three months later. His heirs supported the application for some time. However, at a certain moment, their lawyer (for unknown reasons) ceased responding to the Court's letters. Such non-communication, i.e., non-cooperation, is interpreted in ECtHR practice as a wish to no longer pursue the application, which almost automatically leads to the striking of the application out of the Court's list of cases, i.e., discontinuation of the case. The second case of *Vasiliauskas* was struck out of the Court's list of cases by the Committee of three judges by its 13 December 2018 inadmissibility decision.[15] That case thus was not examined on its merits.

A hypothetical question that one may ask would be: what would the position of the Committee of Ministers have been had it been aware of the second case of *Vasiliauskas*? Would the Committee have closed the supervision procedure, or would it have waited? Would it have expressed its support for the measures taken by the Lithuanian authorities in a more moderate way? Also: what would the outcome of the second case of *Vasiliauskas* have been if the applicant's lawyer had not ceased to cooperate with the Court? Or: what course would the events have taken if the Committee of three judges had decided that it was necessary to continue the examination of V. Vasiliauskas' second application because "respect for human rights as defined in the Convention and the Protocols thereto so requires" (as provided for in Article 37 § 1 of ECHR *in fine*)?

7) *The case of Drėlingas.* That case was examined by a Chamber on 29 January 2019. The judgment was delivered on 12 March 2019: no violation of Article 7 of the ECHR. In the judgment, considerable attention is paid to the position of the Committee of Ministers, which it expressed when closing the procedure of supervision in *Vasiliauskas*. Thus, if after the *Vasiliauskas* judgment the prevailing view was that that the judgment implied a prohibition for Lithuania to treat the destruction of partisans as a genocide, after the *Drėlingas* judgment, the second of the above-mentioned alternative interpretations gained authority: in the case of *Vasiliauskas*, Lithuanian courts' judgments were assessed as insufficiently substantiated, but nothing more.

One could ask a hypothetical question: what would the Chamber (or maybe the Grand Chamber, if the case had been relinquished in its favour) judgment have been in the case of *Drėlingas* had the Committee of Ministers not closed the supervision in

[15] Decision of the European Court of Human Rights (Committee of the Fourth Section) of 13 December 2018 in the case of *Vasiliauskas v. Lithuania*, no. 58905/15, ECLI:CE:ECHR:2018:1213DEC005890516.

Vasiliauskas, or, in the alternative, had the Committee's stance regarding individual and general measures taken by Lithuanian authorities not been so unambiguously favourable to Lithuania?

8) *The 2 September 2019 decision of the panel of judges of the Grand Chamber*. Having been served with the unfavourable Chamber judgment, S. Drėlingas requested his case to be referred to the ECtHR Grand Chamber. The request was examined and not granted. The panel meetings are not public – those *hors de la Cour* can only speculate on the motives of the five members of the panel, but there is no way to know them for sure; whatever versions may be raised, they will be neither denied nor confirmed.

However, one may ask: what would the Grand Chamber's judgment have been in the case of *Drėlingas* had the decision of the panel been to the contrary, thus, had the case been referred to the Grand Chamber?

The hypothetical questions asked here cannot be answered with any certainty, but one may ask anyway. This is akin to the construction of mental alternative history, where elements that often go unnoticed but have a bearing on the final outcome gain their proper weight.

Today, the long-term effects of the *Drėlingas* judgment can hardly be prognosticated on. No doubt it will have political and moral significance, as well as significance for the perception of history, even though it is too early yet to assess its scale. This judgment is certainly important both for human rights law and criminal law, as well as international law. Hopefully, it has the potential to contribute to the broader application of the concept of genocide, which has so far been extremely conservative and has not allowed this word to be officially used for naming many cases of genocide that have taken or are taking place in the world.[16]

However, it is also possible that the *Drėlingas* judgment will remain the only such in the field of judgments on the issue of genocide. So far, it has not yet gained considerable jurisprudential import even in the ECtHR's own judgments. The only Court decision where reference has been made to the *Drėlingas* judgment so far is the inadmissibility decision in *Allen v. Ireland*,[17] which concerns alleged sexual exploitation. In that case, which is not related to genocide or other crimes of such scale, a Chamber of seven judges referred to the *Drėlingas* judgment, stating that the "Committee of Ministers' role [in assessing measures taken by a state] does not mean that [they] ... cannot raise a

[16] Cf. the observation of a renowned genocide expert that Raphael Lemkin, who coined the term *genocide*, "would be horrified, however, by the parsing of words, the distracting fights over the labeling of such abject cruelty and the placing of his term on a perch so high that the legal meaning of 'genocide' is held apart from its ordinary conception". Philippe Sands, "What the Inventor of the Word 'Genocide' Might Have Said About Putin's War", *New York Times*, 28 April 2022, https://www.nytimes.com/2022/04/28/opinion/biden-putin-genocide.html?searchResultPosition=1.

[17] Judgment of the European Court of Human Rights (Chamber of the Fifth Section) of 19 November 2019 in the case of *Allen v. Ireland,* no. 37053/18, ECLI:CE:ECHR:2019:1119DEC003705318.

new issue undecided by the initial judgment". Such a statement, although correct, is not formulated verbatim in the *Drėlingas* judgment.

HENRY C. THERIAULT. The *Drėlingas* case, the limits of law, and new avenues for repair of and resistance to genocide

Professor, Worcester State University, U.S.

