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Vasiliauskas vs. Lithuania: Battle lost in the war to come?☆



Justinas Žilinskas

Mykolas Romeris University, Lithuania

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ABSTRACT

The present article comments on case *Vasiliauskas vs. Lithuania* in which European Court of Human Rights has found Lithuania in breach of European Convention on Human Rights, Article 7. In this case Lithuania retroactively applied broadened definition of genocide embedded in the national law. Such definition was created with the aim to prosecute persons that carried out soviet repressions in Soviet Union occupied Lithuania after World War Two. However, the ECHR judgement was adopted only by minimal margin, and the dissenting opinions were numerous with criticism upon majority that it chose too formal way and failed to address the justice that soviet repression victims are still craving. Nevertheless, the majority decision could not be easily dismissed neither by Lithuania, nor by any other country that is facing the same historical trend therefore it is necessary to consider what steps Lithuania shall take and how to make it in line with Vasiliauskas decision.

1. Introduction: stories

Events of the Second World War were harsh here, in the Baltic. Nazis occupation was not the one and only evil here. There are many stories to be told about atrocities during Soviet occupation – stories of villages burned and homesteads destroyed. Stories of families deported, when men were separated from their wives and children never to be seen again. Stories, that finally made their way to international best sellers lists as Rūta Šepetyš “Between Shades of Grey”.

But everyone here has his own personal story. My story comes from my mother’s family. There is nothing really horrible in it, it’s one of the thousands stories alike, but to me it seems as a kind of signatory, kind of capturing the *zeitgeist*. Here it goes: my grandfather from mother’s side was an ordinary farmer. One day to his house came soviet officers (so-called “stribai”, from russian word - destroyers) and said: we know, that you are hiding forest-men (this was nickname of anti-soviet partisans), now we are going to tear out the floor to find the bunker. My grandfather said: “Go on. And if you will find anything – you can shoot me on a spot”. He was not a member of the resistance, he just tried to live his life and save his family. But the answer what he got was: “No, we would not shoot you. First of all we will torture you”.

Why have I started from this story? Perhaps, just to show in what historic and emotional layout the European Court of Human Rights stepped in while dealing with the case Vasiliauskas vs. Lithuania (*Lithuania & Vasiliauskas, 2015*).

2. Vasiliauskas vs. Lithuania: in and around

The defendant Vasiliauskas was an operative of MGB (*Ministerstvo gosudarstvennoj bezopasnosti* or State’s Security Ministry,

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E-mail address: j.zilinskas@mruni.eu.

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later on this institution was renamed to well-known KGB). This soviet's repressive institution was engaged in repressions against anyone, who was not accepting Lithuania's re-occupation back in 1944, when soviets drove away the nazis; or simply anyone who was regarded by the soviet regime as an "enemy". As perhaps we all know there was not even a necessity to show open animosity, it was enough that you are designated as such on "objective terms" as kulak, bourgeois nationalist, trockist, etc. (Harendt, 1976, p. 424). Vasiliauskas joined MGB in 1952. One his main function as MGB operative was the extermination armed anti-soviet resistance that was still present despite of years of occupation. In 1953 Vasiliauskas participated in one "operation" where he killed (or at least participated in joint effort to kill) two partisans. For this successful operation he was shortly after decorated, accepted into Communist party ranks, finally, he had successful carrier in KGB. After restoration of Lithuania's independence back in 1990, Vasiliauskas was charged by the prosecution for genocide in 2001 and found guilty in 2004. The Appeals and Supreme Court upheld the verdict in 2005 (Vasiliauskas & Lithuania, 2015, paras. 15–47). Vasiliauskas case not only went through all the instances of the domestic courts and landed in ECHR. Because of this case the Constitutional Court of Lithuania had to analyse the domestic regulation of the crime of genocide. Finally the case was heard by the Grand Chamber of the Court in 2013 and in 2015 finally came the judgement: breach of the article 7 of ECHR, 9 votes to 8, i.e. by narrow margin.

