HENRY C. THERIAULT. The *Drėlingas* case, the limits of law, and new avenues for repair of and resistance to genocide

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Abstract

The *Drėlingas* decision corrected the failure of the *Vasiliauskas* case to establish that the Soviet Union committed genocide through its targeting of Lithuanian resisters to a campaign of denationalization. This approach was required because of the UN Genocide Convention's limitations, but the cost of success was ignoring the political aspect of this genocide, which is inseparable from its national aspect. The decision also reinforced the Convention's flawed focus on individuals rather than the social formations that actually commit genocide – in this case, the Soviet Union. The most significant implication of *Drėlingas*, however, is its determination that those who engaged in armed resistance to a process less than genocidal could themselves be victims of genocide. The *Drėlingas* decision thus provides a profoundly important counterbalance to the prevailing tendency to treat resistance to oppression as participation in a mutual conflict disallowing genocidal victimization and the pervasive prejudicial preference for helpless victims.

Keywords: Genocide law, Soviet genocide, Lithuania, *Drėlingas* case, antinational-ism, victims' resistance

The *Drėlingas* decision[18] can be seen as an important corrective to the *Vasiliauskas* case[19] by recognizing as genocide that which, from a common-sense perspective, we perceive as such. The decision allowed the application of the UN Convention on the Prevention and Punishment of the Crime of Genocide[20] to events that occurred decades prior to the Lithuanian law specifically including political groups as possible targets of genocide[21] – something the UN Genocide Convention famously does not.

The *Drėlingas* decision depended on the same basic logic as the establishment of

[18] Judgment of the European Court of Human Rights (Chamber of the Fourth Section) of 12 March 2019 in the case of *Drėlingas v. Lithuania*, no. 28859/16, ECLI:CE:ECHR:2019:0312JUD002885916

[19] Judgment of the European Court of Human Rights (Grand Chamber) of 20 October 2015 in the case of *Vasiliauskas* v. *Lithuania*, no. 35343/05, ECLI:CE:ECHR:2015:1020JUD003534305.

[20] UN General Assembly, *Convention on the Prevention and Punishment of the Crime of Genocide*, December 9, 1948, United Nations, Treaty Series, Vol. 78, p. 277 [A/RES/260] (hereafter "UN Genocide Convention" or "Convention").

[21] In 1998, genocide was added as a crime to the Lithuanian Criminal Code, and in 2003 the definition was expanded through the new Article 99 to include political as well as social groups, in addition to national, ethnic, religious, and racial groups protected by the UN Genocide Convention (Justinas Žilinskas, "Broadening the Concept of Genocide in Lithuania's Criminal Law and the Principle of *Nullum Crimen Sine Lege*", *Jurisprudence* 4, 118 (2009), 333–348, p. 336).

the Srebrenica Genocide through the *Krstić* case,[22] in which genocide was determined to have occurred through the mass murder of a relatively small percentage of an overall target group, but that small percentage had a special role in the future viability of the group as a whole. Partisans and their supporters were attempting to preserve Lithuanian national identity in the face of homogenizing, russifying, antinational-ist Soviet central authority. In this sense, they could be considered an essential part of the Lithuanian national group as a national group.

As with the true table method in formal logic, this line of reasoning yielded a proper result, but did not reflect what truly made the event in question genocidal. It was that a *political* group was targeted for elimination, which constitutes genocide under Lithuanian law, but not under the UN Genocide Convention. The shift in *Drėlingas* to an argument consistent with the UN Genocide Convention was a legal manoeuvre in a situation in which the law itself was the outcome of earlier political manoeuvring that resulted in the exclusion of certain group types out of expediency.[23] The obvious moral motive for why the case was brought at all was that a *political* group was destroyed and *that* – the destruction of the political group – should be considered genocide.

It is perhaps more accurate to say that the sharp distinction between political and national groups assumed in the negotiations generating the UN Genocide Convention and applications since is illusory. The part of the Lithuanian national group targeted for elimination was precisely the part most active in protection of their national identity. It was a *political* group motivated by *national* preservation. In this sense, the target of Soviet authorities was a political-national group that fits somewhere between what is and what is not covered by the UN definition of genocide. This is crucial, because resistance to Soviet anti-Lithuanian destruction was not universal among Lithuanians, and thus there was a political division among Lithuanians. The part of the Lithuanian national group targeted was a politically defined part. The posing of an *either* national *or* political group would have been appropriate only if had one group of Lithuanians sought to force other Lithuanians to conform to a particular government or political system or had the Soviet central authorities been indifferent to Lithuanian national identity and sought to impose a communist economic and authoritarian political system that was simply indifferent to (or tolerant of), rather than hostile toward, national identity. But, the goal of those central authorities was assimilation into a new state structure; even if that state is considered not to have been a national state (though in reality russification was part of the Soviet project) and thus did not seek to impose one national identity over another, it still required the denationalization of those forced to assimilate into it. In other words, its members constituted the *political* group targeted precisely because of their Lithuanian *national* identity and desire to preserve it.