Abstract

The *Drėlingas* decision corrected the failure of the *Vasiliauskas* case to establish that the Soviet Union committed genocide through its targeting of Lithuanian resisters to a campaign of denationalization. This approach was required because of the UN Genocide Convention's limitations, but the cost of success was ignoring the political aspect of this genocide, which is inseparable from its national aspect. The decision also reinforced the Convention's flawed focus on individuals rather than the social formations that actually commit genocide – in this case, the Soviet Union. The most significant implication of *Drėlingas*, however, is its determination that those who engaged in armed resistance to a process less than genocidal could themselves be victims of genocide. The *Drėlingas* decision thus provides a profoundly important counterbalance to the prevailing tendency to treat resistance to oppression as participation in a mutual conflict disallowing genocidal victimization and the pervasive prejudicial preference for helpless victims.

Keywords: Genocide law, Soviet genocide, Lithuania, *Drėlingas* case, antinational-ism, victims' resistance

The *Drėlingas* decision[18] can be seen as an important corrective to the *Vasiliauskas* case[19] by recognizing as genocide that which, from a common-sense perspective, we perceive as such. The decision allowed the application of the UN Convention on the Prevention and Punishment of the Crime of Genocide[20] to events that occurred decades prior to the Lithuanian law specifically including political groups as possible targets of genocide[21] – something the UN Genocide Convention famously does not.

The *Drėlingas* decision depended on the same basic logic as the establishment of

[18] Judgment of the European Court of Human Rights (Chamber of the Fourth Section) of 12 March 2019 in the case of *Drėlingas v. Lithuania*, no. 28859/16, ECLI:CE:ECHR:2019:0312JUD002885916

[19] Judgment of the European Court of Human Rights (Grand Chamber) of 20 October 2015 in the case of *Vasiliauskas* v. *Lithuania*, no. 35343/05, ECLI:CE:ECHR:2015:1020JUD003534305.

[20] UN General Assembly, *Convention on the Prevention and Punishment of the Crime of Genocide*, December 9, 1948, United Nations, Treaty Series, Vol. 78, p. 277 [A/RES/260] (hereafter "UN Genocide Convention" or "Convention").

[21] In 1998, genocide was added as a crime to the Lithuanian Criminal Code, and in 2003 the definition was expanded through the new Article 99 to include political as well as social groups, in addition to national, ethnic, religious, and racial groups protected by the UN Genocide Convention (Justinas Žilinskas, "Broadening the Concept of Genocide in Lithuania's Criminal Law and the Principle of *Nullum Crimen Sine Lege*", *Jurisprudence* 4, 118 (2009), 333–348, p. 336).

the Srebrenica Genocide through the *Krstić* case,[22] in which genocide was determined to have occurred through the mass murder of a relatively small percentage of an overall target group, but that small percentage had a special role in the future viability of the group as a whole. Partisans and their supporters were attempting to preserve Lithuanian national identity in the face of homogenizing, russifying, antinational-ist Soviet central authority. In this sense, they could be considered an essential part of the Lithuanian national group as a national group.

As with the true table method in formal logic, this line of reasoning yielded a proper result, but did not reflect what truly made the event in question genocidal. It was that a *political* group was targeted for elimination, which constitutes genocide under Lithuanian law, but not under the UN Genocide Convention. The shift in *Drėlingas* to an argument consistent with the UN Genocide Convention was a legal manoeuvre in a situation in which the law itself was the outcome of earlier political manoeuvring that resulted in the exclusion of certain group types out of expediency.[23] The obvious moral motive for why the case was brought at all was that a *political* group was destroyed and *that* – the destruction of the political group – should be considered genocide.

It is perhaps more accurate to say that the sharp distinction between political and national groups assumed in the negotiations generating the UN Genocide Convention and applications since is illusory. The part of the Lithuanian national group targeted for elimination was precisely the part most active in protection of their national identity. It was a *political* group motivated by *national* preservation. In this sense, the target of Soviet authorities was a political-national group that fits somewhere between what is and what is not covered by the UN definition of genocide. This is crucial, because resistance to Soviet anti-Lithuanian destruction was not universal among Lithuanians, and thus there was a political division among Lithuanians. The part of the Lithuanian national group targeted was a politically defined part. The posing of an *either* national *or* political group would have been appropriate only if had one group of Lithuanians sought to force other Lithuanians to conform to a particular government or political system or had the Soviet central authorities been indifferent to Lithuanian national identity and sought to impose a communist economic and authoritarian political system that was simply indifferent to (or tolerant of), rather than hostile toward, national identity. But, the goal of those central authorities was assimilation into a new state structure; even if that state is considered not to have been a national state (though in reality russification was part of the Soviet project) and thus did not seek to impose one national identity over another, it still required the denationalization of those forced to assimilate into it. In other words, its members constituted the *political* group targeted precisely because of their Lithuanian *national* identity and desire to preserve it.

[22] Judgment of the International Criminal Tribunal for the Former Yugoslavia (Appeals Chamber) of 19 April 2004 in the case of *Prosecutor* v. *Radislav Krstić*, no. IT-98-33-A.

[23] See, for example, Leo Kuper, *Genocide: Its Political Use in the Twentieth Century* (New Haven, CT, USA: Yale University Press, 1981), 19–39.

Emphasizing this complexity, however, would have undermined the Lithuanian case. To get the morally right result, the Lithuanian side had to play the game according to the UN Genocide Convention's rules, by not relying on the obvious political nature of the group targeted. I use "play the game" very intentionally here, as in Bernard Suits' definition of a game as an activity in which a goal is pursued by means that are artificially limited (for instance, putting a soccer ball in a goal by overcoming defenders and a goal keeper, having to stay within a specific area, not being able to hold opponents, not being allowed to use hands, etc.; taking money from a table top not simply by reaching out and pulling it in, but by getting better cards than others at the table or convincing them that you do as they attempt the same; etc.).[24] Viewed in this way, the legal realm is not (simply) a Foucaultian "discursive formation",[25] but a game – one with the highest possible stakes. Just as on the football pitch or at the poker table, being a good person or having a good cause counts for nothing, what matters in the legal realm is demonstrating the superior play – or at least being able to manoeuvre better than the opponent. This is not meant to disparage the legal field, but to explain its relationship to the realm of ethics.

