Is Soviet Nuremberg Happening In the European Court of Human Rights?

Who controls the present, controls the past.
George Orwell

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ABSTRACT

Soviet genocide in Lithuania is closely related to the issue of national identity, as the trauma of genocide is shaping Lithuanian nation till these days. Due to Soviet actions in Lithuania, throughout the periods of 1940-1941 and 1944-1990, the country lost almost 1/5 of its population. The collective memory of Soviet respressions as a part of *Soviet genocide narrative* had a major role in the consolidation of the Lithuanian nation during the revival process (1986-1992). However, the question of Soviet genocide was ignored for a very long time in all post-Soviet countries and remains to be highly underrepresented in the Western academic world.

Since 1990 Lithuania has been claiming that what happened there during Soviet occupation is genocide, as per Convention on the Prevention and Punishment of the Crime of Genocide (1948), which embodies universal justice for suppressed nations and other groups. The application of Lithuanian national legal regulations regarding this issue has been recently discussed in the framework of another postwar international legal instrument – the European Convention of Human Rights (1950).

Lithuanians, together with Latvians and Estonians, were considered as persons belonging to the so-called *untrustworthy* or *unreliable* nationalities, which interfered with the Soviet plan of successful sovietization. As the Lithuanian Constitutional Court summarized in 2014, the repressions against the residents of Lithuania were not in any manner coincidental and chaotic, but rather such repressions sought to exterminate the basis of the political nation of Lithuania, *inter alia*, the former social and political structure of the State of Lithuania (1918-1940). Those repressions were directed against the most active political and social groups of the residents of the Republic of Lithuania: participants of the resistance against the occupation (partisans) and their supporters, civil servants and officials of the State of Lithuania, Lithuanian public figures, intellectuals and the academic community, farmers, priests, and members of the families of those groups.

Partisans were dangerous to the Soviet regime because they were putting into practice the right of the Lithuanian nation to self-defense against occupation and aggression. The resistance obstructed the Soviet occupational structures in carrying out their deportations and other repressive measures against Lithuanian civilians. In this way, the participants in the resistance (1944-1953) not only sought to ensure the survival of the nation (by defending it) but also embodied that survival. However, only in the cases of *Vasiliauskas v. Lithuania* (2015) and *Drėlingas v. Lithuania* (2019) held before the European Court of Human Rights the conflict between Soviet/Russian and Lithuanian narratives about Soviet repressions during occupations (1940-1941 and 1944-1990) against Lithuanian partisans finally reached the legal level.

The **goal** of this paper is to examine the main debates, which were revealed by the European Court of Human Rights in the cases of *Vasiliauskas v. Lithuania* (2015) and *Drėlingas v. Lithuania* (2019), regarding the killings of Lithuanian partisans, including: the recognition of the significance of partisans for the Lithuanian nation, the foreseeability of genocide in part, as well as the punishment for the complicity to kill Lithuanian partisans.

Introduction

While the whole world was shocked by the Nazis entering Paris on June 14, 1940, the next morning Lithuania was unable to confront the 150,000 Red Army soldiers, who entered its territory at 4 am. On June 16 Lithuanians faced Soviet soldiers in the roads and streets and the first Soviet occupation began, which lasted till June 22, 1941, when Lithuania was occupied by Nazi Germany. The second Soviet occupation began in July 1944 and its initial period later developed into a period of a quasi-colonial rule (Annus 2012, 38). According to various data, both occupations by the USSR (1940-1941 and 1944-1990) caused the Republic of Lithuania to lose almost one fifth of its population, including refugees. As it was summarized by the Lithuanian Constitutional Court in 2014, about 85 thousand people were killed and about 132 thousand were deported to the USSR.[1] More than 20,000 of those killed were participants of the armed resistance against the Soviet occupation (partisans) and their supporters (data from 1944 to 1952). In June 14, 1941 the first mass deportation of the citizens of the Republic of Lithuania to Siberia commenced, when 12,500 people were deported. During the next Soviet deportations in 1945-1952 32,000 of deportees were children.

Since the restoration of Lithuania's independence thirty years ago, the primary political goal was to resume Lithuanian statehood from the interwar period. The next step was the question of legal evaluation of Soviet repressions to enter the national and European legal agenda. As the Lithuanian Constitutional Court ruled in 2010,

> during the occupation by both the USSR and Nazi Germany not only was democracy denied, but crimes were also committed in respect of the people of the occupied State: genocide took place. It is obvious that those who had suffered from the crime of genocide, committed by individuals serving the regimes of occupying States during the years of occupation, had no legal recourse to claim damages from the perpetrators of the crimes of genocide.[2]

Indeed, during the years of Soviet rule, the crime of genocide was not listed as a criminal offence in the Soviet criminal legislation applied in Lithuania – neither in the 1926 RSFSR Criminal Code which was applied in Lithuania until 1961, nor in the 1961 LSSR Criminal Code.

The international criminal framework embodied in 1948 Convention on the Prevention and Punishment of the Crime of Genocide (UNCG) is the foremost legal background for the evaluation of Soviet repressions, mainly because of its history-writing function, which was the major purpose of the local trials undertaken by the Baltic states after 1990 (Liivoja 2013, 249; Pettai 2017). Article 1 of the UNCG states, that the Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish.

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[1] Lietuvos Respublikos Konstitucinio Teismo 2014 m. kovo 18 d. Nr. KT11-N4/2014 nutarimas "Dėl Lietuvos Respublikos Baudžiamojo Kodekso kai kurių nuostatų, susijusių su baudžiamąja atsakomybe už genocidą, atitikties Lietuvos Respublikos Konstitucijai" [Constitutional Court of the Republic of Lithuania March 18, 2014 Judgment no. KT11-N4/2014 "On the Conformity of Certain Provisions of the Criminal Code of the Republic of Lithuania with Criminal Liability for Genocide to the Constitution of the Republic of Lithuania"].

