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Estonia and the Russian Federation reignited consultations on their maritime and land boundary treaties in the end of 2012 while I was working as a legal adviser at the Estonian Ministry of Justice. In the middle of 2013, I was assigned with the task of providing a legal analysis on the treaties. The legal aspects of the Estonian maritime boundaries and straits raised my curiosity, which is why I decided to examine them further in my doctoral studies.

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Alongside my daily work as an adviser at the Estonian Supreme Court I was responsible for drafting the project charter for the codification of the Estonian law on maritime zones in 2015. In the course of this, I was invited to meetings by the Ministry of Economic Affairs and Communications, Estonian Maritime Administration and Ministry of the Interior. I am thankful for this since these meetings and written feedback from many other ministries enabled me to better grasp the Estonian legislative policy pertaining, in some aspects, to the legal regime of straits.

The study does not have any overlap with the project charter (as published by the Estonian Ministries of Justice and Economic Affairs and Communications), since the project charter does not delve into the legal regime of straits. Only the thesis' chapter 3 of Part III marginally repeats the critique on the Estonian law on innocent passage that I voiced in the project charter. Other than that, the present study represents a hitherto unpublished piece of work.

This book is dedicated to my wife Kati and kids Marie, Mattias and Marten – my boundaries and straits of life.

Tallinn, 07.03.2017

INTRODUCTION

A. The Object of the Study

The study focuses on the United Nations Convention on the Law of the Sea[1] (hereinafter *LOSC*) regime of straits, since this represents the only universal treaty on the legal regime of straits.[2] The extension of the width of the territorial sea up to 12 nautical miles (hereinafter *miles*) under Article 3 of the LOSC entailed a progressive development of the international legal framework on straits. Part III of the LOSC serves as the cornerstone for the current law on the sophisticated legal categories of these natural narrow sea passages.

The most innovative legal concept in Part III of the LOSC is the regime of transit passage. It applies to straits that connect two parts of an exclusive economic zone (hereinafter *EEZ*) or the high seas (Article 37 of the LOSC). Part III of the LOSC also codified the rules of innocent passage in straits. The right of innocent passage is applied to two types of straits. First, it includes straits that connect the high seas or an EEZ with the territorial sea of a foreign State (Article 45(1)(b) of the LOSC). Second, it encompasses straits where the transit passage does not apply, since they are formed by an island of a State bordering the strait (hereinafter *strait State*) and its mainland and there exists a route seaward of the island through the high seas or through an EEZ of similar convenience with respect to navigational and hydrographical characteristics (Article 45(1)(a) of the LOSC).

Since the legal framework of transit and innocent passage encroaches on the sovereignty of the strait State it otherwise enjoys in its internal waters and territorial sea, Part III of the LOSC also stipulates certain narrowly construed exceptions to the applicability of these straits regimes. Those exceptions apply to another three types of straits. Straits through which passage has already been regulated by a long-standing international convention are excluded from the LOSC regime on transit and innocent passage (Article 35(c) of the LOSC). Likewise, straits comprising long-standing internal waters (Article 35(a) of the LOSC) and straits through which there is a high seas route or which are crossed by an EEZ (Articles 35(b) and 36 of the LOSC) are not affected by the strait regime of transit or innocent passage.

The six above-mentioned main legal classifications of straits in addition to a potentially distinct category of *sui generis* straits (Article 311(2) of the LOSC) and non-international straits[3] form the object of this study. Due to its geographical scope, the study is not concerned with archipelagic sea lanes passage (Article 53 of the LOSC; applies to archipelagic States, e.g. Indonesia or the Philippines) which is functionally, however, *grosso modo* equivalent to the transit passage in straits and forms another exception to the applicability of the transit

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[1] United Nations Convention on the Law of the Sea. Montego Bay 10.12.1982, e.i.f. 16.11.1994.

[2] See e.g. R. Palmer Cundick. International Straits: The Right of Access. – 5 Georgia Journal of International and Comparative Law 1975, pp. 117, 121–124.

[3] See *infra* section 1.1 of Part I.

or non-suspendable innocent passage regimes in straits. Likewise, the potentially distinct category of ice-covered straits (Article 234 of the LOSC) is not directly relevant for the purposes of this study, although due to conceptual reasons its potential theoretical foundations are also discussed.[4]

In order to reflect on the legal classification of straits as comprehensively as possible, the present study is limited in geographical scope. It concerns the Estonian Straits[5] in the north-eastern part of the Baltic Sea that are situated in the Gulf of Finland and in the Gulf of Riga, since the author is most aware of their legal, historical and geographical context. The Estonian Straits include the Viro Strait in the Gulf of Finland,[6] the Irbe Strait in the Gulf of Riga and the Sea of Straits in the western Estonian archipelago. Albeit the Viro Strait is also bordered by the Finnish coast and the Irbe Strait by the Latvian coast, the common denominator of the above-referred straits is that their strait State is or includes Estonia.[7] Thus, the term *Estonian Straits* is above all a geographical notion.

In the course of the study, parallels with other straits of the world, in particular in the Baltic Sea, are drawn where appropriate. The Estonian Straits have also been chosen as the primary object of this study for the exceptional reason that they enable to examine within a clearly defined geographical and legal dimension the interrelations of all the main legal categories of straits (as identified above) due to their potential application to the Estonian Straits on the basis of their legal and geographical characteristics.

B. Research Task and Central Postulates

Albeit the six main legal categories of straits fall under distinct legal regimes, they nevertheless are far from isolated from each other. As this study aims to demonstrate, they are inextricably linked in that in most cases, the category of a strait is potentially subject to alteration. Due to a change in circumstances, a strait that first is covered by one passage regime may become subject to a different passage regime. In most cases, this depends primarily on whether the strait States intend to apply the regime of transit or innocent passage to the ships and aircraft transiting the strait. Once the decision has been made, it is also reversible. *Prima facie* the strait States may shift the legal regime applicable to a strait by having, in most cases, the possibility to give effect to the above-

4 See *infra* section 2.2 of Part I.

5 The author is not aware of any prior use of the term *Estonian Straits* in legal literature.

6 The term *Viro Strait* has not been used before. Instead, this maritime area has been referred to as the *Passage through the Gulf of Finland*, *Entrance to the Gulf of Finland* or simply *Gulf of Finland* since it is not commonly acknowledged that this natural narrow sea passage forms a strait legally. In this study the term *Viro Strait* has been adopted primarily for reasons of precision and clarity – so as to draw a clear distinction between the Viro Strait and the Gulf of Finland proper.

7 Similarly, the Danish Straits include the Øresund which is bordered by the Danish as well as Swedish coasts.

referred exceptions to the applicability of the transit or innocent passage regime. This implies a certain volatility in the classification of straits.

In addition, since the exact legal categorisation of straits depends above all on legal nuances, the discovery of new legal circumstances may warrant an unanticipated exception to the applicability of the transit or innocent passage regime in a strait. The relevant circumstances may be difficult to discover and might spring up in unexpected ways, as this study also exemplifies. Thus, as will be subsequently demonstrated, general monographs on the legal classification of international straits of the world may not always be exact since they fail to discuss all the necessary details for specific straits. The exact legal classification of straits is necessary since inaccuracies in this field may lead to further confusion or conflict over the applicable passage rights.

The objective of the present study is to establish the interrelations between the afore-referred six main categories of straits as well as the potentially distinct category of *sui generis* straits and, in the course of that, provide legal classifications for the straits in the Gulf of Finland and the Gulf of Riga. The problem lies in ascertaining the main legal circumstances that serve as the basis for such interrelations. The hypothesis of this study is that such legal circumstances comprise the outer limits of maritime zones and maritime boundary delimitation, long-standing international conventions on straits, the maritime zones of the strait State (*prima facie* its domestic law on internal waters) as well as the concept of State continuity.

The importance of nearly all of these factors for the legal regime of straits is underlined in Part III of the LOSC on the legal framework on straits. Only such legal factors as maritime boundary delimitation and State continuity are not expressly referred to in the text of Part III of the LOSC. However, both the legal literature and the case law suggest the relevance of navigational factors in delimiting the territorial sea.[8] The legal regime of straits is of great importance for navigation and thus may serve as one of such legal circumstances which may influence the final course of the maritime boundary. Likewise, references to long-standing treaties and domestic law of the strait State on its internal waters in Part III of the LOSC imply the potential relevance of the concept of State continuity for giving effect to the exceptions to the strait regime of transit or innocent passage.

The author aims to determine whether these factors singled out above (not forming a closed list) have significance for the legal classification of straits by providing grounds for effectuating the exceptions to the applicability of the transit or non-suspendable innocent passage regime, mostly at the discretion of the strait State(s). The author is not aware of any previous general studies on such interrelations of the legal categories of straits. It follows from the foregoing that the study also purports to demonstrate how the legal regime of straits may be intertwined with the domestic law, maritime delimitation law and the law of treaties.

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[8] See e.g. Y. Tanaka. Predictability and Flexibility in the Law of Maritime Delimitation. Oxford/Portland/Oregon: Hart 2006, pp. 314–319.

C. Methodology and Sources of the Research

The study is not limited to the interpretation of the LOSC and other international treaties on the basis of the relevant case law. Its primary sources include equally important archival materials, domestic law and maps of the relevant strait States – Estonia, Finland and Latvia as well as non-strait States like the Soviet Union/Russian Federation. With the exception of Part I of the study, legal literature is supplementary for interpreting the above-mentioned primary sources. Notably, previous studies with a focus on the legal regime of the Estonian Straits are lacking.

It follows from the foregoing that the study uses mostly analytical and comparative legal methods for interpreting the relevant international law as well as Estonian, Finnish and Latvian domestic law on the legal regime of straits. The analysis occasionally departs from the *lex lata* and includes suggestions from the perspective of *de lege ferenda* where appropriate.

Since the legal classification of the Estonian Straits together with the study of the maritime boundary delimitation in the Gulf of Riga requires the establishment of the facts of the past and focusing on the historical treaties, historical maps, long-annulled domestic laws of the strait States and other archival materials, the research also follows the historical method. In particular, in the field of the legal regime of straits and maritime boundary delimitation, the LOSC makes explicit references to history by employing the concepts of historic bays (Article 10(6) of the LOSC), historic titles (Article 15 of the LOSC), long-standing international conventions (Article 35(c) of the LOSC) and long-standing internal waters (Articles 8(2) and 35(a) of the LOSC). The historical method is used mainly for determining whether these concepts are applicable in the case of Estonian Straits.

D. Structure of the Research

The study comprises five parts. In the first part, the conclusions of various authors on the legal categories of straits are discussed with the aim of establishing whether there exists a uniform understanding on the legal classification of straits in legal literature. A differentiation is made between scholars on the basis of whether they adopt a traditional or liberal approach towards Part III of the LOSC.

The traditional approach follows legal positivism in that the authors stick to the text of Part III of the LOSC in categorising straits. The liberal approach, on the other hand, adopts such determinants for the legal classification of straits which do not directly follow from Part III of the LOSC. Notably, in discussing the types of straits as systematised by the various authors, a harmonised use of terms is used regarding the legal catalogue of straits. This use of terms may not always coincide with the terminology used by other authors.

In some instances a term is used for a particular legal category of straits which might never have been used before in the legal literature in this context (e.g. *straits comprising long-standing internal waters*, *sui generis straits*, *ice-covered straits*). This is due to the need of maintaining a certain degree of consistency throughout the text and for guiding the reader in the sophisticated content of the catalogue of straits. Specific references are made after the titles of different types of straits to the relevant provisions of the LOSC which provide their legal basis.

The first part then proceeds with examining the most disputable categories of straits, over which there is most disagreement in the legal literature. At that stage, the study does not focus on the legal categories of straits that have not raised any substantial controversy in the legal literature. Such types of straits are scrutinised in detail in other parts of the study. Finally, the principal legal instruments which serve as the means for altering the legal categories of straits are established in the first part of the study.

In the next four parts of the study, nearly all of such determinants of the legal categories of straits are studied in detail. It is established how the coastal States of the Gulf of Finland and Gulf of Riga have altered and may further alter the legal categories of straits regimes which are potentially applicable to the Estonian Straits. In the course of this, the focus lies on establishing the significance of the outer limits of maritime zones, long-standing international conventions, *sui generis* legal regimes, as well as the concept of State continuity, domestic law on the internal waters and the maritime boundary delimitation for the Estonian Straits.

The study on the Viro Strait in Part IV and chapter 2 of Part III aims at determining the interrelations between five types of straits: straits linking two parts of an EEZ, straits that connect an EEZ with the territorial sea of a foreign State, straits through which passage has already been regulated by a long-standing international convention, *sui generis* straits as well as straits through which runs an EEZ. In this context, particular emphasis lies on scrutinising the passage rights of foreign ships and aircraft in the Viro Strait under the various potentially applicable legal regimes.

The study on the legal regime of the passages of the Gulf of Riga in Part V and chapter 1 of Part III concerns the legal classification of the Irbe Strait and the Sea of Straits. The passages to the Gulf of Riga are used to establish the potential interrelations between five legal categories of straits, all of which are potentially applicable to the Irbe Strait and the Sea of Straits: straits linking two parts of an EEZ, straits that connect an EEZ with the territorial sea of a foreign State, straits comprising long-standing internal waters, straits which include an EEZ corridor as well as straits where transit passage does not apply since they are formed by an island of a State bordering the strait and its mainland and there exists seaward of the island a route through the high seas or through an EEZ of similar convenience with respect to navigational and hydrographical characteristics. In this context, the maritime boundary delimitation in the Gulf of Riga is

examined in Part II of the study for ascertaining whether it has had an impact on the legal classification of the Irbe Strait and the Sea of Straits.

Finally, the study ends with a conclusion on the significance of the main determinants of the legal categories of straits for the classification of the Estonian Straits. This concerns the outer limits of maritime zones, maritime boundary delimitation, long-standing international conventions, domestic law on internal waters, *sui generis* strait regimes and the concept of State continuity. It departs at times from the narrow geographical confines of the Estonian Straits as it purports to reflect also the universal interconnections between the legal regimes of straits.

PART I. THE LEGAL CATEGORIES OF STRAITS

1. Interpretation of the Legal Categories of Straits under the LOSC

1.1. The Definition of Strait

Part III of the LOSC provides a legal framework for straits used for international navigation from which the legal categories of straits can also be inferred. Generally, the term *strait* is understood to mean a natural narrow sea passage which connects two larger areas of water. In essence, this is a geographical definition. A clear legal definition of a *strait* is missing.

For the purposes of the present study, *strait* means any international or non-international strait. These terms are not used in the LOSC. The LOSC refers to *straits used for international navigation* which is not synonymous with either *international straits* or *non-international straits*. It is important to distinguish between them mainly because, in contrast to international straits, international vessel traffic is not safeguarded under Part III (and Part IV) of the LOSC in non-international straits.

Under the systematic interpretation of the LOSC, one may consider international straits as such natural sea passages that connect two larger maritime areas and which are not more than 24 miles wide[9] as measured from coast to coast or from baseline to baseline and which are due to the applicable legal regime different from non-international straits. As an additional criterion, an international strait needs to be used for international navigation, the magnitude of which is essentially irrelevant.[10]

Therefore, straits which could in all other aspects be categorised as international straits but fail to meet this functional criterion of actual vessel traffic are non-international straits. Non-international straits also include straits that are located either in long-standing internal waters where the passage rights of foreign ships and aircraft are not internationally safeguarded under Part III of the LOSC (Article 35(a) of the LOSC) or in such territorial sea in respect of which none of the legal regimes of international straits applies (consequently, the ordinary regime of suspendable innocent passage applies (Article 17 of the LOSC)).

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[9] This follows from Article 35(b) of the LOSC according to which nothing in Part III of the LOSC affects the legal status of the waters beyond the territorial seas of strait States as EEZs or high seas. It should be noted, however, that if the EEZ or high seas belt crossing such maritime area is very narrow (*prima facie* less than couple of miles wide) and, due to its characteristics, is not convenient for shipping, then this narrow passage would still meet the legal characteristics of a strait and fall under Part III of the LOSC (Article 36 of the LOSC). Nonetheless, it is a purely hypothetical possibility and, in practice, highly unlikely. Other than that, the narrow passages which exceed the 24-mile limit should not be considered as straits legally (unlike geographically, by custom etc).

[10] Corfu Channel Case (United Kingdom v. Albania), Judgment, I.C.J. Reports 1949, p. 28. See further e.g. S. N. Nandan, D. H. Anderson. Straits Used for International Navigation: A Commentary on Part III of the United Nations Convention on the Law of the Sea 1982. – 60 The British Yearbook of International Law 1989(1), pp. 167–169.

Due to its functional scope, the definition *straits used for international navigation* as used in Part III of the LOSC thus embraces most legal categories of non-international straits and all international straits. Analogously to the above-mentioned legal types of non-international straits, international straits also fall under distinct legal categories. Most of them provide for either transit or non-suspendable innocent passage regimes. These passage regimes are only applicable in international straits.

1.2. The Regimes of Transit and Non-Suspendable Innocent Passage

The aim of establishing the right of transit passage in the LOSC was to guarantee a regime of passage in the strategically important international straits similar to that of the freedom of navigation and overflight. These freedoms had generally been applicable in such straits but that state of affairs was jeopardised by the prospective extension of the maximum width of the territorial sea under the LOSC from the generally recognised 3 miles to 12 miles. In the context of the adoption of the LOSC, its Part III on the legal regime of straits has thus been considered by one of its drafters even as "by far the single most important issue at the Conference".[11]

As a consequence of a package deal in connection with the extension of the outer limits of territorial sea, the right of transit passage guarantees under Article 38(2) of the LOSC the freedom of navigation and overflight in international straits that are located in the territorial sea and are used for navigating from one part of the high seas or an EEZ to another. The extension of the breadth of the territorial sea to 12 miles and the establishment of the right of transit passage under the LOSC are hence inseparably connected.[12]

Ships, including submarines, may transit a strait in their normal mode under the right of transit passage. This means that submarines, for example, enjoy the right of submerged continuous and expeditious passage in a strait. By contrast, in innocent passage submarines and other underwater vehicles are required, pursuant to Article 20 of the LOSC, to navigate on the surface and to show their flag.[13] In addition, foreign aircraft enjoy the freedom of overflight in transit

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[11] S. N. Nandan. The Provisions on Straits Used for International Navigation in the 1982 United Nations Convention on the Law of the Sea. – 2 Singapore Journal of International & Comparative Law 1998, p. 393.

[12] See R. B. McNees. Freedom of Transit through International Straits. – 6 Journal of Maritime Law and Commerce 1975, pp. 183-188, 210. See also, e.g. S. Mahmoudi. Customary International Law and Transit Passage. – 20 Ocean Development and International Law 1989(2), p. 163. See also Nandan, Anderson, *op. cit.*, p. 179.

[13] During the Third United Nations Conference on the Law of the Sea, many strait States anticipated to establish in the draft LOSC that submarines have to navigate on the surface also while in transit passage, but as a result of the negotiations, such proposals were withdrawn by 1977. See D. D. Caron. The Great Straits Debate: The Conflict, Debate, and Compromise that Shaped the Straits Articles of the 1982 United Nations

passage, which, by comparison, is not applicable for aircraft under the framework of innocent passage. Maritime States also safeguard their right to launch and land aircraft or use formation steaming in transit passage.[14]

Distinct from the extensive requirements applicable to innocent passage under Article 21 of the LOSC, ships and aircraft in transit passage need to follow only a few conditions. Of those, the primary requirement stems from Article 39 of the LOSC which provides that transit passage needs to be continuous and expeditious while ships and aircraft need to refrain from any activities other than those incidental to their normal mode of continuous and expeditious transit, unless rendered necessary by *force majeure* or by distress. It is also prohibited to carry out any research or survey activities without the prior authorisation of strait States in transit passage (Article 40 of the LOSC).[15]

Unlike the general innocent passage, the strait State cannot temporarily suspend transit passage or non-suspendable innocent passage in straits for the protection of its security or due to *inter alia* military exercises. However, on the basis of customary international law, this does not exclude the possibility of adopting immediate, proportionate and necessary measures against foreign ships or aircraft to counter a foreign State's attack.[16]

Safeguards with respect to international straits are stipulated in Article 233 of the LOSC. It provides that the strait State(s) may take appropriate enforcement measures by giving effect to applicable international regulations regarding the discharge of noxious substances (e.g. oil, oily wastes) if violation of the laws and regulations on the safety of navigation, the regulation of maritime traffic or the prevention, reduction and control of pollution in the strait is causing or threatening major damage to the marine environment of the straits. Yet in practice, States have the right to adopt such measures only in exceptional cases.[17]

The strait regimes of transit passage and non-suspendable innocent passage have thus been clearly distinguished in the LOSC.[18] However, Part III of the LOSC does not present a clear list of the legal categories of straits, on the basis of which straits may be made subject to a particular type of passage regime. In practice, this complicates the exact legal categorisation of straits. It is important

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Convention on the Law of the Sea. – D. D. Caron, N. Oral (eds). Navigating Straits: Challenges for International Law. Leiden: Martinus Nijhoff 2014, p. 26.

[14] B. H. Oxman. Transit of Straits and Archipelagic Waters by Military Aircraft. – Singapore Journal of International & Comparative Law 2000(4), pp. 403–404.

[15] At the same time, it is argued that the use of radar and sonar during transit passage is permitted. N. Klein. Maritime Security and the Law of the Sea. Oxford: Oxford University Press 2011, p. 34.

[16] Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Judgment, I.C.J. Reports 1986, p. 14, para 194–195. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1991, p. 226, para 41.

[17] J. M. Van Dyke. Rights and Responsibilities of Straits States. – Caron, Oral (eds), *op. cit.*, pp. 40–41.

[18] The differences between the two passage regimes are examined in greater detail below in the course of this study.

to establish the applicable legal category to a particular strait accurately because this determines the passage rights of foreign ships and aircraft as well as the rights and duties of strait State(s) in the relevant maritime area. As examined next, the conclusions made in the legal literature on the catalogue of the legal categories of straits have not been uniform.

1.3. The Classification of Straits: Traditional Approach

The traditional approach towards the classification of straits is characterised by staying within the confines of the legal categories of straits as provided in Part III of the LOSC. In this view the legal categories of straits as stipulated in Part III of the LOSC are exhaustive. Hence, this approach omits any other legal categories of straits not explicitly mentioned in Part III of the LOSC. Thus, its potential inter-linkages with the other parts of the LOSC are ignored.

There appears to be a few authors who approach the legal classification of straits traditionally. For example, in their catalogue of straits, Satya N. Nandan and David H. Anderson distinguish between six legal categories of straits:[19]

1. Straits which link two parts of an EEZ or the high seas (Article 37);
2. Straits which are regulated by long-standing international conventions (Article 35(c));
3. Straits which are formed by an island of a strait State and its mainland coast (Article 38(1));
4. Straits which connect an EEZ or the high seas with the territorial sea of a foreign State (Article 45(1)(b));
5. Straits which include an EEZ or the high seas corridor (Article 36);
6. Straits not used for international navigation.

In addition, Nandan and Anderson note that straits which are located in the archipelagic waters are subject to Part IV of the LOSC (on the archipelagic States).[20] Notably, their list explicitly includes straits not used for international navigation which are not referred to as a distinct legal category of straits by many (if not most) other authors. Yet it is inherent in the legal regime of straits that such straits do not fall under the scope of Part III of the LOSC which begins in its Article 34(1) by stating that this part establishes the regime of passage (only) through straits used for international navigation. Since many other authors refer in their catalogues of the legal categories of straits only to straits used for international navigation, it is hereinafter tacitly understood that they deem straits not used for international navigation as falling under a separate legal regime. For example, Robin Churchill and Vaughan Lowe also argue for the existence of the afore-referred (first) five distinct Part III-categories of

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[19] Nandan, Anderson, *op. cit.*, p. 165.
[20] Ibid, pp. 165–166.

straits,[21] without explicitly claiming the apparently obvious fact that straits not used for international navigation form a separate category of straits.[22]

This list of five legal categories of straits is also shared by Donald Rothwell and Tim Stephens.[23] In addition, Rothwell and Stephens refer to straits in the archipelagic waters where the archipelagic sea lanes passage applies (Article 53). They do not expressly include this in their list as a distinct legal category of straits.[24] Neither do Churchill and Lowe as well as Nandan and Anderson.[25] Nevertheless, systematically, the five authors seem to associate the Article 53-regime with straits. Rothwell and Stephens, as well as Churchill and Lowe, also omit in their catalogue such straits which comprise long-standing internal waters (Article 35(a) of the LOSC). They do not make any other reference to this provision in the context of the legal categories of straits. In comparison, although Nandan and Anderson neither refer to Article 35(a)-type of straits, they still interpret the said provision, albeit in a different context. They claim that Article 35(a) might affect some maritime areas in a particular strait but apparently do not find that this provision could affect the legal regime of a particular strait *in toto*.[26]

Rothwell and Stephens take a relatively liberal stance towards Article 35(c) of the LOSC as they do not restrict its applicability only to such straits that have been generally recognised as falling under its scope. Instead, Rothwell and Stephens also refer to the Torres Strait and the Strait of Tiran as potentially falling under the Article 35(c)-exception "if the treaties which regulate those straits remain operative and are respected not only by the parties themselves but by other user states."[27]

Jon Van Dyke, on the other hand, refers only to the first four types of above-listed straits.[28] Van Dyke maintains the safety clause "at least" (four types of straits) prior to outlining the categories of straits.[29] He does not explicitly mention straits in the archipelagic waters where archipelagic sea lanes passage applies (Article 53 of the LOSC) as a distinct legal category of straits. Additionally, he abstains from making a reference to straits comprising long-standing internal waters (Article 35(a) of the LOSC). These omissions also charac-

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[21] R. R. Churchill, A. V. Lowe. The Law of the Sea. Manchester: Manchester University Press 1992, pp. 90–94.

[22] On the straits not used for international navigation, see *supra* section 1.1 of Part I.

[23] D. R. Rothwell, T. Stephens. The International Law of the Sea. Oxford/Portland/Oregon: Hart 2010, pp. 237–238. D. R. Rothwell, T. Stephens. The International Law of the Sea. Oxford/Portland/Oregon: Hart 2016, p. 253. In an earlier article Rothwell also refers to these five types of straits. See D. R. Rothwell. International Straits and UNCLOS: An Australian Case Study. – 23 Journal of Maritime Law and Commerce 1992(3), pp. 467–469.

[24] Rothwell, Stephens 2010, *op. cit.*, pp. 250–251. Rothwell, Stephens 2016, *op. cit.*, p. 270.

[25] See Churchill, Lowe, *op. cit.*, p. 90. Nandan, Anderson, *op. cit.*, p. 165.

[26] See Nandan, Anderson, *op. cit.*, pp. 173–174.

[27] Rothwell, Stephens 2010, *op. cit.*, p. 238. Rothwell, Stephens 2016, *op. cit.*, p. 254. On this matter, see also *infra* section 3 of Part I.

[28] Van Dyke 2014, *op. cit.*, pp. 33–34.

[29] Ibid, p. 33.

terise the catalogue of straits as listed by Churchill and Lowe, Rothwell and Stephens, Nandan and Anderson.

Likewise, Janusz Symonides omits straits in the archipelagic waters from his list. In addition, he does not refer to straits that connect an EEZ or the high seas with the territorial sea of a foreign State (Article 45(1)(b)). Unlike other above-mentioned authors, he lists straits in internal waters where the strait State maintains freedom of transit regulation as a distinct category of "local straits" (presumably in reference to Article 35(a) of the LOSC). The other four categories of straits included in Symonides' list are Article 37, 35(c), 38(1), and 36-types of straits (mentioned above).[30]

However, as examined next, the LOSC potentially allows distinguishing between additional legal categories of straits that are not mentioned above. The existence of such additional legal categories of straits is based on a systematic interpretation of the LOSC. Therefore, this approach towards the classification of straits is not traditional, as it embraces the interlinkages between the various parts of the LOSC. This approach, in combination with State practice, may also indicate the existence of such legal categories of straits that do not originate from Part III of the LOSC.

1.4. The Classification of Straits: Liberal Approach

It is characteristic for the liberal approach to add some categories of straits to the ones explicitly provided in Part III of the LOSC. There are many reasons why authors may depart from the text of Part III of the LOSC when categorising straits. This may be done intentionally or mistakenly. In the latter instance, the writer's intention may not necessarily be that of adopting a liberal approach and it thus should not be considered as such. Such practices include the incomplete classification of the legal categories of straits, e.g. open-ended lists. Nevertheless, by enlisting only some selected legal categories of straits, the author inevitably downplays the importance of the ones left unnoticed.

In *The Regime of Straits in International Law*, Bing Bing Jia appears to have deliberately not delved into the positivist classification of straits. His monograph lacks a clear list of categories for straits. Instead, he examines other determinants of an international strait, such as their geographical criteria (e.g. straits between internal waters and the high seas, straits between the territorial sea and the high seas, straits between parts of the high seas) and the criterion of use for international navigation.

However, Jia's study also includes elements of positivist classification, e.g. in examining special regimes of passage under long-standing treaties (Article 35(c) of the LOSC) and the regime of transit passage (Article 37 of the LOSC). Perhaps one of his most liberal assertions is that of the existence of a separate category of straits comprising historic waters, which he appears to distinguish

[30] J. Symonides. Freedom of Navigation in International Straits. – 17 Polish Yearbook of International Law 1988, p. 215.

from straits comprising long-standing internal waters under Article 35(a) of the LOSC.[31] In a recent article, however, Jia essentially merges his assertion of the existence of historic straits with the Article 35(a)-exception on straits comprising long-standing internal waters.[32]

Another author who asserts the existence of historic straits is Ana López Martín. In her monograph titled *International Straits: Concept, Classification and Rules of Passage*, the author interprets Article 35(a) of the LOSC liberally by coming to the conclusion that the applicability of this category of straits rests on the condition of historic entitlements which, if existent, leads to the strait being categorised as a historic strait.[33] In total, López Martín presents in her catalogue eight types of straits:

1. Straits which link two parts of an EEZ or the high seas (Article 37);
2. Straits which are regulated by long-standing international conventions (Article 35(c));
3. Straits which are formed by an island of a strait State and its mainland coast (Article 38(1));
4. Straits which connect an EEZ or the high seas with the territorial sea of a foreign State (Article 45(1)(b));
5. Straits in archipelagic waters (Article 53);
6. Straits which include an EEZ or high seas corridor (Article 36);
7. Historic straits (Article 35(a));
8. Straits regulated by a treaty compatible with the LOSC (Article 311(2)).

As examined below, the interpretation of Article 35(a) of the LOSC in a way which centres on the concept of historic straits is not wholly in line with the ordinary meaning of its terms in their context and in the light of the provision's object and purpose.[34] In addition, among López Martín's other liberal assertions is the existence of the Article 311(2)-category of straits as it is not explicitly provided for in the text of Part III of the LOSC. According to Article 311(2), the LOSC does not alter the rights and obligations of States Parties which arise from other agreements compatible with the LOSC and which do not affect the enjoyment by other States Parties of their rights or the performance of their obligations under the LOSC. López Martín thus notes that

> "[A] treaty which specifically regulates the passage through a determined strait will be applicable on condition that its provisions are compatible with those of the [LOSC] and the rights and obligations in Part III are not affected. That is to say, if the treaty contains a regime of passage for this strait which is more liberal

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[31] B. B. Jia. The Regime of Straits in International Law. Oxford: Clarendon Press 1998, pp. 8–9, 75–76. See also *infra* section 2.1 of Part I.

[32] B. B. Jia. The Northwest Passage: An Artificial Waterway Subject to a Bilateral Treaty Regime. – 44 Ocean Development & International Law 2013(2), pp. 125, 127.

[33] A. G. López Martín. International Straits: Concept, Classification and Rules of Passage. Heidelberg/Dordrecht/London/New York: Springer 2010, p. 70.

[34] See *infra* section 2.1 of Part I.

> than the one which would correspond by applying the relevant provisions in Part III, then this treaty is applicable."[35]

The existence of the category of straits regulated by a treaty compatible with the LOSC (hereinafter *sui generis straits*) is scrutinised below.[36] Yet, unlike the other authors, López Martín also interprets Article 45(1)(b) of the LOSC liberally as she comes to the conclusion that this provision, which applies the regime of non-suspendable innocent passage to straits that connect an EEZ or the high seas with the territorial sea of a *foreign State*, may be applied to all so-called dead-end straits[37] leading to a territorial sea of a State, including to the territorial sea of one of the strait States.[38]

In their monograph *The Legal Regime of Straits*, Hugo Caminos and Vincent Cogliati-Bantz do not provide a clear, concise and exhaustive list of the legal categories of straits. However, one may infer such a list from the book's second and third parts, which address the transit passage and archipelagic sealanes passage regimes as well as exceptions to the transit passage regime. In essence, Caminos and Cogliati-Bantz refer to the same eight categories of straits mentioned by López Martín and listed above: straits which link two parts of an EEZ or the high seas (Article 37);[39] straits which are regulated by long-standing international conventions (Article 35(c));[40] straits which are formed by an island of a strait State and its mainland coast (Article 38(1));[41] straits which connect an EEZ or the high seas with the territorial sea of a foreign State (Article 45(1)(b));[42] straits which include an EEZ or the high seas corridor (Article 36);[43] straits in the archipelagic waters (Article 53);[44] straits comprising long-standing internal waters (Article 35(a));[45] *sui generis* straits (Article 311(2)).[46]

Thus, Caminos and Cogliati-Bantz interpret the interrelationship between some provisions of the LOSC and its Part III on the legal regime of straits liberally. This concerns *prima facie* Article 53 on straits in archipelagic waters as well as Article 311(2) of the LOSC which pertains to *sui generis* straits. Furthermore, Caminos and Cogliati-Bantz are rather supportive of a liberal inter-

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35 López Martín, *op. cit.*, p. 80.
36 See *infra* section 2.3 of Part I.
37 The term *dead-end straits* is widely used for referring to Article 45(1)(b)-type of straits. See also e.g. W. L. Schachte Jr, J. P. A. Bernhardt. International Straits and Navigational Freedoms. – 33 Virginia Journal of International Law 1992–1993, p. 534.
38 López Martín, *op. cit.*, p. 100. For critique on this interpretation, see *infra* section 4.1 of chapter 1 in Part III.
39 H. Caminos, V. P. Cogliati-Bantz. The Legal Regime of Straits: Contemporary Challenges and Solutions. Cambridge: Cambridge University Press 2014, p. 208.
40 Ibid, pp. 71–72.
41 Ibid, p. 46.
42 Ibid, p. 54.
43 Ibid, p. 42.
44 Ibid, pp. 184–188.
45 Ibid, pp. 65–66.
46 Ibid, pp. 107–108.

pretation of Article 234 of the LOSC pertaining potentially to international straits that are wholly or partly located in ice-covered areas and covered with ice for most of the year (hereinafter *ice-covered straits*). This is subject to further discussion below.[47]

Lewis Alexander's list comprises the first seven of the above-mentioned categories of straits (thus excluding *sui generis* straits).[48] While Caminos and Cogliati-Bantz approach Article 35(c) of the LOSC traditionally and argue for a closed list of straits (the Danish Straits, the Åland Strait, the Strait of Magellan and the Turkish Straits (Bosporus and the Dardanelles)),[49] Alexander does not wholly share this approach. Alexander notes that in addition to the Turkish and Danish straits, the "[t]wo other straits that might conceivably be affected by the article are Gibraltar and Tiran."[50] Alexander substantiates this claim by examining the relevant treaties that regulate passage in these straits. This is noteworthy because very few authors who have interpreted Article 35(c) of the LOSC have departed from the generally accepted list of the above-mentioned straits falling under its scope.[51] Thus, it seems that in Alexander's view, the list of Article 35(c)-straits has not been written in stone.

Other two authors related to the United States Government, William Schachte Jr and Peter Bernhardt, provide a closed list of legal categories of straits which includes the above-referred first six types of straits.[52] Unlike Alexander's categories of straits, Schachte Jr and Bernhardt omit (in addition to the *sui generis* straits) straits comprising long-standing internal waters (Article 35(a)) from their list. Yet Alexander, Schachte Jr and Bernhardt all consider straits in archipelagic waters as a distinct category of straits, despite the fact that this type of straits is not included in Part III of the LOSC.

Analogously to Schachte Jr and Bernhardt, Erik Franckx makes reference to all of the above-listed first six categories of straits (incl. straits in the archipelagic waters) and not to straits comprising long-standing internal waters (Article 35(a)) and *sui generis* straits (Article 311(2)).[53] Franckx refers to straits with a route through the high seas or an EEZ that is not of similar convenience (Article 36 to the contrary) as a distinct category of straits. Such a classification is not clearly provided for in the text of the LOSC. Franckx infers from Article 36 of the LOSC on straits that include an EEZ or the high seas corridor that if the EEZ or the high seas corridor is not of similar convenience to an ordinary route through the high seas or an EEZ, then the regime of transit passage should be

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[47] See *infra* section 2 of Part I.

[48] L. M. Alexander. International Straits. – H. B. Robertson, Jr. (ed). The Law of Naval Operations. Newport: Naval War College Press 1991, pp. 91, 95–96, 99–103.

[49] Caminos, Cogliati-Bantz, *op. cit*, p. 77. On this matter, see also *infra* section 3 of Part I.

[50] Alexander 1991, *op. cit.*, p. 101.

[51] Notably, Rothwell and Stephens also adopted a liberal approach towards Article 35(c) of the LOSC. See *supra* section 1.3 of Part I.

[52] Schachte Jr, Bernhardt, *op. cit.*, p. 538.

[53] E. Franckx. The U.S.S.R. Position on the Innocent Passage of Warships Through Foreign Territorial Waters. – 18 Journal of Maritime Law and Commerce 1987(1), pp. 34–35.

applicable.[54] However, it might not necessarily be the case that the right of transit passage applies in such a strait. It is equally possible that the regime of non-suspendable innocent passage applies in case the strait leads to the territorial sea of a foreign State or it is formed by an island of a strait State and its mainland coast. In any case, however, it would not necessarily form a distinct category of straits under the LOSC, since, as provided in Article 36, in such instance Part III of the LOSC would be applicable along with its conventional categories of straits.

Yoshifumi Tanaka also refers to straits in the archipelagic waters as a distinct category of straits.[55] Similarly to Franckx, and Schachte Jr and Bernhardt, Tanaka omits from his well-structured catalogue of the above-mentioned six categories of straits the Article 35(a)-type of straits comprising long-standing internal waters.[56] In a slightly different context, he nevertheless refers to Article 35(a), but not as providing for a distinct category of straits (similarly to Nandan and Anderson).[57]

1.5. Synopsis of the Traditional and Liberal Approach on the Classification of Straits

In light of the foregoing, legal scholars do not share a common view on the legal categories of straits. A uniform list of types of straits is thus lacking. In some respects, this is *prima facie* a theoretical problem (e.g. whether straits in archipelagic waters constitute a distinct legal category of straits). Generally, however, this has significant practical implications for navigation. For example, the question about the existence of distinct types of so-called historic straits and straits comprising long-standing internal waters (Article 35(a)), as well as ice-covered straits (Article 234) lies at the heart of the dispute about passage rights in the Northeast Passage and Northwest Passage in the Arctic.

The above-referred authors expressly accept in unison only the following four types of straits:

1. Straits which link two parts of an EEZ or the high seas (Article 37);
2. Straits which are regulated by long-standing international conventions (Article 35(c));
3. Straits that are formed by an island of a strait State and its mainland coast (Article 38(1));
4. Straits that connect an EEZ or the high seas with the territorial sea of a foreign State (Article 45(1)(b)).

[54] Ibid, p. 35.

[55] Y. Tanaka. The International Law of the Sea. Cambridge: Cambridge University Press 2012, p. 97. Y. Tanaka. The International Law of the Sea. Cambridge: Cambridge University Press 2015, p. 98.

[56] Ibid.

[57] Tanaka 2012, *op. cit.*, pp. 97–98. Tanaka 2015, *op. cit.*, p. 99.

These four types of straits (in combination with the obvious legal category of straits that are not used for international navigation) represent nearly half of the (potential) legal categories of straits discussed above. Therefore, it is difficult to agree with Donald Rothwell that the regime of international straits is settled.[58] As long as a consensus is lacking in the legal literature and presumably between States on the classification of straits under the LOSC, the legal regime of straits cannot be settled.

It would be reasonable, however, to add to the above-mentioned four types of straits another two legal categories that do not invoke much controversy in the legal literature. First, straits that include an EEZ or a high seas corridor (Article 36) are recognised almost unanimously as a distinct category of straits. Only Jon Van Dyke does not expressly mention this type of straits as a distinct legal category, but this may be explained by the fact that he left his list open-ended. Erik Franckx, on the other hand, appeared to interpret Article 36 of the LOSC somewhat differently from the rest of the authors; but in any case, he does not deny the existence of a distinct legal category of straits under the said provision.

Likewise, it appears that there is no substantial disagreement over the existence of a particular type of straits located in the archipelagic waters. Although the representatives of the traditional approach avoid referring to the Article 53-type of straits explicitly in their catalogues as a distinct legal category of straits, they have either left the list open (Van Dyke) or closely associated straits in the archipelagic waters with Part III of the LOSC on international straits (Nandan and Anderson, Rothwell and Stephens, Churchill and Lowe). The inclusion of straits in the archipelagic waters into the catalogue of legal categories of straits follows a liberal approach, since Article 53 is placed in Part IV of the LOSC. Part III of the LOSC on the legal framework of straits does not include any reference to straits in the archipelagic waters.

In this regard, Jia has recently commented on the appropriateness of recognising straits in the archipelagic waters as a distinct legal category of straits. In his review of Caminos' and Cogliati-Bantz's above-referred monograph on the legal regime of straits, Jia finds that

> "The sections on the regime of archipelagic waters (168–205) are interesting additions to a standard account of the regime of international straits, even though it may be wondered to what extent the regime of archipelagic sea lanes passage, provided under Part IV of [the LOSC], is similar to that of Part III (185). The similarity of these two regimes would readily be acknowledged, were it referred to the, more or less, similar language used in expressing the respective rights of passage and overflight. However there is perhaps one distinction that should be drawn between them. The archipelagic sea lanes run along normal routes of passage or overflight (Article 53 (4), [LOSC]), which are defined by reference to

[58] D. R. Rothwell. International Straits. – D. R. Rothwell, A. G. Oude Elferink, K. N. Scott, T. Stephens (eds). The Oxford Handbook of the Law of the Sea. Oxford: Oxford University Press 2015, p. 133.

> continuous axis lines (Article 53 (5)). In contrast, international straits, in the sense of Part III, are natural waterways, each being a geographical unit. They are not readily assimilated to such 'artificial' waterways as navigational routes which are, at most, 'composite' straits. Examples similar to archipelagic sea lanes can perhaps be found in singular cases of composite straits, such as the Northwest Passage off the Canadian coast in the Arctic. There is reason to view that Passage as a combination of straits that mirrors a route formed by archipelagic sea lanes."[59]

Thus, Jia appears to relate the rationale behind recognising straits in the archipelagic waters as a distinct category of straits with the existence of such 'composite' straits which bear resemblance to the archipelagic sea lanes due to their character as prolonged and continuous waterways. Yet it is questionable whether this relevant. Rather, the fundamental problem here appears to be the legal definition of an international strait. This term has not been defined in legal instruments, including the LOSC.

However, the criteria of an international strait (as put forward above)[60] are met with regard to a strait in the archipelagic waters if its width is less than 24 miles as measured from coast to coast and it is used for international navigation. Straits in the archipelagic waters maintain their characteristics and function as straits. Article 53 of the LOSC merely provides a distinct legal regime that exempts them from the scope of transit and non-suspendable innocent passage under Part III of the LOSC.[61] Thus, in the context of straits, Article 53 of the LOSC belongs to the group of provisions comprised of Articles 35(a–c) and 36 which provide exceptions to the transit and non-suspendable innocent passage regimes. Arguably, it would have been appropriate for the drafters of the LOSC to also express this in section 1 of Part III of the LOSC in view of ensuring coherence and clarity in respect to the legal framework on straits.

It also follows from the systematic interpretation of the LOSC that another legally relevant category of straits should be recognised. This category comprises non-international straits located in territorial sea in respect of which none of the legal regimes of international straits applies. Therefore, the ordinary regime of suspendable innocent passage applies (Article 17) in such straits. In practice, such non-international straits can include e.g. straits which connect an EEZ or the high seas with the territorial sea of one of its strait States (straits which do not meet the condition of *a foreign State* as stipulated in Article 45(1)(b)).[62] Such Article 17-type of straits appear to form a distinct legal cate-

[59] B. B. Jia. The Legal Regime of Straits: Contemporary Challenges and Solutions. By Hugo Caminos & Vincent P. Cogliati-Bantz. – 85 The British Yearbook of International Law 2015(1), p. 184.

[60] *Supra* section 1.1 of Part I.

[61] For the differences between the archipelagic sea lanes passage and transit passage, see e.g. Klein, *op. cit.*, pp. 34, 36. See also Oxman, *op. cit.*, p. 405. The characteristics of the transit and non-suspendable innocent passage are discussed in *supra* section 1.1 of Part I.

[62] For a discussion on the implications of the wording of Article 45(1)(b) of the LOSC in the context of the Article 17-category of straits, see *infra* section 4.1 of chapter 1 in Part III.

gory of non-international straits, albeit none of the above-referred authors has apparently expressly acknowledged this. The lack of legal debate on this matter may be explained by the fact that, in practice, this is a relatively insignificant legal category of straits similarly to such straits which are not used for international navigation.

However, there are significant disagreements over the existence of the so-called historic straits and straits comprising long-standing internal waters (Article 35(a)), ice-covered straits (Article 234) and *sui generis* straits (Article 311(2)). In the legal literature, there are clear discrepancies between the views of the representatives of the traditional and liberal approach to these types of straits. Thus, the principal difference between the traditional and liberal approaches ultimately rests on the (non-)recognition of only a few distinct legal categories of straits. Yet in practice, this has significant implications for the passage rights of foreign ships and aircraft in and over straits. Moreover, even the liberal authors, who do not limit themselves only to Part III of the LOSC when classifying straits, are far from sharing a mutual view on the existence of these types of straits.

While most of the authors confirm the existence of a distinct legal category of straits in the archipelagic waters under Part IV of the LOSC, it is not so common for them to agree with the existence of potentially another two legal categories of straits, i.e. Article 234 and 311(2)-types of straits, which are likewise founded on such LOSC provisions that fall outside of Part III of the LOSC. Therefore, these two potentially distinct categories of straits in addition to Article 35(a)-type of straits will be subjected to further scrutiny.

2. The Legal Regimes of Historic Straits, Ice-Covered Straits and *Sui Generis* Straits

2.1. Historic Straits: Interpretation of Article 35(a) of the LOSC

Much less than half of the above-mentioned authors refer to Article 35(a) of the LOSC as the legal basis for a distinct category of straits. Yet Article 35(a) in Part III of the LOSC and its importance for the legal regime of straits stands out even under a traditional reading of the LOSC. The poor record of reference to Article 35(a) may be due to its sophisticated wording which veils its scope and makes its significance for the legal regime of straits difficult to understand.

The use of terms in Article 35(a) of the LOSC has also warranted different interpretations. It has been interpreted broadly as well as restrictively. Under its broad interpretation one departs from the ordinary meaning of its terms, whereas this is not the case under the literal interpretation.

Article 35(a) of the LOSC may potentially embrace two categories of straits that do not fall under the LOSC legal framework on international straits. Pursuant to the broad interpretation, the first category of straits included in this provision may be straits comprising internal waters which have historically been

considered as such not under a long-standing convention (Article 35(c) of the LOSC), but instead, for example, on the basis of the concept of historic bay or, more generally, historic waters. Authors who support the existence of such a distinct category of straits include Jia and López Martín.

Jia, for example, refers to the Strait of Juan de Fuca, Hudson Strait and the Northeast Passage as examples of potential historic straits.[63] He argues that historic straits occur as integral parts of historic bays.[64]

Similarly, López Martín has limited the application of Article 35(a) of the LOSC only to such straits that have always been part of internal waters on the basis of historic entitlements. Thus, she argues that

> "There are straits which are formed by internal waters which have always been internal waters. This category of straits remains outside the scope of application of Part III according to article 35 a). /.../
>
> When do such circumstances arise? When can we speak of internal waters which have not arisen as a consequence of the establishment of a straight baseline in accordance with the method of article 7? This possibility that a strait might include internal waters which have always been of this type, that is to say, they have not been transformed into internal waters as a consequence of the establishment of a straight baseline, may occur, as pointed out by D. Pharand, as a consequence of the existence of *historic entitlements*. This would involve the hypothesis of historic waters which would create a type of 'historic straits' similar to the 'historic bays' referred to in article 10.6 of the Convention.
>
> Practice provides some examples of historic bays which are fully recognized, such as Chesapeake Bay, Delaware Bay and the Gulf of Fonseca. However, the situation differs as regards the existence of historic internal waters in straits. Except for *Indreleia* in Norway, there is no generalised recognition of any other strait which includes historic waters."[65]

Such interpretations by Jia and López Martín of Article 35(a) of the LOSC do not well coincide with the provision's literal or teleological meaning.[66] First, it is misleading to adopt the ambiguous temporal dimension "always (been part of internal waters)" instead of the one provided in Article 35(a) of the LOSC itself, according to which Part III of the LOSC does not affect any areas of internal waters within a strait that had been considered as such prior to the establishment of straight baselines. It is also unnecessary to relate Article 35(a) of the LOSC only to another ambiguous term "historic entitlements" as Article 35(a) of the LOSC encompasses a somewhat more clear-cut scope of application.

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63 Jia 1998, *op. cit.*, p. 75.

64 Ibid, pp. 75–77.

65 López Martín, *op. cit.*, pp. 69–70.

66 The literal and teleological interpretation methods are referred to in Article 31 of the 1969 Vienna Convention in the following terms: „A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." Vienna Convention on the Law of Treaties. Vienna 23.05.1969, e.i.f. 27.01.1980.

In addition, the LOSC does not refer to the term "historic straits" in Article 35(a) as a distinct category of straits. However, Article 35(a) of the LOSC may embrace in some cases also the concept of historic waters or historic bay which may include, as Jia notes, so-called historic straits. Yet, as the LOSC Annex VII Tribunal has observed, historic waters may refer to an exceptional title over either the internal waters or territorial sea.[67] Hence, so-called historic straits may not necessarily fall under Article 35(a) of the LOSC since it refers only to internal waters, whereas historic straits may also comprise the territorial sea.

If recognised, the concept of historic straits would be a controversial distinct category of straits, since it would not necessarily follow the categories of straits as provided in Part III of the LOSC. This is primarily due to the fact that, as examined above, historic straits may not fall under the terms of Article 35(a) of the LOSC. In this case, such a distinct category of straits could find its legal basis only from general international law. However, in this context Caminos and Cogliati-Bantz have come to the conclusion that "Because the [LOSC] regulates the regime of straits used for international navigation, the last preambular paragraph referring to rules of general international law is inapplicable."[68] Similarly, the LOSC Annex VII Tribunal has emphasised that the LOSC is a package deal and in this regard stated that

> "In the Tribunal's view, the prohibition on reservations is informative of the Convention's approach to historic rights. It is simply inconceivable that the drafters of the Convention could have gone to such lengths to forge a consensus text and to prohibit any but a few express reservations while, at the same time, anticipating that the resulting Convention would be subordinate to broad claims of historic rights."[69]

Therefore, it should be understood that the so-called historic straits do not form a distinct and, legally speaking, ambiguous category of straits, but instead are part of the category of straits comprising long-standing internal waters on the condition that they meet the criteria of Article 35(a) of the LOSC.

In case a particular so-called historic strait does not satisfy the criteria of Article 35(a) of the LOSC, then it may form an exception to the applicability of the transit or non-suspendable innocent passage regime, but only when its legal regime is in conformity with Article 311(2) of the LOSC. The LOSC Annex VII Tribunal has stated that "this provision applies equally to the interaction of the Convention with other norms of international law, such as historic rights, that do not take the form of an agreement".[70] This means that the so-called historic strait's particular legal regime needs to be more liberal or at least as liberal in comparison to the one that would otherwise be applicable to it under Part III of the LOSC.

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67 South China Sea Arbitration (the Philippines v. China). Award of the LOSC Annex VII Tribunal, 12.07.2016, para 225.

68 Caminos, Cogliati-Bantz, *op. cit.*, p. 75.

69 South China Sea Arbitration, *op. cit.*, para 254.

70 Ibid, para 235.

In practice, the occurrence of such Article 311(2)-type of so-called historic straits is unlikely. In general, States invoke the applicability of the concept of historic straits for restricting the passage rights to foreign ships and aircraft that would otherwise enjoy it under Part III of the LOSC. Nevertheless, in case any so-called historic strait not falling under the Article 35(a)-exception should meet the conditions of Article 311(2) of the LOSC, it would consequently fall under the potentially distinct category of *sui generis* straits.[71]

If the so-called historic strait's legal regime does not meet either the criteria of Articles 35(a) nor 311(2) of the LOSC, then, depending on the particular characteristics of the strait, one of the other legal categories of straits applies to it. This follows directly from the ordinary meaning of the terms of the said provisions. According to Article 35(a) of the LOSC the right of transit passage or non-suspendable innocent passage exists in these kinds of internal waters, including straits where the establishment of a straight baseline has the effect of enclosing as internal waters areas which had not previously been considered as such and which also do not meet the criteria of *sui generis* straits (Article 311(2)).

Pursuant to its ordinary meaning, Article 35(a) of the LOSC unequivocally encompasses straits that have been enclosed by a straight baseline, as a result of which the strait includes internal waters which, however, were also internal waters prior to the drawing of the straight baseline(s). Article 35(a)-type of straits may be referred to as straits comprising long-standing internal waters. In this context, the notion "long-standing internal waters" is a euphemism. Since this criterion, similarly to Article 35(c) of the LOSC (on straits which are regulated by long-standing international conventions), creates a direct link with previous legal instruments applicable to a particular maritime area, the term *long-standing* as used in this euphemism serves to underline the similarities between the two categories of straits and assist in grasping its sophisticated wording and meaning.

The criterion "not previously been considered as such" has also caused some confusion in the legal literature about its actual meaning. In some coastal States, e.g. in Norway and Finland, the method of drawing straight baselines was used prior to its first formulation in an international treaty, the 1958 Convention on the Territorial Sea and the Contiguous Zone.[72] Subsequent to the International Court of Justice's (hereinafter *ICJ*) legitimisation of Norway's use of straight baselines in its 1951 judgment,[73] Finland established straight baselines under its 1956 Act on the Delimitation of Territorial Waters of Finland.[74]

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71 On *sui generis* straits see *infra* section 2.3 of Part I.

72 Convention on the Territorial Sea and the Contiguous Zone. Geneva 29.04.1958, e.i.f. 10.09.1964.

73 Fisheries case (United Kingdom v. Norway), Judgment, I.C.J. Reports 1951, pp. 131–132.

74 Laki Suomen aluevesien rajoista (Act on the Delimitation of Territorial Waters of Finland). Adopted 18.08.1956, e.i.f. 30.07.1995 (as amended by Act No 144/1965, Act

Pirjo Kleemola-Juntunen has found that as the exception provided in Article 35(a) of the LOSC was incorporated into the LOSC from Article 5(2) of the 1958 Convention on the Territorial Sea and the Contiguous Zone, the time frame "not previously been considered as such" should therefore be understood as referring to the 1958 Convention.[75] Thus, following this reasoning, the passages through e.g. the Finnish Archipelago Sea are not international straits in terms of Article 35(a) of the LOSC. Instead, under the LOSC as well as the domestic law of Finland, the waters of the Archipelago Sea are internal waters since the Finnish system of straight baselines was established prior to the 1958 Convention. Consequently, the passages through the Archipelago Sea may be regarded as so-called internal straits through which foreign vessels cannot exercise innocent or transit passage. Jia has made an analogous claim in respect to the Canadian straight baselines around its Arctic archipelago, as a consequence of which he deems the Article 35(a)-exception applicable also to the Northwest Passage.[76]

As will be demonstrated subsequently in the example of the Estonian Sea of Straits,[77] the question of whether excluding the right of innocent or transit passage *inter alia* in the Finnish Archipelago Sea is slightly more complex than merely assessing whether the system of straight baselines was first established prior to the 1958 Convention. In the view of the present author, Kleemola-Juntunen's and Jia's interpretations of Article 35(a) of the LOSC depart from the wording of the said provision. They essentially create criteria for its application that are different from the one provided in the Convention itself. Under their interpretation Article 35(a) of the LOSC would also embrace such straits the waters of which were not internal prior to the first drawing of the straight baseline(s) by the strait State.

The Virginia Commentary refers to the exception provided in Article 35(a) of the LOSC in following terms, "The exception is internal waters "which had not previously been considered as such" before the establishment of a straight baseline "in accordance with the method set forth in Article 7.""[78] Thus, as Caminos and Cogliati-Bantz point out, Article 35(a) of the LOSC means that any existing and future area of internal waters within a strait will be affected by the legal framework applicable to international straits under Part III of the LOSC if that particular area was not part of the internal waters of the coastal State prior to the establishment of straight baselines.[79] Similarly, Nandan and

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No 332/1966 and Act No 981/1995). Accessible: http://www.finlex.fi/en/laki/kaannokset/1956/en19560463.pdf (14.09.2016).

75 P. Kleemola-Juntunen. Passage Rights in International Law: A Case Study of the Territorial Waters of the Åland Islands. Rovaniemi: Lapland University Press 2014, p. 212.

76 Jia 2013, *op. cit.*, p. 125.

77 See *infra* section 4 of Part V.

78 S. N. Nandan, S. Rosenne (eds). United Nations Convention on the Law of the Sea 1982: A Commentary, vol. II. Dordrecht/Boston/London: Martinus Nijhoff 2003, p. 307.

79 See Caminos, Cogliati-Bantz, *op. cit.*, pp. 66–67.

Anderson note that "sub-paragraph (*a*) means that the rules about passage in Part III do not affect any areas of internal waters within a strait, unless those areas become internal waters as a result of the drawing of straight baselines in accordance with the method set forth in Article 7."[80]

This follows the ordinary meaning of the terms of Article 35(a) of the LOSC but also its teleological meaning. It is also in accordance with the aim of the drafters of an analogous clause stipulated in Article 5(2) of the 1958 Convention on the Territorial Sea and the Contiguous Zone.[81] Likewise, it follows the drafting history of Article 35(a) of the LOSC as its drafters' intention was to include "any areas of internal waters which had been considered as part of the high seas or territorial sea prior to the drawing of straight baselines" under the legal framework of Part III of the LOSC on international straits.[82] In particular, if a strait State should include a strait in which the right of innocent (or transit) passage has been applicable within its system of straight baselines, it would not deprive the foreign ships (and aircraft) from the right of innocent (or transit) passage in that particular strait.

This literal and teleological interpretation of Article 35(a) of the LOSC embraces many straits, not least in the Baltic Sea, which fall under the category of straits comprising long-standing internal waters. By contrast, under the historic straits-centred approach, López Martín argued that only the Norwegian Indreleia falls within the ambit of Article 35(a) of the LOSC.[83] As will be examined later in the study, at least two seas of straits in the Baltic Sea meet the criteria of Article 35(a) of the LOSC under its literal and teleological interpretation (or, likewise, under the above-referred interpretation of Jia and Kleemola-Juntunen) and in light of the 1938 Nordic Rules of Neutrality. These are the Estonian Sea of Straits and the Finnish Archipelago Sea (next to the Åland Strait) as well as potentially the Swedish Kalmarsund.[84]

Notably, Canada refers to the Northwest Passage and the Russian Federation refers to the Northern Sea Route as historic straits, their Arctic waters thus forming a part of so-called historic internal waters.[85] The legitimacy of these claims depend *a priori* on the applicability of the Article 35(a)-exception as interpreted above. However, the legal regime of the Northwest Passage and the Northern Sea Route exemplifies also how closely Article 35(a) of the LOSC may be intertwined with Article 234 of the LOSC. The Article 234-category of

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[80] Nandan, Anderson, *op. cit.*, p. 173.

[81] See Palmer Cundick, *op. cit.*, pp. 129–130. See also Jia 1998, *op. cit.*, pp. 8–9.

[82] Nandan, Anderson, *op. cit.*, p. 173.

[83] López Martín, *op. cit.*, p. 70. It should be noted, however, that in the 1951 Fisheries case, the ICJ rejected the view that Indreleia, a nearly 2000-km long navigational route in the Norwegian internal waters leading *inter alia* from the North Sea to the Barents Sea, is a strait. Fisheries case 1951, *op. cit.*, p. 132. On this matter, see e.g. C. R. Symmons. Historic Waters in the Law of the Sea: A Modern Re-Appraisal. Leiden, Boston: Martinus Nijhoff 2008, pp. 31, 33. See also Jia 2013, *op. cit.*, p. 130.

[84] See *infra* section 4 of Part V.

[85] The member States of the European Union as well as the United States have protested against these claims. See e.g. López Martín, *op. cit.*, pp. 70–71.

straits potentially provides the means for the strait States to prohibit or extensively restrict passage also in those Arctic straits which do not meet the criteria of Article 35(a) of the LOSC and consequently do not comprise long-standing internal waters. This necessitates next a scrutiny on the scope of Article 234 of the LOSC.

2.2. Ice-Covered Straits: Interpretation of Article 234 of the LOSC

Article 234 of the LOSC stipulates that coastal States have the right to adopt and enforce non-discriminatory laws and regulations for the prevention, reduction and control of marine pollution from vessels in ice-covered areas within the limits of the EEZ where particularly severe climatic conditions and the presence of ice covering the area for most of the year create obstructions or exceptional hazards to navigation; and pollution of the marine environment could cause major harm to or irreversible disturbance to the ecological balance. Such laws and regulations need to have due regard to navigation and the protection and preservation of the marine environment based on the best available scientific evidence.

Article 234 of the LOSC does not refer to straits. Neither does Part III of the LOSC on the legal regime of straits refer to Article 234. Therefore, under literal interpretation it is not clear whether strait States may adopt measures aimed against marine pollution in ice-covered straits. In this regard, Erik Jaap Molenaar maintains that

> "This raises the question whether within such straits Part III applies or, rather, the extensive coastal State powers pursuant to Article 234. The fact that Article 234 is placed in the separate section 8 of Part XII and does not refer to straits, seem to support the view of 'dominance' of Article 234 over Part III. Supporting the opposite view would in many geographical constellations lead to the illogical result of a corridor of less extensive coastal (strait) State jurisdiction connecting areas with more extensive coastal State jurisdiction. The exceptional circumstances in ice-covered areas would also justify a regime which interferes more with navigation than under Part III of the LOSC, provided this is necessary for the safety of navigation or the protection of the marine environment."[86]

In essence, Molenaar thus argues for a distinct legal regime under Article 234 of the LOSC for ice-covered straits. Molenaar adds that the situation would be different if the regulatory content of Article 234 of the LOSC would have been inserted during the drafting of the LOSC into its Article 233, then Part III of the LOSC would have prevailed.[87] Analogously, Caminos and Cogliati-Bantz argue that "Because Article 233 does not except section 8, it should be concluded that

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[86] E. J. Molenaar. Coastal State Jurisdiction over Vessel-Source Pollution. The Hague/ Boston/London: Kluwer 1998, pp. 289–290.

[87] Ibid, p. 289.

section 8 indeed may affect the legal regime of straits in ice-covered areas."[88] This view is also shared by Donat Pharand.[89] Caminos and Cogliati-Bantz claim that under Article 234 strait States may adopt unilateral measures also in international straits in derogation from both Part II and Part III.[90] Jia agrees, "Article 234 can certainly be applied to straits subject to Part III of the LOS Convention."[91]

Indeed, Article 233 of the LOSC excludes expressly the possibility that LOSC sections 5, 6 and 7 (on international rules and national legislation to prevent, reduce and control pollution of the marine environment as well as on enforcement and safeguards) would in any way affect the legal regime of international straits. Thus, it does not at least directly rule out the possibility that section 8 (Article 234) of the LOSC on ice-covered areas could affect the legal regime of straits as stipulated in Part III of the LOSC.

Similarly to most authors Shabtai Rosenne and Alexander Yankov find that Article 234 of the LOSC concerns all waters landward of the outer limits of an EEZ,[92] but they do not take a clear position on its impact on the legal regime of straits.[93] By contrast, McRae and Goundrey as well as Boyle interpret the scope of Article 234 narrowly and argue that it is only applicable in an EEZ, not in the internal waters or territorial sea, the legal regime of which thus also sets the limits to the extent of the unilateral measures that may be taken by the coastal State under Article 234 in its EEZ.[94]

McRae and Goundrey argue that the coastal State would not be entitled under Article 234 to *inter alia* impose requirements on foreign ships having the effect of impairing or denying the right of innocent passage (and thus presumably also the right of transit passage).[95] Similarly, Douglas Brubaker maintains:

> „Although controversial, theoretically it seems probable that the international straits regime would prevail over the ice-covered waters regime. This is chiefly because it seems unlikely that the United States, the principal opponent to the

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88 Caminos, Cogliati-Bantz, *op. cit.*, pp. 414–415.

89 D. Pharand. The Arctic Waters and the Northwest Passage: A Final Revisit. – 38 Ocean Development & International Law 2007(3), pp. 46–47.

90 Caminos, Cogliati-Bantz, *op. cit.*, p. 415.

91 Jia 2013, *op. cit.*, p. 134.

92 S. Rosenne, A. Yankov. United Nations Convention on the Law of the Sea: A Commentary, vol. IV. Dordrecht/Boston/London: Martinus Nijhoff 2002, p. 397. See also R. Douglas Brubaker. Regulation of navigation and vessel-source pollution in the Northern Sea Route: Article 234 and state practice. – D. Vidas (ed). Protecting the polar marine environment: Law and policy for pollution prevention. Cambridge: Cambridge University Press 2004, p. 227. See also Pharand, *op. cit.*, p. 47.

93 See Rosenne, Yankov, *op. cit.*, pp. 392–398.

94 D. M. McRae, D. J. Goundrey. Environmental Jurisdiction in Arctic Waters: The Extent of Article 234. – 16 University of British Columbia Law Review 1982(2), pp. 221, 227. A. E. Boyle. Marine Pollution under the Law of the Sea Convention. – 79 The American Journal of International Law 1985, p. 361.

95 McRae, Goundrey, *op. cit.*, pp. 221, 227.

> Soviet Union and Canada in the negotiations leading to Article 234, would allow any interference with the international straits regime.“[96]

Notably, for aircraft and submarines, the ice-cover does not constitute a circumstance that would have a significant practical effect on the straits regime. In particular, Schachte Jr and Bernhardt claim that "In the United States' view, it is immaterial whether ice covers such a [Article 37] strait during most or all of the year, because the right of transit passage covers overflight as well as submerged transit."[97]

In light of the diverging views and State practice it is not clear whether Article 234 prevails over the legal regime of straits stipulated in Part III of the LOSC. Hence, it is uncertain whether there exists a new category of straits which are located in ice-covered areas. Article 234 of the LOSC in its scope as well as in wording is a vaguely drafted provision which regulates ice-covered areas within the limits of an EEZ. Nevertheless, while Canada and the Russian Federation have already applied it in respect of navigation transiting straits that *inter alia* fall under the territorial sea,[98] there have been recently calls for such application of Article 234 of the LOSC also in the United States which has rather asserted the prevalence of Part III of the LOSC over Article 234.[99]

Even if a particular strait State should adopt the liberal interpretation of Article 234 of the LOSC, it must strictly distinguish between those vessels or aircraft that are owned or operated by a State and those that are not. Pursuant to Article 236 the LOSC provisions on the protection and preservation of the marine environment (incl. Art 234) do not apply to any warship, naval auxiliary, other vessels or aircraft owned or operated by a State and used, for the time being, only on government non-commercial service. Such vessels and aircraft have to follow the strait State's domestic legal requirements for exercising passage rights adopted under Article 234 of the LOSC only so far as is reasonable and practicable. While Part III of the LOSC provides generally uniform straits regimes for all ships and, where applicable, aircraft, the ice-covered straits would consequently embrace under Article 234 of the LOSC a very different approach, distinguishing between the applicable regimes of passage depending on whether a particular vessel or aircraft is owned or operated by a State.

The broad wording of Article 234 would provide a strait State in ice-covered areas with extensive means for restricting passage in international straits under its domestic law as long as in doing so the strait State generally gives 'due regard to navigation'. Article 234 of the LOSC aims at 'preventing, reducing and controlling marine pollution from vessels' which may be interpreted by the

[96] R. Douglas Brubaker. Straits in the Russian Arctic. – 32 Ocean Development & International Law 2001, p. 269.
[97] Schachte Jr, Bernhardt, *op. cit.*, p. 538.
[98] Douglas Brubaker, *op. cit.*, pp. 272–273, 276–277.
[99] S. P. Fields. Article 234 of the United Nations Convention on the Law of the Sea: The Overlooked Linchpin for Achieving Safety and Security in the U.S. Arctic? – 7 Harvard National Security Journal 2016(1), pp. 75–76.

strait State concerned in a manner which results essentially in the denial of passage rights in international straits. Such measures, irrespective of the question of their legitimacy under *inter alia* Article 35(a) of the LOSC, may in State practice include blanket fees for transiting the straits and mandatory ice-breaker pilotage or leading.[100]

Since it is practically impossible to objectively determine the threshold that a strait State needs to reach under Article 234 of the LOSC for meeting the criterion of giving 'due regard to navigation', this provision, if accepted as applicable to straits, would effectively provide the strait State with nearly unlimited discretion for regulating passage rights in a strait. Caminos and Cogliati-Bantz, for example, come to the conclusion that "If it is established that the measure, when adopted in a strait, complies with the due regard requirement, the best interpretation is that it does not hamper or impede transit passage under Part III."[101] However, this statement about the need to preserve the right of transit passage in international straits that fall potentially under Article 234 is somewhat self-defeating if one accepts the strait States' near-unfettered discretion as expressed in the mere 'due regard' criterion for adopting unilateral measures under Article 234 of the LOSC which severely hinder or prohibit passage in international straits. Similarly, McRae and Goundrey argue that

> "Beyond stating that as a minimum Article 234 contemplates that there will be some navigation in ice-covered areas it is difficult to ascribe much precision to the term "due regard to navigation". It would be going too far to suggest that the coastal state must have due regard to the usual rules relating to navigation within the economic zone, for this would reintroduce the standards from which Article 234 purports to derogate."[102]

The existence of a distinct category of ice-covered straits under Article 234 is thus doubtful. Although the opposite interpretation of the said vaguely worded provision is not ruled out, it is a very liberal one in the context of the straits regime. The extensive powers that would be attributed to a strait State in case the general norm of Article 234 would overshadow Part III of the LOSC would have necessitated, given the sensitivity of the straits debate in the drafting of the LOSC, at least a somewhat more clear recognition of that in the text of the LOSC.

The rejection of the prevalence of Article 234 over Part III of the LOSC does not mean that the coastal States bordering ice-covered straits would not have the right to adopt measures aimed at countering the hazards stemming from navigation in these particularly sensitive maritime areas. According to Article 42(1) of Part III of the LOSC the concerned strait States may adopt measures *inter alia*

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[100] See e.g. Douglas Brubaker 2004, *op. cit.*, pp. 228–229. See also E. Franckx. The Legal Regime of Navigation in the Russian Arctic. – 18 Journal of Transnational Law & Policy 2009(2), pp. 334–335, 340.

[101] Caminos, Cogliati-Bantz, *op. cit.*, p. 420.

[102] McRae, Goundrey, *op. cit.*, p. 221.

for the prevention, reduction and control of pollution, by giving effect to applicable international regulations regarding the discharge of oil, oily wastes and other noxious substances in the strait. The main difference is that such laws could not be adopted unilaterally subject only to the discretion of the strait State, but instead „by giving effect to applicable international regulations", which *prima facie* are adopted by the International Maritime Organization. Pursuant to Article 42(2) of the LOSC such laws and regulations cannot discriminate in form or in fact among foreign ships or in their application have the practical effect of denying, hampering or impairing the right of transit passage. Even greater means are available for the strait State in regards to the non-suspendable innocent passage in international straits pursuant to Article 21(1)-(2) of the LOSC.

In addition to Article 234 on ice-covered straits as well as Article 53 on straits in the archipelagic waters, there is another LOSC provision which provides potentially for a distinct legal regime for a strait irrespective of that otherwise applicable to it under Part III of the LOSC. This third potential legal category of straits belonging to the group of such strait regimes which are not integrated into Part III of the LOSC is the Article 311(2)-type of straits. However, in sharp contrast to Article 234 the straits falling under the legal regime of Article 311(2) of the LOSC can only provide for a more liberal navigational regime in and over straits as compared to the one which would otherwise regulate its passage regime under Part III of the LOSC.

2.3. Sui Generis Straits: Interpretation of Article 311(2) of the LOSC

Part III of the LOSC does not make any references to Article 311(2). It is a general provision that enables to determine the legality of treaties concluded between States on matters that are regulated under the LOSC. No doubt, the legal regime of straits is one of such fields among numerous others. Article 311(2) of the LOSC may thus be considered relevant for interpreting the legal regimes of straits under Part III of the LOSC.

Article 311(2) of the LOSC facilitates inter-linkages between the different categories of straits as regulated under Part III of the LOSC. Thus, it clarifies the possibilities for States to change the legal regime applicable to a particular strait within the existing legal framework of the categories of straits under Part III of the LOSC. For example, strait States may conclude an agreement for limiting the width of the outer limits of their territorial sea in a particular strait to establish an EEZ or a high seas corridor in order to switch the legal regime otherwise applicable to that strait (either transit or non-suspendable innocent passage) with the one provided in Article 36 of the LOSC.[103]

However, it is not settled whether Article 311(2) of the LOSC also provides the legal basis for a distinct category of straits. If Article 311(2) of the LOSC

[103] For a case study on this in the example of the Viro Strait, see *infra* section 2 of chapter 2 in Part III.

has such potential, then it would essentially imply the existence of a *sui generis* category of straits, which is not expressly provided for in Part III of the LOSC. This creates a certain amount of instability for the Part III legal framework on straits.

Nevertheless, this concern is mitigated by the requirement of Article 311(2) of the LOSC according to which such *sui generis* strait regimes must be compatible with the LOSC. This means that for their legality, such legal regimes can only provide for more extensive passage rights to foreign States as compared to the conventional categories of straits that would otherwise be applicable to a particular strait. Hence, the contracting States could adopt in and above their waters only a more liberal regime of passage in line with the underlying principle of the freedom of the seas.

Molenaar has referred to the following straits that are regulated by a specific treaty other than the LOSC that do not fall under the Article 35(c)-exception: the Beagle Channel, the Strait of Gibraltar, the Straits of Malacca and Singapore and the Strait of Tiran.[104] In addition, the Torres Strait, similarly to the Strait of Tiran, is also subject to a treaty concluded in the end of the 1970s and hence they are generally not considered as straits in which passage is regulated by a long-standing convention in terms of Article 35(c) of the LOSC, since, these treaties were, above all, concluded shortly before the adoption of the LOSC in 1982 and are thus not long-standing.[105] The same applies to the 1984 treaty[106] regulating passage in the Beagle Channel between Argentina and Chile[107] as well as to the depth separation scheme that was adopted with regards to the straits of Malacca and Singapore in 1976,[108] albeit there have also been no pretensions to the effect that these straits fall under the Article 35(c)-exception.

Molenaar's list is not presented in the context of Article 311(2) of the LOSC. It is doubtful whether all, if any, of the strait regimes mentioned by Molenaar fall under the scope of *sui generis* category of straits under Article 311(2) of the LOSC. Nonetheless, they are indicative for assessing the potential scope of the Article 311(2)-category of straits. For the purpose of examining the theoretical foundations of Article 311(2)-type of straits it suffices to establish that at least one of these strait regimes cannot be classified into any other categories of

[104] Molenaar, *op. cit.*, p. 307.

[105] H. Caminos. Categories of International Straits Excluded from the Transit Passage Regime under Part III of the United Nations Convention on the Law of the Sea. – T. M. Ndiaye, R. Wolfrum (eds). Law of the Sea, Environmental Law and Settlement of Disputes: Liber Amicorum Judge Thomas A. Mensah. Leiden: Martinus Nijhoff 2007, p. 587. Rothwell, Stephens 2016, *op. cit.*, p. 254. S. B. Kaye. The Torres Strait. The Hague: Martinus Nijhoff 1997, p. 82. See also Caminos, Cogliati-Bantz, *op. cit.*, p. 77. See also Nandan, Rosenne, *op. cit.*, p. 307.

[106] Treaty of Peace and Friendship between Chile and Argentina. Vatican City 29.11.1984, e.i.f. 02.05.1985. Accessible: http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/TREATIES/CHL-ARG1984PF.PDF (14.09.2016).

[107] Furthermore, Chile does not consider the Beagle Channel as an international strait. See Caminos, Cogliati-Bantz, *op. cit.*, p. 65.

[108] See Caminos, Cogliati-Bantz, *op. cit.*, pp. 391–392.

straits as established above.[109] In particular, in the legal literature it is suggested that the Strait of Tiran falls into the category of *sui generis* straits.[110]

The Strait of Tiran meets the requirements of Article 45(1)(b) of the LOSC as it connects EEZs in the Red Sea with the territorial sea of a non-riparian foreign State (Israel and Jordan). In particular, this provision (as incorporated from the 1958 Convention to the LOSC) was initially drafted to specifically address Israel's navigational concerns with the Strait of Tiran.[111]

However, the passage regime in the Strait of Tiran is partly regulated under Article 5(2) of the 1979 Peace Treaty between Egypt and Israel.[112] It stipulates that "The Parties consider the Strait of Tiran and the Gulf of Aqaba to be international waterways open to all nations for unimpeded and non-suspendable freedom of navigation and overflight. The parties will respect each other's right to navigation and overflight for access to either country through the Strait of Tiran and the Gulf of Aqaba." This provision is also included in Article 14(3) of the 1994 Peace Treaty between Israel and Jordan.[113]

This implies that Article 45(1)(b) of the LOSC is (currently) inapplicable in respect of the ships and aircraft of all States transiting this maritime area in the Egyptian, Israeli and Jordanian waters of the Gulf of Aqaba and Strait of Tiran due to the more liberal passage regime (which is thus in conformity with Article 311(2) of the LOSC) provided in the 1979 and 1994 peace treaties.[114] Only Saudi Arabia, the fourth coastal State of the Gulf of Aqaba, has not concluded a treaty with Israel that would provide for a similar passage regime in the Gulf of Aqaba and the Strait of Tiran.

The regime of passage as stipulated in the 1979 and 1994 peace treaties bears most resemblance to the transit passage regime. It guarantees in the Strait of Tiran and the Gulf of Aqaba freedom of navigation and overflight, which would otherwise be applicable under the transit passage regime (Article 38(2) of the LOSC). Yet the Strait of Tiran does not link two parts of an EEZ or the high seas (the precondition for the applicability of the regime of transit passage under Article 37 of the LOSC). In addition, it appears that the passage regime applicable to the Strait of Tiran and the Gulf of Aqaba under the said treaties does not coincide with the transit passage regime. The transit passage regime is not the same in all its aspects as that of the freedom of navigation and overflight applicable in the EEZ and in the high seas.[115]

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[109] See *supra* section 1.5 of Part I.

[110] Caminos, Cogliati-Bantz, *op. cit.*, pp. 107–108. López Martín, *op. cit.*, pp. 80–81.

[111] G. J. Mangone. Straits used for International Navigation. – 18 Ocean Development and International Law 1987(4), p. 404. Churchill, Lowe, *op. cit.*, p. 89.

[112] Peace Treaty between Israel and Egypt. Washington D.C. 26.03.1979, e.i.f. 26.03.1979. Accessible: http://www.mfa.gov.il/mfa/foreignpolicy/peace/guide/pages/israel-egypt%20peace%20treaty.aspx (14.09.2016).

