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MYKOLAS ROMERIS UNIVERSITY

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**REPARATION IN INTERNATIONAL LAW: REMEDIES FOR VICTIMS  
OF SOVIET OCCUPATION**

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**REPARACIJA TARPTAUTINĖJE TEISĖJE: ŽALOS ATLYGINIMAS  
SOVIETINĖS OKUPACIJOS AUKOMS**

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## INTRODUCTION

**Relevance of the research.** History reveals that mankind has faced various tragic events that resulted in the suffering of many people. Communism is the ideology whose application resulted in the death of nearly 100 million people in the world, and around 20 million people perished in the cradle of communism—the Union of Soviet Socialist Republics (USSR).<sup>1</sup> The latter number reflects only deaths, but many more people faced various repressions aimed at establishment and maintenance of Soviet order based on the ideology of communism. The people of the Baltic states were affected as well; Lithuania, Latvia and Estonia lost their independence and *de facto* became part of the USSR in 1940. It is estimated that nearly 350 thousand people in Lithuania,<sup>2</sup> nearly 150 thousand people in Latvia<sup>3</sup> and nearly 130 thousand people in Estonia<sup>4</sup> faced various repressions under soviet regime. These brutalities unquestionably violated fundamental human values and human dignity that are currently protected by the human rights regime.

Human rights as a concern of the international community arose right after the Second World War to deal with atrocities of the Nazi regime. This quickly developed into a separate body of international law that puts the obligation on a state to protect human rights, creating a relationship between an individual and a state.<sup>5</sup> Prior to the Second World War how a state treated its own citizens was largely a domestic matter due to the domination of principle of state sovereignty at international level;<sup>6</sup> however, certain protection of human dignity was guaranteed in norms of international law governing the duty of a state to protect minorities<sup>7</sup> and aliens that reside in its territory.<sup>8</sup> Moreover, international humanitarian law, one of the oldest branches of international law, is usually considered as a background for the human rights movement because ‘[t]he law of war has always contained rules based on chivalry, humanity, and religious values

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<sup>1</sup> Stephane Courtois et al., *Juodoji komunizmo knyga: nusikaltimai, teroras, represijos*, trans. Irina Mikalkevičienė et al. (Vilnius: Vaga, 2000), 13.

<sup>2</sup> Lietuvos gyventojų genocido ir rezistencijos tyrimo centras, „Lietuvos gyventojų netektys okupacijų metais“, *Lietuvos gyventojų genocido ir rezistencijos tyrimo centras*, accessed June 14, 2017, <http://genocid.lt/centras/lt/147/c/>.

<sup>3</sup> Valters Nollendorfs, „Crimes of Communism in Latvia,“ (paper presented at International Conference *Crimes of the Communist Regimes: an assessment by historians and legal experts*, Prague, February 2010), 103-104.

<sup>4</sup> Estonian State Commission on Examination of the Policies of Repression, *The white book. Losses inflicted on the Estonian nation by occupation regimes 1940-1991*, trans. Mari Ets et al. (Estonian Encyclopaedia Publishers, 2005), 38-39.

<sup>5</sup> Tanel Kerikmäe, Ondrej Hamulák and Archil Chochia, „A Historical Study of Contemporary Human Rights: Deviation or Extinction?“ *Acta Baltica Historiae et Philosophiae Scientiarum* 4, no. 2 (Autumn 2016): 102-103, doi: 10.11590/abhps.2016.2.06.

<sup>6</sup> *Ibid.*, 103.

<sup>7</sup> Henry J. Steiner, Philip Alston and Ryan Goodman, *International Human Rights in Context: Law, Politics, Morals* (New York: Oxford University Press, 2008), 96-99.

<sup>8</sup> Dinah L. Shelton, *Remedies in International Human Rights Law* (New York: Oxford University Press, 2005), 59-62.



that were designed to protect noncombatants'.<sup>9</sup> Thus the question arises whether the experiences of those who suffered under the Soviet regime in the Baltic states should be addressed and in what manner this should be done.

Since the beginning of the 1980s, the rights of victims of massive repressions, including their right to reparation, have received growing attention.<sup>10</sup> This resulted not only in the boost of legal research on the issue<sup>11</sup> but also in certain codification of the rights of victims at the international level. On 16 December 2005, the General Assembly of the United Nations adopted the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (hereinafter 'Basic Principles and Guidelines') at its 64th plenary meeting. This document codified both: the provisions of international human rights law and international humanitarian law on the victims' right to effective remedies for violations of the law. The biggest part of it is devoted to reparation as a tool of redressing victims. Although it is one of the so called soft law documents, it is important for its comprehensiveness on victims' rights embodied in international law. Its adoption also serves as a landmark in redressing victims of various repressive regimes.

After the collapse of the USSR in the beginning of 1990s, the Baltic states, together with other countries affected by Soviet influence, have a chance to address the wrongs done during the Soviet period. Because of the nature, length and scope of the Soviet regime, every aspect of the existence of these states, as well as of human life in these states, was affected. As a result, this requires addressing Soviet legacy from various perspectives. One of these perspectives is redress for the victims of the Soviet regime. It is of special importance because redress restores dignity to victims as members of society and contributes to civic trust and social solidarity in society as a whole. First of all, a victim here is perceived as an individual who suffered a violation of his/her basic human rights because of abuse of state power when the Soviet regime was imposed in the territory of the Baltic states. However the exact definition of a victim will be clarified during the research because whether a person is considered to be a victim depends on a particular category of international norms, i.e. whether 'norms [are] of an institutional or conventional nature, of a

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<sup>9</sup> Theodor Meron, "The Humanization of Humanitarian Law," *The American Journal of International Law* 94, no. 2 (April 2000): 242, <http://www.jstor.org/stable/2555292>.

<sup>10</sup> Raquel Aldana-Pindell, "In Vindication of Justiciable Victims' Rights to Truth and Justice for State-Sponsored Crimes," *Vanderbilt Journal of Transnational Law* 35, no. 5 (November 2002): 1407, [http://heinonline.org.ezproxy.vdu.lt/HOL/Page?handle=hein.journals/vantl35&div=49&start\\_page=1399&collection=journals&set\\_as\\_cursor=0&men\\_tab=srchresults](http://heinonline.org.ezproxy.vdu.lt/HOL/Page?handle=hein.journals/vantl35&div=49&start_page=1399&collection=journals&set_as_cursor=0&men_tab=srchresults); Carlos Fernandez de Casadevante Romani, "International Law of Victims," *Max Planck Yearbook of United Nations Law* 14, no. 1 (2010): 223, [http://heinonline.org.ezproxy.vdu.lt/HOL/Page?handle=hein.intyb/maxpyb0014&div=12&start\\_page=219&collection=intyb&set\\_as\\_cursor=0&men\\_tab=srchresults](http://heinonline.org.ezproxy.vdu.lt/HOL/Page?handle=hein.intyb/maxpyb0014&div=12&start_page=219&collection=intyb&set_as_cursor=0&men_tab=srchresults).

<sup>11</sup> See "RESEARCH ON RIGHT TO REPARATION".

general or regional frame', as they are 'related to concrete categories of victims'.<sup>12</sup> Moreover, this task is very difficult since the large number of violations poses various legal, social and cultural questions that must be dealt with.<sup>13</sup>

**The problem of the research.** Despite of the huge attention to victims' right to reparation, it seems that the victims of the Soviet regime in the Baltic states have not been redressed, because the Russian Federation denies responsibility for any atrocities committed in the territory of these states during the Soviet regime. Even though the Baltic states have implemented certain reparative policies and are considered to be the leaders in the field compared to other former republics of the USSR,<sup>14</sup> the policies are inadequate; no just compensation was paid for the victims, the apology for repressions was not suggested and the negotiation concerning this issue between the Russian Federation and the Baltic states has been rejected.<sup>15</sup> Moreover, the issue of redress of victims in the Baltic States was further veiled in academic research because of scientific interest in other problems related with the Soviet legacy, i.e. state succession, democratization, lustration, etc. A relatively small number of victims in the Baltic states (as compared to the whole number of victims of communism in the USSR) does not catch the attention of scholars, as in accordance with popular opinion there is no striking immediate difference between Baltic states and former union republics of the USSR.

The need to address the issue of reparations in the Baltic states from the perspective of victims rests on three different grounds. First of all, the Baltic states, before their seizure by the

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<sup>12</sup> de Casadevante Romani, „International Law of Victims,“ 221-222.

<sup>13</sup> Pablo de Greiff, „Justice and Reparations,“ in *The Handbook of Reparations*, ed. Pablo de Greiff (New York: Oxford University Press, 2006), 465-466; M. Brinton Lykes and Marcie Mersky „Reparations and Mental Health: Psychosocial Interventions Towards Healing, Human Agency, and Rethreading Social Realities,“ in *The Handbook of Reparations*, ed. Pablo de Greiff (New York: Oxford University Press, 2006), 615; Naomi Roht-Arriaza, “Reparations Decisions and Dilemmas,” *Hastings International and Comparative Law Review* 27, no. 2 (Winter 2004): 160, <http://heinonline.org.ezproxy.vdu.lt/HOL/Page?public=false&handle=hein.journals/hasint27&page=157&collection=journals#>.

<sup>14</sup> Lavinia Stan, “Introduction: post-communist transition, justice and transitional justice,” in *Transitional Justice in Eastern Europe and the former Soviet Union*, ed. Lavinia Stan (Routledge, 2009), Taylor & Francis e-Library e-book, 4, 9-10.

<sup>15</sup> Lauri 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: Brill, 2003), eBook Collection (EBSCOhost), 258-260; Vladimir Socor, “Moscow Wants Baltic States to Compensate Occupation Costs,” *Eurasia Daily Monitor*, published October 5, 2004, <https://jamestown.org/program/moscow-wants-baltic-states-to-compensate-occupation-costs/>; “Baltic countries preparing to claim occupation damages from Russia,” *Postimees*, published November 5, 2015, <http://news.postimees.ee/3388405/baltic-countries-preparing-to-claim-occupation-damages-from-russia>; “Russian official dismisses Baltic compensation claims for Soviet occupation,” *Russia beyond*, published November 5, 2015, [https://www.rbth.com/news/2015/11/05/russian-official-dismisses-baltic-compensation-claims-for-soviet-occupation\\_537607](https://www.rbth.com/news/2015/11/05/russian-official-dismisses-baltic-compensation-claims-for-soviet-occupation_537607); Yuriy Rubtsov, “Compensation for «Soviet Occupation»? Not Before Vilnius and Klaipėda are Returned to Their Owners,” *Strategic Culture Foundation*, published November 12, 2015, <https://www.strategic-culture.org/news/2015/11/12/compensation-soviet-occupation-before-vilnius-klaipeda-returned-their-owners.html>.

USSR in 1940, were the only states among the other former Soviet republics<sup>16</sup> whose independence and statehood was recognized not only by the international community but also by the USSR itself after the First World War. Therefore, the legality of the USSR's seizure of the Baltic states itself is questionable. Second, the separation of the Baltic states and Georgia from the USSR differs from the other former Soviet republics, as these states were not parties to the Belavezha Accords and Alma-Ata Accords that ended the existence of the USSR.<sup>17</sup> Finally, the Baltic states have the widest international recognition of continuing pre-war statehood compared to other former Soviet republics that appeared after the collapse of the USSR.<sup>18</sup>

Thus, the history of the Baltic states in the composition of the USSR completely differs from the history of other former Soviet republics. This history affects the redress of the victims in the Baltic states because it depends on the legal status of the Baltic states in 1940–1991 under international law. This is even more complicated by the fact that the Basic Principles and Guidelines emphasized the difference between violations of international human rights law and violations of international humanitarian law—i.e. different bodies of law. Under these circumstances there is a need to clarify whether international human rights law or international humanitarian law is applicable and what the relation between these two bodies of international law means for victims in the Baltic states. The difficulty of these questions is illustrated by the fact that disagreement exists between the Baltic states and the Russian Federation on the latter issue. Thus, the case of victims in the Baltic states and the scope of their right to reparation remains a relevant field of legal research because it raises questions as to the role of both the Russian Federation and the Baltic states in providing remedies for the victims, e.g. what position they should take and what legal regulation concerning remedies should be applied.

**Originality of the research.** Analysis of the research on the problem revealed that the situation of the victims of the Soviet regime in the Baltic states is usually omitted when reparation

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<sup>16</sup> Karelo-Finnish SSR and Moldovan SSR were created in the same year as a result of Joseph Stalin's policy when territories from Finland and Romania were grasped. See: *The Columbia Encyclopedia, 6th ed., encyclopedia.com*, s.v. „Union of Soviet Socialist Republics,” accessed June 26, 2017, <http://www.encyclopedia.com/places/commonwealth-independent-states-and-baltic-nations/cis-and-baltic-political-geography/union>.

<sup>17</sup> "Text of Minsk Declaration," "Text of Minsk Agreement," "Text of Alma Ata Agreements," *International Legal Materials* 31, no. 1 (January 1992): 142-154, [http://heinonline.org.ezproxy.vdu.lt/HOL/Page?handle=hein.journals/intlm31&div=93&start\\_page=495&collection=journals&set\\_as\\_cursor=0&men\\_tab=srchresults#](http://heinonline.org.ezproxy.vdu.lt/HOL/Page?handle=hein.journals/intlm31&div=93&start_page=495&collection=journals&set_as_cursor=0&men_tab=srchresults#).

<sup>18</sup> Rein Mullerson, "Continuity and Succession of States, by Reference to the Former USSR and Yugoslavia," *International and Comparative Law Quarterly* 42, no. 3 (July 1993): 480-483, [http://heinonline.org.ezproxy.vdu.lt/HOL/Page?handle=hein.journals/incolq42&div=29&start\\_page=473&collection=journals&set\\_as\\_cursor=0&men\\_tab=srchresults#](http://heinonline.org.ezproxy.vdu.lt/HOL/Page?handle=hein.journals/incolq42&div=29&start_page=473&collection=journals&set_as_cursor=0&men_tab=srchresults#); Peter van Elsuwege, "State Continuity and its Consequences: The Case of the Baltic States," *Leiden Journal of International Law* 16, no. 2 (June 2003): 377-388, doi:10.1017/S0922156503001195; Hannes Vallikivi and Tanel Kerikmäe, "State Continuity in the Light of Estonian Treaties Concluded before World War II," *Juridica International* 5 (2000): 35, <https://doi.org/10.12697/issn1406-1082>.

for the victims of communism or the Soviet regime is analysed. This issue is either absorbed in the analysis of the general policy of reparation in the former USSR by making no difference between former Soviet republics or simply addressing only the case of the Russian Federation. Meanwhile, legal research concerning the legacy of the Soviet regime in the Baltic states concentrates on such questions as the status of the Baltic states under the Soviet regime, legal interstate relations between the Russian Federation and the Baltic states concerning state continuity and both of their interstate obligations as a result of soviet regime and its collapse. The right to reparation for victims of the Soviet regime in the Baltic states is generally left aside or addressed only in a brief manner. The notable exception is the work of Nika Bruskina.<sup>19</sup> Thus, the situation of redress for victims in the Baltic states still requires a distinct legal approach.

**The object of the research** is reparation to victims of the Soviet regime in the Baltic states.

**The aim of the research** is to define a legal regulation applicable to reparation for victims of Soviet regime in the Baltic states and its enforcement possibilities under international law.

**Tasks of the research** that need to be addressed:

- 1) to identify the applicable set of rules of international law according to legal status of the Baltic states in 1940–1991 under soviet rule;
- 2) in the case of the USSR's non-compliance with established international obligations, to evaluate effects of non-compliance for people of the Baltic states;
- 3) to identify an applicable legal concept of reparation to victims of the Soviet regime in the Baltic states;
- 4) to reveal reparatory measures applied for the victims of the Soviet regime in the Baltic states;
- 5) to evaluate discrepancies between the applicable legal concept of reparation and its actual implementation in the case of the Baltic states in the light of legal obligations of states involved;
- 6) to identify subjects currently responsible for reparation for the victims of the Soviet regime in the Baltic states and a possible framework of application of responsibility;
- 7) to suggest possible legal solutions for implementation of an applicable legal concept of reparation for the victims of the Soviet regime in the Baltic states.

To accomplish the first task legal status of the Baltic states in 1940–1991 under Soviet rule within the framework of international law will be defined in order to identify the applicable set of rules of international law for the case of victims of soviet regime in the Baltic states. After

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<sup>19</sup> For detailed review see: "RESEARCH ON REPARATION FOR VICTIMS OF COMMUNISM IN THE BALTIC STATES".

identification of the applicable set of rules of international law, the USSR's compliance with its international obligations regarding people of the Baltic states will be evaluated. In case of violations of these international obligations, the definition of a victim will be established. Subsequently the particular regulation governing the right to reparation will be revealed, and the legal concept of reparation will be established. This will help to identify the context of the victims' right to reparation. The fourth and the fifth tasks will help to reveal how implemented reparatory measures correspond with the applicable rules governing the right to reparation for the victims in the Baltic states. With the realization of the sixth task, enforcement of the right to reparation will be established within a particular framework of legal responsibility. Thus, implementation of these tasks will enable the identification of the shortages of current reparatory measures for the victims, and this would help to define possible measures to enforce victims' rights to reparation in the Baltic states. The latter step will be implemented by realisation of the final task.

**Defendable propositions.** Defendable proposition according to the scope of the problem revealed are formulated as follows:

- the USSR, acting as occupant, breached its international obligations to protect people in its occupied territories of other states
- international humanitarian law and human rights law is the applicable legal framework for the reparation of victims of the Soviet regime in the Baltic states
- only compensation as a form of reparation is possible for the victims of the Soviet regime in the Baltic states
- the victims of the Soviet regime in the Baltic states have not received reparation
- only the Russian Federation is responsible for the remedies for victims of the Soviet regime in the Baltic states
- there are no possible legal means to enforce right to reparation for the victims of Soviet regime in the Baltic states.

**Practical application of the research findings.** Results of the research will enable the establishment of legal regulations for reparation for victims of the Soviet regime in the Baltic states. This will increase organization of the victims' claim and ensure proper presentation to the responsible subjects. This will also contribute to the victims' ability to choose appropriate legal means in order to defend their right to reparation.

At the governmental level, victims' perspectives will enable the governments of the Baltic states to review or shape their claim to the Russian Federation for reparations concerning damages that were faced by natural persons because of the Soviet regime. Thus, soundness of current claims for the people of the Baltic states due to the imposed Soviet regime will be tested and clarified.

Finally, results of the research will complement understanding of how particular international legal norms governing reparations for victims might be interpreted under circumstances similar to the Baltic states after invasion by the USSR. This will highlight existing problems in the field of reparation for victims of gross violations of international human rights law and victims of serious violations of international humanitarian law.

**Thesis outline.** The research is presented in four chapters, and suggestions are made in accordance with the results of the research.

In the first chapter of the thesis, the status of the Baltic states in the USSR is analysed, and the applicable set of rules of international law is established. The second chapter of the thesis reveals particular rules governing the right to reparation under the applicable set of rules of international law, and the concept of reparation is shaped. The problem of the definition of a victim is analysed in accordance with established legal evaluations of the actions toward the people of the Baltic states under Soviet rule. The third chapter of the thesis is devoted to particular reparatory measures that were implemented towards victims of the Soviet regime in the Baltic states. Applied reparatory measures are analysed from two different perspectives—measures that were applied after independence of the Baltic states and measures that were applied in the USSR. The fourth chapter of the thesis defines the scope of responsibility of the Russian Federation as the continuator of the occupying state and role of the Baltic states as occupied states in defense for victims' rights to reparation. Finally, possible legal solutions for implementation of the right to reparation for the victims of the Soviet regime in the Baltic states are suggested.

## REVIEW OF PREVIOUS RESEARCH

The collapse of various repressive regimes and the end of the Cold War resulted in the boost of academic writings on the subject of transitional justice and its various aspects. Ruti G. Teitel, one of the prominent legal researchers of various issues on transitional justice, defines transitional justice as ‘the conception of justice associated with periods of political change, characterized by legal responses to confront the wrongdoings of repressive predecessor regimes.’<sup>20</sup> Such transitions are also associated with respect for human rights.<sup>21</sup> In the case of transitional justice, the respect for human rights means not only the guarantee of human rights to each person in a state after the end of an abusive regime but also the requirement to restore human rights for people who became victims of that regime in various circumstances usually also resulting in commitment of international crimes. Therefore, as Pablo de Greiff notes, ‘the countries that have emerged from conflict or that have undergone transitions to democracy have at least given some consideration to programmes of reparations’.<sup>22</sup>

Thus, the problem analysed in this thesis required review of previous research in two different directions, i.e. research on the issue of reparation and research on the case of the Baltic states under the Soviet regime. The analysis revealed that the issue of reparation is usually analysed either separately or within the general framework of transitional justice, as reparation is usually associated with the concept of transitional justice. Meanwhile, the case of reparation in the Baltic states appears only as an adjacent question on a certain other problem analysed. The trend of greater interest in the latter issue by researchers of political science as compared to researchers of legal science was also noticeable.

### **RESEARCH ON RIGHT TO REPARATION**

First of all, publications must be reviewed that have addressed the issue of remedies or reparation in the broader context of transitional justice. One of the most extensive works is compiled by Neil J. Kritz, where research on the issue by prominent scholars representing different branches of science are collected to reveal the phenomenon of transitional justice. His three-volume collection addresses not only various aspects of transitional justice but also gives in-depth studies on cases of particular states and collects domestic legislation on each subject of

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<sup>20</sup> Ruti G. Teitel, "Transitional Justice Genealogy," *Harvard Human Rights Journal* 16 (2003): 69, [http://heinonline.org.ezproxy.vdu.lt/HOL/Page?handle=hein.journals/hhrj16&div=8&start\\_page=69&collection=journals&set\\_as\\_cursor=0&men\\_tab=srchresults#](http://heinonline.org.ezproxy.vdu.lt/HOL/Page?handle=hein.journals/hhrj16&div=8&start_page=69&collection=journals&set_as_cursor=0&men_tab=srchresults#).

<sup>21</sup> Ruti G. Teitel, *Transitional Justice* (New York: Oxford University Press, 2001), 5.

<sup>22</sup> Pablo de Greiff „Introduction. Repairing The Past: Compensation For Victims Of Human Rights Violations,“ in *The Handbook of Reparations*, ed. Pablo de Greiff (New York: Oxford University Press, 2006), 1.

transitional justice, enabling comparison of differences regulating the same issue, including the issue of remedies.<sup>23</sup> Concerning remedies, such issues as the legal obligations concerning the right to an effective remedy under international law, the scope of remedies and their implementation, arguments for and against reparation, challenges faced by governments trying to implement them as well as psychological and social needs of victims are addressed to give a general understanding of problems that could be faced and should be dealt with in implementing various remedial programmes. However, in this study the questions are dealt with in a generalized manner without any suggestions of particular solutions for different situations.

Another work analysing the issue of reparation in the broader context of transitional justice is work of Ruti G. Teitel. In her publication *Transitional Justice*, one chapter of the book is devoted to the reparation and various measures of reparatory justice in transitions.<sup>24</sup> Teitel on the issue of reparation tries to identify the reasons why countries that face transitions implement various means of reparatory justice. Examples of various transitions are used, starting with the Israelites' exodus from Egypt in ancient times and ending with the post-war reparations and transitions that took place in Latin America and post-communist Europe. Valuable insights are presented towards understanding the function of reparation in society and its multiple purposes. Special attention and possible solutions are also given to such problematic questions in case of reparatory measures as setting criteria of eligibility for reparations, passage of time resulting in distributive and not corrective justice, relations of individual and collective responsibility. The issue of reparatory measures is viewed together with other aspects of transitional justice, i.e. the concept of rule of law in transitions and dilemmas of constitutionalism, issues of application of criminal liability and various administrative measures concerning transitions. Thus, the discussion of the issue of remedies in the broader context of transitional justice policy helps to clarify its place and impact on that policy. Special attention is also given to history, the construction of historical narrative and the role of law in shaping the history of repression and transition in a certain state. By addressing all these aspects, Teitel tries to shape a theory of transitional justice. Analysis of reparatory justice is just one of the components to understand the changes that happen during transitions to democracy and the reasons behind these changes. Thus, suggestions of reparatory programmes for particular cases was not the object of this research.

Concerning the particular field of the right to a remedy in cases of human rights violations, the leading work is that of Dinah Shelton. Shelton provides valuable general insights based on thorough analytical work, addressing relevant international, regional and national legal documents

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<sup>23</sup> Neil J. Kritz, ed. *Transitional Justice - How Emerging Democracies Reckon with Former Regimes*, 3 vols. (Washington, D.C.: United States Institute of Peace Press, 1995).

<sup>24</sup> Teitel, *Transitional Justice*, 119-147.



and case law of related judicial authorities, on the various issues of remedies.<sup>25</sup> This is a comprehensive work containing all aspects of remedy for human rights violations, i.e. historical development on the right to a remedy in cases of human rights violations, subjects of the right to a remedy and their reciprocal relations, possible forms of remedies, their rationale and application both at the national and international level. The study also describes basic international institutions and instruments regulating the right to a remedy in cases of human rights violations as well as different regional (*e.g.* European human rights system, Inter-American system) or national systems and measures (*e.g.* the US Alien Tort Statute and Torture Victim Protection Act) implementing the right. As this study focuses on the right to a remedy in cases of human rights violations, it does not address in detail actual application of the right to a remedy in particular cases. In addition, the difference of circumstances when violations are made, i.e. whether resulting because of civil war, belligerent occupation, abusive state regime, etc., is also not discussed. However, some general comments on such widely discussed cases of wartime violations (those of the Second World War inflicted by the Germans and the Japanese), discrimination against minorities, colonialism, infringement of rights of indigenous peoples and slavery are made.

The other prominent work on the right to a remedy is the work of Pablo de Greiff.<sup>26</sup> The study is an in-depth analysis of various reparation programmes, implemented in the countries of Latin America after the collapse of military regimes, Africa, the United States (U.S.) (concerning the Japanese-American internment and compensation of victims of the September 11 attacks) and Germany after the Holocaust; the study also analyses the work of United Nations Compensation Commission in resolving reparation issues after the Iraq-Kuwait conflict, thus encompassing the period after the Second World War through the present day. Research is not devoted only to the analysis of different practices but also explores various thematic issues: general (legal, political frameworks of reparations, problems of regulation and implementation, relationship of international and national law in providing reparations) and particular (reparations for sexual violence, psychological, social dimension and effects of reparations). The legal acts and documents regulating reparations in particular states are also provided. The study is especially valuable for generalised experiences concerning design and implementation of reparations, theoretical insights and suggestions of solutions to various problems concerning effective implementation of reparation programmes. However, the study does not address the issue of reparations that were implemented in Central and Eastern Europe or in the Balkan region after the collapse of the USSR, despite the fact that they were implemented in the same period as other

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<sup>25</sup> Shelton, *Remedies*.

<sup>26</sup> Pablo de Greiff, ed. *The Handbook of Reparations* (New York: Oxford University Press, 2006).

reparation programmes addressed in the book. Therefore, the question of reparations in the case of Central and Eastern Europe, remains open.

To sum up, none of the research on this topic suggests possible solutions for the case of the Baltic states. This is because of different circumstances resulting in human rights abuses, as each circumstance requires application of different law; for example, international humanitarian law cannot be applied to the cases where human rights violations are a result of an abusive state regime, and a national law cannot be applied in cases of international armed conflict. Thus, previously reviewed studies suggest general insights on the right to reparation, but particular applicable rules for the problem analysed here must be discerned.

### ***RESEARCH ON REPARATION FOR VICTIMS OF COMMUNISM IN THE BALTIC STATES***

Analysis of works on reparations after the collapse of communism reveals that the question of reparations in Central and Eastern European countries in academic literature in general fails to address the fact that some of the countries under the ‘Iron Curtain’ (Albania, Bulgaria, former Czechoslovakia, Hungary, former German Democratic Republic, Poland and Romania) managed to keep their statehood while being highly controlled by the USSR; meanwhile, other countries (Lithuania, Latvia and Estonia) disappeared completely from the political map after the Second World War and were treated as the part of the USSR without the separate identity of a state.<sup>27</sup>

This problem was specifically addressed by Eva-Clarita Pettai and Vello Pettai, who noticed that transitional justice in the Baltic states should be perceived as a unique phenomenon because of the history of their statehood during the twentieth century.<sup>28</sup> Again, this research is devoted not to the issue of reparation in the Baltic states but to establishment of a comprehensive model for understanding the politics of truth and justice and for framing each of the Baltic states in this model as compared to other post-communist states. Although legal regulation of main areas of

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<sup>27</sup> For e.g. Lavinia Stan, ed. *Transitional Justice in Eastern Europe and the former Soviet Union* (Routledge, 2009), Taylor & Francis e-Library e-book; Jon Elster, *Closing the Books: Transitional Justice in Historical Perspective* (Cambridge: Cambridge University Press, 2004), 66-70; Teitel, *Transitional Justice*, 142; Roht-Arriaza, “Reparations Decisions and Dilemmas,” 172-173; Jamal Benomar, “Justice after Transitions,” in *Transitional Justice - How Emerging Democracies Reckon with Former Regimes*, ed. Neil J. Kritz (Washington, D.C.: United States Institute of Peace Press, 1995), I: 34-37; Stephen Holmes, “The End of Decommunisation,” in *Transitional Justice - How Emerging Democracies Reckon with Former Regimes*, ed. Neil J. Kritz (Washington, D.C.: United States Institute of Peace Press, 1995), I: 116-120. Other example of omission of particularities of transitional justice in the Baltic States is when the case of the Russian Federation is taken as an only example to represent transition after the collapse of soviet regime leaving other former union republics and territories of the Baltic states administered by the institutions of the occupant aside, see: Aryeh Neier, “What Should be Done about the Guilty?” in *Transitional Justice - How Emerging Democracies Reckon with Former Regimes*, ed. Neil J. Kritz (Washington, D.C.: United States Institute of Peace Press, 1995), I: 172-183.

<sup>28</sup> Eva-Clarita Pettai and Vello Pettai, *Transitional and Retrospective Justice in the Baltic States* (Cambridge: Cambridge University Press, 2015).

transitional justice—i.e. criminal responsibility, administrative sanctions, compensation, disclosure of truth—in the Baltic states was discussed in this study, the research itself is one of political science and as such only explains the path the Baltic states have taken in their transition from their Soviet past. Thus, the legal evaluation of the applied transitional measures in such field as redress of victims is still missing. Nevertheless, this study is valuable for the comprehensive discussion of legal regulation aimed at dealing with Soviet legacy in the Baltic states.

The problem of reparation for atrocities of the Soviet regime in the Baltic states is episodically examined from a legal perspective in the works of Dainius Žalimas<sup>29</sup> and Lauri Mälksoo.<sup>30</sup> However, these studies are aimed at an in-depth analysis of the legality of the loss of statehood of the Baltic states.<sup>31</sup> Thus, the question of reparation in these studies is a residual one. On the issue of reparation, both authors stress the illegality of acts against the Baltic states and that such illegality is an internationally wrongful act requiring state responsibility, address the issue of the eligible subject of responsibility, i.e. the continuity of the USSR identity by the Russian Federation, and steps taken by the Baltic states to present the claim. This confirms the existence of state responsibility of the Russian Federation, but no analysis on the scope of reparations is suggested; additionally, there are no suggestions on possibilities to invoke state responsibility of the Russian Federation. The issue of reparation is viewed purely as an interstate matter for the breach of international law governing interstate relations and not from the perspective of illegality of acts against people of the Baltic states.

For this reason the doctoral thesis of Nika Bruskina is of particular importance. In her work Bruskina analyses the right of victims of the Nazi and Communist regimes to state financial compensation as a part of reparations. Not only is the right to compensation under international law analysed but also the practices of European countries whose residents suffered from the Nazi and/or Communist regimes, particularly of countries treated as a part of the USSR, are taken into account. Therefore, the interaction between international and domestic human rights law in establishing a right to compensation is revealed, concluding that there is no international legally binding obligation for a state to pay compensation to a victim in the case of human right violations under Nazi and Communist regimes. Current international obligations under human rights treaties are considered to be in effect for a particular state after their entrance into force, i.e. after commitment of massive human rights violations. As a result the right of the victims of Nazi and Communist regimes to compensation is recognized if a state itself undertook obligation to grant

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<sup>29</sup> Dainius Žalimas, *Lietuvos Respublikos nepriklausomybės atkūrimas: pagrindiniai klausimai pagal tarptautinę teisę* (Vilnius: Rosma, 1997), 152-154.

<sup>30</sup> Mälksoo, *Illegal Annexation*, 251-263.

<sup>31</sup> In Dainius Žalimas' study only the in-depth analysis of the case of Lithuania is provided.

compensation, either by establishing domestic law or under treaty. Such issues as the possibility to defending a claim to compensation and their scope under the European Convention on Human Rights and/or the International Covenant on Civil and Political Rights (ICCPR), as well as the duties of a state granting compensation, are explored. Significant suggestions concerning implementation of a right to compensation for victims of Nazi and Communist regimes are also provided. Moreover, Bruskina's position to analyse the right to compensation in line both for the victims of Nazi and Communist regimes is highly appreciated, as this contributes to the understanding of both regimes as equally criminal and guilty of egregious human rights violations. Because of in-depth analysis of the right to compensation in cases of human rights violations under Nazi and Communist regimes, other forms of reparations are not studied in Bruskina's doctoral thesis, although certain insights are provided (e.g. application of certain satisfactory measures in provision of compensation).<sup>32</sup>

Taking everything into account the review of previous research revealed that the issue of reparation has received much attention from the perspective of various social sciences. Legal questions were also analysed, and valuable general insights were suggested concerning the establishment of the right to reparation for victims of human rights violations at international, regional and national levels and its scope and implementation. However, the lack of apportionment of different circumstances on the case of reparation for human rights violations is noticeable as human rights violations differs in scale, are committed at different times in armed conflicts, in peace time or under circumstances that do not clearly fit either state of war or peace. Although various cases concerning different countries were analysed, the unique situation of victims of the Soviet regime in the Baltic states has generally received almost no attention from the perspective of legal sciences, with the exception of their right to compensation. Thus, a comprehensive legal study on the whole issue of reparations from the victims' perspective in the Baltic states is still required.

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<sup>32</sup> Nika Bruskina, „Valstybės kompensacija nacių ir komunistinių režimų nusikaltimų aukoms: tarptautinės ir nacionalinės teisės sąveika“ (PhD diss., Vilnius University, 2014), [https://elaba.lvb.lt/primo\\_library/libweb/action/search.do?vid=ELABA&prefLang=lt\\_LT&afterPDS=true&scp.scps=scope:\(ELABAETD\),scope:\(ELABAPDB\)](https://elaba.lvb.lt/primo_library/libweb/action/search.do?vid=ELABA&prefLang=lt_LT&afterPDS=true&scp.scps=scope:(ELABAETD),scope:(ELABAPDB)).

## RESEARCH METHODOLOGY

**Methodological provisions.** The victims' perspective—chosen as the starting point for this research—suggests that the question of reparation should be viewed through the prism of human rights law. It is a body of international law having worldwide acceptance whose origins 'belonged to early philosophical and legal theories of the natural law'.<sup>33</sup> This would suggest taking ideas of natural law as a primary method of research because human rights are 'inherent to all persons by virtue of their birth and human dignity ... and law cannot deprive humans of their fundamental human rights'.<sup>34</sup>

However, the research methodology is generally based on methods in international law because '[u]nder international law, human rights are binding only if contained in international agreements'<sup>35</sup> or customary international law or 'general principles of law recognized by civilized nations'.<sup>36</sup> Selection of methods in international law as primary research methods is also based on the fact that the problem analysed here involves relations between four different states with different legal systems, and international law is the law that 'transcend[s] domestic law and politics' and 'offers an alternative construction of law that, despite substantial political change, is continuous and enduring'.<sup>37</sup> Additionally, in legal methodology the theoretical framework used to analyse a particular object is made up from the legal system itself. Thus, categories and concepts of international law form at the same time the conceptual framework of this legal research.<sup>38</sup>

It is important to note that international legal scholarship does not have one applicable method of research.<sup>39</sup> The reason behind this is controversy in the understanding of law as a science and in legal methodology, where several different approaches can be discerned.<sup>40</sup> Therefore, it is important to address particular methods of international legal scholarship applied in this research and justify their selection.

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<sup>33</sup> Peter Davies, ed. *Human Rights* (London: Routledge, 1988), 1, cited in Kerikmäe, Hamulak and Chochia, „Historical Study“, 102.

<sup>34</sup> Kerikmäe, Hamulak and Chochia, „Historical Study“, 105.

<sup>35</sup> *Ibid.*, 107.

<sup>36</sup> *Ibid.*, 108-109

<sup>37</sup> Teitel, *Transitional Justice*, 20.

<sup>38</sup> Pauline C. Westerman, „Open or Autonomous: The Debate on Legal Methodology as a Reflection of the Debate on Law,“ in *Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline?* ed. Mark van Hoecke (Oxford: Hart Publishing, 2011), eBook Collection (EBSCOhost), Introduction; Eglė Mackuvienė, „Teisės mokslo ir jurisprudencijos mokslų studijos 1, no. 5 (2010): 299, <https://www3.mruni.eu/ojs/societal-studies/article/view/1365>.

<sup>39</sup> Annie-Marie Slaughter and Steven R. Ratner, "Symposium on Method in International Law. Appraising the Methods of International Law: A Prospectus for Readers," *American Journal of International Law* 93, no. 2 (April 1999): 291-295, [http://heinonline.org.ezproxy.vdu.lt/HOL/Page?handle=hein.journals/ajil93&div=20&start\\_page=291&collection=journals&set\\_as\\_cursor=1&men\\_tab=srchresults#](http://heinonline.org.ezproxy.vdu.lt/HOL/Page?handle=hein.journals/ajil93&div=20&start_page=291&collection=journals&set_as_cursor=1&men_tab=srchresults#).

<sup>40</sup> Mackuvienė, „Teisės mokslo ir jurisprudencijos mokslų studijos 1, no. 5 (2010): 293-295, 299-301.

Following the previously mentioned assumptions, modern positivism is the principal method of research. The positivistic approach was chosen because, first of all, positivism is ‘the *lingua franca* of most international lawyers, especially in continental Europe’<sup>41</sup> and reflects the prevailing understanding in international law that ‘states create international norms by reaching consent on the content of a rule.’<sup>42</sup> Thus international legal norms relevant to the question analysed in the thesis were determined first in accordance with Article 38 of the Statute of the International Court of Justice, naming sources of international law, but the strict view that law should be independent from its context was not followed, as modern positivism took into account changing political reality and ‘focuse[d] on the will of states less than previously’.<sup>43</sup>

This evolution of positivism changed the interpretive tools used to understand rules established in sources of international law. These new interpretive tools, used to determine international norms of customary nature, mean that state practice is determined not only from external conduct of states with each other but also from ‘their domestic legislation, judicial decisions, diplomatic despatches, internal government memoranda, and ministerial statements in Parliaments and elsewhere.’<sup>44</sup> Respectively ‘*opinion juris* may be deduced from the conclusion of treaties or voting records in international fora.’<sup>45</sup> Thus, one must be agree with Bruno Simma and Andreas L. Paulus that, under the latter view, customary international law develops quite rapidly.<sup>46</sup> Furthermore, the significance of decisions of international tribunals for the meaning of norms in international treaties is emphasized—as is the role of soft law as ‘an important device for the attribution of meaning to rules.’<sup>47</sup> Hence, most of these interpretive tools were used to discuss the concept of reparations applicable to the case of the victims of the Soviet regime in the Baltic states.

Some features of policy-oriented jurisprudence might also be useful in the research performed. This is due to the orientation towards the victim’s perspective and aspiration to remedy the victims of the Soviet regime in the Baltic states. It is the method of policy-oriented jurisprudence that is based on the view that law is only a means to an end, not an end in itself.<sup>48</sup> Meanwhile, for a positivistic approach it is the coherence of the legal system that matters, and it is the only possible aim of any legal research.<sup>49</sup> Thus, it is policy-oriented jurisprudence that

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<sup>41</sup> Slaughter and Ratner, „Symposium on Method in International Law,“ 293.

<sup>42</sup> *Ibid.*, 303.

<sup>43</sup> *Ibid.*, 306.

<sup>44</sup> *Ibid.*

<sup>45</sup> *Ibid.*, 306-307.

<sup>46</sup> *Ibid.*, 307.

<sup>47</sup> *Ibid.*, 307-308.

<sup>48</sup> *Ibid.*, 324.

<sup>49</sup> Westerman, „Open or Autonomous,“ The Problem of the Lacking Third, Legal System as Theoretical Framework; Slaughter and Ratner, „Symposium on Method in International Law,“ 303.

allows context to shape the law. Nevertheless, such a position also has its limitations, and proponents of the latter method suggest that any goal of society should be compatible with the general goal of minimum public order; in the case of international law, this goal is public order of human dignity.<sup>50</sup>

In the personal view of the author of this thesis, an aspiration to remedy victims of the Soviet regime in the Baltic states is in line with ‘the global common interest in approximating a world public order of human dignity’,<sup>51</sup> promoted under the method of policy-oriented jurisprudence. However, taken from the positivistic approach, coherence of international legal order is also maintained because the preamble of the Charter of the United Nations states that the United Nations is created in order ‘to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small.’<sup>52</sup> Thus, it is possible to apply certain features of other methods of international law, and in this case the method of policy-oriented jurisprudence in particular, as long as there are no serious contradictions between their applications. This approach is supported by Annie-Marie Slaughter and Steven R. Ratner, who stated that ‘[a] method used by a writer on international law may correspond to one theory of international law or to more than one if an author chooses to apply different theories.’<sup>53</sup>

To sum up the basic methodological provisions of this research, it is the theory and method of modern positivism that shapes the research; however, the human rights perspective might suggest a value-based approach, and it is visible in the aspiration to remedy the victims of the Soviet regime in the Baltic states. This aspiration is viewed as corresponding with international legal order based on the ‘faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small’<sup>54</sup> because after serious human rights abuses, it is a remedy that represents discontinuity with the abusive past and contributes to the restoration of human dignity.<sup>55</sup>

**Research methods.** Eglė Mackuvienė notes that there is a tendency to apply methods of interpretation of law to scientific legal research with minimal application of general methods of social sciences, and such practice does not contribute to the perception of law as a science.<sup>56</sup>

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<sup>50</sup> Slaughter and Ratner, „Symposium on Method in International Law,“ 324, 334.

<sup>51</sup> Ibid., 334.

<sup>52</sup> Charter of the United Nations, June 26, 1945, available from <https://treaties.un.org/Pages/showDetails.aspx?objid=080000028017ebb8&clang=en>.

<sup>53</sup> Slaughter and Ratner, „Symposium on Method in International Law,“ 292-293.

<sup>54</sup> See footnote 52.

<sup>55</sup> Teitel, *Transitional Justice*, 147; Jaime E. Malamud-Goti and Lucas S. Grosman, „Reparations and Civil Litigation: Compensation for Human Rights Violations in Transitional Democracies,“ in *The Handbook of Reparations*, ed. Pablo de Greiff (New York: Oxford University Press, 2006), 541.

<sup>56</sup> Mackuvienė, „Teisės mokslo ir jurisprudencijos moksliskumo problema,“ 301.

Therefore, this thesis tries to avoid this, and applies suitable methods of social sciences and performs legal research. Tasks enumerated to reach the aim of thesis will be fulfilled by applying not only methods of interpretation of law, but interpretative research methods such as analytical overview, systemic analysis, comparative analysis, inductive reasoning, generalisation<sup>57</sup> and the empirical research method of document analysis.

First, analysis of applicable legal norms on the problem revealed is performed in accordance with the methodological basics of legal research, i.e. logics, analysis, reasoning and hermeneutics.<sup>58</sup> Moreover as case law is considered to be social reality,<sup>59</sup> document analysis as a method of social research next to interpretative research methods described below was also applied to analyse legal acts, case law and other relevant documents. The latter method helped to identify different legal norms governing various aspects of reparations to victims of the Soviet regime in the Baltic states and to identify main problematic areas concerning actual implementation of reparatory measures.

The method of analytical overview is applied to describe and analyse circumstances surrounding the loss of independence of the Baltic states, the scope of reparations available for victims of gross violations of human rights law and serious violations of international humanitarian law, reparatory measures that were applied to the victims of the Soviet regime in the Baltic states by the Baltic states themselves and by the USSR. Features of the concept of the state succession and state responsibility will also be discussed using this method. Established conceptions will be further explored using methods of systemic analysis and comparative analysis.

With the help of systemic analysis, the interaction of components related to reparation under international and domestic law and the interaction between different elements defining type of state succession will be disclosed. This method will also enable the definition of interactions between different conceptions in order to understand how state succession affects reparation or whether the established framework of applicable legal rules on reparation corresponds with the actual circumstances the Baltic states appeared in after imposition of the Soviet regime by the USSR. Subsequently, possible inconsistencies might be revealed contributing to a deeper understanding of the operation of particular legal norms in given circumstances.

Meanwhile, comparative analysis will enable the comparison of applied reparatory measures between the different Baltic states as well as reparatory measures that were applied by the USSR and the Baltic states. This will also enable the juxtaposition of implemented reparatory policies with established concepts of reparation and reveal any existing discrepancies. This

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<sup>57</sup> Rimantas Tidikis, *Socialinių mokslų tyrimų metodologija* (Vilnius: Lietuvos teisės universitetas, 2003), 369-446.

<sup>58</sup> Mackuvienė, „Teisės mokslo ir jurisprudencijos mokslų problema“, 300.

<sup>59</sup> *Ibid.*, 296.



method will also enable the author of this thesis to address developments of applicable legal norms and apply them to established circumstances. The method of comparative analysis is also very important in the revelation and comparison of different possibilities to solve the question of state responsibility in order to remedy victims of the Soviet regime in the Baltic states.

Finally, methods of inductive reasoning and generalisation are important for establishing general statements and conclusions that explain the applicable legal regulations on reparation for victims of the Soviet regime in the Baltic states and their enforcement possibilities. It is these methods that allow for summarizing the results of the performed legal research and revelation of actual operation of legal norms governing reparation at international level in the case of the victims in the Baltic states in relation to the Russian Federation. Inductive reasoning will also allow testing of the validity of the formulated defensible propositions. This will definitely contribute to suggesting possible solutions.

# 1. RULES OF INTERNATIONAL LAW APPLICABLE TO THE BALTIC STATES IN 1940–1991

Any remedy under international law is provided only in the case of an internationally wrongful act performed by a state.<sup>60</sup> However, in order to establish responsibility, an applicable law must be identified. Therefore, the international status of the Baltic states in 1940–1991 must be evaluated.

## 1.1. STATUS OF THE BALTIC STATES IN 1940–1991 UNDER INTERNATIONAL LAW

Unfortunately, the evaluation of the legal status of the Baltic states in 1940–1991 is not straightforward. The nature of Soviet rule in the Baltics is rather complicated both at the political and scholarly level, as there is no agreement on the issue. Case law of the European Court of Human Rights also reflects this intricacy. In various cases the status of respective Baltic states during the 1940–1991 period is defined as illegal incorporation,<sup>61</sup> Soviet rule,<sup>62</sup> or occupation,<sup>63</sup> or some decisions adopted multiple definitions.<sup>64</sup> However, in *Sipin v. Estonia* the Human Rights Committee considered the status of Estonia to be that of an occupied country; that determination was relevant in deciding whether restrictions to obtain Estonian citizenship faced by an officer of the former armed forces of the USSR were compatible with Article 26 of the ICCPR.<sup>65</sup>

Therefore, particular attention must be given to scholarly analysis of the situation. Silence on the issue is also noticeable, regardless of the intricacy of the legal questions surrounding the

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<sup>60</sup> Wladyslaw Czaplinski, "State Succession and State Responsibility," *Canadian Yearbook of International Law* 28 (1990): 339,

[http://heinonline.org.ezproxy.vdu.lt/HOL/Page?handle=hein\\_journals/cybil28&div=11&start\\_page=339&collection=journals&set\\_as\\_cursor=0&men\\_tab=srchresults#](http://heinonline.org.ezproxy.vdu.lt/HOL/Page?handle=hein_journals/cybil28&div=11&start_page=339&collection=journals&set_as_cursor=0&men_tab=srchresults#); Dinah Shelton, „Righting Wrongs: Reparations in the Articles on State Responsibility,” *The American Journal of International Law* 96, no. 4 (October 2002): 835, <http://www.jstor.org/stable/3070681>; Emanuela-Chiara Gillard, „Reparation for violations of international humanitarian law,” *International Review of the Red Cross* 85, no. 851 (September 2003): 530-531, <https://www.icrc.org/eng/resources/documents/article/other/5srlfz.htm>.

<sup>61</sup> See *Zdanoka v. Latvia* [GC], no. 58278/00, 2006-IV *Reports of Judgments and Decisions* (ECHR) 29; *Kuolelis, Bartosevicius and Burokevicius v. Lithuania*, nos. 74357/01, 26764/02 and 27434/02, ECHR, HUDOC (February 19, 2008), <http://hudoc.echr.coe.int/eng?i=001-85152>.

<sup>62</sup> See *Sidabras and Džiautas v. Lithuania*, nos. 55480/00 and 59330/00, 2004-VIII *Reports of Judgments and Decisions* (ECHR) 367; *Liepajnieks v. Latvia* [dec.], no. 37586/06, ECHR, HUDOC (November 2, 2010), <http://hudoc.echr.coe.int/eng?i=001-101910>.

<sup>63</sup> See *Sõro v. Estonia*, no. 22588/08, ECHR, HUDOC (September 3, 2015), <http://hudoc.echr.coe.int/eng?i=001-156518>; *Kolk and Kislyiy v. Estonia* [dec.], nos. 23052/04 and 24018/04, 2006-I *Reports of Judgments and Decisions* (ECHR) 399; *Penart v. Estonia* [dec.], no. 14685/04, ECHR, HUDOC (January 24, 2006), <http://hudoc.echr.coe.int/eng?i=001-72685>.

<sup>64</sup> See *Vasiliauskas v. Lithuania* [GC], no. 35343/05, ECHR, HUDOC (October 20, 2015), <http://hudoc.echr.coe.int/eng?i=001-158290>.

<sup>65</sup> *Sipin v. Estonia*, Communication no. CCPR/C/93/D/1423/2005, Adoption of views, para. 7.4 (July 9, 2008), <http://juris.ohchr.org/Search/Details/1377>. See also *Tsarjov v. Estonia*, Communication no. CCPR/C/91/D/1223/2003, Adoption of views (October 26, 2007), <http://juris.ohchr.org/Search/Details/1371>.

status of the Baltic states under the Soviet regime.<sup>66</sup> Ultimately, two different views might be found regarding this situation:

- state succession (incorporation/annexation)<sup>67</sup>
- occupation of the Baltic states<sup>68</sup>

Both views will be analysed in detail, as this is a precondition necessary to establish subjects responsible for the repressions inflicted on people of the Baltic states as well as legal norms applicable to potential remedies for these acts.

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<sup>66</sup> Lauri Mälksoo, "State Identity: Deconstruction and Functional Splitting: The Case of Illegal Annexations," *Austrian Review of International and European Law* 7 (2002): 100, [http://heinonline.org.ezproxy.vdu.lt/HOL/Page?handle=hein.intyb/aurviel0007&div=6&start\\_page=91&collection=intyb&set\\_as\\_cursor=0&men\\_tab=srchresults#](http://heinonline.org.ezproxy.vdu.lt/HOL/Page?handle=hein.intyb/aurviel0007&div=6&start_page=91&collection=intyb&set_as_cursor=0&men_tab=srchresults#); Saulius Katuoka and Justinas Žilinskas, „Lietuva ir tarptautinė teisė: 1940–1991 m. SSRS okupacijos neigimo teisiniame diskurse nepagrįstumas,“ in *Regnum Est. 1990 m. Kovo 11-osios Nepriklausomybės Aktui – 20. Liber Amicorum Vytautui Landsbergiui*, ed. Gediminas Mesonis (Vilnius: Mykolo Romerio universitetas, 2010), 262-263.

<sup>67</sup> Александр Семенович Орлов, „СССР и Прибалтика. 1939-1940,“ *История СССР* 4 (Июль-Август 1990): 42-57, <http://gorenka.org/index.php/zhurnaly-iz-proshlogo/11805-istoriya-sssr-4-1990-g>; Arvydas Anušauskas et al., eds., *Lietuva 1940-1990* (Vilnius: Lietuvos gyventojų genocido ir rezistencijos tyrimų centras, 2007), 51-160; Alexander N. Vylegzhanin, Gennadiy V. Ignatenko and Alexandra U. Skuratova, "Contemporary Attempts to Distort the Legal Results of the Great Victory over Nazi Germany," *Moscow Journal of International Law* 79, no. 3 (Июль–Сентябрь 2010): 49-73, <http://old.mjil.ru/archived>; С.В.Черниченко, „Об „оккупации“ Прибалтики и нарушении прав русскоязычного населения,“ *Международная жизнь* no. 7-8 (2004): 212-225, <http://archive.mid.ru/ns-pobeda.nsf/b33502cdd8144475c3256eda0037e5fc/a9693d8763f70b92c3256f00001e65f2?OpenDocument>; William J.H. III Hough, "The Annexation of the Baltic States and Its Effect on the Development of Law Prohibiting Forcible Seizure of Territory," *New York Law School Journal of International and Comparative Law* 6, no. 2 (1985): 301-534,

[http://heinonline.org.ezproxy.vdu.lt/HOL/Page?handle=hein.journals/nylsintcom6&div=18&start\\_page=301&collection=journals&set\\_as\\_cursor=0&men\\_tab=srchresults#](http://heinonline.org.ezproxy.vdu.lt/HOL/Page?handle=hein.journals/nylsintcom6&div=18&start_page=301&collection=journals&set_as_cursor=0&men_tab=srchresults#); Visuvanathan Rudrakumaran, "The Legitimacy of Lithuania's Claim for Secession," *Boston University International Law Journal* 10, no. 1 (Spring 1992): 33-60, [http://heinonline.org.ezproxy.vdu.lt/HOL/Page?handle=hein.journals/builj10&div=7&start\\_page=33&collection=journals&set\\_as\\_cursor=0&men\\_tab=srchresults#](http://heinonline.org.ezproxy.vdu.lt/HOL/Page?handle=hein.journals/builj10&div=7&start_page=33&collection=journals&set_as_cursor=0&men_tab=srchresults#); Dietrich 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* 1 (2001): 124, [http://heinonline.org.ezproxy.vdu.lt/HOL/Page?handle=hein.intyb/byrbkinl0001&div=12&start\\_page=121&collection=intyb&set\\_as\\_cursor=0&men\\_tab=srchresults#](http://heinonline.org.ezproxy.vdu.lt/HOL/Page?handle=hein.intyb/byrbkinl0001&div=12&start_page=121&collection=intyb&set_as_cursor=0&men_tab=srchresults#); Kristina Spohr Readman, "The Baltic Question in West German Politics, 1949–90," *Journal of Baltic Studies* 38, no. 2 (June 2007): 154, 157, 159, 163, 171, doi: 10.1080/01629770701345073.

