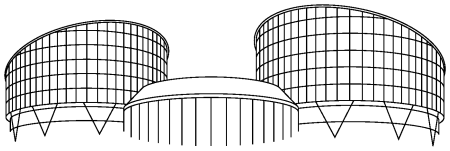

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

GRAND CHAMBER

CASE OF VASILIAUSKAS v. LITHUANIA

(Application no. 35343/05)

JUDGMENT

STRASBOURG

20 October 2015

This judgment is final. It may be subject to editorial revision.

In the case of Vasiliauskas v. Lithuania,

The European Court of Human Rights, sitting as a Grand Chamber composed of:

Dean Spielmann, *President,*
Josep Casadevall,
Guido Raimondi,
Mark Villiger,
Isabelle Berro,
Işıl Karakaş,
Ineta Ziemele,
Khanlar Hajiyev,
Dragoljub Popović,
András Sajó,
Ann Power-Forde,
Nebojša Vučinić,
Paulo Pinto de Albuquerque,
André Potocki,
Ksenija Turković,
Egidijus Kūris,
Jon Fridrik Kjølbro, *judges,*

and Erik Fribergh, *Registrar,*

Having deliberated in private on 4 June 2014 and 2 July 2015,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 35343/05) against the Republic of Lithuania lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Lithuanian national, Mr Vytautas Vasiliauskas ("the applicant"), on 30 July 2005.

2. The applicant, who had been granted legal aid, was represented by Mr Š. Vilčinskas, a lawyer practising in Vilnius. The Lithuanian Government ("the Government") were represented by their Acting Agent, Ms Karolina Bubnytė.

3. The applicant complained that his conviction for genocide was in breach of Article 7 of the Convention, in particular because the national courts' broad interpretation of that crime had no basis in international law.

4. The application was allocated to the Second Section of the Court (Rule 52 § 1 of the Rules of the Court). On 16 June 2009 the President of the Section decided to give notice of the application to the Government.

5. On 17 September 2013 a Chamber of the Second Section, composed of the following judges: Guido Raimondi, Danutė Jočienė, Peer Lorenzen, Dragoljub Popović, Işıl Karakaş, Nebojša Vučinić and Paulo Pinto de Albuquerque, and also of Stanley Naismith, Section Registrar, relinquished jurisdiction in favour of the Grand Chamber, neither of the parties having objected to relinquishment (Article 30 of the Convention and Rule 72).

6. The composition of the Grand Chamber was determined according to the provisions of Article 26 §§ 4 and 5 of the Convention and Rule 24.

7. The applicant and the Government each filed further written observations on the admissibility and merits.

8. In addition, third-party comments were received from the Government of the Russian Federation, which had been granted leave by the President of the Grand Chamber to intervene in the written procedure (Article 36 § 2 of the Convention and Rule 44).

9. A hearing took place in public in the Human Rights Building, Strasbourg, on 4 June 2014 (Rule 59 § 3).

There appeared before the Court:

(a) *for the Government*

Ms K. BUBNYTĖ, Ministry of Justice, *Acting Agent*,
Ms L. URBAITĖ, Ministry of Justice, *Counsel*,
Mr W. A. SCHABAS, Middlesex University, *Counsel*,

(b) for the applicant

Mr Š. VILČINSKAS *Counsel*.

The Court heard addresses by Ms Bubnytė, Mr Schabas and Mr Vilčinskas, as well as their replies to questions put by Judges Power-Forde, Ziemele, Pinto de Albuquerque, Sajó, Spielmann, Turković and Vučinić.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

10. The applicant was born on 21 October 1930 and lives in Tauragė.

A. Summary of the historical background

11. On 23 August 1939 the Soviet Union (hereafter at times referred to as "the USSR"), led by Josef Stalin, signed a non-aggression treaty with

Germany, led by Adolph Hitler ("the Molotov-Ribbentrop Pact"). Under a secret additional protocol approved by the parties on the same date, as amended on 28 September 1939 and 10 January 1940, Lithuania and other Baltic States were attributed to the USSR's sphere of interest in the event of a future "territorial and political rearrangement" of the territories of these then independent countries. After Germany's invasion of Poland on 1 September 1939 and the subsequent start of the Second World War, the Soviet Union began exerting considerable pressure on the Governments of the Baltic States with a view to taking control of those countries pursuant to the Molotov-Ribbentrop Pact and its additional protocol.

12. Following an ultimatum to allow an unlimited number of Soviet troops to be stationed in the Baltic countries, on 15 June 1940 the Soviet army invaded Lithuania. The Government of Lithuania was removed from office, and a new Government was formed under the direction of the Communist Party of the Soviet Union, the USSR's only political party. On 3 August 1940 the Soviet Union completed the annexation of Lithuania by adopting an act incorporating the country into the USSR, with Lithuania being named the "the Lithuanian Soviet Socialist Republic" (hereinafter referred to as "the LSSR"). In 1941 the territory was occupied by Nazi German forces. In July 1944 Soviet rule was re-established in Lithuanian territory (see *Kuolelis and Others v. Lithuania*, nos. 74357/01, 26764/02 and 27434/02, § 8, 19 February 2008, and also *Ždanoka v. Latvia* [GC], no. 58278/00, §§ 12 and 13, ECHR 2006-IV).

13. A nation-wide partisan movement began in Lithuania. The goal of the entire armed and unarmed resistance was the liberation of and re-establishment of independent Lithuania. In 1949 an all-partisan organisation, the Movement of the Struggle for the Freedom of Lithuania (*Lietuvos laisvės kovos sajūdis* ("LKKS")) was formed. On 16 February 1949 the organisation adopted the Declaration stating that the LKKS Council was "the highest political authority of the nation, leading the nation's political and military struggle for freedom (*aukščiausias tautos politinis organas, vadovaująs politinei ir karinei tautos išsilaisvinimo kovai*)". The Soviet repressive structures, embodied in the NKVD (People's Commissariat for Internal Affairs, *Narodnyy Komissariat Vnutrennikh Del*), the MGB (Ministry of State Security, *Ministerstvo Gosudarstvenoj Bezopastnosti*) and other bodies, sought to suppress the resistance. The system of repressive organisations was reorganised on repeated occasions. Most of the leading and operative employees of those structures were non-Lithuanians sent to Lithuania from the USSR. In the 1950s the partisan movement was suppressed by the Soviet authorities, although separate partisan formations were operating for some time until after 1953, the year in which the leadership of the LKKS was captured and murdered.

14. Lithuania regained its independence on 11 March 1990; this was officially recognised by the USSR on 6 September 1991. The Russian army left Lithuania on 31 August 1993.

B. The applicant's career at the MGB and his conviction for genocide

1. The applicant's status within the MGB of the Lithuanian SSR

15. The Government provided the Court with copies from the Lithuanian Special Archive (*Lietuvos ypatingasis archyvas*) of the applicant's service file from the period when he worked for the MGB of the Lithuanian SSR. The documents are in Russian and were translated into Lithuanian by a translator from the Kaunas region public prosecutor's office. It appears that these documents were relied upon by the prosecutor when he brought the bill of indictment against the applicant in 2001 (see paragraph 29 below). The documents disclose the following information.

16. Between 1950 and 1952 the applicant studied at the Lithuanian SSR MGB School in Vilnius.

17. On 8 April 1952 the applicant was employed as an assistant operational agent (*operatyvinis įgaliotinis*), and from 15 September 1952 he worked as an operational agent in the Šakiai district unit of the LSSR MGB. As of 1 July 1953 the applicant worked as a senior operational agent in the MGB and subsequently in the KGB.

18. The minutes of the Šakiai district MGB unit Communist party members' meeting of 2 March 1953 record that the agenda of that meeting was devoted to discussing "the decisions of the USSR Central Committee, and orders from the USSR MGB and LSSR MGB as to the extermination of nationalist elements in the [Šakiai] district". The minutes further record that a member of the Šakiai district MGB urged that in the immediate future the "bandits and nationalist underground should be eradicated". The regional unit of the Communist party was encouraged to put more effort into enlightening the inhabitants about the "fight against the bandits and nationalist underground". The minutes record the applicant's view that "their [his MGB unit's] goal was to exterminate as quickly as possible the bandits, those who help them and their contacts".

19. It appears from the minutes of the meeting of 18 September 1953 of the Šakiai district MGB unit Communist party members, that on that occasion the applicant gave a speech about "the fight against the nationalist underground". The applicant stated that so far he "had not succeeded in exposing all the members of the nationalist gangs in the district assigned to him". In the applicant's view, "if each communist, each member of his [MGB] unit, takes up his duties more thoroughly, they can obtain good results in the fight against the nationalist underground".

20. During the meeting of 4 November 1953 of the Šakiai district MGB unit Communist party members, the applicant was described as a person who had achieved good results in his work.

21. On 23 December 1953 the applicant became a member of the Communist Party of the Soviet Union. The record of the meeting of the Šakiai district MGB unit Communist party members indicates, that the applicant's superiors characterised him as being disciplined (*disciplinuotas*), being politically aware (*politiškai raštingas*) and having good work results. The superiors pointed out that joining the ranks of the "glorious Communist party" obliged the applicant to "raise his political awareness, study the history of the Communist party in its fight with various enemies and always be alert".

22. In 1964 the applicant gained the qualification of a jurist at the KGB Felix Dzerzinskij Higher Institute.

23. From 1967 until he retired in 1975 on health grounds, the applicant worked as the Head of the KGB Department in the Jurbarkas district.

24. According to the applicant's service record, during his 25 years' service in the MGB (KGB), he was awarded, decorated or commended at least 24 times. During his service in the MGB and the KGB the applicant served up to the rank of lieutenant-colonel (*papulkininkis*).

2. The operation to capture or kill partisans J.A. and A.A.

25. On 2 January 1953 the applicant took part in an operation against two Lithuanian partisans, the brothers J.A. and A.A., who had been hiding in the forest in the Šakiai area. M.Ž., the applicant's co-accused in the subsequent criminal proceedings for genocide, had provided the Soviet authorities with information about the partisans' whereabouts. An operation to capture or liquidate the partisans had been planned. Several soldiers were involved and the applicant was part of the operation. During the attempt to apprehend them, J.A. and A.A. resisted by opening fire on the MGB officers and Soviet soldiers. The partisans were shot and killed.

26. On the day of the operation, that is, on 2 January 1953, the Head of the Šakiai district MGB drafted a report to his superior – the head of the Kaunas region MGB, wherein it was mentioned that the applicant had contributed to the success of the operation during in which "two bandits had been liquidated", and thus deserved to be commended (*užsitarnavo paskatinimą*).

27. On 1 September 1953 the Head of the Šakiai district MGB wrote to the Minister of the Interior of the Lithuanian SSR, informing him that on 2 January 1953 the applicant and the MGB officers had liquidated "two members of a nationalist gang [J.A. and A.A.]". He proposed that the applicant be rewarded for that operation. The applicant's service file indicates that on 15 September 1953 the applicant received a commendation and was paid a premium of 500 roubles.

28. On 10 December 1971 the Chairman of the Executive Committee of the Šakiai district indicated that brothers J.A. and A.A. belonged to a "bourgeois nationalistic armed gang" during the post-war period and that in 1953 they were shot as its members.

3. The applicant's conviction for genocide

(a) The bill of indictment

29. After Lithuania regained its independence, the Kaunas region public prosecutor's office started an investigation in April 2001 into the death of the brothers J.A. and A.A. In September 2001 the prosecutor charged the applicant and M.Ž. with genocide, pursuant to Article 71 § 2 of the Criminal Code then in force (see paragraph 52 below). The prosecutor found it to be established that as of 15 September 1951[1] the applicant had served as an operational agent in the Kaunas region Šakiai district branch of the LSSR MGB. He knew that "the LSSR MGB's main purpose was to physically eradicate part of the Lithuanian population belonging to a separate political group (*atskira politinė grupė*), namely, the Lithuanian partisans, participants in the resistance to the Soviet occupation". "The applicant had been active in fulfilling that main goal of the LSSR MGB by killing some of the inhabitants of Lithuania belonging to the aforementioned political group". For the prosecutor, the applicant's guilt was proved on the basis of his service record (*tarnybos kortelė*), the applicant's superiors' commendation for his persistence when executing search measures, managing the operation and personal participation when apprehending the bandits (*pareikšta padėka už atkaklumą pravedant agentūrines-tyrimo priemones, vadovavimą operacijai, asmeninį dalyvavimą sulaikant banditus*). The evidence examined by the prosecutor included statements by witnesses, minutes of the meetings of the Šakiai district MGB unit which were obtained from the Lithuanian Special Archive (*Lietuvos ypatingasis archyvas*) and the Genocide and Resistance Research Centre of Lithuania (*Lietuvos gyventojų genocido ir rezistencijos tyrimo centras*) and translations of those documents, which mentioned the applicant, the tasks he had been assigned with regard to the liquidation of banditry, bandits' assistants and contact persons. Other evidence included [MGB] reports about the liquidated bandits J.A. and A.A.

(b) The trial court's verdict

30. By a judgment of 4 February 2004, the Kaunas Regional Court found that there was sufficient evidence to convict the applicant of genocide. On the basis of witness statements, written evidence provided by the Genocide and Resistance Research Centre of Lithuania and statements

1. The applicant's file indicates the date as 15 September 1952.

by the applicant and his co-accused M.Ž., the court established that J.A. and A.A. had belonged to the 37th unit of the Tauras district partisans. The trial court noted that the information in the case file allowed it to conclude that in order to compromise the partisan brothers the Soviet authorities had spread misinformation to the effect that J.A. and A.A. had deserted from the partisan unit, were hiding alone and, thereafter, had no connection with the partisans. Those accusations were untrue. In reality, the partisans, including the brothers J.A. and A.A., operated in small groups in order to avoid extermination by the Soviets. Lastly, there was no credible evidence in the case which would disprove the assertion that J.A. and A.A. "were members of the organised resistance and that they belonged to a political group". The trial court also noted testimony by one witness that the partisan brothers had been hiding in the forest for three to four years, and that his family had given them food.

31. As to the applicant, the court noted that as of 15 September 1951 he had been working as an operational agent of the MGB of the Lithuanian SSR and "knew the main goal of that Ministry, which was to physically eradicate a separate political group, Lithuanian partisans, constituting part of the Lithuanian population". In the MGB files the two brothers had been listed as partisans, members of the armed national underground resistance (*partizanai – nacionalinio ginkluoto pogrindžio dalyviai*). The court dismissed the applicant's contention that he had not actively participated in the operation to capture or to liquidate the two partisans during which those two partisans had died. On the contrary, the applicant's superior officer's operational file had stated that one of the bandits had been personally eliminated by the applicant. After the operation the applicant had been admitted to the Communist party and both he and M.Ž. had received a financial reward. Most importantly, neither the applicant nor M.Ž. denied taking part in the operation to liquidate the partisans. The trial court took the view that all of the circumstances allowed the conclusion that both of the accused had participated on 2 January 1953 "in the physical extermination (killing) of inhabitants of Lithuania who belonged to separate political group (*atskira politinė grupė*), participants in the resistance to the Soviet occupational power, that is to say, [the applicant] took part in genocide".

32. The Kaunas Regional Court noted that Article 3 of the Law of 9 April 1992 "On Responsibility for Genocide of Inhabitants of Lithuania" provided for the possibility of applying criminal liability for genocide retroactively.

33. The Kaunas Regional Court convicted the applicant of genocide under Article 99 of the Criminal Code (see paragraph 53 below) and sentenced him to six years' imprisonment. The applicant was granted a suspension of his sentence on health grounds.

M.Ž. was also convicted of being an accessory to genocide under the same provision of the Criminal Code. She was sentenced to five years' of imprisonment, suspended on health grounds.

The trial court also granted a civil claim by the injured party, M.B., who was the daughter of J.A. and the niece of A.A., but reserved the question of the amount of damages for separate civil proceedings.

34. Both the applicant and M.Ž. appealed against their convictions.

(c) The appellate court's decision

35. On 21 September 2004 the Court of Appeal upheld the convictions and held that the trial court's verdict had been lawful and well-founded. The appellate court indicated that the trial court had not concluded that the applicant had personally shot one of the partisans. In fact, the applicant had been sentenced only for taking part in the operation to eradicate the partisans as representatives of a political group. The applicant himself acknowledged, and it had been proven by the witnesses' statements and documents, that he had taken an active part in the impugned operation, that he had been responsible for M.Ž., who had shown the Soviet authorities the partisans' hiding place, that he had been one of the officers who had surrounded the bunker, and that he had stayed with M.Ž. until the end of the operation. In passing sentence, the Court of Appeal observed that the applicant, as an operational officer of the Šakiai district MGB who had worked voluntarily for the occupying authority (MGB) "had clearly known that the goal of that institution was to physically exterminate the Lithuanian partisans, as part of the Lithuanian population (*tikrai žinojo, kad šios įstaigos tikslas yra Lietuvos partizanų, kaip Lietuvos gyventojų dalies, fiziškas sunaikinimas*)". Conscious of that fact, the applicant, together with other participants in the operation, had taken part in person in the killing of the partisan brothers J.A. and A.A. Likewise, M.Ž., as an MGB agent, also understood the goals of that organisation and by providing it with information about the partisans' whereabouts and by showing MGB the partisans' bunker, had understood that the brothers would be exterminated. Accordingly, both the applicant and M.Ž. had acted with direct intent (*tiesioginė tyčia)*. Lastly, the Court of Appeal found that at the time of the criminal proceedings against him the applicant had still been of the view that the Soviet authorities' actions against the Lithuanian partisans were lawful.

36. The appellate court dismissed the argument by the applicant that the definition of genocide under Lithuanian law, pursuant to Article 99 of the Criminal Code, contradicted the definition enshrined in Article II of the 1948 United Nations Convention on the Prevention and Punishment of the Crime of Genocide (hereinafter referred to as "the Genocide Convention"). The Court of Appeal noted the trial court's conclusion that the brothers J.A. and A.A. had been exterminated for belonging to a "political group". Whilst

admitting that the definition of the crime of genocide in Article 99 of the Criminal Code also included social and political groups, and was therefore wider than that established by the Genocide Convention, the appellate court found that the addition of those groups was "reasonable and in line with reality". The Genocide Convention did not contain specific provisions to the effect that the concept of genocide could be interpreted widely; however, neither did the Genocide Convention prohibit such an interpretation. The concept of genocide had been expanded in Criminal Codes of other countries. The appellate court further explained that "political group means people connected by common political views and beliefs and the goal to physically eradicate such a group also means genocide, because this has an intention to eradicate part of the people (*politinė grupė – tai žmonės, susiję bendromis politinėmis pažiūromis ir įsitikinimais, ir siekimas tokią grupę fiziškai sunaikinti taip pat reiškia genocidą, nes siekiama sunaikinti dalį žmonių*)". The court emphasised that:

> "the attribution of the Lithuanian partisans, that is to say, participants in armed resistance to occupational power, to a particular "political" group, as was done in the trial court's verdict, in essence was only relative/conditional and not very precise. The members of this group had at the same time been representatives of the Lithuanian nation, that is, the national group. The Soviet genocide was carried out precisely on the criteria of the inhabitants' nationality-ethnicity. It follows that Lithuanian partisans could be attributed not only to political, but also to national and ethnic groups, that is to say, to the groups listed in the Genocide Convention."

37. The Court of Appeal dismissed the applicant's and M.Ž.'s contention that their actions were not genocide because at the time of their deaths the brothers J.A. and A.A. had not been partisans and thus could not have been considered as belonging to "a political, social or other group":

> "... The complaints of the convicted V. Vasiliauskas and M.Ž. also contain allegations that during the war the brothers J.A. and A.A. had collaborated with the German occupying forces and had committed crimes. Besides, in 1947 they had deserted from the partisan squad and afterwards did not keep in touch with other partisans. Therefore, in the appellants' view, J.A. and A.A. could not have been considered members of any political, social or other group, and actions against them could not have been considered as acts of genocide. This Chamber is of the view that these arguments have been reasonably rejected by th[is] court and have already been addressed in the judgment of conviction. Both V. Vasiliauskas and M.Ž. mention certificate no. 1767 of the Lithuanian Archive Department, dated 13 November 2001. The certificate indicates that the KGB archive contains a criminal case on J.A., and that in the indictment of that case it is written that, when Germany occupied Lithuania, J.A. joined the armed squad of white partisans; he carried weapons and took part in arrests, detention and transportation of active Soviet party members and Jews. Besides, he conducted anti-Soviet agitation and made terrorist threats against communists, which means that he has committed the crime provided for in Article 58^{1a} of the Criminal Code of the Russian Soviet Federative Socialist Republic [counter-revolutionary crime and treason of the motherland]. On 4 May 1945 J.A. escaped from prison and joined the partisan squad.

As regards A.A., the certificate indicates that during the German occupation he served in the German police, and in 1944 he began living as an outlaw, joining the armed nationalist partisans' unit. It is also indicated that in 1947 J.A. and A.A. left the partisan unit and went into hiding alone: they did not keep in touch with other partisans, and by order of the commander of the Tauras partisan unit were considered deserters. In respect of J.A. the same is indicated in the indictment of 16 March 1945 drawn up by the [MGB]. The specific acts that J.A. was accused of were not detailed. Assessing the above documents, it appears that they contain no data about the brothers' involvement in particular crimes against humanity. Moreover, from the charges against J.A. it is more likely that he had been accused primarily of activity against the [USSR] occupying forces themselves. There are no data in the case file about any involvement by the brothers in other criminal acts. Even in KGB documents it is indicated that from 1947 J.A. and A.A. were hiding "without committing robberies, and they did not belong to any [criminal] gang". The Genocide and Resistance Research Centre's letter "Resistance activity by J.A. and A.A." indicates that from 1945 they belonged to partisan unit no. 37... According to data from the Šakiai MGB, in 1949 [J.A. and A.A.] still belonged to partisan unit no. 37... Afterwards they left the unit and took no further part in active partisan actions.

In the Chamber's view, the information given does not indicate that until their liquidation J.A. and A.A. could not have been considered Lithuanian partisans. In the judgment of conviction it is rightly noted that during the relevant period partisans had already been forced to fight in small groups to avoid extermination. Even in the MGB files there is an indication that in August 1952 other partisans were looking for an opportunity to meet J.A. and A.A. in order to form a single squad. Therefore the MGB decided to spread the rumour that J.A. and A.A. were MGB agents. Particular plans to discredit J.A. and A.A. are apparent from the plan of 12 September 1952 confirmed by the head of the MGB board of Kaunas District... Witness A.S. testified that in 1952 she met partisans J.A. and A.A. and supplied them with food. In addition, J.A. and A.A. gave her a certificate confirming that she was a supporter of the partisans. She has kept that certificate to this day.

On 18 November 1992 the Office of the Prosecutor General cleared J.A.'s name in respect of crimes attributed to him in the indictment of 1945. The prosecutor indicated that from October 1944 to May 1945 J.A. was unlawfully imprisoned. In 1998 and 2002 the Lithuanian Genocide and Resistance Research Centre posthumously granted J.A. and A.A. volunteer fighter (*kario savanorio*) certificates. The fact that the MGB itself had considered J.A. and A.A. to be partisans is clear from the report of 11 June 1952, in which the head of the Kaunas MGB informed the LSSR Minister of the Interior that measures had been adopted to ascertain the hiding place of [J.A. and A.A.] and liquidate them. The Šakiai district MGB was to take measures for speedier liquidation of [J.A. and A.A.]. All this served to prove that when putting those plans into action J.A. and A.A. had been killed as participants in the armed resistance."

(d) The Supreme Court's ruling

38. On 22 February 2005 the Supreme Court, in cassation proceedings, upheld the conviction of the applicant and M.Ž. As concerns the concept of genocide, the court held:

"Both of those convicted argue that the concept of genocide, as established in Article 99 of the Criminal Code, is broader than the one established in Article II of the 1948 Genocide Convention, thus not corresponding to the norms of international law. This argument must be dismissed.

> Indeed, Article 99 of the Criminal Code does provide for a broader concept (*platesnė nusikaltimo sudėtis*) of the crime of genocide than that in Article II of the [Genocide] Convention. According to Article 99 of the Criminal Code, genocide also comprises actions aimed at the physical eradication of some or all of the members of a social or political group. Article II of the Convention does not mention such groups.
>
> By acceding to the [Genocide] Convention, the Republic of Lithuania acquired the obligation to ensure that its norms were applied on its territory. Accordingly, by acceding to the [Genocide] Convention Lithuania acquired the obligation to punish actions aimed at the total or partial destruction of a national, ethnic, racial or religious group, and to prevent such actions. Acceding to the [Genocide] Convention does not deprive a State of the right to define actions which are crimes, and to prohibit them (*apibrėžti veikas, kurios yra nusikaltimai, ir jas uždrausti*). This is even truer because Article V of the [above] Convention provides that the Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the Convention and to provide penalties for those guilty of genocide or any of the other acts enumerated in Article III. In Lithuania, this provision has been put into force by enactment of the Law of 9 April 1992 "On Responsibility for Genocide of Inhabitants of Lithuania". The concept of genocide, as established in Article 1 of that law, corresponded to the concept of genocide established in Article II of the Genocide Convention. At the same time, when joining the Convention, in Article 2 of the Law "On Responsibility for Genocide of Inhabitants of Lithuania" the Lithuanian Parliament established that killings and torture of Lithuanian people and their deportations during the years under Nazi German and USSR occupation and annexation corresponded to the characteristics of the crime of genocide as established by the norms of international law. The 1998 amendments to the Criminal Code established the elements of the crime of genocide (*apibrėžta genocido nusikaltimo sudėtis*), and included in them acts aimed at physical extermination of some or all of the members of a social or political group. This characteristic of the crime of genocide remained in Article 99 of the Criminal Code. It is clear that adding acts aimed at the physical extermination of some or all of the members of a social or political group to the definition of the crime of genocide amounts to nothing more than execution of the legal norms of Article 2 of the Law of 9 April 1992 "On Responsibility for Genocide of Inhabitants of Lithuania". It follows that the doubts by the applicant and M.Ž. about the interpretation of the concept of the crime of genocide are not founded."

39. The Supreme Court noted that the applicant and M.Ž. "had been convicted of involvement in the physical extermination of a part the inhabitants of Lithuania, who belonged to a separate political group, that is Lithuanian partisans – members of the resistance to the Soviet occupation power (*nuteisti už dalyvavimą fiziškai sunaikinant Lietuvos gyventojų dalį, priklausiusią atskirai politinei grupei, t.y. Lietuvos partizanams – pasipriešinimo sovietų okupacinei valdžiai dalyviams*)". The court dismissed arguments by the applicant and M.Ž. that the brothers J.A. and A.A. had deserted from the partisans and at the time of their death they therefore no longer belonged to the partisans' political group. That argument had been raised both before the trial and appellate courts and had been dismissed by them for sound and clear reasons.

