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State Continuity in the Light of Estonian Treaties Concluded before World War II[*1]

The Republic of Estonia as a new state emerged in 1918, separating from Russia undergoing a period of confusion. Estonian soldiers who had taken over the front from the retreating German army at the end of the First World War won the War of Independence against the troops of Soviet Russia. The victory was formalised with the Tartu Peace Treaty (2 February 1920)[*2], which recognised the independence and sovereignty of the state of Estonia and the waiver by Russia of the rights of a sovereign with regard to the Estonian nation and country forever. The Tartu Peace Treaty also determined the border between Estonia and Russia.

The Soviet Union "resorted to revanchism" in the summer of 1940. Europe, which had once again sunk into confusion, could observe how the Republic of Estonia, Republic of Latvia and Republic of Lithuania, members of the League of Nations were annexed by the Soviet Union at a direct military threat.[*3] The Treaty on Mutual Assistance between Estonia and the Soviet Union (28 September 1939)[*4], supported by the so-called Molotov-Ribbentrop Secret Protocol (23 August 1939)[*5] assigned to the Soviet Union the right to rent some marine bases and airfields on the Estonian territory (article III) and provided the prerequisites for the presentation of an ultimatum (16 June 1940)[*6], which demanded that army units of the Soviet Union be brought to the crucial centres in Estonia and that a new pro-Soviet government be

1 This paper constitutes a part of a research project carried out by International and European Law Research Centre established at Law Faculty of the University of Tartu in 2000.

2 See Riigi Teataja (the State Gazette) 1920, 24/25; or 11 League of Nations Treaty Series (LNTS) 30 (1922).

3 See generally, Baltic States: a study of their origin and national development, their seizure and incorporation into the U.S.S.R.: third interim report of the Select Committee on Communist Aggression, House of Representatives, Eighty-third Congress, second session, 1954, under the authority of H. Res. 346 and H. Res. 438. 3rd reprint ed., Buffalo: W. S. Hein, 1972; B. Meissner. Die Sovjetunion, die baltische Staaten und das Völkerrecht. Köln: Verlag für Politik und Wirtschaft, 1956.

4 See Riigi Teataja (the State Gazette) II 1939, 15, 25.

5 Secret Protocol to the Treaty on Non-aggression between Germany and the Soviet Union. – DGFP. Ser. D, Vol. VII, pp. 246–247.

6 For the text of the Note Verbale, See Mezhdunarodnaya zhizn', 1990, No. 3, pp. 129–130. Referred via: Baasidelepingust anneksioonini (From the Agreement on the Military Bases to Annexation). Compiled by J. Ant. *et al.*, Tallinn: Perioodika, 1990.

established. As a result of the formal arrangement of the new government and the actual arrangement of the embassy of the Soviet Union, 14–15 July 1940, an extraordinary election to the lower chamber of the parliament (State Council) took place with two candidates in only one out of 80 electoral districts and all the opposing candidates of the pro-Soviet Estonian League of Working People were removed by the persons arranging the elections; the upper chamber remained unformed.*[7] The new State Council adopted a declaration (22 July 1940), asking the Supreme Council of the Soviet Union to admit the Estonian Soviet Socialist Republic to the Soviet Union. On 6 August 1940, the Supreme Council of the Soviet Union "granted the request of the State Council of Estonia".

The majority of the states in the world disapproved of the annexation and the membership of the Baltic states of the Soviet Union was not recognised (at least *de iure*) for decades.*[8] The procedure for the re-establishment of independence starting in 1987–1988 and involving the entire population of Estonia, Latvia and Lithuania culminated in August 1991, when the failing *coup d'état* in Moscow (19–22 August 1991) provided an impetus for the formal liberation (as regarded by the Soviet Union) of these states from the Soviet Union. The Baltic peoples who became members of the UN in less than a month (17 September 1991) after the *coup d'état* in August convincingly declared the re-establishment of their sovereign states and ruled out the creation of a new state.*[9] In 1991, many states declared that they would **re-establish** their diplomatic relations with Estonia, not establish relations with a newcomer.*[10]

When a state re-establishes its sovereignty after illegal occupation or annexation, its international rights and obligations are automatically recovered as a rule. In 1918–1940, Estonia concluded over 210 bilateral treaties and was a party to over 80 multilateral conventions. R. Müllerson has written about them: "Still, most treaties concluded more than fifty years ago by the Baltic states had become obsolete. It is clear that *restitutio ad integrum* after more than fifty years is more often a legal fiction than a realistic option."*[11] While consenting to this argument, we still have to ask whether the refusal to *de iure* recognise the use of force by the Soviet Union against the Baltic states, or the desire of the Baltic peoples – both those who remained on the occupied territory and those who moved on to the free world as refugees – to **re-establish** their independence instead of **accepting** sovereignty as **a donation** from the occupying state was not equally fictitious.

