Drelingas v. Lithuania (N. 28859/16): The ECtHR acknowledges the Lithuanian Ethno-Political Genocide

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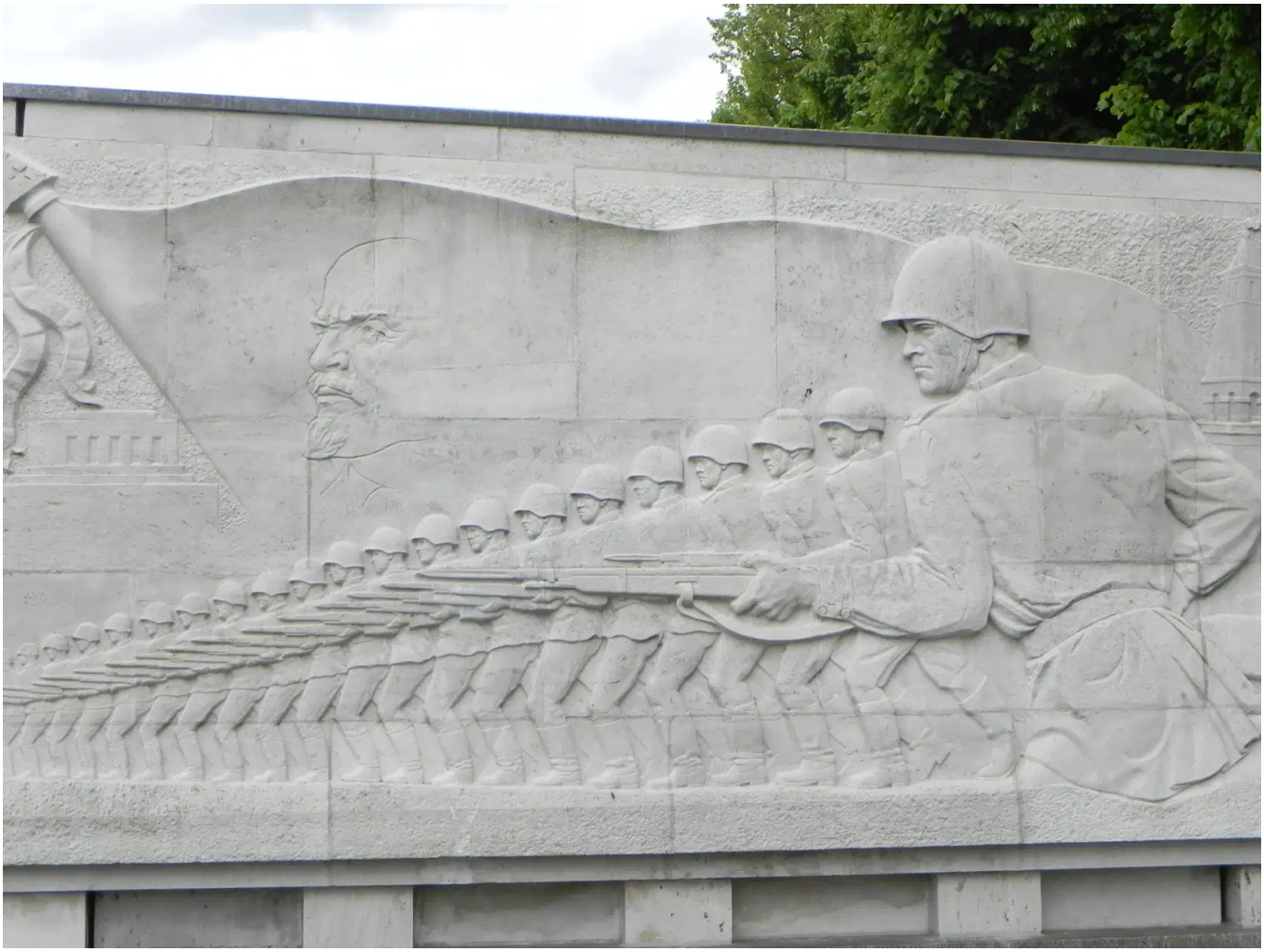

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On 9 September 2019, a Grand Chamber panel of five judges of the European Court of Human Rights (ECtHR) decided to reject the request to refer the case of *Drelingas v. Lithuania*. As a consequence, the judgment of 12 March 2019 – issued by five votes to two – became final. The casefocused on Article 7 ECHR. However, the relevance of the case concerns its impact on the definition of genocide.

