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BROADENING THE CONCEPT OF GENOCIDE IN LITHUANIA'S CRIMINAL LAW AND THE PRINCIPLE OF *NULLUM CRIMEN SINE LEGE*

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Annotation. *The present article discusses the broadening of the concept of genocide in Lithuanian national criminal law with regard to the principle of nullum crimen sine lege. The broadened definition, which includes two groups, social and political raises serious problems when the national provisions on genocide are applied retroactively. However, in the case of Lithuania, such a broadening of the definition may be interpreted not as an introduction of distinct independent groups, but of groups that closely overlap with the groups defined by the UN Genocide convention of 1948. The article suggests that potential problems with the principle of nullum crimen sine lege may be avoided by qualifying crimes against the Soviet regime as crimes against humanity.*

Keywords: *crimes against humanity, genocide, international criminal law.*

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Introduction

A victim–whether a person or a nation–always longs for justice. Such longing is especially evident and long-lasting when one has had no chances to bring the perpetrators of the most heinous crimes to justice. In the twentieth century, Lithuania faced two terrible occupations: by Nazi Germany (1941–1944), which resulted in the annihilation of the Jewish community, and by the Soviets (1940–1941, 1944–1990), which destroyed not only the Lithuanian political nation, but also its economy, social structures, cultural heritage. Criminal policies pursued by these two totalitarian regimes were on a never before seen scale and aimed not simply at the destruction of the untrustworthy, but, as noted by Hannah Arendt, at the total reconstruction of society and the world itself.[1]

The Lithuanian legal system, when legally evaluating the legacy of these regimes, mostly refers to their crimes as genocide. However, it is clear that the two regimes were not identical. The Nazis aimed at a brutal, physical destruction of nations and ethnic groups (Jews, Roma, etc.), constructing a world on the basis of "racial laws". Soviet policy was much more miscellaneous and entailed long-term calculation, with gradual destruction of pre-existing societies and with a particular emphasis on the use of slave labour, even more extensively so than that of the Nazis.[2] The physical destruction was not as self-evident as it was in the case of the Nazis. Nevertheless, to label Soviet repressive policy as genocide is not only Lithuania's decision, but more or less common to all post-Soviet states. The same views are professed in Latvia and Estonia; Ukrainians have also made a huge effort to have the Great Famine (Holodomor) recognized internationally as genocide, though with limited success.[3] This approach in the international arena often meets stiff opposition. The opposition firstly comes from Russia, which continues the identity of the USSR on the international plain, but is absolutely unwilling to accept any claims of responsibility for crimes committed by the USSR. Secondly, this approach worries the Jewish community, which sometimes sees it as an attempt to undermine the uniqueness of the Holocaust as the only "true" genocide.[4] Some aspects of regulation on genocide in post-Soviet states have been discussed by Rytis Satkauskas,[5] but the renewed significance of this topic may well be confirmed by the fact that the European Court of Human Rights has communicated to Lithuania the first case where such issues are present[6].

Therefore, the aim of this article is to discuss: how the crime of genocide was introduced into Lithuanian criminal law; what the rationale behind the broadening of

1 Arendt, H. *Totalitarizmo ištakos* [The Origins of Totalitarianism]. Vilnius: Tyto alba, 2001, p. 402.

2 See Applebaum, A. *Gulag: A History.* Doubleday, 2003.

3 See UN GA A/C.3/58/9 (2003).

4 See Donskis, L. The Inflation of Genocide [interactive] [accessed 2009-11-05]. <http://www.europeanvoice.com/article/2009/07/the-inflation-of-genocide/65613.aspx>.

5 See Satkauskas, R. Soviet Genocide Trials in the Baltic States: the Relevance of International Law. *Yearbook of International Humanitarian Law*. 2004, 7: 388–409.

6 See *Vasiliauskas v. Lithuania*, application No. 35343/05.

genocide's definition was; and what possible impact it may have on Lithuania's international obligations, in particular towards the principle of *nullum crimen sine lege*.

In the words of the International Criminal Tribunal for Rwanda as well as those of A. Schabas, genocide is "the crime of crimes";[7] therefore not every mass slaughter can be labelled as genocide. A recent decision by the government of the so-called breakaway Republic of South Ossetia to open a museum to commemorate the genocide[8] that was allegedly carried out by the Georgians in the Russian–Georgian war of August, 2008[9] reveals that the inflation of genocide might indeed take some tragi-comic forms.

However, in a comparison between Nazi and Soviet policies, almost no one contests the fact that both regimes "scored" huge numbers of victims even if by different methods. It is not the criminality of the policy that is disputed, but its legal qualification and the fate of its perpetrators and victims.

