Twentieth century totalitarian regimes, lustration, and guilt for crimes of the past: challenges and dangers for the Strasbourg Court

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Abstract

This article addresses a key contemporary problem confronting the Strasbourg Court. While it is well established that seeking the historical truth is an integral part of the right to freedom of expression, it cannot be the role of the Strasbourg Court to arbitrate underlying historical issues (*Dzhugashvili v. Russia*, 2014). Still less can it be for the Court to decide on individual or collective guilt for crimes of the past, rather than on violations of Convention rights. For example, the Court has found many violations of human rights in the more recent armed conflicts in Northern Ireland, South-East Turkey, Chechnya, or the Basque Country, but has never sought to pronounce on the legal or moral issues underlying these conflicts, or on their deep historical roots. However, the existence of the USSR for more than 70 years, and 12 years of Nazism in Germany, leading to WWII, dominated the 20th century in Europe. These have both been described as totalitarian regimes. The fall of the Berlin Wall in 1989 followed by the collapse of the USSR in 1991 led to dramatic changes not only in statehood and political systems, but also a strong desire for states emerging from the USSR or Soviet domination to purge the past, and to identify and punish wrongdoers. Various forms of lustration have been a product of this desire, with the exception of the Russian Federation, where the characterization and proper evaluation of its Soviet past are questions still unresolved. Increasingly the Strasbourg Court has been called on to decide highly controversial cases, for example *Zdanoka v. Latvia* (2006), *Vajnai v. Hungary* (2008), *Kononov v. Latvia* (2010), *Korobov v. Estonia* (2013), *Soro v. Estonia* (2015). The author was counsel for the applicants in some of these cases. I ask: what are the dangers and challenges for the Strasbourg Court in adjudicating such cases, and how can it avoid the appearance of taking sides in bitter and intractable arguments?

1 Introduction

It is an integral part of the right to freedom of expression to seek the historical truth. But it cannot be the role of the Strasbourg Court to arbitrate underlying historical issues (*Dzhugashvili v. Russia*, 2014). Still less can it be for the Court to decide on individual or collective guilt for crimes of the past, rather than on violations of Convention rights. For example, the Court has found many violations of human rights in the more recent armed conflicts in Northern Ireland, South-East Turkey, Chechnya, or the Basque Country, but has never sought to pronounce on the legal or moral issues underlying these conflicts, or on their deep historical roots. However, the existence of the USSR for more than 70 years, and 12 years of Nazism in Germany, leading to WWII, dominated the 20th century in Europe. The fall of the Berlin Wall in 1989 followed by the collapse of the USSR in 1991 led to dramatic changes not only in statehood and political system, but also a strong desire on states emerging from the USSR or Soviet domination to purge the past, and to identify and punish wrongdoers. Various forms of lustration have been a product of this desire, with the exception of the Russian Federation, where the characterisation and proper evaluation of its Soviet past are questions still unresolved. Increasingly the Strasbourg Court has been called on to decide highly controversial cases, for example

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In their partly dissenting Opinion for the Grand Chamber judgment in *Janowiec and Others v. Russia*,[1] Judges Ziemele, De Gaetano, Laffranque and Keller agreed with the joint partly dissenting opinion of Judges Spielmann, Villiger and Nußberger in the Chamber Judgment of 16 April 2012, as to "the gravity and magnitude of the war crimes committed in 1940 in Katyn, Kharkov and Tver, coupled with the attitude of the Russian authorities after the entry into force of the Convention". There can be no question, as a matter of fact, that the most serious crimes were committed on the direct instructions of the leaders of the USSR. But they concluded:

> We express our profound disagreement and dissatisfaction with the findings of the majority in this case, a case of most hideous human rights violations, which turn the applicants' long history of justice delayed into a permanent case of justice denied.

What had the applicants been denied? This chapter explores that very question under a number of headings, and also draws upon my own experience as an advocate in one of the leading cases on the topic, *Ždanoka v. Latvia*.[2]

I stand by the undoubted historical record as to real crimes. This record is not a matter for dispute, or for "social construction". The question, however, is the extent to which such crimes are susceptible to redress through the European Court of Human Rights.

The first question which arises is why this is such a live issue.

I turn therefore first to the question of the Holocaust, and the way in which it has been treated by the Strasbourg Court. Second, I reflect on the question of the crimes of Communism, before turning, thirdly, to the next step, which is the practice, especially in Central and Eastern Europe, of lustration. Fourth, I broach the subject of the "right to truth" and whether the Court should get involved at all in issues of historical truth; and fifthly, the controversial topic of the manipulation of "truth" by the "communist" regimes, drawing on some provocative work by Eric Heinze. Sixth, I examine in some detail cases which have arisen in Latvia, as explored by Nils Muižnieks, the Council of Europe's Commissioner for Human Rights, in his survey, which I take to task for its normative criterion, namely whether the Strasbourg Court has engaged with the issue of the crimes of the USSR. It will be apparent that in several cases, including two in which I represented the applicants, I have some sympathy with the Russian position. I also, seventh, review three more recent cases. I conclude with some shocking behavior by Russia, seeking to re-write history in a manner which lays a person open to criminal prosecution simply for telling the historical truth. These cases, and another recent case against Switzerland, turn on the extent of freedom of expression. But the vexed question of retrospective criminalization of partisan activity during World War II will not go away.

2 The Holocaust

I start with the Holocaust, a crime on an extraordinary scale whose historical existence is not only beyond question, but whose denial is now treated as a crime in many countries of the Council of Europe. Like the Katyn massacre, this is an event which undeniably took place.

[1] ECtHR, Appl.nos.55508/07 and 29520/09, *Janowiec and Others v. Russia*, judgment of 21 October 2013.
[2] ECtHR, Appl.no.58278/00, *Ždanoka v. Latvia,* judgment (GC) of 16 March 2006.

Paula Lobba examined the spread of "denialism" since the 1990s, and noted that states punishing only denial of the Holocaust include: Germany, France, Austria and Belgium; states banning denial of a wider class of crimes include: Spain, Luxembourg, Liechtenstein, Switzerland, Slovenia, Latvia and Malta.[3] Other states which do not consider the gravity of this kind of utterance alone to be such as to warrant criminal punishment include the United Kingdom, Greece, Ireland, Italy, Denmark, Finland, the Netherlands, Sweden and Norway. Lobba added that despite the lack of express criminalization in these countries, denialism might still be punished in so far as it falls within existing laws against hate speech.[4] The European Union had, she pointed out, sought to reconcile these two rival positions by introducing Framework Decision 2008/913/JHA.[5] Whereas the declared goal of this Framework Decision was to harmonize criminal measures against racism and xenophobia, such European intervention in effect broadened the original reach of the crime of denialism to embrace also negation of nearly all core international crimes.[6] As Lobba noted, this development had drawn extensive comment from her and other scholars.[7]

Her focus was on the European Court of Human Rights and its recent case-law:

> The denial of the Holocaust triggers the application of Article 17 of the European Convention on Human Rights (ECHR) – also known as the abuse clause – which causes through its 'guillotine effect'[8] the categorical exclusion of a given expression from the protection of the Convention. In other words, when faced with a conduct of this sort, the Court need not proceed to examine the merits of the complaint but, rather, declares it inadmissible on a prima facie assessment.