As there is no precedent similar to the re-establishment of independence of the Baltic states, we have to ask if *restitutio ad integrum* is inevitable in case of continuity of a state and to what extent would its application be possible and reasonable. Here we face a collision of **ethical arguments** – the right of political self-determination of a social entity, carrying the same and stable identity and capable of existing as a state is not refuted by the actual power of any other social entity, however long-lasting, over this social entity –, and **practical arguments** – the relationships emerging from the life of a social entity that has lasted over a sufficiently long period and organised as a state have become so stable that their abrupt replacement with old relationships excessively destabilises the life of this social entity. Although these contrasts rather imply the national dilemma of *restitutio*, the same ethical and practical statements are weighed also in international politics.

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7 For the annexation process, see *e.g.* B. Meissner. Die baltischen Staaten im weltpolitischen und völkerrechtlichen Wandel. Beiträge 1954–1994. Hamburg: Bibliotheca Baltica, 1995; see also E. Sarv. Õiguse vastu ei saa ükski. Eesti taotlused ja rahvusvaheline õigus (Nobody Can Fight Justice. Pursuits of Estonia and International Law). Tartu: Okupatsioonide Repressiivpoliitika Uurimise Riiklik Komisjon, 1997.

8 See *e.g.* J.-H.-W. Hough. The Annexation of the Baltic States and its Effect on the Development of Law Prohibiting Forcible Seizure of Territory. – New York Law School Journal of International and Comparative Law, Vol. 6, No. 2, 1985, pp. 391–446.

9 For declarations regarding Estonia, see *e.g.* Resolution of the Supreme Council of the Estonian Soviet Socialist Republic on national status of Estonia (29 March 29, 1990) – Riigi Teataja (the State Gazette) 1990, 12, 180; Declaration of the Supreme Council of the Republic of Estonia (11 March 11, 1991) on the results of referendum regarding restoration of Estonian sovereignty and independence – Riigi Teataja (the State Gazette) 1991, 8, 124; and Resolution of the Supreme Council of the Republic of Estonia on national independence of Estonia (20 August 20, 1991) – Riigi Teataja (the State Gazette) 1991, 25, 312; in parallel with the pro-liberation Soviet authorities, Estonian Congress, the representative institution of the citizens of the Republic of Estonia and their successors was established on civil initiative; the above-mentioned declaration of 20 August 1991 created of the members of the Supreme Council and Estonian Congress on an equal basis the Constitutional Assembly preparing a new constitution; the *Riigikogu* (Estonian parliament), elected under the new Constitution, adopted the Declaration on restoration of constitutional power (7 October 1992) – Riigi Teataja (the State Gazette) 1992, 40, 533.

10 See M. Kaljurand. Some Aspects of Succession of Estonia to the International Treaties Concluded in 1918–1940. – Master's Thesis at The Fletcher School of Law and Diplomacy. A Manuscript, 1995, Fn. 17; See also R. Pullat. The Restoration of the Independence of Estonia 1991. – Finnish Yearbook of International Law, Vol. II, 1991, pp. 529–530.

11 R. Müllerson. Law and Politics in Succession of States: International Law on Succession of States. – Dissolution, Continuation and Succession in Eastern Europe. Ed. by B. Stern. The Hague: Kluwer Law International, 1998, p. 16.

The present remarks raise the most important aspects of the issue of the identity and continuity of states under international law: under what conditions can the situation created through occupation be regarded as fixed to the extent that the continuity of the occupied state ceases? In what activities has the re-established state's status to manifest itself in order that one could speak of continuity? Must – and can – the re-establishment of sovereignty after a considerable period be complete? If no, to what extent does international law allow re-establishment of the legal relations applicable before the occupation? Answers to these questions would create a legal basis for Estonian continuity-based legal policy in communicating with other states or international organisations. It is likely that these answers will also develop international law, offering a fulcrum for the treatment of states restored after annexation. The purpose of this paper is to examine the relevance of the issue of continuity and to map the fields of international treaty law to be examined in order to provide answers to the above-mentioned questions.

The authors find that the issue of continuity is currently in a latent phase in Estonian law. First attempts to clarify the standpoints of Estonia's counterparties have been made. Various opinions have been brought out, but the rise of new foreign policy priorities has pushed the issue of earlier treaties aside. In the following section, we will demonstrate that the actual relevance of this issue with regard to foreign and internal policy is substantial.

Relevance of Issue

The issue concerning the validity and applicability of continuing treaties is characterised by a more practical significance than the re-establishment of historical justice or investigation into the conscience of international community. We would like to offer three examples where the validity or invalidity of Estonian treaties concluded before 1940 could have far-ranging consequences: determination of the Estonian-Russian border, restitution of the property of Baltic-German émigrés in the course of the ownership reform and the compatibility of Estonian international obligations with the *acquis* upon accession to the European Union.