[2] Lietuvos Respublikos Konstitucinio Teismo 2010 m. lapkričio 10 d. nutarimas Nr. 09/2008 "Dėl Lietuvos Respublikos įstatymo 'Dėl SSRS okupacijos žalos atlyginimo', Lietuvos Respublikos asmenų, represuotų už pasipriešinimą okupaciniams režimams, teisių atkūrimo įstatymo, Lietuvos Respublikos įstatymo 'Dėl atsakomybės už lietuvos gyventojų genocidą' atitikties Lietuvos Respublikos Konstitucijai" [Judgment of the Constitutional Court of the Republic of Lithuania of 2010 November 10 no. 09/2008 "On the compliance of the Law of the Republic of Lithuania 'On the Compensation for the Damage of the Occupation of the USSR', the 'Law on the Restoration of the Rights of Persons Repressed against the Occupation Regimes'"].

Article II stipulates, that in 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: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group.

On April 9, 1992, Lithuania acceded to the UNCG and to the 1968 United Nations Convention on the Non-Applicability of Statutory Limitations to war Crimes and Crimes against Humanity. On the same day the "Law on Responsibility for Genocide of Inhabitants of Lithuania" was enacted, which recognized Soviet actions as genocidal.[3] On April 21, 1998 the provisions regarding Soviet genocide were repealed and prosecution for genocide was thereafter incorporated into Articles 49 and 71 of the Criminal Code.[4] In 2003, Article 99 of the new Criminal Code, in force from May 1 of the same year, stipulated, that a person who, seeking to physically destroy some or all of the members of any national, ethnic, racial, religious, social or political group, organizes, is in charge of or participates in killing, torturing or causing bodily harm to them, hindering their mental development, deporting them or otherwise inflicting on them situations which bring about the death of some or all of them, restricting births to members of those groups or forcibly transferring their children to other groups, shall be punished by imprisonment for a term of from five to twenty years or by life imprisonment.[5]

However, the recognition of Soviet genocide in Lithuania remains complicated due to various practical and legal reasons. Firstly, the possibility to collect evidence about the criminal acts that took place 80 years ago is limited, not to mention, that the main evidence left is highly politicized, fragmentary and sometimes fabricated Soviet documentation in the national and Russian archives. Moreover, some relevant documents are impossible to get due to the limited access to some of the archives, i.e., the Russian State Military Archive, which contains important information about Soviet military actions in the Baltic states. This problem was also addressed by the European Parliament resolution of 2 April 2009 "On European conscience and totalitarianism," where the regrets about closed archives were expressed. The consultations between prosecutors and historians regarding the collection of evidence are crucial at this point. Secondly, the possibility to convict suspected persons is also limited due to the natural change of generations. According to official data delivered by the Lithuanian Prosecution Office in October 2019, between 1987 and 2017, 155 investigations for the crime of genocide were carried out against Lithuanian partisans, however, only 10 persons were

[3] Įstatymas dėl atsakomybės už Lietuvos gyventojų genocidą [Law "On Responsibility for Genocide of Inhabitants of Lithuania"], State Gazette, 1992, No. I-2477. It reads as follows: Article 1 "Actions aimed at the physical extermination of some or all of the inhabitants who belong to a national, ethnic, racial or religious group, by killing members of the group, or deliberately inflicting on them torture, serious bodily harm, mental harm; or conditions of life calculated to bring about its physical destruction in whole or in part; forcibly transferring children of the group to another group; and imposing measures intended to prevent births within the group (genocide), shall be punished by imprisonment of from five to ten years and the confiscation of property, or by the death penalty with confiscation of property." Article 2 "The killing and torturing and deportation of inhabitants of Lithuania committed during the occupation and annexation of Lithuania by Nazi Germany or the USSR shall be classified as the crime of genocide as defined by international law." Article 3 "The Law on Responsibility for Genocide of Inhabitants of Lithuania may be applied retroactively. There is no statute of limitations to prosecute individuals who have committed acts specified in this Law before [it] came into force."

[4] Lietuvos Respublikos Baudžiamojo kodekso papildymo 62^1, 71 straipsniais ir 8^1, 24, 25, 26, 35, 49, 54^1, 89 straipsnių pakeitimo ir papildymo istatymas [Law Amending Articles 62 (1), 71 and Articles 81, 24, 25, 26, 35, 49, 541, 89 of the Criminal Code]. State Gazette, 1998, No. VIII-708. The provisions of the latter stipulated: Article 49. Statute of Limitations: "5. There is no statute of limitations for genocide. Those convicted of genocide may not be relieved from serving sentences by amnesty." Article 71. Genocide: "1. Actions aimed at the physical extermination of some or all of the inhabitants who belong to a national, ethnical, racial, religious, social or political group, consisting of cruel torture of members of the group, serious bodily harm, or harming mental development; or deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; forcibly transferring children of the group to another group; or imposing measures intended to prevent births within the group, shall be punishable by imprisonment of from five to twenty years. 2. Actions enumerated in paragraph 1 of the Article which result in murder, also organizing and leading actions enumerated in paragraphs 1 and 2, shall be punishable by imprisonment of from ten to twenty years or by death."

[5] Lietuvos Respublikos baudžiamasis kodeksas [Criminal Code of the Republic of Lithuania]. State Gazette, 2000, No. 89-2741.

convicted and some of them (4) were left on probation due to poor health condition. In addition, 5 of the suspected persons died during the investigation and 25 more during the trail.

There are legal obstacles too, the main of them being the difference between the definitions of genocide in the UNCG and Lithuanian law. Since 1992 Lithuania adopted a broader definition of genocide, which includes crimes against political and social groups, along with national, ethnic, racial and religious groups, as established in the UNCG. The second problematic legal issue is the retroactivity of genocide crime, as many Soviet genocidal acts took place before the adoption of the UNCG in 1948, which entered into force on January 11, 1951 and USSR ratified it even later – on May 3, 1954 (Schabas 2010, 36).

The difference between international and national genocide definition was discussed in the European Court of Human Rights (ECtHR), by examining Lithuanian partisans as a significant part of the national group. Meanwhile the retroactivity of genocide was addressed only fragmentary in dissenting opinions delivered by some ECtHR judges arguing the foreseeability of genocide in part, as well as the punishment for the complicity in genocide.