Lobba's intention was to highlight the dangers flowing from the ample interpretation given to Article 17, the "abuse clause", by the Strasbourg Court since *Lehideux and Isorni v. France*,[9] especially in cases concerning Holocaust denial, and the implications for freedom of expression.[10] Her warning was expressed in strong terms:

> The problems raised by the Court's development in this field, therefore, are far from being unimportant or peripheral. It is not a pardonable sort of 'original sin' that we are now discussing. Rather, there is a need to reveal the dangers of case law that is potentially capable of expanding the scope of validity of criminal restrictions on freedom of expression in an area

[3] Paolo Lobba "Holocaust Denial before the European Court of Human Rights: Evolution of an Exceptional Regime", 26(1) *European Journal of International Law* (2015), 237-253, at 238, note 4.
[4] *Ibid.*, at 238, note 5.
[5] Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law, OJ L 328/55.
[6] *Ibid.*, Art.1(1)(c) and (d).
[7] Laurent Pech, "The Law of Holocaust Denial in Europe: Towards a (Qualified) EU-Wide Criminal Prohibition", in Ludovic Hennebel and Thomas Hochmann (eds), *Genocide Denials and the Law* (2011), 185; Paolo Lobba, "Punishing Denialism beyond Holocaust Denial: EU Framework Decision 2008/913/JHA and Other Expansive Trends", 5(1) *New Journal of European Criminal Law* (2014), 58-77; Bernadette Renauld, "La décision-cadre 2008/913/JAI du Conseil de l'Union Européenne", 81 *Revue trimestrielle des droits de l'homme* (RTDH) (2010), 117-140; John J. Garman, "The European Union Combats Racism and Xenophobia by Forbidding Expression: an analysis of the framework decision", 39 *University of Toledo Law Review* (2008) 843-860.
[8] Lobba points out that the phrase was coined by Gerard Cohen-Jonathan, "Le droit de l'homme à la non-discrimination raciale", 46 *RTDH* (2001) 665-688.
[9] ECtHR, Grand Chamber (GC), Appl.no.24662/94, *Lehideux and Isorni v. France*, judgment of 23 September 1998.
[10] Lobba, *op.cit.,* note 3, at 252.

> – the formation and preservation of a shared memory on a country's founding past events – that is critical to the contemporaneous demands of identity building.[11]

However, as Maria Mälksoo (to whose important scholarship I return in this chapter) has pointed out,

> Through painful memory work after the war, the old EU member states have consolidated the position of the Holocaust as the moral absolute. Attempts to push Communist crimes into a similar framework by asserting the essential equivalence between the crimes of Europe's two totalitarian regimes are usually regarded with contempt. This background gives cause for scepticism about the applicability of the so-called Holocaust-based tactics when seeking universal condemnation of Communist crimes.[12]

In further comments, she noted a "noticeable imbalance" in the remembering and study of recent history in Eastern and Western Europe, comparing the rigor and depth of analysis with regard to the crimes of the Nazis, especially the Holocaust, with the crimes of the communist regimes of the former Soviet bloc. In her view, this was largely due to the fact that the legacy of Nazism was "more immanent" and for that reason reflection on it more urgent. Another factor was that there had never been a Soviet Nuremberg process. She cited the late Estonian President Lennart Meri, who remarked in the early 1990s that everybody was talking about the death of communism, but no-one had actually seen its body.[13]

I already mentioned Katyn. So, what about the crimes committed by the war-time anti-Nazi allies?

3 The Crimes of Communism

In December 2010, the European Commission (EC) rejected calls from six East European countries[14] to criminalize denial of crimes perpetrated by communist regimes, in the same way as a number of EU countries have banned the public condoning, denial, and gross trivialization of the Holocaust.[15] This decision was based in part on a study commissioned by the EC, and produced in 2010, in the shape of the "Study on how the memory of crimes committed by totalitarian regimes in Europe is dealt with in the Member States", by Professor Dr. Carlos Closa Montero.[16]

In the overview of his Report, he noted that in relation to justice for victims, many Member States have adopted extensive measures aiming at rehabilitation of victims, reparation and restitution of property,[17] but that 11 Member States have no legislation on denial of crimes of genocide, crimes

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[11] Lobba, *op.cit.* note 3, at 249.
[12] Maria Mälksoo, "The Memory Political Horizons of Estonian Foreign Policy", 82 *Diplomaatia* (June 2010), available at <http://www.diplomaatia.ee/en/article/the-memory-political-horizons-of-estonian-foreign-policy/>); see also Maria Mälksoo, "The Discourse of Communist Crimes in the European Memory Politics of World War II", paper presented at the Ideology and Discourse Analysis conference "Rethinking Political Frontiers and Democracy in a New World Order", Roskilde University, Denmark, 8-10 September 2008 (copy in possession of the author).
[13] Maria Mälksoo, *The Politics of Becoming European; A study of Polish and Baltic post-Cold War security imaginaries* (Routledge, Abingdon, 2010), 90-91.
[14] Lithuania, Latvia, Bulgaria, Hungary, Romania, and the Czech Republic.
[15] *EurActiv,* "Commission turns down EU anti-communist calls" (23 December 2010), available at <https://www.euractiv.com/section/languages-culture/news/commission-turns-down-eu-anti-communist-calls/>.
[16] Carlos Closa Montero, "Study on how the memory of crimes committed by totalitarian regimes in Europe is dealt with in the Member States", Contract No JLS/2008/C4/006 (2010), Report available at <http://digital.csic.es/bitstream/10261/34366/1/Closa_Memory_of_crimes.pdf>.
[17] *Ibid.*, at 7.

against humanity and war crimes,[18] and that only two Member States (the Czech Republic and Poland) have national legislation on denial of crimes which explicitly refers to denial of crimes by the totalitarian communist regime.[19]

Maria Mälksoo noted that public hearings and international conferences on the subject of crimes committed by totalitarian regimes had been organized under the aegis of the Slovenian, Czech, Hungarian, and Polish EU Presidencies in 2008–2011,[20] but in view of the failure of the 2010 initiative at the EC, commented:

> The discursive linkage of communist regimes with criminality has enabled the reinforcement of their moral illegitimacy and incompatibility with "European values." While the flow of political declarations by various European organizations supporting the condemnation of totalitarian communist regimes has been quite noteworthy, the legal score card of institutionalizing the denouncement of communist regimes has nonetheless remained rather checkered.[21]

This last remark is an understatement: the European Union does not wish to get involved in the writing or re-writing of history.

4 Lustration

Lustration is another area where issues of historical truth render complex issues even more complicated and contentious.

