



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

FOURTH SECTION

**CASE OF DRÉLINGAS v. LITHUANIA**

*(Application no. 28859/16)*

JUDGMENT

STRASBOURG

12 March 2019

*This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.*



**In the case of Drėlingas v. Lithuania,**

The European Court of Human Rights (Fourth Section), sitting as a Chamber composed of:

Ganna Yudkivska, *President*,

Paulo Pinto de Albuquerque,

Faris Vehabović,

Egidijus Kūris,

Iulia Antoanella Motoc,

Carlo Ranzoni,

Péter Paczolay, *judges*,

and Marialena Tsirli, *Section Registrar*,

Having deliberated in private on 29 January 2019,

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

**PROCEDURE**

1. The case originated in an application (no. 28859/16) 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 Stanislovas Drėlingas (“the applicant”), on 18 May 2016.

2. The Lithuanian Government (“the Government”) were represented by their Agent, Ms K. Bubnytė-Širmenė.

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. On 29 January 2018 notice of the application was given to the Government.

**THE FACTS****I. THE CIRCUMSTANCES OF THE CASE**

5. The applicant was born in 1931 and lives in Utena.

**A. Historical background**

6. The historical background is summarised in *Vasiliauskas v. Lithuania* [GC], no. 35343/05, §§ 11-14, ECHR 2015.

## **B. The partisans A.R. “Vanagas” and B.M. “Vanda”**

### *1. A.R. “Vanagas”*

7. Adolfas Ramanauskas, code name “Vanagas” (hereinafter – also A.R. “Vanagas”), was born in 1918 in the United States of America. In 1921 his family returned to Lithuania. He was a teacher.

8. As established by the domestic courts, A.R. “Vanagas” became a participant in the armed resistance against the Soviet occupation, a Lithuanian partisan, on 25 June 1945. Initially, he led a partisan squad, later he became a commander of a partisan battalion, then commander of a brigade, and from October 1948 he was the commander of the south Lithuania region. In 1949 an all-partisan organisation, the Movement of the Struggle for the Freedom of Lithuania (*Lietuvos laisvės kovos sąjūdis* (“LLKS”)) was formed. On 16 February 1949 the organisation adopted a declaration stating that the LLKS Council was “the highest political authority of the nation, leading the nation’s political and military struggle for freedom”. That year, in the assembly of partisan commanders of the whole of Lithuania, A.R. “Vanagas” was appointed first deputy of the Chairman of the Presidium of the LLKS (*Lietuvos laisvės kovos sąjūdžio tarybos prezidiumo pirmininko pavaduotojas*). Later that year he was also elected commander in chief of the defence forces of the LLKS. In 1951 A.R. “Vanagas” became chairman of the LLKS Council.

9. In 1956 he was captured and tortured, and in 1957 sentenced to death and shot (see also paragraphs 20-31 below).

10. After restoration of Lithuania’s independence in 1990, by a ruling of 19 March 1991 A.R. “Vanagas” was rehabilitated by the Supreme Court.

11. In 1997 “Vanagas” was posthumously recognised as a participant in the armed resistance to the Soviet occupation and granted volunteer serviceman status.

12. In 1998 and 1999 he posthumously received the military rank of brigadier general, and was granted the State decorations.

13. On 16 October 2003 the Seimas granted to A.R. “Vanagas”, as a person who had signed the declaration of the LLKS of 16 February 1949, the status of signatory to the act of independence of Lithuania.

14. The Seimas, *inter alia*, having regard to the fact that on 6 March 2018 it was 100 years since the birth of A.R. “Vanagas”, emphasising the importance of the partisan movement fighting against the Soviet occupation, seeking to give due respect to that historic personality for the Lithuanian nation, proclaimed the year 2018 as the year of Adolfas Ramanauskas “Vanagas”.

15. On 20 November 2018 the Seimas also declared the leader of the partisans A.R. “Vanagas” the head of the Lithuanian State which had fought the Soviet occupation. His remains were discovered the same year and he received State funeral.

2. *B.M. “Vanda”*

16. Birutė Mažeikaitė, code name “Vanda” (hereinafter – also B.M. “Vanda”), was born in 1924. From 1945 she was a liaison person (*ryšininke*) of the partisans of the Dainava Region, and was later a partisan in that region. She was A.R. “Vanagas” wife.

17. In 1956 she was captured, and in 1957 sentenced to deportation (see also paragraphs 20-32 below).

18. She was rehabilitated on 18 September 1989 by the Supreme Court of the Lithuanian SSR.

19. In 1998 B.M. “Vanda” was recognised as a participant in the armed resistance to the Soviet occupation.

**C. The applicant’s career at the MGB/KGB and his conviction for genocide**

1. *The applicant’s status within the MGB/KGB of the Lithuanian SSR*

20. As established by the domestic courts, for two years from March 1950 the applicant had studied at the Lithuanian SSR (hereinafter – the LSSR) Ministry of State Security (MGB) School in Vilnius. Upon graduation from that establishment in 1952, he was granted the military rank of officer-lieutenant, and joined the 2-N Board of the LSSR MGB, the main function of which was the fight against the national resistance movement. In particular, the division where the applicant worked was tasked with carrying out surveillance of the members and leadership of the Lithuanian underground movement. From 1952 the applicant was also a member of the USSR Communist Party.

21. At the time of arrest of A.R. “Vanagas” and B.B. “Vanda” in 1956, the applicant was a senior operative officer at the KGB (successor to the MGB; see paragraph 24 of the Supreme Court’s ruling in paragraph 51 below and paragraph 54 below), and had the rank of senior lieutenant.

2. *The operation to capture partisans A.R. “Vanagas” and B.M. “Vanda”*

22. According to a report of 18 October 1956 by the Chairman of the KGB of the Lithuanian SSR to the Chairman of the KGB of the USSR, which was relied on during the criminal proceedings against the applicant, from 1945 A.R. “Vanagas” had been an active participant in the “bourgeois” “national underground”. The report also noted the role of A.R. “Vanagas” in the LLKS, where he had eventually been declared the chief commander of the defence forces and had been granted the military rank of general (also see paragraph 8 above). Notwithstanding the fact that A.R. “Vanagas” had been in hiding with his wife B.M. “Vanda”, he retained that rank until the day of his capture.

23. The report also stated that following the plan for “liquidating the remaining banditry in the Republic (*banditizmo likučių Respublikoje likvidavimas*)” set by the KGB of the USSR, “particular attention” and “paramount importance” had been given to the search for and capture of A.R. “Vanagas”. The report noted that in 1950-53 some of the “bandit gangs” had been liquidated. Nonetheless, A.R. “Vanagas” and his wife had succeeded in avoiding capture by moving within Lithuanian territory. A special operative group from among the qualified Chekists of the KGB was therefore established to work continuously in the search for A.R. “Vanagas”. In 1956 alone, a total of thirty agents were recruited to pursue A.R. “Vanagas” and his family. Places where it was possible A.R. “Vanagas” and his wife would show up in the towns of Kaunas and Merkinė were covered by reliable and qualified agents; in other places where he might also appear active measures, including cooperation with the armed forces of the Ministry of the Interior, were employed so that A.R. “Vanagas” could not set up a new hideout.

24. The report also stated that on 11 October 1956 one of the agents, “Ž”, alerted the security services that A.R. “Vanagas” and his wife B.M. “Vanda” would be staying at his home in Kaunas overnight. The same day operation was then planned for their capture.

25. The plan specified that two detention groups were composed to effect the seizure: the first group, consisting of six operative agents and led by mayor J.O., was to be in a car approximately 200 metres from “Ž”’s house in Kampo Street; the second group, consisting of six operative agents and led by mayor N.D., was to be in another car in Algirdo Street, approximately 300 metres from that house. As later established by the trial court, the applicant was included in the second detention group (see paragraph 38 below). Radio contact between the two detention groups and surveillance of the house as well as surrounding objects (railway tracks, bridges, and so on) was to be assured. The plan also stipulated that either group could arrest A.R. “Vanagas” and B.M. “Vanda”; it only depended which street they chose to walk into. The plan also stipulated that further instructions to the agents who were to take part in that operation would be given by the deputies to the LSSR KGB Chairman.

26. According to the KGB documents, on 12 October 1956 at about 8.30 a.m., A.R. “Vanagas” and B.M. “Vanda” left “Ž”’s house in Kaunas. They walked on to Kampo Street, where they were seized by the KGB officers. They were carrying two pistols and two seals inscribed “LLKS Presidium” and “LLKS Military Headquarters (*LLKS ginkluotųjų pajėgų štabas*)”, forged passports, and other documents. After the arrest, A.R. “Vanagas” and B.M. “Vanda” were transported to Vilnius, where at about 2 p.m. they were detained in the prison of the KGB of the Lithuanian SSR in Vilnius.

27. On 15 October 1956 the head of the KGB of the Lithuanian SSR wrote a special report to the Chairman of the LSSR Communist Party to the

effect that now that A.R. “Vanagas” had been captured “the liquidation of the commanders of Lithuania’s bourgeois nationalist banditry formations was complete”.

28. The report of 18 October 1956 (see paragraph 22 above) also concluded that “having arrested the last leader of the Lithuanian nationalist underground [A.]R., the liquidation of the former heads of the Lithuanian bourgeois nationalist banditry formations was totally completed”.

29. As detailed in a medical report of 15 October 1956 by the doctors at the KGB hospital in Vilnius, A.R. “Vanagas” was taken to that hospital at 4:30 p.m. on 12 October 1956 in a particularly grave condition. He was unconscious, his blood pressure was barely felt; he had muscle tremors. Upon medical examination it was established that A.R. “Vanagas” had six stab wounds to his right eye socket, wounds in his stomach, a wide wound from a tearing on his scrotum; both his testicles were gone. He was given a blood transfusion and thus stabilised, and he was operated on. The doctors noted that if his health allowed A.R. “Vanagas” could be interrogated after two or three weeks.

30. In the KGB decision of 13 October 1956 on the detention of “Vanagas” it was, *inter alia*, stated that by nationality he was Lithuanian, and he also belonged to “Lithuanian bourgeois nationalists”. The decision underlined the specific, active and leading role of A.R. “Vanagas” in the partisan movement. The decision also noted that in 1946-47 A.R. “Vanagas” took an active part in the publication of the anti-Soviet newspapers *Bell of Freedom (Laisvės varpas)* and *Voice of Freedom (Laisvės balsas)*.

31. On 24-25 September 1957 the Supreme Court of the Lithuanian SSR found A.R. “Vanagas” guilty of counter-revolutionary crime and treason against the “Motherland” and sentenced to death. He was shot on 29 November 1957 in Vilnius.

32. By a decision of the Supreme Court of the LSSR of 8 May 1957, B.M. “Vanda” was sentenced to eight years’ imprisonment. She was deported to the Soviet Gulags in Kemerovo region, in Siberia, in what is now the Russian Federation.

### 3. *The applicant’s conviction for genocide*

#### (a) **The criminal proceedings against the applicant**

33. After Lithuania regained its independence, on 13 June 2014 the applicant was charged with being an accessory to genocide, in accordance with Articles 24 § 6 and 99 of the Criminal Code (see paragraph 58 below), for having taken part in the operation of 11-12 October 1956 during which A.R. “Vanagas” was captured, and subsequently tortured, sentenced to death and executed, and B.M. “Vanda” was captured and afterwards sentenced to deportation. The prosecutor noted that both partisans were

members of the “Lithuanian armed resistance to the Soviet occupation” and members of a “separate national-ethnic-political group”.

**(b) The trial court’s judgment**

34. By a judgment of 12 March 2015 the Kaunas Regional Court found the applicant guilty of being an accessory to genocide under Article 99 of the Lithuanian Criminal Code. It held that on 11 and 12 October 1956 the applicant had taken part in an operation during which one of the most prominent leaders of the Lithuanian partisans, who was also the chairman of the all-partisan organisation, the Movement of the Struggle for the Freedom of Lithuania, A.R. “Vanagas”, was captured together with his wife, B.M. “Vanda”, who was also a partisan. Afterwards, A.R. “Vanagas” was detained in a KGB prison, tortured nearly to death, sentenced, and executed (see paragraphs 29 and 31 above); B.M. “Vanda” was sentenced to deportation (see paragraph 32 above).

35. Referring at length to the Lithuanian Constitutional Court ruling of 18 March 2014 (see paragraph 59 below; other relevant extracts from that ruling are reproduced in *Vasiliauskas*, cited above, §§ 56-63), the trial court pointed out that, in cases where the intention was to exterminate part of a protected group, that part should be sufficiently significant to have an impact on the survival of the entire protected group (see paragraph 59 below). The trial court underlined that Lithuanian partisans were also representatives of the Lithuanian nation (*lietuvių tauta*), and therefore representatives of a national group. It noted that Soviet genocide had been perpetrated precisely in accordance with the inhabitants’ “national” criterion. In the case at hand, given their background, to which the court also gave particular consideration (see paragraphs 8 and 16 above), A.R. “Vanagas” and B.M. “Vanda”, as active participants in the resistance to the Soviet occupation, “had been important for the survival of the entire national group (the Lithuanian nation), defined by ethnic characteristics, given that armed resistance to the occupation obstructed the Soviet occupation authorities in carrying out deportations or taking other repressive measures against Lithuanian civilians”. Relying on the aforementioned Constitutional Court ruling, the trial court also noted that the applicant “had served in the MGB/KGB unit, the main task of which was the elimination of part of Lithuania’s population – members of the armed resistance to the Soviet occupation, belonging to a separate national-ethnic-political group, and which had an impact on the survival of the national-ethnic group”.

