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**CRIMES COMMITTED BY THE COMMUNIST REGIMES
FROM THE STANDPOINT OF INTERNATIONAL LEGISLATION:
LITHUANIAN CASE STUDY**

I appreciate very much the initiative to organise the conference on the issue concerning the crimes committed by the communist regimes. It is my pleasure to give an introduction to the basic legal aspects of the mentioned issue together with the special presentation of the legal analysis of the Lithuanian case. International crimes such as crimes against humanity, genocide and war crimes inevitably have to be dealt within the international legal context. They concern not only national measures to implement the justice but also depend on the efforts put forward by the international community to condemn them publicly and create sufficient international legal basis for the effective persecution.

Let me first of all go through the general introduction into the notion of the international crimes and specifically crimes against humanity, war crimes and genocide; secondly, I will address historical facts and legal instruments relevant in assessing crimes of the communist regimes; thirdly, I will analyse Lithuanian case as an illustration how the crimes of the occupation communist regime are dealt with in our national legal system; and finally, I will touch briefly the existing EU legislation related with a crime of genocide, crimes against humanity and war crimes and highlight the need for equal treatment of these crimes irrespective of their perpetrators (equal treatment of the crimes committed by Nazi and Soviet regimes).

I. THE DEFINITION AND CLASSIFICATION OF INTERNATIONAL CRIMES. International crimes are breaches of international rules entailing the personal criminal liability of the individuals concerned (as opposed to the responsibility of the State of which the individuals may act as organs).¹ They are international criminal law normative proscriptions whose violation is likely to affect international peace and security of humankind or is contrary to fundamental humanitarian values, or which is product of state action or a state-favouring policy.² From other international violations they are most distinguished by the

¹ Cassese, A. *International Criminal Law*. New York: Oxford University Press. 2003. P. 23.

² Bassiouni, C. M. *Introduction to International Criminal Law*. New York: Transnational Publishers, Inc. (2003). P. 121.

fact that their commission often cannot occur without state action or state-favouring policy³. International crimes are expected to have certain common features⁴ such as: a) they are violations of international customary rules; b) these rules intended to protect values considered important by the whole international community and consequently binding all States and individuals. Such values first of all are fundamental human rights, such as right to life, dignity, legal personality and freedom, prohibition of torture and inhuman treatment, etc.⁵; c) furthermore there is a universal interest in repressing these crimes; d) finally, if the perpetrator has acted in an official capacity, the State on whose behalf he has performed the prohibited act is barred from claiming enjoyment of immunity.

Under this definition such international crimes as war crimes, crimes against humanity, genocide, torture (distinct from torture as one of the categories of war crimes or crimes against humanity, e.g. torture not of a large scale or not systematic, or committed by private persons), aggression and some extreme forms of terrorism (serious acts of State-sponsored or -tolerated international terrorism)⁶ can be listed.⁷ However, classical examples of international crimes giving rise to individual criminal responsibility are genocide, crimes against humanity and war crimes (these categories of international crimes also fall into the jurisdiction of the International Criminal Court and they are also defined in the 1998 Rome Statute of this Court, one of the most recent international legal instruments defining international crimes).

Thus crimes against humanity, genocide and war crimes together with crime of aggression are considered to be the most serious crimes for the international community as a whole. These crimes are defined by the 1998 Rome Statute of the International Criminal Court (ICC), the 1949 Geneva conventions and their Additional Protocols of 1977, the statutes of the ad hoc international criminal tribunals (the Statute of Nuremberg International Military Tribunal, Statutes of the International criminal tribunal for the former Yugoslavia and International criminal tribunal for Rwanda). Despite expectations to have the ICC as the

³ Ibid. P. 121.

⁴ According to: Op. cit. Cassese, A. P. 23.

⁵ Fundamental values of international community are laid down and protected by a number of international instruments, among which the most important are the 1945 UN Charter, the 1948 Universal Declaration of Human Rights, the 1950 European Convention on Human Rights, the two 1966 UN Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights; also prohibiting conduct that is detrimental to the fundamental values of international community – the 1948 Convention on Genocide, the 1949 Geneva Conventions on the protection of victims of armed conflicts and their three Additional Protocols, the 1984 Convention against Torture, the 1968 Convention on the Non-applicability of Statutory Limitations to War Crimes and Crimes Against Humanity and other.

⁶ Ibid. P. 24.

⁷ Bassiouni, C. M. also enlists such additional crimes as mercenarism, slavery, unlawful human experimentation. See: op.cit. Bassiouni, C. M. P. 121.

international judicial institution implementing justice for the most starveling of it, the ICC does not give opportunity to seek justice for the crimes committed by the communist regimes since it has limited *ratione temporis* jurisdiction (only crimes committed after the Rome Statute entered into force (1 July 2002) may be investigated by the ICC). Therefore it still remains a matter of national process and relies upon good will and initiative shown by the international community to condemn crimes of the communist regimes publicly and create legal and institutional basis to try for them.

Since II WW **crimes against humanity** have been repeatedly recognised in international instruments as a part of international law, with considerable consistency in their definition.⁸ The notion of the crimes against humanity covers actions that share a set of common features: (1) they constitute a serious attack on life and human dignity or grave humiliation or degradation of one or more human beings; (2) they are a part either of governmental policy, or of a widespread or systematic practice of atrocities tolerated, condoned, or acquiesced in by government or *de facto* authority; (3) it does not matter either they have been committed during the situation of war or peace; (4) the victims of the crime may be civilians (according to Art. 7 of the Rome Statute of International Criminal Court, only civilians) or at least persons not longer qualified as combatants⁹, e.g. persons no longer taking part in hostilities or enemy combatants.¹⁰

Art. 7 of the ICC Statute provides a list of crimes against humanity. The most important and relevant to qualify the acts of the communist regimes are the following crimes: 1) murder; 2) extermination; 3) enslavement; 4) deportation or forcible transfer of population; 5) imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; 6) torture; 7) rape and other sexual violence; 8) persecution against any group on political, racial, national, ethnic, cultural, religious grounds; 9) enforced disappearance of persons.

⁸ Dixon R. in: Triffterer, O. (ed.) (1999). *Commentary on the Rome Statute of the International Criminal Court*. Baden-Baden: Nomos Verlagsgesellschaft. P. 122. The relevant provisions include Art. 6 (c) of the 1946 Nuremberg Charter, Art. II para. 1 (c) of the Allied Control Council Law No. 10, Art. 5 (c) of the Tokyo Charter, principle VI (c) of the 1950 Nuremberg principles; Art. 10 of the Draft code of Offences against Peace and Security of Mankind of 1954; the 1968 Convention on the Non-Applicability of Statutory Limitations for War Crimes and Crimes Against Humanity, adopted by G.A. Resolution 2391 (XXIII) of 26 Nov. 1968, Art. 1(b); the 1973 International Convention on the Suppression and Punishment of the Crime of Apartheid, adopted by the G.A. Res. 3068 (XXVIII), 30 Nov. 1973; Art. 5 of the 1993 Statute of the International Criminal Tribunal for the former Yugoslavia, Art. 3 of the 1994 Statute of the International Criminal Tribunal for Rwanda; Art. 18 of the 1996 Draft Code of Crimes against Peace and Security of Mankind; Art. 7 of the Rome Statute of the ICC (1998).

⁹ Zahar, A. Sluiter, G. *International Criminal Law. A Critical Introduction*. Oxford: Oxford University Press, 2008, p. 208.

¹⁰ Op. cit. Cassese, A. P. 64

Most often the crimes against humanity have the following elements¹¹: 1) the perpetrator killed or injured, or done serious harm to one or more persons; 2) the conduct was committed as part of a widespread or systematic attack directed against a civilian population; 3) the perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack against a civilian population. The last two elements clarify the requisite participation in and knowledge of a widespread or systematic attack against a civilian population. However, the last element should not be interpreted as requiring proof that the perpetrator had knowledge of all characteristics of the attack or the precise details of the plan or policy of the State or organization. In the case of an emerging widespread or systematic attack against a civilian population, the intent clause of the last element indicates that this mental element is satisfied if the perpetrator intended to further such an attack.

Thus the key element of the crimes against humanity distinguishing them from ordinary crimes (e.g., murder, torture, rape, deprivation of liberty) is their *massive and systematic character*, i.e. they have to be committed as a part of widespread campaign of violence against civilian population that may be also called as a general criminal context (a single act of violence committed by a concrete individual can be regarded as a crime against humanity if it takes place in the relevant context when there are a lot of other persons committing similar acts against civilians as a part of the same campaign¹²).

War crimes are serious violations of customary or, whenever applicable, treaty rules belonging to the corpus of the international humanitarian law of armed conflict (does not matter whether it is an international or non international).¹³ As the Appeals Chamber of the ICTY stated in *Tadic* case (Interlocutory Appeal) (a) war crimes must consist of ‘a serious’ infringement of an international rule and ‘must constitute a breach of a rule protecting important values and the breach must involve grave consequences for the victim’; (b) the rule violated must either belong to the corpus of customary law or be part an applicable treaty; (c) ‘the violation must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule’. Thus a war crime may be shortly defined as any serious violation of international humanitarian law¹⁴.

The most relevant crimes to qualify the acts of the communist regimes are: 1) wilful killing; 2) torture or inhuman treatment; 3) wilfully causing great suffering, or serious injury

¹¹ The ICC Elements of Crimes: http://www.icc-cpi.int/NR/rdonlyres/9CAEE830-38CF-41D6-AB0B-68E5F9082543/0/Element_of_Crimes_English.pdf.

¹² Bonafè B. I. *The Relationship between State and Individual Responsibility for International Crimes*. Leiden, Martinus Nijhoff Publishers, 2009. P. 99-104.

¹³ Op. cit. Cassese, A. P. 47.

¹⁴ Op. cit. Zahar, A. Sluiter, G. P. 110-111.

to body or health; 4) extensive destruction and appropriation of property; 5) compelling a protected person to serve in the forces of a hostile Power; 6) wilful deprivation of the rights of a prisoner of war or other protected person to fair and regular trial; 7) intentional attacks against the civilian population; 8) intentional attacks against civilian objects; 9) killing or wounding a combatant who has surrendered; 10) the transfer by the Occupying Power of parts of its own civilian population into the occupied territory; 11) intentional attacks against buildings dedicated to religion, education, art, science or historic monuments, hospitals; 12) pillaging a town or place; 13) rape and sexual violence; 14) employment of weapons prohibited by international law.

Most often war crimes have the following elements¹⁵: 1) the perpetrator killed or inflicted severe physical or mental damage upon one or more persons; 2) such person or persons were protected under one or more of the Geneva Conventions or their Additional Protocols; 3) the perpetrator was aware of the factual circumstances that established that protected status; 4) the conduct took place in the context of and was associated with an armed conflict; 5) the perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Thus the *distinctive feature of war crimes* is that they have to be committed against protected persons in time of war (armed conflict). Also contrary to the crimes against humanity, war crimes may be isolated acts (one single act of violence) not necessarily done in a broader criminal context (i.e., not of massive and systematic character).