[113] Treaty of Peace between the State of Israel and the Hashemite Kingdom of Jordan. Arava 26.10.1994, e.i.f. 10.11.1994. Accessible: http://www.mfa.gov.il/MFA/ForeignPolicy/Peace/Guide/Pages/Israel-Jordan%20Peace%20Treaty.aspx (14.09.2016).

[114] In addition, Israel is anyhow not a party to the LOSC.

[115] See generally on the regime of transit passage *supra* section 1.2 of Part I.

The freedom of navigation and overflight could potentially apply to the Strait of Tiran only under Article 36 of the LOSC when its straits States would establish a convenient EEZ corridor through the strait by limiting the maximum breadth of their territorial sea in this maritime area. The strait States have not done so, which is why the Article 36-category of straits is also not applicable to the Strait of Tiran.

In addition, the freedom of navigation and overflight as guaranteed in the Egyptian, Israeli and Jordanian waters is clearly not reconcilable with the regime of non-suspendable innocent passage under Article 38(1) of the LOSC (applicable to straits that are formed by an island of a strait State and its mainland coast) or the passage regime of non-international straits that fall into long-standing internal waters in terms of Article 35(a) of the LOSC. Evidently, the Strait of Tiran cannot be considered an ice-covered strait (Article 234 of the LOSC) or a strait located in the archipelagic waters (Article 53 of the LOSC).

Therefore, if one would exclude the category of *sui generis* straits (Article 311(2) of the LOSC), then the passage regime applicable to the Strait of Tiran under the 1979 and 1994 peace treaties could conceivably only fall to the Article 35(c)-category of straits that are regulated by long-standing international conventions. This is not ruled out since although the Strait of Tiran was not considered as such at the time of drafting the LOSC, it may by now potentially satisfy the criteria of Article 35(c) of the LOSC pursuant to the ordinary meaning of its terms due to the 1979 Peace Treaty. This is also suggested by Rothwell, Stephens and Alexander.[116] Indeed, it is not ruled out on the basis of the wording of Article 35(c) of the LOSC or its object and purpose that in case the regulation of passage in certain straits under a separate convention concluded prior to the LOSC stays in force for a long period of time, it may qualify under the Article 35(c)-exception in the future.

However, there is no indication to the effect that States (*prima facie* Egypt and Israel) consider the Strait of Tiran as an Article 35(c)-type of strait. Furthermore, even if the Strait of Tiran would be declared an Article 35(c)-type of strait in the future, it would still not settle the question about the legal category that was applicable to it from 1979 onwards. Clearly, at the time of signing the LOSC, the Strait of Tiran was not considered as a strait regulated by a long-standing treaty. Hence, the legal regime applicable to the Strait of Tiran demonstrates the existence of a *sui generis* category of straits under Article 311(2) of the LOSC.[117] Next, it is necessary to examine what are the primary legal instruments by which States may potentially change the legal category of a particular strait.

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[116] See *supra* section 1.1 and 1.2 of Part I.

[117] It is argued below that the Viro Strait in the Gulf of Finland may possibly have also been a *sui generis* type of strait from 1991 to 1994. See *infra* section 5.3 of Part IV.

3. The Determinants of the Legal Categories of Straits

In most cases, the legal category of a strait is not predetermined and there is considerable room of manoeuvre for the concerned States to change the applicable legal regime subject to their discretion. The principal legal instruments that determine the legal categories of straits are embodied in the afore-mentioned LOSC provisions on the various types of straits. In broad terms, such determinants include the following:

1. EEZ or the high seas at both ends of the strait (Article 37);
2. Non-strait-State's territorial sea to which the strait leads (Article 45(1)(b));
3. EEZ or high seas corridor through the strait (Article 36);
4. An island around which an alternative and convenient sea-route exists through the high seas or an EEZ by-passing the strait situated between that island and mainland coast (Article 38(1));
5. Archipelagic baselines (Article 47);
6. Straight baselines and long-standing internal waters comprising the strait (Article 35(a));
7. Long-standing treaties on straits (Article 35(c));
8. Non-long-standing treaties on straits compatible with the LOSC (Article 311(2));
9. Ice which covers the strait for most of the year (Article 234);[118]
10. Major geopolitical implications concerning the relevant coastal and maritime area.

Only two of these determinants are such that the concerned States have close to no influence over their presence. Such determinants are islands and ice (respectively, Articles 38(1) and 234 of the LOSC). The existence of naturally formed islands and ice in the relevant maritime area depends on nature and particularly on climate change. Thus, they are not constant. Rather, the two may be referred to as natural determinants, whereas the other eight are in essence man-made determinants.

States exercise considerable control over the man-made determinants. The man-made determinants may be categorised into four groups. First, geopolitical implications concerning the relevant coastal and maritime area form a distinct determinant. From the outset, it is the advent or loss of independence of a State or the change in title over sections of the relevant coastal and maritime area that may change the legal category of a strait under the LOSC or cause the termination of the legal status of a strait completely.[119] In this context, the concept of State continuity may also have a significant effect on the legal regime of straits as examined below.[120] In respect of the other man-made determinants, their effects on the categorisation of straits may be more nuanced.

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[118] If one considers ice-covered straits as a distinct category of straits.
[119] See also *infra* section 2.1 of chapter 2 in Part III.
[120] See *infra* e.g. Part V.

Straits in the internal waters and archipelagic waters that meet the criteria of Articles 35(a) and 47 of the LOSC are similar, since their common characteristics and also main determinants are baselines. A State exercises discretion over the establishment of straight or archipelagic baselines. If a State chooses to do so, the archipelagic or internal waters falling to the land-ward side of the baselines may include straits in which the passage rights may thus be regulated by the regimes of archipelagic sea lanes passage (Article 53 of the LOSC) or the domestic law of the strait State on its internal waters, in case the relevant maritime area was also considered internal waters prior to the establishment of straight baselines (Article 35(a) of the LOSC). On the other hand, in case the strait State chooses to maintain normal baselines, its strait(s) would fall under the other potentially applicable legal categories of straits. In both instances, it is mostly a matter of the strait State's domestic law whether the archipelagic or straight baselines are established and whether the internal waters falling to the land-ward side of the straight baselines either maintain their status as internal waters or are newly created as a result of drawing straight baselines.

A third group of man-made determinants for the legal categories of straits consists of treaties (Articles 35(c) and 311(2) of the LOSC). It is generally agreed that the criteria of Article 35(c) of the LOSC are met in the instances of the Danish Straits,[121] the Åland Strait,[122] the Strait of Magellan,[123] and the Turkish Straits (Bosporus and the Dardanelles).[124] Yet there also seems to be such international straits that may satisfy the criteria of Article 35(c) of the LOSC, but are not considered as straits falling under the exception provided in Article 35(c) of the LOSC in practice. Such treaties may be in force and they may at least partly regulate passage in a particular strait, but they are neverthe-

[121] United Nations. Division for Ocean Affairs and the Law of the Sea. United Nations Convention on the Law of the Sea: Declarations made upon signature, ratification, accession or succession or anytime thereafter. Denmark's declaration upon the ratification of the LOSC on November 16th, 2004. Ibid. – Sweden's declaration upon signing the LOSC on December 10th, 1982 and ratifying it on June 25th, 1996.

[122] Ibid. – Sweden. Ibid. – Finland's declaration upon signing the LOSC on December 10th, 1982 and ratifying it on June 21st, 1996. In drafting the LOSC, its Article 35(c) was commonly understood to also include the Åland Strait. See e.g. Rothwell 2015, *op. cit.*, p. 127. See also Denmark's Counter-Memorial in the Passage through the Great Belt Case (Finland v. Denmark) Copenhagen: Government of the Kingdom of Denmark 1992, pp. 238–239. Nevertheless, the US has not recognised the Åland Strait as an international strait regulated by a long-standing convention in terms of Article 35(c) of the LOSC. See R. W. Smith, J. Ashley Roach. Limits in the Seas, No. 112: United States Responses to Excessive National Maritime Claims. Washington D.C: US Department of State 1992, p. 67. See also Kleemola-Juntunen, *op. cit.*, p. 256.

[123] LOSC Declarations: Declarations made upon signature, ratification, accession or succession or anytime thereafter, *op. cit.* – Chile's declaration upon ratifying the LOSC on August 25th, 1997. Ibid. – Argentina's declaration upon ratifying the LOSC on December 1st, 1995.

[124] N. Ünlü. The Legal Regime of the Turkish Straits. Dordrecht: Martinus Nijhoff 2002, p. 54. See also Caminos, Cogliati-Bantz, *op. cit.*, p. 77. López Martín, *op. cit.*, p. 78.

less not considered by States, including its strait States, as falling under the Article 35(c)-exception.

In this regard, Article 35(c) of the LOSC appears not to require the strait State's and other States' subjective element on the applicability of such a convention to an international strait. The wording of Article 35(c) of the LOSC implies that in the presence of a long-standing convention it should regulate passage in an international strait *ipso facto*, i.e. on the condition that such an agreement: 1) is in force and; 2) regulates in whole or in part ...; 3)... passage specifically in such strait (*specifically relates to such a strait*).

However, it is noted in the legal literature that a well-established recognition by States is a necessary precondition for the applicability of Article 35(c) of the LOSC.[125] State practice seems to confirm that even if there is a long-standing treaty that satisfies the ordinary meaning of the terms of Article 35(c) of the LOSC, its applicability still depends on the intent of (strait) States. Thus, it is a matter of discretion for the strait States to invoke Article 35(c) of the LOSC as the exception to the applicability of the transit or non-suspendable innocent passage regimes.

In the instance of the Strait of Gibraltar, the States, including the strait States Spain, Morocco and the United Kingdom, have not recognised it as a strait falling under the exception stipulated in Article 35(c) of the LOSC due to the reason that the 1904 declaration between Great Britain and France[126] is not deemed as regulating passage in the strait.[127] Its Article 7 prohibited the erection of any fortifications or strategic works on a specific portion of the coast of Morocco in order to secure free passage in the Strait of Gibraltar.[128] Many scholars have maintained on this basis that a long-standing convention regulates passage in the Strait of Gibraltar.[129] It is also referred to in the 1958 United Nations Conference on the Law of the Sea Preparatory Document No. 11 as one of the five straits where the legal regime has already been regulated under a specific treaty.[130]

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[125] Caminos 2007, *op. cit.*, p. 583.

[126] Declaration between Great Britain and France respecting Egypt and Morocco. London 08.04.1904. Accessible: http://avalon.law.yale.edu/20th_century/entecord.asp (14.09.2016).

[127] Jia 1998, *op. cit.*, pp. 126–127.

[128] See further on Article 7, E. Brüel. International Straits. A Treatise on International Law, vol. II. Straits Comprised by Positive Regulations. London: Sweet & Maxwell 1947, pp. 149–156.

[129] See e.g. C. J. Colombos. International Law of the Sea. London: Longmans 1967, p. 220. McNees, *op. cit.*, p. 191. Palmer Cundick, *op. cit.*, pp. 126–127. Alexander also refers to this option: see Alexander 1991, *op. cit.*, p. 101. See also A. Uustal. Rahvusvaheline õigus V: rahvusvaheline mere- ja ilmaruumiõigus. Tartu: Tartu State University Press 1977, p. 62. For an opposing view see e.g. Symonides, *op. cit.*, p. 216.

[130] United Nations. Guide to instruments affecting the legal status of straits: document prepared by the Secretariat. 1958 A/CONP.13/14. See also D. H. N. Johnson. Some Legal Problems of International Waterways, with Particular Reference to the Straits of Tiran and the Suez Canal. – 31 The Modern Law Review 1968, p. 158.

Palmer Cundick refers to the Strait of Gibraltar as the best known example of a strait that is regulated by an international agreement and ensures the freedom of passage through straits whose width prior to the LOSC far exceeded the sum of the belts of territorial sea running through them.[131] He argues in respect of Article 7 of the 1904 declaration that "This was designed to guarantee that nations might continue their usage, even where the channel used for navigation might require shipping to pass through the territorial waters of the coastal state."[132] Indeed, the aim of Article 7 is explicitly "to secure the free passage of the Straits of Gibraltar". This treaty, which clearly safeguards freedom of navigation, may potentially fall under the scope of Article 35(c) of the LOSC but, crucially, is not considered as such by States. It is widely held that the Strait of Gibraltar cannot be regarded as an international strait falling under the category of Article 35(c) of the LOSC.[133]

The scope of Article 35(c) of the LOSC is narrow and there are only few treaties which meet its criteria. In this context, a significant example aside the Strait of Gibraltar is the Viro Strait in the Gulf of Finland, which may have potentially been subject to long-standing treaties that regulated passage specifically in that strait from 1991 until their termination most likely in 1994 or, alternatively, in 2010, but which were not recognised as such by States, including the strait States.[134] The Viro Strait also illustrates the magnitude of control that States possess in regard to long-standing treaties giving effect to the Article 35(c)-exception, as they may be terminated or modified in conformity with the general international law of treaties as examined below.[135] Consequently, a strait which has been subject to Article 35(c) of the LOSC may lose its status and fall under a different legal category of straits.

The same applies to non-long-standing treaties that regulate passage in straits and are compatible with the LOSC (Article 311(2) of the LOSC). Strait States exercise even more control over this strait regime's determinant since States may conclude such a treaty (unlike the long-standing treaties on straits) whenever they wish, thereby altering the legal category of a strait, provided that such a treaty is compatible with the LOSC. The latter criterion, on the other hand, limits considerably the discretion that strait States have in regard to this determinant since, as analysed above,[136] it means in practice that the passage regime provided in such a treaty needs to be more liberal in comparison with the one which would otherwise be applicable to such a strait under Part III of the LOSC.

The common denominator for the fourth group of man-made determinants of the legal categories of straits is their focus on the interplay between various maritime zones and their outer limits. Article 37 of the LOSC determines the

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131 Palmer Cundick, *op. cit.*, pp. 126–127.
132 Ibid.
133 See e.g. Caminos 2007, *op. cit.*, p. 585.
134 See *infra* section 5.3 of Part IV.
135 See *infra* section 5 of Part IV.
136 See *supra* section 2.3 of Part I.

legal category of a strait in case there is an EEZ or high seas at both ends of the strait, whereas Article 36 of the LOSC is applicable in case there is an EEZ corridor or a high seas corridor through the strait. The third determinant belonging to this group includes the presence of non-strait-State's territorial sea to which the strait leads (Article 45(1)(b) of the LOSC).

The three categories of straits falling under Articles 36, 37 and 45(1)(b) of the LOSC are closely connected. In general, any Article 45(1)(b)-type of strait between a part of the high seas or an EEZ and the territorial sea of a foreign State may be alternatively subject to the legal categories of Articles 36 or 37 of the LOSC.

If the strait States limit the extent of their territorial sea that would otherwise entirely cover the strait, so as to create a convenient EEZ corridor or a high seas corridor through the strait, then the applicable passage regime is that provided in Article 36 of the LOSC. This alteration of the legal regime may be given effect irrespective of whether the strait leads to the territorial sea of a foreign State. Such a restriction on the outer limits of the territorial sea of a strait State is also relatively common in the Baltic Sea, as it has been used by Denmark and its neighbouring States Sweden and Germany in respect of straits which connect two parts of an EEZ, as well as by Estonia and Finland with regard to the Viro Strait, which leads to the territorial sea of a foreign State (the Russian Federation).[137]

However, it may likewise occur that the strait leads to the territorial sea of a foreign State and the strait States are not willing to limit the breadth of their territorial sea in order to establish a corridor where the freedom of navigation could be enjoyed for the purpose of transiting the strait. This would grant foreign ships the right of non-suspendable innocent passage in the strait under Article 41(1)(b) of the LOSC, but would not provide the right of overflight for foreign aircraft. Technically, it is then possible for the third State to by-pass Article 41(1)(b) of the LOSC by limiting under its domestic law the maximum breadth of its own territorial sea in the maritime area to which the strait leads with the aim of establishing an EEZ. Since the strait would then link two parts of an EEZ (or the high seas), Article 37 of the LOSC would be applicable, granting foreign ships and aircraft the right of transit passage in the strait.[138] In practice, the legal regime of an Article 41(1)(b)-type of strait has apparently not been switched to that of Article 37 thus far.

The impact that the above-mentioned four groups of man-made determinants and the natural determinant of islands (Article 38(1)) have on the legal categorisation of straits will be studied more closely in the example of the Estonian Straits. In particular, the significance of outer limits of maritime zones, treaties (particularly long-standing international conventions), domestic law of the strait State on its internal waters and baselines as well as geopolitical implications concerning the relevant coastal and maritime areas (particularly the concept of

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[137] See *infra* section 2.2 of chapter 2 in Part III.
[138] See *infra* section 5 of chapter 2 in Part III.

State continuity) for the classification of straits are examined. In the course of this, it is established which legal categories of straits (as identified above) have been applicable, currently apply and may potentially apply to the Estonian Straits. This classification points to the volatility that is embedded in the straits regime. It also exemplifies how the applicable passage regimes of foreign ships and aircraft in the Gulf of Finland, the Sea of Straits and the Gulf of Riga have changed in the last century and may be further altered in the future by (mostly) the concerned strait States. The following parts of the study thus aim to demonstrate the practical implications of the legal categorisation of straits.

In the first part of the study, it was first necessary to establish the list of legal categories of straits since it would be purposeless and potentially misleading to classify straits in practice without having first ascertained which legal categories of straits exist under the LOSC and what are their general legal criteria. The legal classification of particular straits in practice makes it possible to provide a much more detailed understanding on such legal criteria as well as the interrelationship between the legal categories of straits. Therefore, in the next parts of the study, the substance and criteria of most of the above-referred legal categories of straits are further examined on the basis of the Estonian Straits with the aim of establishing the practical significance of the legal classification of straits for international navigation in and over straits.

However, first it is scrutinised whether maritime boundary delimitation may also have had a determinative effect on the legal regime of the Estonian Straits. In case it had such an effect, it should be included in the above catalogue of determinants of the legal categories of straits. Notably, nothing in Part III of the LOSC indicates that maritime boundary delimitation could have a substantial impact on the legal classification of straits. However, since navigational factors have been generally singled out as a special circumstance, potentially warranting the modification of the preliminary equidistance line, it might be likewise possible that the passage rights of foreign ships and aircraft may be somehow influenced by the delimitation of boundaries in a strait or in an adjacent maritime area.

PART II. THE SIGNIFICANCE OF MARITIME BOUNDARY DELIMITATION FOR THE LEGAL REGIME OF THE ESTONIAN STRAITS

The right of transit passage applies in straits which are used for international navigation between one part of the high seas or an EEZ and another part of the high seas or an EEZ (Article 37 of the LOSC). It follows from this that the delimitation of a maritime boundary can potentially influence the passage regime of an adjacent strait if the concerned States either agree on the establishment of an EEZ in the relevant maritime area which would otherwise be non-existent or on the abolishment of an already existing EEZ in the relevant maritime area by means of maritime delimitation law. Correspondingly, this may result in the applicability or inapplicability of the right of transit passage in an adjacent strait. The applicable passage regime of the Estonian Straits was potentially alterable in the course of maritime boundary delimitations between the coastal States of the Gulf of Finland proper and the Gulf of Riga.

It is clear that the Estonian-Russian maritime boundary delimitation in the south-eastern part of the Gulf of Finland did not have any significance for the Viro Strait's transit regime. Due to the relative proximity of the Estonian and Russian coasts in Narva Bay and in the Gulf of Finland proper as well as the fact that by virtue of Article 3 of the LOSC both States have the right to establish the breadth of their territorial sea up to a limit of 12 miles for islands under their sovereignty, the relevant maritime area, as viewed from both sides of the agreed median line, falls exclusively to the zones of 12-miles-wide territorial sea of both States.[139] Therefore, the relevant maritime area did not include an already existing EEZ prior to the delimitation process. Estonia and the Russian Federation did also not agree on the establishment of an EEZ in the relevant maritime area. The question of the possibility of the establishment of an EEZ under the Maritime Boundary Treaty[140] was not relevant for the maritime delimitation between Estonia and the Russian Federation. The potential significance of the maritime boundary delimitation between Finland and the Soviet Union in the north-eastern part of the Gulf of Finland for the current legal regime of the Viro Strait is studied below.[141]

In this part, it is examined whether the maritime boundary delimitation between Estonia and Latvia in the Gulf of Riga had any significance for the legal regime of the Irbe Strait and the Sea of Straits. In particular, the Estonian and Latvian coasts in the Gulf of Riga are relatively distant. This raises the

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[139] See A. Lott. The Estonian-Russian Territorial Sea Boundary Delimitation in the Gulf of Finland. – The International Journal of Marine and Coastal Law 2017 (forthcoming).

[140] Treaty on the Delimitation of Maritime Areas of Narva Bay and the Gulf of Finland between the Republic of Estonia and the Russian Federation. Moscow 18.02.2014, not yet ratified. Accessible in Estonian and Russian at: http://www.riigikogu.ee (14.09.2016).

[141] See *infra* sections 3 and 5 of chapter 2 in Part III.

question of whether the internal waters and territorial sea of Estonia and Latvia cover the entire maritime area of the Gulf of Riga. Hence, the problem lies in determining whether the maritime boundary in the Gulf of Riga delimits the territorial sea of Estonia and Latvia or whether it serves as a single maritime boundary which is also the boundary line between the EEZ, continental shelf and potential contiguous zone of the Gulf's coastal States.

1. The Estonian-Latvian Negotiations on the Maritime Boundary in the Gulf of Riga

The land boundary between Estonia and Latvia was delimited under the October 19th, 1920 bilateral Convention[142] and additional treaties.[143] On March 20th, 1992, Estonia and Latvia agreed to re-establish the pre-June 16th, 1940 land boundary between the two States on the basis of the treaties and other legal acts concluded in the 1920s and 1930s.[144]

The maritime boundary in the Gulf of Riga had not been delimited between the two States.[145] Hence, Article XIII of the 1992 Treaty on the re-establishment of the boundary provided that the maritime boundary between Estonia and Latvia was to be delimited under a separate agreement. The negotiations between the Estonian and Latvian delegations on the maritime boundary in the Gulf of Riga commenced in November 1994.[146] Swedish experts entered the negotiations in autumn 1995 and provided good offices and chaired the meetings between the two negotiating States.[147]

In connection with the conclusion of the maritime boundary treaty, Estonia first sought Latvia's recognition of a 12-miles-wide Estonia's territorial sea around Ruhnu Island (hist. *Runö*), the coordinates of which had already been stipulated in the 1993 Estonian Maritime Boundaries Act.[148] However, Latvia favoured a perpendicular line as drawn west-wards from the end-point of the

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[142] Convention between Estonia and Latvia Regarding the Delimitation on the Spot of the Frontier between the Two States, and also Regarding the Rights of the Citizens in the Frontier Zone and the Status of Immovable Property Intersected by the Frontier Line. Riga 19.10.1920, e.i.f. 11.12.1920.

[143] On the plethora of additional treaties, see *infra* section 2 of Part II.

[144] Article I of the Treaty between the Estonian Republic and Latvian Republic on the Re-establishment of the State Boundary. Valga 20.03.1992, e.i.f. 19.09.1993.

[145] See also the minutes of the first reading of the Maritime Boundary Treaty between Estonia and Latvia in the Estonian Parliament. The stenographic record of the VIII Riigikogu, 15.08.1996. Accessible in Estonian at: http://stenogrammid.riigikogu.ee (14.09.2016).

[146] Ibid.

[147] Ibid.

[148] Merealapiiride seadus (Maritime Boundaries Act). Adopted 10.03.1993, e.i.f. 24.03.1993 (RT 1993, 14, 217), Annex 1. Baselines of the Territorial Sea of the Republic of Estonia. Accessible: https://www.riigiteataja.ee/tolkelisa/5081/1201/3008/annex.pdf# (14.09.2016).

Estonian-Latvian land boundary and accompanied with a 3-miles-wide territorial sea around Ruhnu Island.[149]

At that stage, the parties did not deliberate on the delimitation of their EEZ in the Baltic Sea west of the Gulf of Riga. Yet the need for trilateral negotiations between Estonia, Latvia and Sweden on certain technical aspects pertaining to their tripoint was acknowledged during the negotiations.[150] According to the Estonian foreign minister, the States had no problems with agreeing on the prospective tripoint since by that stage, Estonia and Latvia had already essentially accepted the boundary line that had been agreed upon earlier between the Soviet Union and Sweden.[151]

By contrast, the maritime boundary delimitation in the Gulf of Riga was complex and caused tensions between the two States. The Estonian foreign minister commented that by April 1996, Estonia and Latvia had reached "a situation in which the divergence of views was obvious."[152] By that time, Latvia had adopted a fishing line in the Gulf of Riga which, due to its expansive nature, ignited tensions between Estonian and Latvian fishermen in the beginning of the fishing season which, as noted by the Estonian foreign minister, caused a potential for the escalation of the conflict:

> "Let's be frank, the threshold of power politics was reached. Our friends from the other coast of the Baltic Sea as well as from the rest of the world were deeply concerned. /.../ On such difficult questions, compromises are hard to reach and they do not seem very pleasant, and yet the only alternative is the continuation with the "herring war", long-poisoned relations with the southern neighbour, diminishing trust in many capitals of the world."[153]

In April 1996, the foreign ministers of Estonia and Latvia met in Vilnius to find a peaceful solution to the maritime boundary delimitation in the Gulf of Riga. On May 3rd and 4th, 1996, the prime ministers of both countries met in Visby during the first meeting of the Baltic Sea coastal States, where the heads of governments together with the President of the European Commission and the European Council underlined the importance of stability and security in the region, including in the relations between neighbouring States.[154] A week later, on May 12th, 1996, the prime ministers of Estonia and Latvia met again and reached an understanding on the maritime boundary, as well as fishing rights in

[149] Stenographic record of the First Reading of the 1996 Maritime Boundary Treaty in the Estonian Parliament, *op. cit.*
[150] Ibid.
[151] Ibid.
[152] Ibid.
[153] Ibid.
[154] Presidency Declaration. − Baltic Sea States Summit. Visby 04.05.1996, p. 1. Accessible: http://www.cbss.org/wp-content/uploads/2012/12/1996-1st-Baltic-Sea-States-Summit-Presidency-Declaration.pdf (14.09.2016).

the Gulf of Riga.[155] The Maritime Boundary Treaty was signed by the prime ministers in Tallinn a month later, on July 12th, 1996.[156]

The Estonian foreign minister cautioned the members of the Estonian Parliament during the first reading of the Maritime Boundary Treaty and noted that the ratification of the treaty is "the last option before turning to the court" as the two States were willing to refer the maritime boundary delimitation to the ICJ in case the treaties would not have been ratified by the parliaments.[157] The treaty caused much parliamentary debate, but was nevertheless ratified.[158] It was the first maritime boundary treaty concluded between the States that had regained their independence after the dissolution of the Soviet Union.[159]

According to the Estonian media, approximately 800 km^2 of maritime area was ceded to Latvia primarily in the eastern part of the Gulf of Riga.[160] The vice-chancellor of the Estonian Ministry of Foreign Affairs noted that Estonia's territorial sea will decrease to some extent in size and Estonia relinquished a claim for an EEZ in the Gulf of Riga.[161] The question about the alleged cession of territory was also raised during the deliberations in the Estonian Parliament.[162]

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[155] Stenographic record of the First Reading of the 1996 Maritime Boundary Treaty in the Estonian Parliament, *op. cit.*

[156] Agreement between the Republic of Estonia and the Republic of Latvia on the Maritime Delimitation in the Gulf of Riga, the Strait of Irbe and the Baltic Sea. Tallinn 12.07.1996, e.i.f. 10.10.1996. Accessible: http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/TREATIES/EST-LVA1996MD.PDF (14.09.2016).

[157] Stenographic record of the first reading of the 1996 Maritime Boundary Treaty in the Estonian Parliament, *op. cit.*

[158] In the Estonian Parliament, the recorded votes were 80 in favour, none against or neutral. See the Minutes of the second reading of the Maritime Boundary Treaty in the Estonian Parliament. The stenographic record of the VIII Riigikogu, 22.08.1996. Accessible in Estonian at: http://stenogrammid.riigikogu.ee (14.09.2016).

[159] E. Franckx. Estonia-Latvia. Report No. 10-15. – Charney, Smith (eds), *op. cit.*, p. 2995.

[160] E. Alatalu. Eesti loovutas Lätile 800 ruutkilomeetrit Liivi lahest. Postimees, 14.05.1996.

[161] Ibid. See also stenographic records of the First and Second Reading of the 1996 Maritime Boundary Treaty in the Estonian Parliament, *op. cit.* Estonia did not gain acceptance from Latvia to ascribe to Ruhnu Island full weight during the maritime boundary delimitation in the Gulf of Riga. Consequently, the island lacks an EEZ in the (south-)eastern part of the Gulf of Riga where it would have overlapped with the Latvian EEZ. Furthermore, as Latvia favoured a solution whereby Ruhnu would have been given only a 3-miles-wide territorial sea, Estonia also had to make significant concessions in the drawing of other sections of the maritime boundary with Latvia in order to guarantee Latvia's recognition of Ruhnu's 12-miles-wide territorial sea. Notably, under maritime delimitation law, Ruhnu should have been in any case entitled to a 12-miles-wide territorial sea where it does not overlap with the territorial sea of Latvia. See e.g. Maritime Delimitation in the Black Sea (Romania v. Ukraine), Judgment, I.C.J. Reports 2009, p. 61, paras 74–76, 188, 218.

[162] Stenographic record of the First Reading of the 1996 Maritime Boundary Treaty in the Estonian Parliament, *op. cit.*

In terms of law, however, the parties could not have ceded any territory as a result of the boundary negotiations since the boundary had not been agreed before. Under section 3 of the Latvian Constitution[163] and section 122 of the Estonian Constitution[164], the maritime boundary had yet to be delimited by an international agreement. For this reason also the 1993 Estonian Maritime Boundaries Act could not have raised any legitimate expectations for a fixed maritime boundary prior to the delimitation with Latvia.

In this regard, Latvia had also abandoned its claim pursuant to which the maritime maps from the 1920s, which depicted a boundary line in the Gulf of Riga, should be chosen as the basis for the maritime boundary delimitation.[165] Estonia did not recognise this claim. The Estonian foreign minister noted that such maps depicted a discontinuous line that was roughly indicative of the division of the maritime areas in the Gulf of Riga but had no significance from the perspective of international law.[166] Likewise, Alex Oude Elferink has noted that both States did not ascribe any significance to such illustrative maps in terms of law and, generally, according to the case law of the ICJ, maps may only be of assisting or confirmative value in the maritime boundary delimitation process.[167]

Also, there were essentially no pre-existing agreements between Estonia and Latvia on the delimitation of the maritime area of Gulf of Riga that could have provided grounds for such legitimate expectations, as subsequent analysis will show.

2. Pre-Existing Agreements Pertaining to the Delimitation of the Maritime Area

The Estonian and Latvian coasts in the eastern part of the Gulf of Riga are adjacent. Hence, the starting point of the maritime boundary between the two States is the end point of the land boundary at low-tide. After gaining independence in 1918, the two States reached an agreement on their land boundary in the 1920s.

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163 Latvijas Republikas satversme (Constitution of the Republic of Latvia). Adopted 15.02.1922, e.i.f. 07.11.1922. Accessible: http://www.saeima.lv/en/legislation/constitution (14.09.2016).

164 Eesti Vabariigi põhiseadus (The Constitution of the Republic of Estonia). Adopted 28.06.1992, e.i.f. 03.07.1992 (RT 1992, 26, 349).

165 See e.g. 1922 map of the maritime boundary in the Gulf of Riga in the scale of 1:750 000 depicting an illustrative boundary line between Abruka and Ruhnu islands. See the Estonian National Archives' file ERA.1604.1.56, p. 17. See also 1931 map of western Estonia issued by the Ministry of Roads. Accessible upon contacting the author.

166 Stenographic record of the First Reading of the 1996 Maritime Boundary Treaty in the Estonian Parliament, *op. cit.*

167 A. G. Oude Elferink. The Law of Maritime Boundary Delimitation: A Case Study of the Russian Federation. Dordrecht: Martinus Nijhoff 1994, p. 174. See also Frontier Dispute (Burkina Faso v. Republic of Mali), I.C.J. Reports 1986, p. 554, para 54.

Estonia and Latvia requested from the United Kingdom the appointment of an arbitrator for the demarcation of their land boundary. The Convention on the Establishment of a Joint Commission Headed by Colonel Stephen George Tallents for the Delimitation of a Land Boundary[168] was concluded on March 22nd, 1920 and Colonel Tallents delivered his decisions on the basis of the Convention on July 1st and 3rd the same year. On October 19th, 1920 at Riga, Estonia and Latvia concluded the Convention Regarding the Delimitation on the Spot of the Frontier between the Two States, and also regarding the rights of the citizens in the frontier zone and the status of immovable property intersected by the frontier line which was registered in the League of Nations on June 16th, 1923.[169]

The Supplementary Boundary Convention between Estonia and Latvia was concluded in Tallinn on November 1st, 1923.[170] It was ratified by Estonia on December 20th, 1923,[171] whereas Latvia ratified it in March 1927.[172] Thus, it entered into force (pursuant to its Article XIV) upon the exchange of the instruments of ratification on March 30th, 1927.[173] Estonia and Latvia concluded another protocol in Tallinn on February 23rd, 1927 whereby the initial boundary Convention of October 19th, 1920 and the supplementary boundary Convention of November 1st, 1923 was modified.[174] Pursuant to a declaration on March 31st, 1927, the boundary between Estonia and Latvia was declared definitively concluded as of April 1st, 1927.[175]

The end point of the Estonian-Latvian land boundary was fixed in the Convention regarding the State Frontier and the Rights of Citizens of the Frontier

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[168] Convention on the Establishment of a Joint Commission Headed by Colonel Stephen George Tallents for the Delimitation of a Land Boundary. Valga 22.03.1920, e.i.f. April 1920.

[169] Certificate of the Registration of the Estonian-Latvian Boundary Treaty in the League of Nations, 16.06.1923. ERA.957.18.8, p. 1.

[170] Supplementary Convention between Estonia and Latvia on Frontier Questions. Tallinn 01.11.1923, e.i.f. 30.03.1927. See ERA.957.18.14.

[171] See the Instrument of Ratification Regarding the Supplementary Boundary Convention. Tallinn, February 1924. Accessible at the National Archives of Estonia.

[172] Instrument of Ratification Regarding the Supplementary Boundary Convention. Riga 30.03.1927. See ERA.957.18.15.

[173] Protocol on the Exchange of Instruments of Ratification Regarding the Supplementary Boundary Convention between Estonia and Latvia. Riga 30.03.1927. See ERA.957.18.16.

[174] Protocol Amending the Convention regarding the State Frontier and the Rights of Citizens of the Frontier Zone, Concluded between Estonia and Latvia at Riga, October 19th, 1920 and the Additional Convention regarding Frontier Questions, Concluded at Tallinn November 1st, 1923. Tallinn 23.02.1927, e.i.f. 31.03.1927. See League of Nations. Treaty Series 1927(61), p. 315. Accessible: http://www.worldlii.org/int/other/LNTSer/1927/50.pdf (14.09.2016).

[175] Protocol Constituting a Declaration with regard to the Final Delimitation of the Frontier between the Two Countries. Riga 31.03.1927. See League of Nations. Treaty Series 1927(61), p. 323. Accessible: http://www.worldlii.org/int/other/LNTSer/1927/50.pdf (14.09.2016).

Zone of October 19th, 1920. This was also the starting point of the maritime boundary between the two States and also the only spot where, at the time, the territorial sea of Estonia and Latvia abutted.[176] In this Ikla-Ainaži section, the two States considered their maritime boundary fixed under the afore-mentioned Convention of October 19th, 1920.[177] The 1920 Convention may thus be considered as a partial agreement on the maritime boundary. The 1920 Convention is valid on the basis of State continuity of both States.

The 1920 Convention was not the only partial agreement on the maritime boundary between Estonia and Latvia. While the 1920 Convention settled the starting point of the maritime boundary between the two States, they also delimited the maritime boundary in its adjacent waters in 1923. It follows from a stenographic record of a meeting in the Estonian Ministry of Foreign Affairs on October 15th, 1923 that a general agreement between Estonia and Latvia on *inter alia* the shallow entrance to the Ainaži port was reached in the Estonian-Latvian mixed commission on February 8th to 9th, 1923.[178] This agreement was appended as a protocol to the 1923 Supplementary Convention on the Estonian-Latvian Frontier Questions. The maritime boundary line provided therein favoured Latvia. In this regard, Artur Taska has deemed it incomprehensible why, despite of the smooth coastline running nearly directly from north to south, Estonia nevertheless accepted in this section a straight boundary line heading north-east, thus leaving Estonia twice as small maritime area as compared to Latvia, instead of adopting a parallel line that would have been more in accordance with the geographical circumstances.[179]

However, according to archival documents, the agreement on the entrance to the port of Ainaži was reached by means of exchange of territories between the two States. In order to avoid the passage of Latvian ships through Estonian waters in the course of entering the port, Estonia agreed to exchange the adjacent waters in the entrance to the Ainaži port with Latvian land territory in Kiusumetsa region (which included many Estonian farmsteads) as compensation. Anton Jürgenstein, a member of the Parliament and representative of the Estonian Coast Guard, commented in a meeting of Estonian officials at the Foreign Ministry that "The port is not of great value, we can gladly give it as compensation."[180] Thus, Article 1(a) of the 1923 Protocol to the 1923 Supplementary Convention on the Estonian-Latvian Frontier Questions provided that Ainaži port belongs completely to Latvia and the boundary line is drawn in parallel with its jetty in such a distance as is necessary for the passage of ships

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[176] For the coordinates of the starting point of the maritime boundary in the Ikla-Ainaži section, see ERA.957.12.389, p. 18.

[177] Stenographic record of the First Reading of the 1996 Maritime Boundary Treaty in the Estonian Parliament, *op. cit.*

[178] ERA.957.12.42, p. 311.

[179] A. Taska. Rahvusvaheline Öigus. Lund: s.n. 1977, p. 101. See also A. Taska. Die Grenzen des Küstenmeeres Estlands. PhD Thesis (1952), University of Kiel, published in Lund in 1974, pp. 130–131.

[180] ERA.957.12.42, p. 313.

and will be demarcated by a technical committee on a map. The provision also stipulates that in this manner Latvia will be granted entrance to the port and exit to the sea. The joint Estonian-Latvian commission specified in their description of the boundary line that this section of the boundary heads four versts[181] to north-east, "the boundary heads to the Gulf of Riga and reaches 4 versts in the direction of NW 50°00´00´´. For locating the boundary in the nature, a post has been placed in the opposite direction SO 50°00´00´´ 217 m from the coast."[182] Other sections of the maritime area in the Gulf of Riga were not delimited by the two States in the 1923 Supplementary Convention.[183]

The Estonian Government noted during the ratification of the 1923 Supplementary Convention in the Parliament that there is no need for delimiting other maritime areas of the Gulf of Riga.[184] The Government explained that the Gulf of Riga comprises the high seas, which is why solving the question of the maritime boundary is not complicated as the coastal State needs to delimit the outer limit of its coastal sea on the basis of its domestic law and in accordance with the principles of international law.[185]

However, in practice Estonia and Latvia were in strong disagreement on the question of Ruhnu Island. At the time, both States claimed sovereignty over the island and due to its location in the middle of the Gulf of Riga, it was of utmost value for navigation. The troubled history of the territorial dispute over Ruhnu Island will be scrutinised in more depth in the next section.

3. Pre-Existing Agreements on the Status of Ruhnu Island

Ruhnu Island is situated in the middle of the Gulf of Riga, 19 miles from the Kolka Cape on the Latvian Courland Peninsula, 29 miles from the Estonian Kihnu Island (hist. *Kynö*) and 35 miles from the Estonian town Kuressaare on Saaremaa Island (hist. *Ösel*).[186] The distance between Ruhnu and the Estonian city Pärnu as well as the Latvian capital of Riga is approximately 52 miles. The island is located on the same latitude as the Irbe Strait.

Geographically, Ruhnu Island is thus closest to the Latvian coast. The historical connections of Ruhnu Island with Latvia are illustrated by its inclusion into the Duchy of Courland from 1562 to 1621.[187] Notably, maps which were

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181 A Russian unit of length equal to 1,067 km. Verst was also used as a maritime unit of length in the Russian Empire. See Taska 1974, *op. cit.*, p. 24.

182 Latvijas-Igaunijas robezas apraksto, Riga 1938, l 106 (referred in: Taska 1977, *op. cit.*, p. 101).

183 Also, since the territorial sea of Estonia and Latvia was 3 miles at the time, the 4-versts-long boundary line did not cover the whole of their territorial sea, leaving approximately 0.75 miles of undelimited territorial sea west of the Ainaži port.

184 Taska 1974, *op. cit.*, p. 129.

185 Ibid.

186 Eesti Entsüklopeedia, vol. 8. – Ruhnu. Tallinn: Eesti Entsüklopeediakirjastus 1995, p. 230.

187 Ibid, p. 231.

compiled relatively shortly after this period did not present Ruhnu Island as being part of western Estonia.[188] Upon gaining independence in 1918, both Latvia and Estonia claimed sovereignty over the island.

In the declaration of independence from February 24th, 1918, Estonia claimed that “the Estonian Republic includes within its borders /.../ Pärnu County along with the Baltic Sea islands – Saare-, Hiiu- and Muhumaa and others which are traditionally inhabited by the Estonian nation in the great majority.”[189] According to the 1922 Estonian population census, the population of Ruhnu Island composed of 252 Swedes, 10 Estonians (3.7 %) and 2 Germans.[190] Thus, Ruhnu Island was not “traditionally inhabited by Estonians in the great majority” in terms of the 1918 Estonian declaration of independence.

In its meeting of January 17th, 1919, the Estonian Provisional Government adopted the decision, “To declare Ruhnu Island part of Estonia.”[191] On June 4th, 1919, the Estonian Constituent Assembly adopted as the second pre-constitutional act[192] the temporary Estonian constitution “The Provisional Order of Government for the Republic of Estonia,” which came into effect on July 9th, 1919.[193] In its section 2, it provided the provisional boundaries of Estonia and listed land areas that fall within those boundaries, *inter alia* the Estonian islands “Saaremaa, Hiiumaa, Muhumaa, Ruhnu, Kihnu, Vormsi, Osmussaar, Pakri Islands, Naissaar, Aegna, Prangli Islands, Suur [Tütarsaar] and Väike Tütarsaar.”[194] However, section 2 of the Estonian Constitution that was adopted by the Constituent Assembly on June 15th, 1920 did not explicitly mention Ruhnu Island, whereas it referred to “Saaremaa, Muhumaa, Hiiumaa and other islands and reefs situated in the Estonian waters”.[195] Distinctly, from the 1918 declaration of independence, section 2 of the Constitution did not stipulate the criterion by which an Estonian island should be “traditionally inhabited by Estonians in the great majority”. Nor did it refer by name to any small islands of Estonia. Presumably, it would have otherwise been also more difficult for Estonia to recognise Finnish sovereignty over Tytärsaari Islands as provided in Articles 3

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[188] See e.g. 1704 map (based on a 1650 map) of Saaremaa and western Estonia in EAA.308.2.28, p. 1.

[189] See Manifest Eestimaa rahwastele (Estonian Declaration of Independence). Adopted 24.02.1918, e.i.f. 24.02.1918 (RT, 27.11.1918, 1).

[190] In 1934, 277 Swedes and 5 Estonians (1.8 %) lived on the island. See H. Kään *et al*. Saaremaa 1. Loodus, aeg, inimene. Tallinn: Eesti Entsüklopeediakirjastus 2002, p. 388.

[191] K. Jaanson. Ruhnu ühendamine. Tänapäev No. 35, 1991. M. Burget. Eesti-Läti piiri loomine. Tartu: Master Thesis, University of Tartu 2010, p. 18.

[192] The other two pre-constitutional acts are the 1918 declaration of independence and the decision on the supreme power in Estonia from July 9th, 1919.

[193] R. Narits *et al*. Sissejuhatus. – Ü. Madise (toim). Eesti Vabariigi põhiseadus. Kommenteeritud vlj. Tallinn: Juura 2012, p. 16.

[194] Taska 1974, *op. cit.*, pp. 44–45.

[195] Eesti Vabariigi põhiseadus (Constitution of the Republic of Estonia). Adopted 15.06.1920, e.i.f. 21.12.1920, partially 09.08.1920 (RT 09.08.1920, 113/114, 243). Accessible in Estonian at: https://www.riigiteataja.ee/failid/1920.html (14.09.2016).

and 13 of the 1920 Tartu Peace Treaty between Finland and the Soviet Russia.[196]

At the same time, Latvia also claimed sovereignty over Ruhnu Island. In spite of their aim and previous negotiations, Estonia and Latvia were not able to avoid controversies in their border descriptions as presented in their memoranda to the 1919 Paris Peace Conference. The "Memorandum on Latvia" declared Ruhnu Island part of Latvia on the basis of the historical inclusion of Ruhnu into the Latvian territorial waters and into the Courland Duchy, as well as by the fact that the lighthouse and radio station located on the island are important for navigation to/from Riga.[197]

According to the letter sent by the Estonian Navy captain Rudolf Schiller to the Estonian Prime Minister on May 10th, 1919, the Latvian Prime Minister Kārlis Ulmanis had claimed sovereignty over Ruhnu Island and had also declared this in notices that were presented in Courland.[198] On May 27th, 1919, the Estonian Ministry of the Interior sent a sea-expedition from Tallinn to Ruhnu that landed on the island on June 3rd, carrying cash and trade for bargaining with the islanders.[199] On the next day, after hearing a speech given in Swedish by the Estonian secretary for the Swedish minority Nikolai Blees, the islanders' general assembly decided to support unification with Estonia.[200] At the presence of the local community, N. Blees then declared Ruhnu Island part of Estonia on behalf of the Estonian Government.[201]

Latvia raised the question about the status of Ruhnu Island in the joint Estonian-Latvian boundary commission headed by Colonel Tallents, but Colonel Tallents found that this question did not fall within the direct ambit of the commission and, after Estonia refused to address this matter, he decided not to discuss it any further.[202] Nevertheless, two out of the three alternative draft boundary lines (from May 31st and June 1st, 1920) concerning the Estonian-Latvian border town Valga, as prepared by the boundary sub-commission on Valga (headed by Colonel Robinson), proposed to cede Ruhnu Island to Latvia in exchange for a more favourable solution for Estonia in Valga.[203] Estonia did not approve any of the three draft proposals.[204]

The Latvian delegation also raised questions about the status of Ruhnu on August 31st, 1920 during the Buldur (Riga) Conference between Estonia, Finland, Latvia, Lithuania and Poland. The Latvian delegation found that Latvia

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196 Treaty of Peace between Finland and Soviet Government of Russia (together with declarations and protocols relative thereto). Tartu 14.10.1920, e.i.f. 31.12.1920. Accessible: http://www.worldlii.org/int/other/LNTSer/1921/13.html (14.09.2016).

197 Burget, *op. cit.*, pp. 19–20.

198 Ibid, pp. 67–68.

199 Jaanson, *op. cit.*

200 Ibid.

201 Ajalugu – Ruhnu Vald. Accessible in Estonian at: http://ruhnu.ee/ajalugu (14.09.2016).

202 Burget, *op. cit.*, pp. 44, 67.

203 Ibid, pp. 51–52.

204 Ibid, p. 52.

has an economic, strategic and ethnic right over the island.[205] The Latvian representative proposed to decide on the sovereignty over Ruhnu Island separately from the other sections of the Estonian-Latvian boundary, but Estonia again refused.[206]

On July 15th, 1921 the Latvian minister of foreign affairs sent a letter to his Estonian counterpart in which he enumerated geographic, navigational, security, historical and economic arguments in favour of Latvia's title over Ruhnu Island.[207] He concluded:

> "Taking into consideration these geographical, economic and historical observations, my Government cannot renounce Runo Island and in the final delimitation of the maritime boundary between our States, the island of Runo must be attributed to Latvia."[208]

Pursuant to the Estonian Government's decision of August 5th, 1921, the Estonian Ministry of Foreign Affairs notified Latvia that the territorial status of Ruhnu Island is not a subject matter of the joint boundary commission and that this question may only be discussed between the two States by diplomatic channels.[209]

At the same time, the Swedish local community on Ruhnu was discontent with the Estonian rule over the island and sent a letter to the Swedish Government in the beginning of 1921 asking Sweden to annex the island.[210] In the summer of 1921, the Estonian Prime Minister Konstantin Päts visited the island. He was assured by the head of the local community about the islanders' desire to live either under the Swedish rule or independently.[211]

Estonia's sovereignty over Ruhnu took root as a result of the Estonian Prime Minister's negotiations with the local community during his visit to the island. It is possible that due to the presence of a large ethnic Swedish minority in north-western Estonia, Sweden also favoured Estonia's rule over Ruhnu Island – the representatives of Sweden had assured this to the Estonian Ministry of Foreign Affairs in 1922 as well as to the Estonian Ambassador in Latvia in

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205 Ibid, p. 62.

206 Ibid.

207 ERA.957.11.440, pp. 12–14.

208 Ibid, p. 14. Originally, the letter is in French analogously to most of the rest of the correspondence between the Estonian and Latvian foreign ministers in the 1920s.

209 Ibid, pp. 7, 10.

210 Eesti Entsüklopeedia. – Ruhnu ühendamine Eestiga. Accessible in Estonian at: http://entsyklopeedia.ee/artikkel/ruhnu_%C3%BChendamine_eestiga1 (01.09.2016). Notably, Swedish law had been applied on Ruhnu Island since the 14th century as confirmed in a letter of the Curonian Bishop Johannes from 1341. See Eesti Entsüklopeedia, *op. cit.* – Ruhnu, p. 231.

211 V. Neggo. Eesti esimese riigivanema visiit Ruhnu saarele. – Kaitse Kodu! No. 11, 12.06.1926 (referred: P. Kask (koost). Eesti Vabariigi riigivanema ja Ruhnu külavanema läbirääkimised 1921. aastal, ehk miks ja kuidas Ruhnu saare noormeestel võimaldati läbida sõjaväeteenistus kohapealses tuletornis. Kuressaare: Kodutrükk 2003, p. 18).

1923.[212] Nevertheless, it was not possible to reach an agreement between Estonia and Latvia on the sovereignty over Ruhnu Island.[213]

On May 2nd, 1923, an Estonian Government commission – comprised of representatives of the Ministries of Foreign Affairs, War and Interior as well as the Maritime Administration – upon the request of the Parliament established the coordinates of the boundary of the territorial waters and six base-points (out of 142 in total) of Ruhnu Island.[214] In July 1923, the Latvian foreign minister expressed readiness to his Estonian colleague to solve the dispute over Ruhnu Island by referring the question to arbitral proceedings if an agreement between the two States should not be reached or, alternatively, sought Estonia's acceptance for establishing a Latvian radio station on the island in case a definitive solution to the dispute over the island should not be reached.[215]

Notwithstanding the official position of the leading Estonian politicians, Estonia's sovereignty over Ruhnu Island was not taken for granted in Estonia even by the end of 1923. At a meeting of the Estonian officials in the Estonian Ministry of Foreign Affairs in October 1923, Anton Jürgenstein (the Estonian member of the Parliament and the representative of the Coast Guard) proposed to consider the cession of Ruhnu Island in exchange for 30–40 farmsteads situated in the frontier area of Võru County.[216] The foreign minister Friedrich Akel rejected the idea and pointed out that the islanders rather preferred staying under the Estonian rule.[217]

By the time of a bilateral conference with Estonia which commenced in Tallinn on October 25th, 1923, Latvia was willing to recognise Estonia's sovereignty over Ruhnu Island in exchange for a monetary compensation.[218] Estonia declined. Thus, the supplementary Convention that was concluded between Estonia and Latvia in Tallinn on November 1st, 1923 does not pay any reference to the status of Ruhnu. Nevertheless, Latvia subsequently refrained from making any claims to its title over the island.[219] Latvia recognised Ruhnu Island as part of Estonia under the 1996 Maritime Boundary Treaty.[220]

As noted by Erik Franckx, islands were the determining factor in the maritime boundary delimitation between Estonia and Latvia.[221] In particular, Ruhnu had a decisive role due to its location in the centre of the Gulf of Riga.[222] This necessitates further scrutiny in view of Ruhnu's status under Article 7(1) of the

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212 Burget, *op. cit.*, p. 69.

213 See also ERA.957.12.42, p. 311.

214 ERA.957.12.389, p. 18.

215 Burget, *op. cit.*, p. 71.

216 ERA.957.12.42, p. 312.

217 Ibid.

218 Burget, *op. cit.*, p. 72.

219 Eesti Entsüklopeedia, *op. cit.* – Ruhnu ühendamine Eestiga. Burget, *op. cit.*, p. 67.

220 See also H. Lindpere. Kaasaegne rahvusvaheline mereõigus. Tallinn: Ilo 2003, p. 62.

221 E. Franckx. Region X: Baltic Sea Boundaries. – D. A. Colson, R. W. Smith (eds). International Maritime Boundaries, vol. 5. Leiden: Martinus Nijhoff 2005, p. 3527.

222 See also Oude Elferink 1994. The Law of Maritime Boundary Delimitation, *op. cit.*, p. 175.

LOSC in light of the legitimacy of the contemporary Estonian straight baselines that connect Ruhnu Island with Kihnu Island and Allirahu Islets (hist. *Hullu-rahu*), as well as their significance for the maritime boundary delimitation in the Gulf of Riga.

4. The Status of Ruhnu Island under Article 7(1) of the LOSC

According to Article 7(1) of the LOSC, Ruhnu Island should be part of a fringe of islands in the immediate vicinity of the Estonian coast in order to draw a straight baseline to and from the islands. Alex Oude Elferink and Erik Franckx have questioned whether Ruhnu Island and its surrounding islets may be regarded as a fringe of islands in the immediate vicinity of the Estonian coast.[223] In case the islands of Ruhnu do not meet the criteria of Article 7(1) of the LOSC, States could dispute the legality of the Estonian straight baselines in the northern part of the Gulf of Riga.

Lewis Alexander has noted that the LOSC lacks universal criteria for determining whether or not a baseline system follows the general direction of the coast.[224] Likewise, it is also not settled how many islands at minimum may comprise "a fringe of islands".[225] The islands of Ruhnu include the main island and some smaller islets in its immediate vicinity. They form part of a lengthy chain of islands off Estonia's western coast. The islands of West Estonian Archipelago are of varying size as they include some of the largest islands in the Baltic Sea (Saaremaa, Hiiumaa, Muhu and Vormsi) as well as over a thousand smaller islands and islets.[226]

The straight baseline between Ruhnu and Kihnu is approximately 29 miles long and the one between Ruhnu and Allirahu Islets is 24 miles long. According to the explanations of the Estonian foreign minister, the draft Maritime Boundaries Act of Estonia was modified prior to its second reading in the Parliament in order to establish straight baselines with Ruhnu Island.[227] He added that "It is a very important modification to the Government's draft Act and introduced indeed by the defence committee [of the Parliament], but the Government does not oppose it."[228] Also, during the deliberations on the 1996 Maritime Boundary Treaty in the Estonian Parliament, the foreign minister, referring to the question of Ruhnu Island, explained that "this island may serve as a base-point only if the distance between it and the coast or another island is less than 24 nautical

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[223] Ibid, pp. 175–176. Franckx 2002, *op. cit.*, pp. 3006–3007.

[224] L. M. Alexander. Baseline Delimitations and Maritime Boundaries. – 23 Virginia Journal of International Law 1983(4), p. 515.

[225] See e.g. S. Kopela. Dependent Archipelagos in the Law of the Sea. Leiden: Martinus Nijhoff 2013, pp. 60–61, 104.

[226] See also L. Velsker. Eesti sai 700 meresaare võrra rikkamaks. ERR Uudised, 25.08.2015.

[227] The oral explanations by the Estonian foreign minister in the second reading of the draft Maritime Boundaries Act in the Parliament. Stenographic record of the Parliament, 10.03.1993. Accessible in Estonian at: http://stenogrammid.riigikogu.ee (01.09.2016).

[228] Ibid.

miles," and that "this would be a point on which we would have had a relatively weak position if the question would have been referred to the court."[229] Yet the views of the Estonian foreign minister do not necessarily correspond to the LOSC or the case law of the ICJ.

The length of straight baselines is explicitly limited only with regard to natural entrances to bays and in connection with archipelagic States (Article 47(2) of the LOSC). Thus, Article 10(5) of the LOSC stipulates that where the distance between the low-water marks of the natural entrance points of a bay exceeds 24 miles, a straight baseline of 24 miles shall be drawn within the bay in such a manner as to enclose the maximum area of water that is possible with a line of that length. The straight baselines connecting Ruhnu Island with Allirahu and Kihnu islands do not pertain to any natural entrance points of a bay.

During the 1958 Conference on the Law of the Sea, a proposal was made to set the limit of 15 miles for the length of any straight baseline, but it was rejected.[230] By that time, the ICJ had already (in 1951) noted that the attempts to limit the length of a straight baseline drawn at sea, analogously to the ones located in bays so that its length would not exceed twice the width of the territorial sea of a coastal State, have been only random proposals and Norway's 44-miles-long straight baselines are not contrary to international law.[231]

Thus, Lewis Alexander has observed that

> "Neither the 1958 nor the 1982 Conventions suggest a maximum limit, and the only potential yardstick is the 1935 Norwegian delimitation method approved by the ICJ. The longest line utilized by the Norwegians was the 44-mile line across Lopphavet."[232]

In State practice there are numerous examples of straight baselines exceeding 24 miles in length, including those of European States, e.g. Iceland, Italy, Malta and Norway.[233] Also, e.g. the straight baselines drawn by Japan in 1977 are in 46 instances longer than 24 miles and in 21 instances longer than 40 miles (maximum length 62 miles), whereas the Chinese straight baselines reach even 70 miles.[234]

In spite of the omission of a limit to the length of a straight baseline in the LOSC, States may nevertheless provide for one in their domestic law. Up until the amendment of its Act on the Delimitation of Territorial Waters in 1995, Finland had stipulated that the length of its straight baselines does not exceed

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[229] Stenographic record of the First Reading of the 1996 Maritime Boundary Treaty in the Estonian Parliament, *op. cit.*

[230] Churchill, Lowe, *op. cit.*, p. 31.

[231] Fisheries case 1951, *op. cit.*, pp. 131–132.

[232] Alexander 1983, *op. cit.*, p. 518.

[233] Churchill, Lowe, *op. cit.*, p. 32.

[234] J. M. Van Dyke. Disputes Over Islands and Maritime Boundaries in East Asia. – J. M. Van Dyke (ed). Maritime Boundary Disputes, Settlement Processes, and the Law of the Sea. Leiden: Martinus Nijhoff 2009, pp. 45, 55.

twice the breadth of its territorial sea, i.e. at the time 8 miles.[235] However, such limitations to the length of straight baselines in the domestic law of a coastal State are rare. Subsequent to the update of the Finnish system of straight baselines in 1995 (the updates are carried out after every 30 years due to the land uplift[236]), the longest Finnish straight baseline exceeds the previous limit of 24 miles and is approximately 27 miles long.[237] Similarly, the longest segment of the Swedish straight baseline is 30 miles,[238] thus also exceeding the Estonian ones connecting Ruhnu Island.

Clearly, the method of straight baselines needs to be applied restrictively and in conformity with the conditions stipulated in Article 7(1) of the LOSC.[239] Yet, since Article 7(1) of the LOSC does not stipulate detailed criteria for assessing the legality of straight baselines,[240] the position of other States on the legality of particular straight baselines is decisive in most cases.[241] In 2016, the International Law Association's Committee on Baselines concluded that as much as half of the straight baseline claims of various States have been contested by other States.[242] Significantly, no State, *prima facie* Latvia, has objected to the Estonian straight baselines (incl. in the Gulf of Riga).[243]

However, Erik Franckx is of the view that in the 1996 Maritime Boundary Treaty, Estonia and Latvia did not take into account the Estonian straight baselines that connect Ruhnu Island. Instead, as argued by Erik Franckx, the boundary line was predicated not on straight baselines, but on historical circumstances

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235 Kleemola-Juntunen, *op. cit.*, p. 62. E. Franckx. Finland and Sweden Complete Their Maritime Boundary in the Baltic Sea. – 27 Ocean Development and International Law 1996, p. 308. The idea of such voluntary self-limitation was also advanced by Abner Uustal in the Soviet Union. See Uustal 1977, *op. cit.*, p. 42.

236 Section 4 of the Laki Suomen aluevesien rajoista annetun lain muuttamisesta (Act Changing the Act on the Delimitation of Territorial Waters of Finland). Adopted 03.03.1995, e.i.f. 30.07.1995. Accessible in Finnish and Swedish at: http://www.finlex.fi/fi/laki/alkup/1995/19950981 (01.09.2016).

237 E. Franckx. Finland-Sweden (Bogskär Area). Report No. 10-13. – J. I. Charney, L. M. Alexander (eds). International Maritime Boundaries, vol. 3. Dordrecht, Boston, London: Martinus Nijhoff 1998, p. 2545.

238 Ibid, p. 2544.

239 Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Merits, Judgment, I.C.J. Reports 2001, p. 94, paras 212–215.

240 See also United States Department of State. Developing Standard Guidelines for Evaluating Straight Baselines. – Limits in the Seas, No. 106. Washington D.C: US Department of State 1987, pp. 17–29.

241 See generally Churchill, Lowe, *op. cit.*, p. 47.

242 D. Rothwell (Rapporteur). Baselines under the International Law of the Sea (Draft Report). Johannesburg: International Law Association 2016, p. 17. Accessible: http://www.ila-hq.org/en/committees/index.cfm/cid/1028 (01.12.2016).

243 For the list of protests made against the straight baseline claims of States, see ibid, pp. 17–21. See also US Navy Judge Advocate General's Corps. – Estonia. Summary of Claims. April 2014.

in the east of Ruhnu Island[244] and on the coordinates of the islands in the section between Ruhnu and Allirahu.[245] The 1996 Maritime Boundary Treaty between Estonia and Latvia does not provide any indication in support of this claim. To the opposite, as explained below,[246] Latvia tacitly recognised Estonia's straight baselines in the Gulf of Riga (likewise Estonia recognised Latvia's straight baselines) by concluding the 1996 Maritime Boundary Treaty. The boundary line, as agreed in the treaty, concords with the Estonian and Latvian straight baselines in the Gulf of Riga.[247]

5. Delimitation in the Gulf of Riga

5.1. Relevant Coasts and Baselines in the Gulf of Riga

The geographical borders of the Gulf of Riga are the entrance of the Irbe Strait (to the west), the Latvian coast (to the south), the coast of Saaremaa Island (to the north-west), the southern ends of the Small Strait and Big Strait next to Muhu Island (to the north) and the mouth of the Pärnu River (to the east). In the centre of the Gulf of Riga lies Ruhnu Island.

Erik Franckx has considered the geographical positioning of the coasts of the Gulf of Riga as complicated from the perspective of maritime boundary delimitation.[248] The coasts in the eastern part of the Gulf of Riga are adjacent, then become opposite in the central and western part of the gulf, only to turn adjacent again in the Baltic Sea proper.

Notwithstanding the vicinity of Latvia and Estonia, their coastlines have little in common in terms of Article 7(1) of the LOSC. Article 7(1) of the LOSC provides that in localities where the coastline is deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity, the method of straight baselines joining appropriate points may be employed in drawing the baseline from which the breadth of the territorial sea is measured. In this regard, Estonia has many islands in the Gulf of Riga, whereas Latvia has none. Thus, section 1(10) of the Latvian Law on the State Border does not refer to any straight baselines connecting islands or enclosing bays. It defines a baseline in the Baltic Sea as "the maximum low-water line and straight lines which connect the points of the hydrotechnical structures or other structures located on the opposite side of a specific port, which are located further towards the

[244] Presumably, the limited boundary line as agreed upon in the afore-referred Article 1(a) of the 1923 protocol to the 1923 Supplementary Convention on the Estonian-Latvian Frontier Questions.
[245] See Franckx 2002, *op. cit.*, p. 3007.
[246] See *infra* section 5.2 of Part II.
[247] See 1996 Agreement on the Maritime Delimitation in the Gulf of Riga, the Strait of Irbe and the Baltic Sea, *op. cit.* See also maps 5 and 6 in Annex 1.
[248] Franckx 2002, *op. cit.*, p. 2996.

sea."[249] Nevertheless, under a 2010 government decree, Latvia has still established four sections of straight baselines connecting points along its relatively smooth coast in the Gulf of Riga. One of these sections is located on the opposite coast of Ruhnu and runs from the northernmost point of the Courland Peninsula many miles southwards.[250]

The Latvian coast comprises only coastal land, whereas the most influential features on the Estonian coast are islands – primarily Saaremaa and Ruhnu, but also Kihnu along with its adjacent Mani and Sorgu islets as well as the Abruka (hist. *Abro*) archipelago composing of Abruka and Vahase (hist. *Wahesoo*) islands and Linnusitamaa, Kasse, Kirju islets in the north-western part of the Gulf of Riga. Similarly, in terms of maritime delimitation, the Allirahu Islets close to Abruka were of great relevance. This applies also to the Estonian Vesitükimaa Islets that are located in the vicinity of the southernmost point of the Sõrve Peninsula in the Irbe Strait.

Due to the complex coastline of the Gulf of Riga, Estonia and Latvia employed a wide array of maritime boundary delimitation methods in order to reach an equitable solution. Unlike in the maritime boundary delimitation between Estonia and the Russian Federation, in the course of which, arguably, only the equidistance rule was applied,[251] the various sections of the maritime boundary between Estonia and Latvia reflect the use of most of the common methods for maritime boundary delimitation.

The maritime boundary between Estonia and Latvia is thus determined not only by the application of the equidistance method, as stipulated in Article 15 of the LOSC, but also by other methods that fall under the rule as stipulated in Article 15 of the LOSC: special circumstances, parallel line, enclaving and perpendicular line methods. Next, the application of these methods to the maritime boundary delimitation between Estonia and Latvia will be studied more carefully with respect to, first, the western part of the Gulf of Riga and, secondly, the eastern part of the Gulf of Riga.

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[249] On the State Border of the Republic of Latvia. Adopted 12.11.2009, e.i.f. 02.12.2009, section 1(10). Accessible: http://www.vvc.gov.lv/export/sites/default/docs/LRTA/Likumi/On_the_State_Border_of_the_Republic_of_Latvia.doc (01.09.2016).

[250] See map 6 in Annex 1.

[251] See Article 1 of the Treaty on the Delimitation of Maritime Areas of Narva Bay and the Gulf of Finland between the Republic of Estonia and the Russian Federation.

5.2. Delimitation in the Western Part of the Gulf of Riga: The Application of the Perpendicular and Equidistance Lines, Special Circumstances and Enclaving

The maritime boundary between Estonia and Latvia in the Baltic Sea proper runs as a perpendicular line from the tripoint[252] of the Estonian, Latvian and Swedish common maritime boundary directly to south-east until it reaches the median line of the Irbe Strait.[253] The perpendicular line (a direct line as drawn from the coast following the general direction of the relevant coasts[254]) is thus relatively long, since the tripoint is situated close to the northernmost point of the Swedish Gotland Island.[255]

It has been argued that navigational interests influenced the maritime delimitation in the Irbe Strait and inspired its coastal States not to use equidistant points, but instead refer to the shipping channel which runs closer to the Latvian coast on the Courland Peninsula.[256] This would imply the use of the thalweg method by Estonia and Latvia in the Irbe Strait. Pursuant to the thalweg method, the boundary line should follow the lowest points along the shipping route or river bed.[257] Yoshifumi Tanaka has noted that

> "In light of the limited State practice available and the small number of cases, the usefulness of the thalweg in the context of maritime delimitation is not evident. In addition, few writers support this system as a general rule for maritime delimitation. /.../ Owing to the insufficiency of State practice and these practical problems, the thalweg system appears to be too unstable to serve as a general rule."[258]

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[252] The tripoint was agreed by Estonia, Latvia and Sweden in a treaty concluded shortly after the entry into force of the 1996 Maritime Boundary Treaty. See Agreement between the Government of the Republic of Estonia, the Government of the Republic of Latvia and the Government of the Kingdom of Sweden on the Common Maritime Boundary Point in the Baltic Sea. Stockholm 30.04.1997, e.i.f. 20.02.1998. See generally on the tripoint agreement in E. Franckx. Estonia-Latvia-Sweden. Report No. 10-17. – Charney, Smith (eds), *op. cit.*, pp. 3041–3055.

[253] See map 5 in Annex 1.

[254] See also e.g. the Delimitation of the Maritime Boundary between Guinea and Guinea-Bissau, 14 February 1985, Reports of International Arbitral Awards, vol. XIX, pp. 149–196. The Grisbådarna Case (Norway v. Sweden), Award of the Tribunal, 23.10.1909, p. 6.

[255] See map in E. Franckx. Two More Maritime Boundary Agreements Concluded in the Eastern Baltic Sea in 1997. – 13 The International Journal of Marine and Coastal Law 1998(2), p. 275.

[256] Franckx 2002, *op. cit.*, p. 3004.

[257] See generally on the thalweg method in Taska 1974, *op. cit.*, p. 126. A. Piip. Rahvusvaheline õigus. Tartu: Akadeemiline Kooperatiiv 1936, p. 175. On the historical development of the thalweg method, see Tanaka 2006, *op. cit.*, pp. 28–31 and S. M. Rhee. Sea Boundary Delimitation between States before World War II. – 76 The American Journal of International Law 1982, pp. 561–564, 578–579.

[258] Tanaka 2006, *op. cit.*, p. 31.

However, the thalweg method may in principle be a stable and effective method of maritime boundary delimitation concerning *prima facie* shallow straits. Such straits may include a shipping channel that follows a relatively direct line. In this regard, the Irbe Strait provides a good example.

The depth of the Irbe Strait is mostly 5–10 meters and may thus be dangerous for larger ships. However, the southern part of the Irbe Strait includes a narrow shipping channel with a depth of 20–23 m.[259] In case the concerns about safe navigation would have been paramount, then the boundary line in the Irbe Strait should have followed generally the lowest points of the Irbe Strait's seabed. Thus, the application of the thalweg method would have implied that the boundary line should have been drawn south of the equidistance line between the Estonian and Latvian coasts on the Sõrve Peninsula and the Courland Peninsula, respectively.

However, the navigational concerns did not influence the boundary delimitation in the Irbe Strait and the thalweg method was not applied. The maritime boundary in the Irbe Strait is an equidistant line as measured from the Estonian straight baselines that connect the southern cape of the Vesitükimaa islet with a rock situated south-west of the Kaavi Cape (to the east), as well as with a rock south-west of the Loode Cape (to the west).[260] The fact that the equidistance method was used in the Irbe Strait was also confirmed by the Estonian foreign minister during the reading of the 1996 Maritime Boundary Treaty in the Estonian Parliament.[261] The equidistance line in the Irbe Strait is located in a relatively deep maritime area east of the centre of the strait (depths ranging from 20 m to slightly over 30 m), whereas in the western part of the strait the boundary crosses the relatively shallow waters adjacent to the southern end of the Sõrve Shelf, including the Ivanovski Shelf, which is only 5 m deep.[262]

Under the 1996 Maritime Boundary Treaty, there is no divergence between the boundary line and the equidistance line in the western part of the Gulf of Riga, since the coastal States of the Gulf of Riga decided to draw the equidistance line in the Gulf of Riga and in the Irbe Strait on the basis of the Estonian and Latvian straight and normal baselines.[263] The boundary line, as agreed between Estonia and Latvia, coincides with the equidistance line, including in

[259] 2001 chart "Väinameri (West-Estonian Archipelago)". Charts of Estonia, vol. 2. Tallinn: Estonian Maritime Administration 2001, p. 8. See also Eesti Nõukogude Entsüklopeedia, vol. 3. – Irbe väin. Tallinn: Valgus 1988, p. 673.

[260] For the coordinates of the points of straight baselines, see Annex 1 of the Estonian Maritime Boundaries Act, *op. cit.* For the boundary line as measured from the Estonian straight baselines and the Latvian smooth mainland coast on the Courland Peninsula, see Charts of Estonia, vol. 3. Tallinn: Estonian Maritime Administration 2002, p. 8.

[261] Stenographic record of the First Reading of the 1996 Maritime Boundary Treaty in the Estonian Parliament, *op. cit.*

[262] Maritime Administration. Charts of Estonia 2002, *op. cit.*, p. 8.

[263] Unlike e.g. in the maritime boundary delimitation between Estonia and the Russian Federation, in the course of which only base points on the coast were recognised.

the maritime area between the eastern coast of the Courland Peninsula and Ruhnu Island.[264]

Therefore, the equidistance line, as defined in Article 15 of the LOSC, was applied in the maritime area ranging from the Irbe Strait to south of Ruhnu Island. In this maritime area, the most influential coastal features regarding the baselines of the equidistance line were Latvia's Courland Peninsula, as well as Estonia's Allirahu Islets close to the Abruka archipelago in addition to Ruhnu Island.[265] According to Artur Taska the equidistance line had been used by Estonia and Latvia in the less than 24-miles-wide maritime area between the Courland Peninsula and Ruhnu Island already in the 1920s under the legal framework of the 1925 Helsinki Convention.[266]

Only the turning points number 11 and 12 between the Abruka archipelago and the Kolka Cape have been adjusted, presumably due to navigational needs. Namely, if the boundary line in this section would have restrictively followed the end point of the Estonian straight baseline connecting the Kaavi Cape with Allirahu Islets, as well as the starting point of the straight baseline connecting Allirahu Islets with Ruhnu Island, then it would have created an acute-angled turning point in the middle of the Gulf of Riga similarly to the one shown on the 1931 Estonian map depicting the *Frontière* between Estonia and Latvia.[267] This would not have been in line with navigational interests since e.g. the Estonian vessels transiting from the Irbe Strait to Ruhnu Island through the Estonian waters would have been required to take an unreasonably long route and follow the acute-angled turning point.[268] The turning points number 11 and 12 thus provide for a smoother boundary line.

The delimitation methods used in the western and the eastern part of the Gulf of Riga resulted in a partial enclave of Ruhnu Island. The territorial sea of Ruhnu Island is 12 miles wide, except for a short section bordering the Courland Peninsula where the equidistance method was used. According to the Estonian foreign minister, the position of Latvia during the maritime delimitation negotiations was to draw a line from the end point of the land boundary on the eastern coast of the Gulf of Riga westwards along the 58th parallel (north) up to

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264 The outcome differs if one disregards the system of straight baselines and uses instead basepoints on the coast. See the map in Franckx 2002, *op. cit.*, p. 3013 and argumentation on the sraight baselines in ibid, p. 3007.

265 See Annex 1 of the Estonian Maritime Boundaries Act, *op. cit.*, as well as the 2002 chart "Liivi laht/Gulf of Riga". Estonian Maritime Administration. Charts of Estonia 2002, *op. cit.*, p. 20. See also the map on Latvia's straight baselines in map 6 in Annex 1.

266 Convention for the Suppression of the Contraband Traffic in Alcoholic Liquors. Helsinki 19.08.1925, e.i.f. 24.12.1925. See Eesti lepingud wälisriikidega, vol. 5 (1925–1926). Tallinn: Tallinna Eesti Kirjastus-Ühisus 1926, pp. 301–307. See Treaty 1 in Annex 2 for the authentic text of the convention in French and Estonian. Taska 1974, *op. cit.*, pp. 62, 131. On the legal framework of the 1925 Helsinki Convention see in more detail *infra* section 1.3 of Part IV.

267 1931 map of western Estonia, *op. cit.*

268 Notably, Latvia does not recognise the right of innocent passage of foreign warships in conformity with the LOSC. See *infra* section 3 of chapter 1 in Part III.

the Irbe Strait, only to enclave Ruhnu Island by according it a 3-miles-wide territorial sea.[269] Although Ruhnu Island was attributed a 12-miles-wide territorial sea in the 1996 Maritime Boundary Treaty, the island's 12-miles-wide territorial sea was still mostly left surrounded by the Latvian waters from east, south and west.[270]

Thus, the enclaving method was used in the maritime boundary delimitation for delimiting the maritime boundary between Estonia and Latvia in the waters surrounding Ruhnu Island. This did not result in a full enclave. In case of full enclave, an island's (partial) maritime zone is wholly bordered with foreign maritime waters. However, this is not the case with Ruhnu Island since it is connected with Estonian internal waters and territorial sea to the north-west, north and north-east. Hence, Ruhnu Island is partially enclaved.[271] This is also influenced by the acute-angled turning point of the boundary east of Ruhnu. The reasons for the establishment of the acute-angled turning point are examined next. For understanding the boundary line in the eastern part of the Gulf of Riga, it is above all necessary to take into account historical circumstances.

5.3. Delimitation in the Eastern Part of the Gulf of Riga

5.3.1. The Application of a Prior Partial Territorial Sea Boundary

The maritime boundary delimitation between Estonia and Latvia has been referred to in the legal literature as one of the examples in State practice that concerns historical considerations.[272] Namely, as discussed earlier,[273] a small section of the territorial sea in the Ikla-Ainaži section had been delimited by Estonia and Latvia already in 1923. However, reference to this partial delimitation does not amount to the use of historic title in the 1996 maritime boundary delimitation.[274] It simply means that Estonia and Latvia had to delimit the remaining part of the territorial sea beyond that partial boundary.

According to the LOSC Annex VII Tribunal, the concept of historic title over sea refers to an area of sea claimed exceptionally as internal waters (or, possibly, as territorial sea) on the basis of historical circumstances.[275] The LOSC Annex VII Tribunal has noted that historic title should be distinguished from historic rights:

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[269] Stenographic record of the First Reading of the 1996 Maritime Boundary Treaty in the Estonian Parliament, *op. cit.*

[270] See map 5 in Annex 1.

[271] See generally United Nations. Handbook on the Delimitation of Maritime Boundaries. New York 2000, p. 59.

[272] Franckx 2002, *op. cit.*, pp. 2997–2998, 3007.

[273] See *supra* section 2 of Part II.

[274] For claims of sovereignty over particular islands in the South China Sea on the basis of historic title: see South China Sea Arbitration, *op. cit.*, para 272. See also Van Dyke 2009, *op. cit.*, pp. 63–65.

[275] South China Sea Arbitration, *op. cit.*, paras 221, 226. See also Fisheries Case 1951, *op. cit.*, p. 130.

> "The term 'historic rights' is general in nature and can describe any rights that a State may possess that would not normally arise under the general rules of international law, absent particular historical circumstances. Historic rights may include sovereignty, but may equally include more limited rights, such as fishing rights or rights of access, that fall well short of a claim of sovereignty. 'Historic title', in contrast, is used specifically to refer to historical sovereignty to land or maritime areas."[276]

The Tribunal has also clarified that the formation of the historic title requires the continuous exercise of this exceptional claim and acquiescence on the part of other affected States.[277] These conditions are not met with regard to the maritime delimitation in the eastern Gulf of Riga.