Adam Czarnota, in his article "Lustration, Decommunisation and the Rule of Law",[22] argued that lustration "generally plays a positive role in laying down foundations for a cleaner public sphere and rule of law and democracy, and also that the debates which lustration have stimulated have played a very positive role in building rule of law cultures in the countries in question."[23] He identified three potentially irreconcilable demands associated with lustration: seeking to instantiate the rule of law in the present, seeking to repair the consequences of its absence in the past, and seeking to establish conditions for it in the future.[24]

This is against the background that "[i]n the Western legal tradition law was not a tool for dealing with historical justice. It was a well-designed instrument for coping with injustice on smaller scales." He also noted that "Generally those who wanted some sort of transitional justice measures to be applied immediately come from the right of the political spectrum."[25]

According to Wojciech Sadurski's authoritative definition,[26] "'lustration' applies to the screening of persons seeking to occupy… certain public positions for evidence of involvement with the communist regime (mainly with the security service apparatus), while 'decommunisation' refers to the exclusion

[18] *Ibid.*, at 8.
[19] *Ibid.*, at 9.
[20] Maria Mälksoo, "Criminalizing Communism: Transnational Mnemopolitics in Europe", 8(1) *International Political Sociology* (2014), 82-99, at 85.
[21] *Ibid.*, at 96.
[22] Adam Czarnota, "Lustration, Decommunisation and the Rule of Law", 1(2) *Hague Journal on the Rule of Law* (2009), 307–336.
[23] *Ibid.*, at 308.
[24] *Ibid.*, at 313-314.
[25] *Ibid*., at 308.
[26] Wojciech Sadurski, *Rights before Courts. A Study of Constitutional Courts in Post-communist States of Central and Eastern Europe* (Springer, Dordrecht, 2005), 245.

of certain categories of ex-Communist officials to run for, and occupy, certain public positions in the new system…. The two have often been lumped together."

This lumping together is what has given rise to grave concerns by the Venice Commission in relation to Ukraine, and also by the Strasbourg Court, as to the way in which lustration can take on the elements of revenge.

In this vein, Kanstantsin Dzehtsiarou has argued:

> Suitability of many of those lustration laws were considered by the European Court of Human Rights and unsurprisingly the Court found some of them in violation of the European Convention on Human Rights. This is so because these laws deeply interfere with the life of the affected persons and the safeguards cannot always prevent excessive interferences. Lustration goes beyond the criminal justice system. It is supposed to quickly heal the legal system in the circumstances of transition. It is a paracriminal procedure which has to be applied very carefully as it may be perceived as a tool of suppressing democracy not enhancing one.[27]

And Magdalena Kaj and Megan Metzger commented,[28] with regard to Poland:[29]

> The goal of lustration should be a coming to terms with the past and the development of stronger potential for a strong democratic society. Jacek Żakowski, however, comments: 'The goal of lustration is not to clarify the past, as it should be, but to create traps for hundreds of thousands of people and to give the social elites of the culture the right to decide who is in a proper social category and who is not'. He argues that the real motivations of lustration were political revenge. In fact, he argues that the new law on lustration embodies totalitarian, not democratic principles.

Also with regard to Poland, Natalia Letki adds:[30]

> Again, lustration should not be perceived as a punishment or revenge. For example, in Polish lustration law there is no punishment for the act of collaboration with the secret service as such, but a person is 'disqualified' if proven to have lied about their collaboration. Therefore, lustration, although based on acts that took place in the past, does not have a retroactive character: it is embedded in the forward-looking perspective.

5 The right to truth

In its Decision in *Yevgeny Dzhugashvili v. Russia*[31] in 2014 the Court reiterated that:

> … it is an integral part of freedom of expression, guaranteed under Article 10 of the Convention, to seek historical truth. It is not the Court's role to arbitrate the underlying

[27] Kanstantsin Dzehtsiarou "Lustration in Ukraine: Political Cleansing or a Tool of Revenge?", *Verfassungsblog.de* (26 June 2015), available at <http://verfassungsblog.de/lustration-in-ukraine-political-cleansing-or-a-tool-of-revenge>/.

[28] Magdalena Kaj, Megan Metzger "Justice or Revenge? The Human Rights Implications of Lustration in Poland", *Humanity in Action,* available at <http://www.humanityinaction.org/knowledgebase/165-justice-or-revenge-the-human-rights-implications-of-lustration-in-poland>.

[29] See further Matt Killingsworth, "Lustration after totalitarianism: Poland's attempt to reconcile with its Communist past", 43 *Communist and Post-Communist Studies* (2010), 275-284.

[30] Natalia Letki, "Lustration and Democratisation in East-Central Europe", 54(4) *Europe-Asia Studies* (2002), 529-552, at 535.

[31] ECtHR, Appl.no.41123/10, *Yevgeny Dzhugashvili v. Russia*, decision of 9 December 2014.

> historical issues, which are part of a continuing debate between historians. A contrary finding would open the way to a judicial intervention in historical debate and inevitably shift the respective historical discussions from public forums to courtrooms.

In 2010, Károly Bárd emphasised the dangers entailed in treating the courts as mechanisms for establishing the historical truth.[32] He focused on two cases to which I will return, the Grand Chamber judgment in *Korbely v. Hungary*,[33] and the Chamber judgment (later reversed in the Grand Chamber) in *Kononov v. Latvia*.[34] In *Kononov* the Chamber considered a complaint on the trial of the applicant who, as established by the Latvian courts, had been involved in 1944 in the killing of Latvian villagers in retaliation for their collaboration with the Germans. The question was basically whether the conviction of the applicant had any basis either in international or national law at the time of the killing. The Chamber came to the conclusion that there had been no such basis and found Latvia in breach of Article 7 (1) of the ECHR. *Korbely* concerned events during the 1956 Hungarian Revolution. The Hungarian Supreme Court had upheld the conviction of the applicant who was a military commander at the time of the event. One of the central issues in this case was whether the person killed by the applicant or upon his order qualified – due to his surrender – as a person not taking part in the hostilities and therefore came under the protection of common Article 3 of the Geneva Conventions. The ECtHR concluded that the domestic courts had not established that the victim expressed an intention to surrender and therefore found Hungary in breach of Article 7 of the ECHR.

In summary, Bárd claimed that the ECtHR had been wrong in bringing the cases under Article 7 of the ECHR. Instead it should have examined the applications under Article 6, and if concerned about the irregularities of the trials and the arbitrary application of the relevant legal provisions, it should have found a breach of the defendant's right to a fair trial. The reason for the ECtHR's choice in his view was that the Court in its effort not to question the legitimacy of using the Hungarian criminal process for coming to terms with the past did not wish to proclaim that the entire domestic trial had been unfair. Thus it appeared safer to bring the cases under Article 7. However, Bárd concluded, the Court had to pay dearly for its political discretion.

In *Kononov* the Latvian government had "stressed the importance of such trials in restoring democracy, establishing the historical truth and guaranteeing justice for the victims of crimes against humanity and war crimes" and argued that "despite all the practical problems with which the Latvian authorities were faced, these trials were very important as they helped to make up for the inadequacies of the Nuremberg trial, a trial that had to a large extent been an example of justice for the victors, punishing crimes perpetrated by the Nazis, while allowing notorious criminal acts by the Allies to go unpunished."[35]

Bárd's concern was that it could be unfortunate to expect criminal trials to record and write history in addition to establishing individual criminal responsibility. Having decided to decide the cases under Article 7 rather than Article 6, the Court had departed from the interpretation given to international law by the Latvian and Hungarian courts, and arrived at a re-assessment of the facts. He concluded:

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[32] Károly Bárd "The Difficulties of Writing the Past through Law – Historical Trials Revisited at the European Court of Human Rights" 81(1) *Revue internationale de droit pénal* (2010), 27-45, available at <https://www.cairn.info/revue-internationale-de-droit-penal-2010-1-page-27.htm>.