Genocide, understood as the intentional killing, destruction or extermination of groups or members of a group as such, was first envisaged as a sub-category of crimes against humanity. Genocide acquired autonomous significance as a specific crime in 1948 when UN GA adopted the Genocide Convention. Most often genocides, as a crime, has the following four elements¹⁶: 1) the perpetrator killed or seriously injured one or more persons; 2) such person or persons belonged to a particular national, ethnical, racial or religious group; 3) the perpetrator intended to destroy, in whole or in part, that national, ethnical, racial or religious group, as such; 4) the conduct took place in the context of a manifest pattern of similar conduct directed against that group or was a conduct that could itself effect such destruction.

Thus the characteristic feature of genocide distinguishing it from other crimes against humanity is presence of genocidal intent, i.e. an intent to destroy, in whole or in part, a certain

¹⁵ The ICC Elements of Crimes: http://www.icc-cpi.int/NR/ronlyres/9CAEE830-38CF-41D6-AB0B-68E5F9082543/0/Element_of_Crimes_English.pdf.

¹⁶ The ICC Elements of Crimes: http://www.icc-cpi.int/NR/ronlyres/9CAEE830-38CF-41D6-AB0B-68E5F9082543/0/Element_of_Crimes_English.pdf.

protected group of people. This intent can be also seen from a broader criminal context (general criminal context) when a number of acts directed against a protected group are committed in pursuing common genocidal plan or by perpetrators sharing the same genocidal intent¹⁷.

Genocide under its formal definition by the 1948 Convention covers only acts directed against a national, ethnical, racial or religious group, i.e. it does not include political and social groups. Initially both latter groups had been considered to fall into the scope of the definition of genocide. However, for political reasons (mainly due to strong opposition from the Soviet Union and its satellites) these groups were excluded from conventional definition. That causes the main problem to qualify the crimes committed by the communist regimes as genocide, because they most often have been directed at elimination of political opposition (the so-called counter-revolutionary groups and elements) and property owners. Although some States (e.g., Estonia, Lithuania, France) adheres to the broader concept of genocide, while in some States the communist crimes have been also directed against national groups (the so called nationalists or separatists), the crimes of the communist regimes nevertheless are rarely addressed as genocide. Though the scale of these crimes and numbers of victims are no less shocking than in the instances of a classical meaning of genocide (e.g., crimes of the Nazi regime or genocidal acts in the former Yugoslavia).

II. CRIMES COMMITTED BY THE COMMUNIST REGIMES. Obviously the violent and repressive acts of the communist regimes often meet the above mentioned criteria to qualify them, in accordance to the relevant circumstances and the context, either as crimes against humanity (e.g., massive killings, torture and persecutions, deportations) or as war crimes (when committed in time of armed conflict or occupation, e.g., attacks on civilian population and civilian objects, rape and sexual violence¹⁸, pillage, wilful killing of members of the resistance and deprivation of appropriate fair trial guarantees, etc.), or even as genocide in its broadened or even conventional meaning (e.g., the context, massive and systematic character of the Soviet repressions in Caucasus¹⁹ and the occupied Baltic States allow to qualify these acts as acts directed to eliminate in whole or at least in part certain national, ethnic and religious groups).

¹⁷ Op. cit. Bonafè B. I. P. 131-136.

¹⁸ E.g., the Soviet armed had practised that kind of massive sexual violence against the local civilian population of the occupied Eastern Prussia (Königsberg region) at the end of the II WW.

¹⁹ E.g., repressions, including deportation of the whole nation, against Chechen and Ingush people. We may speak also about genocide of the local population of the Eastern Prussia (Königsberg region).

The facts about the communist crimes speak for themselves. For instance, the Special Rapporteur on the PACE Draft Resolution on the need to condemn the crimes of the communist regimes provided the following impressive numbers of the victims of the communist regimes²⁰: in the former Soviet Union – 20 million people, in China – 65 million, Vietnam – 1 million, North Korea – 2 million, Cambodia – 2 million, Eastern Europe (excluding the Soviet Union) – 1 million. The Holodomor in Ukraine of 1930s when the Soviet totalitarian regime deliberately implemented special measures to create artificially the situation of a large scale famine that resulted in loss of up to 5 millions of Ukrainians, mostly peasants who had not been favourable to the regime. More than 300.000 citizens of the Republic of Estonia – almost a third of its then population – were affected by arrests, mass murder, deportation and other acts of repression. As a result of Soviet occupation, Estonia permanently lost at least 200.000 people or 20% of its population. Even today, there are less Estonians in Estonia than before WWII.²¹ Up to a million Lithuanians (also around one third of population) were affected by the Soviet occupation, while Lithuania lost around one fifth of its population due to the Soviet repressions, deportations and exodus. Bearing in mind the historical experience of other Central European countries, such as the Czech Republic, Slovakia, Hungary, Poland, Latvia, Bulgaria, Romania, I do not think that in Europe any serious doubt may be casted on the very fact whether crimes against humanity and war crimes and, in some instances, crime of genocide had been committed by communist totalitarian regimes, in particular by the Soviet Union.

Actually I do not think that there is any doubt whether the communist regimes had committed crimes against humanity, war crimes and even genocide. Their commission has been acknowledged on various occasions by different European organisations. The main problems is not sufficient or not sufficiently consolidated will of States to condemn these crimes and the extreme communist ideology justifying their commission with the same strength as the crimes and ideology of the Nazi regime has been already condemned. For instance, on 28 November 2008 the Member States of the European Union in the special declaration related with the EU Council Framework Decision 2008/913/JHA on combating certain forms and expressions of racism and xenophobia by means of criminal law have expressly acknowledged the crimes committed by totalitarian regimes by deploring them. However the

²⁰ Doc. 10765. The 16 December 2005 Report of the Political Affairs Committee on need for international condemnation of crimes of totalitarian communist regimes: <http://assembly.coe.int/main.asp?link=http://assembly.coe.int/Documents/WorkingDocs/Doc05/EDOC10765.htm>.

²¹ <http://www.communistcrimes.org/en/Database/Estonia/Historical-Introduction>.

crimes committed by the communist regimes were not covered by that Framework Decision (which is binding on the Member States) with regard to prohibition of public condoning, denial and gross trivialisation of genocide, crimes against humanity and war crimes.

NON-BINDING ACTS OF EUROPEAN INSTITUTIONS REGARDING THE CRIMES OF THE COMMUNIST REGIMES. The most influential European parliamentary institutions have issued a number of non-binding political resolutions directly concerning the crimes committed by the communist regimes. *From the standpoint of international law these acts can be considered as subsidiary tools or sources to interpret relevant rules of international law, to assess the crimes committed by communist regimes as meeting international legal criteria of crimes against humanity, war crimes and even genocide. Ultimately they also express the authoritative opinion regarding qualification of the crimes committed by the communist regimes as well as the measures to be taken by European States with regard to these crimes (their investigation and condemnation, raising public awareness about these crimes, commemoration and remembrance of the victims, etc.).*

First of all I would like to mention the recent resolution of *the European Parliament on European Conscience and Totalitarianism*²² adopted on 2 April 2009. This Resolution *inter alia* acknowledged that “millions of victims were deported, imprisoned, tortured and murdered by totalitarian and authoritarian regimes during the 20th century in Europe”; the European Parliament noted the specific historical experience of the Central European States by stating “the dominant historical experience of Western Europe was Nazism, and whereas Central and Eastern European countries have experienced both Communism and Nazism”. The European Parliament also condemned “strongly and unequivocally all crimes against humanity and the massive human rights violations committed by all totalitarian and authoritarian regimes”. That means, as I mentioned already, that there is no question or doubts about the very fact of commission by the communist regimes of crimes against humanity, war crimes or, in some instances, even genocide. Furthermore the European Parliament underlined the importance of remembrance of the past, reconciliation, research, teaching and public awareness about the crimes committed of the communist regimes.

Secondly, I would also like to mention two important resolutions of the other authoritative and wider European institution – *the Parliamentary Assembly of the Council of Europe*. The first resolution is more of general character, - the *27 June 1996 Resolution 1096(1996) on Measures to Dismantle the Heritage of Former Communist Totalitarian*

²² <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2009-0213+0+DOC+XML+V0//EN>.

*Regimes*²³ as apart the prosecution of the crimes it recommends a number of other measures to deal with the legacy of the communist regimes. As follows from the text of the Resolution, the fact of the crimes committed by the communist regimes is beyond the question; the Parliamentary Assembly is only concerned that justice should be done “without seeking revenge” in a manner compatible with democracy and rule of law, and the prosecution of individual crimes should go hand-in-hand with the rehabilitation of the victims.

With regard the crimes committed by the communist regimes, this resolution was further continued by the *25 January 2006 Resolution No. 1481(2006) on Need for International Condemnation of Crimes of Totalitarian Communist Regimes*²⁴, which is, to my mind, the most comprehensive resolution on the matter. The Parliamentary Assembly not only condemned the crimes committed by totalitarian communist regimes. It also noted that the totalitarian communist regimes “without exception, (were) characterised by massive violations of human rights. The violations have differed depending on the culture, country and the historical period and have included individual and collective assassinations and executions, death in concentration camps, starvation, deportations, torture, slave labour and other forms of mass physical terror, persecution on ethnic or religious grounds, violation of freedom of conscience, thought and expression, of freedom of the press, and also lack of political pluralism”. Thus most of the violations noted fall into the category of crimes against humanity or war crimes, if committed in relation with the armed conflict. Furthermore the Parliamentary Assembly also noted that the crimes of the communist regimes “were justified in the name of the class struggle theory and the principle of dictatorship of the proletariat. The interpretation of both principles legitimised the “elimination” of people who were considered harmful to the construction of a new society and, as such, enemies of the totalitarian communist regimes”. This important passage can be understood as recognition, at least to some extent, of the genocidal intent of the communist regimes to eliminate a certain group of people (it was expressly stated in the Explanatory Memorandum included into the 16 December 2005 Report of the Political Affairs Committee on the Draft Resolution²⁵ that “the important feature of communist crimes has been repression directed against *whole categories of innocent people* whose only ‘crime’ was being members of these categories. In this way, in the name of ideology, the regimes have murdered tens of millions of rich peasants (kulaks), nobles,

²³ <http://assembly.coe.int/main.asp?Link=/documents/adoptedtext/ta96/eres1096.htm>.

²⁴ <http://assembly.coe.int/main.asp?Link=/documents/adoptedtext/ta06/eres1481.htm>.