From among the treaties concluded before the Second World War, the **Tartu Peace Treaty** emerges as relevant to the sovereignty of Estonia*[12]; it has been laid down *expressis verbis* in § 122 of the valid Estonian Constitution: "The land border of Estonia shall be established by the Tartu Peace Treaty of 2 February 1920 and the other interstate border treaties …" The first principal matter agreed upon at the Tartu peace conference (January 1920) was the recognition of Estonian independence. Unconditional recognition of independence and determination of the state border marked a critical turn both in the stabilisation of interstate relations and development of Estonia's statehood. In the border negotiations with the Russian Federation held in the 1990s, Estonia has proceeded from the principle of continuity and regarded the Tartu Peace Treaty as valid and binding. Russia has viewed the Treaty as "a historical document" and disregarded its legally binding nature with regard to interstate relations. The principle of *rebus sic stantibus* has been used, although article 62 of the Vienna Convention on the Law of Treaties does not permit that to be done by a state due to whose activities aimed against international law the treaty could not be complied with. Also, article 62 refers to the fact that a fundamental change of circumstances may not be invoked with regard to treaties establishing a boundary, of which a part of the Tartu Peace Treaty (article III) is. At the moment, the Petroskoy draft boundary agreement, in compliance with which the boundary established by the Tartu Peace Treaty was changed to Estonia's disadvantage is ready to be signed. According to one opinion, the government of Estonia has, through consenting to the new boundary agreement, abandoned the principle of continuity as a priority because the above-mentioned § 122 of the Constitution assigns constitutional force to article 3 of the Tartu Peace Treaty, laying down the geographical position of the border ("The frontier between Estonia and Russia take the following course: …"). The persons protecting this step taken by the government of Estonia (*Realpolitiker*) refer to the wording of § 122 of the valid Constitution, pointing out that the border is not exclusively regulated by this Treaty but the principle of *lex specialis* applies.

Disregard of the principle of continuity would also entail amendment to the **Estonian ownership reform** that has functioned to date, on the basis of which nationalised, collectivised or in any other manner

12 See E. Mattisen. Searching for a Dignified Compromise: The Estonian-Russian Border 1000 years. Tallinn: ILO, 1996, particularly Chapter 4 "Lawful and Internationally Recognised Estonia", pp. 52–70.

unlawfully expropriated property taken by occupation authorities is restituted or compensated for. Section 7 (3) of the Republic of Estonia Principles of Ownership Reform Act*[13], adopted on 13 June 1991, sets out: "Applications for return of or compensation for unlawfully expropriated property which was in the ownership of persons who left Estonia on the basis of agreements entered into with the German state and which was located in the Republic of Estonia are resolved by an international agreement". This provision excludes applications of émigrés for the restitution of their property from the general circle of entitled subjects. The giving of content to this provision is one of the topical questions on the issue of continuity.

There are two treaties that might relate to the giving of content to this provision. Firstly, the protocol on the resettlement of German population living in Estonia to the State of Germany*[14], concluded between the State of Germany and the Republic of Estonia on 15 October 1939 and its supplementary protocol of 6 April 1940 concerning transfer of money to the State of Germany.*[15] The protocol is important for determining the scope of émigrés to Germany at that time.

Secondly, the treaty between the Soviet Union and Germany, signed on 10 January 1941*[16] and entered into force on the same day, article 1 of which set out: "The government of the Soviet Union shall pay to the government of the State of Germany as complete and final compensation for all claims presented by Germany to the Union of Soviet Socialist Republics with regard to the German property situated on the territories of the Soviet Socialist Republics of Lithuania, Latvia and Estonia as well as for all claims presented by Germany against natural and legal persons who owned or own dwellings on the territories of these republics, 200 million state marks." The State of Germany, in its turn, undertook to pay to the USSR for the analogous property located on its own territory 50 million state marks, leaving a lump sum in the amount of 150 million state marks for the benefit of Germany.

The issue of the validity of both treaties and the impact on the ownership reform should be solved proceeding from the continuity of the state and legal succession. With the conclusion of the treaty of 1941, Germany violated the international treaty with the Republic of Estonia. According to article 62 (2b) of the Vienna convention, Germany can not refer to the principle of *rebus sic stantibus* as a ground for termination of the treaty with regard to it as a party thereto due to the fact that the fundamental changes were a result of the breach of its obligation under the treaty. Under the occupation, the legal personality of the Republic of Estonia was *de iure* indisputable, but *de facto* almost void, external sovereignty or *imperium et iurisdictio* was restrained; thus, it was impossible to comply with the treaties concluded earlier or even discuss the issue with other parties to the treaty. The important question whether some of these treaties have developed into customary law, which should be regarded as part of the law of a state according to revisionist scholars*[17], no longer exists already because it was impossible for the Republic of Estonia to comply with the treaties over a particular period, not to mention recognition of these treaties as a part of international customary law. On the other hand, the use of the *rebus sic stantibus* doctrine in this case seems to be a weak argument, taking into account that the Permanent Court of International Justice did not extend this principle to ownership issues.*[18]