The applicant was Stanislovas Drelingas, a former member of MGB/KGB during the Soviet occupation of Lithuania. In 1956 he participated in the arrest of Vanagas, a leader of the Lithuanian anti-Soviet resistance, and his wife Vanda. Vanagas was then tortured and executed, whereas Vanda was deported to Siberia. After the independence, Drelingas was tried in 2014 and convicted as an accessory to genocide under Article 99 of the Lithuanian Criminal Code (CC), which came into force in 2003. This provision expands the list of protected groups provided for under international criminal law since the 1948 Genocide Convention, by also including political groups.

In a previous and analogous case (*Vasiliauskas*), the Lithuanian Constitutional Court was asked to judge upon the constitutionality of the application of Article 99 CC to facts related to the Soviet occupation, in the light of the principle of non-retroactivity. In its ruling of 18 march 2014, the Court affirmed that such an application was not retroactive, because the intention to exterminate a political group had to be considered as the intention to exterminate a significant part of the internationally protected national group, since that part was sufficiently significant to have an impact on the survival of the entire national group (so-called ethno-political genocide.) Such reasoning was based on the 1948 Genocide Convention which establishes the responsibility for genocide even if only a part of the group is targeted. The Constitutional Court interpreted the words "in whole or in part" not in a quantitative – as it seems more coherent with the *travaux préparatoires* – but in a qualitative manner, considering the prominence of the targeted subgroup in relation to the protected group as a whole. This allowed the Court to hold the application of the 2003 provision constitutionally legitimate. Nonetheless, in that same case, the ECtHR refused – by nine votes to eight – such a reasoning and held that there had been a violation of Article 7 ECHR. The Court found that the qualitative interpretation had only materialized as part of subsequent judicial practice and was not foreseeable at the time of the facts[1].

In *Drelingas*, the Fourth Section of the ECtHR reaches the opposite conclusion. Lithuania presented the same argumentation of *Vasiliauskas*,stressing that the liquidation of the Lithuanian partisans was part of a broader genocidial plan of the Soviet Union, which targeted the intelligentsia of the Lithuanian nation (in a three million-size nation, around 20.000 people were killed, more than 200.000 were deported to Gulags or Siberia, where around 50.000 perished.[2]) The Court finds that the Lithuanian Court's finding, that the partisans were "significant for the survival of the entire national group (the Lithuanian nation) as defined by ethnic features, provides plentiful indication of the grounds on which it was based,[3]" whereas the related evidence in *Vasiliauskas* was insufficient. That of the Lithuanian Court was therefore a "a loyal interpretation of the [Strasbourg] Court's [2015] judgment,

taken in good faith in order to comply with Lithuania's international obligations.[4]" Therefore, the Court does not see its decision as an overruling of the *Vasiliauskas* judgment, but rather as a consequence of the different quality of the evidence provided for by Lithuania in order to support its legal reasoning.

Two judges out of seven voted against the majority. Judge Ranzoni points out that the majority avoided to face the issue of the qualitative interpretation of the words "in part"[5]. It is also interesting to notice that among the majority judges we can find Paulo Pinto de Albuquerque and Egidijus Kuris – the latter Lithuanian – who were both dissenting judges in *Vasiliauskas*.

As usual without giving further reasons, the Grand Chamber refused to refer the case. On one hand, this could be seen as an attempt to avoid an explicit conflict, since a Grand Chamber judgment would necessary have needed to deal with the main issue of the relevance of politicide within the definition of genocide. On the other hand, this has led to an historical acknowledgment of the qualification of genocide in relation to the Soviet repression in Lithuania. Till now, Soviet crimes had never received such a qualification before the ECtHR, which led a scholar to wonder whether we could use the emphatic expression "Soviet Nuremberg.[6]" Latvia – in *Kononov* – used the category of crimes against humanity. Lithuania has obtained this acknowledgment without any major public discussion, whereas it is notorious how Poland has been unsuccessfully struggling for decades in order to achieve the same in relation to the Katyn massacre.

This judgment offers food for thought. First of all, by basing the decision on evidence, the majority avoided to face the foreseeability issue, which was the key of the *Vasiliauskas* judgment. Secondly, the judgment raises the more general question on the opportunity to recognize politicide as a form of genocide, whose answer depends on the adopted notion of genocide and whether this should be focused on cultural rather than biological elements. In *Jorgic v. Germany* the Court affirmed that a (broader) cultural definition of genocide could not be considered undisputed at the international level[7]. Thirdly, behind this judgment there is the older discussion about the dangers connected to the genocide "label," provided for by Raphael Lemkin. Considered today as "crime of crimes," genocide has been accused of distorting the criminal prosecution of war crimes and crimes against humanity and of widening the distance between victim and perpetrator groups. Those critics depart from the consideration that today the official judicial acknowledgment as victims of genocide (and not "simply" of crimes against humanity) has gained a central identitarian meaning for many groups. This dispute is as old as the theoretical conflict between Lemkin and Hersch Lauterpacht[8] and it came back to life in relation to the experiences of former Yugoslavia and Latin America. The latter made particularly clear how limited the international definition of genocide was. Judicial attempts to expand that definition also had an impact on national legislations, when many Latin American countries decided to broaden their domestic definitions of genocide, while implementing the Rome Statute of the ICC.[9] Still in relation to Latin American dictatorships, the Spanish judges in the *Pinochet* case[10] and their Argentinian colleagues[11] were the first to use the legal reasoning which considers the political group as a part of the national group.

