ARTICLES

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THE CRIME OF GENOCIDE AGAINST THE LITHUANIAN PARTISANS: A DIALOGUE BETWEEN THE COUNCIL OF EUROPE AND THE LITHUANIAN COURTS

NIKA BRUSKINA*

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ABSTRACT: The *Article* begins with a historical background and an overview of the earlier case-law of the Lithuanian courts which concluded that certain individuals' acts directed against the Lithuanian partisans as a "separate political group" during the Soviet occupation regime could be qualified as a crime of genocide. Second, the *Article* analyses two relevant decisions – the ruling of the Constitutional Court of Lithuania of 18 March 2014 and the judgment of the Grand Chamber of the European Court of Human Rights of 20 October 2015 in the case of *Vasiliauskas v. Lithuania* (judgment of 20 October 2015, no. 35343/05). Third, the *Article* argues that in light of the reasoning in these two decisions, the Lithuanian courts modified their argumentation as regards the notion of a protected group under the crime of genocide that was done during the Soviet occupation. The *Article* notes that such a change of the case law of the domestic courts was positively assessed by the Committee of Ministers of the Council of Europe and the European Court of Human Rights in its judgment of 12 March 2019

* Assistant Professor (PhD), Vilnius University (Lithuania), niktory@gmail.com. The Author thanks Dr Grażyna Baranowska and Dr León Castellanos-Jankiewicz for their comments on the draft of this *Article*.

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in the *Drėlingas v. Lithuania* case (no. 28859/16). The *Article* concludes that this modified argumentation of the Lithuanian courts demonstrates the existence of effective dialogue between the Council of Europe and the domestic courts of Lithuania as well as their ambition to ensure the rule of law is respected while putting the individuals on trial for their crimes committed in the past.

KEYWORDS: genocide – partisans – Soviet occupation – Convention for the Protection of Human Rights and Fundamental Freedoms – European Court of Human Rights – non-retroactivity of criminal law.

I. INTRODUCTION

After the Baltic States were occupied, the Soviet policy was to eliminate the members of the national resistance to the Soviet occupation in the 1940s-1950s – i.e. the partisans and their supporters. The criminal prosecutions against the Soviet officials with respect to the crimes committed against the partisans and their supporters took place in all three Baltic States since the 1990s after those three States restored their independence.[1] However, it seems that only the practice of the Republic of Lithuania was consistent as regards the qualification as genocide of the acts of the Soviet officials against the Lithuanian partisans and their supporters.[2]

The evaluation of the role of the Lithuanian partisans and the qualification of the acts against the Lithuanian partisans as genocide has been a matter of controversy and debate. Such prosecutions raised certain doubts among scholars and, later, among the domestic courts themselves. To these actors, it was questionable whether such prosecutions were compatible with the *nullum crimen, nulla poena sine lege* principle. It is generally recognized that the maxim *nullum crimen, nulla poena sine lege* (meaning that only the law can define a crime and prescribe a penalty) is one of the fundamental principles of modern criminal law and is an essential element of the rule of law – which requires that State authorities shall act in accordance with the law and the acts of the State authorities shall thus be foreseeable for the individuals.[3] As regards the prosecutions for the crime of

[1] E.-C. PETTAI, *Prosecuting Soviet Genocide: Comparing the Politics of Criminal Justice in the Baltic States*, in *European Politics and Society*, 2017, p. 1 *et seq*. The prosecution of Communist-era crimes committed by Soviet officials has also become a recurring issue in Ukraine. See A. CHERVIASTOVA, *On the Frontline of European Memory Wars: Memory Laws and Policy in Ukraine*, in *European Papers*, Vol. 5, 2020, No 1, www.europeanpapers.eu, p. 119 *et seq.*

[2] D. ŽALIMAS, *Crimes Committed by the Communist Regimes from the Standpoint of International Legislation: Lithuanian Case Study*, in *Conference on the Crimes of Communist Regimes, the Institute for the Study of Totalitarian Regimes*, 2010, Prague, www.ustrcr.cz.

[3] L.-A. SICILIANOS, *L'Articulation entre Droit International Humanitaire et Droits de l'Homme dans la Jurisprudence de la Cour Europeenne des Droits de l'Homme*, in *Swiss Review of International and European Law*, 2017, p. 9 *et seq*.; A. RYCHLEWSKA, *The Nullum Crimen Sine Lege Principle in the European Convention of Human Rights: The Actual Scope of Guarantees*, in *Polish Yearbook of International Law*, 2016, p. 163 *et seq*.; T. DE SOUZA DIAS, *Accessibility and Foreseeability in the Application of the Principle of Legality under General International Law: A Time for Revision?*, in *Human Rights Law Review*, 2020, p. 1 *et seq.*

genocide against the Lithuanian partisans, the thrust of the dispute was connected with the scope of the term "protected groups" under the definition of genocide.

A legally binding definition of genocide is embodied in the Convention on the Prevention and Punishment of the Crime of Genocide (hereinafter, Genocide Convention),[4] which was adopted on 9 December 1948. The Genocide Convention entered into force in respect of the Republic of Lithuania on 1 May 1996, i.e. after Lithuania restored its independence, but what is important is that the USSR signed the Genocide Convention on 16 December 1949 and ratified it on 3 May 1954.[5] Therefore, it can be argued that the instrument prohibiting acts of genocide was *accessible* and *foreseeable* to the convicts at the time they committed their acts during the Soviet occupation. However, under Art. 2 of the Genocide Convention, the crime of genocide is committed against certain protected groups or part thereof: a national, ethnical, racial or religious group. In the Genocide Convention the list of protected groups is exhaustive and it does not include any other separate groups like political or social groups.[6] Therefore, some other international or domestic legal source was needed to make such prosecution for the genocide against the partisans – who were held as a separate political group – in accordance with the rule of law. During the Soviet occupation, the Criminal Code of the Lithuanian Soviet Socialist Republic (hereafter, the Lithuanian SSR) of 1961 was applied in the territory of the Republic of Lithuania, but that Code did not define the crime of genocide and thus no criminal liability was established for the genocide at the relevant time. After the independence of Lithuania was restored, the Lithuanian authorities convicted the individuals for the genocide against the partisans as a separate political group by retroactively applying Art. 99 (Genocide) of the Criminal Code of the Republic of Lithuania, as effective as of 1 May 2003 (hereafter, the 2003 Criminal Code or the Lithuanian Criminal Code), to the events occurring in the 1940s-1950s.[7] Indeed, one can

[4] Convention on the Prevention and Punishment of the Crime of Genocide, Paris, 9 December 1948, in *UNTS*, vol. 78, p. 277.

[5] See the list of participants to the Genocide Convention, available at treaties.un.org.

[6] According to Art. 2 of the Genocide 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* (emphasis added), 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" (emphasis added).