The most essential issue in practice is **the conformity of the international obligations of Estonia with the *acquis* of the European Union**. The Prime Ministers of the Baltic states signed the association agreements (so-called Europe Agreements) with the European Communities and their member states in Luxembourg on 12 June 1995. The *Riigikogu* ratified the Estonia's Europe Agreement unanimously on 1 August 1995.*[19] Estonia is the first Central European state which concluded an association agreement without a transition period. The Europe Agreement imposes on Estonia an obligation to harmonise Estonian law with Community law in fields related to the domestic market, *i.e.* particularly in trade and economy. The association agreement between Estonia and the European Communities and the member states thus caused an increase in the direct legal obligations of the Republic of Estonia. The harmonisation of legislation

13 Eesti Vabariigi omandireformi aluste seadus (Republic of Estonia Principles of Ownership Reform Act) – Riigi Teataja (the State Gazette) 1991, 21, 257, entered into force on 20 June 1991.

14 Riigi Teataja (the State Gazette) II 1939, 18, 29.

15 Riigi Teataja (the State Gazette) II 1940, 2, 4.

16 About the regulation of mutual claims on property of the State of Germany and the USSR with regard to Lithuania, Latvia and Estonia: Bundesarchiv, Abteilungen Potsdam.

17 See H. H. Koh. Is International Law Really State Law?. – Harvard Law Review, Vol. 111, 1998, No. 7 pp. 1824–1861.

18 Free Zones of Upper Savoy and the District of Gex, P.C.I.J., 1932, Ser. A/B, No. 46, 157.

19 Riigi Teataja (the State Gazette) II 1995, 22–27, 27.

with which the obligations are concerned means voluntary harmonisation in reality.*[20] The harmonisation also effects international treaties serving as integral parts of the legal order of Estonia. It is important to note that the accession conditions*[21] to states – the so-called Copenhagen criteria may be regarded as a political test that even exceed by their content the provisions set out in the association agreements.

Presuming that Estonia will be a member state of the European Union in the future, one has to prevent the conflict between our law, including the conflict of the international treaties concluded before the Second World War, and the primary legislation of the Community. Article 307 of the Treaty Establishing the European Community (previous article 234) sets out: "The rights and obligations arising from agreements concluded before the entry into force of this Treaty between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of this Treaty …" However, Community law does not permit the member states to exercise the rights arising from the Treaty, if this violates the legal obligations of the member state to the supranational Community: "… To the extent that such agreements are not compatible with this Treaty, the Member State or States concerned shall take all appropriate steps to eliminate the incompatibilities established" (article 307).

Thus, the member states cannot rely on international treaties concluded before accession to the European Union, which would justify the restrictions imposed with regard to the domestic market. The phrase "all appropriate steps" refers to a possibility that the states will denunciate the conflicting agreement. From this, one may conclude that an individual may contest the provisions of an international treaty incorporated into domestic law, if these are in conflict with the Community law ensuring more favourable rights to him or her. From the Community viewpoint, this provision is certainly valid. If a member state uses an international alternative, it can be brought to justice for violating the Treaty. An individual cannot be brought to justice, as it is the state that allows for application of law (both international and Community law) in its jurisdiction.

Also, article 307 (2) (previous 234 (2)) of the Treaty Establishing the European Union sets out: "To the extent that such agreements are not compatible with this Treaty, the Member State or States concerned shall take all appropriate steps to eliminate the incompatibilities established. Member States shall, where necessary, assist each other to this end and shall, where appropriate, adopt a common attitude," and the third paragraph of the provision contains a particular admonition, "In applying the agreements referred to in the first paragraph, Member States shall take into account the fact that the advantages accorded under this Treaty by each Member State form an integral part of the establishment of the Community and are thereby inseparably linked with the creation of common institutions, the conferring of powers upon them and the granting of the same advantages by all the other Member States". The phrase concerning common advantages can be regarded as prohibition against the freedom to implement communitarised international law.*[22] Article 10 (previous article 5) of the Treaty of Rome establishing the obligation of loyalty sets out: "Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community […]".

It is likely that a state as a subject of international law may have obligations not related to Community law. However, due to the expansion of the latter, these possibilities gradually decrease. A state cannot be viewed as a bifurcated entity, which, being a party to an international treaty as a sovereign state and simultaneously as a member state of the Community, acts in a dual manner. Delegation of sovereignty is still an objective act which obviously alters the content of the legal personality of the state. At least in theory, there cannot be a situation where a ruling of the European Court of Justice is binding on a state as a member state, not as a sovereign subject in international law.

It has been claimed that generally the European Court of Justice does not have jurisdiction to declare a treaty concluded with third states void. The member states are not obliged to follow such a decision. Consequently, the European Court of Justice can only decide whether a treaty is recognised and applied within the legal system of the Community. When discussing the conformity of the obligations of the Republic of Estonia in international law with the requirements presented by the European Union, one also has to point out a ruling of the European Court of Justice of 16 June 1998.*[23] The European Court of Justice

20 A. Evans. Voluntary Harmonisation in Integration between the European Community and Eastern Europe. – European Law Review, June 1997.