The legal nature of concrete approaches to addressing genocide imposes another limit on the treatment of genocide. Laws against genocide should focus on states and other groups of perpetrators and groups as victims, for that is a central aspect of Lemkin's concept. But, they actually focus on individual perpetrators, and this contorts the reality of what genocide is: a *collective* set of acts. The UN Genocide Convention is, in many ways, not about genocide at all, but is a reductive adaptation of criminal law focused on individuals.[26] The vast majority of legal actions against genocide are, in their essence, equivalent to typical murder, rape, and related trials. The added dimension is proving that the offenses happened as part of the commission of genocide, but in this sense, genocide is simply a condition marking the seriousness of the individual offense, not the point of the legal process. However, if, by the logic of the *Drėlingas* decision, the direct victims of the killing are victims of genocide precisely because of their relationship to a larger group (the Lithuanian national group) – that is why their killing is genocidal – should we not also see the state or other group that individual perpetrators acted as a part of as the true perpetrator of a given genocide? Should not the conviction of an individual perpetrator entail the much more important culpability of the state or collective and result in sanctions against the state or collective that perpetrated the genocide? It would not be a stretch to see the Republic of Lithuania's pursuit of justice through the *Drėlingas* case as a case against the Soviet Union and, thus, its legal successor state, the Russian Federation. It is vastly more difficult, if not virtually impossible, however,

[24] See Bernard Suits, "The Elements of Sport", in Jason Holt, ed., *Philosophy of Sport: Core Readings* (Buffalo, NY, USA: Broadview Press, 2014), 19–34.
[25] See Michel Foucault, *The Archaeology of Knowledge and the Discourse on Language*, tr. A.M. Sheridan Smith (New York, NY, USA: Pantheon Books, 1972), 31–39.
[26] Henry C. Theriault, "Reparations for Genocide: Group Harm and the Limits of Liberal Individualism", *International Criminal Law Review* 14, 2 (2014), 441–469.

to achieve the punishment of a state or recquire reparations by a state perpetrator than it is to convict individual members of the perpetrator group, which little or nothing to mitigate the impacts of a genocide.

It is these impacts that lead us to another problematic aspect of this decision. Concern about the retroactivity of the application of the Lithuanian law to an earlier genocide misunderstands that, if genocide is understood properly as an overarching process rather than reduced to this or that discrete act of this or that individual (in this case, Drėlingas), the genocidal assault on Lithuanian national identity must be recognized as still unfolding. While murders, rapes, and so forth are discrete events, genocides are not events but processes.[27] Moreover, while the actions of the perpetrator and the event of a murder, rape, or so forth that they commit are coextensive, this is not the case for genocide. The collective actions producing a genocide are typically shorter in duration than the genocidal process itself. This could be seen as the function of the intensity of genocidal violence, which cannot be registered in the world in as short a time as genocide typically takes to commit. Just as a flood might not manifest until days after the rain supplying it with water has stopped falling, a genocide committed through actions that might take years actually lasts much longer. To recast the continuing violation argument of Frédérick Mégret[28] in a more complex fashion, genocide is a process that inevitably overspills the temporal boundaries of the actions producing it.[29] In this way, the *Drėlingas* court should not have been concerned with whether actions decades ago could be subject to a subsequent law against genocide, but rather should have assessed whether the process of state of genocide initiated by them is still persisting or at least persisted after the Lithuanian statute that covered political groups came into force. This is not simply about the consequences that follow from an action, but the completion of the action itself. It is certainly possible, when examining the challenges and vulnerabilities of Lithuanian cultural and political cohesion and viability in the Soviet and post-Soviet eras, to conclude that genocide continued forward well after adoption of the post-Soviet Lithuanian law against genocide.

While this might appear to violate various legal principles and conflate a process with its effects, there is a test of this approach. Unlike individual acts of violence, in which there could be persistent consequences but the action itself is complete and irreversible – once committed, one cannot take back a murder or rape – genocide is quite

[27] Sheri P. Rosenberg, "Genocide Is a Process, Not an Event", *Genocide Studies and Prevention: An International Journal* 7, 1 (2012), 16–23.

[28] Frédéric Mégret, "The Notion of 'Continuous Violations', Expropriated Armenian Properties, and the European Court of Human Rights", *International Criminal Law Review* 14, 2 (2014), 317–331.

[29] Henry C. Theriault, "Time for Justice", paper delivered at "Justice after Atrocity?" conference, Kean University, 20 April 2018. Genocide by attrition (see Helen Fein, "Genocide by Attrition 1939–1993 – The Warsaw Ghetto, Cambodia, and Sudan: Links between Human Rights, Health, and Mass Death", *Health and Human Rights: An International Quarterly Journal* 2, 2 (1997), 10–45), in which actions can be intentionally slowed in order to obscure their cohesive wholes, might seem to be an exception. But, even in cases in which the actions of a genocide occur over a long period of time, the impacts of those actions unfold over a yet longer period.

different. Counter-actions can be undertaken to interrupt the completion of a genocidal process, even if the acts producing it have concluded. While typically misconstrued as reparations, these are in fact interdictions against the trajectory of a genocidal process. For this reason, the typical legal as well as political and ethical objections to reparations based on the passage of time reflect misunderstandings of the metaphysical nature of genocide. As a process, repair is actually intervention, not something done after the fact, as is individual criminal justice applied to cases of genocide – however morally right individual cases are in a limited sense.

