THE POSSIBLE LEGAL EFFECTS AND PERILS OF ENLARGING THE DEFINITION OF GENOCIDE THROUGH NATIONAL NORMS

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ABSTRACT

At an international level, the definition of genocide remained virtually the same since 1948. Even though proposals to enlarge this definition have been made throughout the years, most of the states refused to accept such a modification. At the end of World War II, the majority of the states accepted that the definition of the crime of genocide should only include four protected groups: national, ethnical, racial and religious. The idea that social and political groups should also be included was rejected. During the years, especially in the 1990s and in the early 2000s, the proposal to include other groups was submitted again. This time, there were several countries, including France and the Baltic States in Europe, which used a more exhaustive national norm. However, the proposal was again rejected.

Having succinctly reviewed the reasons behind these controversial repeated choices, this paper will proceed to present the examples of several national definitions which include other types of groups. These norms will be analyzed from two points of view: the national historical reasons specific for each country and the legal effects of these legislative solutions. In the end, the possible implications of the enlarged national definitions will be analyzed, especially in light of the fundamental guarantees of a criminal trial governed by the European Convention of Human Rights.

Keywords*: genocide, convention, legal norms, political groups, jus cogens.*

INTRODUCTION

At an international level, the definition of genocide remained virtually the same since 1948. Even though proposals to enlarge this definition have been made throughout the years, most of the states refused to accept such a modification. At the end of World War II, the majority of the states accepted that the definition of

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Rom. Jour. of Sociological Studies, New Series, No. 2, p. 123–135, Bucharest, 2021

the crime of genocide should only include four protected groups: national, ethnical, racial and religious. The idea that social and political groups should also be included was rejected. During the years, especially in the 1990s and in the early 2000s, the proposal to include other groups was submitted again. This time, there were several countries, including France and the Baltic States in Europe, which used a more exhaustive national norm. However, the proposal was again rejected.

The aim of this paper is to analyze some of the possible implications that such an enlargement could have for the transitional justice phenomenon from a legal perspective. In order to achieve this goal, one will have to take into account both the legal texts and the legal doctrine, while accepting that the evolution of the legal norms cannot be dissociated from the evolution of the political thinking. In the end, the jurist has to set aside the idealistically approach of the law as a purely scientifical creation and bow before the irrefutable realities of the last two centuries.

As a consequence, the structure of this paper has been chosen to reflect these phenomena. Having succinctly reviewed the reasons behind the controversial repeated choices which shaped the international legal definitions, this paper will proceed to present the examples of several national definitions which include other types of groups. These norms will be analyzed from two points of view: the national historical reasons specific for each country and the legal effects of these legislative solutions. In the end, the possible implications of the enlarged national definitions will be analyzed, especially in light of the fundamental guarantees of a criminal trial governed by the European Convention of Human Rights.

SHAPING THE INTERNATIONAL DEFINITION OF GENOCIDE

On the 9th of December 1948, the General Assembly of the United Nations approved the final version of the *Convention on the Prevention and Punishment of the Crime of Genocide*, hereinafter UNGC. It was on this occasion that one of the most important and stable norms of the contemporaneous legal systems was born, marking at the same time a shift in the political paradigm of the global society. We are, of course, referring to the second article of the document, which reads as follows:

> "In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
> (a) Killing members of the group;
> (b) Causing serious bodily or mental harm to members of the group;
> (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
> (d) Imposing measures intended to prevent births within the group;
> (e) Forcibly transferring children of the group to another group" (UNGC, 1948, art II).

The crime of genocide was thus officially individualized in relation to the crimes of humanity, previously defined in the Charter of the International Military Tribunal from Nuremberg. In the case of the former, the perpetrator has to act with a specific form of direct intent as he has to commit the deed in order to destroy at least partially at least one national, ethnical, racial or religious group. This is to be compared with the *mens rea* required for the commission of the crimes against humanity, namely acting with the intention or at least agreeing to contribute through a specific illicit conduct to the systematic or generalized attack against a civilian population.

One can easily observe that in situations criminalized by the dispositions of art. II of the UNGC, the attitude of the perpetrator towards their victims has to be truly exceptional. In fact, it is this specific objective of the one element which determined most of the authors to affirm that genocide is the most serious crime that has ever been included in the criminal legislation of any country.

