EGIDIJUS KŪRIS. *Vasiliauskas*, *Drėlingas* and beyond – an insider's view

Professor, Law Faculty, Vilnius University, Lithuania*

ORCID: 0000-0002-9235-6658

Abstract

The judgment of the European Court of Human Rights Chamber in *Drėlingas v. Lithuania* (2019) is usually seen as the antithesis of *Vasiliauskas v. Lithuania* (2015). In *Vasiliauskas*, which involved an applicant convicted for the (Soviet) genocide of Lithuanian partisans in the post-war years, the Court found a violation of Article 7 of the Convention for the Protection of Human Rights and Fundamental Freedoms, whereas in the very similar *Drėlingas* case such a violation was not established. This article, authored by a judge of the Court who sat in both of these cases, deals with a peculiar set of circumstances pertaining to the procedure of the examination of *Drėlingas*. Not yet paid heed by any commentator (and hardly noticeable to an outsider), these circumstances, and especially their sequence, allow hypothetical questions to be raised as to what the outcome of *Drėlingas* could have been if the sequence of events dealt with had been different, let alone if some of the events had not taken place.

Keywords: European Court of Human Rights, Lithuania, genocide, Committee of Ministers of the Council of Europe

The European Court of Human Rights (ECtHR) Chamber judgment in *Drėlingas v. Lithuania*[1] has not been widely commented on – at least much less than the Grand Chamber judgment in *Vasiliauskas v. Lithuania*,[2] from which it departed.[3] In Lithuania, most comments in the (non-specialised) media were informational and political. The judgment was hailed as a political victory – an unexpected one, especially given that *Vasiliauskas*, perceived as Lithuania's historical and geopolitical defeat, was considered settled law. *Drėlingas* is antipodal to *Vasiliauskas*. In *Vasiliauskas*, the ECtHR was not convinced by Lithuanian courts' reasoning underlying the conviction of the applicant, a former NKVD officer, for participation in the Soviet genocide of Lithuanian partisans in the post-war years. On the contrary, in *Drėlingas* the ECtHR accepted a very simi-

* The author is a judge of the European Court of Human Rights (2013–) and former Justice (1999–2008) and President (2002–2008) of the Lithuanian Constitutional Court. The views expressed are those of the author and must not be attributed to any institution.

[1] 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.

[2] 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.

[3] I do not have in mind the comments in the Russian media, which were abundant immediately after the delivery of *Drėlingas*, but most of which do not merit citation in any serious publication owing to their hysterical tone, insulting language, and lack of legal (or any other) analysis.

lar reasoning as not violating the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). In that case, an international court recognised for the first time that Lithuania might qualify the post-war Soviet repressions as genocide and punish its remaining perpetrators (although today the number of those remaining to be prosecuted approaches zero).

Drėlingas may be seen not only as the antithesis of *Vasiliauskas* but also as a judgment for which *Vasiliauskas* was a prelude and, paradoxically, a precondition. This aspect, to the best of the author's knowledge, has not been discussed by commentators.[4] Although in *Drėlingas* no violation of Article 7 of the ECHR was found on the merits of that case, the author finds it worthwhile to consider whether what also might have contributed to such a finding was not a peculiar set of various circumstances, coincidences, and even happenstances. To wit, one may wonder (even if this question is purely speculative and cannot be answered with any reliability) whether the outcome of *Drėlingas* could not have been different, had the sequence of events been different. These events include some seemingly insignificant, procedural fragments unrelated to the essence of the case, not spotted by "external" analysts, but having not escaped the attention of the author, an insider in both cases. Further, I discuss these events in chronological order, but do not discuss the content of the judgment or the Court's reasoning. Instead, I raise some questions, rhetorical as they may seem, which pertain to what could be called (perhaps too pretentiously) alternative history.