40. The Supreme Court observed that in 1944-53 the "nation's armed resistance – the partisan war – against the Soviet Union's occupying army

and structures of occupying regime was underway in Lithuania". It further pointed out that under the Law on the Status of Participants in Resistance against the Occupations of 1940-90, enacted on 28 November 1996, the partisans who fought against the occupation had been declared to be volunteer-fighters. In 1998 and 2001 the Lithuanian Genocide and Resistance Research Centre granted volunteer-fighter status to J.A. and A.A., which meant that they had met the condition contained in that Law that such status was not to be granted to individuals who had committed crimes against humanity or had killed civilians.

41. The Supreme Court also dismissed the applicant's argument that he had not committed any act causing the death of the two partisans:

> "The trial court has concluded that V. Vasiliauskas took part in the killing of Lithuanian partisans J.A. and A.A.: he surrounded the bunker with other MGB officers and attacked the bunker; during the attack J.A. and A.A. were shot and killed. The trial court's verdict does not state that V. Vasiliauskas himself killed any of the partisans, although data to that effect exists in the case file [the 2 January 1953 report by the head of the Šakiai district MGB).
>
> Participation in killing people who belong to a political group is one of the objective elements (*vienas iš nusikaltimo sudėties objektyviosios pusės požymių*) of the crime of genocide listed in Article 99 of the Criminal Code. Involvement in the killing of members of the groups enumerated in Article 99 means not only committing acts causing loss of life; it also means setting up conditions (*sudarymas sąlygų*) so that the killings happen. It has been established that V. Vasiliauskas, as an MGB officer, together with an MGB subsection chief, took part in preparations for the operation to exterminate J.A. and A.A.; V. Vasiliauskas was armed, and during the operation he was responsible for the MGB agent [M.Ž.], who had located the partisans' bunker; V. Vasiliauskas stayed with M.Ž. until the end of the operation. V. Vasiliauskas himself acknowledges those actions. Having taken the above into account, the Court of Appeal arrived at the reasonable conclusion that V. Vasiliauskas had played an active role in the operation of extermination of the partisans J.A. and A.A. Even though it has not been established that V. Vasiliauskas killed either of the partisans himself, the actions he took when preparing the operation and at the time of the operation correspond to the objective element of the crime of genocide, as established in Article 99 of the Criminal Code – involvement in killing people who belong to a political group.
>
> The actions of V. Vasiliauskas also correspond to the subjective element of genocide – direct intent (*tiesioginė tyčia*): V. Vasiliauskas, when taking those actions, had known the goal of the Soviet Government – to eradicate all Lithuanian partisans. He knew that the brothers J.A. and A.A. were partisans, and understood that during the operation they would be killed or arrested and then tortured, tried as "traitors to the homeland" and [possibly] sentenced to death, and [V. Vasiliauskas] wished that to happen."

4. Civil proceedings for non-pecuniary damage

42. On 20 December 2004 M.B. brought civil proceedings, claiming 200,000 Lithuanian litai (LTL, approximately 58,000 euros (EUR)) from the applicant and M.Ž., to be paid by them jointly. The plaintiff noted that one of the partisans who had been killed, J.A., was her father, and the other

partisan, A.A., was her uncle. At the time of their death she was nearly seven years old. Her father's death had left her an orphan. Because of the applicant's actions she and her remaining family members had sustained enormous mental suffering, depression, humiliation, and loss of reputation; her opportunities to communicate with others had been reduced and she had had to hide and constantly change her place of residence. M.B. argued that she continued to feel the repercussions of the crime up to the present time, because the applicant and M.Ž. still refused to tell her where her father was buried.

43. On 9 November 2006 the Kaunas Regional Court dismissed the claim. It noted that the State of Lithuania had already paid M.B. the sum of LTL 20,000 as one-off compensation payable to those whose families had suffered under the 1940-90 occupation (see paragraph 68 below). It followed that the State had already compensated for M.B.'s suffering caused by the loss of her family members.

44. By a ruling of 20 June 2007 the Court of Appeal overturned the above decision and found that the applicant and M.Ž. were to pay a sum of LTL 150,000 for the damage their criminal actions had caused M.B. The court also emphasised that M.B. could not have applied for damages in Soviet times, when Lithuania was under occupation, that is, during the period when the applicant and M.Ž. had committed the crimes "against the Lithuanian partisans' battles for the freedom and independence of the Lithuanian State (*nukreipti prieš Lietuvos partizanų kovas už Lietuvos valstybės laisvę ir nepriklausomybę*)". It found that the loss of her family member and a close relative had caused M.B. serious suffering and emotional depression. Furthermore, the court emphasised that "it had to be taken into consideration that the criminal acts were committed on a massive scale and in essence were directed not against particular individuals, but against everyone who had fought for the independence of Lithuania". Given the applicant's and M.Ž.'s serious health problems and the fact that considerable time had elapsed since the crimes were committed, the appellate court awarded M.B. the sum of LTL 150,000 in compensation for non-pecuniary damage, to be paid jointly by both individuals who had been found guilty of genocide.

45. By a ruling of 28 February 2011 the enlarged chamber of the Supreme Court upheld the appellate court's decision, but reduced the sum to be paid jointly (*solidariai*) by the applicant and M.Ž. to LTL 50,000 (approximately EUR 14,500). The court observed, *inter alia*, that the applicant and M.Ž. had committed the crime of genocide when acting together with officers of the LSSR Šakiai district MGB and Soviet soldiers. Accordingly, it was necessary not to impose a disproportionate burden on the applicant and M.Ž. Moreover, "crimes against humanity had the characteristic that they were directed against many people, that is to say the perpetrator caused harm to many victims", which also had to be taken into

account when adjudging the damages to be paid to each of the victims. Should the court grant too large a sum of money, it could complicate the execution of subsequent court decisions if not all the victims were known or should they come forward in future.

5. The steps to have the applicant's criminal case reopened

46. After the Constitutional Court's ruling of 18 March 2014 (see paragraphs 56-63 below), by a decision of 10 April 2014 the Prosecutor General decided to initiate a process under Article 444 of the Code of Criminal Procedure on account of newly discovered circumstances. The Prosecutor General noted that the trial court had found the applicant and M.Ž. guilty of genocide of a political group. The conviction had been upheld by appellate and cassation courts. The Prosecutor General's decision states that, taking into consideration the conclusions set out in the Constitutional Court's ruling to the effect that retroactive prosecution for genocide of persons belonging to a political or social group was in breach of the principle of the rule of law, it had to be ascertained whether the applicant (and his co-accused M.Ž.) were to be considered innocent, guilty of genocide or, as another alternative, whether they might have committed some other criminal activity. A prosecutor from the Prosecutor General Office was appointed to examine those newly discovered circumstances.

47. By a final decision of 28 May 2014 the prosecutor held that the Constitutional Court's ruling of 18 March 2014 constituted an interpretation of a legal norm and not a newly discovered factual circumstance ("another circumstance" within the meaning of Article 444 § 1 (4) of the Code of Criminal Procedure). Consequently, it could not be the basis for requesting the Supreme Court to re-open the applicant's criminal case. Accordingly, this constituted a legal impediment to an application to the Supreme Court to re-open the criminal procedure in the applicant's case.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. The restoration of independence of Lithuania

48. On 11 March 1990, by the Law "On the Restoration of Validity of the Constitution of Lithuania of 12 May 1938", the Supreme Council restored the validity of essential provisions of that Constitution, which was in force before the Soviet occupation in 1940, thereby discontinuing the effect of the USSR Constitution of 1977 and the LSSR Constitution of 1978. On the same date the Supreme Council adopted the provisional Constitution – the Provisional Fundamental Law of the Republic of Lithuania (*Laikinasis Pagrindinis Įstatymas*), setting out the constitutional principles of the re-established independent State of Lithuania. In particular,

this Law referred to Lithuania as a sovereign democratic republic, power being vested in the people and exercised by the Supreme Council, the Government and the Judiciary. Moreover, it provided that all earlier laws and legal acts continued to be in force as long as they were not incompatible with the new Provisional Fundamental Law. That Law remained valid until 2 November 1992. On the basis of the plebiscite held on 9 February 1991, on 11 February 1991 the Supreme Council adopted a Constitutional Law stating that the notion that "the State of Lithuania is an independent and democratic republic" was a constitutional norm of the Republic of Lithuania and a fundamental principle of the State (see *Kuolelis and Others*, cited above, §§ 64, 65 and 71).

49. By the Treaty "On the Foundations for Relations Between the States", signed by the Republic of Lithuania and the Russian Soviet Federative Socialist Republic (hereinafter referred to as "RSFSR") on 29 July 1991, both States recognised each other as independent subjects of international law and as sovereign States. The Preamble to the Treaty noted that events in the past had prevented each of these States from freely and completely exercising its State sovereignty.

B. The crime of genocide

1. *The Law "On Responsibility for Genocide of Inhabitants of Lithuania", Criminal Codes and the Supreme Court's guidelines on the crime of genocide*

50. During the years of the Soviet rule and prior to 1992, the crime of genocide was not listed as a criminal offence in the criminal legislation applied in Lithuania – neither in the 1926 RSFSR Criminal Code ("RSFSR Criminal Code") which was applied in Lithuania until 1961, nor in the 1961 LSSR Criminal Code ("1961 Criminal Code") (see §§ 70-72 below).

51. On 9 April 1992, Lithuania acceded to the 1948 Genocide Convention and to the 1968 United Nations Convention on the Non-Applicability of Statutory Limitations to war Crimes and Crimes against Humanity. On the same day the Law "On Responsibility for Genocide of Inhabitants of Lithuania" (*Įstatymas dėl atsakomybės už Lietuvos gyventojų genocidą*) was enacted. It reads as follows:

Article 1

"Actions aimed at the physical extermination of some or all of the inhabitants who belong to a national, ethnic, racial or religious group, by killing members of the group, or deliberately inflicting on them torture, serious bodily harm, mental harm; or conditions of life calculated to bring about its physical destruction in whole or in part; forcibly transferring children of the group to another group; and imposing measures intended to prevent births within the group (genocide), shall be punished by imprisonment of from five to ten years and the confiscation of property, or by the death penalty with confiscation of property."

Article 2

"The killing and torturing and deportation of inhabitants of Lithuania committed during the occupation and annexation of Lithuania by Nazi Germany or the USSR shall be classified as the crime of genocide as defined by international law."

Article 3

"The Law on Responsibility for Genocide of Inhabitants of Lithuania may be applied retroactively. There is no statute of limitations to prosecute individuals who have committed acts specified in this Law before [it] came into force. "

52. On 21 April 1998, Articles 2 and 3 of the above Law were repealed and prosecution for genocide was thereafter incorporated into Articles 49 and 71 of the Criminal Code. The provisions of the latter stipulated:

Article 49. Statute of Limitations

"5. There is no statute of limitations for genocide. Those convicted of genocide may not be relieved from serving sentences by amnesty."

Article 71. Genocide

"1. Actions aimed at the physical extermination of some or all of the inhabitants who belong to a national, ethnical, racial, religious, social or political group, consisting of cruel torture of members of the group, serious bodily harm, or harming mental development; or deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; forcibly transferring children of the group to another group; or imposing measures intended to prevent births within the group, shall be punishable by imprisonment of from five to twenty years.

2. Actions enumerated in paragraph 1 of the Article which result in murder, also organising and leading actions enumerated in paragraphs 1 and 2, shall be punishable by imprisonment of from ten to twenty years or by death."

53. The new Criminal Code, in force from 1 May 2003, and thus valid at the time of the applicant's conviction, read:

Article 3. Term of Validity of a Criminal Law

"1. The criminality of an act and punishability of a person shall be determined by a criminal law in force at the time of the commission of that act. The time of the commission of a criminal act shall be the time of an act (or omission) or the time of occurrence of the consequences provided for by the criminal law, where the occurrence of those consequences was desired at a different time.

2. A criminal law nullifying the criminality of an act, commuting a penalty or in otherwise mitigating legal circumstances for the person who committed the criminal act shall have a retroactive effect, i.e., it shall apply to the persons who committed the criminal act prior to the coming into force of such a law, also to the persons serving a sentence and those with previous convictions.

3. A criminal law establishing the criminality of an act, imposing a more severe penalty upon or otherwise aggravating legal circumstances of the person who has committed the criminal act shall have no retroactive effect. The provisions of this Code establishing liability for genocide (Article 99), treatment of persons prohibited

under international law (Article 100), killing of persons protected under international humanitarian law (Article 101), deportation of the civil population of an occupied state (Article 102), causing bodily harm to, torture or other inhuman treatment of persons protected under international humanitarian law (Article 103), forcible use of civilians or prisoners of war in the armed forces of the enemy (Article 105) and prohibited military attack (Article 111) shall constitute an exception.

4. Only the penal or reformative sanctions as well as medical treatment measures provided for by a criminal law in force at the time of passing of a court judgment shall be imposed."

Article 95. Statute of Limitations of a Judgment of Conviction

"8. The following crimes provided for in this Code shall have no statute of limitations:

1) genocide (Article 99)."

Article 99. Genocide

"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 from five to twenty years or by life imprisonment."

54. In a ruling of 29 November 2010 on compatibility with the Constitution of the Law "On Compensation for the Damage Inflicted by the USSR Occupation", the Constitutional Court held as follows:

"During the occupation by both the USSR and Nazi Germany not only was democracy denied, but crimes were also committed in respect of the people of the occupied State: genocide took place. It is obvious that those who had suffered from the crime of genocide, committed by individuals serving the regimes of occupying States during the years of occupation, had no legal recourse to claim damages from the perpetrators of the crimes of genocide."

55. On 29 June 2012 the Supreme Court adopted Guidelines for Courts' Practice in Crimes against Humanity and War Crimes Cases. The Guidelines provide that in order to charge a person with genocide the context in which the crime was committed is important; it is also indispensable to establish that the person had the goal of exterminating some or all persons who belonged to a particular group. Genocide is an intentional crime. Intent can be established from the fact that the person had worked for the special units of the repressive organisation which were directly conducting repressive operations, for example, against the Lithuanian partisans who had opposed the occupational regime. Membership of a repressive organisation establishes that the person understood the goal of that organisation (points 10 and 11).

2. The Constitutional Court's ruling of 18 March 2014

56. In 2011 a group of members of the Lithuanian Seimas as well as criminal courts in five criminal cases asked the Constitutional Court to examine whether, in view of the content, Article 3 § 3, Article 95 § 8 (1), and Article 99 of the Criminal Code of the Republic of Lithuania were not in conflict with Article 31 §§ 2 and 4 and Article 138 § 3 of the Constitution of the Republic of Lithuania and the constitutional principle of the rule of law.

57. One of those requests was lodged by the Court of Appeal (petition No. 1B-58/2011).[2] It transpires from the Court of Appeal's decision seeking the guidance of the Constitutional Court that, on 9 June 2011, the Kaunas Regional Court had found the applicant guilty of genocide in another criminal case which also concerned the genocide of the Lithuanian partisans. The trial court in that case established that from 15 September 1952 the applicant served as an operational agent in the occupational structure, the Šakiai district MGB, and "knew its main goal, namely to physically eliminate a part of the inhabitants of Lithuania belonging to a separate national-ethnic-political group, that is, Lithuanian partisans". On the night of 23 March 1953 the applicant, acting together with the commanding officers of the Kaunas region Šakiai district MGB and with the aim of killing or capturing and deporting the partisans who were hiding at a house in the Šakiai district, took part in an operation in which partisan J.B. was injured and arrested. On 20 July 1953 the Vilnius region MGB military tribunal sentenced the partisan in question to twenty-five years of deprivation of liberty. In August 1953 the partisan was deported from Lithuania to a special camp within the territory of the former USSR. The trial court thus held that, through those actions the applicant had taken part in the partisan's deportation from Lithuania to the territory of the occupying State, thereby unlawfully imprisoning the partisan in a prison camp (*lageryje*).

58. On 18 March 2014 the Constitutional Court gave a ruling on whether the crime of genocide, as defined in the Lithuanian Criminal Code, and the possibility to punish that crime retroactively, were compatible with the Lithuanian Constitution. The court held that Article 99 of the Criminal Code, which stipulates that actions, aimed at physical destruction, in whole or in part, of persons belonging to any national, ethnic, racial, religious, and also social or political group, could be considered as genocide was

2. During the hearing of 4 June 2014 the Acting Agent of the Government confirmed that one of the requests concerned V. Vasiliauskas' conviction for genocide in another criminal case.
On 13 June 2014 the Court of Appeal upheld the applicant's conviction for genocide (the latter information is taken from the news portal
<http://kauno.diena.lt/naujienos/kriminalai/nusikaltimai/apeliacinis-teismas-buves-sovietu-saugumietis-genocido-byloje-nuteistas-pagristai-634498>).

compatible with the Lithuanian Constitution. Having reviewed the relevant international law instruments, including the case-law of the International Criminal Tribunal for the former Yugoslavia and of the International Court of Justice, the Constitutional Court took the view that States have a certain discretion, because of particular historical, political, social and cultural contexts, to establish in their domestic law a broader definition of the crime of genocide than that which is established in international law. Thus political and social groups may be included in the definition of genocide (see point 3.7. of the ruling, chapter II, part of reasoning).

59. The Constitutional Court also noted that, according to the conclusions of historians, Lithuanians, together with Latvians and Estonians, as well as some other nations which lived in the territory of the USSR (Germans, Ukrainians, Crimean Tatars, Chechens, Ingush) were considered as persons belonging to the "untrustworthy" nations. On account of their nationality, the persons belonging to "untrustworthy" nations were doomed to extermination, *inter alia*, by means of unbearable living conditions in exile. The Constitutional Court held (here and further translation to English by the Constitutional Court itself):

> "6.3. Thus, with consideration of such an international and historical context, *inter alia*, the aforesaid ideology of the totalitarian communist regime of the USSR upon which the extermination of entire groups of people was grounded, the scale of repressions of the USSR against residents of the Republic of Lithuania, which was a part of the targeted policy of the extermination of the basis of Lithuania's political nation and of the targeted policy of the treatment of Lithuanians as an "unreliable" nation, the conclusion should be drawn that, during a certain period (in 1941, when mass deportations of Lithuanians to the Soviet Union began and non-judicial executions of detained persons were carried out, and in 1944–1953, when mass repressions were carried out during the guerrilla war against the occupation of the Republic of Lithuania), the crimes perpetrated by the Soviet occupation regime, in case of the proof of the existence of a special purpose aimed at destroying, in whole or in part, any national, ethnic, racial or religious group, might be assessed as genocide as defined according to the universally recognised norms of international law (*inter alia*, according to the Convention Against Genocide). As mentioned before, under the universally recognised norms of international law, actions are considered to constitute genocide if they are deliberate actions aimed at destroying, not only in whole but also in part, any national, ethnical, racial, or religious group; when a part of the protected group is targeted, that part must be significant enough for its destruction to have an impact on the group as a whole; actions may also be recognised as genocide if they are deliberate actions aimed at destroying certain social or political groups that constitute a significant part of any national, ethnical, racial, or religious group and the destruction of which would have an impact on the respective national, ethnical, racial, or religious group as a whole. It has also been mentioned that the physical destruction of the group is the likely outcome of a forcible transfer of the population when this transfer is conducted in such a way that the group can no longer reconstitute itself – particularly when it involves the separation of its members; in such cases, the forcible transfer of individuals could lead to the destruction of the group, since the group ceases to exist as a group or, at least, as the group it was".

The Constitutional Court then held:

"In other words, it has been mentioned that, according to the universally recognised norms of international law, the actions carried out during a certain period against certain political and social groups of the residents of the Republic of Lithuania might be considered to constitute genocide if such actions – provided this has been proved – were aimed at destroying the groups that represented a significant part of the Lithuanian nation and whose destruction had an impact on the survival of the entire Lithuanian nation. It should be noted that, in case of the absence of any proof of such an aim, in its turn it should not mean that, for their actions against residents of Lithuania (e.g., their killing, torturing, deportation, forced recruitment to the armed forces of an occupying state, persecution for political, national, or religious reasons), respective persons should not be punished according to laws of the Republic of Lithuania and universally recognised norms of international law; in view of concrete circumstances, one should assess whether those actions entail crimes against humanity or war crimes.

6.4. In this context it should be noted that, as mentioned before, the Preamble to the Law "On Responsibility for Genocide of Inhabitants of Lithuania" of 9 April 1992 held, *inter alia*, that the policy of genocide and of crimes against humanity which was carried out against the residents of Lithuania was accomplished at the time of the occupation and annexation by the Nazi Germany or the USSR; Article 2 of the same law established that "[k]illing or torturing of people of Lithuania, deportation of its residents, which were carried out in Lithuania during the years of the occupation and annexation by the Nazi Germany or the USSR, correspond to the features of genocide provided for in the norms of international law".

6.5. To sum up, it should be noted that the inclusion of social and political groups into the definition of genocide in Article 99 of the CC that is being impugned by the petitioners was determined by a concrete legal and historical context – the international crimes committed by the occupation regimes in the Republic of Lithuania."

60. The Constitutional Court also held that Article 95 of the Lithuanian Criminal Code, which provides that there is no statute of limitations for genocide (including genocide of social and political groups), was compatible with the Constitution. In the Constitutional Court's view, the Constitution allows such legal regulation when the statute of limitations is not applicable to prosecute the most serious crimes, genocide against social or political groups being one of them. The Constitutional Court then observed that, in the light of the obligation under Article 135 § 1 of the Constitution to adhere to Lithuania's obligations stemming from the universally recognised international-law norms prohibiting such crimes as genocide, Lithuanian laws could not set a lower standard than those provided by international law. On the other hand, the principle of the rule of law, and thus the principles of *nullum crimen sine lege* and *nulla poena sine lege*, would be breached if Lithuanian criminal legislation allowed retroactive punishment for crimes which have been defined only in accordance with the domestic law, in this case, for genocide of persons belonging to a political or social group. In other words, retroactive prosecution for genocide of social or political groups, when the genocide

took place before the Criminal Code amendments of 21 April 1998, would be in breach of the Constitution and the principle of the rule of law.

61. As to the crimes perpetrated by the totalitarian regimes, including the Soviet Union, the Constitutional Court also observed (point 6.1, chapter II, part of reasoning):

> "Thus, crimes against humanity and war crimes are undoubtedly attributable to totalitarian communist regimes, *inter alia*, the Soviet Union, whilst the crimes committed against certain national or ethnic groups during a certain period might be considered to constitute genocide as defined according to the universally recognised norms of international law.
>
> In this context it should be mentioned that the crimes perpetrated by the USSR totalitarian communist regime have been recognised by laws of the Russian Federation. For example, the Preamble to the Law 'On Rehabilitation of the Repressed Peoples' of 26 April 1991 states, among other things, that 'the renewal of the Soviet society ....has created favourable possibilities of the rehabilitation of the peoples that were repressed, experienced genocide and slander during the years of the Soviet power'". [See also paragraph 74 below]

62. As to the scale of Soviet repressions in Lithuania during the Soviet rule (in particular, in 1940-1941 and 1944-1953), the Constitutional Court found:

> "6.2. According to various data, due to the both occupations carried out by the USSR, the Republic of Lithuania lost almost one fifth of its population, including refugees. According to the data presented by the Genocide and Resistance Research Centre of Lithuania, during the period of the Soviet occupation (1940–1941 and 1944–1990), in all, 85,000 Lithuanian inhabitants perished or were killed, around 132,000 Lithuanian inhabitants were deported to the Soviet Union (at the time of the deportations of 1945–1952, 32,000 of the deportees were children). From among those perished or killed, 20,000 were participants of the armed resistance against the occupation (partisans) and their supporters (data for 1944–1952), around 1,100 – shot or tortured to death in June 1941 when the Soviet armed forces were retreating from Lithuania, around 35–37,000 political prisoners perished in special camps and prisons, and around 28,000 deportees perished in exile; on 14 June 1941, the first mass deportation of citizens of the Republic of Lithuania to Siberia began (all in all, 12,000 people were exiled then); one of the biggest repressions against the civil population was carried out in 1944–1946: up to 130,000 Lithuanian inhabitants were detained and arrested, 32,000 were repressed and transferred to special camps and prisons, around 108,400 were recruited to the USSR troops by force in 1944–1945. During the 1944–1953 partisan war against the occupation, all in all, 186,000 people were arrested and imprisoned.
>
> It is obvious from these numbers that, in the territory of the Republic of Lithuania, the Soviet occupation regime perpetrated international crimes that could be qualified, according to the universally recognised norms of international law *(inter alia*, the Charter of the Nuremberg Tribunal), as crimes against humanity (killing and extermination of civilians, deportation of residents, their imprisonment and persecution on political and national grounds, etc.) and war crimes (killing and deportation of persons protected under international humanitarian law, forced recruitment of residents of an occupied territory to the armed forces of an occupying state, etc.).

It needs to be emphasised that, according to the research conducted by historians, the crimes against the residents of the Republic of Lithuania were a part of the targeted and systematic totalitarian policy pursued by the USSR: the repressions against the residents of Lithuania were not in any manner coincidental and chaotic, but rather such repressions sought to exterminate the basis of the political nation of Lithuania, *inter alia,* the former social and political structure of the State of Lithuania. Those repressions were directed against the most active political and social groups of the residents of the Republic of Lithuania: participants of the resistance against the occupation and their supporters, civil servants and officials of the State of Lithuania, Lithuanian public figures, intellectuals and the academic community, farmers, priests, and members of the families of those groups. It should be noted that, by means of the repressions, the occupation regime sought to exterminate, to cause harm and break those people: they were victims of non-judicial executions, they were imprisoned and sent to special camps for forced labour, they were deported to faraway harsh-climate sparsely populated places of the Soviet Union by purposefully creating intolerable life conditions that posed constant threat to one's life and health."

63. As to the partisans' role, the Constitutional Court observed:

"It should also be noted that, according to the laws of the Republic of Lithuania ... the organised armed resistance against the Soviet occupation is regarded as self-defence of the State of Lithuania, the participants of the armed resistance are declared volunteer servicemen and their military ranks and awards are recognized..."

The Constitutional Court also noted:

"...[a]t the time of the occupation, the [Council of the Movement of the Struggle for Freedom of Lithuania] [was] the supreme national political body leading the political and military national struggle for freedom."

The Constitutional Court then held:

"7.3. Thus, in consideration of the international and historical context, it should be noted that, in the course of the qualification of the actions against the participants of the resistance against the Soviet occupation as a political group, one should take into account the significance of this group for the entire respective national group (the Lithuanian nation) which is covered by the definition of genocide according to the universally recognised norms of international law.

It has been mentioned that, according to the universally recognised norms of international law, the actions carried out during a certain period against certain political and social groups of the residents of the Republic of Lithuania might be considered to constitute genocide if such actions – provided this has been proved – were aimed at destroying the groups that represented a significant part of the Lithuanian nation and whose destruction had an impact on the survival of the entire Lithuanian nation. It has also been mentioned that in case of the absence of any proof of such an aim, in its turn it should not mean that, for their actions against residents of Lithuania (e.g., their killing, torturing, deportation, forced recruitment to the armed forces of an occupying state, persecution for political, national, or religious reasons), respective persons should not be punished according to universally recognised norms of international law and laws of the Republic of Lithuania; in view of concrete circumstances, one should assess whether those actions also entail crimes against humanity or war crimes. As regards the participants (partisans) of the armed resistance of the Republic of Lithuania against the Soviet occupation, account must also be taken of the fact that the Soviet Union, while ignoring the universally

> recognised norms of international law, neither recognised their status of combatants and prisoners of war nor provided them with the corresponding international guarantees related to such a status; from the conclusions of the historians that investigated documents of the repressive structures of the interior and security of the USSR it is clear that those structures pursued the targeted policy of the extermination of "bandits", "terrorists", and "bourgeois nationalists" to which they also ascribed the Lithuanian partisans, *inter alia*, special "extermination" squads were established and they were used in the fight against the Lithuanian partisans and their supporters."