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<http://assembly.coe.int//main.asp?link=http://assembly.coe.int/Documents/WorkingDocs/Doc05/EDOC10765.htm>.

bourgeois, Cossacks, Ukrainians and other groups”). Therefore the Resolution can substantiate the claim that at least in respect of some national and ethnic group the crimes of the communist regimes could amount to genocide, as well as we can find additional arguments to broaden the traditional legal concept of genocide so as to include elimination of social and political groups.

The Resolution furthermore expresses concerns about poor public awareness about the crimes of the communist regimes, calls for the clear position of the international community on the past that would pave the way to further reconciliation; awareness of history and moral satisfaction of the victims are indicated among the further measures to be taken.

The last resolution I would like to mention is *the Resolution of the OSCE Parliamentary Assembly on Divided Europe Reunited: Promoting Human Rights and Civil Liberties in the OSCE Region in the 21st Century*²⁶, which was adopted on 3 July 2009 by the annual session of the Assembly in Vilnius. In line with the above mentioned EP and PACE resolutions this Resolution expressly acknowledged the crimes of the communist regimes by noting that “in the twentieth century European countries experienced two major totalitarian regimes, Nazi and Stalinist, which brought about *genocide, violations of human rights and freedoms, war crimes and crimes against humanity*”; it also stressed the need to raise public awareness about the totalitarian legacy, to open archives and to facilitate reconciliation based on truth and remembrance. All totalitarian rule from whatever ideological background was declared unacceptable and incompatible with the values of the widest European organization.

The basis for international condemnation of the crimes of the communist regimes could be *the universal validity of the Nuremberg principles* (the customary international law principles recognised in the Statute of the Nuremberg International Military Tribunal and the jurisprudence of this Tribunal). The universal validity of these principles has already been recognized by *the European Court of Human Rights*. The Court emphasized the universal validity of the Nuremberg principles in its decision on admissibility of 17 January 2006 in the case of *Kolk and Kislyiy v. Estonia* and in the decision on admissibility of 24 January 2006 in the case *Penart v. Estonia* stating that “responsibility for crimes against humanity cannot be limited only to the nationals of certain countries and solely to acts committed within the specific time frame of the Second World War”²⁷. The Court also noted that the Nuremberg

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http://www.oscepa.org/images/stories/documents/activities/1.Annual%20Session/2009_Vilnius/Final_Vilnius_Declaration_ENG.pdf.

²⁷ Extracts from these Court decisions:

principles and their universal validity were perfectly known to the Soviet Union, which was the founder of the Nuremberg Tribunal and the original member of the United Nations.

III. LITHUANIAN CASE. The specific feature of the communist crimes committed in the Baltic States is that they are attributable not only to the totalitarian communist regime but also to a foreign State (the Soviet Union), i.e. this regime had been the regime of foreign occupation as well. That follows from the fact that in 1940 the Soviet aggression was committed against the Baltic States, as one of the consequences of the Molotov-Ribbentrop Pact of 1939. For instance, the acts of the Soviet Union are to be treated as act of aggression falling within the definition of aggression stipulated in the 1933 Convention between Lithuania and the Soviet Union on the Definition of Aggression, which was based on the provisions of the Briand-Kellogg Pact and was equivalent in essence to the multilateral London Convention on the Definition of Aggression. This was an invasion by the armed forces, without a declaration of war, of the territory of another State. The occupation and annexation of the territory of Lithuania was a continuation of the aggression.²⁸

The repressions of the Soviet occupation totalitarian regime followed immediately as Lithuanian society had not consented to the occupation and annexation of Lithuania. As mentioned, the Soviet occupation directly affected around one third of Lithuanian population and one fifth of the population was lost. For instance, during the first Soviet occupation in 1940–1941, approximately 30 000 people became victims of the Soviet terror. Out of this number, over 1 000 were killed in Lithuania and nearly 20 thousand were deported to the GULAG camps. At the beginning of the second Soviet occupation, in 1944-1956, around 120 000 people had been deported from Lithuania, more than 20 000 members of the Resistance

“The Court notes that deportation of the civilian population was expressly recognised as a crime against humanity in the Charter of the Nuremberg Tribunal of 1945 (Article 6 (c)). Although the Nuremberg Tribunal was established for trying the major war criminals of the European Axis countries for the offences they had committed before or during the Second World War, the Court notes that the universal validity of the principles concerning crimes against humanity was subsequently confirmed by, inter alia, resolution 95 of the United Nations General Assembly (11 December 1946) and later by the International Law Commission. Accordingly, responsibility for crimes against humanity cannot be limited only to the nationals of certain countries and solely to acts committed within the specific time frame of the Second World War. In this context the Court would emphasise that it is expressly stated in Article I (b) of the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity that no statutory limitations shall apply to crimes against humanity, irrespective of the date of their commission and whether committed in time of war or in time of peace...

It is noteworthy in this context that the Soviet Union was a party to the London Agreement of 8 August 1945 by which the Nuremberg Charter was enacted. Moreover, on 11 December 1946 the United Nations General Assembly affirmed the principles of international law recognised by the Charter. As the Soviet Union was a member State of the United Nations, it cannot be claimed that these principles were unknown to the Soviet authorities.”

²⁸ *Crimes of the Soviet Totalitarian Regime in Lithuania*. Vilnius: Solidarity, 2008. P. 6.

and a similar number of civilian population had been killed, around 180 000 people had been imprisoned, more than 100 000 people had been recruited to the Soviet armed forces, nearly 450 000 people had left the country before the second Soviet occupation²⁹. Massive repressions had been carried out not only against the members of the Resistance and other politically unfavourable people, but also against their families, children and close relatives.

Thus the following crimes against humanity and war crimes committed by the Soviet regime can be mentioned: massive killings and torture of the population and the members of the Resistance denying for the latter category guarantees provided for combatants and prisoners of war by international law, massive deportations of the civilian population, massive arrests, deprivation of liberty and other persecutions on political grounds, forced mobilisation and recruitment to the occupation armed forces.

In assessing the Soviet crimes it is necessary to realise that the Soviet repressions were neither incidental nor chaotic. The repressions were not simply savage treatment of the enemies of the regime but a part of a systematic totalitarian policy. As the Lithuanian example illustrates, the goal of this policy was to destroy a political nation (nowadays we usually call it a 'civil society') – a social structure that was the basis of existence of the national State. It is evident that in Lithuania most brutal repressions had been carried out against the most active part of the political Nation having the greatest survival and resistance potential: State officials, officers, public figures, intelligentsia and the academic community, most influential clergymen, etc. All waves of violence had been directed against the most active part of society, which was capable of uniting fellow citizens for concerted action and resistance.

It is also important to evaluate the nature of repressions, which clearly reveals their ultimate goal. Political prisoners and deportees were moved to severe-climate and scarcely populated, and frequently even completely uninhabited locations thus achieving their complete isolation. They were usually able to communicate only with people of the same fate. Moreover, all of them faced a continuous increased threat to life and health, which was determined by deplorable living conditions. These circumstances enable to reveal the aims of the Soviets towards such people. A considerable number of them died still on their way to concentration camps, whereas those who survived were surrendered to be killed by nature, diseases and starvation, and when the required result was not achieved – hard labour had to contribute to the same effect. They were not to return to their political nation and recover their former influence. One of the most striking proofs of this is the extermination of the people

²⁹ Figures from: *Crimes of the Soviet Totalitarian Regime in Lithuania*. Vilnius: Solidarity, 2008.

held in prisons and camps, which started following the German attack on the Soviet Union in June 1941.

Therefore the crimes committed in Lithuania by the Soviet occupation totalitarian regime can be treated not only as usual crimes against humanity or war crimes. Beyond any reasonable doubt, these were politically arranged, motivated and systematically committed crimes involving the whole totalitarian apparatus of the USSR: starting from the Communist ideology and ending with allocation of special state funds. It can be firmly stated that these crimes were a composite part of the Soviet policy that was actually criminal in nature. Factual circumstances allow making the presumption that the totality of crimes committed by the USSR occupation authorities against the Lithuanian Nation might amount to the crime of genocide as defined by the 1948 Genocide Convention. It is stipulated in this Convention that genocide can be understood as massive killing and torture of the members of the certain group as well as deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part. While factual circumstances evidence that the goal of the occupants was to destroy the most important part of the Nation.

LITHUANIAN LEGAL INSTRUMENTS AND CASE LAW. The first national law defining a crime of genocide (the Law on Responsibility for the Genocide Perpetrated against the Population of Lithuania) was adopted on 9 April 1992. Currently a crime of genocide, crimes against humanity and war crimes are included into one section of the 2000 Criminal Code now in force (Section XV “Crimes against Humanity and War Crimes”).

Lithuanian laws provide for a retroactive effect and inapplicability of any statutory limitations for a crime of genocide, crimes against humanity and most of war crimes. These laws relied on the universally recognised exception known already from the Nuremberg trial that allowed applying retroactively legal responsibility for international crimes, in particular crimes against humanity and war crimes. Lithuanian laws are also based *on the universality of the Nuremberg principles* (principles of international criminal law) in providing that criminal responsibility has to be applied to all the perpetrators of genocide, crimes against humanity and war crimes, irrespective of what regime has been behind them, i.e. both the perpetrators of the Nazi and the Soviet crimes have to be punished (as provided by Art. 2 of the Law on Responsibility for the Genocide Perpetrated against the Population of Lithuania, “killing or torturing of people of Lithuania, deportation of its inhabitants committed by the Nazi Germany and at the time of occupation and annexation (of the country) by the USSR, bear the characteristics of the crime of genocide provided for in the norms of international law”).

Another characteristic feature of Lithuanian legislation is that Lithuania adheres to the **broader definition of a crime of genocide** that also covers acts directed against social and political groups. Both the Appeal Court of Lithuania and the Supreme Court of Lithuania have confirmed that Lithuanian legislation has indeed supplemented the definition of genocide provided by the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (the Genocide Convention) by adding political and social groups³⁰. However, this supplement is seen as adequate to the specific situation and experience of Lithuania; it is understood to be in compliance with the Genocide Convention and formulated taking into account the legislation of some other countries. As the Appeal Court has noted, “this supplement is reasonable and reflecting the reality. First of all, although the Convention does not contain provisions on possible broader interpretation of the definition of genocide, it does not contain any prohibition of such an interpretation either. Furthermore, the definition of genocide is broadened in the criminal codes of some other countries”³¹. The Appeal Court proceeded on defining a political group³² and noting that destruction of such a group by the same token can be understood as destruction of a national or ethnical or other group covered by the Convention to which that political group belongs (in particular taking into account the realities and experience of Lithuania): “a political group means the people related by common political attitudes and convictions, therefore intent to destroy such a group would also mean genocide, as there is an intent to destroy a part of people. The Chamber (of the Court) also takes notice that attribution in the Judgment (of the court of first instance³³) of Lithuanian guerrillas (partisans), that is the participants of the armed Resistance against the occupation, to the concrete ‘political’ group is in essence conditional and not entirely correct. After all, members of this group by the same token had represented Lithuanian people, as the national group. The Soviet genocide had been carried out namely by the criteria of nationality and ethnicity of the population. All of that leads to the conclusion that Lithuanian guerrillas (partisans) can be

³⁰ The case of *Žukaitienė* and *Vasiliauskas*: the 21 September 2004 Judgment of the Appeal Court of Lithuania in the case No. 1A-392 of *Žukaitienė* and *Vasiliauskas* and the 22 February 2005 Judgment of the Supreme Court of Lithuania in the case No. 2K-158/2005 of *Žukaitienė* and *Vasiliauskas*.