<sup>68</sup> Eyal Benvenisti, *The International Law of Occupation* (Princeton: Princeton University Press, 2002), 67-72; Katuoka and Žilinskas, „Lietuva ir tarptautinė teisė,“ 281; Mälksoo, *Illegal Annexation and State Continuity*, 167-195; Igor Grazin, "International Recognition of National Rights: The Baltic States' Case," *Notre Dame Law Review* 66, no. 5 (1990-1991): 1398, 1402-1407, [http://heinonline.org.ezproxy.vdu.lt/HOL/Page?handle=hein.journals/tndl66&div=53&start\\_page=1385&collection=journals&set\\_as\\_cursor=0&men\\_tab=srchresults#](http://heinonline.org.ezproxy.vdu.lt/HOL/Page?handle=hein.journals/tndl66&div=53&start_page=1385&collection=journals&set_as_cursor=0&men_tab=srchresults#); Vallikivi and Kerikmäe, "State Continuity," 30-32, 33, 35, 36-37; Boris Meissner, "The Right of Self Determination after Helsinki and Its Significance for the Baltic Nations," *Case Western Reserve Journal of International Law* 13, no. 2 (1981): 380-381, <https://scholarlycommons.law.case.edu/jil/vol13/iss2/17/>; Soonchun Lee, "Identity and Continuity of State: The Cases of the Baltic States and Korea," *Korea University Law Review* 10 (2011): 152, 153, 154, [http://heinonline.org.ezproxy.vdu.lt/HOL/Page?handle=hein.journals/korunilre10&div=11&start\\_page=149&collection=journals&set\\_as\\_cursor=0&men\\_tab=srchresults#](http://heinonline.org.ezproxy.vdu.lt/HOL/Page?handle=hein.journals/korunilre10&div=11&start_page=149&collection=journals&set_as_cursor=0&men_tab=srchresults#); Robert A. Vitas, "The Recognition of Lithuania: The Completion of the Legal Circle," *Journal of Baltic Studies* 24, no. 3 (Fall 1993): 247, <http://www.jstor.org/stable/43211819>.

### 1.1.1. Incorporation and annexation of the Baltic states to the USSR

State succession is described as one of the most confusing subjects in international law, especially concerning rights and obligations towards third states,<sup>69</sup> and is more subject to political realities than legal concepts.<sup>70</sup> Meanwhile, Vladimir-Djuro Degan explains the variety of views by different practical problems governing every case of state succession.<sup>71</sup> Although there are many suggested definitions for this concept, one produced by Malcolm N. Shaw could be regarded as the most accurate, and that is that state succession is a factual change in sovereign authority over a particular territory.<sup>72</sup> State succession covers both cases of change in sovereign authority, i.e. mergers and splits of states.

Incorporation (accession, association, absorption) and unification represent types of mergers, while dissolution (dismemberment) and secession (separation) represent types of splits.<sup>73</sup> Meanwhile cession and 'newly independent states' do not fall under either group and are different types of state succession. Cession describes a case when a part of territory of one state is transferred to another state.<sup>74</sup> 'Newly independent states' is a term coined in the Vienna Convention on Succession of States in respect of Treaties to respond to the consequences of the decolonization process and defines states born out of decolonization.<sup>75</sup> Moreover, Matthew C.R. Craven also talks about annexation and resurrection of states as specific modes of incorporation (absorption) or birth of a new state.<sup>76</sup> Thus there is some variety in the possible types of state succession and in the definitions used to describe the types of mechanisms governing changes of

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<sup>69</sup> Malcolm N. Shaw, "State Succession Revisited," *Finnish Yearbook of International Law* 5 (1994): 34-35, [http://heinonline.org.ezproxy.vdu.lt/HOL/Page?handle=hein.intyb/finnybki0005&div=5&start\\_page=34&collection=intyb&set\\_as\\_cursor=0&men\\_tab=srchresults#](http://heinonline.org.ezproxy.vdu.lt/HOL/Page?handle=hein.intyb/finnybki0005&div=5&start_page=34&collection=intyb&set_as_cursor=0&men_tab=srchresults#); Matthew C.R. Craven, „The Problem of State Succession and the Identity of States under International Law,“ *European Journal of International Law* 9, no. 1 (1998): 142-162, <http://www.ejil.org/article.php?article=1471&issue=47>; Birutė Kunigėlytė-Žiūkienė, „Valstybių teisių perėmimas, neteisėti teritoriniai pokyčiai ir pilietybė“ (PhD diss., Mykolas Romeris University, 2015): 17-21, <https://repository.mruni.eu/handle/007/14388>.

<sup>70</sup> Patrick Dumberry, *State Succession to International Responsibility* (Leiden: Brill, 2007), eBook Collection (EBSCOhost), 3-4; Czaplinski, "State Succession and State Responsibility," 356.

<sup>71</sup> Vladimir-Djuro Degan, "State Succession," *Finnish Yearbook of International Law* 4 (1993): 139, [http://heinonline.org.ezproxy.vdu.lt/HOL/Page?handle=hein.intyb/finnybki0004&div=6&start\\_page=130&collection=intyb&set\\_as\\_cursor=0&men\\_tab=srchresults#](http://heinonline.org.ezproxy.vdu.lt/HOL/Page?handle=hein.intyb/finnybki0004&div=6&start_page=130&collection=intyb&set_as_cursor=0&men_tab=srchresults#).

<sup>72</sup> Shaw, "State Succession Revisited," 40-43, 44.

<sup>73</sup> Shaw, "State Succession Revisited," 44; Dumberry, *State Succession to International Responsibility*, 62; Kunigėlytė-Žiūkienė, „Valstybių teisių perėmimas,“ 27-38; Degan, "State Succession," 132-136; Craven, „Problem of State Succession,“ 152, 158.

<sup>74</sup> Kunigėlytė-Žiūkienė, „Valstybių teisių perėmimas,“ 36-37; Degan, "State Succession," 132.

<sup>75</sup> Hubert Beemelmans, "State Succession in International Law: Remarks on Recent Theory and State Praxis," *Boston University International Law Journal* 15, no. 1 (Spring 1997): 84, [http://heinonline.org.ezproxy.vdu.lt/HOL/Page?handle=hein.journals/builj15&div=8&start\\_page=71&collection=journals&set\\_as\\_cursor=0&men\\_tab=srchresults#](http://heinonline.org.ezproxy.vdu.lt/HOL/Page?handle=hein.journals/builj15&div=8&start_page=71&collection=journals&set_as_cursor=0&men_tab=srchresults#); Tammy Fahmi, "Succession of States and International Treaty Obligations as Applied to the Break up of the Soviet Union and Yugoslavia," *New England International and Comparative Law Annual* 1 (1995): 87, [http://heinonline.org.ezproxy.vdu.lt/HOL/Page?handle=hein.journals/newenjc1&div=8&start\\_page=85&collection=journals&set\\_as\\_cursor=0&men\\_tab=srchresults#](http://heinonline.org.ezproxy.vdu.lt/HOL/Page?handle=hein.journals/newenjc1&div=8&start_page=85&collection=journals&set_as_cursor=0&men_tab=srchresults#).

<sup>76</sup> Craven, "Problem of State Succession," 152.

sovereignty over particular territory. Still, general attributes of a certain type could be assigned to a particular case, although the case could be quite contentious.

It must be noted that the variety of the types of state successions reveals differences in the rights and obligations succeeded by new sovereigns. Moreover, there is no general rule about state succession regarding international rights and obligations, as two basic different concepts exist, i.e. continuity and the clean slate doctrine. Depending on the type of state succession, different concepts are applied for international treaties, state debt and property, other international obligations and state boundaries.<sup>77</sup> Thus in a case of state succession, it is important to correctly determine its type, as the international rights and obligations of a new sovereign are dependent on that determination.

After discussing possible types of state succession and its effects, it is important to address the legality of changes in sovereignty, as illegal changes do not affect the status of the previous sovereign and might be a cause of action when an internationally wrongful act has been committed. According to Malcolm N. Shaw, '[s]uccession may be brought about peacefully or by external violent action, by internal revolution or as a consequence of extensive territorial resettlement after a major conflict.'<sup>78</sup> Nevertheless, this does not mean that changes in sovereignty are automatically deemed to be legal regardless of the means of implementation. Here the role of the international community in recognizing a change in sovereignty is particularly relevant, although Hubert Beemelmans notes that '[a]s third states cannot recognize an entity as a sovereign state that does not want to be one, likewise third states cannot impose their view in cases of state succession.'<sup>79</sup>

Taking into account the views presented, the case of the Baltic states under the Soviet regime must be addressed in order to evaluate (1) whether the fall of the Baltic states was a change in sovereignty over the territory of the Baltic states in 1940–1991 and (2) if it was legal, what type of state succession was visible here. This is especially important in order to correctly establish the applicable law concerning remedies for the international crimes committed in the Baltic states under the Soviet regime. Academic literature of the situation presents both views of legality and illegality.

#### ***1.1.1.1. Validity of incorporation and annexation***

It was already discussed that merger as a form of state succession has different types. Academic literature usually labels the situation of the Baltic states as incorporation or annexation,

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<sup>77</sup> Fahmi, "Succession of States," 85-86; Shaw, "State Succession Revisited," 44-97.

<sup>78</sup> Shaw, "State Succession Revisited," 39.

<sup>79</sup> Beemelmans, "State Succession in International Law," 77.

because latter definitions are used when the sovereignty of one state (here, the sovereignty of each of the Baltic states) is transferred to an already existing state (here, the USSR).<sup>80</sup> Other possible similar labels, e.g., accession, abortion, association, will not be used here, as they are not common in academic literature analysing the merger of the Baltic states with the USSR. Unification as a type of merger will also not be analysed, because a new state was not created as the result of a merger of several different states.

#### 1.1.1.1.1. *Incorporation*

Under the view of the case of the Baltic states as one of state succession, incorporation of the Baltic states to the USSR was considered to be in effect when the request to join the USSR was expressed by the newly elected Parliaments in each of the Baltic states.<sup>81</sup> These requests to join the USSR were satisfied by the Supreme Soviet of the USSR on August 3–6 in 1940.<sup>82</sup> According to Alexander Vylegzhanin and others, mutual consent was expressed by each of the Baltic state and the USSR;<sup>83</sup> therefore, the USSR acquired the territory of the Baltic states through the act of incorporation.

In such circumstances consent to transfer sovereign rights over territory must be given with free will.<sup>84</sup> Therefore, particular attention must be given to the way the Baltic states gave such consent. There is no dispute between scholars that the will to join the USSR was expressed by newly elected Parliaments in each of the Baltic states and within the presence of the army of the USSR, i.e. the presence of the army of foreign state. The USSR's army entered each of the Baltic states in the middle of June 1940; therefore, the circumstances surrounding this entrance must be discussed, as this action constituted the use of force against the sovereign Baltic states and the question arises whether such use of force was legitimate.

According to Alexander Orlov, by entering the Baltic states the army of the USSR acted in self-defense and in conformity with the bilateral treaties of mutual assistance between the USSR and each respective Baltic state. Taking into account that, at that time, self-defense was considered

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<sup>80</sup> For e.g. Hough, "Annexation of the Baltic States," 369-384; Rudrakumaran, "Legitimacy of Lithuania's Claim for Secession," 35-60; Loeber, "Legal Consequences of Molotov Ribbentrop Pact," 121-166; Shaw, "State Succession Revisited," 57-58.

<sup>81</sup> Орлов, „СССР и Прибалтика“, 42-57; Anušauskas et al., *Lietuva 1940-1990*, 77-88; I. Joseph Vizulis, *Nations Under Duress: The Baltic States* (New York: Associated Faculty Press, 1985), 48-53; I. Joseph Vizulis, *The Molotov-Ribbentrop Pact of 1939: The Baltic Case* (New York: Praeger Publishers, 1990), 32.

<sup>82</sup> Lithuania on 3 August 1940, Latvia on 5 August 1940 and Estonia on 6 August 1940. Vizulis, *Nations Under Duress*, 53.

<sup>83</sup> Vylegzhanin, Ignatenko and Skuratova, "Contemporary Attempts to Distort Legal Results of Great Victory," 61.

<sup>84</sup> Robert Yewdall Jennings, *The Acquisition of Territory in International Law* (Manchester: Manchester University Press, 1963), [https://books.google.lt/books?id=NhfpAAAAIAAJ&printsec=frontcover&source=gbg\\_summary\\_r&cad=0#v=onepage&q&f=false](https://books.google.lt/books?id=NhfpAAAAIAAJ&printsec=frontcover&source=gbg_summary_r&cad=0#v=onepage&q&f=false), 57.

to be one of the fundamental principles governing international law<sup>85</sup> and the only legitimate use of force,<sup>86</sup> the need for self-defense on the part of the USSR had to be demonstrated.

To demonstrate the need for self-defense, Alexander Orlov states that the USSR and the Baltic states were in a precarious position because of the aggressive policy of Nazi Germany towards other European countries. During these tense times, the USSR suspected that each of the Baltic states violated previously existing bilateral treaties of mutual assistance. For example, Estonia provided assistance to Finland, who was at war with the USSR; Latvia had not provided required and agreed land parcels for the establishment of the military bases according to the bilateral treaty of mutual assistance with the USSR, and Lithuania was in secret cooperation with Germany. Moreover, the USSR asserted that some soldiers of the Red Army were kidnapped from their office in the territory of Lithuania.<sup>87</sup> Therefore, the USSR, acting in self-defense, entered the Baltic states, which inspired the revolutionary moods among the citizens of these states. According to A. Orlov, old authoritarian governments were overthrown; thus, new elections were unavoidable and were organized peacefully.<sup>88</sup> In summary, change in sovereign authority in the Baltic states happened as the result of internal revolution. The view of socialist revolution of the working class in the Baltic states was also produced by historians under the Soviet regime in the Baltic states.<sup>89</sup>

However, this position lacks full disclosure of the circumstances surrounding these events. Concerning the arguments of self-defense, it must be stressed that it is questionable whether the USSR was fearful of the aggressive policy of Nazi Germany, because the Nazis and the USSR had signed the German–Soviet Non-aggression Pact (the Molotov–Ribbentrop Pact) on 23 August 1939; that agreement was still carefully observed by both parties at the time the Red Army entered into the Baltic states.<sup>90</sup> Furthermore, at the beginning of the Second World War all Baltic states declared their neutrality.<sup>91</sup>

Concerning the accusations of breach of the bilateral treaties of mutual assistance by the Baltic states, which resulted in the presentation of the ultimatums by the USSR, historical research

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<sup>85</sup> Georg Schwarzenberger, "Title to Territory: Response to a Challenge," *American Journal of International Law* 51, no. 2 (April 1957): 312, [http://heinonline.org.ezproxy.vdu.lt/HOL/Page?handle=hein.journals/ajil51&div=21&start\\_page=308&collection=journals&set\\_as\\_cursor=0&men\\_tab=srchresults#](http://heinonline.org.ezproxy.vdu.lt/HOL/Page?handle=hein.journals/ajil51&div=21&start_page=308&collection=journals&set_as_cursor=0&men_tab=srchresults#).

<sup>86</sup> Jennings, *Acquisition of Territory*, 58.

<sup>87</sup> Орлов, „СССР и Прибалтика“, 42-57.

<sup>88</sup> Орлов, „СССР и Прибалтика“, 42-57. See also Vylegzhanin, Ignatenko and Skuratova, "Contemporary Attempts to Distort Legal Results of Great Victory," 58-61.

<sup>89</sup> Alfred Erich Senn, *Lithuania 1940: revolution from above* (Amsterdam, New York: Rodopi, 2007), 147.

<sup>90</sup> Vizulis, *Molotov-Ribbentrop Pact of 1939*, 5-6; Valters Nollendorfs et al., *The Three Occupations of Latvia 1940-1991: Soviet and Nazi Take-Overs and Their Consequences* (Rīga: Occupation Museum Foundation, 2005), [http://www.mfa.gov.lv/data/file/e/P/3\\_okupacijas.pdf](http://www.mfa.gov.lv/data/file/e/P/3_okupacijas.pdf), 10-11; Senn, *Lithuania 1940*, 79, 87, 95-96, 98-99, 177.

<sup>91</sup> Estonian State Commission on Examination of the Policies of Repression, *The white book*, 9; Nollendorfs et al., *Three Occupations of Latvia 1940-1991*, 9; Anušauskas et al., *Lietuva 1940-1990*, 41.

has not confirmed them to be true, as the Baltic states complied with the requirements of mutual assistance treaties.<sup>92</sup> Moreover, when the League of Nations voted to expel the USSR because of its initiation of war against Finland when Finland refused to sign a bilateral treaty of mutual assistance similar to those imposed on each of the Baltic states, the Baltic states abstained from voting.<sup>93</sup> In summary, neither the argument of self-defense nor the argument of alleged breaches of bilateral treaties of mutual assistance have merit to justify the entrance of the Red Army into the Baltic states, and it is clear that such entrance was an act of aggression.

As previously mentioned, ultimatums were presented to each Baltic state, demanding compliance with the requirements of the USSR. One of the requirements was entrance of unlimited units of the Red Army in each of the Baltic states.<sup>94</sup> Therefore, entrance of the army was unavoidable even after Lithuania, Latvia and Estonia complied with the other requirements of the ultimatums.

It is important to note that all of the ultimatums included a provision requiring a change of government to ensure the proper fulfillment of the treaties of mutual assistance.<sup>95</sup> However, the ultimatums were not enough, and the USSR sent special representatives to coordinate the formation of new governments in the Baltic states, as it was not satisfied with the suggestions of the Baltic states themselves in order to comply with the ultimatum's requirement to change government. As composition of these new governments was already prepared by the USSR, the representatives of the legitimate governments of the Baltic states were not allowed to introduce any changes.<sup>96</sup>

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<sup>92</sup> For falsehood of the accusations in case of all Baltic States see: Hough, "Annexation of the Baltic States," 385-390. For case of the kidnapping of soldiers and refusal by the representatives of the USSR army on the territory of Lithuania to cooperate with established Lithuanian commission to investigate incidents see: Anušauskas et al., *Lietuva 1940-1990*, 54-55, for other accusations concerning cooperation with Germany see: Senn, *Lithuania* 1940, 73-74, 79-80. For falsity on the accusations toward Estonia and the use of newly established military bases in Estonia by the USSR to attack Finland see: Estonian State Commission on Examination of the Policies of Repression, *The white book*, 9; Senn, *Lithuania* 1940, 70. For case of Latvia see: Armins Ruis, "Latvia," in *Government, Law, and Courts in the Soviet Union and Eastern Europe*, eds. Vladimir Gsovski and Kazimierz Grzybowski (New York: Praeger, 1960), 1: 117, [http://heinonline.org.ezproxy.vdu.lt/HOL/Page?handle=hein.cow/golsoe0001&div=8&start\\_page=80&collection=cow&set\\_as\\_cursor=0&men\\_tab=srchresults#](http://heinonline.org.ezproxy.vdu.lt/HOL/Page?handle=hein.cow/golsoe0001&div=8&start_page=80&collection=cow&set_as_cursor=0&men_tab=srchresults#).

<sup>93</sup> Romuald J. Misiunas and Rein Taagepera, *The Baltic States: Years of Dependence, 1940-1990* (Berkeley and Los Angeles: University of California Press, 1993), [https://books.google.lt/books?id=FJejwedGesMC&printsec=frontcover&source=gbs\\_ge\\_summary\\_r&cad=0#v=onepage&q&f=false](https://books.google.lt/books?id=FJejwedGesMC&printsec=frontcover&source=gbs_ge_summary_r&cad=0#v=onepage&q&f=false), 17; Senn, *Lithuania* 1940, 70.

<sup>94</sup> Hough, "Annexation of the Baltic States," 375-378; Konstantin K. Khudoley, „Sovietization of the Baltic States in summer 1940 and its consequences," *Вестник Санкт-Петербургского университета* Серия 6, no. 1 (Март 2013): 95, <https://cyberleninka.ru/article/n/sovietizatsiya-baltiyskih-gosudarstv-letom-1940-goda-i-ee-posledstviya>.

<sup>95</sup> Hough, "Annexation of the Baltic States," 375-376, 378; Khudoley, „Sovietization of the Baltic States," 95; Vizulis, *Nations Under Duress*, 44, 48-49; Misiunas and Taagepera, *Baltic States*, 19.

<sup>96</sup> Vizulis, *Nations Under Duress*, 48-49; Misiunas and Taagepera, *Baltic States*, 19-22; Khudoley, „Sovietization of the Baltic States," 99-100.



Thus, new governments directly governed by the representatives from the USSR were formed and should be defined as puppet governments.<sup>97</sup> These puppet governments introduced further changes that were required to incorporate the Baltic states into the USSR: changed structure and personnel of the government and other state institutions, legalized only the communist party, banned various political and public organizations, established only those representing communist ideology and so on.<sup>98</sup> The final step was organizing new elections for the parliaments of the Baltic states; these elections were organized in violation of the applicable constitutions and election laws. The elections were announced on 14–15 July 1940 in all Baltic states.<sup>99</sup>

As the communist party was the only party eligible to participate in the elections, there was no choice for the people to select other representatives. Although non-party candidates could participate, such candidates could only be from newly founded organizations representing communist ideology. Possible participation by other parties was only theoretical and was actually suppressed by newly formed governmental institutions. Moreover, the goal of joining the USSR was not mentioned in the programme of the communist party during elections for the parliaments of Lithuania, Latvia or Estonia.<sup>100</sup> To create the illusion of high participation rates in the elections, people were intimidated, and unrealistic goals of the communist party were presented. The accuracy of the announced results is also highly questioned.<sup>101</sup> Moreover, the results of the elections organized in previously described manner were more than clear—the victory of the communist party in each of the Baltic states.

Additionally, mass demonstrations were organized in all Baltic states to express support for the new policies implemented by the newly appointed governments and newly elected parliaments after the entrance of the Red Army. However, history reveals that those demonstrations were organized with the help of soldiers of the Red Army; Russian soldiers and migrating Russian workers from previously established military bases in the Baltic states took part in the demonstrations. Recently released prisoners who had been imprisoned under previous

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<sup>97</sup> Anušauskas et al., *Lietuva 1940-1990*, 66-73; Dainius Žalimas, „1940 metų SSRS veiksmy prieš Lietuvos Respubliką teisinė kvalifikacija: agresija, okupacija ar aneksija?“ (paper presented at International Conference *1940 m. Baltijos šalyse: geležinė uždanga nusileidžia*, Vilnius, June 2010), LR Seimas video, 04:25:02 at 33:13, filmed in June 2010, accessed February 2017, [http://www3.lrs.lt/pls/inter/www\\_tv.show?id=7394,1,49](http://www3.lrs.lt/pls/inter/www_tv.show?id=7394,1,49); Senn, *Lithuania 1940*, 144, 145-146, 147; Khudoley, „Sovietization of the Baltic States,” 101.

<sup>98</sup> Anušauskas et al., *Lietuva 1940-1990*, 71-73.

<sup>99</sup> Nollendorfs et al., *Three Occupations of Latvia 1940-1991*, 15, Estonian State Commission on Examination of the Policies of Repression, *The white book*, 12; Algirdas Jakubčionis, Stasys Knezys and Arūnas Streikus, *Okupacija ir aneksija: pirmoji sovietinė okupacija (1940-1941)* (Vilnius: Margi raštai, 2006), 22; Meissner, “Right of Self Determination after Helsinki,” 380; Vallikivi and Kerikmäe, “State Continuity,” 31.

<sup>100</sup> Jakubčionis, Knezys and Streikus, *Okupacija ir aneksija*, 22-23; Misiunas and Taagepera, *Baltic States*, 26-27; Vizulis, *Nations Under Duress*, 50-51; Vallikivi and Kerikmäe, “State Continuity,” 31.

<sup>101</sup> Anušauskas et al., *Lietuva 1940-1990*, 79-86; Misiunas and Taagepera, *Baltic States*, 27-28; <sup>101</sup> Jakubčionis, Knezys and Streikus, *Okupacija ir aneksija*, 22-23; Senn, *Lithuania 1940*, 221-223.

governments of the Baltic states for anti-state activities also participated in the demonstrations. In other cases people gathered not knowing exactly the purpose of the particular meeting or demonstration.<sup>102</sup>

As it was stated previously, these newly elected parliaments in each of the Baltic states voted for their incorporation to the USSR. However, the actual circumstances show that such action clearly lacked the free will of the people of the Baltic states, i.e. legitimacy. Thus, it is impossible to claim that the consent to join the USSR was expressed by the free will of the people. Taking into account these circumstances, it is clear that there was no internal revolution in the Baltic states; the whole process was shaped by the USSR through the entrance of the Red Army.

Moreover, the ideology of communism is based on the presumption of revolution imposed by the working class, i.e. workers,<sup>103</sup> but Konstantin Hudoley notes that all of the Baltic states were agricultural; farmers constituted two-thirds of the population in Latvia and Estonia and 85 percent in Lithuania, while workers constituted 16.3 percent in Latvia, 24 percent in Estonia and only 7 percent in Lithuania. For Konstantin Hudoley these numbers are too low for effective social revolution, although it is true that workers in the Baltic states faced economic problems due to the beginning of the Second World War and partly because of authoritative regimes in the Baltic states.<sup>104</sup> Alfred Erich Senn adds that there was no strong communist party in any of the Baltic states, and communism lacked significant support from society in the Baltics.<sup>105</sup> Therefore, the argument that social revolution was a basis for change of sovereignty in the Baltic states can also be rejected.

The analysis performed revealed that the entrance of the army of the USSR cannot be justified as an act of self-defense, because the USSR had not faced any threat of use of force at the time the army entered the Baltic states. In any event, because of the ultimatums against them, for the Baltic states this was unavoidable. Arguments of social revolution can also be rejected because it has not been demonstrated that there was societal support for the regime introduced by the USSR in the Baltic states.

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<sup>102</sup> Estonian State Commission on Examination of the Policies of Repression, *The white book*, 11-12; Jakubčionis, Knezys and Streikus, *Okupacija ir aneksija*, 24; Anušauskas et al., *Lietuva 1940-1990*, 84-85; Nollendorfs et al., *Three Occupations of Latvia 1940-1991*, 14-15.

<sup>103</sup> George F. Kennan, "The Sources of Soviet Conduct," *Foreign Affairs* 25, no. 4 (July 1947): 566, [http://heinonline.org.ezproxy.vdu.lt/HOL/Page?handle=hein.journals/fora25&div=55&start\\_page=566&collection=journals&set\\_as\\_cursor=1&men\\_tab=srchresults#](http://heinonline.org.ezproxy.vdu.lt/HOL/Page?handle=hein.journals/fora25&div=55&start_page=566&collection=journals&set_as_cursor=1&men_tab=srchresults#).

<sup>104</sup> Khudoley, „Sovietization of the Baltic States,” 97.

<sup>105</sup> Senn, *Lithuania* 1940, 151-168.

#### 1.1.1.1.2. Annexation

The term ‘annexation’ in international law appears in the analysis of legal questions governing territories of states, state succession and even the law of occupation. While the meaning of annexation in the doctrine of state succession was already briefly discussed,<sup>106</sup> cases of territories of states and the law of occupation must also be briefly discussed.

Under the legal doctrine governing territories of states, annexation is considered to be a symbolic measure followed after certain modes of acquisition of territory, i.e. cession, occupation, prescription, accretion and conquest or subjugation (‘debalattio’).<sup>107</sup> Through annexation the state acquires rights of the sovereign over the annexed territory,<sup>108</sup> and the legality of acquisition of a territory through annexation would ‘depend on (a) the international law at the time (the intertemporal rule), (b) (possibly) whether the annexing State had established effective control over the territory and (c) whether other States had recognized the annexation.’<sup>109</sup>

As annexation by itself is not an illegal act and its legality is subject to the legality of previous territorial arrangements, the mode of acquisition of the territory of the Baltic states becomes particularly important. Accretion as a mode of acquisition of territory will not be considered here, as it means augmentation or loss of territory by nature.<sup>110</sup> Cession is also not relevant, as it concerns the transfer of part of a state’s territory as opposed to the whole territory of a state.<sup>111</sup> Instead, other modes of acquisition of territory, i.e. occupation, conquest and prescription, will be discussed as they relate to the Baltic states.<sup>112</sup> First, the issue of conquest needs to be addressed because the term ‘annexation’ is more often used to define acquisition of territory by conquest.<sup>113</sup>

Acquisition of a legal title to certain territory by conquest was legal in the nineteenth century and possibly until the First World War. However, the legality of acquiring such title through

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<sup>106</sup> See “1.1.1 Incorporation and annexation of the Baltic states to the USSR”.

<sup>107</sup> Anthony Aust, *Handbook of International Law* (Cambridge: Cambridge University Press, 2012), 35-38; Bardo Fassbender and Anne Peters, *The Oxford Handbook of the History of International Law* (Oxford: Oxford University Press, 2014), 238; Malcolm N. Shaw, *International law* (Cambridge: Cambridge University Press, 2014), 338-346; Rudrakumaran, "Legitimacy of Lithuania's Claim for Secession," 36.

<sup>108</sup> Ian Brownlie, *Principles of Public International Law* (Oxford: Oxford University Press, 2008), 141.

<sup>109</sup> Aust, *Handbook of International Law*, 36.

<sup>110</sup> Jennings, *Acquisition of Territory*, 19.

<sup>111</sup> See footnote 74.

<sup>112</sup> The case of prescription will be discussed in sub-chapter “1.1.1.2 Prescription and recognition as a cure of shortages of acquired legal title”.

<sup>113</sup> Seokwoo Lee, "Continuing Relevance of Traditional Modes of Territorial Acquisition in International Law and Modest Proposal," *Connecticut Journal of International Law* 16, no. 1 (Fall 2000): 10, [https://heinonline-org.ezproxy.vdu.lt:2443/HOL/Page?handle=hein.journals/conjil16&div=6&start\\_page=1&collection=journals&set\\_as\\_cursor=0&men\\_tab=srchresults#](https://heinonline-org.ezproxy.vdu.lt:2443/HOL/Page?handle=hein.journals/conjil16&div=6&start_page=1&collection=journals&set_as_cursor=0&men_tab=srchresults#); William I. Cargo, review of *Conquest and Modern International Law: the Legal Limitations on the Acquisition of Territory by Conquest*, by Matthew M. McMahon, *The American Historical Review* 48, no. 1 (October 1942): 70, <http://www.jstor.org/stable/1843256>.

conquest in the period between the two World Wars is contested,<sup>114</sup> especially after General Treaty for Renunciation of War as an Instrument of National Policy (Kellogg–Briand Pact) entered into force.<sup>115</sup> Unfortunately, scholars addressing the issue of annexation of the Baltic states do not consider in depth whether the Baltic states were conquered by the USSR according to international law, but some insights could be found.<sup>116</sup>

Visuvanathan Rudrakumaran states that the USSR cannot claim legal title by conquest, because of its international obligations and because it lacked the conditions under which conquest is possible.<sup>117</sup> This position is also supported by Lauri Mälksoo, who notes that the USSR itself recognized conquest as an illegal means of acquiring territory of a state in 1933 when dealing with the case of Manchuria.<sup>118</sup> On the other hand, Stanislav Chernichenko argues that incorporation of the Baltic states was a legal annexation and that the mere presence of the USSR army in the territory of the Baltic states was not a belligerent occupation or conquest, as this presence was not a result of a state of war under Hague Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land (hereinafter ‘Hague Regulations’), i.e. it is only a case of state succession.<sup>119</sup> Taking into account these different positions, more clarification on this issue is necessary.

The position of considering the acts of the USSR as conquest would be the most accurate. Although Stanislav Chernichenko rejects such a position, he does not specify a particular mode of acquisition of the territory of the Baltic states by the USSR, as annexation alone cannot be considered as a separate measure for acquisition of territory. Taking into account previous considerations, only cases of occupation and prescription should be applied to the case of the Baltic states.

Concerning cases of occupation, Visuvanathan Rudrakumaran notes that occupation followed by annexation is only possible if an occupied territory is *terra nullius*, and ‘Lithuania was not *terra nullius* at the time of incorporation.’<sup>120</sup> Following the same argumentation,<sup>121</sup> neither Latvia nor Estonia could be considered *terra nullius* at the time of incorporation. Thus, it is not possible to consider that sovereignty of the USSR over the Baltic states existed because of

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<sup>114</sup> Aust, *Handbook of International Law*, 36; Michael Siegrist, „The Functional Beginning of Belligerent Occupation“ (Master thesis, Academy of International Humanitarian and Human Rights Law in Geneva, 2010): 6, <http://www.prix-henry-dunant.org/en/recipients-research/2010-michael-siegrist/>.

<sup>115</sup> Mälksoo, "State Identity," 96-97.

<sup>116</sup> For e.g. Mälksoo, *Illegal Annexation and State Continuity*, 119, 127, 136, 193, 203; Rudrakumaran, "Legitimacy of Lithuania's Claim for Secession," 34-36, 37.

<sup>117</sup> Rudrakumaran, "Legitimacy of Lithuania's Claim for Secession," 37, 44-46.

<sup>118</sup> Mälksoo, *Illegal Annexation and State Continuity*, 117.

<sup>119</sup> Черниченко, „Об „оккупации“ Прибалтики“,“ 212-225.

<sup>120</sup> Rudrakumaran, "Legitimacy of Lithuania's Claim for Secession," 37.

<sup>121</sup> *Ibid.*, 34-36.

the USSR's occupation of the territory. Meanwhile, acquisition of territory by prescription suggests that other legal attempts to acquire title over a particular territory cannot be demonstrated. Thus, the legality of conquest to acquire territories of the Baltic states on the part of the USSR must be considered.

Lauri Mälksoo notes that annexation under the Hague Regulations is illegal if a state of war has not ended. It is clear that an annexed territory must be recognized as subjugated, i.e. conquered, before annexation; otherwise, the annexation is considered premature, and the law of belligerent occupation is applicable.<sup>122</sup> Therefore, annexation cannot be carried out while the territory is considered to be under belligerent occupation; the territory must be conquered. However, as already explained, the latter mode of acquisition was deemed by the USSR itself as illegal under international law.

Taking also into account infringements of bilateral agreements between each of the Baltic states and the USSR and international obligations of the USSR that will be discussed later,<sup>123</sup> it is impossible to assert that the incorporation of the Baltic states into the USSR was carried out without any violations of applicable international law. It was neither a valid state succession nor a valid acquisition of territory by annexation. The conclusion that the annexation of the Baltic states was illegal in nature is strongly based on the views that acquisition of territory by force, in the light of the international obligations assumed by the USSR, was illegal at the time and that the entrance of the Red Army constituted the use of force. This also supports the application of the law of occupation for the case of the Baltic states.

It still could be argued that Soviet expansion was reconciled with international law, as the subjection of the Baltic states lasted for more than 50 years. Some scholars find this disturbing from a legal point of view because similar practices by the Axis countries after the Second World War were treated as a deviation from applicable international law.<sup>124</sup> The lapse of time also must be taken into consideration, i.e. the case of prescription, and recognition of the international community also plays major role in determining the legality of title over the territory. Therefore, these issues must be discussed, as they are considered to be able to cure previous violations in acquisition of title or sovereignty.

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<sup>122</sup> Mälksoo, *Illegal Annexation and State Continuity*, 177-182.

<sup>123</sup> See "1.1.2 Soviet regime as the belligerent occupation of the Baltic states".

<sup>124</sup> Benvenisti, *International Law of Occupation*, 67; Mälksoo, "State Identity," 96-97; Vizulis, *Molotov-Ribbentrop Pact of 1939*, 51-52, 54, Mark W. Zacher, „The Territorial Integrity Norm: International Boundaries and the Use of Force,” *International Organization* 55, no. 2 (Spring, 2001): 220-221, <http://www.jstor.org/stable/3078631>.

### 1.1.1.2. *Prescription and recognition as a cure of shortages of acquired legal title*

#### 1.1.1.2.1. *Prescription*

Acquisition of territory by prescription means acquisition of territory that is not *terra nullius*, but the legality of its acquisition is doubtful.<sup>125</sup> Here analysis of the conflict between the principle of *ex injuria jus non oritur* (illegal acts cannot create law) and the principle of *ex factis jus oritur* (law arises out of fact) becomes particularly relevant and is addressed by scholars considering the case of the Baltic states in 1940–1991.<sup>126</sup> According to Anthony Aust, ‘although international law is not keen to legalise unlawful conduct, the aim of international law is always stability and certainty.’<sup>127</sup> This position is summarized by Malcolm N. Shaw, stating that prescription is ‘the legitimisation of a fact’.<sup>128</sup> However, others advocate an alternate position that an illegal act cannot be cured by prescription. It is possible to claim acquisition of title over territory by prescription if the acquisition is questionable but not illegal, as illegality clearly lacks good faith.<sup>129</sup>

Ian Brownlie contends that the concept of acquisition of title by prescription is not unambiguous and has different interpretations or modifications concerning particular cases of acquiring territory in such a way.<sup>130</sup> Nevertheless, all authors agree that only the lapse of time to acquire title by prescription is not decisive; other criteria also come into play. Therefore, international law will generally accept the acquisition if the contested territory ‘has been under the effective control of a state, and that has been uninterrupted and uncontested for a long time’; however, timely protests from the former sovereign will typically preclude such a claim.<sup>131</sup>

Therefore, for such an acquisition to be accepted, the facts become particularly important. Special attention must be given to the protests of the former sovereign, as Malcolm N. Shaw stresses that this ‘may completely block any prescriptive claim.’<sup>132</sup> Academic literature is in agreement that there is no requirement to resist in arms by a former sovereign, especially after the war is no longer recognized as a legal means to solve conflicts between states. Nor is the requirement to present matter the before an international tribunal mandatory, although doing so would be a clear demonstration of protest.<sup>133</sup>

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<sup>125</sup> Aust, *Handbook of International Law*, 38; Shaw, *International law*, 343-344.

<sup>126</sup> Mälksoo, "State Identity," 91-110; Žalimas, *Lietuvos Respublikos nepriklausomybės atkūrimas*, 59-63.

<sup>127</sup> Aust, *Handbook of International Law*, 38.

<sup>128</sup> Shaw, *International law*, 344.

<sup>129</sup> Brownlie, *Principles of Public International Law*, 150-151.

<sup>130</sup> *Ibid.*, 146-148.

<sup>131</sup> Aust, *Handbook of International Law*, 38. In addition Adam Roberts, „Transformative Military Occupation: Applying the Laws of War and Human Rights,” *American Journal of International Law* 100, no. 3 (July 2006): 584, doi: <https://doi.org/10.1017/S0002930000031067>; Shaw, *International law*, 344-345.

<sup>132</sup> Shaw, *International law*, 344.

<sup>133</sup> Shaw, *International law*, 345; Brownlie, *Principles of Public International Law*, 148-150.

Thus ‘any conduct indicating a lack of acquiescence’, e.g. diplomatic protests to the existing circumstances, can be sufficient to demonstrate objection and prevent acquisition of title by prescription or at least postpone the process of prescription for a certain period of time.<sup>134</sup> Moreover, extinction of a state has to be definite and final, i.e. ‘the last hope has vanished and that a regaining of independence is contrary to all expectations.’<sup>135</sup>

In the case of the Baltic states, resistance of the enslaved nations through the entire period of the Soviet regime<sup>136</sup> becomes particularly important because such resistance could be treated as protests of the former sovereign. This is especially true taking into account the modern concept of a state where sovereignty of a state is considered to belong to the nation and not to the particular ruler of a state. The constitutions of each Baltic state that were applicable at the moment when the army of the USSR entered the Baltic states all contained provisions declaring that the sovereign power of the state was vested in the people.<sup>137</sup>

In addition to the resistance of enslaved nations themselves, the activities of exiles from the Baltic states were also very important. After the beginning of the quasi-belligerent occupation, the required preconditions to establish governments-in-exile existed according to the criteria established by S. Talmon.<sup>138</sup> Governments of the independent and sovereign Baltic states were ousted by the illegal use of force, and puppet governments were installed. In addition, diplomatic services of the Baltic states were able to act independently from interference of other states in pursuing the goal of re-establishing independence from the USSR.<sup>139</sup>

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<sup>134</sup> Brownlie, *Principles of Public International Law*, 149.

<sup>135</sup> Loeber, “Legal Consequences of Molotov Ribbentrop Pact,” 124. In addition Hough, “Annexation of the Baltic States,” 480; Brownlie, *Principles of Public International Law*, 148-150.

<sup>136</sup> Misiunas and Taagepera, *Baltic States*, 81-91, 239-259; Vizulis, *Molotov-Ribbentrop Pact of 1939*, 74-75, 83-96, 105-114; Hough, “Annexation of the Baltic States,” 472-473; Mälksoo, *Illegal Annexation and State Continuity*, 33-34; Sanita Reinsone, “Forbidden and sublime forest landscapes: narrated experiences of Latvian national partisan women after World War II,” *Cold War History* 16, no. 4 (2016): 396-399, doi: 10.1080/14682745.2014.986108; Justinas Žilinskas, “Status of Members of Anti-Soviet Armed Resistance (Partisans' War) of 1944-1953 in Lithuania under International Law,” *Baltic Yearbook of International Law* 11 (2011): 34-38, [http://heinonline.org.ezproxy.vdu.lt/HOL/Page?handle=hein.intyb/byrbkinl0011&div=6&start\\_page=31&collection=intyb&set\\_as\\_cursor=0&men\\_tab=srchresults#](http://heinonline.org.ezproxy.vdu.lt/HOL/Page?handle=hein.intyb/byrbkinl0011&div=6&start_page=31&collection=intyb&set_as_cursor=0&men_tab=srchresults#).

<sup>137</sup> 1938 m. Lietuvos Konstitucija [Constitution] May 12, 1938, art. 1 in *Lietuvos Konstitucija* (Kaunas: Spindulys, 1938); Latvijas Republikas Satversme [Constitution] February 15, 1922, “Latvijas Vēstnesis”, 43, 01.07.1993., art. 2, [https://m.likumi.lv/doc.php?id=57980&version\\_date=21.03.1933](https://m.likumi.lv/doc.php?id=57980&version_date=21.03.1933); Tanel Kerikmäe and Sandra Särav, “Estonian experience: Transition to Democratic Constitutionalism,” in *Cambodian Constitutional Law*, eds. Hor Peng, Kong Phallack and Jörg Menzel (Konrad Adenauer Stiftung Cambodia Office, 2016), <http://www.kas.de/wf/en/33.47410/>, 631-632, 635.

<sup>138</sup> Stefan Talmon provides 4 criteria “for an authority in exile to qualify as a ‘government’ in international law” and this encompasses “(1) [sovereign and independent] State, (2) representative character, (3) independence, (4) internationally illegality of the government in situ”. Stefan Talmon, “Who is a Legitimate Government in Exile? Towards Normative Criteria for Governmental Legitimacy in International Law,” in *The Reality of International Law. Essays in Honour of Ian Brownlie*, eds. Guy S. Goodwin-Gill and Stefan Talmon (Oxford University Press, 1999), doi:10.1093/acprof:oso/9780198268376.003.0023, 499-537.

<sup>139</sup> Leo Jansons, “The concept of the Baltic States and its sources of Legitimacy after World War II in American Documents of 1950s,” (paper presented at International Conference *The Baltic States in the Soviet Union. From post-stalinism to perestroika 1953-1990, April 2012, Riga*), 155-162.

Unfortunately, only the Estonians managed to create a formal government-in-exile in addition to their diplomatic services,<sup>140</sup> while the diplomatic services of Latvia and Lithuania were the only official institutions representing their independent statehoods, respectively.<sup>141</sup> However, even the Estonian government-in-exile did not receive international recognition.<sup>142</sup> This might have been due to limits on its ability to demonstrate representation of the enslaved nation of Estonia because the chain of events prevented clear, continuous representation of the nation while abroad and required other evidences of such representation. Because of this, it was quite hard to demonstrate that existing national structures or organizations abroad actually represented the will of nation. The same was true for Latvia and Lithuania.<sup>143</sup> It also cannot be denied that more widespread recognition of the government-in-exile and diplomatic services of the Baltic nations was discouraged by the fact that the aggressor was the USSR—one of the major powers of the Cold War. It was ultimately quite a unique situation that the Baltic states continued their statehood through their diplomatic missions.<sup>144</sup>

Nevertheless, representation of enslaved Baltic nations was still visible because the majority of both those exiled and those who stayed in the occupied territories were united by the goal of re-establishing the independence of the Baltic states and opposing the illegal nature of their annexation.<sup>145</sup> Activities of exiles at political, legal and scholarly levels were very important in preventing the extinction of the last hope to regain the Baltic states' independence.<sup>146</sup> Taking everything into account, resistance from the people in the Baltic states—primary in the form of partisan war and later in the form of peaceful protests—supported by activities of exiles and diplomatic services abroad, prevented the USSR from acquiring title over the territory of the Baltic states through prescription, despite its effective control over the area.

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<sup>140</sup> Lauri Mälksoo, "Professor Uluots, the Estonia Government in Exile and the Continuity of the Republic of Estonia in International Law," *Nordic Journal of International Law* 69, no. 3 (2000): 289-316, [http://heinonline.org.ezproxy.vdu.lt/HOL/Page?handle=hein.journals/nordic69&div=24&start\\_page=289&collection=journals&set\\_as\\_cursor=0&men\\_tab=srchresults#](http://heinonline.org.ezproxy.vdu.lt/HOL/Page?handle=hein.journals/nordic69&div=24&start_page=289&collection=journals&set_as_cursor=0&men_tab=srchresults#).

<sup>141</sup> Jansons, "The concept of the Baltic States," 144-164; Anušauskas et al., *Lietuva 1940-1990*, 257-266, 382-393, 476-485; 590-600.

<sup>142</sup> Stefan Talmon, *Recognition of Governments in International Law: With Particular Reference to Governments in Exile* (New York: Oxford University Press, 1998), [https://books.google.lt/books?id=scc8EboiJX8C&printsec=frontcover&source=gbg\\_summary\\_r&cad=0#v=onepage&q&f=false](https://books.google.lt/books?id=scc8EboiJX8C&printsec=frontcover&source=gbg_summary_r&cad=0#v=onepage&q&f=false), 300.

<sup>143</sup> Jansons, "The concept of the Baltic States," 144-164.

<sup>144</sup> *Ibid.*, p. 162-163.

<sup>145</sup> Asta Petraitytė-Briedienė, *Tylieji priesaikos riteriai: Lietuvos pasiuntinybė Vašingtone Šaltojo karo metais* (Kaunas: Vytauto Didžiojo universitetas; Vilnius: Versus aureus, 2014), 247; Mälksoo, "Professor Uluots," 289-316.

<sup>146</sup> Rein Taagepera, "The Struggle for Baltic History," *Journal of Baltic Studies* 40, no. 4 (December 2009): 451-464, <https://escholarship.org/uc/item/5q58n67m>; Andrej Plakans, "Uncertain Focus: Thoughts on Western Research about the Baltic Republics. 1953-1990" (paper presented at International Conference *The Baltic States in the Soviet Union. From post-stalinism to perestroika 1953-1990*, April 2012, Riga), 57-66.



#### 1.1.1.2.2. Recognition

The final question that must be addressed is the issue of recognition. Georg Schwarzenberger states that any acquisition of territory in order to prove the validity of acquired title requires consent and recognition or acquiescence.<sup>147</sup> According to Schwarzenberger, recognition can be an independent root of title.<sup>148</sup> It is also described as ‘the traditional procedure by which the law is adjusted to fact’ or ‘the law when occasion requires may seem to embrace illegality’.<sup>149</sup> Thus, this issue cannot be overlooked in evaluating whether the USSR could claim to acquire legal title over the territory of the Baltic states.

What matters when it comes to recognition is recognition of third states toward the territorial changes inflicted between concerned states. If a majority of states do not recognize territorial claims because the mode of acquisition is unacceptable to those other states, any title to the territory is an inchoate title irrespective of the mode of acquisition.<sup>150</sup> Moreover, any state is bound to act at the international level with good faith constituting fundamental principle of international law.<sup>151</sup> Therefore, the required level of recognition could be ‘all members of the State community’, and ‘every reasonable chance of a *restitutio ad integrum* must be excluded.’<sup>152</sup>

Because recognition or non-recognition of territorial changes depends on the behaviour of the state community, it is usually considered to be a matter of politics.<sup>153</sup> Nevertheless, these issues present certain legal consequences.<sup>154</sup> This could be illustrated by case law of the courts of the U.S. and the United Kingdom (UK) that dealt with cases concerning the ownership of merchant vessels (their nationalization by the USSR) that were in ports of these countries and cases concerning estates or other property after the USSR occupied the Baltic states. In these cases representatives of the USSR were usually denied the ability to claim title on the vessels or particular property belonging to the nationals or entities of the Baltic states due to non-recognition of the acts of the USSR in the Baltic states as legal by either the government of the U.S. or the UK. In some cases the disputes were solved applying the law of the Baltic states and not that of respective Soviet socialist republic.<sup>155</sup>

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<sup>147</sup> Schwarzenberger, "Title to Territory," 311, 312.

<sup>148</sup> Ibid., 318.

<sup>149</sup> Jennings, *Acquisition of Territory*, 62. See also Mälksoo, *Illegal Annexation and State Continuity*, 29-31.

<sup>150</sup> Schwarzenberger, "Title to Territory," 318.

<sup>151</sup> Ibid, p. 312, 323.

<sup>152</sup> Krystyna Marek, *Identity and Continuity of States in International Law* (Genève: E. Dros, 1968), 329, cited in Mälksoo, *Illegal Annexation and State Continuity*, 31, fn. 7.

<sup>153</sup> James Wilford Garner, „Non-Recognition of Illegal Territorial Annexations and Claims to Sovereignty,“ *The American Journal of International Law* 30, no. 4 (October 1936): 679-688 681, <http://www.jstor.org/stable/2191130>; Leo Gross, review of *The Acquisition of Territory in International Law*, by R.Y. Jennings, *The American Journal of International Law*. 59, no. 2 (April 1965): 410, <http://www.jstor.org/stable/2196989>.

<sup>154</sup> Mälksoo, "State Identity," 104, 108-110.

<sup>155</sup> Hough, "Annexation of the Baltic States," 397-403, 416-417.

Thus, recognition or non-recognition of the claim over a territory presents legal consequences at the international level. Regarding the issue of non-recognition in the case of the Baltic states, scholars present plenty of cases demonstrating that the international community has not recognized the annexation during the period of 1940–1991 because of its illegal nature; however, over time such non-recognition policies became milder due to changes in governments or for practical reasons. The position of the U.S. was particularly relevant, as the U.S. firmly held the position of non-recognition of the USSR's incorporation of the Baltic states.<sup>156</sup>

However, some academic literature has adopted the position that the USSR's territorial acquisition of the Baltic states was actually recognized by the international community, and as a result it must be addressed. Scholars adopting this position stress the importance of the Helsinki Final Act, signed in 1975 at the Conference on Security and Co-operation in Europe, as well as the final agreements made during the Yalta and Potsdam conferences that were organized by the main Allied powers of the Second World War, i.e. Great Britain, the U.S. and the USSR.<sup>157</sup>

Arguments related to recognition first of all rest on Article III of the Helsinki Final Act,<sup>158</sup> which stated, 'The participating States regard as inviolable all one another's frontiers as well as the frontiers of all States in Europe and therefore they will refrain now and in the future from assaulting these frontiers.'<sup>159</sup> These words are interpreted as recognizing the existing frontiers of the states as they existed after the Second World War and as a result recognizing the title of the USSR over the territories of the Baltic states.<sup>160</sup> To follow the position that recognition itself is an independent root of title, such recognition could be seen as legitimizing the alleged title of the USSR despite the illegality of its previous actions towards the Baltic states.

However, not all scholars interpret the result of the Helsinki Final Act in the same manner. I. Joseph Vizulis stresses that the act has no binding force.<sup>161</sup> In addition, an interpretation legitimizing the USSR's title to the territory of the Baltic states would contradict the principles

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<sup>156</sup> The widest analysis on the issue is presented by Hough, "Annexation of the Baltic States," 391-446. See also Vizulis, *Nations Under Duress*, 153-157; Vizulis, *Molotov-Ribbentrop Pact of 1939*, 135-144; Žalimas, *Lietuvos Respublikos nepriklausomybės atkūrimas*, 110-118. For cases of particular countries see: Spohr Readman, "Baltic Question in West German Politics," 153-178; Jansons, "The concept of the Baltic States".

<sup>157</sup> Владислав Владиславович Воротников, „Концепции и приоритеты внешней политики Латвии, Литвы и Эстонии в 2004-2012 гг.“ (PhD diss., Moscow State Institute of International Relations, 2014): 64-68, <https://search.rsl.ru/ru/record/01007890206>.

<sup>158</sup> Воротников, „Концепции и приоритеты“, 64-68; Черниченко, „Об „оккупации“ Прибалтики“, 212-225.

<sup>159</sup> Helsinki Final Act, art. III, concluded August 1, 1975, <http://www.osce.org/helsinki-final-act?download=true>.

<sup>160</sup> See footnote 158.

<sup>161</sup> Similar insights are provided also by James P. Terry, "Lithuanian Independence and International Law: A Retrospective Examination," *Naval Law Review* 40 (1992): 139, [http://heinonline.org.ezproxy.vdu.lt/HOL/Page?handle=hein.journals/naval40&div=10&start\\_page=133&collection=journals&set\\_as\\_cursor=0&men\\_tab=srchresults#](http://heinonline.org.ezproxy.vdu.lt/HOL/Page?handle=hein.journals/naval40&div=10&start_page=133&collection=journals&set_as_cursor=0&men_tab=srchresults#); Meissner, "Right of Self Determination after Helsinki," 378; Richard Davy, "Helsinki myths: setting the record straight on the Final Act of the CSCE, 1975," *Cold War History* 9, no. 1 (2009): 4, <https://doi.org/10.1080/14682740802490380>; Lyra Jakulevičienė, *Tarptautinių sutarčių teisė* (Vilnius: VĮ Registrų centras, 2011), 68.

that were also agreed to be respected by the states who participated in the Conference on Security and Cooperation, and principle of self-determination was particularly salient.<sup>162</sup> Additionally, William J.H. Hough III provides particular examples of statements of certain states who signed the Helsinki Final Act that clearly demonstrate an intent not to interpret the act as recognizing the title of the USSR over the territories of the Baltic states because of the illegality of the USSR's actions.<sup>163</sup>

It also must be stressed that many scholars viewed the act as an attempt to mitigate existing Cold War tensions, where it was important to preserve the principle of self-determination in order to guarantee peace and protect human rights. Such an interpretation implies that any territorial changes introduced by force cannot be recognized as valid, because doing so would trample the principle of self-determination.<sup>164</sup> Moreover, Stefan Talmon viewed the Helsinki Final Act as one of the documents confirming the duty of states at international level 'not to recognize as legal territorial acquisitions resulting from the threat of use of force'.<sup>165</sup>

Thus, it is clear that any interpretation of the Helsinki Final Act as a document confirming territorial frontiers as they existed after the Second World War and as a result recognizing the title of the USSR over the territories of the Baltic states is too wide. It is also apparent that its content is interpreted in a number of different ways, and the act cannot be regarded as recognition of the USSR's title over the territory. Finally, several states whose leaders signed Helsinki Final Act<sup>166</sup> clearly expressed that they do not view the document as recognizing the title of the USSR over the territories of the Baltic states.<sup>167</sup>

Returning to the alleged recognition in the final agreements made during the Yalta and Potsdam conferences, it must be noted that in both agreements the USSR was one of three states participating in the conferences. According to I. Joseph Vizulis, the main focus in Yalta was the defeat of Nazi Germany and not the aftermath of the war. For the U.S., the USSR's promises to join in the fight against Japan were particularly important; as a result, the issue of the USSR's illegal acquisitions of territories remained unchallenged.<sup>168</sup> Moreover, the USSR itself breached the Yalta agreement by not giving an opportunity for free elections concerning future governments

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<sup>162</sup> Vizulis, *Nations Under Duress*, 161-163.

<sup>163</sup> William J.H. Hough III mentions Belgium, Canada, France, the United Kingdom, the U.S. See Hough, "Annexation of the Baltic States," 410-412, 415, 428-429, 430, 432-433.

<sup>164</sup> Zacher, "The Territorial Integrity Norm," 238; Meissner, "Right of Self Determination after Helsinki," 378; Terry, "Lithuanian Independence and International Law," 138-139; Davy, "Helsinki myths," 1-22.

<sup>165</sup> Stefan Talmon, "The Duty Not to 'Recognize as Lawful' a Situation Created by the Illegal Use of Force or Other Serious Breaches of a Jus Cogens Obligation: An Obligation without Real Substance?" in *The Fundamental Rules of the International Legal Order: Jus Cogens and Obligations Erga Omnes*, eds. Jean-Marc Thouvenin and Christian Tomuschat (Leiden: Brill, 2006), eBook Collection (EBSCOhost), 102.

