

# Soviet Genocide? Communist Mass Deportations in the Baltic States and International Law

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**Abstract.** The present article deals with international law problems that have arisen in the process of legal clarification of the state crimes committed during the Soviet occupation in the three Baltic states. Following the restoration of their independence in 1991, the Baltic states have sought to establish the historical truth about the mass crimes committed during the Nazi and Soviet occupations – Estonia’s International History Commission recently published its first report which is analyzed in this article. Moreover, the courts in the Baltic states have convicted deporters of 1941 and 1949 for crimes against humanity and/or genocide. By discussing different definitions of ‘genocide,’ the author attempts to answer the question whether the general context of the Stalinist mass repressions in the Baltic states permits to qualify the occupant’s policy as ‘genocide.’

## 1. INTRODUCTION

In the present time, which is otherwise so rich in calls for interdisciplinary research, a much-debated book written by a group of mostly French historians has elicited relatively little attention by the scholars of international law: *Le livre noir du communisme*.<sup>1</sup> The lack of reactions by international lawyers is somewhat surprising, especially since the authors of this controversial book penetrate extensively and critically into issues of international criminal law and justice.

Of course, the mass crimes committed under Stalin’s communist regime in the USSR is not a discovery first made by Stéphane Courtois and his

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1. See S. Courtois, *et al.*, *Le livre noir du communisme. Crimes, terreur et répression* (1997). The English translation has been published by the Harvard University Press in 1999. See also P. Rigoulot & I. Yannakis, *Un pavé dans l’Histoire. Le débat français sur Le Livre noir du communisme* (1998); and H. Möller (Ed.), *Der rote Holocaust und die Deutschen. Die Debatte um das “Schwarzbuch des Kommunismus”* (1999). For a critical response, see, e.g., J. Mecklenburg & W. Wippermann, “Roter Holocaust”? Kritik des Schwarzbuchs des Kommunismus (1998).

co-authors. The mass repressions of the totalitarian Soviet regime have been analyzed earlier in important works of philosophy, literature, and history.<sup>2</sup> But altogether, the tremendous human tragedy in Stalin's USSR was neither adequately perceived nor confronted in the West. Double standards were applied to the "far-away" peoples of the USSR – morally, politically and, as the analysis of some definitions of international crimes seems to suggest, legally.

The novelty of Courtois' work is that he, rather than restricting himself to the moral condemnation of the Soviet mass "liquidations," applies the categories of international crimes to Stalin's policies. He recites the Soviet aggressions (*e.g.*, the occupation and annexation of Eastern European states and territories following the Hitler-Stalin Pact), but especially crimes against humanity and what he provocatively calls "class genocide" (*e.g.*, the liquidation of kulaks and the deliberate organizing of the Ukrainian famine in 1932–1933).<sup>3</sup>

By this intervention into the realm of international law, the authors of *Le livre noir* challenge the "rightness" of two definitions of international crimes, as (at least historically) established in international legal instruments: those of crimes against humanity and genocide. As is well known, according to the Nuremberg definition, mass killings and deportations of the civilian population could be prosecuted as crimes against humanity only when they had been committed "in execution of or in connection with any crime within the jurisdiction of the Tribunal," *i.e.*, crimes against peace (aggression) or war crimes.<sup>4</sup> At the same time the definition acknowledged that the crimes against humanity could be committed against the civilian population "before or during the war."

As the Allied Control Council for Germany with its Law No. 10 removed in 1946 the restrictive connexion with the crime against peace or war crimes, the exact meaning of the restriction in the Nuremberg definition has been a source of different views and interpretations.<sup>5</sup> According

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2. Of the classical works, *see especially* H. Arendt, *The Origins of Totalitarianism* (1951); R. Conquest, *The Great Terror* (1968); A. Solzhenitsyn, *The Gulag Archipelago 1918–1956: An Experiment in Literary Investigation* (1974); R. Conquest, *The Great Terror: A Reassessment* (1990); F. Furez, *Le passé d'une illusion* (1995).
  3. *See Courtois, et al., supra note 1, at 14 et seq.* For a recent analysis of the Ukrainian famine, *see* B.B. Green, *Stalinist Terror and the Question of Genocide: The Great Famine*, in A.S. Rosenbaum (Ed.), *Is the Holocaust Unique? Perspectives on Comparative Genocide*, 2nd ed., 169–193 (2001).
  4. *See, e.g.*, E. Schwelb, *Crimes Against Humanity*, 23 BYBIL 178–226 (1946); and United Nations War Crimes Commission, *History of the United Nations War Crimes Commission and the Development of the Laws of War 192 et seq.* (London: UN War Crimes Commission, 1949). *See, generally*, C.M. Bassiouni, *Crimes Against Humanity in International Criminal Law 31 et seq.* (1992).
  5. According to Christian Tomuschat, the restriction was rather of a technical nature and was not meant to raise doubts about the criminality of similar acts beyond the context of war. *See* C. Tomuschat, *Die Vertreibung der Sudetendeutschen. Zur Frage des Bestehens von Rechtsansprüchen nach Völkerrecht und deutschem Recht*, 56(1–2) ZaöRV 1, at 31 *et seq.* (1996).

to one view, neither the Soviet killings and mass deportations of its own people(s), nor the forced transfer of several million Germans following the Allied decision at the Potsdam Conference<sup>6</sup> could formally be qualified as crimes against humanity, since they were not “connected to” war crimes or aggression.<sup>7</sup>

Following heated arguments, the international legal definition of genocide was similarly restricted by the drafters of the Convention for the Prevention and Punishment of the Crime of Genocide.<sup>8</sup> While the initial draft defined genocide as “the intentional destruction of a group of human beings,” including racial, national, linguistic, religious or political groups, the Soviet opposition<sup>9</sup> to this broad definition played a crucial role in the omission of “political” (including “social”) groups from the definition of genocide when the Genocide Convention was adopted in 1948.<sup>10</sup> The argument that the “political” groups lack the required stability has not been able to persuade a number of legal and social scientists criticizing the exclusion of “political” groups from the genocide definition.<sup>11</sup> William A. Schabas, even though favouring the restrictive definition of genocide, admits: “It is clear that political groups were excluded from the definition for ‘political’ reasons rather than reasons of principle.”<sup>12</sup>

These debates and controversies would be “harmless” intellectual exercises on historical matters, had they not become so topical from a practical legal point of view after the USSR collapsed in 1991. A whole range of historical, moral, and legal questions emerged on the ruins of the Soviet empire, the most burning of them the question about the guilt and responsibility for the Soviet-era crimes. Who, if anyone, was going to take the responsibility for the Soviet-era “repressions”? Many victims demanded:

6. See further A.M. de Zayas, *International Law and Mass Population Transfers*, 16 *Harvard Journal of International Law* 207–258 (1975).

7. The importance of the connexion is, e.g., stressed by Bassiouni, *supra* note 4, at 258.

8. See Convention on the Prevention and Punishment of the Crime of Genocide, adopted by UN General Assembly Res. 260(III)A on 9 December 1948, 78 UNTS 277 (1951). For a thorough over-view, see W.A. Schabas, *Genocide in International Law* (2000).

9. The USSR presented a document entitled *Basic Principles of a Convention on Genocide*, and argued that genocide was “organically bound up with fascism-nazism.” See UN Doc. A/C. 6/273.

10. The 1948 Genocide Convention provides the following definition:

In the present Convention, Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) killing members of the group; (b) causing serious bodily or mental harm to members of the group; (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) imposing measures intended to prevent births within the group; (e) forcibly transferring children of the group to another group.

11. See, e.g., P.N. Drost, *The Crime of State*, Volume 2: Genocide 122–123 (1959); L. Kuper, *Genocide: Its Political Use in the Twentieth Century* (1982); H.-H. Jescheck, *Genocide*, I EPIL 543 (1992) (written 1985); F. Chalk & K. Jonassohn, *The History and Sociology of Genocide: Analyses and Case Studies* (1990).

12. Schabas, *supra* note 8, at 139 *et seq.*

will the perpetrators be prosecuted? In short, in the former USSR, people asked the classical question, well-known in South Africa, Chile, Guatemala, Germany, and many other countries of the world: what to undertake with the crimes that had been committed by the previous regime?

The longer the time that has passed since the crimes had been committed, the more difficult it becomes to apply consequently legal principles to the past situations. In one of the most tragic cases of this kind, in Cambodia, it took for the country and for the world twenty five years to give a legal (judicial) response to the Khmer rouge mass crimes, and the results of this process are still to be expected. In many instances, the needs for justice have often – one of the illustrious examples being the controversial Truth and Reconciliation Commission of South Africa<sup>13</sup> – been balanced with the need for peace.

The problem remains: when a state or regime has perpetrated crimes against its own and/or foreign citizens, to what extent can justice be established retrospectively? Would the calls for justice in some circumstances remind us of the Roman maxime *fiat justitia, pereat mundus*? This question has been asked in practice, notwithstanding the fact that the non-applicability of statutes of limitations to worst crimes, prohibited by international law, is a well-established legal principle.<sup>14</sup>

The former USSR is a unique case of “transitional justice” since the repressive regime was overturned (often more than) half a century after it had perpetrated its mass liquidations and deportations. Were those repressions at the time when they were committed legally a purely domestic matter or did they violate principles of international law? In the case of the criminal prosecution of offenders, would the Soviet criminal law or international law apply? As the perpetrators of the Stalin-era mass repressions had all become aged persons, should amnesty apply to them in case they would be convicted?

Soon it appeared that different states within the territory of the former USSR opted for different models of *Vergangenheitsaufarbeitung*, i.e., historical and legal clarification of the past crimes. In most countries of the former USSR where the (more or less transformed) communist elites preserved their positions in politics, a *de facto* amnesty for Soviet-era crimes has been granted. In those countries, most notably in Russia, the crimes of the Stalin era have been perceived as a tragic domestic matter which has been left for historians and not for lawyers to study. The victims have usually been rehabilitated but the state has not accepted its further responsibilities, e.g., in the criminal prosecution of offenders or in the compen-

13. See, e.g., P.K. Rakate, *Dealing with the Hatchet of the Past: A Critique of the South African Truth and Reconciliation Commission Report*, 40(3) *Indian Journal of International Law* 547–558 (2000). See also the debate between P. Rakate, G. Meintjes and J. Méndez in 3 *International Law FORUM du droit international* 42–49 (2001).