[33] ECtHR, [GC] Appl.no.9174/02, *Korbely v. Hungary*, judgment of 19 September 2008.

[34] ECtHR. Appl.no.36376/04, *Kononov v. Latvia,* judgment of 24 July 2008; in the Grand Chamber judgment of 17 May 2010.

[35] *Ibid.*, at para. 92.

> The judgment of the Court demonstrates once more the difficulties to find the proper candidate for presenting a new account of history through trials conducted five decades after the events have taken place.

6 Truth in the Communist Regimes

A special issue of the *German Law Journal* in 2005 was devoted to "Confronting Memories". The scene was set by Christian Joerges in his Introduction. He reminded the reader that "… history is a reflection on the past from the present, and we must be aware that the common identities that we forge and the narratives that we live with emerge from processes of remembering and forgetting."[36]

András Sajó, since 2008 the judge from Hungary at the European Court of Human Rights, illustrated the difficulties encountered when confronting issues of truth in countries such as his.[37] He reminded his readers that in the period after WW II, the non-indoctrinated presentation of contemporary history was prohibited, partly because the Hungarian Communist regime used many Hungarian Nazis. The democratic governments of France did the same. And, for about forty years of German and Austrian politics, there were revelations that former Nazi party and SS members were working in high government positions.[38] In Hungary, as in most East European countries, public reflection on past crimes was not part of the discussions that shape national identity: "History froze once again in lies."[39] The result, in the context of a refusal to consider responsibility, was that there was no serious calling to account of crimes committed under communism: "The prevailing attitude suggested that Hungarians had suffered enough for everything, and since individual responsibility was not practiced, there were no patterns for introspection or for collective introspection."[40]

Vivian Grosswald Curran, in the Epilogue entitled "Law's Past and Europe's Future" in the same Special Issue,[41] cited Ruti Teitel as pointing out, in the context of states in transition, that because post-Communist countries had suffered from the historical revisionism that Communist governments practiced as part of their abuse and violation of truth and justice, these countries uniformly rejected redressing past crimes and offenses through the construction of a historical narrative along the model of the South African Truth and Reconciliation Hearings.[42]

Eric Heinze of Queen Mary University of London, is leading a four-country project Memory Laws in European and Comparative Perspective (MELA).[43] He has written a short blog introduction. The introduction[44] to the project contains the following:

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[36] Christian Jorges, Introduction, in 6(2) *German Law Journal* (2005), Special Issue – "Confronting Memories: European "Bitter Experiences" and the Constitutionalization Process: Constructing Europe in the Shadow of its Pasts", available at <http://www.germanlawjournal.com/volume-06-no-02>, 245-254, available at <https://static1.squarespace.com/static/56330ad3e4b0733dcc0c8495/t/56b8e1173c44d83684ff612b/1454956823640/GLJ_Vol_06_No_02_Joerges.pdf>.

[37] András Sajó, "Legal Consequences of Past Collective Wrongdoing after Communism" 6(2) *German Law Journal* (2005), 425-437, available at <https://static1.squarespace.com/static/56330ad3e4b0733dcc0c8495/t/56b8eb5c62cd94ec072e4f30/1454959452462/GLJ_Vol_06_No_02_Sajo.pdf>.

[38] *Ibid.*, at 427.

[39] *Ibid.*, at 430.

[40] *Ibid*, at 430.

[41] Vivian Grosswald Curran, "Law's Past and Europe's Future", 6(2) *German Law Journal* (2005), 483-512, available at <https://static1.squarespace.com/static/56330ad3e4b0733dcc0c8495/t/56b8ebad62cd94ec072e52b4/1454959534349/GLJ_Vol_06_No_02_Grosswald.pdf>.

[42] Ruti G. Teitel, "Transitional Justice Genealogy" 16 *Harvard Human Rights Journal* (2003), 69-94, at 78-79.

[43] MELA (Memory Laws in European and Comparative Perspective), available at <http://melaproject.org/>.

> Most older Central and Eastern Europeans were indoctrinated with false information about Soviet conduct, such as the Molotov- Ribbentrop partition of Poland (1939). Similarly, the Kremlin long attributed the Katyń massacre to the Germans, although it was committed under Soviet command. Recent attempts to commemorate Stalinist crimes include the 1998 Polish laws against the denial of Soviet-era atrocities and the 2006 Ukrainian law against denying the Holodomor, the politics of mass starvation engineered by Joseph Stalin in 1932-33 to crush national autonomy movements. We must again ask how far that renewal of memory ought to extend. How legitimate are the Baltic states' prohibitions on the denial of Soviet repression? How selective are EU resolutions commemorating Stalinist crimes?

And Heinze concludes his blog as follows:[45]

> If you want to know where a state's ethical compass lies, if you want to know its attitude towards human rights, then yes, look by all means at its official version of past events – but look above all at the freedom of its citizens to challenge that version.

This follows from the principled position Heinze has taken on highly controversial issues of "no-platforming"; as part of a broader examination of provocative speech, he has proposed a series of arguments for, but matched with stronger arguments against, censoring speakers.[46]

However, Heinze raises in his blog another important problem, generally forgotten or ignored, again concerning one of the Baltic states, this time Lithuania. Heinze insists that:

> The lesson is one we must learn forever anew: a government's legitimacy is reflected in the degree to which it tolerates its citizens lampooning and deriding it. Lithuanians have today gained the freedom to detest Zappa the man as loudly as they wish, along with any understandings of history that his image memorialises.
>
> To be sure, not all Lithuanian laws and practices are equally enlightened. Pandering to local post-Soviet nationalism, the state has brought a few nasty prosecutions against elderly Holocaust survivors on trumped-up charges of wartime collaboration.

He is referring to a monument to Frank Zappa erected pursuant to a special law passed in 1992, following independence. This sculpture "…overtly satirises a chilling past, when ubiquitous, taboo-laden images of state-approved heroes had been planted throughout Soviet-dominated nations." But Heinze's second reference is to events in 2008, when, as *The Economist* pointed out, some Lithuanians posed "… a series of false moral equivalences: Jews were disloyal citizens of pre-war Lithuania, helped the Soviet occupiers in 1940, and were therefore partly to blame for their fate. And the genocide that really matters was the one that Lithuanian people suffered at Soviet hands after 1944." This is what could be termed "Holocaust obfuscation".

The cases in question were those of Fania Brantsovsky, now 86, by 2008 a librarian at the Vilnius Yiddish Institute in Lithuania, a survivor of the Vilna Ghetto and a former partisan. Prosecutors said

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[44] Taken from the Introduction to: *Law and Memory: Addressing Historical Injustice by Legislation and Trials* (Uladzislau Belavusau and Aleksandra Gliszczyńska-Grabias (eds) (Cambridge University Press, Cambridge, forthcoming).