[7] Art. 99 (Genocide) of the Criminal Code of the Republic of Lithuania, as effective as of 1 May 2003, stipulates "A person who, seeking to physically destroy, in whole or in part, the persons belonging to any *national, ethnic, racial, religious, social or political group*, organised, was in charge of or participated in their killing, in torturing, in causing bodily harm to them, in hindering their mental development, in their deportation or otherwise inflicted on them the conditions of life bringing about the death of all or a part of them, restricted the birth of the persons belonging to those groups or forcibly transferred their children to other groups, shall be punished by deprivation of freedom from five to twenty years, or by life imprisonment" (emphasis added).

note that Art. 99 of the 2003 Criminal Code, in addition to national, ethnic, racial, and religious groups, also included social and political groups as protected entities. However, as has been already noted, those separate political and social groups were not covered by the definition of genocide at the material time of their commission in the 1940s-1950s. Therefore, the domestic law pursuant to which the Lithuanian prosecutor and the courts put the individuals on trial could not have been foreseeable to the convicted individuals at the time of their involvement in the acts against the partisans. This fact led the European Court of Human Rights to find a violation of Art. 7 of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereafter, the European Convention)[8] in the *Vasiliauskas v. Lithuania* case.[9]

In this connection, it should be recalled that the European Court of Human Rights recognizes that "it is legitimate for a State governed by the rule of law to bring criminal proceedings against persons who have committed crimes under a former regime".[10] Under the universally recognized norms of international law, no statutory limitation for conviction shall be applied to the international crimes,[11] including the crime of genocide as defined under the Genocide Convention. The Court recognizes that imprescriptibility (non-applicability of statutory limitations) of the international crimes is compatible with the European Convention,[12] even if the events took place sixty years ago.[13] However, States must act in compliance with the requirements of Art. 7 (no punishment without law) in doing so.[14] By bringing the criminals to justice, the rule of law must be respected in all cases. As stressed by the Court, Art. 7 prohibits the retrospective application of criminal law to an accused's disadvantage. Art. 7 of the European Convention is not breached when at the time of its commission the criminal offence was clearly defined in written or unwritten form, be it in international or domestic law (even if the domestic law in force at the material time is interpreted and applied in the light of the rule of law

[8] Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols No. 11 and 14, CETS No. 005, Rome, 4 November 1950, entry into force 3 September 1953.

[9] European Court of Human Rights, judgment of 20 October 2015, no. 35343/05, *Vasiliauskas v. Lithuania* [GC].

[10] European Court of Human Rights, judgment of 22 March 2001, nos 34044/96, 35532/97 and 44801/98, *Streletz, Kessler and Krenz v. Germany* [GC], para. 81; decision of 28 June 2001, no. 46362/99, *Glaessner v. Germany*; decision of 21 June 2011, no. 2615/10, *Polednová v. the Czech Republic*.

[11] Convention on the non-applicability of statutory limitations to war crimes and crimes against humanity, adopted by the General Assembly of the United Nations on 26 November 1968, in *UNTS*, vol. 754, p. 73; European Convention on the Non-Applicability of Statutory Limitation to Crimes against Humanity and War Crimes, 25 January 1974, CETS No. 082.

[12] European Court of Human Rights: decision of 29 May 2001, no. 63716/00, *Sawoniuk v. the United Kingdom*; decision of 25 November 2014, no. 45520/04 and 19363/05, *Larionovs v. Latvia and Tess v. Latvia*, para. 151.

[13] European Court of Human Rights, decision of 23 March 2010, no 36586/08, *Sommer v. Italy*.

[14] European Court of Human Rights, judgment of 18 July 2013, nos 2312/08 and 34179/08, *Maktouf and Damjanović v. Bosnia and Herzegovina* [GC], para. 75 and the cases cited therein.

and a democratic regime which were put in place after the repressive regime during which the crime was committed). The European Court of Human Rights admits that Art. 7 of the European Convention "cannot be read as outlawing the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, *provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen*".[15] However, in every case, that law must be accessible and foreseeable to the convicted person.[16]

Turning to the foreseeability of the law in the Soviet genocide cases, one may find that the case-law of the Lithuanian domestic courts changed in the light of the explanation of the Constitutional Court of Lithuania of 18 March 2014 and, in particular, after the judgment of the European Court of Human Rights in the above-mentioned *Vasiliauskas* case. The Republic of Lithuania succeeded in demonstrating before the Committee of Ministers of the Council of Europe as well as once again before the European Court of Human Rights (in the *Drėlingas v. Lithuania* case)[17] that the conviction and punishment for the crime of genocide against the Lithuanian partisans during the Soviet occupation did not violate the principle of the rule of law as embodied in Art. 7 of the European Convention. The conviction for genocide was consistent with the essence of the criminal offence of genocide and could reasonably have been foreseen by the convicts at the time the alleged crimes were committed. In particular, the extensive historical background that was provided by the domestic courts in those cases showed that at the time of the commission of the crime the convicts could foresee that they could be punished for the genocide against the partisans as significant part of the Lithuanian nation. In other words, the Lithuanian courts held that it was the genocide against part of the national ethnic group protected under the Genocide Convention which was in force in the Soviet Union at the material time. The key to the success of the Lithuanian authorities in obtaining the convictions was thorough application of the guidelines provided by the Constitutional Court of Lithuania and the European Court of Human Rights in the aforementioned *Vasiliauskas* case.

[15] European Court of Human Rights: judgment of 12 July 2007, no. 74613/01, *Jorgic v. Germany*, para. 101 (emphasis added); judgment of 19 September 2008, no. 9174/02, *Korbely v. Hungary* [GC], para. 71; judgment of 17 May 2010, no. 36376/04, *Kononov v. Latvia* [GC], para. 185; see also Guide on Article 7 of the European Convention Human Rights – No punishment without law, updated on 31 December 2019, www.echr.coe.int.

[16] European Court of Human Rights: judgment of 22 November 1995, no. 20166/92, *S.W. v. the United Kingdom,* paras 34-36; judgment of 22 March 2001, nos 34044/96, 35532/97 and 44801/98, *Streletz, Kessler and Krenz v. Germany* [GC]; decision of 17 January 2006, nos 23052/04 and 24018/04, *Kolk & Kislyiy v Estonia*; decision of 24 January 2006, no. 14685/04, *Penart v Estonia*; judgment of 12 July 2007, no. 74613/01; *Jorgic v. Germany,* cit., para. 100; *Korbely v. Hungary* [GC], cit., paras 69-70; *Kononov v. Latvia* [GC], cit., para. 185 and the cases cited therein.

[17] European Court of Human Rights, judgment of 12 March 2019, no. 28859/16, *Drėlingas v. Lithuania*.

II. Historical background

First and foremost, one should start from the historical background. On 15 June 1940 the Soviet army invaded Lithuania. The Government of Lithuania was removed from office. On 3 August 1940 Lithuania was annexed to the Soviet Union. On 22 June 1941 the territory was occupied by Nazi German forces. In July 1944 Soviet rule was re-established in Lithuanian territory. A nation-wide partisan movement began in Lithuania in 1944 and officially lasted until 1953. The members of armed and unarmed resistance were seeking to re-establish independent Lithuania. It has been generally acknowledged that the Lithuanian nation supported the partisans.[18] The anti-Soviet partisan movement in Lithuania was one of the biggest partisan movements in post-World War Two and the biggest in the Baltic States. The Soviet government formed a repressive mechanism – namely, the NKVD (People's Commissariat for Internal Affairs) and the MGB (Ministry of State Security) – in order to suppress the opposition of the Lithuanian nation to the occupation. The partisan movement is highly important for the history of Lithuania. After the independence of Lithuania was restored, on 2 May 1990 the Supreme Council adopted the Law "On Restoring the Rights of Persons Repressed for Resistance Against the Occupational Regimes", which *inter alia* held that "the resistance of the inhabitants of Lithuania to aggression and occupation regimes did not contradict national and international law" and that "the Supreme Council of the Republic of Lithuania assesses the struggle of the participants in the resistance movement as the expression of the nation's right to self-defense".[19] On 23 January 1997 the Lithuanian Parliament adopted the Law on the Status of Participants in Resistance against the Occupations of 1940-90.[20] The Law stipulates that, in the period 1944-1953, armed national resistance (the Lithuanian partisan war) took place in Lithuania against the occupying army of the Soviet Union and the Soviet regime. The Preamble also *inter alia* states that the declaration of the Council of an all-partisan organisation, the Movement of the Struggle for the Freedom of Lithuania (*Lietuvos laisvės kovos sąjūdis*), of 16 February 1949 expressed the "sovereign will of the nation". The commemoration measures taken by the independent State of Lithuania show the respect for the partisans and their significance for the Lithuanian nation. For instance, by the resolution of the Parliament of 12 March 2009 the partisan Jonas Žemaitis (codename "Vytautas")[21] was recognized as the

[18] See *Vasiliauskas v. Lithuania* [GC], cit., paras 11-14; see also Constitutional Court of the Republic of Lithuania, judgment of 18 March 2014, no. KT11-N4/2014; European Court of Human Rights*, Drėlingas v. Lithuania*, cit., paras 51-52, 100-111.