Tell me, who gave you the right to condemn us to death for defending our homes, our culture?
Partisan Juozas Streikus's final speech at Soviet court in 1962

The summary of *Vasiliauskas v. Lithuania* (2015) and *Drelingas v. Lithuania* (2019)

In the case *Vasiliauskas v. Lithuania* (Application No. 35343/05) former MGB (Ministry of State Security, 1946-1953) officer Vytautas Vasiliauskas (born 1930) complained that his conviction for genocide by domestic courts was in breach of Article 7 of 1950 European Convention on Human Rights (ECHR) in particular because the national courts' broad interpretation of that crime had no basis in international law. On January 2, 1953 Mr. Vasiliauskas took part in an operation against two Lithuanian partisans, who had been hiding in the forest. The goal of the operation was to capture or eliminate the partisans (Soviet jargon used the term "to liquidate bandits"). Several soldiers were involved and the applicant was part of the operation. During the attempt to apprehend them, the partisans resisted by opening fire on the MGB officers and Soviet soldiers. The partisans were shot and killed.

In this case the question that the ECtHR had to answer was whether the applicant's conviction for genocide in 2005 by domestic courts were reasonably foreseeable, in light of international law as it stood in 1953, when the crime was committed. ECtHR Grand Chamber of 17 judges came out split on the outcome, ruling by 9 votes to 8 that the conviction for genocide of political and social groups according to Lithuanian post-Soviet legislation was not foreseeable and that it was in violation of the ECHR Article 7, which states that one cannot be held criminally accountable for something which is not a crime at the time it's committed. The numerous dissenting opinions criticized the majority that it ruled too formally and failed to address the justice desired by Soviet victims.

In the case *Drelingas v. Lithuania* (Application No. 28859/16) former KGB (State Security Committee, 1954-1992) officer Stanislovas Drelingas (born 1931) complained to the ECtHR on the same grounds. In 2014 Mr. Drelingas was charged by domestic courts with being an accessory to genocide for having taken part in the operation on 11-12 October, 1956 during which the last partisan leader *Vanagas* (Eagle) was captured, and subsequently tortured, sentenced to death and executed. His wife *Vanda* was also captured and sentenced to deportation afterwards. Once again, the main question was, whether the applicant could have sufficiently foreseen that he was involved in committing genocide in 1956. In the judgment, which was delivered on March 2019, ECtHR held that Mr. Drelingas must have been aware in 1956 that he could be prosecuted for genocide of a national group for taking part in the detention operation of two partisans and his conviction had been foreseeable. The judgment entered into force on September 10, 2019, when the defendant's request for referral at the Grand Chamber of ECtHR was rejected.

Lithuanian partisans as a significant part of the national group

In the broader sense, both of the aforementioned ECtHR cases were concerned with the Lithuanian legal definition of genocide, which included *inter alia* protection of political and social groups and explicitly had retroactive application in the context of Soviet crimes. These ECtHR judgments illustrate the debate over the inclusion of political groups in the definition of genocide, a debate that has raged since the adoption of UNCG (Schaack 1997, 2259-2291; Weiss-Wendt 2005, 551-559; Weiss-Wendt 2019, 173-188). The final exclusion of political groups from the definition of genocide in 1948 was probably the main reason, why Latvia and Estonia after 1990 took a less problematic approach of considering that Soviet repressions during occupation were mostly crimes against humanity or so-called ethnic cleansings (Mälksoo 2001, 778; Mertelsmann, Raih-Tamm 2009, 307).

Meanwhile, Lithuania took the approach that Soviet repressions were genocide, as this crime addressed the specific historical context in Soviet occupied Lithuania. In 2014, the Lithuanian Constitutional Court held that national law, which stipulates that actions, aimed at physical destruction, in whole or in part, of persons belonging to any national, ethnic, racial, religious, and also social or political group, could be considered as genocide, was compatible with the Lithuanian Constitution. The Constitutional Court took the view that states have a certain discretion, because of particular historical, political, social and cultural contexts, to establish in their domestic law a broader definition of the crime of genocide than that which is established in international law.

After 1917, the Bolshevik regime was determined to transform human existence and create an entirely new kind of human being – the New Soviet man (Vaitiekūnas 1951). Therefore, the nationality was not important anymore, and a new socialist nation had to emerge. As Lebed (1958, 4-5) put it,

> it is crystal clear that the liquidation of national cultures or, to use the Soviet terminology "bourgeois nations," and their democratic state structures is a natural phenomenon inherent in the Bolshevik revolution and arising out of the nature of the Communist dictatorship, as does the expected subsequent formation of the socialist nations. The socialist nations are artificial creations by means of which the Communist party attempts to undermine national aspirations and thereby to prepare the way for internationalism in the future.

Lemkin, who was a Polish-Jewish origin lawyer and the inventor of the term genocide, also argued that Nazi and Soviet regimes shared the defining characteristic of attempting to destroy the national patterns of the oppressed groups and replace it with a Sovietness or Germanness (Irvin-Erickson 2013, 285).

In the context of the Baltic region, the problem is that the Soviet regime rarely directed its efforts against nationalities as such, but was primarily concerned with getting rid of people of "upper classes" of newly occupied territories (Williams 2000). Since 1940, the Soviets took the view that the legitimate post-1917 governments in the Baltic states had not been the ones with which they had negotiated peace treaties in 1920, therefore, accordingly, everyone involved in governing the Baltic states between 1918 and 1940 was seen as having played a role in an illegal usurpation of Soviet power (Liivoja 2013, 249). As a result, Lithuanians, together with Latvians and Estonians, were considered as persons belonging to the so-called untrustworthy or unreliable nationalities, which interfered with the Soviet plan of successful sovietization. For example, as the conditions for the deportees got stricter, the policy towards Lithuanians and other "untrustworthy" nations (Chechens, Latvians, Estonians, etc.) was made more explicit. The minister of the interior of the Soviet Union, Kruglov and general prosecutor Safonov established a procedure to enter children of exiles (older than 16) into the general registry of exiles (i.e. permanent exile). Children over 16, born into mixed families of deportees and non-deportees were given the right to select either their mother's or father's nationality. Children selecting the nationality of their exiled mother or father were entered into the deportee registry, while those selecting the non-deportee nationality were not. This was a means of stimulating denationalization. The younger generation, having refused their nationality, language and culture, was able to avoid the fate of their parents. Whereas the children of Russian deportees (who

were called "vlasovniks" and "ukazniks") were not entered into the deportee registry at all, even though, at a glance, these people were of a similar fate (Anusauskas 1996, 385).

