

LEGAL AND POLITICAL ISSUES ON THE CONTINUITY OF THE REPUBLIC OF LITHUANIA

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Some historical dates remind us of the current legal and political status of the Republic of Lithuania. First, this year the 60th anniversary of the signing of the Molotov-Ribbentrop Pact was commemorated. On August 23 and September 28, 1939, Germany and the USSR signed two secret protocols that determined Lithuania's fate for the next 50 years. The Republic of Lithuania whose independence was officially recognized by many states during 1918-1922 was made part of the Soviet sphere of interests. As a consequence, in 1940 the Soviet Union occupied and annexed Lithuania.

Moreover, next year marks the 10th anniversary of the restoration of Lithuania's independence. On March 11, 1990 the Supreme Council (Parliament) of Lithuania declared the reestablishment of the sovereign powers of the Republic of Lithuania.

Therefore, it is useful to evaluate the Molotov-Ribbentrop Pact once again from the standpoint of international law. This issue has great importance because it determines the legal basis on which the independence of Lithuania was restored in 1990. This article will focus on two issues: 1) has Lithuania ever been a legitimate part of the former USSR? (the issue of the status of Lithuania in 1940-1990), and 2) is the contemporary Republic of Lithuania identical to the pre-war Republic of Lithuania? (the continuity and identity of Lithuania).

The legal assessment of the restoration of Lithuania's independence may play a role in some significant political issues, such as Lithuania's desire to become a fully-fledged member of NATO as soon as possible. On January 12, 1999 the Seimas (Parliament) of Lithuania adopted a special memorandum addressed to the parliaments of the NATO Member States. The document pointed out Russia's inability to hamper Lithuania's integration into NATO on the grounds that Lithuania is a former republic of the USSR. The Seimas stressed the fact that from the standpoint of international law the Republic of Lithuania had never been a constituent part of the USSR. Russia maintains a different viewpoint and it is, thus, worthwhile to mention briefly the principal international legal issues concerning the status of Lithuania.

Evaluation of Lithuania's occupation and annexation in accordance with international law. The Molotov-Ribbentrop Pact brought about the occupation and annexation of the independent Republic of Lithuania. Therefore, it is reasonable to examine the Pact and its consequences. The Pact's provisions (especially the one granting the USSR the possibility to take special measures to protect Soviet interests in the territory of Lithuania) and their implementation (namely, those pertaining to Lithuania's occupation and annexation) violated several legal obligations of the USSR to Lithuania and the international community. The obligation to respect the territorial integrity and political independence of states was stipulated in Article 10 of the Statute of the League of Nations. The 1928 Paris Treaty on the Renunciation of a War as a Means of National Policy (the

Briand-Kellogg Pact) was also violated. In accordance with the Treaty, any use of force is prohibited. In 1940, this norm had already become a part of international customary law.¹

The most sensitive issue is whether the threat of force used in 1940 was illegal. Some Russian authorities and legal scholars claim that at that time such conduct was legitimate under international law because they understand the term *a war* in its most narrow meaning, i.e. as the direct use of military force by one state against another. According to them, the ultimatum presented by the USSR to the Republic of Lithuania was only duress constituting a threat of force rather than the use of force. Russia sometimes declares that because Lithuania accepted the conditions of the ultimatum and did not resist the occupation, the annexation of Lithuania should therefore be treated as legal.

This position has some contradictions. First of all, it disagrees with the nature of law and state practice. The main objective of any law system, including international law, is to ensure that the actions of countries and the international community are based on justice. Moreover, the law should be interpreted so that it would be consistent with common sense. Keeping in mind these two principles, it is clear that the term *war* used in the 1928 Paris Treaty should be interpreted in a broader sense to include any use or threat of force. In fact, it is impossible to treat the use of force and the threat of force differently because they are interrelated actions of the same nature: the former usually coming after the latter. A different interpretation would allow states to employ force in a disguised way not assuming any international legal responsibility. This would be immoral and unjust because it would lead to the justification of the so-called *pacific* occupation which occurs with the consent of the occupied state after the threat of force by the occupying state. Thus, this kind of foreign occupation should be the same as the use of force and the same norms of international law should be applied as in the case of classic military occupation.² To sum up, consent made under duress is not consent, and this violence constitutes a violation of international law.³

At that time, state practice had also confirmed that point of view. Many states considered Lithuania's occupation and annexation as illegal and thus did not recognize the incorporation of Lithuania into the USSR.⁴ For instance, the United States expressed its opinion on July 23, 1940: "The people of the United States are opposed to predatory activities no matter whether they are carried on by the use of force *or by the threat of force*. The United States will stand by these principles, because of the conviction of the American people that unless the doctrine in which these principles are inherent once again governs the relations between nations, the rule of reason, of justice, and of law in other words, the basis of modern civilization itself cannot be preserved."⁵ Moreover, at that time the same criteria were applied in other analogous cases. For example, the annexations of Austria, Czechoslovakia, Ethiopia, Albania, and Poland were not recognized. Some of them (for

¹ *Encyclopaedia of Public International Law* (Amsterdam: Elsevier, 1982), 3, p. 238.