C. Other relevant domestic law

64. Article 31 § 4 of the Lithuanian Constitution stipulates that punishment may be imposed or applied only on grounds established by law. Article 135 states that the Republic of Lithuania shall follow the universally recognised principles and norms of international law, shall seek to ensure the citizens' basic rights and freedoms. Article 138 § 3 provides that international treaties which have been ratified by Parliament are a constituent part of the Lithuanian legal system.

65. Pursuant to Article 11 of the Law on Treaties, if a ratified treaty establishes norms other than those established by laws, the provision contained in the treaty shall prevail. On 14 March 2006 the Constitutional Court held that it was a legal tradition and a constitutional principle for the restored independent State of Lithuania to observe international obligations undertaken of its own free will and to respect the universally recognised principles of international law, including the principle of *pacta sunt servanda*. On 18 March 2014 the Constitutional Court further held that, pursuant to the principle of *pacta sunt servanda*, obligations arising from the universally recognised norms of international law that prohibit international crimes are to be fulfilled in good faith. Thus, in the context of the constitutional justice case at issue (see paragraphs 56-63 above), it was important to clarify the content of the universally recognised norms of international law which are related to international crimes, *inter alia*, that of genocide.

66. On 2 May 1990, the Supreme Council adopted the Law "On Restoring the Rights of Persons Repressed for Resistance Against the Occupational Regimes", which *inter alia* held that "the resistance of the inhabitants of Lithuania to aggression and occupation regimes did not contradict national and international law" and that "the Supreme Council of the Republic of Lithuania assesses the struggle of the participants in the resistance movement as the expression of the nation's right to self-defense". According to the initial version of this Law, the latter provision could not be applied to persons who took part in committing the crimes of genocide, killings and torture of unarmed civil population. The 2008 version of this Law stipulates that this provision is not applied also to persons, who took part in committing crimes against humanity and war crimes, that the data

contained in the cases of repressive structures of occupation regimes cannot be considered as evidence without additional investigation, and that the participants in the armed resistance are declared volunteer fighters of Lithuania (*skelbiami Lietuvos kariais savanoriais*).

67. On 23 January 1997 the Lithuanian Parliament adopted the Law on the Status of Participants in Resistance against the Occupations of 1940-90 (*Pasipriešinimo 1940-1990 metų okupacijoms dalyvių teisinio statuso įstatymas*). The Preamble to the Law notes that from 15 June 1940 to 11 March 1990 all the territory of Lithuania was under German and USSR occupations. It also stipulates that in 1944-53 armed "national" resistance (the Lithuanian partisan war) took place in Lithuania against the occupying army of the Soviet Union and the Soviet regime. "The partisan command was the highest lawful political and military authority". The Preamble also stipulates that the 16 February 1949 Declaration (see paragraph 13 above) expressed the "sovereign will of the nation".

Article 2 § 1 (4) of the Law grants "voluntary fighter" (*karys savanoris*) status to partisans as participants in the armed resistance. The notion of "partisans" refers to those who belonged to the organisational structures of the armed resistance, gave an oath and did not breach it, were armed, lived outside the law, and took part in battles under the command of their leadership.

The status of voluntary fighter cannot be granted to those who committed war crimes, gave orders to kill civilians or killed civilians themselves (Article 6 § 2 (1) of the Law).

68. On 6 October 1998 the Lithuanian Parliament adopted the Law on State Support to the Families of Those Who Lost Their Lives While Resisting the 1940-1990 Occupations (*Valstybės paramos žuvusių pasipriešinimo 1940-1990 metų okupacijos dalyvių šeimoms įstatymas*). The State was to pay a lump sum of LTL 20,000 to family members of voluntary soldiers (participants in the armed resistance), who had died in battle, during arrests, had been killed or had died during interrogation or who had been sentenced to death and executed (Article 2 § 2 (1)).

69. As to the possibility of reopening criminal proceedings, the Code of Criminal Procedure provides that criminal proceedings may be reopened if new circumstances come to light which were not known before the judgment was adopted and which could prove that the convicted person is not guilty or could have committed a less or a more serious crime (Article 444 § 1 (4)). A request for reopening may be submitted by the person convicted or by the Prosecutor General (Article 446 §§ 1-3). The final decision whether to reopen proceedings is taken by the Supreme Court, which may quash the judgment and transfer the case for fresh examination, quash the judgment and discontinue the criminal case or reject the request for reopening (Articles 448-9).

D. Relevant Soviet and Russian law

70. In 1940 the RSFSR Criminal Code became applicable on the territory of the Lithuanian SSR.

71. The RSFSR Criminal Code provided for criminal liability for a series of counter-revolutionary crimes (Article 58^{1}). "Counter-revolutionary" was understood as any action directed toward the overthrow, subversion, or weakening of the power of the Soviet government. Article 58^{1a} provided for criminal liability for treason against the motherland, which was described as acts committed by citizens of the USSR entailing harm to the military power of the USSR, its national sovereignty or the inviolability of its territory. It was punishable by death, or where mitigating circumstances existed, by deprivation of liberty for a term of ten years with confiscation of all property. Intentional homicide was punishable by deprivation of liberty of up to eight years. If intentional homicide was carried out by a member of the military, under especially aggravated circumstances, it could attract the death penalty (Articles 136 and 137).

72. On 26 June 1961 the Supreme Soviet of the Lithuanian SSR adopted the LSSR Criminal Code, replacing the RSFSR Code. It entered into force on 1 September 1961. Under Article 104 of the LSSR Criminal Code murder was punishable by deprivation of liberty from three to twelve years. Aggravated murder, for instance murder of two or more persons, was punishable by imprisonment of eight to fifteen years, with or without deportation, or by capital punishment.

73. On 24 December 1989 the Congress of People's Deputies of the USSR passed a Resolution on the Political and Juridical Appraisal of the Soviet-German Non-aggression Treaty of 1939. It denounced the Secret Additional Protocol to that Treaty, as well as other secret agreements with Germany, as having no basis in law and invalid ever since its signature. In the Resolution, it is noted that the territorial divisions into Soviet and German spheres of influence had been contrary to the sovereignty and independence of several "third" countries (among them Latvia, Lithuania and Estonia). This was followed by a Decision of the Supreme Council of the LSSR on 7 February 1990 denouncing the unlawful incorporation of Lithuania into the USSR in 1940 (see *Kuolelis and Others*, cited above, § 10).

74. The Preamble to the Law "On Rehabilitation of the Repressed Peoples" (*Закон "О реабилитации репрессированных народов"*) of the Russian Federation, enacted on 26 April 1991, provides that the "renewal of the Soviet society in the process of its democratisation and the formation of the rule of law in the country has created favourable opportunities for the rehabilitation of those peoples which were repressed during the years of the

Soviet rule and were subject to genocide and slanderous attacks". The Law also states that its aim was:

> "Article 1. To rehabilitate all repressed peoples of the Russian Soviet Federal Socialist Republic, having acknowledged that the acts against those nations were unlawful and criminal.

It also states:

> Article 2. Those peoples (nations, nationalities or ethnical groups and other historically established cultural-ethnical communities of people, for example Cossacks), in respect of whom on the grounds of national or other affiliation a State-level policy of slander and genocide was conducted, accompanied by their forced relocation, abolition of nation-State formations, the reshaping of national territorial borders and establishment of a regime of terror and violence in the places of special settlements, shall be recognised as having been repressed."

III. RELEVANT INTERNATIONAL AND COMPARATIVE LAW AND PRACTICE

A. Charter of the International Military Tribunal and the Nuremberg Principles

75. The Charter of the International Military Tribunal ("IMT") Nuremberg, set up in accordance with the London Agreement signed on 8 August 1945 by the Governments of the USA, France, the United Kingdom and the USSR, contained the following definition of crimes against humanity:

Article 6

> "The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility: ...
>
> (c) crimes against humanity: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.
>
> Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan."

76. The definition was subsequently codified as Principle VI in the Principles of International Law Recognised in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal, formulated by the International Law Commission in 1950 under the United Nations General Assembly Resolution 177 (II) and affirmed by the General Assembly.

In particular, Nuremberg Principle I held:

"Any person who commits an act which constitutes a crime under international law is responsible therefor and liable to punishment"

Principle II stipulated:

"The fact that internal law does not impose a penalty for an act which constitutes a crime under international law does not relieve the person who committed the act from responsibility under international law".

Principle IV stipulated:

"The fact that a person acted pursuant to an order of his Government or of a superior does not relieve him from responsibility under international law, provided a moral choice was in fact possible to him".

Principle VI stipulated:

"The crimes hereinafter set out are punishable as crimes under international law:

...

(c) Crimes against humanity:

Murder, extermination, enslavement, deportation and other inhuman acts done against any civilian population, or persecutions on political, racial or religious grounds, when such acts are done or such persecutions are carried on in execution of or in connection with any crime against peace or any war crime."

B. The United Nations Resolutions

77. United Nations General Assembly Resolution No. 95 (I), adopted on 11 December 1946, provided:

"The General Assembly ... [a]ffirms the principles of international law recognised by the Charter of the Nuremberg Tribunal and the judgment of the Tribunal ..."

78. United Nations General Assembly Resolution 96 (I), adopted on 11 December 1946, provided:

"Genocide is a denial of the right of existence of entire human groups, as homicide is the denial of the right to live of individual human beings; such denial of the right of existence shocks the conscience of mankind, results in great losses to humanity in the form of cultural and other contributions represented by these human groups, and is contrary to moral law and to the spirit and aims of the United Nations.

Many instances of such crimes of genocide have occurred when racial, religious, political and other groups have been destroyed, entirely or in part.

The punishment of the crime of genocide is a matter of international concern.

The General Assembly, therefore,

Affirms that genocide is a crime under international law which the civilised world condemns, and for the commission of which principals and accomplices – whether private individuals, public officials or statesmen, and whether the crime is committed on religious, racial, political or any other grounds – are punishable;

Invites the Member States to enact the necessary legislation for the prevention and punishment of this crime..."

C. Convention on the Prevention and Punishment of the Crime of Genocide

79. The United Nations General Assembly adopted the Genocide Convention by unanimous vote of the 56 participants at its 179th plenary meeting, on 9 December 1948 (resolution 260 (III)). The Soviet Union signed the Convention on 16 December 1949 and ratified it on 3 May 1954.[3] The Republic of Lithuania acceded to the Genocide Convention after the restoration and international recognition of its independence, on 9 April 1992, and it came into force in respect of Lithuania on 1 May 1996. The Genocide Convention provides, in so far as relevant:

> "The Contracting Parties,
>
> Having considered the declaration made by the General Assembly of the United Nations in its resolution 96 (I) dated 11 December 1946 that genocide is a crime under international law, contrary to the spirit and aims of the United Nations and condemned by the civilized world,
>
> Recognizing that at all periods of history genocide has inflicted great losses on humanity, and
>
> Being convinced that, in order to liberate mankind from such an odious scourge, international co-operation is required,
>
> Hereby agree as hereinafter provided:
>
> **Article I:** The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish.
>
> **Article II:** In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
>
> (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group.
>
> **Article III:** The following acts shall be punishable:
>
> (a) Genocide; (b) Conspiracy to commit genocide; (c) Direct and public incitement to commit genocide; (d) Attempt to commit genocide; (e) Complicity in genocide.
>
> **Article IV:** Persons committing genocide or any of the other acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.

3. Information obtained from the following UN site: < https://treaties.un.org/home.aspx >. In their observations, the Russian Government state that the Genocide Convention was ratified by the USSR on 18 March 1953 and entered into force on the territory of the USSR on 1 August 1954.

> **Article V:** The Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention, and, in particular, to provide effective penalties for persons guilty of genocide or any of the other acts enumerated in article III.
>
> **Article VI:** Persons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction."

80. In 1951 the International Court of Justice ("ICJ") stated, in its *Advisory Opinion on the Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*[4], that that the principles underlying the 1948 Convention were principles which were recognised by civilised nations as binding on States even without any conventional obligation, the ICJ referring to the UN General Assembly Resolution 96(I) and to "the moral and humanitarian principles" which were at the basis of the 1948 Convention.

81. In the *Eichmann* case in 1961[5], Adolf Eichmann was convicted by the District Court of Jerusalem under section I(a) of the Nazis and Nazi Collaborators (Punishment) Law, 5710/1950, an Israeli law which punished crimes against the Jewish people and which was derived from Article II of the 1948 Convention. Having quoted from the *Advisory Opinion* cited in paragraph 80 above, the trial court found that there was no doubt that genocide was recognised during the Second World War as a crime under international law *ex tunc*, so that jurisdiction over such crimes was universal.

82. By judgment of 29 May 1962, the Supreme Court of Israel confirmed the trial court's judgment and added:

> "...[I]f any doubt existed as to this appraisal of the Nuremberg Principles as principles that have formed part of the customary law of nations "since time immemorial", two international documents justify it. We allude to the [UN] General Assembly Resolution [No. 95(1)] of December 11 1946, which "affirms the principles of international law recognized by the Charter of the Nuremberg Tribunal and the Judgment of the Tribunal", and also to the General Assembly Resolution of the same date, No. 96(I), in which the General Assembly "affirms that Genocide is a crime under international law" ...
>
> What is more, in the wake of Resolution 96(I) of December 11, 1946, the [UN] General Assembly unanimously adopted on December 9, 1948, the [1948 Convention]. Article I of this Convention provides: '[t]he Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law'.
>
> As the District Court has shown, relying on the Advisory Opinion of the [ICJ] dated May 28, 1951, the import of this provision is that principles inherent in the

4. ICJ Reports 1951, p. 23.
5. 36 International Law Reports ("ILR"), 1968, pp. 5-344.

Convention – as distinct from the contractual obligations embodied therein – "were already part of customary international law when the dreadful crimes were perpetrated, which led to the United Nations resolution and the drafting of the Convention – the crimes of Genocide committed by the Nazis" (paragraph 21 of the judgment).

The outcome of the above analysis is that the crimes set out in the Law of 1950, which we have grouped under the inclusive caption "crimes against humanity", must be seen today as acts that have always been forbidden by customary international law – acts which are of a "universal" criminal character and entail individual criminal responsibility. That being so, the enactment of the Law was not from the point of view of international law a legislative act which conflicted with the principle *nulla poena* or the operation of which was retroactive, but rather one by which the [legislature] gave effect to international law and its objectives ..."

D. Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity

83. The United Nations Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity (26 November 1968), ratified by the Republic of Lithuania on 1 February 1996, provides, in particular:

Article I

"No statutory limitation shall apply to the following crimes, irrespective of the date of their commission: ...

(b) Crimes against humanity whether committed in time of war or in time of peace as they are defined in the Charter of the International Military Tribunal, Nuremberg, of 8 August 1945 and confirmed by resolutions 3 (I) of 13 February 1946 and 95 (I) of 11 December 1946 of the General Assembly of the United Nations, eviction by armed attack or occupation and inhuman acts resulting from the policy of apartheid, and the crime of genocide as defined in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, even if such acts do not constitute a violation of the domestic law of the country in which they were committed."

Article II

"If any of the crimes mentioned in article I is committed, the provisions of this Convention shall apply to representatives of the State authority and private individuals who, as principals or accomplices, participate in or who directly incite others to the commission of any of those crimes, or who conspire to commit them, irrespective of the degree of completion, and to representatives of the State authority who tolerate their commission."

Article IV

"The States Parties to the present Convention undertake to adopt, in accordance with their respective constitutional processes, any legislative or other measures necessary to ensure that statutory or other limitations shall not apply to the prosecution and punishment of the crimes referred to in articles I and II of this Convention and that, where they exist, such limitations shall be abolished."

E. The Vienna Convention on the Law of Treaties

84. Article 31 § 1 of the Vienna Convention on the Law of Treaties, concluded on 23 May 1969 and ratified by the Republic of Lithuania on 15 January 1992, provides that a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

F. Statute of the International Criminal Tribunal for the former Yugoslavia

85. Articles 4 and 5 of the Statute of the International Criminal Tribunal for the former Yugoslavia ("ICTY Statute") (1993) reads as follows:

Article 4 - Genocide

"1. The International Tribunal shall have the power to prosecute persons committing genocide as defined in paragraph 2 of this article or of committing any of the other acts enumerated in paragraph 3 of this article.

2. Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such ..."

Article 5 - Crimes against humanity

"The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population:

(a) murder;

(b) extermination;

(c) enslavement;

(d) deportation;

(e) imprisonment;

(f) torture;

(g) rape;

(h) persecutions on political, racial and religious grounds;

(i) other inhumane acts."

G. Statute of the International Tribunal for Rwanda

86. The Statute of the International Tribunal for Rwanda ("ICTR Statute") (1994) reads as follows:

Article 2: Genocide

"...

2. Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

a. Killing members of the group;

b. Causing serious bodily or mental harm to members of the group;

c. Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

d. Imposing measures intended to prevent births within the group;

e. Forcibly transferring children of the group to another group."

H. Rome Statute of the International Criminal Court

87. The Rome Statute of the International Criminal Court (1998, "ICC Statute"), in force in respect of Lithuania as of 1 August 2003, reads as follows:

Article 6 – Genocide

"For the purpose of this Statute, "genocide" means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such ..."

I. Resolution 1096 (1996) of the Parliamentary Assembly of the Council of Europe

88. On 27 June 1996 the Parliamentary Assembly of the Council of Europe adopted Resolution no. 1096 on measures to dismantle the heritage of former communist totalitarian systems, which provides as follows:

"7. The Assembly also recommends that criminal acts committed by individuals during the communist totalitarian regime be prosecuted and punished under the standard criminal code. If the criminal code provides for a statute of limitations for some crimes, this can be extended, since it is only a procedural, not a substantive matter. Passing and applying retroactive criminal laws is, however, not permitted. On the other hand, the trial and punishment of any person for any act or omission which at the time when it was committed did not constitute a criminal offence according to national law, but which was considered criminal according to the general principles of law recognised by civilised nations, is permitted. Moreover, where a person clearly acted in violation of human rights, the claim of having acted under orders excludes neither illegality nor individual guilt."

J. Resolution 1481 (2006) of the Parliamentary Assembly of the Council of Europe

89. On 25 January 2006 the Parliamentary Assembly of the Council of Europe adopted Resolution no. 1481 on the Need for International

Condemnation of Crimes of Totalitarian Communist Regimes, which reads as follows:

> "1. The Parliamentary Assembly refers to its Resolution 1096 (1996) on measures to dismantle the heritage of the former communist totalitarian systems.
>
> 2. The totalitarian communist regimes which ruled in central and eastern Europe in the last century, and which are still in power in several countries in the world, have been, without exception, characterised by massive violations of human rights. The violations have differed depending on the culture, country and the historical period and have included individual and collective assassinations and executions, death in concentration camps, starvation, deportations, torture, slave labour and other forms of mass physical terror, persecution on ethnic or religious grounds, violation of freedom of conscience, thought and expression, of freedom of the press, and also lack of political pluralism.
>
> 3. The crimes were justified in the name of the class struggle theory and the principle of dictatorship of the proletariat. The interpretation of both principles legitimised the "elimination" of people who were considered harmful to the construction of a new society and, as such, enemies of the totalitarian communist regimes. A vast number of victims in every country concerned were its own nationals. It was the case particularly of the peoples of the former USSR who by far outnumbered other peoples in terms of the number of victims...
>
> 5. The fall of totalitarian communist regimes in central and eastern Europe has not been followed in all cases by an international investigation of the crimes committed by them. Moreover, the authors of these crimes have not been brought to trial by the international community, as was the case with the horrible crimes committed by National Socialism (Nazism).
>
> 6. Consequently, public awareness of crimes committed by totalitarian communist regimes is very poor. Communist parties are legal and active in some countries, even if in some cases they have not distanced themselves from the crimes committed by totalitarian communist regimes in the past."

K. Resolution 1723 (2010) of the Parliamentary Assembly of the Council of Europe

90. On 23 April 2010 the Parliamentary Assembly of the Council of Europe adopted a Resolution Commemorating the victims of the Great Famine (*Holodomor*) in the former USSR. The Resolution held that "[t]he totalitarian Stalinist regime in the former Soviet Union led to horrifying human rights violations which deprived millions of people of their right to life".

IV. RELEVANT INTERNATIONAL AND COMPARATIVE LAW AND PRACTICE AS TO THE MEANING OF THE WORDS "IN PART" IN ARTICLE II OF THE GENOCIDE CONVENTION

A. Commentaries

91. The Preamble to UN Resolution 96(I) of 1946 states that many instances of genocide have taken place when "racial, religious, political or other groups have been destroyed, entirely or in part".

Article II of the 1948 Genocide Convention reads that acts of genocide must be committed with the intent to destroy "in whole or in part" a protected group.

92. The Genocide Convention itself provides no indication of what constitutes intent to destroy "in part". The *travaux préparatoires* provide little guidance as to what the drafters meant by "in part".

93. Some early commentators on the Genocide Convention contended that the term "in part" contains a substantiality requirement. Pieter Drost remarked that any systematic destruction of a fraction of a protected group constituted genocide.[6] Raphael Lemkin took the views that "the Convention applies only to actions undertaken on a mass scale".[7] He argued that "the destruction in part must be of a substantial nature so as to affect the entirety." The commentators did not express the view either way on whether the destruction of political or economic groups could amount to the partial destruction of a national group within the meaning of Article II.

94. According to the International Law Commission ("the ILC"), the perpetrators of the crime must seek to destroy a quantitatively substantial part of the protected group:

> "It is not necessary to intend to achieve the complete annihilation of a group from every corner of the globe. None the less the crime of genocide by its very nature requires the intention to destroy at least a substantial part of a particular group."[8]

95. Benjamin Whitaker's 1985 study on the prevention and punishment of the crime of genocide holds that the partial destruction of a group merits the characterisation of genocide when it concerns a large portion of the entire group or a significant section of that group:

> "'In part' would seem to imply a reasonably significant number, relative to the total of the group as a whole, or else a significant section of a group, such as its leadership."

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6. Pieter Drost, *The Crime of State, Book II, Genocide*, Sythoff, Leyden, 1959, p. 85.

7. 2 Executive Sessions of the Senate Foreign Relations Commitee, Historical Series 370 (1976), in W.A. Schabas, *Genocide in International Law*: *The Crime of Crimes*, Cambridge University Press 2000, p. 238, as in ICTY Appeals Chamber judgment of 19 April 2004 in *Krstic*, § 10.

8. Draft Code of Crimes Against the Peace and Security of Mankind (commentary), *Report of the ILC on the work of its forty-eighth session 1996*, UN Doc. A/51/10 (1996).

96. The "Final Report of the Commission of Experts established pursuant to Security Council resolution 780 (1992)" (to investigate violations of international humanitarian law in the former Yugoslavia, hereinafter "the Commission of Experts' 1992 Report on Yugoslavia[9]") confirmed this interpretation. It held:

> "93. Destruction of a group in whole or in part does not mean that the group in its entirety must be exterminated. The words "in whole or in part" were inserted in the text to make it clear that it is not necessary to aim at killing all the members of the group.
>
> 94. If essentially the total leadership of a group is targeted, it could also amount to genocide. Such leadership includes political and administrative leaders, religious leaders, academics and intellectuals, business leaders and others - the totality *per se* may be a strong indication of genocide regardless of the actual numbers killed. A corroborating argument will be the fate of the rest of the group. The character of the attack on the leadership must be viewed in the context of the fate or what happened to the rest of the group. If a group has its leadership exterminated, and at the same time or in the wake of that, has a relatively large number of the members of the group killed or subjected to other heinous acts, for example deported on a large scale or forced to flee, the cluster of violations ought to be considered in its entirety in order to interpret the provisions of the Convention in a spirit consistent with its purpose. Similarly, the extermination of a group's law enforcement and military personnel may be a significant section of a group in that it renders the group at large defenceless against other abuses of a similar or other nature, particularly if the leadership is being eliminated as well. Thus, the intent to destroy the fabric of a society through the extermination of its leadership, when accompanied by other acts of elimination of a segment of society, can also be deemed genocide."

B. Case-law of the International Criminal Tribunal for the former Yugoslavia

97. The interpretation history of the words "in whole or in part" since 1948 was outlined by the Trial Chamber of the International Criminal Tribunal for the former Yugoslavia ("the ICTY") in *Prosecutor v. Krstić* (case IT-98-33-T, judgment of 2 August 2001, §§ 584-587). The ICTY has further interpreted the intent requirement to destroy a group "in whole or in part" within the meaning of Article 4 (2) of its Statute, which is based on Article II of the Genocide Convention.

98. In *Prosecutor v. Jelisić* (Case IT-95-10-T, Judgment, 14 December 1999), the ICTY Trial Chamber, citing in support the ILC Draft Code of 1996 and the Commission of Experts' 1992 Report on Yugoslavia, held as follows:

> "80. ... [It] is recognised that the destruction sought need not be directed at the whole group which, moreover, is clear from the letter of Article 4 of the Statute. The ILC also states that "[i]t is not necessary to intend to achieve the complete annihilation of a group from every corner of the globe". The question which then

9. *Report of the Commission of Experts*, UN Doc. S/1994/674.

arises is what proportion of the group is marked for destruction and beyond what threshold could the crime be qualified as genocide? ...

82. Given the goal of the Convention to deal with mass crimes, it is widely acknowledged that the intention to destroy must target at least a substantial part of the group ... Genocidal intent may therefore be manifest in two forms. It may consist of desiring the extermination of a very large number of the members of the group, in which case it would constitute an intention to destroy a group *en masse*. However, it may also consist of the desired destruction of a more limited number of persons selected for the impact that their disappearance would have upon the survival of the group as such. This would then constitute an intention to destroy the group 'selectively' ...

99. In *Prosecutor v. Krstić* (cited above) the ICTY Trial Chamber analysed whether Mr Krstić had committed acts of genocide in the Srebrenica massacre of 1995. As to the term "in part", the Trial Chamber held:

"590. The Trial Chamber is thus left with a margin of discretion in assessing what is destruction "in part" of the group. But it must exercise its discretionary power in a spirit consonant with the object and purpose of the Convention which is to criminalise specified conduct directed against the existence of protected groups, as such. The Trial Chamber is therefore of the opinion that the intent to destroy a group, even if only in part, means seeking to destroy a distinct part of the group as opposed to an accumulation of isolated individuals within it. Although the perpetrators of genocide need not seek to destroy the entire group protected by the Convention, they must view the part of the group they wish to destroy as a distinct entity which must be eliminated as such. A campaign resulting in the killings, in different places spread over a broad geographical area, of a finite number of members of a protected group might not thus qualify as genocide, despite the high total number of casualties, because it would not show an intent by the perpetrators to target the very existence of the group as such ..."