21 D. Kennedy and D. E. Webb. The Limits of Integration: Eastern Europe and the European Community. – Common Market Law Review, 1993, Vol. 30, No. 6, p. 1095.

22 See C-124/95, The Queen, *ex parte*: Centro-Com Srl. v. HM Treasury and Bank of England [1997] ECR I-114.

23 C-162/96, Racke v. Hauptzollamt Mainz [1998] ECR I-3655.

declared "even though the Vienna convention does not bind either the Community or all its Member States, a series of its provisions, including Article 62, reflect the rules of international law […]" Moreover, the Court set out that upon the alteration of circumstances, "the rules of customary international law concerning the termination and the suspension of treaty relations by reason of a fundamental change of circumstances are binding upon the Community institutions and form part of the Community legal order". The Court also declared its will to recognise the other principles of international law, pointing out that the principle of *pacta sunt servanda* is "a fundamental principle of any legal order".

The practice has demonstrated that four conditions have to be met in order that the treaties concluded between the member states be binding on the Community:

- the treaty has to be concluded before the Community was established and it must be done by all the member states;
- the member states themselves have to wish that the Community follow this treaty;
- the institutions of the Community must act in accordance with the treaty, and
- the other parties have to recognise the transfer of rights and obligations to the Community.

The international treaties concluded by the Republic of Estonia before the Second World War do not conform to these criteria; consequently, it is extremely important to identify the treaties valid with regard to Estonia and then analyse their conformity with the *acquis*.

Validity of International Treaties upon Re-establishment of Full Statehood

The issue of the validity of treaties concluded before illegal occupation after the state has re-established its independence becomes very complicated. In addition to legal matters, this is influenced by political, economic and other factors.*[24] The historical examples of the restoration of state identity in the 20th century (*e.g.* Ethiopia, Czechoslovakia, Albania, Austria) as presented in literature contain a considerably shorter "pupation period" as the examples derived from the Baltic states.*[25]

Several states have announced that they do not consider the treaties concluded with Estonia from 1918–1940 valid (Japan, Germany, Italy, China and Russia).*[26] At the same time, "The United States consistently refused to recognize the incorporation of Estonia […] into the Soviet Union. […] Britain accorded only *de facto* recognition."*[27] The United States of America have regarded the old treaties concluded with Estonia always as binding on itself and also partially complied with them (in diplomatic relations with the foreign representations of Estonia that operated also during the annexation period).

Belgium, for instance, announced that having recognised the continuity of the Baltic states, it regards the treaties concluded before 1940 as valid and assured that invalidation of treaties can be carried out according to the Vienna convention on the Law of Treaties after the treaties have been reviewed in detail. Also, Belgium announced that its refusal to recognise the Soviet occupation entails non-application of the bilateral treaties concluded with the Soviet Union in 1940–1991 to Estonia.*[28] Review of and agreement upon the continuation or termination of each bilateral treaty will probably be the best practice. The standpoints of the parties to treaties concerning the validity and applicability of treaties may be reconfirmed. For example, visa freedom between the United Kingdom and Estonia was restored according to the visa freedom agreement concluded in 1928 via exchange of notes in 1992. The validity of the treaty on intellectual cooperation concluded on 11 December 1937 between Estonia and Finland was restored on 5 February 1992.

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24 For tentative viewpoints concerning the possibility to strictly apply the principle of continuity in addition to Müllerson, *op. cit.* See also: K. Marek. Identity and Continuity of States in Public International Law. 2nd ed., Genève: Droz, 1968; M. Lehto. Succession of States in the Former Soviet Union. Arrangements Concerning the Bilateral Treaties of Finland and the USSR. – Finnish Yearbook of International Law, Vol. IV, 1993, p. 208; M. Kaljurand, p. 22 *et. seq.*

25 See *e.g.* K. Marek; I. Brownlie. Principles of Public International Law. 5th ed., Oxford: Clarendon Press, 1998, pp. 81–83.

26 This piece of information is provided by the Estonian Ministry of Foreign Affairs.

27 R. M. M. Wallace. International Law. 2nd ed., London: Sweet & Maxwell, 1992, p. 95.

28 Note of the Embassy of the Kingdom of Belgium of 19 October 1998 – the archive of the Estonian Ministry of Foreign Affairs.

Before one continues with description of criteria from which Estonia should proceed when determining the validity of old treaties, one should mention the principle of *pacta sunt servanda*, creating a presumption that all old treaties are in force. This principle is deemed to be a part of customary law and it is particularly important in relation to this issue. Namely, the Vienna convention on the Law of Treaties does not have retroactive force (article 4) and is applicable only to treaties concluded after 27 January 1980. Before 1969, and in fact until 1980, international law of treaties consisted of customary law, the majority of which was codified in the Vienna convention on the Law of Treaties (1969).

