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THE SOVIET CRACKDOWN ON LITHUANIAN PARTISAN MOVEMENTS (1946–1956) – A GENOCIDE?
BACKGROUND DELIBERATIONS ON THE ECHR JUDGMENT IN *DRĖLINGAS V. LITHUANIA*

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Abstract. The present contribution deals with the question of whether the sufferings inflicted upon the Lithuanian population during the Soviet anti-insurgency and Sovietization campaigns of the 1940s and 1950s amounted to genocide under international law. Proceeding from the factual findings of the ECHR's much-noticed judgments in the cases of *Vasiliauskas v. Lithuania* (2015) and *Drėlingas v. Lithuania* (2019), it is argued that these historical incidents – although constituting a borderline case – did not pass the legal threshold of genocide, neither in terms of "physical genocide" nor under the contested concept of "social" or "cultural genocide". As regards physical genocide, it cannot be sufficiently ascertained that the targeted fraction of the protected group of ethnic Lithuanians reached the numeric threshold of a substantial "part" of the group under the definition of genocide. In view of social/cultural genocide, this article purports that Soviet policy-makers might indeed have acted with the intent to culturally destroy a sufficient part of the group, but lacked the required genocidal motive.

Keywords: genocide, partisan movement, Vasiliauskas v. Lithuania case, Drėlingas v. Lithuania (2019) case.

Introduction

The venture undertaken by international criminal law to capture systemic mass-crimes that "shock the conscience of humanity" (preamble to the ICC Statute) in bald legal terms turns out to be a dispiriting task at times. Already in his opening statement at the Nuremburg Trial against Major War Criminals, chief prosecutor Robert H. Jackson drew attention to a key feature of the newly evolving field of international criminal law, denoting it as "one of the most significant tributes that Power has ever paid to Reason" (*Trial of the Major War Criminals*, 1947, S. 99). Indeed, international criminal law as it stands may well be conceived of as an epitome of *compromise* between power and reason, sovereignty and world-conscience, *realpolitik* and justice. For this reason alone, high hopes and aspirations that international criminal law can in all instances serve as an accurate measuring-device of massive wrongs are doomed to disappointment. Such disappointment is particularly hurtful when traumatic collective experiences of suppression have sunk into the defining narratives of an ethnic or national community and compose an important aspect of its self-perception and identity. In such cases, the wish that the endured suffering be acknowledged before not only the "Tribunal of World-History" (Schiller, 1987, p. 133) but also the Tribunals of World-*Law* is all too understandable, and declining such recognition may even – albeit erroneously – be perceived as an act of secondary victimization. Arguably, the Soviet Union's suppressive campaign against Lithuanian armed and unarmed resistance depicts such a case that was not adequately mirrored by the international criminal law provisions applicable at that time. Accordingly, the ECHR's much noticed *Drėlingas* judgment, along with its earlier, no less notable *Vasiliauskas* judgment, hold all the markings of enflaming passion and dividing minds, which is evidenced not only by a number of dissenting opinions in both cases, but even more so by the fact that

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the ECHR's majority opinion seems to have shifted from a stance of reservation (in *Vasiliauskas*) towards a stance of affirmation (in *Drėlingas*) in regard to labeling these historic events as "genocide".

Leaving aside the peculiarities of both cases, the legal considerations hereinafter shall focus on the broader question of whether the severe Soviet measures taken against parts of the Lithuanian population – partisan group members and others – amounted to genocide if assessed in accordance with the developmental state of international criminal law at that time. Before this core issue can be addressed, however, it seems necessary to adduce the following disclaiming remarks. First, for the purposes of the present text, only the time period between UN General Assembly Resolution 96 (I) of 11 December 1946 (UN-Doc. A/RES/96) and the execution of Adolfas Ramanauskas ("Vanagas") in 1957 shall be taken into account, as the first date marks the first definite expression of an international consensus on the punishability of genocide as a crime under international law, while the second date marks a final decapitalizing blow to the residual structures of the already shattered Lithuanian resistance movement. Second, the scope of genocide under *customary* international law in said time period shall be deemed as being congruent with the scope of genocide as set out by the UN Genocide Convention of 1948 (UN-Doc. A/RES/260(III)), as the latter can be assumed to reflect the universally shared *opinio iuris* of those days. Third, in construing the crime, particular emphasis shall be given to the *trauvaux préparatoires* of the Genocide Convention. For lack of any state practice in applying the freshly coined crime in the early 1950s, let alone relevant international jurisprudence, such a focus seems warranted despite the merely subsidiary role afforded to the preparatory work of international treaties by international legal theory at that time and, subsequently, by Art. 32 of the Vienna Convention on the Law of Treaties (1969). Fourth, the information and translations provided in *Vasilauskas* and *Drėlingas* shall be employed as the only sources in regard to the historical events. Last – and in view of the aforementioned qualifications – it is advised that the observations at hand be regarded as preliminary in nature and only as seeking to add to the debate on potential misinterpretations of the crime of genocide on the part of the courts involved, including the ECHR.

1. Protected group

One major issue of the *Drėlingas* and *Vasiliauskas* cases was to delineate a group under the protection of genocide, as defined in international criminal law at the material time, that was targeted by the stark Sovietization policy and counter-insurgency measures carried out in Lithuania. In particular, dispute revolved around the critical question of whether the members of the Lithuanian insurgency movement which would merge into the LLKS (*Lietuvos laisvės kovos sajūdis*) in 1949 – the all-partisan organization whose goal it was to lead "the nation's political and military struggle for freedom" from Soviet rule (LLKS-Declaration of 16 February 1949, cited at Judgment of *Drėlingas v. Lithuania*, 2019, para. 8) – enjoyed protection as a stand-alone "political group" or, at best, as a mere part of the much larger ethnic or national Lithuanian group (para. 74). Forming a good starting point for the ensuing observations, these questions shall be addressed first.