Unfortunately, the fates of those who committed such crimes under the two regimes has been very dissimilar. The Soviets prosecuted and tried persons for crimes related to the Nazi occupation, though these trials were a far cry from meeting internationally recognized standards of fair trial. Lithuania, on the other hand, for almost fifty years has not been able to bring to justice those directly involved in crippling the country by killing, exiling and extorting a substantial part of the nation during the Soviet occupation. Moreover, those previously engaged in numerous crimes were decorated, promoted and in other ways favoured by the Soviet regime. Hence, one of the first steps taken by Lithuania, after restoring independence in 1990, was to create a legal base for the prosecution of Soviet crimes.

Genocide is a crime under international law. Its definition was first established in international law by the United Nations Convention on Prevention and Punishment of Genocide (Genocide Convention) adopted by the United Nations General Assembly on 9 October 1948.[10] Nowadays the definition established by the Convention is regarded as a part of international customary law.[11]

In 1992, Lithuania acceded to the Genocide Convention by a special *Law on Responsibility for the Genocide of Lithuanian Inhabitants* which in Article 1 defines of the crime of genocide as:

Actions that aim at physical extermination of all or part of the inhabitants who belong to a national, ethnic, racial or religious group, consisting of killing members of

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7 Schabas, W. A. *Genocide in International Law: The Crime of Crimes*. Cambridge University Press, 2000, p. 9.

8 'Genocide' museum commemorates war with Georgia [interactive] [accessed 2009-11-05]. <http://www.euronews.net/2009/08/08/genocide-museum-commemorates-war-with-georgia/>.

9 Even though the EU sponsored International Fact-Finding Commission was not able to prove that Georgian offences might be labelled as genocide, see [interactive] [accessed 2009-11-05]. <http://www.ceiig.ch/Index.html>.

10 Convention on the Prevention and Punishment of the Crime of Genocide, adopted by Resolution 260 (III) A of the U.N. General Assembly on 9 December 1948, entry into force 12 January, 1951. *United Nations Treaty Series*. Vol. 78, p. 277.

11 *The Making of Rome Statute.* Lee, R. S. (ed.). The Hague/Boston/London: Kluwer Law International, 1999, p. 89.

the group, cruel torture, serious bodily harm, mental harm; deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; forcibly transferring children of the group to another group; and imposing measures intended to prevent births within the group (genocide)"[12].

This definition is almost analogous to that found in the Genocide Convention, but with two exceptions. First, it includes "cruel torture" as an inhumane stand-alone act, though this particular act is not listed in the Convention. Second, it attaches *dollus specialis* (specific intent) to destroy a group in whole or in part to the physical instances of genocide only. Consequently, there has been no requirement to find specific intent in cases of birth prevention and forcible transfer of children. Unfortunately, it is impossible to determine why such differences were defined, but it seems they reflected no specific goals (there were no cases of genocide in Lithuania that would include acts of forcible transfer or imposition of birth prevention measures).

However, a more important statement is found in Article 2 of the Special law, which states that:

The killing and torturing and deportation of Lithuanian inhabitants committed during the occupation and annexation of Lithuania by Nazi Germany and the USSR correspond to the crime of genocide as contemplated by international law"[13].

It was in fact an expression of political will as well as public opinion to qualify crimes committed by both regimes as genocide. There was no comprehensive legal discussion on the particularities of Soviet crimes as genocide. The first criminal proceedings in Lithuania began on the basis of this law. They were directed toward Nazi collaborators (Lileikis, Gimžauskas)[14] as well as representatives of the Soviet regime (Raslanas[15], Kurakinas and Others[16], etc.). Special criminal laws were uncommon in the Lithuanian system of criminal law. Therefore in 1998, the crime of genocide was incorporated into Criminal Code, Article 71.[17] The definition was amended, including two additional groups in the list of protected: social and political. This amendment also passed into the new Article 99 of the Criminal Code (entered into force on 1 May 2003).[18] The new definition also made specific intent necessary for all inhumane acts.

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12 Lietuvos Respublikos įstatymas „Dėl atsakomybės už Lietuvos gyventojų genocidą". *Valstybės žinios*, 1992, Nr. 13-342. [Law on Responsibility for the Genocide of Lithuanian Inhabitants. *Official Gazette*. 1992, No. 13-342].

13 *Ibid.*

14 It should be noted that shortly before the Soviet re-occupation in 1944, huge numbers of Lithuanians fled to Germany, including those who collaborated with the Nazis.

15 09-2-024-88, Generalinė prokuratūra, STS. [Chief Prosecutor's Office, Special Investigations Department, No. 09-2-024-88].

16 Lietuvos apeliacinio teismo byla Nr. 1A-141, 1997. [Appeal Court of Lithuania, Case No. 1A-141].

17 Baudžiamojo kodekso papildymo 62(1), 71 straipsniais ir 8(1), 24, 25, 26, 35, 49, 54(1), 89 straipsnių pakeitimo ir papildymo įstatymas. *Valstybės žinios*. 1998, Nr. 42-1140. [The Law on Ammendment of Lithuanian Criminal Code by articles 62(1), 71 and on the ammendment and alteration of articles 8(1), 24, 25, 26, 35, 49, 54(1), 89. Official Gazette, 1998-05-06, Nr. 42-1140].