<sup>166</sup> Helsinki Final Act was signed by leaders of 35 states. See: Davy, "Helsinki myths," 2.

<sup>167</sup> See footnote 163.

<sup>168</sup> Vizulis, *Molotov-Ribbentrop Pact of 1939*, 53-57.

in countries under its influence in Europe after the end of the Second World War.<sup>169</sup> This demonstrates that the USSR itself had not complied with all provisions of the Yalta agreement and this raises doubts whether the USSR itself considered Yalta agreement legally binding.

Regarding the Potsdam agreement, it is important to stress that no attempts were made to write a peace treaty between all former belligerent parties after the Second World War, and this was the last meeting between the major Allied powers; contradictions between the views of Western leaders and the USSR were already visible, mainly due to expansionist politics of the USSR. The main questions that were discussed at this conference were 'administration of defeated Germany, the demarcation of the boundaries of Poland, the occupation of Austria, the definition of the Soviet Union's role in eastern Europe, the determination of reparations, and the further prosecution of the war against Japan.'<sup>170</sup> However, the Allies had not managed to solve all of these issues and were unable to reach a consensus on the question of whether reparations should be imposed on Germany.<sup>171</sup> As the tension between the West, represented by the U.S., and the East, represented by the USSR, eventually increased to the point of being known as the Cold War, it is hard to talk about any recognition of the territorial acquisitions by the USSR at this conference. This is especially true in light of the fact that the U.S. and the UK stressed the non-recognition of the incorporation of the Baltic states into the USSR after Potsdam conference.<sup>172</sup>

Taking everything into account, it is clear that historical facts challenge the claim of legal incorporation of the Baltic states to the USSR. The Baltic states had not given their free consent to join the USSR, and recognition of the legitimacy of the USSR's claims by the international community cannot be established without any doubts. This is particularly true because Lithuania, Latvia and Estonia were largely recognized as re-established states that had not seceded from the USSR.<sup>173</sup> The illegal nature of their annexation seems to be confirmed, especially after it was

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<sup>169</sup> *Encyclopedia Britannica Online*, *britannica.com*, s.v. "Yalta Conference," accessed February 11, 2017, <https://www.britannica.com/event/Yalta-Conference>; Anne Applebaum, *Geležinė uždanga. Rytų Europos sugniuždymas 1944-1956*, trans. Vitalijus Šarkovas (Vilnius: Tyto Alba, 2013), 237-269.

<sup>170</sup> *Encyclopedia Britannica Online*, *britannica.com*, s.v. "Potsdam Conference," accessed February 11, 2017, <https://www.britannica.com/event/Potsdam-Conference>. See also Rudolf Dolzer, "The Settlement of War-Related Claims: Does International Law Recognize a Victim's Private Right of Action - Lessons after 1945," *Berkeley Journal of International Law* 20, no. 1 (2002): 318, [http://heinonline.org.ezproxy.vdu.lt/HOL/Page?handle=hein.journals/berkjintlw20&div=19&start\\_page=296&collection=journals&set\\_as\\_cursor=0&men\\_tab=srchresults#](http://heinonline.org.ezproxy.vdu.lt/HOL/Page?handle=hein.journals/berkjintlw20&div=19&start_page=296&collection=journals&set_as_cursor=0&men_tab=srchresults#).

<sup>171</sup> Richard M. Buxbaum, "A Legal History of International Reparations," *Berkeley Journal of International Law* 23, no. 2 (2005): 321-324, [http://heinonline.org.ezproxy.vdu.lt/HOL/Page?handle=hein.journals/berkjintlw23&div=19&start\\_page=314&collection=journals&set\\_as\\_cursor=0&men\\_tab=srchresults#](http://heinonline.org.ezproxy.vdu.lt/HOL/Page?handle=hein.journals/berkjintlw23&div=19&start_page=314&collection=journals&set_as_cursor=0&men_tab=srchresults#).

<sup>172</sup> See footnote 156.

<sup>173</sup> Dumberry, *State Succession to International Responsibility*, 151; Shaw, "State Succession Revisited," 56-59, 48, 72; Fahmi, "Succession of States," 94; Beemelmans, "State Succession in International Law," 81, 96, 111-113; Mullerson, "Continuity and Succession of States," 482; Urs W. Saxer, "The Transformation of the Soviet Union: From a Socialist Federation to a Commonwealth of Independent States," *Loyola of Los Angeles International and Comparative Law Journal* 14, no. 3 (July 1992): 639,

established that the USSR lacked authorizing rule under international law followed by non-recognition policy.

Considering the Baltic states as illegally incorporated or annexed, the question that arises is what is the status of the territory that is annexed illegally? According to scholars defending the position of the illegality of annexation of the Baltic states, illegality of annexation invokes application of the principle of *ex injuria jus non oritur*. This is particularly stressed in defending the issue of the continuity of the Baltic states of their legal identity and denying the sovereign rights of the USSR over the territory.<sup>174</sup> One of the possible answers is to consider illegally annexed territory as occupied territory.<sup>175</sup> Thus, such a position must also be discussed.

### 1.1.2. Soviet regime as the belligerent occupation of the Baltic states

This position holds that the Baltic states should be considered occupied states for the whole period when the Soviet regime was established in the Baltic states. In order to analyse this position, it is important to establish a legal framework governing occupation. Different scholars provide different positions in this field. An in-depth analysis of the situation is given only by Eyal Benvenisti, Lauri Mälksoo, S. Katuoka and J. Žilinskas, while other scholars simply conclude that the Baltic states were occupied, without giving a comprehensive analysis. Despite the limited analysis, this scholarly work supports the view that the Baltic states should be considered occupied states for the period of 1940–1991.<sup>176</sup>

Some scholars adopt to the position that the term of occupation has itself experienced serious transformation through the twentieth century, i.e. from the purely belligerent meaning embodied in the Hague Regulations to the meaning of ‘effective control of a power ... over a territory to which that power has no sovereign title, without the volition of the sovereign of that territory.’<sup>177</sup> This change was a result of the Second World War occupations that did not fit the

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[http://heinonline.org.ezproxy.vdu.lt/HOL/Page?handle=hein.journals/loyint14&div=31&start\\_page=581&collection=journals&set\\_as\\_cursor=0&men\\_tab=srchresults#](http://heinonline.org.ezproxy.vdu.lt/HOL/Page?handle=hein.journals/loyint14&div=31&start_page=581&collection=journals&set_as_cursor=0&men_tab=srchresults#); Žalimas, *Lietuvos Respublikos nepriklausomybės atkūrimas*, 193-195; Vallikivi and Kerikmäe, “State Continuity,” 35-39.

<sup>174</sup> Dainius Žalimas, "Legal Issues on the Continuity of the Republic of Lithuania," *Baltic Yearbook of International Law* 1 (2001): 8-11,

[http://heinonline.org.ezproxy.vdu.lt/HOL/Page?handle=hein.intyb/byrbkinl0001&div=9&start\\_page=1&collection=intyb&set\\_as\\_cursor=0&men\\_tab=srchresults#](http://heinonline.org.ezproxy.vdu.lt/HOL/Page?handle=hein.intyb/byrbkinl0001&div=9&start_page=1&collection=intyb&set_as_cursor=0&men_tab=srchresults#); Loeber, “Legal Consequences of Molotov Ribbentrop Pact,” 128-129; Hough, “Annexation of the Baltic States,” 480-481; Vizulis, *Nations Under Duress*, 149-152.

<sup>175</sup> Saxer, "Transformation of Soviet Union," 639; Mälksoo, *Illegal Annexation and State Continuity*, 191-195; Katuoka and Žilinskas, „Lietuva ir tarptautinė teisė,” 281; Vizulis, *Nations Under Duress*, 162; Vizulis, *Molotov-Ribbentrop Pact of 1939*, 146; Meissner, “Right of Self Determination after Helsinki,” 381.

<sup>176</sup> Grazin, „International Recognition of National Rights,” 1398, 1402-1407; Lee „Identity and Continuity of State,” 152, 153, 154; Vitas, "Recognition of Lithuania," 247.

<sup>177</sup> Benvenisti, *International Law of Occupation*, 3-4. See also Breven C. Parsons, "Moving the Law of Occupation into the Twenty-First Century," *Naval Law Review* 57 (2009): 7, [http://heinonline.org.ezproxy.vdu.lt/HOL/Page?handle=hein.journals/naval57&div=3&start\\_page=1&collection=journals&set\\_as\\_cursor=0&men\\_tab=srchresults#](http://heinonline.org.ezproxy.vdu.lt/HOL/Page?handle=hein.journals/naval57&div=3&start_page=1&collection=journals&set_as_cursor=0&men_tab=srchresults#).

exact definition of occupation under the Hague Regulations or, according to Eyal Benvenisti, was disregard of established legal order concerning belligerent occupation under international law. As a result, new order through the Geneva Conventions and their further protocols (hereinafter ‘Geneva Conventions’) <sup>178</sup> was established. <sup>179</sup>

Yoram Dinstein states that the Hague Regulations have not lost their obligatory power since they have not been revoked. He treats the Hague Regulations and Geneva Conventions concerning the law of occupation as separate legal regimes coexisting together. Application of the respective norm depends on the date of a particular case and whether a state is a party to the respective treaty; this is particularly applicable to Geneva Conventions, in case they do not contain of the default of customary international law. On the other hand, the rules concerning belligerent occupation laid down in the Hague Regulations are seen as the rules reflecting customary international law. <sup>180</sup>

The latter view is supported by case law of the International Court of Justice (ICJ), particularly concerning the definition of occupation contained in Article 42 of the Hague Regulations, <sup>181</sup> as the Geneva Conventions are silent on this issue. The ICJ looked at the definition of occupation provided in the Hague Regulations to assess whether international humanitarian law as it appears in the Geneva Conventions was applicable to the military activities of Uganda in the territory of the Democratic Republic of the Congo in 1998 and for the military activities of Israel in the territory of Palestine. Thus, if a certain question is not addressed by the Geneva Conventions, the Hague Regulations are applicable, and this is particularly true for the definition of occupation. Additionally, the Geneva Conventions entered into force in 1950 and for the USSR in 1954, <sup>182</sup> after the occupation of the Baltic states had begun. Therefore, application of the Hague

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<sup>178</sup> Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Geneva, 12 August 1949; Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Geneva, 12 August 1949; Convention (III) relative to the Treatment of Prisoners of War, Geneva, 12 August 1949; Convention (IV) relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977 with annexes; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977; Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the Adoption of an Additional Distinctive Emblem (Protocol III), 8 December 2005.

<sup>179</sup> Benvenisti, *International Law of Occupation*, 59, 96-98; Siegrist „Functional Beginning of Belligerent Occupation“, 20, 22-23, 25-27.

<sup>180</sup> Yoram Dinstein, *The international law of belligerent occupation* (New York: Cambridge University Press, 2009), 4-8.

<sup>181</sup> See particularly *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, I.C.J. Reports 2005, p. 168, <http://www.icj-cij.org/files/case-related/116/116-20051219-JUD-01-00-EN.pdf>, paras. 172-180; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, I.C.J. Reports 2004, p. 136, <http://www.icj-cij.org/files/case-related/131/131-20040709-ADV-01-00-EN.pdf>, para. 78.

<sup>182</sup> International Committee of the Red Cross, “Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Geneva, 12 August 1949,” *Treaties, States Parties and Commentaries database*, accessed February 20, 2017, <https://www.icrc.org/ihl.nsf/INTRO/365?OpenDocument>; International Committee of the Red Cross, “Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea. Geneva, 12 August 1949,” *Treaties, States Parties and*

Regulations is the only possible option to evaluate the belligerent occupation of the Baltic states by the USSR, as they are applicable through the entire period of occupation of the Baltic states.

This position is not affected by the argument of Michael Siegrist that the definition of belligerent occupation in Article 42 of the Hague Regulations is not in conformity with the aims of Geneva Conventions. He supports the view adopted in the case law of the International Criminal Tribunal for the former Yugoslavia (ICTY), where the test of the functional beginning of belligerent occupation was applied to determine if certain territory is occupied.<sup>183</sup> Taking into account that the USSR was bound by the Geneva Conventions since 1954, this would mean that the status of the Baltic states as occupied states would have to meet the test of the functional beginning of belligerent occupation, i.e. that the law of belligerent occupation becomes applicable when enemy forces enter into relationships with the local population, which are governed by Section III of the Fourth Geneva Convention, ‘even though not all elements required by Article 42 of the 1907 Hague Regulations have been fulfilled’.<sup>184</sup>

It is clear that under Michael Siegrist’s position a territory could gain the status of an occupied territory rather easily compared to the requirements of Article 42 of the Hague Regulations, but Michael Siegrist’s arguments do not suggest that definition of belligerent occupation as found in the Hague Regulations was changed while the Baltic states were governed by the USSR, because no consistent state practice and *opinion juris* could be demonstrated. First, the ICTY was bound by its limited jurisdiction as it appears in Article 1 of Statute of the International Criminal Tribunal for the former Yugoslavia.<sup>185</sup> The events evaluated were those that happened in the territory of the former Yugoslavia during the armed conflict in the 1990s, i.e. after the end of occupation of the Baltic states. As a result, case law of the ICTY addresses only one specific event and only several countries. Moreover, ‘[i]t was established by the Security Council in accordance with Chapter VII of the UN Charter’<sup>186</sup> and not by states themselves. Finally, as the ICTY had limited jurisdiction, while the ICJ was and still remains the only international judicial institution, created by states themselves, to apply international humanitarian

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*Commentaries database*, accessed February 20, 2017, <https://www.icrc.org/ihl.nsf/INTRO/370?OpenDocument>; International Committee of the Red Cross, “Convention (III) relative to the Treatment of Prisoners of War. Geneva, 12 August 1949,” *Treaties, States Parties and Commentaries database*, accessed February 20, 2017, <https://www.icrc.org/ihl.nsf/INTRO/375?OpenDocument>; International Committee of the Red Cross, “Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949,” *Treaties, States Parties and Commentaries database*, accessed February 20, 2017, <https://www.icrc.org/ihl.nsf/INTRO/380>.

<sup>183</sup> Siegrist „Functional Beginning of Belligerent Occupation“, 25-34.

<sup>184</sup> *Ibid.*, 23.

<sup>185</sup> UN Security Council, Resolution 827 (May 25, 1993), para. 2; UN Secretary General, *Report of the Secretary-General pursuant to Paragraph 2 of Security Council Resolution 808 (1993)*, UN Doc. S/25704 (May 3, 1993), Annex.

<sup>186</sup> International Criminal Tribunal for the former Yugoslavia, “About the ICTY,” *United Nations*, accessed February 25, 2018, <http://www.icty.org/en/about>.

law for various interstate disputes. Therefore, for purpose of analysing the case of the Baltic states, Article 42 of the Hague Regulations remains the governing rule defining belligerent occupation.

According to the Hague Regulations, rules governing occupation are applicable when international military conflict arises,<sup>187</sup> and a territory is considered to be occupied when armed forces of one state are actually in the territory of the enemy state and these armed forces are able to control the taken territory effectively.<sup>188</sup> It is important to note that such control of the territory does not confer sovereignty over that territory to the occupying power.<sup>189</sup> At the time of the invasion of the USSR into the Baltic states, there was no international military conflict between the USSR and any of the Baltic states that would fit the definition of international military conflict under international humanitarian law.<sup>190</sup>

Nevertheless, Lauri Mälksoo, S. Katuoka and J. Žilinskas are of the position that at the time the Baltic states were occupied, the formal definition of belligerent occupation in the Hague Regulations was already interpreted in broader manner. This position is supported by the analysis of the occupations of Austria, Czechoslovakia, Denmark and the Klaipėda region and their evaluation in international legal documents.<sup>191</sup> S. Katuoka and J. Žilinskas state that under international humanitarian law at the time the Baltic states were occupied, no official statement of war between states was required and territory was considered to be occupied subject to the presence of armed forces of one state on certain territory of the other state and effective control of that territory by armed forces or other established institutions. Such occupation is recognized as quasi-belligerent occupation (*occupatio quasi bellica*), and Hague Regulations toward the conduct of the USSR must be applied.<sup>192</sup>

Eyal Benvenisti also treats the case of the Baltic states in 1940 as one of occupation, although according to him, occupations by the USSR in 1939–1940 are examples of disregard towards the Hague Regulations because the conduct of the USSR was in contradiction to the principle of inalienability of sovereignty through the use of force, i.e. ‘the basic principle underlying the Hague Regulations.’<sup>193</sup> Therefore, he considers the occupation of the Baltic states as an illegal occupation. Illegality of occupation could be found on either or both of these grounds:

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<sup>187</sup> Dinstein, *International law of belligerent occupation*, 31-36; Roberts „Transformative Military Occupation,” 582.

<sup>188</sup> Katuoka and Žilinskas, „Lietuva ir tarptautinė teisė,” 269-270.

<sup>189</sup> Roberts „Transformative Military Occupation,” 582-585; Dinstein, *International law of belligerent occupation*, 49; Benvenisti, *International Law of Occupation*, 97.

<sup>190</sup> Loeber, “Legal Consequences of Molotov Ribbentrop Pact,” 127; Mälksoo, *Illegal Annexation and State Continuity*, 104.

<sup>191</sup> Katuoka and Žilinskas, „Lietuva ir tarptautinė teisė,” 270-276; Mälksoo, *Illegal Annexation and State Continuity*, 174-176.

<sup>192</sup> Katuoka and Žilinskas, „Lietuva ir tarptautinė teisė,” 282; Mälksoo, *Illegal Annexation and State Continuity*, 104.

<sup>193</sup> Benvenisti, *International Law of Occupation*, 67.



- illegality predicated on the aggression that led to the occupation,<sup>194</sup>
- illegal mode of governance chosen by the occupying army upon assuming control.

Eyal Benvenisti finds both grounds of illegality to be present in case of the occupation of the Baltic states.<sup>195</sup>

Concerning the illegality of aggression that led to occupation of the Baltic states, it is established that the USSR's occupation of the Baltic states in 1940 was the infringement of both: bilateral agreements between each of the Baltic states and the USSR and international legal order.<sup>196</sup> In the case of Lithuania, Dainius Žalimas notes that by occupying Lithuania, the USSR infringed the Peace Treaty and Protocol, signed in Moscow on 12 July 1920, between the Lithuania and Soviet Government of Russia; Article 1 of the treaty stated that 'Russia recognizes without reservation the sovereign rights and independence of the Lithuanian State, with all the juridical consequences arising from such recognition, and voluntarily and for all time abandons all the sovereign rights of Russia over the Lithuanian people and their territory.'<sup>197</sup> The USSR entered into similar bilateral treaties, recognizing irrevocable sovereignty of each state with Estonia<sup>198</sup> and Latvia<sup>199</sup> on 2 February 1920 and 11 August 1920, respectively.<sup>200</sup>

Previous bilateral agreements were not the only ones that required the USSR to respect the sovereignty of the Baltic states. In 1926 Lithuania and the USSR entered into a treaty of mutual friendship and non-aggression; under Article 2 of this treaty, Lithuania and the USSR were 'placed ... under the obligation of "to respect in all circumstances the sovereignty and territorial integrity of each other".'<sup>201</sup> Latvia and Estonia reached the 'same basic international legal

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<sup>194</sup> This ground for illegality of occupation is also named by Steven R. Ratner, "Foreign Occupation and International Territorial Administration: The Challenges of Convergence," *The European Journal of International Law* 16, no. 4 (2005): 695, doi: 10.1093/ejil/chi138.

<sup>195</sup> Benvenisti, *International Law of Occupation*, 68.

<sup>196</sup> Žalimas, *Lietuvos Respublikos nepriklausomybės atkūrimas*, 28-53; Susan E. Himmer, "The Achievement of Independence in the Baltic States and Its Justifications," *Emory International Law Review* 6, no. 1 (Spring 1992): 261-272,

[http://heinonline.org.ezproxy.vdu.lt/HOL/Page?handle=hein.journals/emint6&div=18&start\\_page=253&collection=journals&set\\_as\\_cursor=0&men\\_tab=srchresults#](http://heinonline.org.ezproxy.vdu.lt/HOL/Page?handle=hein.journals/emint6&div=18&start_page=253&collection=journals&set_as_cursor=0&men_tab=srchresults#); Hough, "Annexation of the Baltic States," 389-390, 480; Vizulis, *Molotov-Ribbentrop Pact of 1939*, 19, 31, 41, 48; Loeber, "Legal Consequences of Molotov Ribbentrop Pact," 121-166.

<sup>197</sup> Peace Treaty and Protocol, Lithuania and Soviet Government of Russia, art. 1, July 12, 1920, 3 League of Nations Treaty Series 105, available from <https://treaties.un.org/doc/Publication/UNTS/LON/Volume%203/v3.pdf>.

<sup>198</sup> Vallikivi and Kerikmäe, "State Continuity," 30, 32.

<sup>199</sup> Treaty of Peace, Latvia and Russia, August 11, 1920, 2 League of Nations Treaty Series 195, available from <https://treaties.un.org/doc/Publication/UNTS/LON/Volume%202/v2.pdf>.

<sup>200</sup> Himmer, "Achievement of Independence in the Baltic States," 261-262; Domas Krivickas and Armins Ruisis, "The Baltic States: Introduction," in *Government, Law, and Courts in the Soviet Union and Eastern Europe*, eds. Vladimir Gsovski and Kazimierz Grzybowski (New York: Praeger, 1960), 1: 80-81, [http://heinonline.org.ezproxy.vdu.lt/HOL/Page?handle=hein.cow/golsoe0001&div=8&start\\_page=80&collection=cow&set\\_as\\_cursor=0&men\\_tab=srchresults#](http://heinonline.org.ezproxy.vdu.lt/HOL/Page?handle=hein.cow/golsoe0001&div=8&start_page=80&collection=cow&set_as_cursor=0&men_tab=srchresults#).

<sup>201</sup> Hough, "Annexation of the Baltic States," 365; Žalimas, "Legal Issues on the Continuity," 3.

guarantees of their frontiers' in 1932.<sup>202</sup> The acts of the USSR in 1940 against the Baltic states violated the bilateral treaties of mutual assistance entered into by the USSR and the respective Baltic state; however, it is worth noting that these treaties were entered into under pressure from the USSR, and their validity is highly questioned.<sup>203</sup>

Regarding the violation of international legal order, it must first be noted that respect for the sovereignty of a state and principle of self-determination emerged as early as in the end of the First World War.<sup>204</sup> In 1928 the USSR acceded to General Treaty for Renunciation of War as an Instrument of National Policy (Kellogg–Briand Pact),<sup>205</sup> known to be the major international treaty condemning war as a means to solve international disputes.<sup>206</sup> In 1934 the USSR became a member of the League of Nations<sup>207</sup> and obliged itself to the aim of the League of Nations to promote peace in the world by respecting territorial integrity of each member state and treating any war or threat of war 'as a matter of concern to the whole'.<sup>208</sup> Additionally, '[a]ll three Baltic republics, as well as the Soviet Union, were signers of the "Convention for the Definition of Aggression" (London, July 3, 1933)' which provided in Article 3 that 'no political, military, economic or other consideration may serve as excuse or justification for... aggression'.<sup>209</sup> Taking into account these obligations of the USSR, its acts towards the Baltic states clearly was not in conformity with applicable international law.

Illegal mode of governance happens when the territory taken is not governed by the armed forces of the occupying power but puppet states or governments are created instead or territory is annexed and is subject to control of the government of an annexing state.<sup>210</sup> The latter practice is used to avoid the requirement of Hague Regulations and Geneva Conventions to withdraw from the occupied territory when the military need for occupation no longer exists.<sup>211</sup> This is what occurred in the Baltic states, where a Soviet 'puppet' regime was installed in each of the Baltics to imitate the free will of people to join the USSR.<sup>212</sup>

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<sup>202</sup> Himmer, "Achievement of Independence in the Baltic States," 266; Hough, "Annexation of the Baltic States," 366-367; Krivickas and Ruisis, "Baltic States," 81-82.

<sup>203</sup> Hough, "Annexation of the Baltic States," 370-372; Žalimas, "Legal Issues on Continuity of Republic of Lithuania," 3; Vizulis, *Molotov-Ribbentrop Pact of 1939*, 29, 43-44; Vizulis, *Nations Under Duress*, 35-37.

<sup>204</sup> Hough, "Annexation of the Baltic States," 323-326.

<sup>205</sup> General Treaty for Renunciation of War as an Instrument of National Policy, August 27, 1928, 94 League of Nations, Treaty Series 59, available from <https://treaties.un.org/doc/Publication/UNTS/LON/Volume%2094/v94.pdf>.

<sup>206</sup> Mälksoo, "State Identity," 96; Hough, "Annexation of the Baltic States," 326.

<sup>207</sup> Lithuania, Latvia and Estonia joined the League of Nations as early as 1921. See Manley O. Hudson, "Afghanistan, Ecuador and the Soviet Union in the League of Nations," *The American Journal of International Law* 29, no. 1 (January 1935): 109, <http://www.jstor.org/stable/2191058>.

<sup>208</sup> Vizulis, *Molotov-Ribbentrop Pact of 1939*, 1-2, 132; Hudson, "Afghanistan, Ecuador and the Soviet Union in the League of Nations," 109-110, 112-116; Hough, "Annexation of the Baltic States," 323-326.

<sup>209</sup> Krivickas and Ruisis, "Baltic States," 83; Vizulis, *Nations Under Duress*, 150.

<sup>210</sup> Benvenisti, *International Law of Occupation*, 71.

<sup>211</sup> Ratner, "Foreign Occupation and International Territorial Administration," 700.

<sup>212</sup> Hough, "Annexation of the Baltic States," 379-385; Vizulis, *Molotov-Ribbentrop Pact of 1939*, 31-32, 119.

Yoram Dinstein completely rejects the possibility of illegal occupation, because ‘the rights and obligations of an Occupying Power remain exactly the same, regardless of the chain of events in which the belligerent occupation was brought about.’<sup>213</sup> Eyal Benvenisti finds such a position in conflict with the principle *ex injuria jus non oritur*, as this means that not only are obligations imposed but the rights for the violator of the law of occupation are upheld. National courts used the Hague Regulations as ‘the criteria for judging the legal effects of the occupant’s measures’ in post occupation countries occupied illegally during the Second World War.<sup>214</sup> This is explained by Eyal Benvenisti as the right of the ousted government to uphold certain measures acting as the sovereign, although it has a right not to abide itself to the same law if the occupant disregards international occupation law.<sup>215</sup>

In the case of the Baltic states, the position of Yoram Dinstein should be adopted because it is based on state practice, i.e. the judgments of American Military Tribunal in Hostages case and of Dutch Special Court in Christiansen case; additionally, there is a difference between the concepts of *jus in bello* and *jus ad bellum*, although belligerent occupation is a consequence of ongoing armed conflict.<sup>216</sup> Additionally, there must be a universal test to evaluate acts of a state *de facto* acting as an occupying power but willing to avoid obligations related to such acts; otherwise uncertainty as to the applicable law would persist, which is contrary to the principle of legal certainty. Therefore, it is preferable to adopt a position that considers the status of the Baltic states under Soviet regime as states under quasi-belligerent occupation.

In summary, the occupation of the Baltic states that was not in strict conformity with the definition of occupation in the Hague Regulations can be described in two different ways, i.e. the situation is defined either as a quasi-belligerent occupation or illegal occupation, according to the view of scholars discussing the occupation of the Baltic states. However, taking into account previous insights, the position that the Baltic states were under quasi-belligerent occupation would be more accurate. The USSR as the main organizer of the quasi-belligerent occupation of the Baltic states had the duties of the occupying power, and the main applicable law on the issue of remedy for the international crimes inflicted against people of the Baltic states during the Soviet regime is international humanitarian law—the law of occupation in particular. For these reasons the Baltic states will be considered as states under belligerent occupation of the USSR for the whole period when the Soviet regime was established in their territory.

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<sup>213</sup> Dinstein, *International law of belligerent occupation*, 2-3

<sup>214</sup> Eyal Benvenisti gives examples of such application of Hague Regulations in cases of illegal occupations of French colony Madagascar, Italian colony Libya, Cyrenaica during WWII. Benvenisti, *International Law of Occupation*, 70.

<sup>215</sup> Benvenisti, *International Law of Occupation*, 71-72.

<sup>216</sup> Dinstein, *International law of belligerent occupation*, 3.

However, the fact that the occupation of the Baltic states was a prolonged one cannot be overlooked. According to Lauri Mälksoo, applicable law in certain circumstances should be determined by the principle *ex factis ius oritur*.<sup>217</sup> Thus, it is important to identify what particular obligations are applicable for the USSR as an occupying power because of repressions committed in the Baltic states, especially as it was already established that sovereignty of the Baltic states was not transferred to the USSR—neither by any mode of territorial acquisition nor by recognition of territorial claims of the USSR.

## **1.2. APPLICABILITY OF HUMAN RIGHTS LAW UNDER PROLONGED BELLIGERENT OCCUPATION**

Human rights law is the principal body of law that reflects obligations of a state towards its citizens.<sup>218</sup> Yet it has been established that the Baltic states were not legally incorporated into the USSR; they were under belligerent occupation for the entire period of the Soviet regime, and this requires application of international humanitarian law to evaluate the actions of the USSR towards people of the Baltic states. However, as previously mentioned, the prolonged nature of the occupation and the position of the Russian Federation to treat the Baltic states as legally incorporated into the USSR cannot be overlooked, as this presumes the need for the application of human rights law because acts of the USSR against the people of the Baltic states seem to be acts against citizens of the USSR. Therefore, the question arises whether an occupant acting as a *de facto* sovereign is responsible for the application of human rights law. In order to establish particular obligations the USSR had towards people of the Baltic states as occupying power and to find proper way of implementing a reparatory policy for the victims of Soviet regime, the relationship between human rights law and international humanitarian law must be established.

Traditionally, human rights law and international humanitarian law are perceived as separate bodies of international law. It has been stated that this view was reflected in Basic Principles and Guidelines by establishing a different nature of violations that results in victim's right to remedy, i.e. gross violations of human rights law and serious violations of international humanitarian law. However, according to Daniel Thürer, acceptance of the Charter of the United Nations that resulted in the rise of human rights law 'required clarification of the relationship between humanitarian law and the new body of human rights law.' He finds that three possible theories of this relationship have emerged:

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<sup>217</sup> Mälksoo, *Illegal Annexation and State Continuity*, 194-195.

<sup>218</sup> Ruti Teitel, "Human Rights Genealogy," *Fordham Law Review* 66, no. 2 (November 1997): 314, [http://heinonline.org.ezproxy.vdu.lt/HOL/Page?handle=hein.journals/flr66&div=19&start\\_page=301&collection=journals&set\\_as\\_cursor=0&men\\_tab=srchresults#](http://heinonline.org.ezproxy.vdu.lt/HOL/Page?handle=hein.journals/flr66&div=19&start_page=301&collection=journals&set_as_cursor=0&men_tab=srchresults#); Kerikmäe, Hamulak and Chochia, „Historical Study,“ 102-103.

- negation of any applicability of human rights law when international humanitarian law is applied;
- merger of human rights law and international humanitarian law;
- partial applicability of human rights law when international humanitarian law is applied.<sup>219</sup>

The majority of scholars support the third view due to developments of international law after the Second World War.<sup>220</sup> This view is based primarily on case law of the ICJ stating that certain human rights protections are enshrined in the ICCPR and do not cease even in the times of war;<sup>221</sup> this view is also supported by interpretation of resolutions of the Security Council and General Assembly of the United Nations and case law on regional human rights treaties. Thus, at least since the ICCPR entered into force, i.e. since 1976, there states subject to the obligations of this Covenant have a duty to ensure protection of certain human rights for individuals subject to its jurisdiction, both in peace time and during a state of war.

Daniel Thürer even suggests that the obligation to apply human rights law in situations where international humanitarian law is applicable can be traced back to the end of the Second World War, although it was not immediately obvious ‘that human rights would become relevant for international humanitarian law’, their applicability during armed conflict is not mentioned in Universal Declaration of Human Rights. This omission is explained by idealistic views that ‘under the Charter of the United Nations peace would flourish’ and there is no need to articulate their applicability on particular circumstances.<sup>222</sup>

The earliest reference to the applicability of human rights in cases of armed conflict is found in Article 15 of the European Convention on Human Rights (1950) and Resolution 2444 (XXIII) of the United Nations General Assembly on Respect for Human Rights in Armed Conflicts (1968).<sup>223</sup> For cases of belligerent occupation, Resolution 2443 (XXIII) of the United Nations General Assembly on respect for and implementation of human rights in occupied territories

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<sup>219</sup> Daniel Thürer, *International Humanitarian Law: Theory, Practice, Context* (The Hague: Brill, 2011), eBook Collection (EBSCOhost), 126-127.

<sup>220</sup> Dinstein, *International law of belligerent occupation*, 69-71, Thürer, *International Humanitarian Law*, 127-130; Meron, “Humanization of Humanitarian Law,” 245-247; Christopher J. Greenwood, „Scope of Application of Humanitarian Law,“ in *The Handbook of International Humanitarian Law*, ed. Dieter Fleck (Oxford: Oxford University Press, 2009) 74-77; Ratner, “Foreign Occupation and International Territorial Administration,“ 702-706; Roberts „Transformative Military Occupation,“ 599-601.

<sup>221</sup> Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996, p. 226, <http://www.icj-cij.org/files/case-related/95/095-19960708-ADV-01-00-EN.pdf>, para. 25; Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004, p. 136, <http://www.icj-cij.org/files/case-related/131/131-20040709-ADV-01-00-EN.pdf>, 106; Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Judgment, I.C.J. Reports 2005, p. 168, <http://www.icj-cij.org/files/case-related/116/116-20051219-JUD-01-00-EN.pdf>, paras. 216-217.

<sup>222</sup> Thürer, *International Humanitarian Law*, 127-128.

<sup>223</sup> *Ibid.*, 314.

(1968) is of special importance. Even though United Nations General Assembly resolutions are not considered to be formal sources of international law, they may contain certain binding rules of international law or reflect *opinion iuris*, evincing formation of customary rule.<sup>224</sup>

Resolution 2443 (XXIII) is primarily aimed at creating and maintaining a special committee to investigate Israeli practices in areas occupied by Israel (hereinafter ‘Special Committee on Israeli Practices’). Nevertheless, it refers to the principles of the Universal Declaration of Human Rights, the right of everyone to return home and resume previous life in particular.<sup>225</sup> This suggests that certain human rights obligations as they are enumerated in the Universal Declaration of Human Rights were considered by international community to be in effect under a state of belligerent occupation as early as 1967, when Israel commenced belligerent occupation of Arab territories.<sup>226</sup> The subsequent adoption of Resolution 2546 (XXIV) confirmed this belief that an occupier should be bound by the obligation to protect human rights in the occupied territory.<sup>227</sup>

The history of adoption of both resolutions reveals the position of the USSR on the applicability of human rights law under cases of belligerent occupation. The USSR was among the 60 UN members that voted in favour on the adoption of Resolution 2443 (XXIII)<sup>228</sup> and among the 52 UN members that were in favour of adopting Resolution 2546 (XXIV).<sup>229</sup> This suggests that the USSR was one of the states that considered an occupying power bound by human rights obligations under the Universal Declaration of Human Rights. Therefore, this confirms that, since the end of the Second World War, the international community has believed that human rights law is applicable even when international humanitarian law is also applicable. The same is valid for a case of belligerent occupation. As previously mentioned, further development of international humanitarian law and human rights law, i.e. the adoption and entrance into force of the ICCPR, suggests that the USSR has not changed its position at the international level, because it was among the signatories of the ICCPR and ratified it in 1973, earlier than the ICCPR itself entered into force.<sup>230</sup>

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<sup>224</sup> Dapo Akande, „International Organizations,“ in *International law*, ed. Malcolm D. Evans (New York: Oxford University Press, 2003), 284; Hugh Thirlway, „The Sources of International Law,“ in *International law*, ed. Malcolm D. Evans (New York: Oxford University Press, 2003), 127, 138, 141.

<sup>225</sup> UN General Assembly, Resolution 2443(XXIII) (December 19, 1968).

<sup>226</sup> Dinstein, *International law of belligerent occupation*, 12-16.

<sup>227</sup> UN General Assembly, Resolution 2546(XXIV) (December 11, 1969).

<sup>228</sup> UNBISnet, *Voting Record Search*, s.v. „A/RES/2443(XXIII)“ accessed October 11, 2017, <http://unbisnet.un.org:8080/ipac20/ipac.jsp?profile=voting&menu=search>.

<sup>229</sup> UNBISnet, *Voting Record Search*, s.v. „A/RES/2546(XXIV)“ accessed October 11, 2017, <http://unbisnet.un.org:8080/ipac20/ipac.jsp?profile=voting&menu=search>.

<sup>230</sup> *United Nations Treaty Collection*, Depository, Status of Treaties, CHAPTER IV: Human Rights, 4. International Covenant on Civil and Political Rights, accessed October 11, 2017, [https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg\\_no=IV-4&chapter=4&clang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-4&chapter=4&clang=en).

Now that it has been established that human rights law applies even when international humanitarian law is applicable, it is important to establish the degree of its applicability. According to Yoram Dinstein, there is a specific set of rights that are non-derogable irrespective of any circumstances, i.e. peace or war. However, international and regional human rights treaties differ in the scope of non-derogable human rights. Right to life; freedom from torture or cruel, inhuman or degrading treatment or punishment; freedom from slavery and servitude; freedom from criminal liability for an act which did not constitute a criminal offence at the time of its commission or being subject to a heavier penalty than one applicable at that time are the human rights that are recognized as non-derogable in the basic international and regional human rights treaties.<sup>231</sup> Hence, this could be considered as a minimum threshold that must be observed during a state of war.

An additional issue that must be taken into account is that international humanitarian law regulates not only warfare; such issues as protection of non-combatants, armistice, belligerent occupation, etc. are also governed by the norms of international humanitarian law. Therefore, the question arises whether the degree of applicability of human rights law together with the obligation to protect non-derogable human should vary subject to different circumstances under a state of war. This question must take into account that these two branches of international law ‘can and do take divergent approaches’ on the same factual circumstances and ‘the solutions they offer may clash with one another.’<sup>232</sup>

Adam Roberts notes that the relationship between human rights law and the law of occupation has not been explored much in academic literature, although ‘the origins of the modern movement for human rights law... have begun with the international concern about the disregard for human rights ... during World War II.’<sup>233</sup> Some insight can be found in the reports of the Special Committee on Israeli Practices established under Resolution 2443 (XXIII) of the United Nations General Assembly. In the first report this committee identified international instruments guiding the scope of investigation on possible human rights violations in accordance with texts of Resolutions 2443 (XXIII) and 2546 (XXIV) as well as texts of other resolutions of organs of the United Nations that addressed territories occupied by Israel. It concluded that ‘[t]he “human rights” of the population of the occupied territories ... consist of two elements,’ i.e. ‘essential and inalienable human rights that are enunciated in the Universal Declaration of Human Rights’ and

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<sup>231</sup> Dinstein, *International law of belligerent occupation*, 74-77.

<sup>232</sup> *Ibid.*, 87.

<sup>233</sup> Roberts „Transformative Military Occupation,“ 589.

‘rights which find their basis in the protection afforded by international law’.<sup>234</sup> This suggests that even though differences exist between states on their international obligations, including scope of their obligations to protect human rights, certain human rights as they are enumerated in the Universal Declaration of Human Rights should be guaranteed under any circumstances. The reasoning for this argument was found in Article 2 of the Universal Declaration of Human Rights, which states that ‘no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether this territory be... independent... or under any other limitation of sovereignty.’<sup>235</sup>

According to the Special Committee on Israeli Practices, the human rights obligations encompassed obligations ‘to secure the return of those inhabitants who had fled the occupied areas to their homes, to ensure the safety, welfare and security of the inhabitants of the occupied territories and to alleviate their sufferings.’<sup>236</sup> Articles 9–13, 17 and 18 particularly of the Universal Declaration on Human Rights were taken into account, along with other international obligations of Israel.<sup>237</sup> A conclusion could be drawn that human rights protected under these articles<sup>238</sup> must be respected next to obligations imposed by international humanitarian law on a particular state in a case of belligerent occupation. However, their actual application can still be affected by international humanitarian law because of its status as *lex specialis*,<sup>239</sup> as international humanitarian law is ‘concerned with the abnormal conditions of armed conflict and the relationship between a state and the citizens of its adversary, a relationship otherwise based upon power rather than law.’<sup>240</sup> As a result, derogation from the applicability of human rights in particular circumstances is unavoidable.

In contrast, some scholars argue that international humanitarian law is not capable of addressing cases of prolonged occupation, as it does not deal with ‘the conversion of a temporary

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<sup>234</sup> Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Population Of The Occupied Territories, UN General Assembly on Its Twenty-Fifth Session, para 36, U.N. Doc. A/8089 (October 5, 1970).

<sup>235</sup> Ibid.

<sup>236</sup> Ibid., para. 30.

<sup>237</sup> Ibid., paras. 71-144.

<sup>238</sup> This encompasses under Universal Declaration of Human Rights prohibition of arbitrary arrest, detention or exile (article 9), right to a fair and public hearing by an independent and impartial tribunal, in the determination of person’s rights and obligations and of any criminal charge against him (article 10), right to be presumed innocent until proved guilty according to law and prohibition of retrospective application of criminal law or heavier penalties (article 11), respect to privacy, honour and reputation, family life, home or correspondence (article 12), freedom of movement and residence (article 13), protection of property and property rights (article 17), right to freedom of thought, conscience and religion (article 18). See: UN General Assembly, Resolution 217 (III) A, Universal Declaration of Human Rights (December 10, 1948).

<sup>239</sup> Dinstein, *International law of belligerent occupation*, 85-88, Greenwood, „Scope of Application of Humanitarian Law,“ 75.

<sup>240</sup> Greenwood, „Scope of Application of Humanitarian Law,“ 74.



presence into a permanent condition',<sup>241</sup> or where the aim of the occupant is actually to make irreversible changes.<sup>242</sup> According to Brian Walsh and Ilan Peleg, '[i]n prolonged occupations, the occupying power assumes a quasi-sovereign status and the longer the occupation, the stronger and more pervasive this status is.'<sup>243</sup> Thus, human rights law could be the body of law that fills the gap that emerges in cases of prolonged occupation when occupation of a territory is not continuation of warfare but an aim to make permanent changes to acquire certain territory. As a result, such a quasi-sovereign willing to act as a legitimate sovereign should assume the same obligations to protect human rights that a legitimate sovereign would have. This confirms Daniel Thürer's argument that 'the closer a particular legal situation is to the battlefield, the greater the precedence of international humanitarian law' and *vice versa*.<sup>244</sup> Yoram Dinstein also supports the possibility of applying human rights law 'when the norms governing belligerent occupation are silent or incomplete.'<sup>245</sup>

Now that these preliminary issues have been addressed, the principles can be applied to the specific situation of the prolonged occupation of the Baltic states. As noted above, governance of the Baltic states was completely modified from warfare that existed during the Second World War and partisan war in the Baltic states to formal peace and governance of the Baltic states under the constitution of the USSR. This did not revoke the status of the Baltic states as occupied states or the application of international humanitarian law as *lex specialis*. Therefore, the USSR's behaviour towards the people of the Baltic states since the beginning of belligerent occupation had to conform with Regulations concerning the Laws and Customs of War on Land annexed to the Hague Convention (IV) respecting the Laws and Customs of War on Land, i.e. Articles 22–23 concerning combatants, Articles 4–8, 11 and 18–19 concerning prisoners of war and Articles 46 and 50 concerning civil population in particular.<sup>246</sup> Additionally wounded and sick combatants had to be protected in accordance with provisions of Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field (1929)<sup>247</sup> since the USSR acceded

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<sup>241</sup> Brian Walsh and Ilan Peleg, "Human rights under military occupation: The need for expansion," *The International Journal of Human Rights* 2, no. 1 (1998): 65, doi: 10.1080/13642989808406710.

<sup>242</sup> Adam Roberts, "What Is a Military Occupation?" *British Yearbook of International Law* 55, no. 1 (January 1985): 287 cited in Mälksoo, *Illegal Annexation and State Continuity*, 179.

<sup>243</sup> Walsh and Peleg, "Human rights under military occupation," 67.

<sup>244</sup> Thürer, *International Humanitarian Law*, 130

<sup>245</sup> Dinstein, *International law of belligerent occupation*, 84.

<sup>246</sup> See: Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, October 18, 1907, *Treaties, States Parties and Commentaries Database of the International Committee of the Red Cross*, <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?documentId=4D47F92DF3966A7EC12563CD002D6788&action=openDocument>.

<sup>247</sup> Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, July 27, 1929, *Treaties, States Parties and Commentaries Database of the International Committee of the Red Cross*, <https://ihl->

to this convention in 1931.<sup>248</sup> Adoption of the Universal Declaration of Human Rights in 1948 added additional obligations to protect at least non-derogable human rights. Furthermore, since 1954 the USSR was bound by provisions of the Geneva Conventions, i.e. Convention (III) relative to the Treatment of Prisoners of War and Articles 27–34 and 47–78 of Convention (IV) relative to the Protection of Civilian Persons in Time of War in particular.<sup>249</sup>

Taking into account the wishes of the USSR to act as a legitimate sovereign in the territory of the Baltic states, it subjected itself to greater obligations to protect human rights because the legal situation of the Baltic states clearly departed from that of a battlefield or temporary belligerent occupation. Under the Universal Declaration of Human Rights, this included at a minimum the prohibition of arbitrary arrest, detention or exile; the right to a fair and public hearing by an independent and impartial tribunal in the determination of person's rights and obligations and of any criminal charge against him; the right to be presumed innocent until proved guilty according to law; respect to privacy, honour and reputation, family life, home or correspondence; freedom of movement and residence; protection of property and property rights and right to freedom of thought, conscience and religion. The obligation to guarantee these rights, except for property rights for people of the Baltic states, was confirmed by subsequent ratification of the ICCPR by the USSR in 1973. Moreover, under paragraph 2 of Article 4 of the ICCPR, the right to freedom of thought, conscience and religion is stated to be non-derogable and had to be ensured by the USSR for the people of the Baltic states under any circumstances.<sup>250</sup> A timetable of the USSR's particular obligations in the Baltic states is provided in Figure 1.

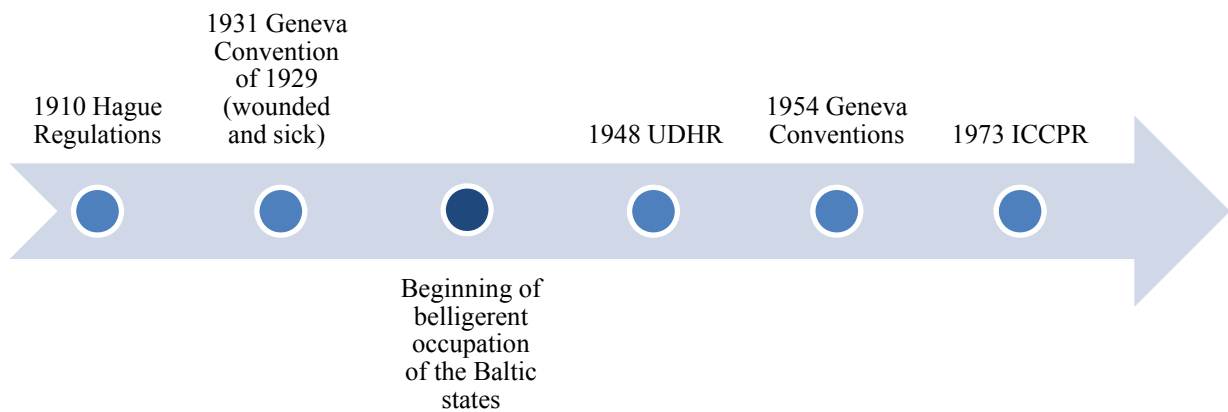
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[databases.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?documentId=09DFB7A98E19533AC12563CD002D6997&action=openDocument](https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?documentId=09DFB7A98E19533AC12563CD002D6997&action=openDocument).

<sup>248</sup> International Committee of the Red Cross, "Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field. Geneva, 27 July 1929," *Treaties, States Parties and Commentaries database*, accessed April 20, 2018, [https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp\\_viewStates=XPages\\_NORMStatesParties&xp\\_treatySelected=300](https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=300).

<sup>249</sup> See: Convention (III) relative to the Treatment of Prisoners of War, August 12, 1949, *Treaties, States Parties and Commentaries Database of the International Committee of the Red Cross*, <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?documentId=77CB9983BE01D004C12563CD002D6B3E&action=openDocument> and Convention (IV) relative to the Protection of Civilian Persons in Time of War, August 12, 1949, *Treaties, States Parties and Commentaries Database of the International Committee of the Red Cross*, <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?documentId=AE2D398352C5B028C12563CD002D6B5C&action=openDocument>. Reservations made by the USSR upon ratification of Geneva Conventions are not relevant for the question analysed here.

<sup>250</sup> International Covenant on Civil and Political Rights, art. 4, para. 2, *adopted* December 16, 1966, 999 *UN Treaty Series* 171 (entered into force March 23, 1976).



*Figure 1. Timetable of international humanitarian law and human rights obligations of the USSR in the Baltic states*

Comparison of both types of obligations, i.e. obligations under international humanitarian law and human rights obligations, enables discernment of obligations common to both bodies of international law that are traceable in all previously mentioned international treaties. Such common obligations encompass:

- protection of life
- freedom from torture or cruel, inhuman or degrading treatment or punishment
- freedom from slavery and servitude
- freedom from criminal liability for an act which did not constitute a criminal offence at the time of its commission or being subject to a heavier penalty than one applicable at that time
- prohibition of arbitrary arrest, detention or exile
- freedom of religion
- respect to honour and reputation and family life

These obligations are primarily governed by international humanitarian law because of its status as *lex specialis*. On the other hand, the right to be presumed innocent until proved guilty according to law; respect to privacy, home or correspondence; freedom of movement and residence and freedom of thought and conscience are guaranteed exclusively through human rights instruments.

Several observations should be made about the protection of rights such as property rights and the right to a fair hearing by an independent and impartial tribunal in the determination of person's rights and obligations. It is noteworthy that protection of property rights, unlike those in

the Universal Declaration of Human Rights, is not guaranteed by the ICCPR; therefore, the scope of their protection under provisions of international humanitarian law becomes especially relevant. Additionally, the right to a fair trial has broader scope of protection under human rights law because the Hague Regulations are silent on this issue and only the Geneva Conventions provides certain guarantees.<sup>251</sup>

Now that the basic humanitarian and human rights obligations binding on the USSR as the occupying power of the Baltic states have been established, there is a need to evaluate the exact scope of these obligations and whether the USSR complied with them. Thus, acts of the USSR as the occupying power must be disclosed in order to establish the degree of non-compliance. As cases of non-compliance were of massive in scale and took various forms, this research will be limited to gross violations of international human rights law and serious violations of international humanitarian law as enshrined in Basic Principles and Guidelines.

### ***1.3. ACTS AGAINST THE PEOPLE OF THE BALTIC STATES UNDER SOVIET RULE AS INTERNATIONAL CRIMES***

#### **1.3.1. Violations of international humanitarian law and human rights law**

Basic Principles and Guidelines, which codifies current obligations for states regarding an individual's right to remedy in cases of gross violations of human rights law and serious violations of international humanitarian law, adopted the traditional view on human rights law and international humanitarian law as separate bodies of law, although some scholars find the distinction between these two types of violations quite artificial as long as issue of right to remedy is in the limelight.<sup>252</sup> It is noticeable that text of Basic Principles and Guidelines also suggest some similarities between these two types of violations. The Preamble states that 'gross violations of international human rights law and serious violations of international humanitarian law which, by their very grave nature, constitute an affront to human dignity'.<sup>253</sup> Moreover, both types of violations can constitute international crimes, and this position is also reflected in Article 4 of Basic Principles and Guidelines. Nevertheless, some common features do not eliminate

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<sup>251</sup> See Convention (III) relative to the Treatment of Prisoners of War, arts. 84 and 105 and Convention (IV) relative to the Protection of Civilian Persons in Time of War, arts. 64, 66, 71-73.

<sup>252</sup> M. Cherif Bassiouni, "International Recognition of Victims' Rights," *Human Rights Law Review* 6, no. 2 (2006): 252-253, doi: 10.1093/hrlr/ngl009; Theo van Boven, "Victims' Rights to a Remedy and Reparation: The New United Nations Principles and Guidelines," in *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity: Systems in Place and Systems in the Making*, eds. Alan Stephens, Mariana Goetz and Carla Ferstman (Leiden: Brill, 2009), eBook Collection (EBSCOhost), 34.

<sup>253</sup> UN General Assembly, Resolution 60/147, annex, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, pmbl. (December 16, 2005).

differences of violations that stem from being human rights law and international humanitarian law separate bodies of international law, so there is a need to define both types of violations and their interrelation with international crimes.

### **1.3.1.1. Gross violations of international human rights law**

The explanation for the term ‘gross’ embodied in Basic Principles and Guidelines to describe the scope of their application to cases of violations of human rights seems to appear in detail for the first time in the ‘Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms’ prepared by Theo van Boven.<sup>254</sup> Basic Principles and Guidelines itself does not have the definition of gross violations. According to Marten Zwanenburg, this gives advantages of flexibility because the meaning is not limited to particular violations and is open to different factual circumstances that might appear in cases of systemic human rights abuses and that could be considered as constituting especially grave breaches.<sup>255</sup>

It must be noted that ‘gross’ is a qualifying term for ‘violations’ and the type of human right that is being violated. Thus, this term reflects certain distinction from other human rights violations, and this distinction primarily concerns individual cases of violations as opposed to systematic violations.<sup>256</sup> Therefore, the general meaning of ‘gross violations of human rights’ in the law seems to encompass the notion of ‘violations that affect in qualitative and quantitative terms the core rights of human beings, notably the right to life and the right to physical and moral integrity of the human person.’<sup>257</sup> In addition, Theo van Boven has provided a non-exhaustive list of the type of human rights violations that can be defined as gross for some guidance; that list includes the following: ‘genocide; slavery and slavery-like practices; summary or arbitrary executions; torture or cruel, inhuman or degrading treatment or punishment; enforced disappearances; arbitrary and prolonged detention; deportation or forcible transfer of population; systematic discrimination, in particular based on race or gender.’<sup>258</sup>

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<sup>254</sup> Theo van Boven, “Victims' Rights to a Remedy and Reparation,” 32-33.

<sup>255</sup> Marten Zwanenburg, "The Van Boven/Bassiouni Principles: An Appraisal," *Netherlands Quarterly of Human Rights* 24, no. 4 (2006): 649, 650, [https://heinonline-org.ezproxy.vdu.lt:2443/HOL/Page?handle=hein\\_journals/nethqur39&div=49&start\\_page=641&collection=journals&set\\_as\\_cursor=0&men\\_tab=srchresults#](https://heinonline-org.ezproxy.vdu.lt:2443/HOL/Page?handle=hein_journals/nethqur39&div=49&start_page=641&collection=journals&set_as_cursor=0&men_tab=srchresults#).

<sup>256</sup> Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, Review of further developments in fields with which the Sub-Commission has been concerned, Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms, final report submitted by Mr. Theo van Boven, Special Rapporteur, para. 8, U.N. Doc. E/CN.4/Sub.2/1993/8 (July 2, 1993).