There has been a discussion about the customary law nature of the principle of *pacta sunt servanda* in the very context of international law. F. R. Téson remarks that it is rather a moral rule, because according to the model of rational interest, the states tend to support rules that allow for opportunistic breach.*[29] Although state governments publicly support the principle of *pacta sunt servanda*, the practice is coloured by opportunism. Téson says that those who consider the principle as having customary law nature possess the "right moral instinct coupled with the wrong theory of custom".*[30] The positivist approach to international law does not consent to such views.*[31] The above-mentioned view nevertheless helps to understand the concept of the principle discussed and explains why international courts make so few references to international customary law, preferring the term *opinio iuris*.

Treaties guide states in the relations between them. They express wishes, promises and usually also mutual benefit (reciprocity, except for treaties on human rights). The purpose of treaties is to decrease ambiguity in international relations. Diplomatic relations between the states concluding treaties are not necessary. Nevertheless, it is useful to examine what parties to the treaty recognised the Republic of Estonia under the annexation period. When concluding a treaty, the Republic of Estonia treated other parties to the treaty as right bearers. During the occupation period, it was impossible for Estonia to perform its obligations to them. If now, in "renewed" contractual relationships, a question arises with regard to the obligations of the Republic of Estonia under international law, it can be tested on the basis of the principle of reciprocity. One has to take into account that the Vienna convention on the Law of Treaties does not treat the principle of *pacta sunt servanda* as an absolute rule.*[32] Article 26 points out "good faith" as a standard necessary for following this principle. It is logical, considering that international law is based on consensus (*volonté générale*). Thus, it is possible to judge to what extent one party as a sovereign imposes particular conditions on another party.

An opportunity to terminate treaties that fail to set out the validity period or possibility to terminate them would render the institute of the treaty too rigid. On the other hand, too simple a method of cancellation of treaties would violate the purpose of the law of treaties – to achieve security in international relations.

Termination of International Treaties

Treaties may be terminated automatically or as a result of expression of will by parties to the treaty. Will may be expressed by both (all) and one party. Proceeding from the principle of continuity, we presume that the old Estonian treaties were valid throughout the period of Soviet occupation. Despite that, treaties could terminate on the basis of international law. A framework of termination of treaties, accompanied by examples from Estonian practice will be presented below.

In case of termination of a treaty **by agreement of parties,** agreement may be expressed before the entry into force of the treaty, *i.e.* be contained in the treaty or manifested only during the treaty's validity (article 54 of the Vienna convention). As a rule, the consent of both parties is required to terminate treaties between two or three parties; however, multilateral agreements are "open" and a unilateral state act will frequently suffice to terminate them.

The most common ground for terminating a treaty is termination **according to the provisions of the treaty**. The treaty may prescribe its term, possibility to denounce it or withdraw therefrom as well as automatic

29 F. R. Téson. A Philosophy of International Law. Oxford: Westview Press, 1998, p. 89.

30 *Ibid*., p. 89.

31 One has to agree with R.-A. Posner that "the greater puzzle is the persistence of academic moralism", one feature of which is "intellectual weakness". R.-A. Posner. The Problematics of Moral and Legal Theory. – Harvard Law Review, Vol. 111, No. 7, 1998, p. 1690.

32 See M. Koskenniemi. From Apology to Utopia. The Structure of International Legal Argument. Helsinki: Finnish Lawyers' Publishing Company, 1989, Fn. 113.

termination, if the number of parties remains below a particular limit. **Upon arrival of the term**, the treaty may terminate automatically. A treaty concluded for a specified term may presume a particular period before notification of premature termination, otherwise extend automatically or change into a treaty concluded for an unspecified term. The majority of open conventions brought into force by Estonia before the Second World War were concluded for an unspecified term. Bilateral treaties, even if concluded for a specified term, extended automatically as a rule and no information about unilateral applications for non-extension of such treaties after 1940 by other counterparties of such treaties are not known to the authors. Considering the status of Estonia, such notification was not obviously regarded as necessary or the Soviet Union was not regarded as a legal successor of the Republic of Estonia to whom the respective notification should have been communicated.

Termination of a treaty **by unilateral application** (denunciation or withdrawal from a treaty) is the most common manner of termination. Most of the old international agreements of Estonia enable such termination – even if they contained a term, they extended after the expiry of the term and would have remained valid until cancelled by either party.

The right of states to terminate a treaty on the basis of a provision permitting termination "tacitly contained" therein is disputable. The International Law Commission has accepted the concept of *desuetude*: a tacit consent to terminate the treaty, if the consent has been clearly expressed in the behaviour of the states. *Desuetude* should not be applicable to open multilateral agreements. For example, the practice of the UN as a depositary concerning the treaties concluded during the last one hundred years considers all of them valid. A state wishing to withdraw from such a treaty can do it according to the provisions of this treaty. Closed multilateral treaties or bilateral treaties are a different case. The cause for the conclusion of such treaties is the interest of the states in relation to other particular states. In such a case, the failure to perform the treaty could prove as a legal fact. When applying *desuetude* to old treaties of Estonia, only non-performance before occupation or after re-establishing of independence can be taken into account – in the meantime, the performance of the treaties by Estonia was impossible.