1) *The case of Vasiliauskas*. The applicant, Vytautas Vasiliauskas, complained about his conviction for participation in the killing of Lithuanian partisans, which Lithuanian criminal law equated to genocide. The Criminal Code[5] defines genocide in wider terms than the 1948 Convention on the Prevention and Punishment of the Crime of Genocide[6] (the Genocide Convention). The application was lodged with the ECtHR in 2005 and was pending for eight years – four years before a notice of the case was given to the Government and four years after that. In September 2013, the Chamber of seven judges relinquished the case in favour of the Grand Chamber. A public hearing was scheduled for early April 2014. At the request of the Government, it was postponed, pending the Constitutional Court ruling in an abstract constitutional review case, where the constitutionality of the Criminal Code provision on liability for genocide was challenged. That case was initiated by six courts examining genocide cases, in one of which the same V. Vasiliauskas was a defendant. His case pending in Strasbourg was the one in which he was already convicted, while the Constitutional Court was about to examine a case where the court that initiated it was yet in a position to convict him

[4] I deal with this matter also in Egidijus Kūris, "Cases against Lithuania in the European Court of Human Rights (2019–2021): In Search of Landmark Judgments", in *The Law of European Union and Administrative Justice of Lithuania*. Skirgailė Žalimienė et al. (eds). (forthcoming). The present article echoes to a certain extent that longer publication.

[5] No. 1001010ISTAIII-1968 in the Register of Legal Acts.

[6] United Nations, Treaty Series, Vol. 78, 277.

in another criminal case. The offence was the same – genocide, but committed against other persons, in another place, at a different time. The Constitutional Court adopted the ruling on 18 March 2014.[7] It was acknowledged, *inter alia*, that Article 99 of the Criminal Code[8] "insofar as it establishes that actions aimed at physically destroying, in whole or in part, persons belonging to any national, ethnical, racial, religious, social, or political group are considered to constitute genocide", was not in conflict with the Constitution. Thus, a broader concept of genocide, including actions aimed at destroying people belonging to social and political groups, than that enshrined in the Genocide Convention was upheld. At the same time, Article 3 § 3 of the Criminal Code,[9] "insofar as this paragraph establishes the legal regulation under which a person may be brought to trial under Article 99 of the Criminal Code for the actions aimed at physically destroying, in whole or in part, persons belonging to any social or political group, where such actions had been committed prior to the time when responsibility was established in the Criminal Code for the genocide of persons belonging to any social or political group", was found unconstitutional.

Thus, according to the Constitutional Court, criminal prosecution is permissible for the "more widely defined" crime of genocide, but only for actions committed after the definition of genocide was expanded in the above-said manner in the Criminal Code. This was of no relevance to the applicant's case in Strasbourg, because he was convicted not for actions against members of a social or political group not mentioned in the Genocide Convention *per se*, but for actions against Lithuanian partisans, i.e., as the Court of Appeal of Lithuania and, subsequently, the Supreme Court of Lithuania explained before the Constitutional Court, against members of such a social or political group which constituted such a significant part of the national, ethnic, racial or religious group that its destruction would affect the entire national, ethnic, racial or religious group, i.e., the Lithuanian nation. It transpires from the *Vasiliauskas* judgment that the interpretation by the Constitutional Court did not convince the majority of the Grand Chamber. The fact that the ruling of the Constitutional Court was adopted already after the conviction of the applicant and, moreover, "only" in an abstract constitutional review case, which was not related to the case regarding which the applicant applied to ECtHR (although it was related to another case in which the same person was tried), also had some bearing. The Court found violation of Article 7 of the Convention by a minimal margin (9:8). One of ECtHR Grand Chamber's reproaches to Lithuanian courts was that their judgments did not provide a broader historical explanation of the significance of the partisans for the Lithuanian nation.[10] It can be debated whether the *Vasiliauskas* judgment was to be understood as the prohibition for Lithuania to treat