However, the phenomenon described by this definition is far older than the middle of the twentieth century. In fact, it is so old that the authors of the UNGC chose to recognize in the preamble "*that at all periods of history genocide has inflicted great losses on humanity.*" Indeed, one cannot ignore the scores of situations in which a State or a community tried to wipe out a national, ethnical, racial and/or religious group. In the Ancient Greece, Euripides condemned his fellow citizens for pillaging Troy after its conquest, arguing that in killing all the men, while enslaving the women and the children, they effectively destroyed the Trojan culture (Moruzi, 1947, pp. 12–13). Later, in the Medieval Age, several states tried to effectively destroy religious and/or political communities: Charles the Twelfth hunted down the Huguenots, the Japanese attempted to eradicate all the Catholics from Japan in the 17th century and Spain tried to purge all the Muslims from its territories. These are only a few of the historical events which could be theoretically analyzed in accordance with the dispositions of art. II of the UNGC. Nevertheless, we would argue that reaching a certain degree of objectivity when trying to evaluate the legal implications of the more recent events is usually, unfortunately, a difficult task. More often than not, the academic impartiality falls prey to the political, cultural, ideological or religious agendas of those involved in the analysis.

For example, on the 24th of April 2001, the Council of Europe, hereinafter C.o.E., forced the issue of the 1915 massacres of the Armenians on Turkey by declaring that the welfare of the diplomatic relations between the former and the latter depends on the willingness of the Turkish government to accept that those mass murders amounted to acts of genocide. This was first and foremost a political statement, but it did not remain without an echo. On the 28th of February 2012, the Parliament of the European Union issued a similar statement and qualified as genocide the same events. They also affirmed that Turkey will not be allowed to join the E.U. until it also acknowledged that those events were genocidal acts. To

this day, Turkey denies such a qualification, even if there are authors who consider that this policy of denial has the unfortunate effect of promoting a culture of hatred in the Caucasus region (Benescu, 2020).

Taking under consideration all these, we would suggest that this debate was not a beneficial one. On the one side we have two political statements demanding for a third, while on the other side we have another political statement, but contrary to the first two. None of those messages has any legal value or effects, but they are all unnecessarily politicizing the subject.

In order to better understand the issue at hand, we should consider another historical event. Between 1932 and 1933, in today's Ukraine, approximately 5,000,000 people died of starvation during a famine regarded by many as deliberately inflicted by the Soviet Union (Drumbl, 2018, p. 616). We now know this historical event under the name of *Holodomor* and understanding one key element about it is crucial for the understanding of this paper's subject. The fact is that there is no consensus regarding the specific *mens rea* of the political leaders who created the premises for this tragic event. Was Joseph Stalin trying to destroy the Ukrainian people, a national group, through the means of a horrendous famine? Or was he simply counterbalancing his political interests, sacrificing Ukrainian lives in order to gain a certain political advantage? The answer is certainly politicized, however the scientific jury is still out, as the possible common ground is shaky at best.

The same argument was proposed in relation to the extermination of the natives by the European settlers (Plouffe, 2012, p. 163). Were the colonialist powers acting with the direct and primary intent of destroying at least in part a national or ethnic group or were they aiming to ethnically cleanse a certain territory by forcing the native to leave in order to inhabit it and exploit its resources? We have no definitive proof in order to support whichever.

In the previous two scenarios, the differences between the two types of subjective attitudes might seem unimportant, especially when put into perspective by the great number of victims, but they are particularly relevant for the understanding of the reluctance of many jurists as to the retroactive use of the label of genocide for events which happened before the Second World War (or even before the approval of the UNGC in 1948). We are of the same opinion, as we believe that caution should be exercised when labeling events and attitudes which happened before the notion genocide was coined by Raphael Lemkin.

In fact, we should remember that *Holodomor* was also one of the examples which inspired Raphael Lemkin to propose the introduction of two new crimes: the *barbarism* and the *vandalism* (Drumbl, 2018, p. 618). The former consisted in the destruction of racial, ethnical, religious or social groups, while the latter was

supposed to designate the intentional destruction of the identity of those groups[1]. As we have already presented the wording of article II of the UNGC, it goes without saying that, in 1948 at least, the international community preferred a more self-limiting way of regulating (Jacobs, 2002, p. 100). Thus, the concept of genocide finds its roots in the 1930s notion of vandalism and it was coined by Raphael Lemkin in the early 1940s, under the strong impression left by his experience with the crimes committed by the agents of the Nazi regime.