While the definition of genocide to this day remains controversial in many respects, it is comparably safe to hold that "political groups" never fell under the crime's protective scope, *inter alia*, for the following reasons. Firstly, strong indications suggest that the enumeration of groups (national, ethnic, racial, and religious) was meant to be exhaustive. This can be inferred not only from the norm's wording and the progressive narrowing of the article's protective scope during the drafting process, but in particular by the fact that an early draft-version included an opening clause ("or other groups"), which was then deleted (Tams, Berster, & Schiffbauer, 2014, Art. II, para. 9, p. 60). Secondly, and even more plainly, discussions held by the UN General Assembly's Sixth Committee – which was in charge of the Genocide Convention's final draft – suggest that political groups were quite purposefully excluded from the crime's protection (Schabas, 2009, p. 153 et seq.). The debate was sparked when the Haitian delegate submitted that, in combination with a requirement of genocidal motive, excluding political groups "would open up a loophole in the provision's scope of protection, since governments would always be able to allege that the extermination of any group had been dictated by political considerations, such as the necessity of quelling an insurrection or maintaining public order" (Tams, Berster & Schiffbauer, 2014, Art. II, para. 9; UN Doc. A/C.6/SR.75, 113). The majority of committee-members, however, did not subscribe to this objection. On the contrary, numerous delegates feared that the protection of political groups would jeopardize the Convention's ratification by a large number of states, especially those with a strong desire to remain free to suppress internal political disturbances (Tams, Berster & Schiffbauer, 2014, Art. II, para. 9; UN Doc. A/C.6/SR.65, 66, 69, 74, 21, 31, 58, 99. Similarly: UN Doc. E/794, p. 13-4). On the grounds of these and other considerations (Tams,

Berster, & Schiffbauer, 2014, Art. II, para. 9), a move to exclude political groups was ultimately adopted by a clear 22 to 6 votes, with 12 delegates abstaining. This episode illustrates that a dominant motive for deleting political groups from the Convention's protective scope was to grant states free rein in combating insurrections and political uprisings of all sorts. The Haitian delegate's warning remark even begs the conclusion that the Sixth Committee's decision was taken in full consideration of the risk that states might use counter-insurgency measures as a pretext for the destruction of national, ethnic, racial, or religious groups. It would thus run directly counter the Convention-makers' explicit intentions to count political associations (and partisan organizations such as the LLKS in particular) among the protected groups under the Genocide Convention. Against this backdrop, the accuracy of the ECHR's finding that (at least) at the time in question, international law did not include "political groups" in the definition of genocide (Judgment of *Vasiliauskas v. Lithuania*, 2015, para. 178; Judgment of *Drėlingas v. Lithuania*, 2019, para. 49) can hardly be called into doubt.

The ensuing question then is whether the Lithuanian resistance movement constituted, if not a protected group in its own right, at least a fraction of a larger group under the protection of the crime of genocide. As it is quite obvious that most of the population of Lithuania at the time qualified both as an ethnic and as a national group, there is no need to dwell at length on this – a few remarks will suffice. *Ethnicity*, to begin with, may be defined as the entirety of cultural, historical, customary, linguistic, and religious peculiarities (the cumulative presence of *all* of these criteria certainly not being required), and the whole way of life and mode of thought which sets a group apart from its neighbors, creates common bonds between its members, and bestows a proper identity (Tams, Berster, & Schiffbauer, 2014, Art II, paras 49 et seq.). The Lithuanian Supreme Court gave a largely identical definition: "[A]n ethnic group is a community of persons with a common origin, language, culture, and self-identity" (Judgment of *Drėlingas v. Lithuania*, 2019, para. 50). Lithuanians, connected by manifold linguistic (*lietuvių kalba*) and cultural properties of all sorts and sharing awareness of a common history and destiny, evidently constituted an ethnic group. The ordinary meaning of *nationality*, on the other hand, is less easy to pinpoint, and so in defining the term *national group* under the Genocide Convention, at least three different approaches have been brought forward (Tams, Berster, & Schiffbauer, 2014, Art. II, para. 48). First, in a formal and rather restrictive manner, *national group* could be confined to all citizens of a given state (Judgment *Prosecutor v. Akayesu*, 1998, paras 512 et seq.). Second, the term could be construed in accordance with existing covenants and rules on the protection of "national minorities", which would include expatriate groups (Kreß, 2018, mn. 40; Pritchard, 2001, p. 31). Third, the term could be extended even further to also encompass any plurality of persons entitled to found a new state by virtue of the right of self-determination (Lisson, 2008, p. 1491 et seq.). As the last two interpretations more or less overlap with the definition of *ethnic group*, in order to allow for clear distinctions it seems preferable to follow the first approach. This narrow understanding is further buttressed by the underlying discussions within the Sixth Committee: the Swedish delegation had particularly pushed for the incorporation of ethnic groups, reasoning that if the term *national group* meant a group enjoying civic rights in a given state, groups linked to a state which had ceased to exist or to one that was in the process of formation would be left unprotected (UN Doc. A/C.6/SR.73, 97; Tams, Berster, & Schiffbauer, 2014, Art. II, para. 48). According to the restrictive view, the existence of a standalone national group of Lithuanians during the relevant time period is quite doubtful, as a national group could at best have existed on the grounds of citizenship of the Lithuanian Soviet Socialist Republic, which, at least formally, remained a separate member-state within the Soviet Union. Citizenship of the Soviet Union, however, was universal by design, and did not acknowledge special affiliations to any one of the member-states. For these reasons, in the following, focus shall be placed only on the group of ethnic Lithuanians, who clearly qualified as a protected entity under genocide as defined in international criminal law at the time in question.