The background of the extermination of Baltic nationalities was the order by NKVD (People's Commissariat of Internal Affairs, 1934-1946) of October 11, 1939 No. 001223, which commanded to prepare for the "mass dissolution of the anti-Soviet and anti-social element in the Baltic States" (Dyukov 2012, 469-472). The Baltic region was sovietized using various measures: introduction of USSR administrative and economic systems, subjugation of states to the economic and political needs of the USSR, militarization, colonization of states by Russian-speaking immigrants, destruction of traditional social structure through genocide and russification, also total control over internal means of communication and contacts with foreign countries, and the destruction of established political, economic and cultural traditions (Strods 2005, 209).

In Lithuania, Soviet repressions targeted the socially and politically influential Lithuanian nationals, who shared a common goal – independent state (res publica) and can be regarded as political nation. Political community as the main element of a nation was described by Reich (1991, 205): "The cosmopolitan man or woman with a sense of global citizenship ... Without a real political community in which to learn, refine, and practice the ideals of justice and fairness, they may find these ideals to be meaningless abstractions." As the Lithuanian Constitutional Court summarized in 2014, the repressions against the residents of Lithuania were not in any manner coincidental and chaotic, but rather such repressions sought to exterminate the basis of the political nation of Lithuania, *inter alia*, the former social and political structure of the State of Lithuania. Those repressions were directed against the most active political and social groups of the residents of the Republic of Lithuania: participants of the resistance against the occupation and their supporters, civil servants and officials of the State of Lithuania, Lithuanian public figures, intellectuals and the academic community, farmers, priests, and members of the families of those groups. The Lithuanian Constitutional Court also concluded that actions which took place before the 2003 national legislation and which had been directed against certain political and social groups might constitute genocide, if it could be proven, that the aim of such actions was to destroy groups that represented a significant part of the Lithuanian nation and whose destruction had an impact on the survival of the entire Lithuanian nation. The Court indicated that Lithuanian partisans constituted such a group, taking into account their activity during the 1944-1953 partisan war.

Lithuanian partisan resistance was the biggest in the Baltics states. It emerged in 1944, as, after the return of the Soviets, the most active Lithuanian residents had only several options: to wait until the regime eventually arrests, deports or kills them, or to become partisans and increase the chances of staying alive, as well as maintain the hope that Lithuanian statehood will be restored soon (Kuodyte 2004, 8). The armed resistance was especially strong during 1945-1947, when partisans dominated the countryside (Daumantas 1988). Partisans were dangerous to the Soviet regime because they were putting into practice the right of the Lithuanian nation to self-defense against occupation and aggression. The resistance obstructed the Soviet occupational structures in carrying out their deportations and other repressive measures against Lithuanian civilians. In this way, the participants in the resistance not only sought to ensure the survival of the nation (by defending it) but also embodied that survival. Moreover, as the Republic of Lithuania, as a state and a subject of international law, did not disappear due to the Soviet aggression, the Lithuanian partisans were the armed forces of the Republic of Lithuania and their leadership was the legitimate government (government) of the Republic of Lithuania fighting the occupation.

Soviets defeated Lithuanian partisan movement in 1953, by utilizing a strategy, which consisted of a variety of methods (Petersen 2001, 170-204). The most effective of them was political propaganda, based on specific Soviet jargon. Lithuanian partisans and members of underground organizations and their supporters were labelled as "bandits" and "bourgeois nationalists," independent farmers were named as "kulaks," institutional employees (teachers, intellectuals, etc.) and the people with positions in the former independent Lithuania were described as "politically and socially unreliable elements," the Catholic clergymen were qualified as "reactionary Catholic clergy" and so on. This jargon also reflected the narrative of so-called class struggle, which was used to deny that the conflict between Soviets and Lithuanian partisans was not a war. In 1947, the Lithuanian

Communist Party issued a ruling, which aimed to create an illusion that Lithuanians were fighting the partisans themselves. It ordered to include pro-communist Lithuanians into local Soviet security organs, to create armed groups of them and even asked permission from Moscow to create a Lithuanian army unit. This request, however, was not granted, as this would have challenged the centralization of Soviet power (LSA, f. 1771, op. 190, d. 5, 179-187). Another narrative about the "kulak-nationalist underground," which, according to the Soviets, wanted to prevent collectivization and created conditions for class struggle, was false too, as there were very few independent farmers among partisans: 92,5% of them originated from peasants of moderate and low wealth, as well as intellectuals (LSA, f. 1771, op. 9, d. 269, 73-75).

This jargon based mass propaganda, employed for two generations, led to the widespread misperception that restricts the Soviet repressions to the destruction of hostile social or political groups only, i.e., groups which are not covered by the 1948 UNCG (Mälksoo 2001, 782).

Partisans were also the target of Soviet military, led by General Kruglov and was comprised of the internal army of NKVD, special NKVD department for fight against "bandits" and local pro-Soviet militia, called "stribai." The units of Istrebiteli (rus. *истребители*) were authorized by Lithuanian Communist Party in July 1944 and were active till 1954 (Tininis 2003, 60). Soviet military counterintelligence called SMERSH was active in this field too. Stalin coined the name СМЕРШ ("SMERSH") in 1943 as a portmanteau of the Russian-language phrase "Смерть шпионам" (SMERt SHpionam, meaning "Death to Spies"). Originally focused on combating German spies infiltrating the Russian military, the organization quickly expanded its mandate: to find and eliminate any "subversive elements" (Vinogradov, Pleaser 2010, 123). The organization was officially in existence until May 4, 1946, when its duties were transferred back to the MGB. SMERSH was active in Lithuania, where it not only persecuted the disloyal military officers, but also verified the reliability of NKVD staff (Gaskaite 1996, 99). During the period from 1944 to 1953, over 20,500 Lithuanian partisans and their supporters were killed (*Ibid*) and 62,000 were arrested or jailed (LSA, f. K-1, op. 3, d. 407, 264-265). Only individual fighters held out until the 1960s.