[19] The Law "On Restoring the Rights of Persons Repressed for Resistance Against the Occupational Regimes".

[20] The Law on the Status of Participants in Resistance against the Occupations of 1940-90.

[21] Jonas Žemaitis was one of the main leaders of the Lithuanian partisans, in February 1949 elected as the chairman of the Presidium of the Council of the Movement of the Struggle for the Freedom of Lithuania, a temporary leader of the defensive forces. Jonas Žemaitis-Vytautas (1909-1954), genocid.lt.

Head of the State.[22] The Parliament, *inter alia* having regard to the fact that 6 March 2018 marked 100 years since the birth of the partisan "Vanagas", stressing the importance of the partisan movement fighting against the Soviet occupation, and seeking to honour "Vanagas", announced that 2018 would be the year of "Adolfas Ramanauskas-Vanagas".[23] The words of the speaker of the Parliament, Viktoras Pranckietis, encapsulate the significance of the partisans in Lithuania in general, and that of "Vanagas" in particular, as regards their historical role: "how much bravery had the fighters for freedom who led us to the independence. The Head of the defensive forces of the Movement of the Struggle for the Freedom of Lithuania Adolfas Ramanauskas-Vanagas through cold, darkness and death, led his nation to the freedom. He was the leader. He was a man of a century".[24]

One may ask why the Soviet acts against the Lithuanian partisans were qualified as genocide, but not as a crime against humanity or a war crime. For example, in Estonia, the killing of the partisans was qualified not as genocide, but as a crime against humanity.[25] There were also suggestions from scholars to qualify Soviet regime crimes against the Lithuanian partisans as crimes against humanity or war crimes.[26] It seems that qualification of the participation in the killing of the partisans during the Soviet occupation of Estonia as crime against humanity did not pose a problem in the European Court of Human Rights. In fact, the European Court upheld the conclusion of the Estonian courts that such acts constituted crimes against humanity under international law at the time of their commission, particularly in light of the Nuremberg Charter (1945), and Resolution No. 95 of the United Nations General Assembly (1946),[27] and therefore established that the finding of criminal responsibility for the crime against humanity of killing the partisans was not a violation of Art. 7 of the European Convention.[28] However, the Lithuanian authorities reserved their own opinion: they have been consistently qualifying the acts of the Soviet officials against the partisans as genocide. As noted by Lithuanian scholar J. Žilinskas,

[22] The resolution of the Parliament of 12 March 2009, recognizing Jonas Žemaitis as the Head of the State of Lithuania.

[23] Resolution no. XIII-739 of the Seimas of the Republic of Lithuania of 16 November 2017.

[24] Speech by the Speaker of the Parliament Viktoras Pranckietis at the solemn commemoration of the Day of Restoration of Independence of Lithuania, press release of 11 March 2018 (translation by the author), www.lrs.lt.

[25] E.-C. Pettai, *Prosecuting Soviet Genocide*, cit., p. 6 *et seq*.

[26] L. Mälksoo, *Soviet Genocide? Communist Mass Deportations in the Baltic States and International Law*, in *Leiden Journal of International Law*, 2001, p. 778 *et seq*.; J. Žilinskas, *Vasiliauskas vs. Lithuania:* Battle Lost in the War to Come?, in *International Comparative Jurisprudence*, 2016, p. 70.

[27] Charter of the International Military Tribunal, annexed to the Agreement by the Government of the United Kingdom of Great Britain and Northern Ireland, the Government of the United States of America, the Provisional Government of the French Republic and the Government of the Union of Soviet Socialist Republics for the prosecution and punishment of the major war criminals of the European Axis, London, 8 August 1945, UNTS, vol. 82, p. 279; General Assembly, Resolution A/RES/95(I) of 11 December 1946, Affirmation of the principles of international law recognized by the Charter of the Nurnberg Tribunal.

[28] European Court of Human Rights, decision of 24 January 2006, no. 14685/04, *Penart v. Estonia.*

it was in fact an expression of political will as well as public opinion to qualify crimes committed by both the Nazi and the Soviet regimes against the Lithuanian residents as genocide.[29] He further explains that a possible reason for a failure of the Lithuanian prosecutors and the courts to qualify the acts as crimes against humanity was a belated introduction of the definition of that crime into the Lithuanian legal system (a definition of a crime that corresponded to the international definition of a crime against humanity was only introduced into the Lithuanian Criminal Code in 2003). Another reason was the position of the authorities when dealing with historical injustices that "genocide" has a stronger impact on public opinion than "crimes against humanity"; the last reason could be the unclear concept of the crime against humanity until the end of twentieth century.[30]

In particular, in their initial decisions, the Lithuanian courts found that the Lithuanian partisans, their contact persons and supporters during the Soviet occupation regime could be held as a "separate political group", i.e. a group of persons united by common political views. All of those persons, the courts found, were against the Soviet occupation regime and were striving for the independent State of Lithuania. The domestic courts determined that such a "separate political group" was protected under the definition of genocide as established under Art. 99 of the 2003 Criminal Code of Lithuania and, accordingly, certain individuals' acts which sought to destroy that separate political group physically and which were enumerated in Art. 99 of the 2003 Criminal Code could be qualified as a crime of genocide under Art. 99 of the 2003 Criminal Code of Lithuania.[31] Some judgments named the Lithuanian partisans and their supporters not as a "separate political group", but as a "separate national-ethnic-political group".[32] Be that as it may, none of those judgments explained the relationship between the concepts of "separate political groups" and "separate national-ethnic-political groups" with any of the groups that were protected under the definition of genocide at the time that the alleged criminal acts were committed. It is evident that such a provision of the domestic law (Art. 99 of the 2003 Criminal Code) was applied retroactively as it was not in force in the 1940s-1950s, i.e. at the time the acts were committed. The domestic courts in their judgments did not refer to the international law or domestic law as in force at the time the alleged acts of the convicted persons were committed. Therefore, the reasoning of the domestic courts as to the non-retroactivity of the criminal law was lacking in those judgments.

[29] J. Žilinskas, *Broadening the Concept of Genocide in Lithuania's Criminal Law and the Principle of Nullum Crimen Sine Lege*, in *Jurisprudence*, 2009, p. 336 *et seq*.

[30] J. Žilinskas, *Broadening the Concept of Genocide*, cit., p. 338 et seq.; J. Žilinskas, *Vasiliauskas vs. Lithuania: Battle lost in the War to Come?,* cit., p. 70 *et seq*.

[31] The Court of Appeal of Lithuania, judgment of 9 January 2009, criminal case no. 1A-21/2009; the Vilnius Regional Court, judgment of 20 January 2012, criminal case no. 1-68-190-2012; the Court of Appeal of Lithuania, judgment of 6 February 2013, criminal case no. 1A-104/2013

[32] The Court of Appeal of Lithuania of 21 December 2011, criminal case no. 1A-177/2011.

The ruling of the Constitutional Court of Lithuania and the judgment of the Grand Chamber of the European Court of Human Rights in the case of *Vasiliauskas v. Lithuania*, which are discussed in the next section, disclose the defects in this case-law of the domestic courts.

III. The ruling of the Constitutional Court of Lithuania of 18 March 2014 and the judgment of the Grand Chamber of the European Court of Human Rights in the case of *Vasiliauskas v. Lithuania*: Their impact on the case-law of the Lithuanian Courts concerning the genocide cases

This section discusses two decisions (the Ruling of the Constitutional Court of Lithuania and the judgment of the European Court of Human Rights) which were highly important for the further development of the case-law of the Lithuanian courts in the Soviet genocide cases.