14. See the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, General Assembly Res. 2391 (XXIII), Annex, 23 U.N. GAOR Supp. (No. 18) at 40, UN Doc. A/7218 (1968).

sation of victims.<sup>15</sup> After all, had not the Soviet Communist Party General-Secretary Khrushov already distanced himself and his country from Stalin's "mistakes"?

The present article deals with a case where a different approach to the past has been taken, *i.e.*, a situation where the Soviet crimes have become a legal issue and the concepts of international criminal law have been applied. This has happened in the three Baltic states – Estonia, Latvia, and Lithuania. As most people in the formerly independent Baltic states had experienced the Soviet era as something imposed from outside – and indeed, this experience was supported by international law –, there were less constraints to look for legal questions and answers, as far as the Soviet repressions were concerned. The general emotional and intellectual atmosphere of this search for answers – huge need for justice, but considerable *lacunae* in the knowledge of international law – is quite well reflected in the words of an Estonian pensioner who has collected from ex-Soviet archives two impressive volumes of documentary evidence on the Soviet deportations of Baltic citizens:

Unhappy people from Estonia and Baltics obeyed strict orders and, being accompanied by unknown gunmen, left their hearths, which their ancestors had built and taken care of. Went to the poverty, hunger, cold and death. How to call it? Is this a violation of human rights? Genocide? Or still something else?<sup>16</sup>

In the following, we intend to find out what answers have been – and can be – given to these questions in the context of the Baltic states, particularly in Estonia. Our primary attention is devoted to the question how coherently and "successfully" have the concepts of international (criminal) law been applied to the deportations and other mass "repressions" that were organized in the 1940s. In particular, we will be dealing with the question whether it is correct to apply the concept of 'genocide' in the context of Soviet crimes in the Baltic states.

## 2. THE LEGAL STATUS OF THE BALTIC STATES FOLLOWING THEIR OCCUPATION AND ANNEXATION BY THE USSR IN 1940

From the point of view of international law, Estonia, Latvia, and Lithuania constitute a special and non-representative case among the ex-republics of the Soviet Union. After approximately twenty years of independent statehood (1918–1940) and membership in the League of Nations, these states were militarily occupied by the USSR in mid-June 1940 and annexed in August 1940.

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15. See, generally, L.B. Obidina, *Country Report: Russia*, in A. Eser & J. Arnold (Eds.), *Criminal Law in Reaction to State Crime. Comparative Insights into Transitional Processes* 252–257 (2000).

16. H. Sabbo, *Võimatu vaikida (Impossible to Remain Silent)*, Vol. I, 618 (Tallinn, 1996).

While the Soviet annexation transformed Estonia, Latvia, and Lithuania *de facto* into Soviet republics and thus *quasi*-effectively into “usual” territory of the USSR, a considerable part of the Western states refused to accord *de iure* recognition to the Soviet annexation. As a symbol of the non-recognition policy, the Baltic legations in the US continued their activities throughout the whole time of the Soviet annexation.<sup>17</sup>

Moreover, when the Baltic states restored their independence in August 1991, their claim of state identity and continuity with pre-1940 independent Baltic republics was recognized by most states.<sup>18</sup> In the Baltic states, the Soviet period (1940–1941, 1944–1991) is thus generally viewed as the Soviet “occupation,” even though the USSR had – by annexing the Baltic states – completely ignored the classical legal limits set to the Occupying Powers. In fact, to the extent that the Soviets had eliminated the military resistance in the Baltic states for mid-1950s and the annexation thereby acquired a certain stability in the following decades, there is a certain element of legal fiction in the Baltic claims of Soviet “occupation” throughout half a century of Soviet reality. In practice, today’s Baltic states necessarily have had to take into account such aspects when solving legal and political issues arising from their legal identity with the pre-war republics.

The illegality of the Soviet annexation gives a special legal framework to the Soviet repressions in the Baltics. The Soviet crimes in the Baltic states can thus be qualified on two levels: on the level of concepts of individual criminal law such as crimes against humanity, and on the level of state-to-state obligations, such as the violations of the 1907 Hague rules of belligerent occupation.

### 3. HISTORICAL BACKGROUND: MASS REPRESSIONS IN THE OCCUPIED BALTIC STATES

#### 3.1. General background: ethnic groups punished by the Soviet regime

There is a widespread misperception that the Soviet mass repressions were directed only against certain hostile social classes within an otherwise homogeneous society. In reality, several ethnic and national groups were treated as “hostile” by the Stalinist regime. Such “untrustworthy” ethnic or national groups were hit particularly hard by the Soviet mass deporta-

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17. See W.H.H. Hough, III, *The Annexation of the Baltic States and Its Effect on the Development of Law Prohibiting Forcible Seizure of Territory*, 6 *New York Law School Journal of International and Comparative Law* 301–533 (1985).

18. See, e.g., L. Mälksoo, *Professor Uluots, the Estonian Government in Exile and the Continuity of the Republic of Estonia in International Law*, 69 *Nordic Journal of International Law* 289–316 (2000).

tions.<sup>19</sup> Historians have hypothesized that the awareness of the tragic fate of “hostile” ethnic minorities in the USSR during the 1930s purges<sup>20</sup> was one of the factors pushing the leaders of the militarily weak Baltic states not to resist the Soviet aggression in 1939–1940. It was feared that the punishment for the determined military fight for independence would be the deportation or even extermination of their peoples.<sup>21</sup> In retrospective, the Baltic peoples were “lucky” at least in the sense that they, unlike some other ethnic groups, were not deported *in toto* by Stalin.

For a better understanding of the legal discussion, a brief historical account of the Soviet (and Nazi) repressions in the occupied Baltic states is provided.

### 3.2. Repressions during the first Soviet occupation (1940–1941)

Immediately following the military occupation of the Baltic states in June 1940, the Soviets started to arrest members of the former political, military, business, and cultural elite. Most of the arrested persons were executed or sent to prison camps in Siberia where they died from malnutrition, slave labour, and insufficient medical care. For instance, of the 48 former Estonian government members who were arrested only 3 survived.<sup>22</sup>

On 14 June 1941, a mass deportation was carried out simultaneously

19. A recent study published by the UN High Commissioner for Refugees gives the following account of the Soviet mass deportations of ethnic groups in 1930s and 1940s: Poles (including Polish Jews), 1940–1941, 380,000; Volga Germans, September 1941, 366,000; Tchetchens, February 1944, 362,000; Meshkets, November 1944, 200,000; Crimean Tatars, May 1944, 183,000; Koreans, 1937, 172,000; Ingouchets, February 1944, 134,000; Kalmyks, December 1944, 92,000; Karachais, November 1943, 68,000; Poles, 1936, 60,000; Finns (Ingermanlandians of the St. Petersburg region), 1942, 45,000; Balkarians, April 1944, 37,000; Moldavians, 1949, 36,000; Greeks of the Black Sea region, 1949, 36,000; Other Germans of the USSR, 1941–1952, 843,000; Other Crimean groups, 1944, 45,000; Other groups of the Black Sea region, 1949, 22,000; Other groups of the northern Caucasus, 1943–1944, 8000. Total – 3,089,000 deportees. See *Les réfugiés dans le monde, Cinquante ans d'action humanitaires*. Haut Commissariat des Nations Unies pour les Réfugiés 187 (Paris: Autrement, 2000). See further R. Conquest, *The Nation Killers. The Soviet Deportation of Nationalities* (1970); N. Bougai, *The Deportation of Peoples in the Soviet Union* (1996); *Deportirovannyye v Kasahstan narody. Vremja i sudby* (Nations Deported to Kazakhstan: Time and Fortunes) 107 *et seq.* (Almaty: Arys, 1998); J.O. Pohl, *Ethnic Cleansing in the USSR, 1937–1949* (1999). See also D. Dahlmann & G. Hirschfeld (Eds.), *Lager, Zwangsarbeit, Vertreibung und Deportation. Dimensionen der Massenverbrechen in der Sowjetunion und in Deutschland 1933 bis 1945* (1999).

20. See for references J.E. Mace, *Genocide in the USSR*, in I.W. Charny (Ed.), *Genocide. A Critical Bibliographic Review* 117 (1988).

21. Somewhat undiplomatically, this explanation has recently been taken up by the (then) Russian Ambassador to the Republic of Estonia, A. Glukhov, who argued in an interview, given to an Estonian daily that in 1940, Estonia “gave away its freedom”: “What is here to discuss – such is history, such is fate. [...] What would have happened if you would have resisted in 1940? Nobody knows. Probably, there would not be any more Estonians.” See A. Glukhov: *Eesti peab Venemaad tänama, mitte ootama vabandamist* (Glukhov: Estonia should thank Russia, not wait for apology), *Eesti Päevaleht*, 15 November 2000.

22. See P. Varju, *Eesti poliitilise eliidi saatusest* (About the Fate of the Estonian Political Elite), (Tallinn: Estonian State Commission on Examination of Policies of Repression, 1994).

in all three Baltic states and in the Soviet-annexed Bessarabia (Moldavia). The “completely secret” decision for the 14 June 1941 mass deportation was taken by the Central Committee of the All-Russia Communist (Bolshevik) Party and the Council of People’s Commissars of the USSR on 14 May 1941.<sup>23</sup> Approximately 10,000 Estonian citizens, arrested and deported to Siberia on 14 June 1941 made up 1% of the whole population of the country.<sup>24</sup> It is estimated that from Latvia, 15,081 people, and from Lithuania, 13,600 people were deported to Siberia on 14 June 1941.<sup>25</sup>

The June 1941 mass deportation hit the elite of the Baltic peoples – active people who had shown leadership in their political, professional, economical etc activities. Most of the men and some of the women deported from the occupied Baltic states were arrested in Russia and sentenced to death or to prison camps. The death rates were very high; for instance, of the men deported from Estonia, only about 100 out of 5,100 returned alive from this deportation.