[45] Eric Heinze, "Law can enshrine a country's history, but it is a citizen's right to question it", *The Conversation* (19 May, 2016), available at <https://theconversation.com/law-can-enshrine-a-countrys-history-but-it-is-a-citizens-right-to-question-it-59561>.

[46] "Ten arguments for – and against – 'no-platforming'. Eric Heinze sets out the flaws in the commonly heard arguments for no-platforming, available at <http://freespeechdebate.com/en/discuss/ten-arguments-for-and-against-no-platforming/>.

they wanted to talk to her and another survivor, Rachel Margolis, about a (Soviet Red Army) partisan massacre of civilians in 1944. Furthermore, prosecutors wanted to interview Yitzhak Arad, a Lithuanian-born historian and ex-head of Yad Vashem in Israel. Until recently he had sat on a high-level Lithuanian commission investigating crimes perpetrated by totalitarian regimes in the country. In 2008 he was refusing to co-operate. In a book published in 1979 he described how his (Soviet Red army) partisan unit "punished" villagers who did not give them food.[47]

These cases are both remarkably reminiscent of the case of *Kononov v. Latvia*, already mentioned above. And there is strong relevance to the case in which I represented the applicant for more than six years, *Ždanoka v. Latvia*.[48]

7 Cases Concerning Latvia, and its Illegal Occupation by the USSR

Nils Muižnieks, a Latvian-American who was born on 31 January 1964 in the United States, has since 1 April 2012 been the Commissioner for Human Rights of the Council of Europe. He edited, in 2008 and 2011, two major collections reflecting on the complexities of the three Baltic states and their engagement with crimes of their historical past.[49]

His 2011 collection contained his own "Latvian-Russian Memory Battles at the European Court of Human Rights", in which he reviewed (not in chronological order) a number of important Latvian cases at the European Court of Human Rights.[50] At the outset he emphasized that "… what the court considers to be historical fact is more difficult for either side to contest at the political level, while the court's interpretations of historical context also carry considerable legal weight, as both sides have accepted the jurisdiction of the ECHR and must implement its judgments." Or, more accurately, it is the state which must implement the judgments.[51] He noted that "… while the Latvian media have not devoted much coverage to the cases in question, Russia's media have made several of the applicants from Latvia into heroes."[52]

This was the subject matter of the 2008 collection, and Muižnieks cited the chapter by Dmitrijs Petrenko, who found that "the Russian media portrayed military and KGB veterans in Latvia involved in various legal proceedings as an important subgroup of "compatriots" abroad under threat in Latvia, where the authorities are "inhumane" and "vengeful." The plight of these individuals is portrayed as being typical of that of Russians in Latvia in general."[53]

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[47] "Prosecution and persecution. Lithuania must stop blaming the victims", *The Economist* (21 August 2008), available at <http://www.economist.com/node/11958563>.

[48] ECtHR, Appl.no.58278/00, *Ždanoka v. Latvia*, Chamber judgment of 17 June 2004, Grand Chamber judgment of 16 March 2006.

[49] Nils Muižnieks (ed.), *Manufacturing Enemy Images? Russian Media Portrayal of Latvia* (Academic Press of the University of Latvia, Riga, 2008), freely available at <https://core.ac.uk/download/pdf/11871144.pdf>; and Nils Muižnieks (ed.), *The Geopolitics of History in Latvian-Russian Relations* (Academic Press of the University of Latvia, Riga, 2011), freely available at <http://www.lu.lv/fileadmin/user_upload/lu_portal/eng/news/The_Geopolitics_of_History_in_Latvian-Russian_Relations.pdf>.

[50] Nils Muižnieks, "Latvian-Russian Memory Battles at the European Court of Human Rights" in Nils Muižnieks (ed.) *The Geopolitics of History in Latvian-Russian Relations* (Academic Press of the University of Latvia, Riga, 2011), 219-238.

[51] Muižnieks (2011), *op.cit.* note 49, at 219.

[52] *Ibid.*, at 221.

[53] Dmitrijs Petrenko, "How Does the Russian Community Live in Latvia?" in Nils Muižnieks (ed.) (2008) "Manufacturing Enemy Images? Russian Media Portrayal of Latvia" (Academic Press of the University of Latvia, Riga, 2008), 45-78.

Muižnieks first turned to the 2010 Grand Chamber judgment in *Kononov v. Latvia*. He recognized that Kononov's case raised (or could have raised, more accurately): "… a number of thorny questions related to history, accountability and law: can and should an individual who fought on the side of the Allies be tried for war crimes? Does it matter which ideology an individual claimed to be fighting for when determining criminal liability? What was the legal status of Latvia in 1944 at the time the events in question took place?"[54]

In a controversial divided judgment – I myself took the side of the dissenters, led by Judge Jean-Paul Costa[55] – the Grand Chamber on 17 May 2010 ruled in favor of Latvia , and determined Kononov could be punished for failing to meet the regulation criteria, specifically, wearing German Wehrmacht uniform while carrying out the crimes. The court determined the execution of the villagers was in violation of established international law at the time, as Kononov was only entitled to arrest them, and his conviction was not barred by statute of limitations.

Muižnieks pointed out that the Grand Chamber "sought to skirt controversial historical issues, merely noting under "the Facts" that "In August 1940 Latvia became part of the Union of Soviet Socialist Republics." The judgment set out "the observations of the parties and third parties to the Grand Chamber" regarding Latvian history, but stressed in paragraph 210 that "The Grand Chamber considers (as did the Chamber, at paragraph 112 of its judgment) that it is not its role to pronounce on the question of the lawfulness of Latvia's incorporation into the USSR, and in any event in the present case, it is not necessary to do so."[56]

Next he turned to the Grand Chamber judgments in *Slivenko v. Latvia*[57] (2003) and *Sisojeva v. Latvia*[58] (2007). In the rulings in both cases, the Court gave in his view a "rather anodyne" rendering of Latvian history, avoiding almost any comment on the issue. In the *Sisojeva* case, the Court noted that: "The first two applicants entered Latvian territory in 1969 and 1968 respectively, when the territory formed part of the Soviet Union." (paragraph 17) In the *Slivenko* case, the Court merely noted that "Latvia regained independence from the USSR in 1991." (paragraph 17) While the Court did not find any substantial violation of the applicant's rights in the *Sisojeva* case, and struck it out, it ruled partially in favor of the applicant in the *Slivenko* case, under Article 8, in that Latvia should have taken into account the applicants' particular circumstances.[59]

In its decision of 18 December 2014 a Chamber of the ECtHR found two cases inadmissible, namely *Larionovs v. Latvia*[60] and *Tess v. Latvia.*[61] In both cases the Chamber found that Mr Larionovs and Mr Tess, the applicants, had failed to lodge a constitutional complaint that, if successful, could have led to the reopening of criminal proceedings and redress of the violation of Article 7 (no punishment without law) alleged by them. The Court consequently rejected their complaint for non-exhaustion of domestic remedies. Muižnieks commented that, in both cases, the Court had sought to avoid detailed comment on the historical context. The Court in an earlier (2008) partial admissibility decision in