III.1. The ruling of the Constitutional Court of Lithuania of 18 March 2014 as the first call to review the domestic case-law in the genocide cases

Some domestic courts, examining five criminal cases on the genocide against the partisans, as well as a group of members of the Parliament of the Republic of Lithuania, had doubts as regards *inter alia* the constitutionality of Art. 3, para. 3,[33] and Art. 99 of the 2003 Criminal Code of Lithuania and instituted proceedings before the Constitutional Court requesting an interpretation.

On 18 March 2014, the Constitutional Court *inter alia* recognized that the legal regulation, established in Art. 3, para. 3, of the Criminal Code, to the effect that it permitted to apply retroactive criminal responsibility under Art. 99 of the Criminal Code for the genocide of persons belonging to any social or political group, was in conflict with Art. 31, para. 4, of the Constitution[34] and the constitutional principle of a state under the rule of law. In other words, it was not compatible with the Constitution to bring a person to trial under Art 99 of the 2003 Criminal Code for the actions aimed at physically destroying, in whole or in part, the members of any social or political group, where such actions had been committed before the Lithuanian Criminal Code established criminal responsibility.

The Constitutional Court made a review of the crimes perpetrated by the Soviet totalitarian regime and the scale of the Soviet repressions. The Constitutional Court observed

[33] The 2003 Criminal Code of the Republic of Lithuania. Art. 3. Term of Validity of a Criminal Law "[...] 3. A criminal law establishing the criminality of an act, imposing a more severe penalty upon or otherwise aggravating legal circumstances of the person who has committed the criminal act shall have no retroactive effect. The provisions of this Code establishing liability for genocide (Art. 99) [...] shall constitute an exception."

[34] The Constitution of the Republic of Lithuania, Art. 31: "Punishment may be imposed or applied only on the grounds established by law".

that "according to various data, due to both occupations carried out by the USSR, the Republic of Lithuania lost almost one-fifth of its population". The Constitutional Court, referring to the data presented by the Genocide and Resistance Research Centre of Lithuania, summarized the losses incurred during the period of the Soviet occupation (1940–1941 and 1944–1990), i.e. that, in all, 85.000 residents of the Republic of Lithuania perished or were killed, and around 132.000 residents were deported to the Soviet Union. Among those who perished or were killed, 20.000 were partisans and their supporters (data for 1944–1952), between 35.000 and 37.000 political prisoners perished in special camps and prisons, and around 28.000 deportees perished in exile; up to 130.000 residents of Lithuania were detained and arrested, 32.000 were repressed and transferred to special camps and prisons, around 108.400 were forcibly recruited to the USSR troops in 1944–1945. Finally, during the 1944–1953 guerrilla war against the occupation, all in all, 186.000 people were arrested and imprisoned. Citing the research conducted by historians, the Constitutional Court added that "the crimes against the residents of the Republic of Lithuania were part of the targeted and systematic totalitarian policy pursued by the USSR". The Constitutional Court noted that those repressions were directed against the most active political and social groups of the residents of the Republic of Lithuania: participants in 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 Constitutional Court explained that by means of the repressions, the Soviet occupation regime sought to exterminate, to cause harm and break those people.

The Constitutional Court of Lithuania, having regard to the historical context, including, the aforesaid ideology and policy of the Soviet occupation regime where certain groups of people were eliminated, as well as to the scale of repressions of the USSR against residents of the Republic of Lithuania, concluded that at the time of Soviet mass repressions, the crimes perpetrated by the Soviet occupation regime, "in case of the proof of the existence of a special purpose aimed at destroying, in whole or in part, any national, ethnic, racial or religious group", might be qualified as genocide *inter alia* under the Genocide Convention. The Constitutional Court noted that actions may also be recognized as genocide if they are aimed at destroying certain social or political groups that constitute a significant part of any national, ethnical, racial, or religious group and the destruction of which would have an impact on the respective national, ethnical, racial, or religious group as a whole.

As to the partisans' role, the Constitutional Court of Lithuania observed that according to the laws of the Republic of Lithuania "the organised armed resistance against the Soviet occupation is regarded as self-defence of the State of Lithuania". In light of the international and historical context, the Constitutional Court stressed that the significance of the partisans for the national group (the Lithuanian nation) – the group that is covered by the definition of genocide – shall be taken into consideration while qualify-

ing the acts against partisans as a genocide.[35] Therefore, it was the first time the domestic courts were given the advice as regards the methodology on how to examine the cases of genocide against partisans. The second time was at the international level – the judgment of the European Court of Human Rights in the case of *Vasiliauskas v. Lithuania*, which is discussed in the next section.

III.2. The judgment of the Grand Chamber of the European Court of Human Rights in the *Vasiliauskas v. Lithuania* case as the second call to review the domestic case-law in the genocide cases

In a judgment of 4 February 2004, the Kaunas Regional Court (the first-instance court) found Mr. V. Vasiliauskas guilty of genocide under Art. 99 of the 2003 Criminal Code, as it was proven that the applicant, an operational agent of the LSSR MGB at the relevant time, on 2 January 1953, was participating in the operation during which two partisans were killed. The court of first instance referred to the partisans as members of a political group. Thus, the judgment was restricted to the physical destruction of a separate political group, that of Lithuanian partisans. On 21 September 2004, the Court of Appeal upheld the conviction. Examining whether there was a retroactive application of the Lithuanian Criminal Code, the Court of Appeal noted that holding the Lithuanian partisans (participants in armed resistance to the Soviet occupation regime) as a separate 'political' group, as was done in the trial court's verdict, was not precise. According to the Court of Appeal, the Soviet genocide was carried out precisely on the criteria of the inhabitants' nationality/ethnicity. The domestic appellate court concluded that Lithuanian partisans were representatives of the Lithuanian nation and they could be attributed not only to political, but also to national and ethnic groups, that is to say, to the groups listed in the Genocide Convention in force at the time of commission of the crime. On 22 February 2005 the Supreme Court of Lithuania also upheld the conviction of the applicant Vasiliauskas.[36] Addressing the matter of retroactivity, the Supreme Court of Lithuania noted that the applicant "had been convicted of involvement in the physical extermination of a part of the inhabitants of Lithuania who belonged to a separate political group, that is, Lithuanian partisans – members of the resistance to the Soviet occupying power". The Supreme Court observed that between 1944 and 1953 the "nation's armed resistance – the partisan war – against the USSR's occupying army and structures of the occupying regime was underway in Lithuania." After being convicted by the domestic courts at all three instances, Mr. V. Vasiliauskas lodged his petition with the European Court of Human Rights. Mr. Vasiliauskas, invoking Art. 7 of the European Convention, complained that the wide interpretation of the crime of genocide encompassing the acts against the Lithuanian partisans did not have a basis in the wording of that offence as laid down in public international law at the

[35] The Constitutional Court of the Republic of Lithuania, judgement of 18 March 2014, cit.

[36] The Supreme Court of Lithuania, judgment of 22 February 2005, criminal case no. 2K-158/2005.

material time. The chamber of the European Court of Human Rights to which the case was assigned decided to relinquish jurisdiction in favor of the Grand Chamber of the European Court on the basis of Art. 30 of the Convention.[37]

The Grand Chamber of the European Court of Human Rights decided in the applicant's favour and found a violation of Art. 7 of the European Convention due to a retroactive conviction of the applicant.[38] The European Court of Human Rights thus examined "whether the applicant's conviction for genocide was consistent with the essence of that offence and could reasonably have been foreseen by the applicant at the time of his participation in the operation of 2 January 1953 during which the two partisans, J.A. and A.A., were killed".[39] Although the European Court of Human Rights found that instruments of international law (Resolution 96 (I) of the UN General Assembly of 1946 as well as the Genocide Convention) prohibiting genocide were sufficiently accessible to the applicant,[40] the European Court concluded that Vasiliauskas could not have foreseen at the time of the killing of the partisans that his acts would be qualified as a genocide. The European Court ruled that there was "no sufficiently strong basis for finding that customary international law as it stood in 1953 included 'political groups' among those falling within the definition of genocide". Thereafter, the European Court analysed the provisions of the Genocide Convention, which was in force at the time the applicant was participating in the killing of Lithuanian partisans. The European Court noted that the Court of Appeal of Lithuania held that the partisans, as participants in armed resistance to occupying power, had also been "representatives of the Lithuanian nation, that is, the national group". In this connection, the European Court of Human Rights emphasized that "the Court of Appeal did not explain what the notion 'representatives' entailed. Nor did it provide much historical or factual account as to how the Lithuanian partisans were representing the Lithuanian nation". The European Court of Human Rights found that the reasoning as to the relationship between the Lithuanian partisans to the national group was also lacking in the judgment of the court of the last instance – the Supreme Court of Lithuania.[41] As the later sections of this *Article* demonstrate, para. 181 of the judgment of the Grand Chamber of the European Court of Human Rights in the *Vasiliauskas* case appeared to be vital for the future development of the case-law of the domestic courts in the cases related to the genocide against partisans.