These problems suggest that the entire western liberal individualist legal tradition cannot adequately address the challenge of genocide. Rather than trying to force the quest for justice in the face of genocide to conform to this tradition, the challenge of genocide should drive radical new developments in concepts of law.

The foregoing critiques of the limitations of the *Drėlingas* decision does not mean, however, that no element of the decision is an important intervention in the struggle against genocide. On the contrary, the most significant feature of the case appears so far to have been neglected, despite representing a major step forward in international law and in the struggle against genocide. This implication of the decision takes us beyond the well-worn issues discussed for three-quarters of a century once more rehearsed in the *Drėlingas* proceedings – whether political groups should be covered by the UN Genocide Convention, what "in part" means in the Convention, whether law against genocide is supersessionary or can be applied retroactively, and so on.

The Soviet Union sought to integrate Lithuania by stripping Lithuanians of Lithuanian identity so that they could be absorbed into a putatively non-national – though actually Russian-dominated – state. Given that Lithuanian identity was (and is) essential to and even constitutive of individuals comprising Lithuanian society and fundamental to the network of their social, artistic, spiritual, and other interrelationships and institutions, loss of national identity would have represented a transformation of the Lithuanian people into something else. If they had adopted such a transformation voluntarily, that would have been one thing, but at least a sizeable percentage did not. What is more, a substantial percentage of those who held on to that identity actively resisted the imposed transformation through defensive military action or assistive support of those carrying out such action. While the powerful pressure by the Soviet central authorities to Sovietize Lithuania could be considered ethnocide that targeted every single person having Lithuanian national identity, whether they accepted Sovietization or not, it was the Soviet central authorities' *response* to *resistance* to this possible ethnocide by members of the targeted group that was unambiguously genocidal. For there was an intentional campaign to destroy that part of the group resisting denationalization/Sovietization. In other words, the Soviet authorities adopted genocide as the means to accomplish Sovietization once the latter was resisted.

The significance of European Court of Human Rights' recognition of the targeting of military resistance as genocide cannot be overstated. This means that the term "genocide" can *legally* apply to a process of overarching destruction despite armed resistance to lesser forms of violence or oppression. (As a corollary, this also applies to armed resistance to full-blown genocide.) This goes beyond rejections of "blaming the victim" strategies of denial, in which genocide victims' resistance to outright genocide is misrepresented as participation in a mutual conflict or even aggression that "justifies" perpetrator actions. In this case, the response to armed resistance to a non-genocidal process can be genocidal and recognized legally as such. It is not just that those targeted by genocide have a right to self-defense, but that those oppressing others have no right to escalate violence to genocide in response to resistance to their oppression. In such a context, making the case for genocide does not require proving *preexisting* genocidal intent nor quiescence on the part of victims, but that genocide was the response to actions of a target group. This is a landmark decision, one of the most important in the history of international law related to genocide, for it does not require members of a group to be passive victims in order their subsequent victimization by genocide to be affirmed legally. While Vahakn Dadrian's key intervention in the early discourse on the inadequacy of the UN definition of genocide and proposal for an improved definition argued that one of the things that distinguishes one-sided mass violence as genocide from mutual violence as war is a decisive power imbalance, not the complete abjection or powerlessness of the victims in the case of the former,[30] the *Drėlingas* decision goes further, to separate the agency of victims and their relative power from the determination that they have been victimized by genocide: what matters is not the power imbalance or a difference in agency – both sides might use violent means – but that the victim side has used violence to resist victimization while the perpetrator side has used violence to victimize and that the perpetrator violence escalated to fit the UN definition of genocide. This is a crucial challenge to concepts of genocide grounded in the Rousseauian approach to post conquest violence against subjugated populations that recognizes the moral wrongness not in the actions of the perpetrators alone but in their occurring in the context of the subjugation and thus military and political powerlessness of the conquered population.[31] While there are important differences of the Lithuanian and other such cases in the Soviet Union and under other (typically communist) denationalizing regimes from genocides of indigenous North and South Americans, Australians, and others who militarily resisted land-theft, systemic violence, and cultural destruction, the parallels make this legal decision quite relevant to those situations as well. What is more, the implications for indigenous groups using *non-lethal* resistance today to land dispossession, cultural destruction and forced assimilation, etc., such as the Uru-eu-wau-wau people in the Brazilian Amazon, are obvious.

[30] See Frank Chalk and Kurt Jonassohn, *The History and Sociology of Genocide: Analyses and Case Studies* (New Haven, CT, USA: Yale University Press, 1990), 14–15.

[31] Jean-Jacques Rousseau, *On the Social Contract*, tr. Judith R. Masters, ed. Roger D. Masters (New York, NY, USA: St. Martin's Press, 1978), 49–52.

A particularly notable contemporary application of the *Drėlingas* precedent is to the case of indigenous Armenians in the Artsakh/Karabakh region and past and recent mass violence against them by Azerbaijan and Turkey. Military resistance by Armenians – which had some success in the early 1990s but has been entirely ineffective from 2020 to the present, yet has been used by Turkey, Azerbaijan, external governments, policy centers, and international media to misrepresent the situation as a military conflict rather than another phase of the overarching genocidal destruction of Armenians as an indigenous group in their traditional homeland – does not discount this from being part of an overarching genocidal process that is being resisted militarily. The resistance, whether viewed as opposition to a process of expulsion from a territory deeply and long-linked to victims' national identity, or to an overarching genocidal process begun in 1894 and extending through 1909, 1915–1923, 1988–1994, and 2020–present, has no bearing on how the Azerbaijani-Turkish mass violence should be evaluated. Indeed, *Drėlingas* makes it impossible to argue that resistance is the cause of violence being characterized as genocide. Other applicable current cases abound, such as the Eritrean and Ethiopian genocide against Tigrayans. Military resistance does not foreclose legal characterization as genocide.

