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Can Transnational Courts Cope with the Past?

The ECtHR's Failed Attempt to Judge Communist History

„let not memory remaining in our hearts"
(Lorenzo da Ponte, Cosi fan tutte)

This paper deals with the reaction of the European Court of Human Rights to the implementation of some national legislative efforts from the point of view of their compliance with transnational fundamental rights requirements.

National legislation and case-law takes, or does not take, into account international law and the jurisprudence of transnational courts. In this paper, I discuss the judgment of the European Court of Human Rights (EctHR) in a Lithuanian genocide case, which shows all the difficulties of making general legal judgements about the past, not only for national, but also for transnational courts. The main question, which was decided first by the Lithuanian courts, and then by the ECtHR, was whether Lithuanian partisans who fought during WWII against both Nazi and Soviet occupants, and later only against the Red Army after the war, can be considered to be a national group protected by the international genocide convention.

I. Antecedents of the Strasbourg judgment

During Lithuania's German occupation between 1941 and 1944, the Nazis and their local collaborators killed some 90% of the country's 208,000 Jewish inhabitants. According to international law, the Lithuanian holocaust is considered a genocide.[1] During the Soviet

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[1] See detailed *Dieckman* and Snyder (2012).

occupation of the country in 1940-1941 and after 1944, the imprisonment and exile of about 275,000 Lithuanians was accompanied by the murder of 20,000 partisans and their supporters. According to the 20 October 2015 judgment of the Grand Chamber of the European Court of Human Rights in the case of Vasiliauskas v. Lithuania, the latter act, i.e. the en masse killing of partisans by the Soviets, was not a genocide.[2] Nine of the 17 members of the Grand Chamber found that two partisans who were killed by the Soviet army in cooperation with the Lithuanian applicant lost their lives as representatives of a political group, rather than representatives of the Lithuanian nation. With this decision, the judges unwittingly took sides in the historical dispute about the very definition of genocide, and about the number of genocides committed during WWII.[3] One school of thought, the double and multiple genocide approach, argues that the rapid mass killing of the Jews by the Germans in areas previously occupied by the Soviets was largely the result of Soviet policies such as mass deportation and the murder of real and imagined opponents, such as the partisans. According to the proponents of multiple genocide, the Soviets bear a major responsibility for the Holocaust. This view, on the other hand, says nothing about the fact that the killing was ended only by the costly victory of the Red Army over the Wehrmacht, as we saw in the case of killing of the Lithuanian partisans.[4]

[2] Case of Vasiliauskas v. Lithuania [Grand Chamber], Application no. 35343/05, Judgment of 20 October 2015.

[3] One of the positions claims that only the Holocaust can be considered as genocide; the second thinks that the crimes committed by the Soviets also belong to this category. A third school is of the opinion that, based on the definition of genocide by the international law, both the Nazis under Hitler and the Soviets under Stalin are responsible for many genocides between 1939 and 1945, and – as the Lithuanian case shows - the latter even after that. Timothy Snyder, a Yale historian, who represents the third view calls 'Zivilisierer' those who exclude the crimes committed by the Soviets because they believe that the liberation of Auschwitz enabled the return of civilization. On the other hand, Snyder considers 'Nationalisierer' those who treat the Soviet Union as an aggressor, and not the savior of civilization. This aggression not only ended state sovereignty, but in order to prevent its future restoration, liquidated the elite, to which the partisans belonged. In other words, for the mostly Western Holocaust 'Zivilisierer' researcher the key concept is civilization, while for the 'Nationalisierer' it is national sovereignty. See Snyder (2014-2015).. Snyder himself, in many of his works, deals with the genocides of the territory – called in the title of his 2010 book 'Bloodlands,' - which was occupied during the 1941-1945 German-Soviet war, alternately by the two war parties. This territory was the most dangerous for both Jews and locals. The Soviets, argues Snyder, did not stop the Holocaust and were themselves responsible for 4 million deaths in the countries where the Nazi Holocaust took place. In his latest book, Black Eart (*Snyder*, 2015) besides Hitler's 'ecological panic' he names the destruction of the state organization of the given countries as the main precondition of the multiple genocides. This concept of Snyder is heavily criticized by many scholars and reviewers. See among others, *Gopnik, Pinto-Duschinsky, Baberowski,* and *Laquer.* A thesis of the destruction of the state apparatus obviously does not apply to the Hungarian Holocaust, because the Hungarian authorities with their reduced but certainly not terminated sovereignty were actively involved in the deportation of half a million Hungarian citizen of Jewish origin after March 19, 1944, when the German army occupied allied Hungary.