[7] Ruling of the Constitutional Court of the Republic of Lithuania of 18 March 2014 "On the compliance of certain provisions of the Criminal Code of the Republic of Lithuania that are related to criminal responsibility for genocide with the Constitution of the Republic of Lithuania". No. 2014-03226 in the Register of Legal Acts.
[8] Wording of 26 September 2000; Official gazette *Valstybės žinios*, 2000, No. 89-2741.
[9] Wording of 22 March 2011; Official gazette *Valstybės žinios*, 2011, No. 38-1805.
[10] Cf. the separate opinion of the author in *Vasiliauskas v. Lithuania* (footnote 2 *supra*).

participation in the massive killing of partisans as participation in the genocide of the Lithuanian nation or as an assessment of Lithuanian courts' decisions as insufficiently substantiated. Judging by the publicly expressed frustration of politicians and commentators in Lithuania and the triumph in the media of Russia (which had joined the case as a third-party intervener), there was an almost universal adoption of the first of these interpretations.[11]

2) *The Supreme Court 25 February 2016 ruling*.[12] In this ruling, having provided numerous references to the ECtHR *Vasiliauskas* judgment, the Supreme Court acquitted M. M., who was charged with genocide. That person was accused of participating in an operation aimed at detaining the last Lithuanian partisan in hiding, which resulted in the death of the latter. These actions were committed in 1965, i.e., more than a decade after the Lithuanian partisan movement had long been suppressed. For this reason, his case was regarded as having a "political lining".

One may legitimately ask: what course would the events have taken if M. M. had not been acquitted?

3) *Reopening of the proceedings in the case of Vasiliauskas*. V. Vasiliauskas died some two weeks before the delivery of ECtHR judgment in his case. At the request of his heirs, his case was reopened. The Supreme Court, in its 27 October 2016 ruling,[13] in an emphatically gentlemanly manner, acquiesced to the reproaches stated by the ECtHR in the case of *Vasiliauskas* regarding insufficiency of reasoning by national courts. It even admitted its own fault that it had allegedly failed to sufficiently explain the particular significance of the partisans for the Lithuanian nation. According to the Supreme Court, the violation of Article 7 of the Convention, as found by the ECtHR, could only be rectified by modifying the charges against V. Vasiliauskas. As the defendant had already passed away, this was impossible. Therefore, V. Vasiliauskas' criminal conviction was annulled, and the criminal case was discontinued.

One may ask: if V. Vasiliauskas had still been alive and the charges against him had been modified, could this have had any effect on other genocide cases examined by Lithuanian courts (the number of which seems to have been a single digit at that time)? If not, what would the position of the ECtHR have been, had it received new applications similar to that of V. Vasiliauskas, regarding other criminal convictions similar to those by which that person was convicted?

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[11] For a broader analysis, see Egidijus Kūris, "On Lessons Learned and Yet to Be Learned: Reflections on the Lithuanian Cases in the Strasbourg Court's Grand Chamber", in *East European Yearbook on Human Rights* 2019 (2) 1, ch. 6.

[12] Ruling of the judicial panel of the Criminal Division of the Supreme Court of Lithuania of 25 February 2016 in criminal case No. 2K-5-895/2016.

[13] Ruling of the Supreme Court of Lithuania (Plenary Session) of 27 October 2016 in criminal case No. 2A-P-8-788/2016.

4) *Closure of the procedure of supervision of the execution of the Vasiliauskas judgment*. On 7 December 2017, the Committee of Ministers of the Council of Europe closed the procedure of supervision of the execution of the *Vasiliauskas* judgment.[14] In the Committee's assessment, the Lithuanian authorities took all necessary individual measures "to put an end to violations established and erase their consequences so as to achieve as far as possible *restitutio in integrum*", as well as general measures "preventing similar violations". The general measures mentioned by the Committee included that the Supreme Court and the Constitutional Court "have significantly developed ... the case-law on genocide ... since [V. Vasiliauskas'] conviction". Truth to tell, the Constitutional Court had had its case-law developed before the case of *Vasiliauskas* was examined by the ECtHR; however, this did not help to obviate the finding of a violation of Article 7 of the Convention. Nonetheless, the judgment of the Supreme Court in M. M.'s case was certainly conducive to this very positive assessment: the CM was of the opinion that the Supreme Court demonstrated a balanced, differentiated judicial response to genocide charges, as not all the accused were convicted – some were acquitted. Needless to say, the Committee's assessment was as favourable to Lithuania as one could be.