18 Baudžiamojo kodekso patvirtinimo ir įsigaliojimo įstatymas. Baudžiamasis kodeksas. *Valstybės žinios*. 2000, Nr. 89-2741. [The Law on adoption and enforcement of Criminal Code of Lithuania. *Official Gazette*. 2000, Nr. 89-2741].

This amendment, by including additional groups not foreseen in the Genocide Convention, clearly reveals Lithuania's intention to treat genocide more broadly than defined in the Convention. On the one hand, it shows that qualification of Soviet regime crimes based on the Convention's definition was becoming problematic.[19] On the other hand, this amendment has witnessed the recent trends of dissatisfaction with the Convention's definition of genocide in both, the national practice of a number of states and the opinions of legal publicists. They have claimed that restricting genocide only to national, ethnic, racial and religious groups leaves a huge lacuna in international law.[20] Jescheck illustrates, that exclusion of certain groups, such as partisan forces in internal struggles or certain categories of inhabitants in opposition to the Government is cause for special concern.[21] By that time a significant number of states had opted in their national law for an extended list of groups (Cote d'Ivoire, Colombia, Poland, Ethiopia, Peru, Latvia, Lithuania, Austria, Costa Rica, Estonia, Romania, France, Belarus, Burkina Faso, Congo, and Finland). Most cases of the definition's broadening have concerned social or political groups, though some states have even chosen an open-ended category like "groups determined by any other arbitrary criterion" (France, Romania).[22] These states have neither been the main players in the international arena, nor representative of the majority opinion in the international community. We therefore have to admit that these examples are not sufficient evidence of a broader definition of genocide being adopted by international customary law.[23] However, this practice reveals a widespread dissatisfaction with the uncertainties of the conventional definition of genocide in all regions of the world. The International Congress on the Evaluation of the Crimes of Communism and International Public Tribunal held in Vilnius, Lithuania, 12-14 June 2000 adopted a resolution recommending that post-Communist countries adopt a broader concept of genocide in their national laws, since there is no such possibility in international law.[24]

Another explanation for why so many states (including Lithuania) have decided to broaden the conventional definition of genocide may lie in the complicated process of regulating international crime, particularly crimes against humanity. In International Law, genocide is understood as a special type of crime against humanity[25] with three im-

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19 Valentukevičius, R. Nusikaltimų žmoniškumui tyrimo problemos [Valentukevicius, R. Problems in investigating crimes agains humanity]. *LEX*. 1998, 3: 35.

20 Lyman Bruun, L. Beyond the 1948 Convention: Emerging Principles of Genocide in Customary International Law. *Maryland Journal of International Law and Trade*. 1993, 17: 210−218; Van Schaack, B. The Crime of Political Genocide: Repairing the Genocide Convention's Blind Spot. *Yale Law Journal*. 1997, 106: 2280−2282.

21 *Encyclopedia of Public International Law*. North Holland Publishing. 1995. p. 543 (Vol.II).

22 Ward, N. *Ferdinandusse. Direct Application of International Criminal Law in National Courts*. Hague: T.M.C. Asser Press, 2006, p. 24.

23 Schabas, W. A., p. 141−142.

24 See Anti-communist congress. Compiled by Anušauskas, A. [translated by Olimpija Armalytė, Rita Frank, Jonas Varnas; English text edited by Gražydas Kirvaitis]; and, Proceedings of the International Public Tribunal in Vilnius [compiled by Vytautas Zabiela, Vytautas Raudeliūnas; translated and edited by Dalija Tekorienė], Vilnius, 2000.

25 As is stated by ICTY in *Prosecutor v. Kupreškić and Others,* Case No. IT-95-16-T (Trial Chamber), 14 January 2000. "Persecution (*as an inhumane act of crimes against humanity–add.*) is only step away from geno-