36. The trial court held that by having taken part in the aforesaid operation the applicant had committed genocide of Lithuanian partisans, who constituted a “national-ethnic-political group”. Article 99 of the Criminal Code could thus be applied retroactively. The court also noted that four of the protected groups listed in that Article (national, ethnic, racial and religious) coincided with those protected under international law norms.

37. On the facts of the case the trial court also rejected the applicant's arguments that he could not be held liable for the fate of A.R. "Vanagas" and B.M. "Vanda" since he had not personally arrested them, nor had he been involved in the sentencing of A.R. "Vanagas" or the deportation of B.M. "Vanda". The court noted that from 1952 the applicant had worked as an operational agent of the MGB. Furthermore, on 12 October 1956 he had been not a simple member of that repressive organisation, but an officer of senior rank. Accordingly, "he perfectly well understood one of the core goals of that repressive structure of that period in occupied Lithuania – to finally physically eliminate the members of the organised Lithuanian national resistance to the Soviet occupation – Lithuanian partisans, their contacts and supporters". Moreover, the applicant had served in the MGB/KGB voluntarily, and had not been forced by anyone. From his earlier experience in that service "he had clearly known that such a high-ranking participant in the Lithuanian national resistance to the occupational regime as A.R. "Vanagas" and his spouse B.M. "Vanda" without doubt would be physically eliminated or deported, since this was the practice of the repressive structures in Lithuania at that time, and was applied not only to those representing resistance to the occupying Soviet regime, but even to those individuals who had nothing to do with the resistance".

38. The trial court also noted that the applicant had taken part in the impugned "particularly professionally organised and very much clandestine" operation for the capture of A.R. "Vanagas" and his spouse B.M. "Vanda" of his own free will. Although the applicant did not apprehend them personally, he took actions which assisted in their arrest. It was also clear that apart from the members of the group that personally arrested A.R. "Vanagas" and B.M. "Vanda", other individuals, including the applicant, also took actions which aided the arrest. Without those other persons' participation in the operation – such as those who had betrayed the two partisans, and those who had followed them and blocked neighbouring streets, yards or bridges so that they could not escape, the arrest would not have been successful. Furthermore, according to the archive materials, the applicant was a member of the reserve group for the arrest, whose role according to the plan was analogous to the role of those who actually had arrested A.R. "Vanagas" and B.M. "Vanda". It was only because A.R. "Vanagas" and B.M. "Vanda" chose to walk on to the street where the applicant's arrest group was not positioned that meant it was the first arrest group which captured the two partisans (see paragraph 25 above). Accordingly, the applicant's role in that operation had still been an important one.

39. In that context the trial court also rejected the applicant's line of defence that he had not even been present in the operation in Kaunas, because he had already arrived at the KGB headquarters in Vilnius, where all the participants in that operation had gathered in its wake, in service uniform instead of plain clothes, and that he had therefore been excluded

from taking part in that operation. The trial court pointed out that every action in a repressive organisation such as the KGB was painstakingly regulated and documented. Had the applicant in reality arrived in service uniform, this would have been evaluated as a gross breach of his duties and, without a doubt, would have been recorded in the KGB documents. On the contrary, after the operation the KGB placed even more confidence in him, and he was entrusted with the guard of A.R. “Vanagas” at the KGB hospital and visiting him in prison, a right which was not vouchsafed to other participants in that operation.

40. Having taken into account the applicant’s advanced age and the fact that the crime had been committed more than fifty years previously, the trial court considered that the minimum sanction – deprivation of liberty in a correctional home for a period of five years – was appropriate. The court noted that although the applicant’s health was weak, it was not so fragile that he could not serve a sentence involving deprivation of liberty. He began serving the sentence.

**(c) The Court of Appeal**

41. On 10 July 2015 the Court of Appeal dismissed an appeal by the applicant and upheld his conviction for genocide under Article 99 of the Criminal Code. Relying on the Constitutional Court ruling of 18 March 2014, the Court of Appeal emphasised the Lithuanian partisans’ role during the Lithuanian inhabitants’ resistance to the Soviet occupation. It underscored that the Lithuanian partisans had been significant for the survival of the entire national group (the Lithuanian nation) defined by ethnic characteristics, given that the partisans obstructed the Soviet repressive structures designed to facilitate deportation and other forms of persecution of civilians in Lithuania. The partisans accordingly fell within a “separate national-ethnic-political group”.

42. The Court of Appeal also underlined that both A.R. “Vanagas” and B.M. “Vanda” had been active participants in the resistance to the Soviet occupation. In fact, A.R. “Vanagas” had been one of its leaders (the court referred to his service history, see paragraphs 8–15 above, and Lithuanian legislation as to the status of volunteer soldiers). Accordingly, the repressive structures’ actions against them could be considered as targeted against a “significant part of a national-ethnic-political group”. This was also proved by the fact that their capture had been declared by the KGB as the end of the “liquidation of former bourgeois nationalist banditry formations” (see paragraphs 27 and 28 above). Although the active resistance ended in 1953, A.R. “Vanagas” and B.M. “Vanda” were searched for by the Soviet authorities even after this. The domestic court paid attention to documents from the relevant time which showed that a particular commitment was made to ensuring the capture of A.R. “Vanagas” in pursuance of the plan for liquidation of the Lithuanian partisans. In his testimony the applicant

confessed that at the time he was aware of A.R. “Vanagas”, that the latter was leader of the partisan movement, and that he was in hiding. Accordingly, the mere fact that A.R. “Vanagas” and B.M. “Vanda” had succeeded in hiding from repression, not only during the partisan war but until their capture in 1956, was not an impediment to qualifying the applicant’s actions as genocide.

43. As to the applicant’s guilt, the appellate court also found that he, having studied at the MGB school and joined that service of his own free will, understood at the time the special goal of the Soviet totalitarian policy, which was to physically exterminate those participating in the Lithuanian national resistance to the Soviet occupation regime – the Lithuanian partisans – “so that the basis of the Lithuanian civil nation (*pilietinė tauta*) would be destroyed”. Accordingly, when briefed on 11 October 1956 about the operation for the arrest of A.R. “Vanagas” and B.M. “Vanda”, the applicant must have understood the danger of his actions, comprehended what was the intended result of that operation, and sought that outcome (the death and deportation of those arrested). In that context, the fact that A.R. “Vanagas” and B.M. “Vanda” were not killed during the operation in which they were captured did not refute the special aim of exterminating the “national-ethnic-political group”, namely the Lithuanian partisans. Nor had that aim been negated by the fact that afterwards the applicant was not responsible for deciding the means, namely issuing a death sentence or a sentence of deprivation of liberty, by which that goal would be achieved.

44. The Court of Appeal also rejected the applicant’s claim that during the impugned operation he had been at the KGB headquarters in Kaunas and had not been in the street where the operation took place, and thus had not taken part in the operation for the capture of A.R. “Vanagas” and B.M. “Vanda”. This was proved by the archive documents, a witness statement, and the applicant’s own testimony given during the pre-trial investigation. Lastly, the Court of Appeal rejected the applicant’s argument that, when arrested on 12 October 1956, A.R. “Vanagas” had attempted to commit suicide. The injuries, such as those noted in the medical expert report (see paragraph 29 above), could not have been self-inflicted.

#### **(d) The Supreme Court**

45. At the applicant’s request, on 18 January 2016 the Supreme Court suspended the execution of his sentence and ordered that he be released from the correctional home until the merits of his appeal on points of law had been examined by the Supreme Court.

46. By a final ruling of 12 April 2016, the Supreme Court, sitting in a plenary session formation (*plenarinė sesija*) of seventeen judges, upheld the lower courts’ decisions as regards the applicant being guilty of genocide. However, it amended the lower courts’ decisions by reducing the

applicant's sentence to five months' deprivation of liberty, which meant that by that time he had already served his sentence.

47. Relying, among other sources, on the Court's judgment in *Vasiliauskas* (cited above), the Supreme Court firstly established that in 1956, at the time of commission of the act by the applicant, genocide was recognised as a crime under international law. Given the applicant's background in MGB/KGB, the international legal instruments prohibiting genocide (as well as complicity in committing genocide) and providing for criminal liability for genocide must have been known to him.

(i) *Regarding the elements of the crime of genocide and the application of Article 99 of the Criminal Code*

48. As to the definition of genocide in Lithuanian law and its compatibility with the principle of rule of law, the Supreme Court recapitulated:

"11. When defining the crime of genocide in Article 99 of the Criminal Code, in addition to national, ethnic, racial and religious groups, social and political groups, that is, the two groups which were not provided for when defining the crime of genocide under the universally recognised norms of international law have been included. The Constitutional Court of the Republic of Lithuania has pointed out in the Ruling of 18 March 2014 that '<...> the inclusion of social and political groups into the definition of genocide in Article 99 of the Criminal Code <...> was determined by a concrete legal and historical context – the international crimes committed by the occupation regimes in the Republic of Lithuania'. The Constitutional Court, *inter alia*, concluded that the legal regulation established in Article 99 of the Criminal Code and a broader interpretation of the crime of genocide does not conflict with the Constitution. On the other hand, the Constitutional Court has held that paragraph 3 of Article 3 of the Criminal Code ..., in so far as this paragraph establishes the legal regulation under which a person may be brought to trial under Article 99 of the Criminal Code for the actions aimed at physically destroying, in whole or in part, the persons belonging to any social or political group, where such actions had been committed prior to the time when liability was established in the Criminal Code for the genocide of persons belonging to any social or political group (thus, the establishment of the retroactive effect of Article 99 of the Criminal Code for the actions which are classified as genocide only under the norms of national law) was in conflict with Article 31 §4 of the Constitution and the constitutional principle of a State under the rule of law."

49. The Supreme Court also gave particular consideration to the Court's judgment in *Vasiliauskas* (cited above), and held:

"12. In the context of the cassation case at issue, the judgment rendered by the Grand Chamber of the European Court of Human Rights on 20 October 2015, *after* the decisions disputed in the given proceedings, in the case *Vasiliauskas v. Lithuania* (application no. 35343/05) is relevant. The Court held that there has been a violation of Article 7 (*nullum crimen sine lege*) of the Convention for the Protection of Human Rights and Fundamental Freedoms by the conviction of the applicant under Article 99 of the Criminal Code for the genocide of a political group of the Lithuanian population – participation in the killing of two Lithuanian partisans in 1953. The Court, *inter alia*, found that in 1953 international treaty law did not include a 'political group' in the definition of genocide, nor could 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 (*Vasiliauskas v. Lithuania*, § 178). In examining whether the interpretation of the actions of V. Vasiliauskas provided by the Lithuanian courts in the case of the applicant V. Vasiliauskas conformed to the concept of the notion of genocide as it stood in 1953, the Court, *inter alia*, noted that authorities have discretion to interpret the definition of genocide more broadly than that contained in the 1948 Genocide Convention. However, such discretion does not permit domestic tribunals to convict persons accused under that broader definition retrospectively. Considering the fact that in 1953 political groups were excluded from the definition of genocide under international law, the [Court] held that the prosecutors were precluded from retroactively charging, and the domestic courts from retroactively convicting, the applicant of genocide of Lithuanian partisans, as members of a political group.

It also follows from the judgment of the [Court] in the case of *Vasiliauskas v. Lithuania* that the Grand Chamber held that the Lithuanian courts had failed to adequately substantiate their conclusions in the judgments rendered in the criminal case of V. Vasiliauskas that the Lithuanian partisans constituted a significant part of the national group, that is, a group protected under Article II of the Genocide Convention.”

50. On the question of attribution of A.R. “Vanagas” and B.M. “Vanda” to a significant part of a “separate national-ethnic-political group”, and the twofold concept of the nation, the Supreme Court held:

“13. It has been mentioned that in the criminal case at issue S.D. has been convicted of aiding representatives of the Soviet occupational power to commit genocidal acts against A.R. and B.M. as ‘members of a distinct national-ethnic-political group, namely one engaging in armed resistance to the Soviet occupation’. The appellate court noted that Lithuanian partisans – members of the armed resistance to the occupational power – are attributed to a ‘separate national-ethnic-political group’ and assessed the unlawful actions directed against A.R. and B.M. by the repressive structures of the occupational power as directed towards a significant ‘part of the national-ethnic-political group’. Thus, the courts described partisans as a national-ethnic-political group. According to the law, where at least one element of a national or ethnic or political group (or a part thereof) under extermination is identified, that is a sufficient basis (also in the presence of other constitutive elements of genocide) to apply Article 99 of the Criminal Code. The above-referred characteristics of a group (or a part thereof) exterminated by genocide have an autonomous alternative meaning of a constitutive element of *corpus delicti*.

Thus, S.D. has been convicted of aiding in the commission of genocide against the persons belonging to the national, ethnic and political group. A political group is not on the list of groups protected by the Genocide Convention. However, that does not make the application of criminal liability to S.D. for genocide unjustified. Criminal actions directed at the extermination of persons belonging to any group protected under the Convention are deemed to be genocide. The courts have held that A.R. and B.M., as members of the resistance to the Soviet occupation who belonged to a political group, were also members of the groups of individuals protected under the Genocide Convention – a national and an ethnic group – therefore, where genocide against any of these groups is discovered, this constitutes a basis for the application of criminal liability. It should be noted that the factual circumstance identified by the courts, namely the affiliation of A.R. and B.M. to a political group, Lithuanian partisans, is relevant in disclosing the essence of the criminal offence and historically

may not be assessed separately from the assessment of a national and ethnic group as a characteristic.”