Today the practical difficulties in bringing evidence in order to establish the genocidial intent, on one hand, and the growing pression of victims' lobbies on (international) criminal justice, on the other, show how easily the category of genocide could influence both the proper

exercise of criminal prosecution and collective memory. There is a high risk of reinforcing old conflicts through 'memory wars.' These in reality have more to do with contingent interests of present time, than with the past they claim to deal with. Did Lithuania need such an official acknowledgment by a Western European Court? Does it have a political meaning in a moment when Russia increases its military presence in the exclave of Kaliningrad? Can this judgment have an effect on the prosecution in other former Soviet states? Surely not in Russia, which has a long list of unimplemented ECtHR's decisions. And lastly, which judgment should prevail in the public opinion: that rendered in 2015 by a Grand Chamber of 17 judges or that rendered in 2019 by a Fourth Section of 7 judges? As it is easy to see, there is a high risk of being caught in the memory traps.[12]

[1] Para. 177.

[2] Justinas Žilinskas, 'Drelingas v. Lithuania (ECHR): Ethno-Political Genocide Confirmed?' (2019).

[3] Para. 105.

[4] Ibidem.

[5] Para. 17.

[6] This provocative expression is taken from the title of Dovile Sagatiene's speech at the conference *Prevention Activism*, Columbia University, New York, 14 December 2019: *European Court of Human Rights – The Soviet Nuremberg or Memory Traps?*

[7] Paras. 10 and ff.

[8] Narrated in the novel Philippe Sands, *East West Street* (Vintage 2017)

[9] For example Ecuador, see Elena Maculan, *Los crímenes internacionales en la jurisprudencia latinoamericana* (Marcial Pons 2019), 61.

[10] Audiencia Nacional, Sala Penal, (173/98), Decision sobre la competencia, 5 November 1998.

[11] Juzgado Nacional en lo Criminal y Correccional Federal n. 4, N. 8686/2000, *Simon, Julio, Del Cerro, Juan Antonio s/sustracciòn de menores de 10 años*, 6 March 2001; Tribunal Oral en lo Criminal Federal n. 1 de La Plata, n. 2251/06, *Etchecolatz, Miguel Osvaldo*, 19 September 2006; Tribunal Oral en lo Criminal Federal n. 1 de La Plata, *Von Wernich, Christian*, 1 November 2007.

[12] Again, this expression is taken from the title of Dovile Sagatiene's speech.

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One thought on “Drelingas v. Lithuania (N. 28859/16): The ECtHR acknowledges the Lithuanian Ethno-Political Genocide”

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1. **El roam says:**
   March 18, 2020 at 6:32 pm
   Important post and issue as well of course. Hell of complications, just worth to mention, the dissenting opinion of judge Ranzoni:

   He claims among others, that, the court, hadn’t reconciled the provisions of the the Genocide Convention, with the conviction of being accessory to genocide. I quote:

   ” The relevant question now is whether the criminal act of being an “accessory to genocide” pursuant to Article 99 in conjunction with Article 24 § 6 of the Lithuanian Criminal Code, as in force from 1 May 2003, was covered by the punishable act of “complicity in genocide” under Article III (e) of the Genocide Convention as interpreted by international law in 1956.”

   End of quotation:

   But, one may argue of course (among others) that it is hard to assert, that conspiracy to commit genocide, or, let alone ” direct and public incitement to commit genocide” or even attempt to commit genocide, would be punishable under the convention, while, actually arresting persons, would go unpunished. This one may argue, is a reasonable interpretation, and even, for reasonable lacuna. Especially, in International law.

   On the other hand, those offenses or, sub offenses mentioned, can be attributed to high ranks officials, rather than, soldiers, in the broader meaning of it. While the applicant, was a low rank one it seems, executing orders. But, order to commit or participate, in genocide, can’t in noway be considered, lawful. It is manifestly, illegal.

   Thanks

   Reply