<sup>257</sup> Theo van Boven, “Victims' Rights to a Remedy and Reparation,” 33-34

<sup>258</sup> Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, Review of further developments in fields with which the Sub-Commission has been concerned, Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental

### 1.3.1.2. *Serious violations of international humanitarian law*

The explanation of serious violations of international humanitarian law is also not provided in Basic Principles and Guidelines. Unfortunately, a similar list for serious violations of international humanitarian law was not found in academic literature. Some guidance might be provided by Martin Zwanenburg, who suggests that an explanation for the term ‘serious’ should be developed using wording and interpretations of the Geneva Conventions, as Basic Principles and Guidelines are based on existing international or domestic legal obligations and Protocol I is specifically mentioned in its preamble. He notices that violations of international humanitarian law are divided into three categories: grave breaches, serious violations and other violations.<sup>259</sup>

The definition for grave breaches is provided in the Geneva Conventions. Grave breaches such as wilful killing, torture or inhuman treatment, including biological experiments and wilfully causing great suffering or serious injury to body or health are common to all Geneva Conventions. Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly, is also defined as grave breach in all Geneva Conventions except Convention (III) relative to the Treatment of Prisoners of War. Meanwhile, the prohibition against compelled service in enemy forces and against wilfully depriving a protected person of the rights of fair and regular trial prescribed in the particular Geneva Convention concerns only prisoners of war and civilian persons. Such acts as unlawful deportation or transfer or unlawful confinement or taking of hostages are considered as grave breaches only when committed against civilian persons.<sup>260</sup>

No clear definition could be found for violations defined as serious. On this issue, the insights of Theo van Boven might be helpful. According to him, grave breaches under the Geneva Conventions ‘refer to atrocious acts ... only in relation to international armed conflicts’ and misses similar atrocities of non-international conflicts. Therefore, they are defined usually as serious violations of international humanitarian law.<sup>261</sup> Such a description would suggest that depending on the type of conflict, i.e. international or not of an international character, the same act could be

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freedoms, final report submitted by Mr. Theo van Boven, Special Rapporteur, para. 13, U.N. Doc. E/CN.4/Sub.2/1993/8 (July 2, 1993).

<sup>259</sup> Zwanenburg, "Van Boven/Bassiouni Principles," 655-657.

<sup>260</sup> Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, art. 50, August 12, 1949, *Treaties, States Parties and Commentaries Database of the International Committee of the Red Cross*, <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?documentId=4825657B0C7E6BF0C12563CD002D6B0B&action=openDocument>; Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, art. 51, August 12, 1949, *Treaties, States Parties and Commentaries Database of the International Committee of the Red Cross*, <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?documentId=2F5AA9B07AB61934C12563CD002D6B25&action=openDocument>; Convention (III) relative to the Treatment of Prisoners of War, art. 130; Convention (IV) relative to the Protection of Civilian Persons in Time of War, art. 147.

<sup>261</sup> Theo van Boven, "Victims' Rights to a Remedy and Reparation," 34.

considered either as a grave breach or serious violation of international humanitarian law. However, provisions of Article 3 common to all Geneva Conventions cannot be omitted.

In accordance with these provisions ‘violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture, taking of hostages, outrages upon personal dignity, in particular humiliating and degrading treatment and the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples’ are prohibited ‘at any time and in any place’ with respect to ‘[p]ersons taking no active part in the hostilities, including members of armed forces who have laid down their arms’ or are out of combat because of sickness, wounds, detention, or any other cause.<sup>262</sup> It is stated in the Commentaries of Article 3 common to all Geneva Conventions that this article reflects ‘the absolute minimum needed to safeguard vital humanitarian interests’ in the case of any type of armed conflict.<sup>263</sup> Moreover, Commentary of 2016 stresses in particular that ‘[t]hese prohibitions are merely specific examples of conduct that is indisputably in violation of the humane treatment obligation’ that ‘has a meaning of its own, beyond the prohibitions listed’.<sup>264</sup>

Comparison of these prohibitions with similar grave breaches suggests that there are minor differences, if any, between wilful killing and murder, cruel treatment or inhumane treatment, serious injury to body or health or mutilation. Hostage-taking and torture are also considered to have the same elements of crime.<sup>265</sup> In addition, failure to give guarantees of fair trial<sup>266</sup> is not only a grave breach but is also prohibited under Article 3 as conduct that violates the obligation of humane treatment. It follows that failure to guarantee a fair trial could be considered either a grave breach or serious violation of international humanitarian law depending on the type of conflict confirmed after an analysis of provisions of Article 3. This aligns with case law of the

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<sup>262</sup> Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, art. 3; Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, art. 3; Convention (III) relative to the Treatment of Prisoners of War, art. 3; Convention (IV) relative to the Protection of Civilian Persons in Time of War, art. 3.

<sup>263</sup> International Committee of the Red Cross. *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (Cambridge: Cambridge University Press, 2016), <https://ihl-databases.icrc.org/ihl/full/GCI-commentary>, para. 507; Jean Pictet et al., *The Geneva Conventions of 12 August 1949: Commentary I Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed forces in the Field* (Geneva: International Committee of the Red Cross, 1952), <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=1919123E0D121FEFC12563CD0041FC08>, 53.

<sup>264</sup> International Committee of the Red Cross. *Commentary on the First Geneva Convention*, para. 555.

<sup>265</sup> International Committee of the Red Cross. *Commentary on the First Geneva Convention*, paras. 351-907.

<sup>266</sup> It is stated in the Commentary of Article 3 common to Geneva Conventions that for a trial to be fair it must be conducted by a court that is ‘independent’ and ‘impartial’. Thus ‘[t]he requirements of independence of the judiciary, in particular from the executive, and of subjective and objective impartiality apply equally to civilian, military and special security courts.’ International Committee of the Red Cross. *Commentary on the First Geneva Convention*, paras. 678-682.

ICTY, which stated that ‘for a violation to be “serious” it “must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim”’.<sup>267</sup> Thus, it could be implied that grave breaches and serious violations under the Geneva Conventions serve as the definition for serious violations of international humanitarian law under Basic Principles and Guidelines.

Taking everything into account, neither the term ‘gross violations of international human rights law’ nor ‘serious violations of international humanitarian law’ provides anything new, but they both give a presumptive definition of activities that severely undermine human dignity and the core rights of human beings. Additionally, certain acts, e.g. slavery and slavery-like practices, summary or arbitrary executions, wilful killing, torture or cruel, inhuman or degrading treatment or punishment, arbitrary and prolonged detention, deportation or forcible transfer of population, can constitute both types of violations; thus, the circumstances in which a given violation occurs become particularly relevant.

Moreover, as noted previously, both types of violations can also constitute international crimes. This is particularly true for genocide, which is named as a gross violation of international human rights law. On the other hand, for other acts to be considered as international crimes, additional elements of crimes against humanity or war crimes need to be established. These additional elements help to delimitate whether a crime committed is a crime against humanity or a war crime, because certain acts can constitute not only both types of violations, i.e. gross or serious, but also both crimes. Because of status of the Baltic states as states under belligerent occupation, elements of war crimes become particularly relevant, but this does not discount the fact that genocide or crimes against humanity could also have been committed.

### **1.3.1.3. War crimes next to other international crimes**

It is widely agreed that violations of the law and customs of war and laws of humanity that contravene the basic values of the international community were definitively established as international crimes in the Nuremberg Charter,<sup>268</sup> although attempts to establish individual international criminal responsibility for acts violating international law, i.e. international humanitarian law in particular, can be traced back to the First World War.<sup>269</sup> The International

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<sup>267</sup> Zwanenburg, "Van Boven/Bassiouni Principles," 655-657.

<sup>268</sup> Christian Tomuschat, "The Legacy of Nuremberg," *Journal of International Criminal Justice* 4, no. 4 (September 2006): 830-831, 837, doi: <https://doi.org/10.1093/jicj/mql051>; Hans-Heinrich Jescheck, "The General Principles of International Criminal Law Set Out in Nuremberg, as Mirrored in the ICC Statute," *Journal of International Criminal Justice* 2, no. 1 (March 2004): 43, doi: <https://doi.org/10.1093/jicj/2.1.38>; Benjamin B. Ferencz, „International Criminal Courts: The Legacy of Nuremberg,” *Pace International Law Review* 10, no. 1 (Summer 1998): 215, <https://digitalcommons.pace.edu/pilr/vol10/iss1/9/>.

<sup>269</sup> Matthew Lippman, "Nuremberg: Forty Five Years Later," *Connecticut Journal of International Law* 7, no. 1 (Fall 1991):



Military Tribunal was vested with jurisdiction for such crimes as crimes against peace, war crimes and crimes against humanity; the war crimes charges were the only charges for which their criminal nature was not challenged, either at the time of adoption of the Nuremberg Charter or later.<sup>270</sup>

However, the first definition of war crimes under the Nuremberg Charter has clearly evolved, as evidenced by the current definition that appears in the Rome Statute. Under the Nuremberg Charter, war crimes were described as

violations of the laws or customs of war [including but not limiting to] murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity.<sup>271</sup>

This list of acts constituting war crimes served as a blueprint for grave breaches that were enumerated in Article 50 of Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field.<sup>272</sup> Provisions on grave breaches were the next major development in the notion of war crimes; this was due to the common obligation to penalize such conduct in all Geneva Conventions, although their status as war crimes was clearly confirmed only in Protocol I.<sup>273</sup>

The next development in the definition of war crimes was the promulgation of the Rome Statute, which has the most comprehensive definition<sup>274</sup> compared to its predecessors.<sup>275</sup> Earlier statutes creating ad hoc tribunals to punish individuals guilty of the most heinous crimes, e.g. ICTY and International Criminal Tribunal for Rwanda, did not establish specific categories of

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[org.ezproxy.vdu.lt:2443/HOL/Page?handle=hein.journals/conjil7&div=6&start\\_page=1&collection=journals&set\\_as\\_cursor=0&men\\_tab=srchresults#](https://heionline-org.ezproxy.vdu.lt:2443/HOL/Page?handle=hein.journals/conjil7&div=6&start_page=1&collection=journals&set_as_cursor=0&men_tab=srchresults#).

<sup>270</sup> Henry L. Stimson, "The Nuremberg Trial: Landmark in Law," *Foreign Affairs* 25, no. 2 (January 1947): 181, [https://heionline-](https://heionline-org.ezproxy.vdu.lt:2443/HOL/Page?handle=hein.journals/fora25&div=23&start_page=179&collection=journals&set_as_cursor=0&men_tab=srchresults#)

[org.ezproxy.vdu.lt:2443/HOL/Page?handle=hein.journals/fora25&div=23&start\\_page=179&collection=journals&set\\_as\\_cursor=0&men\\_tab=srchresults#](https://heionline-org.ezproxy.vdu.lt:2443/HOL/Page?handle=hein.journals/fora25&div=23&start_page=179&collection=journals&set_as_cursor=0&men_tab=srchresults#); Jescheck, "The General Principles of International Criminal Law," 41; George A. Finch, "The Nuremberg Trial and International Law," *American Journal of International Law* 41, no. 1 (January 1947): 20-22, [https://heionline-](https://heionline-org.ezproxy.vdu.lt:2443/HOL/Page?handle=hein.journals/ajil41&div=6&start_page=20&collection=journals&set_as_cursor=0&men_tab=srchresults#)  
[org.ezproxy.vdu.lt:2443/HOL/Page?handle=hein.journals/ajil41&div=6&start\\_page=20&collection=journals&set\\_as\\_cursor=0&men\\_tab=srchresults#](https://heionline-org.ezproxy.vdu.lt:2443/HOL/Page?handle=hein.journals/ajil41&div=6&start_page=20&collection=journals&set_as_cursor=0&men_tab=srchresults#).

<sup>271</sup> Charter of the International Military Tribunal, Annex to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, art. 6 (b), August 8, 1945, 82 *UN Treaty Series* 284.

<sup>272</sup> International Committee of the Red Cross. *Commentary on the First Geneva Convention*, para. 2916.

<sup>273</sup> *Ibid.*, para. 2820.

<sup>274</sup> In the Article 8, part 2 of the Rome Statute war crimes are defined in four categories, i.e. '(1) grave abuses in an international armed conflict, as defined in the Geneva Conventions of 1949;13 (2) serious violations of laws and customs of international law in international armed conflict;54 (3) serious violations of Common Article 3 of the Geneva Conventions in non-international armed conflict;55 and (4) serious violations of laws and customs applicable in non-international armed conflict.' Shana Tabak, "Article 124, War Crimes, and the Development of the Rome Statute," *Georgetown Journal of International Law* 40, no. 3 (2009): 1078-1079, [https://heionline-](https://heionline-org.ezproxy.vdu.lt:2443/HOL/Page?handle=hein.journals/geojintl40&div=33&start_page=1069&collection=journals&set_as_cursor=0&men_tab=srchresults#)  
[org.ezproxy.vdu.lt:2443/HOL/Page?handle=hein.journals/geojintl40&div=33&start\\_page=1069&collection=journals&set\\_as\\_cursor=0&men\\_tab=srchresults#](https://heionline-org.ezproxy.vdu.lt:2443/HOL/Page?handle=hein.journals/geojintl40&div=33&start_page=1069&collection=journals&set_as_cursor=0&men_tab=srchresults#).

<sup>275</sup> Tabak, "Article 124," 1077.

war crimes. Instead, such statutes listed grave breaches of the Geneva Conventions<sup>276</sup> or violations of Article 3 common to the Geneva Conventions and Protocol II<sup>277</sup> as crimes punishable under the respective statute. It is also noteworthy that statutes of the so called ad hoc internationalized or mixed courts that were established around the same period when the Rome Statute entered into force used definitions of grave breaches or violations of Article 3 common to the Geneva Conventions in their founding documents instead of war crimes; the one exception was the UNTAET (East Timor) Serious Crimes Panel.<sup>278</sup>

Taking into account these developments and the problem analysed here, provisions on war crimes in the Nuremberg Charter and provisions of the Geneva Conventions are of particular relevance because the principles of international law recognized by the Nuremberg Charter and the judgment of the International Military Tribunal were confirmed by UN General Assembly in its Resolution 95 (I),<sup>279</sup> and grave breaches under the Geneva Conventions were intended to clearly demonstrate acts that are punishable universally because of their gravity.<sup>280</sup>

For an individual to be punished for commission of grave breaches, the nexus between ongoing international armed conflict and the acts committed first needs to be established.<sup>281</sup> Unfortunately, if an armed conflict is not international, the grave breaches regime will not be applicable.<sup>282</sup> The next element necessary to establishing grave breaches is the commission of prohibited acts ‘against persons or property protected under the relevant Geneva Convention.’<sup>283</sup> The mental element (*mens rea*) of grave breaches is determined in accordance with domestic law, as the Geneva Conventions are silent on this element.<sup>284</sup>

Although some prohibited acts, such as extensive destruction and appropriation of property and compulsion to serve in enemy forces, can be clearly related with ongoing armed conflict for they have long establishment as prohibited acts under customary international humanitarian law,<sup>285</sup> some acts could constitute either war crimes or crimes against humanity. Nevertheless, some observations need to be made on torture because the definition has different interpretations

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<sup>276</sup> UN Security Council, Resolution 827 (May 25, 1993), para. 2; UN Secretary General, *Report of the Secretary-General pursuant to Paragraph 2 of Security Council Resolution 808 (1993)*, UN Doc. S/25704 (May 3, 1993), Annex, art. 2.

<sup>277</sup> UN Security Council, Resolution 955 (November 8, 1994), annex, art. 4.

<sup>278</sup> Geert-Jan G. J. Knoops, *An Introduction to the Law of International Criminal Tribunals: A Comparative Study* (Leiden: Brill - Nijhoff, 2014), eBook Collection (EBSCOhost), 14-24.

<sup>279</sup> Lippman, "Nuremberg," 47-48.

<sup>280</sup> International Committee of the Red Cross. *Commentary on the First Geneva Convention*, para. 2916.

<sup>281</sup> *Ibid.*, paras. 2920-2925.

<sup>282</sup> *Ibid.*, para. 2904.

<sup>283</sup> *Ibid.*, paras. 2926-2928.

<sup>284</sup> *Ibid.*, para. 2932.

<sup>285</sup> Jean Pictet, ed., *The Geneva Conventions of 12 August 1949: Commentary IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (Geneva: International Committee of the Red Cross, 1952), <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=659A26A51BB6FE7AC12563CD0042F063>, 600.

in different circumstances. The most important difference is that under international humanitarian law there is no requirement for official involvement in the act for it to be recognized as torture, although such a requirement is established under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.<sup>286</sup> Instead, there is a requirement that ‘torture must be inflicted for a specific purpose’ in order to delimitate it from other prohibited acts.<sup>287</sup> Thus, because there is no requirement of official involvement in a case of international armed conflict, the act of torture could be established more easily if other elements constituting a grave breach are present.

Crimes against humanity is the next international crime that should be discussed in order to delineate it from war crimes and to properly describe the acts that were committed against people of the Baltic states under the Soviet regime. Under the Nuremberg Charter crimes against humanity were defined as certain acts against any civilian population committed ‘before or during the war’ and ‘persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the [International Military Tribunal]’.<sup>288</sup> Compared to the definition of war crimes, it can be concluded that war crimes contemplated prohibited acts in connection with military actions and their participants or other related persons, while crimes against humanity encompassed prohibited acts only against civilian populations. These two crimes could be seen as different sides of the same coin under the Nuremberg Charter. Still, it must be taken into account that war crimes under the Nuremberg Charter were defined in a non-exhaustive manner, and some acts committed in occupied territories against civilian populations were considered war crimes in judgements of the International Military Tribunal and following tribunals. In cases where such acts were widespread or had a visible element of persecution, they were considered crimes against humanity and war crimes at the same time.<sup>289</sup>

These circumstances show that the mandatory requirement of a nexus with an armed conflict when prohibited acts under international humanitarian law are committed against civilian populations could create a problem of separation of war crimes and crimes against humanity. However, crimes against humanity also served as the basis for punishment of acts committed in Germany against Jews who were German citizens, as these acts ‘were difficult to characterise as war crimes.’<sup>290</sup> The problem became increasingly noticeable after the adoption of the Geneva

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<sup>286</sup> International Committee of the Red Cross. *Commentary on the First Geneva Convention*, paras. 645 and 2970.

<sup>287</sup> *Ibid.*, para 2962.

<sup>288</sup> Charter of the International Military Tribunal, Annex to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, art. 6 (c), August 8, 1945, 82 *UN Treaty Series* 284.

<sup>289</sup> Kevin Jon Heller, *The Nuremberg Military Tribunals and the Origins of International Criminal Law* (Oxford: Oxford University Press, 2011), eBook Collection (EBSCOhost), 232.

<sup>290</sup> Katrīna Inkuša, "Mass Deportations of 1949 in Latvia as a Crime against Humanity - A Fair Legal Reality for Social and Political Groups in the Context of the Genocide Convention," *Baltic Yearbook of International Law* 9 (2009):

Conventions, when certain acts against civil populations prohibited under international humanitarian law were also recognized as grave breaches. A possible solution could be the idea suggested by David Matas—that crimes against humanity are ‘committed during war, but they [are] not part of the war effort.’<sup>291</sup> Additional mandatory elements also help to delineate crimes against humanity and war crimes. Nevertheless, such a nexus still creates a problem that in a case of abuses committed by a state against its own citizens, such acts will go unpunished despite their indisputable gravity and inhuman nature.<sup>292</sup> This nexus was mandatory as an element of crimes against humanity at least until somewhere between 1968 and 1984, when the international community faced the problem of abusive governmental regimes within the state itself.<sup>293</sup> The current definition of crimes against humanity under the Rome Statute suggests that such a nexus is no longer required.

The next mandatory element of crimes against humanity that needs to be established is the systematic or widespread nature of the acts committed, i.e. acts must be committed as a result of a particular policy or carried out in a wide scale.<sup>294</sup> As previously stated, these elements were clearly present in the Nuremberg Charter, and they are part of the current definition of crimes against humanity in the Rome Statute.

The final aspect to be mentioned is the mental element of crimes against humanity, *i.e.* the *mens rea*. According to Aurelija Adomaitytė, the case law on prosecution for crimes against humanity tends to show that only general intent is necessary to commit this crime if other elements are present; a requirement of specific intent would unreasonably limit punishment of persons responsible for their commission, despite the fact that their activities actually amounted to the commission of crimes against humanity. Additionally, this element is relevant in order to delineate wilful killing, which constitutes a crime against humanity, and genocide, which has specific intent to destroy, in whole or in part, a particular group of society.<sup>295</sup>

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<sup>291</sup> David Matas, "From Nuremberg to Rome: Tracing the Legacy of the Nuremberg Trials," *Gonzaga Journal of International Law* 10 (2006-2007): 20, [https://heinonline-org.ezproxy.vdu.lt:2443/HOL/Page?handle=hein.journals/gjil10&div=4&start\\_page=17&collection=journals&set\\_as\\_cursor=0&men\\_tab=srchresults#](https://heinonline-org.ezproxy.vdu.lt:2443/HOL/Page?handle=hein.journals/gjil10&div=4&start_page=17&collection=journals&set_as_cursor=0&men_tab=srchresults#).

<sup>292</sup> Aurelija Adomaitytė, „Ar asmeniui, okupacijos metu vykdžiusiam nusikaltimus žmoniškumui, gali būti taikoma baudžiamoji atsakomybė, jei pagal tuo metu galiojusią nacionalinę teisę tokia atsakomybė nebuvo numatyta?“ *Teisės apžvalga* 9, no. 2 (2012): 76, <https://ejournals.vdu.lt/index.php/LawReview/article/view/1058>.

<sup>293</sup> Stuart Ford, "Crimes against Humanity at the Extraordinary Chambers in the Courts of Cambodia: Is a Connection with Armed Conflict Required," *UCLA Pacific Basin Law Journal* 24, no. 2 (Spring 2007): 198, [https://heinonline-org.ezproxy.vdu.lt:2443/HOL/Page?handle=hein.journals/uclapblj24&div=9&start\\_page=125&collection=journals&set\\_as\\_cursor=0&men\\_tab=srchresults#](https://heinonline-org.ezproxy.vdu.lt:2443/HOL/Page?handle=hein.journals/uclapblj24&div=9&start_page=125&collection=journals&set_as_cursor=0&men_tab=srchresults#).

<sup>294</sup> Adomaitytė, „Ar asmeniui, okupacijos metu vykdžiusiam nusikaltimus žmoniškumui, gali būti taikoma baudžiamoji atsakomybė,“ 79.

<sup>295</sup> *Ibid.*, 81-84.

The final international crime that needs to be discussed is that of genocide. This crime was not included in the Nuremberg Charter, and ‘what would now constitute genocide was then prosecuted as a crime against humanity’,<sup>296</sup> after the adoption of the Convention on the Prevention and Punishment of the Crime of Genocide in 1948, states ratifying the convention undertook a duty to prevent and punish genocide committed either in times of peace or in times of war.<sup>297</sup> The USSR signed the Genocide Convention in 1949 but ratified it only in 1954.<sup>298</sup> Nevertheless, Beth Van Schaack argues that prohibition of genocide is ‘a customary and peremptory norm of international law’ that has its true expression in UN General Assembly Resolution 96 (I).<sup>299</sup>

Academic discussion on the scope of the crime of genocide is highly developed and still appears to be relevant as the international community has to deal with extermination of various groups of people from time to time.<sup>300</sup> According to Geert-Jan G. J. Knoops, ‘[t]hree major elements ... must be fulfilled in order to prove this crime beyond a reasonable doubt,’ i.e. commission of at least of one particular act listed in the Article 2 of the Genocide Convention, intention to destroy a particular group and the group must be national, ethnical, racial or religious.<sup>301</sup> This last element appears to be highly questioned in jurisprudence as not encompassing all possible cases of extermination of a certain group of people.<sup>302</sup> This reflects problems with the adopted definition of genocide, and Patricia M. Wald correctly states that the

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<sup>296</sup> Patricia M. Wald, "Genocide and Crimes against Humanity," *Washington University Global Studies Law Review* 6, no. 3 (2007): 623, [https://heinonline.org.ezproxy.vdu.lt:2443/HOL/Page?handle=hein.journals/wasglo6&div=36&start\\_page=621&collection=journals&set\\_as\\_cursor=0&men\\_tab=srchresults#](https://heinonline.org.ezproxy.vdu.lt:2443/HOL/Page?handle=hein.journals/wasglo6&div=36&start_page=621&collection=journals&set_as_cursor=0&men_tab=srchresults#).

<sup>297</sup> Convention on the Prevention and Punishment of the Crime of Genocide, art.I, *adopted* December 9, 1948, 78 *UN Treaty Series* 277 (entered into force January 12, 1951).

<sup>298</sup> International Committee of the Red Cross, "Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948," *Treaties, States Parties and Commentaries database*, accessed April 20, 2018, <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?action=openDocument&documentId=1507EE9200C58C5EC12563F6005FB3E5>.

<sup>299</sup> Beth van Schaack, "The Crime of Political Genocide: Repairing the Genocide Convention's Blind Spot," *Yale Law Journal* 106, no. 7 (May 1997): 2261, 2280-2282, [https://heinonline.org.ezproxy.vdu.lt:2443/HOL/Page?handle=hein.journals/ylr106&div=75&start\\_page=2259&collection=journals&set\\_as\\_cursor=0&men\\_tab=srchresults#](https://heinonline.org.ezproxy.vdu.lt:2443/HOL/Page?handle=hein.journals/ylr106&div=75&start_page=2259&collection=journals&set_as_cursor=0&men_tab=srchresults#).

<sup>300</sup> See for e.g. Peter Quayle, "Unimaginable Evil: The Legislative of the Genocide Convention," *International Criminal Law Review* 5, no. 3 (2005): 363-372, doi: <https://doi.org/10.1163/1571812054940120>; Hurst Hannum, "International Law and Cambodian Genocide: The Sounds of Silence," *Human Rights Quarterly* 11, no. 1 (1989): 82-138, <https://heinonline.org.ezproxy.vdu.lt:2443/HOL/Page?collection=journals&handle=hein.journals/hurq11&id=93#>; Lauri Mälksoo, "The Definition of Genocide and the Role of Soviet International Lawyers: Reflections on the Socialist Legacy in International Law," *Baltic Yearbook of International Law* 6, no. 1 (2006): 111-124, [https://heinonline.org.ezproxy.vdu.lt:2443/HOL/Page?handle=hein.intyb/byrbkinl0006&div=13&start\\_page=111&collection=intyb&set\\_as\\_cursor=0&men\\_tab=srchresults#](https://heinonline.org.ezproxy.vdu.lt:2443/HOL/Page?handle=hein.intyb/byrbkinl0006&div=13&start_page=111&collection=intyb&set_as_cursor=0&men_tab=srchresults#); Inkuša, "Mass Deportations of 1949 in Latvia as a Crime against Humanity," 69-94.

<sup>301</sup> Knoops, *Introduction to the Law of International Criminal Tribunals*, 31-32.

<sup>302</sup> Michael Freeman, "The Theory and Prevention of Genocide," *Holocaust and Genocide Studies* 6, no. 2 (1991): 187, [https://heinonline.org.ezproxy.vdu.lt:2443/HOL/Page?handle=hein.journals/hologen6&div=24&start\\_page=185&collection=journals&set\\_as\\_cursor=0&men\\_tab=srchresults](https://heinonline.org.ezproxy.vdu.lt:2443/HOL/Page?handle=hein.journals/hologen6&div=24&start_page=185&collection=journals&set_as_cursor=0&men_tab=srchresults).

Genocide Convention 'has remained textually static though interpretatively somewhat fluid.'<sup>303</sup> Nevertheless, any interpretation not compatible with the definition could be evaluated as a violation of the principle of *nullum crimen sine lege*. Consequently, cases not falling within the definition of genocide are usually prosecuted as crimes against humanity.<sup>304</sup>

This brief presentation of the definitions of the main international crimes revealed their origin in customary international humanitarian law. Nowadays, crimes against humanity and genocide are separate crimes that are prohibited under any circumstances, i.e. in times of peace or in times of war, while a nexus with an armed conflict must be established for a person to be found guilty of war crimes. It is also noticeable that gross violations of human rights law and serious violations of international humanitarian law are actually international crimes in many cases. Therefore, commission of such crimes needs to be established for the case of the people of the Baltic states under Soviet rule because this would demonstrate the actual non-compliance with obligations the USSR was bound to in the territories of the Baltic states and the effects this had on people of the Baltic states. In addition, this will enable a better understanding of the scope of activities that cannot go unpunished and shortages in the existing definitions of international crimes.

### **1.3.2. Prosecution of acts committed against the people of the Baltic states under the Soviet regime**

The most significant event with the aim of addressing the repression of the communist regime from a legal, political and social perspective that resulted from the policies of the USSR in Europe and the Baltic states was the Anti-Communist Congress that established the International Public Tribunal in Vilnius in 2000. The initiative was implemented by non-governmental organizations, historians, lawyers and other socially active persons from 25 countries.<sup>305</sup> This tribunal was established as a response to inactivity on the part of the international community in addressing the destruction of millions of people under communist regimes and a non-governmental initiative to evaluate repressions committed against people in

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<sup>303</sup> Wald, "Genocide and Crimes against Humanity," 621.

<sup>304</sup> Wald, "Genocide and Crimes against Humanity," 621-634; Inkuša, "Mass Deportations of 1949 in Latvia as a Crime against Humanity," 82-93.

<sup>305</sup> Albania, Belarus, Bulgaria, Canada, Chechnya, Croatia, Estonia, Germany, Hungary, Italy, Israel, Japan, Kazakhstan, Kyrgystan, Latvia, Lithuania, Moldova, Poland, Romania, Russia, Slovakia, Sweden, Ukraine

the states under influence of the USSR.<sup>306</sup> Thus, it is not an international judicial tribunal in the proper sense.<sup>307</sup>

Under the Statute of the International Public Tribunal in Vilnius, the tribunal's jurisdiction was confined to such crimes as crimes against peace,<sup>308</sup> war crimes,<sup>309</sup> genocide<sup>310</sup> and crimes against humanity,<sup>311</sup> as they are defined in the statute. The definitions of the crimes were formulated under the guidance of the Nuremberg Charter, the Statute of the International Criminal Tribunal for Rwanda, the Draft Code of Offences against the Peace and Security of Mankind, the Rome Statute national legal acts of participating countries; they were then adjusted to the specific circumstances of the repressions committed against people in the states under the USSR's influence.

Adjustments to the definitions of crimes against peace, war crimes, crimes against humanity and genocide in this statute are visible in their wording. Some examples of these adjustments include a broader definition of genocide that includes social and political groups, omission of certain acts as constituting war crimes or crimes against humanity (in particular the taking of hostages or enforced disappearance) and emphasis on particular circumstances such as

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<sup>306</sup> Arvydas Anušauskas, Vytautas Zabiela and Vytautas Raudeliūnas, eds., *Antikomunistinis kongresas ir tarptautinio Vilniaus visuomeninio tribunolo procesas: "Komunizmo nusikaltimų įvertinimas" 2000* (Vilnius: Ramona, 2002), 449-451.

<sup>307</sup> Lauri Mälksoo, "Soviet Genocide? Communist Mass Deportations in the Baltic States and International Law," *Leiden Journal of International Law* 14, no. 4 (December 2001): 766, [https://heinonline-org.ezproxy.vdu.lt:2443/HOL/Page?handle=hein.journals/lejint14&div=52&start\\_page=757&collection=journals&set\\_as\\_cursor=0&men\\_tab=srchresults#](https://heinonline-org.ezproxy.vdu.lt:2443/HOL/Page?handle=hein.journals/lejint14&div=52&start_page=757&collection=journals&set_as_cursor=0&men_tab=srchresults#).

<sup>308</sup> Planning, preparation, initiation and undertaking aggression. Aggression shall be understood as the use of armed forces against the sovereignty of another country, its territorial integrity or political independence or any military occupation, including a temporary occupation, or any annexation of another country's territory, or its part, in violation of the Statutes of the United Nations. Article 3, a) point of Statute of International Public Tribunal in Vilnius as published in Arvydas Anušauskas, Vytautas Zabiela and Vytautas Raudeliūnas, eds., *Anti-Communist Congress and Proceedings of the International Public Tribunal in Vilnius: "Evaluation of the Crimes of Communism" 2000*, trans. Dališa Tekorienė, et al. (Vilnius: Ramona, 2002), 511-512.

<sup>309</sup> Any actions in violation of international humanitarian law: premeditated murder; torture and inhuman treatment, intentional infliction of great pain, humiliation of one's honour or dignity, rape, forced service in the occupying armed forces, forced participation in military actions, destruction and devastation of cities, towns and countryside, looting and intentional destruction of cult buildings and religious institutions, mass destruction or appropriation of artistic, scientific or historical assets, unlawful deportation, relocation or incarceration of persons protected by international humanitarian law, settlement of civilians of the occupying country on the territory of the occupied country. Article 3, b) point of Statute of International Public Tribunal in Vilnius as published in Anušauskas, Zabiela and Raudeliūnas, eds., *Anti-Communist Congress*, 512.

<sup>310</sup> Actions intended to physically exterminate all or part of the population belonging to a national, ethnical, racial, religious, social or political group by killing, torture, grave physical injury, intentional creation of unsustainable living conditions for the whole or part of such a group of persons and organization or supervision of such actions. Article 3, c) point of Statute of International Public Tribunal in Vilnius as published in Anušauskas, Zabiela and Raudeliūnas, eds., *Anti-Communist Congress*, 512.

<sup>311</sup> Actions directed universally or continuously against civilians both in war and in peace under the instigation or command of the state or any other organization or group: murder, extermination, enslavement, forced labour, political, racial, ethnic or any other kind of persecution of any identifiable social group, which is prohibited by international law, deportation or forced relocation within the territory of the same state or expulsion from the territory of one's country, unlawful incarceration, rape, any other brutal sexual abuse; other inhumane actions threatening the physical or mental health or honour and dignity of a person. Article 3, d) point of Statute of International Public Tribunal in Vilnius as published in Anušauskas, Zabiela and Raudeliūnas, eds., *Anti-Communist Congress*, 512.

nationalization of property, russification and suppression of religious freedom. Despite these adjustments, the definitions generally represent the definitions of international crimes in the above mentioned international treaties and other legal acts.

An in-depth analysis of the judgment of the International Public Tribunal in Vilnius reveals that the tribunal was not concerned with the correct legal evaluation of the events but focused on collecting all possible materials and revealing the huge scale of atrocities committed under the communist regime. Thus, the work of the International Public Tribunal in Vilnius is particularly important for its establishment of historical facts concerning repressions and their nature. After reviewing volumes of various documents and hearing statements of witnesses from different countries, the tribunal established that the communist regime is responsible for crimes against peace, war crimes, crimes against humanity, inter alia genocide, as they are defined under its statute, in Lithuania, Latvia and Estonia. In addition, relevant international treaties and other documents were mentioned.<sup>312</sup>

The crimes against peace in the Baltic states were established based on the facts that on 15–17 June 1940 the army of the USSR entered the territory of the Baltic states under the ultimatums presented to their governments. These acts were the results of secret protocols of the Molotov–Ribbentrop Pact of 23 August 1939 and violations of bilateral agreements with the Baltic states and the Convention for the Definition of Aggression of 3 July 1933.<sup>313</sup>

War crimes in the Baltic states were found based on the following established facts:

- Forceful mobilization of men from the Baltic states to the Red Army of the USSR in 1944–1945, their forced participation in the Second World War hostilities and forceful mobilization to the army of the USSR during the Soviet War in Afghanistan in 1979–1989
- Wilful killing of civilians in 1944–1945 in Lithuania
- Wilful killing of partisans in Lithuania and Estonia
- Deliberate destruction (burning) of towns, villages and settlements
- Transfer of civilians of occupying power to an occupied territory of Latvia
- Destruction, devastation and appropriation of works of arts, scientific property or historical values and other property in the Baltic states

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<sup>312</sup> Anušauskas, Zabiela and Raudeliūnas, eds., *Antikomunistinis kongresas*, 832-919.

<sup>313</sup> Because of these acts Parts 4-5 of the General Treaty for Renunciation of War as an Instrument of National Policy (Kellogg-Briand Pact) of 27 August 1928, Article 2, parts 3-4 of the Charter of the United Nations, Article 6, part a of the Charter of the International Military Tribunal, UN General Assembly resolution on Definition of Aggression of 14 December 1974 were also violated.



Because of these acts, Articles 23 (g), 25, 46 of the Hague Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land of 29 July 1899; 23 (g), 25, 46 of the Hague convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land of 18 October 1907; Article 6, part b of the Charter of the International Military Tribunal; Article 51, parts 2, 4, 5 and Article 54 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) of 8 June 1977; and Article 8 part 2, a (iv) point and b (i, ii, v) points of the Rome Statute of the International Criminal Court were violated.

Crimes against humanity were found due to established facts of unlawful imprisonment, deportation and compulsion to forced labour leading to high rates of mortality because of degrading treatment and inhumane conditions, torture of people of the Baltic states, murder and extermination of political prisoners of the Baltic states. These acts, together with war crimes, were treated as genocide because the result of these crimes was the extermination of a significant part of population of the people of the Baltic states, especially the intelligentsia. It was considered that such acts violated Article 6 part c of the Charter of the International Military Tribunal; Article 7 part 1, points a, b, d, e, f of the Rome Statute of the International Criminal Court; Article 1 part 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; Article 9 of Universal Declaration of Human Rights; and Article 9 of ICCPR.<sup>314</sup>

It is apparent that the International Public Tribunal in Vilnius applied international treaties to evaluate repressions as constituting international crimes rather primitively, especially as the question of retroactive application of particular norms of international law is not addressed at all. Thus, it could be said that the judgment of the tribunal gave only a general framework of a legal evaluation of the repressions in the Baltic states under Soviet rule; the tribunal's judgment also called for the establishment of international bodies similar to those established under the direction of the United Nations to investigate and try persons responsible for the commission of international crimes under the communist regime.<sup>315</sup>

Scholars have provided a somewhat complex evaluation of Soviet repressions as international crimes, as scholars have observed various problems of addressing the factual circumstances under the relevant international criminal law. The most notable and widely discussed issue is reconciliation of the definition of genocide with the factual circumstances of Soviet repressions, i.e. mainly deportations and killing of partisans—as none of the acts

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<sup>314</sup> Anušauskas, Zabiela and Raudeliūnas, eds., *Antikomunistinis kongresas*, 895-914.

<sup>315</sup> *Ibid.*, 917-918.

committed under the Soviet regime demonstrate an explicit *dolus specialis* to destroy, in whole or in part, one of the protected groups under the Convention on the Prevention and Punishment of the Crime of Genocide.

Nevertheless, there is support for treating these repressions as genocide. Lauri Mälksoo particularly notes that under case law of the ICTY, intent to destroy a protected group is interpreted in two forms and the form of the intent to pursue a more selective destruction targeting only certain members whose destruction would be crucial for the protected group to survive as such could be seen in the repressive policy of the USSR addressed against certain social or political groups.<sup>316</sup> Justinas Žilinskas, in support of this position, highlights certain historical facts, such as the prohibition of children of deportees of Lithuanian, Latvian and Estonian origin, upon reaching the age of 16, from returning to their homeland and treating certain nations ‘politically untrustworthy’ as such.<sup>317</sup> Thus, these scholars tend to circumscribe repressions under Soviet rule in the Baltic states within the definition of genocide provided in the Convention on the Prevention and Punishment of the Crime of Genocide.

Another position concerning the treatment of Soviet repressions as genocide supports a broader definition of genocide that includes social and political groups as protected groups. This position rests on the arguments that ‘the international legal order does not impede the wider use of the notion of the genocide’ and the Baltic states are not the only countries having broad definition of genocide in their criminal codes.<sup>318</sup>

As a result, the position of treating the most serious of soviet repressions as crimes against humanity is generally described as a safe position.<sup>319</sup> However, Lauri Mälksoo correctly notes that at the time when mass repressions had been carried out in the Baltic states, classification of such repressions as crimes against humanity under applicable international criminal law could be problematic as ‘[t]he Nuremberg Tribunal’s definition of “crimes against humanity” established a mandatory nexus with crimes against peace (aggression) or war crimes’ and ‘[w]ithout establishing a similar nexus in ... Baltic republics under the Soviet occupation, some doubts about

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<sup>316</sup> Mälksoo, "Soviet Genocide?" 782-785.

<sup>317</sup> Justinas Žilinskas, „Broadening the Concept of Genocide in Lithuania’s Criminal Law and the Principle of *nullum crimen sine lege*,” *Jurisprudencija* 118, no. 4 (2009): 342-343, <https://www3.mruni.eu/ojs/jurisprudence/article/view/1538>.

<sup>318</sup> Rytis Satkauskas, “Soviet Genocide Trials in the Baltic States: the Relevance of International Law,” *Yearbook of International Humanitarian Law* 7 (December 2004): 405-407, doi: 10.1017/S1389135904003885; Inkuša, "Mass Deportations of 1949 in Latvia as a Crime against Humanity," 92-93.

<sup>319</sup> Žilinskas, „Broadening the Concept of Genocide,” 344; Rain Liivoja, „Competing Histories: Soviet War Crimes in the Baltic States,” in *The Hidden Histories of War Crimes Trials*, eds. Kevin Jon Heller and Gerry Simpson, (Oxford: Oxford University Press, 2013), 259.

the proper application of the concept of “crimes against humanity” would persist.’<sup>320</sup> Thus, a nexus with armed conflict at least had to be established.<sup>321</sup>

Although aggression on the part of the USSR could be proven under applicable international law based on its acts against the Baltic states, which would mean that the nexus necessary for supporting a conclusion that the Soviet repressions constituted crimes against humanity is found, the case of war crimes is not discussed by Lauri Mälksoo.<sup>322</sup> In addition, the possibility of treating repressions of the USSR as war crimes is not widely discussed in academic literature, and only limited insights are provided.<sup>323</sup> This could be justified to some extent by the fact that few trials have been conducted in the Baltic states where the conviction was based on the commission of war crimes,<sup>324</sup> and Rain Liivoja finds this quite strange considering that the Baltic states were under belligerent occupation and the better development of international humanitarian law at the time.<sup>325</sup>

In considering the potential problems of performing a general evaluation of Soviet repressions as international crimes, all scholars stress the importance of addressing each case individually, as circumstances may vary from case to case<sup>326</sup> and only a thin line can be drawn between genocide and crimes against humanity.<sup>327</sup> Moreover, scholars have criticized the established legal basis for the prosecution of international crimes in the Baltic states as lacking the required foundation in international criminal law and resulting in aggravated prosecution of those responsible for the repressions in the Baltic states under Soviet rule.<sup>328</sup>

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<sup>320</sup> Mälksoo, "Soviet Genocide?" 770.

<sup>321</sup> Inkuša, "Mass Deportations of 1949 in Latvia as a Crime against Humanity," 83.

<sup>322</sup> Mälksoo, "Soviet Genocide?" 770-771.

<sup>323</sup> Some valuable insights are offered by Justinas Žilinskas. See Justinas Žilinskas, „Karo nusikaltimų reglamentavimas Lietuvos Respublikos baudžiamajame kodekse ir jų atitikties tarptautinei teisei problemos,” *Jurisprudencija* 80, no. 2 (2006): 144–157, <https://www3.mruni.eu/ojs/jurisprudence/article/view/2919>.

<sup>324</sup> In Latvia case of Vasily Kononov seems to be the only case. Meanwhile Lithuania could be regarded as having the highest number of individuals convicted for the war crimes committed during soviet rule. The most of judgements concern unlawful deportation or transfer of civil population prohibited by Article 102 of the Criminal Code of the Republic of Lithuania. See: Lietuvos Aukščiausiasis Teismas [LAT] [Supreme Court of Lithuania], June 7, 2016, case no. 2K-214-976/2016; Lietuvos apeliacinis teismas [Court of Appeal of Lithuania], April 22, 2016, case no. 1A-159-177/2016; Lietuvos apeliacinis teismas [Court of Appeal of Lithuania], March 6, 2014, case no. 1A-79/2014; Lietuvos apeliacinis teismas [Court of Appeal of Lithuania], January 14, 2013, case no. 1A-103/2013; Panevėžio apygardos teismas [Panevėžys Regional Court], June 9, 2016, case no. 1-18-531/2016; Klaipėdos apygardos teismas [Klaipėda regional Court], December 2, 2014, case no. 1-39-174/2014; Vilniaus apygardos teismas [Vilnius Regional Court], October 1, 2014, case no. 1-315-195/2014; Vilniaus apygardos teismas [Vilnius Regional Court], May 31, 2013, case no. 1-175-149/2013.

<sup>325</sup> Liivoja, „Competing Histories,” 260.

<sup>326</sup> Satkauskas, “Soviet Genocide Trials in the Baltic States,” 389, 392-395; Žilinskas, „Broadening the Concept of Genocide,” 343-344; Mälksoo, "Soviet Genocide?" 785.

<sup>327</sup> Inkuša, "Mass Deportations of 1949 in Latvia as a Crime against Humanity," 82-87.

<sup>328</sup> Justinas Žilinskas, „Nusikaltimai žmoniškumui naujajame Lietuvos respublikos baudžiamajame kodekse,” *Jurisprudencija* 23, no. 15 (2001): 162-173, <https://www3.mruni.eu/ojs/jurisprudence/article/view/3688>; Žilinskas, „Karo nusikaltimų reglamentavimas,” 144–157; Satkauskas, “Soviet Genocide Trials in the Baltic States,” 392, 395-398, 408; Liivoja, „Competing Histories,” 256-257; Mälksoo, "Soviet Genocide?" 771-778.

It is noteworthy that Lithuania differed from Latvia and Estonia in its codification of international crimes as well as in definition of international crimes. While in Lithuania genocide and crimes against humanity are established as separate crimes under separate articles within the Criminal Code<sup>329</sup>, in Latvia<sup>330</sup> and Estonia<sup>331</sup> both crimes were united under one article and were treated as one crime for a significant period of time.<sup>332</sup> The regulations in Latvia and Estonia resulted in doubts about whether a person was found guilty of genocide or crimes against humanity.<sup>333</sup> As for war crimes, they are included in the criminal laws of all three Baltic states, but as noted previously, convictions for the commission of war crimes has been almost non-existent except in Lithuania.<sup>334</sup>

Despite the deficiencies in the legal basis, courts of the Baltic states had to deal with convictions for the commission of international crimes under the Soviet regime and render decisions. Depending on the particular circumstances, individuals were found guilty of genocide, crimes against humanity and in some cases war crimes.<sup>335</sup> Moreover, because of previously mentioned differences in legal regulation, courts in the Baltic states differed in their legal evaluation of the same factual circumstances. Cases involving deportations are particularly illustrative of this issue. This form of repression carried out under the Soviet regime was treated generally as crimes against humanity in Estonia,<sup>336</sup> genocide within the context of crimes against humanity in Latvia<sup>337</sup> and as war crimes in Lithuania.<sup>338</sup>

However, in certain cases this was unavoidable due to different circumstances. This was particularly relevant in case of partisans; under Estonian case law they are recognized as ‘civilians for the purposes of the law of armed conflict’<sup>339</sup> and under the jurisprudence of Lithuanian Constitutional Court as combatants.<sup>340</sup> This difference is of no surprise, as partisans of Lithuania

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<sup>329</sup> Žilinskas, „Nusikaltimai žmoniškumui”, 162-173.

<sup>330</sup> Since July 1, 2009 genocide and crimes against humanity are treated as separate crimes under articles 71 and 71<sup>2</sup> respectively of the Criminal Law. Krimināllikums [The Criminal Law], "Latvijas Vēstnesis", 199/200 (1260/1261), 08.07.1998, as last amended on May 21, 2009, <https://likumi.lv/ta/en/en/id/88966-the-criminal-law>.

<sup>331</sup> Since September 1, 2002, i.e. after the New Penal Code entered into force, genocide and crimes against humanity are treated as separate crimes. Karistusseadustik [KarS] [Penal Code], RT I 2001, 61, 364, <https://www.riigiteataja.ee/en/eli/ee/528122016006/consolide/current>.

<sup>332</sup> Mälksoo, "Soviet Genocide?" 771-773; Inkuša, "Mass Deportations of 1949 in Latvia as a Crime against Humanity," p. 73-74.

<sup>333</sup> Mälksoo, "Soviet Genocide?" 778-781.

<sup>334</sup> See footnote 324.

<sup>335</sup> In depth analysis on the issue is provided by Rain Liivoja and Eva-Clarita Pettai, Vello Pettai. See Liivoja, „Competing Histories,” 248-266; Pettai and Pettai, *Transitional and Retrospective Justice in the Baltic States*, 65-114.

<sup>336</sup> Mälksoo, "Soviet Genocide?" 773-776.

<sup>337</sup> Liivoja, „Competing Histories,” 258.

<sup>338</sup> See footnote 324.

<sup>339</sup> Liivoja, „Competing Histories,” 257-258.

<sup>340</sup> Lietuvos Respublikos Konstitucinis Teismas [Constitutional Court of the Republic of Lithuania], March 18, 2014, ruling no. KT11-N4/2014, 7.2 point, <http://www.lrkt.lt/en/court-acts/search/170/ta853/content>.

were a strictly organized military power acting under principles of international humanitarian law, while their counterparts in Latvia and Estonia did not share all similar attributes.<sup>341</sup> As a result of such different treatment, persons found guilty for the deliberate killing of partisans while acting as officers of the occupying regime were convicted of crimes against humanity in Estonia.<sup>342</sup> Meanwhile, Lithuania treated partisans as a political group constituting a significant part of the national group, and their elimination by representatives of the occupying regime was treated as genocide.<sup>343</sup>

Taking into account previously mentioned circumstances, it is unsurprising that some of the judgments by the courts of the Baltic states were challenged before the European Court of Human Rights on the basis that they violated the principle of *nullum crimen sine lege* under Article 7 of the European Convention on Human Rights, as repressions against the people of the Baltic states under Soviet rule were not treated as crimes. Such cases as *Kononov v. Latvia* and *Vasiliauskas v. Lithuania* have received the widest attention. However, the cases of *Larionovs* and *Tess v. Latvia*, *Kolk and Kislyiy v. Estonia* and *Penart v. Estonia* were declared inadmissible.<sup>344</sup>

Vasiliy Kononov was found guilty under section 68-3 of the 1961 Criminal Code of Latvia for war crimes because of events in the eastern Latvian village of Mazie Bati on 27 May 1944.<sup>345</sup> As a Soviet partisan and superior of the unit, V. Kononov ‘attacked [with his unit] the farmsteads, found weapons in some of them, and killed, in a gruesome manner, nine villagers, including a woman who was nine months pregnant.’<sup>346</sup> He challenged this conviction before the European Court of Human Rights because, according to him, his acts did not constitute war crimes, as he and his unit were responsible for capturing villagers of Mazie Bati to put them on a trial in a Soviet

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<sup>341</sup> Žilinskas, “Status of Members of Anti-Soviet Armed Resistance,” 34-38; Reinsone, “Forbidden and sublime forest landscapes,” 2-5; Edita Gruodytė and Silvija Gervienė, “Baudžiamosios atsakomybės už genocido nusikaltimą taikymo ypatumai vertinant sovietinės okupacijos metu įvykdytas tarptautines nusikalstamas veikas po 2014 m. kovo 18 d. LR Konstitucinio Teismo sprendimo,” in *Baudžiamasis procesas: teisingumo garantas ar kliūtis?* ed. Gabrielė Juodkaitė-Granskienė (Vilnius: Vilniaus universiteto teisės fakultetas, 2014), 229-231.

<sup>342</sup> Liivoja, „Competing Histories,” 257-258.

<sup>343</sup> Gruodytė and Silvija Gervienė, “Baudžiamosios atsakomybės už genocido nusikaltimą taikymo ypatumai,” 215-239.

<sup>344</sup> In *Kolk and Kislyiy v. Estonia* and *Penart v. Estonia* the European Court of Human Rights declared applications stating violation of Article 7 of the European Convention of Human Rights inadmissible because the Court considered that such actions as deportations of Estonians in 1949 and killing of Estonian partisans at the time were punishable as crimes against humanity under international law. See *Kolk and Kislyiy v. Estonia* [dec.], nos. 23052/04 and 24018/04, 2006-I *Reports of Judgments and Decisions* (ECHR) 399; *Penart v. Estonia* [dec.], no. 14685/04, ECHR, HUDOC (January 24, 2006), <http://hudoc.echr.coe.int/eng?i=001-72685>. Meanwhile in *Larionovs* and *Tess v. Latvia* application was declared inadmissible because applicants failed to exhaust the remedy provided for by Latvian law as they have not challenged particular law criminalizing their activity and its retroactive application under relevant articles of Latvian Constitution. Thus the decision to punish applicants for ‘genocide as a special category of the crimes against humanity’ remained unchallenged. See *Larionovs* and *Tess v. Latvia* [dec.], nos. 45520/04 19363/05, 25/11/2014, ECHR, HUDOC (November 25, 2014), <http://hudoc.echr.coe.int/eng?i=001-149129>.

<sup>345</sup> *Kononov v. Latvia* [GC], no. 36376/04, 2010-IV *Reports of Judgments and Decisions* (ECHR) 35.

<sup>346</sup> Lauri Mälksoo, “Kononov v. Latvia,” *The American Journal of International Law* 105, no. 1 (January 2011): 101-108,

doi:10.5305/amerjintelaw.105.1.0101.

war tribunal because they were responsible for the German Army's destruction of a group of Red Partisans led by Major Chugunov in February 1944. V. Kononov contended that they must be considered combatants because the male villagers were provided with a rifle and two grenades by Germans for protection.

In holding that there was no violation of Article 7 of the European Convention on Human Rights in prosecuting V. Kononov for war crimes, the Court noted:

[E]ven if the deceased villagers were considered combatants or civilians who had participated in hostilities, *jus in bello* in 1944 considered the circumstances of their murder and ill-treatment a war crime since those acts violated a fundamental rule of the laws and customs of war protecting an enemy rendered *hors de combat*. For this protection to apply, a person had to be wounded, disabled or unable for another reason to defend him/herself (including not carrying arms), a person was not required to have a particular legal status, and a formal surrender was not required. As combatants, the villagers would also have been entitled to protection as prisoners of war under the control of the applicant and his unit and their subsequent ill-treatment and summary execution would have been contrary to the numerous rules and customs of war protecting prisoners of war (noted at paragraph 202 above). Accordingly, the ill-treatment, wounding and killing of the villagers constituted a war crime.<sup>347</sup>

Thus, the Court did not even consider whether the villagers were civilians or combatants under relevant international humanitarian law, because the cruelty of the acts in the given circumstances were enough for the Latvian courts to convict V. Kononov for the war crimes, as the Court was satisfied that an international armed conflict between Germany and the USSR had been established in connection with events. Taking everything into account, the Court has not established any details that would be beyond the required minimum to solve the particular question.

In another case, *Vasiliauskas v. Lithuania*, Vytautas Vasiliauskas was found guilty under Article 99 of the Criminal Code of Lithuania for genocide because, as a worker in the Šakiai district unit of the MGB of the Lithuanian SSR (LSSR MGB) on 2 January 1953, he took part in a planned operation against two Lithuanian partisans, the brothers J.A. and A.A., who had been hiding in the forest in the Šakiai area. During the attempt to apprehend them, J.A. and A.A. resisted by opening fire on the MGB officers and Soviet soldiers. The partisans were shot and killed.<sup>348</sup> V. Vasiliauskas claimed that his conviction was in violation of Article 7 of the European Convention on Human Rights, as he was found guilty of genocide of a political group in violation of principle *nullum crimen sine lege*.

The decision of the European Court of Human Rights, by nine votes to eight, was in favour of the applicant, i.e. the Court found there had been a violation of Article 7 § 1 due to his

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<sup>347</sup> *Kononov v. Latvia* [GC], no. 36376/04, 2010-IV *Reports of Judgments and Decisions* (ECHR) 35, para. 216.