“18. It should be noted in the context of the case at issue that the definition of a national and an ethnic group should be linked with the concept of a nation, the understanding whereof is twofold ... The first meaning is related to the notion of ethnicity or an ethnic group, and means a historically developed community – an ethnic nation with common ethnic, cultural characteristics (origin, language, self-awareness, territory, ethnopsychology, traditions, and so on). Thus, an ethnic group is a community of persons with a common origin, language, culture, and self-identity. The other meaning of a nation pertains to the notion of nation (Latin *natio*) or a modern nation to which, as a formation, the attributes of statehood, nationalism and citizenship are characteristic. Therefore, a nation may be defined as a community of people historically formed on the basis of a common language, territory, socioeconomic life, culture and national self-identity, with a common national, political and economic perspective. Thus, a national group means a historically developed community of people belonging to a certain nation, formed on the basis of language, territory, socioeconomic life, culture, national self-identity and other common characteristics. Individuals belonging to both a national and an ethnic group may be interrelated, and a complete delimitation of such groups as a separate formation in the crime of genocide is not always possible.”

51. As to the international legal and historical context in 1940-56 and the national resistance to the Soviet repression the Supreme Court expounded:

“20. In the context of the proceedings at issue, it is highly important to consider the international legal and historical circumstances of the period between 1940 and 1956, as well as the scope (massive scale) of the national resistance to the occupying power and the scale of repression of the Soviet occupying power against the Lithuanian population.

21. As is generally known, on 15 June 1940 an act of aggression was carried out by the USSR against the Republic of Lithuania, namely the invasion of the Soviet armed forces into the territory of the Republic of Lithuania and the occupation of the territory of the Republic of Lithuania. Continuing its aggression, the USSR carried out the annexation of the territory of the Republic of Lithuania on 3 August 1940. In June 1941 the Republic of Lithuania was occupied by the German Reich: the latter occupation began on 22 June 1941 when Germany attacked the Soviet Union and ended in 1944–45 after the USSR had reoccupied the territory of the Republic of Lithuania. The second Soviet occupation continued until 11 March 1990, when the independence of the Republic of Lithuania was restored.

22. After the Soviet Union occupied Lithuania, its residents suffered mass acts of repression that violated fundamental human rights to life, health, freedom and dignity...

[The Supreme Court then cited passages from the ruling of 18 March 2014 of the Constitutional Court about the scale of repressions, see *Vasiliauskas*, cited above, § 62].

23. The occupants used the most brutal methods of fighting: they destroyed the farmsteads of partisan families and their supporters with mortar fire, publicly disfigured dead bodies in public squares of towns and villages, and arranged provocations by hitmen agents ... Repression was also applied against the families of participants in the resistance and their supporters: their property (farms) was

confiscated, and their families were exiled *en masse*. On the basis of resolutions of the Council of Ministers of the USSR, the largest deportations of Lithuanians were carried out in 1948-51. The first two deportations (in May 1948 and March-April 1949) were officially directed against the families of known partisans and persons in hiding, partisans who had been killed, and convicted persons, also against the participants in the resistance: in May 1948 more than 40,000 residents (around 11,000 families) were deported from Lithuania, and in March–April 1949 more than 32,000 people (around 10,000 families)...

24. The main bodies of the Soviet occupational power that carried out repressive acts in the suppression of the Lithuanian national resistance against occupants from 1944 were the relevant structures of the People's Commissariat for Internal Affairs and the People's Commissariat for State Security (NKVD and NKGB) of the LSSR; from 1946, the people's commissariats were renamed ministries (the Ministry of Internal Affairs (MVD) and the Ministry of State Security (MGB)), which became from 1954 the State Security Department of the LSSR (KGB), there were also internal security units of the USSR NKVD-MVD-MGB, special "extermination" squads (*stribai*) and other repressive bodies. By the Law of 16 July 1998 "On the Assessment of the USSR State Security Committee (NKVD, NKGB, MGB, KGB) and the Current Activities of the Staff Members of this Organisation", the Seimas of the Republic of Lithuania recognised the NKVD, NKGB, MGB, KGB as a criminal organisation which had committed war crimes, genocide, acts of repression, terror and political persecution in the Republic of Lithuania occupied by the USSR.

25. The annihilation of the participants in the armed national resistance, namely Lithuanian partisans, their connections and supporters, by the occupying power and its repressive bodies, was systematic, consistent, based on a clear methodology and instructions. It has been mentioned that the acts of repression were directed against the most active and advanced part of the Lithuanian nation as a national, ethnic group. Such extermination had the clear aim of influencing the demographic changes of the Lithuanian nation and its very survival, as well as at facilitating the sovietisation of the occupied Lithuania. The extermination of the resistance participants not only meant the elimination of obstacles to the objectives of the occupying regime; it also had another purpose, namely to intimidate the residents of Lithuania by showing what destiny awaited those who refused to obey the occupying power.

It should be noted that Resolution No 1481 of 25 January 2006 of the Parliamentary Assembly of the Council of Europe 'On the Need for International Condemnation of Crimes of Totalitarian Communist Regimes' stated that the communist regimes justified massive violations of human rights and crimes against them in the name of the class struggle theory and the principle of dictatorship of the proletariat; they legitimised the elimination of people who were considered harmful to the construction of a new society and as such enemies of the regime, and a vast number of victims in every country concerned were its ethnic residents."

52. As to the partisans' role specifically, the Supreme Court stated:

"26. When the Soviet Union occupied Lithuania for the second time, tens of thousands of Lithuanian residents joined the struggle against the occupants. In 1944-45, about 30,000 armed men joined forces in the forests. ... The majority chose armed struggle consciously and were committed to fighting until the restoration of an independent Lithuanian State... Partisan groups regulated their activities with statutes and rules. Those who joined the partisans took an oath. Partisans wore military uniforms with distinctive signs. The ten years of resistance, also known as the Lithuanian War or the resistance or partisan war, is exceptional in the history of Lithuania from several aspects: its duration (almost ten years), universality (during the

entire period there were at least 50,000 active members of the armed resistance and about 100,000 others who participated in the resistance as members of underground organisations and supporters), and the unequal balance of power which was unfavourable to the Lithuanian partisans .... On 10-20 February 1949 an assembly of Lithuania's partisan commanders took place; this brought together the units of the anti-Soviet resistance into one organisation, namely the Movement of the Struggle for the Freedom of Lithuania (LLKS). This organisation, under the leadership of General Jonas Žemaitis-Vytautas, adopted military-political documents proclaiming the LLKS as the organisation which was leading the political and military liberation struggle of the nation and represented the ideals of independent Lithuania in the occupied country. During the assembly, on 16 February 1949, a political declaration was adopted, whereby the restoration of the independent parliamentary Republic of Lithuania was declared the final goal of the partisan movement's struggle.

27. According to the laws of the Republic of Lithuania ... '[d]uring the occupation period, the LLKS Council [was] the supreme political body of the nation, in charge of the political and military fight for the liberation of the nation'...

29. People of different status participated in the national armed resistance, mostly Lithuanians by nationality; they were united by a common goal, namely to restore the independence of Lithuania. The resistance was supported and the occupation was also resisted in other ways by a large part of the Lithuanian nation. As mentioned, according to the data available not less than 50,000 people participated actively in the armed resistance that lasted for a decade, and the whole resistance movement involved around 100,000 residents of Lithuania, as members of underground organisations and supporters; around 20,000 Lithuanian partisans and their supporters were killed in total during the resistance. It should be noted that according to the data of the Department of Statistics of Lithuania, in 1945 the population of Lithuania was 2.5 million ..., and there were approximately 2.3 million residents in 1951 .... Although the numbers who participated in the resistance and suffered from the repression are undoubtedly high, they should be considered not only by "quantitative" criterion but also in the context of the overall scale of the repression, including massive deportations of civilians. It has been mentioned that the acts of repression by the Soviet power were also directed against the family members of partisans and their connections and supporters, who were also incarcerated, deported or killed: [in this way,] it was also aimed at the extermination of a large part of the Lithuanian nation, a national, ethnic group. Thus, the total number of victim participants in the resistance – Lithuanian partisans, their connections and supporters, who were killed or suffered repression of other kinds, is significant both in absolute terms and considering the size of the total population of Lithuania at that time.

30. It has been mentioned that armed participants in the resistance, Lithuanian partisans, who had the support of Lithuanian residents, were putting into practice the right of the nation to self-defence against occupation and aggression. The armed resistance obstructed the Soviet occupational structures in carrying out their deportations, exiles, and other repressive measures against Lithuanian civilians. In this way the participants in the resistance not only really sought to ensure the survival of the nation (by defending it) but also embodied that survival. The leadership of Lithuanian partisans was the supreme political and military power, represented abroad by the Supreme Committee for the Liberation of Lithuania (Preamble of the Law of the Republic of Lithuania on the Status of Participants in Resistance against the Occupations of 1940-90 ...."

53. Regarding the role of A.R. “Vanagas” and B.M. “Vanda” in the national resistance movement, the Supreme Court reiterated the lower courts’ findings of fact (see paragraph 8 above). It also held:

“31. ... The courts established in the proceedings that A.R. and B.M. were active participants in the armed resistance against the Soviet occupation, and A.R. was also one of the leaders of this resistance. Lithuanian partisans, as a separate political group, were significant for the survival of the entire national group (the Lithuanian nation), which is defined by ethnic features.

Attention should be drawn to the fact that A.R. was persecuted, and his destruction was sought, not only because of his membership of the partisan movement but also as the chairman of the political power of the occupied State: the Presidium of the LLKS Council. The evidence in the case file confirms that large forces of the LSSR MGB (KGB) were allocated for that purpose: a permanent operational group for the search for A.R. was formed, more than forty agents were deployed, much organisational work was undertaken, and the search continued for several years.

It should also be noted that after the detention of A.R. and his wife B.M. it was reported to the leadership of the LSSR MGB (KGB) that the detention of A.R. had completed the ‘liquidation of Lithuanian ‘bourgeois nationalist’ (bandit) leaders’.

32. In the light of the circumstances described, it should be held that the participants in the resistance to occupation, namely Lithuanian partisans, their connections and supporters, – were a significant part of the Lithuanian nation, as a national, ethnic group. This part of the national and ethnic group had an essential impact on the survival of the Lithuanian nation, and was highly important for the protection and defence of Lithuanian national identity, culture and national self-awareness. This [description] conforms to the characteristics of the above-described group protected under Article II of the Genocide Convention: extermination of members of this group should be assessed as genocide under both international law and the Criminal Code. Therefore, the conclusions of the courts, that A.R. and B.M., as Lithuanian partisans, were members of the national and ethnic group protected under the Genocide Convention and targeted by the actions of the institutions of the occupational power that sought to exterminate part of this group, should be upheld.”

*(ii) As to the applicant being guilty of genocide*

54. Regarding the applicant’s conviction for genocide, the Supreme Court found it established that by 1956, when the crime was committed, the applicant had already been working for the MGB, which he had joined “consciously and voluntarily”, for four years. Before that, he had completed the Vilnius School of MGB Operational Staff Training, where he studied for two years. It was noteworthy that the applicant had studied at the security service school and started his service in the security structure during the period when the national resistance movement against the occupying power was active. He was not an ordinary officer: from 1952 he was a member of the USSR Communist party, and after graduating from the MGB school he was granted the rank of officer-lieutenant. The applicant worked at the Lithuanian MGB/KGB 2-N board, the main function of which was the fight against the national resistance movement. It was also noteworthy that the division where the applicant had worked carried out surveillance of the

members and leadership of the Lithuanian national underground movement. Furthermore, at the time of the arrest of A.R. “Vanagas” and B.M. “Vanda” in 1956 the applicant was already a senior operative officer in the KGB. He had the rank of senior lieutenant. As could be seen from his service record, he was directly “involved in combat operations with regard to national underground (banditry)”. It had also been established that the applicant was aware of the actions of a repressive nature being conducted against the partisans; he knew about A.R. “Vanagas” as the leader of the partisans and about his being in hiding from the Soviet authorities. He was also briefed about the purpose of the operation aimed at the capture of A.R. “Vanagas”.

55. In the light of the foregoing, the Supreme Court held that the applicant understood one of the essential operational goals of the LSSR MGB, namely to destroy physically the members of the organised movement of the Lithuanian national resistance to the Soviet regime, that is Lithuanian partisans, their connections and supporters, as a part of the Lithuanian national-ethnic group; he approved of those goals and took part in their implementation during the secret operation in which the Lithuanian partisans A.R. “Vanagas” and B.M. “Vanda” were captured. He was also aware of the torture, killing or deportation threatening them after the detention. Thus, the participation of the applicant in the detention operation was inseparable from the goal of the LSSR MGB/KGB to destroy Lithuanian partisans as part of a national-ethnic group. Attention should be drawn to the fact that, in fact, it was officers of the board of the LSSR KGB, where the applicant had served, who took of A.R. “Vanagas” and B.M. “Vanda” into detention, which only confirmed the fact that the applicant was not a person who was in the detention group accidentally.