portant limitations: a specific list of protected groups, *dollus specialis* and a specific list of inhumane acts. For Lithuania and other countries it might appear logical to adopt an easier approach and qualify Soviet regime crimes as crimes against humanity. However, a definition of a crime that more or less corresponds to the international definition of a crime against humanity was only introduced into the Lithuanian Criminal Code in 2003. Another likely reason for this choice is that the title "genocide" itself has a much stronger impact on public opinion, especially when dealing with historical injustices, unlike "crimes against humanity" whose nature is much less understood by the public. Although crimes against humanity were introduced into international criminal law back in 1945 by the London Charter, which affirmed the Statute for International Military Tribunal,[26] until the end of twentieth century, this type of crime was still lacking a contemporary definition based on universal agreement and international treaties. There have been different draft definitions (as in the Code of Crimes against Peace and Security of Mankind as of 1954 and 1996, prepared by the United Nations General Assembly International Law Commission), definitions in the Statutes of the International Criminal Tribunal for Former Yugoslavia, as well as the International Criminal Tribunal for Rwanda. However, these definitions have even contradicted each other to some extent (links with armed conflict, elements of persecution).[27] Only in 1998 was the Rome Statute of International Criminal Court[28] adopted to define some of the most heinous international crimes, including crimes against humanity. However, the future of the Rome Statute and International Criminal Court was still very unclear in 1998. Therefore it is not surprising that crimes against humanity was a rather "unpopular" crime to import into national legal systems and many states opted for a broadened definition of genocide, especially considering that the difference between genocide and crimes against humanity is moderate.

The issue of "genocide groups" has been a question of great controversy since the adoption of the Genocide Convention. The debate on which groups should be covered by the Genocide Convention began immediately at the start of the Convention's preparation. The first international document, UN General Assembly 1946 resolution 96(I) on genocide included references to political groups[29]. The creator of the term "genocide", R. Lemkin lobbied not only for the inclusion of political groups in the Convention, but also of "layers of society", which is definitely close to social groups. In fact, there is

cide–the most abhorrent crime against humanity. In the crime of genocide the criminal intent is to destroy the group or its members; in the crime of persecution the criminal intent is instead to forcibly discriminate against a group or members thereof by grossly and systematically violating their fundamental rights. <...>", statement that genocide is a form of crimes against humanity is also found in Eichman case (See The Eichman Case: *Attorney General of Israel v. Eichmann*. *International Criminal Law*. New York, 1986, p. 285).

26 See Charter of the International Military Tribunal. *United Nations Treaty Series*. Vol. 82, 279, Article 6(c).

27 See Security Council Resolution 827(1993) on Establishing an International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International humanitarian Law Committed in the Territory of the Former Yugoslavia. *International Legal Materials*, 1993, 1192, Article 5 and Security Council Resolution 955(1994) establishing the International Tribunal for Rwanda. *International Legal Materials*. 1994, 1598, Article 3.

28 See Rome Statute of the International Criminal Court, UN. Doc. A/CONF.183/9/1998.

29 UN GA Res. 96(1).

evidence that R. Lemkin himself regarded the Soviet repressions in the Baltic States as genocide.[30]

Looking at the *travaux preparatoire* as well as the writer's commentaries that followed the Convention leaves no doubt that exclusion of political groups from the definition of genocide was based mostly on political and only partially on legal reasoning. For example, Soviet representatives claimed in 1948 that "the crime of genocide is organically bound up with Fascism-Nazism and other similar race 'theories' which preach racial and national hatred, the domination of the so-called 'higher' races and the extermination of the so-called 'lower' race".[31] Moreover, the Soviet scholar Andriuchin wrote: "By inclusion of political groups, imperialists aimed to protect by international law the reactionary conspiratory activities of imperialist agents in the countries of people's democracy. Acceptance of such provision would have meant that the convention will protect mature reactionaries, imperialistic conspirators".[32] Poland (an involuntary satellite of the USSR at the time) expressed similar resistance to including political groups, observing that national, racial and religious groups "had a fully established historical background, while political groups had no such stable form".[33] However, the stability issue (which is often referenced as the main criterion for limiting groups protected from genocide) is quite controversial and one would be hard pressed to see how religious groups are more stable than political ones. Persons may change their religion as well as their political views, but genocide is a crime of "stigma" and an individual's shift in views may often have a very limited effect on his fate. To claim that religious groups are more stable than political ones, may therefore be a logical fallacy.

Furthermore, the listed genocide groups may be seen as interchangeable with no hard delineation between one and the other. In fact, all four groups represent one social entity, bound by many links. Religious identities may overlap with issues of nationality or ethnicity (i. e., Bosnian Muslims or Austrian Jews). The purpose of the Genocide Convention was not to define exactly the groups protected but to cover the most essential features of groups at stake. Therefore, a simple political group on its own (i. e., a political party) was not significant enough to be protected from genocide, but such protection may have come into play in case of a cumulative situation where political groups are targeted not only for their political views but also for their belonging to national, religious, ethnic or racial groups. For example, in the wake of the German–USSR war in 1941, when the first pogroms and killings of Jews started in Lithuania, many Jews were targeted as Communists and thus perished for political pretexts[34] though it was still regarded as genocide.

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30 Weiss-Wendt, A. Hostage of Politics: Raphael Lemkin on „Soviet Genocide". *Journal of Genocide Research*. 2005, 7(4): 551–559.

31 Schabas, W. A., p. 211.

32 Андрюхин, М. Н. Геноцид – тягчейшее преступление против человечества [Andruchin, M. N. Genocide – the Hardest Crime against Humanity]. Москва, 1961.