2. Intent to destroy

Besides the existence of a protected group, the crime of genocide notoriously requires special intent (*dolus specialis*) on the part of the perpetrators "to destroy a protected group, in whole or in part". According to the prevailing restrictive understanding, the notion to "destroy" only denotes the *physical* (or biological) annihilation of the respective group, but does not extend to forms of social destruction – that is, the dissolution of the group as a social entity by eliminating the cultural ligatures between its members. Readily picking up on this restrictive approach, the courts in *Vasiliauskas* and *Drėlingas* gave no deeper consideration to the question of whether parts or even the entirety of the ethnic group of Lithuanians might have (also) been targeted for social destruction. Only the Lithuanian Supreme Court slightly touched on the topic, stating that "[t]he participants in the resistance to

occupation (…) had an essential impact on the *survival of the Lithuanian nation*, and [were] highly important for the protection and defence of Lithuanian *national identity, culture and national self-awareness*" (Judgment of *Drėlingas v. Lithuania*, 2019, para. 53, emphasis added). However, to all appearances, they likewise failed to assess this finding's potential implications in terms of "social genocide." According to the present view, the courts missed an opportunity here. Aside from "physical genocide," they could and should have given deeper consideration to the merits of the concept of social genocide (i.e., "cultural genocide") as well, which might be more adequate for capturing the specific wrongs committed in Lithuania from 1946–1957. Therefore, Soviet policies in Lithuania shall be assessed in terms of both physical and social genocide hereinafter.

2.1. Intent to physically destroy a group, in part?

Pursuant to the understanding proposed here, the special "intent to destroy" is composed of both a volitional and a cognitive element (Tams, Berster, & Schiffbauer, 2014, Art. II, para. 104). While the exact requirements of the volitional element are controversial in respect of mid- and low-level perpetrators (for the dispute between the "purpose-based-approach" and the "knowledge-based approach", see Tams, Berster, & Schiffbauer, 2014, Art. II, mns 117 et seq.), a relative consensus exists that on the part of the leading figures and string-pullers behind a genocidal campaign, the destruction of the group (in whole or in part) needs to be the perpetrators' *goal*, *objective*, or *purpose* (Judgment of *Prosecutor v. Krstić*, 2004, para. 32; Judgment of *Bosnia and Herzegovina v. Serbia and Montenegro*, 2007, para. 188). According to an equally widespread view, this does not necessarily require the destruction to be the perpetrators' *final* goal, but is also fulfilled when – from the perpetrators' perspective – the group's (partial) destruction constitutes an indispensable intermediary step within a causal chain leading to the final goal (Kim, 2016, p. 72 et seq. ("on the straight line of your purpose")). Mere awareness that the (partial) destruction of a group could or would occur as a *side-effect* in pursuit of a different end, however, would fall short of the threshold for genocidal intent.

In contrast to the volitional element of genocidal intent, its cognitive component is rarely addressed in academic writing and jurisprudence. Nevertheless, the necessity of such an element within "genocidal intent" already flows from the logical consideration that only a "genocidal maniac" would act in pursuit of a destructive goal which they think is impossible to attain, or to the realization of which they feel incapable of contributing (for a more elaborate explanation, see Tams Berster & Schiffbauer, 2014, Art. II mns 106 et seq.). While the sheer existence of a cognitive element within the "intent to destroy" is therefore quite evident, pinpointing the extent of likelihood the offender must assume in regard to the intended destruction remains tricky, and even more so in assessing which cognitive degree might have been required in the 1950s. In that respect, indirect guidance can be gleaned from Article 30 of the ICC Statute, which reflects the respective position within international criminal customary law as it stood at the time of the Rome Conference on the Establishment of the ICC (1998) and presumably stands today. For lack of other distinct sources, it seems warranted to assume that the legal state of the 1950s did not considerably differ from this consensus expressed in Art. 30 of the ICC Statute. Pursuant to this provision, unless otherwise provided, the cognitive component ("knowledge") is an indispensable part of the perpetrators' *mens rea* (Article 30 para. 1 ICC-Statute), "knowledge" being defined as the awareness that a consequence *will occur in the ordinary course of events* (Article 30 para. 3 ICC-Statute, emphasis added).

On the basis of these requirements of genocidal intent, the question remains as to whether Soviet officials acted with the intent to physically destroy the Lithuanian ethnicity. Starting with the aspect of volition, at the outset it would seem as a given that Soviet policy-makers did not intend to physically annihilate the ethnic group in its entirety. Lithuanian Courts – unchallenged by the ECHR – were, however, satisfied that such an objective existed in regard to the members of the LLKS and associated persons. Along these lines, for instance, the Trial Court of the *Drėlingas* case held that it was "one of the core goals of that repressive structure (…) to finally physically eliminate the members of the organized Lithuanian national resistance to the Soviet occupation – Lithuanian partisans, their contacts and supporters" (Cited at Judgment of *Drėlingas v. Lithuania*, 2019, para. 37). Arguably, however, while this assessment seems quite convincing in principle, it needs to be specified in order to reflect the Soviet policy-makers' genuine intentions, which most likely did not consist in the intent to kill all partisans and supporters *under all circumstances*. First, it should be taken into account that even somewhat prominent LLKS-supporters or members were not automatically put to death but, at times, were "dealt with" in different forms. For instance, as mentioned in the *Drėlingas* judgment, Vanaga's wife, Birutė Mažeikaitė (code name "Vanda"), was sentenced to eight years' imprisonment and deported to Soviet gulags in Siberia. Moreover, the wording of the