<sup>348</sup> *Vasiliauskas v. Lithuania* [GC], no. 35343/05, ECHR, HUDOC (October 20, 2015), <http://hudoc.echr.coe.int/eng?i=001-158290>.

conviction for genocide and no justification was established under the exception of Article 7 § 2 for this conviction. The Court concluded that the partisans of Lithuania constituted a political group, and in 1953, the date of the commitment of the crime, the applicant could not foresee ‘that the act for which the applicant was convicted could be qualified as genocide’, because ‘international treaty law did not include a “political group” in the definition of genocide, nor can it be established with sufficient clarity that customary international law provided for a broader definition of genocide than that set out in Article II of the 1948 Genocide Convention.’<sup>349</sup> This is also valid while applying the exception under Article 7 § 2, as this rule was established to prevent any doubts ‘about the validity of prosecutions after the Second World War in respect of the crimes committed during that war’ and confirms the general rule of non-retroactivity.<sup>350</sup>

While in *Kononov v. Latvia* the Court relied on the factual circumstances established by the domestic courts, in *Vasiliauskas v. Lithuania* the established factual background was questioned because the Court had not found sufficient reasoning in the decisions of the domestic courts that had been intent in the acts of the applicant to destroy Lithuanian partisans as a political group constituting a significant part of national group. They had been considered to be only a political group.<sup>351</sup> However, in the opinion of the dissenting judges, the Court failed to address the context of events, as this is particularly relevant under established case law of the International Criminal Tribunal for Rwanda or the ICJ and thus failed to establish that it was not a mere struggle for power to implement political goals but a struggle for survival of a nation with partisans representing a substantial part of the nation that was intended to be destroyed according to the established facts by the domestic courts.<sup>352</sup>

Attempts to challenge prosecutions for the deliberate killing of partisans as crimes against humanity before the European Court of Human Rights were unsuccessful in cases originating from Estonia.<sup>353</sup> However, Article 7(1) of the European Convention on Human Rights was invoked against Lithuania in its attempt to evaluate similar acts as genocide. As was correctly stated in the opinions of dissenting judges, the Court failed to recognize the exclusive nature of partisan war in Lithuania and the accompanying circumstances.

It is noteworthy that case law in Lithuania concerning the intentional killing of Lithuanian partisans has not changed after the judgment of the European Court of Human Rights in

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<sup>349</sup> *Ibid.*, para. 178.

<sup>350</sup> *Ibid.*, para. 189.

<sup>351</sup> *Ibid.*, paras. 179-181.

<sup>352</sup> See *Vasiliauskas v. Lithuania* [GC], no. 35343/05, ECHR, HUDOC (October 20, 2015), <http://hudoc.echr.coe.int/eng?i=001-158290> (Judges Villiger, Power - Forde, Pinto De Albuquerque and Kūris dissenting, paras. 14-16, 19 and Judge Ziemele dissenting, paras. 11-14).

<sup>353</sup> *Penart v. Estonia* [dec.], no. 14685/04, ECHR, HUDOC (January 24, 2006), <http://hudoc.echr.coe.int/eng?i=001-72685>.

Vasiliauskas v. Lithuania. The plenary session of the Supreme Court of Lithuania, in case No. 2K-P-18-648/2016 where Stanislovas Drėlingas was found guilty of genocide for participation in the operation aimed at the destruction of the chief commander of Lithuanian partisans Adofas Ramanauskas (codename Vanagas) and his wife, Lithuanian partisan Birutė Mažeikaitė, held that Stanislovas Drėlingas committed the crime genocide after detailed consideration of facts of the case, historical context and findings on relevant international law of the European Court of Human Rights in *Vasiliauskas v. Lithuania*.<sup>354</sup> The Supreme Court of Lithuania paid particular attention to the observation in *Vasiliauskas v. Lithuania* that previous decisions of domestic courts lacked sufficient reasoning. However, it appears that this decision will still be put to the test before the Court, as Stanislovas Drėlingas has lodged an application against Lithuania because of an alleged violation of Article 7 of the Convention.<sup>355</sup>

Thus, it seems that the case law of Lithuanian courts was affected by the decision of the European Court of Human Rights only to the effect that courts now give detailed reasoning; the end results have not changed.<sup>356</sup> This is confirmed by the subsequent case law of the domestic courts at both the trial and appellate levels.<sup>357</sup> Moreover, the minor possibility of renewing the procedure in the European Court of Human Rights exists if new materials or findings that were not available during the initial procedure due to objective circumstances could be presented.<sup>358</sup> This is particularly important with regard to governmental archives, especially of the USSR, and restricted access to them.<sup>359</sup>

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<sup>354</sup> Lietuvos Aukščiausiasis Teismas [LAT] [Supreme Court of Lithuania] plenary session, April 12, 2016, case no. 2K-P-18-648/2016.

<sup>355</sup> *Drėlingas v. Lithuania and 1 other application* [communicated case], nos. 28859/16 58905/16, ECHR, HUDOC, <http://hudoc.echr.coe.int/eng?i=001-181093>.

<sup>356</sup> However this case-law of Lithuania is challenged again before the European Court of Human Rights and the government of Lithuania is asked: “Did the acts of which both of the applicants had been convicted constitute the criminal offence of genocide under national or international law at the time when they were committed, as provided for by Article 7 of the Convention (see *Vasiliauskas v. Lithuania* [GC], no. 35343/05, §§ 165-178, ECHR 2015)?” See: *Drėlingas v. Lithuania and 1 other application* [communicated case], nos. 28859/16 58905/16, ECHR, HUDOC (January 29, 2018) <http://hudoc.echr.coe.int/eng?i=001-181093>.

<sup>357</sup> Lietuvos apeliacinis teismas [Court of Appeal of Lithuania], July 8, 2016, case no. 1A-124-518/2016; *Kauno apygardos teismas* [Kaunas Regional Court], June 17, 2016, case no. 1-176-383/2016.

<sup>358</sup> Judge Paulo Pinto de Albuquerque, “The relevance of the ECHR for judging crimes of the past” in panel *Reparations of Past Mass Crimes*, Geneva Academy of International Humanitarian Law and Human Rights video, 2:09:16 at 54:01, streamed live on March 3, 2016, <https://www.youtube.com/watch?v=N-JzGwEFj1M&feature=embvm>.

<sup>359</sup> Antonio González-Quintana, *Archival Policies in the Protection of Human Rights*, trans. Margaret Turner (Paris: International Council on Archives, 2009), accessed January 11, 2017, <http://www.ica.org/6458/resources/the-management-of-the-archives-of-the-state-security-services-of-former-repressive-regimes.html>, 82-83. Thus a possibility exists that after declassification of materials of other countries’ intelligence services new materials or findings that were not available during procedure due to objective circumstances in *Vasiliauskas v. Lithuania* could be presented. The example of this could be release of the records by Central Intelligence Agency (CIA) of the United States where certain reports address guerrilla forces and Soviet troops in Lithuania. See: Central Intelligence Agency, Report, Subject: 1. Guerrilla Forces in Lithuania 2. Soviet Troops in Lithuania, November 8, 1949, released November 10, 2005, no. CIA-RDP82-00457R003500230008-4, General CIA Records, accessed January 11, 2017 <https://www.cia.gov/library/readingroom/document/cia-rdp82-00457r003500230008-4>.



In addition, it is noteworthy that in both cases the European Court of Human Rights avoided the question of the status of the Baltic states under Soviet rule. In *Kononov v. Latvia* the Court stated ‘that it is not its role to pronounce on the question of the lawfulness of Latvia’s incorporation into the USSR and, in any event in the present case, it is not necessary to do so.’<sup>360</sup> In *Vasiliauskas v. Lithuania* this question was not relevant, as the establishment of genocide is not connected to a particular situation of war or peace.<sup>361</sup> However this question would be unavoidable in a case of treatment of repressions against the people of the Baltic states under Soviet rule after the Second World War as war crimes. Here the case law of Lithuania to treat deportations that followed the Second World War as war crimes could be regarded as an exclusive example.

Thus, consideration of actions toward the people of the Baltic states under Soviet rule as international crimes is not without difficulties, not only because of an insufficient legal basis but also because the passage of time affected possible prosecutions in the most of the cases as many perpetrators died before the prosecutions started or during the process.<sup>362</sup> Challenges also arose before the European Court of Human Rights, as decisions of the Court presented doubts as to the chances of treating certain repressions in the Baltic states under Soviet rule as genocide. Difficulties might also be faced in establishing the commission of war crimes because this requires identification of a state of war during the entire Soviet period in the Baltic states, and it is not clear whether a lack of declaration of a state of war before the belligerent occupation between the USSR and each respective Baltic state would amount to conclusion that there was international armed conflict in the proper legal sense for the regime of grave breaches to apply. The same is true for the establishment of crimes against humanity, as they initially also required a nexus with a state of war.

The cases related to prosecution under Allied Control Council Law No. 10 for war crimes committed in Austria and the Sudetenland after they were occupied by Nazi Germany suggest that the existence of actual conflict must be proved.<sup>363</sup> Thus, since it was established that war was not declared between the USSR and the Baltic states,<sup>364</sup> it would appear that a situation where a weaker state is incapable of resistance against an aggressive state is not enough and prosecution for war crimes and crimes against humanity is not possible. The legal evaluation of the partisan war that started in the Baltic states at the end of the Second World War as a state of war between

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<sup>360</sup> *Kononov v. Latvia* [GC], no. 36376/04, 2010-IV *Reports of Judgments and Decisions* (ECHR) 35, para. 210.

<sup>361</sup> Steven R. Ratner, Jason S. Abrams and James L. Bischoff, *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy* (New York: Oxford University Press, 2009), 82.

<sup>362</sup> Pettai and Pettai, *Transitional and Retrospective Justice in the Baltic States*, 85-86.

<sup>363</sup> Jon Heller, *The Nuremberg Military Tribunals*, 204-205.

<sup>364</sup> See 1.1.2 Soviet regime as the belligerent occupation of the Baltic states.

the USSR and each respective Baltic state becomes very important because this demonstrates existence of actual armed conflict.

Kevin Jon Heller also notes inconsistencies when it comes to the requirement of actual armed conflict with judgments of International Military Tribunal. He particularly addresses the dissenting opinion in the *Krupp* case heard before Tribunal III, established to conduct trials in accordance with Allied Control Council Law No. 10 in the American zone of occupation,<sup>365</sup> where it was correctly stated that the requirement of actual armed conflict for prosecution of war crimes is incompatible with the judgment of the International Military Tribunal, which applied the law of war in the Sudetenland. With respect to the case of Austria, there was no ‘sense to exempt an aggressor from the restrictions of the Hague Regulations simply because the state that it invaded was too militarily weak to resist’ especially taking into account the fact that the invasions of Austria and Czechoslovakia were declared to be crimes against peace in the judgment of the International Military Tribunal.<sup>366</sup> Thus, it is possible for different interpretations of the requirement of actual armed conflict in order to prosecute for war crimes, and this is particularly relevant for the Baltic states.

Moreover, the establishment that international crimes were committed is not the only way to conclude that gross violations of human rights law or serious violations of international humanitarian law were committed in the Baltic states. Under Basic Principles and Guidelines, the particular nature of the acts, and not the exact definition of the particular international crime at the relevant time, is taken into consideration, i.e. torture, cruel, inhuman or degrading treatment, etc., to find the respective violation. It is also important to stress that there is no requirement of a nexus between individual criminal responsibility and a right to remedy, as this right is effective without establishment of the former.<sup>367</sup>

Nevertheless, for the purpose of this thesis, a general description of the actions towards the people of the Baltic states under Soviet rule as international crimes is possible because of the decisions of the courts of the Baltic states. Under these decisions it is possible to conclude that international crimes such as genocide, crimes against humanity in Latvia, Estonia and Lithuania and war crimes in Lithuania were committed under Soviet rule. Although it must be admitted that the indictment of genocide was challenged, there is still a minor possibility of reversing this challenge, either in subsequent case law on the same question or under the renewal procedure in the European Court of Human Rights.

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<sup>365</sup> Heller, *The Nuremberg Military Tribunals*, 25, 38.

<sup>366</sup> Heller, *The Nuremberg Military Tribunals*, 205.

<sup>367</sup> Redress, *Implementing Victims’ Rights: A Handbook on the Basic Principles and Guidelines on the Right to a Remedy and Reparation* (London: The Redress Trust, 2006), 251-252.

Hence genocide and crimes against humanity could be regarded either as gross violations of human rights law or serious violations of international humanitarian law and war crimes as serious violations of international humanitarian law. Here the assumption could be made that both types of violations were committed in the Baltic states under Soviet rule. However, as it was already established that the Baltic states were under belligerent occupation of the USSR, the position of treating actions towards the people of the Baltic states under Soviet rule as serious violations of international humanitarian law would be more precise in cases where the same act constitutes both types of violations. Subsequently established violations against people of the Baltic states raises the question of the state's responsibility, as with the rise of human rights law the trend to remedy victims appeared.<sup>368</sup> With reference to previous findings, the question of reparation for victims of the Soviet regime should be viewed within the framework of international humanitarian law, and in case this body of law is silent, human rights law should be applicable, subject to the *lex specialis* status of international humanitarian law.

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<sup>368</sup> Roht-Arriaza, "Reparations Decisions and Dilemmas," 160.

## 2. REMEDIES FOR VICTIMS OF INTERNATIONAL CRIMES

### 2.1. STATUS OF VICTIM AS A PREMISE FOR REPARATORY MEASURES

The status of a victim in cases of gross or serious violations is very important and must be acknowledged, as this is not only the precondition to acquire the right to remedy but also reflects solidarity of society against injustice suffered.<sup>369</sup> Unfortunately, none of the previously discussed international treaties provide an explicit definition of a victim in a case where international crimes are committed, and only domestic law of the Baltic states and the Russian Federation, which will be discussed later, provide the required understanding on the notion of a victim. Therefore, the definition of a victim as provided in Basic Principles and Guidelines helps to understand who can be considered to be a victim under international law when a violation is committed:

victims are persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of international human rights law, or serious violations of international humanitarian law.<sup>370</sup>

The importance of acknowledging the status of a victim is clearly reflected in Basic Principles and Guidelines, as a person is considered to be a victim ‘regardless of whether a perpetrator is identified or whether he/she has a particular relationship with the victim.’<sup>371</sup> Moreover, ‘the immediate family or dependants of the direct victim’ and ‘persons who have suffered harm in intervening to assist victims in distress or to prevent victimization’ also might be regarded as victims. However, status as a victim for those who are not direct victims is only provided in accordance with domestic law and where appropriate.<sup>372</sup> Thus, the scope of family member’s eligibility for the status of a victim would depend on the domestic law of a particular state.

This description of victims suggests that there are two types of victims, i.e. direct and indirect, and this is established by the type of link between violations, which can be committed either through act or omission,<sup>373</sup> and harm or loss suffered.<sup>374</sup> However, some scholars observe that in some cases, such as the wilful killing or disappearance, family members of the killed or disappeared person can be regarded as both direct and indirect victims depending on

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<sup>369</sup> Bassiouni, “International Recognition of Victims’ Rights,” 257-258; Greiff, „Justice and Reparations,“ 460-461.

<sup>370</sup> UN General Assembly, Resolution 60/147, annex, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, art. 8 (December 16, 2005).

<sup>371</sup> Redress, *Implementing Victims’ Rights*, 16; Theo van Boven, “Victims’ Rights to a Remedy and Reparation,” 35.

<sup>372</sup> UN General Assembly, Resolution 60/147, annex, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, art. 8 (December 16, 2005).

<sup>373</sup> Redress, *Implementing Victims’ Rights*, 15; Theo van Boven, “Victims’ Rights to a Remedy and Reparation,” 35.

<sup>374</sup> Theo van Boven, “Victims’ Rights to a Remedy and Reparation,” 35; Zwanenburg, “Van Boven/Bassiouni Principles,” 661; Redress, *Implementing Victims’ Rights*, 16.

circumstances. A similar scenario would arise for those who intervened to assist a direct victim if the actions against them constitute gross violations of human rights law or serious violations of international humanitarian law.<sup>375</sup> Nevertheless, regardless of the type of link, all victims, i.e. direct and indirect, have the right to an effective remedy in the same.

The connection with the particular harm or loss suffered also needs to be established, and in accordance with Basic Principles and Guidelines it encompasses:

- physical injury
- mental injury
- emotional suffering
- economic loss
- substantial impairment of fundamental rights

The definition provided reflects the position that violations could result not only in material damage but also in personal harm. A variety of damages and loss suffered by victims is recognized, and any of them is enough to conclude that a person is a victim if a particular act or omission constitutes a gross violation of human rights law or serious violation of international humanitarian law and the link with the violation and harm suffered can be established.

In summary, for a person to be considered a victim under Basic Principles and Guidelines, it is the violation itself that matters in granting status as a victim. In the first part of the thesis, it was established that international crimes were committed against people of the Baltic states constituting both gross violations and serious violations under Basic Principles and Guidelines. Subsequently it could be concluded that commission of these crimes resulted in violations of such obligations under international humanitarian law and human rights law as protection of life; prohibition of torture or cruel, inhuman or degrading treatment or punishment; prohibition of compulsion to serve in the enemy forces; prohibition of criminal liability for an act which did not constitute a criminal offence at the time of its commission or being subject to a heavier penalty than one applicable at that time; prohibition of arbitrary arrest, detention or exile; obligation to conduct fair trial; obligation to respect freedom of religion and obligation to respect property. These can be clearly considered to be substantial impairments of fundamental rights because of international crimes committed and constitute a harm suffered. However, a particular victim of the Soviet regime might have suffered additional harm or loss in addition to the violation inflicted on him or her. The type of causality can be both direct and indirect but, this relation is only considered if a victim is an immediate family member or dependant of the direct victim or a person who has suffered harm in

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<sup>375</sup> Redress, *Implementing Victims' Rights*, 18-19.

intervening to assist victims in distress or to prevent victimization. A person is also considered to be a victim regardless of whether the perpetrator is identified and whether the violation is an act or omission. Taking into account these findings, it is important to address the definition of a victim in the domestic law of the Baltic states, because international law not only refers in particular cases to domestic law to establish the status of a victim (in cases of an indirect link with the violation committed) but also because it is a source of implementation of the rights prescribed to victims under international law.

After re-establishment of their independence, all Baltic states enacted special laws defining groups of victims and their status for people who suffered various impairments and harm during both Soviet and Nazi rule. These laws recognize the innocence of victims and their sufferings and provide an initial background for the implementation of further rights to remedy. Latvia was the first among the Baltic states to introduce such law, doing so in 1995.<sup>376</sup> Similar acts concerning victims were promulgated in Lithuania in 1997 and in Estonia in 2003.<sup>377</sup> However, a person is not eligible for the status of a victim if he or she committed international crimes, carried out repressions in the name of the occupying Nazi or Soviet power or collaborated with either regime.

The promulgated legal acts have not remained constant and have changed over time. In Latvia and especially in Lithuania, new definitions of persons eligible for status as a victim were included, thus broadening the scope of persons eligible for such status. Additionally, in Estonia additional rights for victims were introduced.

Under the current version of the Law on the Legal Status of the People of the Republic of Lithuania Who Fell Victims to the Occupations of 1939–1990, several large groups of victims are established:

- persons who were repressed by occupational regimes for political reasons or because of origin
- former waifs

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<sup>376</sup> Par politiski represētās personas statusa noteikšanu komunistiskajā un nacistiskajā režīmā cietušajiem [Law Concerning the Determination of Repressed Status for Persons Who Suffered under the Communist and Nazi Regimes], "Latvijas Vēstnesis", 64 (347), 26.04.1995, as last amended on March 31, 2011, <http://likumi.lv/doc.php?id=34832>. Translation of title provided in "Information by Country," Transitional Justice and Memory in the EU, *Spanish National Research Council*, accessed April 30, 2015, <http://www.proyectos.cchs.csic.es/transitionaljustice/information-by-country>.

<sup>377</sup> Lietuvos Respublikos asmenų, nukentėjusių nuo 1939-1990 metų okupacijų, teisinio statuso įstatymas [Republic of Lithuania Law on the Legal Status of the People of the Republic of Lithuania Who Fell Victims to the Occupations of 1939-1990], Valstybės žinios, 1997-07-11, Nr. 66-1609, as last amended on December 11, 2014, <https://www.e-tar.lt/portal/lt/legalAct/TAR.FA7CC8021E9D/sOSEZNALto>. Translation of title provided in "Information by Country," Transitional Justice and Memory in the EU, *Spanish National Research Council*, accessed April 30, 2015, <http://www.proyectos.cchs.csic.es/transitionaljustice/information-by-country>; Okupatsioonirežiimide poolt repressseeritud isiku seadus [Persons Repressed by Occupying Powers Act], RT I 2003, 88, 589, as last amended on June 15, 2016, <https://www.riigiteataja.ee/en/eli/ee/511012017003/consolide>.

- participants of the Afghan War from 1978–1992
- other injured persons<sup>378</sup>

Each of these groups is also divided into several categories. The group of persons who were repressed by occupational regimes for political reasons or because of origin and the group of other injured persons have the highest number of categories.

The Latvian Law Concerning the Determination of Repressed Status for Persons Who Suffered under the Communist and Nazi Regimes divides victims into two large groups based on the type of regime a person suffered from, i.e. victims of the Communist regime and victims of the Nazi regime.<sup>379</sup> These groups are also divided into different categories. Under Estonian regulation two large groups of victims are established: unlawfully repressed persons and persons treated as repressed persons. The unlawfully repressed persons group is further divided into 14 categories.<sup>380</sup>

The case of partisans, i.e. persons who fought for freedom and resisted occupation by arms, deserves separate attention, as the status of these persons in Lithuania and Latvia are governed by separate laws.<sup>381</sup> Under Article 1 paragraph 2 of Republic of Lithuania Law on Rehabilitation of Persons Repressed for Resistance to the Occupying Regime, partisans are considered volunteer soldiers of the Republic of Lithuania, and their military ranks and awards are recognized.<sup>382</sup> They are also subject to the same exception that the law does not apply to persons responsible for the commitment of international crimes. More detailed provisions concerning their status are provided in a separate law.<sup>383</sup> They are also entitled to bigger benefits compared to other persons

<sup>378</sup> Lietuvos Respublikos asmenų, nukentėjusių nuo 1939-1990 metų okupacijų, teisinio statuso įstatymas [Republic of Lithuania Law on the Legal Status of the People of the Republic of Lithuania Who Fell Victims to the Occupations of 1939-1990], art. 3, Valstybės žinios, 1997-07-11, Nr. 66-1609, as last amended on December 11, 2014, <https://www.e-tar.lt/portal/lt/legalAct/TAR.FA7CC8021E9D/sOSEZNALto>.

<sup>379</sup> Par politiski represētās personas statusa noteikšanu komunistiskajā un nacistiskajā režīmā cietušajiem [Law Concerning the Determination of Repressed Status for Persons Who Suffered under the Communist and Nazi Regimes], arts. 2 and 4, "Latvijas Vēstnesis", 64 (347), 26.04.1995, as last amended on March 31, 2011, <http://likumi.lv/doc.php?id=34832>.

<sup>380</sup> Okupatsioonirežiimide poolt represseritud isiku seadus [Persons Repressed by Occupying Powers Act], arts. 2 and 4, RT I 2003, 88, 589, as last amended on June 15, 2016, <https://www.riigiteataja.ee/en/eli/ee/511012017003/consolide>.

<sup>381</sup> Lietuvos Respublikos pasipriešinimo 1940-1990 metų okupacijoms dalyvių teisinio statuso įstatymas [Republic of Lithuania Law on the Legal Status of Participants of Resistance to the Occupations of 1939-1990], Valstybės žinios, 1997-02-07, Nr. 12-230, as last amended on November 19, 2015, [https://www.e-tar.lt/portal/lt/legalAct/TAR.BFB136428878/TAIS\\_476973](https://www.e-tar.lt/portal/lt/legalAct/TAR.BFB136428878/TAIS_476973); Par nacionālās pretošanās kustības dalībnieka statusu [Law on Status of Participant of the Resistance Movement], "Latvijas Vēstnesis", 82 (567), 10.05.1996, as last amended on October 23, 2014, <http://likumi.lv/ta/id/40103-par-nacionalas-pretosanas-kustibas-dalibnieka-statusu>.

<sup>382</sup> Lietuvos Respublikos asmenų, represuotų už pasipriešinimą okupaciniams režimams, teisių atkūrimo įstatymas [Republic of Lithuania Law on Restoration of Rights for Persons Repressed for Resistance to the Occupations], Lietuvos aidas, 1990-05-08, Nr. 1-0, as last amended on October 11, 2016, [https://www.e-tar.lt/portal/lt/legalAct/TAR.7A23697137FA/TAIS\\_331928](https://www.e-tar.lt/portal/lt/legalAct/TAR.7A23697137FA/TAIS_331928).

<sup>383</sup> Lietuvos Respublikos pasipriešinimo 1940-1990 metų okupacijoms dalyvių teisinio statuso įstatymas [Republic of Lithuania Law on the Legal Status of Participants of Resistance to the Occupations of 1939-1990], Valstybės žinios, 1997-02-07, Nr. 12-230, as last amended on November 19, 2015, [https://www.e-tar.lt/portal/lt/legalAct/TAR.BFB136428878/TAIS\\_476973](https://www.e-tar.lt/portal/lt/legalAct/TAR.BFB136428878/TAIS_476973).

having the status of a victim under the Law on the Legal Status of the People of the Republic of Lithuania Who Fell Victims to the Occupations of 1939–1990.<sup>384</sup> In Latvia persons who fought for freedom and resisted occupation by arms are treated as an additional group of victims, with the emphasis on their active resistance towards the occupying power.<sup>385</sup>

After identifying possible groups of victims, it is important to establish conditions that are required to get particular status as a victim. The definitions of victims in all of the Baltic states have certain similarities, as victims are usually defined only by the circumstances in which a particular person had appeared, e.g. sentenced to death under Article 58 of the Russian Soviet Federative Socialist Republic (RSFSR) Penal Code, sentenced to imprisonment for participating in an anti-occupation protest, deported and prohibited from residing in his/her native country, etc.<sup>386</sup> Thus, the definition of a victim is not based on the framework of the violation, harm or loss and relationship between them, but defining victims according to the circumstances in which a person appeared allows the identification of such a framework. It is possible to identify substantial impairments of such human rights as the right to life, health, bodily integrity, freedom, and freedom of expression that resulted in death, severe impairment of physical and mental health, personal insecurity and economic loss. Hence, identified types of harm generally correspond with the harm that is required to be faced by a person in order to be recognized as a victim in international law under Basic Principles and Guidelines.

However, the manner in which victims are defined in the Baltic states does not allow a precise determination of whether violations occurred as a result of gross violations of human rights law or serious violations of international humanitarian law. Lithuanian law could be regarded as reflecting the view that repressions committed against the people of Lithuania should be considered as serious violations of international humanitarian law, as people who suffered under the Soviet regime are generally defined as persons who were repressed by occupational regimes, thus giving reference to the status of Lithuania as a state under belligerent occupation that is governed by international humanitarian law. On the other hand, the Latvian and Estonian

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<sup>384</sup> For e.g. differences particularly are noticeable concerning right to state pension under Republic of Lithuania Law on State Pensions because partisans who have received status of volunteer soldiers of the Republic of Lithuania are entitled to bigger state pensions. Lietuvos Respublikos valstybinių pensijų įstatymas [Republic of Lithuania Law on State Pensions], arts. 8 and 13, Valstybės žinios, 1994-12-30, Nr. 101-2018, as last amended on June 29, 2016, [https://www.e-tar.lt/portal/lt/legalAct/TAR\\_ED38F243563C/OYaAsIMrHG](https://www.e-tar.lt/portal/lt/legalAct/TAR_ED38F243563C/OYaAsIMrHG).

<sup>385</sup> Par nacionālās pretošanās kustības dalībnieka statusu [Law on Status of Participant of the Resistance Movement], art 8., "Latvijas Vēstnesis", 82 (567), 10.05.1996, as last amended on October 23, 2014, <http://likumi.lv/ta/id/40103-par-nacionalas-pretosanas-kustibas-dalibnieka-statusu>.

<sup>386</sup> As exceptions could be provisions of Article 2, part 1, 1 point of Persons Repressed by Occupying Powers Act where a person is considered to be a victim if he or she is who is 'a victim of genocide, as defined in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide.' Okupatsioonirežiimide poolt represseritud isiku seadus [Persons Repressed by Occupying Powers Act], RT I 2003, 88, 589, as last amended on June 15, 2016, <https://www.riigiteataja.ee/en/eli/ee/511012017003/consolide>.



definitions only suggest violations of such human rights as the right to life, freedom and personal security, and these definitions are not related to the status of Latvia or Estonia under the Soviet regime.

Comparing the regulations concerning persons who are recognized as victims, it is noticeable that despite some similarities there are significant differences in the definitions of persons eligible for the status of a victim. Lithuanian regulation is very detailed compared to Latvian and Estonian regulations; the Lithuanian regulation attempts to encompass any activities that resulted in any violation of life, health, bodily integrity, freedom, freedom of expression and so on or any person harmed by such activities (e.g. family members or even sometimes close relatives), especially those of the Soviet regime. Some categories of victims are duplicated,<sup>387</sup> while others are equated in status even though the repressions against them resulted in different consequences towards their lives.<sup>388</sup> Such regulation is very complex and results in litigation with a state concerning one's status as a victim or the benefits related to the status of a victim.<sup>389</sup> The lack of legal aid in proceedings<sup>390</sup> and difficulties in proving certain circumstances also create problems.<sup>391</sup>

Concerning the type of link between a violation and harm or loss suffered, Lithuania has the broadest list of indirect victims compared to Latvia and Estonia. Under Lithuanian law, indirect

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<sup>387</sup> For e.g. on group of other repressed persons persons who lost their health due to forced labour and persons taken for the forced labour are classified under different categories, although they all have the same status of „other injured person“. Lietuvos Respublikos asmenų, nukentėjusių nuo 1939-1990 metų okupacijų, teisinio statuso įstatymas [Republic of Lithuania Law on the Legal Status of the People of the Republic of Lithuania Who Fell Victims to the Occupations of 1939-1990], art. 7, para. 1, Valstybės žinios, 1997-07-11, Nr. 66-1609, as last amended on December 11, 2014, <https://www.e-tar.lt/portal/lt/legalAct/TAR.FA7CC8021E9D/sOSEZNALto>.

<sup>388</sup> For e.g. status of political prisoners is provided for those who were punished by death penalty for their normal political activity in democratic society and those who were sentenced for non-implementation of financial obligation or obligation in-kind imposed to all inhabitants. Lietuvos Respublikos asmenų, nukentėjusių nuo 1939-1990 metų okupacijų, teisinio statuso įstatymas [Republic of Lithuania Law on the Legal Status of the People of the Republic of Lithuania Who Fell Victims to the Occupations of 1939-1990], art. 4, para. 1, Valstybės žinios, 1997-07-11, Nr. 66-1609, as last amended on December 11, 2014, <https://www.e-tar.lt/portal/lt/legalAct/TAR.FA7CC8021E9D/sOSEZNALto>.

<sup>389</sup> For e.g. Lietuvos vyriausiasis administracinis teismas [Supreme Administrative Court of Lithuania], August 20, 2013, case no. A-146-875-13; Lietuvos vyriausiasis administracinis teismas [Supreme Administrative Court of Lithuania], July 12, 2007, case no. A-556-708-07; Lietuvos vyriausiasis administracinis teismas [Supreme Administrative Court of Lithuania], March 17, 2006, case no. A-415-831-06; Lietuvos vyriausiasis administracinis teismas [Supreme Administrative Court of Lithuania], May 26, 2004, case no. A-04-527-04; Lietuvos vyriausiasis administracinis teismas [Supreme Administrative Court of Lithuania], July 11, 2001, case no. A-07-00658-01; Lietuvos vyriausiasis administracinis teismas [Supreme Administrative Court of Lithuania], March 7, case no. A-03-00288-01; Lietuvos vyriausiasis administracinis teismas [Supreme Administrative Court of Lithuania], February 13, 2001, case no. A-05-00173-01; Lietuvos vyriausiasis administracinis teismas [Supreme Administrative Court of Lithuania], January 24, 2001, case no. A-07-00066-01.

<sup>390</sup> For e.g. Lietuvos vyriausiasis administracinis teismas [Supreme Administrative Court of Lithuania], April 30, 2003, case no. A-07-420-03.

<sup>391</sup> For e.g. Lietuvos vyriausiasis administracinis teismas [Supreme Administrative Court of Lithuania], March 17, 2011, case no. A-822-936-11; Lietuvos Aukščiausiasis Teismas [LAT] [Supreme Court of Lithuania], February 12, 2007, case no. 3K-3-41/2007; Kauno apygardos teismas [Kaunas Regional Court], April 9, 2015, case no. 2A-940-343/2015; Klaipėdos apygardos teismas [Klaipėda regional Court], March 27, 2014, case no. 2A-340-538/2014.

victims—specifically children, parents and spouses—are recognized in cases of death, deportation or the serious threat of deportation, and the category of indirect victims also includes dependants and siblings in cases of forced labour.<sup>392</sup> However, under Latvian and Estonian regulation, only children who were ‘born while the parent was in forced exile or in a custodial institution or after the parent’s release until the time when the parent was granted permission and had an actual opportunity to return’ to country of origin are granted with the status of a victim.<sup>393</sup> The status of a victim is not extended to such family members as parents, spouses or dependants under Latvian or Estonian law.

Taking everything into account, the very broad corpus of victims in Lithuania might undermine the general understanding of the gravity of repressions that were inflicted under the Soviet regime. On the other hand, Estonia and Latvia provide status as a victim only to those who have suffered substantial impairments of their basic human rights or were forcibly put under severe health risks (e.g. subjected to radiation as a test subject in connection with the explosion of a nuclear device). Thus, it is possible that a person recognized as a victim in one Baltic state, especially in Lithuania, might not have the same status in the others, despite the fact that all people from the Baltic states are considered to share the same history of repression.<sup>394</sup>

As it was stated previously, the status as a victim acknowledges sufferings endured and is a prerequisite to implement the right to remedy effectively. In Latvia and Estonia rights and benefits that victims are entitled to are defined in the same legal act that defines victims. In Lithuania the regulation is cumbersome, as the status of a victim under the Law on the Legal Status of the People of the Republic of Lithuania Who Fell Victims to the Occupations of 1939–1990 does not automatically confer the right to get certain benefits, because a victim eligible for certain rights or benefits is defined separately in each law regulating those rights or benefits.<sup>395</sup> This is strange,

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<sup>392</sup> Lietuvos Respublikos asmenų, nukentėjusių nuo 1939-1990 metų okupacijų, teisinio statuso įstatymas [Republic of Lithuania Law on the Legal Status of the People of the Republic of Lithuania Who Fell Victims to the Occupations of 1939-1990], arts. 4-5<sup>1</sup>, 7-7<sup>1</sup>, Valstybės žinios, 1997-07-11, Nr. 66-1609, as last amended on December 11, 2014, <https://www.e-tar.lt/portal/lt/legalAct/TAR.FA7CC8021E9D/sOSEZNALto>.

<sup>393</sup> Okupatsioonirežiimide poolt repressseeritud isiku seadus [Persons Repressed by Occupying Powers Act], art. 2, para. 1, RT I 2003, 88, 589, as last amended on June 15, 2016, <https://www.riigiteataja.ee/en/eli/ee/511012017003/consolide>; Par politiski represētās personas statusa noteikšanu komunistiskajā un nacistiskajā režīmā cietušajiem [Law Concerning the Determination of Repressed Status for Persons Who Suffered under the Communist and Nazi Regimes], art. 2, "Latvijas Vēstnesis", 64 (347), 26.04.1995, as last amended on March 31, 2011, <http://likumi.lv/doc.php?id=34832>.

<sup>394</sup> See 1.3.2 Prosecution of acts committed against the people of the Baltic states under the Soviet regime

<sup>395</sup> Lietuvos Respublikos valstybinių pensijų įstatymas [Republic of Lithuania Law on State Pensions], Valstybės žinios, 1994-12-30, Nr. 101-2018, as last amended on June 29, 2016, <https://www.e-tar.lt/portal/lt/legalAct/TAR.ED38F243563C/OYaAsIMrHG>; Lietuvos Respublikos transporto lengvatų įstatymas [Republic of Lithuania Law on transport privileges], Valstybės žinios, 2000-04-19, Nr. 32-890, as last amended on December 18, 2014, <https://www.e-tar.lt/portal/lt/legalAct/TAR.033D686E8F1B/AymdIHUtoP>; Lietuvos Respublikos sveikatos draudimo įstatymas [Republic of Lithuania Law on Health Insurance], Valstybės žinios, 1996-06-12, Nr. 55-1287, as last amended on December 15, 2015, <https://www.e-tar.lt/portal/lt/legalAct/TAR.94F6B680E8B8/aOxXEpxPWE>.

as Article 9 section 1 of this law states that persons having the status of a victim are entitled to rights and benefits prescribed by law.<sup>396</sup> Case law of the Supreme Administrative Court of Lithuania seems to confirm such a distinction,<sup>397</sup> although in some cases the Court interpreted the definition of a victim eligible for certain rights under a particular law in a very wide sense.<sup>398</sup> Such regulation undermines the whole idea of acknowledging the sufferings of victims, discriminates victims and leaves the acquisition of the status of a victim meaningless in certain cases.

In summary all Baltic states recognize the status of a victim for those persons who suffered during the Soviet regime because of a substantial impairment of their basic human rights, i.e. the right to life, freedom and personal safety, as well as physical or mental injury because of gross human rights violations or serious violations of international humanitarian law. This aligns with the definition of a victim in Basic Principles and Guidelines because the status of a victim is provided regardless of whether the perpetrator is identified and whether a certain act or omission is considered to be an international crime.

Under the laws of Lithuania, persons who suffered only from the particularity of the Soviet regime, e.g. participation in the building of Slavutych city<sup>399</sup> or transfer from one part to another within the country,<sup>400</sup> are also recognized as victims, but such cases are not in accordance with the notion of a victim as established under Basic Principles and Guidelines. Therefore, for the purposes of this thesis, persons who suffered only from the particularity of the Soviet regime will

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<sup>396</sup> Lietuvos Respublikos asmenų, nukentėjusių nuo 1939-1990 metų okupacijų, teisinio statuso įstatymas [Republic of Lithuania Law on the Legal Status of the People of the Republic of Lithuania Who Fell Victims to the Occupations of 1939-1990], art. 9, para. 1, Valstybės žinios, 1997-07-11, Nr. 66-1609, as last amended on December 11, 2014, <https://www.e-tar.lt/portal/lt/legalAct/TAR.FA7CC8021E9D/sOSEZNALto>.

<sup>397</sup> In the case No. A<sup>4</sup>-527-2004 the victim was not entitled to state pension under Republic of Lithuania Law on State Pensions although her status as a victim was recognized under Law on the Legal Status of the People of the Republic of Lithuania Who Fell Victims to the Occupations of 1939-1990. It was declared that Law on the Legal Status of the People of the Republic of Lithuania Who Fell Victims to the Occupations of 1939-1990 is not directly applicable in connection with Law on State Pensions eligible groups for state pension are defined separately by this law. Lietuvos vyriausiasis administracinis teismas [Supreme Administrative Court of Lithuania], May 26, 2004, case no. A-04-527-04.

<sup>398</sup> In the case No. A<sup>146</sup>-875/2013 the victim was entitled to state pension under Law on State Pensions for participation in building of Slavutych city although under this law there was no direct provision granting state pension in such case. The court actually expanded meaning of elimination of the consequences of the accident at the Chernobyl Nuclear Power Plant as granting right to state pension under Law on State Pensions because it considered that building of Slavutych city was related with the elimination of the consequences of the accident at the Chernobyl Nuclear Power Plant. It is noteworthy that the court based its reasoning not on the status of the person as the victim of Soviet regime but on the duty of state to take care of those people who are with disabilities. See: Lietuvos vyriausiasis administracinis teismas [Supreme Administrative Court of Lithuania], August 20, 2013, case no. A-146-875-13. Slavutych is a city situated 50 km from Chernobyl, built for the evacuated personnel of the Chernobyl Nuclear Power Plant after the 1986 disaster. Mare Tekkel *et al.*, "The Estonian Study of Chernobyl Cleanup Workers: I. Design and Questionnaire Data," *Radiation Research* 147, no. 5 (May, 1997): 643, <https://www.jstor.org/stable/3579631>.

<sup>399</sup> Lietuvos Respublikos asmenų, nukentėjusių nuo 1939-1990 metų okupacijų, teisinio statuso įstatymas [Republic of Lithuania Law on the Legal Status of the People of the Republic of Lithuania Who Fell Victims to the Occupations of 1939-1990], art. 7, para. 1 (8), Valstybės žinios, 1997-07-11, Nr. 66-1609, as last amended on December 11, 2014, <https://www.e-tar.lt/portal/lt/legalAct/TAR.FA7CC8021E9D/sOSEZNALto>.

<sup>400</sup> Ibid., art. 5, para. 1 (2), art. 7, para. 1 (8).

not be considered as victims. The position of Latvia and Estonia to treat as victims only those who suffered substantial impairments of their basic rights or faced serious physical or mental injuries is more preferable, as it also allows one to perceive the gravity of repressions committed not only as a result of the illegality of the USSR's actions against the Baltic states but also as a result of violations of international humanitarian law and human rights law. This emphasizes the importance of protecting human rights and does not diminish the sufferings of those who faced the most serious repressions.

After that the definition of a victim under domestic law of the Baltic states aligns with international law as provided in Basic Principles and Guidelines, it is important to address the scope of remedies that are available for victims of the Soviet regime. The concept of remedies needs to be discussed, as victims of serious violations of international humanitarian law and gross violations of international human rights law are natural persons who traditionally were not perceived as subjects of international humanitarian law as well as international law.

## **2.2. CONCEPT OF REMEDIES**

Taking into account previous findings on the commission of serious violations of international humanitarian law and gross violations of human rights law when the Baltic states were under belligerent occupation, it is important to address whether the right to a remedy is established in international humanitarian law, how is it regulated and the scope of the right to a remedy under international humanitarian law and human rights law. In the Preamble of Basic Principles and Guidelines it is stated that:

the provisions providing a right to a remedy for victims of violations of international human rights law found in numerous international instruments, in particular article 8 of the Universal Declaration of Human Rights, article 2 of the International Covenant on Civil and Political Rights, article 6 of the International Convention on the Elimination of All Forms of Racial Discrimination, article 14 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and article 39 of the Convention on the Rights of the Child, and of international humanitarian law as found in article 3 of the Hague Convention respecting the Laws and Customs of War on Land of 18 October 1907 (Convention IV), article 91 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) of 8 June 1977, and articles 68 and 75 of the Rome Statute of the International Criminal Court<sup>401</sup>

It could be concluded that the right to a remedy is established under both regimes of international law. However, there is no doubt that the right to a remedy is understood differently in each of these previously mentioned documents. Ruti G. Teitel notes that '[t]he vocabulary of

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<sup>401</sup> UN General Assembly, Resolution 60/147, annex, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, pmb. (December 16, 2005).

“reparatory justice” illustrates its multiple dimensions, comprehending numerous diverse forms: reparations, damages, remedies, redress, restitution, compensation, rehabilitation, tribute’.<sup>402</sup> Dinah Shelton also draws attention to the fact that in defining redress of victims various terms are employed that also ‘may be interpreted differently by international bodies, national judges, and authors’.<sup>403</sup> As a result ‘there is a lack of commonly-shared understanding ... as to the role and rights of victims.’<sup>404</sup>

However, authors who engaged in thorough analysis of the content of an individual’s right to a remedy under most of the previously mentioned documents were able to characterize common features of this right.<sup>405</sup> Works of Theo Van Boven and M. Cherif Bassiouni evolved into Basic Principles and Guidelines<sup>406</sup> as a document ‘structuring existing obligations for states’<sup>407</sup> and demonstrating that the right to an effective remedy has broad recognition in international law.

It is suggested under Basic Principles and Guidelines that the definition of remedy should be understood to encompass procedural and substantive aspects, where the process of solving issues concerning remedies is a procedural aspect and substantive aspects relate to particular possible forms of redress.<sup>408</sup> In Basic principles and Guidelines, this is addressed by stating that right to a remedy consists of all of the following:

- access to justice
- reparations
- access to relevant information concerning violations and reparation mechanisms

Access to justice stands as a procedural part of a remedy, while actual reparations constitute a substantive one.<sup>409</sup> Access to relevant information concerning violations and reparation mechanisms serves as a primary tool in implementing the right to a remedy. Without access to relevant information concerning reparation mechanisms, it is impossible to establish such a right without knowing about its existence, scope and possible means of implementation. Access to

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<sup>402</sup> Teitel, *Transitional Justice*, 119.

<sup>403</sup> Shelton, *Remedies in International Human Rights Law*, 7; Antoine Buyse, “Lost and Regained? Restitution as a Remedy for Human Rights Violations in the Context of International Law,” *Heidelberg Journal of International Law (Zeitschrift für ausländisches öffentliches Recht und Völkerrecht)* 68 (2008): 129 – 153, <http://dspace.library.uu.nl/handle/1874/32809>.

<sup>404</sup> Bassiouni, “International Recognition of Victims’ Rights,” 204.

<sup>405</sup> Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, Review of further developments in fields with which the Sub-Commission has been concerned, Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms, final report submitted by Mr. Theo van Boven, Special Rapporteur, para. 13, U.N. Doc. E/CN.4/Sub.2/1993/8 (July 2, 1993); Bassiouni, “International Recognition of Victims’ Rights,” 203-27, Shelton, *Remedies in International Human Rights Law*.

<sup>406</sup> Shelton, *Remedies in International Human Rights Law*, 143-152. Buyse, “Lost and Regained?” 138-143; Zwanenburg, “Van Boven/Bassiouni Principles,” 641-668.

<sup>407</sup> Buyse, “Lost and Regained?” 142.

<sup>408</sup> Shelton, *Remedies in International Human Rights Law*, 7-8, 114; Redress, *Implementing Victims’ Rights*, 8.

<sup>409</sup> Buyse, “Lost and Regained?” 129 – 153.

relevant information concerning violations serves as a means of implementing a victim's right to truth<sup>410</sup> and evidence concerning human rights violations inflicted on them. Taking everything into account, it is readily apparent that the right to a remedy encompasses all procedures and elements relevant to actually obtaining a remedy and creates preconditions for the effectiveness of remedies.

In this thesis the substantive part of a remedy, i.e. reparations, will be analysed to establish an applicable model of reparations for the Baltic states, because knowledge of the scope of reparations a victim is entitled to further enables selection of the appropriate legal means for its implementation. Furthermore, clearly establishing the elements constituting the substantive part of remedies will enable discernment between issues of international humanitarian law and human rights law, as it is possible to apply both regimes for reparations for the victims of the Soviet regime in the Baltic states.

### **2.3. REPARATION AS A SUBSTANTIVE PART OF A REMEDY**

Reparation as part of a remedy receives wide attention in legal academic writings. It has a definition with multiple meanings, not only because its meaning has changed over times but because the definition itself carries various forms of redress in it. It is true that the initial concept of reparations has changed dramatically from the time when the concept emerged in international law. Richard Falk identifies three different circumstances when the term 'reparation' is used, including the initial meaning of payments made by a defeated state to a winner state:

the first ... involves disputes between states, and increasingly other actors, in which the complaining party seeks relief from alleged wrongs attributed to the defending party; the second involves war/peace settings in which the victorious side imposes obligations on the losing side, 'victors' justice, ...; the third, achieving attention recently, involves transitions to democracy settings in which the prior governing authority is held accountable for alleged wrongs, and again reflect political outcomes of sustained struggle, but not international war.  
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Reparations under the first two previously mentioned circumstances identified by R. Falk were perceived purely as compensation.<sup>412</sup> In addition Richard Falk notes that existing relations under the first two circumstances are governed entirely by international norms, procedures and institutions. Therefore, the main subjects in this legal relation were states. The third set of circumstances is understood 'as a matter of domestic discretion, although influenced by wider

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<sup>410</sup> Office of the United Nations High Commissioner for Human Rights, *Promotion and Protection of Human Rights: Study on the right to the truth*, paras. 4-32, U.N. Doc. E/CN.4/2006/91 (February 8, 2006).

<sup>411</sup> Richard Falk "Reparations, International Law, and Global Justice: a New Frontier," in *The Handbook of Reparations*, ed. Pablo de Greiff (New York: Oxford University Press, 2006), 480.

<sup>412</sup> *Ibid.*, 483.

trends of national practice in comparable instances, and by wider global trends toward individual accountability for crimes against humanity'.<sup>413</sup>

R. Teitel also notes that traditionally reparations defined the situation after war when 'the norm was for defeated nations to pay reparations to the other parties [nations]'.<sup>414</sup> However, after the creation of the United Nations and adoption of the Charter of the United Nations, war is no longer recognized as a possible means to solve international disputes, and this also inspired changes to the concept of reparations. According to Ruti G. Teitel, the post-Second World War payments forever changed the concept of reparations.<sup>415</sup> The use of reparations as a form of remedy for violations of international human rights and humanitarian law is firmly established in legal academic writings.<sup>416</sup> It is also understood that reparation consists of several different forms and not only compensation.

As set forth in Basic Principles and Guidelines, reparation encompasses such forms as:

- restitution
- compensation
- rehabilitation
- satisfaction
- guarantees of non-repetition<sup>417</sup>

However, Basic Principles and Guidelines does not have binding force. Nor does it fully take into account the changes in the concept of reparations over time, as the document only summarizes particular legal obligations existing under international law—either in case of gross violations of human rights law or serious violations of international humanitarian law irrespective of the date of their adoption. Therefore, the situation of prolonged occupation in the Baltic states requires comparing particular international obligations under international treaties and customary international law and their evolution with the concept of reparation as established by Basic Principles and Guidelines to identify whether application is possible.

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<sup>413</sup> Ibid., 480.

<sup>414</sup> Teitel, *Transitional Justice*, 123.

<sup>415</sup> Ibid.

<sup>416</sup> For e. g. Gentian Zyberi, "The International Court of Justice and Applied Forms of Reparation for International Human Rights and Humanitarian Law Violations," *Utrecht Law Review* 7, no. 1 (January 2011): 204-215, [https://heinonline-org.ezproxy.vdu.lt:2443/HOL/Page?handle=hein.journals/utrecht7&div=14&start\\_page=204&collection=journals&set\\_as\\_cursor=0&men\\_tab=srchresults#](https://heinonline-org.ezproxy.vdu.lt:2443/HOL/Page?handle=hein.journals/utrecht7&div=14&start_page=204&collection=journals&set_as_cursor=0&men_tab=srchresults#); Roht-Arriaza, "Reparations Decisions and Dilemmas," 157-220; Greiff, ed., *Handbook of Reparations*; Christine Evans, *The Right to Reparation in International Law for Victims of Armed Conflict* (New York: Cambridge University Press, 2012).

<sup>417</sup> UN General Assembly, Resolution 60/147, annex, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, art. 18 (December 16, 2005).

The Hague Regulations and Geneva Conventions that are referenced in the preamble of Basic Principles and Guidelines are considered to be the main legal framework governing the current law of occupation. According to Lauri Mälksoo, since its creation the USSR declared the non-applicability of international treaties that had been signed by Tsarist Russia, and the Hague Regulations were one of these treaties. Nevertheless, ‘as the Hague Regulations had - according to the dictum of the Nuremberg trial - acquired the status of customary international law, the USSR was materially bound to its prescriptions since the very beginning of World War II’.<sup>418</sup> The Geneva Conventions became binding on the USSR in 1954, as ‘the USSR was one of the original signatory States of the 1949 Geneva Conventions.’<sup>419</sup>

The obligation to provide a remedy for the violations of international humanitarian law was established in Article 3 of the Hague Convention (IV) respecting the Laws and Customs of War on Land and reads as follows:

A belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.<sup>420</sup>

John H. E. Fried in 1946 noted that this article, proposed by Germany, ‘was a significant step forward... by expressly stipulating that a state whose armed forces violate the Hague Regulations must give indemnification’.<sup>421</sup> On the other hand, in the opinion of Emanuela-Chiara Gillard the obligation to make reparation is a general principle of international law and ‘arises automatically as a consequence of the unlawful act, without the need for the obligation to be spelled out in conventions’.<sup>422</sup>

Introduction of the Geneva Conventions has not altered this provision, as they were silent on the responsibility of a party to the Geneva Convention for their breach. This is not surprising, as the Geneva Convention are complementary to the existing Hague Regulations that had already become customary international law. Only with the completion of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) in 8 June 1977 was the provision concerning responsibility of a party that violates the provisions of the Geneva Conventions or Protocol I introduced. According to the

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<sup>418</sup> Mälksoo, *Illegal Annexation and State Continuity*, 186-187. See also Meron, “Humanization of Humanitarian Law,” 248.

<sup>419</sup> Mälksoo, *Illegal Annexation and State Continuity*, 189.

<sup>420</sup> Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, art. 3, October 18, 1907, *Treaties, States Parties and Commentaries Database of the International Committee of the Red Cross*, <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?documentId=4D47F92DF3966A7EC12563CD002D6788&action=openDocument>.

<sup>421</sup> John H. E. Fried, “Transfer of Civilian Manpower from Occupied Territory,” *The American Journal of International Law* 40, no. 2 (April, 1946): 306-307, <http://www.jstor.org/stable/2193193>.

<sup>422</sup> Gillard, „Reparation for violations of international humanitarian law,“ 530-531, 532.



Commentary on the Additional Protocols of 8 June 1977, ‘Article 91 [of Protocol I] literally reproduces Article 3 of the Hague Convention Concerning the Laws and Customs of War on Land of 1907, and does not abrogate it in any way, which means that it continues to be customary law for all nations.’<sup>423</sup> Thus, the obligation to provide certain remedies for violations of international humanitarian law is clearly established.

Meanwhile, Article 8 of the Universal Declaration of Human Rights that was adopted in 1948 stated that ‘[e]veryone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.’ In this document no particular form of remedy is established, thus allowing its construction within a particular situation. However, it is widely known that the Universal Declaration of Human Rights was not adopted as an international treaty imposing obligations on states but as a basis for further codification of human rights.<sup>424</sup> The declaration has served this function perfectly, as its provisions appeared in human rights instruments at both the international and regional level<sup>425</sup> and ‘served ... as a model for many domestic constitutions, laws, regulations, and policies that protect fundamental human rights.’<sup>426</sup>

Most authors agree that the obligation of a state to provide an individual with the right to a remedy is established in Article 2(3)(a) of the ICCPR at the international level and under regional human rights systems, e.g. Inter-American Convention on Human Rights, European Convention of Human Rights, African Charter on Human and Peoples’ Rights.<sup>427</sup> The earliest of these documents is the European Convention of Human Rights, which entered into force in 1950.<sup>428</sup> As the USSR was not a party to this treaty, it did not expressly agree to be legally bound to provide a remedy for human rights violations until after it ratified the ICCPR.<sup>429</sup> Thus, it is necessary to

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<sup>423</sup> Yves Sandoz, Christophe Swinarski and Bruno Zimmermann, eds., *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Geneva: International Committee of the Red Cross and Martinus Nijhoff Publishers, 1987), <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=1066AF25ED669409C12563CD00438071>, 1053.

<sup>424</sup> Kerikmäe, Hamulak and Chochia, „Historical Study,“ 108; Hurst Hannum, "The Status of the Universal Declaration of Human Rights in National and International Law," *Georgia Journal of International and Comparative Law* 25, no. Issues 1 & 2 (1995/1996): 289, [https://heinonline-org.ezproxy.vdu.lt:2443/HOL/Page?handle=hein.journals/gjicl25&div=17&start\\_page=287&collection=journals&set\\_as\\_cursor=0&men\\_tab=srchresults#](https://heinonline-org.ezproxy.vdu.lt:2443/HOL/Page?handle=hein.journals/gjicl25&div=17&start_page=287&collection=journals&set_as_cursor=0&men_tab=srchresults#).

<sup>425</sup> <sup>425</sup> Kerikmäe, Hamulak and Chochia, „Historical Study,“ 108.

<sup>426</sup> Hannum, "Status of the Universal Declaration of Human Rights," 289.

<sup>427</sup> Zwanenburg, "Van Boven/Bassiouni Principles," 653; Buyse, "Lost and Regained?" 136-138; 143-148; Bassiouni, "International Recognition of Victims’ Rights," 214; Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, Review of further developments in fields with which the Sub-Commission has been concerned, Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms, final report submitted by Mr. Theo van Boven, Special Rapporteur, paras. 26-32, U.N. Doc. E/CN.4/Sub.2/1993/8 (July 2, 1993); Shelton, *Remedies in International Human Rights Law*, 114-116, 122-130, 137-143.

