EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

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Conviction of an officer in the State security services for genocide was not justified

In today's **Grand Chamber** judgment[1] in the case of Vasiliauskas v. Lithuania (application no. 35343/05) the European Court of Human Rights held, by nine votes to eight, that there had been:

a violation of Article 7 (no punishment without law) of the European Convention on Human Rights.

The case concerned the conviction in 2004 of Mr Vasiliauskas, an officer in the State security services of the Lithuanian Soviet Socialist Republic from 1952 to his retirement in 1975, for the genocide in 1953 of Lithuanian partisans who resisted Soviet rule after the Second World War. Mr Vasiliauskas notably complained that the wide interpretation of the crime of genocide, as adopted by the Lithuanian courts in his case, had no basis in the wording of that offence as laid down in public international law. He submitted in particular that he had been convicted on the basis of Article 99 of the new Lithuanian Criminal Code which, providing for criminal liability for genocide, includes political groups – such as partisans – among the groups that could be considered as victims of genocide. However, the Convention on the Prevention and Punishment of the Crime of Genocide of 1948 ("Genocide Convention") does not include political groups among those protected.

The Court found in particular that it was clear that Mr Vasiliauskas' conviction had been based upon legal provisions that had not been in force in 1953, and that such provisions had therefore been applied retroactively. The retrospective application of the criminal law to an accused's disadvantage being prohibited under the European Convention, it therefore had to be established whether Mr Vasiliauskas' conviction had been based upon international law as it stood in 1953. Although the offence of genocide had been clearly defined in the international law (notably, it had been codified in the 1948 Genocide Convention, approved by the United Nations in 1948 and signed by the Soviet Union in 1949) and therefore accessible to Mr Vasiliauskas, the Court took the view that his conviction could not have been foreseen under international law as it stood at the time of the killings of the partisans. Notably, international treaty law had not included a "political group" in the definition of genocide and customary international law was not clear on the definition (opinions being divided). Nor was the Court convinced that the Lithuanian courts' interpretation of the crime of genocide in Mr Vasiliauskas' case had been in accordance with the understanding of the concept of genocide as it stood in 1953: even though the courts had rephrased his conviction to attribute Lithuanian partisans to "representatives of the Lithuanian nation", that is a national group which is protected under the Genocide Convention, no explanation had been given as to what the notion "representatives" entailed or how historically or factually the Lithuanian partisans had represented the Lithuanian nation. Indeed, the definition of the crime of genocide in Lithuanian law had not only had no basis in the wording of that offence as expressed in the 1948 Genocide Convention, but had also been gradually enlarged during the years of Lithuania's independence. Mr Vasiliauskas' conviction of genocide had not therefore been justified.

1. Grand Chamber judgments are final (Article 44 of the Convention).
All final judgments are transmitted to the Committee of Ministers of the Council of Europe for supervision of their execution. Further information about the execution process can be found here: www.coe.int/t/dghl/monitoring/execution.

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Principal facts

The applicant, Vytautas Vasiliauskas, is a Lithuanian national who was born in 1930 and lives in Tauragė (Lithuania).

During the Second World War the Soviet army invaded Lithuania. In August 1940 the Soviet Union completed the annexation of the country, which was subsequently named "the Lithuanian Soviet Socialist Republic" (the "LSSR"). A nation-wide partisan resistance movement began aiming at the liberation and re-establishment of an independent Lithuania. In the 1950s anti-Soviet armed groups – in particular partisans – continued to put up resistance throughout the LSSR and they were suppressed by the Soviet authorities. Lithuania regained its independence in 1990 and the Russian army left the country in 1993.

On 1 May 2003 a new Criminal Code came into force in the newly independent Lithuania and criminal liability for genocide was provided for under Article 99 of the new code.

In the meantime, the Lithuanian prosecuting authorities had started an investigation into the deaths of two brothers in January 1953 in the Šakiai area. Thus, on 4 February 2004 a regional court found Mr Vasiliauskas, an LSSR Ministry of State Security (MGB) officer in 1953, guilty of the killing of the two brothers, considering that as they were representatives of a political group, the Lithuanian partisans, this corresponded to the crime of genocide under Article 99 of the new Lithuanian Criminal Code. Mr Vasiliauskas was sentenced to six years' imprisonment.

The decision of the regional court was upheld by the Court of Appeal in September 2004 and then by the Supreme Court in a final decision of February 2005.

The Court of Appeal held in particular that to attribute Lithuanian partisans to a political group was not precise enough. It found that the Lithuanian partisans had been representatives of the Lithuanian nation, that is, a national group, and that the Soviet genocide had been carried out precisely on account of the inhabitants' nationality-ethnicity which would be the requirement under international law for their deaths to be considered genocide.