56. Lastly, the Supreme Court noted that the fact that the applicant had taken part in an operation in 1956, after active armed resistance to the Soviet occupation had ended [as noted by the Constitutional Court, such active armed resistance took place between 1944 and 1953], had no bearing on the classification of his actions as genocide. Actions could qualify as genocide even if they had not been committed during one single period. In the applicant’s case, it was paramount that his and the KGB’s actions had been prompted by one single goal, namely to physically exterminate all or part of the members of a protected group. The case-file documents showed that the Soviet authorities’ goal of completely eliminating the leadership and members of the national resistance had remained in place even after the period of their active resistance was over. In this connection it was also pertinent that A.R. “Vanagas” had been one of the leaders of the national resistance, that more than forty KGB agents had been involved in the efforts to capture him, and that it was only after several years of searching that the KGB had succeeded in apprehending him. After that operation the KGB had declared that with the capture of A.R. “Vanagas” “the liquidation of the Lithuanian bourgeois nationalists’ leaders” had been terminated.

Accordingly, the applicant's actions also conformed to the subjective elements of *corpus delicti* of genocide.

## II. RELEVANT DOMESTIC LAW AND PRACTICE

### A. The crime of genocide

57. For extensive reproduction of relevant domestic law and practice see *Vasiliauskas v. Lithuania* [GC], no. 35343/05, §§ 48-68, ECHR 2015.

58. The Criminal Code, in force from 1 May 2003, and thus valid at the time when the applicant was charged with and convicted of being an accessory to genocide, read:

#### Article 3. Term of Validity of a Criminal Law

“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) ... shall constitute an exception ...”

#### Article 24. Complicity and Types of Accomplices

“1. Complicity shall be intentional joint participation in the commission of a criminal act of two or more conspiring legally capable persons who have attained the age specified in Article 13 of this Code.

2. Accomplices in a criminal act shall include a perpetrator, an organiser, an abettor and an accessory ...

6. An accessory is a person who has aided in the commission of a criminal act through counselling, issuing instructions, providing means, or removing obstacles, protecting or shielding other accomplices, who has promised in advance to conceal the offender, hide the instruments or means of commission of the criminal act, the traces of the act or the items acquired by criminal means, also a person who has promised in advance to handle the items acquired or produced in the course of the criminal act.”

#### 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 five to twenty years or by life imprisonment.”

59. Specifically, as to extermination of political groups, and the partisans' role, in the ruling of 18 March 2014 the Constitutional Court stated:

“6.3. Thus, with consideration of ... an international and historical context, *inter alia*, the ... 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).”

“7.3. ... [I]n 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.”

## **B. The reopening of domestic court proceedings in the *Vasiliauskas* case after the Court's judgment of 20 October 2015**

60. Mr V. Vasiliauskas died on 7 November 2015, two weeks after the Grand Chamber held that there had been a violation of Article 7 of the Convention in his case.

61. On the basis of a request by Mr V. Vasiliauskas' heirs, namely his wife and his daughter, and having taken account of the Court's judgment, by a ruling of 5 May 2016 of the Supreme Court his criminal proceedings were reopened.

62. Afterwards, in a final ruling of 27 October 2016, the plenary session of the Supreme Court (fifteen judges) pointed out that both the Constitutional Court in its ruling of 18 March 2014, and the Supreme Court in its subsequent ruling of 12 April 2016 (that is, in the instant applicant Mr S. Drélingas' case, see paragraphs 46-56 above) had already provided extensive explanations about the nature of the Soviet repression against the Lithuanian partisans, as well as answers to the question why the Lithuanian partisans, their liaison persons and their supporters had constituted a significant part of the Lithuanian nation, as a national and ethnic group, that is, a group protected under Article II of the Genocide Convention. The arguments in those previous court decisions also allowed the conclusion that the extermination of the partisans could be considered genocide, both under Article 99 of the Criminal Code and under international law.

63. The Supreme Court also considered that, although the Court's Grand Chamber had doubts as to whether partisans could be treated as part of a protected national or ethnic group (the Supreme Court referred to §§ 179 and 181-85 of the Court's judgment in *Vasiliauskas*), on the basis of the Grand Chamber's reasoning the Supreme Court considered that those doubts were chiefly prompted by the fact that in Mr V. Vasiliauskas' criminal case the Lithuanian courts had not provided a wider historical and factual account as to how the Lithuanian partisans had represented the Lithuanian nation, and that their role ("the partisans' specific mantle") with regard to the "national" group had not been interpreted.

64. Turning to Mr V. Vasiliauskas' conviction for genocide, on the basis of the letter and the contents of the trial, appellate and cassation courts' decisions, the Supreme Court however established that Mr V. Vasiliauskas "had been retroactively charged with and convicted of genocide of part of Lithuania's population, which belonged precisely to a separate political group". The Supreme Court also highlighted that although the Court of Appeal held when finding Mr V. Vasiliauskas guilty that attribution of the Lithuanian partisans to a political group "in essence was only relative/conditional and not very precise", and that "the members of this group had at the same time been representatives of the Lithuanian nation, that is, the national group" (see *Vasiliauskas*, cited above, § 36), its argumentation, which was only a couple of sentences long, was clearly

insufficient to justify the conclusion that Mr V. Vasiliauskas had been charged and convicted on precisely such charges (that is to say, on charges of the genocide of a national group), and that therefore during the criminal proceedings he had not been in the position of knowing the nature of that criminal charge and being able to defend himself against it effectively. The Supreme Court acknowledged that at that time it also had not explained the partisans' particular significance for the national and/or ethnic group.

65. The Supreme Court thus considered that Mr V. Vasiliauskas' conviction for genocide of the Lithuanian partisans had been in breach of Article 7 of the Convention and Article 31 § 4 of the Constitution, which states that punishment may be imposed or applied only on grounds established by law. Such a breach could have been remedied only by amending the criminal charges, but that had been impossible because Mr V. Vasiliauskas had died. It followed that the court decisions in Mr V. Vasiliauskas' case, in which he had been found guilty of genocide, had to be quashed, and the criminal case had to be discontinued.

### **C. The criminal proceedings for genocide against M.M.**

66. On 25 February 2016 the Supreme Court delivered a ruling in criminal case no. 2K-5-895/2016. The case concerned prosecution for genocide of a certain M.M. for actions he had taken in 1965, when, as a junior lieutenant in an unspecified entity of the Soviet repressive structure, he had taken part in an operation for the arrest of a Lithuanian partisan, A.K. During that operation the partisan had shot himself to avoid capture.

67. The Supreme Court had regard both to the Constitutional Court's ruling of 18 March 2014, as well as to the Court's judgment in *Vasiliauskas* (cited above). The Supreme Court considered that the mere fact that the operation to apprehend A.K. took place in 1965 did not negate his status as a partisan; likewise, it did not negate the fact that his arrest could have been connected to his partisan activity. This was also supported by the fact that A.K. was charged with treason and with membership of an anti-Soviet organisation.

68. That being so, the Supreme Court underlined that M.M.'s participation in the operation for A.K.'s capture did not mean of itself that his actions corresponded to the elements of the crime of genocide, as defined in Article 99 of the Criminal Code. It had to be determined whether M.M. had understood that he was taking part in an operation to capture a partisan, a member of the resistance to the Soviet occupying regime, and had had the intention so to act.

69. Turning to the subjective elements of the crime of genocide, the Supreme Court found it established by the lower courts that: 1) the evening before the operation M.M. was informed in advance by his direct superior that he would have to participate in the search the next day, although he was

given no details of it; 2) only after visiting the region M.M. and others were informed by an investigator, not previously known to M.M., that a search would be conducted in order to find and arrest an “armed illegal person”, A.K., against whom a criminal case was pending; 3) M.M. had no knowledge of the offences in respect of which a criminal case had been initiated against A.K.; 4) M.M. had not seen and had not been familiarised with any documents possessed by the security structures and related to A.K. or his activities; 5) M.M. had been previously appointed [to the security structures] to do an internship, and had then left for two years in order to write his diploma thesis; he returned a month before the search. There was no data certifying that M.M. had taken any procedural steps before the impugned operation, or that he had collected or been familiarised with the operational materials regarding A.K., already collected by and in the possession of the KGB. Neither was there any proof that M.M. had ever been at the scene of the killing or suicide of any other Lithuanian partisan.

70. In the light of the above, the Supreme Court held that there was no basis for stating that during that operation M.M. understood that he had participated in the arrest of A.K., as a partisan. It was also evident from the criminal case file that M.M. was not the person who had organised or led the operation for A.K.’s arrest. It followed that there was no direct intent and special purpose, which were the constitutive elements of the crime of genocide under Article 99 of the Criminal Code.

71. The Supreme Court lastly noted that M.M. had been indicted for participation in the physical elimination of A.K. as a member of a “separate political group – resistance to the Soviet occupation”. However, after the Constitutional Court ruling, which was adopted on the basis of, *inter alia*, the trial court’s referral to the Constitutional Court for interpretation in M.M.’s case, to prosecute a person for genocide of a political group retroactively was unlawful. This was also in breach of Article 7 of the Convention, as confirmed by the Court in *Vasiliauskas* (cited above). This was one more ground why M.M. could not be held criminally liable.

#### **D. Other relevant criminal law**

72. The Law on Courts reads:

##### **Article 23. Jurisdiction of the Supreme Court**

“1. The Supreme Court shall be the only court of the cassation instance for reviewing effective decisions, judgments, rulings...

2. The Supreme Court shall develop uniform court practice in the interpretation and application of laws and other legal acts.

3. The State and other institutions and other persons shall take into account the interpretation of laws and other legal acts given by the Supreme Court in its rulings.

4. When developing uniform court practice in the interpretation and application of laws and other legal acts the Supreme Court examines the practice of domestic, European Union and international courts, other sources of law...”

### III. RELEVANT INTERNATIONAL LAW AND PRACTICE

73. For relevant international law and practice see *Vasiliauskas v. Lithuania* [GC], no. 35343/05, §§ 75-113, ECHR 2015. For the assessment, by the USSR and the Russian Federation, of the historical context and the repressions, also see §§ 73 and 74 of that judgment.

74. The Notes on the Agenda, prepared by the Council of Europe Committee of Minister’s Secretariat, for the Committee of Ministers meeting of 5-7 December 2017 which included supervision of the execution of the Court’s judgment in *Vasiliauskas* (cited above), and later led to Resolution CM/ResDH(2017)430 (see the next paragraph), stipulated:

**”Status of execution**

The Lithuanian authorities have submitted information on several occasions, most recently in a consolidated action report of 5 October 2017 (DH-DD(2017)1132).

Individual measures:

The just satisfaction awarded by the Court (which included pecuniary damages to cover the compensation the applicant was ordered to pay to the victim in the domestic civil proceedings) was paid within the deadline.

The applicant died in 2015. On 19 April 2016, his next of kin seised the Supreme Court of Lithuania with a reopening request following the European Court’s judgment, seeking the annulment of the applicant’s conviction and termination of the case. On 27 October 2016, the Plenary Session of the Criminal Division of the Supreme Court decided, taking into account the European Court’s findings, to annul the judgment of conviction and subsequent decisions of the appellate and cassation instances. The Supreme Court further decided to terminate the criminal proceedings against the applicant as he had died.

The authorities consider that no further individual measures are necessary.

General measures:

*Domestic law*

The authorities submit that the violation was a result of the improper application of domestic law by the domestic courts and that, accordingly, the execution of the judgment in this case does not require any legislative amendments but instead a change in the approach adopted by the domestic courts.

*Developments in domestic case-law*

The authorities note that the domestic courts (of both constitutional and criminal jurisdictions) have significantly developed their case-law on genocide since the applicant’s [Mr. V.Vasiliauskas’] conviction in 2004, even before the European Court delivered its judgment in the case of *Vasiliauskas*. They therefore consider that similar violations will be prevented in the future.

On 18 March 2014 the Constitutional Court held, *inter alia*, that the broad notion of genocide as provided by Article 99 of the 2003 Criminal Code (which included social

and political groups in the range of protected groups) was compatible with the Lithuanian Constitution but could not be applied retroactively. In other words, retroactive prosecution for genocide of social and political groups, in respect of facts which took place before the Criminal Code amendments which established this crime, would be in breach of the Constitution and the principle of the rule of law. At the same time, the Constitutional Court concluded that actions which took place at an earlier date and which had been directed against certain political and social groups might constitute genocide if it could be proved that the aim was to destroy groups that represented a significant part of the Lithuanian nation and whose destruction had an impact on the survival of the entire Lithuanian nation. The Constitutional Court indicated that Lithuanian partisans constituted such a group, taking into account their activity during the 1944-1953 partisan war.

The prosecution authorities and domestic courts have therefore adapted their practice under Article 99 of the 2003 Criminal Code taking into account the Constitutional Court and the *Vasiliauskas* judgments. The authorities now refrain from retroactive prosecution and conviction for genocide of political groups.

Accordingly, in February 2016 [see paragraphs 66-71 above] the Supreme Court upheld the acquittal of a person on genocide charges. In that case the Supreme Court held that there were no subjective elements of genocide in the actions of the accused. It further noted, referring to the European Court's finding in *Vasiliauskas* and the Constitutional Court's ruling of March 2014, that at the time of the commission of the act in 1965, there was no universally recognised norm of international law punishing genocide of a political group. Accordingly, the provisions of the Criminal Code on genocide directed against political groups could not be applied retroactively.