Those who followed closely must have spotted the point: Vasiliauskas was found guilty for *genocide* when he killed not a civilians, but two armed partisans who resisted the capture. After the restoration of Independence, Lithuania took the approach that soviet policy in occupied territories was genocide. Such notion was directly embedded in the special law on genocide ([Law on the Genocide of inhabitants of Lithuania, 1992](#)), which later was transferred into Criminal Code. However, soon prosecution was faced with not-so-friendly reality: the limited scope of 1948 Genocide convention, that provided for limited protected groups lists: national, ethnic, racial, religious in its Article 2 ([Convention on the Prevention & Punishment of Genocide, 1948](#)). The problem rested of course in the fact that soviet mass-atrocities bear social, or a class-struggle (as by Marx) element. Soviets rarely were directing their efforts against nationalities as such (though there were such instances as deportations *in toto* of Chechens, Ingushs, Crimea tatars, etc. (Williams, (2000), p. 101–134)), but first of all soviets were getting rid of those of "upper classes" (whatever it may include) of newly occupied territories. Faced by that, and evident difficulties to prove that soviet policy was directed against Lithuanians as a nation, Lithuania lawmakers did not hesitated long – they simply introduced in our criminal code two additional groups that can become a target for genocide: political and social ([Criminal Code of Lithuania, 2000](#)).

This threw the discussion back to the early days of genocide definition, started by Polish – American jurist Raphael Lemkin: should we consider politically motivated mass-crimes as genocide? Lemkin's answer was in affirmative – for him personally Holodomor (artificial famine, orchestrated by soviets) in Ukraine and Kazakhstan, repressions against balts was also the genocide (Wendt, 2005, p. 551–559). UN's answer initially in 1946 was also alike in the [United Nations General Assembly Resolution \(1946\)](#), however, when the final version of 1948 convention on genocide came into being, the big powers managed to get rid of political groups (Schabas, 2000, p. 211). Any other attempts to expand the list of genocide groups internationally were unsuccessful.

It must be said that extended definition of genocide in national jurisdictions in the 2000 was gaining a momentum (Schabas, 2000, p. 141–142, Vasiliauskas v. Lithuania, para. 174). But the problem was that Lithuania applied this extended definition retroactively. Instead of the considerations to qualify Vasiliauskas action as other crime (i.e. crime of war or crimes against humanity) both the prosecution and the courts upheld the line that Vasiliauskas committed an act of genocide against political group, even though the appeal's court made an attempt to connect it with the national group for the first time describing political group as a part of national group (Lithuania & Vasiliauskas, 2015, para. 36). This showed that domestic courts started to feel the need to substantiate responsibility for genocide not only by national law but by the international law as well.

The Constitution Court of Lithuania first of all took up the matter. After thorough deliberations, the court finally ruled that it would be a breach of Constitution just simply to apply social/political genocide retroactively. However, if there is a prove that political/social group under destruction can be considered as a significant part of national or other genocide-protected group, it is possible to apply genocide of political and social groups even retroactively (Lithuania & Vasiliauskas, 2015, para. 59, [Decision of Constitutional Court of Lithuania, 2014](#)). Basically, Constitutional Court followed the appeal's court approach while trying to find a way around and to reconcile national sentiments and the international law.

However, when case turned to the ECHR, the majority of the Grand Chamber was impressed neither with Lithuanian courts, nor with Constitutional Court decision. The Grand Chambers judgement can be summed up to the following points:

- 1) The Court was not satisfied with Lithuanian position, in part presented by prof. Schabas himself, that in 1953 existed customary definition of genocide that is wider then the one established in 1948 Convention (Lithuania & Vasiliauskas, 2015, paras. 175, 178);
- 2) The Court considers that interpretation "in part" that was presented Appeals Court and Constitutional Court, even though supported by the international practice, is a late development in international law and cannot be foreseen in 1953 by the defendant (Lithuania & Vasiliauskas, 2015, paras. 180–181);
- 3) Government and courts failed to prove that understanding of significance of the targeted group (i.e. destruction of the group "in part"), whatever the motives, can be attached to the Lithuanian partisans (in its own words "there is no firm finding in the establishment of the facts by the domestic criminal courts to enable the Court to assess on which basis the domestic courts concluded that in 1953 the Lithuanian partisans constituted a significant part of the national group, in other words, a group protected under Article II of the Genocide Convention.") (Lithuania & Vasiliauskas, 2015, para. 181).