Nevertheless, in the 2015 case of *Vasiliauskas*, the domestic interpretation of Lithuanian partisans as an important part of the national group was rejected by the majority of ECtHR judges. ECtHR ruled that the Lithuanian government and courts failed to substantiate Vasiliauskas's understanding of the significance of the targeted group, i.e. destruction of the group in part. In this regard Judges Villiger, Power-Forde, Pinto de Albuquerque and Kūris claimed that ECtHR looked at the case too formalistically and did not take into account historical circumstances, by viewing the partisans exclusively through the prism of a political group. Moreover, it disregarded the significance of this group towards the whole Lithuanian nation. Judge Power-Forde from Ireland also regretted that ECtHR missed the chance to give the soviet era a proper name. Judge Kūris from Lithuania was surprised that ECtHR wanted to find a historical treatise in the Lithuanian court decisions.

Probably this was the reason why in the *Drelingas* case, Lithuanian domestic courts were more careful to clarify the significance of Lithuanian partisans to the national group. In 2016 the Supreme Court of the Republic of Lithuania argued that the two killed partisans belonged to a significant part of a separate national-ethnic-political group, by introducing the twofold concept of the nation, meaning that the features of ethnicity and nationality were interrelated in postwar Lithuania. Therefore, a complete delimitation of such groups as a separate formation in the crime of genocide is not always possible. The Court further described that people of different status participated in the national armed resistance, mostly Lithuanians by nationality. They were united by a common goal, namely to restore the independence of Lithuania. The resistance was supported and the occupation was also resisted in other ways by a large part of the Lithuanian nation. Therefore, in 2019 while analyzing the question, whether the applicant's conviction for genocide was compatible with Article 7 of the ECHR, the Strasbourg Court found that the Lithuanian Supreme Court had explained why the partisans who had resisted Soviet rule could be considered as an important part of the nation and, therefore, be covered by international law – the UNCG.

The retroactive conviction for genocide

The retroactivity of genocide

The crime of genocide was perpetrated for centuries. There are many historical examples of humanitarian intervention on behalf of populations persecuted in a manner shocking to mankind. In 1827, England, France and tsarist Russia had intervened to end the atrocities in the Greco-Turkish war. In 1840, the President of the U.S., through his Secretary of State, intervened with the Sultan of Turkey on behalf of the persecuted Jews of Damascus and Rhodes. The French intervened to check religious atrocities in Lebanon in 1861 (Bruun 1993, 212, 214). However, these crimes had no specific definition before 1944, when Lemkin coined the term genocide from the Greek word *genos* (birth, kind, race) and the Latin suffix – *cide* (killing).[6] This linguistic and legal innovation entered the international legal vocabulary during Nuremberg trials, which were held between November 20, 1945 and October 1, 1946, and saw the trials of the most important political and military leaders of the Third Reich. After three years the term genocide was embodied in the UNCG, with the focus on historical background in its preamble, which recognized that "at all periods of history genocide has inflicted great losses on humanity" and that international cooperation is required to "liberate humankind from such an odious scourge."

Although none of the persons tried at Nuremberg were convicted for genocide in particular, the trials took the general approach, that "they must have known they were doing wrong" (Schabas 2010, 52). This viewpoint was also applied in the 1946 case *Poland v. Greiser*, which set the first precedent of retroactive genocide, because the former Nazi officer was convicted of Jewish genocide in Poland, which took place in during 1941-1944, before the adoption of the UNCG (Heller and Simpson 2013). Since then, the doctrine of substantive justice, as opposed to that of strict legality, was adopted. That is, even in the absence of a clear rule banning conduct as criminal, acts that seriously harm society should not go unpunished (Cassese 2008, 38-39). It means that, under specific circumstances, a domestic court may resort to exceptions, in order to try a person without violating the principle of non-retroactivity. The doctrine of substantive non-retroactivity was again applied in the famous 1961 case of the former Nazi officer Adolf Eichmann, who was convicted in Israel under the local 1950 law for the crimes committed before 1945 (Priemel 2013, 576). The Israeli Supreme Court endorsed the lower court's conclusion concerning the customary nature of the crime of genocide, noting that "the enactment of the 1950 law was not from the point of view of international law a legislative act which conflicted with the principle *nulla poena* or the operation of which was retroactive, but rather one by which the Knesset gave effect to international law and its objectives" (Baade 1961, 415).

In the context of Soviet genocide the doctrine of substantive justice was settled in the 1996 Council of Europe Resolution No. 1096 "On measures to dismantle the heritage of former communist totalitarian systems." On the one hand, this resolution forbade to pass and apply retroactive criminal laws, but on the other hand stated, that the trial and punishment of any person for any act or omission which at the time when it was committed did not constitute a criminal offence according to national law, but which was considered criminal according to the general principles of law recognized by civilized nations, is permitted. The Council of Europe also recommended that criminal acts committed by individuals during the communist totalitarian regime be prosecuted and punished under the standard criminal code. If the criminal code provides for a statute of limitations for some crimes, this can be extended, since it is only a procedural, not a substantive matter.

Thus, even the objection of *nullum crimen* does not undermine the fact that genocide existed in the territory of USSR prior to 1954, when UNCG was ratified by USSR. The victims of Soviet regime who lived within the USSR territory, have been claiming Soviet genocide, at least, since 1947, when the representatives of former Baltic states' delegations-in-exile in Washington appealed to the UN General Assembly to indict the USSR for genocide against their respective nations and expressed their concern that the Soviet occupation with "genocide practice is a threat for the existence of Baltic nations" (Weiss-Wendt 2005, 555). The U.S. born Lithuanian partisan leader, general Adolfas

[6] There is another suggestion, that the word genocide was created in winter of 1942 (Irvin-Erickson 2017, 1).

Ramanauskas (*Vanagas)* (2018, 634-636) in his diary dated 1948, accused the American nation of not helping Lithuanians and presented Soviet genocide in Lithuania as the shame of civilization: "the genocide of Lithuanian nation began in the very first days of the invasion, and continues to this day. It is manifested by the continuing deportations to Siberia, murder, mass arrests, and torture in prison, condemning people to slow death.. we trusted in promises that were never fulfilled." The genocidal policy of the Soviet regime in occupied countries was clear to American politicians as well, as in 1958, the U.S. Library of Congress prepared the study about genocide, discrimination and abuse of power in USSR, where collectivization, demonetization and mass deportations were considered as genocidal acts (Whelan 1958, 15-23).