KGB reports of 15 and 18 October 1956, which the courts invoked in support of their view that leading Soviet officials indeed sought to physically annihilate the resistance groups, is rather ambivalent. The last report concluded that "having arrested the last leader of the Lithuanian nationalist underground R. [Ramanauskas ("Vanagas")] the *liquidation* of the former heads of the Lithuanian bourgeois nationalist banditry formations was totally completed" (Judgment of *Drėlingas v. Lithuania*, 2019, para. 28, emphasis added). It should be noted that *liquidation* is a broad term that does not forcibly denote the physical destruction (i.e. the killing) of all partisan group members, but may also be understood as total neutralization, incapacitation, and dissolution of said formations. In light of the historical circumstances, the latter interpretation seems to be more fitting, since Vanagas and Vanda were still alive at the time of the report, so that the announced "total completion" of the projected "liquidation" of the targeted groups could hardly be meant to denote their total physical destruction. Down the line, therefore, it would seem more accurate to describe the Soviet agenda in Lithuania as total neutralization of the Lithuanian "bourgeois nationalist" resistance by all necessary means, including the killing of opponents *whenever it might seem purposive or useful to do so*. Yet this concretization of the perpetrators' intentions does not compromise the finding that the perpetrators met the volitional requirement of genocidal intent. Notably, the fact that at the time the destructive policy was forged it was still unclear just how many opponents would actually have to be killed in order to reach the projected goal does not preclude the willingness to kill *all* members and supporters of the LLKS, as the destructive decision itself was unconditional, while only its degree of realization was subjected to circumstances still unknown when the policy was made.

The cognitive component of genocidal intent, however, causes trouble in the present case. As outlined above, this element requires the awareness of a substantial likelihood that a group's partial destruction will occur as the result of the perpetrators' plot. Yet at the beginning and throughout the Soviet anti-resistance campaign, there could not be any certainty as to how many killings in total would have to be committed in order to reach the projected goal to fully neutralize the Lithuanian resistance movement. While it is likely that the Soviet leaders developed some estimates about the potential number of opponents to be killed, then, it should be very difficult to ascertain the number of killings that (from their perspective) would have had to be reckoned with not as a mere possibility, but as a *substantially likely* consequence of their anti-resistance policy. Unless there exist any Soviet reports or memoranda that could shed light on this question (the *Vasiliauskas* and *Drėlingas* judgments make no mention of such documents), the actual death toll provides the only tolerably reliable clue as to what Soviet officials might have projected as a likely consequence of their policy. According to the Lithuanian Supreme Court, roughly 20,000 Lithuanian partisans and their supporters were killed during the resistance (cited at Judgment of *Drėlingas v. Lithuania*, 2019, para. 52), so this number should be taken as an estimator for the scope of the cognitive element, and as a consequence, of the special intent to physically destroy a group (in part).

Thus, on the basis of the foregoing considerations, Soviet policy-makers indeed acted with the "intent to destroy", physically, a fraction of the Lithuanian ethnic group. This fraction numbering no more than around 20,000, however, undercuts the numeric threshold of a sufficient "part" of the group under the definition of genocide, as shall be addressed below.

2.2. Intent to socially destroy a group?

Arguably, extending the notion of "intent to destroy" to certain forms of social or cultural destruction is much more in line with the wording, spirit, and objectives of the Genocide Convention.

Firstly, when the Genocide Convention was forged, the chief objective of criminalizing genocide was to protect the right to exist of such human groups as may be regarded as "the spiritual resources of mankind" (Lemkin, n.d.; similarly Lemkin, 1947, p. 147), and whose disappearing would hence result "in great losses to humanity in the form of cultural and other contributions" (UN General Assembly, UN Doc. A/96(I)). Quite clearly, the Genocide Convention's fundamental concern to uphold the cultural, spiritual, and genetic multiplicity of mankind is no less imperiled by the social dissolution of a group than by the physical destruction of the group's members (Kreß, 2006, p. 486). The *effet utile* principle of treaty interpretation hence strongly militates in favor of an extensive notion of the term "destruction" – an argument, incidentally, which was already raised during the drafting process (UN Doc. A/C.6/SR.83, 195 et seq.; 205). Secondly, reducing "destruction" to forms of physical annihilation fails to explain why genocide can be committed by acts that leave the physical integrity of the group-members unharmed, such as causing serious mental harm to members of the group (under Art. II (b)) or transferring children

from one group to another (under Art. II (e) of the Genocide Convention). It only remains to assume, therefore, that the inclusion of serious mental harm serves to cover detrimental effects on a group's social texture as well as its national, ethnic, and religious peculiarities. Lastly – and contrary to a common presumption – the drafting process of the Genocide Convention does not suggest otherwise. Proponents of the restrictive approach essentially argue that the drafters originally envisaged two types of genocide, physical (or biological) and social, but abandoned the latter concept later-on, thereby limiting the scope of the Convention to the physical (or biological) destruction of a group (Judgment of Application of the Convention, 2015, para. 136). However, a careful analysis of the historical material suggests otherwise. Indeed, at the last stage of the drafting process in the Sixth Committee, criticism emerged against draft Art. III, which specified a set of acts through which social genocide could be committed. Specifically, the Committee found fault with these provisions for lacking terminological clarity (UN Doc. A/C.6/SR.83, p. 197) and for not amounting to the normative gravity of the acts of "physical genocide" (p. 197), and concluded by deleting draft Art. III in total. Yet this deletion of the specific acts of social genocide should not be mistaken as a clear vote for abandoning the concept of social genocide in its entirety. On the contrary, a number of delegates who criticized the acts under Article III (or did not object to their deletion during the vote, respectively), spoke in favor of the concept of social genocide in principle (pp. 193–204) as well as highlighting its practical importance for a group's persistence (pp. 193, 195, 199). It follows that the Committee's vote may well be regarded as a specific move against the inclusion of draft Article III, but not necessarily as reflecting a negative stance towards the idea of social genocide *per se*.