As a final point that consideration of the *Drėlingas* case offers, it should be noted that Soviet genocide was a special type, which did not target this or that specific national group – Lithuanian, Ukrainian, etc. – based on the particularities of that group, but instead targeted groups based on their membership in the category of "national group" without reference to the specific national group they were. In a telling contrast to Nazi genocide, in which some national groups were deemed unworthy of existence and others worthy, Soviet genocide was genocide against the very concept of national identity, not this or that national group (however much unacknowledged Russian national features were preserved as a faux "universal" Soviet identity). We might consider this to be categorical genocide or "categoricide". The Soviet ideology could not allow a sharing of political allegiance to a state with cultural allegiance to a national identity. Of course, nationalist attitudes among its targeted groups were not able to accept citizenship that did not accommodate diverse national identities, but given the pre-existing nature of national identity in such cases and the violent imposition of an anti-national social order on them, that is irrelevant.

It remains to be seen whether this most essential and consequential implication of the *Drėlingas* decision will strengthen the legal and political position of those, such as the Tigrayans, facing genocide after undertaking military resistance to oppression.

ANDRES PARMAS. The role of national definitions of the crime of genocide in developing a definition of the crime of genocide in international law

Prosecutor General of Estonia, Law Faculty, University of Tartu, Estonia

OVERVIEW

Thank you for the introduction and for the kind words. It is nice to be here and to have this opportunity to speak on this occasion. The Baltic states have been struggling to investigate and to prosecute international crimes committed during Soviet occupation, as well as acquainting the rest of the world with the idea that such crimes were indeed international crimes, war crimes, crimes against humanity, and even genocide. It has been a bumpy road, as can also be witnessed by Lithuanian cases such as *Vasiliauskas* and *Drėlingas*. In my very short intervention, allow me to comment on the definition of the crime of genocide from that perspective. As generally known, the universally recognised definition embraces four protected groups: ethnic, national, religious, and racial groups. Any other common denominators of persons have consciously, or I would even say maliciously, been exempted from the circle of protected groups.

Different States Parties to the Genocide Convention had different reasons to limit the scope to only these four groups. One could say that for the exemption of political groups from the list we can mainly send our thanks to the Soviet Union, which of course at the time of negotiations was persecuting and destroying any kind of political dissent in its empire. Since the adoption of the Genocide Convention, there has been a move to try to widen the circle of protected groups to specifically include political groups into its scope. Think, for example, of UN Special Rapporteur Whittaker's report in 1985. However, so far this has been to no avail. So, what to do? The Criminal Codes of many countries entail in their domestic definitions of the crime of genocide more groups than these four that are universally recognised.

Quite prominently so, this also includes political groups. In a world where there is a lack of common ground to agree verbatim on widening the scope and the definition of the crime of genocide, domestic statutes and respective domestic case law becomes of specific importance. When the number of states whose domestic criminal code includes a wider form of the crime of genocide grows, this will also help to boost the respective case law, to raise awareness of the problem, and to eventually bring about a situation where there will be more ground to also widen the definition at the international level. Therefore, cases like *Drėlingas* also represent small but very important stones in this pyramid. This is the reason why we are here today, and this is the importance of this case. This is one of the most prominent cases where, as professor Žilinskas has said, the idea or the concept of political groups also belonging to the groups that are worth

protection through the definition of the crime of genocide is welcomed in through the backdoor.

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

Post-doctoral Research Fellow in International Law, Università degli Studi di Torino, Italy*

ORCID: 0000-0003-2676-6146

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

* The present paper is based upon the article "The Principle of Legality and the Crime of Genocide: *Drėlingas v. Lithuania*", published by the author in *Human Rights Law Review*, 2020.

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.

ELĪNA GRIGORE-BĀRA. Criminal prosecution as a component of transitional justice: dealing with Soviet genocide in Latvia

Assistant Professor at the Chair of Legal Theory and History, the Faculty of Law of the University of Latvia, Latvia

ORCID: 0000-0003-3127-5923

Abstract

After the restoration of independence in 1990, the Latvian legal system had to undergo a transition from the Soviet totalitarian regime to a democratic system governed by the rule of law. Several transitional justice mechanisms had to be implemented, including prosecution initiatives. To make this possible, the Criminal Code was amended, introducing the crime of genocide in 1993. Until 2009, Latvian Criminal Law provided for a broadened definition of genocide which included additional protected groups and additional prohibited activities. Latvian courts of general jurisdiction that tried the Soviet genocide cases hold that this broadened genocide definition was not in conflict with international law, and thus did not preclude the conviction of persons for crimes committed during the Soviet occupation.

Keywords: Transitional Justice, Latvian Criminal Law, Soviet Genocide, Dynamic Interpretation.

In the conference report, the author addressed two main issues: the development of legislation on the crime of genocide in Latvian law and the relevant court practice. The crime of genocide was introduced into Latvian law in 1993[32] as an amendment to the Criminal Code (adopted in 1961).[33] The Supreme Council of the Republic of Latvia added a new chapter to the Special part of the Criminal Code – "Crimes against humanity, genocide, crimes against peace and war crimes". The chapter consisted of three articles, one of which provided for criminal liability for genocide – Article 68[1] "Crimes against humanity, genocide". Firstly, the Latvian Criminal Code did not distinguish genocide from crimes against humanity, and merged them together into one article. Secondly, the definition of genocide was broadened – it included social groups and people with common conviction (political groups). Thirdly, the list of prohibited activities was extended – it also included the restriction or deprivation of political, economic, and social rights.