² *Encyclopaedia of Public International Law* (Amsterdam: Elsevier, 1982), 4, p. 67-70.

³ Vilenas Vadapalas, Vytautas Žalys "Ar galioja aneksijai senaties terminas [Does the Prescription Deadline Apply to Annexation]," *Atgimimas* (August 18-25, 1989).

⁴ Dainius Žalimas, *Lietuvos Respublikos nepriklausomybės atkūrimas: pagrindiniai klausimai pagal tarptautinę teisę [The Reestablishment of the Independence of the Republic of Lithuania: Fundamental Questions under International Law]* (Vilnius: Rosma, 1997), p. 110-118.

⁵ Krystyna Marek, *Identity and Continuity of States in Public International Law* (Geneve: Librairie E.Droz, 1954), p. 399.

instance, Austria and Czechoslovakia) were annexed without serious military resistance. The reaction of the international community to the annexation of the Baltic States and of the other mentioned countries was a clear manifestation of the Stimson doctrine under which any situation, treaty, or agreement that contradicts the Statute of the League of Nations and the 1928 Paris Treaty can not be recognized.⁶ The principles of that doctrine were confirmed by the Assembly of the League of Nations in 1932.

Therefore, it is possible to conclude that the occupation and annexation of the Republic of Lithuania should be regarded as a major international crime. This is because the peremptory norms and main principles of international law such as the non-use of force, respect of sovereignty, non-interference in the domestic affairs of other states and the self-determination of all nations had been violated. With respect to the latter, it is reasonable to treat the annexation of Lithuania as a flagrant violation of clause 2 of the Atlantic Charter, according to which no territory may be transferred without the free will and consent of the inhabitants concerned.⁷ Such a qualification may be supported by the Statute and practice of the Nürnberg International Criminal Tribunal. The Tribunal decided that the serious violations of Article 10 of the Statute of the League of Nations and of Article 1 of the Briand-Kellogg Pact made by Germany in 1938-1941 were international crimes. There are no reasons to treat the analogous actions of the Soviet Union in 1940 in a different way. If we took an opposite view, we would deny the legal nature of international law. Under any system of law it is impossible to qualify analogous acts made under the same circumstances differently, i.e. we can not treat an action made by one state as an international crime and the same action made by another state as a legitimate act.

It would therefore be logical to treat the Molotov-Ribbentrop Pact and the annexation of Lithuania as null and void. Hence, the position of Russia (or some of its leaders) justifying the occupation and annexation of Lithuania possesses no legal basis. It can be explained by the traditional Soviet practice of viewing international law as a very flexible method for justifying any act of its foreign policy. Such a position is clearly based primarily on political interest.⁸ In my opinion, the political interest is clear: in order to avoid possible international responsibility for the performed act and not to reveal the true essence of the former Soviet empire, Russia is making every effort to justify any act of the former USSR.

What is more interesting, Russia as the legal entity continuing the rights and obligations of the former USSR intends to ignore the position of the latter expressed on December 24, 1989 by the Congress of the People's Deputies of the USSR, following its decision on the political and legal evaluation of the Soviet-German non-aggression pact. Thereafter, the USSR recognized that the secret Soviet-German protocols (Molotov-Ribbentrop Pact) and their accompanying acts had violated the sovereignty and independence of some third countries. The Soviet Union itself therefore declared the Molotov-Ribbentrop Pact null and void from the very date of its signing.

Finally, it seems that the Russian officials who declare that the occupation and annexation of Lithuania was legitimate are determined to forget that Russia supported the

⁶ Vilenas Vadapalas, *Tarptautinė teisė: bendroji dalis [International Law: General Part]* (Vilnius: Eugrimas, 1998), p. 95.

⁷ Marek, *Identity*, p. 405.