In addition, there is nothing in the UNCG which would suggest, that it does *not* apply retroactively (Schabas 2010, 40-41). At the time UNCG was adopted, there were three examples of international treaties defining atrocity crimes, and each of them had an implicit retrospective application. The Treaty of Versailles (1919), the Treaty of Sevres (1920), and the Charter of the International Military Tribunal (1945) provide for retroactive prosecution of crimes against peace, war crimes and crimes against humanity. A large number of states have incorporated the crime of genocide into their own national legislation, often giving their legislation retroactive effect as well, and it does not seem to be state practice to limit this retroactive effect to events subsequent to the UNCG's entry into force. Lithuania was also among those states, however, the scope of retroactivity of genocide was narrowed in 2014, when the Lithuanian Constitutional Court held, that retroactive prosecution for genocide of social and political groups, in respect of facts which took place before the 2003 legislation, which established this crime, would be in breach of the Constitution and the principle of the rule of law.

The foreseeability test at ECtHR: genocide in part and the complicity in genocide

The legacy of the precedents set in Nuremberg weighed heavily on States engaged in the process of adopting the ECHR in 1950. The Convention's Article 7 contains two paragraphs: the first paragraph enunciates the principle *nullum crimen, nulla poena sine lege* and the second – embodies the doctrine of substantive justice. Article 7 (1): "No one shall be held guilty of any criminal offence on account act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed, than the one that was applicable at the time the criminal offence was committed." Article 7 (2): "This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by civilized nations." According to the ECtHR case-law,

> the preparatory works to the Convention show that the purpose of paragraph 2 of Article 7 is to specify that Article 7 does not affect laws which, in the wholly exceptional circumstances at the end of the Second World War, were passed in order to punish war crimes, treason and collaboration with the enemy; accordingly, it does not in any way aim to pass legal or moral judgment on those laws.[7]

Thus, the second paragraph was included to clarify that the prosecutions of war crimes committed during WWII were not inconsistent with ECHR.

Following Article 7 (2) of ECHR, it would seem that little argument is needed to show that the rule of non-retroactivity is not violated by the prosecution of the executors of Soviet genocide under the 1948 UNCG and the Lithuanian Criminal Code of 2003, mainly because the latter law is retroactive in form, not in substance. However, in order to neutralize the critique towards the doctrine of substantive justice, since the 1990s ECtHR adopted the foreseeability test, which applies in criminal cases, regarding the universal principle of non-retroactivity, when determining whether the conduct in question falls within the scope of a criminal statute. In the case of *Kokkinakis v. Greece*, ECtHR

[7] *Kononov v. Latvia*, ECtHR former third division Judgment, July 24, 2008, no. 36376/04, para. 115.

interpreted the general scope of Article 7(1) saying that "[Article 7(1)] also embodies, more generally, the principle that only the law can define a crime and prescribe a penalty... and the principle that the criminal law must not be extensively construed to an accused's detriment, for instance by analogy; it follows from this that an offence must be clearly defined in law."[8] In the cases of *CR. v United Kingdom* and *S.W. v United Kingdom*, which regarded the interpretation of the *nullum crimen* principle set forth in the first clause of Article 7 (1), the ECtHR held that so long as the law is accessible and foreseeable, then the *nullum crimen* principle is respected[9].

In the cases *Vasiliauskas v. Lithuania* and *Drelingas v. Lithuania* the foreseeability test was applied to address two legal problems: the definition of genocide in part and the broad concept of complicity in genocide, as both of them, presumably, developed much later than the criminal acts took place.

The words in part in the context of the definition of genocide, mean that it is sufficient for the recognition of genocide, that the perpetrator seek to destroy a part of a group. In modern criminal law it has become well established, that where a conviction for genocide relies on the intent to destroy a protected group in part, the part must be substantial (Sainati 2012, 187). This concept is important in the context of Soviet genocide against the Lithuanian nation, as it allows to identify Lithuanian partisans as a substantial part of a national group, protected by the UNCG. However, in the 2015 *Vasiliauskas* case, the ECtHR Grand Chamber explained that the term in part, as used in Article II of the UNCG, was subsequently developed in the international case-law on the crime of genocide:

> In particular, the intentional destruction of a "distinct" part of the protected group could be considered as genocide of the entire protected group, provided that the "distinct" part was substantial because of the very large number of its members. Furthermore, in addition to the numerical size of the targeted part, judicial interpretation confirmed that its "prominence" within the protected group could also be a useful consideration. Be that as it may, this interpretation of the phrase "in part" could not have been foreseen by the applicant at the relevant time.[10]

The ECtHR also held, that "the Court is not convinced that at the relevant time the applicant, even with the assistance of a lawyer, could have foreseen that the killing of the Lithuanian partisans could constitute the offence of genocide of Lithuanian nationals or of ethnic Lithuanians" (*Ibid*, para. 181).

This conclusion can be challenged by the historical and legal analysis of the phrase "in part." The primary creator of the concept in part was Lemkin (1947, 151) himself, who was already using the adjective substantial in 1947: in his article on the use of the concept genocide in treaties between states, he noted "especially in cases were such tensions result in large scale criminality." The preparatory works of the UNCG, explored by prof. Schabas in detail, also suggest that the term in part was already in consideration for some time before the adoption of the UNCG. For instance, the notion that genocide might constitute destruction of groups "entirely or in part" appeared in the preamble of General Assembly 1946 Resolution 96 (I), which was the precursor for the UNCG, and the Secretariat draft defined genocide as "a criminal act directed against any one of the aforesaid groups of human beings, with the purpose of destroying it in whole or in part, or of preventing its preservation or development" (Schabas 2000, 230-234).