[32] Likums „Par grozījumiem Latvijas krimināl kodeksā un Latvijas krimināl procesa kodeksā" [Law "On amendments to the Latvian Criminal Code and the Latvian Code of Criminal Procedure"], adopted on 6 April 1993, entered into force 28 April 1993, accessed on 31 May 2022, https://likumi.lv/ta/id/60472

[33] The Criminal Code was inherited from the Soviet occupation period and remained in force after the restoration of independence of the Republic of Latvia, until it was replaced by the new Latvian Criminal Law in 1998.

In 1998, a new criminal law was adopted – the Latvian Criminal Law.[34] It resolved one ambiguity by distinguishing the crime of genocide from other crimes against humanity. Genocide was defined in a separate article – "Article 71. Genocide". Initially, two additional protected groups remained in the new regulation; however, the list of prohibited activities was shortened and restrictions and deprivations of rights were excluded. Amendments to this article were made in 2009,[35] and the additional two protected groups were excluded from the scope of the law. Thus, since 2009, the definition of genocide in Latvian Criminal Law[36] is the same as the one in the Convention on the Prevention and Punishment of the Crime of Genocide.

None of the articles that provided the broadened definition of genocide have been reviewed by the Constitutional Court of the Republic of Latvia. Some conclusions on the compliance of the broadened genocide definition with international law can only be seen in the case law of courts that tried genocide cases – regional courts and the Supreme Court of the Republic of Latvia. None of these courts considered that the broadened genocide definition would preclude the conviction of persons for crimes committed during the Soviet occupation. They did not hold that national criminal law was in conflict with international law. For example, the Kurzeme Regional Court asserted that the characteristics of protected groups, listed in the Convention on the Prevention and Punishment of the Crime of Genocide, cannot be considered as an exhaustive list. Similarly, the Zemgale Regional Court used the principle of dynamic interpretation and considered that, while the Genocide Convention provides previous historic experience, new experience has been gained since the Convention was drafted which has to be considered.[37]

It is doubtful whether genocide cases tried in Latvia have fully ensured the achievement of the objective – the implementation of material justice and the prevention of impunity. In order to promote reconciliation and consolidate peace, more emphasis needs to be placed on other mechanisms of transitional justice.

[34] „Krimināllikums" [„Criminal Law"], adopted on 17 June 1998, entered into force 1 April 1999, accessed on 31 May 2022, https://likumi.lv/ta/id/88966/redakcijas-datums/1999/04/01.
[35] „Grozījumi Krimināllikumā" [„Amendments to the Criminal Law"], adopted on 21 May 2009, entered into force 1 July 2009, accessed on 31 May 2022, https://likumi.lv/ta/id/193112..
[36] "Criminal Law", accessed on 31 May 2022,: https://likumi.lv/ta/en/en/id/88966-criminal-law..
[37] Mārtiņš Paparinskis, "Deportāciju prāvas: starptautisko tiesību skatupunkts" ["Deportation cases: an international law perspective"], *Jurista Vārds* No. 16 (371)(2005),https://juristavards.lv/doc/107215-deportaciju-pravas-starptautisko-tiesibu-skatupunkts/..

JUSTINAS ŽILINSKAS. Closing the loophole? *Drėlingas* and *Vasiliauskas* cases from the crimes against humanity perspective

Professor, Law School, Mykolas Romeris University, Lithuania

ORCID: 0000-0002-2476-9346

Keywords: Soviet Genocide, Crimes Against Humanity, Political Genocide

It has already been stated multiple times that when we speak of the *Drėlingas* or *Vasiliauskas* cases,[38] and when we are considering various issues of genocide in the circumstances of the crimes committed by the Soviet regime, another question looms over us. If proving genocide in those cases is so complicated, can we consider an alternative option: crimes against humanity? This question was exactly the one that came to my mind when I started to become interested in these cases. Crimes against humanity seemed like a natural choice, having in mind that they were already introduced in 1945 in the Statute of the International Military Tribunal,[39] annexed to the London Charter, and their concept was afterwards confirmed by the UN General Assembly as well as post-World War II jurisprudence. For some reason, Lithuania did not use this category of crimes as an option for the prosecution of soviet criminals. Moreover, crimes against humanity in the Criminal Code[40] of Independent Lithuania were introduced only in 2000, i.e., ten years into independence. This was always a puzzle to me, especially looking at our neighbours with a shared fate – Latvia and Estonia – who introduced definitions of these crimes in their legal systems much earlier.

I started to think – why? Was Lithuania simply lured by the power of the word *genocide*? Everybody knows that genocide is something very grave, terrible, the "crime of crimes" – and everyone has at least some notion of what genocide means. Do "crimes against humanity" – which are also very grave crimes and, in fact, which may involve facts on the ground that are even more shocking than "true" genocide in some circumstances – have the same power? Having in mind that in both the *Drėlingas* and *Vasiliauskas* cases we have the problem of political genocide that has existed since the UN GA Resolution 96(1)[41] of January 11, 1946, I started to consider whether in a material sense those two persons (Drėlingas and Vasiliauskas) could have been tried for crimes against humanity, not genocide. Maybe in such a case Lithuania would not have faced