The Supreme Court further upheld the finding of the lower courts that Mr Vasiliauskas had participated in the killing of the resistance fighters and that he had to have known the goal of the Soviet government – namely, to eradicate the resistance fighters – and had to have realised that the two partisans would either be killed or arrested and sentenced.

Most recently, steps were taken to have Mr Vasiliauskas' criminal case re-opened, but the Prosecutor found that there were no new circumstances to justify a request being made to the Supreme Court to reconsider the case.

Complaints, procedure and composition of the Court

Mr Vasiliauskas complained that his conviction of genocide had been in breach of Article 7 (no punishment without law) of the European Convention on Human Rights. He submitted that Article 99 of the Lithuanian Criminal Code, which only entered into force on 1 May 2003, had retroactive effect and defined the notion of genocide in wider terms than the international definition under Article II of the Convention on the Prevention and Punishment of the Crime of Genocide of 1948 (the "Genocide Convention")[2]. Namely, Article 99 includes political groups among the groups that could be considered as victims of genocide. However, the Genocide Convention does not include political groups among those protected.

The application was lodged with the European Court of Human Rights on 30 July 2005.

[2] Namely, the Genocide Convention provides that the crime of genocide is characterised by an "intent to destroy, in whole or in part, a national, ethnical, racial or religious group, …".

The Court gave notice of the application to the Lithuanian Government, with questions, on 16 June 2009. A statement of facts submitted by the Court to the Lithuanian Government is available in English only on the Court's website.

On 17 September 2013 the Chamber to which the case was allocated decided to relinquish jurisdiction in favor of the Grand Chamber.

A hearing was held on the case in Strasbourg on 4 June 2014.

The Russian Government were given leave (under Article 36 § 2) to intervene as a third party in the written procedure.

Judgment was given by the Grand Chamber of 17 judges, composed as follows:

Dean **Spielmann** (Luxembourg), *President*,
Josep **Casadevall** (Andorra),
Guido **Raimondi** (Italy),
Mark **Villiger** (Liechtenstein),
Isabelle **Berro** (Monaco),
Işıl **Karakaş** (Turkey),
Ineta **Ziemele** (Latvia),
Khanlar **Hajiyev** (Azerbaijan),
Dragoljub **Popović** (Serbia),
András **Sajó** (Hungary),
Ann **Power-Forde** (Ireland),
Nebojša **Vučinić** (Montenegro),
Paulo **Pinto de Albuquerque** (Portugal),
André **Potocki** (France),
Ksenija **Turković** (Croatia),
Egidijus **Kūris** (Lithuania),
Jon Fridrik **Kjølbro** (Denmark),

and also Erik Fribergh, *Registrar.*

Decision of the Court

The Court reiterated that Article 7 of the Convention prohibits the retrospective application of the criminal law to an accused's disadvantage. It also more generally embodies the principles that only the law can define a crime and prescribe a penalty and that criminal law must not be extensively construed to an accused's detriment. Thus, an offence must be clearly defined in the law (or be "accessible") and an individual should be able to know (or "foresee") from the wording of the relevant provision of the law – if need be with informed legal advice – what acts and omissions will make him or her criminally liable.

The crime of genocide was introduced into Lithuanian law in 1992 and was subsequently provided for under Article 99 of the new Criminal Code. The new Criminal Code entered into force in 2003, a year before Mr Vasiliauskas was convicted. It was therefore clear that Mr Vasiliauskas' conviction had been based upon legal provisions that had not been in force in 1953, and that such provisions had therefore been applied retroactively. Consequently, there would be a violation of Article 7 of the European Convention unless it could be established that Mr Vasiliauskas' conviction had been based upon international law as it stood in 1953. In the Court's view, Mr Vasiliauskas' conviction therefore had to be examined from that perspective.

As concerned whether the offence of genocide had been clearly defined in the international law, the Court found that instruments of international law prohibiting genocide had been sufficiently

accessible to Mr Vasiliauskas. Genocide had been clearly recognised as a crime under international law in 1953. It was codified in the Genocide Convention, which was approved unanimously by the United Nations General Assembly in 1948 and signed by the Soviet Union in 1949. Even before then, genocide had been acknowledged and condemned by the United Nations in 1946.

However, the Court took the view that Mr Vasiliauskas' conviction for genocide could not have been foreseen under international law as it stood at the time of the killings of the partisans. When examining this foreseeability aspect of the case, the Court bore in mind that the stringent requirements – namely, proof of specific intent that a protected group was targeted for destruction in its entirety or in substantial part – for imposing a conviction of genocide guarded against the danger of such a conviction being imposed lightly.