³¹ The 21 September 2004 Judgment of the Appeal Court of Lithuania in the case No. 1A-392 of *Žukaitienė* and *Vasiliauskas*.

³² In the *Navickas* case (the 9 January 2009 Judgment of the Appeal Court of Lithuania in the case No. 1A-21/2009 of *Navickas*) the Appeal Court noted that a political group is a certain group of people related by common political attitudes and convictions, thereby confirming the definition provided in the *Žukaitienė* and *Vasiliauskas* case.

³³ The 4 February 2004 Judgment of the Kaunas Regional Court of Lithuania in the case No. 1-62 of *Žukaitienė* and *Vasiliauskas*.

attributed not only to a political, but also to a national and ethnical group, i.e. to the groups named by the (Genocide) Convention itself”³⁴.

The Supreme Court has continued reasoning of the Appeal Court stating that “by acceding to the (Genocide) Convention the Republic of Lithuania assumed the commitment to punish for the acts aiming at destruction in whole or in part of any national, ethnical, racial or religious group and to prevent those acts. However, the accession to the Convention does not deprive the State of its right to define the acts considered to be crimes and to prohibit those acts. Moreover, under Article 5 of the Convention “the Contracting Parties undertake to enact, in accordance with their respective constitutions, the necessary legislation to give effect to the provisions of the present Convention and, in particular, to provide effective penalties for persons guilty of genocide or any of the other acts enumerated in Article 3”. This provision has been implemented in the Republic of Lithuania by adopting the Law on Responsibility for the Genocide Perpetrated against the Population of Lithuania (the 9 April 1992 Law No. I-2477), by which Lithuania adhered to the Convention. The definition of genocide provided by Art. 1 of this Law was in compliance with that provided by Art. 2 of the Convention. By the same token, adhering to the Convention the Supreme Council of the Republic of Lithuania specified that “killing or torturing of people of Lithuania, deportation of its inhabitants committed by the Nazi Germany and at the time of occupation and annexation (of the country) by the USSR, bear the characteristics of the crime of genocide provided for in the norms of international law” (Art. 2 of the Law on Responsibility for the Genocide Perpetrated against the Population of Lithuania)... It is obvious that the supplement of the elements of the crime of genocide by the acts aiming at physical destruction of all or a part of people belonging to a certain social or political group is nothing more but realisation of the provisions of Art. 2 of the Law on Responsibility for the Genocide Perpetrated against the Population of Lithuania”³⁵.

The last characteristic feature of the legal situation in Lithuania as regards perpetrators of the crimes of the Soviet totalitarian regime is related with the criminal acts committed during the January-August 1991 Soviet aggression against Lithuania (i.e., killing of the defenders of Lithuanian independence and attempts to overthrow the independence and the legitimate government). As these crimes had been committed during aggression and the

³⁴ The 21 September 2004 Judgment of the Appeal Court of Lithuania in the case No. 1A-392 of *Žukaitienė* and *Vasiliauskas*.

³⁵ The 22 February 2005 Judgment of the Supreme Court of Lithuania in the case No. 2K-158/2005 of *Žukaitienė* and *Vasiliauskas*.

attempts to re-occupy Lithuania had been made³⁶, they could be qualified as war crimes (e. g., targeting at civilians and civilian objects, killing and seriously injuring the persons protected by international humanitarian law – non-combatants and civilian population³⁷). However, in practice these crimes were qualified as ordinary crimes against persons (a murder under aggravating circumstances – the murder of more than one person and the persons performing official State or social duties) and the crimes against the State (establishment of and active participation in anti-State organisations and public incitement to overthrow the sovereignty and the legitimate government of Lithuania). Such a practice can be explained partly by the absence of provisions on aggression, war crimes and crimes against humanity in the Criminal Code then in force (in 1991 when the crimes in question were committed), partly by reluctance of investigating authorities and the courts to go further in legal qualification of the criminal acts when the ordinary crimes can be easily proven. Three convicts sentenced in the *January 13th* case applied to the European Court of Human Rights challenging their sentence on the grounds that it allegedly was in breach of the Convention for the Protection of Human Rights and Fundamental Freedoms, in particular with the principle *nullum crimen sine lege*³⁸ (there is no crime without a law defining it at the time of its commission), the freedoms of expression and associations. However in the case of *Kuolelis, Bartoševičius and Burokevičius*

³⁶ See more about the January-August 1991 Soviet aggression against the Republic of Lithuania: Žalimas D. *The Soviet Aggression against Lithuania in January 1991: International Legal Aspects*. // *Baltic Yearbook of International Law*, 2006, vol. 6, p. 293-343.

³⁷ In the *January 13th* case it was established that the Soviet armed forces assisted by local collaborators (the local branch of the Communist Party of the Soviet Union and the affiliated organisations) had attacked a number of civilian objects, including premises of national radio and television and other mass media and the TV tower in Vilnius; 13 civilians peacefully protesting against the attacks had been killed at night of 13 January 1991 nearby the TV tower and hundreds of peaceful defenders of Lithuanian independence had been injured). The aim of the attacks was to overthrow the independence and the legitimate government of the Republic of Lithuania and to install the puppet communist regime in the country (see the *January 13th* case: the 23 August 1999 Judgment of the Vilnius Regional Court of Lithuania in the case No. 1-2(1999) of the *January 13th*, the 20 February 2001 Judgment of the Appeal Court in the case No. 1A-43(2001) of the *January 13th* and the 28 December 2001 Judgment of the Supreme Court of Lithuania in the case No. 2K-595/2001 of the *January 13th*). In the *Medininkai* case it was established that at night of 31 August 1991 the armed OMON squad subordinate to the USSR command (the OMON had been the USSR paramilitary militia squads for special operations) attacked Lithuanian customs check point at the border with Belarus. Without meeting any resistance from the side of unarmed Lithuanian officials (as the OMON attacks on Lithuanian customs check points had been frequent at that time, however usually ending with destruction of the check point facility without murdering the officials on duty), the USSR OMON squad had killed 6 Lithuanian police and customs officials, one customs official had been seriously injured and survived, however remained disabled for life.

³⁸ The applicants tried to challenge the very date and legality of the restoration of the independence of Lithuania by claiming that their attempts to restore the Soviet rule in Lithuania had been allegedly legal as they had acted as the Soviet citizens against the anti-Soviet Lithuanian government and they had been allegedly entitled to pursue their activities until the Soviet Union recognized the independent Lithuania on 6 September 1991. Therefore they claimed also that until this date the Criminal Code of the Republic of Lithuania had not been applicable with regard of their activities.

*v. Lithuania*³⁹ the Court rejected all the claims regarding alleged breaches of the Convention for the Protection of Human Rights and Fundamental Freedoms, whereby confirming legality of the sentence in the *January 13th* case⁴⁰ (the Court also accepted the legitimacy of the restoration of Lithuanian independence and the elected Lithuanian authorities).

Although many types of crimes had been committed by the Soviet occupation regime in Lithuania and against the population of Lithuania, so far only the perpetrators of the **acts of genocide and some crimes against humanity and war crimes** (deportation and killing of civilians) were brought to justice. According to the data, available from the Prosecutor General's Office of the Republic of Lithuania, as from 1990-2008 around 230 investigations have been started on the Soviet crimes against humanity (including acts of genocide) and war crimes. However, due to a very long time (more than 50 years) passed since the commission of the most crimes these investigations faced a number of practical difficulties compelling to discontinue most of the legal investigations (most of the perpetrators of the crimes and witnesses are already dead, unknown, out of reach for Lithuanian authorities or of bad health condition, more often it was impossible to find evidence sufficient for criminal prosecution). Therefore the investigations were not productive in terms of prosecution and trial as they resulted in a quite small number of prosecutions: only 20 persons have been charged with crimes against humanity (including acts of genocide) and war crimes (29 according to other sources).

Most of the perpetrators whose cases had been completed were tried for **genocide**, while some – for **crimes against humanity** (*deportations*) and **war crimes** (*killing of civilians*).

Most cases of **genocide** are related with acts of killing guerrillas (partisans) and applicability of the definition of genocide to those acts. In Lithuanian jurisprudence guerrillas are understood as a political group belonging to a broader national and ethnical group (Lithuanians), therefore an intent to destroy such a group is perceived as an intent to commit genocide both under national law (that includes political groups into the scope of the definition of genocide) and international law (that in this context expressly mentions only national and ethnical groups against which the genocide can be directed). The Soviet

³⁹ The 19 February 2008 Judgment of the European Court of Human Rights in the case of *Kuolelis, Bartoševičius and Burokevičius v. Lithuania* (applications Nos. 74357/01, 26764/02 and 27434/02).

⁴⁰ The Court found that “the applicants were convicted for crimes which were sufficiently clear and foreseeable under the laws of the re-established Republic of Lithuania”. The Court also considered that “the consequences of failure to comply with those laws were adequately predictable, not only with the assistance of legal advice, but also as a matter of common sense. Moreover, the third applicant was convicted of complicity in aggravated murder and causing bodily harm, crimes consistently prohibited throughout the whole period in question”.

authorities had indeed declared openly their intent to eliminate guerrillas, as such, and even established special military units of destroyers (*istrebitels*) for this purpose, therefore it was not difficult for Lithuanian court to establish a genocidal intent.

The first issue arising out of Lithuanian case-law is the definition of a group against which genocide is directed. The guerrillas (partisans) are understood as a political group consisting of the participants of the armed Resistance against the Soviet occupation, i.e. those who refused to comply with the Soviet occupation regime and therefore conducted an organised armed fight against this regime for the liberation of the country⁴¹.