In a further judgment of April 2016 [see paragraphs 46-56 above], the Plenary of the Supreme Court upheld a conviction for genocide of a man who had killed a partisan leader and his spouse in 1956. The authorities underline that, in coming to that decision, the Supreme Court took into account the above-mentioned ruling of the Constitutional Court as well as the European Court's judgment in *Vasiliauskas*. It examined in detail the requirements of Article 7 of the Convention and the offence of genocide as it stood at the relevant time, and explained how partisans were part of a protected group under the Genocide Convention.

In response to the European Court's concerns, the Supreme Court provided detailed explanations as to how Lithuanian partisans, their liaisons and supporters, were a significant part of the Lithuanian national, ethnic group and had an essential impact on the survival of the Lithuanian nation, and were therefore protected by the 1948 Genocide Convention.

The judgment of the European Court has been published and disseminated to all the authorities directly concerned. The authorities also indicate that the Convention and the Court's case-law have direct effect in the Lithuanian legal system.

#### **Analysis by the Secretariat**

##### Individual measures:

Given that the just satisfaction has been paid and the applicant's criminal conviction has been quashed, no further individual measures are necessary.

##### General measures:

For the avoidance of doubt and as noted by the Court at § 181, the domestic authorities have discretion to interpret the definition of genocide more broadly than in the 1948 Genocide Convention. However, prosecutors are precluded from charging

and the domestic courts from convicting persons accused retrospectively under that broader definition. Accordingly, the authorities' position that the broader definition of the term genocide in Lithuanian law does not necessitate any legislative amendments appears to be in line with the European Court's judgment.

It is recalled that the main problem in the case of *Vasiliauskas* was that political groups did not fall within the protected groups under the offence of genocide as defined in international law at the material time.

It is in this light that the developments in the Lithuanian courts' case-law should be examined. The following aspects are of particular note:

The Supreme Court's judgment of 12 April 2016 [see paragraphs 46-56 above] takes into account the Court's findings in *Vasiliauskas* and expressly acknowledges that the crime of genocide against political groups cannot be applied retroactively.

The Supreme Court in the same judgment further provides comprehensive historical and factual accounts as to how the partisans represented the Lithuanian nation, as well as substantial explanations for the finding that in 1953 the Lithuanian partisans constituted a significant part of the national group and were therefore protected by the 1948 Genocide Convention.

When upholding the acquittal of the accused in the judgment of February 2016 [see paragraphs 66-71 above], the Supreme Court noted that he had not acted with the special intent required for conviction of genocide. When it did find such intent, in its April 2016 judgment, the Supreme Court explained why an intention to destroy the partisans constituted intent to destroy part of a national group, which it had failed to do in the *Vasiliauskas* case.

Against the above background, it appears that the shortcomings identified by the Court have been rectified in the domestic case-law at the highest level. In light of the above, the Committee of Ministers may wish to close its supervision of the execution of this judgment."

75. The Resolution on Execution of the judgment of the European Court of Human Rights *Vasiliauskas against Lithuania* (Adopted by the Committee of Ministers on 7 December 2017 at the 1302nd meeting of the Ministers' Deputies) reads:

"The Committee of Ministers, under the terms of Article 46, paragraph 2, of the Convention for the Protection of Human Rights and Fundamental Freedoms, which provides that the Committee supervises the execution of final judgments of the European Court of Human Rights (hereinafter "the Convention" and "the Court"),

Having regard to the final judgment transmitted by the Court to the Committee in this case and to the violation established;

Recalling the respondent State's obligation, under Article 46, paragraph 1, of the Convention, to abide by all final judgments in cases to which it has been a party and that this obligation entails, over and above the payment of any sums awarded by the Court, the adoption by the authorities of the respondent State, where required:

- of individual measures to put an end to violations established and erase their consequences so as to achieve as far as possible *restitutio in integrum*; and
- of general measures preventing similar violations;

Having invited the government of the respondent State to inform the Committee of the measures taken to comply with the above-mentioned obligation;

Having examined the action report provided by the government indicating the measures adopted in order to give effect to the judgment, including the information provided regarding the payment of the just satisfaction awarded by the Court (see document DH-DD(2017)1132);

Having satisfied itself that all the measures required by Article 46, paragraph 1, have been adopted,

DECLARES that it has exercised its functions under Article 46, paragraph 2, of the Convention in this case and

DECIDES to close the examination thereof.”

## THE LAW

### I. ALLEGED VIOLATION OF ARTICLE 7 OF THE CONVENTION

76. 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

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

#### B. Merits

##### 1. *The submissions by the parties*

###### (a) **The applicant**

78. The applicant complained that his conviction under Article 99 of the Lithuanian Criminal Code had been retroactive and therefore amounted to a breach of Article 7 of the Convention. He also pointed out that the crime of genocide, as described in that provision of the Criminal Code, did not have

a basis in the wording of that offence as laid down in public international law. The Lithuanian courts' interpretation of the concept of genocide in his case had been too broad.

79. The applicant also submitted that by 1953 the partisan movement in Lithuania had already been suppressed, and that it had therefore been unreasonable to find him guilty of the genocide of Lithuanian partisans. He pointed out that in 1956, when the operation for A.R. "Vanagas" and B.M. "Vanda" capture took place, as many as 2,000,000 Lithuanians lived in Lithuania. Furthermore, given the fact that A.R. "Vanagas" and B.M. "Vanda" had been in hiding, it was also unjustified to consider them to have had any significant impact on the survival of the Lithuanian nation at the time.

80. The applicant also asserted that his role in the operation targeting the two partisans' capture had been too insignificant to attract criminal liability for genocide. He claimed that although he had worked at the MGB/KGB from April 1952, during the operation of October 1956 he had been included in one of the groups for detention of A.R. "Vanagas" and B.M. "Vanda" merely as an interpreter. Moreover, he had not taken part in that operation personally, but was left behind at the KGB headquarters in Kaunas. He also considered that the process of capture of two individuals in itself could not be recognised as an act of genocide under international law.

81. It was equally wrong to hold the applicant accountable for the consequences which materialised in 1957. Those consequences were brought about on A.R. "Vanagas" and B.M. "Vanda", not by the actions of the KGB and its objectives as regards the partisans, but by the judgments of the Supreme Court of the LSSR, which had never been a branch of the LSSR KGB. Likewise, national or international law had never concluded that that institution, namely the Supreme Court of the LSSR, had pursued acts of genocide or aided the KGB in performing them. The applicant had not taken part either when the LSSR Supreme Court had passed those judgments, nor when those judgments had been executed. In sum, it had not been established that he had acted in concert with "at least one of the real perpetrators of genocide", aiding actions which corresponded to objective and subjective elements of that crime.

82. The applicant thus concluded that it had been wrong to sentence him without identifying the specific purpose of genocide, namely the intention to annihilate in whole or in part, or even a single person, belonging to the Lithuanian partisans, and without having identified any actual actions taken which were aimed at the death of A.R. "Vanagas" and deportation of B.M. "Vanda".

83. The applicant also stated that although the purpose of the KGB was to commit offences against Lithuania's residents and "pursue a targeted, systemic and totalitarian policy aimed at the destruction of the Lithuanian nation", he had never been part of it. Not by a single action had he contributed to the repression carried out by the USSR in the period of

1940-41 and 1944-90. He had had nothing to do with the fate of a single one of the 85,000 Lithuanian residents who died, or with the deportation of a single one of the 132,000 who had been sent to the Soviet Union in 1945-52. Not one action by the applicant had contributed to the death of any of the 20,000 armed opposition partisans or their supporters. Neither was he involved in the arrest or imprisonment of a single one of the 186,000 persons arrested or imprisoned in 1944-53. He had never agreed to such actions and had nothing in common with the perpetrators of such repressive acts.

**(b) The Government**

84. As to the historical background of the case, the Government essentially echoed the arguments they had already presented in the *Vasiliauskas v. Lithuania* [GC], no. 35343/05, §§ 131-40, ECHR 2015.

85. The Government also considered that the crime of genocide was clearly recognised as a crime under international law at the material time and thus sufficiently accessible to the applicant (they relied on *Vasiliauskas*, cited above, § 168).

86. They also saw the applicant's conviction for genocide as foreseeable, especially in the light of international law as interpreted by the Constitutional Court, taking into account the particular national historic context and providing in this regard extensive substantiation. Indeed, the Constitutional Court's ruling of 18 March 2014 revealed in detail the significance of the Lithuanian partisans for the entire Lithuanian nation. Similarly, one could not but note that in that ruling an extensive analysis of the historical facts and statistics was provided.

87. The Government pointed out that in the judgment of *Vasiliauskas* (cited above, § 159) the Court did not deny the right of the State to take action against the perpetrators of the repressions committed during the Soviet occupation regime. What led the Court to find a violation of Article 7 of the Convention in that case was the domestic courts' reference to the Lithuanian partisans as a separate political group, which had been excluded from the definition of acts of genocide at the relevant time (the 1950s) and the lack of reasoning of the domestic courts that the Lithuanian partisans constituted a significant part of a protected group, namely the Lithuanian national group. The domestic courts were criticised for not explaining what the notion of "representatives" entailed, and for not providing much of a historical or factual account of how the Lithuanian partisans were representative of the Lithuanian nation (see *Vasiliauskas*, cited above, §§ 159 and 179-86). The judgment of the Court showed that the lack of arguments of the Lithuanian courts in that specific case had been of the utmost importance.

88. Contrary to the criminal courts' decisions in the case of *Vasiliauskas*, in the applicant's case the domestic courts filled the gap

created by the lack of argumentation. It was noteworthy that in the present applicant's criminal case the decisions of courts at all three levels of jurisdiction were adopted subsequently to the ruling of the Constitutional Court of 18 March 2014. The criminal courts in the applicant's case made numerous references to the conclusions made in that ruling. In other words, the extensive reasoning provided in the ruling of the Constitutional Court became part of the reasoning of the domestic courts.

89. The Government also wished to underline that in the present case the domestic courts (the court of first instance and the appellate court) considered the case in what could be described as a transitional period – after the ruling of the Constitutional Court, but before the judgment of the Court in the case of *Vasiliauskas*. It could be argued that this fact (the time factor) could explain why the argumentation of those domestic courts could not take into account the arguments provided for in the judgment of the Court in the *Vasiliauskas* case. Indeed, given the fact that the domestic courts were explaining very well-known domestic context to a domestic audience, using extensive argumentation submitted by the Constitutional Court, in the Government's view any further explanation would have been superfluous. For its part, the ruling of the Supreme Court in the present applicant's case was adopted not only after the ruling of the Constitutional Court of Lithuania, but also after the judgment of the Court in the case of *Vasiliauskas* had been delivered.

90. If the text of the domestic courts' decisions in the applicant's criminal case is examined, it is clear that enough factual and historical background is provided to explain the context in which genocide was committed and the significance of the resistance movement and of the Lithuanian partisans (in particular that of A.R. "Vanagas", but also of his wife "Vanda") for the survival of the Lithuanian nation. In fact, the domestic courts scrutinised the concept of partisans as representatives of protected national and ethnic groups, also observing that genocide could target a group of people belonging to several protected groups, and that in some instances protected groups might be interchangeable. The Government thus considered, that, similarly to the case of *Jorgic v. Germany* (no. 74613/01, § 105, ECHR 2007-III), in the present case the Supreme Court applied a systematic interpretation of the definition of genocide.

91. It was important to note in this regard that the significant shift in the domestic case-law started after the Constitutional Court of Lithuania adopted its ruling on 18 March 2014. Accordingly, since then the domestic authorities have refrained from retroactive prosecution and conviction for genocide of separate political groups if the acts were committed in the past and before the entry into force of the domestic law providing for protection of social and political groups.

92. The reasoning given by the Court in its judgment in the case of *Vasiliauskas* for the first time was integrated and developed in the case-law of the domestic courts in the applicant's criminal case. Later this stance was

followed by the domestic courts in other criminal cases related to genocide committed in the past (see paragraphs 66-71 above). Indeed, by setting out the basic principles in the case of *Vasiliauskas*, the Court aided the competent domestic authorities (prosecutors' offices, the domestic courts) to fulfil dual harmonisation of domestic law – firstly with international law and secondly with the Convention. As a result, since then the domestic courts have qualified actions against the Lithuanian partisans as genocide under Article 99 of the Criminal Code, whilst observing the requirements arising from the Convention, and refraining from retroactive prosecution for genocide of separate political groups.

93. The Government drew the Court's attention to the fact that information about these developments in the domestic case-law had been presented to the Committee of Ministers when executing the Court's judgment in *Vasiliauskas* case (see paragraph 74 above). The Government pointed out that the Committee of Ministers then decided to close the *Vasiliauskas* case in the light of the measures taken by the Lithuanian authorities (see paragraph 75 above).

94. In the light of the above, the Government were confident that the ruling adopted by the Plenary of the Supreme Court in the applicant's case represented a genuine example of a dialogue between the Court and the domestic courts of Lithuania, which merited certain deference, as it had already been demonstrated by the Court in respect of national courts of other States, which had duly taken into account the requirements formulated by the Court in its previous judgments. In this regard the Government referred to the Court's judgment in *Hutchinson v. the United Kingdom* ([GC] no. 57592/08, 17 January 2017), in which the Court examined the domestic law of the United Kingdom after the domestic court had responded to the critique of it expressed in the Court's earlier judgment. In *Hutchinson* (cited above, § 70), the Court agreed that the lack of clarity identified by it earlier had been dispelled by a subsequent decision of the Court of Appeal. The Court was also satisfied that the exercise of the domestic law will, as it was clear from the later decision of the domestic court, be guided by all of the relevant case-law of the Court.