[4] See this critic of Timothy Snyder's Black Earth at *Bartov.*

II. The Majority Decision

The ECtHR's assessment starts with the enumeration of general principles. The most important of these is laid down in Article 7 of the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights), which reads as follows:

> "1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.
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> 2. This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations."

The Court made it clear that this provision is not confined to prohibiting the retrospective application of criminal law to an accused's disadvantage, but it also embodies, more generally, the principle that only the law can define a crime and prescribe a penalty (nullum crimen, nulla poena sine lege) and the principle that criminal law must not be extensively construed to an accused's detriment, for instance by analogy. Referring to the case Korbély v. Hungary, the Court emphasized that regarding such criminal regulations, accessibility and foreseeability are crucial requirements, which does not exclude the possibility of judicial interpretation of the norms. According to the judges, a state practice of tolerating or encouraging certain acts that have been deemed criminal offences under national or international legal instruments and the sense of impunity which such a practice instils in the perpetrators of such acts does not prevent their being brought to justice and punished. This principle was used by the ECtHR both for leaders issuing, and for soldiers executing, commands in the case of shootings at the Berlin wall. Regarding the East-German soldiers, the judgment said that they could not show

total, blind obedience to orders which flagrantly infringed internationally recognized human rights, in particular the right to life.[5] As for the case of political leaders, the Court stated that the illegality of commands for the shooting down of border crossers was already accessible and foreseeable according to the law of the GDR at the time the commands were issued. Therefore holding those leaders responsible after unification of the two German states for the crimes they committed was not a violatation of Article 7.[6] In other words, these cases demonstrate that it is entirely for the state governed by the rule of law to bring criminal proceeding against those who have committed crimes under a former regime.

The Court's task was to assess whether there was a sufficiently clear legal basis, having regard to the applicable law in 1953, for the applicant's conviction. In particular, the Court examined whether the applicant's conviction for genocide was consistent with the essence of that offence and could reasonably have been foreseen by the applicant at the time of his participation in the 2 January 1953 operation, during which the two partisans were killed. While performing this function, the ECtHR confirmed that the question of the applicant's criminal responsibility was primarily a matter for the domestic courts to assess.

It was clear for the Strasbourg Court that the applicant's conviction was based upon legal provisions that were not in force in 1953. But it was also clear that the Soviet Union was a party to both the 1945 Charter of the International Military Tribunal, which defined crimes against humanity, and to the Genocide Convention of 1949, which came into force in early 1951. This meant that the crime of genocide was clearly recognized as a crime under international law in 1953, and sufficiently accessible to the applicant. However, its scope did not include social and political groups, even though according to some authors, this exclusion was the result of Soviet pressure.

The ECtHR accepted that in 1998 the Lithuanian legislation had discretion to extend the protection against genocide to social and political groups, however such discretion did not

[5] K.-H.W. v. Germany [GC], no. 37201/97, ECHR 2001-II.
[6] Streletz, Kessler and Krenz v. Germany [GC], nos. 34044/96, 35532/97 and 44801/98, ECHR 2001-II.

permit domestic tribunals to convict persons accused under that broader definition retrospectively. Also, while the Court accepted the domestic courts' discretion to interpret the definition of genocide more broadly than that contained in the 1948 Genocide Convention, it did not accept the domestic courts' conclusion that in 1953 the Lithuanian partisans constituted a significant part of the national group. Instead, the Court accepted the applicant's argument that his action was aimed at the extermination of the partisans as a separate and clearly identifiable group, characterized by its armed resistance to Soviet power. The opinion of the Court is similar to that of the Lithuanian Constitutional Court, in that they both agreed that the retroactive prosecution for genocide of persons belonging to a political group, if the events took place before those two groups were added to the Lithuanian Criminal Code, would be against the rule of law and in breach of Lithuania's obligations under international law. But the majority of the ECtHR judges took the view that applicant's conviction for genocide could not have been foreseen at the time that the partisans were killed, and therefore the Grand Chamber of the ECtHR voted 9-8 that Lithuania had violated Article 7 of the Convention, and awarded the applicant 10,000 Euro in pecuniary damages.