In one case the defendant was found guilty for the act of genocide directed against other political group than the guerrillas: in the *Raslanas* case it was “a separate political group of persons having convictions contrary to the policy of the Soviet occupation authorities”⁴². The convict had organised and conducted himself (together with the Soviet military unit) the elimination of a part of that group – 76 unarmed civilians – political prisoners and detainees accused of the so-called counterrevolutionary crimes⁴³. Therefore the court qualified this act as the elimination of “a part of civilian unarmed inhabitants of Lithuania belonging to a separate political group”⁴⁴. Once the defendants were found guilty of the act of genocide directed against a wider national and ethnical group of Lithuanians⁴⁵: killing, shooting and burning of one Lithuanian family (two women – mother-in-law and daughter-in-law (the latter had been visibly pregnant), a 6 months old child and a man – the head of the family) was qualified as the act aiming at physical destruction of a part of Lithuanian population due to a general criminal context of that act and the then official capacity of the perpetrators of that act.

The second important issue arising out of Lithuanian case-law is the determination of a genocidal intent, i. e. the intent to destroy in whole or in part the political, national and ethnical group in question. To establish such an intent of the accused the element of the

⁴¹ The 21 October 2001 Judgment of the Panevėžys Regional Court of Lithuania in the case No. 1-81-09 of *Šilinis*, the 4 June 2002 Judgment of the Vilnius Regional Court of Lithuania in the case No. 1-14 of *Preikšaitis*, *Tamošiūnas* and *Lapinskas*, the 21 September 2004 Judgment of the Appeal Court of Lithuania in the case No. 1A-392 of *Žukaitienė* and *Vasiliauskas*, the 22 February 2005 Judgment of the Supreme Court of Lithuania in the case No. 2K-158/2005 of *Žukaitienė* and *Vasiliauskas*, the 25 January 2008 Judgment of the Kaunas Regional Court of Lithuania in the case No. 1-20-401/08 of *Juškauskas*, the 25 January 2008 Judgment of the Kaunas Regional Court of Lithuania in the case No. 1-20-401/08 of *Navickas*, the 9 January 2009 Judgment of the Appeal Court of Lithuania in the case No. 1A-21/2009 of *Navickas*.

⁴² The 5 April 2001 Judgment of the Šiauliai Regional Court of Lithuania in the case No. 1¹-2 of *Raslanas*.

⁴³ They had been savagely killed in the Rainiai forest (therefore this case also has its unofficial title of the *Rainiai* case) at the outbreak of the Nazi-Soviet war on 24 June 1941: the victims had not only been shot and quickly buried, but before shooting they had been also tortured by using axes, knives, bayonets and other tools.

⁴⁴ The 5 April 2001 Judgment of the Šiauliai Regional Court of Lithuania in the case No. 1¹-2 of *Raslanas*.

⁴⁵ The case of *Kurakinas*, *Bartaševičius* and *Šakalys*: the 21 January 1997 Judgment of the Vilnius Regional Court of Lithuania in the case No. 1-9 of *Kurakinas*, *Bartaševičius* and *Šakalys* and the 13 February 1998 Judgment of the Appeal Court of Lithuania in the case No. 1A-5 of *Kurakinas*, *Bartaševičius* and *Šakalys*.

general criminal context plays a key and pivotal role: the genocidal intent can be always established in connection to the existence of a genocidal campaign, i. e. the genocidal intent of a person is substantially inferred from the surrounding general criminal context⁴⁶ (e.g., conduct of other persons, sharing with them the genocidal intent, existence of a genocidal plan, membership of the accused in any organisation having such a plan, aims, purposes and the activities of a joint criminal enterprise (a criminal organisation) in which the accused participated). For instance, membership and active participation in the activities of the special units aiming at destruction of a certain group of Lithuanian population and in such a way implementing the policy of the Soviet occupation authorities directed against Lithuanian population was regarded as a sufficient prove of the genocidal intent of the individual on trial (e. g., in the *Kurakinas*, *Bartaševičius* and *Šakalys* case the genocidal intent of the convicts was derived from their service in the Soviet units of destroyers (*istrebitels*) which had the purpose to eliminate ‘adversary elements’ *inter alia* following from their official title of ‘destroyers battalions’ and had carried out massive killings of Lithuanians and their families⁴⁷). Collaboration with and aiding and abetting to the repressive structures aiming at the destruction of a part of Lithuanian population forming a separate political group was also regarded as sharing the genocidal intent and a sufficient proof for establishing the genocidal intent for the purposes of individual criminal responsibility (for instance, being a secret agent or an agent-stormtrooper of the Soviet repressive structures (the special security services) with the task to report about the activities of the guerrillas (partisans) or even to eliminate the guerrillas⁴⁸ was regarded a sufficient proof of being aware of and sharing the genocidal intent⁴⁹). In the *Juškauskas* case⁵⁰ the court noted that all operations aiming at

⁴⁶ See, e. g.: Bonafè B. I. *The Relationship between State and Individual Responsibility for International Crimes*. Leiden, Martinus Nijhoff Publishers, 2009, p. 131-136, 144-145.

⁴⁷ The 21 January 1997 Judgment of the Vilnius Regional Court of Lithuania in the case No. 1-9 of *Kurakinas*, *Bartaševičius* and *Šakalys*.

⁴⁸ That had been the task of agents-stormtroopers. They had been recruited by the Soviet security structures from the captured guerrillas (partisans) with the task to establish contacts with the active guerrillas and to kill or capture them or assist in killing or capturing them. The agents-stormtroopers had performed their tasks in secret, i. e. had been masked as true guerrillas concealing the fact of their capture and had practised deception in performing their tasks.

⁴⁹ The 4 June 2002 Judgment of the Vilnius Regional Court of Lithuania in the case No. 1-14 of *Preikšaitis*, *Tamošiūnas* and *Lapinskas*, the 4 February 2004 Judgment of the Kaunas Regional Court of Lithuania in the case No. 1-62 of *Žukaitienė* and *Vasiliauskas*, the 21 September 2004 Judgment of the Appeal Court of Lithuania in the case No. 1A-392 of *Žukaitienė* and *Vasiliauskas*, the 22 February 2005 Judgment of the Supreme Court of Lithuania in the case No. 2K-158/2005 of *Žukaitienė* and *Vasiliauskas*, the 25 January 2008 Judgment of the Kaunas Regional Court of Lithuania in the case No. 1-20-401/08 of *Juškauskas*, the 25 January 2008 Judgment of the Kaunas Regional Court of Lithuania in the case No. 1-20-401/08 of *Navickas*, the 9 January 2009 Judgment of the Appeal Court of Lithuania in the case No. 1A-21/2009 of *Navickas*.

⁵⁰ The 25 January 2008 Judgment of the Kaunas Regional Court of Lithuania in the case No. 1-20-401/08 of *Juškauskas*.

elimination of the guerrillas and their supporters had been carefully planned in advance drafting the concrete plans and assigning the concrete persons to implement those plans (the existence of such a plan was also considered as a proof of genocidal intent).

However, only membership and participation in the organisation aiming at destruction of a certain group of people cannot be regarded as a sufficient proof to find the defendants guilty of the act of genocide if their participation in that act cannot be sufficiently substantiated. For instance, in the *Preikšaitis, Tamošiūnas* and *Lapinskas* case the court of first instance stated that it was not sufficient to base the indictment only upon writings, the copies of writings, not signed or signed by other persons, the reports of the classified agents or the agents-stormtroopers with alias; in determining criminal responsibility of the individuals concerned this kind of evidence could be used insofar it is confirmed by other data, such as testimonies of the defendants, the victims, the witnesses and other materials. The court concluded that the conviction cannot be based only upon presumptions and guesses or only upon the fact of service in the then repressive structures⁵¹. The Appeal Court has also confirmed that only individual criminal responsibility can be applied for commission of the concrete acts of genocide, therefore individuals cannot be convicted only for their service in the repressive structures⁵².

The third important issue arising out of Lithuanian case-law on genocide is the concrete acts attributable to the crime of genocide. In general Lithuania courts followed the practice that even single act of an individual can amount to genocide if it is a part of a broader genocidal context – the genocidal campaign⁵³. For instance, in the *Navickas* case the Appeal Court noted that the crime of genocide is regarded as committed by a person if it is established that he or she has performed at least one of the acts attributable to genocide (organisation, direction or participation in acts attributable to genocide); however, the crime of genocide may also consist of a series of criminal acts united by the same intent to destroy a certain group of people⁵⁴. The Court *inter alia* has stated that, as a crime of genocide is directed against not a separate individual but rather against a certain group of people attempting on security of the

⁵¹ The 4 June 2002 Judgment of the Vilnius Regional Court of Lithuania in the case No. 1-14 of *Preikšaitis, Tamošiūnas* and *Lapinskas*.

⁵² The 20 November 2002 Judgment of the Appeal Court of Lithuania in the case No. 1A-340 of *Preikšaitis, Tamošiūnas* and *Lapinskas*.

⁵³ If the acts aiming at destruction of a certain group are performed at the collective level as a systematic and organized campaign, then in this context a person can be held responsible for a single act or for a murder of a single person committed as a part of that campaign. See: Bonafè B. I. *The Relationship between State and Individual Responsibility for International Crimes*. Leiden, Martinus Nijhoff Publishers, 2009, p. 104-108, 117-118.

⁵⁴ The 9 January 2009 Judgment of the Appeal Court of Lithuania in the case No. 1A-21/2009 of *Navickas*.

mankind, “the acts of genocide are continuing for a certain time, often in a large territory even not in within a single State, therefore they have to be seen not as separate isolated acts but rather as a process encompassing the latter acts. It follows thence that a person committing the genocide performs not several criminal acts but rather is continuing them realising the same intent”⁵⁵ (therefore several acts of genocide committed by the same person have to be assessed not as a few crimes of genocide but rather as the one continuous crime).

As follows from the case-law, to convict a person it is sufficient to establish his or her active participation in the act of genocide, while it is less important whether the person himself or herself killed a member of the targeted group, i.e. it is sufficient that he or she was among those committing the act in question⁵⁶. The person may be held responsible for either organisation or direction (two forms of complicity) or active participation in the act of genocide, or a combination of these roles⁵⁷. For instance, in the *Raslanas* case the defendant was found guilty both for organisation and direction and participation in killing of 76 political prisoners⁵⁸. In the *Kurakinas*, *Bartaševičius* and *Šakalys* case the defendants were found guilty for direction and participation in the killing of Lithuanian family⁵⁹. Meanwhile active participation in the act of genocide may comprise not only direct participation in or execution of the act concerned (killing the guerrillas), but also aiding as one of the form of complicity: e. g., ensuring intelligence, organisation and execution of the operation against the guerrillas or reporting and assisting in finding the guerrillas⁶⁰.

In a few cases of **crimes against humanity (deportation)** a direct and active participation of the convicts in deportation of civilians was established⁶¹: the convicts being the officials of the Soviet repressive structures (the representatives of the security services) had carried out the Soviet decree on deportation of ‘kulaks’ (they had taken the families subject to deportation from their homes and had transferred them to other Soviet officials at a railway station from which those families had been transported to the remote regions of the Soviet Union). However, in the *Misiūnas* case the role of the convict was treated as a

⁵⁵ *Ibid.*

⁵⁶ The 25 January 2008 Judgment of the Kaunas Regional Court of Lithuania in the case No. 1-20-401/08 of *Navickas*.