⁸ Pranas Kūris, "Lietuvos nepriklausomos valstybės atkūrimas ir tarptautinė teisė [The Reestablishment of the Lithuanian Independent State and International Law]," *Teisės problemos [Problems of Law]*, 1 (1998), 10.

opposite position in the preamble of its July 29, 1991 Treaty on the Fundamentals of Interstate Relations with Lithuania. In this document Russia declared that the USSR had to eliminate the consequences of the 1940 annexation which violated Lithuania's sovereignty. Thus, the opposite statements may be viewed as attempts to violate the fundamentals of the friendly relations between Russia and Lithuania.

The continuity and identity of the Republic of Lithuania. Every legal system tries to prevent any actions that do not comply with its principles and provisions. International law can not recognize the legal effect of acts that can destroy the fundamentals of the international community. Undoubtedly, aggression and illegal annexation are some of the most dangerous international crimes. According to the fundamental principle of law *ex injuria non oritur jus* (this principle is common to all legal systems), no legal benefit can be derived from an illegal act.

In the case of the illegal occupation and annexation of Lithuania, the application of the principle *ex injuria non oritur jus* leads to the conclusion that the Soviet Union did not have any sovereign rights over Lithuania's territory. Therefore, in accordance with international law, Lithuania had never been a legitimate part of the USSR. The Lithuanian SSR established in the territory of the Republic of Lithuania by the occupying forces of the Soviet Union should be considered as nothing more than a puppet creation⁹ that could also not obtain any sovereign rights to Lithuania's territory. It is also necessary to note that the long period of occupation did not grant the Soviet Union any rights to Lithuania because international law does not know any general term of prescription.¹⁰ This statement was confirmed by the fact that many members of the international community never recognized the incorporation of Lithuania into the USSR. Moreover, it would be a bold thing to assert that Lithuania was a *de jure* constituent part of the Soviet Union because this statement would acknowledge the law-making power of illegal acts that are also among the most dangerous crimes for the international community.

The most important thing is that according to the principle *ex injuria non oritur jus*, even though all the territory of Lithuania was occupied by the USSR, the Republic of Lithuania continued to exist as a subject of international law. This continuity was recognized by the major Western powers and other democratic states and was maintained by the Lithuanian legations in foreign states. The representatives of Lithuania were considered to be the representatives of the Republic of Lithuania appointed by the last government prior to the occupation of the country. Lithuanian passports and other official documents issued by the operating Lithuanian embassies and consular agencies were considered as valid by some countries. Therefore, the continuity of the Republic of Lithuania was an obvious fact.¹¹ It is clear that it would be absurd to recognize operating embassies and consular agencies as well as the citizenship and passports of a non-existing state. Thus, the Republic of Lithuania was treated as an occupied State; the rights and obligations of which were not impaired by the foreign occupation. Lithuania preserved all of its sovereign rights including the legal title to its territory although it could not exercise these rights until independence was restored in 1990.

⁹ Marek, *Identity*, p. 396.

¹⁰ Vadapalas, *Tarptautinė*, p. 200, 214-215.

¹¹ About the continuity of Lithuania see: Žalimas, *Lietuvos Respublikos*, p.75-83.

Therefore, it is only logical that the restoration of the independence of the Republic of Lithuania was enacted on the basis of the *de jure* continuity of the State. On March 11, 1990, the Supreme Council (the Reconstituent Seimas of the Republic of Lithuania) after free elections and expressing the will of the people proclaimed the restoration of the country's independence. The "Act on the Re-establishment of the Independent State of Lithuania" clearly stated that the execution of the sovereign powers of the State of Lithuania abolished by a foreign force in 1940 had been re-established.

Therefore, on this basis the current Republic of Lithuania should be considered to be identical with the pre-war Republic of Lithuania. The same origin of statehood was fixed in the following provision of the Act: the Act of Independence of the Council of Lithuania on February 16, 1918 and the Resolution on the Re-established Democratic State of Lithuania of the Constituent Seimas (Assembly) on May 15, 1920 had never lost their legal force and remained the constitutional basis for the Republic of Lithuania.