[54] Muižnieks (2011), *op.cit.* note 49, at 221.
[55] Bill Bowring, "*Postanovleniye bolshoi palaty Yevropeiskovo Suda po Pravam Cheloveka po delu "*Kononov protiv. Latvii" *(17 Maya 2010 goda): prava li Rossiiskaya Federatsii v. svoyom ponimanii sootnosheniya politiki i mezhdunarodnovo prava?"* [The ECtHR Grand Chamber judgment in *Kononov v. Latvia* of 17 May 2010: is the Russian Federation correct in its understanding of the relationship between politics and international law?] 2(3) *Mezhdunarodnoye Pravosudiye* (2012), 75-84.
[56] Muižnieks (2011), *op.cit.* note 49 at 225
[57] ÉCtHR, Appl.no. 48321/99, *Slivenko v. Latvia*, GC judgment of 9 October 2003.
[58] Striking out, Appl.no.60654/00, *Sisojeva v. Latvia*, GC judgment of 15 January 2007.
[59] Muižnieks (2011), *op.cit.* note 49 at 228.
[60] ECtHR. Appl.no.45520/04, *Larionovs v. Latvia*, decision of 18 December 2014.
[61] ECtHR, Appl.no.19363/05, *Tess v. Latvia*, decision of 18 December 2014.

Larionovs noted under "The Facts": "after the annexation of Latvia by the USSR in summer 1940" and in neutral language "the deportation of Baltic peasants of 25 March 1949."

Muižnieks was more impressed by the Grand Chamber's judgment in *Ždanoka v. Latvia*.[62] It departed from its previous practice of avoiding significant commentary on historical issues and laid out in the section on "The Facts" how Latvia came to be a part of the Soviet Union and the events of 1990 and 1991, mentioning the Molotov-Ribbentrop Pact and its secret protocols, Soviet ultimatums to the interwar Latvian government, and the invasion and annexation of Latvia.[63] Then, the Court drew an explicit link between the Soviet annexation and the Communist Party:

> Latvia, together with the other Baltic states, lost its independence in 1940 in the aftermath of the partition of Central and Eastern Europe agreed by Hitler's Germany and Stalin's Soviet Union by way of the secret protocol to the Molotov-Ribbentrop Pact, an agreement contrary to the generally recognized principles of international law. The ensuing annexation of Latvia by the Soviet Union was orchestrated and conducted under the authority of the Communist Party of the Soviet Union (paragraph 119).

Muižnieks interviewed the Latvian agent in the case, Inga Reine, and was given access to the (public) court papers including the Memorial I drafted, and my written submissions to the Grand Chamber. He noted:

> When the Latvian government provided the Court with a detailed account of the independence struggle supported by 26 scholarly annexes, *Ždanoka* beat a retreat, her legal counsel suggesting to the Court that "The Applicant does not wish to enter into a detailed discussion of the history of events in 1990-1991. These are in any event of limited relevance to her case" … In a document submitted to the Court, Ždanoka's counsel sought to steer it away from the historical issues raised by the Latvian government: "the Grand Chamber is not the appropriate forum in which to re-open these issues, which will ultimately be decided by historians and by public opinion."[64]

Those are accurate quotations, but - indeed - the case did not require the Court to rule on issues of historical truth, nor did it. The issue was whether Latvia's prohibition of the applicant's candidacy for elections violated Article 3 of Protocol 1 to the ECHR; and the Grand Chamber held that the prohibition, contained in a Law of 1995 but relating to the applicant's active membership of the Communist Party in early 1991, was within Latvia's margin of appreciation – but would soon not be. I commented in detail on the judgment in publications in English and in Russian.[65]

I have since been in communication with Nils Muižnieks, and here, as I sent it to him, is my own recollection. As was more frequently the case at that time, there were oral hearings before both the Chamber and the Grand Chamber. On 17 June 2004, following the hearing, a Chamber of the First Section, presided over by Judge Rozakis, delivered a judgment in which it held, by five votes to two,

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[62] ECtHR, Appl.no.58278/00, *Ždanoka v. Latvia*, judgment (GC) of 16 March 2006.

[63] On the Pact, see paras 12-13; on the events of January and March 1990, see paras 20-24; on the events of August and September 1991, see paras 25-29.

[64] Muižnieks (2011), *op.cit.* note 49 at 231-232.

[65] Bill Bowring, "Negating Pluralist Democracy: The European Court Of Human Rights Forgets the Rights of the Electors" 11 *KHRP Legal Review* (2007), 67-96, available at <http://www.bbk.ac.uk/law/about/ft-academic/bowring/negatingpluralistdemocracy>; and in Russian Bill Bowring, "*Pozitsiya Yevropeiskovo Suda po Pravam Cheloveka v. Voprose ob Izbiratelnikh Pravakh Grazhdan v. Kontekste Latviiskoi Praktiki: Kriticheskii Vzglyad* [The European Court of Human Rights and the Question of the Electoral Rights of the Citizen in the Context of Latvian Practice: Critical Comments]" 6(27) *Pravo Cheloveka: Praktika Yevropeiskovo Suda po Pravam Cheloveka* (2008), 28-80.

that there had been a violation of Article 3 of Protocol No. 1 and Article 11 of the Convention, Before the Chamber, Inga Reine argued law.

As to the applicant's present conduct, the Court noted that the criticisms levelled at her mainly concerned the fact that she defended and disseminated ideas diametrically opposed to the official policy of the Latvian authorities and were disapproved of by a large proportion of the population. With regard to her ideas concerning the Russian-speaking minority in Latvia and the legislation on language matters, the Court could not discern any sign of anti-democratic leanings or incompatibility with the fundamental values of the Convention. The same conclusion was inescapable as regards the means the applicant used to attain her political objectives. In short, the Government had not supplied information about any specific act by the applicant capable of endangering the Latvian State, its national security or its democratic order. Consequently, the Court considered that her permanent ineligibility to stand for election to the Latvian parliament was not proportionate to the legitimate aims it pursued, that it curtailed her electoral rights to such an extent as to impair their very essence and that its necessity in a democratic society had not been established. Judges Bonello and Levits dissented.

Before the Grand Chamber, Inga Reine gave a much more political presentation, comparing the applicant to Milosevic, and implying that she should take responsibility for the crimes of Stalin. Indeed, the atmosphere in the Court was very highly charged. Following the oral submissions, a judge asked me the following question: "Mr Bowring! When did your client publicly apologise for having been a member of the Communist Party?" I was not sure there was such a requirement in human rights law. Another judge asked me: "Mr Bowring! When your client was naturalised a Latvian citizen did she not have to swear an oath of loyalty to Latvia?" To which the answer was that as a member of a family who had been living in Latvia for three generations, since the 19th century (her Jewish grandparents were murdered by the Nazis), she was entitled to Latvian citizenship as of right, although she had to go to court to vindicate it. The Latvian government tried very hard to find evidence of disloyalty by the applicant, but found none, as the Chamber had noted.