In Estonia, another wave of deportations was carried out under the pretext of conscription to the Red Army, following the German attack against the USSR in World War II. In early July 1941, 33,000 Estonian men were mobilized into the Soviet army and moved to the USSR. However, already on 10 July 1941, the conscripts from the annexed territories were declared “politically not reliable” and sent to NKVD (People’s Commissariat for Internal Affairs) work camps. It is estimated that around 10,000 illegally conscripted Estonians died in Siberian “work battalions” due to inhumane conditions and exterminations.<sup>26</sup>

### 3.3. Crimes perpetrated during the German occupation (1941–1944)

During the German occupation (1941–1944), the Baltic states became tragically one of the Eastern European theatres of the Holocaust. In Lithuania, more than 100,000 Lithuanian Jews were killed; only 20,000 of the more than 150,000 pre-war Lithuanian Jews survived the Holocaust. In Latvia, around 80,000 people were killed during the German occupation – most of them (almost 70,000) the Jews who could not leave the country. Around 6,600 Estonian citizens were killed, among them almost 1,000 Estonian

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23. See more about this document, which can be found in the State Archives of the Russian Federation, in Bougai, *supra* note 19, at 152.

24. See V. Salo (Ed.), *Deported in 1941. General Index of Deportees from Estonia* (Brampton: Marjamaa Publications, 1993).

25. See A. Küng, *Communism and Crimes against Humanity in the Baltic States*, A report to the Jarl Hjalmarson Foundation seminar on 13 April 1999. See <http://www.rel.ee/akungeng.html>, at 4 (visited on 31 July 2000). According to another data, 17,171 people were deported from Latvia and 15,851 from Lithuania. See *further id.*

26. J. Kahk (Ed.), *World War II and Soviet Occupation in Estonia: A Damages Report 36* (1990).

Jews and 243 Romani.<sup>27</sup> The German Nazis also killed most of the more than 36,000 Soviet prisoners of war in Estonia. Just as the Soviet occupants did, the Nazis also found among the Baltic citizens perpetrators who helped them to liquidate their perceived political enemies.<sup>28</sup>

Before the second Soviet invasion in the autumn of 1944, several hundred thousand Lithuanians, Latvians, and Estonians fled to the West. In Estonia, the fears of the return of the Soviet occupants had been nourished even further when on 9 March 1944, Soviet airforce carried out a terror attack against the capital Tallinn.<sup>29</sup>

### 3.4. Repressive policies during the second Soviet occupation (1944–1991)

After the Soviets had occupied the Baltic republics for the second time in 1944, they were confronted with a guerilla movement that had been formed among the native population (called “forest brethren” by the sympathizers and “bandits” by the Soviets.) In order to defeat the guerilla movement, 41,158 Lithuanians were deported to Soviet Russia in May 1948. The deportation was decided by the USSR Council of Ministers on 21 February 1948, and was directed against “bandits and nationalists, bandits accomplices, kulaks and their families.”<sup>30</sup>

On 25 March 1949 nearly 100,000 more Balts were arrested and deported in cattle wagons to Siberia following the decision of the USSR Council of Ministers dated 29 January 1949. Among the deported persons around 40,500 were Latvians, 33,500 Lithuanians and 20,500 Estonians. The target groups of this deportation were “the kulaks with their families, the families of the bandits and of the convicted nationalists, legalized bandits who continue their hostile activities and their families, family members of those who have helped the bandits.”<sup>31</sup> Of the people deported in 1949, approximately 10% died in Siberia.<sup>32</sup>

In the subsequent years, several smaller groups, such as the members of the religious sect of Jehovah Witnesses, were deported from the Baltic republics.<sup>33</sup>

27. See E. Gurin-Loov, *Suur häving: Eesti juutide katastroof, 1941/Holocaust of the Estonian Jews, 1941* (Tallinn: Eesti Juudi Kogukond, 1994).

28. See, e.g., a special publication on the Holocaust in Lithuania, discussing *inter alia* the complicity of Lithuanians: 12(1) *Holocaust and Genocide Studies* (Spring 1998).

29. See J. Kivimäe & L. Kõiv (Eds.), *Tallinn tules. Dokumente ja materjale Tallinna pommitamisest 9./10. märtsil 1944* (Tallinn in Fire. Documents and Materials On the Bombing of Tallinn on 9/10 March 1944) (Tallinn, 1997).

30. See Bougai, *supra* note 19, at 166.

31. See *id.*

32. See further, e.g., A. Rahi, 1949. aasta märtsiküüditamine Tartu linnas ja maakonnas (The March 1949 Deportation in the Town and County of Tartu) (Tartu: “Kleio”, 1998).

33. The reason for the deportation of the Jehovah Witnesses was not so much their religious convictions *per se*, but that they refused to work in kolkhoses and to serve in the Red Army. See Bougai, *supra* note 19, at 160.

Altogether, around 15% per cent of the population of the Baltic states was arrested, deported, and/or executed under the reign of Stalin. In Latvia, around 139,700 persons were deported, 51,973 arrested, at least 1,986 executed. In Lithuania, *ca.* 130,000 persons were deported altogether (28,000 of those died in Siberia), *ca.* 200,000 were arrested (149,741 of those were transferred to Soviet concentration camps). 25,000 guerillas were killed in the fight against the Soviets; 2,747 arrested persons were killed in Lithuanian prisons.<sup>34</sup>

In Estonia, 32,000 individuals (together with 1941 “conscripts”: 65,000) were deported and around 80,000 arrested by the Soviets, around 2000 were executed and the same number of civilians fell victims to Soviet bombing.

After the death of Stalin in 1953, the Soviet repressions in the Baltic states took generally less violent forms, just as more passive forms of resistance were adopted among the Baltic population.

#### 4. LEGAL EVALUATION OF THE SOVIET REPRESSIONS: THE CASE OF ESTONIA

In this part of the article, we take one of the Baltic states, Estonia, and explore how the legal evaluation of the past crimes has been undertaken. As we have established, the repressions that the three Baltic republics experienced were quite synchronized – therefore, the general problems of international law are similar to all three.

In the immediate years following the re-establishment of the independence of Estonia in 1991, some publicists called for a “Nuremberg trial for communist crimes.” However, the circumstances around the collapse of the communist regime did not favour the establishment of such an international judicial body.<sup>35</sup>

The Estonian process of *Vergangenheitsaufarbeitung* has been marked with fragmentations, conflicting views, and controversial developments. It appeared soon that the most important task would be to establish the historical truth about the past crimes, and at least identify their perpetra-

34. See <http://www.tdd.lt/genocid/index.html> (website of the Lithuanian Genocide and Resistance Research Center).

35. In Lithuania, calls for a “communist Nuremberg” are still made. For instance, the International Congress on the Evaluation of Crimes of Communism which was held in Vilnius on 12–14 June 2000 and attended *inter alia* by the former President of Poland Lech Walensa, adopted an “Appeal to the World Community concerning the Establishment of the International Tribunal for the Prosecution of the Crimes of Communism and Their Perpetrators.” Moreover, a Vilnius International Public Tribunal on the Evaluation of Crimes of Communism was established at the same conference. As far as can be established, the Vilnius “Tribunal” is not a judicial body in the proper sense. The Tribunal has heard in public sessions “accusatory acts” from different countries, “examined victims and witnesses” and proclaimed decisions at the Lithuanian National Drama Theatre [*sic*]. See [http://ok.w3.lt/cgi-bin/2000.pl?En\\_organization.htm](http://ok.w3.lt/cgi-bin/2000.pl?En_organization.htm) (last visited 15 June 2001).

tors. It became therefore crucial to charge some authoritative body with painting an objective picture of these crimes. Estonia finally opted for a relatively modern and popular<sup>36</sup> concept of an international “history commission,” the Estonian International Commission for Investigation of Crimes Against Humanity (‘EICICAH’). Similar “history commissions” have been set up in Latvia and in Lithuania.

#### 4.1. The Estonian International Commission for the investigation of crimes against humanity

##### 4.1.1. Establishment and the first report

The Estonian “International History Commission” was established by Lennart Meri, President of the Republic of Estonia (1992–2001), and held its first session in Tallinn in January 1999. Minister Max Jakobson from Finland serves as the Chairman of the Commission, the members of which are Nicolas Lane, Uffe Ellemann-Jensen, Peter Reddaway, Arseny Roginsky, Paul Goble, and Wolfgang Freiherr von Stetten. There are thus no Estonian citizens among the members of the Commission.

In opening the work of the Commission, President Meri made a statement about the mandate and goals of the Commission:

This commission is committed to setting out in as clear terms as possible what crimes against humanity happened in Estonia [...]. And it is committed to compiling a record sufficiently well-documented and complete that no-one will be able to deny what happened or to avoid facing up to the facts.<sup>37</sup>

President Meri added that the Commission was not to act as a judicial or prosecutorial body, since its members were not judges and did not intend to act as such. “They are not trying to compile a set of facts in order to launch judicial actions against anyone or any institution, either here in Estonia or elsewhere.”<sup>38</sup>

In April 2001, the EICICAH publicized its first report, dealing with crimes against humanity committed during the Nazi German occupation in Estonia (1941–1944).<sup>39</sup> While the Commission stressed that “overall responsibility for most, if not all of the episodes of criminality reported upon here lies with the German military and civil occupying forces,”<sup>40</sup> it also identified the events in which cases it believed “at least *prima facie* evidence that genocide, crimes against humanity, and war crimes were

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36. Comparable History Commissions for the study of World War II events have been recently set up in Austria and in Liechtenstein. See, e.g., <http://www.historikerkommission.gv.at>.

37. Quoted at <http://www.historycommission.ee/temp/statement.htm>.

38. See *id.*

39. See <http://www.historycommission.ee/temp/conclusions.htm>.

40. See *id.*, at 1.

committed by, or with the active assistance of, Estonians on or outside Estonian territory.”<sup>41</sup>

The Commission noted that it has been difficult for Estonians to deal with the German occupation, since

[t]he repressive policies of both of the Soviet periods of occupation, the inability of Estonia to reassert her independence during or after the German occupation, the losses of life and property that occurred as a result of the war, and the further loss of tens of thousands of Estonians who fled the return of the Soviets, made Estonia and Estonians a victim nation. After the war it was only natural that Estonians [...] primarily attributed this victimhood to the ‘oppressor in residence’, the Soviet Union.<sup>42</sup>

However, the Commission concluded that

[...] being a victim does not preclude acts of perpetration. A people which respects the rule of law should recognize crimes when they have been committed, and condemn them and those who committed them. It is unjust that an entire nation should be criminalized because of the actions of some of its citizens; but it is equally unjust that its criminals should be able to shelter behind a cloak of victimhood.<sup>43</sup>

It is to be hoped that the Commission’s first report on the complicity of Estonians in crimes perpetrated during the German occupation will make a necessary contribution towards achieving in Estonia a more balanced picture of the crimes committed during the foreign occupations. Individuals who perpetrated crimes against humanity should be held accountable, notwithstanding their ethnic or national origin or whether the crimes were committed during the Nazi or the Soviet occupations.