In consequence, we would suggest that there are three main ideas that we should remember if we are considering the use of the notion of genocide. Firstly, one should remember that the notion of genocide caught like wildfire in the 1930s and 1940s, even though it was not legally defined until 1948. All those years ago, humanity was living a collective trauma and it needed a new vocabulary to express its feelings and thoughts. Hence, it should not come as a surprise that Robert H. Jackson used in the indictment submitted to the International Military Tribunal of Nuremberg, hereinafter IMTN, the word genocide in order to describe the crimes committed by the defendants, even if the correct classification of those acts according to the Charter of the IMTN was crimes against humanity (Schabas, 2010, p. 245). Secondly, one should observe that for over seventy years, the concept had a clear, unmodified definition which was accepted by the international community. Moreover, this concept has been used to legally frame some of the most serious violations of human rights of the last three decades, especially in the former Yugoslavia and in Rwanda.

Thirdly, one should observe that, even though the prohibition of genocide is now a part of the *jus cogens*, thus being opposable to all the peoples of the world, irrespective of their national legislation, we should not believe that genocide is legally defined in the same manner in every country.

In the following sections we are going to explore the implications of these three ideas in an attempt to analyze the advantages and disadvantages of employing an enlarged definition of genocide.

THE *JUS COGENS* ASPECT

The peremptory norms of the general international law, also known under the name of *jus cogens*, were officially introduced as a legal concept in 1969, when the *United Nations Vienna Convention on the Law of Treaties*, hereinafter UNLT, was approved for signature[2]. They were defined in art. 53, where it was stated that they are

[1] Vandalism, as a term for this phenomenon, did not catch on. Instead, the concept is more commonly known nowadays as cultural genocide.

[2] The complete text of the treaty may be found at https://legal.un.org/ilc/texts/instruments/english/conventions/ 1_1_1969.pdf, last visited on the 6th of December 2020.

> "accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character".

Articles 53 and 64 of the same act are crucial for the understanding of the implications of this definition, since we may now argue that these rules govern the national and international legal orders. The will of the State, its rights and freedom of action, both internally and externally, are to be understood and exercised with their observance. For a long time now, it was known that the *jus cogens* norms have to be considered whenever a treaty is being drafted, as its legal conclusion is impossible if its provisions are contrary to the former set of norms (Geamănu, 1967, pp. 296–300). We should mention, however, that the *jus cogens* received (almost) full recognition, becoming a working reality of the international law after the fall of the Communist regimes. The emergence of so many democracies created the perfect momentum for the promotion of this new legal species.

However, we should point out that the process of determining which norms are included in the *jus cogens* is not an exact science. As an example, the International Court of Justice uses several techniques, including the study of the State diplomatic relations, the content of the in-effect treaties, the national and international jurisprudence, etc. (Ryngaert & Siccama, 2018). As for the national courts, they are also employing different techniques depending on how well the judges understand the subject and the internationally accepted best practices. In turn, this means that mistakes are common in the national jurisprudence. For example, in the early 2000s there were cases in which national courts erroneously believed that some of the norms included in the Rome Statute of 1998 were part of the *jus cogens* (Ryngaert & Siccama, 2018, pp. 10–16). The mistake was generated by the fact that those judges believed that if some of the norms included in the treaty are peremptory norms, then most of them have to be.

All this being considered, the ideas exposed in the previous paragraph should not be read as meaning that we do not have any authority on the subject. Fortunately, such body exists, providing the international community with annual studies regarding the evolution of this type of customary law. As of today, there are several universally recognized peremptory norms of the general international law, while a few other are being analyzed by the International Law Commission of the United Nations, hereinafter ILC. According to this entity, the ones that are not openly contested are:

> "– the prohibition of the use of aggressive force in the international relations;
> – **the prohibition of genocide**, crimes against humanity, torture, slavery, apartheid and racial discrimination;

– the right to self-determination of the peoples;
– the basic rules of the international humanitarian law."[3]

We should highlight the fact that the legal doctrine suggests that there are many more norms which could be qualified according to art. 53 of the UNLT, as is the right to a fair trial (Samad, 2016, p. 278). The proponents of the idea usually argue that this right is basically universally protected by the human rights international conventions, while it is included as a fundamental right in the constitutional law of the majority of States.