100. Among other arguments, the defence had maintained that the Bosnian Serb Army had solely intended to kill all potential fighters in order to eliminate any future military threat. The Trial Chamber did not accept this argument. It analysed together the fact of the killing of military-age males and the deportation of the rest of the group, viewing the deportation as an indication that the killing of the military-age males was done with intent to destroy the Bosnian Muslims of Srebrenica (§§ 594, 595, 598 and 634 of the judgment).

101. On 19 April 2004 the ICTY Appeals Chamber in *Prosecutor v. Krstić* held that "part" is determined not only by numbers:

"12. The intent requirement of genocide under Article 4 of the Statute is therefore satisfied where evidence shows that the alleged perpetrator intended to destroy at least a substantial part of the protected group. The determination of when the targeted part is substantial enough to meet this requirement may involve a number of considerations. The numeric size of the targeted part of the group is the necessary and important starting point, though not in all cases the ending point of the inquiry. The number of individuals targeted should be evaluated not only in absolute terms, but also in relation to the overall size of the entire group. In addition to the numeric size of the targeted portion, its prominence within the group can be a useful consideration. If a specific part of the group is emblematic of the overall group, or is essential to its

survival, that may support a finding that the part qualifies as substantial within the meaning of Article 4...”

The ICTY Appeals Chamber also considered that “the elimination of the Muslim population of Srebrenica ... would serve as a potent example to all Bosnian Muslims of their vulnerability and defenselessness in the face of Serb military forces. The fate of the Bosnian Muslims of Srebrenica would be emblematic of that of all Bosnian Muslims” (§ 16).

102. In the case of *Prosecutor v. Sikirica* (IT-95-8, Judgment on Defence Motions to Acquit, 3 September 2001) the ICTY Trial Chamber stated:

“65. The United Nations Expert Study on Genocide defines the term “in part” as implying “a reasonably significant number, relative to the total of the group as a whole, or else a significant section of a group such as its leadership”. This definition means that, although the complete annihilation of the group is not required, it is necessary to establish “the intention to destroy at least a substantial part of a particular group”. The Chamber believes that it is more appropriate to speak of a “reasonably substantial” rather than a “reasonably significant” number. This part of the definition calls for evidence of an intention to destroy a reasonably substantial number relative to the total population of the group. According to this definition, if that criterion is not met, the *mens rea* may yet be established by evidence of an intention to destroy a significant section of the group, such as its leadership. While the Chamber does not reject that aspect of the definition, which sees the two elements as being alternative, there may be situations in which the inference as to the intent can not be drawn on the basis of the evidence in relation to each element in isolation, but when the evidence in relation to each is viewed as a whole, it would be perfectly proper to draw the inference.

...

76. If the quantitative criterion is not met, the intention to destroy in part may yet be established if there is evidence that the destruction is related to a significant section of the group, such as its leadership.

77. The Chamber finds persuasive the analysis in the *Jelisić* Trial Judgement that the requisite intent may be inferred from the “desired destruction of a more limited number of persons selected for the impact that their disappearance would have upon the survival of the group as such.” The important element here is the targeting of a selective number of persons who by reason of their special qualities of leadership within the group as a whole, are of such importance that their victimisation within the terms of Article 4(2) (a), (b) and (c) would impact upon the survival of the group, as such.”

103. The prosecutor asked the Trial Chamber to view the Bosnian Muslims who were active in the resistance and defence of their villages from Bosnian Serb attacks as leaders of the group, since their elimination would have a significant impact on the survival of the group. The Trial Chamber refused, holding that “very little evidence has been adduced as to the leadership status of those [persons] ... There is evidence that among those detained were taxi-drivers, schoolteachers, lawyers, pilots, butchers and café owners. But there is no specific evidence that identifies them as

leaders of the community. Indeed, they do not appear to have been persons with any special significance to their community, except to the extent that some of them were of military age" (§ 80). The ICTY Trial Chamber thus rejected the submission that all those Bosnian Muslims who were active in the resistance of the take-over of their villages, should be treated as leaders. "Acceptance of that submission would necessarily involve a definition of leadership so elastic as to be meaningless" (§ 81).

104. In the case of *Prosecutor v. Tolimir* (IT-05-88/2-T, judgment of 12 December 2012), the majority of the ICTY Trial Chamber considered, with regard to the killing of three leaders of the Žepa Bosnian Muslim enclave (the mayor of the municipality, who was also a religious leader, the military commander and the head of the civil protection unit), that "while the individuals killed were only three in numbers, in view of the size of Žepa, they constituted the core of its civilian and military leadership". Therefore their killing "was a case of deliberate destruction of a limited number of persons selected for the impact that their disappearance would have on the survival of the group as such". Moreover, the killing of one of those three persons, who at that time enjoyed a special status as the defender of the Bosnian Muslim population of Žepa, had a symbolic purpose for the survival of the Bosnian Muslims of Eastern Bosnia and Herzegovina. On that basis and taking into account also the forcible transfer of the remaining population of Žepa, the majority of the Trial Chamber was satisfied beyond reasonable doubt that Bosnian Serb Forces had killed the three leaders of the Žepa enclave with the specific genocidal intent of destroying part of the Bosnian Muslim population as such (§§ 780-782).

C. Case-law of the International Court of Justice

105. The International Court of Justice ("the ICJ"), in its judgment of 26 February 2007 in the Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Serbia and Montenegro*; see §§ 198-201 of that judgment) concluded that genocide in Bosnia and Herzegovina had been committed in relation to the 1995 Srebrenica massacre. With regard to the drafting history of the Genocide Convention, the ICJ held:

> "194. The drafting history of the Convention confirms that a positive definition must be used. Genocide as "the denial of the existence of entire human groups" was contrasted with homicide, "the denial of the right to live of individual human beings" by the General Assembly in its 1946 resolution 96 (I) cited in the Preamble to the Convention. The drafters of the Convention also gave close attention to the positive identification of groups with specific distinguishing characteristics in deciding which groups they would include and which (such as political groups) they would exclude. The Court spoke to the same effect in 1951 in declaring as an object of the Convention the safeguarding of "the very existence of certain human groups" (*Reservations to the Convention on the Prevention and Punishment of the Crime of*

Genocide, Advisory Opinion, I.C.J. Reports 1951, p. 23). Such an understanding of genocide requires a positive identification of the group. The rejection of proposals to include within the Convention political groups and cultural genocide also demonstrates that the drafters were giving close attention to the positive identification of groups with specific distinguishing well-established, some said immutable, characteristics. A negatively defined group cannot be seen in that way."

106. In paragraphs 198-201 of the judgment, the ICJ considered the words "in part" in the first place to refer to a requirement of substantiality, following the approach of the ICTY and the ILC. It also referred to the criterion of opportunity, meaning the opportunity available to the perpetrators, according to their area of activity and control. As a useful consideration, the ICJ also accepted the qualitative criterion ("the prominence of certain individuals within the group", as mentioned in paragraph 12 of the ICTY Appeals Chamber judgment in *Krstić*). The ICJ nevertheless held:

"establishing the 'group' requirement will not always depend on the substantiality requirement alone although it is an essential starting point. It follows in the Court's opinion that the qualitative approach cannot stand alone. The Appeals Chamber in *Krstić* also expresses that view."

107. The ICJ found that acts of killings and of causing serious bodily and mental harm (both to those who were about to be executed and to the others who were separated and displaced) had been committed in Srebrenica in July 1995. Following the ICTY Appeals Chamber in *Krstić,* the Court considered the Bosnian Muslims of Srebrenica to form a "part" of the Bosnian Muslim group. Moreover, it endorsed the findings of the ICTY that "although this population [40,000 people] constituted only a small percentage of the overall Muslim population of Bosnia and Herzegovina at the time, the importance of the Muslim community of Srebrenica is not captured solely by its size" (§ 296, citing *Krstić*).

108. In the judgment of 3 February 2015 on the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Croatia v. Serbia*), the ICJ held (references omitted):

"142. The Court recalls that the destruction of the group "in part" within the meaning of Article II of the Convention must be assessed by reference to a number of criteria. In this regard, it held in 2007 that "the intent must be to destroy at least a substantial part of the particular group", and that this is a "critical" criterion. The Court further noted that "it is widely accepted that genocide may be found to have been committed where the intent is to destroy the group within a geographically limited area" and that, accordingly, "[t]he area of the perpetrator's activity and control are to be considered". Account must also be taken of the prominence of the allegedly targeted part within the group as a whole. With respect to this criterion, the Appeals Chamber of the ICTY specified in its Judgment rendered in the *Krstić* case that "[i]f a specific part of the group is emblematic of the overall group, or is essential to its survival, that may support a finding that the part qualifies as substantial within the meaning of Article 4 [of the ICTY Statute, paragraph 2 of which essentially reproduces Article II of the Convention]".

In 2007, the Court held that these factors would have to be assessed in any particular case. It follows that, in evaluating whether the allegedly targeted part of a protected group is substantial in relation to the overall group, the Court will take into account the quantitative element as well as evidence regarding the geographic location and prominence of the allegedly targeted part of the group."

Additionally, it should be noted that in the said judgment the ICJ also dealt with the question as to whether the status of the victims – combatants or civilians – was relevant for its assessment. It found:

"218. The Court will first consider the allegations concerning those killed during the siege and capture of Vukovar. The Parties have debated the number of victims, their status and ethnicity and the circumstances in which they died. The Court need not resolve all those issues. It observes that, while there is still some uncertainty surrounding these questions, it is clear that the attack on Vukovar was not confined to military objectives; it was also directed at the then predominantly Croat civilian population (many Serbs having fled the city before or after the fighting broke out) ..."

V. OTHER RELEVANT PRACTICE BY INTERNATIONAL COURTS

109. With regard to the groups protected by Article II of the Genocide Convention, in the case of *Prosecutor v. Rutaganda* (ICTR-96-3-T, 6 December 1999), and confirmed in its subsequent case-law, the Trial Chamber of the International Tribunal for Rwanda held:

"Potential Groups of Victims of the Crime of Genocide

55. The Chamber is of the view that it is necessary to consider the issue of the potential groups of victims of genocide in light of the provisions of the Statute and the Genocide Convention, which stipulate that genocide aims at 'destroy[ing], in whole or in part, a national, ethnical, racial or religious group, as such.'

56. The Chamber notes that the concepts of national, ethnical, racial and religious groups have been researched extensively and that, at present, there are no generally and internationally accepted precise definitions thereof. Each of these concepts must be assessed in the light of a particular political, social and cultural context. Moreover, the Chamber notes that for the purposes of applying the Genocide Convention, membership of a group is, in essence, a subjective rather than an objective concept. The victim is perceived by the perpetrator of genocide as belonging to a group slated for destruction. In some instances, the victim may perceive himself/herself as belonging to the said group.

57. Nevertheless, the Chamber is of the view that a subjective definition alone is not enough to determine victim groups, as provided for in the Genocide Convention. It appears, from a reading of the *travaux préparatoires* of the Genocide Convention, that certain groups, such as political and economic groups, have been excluded from the protected groups, because they are considered to be mobile groups which one joins through individual, political commitment. That would seem to suggest *a contrario* that the Convention was presumably intended to cover relatively stable and permanent groups.

58. Therefore, the Chamber holds that in assessing whether a particular group may be considered as protected from the crime of genocide, it will proceed on a case-by-

case basis, taking into account both the relevant evidence proffered and the political and cultural context as indicated *supra*."

110. The said line of reasoning was maintained and reaffirmed in later cases decided by this Tribunal. In particular, in *Procecutor v. Semanza* (ICTR-97-20, judgment of 15 May 2003, § 317) the Trial Chamber held that the determination on whether a group comes within the Protection under the Genocide Convention must be assessed on a case-by-case basis by reference to the objective particulars of a given social or historical context and by the subjective perceptions of the perpetrators; the determination of a protected group must be made on a case-by-case basis, by consulting both objective and subjective criteria. In *Prosecutor v. Kamuhanda* (ICTR-95-54A-T, judgment of 22 January 2004, § 630), the Trial Chamber held that that the concept of a group enjoys no generally or internationally accepted definition, rather each group must be assessed in the light of a particular political, social, historical, and cultural context.

111. With regard to crimes against humanity and the concept of "directed against [a] civil population", in the case of *Prosecutor v. Kupreškić and Others* (IT-95-16-T, judgment of 14 January 2000), which concerned the killing of some 116 Muslims in order to expel the Muslim population from a village, the ICTY Trial Chamber found:

"3. 'Directed Against a Civilian Population'

547. It would seem that a wide definition of "civilian" and "population" is intended. This is warranted first of all by the object and purpose of the general principles and rules of humanitarian law, in particular by the rules prohibiting crimes against humanity. The latter are intended to safeguard basic human values by banning atrocities directed against human dignity. One fails to see why only civilians and not also combatants should be protected by these rules (in particular by the rule prohibiting persecution), given that these rules may be held to possess a broader humanitarian scope and purpose than those prohibiting war crimes. However, faced with the explicit limitation laid down in Article 5, the Trial Chamber holds that a broad interpretation should nevertheless be placed on the word "civilians", the more so because the limitation in Article 5 constitutes a departure from customary international law.

548. The above proposition is borne out by the case law. Of particular relevance to the present case is the finding in *Barbie*[10] (admittedly based on general international law) that "inhumane acts and persecution committed in a systematic manner, in the name of a State practising a policy of ideological supremacy, not only against persons by reason of their membership of a racial or religious community but also against the opponents of that policy, whatever the form of their "opposition" could be considered a crime against humanity. In the *Vukovar* Rule 61 Decision of 3 April 1996, a Trial Chamber held that crimes against humanity may be committed even where the victims at one time bore arms.

10. The *Barbie* case, French Court of Cassation (Criminal Chamber), 20 December 1985, 78 ILR 125.

549. Thus the presence of those actively involved in the conflict should not prevent the characterization of a population as civilian and those actively involved in a resistance movement can qualify as victims of crimes against humanity."

112. As to the requirements that must be satisfied before the conviction for genocide may be imposed, in the aforementioned judgment of *Bosnia and Herzegovina v. Serbia and Montenegro*, the ICJ held as follows (§ 293 of the ICJ judgment; the ICJ referred to paragraph 37 of the ICTY Appeals Chamber judgment in *Prosecutor v. Krstić*):

"293. ... The gravity of genocide is reflected in the stringent requirements which must be satisfied before this conviction is imposed. These requirements – the demanding proof of specific intent and the showing that the group was targeted for destruction in its entirety or in substantial part – guard against a danger that convictions for this crime will be imposed lightly. Where these requirements are satisfied, however, the law must not shy away from referring to the crime committed by its proper name."

113. Different international tribunals have held that the prohibition of genocide is a peremptory norm of international law (*ius cogens*). Among such authorities are the ICJ cases *Democratic Republic of the Congo v. Rwanda* (judgment of 3 February 2006, I.C.J. Reports 2006, p. 6), *Bosnia and Herzegovina v. Serbia and Montenegro* (judgment of 26 February 2007, I.C.J. Reports 2007, p. 43) and *Germany v. Italy* (judgment of 3 February 2012, I.C.J. Reports 2012, p. 99), as well as the International Tribunal for Rwanda case *Prosecutor v. Kayishema and Ruzindana* (ICTR-95-1-T, judgment of 21 May 1999).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 7 OF THE CONVENTION

114. The applicant complained that the wide interpretation of the crime of genocide, as adopted by the Lithuanian courts, did not have a basis in the wording of that offence as laid down in public international law. He claimed that his conviction for genocide therefore amounted to a breach of Article 7 of the Convention, 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.

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."

A. Admissibility

1. The six-month rule

115. The Government argued that the applicant had failed to lodge his application within six months of the date on which the final decision was taken. Whilst admitting that the postmark on the envelope containing the application was dated 30 July 2005, they noted that the application form was received at the Court only on 29 September 2005. Such a delay was inexplicable.

116. The applicant submitted that his application to the Court was sent in due time.

117. The Court observes that the applicant's conviction was upheld by the Supreme Court on 22 February 2005. Accordingly, the time-limit of six months to lodge an application with the Court, within the meaning of Article 35 §§ 1 and 4 of the Convention, expired on 22 August 2005. Having examined the materials submitted by the applicant, the Court notes that the envelope containing his application form was posted from Lithuania on 30 July 2005, given that the envelope bears a postmark of the Tauragė post office bearing that day. The envelope also bears a stamp to the effect that it was received at the Registry of the Court on 28 September 2005. The application form is stamped as having been received at the Court on 29 September 2005. Although acknowledging that there was some delay in the application reaching the Court, it considers the post mark to be the date on which the application was introduced (see *Kipritçi v. Turkey*, no. 14294/04, § 18, 3 June 2008). Accordingly, the Government's objection must be dismissed.

2. The Government's request to strike the case out of the Court's list of cases

118. In their observations on the admissibility and merits of the case, received by the Court on 11 April 2014, the Government also drew the Court's attention to the fact that, after the Constitutional Court's ruling of 18 March 2014, new facts emerged in the present case. On 10 April 2014 the Prosecutor General considered that the conclusions of the Constitutional Court could raise doubts as to the lawfulness of the applicant's conviction for genocide. The prosecutor thus decided to initiate the process of reopening the criminal case. The Government admitted, however, that the final decision on whether to reopen the criminal proceedings against the applicant lay with the Supreme Court (see paragraphs 47 and 69 above). According to the Government's submission of 11 April 2014, the procedural step taken for the reopening of the applicant's criminal case should lead to the conclusion that the applicant's situation was in the process of being resolved at the national level (they referred to *Pisano v. Italy* (striking out)

[GC], no. 36732/97, §§ 40-50, 24 October 2002). That being so and taking into account the principle of subsidiarity, the Government asked the Court to strike the case from the Court's list of cases in accordance with Article 37 § 1 sub-paragraphs (b) and (c) of the Convention. In their view no particular reason relating to respect for human rights as defined in the Convention required the Court to continue the examination of the application in accordance with Article 37 § 1 *in fine* of the Convention.

119. The Court observes, however, that by a final decision of 28 May 2014 the prosecutor decided not to ask the Supreme Court to re-open the applicant's criminal case (see paragraph 47 above). It thus cannot be said that the matter has been resolved or that it is no longer justified to continue the examination of this application within the meaning of Article 37 § 1 (b) and (c) of the Convention.

3. Conclusion

120. The Court further notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. Not being inadmissible on any other grounds it must therefore be declared admissible.

B. Merits

1. The submissions by the parties

(a) The applicant

121. The applicant complained that the wide interpretation of the crime of genocide, as adopted by the Lithuanian courts, had no basis in public international law. He claimed that his conviction under Article 99 of the Lithuanian Criminal Code was retroactive and therefore amounted to a breach of Article 7 of the Convention.

122. The applicant noted that in 1992 Lithuania enacted its law on the Genocide Convention. Pursuant to Article II of the Convention, genocide is defined as actions aiming at the extermination of a "national, ethnic, racial or religious" group. Lithuania signed the Convention without reservation. For the applicant, any expansion of the concept by the addition of "social and political groups" in 1998 was, therefore, impermissible. The applicant further noted that the exhaustive definition of the crime of genocide which limited protection to four specific groups was established in the Law On Responsibility for Genocide of the Inhabitants of Lithuania of 9 April 1992. He also maintained that the Lithuanian delegates argued for the expansion of the concept of genocide in 1998, when the International Criminal Court was established within the framework of the United Nations. The definition, however, remained unchanged.

123. The applicant observed that social and political groups were added to the Lithuanian definition of genocide by the Criminal Code amendments of 21 April 1998. In the light of Article 7 of the Convention, he claimed that criminal liability for genocide in respect of those two groups was thus not applicable at one particular point in time but was applicable at another, although the facts potentially giving rise to an issue were the same. In his specific case, he contended, the Lithuanian State had applied the criminal law retroactively, despite the fact that from 1992 to 1998 the State itself regarded the applicant's actions as not constituting the crime of genocide. Even acknowledging that the crime of genocide could be prosecuted retroactively, he submitted that it was difficult to accept that criminal liability for such a crime depended on the State's ability to amend the legislation or to find new characteristics of the crime which were relevant only for Lithuania. The applicant pointed to the fact that Lithuania itself prohibits the retroactive application of criminal law.

124. The applicant also submitted that a feature of international law was that States may not derogate from the international treaties which they have signed, unless permitted so to do under the relevant treaty. He accepted that the Republic of Lithuania had a sovereign right to pass its own laws. However, that right was not an absolute one. Firstly, all of its laws had to comply with the Lithuanian Constitution pursuant to which international treaties which have been ratified by Lithuania are an integral part of its national law. As to the elements of the Lithuanian criminal law, namely, the inclusion of political and social groups in Article 99 of the Criminal Code, these were not covered by Article II of the Genocide Convention. Therefore, they could not be defended on the basis of international law, which Lithuania had committed itself to observe.

125. Furthermore, prosecution for the killing of persons belonging to political and social groups was subject to prescription. The Lithuanian courts' interpretation of the domestic criminal law and responsibility for genocide, given that it was wider than that in the Genocide Convention, thus failed to comply with the principle of *nullum crimen sine lege*. This approach had been confirmed by the Constitutional Court's ruling of 18 March 2014, which acknowledged that retroactive prosecution for genocide of a political or social group, when the crime was committed prior to the amendment of the Lithuanian Criminal Code establishing responsibility for genocide of persons belonging to those two categories, was unconstitutional.

126. As to the historical background the applicant noted that he was not in a position to dispute the very broad review of general political, historical or other circumstances as presented by the Government (see paragraph 133 below). He accepted that the number of victims in Lithuania "in the years 1939-1953 was about 500,000 Lithuanians". That being so, the applicant nevertheless observed that between 1941 and 1944 Lithuania had been

under German occupation. During that time the Nazis, together with their local auxiliaries, had killed hundreds of thousands of innocent persons in Lithuania. This was of relevance to the case as, according to the applicant, the brothers J.A. and A.A. had been Nazi collaborators.

127. In that connection, the applicant contested the domestic courts' finding that J.A. and A.A. were partisans. He asserted that they had voluntarily served in the Nazi police force and were suspected of having participated in the persecution of Jews and other innocent people. After the Soviets came to Lithuania in 1944, the authorities lawfully prosecuted J.A. and A.A. for those crimes. In any case, the applicant claimed that J.A. and A.A. had left the partisans years before the events at issue. Accordingly, J.A. and A.A. had not been partisans on the day of their death in 1953. Therefore, the argument that they were members of a political group (protected by Article 99 of the Lithuanian Criminal Code) or representatives of the national group (protected by Article II of the Genocide Convention) had no factual basis.

128. Finally, the applicant argued that even if one accepted the domestic courts' position that J.A. and A.A. had been partisans and had been members of the armed resistance at the time of their death in 1953, their killing could not constitute genocide. On this point the applicant argued that genocide consisted of actions directed at the extermination of unarmed civilians, but not at armies or countrywide liberation movements.

129. The applicant concluded that by finding him guilty of genocide the Republic of Lithuania had been in breach of international and domestic law that allowed the State to prosecute for genocide only where the victims were members of a protected group. Whichever version of the facts was accepted, his (according to which the Soviet authorities prosecuted the brothers J.A. and A.A. as criminals) or the Government's (according to which they were members of the armed resistance), J.A. and A.A. could not possibly fall into any of the protected groups.

130. In the light of the above, the applicant maintained that his conviction for genocide was in breach of Article 7 § 1of the Convention. He added that Article 7 § 2 was also not applicable. As the acts he was accused of did not constitute the crime of genocide, they could not be qualified as "criminal according to the general principles of law recognised by civilized nations" either.

(b) The Government

131. The Government submitted that to understand this case it was of paramount importance to comprehend the Soviet repressive policy in Lithuania. They noted that the crimes against Lithuanians were a part of a targeted and systematic totalitarian policy pursued by the USSR. The repressions against Lithuanians were not coincidental or chaotic. They sought to exterminate the former social and political structure of the State,

which was the very basis of the political nation of Lithuania. They were directed against the most active political and social groups, namely resistance members and their supporters, civil servants and officials of the State of Lithuania, Lithuanian public figures, intellectuals, academics, farmers, priests, and members of the families of those groups.

132. The Government stressed that the Lithuanian partisans were representatives of the Lithuanian nation. The movement acquired its power from society itself; it united people of different backgrounds (members of the intelligentsia, peasants, teachers, former military officers, and so on). Partisans did not profess any specific political views other than that independence should be restored to Lithuania and the Soviets driven out of the country. They came together under nationalist symbols and were able to maintain their resistance for ten years in the harshest conditions of the Soviet repressions because they received significant support from the Lithuanian people. In its ruling of 18 March 2014 the Constitutional Court had noted the significance of partisans for the entire national group, that is, the Lithuanian nation (see paragraph 63 above).

133. As to the scale of the repressions in Lithuania, the Government firstly submitted that, according to the Statistical Yearbook, in 1939 the Lithuanian population stood at 2,925,271. By 1953 some 500,000 Lithuanians had been directly affected by the terror and political repressions of the Soviet regime – they had been either killed, deported or imprisoned (see A. Anušauskas, *Demografiniai karo ir okupacijos nuostoliai: okupuotos Lietuvos istorija (Demographic losses of war and occupation: the history of occupied Lithuania)*, Vilnius: Lietuvos gyventojų genocido ir rezistencijos tyrimo centras, 2007, p. 395). The Government also noted that the numbers of the victims of Soviet repressions in Lithuania had already been set out in the Constitutional Court's ruling of 18 March 2014 (see paragraph 62 above) and the Conclusions of the International Commission for the Evaluation of the Crimes of the Nazi and Soviet Occupation Regimes in Lithuania.[11]

134. As to partisans, the Government stated that during the resistance of 1940-41 and 1944-53, some 20,000 partisans had been killed and a large number of their supporters imprisoned or deported to Siberia. The repressive institutions of the Soviet Union employed a number of severe measures to suppress the underground: deportations of families of resistance

11. http://www.komisija.lt. The Commission was established by Presidential decree of 7 September 1998. It is now comprised of a number of well-known historians, lawyers and public figures from France, Germany, Hungary, Israel, Lithuania, the Russian Federation the United Kingdom and the United States. It was considered that, due to the repressive legacy of Soviet rule, painful problems of the past, such as the Holocaust and other issues, had never been subjected to uncensored public discussion. It was also recognised that for the sake of future generations such historical issues must be addressed, researched and evaluated in compliance with accepted international standards.

members, torture of resistance members, acts of psychological warfare or terror and punitive actions against resistance members and their supporters, such as the burning of villages and extra-judicial executions. Most of these measures were applied in clear breach of international law, and of the Constitution of the USSR and other Soviet laws. In particular, the Constitutional Court had noted that the Soviet Union did not regard partisans as having the status of combatants or prisoners of war and did not accord to them the international guarantees related to such status.