III. The Dissenting Opinions

The eight judges in the minority issued five dissenting opinions. One of those dissenting opinions, signed by Sajó from Hungary, Vučinič from Montenegro, and Turkovič from Serbia does not take a side on the merit of the application, i.e. whether there was a breach of the Convention, because the judges thought that the application should have been rejected outright. According to the dissenting judges, the applicant had access to a remedy. Pursuant to the Constitutional Court ruling of 18 March 2014, if the applicant believed that the judgment had not been enforced, and that he has no other means of enforcing it, then he would have been free to seek a remedy by submitting a domestic complaint under the Convention for the non-enforcement.

One of the other three dissents was signed by four judges: three from Western Europe and one from Lithuania. Two of them, judge Power-Forde from the United Kingdom, and Kürs, the

Lithuanian judge, issued separate dissents as well, and judge Ziemele from Latvia wrote a dissenting opinion by herself only. It is difficult to make a conclusion based exclusively on the national affiliation of the dissenting judges, but we can say that all of the judges whose countries were once occupied by the Soviet Union (Azerbaijan, although formally independent, remained autocratic with close Russian ties) were opposed to declaring a violation of the Convention in connection with the applicant sentenced for genocide in his own country. (I consider András Sajó's dissent also belonging to this group of judges because he did not join the majority in declaring that the Convention had been violated.) They were joined by three West-European judges from Lichtenstein, the UK, and Portugal respectively. As we will see, Power-Forde denounced the Soviet genocide in particularly strong words. The judges in the majority, six West-European judges and judges from Turkey and Serbia respectively, countries not affected by Soviet occupation, were seemingly less moved by the problem of Soviet genocides. (As I mentioned, the situation of the Azerbajani judge, also belonging to the majority, is different.)

The four judges with the joint dissent disagreed with the majority's assessment of both the relevant facts and the applicable law, and accordingly did not believe that Article 7 of the Convention had been violated because the applicant's conviction for genocide was based on international law as it stood at the relevant time, and was therefore foreseeable. Regarding the facts, the minority opinion referred to the constant case-law of the ECtHR that it is not within its province to substitute its assessment for that of the domestic courts, since they are in a better position to assess all of the available material and evidence. This applies to the very essence of the Soviet policy in occupied Lithuania in the 1940s and 1950s, and even though the events are today disputed between Lithuania and Russia, the third-party intervener, the Russian Federation, had acknowledged that during the Soviet era the peoples under its control were subjected to repression, including genocide.

Regarding the applicable law, the four judges – similarly to the Lithuanian Court of Appeal and the Constitutional Court – thought that members of the targeted political group, the partisans, were members of a group protected by the 1948 Genocide Convention at the time, namely as 'part' of a national group. This is confirmed, according to the dissenting judges, by

the fact that the express intention of the Soviet state policy was to 'exterminate' 'nationalist elements', 'the bandits and nationalist underground', which despite their relatively low overall number, shows their importance as a substantial part of the population of three million. Because the extermination of the Lithuanian partisans as a group was part of USSR's State policy and practice the judges concluded that the applicant could foresee that by taking part in the extermination of a substantial part of the Lithuanian population, he would be accountable for genocide.