#### *4.1.2. Analysis of some legal aspects in the Commission’s work*

The topic of this article does not permit to analyze the History Commission’s report on the crimes against international law committed in Estonia during the German occupation. Those crimes were properly qualified already in Nuremberg, and for the purposes of *international legal* analysis, the Estonian History Commission could have hardly contributed anything new. We will thus only discuss a few problems that are legally relevant from the perspective of the evaluation of the Soviet crimes.

In most instances of international “truth commissions,” questions about their exact legal nature and function have been raised, *e.g.*, whether they are judicial bodies or not, whether they are applying the law or not. In most cases, truth commissions have combined fact-finding with political

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41. *See id.*, at 2 *et seq.*

42. *See id.*, at 9.

43. *See id.*, at 9f.

and sometimes *quasi*-judicial functions.<sup>44</sup> Similar questions can be raised with respect to “history” commissions which in this sense can be understood as one kind of “truth commissions.”<sup>45</sup>

The Estonian International Commission is clearly not a judicial body; its role is not to judge individuals. However, by applying international legal concepts such as “crimes against humanity” to “criminal events,”<sup>46</sup> and by assigning responsibility to certain individuals, either by virtue of the positions they held or by the actions of the individual,<sup>47</sup> the work of the Commission includes some quasi-legal elements. Even though the Commission is not a judicial body, its assignment of responsibility for crimes against humanity committed by certain individuals goes beyond the establishment of a mere “moral” responsibility. Formally, such an assignment by the Commission may be “non-binding,” however, due to the authority of the institution, such a judgment by the truth commission would probably serve as an important political and legal guideline not just for the society but for the state judiciary as well.

From the legal point of view, a surprising decision of the Estonian History Commission is the application of the definition of ‘crimes against humanity’ as set out in Article 7 of the 1998 Rome Statute of the International Criminal Court (‘ICC’) to the events that took place in Estonia during the 1940s. The Commission explains:

Although these definitions were arrived at many years after the events that we have studied, we are confident that they represent a standard that is appropriate to those events. This is, furthermore, not a judicial commission; any legal action that may be taken as a result of the Commission’s findings will be the responsibility of the appropriate authorities of the Republic of Estonia.<sup>48</sup>

The Rome Statute’s definition of ‘crimes against humanity’ constitutes of itself a progressive development of international law when compared to the Nuremberg definition of 1945. While it may not make a real difference in the Estonian historical context in terms of judging the nature and scale of specific atrocities committed during the occupation – which may qualify as crimes against humanity both under the Nuremberg and

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44. See, generally, C. Tomuschat, *Human Rights and National Truth Commissions*, in P. Baehr (Ed.), *Innovation and Inspiration: Fifty Years of the Universal Declaration of Human Rights* 151–160 (1999); and C. Tomuschat, *Between National and International Law. Guatemala’s Historical Clarification Commission*, in V. Götz, P. Selmer & R. Wolfrum (Eds.), *Liber amicorum Günther Jaenicke – Zum 85. Geburtstag 991–1011* (1998).

45. “Truth commissions” can be distinguished from the “history commissions” by the time factor. In both cases, “historical truth” needs to be established; however, in the case of a “history commission” the past events lay so far back that the emphasis is no longer on the testimonies of the individuals (“tell-their-stories aspect”).

46. See *supra* note 39, at 2.

47. See *id.*, at 4f.

48. See *id.*, at 2.

Rome definitions –, it still neglects the fundamental legal principle of non-retroactivity.<sup>49</sup>

With respect to the German occupation in Estonia, the application of the Rome rather than Nuremberg definition of crimes against humanity by the Estonian History Commission may have created less problems – at least the connexion with crimes against peace or war crimes which was already established by the Nuremberg Tribunal, is not at stake. However, in evaluating the crimes committed during the Soviet occupation, simply to apply the Rome definition would be a too easy way out. The Nuremberg Tribunal's definition of "crimes against humanity" established a mandatory nexus with crimes against peace (aggression) or war crimes. Without establishing a similar nexus in Estonia and other Baltic republics under the Soviet occupation, some doubts about the proper application of the concept of 'crimes against humanity' would persist.

There is evidence in the recent state practice that the qualification of certain World War II events as "aggression" is continuously considered to be of big legal and political importance. For instance, on 1 September 1999, *i.e.*, on the 60th anniversary of the outbreak of World War II, the Russian Ministry of Foreign Affairs issued a note in which it *inter alia* took a position with respect to the invasion of the Soviet army in Poland on 17 September 1939. The Russian note stated: "The entering of Soviet troops into Poland cannot be regarded as aggression in any way."<sup>50</sup> Similar argument could be made with respect to the Baltic republics, especially as the Baltic governments accepted in June 1940 the Soviet ultimatums and no state of war was technically triggered.

However, in the case of the occupation of the Baltic states, such an argument would be difficult to maintain. The USSR had concluded with the Baltic states a comprehensive system of security treaties in which a special role was played by the non-aggression pacts and the Convention on the Definition of Aggression of 3 July 1933,<sup>51</sup> the terms of which had been proposed by the USSR. The latter treaty defined "aggression" not only as military attack (the outbreak of military activities), but also *inter alia* as the military blockade of the coasts and borders of another state. The Soviet ultimatums to the governments of the Baltic states in mid-June 1940 were preceded by the military blockade of the land and sea borders. Moreover, the island of Naissaar which closes the sea access to the Estonian capital Tallinn, was occupied by the Soviet army one day before the Soviet ultimatum was presented. Therefore, notwithstanding the fact that the Soviet leadership subsequently tried to give the appearance of legality to the sovietization of the Baltic republics and to their "entering"

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49. *Cf.* in the context of international criminal law: J. Barboza, *International Criminal Law*, 278 Recueil des cours 54 (1999).

50. Information on file with the author.

51. See 147 LNTS 69 (with respect to Latvia and Estonia) and 148 LNTS 79 (with respect to Lithuania).

into the USSR, the Soviet's own definition compels to qualify the occupation of the Baltic states in June 1940 as acts of aggression.

While it is difficult to imagine that any lawyer or politician would today try to avoid the qualification of the Soviet mass deportations and "liquidations" in the Baltic states as crimes against humanity by warding this claim off with the denial of the aggression, it would have been more accurate if the EICICAH had taken the Nuremberg definition of crimes against humanity as the starting point of its discussion. Possibly, the Commission wondered whether, being a "history" commission – applying, however, international legal terms, such as 'crimes against humanity' – it has the right mandate to answer the question whether the Soviet repressions were preceded by an *act of aggression*. Such treatment of the problem would be an easier way out politically, but not methodologically.

However, the Commission can still improve this fallacy when it turns next specifically to the study of the crimes committed during the Soviet occupation. So far, in its first report dealing with the German occupation, the Commission made only a preliminary statement about the first Soviet occupation in Estonia (1940–1941): "Altogether tens of thousands Estonian citizens and residents fell victims to crimes against humanity and war crimes."<sup>52</sup>

#### 4.2. Soviet mass crimes in Estonian courts and international law

Consciously and sometimes un-consciously, the Estonian court practice has been a mirror image of several important legal questions that arise in the context of the communist repressions in the Baltic states. International criminal law has been known for its *dédoublement fonctionnel* principle, and the domestic courts have usually been charged with the prosecution of international crimes. However, often there have been concerns voiced about whether the national legal systems are qualified enough to apply international criminal law in a competent and non-biased manner. In Estonia, the transformation of some concepts of international criminal law into the Estonian criminal law and practice has not occurred without deficiencies, at least when measured by an international yardstick.

##### 4.2.1. The definitions of 'crimes against humanity' and 'genocide' in the (former) Estonian Criminal Code

The Constitution of the Republic of Estonia establishes that the general principles and norms of international law are a part of the Estonian domestic law.<sup>53</sup> Thus, crimes under international law such as crimes against humanity and genocide, which were unknown in the Soviet Criminal Code,

52. See *supra* note 39, at 1.

53. See the Constitution of the Republic of Estonia, adopted at the referendum on 28 June 1992, § 3. See Riigi Teataja (The State Gazette) No. 26, at 349; No. 36, at 1200 (1992).

have been included in the new Estonian Penal Code which was adopted by the parliament *Riigikogu* on 6 June 2001.<sup>54</sup> Before the adoption of the new Penal Code, a new chapter entitled “Crimes Against Humanity and War Crimes”, was included on 9 November 1994 in the (modified ex-Soviet) Estonian Criminal Code. Thus, before 2001, Soviet-era crimes have been qualified under § 61’ of the former Estonian Criminal Code which was entitled “Crime against Humanity” and read:

- (1) For committing crimes against humanity, including genocide, as these crimes are defined in norms of international law, i.e., for wilful acts which aimed to completely or partially destroy a national, ethnic, racial, religious group, a group offering resistance to the occupation regime or other social group, for killing a member of such group or inflicting upon him serious or very serious bodily or mental damage or for torturing him, for forced removal of children, for the deportation or expulsion of the indigenous population during an armed attack, occupation or annexation, or the denial of their economic, political and social human rights or the stripping of such rights – will be punished with the loss of freedom from eight until fifteen years or with the life sentence or with death penalty.
- (2) The representative of the state authorities, with whose approval the crimes mentioned in this article’s first paragraph were committed, shall be punished due to his involvement as an accessory in accordance with § 17 para. 6.

This article was not necessarily the most successful example of legal draftmanship. It was entitled ‘crimes against humanity,’ but in reality combined the elements of two different international crimes: crime against humanity and genocide. Substantively speaking, there was also an inner contradiction in this Article: on the one hand, reference was made to the definitions of ‘crime against humanity’ and ‘genocide’ in *international law*; on the other hand, the article’s own concepts went further from the respective international definitions. The inclusion of “groups offering resistance to the occupation regime or other social groups” in the definition of “genocide” went further from the definition set out in the 1948 Genocide Convention, whereas the inclusion of the “denial or stripping of the economic, political or social human rights (in the case of armed attack, occupation or annexation)” in the definition of ‘crime against humanity’ was an unprecedented expansion of the concept.