[38] "Judgment of the European Court of Human Rights of 12 March 2019 in the case of *Drėlingas v. Lithuania*, no. 28859/16", ECLI:CE:ECHR:2019:0312JUD002885916; "Judgment of the European Court of Human Rights of 20 October 2015 in the case of *Vasiliauskas v. Lithuania*, no. 35343/05", ECLI:CE:ECHR:2015:1020JUD003534305.
[39] "Agreement for the prosecution and punishment of major war criminals of European Axis". Signed in London on 8 August 1945, 251 UNTS 51.
[40] "Lietuvos Respublikos baudžiamojo kodekso patvirtinimo ir įsigaliojimo įstatymas", *Valstybės žinios (Official Gazette)*, 2000, Nr. 89-2741.
[41] UN General Assembly, The Crime of Genocide, 11 December 1946, A/RES/96.

the ECtHR, considering that crimes against humanity were already established in the Statute of the International Military Tribunal at the Nuremberg Trials in 1945,[42] while the concept of genocide was only in the writings of Raphael Lemkin. As Andreas Parmas rightfully pointed out in his presentation, the definition of genocide adopted in the Convention on the Prevention and Punishment of the Crime of Genocide of 1948 (hereinafter – the Genocide convention)[43] was primarily a political definition. It was also a legal definition, but based on political considerations which are clearly visible in its *travaux preparatoire*.[44] Furthermore, it was a deliberately flawed definition, eliminating political and social groups.

Therefore, can we use crimes against humanity in the circumstances of the *Vasiliauskas* and/or *Drėlingas* cases? At first glance, it looks like the definition of crimes against humanity is wider than that of genocide – or, at least, it is not confined by the limitation of groups with particular features (national, ethnic, racial, religious). It also does not have the requirement of intent to destroy the group "in whole or in part". These constituent elements of genocide were heavily debated in *Vasiliauskas* and *Drėlingas*. Perhaps this discussion is futile when we have another international instrument available.

Without going too deep into a detailed analysis of the particularities of these cases, I would like to point out a few things. First, when we talk about crimes against humanity, we talk about massive crimes against a civilian population. However, in both cases at hand we have victims that belonged to an armed resistance. Can they be considered part of the civilian population? In the *Drėlingas* case, the victim, Adolfas Ramanauskas (Vanagas), a partisan leader, was hors de combat. However, in the *Vasiliauskas* case, two partisans were killed directly during a "military operation" by the members of repressive soviet institutions (MVD-NKGB): they died in combat, armed and resisting. Could these victims be considered victims of crimes against humanity?

Before answering that question, I would like to discuss general elements of crimes against humanity. As was mentioned, crimes against humanity appeared for the first time as a black letter law rule in international law in Article 6(c) of the Statute of the International Military Tribunal. This stated that crimes against humanity must be understood as "murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any

[42] UN General Assembly, "Affirmation of the Principles of International Law recognized by the Charter of the Nürnberg Tribunal, 11 December 1946, A/RES/95"; "Principles of International Law Recognized in the Charter of the Nüremberg Tribunal and in the Judgment of the Tribunal, 1950". *Yearbook of the International Law Commission* Vol. II, (1950): 374–378.

[43] "Convention on the Prevention and Punishment of the Crime of Genocide", adopted by Resolution 260 (III)A of the U.N. General Assembly on 9 December 1948, 277 UNTS 78.

[44] Lawrence J. LeBlanc, *The United States and the Genocide Convention* (Duke University Press Durham and London, 1991), 80–82.

crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated".

There is a common agreement that this definition, now regarded as part of international customary law, included two types of crimes against humanity that make a distinction between ordinary ("murder type") crimes against humanity and persecution ("persecution type") crimes against humanity. The first type covers only crimes directed against the civilian population. However, the second type is much wider, and the scope of its victims may include combatants. This approach was confirmed in Post-World War II jurisprudence, both implicitly and explicitly, in *Pilz* by the Dutch Special Court of Cassation (1949), and in *Barbie* (1986) and *Touvier* (1992) in French courts.[45] The French cases are most important for us because they deal with the killing of members of the French Resistance Movement. Therefore, it can be stated that as early as 1949 crimes against humanity in the form or persecution included non-civilian persons into their ambit. However, it seems that the Rome Statute[46] of the International Criminal Court in Article 7 – as well as Article 5 of the International Criminal Tribunal for the Former Yugoslavia Statute[47] and Article 6 of the International Criminal Tribunal for Rwanda Statute[48] – took a different approach, reserving crimes against humanity only for "any civilian population", though hors de combat persons should be included in the scope as well.[49] Therefore, it appears that in international law we have a collision between customary law and the "not-so" progressive development of the law. This problem was complicated by the fact that after ratifying the Rome Statute many states adopted its approach in national codes.

This was also the case for Lithuania. Article 100 ("Behaviour with humans prohibited by international law") in the Criminal Code of Lithuania was to be modelled after Article 7 of the Rome Statute. Its first version, from 2000, in the first section reads: "(person) who with the intent, executing or supporting state or organisation's policy attacked civilians in massive or systematic way". Therefore, the "civilian" element was directly embedded, and the first section clearly sets out the "chapeau" or general elements for crimes against humanity as established in the Rome Statute. However, the same definition in Article 100 also provides for the "persecution of any group of people or community". This also uses the general term "humans" in some other circumstances, e.g., "traded in humans", "apprehended humans, arrested them or limited their freedom". Moreover, sections of the article are separated by semicolons, making the original idea

[45] Antonio Cassese, *International Criminal Law* (Oxford University Press, 2003), 85–89.
[46] UN General Assembly, "Rome Statute of the International Criminal Court", as last amended on 2010, 17 July 1998, accessed 4 October 2022, https://www.refworld.org/docid/3ae6b3a84.html.
[47] UN Security Council, "Statute of the International Criminal Tribunal for the Former Yugoslavia", as last amended on 17 May 2002, 25 May 1993, accessed 4 October 2022, https://www.refworld.org/docid/3dda28414.html.
[48] UN Security Council, "Statute of the International Criminal Tribunal for Rwanda", as last amended on 13 October 2006, 8 November 1994, accessed 4 October 2022, https://www.refworld.org/docid/3ae6b3952c.html.
[49] Antonio Cassese, *International Criminal Law* (Oxford University Press, 2003), 93.

