The ECtHR's Recent Encounter with Genocide: a closer look at the judgment in Vasiliauskas v Lithuania (App. No. 35343/05)

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A. Introduction

On 20 October 2015 the European Court of Human Rights ("the Court") in Strasbourg delivered a judgment in the case of Vasiliauskas v Lithuania (No. 35342/05).[1]

The case concerned the status of a retroactive conviction of genocide under the Lithuanian Criminal Code with respect to Article 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention").

A slim majority of 9-8 found that there had been a violation of Article 7 of the Convention. The Court ultimately held that the definition of genocide adopted by the Lithuanian law and used to convict the applicant for a crime committed in 1953 did not fulfil the qualitative or quantitative requirements prescribed by international law at that time.

B. Background Facts and Issues for Determination

Mr Vytautas Vasiliauskas ("the applicant") was a Lithuanian national retroactively convicted for genocide under Article 99 of the Lithuanian Criminal Code, which was enacted in 2003.

The killing of two Lithuanian partisans was committed in 1953 against the backdrop of Soviet occupation and annexation of Baltic States following the end of conflict between the Soviet Union and Nazi Germany. Lithuanian partisans, a political group, formed part of the underground resistance during the Soviet regime.

Mr Vasilauskas made an application to the Court arguing that his conviction was in breach of Article 7 of the Convention, which states there shall be no punishment without a clearly defined criminal offence. The applicant's primary argument was that the Lithuanian Courts' broad interpretation of the crime of genocide, inclusive of political and social groups, had no basis in public international law. The Government of Lithuania countered that the interpretation given was in fact compatible with the essence of the offence of genocide at the relevant time.

The primary question before the Court was whether there was a legal basis for a conviction having regard to the meaning of genocide in international treaty and customary law at the time the crime was committed. [2] In other words, the question was whether it was reasonably foreseeable in 1953 that the applicant's actions would result in a conviction for genocide.

C. The Judgment

I. Applicable Law

The applicant challenged his conviction under Article 7 of the Convention, which states that no person 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. Essentially Article 7 expresses the principle of *nullem crimen sine lege* i.e. that no crime shall be punishable without law.[3]

Also applicable in this case was Article II of the United Nations Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948 ("the Genocide Convention"), which defines genocide as "acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group".[4]

Although Lithuania enacted its national law under the Genocide Convention in 1992, the Lithuanian Criminal Code was widened in 1998 so that the definition of genocide also comprised actions aimed at the physical eradication of some or all of the members of a "social or political group".[5]

II. Majority Judgment

The majority of the Court found that the conviction under the section 99 of the new Lithuanian Criminal Code amounted to a violation of Article 7 of the Convention.

As the applicant's conviction was based on law not in force in 1953, the Court considered that any retroactive application of Lithuanian Criminal Law would violate Article 7 unless it could be established that the conviction had a legal basis under international law as it stood in 1953. [6]

The Court noted that genocide was a recognised crime under international law in 1953 by reference to its codification in the 1948 Genocide Convention.[7] However, the Court still needed to determine whether the applicant's act qualified as genocide according to this established definition.

1. Inclusion of "political groups" in definition of genocide

It was immediately clear to the Court that "political groups" are not one of the four protected categories within Article II of the Convention.[8] Moreover the Court noted, that an examination of the historical drafting materials of the Genocide Convention indicated that this was a deliberate exclusion by the drafters.[9]

The Court held that there were no convincing reasons to depart from the established groups within this definition. This view was strengthened as all subsequent instruments of international law, such as the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity of 1968, the International Criminal Tribunal for the former Yugoslavia Statute of 1993 and the Rome Statute on the International Criminal Court of 1998, reflect near identical definitions as that contained in the Genocide Convention.[10]

The Court did acknowledge the existence of some views under customary international law of a broader definition of genocide, which included political groups. However, the Court did not find these convincing especially in the face of equally strong opposing views.[11]

2. Interpretation of "in part" as used in Article II of the Genocide Convention

The Court next dealt with the Government of Lithuania's submission that the Lithuanian partisans were "part" of a national group (the ethnic Lithuanians) and were thus protected by Article II of the Genocide Convention.[12] As mentioned prior, Article II of the Genocide Convention provides that a crime will amount to genocide where there was "intent to destroy in whole or in part…a group, as such".

The Court held that the "in part" element of the definition of genocide, as it stood in 1953, had a requirement as to substantiality.[13] This interpretation would necessarily preclude a mere part of an ethno-national group i.e. two Lithuanian partisans from coming within the protection of Article II where the crime did not also fulfil a numerical requirement of substantiality.

The Court added that the requirements imposed by the definition of genocide i.e. the proof of specific intent and a demonstration that the protected group was targeted for destruction in its entirety or in substantial part, were intended to ensure that punishment for this crime is not imposed lightly.