Multilateral treaties often contain a provision that upon **reduction of the parties below a particular number**, the treaty shall automatically terminate. According to the authors' knowledge, the open treaties concluded before the Second World War have not been denunciated in such large numbers as causing the termination of any treaty on this ground.

One form of terminating a treaty by agreement of the parties is termination of a treaty **by agreement of all the parties** without the treaty regulating the termination *expressis verbis*.*[33] Article 54 of the Vienna convention imposes thereon two conditions: all the parties must consent to it and consult with the other contracting states before using this right. This manner of termination presupposes recourse to the counterparty/counterparties. In case of bilateral or closed multilateral treaties, the restricted active legal capacity of Estonia as a partner obviously precluded the use of this model (the authors are not aware of any recourse to the Estonian government bodies or foreign representations with such proposals) – termination of multilateral conventions would have also presupposed consultation with Estonia as a formal party. Multilateral conventions have not been terminated but amended after Estonia was occupied. This means that the initial versions of the conventions continue to be valid. This is testified, *inter alia*, by the steps taken by the Secretary-General of the UN as a depositary who has for example registered new parties to old versions as a result of legal succession after the entry into force of new versions. Consequently, consent of all the parties other than Estonia cannot be regarded as a ground for the termination of the old treaties of Estonia.

[33] For example, the Agreement on Commerce and Shipping between Estonia and Turkey, concluded on 16 September 1929 (Riigi Teataja (the State Gazette) 1930, 56, 377) and other economic agreements on economy were terminated by the Agreement on Commercial and Economic Cooperation, concluded between Estonia and Turkey on 28 August 1995 (Riigi Teataja (the State Gazette) II 1995, 42, 188); article XIII thereof sets out: "The treaties and protocols and clearing agreements on commercial and economic cooperation concluded between the two states before 1940 shall be terminated upon the entry into force of this Agreement."

Termination of a treaty implied by **conclusion of a later treaty** is equal to the above-mentioned ground. The later treaty may, but need not explicitly, replace the earlier treaty.*[34] If the later treaty governs the same matter, the principle of *lex posterior* shall be applied upon solving a conflict. Article 59 of the Vienna convention imposes four preconditions on the termination of an earlier treaty:

- a later treaty shall be concluded by all the parties to the earlier one;
- a later treaty concluded shall concern the same issue as the earlier;
- it arises from the new treaty or it has been established in some other manner that this matter shall be governed by a new treaty;
- the provisions of the later treaty are so far incompatible with those of the earlier one that the two treaties are not capable of being applied at the same time.

These criteria suggest that if the conclusion of a later treaty does not imply the parties' wish to terminate the earlier treaty, the actual provisions of the treaties have to be compared. The provisions of the earlier treaty concerning the areas not regulated by the later treaty may remain valid (on condition that these can operate without the provisions invalidated due to the replacement or together with the replaced provisions).

Novation as well as termination of a treaty by agreement of all the parties would have presupposed the consent of the Republic of Estonia for terminating the treaties concluded before 1940. Insofar as it is known, such consent was not given during the occupation period; therefore one can speak about the application of such grounds only in relation to the treaties concluded after August 1991.

Termination of a treaty **upon the emergence of a new customary law norm** means in fact a new treaty between the parties. The latter is expressed in the customary law norm, the conscious behaviour of the states but not in documents executed in writing. The Vienna convention does not mention this ground. The basis arises from the view that a later customary law norm may overthrow the earlier provision of the treaty.*[35] If two states involved in a treaty start to behave differently from the provisions of the treaty and mutually accept it, it may be considered to be a modification of the treaty, in which will is expressed through acts (indirect expression of will). From the viewpoint of the clarity of legal relations, this cannot be appreciated, and a treaty modified in this manner should certainly not bind third parties who wish to continue to perform the treaty in its initial form. Let us recall that article 54 (b) of the Vienna convention also demands the consent of all the parties for terminating a treaty. Consequently, international open treaties, the other parties to which have opted for a different type of behaviour from that provided for in the treaty, can not be terminated with regard to Estonia, unless Estonia consciously chooses to comply with the customary law norm that has emerged.

Another ground for terminating a treaty upon mutual agreement is the **tacit right to denunciate or withdraw from a treaty** mentioned in article 56 of the Vienna convention. According to the Vienna convention, this possibility shall be expressed in the intention of the parties upon conclusion of a treaty or be implied by the nature of the treaty. The origin and scope of such right to terminate is, however, unclear.*[36]

The Republic of Estonia has not been persistent in raising the issue of validity or termination of the treaties concluded after the re-establishment of its independence. It is understandable that it is difficult to perform this with all counterparties, but in the interests of the clarity of interstate relations, a mutual agreement concerning the validity or termination of as large number of bilateral and closed multilateral treaties as possible should be reached.