3. Roaring dissent

As it was mentioned, the judgement was adopted by the minimal margin: 9 to 8, and was followed by a number of separate and dissenting opinions. The dissents in volume almost were equal to the judgement.

The joint dissenters (judges Villiger, Power-Forde, Pinto de Albuquerque, Kūris) claimed that the Court looked at the case too formalistically, it did not take into account historical circumstances, it viewed the partisans exclusively through the prism of a political group, moreover, it disregarded the significance of this groups towards a whole Lithuanian nation. It stated “*We cannot accept that a protected group (a nation) which defends itself against the destruction of its very fabric though the mobilisation of a resistance movement suddenly, by that act of resistance, transforms itself solely into a ‘political group’, thus placing itself outside the terms of the Genocide Convention. This would be to interpret both the Genocide Convention and Convention’s provisions in an overly formalistic manner and in a spirit inconsistent with their purpose.*” (Vasiliauskas & Lithuania, 2015, Joint Dissenting Opinion Of Judges Villiger, Power-Forde, Pinto De Albuquerque And Kūris, p. 68–82).

Judge Ziemele from Latvia in her separate opinion also contested the majority view that Lithuanian courts as well as Government used “in part” interpretation that was developed much later than the acts of the accused happened. She stated “*On the contrary, the ICJ traces very carefully the intent of the drafters of the Convention, which predates the events in Lithuania. It states that it determined certain matters of principle in 1951 which were “recalled” in 2007. The ICJ interprets Article II of the Convention as it was adopted in 1948. I take the position that the ICJ’s case law is the appropriate authority for our Court as concerns the understanding of the scope and content of the relevant concepts in Article II.*”, i.e. she claims that “in part” interpretation, presented in the ICJ and subsequently ICTY cases, had nothing to do with contemporary reading, it was not a new findings or developments as such (Lithuania & Vasiliauskas, 2015, Dissenting Opinion Of Judge Ziemele, p. 83–92).

Judge Kūris (Lithuanian judge) was surprised that the majority wanted to find historical treatise in decisions of Lithuanian courts (proving the significant role of partisans role in nation’s history), but it is not the function of the court and the Court never asked for that previously (Lithuania & Vasiliauskas, 2015, Dissenting Opinion Of Judge Kūris, p. 95–98). Judge Power-Forde from Ireland crafted a short dissent were she nailed majority for a being over formalistic and missing the chance to give soviet era a proper name (Lithuania & Vasiliauskas, 2015, Dissenting Opinion Of Judge Power-Forde, p. 94). Judges Sajo, Vučinič and Turkovič considered that Constitutional Court of Lithuania made a remedy available for the applicant to use, therefore application shall be dismissed (Lithuania & Vasiliauskas, 2015, Dissenting Opinion Of Judges Sajo, Vučinič And Turkovič, p. 93).

Honestly, the experience after the reading of this case was something like a novel: not only law, but also a lot of emotions, feelings, appeals, etc. Strict, formalistic approach of the majority and passionate dissents, even with poetry quotes (as in Judge Kūris dissenting opinion).

4. Discussion

Perhaps, one of the biggest problems while dealing with this case is the context. As it was mentioned in the beginning, Soviet occupation of the Baltic states, inhumane Soviet policy as such all-over the lands in Soviet control from the very formation of this non-human state has not been redressed in international law - because of historic circumstances. Therefore every such process is still regarded as a kind of battlefield between justice and injustice, and from nowadays point of view – between democracy traditions and nowadays Russia’s expansionism reborn (it is easy to see this trend in “third party”, i.e. Russian Federation submissions that represents Soviet Unions and nowadays Russia view (Lithuania & Vasiliauskas, 2015, paras. 147–152)). As judge Kūris pointed out “Courts in their ivory towers deal with law. But not only that. More importantly, they deal with human justice” (Lithuania & Vasiliauskas, 2015, Dissenting Opinion Of Judge Kūris, p. 97).