An interesting example of a norm which is not considered part of the *jus cogens* is the right to immunity of jurisdiction of the heads of States and of other high-level officials (Gillett, 2012, p. 93). In light of this idea, we would like to underline the fact that even if most authors believe that the peremptory norms are part of the international customary law, this does not mean that all the rules which form the latter may be considered as part of the former. In other words, even if all the *jus cogens* norms are considered customary norms, not all the customary rules are regarded as part of the *jus cogens*.

In the end of this section, we could wonder why only the prohibition of a few crimes was transposed among the peremptory norms of the international customary law? Why not murder, rape, various acts of terrorism and so on? As it was previously noted in the legal doctrine, the crime of genocide has a multidimensional impact on the society, especially given its complex and systematic nature (Campbell, 2004, p. 37). As an example, the effects of the Holocaust are still visible today everywhere in the world, not only in Germany or in Europe. Its denial is still criminalized in many countries, with Austria, the Federal Republic of Germany and France being the first three countries to introduce such a norm immediately after the Second World War (Fijalkowski, 2014, p. 302). Therefore, since the 1970s, genocide became the object of an interdisciplinary field of study (Feierstein, 2015, pp. 120–121). The legal sciences, history, psychology, sociology and anthropology contributed with various and interconnected inputs, radically transforming our understanding of this illicit conduct. Given all these, we should remember that, even if criminality is a global reality, only a handful of crimes and offenses generate such an extensive interest.

[3] More on the subject may be found in the Fourth report on peremptory norms of general international law (jus cogens) by Dire Tladi, Special Rapporteur, which may be consulted at http://legal.un.org/docs/?symbol=A/ CN.4/727, last visited on the 4th of December 2020.

IS THE BROADENING OF THE DEFINITION OF GENOCIDE A DESIDERATUM?[4]

For a very long time, before and after the Second World War, Raphael Lemkin presented the concept of genocide by affirming that it is a crime which may be committed for political, social, cultural, economic, biological, psychological, religious and/or moral reasons (Drumbl, 2018, pp. 632–634). Moreover, the Polish jurist believed that such a crime is able to reorganize the internal structure of large human groups, changing their collective identity (Feierstein, 2015). Such an altering effect could not be achieved in the absence of a very complex set of interconnected inputs.

For a while, between 1945 and 1948, it seemed that if genocide were to be defined in a treaty, it would most certainly be defined in an extensive manner. In this sense, one should also remember that all the preliminary versions of the UNGC included in the scope of the definition the political groups. Only a handful of States were against this. As an example, Great Britain, Denmark, the USSR, Brazil and several other countries refused to validate the definition while it was still under negotiation, arguing against the inclusion of such collectives (Drumbl, 2018, p. 116). Nevertheless, the opponents had the necessary strength to impose their view and the final version of the second article of the UNGC made reference to only four types of groups: national, ethnical, racial and religious.

As we previously mentioned, the definition of genocide remained the same from 1948 until the present day, even if it was included in several other international agreements, like the Statutes of the International Criminal Tribunals for the former Yugoslavia and Rwanda. In 1998, during the Rome Conference, the representatives of the participant countries agreed again to leave the definition unchanged. The arguments which prevailed were the following:

– changing the definition by including other groups (political, social, sexual etc.) would affect the stability of the peremptory norm of the international customary law, as many States would refuse to accept any such modification;

– changing the definition is not necessary, as all types of groups are already protected by the definition of the crimes against humanity, which criminalizes certain actions and inactions, if they are committed "as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack";

– changing the definition would potentially jeopardize the advancement of the international criminal law, as it might antagonize a lot of the States which have persecuted or are still persecuting different types of social groups.

[4] In this section we are going to provide several examples of pieces of legislation from other countries. The complete English version of those acts may be found at https://www.legislationline.org/. One may also be interested in consulting the Romanian translation of the cited Criminal Codes and if this the case, one may find such documents at http://codexpenal.just.ro/codex.html.

In light of the previous paragraphs, one could easily see why the *international* definition of the crime of genocide did not change. However, it also explains in part why most of the countries elect to include in their national legislation the same definition. It is much easier and safer to criminalize a specific conduct in a manner which ensures at the same time the observance by the State of its international obligations. Romania did the same in 2014, when it transposed the internationally recognized norm in art. 438 of the Romanian Criminal Code.

