Regime Change May Allow Prosecution of a Former Oppressive Regime's Enforcers for Genocide

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By: James Hendry

In *Drelingas v. Lithuania* (*Drelingas*) released March 12, the European Court of Human Rights (ECtHR), held that a former KGB officer could be convicted of genocide where he had been involved in the killing of the leader of the Lithuanian partisan movement and the deportation of the leader's wife in 1956 when Lithuania was under Soviet rule. The case demonstrates the consequences for the security forces of an oppressive regime who are still around when the regime supported by the partisans is freed and creates its own national law that makes genocide an offence. The problem before the Court in this case was whether the offence existed in 1956 when the criminal act occurred. Article 7 of the *European Convention on Human Rights* (Convention) prohibits the conviction of anyone for a criminal offence that was not an offence under national or international law when it was committed.

Drelingas was a senior operative officer of the MGB/KGB section established to fight the Lithuanian national resistance movement. "Vanagas" was the leader of that partisan movement; "Vandas", his

wife, was a fellow partisan. They were abducted off the street one in the morning of October 12, 1956 by a group of MGB/KGB officers including Drelingas. Vanagas was viciously tortured. A Soviet report on the event said that his capture meant that “the liquidation of the commanders of Lithuanian bourgeois nationalist banditry formations was totally completed” (para. 27). He was tried and shot; his wife sent to the gulags.

After Lithuania gained its independence, Drelingas was charged in 2014 as an accessory to genocide contrary to Article 99 of the Lithuanian Criminal Code in force from 2003 (para. 58):

A person who, seeking to physically destroy some or all of the members of any national, ethnic, racial, religious, social or political group, organises, is in charge of or participates in killing, torturing or causing bodily harm to them, hindering their mental development, deporting them or otherwise inflicting on them situations which bring about the death of some or all of them, restricting births to members of those groups or forcibly transferring their children to other groups, shall be punished by imprisonment for a term of five to twenty years or by life imprisonment.

Drelingas argued that his conviction in 2015 by a Lithuanian court breached Article 7 of the Convention because Article 99 was applied retroactively in that it was not national Lithuanian law in 1956 and that international law did not protect political groups such as the partisans led by his victim, Vanagas, because the Genocide Convention required States parties, including the Soviet Union, to prevent and punish genocide which “…means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group…” (Article II). The question then was whether partisans were a political group not covered by the Genocide Convention, or alternatively whether they were “part” of one of the protected groups under international law.

Vasiliauskas v. Lithuania (2015)

The difficulty for the Lithuanian prosecution in *Drelingas* was that a similar case was already proceeding before the ECtHR, leading to a decision of the Grand Chamber of the ECtHR a few months after Drelingas’ first instance conviction in Lithuanian Regional Court. In *Vasiliauskas v. Lithuania (2015)* (*Vasiliauskas*), the Grand Chamber decided by a bare majority (9/8) that Article 7 prevented the conviction under the predecessor of Lithuanian Article 99 of a MGB/KGB officer engaged in the same Soviet repression of the nationalist underground trying to establish an independent Lithuania. Vasiliauskas was involved in an operation in which two partisans were killed in 1953. He was commended by his Soviet superiors. The later Lithuanian indictment against him referred to his knowledge that his MGB/KGB section was intended to physically eradicate part of the Lithuanian population belonging to a separate political group, the partisans, resisting Soviet oppression (para. 29).

The majority of the Grand Chamber held that Vasiliauskas could not have reasonably foreseen as required by Article 7 that partisans were a political group and so, as such, not among the four groups

protected by the Genocide Convention, nor among the groups protected by customary international law which included the prohibition of genocide as *jus cogens*(paras. 170-175). The majority also held that the applicant could not have foreseen that the partisans were “part” of the national group of Lithuanians protected by the Genocide Convention because they were not substantial enough in numbers. In its reasons for judgment, the majority reviewed the qualitative developments in the interpretation of the concept of being “part” of a national group for the purposes of a finding of genocide as developed by the International Criminal Tribunal for the former Yugoslavia, the International Criminal Tribunal for Rwanda and the International Court of Justice (ICJ) which had recognized that a distinct or prominent part of the protected group might be taken into consideration along with the substantial size of the group to receive protection as part of a national group (see paras. 97-108). The cases reviewed by the majority included *Bosnia and Herzegovina v. Serbia and Montenegro (2007)* where the ICJ recognized that a “part” of a group protected under the Genocide Convention had to meet the quantitative requirement of substantial numbers to distinguish the crime from homicide, but also that a court could take into account in its assessment of the “part” of the protected group, the qualitative factor of the prominence of certain individuals within the group (para. 106). The majority also noted that the ICJ held in *Croatia v. Serbia (2015)* that a court could also consider the qualitative factor that the victims of the protected group inhabited a specific geographic area, their prominence in the group, their emblematic quality or their importance to the survival of the group.

However, in the end, the majority declined to apply these cases on the ground that Vasiliauskas could not have foreseen these evolutionary developments in the law in 1953 (para. 177). The majority went on to hold that even if this qualitative interpretation of “part” of a protected group were accepted, the domestic courts, in the case before them, did not make findings supporting the conclusion that the applicant could reasonably foresee that the Lithuanian partisans constituted a significant part of the national group. Instead, the majority held that the Lithuanian Court of Appeal’s finding that the partisans were “representatives of the Lithuanian nation, that is, the national group” was too vague (para. 179). It found that the Soviets regarded their actions as an attempt to exterminate a separate and clearly identifiable group characterized by their armed resistance to Soviet power attempting to establish an independent Lithuanian state not protected under international law (para. 182). Vasiliauskas had accordingly established a breach of Article 7 and the majority awarded him just satisfaction.