⁵⁷ Art. 99 of the Criminal Code of the Republic of Lithuania.

⁵⁸ The 5 April 2001 Judgment of the Šiauliai Regional Court of Lithuania in the case No. 1¹-2 of *Raslanas*.

⁵⁹ The 21 January 1997 Judgment of the Vilnius Regional Court of Lithuania in the case No. 1-9 of *Kurakinas*, *Bartaševičius* and *Šakalys*.

⁶⁰ The 22 February 2005 Judgment of the Supreme Court of Lithuania in the case No. 2K-158/2005 of *Žukaitienė* and *Vasiliauskas*

⁶¹ The 30 December 2002 Judgment of the Vilnius Regional Court of Lithuania in the case No. 1-119 of *Misiūnas*; the 15 February 2005 Judgment of the Vilnius Regional Court of Lithuania in the case No. 1-91 of *Vilčinskas*.

secondary one as, in the opinion of the court, he had committed the crime due to service subordination and the difficulty to choose a way of right conduct thereto; therefore that was regarded as an extenuating circumstance⁶². Nevertheless execution of an order to carry out the deportation has never been treated as a circumstance excusing from responsibility, as such orders are regarded as the manifestly illegal activity of the occupying State⁶³. As regards criminal intent to commit the deportation as a crime against humanity, it was derived from the general criminal context (awareness of waves of the deportations already committed and the aims of the repressive structure the convict had been serving for)⁶⁴.

In the only case of **war crimes (killing of civilians)**⁶⁵ the courts had the possibility to elaborate the concept and regulation of war crimes. The Appeal Court has defined war crimes as “intentional dangerous deeds violating two main objects: 1) universally recognised rules and customs of warfare and 2) universally recognised order of treatment of civilians, prisoners of war and other protected persons... The necessary objective element for war crimes is the time of their commission, namely a war, international armed conflict or occupation (annexation)”⁶⁶. The Court noted that this element, taken together with the victims (the civilian population of the occupied territory) and the perpetrator (a serviceman of the military repressive structure), is decisive in making distinction between a war crime and an ordinary crime (a murder). The Supreme Court has further confirmed that the provisions of the Criminal Code defining war crimes are not blank and are sufficiently clear to try suspects as all the main elements of those crimes (criminal acts, their object and time) are defined, while a final conclusion on incriminated crimes belongs to the exclusive competence of judiciary⁶⁷.

In this historical and legal context, when national law had accepted the broader definition of genocide, quite late incorporated definitions of crimes against humanity and war crimes (that happened only in 1998) while the special law on responsibility for the genocide against the population of Lithuania had qualified the Soviet crimes as genocide, national courts often had little choice but to try for genocide those who committed these crimes⁶⁸.

⁶² The 26 March 2003 Judgment of the Appeal Court of Lithuania in the case No. 1A-109 of *Misiūnas*.

⁶³ The 15 February 2005 Judgment of the Vilnius Regional Court of Lithuania in the case No. 1-91 of *Vilčinskis*.

⁶⁴ The 13 December 2001 Judgment of the Appeal Court of Lithuania in the case No. 1A-498 of *Baranauskas*.

⁶⁵ The *Baranauskas* case: the 13 December 2001 Judgment of the Appeal Court of Lithuania in the case No. 1A-498 of *Baranauskas* and the 19 March 2002 Judgment of the Supreme Court of Lithuania in the case No. 2K-S-2.2.3 of *Baranauskas*. Deportation of civilians was also incriminated to the convict in that case.

⁶⁶ The 13 December 2001 Judgment of the Appeal Court of Lithuania in the case No. 1A-498 of *Baranauskas*.

⁶⁷ The 19 March 2002 Judgment of the Supreme Court of Lithuania in the case No. 2K-S-2.2.3 of *Baranauskas*.

⁶⁸ E. g., in its 22 February 2005 Judgment in the case No. 2K-158/2005 of *Žukaitienė* and *Vasiliauskas* the Supreme Court of Lithuania rejected arguments that the definition of genocide should be understood in the narrower sense according to the 1948 Convention on Genocide. The Court stated that accession of Lithuania to the Convention has not deprived the State of its right to interpret the Convention and to define what acts had to

However, now one case (*Vasiliauskas v. Lithuania*) is pending before the European Court of Human Rights where the applicant complains to be a victim of breach of Art. 7 of the Convention for the Protection of human Rights and Fundamental Freedoms (principle of *nullum crimen sine lege*) questioning the compatibility of such national jurisprudence with the 1948 Convention on the Prevention and Punishment of the Crime of Genocide⁶⁹.

To sum it up, as it is evident at least from Lithuanian example, persecution of individual perpetrators of the crimes committed by the Soviet occupation regime, is unlikely to bring impressive results and be effective, mostly due to a long time lapsed since the commission of the crimes in question. Therefore the emphasis could be made on the need of general condemnation of the communist crimes, persecution of those who are attempting to condone, justify, deny or grossly trivialise those crimes. To my mind these are the closest ways to achieve minimal moral satisfaction for the victims of these crimes as well as to ensure appropriate level of protection of their dignity. For this purpose first of all we could try to use the EU policies and legislation.

EU LEGISLATION AND THE NEED FOR EQUAL TREATMENT OF NAZI AND SOVIET CRIMES. So far, the only binding legal instrument related to the crimes committed by totalitarian regimes is the EU Council Framework Decision 2008/913/JHA on combating certain forms and expressions of racism and xenophobia by means of criminal law⁷⁰ (hereinafter – the Framework Decision). It seeks to approximate criminal legislation in the field of combating racism and xenophobia. *Inter alia* it imposes the obligation on Member States to establish criminal responsibility for public condoning, denial and gross trivialisation of crimes of genocide, crimes against humanity and war crimes, including crimes defined in Article 6 of the Charter of the Nuremberg International Military Tribunal, directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin (para. 1(d) of Article 1 of the Framework Decision). Thus one can state that by the Framework Decision all crimes of genocide, crimes against humanity

be treated as criminal and falling within the concept of genocide; the Court also reminded that current definition of genocide under Art. 99 of the Criminal Code includes acts against social and political groups since it is implementing evaluation of the crimes of the Soviet occupation regime provided already in 1992 by the Law on Responsibility for the Genocide Perpetrated against the Population of Lithuania.

⁶⁹ According to the data provided by the Agent of the Government of the Republic of Lithuania in the European Court of Human Rights Ms. Elvyra Baltutyte, the applicant claims to have been convicted for acts not punishable neither under national law of that time nor under international law, as the Lithuanian laws defining genocide are allegedly too broad and therefore not compatible with the 1948 Convention on Genocide to the extent they cover social and political groups.

⁷⁰ OJ L 328, 6.12.2008, p. 55–58.

and war crimes committed by the Nazi regime before and during the World War II have been condemned at the European level as all the EU countries are committed not to tolerate public condoning, denial and gross trivialisation of those crimes and equally protect dignity of their victims. However, the Framework Decision does not cover crimes committed by the Soviet totalitarian regime that had brought no less harm and sufferings to a large part of Europe.

That has been acknowledged in the Statement of the EU Member States adopted together with the Framework Decision. The EU Council declared that the Framework Decision was limited to crimes committed on the grounds of race, colour, religion, descent or national or ethnic origin, i.e. it did not cover crimes committed by totalitarian regimes on other grounds, including political convictions and social status. However, the Council found it necessary to deplore all these crimes and instructed the Commission to examine whether an additional instrument is needed to cover the crimes of genocide, crimes against humanity and war crimes committed by totalitarian regimes and directed against persons defined by reference to criteria other than race, colour, religion, descent and national or ethnic origin.

I would like to provide several arguments why *there is such a need to have the legal instrument covering all the crimes committed by totalitarian regimes, including the communist regimes*. The first argument is the need for the same moral and legal assessment and condemnation of all the crimes of genocide, crimes against humanity and war crimes notwithstanding which regime is responsible for these crimes, who are their perpetrators and what kind of ideology stands behind them. If the criminal acts committed by different totalitarian regimes are qualified in the same way under international law, obviously they deserve the same condemnation. I can recall that in this regard the Parliamentary Assembly of the Council of Europe has already stressed the need of moral assessment and condemnation of the crimes committed by communist totalitarian regimes and called for the clear position of the international community on the tragic past.

The second argument is the need for prevention of genocide, crimes against humanity and war crimes. Among other measures persecution of those who are trying to deny or justify these crimes ensures their condemnation and prevention. Meanwhile the Framework Decision has created a paradoxical situation when crimes committed by the Nazi regime seem to be more condemned than the same crimes committed by the Soviet regime. Therefore it is essential to apply the same legal standards for denial and justification of the crimes committed

by the communist totalitarian regimes. Otherwise those who are glorifying these regimes and their crimes may be given a wrong signal regarding their activities⁷¹.

The third argument is already mentioned universality of the Nuremberg principles, as recognized by the European Court of Human Rights. That implies *inter alia* that the same legal standards have to be applied in dealing with the Nazi and the Soviet crimes. Consequently, public condoning, denial and gross trivialisation of the latter crimes should not be tolerated as well.

The fourth argument is the need to protect dignity of the victims of the gravest international crimes. Applying on *mutatis mutandis* basis the reasoning of the Hungarian Constitutional Court (the 9 May 2000 Decision on constitutionality of prohibition of the Nazi and the Soviet symbols) we can also underline the need to protect the dignity of communities suffered from repressions of communist totalitarian regimes. In line with this reasoning both public use of totalitarian symbols and public justification or denial of totalitarian crimes may be regarded as offensive to dignity of members of any group suffered from repressions. Meanwhile the Framework Decision might lead to deplorable discrimination between victims of different totalitarian regimes. This situation would not be in line with the already mentioned Resolution No. 1481(2006) of Parliamentary Assembly of the Council of Europe, which states *inter alia* that “those victims of crimes committed by totalitarian communist regimes who are still alive or their families, deserve sympathy, understanding and recognition for their sufferings”. Any kind of discrimination between the victims of different totalitarian regimes is unacceptable in a democratic society; it is not compatible with the European values either.