of law makers very hard to decipher, and creating confusion as to how such a definition shall be interpreted – under customary international law, or under the Rome Statute (the transposition of which into national law led to the creation of this definition). If we consider the first section as a general section, then persecution must also be related only to the civilian population. If we claim that each section separated by a semicolon means a different act, another problem appears, because inhumane acts are grouped by semicolons. Therefore, "trade in humans" would also become separated from the chapeau. This incoherence leaves many questions unanswered. Therefore, we can assume that both in the *Vasiliauskas* and *Drėlingas* cases neither the prosecution nor the Lithuanian courts were ready to apply this new and very complicated national legal norm.

In answering the question that started this discussion – "Would victims in the *Vasiliauskas* and *Drėlingas* cases qualify as victims of crimes against humanity?" – we can conclude the following. Hypothetically, both of these cases could fit under the umbrella of crimes against humanity following Lithuanian regulation, but the result of this will depend on the reasoning (whether it is based on international customary law or the Rome Statute approach) chosen by the prosecution and courts. Therefore, choosing "genocide" was more convenient not only because of the power of the word.

Secondly, coming back to the *Vasiliauskas* and *Drėlingas* cases in the ECtHR, there is fertile ground on which to claim that the *Drėlingas* case could have been successful (from the Government's side) in qualifying as a crime against humanity. One must not forget that Vanagas was brutally tortured and then executed. He was also hors de combat when he was captured, so he as a victim would even correspond to the approach of Article 7 of the Rome Statue. There are more doubts about *Vasiliauskas*, although following customary international law on crimes against humanity the victims in this case can also be considered as victims of the crime of persecution.

On the other hand, genocide qualifications in those cases also made the ECtHR reconsider its approach to soviet repressions in general terms. The loophole that became evident in the *Vasiliauskas* and *Drėlingas* cases was not so much about the corpus delicti of genocide, but the general understanding of soviet repressive policy trends and issues. It was indeed a matter of historic justice, and one can argue indefinitely whether international courts should deal with it or stay in their "ivory towers", as was pointed out by judge Kūris in his dissenting opinion in the *Vasiliauskas* case.

MARK A. DRUMBL. Fragmentation and judging in international law: genocide as before different courts

Professor, Washington and Lee University School of Law, U.S.

OVERVIEW

Overview: I am a law professor at Washington and Lee University, U.S., and I am delighted to be participating in this crucial event discussing key aspects of accountability, law, and justice for Lithuania.

I know I am the last speaker of the conference. I think as the last speaker what I would like to do is not only look back at some of the themes that have been covered so far but also look ahead. I think a lot of our time here in this conference has been focused on historicity, legal aspects, and also the political aspects of the European Court's judgement recognising genocide in Lithuania, and I think what I would like to do in my remarks is focus on the broader effects of the case on public international law more generally. I hope to face outwards to unwind the effects of this judgement on the international legal landscape, as opposed to only the Lithuanian legal aspect. So, to perhaps end on a slightly different note.

The title of my remarks is Fragmentation and Judging in International Law: Genocide as Before Different Courts. Here, what I would like to do in this frame is to place the ruling of the European court in a broader tapestry of public international law, and also to ask a question or two on the role of the judge interpreting international law. Let me make four points.

First, the European Court of Human Rights now joins an array of other international courts in defining the historical tragedy of genocide. The International Criminal Tribunal for Rwanda, the Yugoslav Tribunal, the tribunal in Cambodia, The International Court of Justice, and a variety of other international institutions took the legal concept of genocide and applied it in different contexts. Either way, whether that path is criminal or civil, in terms of remedy, we have seen slightly different definitions emerge in slightly different places by slightly different courts ruling on different facts, and this could be constructed as illustrating how a legal concept becomes improved or shifts into a variety of particular contexts.

My second point relates to the reality that even in the *Drėlingas* case itself judges approached things differently: minority and majority. Courts do not speak with just one voice. Conversations about "yes genocide" or "no genocide" happen through people. We have individuality and the idiosyncratic reality that judges may see different terms and facts differently.

Thirdly, we have a different point of fragmentation and that is within the Europe-

an court itself, where now we have a case from Lithuania that achieves a different result than a case from not so far before – also about genocide, but where genocide was not found. So, we have a sense of fragmentation within the courts in which different realities lead to different outcomes on the same fundamental question.

My fourth point is my final one, and that is the big, normative take away. Lawyers are generally prone to seeing themselves as logical, organised, and predictable – dare I say almost scientific? However, fragmentation is messy and confusing, unpredictable and unsettling, and yet the arc of justice finds itself in fragmentation and diversity. To me, it raises a final question that I would like to ask while I wrap up, and that is: should law always be logical, or should law be lived in life? Lived in a reality of a certain level of unpredictability, of change, movement, dynamism? At the end of the day, I think that this is a very interesting question for public international law that is reflected in and by the reality that many different courts, in many different places, when faced with the putatively universal crime of genocide approach it differently. Perhaps, at the end of the day, that fragmentation is to be welcomed and not necessarily feared. Thank you very much and have a wonderful remainder of your day.

Edited by MB Kopis

Layout by Jovita Jankauskienė

Published by:
Mykolas Romeris University
Ateities st. 20, LT-08303 Vilnius, Lithuania
www.mruni.eu