[22] Judgment of the International Criminal Tribunal for the Former Yugoslavia (Appeals Chamber) of 19 April 2004 in the case of *Prosecutor* v. *Radislav Krstić*, no. IT-98-33-A.

[23] See, for example, Leo Kuper, *Genocide: Its Political Use in the Twentieth Century* (New Haven, CT, USA: Yale University Press, 1981), 19–39.

Emphasizing this complexity, however, would have undermined the Lithuanian case. To get the morally right result, the Lithuanian side had to play the game according to the UN Genocide Convention's rules, by not relying on the obvious political nature of the group targeted. I use "play the game" very intentionally here, as in Bernard Suits' definition of a game as an activity in which a goal is pursued by means that are artificially limited (for instance, putting a soccer ball in a goal by overcoming defenders and a goal keeper, having to stay within a specific area, not being able to hold opponents, not being allowed to use hands, etc.; taking money from a table top not simply by reaching out and pulling it in, but by getting better cards than others at the table or convincing them that you do as they attempt the same; etc.).[24] Viewed in this way, the legal realm is not (simply) a Foucaultian "discursive formation",[25] but a game – one with the highest possible stakes. Just as on the football pitch or at the poker table, being a good person or having a good cause counts for nothing, what matters in the legal realm is demonstrating the superior play – or at least being able to manoeuvre better than the opponent. This is not meant to disparage the legal field, but to explain its relationship to the realm of ethics.

The legal nature of concrete approaches to addressing genocide imposes another limit on the treatment of genocide. Laws against genocide should focus on states and other groups of perpetrators and groups as victims, for that is a central aspect of Lemkin's concept. But, they actually focus on individual perpetrators, and this contorts the reality of what genocide is: a *collective* set of acts. The UN Genocide Convention is, in many ways, not about genocide at all, but is a reductive adaptation of criminal law focused on individuals.[26] The vast majority of legal actions against genocide are, in their essence, equivalent to typical murder, rape, and related trials. The added dimension is proving that the offenses happened as part of the commission of genocide, but in this sense, genocide is simply a condition marking the seriousness of the individual offense, not the point of the legal process. However, if, by the logic of the *Drėlingas* decision, the direct victims of the killing are victims of genocide precisely because of their relationship to a larger group (the Lithuanian national group) – that is why their killing is genocidal – should we not also see the state or other group that individual perpetrators acted as a part of as the true perpetrator of a given genocide? Should not the conviction of an individual perpetrator entail the much more important culpability of the state or collective and result in sanctions against the state or collective that perpetrated the genocide? It would not be a stretch to see the Republic of Lithuania's pursuit of justice through the *Drėlingas* case as a case against the Soviet Union and, thus, its legal successor state, the Russian Federation. It is vastly more difficult, if not virtually impossible, however,

[24] See Bernard Suits, "The Elements of Sport", in Jason Holt, ed., *Philosophy of Sport: Core Readings* (Buffalo, NY, USA: Broadview Press, 2014), 19–34.
[25] See Michel Foucault, *The Archaeology of Knowledge and the Discourse on Language*, tr. A.M. Sheridan Smith (New York, NY, USA: Pantheon Books, 1972), 31–39.
[26] Henry C. Theriault, "Reparations for Genocide: Group Harm and the Limits of Liberal Individualism", *International Criminal Law Review* 14, 2 (2014), 441–469.

to achieve the punishment of a state or recquire reparations by a state perpetrator than it is to convict individual members of the perpetrator group, which little or nothing to mitigate the impacts of a genocide.

It is these impacts that lead us to another problematic aspect of this decision. Concern about the retroactivity of the application of the Lithuanian law to an earlier genocide misunderstands that, if genocide is understood properly as an overarching process rather than reduced to this or that discrete act of this or that individual (in this case, Drėlingas), the genocidal assault on Lithuanian national identity must be recognized as still unfolding. While murders, rapes, and so forth are discrete events, genocides are not events but processes.[27] Moreover, while the actions of the perpetrator and the event of a murder, rape, or so forth that they commit are coextensive, this is not the case for genocide. The collective actions producing a genocide are typically shorter in duration than the genocidal process itself. This could be seen as the function of the intensity of genocidal violence, which cannot be registered in the world in as short a time as genocide typically takes to commit. Just as a flood might not manifest until days after the rain supplying it with water has stopped falling, a genocide committed through actions that might take years actually lasts much longer. To recast the continuing violation argument of Frédérick Mégret[28] in a more complex fashion, genocide is a process that inevitably overspills the temporal boundaries of the actions producing it.[29] In this way, the *Drėlingas* court should not have been concerned with whether actions decades ago could be subject to a subsequent law against genocide, but rather should have assessed whether the process of state of genocide initiated by them is still persisting or at least persisted after the Lithuanian statute that covered political groups came into force. This is not simply about the consequences that follow from an action, but the completion of the action itself. It is certainly possible, when examining the challenges and vulnerabilities of Lithuanian cultural and political cohesion and viability in the Soviet and post-Soviet eras, to conclude that genocide continued forward well after adoption of the post-Soviet Lithuanian law against genocide.