Pursuant to Article I of the 1992 Treaty on the Re-Establishment of the Boundary between Estonia and Latvia, the treaties and other legal acts concluded between the two States in the 1920s and 1930s served as the basis for their post-1991 boundary. Although the maritime boundary between Estonia and Latvia was not the object of the 1992 treaty, it nevertheless had great significance for the delimitation of the maritime boundary in the Gulf of Riga, which is exemplified by the reference to the 1992 Treaty on the Re-Establishment of the Boundary in the 1996 Maritime Boundary Treaty.[278]

In particular, pursuant to Article 1(a) of the Protocol appended to the 1923 Supplementary Convention on the Estonian-Latvian Frontier Question, the maritime boundary between the two States was drawn from the end point of the land boundary to north-east for over 3 miles and ran essentially in parallel with the 660-metre-long Ainaži port's northern jetty, the construction of which was finished in 1928.[279] Then the boundary line, as agreed under the 1996 Maritime Boundary Treaty, turns south-west and runs in that direction for approximately 0.5 miles.[280] The end-point of this section of the maritime boundary (turning point number 3) was referred to by the Estonian and Latvian delegations in the negotiations as "the historical border point at sea".[281] In order to also guarantee entrance to the Ainaži port for modern ships with a deeper draught, the length of the historical Estonian-Latvian partial pre-1940 maritime boundary was now extended 0.5 miles on the basis of the principles stipulated in Article 1(a) of the Protocol appended to the 1923 Supplementary Convention, so as to reach a total of 4 miles.[282] Thus, this 4-miles-long section of the Estonian-Latvian maritime boundary (from the end point of the land boundary up to turning point number 3) was delimited on the basis of a previous partial territorial sea boundary (in light of the Protocol appended to the 1923 Supplementary Convention).

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276 South China Sea Arbitration, *op. cit.*, para 225.
277 Ibid, para 265.
278 Franckx 2002, *op. cit.*, p. 2998.
279 See in more detail *supra* section 2 of Part II.
280 See map 5 in Annex 1.
281 See Franckx 2002, *op. cit.*, p. 2998.
282 Ibid, p. 3004.

However, the remaining section of the eastern part of the Gulf of Riga up to the territorial sea of Ruhnu Island was not delimited on the basis of the previous partial territorial sea boundary. These waters had been high seas prior to 1940 and had not been subject to any specific agreement by the States. In this part of the maritime area, the parallel line method was used for delimiting the boundary.

5.3.2. The Application of the Parallel Line Method

After the 4-miles-long historical boundary, the section of the boundary line between its turning points no. 3 and 4 runs as a straight line in the east-west direction and is mostly based on the parallel line method. The use of the parallel line method enabled to allocate a large maritime area between Ruhnu Island and the eastern mainland coast to Latvia. If the States had applied the equdistance method instead, this maritime area would have consequently fallen to the Estonian side of the boundary, as the Latvian coast is relatively distant in comparison with the Estonian islands Ruhnu and Kihnu, as well as the straight baseline which connects them and nearly crosses the terminus of the parallel line.[283]

Upon Latvia's proposal Estonia and Latvia took the "historical border point at sea" (turning point no 3 as the starting point for drawing an approximately 20-miles-long straight line to the west in parallel with the nearby 58th parallel north.[284] The application of the parallel line method was possible since the eastern coast of the Gulf of Riga, which runs almost directly from north to south, is smooth and adjacent.

Notably, the application of the parallel line method is in State practice generally common for delimiting more distant maritime areas, e.g. in oceans.[285] This relates to the fact that due to its simplicity, the parallel line may not be sufficiently accurate and nuanced for reaching an equitable solution.[286] Hence, the application of the parallel line method by Estonia and Latvia may be consid-

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[283] By contrast, Erik Franckx has found that the Estonian-Latvian maritime boundary up to its turning point number 4, which is located approximately 24 miles west of the end point of the land boundary, is based on the historical boundary which was agreed in Article 1(a) of the Protocol to the 1923 Supplementary Convention. See Franckx 2002, *op. cit.*, pp. 2998, 3008.

[284] Stenographic record of the Second Reading of the 1996 Maritime Boundary Treaty in the Estonian Parliament, *op. cit.*

[285] E.g. Agreement between Portugal and Spain on the Delimitation of the Territorial Sea and Contiguous Zone. Lissabon 12.02.1976, not yet ratified. Treaty on the Delimitation of Marine and Submarine Areas and Related Matters between the Republic of Panama and the Republic of Colombia. Cartagena 20.11.1976, e.i.f. 30.11.1977. Exchange of Notes between the United Republic of Tanzania and Kenya concerning the Delimitation of the Territorial Waters Boundary between the two States. Dodoma/Nairobi 17.12.1975, e.i.f. 09.07.1976.

[286] See United Nations Handbook on the Delimitation of Maritime Boundaries, *op. cit.*, p. 57.

ered as a rare example of its use for the delimitation of a relatively narrow maritime area.

The parallel line ends by reaching the boundary's turning point number 4 which demarcates the outer limit of the 12-miles-wide territorial sea of Ruhnu Island. Also, at this point, the maritime boundary almost overlaps with the Estonian straight baseline as drawn between the islands of Ruhnu and Kihnu. During the reading of the 1996 Maritime Boundary Treaty, members of the Estonian Parliament proposed to modify the parallel line so as to exclude the acute-angled triangle which results from the crossing of the parallel line with the territorial sea of Ruhnu Island.[287] Navigation as a special circumstance in terms of Article 15 of the LOSC would have provided sufficient legal grounds for such modification of the boundary line. However, it is likely that the application of the parallel line east of Ruhnu Island was part of a package deal by which Latvia also recognised the 12-miles-wide territorial sea of Ruhnu Island. This would explain why it was not adjusted to navigational needs.

The Estonian foreign minister was questioned by the members of the Parliament during the first reading of the 1996 Maritime Boundary Treaty about the potential for a compromise with Latvia for excluding the possibility of Estonian ships sailing the Ruhnu-Pärnu waterway in this acute angle to accidentally enter the Latvian territorial sea.[288] The foreign minister admitted in his later reply during the second reading in the Parliament that "it is uncommon in State practice that an acute triangle is agreed upon in the maritime boundary" as he also noted that the proposal made by the Estonian delegation in the course of the negotiations to discuss this question further was rejected by Latvia, since it considered this "neither necessary nor reasonable".[289] At the same time, the Latvian Government confirmed that it recognises the right of innocent passage of Estonian ships in this maritime area in accordance with the LOSC.[290]

The application of the parallel line method to the maritime boundary delimitation in the eastern part of the Gulf of Riga may also be explained by the unanticipated fact that in terms of Article 3 of the LOSC, this approximately 20-miles-wide maritime area (between turning points no. 3 and 4) of the eastern part of the Gulf of Riga does not include the territorial sea of Estonia nor Latvia. Instead, it was an area in which both Estonia and Latvia could potentially have established their EEZ. Yet since Ruhnu Island was attributed only partial effect and thus its potential EEZ was omitted, this part of the maritime area fell completely under the Latvian EEZ.

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[287] Stenographic record of the First Reading of the 1996 Maritime Boundary Treaty in the Estonian Parliament, *op. cit.*

[288] Ibid.

[289] Stenographic record of the Second Reading of the 1996 Maritime Boundary Treaty in the Estonian Parliament, *op. cit.*

[290] Ibid.

6. The EEZ in the Gulf of Riga

The coastal States of the Gulf of Riga (Estonia and Latvia) are not entitled to wholly cover the Gulf of Riga with their territorial sea. The Estonian system of straight baselines, which is based on the Sõrve Peninsula, Allirahu Islets, Ruhnu Island and Kihnu Island, only excludes the possibility of the existence of a narrow belt of an EEZ in the Estonian maritime area of the Gulf of Riga. Such an EEZ would have otherwise spanned the middle of the triangular area between the islands of Abruka, Kihnu and Ruhnu (north-west, north and north-east of Ruhnu).

As analysed above, Latvia tacitly recognised Estonia's system of straight baselines in the Gulf of Riga by agreeing to draw the equidistance line on the basis of them. Both States might have presumed that they managed to exclude an EEZ from the Gulf of Riga, including in the Latvian maritime area.[291] Latvia's rejection of the Estonian system of straight baselines in the Gulf of Riga on the basis of a claim that they are excessive and illegitimate under Article 7(1) of the LOSC would likely have established the cornerstone for any parallel legal regime of passage rights in the Gulf of Riga for foreign ships and aircraft. The rejection of Estonia's straight baselines, which would have signalled Latvia's protest against the inclusion of the maritime area north of Ruhnu Island into Estonia's internal waters, would not have been in the interest of Latvia as it would have indicated for third States the means for enjoying the right of transit passage in the Gulf of Riga. By submitting protests against Estonia's straight baselines (as established under its domestic law) in the Gulf of Riga, the ships and aircraft of foreign States could have claimed the right of transit passage in this maritime area.[292]

The applicability of the right of transit passage in the Gulf of Riga would have potentially impacted Latvia as much as Estonia. Thus, by tacitly recognising Estonia's straight baselines in the course of the maritime boundary delimitation in the Gulf of Riga, Latvia effectively contributed to mooting any potential discussion on the applicability of the transit passage regime to foreign ships and aircraft in the Gulf of Riga. Yet this co-operation (either intentional or by default) between the two States would have been truly effective only if the potential for an EEZ in the Latvian maritime area would have been excluded.

This is not the case. The Latvian maritime area does not include any islands,[293] which has resulted in the relatively sizeable EEZ in the Gulf of Riga proper. The south-eastern part of the Gulf of Riga includes a belt of an EEZ which is approximately 40 miles long and up to 25 miles wide.[294] This maritime area falls outside of Latvia's 12-miles-wide territorial sea. Also, since the Estonian territorial sea, as measured from the straight baseline connecting the

[291] See *infra* section 2 of chapter 1 in Part III.
[292] See also *infra* section 4.2 of chapter 1 in Part III.
[293] Notably, close to the Kolka Cape is located a Latvian artificial island which includes a lighthouse.
[294] See map 6 in Annex 1.

islands of Ruhnu and Kihnu, could have covered only a small northern part of the EEZ area,[295] the exclusion of the EEZ in the Gulf of Riga could not have been possible by means of transferring sovereignty that Estonia would otherwise have had over this area to Latvia analogously to the 1990 Bering Sea Treaty[296] or the 2010 Barents Sea Treaty.[297] Likewise, the delimitation of the boundary line, by which both States would have agreed to incorporate northern parts of the current Latvian EEZ adjacent to the Estonian straight baseline between Ruhnu Island and Kihnu Island into the Estonian waters while compensating this in the other sections of the maritime boundary, could not have excluded the existence of an EEZ in the Gulf of Riga.

Neither does the domestic law of Latvia provide that its maritime area in the Gulf of Riga falls entirely under Latvia's sovereignty, i.e. under its territorial sea and internal waters. Initially, section 4 of the December 1990 Latvian Law On the Border stipulated in accordance with Article 3 of the LOSC that "Among the territorial waters of the Republic of Latvia shall be regarded the waters of the Baltic Sea to the width of 12 sea miles, counting from the maximum low tide line from the Latvian coast."[298] Subsequent to the 1996 Maritime Boundary Treaty with Estonia, the corresponding provision on the width of the territorial sea was amended and provided as of 1998 that "The territorial sea of the Republic of Latvia, unless specified otherwise in bilateral agreements, shall be the waters 12 nautical miles wide measured from the base line."[299] In 2009, the new Latvian Law on the Border entered into force which defines in section 1(9) the territorial sea of Latvia as "the waters of the Baltic Sea and of the Gulf of Riga of the Baltic Sea in width of 12 nautical miles, counting from the base line, if it has not been otherwise specified by international agreements".[300]

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[295] See maps 5 and 6 in Annex 1.

[296] Article 3 of the Agreement between the United States of America and the Union of Soviet Socialist Republics on the maritime boundary. Washington 01.06.1990, not yet ratified. Accessible: http://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/TREATIES/USA-RUS1990MB.PDF (01.09.2016).

[297] Article 3 of the Treaty between the Kingdom of Norway and the Russian Federation Concerning Maritime Delimitation and Cooperation in the Barents Sea and the Arctic Ocean. Murmansk 15.09.2010, e.i.f. 07.07.2011. Accessible: http://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/TREATIES/NOR-RUS2010.PDF (01.09.2016). See also Ø. Jensen. The Barents Sea: Treaty between the Kingdom of Norway and the Russian Federation Concerning Maritime Delimitation and Cooperation in the Barents Sea and the Arctic Ocean. – 26 The International Journal of Marine and Coastal Law 2011(1), p. 155.

[298] Law of the Republic of Latvia „On the Border of the Republic of Latvia". Adopted December 1990, e.i.f. 10.12.1990. Accessible: http://www.un.org/depts/los/LEGISLATIONANDTREATIES/STATEFILES/LVA.htm (01.09.2016).

[299] State Border Law of the Republic of Latvia. Adopted 27.10.1994, e.i.f. 10.11.1994, section 4(1) subsequent to the 14.10.1998 amendment. Accessible: http://www.vvc.gov.lv/export/sites/default/docs/LRTA/Likumi/State_Border_Law_of_the_Republic_of_Latvia.doc (01.09.2016).

[300] Section 1(9) of the Act on the State Border of the Republic of Latvia, *op. cit.*

Until quite recently, an authoritative map on the Latvian maritime zones in the Gulf of Riga was not readily available. Yet on July 13th, 2011, the Secretary-General of the United Nations communicated to all Member States of the United Nations that Latvia had two weeks earlier deposited with him, pursuant to Article 16(2) of the LOSC, maps showing the baselines and the outer limits of Latvia's territorial sea, including the lines of delimitation, as well as a list of geographical coordinates of points defining Latvia's baselines.[301] The Latvian map depicts the limits of the EEZ in the south-eastern part of the Gulf of Riga.[302]

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[301] M.Z.N.84.2011.LOS (Maritime Zone Notification). Accessible: http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/mzn_s/mzn84ef.pdf (01.09.2016).

[302] See map 6 in Annex 1.

PART III. THE SIGNIFICANCE OF THE OUTER LIMITS OF MARITIME ZONES FOR THE LEGAL REGIME OF THE ESTONIAN STRAITS

It has not always been unequivocal that the Gulf of Riga includes an EEZ in the Latvian maritime zone. As subsequent analysis shows, many authors have examined the passage rights in the Gulf of Riga and the Irbe Strait from the perspective of innocent passage. None of them has taken into account the Latvian EEZ in the Gulf of Riga.[303] The significance that the Latvian EEZ next to Ruhnu Island has on the legal regime of the Irbe Strait and on the Gulf of Riga is discussed next. In particular, it is also examined how a potential change in the outer limits of the Estonian and/or Latvian maritime zones may result in the further alteration of the passage regime in the Irbe Strait and in the Gulf of Riga. The significance of the outer limits of maritime zones for the legal regime of straits is later in this part of the study also scrutinised in the example of the Gulf of Finland.

Chapter 1. The Irbe Strait in the Gulf of Riga

1. The Characteristics of the Irbe Strait

The Irbe Strait (Estonian: *Kura kurk* or *Irbe väin;* Latvian: *Irbes jūras šaurums*) connects the Baltic Sea proper with the Gulf of Riga. It lies between the Estonian Sõrve Peninsula and the Latvian Courland Peninsula and stretches from the Ovisi lighthouse in the west to the Abruka meridian in the east.[304]

The shallow strait is in its western part generally 5 to 10 m deep due to the almost continuous belt of shallows extending from the Latvian coast to the tip of the Estonian Sõrve Peninsula.[305] However, its narrow shipping channel is 20–23 m deep.[306] Due to the relatively shallow depth and low salinity of the Gulf of Riga, the strait is often covered with ice; the Gulf of Riga freezes completely over in about a third of winters and the ice cover may last from January to April.[307] However, even the bays (e.g. Pärnu Bay) of the Gulf of Riga are never covered with ice for most of the year. This excludes the applicability of the

[303] This is the general trend. E.g. the maps of the Baltic Marine Environment Protection (Helsinki) Commission do not depict the Latvian EEZ in the Gulf of Riga; this maritime area has been widely deemed to include only the territorial sea boundary of Estonia and Latvia. See e.g. the various maps presented in the Helsinki Commission's reports on shipping accidents in the Baltic Sea area. Accessible: http://helcom.fi/action-areas/shipping/publications (01.09.2016).

[304] Eesti Entsüklopeedia. – Kura kurk. Accessible in Estonian at: http://entsyklopeedia.ee/artikkel/kura_kurk1 (01.09.2016).

[305] The depths in the eastern end of the Irbe Strait reach up to 30 m.

[306] Tea Entsüklopeedia, vol. 11. – Kura kurk. Tallinn: Tea 2014, p. 145.

[307] Eesti Entsüklopeedia, vol. 8, *op. cit.*, Riia laht, p. 128. Eesti Nõukogude Entsüklopeedia, vol. 3, *op. cit.*, p. 673.

special legal regime of ice-covered areas (Article 234 of the LOSC) to the Gulf of Riga.[308]

The international sealane of the Irbe Strait leads to the ports of *inter alia* Riga, Pärnu, Kuressaare, Roomassaare and Virtsu. The Irbe Strait has heavy traffic, reaching over 10 000 ships a year in 2011 and 2012.[309] In 2013, the ship traffic crossings in the Irbe Strait amounted to 9639 as compared with the Viro Strait's 38 150 crossings, Øresund's 29 474 crossings, the Great Belt's 18 478 crossings and the Åland Strait's 14 433 crossings.[310] In 2014, the 815-years-old Riga port alone accommodated 3797 vessels.[311] At the same time, the Irbe Strait falls entirely under the European network of nature protection areas (Natura 2000) and includes the Estonian nature reserve of Vesitükimaa Islets (216,4 ha) which is located at the tip of the Sõrve Peninsula. It is an important nesting area for sea birds and also has a grey seals' habitat.[312]

At its narrowest section, the Irbe Strait is 14.5 miles wide. The Irbe Strait falls entirely within the territorial sea of its coastal States Estonia and Latvia. Thus, the Irbe Strait meets the geographic and functional criteria of an international strait as it is used for international shipping and its width is up to 24 miles.

2. Straits of the Gulf of Riga Linking Two Parts of an EEZ

The Irbe Strait and the Sea of Straits may potentially fall under the transit passage regime since they connect the Latvian/Swedish/Estonian/Finnish EEZs in the Baltic Sea proper with the Latvian EEZ in the south-eastern part of the Gulf of Riga.[313] In this case, the right of transit passage would apply also in maritime areas that lead to such international straits or from such international straits to the respective EEZ, such as the northern part of the Gulf of Riga.[314] This would

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308 For a discussion on Article 234 of the LOSC, see *supra* section 2.2 of Part I.

309 See the maps and figures in Baltic Marine Environment Protection Commission. Report on shipping accidents in the Baltic Sea area during 2011. Helsinki 2011, pp. 2–5. Baltic Marine Environment Protection Commission. Report on shipping accidents in the Baltic Sea area during 2012. Helsinki 2012, pp. 3–7. The figures do not include small craft. Accessible: http://helcom.fi/action-areas/shipping/publications (01.11.2015).

310 Baltic Marine Environment Protection Commission. Report on shipping accidents in the Baltic Sea area during 2013. Helsinki 2014, p. 3. Accessible: http://helcom.fi/action-areas/shipping/publications (01.11.2015).

311 See About Port. – Freeport of Riga Authority, 2015. Accessible: http://www.rop.lv/en (01.09.2016).

312 See also M. Kuris (koost). Vesitükimaa laidude, Vesitükimaa hoiuala ja Kura kurgu hoiuala kaitsekorralduskava 2016–2025. Tallinn: Keskkonnaamet 2015, pp. 7–8.

313 On the legal regime of transit passage see *supra* section 1.2 of Part I.

314 See also A. R. Thomas, J. C. Duncan. Annotated Supplement to the Commander's Handbook on the Law of Naval Operations. – 73 International Law Studies 1999, p. 183. Schachte, Jr, Bernhardt, *op. cit.*, p. 536. R. I. Clove. Submarine Navigation in International Straits: A Legal Perspective. – 39 Naval Law Review 1990, p. 109. M. C. Stelakatos-Loverdos. The Contribution of Channels to the Definition of Straits Used for

be contrary to *inter alia* the security interests of the coastal States of the Gulf of Riga.

The Estonian foreign minister commented before the Parliament that during the maritime boundary delimitation in the Gulf of Riga, great emphasis was put on security concerns in view of finding a solution that would be favourable to the interests of Estonia.[315] He added that if the maritime boundary delimitation between Estonia and Latvia would not have been successful and both States would have referred the dispute for international arbitration, then in the end, Estonia and Latvia "would have been obliged to guarantee access to third States through the Irbe Strait and, besides, it would have been still necessary to delimit EEZ in international waters."[316] It thus appears that in the 1996 Maritime Boundary Treaty Estonia and Latvia aimed at setting aside Part III of the LOSC on the legal regime of straits. With respect to the foreign minister's comment on the EEZ it should be noted that Estonia and Latvia delimited the EEZ by leaving all of the overlapping EEZ on the Latvian side of the boundary.[317]

The head of the Parliament's foreign committee also hinted at the security concerns associated with the applicability of transit passage in the Irbe Strait:

> "In discussing the question at the [Parliament's] foreign committee it was not understood that the Gulf of Riga would need to be a part of the sea with free entrance and I understand that principally we are all of the view that the Gulf of Riga should be closed and divided between the territorial sea of Estonia and Latvia. In this regard, any talk that it should still include an exclusive economic zone similarly to what we provided in the 1993 Maritime Boundaries Act is, indeed, outdated."[318]

Thus, it appears that during the maritime boundary negotiations, Estonia and Latvia strived to exclude the existence of an EEZ in the Gulf of Riga in order to avoid the potential applicability of the transit passage regime in the Gulf of Riga. However, they did not succeed in this attempt since the failure to agree on the status of the Gulf of Riga as a historical bay inevitably lead to the existence of a Latvian EEZ in the Gulf of Riga which is beyond 12 miles from the baselines of both States.[319]

By comparison, due to the relative proximity of the Estonian and Russian coasts in Narva Bay and in the Gulf of Finland proper, as well as the fact that by virtue of Article 3 of the LOSC, both States have the right to establish the breadth of its territorial sea up to a limit of 12 miles for islands under their sov-

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International Navigation. – 13 The International Journal of Marine and Coastal Law 1998(1), p. 85.

315 Stenographic record of the First Reading of the 1996 Maritime Boundary Treaty in the Estonian Parliament, *op. cit.*

316 Ibid.

317 See *supra* section 6 of Part II.

318 Stenographic record of the First Reading of the 1996 Maritime Boundary Treaty in the Estonian Parliament, *op. cit.*

319 See *supra* section 6 of Part II. See also *infra* section 4.3 of Chapter 1 in Part III.

ereignty, the relevant maritime area in the Gulf of Finland, as viewed from both sides of the agreed median line under the Estonian and Russian Maritime Boundary Treaty, falls exclusively to the zones of 12-miles-wide territorial sea of both States.[320] Hence, the question of the exclusion of an EEZ under the Estonian and Russian Maritime Boundary Treaty in the context of the Viro Strait's transit regime was not relevant for the maritime boundary delimitation in the Gulf of Finland proper and Narva Bay. Therefore, it would not have been even theoretically possible to alter the Viro Strait's transit regime by means of maritime boundary delimitation.

The reason why strait States generally attempt by any legal means to avoid the applicability of the transit passage regime to its strait(s) pertains to the magnitude of limits on the coastal State's sovereignty over its territory, as provided in the legal framework under section 2 of Part III of the LOSC.[321] The domestic law of Estonia and Latvia on the passage rights of warships and other foreign vessels used for national non-commercial purposes does not follow the legal framework of transit passage and excludes the possibility of exercising transit passage in the relevant maritime area.

3. The Domestic Law of Estonia and Latvia on the Passage Rights of Warships and other Foreign Vessels Used for National Non-Commercial Purposes

Pursuant to section 13(1) of the Estonian State Borders Act,[322] innocent passage through the territorial sea of Estonia is permitted. Passage must be continuous and expeditious as, pursuant to section 13(5) of the Act, a vessel may only stop in case of a marine casualty, due to *force majeure*, in order to save human lives or provide assistance to vessels or aircraft in danger or in distress. According to section 13(7) of the Act, the deck armaments of a foreign vessel must be fixed in the position for transport and covered. Alex Oude Elferink has pointed out that such a specific requirement is not provided for in the LOSC as, according to Article 19(2)(b), it merely requires foreign ships in innocent passage to avoid "any exercise or practice with weapons of any kind".[323] Additionally, fishing

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[320] See also Case Concerning Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras), Judgment, I.C.J. Reports 2007, p. 659, para 302.

[321] The transit passage regime is almost always contrary to the interests of the strait States. Thus, the strait States generally strongly opposed the establishment of the concept of transit passage during the drafting of the LOSC. See e.g. Nandan, Rosenne, *op. cit.*, p. 284. See also Rothwell 2015, *op. cit.*, p. 122.

[322] Riigipiiri seadus (State Borders Act). Adopted 30.06.1994, e.i.f. 31.07.1994 (RT I 1994, 54, 902). Accessible: https://www.riigiteataja.ee/en/eli/ee/520012015001/consolide/current (14.09.2016).

[323] A. G. Oude Elferink. Estonia: Rules of Navigation of Ships through the Territorial Sea and the Internal Waters of Estonia. – 8 International Journal of Marine & Coastal Law 1993, p. 424.

and other gear must be placed at the storage facilities upon passage through the Estonian territorial sea. The latter requirement is absent from and thus also complements the indicative list of activities in Article 19(2) of the LOSC that are considered to be prejudicial to the peace, good order or security of the coastal State if carried out in its territorial sea.[324]

However, by contrast to the Swedish, Finnish and Russian regulations,[325] section 13(2) of the State Borders Act of Estonia still retains the requirement for foreign warships and other government-owned vessels used for non-commercial purposes to give a prior notification in order to enter the territorial sea of Estonia. Additionally, section 43(1) of the National Defence Act[326] of Estonia stipulates that a permit for entry of a foreign military vessel into Estonian territorial waters or inland waters is issued by the minister of defence or a person authorised thereby.

Although according to the wording of the said provision, the permit is necessary "for entry /…/ in territorial waters," it appears that unlike section 13(2) of the State Borders Act, it does not regulate innocent or transit passage through the territorial sea or internal waters, but rather the entry and stay of foreign warships in the Estonian territorial sea and internal waters. This is clarified in section 2(4) of the procedure for the issue of permits for entry of foreign military vessels in Estonian territorial waters or inland waters[327] (adopted as a Cabinet regulation under section 43(2) of the National Defence Act) which stipulates that diplomatic clearances are not required for exercising the right of innocent passage in the Estonian territorial sea. Instead, foreign military ships need to

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[324] See ibid.

[325] Ordinance concerning the admission to Swedish territory of foreign naval vessels and military aircraft (as amended 27.10.1994). Adopted 03.06.1966, e.i.f. 03.06.1966. See Hallituksen esitys Eduskunnalle Yhdistyneiden Kansakuntien merioikeusyleissopimuksen ja sen XI osan soveltamiseen liittyvän sopimuksen eräiden määräysten hyväksymisestä sekä laiksi aluksista aiheutuvan vesien pilaantumisen ehkäisemisestä annetun lain muuttamisesta (Explanatory Note to the Proposal of the Finnish Government) – 2.1. Aluemeri. Helsinki 1996, HE 12/1996. Accessible in Finnish at: http://www.finlex.fi/fi/esitykset/he/1996/19960012 (14.09.2016). See also Federal Act on the internal maritime waters, territorial sea and contiguous zone of the Russian Federation. Adopted 16.07.1998, e.i.f. 31.07.1998, sections 2(4) and 10–13. Accessible: http://www.un.org/depts/los/LEGISLATIONANDTREATIES/STATEFILES/RUS.htm (01.09.2016).

[326] Riigikaitseseadus (National Defence Act). Adopted 11.02.2015, e.i.f. 01.01.2016 (RT I, 12.03.2015, 1). Accessible: https://www.riigiteataja.ee/en/eli/ee/517112015001/consolide/current (01.09.2016).

[327] Välisriigi sõjalaevale territoriaal- või sisevetesse sisenemise loa ning välisriigi riiklikule õhusõidukile õhuruumi sisenemise loa andmise kord (Procedure for the Issue of Permits for Entry of Foreign Military Vessels in Estonian Territorial Waters or Inland Waters and Permits for Entry into Estonian Airspace of Foreign State Military Aircraft, for their Landing on Estonian Territory or for their Flying over the Territory). Adopted 28.01.2016, e.i.f. 05.02.2016 (RT I, 02.02.2016, 2). Accessible in Estonian with an English translation of the Application for Diplomatic Clearance of Military Ship at: https://www.riigiteataja.ee/akt/102022016002 (01.09.2016).

comply with the prior notification requirement as stipulated in section 13(2) of the State Borders Act.

The Estonian domestic law is silent on the regulation of transit passage in its maritime area. If the regime of transit passage should be applicable in some portions of Estonia's maritime area, then it is unclear whether foreign ships and aircraft have an obligation under the Estonian domestic law to get prior permission for the exercise of such right. Such an obligation would certainly be void under Article 38(1) of the LOSC. Yet section 12(2) of the Estonian State Borders Act currently provides that an aircraft may cross the state border outside the established airway only with the permission of an agency authorised by the Estonian Government.

A similar regulation to the afore-mentioned 2016 Estonian Cabinet Decree is also in force in Latvia. Under Paragraph 3 of the Latvian regulation, a foreign warship is similarly required to apply for a permit from the Ministry of Foreign Affairs to enter the Latvian territorial sea.[328] The 34-paragraphs long detailed regulation stipulates in Paragraph 5 *inter alia* that the embassy or the Ministry of Foreign Affairs shall, by diplomatic channels, request a permit for entering no later than 30 days prior to the planned entering in the territorial sea, inland waters and ports of Latvia by foreign warships if another procedure has not been specified in an international agreement. If the Head of State or a member of the government is on board a foreign warship as an official person, the warship needs to request a permit no later than 7 days prior to entering the Latvian territorial sea, pursuant to Paragraph 6 of the regulation. According to Paragraph 32 of the regulation, a foreign warship must notify the Latvian authorities if it is forced to enter and temporarily stay in the territorial sea due to an accident or natural disaster, need for medical assistance or other emergency reasons.

The Latvian Cabinet regulation of 2010 is adopted pursuant to Article 11(3) of the Law on the Border of the Republic of Latvia, which distinctly from the Estonian State Borders Act does not provide for a prior notification requirement for the foreign warships to exercise their right of innocent passage through the territorial sea. Section 10(9) of the Latvian Law on the Border stipulates that vessels of foreign States have the right to cross the State border and enter the territorial sea in conformity with the principle of innocent passage in accordance with the LOSC.

However, section 11(3) of the same Act provides that the procedures by which foreign warships enter and stay in the territorial sea, inland waters and ports, as well as leave the territorial sea, inland waters and ports, shall be determined by the Cabinet. Molenaar has noted that it is unclear what this actually

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[328] Procedures, by which Foreign Warships shall Enter and Stay in the Territorial Sea, Inland Waters and Ports of the Republic of Latvia and Leave Them (Cabinet Regulation No. 759). Adopted 10.08.2010, e.i.f. (with amending regulations) 11.11.2011. Accessible: http://www.vvc.gov.lv/export/sites/default/docs/LRTA/MK_Noteikumi/Cab._Reg._No._759_-_Foreign_Warships_shall_Enter_and_Stay_in_the_Territorial_Sea.doc (01.09.2016).

amounts to.[329] Section 11(3) of the Latvian Law on the Border is not subordinated to other Latvian laws that would clarify the nature of the innocent passage as provided in the domestic law. Thus, it is questionable whether section 11(3) of the Latvian Law on the Border in combination with the 2010 Cabinet regulation respects the right of innocent passage of foreign warships through the Latvian territorial sea absent of a prior permit. In addition, the Latvian domestic law does not regulate the right of transit passage.

In its Government Decree on territorial surveillance, Finland has also set out detailed requirements for foreign government (incl. military) vessels for applying to enter Finnish territorial sea and internal waters.[330] However, similarly to section 2(4) of the above-referred Estonian Cabinet Regulation, Finland has also unequivocally stated in section 5(1) of its Territorial Surveillance Act that a prior permission is not required in cases of innocent passage.[331]

The duties to notify the Estonian government in advance of passage through its territorial sea, as stipulated in section 13(2) and section $14^1(1)$ of the State Borders Act of Estonia, as well as to request a permit from the Latvian State authority, as seems to be provided in the Latvian regulation, are both in breach of the fundamental norm of the LOSC, namely Article 17, according to which all ships enjoy the right of innocent passage through the territorial sea.[332] Alex Oude Elferink has noted in connection with the Estonian requirement of prior notification that its application to foreign warships was generally quite frequent in State practice in 1994, whereas its extension to all vessels used for national non-commercial purposes at the time goes beyond the practice of most other States.[333]

Such a restrictive understanding of innocent passage was already adopted in Estonia under the Soviet rule by the Estonian scholar Abner Uustal.[334] Uustal was among the Soviet jurists that opposed to "bourgeois authors"[335] who "do not recognise the coastal States' right to prohibit the passage of ships and the overflight of aircraft".[336] Uustal was of the view that it is not possible to provide for innocent passage of foreign warships through territorial sea because "the foreign warships of capitalist States in the territorial sea of other States endan-

[329] Molenaar, *op. cit.*, pp. 239–240.

[330] Valtioneuvoston asetus aluevalvonnasta (Government Decree on Territorial Surveillance). Adopted 16.11.2000, e.i.f. 01.01.2001. Accessible: https://www.finlex.fi/fi/laki/kaannokset/2000/en20000971.pdf (01.09.2016).

[331] Aluevalvontalaki (Territorial Surveillance Act). Adopted 18.08.2000, e.i.f. 01.01.2001. Accessible: www.finlex.fi/en/laki/kaannokset/2000/en20000755.pdf (01.09.2016).

[332] See also LOSC: Declarations made upon signature, ratification, accession or succession or anytime thereafter, *op. cit.* – Germany, the United Kingdom, Italy, the Netherlands. See also e.g. Z. Keyuan. Innocent Passage for Warships: The Chinese Doctrine and Practice. – 29 Ocean Development & International Law 1998(3), p. 211.

[333] Oude Elferink 1993, *op. cit.*, p. 423.

[334] Professor of International law at the University of Tartu from 1966 to 1985. See L. Mälksoo. Rahvusvaheline õigus Eestis: ajalugu ja poliitika. Tallinn: Juura 2008, p. 111.

[335] A. Uustal. Rahvusvaheline õigus. Tallinn: Eesti Raamat 1984, p. 259.

[336] Ibid, p. 260.

ger the security of coastal States due to their weapons."[337] Uustal's approach to international law has been found to be wholly political and subsumed to the aims and interests of the politics of the Soviet Union.[338] Yet it is notable that after the 1989 joint declaration by the Soviet Union and the United States, even the Soviet Union abandoned the requirement of a prior notification or request for authorisation for a foreign ship to enjoy the right of innocent passage through territorial sea.[339] Other Estonia's neighbouring countries Finland and Sweden did so some years later, as discussed below.[340]

By contrast to Abner Uustal, the pre-1940 Estonian scholar Ants Piip favoured innocent passage concordant with the doctrine of *mare liberum*. Piip insisted that "the coastal State cannot prohibit passage through its coastal waters, i.e. coastal seas, to foreign ships and therefore, foreign merchant vessels as well as warships have so-called right to passage (*ius passagii innoxii*). Such a right is well founded, because the coastal sea is nothing more than a part of the high seas that the coastal State may be interested in the most, but in regard to which other States also have a certain necessity."[341] Likewise, in the Estonian draft reply of November 24th, 1938 to a preliminary notion[342] made by the British Foreign Office in its letter from 21st November 1938 on the 1938 Estonian Neutrality Act, it was stated that "Pursuant to the general norm of international law (XIII Hague Conv. Art. 10), the passage of warships through territorial waters is always permitted – it cannot be prohibited".[343] In the official reply by the Estonian Ministry of Foreign Affairs from October 2nd, 1939 to the memorandum[344] presented by the British Foreign Office to Estonia on June 5th, 1939, it was specified:

> "The Estonian Government wish to point out that according to the general principles of international law, as well as according to the provisions of Paragraph 1, belligerent warships may enter Estonian ports and territorial waters provided they, in so doing, comply with the prescriptions in force. The Government of a

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337 Uustal 1977, *op. cit.*, p. 37.

338 See Mälksoo 2008, *op. cit*, pp. 111, 119, 123.

339 Joint Statement by the United States of America and the Union of Soviet Socialist Republics: Uniform Interpretation of Rules of International Law Governing Innocent Passage. Jackson Hole 23.09.1989, p. 2. Accessible: http://www.un.org/depts/los/doalos_publications/LOSBulletins/bulletinpdf/bulE14.pdf (01.09.2016).

340 *Infra* section 2.2 of chapter 2 in Part III.

341 A. Piip. Rahvusvaheline mereõigus. Mereväeohvitseridele peetud loengute kokkuvõte. Tallinn: Merejõudude Staap 1926, pp. 10–11.

342 ERA.957.14.590, p. 2.
„In the first place, His Majesty's Government must make a general reservation regarding the prohibition of the stay of belligerent submarines in Estonian waters, and desire to point out that it has not hitherto been a practice in any war for neutrals to forbid entry altogether to any class of belligerent warship."

343 Ibid, p. 68.

344 An analogous memorandum was presented by the British Foreign Office to the governments of all the northern countries that had adopted the neutrality act in 1938, including Finland, Latvia and Lithuania. See ERA.957.14.563, pp. 5–6.

> neutral State is, however, entitled to prohibit, as the British Government themselves admit it, in exceptional cases the entry of belligerent warships into its territorial waters and ports."[345]

Also, in modern Estonian literature on the law of the sea, Heiki Lindpere has stated that legal acts that ignore the right of innocent passage or reservations to that effect made upon signing, ratifying or acceding to the LOSC are "indisputably void".[346]

Nevertheless, Estonia, similarly to Bangladesh, Croatia, Denmark, Egypt, Guyana, India, Libya, Malta, Mauritius, Nigeria, Serbia, Montenegro and South Korea, still upholds the requirement of prior notification.[347] Latvia's requirement of a prior permit for warships to enter its territorial sea also hinders the right of innocent passage. Algeria, Antigua and Barbuda, Bangladesh, Barbados, Brazil, Cambodia, Cape Verde, China, Congo, Denmark, Grenada, Iran, Maldives, Myanmar, Oman, Pakistan, the Philippines, Poland, Romania, St Vincent and the Grenadines, Somalia, Sri Lanka, Sudan, Syria, United Arab Emirates, Vietnam and Yemen required such a permit.[348] While acceding to the LOSC, Estonia and Latvia did not make a reservation on their restrictions to the right of innocent passage.[349]

It follows from the foregoing that the domestic law of Estonia and Latvia is in breach of the LOSC with regard to the legal framework applicable to innocent passage, as well as with the right of transit passage in case it should be applicable in the straits of the Gulf of Riga. In the case of applicability of transit passage regime to the Irbe Strait and/or the Sea of Straits, foreign (military) aircraft and (war)ships would essentially have the right to freely enter the Gulf of Riga through the Irbe Strait/Sea of Straits in their normal modes, navigate/fly around Ruhnu Island (through the Latvian EEZ) if they wish and leave the Gulf of Riga through the Irbe Strait and/or the Sea of Straits. This necessitates subsequent analysis on whether the transit passage regime is applicable to foreign ships and aircraft in the Irbe Strait.[350]

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[345] Ibid, p. 6.

[346] Lindpere 2003, *op. cit.*, p. 55. See criticism on the current Estonian legal framework on innocent passage also in A. Lott. Rahumeelse läbisõidu õigus Eesti territoriaalmeres. – Juridica 2015(9), pp. 636, 641–644. See also I. Kaunis, H. Lindpere, A. Lott. Mereõiguse kodifitseerimise lähteülesanne. Tallinn: Ministry of Economic Affairs and Communications 2015, pp. 165–169.

[347] Rothwell, Stephens 2016, *op. cit.*, p. 291.

[348] Ibid. Rothwell and Stephens do not refer to Latvia in their list of countries requiring a prior permit.

[349] LOSC: Declarations made upon signature, ratification, accession or succession or anytime thereafter, *op. cit.* – Estonia; Latvia.

[350] The passage regime in the Sea of Straits is examined *infra* in Part V.

4. The Legal Framework Applicable to the Irbe Strait

4.1. The Inapplicability of Article 45(1)(b) of the LOSC to the Irbe Strait

Artur Taska has noted that the pre-1940 legal status of the Irbe Strait as an international strait was beyond doubt,[351] although at that time, the 4-miles-wide territorial sea of its coastal States did not cover the strait entirely. Nowadays, López Martín has in her *International Straits: Concept, Classification and Rules of Passage* categorised the Irbe Strait as an international strait that connects part of an EEZ with the territorial sea of a foreign State in terms of Article 45(1)(b) of the LOSC.[352] Likewise, Caminos and Cogliati-Bantz have referred to the Irbe Strait as Article 45(1)(b)-type of strait on the basis of López Martín's study.[353] In this case, the right of non-suspendable innocent passage would be applicable to the ships transiting the Irbe Strait pursuant to Article 45(2) of the LOSC.

Yet this categorisation is not accurate. First, as López Martín herself seems to admit,[354] Article 45(1)(b) of the LOSC applies to such international straits that connect the territorial sea of a foreign State, i.e. not that of a strait State. Hence, geopolitically, Article 45(1)(b) of the LOSC may potentially be applicable to the Viro Strait (the strait States of which are Estonia and Finland) since it connects the territorial sea of a foreign State – that of the Russian Federation. By contrast, the Irbe Strait does not meet this geo-political criterion since it leads only to the territorial sea of Estonia and Latvia. Both countries are the coastal States of the Irbe Strait and may thus not be considered as foreign States in terms of the said provision. Thus, if the EEZ in the Gulf of Riga would be, hypothetically, non-existent, the Irbe Strait would rather fall under the category of non-international straits located in the territorial sea in respect of which none of the legal regimes of international straits is applicable (consequently the ordinary regime of suspendable innocent passage applies (Article 17 of the LOSC).

However, López Martín found that despite the inclusion of the term „foreign State" in Article 45(1)(b) of the LOSC, this provision may still be applied to all so-called dead-end straits, i.e. international straits which connect the territorial sea of a State, and thus also to the Irbe Strait.[355] She argued that

> "[I]f we carry out an extensive rather than a strict interpretation of this rule, we could also consider that the straits located between the high sea or an exclusive economic zone and the territorial sea of a State, even if it is a coastal State of the

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[351] Taska 1974, *op. cit.*, p. 113.
[352] López Martín, *op. cit.*, p. 100.
[353] Caminos, Cogliati-Bantz, *op. cit.*, p. 58. The authors have not examined the characteristics of the Irbe Strait (Kurk Strait, as the authors incorrectly refer to it) since if the authors had actually applied their conclusions on the criteria of Article 45(1)(b) of the LOSC to their classification of the Irbe Strait, then it would clearly not have been possible to place it in the Article 45(1)(b)-category of strait. This is due to Caminos' and Cogliati-Bantz's false presumption that the Irbe Strait is only bordered by Estonia (thus leading to the territorial sea of a foreign State – Latvia).
[354] López Martín, *op. cit.*, p. 99.
[355] Ibid, p. 100.

> strait are also included. This interpretation would be founded on two considerations. On the one hand, the stipulations in article 35 a) concerning internal waters which we have analysed; on the other hand, the types of straits we refer to are clearly "dead-end" straits, a category which is unanimously considered to be the objective of article 45.1 b), as was stated above. In addition, this same interpretation would also be supported by the opinion of some States. As regards this point, on presenting the proposal of the United Kingdom to the Second Committee, which is the proposal of article 45, the British delegate referred to these types of straits as "linking a part of the high seas with the territorial sea of a State"."[356]

However, such interpretation would go against not only the ordinary meaning of the terms of the said provision, but arguably also against its purpose. Article 45(1)(b) of the LOSC aims to ensure primarily that a State which does not have any control over the strait that connects its territorial sea with either the high seas or an EEZ would be vested with a lasting (non-suspendable) right of innocent passage in the strait. Likewise, Nandan and Anderson maintain in this context that "'foreign' means the same as in Article 16(4) of the CTSCZ, i.e. a State situated beyond the coastal State(s) bordering the strait."[357] Also, the Virginia Commentaries refer that an international strait falling under Article 45(1)(b) of the LOSC needs to connect the territorial sea of "a foreign State," not that of "a State".[358]

Second, during the time of writing the *International Straits: Concept, Classification and Rules of Passage* (published in English 2010, in Spanish in 2008), López Martín was not able to take into account the maps that Latvia deposited with the Secretary-General of the United Nations in June 2011 which show the baselines and the outer limits of Latvia's territorial sea, including the limits of Latvia's EEZ in the Gulf of Riga.

4.2. Transit Passage in the Irbe Strait

On the basis of Latvia's 2011 submission, it may be concluded that although Article 45(1)(b) of the LOSC is not applicable to the Irbe Strait, it does not necessarily mean that the Irbe Strait may be considered under the LOSC as a non-international strait in which passage rights of foreign ships would not be safeguarded. This is due to the existence of the Latvian EEZ in the south-eastern part of the Gulf of Riga. As a result of this, the Irbe Strait may be, in terms of Article 37 of the LOSC, used for international navigation between one part of an EEZ in the Baltic Sea proper and another part of an EEZ in the Gulf of Riga.

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[356] Ibid.

[357] Nandan, Anderson, *op. cit.*, p. 197.

[358] Nandan, Rosenne, *op. cit.*, p. 396. This matter is further analysed in Caminos, Cogliati-Bantz, *op. cit.*, pp. 57–58.

In this case, the Irbe Strait would fall under the above-described legal regime of transit passage.[359]

Article 37 of the LOSC provides that the regime of transit passage applies to international straits which are *used* for international navigation between two parts of an EEZ. In this regard, ships that transit the Irbe Strait do not always necessarily cross the Latvian EEZ in the south-eastern part of the Gulf of Riga. In case foreign ships are using the sealane leading to the Estonian ports of Pärnu, Kuressaare, Roomassaare, Virtsu, etc., they only navigate in the territorial sea and internal waters of Estonia, since the northern part of the Gulf of Riga does not include an EEZ. Similarly, although foreign ships using the sealane from the Irbe Strait to the port of Riga often cross the Latvian EEZ south of Ruhnu Island,[360] they may as well navigate solely in the Latvian territorial sea east of the Courland Peninsula for reaching Riga.

The wording of Article 37 of the LOSC thus raises the question whether an international strait needs to be actually used by a ship (or aircraft) for reaching another part of an EEZ. In this regard, however, it would be sufficient for foreign ships and aircraft to be subject to the right of transit passage only if they claim that they will cross the EEZ. The strait States would be able to monitor vessel and air traffic in the Gulf of Riga in view of ascertaining whether a foreign ship or aircraft that claimed the right of transit passage actually complies with its requirements (*prima facie* the continuous and expeditious transit via the Latvian EEZ) as stipulated in section 2 of Part III of the LOSC. The transit passage regime might also raise tensions in the Gulf of Riga, since although its coastal States could potentially order a foreign ship or aircraft to leave the Gulf of Riga due to its breach of the rules of transit passage, it would not be ruled out that the latter repeats such actions under the right of transit passage (indefinitely[361]).

The application of the right of transit passage in the Irbe Strait as well as in the maritime areas leading to the Latvian EEZ in the Gulf of Riga (comprising the Estonian as well as Latvian maritime areas and thus essentially most parts of the Gulf of Riga)[362] could be considered as a juridical fact which is not alterable by the strait States by means of any control system. The juridical fact – the application of the transit passage to foreign ships and aircraft in the Irbe Stait – is due to the existence of the Latvian EEZ (previously high seas) in the Gulf of Riga.

In practice, Estonia and Latvia could argue that the EEZ in the Gulf of Riga is wholly surrounded by their territorial sea and thefore does not call for the application of the transit passage regime. Yet the text of the LOSC does not

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[359] See s*upra* section 1.2 of Part I.

[360] See Marine Traffic. – Gulf of Riga. Accessible: http://www.marinetraffic.com (01.09.2016). Compare with map 6 in Annex 1.

[361] By analogy, Russian aircraft have made frequent incursions into the Estonian airspace over Vaindloo Island for decades.

[362] The right of transit passage does not apply in the Latvian EEZ (Article 35(b) of the LOSC) where foreign ships and aircraft enjoy the freedoms of navigation and overflight.

provide a legal basis for such interpretation of the transit passage regime. Should the ships and aircraft of a third State exercise transit passage in this maritime area despite possible warnings from Estonia and Latvia, it would potentially stir up potential conflict and escalate tensions between the user State and the strait States.

Furthermore, in case the rules of transit passage are breached by a foreign State's aircraft, then it would most likely be the North Atlantic Treaty Organization's (hereinafter *NATO*) air defence Quick Reaction Alert's fighter jets deployed in the Ämari air base near Tallinn that would be scrambled. However, some NATO member States that contribute to the air-policing mission in the Baltic States may not consider breaches of the transit passage regime by a foreign ship or aircraft as amounting to an unauthorised transit passage against which measures may be taken by the strait State. For example, Oxman has argued that

> "[E]ven a first-year law student could construct the syllogism that any vessel or aircraft that does not comply with any obligation no longer comes within the definition of the transit right, and the coastal state is free to deal with its unauthorized presence in the same way as with any other unauthorized presence in its waters. A similar game could be played in reverse with the sovereignty of the coastal states, which 'is exercised subject to this Convention' or parts thereof. This is not a reasonable interpretation of the transit passage and archipelagic sea lanes passage regimes in context. Unilateral enforcement by the coastal state of the conditions for transit or its own interpretation thereof was simply not contemplated or authorized except where expressly permitted."[363]

In general, Oxman argues for a very limited strait State's jurisdiction over aircraft and ships acting in breach of the transit passage regime. This interpretation follows the aim of the legal regime of transit passage. It is clear that due to the freedom of navigation and overflight, the coastal State's jurisdiction over ships and aircraft in transit passage is restricted under Articles 38(1), 42(2) and 44 of the LOSC and the discretionary right in regard to breaches of the right of transit passage or measures aimed at preventing it is reduced to the minimum.

However, by interpreting the LOSC systematically, it is also possible to arrive at a different conclusion of the strait State's powers against unlawful transit passage. Klein argues that

> "[I]f a warship is not adhering to the requirements of transit passage (it has stopped, is hovering, or is otherwise engaged in non-expeditious passage without reason of force majeure or distress), the lawful response of the coastal state would be similar to that in response to non-innocent passage. Namely—although not stated specifically—the coastal state would be entitled to require the warship to leave the strait immediately."[364]

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[363] Oxman, *op. cit.*, p. 409.
[364] Klein, *op. cit.*, p. 36.

Molenaar finds that the breach of obligations only under Article 39(1)(a-c) of the LOSC ends transit passage and further explains that in this case:

> "[I]t seems that ships engaging in activities which are not exercises of the right of transit passage, will lose this right. Such ships are to be considered in non-transit passage, and through Article 38(3), will automatically fall under the general regime of innocent passage. /.../ [T]his will usually imply loss of innocence as well, and bring the powers under Article 25(2) into view. It is submitted that the obligation under Article 44 for strait States not to suspend transit passage does not prevent a strait State from suspending a particular case of transit passage for want of innocence, but rather prohibits the general suspension for security or any other reason similar to Article 25(3)."[365]

Similarly, Jia comes to the conclusion that the strait States may interrupt transit passage in case the conditions for exercising this right are violated.[366] This view is also shared by de Yturriaga as well as Churchill and Lowe.[367] Nonetheless, as appears from above, State practice and the opinions expressed in the legal literature are not uniform on the question of strait State's powers in respect of foreign aircraft and ships that do not comply with the regime of transit passage.

In addition, State practice and the views of legal scholars differ on the legality of foreign military activities[368] in the coastal State's EEZ. In the Latvian EEZ in the Gulf of Riga, the right of foreign military activities implies foreign States' right to send their warships and military aircraft under the regime of transit passage to these enclaved international waters, which might then be used possibly as *inter alia* a military practicing field by foreign States. This would be against the security interests of Estonia and Latvia as the coastal States of the Gulf of Riga. On the same grounds, China and many other States oppose a wide discretion of flag States to carry out military activities in another coastal State's EEZ.[369] Bangladesh, Brazil, Cape Verde, India, Malaysia, Pakistan, and Uruguay have declared under Article 310 of the LOSC that foreign military activities in their EEZ are not allowed.[370]

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365 Molenaar, *op. cit.*, p. 289.

366 Jia 1998, *op. cit.*, p. 148.

367 J. A. de Yturriaga. Straits Used for International Navigation: A Spanish Perspective. Dordrecht/Boston/London: Martinus Nijhoff 1991, p. 222. Churchill, Lowe, *op. cit.*, p. 91.

368 This term is undefined in the LOSC. Mahmoudi has suggested on the basis of the drafting history of Article 298(l)(b) of the LOSC that „military activities are activities which are undertaken either by warships or military aircraft or by government vessels and aircraft engaged in noncommercial services, and the purpose of which is to increase the readiness of a state for war." S. Mahmoudi. Foreign Military Activities in the Swedish Economic Zone. – 11 The International Journal of Marine and Coastal Law 1996(3), p. 375.

369 R. Pedrozo. Preserving Navigational Rights and Freedoms: The Right to Conduct Military Activities in China's Exclusive Economic Zone. – 9 Chinese Journal of International Law 2010, p. 27.

370 Klein, *op. cit.*, p. 48.

Nevertheless, the majority of States, *prima facie* Western States, do not oppose military activities in another coastal State's EEZ. Raul Pedrozo notes that intelligence collection and other military activities are permitted in another coastal State's EEZ.[371] Likewise, Said Mahmoudi comes to the conclusion on the basis of the Swedish domestic law and State practice that "foreign military activities, strictly under the conditions prescribed in the convention, may be permitted, and in case of non-resource-related residual rights, flag states may expect a conciliatory attitude from Sweden."[372] Barbara Kwiatkowska also finds that peaceful military activities (e.g. naval manouvres, weapons practice, the emplacement of sensor arrays, aerial reconnaissance, intelligence gathering) in an EEZ are lawful and related to the high seas freedoms in an EEZ.[373] Klein, on the other hand, argues for "the moderate position of allowing reasonable naval activities without the use of weapons."[374]

Pedrozo observes that the United States activities in the EEZ of other coastal States have been wide-ranging and include military exercises and manoeuvres, weapons firing and testing as well as surveys and surveillance.[375] The United States has been also assertive in accepting such right of other flag States in the Baltic Sea. For example, the Department of State explicitly recognised in 1996 the right of the Russian Federation to carry out military activities in the Lithuanian EEZ.[376]

Furthermore, according to the United States' position, hydrographic surveying is to be distinguished from marine scientific research, for which coastal State's prior permission is required pursuant to Articles 56(1)(b)(ii) and 246(2) of the LOSC.[377] Thus, while it is prohibited under Article 40 of the LOSC to carry out any research or survey activities during transit passage in the Irbe Strait and in the Gulf of Riga without the prior authorisation of the strait States Estonia and Latvia, it might be lawful to conduct the same surveys with military vessels without Latvia's permission in its EEZ in the Gulf of Riga. In this regard, Pedrozo distinguishes military marine data collection and hydrographic surveys which fall under the high seas freedoms from marine scientific research.[378]

Therefore, military activities in the Latvian EEZ in the Gulf of Riga might be lawful as long as they are consistent with the United Nations Charter in terms of Articles 88 and 301 of the LOSC.[379] In particular, such activities may

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[371] Pedrozo, *op. cit.*, p. 12.
[372] Mahmoudi 1996, *op. cit.*, p. 386.
[373] B. Kwiatkowska. The 200 Mile Exclusive Economic Zone in the New Law of the Sea. Dordrecht/Boston/London: Martinus Nijhoff 1989, p. 203.
[374] Klein, *op. cit.*, p. 51.
[375] Pedrozo, *op. cit.*, pp. 12–13.
[376] See further J. Kraska, R. Pedrozo. International Maritime Security Law. Leiden, Boston: Martinus Nijhoff 2013, pp. 237–238.
[377] Pedrozo, *op. cit.*, p. 14.
[378] Ibid, pp. 21–23.
[379] See Kwiatkowska 1989, *op. cit.*, p. 203. See also Mahmoudi 1996, *op. cit.*, p. 374.

not constitute any threat or use of force against the territorial integrity or political independence of Latvia and Estonia.

Subsequently, the option for the strait States to exclude the applicability of the transit passage regime and the right of foreign States to carry out military activities in the Latvian EEZ in the Gulf of Riga will be examined. Under international law (particularly LOSC), this possibility stems from the concept of the so-called historic waters. In particular, Article 35(a) of the LOSC stipulates that nothing in the legal framework on international straits, as provided in Part III of the LOSC, affects any areas of internal waters within a strait, except where the establishment of a straight baseline in accordance with the method set forth in Article 7, has the effect of enclosing as internal waters areas which had not previously been considered as such.

Due to its great width and the lack of any islands in the centre or southern part of the strait, the 14.5-miles-wide narrowest section of the passage through the Irbe Strait could not have been and also has not been declared by Estonia and Latvia as internal waters under their domestic legal acts. Thus, the applicability of the exception stipulated in Article 35(a) of the LOSC to the Gulf of Riga, including the Irbe Strait, may only be founded on the concept of historic bay as recognised under the international law of the sea.

4.3. The Irbe Strait and the Gulf of Riga in light of the Concepts of Historic Strait and Historic Bay

Article 10(6) of the LOSC provides that *inter alia* the requirement stipulated in its Article 10(2), according to which an indentation is not regarded as a bay unless its area is as large as, or larger than, that of the semi-circle whose diameter is a line drawn across the mouth of that indentation, does not apply to historic bays. Subsequent to signing the LOSC on December 10th, 1982, the Soviet Union declared under a 1985 decree the Gulf of Riga a historic bay (as it had done previously under a 1947 decree) and closed the Irbe Strait by drawing a straight baseline from the Cape Loode on the Sõrve Peninsula to the Ovisi lighthouse on the Courland Peninsula.[380] Pursuant to the position of the Soviet Union, the Gulf of Riga was in the immediate vicinity of its coast and thus fell under its complete sovereignty, which extended back to the era of imperial Russia – this, in addition to the lack of specific protests by other States,[381] enabled the Soviet Union to declare the Gulf of Riga a historic bay.[382] Nevertheless, the

[380] See Franckx 2002, *op. cit.*, p. 2999. Decree no. 4450 of the Council of Ministers of the Soviet Union on the Confirmation of a List of Geographic Coordinates Determining the Position of the Baseline in the Arctic Ocean, the Baltic Sea and Black Sea from which the Width of the Territorial Waters, Economic Zone and Continental Shelf of the U.S.S.R. is Measured, 15.01.1985.

[381] R. Lapidoth-Eschelbacher. The Red Sea and the Gulf of Aden. The Hague: Martinus Nijhoff 1982, p. 112. See also Franckx 2002, *op. cit.*, p. 2999.

[382] Franckx 2002, *op. cit.*, pp. 2999–3000. See also Uustal 1977, *op. cit.*, p. 42. Uustal 1984, *op. cit.*, p. 265.

protests of numerous States against the illegal annexation of Estonia and Latvia may potentially be interpreted as the non-recognition of the historic bay status of the Gulf of Riga.

The LOSC does not provide for a legal definition of a historic bay. However, pursuant to the customary international law, a historic bay may be recognised as such on the condition that the coastal State has made a corresponding declaration and States have generally accepted this or do not oppose it.[383] Additionally, the coastal State needs to have exercised authority over the relevant maritime area consistently and over a long period of time.[384] The United States Supreme Court has found that in order to establish that a body of water is a historic bay, a coastal nation must have "traditionally asserted and maintained dominion with the acquiescence of foreign nations" and "that at least three factors are significant in the determination of historic bay status: (1) the claiming nation must have exercised authority over the area; (2) that exercise must have been continuous; and (3) foreign states must have acquiesced in the exercise of authority."[385] Churchill and Lowe note that the primary prerequisite for the recognition of a historic bay is the acceptance by other States.[386] Also, Caminos and Cogliati-Bantz refer to the need for a long and consistent assertion of dominion over the bay which has included the coastal State's right to exclude foreign vessels, except on permission, as well as the element of acquiescence by third States.[387]

Prior to the independence of Estonia, Finland and Latvia in 1918, the Russian Empire considered both the Gulf of Finland as well as the Gulf of Riga as its historic bays.[388] That followed the notion made by Friedrich von Martens in 1886, according to which bays with coasts belonging to a single State comprise its territorial sea.[389] Martens found that in Europe, such bays include the Gulf of Finland and the Gulf of Riga (Russian Empire), Zuiderzee (the Netherlands), Solent (British Empire) and, as a historical example, the Gulf of Bothnia (during the period when Finland was part of the Swedish Empire).[390] Similarly, Latvia considered in the beginning of 1920s that the Gulf of Riga is a historic bay

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383 United Nations Secretariat. Judicial Régime of Historic waters including historic bays. – Yearbook of the International Law Commission 1962, vol. II, pp. 8–10, 25.

384 Ibid, p. 25.

385 US Supreme Court. United States v. Alaska, 23.06.1975, No. 73-1888, Part II. The US has taken the position that the exercise of authority over the body of water in question needs to be open, notorious and effective. See United States Department of State. China: Maritime Claims in the South China Sea. – Limits in the Seas, No. 143. Washington D.C: US Department of State 2014, p. 10.

386 Churchill, Lowe, *op. cit.*, p. 37.

387 Caminos, Cogliati-Bantz, *op. cit.*, pp. 60–61.

388 Taska 1974, *op. cit.*, p. 86. Piip 1936, *op. cit.*, p. 183.

389 F. F. von Martens. Völkerrecht: das internationale Recht der civilisirten Nationen, vol. 1. Berlin: Weidmann Buchhandlung 1886, p. 382.

390 Ibid, p. 383.

(*closed sea*), whereas Estonia rejected this proposition in the Estonian-Latvian Border Commision in 1922.[391]

Since the restitution of independence of Estonia and Latvia, the coasts of the Gulf of Riga belong to two States. Thus, it does not meet the terms of Article 10(1) of the LOSC. Yet Latvia regarded in the first half of the 1990s the Gulf of Riga as a historic bay.[392] Latvia's interpretation of the Gulf of Riga as a historic bay was apparently founded on the ICJ's judgment in the Gulf of Fonseca case, in which a Chamber of the Court found in the context of the concept of historic bay that

> "A State succession is one of the ways in which territorial sovereignty passes from one State to another; and there seems no reason in principle why a succession should not create a joint sovereignty where a single and undivided maritime area passes to two or more new States."[393]

A similar conclusion had been reached in the study on historic bays as published by the United Nations Secretariat in 1962.[394] On the basis of the *uti possidetis juris* principle[395] as recognised by the Court in 1986,[396] the ICJ decided that the waters of the Gulf of Fonseca are held in a joint sovereignty of its three coastal States ("threefold joint sovereignty"), excluding the 3-miles-wide belt of internal waters of the coastal States, over which each coastal State exercised its exclusive sovereignty.[397]

Analogously, it follows from the foregoing that Estonia and Latvia may have been entitled to declare the Gulf of Riga a historic bay upon their restoration of independence. On the other hand, the classification of the Gulf of Riga as a historic bay on the basis of the Soviet Union's prior practice and legal framework on this matter would have been in contravention with the doctrine of State continuity as adopted by Estonia and Latvia. Thereby, Estonia and Latvia might

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[391] Eesti-Läti piirikommisjoni tegewuse tagajärjed. Postimees, 01.04.1922.

[392] Stenographic record of the First Reading of the 1996 Maritime Boundary Treaty in the Estonian Parliament, *op. cit.* See also Franckx 2002, *op. cit.*, p. 3000.

[393] Land, Island and Maritime Frontier Dispute (El Salvador v. Honduras: Nicaragua intervening), Judgment, I.C.J. Reports 1992, p. 351, para 399. See also Lapidoth-Eschelbacher, *op. cit.*, p. 113.

[394] United Nations Secretariat 1962, *op. cit.*, p. 21.

[395] See generally Opinion no. 2, The Arbitration Commission of the Conference on Yugoslavia, 11.01.1992 (referred: A. Pellet. The Opinions of the Badinter Arbitration Committee: A Second Breath for the Self-Determination of Peoples. − European Journal of International Law 1992(3), p. 184). See also J. Mayall. Nationalism, Self-determination, and the Doctrine of Territorial Unity. – M. Weller, B. Metzger (eds). Settling Self-Determination Disputes: Complex Power-Sharing in Theory and Practice. Leiden, Boston: Martinus Nijhoff 2008, pp. 9–10.

[396] Burkina Faso v. Republic of Mali, *op. cit.*, para 20.

[397] El Salvador v. Honduras, *op. cit.*, para 418.

have indirectly declared themselves as successor States to the Soviet Union – not as continuators of the pre-1940 Estonian and Latvian republics.[398]

Estonia had already declared on October 8th, 1991 that it does not consider itself as a successor State to the Soviet Union.[399] As Estonia had principally not been against the legal concept of historic bay and had even recognised it during the 1930 Hague Codification Conference,[400] it rejected Latvia's proposal to declare the Gulf of Riga a historic bay primarily on the grounds of State continuity.[401]

At the same time, Estonia also acknowledged the negative effect that the joint sovereignty over the Gulf of Riga would have on its fishing industry.[402] Prior to the break of Estonia's and Latvia's independence in 1940, the Gulf of Riga fell primarily under the regime of the high seas and, during Soviet rule, under the regime of the internal waters of the Soviet Union, which is why Estonian and Latvian fishermen used to catch fish in the whole maritime area of the Gulf of Riga. This favoured Latvian fishermen who carried out approximately two-thirds of the combined fishing effort in the Gulf of Riga prior to the restoration of Estonia's and Latvia's independence.[403]

The Estonian foreign minister explained in the Parliament that upon the establishment of a regime of joint sovereignty over the Gulf of Riga, Latvian fishing vessels would catch fish under their domestic legal framework that provides lesser protection for the fish stocks in maritime areas that reach even close to the Abruka archipelago.[404] This could have caused irreversible damage to *inter alia* the spawning grounds around Ruhnu Island.[405]

It is also unclear whether the Gulf of Riga is situated wholly in the immediate vicinity of Estonian and Latvian coasts, which is a prerequisite for the application of the joint sovereignty of its coastal States. Distinct from the Gulf of Fonseca, which was recognised by the ICJ as a historic bay, the Gulf of Riga also includes extensive maritime areas that reach further than 12 miles to the sea as measured from the baselines.[406] On the other hand, there are also examples of

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[398] See on the *uti possidetis* principle in the context of the restitution of independence of the Baltic States in L. Mälksoo. Illegal Annexation and State Continuity: The Case of the Incorporation of the Baltic States by the USSR, a Study of the Tension Between Normativity and Power in International Law. Leiden/Boston: Martinus Nijhoff 2003, p. 249.

[399] A. G. Oude Elferink. Estonia: Law on the Boundaries of the Maritime Tract. – 9 International Journal of Marine & Coastal Law 1994, p. 238.

[400] Taska 1977, *op. cit.*, p. 97.

[401] See also Lindpere 2003, *op. cit.*, p. 40.

[402] Stenographic record of the First Reading of the 1996 Maritime Boundary Treaty in the Estonian Parliament, *op. cit.*

[403] Franckx 2002, *op. cit.*, p. 3002.

[404] Stenographic record of the First Reading of the 1996 Maritime Boundary Treaty in the Estonian Parliament, *op. cit.*

[405] Ibid.

[406] See *supra* section 6 of Part II.

historic bays which cover more extensive maritime areas than the Gulf of Riga (e.g. Hudson Bay).

In its 1994 Maritime Code,[407] Latvia declared the Gulf of Riga enclosed joint internal waters of Estonia and Latvia in which their ships enjoy free navigation.[408] By contrast, Estonia sought to divide the maritime area of the Gulf of Riga between the two coastal States. Estonia had established its straight baselines in the Gulf of Riga under the 1993 Maritime Boundaries Act. Estonia thus vetoed Latvia's endeavours, since the preservation of the legal status of a historic bay necessitates that in the case of the disintegration of the bay's coastal State (in this case the Soviet Union), each of the new coastal States needs to recognise the continuous historical status of the bay.[409]

In light of Estonia's rejection of the concept of the Gulf of Riga as a historic bay and the delimitation of the maritime boundary in the Gulf of Riga, it is highly unlikely that its coastal States would ever again consider the Gulf of Riga as falling under the so-called historic waters exception as provided in Article 35(a) of the LOSC. Yet such a legal line of argument might have provided the only means for the exclusion of the transit passage regime in the Irbe Strait (under Article 35 of the LOSC),[410] albeit its legal basis is at most far from certain.[411]

In addition to the apparent lack of legal grounds in international law for claiming the Irbe Strait a historic strait, it is also doubtful whether third States would accept such an act, not least because of the general implications that such an introduction of essentially a new category of straits might have on the stability and coherence of the catalogue of straits as provided in Part III of the LOSC.[412] Thus, currently the Gulf of Riga is freely accessible[413] for foreign aircraft and ships from the Irbe Strait similarly to the pre-1940 situation.

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[407] Cabinet Regulation no. 168 on Latvian Maritime Regulations (Maritime Code). Adopted 16.08.1994, e.i.f. 10.09.1994.

[408] Stenographic record of the Second Reading of the 1996 Maritime Boundary Treaty in the Estonian Parliament, *op. cit.*

[409] El Salvador v. Honduras, *op. cit.*, para 394. See also United Nations Secretariat 1962, *op. cit.*, p. 21.

[410] The Irbe Strait is bordered by two coastal States which therefore (unlike the Soviet Union in 1985) cannot close the strait by a straight baseline. Thus, it cannot be a strait which comprises long-standing internal waters in terms of Article 35(a) of the LOSC.

[411] See *supra* section 2.1 of Part I.

[412] See *supra* section 2.1 of Part I.

[413] The depths of the Irbe Strait and the Gulf of Riga are not sufficient for e.g. nuclear submarines to exercise such operations submerged. However, the Gulf of Riga should be freely accessible for submerged smaller submarines.

5. The Legal Framework Applicable to the Irbe Strait *de lege ferenda*

As examined previously, the transit passage regime in the Irbe Strait and in the Gulf of Riga hinders the security of Estonia and Latvia.[414] It also raises concerns for the safety of international navigation due to e.g. the flights of military aircraft with unactivated/absent transponders or the unchecked navigation of foreign submarines (incl. in the shallow Irbe Strait). There appears to be two possibilities in this instance for limiting the adverse effects of the transit passage regime for the strait States. The adoption of compulsory routeing measures in this maritime area would provide lesser safeguards for the coastal States in comparison with the establishment of an EEZ corridor that would exclude the transit passage while also limiting the outer limits of the Estonian and Latvian territorial sea.

As a general rule, ships and aircraft transiting the strait continuously and expeditiously are not obliged to follow any prescribed trajectory. Pursuant to Article 41(1) of the LOSC, strait States may designate sea lanes and prescribe traffic separation schemes for transit passage where necessary to promote the safe passage of ships, but such sea lanes and traffic separation schemes must have been previously developed by the International Maritime Organization in accordance with Article 41(4) of the LOSC. Thus, this constitutes an exception from the general rule stipulated in Article 22(3)(a) of the LOSC, according to which the coastal State only has to take into account the recommendations of the International Maritime Organization in the designation of sea lanes and the prescription of traffic separation schemes.[415]

In case compulsory routeing measures would be adopted by the International Maritime Organization in respect of the Gulf of Riga, such sealanes and a traffic separation scheme might not address sufficiently the security concerns of Estonia and Latvia.[416] According to the United States position, sea lanes and traffic separation schemes are not applicable to *inter alia* warships in transit passage, albeit in practice it is still considered advisable to follow them.[417] The voluntary use of sea lanes and traffic separation schemes by sovereign immune vessels in transit passage does not go against the International Maritime Organization's General Provisions on Ships' Routeing which stipulates that routeing systems (incl. traffic separation schemes) are only *recommended* for use by *all ships*.[418]

In addition, although at least non-State-owned foreign ships would be required under Articles 39(2)(a) and 41(7) of the LOSC in the course of transit

[414] On the strait State's security concerns see Klein, *op. cit.*, p. 25.

[415] See also Nandan, Anderson, *op. cit.*, p. 189.

[416] See *mutatis mutandis* the conclusions reached in respect of the Gulf of Finland *infra* section 5 of chapter 2 in Part III.

[417] See Thomas, Duncan, *op. cit.*, p. 184. On the other hand, Nandan and Anderson consider that a strait State may apply its domestic law on sea lanes or traffic regulation in respect of "all foreign ships exercising the right of transit passage". Nandan, Anderson, *op. cit.*, p. 191.

[418] Section 8.2 of the IMO Resolution A.572(14), as amended. General Provisions on Ships' Routeing. London 20.11.1985, e.i.f. (as amended) 01.01.1997.

passage to follow the potential traffic separation scheme, it would not apply to foreign aircraft and thus would not limit them in undertaking transit passage in the Gulf of Riga (Article 39(3) of the LOSC).[419] Likewise, in case ships in transit passage would not follow the compulsory routeing measures and might violate Article 41 of the LOSC, then the coastal State's ability to take counter-measures would be restricted, as the ship would still have the right to continue its transit passage.[420]

In the course of its decision-making on compulsory routeing measures under Article 41(4) of the LOSC, the International Maritime Organization is concerned not only with ensuring safe navigation of ships, but also general navigational interests, including the freedom of the seas. In this connection, Hugo Caminos and Vincent Cogliati-Bantz have concluded on the basis of the applicable legal framework that "the extent of a mandatory routeing system should be limited to what is *essential* in the interest of safety of navigation and the protection of the marine environment. The International Maritime Organization will not adopt a proposed routeing system until it is satisfied that the proposed system will not impose *unnecessary* constraints on shipping and that the system is completely in accordance with the requirements of SOLAS."[421] In particular, this follows from section 6(8) of the International Maritime Organization's General Provisions on Ships' Routeing which stipulates that the extent of a traffic separation scheme should be limited to what is essential in the interests of safe navigation. It may be reasonable to expect that such compulsory routeing measures would be proportional at least in the shallow Irbe Strait where the shipping corridor is at times only approximately one mile wide and where shipping accidents have occurred relatively frequently.[422]

The legality of implementing compulsory routeing measures in the wide maritime area of the Gulf of Riga proper needs to be further assessed in light of the criteria of Article 42(2) of the LOSC. In particular, the application of such compulsory routeing measures may not hamper or impair the right of transit passage in the Gulf of Riga. Steven Kempton argues that the terms "hampering" or "impairing" as used in that provision imply "an action that has the effect of physically obstructing passage to the extent that a ship would be required to

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[419] See further *infra* section 5 of chapter 2 in Part III.

[420] Thomas, Duncan, *op. cit.*, p. 184. See also *infra* section 5 of chapter 2 in Part III. One the other hand, Nandan and Anderson refer in this context only to foreign warships. See Nandan, Anderson, *op. cit.*, p. 192.

[421] Caminos, Cogliati-Bantz, *op. cit.*, p. 241. SOLAS stands for the International Convention for the Safety of Life at Sea.

[422] E.g. a German cruise ship crossing the Irbe Strait ran aground in 2008. Most recently, the Danish tanker and Panama's dry bulk carrier collided in the Irbe Strait in January 2015. See Associated Press. Stranded cruise ship evacuated off Latvia. NBC News, 05.05.2008. See also The Bahama's Maritime Authority. Report of the investigation into the grounding of M/V Mona Lisa at the Irbe Strait, Latvia on 04th May 2008. London 2009. Accessible: http://www.bahamasmaritime.com/wp-content/uploads/2015/08/MONA-LISA-Report-May-2008.pdf (01.09.2016). See also Cargo Ships Collide off Latvia. World Maritime News, 20.01.2015.

significantly deviate from its originally intended course, and where the alternate route would result in unacceptable delays and increased costs."[423] It appears that none of the conceivable compulsory sealanes' trajectories in the Gulf of Riga proper could force ships to significantly deviate from the shortest trajectory and in any case should not cause unacceptable delays or additional costs.

De lege ferenda there is an additional option for the coastal States to more thoroughly safeguard their security interests in the Gulf of Riga. If necessary, it is possible to consider establishing an EEZ corridor in the Irbe Strait, similar to the one agreed upon between Estonia and Finland in the Viro Strait in order to exclude the applicability of the regime of transit passage in the Gulf of Riga. This follows from Article 36 of the LOSC which provides the only other possibility aside from the afore-mentioned Article 35 for the inapplicability of the LOSC legal framework on international straits (Part III).

Pursuant to Article 36 of the LOSC, its Part III does not apply to an international strait if it includes a route through the high seas or through an EEZ of similar convenience with respect to navigational and hydrographical characteristics. Although the freedoms of navigation and overflight would apply in such prospective corridor analogously with the transit passage, it would limit the use of these freedoms to the confines of a narrow EEZ corridor leading from the Irbe Strait straight to the Latvian EEZ south of Ruhnu Island.

By contrast to the regime of transit passage, foreign ships and aircraft would not be entitled to the freedoms of navigation and overflight in most of the maritime area of the Gulf of Riga. Their use would be restrictively limited to the corridor as established under Article 36 of the LOSC. As a result of the establishment of the EEZ corridor in the western part of the Gulf of Riga, foreign ships and aircraft would enjoy the freedoms of navigation and overflight only for reaching the EEZ close to the Riga port. It would abolish the currently freely usable roundabout in the Gulf of Riga, which encompasses the maritime area of Latvia together with the internal waters and territorial sea of Estonia.

Lewis Alexander has noted that in order to fulfil the condition stipulated in Article 36 of the LOSC, according to which the EEZ corridor must be of "similar convenience" to an ordinary route through the high seas or an EEZ, the corridor should be at least 2 or 3 miles wide at its narrowest point.[424] For the same reason, the corridor could not be established by means of limiting the outer limits of both the Estonian and Latvian territorial sea at least 1.5 miles from the

[423] S. B. Kempton. Ship Routing Measures in International Straits. – 14 Ocean Yearbook 2000, p. 240.

[424] Alexander 1991, *op. cit.*, p. 100. L. M. Alexander. Exceptions to the Transit Passage Regime: Straits with Routes of "Similar Convenience". – 18 Ocean Development and International Law 1987(4), p. 483. At the same time, Clove argues that it is not possible to agree on the minimum width that could trigger the applicability of Article 36 of the LOSC. He argues that the determinants of a convenient corridor are not constant and depend on the particular circumstances of each case: the width, the density of shipping in the area, the depth and contour of the bottom, and whether the vessel transiting is a single submarine or a battle group steaming in formation. See Clove, *op. cit.*, p. 111.

equidistant boundary line in the western part of the Gulf of Riga, since it would then not overlap with the shipping channel in the southern part of the strait but would instead cross the shallow waters in the western part of the Irbe Strait (unless expensive dredging would be carried out). A potential EEZ corridor along the maritime boundary would also be significantly lengthier and would have to follow a relatively sharp angle in the turning points number 11 and 12 of the maritime boundary, which would not correspond to the main shipping route between the Irbe Strait and the Riga Port.

In case the Irbe Strait's shipping channel would be included in the potential EEZ corridor, then the EEZ corridor west of the Kolka Cape (*Kolkasrags*) would be located in the Latvian maritime area. This could be compensated on an equitable basis by the exclusion of the EEZ corridor from the Latvian maritime zone east of the Kolka Cape. There the corridor could be established within the limits of the Estonian maritime area west and south of Ruhnu Island. It would run southwards until it reaches the Latvian EEZ south of Ruhnu Island.[425] Thus, by limiting slightly the outer limits of their territorial sea, Estonia and Latvia could better address their potential security concerns in respect of their internal waters and territorial sea in the Gulf of Riga. As examined next, Estonia and Finland have established an EEZ corridor in the Gulf of Finland in the same manner.

Chapter 2. The Viro Strait in the Gulf of Finland

1. The Characteristics of the Viro Strait

From its 70-kilometres-wide mouth (Hanko Peninsula and Osmussaar-Põõsaspea Cape line) to the river Neva, the Gulf of Finland is about 420 km long with a maximum width of 150 km and comprising 30 000 km^2 of maritime area.[426] As a consequence of the Soviet annexation of Estonia in 1940, the Gulf of Finland was a gulf between two States – Finland and the Soviet Union – until 1991. The restoration of Estonia's independence in 1991 fundamentally altered the legal status of the Gulf of Finland.[427]

As measured from the Estonian and Finnish baselines, the Gulf of Finland is less than 24 miles (approx. 17 miles at its narrowest point) wide up to the outer limit of the Russian Federation's territorial sea. This about 100-miles-long narrow passage is the Viro Strait (Estonian: *Viru väin*; Finnish: *Viron salmi*; Russian: *Вируский пролив*),[428] running from close to the Osmussaar Island (hist.