It shall be pointed out that this is not the first case when soviet officers are indicted of international law based crimes in post-soviet countries, including the genocide. There were criminal proceedings also on the other crimes such as specific war crimes (i.e. deportation of population) and crimes against humanity. However, this is the first case on soviet genocide that has reached Strasbourg. There is also not the first instance when ECHR was dealing with the case related to the Second World War events in the Baltic – the famous *Kononov vs. Latvia* case (Kononov & Latvia, 2010), numerous times referred in the judgement, caused no less emotions than the current one. However, the emotions stirred here in the Baltics and partly in Russia, for outer world, even Western Europe, it still remained more or less unknown.

As it was mentioned before, the Judgement stated that it was impossible for the Court to asses, “on which basis the domestic courts concluded that in 1953 the Lithuanian partisans constituted a significant part of the national group, in other words, a group protected under Article II of the Genocide Convention” (para. 181). Dissenters were puzzled, what was not enough for the Court, having in mind that the Government (as well as Constitutional Court previously) devoted a lot of space to prove this significance (Lithuania & Vasiliauskas, 2015, Joint Dissenting Opinion Of Judges Villiger, Power-Forde, Pinto De Albuquerque And Kūris, p. 77, Dissenting Opinion of Judge Ziemele, para. 13, p. 87). However, there is an issue that seems to be overlooked both by the majority and the dissenters. If domestic courts would have “adequately” proved this significance, would it change the final majority’s decision? It seems, that the judgement first of all was based on foreseeability of the action, committed by Vasiliauskas as genocide. Therefore, the first question has to be “would Vasiliauskas have been able to asses the partisans as significant part of national group? ”, i.e. the request should have been connected not with the coherence of domestic court’s arguments, but with Vasiliauskas *mens rea*. Second, the Court already characterised the “significance of the part” criteria as recently developed (Lithuania & Vasiliauskas, 2015, para. 178); therefore Vasiliauskas still would be considered unable to foresee his action, it would not change the previous argument. It seems that in this particular instance the Court tried to shift the blame on domestic courts without relying on its own arguments.

It is hard to disagree with judge Ziemele's dissent regarding Judgement's interpretation "in part" (Lithuania & Vasiliauskas, 2015, Dissenting Opinion of Judge Ziemele, p. 86), where the Majority argued that qualitative criteria of "in part" appeared later in international law than the acts committed by Vasiliauskas (Lithuania & Vasiliauskas, 2015, paras. 176–177). Judgement has built its argument mainly on insufficient case law, however, if one should take a look at the history, the qualitative criteria would be at hand, e.g. Armenian genocide in Ottoman Empire started with mass-killings of prominent Armenian public figures and intellectuals (See Kévorkian, 2011, pp. 265–613), Raphael Lemkin was not just aware of those killings, he investigated it (Kifner, 2016). Moreover, the Judgement itself only refers to subsequent court practice (Lithuania & Vasiliauskas, 2015, para. 177) without evaluating such practice from the point of view of customary international law. Such evaluation would be necessary if those instruments have altered Article II of Genocide convention where the requirement "in part" is embedded.

It is also quite disappointing that ECHR while analysing the case did not take into account that "conflict parties" in Vasiliauskas case circumstances were treated on unequal footing: it was numerous times emphasized in dissent and Government's position, that soviets denied anti-soviet partisans any rights accorded by the law of war, it also meant that after giving up to the enemy, they will face torture, death, or slave labour camp for 25 years (if lucky). It is ironic that it would be easier to indict soviet officers with misbehaviour like torture after partisan was captured as a war crime than of genocide when the operations for "extermination" (this is original wording of the soviets!) were performed. Even if we would refer to post war anti-nazi justice, like famous Nuremberg's Hostages case that provided for very grim and non-beneficial treatment of resistance fighters (See Wilhem List and Others, 1949), soviets even does not considered such option towards anti-soviet resistance members in the Baltic, Ukraine or Poland. This point of view is also interesting to refer to the soviet quasi-concept of "just war" which totally in line with Hannas Arendt revelation about the totalitarian regimes where she noted "Nazi law treated the whole world as falling potentially under its jurisdiction" (Arendt, 1976, p. 416), under soviet ideology the only just wars were wars waged with the aim to establish "peoples rule" (Kulski, 1951, p. 347–349).