The judgment was delivered on 16 March 2006, the day the Latvian former members of the Waffen SS march each year in Riga, *Leģionāru piemiņas diena*, and the applicant, regarding this as a deliberate provocation (which it probably was), refused to go to court on that day. I went to represent her. Outside the court, the Latvian lawyer who prepared the draft judgment, said to me in a jovial manner "Just wait to see what we have done with the jurisprudence!" Remarkably, a year or so later, the Latvian lawyer having left the Registry, he came to find me in London to apologize.

The majority, by 13 votes to 4, held that Latvia's ban was within its margin of appreciation. However, Latvia's victory was conditional, unusually. The majority concluded (paragraph135):

> It is to be noted that the Constitutional Court observed in its decision of 30 August 2000 that the Latvian parliament should establish a time-limit on the restriction. In the light of this warning, even if today Latvia cannot be considered to have overstepped its wide margin of appreciation under [P1A3], it is nevertheless the case that the Latvian parliament must keep the statutory restriction under constant review, with a view to bringing it to an early end. Such a conclusion seems all the more justified in view of the greater stability which Latvia now enjoys, *inter alia*, by reason of its full European integration… Hence, the failure by the Latvian legislature to take active steps in this connection may result in a different finding by the Court.

The strongly worded dissenting judgment of Judge Rozakis described the majority judgment as "dubious" and "obscure".

My own view is that Tatiana Ždanoka should be awarded a medal by Latvia for helping the ethnic Russians and Russian speakers to focus on Brussels and Strasbourg rather than Moscow. It is notable that in her two terms as an MEP – the Latvian government failed to prevent her from standing, several members of the ruling party overslept and missed the vote on the question – she has been a member of the European Free Alliance - Greens group.

Muižnieks concluded his survey with the 2008 Chamber judgment in *Ādamsons v. Latvia*,[66] a case quite different from that of *Ždanoka*. As he noted, the court kept well away from issues of history or historical truth. In his concurring opinion (joined by two other judges), Judge Garlicki said: "Nous sommes des experts en droit et en légalité, mais non en politique et en histoire, et nous ne devrions nous aventurer dans ces deux derniers domaines que lorsque cela se révèle absolument nécessaire."[67]

8 Some more recent Strasbourg cases

In *Vajnai v. Hungary*,[68] where the applicant was prosecuted for wearing a red star at a socialist demonstration, he argued that there was a profound difference between Fascist and Communist ideologies and that, in any event, the red star could not be exclusively associated with the "communist dictatorship". In the international workers' movement, the red star – sometimes understood as representing the five fingers of a worker's hand or the five continents – had been regarded since the nineteenth century as a symbol of the fight for social justice, the liberation of workers and freedom of the people, and, generally, of socialism in a broad sense. The Court was (paragraph 52) "mindful of the fact that the well-known mass violations of human rights committed under communism discredited the symbolic value of the red star. However, in the Court's view, it cannot be understood as representing exclusively communist totalitarian rule, as the Government have implicitly conceded. It is clear that this star also still symbolises the international workers' movement, struggling for a fairer society, as well as certain lawful political parties active in different member States."

In another case against Estonia, in which I represented the applicants, *Korobov and others v. Estonia*,[69] six applicants were arrested, allegedly violently, and were detained and some brutalised in detention. Ensuing attempts by the applicants to institute prosecution against the police failed. The Chamber in 2013 unanimously found a violation of Article 3 through the use of excessive force in the case of one applicant, and four applicants established violations of the procedural obligation implicit in Article 3, because Estonia had failed to carry out an effective and independent investigation of their allegations of ill-treatment.

The context was the "Bronze Soldier" disturbances in 2007. Originally named a "Monument to the Liberators of Tallinn", this statue was unveiled on 22 September 1947, on the third anniversary of the "liberation" in 1944. In fact, the Nazi Germans had retreated before the Red Army arrived, and on 18 September 1944 the Provisional Estonian government (Estonia was an independent state from 1919 until its annexation by the USSR following the Ribbentrop-Molotov Pact) had declared independence, which was short-lived as Estonia was rapidly incorporated into the USSR. This was without doubt an illegal occupation and annexation.

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[66] ECtHR, Appl.no.3669/03, *Ādamsons v. Latvia*, judgment of 24 June 2008.
[67] My translation: "We are experts in law and legality, not in politics and history, and we should not venture into the latter two domains unless that reveals itself to be absolutely necessary".
[68] ECtHR, Appl.no.33629/06, *Vajnai v. Hungary*, judgment of 8 July 2008; and see Antoine Buyse "Red Star Judgment", ECHR Blog (9 July 2008), available at <http://echrblog.blogspot.co.uk/2008/07/red-star-judgment.html>.
[69] ECtHR, Appl.no.10195/08, *Korobov and others v. Estonia*, judgment of 21 March 2013.

At last, 47 years later, with the collapse of the USSR, Estonia regained its independence. In 2007, the Estonian Parliament enacted the Protection of War Graves Act; part of the "protective measures" proposed enabled the relocation of war graves currently in "unsuitable" sites. In April 2007, a large tent was put over the monument in preparation for the exhumation, and a police cordon formed. Over the nights of 26 to 28 April, thousands of people gathered, mainly Russian speakers, who protested at the exhumation. Things got out of hand, with stones being thrown, vandalism, and over 1,160 arrests made, including the applicants. [70]

It is notable that the Court was not asked to examine, much less to rule on, the historical background to the disturbances in which the applicants were detained, and refrained from touching on these contentious matters at all.

Finally, in *Sõro v. Estonia* (2015),[71] where from 1980 to 1991 the applicant was employed as a driver by the Committee for State Security, and under the 1995 Disclosure Act[72] information as to that fact was published, the Court held:

> … in the applicant's case the information in question was only published in 2004 - almost thirteen years after the restoration of the Estonian independence. The Court is of the opinion that any threat the former servicemen of the KGB could initially pose to the newly created democracy must have considerably decreased with the passage of time. It notes that it does not appear from the file that any assessment of the possible threat posed by the applicant at the time of the publication of the information was carried out.

The Court held that there had been a violation of Article 8. But Judges Hajiyev, Laffranque and Dedov, the judge from Russia, elected in 2013, expressed a perhaps surprising joint dissenting opinion, in that the interference with the applicant's right to respect for his private life was necessary in a democratic society and constituted a proportionate measure. In their view, the majority had "failed to see the overall context of this case and its consequences for Estonian society and security, to respect subsidiarity and the margin of appreciation and to leave any room for the respondent State and its courts to deal with sensitive issues of a moral, historical and political nature, given that there was no disproportionate interference with the applicant's rights and no manifest errors or arbitrariness in the actions of the authorities, including the domestic courts."

They added:

> We reiterate that it is not the Court's role to arbitrate on historical issues (compare *Dzhugashvili v. Russia*.) It must exercise caution when scrutinising decisions made in this connection by a democratically elected legislature wishing to draw a clear line between the former regime together with its oppressive institutions and the newly established democratic order, to offer reconciliation with the past and to help to make good past injustices. The expectations of society and the legislature's choices in different countries inevitably differ in such matters, depending on their unique historical experience. In such matters the Court

[70] See David Hart, "The Tallinn Bronze Soldier riots – and why Russia was in Strasbourg", UK Human Rights Blog (14 April 2013), available at <https://ukhumanrightsblog.com/2013/04/14/the-tallinn-bronze-soldier-riots-and-why-russia-was-in-strasbourg/#more-18031>.