The aforementioned considerations (among others, see: Berster, 2015, p. 1 et seq.) would have opened up an avenue to argue that the specific intent requirement extended to forms of social or cultural destruction all along. It would thus not appear *a priori* excluded that the practice of forcible Sovietization of Lithuania involved a *genocidal* intent to (socially) destroy the ethnic or national group of Lithuanians in whole or in part. Extending the special intent requirement to social destruction is not to say, however, that the (intended) subjugation and Sovietization policy in Lithuania would automatically turn genocidal in character, as – at least from the present viewpoint – only the intention of particularly *grave* infringements upon a group's social texture should be deemed to exceed the threshold for genocide. The need for such reservation follows from the fact that causing detriment to a group's cultural integrity is much tougher to assess than physical destruction, which invariably constitutes a massive wrong. For instance, cultural interference may range from comparably harmless measures of acculturation, such as compulsory school attendance for all children of minority groups, to utterly vile acts such as the targeted killing of all dignitaries of a particular religion. This illustrates that extending "destruction" to all forms of social destruction whatsoever would run into a notional blur that would be at odds with even modest aspirations of legal certainty. However, according to the present view, these issues of vagueness can easily be resolved by means of interpretation. In order to qualify as an intent to *socially* destroy a group in whole or in part, the perpetrator's intentions should have to meet two requirements cumulatively.

The first requirement can be gleaned from an analytical comparison between physical and social destruction: physical (and biological) destruction targets the "physis" of the group's members; social destruction targets the non-physical bonds and links between those members. In order to depict a comparable wrong, the required intensity of social destruction must be constructed as an analogy to physical destruction. Thus, since a group's *physical* (or biological) destruction requires nothing short of the killing (or birth-prevention) of group-members, an analogous notion of *social* destruction would require the near *total* dissolution of the specifically national, ethnic, racial, or religious ties between the group members. At any rate, the perpetrators' destructive goal must be of such a kind that, if accomplished, the (former) group would be incapacitated as a "spiritual resource of mankind," and whose disintegration would hence spell a "great loss to humanity in the form of cultural and other contributions."

The second restriction is required to adhere to the Sixth Committee's decision to eliminate all *acts* of social genocide as provided by draft Article III while (according to the present understanding) not abandoning the concept of social genocide as such. Against this backdrop, only such (projected) campaigns of social destruction as are composed of acts according to Article II (a)-(e) of the Genocide Convention should be rated as genocidal. By tying the vague term of social or cultural destruction to the clean-cut and exhaustive list of genocidal acts under Article II (a)-(e) of the Genocide Convention, the abovementioned concerns that extending the intent to destroy to forms of social destruction would undermine legal certainty can be dissolved.

Having shed some light on the presumptive contours of social/cultural genocide, we can now proceed to the focal question of whether the occurrences in Lithuania met the aforementioned two requirements.

2.2.1. Intent to socially destroy the ethnic group of Lithuanians, in whole

As a first step, one may consider whether the ethnic group of Lithuanians was targeted for social destruction *in their entirety*. Already in regard to the first of the here-proposed requirements, however, it is particularly difficult to fathom whether Soviet policies actually sought to liquidate the Lithuanian ethnic group to a point where it would dissolve into one large Soviet society and lose its ability to contribute to the cultural multitude of mankind. Ponderous voices in academic writing have taken this view, such as that of James E. Mace (1988, p. 119) who held that, at least "[i]n the Stalin period, the Soviet State did not hesitate to attempt the complete destruction of [national and religious] identities and those who bore them, if they were perceived to be hindrances to the state's complete integration and subordination of all forces in society to Stalin's goals". To the same effect, Lauri Mälksoo (2001, p. 784) observed that "[t]he Baltic national groups were ordered to be transformed into something else, for a part of the 'Soviet people', and Stalin's condition for individuals' and groups' right to existence was their willingness to obey to such forced transformation of identity". On the other hand, it should not be ignored that even the sternest Stalinist Sovietization regime left a number of key elements of the Lithuanian ethnicity largely inviolate, such as a common language and literature (irrespective of the increasing role of Russian as a *lingua franca*) and a communal spirit flowing from the awareness of a common history. The sole fact that even decades after the Lithuanian opposition movement was brutally stamped out, the surviving sentiment of ethnic or national unity proved unabated and strong enough to lead to national independence in 1990, may also indicate that the Sovietization policy allowed for maintaining certain ethnic or national properties, albeit on a reduced scale. Moreover, at least extrinsically, the Sovietization campaign in the Baltics and elsewhere features differences in comparison to "typical" forms of social genocide: while the latter consist in the forced acculturation, dissolution, and seamless integration of a (minority) group into an *already existing* ethnic group, the former strived for the creation of an entirely new way of life as an interim step towards the utopia of a classless society. Finally, devout Marxists among those who headed the Sovietization campaign in Lithuania likely believed that the destruction of the bourgeois portions within Lithuanian culture was in essence not a matter of individual will, but of historical necessity, pre-determined by the laws of historical materialism and therefore principally outside of the realm of purposeful human behavior (see, e.g., Marx, 1982, p. 92: "Even when a society has begun to track down the natural laws [!] of its movement (…) it can neither leap over the natural phases of its development nor remove them by decree. But it can shorten and lessen the birth-pangs"). However, is it notionally even possible to build "intent" towards the realization of something when one is firmly convinced of its historical inevitability? These considerations alone indicate that it would go beyond the scope of this contribution (and far beyond the author's historical expertise) to venture an assessment as to whether Soviet policies met the first requirement of the (projected) social destruction of a protected group. Ultimately, however, this question can be left open, as the second here-proposed requirement of social genocide – the intent to destroy a group's social texture *by means of acts according to Art. II* of the Genocide Convention – was obviously *not* fulfilled in regard to the whole group of ethnic Lithuanians, the majority of whom were not targeted for these specific forms of maltreatment.