[37] Art. 30 of the European Convention states that "Where a case pending before a Chamber raises a serious question affecting the interpretation of the Convention or the Protocols thereto, or where the resolution of a question before the Chamber might have a result inconsistent with a judgment previously delivered by the Court, the Chamber may, at any time before it has rendered its judgment, relinquish jurisdiction in favour of the Grand Chamber, unless one of the parties to the case objects".

[38] *Vasiliauskas v. Lithuania* [GC], cit.

[39] *Ibid.*, para. 162.

[40] *Ibid*., paras 167-168.

[41] *Ibid*., para. 179.

The Grand Chamber of the European Court then found as follows:

> "The Court has already established that in 1953 political groups were excluded from the definition of genocide under international law [...]. It follows that the prosecutors were precluded from retroactively charging, and the domestic courts from retroactively convicting the applicant for the genocide of Lithuanian partisans, for being part of a political group [...]. Moreover, even if the international courts' subsequent interpretation of the term "in part" was available in 1953, 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 Art. II of the Genocide Convention".[42]

The Grand Chamber of the European Court of Human Rights thus found a violation of Art. 7 of the European Convention by nine votes to eight. Five dissenting opinions were annexed to the judgment of the Grand Chamber, attesting to the challenging task of dealing with the past in judicial decisions.

Indeed, the *Vasiliauskas v. Lithuania* case reflects the relevance of historical facts for establishing criminal responsibility for the crime of genocide. The judgment demonstrates the importance of the need for the knowledge of history and its additional interpretation. In his dissenting opinion, Judge E. Kūris from Lithuania stressed that "a trial is not a university seminar in history, and a judgment is not an encyclopaedia". The domestic courts, which deliver their judgments "in a specific society for the members of that society", must not "explicitly provide "much historical and factual account [...] as to facts which are obvious to that society". "These facts are known to every schoolchild in that society. True, they are not necessarily known in Strasbourg, but in that event this is Strasbourg's problem".[43] Judge E. Kūris held that the significant role of the Lithuanian partisans in the resistance to the Soviet occupation and the survival of the Lithuanian nation were self-evident facts and shall not be proved. Indeed, this separate opinion of the Judge from Lithuania shows the differences between the perception of Lithuanian judges acting within national society and European judges as regards the need for further elaboration of the historical facts in their judgments. It seems that the European Court of Human Rights sought to ensure that the judgments of the domestic courts were as substantiated as possible in order to preclude any sign of a violation of the rule of law and to justify the conclusion that the individual could be charged and convicted for the genocide of part of the national group – the group that was covered by the definition of genocide at the time of commission of the offence.

Pursuant to Art. 46 of the European Convention, the final judgments of the European Court of Human Rights are binding on the Contracting Parties in any case to which they are parties. The Committee of Ministers of the Council of Europe is tasked with the super-

[42] *Ibid.*, para. 181.
[43] *Ibid.*, dissenting opinion of judge Kūris.

vision and execution of those judgments.[44] Therefore, if the European Court of Human Rights finds a violation of the European Convention or the Protocol(s) thereto in the case against a certain State Party, that respondent State has a legal obligation not just to pay the sums awarded by way of just satisfaction under Art. 41 of the European Convention, "but also to select, subject to supervision by the Committee of Ministers, the general and/or, if appropriate, individual measures to be adopted in their domestic legal order to put an end to the violation found by the Court and to redress so far as possible the effects". Be that as it may, the implementation measures chosen by the State Party shall be compatible with the conclusions set out in the judgment of the European Court of Human Rights.[45] In the *Vasiliauskas* case, the Republic of Lithuania implemented properly the individual measures taken to end the violation found by the European Court of Human Rights and put the applicant in the same situation as it was prior to the violation. First, the Government of Lithuania paid the applicant the sums awarded by the European Court of Human Rights.[46] Second, in accordance with the domestic law the Supreme Court of Lithuania reopened the criminal proceedings in the applicant's case and found that Mr. V. Vasiliauskas' conviction for genocide of the Lithuanian partisans had been in breach of Art. 7 of the European Convention and of Art. 31, para. 4, of the Constitution because of the insufficient argumentation of the domestic courts as regards the group against which the acts were committed. As the criminal charges could not be amended due to the death of Mr. Vasiliauskas, therefore, the earlier court decisions whereby Mr. Vasiliauskas had been found guilty of genocide were quashed and the criminal case against Vasiliauskas was discontinued.[47] The next section of this *Article* will discuss one of the main general measures taken by the State seeking to prevent new similar violations. Namely, the case-law of the Lithuanian courts that was modified after the judgment of the European Court of Human Rights in the *Vasiliauskas* case will be examined.

[44] Convention for the Protection of Human Rights and Fundamental Freedoms, cit.

[45] European Court of Human Rights: judgment of 22 June 2004, no. 31443/96, *Broniowski v. Poland* [GC], para. 192; judgment of 17 July 2014, no. 47848/08, *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania* [GC], para. 158; judgment of 6 November 2018, nos 55391/13, 57728/13, 74041/13, *Ramos Nunes de Carvalho e Sá v. Portugal,* para. 222. Committee of Ministers of the Council of Europe, Recommendation No. R (2000) 2 to member states on the re-examination or reopening of certain cases at domestic level following judgements of the European Court of Human Rights of 19 January 2000.

[46] The European Court of Human Rights held that the finding of a violation of Art. 7 of the European Convention constituted in itself sufficient just satisfaction for the non-pecuniary damage sustained by the applicant Vasiliauskas, but the European Court awarded the applicant EUR 10,072 in respect of pecuniary damage – the sum the applicant had paid to the civil claimant (the relative of the killed partisans) in the domestic court proceedings and EUR 2,450 in respect of costs and expenses (*Vasiliauskas v. Lithuania* [GC], cit., paras 192-198).

[47] The Supreme Court of Lithuania, judgment of 27 October 2016, criminal case no. 2A-P-8-788/2016. As regards the overview of the reopening proceedings in the *Vasiliauskas* case, see also European Court of Human Rights, *Drėlingas v. Lithuania*, cit., paras 60-65.