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34 For example, the Single Convention on Narcotic Drugs of 1961 (Riigi Teataja (the State Gazette) II 1996, 19–22, 84) entered into force with regard to Estonia; according to article 44 thereof the convention terminated, *inter alia*, the following treaties concluded between counterparties before:
– International Opium Convention, concluded at The Hague on 23 January 1912 (Riigi Teataja (the State Gazette) 1922, 109–110, 82) that entered into force with regard to Estonia on 21 January 1931;
– International Opium Convention, concluded at Geneva on 19 February 1925; (Riigi Teataja (the State Gazette) 1930, 51, 323) that entered into force with regard to Estonia on 30 November 1930; and
– Convention for Limiting the Manufacture and Regulating the Distribution of Narcotic Drugs, concluded at Geneva on 13 July 1931 (Riigi Teataja (the State Gazette) 1935, 45, 47) that entered into force with regard to Estonia on 3 October 1935.
The Convention on the Performance of Judgement of Foreign Arbitration, concluded at Geneva on 26 September 1927 (Riigi Teataja (the State Gazette) 1929, 37, 280) and the Protocol on Arbitration Clauses, concluded in Geneva on 24 September 1923 (Riigi Teataja (the State Gazette) 1928, 57, 40) terminated with regard to Estonia with the entry into force of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, concluded in New York on 10 June 1958 (Riigi Teataja (the State Gazette) II 1993, 21/22, 51) on 28 November 1993 (article 7 (2)). There are more examples of this type.

35 See *e.g.*, N. Kontou. The Termination and Revision of Treaties in the Light of New Customary International Law. Oxford: Clarendon Press, 1994, pp. 22–24.

36 See *e.g.* M. Akehurst. Treaties, Termination. In: R. Bernhardt (ed.) EPIL, Instalment 7 (1984), p. 507–508.

There are several grounds for unilateral termination of a treaty (articles 59, 60 and 61 of the Vienna convention):

- termination of a treaty as a **consequence of its breach**;
- **impossibility of performance**; and
- **fundamental change of circumstances** (the principle of *clausula rebus sic stantibus*).

The first two cannot be applied to the old treaties of Estonia. The annexation deprived Estonia of the possibility to perform and breach treaties. Impossibility of performance does not imply cessation of the party of the treaty but the cessation of the object of the treaty.

A fundamental change of the circumstances set out in article 62 of the Vienna convention operates on condition that the treaty remains valid only as long as the conditions existing during the conclusion thereof exist. In relation with a fundamental change of circumstances, two more grounds may be pointed out with regard to the termination of treaties that are not expressly mentioned in the Vienna convention:

- **cessation of a party** (termination of a state without a legal successor); and
- **outbreak of war between the parties**.

Neither of the above-mentioned grounds applies to Estonia, because Estonia did not participate in the Second World War (Estonia also followed a strict policy of neutrality before the Second World War) and one could not speak about cessation of a party in case of state continuity.

The doctrine of *clausula rebus sic stantibus* has been viewed as international customary law.*[37] In order to preserve the normative nature of the doctrine, the "changes" should be casuistically analysed and one should examine whether these happened in a legal manner or outside law. Moreover, it is important whether these changes were supported by the practice employed by a party to the treaty and by what is called *opinio iuris*.

Article 62 (1) of the Vienna convention sets out two conditions for applying this ground:

- "the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty"; and
- "the effect of the change is radically to transform the extent of obligations still to be performed under the treaty".

Here it is suitable to cite J. L. Brierly, "[…] it is mistake to think that by some ingenious manipulation of existing legal doctrines we can always find a solution for the problems of a changing international world […] law is bound to uphold the principle that treaties must be observed […]."*[38]

To sum up the above-mentioned topic, one has to admit that the Republic of Estonia has a number of international rights and obligations arising from treaties, about the extent of which one does not have an actual overview. Several rights and obligations require updating – Estonia should accede to supplementary protocols amending open conventions (*e.g.* concerning trafficking in persons).

Section 123 (2) of the Constitution of the Republic of Estonia provides for direct application of the ratified international treaties in the Estonian legal system. Even if one considers as absolute the assertion that the treaties concluded before Soviet occupation became obsolete due to the alteration of the paradigm of international law (the international legal subjection of an individual – law of human rights – was established), it is a fact that the bearers of the highest state authority in Estonia are people who have to be informed about the contractual relations of the state with other states and international organisations.

When restoring its independence, Estonia has paid much attention to the provisions of international law and attempted to use legal means. Therefore, Estonia should continue this dignified trend and, proceeding from the principle of continuity, clarify the validity of its old treaties both in its own interests and the interests of all the other states in the world.

[37] See Decision of the International Court of Justice in the case of Fisheries Jurisdiction (United Kingdom v. Iceland). – 1973, ICJ Rep. 3.

[38] J. L. Brierly. The Law of Nations. An Introduction to the International Law of Peace. Oxford: Clarendon Press, 1963, p. 339.