Of course, the restoration of the independence of the Republic of Lithuania did not mean a full *restitutio in integrum*. It was impossible to re-establish the situation that had existed 50 years earlier in 1940. After all, there is no similar requirement under international law. On the contrary, international law is based on general legal principles common to all law systems. According to one of these principles well known from Roman law, no law may require impossible things (*ad impossibile nemo tenetur*). The continuity and identity of the Republic of Lithuania are therefore modified by the impact of previous legal norms and the actual situation, of the previous fifty years.¹² Such a modification is unavoidable for justice and effectiveness to be reconciled within the framework of international law. For example, while restoring its independence, Lithuania could not neglect the principles of the inviolability of frontiers that occurred during the time of its occupation. Thus, the "Act on the Re-establishment of the Independent State of Lithuania" states that "the State of Lithuania stresses its adherence to universally recognized principles of international law, recognizes the principle of inviolability of borders as formulated in the Helsinki Final Act of Conference on Security and Cooperation in Europe of 1975, and guarantees human, civil, and national minorities rights." On the other hand, it was impossible to ignore the actual situation in the country. For that reason, the inter-war Lithuanian laws (excepting the 1938 Constitution) were not made valid again and the laws of the Soviet period were left in force as long as they did not contradict the Temporary Fundamental Law of the Republic of Lithuania.

The concept of modified state continuity and identity is well known in international law. For instance, Prof. Ian Brownlie states that the continuity and identity of states that restored their independence shortly after World War II were modified. He also asserts that even in the cases of clear state continuity and identity, it is necessary to take into consideration concrete circumstances, with applicable principles of law and good policy dictating the decisions only in part predetermined by state continuity.¹³

To sum up, the restoration of the independence of the Republic of Lithuania as well as of the other Baltic States has been a unique phenomenon in contemporary international law and state practice. There are no other examples of restoring independence after so long a period of occupation. The norms and principles of international law had preserved the

¹² Ibid., p. 93-100.

¹³ Ian Brownlie, *Principles of Public International Law* (Oxford: Clarendon Press, 1991), p. 83.

continuity and identity of the Republic of Lithuania for fifty years. Therefore, the restoration of the independence of the Republic of Lithuania could be rated as a clear manifestation of the basic aim of that law founded on the idea of justice. According to Prof. Romain Yakemtchouk, it was a nice victory for international law which successfully passed a long 50 - year political and moral test.¹⁴

The continuity and identity of the Republic of Lithuania have been recognized by most European and other democratic states. Iceland was the first foreign country to recognize the restoration of independence of the Republic of Lithuania based on *de jure* state continuity. On February 11, 1991, the Alting (the Parliament) of Iceland passed a Resolution confirming that the recognition of the independence of the Republic of Lithuania granted by the Government of Iceland in 1922 was still fully in force. Other states recognized the restoration of Lithuania's independence after the failed August coup in the Soviet Union. In the period between August 24 and the beginning of September 1991, many foreign states recognized the restoration of Lithuania's independence without worrying about getting the explicit consent from the USSR. This recognition by other states can not be considered as premature because Lithuania's previous incorporation into the USSR was illegal.

The more important thing is that the recognition of the restoration of the Republic of Lithuania independence means recognition of the Government rather than of the State.¹⁵ Since the *de jure* recognition had already been granted to Lithuania during the inter-war period and subsequently maintained by the international community, the recognition was extended only to the Government of Lithuania, i.e. only the legality of the new government had to be recognized. Consequently, Lithuania was recognized as a State that had restored its independence rather than as a newly born entity. This is the principal difference between Lithuania and the former republics of the Soviet Union, which are regarded as new states.

In this respect, it would be useful to mention the Russian view on the restoration of Lithuanian independence. Currently, Russian officials frequently declare that they regard Lithuania and the other Baltic States as former Soviet republics. This implies their refusal to recognize the continuity and identity of the Republic of Lithuania. However, these statements contradict the official Russian position established in Article 1 of its July 29, 1991 Treaty on the Fundamentals of Interstate Relations with Lithuania. In that document, Russia recognized the Republic of Lithuania as a subject of international law and Sovereign State under its state status defined in the fundamental acts of March 11, 1990. Due to this provision, one is compelled to conclude that Russia like other states has recognized that the restoration of independence of the Republic of Lithuania was based on the principles of state continuity and identity. The fundamental Treaty of 1991 is still in force and comprises the legal grounds of Lithuanian-Russian relations. In my opinion, Lithuania should consider the statements by Russian officials that Lithuania is a new State like other former Soviet republics as an unfriendly act undermining the fundamentals of bilateral relations.

Of course, this Russian position has influenced other states and international organizations. For example, the UN and some other international organizations have not

¹⁴ Romain Yakemtchouk, "Les republics baltes en droit international: Echech d'une annexion operee en violation du droit des gens," *The Baltic Path to Independence* (New York: William S. Hein & Co., 1994), p. 261.