IV. The cases examined by the Lithuanian courts following the ruling of the constitutional court of 18 March 2014 and the judgment of the European Court of Human Rights in the *Vasiliauskas v. Lithuania* case

Even before the ruling of the Constitutional Court of Lithuania and the judgment of the European Court of Human Rights in the *Vasiliauskas* case, one could find the view that political and social groups were included in the definition of genocide in Lithuanian law because these groups closely overlap with national, religious and ethnic groups. The domestic courts were criticized for their failure to make more detailed explanations in their judgments on the relation between these groups and their judgments were therefore inconsistent with the requirements of international law as regards the definition of protected groups under the Genocide Convention.[48] After the judgment of the Grand Chamber of the European Court of Human Rights in the *Vasiliauskas v. Lithuania* case was delivered, both the Lithuanian Prosecutor's Office and the domestic courts understood the aforementioned para. 181 of that judgment as an urge to fill in the gap of the lacking argumentation as regards the notion of the group against which the genocide was committed during the Soviet occupation. Indeed, it seems that besides the ruling of the Constitutional Court of 18 March 2014, para. 181 of the judgment of the Grand Chamber also brought some hope for the domestic courts to evade future violations of Art. 7 of the European Convention in the genocide against partisans cases if the courts provided further explanations as regards the significance of the partisans for the survival of the Lithuanian nation – i.e., the group protected under the Genocide Convention at the time the criminal acts were committed. Therefore, referring to the explanation as given in the ruling of the Constitutional Court of Lithuania of 18 March 2014, and to the judgment of the European Court of Human Rights in the *Vasiliauskas v. Lithuania* case, the Lithuanian courts modified their argumentation in the cases under Art. 99 of the Criminal Code not linking the Lithuanian partisans to a separate political group, but taking instead the wider understanding of the Lithuanian partisans as part of the national and ethnic group that was protected under the international law in the 1950s (at the time the acts against the Lithuanian partisans were committed). In such cases, after the ruling of the Constitutional Court of Lithuania[49] and, in particular, after the judgment of the European Court of Human Rights in the *Vasiliauskas* case,[50] the courts provided extensive argumentation which sought to prove that the person charged with genocide

[48] J. Žilinskas, *Broadening the Concept of Genocide,* cit., p. 343; J. Žilinskas, *Vasiliauskas vs. Lithuania: Battle lost in the War to Come?,* cit., p. 68.

[49] The Court of Appeal of Lithuania, judgment of 20 June 2014, criminal case no. 1A-6/2014; the Supreme Court of Lithuania, judgment of 24 February 2015, criminal case no. 2K-48-222/2015.

[50] The Supreme Court of Lithuania, judgment of 12 April 2016, criminal case no. 2K-P-18-648/2016.

was acting with special intent to physically destroy the Lithuanian partisans as constituting a significant part of the national group.

As mentioned in the previous section of this *Article*, under Art. 46, paras 1 and 2 of the European Convention, the Contracting States shall abide by the final judgments of the European Court of Human Rights in the cases instituted against them. Therefore, after the European Court of Human Rights found a violation of Art. 7 of the European Convention in the *Vasiliauskas v. Lithuania* case, the Government, executing that judgment, informed the Committee of Ministers of the Council of Europe of developments in the case-law of the domestic courts. The Government stated that the principles indicated in the judgment of the European Court of Human Rights in the *Vasiliauskas* case had been taken into account by the domestic courts. The domestic courts were providing extensive explanations as to why the Lithuanian partisans should be regarded as a significant part of the Lithuanian national ethnic group at the material time.[51] The Committee of Ministers decided to close this case in light of the measures taken by the Lithuanian authorities.[52] The only delegation of the Council of Europe which resisted against closure of supervision was the Russian Federation.[53] Therefore, by the closure of the *Vasiliauskas* case the States of the Council of Europe demonstrated tolerance to the position of the Lithuanian authorities as regards the notion of the protected group in genocide cases related to the period of Soviet occupation. Therefore, it was the first victory of the Lithuanian domestic authorities in such genocide cases at the international level. The next section will show that the international judicial institution – the European Court of Human Rights – had also the chance to provide the legal assessment of the evolution of the domestic courts' decisions.

[51] See Action report (05/10/2017) - Communication from Lithuania concerning the case of *Vasiliauskas v. Lithuania* (Application No. 35343/05), hudoc.exec.coe.int.

[52] Committee of Ministers of the Council of Europe, Resolution CM/ResDH(2017)430 Execution of the judgment of the European Court of Human Rights Vasiliauskas against Lithuania of 7 December 2017.

[53] In this regard it may be recalled that the Russian Federation is of the strong view that the Lithuanian partisans were participating in the bandit groups and killing the civilians, thus the acts against the partisans is not a genocide. О планах увековечить в Литве память главаря «лесных братьев» А.Раманаускаса-Ванагаса, из брифинга официального представителя МИД России М.В.Захаровой, in the Ministry of Foreign Affairs of the Russian Federation, 4 October 2018, lithuania.mid.ru; the submissions of the Russian Government, third-party intervener, in *Vasiliauskas v. Lithuania* [GC], cit., paras 147-152; Комментарий Департамента информации и печати МИД России в связи с постановлением Европейского Суда по правам человека по делу «Дрелингас против Литвы», 1839-14-09-2019, in the Ministry of Foreign Affairs of the Russian Federation, 14 September 2019, www.mid.ru. In response, the Republic of Lithuania holds that the aim of such statements by the Russian Federation is "discrediting the Lithuanian armed resistance movement and denying the fact of the Soviet occupation in general". Lithuania's Foreign Ministry summons Russian Ambassador, voices strong protest, in the Ministry of Foreign Affairs of the Republic of Lithuania, 8 October 2018, www.urm.lt.

V. The *Drelingas* case before the European Court of Human Rights as the test for the progress done by the domestic courts

After the judgment of the Grand Chamber of the European Court of Human Rights in the *Vasiliauskas* case, the European Court had the chance to examine one more similar case brought by Mr. Drėlingas. It was very interesting to follow what judgment would be taken in the *Drėlingas* case, in particular, regard being had to the fact the earlier judgment in the case of *Vasiliauskas* had been adopted by the minimal margin: 9 to 8, and had been followed by a number of dissenting opinions, which in volume almost were equal to the judgment.

The applicant – Mr. Drėlingas – was convicted of genocide, under Art. 99 of the Lithuanian Criminal Code. The domestic courts established that as of 1952 Mr. Drėlingas had worked as an operational agent of the MGB (Ministry of State Security), a Soviet repressive structure tasked with suppressing the resistance to the Soviet occupation. It was proved that on 11 and 12 October 1956, Mr. Drėlingas had taken part in the operation during which one of the most prominent leaders of the Lithuanian partisans – A. R. "Vanagas" − had been captured together with his wife, B. M. "Vanda", who was also a partisan, seeking to exterminate them physically. After being seized, on 12 October 1956 "Vanagas" and "Vanda" were detained on remand. On 24-25 September 1957 "Vanagas" was sentenced to death penalty by the decision of the Supreme Court of the Lithuanian SSR. On 29 November 1957 "Vanagas" was shot as result of that sentence. On 8 May 1957 by the decision of the Supreme Court of the LSSR "Vanda" was deported to Siberia for the period of 8 years.

By the final judgment of 12 April 2016, delivered by the Plenary Session of the Criminal Chamber of the Supreme Court of Lithuania (17 Judges) in the criminal case[54] the defendant, Mr. Drėlingas, was convicted for the first time already after the judgment of the European Court of Human Rights in the *Vasiliauskas* case. The Supreme Court upheld the decisions of the inferior courts as regards the conviction of Mr. Drėlingas under Art. 99 of the Lithuanian Criminal Code. The Supreme Court, invoking the case-file of the applicant, recalled that, by 1956 − when the crime was committed − the applicant had already been working in the MGB-KGB structures for some years. Mr. Drėlingas was aware of the actions of repressive nature against partisans; he also knew about "Vanagas", as a leader of partisans, and about his absconding. The applicant participated in one out of two detention groups of "Vanagas" and "Vanda". All that proved that at the relevant time he had been aware of the repressive policy of the USSR aimed at the physical extermination of the Lithuanian partisans as significant part of the Lithuanian nation, their contacts and their supporters, as members of a national and ethnic group, and that such acts are regarded as genocide under the international law as well as the

[54] The Supreme Court of Lithuania, judgment of 12 April 2016, criminal case no. 2K-P-18-648/2016.