<sup>428</sup> See footnote 223.

<sup>429</sup> See footnote 230.

determine whether Article 8 of the Universal Declaration of Human Rights could be considered as customary international law creating an obligation on a state to provide remedy in cases of violation of human rights as early as on the date of its adoption.

According to Hurst Hannum, Article 8 of the Universal Declaration of Human Rights 'is not generally included in lists of customary human rights and has not been the subject of significant domestic jurisprudence' despite of its importance in ensuring protection of other human rights enumerated in the declaration.<sup>430</sup> In contrast, Christopher C. Joyner states that Article 8 is a guarantee that 'no person is above the law', as '[e]very person should have recourse to protection under the law ... and to justice in seeking juridical remedies under the law.'<sup>431</sup> This suggests that although it is hard to establish an indisputably customary nature of state obligation to provide a remedy for violations of human rights, this obligation might be treated as a general principle of international law.

General principles of international law could be defined as the most indefinite doctrine of international law. According to Hugh Thirlway, these principles were intended for the situation in the international law known as a *non liquet*, but there is no agreement on the substance of these principles.<sup>432</sup> One theory suggests that these principles 'are those which can be derived from a comparison of the various systems of municipal law, and the extraction of such principles as appear to be shared by all, or a majority, of them'<sup>433</sup>, while others define these principles as principles 'applicable directly to international legal relations', such as 'the special prevails over the general,' etc.<sup>434</sup> Taking the view of general principles as principles shared by the majority of states under municipal law and the principle of *restitutio in integrum*, having its foundation in both civil and common law countries, it should be agreed that the general principles of law mentioned in Article 38(l)(c) of the Statute of the International Court of Justice should '[receive] greater attention as a method for obtaining greater legal recognition for the principles of the Universal Declaration and other human rights instruments.'<sup>435</sup> The latter position would support the conclusion that provision of an effective remedy in case of human rights violations, especially

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<sup>430</sup> Hannum, "Status of the Universal Declaration of Human Rights," 345.

<sup>431</sup> Christopher C. Joyner, "Redressing Impunity for Human Rights Violations: The Universal Declaration and the Search for Accountability," *Denver Journal of International Law and Policy* 26, no. 4 (Summer 1998): 592, [https://heinonline-org.ezproxy.vdu.lt:2443/HOL/Page?handle=hein.journals/denilp26&div=29&start\\_page=591&collection=journals&set\\_as\\_cursor=0&men\\_tab=srchresults#](https://heinonline-org.ezproxy.vdu.lt:2443/HOL/Page?handle=hein.journals/denilp26&div=29&start_page=591&collection=journals&set_as_cursor=0&men_tab=srchresults#).

<sup>432</sup> Thirlway, „Sources of International Law,“ 130-131.

<sup>433</sup> Ibid., 131.

<sup>434</sup> Ibid., 131-132.

<sup>435</sup> Theodor Meron, *Human Rights and Humanitarian Norms As Customary Law* (Oxford: Clarendon Press, 1989), 88, cited in Hannum, "Status of the Universal Declaration of Human Rights," 351.

grave ones, is a general principle of law recognized by civilized nations and thus binding on any state.

In summary, it is impossible to state unambiguously that the obligation to provide an effective remedy in the case of human rights violations was already apparent, either as a custom or general principle of international law, at the moment of belligerent occupation of the Baltic states. However, this ambiguity does not definitively preclude that such an obligation did exist. Additionally, it is indisputable that the legally binding obligation to provide remedies in cases of human rights violations, stemming from the ICCPR was binding on the USSR since the ICCPR's entrance into force.

Taking everything into account, remedial obligations in cases of violation of particular norms have stronger support under international humanitarian law than under human rights law. However, the scope of reparatory measures is not clear. Under Basic Principles and Guidelines, it is suggested that reparatory measures do not differ if a case is one of gross violations of human rights law or serious violations of international humanitarian law. The wording of the Hague Regulations suggests that only compensation should be provided, but a broader definition of remedy is used in the Universal Declaration of Human Rights. Therefore, there is a need to discuss each form of reparations under Basic Principles and Guidelines in detail in order to find out their origins and establishment under both international humanitarian law and human rights law.

### **2.3.1. Restitution**

As it was mentioned previously, the text of Article 3 of the Hague Regulations does not mention restitution as a form of reparation for its violations. However, compensation under Article 3 of the Hague Convention (IV) respecting the Laws and Customs of War on Land does not mean only monetary payment but has a broader sense of reparation.<sup>436</sup> This is partly because reparation in the Hague Regulations had a meaning related to obligations imposed on the losing side by a victor after war. Additionally, compensation was intended to cure particular wrongs or violations that resulted in loss or damage. Therefore it is a sanction for a violation.<sup>437</sup>

Taking this into account, the meaning of Article 3 of the Hague Regulations should be construed in conformity with the principle discussed in the Chorzow Factory case by the Permanent Court of International Justice in 1928, a landmark case setting the criteria for

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<sup>436</sup> Riccardo Pisillo Mazzeschi, "Reparation Claims by Individuals for State Breaches of Humanitarian Law and Human Rights: An Overview," *Journal of International Criminal Justice* 1, no. 2 (August 2003): 341, [https://heinonline-org.ezproxy.vdu.lt:2443/HOL/Page?handle=hein.journals/jicj1&div=27&start\\_page=339&collection=journals&set\\_as\\_cursor=0&men\\_tab=srchresults#](https://heinonline-org.ezproxy.vdu.lt:2443/HOL/Page?handle=hein.journals/jicj1&div=27&start_page=339&collection=journals&set_as_cursor=0&men_tab=srchresults#).

<sup>437</sup> Sandoz, Swinarski and Zimmermann, eds., *Commentary on the Additional Protocols*, 1053-1056; Buxbaum, "Legal History of International Reparations," 322.

reparation.<sup>438</sup> Additionally, provisions of the Treaty of Versailles cannot be overlooked, because not only was restoration of requisitioned or confiscated private property regulated in this peace treaty<sup>439</sup> but Article 238 provided for restitution of cash, animals, objects of every nature and securities taken away, seized or sequestered as a measure of reparation next to compensation.<sup>440</sup> Therefore, compensation will be due only if restitution, either in kind or the restoration of the situation existing before the violation, is not possible. Nevertheless, it must be admitted that if damage results from an armed conflict full restitution is usually almost impossible.<sup>441</sup> It may be reasonable to assume that this is why reparations are discussed only in terms of compensation in the Hague Regulations. To sum up, restitution also could be treated as constituting reparation under Article 3 of the Hague Convention (IV) respecting the Laws and Customs of War on Land.

It is important to note that at the end of the Second World War countries that faced German occupation ‘enacted legislation ... providing a domestic-law basis for the restitution of, or compensation for, loss of property’ and ‘some compensation ... for loss of life or liberty and damage to health and other personal elements.’<sup>442</sup> Property whose loss was the result of violations of international humanitarian law was taken into account in particular,<sup>443</sup> and this contributes to the understanding of restitution as a measure of reparation intended to repair illegal acts. Although it was expected that domestic initiatives would be funded by further reparations from Germany and other Axis countries, these expectations were lost after the Paris Reparation Conference, when it became clear that only loss of state property would be taken into account, leaving aside the most individual claims.<sup>444</sup> Nevertheless, this does not undermine the importance of restitution, because the issue of reparation from Germany after the Second World War was sought to be solved in a manner that would avoid complete destruction of Germany, which was what occurred after the First World War with huge reparations imposed on Germany.<sup>445</sup> Moreover, some of the questions of restitution that were left aside in the Paris Reparation Conference were solved later by

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<sup>438</sup> Shelton, *Remedies in International Human Rights Law*, 70, 85; Buyse, “Lost and Regained?” 130.

<sup>439</sup> Wladyslaw Czaplinski, “The Concept of War Reparations in International Law and Reparations after World War II,” *Polish Quarterly of International Affairs* 14, no. 1 (2005): 71-72, [https://heinonline-org.ezproxy.vdu.lt:2443/HOL/Page?handle=hein.journals/polquint14&div=6&start\\_page=69&collection=journals&set\\_as\\_cursor=19&men\\_tab=srchresults#](https://heinonline-org.ezproxy.vdu.lt:2443/HOL/Page?handle=hein.journals/polquint14&div=6&start_page=69&collection=journals&set_as_cursor=19&men_tab=srchresults#).

<sup>440</sup> Peace with Germany (Treaty of Versailles), Section I Part VIII, June 28, 1919, *Treaties and Other International Agreements of the United States of America 1776-1949* (Bevans) 2 (1968): 43-240, <https://heinonline-org.ezproxy.vdu.lt:2443/HOL/Page?collection=ustreaties&handle=hein.ustreaties/ustbv002&id=52#>.

<sup>441</sup> Sandoz, Swinarski and Zimmermann, eds., *Commentary on the Additional Protocols*, 1053-1056.

<sup>442</sup> Buxbaum, “Legal History of International Reparations,” 328-329.

<sup>443</sup> Nehemiah Robinson, “War Damage Compensation and Restitution in Foreign Countries,” *Law and Contemporary Problems* 16, no. 3 (Summer 1951): 355-376, [https://heinonline-org.ezproxy.vdu.lt:2443/HOL/Page?handle=hein.journals/lcp16&div=24&start\\_page=347&collection=journals&set\\_as\\_cursor=0&men\\_tab=srchresults](https://heinonline-org.ezproxy.vdu.lt:2443/HOL/Page?handle=hein.journals/lcp16&div=24&start_page=347&collection=journals&set_as_cursor=0&men_tab=srchresults).

<sup>444</sup> Buxbaum, “Legal History of International Reparations,” 329, 333, 343-345.

<sup>445</sup> *Ibid.*, 321-324, 343-345.

conclusions of bilateral agreements with Germany and other concerned states.<sup>446</sup> This clearly reflects that the duty to provide restitution in a case of destruction of property is deeply established in international law.

As it was stated previously, the obligation to provide reparation for violations of international humanitarian law was contained only in Protocol I. Although the provision to provide compensation remained, the provision common to all four Geneva Conventions, that ‘[n]o High Contracting Party shall be allowed to absolve itself or any other High Contracting Party of any liability incurred by itself or by another High Contracting Party in respect of [grave breaches]’<sup>447</sup> might suggest that the principle already established in Article 3 of the Hague Regulations to provide remedies of broader scope than compensation remained unchanged subject also to provisions of general international law naming restitution as a primary form of reparation in case of violated international obligations.<sup>448</sup>

Restitution under Basic Principles and Guidelines does not have primary status as compared to other reparatory measures,<sup>449</sup> and some authors do not agree with this position, stating that it is strongly established under international public law that compensation is provided only when and where restitution is not possible.<sup>450</sup> Dinah Shelton suggests that restitution should be defined as a mandatory form of reparation in addition to other possible forms. However, Marten Zwanenburg notes that treatment of all forms of reparations with equal importance ‘reflects the victim-oriented perspective of [Basic Principles and Guidelines].’<sup>451</sup>

In judging these positions one must draw attention to the fact that each case concerning massive violations of basic human rights has its distinct features, and restitution therefore might not be possible. Moreover, the Chorzow Factory case was decided to solve interstate disputes and did not address a situation between an individual and a state in a case of human rights or humanitarian law violations. Several authors particularly stress the need to adopt reparations in a

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<sup>446</sup> Buxbaum, “Legal History of International Reparations,” 329; Richard M. Buxbaum, “From Paris to London: The Legal History of European Reparation Claims: 1946-1953,” *Berkeley Journal of International Law* 31, no. 2 (2013): 334, <http://scholarship.law.berkeley.edu/bjil/vol31/iss2/1>.

<sup>447</sup> Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, art. 51; Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, art. 52; Convention (III) relative to the Treatment of Prisoners of War, art. 131; Convention (IV) relative to the Protection of Civilian Persons in Time of War, art. 148.

<sup>448</sup> Sandoz, Swinarski and Zimmermann, eds., *Commentary on the Additional Protocols*, 1053-1056.

<sup>449</sup> Zwanenburg, “Van Boven/Bassiouni Principles,” 666; Rhodri C. Williams, *The Contemporary Right to Property Restitution in the Context of Transitional Justice* (International Center for Transitional Justice, 2007), accessed December 3, 2016, <https://www.ictj.org/publication/contemporary-right-property-restitution-context-transitional-justice>, 4; Redress, *Implementing Victims’ Rights*, 33.

<sup>450</sup> Shelton, *Remedies in International Human Rights Law*, 150; Zyberi, “International Court of Justice and Applied Forms of Reparation,” 206.

<sup>451</sup> Zwanenburg, “Van Boven/Bassiouni Principles,” 666.

way that keeps in mind the nature of the repressions,<sup>452</sup> their impact on a particular victim and the whole society,<sup>453</sup> the needs of victims<sup>454</sup> and the culture of the victimized society.<sup>455</sup> It could be assumed that by not separating restitution as a distinctive form of reparation, Basic Principles and Guidelines leaves room for interpretation, while applying reparation to the particular context where the issue of remedies is solved. Nevertheless, the international law governing restitution should not be overlooked, and restitution should be applied as much as possible.

According to Basic Principles and Guidelines ‘[r]estitution should, whenever possible, restore the victim to the original situation before the gross violations of international human rights law or serious violations of international humanitarian law occurred.’ Additionally, a representative list of areas of application is given, and this includes restoration of liberty; enjoyment of human rights, identity, family life and citizenship; return to one’s place of residence; restoration of employment and return of property. According to Rhodri C. Williams, Basic Principles and Guidelines defines restitution so broadly that the concept departs from its traditional function to remedy a deprivation of assets. Nevertheless, this is explained by the complexity of human rights and humanitarian law violations threatening ‘life, liberty, human dignity, and mental or physical integrity’ that ‘impinge on both tangible and intangible values.’<sup>456</sup> Thus greater attention will be given to the explanation of the meaning of restitution of intangible values.

Early attempts to restore enjoyment of human rights and citizenship can be traced back to remedial measures implemented to face the consequences of the Holocaust,<sup>457</sup> although the return of property taken by the Nazis was the primary issue of restitution.<sup>458</sup> These values could be defined as fundamental ones because human rights guarantee the very essence of human dignity and citizenship is the basis of rights and duties that bind an individual and the state. Thus, it is of

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<sup>452</sup> Shelton, *Remedies in International Human Rights Law*, 119; Pettai, *Transitional and Retrospective Justice in the Baltic States*, 8-9.

<sup>453</sup> Lykes and Mersky „Reparations and Mental Health,” 600, 608-609.

<sup>454</sup> Shelton, *Remedies in International Human Rights Law*, 119; Greiff, „Justice and Reparations,” 466.

<sup>455</sup> Greiff, „Justice and Reparations,” 466; Lykes and Mersky „Reparations and Mental Health,” 603.

<sup>456</sup> Williams, *The Contemporary Right to Property Restitution*, 4-5.

<sup>457</sup> David Fraser and Frank Caestecker, "Jews or Germans: Nationality Legislation and the Restoration of Liberal Democracy in Western Europe after the Holocaust," *Law and History Review* 31, no. 2 (May 2013): 400, 402-403, 404-413,

[https://heinonline-org.ezproxy.vdu.lt:2443/HOL/Page?handle=hein.journals/lawhst31&div=19&start\\_page=391&collection=journals&set\\_as\\_cursor=0&men\\_tab=srchresults#](https://heinonline-org.ezproxy.vdu.lt:2443/HOL/Page?handle=hein.journals/lawhst31&div=19&start_page=391&collection=journals&set_as_cursor=0&men_tab=srchresults#); Ursula Kriebaum, "Restitution Claims for Massive Violations of Human Rights During the Nazi Regime the Austrian Case," *Human Rights in Development Yearbook* 2001 (2001): 182-183, [https://heinonline-org.ezproxy.vdu.lt:2443/HOL/Page?handle=hein.intyb/ybhumri2001&div=12&start\\_page=163&collection=intyb&set\\_as\\_cursor=0&men\\_tab=srchresults#](https://heinonline-org.ezproxy.vdu.lt:2443/HOL/Page?handle=hein.intyb/ybhumri2001&div=12&start_page=163&collection=intyb&set_as_cursor=0&men_tab=srchresults#).

<sup>458</sup> Norman Bentwich, "International Aspects of Restitution and Compensation for Victims of the Nazis," *British Year Book of International Law* 32 (1955-1956): 204-217, [https://heinonline-org.ezproxy.vdu.lt:2443/HOL/Page?handle=hein.journals/byrint32&div=10&start\\_page=204&collection=journals&set\\_as\\_cursor=0&men\\_tab=srchresults#](https://heinonline-org.ezproxy.vdu.lt:2443/HOL/Page?handle=hein.journals/byrint32&div=10&start_page=204&collection=journals&set_as_cursor=0&men_tab=srchresults#).

no surprise that that their restoration is specifically mentioned in Basic Principles and Guidelines, as almost every gross violation of human rights or international humanitarian law involves serious damage on these values. However, automatic restoration of citizenship was not always a desirable measure, and it was recognized that this right should be implemented upon the request of a victim.<sup>459</sup>

Other issues concerning restoration of a particular value or situation arose due to specific circumstances visible in cases of certain mass violations of fundamental rights and freedoms. Forced disappearances were the repressive practice widely used in Latin America during the rule of military regimes. Because the of practice of steal and selling the babies of people who were under attack by the military regime was part of the forced disappearances practice, the family relations were disrupted, which endangered the identity of part of the society. Thus, the right to identity involves a right to know the truth about one's real parents and to be reunited with one's true family and relatives.<sup>460</sup>

Return to one's place of residence is a measure that was specifically aimed at remedying societies that faced ethnic conflicts where ethnic minorities were evicted from their homes and land in order to give their assets to persons of a rival ethnicity. Such activity is recognized as a serious violation of international humanitarian law, and displaced populations eventually need to have the ability to return. This form of restitution includes the right to repatriation to one's country of origin but not to return to one's home within that country. However, states are facing problems because the growing number of refugees and internationally displaced persons calls for the expansion of this right with the meaning of returning to one's home of origin based not only on property rights but also on tenure or rental rights with a duty to guarantee adequate housing.<sup>461</sup>

Restoration of employment is an example of restitution that faced expansion—from restoration of unpaid wages, severance payments and pension rights<sup>462</sup> to reinstatement to a particular position after people had been arbitrarily dismissed from their jobs. The latter practice has been recently developed by the Inter-American Court of Human Rights.<sup>463</sup> However, the

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<sup>459</sup> Fraser and Caestecker, "Jews or Germans," 415-420.

<sup>460</sup> Lisa Avery, "A Return to Life: The Right to Identity and the Right to Identify Argentina's Living Disappeared," *Harvard Women's Law Journal* 27 (2004): 236-237, 241, 252-256, [https://heinonline-org.ezproxy.vdu.lt:2443/HOL/Page?handle=hein.journals/hwlj27&div=8&start\\_page=235&collection=journals&set\\_as\\_cursor=0&men\\_tab=srchresults#](https://heinonline-org.ezproxy.vdu.lt:2443/HOL/Page?handle=hein.journals/hwlj27&div=8&start_page=235&collection=journals&set_as_cursor=0&men_tab=srchresults#).

<sup>461</sup> Williams, *The Contemporary Right to Property Restitution*, 6-11; Heike Niebergall, "Overcoming Evidentiary Weaknesses in Reparation Claims Programmes," in *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity: Systems in Place and Systems in the Making*, eds. Alan Stephens, Mariana Goetz, and Carla Ferstman (Leiden: Brill, 2009), eBook Collection (EBSCOhost), 146.

<sup>462</sup> Kriebaum, "Restitution Claims for Massive Violations," 177.

<sup>463</sup> Thomas M. Antkowiak, "Remedial Approaches to Human Rights Violations: The Inter-American Court of Human Rights and Beyond," *Columbia Journal of Transnational Law* 46, no. 2 (2008): 372-373, [https://heinonline-org.ezproxy.vdu.lt:2443/HOL/Page?handle=hein.journals/cjtl46&div=15&start\\_page=351&collection=journals&set\\_as\\_cursor=0&men\\_tab=srchresults#](https://heinonline-org.ezproxy.vdu.lt:2443/HOL/Page?handle=hein.journals/cjtl46&div=15&start_page=351&collection=journals&set_as_cursor=0&men_tab=srchresults#).

actual reinstatement depends on the particular circumstances of each case, and it is almost impossible in cases of massive violations or after a significant lapse of time that results in completely changed circumstances.

Restoration of liberty could be regarded as the most obscure form of restitution. The research on its particular application was without success. However, certain observations could be found. Thomas M. Antkowiak states that under case law of the Inter-American Court of Human Rights, automatic release of detainees is not assured by this measure, but in certain cases the Court can order such release.<sup>464</sup> This could be explained by the fact that criminal policy is purely a matter of a state; therefore, immediate release from detention cannot be ordered by other institutions apart from an institution of particular state, although a state can be obliged to do so by revising its trial procedures.

Taking into account the priority of restitution in providing reparations, application of restitution of these previously discussed intangible values should be seen as mandatory efforts to redress victims of human rights abuses or international humanitarian law violations. This is due to the fact that the obligation to provide restitution could be found in both international humanitarian law and human rights law. However, application of particular measures is affected by circumstances of particular violations that must be redressed. Therefore, the most appropriate definition of restitution in this case is that of general character, i.e. ‘*a return to the status quo ante*’,<sup>465</sup> as there was no violation. This path is followed in Basic Principles and Guidelines, as this conforms to actual international practice, while measures specified could be viewed as possible examples of restitution that must be considered in addressing the particular case.

### **2.3.2. Compensation**

Compensation as a form of reparation has its clearest expression under Article 3 of the Hague Convention (IV) respecting the Laws and Customs of War on Land. It was also part of reparations under the Treaty of Versailles and Paris Agreement.<sup>466</sup> As that treaty stated, there is a general view that compensation should be provided in cases when restitution is not possible. Nevertheless, usually in cases where a state abuses its power or in an armed conflict, the scale of human rights abuses is so huge that it is impossible to apply restitution in full to address all harm inflicted, and it is impossible to return tangible assets, due to their destruction. Therefore,

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<sup>464</sup> Ibid., 374.

<sup>465</sup> Buyse, “Lost and Regained,” 133.

<sup>466</sup> Czaplinski, “Concept of War Reparations,” 71-72.



compensation as a form of reparation receives wide attention. Another reason for its wide application is that in certain cases it is a fast way to deal with the legacy of repressive regime.<sup>467</sup>

In Basic Principles and Guidelines, the definition of compensation reads as follows:

any economically assessable damage, as appropriate and proportional to the gravity of the violation and the circumstances of each case, resulting from gross violations of international human rights law and serious violations of international humanitarian law, such as: (a) Physical or mental harm; (b) Lost opportunities, including employment, education and social benefits; (c) Material damages and loss of earnings, including loss of earning potential; (d) Moral damage; (e) Costs required for legal or expert assistance, medicine and medical services, and psychological and social services.<sup>468</sup>

The definition of compensation in Basic Principles and Guidelines suggests that compensation covers both material and non-material damages. However, Gentian Zyberi stresses that under international public law compensation for material damages is highly recognized, while compensation for moral damages is questioned.<sup>469</sup> His position is based only on the case law of the ICJ, particularly on the Advisory Opinion on Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, which makes no references to moral damages but enumerates material damages in cases of violations of human rights either in armed conflict or in peace time. Nevertheless, the omission of moral damages in the case law of the ICJ cannot be treated as completely denying the ability to obtain compensation for moral damages in such cases. Other sources of international law, discussed below, allow for a different conclusion to be drawn.

The duty to compensate for moral damages at the international level can be traced back to the Treaty of Versailles, entered into by Germany and the Allied and Associated Powers after the First World War. In particular, Annex I to Section I of Part VIII of the Treaty of Versailles states that compensation may be claimed from Germany for ‘injury to or death of civilians caused by acts of war ... and all the direct consequences thereof’ as well as for damages ‘caused by Germany or her allies in their own territory or in occupied or invaded territory to civilian victims of all acts injurious to health or capacity to work, or to honour, as well as the surviving dependents of such victims.’<sup>470</sup> Moreover, Germany’s responsibility for similar damages was also recognized by the Agreement Between the United States and Germany Providing for the Determination of the

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<sup>467</sup> Max du Plessis, "Historical Injustice and International Law: An Exploratory Discussion of Reparation for Slavery," *Human Rights Quarterly* 25, no. 3 (August 2003): 630, [https://heinonline-org.ezproxy.vdu.lt:2443/HOL/Page?handle=hein.journals/hurq25&div=33&start\\_page=624&collection=journals&et\\_as\\_cursor=0&men\\_tab=srchresults#](https://heinonline-org.ezproxy.vdu.lt:2443/HOL/Page?handle=hein.journals/hurq25&div=33&start_page=624&collection=journals&et_as_cursor=0&men_tab=srchresults#); Falk „Reparations, International Law, and Global Justice,” 483.

<sup>468</sup> UN General Assembly, Resolution 60/147, annex, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, art. 20 (December 16, 2005).

<sup>469</sup> Zyberi, "International Court of Justice and Applied Forms of Reparation," 209-210.

<sup>470</sup> Peace with Germany (Treaty of Versailles), Annex I Section I Part VIII, June 28, 1919, *Treaties and Other International Agreements of the United States of America 1776-1949* (Bevens) 2 (1968): 43-240, <https://heinonline-org.ezproxy.vdu.lt:2443/HOL/Page?collection=ustreaties&handle=hein.ustreaties/ustbv002&id=52#>.

Amount of the Claims against Germany, which was signed by Germany and the U.S. next to Treaty of Peace between the U.S. and Germany after the First World War because the U.S. had not ratified Treaty of Versailles.<sup>471</sup>

Compensation for moral damages was also recognized in federal legislation of Germany enacted after the Second World War to compensate the victims of Holocaust. The 1953 Federal Supplementary Law for the compensation of Victims of National Socialist Persecution, the 1956 Federal Compensation Law and the 1965 BEG Schlussgesetz—the Federal Compensation Final Law allowed compensation under particular conditions for loss of life for surviving family members and also compensation for damages to freedom.<sup>472</sup> The United Nations Compensation Commission, established under Security Council Resolution No. 687 of April 3, 1991, for the purpose of processing claims and paying compensation for losses and damage suffered as a direct result of Iraq's unlawful invasion and occupation of Kuwait, also paid compensation for moral damages, i.e. personal injury, mental pain and anguish.<sup>473</sup>

In summary, compensation for moral damages in cases of violations of human rights—either in armed conflict or in peace time—can be traced in other sources of international law. Therefore, its inclusion in Basic Principles and Guidelines is completely justified as reflecting existing international or domestic legal obligations in this field. Although it is acceptable that that issue of moral damages at the same time might be the subject matter of satisfaction,<sup>474</sup> but criterion to separate these two different forms of reparation is established and it is ‘the quantification of harms’<sup>475</sup> that usually has its expression in a certain amount of money. Thus, the only important issue is quantification of damages, irrespective of their nature, i.e. material or moral ones.

Despite the discussion on the scope of compensation, there is a general view that there is no amount of money able to compensate the whole harm suffered in a case of massive human rights violations.<sup>476</sup> Some scholars note that criteria applicable in an individual case of violations of

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<sup>471</sup> David J. Bederman, "The United Nations Compensation Commission and the Tradition of International Claims Settlement," *New York University Journal of International Law and Politics* 27, no. 1 (Fall 1994): 19-22, [https://heinonline-org.ezproxy.vdu.lt:2443/HOL/Page?handle=hein.journals/nyuilp27&div=8&start\\_page=1&collection=journals&set\\_as\\_cursor=0&men\\_tab=srchresults#](https://heinonline-org.ezproxy.vdu.lt:2443/HOL/Page?handle=hein.journals/nyuilp27&div=8&start_page=1&collection=journals&set_as_cursor=0&men_tab=srchresults#).

<sup>472</sup> Ariel Colonomos and Andrea Armstrong, „German Reparations to the Jews After World War II: A Turning Point in the History of Reparations,“ in *The Handbook of Reparations*, ed. Pablo de Greiff (New York: Oxford University Press, 2006), 402-408.

<sup>473</sup> Bederman, "United Nations Compensation Commission,“ 6; United Nations Compensation Commission, “The Claims,“ *United Nations Compensation Commission*, accessed January 12, 2017, <http://www.uncc.ch/claims>.

<sup>474</sup> Zyberi, "International Court of Justice and Applied Forms of Reparation,“ 209.

<sup>475</sup> Greiff, „Justice and Reparations,“ 452.

<sup>476</sup> Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, Review of further developments in fields with which the Sub-Commission has been concerned, Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms, final report submitted by Mr. Theo van Boven, Special Rapporteur, para. 131, U.N. Doc. E/CN.4/Sub.2/1993/8 (July 2, 1993); Greiff, „Justice and Reparations,“ 456; Brandon Hamber, „Narrowing the Micro and Macro: A Psychological Perspective on Reparations in Societies in Transition,“ in *The Handbook of Reparations*, 106

human rights does not serve equally well to determine compensable damages in a case of massive violations.<sup>477</sup> Therefore, significant attention is given to the two possible methods of compensation, i.e. an individual claim under tort law and administrative compensation (or lump-sum payments).

The majority of scholars are proponents of the so called administrative compensation in cases of massive violations,<sup>478</sup> and according to Rudolf Dolzer this is especially true in matters between states resulting from armed conflict;<sup>479</sup> however, some scholars propose application of regular tort law in addition to administrative compensation schemes.<sup>480</sup> The possibility of an individual claim under tort law in cases of massive human rights abuses is criticized on several grounds. First is the lack of resources in the judicial systems, especially in a state recovering after a repressive regime, to cope with the claims of victims. The next issue is the danger of unequal treatment of victims caused by victims not having equal access to the courts, either because of lack of knowledge or lack of evidence on a particular case; even if victims have adequate access, there is a risk that similar cases will be treated differently and that different awards will be provided.<sup>481</sup> This would result in a loss of perception about the real magnitude of injustice done and frustration in society.

Meanwhile, administrative compensation schemes fail to address the needs of each victim, respect his/her individual dignity and address individual sufferings—not to mention that some groups of victims are completely overlooked when trying to measure who deserves compensation.<sup>482</sup> Such compensation schemes are also easily associated with silence seeking plans.<sup>483</sup> Moreover, under such a scheme the perpetrator of human rights violations never pays for

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ed. Pablo de Greiff (New York: Oxford University Press, 2006), 568-569; Roht-Arriaza, "Reparations Decisions and Dilemmas," 158-159; Beth van Schaack, "In Defense of Civil Redress: The Domestic Enforcement of Human Rights Norms in the Context of the Proposed Hague Judgments Convention," *Harvard International Law Journal* 42, no. 1 (Winter 2001): 157, [https://heinonline.org.ezproxy.vdu.lt:2443/HOL/Page?handle=hein.journals/hilj42&div=12&start\\_page=141&collection=journals&set\\_as\\_cursor=0&men\\_tab=srchresults#](https://heinonline.org.ezproxy.vdu.lt:2443/HOL/Page?handle=hein.journals/hilj42&div=12&start_page=141&collection=journals&set_as_cursor=0&men_tab=srchresults#).

<sup>477</sup> Shelton, *Remedies in International Human Rights Law*, 151, 430; Arturo J. Carrillo, "Justice in Context: The Relevance of Inter-American Human Rights Law and Practice to Repairing the Past," in *The Handbook of Reparations*, ed. Pablo de Greiff (New York: Oxford University Press, 2006), 527-528; Teitel, *Transitional Justice*, 141-146.

<sup>478</sup> For e.g. Greiff, „Justice and Reparations,“ 456-459, Teitel, *Transitional Justice*, 132-133, 146-147; Rainer Hofmann and Frank Riemann, *Compensation for victims of war* (Berlin: International Law Association, Committee on Reparation for Victims of Armed Conflict, 2004), accessed January 11, 2017, <http://www.ila-hq.org/index.php/committees>, 19.

<sup>479</sup> Dolzer, "Settlement of War-Related Claims," 302-303, 328.

<sup>480</sup> Malamud-Goti and Grosman, „Reparations and Civil Litigation,“ 546-557; Schaack, "In Defense of Civil Redress," 155-159.

<sup>481</sup> Greiff, „Justice and Reparations,“ 456-459; Roht-Arriaza, "Reparations Decisions and Dilemmas," 165, 169.

<sup>482</sup> Regula Ludi, "The Vectors of Postwar Victim Reparations: Relief, Redress and Memory Politics," *Journal of Contemporary History* 41, no. 3 (July 2006): 450, <https://www.jstor.org/stable/30036397>.

<sup>483</sup> Malamud-Goti and Grosman, „Reparations and Civil Litigation,“ 552, 555; Roht-Arriaza, "Reparations Decisions and Dilemmas," 177-181; Ellen L. Lutz, "After the Elections: compensating victims of human rights abuses," in

the harm inflicted,<sup>484</sup> and the question of available resources for compensations is of particular importance.

Taking all the arguments into account, priority should be given to an individual claim, as this method particularly takes into account the individual dignity of a victim and helps to establish a truth by judicial means that are usually considered to be impartial and without the political shade that is usually attributed to cases involving administrative schemes. However, if an act is attributable to a state because of its repressive policy and involves an interstate dispute, administrative compensation can be the only way to pay compensation as a form of reparation, because the concept of states as the only subjects of international law is still firmly established and individuals are granted rights only when a particular international treaty expressly does so. Administrative compensation would also be desirable in cases when a perpetrator could not be found.

In any event, if there is a possibility to choose, a victim should have a right to choose whether to present an individual claim against the perpetrator or to receive a lump-sum, as this would ensure respect for the human dignity of a victim. Remembering that it is impossible to compensate the whole harm suffered in a case of massive human rights violations, the fear that this would result in excessive redress is without merits. Moreover, this reveals the importance of all components of reparation, as, together with other measures, compensation has additional value and moral meaning.<sup>485</sup>

### 2.3.3. Satisfaction

Satisfaction is another established form of reparation in Basic Principles and Guidelines aimed redressing moral harm incapable of financial assessment. The Commentary on Draft articles on Responsibility of States for Internationally Wrongful Acts states that satisfaction as a remedial measure has deep establishment in international law. At the end of the ninetieth century and beginning of the twentieth century it was applied as a remedial measure if the internationally wrongful act of one state caused non-material injury to another state.<sup>486</sup> ‘[I]nsults to the symbols

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*Transitional Justice - How Emerging Democracies Reckon with Former Regimes*, ed. Neil J. Kritz, (Washington, D.C.: United States Institute of Peace Press, 1995), I: 552-553.

<sup>484</sup> Malamud-Goti and Grosman, „Reparations and Civil Litigation,” 553.

<sup>485</sup> Hamber, „Narrowing the Micro and Macro,” 566-567; Lykes and Mersky „Reparations and Mental Health,” 590-591; Shelton, *Remedies in International Human Rights Law*, 11; Teitel, *Transitional Justice*, 145, 146; Yael Danieli, “Massive Trauma and the Healing Role of Reparative Justice,” in *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity: Systems in Place and Systems in the Making*, eds. Alan Stephens, Mariana Goetz, and Carla Ferstman (Leiden: Brill, 2009), eBook Collection (EBSCOhost), 59.

<sup>486</sup> *Report of the International Law Commission to the General Assembly*, 56 U.N. GAOR Supp. No. 10 and Corr.1, at 63, 213, 264-265, U.N. Doc. A/56/10 (2001), reprinted in [2001] Yearbook of the International Law Commission, vol. II, Part Two, U.N. Doc. A/CN.4/SER.A/2001/Add.1 (Part 2).

of the State, such as the national flag, violations of sovereignty or territorial integrity, attacks on ships or aircraft,<sup>487</sup> etc. are examples of those acts that required satisfaction. Paragraph 2 of Article 37 of the Draft articles on Responsibility of States for Internationally Wrongful Acts provides a non-exhaustive list of possible measures of satisfaction, and these include an acknowledgement of the breach, an expression of regret, a formal apology or another appropriate measure.<sup>488</sup> After finding that satisfaction is a well-established remedial measure in general international public law, the question appears how it is or could be applied in cases of human rights violations and violations of international humanitarian law.

Article 3 of the Hague Regulations does not mention satisfaction as a form of remedy in cases when provisions of the Hague Regulations are violated, and the reasons behind this were provided earlier.<sup>489</sup> However, further developments of international humanitarian law suggest that broader construction of remedial measures available under this body of law could also encompass satisfaction. This is possible due to findings of criminal responsibility for persons liable for violations of the Geneva Conventions that constitute war crimes, because judicial and administrative sanctions against persons liable for such violations are named in Basic Principles and Guidelines as a possible measure of satisfaction. According to the Commentary to the Geneva Conventions of 12 August 1949, Article 91 of Protocol I must be interpreted together with the article common to the all four Geneva Conventions,<sup>490</sup> and parties to the Geneva Conventions ‘are not free to forego the prosecution of the war criminals.’<sup>491</sup> Thus, it could be implied that application of criminal responsibility in cases of commission of a war crime demonstrates the introduction of an obligation to provide satisfaction, at least in any judicial sanction against persons liable for the commission of such crimes.

Additionally, the Reparation for Victims of Armed Conflict Committee, established by the International Law Association,<sup>492</sup> supports the application of satisfaction in cases of violations of international humanitarian law exactly because of its appearance as a remedial measure in the previously mentioned Draft Articles on State Responsibility. This rationale is supported under the practice of international institutions working on reparation programmes established at the international level to reconcile a particular society after an armed conflict (e.g. the International Commission of Inquiry on Darfur). It is even stated that a variety of forms of reparations is

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<sup>487</sup> Ibid.

<sup>488</sup> Ibid., at 263-264.

<sup>489</sup> See sub-chapter 2.3.1 „Restitution“.

<sup>490</sup> See footnote 447.

<sup>491</sup> Sandoz, Swinarski and Zimmermann, eds., *Commentary on the Additional Protocols*, 1053-1056.

<sup>492</sup> For more information on activities of the committees of International Law Association (ILA) and the ILA itself see: International Law Association, “Committees,” International Law Association, accessed January 23, 2017, <http://www.ila-hq.org/index.php/committees>.

desirable due to the need to address all harm inflicted by a violation of the international law.<sup>493</sup> This demonstrates that well established provisions of general international public law are applied when international humanitarian law is silent on the issue, and there is a need to reconcile changed circumstances with the existing provisions of international humanitarian law.

As for the case of human rights law, the term ‘remedy’ under Article 8 of the Universal Declaration of Human Rights could be considered as encompassing satisfaction because the term itself does not suggest any specific form of remedy and might be interpreted in accordance with particular circumstances. However, it is noteworthy that this form of reparation as a part of any remedy for human rights violations was particularly developed by the Inter-American Court of human rights, as many authors discussing the application of satisfaction give examples of the case law developed by this court.<sup>494</sup>

Satisfaction as a form of reparation for human rights violations is especially broad because it encompasses a variety of measures to address moral harm or, as it is stated by some authors, ‘to amend violations in ways unaddressed by classic forms of restitution and compensation.’<sup>495</sup> However, if it is recognised that compensation encompasses both material and moral damages, it is important to understand that satisfaction is a means to address financially non-assessable damage with material or non-material measures producing certain intangible results, e.g. relief, forgiveness, etc.<sup>496</sup>

Because of the variety of measures applicable under the umbrella of satisfaction, there is no agreement on its scope in certain cases. For example, the commentary of Article 9 of the Draft Declaration of International Law Principles on Reparation for Victims of Armed Conflict particularly stresses that ‘[a] wide range of measures may fall under this definition’, and Article 9 names only some of them ‘in a non-exhaustive manner.’<sup>497</sup> On the other hand, Basic Principles and Guidelines list the following measures of satisfaction:

- (a) Effective measures aimed at the cessation of continuing violations;
- (b) Verification of the facts and full and public disclosure of the truth ...;

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<sup>493</sup> Rainer Hofmann, *Reparation For Victims Of Armed Conflict (substantive issues)* (Hague: International Law Association, Committee on Reparation for Victims of Armed Conflict, 2004), accessed January 11, 2017, <http://www.ila-hq.org/index.php/committees>, 3-4, 24-25.

<sup>494</sup> For e.g. Carrillo, “Justice in Context,” 525-527, Antkowiak, “Remedial Approaches to Human Rights Violations,” 365-372, 378-382; Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, Review of further developments in fields with which the Sub-Commission has been concerned, Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms, final report submitted by Mr. Theo van Boven, Special Rapporteur, paras. 87-92, U.N. Doc. E/CN.4/Sub.2/1993/8 (July 2, 1993).

<sup>495</sup> Zyberi, “International Court of Justice and Applied Forms of Reparation,” 211.

<sup>496</sup> Carrillo, “Justice in Context,” 519-525. Gentian Zyberi suggests to exclude issue of moral damages from compensation as it is „subject-matter of satisfaction.“ See: Zyberi, “International Court of Justice and Applied Forms of Reparation,” 209.

<sup>497</sup> Hofmann, *Reparation For Victims Of Armed Conflict*, 24-25.

- (c) The search for the whereabouts of the disappeared, for the identities of the children abducted, and for the bodies of those killed, and assistance in the recovery, identification and reburial of the bodies in accordance with the expressed or presumed wish of the victims, or the cultural practices of the families and communities;
- (d) An official declaration or a judicial decision restoring the dignity, the reputation and the rights of the victim and of persons closely connected with the victim;
- (e) Public apology, including acknowledgement of the facts and acceptance of responsibility;
- (f) Judicial and administrative sanctions against persons liable for the violations;
- (g) Commemorations and tributes to the victims;
- (h) Inclusion of an accurate account of the violations that occurred in international human rights law and international humanitarian law training and in educational material at all levels.<sup>498</sup>

There is no obligation to apply all of them, as it is stated in Basic Principles and Guidelines that any or all of the above measures could be applied. However, opinions are expressed that public acknowledgement of violations is the most important form of satisfaction, as '[o]ne of the worst aspects for a victim is that he/she is not believed or that what really happened ... has been covered up or shrouded in secrecy.'<sup>499</sup> Meanwhile, Christine Evans emphasizes 'the disclosure of the truth' as the main component of satisfaction.<sup>500</sup> Taking this into account, it could be concluded that measures available as a satisfaction should fulfil non-material desires of victims, and a variety of possibilities contributes to that goal. In addition, in a case of massive egregious human rights violations, satisfaction is very important because of the vertical relation between a state and individual, where the state uses its power against its citizens.<sup>501</sup>

Such variety requires some organizational system, and the measures could be grouped in accordance with the aim of a particular measure. Some measures are aimed at recognition of victimization and acknowledgement of responsibility of guilty parties,<sup>502</sup> while others are aimed at disclosure of truth regarding injustices and preservation of memory<sup>503</sup> with cessation of

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<sup>498</sup> UN General Assembly, Resolution 60/147, annex, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, art. 22 (December 16, 2005).

<sup>499</sup> Redress, *Implementing Victims' Rights*, 38.

<sup>500</sup> Evans, *Right to Reparation in International Law*, 13.

<sup>501</sup> Shelton, *Remedies in International Human Rights Law*, 150.

<sup>502</sup> An official declaration or a judicial decision restoring the dignity, the reputation and the rights of the victim and of persons closely connected with the victim, public apology, including acknowledgement of the facts and acceptance of responsibility and judicial and administrative sanctions against persons liable for the violations. UN General Assembly, Resolution 60/147, annex, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, art. 22 (December 16, 2005).

<sup>503</sup> Verification of the facts and full and public disclosure of the truth, the search for the whereabouts of the disappeared, for the identities of the children abducted, and for the bodies of those killed, and assistance in the recovery, identification and reburial of the bodies in accordance with the expressed or presumed wish of the victims, or the cultural practices of the families and communities, commemorations and tributes to the victims, inclusion of an accurate account of the violations that occurred in international human rights law and international humanitarian law training and in educational material at all levels. UN General Assembly, Resolution 60/147, annex, Basic

continuing violations not falling under either of these two groups. This organizational system allows perception of the particular needs of victims and will be used subsequently in this work to describe measures that were applied for the victims of the Soviet regime in the Baltic states.

Additionally, there is a need to say a few words on cessation of violations as a form of satisfaction. Some scholars do not agree with the position of including this as a measure of satisfaction and are of position to treat this measure as an independent legal obligation.<sup>504</sup> According to Dinah Shelton, ‘to include cessation within the notion of reparation seems to imply that in the absence of a victim there is no duty of cessation’, undermining ‘the obligation to cease any conduct that is not in conformity with international duty.’<sup>505</sup> Thus, ‘restitution and cessation will be accomplished by the same act, for example, restoration of liberty and return of property’.<sup>506</sup> Moreover, if there is no obligation to apply all of the listed measures of satisfaction and application of any measure is possible, it is very hard to imagine how other measures could be applied if human rights violation are not stopped.

In summary, it could be stated that satisfaction as a remedial measure has faced developments under international law due to changing circumstances and the need to adapt to them. Due to these developments, it has become the type of reparation applied to redress individuals who suffered because of violations of international humanitarian law and human rights law. Nevertheless, its actual mode of application is highly sensitive to the particular circumstances surrounding specific violations. Therefore, the possible forms of satisfaction are not clearly established. That being said, for victims of violations that are of the most inhuman nature, acknowledgement of what had happened and disclosure of truth are the most important values that should be achieved with applicable means of satisfaction; specifically, public apology, including acknowledgement of the facts and acceptance of responsibility, is of particular importance.

#### **2.3.4. Guarantees of non-repetition**

Guarantees of non-repetition as a separate form of reparation are established in Basic Principles and Guidelines. They are directed towards creation of rule of law and respect for human rights in a particular society.<sup>507</sup> However, many scholars addressing the issue of satisfaction

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Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, art. 22 (December 16, 2005).

<sup>504</sup> Shelton, *Remedies in International Human Rights Law*, 149; Zyberi, "International Court of Justice and Applied Forms of Reparation," 212-213.

<sup>505</sup> Shelton, *Remedies in International Human Rights Law*, 149.

<sup>506</sup> Shelton, *Remedies in International Human Rights Law*, 150.

<sup>507</sup> Guarantees of non-repetition should include, where applicable, any or all of the following measures, which will also contribute to prevention: (a) Ensuring effective civilian control of military and security forces; (b) Ensuring that all civilian and military proceedings abide by international standards of due process, fairness and impartiality; (c)



usually addresses issue of guarantees of non-repetition at the same time without specifically listing measures concerning guarantees of non-repetition.<sup>508</sup> The reason behind this is that both forms of reparation issues that cannot be evaluated by money and are in many instances of a collective character. Dinah Shelton stresses that, just as with cases of satisfaction, guarantees of non-repetition are very important in cases of massive human rights violations that result from repressions of a state apparatus towards people to create a trust in state.<sup>509</sup>

To summarize these positions, it is possible to conclude that cessation of violations and guarantees of non-repetition are closely related. Both measures ensure establishment of a regime respecting human rights and redress of victims of human rights violations. Additionally, it is stated that cessation of violations is a negative obligation towards future performances of a state, and guarantees of non-repetition are ‘a positive reinforcement of future performances’.<sup>510</sup> Therefore, the position of treating guarantees of non-repetition and cessation of violations as separate legal obligations would be more acceptable. In addition, the latter measure is highly correlated with political will both at domestic and international level.

### 2.3.5. Rehabilitation

Rehabilitation is a final form of reparation that should be discussed to shape the concept of reparation. It is treated as a new form of reparation that is not so firmly established as restitution, compensation and satisfaction. Rehabilitation as a form of reparation is not mentioned in authoritative sources of legal norms of international public law, e.g. the Draft Articles on State Responsibility,<sup>511</sup> and has not been applied by the ICJ.<sup>512</sup> However, the right to rehabilitation as a form of reparation can be found in Article 14 of the Convention Against Torture and Other Cruel Inhuman and Other Degrading Treatment or Punishment,<sup>513</sup> and the Inter-American Court of

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Strengthening the independence of the judiciary; (d) Protecting persons in the legal, medical and health-care professions, the media and other related professions, and human rights defenders; (e) Providing, on a priority and continued basis, human rights and international humanitarian law education to all sectors of society and training for law enforcement officials as well as military and security forces; (f) Promoting the observance of codes of conduct and ethical norms, in particular international standards, by public servants, including law enforcement, correctional, media, medical, psychological, social service and military personnel, as well as by economic enterprises; (g) Promoting mechanisms for preventing and monitoring social conflicts and their resolution; (h) Reviewing and reforming laws contributing to or allowing gross violations of international human rights law and serious violations of international humanitarian law. UN General Assembly, Resolution 60/147, annex, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, art. 23 (December 16, 2005).

<sup>508</sup> Greiff, „Justice and Reparations,“ 452; Carrillo, “Justice in Context,” 525-527; Roht-Arriaza, “Reparations Decisions and Dilemmas,” 159-160.

<sup>509</sup> Shelton, *Remedies in International Human Rights Law*, 150.

<sup>510</sup> Redress, *Implementing Victims’ Rights*, 40.

<sup>511</sup> Falk „Reparations, International Law, and Global Justice,” 482.

<sup>512</sup> Zyberi, "International Court of Justice and Applied Forms of Reparation," 205-206.

<sup>513</sup> Falk „Reparations, International Law, and Global Justice,” 484; Roht-Arriaza, “Reparations Decisions and Dilemmas,” 161.

Human Rights also interprets provisions of American Convention on Human Rights as providing for rehabilitation.<sup>514</sup>

Aims of rehabilitation are ‘future medical and clinical treatment aimed at caring for the victim’s short- or long-term injuries, thus distinguishing it from simple compensation for past medical or professional expenses’<sup>515</sup>. Under Basic Principles and Guidelines, rehabilitation is not intended only to provide medical and psychological care, as this form of reparation also includes legal and social services. This position is strongly supported by Nora Sveaass, noting that ‘it is directly misleading and politically wrong to approach political actions and abuse power with medical terminology.’<sup>516</sup> Such a view is based on the position that rehabilitation should restore physical, mental, social and vocational ability of individual and his/her full inclusion and participation in society.<sup>517</sup> Thus, it could be stated that rehabilitation as a form of reparation still needs to be shaped by further legal regulation of an obligatory nature.

Taking into account the variety of reparatory measures, their complex application and certain discretion in their provision, it is important to find guidance to enable their successful application. Because of this need, wide attention is given to the aims of reparations. First, reparations should help to implement the general aims of transition, i.e. recognition, civic trust and social solidarity in society.<sup>518</sup> The truth plays a very important role here.<sup>519</sup> In cases of massive human rights or international humanitarian law violations, where reaching the traditional legal standard to fully repair past wrongs is a very complicated task, the particular aim of reparations as forward-looking is stressed.<sup>520</sup>

Attention should be also drawn to the view that legal means are incapable of grasping the massiveness of repressions, and because of this, reparations are perceived as a political tool, especially as this helps to implement broader political goals and justice in society. Therefore, reparations are perceived not only as a legal obligation but also as social solidarity of society.<sup>521</sup>

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<sup>514</sup> Carrillo, “Justice in Context,” 512.

<sup>515</sup> Ibid.

<sup>516</sup> Nora Sveaass, „Gross human rights violations and reparation under international law: approaching rehabilitation as a form of reparation,” *European Journal of Psychotraumatology* 4 (2013), doi: 10.3402/ejpt.v4i0.17191.

<sup>517</sup> Redress, *Rehabilitation as a Form of Reparation under International Law* (London: The Redress Trust, 2009), 8-11.

<sup>518</sup> Greiff, „Justice and Reparations,” 465-466; Lykes and Mersky „Reparations and Mental Health,” 591, 610, 615.

<sup>519</sup> Malamud-Goti and Grosman, „Reparations and Civil Litigation,” 552; Hamber, „Narrowing the Micro and Macro,” 568, 576-577; Lykes and Mersky „Reparations and Mental Health,” 610, 615; Shelton, *Remedies in International Human Rights Law*, 9-10, 121; Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, Review of further developments in fields with which the Sub-Commission has been concerned, Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms, final report submitted by Mr. Theo van Boven, Special Rapporteur, para. 134, U.N. Doc. E/CN.4/Sub.2/1993/8 (July 2, 1993).

<sup>520</sup> Teitel, *Transitional Justice*, 464; Roht-Arriaza, “Reparations Decisions and Dilemmas,” 181.

<sup>521</sup> Greiff, „Justice and Reparations,” 466; Falk „Reparations, International Law, and Global Justice,” 480, 485; Lykes and Mersky „Reparations and Mental Health,” 596, 610, Shelton, *Remedies in International Human Rights Law*, 455, 646; Zwanenburg, “Van Boven/Bassiouni Principles,” 647.

Conversely, M. Cherif Bassiouni disagrees with this position, stating that ‘there is no evidence in international or national law that there is a right to compensation, reparations, and redress other than as a consequence to the establishment of responsibility for the harm produced,’ as responsibility can be established only in criminal and civil legal proceedings. Human and social solidarity, in his opinion, is reflected only in social assistance and support programmes.<sup>522</sup>

In summary, the obligation to provide reparation under international humanitarian law has greatly evolved since the adoption of the Hague Regulations. It is also noteworthy that due to acceptance of Basic Principles and Guidelines, reparation as a part of a right to remedy in cases of gross human rights violations and serious violations of international humanitarian law are firmly established. In a case of belligerent occupation, the obligation to provide a remedy arises either because of a serious violation of international humanitarian law or a gross violation of human rights law. Thus, it is a legal obligation that shapes reparations and not just political will and social solidarity. Additionally, a particular act can constitute both types of violations, and there is an obligation to remedy them. With the initial duty constituting such elements as restitution, compensation and satisfaction, expansion of human rights law has caused this duty to evolve to the scope that is already established in Basic Principles and Guidelines. Furthermore, it is not only human rights law that caused expansion of this obligation in international humanitarian law. Theodor Meron emphasizes the importance of the Martens Clause in the Hague Regulations because the strong language of the Martens clause,<sup>523</sup> with its invocation of the laws of humanity and dictates of public conscience, allows for the filling of absences of particular a norm in international humanitarian law to interpret a given situation.<sup>524</sup>

Taking into account the discussed concept of reparation, it is clear that the victims of Soviet regime under the belligerent occupation of the Baltic states are entitled to restitution, compensation and satisfaction due to the provisions of Article 3 of the Hague Convention (IV) respecting the Laws and Customs of War on Land and general public international law—at least to the extent that it addresses restitution and satisfaction. On the other hand, the obligatory nature of Article 8 of the Universal Declaration of Human Rights is not so clear, but it would not be

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<sup>522</sup> Bassiouni, “International Recognition of Victims’ Rights,” 205.

<sup>523</sup> Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience. Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, pmbl., October 18, 1907, *Treaties, States Parties and Commentaries Database of the International Committee of the Red Cross*, <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?documentId=4D47F92DF3966A7EC12563CD002D6788&action=openDocument>.

<sup>524</sup> Meron, “Humanization of Humanitarian Law,” 239-278.

contrary to public international law to recognize that all human rights enshrined in the document as general principles of law that bind every state at international level. However, the obscure nature of the obligatory power of the Universal Declaration of Human Rights means that the entitlement of the victims of the Soviet regime in the Baltic states to rehabilitation is a choice for the state responsible for victimization. Guarantees of non-repetition also can be treated as an aspiration because they are subject to political will at both the national and international level. After discussion of possible forms of reparation, it is important to understand how a victim's right to reparation can be implemented in accordance with provisions of international humanitarian law.

#### ***2.4. IMPLEMENTATION OF A VICTIM'S RIGHT TO REPARATION IN INTERNATIONAL HUMANITARIAN LAW***

The establishment of the scope of reparation a victim of a serious violation of international humanitarian law or a gross violation of human rights law is entitled to poses a question of its implementation possibilities. While the concept of reparation itself does not differ in case of serious or gross violation, the implementation possibilities are clearly affected by the applicable body of international law, i.e. international humanitarian law or human rights law, since human rights law is the only body of international law that grants rights for individuals at the international level, subject to particular treaty obligations of a state. Since it was established that the case of the victims of the Soviet regime in the Baltic states is primarily governed by international humanitarian law, implementation of the right to reparation is also governed by this body of international law.