The Court acknowledged that subsequent case law of the ICTY, ICTR and the ICJ provided further guidance as to the meaning of “in part”. Such cases established that “in part” could certainly include a “distinct” part of protected groups, provided this “distinct” part was also substantial in terms of large number of members or in terms of the prominence of the targeted group.[14]

However the Court noted that this interpretation of the definition of genocide beginning only in the 1990s would not have been foreseeable to the applicant in 1953 and therefore could not serve as a legal basis for conviction under international law.

III. Dissenting Opinion

Opinion of Judges Villiger, Power-Forde, Pinto De Albuquerque and Kuris

The dissenting opinion of Judges Villiger, Power-Forde, Pinto De Albuquerque and Kuros disagreed with the majority, instead finding that there had been no violation of Article 7.[15] They held that the requirements of the definition of genocide had been met to the effect that the applicant’s conviction was foreseeable in 1953.[16]

Although in agreement with the majority that political groups were not protected groups under the definition of genocide in Article II of the Genocide Convention, this dissenting opinion found that to restrict the application of this definition without taking the inquiry further was to take an overly formalistic approach.[17]

The judges stated that it was open to conclude that Lithuanian partisans, although a political group, were simultaneously a significant part of the national group of ethnic Lithuanians. Their killing was targeted as part of the broader objective to destroy ethno-national Lithuanians and to devastate the very fabric of Lithuania and, as such, it was an act of genocide.

This opinion was persuaded by the importance of the role of partisans in the social context of Lithuania at the time and the symbolic significance of their destruction to the Lithuanian people attempting to resist Soviet occupation.

In relation to the interpretation of “in part” the dissenting opinion also diverged from the majority. They agreed with the findings of the Lithuanian Constitutional Court that, due to their prominence and emblematic character, the partisans could be considered a part of the broader ethno-national group of Lithuanians and thus within the protection of Article II.

This opinion agreed with the majority that there was a lack of judicial interpretation regarding the phrase “in part” in 1953 however also stated that this alone should not automatically bring the act outside of the definition of genocide.[18] To assert in such cases that genocide did not occur until after judicial interpretation had fully developed would be legally inconsistent and potentially offensive to those prevented from bringing actions for genocide before international courts.[19]

D. Conclusion

This judgment, in particular the divergence between the majority and minority approaches, outlines the difficulties for the Court in defining genocide which is a concept of international criminal law in general and not specifically of European human rights law.

The majority judgment placed significant qualifications on what will constitute a destruction “in part” of a protected group when it comes to establishing genocidal intent under Article II of the Genocide Convention, at least where the crime precedes later jurisprudence to the contrary.

This is significant as it could lead to further challenges under Article 7 from those convicted of genocide committed prior to clarifying judicial interpretation of the definition in Article II.[20] One wonders in particular whether persons convicted of genocide by one of the international criminal courts may now

be tempted to challenge their conviction before the ECtHR based on Art. 7 ECHR. Neither the ICC which constitutes an inter-governmental organization of its own, nor the ICTY and the ICTR which operate as subsidiary organs of the UN Security Council are as such subject to the ECHR and the jurisdiction of the ECtHR. But convicted genocidaires might consider lodging individual applications against one or more Convention States for either providing assistance to those international courts or for not protecting them properly from those courts' excessive interpretations of the crime of genocide.

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[1] Grand Chamber, European Court of Human Rights, 20 October 2015, available online at http://hudoc.echr.coe.int/eng?i=001-158290,last accessed on 29/02/2015.

[2] Ibid, p. 156.

[3] Ibid, p. 154.

[4] See the United Nations Convention on the Prevention and Punishment of the Crime of Genocide available online at: https://treaties.un.org/doc/Publication/UNTS/Volume%2078/volume-78-I-1021-English.pdf, last visited 30/11/2015.

[5] See Article 99 of the Lithuanian Criminal Code available online at: file:///Users/anikabratzel/Downloads/Lithuania_CC_am2010_en.pdf, last visited 30/11/2015.

[6] Above n 1, p 166.

[7] Ibid p. 168.

[8] Ibid p. 170.

[9] Ibid.

[10] Ibid.

[11] Ibid, p. 175.

[12] Ibid, p. 176.

[13] Ibid.

[14] Ibid, p. 177.

[15] See other dissenting opinions, which agree in the most part with the Opinion of Judges Villiger, Power-Forde, Pinto De Albuquerque and Kuris, p, 68.

[16] See Separate Opinions, p. 1

[17] Ibid, p. 11.

[18] Ibid, p. 18.

[19] Ibid.

[20] See the EJIL Talk! article “European Court Tackles the Definition of Genocide” available online at: http://www.ejiltalk.org/category/international-criminal-law/genocide/ , last visited 30/12/2015.