95. The Government were of the view that, similarly to the conclusions reached by the Court in *Hutchinson*, in the instant case the up-to-date case-law of the domestic courts, and, in particular, the Supreme Court's ruling of 12 April 2016 in the applicant's case, no longer displayed the discrepancy that the Court identified in the case of *Vasiliauskas*. That being so, and having regard to the principle that the primary responsibility for protecting the rights set out in the Convention lies with the domestic authorities, also having regard to the joint responsibility of the States Parties and the Court in securing the rights set forth in the Convention, the Government asked the Court to find that the domestic courts in the present case "drew the necessary conclusions" from the *Vasiliauskas*' judgment "and, by clarifying

domestic law, addressed the cause of the Convention violation” (they quoted *Hutchinson*, cited above, § 71).

## 2. *The Court’s assessment*

### (a) **General principles**

96. For the general principles regarding Article 7 of the Convention see *Vasiliauskas* (cited above, §§ 153-162).

### (b) **The relevant facts**

97. 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, firstly, he was not physically present during the operation of 12 October 1956 when the partisans A.R. ”Vanagas” and B.M. “Vanda” were captured, and, secondly, that their demise was caused not by the applicant personally but afterwards by the Supreme Court of the LSSR, which sentenced them to death and deportation respectively.

98. As to the first allegation by the applicant, the Court observes that the applicant’s arguments had been thoroughly examined but dismissed by the courts at three levels of jurisdiction. Those courts came to a clear finding on this matter, 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. The Court confirms that the question of the applicant’s criminal responsibility was primarily a matter for assessment by the domestic courts (see *Vasiliauskas*, cited above, § 164, and the cases cited therein). It also considers that in view of the complexity of the task of reconstructing the facts of the case nearly sixty years after the events, the national courts were in a better position to assess all the available material and evidence. Those courts also had regard to the historical background, the manner in which the MGB/KGB functioned, and the archive documents regarding the impugned operation (see paragraphs 37-39, 43, 44, 54 and 55 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 (also see *Vasiliauskas*, cited above, § 164).

99. Neither can the Court agree to the applicant’s suggestion that he could not be charged with genocide because he had not taken the decision to execute or deport A.R. ”Vanagas” and B.M. “Vanda”. It has already reached a similar conclusion in the case of *Vasiliauskas* (cited above, § 158), where it reiterated 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. As noted by the domestic courts, the applicant,

who from 1950 on had certainly had knowledge of the MGB/KGB methods, given that he had not only studied at the MGB school, but then from 1952 worked as an officer of the MGB/KGB division tasked with suppression of resistance, must have clearly understood that after their capture the two partisans would be eliminated (see paragraphs 54-56 above). Accordingly, the fact that A.R. “Vanagas” was shot and B.M. “Vanda” deported on the basis of LSSR Supreme Court decisions (see paragraphs 31 and 32 above) does not alter or remove the applicant’s criminal responsibility for their fate.

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

100. In the present case the Government’s submissions were essentially confined to the issue of whether, in view of the *Drėlingas* ruling of 12 April 2016 (see paragraphs 46-56 above), the applicant’s situation in relation to his conviction for genocide is in keeping with the requirements of Article 7 as these were laid down in the *Vasiliauskas* judgment (cited above §§ 179-86). In this connection, the Court will first examine whether the lack of clarity in the domestic case-law has now been dispelled, and if so whether the relevant requirements have now been met in the applicant’s case (see, *mutatis mutandis*, *Hutchinson*, cited above, § 37).

101. The Supreme Court, in its reasoning in the ruling of 12 April 2016, analysed the content of the Court’s judgment of 20 October 2015. It inferred from its reading of the latter judgment that the Court had found a violation of Article 7 of the Convention on account of the fact that the Lithuanian courts had failed to adequately substantiate their conclusions that the Lithuanian partisans constituted a significant part of a national group, that is, a group protected under Article II of the Genocide Convention (see paragraph 49 above). Such understanding of the Court’s judgment by the Supreme Court is also confirmed by its subsequent ruling in the reopened *Vasiliauskas* case, where it pointed out that during the initial proceedings against Mr V. Vasiliauskas the domestic courts had not provided sufficient argumentation to justify the partisans’ specific “mantle” with regard to the national group (see paragraphs 63 and 64 above).

102. In the light of the principles governing the execution of judgments, the Court considers it unnecessary to express a position on the validity of that interpretation by the Supreme Court. Indeed, it is sufficient for the Court to satisfy itself that the ruling of 12 April 2016 did not distort or misrepresent the judgment delivered by the Court.

103. The Court cannot but observe that in the applicant’s case the Supreme Court did indeed provide an extensive explanation, elaborating upon the elements what constituted the “nation” (see paragraph 18 of the Supreme Court’s ruling, cited in paragraph 50 above) as well as elements which had led to the conclusion that the Lithuanian partisans had constituted “a significant part of the Lithuanian nation as a national and ethnic group”. Among other things, the Supreme Court noted that the Soviet repression had

been targeted against the most active and prominent part of the Lithuanian nation (*lietuvių tauta*), defined by the criteria of nationality and ethnicity. These repressive acts had the clear goal of creating an impact on the demographic situation of the Lithuanian nation. In turn, the members of the resistance – Lithuanian partisans, their liaison persons and their supporters – had represented a significant part of the Lithuanian population, as a national and ethnic group, because the partisans had played an essential role when protecting the national identity, culture and national self-awareness of the Lithuanian nation. The Supreme Court therefore held that such characteristics led to the conclusion that the partisans as a group were a significant part of a protected national and ethnic group, and that their extermination had therefore constituted genocide, both under Article 99 of the Criminal Code and under Article II of the Genocide Convention (see, for particularly detailed analysis, paragraphs 50-52 above). That being so, the Court finds that the Supreme Court had addressed the weakness identified by the Court in the *Vasiliauskas* judgment, where it held that “there [was] 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 had 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” (see *Vasiliauskas*, cited above, § 181).

104. The Court also observes that in that ruling the Supreme Court also relied on the Constitutional Court ruling of 18 March 2014, which in itself had already began providing a historical context in respect of the partisan movement in Lithuania and its significance for the Lithuanian nation (see paragraph 59 above). The Court thus acknowledges the Government’s argument about gradual clarification of the domestic case-law on the partisans’ specific role.

105. Having regard to the principle of subsidiarity and to the wording of the Court’s 2015 judgment, the Court considers that the Supreme Court’s finding, that the applicant was guilty of genocide of partisans A.R. “Vanagas” and B.M. “Vanda”, the partisans being significant for the survival of the entire national group (the Lithuanian nation) as defined by ethnic features (see paragraph 53 above), provides plentiful indication of the grounds on which it was based. Those grounds do not distort the findings of the Court’s judgment. On the contrary, this was a loyal interpretation of the Court’s judgment, taken in good faith in order to comply with Lithuania’s international obligations. The Court thus concludes that the Supreme Court’s interpretation of the Court’s 2015 judgment was not, seen as a whole, the result of any manifest factual or legal error leading to the applicant’s unforeseeable conviction for genocide.

106. Likewise, in the context of the examination of how the Supreme Court received the gist of the Court’s finding in *Vasiliauskas*, the Court gives weight to the fact that within the reopened criminal proceedings in

that case the Supreme Court acknowledged, without the slightest reservation, that the interpretation of the partisans' role earlier given in that case by the criminal courts was insufficient and thus lacking (see paragraph 64 above).

107. The Court further observes that in the rulings, adopted after the Court's judgment in *Vasiliauskas*, the Supreme Court also remedied another flaw which had been pointed out by the Court in that judgment (see *Vasiliauskas*, cited above, § 184). Namely, in the case of M.M. it noted that genocide of persons belonging to a political group, which was not protected under Article II of the Genocide Convention, as such could not be prosecuted retroactively (see paragraph 71 above). Within the reopened criminal proceedings against Mr V. Vasiliauskas the Supreme Court likewise observed that, given the situation that he had previously been charged with and convicted of genocide of members of a political group, such a prosecution could not continue (see paragraphs 64 and 65 above).

**(d) Conclusion**

108. The Court considers that the *Drėlingas* ruling, adopted by the Supreme Court acting in plenary session, has dispelled the lack of clarity identified in *Vasiliauskas* arising out of the discrepancy within the domestic law, namely Article 99 of the Criminal Code, and Article II of the Genocide Convention. In addition, the Supreme Court has brought clarification as regards the scope of review when the charges of genocide are examined by the domestic courts, including the prohibition on retroactive prosecution for genocide of individuals belonging to a political group (see paragraphs 48, 64 and 65 above), as such, and the need to establish intent (see paragraphs 54-56 and 68-70 above). In this way the domestic system, based on the international law (the Genocide Convention), and case-law of the domestic courts (the Constitutional Court's ruling of 18 March 2014 and the Supreme Court's ruling of 12 April 2016 in the applicant's case) no longer displays the contrast that the Court identified in *Vasiliauskas* (see also paragraphs 74 and 75 above). The statutory obligation on the domestic courts to take into account the Supreme Court's case-law provides an important safeguard for the future (see paragraph 72 above; also see, *mutatis mutandis*, *Hutchinson*, cited above, § 70).

109. As the Court has often stated, the primary responsibility for protecting the rights set out in the Convention lies with the domestic authorities. It considers that the Supreme Court drew the necessary conclusions from the *Vasiliauskas* judgment and, by clarifying the domestic case-law, addressed the cause of the Convention violation (see *Hutchinson*, cited above, § 71, and the cases cited therein).

110. In the light of the foregoing, the Court concludes that the applicant's conviction for genocide of partisans A.R. "Vanagas" and

B.M. “Vanda” can be regarded as foreseeable, in keeping with Article 7 of the Convention.

111. The foregoing considerations are sufficient to enable the Court to conclude that there has been no violation of Article 7 of the Convention.

#### FOR THESE REASONS, THE COURT

1. *Declares*, unanimously, the application admissible;
2. *Holds*, by five votes to two, that there has been no violation of Article 7 of the Convention.

Done in English, and notified in writing on 12 March 2019, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court

Marialena Tsirli  
Registrar

Ganna Yudkivska  
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinions of Judges Motoc and Ranzoni are annexed to this judgment.

G.Y.  
M.T.

## DISSENTING OPINION OF JUDGE MOTOC

« *Les faits sont les faits. Et qui dit que le ciel est bleu quand il est gris prostitue les mots et prépare la tyrannie* ». Albert Camus.

**Introduction**

1. In this complicated and sensitive case, I was unable to vote with the majority. In my view, such a major change of case-law can only be effected by the Grand Chamber. The majority compares the change in case-law between *Vasiliauskas* and *Drėlingas* with that between *Vinter* and *Hutchinson*, forgetting an essential element: the fact that this rebirth was made by the Grand Chamber. And in this case, as in *Hutchinson*, the Grand Chamber's intervention is needed.

2. The consequences of this ECHR decision, unprecedented in international practice, are fundamental. This is the first time that ethno-political genocide has been recognised by an international Court. Such genocide is now claimed by a multitude of States and populations. Once the ECHR accepts the "ethno-political" label, other countries will be tempted to follow in Lithuania's footsteps. By delivering this judgment the majority are expanding the scope of genocide far beyond the approach taken so far in international criminal law.

3. The issue of the definition of genocide has remained one of the most difficult in public international law. Even after the adoption of the 1948 Convention, which explicitly excludes the "political" criterion regarding the definition of genocide, the notion was still claimed by members of an ethnic group but of a perceived political or social class were adopted. Most of the millions who perished at the hands of Stalin, Mao Tse-tung or Pol Pot died because the leaders believed they belong to the subversive class. But in fact, they died on ideological grounds. The political scientist D. Russell called this kind of mass killing democide.

4. One of the main problems in this case is the context. Therefore, any trial of this kind is still considered as a sort of battlefield between justice and injustice. As Judge Kūris pointed out in his dissenting opinion in *Vasiliauskas* "Courts in their ivory towers deal with the law, but not only that. More importantly, they are dealing with human justice" (see *Vasiliauskas*, 2015, Judge Kūris' opinion p. 97).

5. Lithuania was the first State to introduce an amendment into their legislation regarding genocide by including additional groups, political and social not covered by the Genocide Convention. On the other hand, this amendment bears witness to recent tendencies towards dissatisfaction, in both national practices and legal commentaries, with the definition set out in the Genocide Convention. They argued that restricting genocide to national, ethnic, racial and religious groups left a huge gap in international law (see

*Van Schaack*, B., “The Crime of Political Genocide: Repairing the Genocide Convention’s Blind Spot”, *Yale Law Journal*. 1997, 106: 2280–228)

6. A significant number of countries have opted for including an extensive list of groups in national legislation (Cote d’Ivoire, Colombia, Poland, Ethiopia, Peru, Lithuania, Costa Rica, Estonia, Romania, France, Belarus, Burkina Faso, Congo and Finland). Most cases of such definition extension have concerned social or political groups, although some countries have also opted for an open category of “groups determined by any other arbitrary criterion” (e.g. France and Romania). Therefore, we must acknowledge that these examples do not provide sufficient evidence of the adoption under international customary law of a wider definition of genocide.