Kai Ambos while analysing Vasiliauskas case expressed an opinion supporting Majority's decision that it would be against principle of legality to let the political group into Genocide convention through the back-door as he characterised the approach to "in part" element by the dissenters and the Government (Ambos, 2015). However, such approach brings us back to the times of Convention's drafting and is pointing to the same flaw that Genocide convention had in 1948.

These flaws are deeply rooted, and perhaps the efforts must be directed towards the future, not the past to change it. Vasiliauskas case pointed at this flaw very clearly: political affiliation of the victim and even the very fact of armed resistance can make you non-protected by the genocide convention even if your group is at stake. Perhaps it would not be a problem if national/ethnic/religious element would be crystal-clear like it was in the Holocaust, but in the case of "part of the group" it poses a significant problem. Let's imagine, that Srebrenica massacre would have happened not *en masse*, but the same people were killed in a longer time span, one by one, coming to the same result. The Genocide convention's protection will be gone, especially if the victims had been able to resist at the moment of killing.

5. Lithuanian perspective

Finally, after Vasiliauskas decision Lithuania shall answer the question what to do with all the cases related to the soviet crimes prosecutions that are indicted under genocide. The judgements of ECHR shall be enforced by the national states, notwithstanding the margin of majority. However, a few very important lessons, I suppose, must be learn for national jurisdictions dealing with soviet legacy.

Despite of my sympathies with dissent, perhaps there is a need to requalify it into war crimes (where is possible) and crimes against humanity.

One may ask can we speak about crimes against humanity (CAH) when we are dealing with partisans - persons who are not civilians and who were resisting enemy by force? In some contrast to the definition of Crimes Against Humanity that was established in ICC statute's Article 7 (Rome Statute of International Criminal Court, 1998), initially Crimes Against Humanity back in 1945 were constructed as double-sided crime: on the one hand its against civilians, on the other – it is persecution without references to the status of the victim (Lithuania & Vasiliauskas, 2015, para. 143) (nowadays such construction is very logic in the case of non international armed conflict, when civilian/combatant status is not so clearly separated as in international armed conflict). CAH was already in place in 1945, International Military Tribunal and post-Nurember trials already provided important jurisprudence. Even if in International Military Tribunal statute there was an element that the crimes must be committed in connection with war crime or crime of peace, even if ECHR at all costs tries to avoid the term "occupation" towards the Baltic States (that's another controversial issue), it is more convenient to address soviet repressions. It was also supported by ICTY practice and perhaps the most important – Barbie case that dealt with the Second World War events (Lithuania & Vasiliauskas, 2015, para. 111).

Extermination of partisans to my mind can fall with ambit of crimes against humanity under persecution easier than to prove "significance" of political group to the national group. Moreover, one should bear in mind that soviet repressions were directed not only towards the partisans, but towards a bigger part of society as well, partisans in fact constituted just a minor part of those repressed, and not all repressed were partisan supporters. Soviets as any totalitarian regime were choosing collective designation for enemies, not the individual ones.

And, in dissent to judge Kūris position, I still consider that national courts that are dealing with the crimes that has basis in international law must give a lot more attention to international law than they do now. Yes, historic treatise is not a court's matter, but historic explanations, data, research is necessary to substantiate legal arguments.

6. Conclusion

Vasiliauskas case judgement by ECHR in Lithuania was not met as a defeat, more likely like a battle lost because of Lithuania's own clumsiness (not enough factual material) and Court's "misunderstanding" of the context. Strong dissent supported this approach and even in the newest cases Supreme Court of Lithuania continued to uphold genocide charges in the case of capturing partisan's leadership and their supporters that later were tortured and executed or repressed.¹ Perhaps it means that more cases on the same matter will come to ECHR. That is why I think Lithuania need to show more flexibility in qualifying soviet crimes by invoking different instruments, not just genocide; or another lost case is very much likely to happen.

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¹ Lietuvos Aukščiausiasis Teismas, Baudžiamoji byla Nr. 2K-P-18–648/2016.