[425] See also map 6 in Annex 1.

[426] Eesti Entsüklopeedia, vol. 8, *op. cit.*, Soome laht, p. 592.

[427] For the change of a strait's legal regime due to major geopolitical implications concerning the relevant maritime area, see also section 3 of Part I, sections 1 and 4 of chapter 1 in Part III, section 1 of chapter 2 in Part III and section 2 of Part V. More generally, see Rothwell 2015, *op. cit.*, p. 132.

[428] Analogously to the term *Viro Strait*, its equivalent names in Estonian, Finnish and Russian have not been used before. The terms *Viru väin*, *Viron salmi* and *Вируский пролив*

Odensholm) in the west, approximately reaching the Vaindloo Island (hist. *Stenskär*) in the east. The coastal States of the Viro Strait are Estonia and Finland.

In legal and geographical terms, the extended spatial scope of the Gulf of Finland includes the Viro Strait between the coasts of Estonia and Finland. On the other hand, if one excludes the Viro Strait from the the legal and geographical borders of the Gulf of Finland, then the Gulf of Finland proper would span the maritime area between Narva-Jõesuu (to the south-east), St Petersburg (to the east), Vyborg (to the north-east) and the imaginary line between the Finnish coastal town Loviisa (to the north-west), the Estonian Vaindloo Island (to the west) and the Estonian coastal town Kunda (to the south-west).

In the centre of the Viro Strait are located international sealanes adopted by the International Maritime Organization. These east-west sealanes were used by well over 40 000 ships a year in 2011 and in 2012.[429] In 2013, the east-west ship traffic crossings in the Viro Strait amounted to 38 150, as compared with Øresund's 29 474 crossings, the Great Belt's 18 478 crossings, the Åland Strait's 14 433 crossings and the Irbe Strait's 9639 crossings.[430] Vessel traffic in the Viro Strait will likely increase further as a result of the Russian Federation's decision to stop using by 2018 the Baltic States' ports (e.g. Ventspils, Riga, Klaipeda, Muuga) for shipping its petroleum products instead of its own ports (e.g. Ust-Luga, Primorsk) on the eastern coast of the Gulf of Finland.[431]

To the above-referred rate of crossings should be added the heavy north-south traffic in the Viro Strait. In the western part of the Gulf of Finland, ships in transit via the east-west international sealanes cross the route of passenger ferries (incl. high-speed craft) sailing the Helsinki-Tallinn line. The route across the strait is heavily used, which is illustrated by the fact that the governments of Estonia and Finland are undertaking studies for constructing an underwater railway tunnel from Tallinn to Helsinki.[432] In 2015, the Port of Tallinn was visited by nearly ten million passengers, of whom 8.2 million (84%) were using the Helsinki-Tallinn line, and in addition to approximately one million passengers on the Tallinn-Stockholm ferries, over a hundred thousand persons trav-

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can be considered as the closest match to their equivalent *Viro Strait*. See also *supra* section A of Introduction.

[429] See the maps and figures in HELCOM 2011, *op. cit.*, pp. 2–5 and in HELCOM 2012, *op. cit.*, pp. 3–7. The figures do not include small craft.

[430] HELCOM 2014, *op. cit.*, p. 3.

[431] See V. Soldatkin, D. Zhdannikov, L. Kelly. Russia to stop oil product export via foreign Baltic ports by 2018. Reuters, 12.09.2016. See also D. Cavegn. Russia to divert petroleum transit away from Baltic ports. ERR News, 13.09.2016.

[432] See Sweco. Helsinki-Tallinn fixed link pre-feasibility study supports further planning of undersea railway tunnel, 11.02.2015. See also G. Topham. Helsinki-Tallinn tunnel proposals look to bring cities closer than ever. The Guardian, 06.01.2016. A railway tunnel would enable to cross the strait potentially in 30 minutes. Alternatively, high-speed travel in tubes could reduce travel time across the strait potentially to 6 minutes. See D. Cavegn. Hyperloop proponents interested in Helsinki-Tallinn undersea route. ERR News, 20.02.2017.

elled from/to St Petersburg.[433] In 2016, the Port of Tallinn received over 10 million passengers.[434]

Consequently, the Tallinn-Helsinki section in the Viro Strait is among the busiest maritime areas in the Baltic Sea which, for its own part, is the location of one of the heaviest global shipping traffic.[435] Therefore, navigating conditions in the Viro Strait are complex. This is also due to the presence of many islands and shallows as well as the fact that the maritime area may be covered with ice from December to April; in harsh winters the Gulf of Finland freezes completely.[436] In light of these hazards, the coastal States of the Gulf of Finland have implemented a mandatory ship reporting system.

The mandatory ship reporting system[437] entered into force under Chapter V, Regulation 11 of the International Convention for the Safety of Life at Sea[438] in the Gulf of Finland on July 1st, 2004.[439] Ships of 300 gross tonnage and over are required to participate in the mandatory ship reporting system; ships under 300 gross tonnage should make reports in circumstances where they are not under command or at anchor in the traffic separation schemes, are restricted in their ability to manoeuvre or have defective navigational aids.[440]

The mandatory ship reporting system in the Gulf of Finland covers the EEZs in the Gulf of Finland. In addition, under Article 21(1)(a) of the LOSC, Estonia and Finland have implemented mandatory ship reporting systems to their territorial sea and internal waters outside vessel traffic services[441] areas. These reporting systems provide the same services and make the same requirements to shipping as the system operating in the EEZs. The mandatory ship reporting

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433 Port of Tallinn. The number of passengers of Port of Tallinn hit a record of 9.79 million people. Press Announcement 06.01.2016.

434 D. Cavegn. Efficiency of Port of Tallinn continues to increase, more than ten million passengers in 2016. ERR News, 28.12.2016.

435 See also J. Viertola. Maritime Safety in the Gulf of Finland: Evaluation of the Regulatory System. Turku: University of Turku Publishing 2013, p. 15.

436 Eesti Entsüklopeedia, vol. 8, *op. cit.*, Soome laht, p. 592.

437 See generally on ship reporting system in Caminos, Cogliati-Bantz, *op. cit.*, pp. 246–248.

438 International Convention for the Safety of Life at Sea. London 01.11.1974, e.i.f. 25.05.1980.

439 See Annex, IMO Resolution MSC.139(76). London 05.12.2002, e.i.f. 01.07.2004. Accessible: http://www.crs.hr/Portals/0/docs/eng/imo_iacs_eu/imo/msc_reports/MSC76-23-Add-1.pdf (14.09.2016).

440 Paragraph 1.1 of Annex 3, IMO Resolution MSC.231(82). London 05.12.2006, e.i.f 01.07.2007. Accessible: http://www.navcen.uscg.gov/pdf/marcomms/imo/msc_resolutions/MSC231.pdf (14.09.2016). See also Finnish Transport Agency. Estonian Maritime Administration. GOFREP Master's Guide. Helsinki/Tallinn 27.12.2010, p. 3. Accessible: http://www2.liikennevirasto.fi/julkaisut/pdf5/2010_gofrep.pdf (14.09.2016).

441 See generally on vessel traffic services in Caminos, Cogliati-Bantz, *op. cit.*, pp. 249–250. See also Annex 1, IMO Resolution A.857(20). Guidelines for Vessel Traffic Services. London 27.11.1997, e.i.f. 03.12.1997.

system and the Estonian and Finnish national mandatory ship reporting systems are together referred as the GOFREP (Gulf of Finland Reporting).[442]

2. The 1994 Agreement on the EEZ Corridor in the Gulf of Finland and its Impact on the Domestic Legislation of Estonia and Finland

2.1. The Establishment of the EEZ Corridor in the Gulf of Finland

The coastal States of the Gulf of Finland have, pursuant to Article 3 of the LOSC, the right to extend their territorial sea up to the limit of 12 miles as measured from the baselines. On March 10th, 1993, the Estonian Parliament adopted the Maritime Boundaries Act. Pursuant to its Article 6, Estonia established a 12-miles-wide territorial sea. Yet according to Annex 2 of the 1993 Maritime Boundaries Act, which defines the specific outer limits, the boundary of the Estonian territorial sea is never closer than 3 miles to the median line in the Gulf of Finland.[443]

Consequently, the Estonian territorial sea in the Gulf of Finland is not 12 miles wide, except for parts in Narva Bay bordering the Russian Federation. With the exception of Narva Bay, the maximum breadth of the Estonian territorial sea in the Gulf of Finland is 9 miles, whereas at its narrowest point to the north of Keri Island (hist. *Kockskär*), Estonia's territorial sea is only 3.6 miles wide.[444] If Estonia and Finland had established a 12-miles-wide territorial sea in the Gulf of Finland, their territorial sea would have reached beyond the median line and overlapped.

With the adoption of the Estonian Maritime Boundaries Act in 1993, Finland had achieved the aims of its 1992 unofficial negotiations with Estonia in Helsinki. First, Finland anticipated that Estonia guarantees free and unhindered passage in the Gulf Finland under the Maritime Boundaries Act, while at the same time leaving open the possibility of extending the territorial sea to 12 miles in breadth in the future, subject to a notice given to Estonia 12 months in advance.[445] The explanatory note of the Maritime Boundaries Act stressed that after Estonia has established in the Gulf of Finland its territorial sea which does not reach closer to the median line than 3 miles, Finland may analogously alter the maximum breadth of its territorial sea in this body of water.[446]

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[442] Paragraph 2.1 of Annex 3, IMO Resolution MSC.231(82).

[443] See also Explanatory Note to the 1993 Maritime Boundaries Act of Estonia of Estonia. Tallinn 1993, pp. 2–3. Accessible in Estonian at the Estonian Parliament's archive.

[444] Ibid, p. 3.

[445] Hallituksen esitys Eduskunnalle laiksi Suomen aluevesien rajoista annetun lain muuttamisesta sekä Suomen aluevesien, mannermaajalustan ja kalastusvyöhykkeen rajoja koskevien sopimusjärjestelyjen hyväksymisestä (Explanatory Note to the Proposal of the Finnish Government). Helsinki 1995, HE 114/1994. Accessible in Finnish at: http://www.finlex.fi/fi/esitykset/he/1994/19940114 (14.09.2016).

[446] Explanatory Note to the 1993 Maritime Boundaries Act of Estonia, *op. cit.*, p. 3.

On April 6th, 1993, two weeks after the Estonian President Lennart Meri (who served as Estonia's Ambassador to Finland during the afore-mentioned unofficial negotiations in 1992) had proclaimed the Maritime Boundaries Act, the Estonian Embassy in Helsinki informed the Finnish Foreign Ministry of Estonia's intention to increase the width of its territorial sea to 12 miles, whereby its outer boundary would extend at certain points to the median line of the Gulf of Finland. Such an extension of the breadth of the Estonian territorial sea would have required amendments to the Maritime Boundaries Act.

On the other hand, in case Estonia would not have already established its part of the Viro Strait's EEZ corridor in the 1993 Maritime Boundaries Act (prior to the 1994 bilateral Agreement), then its establishment under an international treaty might not have been possible in practice due to constitutional requirements. In this case, the 1994 bilateral Agreement would have modified the State border (which pursuant to section 2(1) of the State Borders Act includes the line that delimits the territorial sea) as established *inter alia* under the Maritime Boundaries Act. Under section 122 of the Estonian Constitution, the ratification of international treaties which modify the borders of Estonia requires a two thirds majority of the members of the Parliament. This majority would have been difficult to achieve as demonstrated by the adoption of the Maritime Boundaries Act in the Parliament earlier.

The Parliament adopted the Maritime Boundaries Act with recorded votes of 42 in favour, 38 against, 3 neutral.[447] The reason why the vote was split might be explained by the fact that at the same time a competing draft Territorial Sea Act was not passed with recorded votes of 36 in favour, 38 against, 2 neutral.[448] Since the vote was split primarily due to the establishment of the Estonian part of the EEZ corridor under the Maritime Boundaries Act, it would have been unlikely that the two thirds majority would have been reached as required under the Constitution in respect of international treaties (but not in respect of unilateral modifications of the State border under Estonia's domestic law).

The Estonian Embassy stressed in its note from April 6th, 1993 that if Finland were also to extend its territorial sea to 12 miles, "the international channel in the Gulf of Finland would be completely closed."[449] Thus, it was proposed,

> "In order to maintain free passage through the Gulf of Finland, the Republic of Estonia is prepared to limit the width of its territorial waters in the Gulf of Fin-

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[447] Minutes of the second reading of the draft Maritime Boundaries Act in the Estonian Parliament. The stenographic record of the VII Riigikogu, 10.03.1993. Accessible in Estonian at: http://stenogrammid.riigikogu.ee (14.09.2016).

[448] Minutes of the second reading of the draft Territorial Sea Act in the Estonian Parliament. The stenographic record of the VII Riigikogu, 10.03.1993. Accessible in Estonian at: http://stenogrammid.riigikogu.ee (14.09.2016). See also *supra* section 2.2 of chapter 2 in Part III.

[449] Exchange of Notes Constituting an Agreement on the Procedure to be followed in the Modification of the Limits of the Territorial Waters in the Gulf of Finland. Tallinn/Helsinki 04.05.1994, e.i.f. 31.07.1995. Accessible:http://www.un.org/depts/los/LEGISLATIONANDTREATIES/STATEFILES/EST.htm (14.09.2016).

> land, so that it extends no closer than 3 nautical miles from the centre line. This is presuming that Finland, for its part, is prepared to limit the width of its own territorial waters correspondingly. If the Republic of Estonia decides at a later stage to depart from the afore-mentioned and expand its territorial waters in the Gulf of Finland, it will inform Finland no less than 12 months in advance. This is presuming that Finland is also prepared correspondingly to inform Estonia of any possible expansion of territorial waters. Should the afore-mentioned be found satisfactory to the Government of Finland, this note and its reply shall constitute an Agreement regarding this subject."[450]

On May 4th, 1994, Finland's Foreign Ministry informed the Estonian Embassy in Helsinki of its acceptance of the proposal.[451] On March 3rd, 1995, the Finnish Parliament adopted a law on certain amendments to the 1956 Act on the Delimitation of Territorial Waters of Finland.[452] Pursuant to its section 5, Finland extended the breadth of its territorial sea from 4 miles[453] to 12 miles, subject to exceptions provided in section 5a of the Act concerning the Gulf of Finland as well as the Gulf of Bothnia. The 1994 bilateral Agreement entered into force one day after the entry into force of the afore-mentioned Act, i.e. on July 31st, 1995.

The boundary between the Estonian EEZ and the Finnish continental shelf, as well as the fishing zone[454] in the Gulf of Finland and the Northern Baltic Sea was agreed on in an agreement from October 18th, 1996.[455] Hence, as the maritime boundary in the Viro Strait is an equidistance line, Estonia and Finland agreed on a symmetrical corridor which is at least 6 miles wide and separates the territorial sea of Estonia and Finland in the Gulf of Finland.[456] This corridor thus comprises the EEZs of Estonia and Finland in which certain high seas free-

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[450] Ibid.

[451] Ibid.

[452] Act Changing the Act on the Delimitation of Territorial Waters of Finland, *op. cit.*

[453] Finland, as well as the Soviet Russia, declared its territorial sea 4 miles wide for the first time in the 1920 Tartu Peace Treaty. See Article 3 of the Treaty of Peace between Finland and Soviet Russia, *op. cit.*

[454] Finnish fishing zone was established in 1975 by Laki Suomen kalastusvyöhykkeestä (Finnish Fishing Zone Act). Adopted 15.11.1974, e.i.f 01.01.1975. Accessible: http://faolex.fao.org/cgi-bin/faolex.exe?rec_id=000127&database=faolex&search_type=link&table=result&lang=eng&format_name=@ERALL (14.09.2016). The Finnish Fishing Zone Act was repealed by the Laki Suomen talousvyöhykkeestä (Act on the Exclusive Economic Zone of Finland). Adopted 26.11.2004, e.i.f. 01.01.2005. Accessible: http://www.un.org/Depts/los/doalos_publications/los_bult.htm (14.09.2016).

[455] Agreement between the Republic of Finland and the Republic of Estonia on the Boundary of the Maritime Zones in the Gulf of Finland and the Northern Baltic Sea. Helsinki 18.10.1996, e.i.f. 07.01.1997. Accessible: http://www.un.org/depts/los/LEGISLATIONANDTREATIES/STATEFILES/EST.htm (14.09.2016).

[456] See map 1 in Annex 1.

doms apply, including the freedom of navigation and overflight as well as the right to lay cables and pipelines.[457]

Furthermore, in establishing the geographical coordinates of the boundary of Estonia's territorial sea in Annex 2 of the 1993 Maritime Boundaries Act, the Estonian Parliament had agreed on a further limitation to the reach of Estonia's territorial sea in addition to the 3-miles-rule. Namely, the coordinates stipulated in the Maritime Boundaries Act imply that the boundary of the territorial sea does not reach closer than 1 mile to the international sealanes approved by the International Maritime Organization in sections where the international sealanes exit the 3-miles-wide Estonian part of the corridor.[458] The combined EEZ of Estonia and Finland in the Gulf of Finland is in some sections thus wider than the 6-miles-wide corridor that was agreed on in the 1994 bilateral Agreement.

2.2. The Impact of the 1994 Agreement on the Estonian and Finnish Legislation

The primary aim of both States Parties to the 1994 Agreement was to ensure free passage through the Gulf of Finland. The Estonian foreign minister explained at the Parliament that this was "a completely voluntary political self-limitation."[459] This was interpreted in Estonia as a concession to the Russian Federation.[460] The foreign minister of Estonia noted during the reading of the Maritime Boundaries Act draft in the Parliament that "There is no legal limitation, no legal factors that would commit us to it. I repeat, we do it on the basis of a voluntary decision."[461] The explanatory note of the Maritime Boundaries Act adds that the boundary of the Estonian territorial sea in the Gulf of Finland "reflects Estonia's geopolitical position."[462] Founding the territorial sea boundary in the Gulf of Finland on such political arguments did not coincide well with popular sentiments in Estonia, which had only recently regained its independence. This was further aggravated by the lack of legal arguments on behalf of the Estonian politicians for the establishment of the EEZ corridor in the Gulf

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457 See more specifically on the high seas freedoms in the Gulf of Finland in A. Lott. Marine Environmental Protection and Transboundary Pipeline Projects: A Case Study of the Nord Stream Pipeline. – 27 Utrecht Journal of International and European Law 2011, pp. 56–61.

458 Explanatory Note to the 1993 Maritime Boundaries Act of Estonia, *op. cit.*, pp. 2–3.

459 The oral explanations by the Estonian foreign minister in the Minutes of the first reading of the draft Maritime Boundaries Act in the Estonian Parliament. The stenographic record of the VII Riigikogu, 21.01.1993. Accessible in Estonian at: http://stenogrammid.riigikogu.ee (14.09.2016).

460 Ibid.

461 Ibid.

462 Explanatory Note to the 1993 Maritime Boundaries Act of Estonia, *op. cit.*, p. 2.

of Finland during the drafting of the Maritime Boundaries Act, its passing in the Parliament and thereafter.[463]

At the same time, the Parliament's defence committee had presented a competing draft act – the Territorial Sea Act. The 1993 draft Territorial Sea Act would have extended Estonia's territorial sea up to 12 miles in the Gulf of Finland and thus abolished the EEZ corridor.[464] The extension of the width of the Estonian territorial sea was also proposed in another draft act from 2007.

According to the 2007 draft act, the EEZ corridor in the Gulf of Finland comprises approximately 1250 km^2 of Estonian maritime area that should instead be declared Estonia's territorial sea.[465] This proposition had been supported in 2005 *inter alia* by the recent Prime Minister of Estonia Juhan Parts, renowned Estonian scholar on the international law of the sea Heiki Lindpere, Member of the Parliament professor Igor Gräzin and the former mayor of Tallinn Hardo Aasmäe.[466] The authors were primarily motivated by the aim of preventing the laying of the Nord Stream transboundary pipeline in the Gulf of Finland due to security and environmental considerations.[467] Particularly, in case the EEZ corridor in the Gulf of Finland would have been abolished by Estonia and Finland prior to the establishment of the Nord Stream submarine pipeline, then the States behind that project would not have enjoyed the freedom of laying submarine cables and pipelines in this maritime area, as stipulated in Article 58(1) of the LOSC.

The extension of the width of the Estonian territorial sea would have brought to the fore the likely non-conformity of the Estonian domestic law on the right of innocent passage with the LOSC and potential conflict with other States, as the 2007 draft act did not propose to annul the requirement of prior notification for a foreign military vessel or other foreign vessel used for national non-commercial purposes to sail through the Estonian territorial sea in the Gulf of Finland (Section 13(2) of the State Border Act). The draft act proceeded from the misconception that "pursuant to the [law of the sea] convention, foreign warships must ask for a permission from the coastal State to exercise the right of innocent passage."[468] This misconception was employed even though it had been stressed in the Estonian legal literature that a possible expansion of the territorial sea in the Gulf of Finland to the median line should be coupled with

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[463] As will be subsequently analysed, there were numerous legal arguments that could have been advanced in favour of the establishment of the EEZ corridor.

[464] Second reading of the draft Territorial Sea Act. Stenographic record of the Parliament, 10.03.1993. Accessible in Estonian at: http://stenogrammid.riigikogu.ee (14.09.2016). The Parliament rejected the draft Act with a narrow margin, as examined previously (36 for, 38 against, 2 neutral).

[465] Explanatory Note to the 1993 Maritime Boundaries Act of Estonia 3 SE. Tallinn 2007, p. 2. Accessible in Estonian at: http://www.riigikogu.ee/?op=ems&page=eelnou&eid=61bf6a3e-fe48-9195-b305-944e25f26bf7& (14.09.2016).

[466] H. Aasmäe, I. Gräzin, H. Lindpere, J. Parts. Eesti merepiiri tuleb nihutada. Eesti Päevaleht, 28.12.2005.

[467] Ibid.

[468] Explanatory Note to the 2007 Maritime Boundaries Act, *op. cit.*, p. 3.

the amendment of section 13(2) of the Estonian State Border Act, so as to abandon the requirement of prior notification or authorisation for innocent passage.[469]

By comparison, the Finnish legislators were more elaborate in their reasons on the legal necessity for establishing the EEZ corridor in the Gulf of Finland. Finland established its 3-miles-wide EEZ corridor in the Gulf of Finland in 1995 in the course of amending the Act on the Delimitation of the Territorial Waters of Finland. The aim of the Act was to ensure its conformity with the LOSC, which had entered into force in the previous year. In its section 5, the breadth of the Finnish territorial sea was extended from 4 miles to 12 miles.

Sweden had already established a 12-miles-wide territorial sea in 1979,[470] whereas Finland had thus far refrained from doing so to avoid a common territorial sea boundary with the Soviet Union in the Gulf of Finland.[471] Yet in the aftermath of the dissolution of the Soviet Union and the restoration of Estonia's independence, Finland considered it necessary to extend its territorial sea in order to enhance the effectiveness of its coast guard, particularly against smuggling.[472]

Exceptions to the 12-miles-wide territorial sea were stipulated in section 5a of the Act on the Delimitation of the Territorial Waters of Finland. In particular, its section 5a(2) guaranteed that in the Gulf of Bothnia and in its southern and northern parts, in the Åland Sea and in the northern part of the Baltic Sea, no point of the outer limits of the territorial sea overlaps with the Swedish maritime zones as agreed upon in bilateral treaties. Additionally, its section 5a(1) provides that in the Gulf of Finland, the outer limits of the territorial sea consist of a line which runs at a distance of at least 3 miles from the median line and every point of which is located north of channels customarily used for international navigation. Thus, section 5a(1) corresponds to the 1994 agreement between Estonia and Finland.

The explanatory note of the amendments to the Act on the Delimitation of the Territorial Waters of Finland refers to the 1979 agreement between Denmark and Sweden concerning the delimitation of the territorial waters between Denmark and Sweden[473] as an example for the 1994 agreement between Finland

[469] H. Lindpere. Maritime Zones and Shipping Laws of the Republic of Estonia: Some Selected Critique. – R. Värk (ed). Estonian Law Reform and Global Challenges: Essays Celebrating the Tenth Anniversary of the Institute of Law, University of Tartu. Tartu: Tartu University Press 2005, p. 21.

[470] Section 4 of the Act concerning the Territorial Waters of Sweden (with amendments No. 959 enacted on 18 December 1978, and No. 1140, on 20 December 1979). Adopted 03.06.1966, e.i.f. 01.07.1966. Accessible: http://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/SWE_1979_Act.pdf (14.09.2016).

[471] HE 114/1994, *op. cit.*

[472] Ibid.

[473] Exchange of Notes Constituting an Agreement between Denmark and Sweden concerning the Delimitation of the Territorial Waters between Denmark and Sweden. Stockholm/Copenhagen 25.06.1979, e.i.f. 21.12.1979. Accessible: http://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/TREATIES/DNK-SWE1979TW.PDF (14.09.2016).

and Estonia on the establishment of the EEZ corridor in the Gulf of Finland.[474] Likewise, it should be noted that Denmark and Germany have limited their territorial sea in the Femer and Kadet straits so as to guarantee a 4-miles-wide channel through their EEZ which links the Great Belt and the Little Belt with the Baltic Sea proper.[475]

With respect to the Danish Straits, for maintaining the freedom of passage subsequent to the extension of their territorial sea to 12 miles, Sweden and Denmark limited their territorial sea in the channels between the Swedish coast and the Danish coast at Skagen, as well as at Laeso, Anholt and Bornholm so that on both sides of the median line there is an area of high seas at least 3 miles wide.[476] Both States agreed to make it possible for foreign vessels and aircraft to transit the high seas in Øresund.[477] Under the 1944 Chicago Convention,[478] foreign aircraft would not have had the freedom of overflight in the absence of such a corridor. The corridor was also necessary for safeguarding passage rights since at the time both Denmark and Sweden required a notification from foreign warships or other government ships operating for non-commercial purposes prior to exercising innocent passage.[479]

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474 HE 114/1994, *op. cit*.

475 See section 1 of the Proclamation by the Government of the Federal Republic of Germany concerning the extension of the breadth of the German territorial sea. Adopted 11.11.1994, e.i.f. 01.01.1995. Accessible: http://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/deu_1994_territorial_proclamation.pdf (14.09.2016). See also R. Lagoni. Straits Used for International Navigation: Environmental Protection and Maritime Safety in the Danish Straits. – B. Öztürk, R. Özkan (eds). The Proceedings of the Symposium on the Straits Used for International Navigation. Istanbul: Turkish Marine Research Foundation 2002, p. 161. R. Platzöder. Bridges and Straits in the Baltic Sea. – R. Platzöder, P. Verlaan (eds). The Baltic Sea: New Developments in National Policies and International Cooperation. The Hague/London/Boston: Martinus Nijhoff 1996, pp. 148–149. B. Kwiatkowska. Economic and Environmental Considerations in Maritime Boundary Delimitations. – J. I. Charney, L. M. Alexander (eds). International Maritime Boundaries, vol. 1. Dordrecht, Boston, London: Martinus Nijhoff 1993, p. 100.

476 The 1979 Danish-Swedish Agreement, *op. cit.*, p. 1.

477 Ibid.

478 Convention on International Civil Aviation. Chicago 06.12.1944, e.i.f. 04.04.1947.

479 LOSC: Declarations made upon signature, ratification, accession or succession or anytime thereafter, *op. cit.* – Denmark; Sweden. Accessible: http://www.un.org/depts/los/convention_agreements/convention_declarations.htm# (14.09.2016). See Royal Ordinance No. 73 Governing the Admission of Foreign Warships and Military Aircraft to Danish Territory in Time of Peace. Adopted 27.02.1976, e.i.f. 27.02.1976. Sweden later waived this requirement and Denmark loosened the conditions in 1999 by requiring prior notification only in case of simultaneous passage of the Great Belt, Samsoe Belt or the Sound of more than three warships to the same nationality or in case of passage through Hollaenderdybet/Drogden or the Little Belt and, in connection therewith, the necessary navigation by the shortest route through internal waters between Funen, Endelave and Samsoe. Ordinance Governing the Admission of Foreign Warships and Military Aircraft to Danish Territory in Time of Peace. Adopted 16.04.1999, e.i.f. 01.05.1999, Articles 3(2) and 4(2). Accessible: https://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/DNK_1999_Ordinance.pdf (14.09.2016).

Similarly, at the time of the conclusion of the 1994 bilateral Agreement, both Finland and Estonia required a prior notification from a foreign warship or another government ship operating for non-commercial purposes that was about to exercise its innocent passage in the Estonian or Finnish territorial sea.[480] The Finnish legislators noted that if Estonia and Finland were to expand their territorial sea up to 12 miles in the Gulf of Finland, then foreign ships would have no other option but to sail through the territorial sea of either of the coastal States in order to reach the other side of the passage through the Gulf of Finland and thus foreign warships or other government ships operating for non-commercial purposes and sailing to or from e.g. St Petersburg or Kronstadt would have to give a prior notification to the coastal State.[481] The legislators noted that such an extension of the territorial sea would have also closed the international corridor for overflights.[482] The explanatory note of the amendments to the Act on the Delimitation of the Territorial Waters of Finland states that the aim of the EEZ corridor in the Gulf of Finland is to guarantee an unhindered passage for ships and aircraft to St Petersburg and Kronstadt.[483]

The above-mentioned arguments for the establishment of the EEZ corridor would be relevant if the strait States' assumption on the general applicability of the regime of non-suspendable innocent passage to the Viro Strait under Article 45(1)(b) of the LOSC was correct. If, instead, the regime of transit passage (Article 37 of the LOSC) would have been applicable to ships and aircraft transiting the Viro Strait, then the establishment of the EEZ corridor would not have been necessary for the purposes of safeguarding the freedoms of navigation and overflight in the strait. Therefore, it is examined next whether the Gulf of Finland proper (excl. the Viro Strait) falls entirely under the territorial sea of its coastal States. In case an EEZ would exist in the Gulf of Finland proper (to the east of Vaindloo Island), then it would have profound implications to the passage regime of the Viro Strait, as studied above in the example of the Irbe Strait in the Gulf of Riga.[484]

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[480] Section 13(2) of the State Border Act of Estonia. Section 9 of the Asetus Suomen alueen valvonnasta ja sen alueellisen koskemattomuuden turvaamisesta (Decree on Surveillance of Finnish Territory and Protection of Finland's Territorial Integrity). Adopted 01.12.1989, e.i.f. 01.01.1990. Accessible in Finnish and Swedish at: http://www.finlex.fi/fi/laki/alkup/1989/19891069 (14.09.2016). Due to mounting international pressure Sweden annulled the requirement of prior notification in January 1995 after the entry into force of the LOSC (Article 17) and Finland followed its suit on May 1st, 1996. See Ordinance concerning the admission to Swedish territory of foreign naval vessels and military aircraft (as amended 27.10.1994). Adopted 03.06.1966, e.i.f. 03.06.1966. See 1996 Proposal of the Finnish Government. – 2.1. Aluemeri. *op. cit*. See also US Navy Judge Advocate General's Corps. – Sweden. Summary of Claims, April 2014. Accessible: http://www.jag.navy.mil/organization/documents/mcrm/Sweden2014.pdf (14.09.2016).

[481] HE 114/1994, *op. cit*.

[482] Ibid.

[483] Ibid.

[484] See *supra* sections 4.2 and 5 of chapter 1 in Part III.

3. The Inapplicability of Article 45(1)(b) of the LOSC to the Viro Strait and the Existence of the Russian EEZ in the Gulf of Finland

The applicability of Article 45(1)(b) of the LOSC to the Viro Strait depends on whether the Viro Strait connects the EEZs of Estonia and Finland in the west to the territorial sea of the Russian Federation in the east. Pursuant to Article 45(1)(b) in combination with Article 45(2) of the LOSC, the right of non-suspendable innocent passage applies in straits between a part of the high seas or an EEZ and the territorial sea of a foreign State. It is commonly assumed that foreign ships would have had the right of innocent passage for sailing through the Gulf of Finland if Estonia and Finland would not have limited their territorial sea in the Viro Strait under the 1994 bilateral Agreement.

The right of non-suspendable innocent passage applies to foreign ships. Under the regime of non-suspendable innocent passage, foreign ships would not be entitled to pass the strait in their normal modes of transit. They would have to comply with the rules of innocent passage as stipulated in Article 19 of the LOSC. Pursuant to Article 20 of the LOSC, submarines and other underwater vehicles would be required to navigate on the surface and to show their flag. Clove has observed that surfaced submarines are "less maneuverable and more likely to become involved in a collision – especially in dense shipping areas such as straits."[485] In case Article 20 of the LOSC would be applicable to the Russian submarines of its Baltic Fleet *en route* to/from Kronstadt throughout the Viro Strait, it might further complicate the already complex navigational conditions in the strait.

Additionally, since foreign aircraft would then cross the territory of Estonia or Finland instead of an EEZ, they would not be entitled to the freedom of overflight that is granted under the right of transit passage or in the EEZ under the high seas freedoms (Article 2(2) of the LOSC). Instead, they would have to comply with the 1944 Chicago Convention. In effect, it would close the only free traffic lane for the civil and military aircraft of the Russian Federation from the Russian mainland to the Kaliningrad exclave. Therefore, if Article 45(1)(b) of the LOSC would apply to the Viro Strait, then the establishment of the EEZ corridor in the Gulf of Finland would have been necessary to achieve the aim of the strait States Estonia and Finland to maintain free passage through the strait.

It would be reasonable to expect that the eastern part of the Gulf of Finland includes only the territorial sea and internal waters of its coastal States, since, due to its coastal geography, the 12-miles-wide territorial sea, as measured from the relevant baselines, could cover the whole relevant maritime area. Nonetheless, the Russian maritime area includes a tiny EEZ with the aim to safeguard free passage of ships north of Gogland Island.[486] Due to the existence of the Russian EEZ in the Gulf of Finland, the regime of non-suspendable innocent

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[485] Clove, *op. cit.*, p. 107.

[486] See also US Department of State. Finland-U.S.S.R. Boundary. – International Boundary Study. Washington D.C: US Department of State 1967, p. 24. Oude Elferink 1994. The Law of Maritime Boundary Delimitation, *op. cit.*, p. 186.

passage cannot apply to the Viro Strait, since the strait connects two EEZs. The tiny Russian EEZ is founded on the 1940, 1965 and 1985 maritime boundary agreements concluded between Finland and the Soviet Union.[487]

Article 2 of the 1940 Treaty of Peace between Finland and the Soviet Union provides that the state frontier between Finland and the Soviet Union runs along a new line so that *inter alia* the entire Karelian Isthmus with the city of Viipuri (Russian: *Выборг*) and Viipuri Bay and the islands in the centre of the Gulf of Finland proper were included in the territory of the Soviet Union. A mixed commission was set up to provide a more detailed establishment of the frontier line, including in the Gulf of Finland proper.[488] A month later, the commission provided a detailed description of the new boundary line between the two States. The coordinates of the outer limits of the Russian territorial sea to the north and west of Gogland Island are provided in section VI(a) of the 1940 Protocol.[489]

According to section VI(a) of the 1940 Protocol, Gogland Island was not attributed full effect in the maritime boundary delimitation, since the breadth of its territorial sea to the north of the island was fixed at only marginally over 2 miles and to the west of the island slightly less than 4 miles (which was the maximum breadth of the territorial sea of both States at the time).[490] The maximum breadth of the Russian Federation's territorial sea is still measured in this section of its maritime area on the basis of section VI(a) of the 1940 Protocol.[491]

In addition, Article 1 of the 1965 treaty between Finland and the Soviet Union on the territorial sea, continental shelf and fishing zone boundary confirms the outer limits of the Soviet Union's territorial sea to the north and west of Gogland Island (as established under the 1940 Protocol) and adds a new easternmost coordinate to the outer limit of the Soviet Union's territorial sea.[492] The outer limits of the Finnish territorial sea were fixed analogously in the 1940

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[487] See also map 7 in Annex 1.

[488] Treaty of Peace between the Soviet Union and Finland. Moscow 12.03.1940, e.i.f. 13.03.1940. Accessible in Finnish at: http://www.finlex.fi/fi/sopimukset/sopsteksti/1940/19400003/19400003_2 (14.09.2016).

[489] Protocol to Article 2 of the Treaty of Peace between the Republic of Finland and the Union of Socialist Soviet Republics signed at Moscow on March 12th, 1940. Moscow 29.04.1940, e.i.f. 29.04.1940, section VI(a). Accessible in Finnish at: http://www.finlex.fi/fi/sopimukset/sopsteksti/1941/19410012/19410012_3#idp3938192 (31.01.2017).

[490] The outer limit of the Soviet Union's territorial sea was fixed on the basis of the following coordinates: 60°08'49.0" (N) and 27°04'36.0" (E); 60°08'30.0" (N) and 27°04'07.0" (E); 60°08'30.0" (N) and 26°57'25.0" (E); 60°08'12.0" (N) and 26°54'25.0" (E); 60°04'60.0" (N) and 26°49'00.0" (E).

[491] See map 7 in Annex 1.

[492] Agreement between the Government of the Republic of Finland and the Government of the Union of Soviet Socialist Republics Concerning the Boundaries of Sea Areas and of the Continental Shelf in the Gulf of Finland. Helsinki 20.05.1965, e.i.f. 25.05.1966, Article 1. Accessible: https://treaties.un.org/Pages/showDetails.aspx?objid=080000028012b6b9 (31.01.2017). See also Oude Elferink 1994. The Law of Maritime Boundary Delimitation, *op. cit.*, p. 185.

Protocol and the 1965 Maritime Boundary Treaty. Consequently, a high seas corridor (now an EEZ corridor) was established to the north and west of Gogland Island. The Russian EEZ is approximately 9 miles long and approximately 2 miles wide (at maximum, slightly less than 4 miles wide).

The coordinates of the Finnish-Russian boundary line in the above-referred high seas corridor are stipulated in Article 2 of the 1965 Maritime Boundary Treaty. Under Article 2 of the 1965 Treaty, this section of the boundary line is a median line as measured from the outer limits of the Finnish and Russian territorial sea. In connection with the establishment of the Soviet Union's EEZ under the 1984 Decree,[493] the Soviet Union and Finland agreed under Article 1 of the 1985 Maritime Boundary Treaty that the boundary of the EEZ, the fishing zone and the continental shelf between Finland and the Soviet Union in the Gulf of Finland and the north-eastern part of the Baltic Sea shall be the line designated in the 1965 Maritime Boundary Treaty.[494] The tiny Russian EEZ in the Gulf of Finland spans the maritime area which is located between the coordinates of the EEZ boundary and the outer limits of the Russian territorial sea to the north and west of Gogland Island, as stipulated in section VI(a) of the 1940 Protocol and Article 1 of the 1965 Maritime Boundary Treaty.[495]

The existence of the Russian EEZ to the north of Gogland Island has been acknowledged in practice, e.g. in planning the laying of the Nord Stream pipelines.[496] Yet the existence of the Russian EEZ in the Gulf of Finland is not a common knowledge in the coastal States of the Gulf of Finland. As studied above, Estonia and Finland apparently assumed in establishing the Viro Strait's EEZ corridor in 1994 that the strait connects the EEZs in the Baltic Sea proper with the Russian Federation's territorial sea in the Gulf of Finland proper. This follows from the strait States' assumption that the regime of innocent passage generally applies to the strait. Likewise, in the recent commentaries to the Estonian Constitution, it is mistakenly argued that if Estonia and Finland would abolish the EEZ corridor, then the regime of innocent passage would be applicable to ships transiting the Gulf of Finland.[497] Similarly, the Estonian Maritime Administration has had no information on the existence of the Russian

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[493] Decree of the Presidium of the Supreme Soviet of the USSR on the Economic Zone of the USSR. Adopted 28.02.1984, e.i.f.01.03.1984.

[494] Agreement between the Government of the Republic of Finland and the Government of the Union of Soviet Socialist Republics regarding the delimitation of the economic zone, the fishing zone and the continental shelf in the Gulf of Finland and in the North-Eastern part of the Baltic Sea. Moscow 05.02.1985, e.i.f. 24.11.1986, Article 1.

[495] See also map 7 in Annex 1.

[496] See Nord Stream Press Release. Nord Stream Completes Additional Route Investigations at Request of the Baltic Sea Countries, 30.05.2008. Accessible: http://www.nord-stream.com/press-info/press-releases/nord-stream-completes-additional-route-investigations-at-request-of-the-baltic-sea-countries-153/ (31.01.2017). See also Nord Stream. Natural Gas Pipeline through the Baltic Sea. Environmental Impact Assessment in the Exclusive Economic Zone of Finland: Summary, 2009, p. 1. Accessible: https://www.nord-stream.com/download/document/122/?language=en (31.01.2017).

[497] L. Mälksoo *et al.* Välissuhted ja välislepingud. – Madise, *op. cit.*, p. 711.

EEZ in the Gulf of Finland.[498] Notably, most nautical charts do not depict the Russian EEZ in the Gulf of Finland.[499] The existence of the Russian EEZ in the Gulf of Finland is forgotten in the coastal States of the Viro Strait.

Therefore, the Viro Strait connects the EEZs in the Baltic Sea proper with the EEZ in the Gulf of Finland proper. Consequently, the right of transit passage would be applicable to foreign ships and aircraft transiting this maritime area if Estonia and Finland would not have decided to establish the EEZ corridor in the Viro Strait. This means that Estonia and Finland were not correct in stating that the establishment of the EEZ corridor is necessary in order to safeguard free passage in the Viro Strait. This, however, does not imply that the establishment of the EEZ corridor is contrary to their interests and law.

The 1994 Agreement[500] is in accordance with the LOSC. Pursuant to its Article 311(2), the LOSC does not alter the rights and obligations of States Parties which arise from other agreements that are compatible with the LOSC and which do not affect the enjoyment by other States Parties of their rights or the performance of their obligations under the LOSC. Article 311(2) applies also to such agreements as the 1994 Agreement, which was concluded before the LOSC entered into force.[501] An agreement would be considered compatible with Article 311(2) of the LOSC in case it does not give less right to third States as compared to Part III of the LOSC.[502] The 1994 Agreement favours international passage and overflight through the Viro Strait due to the EEZ corridor. The passage rights in the EEZ corridor are regulated under Articles 35(b) and 36 of the LOSC.

4. The EEZ Corridor in the Viro Strait under Articles 35(b) and 36 of the LOSC

Ships can transit maritime areas that are over 24 miles wide (as measured from the baselines) through the EEZ that separates the territorial sea of the coastal States. Yet, as in the Viro Strait, such an EEZ corridor may also be established in straits that are less than 24 miles wide. The LOSC framework on international straits (Part III) is not applicable to such straits on the condition that the EEZ corridor is of similar convenience with respect to navigational and hydrographical characteristics.[503]

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[498] Information kindly obtained from Mr Taivo Kivimäe, the Estonian Maritime Administration on 20.12.2013.

[499] See e.g. the Estonian Maritime Administration's 2010 nautical chart no. 300. Gulf of Finland: Paldiski to Narva.

[500] The 1994 Agreement meets the definition of a "treaty" as stipulated in Article 2(1)(a) of the 1969 Vienna Convention. It is an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.

[501] See López Martín, *op. cit.*, p. 81.

[502] Thomas, Duncan, *op. cit.*, p. 80. Caminos 2007, *op. cit.*, p. 588.

[503] LOSC, Article 36. See also Nandan, Rosenne, *op. cit.*, p. 310.

The latter requirement means that the right of innocent passage or transit passage under Part III of the LOSC would still be applicable if the EEZ corridor is not suitable for transiting the strait.[504] In practice, such instances (due to shallow waters, adverse currents etc.) have not been identified.[505]

The Article 36-condition of similar convenience to an ordinary route through the high seas or an EEZ is met with regards to the EEZ corridor in the Viro Strait, as it is 6 miles wide and Estonia further explicitly specified in its domestic law that its territorial sea boundary does not reach closer than 1 mile to the international sealanes in sections where the international sealanes are south of the 3-miles-wide Estonian part of the EEZ corridor. Considering that other significant obstacles (e.g. shallow waters, islets) to international navigation through the EEZ corridor in the Viro Strait are also lacking, it is clearly a route of similar convenience.

Pursuant to Article 36 of the LOSC, other relevant parts instead of Part III of the LOSC apply to an EEZ route in a strait, including the provisions regarding the freedoms of navigation and overflight. Article 35(b) confirms that nothing in the LOSC framework on international straits (Part III) affects the legal status of the EEZ beyond the territorial sea of strait States. The aim of this provision is to supplement Article 34(1) of the LOSC so as to safeguard that strait States do not infer from Part III of the LOSC additional rights or jurisdiction over the EEZ or the high seas located in an international strait.[506] Thus, as a result of the 1994 Agreement, a ship or an aircraft transiting the Viro Strait via the EEZ corridor enjoys the freedom of navigation or overflight, unless it enters Estonia's or Finland's territorial sea or airspace above it.[507] However, it needs to be examined which consequences would follow in case Estonia and Finland would decide to abolish the current EEZ corridor by extending the outer limits of their territorial sea in the Viro Strait.

5. The Viro Strait in the Context of a Potential Transit Passage Regime

The extension of the territorial sea of Estonia and Finland up to 12 miles in the Viro Strait might not necessarily be in the best interests of the strait States. In principle, although Estonia and Finland may extend their territorial sea in the Viro Strait up to the median line in accordance with the 1994 bilateral Agreement, nothing could avert the Russian Federation in such circumstances from limiting the width of its territorial sea under its domestic law unilaterally analogously to the bilateral 1994 Agreement with the aim of creating an EEZ in the eastern part of the Gulf of Finland, even if its EEZ to the north of Gogland Island would be non-existent. Thus, the Russian Federation would in any case have the option of altering the outer limits of its territorial sea with the aim of

[504] Thomas, Duncan, *op. cit.*, pp. 121, 176.
[505] Ibid, p. 127. Alexander 1987, *op. cit.*, p. 481.
[506] Nandan, Rosenne, *op. cit.*, p. 307.
[507] See also Thomas, Duncan, *op. cit.*, p. 127.

applying transit passage to the Viro Strait. The alteration of the strait's classification through the domestic law of a State not littoral of the strait in this manner would be at least technically possible.

In an international strait, the right of transit passage applies from coast to coast,[508] except for internal waters within a strait where the establishment of a straight baseline had the effect of enclosing as internal waters areas which had not previously been considered as such (Article 35(a) of the LOSC).[509] Therefore, the right of transit passage (and innocent passage) could not be applicable in the Finnish internal waters in the Viro Strait due to the fact that Finland declared the relevant maritime area as its internal waters already in 1938,[510] thus long before it established a system of straight baselines in 1956.[511] In the Viro Strait, straight baselines connect numerous skerries that are located many miles south of the Finnish mainland, including in the area of Helsinki.

Estonia established its system of straight baselines after the restoration of its independence in Annex 1 of the 1993 Maritime Boundaries Act. At first sight, the Estonian internal waters in the Viro Strait may thus not be regarded as having had the effect of enclosing as internal waters areas which had not previously been considered as such in terms of Article 35(a) of the LOSC. In spite of the absence of an internationally recognised methodology for establishing straight baselines prior to the break of Estonia's independence in 1940, Estonia nevertheless had declared a considerable part of its coastal waters as internal waters.

Initially, pursuant to Article 2 of the 1918 Estonian Temporary Administrative Laws,[512] the cannon-shot rule was used for delimiting bays and their inner parts over which it was possible to exercise complete dominion from the coast; such waters formed the internal sea of Estonia.[513] This regulation was in force until 1938 when it was replaced by the Waterways Act,[514] which, however, did not distinguish bays (formerly internal waters) from the territorial sea. How-

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[508] See e.g. Schachte, Jr, Bernhardt, *op. cit.*, p. 536.

[509] See *supra* section 2.1 of Part I.

[510] See more specifically *infra* section 4.2 of Part V on the 1938 Nordic Neutrality Rules.

[511] See Act on the Delimitation of Territorial Waters of Finland, *op. cit.*

[512] Ajutised administratiivseadused (Temporary Administrative Laws). Adopted 19.11.1918, e.i.f. 27.11.1918 (RT 1918, 1).

[513] Taska 1974, *op. cit.*, p. 88. Article 164 of the Russian act on maritime commerce was applicable to the delimitation of bays under Article 2 of the 1918 Estonian temporary administrative laws, which provided that "Bays, their inner parts over which it is possible to exercise complete dominion from the coast, are the internal sea of the coastal State and subject to its unlimited territorial supremacy… The border of such an internal sea shall be established commonly as an imaginary line drawn from one coast to the other in such a way that the centre point of the line is at the cannon-shot range from both coasts. Waters on the landward side of the line form the internal sea and waters on the seaward side of the line form the territorial sea." The Collection of Russian Acts, vol. 11(2), the editions of 1903, 1912 and 1913, p. 39 (referred in Taska 1977, *op. cit.*, p. 97).

[514] Veeteede seadus (Waterways Act). Adopted 21.01.1938, e.i.f. 01.02.1938 (RT 1938, 12, 96). See ERA.31.5.217, p. 1.

ever, on November 3rd, 1938, the Neutrality Act[515] was passed, which provided in section 2(3) that the Estonian internal waters shall be deemed to include ports, entrances to ports, gulfs and bays, and the waters between those Estonian islands, islets and reefs which are not constantly submerged, and between the said islands, islets and reefs and the mainland.[516]

Internal waters of Estonia were thus maritime areas that were connected to the coast due to the location of its islands and bays. The main islands which contributed to the extension of the Estonian internal waters in the Gulf of Finland under section 2(3) of the Neutrality Act were Pakri Islands (hist. *Rågöarna*), Naissaar (hist. *Nargö/Nargen*), Aegna (hist. *Ulfsö/Wulf*), Prangli (hist. *Vrangö*), Aksi (hist. *Lilla Wrangelsö*), Mohni (hist. *Ekholm*), Rammu (hist. *Ramö*), Malusi (hist. *Malö*), Keri and Vaindloo. As Naissaar, Aegna, Prangli, Keri, Aksi, Rammu and Malusi together with smaller islands in their vicinity comprise a long line of islands (approximately 40 km from east to west) situated in front of Tallinn Bay, Muuga Bay and Kolga Bay, they consequently enclosed a large maritime area falling under the internal waters of Estonia. Of those islands, Keri lies furthest to the north: approximately 13 miles as measured from the coast of Muuga Bay. Thus, internal waters closed *inter alia* Tallinn Bay and Muuga and Kolga bays in its immediate vicinity as well as Paldiski Bay along Pakri Islands.

It follows from the foregoing that after the restoration of Estonia's independence in 1991 the internal waters, as established in the framework of straight baselines, were to a significant extent such internal waters that had been previously considered as such in terms of Article 35(a) of the LOSC.[517] Therefore, from the perspective of States that recognise Estonia's State continuity, foreign ships and aircraft cannot enjoy the right of innocent passage or transit passage in such internal waters, particularly in Tallinn Bay. However, as the Russian Federation does not recognise Estonia's State continuity, it might object to this under international law.[518] Thereby it might not feel itself curtailed by the limits of the right of transit passage in the afore-mentioned internal waters of Estonia. In any case, if Estonia and Finland would abolish the EEZ corridor, then the maritime area in the Viro Strait where ships and aircraft would be entitled to transit passage (primarily the territorial sea of both States) would still be significantly greater in comparison to the limits of the EEZ corridor.

Thus, when enjoying the right of transit passage, foreign ships (including submarines) and aircraft could transit the strait very close to Tallinn and Helsinki (essentially up to Naissaar-Aegna line near Tallinn and the skerries near Helsinki). In order to limit such transit passage, Estonia and Finland could possibly retain the existing ship routes in the Gulf of Finland under Article 41 of

[515] Erapooletuse korraldamise seadus (Neutrality Act). Adopted 03.11.1938, e.i.f. 03.12.1938 (RT 1938, 99, 860).

[516] See more specifically *infra* section 4.2 of Part V on the 1938 Nordic Neutrality Rules.

[517] See also section 2.1 of Part I.

[518] See generally on the Russian approach to Estonia's State continituity in L. Mälksoo. Russian Approaches to International Law. Oxford: Oxford University Press 2015, p. 31.

the LOSC. Foreign ships in passage would have to follow and respect the mandatory ship routes under Articles 39(2)(a) and 41(7) of the LOSC if undertaking transit passage.

The International Maritime Organization as the competent organisation has adopted the traffic separation scheme in respect of the Gulf of Finland.[519] Since the traffic separation scheme for the Gulf of Finland was adopted by the International Maritime Organization, it may be considered as "generally accepted" in terms of Articles 39(2)(a) and 41(7) of the LOSC and necessary for the safety of navigation as required under both of the afore-referred provisions.[520] In effect, non-State-owned ships would be required to comply with the traffic separation scheme in the Gulf of Finland if they should potentially exercise the right of transit passage. However, as examined above,[521] this would not limit the spatial extent of the right of transit passage of sovereign immune vessels (incl. warships). Furthermore, the traffic separation scheme does not apply to aircraft (Articles 39(3) and 41 of the LOSC).[522]

Albeit civil aircraft are required under Article 39(3)(a) of the LOSC to observe the Rules of the Air established by the International Civil Aviation Organization (ICAO), this is not always the case for State aircraft.[523] State aircraft are required to normally comply with the Rules of the Air and at all times operate with due regard for the safety of navigation as well as monitor the radio frequency assigned by the competent internationally designated air traffic control authority or the appropriate international distress radio frequency (Article 39(3)(a) and (b) of the LOSC). Nandan and Anderson explain about the drafting of Parts III and IV of the LOSC that

> "For strategic reasons the US did not want military aircraft to be subject to reporting requirements at all times. The normal practice is for military aircraft to observe and comply with ICAO rules, even though strictly they apply only to civil aircraft."[524]

Oxman observes that the wide regulatory powers of the International Civil Aviation Organization are not applicable to military aircraft and refers to problems with flight plans, flight control and two-way communication as the main safety concerns in regard to such aircraft.[525] These problems are pertinent especially in

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519 See the traffic separation scheme as shown on the International Maritime Organization's map in Traffic Separation Schemes (TSS) and Mandatory Ship Reporting Area in the Baltic (Gulf of Finland). NAV 48/3/1, 28.03.2002, p. 4 of Annex 1. Accessible: http://www.sjofartsverket.se/upload/5471/48-3-1.pdf (14.09.2016).

520 See Nandan, Rosenne, *op. cit.*, p. 344. See also Caminos, Cogliati-Bantz, *op. cit.*, pp. 311–313.

521 *Supra* section 5 of chapter 1 in Part III.

522 See further Caminos, Cogliati-Bantz, *op. cit.*, pp. 317–321. See also Oxman, *op. cit.*, pp. 410–411.

523 See also Oxman, *op. cit.*, pp. 399–400.

524 Nandan, Anderson, *op. cit.*, p. 185.

525 Oxman, *op. cit.*, p. 400.

the narrow Viro Strait which is heavily navigated by Russian military aircraft. In view of improving air safety, the Russian Federation has recently accepted the Finnish President Sauli Niinistö's proposal to fly its aircraft over the Baltic Sea with activated transponders so as to allow commercial radars to detect their movement and minimise the threat of collisions.[526] Nevertheless, Russian military aircraft continue to fly over the Viro Strait with mostly unactivated transponders. According to the Estonian Air Navigation Services, the Estonian part of the Viro Strait's EEZ corridor is crossed annually by approximately 400 Russian military aircraft of which only 50–70 aircraft use activated transponders.[527] Since the Estonian commercial radars are not able to detect the movement of most of the military aircraft transiting the EEZ corridor in the Viro Strait, the Estonian Air Navigation Services will automatically receive information on aircraft flying with unactivated transponders from the Estonian Defence Forces' military radars.[528]

The Viro Strait is the only passage linking the Russian mainland with the Kaliningrad exclave for Russian aircraft. It is vital for *inter alia* the Russian air force to maintain freedom of overflight in the Viro Strait. In case the regime of transit passage would be applicable to the Viro Strait, then the Russian military aircraft and potentially also warships could cross the Viro Strait close to Tallinn or Helsinki. This would create further hazards to civilian air-traffic even if the Russian military aircraft would have their identification transponders installed and activated.[529] The distance between the Tallinn airport and Tallinn Bay is only approximately 3 km and the Helsinki airport is also less than 20 km away from the Helsinki South Harbour. In a similar geographical setting, a Russian intelligence plane nearly collided in 2014 with a commercial airline over Sweden shortly after the airplane had taken off from the Copenhagen airport.[530] If the Russian military aircraft could transit the strait outside the limits of the existing EEZ corridor in the Gulf of Finland closer to the Tallinn and Helsinki airports, the risk of air-collisions might increase significantly.

It is doubtful whether the sealanes and traffic separation scheme in the Gulf of Finland would address the security interests of Estonia and Finland sufficiently if the Viro Strait should fall under the regime of transit passage in case of the abolishment of the EEZ corridor. Firstly, the strait State does not have the right to adopt any air routes in respect of aircraft exercising the right of transit passage.[531] Also, the military aircraft exercising the right of transit passage are

[526] R. Emmott. Russia offers to fly warplanes more safely over the Baltics. Reuters, 14.07.2016.

[527] A. Krjukov. Lennuliiklusteeninduse AS: Vene õhuvägi teeb Eesti neutraalvete kohal umbes 400 lendu aastas. ERR Uudised, 12.02.2017.

[528] I. Kuus. Eesti lennujuhid hakkavad peatselt "pimelende" nägema. ERR Uudised, 05.03.2017.

[529] Reportedly, the Russian military aircraft do not have transponders. J. Piirsalu. Russian warplanes cannot switch on transponders. Postimees, 06.09.2016.

[530] Russian plane has near-miss with passenger aircraft over Sweden. The Guardian, 13.12.2014.

[531] Caminos, Cogliati-Bantz, *op. cit.*, p. 235.

not legally bound to comply with the International Civil Aviation Organization's Rules of the Air, as examined above. Secondly, foreign warships could transit the Viro Strait close to the mainland coasts and capitals of the strait States. Thirdly, it would be significantly more difficult for Estonia and Finland to exercise control over their territorial sea boundary and take countermeasures against the violations of the passage and border regime.

In this connection, Caminos and Cogliati-Bantz have noted, "Should compulsory routeing measures not be respected, for instance, when a ship navigates outside a designated traffic lane, the ship concerned would be in breach of Article 41 [of the LOSC – A. L.], but that does not entitle the State bordering the strait to consider the right of transit to have been lost."[532] Hence, the ship in transit passage might be entitled to continue its passage in spite of the breach of the transit passage regime.[533] In any case, the abolishment of the EEZ corridor would make it more difficult for the coastal States of the Viro Strait to detect and take measures against illegal entries.

Likewise, if the EEZ corridor would be abolished and the transit passage regime would be applicable to the Viro Strait instead, then foreign sovereign immune vessels and (military) aircraft could potentially navigate in/above the Russian Federation's territorial sea and its internal waters in eastern Gulf of Finland – on the condition that the Russian internal waters do not meet the criteria of long-standing internal waters under Article 35(a) of the LOSC, as studied above. In addition, the Russian Federation could not enjoy the freedom to lay submarine cables and pipelines in the Viro Strait anymore.

Under the regime of transit passage, foreign sovereign immune vessels and (military) aircraft might enter the Viro Strait and, in principle, head freely to the waters located between the islands in the centre of the Gulf of Finland proper, enter e.g. Vyborg Bay and areas close to Kronstadt and St Petersburg and then leave the Gulf of Finland proper by crossing the tiny Russian EEZ north of Gogland Island.[534] Prior to leaving the Gulf of Finland proper, foreign ships and aircraft could also make a stop in the Russian EEZ (next to the Russian military intelligence unit on Gogland Island) to conduct *inter alia* military activities under the applicable high seas freedoms.[535]

Under the current Viro Strait's legal regime, this would not be possible. The eastern Gulf of Finland includes the Russian Federation's territorial sea and internal waters where the freedoms of navigation and overflight do not apply. Instead, the general legal regime of innocent passage is applicable to the Russian Federation's territorial sea and potentially to its internal waters if they meet the criteria of Article 8(2) of the LOSC. Foreign aircraft cannot fly above the Russian Federation's territorial sea and internal waters without the Russian

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532 Ibid, p. 242.

533 See further discussion on this aspect and e.g. the United States position on this matter in *supra* section 5 of chapter 1 in Part III.

534 See in detail the analogous case study on the Gulf of Riga in section 4.2 of chapter 1 in Part III.

535 Ibid.

Federation's prior permission (Article 2(2) of the LOSC). Foreign ships are required to comply with the rules of the St Petersburg Coastal Vessel Traffic Service which covers nearly the entire Russian Federation's maritime area in the Gulf of Finland, except for the ones covered by the spatially more limited vessel traffic services of Ust-Luga, Primorsk, Vyborg, Vysotsk and St Petersburg Port.[536] Under the rules of the St Petersburg Coastal Vessel Traffic Service, ships entering the Russian territorial sea from west must receive a prior permission from the Russian Federation's authorities.[537] Therefore, foreign ships and aircraft can only navigate in/above the eastern Gulf of Finland if the Russian Federation has granted its prior authorisation.

The above-mentioned examples serve to illustrate that the applicability of the regime of transit passage to the Viro Strait might not necessarily be in the interests of the Russian Federation. Rather, it would pose security concerns to the Russian Federation analogous to the ones of Estonia and Finland if the EEZ corridor were to be abolished.

In this context, the problem with illegal incursions should also be acknowledged. This is illustrated by the fact that the Swedish and Finnish navies spotted and chased – most recently in the end of 2014 and in the beginning of 2015 – suspected foreign submarines in their territorial waters close to Stockholm and Helsinki.[538] Also, Russian-signed submarine signal buoys have often been found on the Estonian coast.[539] In this regard, an Estonian Navy officer has noted that Estonia has little surveillance capabilities for detecting submerged foreign submarines that have illegally entered its waters.[540] If detected, however, it may be lawful on the basis of the Finnish and Swedish practice to fire depth charges against a suspected foreign submarine which has illegally entered into the coastal State's waters in order to force it surface and threat to sink it in case it does not.[541]

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[536] See e.g. a map of the vessel traffic services in the Russian Federation's maritime area of the Gulf of Finland, in National Geospatial-Intelligence Agency. Sailing Directions (Enroute): Gulf of Finland and Gulf of Bothnia. Springfield: US Government 2017, p. 62.

[537] Rosmorport. – VTS services, 'Terms and conditions of navigation'. Accessible: http://www.rosmorport.com/spb_serv_nav.html (14.03.2017). See also Министе́рство тра́нспорта Росси́йской Федера́ции. Правила плавания в районе действия Прибрежной СУДС в составе Региональной Системы Управления Движением Судов в восточной части Финского залива (РСУДС), 20.12.2007.

[538] J. Rosendahl. Finnish military fires depth charges at suspected submarine. Reuters, 28.04.2015. Sweden confirms submarine violation. The Guardian, 14.11.2014. Such illegal entries by foreign submarines have allegedly occurred also previously: See e.g. New submarine search off Porvoo. Helsingin Sanomat, 15.08.2001.

[539] D. Cavegn. Russian submarine signal buoy found on Saaremaa island. ERR News, 22.07.2016.

[540] See M. Männi. Mereväelane: Eestil ei ole täielikku ülevaadet, mis meie vetes toimub. Postimees, 19.10.2014.

[541] See also Klein, *op. cit.*, p. 41.

Yet in some instances, illegal foreign military entries to the territory in the immediate vicinity of a coastal State's capital may not be carried out undercover. At the end of 2003 (just before Estonia joined the NATO), two Russian fighter jets violated Estonia's airspace and flew approximately 200 km in Estonia's airspace along its coastline and over Tallinn.[542] Estonian airspace violations by the Russian aircraft have been frequent, in particular close to Vaindloo Island in the Viro Strait.[543] The Russian fighter jets have recently also violated the Finnish airspace close to Helsinki.[544] In light of such instances and the present state of affairs,[545] it would be advisable to maintain the limitation on the freedoms of navigation and overflight in the form of a relatively narrow EEZ corridor in the Viro Strait, instead of broadening the passage rights throughout the Gulf of Finland to a greater extent. It appears that the EEZ corridor balances the interests of the coastal States of the Gulf of Finland better as compared with the potential applicability of the transit passage regime to the Viro Strait. Yet it must be established next whether it is actually possible to abolish the EEZ corridor in the Viro Strait under previous international agreements concluded by Estonia and Finland with their eastern neighbouring State.

[542] T. Sildam, K. Kaas. Vene hävituslennukid tungisid Eesti taevasse. Postimees, 05.03.2004.

[543] In 2014, there were ten incursions by the Russian aircraft to the NATO Member States' airspace, eight of which occurred in Estonia and six of which took place over Vaindloo Island. See A. Nardelli, G. Arnett. NATO reports surge in jet interceptions as Russia tensions increase. The Guardian, 03.08.2015. See also Anonymous. Typhoon jets intercept Russian planes that committed 'act of aggression'. The Guardian, 13.05.2016.

[544] M. Salomaa. Ulkoministeriö kutsui Venäjän suurlähettilään puhutteluun – "Suomi ottaa alueloukkaukset aina vakavasti". Helsingin Sanomat, 07.10.2016. Vene sõjalennukid rikkusid Eesti ja Soome õhupiiri. ERR Uudised, 07.10.2016.

[545] Circumstances may change, e.g. if the Russian Federation engages in military activities in the Viro Strait's narrow EEZ corridor or in the Latvian EEZ in the Gulf of Riga that hinders navigation or constitutes a threat to the strait States. See also *supra* section 4.2 of chapter 1 in Part III.

PART IV. THE SIGNIFICANCE OF LONG-STANDING TREATIES AND THE LEGAL REGIME OF *SUI GENERIS* STRAITS FOR THE VIRO STRAIT

1. The Legal Framework of the Viro Strait under Previous International Agreements

Estonia's independence in 1918 raised problems for its eastern neighbouring State in terms of its vessels' passage rights in the Gulf of Finland. These essentially corresponded to the ones which the Russian Federation encountered due to the restoration of Estonia's independence in 1991 and which led to the establishment of the EEZ corridor in the Gulf of Finland under the 1994 bilateral Agreement. In spite of a time lag of over 70 years and the profound developments in the international law of the sea that occurred in the course of this period, it is important to scrutinise the problems and solutions with regard to the legal framework applicable to the Viro Strait in the 1920s and 1930s. Thereby, it is possible to comprehend its possible significance for the contemporary EEZ corridor in the Viro Strait.

Following 1922 Estonian-Finnish bilateral negotiations, the 1923 Oslo Conference between Denmark, Norway, Sweden, Finland and Germany and the Helsinki Conference from November 24th to December 4th, 1924 (attended by all Baltic Sea coastal States), the Helsinki Convention for the Suppression of the Contraband Traffic in Alcoholic Liquors was concluded between all of the Baltic Sea coastal States.[546] The Helsinki Convention provided for a 12-miles-wide control zone which would have significantly impaired the passage rights of the Soviet ships in the Viro Strait. Namely, the 12-miles-wide maritime zones of Estonia and Finland would have covered most of the Viro Strait, including areas where the international sealanes were located.[547] Therefore, upon the Soviet Union's initiative, the three coastal States of the Gulf of Finland adopted a sophisticated legal framework to safeguard high seas freedoms in this maritime area.

Unlike the generally recognised Article 35(c)-type of treaties on straits (e.g. the Danish Straits and the Åland Strait), the Helsinki international agreements pertaining to the passage rights in the Viro Strait have not been applied over a prolonged period of time. More significantly, they were not referred to and appear to have gone unnoticed in concluding the 1994 bilateral Agreement on the EEZ corridor in the Viro Strait. Yet it is necessary to acknowledge the existence of these agreements as they ascertain that the 1994 bilateral Agreement does not stand in isolation from previous international agreements, but rather continues their aim with regard to the passage rights in the Viro Strait.

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[546] Initially, it was projected as an Estonian-Finnish bilateral treaty. See ERA.31.3.5424, p. 1.

[547] See map 4 in Annex 1.

In this context, a 1932 judgment of the Estonian Supreme Court is of particular assistance for assessing the previous international agreements in the context of the passage rights in the Viro Strait in the 1920s and 1930s. It is also important to examine this judgment since the parties to that legal dispute were in disagreement about the need to recognise freedom of navigation in the Viro Strait similarly to how the parties to the modern debate in Estonia argue about the usefulness of maintaining the EEZ corridor in the Viro Strait. The judgment and its aftermath have significant implications for the current legal regime of the Viro Strait.

1.1. The Context of the 1932 Judgment of the Estonian Supreme Court *en banc* on Passage Rights in the Viro Strait

In 1932, the Estonian Supreme Court *en banc* had to solve a dispute on passage rights in the Viro Strait.[548] The case concerned a Hungarian-flagged steamship *Hullam* which was involved in traffic in alcoholic liquors 9.6 miles north of Vaindloo Island in the Estonian 12-miles-wide customs zone (exact location: Latitude 59 59,0 (N), longitude 26 23,0 (E)).[549] The ship was anchored and its cargo[550] was being unloaded to a Panama-flagged yacht *Elba* and to Estonian boats for shipping to Estonia.[551] The ship (along with its cargo) was arrested by the Estonian Coast Guard and her deputy captain (Estonian citizen) charged with breaching of the Estonian Tolls Act.[552] The courts of first and second instance together with the Estonian Prosecutor's Office found that the Estonian Coast Guard did not have the right to arrest the ship under the legal framework of the 1925 Helsinki Convention, whereas the Estonian Ministry of Economics and the Customs Authority were of the opposite opinion.[553]

It is a rare case in the jurisprudence of the Estonian Supreme Court, as it focuses on issues of the law of the sea, not civil, criminal or administrative law upon which the court mostly had to decide. The main competence of the Supreme Court lay in the review of court judgements by way of cassation proceedings in its Administrative, Civil and Criminal Chambers. At the time, the Court did not exercise formally constitutional review. The Supreme Court *en banc* was competent *inter alia* to review cases that had caused disputes in practice.[554] To this category falls also the case on passage rights in the Viro Strait.

Due to the disparate views on the passage rights in the Gulf Finland between the Estonian Border Guard and the Ministry of Economics on the one hand and

[548] Judgment of the Supreme Court of Estonia *en banc*, 01.10.1932. – R. Rägo (toim). Riigikohtu 1932. a. otsused. Tartu: Õigus 1934, p. 8. Reprinted in T. Anepaio (koost). Riigikohus. Otsuste valikkogumik 1920–1940. Tartu: Elmatar 1999, pp. 57–64.

[549] ERA.1356.1.302, pp. 1, 24.

[550] For the detailed description of its cargo, see ERA.1356.1.302, p. 24(verso).

[551] Ibid, pp. 8, 25(verso).

[552] Ibid, pp. 1–2, 9(verso), 24(verso),

[553] Ibid, p. 1.

[554] T. Anepaio. Eesti Vabariigi Riigikohus. Eesti Jurist 1994(4), p. 26.

the Tallinn-Haapsalu circuit court and the national Court of Appeal on the other, the Supreme Court of Estonia *en banc* had to decide upon the request of the Ministry of Economics in 1932 whether foreign ships were entitled to freedom of navigation under the high seas freedoms through the Estonian 12-miles-wide control zone in the Gulf of Finland as established under the 1925 Helsinki Convention for the Suppression of the Contraband Traffic in Alcoholic Liquors. The Estonian Border Guard and the Ministry of Economics maintained that Estonia was bound to ensure compliance with its legal acts on tax and customs in the Viro Strait in view of ships involved in contraband traffic in alcoholic liquors in the high seas, whereas the courts found that under the legal framework of the 1925 Helsinki Convention, ships transiting the Gulf of Finland in its high seas corridor enjoy freedom of navigation and thus cannot be subjected to any customs control or other hindrances to their passage.

The line of argumentation in the Supreme Court's judgment reflected at the time to a significant extent the views of the persons that drafted it. In the modern Supreme Court of Estonia, the draft judgment, which is deliberated by the Chamber in private, is generally drafted by a justice and the Chamber's counsellor, whereas prior to 1940, the judgment of the Supreme Court was drafted essentially solely by the justice that had to present the case in the private deliberations of the Chamber.[555] Also, the State prosecutor (somewhat similar institution to the nine Advocates General of the European Court of Justice), who was solely appointed to the Supreme Court along with his aid, had to deliver his independent[556] opinion on the case. This opinion was also discussed during the deliberations in the Chamber. It may be assumed that the decisive figures in connection with the 1932 judgment of the Supreme Court *en banc* were the presenting justice Peeter Kann,[557] Kaarel Parts as the Chief Justice of the Supreme Court from 1920 to 1940 (acted also as the chairman in the proceedings) and the prosecutor Richard Rägo.[558]

The Supreme Court was independent of the Estonian Government as its justices were appointed by the Parliament.[559] Many justices had been active in Estonian politics previously. The Chief Justice Kaarel Parts had been the founding member of the centre-right Estonian People's Party, member of the Russian II State Duma and the chairman of the Estonian *Maanõukogu*,[560] which was the first Estonian Parliament-like assembly established in the Russian Empire in 1917. Unlike many other justices of the Supreme Court, who had studied law in the university of St Petersburg (where their fellow-Estonian

[555] Oral explanations of T. Anepaio, 12.10.2015.
[556] The prosecutor was also independent of the justices (including the Chief Justice) of the Supreme Court.
[557] ERA.1356.1.302, p. 1.
[558] See Judgment 01.10.1932, *op. cit.*, p. 8. R. Rägo was appointed later as justice of the Supreme Court in 1939.
[559] Anepaio 1994, *op. cit.*, p. 29.
[560] Ibid, p. 31.

Friedrich Martens lectured on international law), Kaarel Parts graduated from Tartu University.[561]

At the time of the 1932 judgment, the Supreme Court composed of well-experienced justices. Five (38 %) of the thirteen justices had been in office since the establishment of the Supreme Court in 1920 (i.e. 13 years).[562] At the time, three justices were non-ethnic Estonians: Dmitri Verhoustinski was Russian, whereas Harald Johannes Jucum and Victor Karl Maximilian Ditmar were Germans.[563] In general, the justices were not outstanding experts on international law.[564] The Supreme Court *en banc* decided to consult the Professor of International law at the University of Tartu Ants Piip for expert advice and asked the Estonian Ministry of Foreign Affairs to send the map of the high seas corridor in the Gulf of Finland.[565]

It is, however, likely that in addition to the Chief Justice, presenting justice and the prosecutor, one of the justices that had significant influence on the substance of the 1932 judgment *en banc* was the member of the former Baltic nobility Victor Ditmar. Justice Ditmar had prior to his appointment to the Supreme Court in 1924 been counsellor at the Estonian Embassy in the Soviet Union, senator at the highest judicial organ of the imperial Russia – the Governing Senate – and had also worked at the appellate court in St Petersburg.[566] Although generally the deliberations of the justices in the Chamber did not necessarily have a profound influence on the text of the draft judgment as prepared by the presenting justice, this might not have been the case with regard to the 1932 judgment *en banc* due to its political connotations[567] and great importance. It is possible that at least during the private deliberations in the Chamber, justice Ditmar was active since he was well-experienced in the field of international law.[568] Notably, the judgment includes a hand-written short comment to testify that justice Jaan Lõo disagreed with the ruling.[569]

As will be subsequently examined,[570] the judgment is in many aspects difficult to explain as being in accordance with international law, in particular with the legal framework of the 1925 Helsinki Convention. However, in other

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561 Ibid, p. 32.

562 Ibid, pp. 32–33.

563 Ibid, p. 31.

564 Notably, the former Estonian foreign minister and ambassador Aleksander Hellat was appointed as the justice of the Supreme Court a year after the 1932 judgment *en banc* (served from February 9th, 1933 to October 18th, 1940). See Supreme Court of Estonia. – Previous Members of the Supreme Court. Accessible: http://www.riigikohus.ee/?id=103 (14.09.2016).

565 ERA.1356.1.302, p. 10. The map is accessible at the Estonian National Archives: ERA.957.13.651, p. 4. For a copy of the map see map 2 in Annex 1.

566 Anepaio 1994, *op. cit.*, p. 31.

567 See e.g. ERA.957.14.327, pp. 3–76.

568 Oral explanations of T. Anepaio, 12.10.2015.

569 ERA.1356.1.302, p. 18(verso).

570 See *infra* section 2 of Part IV.

aspects it did and, more significantly, it was in some instances not in accordance with the then current law but similar in content to the later LOSC straits regime.

1.2. Passage Rights in the Viro Strait in the 1920s and 1930s in the Context of the Estonian Supreme Court's 1932 Judgment

In the 1920s and 1930s, the territorial sea of Estonia and Finland did not cover most of the maritime area in the passage through the Gulf of Finland. At the time, both States applied normal baselines for measuring the breadth of their territorial sea. Pursuant to Article 3 of the 1920 Tartu Peace Treaty between Finland and Soviet Russia, the breadth of the Finnish territorial sea was 4 miles.[571]

The Estonian territorial sea was considered 3 miles wide up until 1938, although it was not stipulated in its domestic law.[572] A Government commission composed of high-level representatives of the Ministries of Foreign Affairs, Interior and War as well as the Maritime Administration had proposed on May 2nd, 1923 that the width of the Estonian territorial sea should be declared 4 miles as in Sweden and Finland.[573] This proposal did not succeed. During the 1930 Hague Codification Conference, Estonia declared that the breadth of its territorial sea was 3 miles.[574] Following the practice of Sweden, Finland and the Soviet Union, Estonia established under section 1 of its 1938 Waterways Act the 4-miles-wide territorial sea.[575]

The extensive maritime area in between the opposite territorial seas of Finland and Estonia was the high seas. For this reason, presumably, the passage through the Gulf of Finland was not regarded as an international strait in the legal literature unlike, for example, the Sea of Straits or the Irbe Strait.[576]

The Supreme Court of Estonia found in its 1932 judgment, which included many references to international as well domestic legal literature on the law of

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[571] However, as confirmed by the Finnish Ministry of Foreign Affairs, the limit of the Finnish territorial sea was not stipulated under its domestic law at least prior to 1940. See ERA.957.14.583, p. 26. More generally, the Scandinavian States already referred to the 4-miles-wide continuous belt of coastal sea as part of their dominion in the 18th century. See A. Uustal. Международно-правовой режим территориальных вод. Tartu: Tartu State University Press 1958, p. 156.

[572] Taska 1974, *op. cit.*, pp. 43, 48. Piip 1936, *op. cit.*, pp. 177–179.

[573] ERA.957.12.389, p. 11. This proposal had been made also in 1921 by an earlier commission, see Piip 1936, *op. cit.*, p. 178. See also map 3 in Annex 1.

[574] Taska 1974, *op. cit.*, p. 43.

[575] Generally, the Waterways Act followed the legal framework on the territorial sea as agreed on during the 1930 Hague Codification Conference and pursuant to which the coastal State's sovereignty extends to the territorial sea as well as to the seabed, subsoil and airspace of the territorial sea. See Anonymous. Uus veeteede seadus valmis: territoriaalmere laiuseks 4 meremiili, merekitsuse laiuseks 10 meremiili. Uus Eesti. Tallinn 23.01.1938, No. 22, p. 1.