33 Schabas, W. A., p. 213.

34 Dieckmann, Ch.; Sužiedėlis, S. The Persecution and Mass Murder of Lithuanian Jews During Summer and Fall of 1941: Sources and Analysis. Vilnius: Margi raštai, 2006, p. 102.

Nevertheless, the broadening of the conventional definition, even if to some extent it does not correspond to international law, does not violate international law *per se*. There is no prohibition, either in the Genocide Convention, or in any other international instrument, to adopting a broader definition than required. It is a state's prerogative to decide upon its criminal law content. As stated by the ICJ in the *Military and Paramilitary Activities* (*Nicaragua vs. USA*) case, the "state's domestic policy falls within its exclusive jurisdiction, provided of course that it does not violate any obligation of international law. Every State possesses a fundamental right to choose and implement its own political, economic and social systems"[35]. Therefore, Lithuania and other states are entitled to adopt broader definitions of genocide and to prosecute persons for those crimes as long as such action corresponds to the general principle of *nullum crimen sine lege*. This principle is established in all universal and regional human rights treaties[36] and it prohibits the prosecution of a person for a criminal offence which did not constitute a criminal offence under national or international law at the time when it was committed. Therefore, states are fully entitled to prosecute persons for genocide based on a broader definition if the crime is committed after the law that criminalizes it comes into effect. The issue may raise serious problems if a given crime was committed before the entry into force of relevant provisions of national criminal law.

Generally, the rule of *nullum crimen sine lege* requires that the criminal offence be established by relevant provisions in national law or international law, e.g., statutes, other legal acts, treaties, etc. However, in the case of most heinous crimes such as war crimes, crimes against humanity and genocide, the rule of *nullum crimen sine lege* is interpreted in a more general way. Ever since the major Nazi trials by the International Military Tribunal (IMT) in 1945, it has been agreed that an offence might be established by international law in a general way, but it still has to be established. For example, war crimes that were listed in Article 6 of the IMT Charter were not literally spelled out in the 1907 Hague Convention on Laws and Customs of War on Land as crimes entailing individual criminal responsibility. Nevertheless, the IMT stated: "the Convention expressly stated that it was an attempt 'to revise the general laws and customs of war,' which it thus recognised to be then existing, but by 1939 these rules laid down in the Convention were recognised by all civilised nations, and were regarded as being declaratory of the laws and customs of war".[37] The same approach was taken by the IMT towards other crimes in the Charter, including the newest ones–crimes against humanity. In 1968, the UN Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity (entered into force on 11 November 1970) lifted statutory limitations for these crimes, thus creating another exception in criminal law.

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35 Military and Paramilitary Activities (Nicaragua/United States of America), Merits. I. 27.6.1986, I.C.J. Reports 1986, p. 131.

36 See Art. 10, UN Universal Declaration of Human Rights, Art. 15, International Covenant on Civil and Political Rights, Art. 7, European Convention for the Protection of Human Rights and Fundamental Freedoms, Art. 9, American Convention On Human Rights, etc.

37 International Military Tribunal, Judgement [interactive] [accessed 2009-10-20]. <http://avalon.law.yale.edu/imt/judlawre.asp>.

Consequently, if a state wishes to apply newly enacted criminal law retroactively, it may do this without breaching the principle *nullum crimen sine lege* as long as the criminal offence is prohibited by international law, at least in a general way (i. e., based on the general principles of law), at the time when the offence was committed. Somewhat later, this approach was literally spelled out in the European Convention of Human Rights Article 7, Part 2 and supported by the case-law of the Court.[38]

Coming back to Lithuanian law, the broadening of the conventional definition of genocide and its retroactive application raises two questions. First, whether genocide was established as a crime under international law in 1940–1955?[39] Second, what was the content of genocide crime and could it encompass the elements of the broadened definition?

In answering the first question, it should be pointed out that the Genocide Convention itself came into force in 1951 and even so took effect only among the High Contracting Parties. The Genocide Convention came into force in the Soviet Union on 3 May 1954. Lithuania, by that time, was occupied and annexed by the Soviet Union and Lithuanian legislative powers were suspended. Accordingly, there was no national law present to criminalize genocide in most of the cases. Nevertheless, the prohibition of genocide was already emerging in international customary law in the mid-1940s, i. e., before the Genocide Convention was adopted and came into force. The term "genocide" was already used in the Judgment of the International Military Tribunal (1945). It was even more intensively and consistently referred to during the post-Nuremberg trials. In the *Justice* Trial (1947), commenced by the US Military (Nuremberg) Tribunal according to Control Council Law No. 10, the Court cited the UN General Assembly Resolution 96(I) and even determined that defendants participated in the crime of genocide. In the Hoess and Greiser trials by Polish courts, the defendants' crimes were also labelled as "genocide", as well as in a number of other cases.[40] This evidence suggests that the crime of genocide may already have been established as a crime under international customary law in the mid-1940s, though with ambiguous content.