Moreover, during the Convention's drafting process (1946-1948), all delegations had full knowledge of the meaning of the words in part in the definition of genocide. The French delegation ardently argued that, if there existed a genocidal intent, an attack on a single individual could still constitute the crime of genocide (Sangkul 2016, 136). Most other delegations, however, opposed the French proposal and, ultimately, they agreed with the views of other delegations and finally, in the meeting on October 13, 1948, the Norwegian delegation's proposal of inserting the phrase "in whole or in part," was widely acclaimed (forty-one in favour, eight against, with two abstentions). Norway

[8] *Kokkinakis v. Greece*, ECtHR Judgment, May 25, 1993, no. 14307/88, para. 52.

[9] *CR. v. United Kingdom*, ECtHR Judgment, November 22, 1995, no. 20190/92; *S.W. v. United Kingdom*, ECtHR Judgment, November 22, 1995, no. 20166/92.

[10] *Vasiliauskas v. Lithuania*, ECtHR Grand Chamber Judgment, October 20, 2015, no. 35343/05, para. 177.

focused the debate by inserting "in whole or in part" after the words "with the intent to destroy" in the Ad Hoc Committee draft (Abtahi and Webb 2008, 1382). According to the Norwegian delegate, they "simply wanted to point out, with regard to the first of the acts enumerated, that it was not necessary to kill all the members of the group in order to commit genocide" (*Ibid*, 1383). USSR, supporting this view, observed that "it expressed the idea corresponding to the historical reality" (*Ibid*, 1386).

Meanwhile, in the *Drelingas* case, ECtHR had no concerns about the foreseeability of genocide in part, because the genocidal acts against Lithuanian partisans took place after the ratification of the UNCG by USSR in 1954. Lithuanian courts were only required to substantiate their interpretation of the partisan repressions as genocide. The Supreme Court of Lithuania stated, that

> although the numbers who participated in the resistance and suffered from the repression are undoubtedly high, they should be considered not only by "quantitative" criterion but also in the context of the overall scale of the repression, including massive deportations of civilians. It has been mentioned that the acts of repression by the Soviet power were also directed against the family members of partisans and their connections and supporters, who were also incarcerated, deported or killed: [in this way,] it was also aimed at the extermination of a large part of the Lithuanian nation, a national, ethnic group. Thus, the total number of victim participants in the resistance – Lithuanian partisans, their connections and supporters, who were killed or suffered repression of other kinds, is significant both in absolute terms and considering the size of the total population of Lithuania at that time.[11]

The Supreme Court of Lithuania took a quantitative approach, where the critical question was not how many members of the group were destroyed, but, rather, what impact the destruction of a certain, targeted stratum of society had on the overall group's long-term survival. Still, Judge Ranzoni from Liechtenstein pointed out that the majority grossly misinterpreted *Vasiliauskas* case, especially regarding the "foreseeability issue," emphasized in the latter (*Drelingas v. Lithuania*, Dissenting Opinion of Judge Ranzoni, para. 19-24).

Another debate addressed by the ECtHR in light of the foreseeability test was concerned with the establishment of the level of complicity, which was punishable as the genocide back in the 1950s. In the *Vasiliauskas* case, the domestic courts ruled that Mr. Vasiliauskas actively participated in an operation to capture or eliminate two partisans, during which they were killed. In the *Drelingas* case, the applicant was convicted for genocide by domestic courts for being a guard in a partisan detention operation. In this case the domestic courts rejected the applicant's arguments, that he could not be held liable for the fate of these partisans, since he had not personally arrested them, nor had he been involved in the sentencing of the last partisan leader *Vanagas*, or the deportation of his wife *Vanda*, because the applicant took actions which assisted in their arrest and he was a member of the reserve group for the arrest, whose role according to the plan was analogous to the role of those who actually had arrested *Vanagas* and *Vanda*. Domestic courts also rejected the applicant's line of defense that he had not even been present in the operation.

The issue of complicity in genocide was again empathized by Judge Ranzoni. In his dissenting opinion he noted, that the majority of ECtHR judges did not examine this matter properly and raised the question of, whether the criminal act of being an accessory to genocide, pursuant to Article 99 in conjunction with Article 24 (6) of the Lithuanian Criminal Code (2003), was covered by the punishable act of complicity in genocide under Article III (e) of the UNCG as interpreted by international law in 1956 (*Drelingas v. Lithuania*, Dissenting Opinion of Judge Ranzoni, para. 25-29).

Article III of UNCG describes four forms of participation in the crime: conspiracy, direct and public incitement, attempt and complicity. The modern doctrine of complicity in genocide was developed by the International Criminal Tribunal for the former Yugoslavia (ICTY) in the 1990s. The prosecutor in *Tadic* case argued that any assistance, even as little as being involved in the operation of one of the camps, constitutes sufficient participation to meet the terms of complicity: "the most marginal act of assistance" can constitute complicity, pleaded the prosecutor.[12] ICTY suggested that

[11] *Drelingas v. Lithuania*, ECtHR Judgment, March 12, 2019, no. 28859/16, para. 29.

[12] *The Prosecutor v. Dusko Tadić,* ICTY, Trail Chamber Judgment, May 7, 1997, no. IT-94-1-T, para. 666.

participation is substantial "if the criminal act, most probably, would not have occurred in the same way, had someone not acted in the role that the accused had assumed" (*Ibid*, para. 688). Even the accused who is not actually present during the crime may be a participant. ICTY observed that "direct contribution does not necessarily require participation in the physical commission of the illegal act" (*Ibid*, para. 678, 691).

This legal interpretation was a compromise between the knowledge-based approach and the purpose-based approach to the *mens rea* of complicity to genocide. The knowledge-based approach indicates that principal culpability for genocide should extend to those who may personally lack a specific genocidal purpose, but who commit genocidal acts while understanding the destructive consequences of their actions (Greenawalt 1999). This view makes it possible to impute principal liability to a broad range of persons, especially those of mid or low ranks. As prof. Schabas (2000, 301) explained, the accomplice intent is not identical to that of the principal offender, but it is criminal and genocidal just the same. The reason why criminal law needs to focus on knowledge rather than intent in the case of accomplices is that their behavior is often quite ambiguous. In the case of the principal offender, the *mens rea* is proved, generally, as a logical deduction from the act itself. This is not as easy with an accomplice whose material act may be facially neutral and, arguably, totally innocent. Therefore, the logical deduction of *mens rea* from *actus reus* is impossible and, in order to prove the *mens rea* of the accomplice, the prosecution must establish knowledge of the principal offender's intent.