The wording of the definitions of the crime against humanity and of genocide in the Estonian Criminal Code gives the impression that the legislator has modeled the respective definitions, bearing primarily in mind their applicability to repressive acts committed in the occupied Estonia.<sup>55</sup>

54. See *Karistusseedustik*, Riigi Teataja I (The State Gazette) No. 61, 6 July 2001. See § 89 “Crimes against Humanity” and § 90 “Genocide”.

55. See also J. Saar & J. Sootak, *Strafrechtliche Vergangenheitsaufarbeitung nach politischem Systemwechsel in verschiedenen Ländern. Landesbericht. Estland 30 et seq.* (on file with the author). These Estonian criminal law professors argue that by expanding the 1945 definition of crimes against humanity and the 1948 definition of genocide *and* not applying the statute of limitations when applying the *expanded* definitions of crimes to 1940s cases, the Estonian legislator has violated the *nullum crimen sine lege* principle.

While this is conceivable, a more consistent reference to the international definition of crimes against humanity would have been advisable.

In the new Estonian Penal Code, adopted in 2001, the definition of ‘crimes against humanity’ is identical to the definition given in the Rome Statute of the ICC and thus does not contain any deviations from the international definition. However, the definition of the crime of ‘genocide’ in the new Estonian Penal Code includes among the protected groups the “groups offering resistance to the occupation regime or other social groups.” This seems to confirm the international trend of including the “political groups” in the definition of ‘genocide,’ notwithstanding the restrictive definition of the 1948 Genocide Convention.<sup>56</sup>

As we will show next, ambiguities inherent in the definitions of ‘crimes against humanity’ and ‘genocide’ in the (now former) Estonian Criminal Code have been a source of some confusion for the Estonian courts.

#### 4.2.2. *Charges and judgments on genocide and crimes against humanity in Estonian courts*

##### 4.2.2.1. *The criminal proceedings against deporters*

Since 1996, Estonian prosecutors have initiated criminal proceedings against a number of individuals, charging them with the deportation of people to Siberia or with other repressive acts. In the following, a closer over-view of these cases is provided.

In the first two cases – against Vassili Riis and Idel Jakobson – the criminal proceedings never ended up with the judgments. The indictment against Vassili Riis (born in 1910) was issued by the prosecutor on 20 March 1996. The accused had been a leading NKVD officer and had in June 1941 given orders for the arrest and/or deportation of 882 Estonian citizens. The indictment accused Riis of having committed a crime under § 61’(2) of the Estonian Criminal Code, since the deportations had been carried out “with the intent to destroy a group possibly offering resistance to the occupying power.” On 13 May 1997, the Court decided to temporarily halt the proceedings due to the bad health condition of the

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56. Several other nations, including France, have included “political groups” to the genocide definitions in their Criminal Codes. Some authors have argued that this reflects a new definition of ‘genocide’ in customary international law. See, e.g., L.L. Bruun, *Beyond the 1948 Convention – Emerging Principles of Genocide in Customary International Law*, 17 *Maryland Journal of International Law and Trade* 210–218 (1993); and B. Van Schaack, *The Crime of Political Genocide: Repairing the Genocide Convention’s Blind Spot*, 106 *Yale Law Journal* 2259–2291, at 2280–2282 (1997).

Note also a Resolution Regarding the Extension of the Meaning of the Concept of “Genocide,” adopted at the International Congress on the Evaluation of Crimes of Communism, held in Vilnius, Lithuania, on 12–14 June 2000. (“It is necessary to extend internationally the meaning of the concept ‘genocide’ so that it should cover physical annihilation not only of nations but also of political and social groups of people. Until it is achieved, such extended meaning is recommended to be introduced into national law.”)

accused person. In 1999, Riis died and the proceedings were terminated by a court order.

Criminal proceedings against Idel Jakobson (born in 1904) were initiated on the basis of § 61'(1) of the Estonian Criminal Code on 19 April 1996. According to the indictment, the accused had served as a high functionary in the NKVD and had from 1940 to 1950 signed the orders of repression about at least 1801 persons, including proposals to execute 621 persons. He was therefore accused of committing "crimes against humanity for the deliberate actions which were aimed at the destruction of national and other social groups offering resistance to the occupation regime." Of the specific cases, according to the indictment, the indicted person had ordered in Sverdlovsk in 1942 the execution of fourteen Estonian citizens who had been deported on 14 June 1941. Due to the indicted person's mental and health condition, his case was closed by an order of the prosecutor on 18 February 1997. The accused died lately.

A court precedent was created when on 22 January 1999, the Lääne County Court convicted Johannes Klaassepp of crimes against humanity under § 61'(1) of the Estonian Criminal Code.<sup>57</sup> Klaassepp (born in 1921) had served as the operative plenipotentiary of the Läänemaa Division of the Estonian SSR Ministry of State Security ('MSS'). According to the indictment, he had in March 1949 "deported 23 Estonians and participated in the deportation of 9 Estonians with the purpose to destroy a national group, a group offering resistance to the occupying power and a social group which had been declared *kulaks*." The Court convicted the defendant and sentenced him conditionally to prison for eight years with a two-year probationary period. In giving its judgment the Court took into account the ages of those deported – the oldest person on the lists linked to Klaassepp was 83 and the youngest, 4 years old. The Court also considered that the defendant had been following orders in his role as an NKVD official and had not planned or organized the crime. Both the prosecutor and the counsel for the defendant appealed to the Circuit Court which, on 6 April 1999, decided not to change the punishment and made no amendments to the judgment of the court of first instance.<sup>58</sup>

Similarly, on 10 March 1999, Pärnu County Court convicted Vassili Beškov under § 61'(1) of the Estonian Criminal Code. According to the indictment, the defendant had as an operative plenipotentiary of NKVD collected the data about 210 persons who were deported to Siberia on 25 March 1949, and participated personally in the deportation of 21 persons. Under § 61'(1), he was charged with the "intent to destroy in part a national group offering resistance to the occupation regime which was also a social group declared 'kulaks'." The Court found that the prosecutor had failed to prove beyond reasonable doubt that the defendant had collected

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57. Act No. II-I 183 1999 of Lääne County Court.

58. See also *Overview of the Status of Human Rights in Estonia in 1999*, compiled by the Estonian Institute of Human Rights, at <http://ww.eihr.ee/texts/ulevaade1999i.html>, at 3.

the data about 210 “kulaks” *for the purposes of* deportation (of which the defendant said he had been informed only in the morning of the deportation day). In this part of the indictment, the defendant was acquitted. However, the Court found, relying on the “documents of delivery” that had been signed by the defendant, that he was guilty in the deportation of 21 persons. The Court convicted the defendant under § 61'(1) and sentenced him to eight years of prison with a three-year probationary period.<sup>59</sup> By sentencing, the Court considered the fact that the defendant committed his crime under superior orders as an alleviatory circumstance, and the deportation of aged people and children as an aggravating circumstance. The convicted appealed the judgment, but on 19 May 1999 dropped his action and agreed to the judgement.

Another deportation case was halted due to the bad health of the accused. On 17 March 1999 the Järva County Court terminated the criminal matter against the former Estonian SSR MSS (NKVD) security agent Vladimir Loginov (born in 1924), charged with crimes against humanity, and ruled that he should be placed in the custody of a psychiatric hospital until his health improves. The prosecutor had accused the former operative plenipotentiary of the Järvamaa Division of the NKVD of the preparation of the list of deportees including 122 persons and the deportation of 14 people to Siberia on 25 March 1949, qualifying it as “crimes against humanity under § 61'(1).” Under the court order, the intent to deport was proven in the case of “four families and fourteen individuals.” The Court affirmed that after the defendant gets well, the Court would decide on his sentence.

So far the last deportation case has been the one against Mikhail Neverovski (born in 1920). The Pärnu County Court started to hear his criminal case on 19 July 1999. According to the indictment, the defendant worked as an operative plenipotentiary of the NKVD in Pärnu and participated in the deportation of March 1949. Thus, pursuant to the indictment, he had “caused, through his deliberate acts, the deportation of natives from the annexed Republic of Estonia with the purpose to destroy in part a national group which was offering resistance to the occupying power and a social group which was declared ‘kulaks’.” He was thus accused in having committed a crime under § 61'(1) of the Estonian Criminal Code, whereas the indictment did not specify explicitly whether the crime was to be called “crime against humanity” or “genocide.” Of more than a hundred victims, about sixty appeared in the courtroom. On 30 July 1999 the Pärnu County Court found the defendant guilty under § 61'(1) of the Estonian Criminal Code, and sentenced him to four years in a closed prison.<sup>60</sup> The convicted appealed the judgement. On 1 November 1999 the Tallinn Circuit Court relieved Neverovski from actual imprisonment

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59. Act No. II-I, 10 March 1999 of the Pärnu County Court.

60. Act No. 1-148 1998.

and replaced the punishment with four years of imprisonment on a three-year probationary period.<sup>61</sup>

4.2.2.2. *The case of the killing of “forest brethren” (Paulov case)*

The defendant Karl-Leonhard Paulov was charged by the prosecutor with a crime under § 61'(1), since he “had killed, as an agent of the NKVD, in order to destroy a group offering resistance to the occupation regime” in commune Viluste on 18 October 1945 a “member of a group offering resistance to the occupying power,” Aleksander Sibul, and on 27 October 1945, two “members of a group offering resistance to the occupying power,” Alfred and Aksel Pärli. The defendant had been offered money from NKVD for killing those “forest brethren”<sup>62</sup> and had been promised that he would not be punished by the Soviet power for his having earlier been conscripted to the German army.

In its judgement of 26 October 1999, the Põlva County Court rejected the qualification of the crime in the indictment and requalified it as deliberate killing on the motive of personal interest (§ 101, paragraph 1 of the Estonian Criminal Code). The Court established that as the “forest brethren” were carrying weapons, they were “offering resistance” to the occupation regime and therefore cannot be regarded as “civilians.” The Põlva County Court noted that § 61'(1) of the Estonian Criminal Code was broader than the definition of ‘genocide’ embodied in the 1948 Genocide Convention, and found that the priority was to be given to the latter. On the basis of available evidence, the Court refused to conclude that the defendant aimed to kill or discriminate against Estonians by killing the three “forest brethren.”