Unfortunately, none of the treaties in the field of international humanitarian law provide for an explicit mandatory mechanism to implement the right to reparation. Customary international humanitarian law becomes particularly relevant, so a compilation of its rules by International Committee of the Red Cross will be taken into account. In accordance with the rule governing reparation, it is stated that individual claims are addressed under three different procedures:

- inter-state and other agreements
- unilateral state act
- national courts

While the first two procedures have deep establishment in state practice and usually encompass voluntary action of a state, implementation of the right to a remedy in cases of violation of international humanitarian law in national courts was generally unsuccessful due to immunity

of a state.<sup>525</sup> Although Greek and Italian courts awarded compensation for victims of serious violations of international humanitarian law that were committed during belligerent occupation of Greece and Italy by Nazi Germany, enforcement of the decisions of Italian courts evolved into the case of Jurisdictional Immunities of the State before the ICJ.<sup>526</sup>

The ICJ stated in its judgement that under customary international law, activities of the armed forces of one state in a territory of another state in the course of conducting an armed conflict are *acta jure imperini*, and the state is immune from jurisdiction of courts of a state in whose territory a violation of international humanitarian law was committed.<sup>527</sup> Neither the gravity of breach of international humanitarian law or human rights law,<sup>528</sup> nor ‘the assumption that the proceedings in the Italian courts involved violations of *jus cogens rules*’ affected ‘the applicability of the customary international law on State immunity’ at the time the events occurred.<sup>529</sup> The reason for such a decision rests on the argument that questions of state immunity are separate from the international responsibility of a state.<sup>530</sup> Taking into account the incapability of an individual to challenge a state before courts of other states for activities of its armed forces—especially related to events concerning the distant past—because of state immunity, the state of citizenship of victim is the only subject that is able to act at the international level in the name of a victim of serious violations of international humanitarian law or gross violations of human rights law committed by armed forces of other state. This clearly make victims dependant on acts of their state of citizenship as well as on acts of the state responsible for violations committed against the victim in the territory under belligerent occupation, and the issue of reparation could be solved only at interstate level.

In the light of these findings, actions taken by the Baltic states and the USSR to remedy victims of Soviet regime become particularly important. As certain reparatory policy has been already implemented in the Baltic states, it is necessary to examine how it corresponds with discussed concept of reparation. Additionally, redress of victims in the Baltic states started while the Baltic states were still under belligerent occupation of the USSR within the general trend of redress of victims of Stalinism in the whole USSR. Thus, it is important to see how the Baltic states have perceived their duties towards victims of the Soviet regime when they implemented

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<sup>525</sup> Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law* (New York: ICRC and Cambridge University Press, 2005), <https://www.icrc.org/eng/resources/documents/publication/pcustom.htm>, I: 541-545.

<sup>526</sup> Jeremiah Lee, „Compensation and Immunity: Germany v. Italy at the ICJ,“ *JURIST*, published January 9, 2009, <http://www.jurist.org/forum/2009/01/compensation-and-immunity-germany-v.php>.

<sup>527</sup> Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment, I.C.J. Reports 2012, p.99 <http://www.icj-cij.org/files/case-related/143/143-20120203-JUD-01-00-EN.pdf>, paras. 72-78.

<sup>528</sup> *Ibid.*, para. 91.

<sup>529</sup> *Ibid.*, para. 97.

<sup>530</sup> *Ibid.*, para. 100.

particular reparatory measures, as victims in the Baltic states no longer live in the state responsible for the violations, and the USSR itself has ceased to exist. It is also important to reveal the scope of such redress in order to understand the full nature of obligations that are incumbent on the USSR. Thus, the actions of the Baltic states as the occupied states and the USSR as the occupying state must be considered in order to understand how reparatory policy was shaped and whether it corresponds with established legal obligations that rest on the state responsible for ensuring provisions of international humanitarian law and human rights law in an occupied territory.

### 3. APPLICATION OF THE CONCEPT OF REPARATIONS IN THE CASE OF THE BALTIC STATES

#### 3.1. REPARATION MEASURES IN THE BALTIC STATES AFTER INDEPENDENCE

This subchapter is aimed at reparation measures that were implemented towards victims of the communist regime in the Baltic states after their declaration of independence.<sup>531</sup> Earlier measures of reparation implemented under the Soviet regime in the Baltic states and their significance on the right to reparations will be discussed later in this chapter.

##### 3.1.1. Application of restitution in the Baltic states

Restitution was the first element of reparations implemented in the Baltic states with the enactment of special laws, i.e.:

- Republic of Lithuania Law on Rehabilitation of Persons Repressed for Resistance to the Occupying Regime, enacted in 2 May 1990<sup>532</sup> - in Lithuania
- Law on the Rehabilitation of Persons Extra-judicially Repressed and Wrongfully Convicted, enacted in 19 February 1992<sup>533</sup> - in Estonia

These laws are considered to be the main documents to implement particular measures of restitution, i.e. restoration of victims' liberty and enjoyment of human rights. Meanwhile, in order to restore victims' liberty and enjoyment of human rights, Latvia has chosen to continue adhering to a similar law enacted while still under belligerent occupation of the USSR, i.e. Law Concerning the Rehabilitation of Illegally Repressed People, enacted in 3 August 1990.<sup>534</sup>

Restoration was implemented through a declaration of innocence for people convicted under particular articles of previously applied criminal codes<sup>535</sup> that were designed to criminalize

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<sup>531</sup> Lithuania on March 11, 1990, Latvia on 21 August, 1991 (On May 4, 1990 transitional period to re-establishment of independence was declared), Estonia on 20 August, 1991 (On March 30, 1990 transitional period to re-establishment of independence was declared)).

<sup>532</sup> Lietuvos Respublikos asmenų, represuotų už pasipriešinimą okupaciniams režimams, teisių atkūrimo įstatymas [Republic of Lithuania Law on Restoration of Rights for Persons Repressed for Resistance to the Occupations], Lietuvos aidas, 1990-05-08, Nr. 1-0, as last amended on October 11, 2016, [https://www.e-tar.lt/portal/lt/legalAct/TAR.7A23697137FA/TAIS\\_331928](https://www.e-tar.lt/portal/lt/legalAct/TAR.7A23697137FA/TAIS_331928).

<sup>533</sup> Kohtuväliselt represseeritud ja alusetult süüdimõistetud isikute rehabiliteerimise kohta [Rehabilitation of Persons Extra-judicially Repressed and Unfoundedly Convicted Act], RT 1992, 7, 103, <https://www.riigiteataja.ee/akt/30577>.

<sup>534</sup> Par politiski represētās personas statusa noteikšanu komunistiskajā un nacistiskajā režīmā cietušajiem [Law Concerning the Determination of Repressed Status for Persons Who Suffered under the Communist and Nazi Regimes], arts. 3, 9, "Latvijas Vēstnesis", 64 (347), 26.04.1995, as last amended on March 31, 2011, <http://likumi.lv/doc.php?id=34832>.

<sup>535</sup> Articles 58<sup>1</sup> - 58<sup>14</sup>, 59<sup>2</sup>, 59<sup>3</sup>, 59<sup>4</sup>-59<sup>6</sup>, 59<sup>10</sup>, 59<sup>13</sup>, 60-62, 64, 66, 68-70, 79<sup>1</sup>-79<sup>4</sup>, 81, 82, 84, 87a, 121, 122, 125, 126, 182, 192a, 193<sup>7</sup>, 193<sup>10</sup> of Criminal Code of the RSFSR (1926); Articles 62, 63, 66-68, 70, 73, 79-82, 88, 89, 199-1, 210, 211 of the Criminal Code of the Lithuanian SSR; Articles 62-64, 66-68, 70, 73, 74, 74<sup>1</sup>, 78-80, 81, 86<sup>1</sup>, 87, 137, 167, 177, 189, 189<sup>1</sup>, 189<sup>2</sup>, 194<sup>1</sup>-194<sup>4</sup>, 220-222, 224 of the Criminal Code of the Estonian SSR and corresponding articles of Criminal Codes of other former Soviet Socialist Republics (SSR);

political activity, religious activities and freedom of expression that are usual and normal in a democratic society. Taking into account the wording of these particular acts, they could also be treated as an official declaration restoring the dignity, the reputation and the rights of a victim, and, as a result, a certain measure of satisfaction. In summary, the initial measures of restitution in the Baltic states were aimed at restoring victims' liberty and enjoyment of human rights.

Additional attention must be given to the provisions concerning the application of these statutes towards persons responsible for the commission of international crimes. All of Baltic states provides that their respective acts are not applicable to a person who, although suitable for declaration of innocence, is found guilty of genocide, crimes against humanity, serious violations of international humanitarian law or is otherwise responsible for the murdering or torture of civilians.<sup>536</sup> These provisions clearly reflect the historical circumstances of double occupation of the Baltic states when Soviet rule was followed by Nazi rule and then later again by Soviet rule that resulted in the commission of international crimes. Such regulation allows exclusion of those who are responsible for the Holocaust or other international crimes from the application of these particular measures of restitution restoring their innocence.

Return to one's place of residence could be regarded as a particularly important measure of restitution, as the repressive policy of the USSR was also implemented through deportations of ethnic Estonians, Latvians and Lithuanians to northern parts of the USSR on a large scale under unbearable conditions; many political prisoners were not allowed to come back to their homeland after their punishment had concluded. Only Lithuania has implemented measures aimed at returning and establishing former deportees and their heirs in Lithuania.<sup>537</sup> The creation of the

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<sup>536</sup> Lietuvos Respublikos asmenų, represuotų už pasipriešinimą okupaciniams režimams, teisių atkūrimo įstatymas [Republic of Lithuania Law on Restoration of Rights for Persons Repressed for Resistance to the Occupations], art. 2, Lietuvos aidas, 1990-05-08, Nr. 1-0, as last amended on October 11, 2016, [https://www.e-tar.lt/portal/lt/legalAct/TAR.7A23697137FA/TAIS\\_331928](https://www.e-tar.lt/portal/lt/legalAct/TAR.7A23697137FA/TAIS_331928); Par politiski represētās personas statusa noteikšanu komunistiskajā un nacistiskajā režīmā cietušajiem [Law Concerning the Determination of Repressed Status for Persons Who Suffered under the Communist and Nazi Regimes], art.2, para. 2, art. 4, para. 4, "Latvijas Vēstnesis", 64 (347), 26.04.1995, as last amended on March 31, 2011, <http://likumi.lv/doc.php?id=34832>; Kohtuväliselt repressēeritud ja alusetult süüdimõistetud isikute rehabiliteerimise kohta [Rehabilitation of Persons Extra-judicially Repressed and Unfoundedly Convicted Act], art.3, para.1, RT 1992, 7, 103, <https://www.riigiteataja.ee/akt/30577>.

<sup>537</sup> Lietuvos Respublikos įstatymas dėl SSRS okupacijos žalos atlyginimo [Republic of Lithuania Law of the Republic of Lithuania on Compensation of Damage Resulting from the Occupation of the USSR], Valstybės žinios, 2000-06-28, Nr. 52-1486, <https://www.e-tar.lt/portal/lt/legalAct/TAR.03410B6A865C>. Translation of title provided in Dainius Žalimas, "Commentary to the Law of the Republic of Lithuania on Compensation of Damage Resulting from the Occupation of the USSR," *Baltic Yearbook of International Law* 3 (2003): 98, [https://heinonline.org.ezproxy.vdu.lt:2443/HOL/Page?handle=hein.intyb/byrbkinl0003&div=9&start\\_page=97&collection=intyb&set\\_as\\_cursor=0&men\\_tab=srchresults#](https://heinonline.org.ezproxy.vdu.lt:2443/HOL/Page?handle=hein.intyb/byrbkinl0003&div=9&start_page=97&collection=intyb&set_as_cursor=0&men_tab=srchresults#). Lietuvos Respublikos Vyriausybės nutarimas „Dėl SSRS deportuotų asmenų grįžimo į Tėvynę fondo įsteigimo ir jo nuostatų patvirtinimo“ [Resolution on Establishment of a Fund for the Return to the Homeland of the Persons Deported by the USSR and Approval of Its Regulations], Valstybės žinios, 2000-11-15, Nr. 98-3108, <https://www.e-tar.lt/portal/lt/legalAct/TAR.7F7F87CC5488>; Lietuvos Respublikos socialinės apsaugos ir darbo ministro įsakymas „Dėl SSRS deportuotų asmenų ir jų palikuonių grįžimo į Tėvynę išlaidų apmokėjimo tvarkos patvirtinimo“ [Order on Approval of the Reimbursement of Expenses of the Return to the Homeland of the Persons Deported by the USSR], Valstybės žinios, 2001-12-21, Nr. 107-3893, <https://www.e-tar.lt/portal/lt/legalAct/TAR.626987F9B929>.



special fund is based on the provisions of Law on Compensation of Damage Resulting from the Occupation by the USSR demanding compensation of damage from the Russian Federation as the successor of the rights and obligations of the USSR. Although no contribution or any other payment of damage was made by the Russian Federation, provisions concerning funding allowed payments from other sources, e.g. donations.<sup>538</sup> As a result, several programmes concerning the return of former deportees and their heirs have been implemented.<sup>539</sup>

Restoration of citizenship in the case of the Baltic states deserves special attention. Due to the loss of independence, all people of Lithuanian, Latvian and Estonian citizenship *de facto* lost their citizenship.<sup>540</sup> Because of the illegality of the measures taken by the USSR towards incorporation of the Baltic states, legal acts of the USSR and the institutions of the occupant in the territories of the Baltic states concerning citizenship were not taken into account when independent Baltic states promulgated their citizenship laws.<sup>541</sup>

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<sup>538</sup> Lietuvos Respublikos Vyriausybės nutarimas „Dėl SSRS deportuotų asmenų grįžimo į Tėvynę fondo įsteigimo ir jo nuostatų patvirtinimo“ [Resolution on Establishment of a Fund for the Return to the Homeland of the Persons Deported by the USSR and Approval of Its Regulations], para. 12, Valstybės žinios, 2000-11-15, Nr. 98-3108, <https://www.e-tar.lt/portal/lt/legalAct/TAR.7F7F87CC5488>

<sup>539</sup> Lietuvos Respublikos Vyriausybės nutarimas „Dėl Politinių kalinių ir tremtinių bei jų šeimų narių sugrįžimo į Lietuvą 2002-2007 metų programos ir Gyvenamųjų patalpų suteikimo nuomos pagrindais grįžtantiems į Lietuvą nuolat gyventi politiniams kaliniams ir tremtiniams bei jų šeimų nariams tvarkos aprašo patvirtinimo“ [Resolution on Approval of the Programme for the Year 2002-2007 on Return of Political Prisoners and Deportees and Their Family Members to Lithuania and Approval of the Procedure for Provision of Accommodation for Political Prisoners and Deportees and Their Family Members Returning to Lithuania for Permanent Residence], Valstybės žinios, 2002-03-09, Nr. 26-930, as last amended on November 5, 2014, <https://www.e-tar.lt/portal/lt/legalAct/TAR.CF08E531F347/ODscQmIYZU>; Lietuvos Respublikos Vyriausybės nutarimas „Dėl Politinių kalinių ir tremtinių bei jų šeimų narių sugrįžimo į Lietuvą 2008–2012 metų programos patvirtinimo“ [Resolution on Approval of the Programme for the Year 2008-2012 on Return of Political Prisoners and Deportees and Their Family Members to Lithuania], Valstybės žinios, 2007-11-22, Nr. 120-4896, <https://www.e-tar.lt/portal/lt/legalAct/TAR.1F89F5DB486E>.

<sup>540</sup> Vytautas Sinkevičius, *Lietuvos Respublikos pilietybė 1918-2001 metais* (Vilnius: VĮ “Teisinės informacijos centras”, 2002), 86-90, 121-123. People having the citizenship of Lithuanian Soviet Socialist Republic, Latvian Soviet Socialist Republic and Estonian Soviet Socialist Republic were announced to be the citizens of the USSR since the date when respective Soviet Socialist Republic was illegally incorporated into the USSR by the enactment of the Soviet nationality edict of September 7, 1940. At the time of such announcement there was no legal act defining citizenship of the respective Soviet Socialist Republic, at least in case of Lithuania. Thus priority of the citizenship of the USSR was established in order to get the citizenship of the respective Soviet Socialist Republic. Later under decree of the Lithuanian SSR Supreme Soviet Presidium “On acquisition of the citizenship of the Lithuanian SSR” (December 30, 1940) it was announced that people residing permanently in the territory of Lithuanian Soviet Socialist Republic on 1 September 1939 were citizens of the USSR from the date when Lithuanian Soviet Socialist Republic “joined” the USSR, i.e. August 3, 1940. Sinkevičius, *Lietuvos Respublikos pilietybė*, 86-98.

<sup>541</sup> However in case of Lithuania citizenship of LSSR granted by the law of 3 November 1989 was taken into account but this was due to the fact that this law was considered to be transitional as it expressed priority of LSSR citizenship instead of the USSR citizenship and loyalty to the LSSR and not the USSR. Lithuania as free country could decide to continue on some duties from its former factual situation. As it is stated by V. Sinkevičius, citizenship of LSSR could not be seen as continuation of Lithuanian citizenship. Sinkevičius, *Lietuvos Respublikos pilietybė*, 126. No such transitional law on citizenship were promulgated in Latvia and Estonia while under occupation of the USSR. Lowell W. Barrington, "The Making of Citizenship Policy in the Baltic States," *Georgetown Immigration Law Journal* 13, no. 2 (1999): 166-182, [https://heinonline-org.ezproxy.vdu.lt:2443/HOL/Page?handle=hein.journals/geoimlj13&div=19&start\\_page=159&collection=journals&set\\_as\\_cursor=0&men\\_tab=srchresults#](https://heinonline-org.ezproxy.vdu.lt:2443/HOL/Page?handle=hein.journals/geoimlj13&div=19&start_page=159&collection=journals&set_as_cursor=0&men_tab=srchresults#).

First, these laws (in the case of Latvia the initial step was a resolution restoring citizenship to pre-1940 citizens) expressed continuity of an independent state prior to the illegal incorporation into the USSR by the regulation that current citizens of the respective Baltic state are persons who were citizens of Lithuania, Latvia or Estonia, respectively, before the date of forced incorporation.<sup>542</sup> As a result, restoration of citizenship could not be regarded as a measure of restitution, as its purpose was to express continuity of the formerly independent states and neither Lithuania, Latvia nor Estonia were responsible for the loss of citizenship of their previous citizens.<sup>543</sup> Additionally, the Baltic states had to deal with the permanent residents in their territory who entered these states after forced incorporation.<sup>544</sup>

The final issue to cover concerning measures of restitution is the return of property. As all private property under the Soviet regime was nationalized, complex regulation governing wide programmes concerning restoration of property rights were implemented after the Baltic states regained their independence.<sup>545</sup> Only Estonian<sup>546</sup> and Latvian<sup>547</sup> legal acts have special provisions regarding the return of victims' property or compensations in case return is not possible. In addition, certain procedural advantages were provided for them during procedures enabling them

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<sup>542</sup> Sinkevičius, *Lietuvos Respublikos pilietybė*, 131; Barrington, "Making of Citizenship Policy," 166-182; Ruta M. Kalvaitis, "Citizenship and National Identity in the Baltic States," *Boston University International Law Journal* 16, no. 1 (Spring 1998): 243-244, 255-256, 258-259, [https://heinonline-org.ezproxy.vdu.lt:2443/HOL/Page?handle=hein\\_journals/builj16&div=10&start\\_page=231&collection=journals&et\\_as\\_cursor=0&men\\_tab=srchresults#](https://heinonline-org.ezproxy.vdu.lt:2443/HOL/Page?handle=hein_journals/builj16&div=10&start_page=231&collection=journals&et_as_cursor=0&men_tab=srchresults#); Joanne Skolnick, "Grappling with the Legacy of Soviet Rule: Citizenship and Human Rights in the Baltic States," *University of Toronto Faculty of Law Review* 54, no. 2 (Spring 1996): 392-393, [https://heinonline-org.ezproxy.vdu.lt:2443/HOL/Page?handle=hein\\_journals/utflr54&div=15&start\\_page=387&collection=journals&et\\_as\\_cursor=0&men\\_tab=srchresults#](https://heinonline-org.ezproxy.vdu.lt:2443/HOL/Page?handle=hein_journals/utflr54&div=15&start_page=387&collection=journals&et_as_cursor=0&men_tab=srchresults#).

<sup>543</sup> Under initial legal acts citizenship of Lithuania was granted for people who have not had citizenship of other state, thus leaving behind persons who were citizens of Lithuania up till the occupation but had to leave due to the threat of repressions against them. Thus continuity of Lithuanian citizenship was not restored in full. This was changed after introduction of later legal act in 1995 and in 1997. Sinkevičius, *Lietuvos Respublikos pilietybė*, 133-137.

<sup>544</sup> Kalvaitis, "Citizenship and National Identity," 262. Here difference could be seen between Lithuania and Latvia with Estonia, as only Lithuania granted automatically citizenship to all permanent residents in the territory of the Republic of Lithuania, irrespective of the date of their entrance to Lithuania. Meanwhile Latvia and Estonia have not granted citizenship automatically to people who entered their territory after the date of occupation by the USSR. These persons had to go through naturalization procedure.

<sup>545</sup> Irena Bražiūnaitė, "Piliečių dalyvavimo restitucijos procese tyrimo teorinės prielaidos ir perspektyvos," *Filosofija. Sociologija*, no. 2 (2005): 20-25; Roberts Zīle, "Changing ownership and the system of property rights in Latvia: restitution and privatization - legal, economical and political issues," (paper presented at the Fifth Biennial Conference *Reinventing the Commons*, Bodo, May, 1995); Tanel Kerikmäe, "The Achilles Heel of Estonia's Ownership Reform: The Case of Emigrants," *European Journal of Law Reform* 6, no. Issues 1/2 (2004): 271-286, [https://heinonline-org.ezproxy.vdu.lt:2443/HOL/Page?collection=journals&handle=hein\\_journals/ejlr6&id=277](https://heinonline-org.ezproxy.vdu.lt:2443/HOL/Page?collection=journals&handle=hein_journals/ejlr6&id=277).

<sup>546</sup> Kohtuväliselt represseritud ja alusetult süüdimõistetud isikute rehabiliteerimise kohta [Rehabilitation of Persons Extra-judicially Repressed and Unfoundedly Convicted Act], arts. 6-7, RT 1992, 7, 103, <https://www.riigiteataja.ee/akt/30577>; Marek Tamm, „In search of lost time: memory politics in Estonia, 1991–2011,” *Nationalities Papers* 41, no. 4 (2013): 656-657, doi: <http://dx.doi.org/10.1080/00905992.2012.747504>.

<sup>547</sup> Par politiski represētās personas statusa noteikšanu komunistiskajā un nacistiskajā režīmā cietušajiem [Law Concerning the Determination of Repressed Status for Persons Who Suffered under the Communist and Nazi Regimes], art. 9, para. 2, "Latvijas Vēstnesis", 64 (347), 26.04.1995, as last amended on March 31, 2011, <http://likumi.lv/doc.php?id=34832>; Inga Švarca, „Transitional Justice Mechanisms Applied by Latvia in Its Transition from Communist Regime,” *HitoSubashi Journal of Law and Politics* 40 (2012): 82, n.152, doi: <http://doi.org/10.15057/22214>.

to restore their property rights.<sup>548</sup> In Lithuania victims were entitled only to better conditions<sup>549</sup> compared to others through general ownership and property rights reform. Nevertheless, taking into account that all private property was nationalized under the Soviet regime, a return of property could not be seen as a specific measure aimed at remedying victims in the Baltic states.

Regarding measures aimed at restoring employment, it must be noted that none of the Baltic states implemented any such measures, although Lithuania recognizes as victims those who lost their jobs for political reasons or because of their origin.<sup>550</sup> On the other hand, Estonia and Latvia do not consider such persons as victims at all. As a result, no measures concerning restoration of employment were implemented in these countries. Restoration of enjoyment of identity and family life was also not implemented, because there is no comprehensive historical data on cases of children or babies taken away under Soviet rule in the Baltic states.

In summary, restitution in the Baltic states was implemented in comparable manners, with such measures as restoration of citizenship and a return of property not being measures aimed particularly to remedy victims. This is a consequence of the fact that under the Soviet regime all people in the Baltic states had lost their previous citizenship and their property was nationalized. None of the Baltic states implemented any measure aimed at the restoration of employment, and this can be explained by the duration of Soviet regime and the changed economic environment from a planned economy to a market economy. The only example of restitution that was aimed particularly at victims and applied in all Baltic states was the restoration of liberty and enjoyment of human rights and return to one's place of residence in Lithuania.

### 3.1.2. Compensation

As it was previously stated, compensation is paid for material and moral damages and is expressed as a certain amount of money. Initial attempts of the Baltic states to pay compensation for the material damages for the victims could be traced in Lithuania to the early years after they

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<sup>548</sup> Par zemes privatizāciju lauku apvidos [Law On Land Privatisation in Rural Areas], arts. 6, 7, 9 and 21, "Ziņotājs", 32/33/34, 20.08.1992, as last amended on November 13, 2014, <https://likumi.lv/ta/en/en/id/74241-on-land-privatisation-in-rural-areas>; Eesti Vabariigi omandireformi aluste seadus [Republic of Estonia Principles of Ownership Reform Act], art 17 para. 7, RT 1991, 21, 257, as last amended on February 18, 2015, <https://www.riigiteataja.ee/en/eli/ee/525062015006/consolide>.

<sup>549</sup> Lietuvos Respublikos piliečių nuosavybės teisių į išlikusį nekilnojamąjį turtą atkūrimo įstatymas [Republic of Lithuania Law on Restitution of the Property Rights of the Nationals of the Republic of Lithuania to the Remaining Immovable Property], art. 4, para. 8, art. 16, para. 9(5), Valstybės žinios, 1997-07-09, Nr. 65-1558, as last amended on June 18, 2015, <https://www.e-tar.lt/portal/lt/legalAct/TAR.8A16A03D98D4/xPSVScawsE>; Lietuvos Respublikos žemės reformos įstatymas [Republic of Lithuania Law on Land Reform], art. 10, paras. 1(3), 1(9), Lietuvos aidas, 1991-08-02, Nr. 151-0, as last amended on June 18, 2015, <https://www.e-tar.lt/portal/lt/legalAct/TAR.075D49C59279/oIPiTCeEuI>.

<sup>550</sup> Lietuvos Respublikos asmenų, nukentėjusių nuo 1939-1990 metų okupacijų, teisinio statuso įstatymas [Republic of Lithuania Law on the Legal Status of the People of the Republic of Lithuania Who Fell Victims to the Occupations of 1939-1990], art. 7, paras. 1 (4), 1 (8), Valstybės žinios, 1997-07-11, Nr. 66-1609, as last amended on December 11, 2014, <https://www.e-tar.lt/portal/lt/legalAct/TAR.FA7CC8021E9D/sOSEZNALto>.

regained their independence.<sup>551</sup> However this practice was not widely developed, as the Baltic states consider the USSR, i.e. the Russian Federation, to be responsible for the damages that were inflicted during Soviet rule on the people of the Baltic states and the Baltic states themselves.<sup>552</sup> Lithuania's position here could be considered as the strongest because, with the enactment of the 'Law on Compensation of Damage Resulting from the Occupation by the USSR',<sup>553</sup> Lithuania declares the Russian Federation as responsible for all damage that resulted from the USSR's occupation and obliges Government of Lithuania to initiate negotiations concerning compensation.<sup>554</sup>

As compensation is mentioned in the 'Law on Compensation of Damage Resulting from the Occupation by the USSR' to express claims for reparations, the issue of its relationship with restitution as a primary form of reparations arises. This problem is addressed by Dainius Žalimas, who states that full reparation is possible because any form of reparation 'was not excluded by Lithuania's Law on Compensation ... despite the fact that most of the provisions were focused on the compensation issues'.<sup>555</sup> However, it is possible that compensation by this law is regarded as the most appropriate form of reparation to resolve interstate claims of the Republic of Lithuania towards the Russian Federation.

Additional remarks must be made concerning payments made by the Baltic states, as a compensation for victims as well as payments for persons who fought in arms for independence against the USSR.<sup>556</sup> The question arises whether such a position is compatible with the position

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<sup>551</sup> In Lithuania each person having status of a victim received 6 euro for every month spent in forced labour camps, ghettos or imprisoned. Thus this regulation encompasses not only victims of Soviet regime, but also victims of Nazis regime. Lietuvos Respublikos Vyriausybės nutarimas "Dėl materialinės žalos atlyginimo asmenims, antrojo pasaulinio karo ir okupacijų metais išvežtiems priverstiniam darbams, buvusiems getuose, įkalinimo įstaigose ir kitose laisvės atėmimo vietose" [Resolution on the Remuneration of Material Damage for People Who Were Subjected to Forced Labour, Imprisoned in Ghettos or Otherwise Imprisoned during the Second World War and Occupations], Lietuvos aidas, 1991-08-17, Nr. 162-0, as last amended on October 15, 2014, <https://www.e-tar.lt/portal/lt/legalAct/TAR.FA40F9474ABE/LMbQywiSyB>.

<sup>552</sup> Carlos Closa Montero, *Study on how the memory of crimes committed by totalitarian regimes in Europe is dealt with in the Member States* (Madrid: Institute for Public Goods and Policy, 2010), accessed June 3, 2015, <http://ipp.csic.es/en/research-project/study-how-memory-crimes-committed-totalitarian-regimes-europe-dealt-member-states>, 103, 127; Rytis Satkauskas, "A Bill for the Occupants or an Issue to Negotiate: The Claims of Reparations for Soviet Occupation," *Baltic Yearbook of International Law* 3 (2003): 84-85, [https://heinonline-org.ezproxy.vdu.lt:2443/HOL/Page?handle=hein.intyb/byrbkinl0003&div=8&start\\_page=77&collection=intyb&set\\_as\\_cursor=0&men\\_tab=srchresults#](https://heinonline-org.ezproxy.vdu.lt:2443/HOL/Page?handle=hein.intyb/byrbkinl0003&div=8&start_page=77&collection=intyb&set_as_cursor=0&men_tab=srchresults#).

<sup>553</sup> Lietuvos Respublikos įstatymas dėl SSRS okupacijos žalos atlyginimo [Republic of Lithuania Law of the Republic of Lithuania on Compensation of Damage Resulting from the Occupation of the USSR], Valstybės žinios, 2000-06-28, Nr. 52-1486, <https://www.e-tar.lt/portal/lt/legalAct/TAR.03410B6A865C>.

<sup>554</sup> Žalimas, "Commentary," 97-164.

<sup>555</sup> *Ibid.*, 134.

<sup>556</sup> Both Latvia and Lithuania provided certain state support for the people who fought against the USSR as the occupying power. See Par nacionālās pretošanās kustības dalībnieka statusu [Law on Status of Participant of the Resistance Movement], art. 10, "Latvijas Vēstnesis", 82 (567), 10.05.1996, as last amended on October 23, 2014, <http://likumi.lv/ta/id/40103-par-nacionalas-pretosanas-kustibas-dalibnieka-statusu>; Lietuvos Respublikos valstybės paramos ginkluoto pasipriešinimo (rezistencijos) dalyviams įstatymas [Republic of Lithuania Law on State Support to the Participants of Armed Resistance], Valstybės žinios, 1997-12-12, Nr. 114-2868, as last amended on October 7, 2014, <https://www.e-tar.lt/portal/lt/legalAct/TAR.D841592F4E8A/vwcnhsHnDE>. Translation of title provided in

that the Russian Federation is responsible for paying compensation. In the case of Lithuania, in 1996 the Government confirmed the work programme on the evaluation of the damage inflicted on the Republic of Lithuania by the former USSR during the period of 1940 to 1991 and the armed forces of the Russian Federation during 1991 to 1993; the various types of harm that need to be evaluated before producing a claim for compensation were enumerated.<sup>557</sup> Under paragraph 12.3 of this programme, one of the types of harm is payments including compensations made by the Republic of Lithuania to the victims of Soviet regime. This means that recourse is made towards the subject responsible and payments already provided should be considered to respond to the urgent need of minimal justice towards victims before submission of the claim. A similar explanation would be valid for the case of Latvia and Estonia as well because there is no data that Latvia and Estonia waived their claims for reparation for victims of the Soviet regime.<sup>558</sup> Meanwhile, payments provided for individuals who fought against the USSR as the occupying power could be considered as a state support for the defenders of independence and statehood and not as a compensation for the harm suffered.

To sum up, none of the Baltic states paid compensation as it is provided in Basic Principles and Guidelines. This is because the Baltic states do not consider themselves responsible for gross human rights violations or serious violations of international humanitarian law that resulted in suffering by the victims of the Soviet regime. Thus, compensation as an element of reparation to which victims in the Baltic states are entitled to is clearly missing in the reparatory policy of the Baltic states.

### 3.1.3. Measures of satisfaction in the Baltic states

The variety of measures possible to apply as satisfaction has already been revealed in this work. Although it is stated that any or all of the possible measures could be applied, the analysis

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Montero, *Study on how the memory of crimes committed by totalitarian regimes in Europe is dealt with*, 418. In addition, Lithuania also provides state support for the family members of the people who fought against the USSR as the occupying power and perished or died because of repressions inflicted on them. Lietuvos Respublikos valstybės paramos žuvusių pasipriešinimo 1940-1990 metų okupacijoms dalyvių šeimoms įstatymas [Republic of Lithuania Law on State Support to Families of the Fallen Participants of the Resistance against the 1940-1990 Occupations], Valstybės žinios, 1998-10-21, Nr. 92-2543, as last amended on October 7, 2014, <https://www.e-tar.lt/portal/lt/legalAct/TAR.EDE1F707F4EE/msazDyAwgQ>. Translation of title provided in Montero, *Study on how the memory of crimes committed by totalitarian regimes in Europe is dealt with*, 418.

<sup>557</sup> Lietuvos Respublikos Vyriausybės nutarimas “Dėl žalos, padarytos Lietuvos Respublikai 1940 - 1991 metais buvusios TSRS ir 1991 - 1993 metais - Rusijos Federacijos kariuomenės, nustatymo darbų programos” [Resolution on the Work Programme on the Evaluation of the Damage Inflicted on the Republic of Lithuania by the Armed Forces of the Former USSR during 1940-1991 and the Armed Forces of the Russian Federation during 1991-1993], Valstybės žinios, 1996-02-21, Nr. 16-424, <https://www.e-tar.lt/portal/lt/legalAct/TAR.7D4644624E4B>. Translation of title provided in Žalimas, “Commentary,” 99.

<sup>558</sup> Mälksoo, *Illegal Annexation and State Continuity*, 251-263; Edmunds Broks, „Loss of the Right to Invoke Responsibility: Is Latvia Losing its Right to Claim Compensation from Russia?“ *Juridiskā zinātne/Law* 9 (2016): 158-161.

of the practice of the Baltic states reveals that almost all possible measures of satisfaction were and are still applied. However their application is affected by the fact that mass repressions were inflicted not by the Baltic states themselves.<sup>559</sup> First, this sub-chapter will deal with measures aimed at recognition of victimization and acknowledgement of responsibility by the guilty parties; later the sub-chapter will address measures aimed at disclosure of truth regarding injustices and preservation of memory.

### ***3.1.3.1. Measures aimed at recognition of victimization and acknowledgement of responsibility***

As it was mentioned previously, the enactment of laws aimed at restoration of victims' liberty and enjoyment of human rights in the Baltic states could be regarded as an official declaration restoring the dignity, reputation and rights of a victim and, as a result, recognition of victimization. Other measures of this group, such as public apology and acceptance of responsibility, deserve special attention. It is clear that apology and acceptance of responsibility should come from a subject responsible for the wrongful acts. In the case of the Baltic states, it was not Lithuania, Latvia or Estonia that repressed its citizens but the aggressive regime imposed by the occupying state—the USSR. As a result this measure was not applied by the Baltic states themselves.

However, in the case of Estonia, the Communist Party of Estonia did accept responsibility by a resolution on 25 March 1990 'acknowledging the Party's mistakes in terms of having denied the independence aspirations of the Estonian people and thereby put in danger the nation itself (because of the ensuing deportations and other repressions).'<sup>560</sup> On the other hand, the Communist Parties in Latvia and Lithuania did not make similar statements accepting their responsibility, although they were the local executors of the policy of the occupying power.<sup>561</sup>

All Baltic states did apply judicial and administrative sanctions against persons liable for violations of human rights law and international humanitarian law. Criminal responsibility as a judicial sanction was targeted against persons responsible for the commitment of international crimes,<sup>562</sup> although compared to the scale and gravity of repressions, the number of actual trials is quite low. Several reasons are usually identified here: lack of evidentiary materials,<sup>563</sup>

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<sup>559</sup> Case of cessation of the continuing violations will not be discussed in this chapter due to observations made in sub-chapter 2.3.4 "Guarantees of non-repetition" to treat this measure and guarantees of non-repetition as a separate category of reparations. In case of the Baltic States this is even more specific as cessation of violations and guarantees of non-repetition were dependent on the withdrawal of the occupant from the Baltic States.

<sup>560</sup> Montero, *Study on how the memory of crimes committed by totalitarian regimes in Europe is dealt with*, 143.

<sup>561</sup> Anušauskas et al., *Lietuva 1940-1990*, 89-108, 276-280, 448-453, 455-457; Nollendorfs et al., *Three Occupations of Latvia 1940-1991*, 20, 22, 34-36.

<sup>562</sup> Liivoja, „Competing Histories,” 254-261.

<sup>563</sup> See footnote 578.

repressions committed are usually seen as not corresponding to the precise definition of particular international crime,<sup>564</sup> problem of retroactive application of the law and lack of condemnation of crimes committed under the Soviet regime at the international level.<sup>565</sup> Judicial sanction here will not be addressed in detail, as this was done in the previous chapter.<sup>566</sup>

Lustration was administrative sanction widely applied in all post-communist countries as well as in the Baltic states. This process has received significant attention in scholarly writings because of legal challenges faced during its implementation, its objectives, different practices among countries and various contradictory views towards it.<sup>567</sup> Although all the Baltic states applied lustration as an administrative sanction, the means of implementing it were quite different, partly depending on exiting political environments and objective obstacles, e.g. the ability to access archives of state security services that operated in every union republic of the former USSR and in the Baltic states as well.<sup>568</sup>

In Lithuania and Latvia people who served for or cooperated in secret with former state security services (KGB) faced limitations for civil service.<sup>569</sup> The ability to stand for elections was limited only in Latvia,<sup>570</sup> as Lithuania allows participation, subject to a requirement to reveal

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<sup>564</sup> This is particularly true in cases concerning convictions of genocide as there is lack of evidence that repressions of Soviet regime inflicted on people of the Baltic States were aimed at national, ethnical, racial or religious groups. See sub-chapter 1.3.2 “Prosecution of acts committed against the people of the Baltic states under the Soviet regime”.

<sup>565</sup> Liivoja, „Competing Histories,” 261-266.

<sup>566</sup> See 1.3.2 “Prosecution of acts committed against the people of the Baltic states under the Soviet regime”

<sup>567</sup> For. e.g. Monika Nalepa, *Skeletons in the Closet: Transitional Justice in Post-Communist Europe* (New York: Cambridge University Press, 2010); Vladimira Dvořáková and Anđelko Milardović, *Lustration and Consolidation of Democracy and the Rule of Law in Central and Eastern Europe* (Zagreb: Political Science Research Centre, 2007), <http://www.kas.de/rpsee/en/publications/12839/>; Cynthia M. Horne, „Lustration, Transitional Justice, and Social Trust in Post-Communist Countries. Repairing or Wresting the Ties that Bind?” *Europe-Asia Studies* 66, no. 2 (March 201): 225–254, doi: 10.1080/09668136.2014.882620; Liviu Damsa, “Lustration (administrative justice) and closure in post-communist East Central Europe,” *International Journal of Public Law and Policy* 1, no. 4 (2011): 335–375, doi: 10.1504/IJPLAP.2011.044991.

<sup>568</sup> For the Baltic States it was State Security Committee (KGB (rus. КГБ Комитет Государственной Безопасности)) and its predecessors.

<sup>569</sup> Lietuvos Respublikos įstatymas dėl SSRS valstybės saugumo komiteto (NKVD, NKGB, MGB, KGB) vertinimo ir šios organizacijos kadrių darbuotojų dabartinės veiklos [Republic of Lithuania Law on Evaluation of the USSR State Security Committee (NKVD, NKGB, MGB, KGB) and the Present Activities of Former Permanent Employees of This Organisation], Valstybės žinios, 1998-07-22, Nr. 65-1877, as last amended on April 22, 1999, [https://www.e-tar.lt/portal/lt/legalAct/TAR.DC1DC18DF88B/TAIS\\_79654](https://www.e-tar.lt/portal/lt/legalAct/TAR.DC1DC18DF88B/TAIS_79654), translation of title provided in Montero, *Study on how the memory of crimes committed by totalitarian regimes in Europe is dealt with*, 418; Lietuvos Respublikos asmenų, slapta bendradarbiavusių su buvusios SSRS specialiosiomis tarnybomis, registracijos, prisipažinimo, įskaitos ir prisipažinusiųjų apsaugos įstatymas [Republic of Lithuania Law on Registering, Confession, Entry into Records and Protection of the Persons Who Have Admitted to Secret Collaboration with Special Services of the Former USSR], Valstybės žinios, 1999, No. 104-2976, as last amended on June 30, 2015, <https://www.e-tar.lt/portal/lt/legalAct/TAR.F8D00907FFBE/LLCqbkPWtO>, translation of title provided in Montero, *Study on how the memory of crimes committed by totalitarian regimes in Europe is dealt with*, 418; Valsts civildienesta likums [State Civil Service Law], art. 7 para. 1, "Latvijas Vēstnesis", 331/333 (2242/2244), 22.09.2000, as last amended on May 24, 2007, <https://likumi.lv/ta/en/en/id/10944-state-civil-service-law>; Likums „Par tiesu varu“ [Law On Judicial Power], art. 55, "Ziņotājs", 1/2, 14.01.1993, as last amended on September 26, 2013, <https://likumi.lv/ta/en/en/id/62847-on-judicial-power>.

<sup>570</sup> Švarca, „Transitional Justice Mechanisms Applied by Latvia,” 74-77; Horne, „Lustration, Transitional Justice, and Social Trust,” 254.

the fact of collaboration and public notification in the official lists for elections to the Seimas, to the European Parliament and Presidential elections.<sup>571</sup> In Estonia limitations for civil service and elections were not applied, but a person had to take oath of conscience, a breach of which would result in disqualification or invalidation of the mandate received.<sup>572</sup> Additionally, in Latvia and Estonia indirect lustration was carried out with the help of laws concerning citizenship, as automatic citizenship was denied for those who had not been citizens of Latvia or Estonia, respectively, on the day of occupation. Without citizenship those who were former KGB employees or secret collaborators or members of a communist party were banned from standing in elections.<sup>573</sup> Lithuania and Estonia also introduced a measure aimed at public notification of collaboration with the KGB for those who had not already confessed to it.<sup>574</sup>

Regarding the current state of these administrative sanctions, in Estonia application of any measures has already expired,<sup>575</sup> while in Latvia all measures are still applied.<sup>576</sup> In Lithuania former secret collaborators could face restrictions if they have not yet undergone the requirements

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<sup>571</sup> Lietuvos Respublikos Seimo rinkimų įstatymas [Republic of Lithuania Law on Elections to the Seimas], art. 98, para. 1, Lietuvos aidas, 1992-07-18, Nr. 139-0, as last amended on March 22, 2016, <https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/89e6d1a0f58111e5bf4ee4a6d3cdb874?jfwid=-1c2dter59l>; Lietuvos Respublikos Prezidento rinkimų įstatymas [Republic of Lithuania Law on Presidential Elections], art. 3, Lietuvos aidas, 1992-12-29, Nr. 253-0, as last amended on June 16, 2015, <https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/cb22d4521f5811e79f4996496b137f39?jfwid=-1c2dter4yt>; Lietuvos Respublikos rinkimų į Europos Parlamentą įstatymas [Republic of Lithuania Law on Elections to the European Parliament], art. 96, para. 1, Valstybės žinios, 2003-12-10, Nr. 115-5192, as last amended on June 30, 2016, <https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/138dcb809e0e11e796fec328fe7809de?jfwid=-1c2dter58d>.

<sup>572</sup> Eesti Vabariigi põhiseaduse rakendamise seadus [The Constitution of the Republic of Estonia Implementation Act], RT I 1992, 26, 350, <https://www.riigiteataja.ee/en/eli/530102013012/consolide>; Lavinia Stan and Nadya Nedelsky, eds., *Encyclopedia of Transitional Justice* (Cambridge: Cambridge University Press, 2013), 2: 163-164.

<sup>573</sup> Švarca, „Transitional Justice Mechanisms Applied by Latvia,” 76-77; Horne, „Lustration, Transitional Justice, and Social Trust,” 254.

<sup>574</sup> Lietuvos Respublikos asmenų, slapta bendradarbiavusių su buvusios SSRS specialiosiomis tarnybomis, registracijos, prisipažinimo, įskaitos ir prisipažinusiųjų apsaugos įstatymas [Republic of Lithuania Law on Registering, Confession, Entry into Records and Protection of the Persons Who Have Admitted to Secret Collaboration with Special Services of the Former USSR], art. 6, Valstybės žinios, 1999, No. 104-2976, as last amended on June 30, 2015, <https://www.e-tar.lt/portal/lt/legalAct/TAR.F8D00907FFBE/LLCqbkPWtO>; Stan and Nedelsky, eds., *Encyclopedia of Transitional Justice*, 2: 164; Mark S. Ellis, "Purging the Past: The Current State of Lustration Laws in the Former Communist Bloc," *Law and Contemporary Problems* 59, no. 4 (Autumn 1996): 192, [https://heinonline.org.ezproxy.vdu.lt:2443/HOL/Page?handle=hein.journals/lcp59&div=56&start\\_page=181&collection=journals&se\\_t\\_as\\_cursor=0&men\\_tab=srchresults#](https://heinonline.org.ezproxy.vdu.lt:2443/HOL/Page?handle=hein.journals/lcp59&div=56&start_page=181&collection=journals&se_t_as_cursor=0&men_tab=srchresults#); Sõro v. Estonia, no. 22588/08, ECHR, HUDOC (September 3, 2015), <http://hudoc.echr.coe.int/eng/?i=001-156518>, paras. 35-40.

<sup>575</sup> Article 6 of the Constitution of the Republic of Estonia Implementation Act [Eesti Vabariigi põhiseaduse rakendamise seadus] <https://www.riigiteataja.ee/akt/24305>

<sup>576</sup> Saeimas vēlēšanu likums [The Saeima Election Law], art. 5, paras. 5, 6, "Latvijas Vēstnesis", 86 (369), 06.06.1995, as last amended on March 31, 2010, <http://www.saeima.lv/en/about-saeima/saeimas-velesanas-1/saeimas-velesanu-likums-1>; Republikas pilsētas domes un novada domes vēlēšanu likums [Law on Elections of the Republic City Council and Municipality Council], art. 9, paras. 5, 6, "Latvijas Vēstnesis", 10 (141), 25.01.1994, as last amended on October 2, 2008, <https://likumi.lv/ta/en/en/id/57839-law-on-elections-of-the-republic-city-council-and-municipality-council>.



of Law on Lustration and subsequently apply for certain position in civil service or take part in election or currently occupy certain positions in civil service or as a result of elections.<sup>577</sup>

Additional attention should be given to the fact that lustration was performed without having full access to the archives of the KGB, as many of the materials were transferred to Moscow or destroyed.<sup>578</sup> This is clearly reflected by the results achieved through lustration. In Lithuania it is estimated that around 118,000 people served in or co-operated with the KGB or its predecessors, while only 1,589 persons confessed to this fact and only 57 persons were identified by a special commission.<sup>579</sup> However, Lithuania was able to identify 95 percent of former KGB regular staff.<sup>580</sup> In Estonia it was estimated that around 20,000 people might come under the measures of the Procedure for Registration and Disclosure of Persons who Have Served in or Co-operated with Security Organisations or Intelligence or Counterintelligence Organisations of Armed Forces of States which Have Occupied Estonia Act. Yet only 1,153 people directly confessed, and 616 people were identified as former servants of KGB by a special commission.<sup>581</sup> Latvia did not implement any measures concerning confession of former collaborators.<sup>582</sup> These results clearly show that lustration was not able to reach much of the population it was aimed at. However, the whole process should not be considered meaningless, as it still helps to reveal historical truth, build trust in public institutions, strengthen new democracy and purify society.<sup>583</sup>

At first sight lustration does not have a clear relationship between victims and perpetrators of crimes, as all applied measures affected persons who were found to be employees or cooperated in secret with the KGB. Moreover, the application of lustration was treated by the European Court of Human Rights (ECtHR) as conflicting with the rights protected by the European Convention

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<sup>577</sup> Lietuvos Respublikos asmenų, slapta bendradarbiavusių su buvusios SSRS specialiosiomis tarnybomis, registracijos, prisipažinimo, įskaitos ir prisipažinusiųjų apsaugos įstatymas [Republic of Lithuania Law on Registering, Confession, Entry into Records and Protection of the Persons Who Have Admitted to Secret Collaboration with Special Services of the Former USSR], art. 9, Valstybės žinios, 1999, No. 104-2976, as last amended on June 30, 2015, <https://www.e-tar.lt/portal/lt/legalAct/TAR.F8D00907FFBE/LLCqbkPWtO>.

<sup>578</sup> Lavinia Stan “The former Soviet Union,” in *Transitional Justice in Eastern Europe and the former Soviet Union*, ed. Lavinia Stan (Routledge, 2009), Taylor & Francis e-Library e-book, 222-246.

<sup>579</sup> “A. Anušauskas: „Liustracijos komisija savo darbą padarė“,” *Lrytas.lt*, published May 18, 2011, <http://kultura.lrytas.lt/-13057249391303414710-a-anu%C5%A1auskas-liustracijos-komisija-savo-darb%C4%85-padar%C4%97.htm>.

<sup>580</sup> Julija Ravaitytė, „Liustracijos politikos Lietuvoje vertinimas“, *Politologija* 77, no. 1 (2015): 60, doi: <https://doi.org/10.15388/Polit.2015.77.7374>.

<sup>581</sup> Stan and Nedelsky, eds., *Encyclopedia of Transitional Justice*, 2: 164. Meanwhile Marek Tamm states that number is equal to 647. Tamm, „In search of lost time,” 658.

<sup>582</sup> This process is especially hindered by the fact that Latvia has only ‘5,000 small index cards containing people’s names’ and ‘[i]t remains unclear whether the names on the cards indicate real informers or simply the people whom the KGB tried to recruit or would have liked to recruit.’ Ieva Zake, “Politicians Versus Intellectuals in the Lustration Debates in Transitional Latvia,” *Journal of Communist Studies and Transition Politics* 26, no. 3 (2010): 397, doi: <http://dx.doi.org/10.1080/13523279.2010.496327>.

<sup>583</sup> Horne, „Lustration, Transitional Justice, and Social Trust,” 227-228; Zake, “Politicians Versus Intellectuals,” 391-393.

of Human Rights due to the broad application and lack of individual assessment of a case.<sup>584</sup> However, it is well established that the KGB, and its predecessors, was the main institution responsible for the implementation of repressive policies of the Soviet regime.<sup>585</sup> As a result, every person performing certain task within the KGB helped to maintain this institution. Therefore application of lustration as a form of administrative sanction has additional value for victims and cannot be perceived as a simple measure of dismantling the heritage of the Soviet regime.

### **3.1.3.2. Measures aimed at disclosure of truth regarding injustices and preservation of memory**

Another group of measures concerning satisfaction is aimed at disclosure of truth regarding injustices and preservation of memory. Regarding the long duration of the Soviet repressive regime, archives play a key role in establishing the truth on committed violations. Thus, quite soon after regaining their independence and cessation of KGB activities, all Baltic states issued primary legal acts aimed at preserving KGB archives and archives formed by other institutions of the repressive regime.<sup>586</sup> The whole process concerning the disclosure of truth and preservation of memory was organized by employing different means to research the past.

Creation of special commissions to investigate the past of repressive regimes as a mean aimed at verification of the facts and full and public disclosure of the truth is one of the applied measures that was a unique method of dealing with the legacy of the communist regime.<sup>587</sup> These commissions were not perceived as classical truth commissions, because they were performed in a manner akin more to academic research than public investigation.<sup>588</sup> An additional noteworthy attribute concerning the activities of special commissions in the Baltic states is their number, as

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<sup>584</sup> Sidabras and Džiautas v. Lithuania, nos. 55480/00 and 59330/00, 2004-VIII *Reports of Judgments and Decisions* (ECHR) 367; Rainys and Gasparavičius v. Lithuania, nos. 70665/01 74345/01, ECHR, HUDOC (April 7, 2005), <http://hudoc.echr.coe.int/eng?i=001-68749>; Žičkus v. Lithuania, no. 26652/02, ECHR, HUDOC (April 7, 2009), <http://hudoc.echr.coe.int/eng?i=001-92069>; Ādamsons v. Latvia, no. 3669/03, ECHR, HUDOC (June 24, 2008), <http://hudoc.echr.coe.int/eng?i=001-87179>; Zdanoka v. Latvia [GC], no. 58278/00, 2006-IV *Reports of Judgments and Decisions* (ECHR) 29; Sõro v. Estonia, no. 22588/08, ECHR, HUDOC (September 3, 2015), <http://hudoc.echr.coe.int/eng?i=001-156518>.

<sup>585</sup> See footnotes 644 and 645.

<sup>586</sup> For Lithuania see Lietuvos Respublikos Aukščiausiosios Tarybos nutarimas „Dėl Sovietų Sąjungos KGB veiklos Lietuvoje ištyrimo“ [Resolution on Investigation of Activities Performed by KGB in Lithuania], Valstybės žinios, 1991-09-10, Nr. 25-667, <https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/TAIS.2807?ifwid=-1c2dter278>; Lietuvos Respublikos įstatymas dėl ypatingos reikšmės archyvų išsaugojimo [Republic of Lithuania Law on Preservation of Archives Having Great Significance], Lietuvos aidas, 1992-11-05, Nr. 217-0, <https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/TAIS.1826>. For Latvia see Švarca, „Transitional Justice Mechanisms Applied by Latvia,” 74. For Estonia see Tamm, „In search of lost time,” 654-655.

<sup>587</sup> Lavinia Stan, „Truth Commissions in Post-Communism: The Overlooked Solution?” *The Open Political Science Journal* 2 (2009): 2-3, doi: 10.2174/1874949600902010001.

<sup>588</sup> *Ibid.*, 3-4.

several commissions were created in Estonia<sup>589</sup> and Latvia.<sup>590</sup> They are considered to complement the work of each other.<sup>591</sup> In Lithuania a special commission was established by the decree of the President of the Republic of Lithuania in 1998.<sup>592</sup> This commission has almost implemented its tasks by publishing research on different periods under both Nazi and Soviet occupations,<sup>593</sup> but in 2012 the decision was made to completely revamp the work of the commission. Guidelines for its work, with special emphasis on the Holocaust, have been settled, and the composition of commission has been changed.<sup>594</sup> Nevertheless, it seems that revamped commission conducts further research based on finding of its predecessor.<sup>595</sup>

Creation of special commissions is not the only measure aimed at verification of the facts and public disclosure of the truth that was implemented by the Baltic states. The laws of the Baltic states established a permanent obligation to research the issue. In Latvia and Estonia the government undertook a general obligation to organise the study of the repressive policies of the occupying states and preservation of memory.<sup>596</sup> As a result, research initiatives concerning disclosure of the repressive past in Latvia and Estonia are of private or academic nature, having

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<sup>589</sup> In Estonia the initiatives to create special commissions came from the Parliament and the Presidents of Estonia, i.e. Lennart Meri and Toomas Hendrik Ilves. Tamm, „In search of lost time,” 659-662; “Truth commissions and similar bodies,” *Transitional Justice and Memory in the EU*, *Spanish National Research Council*, accessed March 23, 2016, <http://www.proyectos.cchs.csic.es/transitionaljustice/content/truth-commissions-and-similar-bodies>.