Yet, there are some countries who decided to modify the definition by enlarging its scope. For example, art. 211–1 of the French Criminal Code[5] states that

> "genocide occurs where, in the enforcement of a concerted plan aimed at the partial or total destruction of a national, ethnic, racial or religious group, **or of a group determined by any other arbitrary criterion** (…)".

The French version is interesting especially since it emphasizes that genocide is impossible in the absence of a form of discrimination. One could argue that this manner of regulating is the effect of the culture of human rights, hopefully nowadays deeply rooted in the heart of the European democracies.

History may be another decisive factor in choosing to enlarge the scope of the crime of genocide. Art. 90 of the Estonian Criminal Code provides the following dispositions:

> "killing or torturing, with the intention of destroying, in whole or in part, of members of a national, ethnic, racial or religious group, **a group resisting occupation or any other social group**, causing of health damage to members of the group, imposing of coercive measures preventing childbirth within the group or forcibly transferring of children of the group (…)".

In a similar manner, Art. 99 of the Lithuanian Criminal Code affirms that

> "a person who, seeking to physically destroy, in whole or in part, the persons belonging to any national, ethnic, racial, religious, **social or political group**, organizes, is in charge of or participates in their killing, torturing (…)".

These two norms have to be understood in light of the realities of Soviet occupation of the Baltic States. Sharing a similarly tragic recent past, Poland is another example in this sense. Art. 118 of the Polish Criminal Code introduces another type of collective passive subject by providing that

> "whoever, acting with an intent to destroy in full or in part, any ethnic, racial, **political or religious group, or a group with a different perspective on life**, commits homicide or (…)".

[5] The French version of the article may be found at https://www.legifrance.gouv.fr/codes/id/LEGIARTI0000064 17533/2004-08-07/, last visited on the 3rd of December 2020.

If we are to understand the rationale behind these articles, we should mention a few infamous truths about the recent history of the Baltic States. Following the Ribbentrop-Molotov Pact, the U.S.S.R. staged a step-by-step "voluntary" integration of Estonia, Latvia and Lithuania in the Union, finalized in 1941. The irony is that just a week later, the three countries were occupied by Nazi Germany. They were retaken following the 1944 Baltic Offensive of the Red Army and remained a part of the Soviet Union until 1991. These historical events marked some of the most dire moments of these countries' histories, given the horrendous extent of the political persecutions and mass crimes committed by the Communist Regime controlled by Kremlin. The tragedies of those days represent some of the reasons which determined certain authors to consider that the Communist regimes, like the Nazi regime, committed crimes of genocide, the sole difference being that the former acted in the name of racial superiority, while the later believed in the class struggle (Karski, 2011, p. 36).

In light of those years, the Baltic States have been known to have a tendency to modify their criminal legislation in order to criminalize specific forms of repression used in the past by the agents of the Communist regimes (Satkauskas, 2004, pp. 397–398). These provisions were then used in order to prosecute and condemn those who actively participated in the deportations in Siberia, in the executions of the members of the armed resistance movements etc. It should be mentioned that, according to the Soviet approximations, over 17,500 citizens from Lithuania, over 15,000 from Latvia and over 14,000 from Estonia were deported in the years following the end of the Second World War. The studies conducted by the Baltic authorities and scholars after 1991 speak about much higher figures: approximately 132,000 from Lithuania, over 43,000 from Estonia and around 122,000 from Latvia. We must stress the fact that the abuses committed by the defendants were usually politically motivated, which would explain why the Baltic legislators considered necessary to include the political groups or other variations of the nation in the definition of genocide. In the end, we have to agree that it is hard to argue today that the class struggle was not intrinsically connected to a political ideology.

In consequence, we would agree that there are some societies where the traumas of the past would justify the modification of the definition of genocide by including other types of groups. A conviction for genocide will always send a strong message in the society, when and if it is properly substantiated. However, we would not say that this is legally necessary, as the serious violations of human rights may always be classified under different criminal law provisions: crimes against humanity, torture, murder, rape etc.

All these being considered, we believe we managed to succinctly set the necessary premises for the analysis of the possible problems which might be encountered by a State who chooses to use an enlarged version of the definition of genocide. It should be added that the following arguments might be employed for

any such way of internally regulating in a domain included in the scope of the *jus cogens*.