The prosecutor appealed the decision of the Põlva County Court. However, in its judgment of 13 December 1999, the Tartu Appellate Court did not change the judgment of the court of the first instance. The Appellate Court established that § 61'(1) of the Estonian Criminal Code contains a broader list of criminal acts than the respective international legal norms and is thus not in accordance with the latter. The Appellate Court argued that international agreements do not define the killing of members of a group offering resistance to the occupying power as ‘crime against humanity.’ However, applying the definition of “combatants” in Article 50, paragraph 1 of the Additional Protocol I to the Geneva

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61. Act No. 11-1/810.

62. About the “forest brethren,” the Supreme Court of Estonia has issued a dictum in the case III-1/3-19/94 (the case of E. Mikkor and K. Nurmoja):

Hiding oneself in the forest was a form of fighting for the independence of the Republic of Estonia and against the injustice done to the Estonian people, whereas during the hiding the victims of the state arbitrariness committed plunders in the state of necessity.

See <http://www.nc.ee/rkis/lahendid/tekst/III-1/3-19/94.html> (last visited on 15 June 2001).

Conventions of 8 June 1977,<sup>63</sup> the appellate court rejected the dictum of the Põlva County Court that *these* “forest brethren” were not “civilians.”

The prosecutor appealed the decision at the Estonian Supreme Court in Tartu. She argued that the acts committed by the defendant would qualify as “murder or extermination of any civilian population” under the Nuremberg Tribunal Statute (Article 6(c)). The fact that the three “forest brethren” had been qualified as “members of a group offering resistance to the occupation power” in the indictment would not *ipso facto* imply that they were not civilians in the sense of the Nuremberg statute definition of the “crimes against humanity.” The defendant killed the “forest brethren” in the framework of a larger NKVD plan that was aimed at depriving citizens of the occupied country of their right to life and fair trial.

The Estonian Supreme Court in its judgment of 21 March 2000 overruled the judgments of the County and Appellate Courts. It explained that § 61’ of the Estonian Criminal Code, entitled “Crime Against Humanity”, contains in reality the elements of two crimes: crime against humanity and genocide. The Supreme Court went on in laying out the definitions of “crimes against humanity” in the Statutes of Nuremberg Tribunal and International Criminal Tribunal for the former Yugoslavia (‘ICTY’), and the definition of “genocide” in the 1948 Genocide Convention. It explained:

By distinguishing crimes against humanity from other crimes, one has to depart from the following bases. In the case of a ‘usual’ crime, the offender does not deny the injured value itself. He does not put himself beside or above the existing value system. By killing the sufferer, he recognizes the human life as a value, its inviolability, although finds to his specific deed a justification. In the case of a crime against humanity, the offender puts himself for various – primarily religious, national or ideological – reasons out of the value system. He acts in the name of other goals (such as ethnic cleansing) and the attacked goods – life, health, corporal integrity – are in the given context for him valueless. The attack is here not directed against the concrete sufferer, but the sufferer could turn out to be a discretionary human being.<sup>64</sup>

The Supreme Court went on to say that due to the failure to distinguish ‘genocide’ from ‘other crimes against humanity’ in § 61’, the County and Appellate Courts had mixed both definitions together, and thus had come to the conclusion that neither applied. The Supreme Court emphasized that the phrase “group offering resistance to the occupation regime,” crystallized in § 61’ is a feature of the crime of genocide, and not of the crime against humanity.

The Supreme Court agreed with the view presented in the cassation

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63. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 8 June 1977, 1125 UNTS 3.

64. Translated from the Estonian Supreme Court judgment rendered on 21 March 2000, *see* <http://www.nc.ee/rkis/lahendid/tekst/3-1-1-31-00.html>.

application that the three victims hid in the forest, in order to eschew the Soviet repressions. The occupation power, however, decided to take away their right to fair trial and to murder them. Therefore, the killings must be qualified as a crime against humanity, concluded the Estonian Supreme Court, relying on the definition of crimes against humanity as contained in Article 6(c) of the Nuremberg Statute.

The case was thus sent back to the Põlva County Court which followed in its new judgment of 29 July 2000 the instructions given by the Estonian Supreme Court. The Court established that the defendant had committed crimes against humanity by murders directed against the civilian population. According to the Court, the murders qualified as crimes against humanity, since the intention to kill was not directed against the concrete victims, but anybody, whose killing would have come within the scope of the operations planned by the NKVD, could have become a victim of this crime. On 29 July 2000 Põlva County Court sentenced Paulov to eight years in prison.

#### 4.2.3. *Analysis and critique of the Court judgments*

The judgments in the recent case of the NKVD agent Paulov raise several questions, especially with regard to the application of law to the facts. What were these “forest brethren,” civilians or non-civilians (combatants)? The respective “forest brethren” were in the possession of weapons, but were in the first place hiding in the fear of repressions by the occupying power. It was not known to the Court whether the killed “forest brethren” had been using their weapons against the Soviets. The Estonian Supreme Court chose to call those “forest brethren” “civilians” rather than “non-civilians,” although the use of the 1949 Geneva Convention and the 1977 Additional Protocols definitions for this purpose may be challenged from the point of view of intertemporal law.

The main legal issue in the case of *Paulov* was when does a murder constitute ‘crime against humanity.’ The theoretical answer, given by the Estonian Supreme Court, does not exactly follow the explanations given in the international jurisprudence and literature. The explanation that “the attack [in the case of crimes against humanity] is not directed against the concrete sufferer but the sufferer could turn out to be a discretionary human being” points to the phenomenon of the depersonalization of victims which, however, also takes place in the cases of “blind” terrorist attacks which are usually not qualified as “crimes against humanity.”<sup>65</sup> Instead, the international jurisprudence has pointed out the “contextual element”

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65. Cf. L. Arbour & J.-P. Brodeur, *Retenir le bras de la vengeance*, in *Le monde des débats* (“Crimes contre l’humanité: une justice des vainqueurs?”), No. 25, 24 (mai 2001).

of such crimes, namely that crime against humanity implies a “wide-spread and systematic attack against the civilian population.”<sup>66</sup>

The historic evidence seems to suggest that in the time of the “forest brethren” resistance in the Baltic states, such wide-spread and systematic attack against the civilian population can be proven. Indeed, the very resistance movement of the “forest brethren” was largely a consequence of the Soviet repressive policies against the civilians.<sup>67</sup> The military attack against the “forest brethren,” of whom many but not all offered *military* resistance against the Soviets, was a part and consequence of the attack *against the civilian population*. However, the courts failed to elaborate on this “contextual element” in the *Paulov* case.

In general, the unfortunate decision of the Estonian legislators to tie the crimes of genocide and crimes against humanity together into a single article in the former Criminal Code has caused considerable misunderstandings in the Estonian legal system. There is the confusion whether the individuals convicted for 1949 deportation have been convicted for ‘crimes against humanity’ or ‘genocide.’ Before the Estonian Supreme Court handed down its judgment in the case of *Paulov*, in which it called attention to the difference between the crime of ‘genocide’ and ‘crime against humanity’ in the former § 61’ of the Criminal Code, Estonian prosecutors and courts qualified the acts of deportation as “deliberate acts, the purpose of which was to destroy a national group, group offering resistance to the occupation regime and a social group declared ‘kulaks’.”<sup>68</sup> This qualification implies thus the crime of ‘genocide.’ At the same time, the indictment of Klaassepp, for instance, concluded that the defendant had committed under § 61’ of the Estonian Criminal Code a ‘crime against humanity,’ restating the title of § 61.’

In most mass deportation cases, the courts have restricted themselves to the pronouncement that the deportators, with their deliberate activities, “the purpose of which was to destroy a [...] group,” had committed “a crime under § 61’.” Due to the Courts’ qualification “the purpose of which was to destroy a [...] group,” commentators have suggested that these convictions were pronounced on account of the crime of ‘genocide.’<sup>69</sup> At the same time, none of these judgments explicitly uses the term ‘genocide.’ Moreover, the judgments establish that the convicts followed superior orders and neither planned nor organized the deportations.

The present author doubts whether the respective Estonian courts have

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66. See, e.g., P. Akhavan, *Contributions of the International Criminal Tribunals for the Former Yugoslavia and Rwanda to Development of Definitions of Crimes Against Humanity and Genocide*, Proceedings of the 94th Annual Meeting of the American Society of International Law, 5–8 April 2000, 279–284 (2000).

67. See, e.g., M. Laar, *War in the Woods. Estonia’s Struggle for Survival 1944–1956* (Washington, DC: The Compact Press, 1992).

68. See, e.g., the indictment of Klaassepp.

69. See *supra* note 58, at 4; Saar & Sootak, *supra* note 58, at 26 *et seq.* (arguing that Beškov, Klaassepp, and Neverovski have been convicted of ‘genocide’).

consciously intended to convict the Soviet deporters for ‘genocide,’ as opposed to ‘crimes against humanity.’ When they have, they have failed to prove the necessary requisites of the crime of genocide. It is striking that none of the respective court decisions has so far paid attention to the proof of the element “intent to destroy,” so essential in the qualification of the crime of genocide. Rather, the repeated qualification that the purpose of the deportations was to “destroy a [...] group” has quasi-automatically been used as some kind of mandatory requisite, as if the very fact of the taking place of the mass deportation would prove such an intent. The qualification has been taken over from the indictment, taken for granted but never proven. It can be traced to the confusing wording of § 61’ of the former Estonian Criminal Code. This author suggests that due to the failure of the Estonian courts to include a proof of the “intent to destroy [...] the group” and without the explicit pronouncement of the crime of ‘genocide,’ the convictions “of crimes under § 61” of the former Estonian Criminal Code can be understood as convictions of ‘crimes against humanity,’ and not of ‘genocide.’

No “intent to destroy a group” is required in order to qualify the acts of the perpetrators of the Soviet mass deportations as ‘crimes against humanity.’ In the case of the March 1949 deportation, it would be difficult to prove that the convicted NKVD officials intended to “destroy the group offering resistance to the occupation regime,” already since – differently from the June 1941 deportation – the destruction in the sense of physical annihilation did not take place. (Most people deported to Siberia in March 1949 managed to return to their homes in the late 1950s.)