[576] See on the classification of the Irbe Strait and the Sea of Straits as international straits in Taska 1974, *op. cit.*, p. 112.

the sea, that the notion of international straits includes straits that are used for international navigation between the high seas and the territorial sea. The Supreme Court found that straits that connect two parts of the high seas or the high seas with a territorial sea are deemed to be free for any orderly, i.e. unthreatening passage, but overall they are subject to the same kind of regulations on State supremacy that apply in regards to the territorial sea.[577] Thus, the Supreme Court seems to have recognised the right of non-suspendable innocent passage in the Viro Strait which was considered due to the 12-miles-wide control zones as a strait that connects the high seas with a territorial sea (of the Soviet Union). The Supreme Court did not lay great emphasis on the functional element of international straits – it stems from its reasoning that the legal regime of straits would be applicable irrespective of whether or not a strait has a heavy traffic of foreign vessels.[578]

The Supreme Court defined the term "unthreatening passage" by referring to the agreement reached in the 1930 Hague Codification Conference, according to which passage is not deemed unthreatening (*inoffensif, innocent*) if the vessel is using a foreign State's territorial sea in order to take any measures against the coastal State's security, public order or fiscal interests and, finally, that unthreatening passage includes the right of stopping and anchoring, but only in so far as the same are incidental to ordinary navigation or are rendered necessary by *force majeure* or a dictated halt.[579] In the terms of contemporary legal framework, this generally accords with the concept of innocent passage under Articles 19(1) and 18(2) of the LOSC.

The position, according to which there can be no suspension of innocent passage of foreign ships through straits which are used for international navigation between one part of the high seas and the territorial sea of a foreign State, was first stipulated in Article 16(4) of the 1958 Convention on the Territorial Sea and the Contiguous Zone. Although the legal framework on the law of the sea had not changed significantly since the time of Estonian Supreme Court's judgment in 1932, the ICJ found in its first judgment delivered in 1949 that the right of non-suspendable innocent passage applies only in international straits that connect two parts of the high seas.[580] Thus, unlike the ICJ, the Supreme Court of Estonia appears to have found, prior to the international conventions on the law of the sea as adopted in the latter part of the 20th century, that the regime of non-suspendable innocent passage may also be applicable in straits that connect a part of the high seas with the territorial sea of a foreign State. The passage through the Gulf of Finland was considered by the Supreme Court to fall under this category of straits. The Supreme Court explicitly ruled that the

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577 Judgment 01.10.1932, *op. cit.*, p. 9.

578 The functional element of a strait was downplayed also by the ICJ and the States themselves during the codification of the law of the sea in the latter part of the 20th century. Some authors have criticised this approach. See e.g. E. Somers. The Legal Regime of the Danish Straits. – Öztürk, Özkan (eds), *op. cit.*, p. 14.

579 Ibid.

580 Corfu Channel Case, *op. cit.*, p. 28.

Gulf of Finland, in parts where its width from coast to coast does not exceed 24 miles, should not be regarded as high seas, but instead (due to the establishment of the 12-miles-wide control zone) as a strait where the right to free (non-suspendable) innocent passage applies.[581] Therefore, the Supreme Court denied the existence of the Viro Strait's high seas corridor where ships and aircraft could enjoy the freedoms of navigation and overflight.

The Supreme Court found that the coastal State's right to repel vessels in its territorial sea as well as in its 12-miles-wide customs zone and zone for the suppression of contraband traffic in alcoholic liquors to ensure compliance with the coastal State's legal acts on tax and customs also applied in the Viro Strait.[582] Consequently, the Hungarian ship *Hullam* was arrested lawfully and the rulings of the lower courts were repealed.[583] This conclusion followed the aim of the 1925 Helsinki Convention to suppress alcohol smuggling and the concept of non-suspendable innocent passage. However, the judgment's conformity with a reservation made by the Soviet Union to the 1925 Helsinki Convention is more ambiguous. To examine this more closely, it is necessary to assess the legal framework of the 1925 Helsinki Convention.

1.3. The Legal Framework of the 1925 Helsinki Convention and the Soviet Union's Reservation on Passage Rights in the Viro Strait

Under Article 9(1) of the 1925 Helsinki Convention, the States Parties undertook the obligation to adopt legal acts against ships involved in contraband traffic in alcoholic liquors. For the effective application of such acts, they established a control zone with a breadth of up to 12 miles.[584] Pursuant to Article 9(2) of the 1925 Helsinki Convention, the States Parties had the right of hot pursuit onto the high seas (up to the boundary of another State's control zone)[585] where the coastal State was entitled to take such measures against the ship pursued as within its 12-miles-wide control zone.

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[581] Judgment 01.10.1932, *op. cit.*, p. 14.

[582] Ibid, p. 12.

[583] ERA.1356.1.302, pp. 20, 26.

[584] Estonia's jurisdiction also extended to 12 miles under the maritime customs zone which was established under section 5 of the 1922 Border Guard Corps Act. In practice, reportedly, the Estonian customs authority had stopped using the customs zone in the middle of the 1920s and limited its reach of conduct to a 4-miles-wide zone. However, the Estonian Coast Guard exercised such jurisdiction in 1932 by arresting the Hungarian ship *Hullam* in the Gulf of Finland. See *supra* section 1.1 of Part IV. From 1934, the Estonian customs authority implemented such jurisdiction in the 12-miles-wide zone again under section 34 of the 1936 Border Guard Act. The special zone for the salvage of goods from ships in distress, as established under section 7 of the 1938 Waterways Act, was also 12 miles wide. See ERA.31.3.5424, p. 4. See also Iseäralise piirivalve korpuse seadus (Border Guard Corps Act). Adopted 30.05.1922, e.i.f. 1922 (RT 1922. Nr 74/75) and Piirivalve seadus (Border Guard Act). Adopted 27.05.1936, e.i.f. 05.06.1936 (RT 1936, 47, 375).

[585] ERA.957.2.641, pp. 2–3, 8.

Pursuant to the declaration made by the States Parties to the Protocol[586] on Article 9 of the 1925 Helsinki Convention, the maritime areas in the Baltic Sea that were less than 24 miles wide were divided by a median line between the opposite coastal States in the absence of an agreement to the contrary. Consequently, some sections in the Viro Strait would have fallen entirely under the Estonian and Finnish control zones for the suppression of contraband traffic in alcoholic liquors.

This triggered the Soviet Union's reservation to the 1925 Helsinki Convention, according to which the precondition for joining the convention was the conclusion of an additional agreement between the Soviet Union, Finland and Estonia in connection with the declaration by States Parties to the Protocol on Article 9 of the 1925 Helsinki Convention. Such an agreement was signed by the representatives of the three States on the same day as the 1925 Helsinki Convention.[587] The aim of the agreement was clearly established. Section 2 of the trilateral Agreement provided that "the principles recognised in international law on the freedom of the seas" apply "to the international sealanes from the ports of the Soviet Union to the Baltic Sea and vice versa".[588]

The applicability of the high seas freedoms in the passage through the Gulf of Finland was reiterated in the 1926 trilateral Protocol between Estonia, Finland and the Soviet Union.[589] This Protocol was signed by six high-level experts of the three States on April 22nd, 1926 in Moscow and pursuant to section 2 of the Protocol, it entered into force on the same date as the Agreement signed in Helsinki between Estonia, Finland and the Soviet Union on August 19th, 1925. The Protocol was concluded in order to set the exact boundaries of the international sealanes referred to in section 2 of the 1925 trilateral Agreement.

Thus, section 1 of the 1926 trilateral Protocol delimited "the borders of the international sealanes over which the supervision envisaged in the general [1925 Helsinki] convention was inapplicable, but to which the principles of

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[586] Protocol to the 1925 Helsinki Convention for the Suppression of the Contraband Traffic in Alcoholic Liquors. Helsinki 19.08.1925, e.i.f. 24.12.1925. See Eesti lepingud wälisriikidega, vol. 5, *op. cit.*, pp. 307–310. See Treaty 1 in Annex 2 for the authentic text of the protocol in French and Estonian.

[587] Agreement between Estonia, Finland and the Soviet Union. Helsinki 19.08.1925, e.i.f. 24.12.1925. See Treaty 2 in Annex 2 for the authentic text of the agreement in French and Estonian.

[588] At times, the high seas corridor was referred to by seafarers as the *Russian Canal.* See ERA.1356.1.302, p. 8.

[589] Protocol Concluded between Estonia, Finland and the Soviet Union in the Expert Conference in Moscow (held April 15th to 22nd, 1926) to the Agreement between Estonia, Finland and the Soviet Union Signed on 19.08.1925. Moscow 22.04.1926, e.i.f. 24.12.1925 (pursuant to the Protocol's section 2). For the text of the Protocol, see Decision of the Estonian Government on the Protocols Signed in the Estonian, Finnish and the Soviet Union's Experts' Conference in Moscow on 22 April 1926. Adopted 22.12.1926, e.i.f. 22.12.1926. See Eesti lepingud wälisriikidega, vol. 6 (1926–1927). Tallinn: Riigi trükikoda 1927, pp. 47–49. See the French and Estonian text of the Protocol in Treaty 3 in Annex 2.

international law on the freedom of the seas applied". According to the coordinates stipulated in the 1926 trilateral Protocol, the international sealanes and the high seas corridor in the Gulf of Finland were more extensive in comparison to the EEZ corridor that was created in the Gulf of Finland under the 1994 Estonian-Finnish Agreement. The approximate geographical boundaries of the current EEZ corridor in the Gulf of Finland are the island of Vaindloo (in the east) and the island of Osmussaar (in the west), whereas the approximate geographical borders of the high seas zone (international sealanes), as fixed in the 1926 trilateral Protocol, reached beyond Pieni-Tytärsaari Island[590] near the imaginary line of Suur-Tytärsaari[591] (in the east) and almost to the westernmost point of the Ristna Peninsula of Hiiumaa Island (hist. *Dagö*) in the west.[592]

The spatial extent of the high seas corridor was fixed in the map that was appended by the States Parties to the 1926 Moscow Protocol pursuant to the last paragraph of its section 1.[593] The map was initially signed by the six high-level delegates-experts of Estonia, Finland and the Soviet Union in Moscow on the same day as they signed the Moscow Protocol, i.e. on April 22nd, 1926, which was also affirmed by the signatures of the three delegates that signed the 1925 Helsinki Convention and the 1925 trilateral Agreement on behalf of Estonia, Finland and the Soviet Union.[594] Additionally, the map, as preserved at the Estonian National Archives, is affirmed by the signatures of the Head of the Archives of the Finnish Ministry of Foreign Affairs, the Head of the Political Department of the Estonian Ministry of Foreign Affairs (along with his certification that the map depicts "the boundaries of the international seaways provided in the protocol") and the Head of the Topo-Hydrographic Department of the Headquarters of the Estonian Defence Forces (accompanied with his certification that the map depicts "the lane of free passage on the basis of the agreement between Estonia-Finland-Russia").[595]

It follows from the 1925 Helsinki trilateral Agreement and the 1926 Moscow Protocol that the coastal State's jurisdiction, as provided in Article 9(1) of the 1925 Helsinki Convention, does not apply to the international seaways in the Gulf of Finland, over which the freedom of the high seas is applicable instead. However, the implementation of the 1925 Helsinki trilateral Agreement by the

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590 Estonian: Väike-Tütarsaar; Russian: Малый Тютерс.

591 Estonian: Suur-Tütarsaar; Russian: Большой Тютерс.

592 One of the two substantial sections of the 1926 Moscow Protocol, concerning the maritime area as divided between the Soviet Union and Finland in the eastern part of the Gulf of Finland under the 1920 Tartu Peace Treaty, was changed completely by the e.i.f. of the 1940 Peace Treaty between the Soviet Union and Finland. Due to the 1940 Peace Treaty, the Finnish islands in the centre of the Gulf of Finland (including Tytärsaari islands) were ceded to the Soviet Union.

593 ERA.957.13.651, p. 4. For a copy of the map see map 2 in Annex 1.

594 Ibid. With the exception of the Soviet delegate that had been replaced from G. Maltzeff to A. Tchernikh. The Estonian and Finnish delegates in the 1925 Helsinki Conference A. Hellat and E. Böök also signed the 1926 map.

595 ERA.957.13.651, p. 4. See map 2 in Annex 1.

Estonian government authorities turned out to be controversial and was finally subject to the Estonian Supreme Court's judgment from 1932.

The Supreme Court of Estonia declared Article 9 of the 1925 Helsinki Convention applicable over the 1925 trilateral Agreement concluded as a result of the Soviet Union's reservation. It came to the conclusion that "it is clear that a multilateral agreement cannot be modified by one group of States Parties to the convention."[596] Yet declarations and reservations to international agreements have been commonplace as they promote the conclusion of treaties by a greater number of States. Depending on the nature of the agreement, its wider ratification may be necessary for reaching its aims. This applies especially with regards to regional agreements, such as the 1925 Helsinki Convention. Most States Parties to the 1925 Helsinki Convention made reservations or declarations pertaining to the text of the treaty.

It is evident from the Protocol on Article 9 of the 1925 Helsinki Convention that the States Parties agreed to the reservation made by the Soviet Union. Such acquiescence was at the time a general prerequisite in the international treaty law for the reservation to take effect.[597] Notably, the other States Parties to the 1925 Helsinki Convention stated in the Protocol that they are conscious about this reservation and, in proof of this, have signed the Protocol which contained the reservation. No objections against this reservation were made. Thus, the 1925 trilateral Agreement between the Soviet Union, Estonia and Finland was an integral part of the 1925 Helsinki Convention. This effectively modified the legal effect of certain provisions of the 1925 Helsinki Convention in relation to their application to the three States.

Therefore, the conclusion of the Supreme Court of Estonia, according to which "it is clear that a multilateral agreement cannot be modified by one group of States Parties to the convention,"[598] did not reconcile well with the contemporary international treaty law or the intent of the States Parties to the 1925 Helsinki Convention.[599] The 1932 judgment by the Supreme Court of Estonia could not have altered the legal effect of the reservation or the substance of the ensuing trilateral treaty between the Soviet Union, Estonia and Finland. In spite of the 1932 judgment by the Supreme Court to the contrary, Estonia was thus obliged under the principle of *pacta sunt servanda* and section 4 of its 1920 Constitution to respect and abide by the obligations it undertook under the 1925 trilateral Agreement.

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[596] Judgment 01.10.1932, *op. cit.*, p. 12.

[597] D. S. Jonas, T. N. Saunders. The Object and Purpose of a Treaty: Three Interpretative Methods. – 43 Vanderbilt Journal of International Law 2010(3), p. 583.

[598] Judgment 01.10.1932, *op. cit.*, p. 12.

[599] Notably, however, albeit Estonia was also a State Party to the Convention, its Ministry of Economics and Border Guard that participated in the court proceedings advocated for the restrictive interpretation of Article 9 of the 1925 Helsinki Convention against the aim and meaning of the Soviet Union's reservation and the ensuing 1925 and 1926 trilateral treaties.

At the same time, the Supreme Court's judgment had a significant impact on the application of the 1925 Helsinki trilateral Agreement, since the Estonian authorities were domestically expected to follow the Supreme Court's judgment despite of its dubious compatibility with the text of the treaty. Therefore, it is necessary to assess the Supreme Court's argumentation in detail to comprehend its reasons and motives that resulted in such a conclusion as reached in the 1932 judgment.

2. The Estonian Supreme Court's 1932 Interpretation of the Purpose of the 1925 Treaty between Estonia, Finland and the Soviet Union

2.1. The Supreme Court's Interpretation of the 1925 Trilateral Treaty

In interpreting the purpose of the 1925 agreement between Estonia, Finland and the Soviet Union, the central question for the Supreme Court of Estonia was whether the three coastal States of the Gulf of Finland wanted to forfeit their rights granted to them under Article 9 of the 1925 Helsinki Convention in the relevant seaways in the Gulf of Finland, either in relation to the ships of one another or other States.[600] The Supreme Court found that

> "On the basis of the relevant acts, there is no ground to assume that they would have disclaimed their rights in relation to other States and it would be absurd to assert such an intention. As absurd would be the idea that Finland and the Soviet Union would have aspired to ease the contraband traffic in alcoholic liquors mutually in respect of their ships in the Gulf of Finland. The aim of the agreement (Accord) between Estonia, Finland and the Soviet Union could not have been to paralyze the convention or lessen their rights in the Gulf of Finland in the fight against the contraband traffic in alcoholic liquors in the scope of the above-referred 12-miles [zone as measured] from the borders of those States' coasts or islands along with the right to hot pursuit in relation to ships suspected of carrying out such contraband traffic in this area – after all, Estonia's 12 miles of customs zone had been already in effect and it was namely Finland that initiated this convention. The aim of the agreement was only to address the question of seaways from the ports of the Soviet Union to the Baltic Sea and vice versa since those ways mostly fell into the area of control zones and it was naturally necessary for the Soviet Union to acquire a clear recognition from the coastal States of this bay – Estonia and Finland – for the freedom of the seaway."[601]

The term "freedom of the seaway" in the context used by the Supreme Court in its 1932 judgment is synonymous to the "freedom of navigation" as provided for in Article 87(1) a) of the LOSC. The freedom of navigation applied in the

[600] Judgment 01.10.1932, *op. cit.*, p. 12.
[601] Ibid.

high seas of the Gulf of Finland in the 1920s and 1930s.[602] Yet coastal States' right to arrest ships in the high seas of the narrow passage through the Gulf of Finland under Article 9 of the 1925 Helsinki Convention and in the scope of their 12-miles-wide control zones posed a challenge to foreign ships enjoying the freedom of navigation in this maritime area.

2.2. The 1932 Judgment's Controversy

In the above-referred passage, the Supreme Court of Estonia refers to the existing 12-miles-wide Estonian customs zone. Yet the court seems not to have acknowledged that many of the States Parties to the 1925 Helsinki Convention (Germany, Sweden, Denmark, Norway) were willing to accept the Estonian, Latvian and Finnish customs zones of greater breadth than the territorial sea only on the basis of an international treaty.[603] Hence, the pre-existing Estonia's customs zone should not have been accorded in the Supreme Court's judgment much significance as it had not been generally recognised by other States. Estonia's 12-mile-wide jurisdictional zone (the control zone as established under the 1925 Helsinki Convention; not the pre-existing customs zone) was given such recognition under the Helsinki Convention. However, the 1925 trilateral Agreement (as an inseparable part of the Helsinki Convention) provided an exception according to which Estonia's and Finland's 12-miles-wide control zones as established under the Convention may not hamper the freedom of navigation in the high seas corridor of the Gulf of Finland.

The Supreme Court of Estonia interpreted the coastal State's right to take measures against the contraband traffic in alcoholic liquors similarly to the contemporary right to exercise criminal jurisdiction in a coastal State's territorial sea to suppress illicit traffic in narcotic drugs or psychotropic substances as stipulated in Article 27(1) d) of the LOSC. Thus, albeit recognising navigational interests, the court found that the public interest to fight against alcohol smuggling prevails over the former. Likewise, it is also possible under the modern law of the sea to stop a vessel, which is exercising its right of innocent passage, if it is suspected of illicit traffic in alcoholic liquors.[604] Yet under the LOSC, such measures may be taken by the coastal State against vessels that are situated in its territorial sea, whereas the maritime area in question was in the 1920s and 1930s high seas. In high seas, the freedom of navigation applied, as was recognised by the Supreme Court.

The Estonian Supreme Court's interpretation of the purpose of the 1925 trilateral Agreement is controversial since it recognises, on the one hand, the freedom of the seaway in the Gulf of Finland, whereas, on the other hand, it also recognises the coastal State's jurisdiction over the ships transiting it. Nota-

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[602] See also Taska 1974, *op. cit.*, p. 24.

[603] Schapiro, *op. cit.*, pp. 445–446.

[604] K. Hakapää, E. J. Molenaar. Innocent Passage – past and present. – 23 Marine Policy 1999(2), p. 133.

bly, paragraph 2 of the 1925 trilateral treaty stipulated explicitly that the freedom of navigation in the high seas corridor of the Gulf of Finland is guaranteed by means of not extending the strait State's 12-miles-wide control zone to that area:

> "The control zones envisaged in this agreement will not expand to the international sealanes that are heading in the Gulf of Finland, in the west of the 27^0 meridian of Greenwich, from the ports of the Union of Soviet Socialist Republics to the Baltic Sea and vice versa, located outside the present area of the Finnish territorial waters, and which will be settled in detail by the experts of the three interested parties. The principles recognized in international law on the freedom of the seas shall be applied to these sealanes."[605]

In terms of the LOSC, "the principles of the international law on the freedom of the seas," as used in the 1925 and 1926 trilateral treaties between Estonia, Finland and the Soviet Union, should be understood due to its object as referring to the freedom of the high seas. Pursuant to Article 87(1) of the LOSC, the freedom of the high seas comprises *inter alia* freedom of navigation and overflight as well as freedom to lay submarine cables and pipelines, freedom to construct artificial islands and other installations permitted under international law, freedom of fishing in addition to freedom of scientific research.

Only the flag State exercises jurisdiction over a ship that enjoys the freedom of navigation and may authorise the boarding of such a ship by the coastal State's authorities.[606] Freedom of navigation was also understood to imply this prior to the Geneva conventions on the law of the sea, i.e. before the rapid development of the modern law of the sea.[607] At the 1930 Hague Codification Conference, all participating States recognised the principle of freedom of navigation.[608] Therefore, the collision between the freedom of navigation and the need to fight against smuggling in the high seas is inherent in the law. This

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[605] „Les zones de contrôle prèvues par cet Accord ne s'ètendront pas sur les routes maritimes internationales conduisant à l'ouest du méridien 27° de Greenwich dans les eaux du golfe de Finlande des ports de l'Union des Républiques Soviétistes Socialistes à la Mer Baltique et vice-versa en dehors des eaux territoriales finlandaises actuelles et dont la position précise sera déterminée par les experts des trois Etats intéressés. A l'égard des routes maritimes internationales sus-mentionnées seront appliqués les principes reconnus par le droit international concernant la liberté des mers." See Treaty 2 in Annex 2.

[606] See P. Wendel. State Responsibility for Interferences with the Freedom of Navigation in Public International Law. Berlin/Heidelberg/New York: Springer 2007, p. 166. See also LOSC Article 110(1).

[607] J. Balicki. Régime of the High Seas: Observations of the Government of Poland, concerning freedom of navigation on the high seas. – Yearbook of the International Law Commission 1955(2), p. 1. Accessible: http://legal.un.org/ilc/documentation/english/a_cn4_l53.pdf (14.09.2016).

[608] M. H. Nordquist, S. Rosenne, S. N. Nandan. United Nations Convention on the Law of the Sea: A Commentary, vol. III. The Hague 2002, p. 81.

contradiction between competing interests proved to be difficult to solve for the Estonian Supreme Court in 1932.

The aim of the 1925 trilateral Agreement and the 1926 trilateral Protocol was to maintain the high seas zone in the Gulf of Finland and guarantee the freedom of navigation (and overflight) in it. The Supreme Court of Estonia regarded in its 1932 judgment the waterway in the Gulf of Finland as "a free belt of water"[609] and "a free seaway,"[610] but in essence came to the conclusion that what was stipulated in the 1926 trilateral Protocol, namely "as if the [coastal State's] supervision envisaged in the general convention would not be applicable to these seaways (§ 1) [has] no significance since the experts were mandated under paragraph 2 of the [1925 trilateral] agreement to only fix the area of the international free seaways, but not to regulate the applicable regime in this area."[611] Thus, the Estonian Supreme Court downplayed in its judgment the significance of section 1 of the 1926 trilateral Protocol. In this regard, the Supreme Court found that under the 1925 trilateral Agreement, the Estonian Government had not agreed to limit its jurisdiction over the seaways falling under the 12-miles-wide control zone in the high seas of the Gulf of Finland.[612]

The court also took the position that "Were it differently and the intention [of the States Parties to the 1925 trilateral Agreement] would have been to exclude the seaways in the part of the Gulf of Finland that lies between Estonia, Finland and the USSR from the scope of Article 9 of the convention and the regulation pertaining to the median line, then such an exception should have been expressly stated. This has not been done."[613] In this regard, the Supreme Court had left paragraph 2 of the 1925 trilateral Agreement without notice, under which Estonia, Finland and the Soviet Union had agreed *expressis verbis* that "the control zones [stipulated in Article 9 of the 1925 Convention] are not applicable to the international seaways in the Gulf of Finland." Hence, the States Parties reiterated in section 1 of the 1926 trilateral Protocol only what had already been stipulated in section 2 of the 1925 trilateral Agreement.

Furthermore, as the Estonian Ambassador to the Soviet Union commented in 1933, the view of the Supreme Court, as if the 1926 trilateral Protocol did not have the same legal status as the 1925 trilateral Agreement, was ill-founded, "since the Soviet delegation set a precondition for signing the 1925 Convention that the experts' protocol will be an organic part of the convention."[614] He also assured that the principal conclusions and the content of the 1926 trilateral Protocol was discussed already during the 1925 Helsinki Conference and States Parties were aware of the limitations which it was about to set.[615]

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609 Judgment 01.10.1932, *op. cit.*, p. 11.
610 Ibid, p. 14.
611 Ibid, p. 11.
612 Ibid.
613 Ibid, p. 14.
614 ERA. 957.13.661, p. 7.
615 Ibid.

In this light, the Supreme Court was not correct in stating that the intention of the States Parties was not to exclude the international seaways from the scope of Article 9 of the 1925 Helsinki Convention.

3. The Soviet Union's Reaction to the 1932 Judgment and the Following Decision of the Estonian Government on the Freedom of Navigation in the Gulf of Finland

The Soviet Union reacted sharply to the 1932 judgment of the Estonian Supreme Court. The Estonian foreign minister Ants Piip was informed by the Soviet Ambassador to Estonia Fyodor Raskolnikov (Ilyin) about the Soviet Government's discontent with the ruling of the Supreme Court.[616] The Estonian foreign minister gave a digest of this conversation to the members of the Estonian Government in a classified document from July 29th, 1933:

> "The Soviet Government is of the position that the international seaway as established in the 1925 agreement on the control zones, concluded in Helsinki between Estonia, Finland and the Soviet Union, enjoys full right of the freedom of the seas. It would thus follow that Estonia does not have the right to stop a ship in this international zone, except for instances of piracy, international traffic in arms and slavery. The judgment of the Supreme Court goes against this principle and jeopardises the freedom of the seas and breaches the maritime interests of the Soviet Union. The Soviet Government would like to solve this question in a friendly manner in this way that the judgment of the Supreme Court, which goes against the norms of international law, would be changed. Otherwise the Soviet Union is forced to see in this Estonia's attempt to constrain the freedom of an international seaway and by protesting against this to also inform other interested States."[617]

The Estonian foreign minister noted that the Soviet Ambassador had confirmed his State's interest in "safeguarding real freedom in maritime connections with Leningrad, which is ever more important as it is the only passage to the Russian ports."[618] Pursuant to the order of the Estonian Government, the Estonian foreign minister spoke to the Chief Justice of the Supreme Court Kaarel Parts who observed that

> "The Supreme Court made a strong judgment which allows the Estonian Government to act according to its political needs, if necessary by giving new laws or regulations. The Supreme Court cannot change its judgment."[619]

616 ERA.957.13.661, pp. 13–16, 18(verso).
617 Ibid, p. 18(verso).
618 Ibid.
619 Ibid, p. 19.

After consulting the Soviet Ambassador, the Chief Justice of the Supreme Court, the Estonian Embassy in Moscow and ministers of the Government, the foreign minister proposed to the Estonian Government to guarantee for the Soviet Union "free and unhindered passage with Leningrad".[620] Pursuant to a classified decision of the Estonian Government from August 2nd, 1933, a commission was established that included the ministers of foreign affairs, economics, defence as well as the minister of courts and interior.[621] The commission approved the afore-mentioned proposition of the minister of foreign affairs on August 15th, 1933.[622] Subsequently, on August 18th, 1933, the State Elder (Prime Minister) Jaan Tõnisson approved the following decision:

> "a) Order the Ministry of Courts and Interior and the Ministry of Economics to give an instruction to their subordinate customs and border guard institutions according to which:
>
> 1) Act on the import and transit of spirit and alcoholic drinks (RT 53/54-1921) is to be implemented with caution, only in extreme and ascertained instances, in accordance with the meaning of the 1925 convention and agreement and the general explanations of the Supreme Court in this part of the Baltic Sea that is agreed under the 1925 control zones agreement between Estonia, Finland and the Soviet Union to fall under the seaways from ports of the Soviet Union to the Baltic Sea and vice versa;
>
> 2) The ships bona fide heading to or coming from Leningrad may in no circumstances be disturbed, except for instances of piracy, international traffic in arms and slavery;
>
> 3) Avoid disturbing ships involved in traffic in spirits sailing in the referred free maritime belt if their pursuit in the sense of customs control has not commenced in territorial waters outside the international seaway;
>
> 4) Only anchored, stationed ships involved in traffic in spirits may be subject to arrest in the free zone;
>
> b) Authorise the Minister of Foreign Affairs to inform the Ambassador of the Union of Soviet Socialist Republics about the content of this instruction."[623]

On September 5th, 1933, the Estonian minister of foreign affairs presented a copy of this instruction in Russian to the Soviet Ambassador and notified the Chief Justice of the Supreme Court as well as the Estonian Embassy in Moscow about this.[624]

Thus, the Estonian Government principally decided to recognise the freedom of navigation as envisaged in the 1925 Helsinki trilateral Agreement and the 1926 Helsinki trilateral Protocol in the high seas corridor of the Viro Strait.

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620 Ibid.
621 ERA.957.13.661, p. 20.
622 See the minutes of the meeting in ibid, pp. 23–24(verso).
623 Ibid, p. 27.
624 Ibid, pp. 30–31.

However, it follows from the Estonian Government's 1933 decision that there were some exceptions to this general rule. Outside Estonia's territorial waters and in the international seaways as well as the high seas as determined by the three coastal States of the Gulf of Finland in the 1925 Helsinki Agreement and the 1926 Moscow Protocol, Estonia's jurisdiction extended up to 12 miles from the coast in respect of anchored, stationed ships involved in traffic in spirits in addition to vessels involved in piracy, international trade in arms and slavery.

This constituted a narrowly constructed exception to the principle of the freedom of navigation in the Estonian part of the 12-miles-wide control zone in the high seas corridor of the Viro Strait. This implies that the Estonian Government essentially decided not to follow the interpretation of the 1925 Helsinki trilateral Agreement and the 1926 Moscow Protocol by the Supreme Court in its 1932 judgment. Instead, it predominantly recognised the freedom of navigation in the high seas corridor of the Viro Strait in the spirit of the object and purpose of the 1925 and 1926 trilateral treaties.

It follows from the foregoing that the 1925 and 1926 trilateral treaties clearly regulated passage comprehensively in the Viro Strait in the 1920s and 1930s. Next, their significance for the legal regime applicable to the Viro Strait subsequent to the restoration of Estonia's independence in 1991 will be analysed from the perspective of Article 35(c) of the LOSC.

Article 35(c) of the LOSC provides that nothing in its Part III on international straits affects the legal regime in straits in which passage is regulated in whole or in part by long-standing international conventions in force specifically relating to such straits. The most recent convention that is deemed by States unequivocally to fulfil the conditions stipulated in Article 35(c) of the LOSC was concluded in 1936: the Montreux Convention on the Bosporus and the Dardanelles.[625] In this regard, as the 1925 Helsinki and 1926 Moscow trilateral agreements were concluded ten years in advance of the Montreux Convention, they may well be considered as long-standing conventions, provided that they satisfy other requirements stipulated in Article 35(c) of the LOSC. This concerns *prima facie* their validity.

Finland withdrew from the 1925 Helsinki Convention as well as the 1925 and 1926 trilateral treaties in 2010.[626] This in combination with the rejection of Estonia's State continuity by the Russian Federation resulted in the definite termination of the 1925 and 1926 trilateral treaties.[627] Nonetheless, the question about the validity of the 1925 and 1926 trilateral treaties from 1940 to 2010 is more complex and subject to further discussion.

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[625] Convention regarding the Régime of the Straits. Montreux 20.07.1936, e.i.f. 09.11.1936. See also Brüel, vol. II, *op. cit.*, pp. 380–424.

[626] See in more detail *infra* section 6.1 of Part IV.

[627] See *infra* section 6.2 of Part IV.

4. The Legal Effect of the 1925 and 1926 Trilateral Treaties from 1940 to 1991

4.1. The Bilateral Treaty Relationships under the 1925 Trilateral Agreement post-1940

The Soviet Union annexed Estonia in 1940. Thereafter, Estonia was *de facto* not a State Party to these treaties any more. The question of Estonia's State continuity is not decisive in assessing the general validity of the 1925 and 1926 trilateral treaties post-1940. Even the potential omission of Estonia from the 1925 trilateral Agreement and the 1926 Moscow Protocol could not have directly impacted the validity of the treaties since it was provided in section 3 of the 1925 Helsinki trilateral Agreement that the treaty stays in force "also if two of the three interested Parties have adopted it inasmuch it is relevant to the two States."[628] According to its Article 2 the 1926 Moscow trilateral Protocol is to stay in force on the same grounds as the 1925 Helsinki trilateral Agreement.

Thus, the trilateral treaties provided for their continued validity in circumstances when they are binding only for two States. This also followed the general understanding at the time of concluding the 1925 Helsinki trilateral Agreement on the grounds of voidance with regard to multilateral treaties in cases of e.g. extinction of one of its State Parties. Oppenheim observed in 1905 that treaties become void when one of the two contracting parties becomes extinct.[629] Notably, the author did not refer to the extinction of a State Party as grounds for the voidance of a multilateral treaty and there is no indication that he took it for granted.

The rationale behind the insertion of this clause into the 1925 trilateral Agreement may also be explained by the interest of the Soviet Union to ensure that if either one of the two coastal States of the Viro Strait (Estonia or Finland) decides to withdraw from the trilateral treaties then the other half of the high seas corridor, which falls under the jurisdiction of the other State Party, remains intact and free for use by the Soviet vessels. Such a continued validity of the 1925 and 1926 trilateral treaties between only two States Parties post-1940 would have been in accordance with the general aim of the 1925 and 1926 trilateral treaties, i.e. ensuring freedom of navigation in the passage through the Gulf of Finland.

Hence, from 1940 the legal commitments under the 1925 Helsinki trilateral Agreement should be distinguished as between Finland and the Soviet Union and later between the Russian Federation as well as Finland and Estonia. The continued validity of the trilateral 1925 and 1926 treaties between Finland and

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[628] Clearly, the annexation of a State Party to the 1925 and 1926 trilateral treaties by another contracting State had in practice a great indirect impact on the treaties. Since the Soviet Union controlled the whole southern coast of the Gulf of Finland, the treaties fell into oblivion.

[629] L. Oppenheim. International Law: A Treatise, vol. I. Peace. London: Longmans 1905, p. 553.

the Soviet Union (the Russian Federation) as well as between Finland and Estonia, in case of loss of the treaty relationship between Estonia and the Soviet Union (the Russian Federation), would also follow the general logic of treaty law. The International Law Commission commented on the draft articles of the law of treaties that

> "Again, although a change in the legal personality of a party resulting in its disappearance as a separate international person may be a factual cause for the termination of a bilateral treaty, this does not appear to be a distinct legal ground for terminating a treaty requiring to be covered in the present articles. A bilateral treaty, lacking two parties, may simply cease any longer to exist, while a multilateral treaty in such circumstances may simply lose a party."[630]

Thus, in case of omission of any treaty relationship between Estonia and the Russian Federation within the legal framework of the 1925 Helsinki Convention, the coastal States of the Gulf of Finland would have had to follow the principle of *pacta sunt servanda* (Article 26 of 1969 Vienna Convention) towards each other from 1940 possibly until the definite termination of the 1925 and 1926 treaties in 2010, except between the Russian Federation and Estonia. Yet first it needs to be examined whether the 1925 and 1926 trilateral treaties remained in force between Finland and the Soviet Union after 1940. This is scrutinised subsequently.

4.2. The Impact of the Annexation of Estonia on the Validity of the 1925 Trilateral Treaty

Subsequent to the annexation of Estonia in 1940, Finland and the Soviet Union could have potentially invoked the *rebus sic stantibus* principle[631] for withdrawing from the 1925 trilateral Agreement. Lassa Oppenheim considered in 1905 the *rebus sic stantibus* clause as grounds for cancelling a treaty by arguing that "A cause which *ipso facto* cancels treaties in such subsequent change of status of one of the contracting States as transforms it into a dependency of another State. As everything depends upon the merits of each case, no general rule can be laid down as regards the question when such change of status must be considered to have taken place /.../".[632] The author also contended that

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[630] International Law Commission. Draft Articles on the Law of Treaties with Commentaries: 1966. United Nations 2005, p. 52. Accessible: http://legal.un.org/ilc/texts/instruments/english/commentaries/1_1_1966.pdf (14.09.2016).

[631] See also Article 62(1) of the 1969 Vienna Convention. See further on the principle of the fundamental change of circumstances: Fisheries Jurisdiction Case (United Kingdom of Great Britain and Northern Ireland v. Iceland), Jurisdiction, I.C.J. Reports 1973, p. 3, paras 36–40. See also M. Fitzmaurice, O. Elias. Contemporary Issues in the Law of Treaties. Utrecht: Eleven International Publishing 2005, pp. 174–185.

[632] Oppenheim, *op. cit.*, p. 556.

> "A certain amount of disagreement over the cases in which the clause [of vital change of circumstances – A. L.] might or might not be justly applied will, of course, always remain. But the fact is remarkable that during the nineteenth century, not many cases of the application of the clause have occurred."[633]

By 1940 the 1928 Briand-Kellogg Pact had become the applicable law and under its Article II the States Parties had agreed that the settlement or solution of all disputes or conflicts of whatever nature or of whatever origin they may be shall never be sought except by pacific means.[634] It bound Estonia and the Soviet Union as the States Parties to the Pact to refrain from the threat or use of force and, more generally, going against its object and purpose. William J. H. Hough III has pointed out that by annexing Estonia in 1940, the Soviet Union breached also other bilateral and multilateral agreements:

> "[T]he occupation of the three Baltic nations was a breach of every major treaty signed between the Soviet Union and the Baltic States subsequent to the USSR's recognition of the Baltic States' perpetual right to sovereignty and independence in the early 1920's. The use of force had been outlawed in Soviet-Baltic relations by the treaties of non-aggression and peaceful settlement of disputes of 1926 and 1932. Moreover, "aggression" had been clearly defined in the Conventions for the Definition of Aggression of July 3rd, 1933. The Soviet invasion was an "aggressive act" as defined by those agreements. Article 3 declared that "no political, military, economic, or other considerations may serve as an excuse or justification for aggression. /.../"
>
> Besides being a clear breach of the bilateral agreements between the Baltic States and Soviet Russia, the invasion and incorporation flagrantly disregarded the major multilateral agreements signed by the Soviet Union, particularly article 10 of the Covenant of the League of Nations and the Treaty of Paris of 1928. Indeed, only two years before the seizure of the Baltic States, the Soviet delegate to the League of Nations had strongly defended the principle of mutual respect for territorial integrity in a speech before the League Assembly. The Soviet delegate declared:
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>> "It must be clear that the League of Nations has no intention of changing its attitude, whether to the direct seizures of and annexations of other people's territory, or to those cases where such annexations are camouflaged by the setting-up of puppet "national" governments, allegedly independent, but in reality serving merely as a screen for, and an agency of, the foreign invader."[635]

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[633] Ibid, p. 552.

[634] See General Treaty for Renunciation of War as an Instrument of National Policy. Paris 27.08.1928, e.i.f. 24.07.1929. See on its interrelations with the League of Nations Covenant (particularly its Article 10) in W. J. H. Hough, III. The Annexation of the Baltic States and Its Effect on the Development of Law Prohibiting Forcible Seizure of Territory. – 6 New York Law School Journal of International and Comparative Law 1985(2), p. 326. See also Article 10 of the Covenant of the League of Nations. Paris 28.06.1919, e.i.f. 10.01.1920.

[635] Hough, *op. cit.*, pp. 389–390.

It is thus doubtful that the annexation of Estonia in 1940, which was not in accordance with the applicable law, provided the grounds for withdrawing from the 1925 trilateral Agreement on the basis of the fundamental change of circumstances that came about by the manifestly illegal conduct by one of its States Parties against the sovereignty of another.

Moreover, the 1925 trilateral Agreement was not a treaty between Estonia and the Soviet Union *inter se* but also included Finland, the status of which as a State after 1940 remained unaffected. Notably, Finland and the Soviet Union did not invoke the annexation of Estonia as a ground of fundamental change of circumstances with respect to the 1925 and 1926 trilateral treaties.[636] Also, even if either State would have done so, it should have followed the applicable procedure under the customary law, which is also reflected in the 1969 Vienna Convention in addition to the more specific requirements stipulated in the 1925 Helsinki Convention's legal framework for withdrawing from the treaties.

Pursuant to its Article 4, the 1969 Vienna Convention does not apply to the 1925 and 1926 trilateral treaties directly because the treaties were concluded prior to the entry into force of the Vienna Convention. Yet under the said provision, this is without prejudice to the application of any (e.g. customary) rules set forth in the 1969 Vienna Convention to which treaties would be subject under international law independently of the Convention.

Anthony Aust has noted that the ICJ has thus far refrained from declaring any provision of the 1969 Vienna Convention as not part of the customary international law and courts may consider each provision of the Convention as customary law.[637] Thus, the norms of the 1969 Vienna Convention may be considered to be part of the international customary law as long as the ICJ has not decided to the opposite.

In the case of *rebus sic stantibus*, the State must, under the procedure set forth in Articles 65(1) and 67 of the 1969 Vienna Convention, notify the other States Parties of its claim and indicate the measure proposed to be taken with respect to the treaty and the reasons thereof. Such a requirement was also common in pre-1940 Europe, as illustrated by the 1923 position of the Swiss Federal Court, "the state which wishes to avail itself of the right to terminate the treaty must inform the other contracting party of its intention in the form prescribed by international law... and it is only through such notice that a lawful

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[636] See Hallituksen esitys alkoholitavarain salakuljetuksen ehkäisemistä tarkoittavan sopimuksen irtisanomisen hyväksymisestä sekä laiksi Suomen ja Ruotsin välillä yhteisestä valvonnasta alkoholitavarain luvattoman maahantuonnin ehkäisemiseksi tehdyn sopimuksen hyväksymisestä annetun lain kumoamisesta (Explanatory Note to the Proposal of the Finnish Government). Helsinki 2008, HE 10/2008, pp. 1–4. Accessible in Finnish at: https://www.eduskunta.fi/FI/vaski/HallituksenEsitys/Documents/he_10+2008.pdf (14.09.2016). Accessible in Finnish and Swedish also at: http://www.finlex.fi/fi/esitykset/he/2008/20080010 (14.09.2016).

[637] A. Aust. Modern Treaty Law and Practice. Cambridge: Cambridge University Press 2007, p. 13.

release from the treaty may be achieved."[638] Such notice was not presented by any State Party to the 1925 and 1926 trilateral treaties. Oppenheim also observes that in case of withdrawal of one State Party, a prior notice needs to be given.[639]

However, if the treaty itself regulates the procedure for withdrawing from it, then under the international law of treaties, the legal situation with regard to the principle of *rebus sic stantibus* is much less complicated. In this connection, the withdrawal from the treaties was regulated in the 1925 and 1926 trilateral treaties. Therefore, any unilateral withdrawal from the 1925 and 1926 treaties without adhering to the procedure stipulated therein would have been void.[640] Notably, the Soviet Union did not withdraw from the 1925 trilateral Agreement (nor the 1925 Helsinki Convention), at least not on the basis of the procedure stipulated therein.

It is also notable that, as confirmed by the Finnish Government, the Soviet Union did not notify Finland of the cancellation of the 1925 and 1926 trilateral treaties post-1940.[641] In this regard, Article 12 of the 1947 Treaty of Peace with Finland provided that

> "1. Each Allied or Associated Power will notify Finland, within a period of six months from the coming into force of the present Treaty, which of its pre-war bilateral treaties with Finland it desires to keep in force or revive. Any provisions not in conformity with the present Treaty shall, however, be deleted from the above-mentioned treaties.
>
> 2. All such treaties so notified shall be registered with the Secretariat of the United Nations in accordance with Article 102 of the Charter of the United Nations.
>
> 3. All such treaties not so notified shall be regarded as abrogated."[642]

The Finnish Government explained in 2010 on this matter that

> "The Union of Soviet Socialist Republics has not expressed intention to keep in force or reinforce the agreement and the protocol that are an inseparable part of the afore-mentioned treaty (SopS 9/1948). On the other hand, the Union of Soviet Socialist Republics has not declared the agreement or the protocol to be abrogated (SopS 14/1948), nor are they registered with the United Nations Treaty Series. It is also possible that the Union of Soviet Socialist Republics has considered that the afore-mentioned agreement and protocol concluded between

[638] Judgment of the Swiss Federal Court in Lepeschkin v. Gossweiler el Cie, 02.02.1923, RS, I, 264) (referred in B. Conforti, A. Labella. Invalidity and Termination of Treaties: The Role of National Courts. – 44 European Journal of International Law 1990(1), p. 61).

[639] Oppenheim, *op. cit.*, p. 549

[640] See also L. R. Helfer. Terminating Treaties. – D. B. Hollis (ed). The Oxford Guide to Treaties. Oxford: Oxford University Press 2014, p. 636.

[641] HE 10/2008 vp, *op. cit.*, p. 3.

[642] Treaty of Peace with Finland. Paris 10.02.1947, e.i.f. 16.09.1947.

> Estonia, Finland and the Union of Soviet Socialist Republics are multilateral treaties which remained unaffected by the procedure stipulated in Article 12 of the Paris Peace Treaty. The validity of the afore-referred agreement and protocol may at any rate for the above mentioned reasons be considered as unclear."[643]

The Russian Ministry of Foreign Affairs explained to Latvia in a note of November 17th, 1992 on the legal force of treaties concluded with the Baltic States prior to 1940 that "It is known that the incorporation of a State into the composition of another brings about the termination of any bilateral treaties concluded between them as independent States."[644] The Russian note referred to only bilateral treaties concluded prior to 1940. In case the Soviet Union considered the 1925 Helsinki Convention, of which the 1925 and 1926 trilateral treaties were an inseparable part, as multilateral treaties which do not fall under the Article 12 clause of the 1947 Paris Peace Treaty, then the treaties should have remained valid in the relations between Finland and the Soviet Union. This should be assumed since Article 12 of the 1947 Paris Peace Treaty explicitly referred to only bilateral treaties. Nevertheless, it requires first a further legal analysis on whether the treaties may have become void post-1940 due to their possible obsolescence or desuetude.

4.3. Obsolescence and Desuetude of the 1925 and 1926 Trilateral Treaties

As discussed above, it is unclear whether the 1925 Helsinki Convention and the trilateral Agreement as its inseparable part were in terms of law generally still in force between Finland and the Soviet Union subsequent to the annexation of Estonia in 1940. Among other provisions, Article 2 of the 1925 Helsinki trilateral Agreement, under which the freedom of navigation in the high seas corridor of the Gulf of Finland was stipulated, lost its actuality since the Soviet Union controlled the whole eastern coast of the Baltic Sea. Hence, the Soviet ships had unhindered access to the ports in Leningrad (St Petersburg), absent of any legal arrangement with Finland. Thus, the legal circumstances which necessitated the conclusion of the 1925 and 1926 trilateral treaties essentially disappeared. This raises the question whether the treaties may have been considered terminated on the grounds of obsolescence.

In the law of treaties, the conception of obsolescence refers to a situation of impossibility of performing a treaty due to the disappearance of the legal circumstances that had constituted one of the treaty's essential conditions.[645]

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[643] HE 10/2008 vp, *op. cit.*, p. 3.

[644] See Mälksoo 2003, *op. cit.*, p. 70.

[645] M. G. Kohen. Desuetude and Obsolescence of Treaties. – E. Cannizaro (ed). The Law of Treaties beyond the Vienna Convention. Oxford: Oxford University Press 2011, p. 358. M. G. Kohen, S. Heathcote. 1969 Vienna Convention. Article 42: Validity and continuance in force of treaties. – O. Corten, P. Klein (eds). The Vienna Conventions on the Law of Treaties: A Commentary, vol. I. Oxford: Oxford University Press 2011, p. 1025.

Oppenheim provided the following example with regard to the impossibility of performing a treaty:

> "A frequently quoted example is that of three States concluding a treaty of alliance and subsequent war breaking out between two of the contracting parties. In such case it is impossible for the third party to execute the treaty, and it becomes void."[646]

Thus, obsolescence means juridical impossibility.[647] Kohen and Heathcote have referred to the regulation on the "enemy state"[648] in Articles 53, 106 and 107 of the United Nations Charter as an example of obsolescence.[649] Desuetude, on the other hand, refers to a situation of non-application of a treaty over a prolonged period of time, which includes a prolonged practice contrary to what is foreseen by the treaty, on the basis of which one can imply the consent of States Parties to abandon it.[650]

The 1969 Vienna Convention, which mostly codified the applicable law on treaties, does not recognise the disappearance of the legal situation which was the essential condition for the application of the treaty as a ground for the termination of such a treaty. In this connection, Article 42(2) of the 1969 Vienna Convention stipulates that "The termination of a treaty, its denunciation or the withdrawal of a party, may take place only as a result of the application of the provisions of the treaty or of the present Convention. The same rule applies to suspension of the operation of a treaty." The International Law Commission noted in this regard:

> "The words "only through the application of the present articles" and "only as a result of the application of the present articles" used respectively in the two paragraphs are also intended to indicate that the grounds of invalidity, termination, denunciation, withdrawal and suspension provided for in the draft articles are exhaustive of all such grounds, apart from any special cases expressly provided for in the treaty itself. In this connexion, the Commission considered whether "obsolescence" or "desuetude" should be recognized as a distinct ground of termination of treaties. But it concluded that, while "obsolescence" or "desuetude"

646 Oppenheim, *op. cit.*, p. 554.

647 By contrast, the conception of supervening impossibility of performance as stipulated in Article 61(1) of the 1969 Vienna Convention implies material impossibility of performance, which results from the permanent disappearance or destruction of an object indispensable for the execution of the treaty. See Kohen, Heathcote, *op. cit.*, p. 1025.

648 Pursuant to Article 53(2) of the United Nations Charter, the term "enemy state" applies to any State which was an enemy of the initial signatory States of the United Nations Charter during the Second World War. Charter of the United Nations. San Francisco 26.06.1945, e.i.f. 24.10.1945.

649 Kohen, Heathcote, *op. cit.*, p. 1025.

650 See ibid, p. 1023. See also T. Giegerich. Termination and Suspension of the Operation of Treaties. – O. Dörr, K. Schmalenbach (eds). Vienna Convention on the Law of Treaties: A Commentary. Berlin, Heidelberg: Springer 2011, p. 959. See also Kohen, *op. cit.*, p. 352.

> may be a factual cause of the termination of a treaty, the legal basis of such termination, when it occurs, is the consent of the parties to abandon the treaty, which is to be implied from their conduct in relation to the treaty. In the Commission's view, therefore, cases of "obsolescence" or "desuetude" may be considered as covered by article 51, paragraph (b), under which a treaty may be terminated "at any time by consent of all the parties"."[651]

Likewise, Kohen and Helfer have observed that during the drafting of the 1969 Vienna Convention, obsolescence and desuetude were not considered as sufficient grounds for the termination of a treaty and the grounds for ending treaty obligations, as enumerated in Article 42(2) of the 1969 Vienna Convention, were supposed to be exhaustive.[652] In legal literature it is still suggested by some authors that State practice recognises also desuetude as an additional means for ending treaty obligations.[653] However, in this regard Giegerich has come to the conclusion that customary international law on the concept of desuetude could not provide an additional legal basis for the termination of a treaty since Article 42(2) of the 1969 Vienna Convention explicitly states that no grounds for terminating a treaty beyond those mentioned in the convention shall be applied.[654]

Thus, obsolescence and desuetude were considered in the drafting of the 1969 Vienna Convention as falling under the scope of its Article 54(b) which provides that the termination of a treaty or the withdrawal of a State Party may take place at any time by consent of all the States Parties after consultation with the other contracting States.[655] This provision was aimed at encompassing also tacit agreement as a separate ground for ending treaty obligations,[656] e.g. the termination or suspension of the operation of a treaty implied by the conclusion of a later treaty (Article 59 of the 1969 Vienna Convention).

Hence, the termination of the 1925 and 1926 trilateral treaties on the basis of obsolescence or desuetude could potentially be implied only by a tacit agreement of Estonia, Finland and the Soviet Union or an explicit agreement. However, it would be difficult to argue for Estonia's consent (*inter alia* Finland refused *de jure* recognition of the occupation of Estonia; the State continued to exist *de jure* as recognised by most States)[657] for the termination of the 1925

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651 ILC Commentaries to the Draft Articles on the Law of Treaties, *op. cit.*, p. 52.

652 Kohen, *op. cit.*, pp. 350–351. Helfer, *op. cit.*, p. 636. See also R. Jennings, A. Watts (eds). Oppenheim's International Law, vol. I. Peace. Harlow: Longman 1992, p. 1297.

653 See references in Helfer, *op. cit.*, p. 636. Giegerich, *op. cit.*, p. 959.

654 Giegerich, *op. cit.*, p. 959.

655 Kohen, Heathcote, *op. cit.* p. 1022.

656 Kohen, *op. cit.*, p. 352. In connection with the concepts of desuetude and obsolescence see also See A. Watts. The International Law Commission 1949–1998. Volume 2: The Treaties, Part 2. Oxford: Oxford University Press 1999, p. 719.

657 Hough, *op. cit.*, p. 437. L. Mälksoo. Nõukogude anneksioon ja riigi järjepidevus: Eesti, Läti ja Leedu staatus rahvusvahelises õiguses 1940. a-1991. a ja pärast 1991. a. Uurimus pingest normatiivsuse ja võimu vahel rahvusvahelises õiguses. Tartu: Tartu University Press 2005, p. 74. Also, 27 out of 35 States with whom Estonia had diplomatic relations

and 1926 trilateral treaties prior to the restitution of its independence in 1991 because the reasons for such termination could only be derived from the loss of its independence *de facto* due to the annexation of it by another State Party to the trilateral treaties.

In connection with the concept of obsolescence, it is also doubtful whether it was *impossible*[658] for Finland and the Soviet Union to perform the 1925 and 1926 trilateral treaties subsequent to the annexation of Estonia since Finland and the Soviet Union could have retained the high seas corridor under the referred treaties. The high seas corridor granted passage rights essentially not only to the Soviet Union but also to third States. Furthermore, it is unlikely that all relevant transit routes were completely on the Soviet side of the median line of the 12-miles-wide control zones. The high seas corridor encompassed an extensive maritime area in the Gulf of Finland, much of which also fell under the Finnish jurisdiction after 1940.[659] Thus, although the object of the 1925 Helsinki trilateral Agreement may have become certainly less relevant after the annexation of Estonia in 1940, it could not have become extinct.

Significantly, Finland refrained from extending its territorial sea in the Viro Strait post-1940, thus keeping the strait's corridor on its own part intact until the conclusion of the 1994 bilateral Agreement with Estonia and also thereafter.[660] As explained above,[661] Finland adopted a 12-miles-wide territorial sea (previously 4 miles) only in 1995 by amending the Act on the Delimitation of Territorial Waters of Finland. Therefore, a corridor with a width of at least 4.5 miles granting unhindered passage through the Gulf of Finland continued to exist after 1940 and prior to the 1994 bilateral Agreement.[662] It implies that the grounds of obsolescence were not satisfied in regards to the 1925 and 1926 trilateral treaties from 1940 to 1991.

However, it is still likely that the 1925 and 1926 trilateral treaties did meet the precondition for desuetude, i.e. a prolonged practice on behalf of the States Parties contrary to what is foreseen by the treaty. On the basis of the available information there is no indication that Finland would have hampered free passage of ships and aircraft in and over its part of the corridor from 1940 until the conclusion of the 1994 bilateral Agreement. By contrast, the Soviet Union's

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prior to 1940 expressly stated re-establishment (not establishment) of diplomatic relations. See J. Salulaid. Restoration of the Effect of Estonian International Treaties. – 2 Baltic Yearbook of International Law 2002, p. 225.

[658] The precondition for obsolescence, as referred above.

[659] See map 2 in Annex 1. It does not depict the 12 mile maritime zone of Finland, but one could draw an analogy from the extent of the Estonian 12 mile maritime zone, which in many areas had the potential of covering the whole section of the high seas corridor as shown on map 4 in Annex 1.

[660] It should be noted, however, that there is no indication that Finland maintained its part of the high seas corridor intact as a result of its obligations under the 1925 and 1926 trilateral treaties.

[661] *Supra* section 2.1 of chapter 2 in Part III.

[662] Alexander 1987, *op. cit.*, p. 482.

State practice during that period of time was clearly contrary to the 1925 and 1926 trilateral treaties.

In 1950, the Soviet Union asserted for the first time officially that its territorial sea in the Baltic Sea is up to 12 miles wide.[663] It claimed a 12-miles-wide territorial sea also in the Gulf of Finland.[664] This is also reflected by the Finnish Government's notion that it refrained from extending the outer limit of its territorial sea to 12 miles in order to avoid a common territorial sea boundary with the Soviet Union in the Gulf of Finland.[665] The Soviet Union's 12-mile-wide territorial sea in the Gulf of Finland covered the formerly Estonian part of the high seas corridor. Therefore, by extending its territorial sea into the maritime area where the high seas freedoms should have applied under the 1925 and 1926 trilateral treaties, the Soviet Union effectively negated free passage in this maritime area against the terms of the 1925 and 1926 trilateral treaties. Also, the Soviet Union's territorial sea in the Gulf of Finland overlapped with its 12-mile-wide coastal security zone as established first in 1927.[666] The spatial extent of this security zone significantly broadened in the Gulf of Finland as a result of the annexation of Estonia in 1940. The Soviet Union thus consistently breached the 1925 and 1926 trilateral treaties after 1940 since its maritime zones (as measured from the southern coast of the Gulf of Finland) were not in conformity with the aim, spatial extent[667] and rules of the high seas corridor. Consequently, there was prolonged practice contrary to the trilateral treaties on the Soviet Union's part.

This is also confirmed by the fact that in November, 1948, the Swedish fishing boat *Hamnfjord*, as she was sailing in the Gulf of Finland, was taken into custody by the Soviet Union's Coast Guard.[668] Gene Glenn observes that

> "After an exhaustive interrogation of its crew members, the Hamnfjord was released from Soviet custody. In a subsequent diplomatic note to Sweden, the Soviet Union asserted that the Hamnfjord had been observed within the borders of the Soviet coastal defense zone and that it had disregarded signals to stop; therefore, the ship and crew had been held for investigation concerning violation of maritime regulations within the Soviet territorial sea. The note in conclusion urged Swedish authorities to inform sailing captains of existing Soviet maritime regulations."[669]

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[663] G. Glenn. Notes and Comments: The Swedish-Soviet Territorial Sea Controversy in the Baltic. – 50 The American Journal of International Law 1956, p. 944.

[664] United States Department of State. Continental Shelf Boundary: Finland-Soviet Union. – Limits in the Seas, No. 16. Washington D.C: US Department of State 1970, p. 5.

[665] HE 114/1994, *op. cit*.

[666] L. B. Schapiro. The Limits of Russian Territorial Waters in the Baltic. – 27 The British Yearbook of International Law 1950, p. 447.

[667] See *infra* map 2 in Annex 1.

[668] Glenn, *op. cit.*, p. 942.

[669] Ibid.

It appears from the circumstances of the *Hamnfjord* incident that the ship was likely not engaged (yet) in fishing activities.[670] The author does not explain in detail where this incident occured. Yet it is beyond reasonable doubt that it took place in the high seas corridor. The high seas corridor, as established under the 1925 and 1926 trilateral treaties, stretched much further to the west than the contemporary EEZ corridor.[671] This incident was a flagrant breach of the 1925 and 1926 trilateral treaties which guaranteed free passage and the freedom of the seas in the high seas corridor.

On the basis of the foregoing, it appears that the Soviet Union's prolonged State practice was contrary to what was foreseen by the 1925 and 1926 trilateral treaties. Notably, however, it seems that Finland and Sweden might not have submitted that the Soviet Union was acting in breach of its commitments under these treaties.[672] On the basis of the foregoing, it appears that solely from the perspective of the Soviet Union, the 1925 and 1926 trilateral treaties had fallen into desuetude after 1940. However, this might not have resulted in the desuetude of the 1925 and 1926 trilateral treaties.

The above-referred definition of *desuetude* implies that the termination of a multilateral treaty on the basis of desuetude requires that all of its States Parties (or at least the number of States Parties required for terminating the treaty on the basis of withdrawal) have been in a long period of time constantly acting in breach of the terms of a multilateral treaty, from which one may imply that States Parties have consented to abandoning the treaty. This does not seem to be the case in the instance of the 1925 and 1926 trilateral treaties.

Finland did not consent to abandoning the 1925 and 1926 trilateral treaties and its State practice reflected this as it kept its part of the high seas corridor intact. Clearly, Estonia did not consent to abandoning the treaty after 1940 either and Finland refused to recognise the occupation of Estonia *de jure*. This implies that the 1925 and 1926 trilateral treaties remained legally dormant in the relations between Estonia and Finland until Estonia regained its independence in 1991 on the basis of its State continuity.

The 1925 and 1926 trilateral treaties might have fallen into desuetude after 1940 in case Finland had extended the maximum breadth of its territorial sea to 12 miles prior to the conclusion of the 1994 Estonian-Finnish bilateral agreement on the establishment of the EEZ corridor in the Viro Strait. In combination with the Soviet Union's State practice, this would have probably resulted in the termination of the 1925 and 1926 trilateral treaties.

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[670] In particular, compare the circumstances of the Hamnfjord case with the subsequent incidents between Sweden and the Soviet Union in *inter alia* Danzing Bay. Glenn, op. cit., pp. 942–944, 946.

[671] For the spatial extent of the high seas corridor, see map 2 in Annex 1.

[672] Although the author of the 1950 note (Gene Glenn) had at his disposal the complete texts or summations of diplomatic correspondence between Sweden and the Soviet Union, he does not refer to any diplomatic protests that would have been aimed against the Soviet Union's violations of the 1925 and 1926 trilateral treaties.

Additionally, the procedure to be followed by the Soviet Union or Finland with respect to the termination or withdrawal from the 1925 and 1926 trilateral treaties as provided in the 1925 and 1926 trilateral treaties or in Article 65 of the 1969 Vienna Convention was not applied, as analysed above. Furthermore, the validity of the 1925 and 1926 treaties was not connected to any period of time.

The latter is also confirmed by the fact that in 1996, the Finnish Parliament and the Government declared in the draft Act on the ratification of the LOSC that the 1925 Helsinki Convention for the Suppression of the Contraband Traffic in Alcoholic Liquors, of which the 1925 Helsinki trilateral Agreement was "an inseparable part" (according to its section 3), is still in force (*sopimus onkin edelleen voimassa*).[673] Notably, the 1925 Helsinki Convention is also still referred to in the legal acts of Germany.[674] In 1979, it was deemed in the German legal literature as one of the most important international treaties in the field of criminal law.[675]

In light of this historical-legal quagmire, the question about the potential validity of the 1925 and 1926 trilateral treaties after 1940 apparently cannot be answered in definite terms. However, it appears that although the Soviet Union acted after 1940 consistently against the terms of the 1925 and 1926 trilateral agreements, this certainly might not have resulted in the termination of the multilateral treaty under international treaty law. Therefore, it follows from the foregoing that under the law of treaties, it is reasonable to assume that the 1925 and 1926 trilateral treaties might have been valid after 1940 (at least between Estonia and Finland). Thus, it raises the question of the relationship of the 1994 bilateral Agreement to the 1925 and 1926 trilateral treaties prior to the 2010 Finnish withdrawal from the 1925 Helsinki treaty framework.

5. The Relationship of the 1994 Agreement on the EEZ Corridor to the 1925 and 1926 Trilateral Treaties Prior to Finland's 2010 Withdrawal

5.1. The Termination of the 1925 and 1926 Trilateral Treaties by the Conclusion of the 1994 Bilateral Agreement

In connection with the restoration of Estonia's independence in 1991, the legal status of the passage through the Gulf of Finland changed once again to an international strait. Thus the same legal problems on passage rights arose in this

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673 Hallituksen esitys Eduskunnalle Yhdistyneiden Kansakuntien merioikeusyleissopimuksen ja sen XI osan soveltamiseen liittyvän sopimuksen eräiden määräysten hyväksymisestä sekä laiksi aluksista aiheutuvan vesien pilaantumisen ehkäisemisestä annetun lain muuttamisesta – 2.6. Aava meri. HE 12/1996, *op. cit.*

674 Gesetz über die Verfrachtung alkoholischer Waren (Act on the Transport of Alcoholic Beverages). 02.01.1975 (BGBl. I S. 289), section 3. Accessible in German: http://www.gesetze-im-internet.de/alkoverfrg/BJNR202300926.html (14.09.2016).

675 A. Elster, H. Lingermann (Hrsg.). Handwörterbuch der Kriminologie. Berlin/New York: De Gruyter 1979, pp. 54–55.

maritime area as had initiated the coastal States of the Gulf of Finland to conclude the 1925 and 1926 trilateral treaties. The legal circumstances that had triggered the conclusion of the 1925 and 1926 trilateral treaties were hence restored in 1991. The fact that the adoption of the LOSC had not altered the need for the establishment of a corridor in which the high seas freedoms would be applicable was illustrated by the conclusion of the 1994 Agreement between Estonia and Finland. Notably, the 1994 Agreement did not refer to the 1925 and 1926 trilateral Agreements.

Taking into account the profound changes that accompanied the restoration of Estonia's independence in 1991 and the entry into force of the LOSC in 1994, it was rational for Estonia and Finland as the States Parties of the 1925 and 1926 trilateral treaties to renew their legal commitments in view of considering *inter alia* the extension of the maximum breadth of the territorial sea as well as the creation of new maritime zones, the EEZ and the contiguous zone.

Thus, the modification of the 1925 and 1926 trilateral treaties might have been necessary by the conclusion of a new treaty on the same subject matter, i.e. passage rights in the Viro Strait. However, in terms of law, the conclusion of such a new treaty might not have altered the applicability of the 1925 and 1926 trilateral treaties to the Viro Strait post-1993, i.e. after the adoption of a 12-miles-wide territorial sea by Estonia and Finland. This is due to the fact that the 1925 and 1926 trilateral treaties referred also to the territorial sea of the coastal States.

Article 9 as the key provision of the legal framework of the 1925 Helsinki Convention explicitly referred in an abstract manner to a "zone which stretches up to 12 miles from the coast of mainland or islands".[676] Thus, Article 9, in respect of which the 1925 and 1926 trilateral treaties were concluded, also regulated the rights and obligations of States Parties within their territorial sea that fell within the limits of 12 miles. The above-referred abstract "zone which stretches up to 12 miles from the coast of mainland or islands" could as well have referred to the 12-miles-wide territorial sea post-LOSC. Since Article 9 of the 1925 Helsinki Convention created new rights and obligations for the States Parties in their adjacent waters within the limits of 12 miles from their coast, it also stipulated that the applicability of the regulations provided therein do not depend on the particular (potentially diverging) positions of the States Parties on the legal principles governing the territorial sea and customs zone.

The extension of the width of the Finnish territorial sea from 4 miles to 12 miles in 1994 and the corresponding act by Estonia as a result of adopting the Maritime Boundaries Act in 1993 meant that it became important again for their neighbouring State in the Gulf of Finland to ensure freedom of navigation and overflight with regard to the Viro Strait. Setting the 1979 agreement between Denmark and Sweden on the delimitation of the territorial waters as an exam-

[676] Les Parties contractantes s'engagent à ne faire aucune objection à ce que chacune d'entre elles applique, dans une zone s'étendant jusqu'à douze milles marins de la côte ou de la limite extérieure des archipels, ses lois aux navires qui se livrent manifestement à la contrebande. See Treaty 1 in Annex 2.

ple,[677] the two coastal States of the Viro Strait concluded an agreement in 1994 on the initiative of Finland on the establishment of the EEZ corridor in the Viro Strait.

Under Article 59(1) of the 1969 Vienna Convention (applicable to all three coastal States of the Gulf of Finland),[678] the 1925 and 1926 trilateral treaties would be considered terminated if all the States Parties to it, i.e. Estonia, Finland and the Russian Federation as the continuator State of the Soviet Union,[679] concluded a later treaty relating to the same subject-matter. The 1925 and 1926 trilateral treaties could have been terminated on the basis of the conclusion of the 1994 bilateral Agreement (Article 59(1) of the Vienna Convention). The 1994 agreement was a bilateral treaty concluded between Estonia and Finland. The Russian Federation was not a State Party to this agreement, nor took part in the negotiations. However, it was established above that the 1925 and 1926 trilateral treaties had apparently fallen into desuetude from the Soviet Union's perspetive. Therefore, in terms of law, the criteria for the termination of the 1925 and 1926 treaties by the conclusion of the 1994 bilateral Agreement under Article 59(1) of the 1969 Vienna Convention were likely met, since under this provision all States Parties to the previous 1925 and 1926 agreements should also have been contracting States to the 1994 treaty. By 1994, the States Parties to the 1925 and 1926 trilateral treaties could have included (beyond reasonable doubt) only Estonia and Finland.

In addition, the provisions of the later treaty (the 1994 bilateral Agreement) are not incompatible with those of the earlier ones. The 1994 Estonian-Finnish treaty on the establishment of the EEZ corridor in the Gulf of Finland had the same subject matter as the 1925 Helsinki trilateral Agreement. Both treaties were concluded with the aim of safeguarding the freedom of navigation as well as freedom of overflight in the Gulf of Finland. Such freedoms apply in the EEZ corridor, which was established in 1994, as well as in the high seas corridor that was established in 1925.

Therefore, it appears that the conclusion of the 1994 bilateral Agreement terminated the 1925 and 1926 trilateral treaties. This is also in conformity with State practice since Estonia and Finland have tacitly interpreted the previous 1925 and 1926 trilateral agreements seemingly as no longer regulating passage rights in the Viro Strait. Yet in the interests of legal clarity it is also considered next if Estonia and Finland would have been entitled to modify the 1925 and 1926 trilateral treaties strictly as between themselves alone if, theoretically, the Russian Federation would have been still a State Party to these trilateral treaties (despite the Soviet Union's contrary State practice).

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[677] Hallituksen esitys Eduskunnalle laiksi Suomen aluevesien rajoista annetun lain muuttamisesta, *op. cit*.

[678] See also United Nations Treaty Collection. Vienna Convention on the Law of Treaties. Status as at 14.09.2016. – Estonia, Finland, the Russian Federation. Accessible: https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=IND&mtdsg_no=XXIII-1&chapter=23&Temp=mtdsg3&clang=_en (14.09.2016).

[679] Mälksoo 2015, *op. cit.*, p. 9.

5.2. The 1994 Agreement as an Agreement to Modify the 1925 and 1926 Trilateral Treaties between Estonia and Finland Prior to the 2010 Termination of the Treaties if the Russian Federation was still a State Party

The 1994 Agreement between Estonia and Finland on the establishment of the EEZ corridor in the Gulf of Finland may be considered an agreement to modify the 1925 and 1926 trilateral treaties between only themselves in terms of Article 41 of the 1969 Vienna Convention if the Russian Federation was still a State Party to the 1925 and 1926 trilateral treaties. This would not have been the first modification of the 1925 and 1926 trilateral treaties between only two parties to the agreements. Finland and the Soviet Union concluded on March 12th, 1940 the Winter War Peace Treaty, according to which Finland *inter alia* ceded its islands in the centre of the Gulf of Finland proper to the Soviet Union.

In effect, the boundaries of the high seas corridor in the Gulf of Finland as stipulated in the 1926 Moscow trilateral Protocol changed as a result of the 1940 Treaty. It was now necessary for the Soviet Union in the short period of time between the conclusion of the 1940 Peace Treaty and the annexation of Estonia in the summer of 1940 to safeguard the freedom of navigation in the Gulf of Finland, not close to the island of Suur-Tytärsaari (in the east) as previously but instead to the island of Vaindloo, as currently under the 1994 bilateral Agreement. Finland and the Soviet Union did not appear to have notified Estonia about such modification of the 1926 Moscow trilateral Protocol. However, neither did the 1940 Peace Treaty have a direct impact on Estonia's interests.

The update of the rights and obligations in the form of concluding the 1994 Agreement between Estonia and Finland was in the interests of the Russian Federation, since the establishment of an EEZ corridor omitted any hindrances to *prima facie* the Russian ships and aircraft to transit the Viro Strait. Hence, its conclusion may not have required a prior consent from the Russian Federation if, hypothetically, it was still a State Party to the 1925 and 1926 trilateral treaties (in spite of what was established in the previous sections). Pursuant to Article 39 of the 1969 Vienna Convention, amendments do not require the consent of all States Parties to the original treaty.[680] The 1994 bilateral Agreement does not appear to have any unfavourable effect on the Russian Federation since, by adapting to the changed circumstances, Estonia and Finland guaranteed the aim of the 1925 and 1926 trilateral treaties, i.e. freedom of navigation in the Viro Strait.

Thus, although there is no reference by the States Parties to that effect, the 1994 bilateral Agreement could then, theoretically, be considered in terms of law as an agreement to modify the 1925 and 1926 trilateral treaties between only Estonia and Finland under Article 41 of the 1969 Vienna Convention. The spatial extent of the high seas corridor as fixed under the 1926 Moscow Protocol (which included the coordinates as well as an appended map of the corri-

[680] J. Brunnée. Treaty Amendments. – Hollis, *op. cit*., p. 350.

dor)[681] was outdated by 1994. In this sense, if the 1925 and 1926 trilateral treaties stayed in force after 1940, then their amendment – in light of the cession of the previously Finnish islands in the Gulf of Finland proper to the Soviet Union in 1940 and the newly introduced maritime zones in international law – would have been in any case appropriate on behalf of the strait States (Estonia and Finland) as soon as Estonia regained its independence.

The modification of the 1925 and 1926 trilateral treaties was not prohibited by the treaties as such. Pursuant to Article 41(1)(b) of the 1969 Vienna Convention, a modification by two States Parties of the trilateral 1925 and 1926 treaties between themselves alone would be lawful if i) it does not affect the enjoyment by the Russian Federation of its rights under the 1925 and 1926 treaties or the performance of its obligations and ii) it does not relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the 1925 and 1926 trilateral treaties as a whole.

According to drafters of the 1969 Vienna Convention, Article 41(1)(b)(i) is aimed at protecting the rights of the States Parties to the original treaty that are not States Parties to the *inter se* agreement as the provision means that the modifying treaty "must not prejudice their rights or add to their burdens".[682] The high seas corridor was established under the 1925 and 1926 trilateral treaties to guarantee the freedom of passage in the Viro Strait. The EEZ corridor clearly does not prejudice the rights or add to the burdens of the Russian Federation in comparison to the high seas corridor since the Russian Federation enjoys under Article 36 of the LOSC the high seas freedoms in the Viro Strait, *prima facie* the freedoms of navigation, overflight and the laying of submarine cables and pipelines.

Although the EEZ corridor is geographically more limited than the high seas corridor, it does not affect the enjoyment by the Russian Federation of its rights under the 1925 and 1926 treaties or the performance of its obligations. This relates to the cession of the Finnish islands in the centre of the Gulf of Finland proper under the 1940 Winter War Peace Treaty to the Soviet Union. Also, the western end of the EEZ corridor connects it with the EEZs of Estonia, Finland and Sweden, thereby posing no obstacles for the Russian Federation in enjoying its high seas freedoms in this maritime area.

The conclusion of a treaty which provides the possibility for the Estonian and Finnish authorities to abolish the international corridor in the Gulf of Finland, in which the freedom of navigation is guaranteed, might constitute a breach of the effective execution of the object and purpose of the 1925 and 1926 trilateral treaties as a whole in terms of Article 41(1)(b)ii) of the 1969 Vienna Convention. Notably, such a possibility is foreseen in the 1994 Agreement concluded between Estonia and Finland which provided that should both or either of the two States decide to depart from the voluntarily imposed limita-

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[681] See *infra* map 2 in Annex 1 and Treaty 3 in Annex 2.

[682] A. Rigaux. D. Simon, J. Spanoudis, E. Weemaels. Article 41, Convention of 1969. – Corten, Klein, *op. cit.,* p. 1002.

tions on the width of the territorial sea in the Gulf of Finland, they will inform the other State no less than twelve months in advance of such planned extension of its territorial waters in this maritime area.[683] This is not against the spirit of the 1925 and 1926 trilateral treaties.

The possibility of denouncing or withdrawing from the 1994 bilateral Agreement should be considered as supplementary to the corresponding provisions of the 1925 trilateral Agreement. Thus, it appears that even if, hypothetically, the Russian Federation was still a State Party to the 1925 and 1926 trilateral treaties, then Estonia and Finland only specified their obligations with regard to giving such a notice while the general grounds for denouncing or withdrawing from the 1925 trilateral Agreement, as well as its 1926 Moscow Protocol, remained unchanged. Under the 1925 and 1926 trilateral treaties, Estonia and Finland would not have been explicitly obligated to give a prior notice of withdrawing from the treaties a long period of time in advance, while such a requirement was stipulated in the 1994 bilateral Agreement. This should be viewed as compatible with the interests of the Russian Federation.

It follows from the foregoing that the 1994 bilateral Agreement may be regarded in accord with the object and purpose of the 1925 and 1926 trilateral treaties in case it would be considered under the 1969 Vienna Convention as a successive treaty to the 1925 and 1926 trilateral treaties from 1994 to 2010. However, it is beyond reasonable doubt that the trilateral treaties did not stay in force after the conclusion of the 1994 bilateral Agreement (as was examined in the previous section).

It is scrutinised subsequently whether the 1925 Helsinki trilateral Agreement may have been a long-standing convention regulating passage in the Viro Strait after the restoration of Estonia's independence in 1991 until the termination of the trilateral treaty by the conclusion of the 1994 bilateral Agreement or, alternatively, Finland's withdrawal from the 1925 Helsinki Convention and the 1925 and 1926 trilateral treaties in 2010.

5.3. The 1925 Helsinki Agreement in light of the LOSC Framework on *Sui Generis* Straits and Long-Standing Conventions Regulating Passage in a Strait

According to Article 35(c) of the LOSC, nothing in its Part III on international straits affects the legal regime in straits in which passage is regulated in whole or in part by long-standing international conventions in force specifically relating to such straits. International straits that have been recognised as falling

[683] Such a requirement for at least 12 months' notice is also stipulated in Article 56(2) of the 1969 Vienna Convention if a State Party intends to denounce or withdraw from a treaty in accordance with Article 56(1) of the 1969 Vienna Convention and its general grounds regulating such procedure.

under Article 35(c) of the LOSC are the Danish Straits, Åland Strait, the Strait of Magellan and the Turkish Straits (Bosporus and the Dardanelles).[684]

The Viro Strait may have been in terms of law and, more specifically, Article 35(c) of the LOSC a strait regulated by the 1925 Helsinki trilateral Agreement and its supplementary 1926 Moscow Protocol (as modified under the 1994 bilateral Agreement) until the conclusion of the 1994 bilateral Agreement or, alternatively, until 2010, since there is also uniform State practice with regard to the freedoms of navigation and overflight as guaranteed by the 1994 bilateral Agreement. However, it is noted in legal literature that a well-established recognition by States is a necessary precondition for the applicability of Article 35(c) of the LOSC.[685] This would above all require the recognition of the strait States themselves. Yet the Viro Strait as a strait falling potentially under the Article 35(c)-exception lacked the recognition (*opinio juris*) of even of its strait States to be considered as such in practice.[686] It follows from the foregoing that the Viro Strait in principle could have qualified as a strait falling under the category of straits regulated by a long-standing convention in terms of Article 35(c) of the LOSC until 1994/2010, but in State practice (*prima facie* Estonia and Finland) it was clearly not considered as such.[687]

It was established that subject to the terms of the bilateral agreement between Estonia and Finland, the Viro Strait has been from 1991 onwards[688] an Article 36-type of strait which includes an EEZ corridor. However, the Viro Strait might have been theoretically also a *sui generis* strait from 1991 until the conclusion of the 1994 bilateral Agreement (which most likely terminated the trilateral treaties as analysed above) as the passage regime provided in the 1925 and 1926 trilateral agreements was in conformity with the LOSC in terms of its Article 311(2).[689] Thus, two parallel legal categories of straits were possibly applicable to the Viro Strait from 1991 to 1994 (or, alternatively, until 2010 if, hypothetically, the 1994 bilateral Agreement did not terminate the trilateral treaties). The primary distinction between the two legal regimes was that under the *sui generis* regime which might have applied under the 1925 and 1926 trilateral treaties (from which at that time Finland had not withdrawn), Finland and Estonia could not have extended their territorial sea up to 12 miles in the Viro Strait absent of prior consent from each other.