7. However, the extension of the convention definition, even if it is somewhat inconsistent with international law, does not violate international law itself. There is no prohibition in either the Genocide Convention or any other international instrument, on adopting a wider definition than is necessary. It is a prerogative of the State to decide on the content of its criminal law.

8. Therefore, Lithuania and other States have the right to adopt wider definitions of genocide and to judge people for the corresponding crimes, as long as such action respects the general principle of *nullum crimen sine legem*. This principle is enshrined in all universal and regional human rights treaties and prohibits the prosecution of a person for an act which was not a criminal offence under national or international law at the time of its commission. Therefore, States are fully entitled to judge people for genocide on the basis of a broader definition if the offence is committed after the law criminalising it has entered into force.

9. This has put the discussion back in the early days of the genocide definition initiated by Raphael Lemkin: should we consider politically motivated massacres as genocide? Lemkin’s answer was affirmative - for himself Holodomor (artificial famine, orchestrated by the Soviets) in Ukraine and Kazakhstan was genocide (Wendt, 2005, pp. 551-59). It must be said that the broad definition of genocide in national jurisdictions in 2000 gained momentum (Schabas, 2000, p. 141-42). But the problem was that Lithuania applied this extended definition retroactively. Instead of criticising *Vasiliauskas*’ actions as another crime (war crimes or crimes against humanity), both the Prosecutor’s Office and the courts have argued that *Vasiliauskas* committed a genocidal act against the political group, even though the court of appeal did try connecting it with the national group for the first time describing the political group as part of the national group (*Vasiliauskas*, § 36). This has shown that national courts have begun to feel the need to substantiate responsibility for genocide, not only through national law, but also through international law.

### I. The *Vasiliauskas* case

10. Vasiliauskas was an operative agent of the MGB (*Ministerstvo gosudarstvennoj bezopasnosti*) or the State Security Ministry, which later became the well-known KGB. This repressive institution was involved in reprisals against anyone who did not accept the re-occupation of Lithuania in 1944 when the Soviets removed the Nazis; or simply anyone who was considered by the Soviet regime to be an “enemy”. As we probably know that it was not even necessary to show open animosity, it was enough to be designated as such in “objective” terms such as kulak, bourgeois nationalist, Trotskyist, etc. (Harendt, 1976, p. 424).

11. Vasiliauskas joined the MGB in 1952. One of his main functions as an MGB operative was the anti-Soviet armed resistance of extermination, which was still present despite years of occupation. In 1953 Vasiliauskas participated in an “operation” in which he killed (or at least participated in the joint effort to kill) two partisans. After Lithuania’s independence was restored in 1990, Vasiliauskas was prosecuted for genocide in 2001 and found guilty in 2004. The appellate courts and the Supreme Court upheld the verdict in 2005 (see *Vasiliauskas v. Lithuania* [GC], no. 35343/05, §§ 15-47, ECHR 2015). The case of *Vasiliauskas* has not gone through all the domestic courts. The Constitutional Court in Lithuania had to analyse the domestic regulations governing the crime of genocide. The case was eventually heard by the Grand Chamber of the Court in 2013, and in 2015 the judgment was finally delivered, finding a violation of Article 7 of the ECHR by 9 votes to 8, which is a very narrow margin.

12. The Court considered that the “partial” interpretation given by the Court of Appeal and the Constitutional Court, even if supported by international practice, is a later development of international law and could not have been foreseen by the defendant in 1953 (see *Vasiliauskas*, §§ 180–81). The Government and the courts had failed to demonstrate that understanding the importance of the target group (i.e., the destruction of “part” of the group), whatever the reasons, can be attached to Lithuanian partisans. In its words, “there is no firm determination in establishing the facts by the criminal courts national courts to enable the Court to assess on the basis of which the national courts concluded that in 1953 the Lithuanian partisans constituted a significant part of the national group, in other words, a protected group under Article II of the Genocide Convention” (see *Vasiliauskas*, cited above, § 181).

13. It should be pointed out that this is not the first case in which Soviet officers have been accused of international law crimes, including genocide, in post-Soviet countries. There have been criminal proceedings concerning other offences, such as specific war crimes (for example, deportation of the population) and crimes against humanity. However, this is the first time a Soviet genocide case has come to Strasbourg. This was also not the first

case dealt with by the Court that related to the events of the Second World War in the Baltic States – see the famous case of *Kononov v. Latvia* [GC], no. 36376/04, ECHR 2010).

14. The majority and the minority agreed on some points, including the fact that customary international law at the time prohibited genocide, in parallel to the 1948 Genocide Convention. They also agree that the list of protected groups under Article II of the Convention, which reflects custom, deliberately excluded political groups. Thus, a conviction for genocide would not have been sound if the Soviets were “merely” destroying their political opponents in Lithuania. Regarding the expression “in part”, the minority believes that it is perfectly fine to first define the protected group as ethnic Lithuanians, and then further define a “part” of that group as Lithuanian partisans or opponents of Soviet rule. The majority, on the other hand, believes that while the idea of “a part” of a group could foreseeably be thought of in numerical terms in 1953, it was not foreseeable that the part could also be defined in qualitative terms, as emerged from the case law of modern international criminal tribunals (see paragraph 177). This last point is, I think, highly problematic, since those individuals who were convicted for intending to destroy a part of a group in modern trials could then also say that their convictions violated *nullum crimen*, since their crimes also preceded in time the case-law of the tribunals who convicted them (see M. Milanovic, “European Court Tackles the Definition of Genocide”).

15. The judgment states that it is impossible for the Court to assess “on the basis of which the national courts concluded that in 1953 the Lithuanian partisans constituted a significant part of the national group, in other words, a protected group under Article II of the Genocide Convention” (see paragraph 181). However, there is a problem that seems to be overlooked by both the majority and the dissenters. If the domestic courts had “properly” proven this significance, would the decision of the final majority have changed? It seems that this decision was based primarily on the predictability of the act committed by Vasiliasukas being considered as genocide. So the first question must be “could Vasiliasukas have assessed partisans as being a significant part of the national group?” That is, the claim should have been linked not to the coherency of the national court’s arguments but to Vasiliasukas’ *mens rea*. Secondly, the Court has already characterised the newly developed criterion of “the importance of the party” (paragraph 178); therefore, Vasiliasukas would still be considered incapable of accounting for his action, and the earlier argument would not have changed. It seems that, in this case, the Court tried to transfer the blame on to the national courts without putting forward any arguments of its own.

## II. *Drėlingas v. Lithuania*

16. The applicant, who had, at the material time, been a senior operative officer at the KGB of the Lithuanian Soviet Socialist Republic (LSSR), took part on 12 October 1956 in the capture of two Lithuanian partisans, A.R. (“Vanagas”) and his wife B.M. (“Vanda”). A.R. had been elected Chief of Defence Forces of the Union of Lithuanian Freedom Fighters (LLKS) in 1949 and became chairman of the LLKS Council in 1951. After the arrest, the two partisans were detained in the KGB prison in Vilnius and tortured. In September 1957, the Supreme Court of the LSSR sentenced A.R. to death, and he was shot two months later. B.M. was sentenced to eight years’ imprisonment. After Lithuania regained its independence, the applicant was found guilty in 2015/16 of his participation in the operation of 12 October 1956, during which A.R. and B.M. had been captured and detained. He was convicted of being “an accessory to genocide” under Article 99 of the Lithuanian Criminal Code in force since 1 May 2003. The legal provisions that led to the applicant’s conviction were therefore applied retroactively. The combination of nationality and ethnicity aspects has already been assessed by the Grand Chamber in its *Vasiliauskas* judgment. It also took into account the decision of the Constitutional Court of 18 March 2014 (see § 56 of *Vasiliauskas*) which the majority now refers to in support of the Supreme Court’s judgment of 12 April 2016 (see paragraph 104). In this regard, the Grand Chamber noted that it was not immediately obvious that the usual meaning of the terms “national” and “ethnic” in the Genocide Convention could be extended to cover partisans.

17. The Court therefore considered that the conclusions of the national courts to the effect that the victims had come under the definition of genocide as part of a protected group had been an interpretation by analogy, to the applicant’s detriment, which had led to an unpredictable conviction (see *Vasiliauskas*, cited above, § 183). It therefore appears that this particular issue has already been dealt with, at least to some extent, by the Grand Chamber in *Vasiliauskas*. From this it can be concluded that the national courts’ judgments in the present case consisted simply of an interpretation of the “national-ethnic-political” group which was incompatible with the Court’s own interpretation. It could also be concluded that the group which the Court had to assess in the present case was, in principle, the same group as had already been assessed in *Vasiliauskas*.

18. The majority considered that the lack of clarity of the internal jurisprudence described in *Vasiliauskas* of the Grand Chamber had now disappeared. In this regard, they claimed that the Lithuanian courts had duly justified their conclusions that the Lithuanian partisans had constituted a significant part of a “national” and “ethnic” group protected under the Genocide Convention. The Supreme Court had argued that the Partisans had “played an essential role in protecting the national identity, culture and

national conscience of the Lithuanian nation”, and that “their extermination was therefore a genocide” under the Genocide Convention (see § 103 of *Vasiliauskas*)

19. The issue of extending the notion of genocide to ethnic or national groups, as proposed by the majority in *Drélingas*, remains a complex one. Together with Lemkin, Vespasian Pella wanted a notion that would encompass national groups. That proposal was expressly rejected.

Much closer to our era, when Special Rapporteur Thiam worked on the draft Code on crimes against the peace and security of mankind, he drew a distinction between the two notions: “It seems that the ethnic bond is more cultural. It is based on cultural values and is characterised by a way of life, a way of thinking and the same way of looking at life and things. On a deeper level, the ethnic group is based on a cosmogony. The racial element, on the other hand, refers more typically to common physical traits”.

#### **IV. Conclusions**

20. Given the implications of this case, and the fact that a new category was created and that the Grand Chamber’s decision in *Vasiliauskas* was reversed with regard to the violation of Article 7 of the Convention, it is necessary that the Grand Chamber intervene in this case.

## DISSENTING OPINION OF JUDGE RANZONI

**I. Introduction**

1. I voted against the finding of a violation of Article 7 of the Convention in the present case because I cannot agree with the majority's assessment of some of the relevant facts, with their interpretation of the Grand Chamber judgment *Vasiliauskas v. Lithuania* ([GC], no. 35343/05, ECHR 2015), and with their application of the general principles.

2. The present case can be summarised as follows. On 12 October 1956 the applicant, who at the time was a senior operative officer at the KGB of the Lithuanian Soviet Socialist Republic (LSSR), took part in the capture of two Lithuanian partisans, A.R. "Vanagas" and his wife B.M. "Vanda". In 1949 A.R. had been elected commander in chief of the defence forces of the Movement of the Struggle for the Freedom of Lithuania (LLKS), and in 1951 he became chairman of the LLKS Council. After the arrest of A.R. and B.M., by a detention group other than the one to which the applicant belonged, they were detained in the KGB prison in Vilnius and tortured. In September 1957 the Supreme Court of the LSSR sentenced A.R. to death, and he was shot two months later. B.M. was sentenced to eight years' imprisonment.

After Lithuania had regained its independence, the applicant in 2015/16 was found guilty of having taken part in the operation of 12 October 1956 during which A.R. and B.M. had been captured and detained. He was convicted as an "accessory to genocide" under Article 99 of the Lithuanian Criminal Code, which came into force on 1 May 2003. Therefore, the legal provisions on which the applicant's conviction was based were applied retroactively.

3. Article 7 § 1 of the Convention prohibits such a retrospective application of criminal law to an accused's disadvantage. It also more generally embodies the principles that only the law can define a crime and prescribe a penalty and that criminal law must not be extensively construed to an accused's detriment. Thus, an offence must be clearly defined in the law (or be "accessible") and an individual should be able to know (or "foresee") from the wording of the relevant provision of the law – if need be with informed legal advice – what acts and omissions will make him or her criminally liable (see *Vasiliauskas*, cited above, § 154).

However, this provision, according to Article 7 § 2, 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. In other words, there would be a violation of Article 7 unless it could be established that the applicants' conviction had been based on international law as it stood in 1956.

4. Consequently, the question which the Court needs to answer under Article 7 in this case is as follows. Could the applicant, in 1956, having regard to international law, in particular the 1948 United Nations Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention), as interpreted at that time, have foreseen that his participation in the arrest of A.R. and B.M. on 12 October 1956 might amount to the offence of “accessory to genocide”, that came into effect only in 2003, leading to his later criminal conviction?

## II. The Grand Chamber judgment in *Vasiliauskas v. Lithuania*

5. The case concerned the conviction in 2004 of Mr Vasiliauskas, an officer in the State security services of the LSSR, for the genocide in 1953 of Lithuanian partisans who had resisted Soviet rule after the Second World War. He complained, *inter alia*, that the wide interpretation of the crime of genocide, as adopted by the Lithuanian courts in his case, had no basis in the wording of that offence as laid down in public international law. He submitted in particular that he had been convicted on the basis of Article 99 of the new Lithuanian Criminal Code which, in its provisions concerning criminal liability for genocide, included political groups – such as partisans – among the groups that could be considered as victims of genocide. However, the Genocide Convention did not include political groups among those protected.