The second question is more complicated. Vivid discussions that took place at the drafting of the Genocide Convention regarding the scope of the crime (see above), reveal that its exact content was a matter of the debate, including the question of protected groups. However, post-war criminal processes reveal that by that point in time, genocide was first and foremost understood as a crime against national, ethnic, racial and religious groups (annihilation and persecution of Jews, Roma, Poles, etc.).[41] This view was dominant during all further development of the norm. Therefore, broadening the conventional definition by including political and social groups might indeed create issues concerning the principle of legality.

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38 See *Theory and Practice of the European Convention on Human Rights*. Fourth edition. van Dijk, P.; van Hoof, F.; van Rijn, A.; Zwaak, L. (eds.). Antwerpen-Oxford: Intersentia, 2006, p. 660; also *Touvier v. France* (dec.), application no. 29420/95, 13 January 1997.

39 The cases related to crimes of the Soviet regime mostly cover this period.

40 Schabas, W. A., p. 48−49.

41 *Ibid*.

The Soviet regime committed a vast range of crimes. Its aim was not merely the immediate and total physical destruction of national or ethnic groups as such, but their violent reconstruction. The violence of the Soviet regime was unleashed on many groups: economic (farmers), social (intelligentsia), political (Trotskyists), religious (clerics), ethnic (Jews), etc.[42] All this was directed towards creating a Communist society–a "natural withering" of all the remnants of bourgeois society, including nationality, state, etc. It is widely accepted that Soviet policy was first of all directed at political and social groups (theories of *politicide* and *stratocide*),[43] not the national or ethnic. However, this is not exactly true; the process of targeting victims for destruction was different within different periods and territories of the Soviet Union, and this is particularly evident in the Baltic States.

Soviet policy in the Baltic States was directed at political, social groups *and* national groups, because particular social and political groups formed the backbone of national groups. This qualification is supported by certain historical facts. For example, Soviet repression policy towards deportees distinguished so-called "untrustworthy *nations*". One of such nations was Lithuanian, along with the Chechens, Latvians, Estonians, i. e., nations whose people opposed the Soviet regime most fiercely. In 1949, the Soviet Union's Minister of Interior, S. Kruglov and Chief Prosecutor Safonov established a new regulation concerning the children of deportees. This regulation established that children of deportees, upon reaching the age of 16, be entered into a list of "eternal deportees" (i. e., with no right to return to their homeland). Children born into mixed marriages between deportees and non-deportees had a right to choose their *nationality* either by the father's, or the mother's line. Those who chose the nationality of the deportee parent were entered into the "eternal deportee" list. This regulation was not applicable to Russian deportees.[44] Some Caucasian and other nations (Chechens, Ingush, Kalmyks, Crimean Tatars) seen as "politically untrustworthy", were deported from their homelands *en masse* in 1944, including women and children.[45] Therefore there is no doubt, that "political" and "social" motives in Soviet policy sometimes just shielded national and ethnic genocidal aspirations. This was exactly the case in Lithuania. Moreover, Soviet authorities, in their official documents, referred to some victims targeted for repression as *bourgeois nationalists* or simply–*nationalists.*[46] In light of this, the broadening

42 For Soviet criminal policy in general see Courtois, S. *et al*. *Le livre noir du communisme. Primes, terreur, repression*. Paris: Lafont, 1997.

43 Harff, B. No Lessons Learned from the Holocaust? Assessing Risks of Genocide and Political Mass Murder since 1955. *American Political Science Review.* 2003, 97(1): 57−73; Donskis L.

44 Anušauskas, A. *Lietuvių tautos sovietinis naikinimas 1940-1958 metais*. [Anusauskas, A.The Soviet Extermination of the Lithuanian People 1940–1958]. Vilnius, 1996, p. 385.

45 See Полян, П. Не по своей воле… История и география принудительных миграций в СССР [Polan, P. Against Their Will... The History and Geography of Forced Migrations in the USSR]. <http://www.demoscope.ru/weekly/knigi/polian/polian.html>. p. 116-136.

46 Pasipriešinimo slopinimas. *Okupuota Lietuva*. Anušauskas, A. (red.) [Repression of Resistance. In Ocupied Lithuania, Anusauskas, A. (ed.)]. Vilnius: Lietuvos gyventojų genocido ir rezistencijos tyrimo centras, 2007, p. 352−363.

of the conventional definition of genocide does not necessarily imply that Lithuania's criminal laws are *out of scope* of the Genocide Convention's definition. Political and social groups were included in the definition in Lithuanian law not because these groups are *distinct* groups, but because they *closely overlap* with national, religious and ethnic groups. This is not a case of political parties and the like that were mostly disregarded in the drafting discussions as unsuitable for genocide protection.[47] I suggest that it is not a broadening, but a broad interpretation of the conventional definition. Unfortunately, Lithuanian courts have not elaborated much on this issue, except in one instance when the Lithuanian Appeals Court stated in its decision in the Vasiliauskas case:

The chamber also draws attention, that to define Lithuanian partisans (i. e., members of anti-Soviet resistance) particularly as a political group, as done in the Judgement[48] is, in fact, debatable and not precise enough. Members of this group also represented the Lithuanian nation, a national group. Soviet genocide was performed according to the criteria of nationality–ethnicity[49].