Finally, *what kind of additional instrument* is needed to fix the situation. I think the best way here is to amend the current Framework Decision which purpose is to combat racism and xenophobia. We can try to reinterpret a concept of xenophobia⁷² so as it could denominate any hatred or persecution of different people. Thus the concept of xenophobia may include not

⁷¹ For instance, today we are facing increasing attempts from some neighbouring countries to glorify the Soviet past, to justify and deny the Soviet aggression against the Baltic States as well as their subsequent occupation, to deny crimes of genocide, crimes against humanity and war crimes committed by the Soviet Union. I can provide one striking example showing how similar are these attempts to the arguments of the Nazi criminals presented during the Nuremberg Tribunal proceedings to justify aggressions against the foreign States. Nowadays Russia is trying to justify and deny the Soviet aggression against the Baltic States on the ground of their alleged consent with military invasion and subsequent annexation. Meanwhile the Nazi criminals tried to justify aggression against and annexation of Austria, Czechoslovakia and many other countries by their alleged consent or even desire to unite with Germany. However, the Nuremberg Tribunal considered this kind of arguments (in particular, those justifying the Anschluss of Austria) to be “really immaterial for the facts plainly prove that the methods employed to achieve the object were those of an aggressor. The ultimate factor was the armed might of Germany ready to be used if any resistance was encountered”. Apparently the same can be said about Russian arguments justifying and denying aggression against the Baltic States.

⁷² The word ‘xenophobia’ consists of two Greek words, i.e. *xenos* that means ‘alien’ and *phobos* that means ‘fear’, therefore the original meaning of xenophobia is a fear, hostility and hatred of anything alien.

only crimes against persons defined by reference to race, colour, religion, descent or national or ethnic origin, but also the same crimes committed on the grounds of different political convictions or social status. To support this kind of reasoning I can recall that some international documents (e.g., the 2001 Durban Declaration and Programme of Action) have already broadened traditional concept of xenophobia by adding related intolerance on such grounds as political or other convictions and social status. *The basis for such reinterpretation could be the 'double legacy of dictatorship' borne a large part of the European Union, i.e. the specific historical experience of the Central European countries, as acknowledged by the European Parliament in its 2 April 2009 Resolution on European Conscience and Totalitarianism (as well as recognition in that Resolution of Nazism, Stalinism and fascist and Communist regimes as a common European legacy).*

Let me conclude that as broad as possible condemnation of the crimes committed by the communist regimes would promote the idea of international justice that has to be fundamental for international law. This would also help the victims of these crimes and their relatives to achieve at least moral satisfaction as well as ensure that similar crimes of totalitarian regimes would never happen again.

Thank you for your attention paid.

Annex 1.

**European Parliament Resolution of 2 April 2009 on European Conscience and
Totalitarianism**

The European Parliament ,

- having regard to the United Nations Universal Declaration of Human Rights,
 - having regard to United Nations General Assembly Resolution 260(III)A of 9 December 1948 on genocide,
 - having regard to Articles 6 and 7 of the Treaty on European Union,
 - having regard to the Charter of Fundamental Rights of the European Union,
 - having regard to Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law,
 - having regard to Resolution 1481 of the Parliamentary Assembly of the Council of Europe of 25 January 2006 on the need for international condemnation of the crimes of totalitarian Communist regimes,
 - having regard to its declaration of 23 September 2008 on the proclamation of 23 August as European Day of Remembrance for Victims of Stalinism and Nazism,
 - having regard to its many previous resolutions on democracy and respect for fundamental rights and freedoms, including that of 12 May 2005 on the 60th anniversary of the end of the Second World War in Europe on 8 May 1945, that of 23 October 2008 on the commemoration of the Holodomor, and that of 15 January 2009 on Srebrenica,
 - having regard to the Truth and Justice Commissions established in various parts of the world, which have helped those who have lived under numerous former authoritarian and totalitarian regimes to overcome their differences and achieve reconciliation,
 - having regard to the statements made by its President and the political groups on 4 July 2006, 70 years after General Franco's coup d'état in Spain,
 - having regard to Rule 103(4) of its Rules of Procedure,
- A. whereas historians agree that fully objective interpretations of historical facts are not possible and objective historical narratives do not exist; whereas, nevertheless, professional historians use scientific tools to study the past, and try to be as impartial as possible,
- B. whereas no political body or political party has a monopoly on interpreting history, and such bodies and parties cannot claim to be objective,
- C. whereas official political interpretations of historical facts should not be imposed by means of majority decisions of parliaments; whereas a parliament cannot legislate on the past,

- D. whereas a core objective of the European integration process is to ensure respect for fundamental rights and the rule of law in the future, and whereas appropriate mechanisms for achieving this goal have been provided for in Articles 6 and 7 of the Treaty on European Union,
- E. whereas misinterpretations of history can fuel exclusivist policies and thereby incite hatred and racism,
- F. whereas the memories of Europe's tragic past must be kept alive in order to honour the victims, condemn the perpetrators and lay the foundations for reconciliation based on truth and remembrance,
- G. whereas millions of victims were deported, imprisoned, tortured and murdered by totalitarian and authoritarian regimes during the 20th century in Europe; whereas the uniqueness of the Holocaust must nevertheless be acknowledged,
- H. whereas the dominant historical experience of Western Europe was Nazism, and whereas Central and Eastern European countries have experienced both Communism and Nazism; whereas understanding has to be promoted in relation to the double legacy of dictatorship borne by these countries,
- I. whereas from the outset European integration has been a response to the suffering inflicted by two world wars and the Nazi tyranny that led to the Holocaust and to the expansion of totalitarian and undemocratic Communist regimes in Central and Eastern Europe, as well as a way of overcoming deep divisions and hostility in Europe through cooperation and integration and of ending war and securing democracy in Europe,
- J. whereas the process of European integration has been successful and has now led to a European Union that encompasses the countries of Central and Eastern Europe which lived under Communist regimes from the end of World War II until the early 1990s, and whereas the earlier accessions of Greece, Spain and Portugal, which suffered under long-lasting fascist regimes, helped secure democracy in the south of Europe,
- K. whereas Europe will not be united unless it is able to form a common view of its history, recognises Nazism, Stalinism and fascist and Communist regimes as a common legacy and brings about an honest and thorough debate on their crimes in the past century,
- L. whereas in 2009 a reunited Europe will celebrate the 20th anniversary of the collapse of the Communist dictatorships in Central and Eastern Europe and the fall of the Berlin Wall, which should provide both an opportunity to enhance awareness of the past and recognise the role of democratic citizens' initiatives, and an incentive to strengthen feelings of togetherness and cohesion,

M. whereas it is also important to remember those who actively opposed totalitarian rule and who should take their place in the consciousness of Europeans as the heroes of the totalitarian age because of their dedication, faithfulness to ideals, honour and courage,

N. whereas from the perspective of the victims it is immaterial which regime deprived them of their liberty or tortured or murdered them for whatever reason,

1. Expresses respect for all victims of totalitarian and undemocratic regimes in Europe and pays tribute to those who fought against tyranny and oppression;

2. Renews its commitment to a peaceful and prosperous Europe founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights;

3. Underlines the importance of keeping the memories of the past alive, because there can be no reconciliation without truth and remembrance; reconfirms its united stand against all totalitarian rule from whatever ideological background;

4. Recalls that the most recent crimes against humanity and acts of genocide in Europe were still taking place in July 1995 and that constant vigilance is needed to fight undemocratic, xenophobic, authoritarian and totalitarian ideas and tendencies;

5. Underlines that, in order to strengthen European awareness of crimes committed by totalitarian and undemocratic regimes, documentation of, and accounts testifying to, Europe's troubled past must be supported, as there can be no reconciliation without remembrance;

6. Regrets that, 20 years after the collapse of the Communist dictatorships in Central and Eastern Europe, access to documents that are of personal relevance or needed for scientific research is still unduly restricted in some Member States; calls for a genuine effort in all Member States towards opening up archives, including those of the former internal security services, secret police and intelligence agencies, although steps must be taken to ensure that this process is not abused for political purposes;

7. Condemns strongly and unequivocally all crimes against humanity and the massive human rights violations committed by all totalitarian and authoritarian regimes; extends to the victims of these crimes and their family members its sympathy, understanding and recognition of their suffering;

8. Declares that European integration as a model of peace and reconciliation represents a free choice by the peoples of Europe to commit to a shared future, and that the European Union has a particular responsibility to promote and safeguard democracy, respect for human rights and the rule of law, both inside and outside the European Union;

9. Calls on the Commission and the Member States to make further efforts to strengthen the teaching of European history and to underline the historic achievement of European integration and the stark contrast between the tragic past and the peaceful and democratic social order in today's European Union;
10. Believes that appropriate preservation of historical memory, a comprehensive reassessment of European history and Europe-wide recognition of all historical aspects of modern Europe will strengthen European integration;
11. Calls in this connection on the Council and the Commission to support and defend the activities of non-governmental organisations, such as Memorial in the Russian Federation, that are actively engaged in researching and collecting documents related to the crimes committed during the Stalinist period;
12. Reiterates its consistent support for strengthened international justice;
13. Calls for the establishment of a Platform of European Memory and Conscience to provide support for networking and cooperation among national research institutes specialising in the subject of totalitarian history, and for the creation of a pan-European documentation centre/memorial for the victims of all totalitarian regimes;
14. Calls for a strengthening of the existing relevant financial instruments with a view to providing support for professional historical research on the issues outlined above;
15. Calls for the proclamation of 23 August as a Europe-wide Day of Remembrance for the victims of all totalitarian and authoritarian regimes, to be commemorated with dignity and impartiality;
16. Is convinced that the ultimate goal of disclosure and assessment of the crimes committed by the Communist totalitarian regimes is reconciliation, which can be achieved by admitting responsibility, asking for forgiveness and fostering moral renewal;
17. Instructs its President to forward this resolution to the Council, the Commission, the parliaments of the Member States, the governments and parliaments of the candidate countries, the governments and parliaments of the countries associated with the European Union, and the governments and parliaments of the Members of the Council of Europe.

Annex 2.

**COUNCIL OF EUROPE PARLIAMENTARY ASSEMBLY RESOLUTION
1096 (1996) on Measures to Dismantle the Heritage of Former Communist Totalitarian
Systems**

1. The heritage of former communist totalitarian systems is not an easy one to handle. On an institutional level this heritage includes (over)centralisation, the militarisation of civilian institutions, bureaucratisation, monopolisation, and over-regulation; on the level of society, it reaches from collectivism and conformism to blind obedience and other totalitarian thought patterns. To re-establish a civilised, liberal state under the rule of law on this basis is difficult - this is why the old structures and thought patterns have to be dismantled and overcome.
2. The goals of this transition process are clear: to create pluralist democracies, based on the rule of law and respect for human rights and diversity. The principles of subsidiarity, freedom of choice, equality of chances, economic pluralism and transparency of the decision-making process all have a role to play in this process. The separation of powers, freedom of the media, protection of private property and the development of a civil society are some of the means which could be used to attain these goals, as are decentralisation, demilitarisation, demonopolisation and debureaucratisation.
3. The dangers of a failed transition process are manifold. At best, oligarchy will reign instead of democracy, corruption instead of the rule of law, and organised crime instead of human rights. At worst, the result could be the "velvet restoration" of a totalitarian regime, if not a violent overthrow of the fledgling democracy. In that worst case, the new undemocratic regime of a bigger country can present also an international danger for its weaker neighbours. The key to peaceful coexistence and a successful transition process lies in striking the delicate balance of providing justice without seeking revenge.
4. Thus a democratic state based on the rule of law must, in dismantling the heritage of former communist totalitarian systems, apply the procedural means of such a state. It cannot apply any other means, since it would then be no better than the totalitarian regime which is to be dismantled. A democratic state based on the rule of law has sufficient means at its disposal to ensure that the cause of justice is served and the guilty are punished - it cannot, and should not, however, cater to the desire for revenge instead of justice. It must instead respect human rights and fundamental freedoms, such as the right to due process and the right to be heard, and it must apply them even to those people who, when they were in power, did not apply them themselves. A state based on the rule of law can also defend itself against a resurgence

of the communist totalitarian threat, since it has ample means at its disposal which do not conflict with human rights and the rule of law, and are based upon the use of both criminal justice and administrative measures.