THE POSSIBLE PITFALLS OF INTRODUCING A WIDER DEFINITION FOR THE CRIME OF GENOCIDE

The principle of legality, also known as the rule of law, is one of the most important principles which govern the modern legal systems. It is crucial for the understanding of the limits of the exercise of power by the State, therefore it has various expressions in different branches of the law, but, for the purposes of this paper, we have to pass directly to its most important meanings in the criminal law: *nullumcrimen sine legepraevia* and *nullapoena sine legepraevia.* These ideas were enshrined in the first paragraph of article 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, hereinafter the ECHR:

> "No one shall be held guilty of any criminal offense on account of any act or omission which did not constitute a criminal offense 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 offense was committed."

The same provisions have been transposed in a similar manner in all the Constitutions of the member states of the European Union and of the Council of Europe. In the Romanian Constitution of 1991, they may be found several places, including art. 1 par. 3, art. 15 par. 2 and art. 23 par. 12.

Thus, the *nullumcrimen sine lege* principle prevents the public authorities from using the criminal law in order to punish a person from committing any act which was not criminalized at the moment of commission. It would seem that this principle is as old as the Western democracies, but it is not. In fact, Hans Kelsen was arguing that in 1945 the observance of this principle in Europe was the exception, rather than the rule (von Bernstorff, 2018, pp. 576–77). Given that it was included in 1950 in the ECHR, it was born out of necessity in the second half of the 20th century.

However, we must add that the moment of its universal acknowledgment also marks the moment of the creation of its most important exception, enshrined in the second paragraph of art. 7 of the ECHR:

> "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 recognized by civilized nations."

This means that a person can be prosecuted, trialed and convicted at any given time for committing of an international crime, even if there was no such

provision in the national criminal law at the moment of the commission. As we previously indicated, the ILC states that genocide is one such crime. This opinion was validated by the European Court of Human Rights in several cases, among which we can quote *Streletz, Kessler and Krenz v. Germany* (2001), *K.-H.W. v. Germany* (2001) and *Kononov v. Latvia* (2010).

However, the idea mentioned in the previous paragraph only applies in relation to the internationally accepted definition of the crime of genocide, namely the one included in art. II of the UNGC. Which raises the following question: what happens when a State includes in its criminal legislation a broader definition in order to be able to use the exception mentioned by art. 7 par. 2 of the ECHR in order to punish perpetrators of serious human rights violations who acted legally at the time. More specifically, if Romania enlarges the definition of the crime of genocide by including the political groups, does this mean that the Romanian authorities have the right to punish former agents of the Communist regime for their contributions to the extermination of the political opponents of the said regime? We are of the opinion that they do not have this right.

CONCLUSION

As we previously stated, the role of the principle of legality is *inter alia* to set a limit to what an individual State is able to sanction. A citizen cannot be expected to follow a rule which did not exist at the time when he or she acted, even if such an action is later deemed to be very serious. This would create the risk that the State will abuse this extraordinary prerogative whenever it suits the political agenda of those who are in power. Therefore, in our opinion, no public authority should be allowed "to bend" a very clear norm in order to avoid the observance of the principle of legality. Enlarging the definition of the crime of genocide by including groups who were violently persecuted in the past has a certain appeal and it might be morally justifiable. However, this does not mean that it is legally correct.

The same conclusion was reached by an European Constitutional Court in 2014, when the Lithuanian Constitutional Court[6] was called upon to answer a difficult question: is art. 99 of the Criminal Code breaking the principle of non-retroactivity by stating that a person may be judged and condemned for committing certain crimes while seeking to physically destroy in whole or in part, the persons belonging to a social or political group, if the deed was perpetrated prior to the entering in effect of the norm? In its ruling, the Court argued that only those provisions of art. 99 who are identical to art. II of the UNGC may be applied retroactively, while the provisions added by the Lithuanian legislator have to be

[6] The complete ruling may be found at https://www.lrkt.lt/en/court-acts/search/170/ta853/content, lastvisited on the 3rd of December 2020.

applied only to the cases which occurred after the entering in effect of the Criminal Code.

The solution provided by the Lithuanian Constitutional Court is elegant enough in our opinion. The national legislator should be free to use an enlarged definition for the crime of genocide, as this means that, in time, the *jus cogens* norms will also evolve. However, the national legislator should not be allowed to use the notion of genocide in order to circumvent the principle of legality, as this would most certainly create a most perilous precedent, no matter how noble the intention might seem at the moment.

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