135. The aim was to destroy the former Lithuanian way of life and to replace it by a new Soviet order comprised of persons without nationality or ethnicity (*homo sovieticus*). That the Soviet policy was criminal and that its regime committed war crimes, crimes against humanity and genocide in Lithuania are established historical facts. In this connection the Government referred to Parliamentary Assembly Resolution 1481(2006) on the need for International Condemnation of Crimes of Totalitarian Communist Regimes (see paragraph 89 above). Furthermore, they noted the fact that the crimes, including genocide, perpetrated by the USSR totalitarian communist regime had been recognised by laws of the Russian Federation itself as, for example, in the law "On Rehabilitation of the Repressed Peoples" of 26 April 1991 (see paragraph 74 above).

136. Turning to the question of whether there was a contemporaneous legal basis for the applicant's conviction, the Government noted that at the relevant time, in 1953, the Criminal Code of the Russian Soviet Federative Socialist Republic was in force. While genocide was not listed as a criminal offence under that Code, the Government maintained that the applicant's acts constituted a criminal offence under international treaty and customary law at the relevant time. Acts of genocide were also criminal according to the general principles of law recognised by civilised nations.

137. On the specific question as to whether acts committed with the intent to destroy a protected group could be qualified as genocide at the material time, the Government referred to the Charter of the International Military Tribunal (1945), which had confirmed that natural persons had responsibilities under international law in respect of the most heinous crimes. Furthermore, the Government relied upon the United Nations Resolution 96 (I) of 11 December 1946, adopted unanimously and without debate, which had affirmed that genocide was a crime under international law and had noted that "crimes of genocide have occurred when racial, religious, political and other groups have been destroyed, entirely or in part". Therefore, as early as December 1946 it was clear that persecutions on political grounds and destruction and extermination of political groups were recognised crimes under international law.

138. In the Government's view, the fact that the 1948 Genocide Convention did not list "political groups" among the protected groups was not decisive. The initial drafters of the Genocide Convention were of the

opinion that the definition of genocide as it had emerged in customary international law was broader than that ultimately determined in the drafting process and the *travaux préparatoires* of the Genocide Convention show that the exclusion of "political groups" was the result of political compromise rather than legal reasoning.

139. The Government further submitted that the protected groups included in the 1948 Genocide Convention may overlap and interchange. One group (nationality) may intersect with another (religion). The Lithuanian courts recognised this in their interpretation of genocide. The Soviet policy in the Baltic States, which the Soviet authorities regarded as 'untrustworthy nations', was targeted against political and social groups precisely because these formed the backbone of the national group. Thus 'politically' motivated killings were merely a screen for national and ethnic genocidal aspirations.

140. The Government also submitted that the Lithuanian domestic legislative changes in 1998 reflected trends in the practice of a number of States as well as in the opinions of legal writers on the subject of genocide. A significant number of States, including, Estonia, Poland, France, Switzerland, Finland, Slovenia, Romania, Ecuador and Costa Rica had extended the definition of genocide in national law. Whilst most extended it to social or political groups, some chose an open-ended inclusive approach, such as, "groups determined by any other arbitrary criterion" (France, Romania).

141. Turning to the applicant's case, the Government submitted that the question was whether at the time of committing the act he could have reasonably foreseen himself being charged with and convicted for a crime under international law. The interpretation that the Lithuanian courts gave to the crime of genocide was compatible with the essence of the offence at the relevant time and was thus reasonably foreseeable.

142. The Government observed that the applicant had been convicted of taking part in the extermination of J.A. and A.A. As partisans, the brothers were considered by the Soviet authorities, including the MGB, to be "bandits", "illegals" or "bourgeois nationalists" who had to be liquidated. The Soviet regime sought to annihilate the culture, religion, language, politics and identity of the Lithuanian nation, aiming for its elimination as a group. The appellate court had thus rightly concluded that J.A. and A.A. could not only be regarded as members of a political group (as the trial court had done) but also as belonging to two groups specifically protected by the Genocide Convention, namely, a national and an ethnic group. This approach had been confirmed by the Supreme Court and the Constitutional Court.

143. As to the applicant's argument that the brothers J.A. and A.A. could not be protected by the Genocide Convention as they had been members of the armed resistance, the Government referred to the close link

between crimes against humanity and genocide. According to Professor Antonio Cassese, at least two sub-classes of crimes against humanity could be distinguished under the Nuremberg principles: firstly, crimes committed against civilians within the framework of a widespread or systematic practice of gross violations of fundamental human rights; and, secondly, crimes of persecution against a particular group of persons, whether civilian or military, in pursuance of a discriminatory or persecutory policy or practice based on religious, racial, ethnic or political grounds (Antonio Cassese, Paola Gaeta, John R. W. D. Jones (eds.). *The Rome Statute of the International Criminal Court. A Commentary*, Oxford, 2002). The Government pointed out that this approach had subsequently been confirmed by the ICTY, in particular, in *Prosecutor v. Kupreskić and Others* (see paragraph 111 above).

144. On the question of the applicant's subjective guilt, the domestic courts emphasised that he had voluntarily joined the MGB and must be considered to have been well aware of the nature and methods of the totalitarian policy towards the Lithuanian nation. Accordingly, the applicant could have expected that he would be obliged to implement illegal orders (see *K.-H.W. v. Germany*, [GC], no. 37201/97, § 74, ECHR 2001-II (extracts)). In that context Nuremberg principle IV was of special relevance, as it clearly indicated that a person acting pursuant to an order of his Government may not escape responsibility under international law, provided a moral choice was in fact possible to him (the Government referred to *Penart v. Estonia* ((dec.) 14685/04, 24 January 2006), and *Kolk and Kislyiy v. Estonia* ((dec.), nos. 23052/04 and 24018/04, ECHR 2006-I)).

145. Lastly, the Government rejected the applicant's allegation that the victims, brothers J.A. and A.A., had collaborated with the Nazis and therefore been legitimately executed. They also contested the applicant's further allegation that at the time of their liquidation J.A. and A.A. could not have been considered as partisans. They noted that both issues had been thoroughly examined by the domestic courts and dismissed as unsubstantiated.

146. In view of the foregoing the Government concluded that the applicant's conviction for genocide was based on international law at the relevant time. Whilst the Constitutional Court's ruling of 18 March 2014 held that the retroactive prosecution for genocide of a social or political group as such was unlawful, it also held that deliberate actions aimed at the destruction of certain social or political groups as a significant part of a national, ethnic, racial or religious group could be classified as genocide under universally recognised international-law norms, in circumstances where the destruction of the groups had an impact on the survival of the entire protected group. The applicant had participated with intent in the implementation of the Soviet policy which aimed to exterminate the

Lithuanian partisans who constituted a significant part of the Lithuanian national group. There was thus no violation of Article 7.

2. The submissions of the third-party intervener

147. The Government of the Russian Federation noted that the present case was not the first time the Court had been called upon to rule on the issue of the compatibility of an applicant's conviction in the Baltic States with the provisions of Article 7 of the Convention. The core of such cases was the prosecution of the applicants for acts that they allegedly committed in the 1940s-1950s at the time when, according to the Government of the Russian Federation, the Baltic States formed an integral part of the USSR (they referred to *Kolk and Kislyiy*, cited above, *Kononov v. Latvia* [GC], no. 36376/04, ECHR 2010, and *Tess v. Latvia* (dec.), no. 19363/05, 4 January 2008). The third-party intervener contended that in order to substantiate the 'legitimacy' of the applicant's conviction the Lithuanian Government relied on a distorted historical description of "atrocities" by the Soviet Government in the Baltic States. Further, their observations were supersaturated" with numerous questionable facts, which they adduced in an attempt to support their unfounded assertion that the Soviet authorities perpetrated "genocide" and "crimes against humanity" in the Lithuanian SSR. The Russian Government objected to what they considered to be a blatant distortion of historical realities and the obvious intention of the Baltic Governments to modify history in accordance with their own preferences at the expense of the people whose activities in the past did not correspond to the official point of view of the present-day national authorities.

148. The policies and legislation of the Soviet Union were not aimed at the destruction or eradication of the Lithuanian nation. They had never been acknowledged as amounting to genocide in any authoritative international instruments. After the withdrawal of the German troops in 1944, parts of the local population refused to disarm and, instead, chose the path of military resistance to the Soviet Army. These were mainly persons who had collaborated with the Nazis. The illegal armed groups were lawfully combated by the Soviet Army and prosecuted by the Soviet Government of the Lithuanian SSR, which was the only internationally recognised authority on that territory after 1945. There was no specific intent on the part of the Soviet authorities or the applicant to destroy any of the constituent parts of Lithuanian society.

149. The Russian Government submitted that national authorities could opt to legalise a wider notion of genocide by adding other groups to those already protected by the Genocide Convention. However, actions that may have been targeted against these "newly protected groups" should not be exempt from the restrictions enshrined in Article 7 of the European Convention on Human Rights. Such actions may constitute a crime only if

committed after the introduction of the expanded definition of genocide, unless they were already punishable under international law in force at the material time. As to political groups, these were excluded from the definition in Article II of the Genocide Convention. That definition has been repeated in subsequent international instruments.

150. It further observed that customary international law did not include political groups within the notion of genocide. A single mention of political groups in Resolution 96 (I) of the General Assembly of the United Nations in 1946 was not enough to disprove this. The fact that Raphael Lemkin, the scholar who first conceptualised the term and whom the Lithuanian Government extensively cited in their written submissions, considered that "genocide" meant "the destruction of a nation or of an ethnic group" was also relevant (Raphael Lemkin, *Axis Rule in Occupied Europe*, 1944, p. 79). There was no evidence that political groups were granted special protection by the general principles of law recognised by civilised nations in 1953. Moreover, political groups were not and never had been, regarded as a protected category within the notion of genocide in the jurisprudence of the international tribunals.

151. Lastly, the applicant's acts also lacked the relevant constituent elements of crimes against humanity, despite the Lithuanian Government assertion to the contrary. His acts were not aimed at the civilian population – brothers J.A. and A.A. were indeed members of an illegal armed group. The acts did not take place before or during the war. They were not committed in execution of or in connection with any crime provided for in the Nuremberg Charter. These charges had not been brought against the applicant by the national prosecution authorities.

152. In sum, the long-term consistency in international law and practice concerning the definition of genocide demonstrated the existence of a clear-cut and enduring consensus in the international community regarding the scope and exhaustive character of the list of protected groups. No wider approach to the definition of genocide than that in the Genocide Convention had ever been acknowledged on an international level. There were no relevant legal provisions as of 1953 which would have been sufficiently clear, accessible and foreseeable for the applicant to reasonably expect that his actions would entail criminal liability and to regulate his conduct accordingly. Therefore, there was no legal basis in national or international law for the applicant's conviction and punishment.

3. The Court's assessment

(a) General principles

153. The Court reiterates that the guarantee enshrined in Article 7, which is an essential element of the rule of law, occupies a prominent place in the Convention system of protection, as is underlined by the fact that no

derogation from it is permissible under Article 15 in time of war or other public emergency. It should be construed and applied, as follows from its object and purpose, in such a way as to provide effective safeguards against arbitrary prosecution, conviction and punishment (see *Kononov*, cited above, § 185; *Del Rio Prada v. Spain* [GC], no. 42750/09, § 77, ECHR 2013).

154. Accordingly, Article 7 is not confined to prohibiting the retrospective application of the criminal law to an accused's disadvantage: 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 the criminal law must not be extensively construed to an accused's detriment, for instance by analogy. It follows from these principles that an offence must be clearly defined in the law, be it national or international. This requirement is satisfied where the individual can know from the wording of the relevant provision – and, if need be, with the assistance of the courts' interpretation of it and with informed legal advice – what acts and omissions will make him criminally liable. The Court has thus indicated that when speaking of "law" Article 7 alludes to the very same concept as that to which the Convention refers elsewhere when using that term, a concept which comprises written as well as unwritten law and implies qualitative requirements, notably those of accessibility and foreseeability (see *Korbely v. Hungary* [GC], no. 9174/02, § 70, ECHR 2008; *Kononov*, cited above, §§ 185 and 196; *Del Río Prada*, cited above, § 91).

155. The Court reiterates that however clearly drafted a legal provision may be, in any system of law, including criminal law, there is an inevitable element of judicial interpretation. There will always be a need for elucidation of doubtful points and for adaptation to changing circumstances. Indeed, in the Convention States, the progressive development of the criminal law through judicial interpretation is a well-entrenched and necessary part of legal tradition. Article 7 of the Convention cannot be read as outlawing the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen (see *S.W. v. the United Kingdom*, 22 November 1995, § 36, Series A no. 335-B; *C.R. v. the United Kingdom*, 22 November 1995, § 34, Series A no. 335-C; *Streletz, Kessler and Krenz v. Germany* [GC], nos. 34044/96, 35532/97 and 44801/98, § 50, ECHR 2001-II; *K.-H.W. v. Germany*, cited above, § 45; *Jorgic v. Germany*, no. 74613/01, § 101, ECHR 2007-III; and *Kononov*, cited above, § 185).

156. In the *Jorgic* case, there were two possible interpretations of the term 'to destroy' in the definition of the crime of genocide and the Court examined the compatibility of the applicant's conviction, on the basis of the wider interpretation (destruction of a distinct social unit as opposed to

physical destruction), with Article 7 of the Convention. It stated that an interpretation of the scope of the offence which was consistent with the essence of that offence "must, as a rule, be considered as foreseeable", although, exceptionally, an applicant could rely on a particular interpretation of the provision being taken by the domestic courts in the special circumstances of the case. The Court went on to examine whether there were special circumstances warranting the conclusion that the applicant, if necessary with legal advice, could have relied on a narrower interpretation of the scope of the crime of genocide by the domestic courts. The Court found that, whilst various authorities (international organisations, national and international courts as well as scholars and writers) had favoured both the wider and the narrower interpretations of the crime of genocide at the time of the impugned acts, Mr Jorgic, if need be with the assistance of a lawyer, could reasonably have foreseen the adoption in his case of the wider interpretation and, therefore, that he risked being charged with and convicted of genocide (cited above, §§ 108-114).

157. The scope of the concept of foreseeability depends to a considerable degree on the content of the instrument in issue, the field it is designed to cover and the number and status of those to whom it is addressed. A law may still satisfy the requirement of foreseeability even if the person concerned has to take appropriate legal advice to assess, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. This is particularly true in relation to persons carrying on a professional activity, who are used to having to proceed with a high degree of caution when pursuing their occupation. They can on this account be expected to take special care in assessing the risks that such activity entails (see *Pessino v. France*, no. 40403/02, § 33, 10 October 2006).

158. According to the general principles of law, defendants are not entitled to justify the conduct which has given rise to their conviction simply by showing that such conduct did in fact take place and therefore formed a practice. Whilst this defence was not raised specifically by the applicant, the Court nevertheless considers it important to reiterate its previous finding in *K.-H.W.* (cited above, § 75) to the effect that even a private soldier could not show total, blind obedience to orders which flagrantly infringed internationally recognised human rights, in particular the right to life, which is the supreme value in the hierarchy of human rights. 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 (see *Streletz, Kessler and Krenz*, cited above, §§ 74, 77-79).

159. The Court reiterates that in the event of a change of State sovereignty over a territory or a change of political regime on a national

territory, it is entirely legitimate for a State governed by the rule of law to bring criminal proceedings against those who have committed crimes under a former regime. The courts of such a State, having taken the place of those which existed previously, cannot be criticised for applying and interpreting the legal provisions in force at the material time in the light of the principles governing a State subject to the rule of law (see *Streletz, Kessler and Krenz*, cited above, § 81, and *Kononov*, cited above, § 241). As well as the obligation on a State to prosecute drawn from the laws and customs of war, Article 2 of the Convention also enjoins the States to take appropriate steps to safeguard the lives of those within their jurisdiction and implies a primary duty to secure the right to life by putting in place effective criminal-law provisions to deter the commission of offences which endanger life (see *Kononov*, cited above, § 241).

160. The Court also reiterates that, in principle, it is not its task to substitute itself for the domestic jurisdictions. Its duty, in accordance with Article 19 of the Convention, is to ensure the observance of the engagements undertaken by the Contracting Parties to the Convention. Given the subsidiary nature of the Convention system, it is not the Court's function to deal with errors of fact or law allegedly committed by a national court, unless and in so far as they may have infringed rights and freedoms protected by the Convention (see *Streletz, Kessler and Krenz*, cited above, § 49, and *Jorgic*, cited above, § 102) and unless that domestic assessment is manifestly arbitrary (see *Kononov*, cited above, § 189). This is particularly the case where the domestic court assesses facts of some historical sensitivity, although the Court may accept certain well-known historical truths and base its reasoning on them (see *Ždanoka*, cited above, § 96). This principle also applies where domestic law refers to rules of general international law or international agreements (see *Waite and Kennedy v. Germany* [GC], no. 26083/94, § 54, ECHR 1999-I, and *Korbely*, cited above, § 72) and where domestic courts apply principles of international law (see *Kononov*, cited above, § 196).

161. That being so, the Court nevertheless reiterates that its powers of review must be greater when the Convention right itself, Article 7 in the present case, requires that there was a legal basis for a conviction and sentence. Article 7 § 1 requires the Court to examine whether there was a contemporaneous legal basis for the applicant's conviction and, in particular, it must satisfy itself that the result reached by the Lithuanian courts was compatible with Article 7 of the Convention, even if there were differences between the legal approach and reasoning of this Court and the relevant domestic decisions. To accord a lesser power of review to this Court would render Article 7 devoid of its purpose (see *Kononov*, cited above, § 198).

162. In sum, the Court's function under Article 7 § 1 is to assess whether there was a sufficiently clear legal basis, having regard to the applicable law

in 1953, for the applicant's conviction (see *Kononov*, cited above, § 199). In particular, the Court will examine 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 operation of 2 January 1953 during which the two partisans, J.A. and A.A., were killed (see paragraph 25 above, also see *Jorgic*, cited above, § 103).

(b) The relevant facts

163. Before examining the merits of the applicant's complaint, the Court will first address the factual dispute between the respondent Government and the applicant, regarding the latter's claim that at the time of their death the brothers J.A. and A.A. were no longer partisans, which would preclude him being convicted for genocide of Lithuanian partisans as a group. Both during the court proceedings in Lithuania and in his submissions to the Court, the applicant submitted that brothers J.A. and A.A. had been Nazi collaborators under the German occupation, this claim being supported by the third-party intervener, and that the brothers had stopped being partisans once the Soviet Union had re-established its grip on Lithuania.

164. The Court observes that the domestic courts came to a clear finding on this part, having carefully considered all of the submissions. In the light of its constant case-law the Court reiterates that it is not within its province to substitute its assessment of the facts for that of the domestic courts (see *Elsholz v. Germany* [GC], no. 25735/94, § 66, ECHR 2000-VIII; *Donohoe v. Ireland*, no. 19165/08, § 73, 12 December 2013). The Court confirms that the question of the applicant's criminal responsibility was primarily a matter for assessment by the domestic courts (see *Streletz, Kessler and Krenz,* cited above, § 51, and *Kononov*, cited above, § 187). It also considers that in view of the complexity of the task of reconstructing the facts of the case more than fifty years after the events, the national courts were in a better position to assess all the available material and evidence. On this point the Court notes that the Court of Appeal gave thorough consideration to the applicant's allegations. However, the court also had regard to the historical background, the special methods used by the resistance movement at the relevant time, and to the archive documents indicating the MGB's orders to spread disinformation about the brothers J.A. and A.A. in order to compromise their integrity or to prevent them joining other partisans. Following its thorough analysis the Court of Appeal dismissed the applicant's allegations as unfounded (paragraph 37 above). That conclusion was fully endorsed by the Supreme Court (paragraph 40 above). The Court sees no reason to depart from the domestic courts' conclusions which, moreover, were based on their direct knowledge of the national circumstances.

(c) Whether the applicant's conviction for genocide was compatible with Article 7 of the Convention

165. The Court reiterates that the crime of genocide was introduced into Lithuanian law in 1992 (see paragraph 51 above). In 2001 the prosecutor charged the applicant with genocide of Lithuanian partisans, representatives of a political group, under Article 71 § 2 of the Lithuanian Criminal Code, as amended in 1998 (see paragraphs 29 and 52 above). By the time the trial court convicted the applicant of genocide in 2004, a new Lithuanian Criminal Code had entered into force and the applicant was convicted under Article 99 of that new Criminal Code. The Court of Appeal and the Supreme Court upheld the applicant's conviction on the basis of the same Article 99 (see paragraphs 33, 36, 38 and 53 above).

166. The Court therefore considers it clear that the applicant's conviction was based upon legal provisions that were not in force in 1953 and that such provisions were therefore applied retroactively. Accordingly, this would constitute a violation of Article 7 of the Convention unless it can be established that his conviction was based upon international law as it stood at the relevant time. The applicant's conviction, in the Court's view, must therefore be examined from that perspective (see, by converse implication, *K.-H.W. v. Germany*, cited above, § 50).

(i) Accessibility

167. The Court notes that the Soviet Union was a party to the London Agreement of 8 August 1945 by which the Charter of the International Military Tribunal was enacted (see *Kononov*, cited above, §§ 116 and 117). Pursuant to Article 6 (c) of the Charter, extermination, deportation and other inhuman acts against any civilian population, including persecutions on political grounds, were defined as crimes against humanity. On 11 December 1946 the General Assembly of the United Nations condemned the crime of genocide by adopting Resolution No. 96 (I). The Genocide Convention of 1948, affirming the principles of international law recognised by that Resolution, was approved unanimously by the United Nations General Assembly on 9 December 1948. The Soviet Union signed the Genocide Convention on 16 December 1949. After twenty instruments of ratification or accession had been deposited, the Convention came into force on 12 January 1951. The Court further observes that in the Advisory Opinion of 1951 the International Court of Justice pointed out that the principles underlying the Genocide Convention are principles which are recognised by civilised nations as binding on States, even without any conventional obligation (see paragraph 80 above).

168. In view of the foregoing, the Court finds that the crime of genocide was clearly recognised as a crime under international law in 1953. It was codified in the 1948 Genocide Convention and, even before that date, it was acknowledged and condemned by the United Nations in 1946. In these

circumstances the Court finds that instruments of international law prohibiting genocide were sufficiently accessible to the applicant.

(ii) Foreseeability

169. In order to verify compliance with Article 7 in the present case, the Court must determine whether it was foreseeable under international law as it stood in 1953 that the act for which the applicant was convicted could be qualified as genocide (see paragraph 162 above).

(α) The definition of the crime of genocide as it stood in 1953

Article II of the Genocide Convention

170. The Court begins by noting that the crime of genocide prohibited by Article II of the 1948 Convention lists four protected groups of persons: national, ethnical, racial or religious. That provision does not refer to social or political groups. Furthermore, the *travaux préparatoires* disclose an intention by the drafters not to include political groups in the list of those protected by the 1948 Convention. The ICJ, when examining the drafting history of Article II of the 1948 Convention in the *Bosnia and Herzegovina v. Serbia and Montenegro* case, observed that the drafters of the Convention "gave close attention to the positive identification of groups with specific distinguishing characteristics in deciding which groups they would include and which (such as political groups) they would exclude" (see paragraph 105 above). The Court finds no convincing arguments for departing from the treaty definition of genocide as established in 1948, including the list of the four protected groups referred to therein. On the contrary, all references to the crime of genocide in subsequent international law instruments – the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity of 1968, the ICTY Statute of 1993, the ICTR Statute of 1994 as well as in the most recent international law instrument – the ICC Statute of 1998 – describe that crime in similar, if not identical, terms. In particular, genocide is defined as acts committed to destroy a national, ethnical, racial or religious group, without reference to political groups (see paragraphs 83, 85, 86 and 87 above). In the Court's view, the fact that certain States decided later to criminalise genocide of a political group in their domestic laws (see paragraphs 36 and 38 above) does not, as such, alter the reality that the text of the 1948 Convention did not do so.

Customary international law

171. The Court turns to the question of whether the 1948 Convention definition of genocide existed alongside broader customary norms of international law, which could provide a valid basis for the applicant's conviction for genocide.

172. It is clear from the Court's earlier finding in relation to the accessibility of the offence that in 1953 genocide was already a crime under international customary law (see paragraph 168 above). The indictment of October 1945 before the Nuremberg IMT, as well as certain prosecutors' oral submissions, charged the defendants with genocide, the significance of which is not necessarily undermined by the fact that the final judgment made no mention of the crime of genocide. The UN General Assembly Resolution 96(1) of December 1946, adopted unanimously and without debate, affirmed the existence of the international crime of genocide. There followed several references in indictments to the crime of genocide, and convictions for crimes with genocidal purposes in the post-Nuremberg trials under Control Council Law no. 10[12] as well as in the trials by the Polish Supreme Court (1946-1947) of *Hoess* and *Greiser*[13]. Article 1 of the 1948 Convention "confirmed" that genocide was a crime under international law. The ICJ later referred to Resolution 96(1) and confirmed that the principles underlying the 1948 Convention were recognised by civilised nations as binding on States even without any conventional obligation (see paragraph 80 above).

173. However, as to whether the scope of the crime of genocide under customary international law could be said to be different and, notably, broader than the conventional definition, opinions appear divided.

174. Raphael Lemkin, who coined the term "genocide", proposed a broad definition of the offence. In his 1944 book[14] he addressed crimes against national groups but accepted that genocide could comprise acts aimed at destroying the national group by destroying its political institutions, culture and livelihood. The later UN General Assembly Resolution 96 (1) called for the preparation of a genocide Convention to protect "racial, religious, political groups and other groups". Certain authors considered that that Resolution reflects a customary *jus cogens* prohibition of genocide[15] while others have questioned this view[16]. Some authors were also of the view that the final list of groups to be protected by the 1948 Convention was the result of political expediency and not the result of a

12. For example, *United States of America v. Alstoetter et al* ("*Justice trial*"), Law Reports of Trials of War Criminals ("LRTWC"), United Nations War Crimes Commission ("UNWCC"), 1948; *United States of America v. Otto Ohlendorf et al ("Einsatzgruppen trial")*, LRTWC, UNWCC, 1948; *United States of America v. Greifelt et al*, LRTWC, UNWCC, 1948.

13. *Poland v. Hoess*, LRTWC, UNWCC, 1948; *Poland v. Greiser*, LRTWC, UNWCC, 1948.

14. R. Lemkin, *Axis Rule in Occupied Europe, Analysis of Government, Proposals for Redress*, Washington, 1944, p. 91.

15. For example, B. Van Schaack, "*The Crime of Political Genocide: Repairing the Genocide Convention's Blind Spot*", 106 Yale Law Journal, 1997, p. 2262.

16. For example, W.A. Schabas, *Genocide in International Law: The Crime of Crimes*, Cambridge University Press 2000, p. 134.

principled reflection based on some philosophical or other distinction between certain types of groups.[17] In the late 1940s some commentators also expressed concern that the exclusion of political and economic groups would mean that the 1948 Convention could not address acts committed by the Soviet authorities against property owners.[18] Other authors, however, disagreed that the exclusion of political groups was the result of Soviet pressure.[19]

175. Having regard to the factors outlined above, the Court finds that there are some arguments to the effect that political groups were protected by customary international law on genocide in 1953. However, there are equally strong contemporaneous countervailing views. At this juncture the Court reiterates that notwithstanding those views favouring the inclusion of political groups in the definition of genocide, the scope of the codified definition of genocide remained narrower in the 1948 Convention and was retained in all subsequent international law instruments (see paragraph 170 above). In sum, the Court finds that there is no sufficiently strong basis for finding that customary international law as it stood in 1953 included "political groups" among those falling within the definition of genocide.