5. The Assembly recommends that member states dismantle the heritage of former communist totalitarian regimes by restructuring the old legal and institutional systems, a process which should be based on the principle(s) of:

- i. demilitarisation, to ensure that the militarisation of essentially civilian institutions, such as the existence of military prison administration or troops of the Ministry of the Interior, which is typical of communist totalitarian systems, comes to an end;
- ii. decentralisation, especially at local and regional levels and within state institutions;
- iii. demonopolisation and privatisation, which are central to the construction of some kind of a market economy and of a pluralist society;
- iv. debureaucratisation, which should reduce communist totalitarian over-regulation and transfer the power from the bureaucrats back to the citizens.

6. This process must include a transformation of mentalities (a transformation of hearts and minds) whose main goal should be to eliminate the fear of responsibility, and to eliminate as well the disrespect for diversity, extreme nationalism, intolerance, racism and xenophobia, which are part of the heritage of the old regimes. All of these should be replaced by democratic values such as tolerance, respect for diversity, subsidiarity and accountability for one's actions.

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

8. The Assembly recommends that the prosecution of individual crimes go hand-in-hand with the rehabilitation of people convicted of "crimes" which in a civilised society do not constitute criminal acts, and of those who were unjustly sentenced. Material compensation should also be awarded to these victims of totalitarian justice, and should not be (much) lower than the

compensation accorded to those unjustly sentenced for crimes under the standard penal code in force.

9. The Assembly welcomes the opening of secret service files for public examination in some former communist totalitarian countries. It advises all countries concerned to enable the persons affected to examine, upon their request, the files kept on them by the former secret services.

10. Furthermore, the Assembly advises that property, including that of the churches, which was illegally or unjustly seized by the state, nationalised, confiscated or otherwise expropriated during the reign of communist totalitarian systems in principle be restituted to its original owners in integrum, if this is possible without violating the rights of current owners who acquired the property in good faith or the rights of tenants who rented the property in good faith, and without harming the progress of democratic reforms. In cases where this is not possible, just material compensation should be awarded. Claims and conflicts relating to individual cases of property restitution should be decided by the courts.

11. Concerning the treatment of persons who did not commit any crimes that can be prosecuted in accordance with paragraph 7, but who nevertheless held high positions in the former totalitarian communist regimes and supported them, the Assembly notes that some states have found it necessary to introduce administrative measures, such as lustration or decommunisation laws. The aim of these measures is to exclude persons from exercising governmental power if they cannot be trusted to exercise it in compliance with democratic principles, as they have shown no commitment to or belief in them in the past and have no interest or motivation to make the transition to them now.

12. The Assembly stresses that, in general, these measures can be compatible with a democratic state under the rule of law if several criteria are met. Firstly, guilt, being individual, rather than collective, must be proven in each individual case - this emphasises the need for an individual, and not collective, application of lustration laws. Secondly, the right of defence, the presumption of innocence until proven guilty, and the right to appeal to a court of law must be guaranteed. Revenge may never be a goal of such measures, nor should political or social misuse of the resulting lustration process be allowed. The aim of lustration is not to punish people presumed guilty - this is the task of prosecutors using criminal law - but to protect the newly emerged democracy.

13. The Assembly thus suggests that it be ensured that lustration laws and similar administrative measures comply with the requirements of a state based on the rule of law, and focus on threats to fundamental human rights and the democratisation process. Please see the

“Guidelines to ensure that lustration laws and similar administrative measures comply with the requirements of a state based on the rule of law” as a reference text.

14. Furthermore, the Assembly recommends that employees discharged from their position on the basis of lustration laws should not in principle lose their previously accrued financial rights. In exceptional cases, where the ruling elite of the former regime awarded itself pension rights higher than those of the ordinary population, these should be reduced to the ordinary level.

15. The Assembly recommends that the authorities of the countries concerned verify that their laws, regulations and procedures comply with the principles contained in this resolution, and revise them, if necessary. This would help to avoid complaints on these procedures lodged with the control mechanisms of the Council of Europe under the European Convention on Human Rights, the Committee of Ministers' monitoring procedure, or the Assembly's monitoring procedure under Order No. 508 (1995) on the honouring of obligations and commitments by member states.

16. Finally, the best guarantee for the dismantlement of former communist totalitarian systems are the profound political, legal and economic reforms in the respective countries, leading to the formation of an authentic democratic mentality and political culture. The Assembly calls, therefore, on all consolidated democracies to step up their aid and assistance to emerging democracies in Europe, in particular as far as the support for the development of a civil society is concerned.

27 June 1996

Annex 3.

**COUNCIL OF EUROPE PARLIAMENTARY ASSEMBLY RESOLUTION
1481 (2006) Need for International Condemnation of Crimes of Totalitarian Communist
Regimes**

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

crimes committed play an important role in the education of young generations. The clear position of the international community on the past may be a reference for their future actions.

8. Moreover, the Assembly believes that those victims of crimes committed by totalitarian communist regimes who are still alive or their families, deserve sympathy, understanding and recognition for their sufferings.

9. Totalitarian communist regimes are still active in some countries of the world and crimes continue to be committed. National interest perceptions should not prevent countries from adequate criticism of current totalitarian communist regimes. The Assembly strongly condemns all those violations of human rights.

10. The debates and condemnations which have taken place so far at national level in some Council of Europe member states cannot give dispensation to the international community from taking a clear position on the crimes committed by the totalitarian communist regimes. It has a moral obligation to do so without any further delay.

11. The Council of Europe is well placed for such a debate at international level. All former European communist countries, with the exception of Belarus, are now members, and the protection of human rights and the rule of law are basic values for which it stands.

12. Therefore, the Assembly strongly condemns the massive human rights violations committed by the totalitarian communist regimes and expresses sympathy, understanding and recognition to the victims of these crimes.

13. Furthermore, it calls on all communist or post-communist parties in its member states which have not yet done so to reassess the history of communism and their own past, clearly distance themselves from the crimes committed by totalitarian communist regimes and condemn them without any ambiguity.

14. The Assembly believes that this clear position of the international community will pave the way to further reconciliation. Furthermore, it will hopefully encourage historians throughout the world to continue their research aimed at the determination and objective verification of what took place.

25 January 2006

Annex 4.

**OSCE PARLIAMENTARY ASSEMBLY
RESOLUTION ON DIVIDED EUROPE REUNITED:
PROMOTING HUMAN RIGHTS AND CIVIL LIBERTIES
IN THE OSCE REGION IN THE 21st CENTURY**

1. Recalling the United Nations Universal Declaration of Human Rights, the Helsinki Final Act and the European Charter of Fundamental Rights,
2. Taking into account the developments that have taken place in the OSCE area in the 20 years since the fall of the Berlin Wall and the Iron Curtain,
3. Noting that in the twentieth century European countries experienced two major totalitarian regimes, Nazi and Stalinist, which brought about genocide, violations of human rights and freedoms, war crimes and crimes against humanity,
4. Acknowledging the uniqueness of the Holocaust, reminding participating States of its impact and the continued acts of anti-Semitism occurring throughout the 56-nation OSCE region, and strongly encouraging the vigorous implementation of the resolutions on anti-Semitism adopted unanimously by the OSCE Parliamentary Assembly since the 2002 Annual Session in Berlin,
5. Reminding the OSCE participating States of their commitment “to clearly and unequivocally condemn totalitarianism” (1990 Copenhagen Document),
6. Recalling that awareness of history helps to prevent the recurrence of similar crimes in the future, and that an honest and thorough debate on history will facilitate reconciliation based on truth and remembrance,
7. Aware that the transition from communist dictatorships to democracy cannot take place in one day, and that it also has to take into account the historical and cultural backgrounds of the countries concerned,
8. Emphasising, however, that it is the obligation of governments and all sectors of society to strive tirelessly towards achieving a truly democratic system that fully respects human rights, without making differences in political culture and tradition a pretext for the non-implementation of commitments,
9. Deploping that in many countries, including some with long-standing democratic traditions, civil liberties are in renewed danger, often because of measures taken to counter so-called “new threats”,

10. Recalling the initiative of the European Parliament to proclaim 23 August, when the Ribbentrop–Molotov Pact was signed 70 years ago, as a Europe-wide Day of Remembrance for Victims of Stalinism and Nazism, in order to preserve the memory of the victims of mass deportations and exterminations,

The OSCE Parliamentary Assembly:

11. Reconfirms its united stand against all totalitarian rule from whatever ideological background;

12. Calls on participating States to honour and implement all commitments undertaken in good faith;

13. Urges the participating States:

- a. to continue research into and raise public awareness of the totalitarian legacy;
- b. to develop and improve educational tools, programmes and activities, most notably for younger generations, on totalitarian history, human dignity, human rights and fundamental freedoms, pluralism, democracy and tolerance;
- c. to promote and support activities of NGOs which are engaged in areas of research and raising public awareness about crimes committed by totalitarian regimes;

14. Requests governments and parliaments of participating States to ensure that any governmental structures and patterns of behaviour that resist full democratisation or perpetuate, or embellish, or seek a return to, or extend into the future, totalitarian rule are fully dismantled;

15. Further requests governments and parliaments of participating States to fully dismantle all structures and patterns of behaviour that have their roots in abusing human rights;

16. Reiterates its call upon all participating States to open their historical and political archives;

17. Expresses deep concern at the glorification of the totalitarian regimes, including the holding of public demonstrations glorifying the Nazi or Stalinist past, as well as the possible spread and strengthening of various extremist movements and groups, including neo-Nazis and skinheads;

18. Calls upon participating States to pursue policies against xenophobia and aggressive nationalism and take more effective measures to combat these phenomena;

19. Asks for a greater respect in all participating States for human rights and civil liberties, even in difficult times of terrorist threats, economic crisis, ecological disasters and mass migration.

3 July 2009, Vilnius