Judge Ziemele from Latvia, referring both to legal academic literature[7] and international courts case law,[8] argued that the definition of genocide of the Genocide convention made various interpretations possible. The 1948 Genocide Convention was adopted in reaction to the proceedings at the Nuremberg Tribunal and the limitations therein, whereby crimes against humanity were linked to wartime. According to the Genocide Convention in contrast, the most heinous crimes could also be committed in times of peace and against a state's own population. The judge – also coming from a Baltic state – also pointed out that the two superpowers at that time, the Soviet Union and Germany, shared an interest in limiting international and universal jurisdiction over genocide, and they also opposed extending protection under the Convention to political groups. The dissent concluded that the Court was not only dealing with the rights of the applicant, but also found itself at the center of a complex social process in a society seeking to establish the truth about the past and its painful events, exercising the right to truth.

In his dissent, Judge Power-Forde from the UK also talked about the historic opportunity of the ECtHR to refer to what happened in the Soviet era by its proper name: genocide. He stated that Stalin's policy was as genocidal in ideology, intent and execution as the policy of Hitler. Referring to the data in the book of the historian Norman Davies, he went even further by

[7] Ziemele refers to the position of William Schabas. Cf. *Schabas,* 4.
[8] According to Ziemele also the case law of the ECtHR illustrates the possibility of various interpretations. In the case Jorgis v. Germany, the Court accepts the wider interpretation of the German domestic court (No. 74613/01, ECHR 2007-III). From the ICTY case law she mentions the Brdjanin case, in which the judges state that the „groups are not clearly defined in the Genocide Convention or elsewhere". (Prosecutor v. Brdjanin, 1 September 2004, ICTY-99-36, T Ch II, paragraph 682)the

claiming in terms of human life, the destructiveness of Stalin's program 'outdid any other disaster in European history, even the Second World War'.[9]

Judge Küris, the Lithuanian member of the Court also expressed his own sincere disappointment that the facts known to every schoolchild in Lithuanian society about the 20,000 partisans who were killed, and the six-digit number of others deported, imprisoned, shot or tortured to death in a nation of three million, did not satisfy the majority that the partisans were 'representatives of the nation'. He argued that it was improper to place such a heavy burden on the national courts to provide a more detailed description and analysis of what was going on in Lithuania (as well as in other Baltic states) in the 1940s and 1950s and the partisan's 'representation' of the Lithuanian nation when these facts were already well-known to the members of the society to which the judgment was directed. Even if the facts were not well-known by the Strasbourg judges, they were obvious to the members of Lithuanian society, and an extensive explanation would have been redundant.

IV. Conclusion

The Lithuanian case decided by the ECtHR demonstrate that if national legislation and courts cannot find solutions that are satisfactory for the entire society, transnational institutions cannot help either. As someone who for the greater part of his life has also has lived in a country which, despite its formal independence, belonged to the area of influence of the former Soviet Union, I tend to identify with the arguments of the dissenting opinions described above. However, acknowledging that courts usually cannot refuse to decide cases before them, I am more skeptical about the role criminal procedure can play in the general exploration of the past. I am rather inclined to agree with those historians[10] who, instead of institutional-legal approaches, emphasize the importance of historical research in processing the past, or to use two German words, which best renders what this process exactly is and

[9] Regarding the comparison of the 'performances' of the two genocides see the reference to *Davis*, 960.
[10] See, e.g., *Judt*, at 830.

what it aims to achieve, and for which no direct translations exist in English: *Geschichtsaufarbeitung* and *Vergangenheitsbewältigung*.[11]

Courts are unable to make final judgments about a nation's past. This does not mean that they should not do their best within the framework of their authority to explore the historical circumstances of the case before them, and based on this render justice for the victims. As Hannah Arendt argued about the difference between the personal and political accountability in connection with the Eichmann trial: the aim of the judicial process is to decide about the responsibility of the accused person, and not to judge history, a given system of government, or ideology.[12] In other words, trials can contribute to coming to terms with former regimes, but cannot do this job instead of society, and especially not against its perceptions about constitutionalism.

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[11] These expressions have normative connotations, as they not only describe a process, but also imply the positive effects this process will entail. The former may be translated by "working through" or "treating" history; the latter by "coping, dealing, coming to terms with" or, even more precisely, "overcoming" the past.
[12] *See Arendt,* 83.

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