applicant participated in these acts. The Supreme Court of Lithuania found that the groups and parts of them should be evaluated having regard to the concrete political, social, historic, cultural context as well as the understanding of the defendant. The Supreme Court recalled that the definition of a national and an ethnic group should be linked with the concept of a nation. The first meaning of nation is related to the notion of ethnicity or an ethnic group and means a historically developed community of persons – an ethnic nation with common ethnic, cultural characteristics (origin, language, self-awareness, territory, traditions, etc.). The other meaning of a nation pertains to the notion nation (Latin *natio*) or a modern nation to which, as a formation, the attributes of statehood, nationalism and citizenship are characteristic. Thus, a national group means a historically developed community of people belonging to a certain nation, formed on the basis of the language, territory, socio-economic life, culture, national self-awareness and other common characteristics. The persons belonging to both a national and an ethnic group may be interrelated and a complete delimitation of such groups is not always possible. The genocide can at the same time target a group of persons who belong to several protected groups under the Genocide Convention. The Supreme Court gave particular consideration to the conclusion of the Grand Chamber of the European Court of Human Rights in the aforementioned judgment of *Vasiliauskas v. Lithuania*. The Supreme Court provided an extensive explanation, elaborating upon the elements which had led to the conclusion that the Lithuanian partisans had been "a significant part of the Lithuanian nation as a national and ethnic group". Among other things, the Supreme Court provided an analysis of the generally known legal and historical circumstances of 1940-1956 as regards the scope (massive scale) of the national resistance to the occupational power and the scale of repressions of the Soviet occupational power against the Lithuanian population. The Supreme Court noted that the Soviet repression had been targeted against the most active and prominent part of the Lithuanian nation, defined by the criteria of nationality and ethnicity. Such extermination had the clear goal of having an impact on the demographic situation of the Lithuanian nation, namely, its survival. The Supreme Court found that Lithuanian partisans, their contact persons and their supporters had represented a significant part of the Lithuanian population, as a national and ethnic group, because the partisans had played an essential role when protecting the national identity, culture and national self-awareness of the Lithuanian nation. The domestic court recalled that Lithuanian partisans who had the support of Lithuanian residents implemented the right of the nation to self-defence against occupation and aggression, repressions against the Lithuanians. The Supreme Court concluded that the total number of victim participants of the resistance – Lithuanian partisans, their contact persons and supporters, who were killed or suffered repression, is significant both in absolute terms and considering the number of the total population of Lithuania of that time. The Supreme Court therefore held that such characteristics led to the conclusion that partisans, as a group, were a significant part of a protected –

national and ethnic – group, and that their extermination had therefore constituted genocide, both under Art. 99 of the Lithuanian Criminal Code, and under Art. II of the Genocide Convention. The Supreme Court also recalled that the inferior courts had established the role and activity of both "Vanagas" and "Vanda" – both of them were active participants of resistance to the Soviet occupation, while "Vanagas" was one of the leaders of that resistance.

Mr Drėlingas in his application before the European Court of Human Rights complained that he had been convicted of genocide in breach of Art. 7 of the European Convention. The European Court, again not unanimously, by five votes to two, found that there had been no violation of Art. 7 of the European Convention in that case. Two dissenting opinions of Judges Motoc and Ranzoni were appended to this judgment.[55] If one compares the wording of the Government's observations and the judgment of the European Court in the *Drėlingas* case, one can see that the majority of the Judges of the European Court of Human Rights fully upheld the arguments of the Government in that case.

In the *Drėlingas* case, the European Court of Human Rights noted that the Lithuanian domestic courts at three levels of jurisdiction had thoroughly examined the participation of the applicant in the operation to capture the two partisans. The European Court was satisfied that the domestic courts had examined the historical background and the archive documents regarding the impugned operation. The European Court also agreed that the applicant must have clearly understood that after the capture of the two partisans they would be eliminated. Accordingly, the fact that A.R. "Vanagas" was shot and B.M. "Vanda" deported on the basis of LSSR Supreme Court decisions does not alter or remove the applicant's criminal responsibility for their fate.

The European Court of Human Rights was satisfied with the extensive explanation and reasoning given by the Supreme Court of Lithuania in the *Drėlingas* case that had been carried out in the light of the principles formulated by the Grand Chamber of the European Court in the case of *Vasiliauskas*. The European Court concluded that the Supreme Court of Lithuania had addressed the weakness identified by the European Court in para. 181 of the judgment in the *Vasiliauskas* case, where the European Court had criticized the lack of the historical account given by the domestic courts.

In the judgment in the *Drėlingas* case, the European Court of Human Rights recognized that the ruling of the Constitutional Court had already begun providing a historical context in respect of the partisan movement in Lithuania and its significance for the Lithuanian nation. The European Court agreed that the ruling of the Constitutional Court (delivered before the judgment of the European Court in the case of *Vasiliauskas*) together with the judgment of the European Court in the case of *Vasiliauskas* helped the domestic courts of general jurisdiction to eliminate the problems identified by the European Court before[56].

[55] European Court of Human Rights, *Drėlingas v. Lithuania*, cit.
[56] *Ibid.*, para. 104.

The European Court of Human Rights found that the interpretation of the judgment of the Grand Chamber in the case of *Vasiliauskas* as formulated in the judgment of the Supreme Court in the *Drėlingas* case was "loyal", "taken in good faith in order to comply with Lithuania's international obligations".

What is also interesting is that the European Court of Human Rights, while examining whether the domestic courts properly understood the conclusions of the European Court in the case of *Vasiliauskas*, analysed the examples of the case-law of the domestic courts as presented by the Government in their observations, i.e. judgments adopted by the Lithuanian domestic courts after the European Court's judgment in the *Vasiliauskas v. Lithuania* case. It seems that in such a way the European Court of Human Rights wished to assess in general the case-law after the judgment in the *Vasiliauskas* case. Namely, the European Court, referring to para. 71 of its judgment in the case of *Hutchinson v. the United Kingdom*,[57] agreed with the Lithuanian Government that in the *Drėlingas* case "the Supreme Court drew the necessary conclusions from the Vasiliauskas judgment and, by clarifying the domestic case-law, addressed the cause of the Convention violation".[58] Therefore, the European Court of Human Rights recognized that judicial interpretation of the Lithuanian courts was consistent with the essence of the offence and could reasonably be foreseen by the applicant at the material time. In other words, the European Court agreed that the interpretation of the domestic courts in the applicant's case was consistent with the definition of genocide as it stood at the time the applicant committed his acts (in the 1950s).

Under Art. 44, para. 2, of the European Convention, the judgments of the Chamber (seven judges) of the European Court of Human Rights become final when the parties to the case do not request that the case be referred to the Grand Chamber of the European Court of Human Rights within the period of three months after the date of the judgment, or when the panel of the Grand Chamber rejects the request of the parties/party to refer the case to the Grand Chamber[59]. After the judgment of the Chamber of the European Court was announced, the applicant Mr. Drėlingas requested to refer the case to the Grand Chamber of the European Court. The judgment of the European Court of Human Rights in the *Drėlingas* case became final only on 9 September 2019, when at its meeting of 9 September 2019 the Grand Chamber panel of five judges decided to reject the applicant's request.[60]

[57] European Court of Human Rights, judgment of 17 January 2017, no. 57592/08, *Hutchinson v. UK* [GC].

[58] European Court of Human Rights, *Drėlingas v. Lithuania*, cit., para. 109.

[59] European Convention of Human Rights, Art. 44. "[...] 2. The judgment of a Chamber shall become final (a) when the parties declare that they will not request that the case be referred to the Grand Chamber; or (b) three months after the date of the judgment, if reference of the case to the Grand Chamber has not been requested; or (c) when the panel of the Grand Chamber rejects the request to refer under Article 43".

[60] Grand Chamber Panel's decisions – September 2019. Press Release – Referrals to Grand Chamber, hudoc.echr.coe.int.