First, in 1953 international treaty law had not included a "political group" in the definition of genocide. Notably, Article II of the 1948 Genocide Convention lists four protected groups of persons – national, ethnical, racial or religious – and does not refer to political groups.

Second, opinions appear to be divided with regard to the scope of genocide under customary international law. It could not therefore be established with sufficient clarity that customary international law had provided for a broader definition of genocide than that set out in Article II of the 1948 Genocide Convention. Notwithstanding certain views favouring the inclusion of political groups in the definition of genocide, the scope of the codified definition of genocide remained narrower in the 1948 Convention and has been retained in all subsequent international law instruments.

Third, as concerned the argument that the Lithuanian partisans had been "part" of a national group, that is a group protected by the Genocide Convention, the Court considered that Mr Vasiliauskas could not have foreseen in 1953 the subsequent judicial interpretations of the term "in part" as used in Article II of the Genocide Convention. In particular, he could not have foreseen the judicial guidance which emerged concerning cases on genocide brought before the international courts, such as cases brought before the International Criminal Tribunal for the former Yugoslavia and the International Court of Justice. In those cases it was found that the intentional destruction of a "distinct" part of a protected group could be interpreted as genocide of the entire protected group, provided that the "distinct part" was substantial.

Nor was the Court convinced that the Lithuanian courts' interpretation of the crime of genocide in Mr Vasiliauskas' case had been in accordance with the understanding of the concept of genocide as it stood in 1953.

There was no firm finding in the establishment of the facts on Mr Vasiliauskas' case by the domestic criminal courts to enable the Court to assess on which basis it had been concluded that in 1953 the Lithuanian partisans constituted a significant part of the national group, in other words, a group protected under Article II of the Genocide Convention. Even though the Court of Appeal had rephrased Mr Vasiliauskas' conviction to attribute Lithuanian partisans to "representatives of the Lithuanian nation, that is, the national group" rather than to a political group, it had not explained what the notion "representatives" entailed. Nor did it provide much historical or factual account as to how the Lithuanian partisans had represented the Lithuanian nation. The partisans' specific mantle with regard to the "national" group was not apparently interpreted by the Supreme Court either. The Court was not therefore convinced that Mr Vasiliauskas, even with the assistance of a lawyer, could have foreseen in 1953 that the killing of the Lithuanian partisans could have constituted the offence of genocide of Lithuanian nationals or of ethnic Lithuanians.

The Court accepted that Mr Vasiliauskas' actions had been aimed at the extermination of the partisans as a separate and clearly identifiable group, characterised by their armed resistance to Soviet power. It was not immediately obvious that the ordinary meaning of the terms "national" or "ethnic" in the Genocide Convention could be extended to partisans. Thus, the domestic courts'

conclusion that the victims came within the definition of genocide as part of a protected group was an interpretation by analogy, to Mr Vasiliauskas' detriment, which also rendered his conviction unforeseeable.

Indeed, the definition of the crime of genocide in Lithuanian law had not only had no basis in the wording of that offence as expressed in the 1948 Genocide Convention, but had also been gradually enlarged during the years of Lithuania's independence, thus further aggravating his situation.

Given the Lithuanian courts' arguments in Mr Vasiliauskas' case, the Court was not persuaded that his conviction of genocide had been consistent with the essence of that offence as defined in international law in 1953 or that it could reasonably have been foreseen by him at the time of his participation in the operation during which the two partisans had been killed. Mr Vasiliauskas' conviction had not therefore been justified under Article 7 § 1 of the Convention. Given that finding, the Court did not consider that Mr Vasiliauskas' conviction could be justified either under Article 7 § 2.

There had therefore been a violation of Article 7 of the Convention.

Article 41 (just satisfaction)

The Court held that the finding of a violation of Article 7 constituted in itself sufficient just satisfaction for any non-pecuniary damage sustained by Mr Vasiliauskas. It further held that Lithuania was to pay Mr Vasiliauskas 10,072 euros (EUR) in respect of pecuniary damages and EUR 2,450 for costs and expenses.

Separate opinions

Judges Villiger, Power-Forde, Pinto de Albuquerque and Kūris expressed a joint dissenting opinion. Judges Sajó, Vučinić and Turković also expressed a joint dissenting opinion. Judges Ziemele, Power-Forde and Kūris each expressed a dissenting opinion. These opinions are annexed to the judgment.

The judgment is available in English and French.

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