Subsequent interpretations of the term "in part", as used in Article II of the Genocide Convention

176. The Court next turns to the respondent Government's submission that because of their prominence the Lithuanian partisans were "part" of the national group, that is, a group protected by Article II of the Genocide Convention. In this connection the Court notes that in 1953 there was no case-law by any international tribunal to provide a judicial interpretation of the definition of genocide. The *travaux préparatoires* to the Genocide Convention provide little guidance on what the drafters meant by the term "in part". The early commentators of the Genocide Convention emphasised that the term "in part" contained a substantiality requirement (see paragraph 93 above). The Genocide Convention itself provides that the crime is characterised by an "intent to destroy in whole or in part ... a group, as such" and the substantiality requirement is supported by Resolution 96(I) according to which "genocide is the denial of the right of existence of entire human groups". Bearing in mind that the goal of the Genocide Convention was to deal with mass crimes, the ICTY noted the wide acknowledgment

17. For example, B. Van Schaack, (1997), op.cit., p. 2268.
18. G. A. Finch, "*Editorial Comment: The Genocide Convention*", 43 American Journal of International Law, 1949, p. 734; *Report of the Committee on International Law of the Bar of the City of New York*, pp. 5-6 ("the excluded groups are the only ones that are presently in [the] process or common danger of extermination…") in J. L. Kunz, "*The United Nations Convention on Genocide*", 43 American Journal of International Law, 1949, p. 743; and P. N. Drost (1959), op. cit., p. 123.
19. B. Van Schaack (1997), op. cit., p. 2268; J. Cooper, *Raphael Lemkin and the Struggle for the Genocide Convention*, Houndmills, Basingstoke, Palgrave MacMillan, 2008, p. 154.

that the intention to destroy must target at least a substantial part of the group (see paragraph 98 above). The gravity of genocide is further reflected in the stringent requirements which must be satisfied before a conviction is imposed – the demanding proof of specific intent and the showing that the group was targeted for destruction in its entirety or in substantial part (see paragraph 106 above). The Court, therefore, considers it reasonable to find that in 1953 it was foreseeable that the term 'in part' contained a requirement as to substantiality.

177. That said, however, the Court is mindful of the subsequent development in the international case-law on the crime of genocide. Half a century after the events for which the applicant was convicted, judicial guidance as to the interpretation of the phrase "in part" emerged when cases concerning genocide were brought before the ICTY, ICTR and the ICJ. In particular, as transpires from the case-law referred to in paragraphs 97-108 above, the intentional destruction of a "distinct" part of the protected group could be considered as genocide of the entire protected group, provided that the "distinct" part was substantial because of the very large number of its members. Furthermore, in addition to the numerical size of the targeted part, judicial interpretation confirmed that its "prominence" within the protected group could also be a useful consideration. Be that as it may, this interpretation of the phrase "in part" could not have been foreseen by the applicant at the relevant time.

Conclusion

178. In sum, the Court finds that in 1953 international treaty law did not include a "political group" in the definition of genocide, nor can it be established with sufficient clarity that customary international law provided for a broader definition of genocide than that set out in Article II of the 1948 Genocide Convention.

(β) Was the domestic courts' interpretation of the applicant's actions in accordance with the understanding of the concept of genocide as it stood in 1953?

179. The Court next turns to the Lithuanian courts' interpretation of the crime of genocide in the applicant's case. It notes that the trial court found the applicant guilty as charged by the prosecutor, that is, guilty of genocide of Lithuanian partisans as members of a separate political group (see paragraphs 29 and 31 above). The Court of Appeal, for its part, rephrased the applicant's conviction, holding that the attribution of the Lithuanian partisans, as participants in armed resistance to occupational power, to a particular "political" group, was "only relative/conditional and not very precise". For the appellate court, the Lithuanian partisans had also been "representatives of the Lithuanian nation, that is, the national group" (see paragraphs 35 and 36 *in fine* above). Even so, the Court of Appeal did not

explain what the notion "representatives" entailed. Nor did it provide much historical or factual account as to how the Lithuanian partisans were representing the Lithuanian nation. Nor does the partisans' specific mantle with regard to the "national" group appear to have been interpreted by the Supreme Court. The Supreme Court, which acknowledged that the applicant was "convicted of involvement in the physical extermination of part of Lithuanian inhabitants who belonged to a separate political group", merely observed that in 1944-1953 the nation's armed resistance against the Soviet occupying regime – the partisan war – took place in Lithuania (see paragraphs 39 and 40 above).

180. For its part, the Lithuanian Constitutional Court also acknowledged that the organised armed resistance against the Soviet occupation was to be regarded as self-defence of the State of Lithuania. The partisans had led the political and military national struggle for freedom.

181. The Court accepts that the domestic authorities have discretion to interpret the definition of genocide more broadly than that contained in 1948 Genocide Convention. However, such discretion does not permit domestic tribunals to convict persons accused under that broader definition retrospectively. The Court has already established that in 1953 political groups were excluded from the definition of genocide under international law (see paragraph 178 above). It follows that the prosecutors were precluded from retroactively charging, and the domestic courts from retroactively convicting the applicant for the genocide of Lithuanian partisans, as members of a political group (see also the Constitutional Court's judgment, paragraph 60 above). Moreover, even if the international courts' subsequent interpretation of the term "in part" was available in 1953, there is no firm finding in the establishment of the facts by the domestic criminal courts to enable the Court to assess on which basis the domestic courts concluded that in 1953 the Lithuanian partisans constituted a significant part of the national group, in other words, a group protected under Article II of the Genocide Convention. That being so, the Court is not convinced that at the relevant time the applicant, even with the assistance of a lawyer, could have foreseen that the killing of the Lithuanian partisans could constitute the offence of genocide of Lithuanian nationals or of ethnic Lithuanians.

182. In addition, the Court notes that Article II of the 1948 Genocide Convention requires the perpetrator to act with intent to destroy a protected group in whole or in part. The applicant's statements at the relevant time refer to action against "bandits", the "nationalist underground" and "nationalist gangs" (see paragraphs 18 and 19 above). Moreover, the aims expressed at the MGB meetings of 1953 were directed against these groups. In the Court's view, even if the MGB's policy of extermination extended to "those who help them and their contacts", the essential goal of this wider group of "Lithuanian nationalists" was to secure independence for the State

of Lithuania (see, in this connection, paragraphs 13, 44 and 67 above). Indeed, as the prosecutor noted, and the appellate and cassation courts confirmed, the Lithuanian partisans were fighting against the Soviet occupation and for the independence of the Lithuanian State (see paragraphs 29, 39, 40 and 44 above). In the light of the above, the Court accepts that the applicant's argument is not without weight, namely that his actions, and those of the MGB, were aimed at the extermination of the partisans as a separate and clearly identifiable group, characterised by its armed resistance to Soviet power.

183. The Court also notes that, in accordance with Article 31 § 1 of the Vienna Convention on the Law of Treaties, the ordinary meaning is to be given to the terms of the treaty. In this regard, it is not immediately obvious that the ordinary meaning of the terms "national" or "ethnic" in the Genocide Convention can be extended to cover partisans. Thus, the Court considers that the domestic courts' conclusion that victims came within the definition of genocide as part of a protected group was an interpretation by analogy, to the applicant's detriment, which rendered his conviction unforeseeable (see *Kokkinakis v. Greece*, 25 May 1993, § 52, Series A no. 260 A; also see *Korbely*, cited above, § 70).

184. On this last point, the Court also gives weight to the applicant's argument that the definition of the crime of genocide in Lithuanian law not only had no basis in the wording of that offence as expressed in the 1948 Genocide Convention, but had also been gradually enlarged during the years of Lithuania's independence, thus further aggravating his situation (see paragraphs 51–53 and 123 above). It has been pointed out by the Lithuanian Constitutional Court that to prosecute retroactively for genocide of persons belonging to a political or social 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 (see paragraph 60 above). The Court cannot accept the argument by the Lithuanian Supreme Court that the 1998 amendments to the Criminal Code, expanding the definition of genocide to include "political groups", could be justified on the basis of Article V of the Genocide Convention. While Article V of the Genocide Convention does not prohibit expanding the definition of genocide, it does not authorise the application of a broader definition of genocide retroactively (see *Scoppola v. Italy (no. 2)* [GC], no. 10249/03, § 93, 17 September 2009; *Maktouf and Damjanović v. Bosnia and Herzegovina* [GC], nos. 2312/08 and 34179/08, § 66, ECHR 2013 (extracts)).

185. Consistently with the ICJ in the case of *Bosnia and Herzegovina v. Serbia and Montenegro*, the Court considers that the gravity of genocide is reflected in the stringent requirements which must be satisfied before this conviction is imposed. These requirements – the proof of specific intent and the demonstration that the protected group was targeted for destruction in its

entirety or in substantial part – guard against a danger that convictions for this crime will be imposed lightly (see paragraph 112 above). Noting the Lithuanian courts' arguments in the instant case, the Court is not persuaded that the applicant's conviction for the crime of genocide could be regarded as consistent with the essence of that offence as defined in international law at the material time and thus could reasonably have been foreseen by him in 1953.

186. In the light of the foregoing, the Court takes the view that the applicant's conviction for genocide could not have been foreseen at the time of the killings of the partisans.

(γ) Whether the applicant's conviction could have been justified under Article 7 § 2 of the Convention

187. The Court notes the Government's argument that the applicant's acts at the relevant time were criminal according to the general principles of law recognised by civilised nations and thus come within the provisions of the second paragraph of Article 7 of the Convention.

188. The Court has to consider whether Article 7 § 2 is applicable to the applicant's conviction. Although the Court has, on only one occasion, applied Article 7 § 2 in the context of post-Second World War and Soviet deportations (see *Penart* and *Kolk and Kislyiy*, cited above), the Grand Chamber in *Kononov* recalled the original and exceptional purpose of that paragraph (§ 186):

> "Finally, the two paragraphs of Article 7 are interlinked and are to be interpreted in a concordant manner (*Tess v. Latvia* (dec.), no. 34854/02, 12 December 2002). Having regard to the subject matter of the case and the reliance on the laws and customs of war as applied before and during the Second World War, the Court considers it relevant to recall that the *travaux préparatoires* to the Convention indicate that the purpose of the second paragraph of Article 7 was to specify that Article 7 did not affect laws which, in the wholly exceptional circumstances at the end of the Second World War, were passed in order to punish, *inter alia*, war crimes so that Article 7 does not in any way aim to pass legal or moral judgment on those laws (see *X. v. Belgium*, no 268/57, Commission decision of 20 July 1957, Yearbook 1, p. 241)..."

189. More recently, this restrictive interpretation of Article 7 § 2 was confirmed in *Maktouf and Damjanović* (cited above, § 72):

> "Furthermore, the Court is unable to agree with the Government's argument that if an act was criminal under "the general principles of law recognised by civilised nations" within the meaning of Article 7 § 2 of the Convention at the time when it was committed then the rule of non-retroactivity of crimes and punishments did not apply. This argument is inconsistent with the *travaux préparatoires* which imply that Article 7 § 1 can be considered to contain the general rule of non-retroactivity and that Article 7 § 2 is only a contextual clarification of the liability limb of that rule, included so as to ensure that there was no doubt about the validity of prosecutions after the Second World War in respect of the crimes committed during that war (see *Kononov*, cited above, § 186). It is thus clear that the drafters of the Convention did

not intend to allow for any general exception to the rule of non-retroactivity. Indeed, the Court has held in a number of cases that the two paragraphs of Article 7 are interlinked and are to be interpreted in a concordant manner (see, for example, *Tess*, cited above, and *Kononov*, cited above, § 186)."

190. That being so, and taking into account the Court's conclusion in paragraph 186 above that the applicant's conviction could not be justified under Article 7 § 1 of the Convention, it cannot be justified under Article 7 § 2 either.

(d) The Court's conclusion

191. The Court holds that there has been a violation of Article 7 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

192. Article 41 of the Convention provides:

"If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

193. The applicant claimed 60,000 euros (EUR) in respect of non-pecuniary damage.

He also claimed 53,173 Lithuanian litai (LTL; approximately EUR 15,400) in respect of the pecuniary damage which he suffered because the Lithuanian courts had granted M.B.'s civil claim (see paragraph 45 above) and had also ordered him to pay M.B.'s legal costs. The applicant submitted invoices indicating that he had paid LTL 34,778 (approximately EUR 10,072) to M.B.

194. If the Court were to find a violation of Article 7 of the Convention, the Government considered that the sum of EUR 60,000 was excessive and unjustified. The applicant had participated in the killing of two partisans; he did not question that fact. Moreover, he was attempting to degrade the memory of those partisans and the fight for independence by submitting ill-founded accusations about the partisan brothers' alleged crimes against humanity during the Nazi occupation.

As to pecuniary damage, the Government submitted that, taking into account that the applicant had been required to pay the awarded compensation jointly, he could ask to be awarded only LTL 26,750 (of that sum, LTL 25,000 was half the amount awarded to M.B. in respect of non-pecuniary damage and LTL 1,750 was the half of M.B.'s legal costs that he had had to bear) or EUR 7,750.

195. While finding that the applicant is entitled to claim that he has suffered non-pecuniary damage, the Court considers, having regard to the very particular circumstances of the case, that such damage is sufficiently compensated by its finding of a violation of Article 7 of the Convention.

The Court awards the applicant EUR 10,072 in respect of pecuniary damage.

B. Costs and expenses

196. The applicant also claimed the sum of LTL 8,000 (approximately EUR 2,300) in relation to legal fees for preparation of the submissions made by the applicant's lawyer to the Court. He also claimed EUR 2,000 for translation and postal expenses in connection with the Court proceedings.

197. The Government argued that the lawyer's fees were excessive. They also noted that only part of the applicant's claim for translation fees was justified by supporting documents.

198. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the information in the Court's possession and the above criteria, the Court considers it reasonable to award the claim in full, less the sum already paid under the Court's legal aid scheme (EUR 850). Consequently, the Court awards the final amount of EUR 2,450 in respect of the applicant's costs and expenses before the Court.

C. Default interest

199. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT

1. *Declares*, by a majority, the application admissible;

2. *Holds*, by nine votes to eight, that there has been a violation of Article 7 of the Convention;

3. *Holds*, by nine votes to eight, that the finding of a violation constitutes in itself sufficient just satisfaction for the non-pecuniary damage sustained by the applicant;

4. *Holds* by nine votes to eight
   (a) that the respondent State is to pay the applicant, within three months the following amounts:
      (i) EUR 10,072 (ten thousand and seventy-two euros) in respect of pecuniary damage;
      (ii) EUR 2,450 (two thousand four hundred and fifty euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

5. *Dismisses*, unanimously, the remainder of the applicant's claim for just satisfaction.

Done in English and French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 20 October 2015.

Erik Fribergh
Registrar

Dean Spielmann
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:
(a) joint dissenting opinion of Judges Villiger, Power-Forde, Pinto de Albuquerque and Kūris;
(b) dissenting opinion of Judge Ziemele;
(c) joint dissenting opinion of Judges Sajó, Vučinić and Turković;
(d) dissenting opinion of Judge Power-Forde;
(e) dissenting opinion of Judge Kūris.

D.S.
E.F.

JOINT DISSENTING OPINION OF JUDGES VILLIGER, POWER-FORDE, PINTO DE ALBUQUERQUE AND KŪRIS

1. We disagree with the majority's assessment of both the relevant facts and the applicable law. We have therefore reached the conclusion that there has been no violation of Article 7. For the reasons that follow, we consider that the applicant's conviction for genocide was based on international law as it stood at the relevant time and was therefore foreseeable.

The relevant facts

2. Both during the court proceedings in Lithuania and in his submissions to this Court, the applicant submitted that the partisan brothers J.A. and A.A. had been Nazi collaborators under the German occupation and had ceased being partisans once the Soviet Union had re-established its grip on Lithuania. We observe that the domestic courts came to a clear finding on this argument, having carefully considered all of the submissions. The Court of Appeal gave thorough consideration to the applicant's allegations. That court also had regard to the historical background, the special methods used by the resistance movement at the relevant time, and to the archive documents indicating that the MGB's orders were to spread misinformation about the brothers J.A. and A.A. in order to compromise their integrity or to prevent them joining other partisans. Furthermore, one of the partisan brothers was charged by the Soviet authorities with counter-revolutionary crime under Article 58^{1a} of the RSFSR Criminal Code (see paragraphs 37 and 71 of the judgment). Following its thorough analysis, the Court of Appeal dismissed the applicant's allegations as unfounded (see paragraph 37 of the judgment). That conclusion was fully endorsed by the Supreme Court (see paragraph 40).

3. We see no reason to depart from the domestic courts' conclusions. In the light of its constant case-law, the Court has consistently reiterated that it is not within its province to substitute its assessment of the facts for that of the domestic courts (see among many authorities, *Elsholz v. Germany* [GC], no. 25735/94, § 66, ECHR 2000-VIII, and *Donohoe v. Ireland*, no. 19165/08, § 73, 12 December 2013). In view of the complexity of the task of reconstructing the facts of the case more than fifty years after the events, the national courts were in a better position to assess all of the available material and evidence. Having regard to all of the foregoing considerations, we regret that the majority did not accept, without providing any plausible explanation, the domestic courts' conclusions as to the facts, those conclusions being based on their direct knowledge of the evidence.

4. We further observe that a number of historical events, notably with regard to the description of the Soviet Government's actions in the Baltic States, and even the very essence of the Soviet policy in occupied Lithuania,

inter alia, in the 1940s and 1950s, are today disputed between the respondent Government and the third-party intervener. It is an undisputed fact that atrocities against the Lithuanian population were committed in the 1940s and 1950s on behalf of the occupying power, and that such an interpretation is not a 'distorted historical description', as was claimed by the third-party intervener (see paragraph 147 of the judgment).

During the criminal and civil proceedings against the applicant the Lithuanian courts analysed the relevant archival documents concerning the historical context of the partisans' activities (see paragraphs 18, 19, 37, 41 and 44 of the judgment). The Constitutional Court set out the numbers of those affected by the Soviet authorities' actions in Lithuania (see paragraphs 59 and 62 of the judgment). The precise factual matter now disputed by the Russian Government was therefore examined by the domestic courts.

It is also highly significant to note that in 1991 the Russian Federation itself acknowledged that during the Soviet era the peoples under its control were subjected to repression, including genocide (see paragraph 74 of the judgment). The scale of the Soviet authorities' actions in the Baltic States has already been noted by the Court in the *Penart v. Estonia* (14685/04, 24 January 2006), and *Kolk and Kislyiy v. Estonia* (nos. 23052/04 and 24018/04, ECHR 2006-I) decisions, and, most recently, in *Larionovs and Tess v. Latvia* ((dec.), no. 45520/04, §§ 11-20 and 114, 25 November 2014). We do not therefore consider that the Lithuanian courts' factual analysis or conclusions have been shown to be arbitrary.

The relevant legal framework

5. The Soviet Union was a party to the London Agreement of 8 August 1945 by which the Charter of the International Military Tribunal was enacted (see *Kononov v. Latvia* [GC], no. 36376/04, ECHR 2010, §§ 116 and 117). Pursuant to Article 6 (c) of the Charter, extermination, deportation and other inhuman acts against any civilian population, including persecutions on political grounds, were defined as crimes against humanity. On 11 December 1946 the General Assembly of the United Nations condemned the crime of genocide by adopting Resolution No. 96 (I). The Genocide Convention of 1948, affirming the principles of international law recognised by that Resolution, was approved unanimously by the United Nations General Assembly on 9 December 1948. The Soviet Union signed the Genocide Convention on 16 December 1949. After twenty instruments of ratification or accession had been deposited, the Convention came into force on 12 January 1951. In the Advisory Opinion of 1951 the International Court of Justice pointed out that the principles underlying the Genocide Convention are principles which are recognised by civilised nations as

binding on States, even without any conventional obligation (see paragraph 80 of the judgment).

6. In view of the foregoing, we find that the crime of genocide was clearly recognised as an offence under international law in 1953. It was formally codified in the 1948 Genocide Convention and, before that date, it was acknowledged and condemned by the United Nations in 1946. In these circumstances we find that the instruments of international law criminalising genocide were sufficiently accessible to the applicant.

The applicant's conviction for genocide

7. The crime of genocide was introduced into Lithuanian domestic law in 1992, that is, soon after restoration of the country's independence (see paragraphs 48 and 51 of the judgment). It is telling that before this introduction the criminal statutes which were applicable in Lithuania during the Soviet rule (first the Russian Criminal Code, and later the Criminal Code of the "Lithuanian SSR") did not even mention genocide as a criminal act, and no legal responsibility was provided for committing acts of genocide. In 2001 the prosecutor charged the applicant with genocide of Lithuanian partisans, as representatives of a political group, under Article 71 § 2 of the Lithuanian Criminal Code, as amended in 1998 (see paragraphs 29 and 52 of the judgment).

It is unquestionable that, given the ongoing nature of the unveiling of the atrocities committed in Lithuania by the occupying regime (which became possible only after that regime collapsed in the early 1990s), the number of victims of the repressions may only increase as new evidence comes to light. Bearing in mind that the discovery of facts concealed by the pre-independence regime and the collection of relevant evidence inevitably requires time, it is natural that alleged perpetrators were not charged in respect of their personal involvement in the said atrocities immediately after the legislative changes, but some years later.

By the time the trial court convicted the applicant of genocide in 2004, a new Lithuanian Criminal Code had entered into force and the applicant was accordingly convicted under Article 99 of that new Criminal Code. The Court of Appeal and the Supreme Court upheld the applicant's conviction on the basis of the said Article 99 (see paragraphs 33, 36, 38 and 53 of the judgment).

8. The applicant's conviction was therefore based upon legal provisions that were not in force in 1953 and, most importantly, could not have been in force at that time, given the fact of Lithuania's occupation. Such provisions were applied retroactively. It follows that this would constitute a violation of Article 7 of the Convention unless it can be established that his conviction was based upon international law as it stood at the relevant time.

The applicant's conviction, in our view, must therefore be examined from that perspective.

Genocide as the destruction of a national group

9. The Lithuanian Supreme Court held that the actions committed by the applicant corresponded to the criminal act of genocide and that the relevant domestic law had been enacted to give effect to the provisions of the Genocide Convention (see paragraph 38 of the judgment). In line with the domestic courts, we agree that the 1948 Convention does not mention social or political groups. It cannot therefore serve as a legal basis for a conviction in respect of the genocide of a purely political group *per se*. The crime of genocide prohibited by Article II of the 1948 Convention listed four specifically protected groups: national, ethnical, racial or religious. Furthermore, the *travaux préparatoires* disclose a clear decision on the part of the drafters, albeit by way of political compromise, not to include political groups, as such, in the list of those protected by the 1948 Convention. The ICJ, when examining the drafting history of Article II of the 1948 Convention in the *Bosnia and Herzegovina v. Serbia and Montenegro* case, also observed that the drafters of the Convention "gave close attention to the positive identification of groups with specific distinguishing well-established characteristics in deciding which groups they would include and which (such as political groups) they would exclude" (see paragraph 105 of the judgment).

10. The Court of Appeal and the Supreme Court considered that the 1948 Convention list of protected groups was not intended to be exhaustive: many other domestic criminal codes had adopted broader definitions of genocide (see paragraphs 36 and 38 of the judgment). The fact that certain States decided later to criminalise within their domestic legislation genocide of a political group as such, does not change the reality that the text of the 1948 Convention did not do so. In this context, we observe that one of the most recent binding international treaties which refers to the crime of genocide – the 1998 Rome Statute of the International Criminal Court – defines it as a crime directed at destruction, in whole or in part, of a national, ethnical, racial or religious group, without mentioning political groups (see paragraph 87 of the judgment).

11. The domestic courts had regard to the fact that members of the targeted political group in the present case (the partisans) were, at the same time, members of a group that was protected under the 1948 Convention, namely, the national group (see paragraph 36 of the judgment). Whilst political groups were excluded from the 1948 Convention, it would be excessively formalistic for this Court to view the partisans exclusively through the prism of a 'political group' and to end its analysis at that stage, without examining the assertion that those same persons were,

simultaneously, members of other groups which are mentioned in Article II of the Convention. We will, therefore, consider the claim that the core objective of the extermination of the Lithuanian partisans – as a significant part of the nation – was the impact that their destruction would have on the survival of the national group or ethnic group as a whole. If so, then their killing would amount to a crime prohibited by Article II of the 1948 Convention.

12. The respondent Government supported this approach. They argued that the targeting of the partisans as "bandits" or "bourgeois nationalists" or simply "nationalists", and of their supporters, masked the more fundamental objective of the destruction of a national and/or ethnic group. In particular, they maintained that by eliminating the important Lithuanian element which the partisans represented, the USSR facilitated the sovietisation of Lithuania and the elimination of Lithuania as the nation it had been, which, in the eyes of USSR authorities, was an 'untrustworthy nation' (see paragraphs 59 and 139 of the judgment). They also submitted that the overall aim was to deal a crippling blow to the most active political and social groups and, thereby to the demography and strength of the nation itself (see paragraphs 131, 132, 135 and 139 of the judgment).

13. We note that the Russian Federation itself has acknowledged that repressed peoples experienced genocide under Soviet rule (see paragraph 74 of the judgment). Similarly, PACE Resolution 1481 (2006) noted that the crimes committed were justified by the Soviet regime in the name of the class struggle theory and the principle of dictatorship of the proletariat, the victims being thereby enemies of the USSR, and that the vast majority of victims in each country were ethnic nationals (see paragraph 89 of the judgment).

14. The ICTR was of the view in its *Rutaganda* judgment (see paragraph 109) that there was no internationally accepted definition of the protected groups and that those concepts had to be assessed in the light of a particular political, social and cultural context. The Lithuanian Constitutional Court was of precisely the same view. It pointed out the particular political, social and cultural context at issue. It described the ideology of the totalitarian communist regime upon which the extermination of entire groups of people was grounded and the scale of the USSR's repressions against the inhabitants of Lithuania. The Constitutional Court found that Article 2 of the 1992 Law "On Liability for Genocide of Residents of Lithuania" corresponded to the features of genocide as provided for in the norms of international law. In summing up, it noted that the inclusion of social and political groups in the definition of Article 99 of the Criminal Code was determined by "a concrete legal and historical context", namely, the international crimes committed by the occupational regimes in the Republic of Lithuania at the material time (see paragraphs 58 and 59 of the judgment).