It was established above that the 1925 and 1926 trilateral treaties fell into desuetude post-1940 solely on the Soviet Union's part and the treaties apparently remained in force between Estonia and Finland *inter se*.[690] Thus, Estonia

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[684] See *supra* section 3 of Part I.
[685] Caminos 2007, *op. cit.*, p. 583.
[686] Estonia and Finland also did not make a declaration to that effect.
[687] On the discretion of strait States with regard to invoking the Article 35(c)-exception see *supra* section 3 of Part I.
[688] The restitution of Estonia's independence subjected the western part of the Gulf of Finland to the legal regime of straits.
[689] On the *sui generis* straits see *supra* section 2.3 of Part I.
[690] See *supra* section 4.3 of Part IV.

and Finland would have not been obligated under the *sui generis* strait regime to seek Russia's prior consent for the extension of their territorial sea up to 12 miles in the Viro Strait. Yet, until the 1994 bilateral Agreement was concluded, Estonia and Finland apparently could not have extended under the terms of the 1925 trilateral Agreement their territorial sea up to 12 miles in the Viro Strait absent of prior consent from each other. This would have been the essence of the *sui generis* strait regime which might have been applicable to the Viro Strait potentially from 1991 to 1994. Presumably, both States had a veto-right against any planned extension of each other's territorial sea at the expense of the EEZ corridor in the Viro Strait if it threatens the freedoms of the high seas in this maritime area (section 2 of the 1925 trilateral Agreement; section 1 of the 1926 trilateral Protocol), particularly the freedom of navigation and overflight as well as the freedom to lay submarine cables and pipelines (Article 58(1) of the LOSC).[691]

In practice, even if the 1925 trilateral Agreement was acknowledged at the time, it was considered out of date in 2008, as will be subsequently explained. In any case, the question about the applicability of the Article 35(c) and Article 311(2)-exceptions to the Viro Strait do not require a definitive answer due to Finland's withdrawal from the legal framework of the 1925 Helsinki Convention in 2010. The legal implications of this decision will be analysed next.

6. The Termination of the 1925 and 1926 Trilateral Treaties

6.1. Finland's Withdrawal from the 1925 Helsinki Convention

The withdrawal of a State Party from the 1925 and 1926 trilateral treaties is regulated under the 1925 Helsinki Convention and in the provisions of the trilateral treaties.[692] Article 2 of the 1926 Moscow trilateral Protocol provides that "This protocol enters into force and it may be denounced on the same time and manner as the above-referred treaty which is concluded between Estonia, Finland and the Union of Soviet Socialist Republics." Although the 1925 trilateral Agreement does not regulate in detail its termination, denunciation or withdrawal of a State Party, it nevertheless stipulates in section 2 that it is an "inseparable part" of the 1925 Helsinki Convention concluded on the same day.

Article 14 of the 1925 Helsinki Convention provides that "In an instance when one of the States Parties desires to withdraw from this Convention, it needs to file a written notification to the Finnish Government that will immedi-

[691] In this period from 1991 to 1994, neither State had established its contiguous zone in the narrow EEZ corridor of the Viro Strait. Estonia has still not established its contiguous zone under Article 33 of the LOSC. Pursuant to section 3(1) of Finland's Customs Act, the Finnish customs territory extends 2 miles further than the outer limit of the territorial sea, unless otherwise provided in an international agreement. This 2-miles-wide zone was established in 1994. See section 2(5) of the Tullilaki (Customs Act). Adopted 29.04.2016, e.i.f. 01.05.2016.

[692] See also Article 54 of the 1969 Vienna Convention.

ately notify the other contracting States about the date of the withdrawal. The withdrawal from the Convention only concerns the State that did so. It enters into effect after one year from the date when the Finnish Government received it." Thus, under Article 2 of the 1926 Moscow trilateral Protocol and section 2 of the 1925 Helsinki trilateral Agreement in combination with Article 14 of the 1925 Helsinki Convention, the possibility of the termination of the treaty was not foreseen. Instead, only the possibility of unilateral withdrawal from the treaty was provided for.

On February 15th, 2008, the Finnish Government referred to the Parliament a draft Act in which it proposed to withdraw from the 1925 Helsinki Convention since the treaty had become out of date and void of any practical effect between its States Parties as well as due to its conflict with the primary law of the European Union.[693] The draft Act noted that this also concerns the 1925 and 1926 trilateral treaties as they are an "inseparable part" of the Convention.[694] The Finnish Government thus observed that it is not necessary to withdraw from the 1925 and 1926 trilateral treaties separately, but instead as a result of withdrawing from the 1925 Helsinki Convention, Finland would also withdraw from the trilateral treaties.[695] Further, the Government pointed to the Swedish withdrawal from the 1925 Helsinki Convention on May 10th, 2007 due to the same reasons.[696]

Following the deliberations of a committee of the Finnish Parliament on March 7th, 2008,[697] the Parliament accepted the Government's proposal for withdrawing from the 1925 Helsinki Convention on March 26th, 2008, absent of any discussion during either the first or the second reading of the draft Act.[698] The Finnish withdrawal from the 1925 Helsinki Convention came into effect on November 17th, 2010 under the legal act of the Finnish President which repealed the 1925 legal act on the domestic entry into force of the 1925 Helsinki Convention.[699]

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693 HE 10/2008 vp, *op. cit.*, pp. 1–3, 6.

694 Ibid, p. 1.

695 Ibid, pp. 3–4. At the same time, the Government noted in the draft Act that despite withdrawing from the 1925 Helsinki Convention, it still maintains its role as the depositary of the Convention pursuant to Article 14 of the Convention.

696 Ibid, pp. 1–2. The Swedish withdrawal entered into force a year later pursuant to Article 14 of the Helsinki Convention.

697 Hallintovaliokunnan mietintö 2/2008vp, 07.03.2008. – Hallituksen esitys alkoholitavarain salakuljetuksen ehkäisemistä tarkoittavan sopimuksen irtisanomisen hyväksymisestä sekä laiksi Suomen ja Ruotsin välillä yhteisestä valvonnasta alkoholitavarain luvattoman maahantuonnin ehkäisemiseksi tehdyn sopimuksen hyväksymisestä annetun lain kumoamisesta. Accessible in Finnish at: https://www.eduskunta.fi/FI/Vaski/sivut/trip.aspx?triptype=ValtiopaivaAsiakirjat&docid=havm+2/2008 (14.09.2016).

698 HE 10/2008 vp, *op. cit.* – Päätökset. See Täysistunnon pöytäkirja (Stenographic Records of the Plenary Session). 24/2008 vp, 13.03.2008. See also Täysistunnon pöytäkirja 27/2008 vp, 26.03.2008. Accessible in Finnish at: https://www.eduskunta.fi/FI/Vaski/sivut/trip.aspx?triptype=ValtiopaivaAsiakirjat&docid=ptk+27/2008 (14.09.2016).

699 Tasavallan presidentin asetus alkoholitavarain salakuljetuksen ehkäisemistä tarkoittavan sopimuksen voimaansaattamisesta annetun asetuksen kumoamisesta (President's Act

6.2. The Legal Consequences of Finland's Withdrawal from the 1925 Helsinki Convention

Following its *restitutio ad integrum* in 1991, Estonia declared that it inherits its international duties and responsibilities stemming from treaties that were in force in relation to it prior to the loss of its independence in June 1940,[700] except for treaties in regards of which Estonia has explicitly made a declaration to the contrary. Estonia has not withdrawn from the 1925 Helsinki Convention nor from the trilateral treaties concluded to supplement it.[701]

However, it is essentially not possible to argue for the validity of the 1925 and 1926 trilateral treaties subsequent to the Finnish 2010 withdrawal. First, it was established above that the 1925 and 1926 trilateral treaties had fallen into desuetude on the Soviet Union's part after the annexation of Estonia in 1940.[702] Second, even if this would not have been the case and, theoretically, the Russian Federation would have been still a State Party to the 1925 and 1926 trilateral treaties, then the treaties would still have been terminated as a result of Finland's withdrawal due to the fact that the Russian Federation has not recognised Estonia's State continuity.[703] Albeit the overwhelming majority of States did not recognise Estonia's annexation by the Soviet Union and Estonia remained independent *de jure* as well as restored its independence under the principle of *restitutio ad integrum*,[704] it does not bear much legal weight in the context of the validity of the 1925 and 1926 trilateral treaties between Estonia

Repealing the Act on the Entry into Force of the Convention for the Suppression of the Contraband Traffic in Alcoholic Liquors). 956/2010, 12.11.2010. Accessible in Finnish/Swedish at: http://www.finlex.fi/fi/laki/alkup/2010/20100956 (14.09.2016).

[700] D. A. Loeber. Legal Consequences of the Molotov-Ribbentrop Pact for the Baltic States on the Obligation to ´Overcome the Problems Inherited from the Past´. – Baltic Yearbook of International Law 2002, *op. cit.*, p. 138. See Salulaid, *op. cit.*, p. 226. T. Kerikmäe, H. Vallikivi. State Continuity in the Light of Estonian Treaties Concluded before World War II. – 5 Juridica International 2000, p. 31. See also I. Ziemele. State Continuity and Nationality: The Baltic States and Russia. Past, Present and Future as Defined by International Law. Leiden/Boston: Martinus Nijhoff 2005, p. 80.

[701] J. Salulaid as a lawyer of the Estonian Ministry of Foreign Affairs has examined the validity of the pre-1940 multilateral treaties one by one but has not singled out the 1925 Helsinki Convention as a treaty from which Estonia would have withdrawn post-1991 (more precisely, the author did not refer to it at all by contrast to other multilateral treaties). He also notes that Estonia has withdrawn from a pre-1940 multilateral treaty on the basis of the *rebus sic stantibus* clause only in one instance. This concerned the International Convention for Unification of Certain Rules Relating to Maritime Liens and Mortgages (1926). Salulaid, *op. cit.*, pp. 227–229.

[702] *Supra* section 4.3 of Part IV.

[703] Mälksoo 2003, *op. cit.*, p. 64.

[704] Hough, *op. cit.*, pp. 391–447. Mälksoo 2005, *op. cit.*, pp. 72–74, 128–132. In the legal literature on maritime boundary delimitation, the legal continuity of the Baltic States is also acknowledged, albeit initially with some caution. See e.g. E. Franckx. Baltic Sea Update. Report No. 10-14. – J. I. Charney, L. M. Alexander (eds). International Maritime Boundaries, vol. 3. Dordrecht, Boston, London: Martinus Nijhoff 1998, pp. 2562–2563.

and the Russian Federation absent of Russia's recognition of Estonia's State continuity.

The Russian Federation has upon the restoration of Estonia's independence in 1991 consistently maintained that the treaties concluded by the Soviet Union with pre-1940 Estonia became defunct in 1940 due to the termination of Estonia's independence.[705] It would be reasonable to assume that the bilateral treaty relationship between Estonia and the Russian Federation within the framework of the 1925 and 1926 trilateral treaties ended in 1940, since the Russian Federation considers Estonia a new State and Estonia has not claimed that these treaties (unlike e.g. the 1920 Tartu Peace Treaty[706]) are valid in its relations with the Russian Federation. The Russian Federation has so far refrained from recognising the bilateral validity of any pre-1940 treaties which the Soviet Union had concluded with the Baltic States.[707] Hence, as a result of Finland's withdrawal from the 1925 Helsinki Convention, the trilateral treaties may be considered as terminated due to the termination of the bilateral treaty relationship between Finland and Estonia. Therefore, as a result of Finland's withdrawal from the 1925 and 1926 trilateral treaties, it is clear that only the 1994 bilateral Agreement currently regulates passage rights in the Viro Strait.

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[705] See Mälksoo 2005, *op. cit.*, pp. 87–88.

[706] Treaty of Peace between Russia and Estonia. Tartu 02.02.1920, e.i.f. 30.03.1920. Accessible: http://www.worldlii.org/int/other/LNTSer/1922/92.html (14.09.2016).

[707] Ziemele, *op. cit.*, p. 81.

PART V. THE SIGNIFICANCE OF DOMESTIC LAW ON THE INTERNAL WATERS AND STATE CONTINUITY FOR THE LEGAL REGIME OF THE SEA OF STRAITS

In addition to the above-studied legal categories of straits regulated by a long-standing convention (Article 35(c) of the LOSC) and *sui generis* straits (311(2) of the LOSC), another distinct type of straits, namely straits comprising long-standing internal waters (Article 35(a) of the LOSC), is intertwined with historical associations and facts of the past. The close connections between legal history and Article 35(a)-category of straits are studied next in detail in the example of the Sea of Straits in the West Estonian Archipelago.

The Sea of Straits is located between the northern end of the Gulf of Riga and south-western end of the Viro Strait. Thus, similarly to the Irbe Strait, it also links two parts of an EEZ. Yet instead of the transit passage regime, it provides a distinct example of the application of Article 35(a) of the LOSC on straits comprising long-standing internal waters.[708] The process of establishing whether the legal regime of Article 35(a) applies to a strait which is otherwise regulated by either transit or non-suspendable innocent passage regime is in many aspects similar to that of examining the applicability of Article 35(c) of the LOSC to a particular strait. In the case of the Viro Strait, the main problem was determining whether there are any previous international treaties regulating passage rights in this maritime area. After identifying the 1925 and 1926 trilateral agreements as such treaties, their legal effect had to be established.

Likewise, in the case of the Sea of Straits, it bears consideration whether there are any legal instruments under which Estonia might have declared this semi-enclosed sea as its internal waters already prior to the first use of straight baselines by Estonia under its 1993 Maritime Boundaries Act. In case Estonia had considered the Sea of Straits as its internal waters prior to the 1993 Maritime Boundaries Act, then it needs to be established under Article 35(a) of the LOSC whether this legal status of the Sea of Straits was also in effect at the time when the Maritime Boundaries Act entered into force. In any case, Article 35(a) of the LOSC can be applicable to the Sea of Straits only due to its special geographic and legal-historical characteristics.

1. The Characteristics of the Sea of Straits

Etymologically, *Väinameri* stands for the Sea of Straits (in Estonian *väin* means a strait and *meri* a sea) as well as the waterway leading to the River Daugava (Estonian: River *Väina*, *Väinameri* thus implying the sea of/to River *Väina*). Daugava served as an important waterway from Scandinavia to southern Europe in the medieval ages and its river mouth is home to the city of Riga. Yet as the name *Väinameri* was commonly adopted only in the 1930s and prior to that this

[708] On the interpretation of Article 35(a) of the LOSC generally see *supra* section 2.1 of Part I.

maritime area was mostly referred to as the Muhu Strait (hist. *Moonsund)*,[709] it should therefore be presumed that the name *Väinameri* refers to the Sea of Straits.

The size of the Sea of Straits is 2243 km^2, it is up to 35 miles long from north to south (the Muhu Strait) and up to 38 miles wide from west to east (from the Soela Strait to Matsalu Bay). The shallow Sea of Straits includes numerous shoals, shallows and hundreds of islands. Its mean depth is approximately 5 m, but may reach up to 20 m in some areas.[710] Thus, it is not navigable for larger ships,[711] although in extreme instances, ships with a draught of up to 4.9 m have reportedly navigated the Muhu Strait.[712] The Estonian Maritime Administration has been planning to run a project for the reconstruction of shipping routes in the western Estonian archipelago in order to allow ships with a draught of up to 5.5 m to transit the Muhu Strait sealane.[713]

The Sea of Straits falls almost entirely under the European network of nature protection areas (Natura 2000) and includes many Estonian nature reserves,[714] including the Matsalu National Park which extends from Matsalu Bay to the middle of the Sea of Straits near Kumari Island. In view of its fragile ecosystem and relatively dangerous sealanes (e.g. shallow waters, presence of hundreds of islands), the Sea of Straits is sensitive to extensive commercial shipping. The Sea of Straits is mostly navigated by the small craft of the Nordic countries and domestic ferries. In 2013, the ferries transported approximately 2 million passengers and over 800 000 vehicles between the mainland coast and islands of western Estonia.[715]

The historically important north-south waterway from the Gulf of Finland to the Gulf of Riga traverses the Big Strait separating the mainland coast from the Muhu Island (hist. *Moon*) and the Hari Strait between the islands of Hiiumaa and Vormsi (hist. *Ormsö*/*Worms*). This approximately 35-miles-long sealane located in the eastern part of the Sea of Straits is commonly known as the Muhu Strait. Additionally, Vormsi is separated from the mainland coast by the Voosi

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709 Eesti Entsüklopeedia, vol. 10. – Väinameri. Tallinn: Eesti Entsüklopeediakirjastus 1998, p. 548.

710 2001 chart "Väinameri (West-Estonian Archipelago)". Maritime Administration. Charts of Estonia 2001, *op. cit.*, p. 5.

711 M. Kuris (koost). Väinamere hoiuala mereosa kaitsekorralduskava aastateks 2009–2018. Tallinn: Keskkonnaamet 2009, p. 11.

712 A. Lember. Süvendatud laevatee neljakordistab laevade arvu Väinameres. Saarte Hääl, 30.12.2008.

713 See Estonian Maritime Administration. MA Contract for Site Investigations in West Estonian Archipelago. 2008. Accessible: http://www.vta.ee/index.php?id=3660&highlight=archipelago (14.09.2016). The artificial works, such as dredging, which have been carried out in the Sea of Straits before (particularly prior to the First World War when the Rohuküla Port on the eastern coast of the Sea of Straits was established as the naval base of the Russian Empire) do not impact the legal regime of straits as applicable under the LOSC. See e.g. López Martín, *op. cit.*, p. 46.

714 See Kuris, *op. cit.*, p. 4.

715 P. Luts. Saartele reisis läinud aastal ligi kaks miljonit inimest. ERR Uudised, 04.01.2014.

Strait (approx. 8 miles long) which links the Gulf of Finland with Haapsalu Bay as well as the rest of the Sea of Straits.

The Hiiu Strait is located between the islands of Hiiumaa and Saaremaa. It includes the Soela Strait (hist. *Seelesund*) as well as Kassari Bay,[716] and is currently less important as international and internal navigation is not so frequent in the western part of the Sea of Straits. This western passage in combination with the Big Strait is slightly longer than the Muhu Strait.

A shorter link between the Soela Strait and the Gulf of Riga is the Small Strait between the islands of Muhu and Saaremaa. However, this extremely shallow strait is not navigable and hence cannot be used by ships for international navigation. It is also closed by a 3.6-kilometres-long road-dam since 1896.[717] Notably, it has neither been used by foreign aircraft for transiting between the EEZs in the Baltic Sea proper and the Latvian EEZ in the south-eastern part of the Gulf of Riga. Thus, the Small Strait falls under the legal category of non-international straits because it does not meet the functional criterion of an international strait.[718]

2. The Sea of Straits under the Potential Regime of Transit Passage

The Sea of Straits connects the EEZ of Estonia as well as the EEZs of Finland and Sweden in its immediate vicinity with the Latvian EEZ in the south-eastern part of the Gulf of Riga. Thus, it is a waterway of international importance as it leads from Latvia to Sweden, Finland and the Russian Federation. Historically, Estonia considered the Sea of Straits as international straits through which, according to Ants Piip, "passage must be free"[719] similarly to the passage through the territorial sea.[720] This understanding is based on a centuries-long tradition and on the importance of international waterways that cross the Sea of Straits.[721] Likewise, under the contemporary legal framework, the Sea of Straits may potentially be considered as comprising international straits.

Omitting the exceptions of Article 35 of the LOSC, foreign ships should, similarly to the Irbe Strait, enjoy the right of transit passage in the internal

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[716] Taska 1974, *op. cit.*, p. 113. See also Maritime Administration. Charts of Estonia 2001, *op. cit.*, p. 5.

[717] Eesti Entsüklopeedia, vol. 10, *op. cit.*, Väinatamm, p. 548. However, the Estonian Parliament and Government are considering options for opening the Small Strait for small boats by making the necessary adjustments to the dam. See A. Krjukov. Keskkonnakomisjon arutab Väikese väina tammi probleemi. ERR Uudised, 21.09.2015. Marine scientists do not support this idea. See M. Kuul. Teadlased ei toeta Väikese väina tammi avade tegemist. ERR Uudised, 19.09.2016.

[718] In addition, on the question of the applicability of the Article 35(a)-exception, see *infra* section 4 of Part V.

[719] Piip 1926, *op. cit*, p. 11.

[720] Piip 1936, *op. cit*, p. 339.

[721] Taska 1974, *op. cit*, p. 113.

waters of the Sea of Straits under Part III of the LOSC. As the Sea of Straits is used for international navigation from the EEZs of Estonia, Sweden and Finland to the EEZ of Latvia (e.g. for navigating from Stockholm or Helsinki to Riga), Estonia would be prohibited under Part III of the LOSC to suspend the passage of a foreign ship or aircraft in the Sea of Straits as well as in parts of its internal waters leading to the Sea of Straits (e.g. in the Gulf of Riga).

The potential applicability of transit passage in the Sea of Straits has a wide array of implications for Estonia, including in the fields of security, environmental protection and communications. If the regime of transit passage would be applicable to the Sea of Straits, then Russian warships and aircraft would be entitled to transit the straits *en route* to, e.g. Kaliningrad or St. Petersburg. This would run counter to the security interests of Estonia.

Additionally, the applicability of the right of transit passage in the Sea of Straits would strictly exclude under Article 44 of the LOSC the right of the Estonian Maritime Administration to suspend navigation in the Sea of Straits, including in the Big Srait, so as to provide the necessary conditions for the formation of ice and thereby allow the Estonian Road Administration to establish ice-roads between the Estonian mainland coast and islands, including Muhu, Saaremaa and Hiiumaa islands. Thick ice may cover the relatively shallow and semi-enclosed Sea of Straits from the middle of December until the end of April.[722] Also, in the context of a much deliberated plan in Estonia to build a bridge from the mainland coast to Muhu Island,[723] Estonia might potentially have to engineer a bridge (or decide instead in favour of a tunnel) so as to allow more sizeable foreign ships to still transit the Sea of Straits in accordance with Article 44 of the LOSC.[724]

Furthermore, the potentially increasing rate of crossings and particularly transits by larger ships would be burdensome for the particularly sensitive sea area of the Sea of Straits due to *inter alia* oil and noise pollution. It would also threaten the habitats of ringed seals on Sipelgarahu and Ahelaid islets as well as those of the grey seal on the strips of land and rocks in the Sea of Straits, e.g. on Eerikulaid and Pujurderahu. Although Sipelgarahu Islet is located in the middle of the Muhu Strait and thus has relatively heavy vessel traffic, it is prohibited to approach the islet from the sea anywhere closer than 500 m. The same rule also applies with regard to many other islets in the Sea of Straits that are part of the Estonian nature reserves.[725] In case the regime of transit passage would be applicable to the Sea of Straits under international law, Estonia would lose most

[722] Eesti Entsüklopeedia, vol. 10, *op. cit.*, Väinameri, p. 548.

[723] See e.g. A. Peetersoo. Suure väina püsiühenduse planeerimisest Saare maakonnaplaneeringus. Kuressaare: Saare Maavalitsus 2014.

[724] See Case Concerning Passage through the Great Belt (Finland v. Denmark), Order, 29.07.1991.

[725] Section 47 of the Matsalu rahvuspargi kaitse-eeskirja ja välispiiri kirjelduse kinnitamine (Confirmation of the Regulation of the Matsalu National Park and its Outer Limits). Adopted 05.05.1997, e.i.f. 15.05.1997 (RT I 1997, 36, 546). Accessible in Estonian at: https://www.riigiteataja.ee/akt/977195?leiaKehtiv (14.09.2016).

of its control over the vessel traffic in this sensitive area. This would also require profound changes to the Estonian domestic legal framework on the Sea of Straits, as will be discussed subsequently.

3. The Domestic Law of Estonia on Passage Rights in the Sea of Straits

The domestic law of Estonia does not recognise the right of transit passage of foreign ships and aircraft in the Sea of Straits. Section 14(1) of the State Borders Act stipulates that a foreign civil vessel may cross, enter or exit the inland maritime waters in order to proceed to an Estonian port or exit it, sail from the Gulf of Finland to the Gulf of Riga and vice versa, save a human life, prevent an accident or reduce damage arising from an accident or due to *force majeure* or for bunkering. Thus, innocent passage is granted to foreign civil ships crossing the Muhu Strait. The right of innocent passage is not provided for government-operated vessels. More generally, it stems from section 14(1) of the State Borders Act that innocent passage is excluded *in toto* in the Soela Strait, which in combination with the Big Strait leads from the Gulf of Riga to the Estonian EEZ west of Saaremaa and Hiiumaa islands and further to the Swedish EEZ.

Innocent passage in the Muhu Strait, as provided in the State Borders Act, is suspendable. In addition, a foreign vessel may navigate the internal sea only along the shipping route, if established, and by using a pilot.[726] Under Article 22 of the LOSC, the coastal State may require, where necessary having regard to the safety of navigation, foreign ships exercising the right of innocent passage through its territorial sea to use such sea lanes and traffic separation schemes as it may designate or prescribe for the regulation of the passage of ships. This right applies also in such internal waters that fall under the regime of innocent passage (Article 8(2) of the LOSC; in straits comprising long-standing internal waters the coastal State may naturally designate sealanes and traffic separation schemes as well as require the use of a pilot as it deems necessary).[727]

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726 Section 14(4) of the State Borders Act. It is ambiguous whether the requirement of compulsory pilotage has been also practicable with regard to foreign ships absent of any significant exceptions to this rule and whether the Estonian authorities have implemented it in this restrictive manner in practice.

727 In international straits where the innocent passage applies and which do not include long-standing internal waters, the sea lanes and traffic separation schemes must be adopted by taking into account the relevant factors, including the recommendations of the competent international organisation. In this regard, the International Maritime Organization is considered as the only competent international organisation according to the International Convention for the Safety of Life at Sea. The sea lanes and traffic separation schemes have to be indicated on charts and duly published by the coastal State (Article 22(4) of the LOSC). Similarly, foreign ships have the right, under Article 24(2) of the LOSC to receive due information on any danger to navigation, of which the coastal State has knowledge of within its territorial sea. See Nandan, Rosenne, *op. cit.*, pp. 205, 212.

This right of the coastal State is particularly relevant in connection with tankers and ships carrying dangerous or noxious substances (Article 22(2) of the LOSC). Subject to section $14(4^1)$ of the State Borders Act, the requirement to follow a shipping route and use a pilot does not apply to pleasure boats, vessels which enter the internal waters due to *force majeure*, for saving a human life, preventing an accident or reducing damage arising from an accident as well as if a ship proceeds to the internal waters by the shortest route to take a pilot on board or if a ship proceeds to the territorial sea by the shortest route after the pilot has disembarked, in addition to other grounds provided in the Maritime Safety Act.[728]

The procedure for vessels and recreational craft to enter and exit the internal sea, ports and Estonian waters of trans-boundary water bodies[729] adopted by the Government pursuant to section 14(2)(1) of the State Borders Act stipulates in section 1(5) that the captain of a ship is required to notify the Police and Border Guard Board two hours in advance of entering the internal sea or Estonian waters of trans-boundary water bodies. In accordance with section 3(2) and 3(3) of the procedure on entering internal waters, this requirement of notification also applies to vessels entering internal waters in order to save a human life, eliminate marine pollution, for icebreaking purposes or bunkering as well as due to *force majeure*.

Pursuant to sections 6(1) and 6(2) of the procedure to enter the internal sea, a small craft is also required to immediately clear its entrance in a port open for international traffic in order to continue sailing in the internal sea. Additionally, under section 2(1) of the procedure for the issue of permits for entry of foreign military vessels in Estonian territorial or internal waters, foreign military vessels need to apply for a permit from the Ministry of Defence in order to cross the Sea of Straits.

It follows from the foregoing that the applicable legal framework does not recognise the right of transit passage of foreign vessels in the Sea of Straits. Its compatibility with the international law of the sea depends on whether the regime of transit passage and other requirements as provided in the LOSC framework on international straits apply to the Sea of Straits under Article 35(a) of the LOSC.

[728] Meresõiduohutuse seadus (Maritime Safety Act). Adopted 12.12.2001, e.i.f. 01.01.2003 (RT I 2002, 1, 1). Accessible: https://www.riigiteataja.ee/en/eli/518062015003/consolide (14.09.2016).

[729] Laevade ja väikelaevade sisemerre, sadamatesse ning piiriveekogude Eestile kuuluvatesse vetesse sisenemise ja neist väljumise kord (The Procedure for Vessels and Recreational Craft to Enter and Exit the Inland Maritime Waters, Ports, and Estonian Waters of Trans-boundary Water Bodies). Adopted 19.05.2004, e.i.f. 15.06.2004 (RT I 2004, 44, 312). Accessible in Estonian at: https://www.riigiteataja.ee/akt/759321?leiaKehtiv (14.09.2016).

4. The Sea of Straits as Non-International Straits

The Sea of Straits is included within Estonia's straight baselines. Thus, the legal framework on internal waters is applicable to this maritime area. Yet this does not exclude under the LOSC the potential applicability of the transit passage regime. The right of transit passage of foreign ships and aircraft would apply in the Sea of Straits, unless its waters fall under the exceptions provided in Article 35 of the LOSC. Pursuant to Article 35(a) of the LOSC, the right of transit passage would apply to foreign ships in the Sea of Straits if its waters had not been considered as internal waters before the establishment of the Estonian straight baselines.[730]

4.1. The Sea of Straits in light of the 1938 Waterways Act

Prior to its annexation by the Soviet Union in 1940, Estonia had not established a system of straight baselines. According to section 2(1) of the 1938 Waterways Act, only normal baselines were used for determining the 4 mile breadth of the territorial sea. The normal baselines were waterlines along the coast, which implies that the waters bordering it were generally territorial, not internal waters (except for small maritime pockets of internal waters, such as bays) under the 1938 Waterways Act.[731]

Under section 1 of the Waterways Act, Estonia stipulated the width of its territorial sea (4 miles) in its domestic law for the first time in clear terms. However, in view of section 1 of the Estonian Waterways Act, the waters of the Sea of Straits exceeded the 4 mile width of the Estonian territorial sea in some sections. This would have resulted in an unhindered passage for foreign ships in the Sea of Straits. Therefore, section 3 of the 1938 Waterways Act of Estonia provided that straits, which are used for passage between two parts of the high seas and the coasts of which are both situated in the territory of Estonia, are regarded as coastal seas (i.e. territorial sea), unless the breadth of the strait exceeds 10 miles.

Already in the 1930 Hague Codification Conference, Estonia had considered the maximum breadth of a strait to be 10 miles.[732] Erik Brüel has also noted that during the Conference, the committee of experts had limited the maximum breadth of an international strait from 12 miles, as proposed in the preparatory documents, to 10 miles.[733] As Gerard Mangone observes, this exception (opposed by the United States) implied that "when the width of a strait

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[730] See *supra* section 2.1 of Part I.

[731] By comparison, as the Estonian coast is deeply indented and accompanied by over 2000 islands, nowadays the 1993 Maritime Boundaries Act applies a normal baseline a couple of kilometres long only close to the Ontika cliff in Narva Bay. Explanatory Note to the 1993 Maritime Boundaries Act of Estonia*, op. cit.*, p. 2.

[732] Taska 1974, *op. cit*, pp. 114–115.

[733] E. Brüel. International Straits. A Treatise on International Law, vol. I. The General Legal Position of International Straits. London: Sweet & Maxwell 1947, p. 177.

exceeded “two belts” of the territorial sea, the waters between the belts would be high seas, *except* that where the area between the belts was not greater than two miles, it could be assimilated into the territorial sea of the coastal state or states.”[734] Estonia had approved this exception.[735]

Nevertheless, the United Kingdom decided to protest against section 3 of the Waterways Act:

> “His Majesty’s Government are only able to recognise the whole of the waters of a strait as territorial waters if the width of each entrance does not exceed six miles and both shores belong to the same country. In straits the entrance of which exceeds six miles in width, territorial waters are, in the view of His Majesty’s Government, limited to a belt three miles in width on either side and following the sinuosities of the Coast.”[736]

The Estonian Government did not reply to this protest specifically. Yet the Ministry of Foreign Affairs instructed on December 15th, 1939 the Estonian Ministries of Interior, Roads and War to apply the 3-miles-wide territorial sea in times of war.[737]

The sole maritime area along the coast of Estonia that met the requirements of section 3 of the Waterways Act was the Sea of Straits.[738] The Sea of Straits was thereby considered Estonia’s territorial sea, thus excluding the high seas in its central part.[739] This was aimed at omitting the right of innocent passage of foreign warships through the Sea of Straits (with the exceptions of *force majeure*, distress or in cases of serious harm), unless an agreement had been concluded to that effect or unless the Estonian authorities had granted prior permission for such passage.[740]

Thus, on the basis of solely the 1938 Waterways Act, the maritime area of the Sea of Straits was not part of the internal waters of Estonia prior to the establishment of its straight baselines under the 1993 Maritime Boundaries Act. Pursuant to Article 35(a) of the LOSC, the legal regime of straits as provided in Part III of the LOSC would hence apply to the Sea of Straits if the 1938 Waterways Act alone was taken into account.

Some authors have come to the conclusion that non-suspendable innocent passage should apply to the Sea of Straits, although they have neither taken into account the above-referred exception provided in Article 35(a) of the LOSC nor the Estonian legal acts prior to 1940 in this connection.[741] Caminos and Cogliati-Bantz have followed López Martín’s classification of the Sea of Straits

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[734] Mangone, *op. cit.*, p. 396.
[735] Brüel, vol. I, *op. cit*, p. 180.
[736] ERA.957.14.583, p. 10.
[737] Ibid, p. 5.
[738] See also the press article on the adoption of the Waterways Act in Uus Eesti 23.01.1938, *op. cit.*, p. 1.
[739] See also Taska 1974, *op. cit.*, pp. 114, 157.
[740] See Uus Eesti 23.01.1938, *op. cit.*, p. 1.
[741] See Caminos, Cogliati-Bantz, *op. cit.*, p. 166. López Martín, *op. cit.*, p. 99.

as falling under the regime of non-suspendable innocent passage.[742] They have thus pointed to the incompatibility of Estonia's requirement of prior authorisation for nuclear-powered ships and ships carrying nuclear or other inherently dangerous or noxious substances or materials to transit the Sea of Straits.[743] The United States also does not recognise the requirement stipulated in Article 14[1] of the State Borders Act of Estonia, according to which for entry in the inland maritime waters of a foreign vessel with a nuclear engine or which is carrying a nuclear weapon or radioactive substances on board or for entry of another vessel used for national non-commercial purposes, the foreign state shall apply for a diplomatic clearance from the Ministry of Foreign Affairs through diplomatic channels at least 14 calendar days before the planned entry.[744]

Yet these views and classification of the Sea of Straits are not correct. This can be explained by the fact that the legal regime applicable to the Sea of Straits has thus far not been subject to any in-depth scrutiny. It is not possible to provide a definitive classification on this matter absent of archival materials. It follows from the domestic law of Estonia that in spite of the absence of an internationally recognised methodology for establishing straight baselines prior to the termination of Estonia's independence in 1940, Estonia had declared a considerable part of its coastal waters as internal waters. This matter is further considered in the next section.

4.2. The Passages to the Sea of Straits Proper as Long-Standing Internal Waters in the Context of the 1938 Nordic Rules of Neutrality

Some parts of the Estonian maritime area were already declared internal waters in 1918. Pursuant to Article 2 of the 1918 Estonian Temporary Administrative Laws, the cannon-shot rule was used for delimiting bays and their inner parts over which it was possible to exercise complete dominion from the coast. These waters formed the internal waters of Estonia. This regulation was in force until 1938 when it was replaced with the Waterways Act which, however, did not distinguish bays (formerly internal waters) from the territorial sea.

However, in the autumn of 1938, the Neutrality Act was passed by the Estonian Parliament. It provided in section 2(3) that the Estonian internal waters shall be deemed to include ports, entrances to ports, gulfs and bays, and the waters between those Estonian islands, islets and reefs which are not constantly submerged, and between the said islands, islets and reefs and the mainland. Internal waters of Estonia, as well as of Finland (incl. its Archipelago Sea),[745]

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[742] The authors have not taken the Latvian EEZ in the Gulf of Riga into account, which is why this categorisation is not correct in any case, since the Sea of Straits would *prima facie* fall under the regime of transit passage.

[743] Caminos, Cogliati-Bantz, *op. cit.*, p. 166.

[744] See US Navy Judge Advocate General's Corps. – Estonia, *op. cit.*

[745] See Article 2(2) of Suomen puolueettomuutta koskevia määräyksiä (Neutrality Act), 17/1938. Accessible in Finnish at: https://www.finlex.fi/fi/sopimukset/sopsteksti/

thus comprised maritime areas that were strongly connected to the coast due to the location of bays[746] or islands. The Neutrality Act was proclaimed by the Estonian President on December 3rd, 1938.[747]

The explanatory note of the draft law underlines that the Neutrality Act of Estonia was drafted on the basis of the neutrality acts that were adopted in 1938 by Denmark, Finland, Norway and Sweden, all of which had been harmonised between those States.[748] Although the explanatory note does not refer to Iceland, it was also a signatory State to the Declaration between Denmark, Finland, Iceland, Norway and Sweden for the Purpose of Establishing Similar Rules of Neutrality.[749] On the basis of the Scandinavian rules of neutrality, as stipulated in the 1938 Declaration,[750] the above-referred countries adopted domestic legislation on neutrality which pertained *prima facie* to the law of the sea from the perspective of the coastal State's maritime security in times of war.

Estonia took the Swedish Neutrality Act as an example and made only few modifications so that its Neutrality Act would better suit its needs.[751] With the aim of establishing a harmonised legal framework in the coastal States of the Baltic Sea, the Estonian Government sent its draft law on neutrality to the Latvian and Lithuanian governments a couple of days after its referral to the Estonian Parliament on October 1st, 1938.[752] On November 18th, 1938, the foreign ministers of Estonia, Latvia and Lithuania signed in Riga a protocol which had

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1938/19380017 (14.09.2016). See also ERA.957.14.627, p. 2. Article 2(2) of the said Act provided analogously to the Estonian above-referred provision that
"Suomen sisäisillä aluevesillä tarkoitetaan tässä asetuksessa Suomen satamia, satamaväyliä, lahtia ja lahdelmia sekä niitä osia Suomen aluevedestä, jotka ovat Suomelle kuuluvien saarien, luotojen ja ainakin ajoittain vedenpinnalla näkyvien karien sisäpuolella tai välissä."

746 E.g. Tallinn Bay along the line between the islands of Aegna and Naissaar, as well as Paldiski Bay along Pakri Islands and Pärnu Bay taking also into account with the islands of Manilaiu, Sorgu and Kihnu. This also included Matsalu and Haapsalu bays in the Sea of Straits.

747 Rahvusraamatukogu. Meie parlament ja aeg: VI Riigikogu (Riigivolikogu ja Riiginõukogu) 17.04.1938 – 05.07.1940. Accessible in Estonian at: https://www.nlib.ee/html/expo/p90/p1/38.html (14.09.2016).

748 ERA.957.14.561, p. 3. On the minor variations between the otherwise identical acts see N. J. Padelford. The New Scandinavian Neutrality Rules. – 32 The American Journal of International Law 1938 (4), pp. 789–790.

749 Declaration between Denmark, Finland Iceland, Norway and Sweden for the Purpose of Establishing Similar Rules of Neutrality. Stockholm 27.05.1938. Accessible: http://www.histdoc.net/history/nordic1938_en.html (14.09.2016). For the text of the Declaration see also: Denmark-Finland-Iceland-Norway-Sweden: Declaration Regarding Similar Rules of Neutrality. – 32 The American Journal of International Law 1938 (4), pp. 141–163.

750 The Scandinavian Neutrality Rules were drafted on the basis of meetings of the foreign ministers in April 1937 (Helsinki), September 1937 (Stockholm) and in April 1938 (Oslo). See ERA.957.14.627, p. 20(verso).

751 ERA.957.14.561, pp. 3–4.

752 ERA.957.14.563, p. 3.

been discussed earlier by experts of the three Baltic States in Tallinn on November 3rd, 1938.[753]

The protocol – essentially a counterpart to the 1938 Scandinavian declaration – stipulated the neutrality rules of Estonia, Latvia and Lithuania and included the text of the rules. The rules were drafted on the basis of the Estonian Neutrality Act.[754] Upon the Estonian proposal,[755] the Protocol foresaw prior consultations between the three Baltic States in case any of them should decide to introduce any modifications to their domestic Neutrality Act diverging from the Baltic neutrality rules as agreed between them in the text of *Loi portant réglementation de la neutralité*.[756] Latvia and Lithuania thereby adopted the definition of internal waters as provided in the Estonian Neutrality Act.[757] In broader terms, all the northern countries – Denmark, Finland, Iceland, Sweden, Norway and the three Baltic States – adopted an identical general definition of internal waters in 1938.[758]

As examined below,[759] it appears that only the United Kingdom explicitly objected to the adoption of this definition of internal waters in the Estonian Neutrality Act (as it did also with the other Nordic States). Yet, as noted by Estonia and the other Nordic States in their replies to the United Kingdom's protest,[760] this particular definition had already been settled in the 1912 Scandinavian Rules of Neutrality in the spirit of the 1907 Hague Convention XIII.[761] Section 1(c) of the 1912 Scandinavian Rules of Neutrality stipulated that "Interior waters include, in addition to ports, entrances to ports, roads and bays, the territorial waters situated between islands, islets, and reefs which are not constantly submerged, and between these and the mainland."[762] This definition is the same as that included in the 1938 Nordic Neutrality Rules (except

[753] See a copy of the protocol in ERA.957.14.562, p. 2.
[754] See the text of the Baltic neutrality rules in, ibid, pp. 3–8.
[755] ERA.957.14.563, p. 7.
[756] ERA.957.14.562, p. 2. Analogously, the Scandinavian neutrality rules provided that, "And have agreed that, should any of them desire, in the light of their own experience, to modify the said Rules, as contemplated by the Convention on the Rights and Duties of Neutral Powers in Naval War, signed at The Hague on October 18th, 1907, they shall not do so without first giving, if possible, sufficient notice to the other four Governments to permit of an exchange of views in the matter." See the 1938 Declaration between Denmark, Finland, Iceland, Norway and Sweden, *op. cit.*
[757] ERA.957.14.562, p. 3.
[758] ERA.957.14.561, p. 3.
[759] See *infra* section 4.3 of Part V.
[760] See *infra* section 4.3 of Part V.
[761] Convention (XIII) concerning the Rights and Duties of Neutral Powers in Naval War. The Hague 18.10.1907, e.i.f. 26.01.1910.
[762] Declaration by Norway, Denmark and Sweden relative to the Establishment of Uniform Rules of Neutrality. Stockholm 21.12.1912. See also Rules of Neutrality established by order of H. M. the King of Norway. 18.12.1912, section 1(c). Both accessible: Declaration by Norway, Denmark and Sweden Relative to the Establishment of Uniform Rules of Neutrality. – 7 The American Journal of International Law 1913(3), pp. 187–191.

some minor differences in wording) as well as in section 2(3) of the Estonian Neutrality Act.

It appears that in the course of this nearly three decades long timeframe, the United Kingdom was the principal and seemingly the only protesting State against the neutrality rules (incl. the definition of internal waters). On this basis, it may be concluded that generally, other States tacitly accepted the definition of internal waters as included first in the 1912 Scandinavian Rules of Neutrality and repeated in the 1938 Neutrality Acts. The Estonian Neutrality Act falls into this broader context.

As examined below, even the content of the United Kingdom's protest against the Estonian Neutrality Act overlapped with those protests made against the other Nordic States. Likewise, Estonia's reply to the United Kingdom's protest was almost a verbatim copy of its Nordic counterparts' responses. As the Estonian archival materials include no indication that any other State aside the United Kingdom protested against the 1912 Scandinavian Rules of Neutrality and its 1938 counterpart, it is reasonable to suggest that States tacitly acquiesced to the definition of internal waters as included *inter alia* in the 1938 Estonian Neutrality Act.

The passages to the Sea of Straits – Hari Strait, Voosi Strait, Soela Strait and Big Strait, as well as Small Strait – meet the conditions of the above-cited section 2(3) of the 1938 Neutrality Act. They are narrow passages with a width of no more than 2.5 miles – although the absolute width of the Hari Strait and the Big Strait is slightly greater, their width in terms of section 2(3) of the 1938 Neutrality Act should be measured on the basis of the maximum distances between the islands that are located in the strait (incl. the islets of Viirelaid (hist. *Pater Noster*), Kesselaid (hist. *Sköld/Schildau*) and Harilaid (hist. *Hares*)). Thus, the passages to the Sea of Straits proper satisfy the criteria of section 2(3) of the 1938 Neutrality Act and should be considered in terms of Article 35(a) of the LOSC as such internal waters that were internal waters also prior to the establishment of straight baselines by Estonia. Hence, the right of transit passage does not apply in the Sea of Straits.

The current Estonian domestic legal framework on passage rights in the Sea of Straits is thus generally in conformity with the LOSC. This follows also from the teleological interpretation of Article 35(a) of the LOSC since, as the transit passage does not apply in the passages to the Sea of Straits, then even if such a right would potentially exist in small maritime pockets in the Sea of Straits proper, e.g. in some sections of the Hiiu Strait[763] or Muhu Strait, it would be void of any practical meaning because, in any case, foreign ships and aircraft would not have the right of transit passage for reaching these small maritime areas.

[763] In the 1920s and 1930s as well as in the 19th century, this maritime area was commonly known as Kassari Bay. Since section 2(3) of the Neutrality Act refers explicitly to bays as internal waters, this maritime area should, following the literal interpretation, also be considered as internal waters. See maps: ERA.T-6.3.1249, p. 1, ERA.T-6.3.1250, p. 1, ERA.T-6.3.1251, p. 1, ERA.T-6.3.1302, p. 1.

Due to the above-mentioned reasons, the passages in the Sea of Straits should not be considered international straits. Instead, they are non-international straits in terms of LOSC Article 35(a) through which foreign ships and aircraft cannot exercise transit passage. Likewise, as will be examined next, the Sea of Straits proper (in addition to its passages) also meets the criteria of Article 35(a) of the LOSC.

4.3. The Sea of Straits Proper as Long-Standing Internal Waters

As in respect of all the other Nordic countries that adopted the neutrality rules in 1938,[764] the British Foreign Office made certain protests in its memorandum[765] of June 5th, 1939 against some of the provisions of the Estonian Neutrality Act. The Estonian Ministry of Foreign Affairs replied to the British Foreign Office on October 2nd, 1939 by stating *inter alia* that

> "The Estonian Government wishes to point out that the rules of international law which regulate neutrality often comprise only a minimum of obligations necessary for safeguarding neutrality. It is quite clear in such cases that a neutral State is entitled, within the limits of its sovereignty, to issue, at its own discretion and for the protection of its interests, more extensive rules than those prescribed by international law.
>
> In the sphere of neutrality law, new situations may arise for the regulation of which no precedent producing recognised principles of international law and practice can be invoked. In cases where neither any precise international rules nor the generally accepted principles of international law give direct guidance, every particular State has to decide for itself in which way and by which means its position as a neutral should most appropriately be maintained."[766]

These passages in the Estonian reply, just like most of the others, were identical to the ones in the prior responses made by the Nordic countries to the British protest. Also, as a standard reply to the British Foreign Office with regard to its comments on the Nordic definition of internal waters, the Estonian Ministry of Foreign Affairs explained that

> "The Estonian Government has adopted for the definition of the interior waters the principles embodied in the Neutrality Rules of 1912 of the Scandinavian States. The Estonian Government has, in consequence, introduced into their legislation no innovation unknown to the international practice."[767]

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[764] ERA.957.14.563, p. 5.

[765] An analogous memorandum was presented by the British Foreign Office to the governments of all the northern countries that adopted the neutrality act in 1938, including Finland, Latvia, Lithuania and Sweden. Ibid, pp. 5–6. See also ERA.957.14.768, pp. 1–5.

[766] ERA.957.14.590, pp. 5–6.

[767] Ibid, p. 7.

This reply followed *mutatis mutandis* the words of *inter alia* the Swedish and Finnish responses to the British Foreign Office,[768] which also referred to the 1912 Declaration by Denmark, Norway and Sweden of Neutrality and Rules of Neutrality. Yet the Estonian response included also an exceptional clause, according to which,

> "At the same time, it should be realised that the interior waters as defined by this law do not in practice extend beyond the limits of the Estonian territorial waters."[769]

Notably, the breadth of the Sea of Straits exceeded the 8 miles breadth of the territorial sea of Estonia as provided in the 1938 Waterways Act and measured from the opposite coasts of the Sea of Straits. Ants Piip noted in 1926 that the coastal State has the same rights over its straits that apply to its coastal sea (i.e. territorial sea), which implies that if the breadth of a strait is narrower than the double breadth of the territorial sea, it is wholly a coastal sea (i.e. territorial sea).[770] According to this rule, the central area of the Sea of Straits would have been high seas which would not have been covered by the initial 3-miles-wide or, as of 1938, the 4-miles-wide territorial sea. It follows from this that in terms of section 2(3) of the Neutrality Act, Estonia's internal waters could neither have covered this central maritime area. However, as discussed above, section 3 of the 1938 Waterways Act provided that the waters of the Sea of Straits are part of the territorial sea of Estonia.

The neutrality acts of 1938 did not provide for a specific limit for the breadth of the coastal State's internal waters. However, an early draft of the 1938 Estonian Neutrality Act included handwritten amendments to its section 2(3), according to which the limit of the internal waters would have been "up to four nautical miles."[771] Most likely, this proposal for the modification of section 2(3) was abandoned in order to maintain the uniform wording of the definition of internal waters with the Nordic neutrality rules. However, it might have also been wise since, as confirmed by the Estonian Ministry of Foreign Affairs in its afore-referred reply to the British Foreign Office, the internal waters of Estonia did not extend beyond the limit of its territorial sea.

Namely, the limit of the breadth of the Estonian territorial sea in the Sea of Straits differed from the usual 4 miles and was instead up to 5 miles. If section 2(3) of the Neutrality Act would have stipulated as the limit of the width of Estonia's internal waters 4 miles, then it would have resulted in the exclusion of the possibility to consider the whole maritime area of the Sea of Straits as internal waters. Under section 2(3) of the Neutrality Act, the whole maritime area of the Sea of Straits may be considered as internal waters due to its deeply indented coastline that encloses the Sea of Straits and the presence of hundreds

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[768] See the Swedish and Finnish replies in: Ibid, pp. 36–38 and 53–54.
[769] ERA.957.14.590, p. 7.
[770] Piip 1926, *op. cit.*, p. 11.
[771] ERA.957.14.590, p. 11.

of islands which extend in many sections even to the most distant maritime areas in the centre of the Sea of Straits.[772]

In the Northern Baltic Sea, the Article 35(a)-exception of the LOSC thus applies to the Sea of Straits in Estonia, but most likely also to the multiple straits in the Åland region of Finland, both areas of which are part of the internal waters of the coastal State under the Nordic neutrality rules of 1938. It is also likely that it applies to the narrow Kalmarsund in Sweden. Albeit Gunnar Alexandersson regarded Kalmarsund as an international strait,[773] it may not be considered as such since its waters, which are in many sections not more than 2 miles wide, may potentially be considered as falling under the definition of internal waters under section 2 of the 1938 Nordic neutrality rules.

In particular, the Swedish 1938 Neutrality Act[774] included in its section 2 a definition of internal waters which was identical with the one provided in the Estonian Neutrality Act, except for a clause according to which the Swedish waters in Øresund are not internal waters, save for the ports and entrances to the ports in Øresund.[775] It did not provide for any exception with regard to Kalmarsund, the waters of which are even narrower (in many sections approx. 2 miles or less) as compared to the waters of Øresund. In contemporary legal literature it is usually understood that under Article 38(1) of the LOSC, the above-referred Messina clause should apply to Kalmarsund.[776] Yet in light of the foregoing, under section 2 of its 1938 Neutrality Act, it might be possible for Sweden to exclude, in accordance with Article 35(a) of the LOSC, the right of transit and innocent passage in the strait altogether.

The above-referred conclusion on the application of the LOSC Article 35(a)-exception to the Sea of Straits is further confirmed by the fact that already on May 2nd, 1923, a high-level Estonian Government commission (comprised of representatives of the Ministries of Foreign Affairs, War and Interior as well as the Maritime Administration) composed a map of the outer limits of the Estonian maritime zones upon the request of the Parliament and the decision of the Government (dated March 21st, 1923) in which they declared that "the Muhu

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[772] By contrast, e.g. the waters north of Ruhnu Island cannot meet the conditions of section 2(3) of the Neutrality Act. See map 3 in Annex 1. It depicts the outer limit of the Estonian 3-miles-wide territorial sea (incl. in the Gulf of Riga). The outer limit of the Estonian pre-1940 internal waters may have in some instances nearly overlapped with that line (particularly in regards to the Abruka archipelago but to a great extent also in connection with the Kihnu archipelago). Generally, the rest of the maritime area north of Ruhnu Island would not be covered by the Article 35(a)-exception and would be subject to the regime of transit passage. In case of the Latvian maritime area, where there are no islands and the coastline is smooth, the spatial extent of the transit passage regime has even lesser constraints.

[773] G. Alexandersson. The Baltic Straits. The Hague/Boston/London: Martinus Nijhoff 1982, p. 69.

[774] Innefattande vissa neutralitetsbestämmelser (Neutrality Act). 1938, No. 187, 27.05.1938, section 2(2).

[775] ERA.957.14.590, p. 29. ERA.957.14.583, p. 31.

[776] López Martín, *op. cit.*, p. 95. Alexander 1991, *op. cit.*, p. 101. Platzöder, *op. cit.*, p. 148.

Strait [at the time, this was the common name used for Väinameri since the term "Väinameri" was adopted only in the latter part of the 1930s[777] – A. L] stays completely within the internal waters of Estonia", while "the Estonian Republic permits innocent passage through it for all ships".[778] At the same time, it is unclear on what legal basis the commission declared the whole Sea of Straits as internal waters. Since the width of the Estonian territorial sea was 3 miles in the 1920s,[779] it would have been clearly insufficient for covering the whole maritime area of the Sea of Straits. Nevertheless, the decision of this commission and its accompanying map (presented to the Government and the Parliament) shows clearly Estonia's intent to regard the Sea of Straits as wholly comprising internal waters.

In fact, although Estonia generally granted permission to foreign ships for exercising the right of innocent passage in the Estonian territorial sea,[780] in at least one instance it refused to grant permission and this concerned in particular the Sea of Straits. On June 14th, 1934, the German Embassy in Tallinn sent a Verbal Note to the Estonian Ministry of Foreign Affairs requesting permission for its cruiser *Königsberg* to enter Tallinn port, for its first minesweeper flotilla (comprised of five minesweepers accompanied by a torpedo boat) to enter Narva port as well as the right for them to stay in Tagalaht (bay on the northwest coast of Saaremaa) and transit the Soela Strait, Kassari Bay, Muhu Strait, Gulf of Riga and Irbe Strait as well as for its second torpedo boat flotilla to transit the Muhu Strait and the Irbe Strait.[781]

As usual, the Estonian Ministry of Foreign Affairs requested the position of the Estonian Defence Forces Board on the German request. The Defence Forces Board was not against the entrance of the German cruiser into Tallinn port nor the stay of minesweepers in the Tagalaht and their transit through the Irbe Strait, but found the potential entrance of the minesweepers into Narva port unacceptable since it would create a precedent which might be followed by similar requests by other States, including the Soviet Union (it also noted that the River Narva is not sufficiently deep for the minesweepers). The Defence Forces Board also deemed the requested right of transit through the Soela Strait, Kassari Bay and Muhu Strait as unacceptable, since it may be followed by analogous counterclaims by the Soviet Union.[782] A corresponding Verbal Note by the Ministry of Foreign Affairs was sent to the German Embassy in Tallinn on

[777] Eesti Entsüklopeedia, vol. 10, *op. cit.*, Väinameri, p. 548.
[778] ERA.957.12.389, p. 11. See also map 3 in Annex 1.
[779] See map 3 in Annex 1.
[780] See ERA.957.14.85, pp. 1–61, ERA.957.14.347, pp. 1–36, ERA.957.14.617, pp. 17–27, ERA.957.14.618, pp. 1–4.
[781] ERA.957.14.85, pp. 17–18.
[782] Ibid, p. 19.

June 26th, 1934.[783] Notably, the ministry did not refer to any legal basis for its refusal.[784]

The Defence Forces Board also noted, however, that foreign warships have previously transited the Muhu Strait, including German torpedo boats in 1927.[785] It also referred to the 1920 Riga Agreement,[786] concluded in the Buldur Conference between Estonia, Finland, Latvia and Poland, according to which the Finnish, Latvian and Polish navies may use the Muhu Strait for innocent passage, which they, indeed, repeatedly made use of.[787] It thus follows from the foregoing that due to the apparent absence of an applicable domestic law, the Estonian authorities' refusals from granting the right of innocent passage in the Sea of Straits to foreign warships was based on custom, rather than on any legal basis derived from international law. It seems that Germany did not protest against this decision.

However, as will be examined below, Germany was one of the two States (the other being the United Kingdom) that filed a protest against the extension of the Estonian territorial sea up to 4 miles in 1938 under the Waterways Act. The existence of the EEZ in the Gulf of Riga might thus have a significant effect for Estonia as it resulted potentially in the application of the right of transit passage in the Sea of Straits for States that may uphold their protest against the 1938 Neutrality Act and Waterways Act. It thus necessitates further scrutiny on whether the transit passage regime may be applicable in the Sea of Straits to the ships and aircraft of such States.

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783 Ibid, p. 20.

784 Procedurally, the right to such refusal was most likely based on the Välisriikide sõja-laevade külaskäikude kord (*Reglement Concernant la Visite de Batiments de Guerre Etrangers en Estonie*). Adopted 18.10.1922, e.i.f. 18.10.1922. For the French version of the text, see ERA.957.3.30, pp. 2–5.

785 See ERA.957.14.85, p. 19.

786 Proposal adopted in the joint session of political and military commissions on the freedom of passage of foreign warships in the waters of the contracting States. Riga 04.09.1920. For the versions of the proposal in Estonian and Russian, see ERA.957.11.383, pp. 9–10. The proposal was affirmed by the Latvian Government on October 10th, 1920 and by the Estonian Government on October 31st, 1924. Ibid, pp. 3, 7.

787 ERA.957.14.85, p. 19. See also ERA.957.14.617, pp. 24–27. The 1920 Riga Agreement (originally concluded in Russian) comprises two sections. Its first section regulates the use of ports by the contracting States' warships whereas the second section provides for "complete freedom of navigation for training purposes" for the warships of Estonia, Finland, Latvia and Poland in their territorial waters. As the result of the 1938 Neutrality Act, the Sea of Straits became part of the Estonian internal waters, which is why the second section of the 1920 Riga Agreement should not be considered applicable to this maritime area anymore and therefore not, in any case, as falling under the exception of Article 35(c) of the LOSC.

5. The Applicability of the Messina Exception to the Sea of Straits

The extension of the width of the Estonian territorial sea to 4 miles under section 1 of the 1938 Waterways Act triggered protests from the United Kingdom and Germany. They were exceptional in that such protests had not been filed against the 4-miles-wide territorial sea of e.g. Finland or Sweden, although the latter (unlike the former) had declared its territorial sea 4 miles wide in its domestic law.[788] Analogously to Germany, which sent its Verbal Notes against section 1 of the Waterways Act to the Estonian Ministry of Foreign Affairs on May 30th, 1938 and March 30th, 1939,[789] the British Embassy in Tallinn directed its protest against *inter alia* section 1 of the Waterways Act on March 24th, 1939, stating that

> "As the Estonian Government are doubtless aware His Majesty's Government are unable to recognise any claim to jurisdiction over waters beyond the limit of three miles from low water mark, following the sinuosities of the Coast."[790]

The Estonian Ministry of Foreign Affairs replied to the British *Chargé d'Affaires* in Tallinn on November 25th, 1939:

> "Considering that there exists no generally recognised international rule concerning the extent of territorial waters, the Estonian Government claims the right to fix for themselves the extent of the Estonian territorial waters.
>
> Nevertheless, they take notice of the British Government's objection and, in particular, are prepared to take into account the British point of view as regards enactment of neutrality in case of war. They are namely prepared to limit, by way of exception to the provision fixing the extent of their territorial waters in peace time and in accordance with the generally accepted international rule, to three miles the extent of their territorial waters for the purpose of application of their neutrality law in respect of belligerent powers."[791]

An identical Verbal Note was sent to the German Embassy in Tallinn on December 2nd, 1939.[792] The German Government upheld its protest in a Verbal Note sent to the Estonian Government on February 7th, 1940 in spite of the above-referred explanations made by the Estonian Ministry of Foreign Affairs.[793]

The protests made by the United Kingdom and Germany in respect of section 1 of the 1938 Waterways Act are relevant for the contemporary passage

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[788] ERA.957.14.583, pp. 29–30. By contrast to Sweden, the width of the Finnish territorial sea was established in the 1920 Tartu Peace Treaty, as discussed above.

[789] Ibid, pp. 2–3.

[790] Ibid, p. 10.

[791] Ibid, p. 7.

[792] Ibid, p. 6.

[793] Ibid, pp. 8–9.

regime in the Sea of Straits since, on this basis, these two States might not consider the Sea of Straits as entirely comprising long-standing internal waters in terms of Article 35(a) of the LOSC. Thus, it is not ruled out that the United Kingdom and Germany consider themselves not bound by the exclusion of the transit passage in the Sea of Straits under Estonia's domestic law in case they should uphold their protests against section 1 of the Waterways Act.[794] In such an instance, both States should also reason why they do not consider the passages to the Sea of Straits as having fallen entirely under the regime of internal waters in terms of section 2(3) of the Neutrality Act, as discussed above.[795] Also, the Russian Federation may object to the concept of long-standing internal waters in the Sea of Straits on the basis of its rejection of Estonia's State continuity.

Yet in this case, it is doubtful that the regime of transit passage would apply to the Sea of Straits in respect of the protesting States. According to Article 38(1) of the LOSC, all ships and aircraft enjoy the right of transit passage, which shall not be impeded in straits that connect two parts of an EEZ; except if the strait is formed by an island of a State bordering the strait and its mainland, transit passage shall not apply if there exists seaward of the island a route through an EEZ of similar convenience with respect to navigational and hydrographical characteristics. This exception for the inapplicability of the regime of transit passage was included in the LOSC expressly in reference to the Messina Strait between Sicily and Italy's mainland and hence is commonly known as the *Messina exception*.[796]

The Sea of Straits is entirely bordered by Estonia, thus meeting the first criterion of Article 38(1) of the LOSC. Yet only the Big Strait (between Muhu Island and the mainland coast) and the Voosi Strait (between Vormsi Island and the mainland coast) are formed by an island and the Estonian mainland in literal terms of the provision. It is possible to navigate via the Big and Voosi straits from the Gulf of Finland to the Gulf of Riga. However, the Muhu Strait, which is commonly used for such navigation, comprises the Big Strait and the Hari Strait. Unlike the Big Strait, the Hari Strait is formed by two islands (Vormsi Island and Hiiumaa Island) similarly to the Hiiu Strait between Hiiumaa Island and Saaremaa Island and the currently non-navigable Small Strait between Saaremaa Island and Muhu Island.

Therefore, some of the straits in the Sea of Straits do not meet the literal terms of Article 38(1) of the LOSC. By contrast, it is clear that since the maritime area of the Muhu Strait (north-south passage in the Sea of Straits) is generally formed by Hiiumaa Island and the Estonian mainland (northern east-west

[794] The United Kingdom also protested against section 3 of the 1938 Waterways Act that provided the extended width of the Estonian territorial sea in the Sea of Straits. See *supra* section 4.1 of Part V.

[795] See *supra* section 4.2 of Part V.

[796] See Caminos, Cogliati-Bantz, *op. cit.*, p. 46. López Martín, *op. cit.*, p. 93. In 1992, only 19 straits had been identified as falling under the Messina exception. See Rothwell 1992, *op. cit.*, p. 474.

section of the strait) as well as Muhu Island and the Estonian mainland (southern east-west section of the strait), the strait geographically satisfies the criteria of the Messina exception.[797] As analysed above, the same might not necessarily apply in regards to the Hiiu Strait (east-west passage in the Sea of Straits with very light traffic). Although the exception would not apply to the Small Strait either, this is practically irrelevant since, due to its shallow waters and a road-dam (since 1896), it does not have any vessel traffic.

However, despite the potential inapplicability of the Article 38(1)-exception to the Hiiu Strait under its literal terms, under the teleological interpretation of the said provision, it might still be considered as exempted from the transit passage regime. This follows from the fact that since the transit passage regime could not apply to the Muhu Strait under Article 38(1) of the LOSC, it would not be possible to exercise continuous and expeditious transit of the Sea of Straits through neither of its possible routes: neither from the EEZ in the Gulf of Finland nor from the Latvian EEZ in the Gulf of Riga to the EEZ in the Baltic Sea proper west of Saaremaa and Hiiumaa islands. Particularly, the ships or aircraft transiting the Sea of Straits would have to cross either the northern or southern section of the Muhu Strait.

It may be presumed that the object and purpose of the Messina exception in Article 38(1) of the LOSC is not to establish in the waters of an archipelago adjacent to the mainland coast multiple passage regimes, some of which cannot be enforced in practice. The application to the Soela Strait of the transit passage regime would be meaningless, since it would not enable ships in the EEZ in the Baltic Sea proper to reach the EEZs in the Gulf of Riga or in the Gulf of Finland. The maritime area in the Soela Strait, where the transit passage regime would be applicable, would be only a few miles long, reaching to Kassary Bay. After passing Kassari Bay, the ships and aircraft could no longer use the right of transit passage since it would be replaced with the regime of non-suspendable innocent passage in the Muhu Strait.

Pursuant to the object and purpose of the Messina exception, it would be reasonable to conclude that where it would not apply under its literal interpretation because a particular strait is formed only by islands (instead of islands and a mainland coast), it could still be applied in such a strait if it forms a continuous waterway that only leads further to such straits where the transit passage regime clearly cannot be applicable under the ordinary meaning of the terms of the Messina exception. Hence, by applying common sense, the Article 38(1)-exception would geographically cover the whole maritime area of the Sea of Straits. Also, in such a geographical context, scholars tend to approach Article 38(1) of the LOSC rather liberally.[798] Likewise, Nandan and Anderson (who were among the drafters of Part III of the LOSC) maintain in respect of Article

[797] The only minor exception in that regard is the Hari Strait at the northern end of the Muhu Strait since it is formed by islands.

[798] Caminos and Cogliati-Bantz, *op. cit.*, p. 47. In addition, Rothwell argues that the 38(1)-regime applies to the strait formed by the King Island and Tasmania Island in the Bass Strait. See Rothwell 1992, *op. cit.*, p. 475.

38(1) of the LOSC that "The application of the exception in particular geographical situations (e.g. where there is an archipelago as in the Aegean or where there are several islands lying together, or where it is not clear what is a State's 'mainland') may not be free from difficulty; but the words should not be interpreted too mechanically. Instead, all the relevant geographical and other circumstances should be taken into account and a 'commonsense' interpretation given".[799]

Thus, in the context of the Sea of Straits, it would be wise to interpret Article 38(1) of the LOSC so that if the strait is formed by an island or a group of islands of a State bordering the strait and its mainland, transit passage shall not apply if there exists seaward of the island a route through the high seas or through an EEZ of similar convenience with respect to navigational and hydrographical characteristics. This somewhat liberal interpretation of the said provision, which adds the terms "or a group of islands" in its geographical scope, does not, in the view of the present author, go against its ordinary meaning in its context and the provision's object and purpose.

Yet Article 38(1) of the LOSC also includes functional criteria for the applicability of the clause. Namely, the seaward route through an EEZ needs to be of similar convenience with respect to navigational and hydrographical characteristics. This concerns also the length of the route.[800] The distance from a point in the EEZ in the western end of the Gulf of Finland directly north of the Hari Strait to the northernmost point of the Latvian EEZ in the Gulf of Riga through the Muhu Strait is approximately 100 miles. By contrast, the seaway between the same points in the EEZs of the Gulf of Finland and the Gulf of Riga through the Estonian EEZ west of Saaremaa and Hiiumaa islands would be slightly less than double the distance. However, this ratio is *grosso modo* commensurate with the difference of distances between the routes from the Ionian Sea to the Tyrrhenian Sea if comparing the seaway through the Messina Strait with the one around Sicily Island. Thus, the Sea of Straits may be considered as also satisfying the navigational criterion for the applicability of the Messina exception as stipulated in Article 38(1) of the LOSC.

It also meets the hydrographical criterion since in comparison with the Muhu Strait, the seaway around Saaremaa and Hiiumaa islands is generally significantly less dangerous both from the perspective of the safety of a ship and its crew as well as the environment.[801] By contrast to the route through the Irbe Strait and around the Estonian western archipelago, the Sea of Straits has shallow waters, hundreds of islands and many reefs in addition to the heavy traffic of passenger ferries between the islands and the Estonian mainland coast.

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799 Nandan, Anderson, *op. cit.*, p. 181. See also ibid, pp. 166–167.

800 See e.g. Caminos, Cogliati-Bantz, *op. cit.*, p. 52. Rothwell 1992, *op. cit.*, p. 474.

801 Small craft are not taken into account since in respect of such vessels innocent passage *grosso modo* applies in the Sea of Straits. On the impact of transit passage on the marine environment and the relevant legal framework, see M. George. Transit Passage and Pollution Control in Straits under the 1982 Law of the Sea Convention. – 33 Ocean Development & International Law 2002(2), pp. 198–202.

Therefore, the Messina exception, as provided in Article 38(1) of the LOSC, could be considered applicable to the ships of States that may reject the concept of Estonian long-standing internal waters in the Sea of Straits on the basis of their previous practice. Consequently, their ships and aircraft would not enjoy the right of transit passage. Instead, their ships (but not aircraft) are entitled to the right of non-suspendable innocent passage in the Sea of Straits since it applies pursuant to Article 45(1)(a) in combination with Article 45(2) of the LOSC to the straits that satisfy the criteria of the Messina exception.

The difference between the regime of non-suspendable innocent passage and the one of common innocent passage as defined in Article 18 of the LOSC lies in the strait State's right to suspend the passage through the strait.[802] Pursuant to Article 25(3) of the LOSC, the coastal State may, after due publishing and without discrimination in form or in fact among foreign ships, decide to suspend temporarily in specified areas of its territorial sea the innocent passage of foreign ships if such suspension is essential for the protection of its security, including weapons exercises.[803] By contrast, according to Article 45(2) of the LOSC, non-suspendable innocent passage cannot be suspended. Thus, although the right of innocent passage does not generally apply to ships transiting the Sea of Straits, Estonia would still have to permit under international law the innocent passage of ships of the afore-referred protesting States in the Sea of Straits, as examined above.

[802] For the differences between transit passage and innocent passage, see *supra* section 1.2 of Part I.

[803] The protection of national security provides relatively wide discretion for the strait State(s). See D. R. Rothwell. Innocent Passage in the Territorial Sea: The UNCLOS Regime and Asia Pacific State Practice. – D. R. Rothwell, S. Bateman (eds). Navigational Rights and Freedoms, and the New Law of the Sea. The Hague: Martinus Nijhoff 2000, p. 93. See more generally on the right to suspend innocent passage in F. Ngantcha. The right of innocent passage and the evolution of the international law of the sea: the current regime of 'free' navigation in coastal waters of third states. London: Pinter Publishers 1990, pp. 163–166.

CONCLUSION

A. The Legal Categories of Straits and their Interrelationship

Straits comprise international and non-international straits. The terms *strait*, *international strait* and *non-international strait* have not been defined in positive law. The author came to the conclusion that one may consider international straits as natural sea passages that connect two larger maritime areas and which are used for international navigation and are not more than 24 miles wide as measured from coast to coast or from baseline to baseline and which are due to the applicable legal regime different from non-international straits.

Non-international straits include straits that are located either in long-standing internal waters (Article 35(a), e.g. the Sea of Straits in the Estonian western archipelago) or in such territorial sea in respect of which none of the legal regimes of international straits applies. The latter may be referred to as Article 17-category of straits where the ordinary regime of suspendable innocent passage applies (e.g. the Irbe Strait if the Latvian EEZ in the Gulf of Riga would be non-existent). Also, straits which could in other aspects be categorised as international straits but are in practice not used for international navigation fall under a distinct category of non-international straits in respect of which the strait State is not required to guarantee the passage regimes of international straits (e.g. the Small Strait in the Estonian western archipelago). The passage rights of foreign ships and aircraft are not internationally safeguarded under Part III of the LOSC in respect of the afore-referred legal categories of non-international straits.

In addition to these legal categories of non-international straits, the LOSC enables distinguishing between seven categories of international straits. These may be referred to as:

1) Straits which link two parts of an EEZ or the high seas (Article 37);
2) Straits which are regulated by long-standing international conventions (Article 35(c));
3) Straits which are formed by an island of a strait State and its mainland coast (Article 38(1));
4) Straits which connect an EEZ or the high seas with the territorial sea of a foreign State (Article 45(1)(b));
5) Straits in the archipelagic waters (Article 53);
6) Straits which include an EEZ or the high seas corridor (Article 36);
7) *Sui generis* straits (Article 311(2)).

Some States and legal scholars also assert the existence of a distinct category of ice-covered straits under Article 234 of the LOSC. However, its legal basis is far from clear (see *supra* section 2.2 of Part I).

All of the above-listed legal categories, except for straits in the archipelagic waters and ice-covered straits, are (potentially) applicable or have been (potentially) applicable to the Estonian Straits. The Estonian Straits demonstrate the

strong interrelationship between the various legal categories of straits. The legal regime of the Estonian Straits has been and continues to be determined by such factors as the outer limits of maritime zones, treaties, islands, maritime boundary delimitation, domestic law on internal waters and baselines as well as geopolitical implications (particularly the concept of State continuity). These may be referred to as the primary determinants of the legal categories of the Estonian Straits. They have enabled and still enable to change the legal regimes applicable to the Estonian Straits mostly under the strait States discretion. This does not apply to all straits in the same manner as the range of factors which can potentially influence the legal categorisation of a strait varies and depends on the characteristics of a particular strait.

Since the restoration of independence of the Baltic States, the Viro Strait has potentially been the subject of five different legal categories of straits under the LOSC. Six distinct legal regimes have been or are potentially applicable under the LOSC to the Irbe Strait and the Sea of Straits (incl. the shallow Small Strait which falls under the category of non-international straits that are not used for international navigation in practice). Only recently has it become possible to establish the legal regimes of the Estonian Straits with a degree of certainty. In particular, prior to the 2010 Finnish withdrawal from a potentially long-standing convention on the legal regime of the Viro Strait, the legal categorisation of the Viro Strait would have been to some extent unclear. Additionally, the maps and legislation depicting Latvia's EEZ in the Gulf of Riga, submitted to the United Nations in 2011, have clarified the Latvian maritime zones and their extent in the Gulf of Riga, implying that the regime of transit passage applies in that maritime area.

Furthermore, in some instances, parallel legal regimes may be applicable to a particular strait under international law, e.g. if a State has protested against the domestic legislation on maritime zones of the strait State or has objected to the strait State's concept of State continuity. This is also the case with e.g. the Sea of Straits, which comprises long-standing internal waters (Article 35(a) of the LOSC). The protesting States are not bound to follow the general passage regime in the Sea of Straits. Also, the Viro Strait may have been from 1991 to 1994 both a strait which includes an EEZ corridor (Article 36 of the LOSC) as well as a *sui generis* strait (Article 311(2) of the LOSC).

Generally, the legal regime of a strait may change fundamentally depending on the legal acts of its strait State(s) or even of a State not bordering the strait. In particular, the latter was illustrated by the example of the Viro Strait. The Russian Federation has established an EEZ in the Gulf of Finland proper under the 1940, 1965 and 1985 maritime boundary agreements between Finland and the Soviet Union, thereby potentially altering the legal regime of the strait. If the Russian Federation's EEZ would be non-existent, then the Russian Federation could establish one unilaterally by limiting the breadth of its territorial sea under its domestic legislation.

Likewise, the outer limits of maritime zones, maritime boundary delimitation, State continuity, domestic law on the internal waters and treaties on the

straits regime may have a decisive impact on the legal classification of straits. The legal classification and regime of straits is thus inextricably linked not only to the outer limits of maritime zones, domestic law on internal waters and to the treaties on the straits regime, but also intertwined with the law of maritime boundary delimitation and State continuity.

Therefore, when making decisions on the questions of State continuity, maritime boundary delimitation or outer limits of maritime zones, one should also acknowledge the potential side-effects on the legal regime of its straits and vice versa. Principal decisions in any one of these fields may have a significant impact on the others, since the range of problems pertaining to the outer limits of maritime zones, maritime boundary delimitation, State continuity as well as to the domestic law on internal waters, long-standing international conventions and other treaties on the straits regime may all be interlinked. Subsequently, the significance of the afore-mentioned factors for the legal regime of straits and vice versa is discussed in more detail on the basis of the conclusions reached in this study.

B. The Significance of Outer Limits of Maritime Zones for the Legal Regime of the Estonian Straits

The modification of the outer limits of maritime zones of a coastal State may alter the legal regime of a strait as provided for in Article 36 of the LOSC. The provision stipulates that Part III of the LOSC on international straits does not apply to an international strait if there exists through the strait a route through the high seas or through an EEZ of similar convenience with respect to navigational and hydrographical characteristics. Other relevant parts of the LOSC, including the provisions regarding the freedoms of navigation and overflight, are applicable in such routes.

The Viro Strait has had decisive significance for the outer limits of maritime zones in the Gulf of Finland. With the aim of ensuring the freedoms of navigation and overflight, Estonia and Finland guaranteed under the 1994 Agreement that the minimal width of the Estonian and Finnish territorial sea boundaries from the median line in the Gulf of Finland is 3 miles. In addition, for safeguarding the freedom of navigation in this maritime area, the Maritime Boundaries Act of Estonia provides that in sections where the international sealanes exit the 3-miles-wide Estonian part of the EEZ corridor, the boundary of the territorial sea shall not reach closer than 1 mile to the international sealanes approved by the International Maritime Organization.

The Estonian minister of foreign affairs claimed in Parliament that the establishment of the EEZ corridor in the Viro Strait was a political decision and abstained from presenting any legal arguments to substantiate its establishment. This has caused misconceptions in Estonia about the purpose of the EEZ corridor. Two draft acts have been presented in 1993 and 2007 to the Parliament which provided for the abolishment of the Estonian part of the EEZ corridor and

for the extension of Estonia's territorial sea in the Gulf of Finland to the maximum width.

Nevertheless, the EEZ corridor in the Viro Strait is compatible with the LOSC and follows the aim of previous international agreements on the passage rights in this maritime area. Estonia and Finland declared in the 1994 bilateral Agreement that the purpose of the establishment of the EEZ corridor was to ensure freedoms of navigation and overflight in the Viro Strait. As is evident from *inter alia* the minutes of the parliamentary proceedings, the Finnish Government and the Parliament were of the opinion that the purpose for guaranteeing the freedoms of navigation and overflight by such means was also connected to the requirement of prior notification for innocent passage as stipulated in the Finnish and Estonian law in contravention to the LOSC. Finland annulled this requirement in 1996, but it is still upheld in the Estonian legal acts.