[71] ECtHR, Appl.no.22588/08, *Sõro v. Estonia*, judgment of 3 September 2015.

[72] Procedure for Registration and Disclosure of Persons who Have Served in or Co-operated with Security Organisations or Intelligence or Counterintelligence Organisations of Armed Forces of States which Have Occupied Estonia Act [*Eestit okupeerinud riikide julgeolekuorganite või relvajõudude luure- või vastuluureorganite teenistuses olnud või nendega koostööd teinud isikute arvelevõtmise ja avalikustamise korra seadus*].

should have due regard to the principle of subsidiarity and allow the States an appropriate margin of appreciation.

9 Conclusion

On 1 September 2016 the Supreme Court of the Russian Federation re-wrote the history of the Second World War, in the words of two distinguished commentators.[73] The Court upheld the conviction of Vladimir Luzgin under Article 354.1 of the Russian Criminal Code -- Rehabilitation of Nazism, a new provision enacted in 2014, two months after the Ukrainian *Maidan* Revolution (or Revolution of Dignity), criminalizing:

> [1] Denial of facts, established by the judgement of the International Military Tribunal…, [2] approval of the crimes adjudicated by said Tribunal, and [3] dissemination of knowingly false information about the activities of the USSR during the Second World War, made publicly.

Luzgin, a 38 year-old auto mechanic, was fined 200,000 rubles (roughly €2,800) for reposting on the popular Russian social networking site *vkontakte* a link to an online article containing numerous assertions in defense of Ukrainian nationalist paramilitaries that fought during the Second World War. The basis for Luzgin's conviction lay in the statement that unlike the nationalists, "the Communists…actively collaborated with Germany in dividing Europe according to the Molotov-Ribbentrop Pact," and "Communists and Germany jointly attacked Poland and started the Second World War on 1 September 1939!"

The new provision was the Russian response to the fact, on which I commented in detail above, that the Baltic states in particular, and Poland, claim as a matter of historical fact that the USSR had illegally occupied them both at the start of and then after the defeat of Nazism in World War II. In response, the Kremlin has accused these states of rehabilitating Nazism, and has endorsed a heroic vision of Soviet history with the victory in the "Great Patriotic War" at its core. As Bogush and Nuzov point out, the Russian regime regards the Molotov-Ribbentrop Pact of 23 August 1939 that divided Poland between Germany and the USSR positively, calling it a "colossal achievement of Stalin's diplomacy." The pact also permitted the annexation by the USSR of the three Baltic states, hitherto independent, as well as part of Romania.

The Supreme Court upheld Mr Luzgin's conviction because by restating the historical claim that the USSR and Germany both attacked Poland in September 1939, he assisted in the "rehabilitation of Nazism" and formation of belief in the "negative activity of the USSR in the Second World War."

In fact, he was telling the truth.

Bogush and Nuzov. cite *Perinçek v. Switzerland*,[74] where the Grand Chamber questioned the existence of a "pressing social need" to punish radical historical opinions, and found a violation of Article 10 in Perinçek's conviction under a law of 1995 criminalizing "Racial Discrimination" for statements denying the characterization of massacres of Armenians in 1915 as genocide. The Grand Chamber held, by 10 votes to 7, that there had been a violation of Article 10. The separate opinions were (a) a partly concurring and partly dissenting opinion of Judge Nußberger; (b) a joint dissenting opinion of Judges Spielmann, Casadevall, Berro, De Gaetano, Sicilianos, Silvis and Kūris;, and (c) an additional dissenting opinion of Judge Silvis, joined by Judges Casadevall, Berro and Kūris.

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[73] Gleb Bogush and Ilya Nuzov, "Russia's Supreme Court Rewrites History of the Second World War", EJIL Talk (28 October 2016), available at <http://www.ejiltalk.org/russias-supreme-court-rewrites-history-of-the-second-world-war/>.

[74] ECtHR, Appl.no.27510/08, *Perinçek v. Switzerland,* judgment of 15 October 2015.

The majority's arguments have been summarized as follows:

1) The applicant's statements bore on a matter of public interest and did not amount to a call for hatred or intolerance (paragraphs 229-241);

2) The context in which they were made had not been marked by heightened tensions or special historical overtones in Switzerland (paragraphs 242-248);

3) The statements could not be regarded as affecting the dignity of the members of the Armenian community to the point of requiring a criminal law response in Switzerland (paragraphs 272-273);

4) There was no international law obligation for Switzerland to criminalize such statements (paragraphs 258-268);

5) The Swiss courts appeared to have censured Perinçek simply for voicing an opinion that diverged from the established ones in Switzerland, and the interference with his right to freedom of expression had taken the serious form of a criminal conviction (paragraphs 274-282).

One commentator concluded:

> The problem with the Strasbourg judgment in *Perinçek* is not that the Court defends freedom of speech under Article 10 ECHR. Historical discussion should be exempted from instrumental state censorship in a democratic state, even if that implies protection of a "bunch of clowns outside" and "negligible contribution to public discourse". The problem is that while acknowledging the dignity of the Armenian community under Article 8 ECHR, the Court fails to express the necessary outrage about Perinçek's statements… In combination with an extremely questionable hierarchy between the Holocaust and other genocides, this failure to distance from Perinçek – albeit rightly protecting his freedom of expression – leaves strikingly little to sustain the dignity of the Armenian victims.[75]

It is highly likely that Mr Luzgin's case, if it reaches the Strasbourg Court, will also be dealt with as a freedom of expression issue under Article 10. He is represented by my EHRAC[76] colleague Kirill Koroteev. The court will be as reluctant as ever to investigate the competing historical "truths" as to the Molotov-Ribbentrop Pact.[77]

However, freedom of expression is not engaged in cases concerning criminal prosecutions under retrospective legislation for fighting on the "wrong" side in World War II, where extremely controversial issues will arise as to the moral equivalency or not of Nazism and Stalinism, and as to whether the crimes of the Allies should be treated in the same way as the crimes of the defeated Nazis.

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[75] Uladzislau Belavusau, "Guest Commentary on Grand Chamber Judgment Perinçek v. Switzerland", ECHR Blog (11 November 2015), available at <http://echrblog.blogspot.co.uk/2015/11/guest-commentary-on-grand-chamber.html>.

[76] European Human Rights Advocacy Centre, which I founded in 2003, with *Memorial.* See <http://ehrac.org.uk/>.

[77] On 15 May 2018 the Czech Republic refused Mr Luzgin asylum. See Carl Shreck, "Czechs Deny Asylum To Russian Convicted For Saying U.S.S.R. Collaborated With Nazis", Radio Free Europe (15 May 2018), available at <https://www.rferl.org/a/czechs-deny-asylum-russian-luzgin-convicted-u-s-s-r-collaborated-nazis/29228081.html>; and see Halya Cpynash, "Russian prosecuted for posting that USSR invaded Poland in 1939 denied asylum in Czech Republic", Human Rights in Ukraine (22 May 2018) , available at <http://khpg.org/en/index.php?id=1526820528>.