Again, one may hypothetically ask: what would the evaluation by the Committee of Ministers have been, had the Supreme Court not acquitted M. M.?

5) *The giving of the notice of the case of Drėlingas to the Government.* Stanislovas Drėlingas lodged an application with the ECtHR in May 2016. The Court gave notice of it to the Lithuanian Government on 29 January 2018. The element of time merits special attention: the application was communicated to the Government a little less than two months after the Committee of Ministers adopted the resolution on the closure of the procedure of supervision in *Vasiliauskas*. It is obvious that the Committee of Ministers, when closing the procedure of supervision, was not aware of the case of *Drėlingas*, of which notice was not yet given to the Lithuanian Government. In addition, not only was the respondent state ignorant about that case, but also the state that had joined the case of *Vasiliauskas* as a third-party intervener, Russia (it did not request to be granted leave to join the case of *Drėlingas* as a third-party intervener).

Another hypothetical question: would the Committee of Ministers 7 December 2017 resolution have been so unambiguously favourable for Lithuania had the Committee had any knowledge of S. Drėlingas' application at that time?

6) *The second case of Vasiliauskas*. With hindsight, this "small" case was of utmost importance in the events leading to the *Drėlingas* judgment, but it "slipped by" completely unnoticed. The case originated from a criminal case in which the Constitutional Court was applied to with a request to investigate the compliance of the Criminal Code

[14] The resolution on execution of the judgment of the European Court of Human Rights in *Vasiliauskas v. Lithuania* (adopted by the Committee of Ministers on 7 December 2017 at the 1302nd meeting of the Ministers' Deputies), Council of Europe, accessed on 15 November 2021, https://rm.coe.int/native/09000016807647ff.

provisions on genocide with the Constitution, and in which it adopted its 18 March 2014 ruling. The ruling, in which it was explained that the Lithuanian partisans constituted a very significant part of the Lithuanian nation, the destruction of which would affect the entire Lithuanian nation as a national group (using a term employed in the Genocide Convention), did not prevent but effectively allowed V. Vasiliauskas' conviction in that new criminal case. In August 2015, V. Vasiliauskas filed his second application with the Strasbourg Court, i.e., at the time when the judgment in his first case was not yet delivered. He died three months later. His heirs supported the application for some time. However, at a certain moment, their lawyer (for unknown reasons) ceased responding to the Court's letters. Such non-communication, i.e., non-cooperation, is interpreted in ECtHR practice as a wish to no longer pursue the application, which almost automatically leads to the striking of the application out of the Court's list of cases, i.e., discontinuation of the case. The second case of *Vasiliauskas* was struck out of the Court's list of cases by the Committee of three judges by its 13 December 2018 inadmissibility decision.[15] That case thus was not examined on its merits.

A hypothetical question that one may ask would be: what would the position of the Committee of Ministers have been had it been aware of the second case of *Vasiliauskas*? Would the Committee have closed the supervision procedure, or would it have waited? Would it have expressed its support for the measures taken by the Lithuanian authorities in a more moderate way? Also: what would the outcome of the second case of *Vasiliauskas* have been if the applicant's lawyer had not ceased to cooperate with the Court? Or: what course would the events have taken if the Committee of three judges had decided that it was necessary to continue the examination of V. Vasiliauskas' second application because "respect for human rights as defined in the Convention and the Protocols thereto so requires" (as provided for in Article 37 § 1 of ECHR *in fine*)?