The reaction to the judgment of the European Court of Human Rights in the *Drėlingas* case varied. According to T. de Souza Dias, it is questionable whether the interpretation of the Lithuanian domestic courts, that was upheld by the European Court of Human Rights in the *Drėlingas* case, regarding the Lithuanian partisans as a substantive part of the protected group was foreseeable at the material time. However, T. de Souza Dias found it important that the European Court of Human Rights did not depart from its finding in the *Vasiliauskas* case that the definition of genocide could not retroactively cover the separate political group as such.[61] It is recognized that even though the *Vasiliauskas* and *Drėlingas* cases are mainly related to the past and historic crimes, their consequences could be far reaching as regards the interpretation of genocide.[62]

Perhaps, one might admit that besides all the legal criteria, in the *Drėlingas* case, contrary to the *Vasiliauskas* case, the European Court of Human Rights paid more attention to the particular historical context within which the alleged acts of the applicant were committed. As it was stated in the dissenting opinion annexed to the judgment in the case of *Vasiliauskas* "[w]e 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 the Convention's provisions in an overly formalistic manner and in a spirit inconsistent with their purpose."[63] As Judge Kūris pointed out, "Courts in their ivory towers deal with law. But not only that. More importantly, they deal with human justice".[64] Indeed, one may suppose that in the *Drėlingas* case the European Court of Human Rights arrived at the conclusion that there was no violation of Art. 7 of the European Convention as the European Court did not apply the *nullum crimen sine lege* principle strictly, but tried to give respect to the collective memory prevailing in Lithuania as well as to the collective perception of the acts directed against the partisans in Lithuania. In the *Drėlingas* case, the Judges of the European Court of Human Rights shared the understanding of the historical facts with the Lithuanian courts.

Invoking the case-law of the European Court of Human Rights, the scholars conclude that when the acts of the perpetrators violate basic human rights of the other individuals, "core values of human dignity and freedom", the European Court of Human Rights balances the right to foreseeability (the right of the perpetrator – the applicant before the European Court of Human Rights) with the other values guaranteed under the European Convention (the rights of the victims, social justice, etc.). What the European Court of Hu-

[61] T. de Souza Dias, *Accessibility and Foreseeability*, cit., p. 20.

[62] J. Žilinskas, *Drėlingas v. Lithuania (ECHR): Ethno-Political Genocide Confirmed*?, in *EJILTalk!*, 15 April 2019, www.ejiltalk.org.

[63] Joint Dissenting Opinion of Judges Villiger, Power-Forde, Pinto De Albuquerque And Kūris, in *Vasiliauskas v. Lithuania* [GC], cit., para. 16.

[64] Dissenting opinion of Judge Kūris, in *Vasiliauskas v. Lithuania* [GC], cit., para. 8.

man Rights establishes in such cases is whether the judgments of the domestic courts which punish the persons for the crime violate the object and purpose of Art. 7 of the European Convention or not.[65] The judgment of the European Court of Human Rights in the *Drėlingas* case might also be explained by the conclusion made by A. Rychlewska. Namely, the individuals charged with a crime cannot rely on the legal practice of the State authorities which was in force at the time of commission of the crime if that legal practice permitted to violate basic human rights (for example, the right to life) of the other individuals[66]. It thus seems that some of the factors which led the European Court of Human Rights to find no violation of Art. 7 of the European Convention in the *Drėlingas* case could be two factors stressed in the dissenting opinions of the Judges in the *Vasiliauskas* case, namely, the need to fight against impunity for the serious human rights violations and demonstrate deference to the right of the Lithuanian society to their historical truth.[67]

The *Drėlingas* case is also an example of how after the dialogue between the Council of Europe institutions (the Committee of Ministers, the European Court of Human Rights) and the Lithuanian domestic authorities, the "judicial truth" achieved before the European Court of Human Rights was made consistent with the "historical truth" – i.e., as it was pertinently defined by E.C. Pettai, with the "dominant narrative in societal and political discourses of the past".[68]

VI. Conclusion

The judgment of the European Court of Human Rights in the *Drėlingas* case demonstrates that the reasoning of the domestic courts as adopted after the judgment of the European Court in the case of *Vasiliauskas v. Lithuania* and the interpretation of the European Court judgment in the case of *Vasiliauskas* is found to be compatible with the

[65] W. A. Schabas, *Retroactive Application of the Genocide Convention*, in *University of St. Thomas Journal of Law and Public Policy*, 2010, p. 54; A. Rychlewska, *The Nullum Crimen Sine Lege Principle*, cit., p. 180 *et seq*.

[66] A. Rychlewska, *The Nullum Crimen Sine Lege Principle*, cit., p. 183.

[67] See Joint dissenting opinion of Judges Villiger, Power-Forde, Pinto de Albuquerque and Kūris, paras 18, 39; dissenting opinion of Judge Ziemele, paras 26-27 and dissenting opinion of Judge Power-Forde, in *Vasiliauskas v. Lithuania* [GC], cit. K. Ambos stresses that the majority in the *Vasiliauskas* case sought to ensure the rule of law was respected while applying criminal responsibility for the crimes of the past, whereas the main arguments of the dissenting Judges in that case were the fight against impunity and seeking to ensure the effectiveness of the rights guaranteed under the European Convention. K. Ambos criticizes such a view of the minority as it is not the role of the court to establish the historical record, see K. Ambos, *The Crime of Genocide and the Principle of Legality under Article 7 of the European Convention on Human Rights*, in *Human Rights Law Review*, 2017, p. 184 *et seq*. As regards the recognition of collective and social dimension of the investigations and accountability, see also A. M. Panepinto, *The Right to the Truth in International Law: The Significance of Strasbourg's Contributions*, in *Legal Studies*, 2017, p. 18 *et seq*. As regards ideological considerations about the Stalin's policy in the dissenting opinions of the Judges in the *Vasiliauskas* case, see also R. Bercea, A. Mercescu, *Ideology Within and Behind the Decisions of the European Judges*, in *Romanian Journal of Comparative Law*, 2017, p. 155 *et seq*.

[68] As regards the term of "historical truth", see E.-C. Pettai, *Prosecuting Soviet genocide*, cit., p. 11.

European Convention requirements. It was highly important for the domestic courts to receive the endorsement of their reasoning by the European Court of Human Rights.

The genocide cases examined in this *Article* demonstrate that the domestic courts have come a long way in the past years. At the beginning, the Lithuanian courts put the Lithuanian partisans under the cover of a "separate political group" or "separate national-ethnic-political group" under the 2003 Criminal Code of Lithuania. By prosecuting the individuals for the genocide against such a "separate political group", the courts in fact ignored the prohibition of retroactivity of the criminal law to the detriment of the accused. Thereafter, in light of the explanations given by the Constitutional Court of Lithuania, the domestic courts took the right position by stressing that the Lithuanian partisans were not only a separate political group, but also part of the Lithuanian nation, that is part of the protected group under international law (the Genocide Convention) at the time the criminal acts were committed. Lastly, following the principles formulated in the judgment of the Grand Chamber of the European Court of Human Rights in the *Vasiliauskas* case, the Lithuanian courts extended their argumentation by providing detailed historical context in order to demonstrate the close link between the Lithuanian partisans with the Lithuanian nation (the protected national and ethnic group) and the significant role that the Lithuanian partisans played for the survival of that group. These positive developments in the case-law of the domestic courts show the effective dialogue held between the domestic courts and the Council of Europe institutions (the Committee of Ministers and, in particular, the European Court of Human Rights) as well as a strong wish of the domestic courts to fulfil the international legal obligations of the State of Lithuania and at the same time to put an end to the impunity for the past violations. The judgment of the European Court of Human Rights in the case of *Drėlingas v. Lithuania* is important from the legal perspective as it provided the European Court of Human Rights with the possibility to assess whether the rule of law was respected while convicting the Soviet officials for the genocide against the Lithuanian partisans. The *Drėlingas* case is also important historically as it is the first time the international judicial institution has found that implementation of the Soviet repressive policy against the Lithuanian partisans, their contact persons and supporters can amount to the crime of genocide as it was understood under the international law in the 1950s, i.e. at the time that policy was carried out.