However, the knowledge-based approach is criticized for convicting subordinate actors of genocide as principals, which can shake the basic legal foundation of differentiating principals and accomplices (Sangkul 2016, 8). For this reason the narrow purpose-based approach prevails, as it interprets the respective "intent to destroy" requirement as a special or specific intent (*dolus specialis*) stressing its volitional or purpose-based tendency (Ambos 2009). It suggests that the scope of *mens rea* should be restrictively circumscribed to the internal volition of an individual and indicates that the prosecution must go beyond establishing that the offender meant to engage in the conduct. As a result, only a small portion of the suspected persons can be convicted as principals of genocide, since it is hardly possible to prove the genocidal intent of the mid or low level officials.

Nevertheless, the compromise approved by ICTY did not set any uniform rule on the *mens rea* of accomplice liability and is still controversial. Some scholars argue that jurists at ICTY have erroneously determined that complicity in genocide is identical to aiding and abetting genocide (Greenfield 2008, 921). Others are claiming that despite the fact that the elements of aiding and abetting are often equated with and commingled with complicity in genocide, it would seem that this would only be the case when complicity in genocide is committed through aiding and abetting (Dawson and Boynton 2008, 278). The only clear thing is that complicity in genocide, as established in Article III (e) of UNCG, is not a separate crime (Sliedregt 2009, 189). Another tentative conclusion delivered by the commentators of the UNCG is that these two patterns emerge from Anglo-American case law: first of all, focusing on the nature of genocide crime, coupled with policy concerns like crime prevention, has led courts and legislators to adopt knowledge-based approach; secondly, compromise solutions have been proposed, which endorse a distinction between two types of accomplices and their *mens rea*, creating two separate statutes: one with a knowledge based approach for facilitators, where facilitation is a separate offence and carries a lesser sentence and one that provides for a purpose-based approach for the joint principal/instigator (*Ibid*, 190).

In the context of the ECtHR cases regarding Soviet genocide in Lithuania the real question is, what was the concept of complicity in the 1950s. The *travaux preparatoires* of UNCG do not reveal any great controversy or disagreement over Article III (e), which established the complicity in genocide (*Ibid*, 165). Quite the opposite, the drafters all felt the need to extend the circle of offenders to those who participate in the commission of genocide. The broad approach applied in the Dachau cases (1945-1947), where employees of the notorious concentration camp were found guilty as accomplices once their involvement in the running of the camp had been established. In the Mauthausen Concentration Camp case (1948), where inmates were murdered in gas chambers, the U.S. Military Tribunal also found that every official, governmental, military and civil, and every employee thereof, whether he be a member of the Waffen SS, Allgemeine SS, a guard, or civilian, was

criminally liable as an accomplice (Schabas 2000, 298). In 1960, during the trail of Robert Mulka, a camp commander at Auschwitz was convicted by a German court as an accessory in the murder of approximately 750 persons as he was involved in procuring Zyklon B gas, constructing gas ovens, arranging for trucks to transport inmates to the gas chambers, and alerting the camp bureaucracy as to the imminent arrival of transports (Wittmann 2005). However, in neither one of these judgments was liability couched in terms of complicity or accomplice liability. Thus, any voluntary cooperation or role in Hitler's war machine and any knowledge of its results and plans gave rise to criminal responsibility under a broad and undifferentiated postwar concept of participation in genocide.

Both applicants, Mr. Vasiliauskas and Mr. Drelingas were the employees of an organization, which, since 1945, aimed to eliminate the "remains of political banditism and other anti-Soviet activities, to eliminate sabotage intelligence and other enemy groups as well as individuals, eliminate anti-Soviet elements, traitors, as well as the traitors of homeland and other enemy protégés and supporters, etc." (Starkauskas 1998). In the context of the broad concept of complicity in genocide in the 1950s, the *mens rea* of both applicants was sufficient to convict them for the complicity in genocide of a national group in part, as they were following a task to destroy partisans. However, the findings of the Supreme Court of Lithuania that Mr. Vasiliauskas, when taking genocidal actions, had known the goal of the Soviet regime to eradicate all Lithuanian partisans, was rejected by the ECtHR. Meanwhile, in the *Drelingas* case, ECtHR concluded that national courts brought clarifications of the need to establish the intent. As explained by the Supreme Court of Lithuania, "given the applicant's background in the KGB, the international legal instruments prohibiting genocide (as well as complicity in committing genocide) and providing for criminal liability for genocide must have been known to him."

Conclusion

During the Soviet occupation (1940-1941 and 1944-1990) Lithuania lost 1/5 of its population and, since 1990, the question of the legal evaluation of various Soviet repressions entered its national and the European legal agenda. In the first case regarding this issue (*Vasiliauskas v. Lithuania*, 2015), the European Court of Human Rights in France was not convinced that Lithuanian partisans, who had resisted Soviet rule for almost a decade, were subject to the crime of genocide. However, in March 2019, ECtHR promulgated a decision in the case of *Drelingas v. Lithuania,* which may challenge the definition of genocide established in the 1948 UNCG, as it approved the judgment of Lithuanian domestic courts, where partisans were recognized as the significant part of Lithuanian nation, therefore, systematic killing of them was genocide of Lithuanian nation in part.

The implications of the ECtHR judgment in the *Drelingas* case are fundamental. For the first time, an international judicial institution has recognized genocide in Lithuania by the Soviet regime. This also provokes to resume the long lasting discussion about the scope of the crime of genocide among international scholars. However, more importantly, the legal arguments of the *Drelingas* case, empower to challenge ongoing efforts to whitewash the Soviet history of brutal and massive repressions in the former Soviet occupied nations. The judgment in the *Drelingas* case also serves to give at least symbolic justice to the victims of Soviet genocide, as well as keeping these issues in the public eye in the West.

Yet, another major debate, which concerned the retroactive conviction for Soviet genocide, was addressed only fragmentary in dissenting opinions delivered by some ECtHR judges arguing the foreseeability of genocide in part, as well as the punishment for the complicity in genocide. While some confusion can be disarmed by historical and legal analysis, the final decision on the retroactivity of genocide is still lagging.