However, even under this reasoning, the qualification of Soviet crimes as genocide remains a problematic issue. In almost every case, the national courts limit themselves to analysis of national law only, and thus do not thoroughly address issues of international law. In fact, it would be far more beneficial for the Lithuanian Prosecutor's Office and the Courts to qualify the crimes of the Soviet regime as crimes against humanity, considering that the Criminal Code which came into force in 2003 has a relevant provision (Article 100).

As noted, in *Kupreskić and Others*, the ICTY has held that persecution is only a step away from genocide–the most abhorrent crime against humanity[50]. Individual criminal responsibility for such crimes has been affirmed by International Military Tribunal jurisprudence and the Nuremberg principles. Moreover, well established case-law of the European Court of Human Rights has affirmed the legality and force of the Nuremberg principles[51]. It should be noted that Judge Myjer in his concurring opinion in *Kononov v. Latvia* clearly indicated that "*No person who committed crimes against humanity or war crimes after Nuremberg could reasonably say that he was not aware of the nature of his acts*"[52]. It is also important that the ECHR has already established that at the relevant time, the Soviet Union was a party to the London Agreement of 8 August 1945, by which the Nuremberg Charter was enacted and besides, the Soviet Union was already a member of the UN when, subsequently, on 11 December 1946, the General Assembly of the UN affirmed the principles of international law recognized by the Charter. Therefore, it cannot be claimed that these principles were unknown to the Soviet authorities[53].

47 Schabas, W. A., p. 115.

48 I. e., the judgment of the district court.

49 *Decision of the Court of Appeals of Lithuania as of 21 September 2004*.

50 *Prosecutor v. Kupreškić and Others*, case No. IT-95-16-T (Trial Chamber), 14 January, 2000.

51 See e.g., *Touvier v. France* (dec.), application no. 29420/95, 13 January, 1997.

52 *Kononov v. Latvia* (dec.), application no. 36376/04, 24 July, 2008.

53 See *Kolk and Kislyiy v. Estonia* (dec.), application nos. 23052/04 & 24018/04, 17 January, 2006; *Penart v. Estonia* (dec.), application no.14685/04, 21 January, 2006.

Crimes against humanity has a far more flexible *corpus delicti*, with no limitation of groups and without specific intent to destroy groups in whole or in part, which may also create some problems for Soviet crimes practice.

In some cases, the Lithuanian Prosecutor's Office and the Courts are taking the said approach and, since 2001, they do not indict or convict every person accused of Soviet crimes for genocide. Some individuals have been convicted under articles of the Criminal Code establishing responsibility for war crimes (namely–deportations),[54] some indicted under article 100, which defines crimes against humanity[55]. In any case, Lithuanian courts should devote much more attention to international aspects of legal regulations when dealing with national law that implements international norms.

Conclusions

The broadened interpretation of genocide in Lithuanian criminal law is based on three major issues: first, political decision to treat crimes of the Soviet regime as genocide; second, problems with the qualification of Soviet crimes according to the conventional definition *stricto sensu*; third, international discussions and emerging practice of expanding the protected groups list. The introduction of two additional groups (social and political) may indeed cause some problems regarding the principle of *nullum crime sine lege*, because in all cases the law on genocide is being applied retroactively. Hence, it must be proven that international law prohibited the crime of genocide when the offences were committed. There is a popular opinion in the international sphere that Soviet crimes were not genocide because they pursued goals other than immediate physical destruction of national, ethnic, or religious groups. However, evidence suggests that Soviet policy in the Baltic States and some other places (Caucasus) did sometimes take on the character of genocide. In other words, policy directed at national groups was veiled in political reasons, and contrary to the Nazis, was not declared openly. Therefore, we may conclude that Lithuania's interpretation of the genocide groups list is an interpretation within the Genocide Convention's definition: social and political groups may be understood not as distinct groups, but as groups that closely overlap with national, religious and ethnic groups. In many instances, it may be advisable to qualify crimes of the Soviet regime as crimes against humanity to avoid possible problems with the principle of *nullum crimen sine lege*. In dealing with such crimes, the courts should address issues of international law more precisely.

54 09-2-005-01, Generalinė prokuratūra, STS. [Chief Prosecutor's Office, Special Investigations Department, No. 09-2-005-01.]