It seems that the crime of genocide may have two levels. It is, first of all, an individual crime in which case the question is whether this particular person acted with the intent to destroy the particular group. However, genocide may also have a “state level” – it may be planned and organized by a few individuals who are acting as highest state organs. Their – “state’s” – intent does not necessarily imply the genocidal intent of the lower state officials. James E. Mace suggests rightly in the context of Stalinist repressions that “[i]n such circumstances, subordinates might well be unaware as to the rationale for a given action or the official reason might not be the real one. We have little choice, in such a situation, but to attempt to extrapolate intent from circumstantial evidence.”<sup>70</sup>

As convictions of ‘genocide’ have also been delivered by Latvian<sup>71</sup> and

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70. Mace, *supra* note 20, at 118.

71. In Latvia, a former KGB chief, Alfons Noviks, was convicted of genocide and sentenced to life in prison in 1995. He died in prison the following year. In May 2000, Mihhail Farbtukh was convicted of genocide for deporting 31 Latvian families to Siberia in 1941. He began to serve a five-year prison sentence. See *Financial Times*, 18 May 2000, at 2. On the case of Noviks, see further I. Ziemele, *The Application of International Law in the Baltic States*, 40 *German Yearbook of International Law* 243, at 261 *et seq.* (1997).

Lithuanian<sup>72</sup> courts, it must be asked whether the general “circumstantial evidence” in the context of the Soviet repressions in the Baltic states may indicate the crime of ‘genocide.’

## 6. COMMUNIST REPRESSIONS IN THE BALTIC REPUBLICS: WAS IT ‘GENOCIDE’?

Most Baltic authors writing on the Soviet mass deportations and “liquidations” in the 1940s–1950s, claim that the Lithuanians, Latvians, and Estonians became victims of Soviet genocide.<sup>73</sup> The condemnation of the Soviet policies as ‘genocide’ has become almost axiomatic in the Baltic states. The Soviet deportations in the Baltic states have also been qualified as ‘genocide’ by some Western authors such as the political scientist Rudolph Rummel.<sup>74</sup> Similarly, historian J. Otto Pohl applies the genocide definition of the 1948 Genocide Convention to the Soviet deportation of nationalities, and argues that Stalin’s policies meet the prong “deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part.”<sup>75</sup> At the same time, the French genocide researcher Yves Ternon warns that in those cases of Soviet deportations when ethnic groups were not deported in their entirety, genocide

72. See S. Lammich, *Country Report: Lithuania*, in Eser & Arnold, *supra* note 15, at 198. In 1997, the District Court of Vilnius convicted Kirilas Kurakinas (75), Petras Bartasevicius (74) and Juozas Sakalys (74) of ‘genocide’ for killing in a Lithuanian village in 1945 a family who had been hiding in front of the Red Army. See also *Postimees*, 5 December 2001, at 3.

73. The claim that the Soviets committed genocide in the Baltic states, was first presented by the Baltic authors in exile. See K. Pelékis, *Genocide. Lithuania’s Threefold Tragedy* (Germany: Venta, 1949); A. Kaelas, *Human Rights and Genocide in the Baltic States. A Statement Submitted to the Delegations of the United Nations General Assembly 52* (Stockholm: Estonian Information Centre, 1950); A. Svabe, *Genocide in the Baltic States* (Stockholm: Latvian National Fund in the Scandinavian Countries, 1952); A. Taska, *Enesemääramisõigusest rahvusmõrvani – Nõukogude Liidu sõnad ja teod Eesti Vabariigi ja rahva suhtes* (From Self-Determination to Genocide – the Words and Deeds of the USSR with Respect to the Republic and People of Estonia), *Eesti Üliõpilaste Seltsi Album XIV*, 81–95 (Toronto: Estoprint, 1965); Latvian National Foundation (Ed.), *These names Accuse. Nominal List of Latvians Deported to Soviet Russia in 1940–41*, 2nd ed., XII (Stockholm: Latvian National Foundation, 1982); A. Vööbus, *Studies in the History of the Estonian People*, Vol. XIII, 118 *et seq.* (Stockholm: ETSE, 1984). Of the recent literature in Lithuania, see A. Amišauskas, *Lietuviu tautos sovietinis naikinimas 1940–1958 metais 466 et seq.* (Vilnius: Mintis, 1996); I. Ignatavicius (Ed.), *Lietuvos naikinimas ir tautos kova 40 et seq.* (Vilnius: Vaga, 1999); Institute of Philosophy, Sociology and Law, *Research Center of Repressions in Lithuania* (Ed.), *Genocide of Lithuanian People, Volume I (1931–1941)* (1992), and B. Burauškaite (Ed.), *Genocide of Lithuanian People, Volume II (1944–1947)* (1998) (Vilnius: Institute of Philosophy, Sociology and Law, Research Center of Repressions in Lithuania). In Estonia: E. Sarv, *Genotsiid ja apartheid okupeeritud Eestis* (Genocide and Apartheid (*sic* – L.M.) in Occupied Estonia), 2–4 *Akadeemia* (1997); P. Varju, *Eesti laste küüditamine 14. juunil 1941 kui genotsiidikuritegu* (The Deportation of Estonian Children on 14 June 1941 as a Crime of Genocide) (Tallinn: ORURK, 1994).

74. R.J. Rummel, *Lethal Politics. Soviet Genocide and Mass Murder since 1917*, 2 (1990).

75. J. Otto Pohl, *Ethnic Cleansing in the USSR, 1937–1949*, 2–3 (1999).

“cannot be proven easily.”<sup>76</sup> The British author Anatol Lieven, however, argues in the Lithuanian context quite categorically that the 1941 Soviet deportation was “in no sense a ‘Lithuanian genocide’.”<sup>77</sup>

The characterization of Soviet repressions in the Baltic states as ‘genocide’ is conceivable to the extent that the repressions were aimed at the destruction of hostile political groups – which is covered by the definition of ‘genocide’ in the criminal law of the Baltic republics. However, as the inclusion of political groups in the definition of ‘genocide’ has internationally remained a matter of controversy, it must be asked whether the Soviet policies in the Baltic states could still be qualified as ‘genocide’ when the legal threshold of the 1948 Genocide Convention is used.

The scope of the present article would not enable us to present here a comprehensive legal analysis on the issue whether the Soviet repressions in the Baltic states could be qualified as ‘genocide.’ We would simply like to point out some crucial issues that the application of the 1948 definition of ‘genocide’ to the Baltic situation raises.

First, Lithuania, Latvia, and Estonia lost a significant percentage of their peoples as a consequence of the Soviet policy of extermination, deportation, and forced exile. However, smaller national and ethnic groups are “by nature” more vulnerable and endangered in the cases of organized repressions and terror, just as during the Stalin era. It must therefore be asked whether the repressions in the occupied Baltics did constitute a “standard treatment” of the Soviet’s own citizens or had a specific character.

One of the crucial questions from the point of view of establishing genocide is: against which groups were the deportations and repressions directed? The widespread misperception restricts the communist repressions to the destruction of hostile “social” or “political” groups only, *i.e.*, groups which are not covered by the 1948 genocide definition. Often, this has proven to be a too simplistic answer. The attacks against hostile “political” groups in communist countries have often simultaneously had a “hidden agenda,” for instance the subjugation of other ethnic or religious groups.<sup>78</sup>

The Soviets themselves defined the target group of their repressions in the Baltic states as “anti-Soviet element.” At the first glance, this may be identified like any other political or social group, just like the “kulaks” in the USSR itself. However, in the context of the occupied Baltic states,

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76. Y. Terson, *Der verbrecherische Staat. Völkermord im 20. Jahrhundert* 215 (Hamburg: Hamburger Edition, 1996) (translation from the French original, 1995, Seuil).

77. A. Lieven, *The Baltic Revolution. Estonia, Latvia and Lithuania and the Path to Independence*, 2nd ed., 151 (1994).

78. In a study on communist Ethiopia, Andre Glucksmann and Thierry Walton point out that the “kulaks” in Ethiopia were oromos (a muslim ethnic group) who had been traditionally discriminated by the Amhara christians. The “dekulakization” in Ethiopia sought thus *inter alia* to subjugate an inferior ethnic and religious group. See A. Glucksmann & T. Walton, *Silence*, on tue 17 (1986).

the “anti-Soviet element” had a different meaning from the rest of the USSR, the meaning of destroying three young nation states. As the Soviet repressions in the Baltic states were antedated by the aggression, the targeted “political groups” were representing Baltic “national groups.”<sup>79</sup> For “anti-Soviet element” were automatically those leaders among the people – from all social strata and ethnic groups of the country, as the study of those deported in June 1941 demonstrates<sup>80</sup> – who had been prior to the occupation and continued to be in favour of Estonia, Latvia, and Lithuania as independent nations based on non-communist principles of government and ownership. Even the orders for 1949 mass deportation, which in Estonia were initially opposed even by local communist leaders, singled out kulaks and “nationalists.” The repressions in the Baltic republics could not therefore be qualified as “autogenocide” which – although this concept remains very controversial – could possibly be used in the case of Soviet Russia itself.

The Soviets handled the years of independent statehood in the Baltic states (1918/1920–1940) retrospectively as an episode of counter-revolution and talked about the “revolutionary reestablishment of the Soviet power.” Thus, the Russian SFSR’s Criminal Code of 1926, which had been made retroactively applicable in the annexed Baltic states in December 1940, served as the “legal” basis for the sentencing of the arrested persons to death or to prison camps.<sup>81</sup> Although the USSR had recognized the Baltic republics *de iure* in 1920, its courts later considered a dedicated involvement in the independent Baltic states (1918–1940) as a crime under the infamous § 58 of the Russian SFSR’s Criminal Code which established crimes against the Soviet state (betrayal of the homeland, acts against the

79. The International Criminal Tribunal for Rwanda has explained that the term “national group” refers to a “collection of people who are perceived to share a legal bond based on common citizenship, coupled with reciprocity of rights and duties.” See *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment, 2 September 1998, at para. 511.