¹⁵ Vadapalas, *Tarptautinė*, p. 216.

clearly recognized the continuity of the Republic of Lithuania.¹⁶ However, we can not disregard the fact that international organizations usually are nothing more than the union of different states. So, as they do not have any position of their own, an independent and transparent position of any international organization might only be possible in case of consensus by the member states. Anyway, Russia's refusal to conform to its position expressed in its July 29, 1991 Treaty with Lithuania does not alter the real continuity and identity of Lithuania. Any previous recognition of Lithuania's incorporation into the USSR can not legalize the situation because the recognition of an illegal situation does not make it lawful.¹⁷

While dealing with the issues of the restoration of the independence of the Republic of Lithuania, one can not ignore the issue of self-determination. It is necessary to note that the restoration of the independence of Lithuania is primarily based on state continuity rather than self-determination. Obviously, the restoration of the independence of the State of Lithuania was also a result of the self-determination of the Lithuanian nation. Nevertheless, Lithuanians were determined not to create a new State but to restore the independence of the old one; the Republic of Lithuania was established in 1918. Therefore, self-determination is only a subsidiary legal basis for the restoration of the independence of the Republic of Lithuania. It also had great political importance as it had strengthened the international position of the restored Independent State of Lithuania.¹⁸

International legal and political consequences following the restoration of the independence of the Republic of Lithuania. The continuity and identity of the Republic of Lithuania have some important international legal and political consequences. First of all, Lithuania can not be considered to have been a former Soviet republic or a legitimate part of the USSR due to the illegality of the annexation of Lithuania in 1940. Therefore, it is unreasonable to state that Lithuania has seceded from the USSR.¹⁹ Neither the Soviet constitution nor any other Soviet laws could have been applied to Lithuania in the course of the restoration of its independence because the USSR had always been a foreign State for Lithuania.

Second, the Republic of Lithuania is not a successor State of the USSR because the latter had never obtained any sovereign rights over Lithuanian territory. The succession of states may take place only when the sovereignty of one State over the certain territory is replaced by the sovereignty of another State. The Republic of Lithuania had never lost its sovereign rights and legal title to its territory. Consequently, Lithuania only resumed its rights and obligations that were suspended during the period of occupation. Therefore, it is not possible to conclude that Lithuania is responsible for the debts of the Soviet authorities or for any damage done by the USSR to other states. This position was clearly expressed by the Presidents of Latvia, Lithuania, and Estonia in the Statement of March 16, 1992 of the Baltic States Council: "The Baltic States are not states-successors to the former USSR and they can not therefore be responsible for the facilities and repayment of the foreign debt of the USSR".

¹⁶ For more information about the position of Lithuania in international organizations see: Ineta Ziemele, *State Continuity and Nationality in the Baltic States* (Ph. D. Dissertation) (Cambridge: University of Cambridge, Faculty of Law, 1998), p. 180-186.

¹⁷ Vadapalas, *Tarptautinė*, p. 223.

¹⁸ Kūris, "Lietuvos...", 11.

¹⁹ Vadapalas, *Tarptautinė*, p. 199.

Third, Lithuania is entitled to reparations for the damage caused by its illegal occupation. Russia as the State continuing the rights and obligations of the former USSR must compensate all losses sustained by Lithuania in 1940-1993 (the term responsibility includes an obligation to pay reparations to the victim). This period comprises the entire Soviet occupation and the subsequent illegal presence of the Russian army in Lithuania's territory after the restoration of the independence of Lithuania in 1990 before its complete withdrawal in 1993. However, it seems that the responsibility of Russia will remain an unresolved issue forever. In this sense, justice will not be accomplished thoroughly. It would be useful here to remember that Russia has no intention to start fulfilling even its minor international obligations to the Baltic States or to the Council of Europe, i.e. Russia has not returned to the Baltic States the real estate (embassy buildings in third countries) as well as the cultural and historical property which had been taken by force by the USSR, despite the request of the Council of Europe upon admitting Russia in 1995.

In fact, it is impossible to make Russia recognize its answerability for past Soviet illegal actions. It is not Lithuania's problem that no international tribunal has ever accused the leaders of the Soviet Union. This is a fact demonstrating a weakness of the international system where large states have enough power to avoid any international responsibility for the damage done to their smaller and not so powerful neighbors. As long as some Russian influential political leaders mourn the collapse of the USSR, Lithuania will continue to feel insecure. Lithuania also can not feel secure while Russia invades and destroys Chechnya, disregarding norms of international law, the rule of law and other principles of democracy. For that reason, such actions constitute a factor that strengthens Lithuania's aspiration to join NATO as soon as possible.