7) *The case of Drėlingas.* That case was examined by a Chamber on 29 January 2019. The judgment was delivered on 12 March 2019: no violation of Article 7 of the ECHR. In the judgment, considerable attention is paid to the position of the Committee of Ministers, which it expressed when closing the procedure of supervision in *Vasiliauskas*. Thus, if after the *Vasiliauskas* judgment the prevailing view was that that the judgment implied a prohibition for Lithuania to treat the destruction of partisans as a genocide, after the *Drėlingas* judgment, the second of the above-mentioned alternative interpretations gained authority: in the case of *Vasiliauskas*, Lithuanian courts' judgments were assessed as insufficiently substantiated, but nothing more.

One could ask a hypothetical question: what would the Chamber (or maybe the Grand Chamber, if the case had been relinquished in its favour) judgment have been in the case of *Drėlingas* had the Committee of Ministers not closed the supervision in

[15] Decision of the European Court of Human Rights (Committee of the Fourth Section) of 13 December 2018 in the case of *Vasiliauskas v. Lithuania*, no. 58905/15, ECLI:CE:ECHR:2018:1213DEC005890516.

Vasiliauskas, or, in the alternative, had the Committee's stance regarding individual and general measures taken by Lithuanian authorities not been so unambiguously favourable to Lithuania?

8) *The 2 September 2019 decision of the panel of judges of the Grand Chamber*. Having been served with the unfavourable Chamber judgment, S. Drėlingas requested his case to be referred to the ECtHR Grand Chamber. The request was examined and not granted. The panel meetings are not public – those *hors de la Cour* can only speculate on the motives of the five members of the panel, but there is no way to know them for sure; whatever versions may be raised, they will be neither denied nor confirmed.

However, one may ask: what would the Grand Chamber's judgment have been in the case of *Drėlingas* had the decision of the panel been to the contrary, thus, had the case been referred to the Grand Chamber?

The hypothetical questions asked here cannot be answered with any certainty, but one may ask anyway. This is akin to the construction of mental alternative history, where elements that often go unnoticed but have a bearing on the final outcome gain their proper weight.

Today, the long-term effects of the *Drėlingas* judgment can hardly be prognosticated on. No doubt it will have political and moral significance, as well as significance for the perception of history, even though it is too early yet to assess its scale. This judgment is certainly important both for human rights law and criminal law, as well as international law. Hopefully, it has the potential to contribute to the broader application of the concept of genocide, which has so far been extremely conservative and has not allowed this word to be officially used for naming many cases of genocide that have taken or are taking place in the world.[16]

However, it is also possible that the *Drėlingas* judgment will remain the only such in the field of judgments on the issue of genocide. So far, it has not yet gained considerable jurisprudential import even in the ECtHR's own judgments. The only Court decision where reference has been made to the *Drėlingas* judgment so far is the inadmissibility decision in *Allen v. Ireland*,[17] which concerns alleged sexual exploitation. In that case, which is not related to genocide or other crimes of such scale, a Chamber of seven judges referred to the *Drėlingas* judgment, stating that the "Committee of Ministers' role [in assessing measures taken by a state] does not mean that [they] ... cannot raise a

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[16] Cf. the observation of a renowned genocide expert that Raphael Lemkin, who coined the term *genocide*, "would be horrified, however, by the parsing of words, the distracting fights over the labeling of such abject cruelty and the placing of his term on a perch so high that the legal meaning of 'genocide' is held apart from its ordinary conception". Philippe Sands, "What the Inventor of the Word 'Genocide' Might Have Said About Putin's War", *New York Times*, 28 April 2022, https://www.nytimes.com/2022/04/28/opinion/biden-putin-genocide.html?searchResultPosition=1.

[17] Judgment of the European Court of Human Rights (Chamber of the Fifth Section) of 19 November 2019 in the case of *Allen v. Ireland,* no. 37053/18, ECLI:CE:ECHR:2019:1119DEC003705318.

new issue undecided by the initial judgment". Such a statement, although correct, is not formulated verbatim in the *Drėlingas* judgment.