80. The analysis of the deportees of June 1941 demonstrates that the deportations were not directed against Lithuanians, Latvians, and Estonians as *ethnic* groups. The number of deported Baltic Jews and Baltic Russians even exceeded their relative size in the population. See further V. Salo, *Population Losses in Estonia June 1940–August 1941*, 212 *et seq.* (Scarborough, 1989). Nor was the 14 June 1941 deportation directed against particular social groups – *e.g.*, according to social status, only 26% of the Estonian deportees of 1941 were owners of land or other substantive property. 43% were workers, 17% were employees or technical personnel, and the remainder were independent or without definite social status. Among the arrested and executed persons, only 34% owned substantive property. See J. Kahk (Ed.), *World War II and Soviet Occupation in Estonia: A Damages Report 35* (1990). *Cf.* for all Baltic states: Bougai, *supra* note 19, at 169 (quoting the sources in the State Archive of the Russian Federation). In the GULAG registry, the people deported from the Baltic states were not classified according to their social status or “criminal record,” but designated laconically as “the Balts.” See H. Strods, *The USSR MGB’s Top Secret Operation “Priboi” (‘Surf’) for the Deportation of Population from the Baltic Countries, 25 February–23 August 1949*, <http://vip.latnet.lv/LPRA/priboi.htm>, at 1 (last visited 15 June 2001).

81. In the case of Estonia, see ENSV Teataja (Official Gazette of the Estonian SSR), 1940, No. 65 (16 December 1940).

military capacity, independence or territorial integrity of the USSR, membership in counter-revolutionary organizations etc.).

The Soviet deportations and exterminations in the Baltic states were accompanied by a phenomenon which the USSR itself had defined as “cultural genocide” when demanding in 1948 its inclusion in the definition of “genocide.”<sup>82</sup> Most of the monuments erected in the Baltic states during the independence period were destroyed by the Soviets as “nationalistic,” millions of books met with the same fate.<sup>83</sup>

However, in the case of the Soviet mass repressions, just as in all other cases of genocide claims, the mental element or *mens rea* of the crime of genocide is most difficult to prove. In practice, the genocidal intent can be inferred from the physical acts, and specifically from “the massive and/or systematic nature of the atrocity.”<sup>84</sup> The prosecution will rely on the context of the crime, its massive scale, and elements of its perpetration that suggest hatred of the group and a desire for its destruction.<sup>85</sup> The intent is a logical deduction that flows from evidence of the material facts.<sup>86</sup>

The ICTY found in the *Jelisić* case that the “genocidal intent can take two forms”: on the one hand, the intent to exterminate a very large number of members of the group, and, on the other, the intent to pursue a more selective destruction targeting only certain members of the group “because of the impact their disappearance would have on the survival of the group as such.”<sup>87</sup> The context of the Soviet repressions in the Baltic states seems to indicate genocidal intent in the second sense. The USSR’s repressive actions in the Baltic states were directed towards “liquidating” the people who would be most determined to carry on the will for independent statehood, based on “non-Soviet” principles of government. The Baltic national groups were ordered to be transformed into something else, for a part of the “Soviet people,” and Stalin’s condition for individuals’ and groups’

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82. The Soviet proposal defined “cultural genocide” as “prohibition or restriction of the national languages in public and private life and the destruction of historical or religious monuments, museums and libraries.” See Schabas, *supra* note 8, at 63; and M.N. Andriuhin, *Genotsid – tjagtsheishee prestuplenije protiv tshelovetshstva* 85–87 (Moscow, 1961).

83. According to the data published by the NGO “Memento” and the Estonian State Commission on Examination of the Policies of Repression, the Soviets destroyed 26 Million copies of books published during Estonia’s independence period.

84. Akayesu, *supra* note 79, at para. 477.

85. Schabas, *supra* note 8, at 222.

86. *Id.*, at 222.

87. *Prosecutor v. Jelisić*, Case No. IT-95-10, at para. 82. See also G. Verdirame, *The Genocide Definition in the Jurisprudence of the Ad Hoc Tribunals*, 49 ICLQ 578, at 587 (2000).

right to existence was their willingness to obey to such forced transformation of identity.<sup>88</sup>

However, the genocidal intent of the Soviet leadership does not automatically prove that for instance an NKVD official who, obeying superior orders, was preparing and carrying out mass deportations, had a *dolus specialis* of the crime of genocide, the intent to *destroy* the (national) group or a part of it. Such an intent must be proven in each individual case separately.

#### 7. SHOULD ANYBODY BE RESPONSIBLE FOR “STALIN”? BY WAY OF CONCLUSION

The crimes committed more than fifty years ago in and by the USSR cannot today be confronted in the way as if those crimes were committed yesterday. Many facts of life, such as the high age of perpetrators, cannot be ignored at the sentencing – as the Estonian court practice reconfirms. However, the prosecution of those guilty in the crimes against humanity and/or genocide has a high symbolic value, and has in the Baltic states proven to be a precondition so that the people could come to terms with the tragic past of their countries.

One of the challenges for the evaluation of the Soviet deportations and other repressive policies in the Baltic states is that those crimes were state crimes, organized by the USSR and by the Soviet Communist Party which was running the state. Although Klaassepp and Neverovski carried out the deportations in the technical sense, they remained relatively “small cogs” in the Soviet state’s repressive machinery, the ones who carried out the superior orders of the Soviet central power. It would be misleading and unfair when they alone would now have to bear the responsibility for those deportations.

In that regard, we have witnessed an interesting phenomenon: since the USSR collapsed in 1991, the responsibility of the former Communist Party and of the Soviet state for the mass repressions has “evaporated” somewhere. The Russian Federation has continued the international legal personality of the USSR, but seems to have chosen the easiest path and released itself from the responsibility for the “negative ballast,” crimes committed by the USSR. So far, the Russian Federation has neither outrightly acknowledged the illegal occupation of the Baltic states by the

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88. James E. Mace writes aptly:

In the Stalin period, the Soviet State did not hesitate to attempt the complete destruction of [national and religious] identities and those who bore them, if they were perceived to be hindrances to the State’s complete integration and subordination of all forces in society to Stalin’s goals. Genocide took place as mechanism of removing obstacles.

Mace, *supra* note 20, at 119.

USSR, nor apologized for the mass repressions that were carried out in the illegally annexed Baltic states.

In the Baltic states, it has become an issue of controversy whether these states should present to the Russian Federation a reparation claim based on the principles of state responsibility. Generally, most politicians seem to agree that even though such a claim would be “right,” it would have little prospect of success and add unnecessary tension to the application of the Baltic states to join NATO and the EU.<sup>89</sup> It is therefore relatively unlikely that a claim based on state responsibility will be presented to Russia.<sup>90</sup>

Political factors have influenced the confrontation with the responsibility of the Soviet Communist Party as well. The Communist Party continues to be full of vitality in Russia, and although the successors of the former Communist parties in the Baltic states play only a marginal role in today’s politics, the number of Balts who joined the Communist Party in the later decades of the Soviet period was not totally unsubstantial. Until today, the Baltic states have been incapable of taking a formal stand on their own citizens’ membership in the Soviet Communist Party.<sup>91</sup> From the point of view of a fair attribution of the responsibility, this is an important factor, since the mass deportations in the Baltic states were not just prepared and carried out by “Moscow,” but implemented by native Baltic communists as well. Those Baltic politicians who were formerly members of the Communist Party, are now reluctant to recognize that there is a contradiction between their countries’ claim of the Soviet “occupation,” and their own former membership in the party (unless one can occupy oneself).

Altogether, most people in the former USSR seem today to perceive themselves as victims of the Soviet era, or of the changes caused by its end. Jutta Scherrer, a scholar from Germany, observes:

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89. Latvian and Russian leaders have already expressed conflicting views when on 21 January 2000 the Riga District Court convicted Vasily Kononov, a 77-year old former Soviet partisan, of war crimes. Kononov had been accused of having killed nine civilians in the village of Malyie Baty in the summer of 1944. President Putin wrote to the Latvian President Vike-Freiberga and asked her to intervene and free Kononov. The Latvian President defended her country’s right to jail Kononov, by arguing that “[s]uch crimes have to be punished irrespective of the ideology on whose behalf they have been committed and irrespective of the age of those who have committed them.” See *Latvian Leader Defends Right to Jail Soviet Partisan*, Financial Times, 25 February 2000, at 2. See also M. Wines, *Latvians and Russians Remain Divided by the Legacy of World War II*, International Herald Tribune, 21 May 2000 at 2.

90. *But see* The Republic of Lithuania Law on Compensation of Damage Resulting from the Occupation by the USSR, adopted on 13 June 2000 which mandates the Lithuanian Government to start negotiations with its Russian counterpart in that matter. For a discussion on the applicability of the principles of state responsibility in the Baltic case, see L. Mälksoo, *The June 14, 1941 Deportation and International Law: Thoughts on Responsibility*, in Pro Patria Union and Jarl Hjalmarson Stiftelsen (Eds.), *Speeches at the International Conference “On Crimes of Communism”* 26–33 (Tallinn, 2000).

91. Only in Lithuania, the then Supreme Council prohibited the future activities of the Communist Party on 22 August 1991, following the unsuccessful *coup d’état* in the USSR.

Most Russians whom I spoke to about Russia's past, understand themselves as victims. In their eyes, they themselves, the Russian nation has brought the biggest sacrifice when compared to the other nationalities and ethnic groups of the Soviet State. Also for the members of the former Soviet republics as the Ukrainians or the Balts, the question of guilt is equally clear: those responsible for the system were the Russians, they themselves the victims. The guilty ones were always the others. The question about the other in myself is not posed.<sup>92</sup>

The question about the "other in myself" is indeed one of the most difficult questions to ask. The establishment and first report of the International History Commission in Estonia may have opened the door for such questions in the post-Soviet region. It is to be hoped that, sooner or later, bigger countries will follow the same path. The application of international legal concepts to the Soviet crimes is likely to remain a complicated matter, but a fair and wise attribution of responsibility to the perpetrators would not only bring justice, but can also make a contribution to the most practical goal of any *Vergangenheitsaufarbeitung*: namely, that such crimes would never occur again.

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92. See J. Scherrer, "Laßt die Toten ihre Toten begraben." *Warum Rußland von den sowjetischen Massenverbrechen nichts wissen will*, *Die Zeit*, 2 July 1998 (translation from German by this author).