Importantly, four dissenting judges in *Vasiliauskas* held that there was no violation of Article 7 because Vasiliauskas should have been reasonably able to foresee that his participation in the substantial and systematic repression of the Lithuanian population within the context of Soviet attempts to eradicate the partisans as a significant part of the nation with the intent of destroying the fabric of the Lithuanian nation fell within the offence of genocide (Judges Villiger, Power-Forde, Pinto de Albuquerque and Kuris, paras. 30, 36). Unlike the majority, they accepted the evolution in the international case law on the issue that a “part” of a national group was not only quantitative, but also qualitative, including the situation where the group in question was prominent, emblematic and essential to the survival of the

nation. While the majority had noted the Lithuanian Court of Appeal's finding that the partisans "represented" the national group of Lithuania without explaining what this representativeness entailed or account for how it represented the Lithuanian nation (para. 179), these dissenters took a contextual approach to these issues. They noted that the Court of Appeal had found the partisans to be representative of the national group, confirming that their reason for being was the protection of the Lithuanian nation from a regime intending to destroy its unique and specific identity and deserving protection from genocide because their "political" activities were intimately combined with their membership in their "national" and ethnic" groups (para. 15). The partisans were a significant and emblematic part of the national group (para. 16). These dissenters found evidence that the domestic courts had recognized the significance of the partisans to the entire national group (para. 24). A fifth dissenter emphasized the importance of the qualitative element of in the ICJ cases and noted that it was strange that the majority gave weight to the argument that the arbitrary killing of the partisans resisting Soviet power was simply a political confrontation (Judge Ziemele, para. 22). Three other dissenters rejected the application because the applicant got his remedy in the domestic courts, without dealing with the question of whether the partisans were part of the national group.

The Committee of Ministers of the Council of Europe charged with the supervision of final judgments of the ECtHR under Article 46 of the Convention noted that in *Vasiliauskas*, the Lithuanian Supreme Court properly held that domestic authorities can broaden the reach of its genocide legislation, but may not apply it retroactively to protect political groups (*Drelingas*, paras. 74-75). It also noted that the Lithuanian Supreme Court had found a great deal of contextual evidence in *Drelingas* about the partisans' role representing the Lithuanian nation and supporting the finding that, in 1953, they constituted a significant part of the national group for the purposes of the Genocide Convention as well as evidence of the intention of Drelingas to destroy the partisans that constituted the specific intent required to prove genocide, something that was missing in *Vasiliauskas*. The Committee resolved that Lithuania had complied with the decision in *Vasiliauskas* and finished its supervision of its execution.

The ECtHR had accepted the evolution of the law before *Drelingas*

Earlier in *Jorgic v. Germany (2007, Final)* the ECtHR, held that consistent with the requirements of Article 7 of the Convention, the applicant could reasonably have foreseen that setting up a paramilitary group to participate in the ethnic cleansing of Muslims ordered by Bosnian Serb political leaders and the military in the Doboj region of Bosnia and Herzegovina where he had killed numerous individuals, driven many from their homes and subjected many others to ill treatment, could lead to his conviction by the German courts exercising universal jurisdiction over the crime of genocide. Jorgic's argument was that the German courts had wrongly interpreted Article 220a of the German Criminal Code referring to the "intent to destroy" a group, as referring to the destruction of the group as a social unit in its distinctiveness and particularity and its feeling of belonging together, without need for proof of biological-physical destruction (German court interpretations: paras. 18, 23, 27). The Court held that the gradual evolution of the law is expected and it only breaches Article 7 when it leads to an unforeseeable result (paras. 101-102). The convicting court, many scholars and the UN General

Assembly (Res. 47/121) agreed on the contested interpretation of the intent to commit genocide that was applied in Jorgic's case. Thus, the Court had accepted the development of the law before *Drelingas*.

The *Drelingas* litigation

In *Drelingas*, the Court proceeded to determine whether the domestic courts had properly applied the principles in *Vasiliauskas*. The Court noted that the domestic courts found that Soviet oppression was targeted at the most active and prominent part of the Lithuanian nation. The partisans had represented a significant part of the population as a national and ethnic group because of their prominent role in the protection of national identity, culture and the national self-awareness of Lithuanians. The Lithuanian domestic courts had concluded that the partisans were a significant part of a national and ethnic group and that their extermination was genocide under international law. By this evidence, the Lithuanian prosecution was able to distinguish *Vasiliauskas*. The Court acknowledged this evolution of domestic case law, resolving the lack of clarity in the application of Article 99 of the Criminal Code in *Vasiliauskas,* thus engaging the Genocide Convention and the guidance from the Grand Chamber about not retroactively prosecuting individuals for genocide involving social and political groups.

There was no violation of Article 7 proved by Drelingas.

Conclusion

The *Drelingas* case did not simply show that impunity for serious international crimes can be resisted not only by a constructive and liberal development of the law, but also that parties seeking to prevent such immunity have to apply their imagination to the evidence and argument in a case so as to reduce the work the courts must do to expand the law.

This was a case that shows an interesting point of convergence between politics and the law that protects human rights. Those who carried out the heinous repressive policies of one regime may face criminal sanctions for their conduct when replaced by a new government.

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