55 01-2-00043-05, Generalinė prokuratūra; 01-2-00001-06, Generalinė prokuratūra [Chief Prosecutor's Office, No. 01-2-00043-05, Chief Prosecutor's Office, 01-2-00001-06.]

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PLEČIAMOJI GENOCIDO SAMPRATA LIETUVOS RESPUBLIKOS BAUDŽIAMUOSIUOSE ĮSTATYMUOSE IR PRINCIPAS *NULLUM CRIMEN SINE LEGE*

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Santrauka. *Straipsnyje analizuojamas galimas plečiamasis genocido sampratos traktavimas Lietuvos baudžiamojoje teisėje bei jos santykis su principu nullum crimen sine lege (nėra nusikaltimo be įstatymo). Šiuo metu dėl galimo plečiamojo genocido traktavimo Europos Žmogaus Teisių Teisme iškelta pirmoji byla prieš Lietuvos Respubliką (Vasiliauskas v. Lietuvą), kadangi toks apibrėžimo plėtimas taikant kvalifikaciją veikoms, vykusioms anksčiau, nei įsigaliojo baudžiamasis įstatymas, galimai pažeidžia principą nullum crimen sine lege. 1992 m. įstatymu „Dėl Lietuvos gyventojų genocido“ Lietuvos Respublikos baudžiamojoje teisėje įtvirtintas genocido apibrėžimas iš principo atitiko genocido apibrėžimą pagal 1948 m. Jungtinių Tautų konvenciją dėl kelio užkirtimo genocido nusikaltimui ir baudimui už jį. Tačiau 1998 m. genocido apibrėžimas, perkeltas į Lietuvos Respublikos baudžiamąjį kodeksą (BK), buvo papildytas dviem grupėmis: socialine ir politine taip išplečiant genocido sąvoką ir nutolstant nuo 1948 m. konvencijos sąvokos. Autoriaus nuomone, tai lėmė keletas priežasčių: 1) problemos kvalifikuojant sovietinio režimo nusikaltimus, kadangi jų atveju sunku remtis konvencijoje pateiktu genocido apibrėžimu; 2) kitų valstybių požiūrio tendencijos plėsti genocido sampratą nacionalinėse teisės sistemose; 3) nusikaltimų žmoniškumui nepakankamas apibrėžtumas tarptautinėje teisėje bei „nepopuliarumas“ nacionalinėse teisės sistemose. Kita vertus, toks genocido sąvokos plėtimas neatitinka principo nullum crimen sine legis, reikalaujančio, kad veika padarymo metu būtų pripažįstama nusikalstama arba nacionalinėje, arba tarptautinėje teisėje. Reikia pritarti nuomonei, jog tarptautinės teisės analizė nerodo, kad plečiamuosius genocido apibrėžimo atvejus būtų galima laikyti naujos paprotinės normos, kuri iš esmės veiktų konvencijos genocido apibrėžimą, susiformavimu. Priešingai, yra pagrįsta, kad konvencinė genocido sąvoka sutampa su analogiška paprotine norma. Tačiau autorius atkreipia dėmesį, jog, pirma, net pagal konvencijos sampratą genocido grupės tarpusavyje nėra lengvai atskiriamos, jos suprantamos kaip vieno darinio kompleksinis apibūdinimas. Antra, tarptautinėje praktikoje vertinant sovietinio režimo nusikaltimus kaip daugiausia nukreiptus prieš politines, socialines, ekonomines grupes (t. y. grupes, kurios nesaugomos pagal konvencijos genocido apibrėžimą), nepakankamai įvertinami sovietinės politikos Baltijos valstybėse ir kai kuriuose kituose SSRS regionuose (pvz., Kaukaze) ypatumai. Istoriniuose šaltiniuose yra įrodymų, kad tam tikrais atvejais sovietinė sistema represijas vykdydavo prieš nacionalines grupes (tautas), kartu veikdama ir prieš socialines ar politines grupes. Todėl galima daryti prielaidą, kad genocido traktavimas pagal Lietuvos baudžiamuosius įstatymus gali būti aiškinamas ne kaip savarankiškų atskirų papildomų grupių įvedimas, o kaip papildomų grupių, apibūdinančių konvencijoje*

numatytų grupių požymius, įvedimas. Kita vertus, autorius siūlo, kad siekiant išvengti galimų neaiškumų dėl principo nullum crimen sine lege taikymo, Lietuvos teisėsaugai vertėtų dažniau sovietinio režimo nusikaltimus kvalifikuoti kaip nusikaltimus žmoniškumui, t. y. pagal BK 100 str.

Reikšminiai žodžiai: *nusikaltimai žmoniškumui, genocidas, tarptautinė baudžiamoji teisė, Tarptautinis Baudžiamasis Teismas, ginkluotų konfliktų studijos.*

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