15. Turning to the facts of the instant case, we note that the trial court found the applicant guilty of genocide on the ground that he had taken part in an operation to capture or kill two Lithuanian partisans, as members of a political group. The Court of Appeal considered such a characterisation to be only conditional and not sufficiently precise, because the partisans were at the same time representatives of the Lithuanian nation, that is, the national group. Such a group was a protected group under Article II of the 1948 Convention. The finding of the Court of Appeal confirms that the very *raison d'être* of the partisans was the protection of the Lithuanian nation in the face of a regime which intended to destroy its unique and specific identity. For the appellate court, the Soviet genocide had been carried out precisely on the precise basis of the criteria of the inhabitants' nationality-ethnicity. These three groups – "political", "national" and "ethnic" – were intrinsically linked (see paragraph 36 of the judgment). These conclusions were not overruled by the Supreme Court (see paragraphs 38-40 of the judgment). The Supreme Court in fact considered that in the period 1944-1953 the partisans embodied the "nation's" armed resistance to the occupying regime on the Lithuanian territory (see paragraph 40 of the judgment). In this context we attach weight to the Government's argument that the partisan movement could not have survived for approximately ten years without support from the Lithuanian nation, that is, the national group (see paragraph 132 of the judgment).

16. Accordingly, and having regard to the factors outlined above, we find that there is considerable force in the argument that J.A. and A.A., as ethnic Lithuanians, were targeted specifically for their membership of the partisan movement whose members were, simultaneously, a significant and emblematic part of the national group and whose very purpose was the protection of the Lithuanian nation from destruction by the Soviet regime and that their killing was, therefore, an act of genocide.

Hence, the applicant's conviction for his wilful participation in the extermination of the partisans constituted an act of genocide on an ethno-national basis and was, thus, a crime provided for in the text of Article II of the 1948 Convention.

We cannot accept that a protected group (a nation) which defends itself against the destruction of its very fabric though the mobilisation of a resistance movement suddenly, by that act of resistance, transforms itself solely into a 'political group', thus placing itself outside the terms of the Genocide Convention. This would be to interpret both the Genocide Convention and Convention's provisions in an overly formalistic manner and in a spirit inconsistent with their purpose.

Genocide as the destruction in part of a group

17. Article II of the Genocide Convention defines genocide as "acts committed with intent to destroy, in whole or *in part*, a national, ethnical, racial or religious group, as such" (emphasis added). According to the interpretation by the Court of Appeal, the Lithuanian partisans constituted "part" of the ethno-national group (see paragraph 36 of the judgment) and therefore the applicant's conviction for genocide could be justified under Article II of the Genocide Convention.

18. We acknowledge that in 1953, when the partisan brothers J.A. and A.A. were killed, there was no jurisprudence on the meaning of the phrase "in part", as used in Article II of the Genocide Convention (see paragraphs 91 and 92 of the judgment). That, however, is understandable, given that the first case in which a conviction for the crime of genocide was pronounced did not occur until 1998 (see the International Criminal Tribunal for Rwanda, judgment of 2 September 1998 in *Prosecutor v. Akayesu*, case No. ICTR-96-4-T). The fact that judicial interpretation of the 1948 Genocide Convention took time to develop cannot in itself mean that genocide did not occur prior to such interpretation.

A supposition that genocides did not occur before 1998 (save the Holocaust) because no court, prior to that date, had stated that they occurred, would be not only legally inconsistent, but also offensive to numerous national, ethnic, racial or religious groups which, in various parts of the globe, fell victim to government-planned destruction, without, however, ever being able to bring their cases to international courts. We believe that this Court should not pursue this line of formalistic reasoning. The Court's title as the "conscience of Europe" obliges such a conclusion.

19. It is not surprising that international jurisprudence on the meaning of the phrase 'in part' only developed once prosecutions for the crime began to be brought. In the mid-1990s, international studies and reports considered that the partial destruction of a group merited the characterisation of genocide when it concerned a substantial part of the entire group or a significant section of that group (see paragraphs 94 and 95 of the judgment). It also emerged that the intent to destroy the fabric of a society through the elimination of its leadership, when accompanied by other heinous acts, such as mass deportations, could give a strong indication of genocide, regardless of the actual numbers killed. Furthermore, the extermination of the group's military personnel had to be seen in the context of the fate of what happened to the rest of the group, which became largely defenceless against other abuses (see paragraph 96 of the judgment).

20. The scope of the term "in part" has also been interpreted by the international courts. The ICTY confirmed that in order to commit genocide it was not necessary to intend to achieve the complete annihilation of a group. The intention to destroy had to target at least a substantial part of the

group. Genocide could be considered as the extermination of a very large number of the members of a protected group. Alternatively, genocidal intent could also consist of the "desired destruction of a more limited number of persons selected for the impact that their disappearance would have upon the survival of a group as such". This was the "intention to destroy the group 'selectively'" (see *Prosecutor v. Jelisić*, and also *Prosecutor v. Tolimir*, paragraphs 98 and 104 of the judgment respectively). If the quantitative criterion is not met, the intention to destroy in part may yet be established if there is evidence that the destruction is related to a significant section of the group, such as its leadership (see *Prosecutor v. Sikirica*, paragraph 102 of the judgment).

21. In the *Prosecutor v. Krstić* judgment, the ICTY Trial Chamber observed that the intent to destroy a group, even if only in part, means seeking to destroy a distinct part of the group as opposed to an accumulation of isolated individuals within it. The perpetrators had to view the part of the group they wished to destroy as "a distinct entity which must be eliminated as such". The very existence of the group was the target. Moreover, when the killing of men of military age took place in combination with the forcible transfer of civilians, thus having a lasting impact upon the entire group, this could not be considered as mere elimination of military resistance (see paragraphs 99 and 100 of the judgment).

22. As the ICTY Appeals Chamber also noted in *Prosecutor v. Krstić*, the numerical size of the targeted part of the group was "a necessary and important starting point, though not in all cases the ending point of the inquiry". In addition to the numerical size of the targeted portion, its "prominence within the group" was also a useful consideration. If a specific part of the group was "emblematic of the overall group" or was "essential to its survival", then that may support a finding that the part qualifies as substantial within the meaning of the offence of genocide. Similarly, part of the group could be regarded as prominent, when its elimination could serve as a "potent example" to all other members of that group as to their "vulnerability and defencelessness". The "fate" of part of the group would thus be "emblematic" of that of all other members of that group (see paragraph 101 of the judgment).

23. In *Bosnia and Herzegovina v. Serbia and Montenegro* the ICJ accepted the relevance of the qualitative criterion – the prominence of certain individuals within the group. The ICJ held, however, that the qualitative approach could not stand alone and that the first criterion – substantiality – should be given priority (see paragraph 106 of the judgment). Furthermore, in the most recent judgment of *Croatia v. Serbia* the ICJ held that in evaluating whether the targeted part of a protected group is substantial in relation to the overall group, the quantitative element, evidence regarding the geographic location and prominence of the targeted part of the group, including whether the specific part of the group is

emblematic of the overall group or essential for its survival, are all relevant criteria that ought to be taken into account (see paragraph 108 of the judgment).

24. In the light of the foregoing considerations and on the facts of the present case, we observe that the Lithuanian courts of criminal jurisdiction did not explicitly address the specific question of whether the partisans in Lithuania constituted a substantial part of the national group. They referred to them only as 'participants in the resistance to the Soviet occupational power' (see paragraph 31 of the judgment). However, the Constitutional Court noted that Lithuanian law recognises the organised resistance against Soviet occupation as the self-defence of 'the nation' and the partisans as the leaders of the political and military national struggle for freedom. The Constitutional Court also referred to 'the significance of this group for the entire respective national group' (see paragraph 63 of the judgment).

In this connection, it is relevant to mention that the assessment of "the struggle of the participants in the resistance movement as the expression of the nation's right to self-defence" had made its way into the Lithuanian legislation as early as April 1990, that is, immediately after the declaration of Lithuania's restored independence (see paragraph 66 of the judgment). It is also relevant to mention that the Lithuanian legislation excludes from the category of partisans ('freedom-fighters') those persons who "belonged to the organisational structures of the armed resistance [and] gave an oath" but who nonetheless breached it, persons who "gave orders to kill civilians or killed civilians themselves" and persons who "took part in committing crimes against humanity and war crimes" (see paragraphs 66 and 67 of the judgment). Moreover, Lithuanian legislation recognises the partisans as the "highest political authority" in the "national" resistance and as representatives of the "sovereign will of the nation" (see paragraphs 13 and 67 of the judgment). This was confirmed by the appellate and cassation courts in criminal and civil proceedings (see paragraphs 39, 40 and 44 of the judgment).

In our view, the national authorities based their decisions on an acceptable assessment of the relevant facts, and did not reach arbitrary conclusions (see, *mutatis mutandis*, *Chauvy and Others v. France*, no. 64915/01, § 69, ECHR 2004-VI; also see *Ždanoka v. Latvia* [GC], no. 58278/00, § 96, ECHR 2006-IV). We therefore do not depart from the Constitutional Court's assessment of the role of the partisans, and accept that because of their "prominence" and "emblematic" character (see *Prosecutor v. Krstić* and *Croatia v. Serbia*, paragraphs 101 and 108 of the judgment respectively) the Lithuanian partisans may be considered as a significant "part of" the national group. In this regard we note the finding of the Constitutional Court to the effect that "in consideration of the international and historical context, it should be noted that, in the course of the qualification of the actions against the participants of the resistance

against the Soviet occupation as a political group, one should take into account the significance of this group for the entire respective national group (the Lithuanian nation) which said group is covered by the definition of genocide according to the universally recognised norms of international law" (see paragraph 63 of the judgment).

25. We also have particular regard to the language in the documentary evidence relied upon by the domestic courts and, notably, to the fact that the MGB had the express intention to "exterminate" "nationalist elements" – "the bandits and nationalist underground" (see paragraph 18 of the judgment). The Supreme Court concluded that in the applicant's case the subjective element of genocide was fulfilled in that he had known the goal of the Soviet government – "to eradicate all Lithuanian partisans" (see paragraph 41 of the judgment *in fine*). In consequence, we further accept that the Lithuanian partisans were targeted for elimination as a distinct part of a group rather than as individuals within a group (see *Prosecutor v. Krstić*, paragraph 99 of the judgment).

26. We also note that some 20,000 Lithuanian partisans were killed in 1940 and 1944-1953. The Lithuanian population at that time stood at nearly 3,000,000. Whilst the number of partisans killed is considerable, it may not appear to be particularly large in terms of an overall percentage of the total population of Lithuania. However, we cannot disregard the general scale of the repressions in Lithuania, including imprisonment and mass deportations of the civilian population. We take particular account of the well-known fact that the Soviet repressions also targeted the partisans' families, as well as other people allegedly connected with them, who were likewise subjected to imprisonment, deportation or killing. The cluster of actions taken against a protected group (in this case, the nation) must be considered in its entirety in order to interpret the provisions of the Genocide Convention in a spirit consistent with its purpose (see paragraph 96 of the judgment). The respondent Government submitted, and this has not been disputed by the applicant (see paragraphs 126 and 133 of the judgment), that in 1940 and 1944-1953 thousands of Lithuanian inhabitants were imprisoned, deported or killed. Soviet repressions in Lithuania affected one in five persons. We have already noted the ICTY judgment in *Prosecutor v. Krstić* and the ICJ judgment in *Croatia v. Serbia* to the effect that when the fate of part of the group is emblematic of that of other members of that group, this may permit a conclusion that the eliminated group was substantial, and enable the finding that it comes within the meaning of the phrase "in part" of Article II of the Genocide Convention (see paragraphs 101 and 108 of the judgment and paragraph 24 above).

27. Accordingly, and having regard to the factors outlined above, we find that the Lithuanian partisans must be considered as a substantial part of the national group, the latter being a group protected under Article II of the Genocide Convention. We therefore conclude that the Court of Appeal,

whose decision was not overruled by the Supreme Court, interpreted the term "in part", as referred to in Article II Genocide Convention, in a manner consistent with its interpretation in international law, having regard to the particular social and political context prevailing in Lithuania at the relevant time.

It remains to be examined whether such an interpretation of Article II of the Genocide Convention was foreseeable by the applicant in 1953.

The foreseeability of the conviction

28. The domestic courts established that the applicant had fulfilled the essential legal requirements of a criminal act, namely, the *actus reus* and *the mens rea*. They described the applicant as an agent of the repressive Soviet authorities, whose aim was to suppress all kinds of national resistance and to exterminate all partisans as a separate group. It transpires from the documents on which the prosecutor based the charges of genocide against the applicant that in 1950-1952 the applicant attended a special MGB school for young recruits of that organisation (see paragraph 17 of the judgment; see also *K.-H.W. v. Germany*, [GC], no. 37201/97, §§ 71 and 74, ECHR 2001-II (extracts)). In 1952 the applicant was an operational officer of the Šakiai district MGB. It is also relevant that, as regards the applicant's personality, he was politically aware and had good work results (see paragraphs 20 and 21 of the judgment).

29. According to the minutes of the Šakiai district MGB meetings in 1953, the MGB was following instructions from the USSR Central Committee and the USSR MGB, to the effect that "bandits and nationalist underground", "bandits, those who help them and their contacts" were to be exterminated (see paragraph 18 of the judgment). Some of those statements about "the fight against the nationalist underground" were made by the applicant himself (see paragraph 19 of the judgment). Such statements are very similar to those that were analysed by the Court in a case against Germany, in which the orders to protect the Berlin wall and to arrest "border violators" or to "annihilate" them were examined (see *K.-H.W.*, cited above, §§ 64 and 65). In *Kamuhanda*, the ICTR also expressed the opinion that it may be difficult to find explicit manifestations of intent by perpetrators. Under such circumstances, the ICTR held that the perpetrator's actions, including circumstantial evidence, may provide sufficient evidence of intent. According to the ICTR, some of the indicia of intent may be "[e]vidence such as the physical targeting of the group or of their property; the use of derogatory language toward members of the targeted group; the weapons employed and the extent of bodily injury; the methodical way of planning, the systematic manner of killing." (see ICTR judgment of 22 January 2004, in *Prosecutor v. Jean de Dieu Kamuhanda*, Case No. ICTR-95-54A-T, paragraph 625).

On the basis of the evidence submitted by the prosecutor, the appellate and cassation courts established that the applicant had a direct intent to exterminate Lithuanian partisans, as part of the Lithuanian population. As the Supreme Court noted, the applicant understood that during the operation of 2 January 1953 the partisan brothers J.A. and A.A. would be killed or arrested and then tortured, tried as "traitors to the State" and, possibly, sentenced to death, and he wished to achieve this end (see, respectively, paragraphs 29, 35 and 41 of the judgment *in fine*).

In other words, the domestic courts have established that the killing of the two brothers was part of a State policy to exterminate Lithuanian partisans and other social groups which were a part of the Lithuanian nation, and that there was a specific intent on the part of the applicant to kill the brothers for the purposes of this criminal plan. The domestic courts have further established that this particular killing was planned and executed by the applicant within that framework. He was not a mere low-level perpetrator; he was a high-ranking MGB and later KGB operational member who served up to the position of lieutenant-colonel. He was not a mere accomplice to the facts; rather, he was the principal offender, who carefully prepared the killing and executed it. He even gained financial and political benefit from the murder, since he was awarded a considerable amount of money for the "heroic" deed that he had committed, and was admitted to the ranks of the Communist Party of the Soviet Union immediately after the killing.

30. In assessing the issue of the reasonable foreseeability of the applicant's conviction, we are not persuaded that the applicant could not have known that he risked being charged with and found guilty of the offence of genocide. In the *Jorgic* case *(Jorgic v. Germany*, no. 74613/01, 12 July 2007), the Court was confronted with two possible interpretations of the term 'to destroy' in the definition of the crime of genocide and the Court examined the compatibility of the applicant's conviction, on the basis of the wider interpretation of that term, with Article 7 of the Convention. It noted that whilst various authorities (international organisations, courts, scholars) had favoured both the wider and the narrower interpretations of the crime of genocide at the time of the impugned acts, Mr Jorgic could reasonably have foreseen the adoption in his case of the wider interpretation and, therefore, that he risked being charged with and convicted of genocide. Had the applicant in this case sought independent legal advice in 1953 and stated that he was an operational agent of the MGB whose intentional goal was the extermination of members of the nationalist underground ('the partisans') (see paragraph 18 of the judgment), the latter being the most resistant part of the Lithuanian nation as it attempted to defy its destruction by Soviet forces, it is likely that he would have been advised that what he was doing bore the essential characteristics of the crime of genocide as it stood under international law at the time.

Given the prominence of the part played by the partisans and their emblematic and actual significance for the Lithuanian nation in the particular context of the time, we find it likely that the applicant could have foreseen that he risked being charged with and convicted of genocide for his intention to destroy a significant 'part of' the Lithuanian nation – the latter being a protected group under the 1948 Convention – in his pursuit of the USSR's totalitarian policy. In so finding, we confirm the principle articulated in *Jorgic* to the effect that an interpretation of the scope of the offence which is consistent with the essence of that offence 'must, as a rule, be considered as foreseeable' (see *Jorgic*, cited above, § 109).

31. We also note that the applicant was not prosecuted for his acts under the RSFSR Criminal Code, which was imposed in Lithuania immediately after its annexation and incorporation into the USSR, nor under the Criminal Code of the Lithuanian SSR, both of which provided criminal liability for deprivation of life (see paragraphs 71 and 72 of the judgment). The Government's argument that extermination of the Lithuanian partisans as a group was part of the USSR's State policy and practice, which was superimposed on the rules of written law at the material time, is not without weight (see *Streletz, Kessler and Krenz v. Germany* [GC], nos. 34044/96, 35532/97 and 44801/98, §§ 67 and 68, ECHR 2001-II). Even so, the applicant cannot rely on the fact that this was the USSR's practice in order to justify his participation in the extermination of the Lithuanian partisans. According to the general principles of law, it is not open to defendants to justify the conduct which has given rise to their conviction simply by showing that such conduct did in fact take place and therefore formed part of an accepted practice (*ibid*, § 74). As the Court has held, even a private soldier cannot show total, blind obedience to orders which flagrantly infringed not only domestic law (see paragraph 71 of the judgment) but also internationally recognised human rights, in particular the right to life, which is the supreme value in the hierarchy of human rights (see *K.-H.W.*, cited above, § 75).

32. In his submissions to the Court the applicant also questioned whether the brothers J.A. and A.A. could be considered to be protected by Article II of the Genocide Convention, given that they were volunteer fighters in the armed resistance, a countrywide movement with a political and military organisation.

33. On this point, we observe that under Article I of the Genocide Convention, genocide is a crime under international law, whether committed in time of peace or in time of war. It may also be noted that the presence of those actively involved in a conflict, including when the victims bore arms, has not been an obstacle for the international courts in finding their killing to be a crime against humanity (see *Prosecutor v. Kupreškić and Others* in paragraph 111 of the judgment; see also, *mutatis mutandis*, *Croatia v. Serbia* in paragraph 108 of the judgment). This reasoning applies

with greater force where the crime of genocide is at issue. On this point we note that, under Article II of the Genocide Convention, genocide is not defined as a crime directed against a civilian population only. In our view, to interpret the Genocide Convention as not applying to those who took up arms to defend themselves would not be in conformity with the underlying purpose of that Convention.

34. We further reiterate the Constitutional Court's conclusion that the Soviet authorities regarded the Lithuanian partisans as illegal rebels. No combatant status, or that of prisoner of war, was ever granted to them during Soviet times. On the contrary, as noted by the Constitutional Court, Lithuanian partisans were portrayed by the Soviet authorities, including the MGB unit in which the applicant served, as "bandits", "terrorists", and "bourgeois nationalists". Special "extermination" squads were established and these were used in the fight against the Lithuanian partisans and their supporters (see paragraphs 18, 19 and 63 of the judgment).

35. Accordingly, the fact that the brothers J.A. and A.A. were armed partisans who had been targeted on account of their membership of and significance within a protected group (the nation) does not preclude charging the applicant with genocide (see, by converse implication and *mutatis mutandis*, *Korbely v. Hungary* [GC], no. 9174/02, §§ 86-94, ECHR 2008).

Conclusion

36. In the light of the above considerations, we find that, within the general context of large-scale and systematic actions against the Lithuanian population, the applicant's participation in the 2 January 1953 operation to capture and/or kill partisan brothers J.A. and A.A., viewed within the framework of the Soviet authorities' operations to eradicate the Lithuanian partisans as a significant part of the nation in 1944-53 with the intent of destroying the fabric of the nation of Lithuania, could reasonably be regarded as falling within the ambit of the offence of genocide under Article II of the Genocide Convention. The interpretation by the domestic courts could thus reasonably have been foreseen by the applicant at the material time. In view of the foregoing, we are satisfied that the requirements to convict the applicant for the crime of genocide have been met in the instant case. We also reiterate the ICJ conclusion that "where those requirements are satisfied... the law must not shy away from referring to the crime committed by its proper name" (see paragraph 112 of the judgment).

37. Having regard to the conclusion reached in the paragraph above, we do not therefore find it necessary to examine whether the applicant's conviction was based on customary international law, an argument raised by the respondent Government.

38. We conclude that the applicant's conviction for genocide was not in breach of Article 7 § 1 of the Convention. Lastly, these requirements of Article 7 § 1 being met, it is not therefore necessary to examine the case under Article 7 § 2 of the Convention (see *Kononov*, cited above, § 246).

39. Our disagreement with the majority does not pertain to the facts as these have been established – it pertains to their interpretation. The majority has likewise accepted that the acts in respect of which the applicant was charged and convicted were indeed committed by him. Having been shielded by the occupant regime for many years, the applicant could nurture an expectation that his impunity would outlive him. For a while, it seemed that the termination of Lithuania's occupation had put an end to such an expectation. Now, by the judgment of this Court, that expectation has been revived. This is a matter of regret.

DISSENTING OPINION OF JUDGE ZIEMELE

1. I do not share the majority's view in this case, in relation either to the outcome or to the reasoning of the judgment. I share largely the view of the dissenting judges Villiger, Power-Forde, Pinto de Albuquerque and Kūris. In my opinion, for the purposes of the present case we must bear in mind the origins of the outlawing of genocide in international law. I will provide a short summary of the relevant points. It is equally important to understand the historical context within which the extermination expeditions against Lithuanian national partisans took place. Finally, I will also comment on the Court's role in these types of case.

Prohibition of Genocide

2. In Raphael Lemkin's words (as cited by J. Vervliet, "Raphael Lemkin (1900-1959) and the Genocide Convention of 1948. Brief Biographical and Bibliographical Notes", in H.G. van der Wilt *et al* (eds.) *The Genocide Convention. The Legacy of 60 Years*, Martinus Nijhoff Publishers, 2012, xxvii):

> "Genocide is directed against the national group as an entity, and the actions involved are directed against individuals, not in their individual capacity, but as members of the national group". "Genocide has two phases: one, destruction of the national pattern of the oppressed group; the other, the imposition of the national pattern of the oppressor. This imposition, in turn, may be upon the oppressed population which is allowed to remain, or upon the territory alone, after removal of the population and colonization of the area by the oppressor's own nationals".

3. William Schabas has pointed out that while the 1948 Convention for the Prevention and Punishment of the Crime of Genocide (hereafter, the 1948 Convention) contains a widely accepted definition of genocide, its language is subject to various interpretations. Many domestic legislatures have imposed their own views on the term. "As a result, even in law, one can speak of many definitions or interpretations of the concept of genocide" (see W. Schabas, "Genocide and Crimes against Humanity: Clarifying the Relationship", in van der Wilt, cited above, p. 4). Indeed, the Court's own case-law, notably in the *Jorgic v. Germany* decision (no. 74613/01, ECHR 2007-III), reflects this reality. In that case, the German domestic courts had adopted a wider interpretation of the definition of acts of genocide. The ICTY stated in the *Brdjanin* case that the "groups are not clearly defined in the Genocide Convention or elsewhere" (see *Prosecutor v. Brdjanin*, 1 September 2004, ICTY-99-36, T Ch II, paragraph 682).

4. For the purposes of clear reasoning, it is important not to confuse different elements of the drafting process of the 1948 Convention. First of all, it should be recalled that the 1948 Convention was adopted in reaction to the proceedings at the Nuremberg Tribunal and to the limitations therein,

whereby crimes against humanity were linked to wartime (see Resolution no. 96 (I) referring to genocide having been committed in the past; also K. Inkuša, "Mass Deportations of 1949 in Latvia as a Crime against Humanity", *Baltic Yearbook of International Law*, volume 9, 2009, p. 83). It was therefore necessary to break out of this situation, since the most heinous crimes could also be committed in times of peace and against a State's own population. That was the purpose of the Convention prohibiting Genocide. Secondly, the entire debate about the definition of genocide is a distinct issue which continues to be examined and developed by international and domestic courts. Despite the many complexities surrounding the definition of genocide, the words of R. Lemkin cited above (see point 2) transmit the very essence of the crime. The definition of genocide as adopted in the 1948 Convention prohibiting certain acts with "intent to destroy, in whole or in part, a national... group" does not limit or contradict Lemkin's description of the essence of genocide (see point 2 above).

5. For anyone who has conducted research on the drafting of the 1948 Convention it is evident, as Matthew Lippman puts it, that "[the] superpowers shared an interest in limiting international and universal jurisdiction over genocide... Both States ([the] Soviet Union and [the]United States) also importantly opposed extending protection under the Convention to political groups" (see M. Lippman, "The Drafting and Development of the 1948 Convention on Genocide and the Politics of International Law", in H.G. van der Wilt, cited above, pp. 19-20). Indeed, the States' greatest reluctance concerned the issue of jurisdiction over the crime of genocide. This point is not part of the case before us. Secondly, the question of whether political groups are included within the scope of protected groups has also been much debated. The drafting history confirms that they are not, and this is a relevant but not decisive point in the present case.

6. Furthermore, the case-law regarding genocide, in so far as it has clarified the scope of the 1948 Convention, is evidently relevant to the present case. Indeed, there have been a number of important cases decided by the International Court of Justice (ICJ) as well as by the war tribunals. In the judgment on the merits in the *Croatia v. Serbia* case (3 February 2015), the ICJ recapitulated the relevant points of the interpretation of the 1948 Convention. The ICJ confirmed as follows (in paragraph 139 of its judgment):

> "The Preamble to the Genocide Convention emphasizes that 'genocide has inflicted great losses on humanity', and that the Contracting Parties have set themselves the aim of 'liberat[ing] mankind from such an odious scourge'. As the Court *noted in* 1951 and *recalled in* 2007 (emphasis added – IZ), an object of the Convention was the safeguarding of 'the very existence of certain human groups' (Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951, p. 23, and Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, I.C.J. Reports 2007 (I), p. 125, para. 194). The

> Court recalls that, in 2007, it held that the intent to destroy a national, ethnic, racial or religious group as such is specific to genocide and distinguishes it from other related criminal acts such as crimes against humanity and persecution (I.C.J. Reports 2007 (I), pp. 121-122, paras. 187-188). Since it is the group, in whole or in part, which is the object of the genocidal intent, the Court is of the view that it is difficult to establish such intent on the basis of isolated acts. It considers that, in the absence of direct proof, there must be evidence of acts on a scale that establishes an intent not only to target certain individuals because of their membership of a particular group, but also to destroy the group itself in whole or in part".