2.2.2. Intent to socially destroy the ethnic or national group of Lithuanians, in part

It cannot be ruled out, however, that both criteria of "social genocide" were met in regard to a considerable *portion* of ethnic Lithuanians, namely those who were specifically deemed to pose a (potential) source of bourgeois persistence or resistance against the imposed Sovietization policies, and were hence subjected to especially harsh treatment. This fraction comprises not only the members and affiliates of the LLKS, but also extends to the large number of deportees with no apparent connection to Lithuanian insurgency units. The kaleidoscope of measures taken against this fraction of the Lithuanian population is very diverse, ranging from deracinating people from their traditional environment by means of deportation or measures of prolonged incarceration in prisons or gulags to the torture or killing of intellectuals, political or military leaders, and other alleged representatives of the Lithuanian bourgeoisie. Behind all of this, however, one consistent purpose may be made out: the goal to root out the ideologically "unreliable" part of the Lithuanian population (see: Judgment of *Vasiliauskas v. Lithuania*, 2015, para. 59, citing the Constitutional Court of Lithuania: "(…) Lithuanians as an 'unreliable' nation (…)") by disconnecting the targeted persons from the rest of the population and from each other, and hence eroding their social ties to the point of being fully incapacitated from interfering with the project of building a new society under

Soviet auspices. Furthermore, said measures to reach this goal invariably qualify as acts under Art. II (a)-(e) of the Genocide Convention. This also holds true in regard to the deportations, which do not in themselves constitute a genocidal act, but were – at least in the case of Lithuania – accompanied and enabled by a multitude of acts under Art. II, in particular conduct according to lit. (a)-(c). Even on the basis of the here-proposed restrictive understanding of social genocide, then, it would not seem far-fetched to hold that the Sovietization campaign in Lithuania did indeed involve genocidal intent in regard to a sizable fraction of the protected ethnic group of Lithuanians.

3. The relevant part of the group

According to the foregoing reflections, Soviet officials acted (a) with the intent to *physically* destroy around 20,000 LLKS members and supporters and (b) with the intent to *socially* destroy a larger number of ethnic Lithuanians. So it remains to determine whether these respective fractions constituted sufficient "parts" of the group under the definition of the Genocide Convention. As to the precise meaning of the "part" element, only vague suggestions can be gleaned from the Convention and its genesis. In light of the Convention's chief protective purpose, however, only such fractions whose destruction would considerably enfeeble or endanger the group as a whole and thus imperil the group's capacity as a "spiritual resource" of mankind should be deemed to qualify (for more information, see: Tams, Berster, & Schiffbauer, 2014, Art. II, paras 132 et seq.). This basic consideration has found its expression in the common finding that "the part must be a *substantial* part of the group" (Judgment of *Prosecutor v. Krstić*, 2004, para. 12 (emphasis added); Judgment of *Bosnia and Herzegovina v. Serbia and Montenegro*, 2007, para. 198; Decision in *Prosecutor v. Al Bashir*, 2009, para. 146; Kreß, 2006, p. 490), and was also corroborated by the Lithuanian Constitutional Court, who demanded that the targeted fraction represent "a significant part of the Lithuanian nation and whose destruction had an impact on the survival of the entire Lithuanian nation" (Judgment of *Drėlingas v. Lithuania*, 2019, para. 59). Since the 1990s, international jurisprudence and scholarly writing have further elucidated that the criterion of "substantiality" or "significance" of the targeted part "can theoretically arise from three different aspects, namely (a) the sheer numeric size of the targeted portion, (b) specific properties or skills of the targeted members which are pertinent for the group's physical or social survival, and (c) a number of circumstantial aspects like the strategic importance of the group members' area of settlement" (Tams, Berster, & Schiffbauer, 2014, Art. II, para. 133) or a specifically symbolic or "emblematic" role afforded to these group members by the other group members. To the present view, it is sound and legitimate to draw upon these aspects – though being formulated decades after the fact – as an interpretative aid in the present case, as they constitute a mere concretization of the *telos*-based substantiality requirement, and were therefore early on implied in the "part" element of the crime's definition (for a different stance, see Judgment of *Vasiliauskas v. Lithuania*, 2015, para. 177, which is challenged in Judgment of *Drėlingas v. Lithuania*, 2019, Judge Motoc diss. op, para. 14). For the application of these criteria to a present case, the ICTY Appeals Chamber provided useful guidance, proposing that the numeric size be taken as "the necessary and important starting point", which should then be supplemented with said additional factors, the applicability and relative weight of which "will vary depending on the circumstances of a particular case" (Judgment of *Prosecutor v. Krstić*, 2004, paras 12, 14, confirmed by Judgment of *Prosecutor v. Karadžić*, 2013, para. 66; Tams, Berster, & Schiffbauer, 2014, Art. II, para. 133). In the case at hand, one would first have to find out if the number of targeted group members relative to the ethnic group's total size *prima facie* satisfied the numeric threshold of substantiality or, failing that, if the lack of magnitude was compensated for by qualitative properties or circumstantial aspects. Quite obviously, determining a numeric bottom-line below which group members are stripped from the Convention's protection and abandoned to their fate is a macabre and discomforting task, and it is not surprising that international courts have at times deemed remarkably small ratios to be sufficient (Tams, Berster, & Schiffbauer, 2014, Art. II, para. 134). Most prominently, the Srebrenica massacre of 1995 was found to constitute genocide (by Judgment of *Prosecutor v. Krstić*, 2001, para. 599; Judgment of *Prosecutor v. Blagojević and Jokić*, 2005, paras 671 et seq.; and Judgment of *Bosnia and Herzegovina v. Serbia and Montenegro*, 2007, para. 297) although the targeted group of Bosnian Muslims in Srebrenica numbered around 40,000 and hence represented less than 3% of the Bosnian Muslim population (Judgment of *Prosecutor v. Krstić*, 2004, para. 15, fns 25 et seq.). In this case, however, the ICTY buttressed its finding by also adducing qualitative aspects, thereby (possibly) indicating that a mere 3% of the whole group would undercut the numeric threshold of substantiality unless counterbalanced by additional factors.