Estonia and Finland were not correct in stating that the establishment of the EEZ corridor is necessary for ensuring the freedoms of navigation and overflight in the Viro Strait. Apparently, the two strait States did not acknowledge the existence of the tiny Russian EEZ in the eastern part of the Gulf of Finland and its significance for the legal regime of the Viro Strait. Neither is its existence commonly acknowledged nowadays in Estonia and Finland.

Even if, hypothetically, the relevant provisions of the 1940, 1965 and 1985 maritime boundary agreements and, consequently, the Russian EEZ in the Gulf of Finland proper would be non-existent, then the Russian Federation could still unilaterally limit the width of its territorial sea analogously to the bilateral action by Estonia and Finland in 1994 with the aim of creating an EEZ in the eastern part of the Gulf of Finland. In case the Russian Federation would not unilaterally establish such an EEZ under its domestic legislation, foreign warships could likely still (notwithstanding the existence of the traffic separation scheme and sea lanes), under the regime of non-suspendable innocent passage, transit the strait close to the Estonian and Finnish capitals, in an area ranging from the Finnish southernmost skerries to Estonian northernmost islands.

Under Article 38 of the LOSC, the right of transit passage is used without giving prior notification or asking for permission from the strait State. Since the requirement of prior notification for transiting the territorial sea, as was stipulated in the Finnish and Estonian law in contravention to the LOSC, concerned the right of innocent passage, this requirement could not have (at least directly) impeded the exercise of the right of transit passage in the Estonian and Finnish territorial sea in the Viro Strait. Hence, the establishment of the EEZ corridor was also not necessarily relevant for the purposes of ensuring transit rights in light of the requirement of prior notification for exercising the right of innocent passage as was stipulated in the Estonian and Finnish domestic law at the time.

Nevertheless, the existence of the Russian tiny EEZ in the eastern part of the Gulf of Finland provides ample reasons why the extension of the width of the Estonian and Finnish territorial sea in the Viro Strait might be equally against the interests of the strait States Estonia and Finland and those of the Russian Federation. Article 36 of the LOSC would be inapplicable if the strait States of

the Viro Strait would both extend their territorial sea to the maximum width of 12 miles in accordance with the 1994 bilateral Agreement. It would also exclude the enjoyment of the freedom to lay submarine cables and pipelines, but not the freedoms of navigation and overflight in the Viro Strait. The freedoms of navigation and overflight could be enjoyed by foreign ships and aircraft under the right of transit passage nearly throughout the whole maritime area of the Gulf of Finland, including potentially the territorial sea and internal waters of the Russian Federation. This is due to the fact that passage in the Viro Strait would be regulated under Article 38 (not Article 45(1)(b) as is commonly assumed) of the LOSC. Consequently, at least the sovereign immune vessels (e.g. warships) and aircraft would not be required to transit the strait in the relatively narrow international corridor as under the current regime.

Thus, the establishment of an EEZ corridor in an international strait limits as much as it safeguards the sovereignty of a strait State over its maritime area. This is also confirmed by the example of the passage regime of the Gulf of Riga and that of its straits. In this particular instance, it underlines the potential advantages of an EEZ corridor for excluding the broad spatial extent of the right of transit passage in an international strait and its adjoining waters.

In 1996, Estonia and Latvia reached an equitable solution on the territorial division of the Gulf of Riga. Yet despite their apparent aim, the parties were not able to exclude the existence of an EEZ in the Gulf of Riga. In this connection, the classification by international experts of the Irbe Strait and the Sea of Straits as straits between a part of an EEZ and the territorial sea of a foreign State in terms of Article 45(1)(b) of the LOSC is not accurate. On the basis of Latvia's 2011 submission to the UN, it is clear that the Irbe Strait as well as the Sea of Straits link two parts of an EEZ between the Baltic Sea proper and the Gulf of Riga.

No exceptions under Article 35 of the LOSC for the exclusion of the transit passage regime apply to the Irbe Strait. This implies that foreign ships (including warships) and aircraft are permitted currently under the LOSC – irrespectively of the domestic law of Estonia and Latvia, which do not recognise such right – to enter the Gulf of Riga in their normal modes for reaching the Latvian EEZ. In the course of this, foreign ships and aircraft may navigate under the right of transit passage (and under the similar freedoms of navigation and overflight in the Latvian EEZ pursuant to Article 35(b) of the LOSC) in/over essentially the whole maritime area of the Gulf of Riga. This includes the extensive internal waters of Estonia, since they were not considered as internal waters under the 1938 Neutrality Act in light of the Article 35(a) exception of the LOSC.

For example, the warships and aircraft of third States exercising the freedom of navigation or overflight under Article 38(2) of the LOSC may enter the Gulf of Riga through the Irbe Strait, head to the Estonian internal waters north of Ruhnu Island, sail/fly around Ruhnu Island in order to reach and cross the Latvian EEZ and then leave the Gulf of Riga via the waters between the Kolka Cape and Ruhnu Island through the Irbe Strait. Under Article 58 of the LOSC

and State practice, when foreign ships and aircraft reach the Latvian EEZ, they may carry out military activities there. Since foreign ships and aircraft are not required to give a prior notice of their planned entry to the Gulf of Riga, it would mean that submerged foreign submarines would be able to navigate around the Gulf of Riga, including its southern part close to Latvia's capital, without either of the coastal State potentially being aware of it.

If necessary, it would be possible to avoid this under Article 36 of the LOSC by establishing an EEZ corridor in the Irbe Strait. The slight adjustment of the outer limits of the Estonian and Latvian territorial sea in the western Gulf of Riga on an equitable basis would enable to limit the use of the freedoms of navigation and overflight to the borders of approximately a 3-miles-wide EEZ corridor leading from the Irbe Strait to the Latvian EEZ in the south-eastern part of the Gulf of Riga. Consequently, the freedoms of navigation and overflight would not be applicable to the rest of the Gulf of Riga. Instead, their use would be possible only in the narrow EEZ corridor solely for reaching the Latvian EEZ close to the Riga port.

C. The Significance of Long-Standing International Conventions and *Sui Generis* Passage Regimes for the Estonian Straits

The significance of long-standing international conventions for the legal regime of straits is provided for in Article 35(c) of the LOSC. According to this provision, nothing in Part III of the LOSC, which stipulates the legal regime of international straits, affects the legal regime in straits in which passage is regulated in whole or in part by long-standing international conventions in force specifically relating to such straits. Thus, the existence of a long-standing international convention on a particular strait has a direct impact on its legal regime.

Pursuant to the wording of Article 35(c) of the LOSC, a long-standing convention would regulate passage in an international strait *ipso facto* on the conditions that the convention is in force and, in whole or in part, specifically regulates passage in such a strait. The provision does not set the strait State's subjective element for the applicability of such a convention to an international strait as a fourth criterion. This poses not merely a theoretical, but also a practical problem as illustrated by the difficulties of drawing clear conclusions on the Viro Strait's legal regime until 2010.

In particular, the Viro Strait may have been in terms of law a strait regulated by a long-standing international convention under Article 35(c) of the LOSC analogously to the Danish Straits, the Åland Strait, the Strait of Magellan and the Turkish Straits (Bosporus and the Dardanelles). As established in this study, this one of the busiest straits globally (in terms of vessel traffic) may have been subject to the 1925 Helsinki trilateral Agreement and its supplementary 1926 Moscow Protocol from 1991 to 1994/2010. In this case, the termination of the 1925 and 1926 trilateral treaties by the conclusion of the 1994 bilateral Agreement between Estonia and Finland or, alternatively, Finland's withdrawal from

these treaties may have represented the first and thus far only instance where a long-standing international convention satisfying the criteria of Article 35(c) of the LOSC has become void.

In practice, the 1994 bilateral Agreement between Estonia and Finland on the establishment of the EEZ corridor in the Viro Strait was regarded as a new and sole treaty on the subject matter and a regional analogue of the 1979 Agreement between Denmark and Sweden concerning the delimitation of their territorial waters. Since the well-established recognition by States may also be considered a necessary precondition for the applicability of Article 35(c) of the LOSC to a specific strait, the Viro Strait should thus not be regarded as being regulated under the 1925 Helsinki trilateral Agreement after the restitution of Estonia's independence in 1991. This is primarily due to the fact that the Viro Strait did not have the recognition of its strait States of falling under the Article 35(c)-exception.

Nonetheless, in terms of law, the subject matter of the 1994 bilateral Agreement corresponded to the one in the 1925 Agreement between Estonia, Finland and the Soviet Union. This trilateral treaty became void, at the latest, in 2010 as a result of Finland's withdrawal from the 1925 treaty system. Similarly to the 1994 bilateral Agreement, the aim of this trilateral Agreement was to ensure freedom of navigation in the Gulf of Finland by excluding the possibility of extending Estonia's and Finland's jurisdiction (up to 12 miles under the 1925 Helsinki Convention), which would have otherwise completely covered some sections of the Viro Strait.

In terms of law, the 1925 Helsinki trilateral Agreement may have been valid after the restitution of Estonia's independence in 1991. On the basis of the Soviet Union's State practice, it appears that the 1925 trilateral Agreement fell into desuetude (solely on the Soviet Union's part) subsequent to the annexation of Estonia in 1940. Yet, on the basis of the treaty law, it does not appear that the 1925 trilateral treaty lost its legal effect post-1940 since it remained in force between Estonia and Finland (Finland did not recognise Estonia's occupation *de jure*).

The 1925 trilateral Helsinki Agreement provided that (in modern terms) the high seas freedoms are applicable to the international corridor of the Gulf of Finland. This was reasserted in the 1926 Moscow trilateral Protocol which also fixed the spatial extent of the high seas corridor. Such high seas freedoms are also applicable to the EEZ corridor that was established under the 1994 bilateral Agreement. The enjoyment of *inter alia* the freedoms of navigation and overflight are crucial for the ships and aircraft transiting the Gulf of Finland from the Russian ports to the Baltic Sea and vice versa.

The 1925 trilateral treaty thus also satisfied the criterion of Article 311(2) of the LOSC as it was more liberal in comparison with the legal regimes otherwise applicable to the Viro Strait under Articles 36 or 38 of the LOSC. Hence, if the treaty was in force from 1991 to 1994/2010, then two legal categories of straits were applicable to the Viro Strait simultaneously. From 1991 onwards, the Viro Strait has been a strait which is crossed by an EEZ corridor (Article 36 of the

LOSC). In parallel, it is not excluded that under the potentially applicable *sui generis* regime of the 1925 trilateral treaty, Estonia and Finland could not have extended their territorial sea up to 12 miles in the Viro Strait absent of prior consent from each other (until the conclusion of the modifying 1994 bilateral Agreement).

The importance of the 1925 trilateral Agreement for the Soviet Union is illustrated by the fact that its conclusion by the coastal States of the Gulf of Finland was set as a precondition for joining the 1925 Helsinki Convention. This was also exemplified by the Soviet Union's strong reaction to the 1932 judgment of the Estonian Supreme Court in which the importance of the 1925 and 1926 trilateral agreements was downplayed, as a result of which the Estonian Government subsequently had to issue a new regulation to guarantee the freedom of navigation in its part of the international corridor in the Gulf of Finland. The Soviet Union's reaction to the 1932 judgment may also bear significance for projecting the reaction of the Russian Federation in case Estonia and Finland should extend their territorial sea in the Viro Strait up to 12 miles, the possibility of which is expressly provided for in the 1994 bilateral Agreement.

D. The Significance of Islands and Domestic Law on the Internal Waters for the Legal Regime of the Estonian Straits

In general, the strait State's domestic law on its internal waters does not have the potential of altering the legal regime of a particular strait. Under Part III of the LOSC, transit or non-suspendable innocent passage would also be applicable in a strait if the relevant maritime area is entirely included within the system of straight baselines and forms internal waters of the strait State. This follows from Article 35(a) of the LOSC which stipulates that the right of transit passage or non-suspendable innocent passage is applicable in those internal waters, including straits where the establishment of a straight baseline has the effect of enclosing as internal waters areas which had not previously been considered as such. However, its practical application *inter alia* in the Canadian and Russian Arctic as well as its legal criteria as referenced in the legal literature has caused some confusion. In this connection, the Sea of Straits in the Estonian western archipelago provides a notable example for testing the meaning and application of Article 35(a) of the LOSC.

The Sea of Straits comprises internal waters which are wholly included within the Estonian system of straight baselines. It links the Estonian as well as the Finnish and Swedish EEZ in the Baltic Sea proper with the Latvian EEZ in the south-eastern part of the Gulf of Riga. Nevertheless, the domestic law of Estonia does not recognise the right of transit passage of foreign ships and aircraft in the Sea of Straits as well as in parts of its internal waters leading to the Sea of Straits (e.g. in the Gulf of Riga). Neither does the Estonian legal framework fully recognise the right of innocent passage in the Sea of Straits. In

effect, Estonia does not consider the Sea of Straits as an international strait subject to Part III of the LOSC. Its compatibility with the international law of the sea is dependent on whether the Sea of Straits meets the criteria of Article 35(a) of the LOSC. This is a narrowly construed exception for the inapplicability of the legal regime of transit or non-suspendable innocent passage in a particular strait on the basis of the strait State's domestic law on its internal waters.

Article 35(a) of the LOSC has been interpreted differently in legal literature, causing misconceptions about its meaning. In this connection, the test to be applied in respect of the Sea of Straits, as with other straits and maritime areas that potentially fall under the scope of Article 35(a) of the LOSC, is whether its waters had been considered as internal waters before the establishment of the straight baselines. In case they had not been considered as such, the right of transit passage would *prima facie* apply to foreign ships in the Sea of Straits pursuant to Article 35(a) of the LOSC (which would be in practice, however, replaced with the regime of non-suspendable innocent passage under the Messina exception as stipulated in Article 38(1) of the LOSC, see below). In the opposite instance, the regime of internal waters would apply absent of any exceptions under Part III of the LOSC on the legal regime of international straits. This creates a direct link between the domestic law of the strait State on its internal waters and the strait's legal regime.

Estonia established straight baselines upon regaining its independence. Prior to its annexation in 1940, only normal baselines were used for limiting the 4-mile breadth of the Estonian territorial sea. In addition, the 1938 Waterways Act provided that straits which are used for passage between two parts of the high seas and the coasts of which are both situated in the territory of Estonia are regarded as territorial sea, unless the breadth of the strait exceeds 10 miles. This exception only applied to the Sea of Straits which was declared the territorial sea of Estonia in its entirety. The right of innocent passage was not applicable in this maritime area, with the exceptions of a prior agreement to the contrary or a prior permission by the Estonian authorities granted for such passage. However, since the regime of territorial sea was applicable to the Sea of Straits pursuant to the 1938 Waterways Act and this law did not establish the legal framework of internal waters, it is not of direct relevance in light of the exception as stipulated in Article 35(a) of the LOSC.

Significantly, Estonia had established its internal waters shortly after the passing of the Waterways Act under the 1938 Nordic Neutrality Rules. The 1938 Neutrality Act of Estonia followed the suit of the neutrality acts adopted in the same year by Denmark, Finland, Iceland, Norway and Sweden. These neutrality acts were adopted on the basis of the Scandinavian rules of neutrality as stipulated in the 1938 Declaration. They primarily regulated matters of the law of the sea for strengthening the coastal State's maritime security during war. Estonia's Neutrality Act was drafted on the basis of the Swedish law. Furthermore, as agreed in the November 1938 Riga Protocol between the Baltic States,

the Estonian law served subsequently as the model for the neutrality acts of Latvia and Lithuania.

The Estonian Neutrality Act stipulated analogously to the other Nordic neutrality acts in its section 2(3) that the Estonian internal waters shall be deemed to include ports, entrances to ports, gulfs and bays, the waters between those Estonian islands, islets and reefs which are not constantly submerged, and between the said islands, islets and reefs and the mainland. This definition of internal waters was adopted by all Nordic States: Denmark, Finland, Iceland, Sweden, Norway and the three Baltic States. In this context and particularly in light of the Article 35(a)-exception of the LOSC, the problem lies in determining whether the entire maritime area of the Sea of Straits met this definition of internal waters as provided for in the Estonian domestic law. Similarly, this appears to be the determinative factor in establishing also whether e.g. the Finnish Archipelago Sea comprises long-standing internal waters in terms of Article 35(a) of the LOSC.

On the basis of the State practice as well as the relevant archival materials, it is clear that the passages to the Sea of Straits – Hari Strait, Voosi Strait, Soela Strait, Big Strait and Small Strait – in addition to the rest of the maritime area of the Sea of Straits meet the conditions of the above-cited section 2(3) of the 1938 Neutrality Act. Therefore, in terms of Article 35(a), the Sea of Straits should be considered among such internal waters that were already internal waters prior to the establishment of the Estonian straight baselines. As a result, the right of transit passage (and, as a general rule, the Messina exception) does not apply in the Sea of Straits. Although Estonia has established to a limited extent the right of innocent passage under its domestic law to certain categories of vessels in the Sea of Straits, it has no obligation to extend its scope in the Sea of Straits so as to fully meet the definition and criteria of innocent passage under the LOSC.

These findings are contrary to the conclusions of authors, who have analysed the legal regime of the Sea of Straits and claim that the regime of non-suspendable innocent passage should apply to this maritime area as it is a so-called dead-end strait. This position made by international experts seems to be shared by the United States. However, in drawing their conclusions, they apparently have not taken into account the Latvian EEZ in the Gulf of Riga, the Estonian domestic law on internal waters in terms of Article 35(a) of the LOSC nor the archival materials pertaining to this matter. Without access to such relevant materials, it is not possible to draw accurate conclusions on the legal regime of a strait which falls potentially under the Article 35(a)-exception of the LOSC.

In light of the foregoing, the Sea of Straits comprises non-international straits through which foreign ships and aircraft cannot exercise transit passage. It was established in this study that in the Baltic Sea proper, such straits that fall under the Article 35(a)-exception of the LOSC in light of the 1938 Nordic Neutrality Rules may also potentially include the multiple straits in the Åland region of Finland as well as the narrow Kalmarsund between the Swedish mainland coast and Öland Island.

Notably, since the strait State's domestic law on its internal waters may have a decisive impact on a strait's legal regime, the corresponding diplomatic protests may likewise have a significant effect as the protesting State may consequently retain its particular passage rights in the relevant strait. In particular, the United Kingdom and Germany sent Verbal Notes to the Estonian Ministry of Foreign Affairs in protest against some of the sections of the Waterways Act and the Neutrality Act of 1938, just as they did with other Nordic States that adopted the uniform neutrality acts of 1938. As a result of these protests, the United Kingdom and Germany may potentially not consider the Sea of Straits as comprising entirely long-standing internal waters in terms of Article 35(a) of the LOSC.

Hence, it is not ruled out that the United Kingdom and Germany consider themselves not bound by the exclusion of the right of transit passage and innocent passage in the Sea of Straits in case they uphold their protests against those parts of the Estonian domestic law, which serve as the legal basis for the application of the Article 35(a)-exception of the LOSC to the Sea of Straits. More broadly, this also points to the importance of the protests made by the European Union and the United States against the Canadian and Russian straight baselines in the Northwest Passage and Northern Sea Route which also enclose as internal waters such Arctic straits that may not meet the criteria of the Article 35(a)-exception of the LOSC.

In particular, if the United Kingdom and Germany should uphold their protests against the relevant Estonian domestic legal acts of 1938, their ships might be entitled to the right of non-suspendable innocent passage in the Sea of Straits. This follows from the so-called Messina exception as established in Article 38(1) of the LOSC. It provides that if the strait is formed by an island of a State bordering the strait and its mainland, transit passage shall not apply if there exists seaward of the island a route through an EEZ of similar convenience with respect to navigational and hydrographical characteristics. The Sea of Straits meets the geographical and functional criteria of the Messina exception as stipulated in Article 38(1) of the LOSC.

Likewise, the legal regime of the Sea of Straits may differ for the Russian Federation. However, in this case the principal reason for such a particular regime of passage lies not in the opposition towards a specific domestic law of the strait State but instead in the rejection of Estonia's State continuity. As a result, the ships of the Russian Federation may potentially have, similarly to the ships of the United Kingdom and Germany, the right of non-suspendable innocent passage in the Sea of Straits under the Messina exception. Notably, the concept of State continuity has also had a significant impact on the legal regime of the Estonian Straits in other respects, as explained next.

E. The Significance of Maritime Boundary Delimitation and State Continuity for the Legal Regime of the Estonian Straits

The legal regime of the Estonian Straits exemplifies a very practical and direct effect of the principle of State continuity. If Estonia would have been willing to abandon its strict adherence to the principle of State continuity similarly to Latvia, the current legal regime of the passages to the Gulf of Riga would be very different. The Irbe Strait and the Sea of Straits as well as the whole Gulf of Riga would then potentially comprise long-standing internal waters in terms of Article 35(a) of the LOSC due to effectuating the historic bay-claim.

In addition, it would not be possible for Estonia to exclude the application of the transit passage regime in the Sea of Straits if it could not effectuate the Article 35(a)-exception of the LOSC. The latter is only applicable to the Sea of Straits on the basis of the 1938 Nordic Neutrality Rules in combination with the principle of State continuity. Thus, the principle of State continuity forms one of the cornerstones of the legal regime of the Estonian Straits.

This also presupposes Estonia's readiness under the principle of State continuity to recognise and accept such pre-1940 legal instruments which it had become a State Party of, even in cases where such legal acts might not be favourable from the strait State's perspective. This theoretical postulate would have the clearest practical effect for Estonia if the 1925 Helsinki trilateral agreements between Estonia, Finland and the Soviet Union guaranteeing free passage in the Viro Strait would still be in force. As examined above, this has not been the case, at least since Finland withdrew from the 1925 and 1926 trilateral Agreements in 2010.

In addition to the State continuity, maritime boundary delimitation may also have an impact on the passage regime of straits. It is settled in the law of maritime boundary delimitation that navigational interests are relevant for the delimitation of the territorial sea boundary. The legal regime of straits may be considered one of such navigational factors since it determines passage rights in straits and in waters leading to straits. Principally, it can thus be included in the list of special circumstances in terms of the second sentence of Article 15 of the LOSC. The significance of the legal regime of straits for maritime boundary delimitation (and vice versa) can be as direct as the interrelationship between the legal regime of straits with the outer limits of maritime zones, treaties on straits regime, State continuity and domestic law of internal waters.

This is confirmed by the fact that due to the establishment of the tiny Russian EEZ in the eastern part of the Gulf of Finland under the 1940, 1965 and 1985 maritime boundary agreements between Finland and the Soviet Union, the regime of transit passage would be applicable to the Viro Strait in case Estonia and Finland were to abolish the EEZ corridor by extending the breadth of their territorial sea in the Viro Strait to 12 miles. The relevant maritime area where the tiny Russian EEZ is located in is within 12 miles distance as measured from the Russian baselines. Therefore, in the absence of the relevant provisions of the said maritime boundary agreements, this maritime area would be wholly within

the limits of the Russian territorial sea. In this case, the regime of non-suspendable innocent passage (instead of the transit passage regime) would be applicable to the Viro Strait if its EEZ corridor were to be abolished.

However, the potential interrelationship between maritime boundary delimitation with the legal regime of straits does not occur in every instance. The presence of this linkage depends primarily on the characteristics of a particular strait and the relevant maritime area subject to delimitation as well as on the specific terms of the relevant maritime boundary agreement. The maritime boundary delimitations between Estonia and Latvia in the Gulf of Riga and between Estonia and the Russian Federation in the Gulf of Finland demonstrate that in most instances the maritime boundary delimitation does not have an impact on the legal regime of straits.

Contrary to what is commonly presumed in the legal literature, the maritime boundary in the Gulf of Riga delimits not only the territorial sea of Estonia and Latvia. It also serves as the single maritime boundary for the EEZ, continental shelf and potential contiguous zone. This implies the applicability of the transit passage regime to the Irbe Strait. In the course of the maritime boundary delimitation, Estonia and Latvia appeared to have generally acknowledged the effect that the application of the right of transit passage has on the passage rights in the Gulf of Riga. Yet the two States did not manage to avoid this by means of excluding an EEZ in the Gulf of Riga as illustrated by the maps and domestic legislation, submitted to the United Nations in 2011, depicting Latvia's EEZ in the Gulf of Riga.

The solution for altering the legal category of the Irbe Strait with the aim of excluding the transit passage regime would have been accepting the continuance of force of the Soviet legal regime of the Gulf of Riga as a historic bay by both Latvia and Estonia. Latvia insisted that such a regime of joint sovereignty in the Gulf of Riga should be agreed upon on the basis of the LOSC and the ICJ's 1992 judgment in the Gulf of Fonseca case and also effectuated this claim in its domestic law, whereas Estonia rejected the proposition due to multiple reasons. Of those, its potential effect on the principle of State continuity was of primary concern.

The legal status of a gulf is a separate matter from the law of maritime boundary delimitation. Since the potential declaration of the Gulf of Riga as a historic bay and the establishment of an Article 36-type of EEZ corridor in the Irbe Strait and the Gulf of Riga, as the only available means for excluding the transit passage regime in the Irbe Strait and in the Gulf of Riga, are not related to maritime boundary delimitation, it is thus clear that the delimitation of the single maritime boundary in the Gulf of Riga did not have an impact on the legal categorisation of the Irbe Strait. Yet Latvia's tacit recognition of Estonia's system of straight baselines in the Gulf of Riga is of significance, as Latvia agreed to draw the equidistance line on the basis of it.

Latvia's recognition would have had a substantial effect on the passage regime of the Irbe Strait and the Gulf of Riga if the EEZ in the Gulf of Riga would have been located only in the Estonian maritime area. The other strait

State's recognition of Estonia's straight baselines in the delimitation process provided greater leverage under international law for the exclusion of the existence of an EEZ by Estonia in its maritime area north of Ruhnu Island. Yet neither the exclusion of this potential Estonian EEZ or, in this connection, Latvia's recognition of Estonia's straight baselines in the Gulf of Riga did have any effect from the perspective of the legal regime of straits. Due to the Latvian EEZ in the south-eastern part of the Gulf of Riga the right of transit passage nevertheless applies to the Irbe Strait and to most of the Gulf of Riga. The existence of the Latvian EEZ in the Gulf of Riga could not have been excluded by means of maritime boundary delimitation. However, the maritime boundary delimitation between Estonia and Latvia indicates that it could have determined the legal category of the Irbe Strait if the geographical setting in the eastern part of the Gulf of Riga would have been slightly different and the Latvian EEZ would have been of a much more limited extent and included only a small northern section of its actual size close to the Estonian territorial sea boundary.

RESÜMEE (SUMMARY IN ESTONIAN)

Eesti väinad: erandid väina rahumeelse või takistamatu läbisõidu õigusraamistikust

A. Väinade õiguslikud kategooriad ja nendevahelised seosed

Uurimuse eesmärk on selgitada välja mereõiguse konventsiooni alusel väinade peamiste õiguslike kategooriate vahelised seosed, mille kaudu on võimalik kohaldada ühele väinale erinevaid läbipääsukordi. Töö peamiseks uurimisobjektiks on Eesti väinad ja nende rannikuriikide Eesti, Soome ja Läti merevöönditele – esmajoones sisevetele (sisemerele) ja territoriaalmerele – kohalduv õiguslik raamistik. Viru väin (Soome lahe läbipääs), Kura kurk ja Väinameri liigitatakse kohaldunud, kohalduvatesse ja potentsiaalselt kohalduvatesse väinade õiguslikesse kategooriatesse ning selgitatakse välja välisriikide laevade ja õhusõidukite läbipääsuõigused Soome lahes, Liivi lahes ja Väinameres.

Väinad jagunevad õiguslikult rahvusvahelisteks ja mitte-rahvusvahelisteks väinadeks. Terminite „väin“, „rahvusvaheline väin“ ja „mitte-rahvusvaheline väin“ legaaldefinitsiooni ei ole mereõiguse konventsioonis sätestatud. Rahvusvahelisteks väinadeks võib lugeda looduslikke merekitsusi (mitte kanaleid), mida kasutatakse rahvusvaheliseks navigatsiooniks (õhu- ja meresõiduks) ning mis ei ole üle 24 meremiili laiad mõõdetuna rannikust rannikuni või lähtejoonest lähtejooneni ja mis on kohalduva õigusraamistiku poolest erinevad mitte-rahvusvahelistest väinadest.

Mitte-rahvusvahelised väinad hõlmavad väinu, mis paiknevad pikaajalistes sisevetes (mereõiguse konventsiooni art 35(a), nt Väinameri) või sellises territoriaalmeres, mille suhtes ükski rahvusvaheliste väinade õiguslik kategooria ei saa kohalduda. Viimati nimetatud on art 17-kategooria väinad (siin ja edaspidi: viited artiklitele mereõiguse konventsioonis), kus kohaldub tavaline peatatav rahumeelse läbisõidu õigus (nt Kura kurk, kui Läti majandusvööndit Liivi lahes ei eksisteeriks). Samuti on mitte-rahvusvahelisteks sellised väinad, mis muude tunnuste poolest on käsitatavad rahvusvaheliste väinadena, kuid mida praktikas rahvusvaheliseks navigatsiooniks ei kasutata (nt Väike väin). Eelnimetatud väinade õiguslike kategooriate puhul ei ole välisriikide laevade ja õhusõidukite läbipääsuõigused mereõiguse konventsiooni osa III (või IV) alusel rahvusvaheliselt täiendavalt tagatud.

Töös leiti, et lisaks eelnimetatud mitte-rahvusvaheliste väinade õiguslikele kategooriatele võimaldab mereõiguse konventsioon eristada seitset kategooriat rahvusvahelisi väinu. Nendeks on:

1) väinad, mille kaudu sõidetakse avamere ühest osast või majandusvööndist teise (art 37);
2) väinad, mida reguleerivad pikaajalised rahvusvahelised konventsioonid (art 35(c));
3) väinad, mille moodustavad väinaga piirneva riigi saar ja maismaaterritoorium (art 38(1));

4) väinad, mis ühendavad majandusvööndit või avamerd välisriigi territoriaalmerega (art 45(1)(b));
5) arhipelaagivetes asuvad väinad (art 53);
6) väinad, mida läbib avamere või majandusvööndi koridor (art 36);
7) *sui generis* väinad (art 311(2)).

Mõned riigid ja teadlased leiavad, et eraldi õigusliku kategooria moodustavad enamuse aastast jääga kaetud väinad (art 234). Sellise potentsiaalse rahvusvaheliste väinade kategooria olemasolu ei ole selge (vt ptk 2.2 osas I).

Kõik eelnimetatud väinade õiguslikud kategooriad peale arhipelaagivetes asuvate väinade (art 53) ja enamuse aastast jääga kaetud väinade (art 234) on (potentsiaalselt) kohalduvad või kohaldunud Eesti väinade suhtes. Iga väinade õigusliku kategooria puhul kehtib iseäralik läbipääsuõiguste raamistik. Samas on väinade suhtes õiguslike kategooriate täpne kohaldamine sageli keeruline. See sõltub juriidilistest nüanssidest, mida võib olla keeruline tuvastada. Väinade täpne kategoriseerimine on aga vajalik, et vältida mh konflikte riikide vahel läbipääsu üle nendest olulistest veeteedest.

Eesti väinad näitlikustavad väinade õiguslike kategooriate vahelisi tugevaid seoseid. Eesti väinadele ja seeläbi Soome lahele, Liivi lahele ja Väinamerele kohalduvate läbipääsuõiguste määravateks mõjuriteks on merevööndite välimised piirid, lepingud, saared, merepiiride delimiteerimine, siseriiklik õigus sisevete ja lähtejoonte kohta ning geopoliitilised muutused (sh õigusliku järjepidevuse põhimõte). Nendel teguritel põhinevad väinade õiguslike kategooriate vahelised seosed. Tegemist ei ole *numerus clausus* loeteluga.

Eelnimetatud tegurid määravad väinade jaotumise erinevate õiguslike kategooriate vahel. Nad võimaldavad seeläbi muuta väinale kohalduvat läbipääsukorda, luues mh eeldused mereõiguse konventsioonis sätestatud erandite rakendamiseks takistamatu või mittepeatatava rahumeelse läbisõidu õigusraamistiku suhtes. Enamjaolt on väinale kohalduva õigusliku kategooria muutmine väina rannikuriigi või -riikide kaalutlusotsus.

Teatud juhtudel võib väinale kohalduda rahvusvahelise õiguse alusel paralleelselt kaks õiguslikku kategooriat. Sellised paralleelsed läbipääsukorrad võivad olla tingitud näiteks mõne lipuriigi protestist väina rannikuriigi merevööndeid reguleerivate õigusaktide või õigusliku järjepidevuse vastu. Väinamerele kohalduvad potentsiaalselt paralleelsed väinade õiguslikud kategooriad, sest kummalgi eelnimetatud alusel protestinud riigid (Suurbritannia, Saksamaa ja Venemaa Föderatsioon) ei ole rahvusvahelise õiguse järgi kohustatud järgima Väinamerele kohalduvat läbipääsukorda. Samuti ei saa välistada, et Viru väin võis olla ajavahemikus 1991–1994/2010 lisaks väinale, mida läbib majandusvööndi koridor (art 36), ka *sui generis* väin (art 311(2)).

Üldjuhul võib väina õiguslik kategooria muutuda väina rannikuriigi, kuid potentsiaalselt ka väinaga mittepiirneva riigi õigusaktide tõttu. Kui Soome lahe idaosas asuvas Venemaa Föderatsiooni merealas majandusvööndit ei asuks, oleks Venemaa Föderatsioonil võimalik kehtestada siseriikliku õiguse alusel majandusvöönd näiteks Suursaare või Tütarsaarte piirkonnas. Selle tulemusel

kohalduks tema ja teiste välisriikide laevadele ning õhusõidukitele Viru väinas takistamatu läbisõidu õigus (art 37).

Eesti iseseisvuse taastamise järel on Viru väinale potentsiaalselt kohaldunud mereõiguse konventsiooni alusel viis väinade õiguslikku kategooriat. Kokku kuus väinade õiguslikku kategooriat on potentsiaalselt kohaldunud või kohalduvad Liivi lahega piirnevate Kura kurgu ja Väinamere suhtes (arvestades Väikese väina kui mitte-rahvusvahelise väinaga, mida ei kasutata rahvusvaheliseks meresõiduks). Eesti väinadele kohalduvate õiguslike kategooriate selge määramine on osutunud võimalikuks aga alles hiljuti. Enne Soome väljumist 2010. aastal potentsiaalselt pikaaegsest lepingust Viru väina läbipääsuõiguste kohta oleks Viru väina õiguslik kategoriseerimine olnud mõneti ebaselge. Samuti esitas Läti 2011. aastal Ühinenud Rahvaste Organisatsioonile oma õigusaktid ja kaardid, mis loovad õiguslikku selgust Läti merevööndite (sh majandusvööndi) ja nende ulatuse kohta Liivi lahes. Nendest tulenevalt kohaldub Kura kurgus ja Liivi lahes välisriikide laevadele ja õhusõidukitele takistamatu läbisõidu õigus.

Merevööndite välimised piirid ja õigusliku järjepidevuse põhimõte, nagu ka välislepingud, merealade delimiteerimine ja siseriiklikud õigusaktid sisevete kohta, võivad evida määravat mõju väinade õiguslikule kategoriseerimisele. Väinade õiguslik kategoriseerimine ja nende õiguslik raamistik on seega lahutamatult seotud mitte üksnes merevööndite välimiste piiridega, siseriikliku õigusega sisevete kohta ja välislepingutega, vaid ka merealade delimiteerimise ja õigusliku järjepidevuse põhimõttega.

Eelnevast tulenevalt on õigusliku järjepidevuse põhimõtet, merealade delimiteerimist või merevööndite välimisi piire puudutavate otsuste tegemisel oluline arvestada nende võimalike mõjudega väinade õiguslikule raamistikule ja vastupidi. Väina rannikuriigi põhimõttelised otsused mõnes neist valdkondadest võivad samavõrra mõjutada teisi, sest reeglina on väinade läbipääsukord, merevööndite välimised piirid, merealade delimiteerimine, õigusliku järjepidevuse põhimõte, väina rannikuriigi õigusaktid sisevete kohta ja väinade õigusraamistikku puudutavad välislepingud omavahel seotud. Need on lisaks saartele, jääle ja arhipelaagivetele peamised mõjurid, mis määravad väinade õiguslikud kategooriad. Järgnevalt hinnatakse üksikasjalikumalt selliste tegurite vastastikkust mõju väinade õigusraamistikuga.

B. Merevööndite välimiste piiride mõju Eesti väinade õigusraamistikule

Mereõiguse konventsiooni artikli 36 järgi ei kohaldata konventsiooni III osa rahvusvahelisele väinale, kui väina läbib laevatee, mille navigatsiooni- ja hüdrograafilised tingimused on sama laadi kui avamere laevateel või majandusvööndit läbival laevateel. Niisugustele väina läbivatele laevateedele kohaldatakse mereõiguse konventsiooni teisi asjakohaseid osi, sh meresõidu- ja ülelennuvabadust käsitlevaid sätteid. Sellest tuleneb, et rannikuriigi merevööndite välimiste piiride muutmine võib põhjustada ka selles merealas paikneva või

sellega piirneva väina õigusliku kategooria muutumise. Seda kinnitab Viru väina oluline mõju merevööndite välimistele piiridele Soome lahes.

Eesmärgiga tagada meresõidu- ja ülelennuvabadust, nõustusid Eesti ja Soome 1994. a lepingus, et nende territoriaalmere vähim kaugus keskjoonest Soome lahes on kolm meremiili. Eesti sätestas merealapiiride seaduses täiendavalt, et nendes kohtades, kus rahvusvahelised laevateed väljuvad Eesti kolme meremiili laiusest Soome lahe majandusvööndi koridori osast, ei ulatu Eesti territoriaalmere piir lähemale kui üks meremiil Rahvusvahelise Mereorganisatsiooni heakskiidetud rahvusvahelistest laevateedest.

Eesti välisminister väitis parlamendis, et majandusvööndi koridori kehtestamine Soome lahes on poliitiline otsus ega esitanud õiguslikke argumente selle vajalikkuse põhjendamiseks. See on põhjustanud Eestis väärarusaamu majandusvööndi koridori eesmärgist. Riigikogus esitati 1993. ja 2007. aastal seaduseelnõud, mille vastuvõtmise korral oleks majandusvööndi koridori Eesti osa kaotatud Viru väinas territoriaalmere kuni 12 meremiilini laiendamise tõttu.

Soome lahe majandusvööndi koridor on kooskõlas mereõiguse konventsiooniga ja järgib Soome lahe rannikuriikide varasema (1925. a) kolmepoolse lepingu eeskuju selles merealas läbipääsuõiguste tagamiseks (vt lähemalt järgmisest alaptk-st). Nagu nähtub mh *Eduskunta* stenogrammidest, leidsid Soome valitsus ja parlament, et Viru väinas meresõidu- ja ülelennuvabaduse tagamise vajalikkus oli seotud ka toona Eesti ja Soome seadustes sätestatud, ent mereõiguse konventsiooniga vastuolus nõudega eelnevalt teatada rannikuriigile rahumeelsest läbisõidust territoriaalmeres. Soome loobus sellisest nõudest 1996. aastal, kuid see on jätkuvalt kehtiv Eesti õigusaktides.

Eesti ja Soome leidsid 1994. aastal ebaõigesti, et majandusvööndi koridori kehtestamine on vajalik meresõidu- ja ülelennuvabaduse tagamiseks Viru väinas. Ilmselt ei võtnud Eesti ja Soome arvesse Venemaa Föderatsiooni väikest majandusvööndit Soome lahe idaosas ja selle tähendusest Viru väina läbipääsurežiimile. Selle väikese majandusvööndi olemasolust Soome lahe idaosas ei olda tänini laiemalt teadlikud.

Takistamatu läbisõidu õiguse kasutamiseks ei pea välisriigi laev või õhusõiduk sellest väina rannikuriigile eelnevalt teatama ega küsima selleks luba. Eesti ja Soome õigusaktides sätestatud, ent mereõiguse konventsiooniga vastuolus nõue eelnevalt teatada rannikuriigile territoriaalmeres sõitmisest puudutas rahumeelset läbisõitu. See ei oleks saanud vähemalt otseselt takistada Eesti või Soome territoriaalmeres asuvatel välisriigi laevadel ja õhusõidukitel kasutada õigust takistamatuks läbisõiduks Viru väinast. Seetõttu ei olnud täpne Eesti ja Soome väide majandusvööndi koridori vajalikkusest põhjendusel, et vastasel juhul ei oleks tagatud väinast vaba läbipääs kohustuse tõttu teatada rahumeelse läbisõidu õiguse kasutamise kavatsusest.

Ka juhul kui 1940. ja 1965. ning 1985. a Soome ja Nõukogude Liidu vahel sõlmitud merepiiri lepingus ei oleks sätestatud õiguslikku alust tänasele Venemaa Föderatsiooni majandusvööndile, oleks Venemaa Föderatsioonil võimalik oma huvide tagamiseks vähendada sarnaselt Eesti ja Soome 1994. a lepinguga ühepoolselt oma territoriaalmere ulatust Soome lahe idaosas, et kehtestada seal

majandusvöönd. Kui Venemaa Föderatsioon ei kehtestaks sellises olukorras majandusvööndit Soome lahe idaosas, võivad välisriikide laevad läbida Viru väina mitte-peatatava rahumeelse läbisõidu õiguse alusel. Sarnaselt takistamatu läbisõidu õigusraamistikuga ei oleks läbisõidu õigus piiratud praeguse koridori piiridega, vaid see kohalduks Soome lõunapoolsetest skääridest Eesti põhjapoolseimate saarteni – seega mõlema riigi pealinnade läheduses.

Sellegipoolest esineb kaalukaid põhjusi, miks Eesti ja Soome territoriaalmere laiendamine võib olla vastuolus nii väina rannikuriikide Eesti ja Soome kui ka Venemaa Föderatsiooni huvidega. Mereõiguse konventsiooni artikkel 36 ei kohalduks Viru väinale juhul, kui Eesti ja Soome laiendaksid oma territoriaalmerd Soome lahes 1994. a kahepoolse lepingu alusel 12 meremiilini. See välistaks merealuste kaablite ja torujuhtmete paigaldamise vabaduse, kuid mitte meresõidu- ja ülelennuvabaduse Viru väinas. Läbipääs Viru väinast kui sumbväinast ei oleks reguleeritud mereõiguse konventsiooni artikli 45 lg 1 punktis b sätestatud mittepeatatava rahumeelse läbisõidu õiguse alusel, vaid takistamatu läbisõidu õiguse alusel (art 38). Venemaa Föderatsiooni majandusvööndi tõttu kohalduks sellisel juhul välisriikide laevadele ja õhusõidukitele peaaegu kogu Soome lahe ulatuses takistamatu läbisõidu õigus, sh potentsiaalselt Venemaa Föderatsiooni territoriaalmeres ja sisevetes. Välisriigi omandis või valduses olevad suveräänse puutumatusega laevad ja õhusõidukid ei peaks sellisel juhul Viru väina läbima kitsas koridoris nagu praegu.

Eelnevast tulenevalt vähendab majandusvööndi koridor samavõrra kui see tagab väinas selle rannikuriigi suveräänsust oma mereala üle. Seda kinnitab ka Liivi lahe ja selle väinade näide, mis ilmestab võimalust piirata rahvusvahelises väinas ja sellega külgnevas merealas vastasel juhul potentsiaalselt ülemäära avaralt kohalduvat välisriikide laevade ja õhusõidukite takistamatu läbisõidu õigust majandusvööndi koridori kehtestamise kaudu.

Eesti ja Läti jõudsid 1996. aastal õiglasele kokkuleppele Liivi lahe merealade piiritlemiseks. Hoolimata Eesti ja Läti sellekohasest nähtavast taotlusest, ei suutnud nad välistada aga majandusvööndi olemasolu Liivi lahes. Liivi lahe majandusvööndi tõttu on olnud väär erialakirjanduses seni levinud Kura kurgu ja Väinamere kategoriseerimine sumbväinadena (art 45 lg 1 p b). Sellised sumbväinad peavad ühendama majandusvööndit välisriigi territoriaalmerega. Läti 2011. aastal Ühinenud Rahvaste Organisatsioonile esitatud õigusaktide ja kaartide põhjal on aga selge, et Liivi laht ja Väinameri ühendavad majandusvööndeid omavahel.

Kura kurgule ei kohaldu ükski mereõiguse konventsiooni artiklis 35 sätestatud eranditest välisriikide laevade ja õhusõidukite takistamatu läbisõidu õiguse välistamiseks. See tähendab, et välisriikide laevad (sh sõjalaevad) ja õhusõidukid võivad mereõiguse konventsiooni alusel – sõltumata Eesti ja Läti õigusaktidest, mis ei tunnista sellist õigust – siseneda Liivi lahte nende tavapärasel moel, et jõuda Läti majandusvööndisse. Selle käigus võivad välisriikide laevad ja õhusõidukid navigeerida takistamatu läbisõidu õiguse järgi kohalduvate meresõidu- ja ülelennuvabadaduste alusel läbi/üle sisuliselt kogu Liivi lahe. Selline õigus on neil ka Ruhnust põhjasuunda jäävates ulatuslikes Eesti sisevetes,

sest tegemist ei ole pikaaegsete sisevetega mereõiguse konventsiooni artikli 35(a) mõttes.

Näiteks võivad välisriikide laevad ja õhusõidukid siseneda mereõiguse konventsiooni artikli 38 lg 2 alusel takistamatu läbisõidu käigus Kura kurgu kaudu Liivi lahte, sõita Ruhnust põhjasuunda jäävatesse Eesti sisevetesse selleks, et seejärel läbida Läti majandusvöönd ja suunduda läbi Kolka nina ning Ruhnu vahelise mereala ja Kura kurgu tagasi Läänemerre. Mereõiguse konventsiooni artikli 58 ja riikide sellekohase praktika järgi on välisriikide laevadel ja õhusõidukitel õigus Läti majandusvööndisse jõudes viia seal läbi ka sõjaväelisi tegevusi. Kuna välisriikide laevad ja õhusõidukid ei pea takistamatu läbisõidu õigust kasutades teatama sellest eelnevalt Eestile ja Lätile, võivad allveelaevad oma tavapärasel moel (vee all) sõita läbi Liivi lahe, sh läbi lahe lõunaosa Riia lähistel, ilma et kumbki Liivi lahe rannikuriik oleks sellest teadlik.

Liivi lahes kohalduva takistamatu läbisõidu õiguse välistamiseks on rannikuriikidel võimalik mereõiguse konventsiooni artiklist 36 juhindudes kehtestada seal majandusvööndi koridor. Sarnaselt majandusvööndi koridoriga Viru väinas piisab mereõiguse konventsiooni artiklis 36 sätestatud erandi kohaldumiseks sellest, et Eesti ja Läti piiravad pariteetselt oma territoriaalmere välimist piiri Liivi lahe lääneosas. Seeläbi on võimalik praegu Liivi lahes kohalduva meresõidu- ja ülelennuvabaduse kasutamine piirata umbes 3 meremiili laiuse koridoriga, mis ulatuks Kura kurgust Läti majandusvööndini Liivi lahe kaguosas. Selle tulemusel ei kohalduks välisriikide laevade ja õhusõidukite suhtes meresõidu- ja ülelennuvabadus ülejäänud Liivi lahe merealas. Neid vabadusi oleks võimalik kasutada üksnes kitsas majandusvööndi koridoris Läti majandusvööndisse jõudmiseks.

C. Pikaajaliste konventsioonide ja *sui generis* läbipääsukordade mõju Eesti väinade õigusraamistikule

Pikaajaliste konventsioonide olulisus väinade õiguslikule raamistikule tuleneb mereõiguse konventsiooni artikli 35 punktist c, mille järgi ei reguleerita mereõiguse konventsiooni III osaga õiguskorda väinades, mille läbimist täielikult või osaliselt reguleerivad neid väinu käsitlevad pikaajalised konventsioonid. Seega omab mereõiguse konventsiooni artikli 35 punkti c tingimusi täitva pikaajalise konventsiooni olemasolu otsest mõju väina õiguslikule raamistikule.

Mereõiguse konventsiooni artikli 35 punkti c sõnastusest tuleneb, et pikaajaline konventsioon kohaldub rahvusvahelisele väinale *ipso facto*, kui konventsioon on jõus ja see reguleerib osaliselt või täielikult õiguskorda väinas. Sätte grammatilise tõlgenduse järgi ei ole pikaajalise konventsiooni kohaldumiseks vaja väina rannikuriigi sellekohast subjektiivset otsust. See põhjustab praktilisi probleeme, nagu näitab Viru väinale 2010. a eelselt kohaldunud õigusliku kategooria määramise keerukus.

Viru väin võis olla pärast Eesti iseseisvuse taastamist 1991. aastal mereõiguse konventsiooni artikli 35 punkti c järgi väin, mida reguleerib pikaajaline

konventsioon sarnaselt Taani ja Türgi väinadega ning Ahvenamaa väina ja Magalhãesi väinaga. Selliseks pikaajaliseks lepinguks oli 19. augustil 1925 Helsingis sõlmitud Läänemere riikide alkoholikaupade salaveo vastu võitlemise konventsiooni juurde kuuluva lõpp-protokolli juurde sõlmitud kokkulepe Eesti, Soome ja Nõukogude Liidu tolliterritooriumide ja avamere koridori kohta Soome lahes. Selle kolmepoolse kokkuleppe punktis 2 nimetatud rahvusvaheliste mereteede piiritlemiseks sõlmisid 22. aprillil 1926 Eesti, Soome ja Nõukogude Liit Moskva protokolli. 1925. a lepingu kehtetuks muutmine 1994. a Eesti ja Soome lepingu sõlmimisega majandusvööndi koridori kohta Viru väinas või alternatiivselt Soome väljaastumine sellest lepingulisest raamistikust 2010. aastal on tõenäoliselt ainsaks näiteks sellest, kuidas potentsiaalselt mereõiguse konventsiooni artikli 35 punkti c tingimusi täitev leping on lõpetatud.

Riikide praktikas käsitati 1994. a Eesti ja Soome kahepoolset lepingut Soome lahe majandusvööndi koridori kehtestamise kohta uue ja eraldiseisva lepinguna, mis reguleerib läbipääsukorda Viru väinas. Soome pidas seda regionaalseks analoogiks Rootsi ja Taani vahel 1979. aastal sõlmitud lepingule, millega majandusvööndi koridori loomise eesmärgil piirasid need Taani väinade rannikuriigid samuti oma territoriaalmere välimist piiri. Kuna riikide, esmajoones väina rannikuriikide, selge tunnustus pikaajalises lepingus sätestatud väina õigusliku raamistiku kohta tuleks lugeda täiendavaks eeltingimuseks mereõiguse konventsiooni artikli 35 punktis c sätestatud erandi kohaldumiseks, ei olnud pärast Eesti iseseisvuse taastamist Viru väina läbipääsukord seega siiski reguleeritud 1925. a Helsingi kolmepoolse lepinguga.

Eesti ja Soome 1994. a lepingu objekt vastas aga 1925. a Helsingi lepingule Eesti, Soome ja Nõukogude Liidu vahel. See kolmepoolne leping lõppes hiljemalt 1994. a Eesti-Soome lepingu sõlmimisega või alternatiivselt 2010. aastal Soome väljaastumisega 1925. a Helsingi konventsiooni lepingulisest raamistikust. Sarnaselt 1994. a kahepoolse lepinguga oli 1925. a kolmepoolse lepingu eesmärk säilitada Viru väinas meresõiduvabadus, piirates 1925. a Helsingi konventsioonis sätestatud rannikuriikide kuni 12 meremiili laiuste kontrollvööndite ulatust selles merekitsuses. Vastasel juhul oleks Viru väin teatud lõikudes langenud täielikult Eesti ja Soome jurisdiktsiooni alla.

Nõukogude Liidu praktikast nähtub, et pärast Eesti annekteerimist 1940. aastal ei pidanud Nõukogude Liit end enam seotuks 1925. a kolmepoolse lepinguga. Sellest hoolimata paistab, et 1940. a järel ei kaotanud rahvusvaheliste lepingute õiguse järgi kehtivust 1925. a kolmepoolne leping, sest see jäi edasi kehtima Eesti ja Soome vahel. 1925. a Helsingi kolmepoolse lepingu järgi kohaldusid Viru väina rahvusvahelisele koridorile avamerevabadused. Eesti, Soome ja Nõukogude Liit kinnitasid seda 1926. a Moskva protokollis, kus sätestati avamere koridori piirid. Sellised avamerevabadused kohalduvad ka 1994. a Eesti ja Soome lepingu alusel Viru väina majandusvööndi koridorile. Venemaa Föderatsioonile on strateegiliselt oluline tagada Viru väinas ennekõike meresõidu- ja ülelennuvabadus, et hoida avatuna mere- ja õhutee Soome lahe idaosast Läänemerre (sh Kaliningradi vetesse), Atlandi ookeanile ja Põhja-Jäämerele.

1925. a ja 1926. a kolmepoolsed lepingud täitsid samuti mereõiguse konventsiooni artikli 311 lg 2 tingimused, sest olid mereõiguse konventsiooni jõustumise järel läbipääsukorra mõttes sama liberaalsed või liberaalsemad nendest väinade õiguslikest kategooriatest, mida Eesti ja Soome saavad Viru väinale kohaldada mereõiguse konventsiooni artiklite 36 või 38 järgi. Seega, juhul, kui 1925. a kolmepoolne leping oli jõus ajavahemikus 1991–1994/2010, kohaldus Viru väinale paralleelselt kaks väina õiguslikku kategooriat. Viru väin on Eesti iseseisvuse taastamisest alates mereõiguse konventsiooni artikli 36 kategooria väin, sest seda läbib majandusvööndi koridor. Ei ole aga välistatud, et 1991. aastast kuni 1994. a Eesti ja Soome lepingu sõlmimiseni (või alternatiivselt Soome väljaastumiseni 1925. ja 1926. a lepingutest 2010. aastal) kohaldus 1925. a Helsingi kolmepoolse lepingu alusel Viru väinale ka *sui generis* väina kategooria. Selle järgi ei oleks Eesti ja Soome saanud sel perioodil oma territoriaalmerd Viru väinas laiendada kuni 12 meremiilini üksteise nõusolekuta, kuigi vastupidist võimaldas mereõiguse konventsioon. 1994. a kahepoolses Eesti ja Soome lepingus nähti ette võimalus majandusvööndi koridori kaotamiseks üksnes eelneva 12-kuu pikkuse etteteatamise alusel.

1925. a Helsingi kolmepoolse lepingu tähtsust Nõukogude Liidu jaoks ilmestab asjaolu, et ta seadis selle sõlmimise eeltingimuseks Läänemere riikide vahelise 1925. a Helsingi konventsiooni osapooleks astumisele. Lepingu olulisust näitab ka Nõukogude Liidu tugev reaktsioon Riigikohtu 1932. a üldkogu otsusele, milles vähendati 1925. a ja 1926. a Helsingi kolmepoolsete lepingute tõlgendamisel nende olulisust Viru väina läbipääsukorra jaoks. Selle tulemusel pidi Eesti valitsus vastu võtma määruse, et tagada Riigikohtu otsusest sõltumata jätkuvalt meresõiduvabadus Viru väina rahvusvahelises koridoris. 1932. a Riigikohtu otsuse diplomaatiline järelkaja võimaldab projitseerida ka Venemaa Föderatsiooni eeldatavalt tugevat reaktsiooni juhul, kui Eesti ja Soome peaksid Viru väina majandusvööndi koridori kaotama territoriaalmere laiendamisel asjassepuutuvas merealas 12 meremiilini.

D. Sisevete-alase siseriikliku õiguse ja saarte mõju Eesti väinade õigusraamistikule

Väina rannikuriigi siseriiklik õigus sisevete kohta ei saa üldjuhul mõjutada läbipääsukorda väinast. Mereõiguse konventsiooni III osa alusel kohaldub väinas takistamatu läbisõidu õigus või mittepeatatava rahumeelse läbisõidu õigus reeglina ka juhul, kui väin on ümbritsetud sirgete lähtejoontega ja on seega osa rannikuriigi sisevetest. See tuleneb mereõiguse konventsiooni artikli 35 punktist a, mille järgi konventsiooni III osaga ei reguleerita väina sisevete alasid, välja arvatud juhul, kui sirge lähtejoonega hõlmatakse siseveteks ka merealad, mis seda varem ei olnud.

Mereõiguse konventsiooni artikli 35 punkti a on kohaldatud vastuoluliselt mh Kanada ja Venemaa Föderatsiooni väinadele Arktikas. Ka erialakirjanduses on esitatud vastuolulised tõlgendused selle sätte rakendamise õiguslike tingi-

muste kohta. See on põhjustanud teataval määral õigusselgusetust selle erandi kohaldamisala suhtes. Mereõiguse konventsiooni artikli 35 punkti a puutumus Väinamerega võimaldab kombata selle sätte kohaldamise piire, luues selles küsimuses vajalikku õigusselgust.

Väinameri on ümbritsetud sirgete lähtejoontega ja koosneb seega täielikult Eesti sisevetest. Väinameri ühendab Eesti, aga ka Soome ja Rootsi majandusvööndeid Läänemeres Läti majandusvööndiga Liivi lahe kaguosas. Eesti siseriiklikus õiguses ei tunnustata välisriikide laevade ja õhusõidukite takistamatu läbisõidu õigust Väinameres ja sellega külgnevates sisevetes (nt Eesti sisevetes Liivi lahes). Samuti ei tunnustata Eesti seadustes rahumeelse läbisõidu õigust Väinameres. Sellest järeldub, et Eesti ei käsita Väinamerd rahvusvahelise väinana. See on kooskõlas rahvusvahelise mereõigusega juhul, kui Väinameri täidab mereõiguse konventsiooni artikli 35 punkti a tingimused. Tegemist on kitsa erandiga, mis võimaldab välistada takistamatu või rahumeelse läbisõidu õiguse väinas selle rannikuriigi siseriikliku õiguse põhjal.

Mereõiguse konventsiooni artikli 35 punktis a sätestatud erandi kohaldumiseks tuleb välja selgitada, kas asjassepuutuv väin oli siseveteks ka enne selle ümber sirgete lähtejoonte kehtestamist. See loob otsese seose väina rannikuriigi sisevete-alase siseriikliku õiguse ja väina läbipääsukorra vahel. Kui Väinameri ei olnud siseveteks enne selle ümber sirgete lähtejoonte kehtestamist, kohaldub seal välisriikide laevadele ja õhusõidukitele *prima facie* takistamatu läbisõidu õigus (mis aga praktikas asenduks nn Messina erandiga mereõiguse konventsiooni artikli 38 lg 1 mõttes, vt allpool). Vastasel juhul kohaldub Väinamerele sisevete õigusraamistik ilma mereõiguse konventsiooni III osas sätestatud piiranguteta läbipääsukorra osas. Kuna Eesti kehtestas Väinamere ümber sirged lähtejooned iseseisvuse taastamisel, tuleb mereõiguse konventsiooni artikli 35 punkti a kohaldumise üle otsustamiseks hinnata Eesti 1940. a eelseid õigusnorme sisevete kohta.

Enne 1940. aastat kasutas Eesti sirgete lähtejoonte asemel üksnes standardlähtejooni oma 4 meremiili laiuse territoriaalmere välispiiri määramiseks. Lisaks sätestas 1938. a veeteede seaduse § 3, et merekitsused, mis on läbikäiguks ulgumere kahe osa vahel ja mille mõlemad rannikud kuuluvad riigi territooriumi hulka, loetakse territoriaalmereks, kui merekitsuse laius ei ületa kümmet meremiili. See erand kohaldus üksnes Väinamerele, mis kuulutati täielikult Eesti territoriaalmereks. 1938. a veeteede seaduse § 4 järgi ei kohaldunud Väinameres välisriikide sõjalaevadele rahumeelse läbisõidu õigus, välja arvatud merehäda puhul või riikidevahelise kokkuleppe või valitsuse loa alusel.

Eelnevast tulenevalt kohaldus Väinamerele 1938. a veeteede seaduse järgi territoriaalmere õigusraamistik. Veeteede seadus ei määranud ka sisevete määramise aluseid. Seetõttu ei ole veeteede seadus otseselt asjassepuutuv Väinamere läbipääsukorra hindamiseks mereõiguse konventsiooni artikli 35 punktis a sätestatud erandi tähenduses. Eesti kehtestas oma siseveed aga vahetult pärast veeteede seaduse vastuvõtmist 1938. a Põhjala neutraliteedireeglite alusel.

Eesti 1938. a erapooletuse korraldamise seadus järgis samal aastal vastu võetud Islandi, Norra, Rootsi, Soome ja Taani neutraliteediseaduste eeskuju. Need neutraliteediseadused võeti vastu harmoneeritult 1938. a Skandinaavia neutraliteedireeglite deklaratsiooni alusel. 1938. a neutraliteediseadustega, sh Eesti erapooletuse korraldamise seadusega, reguleeriti valdavalt mereõigusesse puutuvaid küsimusi, et tugevdada rannikuriigi julgeolekut sõjatingimustes. Eesti erapooletuse korraldamise seadus töötati välja Rootsi neutraliteediseaduse põhjal. Eesti erapooletuse korraldamise seadus oli 1938. a Riia protokolli järgi omakorda aluseks Läti ja Leedu neutraliteediseadustele.

Eesti erapooletuse korraldamise seaduse § 2 lg 3 sätestas sarnaselt teiste 1938. a neutraliteediseadustega, et Eesti siseveteks loetakse sadamad, sadamasuudmed, lahed ja merelõukad, samuti veealad, mis asetsevad mittealaliselt vee all olevate Eesti saarte, laidude ja karide vahel ning seespool neid. See definitsioon kohaldus *mutatis mutandis* kõigis Põhjala riikides. Mereõiguse konventsiooni artikli 35 punkti a kohaldumise seisukohalt seisneb küsimus selles, kas kogu Väinameri oli tunnistatud Eesti siseveteks 1938. a erapooletuse korraldamise seaduse § 2 lg 3 mõttes. Analoogilist kontrolliskeemi tuleks kohaldada ka näiteks Ahvenamaa saarestiku vete suhtes, et välja selgitada, kas saarestikuvahelised väinad täidavad mereõiguse konventsiooni artikli 35 punkti a tingimused.

Riikide praktika ja arhiiviallikate põhjal on selge, et Väinamere läbipääsud – Hari kurk, Voosi kurk, Soela väin ja Suur väin, nagu ka Väike väin – lisaks ülejäänud Väinamere merealale täidavad 1938. a erapooletuse korraldamise seaduse § 2 lg-s 3 sätestatud tingimused. Seetõttu tuleks kogu Väinamerd käsitada selliste sisevetena mereõiguse konventsiooni artikli 35 punkti a tähenduses, mis olid siseveteks ka enne nende ümbritsemist sirgete lähtejoontega. Selle tulemusel ei kohaldu Väinameres takistamatu läbisõidu õigus (ega üldjuhul ka nn Messina erand), kuigi see merekitsus ühendab kaht majandusvööndi osa. Eesti küll tunnustab siseriiklikus õiguses piiratud kujul rahumeelse läbisõidu õigust teatud tüüpi laevade suhtes Väinameres, kuid tal ei ole selleks mereõiguse konventsiooni artikli 35 punkti a kohaldumise tõttu kohustust. Eestil pole vaja täita mereõiguse konventsioonis sätestatud rannikuriigile seatud nõudeid rahumeelse läbisõidu õiguse tunnustamiseks Väinameres.

Need järeldused on vastupidised seni rahvusvahelises erialakirjanduses esitatuga, mille kohaselt peaks Väinamerd kui sumbväina läbivatele laevadele kohalduma mereõiguse konventsiooni artikli 45 lg 1 punkti b alusel mittepeatatava rahumeelse läbisõidu õigus. Sellised järeldused on ekslikud lisaks põhjusel, et mereõiguse konventsiooni artikli 35 punktis a sätestatud erandi mittekohaldumisel peaks välisriikide laevadel ja õhusõidukitel olema Väinameres *prima facie* takistamatu läbisõidu õigus Läti majandusvööndi tõttu Liivi lahes. Siiski näib neid seisukohti jagavat mh Ameerika Ühendriikide merevägi. Ligipääsuta Eesti arhiiviallikatele mereõiguse konventsiooni artikli 35 punktis a sätestatud erandi kohaldumise hindamiseks, on sellised järeldused Väinamere läbipääsukorra kohta jäänud pinnapealseteks.

Eelnevast tulenevalt koosneb Väinameri sellistest sisevetest, milles välisriikide laevadel ja õhusõidukitel ei ole võimalik takistamatu läbisõidu õigust (ega rahumeelse läbisõidu õigust) kasutada, kui vastupidist ei sätesta omal initsiatiivil Väinamere rannikuriik Eesti. Töös leiti, et 1938. a Põhjala neutraliteedireeglite tõttu on sellisteks Läänemere väinadeks, kus potentsiaalselt kohaldub mereõiguse konventsiooni artikli 35 punktis a sätestatud erand, ka Ahvenamaa saarestiku arvukad väinad ja kitsas Kalmari väin Rootsi mandri ja Ölandi saare vahel.

Kuna mereõiguse konventsiooni artikli 35 punktis a sätestatud erandi tõttu on väinale kohalduvale õiguslikule kategooriale oluline mõju väina rannikuriigi siseriiklikul õigusel, võivad samavõrra olulist mõju väina läbipääsukorrale omada välisriikide diplomaatilised protestid väina rannikuriigi siseriikliku õiguse asjassepuutuvate sätete vastu. Protesti esitanud riik võib säilitada oma laevadele ja õhusõidukitele selle läbipääsukorra, mis kohaldus väinale enne selle tunnistamist siseveteks. Ka Eesti erapooletuse korraldamise seaduses sätestatud sisevete õigusraamistiku (ka mõnede veeteede seaduse sätete) vastu esitasid Välisministeeriumile protestid Ühendkuningriik ja Saksamaa. Sarnaselt talitasid Ühendkuningriik ja Saksamaa kõigi teiste 1938. aastal neutraliteediseaduse vastu võtnud Põhjala riikide suhtes. Protesti tõttu on neil õiguslik alus mitte tunnustada Väinamere suhtes mereõiguse konventsiooni artikli 35 punktis a sätestatud erandi kohaldumist.

Eelnevast tulenevalt ei ole välistatud, et Ühendkunigriik ja Saksamaa ei pea ennast õiguslikult seotuks sellega, et Eesti on välistanud Väinameres takistamatu läbisõidu korra ja mereõiguse konventsiooni tingimustele vastava rahumeelse läbisõidu korra. Selle eelduseks on, et nad jäävad kindlaks oma protestidele 1938. a erapooletuse korraldamise seaduse nende sätete vastu, mis on õiguslikuks aluseks Eesti siseriiklikus õiguses kehtestatud Väinamere läbipääsukorrale. Üldisemaltki kinnitab see Euroopa Liidu ja Ameerika Ühendriikide protestide olulisust nende sirgete lähtejoonte suhtes, mille kehtestamisega kuulutasid Kanada ja Venemaa Föderatsioon Loodeväila ja Kirdeväila oma siseveteks ja mille suhtes võivad seetõttu need väina rannikuriigid oma huvides potentsiaalselt kohaldada mereõiguse konventsiooni artikli 35 punktis a sätestatud erandit, kuigi need väinad ei pruugi tingimata selle tingimusi täita.

Kui Ühendkuningriik ja Saksamaa kinnitavad oma protestide jätkuvat kehtivust, ei kohaldu nende laevadele ja õhusõidukitele Väinameres siiski mitte takistamatu läbisõidu õigus. Seda eeldusel, et Eesti tugineb sellisel juhul nn Messina klauslile. Nimelt kohaldub mereõiguse konventsiooni artiklite 38 lg 1 ja 45 lg 1 punkti a järgi mittepeatatav rahumeelse läbisõidu õiguse kord sellistele väinadele, millele ei kohaldu takistamatu läbisõidu õigus põhjusel, et väina moodustavad väinaga piirneva riigi saar ja selle riigi manner ning kui saarest mere pool on avamere või majandusvööndi läbisõidutee, mis navigatsiooni- ja hüdrograafiliste tingimuste poolest on sama sobiv. Väinameri täidab need tingimused nn Messina erandi kohaldumiseks.

Väinamere läbipääsukord võib erineda ka Venemaa Föderatsiooni jaoks. Selle põhjuseks ei ole aga mitte diplomaatiline protest asjakohase siseriikliku

õigusakti või selle sätte vastu, vaid Eesti õigusliku järjepidevuse eitamine. Selle tulemusel võib Venemaa Föderatsiooni laevadele kohalduda mittepeatatava rahumeelse läbisõidu õigus nn Messina klausli alusel sarnaselt potentsiaalselt Ühendkuningriigi ja Saksamaa laevadega. Nagu järgnevalt selgub, on õigusliku järjepidevuse põhimõte mõjutanud Eesti väinade läbipääsukorda ka muul moel.

E. Merealade delimiteerimise ja õigusliku järjepidevuse mõju Eesti väinade õigusraamistikule

Õigusliku järjepidevuse põhimõttel on olnud otsene mõju Eesti väinade õigusraamistikule. Nende omavahelist seotust näitab see, et kui Eesti oleks olnud sarnaselt Lätiga valmis loobuma õigusliku järjepidevuse põhimõtte rangest käsitlusest, oleks Liivi lahe väinade läbipääsukord tänasest väga erinev. Selle tulemusel Liivi lahele ajaloolise lahe kontseptsiooni kohaldumisel koosneksid Kura kurk, Väinameri ja kogu Liivi laht pikaaegsetest sisevetest mereõiguse konventsiooni artikli 35 punkti a tähenduses.

Eestil ei oleks võimalik välistada ka Väinameres takistamatu läbisõidu õiguse kohaldumist ilma mereõiguse konventsiooni artikli 35 punktis a sätestatud erandi rakendamiseta. See erand kohaldub Väinamerele üksnes 1938. a Põhjala neutraliteedireeglite alusel koostoimes Eesti õigusliku järjepidevuse põhimõttega. Õigusliku järjepidevuse põhimõte on seega üheks Eesti väinade õigusraamistiku nurgakiviks.

Eeltoodu viitab sellele, et Eesti peaks õigusliku järjepidevuse põhimõttest lähtuvalt ühtlasi tunnustama neid 1940. a eelseid lepinguid, mis ei ole üksnes tema kui lepingu osapoolest rannikuriigi huvides. Selline postulaat omaks Eestile praktilist tähendust ennekõike juhul, kui 1925. a Helsingi lepingud Eesti, Soome ja Nõukogude Liidu vahel vaba läbipääsu tagamisest Viru väinas oleksid jätkuvalt jõus. Nagu eelpool hinnatud, on need lepingud aga kehtetud hiljemalt alates Soome väljaastumisest 2010. aastal.

Lisaks õiguslikule järjepidevusele võib ka merealade delimiteerimine omada mõju väinade läbipääsukorrale. Merealade delimiteerimisele kohalduva õiguse järgi võivad navigatsiooni-alased kaalutlused olla asjassepuutuvad territoriaalmere piiri määramisel. Väinade läbipääsukord on seotud otseselt navigatsiooniga, sest see määrab läbipääsuõigused väinades, nagu ka nendesse suunduvates merealades. Väinade läbipääsukord võib seega olla merepiiride delimiteerimisel eriliseks asjaoluks mereõiguse konventsiooni artikli 15 teise lause tähenduses. Väinade läbipääsukorra seosed merealade delimiteerimisega (ja vastupidi) võivad olla sama otsesed kui seosed merevööndite välimiste piiridega, väinade õigusraamistikku puutuvate lepingutega, õigusliku järjepidevuse põhimõttega ja sisevete-alaste siseriiklike õigusaktidega.

Seda kinnitab asjaolu, et 1940. ja 1965. ning 1985. aastal Soome ning Nõukogude Liidu vahel sõlmitud Soome lahe merealade piiritlemise lepingute alusel Venemaa Föderatsiooni kehtestatud majandusvööndi tõttu Goglandi saare vahetus läheduses on Viru väin majandusvööndi koridori kaotamisel väinaks,

mis ühendab kaht majandusvööndi osa. Mereala, kus Venemaa Föderatsiooni majandusvöönd paikneb, asub lähemal kui 12 meremiili lähtejoontest mõõdetuna. Seetõttu asuks asjassepuutuv mereala Venemaa Föderatsiooni majandusvööndi õiguslikuks aluseks olevate lepingute säteteta mitte majandusvööndis, vaid territoriaalmeres. Sellisel juhul kohalduks Viru väinale takistamatu läbisõidu õigusliku raamistiku asemel majandusvööndi koridori kaotamisel mittepeatatava rahumeelse läbisõidu õigusraamistik – seda eeldusel, et Venemaa Föderatsioon ei tõmbaks sellisel juhul oma siseriiklikus õiguses ühepoolselt tagasi territoriaalmere välimist piiri asjassepuutuvas merealas.

Merealade delimiteerimise ja väinade õigusraamistiku vastastikmõju ei pruugi siiski alati esineda, vaid sõltub ennekõike asjassepuutuva väina ja delimiteerimisele kuuluva mereala tunnustest, nagu ka merealade piiritlemise lepingu tingimustest. Seda kinnitab merealade delimiteerimine Eesti ja Läti ning Eesti ja Venemaa Föderatsiooni vahel. Kummalgi juhul ei saanud merealade delimiteerimine mõjutada läbipääsukorda asjassepuutuvas väinas.

Enne Eesti ja Läti merealade delimiteerimist ei olnud Kura kurgu ja Väinamere läbipääsukord selge ega väljakujunenud. Selle põhjuseks ei olnud aga mitte merepiiri puudumine Liivi lahes, vaid rannikuriikide eriarvamused Liivi lahe tunnustamise asjus ajaloolise lahena. Vastupidiselt rahvusvahelises erialakirjanduses seni leitule ei puuduta merepiir Liivi lahes vaid Eesti ja Läti territoriaalmerd. See on ühtlasi merepiiriks Läti majandusvööndile, mandrilavale ja võimalikule külgvööndile Liivi lahes. Sellest tulenevalt kohaldub Kura kurgule takistamatu läbisõidu kord. Merealade delimiteerimise käigus paistsid Eesti ja Läti üldiselt teadvustavat takistamatu läbisõidu korra kohaldumise mõju navigatsioonile Liivi lahes. Samas näisid Eesti ja Läti eeldavat, et nad suutsid seda merealade delimiteerimisel vältida majandusvööndi olemasolu välistamise kaudu Liivi lahes.

Kura kurgu õigusliku kategooria muutmiseks ja seeläbi takistamatu läbisõidu korra välistamiseks oleksid pidanud lahe rannikuriigid Eesti ja Läti ühiselt nõustuma Nõukogude Liidu pärandina ajaloolise lahe õigusraamistiku jätkuvas kohaldamises Liivi lahe suhtes. Läti nõudis, et Liivi laht tuleb tunnistada selliseks jagatud suveräänsusega merealaks mereõiguse konventsiooni ja Rahvusvahelise Kohtu 1992. a Fonseca lahe otsuse põhjal ning ka jõustas sellise korra oma siseriiklikus õiguses. Eesti vastustas seda ettepanekut peamiselt vastuolu tõttu õigusliku järjepidevuse põhimõttega.

Majandusvööndi olemasolu Liivi lahes on ajaloolise lahe kontseptsiooni kohaldumise välistamise järel paratamatu. Seda kinnitavad ka Läti 2011. aastal Ühinenud Rahvaste Organisatsioonile esitatud õigusaktid ja kaardid majandusvööndi kohta Liivi lahe kaguosas.

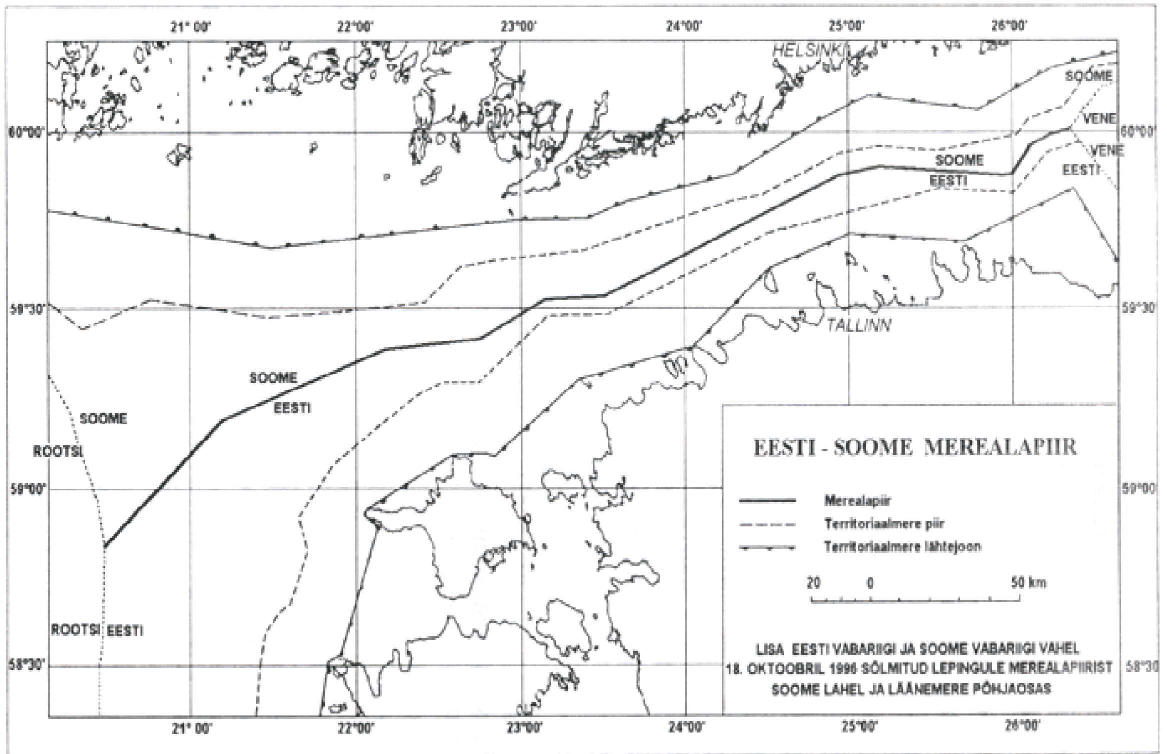
Lahe õigusliku korra määramine on eraldiseisev küsimus merealade delimiteerimisest. Kuna Liivi lahe tunnistamine ajallooliseks laheks ja eelpool hinnatud majandusvööndi koridori kehtestamine Kura kurgus ja Liivi lahes on ainsateks võimalusteks Kura kurgus ja Liivi lahes takistamatu läbisõidu õiguse välistamiseks ja need küsimused ei ole osa merealade delimiteerimisest, on selge, et Liivi lahe ja Kura kurgu merealade delimiteerimine ei omanud mõju

nende läbipääsukorrale. Samas on märkimisväärne, et merealade piiritlemise käigus andis Läti vaikiva tunnustuse Eesti sirgetele lähtejoontele Liivi lahes, nõustudes tõmbama keskjoone nende põhjal.