While this might appear to violate various legal principles and conflate a process with its effects, there is a test of this approach. Unlike individual acts of violence, in which there could be persistent consequences but the action itself is complete and irreversible – once committed, one cannot take back a murder or rape – genocide is quite

[27] Sheri P. Rosenberg, "Genocide Is a Process, Not an Event", *Genocide Studies and Prevention: An International Journal* 7, 1 (2012), 16–23.

[28] Frédéric Mégret, "The Notion of 'Continuous Violations', Expropriated Armenian Properties, and the European Court of Human Rights", *International Criminal Law Review* 14, 2 (2014), 317–331.

[29] Henry C. Theriault, "Time for Justice", paper delivered at "Justice after Atrocity?" conference, Kean University, 20 April 2018. Genocide by attrition (see Helen Fein, "Genocide by Attrition 1939–1993 – The Warsaw Ghetto, Cambodia, and Sudan: Links between Human Rights, Health, and Mass Death", *Health and Human Rights: An International Quarterly Journal* 2, 2 (1997), 10–45), in which actions can be intentionally slowed in order to obscure their cohesive wholes, might seem to be an exception. But, even in cases in which the actions of a genocide occur over a long period of time, the impacts of those actions unfold over a yet longer period.

different. Counter-actions can be undertaken to interrupt the completion of a genocidal process, even if the acts producing it have concluded. While typically misconstrued as reparations, these are in fact interdictions against the trajectory of a genocidal process. For this reason, the typical legal as well as political and ethical objections to reparations based on the passage of time reflect misunderstandings of the metaphysical nature of genocide. As a process, repair is actually intervention, not something done after the fact, as is individual criminal justice applied to cases of genocide – however morally right individual cases are in a limited sense.

These problems suggest that the entire western liberal individualist legal tradition cannot adequately address the challenge of genocide. Rather than trying to force the quest for justice in the face of genocide to conform to this tradition, the challenge of genocide should drive radical new developments in concepts of law.

The foregoing critiques of the limitations of the *Drėlingas* decision does not mean, however, that no element of the decision is an important intervention in the struggle against genocide. On the contrary, the most significant feature of the case appears so far to have been neglected, despite representing a major step forward in international law and in the struggle against genocide. This implication of the decision takes us beyond the well-worn issues discussed for three-quarters of a century once more rehearsed in the *Drėlingas* proceedings – whether political groups should be covered by the UN Genocide Convention, what "in part" means in the Convention, whether law against genocide is supersessionary or can be applied retroactively, and so on.

The Soviet Union sought to integrate Lithuania by stripping Lithuanians of Lithuanian identity so that they could be absorbed into a putatively non-national – though actually Russian-dominated – state. Given that Lithuanian identity was (and is) essential to and even constitutive of individuals comprising Lithuanian society and fundamental to the network of their social, artistic, spiritual, and other interrelationships and institutions, loss of national identity would have represented a transformation of the Lithuanian people into something else. If they had adopted such a transformation voluntarily, that would have been one thing, but at least a sizeable percentage did not. What is more, a substantial percentage of those who held on to that identity actively resisted the imposed transformation through defensive military action or assistive support of those carrying out such action. While the powerful pressure by the Soviet central authorities to Sovietize Lithuania could be considered ethnocide that targeted every single person having Lithuanian national identity, whether they accepted Sovietization or not, it was the Soviet central authorities' *response* to *resistance* to this possible ethnocide by members of the targeted group that was unambiguously genocidal. For there was an intentional campaign to destroy that part of the group resisting denationalization/Sovietization. In other words, the Soviet authorities adopted genocide as the means to accomplish Sovietization once the latter was resisted.