6. The Court found that it was clear that Mr Vasiliauskas’ conviction had been based upon legal provisions that had not been in force in 1953, and that those provisions had been applied retroactively. It therefore had to be established whether his conviction had been covered by international law as it stood in 1953. Although the offence of genocide had been clearly defined in international law, in particular in the Genocide Convention, signed by the Soviet Union in 1949 and therefore accessible to Mr Vasiliauskas, the Court took the view that his conviction could not have been foreseen under international law as it stood at the time of the killings of the partisans. In particular, international treaty law had not included a “political group” in the definition of genocide. Nor was the Court convinced that the Lithuanian courts’ interpretation of the crime of genocide in Mr Vasiliauskas’ case had been in accordance with the understanding of the concept of genocide as it stood in 1953. Indeed, the definition of the crime of genocide in Lithuanian law had not only had no basis in the wording of that offence as expressed in the Genocide Convention, but had also been gradually enlarged during the years of Lithuania’s independence. The same applied to the argument that the Lithuanian partisans had been “part” of a national group, that is to say a group protected by the Genocide Convention. The Court considered that although the courts had rephrased Mr Vasiliauskas’ conviction to attribute to Lithuanian partisans the status of “representatives of the Lithuanian

nation”, he could not have foreseen in 1953 the subsequent judicial interpretations of the term “in part” as used in Article II of the Genocide Convention.

### **III. My six points of disagreement with the majority’s reasoning and conclusion**

7. First, I find problematic the reasoning in paragraph 99 of the judgment and the comparison with *Vasiliauskas*. The applicant in the present case participated on 12 October 1956 in the operation leading to the arrest of A.R. and B.M., but he was not involved in their sentencing, execution or deportation, and he therefore argued that his actions did not constitute genocide. The majority dismissed this argument by stating that the Court had “already reached a similar conclusion in the case of *Vasiliauskas*”.

8. However, that case concerned a person who in 1953 had taken part in an operation in which partisans had been directly killed. It was in this context that the Grand Chamber stated that even soldiers could not show total, blind obedience to orders which – and this is the important specification – “flagrantly infringed internationally recognised human rights, in particular the right to life” (see *Vasiliauskas*, § 158).

9. In that regard, in the context of a charge of genocide, there exists a substantive difference between, on the one hand, participation in the direct killing of persons and, on the other, participation in the arrest of persons who were later sentenced by the Supreme Court of the LSSR. The majority did not explain why the applicant’s participation – incidentally, together with many other agents – in the arrest of A.R. and B.M. “flagrantly infringed internationally recognised human rights”. What is more, whereas A.R. was actually sentenced to death and shot, B.M. was not, but sentenced to imprisonment. This fact contradicts the observation in paragraph 99 that the applicant “must have clearly understood that after their capture the two partisans would be eliminated” (emphasis added).

10. Second point: In the *Vasiliauskas* judgment (§§ 175 and 178) the Court stated *inter alia* that customary international law as it stood in 1953 did not include “political groups” under the definition of genocide. The trial court’s judgment in the present case used the term “national-ethnic-political” group which was reiterated by the Court of Appeal as well as the Supreme Court (see paragraphs 35-36, 41 and 50 of the above judgment). The latter also stated that Lithuanian partisans were a separate “political” group (see paragraph 53 of the above judgment). Therefore, the “political” aspect of the group seems to have persisted, although the courts tried to shift the emphasis more to the “national” and the “ethnic” aspects of the group.

11. The criteria of nationality and ethnicity though were already assessed by the Grand Chamber in its *Vasiliauskas* judgment. In its

assessment it also took into consideration the Constitutional Court's decision of 18 March 2014 (see *Vasiliauskas*, §§ 56 et seq.), which the majority now refer to in support of the Supreme Court's ruling of 12 April 2016 (see paragraph 104 of the above judgment). In this regard, the Grand Chamber observed that it was not immediately obvious that the ordinary meaning of the terms "national" or "ethnic" in the Genocide Convention could be extended to cover partisans. It thus considered that the domestic courts' conclusion that the 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 *Vasiliauskas*, § 183).

12. Therefore, it seems that this specific aspect has already been dealt with, at least to some extent, by the Grand Chamber in *Vasiliauskas* judgment. From this it could be concluded that the domestic courts' judgments in the present case simply consisted of an interpretation of the "national-ethnic-political" group that disregarded the Court's own interpretation as already given. It could likewise be concluded that the group which the Court had to assess in the present case was in principle the very same group as had already been assessed in *Vasiliauskas*, although it now carries the new label "national-ethnic-political" group. Or to put it more colloquially, old wine in new bottles?

13. Be that as it may, there are more substantial arguments for my disagreement with the majority's reasoning and their final conclusion, for example my third point: The majority held that the lack of clarity in domestic case-law described in the Grand Chamber's *Vasiliauskas* judgment had now been dispelled. In that regard, they stated that the Lithuanian courts had in the meantime adequately substantiated their conclusions that the Lithuanian partisans constituted a significant part of a "national" and "ethnic" group protected under the Genocide Convention. The Supreme Court argued that the partisans "had played an essential role when protecting the national identity, culture and national self-awareness of the Lithuanian nation" and that "their extermination had therefore constituted genocide" also under the Genocide Convention (see paragraph 103 of the above judgment).

14. Being mindful of the Court's subsidiary role in the assessment and interpretation of historical events, this nevertheless raises the questions whether such an interpretation is acceptable and whether, as a consequence, the applicant's conviction for genocide was actually foreseeable for him at the time of his actions. Moreover, is the domestic courts' interpretation in accordance with the international understanding of the concept of genocide at the time of the applicant's actions?

15. In *Vasiliauskas* (see § 161), the Grand Chamber stated that its powers of review must be greater when the Convention right itself requires a conviction and sentence to have a legal basis. This applies in particular to

Article 7, which requires the Court to examine whether there was a contemporaneous legal basis for the applicant's conviction. Notably, it must satisfy itself that the result reached by the Lithuanian courts was compatible with Article 7, which provision, in principle, prohibits the retroactive application of criminal law to an accused's disadvantage. To accord a lesser power of review to this Court would render Article 7 devoid of its purpose (*ibid.*).

16. The Court thus cannot confine its review to the question whether or not the domestic courts' interpretation "distorted" the findings of the Court's *Vasiliauskas* judgment and to the conclusion that the national interpretation "was not, seen as a whole, the result of any manifest factual or legal error" (see paragraph 105 of the above judgment). In this respect, it is likewise not appropriate to apply, particularly without any reference to the Court's case-law, the "principles governing the execution of judgments" (see paragraph 102 of the above judgment). The present case is not about the execution of the *Vasiliauskas* judgment and therefore did not absolve the Court from conducting a full examination of the applicant's criminal conviction from the standpoint of Article 7 of the Convention, thereby assessing itself whether there had been a sufficiently clear basis in international law for such a conviction at the time of the events in 1956.

17. Moreover, as the Grand Chamber explained in *Vasiliauskas* (see § 177), the term "in part", as used in Article II of the Genocide Convention, was subsequently developed in the international case-law on the crime of genocide. It held:

"In particular, ... 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."

However, and this must also be taken into account, the Grand Chamber then added (*ibid.*):

"Be that as it may, this interpretation of the phrase "in part" could not have been foreseen by the applicant at the relevant time."

This holds equally true for the applicant in the present case.

18. There are therefore clear limits for the domestic courts in providing an interpretation of the definition of genocide and the intent to destroy, in whole or in part, a national ethnical group. Consequently, there are also limits for the domestic courts as well as for the Strasbourg Court in applying these concepts, as understood by international law at the time of the events. However, the reasoning of the Supreme Court's judgment of 12 April 2016 indicates that the assessment was done rather from the perspective of 2016 and applying the broader definition of genocide – taking into account in particular international case-law in the years 1999-2007 – instead of

adhering to the 1950s interpretation, which would have limited the criminal liability for genocide. As the Grand Chamber clearly stated in *Vasiliauskas* (see § 184 *in fine*, with further references): 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.

19. Fourth point: It is a different matter whether, in 1956, the applicant could at all have foreseen such an interpretation of the definition of genocide and of the term “part of a national group” leading to his later conviction. In this respect, another reference could be made to *Vasiliauskas*, § 181 *in fine*, where the Grand Chamber held as follows:

“... 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.”

20. In the present case, how could the applicant, even with the assistance of a lawyer, have foreseen the interpretation of the crime of genocide made in 2015-2016 by the domestic courts? To my mind, actually, he could not have foreseen either the classification of the Lithuanian partisans as a group protected under the Genocide Convention or the fact that the applicant’s participation in the arrest of a former leader of the partisans as such could constitute the offence of genocide. If that had been so obvious and foreseeable for the present applicant in 1956, the Grand Chamber would have been all the more convinced of the respective foreseeability for the applicant in *Vasiliauskas* who – it might be remembered – directly and knowingly took part in the killing of Lithuanian partisans. The foreseeability requirements cannot be lower for the applicant in the present case than for Mr Vasiliauskas.

21. Fifth point: The foregoing observations lead to the next aspect which I would like to discuss and which, to my mind, has not been dealt with in the majority’s judgment, or at least not sufficiently. The alleged genocide was committed by the applicant on 12 October 1956. Therefore, the situation and the foreseeability of the applicant’s conviction for genocide need to be assessed within the context of October 1956. However, the active resistance of the Lithuanian partisans ended in 1953 (see paragraph 42 of the above judgment). The ten years of resistance, also known as the “Lithuanian War or the resistance or partisan war” (see paragraph 52 of the above judgment), had already been over for three years when the applicant took part in the arrest of A.R. and B.M.

22. This raises the following additional questions: (a) What was the significance of the resistance movement and of the Lithuanian partisans in October 1956? (b) Did the Lithuanian partisans in October 1956 still constitute a significant part of the national group protected by the Genocide Convention? (c) Were the Lithuanian partisans in October 1956 still

significant for the survival of the entire national group, namely the Lithuanian nation (see *inter alia* paragraphs 53 and 105 of the above judgment)?

23. These questions were answered neither by the domestic courts nor by the majority in the present judgment. They had regard only to the situation as it existed till 1953 without even considering whether the legal assessment of the situation in 1956 could have been different from 1953. For lack of positive answers to the above questions (b) and (c), I am unable to find that the applicant's conviction for genocide could have been foreseeable for him in October 1956.

24. This point might also be emphasised by a hypothetical example. What if a person had been killed, let's say, in 1985, because he had been a leading Lithuanian partisan in the 1950s? Would such an offence still have been characterised as genocide?

25. Sixth point: The present case comprises one more specific feature which was not examined in the majority's judgment. Article III of the Genocide Convention defines the following acts as punishable: (a) genocide; (b) conspiracy to commit genocide; (c) direct and public incitement to commit genocide; (d) attempt to commit genocide; and (e) complicity in genocide (see *Vasiliauskas*, § 79).

26. The applicant was apparently convicted as an "accessory to genocide" under Article 99 taken in conjunction with Article 24 § 6 of the Lithuanian Criminal Code (see paragraph 58 of the above judgment) for having taken action which had assisted in the arrest of A.R. and B.M. on 12 October 1956 (see paragraph 38). Pursuant to Article 24 of the Lithuanian Criminal Code, an "accessory" is one type of "accomplice", albeit in the less serious mode of criminal participation and liability.

27. The relevant question now is whether the criminal act of being an "accessory to genocide" pursuant to Article 99 in conjunction with Article 24 § 6 of the Lithuanian Criminal Code, as in force from 1 May 2003, was covered by the punishable act of "complicity in genocide" under Article III (e) of the Genocide Convention as interpreted by international law in 1956. This again raises the question of the foreseeability of the applicant's conviction in 2015/2016. It should be remembered in this respect that the legal provisions on which the applicant's conviction was based were applied retroactively, and that Article 7 should be construed and applied in such a way as to provide effective safeguards against arbitrary prosecution, conviction and punishment (see *Vasiliauskas*, § 153).

28. However, the domestic courts failed to consider whether being an "accessory to genocide" as provided by Articles 99 and 24 § 6 of the Lithuanian Criminal Code was covered by the Genocide Convention as interpreted in 1956, and whether this could have been foreseeable for the applicant (see, in this respect, the Supreme Court's ruling of 12 April 2016,

and paragraphs 45-56 of the present judgment). The majority also refrained from assessing this aspect.

29. Against this background, I am once again unable to find that the applicant's conviction as "accessory to genocide" was foreseeable for him in October 1956.

#### **IV. Conclusion**

30. Coming back to the question which the Court had to answer under Article 7 in this case, for the above-mentioned reasons my conclusion is as follows: When the applicant participated in the arrest of A.R. and B.M. on 12 October 1956, he did not foresee, and could not have foreseen, even with the assistance of a lawyer, that his actions, having regard to international law, in particular the Genocide Convention, as interpreted at that time, could constitute the offence of being an "accessory to genocide", leading to his later criminal conviction.

31. In my opinion – and I say that with all due respect – the Chamber majority misinterpreted the *Vasiliauskas* judgment and disavowed the Grand Chamber. A faithful application of *Vasiliauskas*, in particular of its principles and its assessment of foreseeability, would in the present case have led to the same result as in that Grand Chamber case, namely the finding that the applicant's conviction could be justified under neither Article 7 § 1 nor Article 7 § 2.

32. Therefore, to my mind, there has been a violation of Article 7 of the Convention.