7. The ICJ further explained in paragraph 142 of the *Croatia v. Serbia* judgment:

> "The Court recalls that the destruction of the group "in part" within the meaning of Article II of the Convention must be assessed by reference to a number of criteria. In this regard, it held in 2007 that "the intent must be to destroy at least a substantial part of the particular group" (I.C.J. Reports 2007 (I), p. 126, para. 198), and that this is a "critical" criterion (ibid., p. 127, para. 201). The Court further noted that "it is widely accepted that genocide may be found to have been committed where the intent is to destroy the group within a geographically limited area" (ibid., p. 126, para. 199) and that, accordingly, "[t]he area of the perpetrator's activity and control are to be considered" (ibid.). Account must also be taken of the prominence of the allegedly targeted part within the group as a whole. With respect to this criterion, the Appeals Chamber of the ICTY specified in its Judgment rendered in the case that "[i]f a specific part of the group is emblematic of the overall group, or is essential to its survival, that may support a finding that the part qualifies as substantial within the meaning of Article 4 [of the ICTY Statute, paragraph 2 of which essentially reproduces Article II of the Convention]" (IT-98-33-A, Judgment of 19 April 2004, para. 12, reference omitted, cited in I.C.J. Reports 2007 (I), p. 127, para. 200)".

8. The ICJ went further and clarified that:

> "In 2007, the Court held that these factors would have to be assessed in any particular case (ibid., p. 127, para. 201). It follows that, in evaluating whether the allegedly targeted part of a protected group is substantial in relation to the overall group, the Court will take into account the quantitative element as well as evidence regarding the geographic location and prominence of the allegedly targeted part of the group" (ibid.).

9. In its 2007 Judgment in *Bosnia and Herzegovina v. Serbia and Montenegro* (cited in I.C.J. Reports 2007 (I), pp. 196-197, paragraph 373), the ICJ had held that:

> "[t]he *dolus specialis*, the specific intent to destroy the group in whole or in part, has to be convincingly shown by reference to particular circumstances, unless a general plan to that end can be convincingly demonstrated to exist; and for a pattern of conduct to be accepted as evidence of its existence, it would have to be such that it could only point to the existence of such intent".

10. These judgments address events which occurred posterior to the killings of the two Lithuanian national partisans as part of the Soviet policy to destroy Lithuanian national resistance, yet the ICJ's interpretation of the 1948 Convention is not revolutionary. On the contrary, the ICJ traces very carefully the intent of the drafters of the Convention, which predates the

events in Lithuania. It states that it determined certain matters of principle in 1951 which were "recalled" in 2007. The ICJ interprets Article II of the Convention as it was adopted in 1948. I take the position that the ICJ's case-law is the appropriate authority for our Court as concerns the understanding of the scope and content of the relevant concepts in Article II.

Destruction of Lithuanian national partisans

11. An understanding of the historical context within which the war between the Lithuanian national partisans and the Soviet armed forces occurred following the end of the conflict between the Soviet Union and the Nazi Germany on the territory of Lithuania and the other two Baltic States is of fundamental relevance to this case. Admittedly, this is not an episode of European history that is widely written about. However, the principle of the proper administration of justice requires that the proceedings be organised in a manner that permits the Court to be aware of all the relevant elements. This appears to be particularly pertinent in a case which requires the Court to take note of *dolus specialis* which, as the ICJ has explained, may depend in some instances, where no clear plan is apparent on "genocidal intent being established indirectly by inferences" (see the above-cited *Croatia v. Serbia* judgment, paragraph 148).

12. The destruction of the Lithuanian, Estonian and Latvian national partisans was a key priority for the Soviet occupation regime, in order to achieve what they considered a complete and final annexation of the Baltic States. For propaganda purposes the Soviet government labelled the national partisans as armed criminals or bandits, and explained the Soviet extermination activities as a response to criminals who were illegally using arms. In Soviet terminology this was not a national resistance war: it was a fight against gangs within a wider context of ideological struggle.

13. In the history of the Baltic States, the resistance war led by the national partisans was the longest-lasting conflict (approximately 1944-56), involving the highest number of fighters and supporters. Due to the international political climate after the Second World War, the Baltic resistance did not receive any foreign assistance. The purpose of resistance was to fight for the independence and survival of the nations which had just experienced the 1941 Soviet deportations, the Nazi occupation and the unlawful return of Soviet power, accompanied by another wave of mass deportations (see *Nikolajs Larionovs v. Latvia* and *Nikolay Tess v. Latvia*, nos. 45520/04 and 19363/05 (dec.), 25 November 2014). At the same time, this war had no prospects of success and was thus even more essential for upholding the national spirit. The Lithuanian Constitutional Court has correctly summed up the purpose and the nature of the resistance war (see paragraph 63 of the judgment). It is also interesting to note that the MGB – the Ministry of State Security of which the applicant was a

member – referred to the fight against bandits and the "nationalist underground". The extermination of Lithuanian nationalism was necessary to achieve the subjugation of the Lithuanian people to the Soviet regime and its ideology. According to the Respondent Government, "some 20,200 partisans were killed, 142,000 people were sent to concentration camps and 118,000 were deported". For example, according to Latvian archive documents for the period 1944 to 1956, the Soviet repressive structures "exterminated 961 armed bandit groups and arrested or killed 10,720 bandits" (see Information Note of 8 January 1957, Latvian SSR KGB, in H. Strods (ed.) Latvijas nacionālo partizānu karš. Dokumenti un materiāli 1944-1956. Rīga, 1999, p. 587).

14. The intent to destroy this part of the Lithuanian nation is in fact well documented in the relevant archives. When one examines the numbers, it is evident that they were highly significant for small nations. When the pattern of those Lithuanians who were targeted by the Soviet regime is considered, as the Respondent Government have shown in paragraph 29 of their submissions, it transpires that they formed the backbone of the Lithuanian nation. We recall Lemkin's observation that the essence of genocide is the destruction of **the national pattern** of the oppressed group and the imposition of another pattern (see point 2 above). The ICJ's case-law does not interpret genocide differently.

Political groups

15. The Court spends much time in its reasoning on the issue of whether the scope of the genocide definition in the 1948 Convention included political groups. The answer it provides in paragraph 175 is, in principle, correct. The real question before the Court, however, is whether national partisans formed – in terms of their role and number – a group whose continuous existence was essential for the survival of the Lithuanian nation. In other words, the Court should have been able to distinguish between, on the one hand, a prominent part of a national group being targeted for political, social or, in any event, discriminatory reasons, and, on the other, a political group plain and simple. There is nothing in the history of outlawing genocide which would exclude from its scope an intention to destroy in part or as a whole a (national) group for political and otherwise discriminatory purposes. Regrettably, the Court has not examined this issue, which is crucial to the case.

16. I pointed out above that the ICJ, which has jurisdiction to interpret the 1948 Convention, had done so by scrutinizing the *travaux preparatoires*. The ICJ discloses the scope of genocide as it was accepted at the time of the Convention's adoption in 1948. It is true that it had this possibility several decades later, but this does not change the fact that we have an authoritative interpretation of the 1948 Convention as it would also

have applied several decades earlier. The ICJ does not mention that it is engaged in evolutive interpretation, taking into account subsequent developments (see, *a contrario*, Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports, p. 19, paragraph 53). On the contrary, the requirements to establish an act of genocide remain stringent. The present case, however, shows that the European Court continues to have a problem with the application of law over time (see my Concurring opinion in *O'Keeffe v. Ireland* [GC], no. 35810/09, ECHR 2014 (extracts)).

17. The Court's conclusion is that in 1953 it was foreseeable that genocide required the destruction or intent to destroy a substantial group, but that it had not been clarified that in addition to the numerical aspect it also concerned the qualitative aspect, that is, the prominence of the targeted group (see paragraph 177 of the judgment), which has only materialised as part of subsequent judicial practice (see the heading of the relevant part of the judgment). The Court has taken into account – among other international case-law – the ICJ's two leading judgments as concerns the interpretation of the words "in part" in the 1948 Convention (see paragraph 105 of the judgment). It is clear, however, that these judgments cannot be read separately, especially since the *Croatia v. Serbia* judgment refers back to the 2007 judgment and provides further clarifications (see points 6-7 above). I have serious reservations as to whether the Court's conclusions in paragraphs 176-177 are compatible with the ICJ's explanation of the words "in part", which in the ICJ's interpretation are clearly more nuanced. As was explained above, the relevant ICJ judgments cannot be regarded as exemplifying a new interpretation of the 1948 Convention. Alternatively, the Court ought to have engaged in more scrupulous research into the legal thinking relevant at the time of the adoption of the Genocide Convention, similar to that carried out in the case of *Kononov v. Latvia (*[GC], no. 36376/04, ECHR 2010).

The Article 7 Standard

18. In § 198 of *Kononov* (cited above), the Court reiterated that:

> "... the Court's powers of review must be greater when the Convention right itself, Article 7 in the present case, requires that there was a legal basis for a conviction and sentence. Article 7 § 1 requires the Court to examine whether there was a contemporaneous legal basis for the applicant's conviction and, in particular, it must satisfy itself that the result reached by the relevant domestic courts... was compatible with Article 7 of the Convention, even if there were differences between the legal approach and reasoning of this Court and the relevant domestic decisions. To accord a lesser power of review to this Court would render Article 7 devoid of purpose."

The Court then assessed "whether there was a sufficiently clear and contemporary legal basis for the specific... crimes" (see *Kononov*, § 199).

19. It pointed out in the *Kononov* case (§ 241) that:

> "it is legitimate and foreseeable for a successor State[1] to bring criminal proceedings against persons who have committed crimes under a former regime and that successor courts cannot be criticised for applying and interpreting the legal provisions in force at the material time during the former regime, but in the light of the principles governing a State subject to the rule of law and having regard to the core principles on which the Convention system is built. It is especially the case when the matter at issue concerns the right to life, a supreme value in the Convention and international hierarchy of human rights and which right Contracting Parties have a primary Convention obligation to protect. As well as the obligation on a State to prosecute drawn from the laws and customs of war, Article 2 of the Convention also enjoins the States to take appropriate steps to safeguard the lives of those within their jurisdiction and implies a primary duty to secure the right to life by putting in place effective criminal-law provisions to deter the commission of offences which endanger life (see *Streletz, Kessler and Krenz*, §§ 72 and 79-86, and *K.-H.W. v. Germany*, §§ 66 and 82-89).It is sufficient for present purposes to note that the above-cited principles are applicable to a change of regime of the nature which took place in Latvia following the declarations of independence of 1990 and 1991 (see paragraphs 27-29 and 210 above)."

20. In the light of the above-cited principles as restated in *Kononov*, it remains unclear what the Court is stating in paragraphs 165-166 of the present judgment when it finds it clear that the applicant's conviction was based upon legal provisions which were not in force in 1953 and that such provisions were applied retroactively. It is self-evident that the Lithuanian legislation of 1992 or 2004 was not in force in the territory of Lithuania in 1953, for the simple reason that the State was occupied by foreign forces. The principle adopted by the Court in comparable cases involving Germany or Latvia is that criminal proceedings brought following a change of regime in respect of crimes committed under the previous regime are, in principle, compatible with the Convention, provided that the Article 7 standard is met. The test under Article 7 in cases involving a change of political regime or State sovereignty over a territory is not a negative one; in other words, a violation of Article 7 occurs where a State brings a prosecution on the basis of the new law because, in formal terms, the law is indeed new unless some special circumstances exclude that violation. Judges Rozakis, Tulkens, Spielmann and Jebens summed up the Court's principle very correctly in their concurring opinion in *Kononov* when they stated: "Hence no one can speak of retrospective application of substantive law, when a person is convicted, even belatedly, on the basis of rules existing at the time of the commission of the act." The assessment of the compliance with Article 7 begins with the question of which **rules**, under either domestic or

1. Apparently the Court used a descriptive non-legal term, since Latvia is not a successor State to the USSR, given that its international legal personality remained intact in view of the illegal use of force. IZ.

international law, governed the acts under investigation at the time those acts were committed? It does not begin with the pronouncement that there is a retroactive application of the law, because the statute was evidently adopted posterior to the events.

21. Furthermore, it is important to retain that in previous cases concerning rules applicable to international crimes the Court has approved a standard requiring that offences are defined by law with **sufficient** accessibility and foreseeability.

22. The Court's ultimate conclusion in the present case is that the domestic courts' reasoning was not sufficient "to enable the Court to assess on which basis the domestic courts concluded that in 1953 Lithuanian partisans constituted a significant part of the national group." Interestingly, the Court itself raises a doubt as to its own limited approach to the interpretation of the words "in part" (see point 17 above). Furthermore, the Court accepts that "the applicant's argument is not without weight, namely that his actions, and those of the MGB, were aimed at the extermination of the partisans as a separate and clearly identifiable group, characterised by its armed resistance to Soviet power" (see paragraph 182 of the judgment). This latter position by the Court is particularly striking. Does it mean that the Court accepts arbitrary killings of combatants, assuming that partisans were combatants, or that it accepts extrajudicial killings? In the *Kononov* case, with reference to its long line of case-law, the Court pointed to the due-diligence principle in Article 2 cases. Given the context and the scale of the acts of extermination of the Baltic nations by the Soviet repressive structures following the Second World War, there is no question that investigations and prosecutions could be initiated into crimes against humanity or genocide (with regard to events in Lithuania, see paragraph 62 of the judgment). In this context, it is particularly strange to find the Court giving weight to the argument that the arbitrary killing of those resisting Soviet power was, as it were, in the nature of political confrontation.

23. Let me now turn to the reasoning of the domestic courts which, in the view of the majority, did not meet the standard of Article 7. The Court of Appeal, which had final jurisdiction on the facts, stated that the trial court's attribution of the Lithuanian partisans to the political group alone was relative and not precise. The Court of Appeal established that, on account of the massive repression of the Lithuanian nation, "Lithuanian partisans could be attributed not only to political, but also to national and ethnic groups, that is to say, to the groups listed in the Genocide Convention" (see paragraph 36 of the judgment). The Supreme Court, which did not have competence to establish facts, did not overrule the interpretation of Article 99 of the Criminal Code and its application to the facts as carried out by the Court of Appeal. It explained further the legislative history of Article 99 and fine-tuned its interpretation. It held that this Article must be read in the light of the 9 April 1992 Law "On

Responsibility for Genocide of Inhabitants of Lithuania", which law had taken verbatim the definition of genocide from the 1948 Convention. Most importantly, the Supreme Court explained that the inclusion *expressis verbis* of social and political groups in Article 99 had not been intended to expand the definition of genocide of the 1992 Law (see paragraph 38 of the judgment). This is a perfectly understandable legislative development, given how the Soviet regime targeted the Lithuanian nation. It identified social and active political groups existing within the nation and forming its backbone. I should point out that the groups within the nation as identified by the Lithuanian legislature in Article 99 correspond to the groups identified in the Soviet regime's detailed plan to destroy the national resistance against its foreign occupation. All this was explained to the Court by the Respondent Government in their observations (pp. 9-13) and is clear from the domestic courts' reasoning, especially that of the Constitutional Court. The latter specifically stated that: "the actions carried out during a certain period against certain political and social groups of the residents of the Republic of Lithuania might be considered to constitute genocide if such actions – provided this has been proved – were aimed at destroying the groups that represented a significant part of the Lithuanian nation and whose destruction had an impact on the survival of the entire Lithuanian nation".

24. It is therefore clear that limiting analysis of the present case to political groups, in isolation from the concept of a national group, is a false approach in the context of post-war events in Lithuania. The majority has chosen to see the events in Lithuania and the killing of the two partisans within a narrow ideological context. This misrepresents what the Lithuanian domestic courts have in actual fact done.

25. Could the applicant have sufficiently foreseen that he was involved in committing a grave crime in 1953? The facts at hand confirm that he was committed to fighting and eradicating the nationalist underground. The facts describe the quick extermination of all bandits. They do not describe an investigation into certain criminal activities and the bringing of suspects before the courts (see paragraphs 18-19 of the judgment). I believe that the applicant's argument before the Court of Appeal is of interest. He did not submit that the killing of the two partisans was a random act. Be that as it may, these questions of fact – and the interpretation of the domestic law – are not matters for the European Court. The Court has clearly stated that "in principle, it is not its task to substitute itself for the domestic jurisdictions. It is primarily for the national authorities, notably the courts, to resolve problems of interpretation of domestic legislation. This also applies where domestic law refers to rules of general international law or international agreements. The Court's role is confined to ascertaining whether the effects of such an interpretation are compatible with the Convention (see *Waite and Kennedy v. Germany* [GC], no. 26083/94, § 54, ECHR 1999-I)." Yet in

paragraphs 181 and 184 of the present judgment the Court reinterprets the Lithuanian domestic law and the findings of the Constitutional Court.

Conclusion

26. The Court is confronted with a historically and legally complex case. It is true that some of the reasoning given by the domestic courts could have been clearer. However, the Court has given and should give a margin for the development of national case-law and for some differences in the domestic courts' reasoning. The Court's role is not to form a different view on the scope of the provisions of the 1948 Convention from that of the primary interpreters of the Convention in the international legal system.

27. More broadly, while it is true that the Court has in recent years paid particular attention to Article 7 principles and cases, major questions remain. In the present case, the Court is not only dealing yet again with the rights of the applicant, but also finds itself at the centre of a complex social process in a society seeking to establish the truth about the past and its painful events. The United Nations has worked on the issue of mass human-rights violations, and has come up with a set of principles which are indispensable for peace in any society going through complex historical transitions (see the Report of the Independent Expert, E/CN.4/2005/102/Add.1). While maintaining the rule-of-law standard that Article 7 provides, it is particularly important that this Court, at the level of the presentation of facts and the choice of methodology and issues, is guided by these broader principles regarding the right to truth and prohibition of impunity.

JOINT DISSENTING OPINION OF JUDGES SAJÓ, VUČINIĆ AND TURKOVIĆ

In view of the Constitutional Court's ruling of 18 March 2014 (see paragraphs 56-63 of the judgment), we consider that a remedy was made available. Should the applicant consider that the Constitutional Court judgment has not been enforced, and that he has no means of having it enforced, then he is free to seek a remedy by submitting a domestic complaint under the Convention for that non-enforcement.

The application must therefore be rejected pursuant to Article 35 §§ 1 and 4 of the Convention.

DISSENTING OPINION OF JUDGE POWER-FORDE

I have already shared my analysis of this case in a joint dissenting opinion. To that I would add the following.

There are few who deny that Stalin's policy was as genocidal in ideology, intent and execution as was the policy pursued by Hitler and his Nazi collaborators. Both totalitarian regimes pushed political violence beyond all previous limits, yet in terms of human life, the destructiveness of Stalin's 'programme' '*outdid any other disaster in European history, even the Second World War'*.[1] It has been established by the domestic courts in this case that the applicant actively and knowingly executed Stalinist policy as operated in Lithuania. The four constitutive requirements of the offence of genocide under international law were met — (i) an intention (ii) to destroy (iii) part of (iv) a protected group. That he could find himself charged with and convicted of genocide—must be regarded as having been foreseeable by the applicant (in the event of a regime change, of course!) given that genocide was recognized, clearly, as a crime, under international law at the time of his participation in the deaths of the partisans.

The Court was presented with an opportunity to refer to what happened in the Soviet era—and in which the applicant was a wilful participant—by its proper name. Through this case law, it has shied away from so doing, preferring instead to conclude that the applicant was wronged for having been convicted of genocide by the Lithuanian courts. The only avenue to this conclusion was the Court's excessively formalistic and rather blinkered approach of viewing the partisans solely through the lens of a 'political group' and of ending its analysis there. Its failure to engage in any meaningful way with the reasoning of the national courts on the role of the partisans in the defence of the Lithuanian nation is lamentable.

1. Norman Davis, *Europe: A History* (London, Pimlico, 1997), 960.

DISSENTING OPINION OF JUDGE KŪRIS

1. My views on the merits of the case are expressed in the joint dissenting opinion of judges Villiger, Power-Forde, Pinto de Albuquerque and myself. Here, I expand on one additional aspect of the case.

2. One argument of the majority, on which the entire finding of a violation of Article 7 of the Convention is based, must be singled out in particular. In fact, it is *the* argument. Without it the reasoning would have led to the opposite conclusion.

That argument is set out in paragraph 179 of the judgment, wherein it is stated (emphasis added):

> "The Court next turns to the Lithuanian courts' interpretation of the crime of genocide in the applicant's case. It notes that the trial court found the applicant guilty as charged by the prosecutor, that is, guilty of genocide of Lithuanian partisans as members of a separate political group (see paragraphs 29 and 31 above). The Court of Appeal, for its part, rephrased the applicant's conviction, holding that the attribution of the Lithuanian partisans, as participants in armed resistance to occupational power, to a particular "political" group, was "only relative/conditional and not very precise". For the appellate court, the Lithuanian partisans had also been "representatives of the Lithuanian nation, that is, the national group" (see paragraphs 35 and 36 *in fine* above). Even so, *the Court of Appeal did not explain what the notion "representatives" entailed. Nor did it provide much historical or factual account as to how the Lithuanian partisans were representing the Lithuanian nation. Nor does the partisans' specific mantle with regard to the "national" group appear to have been interpreted by the Supreme Court*. The Supreme Court, which acknowledged that the applicant was "convicted of involvement in the physical extermination of part of Lithuanian inhabitants who belonged to a separate political group", merely observed that in 1944-1953 the nation's armed resistance against the Soviet occupying regime – the partisan war – took place in Lithuania (see paragraphs 39 and 40 above)."

3. To begin with, this description of the findings by the national courts emphasises one single statement by the Supreme Court, as if the latter had made no other observations (compare paragraphs 38-40 of the judgment). This representation of the Supreme Court's position is selective and, therefore, a misrepresentation. Also, one must be mindful that the Supreme Court is merely a cassation court. As such, it could either approve or disapprove of the finding by the Court of Appeal. In the present case, the latter's finding was approved. Through the above misrepresentation, however, the Court of Appeal's reasoned findings have been made to appear irrelevant. It is in the judgment of the Court of Appeal, and not that of the Supreme Court, that one should search for an answer as to the legal qualification of the applicant's acts.

4. The reasoning in paragraph 179 of the judgment indicates that, in order to satisfy the Court's test, the national courts ought to have expanded in explicit wording on the role ("specific mantle") of the Lithuanian partisans as "representatives" of the Lithuanian nation. In the words of the

majority, in order to satisfy that test, "much historical and factual account" ought to have been provided. In other words, in order to find no violation of the Convention, the majority would have been satisfied had the Lithuanian courts explicitly explained "what the notion 'representatives' entailed".

As if this were not clear in itself. When (as is noted in, *inter alia*, paragraph 62 of the judgment) a partisan movement (with their supporters) encompassed tens of thousands of young men, of whom 20,000 were killed, and when the total of those others deported, imprisoned, shot or tortured to death is expressed in six-digit numbers (which, as new evidence comes to light, is only increasing), and all this in a nation of three million, what explanation would have sufficed to satisfy the majority that the partisans were "representatives of the nation"? This question the majority left open. I wonder if it itself could provide an answer.

Courts must be precise and explicit when describing and assessing a defendant's actions. Must they be equally explicit when describing a nation's history? I do not believe so. This Court is itself at times very laconic when it comes to descriptions of historical facts, for better or for worse. After all, a trial is not a university seminar in history, and a judgment is not an encyclopaedia.

In the present case, the Court has dealt with facts which are self-evident. It is obvious that the occupied Lithuanian nation did not joyfully embrace the occupation with open arms. It is obvious that the repressions of Lithuanians by the occupying regime were on a massive scale. It is obvious that the resistance against occupation was nation-wide. It is obvious that the partisans were the spearhead of this resistance. It is obvious that they enjoyed, at least until the resistance was suppressed, wide support from the population. It is obvious that their main goal – an independent Lithuania – was also the main goal of the Lithuanian nation. And it is obvious that by performing the function of defenders of independence, however unrealistic their prospects of success at that time, the partisan movement represented the body and the spirit of the Lithuanian nation. As such, the partisans were a substantive and emblematic part of that nation.

Had the national courts to spell *this* out? Would it have made any sense in the society in which the criminal case against the applicant was decided?

I believe that any such explanation would have been redundant. These facts are known to every schoolchild in *that* society. True, they are not necessarily known in Strasbourg, but in that event this is Strasbourg's problem.

Since when does this Court require that *a national court*, which delivers its judgment *in a specific society* for the members of *that* society, must explicitly provide "much historical and factual account" as to facts which are obvious to *that* society? The question is even more legitimate in respect of historical facts which have become the cause of a nation's long-lasting trauma. So far, the maxim that it is not required to prove the obvious has not

been called into question by this Court. How is it that *sed quid in infernos dicit* has now become the methodology of interpretation of the Convention and, thus, part of the Court's case-law?

5. Even so, the facts are there. Exhaustive statistical data were provided by the respondent Government, and are also reflected in the ruling of the Constitutional Court, as cited by this Court. The assessment of the essence of the partisans' role is present there, too. Even the majority which did not find it established that the partisans genuinely "represented" the Lithuanian nation did not question the statement of the Supreme Court that "the nation's armed resistance against the Soviet occupying regime – the partisan war – took place in Lithuania". If there was "[a] partisan *war*", then *what* has not been established?

If one wishes to turn to a more detailed description and analysis of what was going on in Lithuania (as well as in the other Baltic States) in the 1940s and 1950s and what, indeed, was the character of the partisans' "representation" of the Lithuanian nation, then it is not in national (or international) courts' judgments that the relevant studies must be pursued.

6. It is on this shaky and artificial premise, namely that the national courts, by being rather succinct as to "how" the partisans "represented" the Lithuanian nation, were unable to prove that the partisans "represented" the Lithuanian nation, that the whole line of reasoning leading to a violation of Convention is based.

This is simply not convincing.

7. No less important is that the methodology employed in the present case carries with it the risk that it may be employed in future cases too. This is a warning notice to the national courts and respondent Governments, as this is a Grand Chamber case, and therefore a precedential one.

8. Courts in their ivory towers deal with law. But not only that. More importantly, they deal with human justice. No doubt, it must be *justice under the law*. But when searching for justice under the law one has to look into the heart of the matter, and not carp at trifles so that they become decisive, even if they are clearly not so. This is precisely what has happened in paragraph 179 of the judgment – and thus in the whole case.

9. About the same time as the applicant was busy with operations against the partisans, someone looked into the heart of the matter. Archibald MacLeish, a great poet and former Librarian of Congress, wrote in his "The Young Dead Soldiers Do Not Speak":

> "The young dead soldiers do not speak.
>
> Nevertheless, they are heard in the still houses: who has not heard them?
>
> They have a silence that speaks for them at night and when the clock counts.
>
> They say: We were young. We have died. Remember us.
>
> They say: We have done what we could but until it is finished it is not done.

> They say: We have given our lives but until it is finished no one can know what our lives gave.
>
> They say: Our deaths are not ours: they are yours, they will mean what you make them.
>
> They say: Whether our lives and our deaths were for peace and a new hope or for nothing we cannot say, it is you who must say this.
>
> We leave you our deaths. Give them their meaning.
>
> We were young, they say. We have died; remember us."

10. This sounds like a commandment. To courts, too. To *this* Court especially, given its prominence as "the conscience of Europe".

Because it is *this Court* which has now been charged with giving meaning – at last – to their deaths.

And yet – what meaning have *we* given to their deaths by this miserable judgment?

"The rest is silence."