On the basis of this standard, the Soviet policy-makers' intent to physically destroy 20,000 members and associates of the LLKS was not directed at a sufficient "part" of the protected group, and hence did not constitute

genocidal intent under international criminal law. According to the data provided by the Lithuanian Department of Statistics, the population of Lithuania numbered approximately 2.3 million in 1951. This brings the ratio of those who were targeted for physical annihilation down to a mere 0.87% of the whole ethnic group, which definitely undercuts the numeric threshold. Trying to compensate for this small number by means of qualitative criteria would also not seem promising in this case. Even though there can be little doubt that the Lithuanian resistance played leading role as a source of hope for national independence and a cornerstone of ethnic identity (and in that sense constituted a "basis of the Lithuanian civil nation (*pilietinė tauta*)" – Lithuanian appellate court, cited at: Judgment of *Drėlingas v. Lithuania*, 2019, para. 43), history has sufficiently proven that the cultural strength and resilience of the Lithuanian ethnicity remained unbroken even after the resistance organized by the LLKS had been quashed.

In respect of the group members targeted for *social* destruction, things look different. According to the Lithuanian Constitutional Court (cited at Judgment of *Vasiliauskas v. Lithuania*, 2015, para. 62), during the relevant time period, 132,000 Lithuanian inhabitants were deported to the Soviet Union (of whom 35,000–37,000 lost their lives in gulags or prisons and 28,000 perished in "ordinary" exile), while 186,000 people were otherwise arrested and imprisoned.

Even factoring in potential double-counts and overlapping data, with an estimated population of 2.3 million in 1951, it seems safe to conclude that well over 10% (and possibly many more) of the ethnic group were targeted for social destruction. Further, considering that this intent had a special focus on leading figures and representatives of the Lithuanian bourgeoisie whose contributions to Lithuanian cultural and social life can be assumed as above-average, the attacked fraction clearly qualifies as a sufficient "part" of the Lithuanian ethnic group.

4. Genocidal motive

Finally, the crime of genocide requires the perpetrators to have acted on the grounds of a special genocidal motive. However, to all appearances the ECHR completely ignored this requirement, which is a major shortcoming of the *Drėlingas* judgment and all the less explicable as the motive element is well established in international jurisprudence and academia, and even finds an – admittedly vague – textual basis in the international definition of the crime ("group *as such*").

In order to establish if this element already pertained to the crime of genocide at the time in question, however, we must once again take a look into the drafting protocols. These reveal that throughout the shaping of the crime's definition, the role of motives was fraught with dispute. This discussion arose during the intermediate drafting stage at the "*Ad Hoc* Committee", when the Lebanese delegate remarked that an additional criterion would be required to reshape genocide as a particularly reprehensible destruction of human groups and exclude certain scenarios from the definition "in which the intentional destruction of a group appeared less reprehensible and inapt to shake the conscience of mankind, such as the destruction of a group which itself habitually committed the crime of genocide" (Tams, Berster, & Schiffbauer, 2014, Art. II, para. 26). To the delegate's mind, this criterion was to be best found in the underlying motive: "Included in the crime of genocide, therefore, would be all acts tending towards the destruction of a group on the grounds of hatred of something different or alien, be it race, religion, language, or political conception, and acts inspired by fanatism in whatever form" (UN Doc. E/AC.25/SR.2, pp. 3–4). A number of states warmed to this idea, opining that a motive element was essential to capture the intrinsic characteristics of genocide (UN Doc. A/C.6/SR.72, p. 84; UN Doc. A/C.6/SR.75, p. 119), and leaving it out would allow cases which should not constitute genocide to fall under the definition, such as the destruction of a group for motives of profit (UN Doc. A/C.6/SR.75, p. 118) or bombing raids against whole groups as a means of defensive warfare (p. 119). However, the proposition remained controversial. The United Kingdom, which led a group of states who opposed any reference to motive in the definition of the crime, argued that the limitative nature of motives was dangerous as it "allowed the guilty to exonerate themselves from the charge of genocide on the pretext that they had not been impelled by motives contained in the proposed list" (p. 120). Eventually, the issue was formally settled through the abovementioned compromise formula, whereby the term "intent to destroy a group" was supplemented by the addendum "as such". The exact meaning of this element, however, remained disputed among the drafters even after the text was adopted.