The significance of European Court of Human Rights' recognition of the targeting of military resistance as genocide cannot be overstated. This means that the term "genocide" can *legally* apply to a process of overarching destruction despite armed resistance to lesser forms of violence or oppression. (As a corollary, this also applies to armed resistance to full-blown genocide.) This goes beyond rejections of "blaming the victim" strategies of denial, in which genocide victims' resistance to outright genocide is misrepresented as participation in a mutual conflict or even aggression that "justifies" perpetrator actions. In this case, the response to armed resistance to a non-genocidal process can be genocidal and recognized legally as such. It is not just that those targeted by genocide have a right to self-defense, but that those oppressing others have no right to escalate violence to genocide in response to resistance to their oppression. In such a context, making the case for genocide does not require proving *preexisting* genocidal intent nor quiescence on the part of victims, but that genocide was the response to actions of a target group. This is a landmark decision, one of the most important in the history of international law related to genocide, for it does not require members of a group to be passive victims in order their subsequent victimization by genocide to be affirmed legally. While Vahakn Dadrian's key intervention in the early discourse on the inadequacy of the UN definition of genocide and proposal for an improved definition argued that one of the things that distinguishes one-sided mass violence as genocide from mutual violence as war is a decisive power imbalance, not the complete abjection or powerlessness of the victims in the case of the former,[30] the *Drėlingas* decision goes further, to separate the agency of victims and their relative power from the determination that they have been victimized by genocide: what matters is not the power imbalance or a difference in agency – both sides might use violent means – but that the victim side has used violence to resist victimization while the perpetrator side has used violence to victimize and that the perpetrator violence escalated to fit the UN definition of genocide. This is a crucial challenge to concepts of genocide grounded in the Rousseauian approach to post conquest violence against subjugated populations that recognizes the moral wrongness not in the actions of the perpetrators alone but in their occurring in the context of the subjugation and thus military and political powerlessness of the conquered population.[31] While there are important differences of the Lithuanian and other such cases in the Soviet Union and under other (typically communist) denationalizing regimes from genocides of indigenous North and South Americans, Australians, and others who militarily resisted land-theft, systemic violence, and cultural destruction, the parallels make this legal decision quite relevant to those situations as well. What is more, the implications for indigenous groups using *non-lethal* resistance today to land dispossession, cultural destruction and forced assimilation, etc., such as the Uru-eu-wau-wau people in the Brazilian Amazon, are obvious.

[30] See Frank Chalk and Kurt Jonassohn, *The History and Sociology of Genocide: Analyses and Case Studies* (New Haven, CT, USA: Yale University Press, 1990), 14–15.

[31] Jean-Jacques Rousseau, *On the Social Contract*, tr. Judith R. Masters, ed. Roger D. Masters (New York, NY, USA: St. Martin's Press, 1978), 49–52.

A particularly notable contemporary application of the *Drėlingas* precedent is to the case of indigenous Armenians in the Artsakh/Karabakh region and past and recent mass violence against them by Azerbaijan and Turkey. Military resistance by Armenians – which had some success in the early 1990s but has been entirely ineffective from 2020 to the present, yet has been used by Turkey, Azerbaijan, external governments, policy centers, and international media to misrepresent the situation as a military conflict rather than another phase of the overarching genocidal destruction of Armenians as an indigenous group in their traditional homeland – does not discount this from being part of an overarching genocidal process that is being resisted militarily. The resistance, whether viewed as opposition to a process of expulsion from a territory deeply and long-linked to victims' national identity, or to an overarching genocidal process begun in 1894 and extending through 1909, 1915–1923, 1988–1994, and 2020–present, has no bearing on how the Azerbaijani-Turkish mass violence should be evaluated. Indeed, *Drėlingas* makes it impossible to argue that resistance is the cause of violence being characterized as genocide. Other applicable current cases abound, such as the Eritrean and Ethiopian genocide against Tigrayans. Military resistance does not foreclose legal characterization as genocide.

As a final point that consideration of the *Drėlingas* case offers, it should be noted that Soviet genocide was a special type, which did not target this or that specific national group – Lithuanian, Ukrainian, etc. – based on the particularities of that group, but instead targeted groups based on their membership in the category of "national group" without reference to the specific national group they were. In a telling contrast to Nazi genocide, in which some national groups were deemed unworthy of existence and others worthy, Soviet genocide was genocide against the very concept of national identity, not this or that national group (however much unacknowledged Russian national features were preserved as a faux "universal" Soviet identity). We might consider this to be categorical genocide or "categoricide". The Soviet ideology could not allow a sharing of political allegiance to a state with cultural allegiance to a national identity. Of course, nationalist attitudes among its targeted groups were not able to accept citizenship that did not accommodate diverse national identities, but given the pre-existing nature of national identity in such cases and the violent imposition of an anti-national social order on them, that is irrelevant.

It remains to be seen whether this most essential and consequential implication of the *Drėlingas* decision will strengthen the legal and political position of those, such as the Tigrayans, facing genocide after undertaking military resistance to oppression.