Läti tunnustus omanuks Kura kurgu ja Liivi lahe läbipääsukorrale mõju, kui majandusvöönd Liivi lahes paikneks üksnes Eesti merealas. Läti kui väina teise rannikuriigi tunnustus Eesti sirgetele lähtejoontele merealade delimiteerimisel pakkus väina rannikuriikide ühetaolise praktika tõttu Eestile tugevama õigusliku aluse oma merealas majandusvööndi välistamiseks. Samas ei omanud potentsiaalse Eesti majandusvööndi välistamine Liivi lahes ja sellega seoses Läti tunnustus asjassepuutuvatele sirgetele lähtejoontele mingit mõju Kura kurgu ja Liivi lahe läbipääsukorrale. Läti majandusvööndi tõttu Liivi lahe kaguosas kohaldub Kura kurgus ja Liivi lahes takistamatu läbisõidu õigus. Läti majandusvööndi olemasolu Liivi lahes ei oleks saanud välistada merealade delimiteerimise kaudu. Merealade delimiteerimine Eesti ja Läti vahel näitab siiski, et see võinuks potentsiaalselt määrata Kura kurgu õigusliku kategooria juhul, kui Liivi lahe kaguosa geograafiline asetus oleks mõnevõrra teistsugune ja Läti majandusvöönd hõlmanuks selle tegelikust ulatusest üksnes väikest põhjapoolset osa, mis külgneb Eesti territoriaalmere piiriga Liivi lahe idaosas.

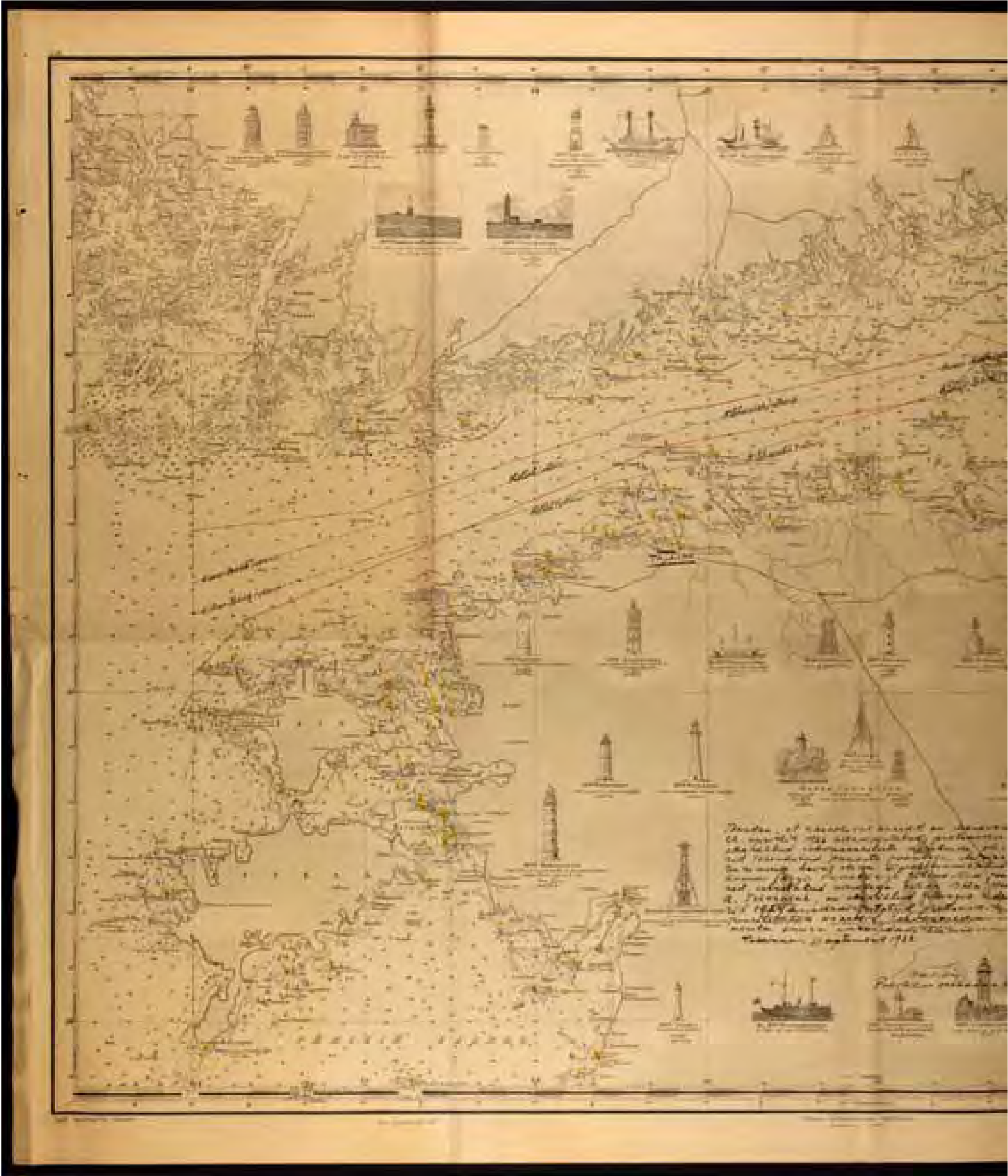
ANNEX 1. MAPS

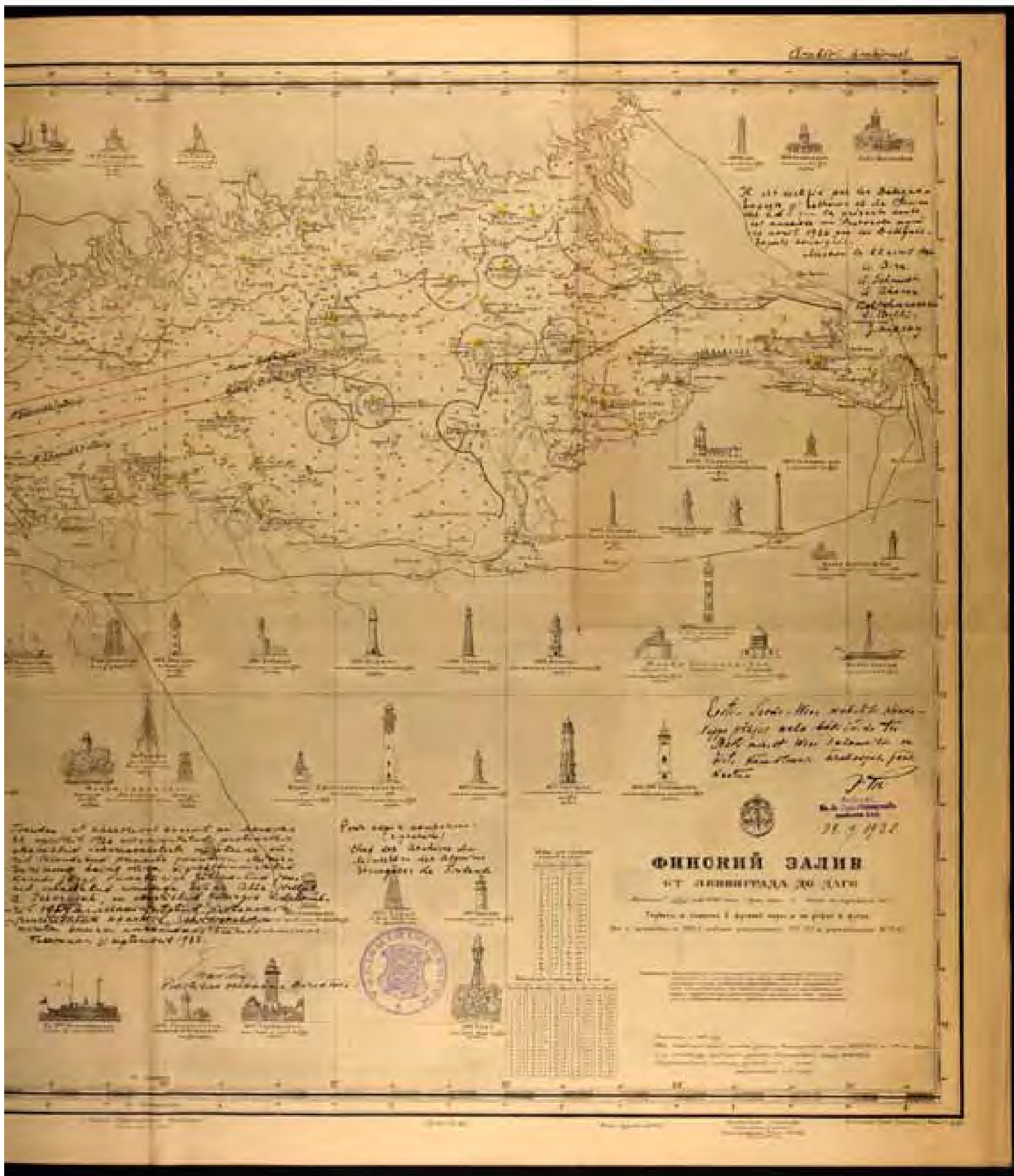
Map 1. The EEZ Corridor in the Gulf of Finland



Source: State Gazette of Estonia. Agreement between the Republic of Finland and the Republic of Estonia on the Boundaries of the Maritime Zones in the Gulf of Finland and the Northern Baltic Sea. Map added to the 1996 Maritime Boundary Treaty depicting the median line, the limit of the territorial sea and straight baselines of Estonia (south) and Finland (north) in the Gulf of Finland and in the Northern Baltic Sea.

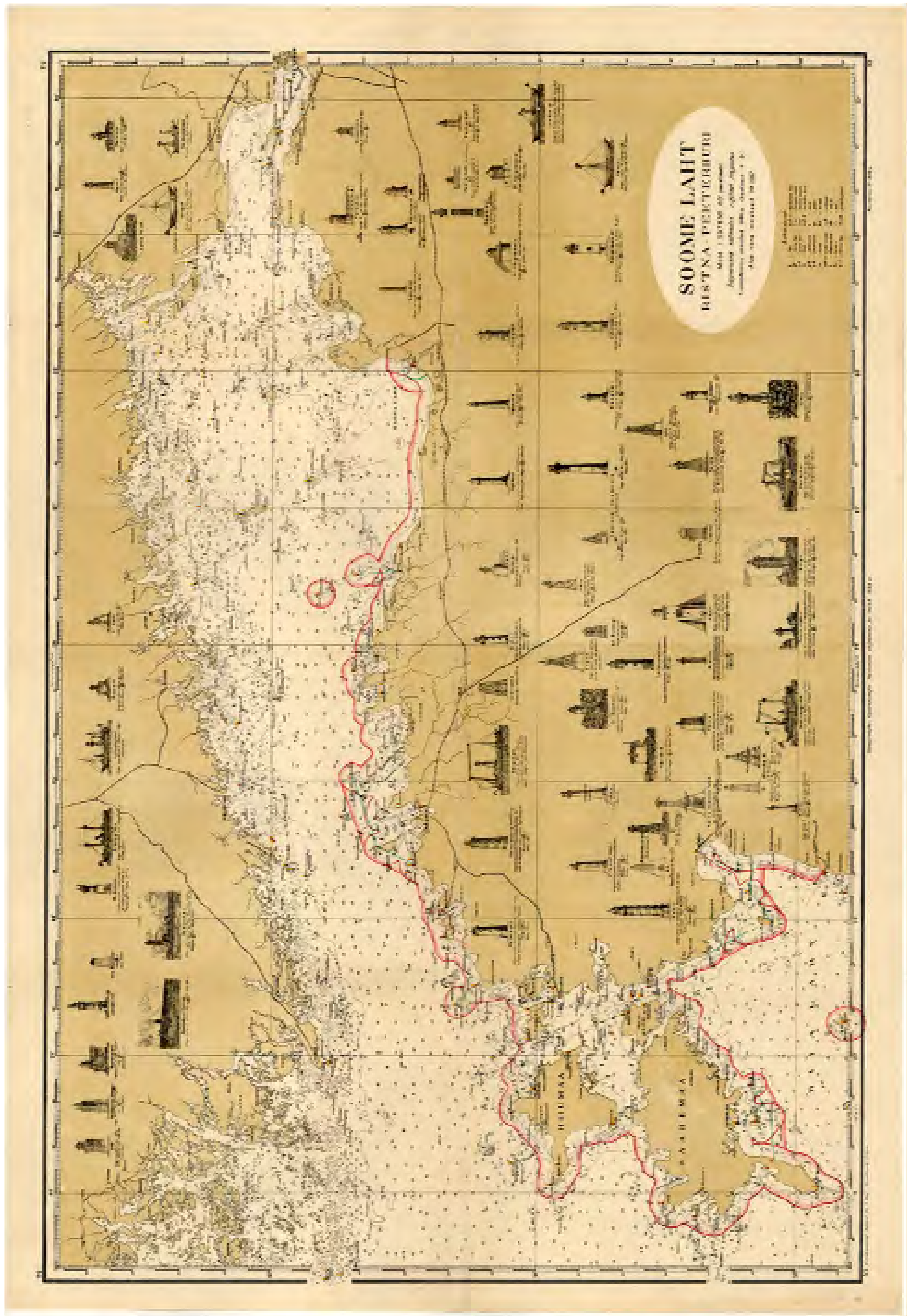
Map 2. The High Seas Corridor in the Gulf of Finland under the 1925 and 1926 Agreements





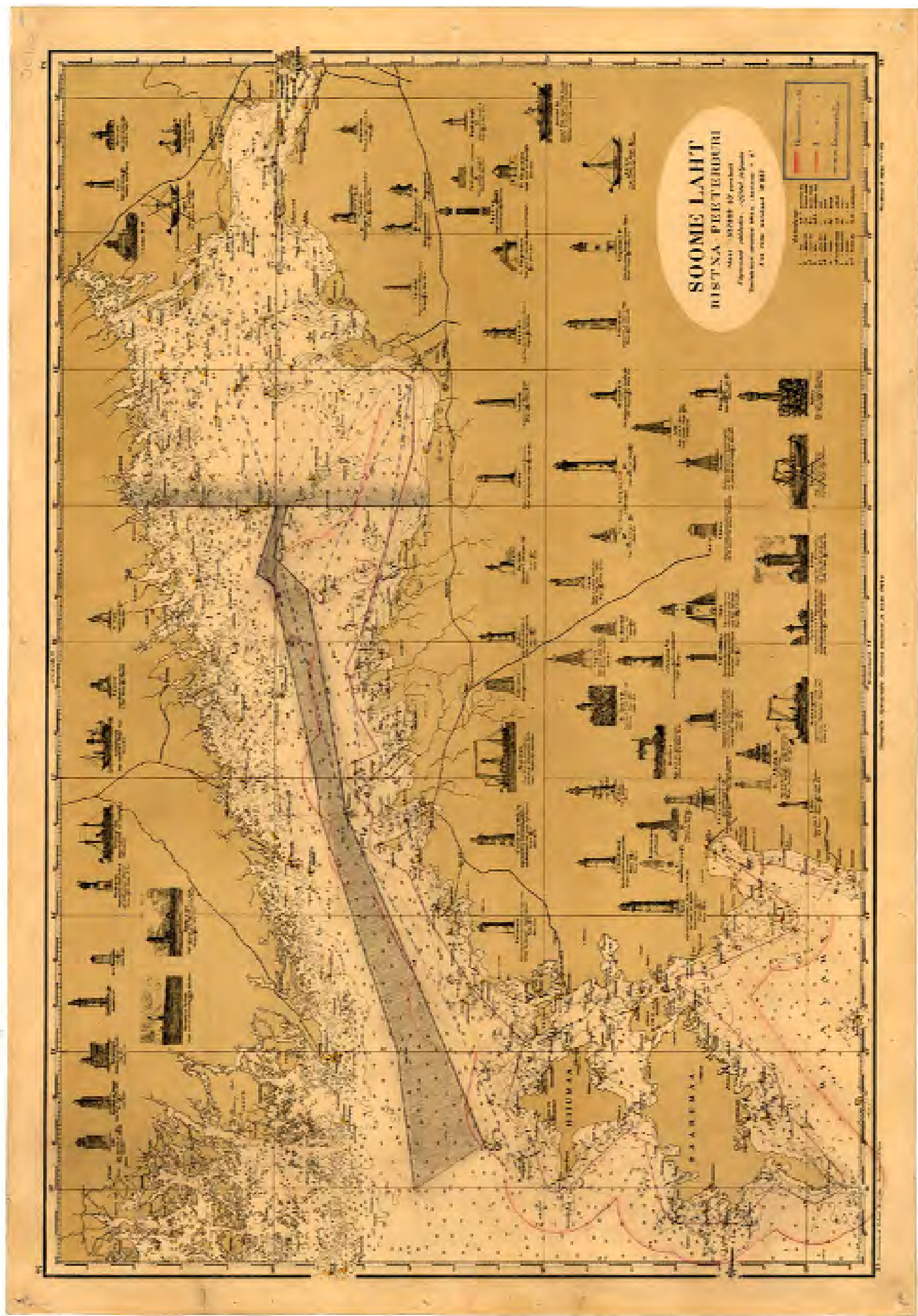
Source: ERA.957.13.651, p. 4.

Map 3. The 3-Miles-Wide Territorial Sea of Estonia in 1923



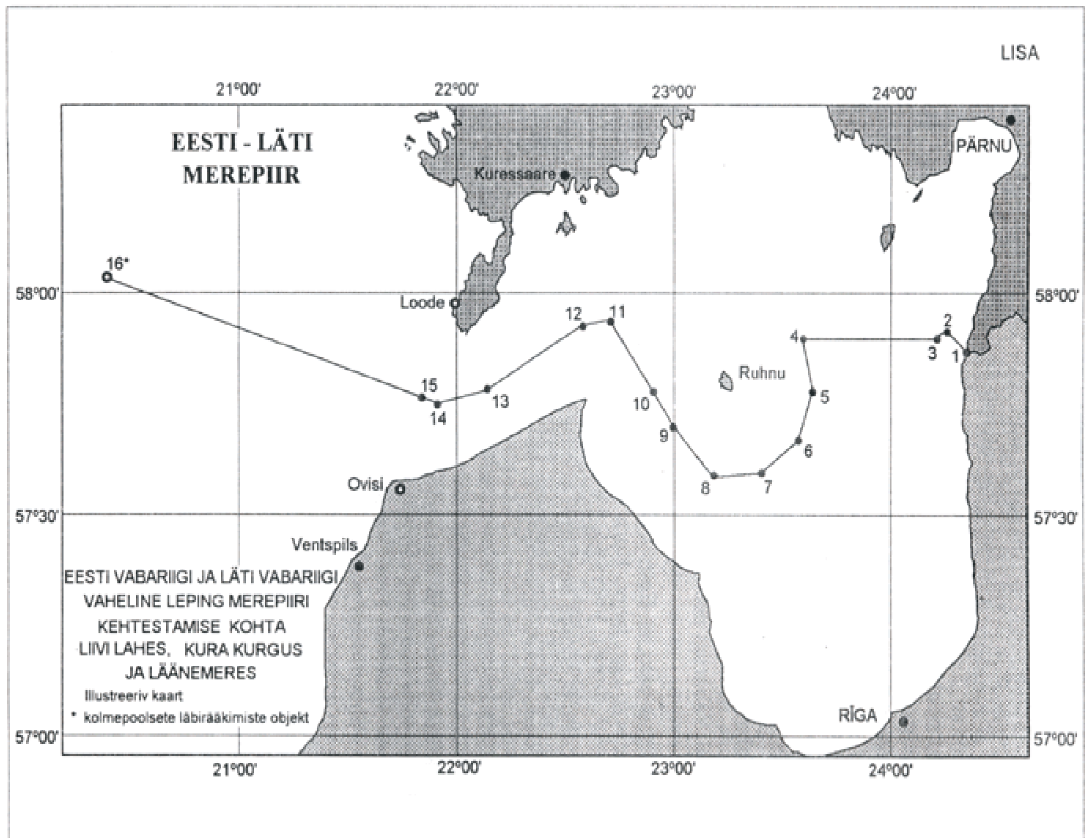
Source: ERA.T-6.3.1259, p. 1.

Map 4. The 12-Miles-Wide Maritime Zone of Estonia in 1923



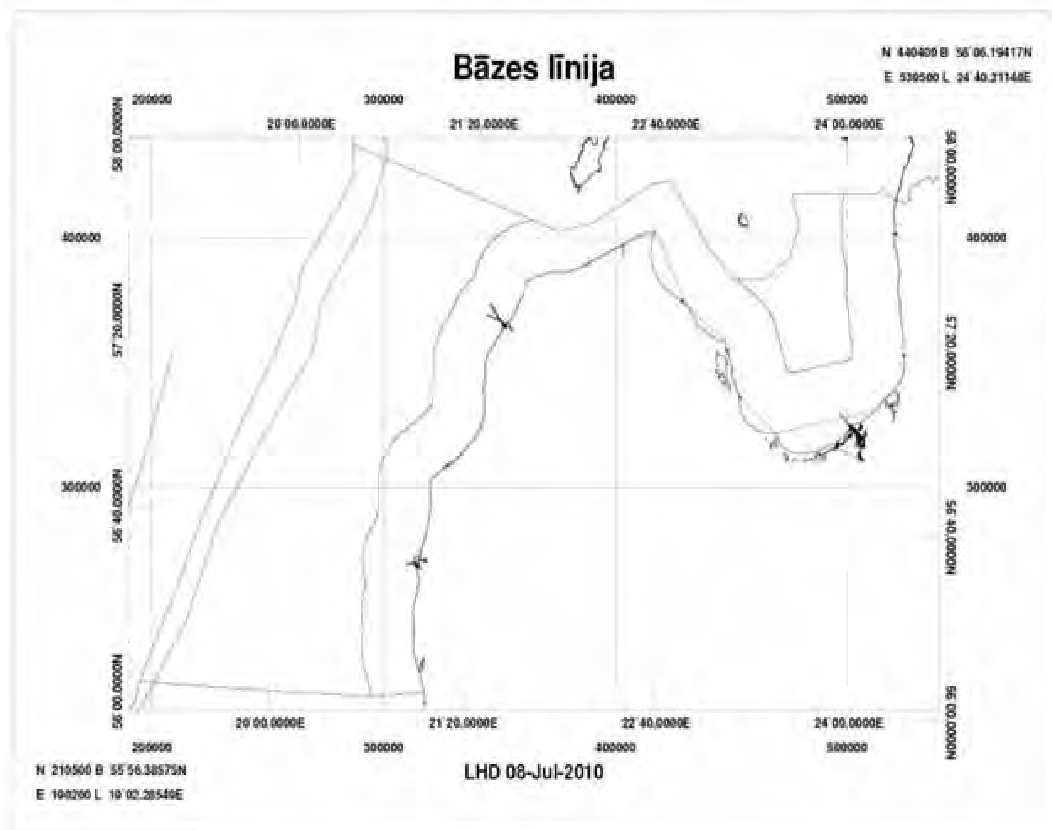
Source: ERA.T-6.3.1258, p. 1.

Map 5. The Maritime Boundary between Estonia and Latvia



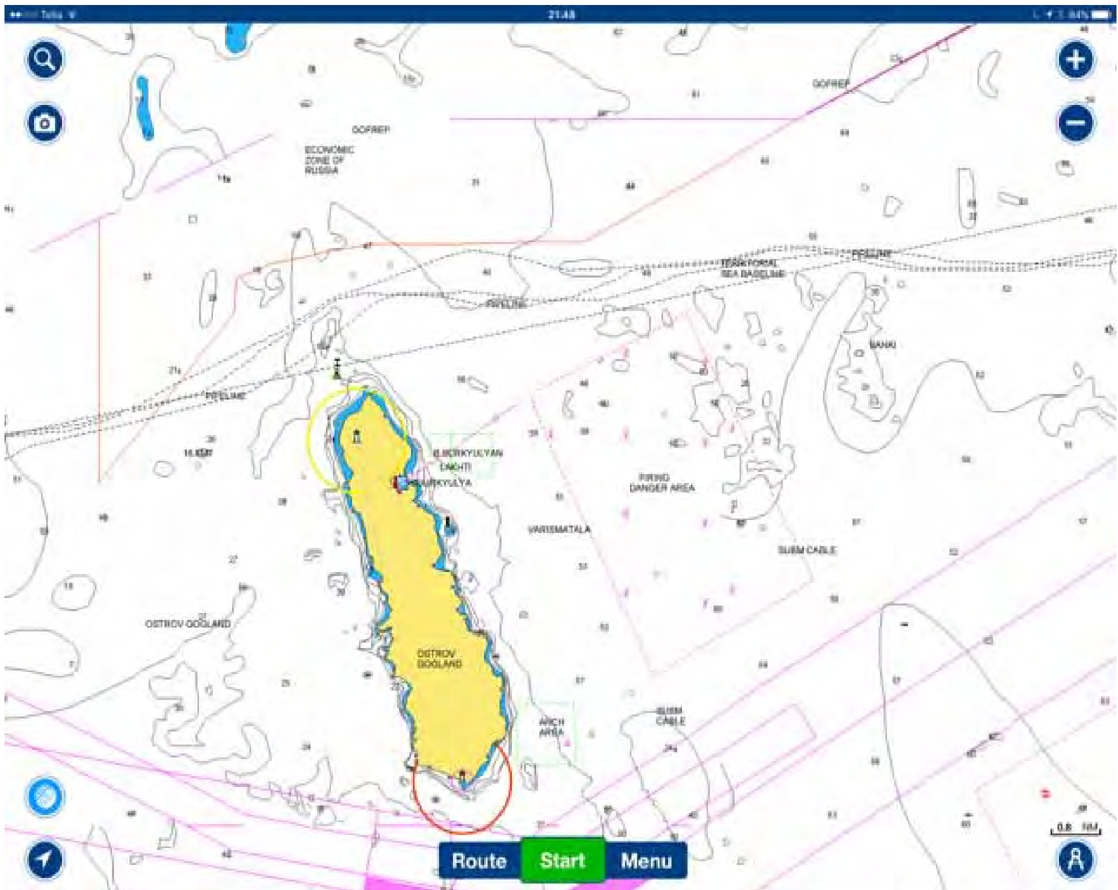
Source: State Gazette of Estonia. Agreement between the Republic of Estonia and the Republic of Latvia on the Maritime Delimitation in the Gulf of Riga, the Strait of Irbe and the Baltic Sea. Tallinn 12.07.1996, e.i.f. 10.10.1996. Accessible: https://www.riigiteataja.ee/aktilisa/0000/1308/2873/13091545.gif# (01.10.2015).

Map 6. Latvia's EEZ in the Gulf of Riga



Source: Noteikumi par bāzes līniju punktu koordinātām. Ministru kabineta noteikumi Nr.779, 17.08.2010. Accessible in Latvian: http://likumi.lv/doc.php?id=215323 (01.10.2015). Also accessible: http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/DEPOSIT/lva_mzn84_2011.pdf (01.10.2015).

Map 7. The Russian Federation's EEZ in the Gulf of Finland



Source: Navionics Europe HD, Vers. 7.1.2, 'Gogland'.

ANNEX 2. HISTORICAL TREATIES

Treaty 1. The 1925 Helsinki Convention for the Suppression of the Contraband Traffic in Alcoholic Liquors and its Protocol

Nr. 76. Riigikogu poolt 25. märtsil 1926. a. wastuwõetud

Alkoholikaupade salawedu wastu wõitlemise konwentsiooni, selle lõpuprotokolli ja Eesti, Soome ning Nõukogude Sotsialistlikkude Wabariikide Liidu wahelise kontrollwööde kokkuleppe kinnitamise seadus.*)

§ 1. Alkoholikaupade salawedu wastu wõitlemise konwentsioon, selle lõpuprotokoll ja Eesti, Soome ning Nõukogude Sotsialistlikkude Wabariikide Liidu waheline kontrollwööde kokkulepe, mis-tugesid kõik kolm alla kirjutatud Helsingis 19. augustil 1925. a., tunnistatakse kinnitatuks.

§ 2. Konwentsiooni, lõpuprotokolli ja kokkuleppe prantsusekeelne algtekst eestikeelse tõlkega awaldatakse ühes käesolewa seadusega.

Algkirjale alla kirjutanud:

Riigikogu esimees A. Rei.
Abisekretär J. Piiskar.

Konwentsioon alkoholikaupade salawedu wastu wõitlemise kohta.

Saksamaa, Taani, Eesti, Soome, Läti, Leedu, Norra, Poola, Dantsigi Wabalinn, Rootsi ja Nõukogude Sotsialistlikkude Wabariikide Liit, soowides alkoholikaupade salawedu maha suruda,

arwesse wõttes, et see salawedu on hädaohuks awalikule kõlblusele ning et tema wastu peab wõitlema kõigi wõimalikkude abinõudega,

arwestades sellega, et seda sihti wõib saawutada kõige otstarbekohasemalt rahwuswaheliste kokkulepetega,

otsustasid selles asjas sõlmida konwentsiooni ja nimetasid oma täiswolinikkudeks:

Saksa Riigipresident:
härra Dr. jur. Herbert Hauschild'i, Saksa Erakorralise Saadiku ja Täiswolilise Ministri,
härra Arthur Werner'i, Kõrgema Walitsuse Nõuniku, Salajase Kohtunõuniku,
härra Dr. jur. Gerhard Schellert'i, Saatkonna Nõuniku;

Tema Majesteet Taani ja Islandi Kuningas:
härra Flemming de Lerche, Tema Majesteedi kammerhärra, Erakorralise Saadiku ja Täiswolilise Ministri;

*) „R. T." nr. 38 — 1926 a.

Convention pour la répression de la contrebande des marchandises alcooliques.

L'Allemagne, le Danemark, l'Esthonie, la Finlande, la Lettonie, la Lithuanie, la Norvège, la Pologne et la Ville Libre de Danzig, la Suède et l'Union des Républiques Soviétistes Socialistes, désireux de réprimer la contrebande des marchandises alcooliques;

estimant que cette contrebande constitue un danger pour la morale publique et doit être combattue par tous les moyens possibles;

considérant que ce but pourra être atteint de la manière la plus efficace par des accords internationaux,

ont décidé de conclure une convention à ce sujet et ont désigné comme plénipotentiaires:

le Reichspräsident Allemand:
M. le Docteur en droit Herbert Hauschild, Envoyé Extraordinaire et Ministre Plénipotentiaire d'Allemagne,
M. Arthur Werner, Conseiller supérieur de Gouvernement, Conseiller intime de Justice,
M. le Docteur en droit Gerhard Schellert, Conseiller de Légation;

S. M. le Roi de Danemark et d'Islande:
M. Flemming de Lerche, Chambellan de Sa Majesté, Son Envoyé Extraordinaire et Ministre Plénipotentiaire;

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Eesti Vabariigi Riigivanem:
härra Aleksander Hellat'i, Eesti Erakorralise Saadiku ja Täievolilise Ministri;

Soome Vabariigi President:
härra Einar Böök'i, endise Ministri, töö- ja hoolekande direktori;

Läti Vabariigi President:
härra Ch. Zarine, Läti Erakorralise Saadiku ja Täievolilise Ministri;

Leedu Vabariigi President:
härra Jurgis Savicki'i, Leedu Chargé d'Affaires'i;

Tema Majesteet Norra Kuningas:
härra Halvard Huitfeldt Bachke, Oma Erakorralise Saadiku ja Täievolilise Ministri;

Poola Vabariigi President:
härra Tytus Filipowicz'i, Poola Erakorralise Saadiku ja Täievolilise Ministri,
härra Marian Kossow'i, Poola konsuli;

Tema Majesteet Rootsi Kuningas:
härra Henning Elmquist'i, Oma Erakorralise Saadiku ja Täievolilise Ministri;

Nõukogude Sotsialistlikkude Vabariikide Liidu Täidesaatev Kesktomitee:
härra G. Maltzeff'i, Nõukogude Sotsialistlikkude Vabariikide Liidu ajutise Chargé d'Affaires'i;

kes, pärast oma heas ja korralikus korras leitud täisvolituskirjade ettenäitamist, kokku leppisid järgmistes eeskirjades:

le Président de la République d'Esthonie:
M. Alexandre Hellat, Envoyé Extraordinaire et Ministre Plénipotentiaire d'Esthonie;

le Président de la République de Finlande:
M. Einar Böök, Ancien Ministre, Directeur du travail et de la prévoyance sociale;

le Président de la République de Lettonie:
M. Ch. Zarine, Envoyé Extraordinaire et Ministre Plénipotentiaire de Lettonie;

le Président de la République de Lithuanie:
M. Jurgis Savickis, Chargé d'affaires de Lithuanie;

S. M. le Roi de Norvège:
M. Halvard Huitfeldt Bachke, Son Envoyé Extraordinaire et Ministre Plénipotentiaire;

le Président de la République de Pologne:
M. Tytus Filipowicz, Envoyé Extraordinaire et Ministre Plénipotentiaire de Pologne;
M. Marian Kossow, Consul de Pologne;

S. M. le Roi de Suède:
M. Henning Elmquist, Son Envoyé Extraordinaire et Ministre Plénipotentiaire;

le Comité Central Exécutif de l'Union des Républiques Soviétistes Socialistes:
M. G. Maltzeff, Chargé d'Affaires a. i. de l'Union des Républiques Soviétistes Socialistes;

qui, après s'être communiqué leurs pleins pouvoirs trouvés en bonne et due forme, ont convenu des dispositions suivantes:

Artikkel 1.

Käesolevas konventsioonis mõistetakse alkoholkaupade all piiritust ja piiritusvedelikke, mis tarvitamiseks ehk joogide valmistamiseks, samuti veine ehk vahuveine, milles alkoholisisaldus ületab kaheksateistkümne ruumiprotsendi. Õlu ja sellesarnased joogid, milles alkoholisisaldus on alla kaheteistkümne protsendi, ei arvata alkoholkaupade hulka.

Käesoleva konventsiooni eeskirjad ei ole maksvad alkoholkaupade kohta, mis moodustavad osa neid [illegible] laeva tarbetarvaradest ehk mis

Article 1er.

Dans la présente Convention, on entend par marchandises alcooliques: l'alcool ainsi que les liquides spiritueux propres à la consommation ou à la fabrication de boissons, et les vins ou vins mousseux dont la teneur en alcool dépasse un volume de dix-huit pour cent. La bière et les boissons similaires à teneur d'alcool inférieure à douze pour cent ne seront pas comprises parmi les marchandises alcooliques.

Les stipulations de cette Convention ne seront pas applicables aux marchandises alcooliques faisant partie des provisions

kuulunud laewaleriisimoale ehk seal teenistuses olewatele isikutele, eeldusel, et nimetatud joogid ei ületa reisiks tarwisminewat hulka ning et nende kohta oleks esitatud deklaratsioon wastawalt asjaomase riigi tollimäärustikule.

Artikkel 2.

Iga lepinguosaline kohustub laewadele, milliste tonnaaž alla saja netto registertonni, ära keelama alkoholikaupade wäljawedu wälismaale, wäljaspoole oma territooriumi, tolliladud ja wabasadamad ühes arwatud.

See keeld ei ole maksew mehaaniliselt jõul liikuwate laewade kohta, mis korralistel liinidel sõidawad.

Artikkel 3.

Iga lepinguosaline kohustub lubama alkoholikaupade wäljawedu wälismaale mõne lepinguosalise laewadel, mille tonnaaž on alla wiiesaja registertonni netto, wäljaspoole oma territooriumi — tolliladud ja wabasadamad ühes arwatud — ainult siis, kui talle on antud ametlik luba selleks omamaa asjaomaste ametiwõimude poolt.

Seda luba wõib wälja anda ainult sel juhtumisel, kui laewaperemehe nimi ja ausus on selgeks tehtud mingisuguse awaliku ehk eraorganisatsiooni poolt, mis kompetentne kaubanduse ja laewasõidu alal.

Nimetatud luba antakse wälja maksewusega kolmeks aastaks. Ta kaotab maksewuse, kui laew laewaperemeest wahetab.

Kuritarwituse korral wõetakse luba tagasi pärast uurimist asjaomaste ametiwõimude poolt.

Artikkel 4.

Artikkel 3-das tähendatud laewade wäljasõit wälismaale wõib sündida ainult siis:

a) kui selge on, et ei ole tegemist salakaubawedoga;

b) kui laewajuht ehk alkoholikaupade saatja kinnitab kirjalikult, et alkoholikaubad, mis laewale laaditud, on korrapäraselt wälja weetud ja et nad tõesti sisse weetakse sihtkohta, eeskirjade kohaselt, mis seal maksewad;

de bord du navire qui les transporte ou appartenant à des personnes voyageant ou employées à bord du navire, pourvu que les dites boissons ne dépassent pas la quantité requise pour le voyage et qu'elles soient déclarées conformément aux règlements douaniers de l'État en question.

Article 2.

Chacune des Parties contractantes s'engage à interdire aux navires jaugeant moins de cent tonneaux registre net d'exporter à l'étranger des marchandises alcooliques hors de son territoire, y compris les entrepôts de douane et les ports francs.

Cette clause ne s'applique pas aux navires à propulsion mécanique desservant une ligne régulière.

Article 3.

Chacune des Parties contractantes s'engage à ne permettre l'exportation à l'étranger des marchandises alcooliques par des navires de la nationalité d'une des Parties jaugeant moins de cinq cents tonneaux registre net, hors de son territoire, — y compris les entrepôts de douane et les ports francs, — que sur une autorisation officielle accordée au navire par les autorités compétentes de son pays d'origine.

Cette autorisation ne pourra être accordée que si l'honorabilité et la loyauté de l'armateur ont été établies par une attestation d'une organisation publique ou privée compétente en matière de commerce et de navigation.

L'autorisation sus-mentionnée sera accordée pour une durée de trois ans. Elle expirera quand le navire changera d'armateur.

En cas d'abus l'autorisation sera retirée après examen des autorités en question.

Article 4.

Le départ pour l'étranger des navires désignés à l'art. 3 ne pourra avoir lieu:

a) que lorsqu'il est évident qu'il ne s'agit pas d'un trafic de contrebande;

b) que lorsque le capitaine du navire ou le chargeur des marchandises alcooliques a déclaré par écrit que les marchandises alcooliques chargées à bord du navire sont exportées de façon loyale et qu'elles seront réellement importées au lieu de destination conformément aux dispositions qui y sont en vigueur;

c) kui laewajuht on tõestanud, wastawalt artikkel 5-da eeskirjadele, et laewal waremalt weetud alkoholikaubad on ülle antud sihtkohal, wõi kui laewajuht wõib tõendusi tood, et ta awariide pärast wõi muudel kaalukatel põhjustel oli takistatud niisugust tõendust toowa.

c) que lorsque le capitaine du navire a prouvé conformément aux stipulations de l'art. 5, que les marchandises alcooliques transportées précédemment par le navire ont été livrées au lieu de destination, à moins que le capitaine n'établisse qu'il a été empêché par des avaries ou par d'autres motifs valables de fournir une telle preuve.

Artikkel 5.

Artikkel 3-das mainitud laewadel wäljamaale wäljaweetawate alkoholikaupade hulk, laad ja sihtkoht tuleb ära tähendada laewajuhi poolt allakirjutatud lisal artikkel 3-das ettenähtud ametlikule loale juure. Need andmed tõestatakse wäljasõidu sadamas asjaomaste ametiwõimude pitsatiga.

Sihtsadamas tõestawad asjaomased ametiwõimud selsamal lisal samal wiisil, et need kaubad on korrapäraselt maha laaditud. Juhtumisel, kui niisuguses riigis, mis ei ole kokkuleppe konwentsiooni osaline, ei ole wõimalik asjaomastelt ametiwõimudelt niisugust tõestust saada, aktsepteeritakse mõni muu küllaldane tõendus.

Article 5.

La quantité, l'espèce et la destination des marchandises alcooliques à exporter à l'étranger sur les navires mentionnés dans l'art. 3 doivent être indiquées sur une annexe jointe à l'autorisation officielle prévue par l'art. 3 et signée par le capitaine. Ces indications seront attestées par le sceau des autorités compétentes dans le port de sortie.

Les autorités compétentes dans le port de destination attesteront de la même manière sur cette annexe que ces marchandises ont été régulièrement déchargées. Dans le cas où l'on ne pourrait recevoir, dans un pays non contractant, une telle attestation des autorités compétentes, on acceptera quelque autre preuve suffisante.

Artikkel 6.

Lepinguosalised on kohustatud kindlaks määrama karistused, mis tarwilikeks osutuwad artiklite 2—4 eeskirjade täitmisel.

Article 6.

Les Parties contractantes sont chargées de prévoir les pénalités rendues nécessaires pour l'application des stipulations des art. 2—4.

Artikkel 7.

Lepinguosalised walwawad wõimaluse piirides selle järele, et alkoholikaupasid, mis määratud omamaa sadamasse, ei juhitaks wäljamaale.

Article 7.

Les Parties contractantes veilleront dans la mesure du possible à ce que les marchandises alcooliques destinées à un port national ne soient pas dirigées sur l'étranger.

Artikkel 8.

Lepinguosalised kohustuwad wõimaluse piirides abinõusid tarwitusele wõtma wõitluseks alkoholi salaweo wastu lepinguosalistesse riikidesse, laewade laadi ja suuruse peale waatamata.

Article 8.

Les Parties contractantes s'engagent à prendre, dans la mesure du possible, des dispositions pour lutter contre la contrebande de l'alcool dans les Etats contractants, quelles que soient l'espèce et la grandeur des navires.

Artikkel 9.

Lepinguosalised kohustuwad mitte [illegible] selle, et igaüks neist wõiks tarwitusele wõtta [illegible] [illegible], wõõ piirides, mis ulatub

Article 9.

Les Parties contractantes s'engagent à ne faire aucune objection à ce que chacune d'entre elles applique, dans une zone s'étendant jusqu'à douze milles marins de la côte

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kuni kahekümne meremiilini rannikust ehk saarte rannast.

Kui laewa, mida kahtlustatakse salawedus, kohatakse ülalnimetatud laiendatud wöös ja kui ta pääseb wäljaspoole seda wööd, wõiwad selle maa wõimud, kellele see wöö kuulub, seda laewa ajada ka wabal merel, wäljaspool seda wööd, ja temaga samuti õiguste kohaselt talitada, kui oleks ta kinni wõetud wöö enese piirides.

Need sätted on wõetud wastu, ilma et nad puudutaksid seisukohta, millele iga lepinguosaline omaette asunud juriidiliste põhimõtete alal, mis käiwad territoriaal- ja tollivööde kohta.

Artikkel 10.

Lepinguosalised peawad kinni hoidma põhimõttest, et karistused alkoholikaupade salawee eest peawad tabama ainult süüdlasi. Igatahes ei wõi laewad olla otsekohelt wõi kaudselt trahwisummade tagatiseks wõi muudele sarnastele nõudmistele, kui alkoholikaubad, mis mõne laewal-teenistuses olewa isiku poolt seadusewastaselt sisse weetud, moodustawad makswatel asjaoludel ainult tühise hulga, ja kui alkoholikaupasid, mis laewa ekipaaži mitme isiku poolt sisse weetud, ei wõi sugeda makswatel asjaoludel suureks hulgaks, see kõik sel tingimusel, et laewaperemees wõi laewajuht ise ei oleks süüdistatud seadusewastases sissewees ning kui peale selle — arwesse wõttes kaupade hulka ja teisi asjaolusid — ei wõi arwata, et nad selles suhtes ei ole hoolt kandnud tarwilise järelwalwe eest.

Kui on kindlaks tehtud, et alkoholikaupasid kandew laew, ükskõik missuguse suurusega, oli sunnitud tungima häda tõttu kohtelsadamasse tõttu, et päästa hädaohust laewa, laadungit ja laewalolewaid inimesi, ei pea ta oma laadungi pärast kandma mingisuguseid kulusid ega tülisid, wälja arwatud teatud juhtumustel tarwilised järelwalwe kulud.

Artikkel 11.

Lepinguosaliste riikide tollivõimud informeeriwad üksteist wastastikku, niihästi kui wõimalik,

ou de la limite extérieure des archipels, ses lois aux navires qui se livrent manifestement à la contrebande.

Si un navire soupçonné de se livrer à la contrebande est rencontré dans la zone élargie nommée ci-dessus et qu'il s'échappe hors de cette zone, les autorités du pays dont relève cette zone pourront le poursuivre aussi au delà de cette zone dans la mer ouverte et user envers lui des mêmes droits que s'il avait été saisi à l'intérieur de la zone.

Ces dispositions sont adoptées sans préjudice de la position prise par chacune des Parties contractantes vis à vis des principes juridiques régissant les zones territoriales et douanières.

Article 10.

Les Parties contractantes devront maintenir le principe que les pénalités de la contrebande des marchandises alcooliques ne doivent atteindre que les délinquants. En tout cas les navires ne pourront pas — directement ou indirectement — servir de caution pour les amendes ni pour les autres frais semblables, quand les marchandises alcooliques importées illégalement par quelqu'une des personnes employées à son bord ne constitueront qu'une quantité insignifiante par rapport aux circonstances et que les marchandises alcooliques importées par plusieurs membres de l'équipage du navire ne pourront pas être considérées comme une quantité considérable, eu égard aux circonstances, tout cela à condition cependant que l'armateur ou le capitaine ne soient pas eux-mêmes inculpés d'importation illégale, et, en outre, qu'ils ne puissent pas — compte tenu de la quantité des marchandises ou des autres circonstances, — être considérés comme ayant négligé la surveillance nécessaire en cette matière.

S'il est constaté qu'un navire, quelle que soit sa grandeur, portant des marchandises alcooliques a été contraint, par suite de relâche forcée, d'aborder dans un port de refuge, pour sauver d'un danger le navire, la cargaison et les personnes qui se trouvent à bord, il ne devra supporter aucun frais ou ennui à cause de sa cargaison, sauf, cas échéant, les frais nécessaires de surveillance.

Article 11.

Les douanes des Etats contractants s'informeront mutuellement aussi bien que

salawee seisukorrast ja isikute asjus, kes sellel alal tegutsewad, ning annawad üksteisele teateid eriliste asjaolude kohta, mis wõiksid kergendada wõitlust salawee wastu.

Artikkel 12.

Lepinguosalised awaldawad walmisolekut heatahtlikult uurimisele alla wõtta ettepanekuid, mida mõni lepinguosalistest wõiks esitada käesolewa konwentsiooni täiendamiseks.

Artikkel 13.

Käesolew konwentsioon ratifitseeritakse ja ratifikatsioonikirjad antakse hoiule Soome Wälisministeeriumile. Ta astub jõusse kolmkümmend päewa pärast seda, kui kolm lepinguosalistest oma ratifikatsioonikirjad üle annud; teiste riikide suhtes astub ta jõusse kolmkümmend päewa peale ratifikatsioonikirjade hoiuleandmist igaühe poolt nendest.

Soome Walitsus teatab teistele lepinguosalistele wiiwitamata ratifikatsioonikirjade kättesaamisest ja nende hoiuleandmise päewa.

Artikkel 14.

Sel korral, kui aks lepinguosalistest soowiks sellest konwentsioonist loobuda, tuleb lahtiütlemisega kirjalikult pöörata Soome Walitsuse poole, kes sellest wiiwitamata teatab teistele lepinguosalistele, ära tähendades lahtiütlemise kättesaamise kuupäewa.

Konwentsioonist loobumine puudutab ainult riiki, kes seda teinud. Ta omandab makswuse üks aasta pärast seda, kui Soome Walitsus ta kätte saanud.

Artikkel 15.

Mittewallakirjutanud riikidele on wõimaldatud ühineda käesolewa konwentsiooniga. Ühinemisest teatatakse Soome Walitsusele, kes sellest annab teada konwentsioonist osawõtjatele riikidele.

Konwentsioon astub jõusse temaga ühinenud riikide kohta kolmekümne päewalise tähtaja järele, arwates päewast, mil sellekohane teadaanne Soome Walitsuse poolt kätte saadud.

Selle tõenduseks on täiswolinikud käesolewa konwentsiooni alla kirjutanud ja ta oma pitseritega warustanud.

possible sur l'état de la contrebande et sur les personnes qui s'y livrent, et se communiqueront des renseignements sur les circonstances spéciales qui pourraient contribuer à faciliter la lutte contre la contrebande.

Article 12.

Les Parties contractantes se déclarent disposées à examiner avec bienveillance les propositions qu'une autre Partie contractante pourrait formuler pour compléter la présente Convention.

Article 13.

La présente Convention sera ratifiée et les ratifications seront déposées au Ministère des Affaires Etrangères de Finlande. Elle entrera en vigueur trente jours à partir du jour où trois des Parties contractantes auront déposé leurs ratifications; à l'égard des autres Etats, elle entrera en vigueur trente jours après le dépôt de leur ratification.

Le Gouvernement finlandais informera immédiatement les autres Parties contractantes de la réception des ratifications et du jour de leur dépôt.

Article 14.

Au cas où l'une des Parties contractantes désirerait dénoncer cette Convention, la dénonciation devra être adressée par écrit au Gouvernement finlandais, qui en informera immédiatement les autres Parties contractantes en indiquant la date de réception de la dénonciation.

La dénonciation ne concerne que l'Etat qui l'a opérée. Elle aura effet un an après la date de sa réception par le Gouvernement finlandais.

Article 15.

Les Etats non signataires sont admis à adhérer à la présente Convention. L'adhésion sera notifiée au Gouvernement finlandais, qui en donnera connaissance aux Etats participant à la Convention.

La Convention produira effet pour les Etats adhérants dans un délai de trente jours à partir du jour où la notification respective aura été reçue par le Gouvernement finlandais.

En foi de quoi, les plénipotentiaires ont apposé leurs signatures à cette convention et l'ont revêtue de leurs cachets.

Tehtud ühes eksemplaris Helsingis, 19. augustil tuhat üheksasada kakskümmend wiis.

Saksamaa nimel:
Dr. Herbert Hauschild, Arthur Werner.
Dr. Gerhard Schellert.

Taani nimel, Fääri saared ja Gröönimaa wälja arwatud:
F. Lerche.

Eesti nimel:
Hellat.

Soome nimel:
Einar Böök.

Läti nimel:
Ch. Zarine.

Leedu nimel:
Jurgis Savickis.

Norra nimel:
H. H. Bachke.

Poola ja Danzigi Wabalinna nimel:
Tytus Filipowicz. Marjan Kossow.

Rootsi nimel:
Henning Elmquist.

Nõukogude Sotsialistlikkude Wabariikide Liidu nimel:
G. Maltzeff.

Fait à Helsingfors en un exemplaire, le 19 août mil neuf cent vingt-cinq.

Pour l'Allemagne.
Dr. Herbert Hauschild, Arthur Werner. Dr. Gerhard Schellert.

Pour le Danemark à l'exception des Iles Féroë et du Groënland.
F. Lerche.

Pour l'Esthonie.
Hellat.

Pour la Finlande.
Einar Böök.

Pour la Lettonie.
Ch. Zarine.

Pour la Lithuanie.
Jurgis Savickis.

Pour la Norvège.
H. H. Bachke.

Pour la Pologne et la Ville Libre de Danzig.
Tytus Filipowicz. Marjan Kossow.

Pour la Suède.
Henning Elmquist.

Pour l'Union des Républiques Soviétistes Socialistes.
G. Maltzeff.

Lõpuprotokoll.

Alla kirjutades tänasel kuupäewal konwentsiooni alkoholikaupade salawedu wastu wõitlemise kohta, leppisid lepinguosaliste täiswolinikud kokku järgmises ja esitasid järgmised deklaratsioonid konwentsiooni kohta.

Artikkel 1. kohta.

On kokku lepitud, et selles artiklis ei kuulu nimetuse „alkoholikaubad" alla tõhusalt denatureeritud piiritus ja piiritus-lakid, ning et sõnade „weinid ja wahuweinid" all tuleb mõista: wein, weinisarnaseid wõi weinist walmistatud jooke, samuti ka arstirohu-weine, wahuweine ja sellesarnaseid jooke.

On kokku lepitud, et 2. lõikes tähendab „asjaomane Riik" seda lepinguosalistest riikidest, kuhu alkoholikaubad sisse weetakse.

Artikkel 7. kohta.

See artikkel näeb ette juhtumise, kus alkoholikaupu saadetakse ühest omamaa sadamast teise.

Protocole de Clôture.

A la signature, en date de ce jour, de la Convention pour la répression de la contrebande des marchandises alcooliques, les Plénipotentiaires des Parties Contractantes ont convenu de ce qui suit et fait les déclarations suivantes au sujet de la Convention.

Ad Article 1er.

Il est entendu que, dans cet article, le terme „marchandises alcooliques" ne comprend pas l'alcool efficacement dénaturé et les vernis et que les mots „vins et vins mousseux" comprennent: le vin, les boissons similaires ou à base de vin, ainsi que les vins médicinaux, les vins mousseux et les boissons similaires.

Il est entendu que, dans l'alinéa 2, „Etat en question" indique celui des Etats contractants dans lequel les marchandises alcooliques sont introduites.

Ad Art. 7.

Cet article envisage le cas où des marchandises alcooliques sont envoyées d'un port national à un autre.

On kokku lepitud, et see artikkel käib ka mereliiklusele kahe mere kaudu kahe omamaa sadama wahel, mis asuwad kumbki erinewal.

Artikkel 9. kohta.

On kokku lepitud, et selles artiklis ettenähtud laiendatud wöö piir loetakse kokkulangewaks kahe lepinguosalise riigi lahutawate wete mediaaniga, kui nende wete laius on alla kahekümne nelja meremiili, ja kui kokkuleppe läbi, kombe alusel wõi muul wiisil ei ole kindlaks määratud piirina mõnd teise joont.

Edasi on kokku lepitud, et sõnade „waba meri" all mõistetakse, ilma et sellega millegi muus etteruttawalt mõista lugeda, territooriumi, mida ei puuduta selle artikli 1. lõike eeskiri.

Saksa delegaadid deklareeriwad, et käesolew konwentsioon ei tohi mingi wiisil kahjustada Saksa weinitoodangut ja -kaubandust. Seepärast aktsepteeriwad nad selle konwentsiooni siiski selle reserwatsiooniga, et niiwõrd kui see puutub Saksamaasse, tuleb alkoholikaupade all (artikkel 1.) mõista piiritust ja piiritusewedelikke, mis kõlbulised tarwitamiseks wõi joogide walmistamiseks, ning weine wõi wahuweine, milliste alkoholisisaldamus ületab üle 180 gr. liitri kohta wõi üle 22 ruumiprotsendi.

Nõukogude Sotsialistlikkude Wabariikide Liidu delegaat deklareerib Saksa deklaratsiooni alusel, et ta oma riigi nimel sama reserwatsiooni teeb.

Teised lepinguosalised riigid deklareeriwad, et nad tunnustawad eeltoodud reserwatsioone, ja kohustuwad nendega arwestama oma seadusandluses ja oma administratsiooni alal.

Saksa, Eesti ja Poola delegaadid deklareeriwad, et nende walitsused kiidawad heaks artikkel 9. eeskirjad, eeldusel, et need ei kitsenda seaduslikku laewasõitu, ning et selle artikli 2. lõike eeskirja ei wõi kuidagi tõlgitseda niisuguse tagaajamise õiguse tunnustusena ipso facto — sõltumata sellest, kas see wäljaspool territoriaalwete piiri wõi wäljaspool 1. lõikes ettenähtud wööd.

Nõukogude Sotsialistlikkude Wabariikide Liidu delegaat deklareerib, et tema Walitsus kiidab heaks konwentsiooni eeskirjad tingimusel, et üheaegselt selle konwentsiooniga astub jõusse kokkulepe, mis täna päewal alla kirjutatud Eesti, Soome ja Nõukogude Sotsialistlikkude Wabariikide Liidu delegaatide poolt, [illegible]

Il est entendu que cet article concerne aussi le trafic maritime entre deux ports nationaux situés dans des mers différentes.

Ad Art. 9.

Il est entendu que la limite de la zone élargie prévue à cet article sera censée concorder avec la ligne médiane des eaux séparant deux Etats contractants, quand leur largeur sera inférieure à vingt quatre milles marins, à moins qu'une autre ligne-frontière n'ait été fixée par convention, par l'usage ou autrement.

Il est de plus entendu que les mots „la mer ouverte" indiquent sans préjudice le territoire qui n'est pas touché par la stipulation de l'alinéa 1er de cet article.

Les Délégués Allemands déclarent que la production et le commerce allemands des vins ne doivent en aucune manière être lésés par cette convention. C'est pourquoi ils acceptent la convention avec cette réserve toutefois que, pour autant que l'Allemagne est concernée, il faut entendre par marchandises alcooliques (art. 1) l'alcool et les liquides spiritueux propres à la consommation ou à la fabrication de boissons, et les vins ou vins mousseux dont la teneur en alcool dépasse 180 gr. par litre ou 22 pourcents de volume.

Le Délégué de l'Union des Républiques Soviétistes Socialistes, sur la base de la déclaration allemande, déclare faire la même réserve pour son pays.

Les autres Etats contractants déclarent reconnaître les réserves ci-dessus et s'engagent à en tenir compte dans leur législation et leur administration.

Les Délégués Allemands, Esthonien et Polonais déclarent que leurs gouvernements approuvent les stipulations de l'article 9, dans la supposition que la navigation légale n'en sera pas gênée, et que la stipulation de l'alinéa 2 de cet article n'implique nullement la reconnaissance ipso facto d'un tel droit de poursuite — que ce soit au delà de la limite des eaux territoriales ou au delà de la zone prévue à l'alinéa 1er.

Le Délégué de l'Union des Républiques Soviétistes Socialistes déclare que son Gouvernement approuve les dispositions de la Convention, sous réserve que simultanément avec cette Convention entrera en vigueur l'accord signé ce jour par les Délégués de l'Esthonie, de la Finlande et de l'Union des

jaotus Soome lahes tollialadeks selle kokkuleppe kohaselt:

deklareerib, et Nõukogude Sotsialistlikude Wabariikide Liidu Walitsus, kiites heaks käesolewa konwentsiooni eeskirjad, ei mõtle selle läbi mingit muutust tekitada, rahwuswahelise õiguse mõttes, oma seisukohas laewade seisukorra alal, mis on riigi omanduses;

deklareerib informatsiooni otstarbel, et Soome lahe ala idapool Greenwichi meridiaani 28° 54', Soome territoriaalweed wälja arwatud, kuulub tarwilisena Nõukogude Sotsialistlikude Wabariikide Liidu kontrollimõjusse.

Eesti, Soome ja Nõukogude Sotsialistlikude Wabariikide Liidu delegaadid deklareeriwad, et nad on tänasel päewal wastu wõtnud kokkuleppe Soome lahe tolliterritooriumide jaotuse kohta, missugustel tolli õigused wõitluse alal alkoholi salawedu wastu tuleb maksma panna, — artikkel 9. mõtte kohaselt — nende kolme rannariigi poolt. See kokkulepe on juure lisatud käesolewale protokollile. Ta astub jõusse samal päewal kui konwentsioon ja tema kohta ei saadeta eriti teadaannet käesolewale konwentsioonile allakirjutanud riikidele.

Teised delegaadid wõtsid selle deklaratsiooni teadmiseks.

Selle tõenduseks on allakirjutanud käesolewa protokolli alla kirjutanud.

Tehtud Helsingis, ühes eksemplaris, 19. augustil tuhat üheksasada kakskümmend wiis.

Saksamaa nimel:
Dr. Herbert Hauschild. Arthur Werner.
Dr. Gerhard Schellert.

Taani nimel, Färi saared ja Grönlandi wälja arwatud.
F. Lerche.

Eesti nimel:
Hellat.

Soome nimel:
Einar Böök.

Läti nimel:
Ch. Zarine.

Républiques Soviétistes Socialistes, et que la répartition des territoires douaniers dans le Golfe de Finlande sera réglée d'après cet Accord:

déclare que le Gouvernement de l'Union des Républiques Soviétistes Socialistes, en approuvant les stipulations de la présente Convention n'entend nullement préjudicier sa position vis-à-vis de la situation, au sens du droit international, des navires qui sont la propriété de l'Etat;

déclare à titre d'information que la partie du Golfe de Finlande à l'Est du méridien 28° 54' de Greenwich, les eaux territoriales finlandaises exclues, entre nécessairement dans la zone de contrôle de l'Union des Républiques Soviétistes Socialistes.

Les Délégués de l'Esthonie, de la Finlande et de l'Union des Républiques Soviétistes Socialistes déclarent qu'ils ont adopté ce jour un accord sur la répartition des territoires douaniers du Golfe de Finlande dans lesquels les droits douaniers pour la lutte contre la contrebande de l'alcool doivent être exercés, — au sens de l'article 9. — par ces trois Etats riverains. Cet accord est joint en annexe au présent protocole. Il entrera en vigueur à la même date que la Convention et ne sera pas notifié spécialement aux Etats signataires de cette Convention.

Les autres Délégués ont pris connaissance de cette déclaration.

En foi de quoi les soussignés ont signé le présent protocole.

Fait à Helsingfors, en un exemplaire, le 19 août mil neuf cent vingt-cinq.

Pour l'Allemagne:
Dr. Herbert Hauschild. Arthur Werner. Dr. Gerhard Schellert.

Pour le Danemark à l'exception des Iles Féroë et du Groënland.
F. Lerche.

Pour l'Esthonie.
Hellat.

Pour la Finlande.
Einar Böök.

Pour la Lettonie.
Ch. Zarine.

Source: Eesti lepingud wälisriikidega, vol. 5 (1925-1926). Tallinn: Tallinna Eesti Kirjastus-Ühisus 1926, pp. 301–309.

Treaty 2. The 1925 Helsinki Agreement between Estonia, Finland and the Soviet Union

Leedu nimel:
Jurgis Savickis.

Norra nimel:
H. H. Bachke.

Poola ja Danzigi Wabalinna nimel:
Tytus Filipowicz, Marjan Kossow.

Rootsi nimel:
Henning Elmquist.

Nõukogude Sotsialistlikkude Wabariikide Liidu nimel:
G. Maltzeff.

Pour la Lithuanie.
Jurgis Savickis.

Pour la Norvège.
H. H. Bachke.

Pour la Pologne et la Ville Libre de Danzig.
Tytus Filipowicz. Marjan Kossow.

Pour la Suède.
Henning Elmquist.

Pour l'Union des Républiques Soviétistes Socialistes.
G. Maltzeff.

Kokkulepe.

Alkoholikaubade salaweo wastu wõitlemise konwerentsi poolt Helsingis tänasel päewal wastu wõetud lõpuprotokolli erikirja põhjal, nimelt: „Selles artiklis ettenähtud laiendatud wöö piir loetakse kokkulanewaks kahte lepinguosalist riiki lahutawate wete mediaaniga, kui nende wete laius on alla kahekümnenelja meremiili, ja kui kokkuleppe läbi, tawade alusel wõi muul wiisil ei ole kindlaks määratud piirina muud kindlat joont", on allakirjutajad täiswolinikud,

Eesti poolt:
härra Aleksander Hellat, Eesti Erakorraline Saadik ja Täiewoliline Minister,

Soome poolt:
härra Einar Böök, endine Minister, töö- ja sotsiaalse hoolekande direktor,

Nõukogude Sotsialistlikkude Wabariikide Liidu poolt:
härra G. Maltzeff, Nõukogude Sotsialistlikkude Wabariikide Liidu Chargé d'Affaires a. i.

kokku leppinud järgmise kokkuleppe kohta:

1. Greenwich'i 27° meridiaanist idapool määratakse Soome ja Nõukogude Sotsialistlikkude Wabariikide Liidu kontrollwööd wastawalt kindlaks sel kujul, kui see on ette nähtud Soome ja Nõukogude Sotsialistlikkude Wabariikide Liidu wahel sõlmitud konwentsiooni artiklis 2-les, mis alla kir-

ACCORD.

En vertu de la disposition insérée dans le Protocole de clôture approuvé en date de ce jour par la Conférence de Helsingfors pour la répression de la contrebande des marchandises alcooliques, à savoir: „La limite de la zone élargie prévue au présent article sera censée concorder avec la ligne médiane des eaux séparant deux Parties Contractantes, quand leur largeur sera inférieure à vingt-quatre milles marins, à moins qu'une autre ligne-frontière n'ait été fixée par convention, par l'usage ou autrement", les soussignés, délégués plénipotentiaires

de l'Esthonie:
M. Alexandre Hellat, Envoyé Extraordinaire et Ministre Plénipotentiaire d'Esthonie;

de la Finlande:
M. Einar Böök, Ancien Ministre, Directeur du travail et de la prévoyance sociale;

et de l'Union des Républiques Soviétistes Socialistes:
M. G. Maltzeff, Chargé d'Affaires a. i. de l'Union des Républiques Soviétistes Socialistes;

ont convenu de l'accord suivant:

1. A l'est du méridien 27° de Greenwich les zones de contrôle respectives de la Finlande et de l'Union des Républiques Soviétistes Socialistes seront déterminées de la manière que stipule l'article 2 de la Convention entre la Finlande et l'Union des

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sõlmitud Helsingis 28. juulil 1923 ja mis käib muuseas korrapidamise kohta Soome lahe selles osas, mis asub väljaspool territoriaalvete piirkonda; siiski peetakse silmas, et Nõukogude Sotsialistlikude Vabariikide Liidu kontrollivööd ei ulatu Soome tollivööde peale, ning et legaalne meresõit Soome mandermaa ja tolle kuuluvate saarte vahel ei oleks takistatud või ei muutuks raskeks, ning samuti, et õigused meresõidu peale, mida kumbki riik omab teise riigi territoriaalvetes, ei oleks kitsendatud käesoleva kokkuleppe läbi.

République Soviétistes Socialistes signée à Helsingfors le 28 juillet 1923 et concernant entre autres la surveillance de l'ordre dans la partie du golfe de Finlande qui se trouve en dehors des eaux territoriales; il sera toutefois observé que les zones de contrôle de l'Union des Républiques Soviétistes Socialistes ne se prolongeront pas sur les zones douanières de la Finlande et que le trafic maritime légitime entre la terre ferme de la Finlande et les îles qui en relèvent ne sera pas empêché ou rendu difficile et encore que les droits concernant le trafic maritime dont jouit chacun des deux Etats dans les eaux territoriales de l'autre Etat ne seront pas diminués par cet Accord.

2. Käesolevas kokkuleppes ettenähtud kontrollivööd ei laiene rahvusvaheliste meresõiduteede peale, mis lähevad Soome lahes, läänepool Greenwich'i 27° meridiaani, Nõukogude Sotsialistlikkude Vabariikide Liidu sadamaist Balti merele, ja vastupidiselt, väljaspool Soome praeguste territoriaalvete piirkonda, ning mille täpne asend määratakse kindlaks kolme huvitatud riigi ekspertide poolt. Eelnimetatud rahvusvaheliste meriteede kohta määratakse tarvitusele rahvusvahelises õiguses tunnustatud põhimõtted merede vabaduse kohta.

2. Les zones de contrôle prévues par cet Accord ne s'étendront pas sur les routes maritimes internationales conduisant à l'ouest du méridien 27° de Greenwich dans les eaux du golfe de Finlande des ports de l'Union des Républiques Soviétistes Socialistes à la Mer Baltique et vice-versa en dehors des eaux territoriales finlandaises actuelles et dont la position précise sera déterminée par les experts des trois Etats intéressés. A l'égard des routes maritimes internationales sus-mentionnées seront appliqués les principes reconnus par le droit international concernant la liberté des mers.

3. Käesolev kokkulepe moodustab lepingupoolte seisukohalt lahutamata osa konventsioonist alkoholikaupade salaveo vastu võitlemise kohta, mis alla kirjutatud tänasel päeval Helsingis.

Ta ratifitseeritakse ja astub jõusse samal ajal ning samal kombel, kui nimetatud konventsioon, võib aga jõusse astuda ka siis, kui kaks kolmest huvitatud riigist ta on vastu võtnud, selles ulatuses, kuivõrd ta puudutab neid kahte riiki.

Selle tõenduseks on Eesti, Soome ja Nõukogude Sotsialistlikkude Vabariikide Liidu täievolilised delegaadid käesoleva kokkuleppe ühes eksemplaris alla kirjutanud ning oma pitseritega varustanud.

Tehtud Helsingis 19. augustil tuhat üheksasada kakskümmend viis.

Eesti nimel:
Hellat.

Soome nimel:
Einar Böök.

Nõukogude Sotsialistlikkude Vabariikide Liidu nimel:
G. Maltzeff.

3. Le présent accord constitue pour les Parties contractantes une partie intégrante de la Convention pour la répression de la contrebande des marchandises alcooliques, signée ce jour à Helsingfors.

Il sera ratifié et entrera en vigueur en même temps et de la même manière que ladite Convention, et pourra aussi entrer en vigueur, si deux des trois Etats intéressés l'ont adopté, dans la mesure où il touche ces deux Etats.

En foi de quoi, les délégués plénipotentiaires de l'Esthonie, de la Finlande et de l'Union des Républiques Soviétistes Socialistes ont signé le présent accord en un exemplaire et l'ont revêtu de leurs cachets.

Fait à Helsingfors le 19 août mil neuf cent vingt-cinq.

Pour l'Esthonie.
Hellat.

Pour la Finlande.
Einar Böök.

Pour l'Union des Républiques Soviétistes Socialistes.
G. Maltzeff.

Source: Eesti lepingud wälisriikidega, vol. 5 (1925–1926). Tallinn: Tallinna Eesti Kirjastus-Ühisus 1926, pp. 310–311.

Protokoll.

Helsingis, 19. augustil 1925. a. Eesti, Soome ja Nõukogude Sotsialistlikkude Vabariikide Liidu vahel sõlmitud kokkuleppe, mis moodustab lepinguosalistele lahutamata osa samal päeval allakirjutatud konventsioonist alkoholikaupade salaveo vastu võitlemise kohta, artikkel 2-se põhjal, mille järele seal mainitud rahvusvaheliste meriteede täpne seis määratakse kindlaks eelnimetatud Riikide ekspertide poolt:

on allakirjutanud eksperdid, nimelt:

Hra A. Birk, Erakorraline Saadik ja Täievoliline Minister, ja

hra A. Schmidt, Saatkonna Nõunik, —

delegeeritud Eesti Valitsuse poolt;

hra A. Ahonen, Tõeline Riiginõunik, — delegeeritud Soome Valitsuse poolt;

hra N. Koltchanovski, Abidirektor Välisasjade Rahvakomissariaadis,

hra W. Belli, punase tööliste ja talupoegade laevastiku Eskaadri-komendant, ja

hra J. Lipsky, Soome asjade Aruandja Välisasjade Rahvakomissariaadis, —

delegeeritud Nõukogude Sotsialistlikkude Vabariikide Liidu poolt;

pärast oma heas ja nõutud korras leitud täisvolituste esitamist vastastikku, kokku leppinud alljärgneva kohta:

§ 1.

Rahvusvaheliste meriteede piirid, missugustele teedele ei laiene üldkonventsioonis ettenähtud järelvalve, kuid missuguste kohta tulevad tarvitusele rahvusvahelise õiguse põhimõtted merede vabaduse kohta, saavad olema järgmised:

Põhjapool joon, mis läheb:

otsejoones 59°59'5 laiusel ja 27°00'0 pikkusel asuvast punktist kuni punktini, mis asub 60°04'0 laiusel ja 26°31'0 pikkusel;

sealt otsejoones kuni punktini, mis asub 60°00'5 laiusel ja 26°24'0 pikkusel;

sealt otsejoones kuni punktini, mis asub 59°51'0 laiusel ja 25°00'0 pikkusel;

sealt otsejoones kuni punktini, mis asub 59°50'0 laiusel ja 24°44'0 pikkusel;

Protocole.

En vertu de l'article 2 de l'Accord conclu à Helsingfors le 19 août 1925 entre l'Esthonie, la Finlande et l'Union des Républiques Sovietistes Socialistes, constituant pour les Parties Contractantes une partie intégrante de la Convention pour la repression de la contrebande des marchandises alcooliques, signée le même jour, — d'après lequel la position précise des routes maritimes internationales y mentionnées sera déterminée par les experts des Etats précités:

les Experts Soussignés, à savoir:

M. A. Birk, Envoyé Extraordinaire et Ministre Plénipotentiaire et

M. A. Schmidt, Conseiller de Légation, —

délégués par le Gouvernement d'Esthonie;

M. A. Ahonen, Conseiller d'Etat Actuel, — délégué par le Gouvernement de Finlande;

M. N. Koltchanovski, Vice-Directeur au Commissariat du Peuple pour les Affaires Etrangères,

M. W. Belli, Commandant d'Escadre de la Flotte Ouvrière et Paysanne Rouge, et

M. J. Lipski, Rapporteur pour les Affaires de Finlande au Commissariat du Peuple pour les Affaires Etrangères, —

délégués par le Gouvernement de l'Union des Républiques Soviétistes Socialistes;

après s'être communiqués leurs pleins pouvoirs trouvés en bonne et due forme, sont convenus de ce qui suit:

§ 1.

Les limites des routes maritimes internationales auxquelles ne s'étend pas la surveillance prévue par la Convention générale mais à l'égard desquelles seront appliqués les principes du droit international concernant la liberté des mers, seront les suivantes:

Au nord la ligne qui se dirige:

en ligne droite du point situé à 59°59'5 de latitude et 27°00'0 de longitude jusqu'au point situé à 60°04' de latitude et 26°31'0 de longitude;

de là, en ligne droite jusqu'au point situé à 60°00'5 de latitude et 26°24'0 de longitude;

de là, en ligne droite jusqu'au point situé à 59°51'0 de latitude et 25°00'0 de longitude;

de là, en ligne droite jusqu'au point situé à 59°50'0 de latitude et 24°44'0 de longitude;

sealt otsejoones kuni punktini, mis asub 59°32'5 laiusel ja 23°00'0 pikkusel;

edasi otsejoones kuni punktini, mis asub 59°29'0 laiusel ja 22°00'0 pikkusel, ja

lõunapool joon, mis läheb:

otsejoones 59°57'5 laiusel ja 27°00'0 pikkusel asuvast punktist kuni punktini, mis asub 60°00'5 laiusel ja 26°38'0 pikkusel;

sealt otsejoones kuni punktini, mis asub 59°53'0 laiusel ja 26°22'0 pikkusel;

sealt otsejoones kuni punktini, mis asub 59°44'0 laiusel ja 24°44'0 pikkusel;

sealt otsejoones kuni punktini, mis asub 59°13'0 laiusel ja 22°18'0 pikkusel;

edasi otsejoones kuni punktini, mis asub 59°03'0 laiusel ja 22°00'0 pikkusel.

Eelkirjeldatud piirjooned on märgitud punaste joontega vene merekaardile Nr. 1557, mis käesolevale protokollile juurelisatud[1]. Juhtumisel, kui ilmsiks tulevad vastolud teksti ja kaardi vahel, siis on tekst mõõduandev.

Märkus: Kõik pikkused on arvatud Greenwich'ist.

§ 2.

Käesolev protokoll astub jõusse ning teda võib üles ütelda samal ajal ja samal viisil, kui eeltähendatud kokkulepet, mis sõlmitud Eesti, Soome ja Nõukogude Sotsialistlikkude Vabariikide Liidu vahel.

§ 3.

Käesolev protokoll on valmistatud ühes eksemplaris, mis deponeeritud Soome Välisministeeriumis ning millest kinnitatud ärakiri saadetakse Eesti Valitsusele ja Nõukogude Sotsialistlikkude Vabariikide Liidu Valitsusele.

Selle tõenduseks on Eesti, Soome ja Nõukogude Sotsialistlikkude Vabariikide Liidu esitajad — eksperdid käesolevale protokollile alla kirjutanud ja ta oma pitseritega varustanud.

Tehtud Moskvas, 22. aprillil 1926. a.

A. Birk.
A. Schmidt.
A. Ahonen.
Koltchanovski.
W. Belli.
J. Lipsky.

de là, en ligne droite jusqu'au point situé à 59°32'5 de latitude et 23°00'0 de longitude;

puis en ligne droite jusqu'au point situé à 59°29'0 de latitude et 22°00'0 de longitude et

au sud, la ligne qui se dirige:

en ligne droite du point situé à 59°57'5 de latitude et 27°00'0 de longitude jusqu'au point situé à 60°00'5 de latitude et 26°38'0 de longitude;

de là, en ligne droite jusqu'au point situé à 59°53'0 de latitude et 26°22'0 de longitude;

de là, en ligne droite jusqu'au point situé à 59°44'0 de latitude et 24°44'0 de longitude;

de là, en ligne droite jusqu'au point situé à 59°13'0 de latitude et 22°18'0 de longitude;

puis en ligne droite jusqu'au point situé à 59°03'0 de latitude et 22°00'0 de longitude.

Les lignes de démarcation décrites ci-dessus sont marquées par les tracés rouges sur la carte maritime russe No. 1557, annexée au présent Protocole. Dans le cas, où le texte et la carte présenteraient des contradictions, c'est le texte qui fera foi.

Remarque: Toutes les longitudes sont calculées de Greenwich.

§ 2.

Le présent Protocole entrera en vigueur et pourra être dénoncé en même temps et de la même manière que l'Accord précité, conclu entre l'Esthonie, la Finlande et l'Union des Républiques Soviétistes Socialistes.

§ 3.

Le présent Protocole est dressé en un exemplaire, déposé au Ministère des Affaires Etrangères de Finlande et dont copie authentiquée sera remise au Gouvernement d'Esthonie et au Gouvernement de l'Union des Républiques Soviétistes Socialistes.

En foi de quoi, les délégués — experts de l'Esthonie, de la Finlande et de l'Union des Républiques Soviétistes Socialistes ont signé le présent Protocole et l'ont revêtu de leurs sceaux.

Fait à Moscou, le 22 avril 1926.

A. Birk.
A. Schmidt.
A. Ahonen.
Koltchanovski.
W. Belli.
J. Lipsky.

Source: Eesti lepingud wälisriikidega, vol. 6 (1926–1927). Tallinn: Riigi trükikoda 1927, pp. 48–49.

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27. Aluevalvontalaki (Territorial Surveillance Act). Adopted 18.08.2000, e.i.f. 01.01.2001.
28. Valtioneuvoston asetus aluevalvonnasta (Government Decree on Territorial Surveillance). Adopted 16.11.2000, e.i.f. 01.01.2001.
29. Laki Suomen talousvyöhykkeestä (Act on the Exclusive Economic Zone of Finland). Adopted 26.11.2004, e.i.f. 01.01.2005.
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37. On the Border of the Republic of Latvia. Adopted December 1990, e.i.f. 10.12.1990.
38. Cabinet Regulation No. 168 on Latvian Maritime Regulations (Maritime Code). Adopted 16.08.1994, e.i.f. 10.09.1994.
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2. 1922 map of the maritime boundary in the Gulf of Riga in the scale of 1:750 000.
3. 1923 map of the Gulf of Finland: Ristna-St. Petersburg (accompanied with a line depicting Estonia's 3-miles-wide territorial sea).
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5. 1926 map appended to the Moscow Protocol depicting the high seas corridor in the Gulf of Finland under the 1925 and 1926 trilateral agreements.
6. 1931 map of western Estonia issued by the Ministry of Roads.
7. 1996 map appended to the Estonian-Finnish Maritime Boundary Treaty.
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2006–2010	B.A. Law, University of Tartu, Faculty of Law
2000–2006	Tartu Karlova Gymnasium
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12.2011–02.2014	Legal adviser, Estonian Ministry of Justice, Department of Public Law, Tallinn
07.2011–09.2011	Legal intern, Organisation for the Prohibition of Chemical Weapons, Office of the Legal Adviser, The Hague
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Working groups:

05.2015–11.2015	Member of the expert working group tasked by the Ministry of Economic Affairs and Infrastructure to prepare a project charter for the codification of the Estonian maritime law, law on maritime zones and marine environment protection law
08.2014–01.2015	Member of the foreign minister's inter-institutional working group tasked with developing an action plan for

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01.2013–06.2013	Head of the governmental working group responsible for drafting an act on security vetting and background checks

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Publications:
1. A. Lott. The Estonian-Russian Territorial Sea Boundary Delimitation in the Gulf of Finland. – The International Journal of Marine and Coastal Law 2017 (forthcoming).
2. A. Lott. Nord Stream's Extension to the Kurgalsky Peninsula: Implications for an EIA. – Nordic Environmental Law Journal 2016(2), pp. 7–18.
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