Despite this controversy at the drafting stage, it would nevertheless be inaccurate to conclude that the motive element was not from its inception incorporated in the crime's definition, since it did make it into the text of Art. II of the Genocide Convention, albeit in a rudimentary form. Simply turning a blind eye to the confining words "as such" would hence mean interpreting the crime *in malam partem* and to the detriment of the accused, which would hardly be in line with the principle of *nullum crimen sine lege* or, respectively, the common-law-based rule of strict construction or interpretation that governed international criminal law from the beginning (albeit naturally on a reduced scale, see: Ambos, 2013, p. 88 et seq.) and is now prominently enshrined in Article 22 para. 2 of the ICC Statute. For the same reasons, failing to consider the term "as such" as a confining motive-requirement while assessing Drėlingas' conviction in terms of Art. 7 ECHR marks a serious flaw within the ECHR's judgment.

In order to fathom whether Soviet policy-makers acted on the basis of a genocidal motive, recourse can be made to a formula used by modern-day international jurisprudence, whereby "[t]he victims of the crime must be targeted *because of* their membership in the protected group, although not necessarily solely because of such membership" (Judgment of *Prosecutor v. Blagojević and Jokić*, 2005, para. 669 (emphasis added); Judgment of *Bosnia and Herzegovina v. Serbia and Montenegro*, 2007, para. 187; Judgment of *Prosecutor v. Niyitegeka*, 2004, para. 53; Judgment of *Prosecutor v. Ntakirutimana* et al., 2004, paras 304, 363; Judgment *Prosecutor v. Akayesu*, 1998, para. 521; Judgment of *Prosecutor v. Krstić*, 2001), para. 561; Kreß, 2006, p. 499). On the basis of this definition and the present author's historical understanding, however, the completion of the motive element must be called into doubt. One chief reason for the Soviet attack on a large part of the Lithuanian ethnic group consisted in their actual or alleged stance of opposition against foreign rule and the denial of the right to self-determination. Yet to this extent, the motivation is a purely *political* one, and is not driven by any aspects pertaining to the *ethnic* categorization of the victims. Besides their wish to secure grip and sheer political power over Lithuania, however, Soviet officials also acted to stamp out the victims' "bourgeois" way of life, which was deemed incompatible with the doctrine of socialism. This political socialist agenda of forcibly replacing an "outmoded" social order with another undeniably implied a certain ethnic dimension as well, since the formerly practiced civilian lifestyle certainly formed an aspect of Lithuanian culture and, thereby, of the Lithuanian ethnicity. *Insofar*, it would seem warranted to hold that the destructive Soviet agenda was partly fueled by ethnic considerations as well. But should such a rather weak "*co*-motive" really be sufficient to conclude that the victims were attacked *because* they were ethnic Lithuanians? Preferably not. It should be taken into account that the lifestyle habits of the bourgeoisie are or were no specific property of the Lithuanian ethnicity but of a multitude of ethnic groups since the beginnings of the bourgeois age. These structures are hence best conceived of as providing a social frame or points of crystallization for the standalone properties and idiosyncrasies of a specific ethnicity. They do not constitute a central or fundamental criterion of ethnicity, as opposed to aspects like common language, literature, art, shared narratives, and the consciousness of a common historical destiny. These latter *defining* aspects of Lithuanian ethnicity, however, supplied neither motive nor cause for the Soviet policy of suppression. Wherever Soviet officials sensed or suspected "bourgeois" opposition similar to the one in Lithuania, they combated it with the same recklessness, as is evidenced, *inter alia*, by the examples of Latvia and Estonia. Therefore, in due respect of the wording of Art. II of the Genocide Convention and in order to uphold the confining function of the motive element, attacks on an ethnic group should not qualify as genocidal if they are motivated by aspects that do not pertain to the group's defining properties (the controversial question as to whether a group's defining properties should be judged from the perspective of the perpetrators, the victims, or an objective bystander is irrelevant in this case, and can hence be left open). In conclusion, the motivation behind the oppressive campaign in Lithuania was not genocidal in character.

Conclusions

The foregoing brief analysis hence prompts the sobering conclusion that the occurrences in Lithuania from 1948 to 1957, albeit constituting a borderline case, ultimately defy categorization as genocide under Art. II of the Genocide Convention. This finding should however not be mistaken as diminishing or even trivializing the tremendous suffering of the Lithuanian people under Soviet rule. Conversely, the case of Lithuania may serve as a prominent example of the well-known fact that the complicated definition of genocide, forged in the incipient stage of international criminal law, holds considerable lacunae and should not be (mis-)conceived of as a reliable measuring tool for the magnitude of mass-crimes and historic wrongs. One lesson to be drawn from the cases of *Vasiliauskas* and *Drėlingas* is the cognizance of an unabated need to strengthen, concretize, and further develop the legal instruments of international criminal law in order to close potential loopholes. This being said, the rather

"technical" approach of legal interpretation taken in this contribution may nevertheless find itself exposed to doubts in terms of *summum ius summa iniuria*. To the same effect, Judge Kūris raised his admonitory remarks against the majority judgment in *Vasiliauskas*, whereby "[c]ourts in their ivory towers deal with the law, but not only that. More importantly, they are dealing with human justice" (Judgment of *Vasiliauskas v. Lithuania*, 2015, diss. op. Judge Kūris, para. 8). On the other hand, at least in this author's firm belief, it is only *through* the law that our path towards human justice remains a promising one – despite setbacks along the way.

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