<sup>590</sup> In Latvia initiative came from the President of Latvia Guntis Ulmanis. In 2005 the Cabinet of Ministers established Commission for Identifying the Number of Victims of the Communist Occupation and their Final Resting Places, Aggregating Information on Repressions and Deportations, and Calculating the Costs to the Latvian State and Its Inhabitants. “Truth commissions and similar bodies,” *Transitional Justice and Memory in the EU*, *Spanish National Research Council*, accessed March 23, 2016, <http://www.proyectos.cchs.csic.es/transitionaljustice/content/truth-commissions-and-similar-bodies>; Montero, *Study on how the memory of crimes committed by totalitarian regimes in Europe is dealt with*, 235-236; Stan, „Truth Commissions in Post-Communism,” 7.

<sup>591</sup> Tamm, „In search of lost time,” 659-662.

<sup>592</sup> Lietuvos Respublikos Prezidento dekretas „Dėl tarptautinės komisijos nacių ir sovietinio okupacinių režimų nusikaltimams Lietuvoje įvertinti“ [Decree of the President of the Republic of Lithuania „On the International Commission for the Evaluation of the Crimes of the Nazi and Soviet Occupation Regimes in Lithuania“], *Valstybės žinios*, 1998-09-11, Nr. 80-2248, [http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc\\_l?p\\_id=61915](http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=61915).

<sup>593</sup> Montero, *Study on how the memory of crimes committed by totalitarian regimes in Europe is dealt with*, 237-238; “Truth commissions and similar bodies,” *Transitional Justice and Memory in the EU*, *Spanish National Research Council*, accessed March 23, 2016, <http://www.proyectos.cchs.csic.es/transitionaljustice/content/truth-commissions-and-similar-bodies>.

<sup>594</sup> Lietuvos Respublikos Prezidento dekretas „Dėl tarptautinės komisijos nacių ir sovietinio okupacinių režimų nusikaltimams Lietuvoje įvertinti“ [Decree of the President of the Republic of Lithuania „On the International Commission for the Evaluation of the Crimes of the Nazi and Soviet Occupation Regimes in Lithuania“], *Valstybės žinios*, 2012-10-18, Nr. 121-6075, <https://www.e-tar.lt/portal/lt/legalAct/TAR.7BB814097EA2>.

<sup>595</sup> Tarptautinė komisija nacių ir sovietinio okupacinių režimų nusikaltimams Lietuvoje įvertinti, “Mokslinių tyrimų duomenų bazė,” *Tarptautinė komisija nacių ir sovietinio okupacinių režimų nusikaltimams Lietuvoje įvertinti*, accessed April 6, 2018, <https://www.komisija.lt/tyrimai/>.

<sup>596</sup> Par politiski represētās personas statusa noteikšanu komunistiskajā un nacistiskajā režīmā cietušajiem [Law Concerning the Determination of Repressed Status for Persons Who Suffered under the Communist and Nazi Regimes], art. 8, “Latvijas Vēstnesis”, 64 (347), 26.04.1995, as last amended on March 31, 2011, <http://likumi.lv/doc.php?id=34832>; Okupatsioonirežiimide poolt represseritud isiku seadus [Persons Repressed by Occupying Powers Act], art. 5, para. 2, RT I 2003, 88, 589, as last amended on June 15, 2016, <https://www.riigiteataja.ee/en/eli/ee/511012017003/consolide>.

state support to a greater or lesser extent.<sup>597</sup> Conversely, Lithuania is the only country that established a permanent research institution, the Genocide and Resistance Research Centre of Lithuania, by legal act.<sup>598</sup> This institution is responsible not only for ‘scientific analysis of the processes that occurred during the Soviet and Nazi occupations and dissemination of the results of the analysis’ but also for other measures aimed at disclosure, research, education, commemorations and tributes to the victims.<sup>599</sup> The centre also accomplishes additional tasks, related to various transitional measures implemented in Lithuania after regaining its independence.<sup>600</sup>

The next measure that must be discussed in this group is the search for the whereabouts of the disappeared, for the identities of the children abducted, and for the bodies of those killed, and assistance in the recovery, identification and reburial of the bodies in accordance with the expressed or presumed wish of the victims or the cultural practices of the families and communities. Despite the fact that many places where the Soviet regime performed mass killings have not been discovered,<sup>601</sup> no specific legislation was introduced to implement measures to search for the bodies of those killed or those who died because of unbearable conditions, and no assistance in the recovery, identification and reburial of the bodies in Baltic states has been provided. The lack of such measures could be explained by the length of time that passed since the massacres, lack of information on their exact location due to inability to access all archived material of former security services and activities by the government of the USSR to destroy such places or the bodies of those killed.<sup>602</sup> However, certain initiatives aimed at research and

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<sup>597</sup> Tamm, „In search of lost time,” 655; Montero, *Study on how the memory of crimes committed by totalitarian regimes in Europe is dealt with*, 44, 46.

<sup>598</sup> Lietuvos Respublikos Lietuvos gyventojų genocido ir rezistencijos tyrimo centro įstatymas [Republic of Lithuania Law on the Centre of Research of the Genocide and Resistance of the Lithuanian Population], Valstybės žinios, 1997-06-27, Nr. 60-1398, as last amended on December 18, 2014, <https://www.e-tar.lt/portal/lt/legalAct/TAR.28635AB7F3EB/xQVTrXGjoj>. Translation of title provided in Montero, *Study on how the memory of crimes committed by totalitarian regimes in Europe is dealt with*, 418.

<sup>599</sup> Lietuvos gyventojų genocido ir rezistencijos tyrimo centras, „The main,” *Lietuvos gyventojų genocido ir rezistencijos tyrimo centras*, accessed July 14, 2016, <http://genocid.lt/centras/en/>.

<sup>600</sup> Lietuvos Respublikos Lietuvos gyventojų genocido ir rezistencijos tyrimo centro įstatymas [Republic of Lithuania Law on the Centre of Research of the Genocide and Resistance of the Lithuanian Population], art. 5, Valstybės žinios, 1997-06-27, Nr. 60-1398, as last amended on December 18, 2014, <https://www.e-tar.lt/portal/lt/legalAct/TAR.28635AB7F3EB/xQVTrXGjoj>.

<sup>601</sup> “Sovietų nužudytų žmonių palaikai buvo slepiami beveik pusę amžiaus,” *Bernardinai.lt*, published September 28, 2015, <http://www.bernardinai.lt/straipsnis/2012-09-28-sovietu-nuzudytu-zmoniu-palaikai-buvo-slepiami-beveik-puse-amziaus/88579>; Nicolas Werth, “Mass Crimes under Stalin (1930-1953),” *SciencesPo*, published March 14, 2008, <http://www.massviolence.org/Mass-crimes-under-Stalin-1930-1953>.

<sup>602</sup> “Sovietų nužudytų žmonių palaikai buvo slepiami beveik pusę amžiaus,” *Bernardinai.lt*, published September 28, 2015, <http://www.bernardinai.lt/straipsnis/2012-09-28-sovietu-nuzudytu-zmoniu-palaikai-buvo-slepiami-beveik-puse-amziaus/88579>; “The Medallion in the Skull,” *Research Teacher*, published September 17, 2012, <http://researchteacher.com/medallion-in-the-skull/>.

commemoration of victims in known mass killings places have been implemented.<sup>603</sup> These activities were treated as a part of broader research and discovery of the truth policy.

It is also important to address measures concerning the preservation of memory, i.e. remembrance days, establishment of memorials, creation of special museums, publication of books providing lists of victims, places of massacres, torture, etc., as well as other various educational initiatives. Certain measures were implemented without specific legal regulations as soon as the Baltic states regained their independence, e.g. removal of Soviet monuments and other symbols, renaming of streets and restoration of previous monuments and street names from the interwar period when all Baltic states were independent.<sup>604</sup> Later preservation of memory was more institutionalized with enactment of legal acts addressing the needs of victims and the legacy of the Soviet regime.

As it was stated previously, the application of measures concerning preservation of memory was regulated to a certain extent by special legislation, with Latvia and Estonia having a broad general obligation to organise the study of the repressive policies and preservation of memory and Lithuania having a special institution responsible for particular activities and tasks in order to implement that aim. There is a variety of possible measures aimed at commemoration and preservation of memory and some of them are established through particular legal regulations.

According to Marek Tamm, museums are one of the most ‘important institutional instrument of memory politics’.<sup>605</sup> They could be regarded as serving dual functions—disclosure of facts and preservation of memory. However, their role is usually analysed in research on issues of memory of past events. All of the Baltic states have special museums on the history of their occupations or the repressions of totalitarian regimes.<sup>606</sup>

In both Latvia and Estonia, museums on history of their occupations were established by private initiatives;<sup>607</sup> in Lithuania the Museum of Genocide Victims was established with the enactment of the Law on the Centre of Research of the Genocide and Resistance of the Lithuanian Population.<sup>608</sup> As a result, the museum is considered to be established by the Centre of Research

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<sup>603</sup> Lietuvos gyventojų genocido ir rezistencijos tyrimo centras, “Tuskulėnų rimties parko memorialinis kompleksas,” *Lietuvos gyventojų genocido ir rezistencijos tyrimo centras*, accessed July 14, 2016, <http://genocid.lt/tuskuleniai/>.

<sup>604</sup> Montero, *Study on how the memory of crimes committed by totalitarian regimes in Europe is dealt with*, 294-296.

<sup>605</sup> Tamm, „In search of lost time,” 662.

<sup>606</sup> It is interesting to note that Aro Velvet compares commercial museum „Gruto Parkas“ in Lithuania with Latvian and Estonian museums of occupations and the Museum of Genocide Victims is left aside in order to present different methods of revealing the history of occupation in the Baltic States. See: Aro Velvet, „Occupied Identities: National Narratives in Baltic Museums of Occupations,” *Journal of Baltic Studies* 42, no. 2 (2011): 194, doi: 10.1080/01629778.2011.569065.

<sup>607</sup> Velvet, „Occupied Identities,” 191-192.

<sup>608</sup> Lietuvos Respublikos Lietuvos gyventojų genocido ir rezistencijos tyrimo centro įstatymas [Republic of Lithuania Law on the Centre of Research of the Genocide and Resistance of the Lithuanian Population], art. 6, Valstybės žinios,

of the Genocide and Resistance of the Lithuanian Population and does not have the status of a national museum under the law of museums, and its founder is responsible for its funding.<sup>609</sup> Regardless, the state could be seen as providing indirect support, as all activities of the Centre of Research of the Genocide and Resistance of the Lithuanian Population are funded by state.<sup>610</sup> The Latvian government has established its relations with the privately owned Museum of the Occupation of Latvia by enacting a special law, the Law on the Museum of the Occupation of Latvia.<sup>611</sup> Under this law the museum has certain state guarantees for its activities and is funded by the state to carry out research and educational tasks provided in the law. In Estonia the Occupation Museum operates under general provisions of the Museums Act; however, its activities have great state support.<sup>612</sup>

Thus, museums as a measure for preservation of memory have significant state support in the Baltic states, despite differences in their funding. Their status is regulated by law, but none of the Baltic states interfere with the performance of research or the presentation of exhibits. Standards are only set to ensure impartiality, quality of activities performed and proper operation of the funding received.

National remembrance days also are one of the measures of preservation of memory established by legal acts in all Baltic states.<sup>613</sup> In the opinion of Marek Tamm, these days should be related to ‘the public rituals’ in order to affect and form collective memory.<sup>614</sup> Currently only Estonia prohibits holding public events incongruous with mourning on 14 June, which was

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1997-06-27, Nr. 60-1398, as last amended on December 18, 2014, <https://www.e-tar.lt/portal/lt/legalAct/TAR.28635AB7F3EB/xQVTrXGjoi>.

<sup>609</sup> Lietuvos Respublikos muziejų įstatymas [Republic of Lithuania Law on museums], art. 4, para. 6, Valstybės žinios, 1995-06-28, Nr. 53-1292, as last amended on May 3, 2016, <https://www.e-tar.lt/portal/lt/legalAct/TAR.863886C4199F/TAIS.464341>.

<sup>610</sup> Lietuvos Respublikos Lietuvos gyventojų genocido ir rezistencijos tyrimo centro įstatymas [Republic of Lithuania Law on the Centre of Research of the Genocide and Resistance of the Lithuanian Population], art. 7, Valstybės žinios, 1997-06-27, Nr. 60-1398, as last amended on December 18, 2014, <https://www.e-tar.lt/portal/lt/legalAct/TAR.28635AB7F3EB/xQVTrXGjoi>.

<sup>611</sup> Latvijas Okupācijas muzeja likums [Law on the Museum of the Occupation of Latvia], "Latvijas Vēstnesis", 171 (3539), 26.10.2006, as last amended on September 8, 2016, <http://likumi.lv/doc.php?id=146475>.

<sup>612</sup> Velmet, „Occupied Identities,” 662.

<sup>613</sup> Par politiski represētās personas statusa noteikšanu komunistiskajā un nacistiskajā režīmā cietušajiem [Law Concerning the Determination of Repressed Status for Persons Who Suffered under the Communist and Nazi Regimes], art. 7, "Latvijas Vēstnesis", 64 (347), 26.04.1995, as last amended on March 31, 2011, <http://likumi.lv/doc.php?id=34832>; Švarca, „Transitional Justice Mechanisms Applied by Latvia,” 83; Lietuvos Respublikos atmintinų dienų įstatymas [Republic of Lithuania Law on Days of Remembrance], art 1, paras. 2(2), 2(21), 2(23), 2(27), 2(31), 2(32), 2(39), 2(47), 2(53), Valstybės žinios, 1997-07-16, Nr. 67-1672, as last amended on December 8, 2016, <https://www.e-tar.lt/portal/lt/legalAct/TAR.D570962773F8/PQqzGsUoZU>; Pühade ja tähtpäevade seadus [Public Holidays and Days of National Importance Act], art. 3 paras. 4, 4<sup>1</sup>, 4<sup>3</sup>, RT I 1998, 13, 162, as last amended on February 17, 2011, <https://www.riigiteataja.ee/en/eli/ee/Riigikogu/act/513112013017/consolide>; Pettai and Pettai, *Transitional and Retrospective Justice in the Baltic States*, 224-236.

<sup>614</sup> Tamm, „In search of lost time,” 664.

established<sup>615</sup> as the Day of Mourning and Commemoration.<sup>616</sup> Lithuania and Latvia limit their legally binding public rituals only to requiring that the national flag be marked with the sign of mourning, i.e. a black ribbon.<sup>617</sup> It could be reasonably concluded that public rituals related to particular national remembrance days are generally not governed by law in the Baltic states.

Memorials are another popular means of implementing preservation of memory. In all Baltic states there is no specific regulation concerning standards of establishing memorials. Estonia could be regarded as the only state among the Baltics that enacted a 'procedure for bestowing a special Broken Cornflower insignia', which was done through Article 10 of the Persons Repressed by Occupying Powers Act.<sup>618</sup> The Badge of Broken Cornflower is viewed as a symbolic recognition of sufferings by those who faced repressions during Soviet occupation.<sup>619</sup> In Lithuania there is a broad obligation imposed by law on the Genocide and Resistance Research Centre of Lithuania to initiate, promote and support creation of memorials and look after the established ones;<sup>620</sup> this could be seen as a legal obligation to establish memorials.

However, the governments of all Baltic states support various initiatives aimed at the creation of memorials. Certain responsibilities are given to state institutions responsible for preservation of national culture.<sup>621</sup> Additionally, in Lithuania discussions were held on the adoption of a law regarding the historical memory of the nation. It was expected that adoption of this law would contribute to preservation of memory concerning the most important historical events for Lithuania and would set standards for establishing objects that should be considered as representing these events, i.e. remembrance days, years, places of historical importance and

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<sup>615</sup> Pühade ja tähtpäevade seadus [Public Holidays and Days of National Importance Act], art. 3<sup>1</sup> para. 2, RT I 1998, 13, 162, as last amended on February 17, 2011, <https://www.riigiteataja.ee/en/eli/ee/Riigikogu/act/513112013017/consolide>.

<sup>616</sup> "National, public and school holidays," *Eesti.ee*, last amended June 27, 2018, <https://www.eesti.ee/en/republic-of-estonia/republic-of-estonia/national-public-and-school-holidays/>.

<sup>617</sup> Lietuvos Respublikos Vyriausybės nutarimas "Dėl Lietuvos Respublikos valstybės vėliavos ir kitų vėliavų kėlimo ir naudojimo" [Resolution on Hoist and Use of National Flag and Other Flags], Valstybės žinios, 2004-12-29, Nr. 186-6923, as last amended on January 18, 2012, <https://www.e-tar.lt/portal/lt/legalAct/TAR.B490744731F8>; Latvijas valsts karoga likums [Law On the National Flag of Latvia], art. 7, para.2, art. 15, "Latvijas Vēstnesis", 182 (4168), 17.11.2009, as last amended on November 8, 2012, <http://likumi.lv/doc.php?id=200642>; Pettai and Pettai, *Transitional and Retrospective Justice in the Baltic States*, 229.

<sup>618</sup> Okupatsioonirežiimide poolt repressseeritud isiku seadus [Persons Repressed by Occupying Powers Act], art. 10, RT I 2003, 88, 589, as last amended on June 15, 2016, <https://www.riigiteataja.ee/en/eli/ee/511012017003/consolide>.

<sup>619</sup> Vello Pettai, „The Fate of Victims of Political Repression – The Right to Rehabilitation and Remembrance,” (paper presented at International Conference *Долгое эхо диктатуры. Жертвы политических репрессий в странах бывшего СССР – реабилитация и память*, Moscow, September 2014), 15-16; Montero, *Study on how the memory of crimes committed by totalitarian regimes in Europe is dealt with*, 134.

<sup>620</sup> Lietuvos Respublikos Lietuvos gyventojų genocido ir rezistencijos tyrimo centro įstatymas [Republic of Lithuania Law on the Centre of Research of the Genocide and Resistance of the Lithuanian Population], art. 5, Valstybės žinios, 1997-06-27, Nr. 60-1398, as last amended on December 18, 2014, <https://www.e-tar.lt/portal/lt/legalAct/TAR.28635AB7F3EB/xQVTrXGjoj>.

<sup>621</sup> Montero, *Study on how the memory of crimes committed by totalitarian regimes in Europe is dealt with*, 134, 136-137, 309-311; Tamm, „In search of lost time,” 666-667

historical rituals.. Here the history of Soviet occupation would be perceived in connection with the whole development of the Republic of Lithuania and would not be aimed particularly at victims.<sup>622</sup> However, the law was not adopted, and there is no evidence that it will again be considered in the near future.<sup>623</sup>

To sum up, the Baltic states generally do not differ significantly in applied measures of satisfaction, as judicial and administrative sanctions against perpetrators and acts restoring the dignity of victims were applied in all Baltic states and measures were taken to disclose the past and preserve memory. Nevertheless, there are distinguishable differences in the implementation of certain measures, especially in lustration politics. Certain measures of satisfaction could be seen as specifically affected by the occupation of the Baltic states and not by repressions towards victims of Soviet regime.

The clearest example of this is the application of public apologies. The Baltic states could not apply this measure, because responsibility can only be taken by those responsible for repressions, i.e. the occupying state and its institutions. The Communist Party of Estonia was the only communist party to accept responsibility despite the fact that the Communist Parties of Lithuania and Latvia were responsible for the implementation of similar repressive policies as those of the Communist Party in Estonia. In addition, application of measures aimed at preservation of memory included not only creation of new symbols but also reinstatement of symbols of the previously independent states. The search for the bodies of those who were killed or died because of unbearable conditions, and assistance in the recovery, identification and reburial of the bodies were performed as a part of measures concerning disclosure of truth, and their actual application was affected by distance of time, lack of access to archives and other factors independent of the actions of the Baltic states.

#### **3.1.4. Rehabilitation**

As previously stated, rehabilitation is a new element of reparation that was particularly developed for the reparation aimed at remedying human rights abuses. As a result, none of the Baltic states have implemented comprehensive programmes of medical and psychological care or social and legal services for victims. Applicable measures were aimed only at medical care, with Estonia having the clearest and most developed medical programme, with certain social services.

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<sup>622</sup> Tautos istorinės atminties įstatymo projektas [Draft Law on Historical Memory of Nation], no. XIP-4631(3), available at: [http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc\\_l?p\\_id=466441&p\\_tr2=2](http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=466441&p_tr2=2).

<sup>623</sup> Lietuvos Respublikos Seimas, *Seimas grąžino tobulinti Tautos istorinės atminties įstatymo projektą*, published April 7, 2015, [http://www3.lrs.lt/pls/inter/w5\\_show?p\\_r=4445&p\\_k=1&p\\_d=156168](http://www3.lrs.lt/pls/inter/w5_show?p_r=4445&p_k=1&p_d=156168).



Estonia was the only state that proposed medical care directed at the health problems related with suffered repressions for victims of the Soviet regime. Under Article 6 of the Persons Repressed by Occupying Powers Act, a victim could apply for a benefit for restoration of health equal to 160 euros once per year. This measure, introduced with the enactment of the Persons Repressed by Occupying Powers Act, was applied until 31 January 2015 and is no longer applicable.<sup>624</sup> Conversely, Lithuania and Latvia have not implemented any particular means aimed at restoration of the health of victims, but certain privileges were introduced that guaranteed free medical care.<sup>625</sup> However, these measures were not specifically aimed at health problems related with suffered repressions, and victims were treated similarly to other groups that have state support for expenses of medical care.

Social services suggested for victims in all of the Baltic states are aimed only at reducing the social and economic burdens of one's life in society. Public transport exemptions are one of the common measures that all Baltic states adopted,<sup>626</sup> although Estonia has given up its application as of 1 January 2016.<sup>627</sup> Latvia and Estonia adopted even more additional benefits, e.g. tax exemptions on personal income tax in Latvia<sup>628</sup> and free entrance to the national or

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<sup>624</sup> Okupatsioonirežiimide poolt represseritud isiku seadus [Persons Repressed by Occupying Powers Act], art. 6, RT I 2003, 88, 589, as last amended on November 14, 2012, <https://www.riigiteataja.ee/en/eli/ee/512112013012/consolide>.

<sup>625</sup> Lietuvos Respublikos sveikatos draudimo įstatymas [Republic of Lithuania Law on Health Insurance], art. 6 para. 4, Valstybės žinios, 1996-06-12, Nr. 55-1287, as last amended on December 15, 2015, <https://www.e-tar.lt/portal/lt/legalAct/TAR.94F6B680E8B8/aOxXEpXPWE>; Par politiski represētās personas statusa noteikšanu komunistiskajā un nacistiskajā režīmā cietušajiem [Law Concerning the Determination of Repressed Status for Persons Who Suffered under the Communist and Nazi Regimes], art. 9, para. 1, "Latvijas Vēstnesis", 64 (347), 26.04.1995, as last amended on March 31, 2011, <http://likumi.lv/doc.php?id=34832>.

<sup>626</sup> Par politiski represētās personas statusa noteikšanu komunistiskajā un nacistiskajā režīmā cietušajiem [Law Concerning the Determination of Repressed Status for Persons Who Suffered under the Communist and Nazi Regimes], art. 9, para. 1, "Latvijas Vēstnesis", 64 (347), 26.04.1995, as last amended on March 31, 2011, <http://likumi.lv/doc.php?id=34832>; Lietuvos Respublikos transporto lengvatų įstatymas [Republic of Lithuania Law on transport privileges], art. 5, Valstybės žinios, 2000-04-19, Nr. 32-890, as last amended on December 18, 2014, <https://www.e-tar.lt/portal/lt/legalAct/TAR.033D686E8F1B/AymdIHUtoP>

<sup>627</sup> Okupatsioonirežiimide poolt represseritud isiku seadus [Persons Repressed by Occupying Powers Act], art. 7, para. 2, RT I 2003, 88, 589, as last amended on November 14, 2012, <https://www.riigiteataja.ee/en/eli/ee/512112013012/consolide>; Okupatsioonirežiimide poolt represseritud isiku seadus [Persons Repressed by Occupying Powers Act], art. 7, para. 2, RT I 2003, 88, 589, as last amended on November 25, 2015, <https://www.riigiteataja.ee/en/eli/ee/512112013012/consolide>.

<sup>628</sup> Par politiski represētās personas statusa noteikšanu komunistiskajā un nacistiskajā režīmā cietušajiem [Law Concerning the Determination of Repressed Status for Persons Who Suffered under the Communist and Nazi Regimes], art. 9, para. 1, "Latvijas Vēstnesis", 64 (347), 26.04.1995, as last amended on March 31, 2011, <http://likumi.lv/doc.php?id=34832>, Par iedzīvotāju ienākuma nodokli [Law On Personal Income Tax], art. 13, para. 1(4), "Latvijas Vēstnesis", 32, 01.06.1993, as last amended on November 23, 2016, <http://m.likumi.lv/doc.php?id=56880>, Noteikumi par iedzīvotāju ienākuma nodokļa papildu atvieglojumiem personām ar invaliditāti, politiski represētajām personām un nacionālās pretošanās kustības dalībniekiem [Regulations on Additional Personal Income Tax Relief for Persons with Disability, Politically Repressed Persons and Members of the National Resistance Movement], "Latvijas Vēstnesis", 94 (809), 11.04.1997, as last amended on September 24, 2013, <http://m.likumi.lv/doc.php?id=42990>.

student's song and dance festivals, free entrance to state museums and the right to recreationally fish free of charge in Estonia.<sup>629</sup>

Additional note must be given to the decision of Estonia to abolish its previous measures concerning medical care and public transport exemptions. Since 1 January 2016, a repressed person's allowance is introduced in the amount of 192 euros in a calendar year.<sup>630</sup> Thus, Estonia is moving away from a model of particular social benefits for victims towards a lump sum paid once per year, enabling a victim to decide for himself/herself on his/her needs in order to fulfil goals of rehabilitation.

Special attention must be given to pension rights of victims in the case of the Baltic states, as all states have established regulations aimed at particular guarantees for the victims concerning their pension rights. This position is easily explained by the duration of the repressive regime, as victims could receive remedies only after the collapse of the regime, usually at senior age. In addition, repressions suffered left serious impact for many victims resulting in disabilities.

The most common means of implementing retirement pension rights is to include time in detention, in exile, spent while participating in fight for freedom or other similar period in time to acquire pension rights.<sup>631</sup> In Latvia and Estonia such periods are even multiplied several times to make the accrual of pension rights easier. Lithuania only releases victims from the requirement to accrue a required minimal period of work and payment of social insurance in order to acquire pension rights.<sup>632</sup>

Another benefit concerning pension rights is various pension supplements or other measures enabling victims to receive bigger pensions. In Lithuania victims are eligible for additional state pensions.<sup>633</sup> Latvia provides more favourable conditions for recalculation of pensions compared

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<sup>629</sup> Okupatsioonirežiimide poolt repressseeritud isiku seadus [Persons Repressed by Occupying Powers Act], art. 7, RT I 2003, 88, 589, as last amended on November 25, 2015, <https://www.riigiteataja.ee/en/eli/ee/512112013012/consolide>.

<sup>630</sup> Okupatsioonirežiimide poolt repressseeritud isiku seadus [Persons Repressed by Occupying Powers Act], art. 6<sup>1</sup>, RT I 2003, 88, 589, as last amended on June 15, 2016, <https://www.riigiteataja.ee/en/eli/ee/511012017003/consolide>. Since January 1, 2018 allowance is 230 euros in a calendar year. Okupatsioonirežiimide poolt repressseeritud isiku seadus [Persons Repressed by Occupying Powers Act], art. 6<sup>1</sup>, RT I 2003, 88, 589, as last amended on December 6, 2017, <https://www.riigiteataja.ee/en/eli/ee/502022016011/consolide/current>.

<sup>631</sup> Lietuvos Respublikos valstybinių socialinio draudimo pensijų įstatymas [Republic of Lithuania Law on State Social Insurance Pensions], art. 54, Valstybės žinios, 1994-08-03, Nr. 59-1153, as last amended on September 21, 2016, <https://www.e-tar.lt/portal/lt/legalAct/TAR.A7F77DF94F5D/RyFqYNnFvx>; Likumu Par valsts pensijām [Law On State Pensions], para. 1(2) of transitional provisions, "Latvijas Vēstnesis", 182 (465), 23.11.1995, as last amended on June 18, 2015, <https://likumi.lv/ta/en/en/id/38048-on-state-pensions>; Okupatsioonirežiimide poolt repressseeritud isiku seadus [Persons Repressed by Occupying Powers Act], art. 13, RT I 2003, 88, 589, as last amended on June 15, 2016, <https://www.riigiteataja.ee/en/eli/ee/511012017003/consolide>.

<sup>632</sup> Lietuvos Respublikos valstybinių socialinio draudimo pensijų įstatymas [Republic of Lithuania Law on State Social Insurance Pensions], art. 1, para. 5, Valstybės žinios, 1994-08-03, Nr. 59-1153, as last amended on September 21, 2016, <https://www.e-tar.lt/portal/lt/legalAct/TAR.A7F77DF94F5D/RyFqYNnFvx>.

<sup>633</sup> Lietuvos Respublikos valstybinių pensijų įstatymas [Republic of Lithuania Law on State Pensions], art. 11-14, Valstybės žinios, 1994-12-30, Nr. 101-2018, as last amended on June 29, 2016, <https://www.e-tar.lt/portal/lt/legalAct/TAR.ED38F243563C/OYAsIMrHG>.

to other cases of recalculation.<sup>634</sup> In Estonia victims have a right to receive pension supplements compared to regular pensions. The size of the supplement depends on the severity of the repressions suffered.<sup>635</sup>

To sum up, the Baltic states have significant differences in their measures aimed at rehabilitation. The only similarities that could be seen are the development of additional pension rights for victims. Due to the above identified differences, it is quite hard to determine the country that has the rehabilitation programme closest to the aims of rehabilitation. However, the provided overview suggests that Latvia and Estonia, as compared with Lithuania, provide more benefits to victims when it comes to restoration of their social abilities and their inclusion and participation in society.

### **3.1.5. Cessation of violations and guaranties of non-repetition as a special case of the Baltic states**

As it was mentioned previously, measures under this form of reparation are aimed at establishment of the rule of law and respect for human rights. As this element of reparations concerns various institutional reforms, it would be sufficient for the objective purposes of this work to state that successful establishment of the rule of law and respect for human rights in the Baltic states is confirmed by their membership in European Union<sup>636</sup> and abidance to the international and regional instruments aimed at protection of human rights.<sup>637</sup> Therefore, attention will be given only to issues particularly related to the case of the Baltic states.

The prohibition of the communist party and declaration of the former security services of the USSR as a criminal organization are measures that particularly correspond to the situation of the Baltic states. The latter institutions were responsible for implementation of the policies of the Soviet regime based on terror and repressions. Additionally, it is important to note that these

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<sup>634</sup> Likumu Par valsts pensijām [Law On State Pensions], paras. 10, 16, 22 of transitional provisions, "Latvijas Vēstnesis", 182 (465), 23.11.1995, as last amended on June 18, 2015, <https://likumi.lv/ta/en/en/id/38048-on-state-pensions>.

<sup>635</sup> Okupatsioonirežiimide poolt repressseeritud isiku seadus [Persons Repressed by Occupying Powers Act], art. 14, RT I 2003, 88, 589, as last amended on June 15, 2016, <https://www.riigiteataja.ee/en/eli/ee/511012017003/consolide>.

<sup>636</sup> Tanel Kerikmäe, "Estonia in the European Legal System: Protection of the Rule of Law through Constitutional Dialogue" (PhD diss., Tallinn University, 2009), <https://www.digar.ee/arhiiv/nlib-digar:55181>, 14-18; Europos Sajunga, „Šalys“, *Europos Sajunga*, last amended July 2, 2018, [https://europa.eu/european-union/about-eu/countries\\_lt#28\\_es\\_valstyb%C4%97s\\_nar%C4%97s](https://europa.eu/european-union/about-eu/countries_lt#28_es_valstyb%C4%97s_nar%C4%97s).

<sup>637</sup> All Baltic States have ratified International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights as well as European Convention on Human Rights with most of their protocols See „Status of Ratification Interactive Dashboard“, *Office of the United Nations High Commissioner for Human Rights*, accessed July 29, 2017, <http://indicators.ohchr.org/>; Council of Europe, „Simplified Chart of signatures and ratifications“, *Search on Treaties*, last modified July 28, 2018, <http://www.coe.int/en/web/conventions/search-on-treaties/-/conventions/chartSignature/3>.

restrictions were also perceived as a part of measures aimed at strengthening the independence and assurance of stability of the restored Baltic states.<sup>638</sup>

The communist party was banned by special legal acts in 1991 in Lithuania<sup>639</sup> and Latvia.<sup>640</sup> This ban was particularly aimed at the Communist Party established under the Soviet regime. Latvia even prohibited organizations related to the communist party.<sup>641</sup> However, in Estonia no such legally binding ban was introduced, but the communist regime was declared to be criminal by Riigikogu in 2002 with the enactment of a special declaration.<sup>642</sup> The communist party as the ruling party of the USSR was declared to be responsible for ‘the crimes against humanity and the war crimes carried out in Estonia by the repressive organs of the Soviet Union.’<sup>643</sup>

Former security services of the USSR in all Baltic states were not only disbanded but also declared to be criminal organizations. While Lithuania and Latvia established these provisions with the enactment of special legal acts,<sup>644</sup> in Estonia Riigikogu, through the declaration On the Crimes of the Occupation Regimes in Estonia declared activities of ‘the NKVD, the NKGB, the KGB and others and any tribunals, special meetings as well as death squads and peoples’ defense battalions’ to be criminal.<sup>645</sup> Latvia was the first state to establish such provision as early as in 1991.<sup>646</sup> Meanwhile, in Lithuania such a provision was established only in 1998, in the same law governing lustration issues.<sup>647</sup> Therefore, in Lithuania this measure could be seen as aimed at justifying lustration and not ensuring guarantees of non-repetition.

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<sup>638</sup> Švarca, „Transitional Justice Mechanisms Applied by Latvia,” 74.

<sup>639</sup> Lietuvos Respublikos Aukščiausiosios Tarybos nutarimas „Dėl LKP (SSKP) struktūrų veiklos Lietuvoje“ [Resolution on Activities of Units of LCP (SSCP)], Valstybės žinios, 1991-09-10, Nr. 25-661, <https://www.e-tar.lt/portal/lt/legalAct/TAR.9F3D35AC0941>.

<sup>640</sup> Švarca, „Transitional Justice Mechanisms Applied by Latvia,” 73-74.

<sup>641</sup> Ibid., 74.

<sup>642</sup> Tamm, „In search of lost time,” 655.

<sup>643</sup> Okupatsioonirežiimi kuritegudest Eestis [Statement on the Crimes of the Occupation Regime in Estonia], RT I 2002, 52, 326, <https://www.riigiteataja.ee/akt/174385>. Translation of title provided in “Riigikogu Statement on the Crimes of the Occupation Regime in Estonia,” *Estonian World Review*, published June 25, 2002, <https://www.eesti.ca/riigikogu-statement-on-the-crimes-of-the-occupation-regime-in-estonia/article1784>.

<sup>644</sup> Lietuvos Respublikos įstatymas dėl SSRS valstybės saugumo komiteto (NKVD, NKGB, MGB, KGB) vertinimo ir šios organizacijos kadroinių darbuotojų dabartinės veiklos [Republic of Lithuania Law on Evaluation of the USSR State Security Committee (NKVD, NKGB, MGB, KGB) and the Present Activities of Former Permanent Employees of This Organisation], art. 1, Valstybės žinios, 1998-07-22, Nr. 65-1877, as last amended on April 22, 1999, [https://www.e-tar.lt/portal/lt/legalAct/TAR.DC1DC18DF88B/TAIS\\_79654](https://www.e-tar.lt/portal/lt/legalAct/TAR.DC1DC18DF88B/TAIS_79654); Švarca, „Transitional Justice Mechanisms Applied by Latvia,” 74; Montero, *Study on how the memory of crimes committed by totalitarian regimes in Europe is dealt with*, 24-25.

<sup>645</sup> Okupatsioonirežiimi kuritegudest Eestis [Statement on the Crimes of the Occupation Regime in Estonia], RT I 2002, 52, 326, <https://www.riigiteataja.ee/akt/174385>. Translation of text provided in “Riigikogu Statement on the Crimes of the Occupation Regime in Estonia,” *Estonian World Review*, published June 25, 2002, <https://www.eesti.ca/riigikogu-statement-on-the-crimes-of-the-occupation-regime-in-estonia/article1784>.

<sup>646</sup> Švarca, „Transitional Justice Mechanisms Applied by Latvia,” 74.

<sup>647</sup> Lietuvos Respublikos įstatymas dėl SSRS valstybės saugumo komiteto (NKVD, NKGB, MGB, KGB) vertinimo ir šios organizacijos kadroinių darbuotojų dabartinės veiklos [Republic of Lithuania Law on Evaluation of the USSR State Security Committee (NKVD, NKGB, MGB, KGB) and the Present Activities of Former Permanent Employees of This Organisation], Valstybės žinios, 1998-07-22, Nr. 65-1877, as last amended on April 22, 1999, [https://www.e-tar.lt/portal/lt/legalAct/TAR.DC1DC18DF88B/TAIS\\_79654](https://www.e-tar.lt/portal/lt/legalAct/TAR.DC1DC18DF88B/TAIS_79654).

The case of the Baltic states also reveals that cessation of violations is particularly dependent on the situation at international level. This is clearly confirmed by the historical account of the events that resulted in the loss of independence of the Baltic states when, with the secret protocols of the Molotov–Ribbentrop Pact in 1939, the fate of Baltic states was decided by two aggressive states, i.e. the German Reich and the USSR.<sup>648</sup> Loss of independence was followed by the establishment of the Soviet regime responsible for the commission of international crimes resulting in serious violations of international humanitarian law and gross human rights violations.<sup>649</sup>

In summary, the Baltic states had to address the issue of guaranties of non-repetition in a special manner regarding the human rights violations committed under the Soviet regime. They had to deal with the structures that were formed by outside forces. Moreover, the case of the Baltic states shows that cessation of violations and guaranties of non-repetition are particularly dependent on the commitment of the international community towards such values as non-recognition of aggression as an allowable means of solving international disputes, a nation's right to self-determination and human rights.<sup>650</sup>

### **3.1.6. Summary on applied reparatory measures in the Baltic states**

The practice of the Baltic states reveals that they implemented reparatory measures trying to correspond in general to the concept of reparation as revealed in Basic Principles and Guidelines. This demonstrates their acknowledgement of the duties of a state towards victims of serious violations of international humanitarian law or gross human rights violations. Here applied reparatory measures cannot be perceived as an assumption of responsibility for the repressions inflicted during the Soviet regime, because responsibility lies with the guilty party. It is merely the implementation of human rights obligations concerning the right to reparation to the citizens of the Baltic states and the victims of the Soviet regime imposed from outside.

The analysis of applied reparation in the Baltic states has revealed that Lithuania, Latvia and Estonia have implemented forms of reparations in a similar manner, as all three countries provided for measures aimed at restitution, satisfaction and rehabilitation. Nevertheless, Lithuania stands out as the only Baltic country that has rather cumbersome regulation in both acknowledgement of status of a victim and in providing reparatory measures; due to this, its

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<sup>648</sup> Vizulis, *Molotov-Ribbentrop Pact of 1939*; Žalimas, *Lietuvos Respublikos nepriklausomybės atkūrimas*, 29-37; Timothy Snyder, *Kruvinos žemės: Europa tarp Hitlerio ir Stalino*, trans. Vitalijus Šarkovas (Vilnius: Tyto alba, 2011), 141-143.

<sup>649</sup> More on the issue in chapter 1.3 “Prosecution of acts committed against the people of the Baltic states under the Soviet regime”.

<sup>650</sup> See chapter 1.1 “STATUS OF THE BALTIC STATES IN 1940–1991 UNDER INTERNATIONAL LAW”.

reparatory policy lacks a friendly orientation towards victims. Compensation as a form of reparation is the only missing component for the victims of the Soviet regime in the Baltic states; this is based on the position of the Baltic states the Russian Federation should be responsible for the damages inflicted during Soviet occupation towards the people of the Baltic states and the Baltic states themselves.

Because of this lack of compensation, it cannot be concluded that victims of the Soviet regime have received all reparatory measures they are entitled to. Compensation is the first element of reparation that must be provided when restitution is not possible. Yet victims of the Soviet regime have not received compensation, despite having faced substantial impairments of their basic human rights or serious physical or mental injury for the whole period under Soviet occupation, which made a return to the *status quo ante* almost impossible. In addition, reparatory measures in the Baltic states were not entirely established to remedy the victims; for example, restitution of property and citizenship and measures of satisfaction concerning preservation of memory were partly established to overcome the consequences of the Soviet legacy, in addition to their underlying reparatory purpose.

Thus, the Baltic states, with their own reparatory policies, cannot ensure proper reparation for the victims of the Soviet regime. Moreover, the case of the Baltic states shows that cessation of violations and guaranties of non-repetition are highly sensitive to the policies implemented at the international level. The next necessary step is the analysis of obligations assumed by the USSR as an occupying power responsible for the repressive policy in the Baltic states and its compliance with reparation measures established by Basic Principles and Guidelines.

### **3.2. OBLIGATIONS ASSUMED BY THE USSR**

It is already historically established that the greatest repressions of the largest scale in the USSR were committed during the period of the Joseph Stalin's rule. After his death the repressive policy of the USSR changed and could be defined as milder, but repressions, although slightly different, remained the main tool of governance for the whole multinational state until Mikhail Gorbachev came to power with his well-known policies of *glasnost* and *perestroika*.<sup>651</sup> These changes also affected the status of victims of the repressive policies of the USSR and must be evaluated in the light of the established concept of reparations.

The measures taken by the USSR towards victims can be divided into two different categories:

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<sup>651</sup> Anušauskas et al., *Lietuva 1940-1990*, 412, 416, Nanci Adler, "Life in the 'Big Zone': The Fate of Returnees in the Aftermath of Stalinist Repression," *Europe-Asia Studies* 5, no. 1 (1999): 8, doi: 10.1080/09668139999092.

- measures taken at the level of the highest authority of the USSR
- measures taken in the territories of the Baltic states administered by institutions of the occupant

Taking this into account, the mode of the governance of the USSR must be established in order to correctly evaluate what obligations were assumed by the USSR to remedy those who suffered repressions under the Soviet regime. For the purpose of this thesis, the Constitutions of the USSR of 1936 and 1977 will be taken into account to evaluate the mode of the governance of the USSR and competences of the highest authorities and authorities of union republics in particular.

Since its creation, the USSR declared itself to be a federal state.<sup>652</sup> This was based on the provisions of the Constitutions of the USSR regarding the union republics right to secede from the USSR as well as the structure of the governance of the union republic, i.e.

[e]ach has its own republican constitution and a political and administrative framework, ... a Communist party apparatus, a legislature (the republican Supreme Soviet) and a system of economic ministries and agencies which are responsible for the production and distribution of goods and services within the republic.<sup>653</sup>

The latter position was even used to shape union republics as subjects of international law.<sup>654</sup> However, such a position faced a lot of criticism from Western scholars.<sup>655</sup> The rejection of these propositions is based on traditional concepts of federalism resting on a power balance between the union and the member states, which is ensured through separation of powers and the ability of a member state to control decisions taken at the union level.

Unfortunately, the Constitutions of the USSR did not provide a means of enabling union republics in the USSR to control decisions of the highest authorities.<sup>656</sup> This is clearly reflected in Article 74 of the Constitution of the USSR of 1977, which stated that union law prevails over republic law in cases of divergence between them, and in paragraph 2 of Article 77, union republics were obliged to implement all the decisions of the highest authorities of the USSR.<sup>657</sup> According to Henn-Jiiri Uibopuu, '[t]he notion of both the 1936 and 1977 Constitutions that

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<sup>652</sup> Gregory Gleason, "Soviet Federalism and Republican Rights," *Columbia Journal of Transnational Law* 28, no. 1 (1990): 22, 28-31, [https://heinonline.org.ezproxy.vdu.lt:2443/HOL/Page?handle=hein.journals/cjt128&div=10&start\\_page=19&collection=journals&set\\_as\\_cursor=0&men\\_tab=srchresults#](https://heinonline.org.ezproxy.vdu.lt:2443/HOL/Page?handle=hein.journals/cjt128&div=10&start_page=19&collection=journals&set_as_cursor=0&men_tab=srchresults#).

<sup>653</sup> Gleason, "Soviet Federalism and Republican Rights," 22-23. See also Saxer, "Transformation of Soviet Union," 613, 615, 616-617, 621; Henn-Juri Uibopuu, "Soviet Federalism under the New Soviet Constitution," *Review of Socialist Law* 5, no. 2 (1979): 178-179, [https://heinonline.org.ezproxy.vdu.lt:2443/HOL/Page?handle=hein.journals/rs15&div=16&start\\_page=171&collection=journals&set\\_as\\_cursor=0&men\\_tab=srchresults#](https://heinonline.org.ezproxy.vdu.lt:2443/HOL/Page?handle=hein.journals/rs15&div=16&start_page=171&collection=journals&set_as_cursor=0&men_tab=srchresults#).

<sup>654</sup> Uibopuu, "Soviet Federalism," 175.

<sup>655</sup> Gleason, "Soviet Federalism and Republican Rights," 23.

<sup>656</sup> Saxer, "Transformation of Soviet Union," 599-600, 617-619-620; Gleason, "Soviet Federalism and Republican Rights," 29-31.

<sup>657</sup> Uibopuu, "Soviet Federalism," 176, 180.

Federal Law prevails over the law of the Union Republics is guarantee enough to prevent Union Republics from any extravagance in their national legislation.<sup>658</sup>

Under such circumstances, establishment of separation of powers between the union and union republics was clearly impossible. This is even truer taking into account the Marxist-Leninist ideology that rejected the existence of national interest and emphasized dominance of the working-class power that required a highly centralized form of government, especially when there was no free will to adhere to the established goals. Thus, the communist concept of a highly centralized and planned economy required a strong government with comprehensive powers; independence of union republics would limit the policy and economic goals of the planned economy.<sup>659</sup>

As a result, statements concerning statehood of union republics were rejected because of the lack of particular elements of statehood, i.e. distinct population and government. The inability to establish a distinct population was based on shortages in establishing a link between a union republic and a person living in that union republic, because union republics did not have separate citizenship laws and citizenship was regulated at the union level.<sup>660</sup> A government, in order to be perceived as an element of statehood, has to have an ability to actually exercise its competence. As it was stated previously, there was no such ability for governments of union republics. Moreover, this is especially true taking into account that constitutions of union republics had been ‘mere stereotype duplicates of the Union Constitution in all operative parts with the exemption of the definition of their territorial administrative subdivisions’, even though the Constitution of the USSR of 1977 no longer called ‘for complete conformity’ and simple conformity had been sufficient.<sup>661</sup>

Taking everything into account, union republics were unable to exercise any significant independent powers. However, according to Urs W. Saxer, ‘despite such double standards, the formal scheme of a federation remained in place during the more than seventy years of communist rule’, and ‘the idea of a federation survived, but it was transformed and rendered meaningless.’<sup>662</sup> As a result the USSR was considered to be unitarian state.<sup>663</sup> Thus, it is clear that under the Constitutions of the USSR of 1936 and 1977 actual governmental power was vested in the bodies of the USSR and not in the bodies of the union republics. Nevertheless, reparatory measures implemented in the territories of the Baltic states administered by institutions of the occupant and

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<sup>658</sup> Ibid., 174.

<sup>659</sup> Saxer, "Transformation of Soviet Union," 607-608, 613.

<sup>660</sup> On this issue see also Sinkevičius, *Lietuvos Respublikos pilietybė*, 86-98.

<sup>661</sup> Uibopuu, "Soviet Federalism," 175-176.

<sup>662</sup> Saxer, "Transformation of Soviet Union," 586.

<sup>663</sup> Uibopuu, "Soviet Federalism," 183; Saxer, "Transformation of Soviet Union," 621-622.



considered by the USSR as union republics must also be taken into account, as the policies of *glasnost* and *perestroika* led to constitutional crises in the USSR in 1988<sup>664</sup> and must be considered to reveal the full scope of the obligations of the USSR.

### 3.2.1. Measures at the level of the USSR

Initial measures aimed at victims of the Stalinist regime are linked with the policy of ‘thaw’ implemented by Nikita Khrushchev. In the 20<sup>th</sup> Congress of the Communist Party of the Soviet Union, Nikita Khrushchev gave his speech in a closed session that was famous for the denunciation of Joseph Stalin and the ‘cult of personality’. In the 22<sup>nd</sup> Congress of the Communist Party of the Soviet Union Nikita, Khrushchev discussed “‘monstrous crimes” and the need for “historical justice” along with more lurid accounts of mass arrests, torture and murder carried out under Stalin.”<sup>665</sup> This gave impetus for the revision of criminal cases and release of certain groups of prisoners from exile or detention.

First, cases of former communists and party members that were repressed by Joseph Stalin were dealt with. Later, issues of members of the working class and deportees came into play.<sup>666</sup> Tat’iana N. Moskal’kova particularly distinguishes certain legal acts of this period as aimed at redress of victims of Stalinism:

- decree of the USSR Council of Ministers No. 1655 of 8 September 1955 ‘On seniority rights, employment and pension rights of citizens who were unjustly subject to criminal liability and on the consequences of rehabilitation’
- decree of the USSR Council of Ministers No. 590 of 27 May 1957 ‘On the procedure for calculating the term of copyright for the heirs of rehabilitated authors’
- decision No. 2225p of 20 April 1956 ‘On various additions to wages of rehabilitated persons and others’<sup>667</sup>

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<sup>664</sup> For more details on this issue see Saxer, "Transformation of Soviet Union," 622-643; Gleason, "Soviet Federalism and Republican Rights," 32-38.

<sup>665</sup> Ilya Nuzov, "The Role of Political Elite in Transitional Justice in Russia: From False Nurembergs to Failed Desovietization," *U.C. Davis Journal of International Law & Policy* 20, no. 2 (Spring 2014): 288, 291, [https://heinonline.org.ezproxy.vdu.lt:2443/HOL/Page?handle=hein.journals/ucdl20&div=13&start\\_page=273&collection=journals&set\\_as\\_cursor=0&men\\_tab=srchresults#](https://heinonline.org.ezproxy.vdu.lt:2443/HOL/Page?handle=hein.journals/ucdl20&div=13&start_page=273&collection=journals&set_as_cursor=0&men_tab=srchresults#); Kathleen E. Smith, „Destalinization in the Former Soviet Union,” in *Impunity And Human Rights In International Law And Practice*, ed. Naomi Roht-Arriaza (New York: Oxford University Press, 1995), eBook Collection (EBSCOhost), 114-115; Tat’iana N. Moskal’Kova, "Rehabilitation of the Innocent in the Russian Federation," *Review of Central and East European Law* 18, no. 5 (1992): 476-477, [https://heinonline.org.ezproxy.vdu.lt:2443/HOL/Page?handle=hein.journals/rsl18&div=45&start\\_page=475&collection=journals&set\\_as\\_cursor=0&men\\_tab=srchresults#](https://heinonline.org.ezproxy.vdu.lt:2443/HOL/Page?handle=hein.journals/rsl18&div=45&start_page=475&collection=journals&set_as_cursor=0&men_tab=srchresults#); Anušauskas et al., *Lietuva 1940-1990*, 416.

<sup>666</sup> Smith, „Destalinization in Former Soviet Union,” 114, 115-116; Nuzov, "Role of Political Elite in Transitional Justice in Russia,” 289, 291; Anušauskas et al., *Lietuva 1940-1990*, 420-424; Adler, “Life in the ‘Big Zone’,” 8.

<sup>667</sup> Moskal’Kova, "Rehabilitation of the Innocent,” 476-477.

Under these legal acts there was the possibility of obtaining the following measures of reparations:

- release from detention (restitution in the form of restoration of liberty)
- restoration of former position and party membership and pension rights (restitution in the form of restoration of employment)
- payment of two month's salary for the position that was held prior to arrest (compensation for loss of earnings)

Meanwhile, measures such as return of property that had been illegally confiscated; compensation for moral damages or an official declaration or a judicial decision restoring the dignity, reputation and rights of the victim generally were not applied. The issue of restoration of liberty deserves special attention, as it was the initial remedial measure, and Nikita Khrushchev had to deal with a huge number of prisoners. It was applied not only in instances of amnesty or pardon but also in cases of revisited sentence and is generally known as rehabilitation procedure.<sup>668</sup>

The procedure regarding restoration of liberty was implemented by 'special three-person commissions made up of an official from the prosecutor's office [usually previously responsible for the implementation of repressive policy], a representative from the party Central Committee, and a party member who had already been rehabilitated.'<sup>669</sup> These commissions had the unlimited power to grant a pardon or not and, if a pardon was granted, to decide whether a person was to be released immediately or have his sentence reduced; the commission also had authority to decide whether the person was entitled to any additional benefits, i.e. measures of reparations. The work of the commissions was organized simply by visiting places of detention or exile and reviewing cases of prisoners and having a short interview with them.<sup>670</sup> It was up to the particular commission how this procedure would be organized and what remedies would be available for a victim. Under these circumstances the restitution of liberty should be understood in the most limited manner not involving full restitution, i.e. restoration of the victim to the original situation before the violation. It is no surprise that after the collapse of the USSR the whole process during the rule of Nikita Khrushchev to remedy the consequences of unjust criminal convictions under the Stalinist regime faced criticism in academic writings due to the lack of impartiality, the selectivity of the process and its secret nature.

The discriminatory nature of the remedial procedures could be based on the fact that the power of any decision was vested solely with the special commission, with no clear criteria or

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<sup>668</sup> Moskal'Kova, "Rehabilitation of the Innocent," 476-477; Smith, „Destalinization in Former Soviet Union," 116.

<sup>669</sup> Smith, „Destalinization in Former Soviet Union," 115.

<sup>670</sup> Ibid., 115-116.

procedure regarding the eligibility of the person to be rehabilitated. There was also no possibility to appeal a decision of the commission. As a result, not all victims of repressions were rehabilitated, as the work of the commission was highly influenced by the personal views of its members. Moreover, not all victims of the same status were eligible for the same packages of reparations. The only measure applicable to persons who were rehabilitated was restoration of liberty. Thus, many former prisoners faced huge problems concerning their isolation in society and return to full social and professional life.<sup>671</sup> The fate of the people repressed in the occupied territories, i.e. the Baltic states, also deserves some attention because cases of people deported from the Baltic states were recently revisited after cases of people deported from other places were revisited.<sup>672</sup>

The selectivity of these remedial measures is clearly reflected by the fact that only political opponents closely related with the repressive policy of Joseph Stalin were executed (L. Beria and 6 the most loyal associates), imprisoned (L. Beria's close associates and certain officials of secret services) or condemned (V. Molotov, L. Kaganovich and G. Malenkov), depriving them of senior positions in the Communist Party. Other party members having the same relation with repressive policy of Joseph Stalin but useful for Nikita Khrushchev to maintain his political power faced no consequences. Moreover, the prosecutions that resulted in executions or imprisonment of several former organizers and executors of repressive policies of Joseph Stalin were not the result of the complaints of victims of the repressions. This confirms that these prosecutions were of a political nature and not aimed at implementation of justice.<sup>673</sup> Thus, the broader wave of accountability, taking into account the scale of repressions, was not implemented, although initial steps were actually taken;<sup>674</sup> measures such as satisfaction as judicial and administrative sanctions against persons liable for the violations were not implemented.

A final relevant aspect regarding the process of redress under the rule of Nikita Khrushchev is the way in which the process was organized. The reports denouncing repressions performed by Joseph Stalin in the 20<sup>th</sup> and 22<sup>th</sup> Congresses were delivered in secret; thus, society had no

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<sup>671</sup> Smith, „Destalinization in Former Soviet Union,“ 115-116; Adler, “Life in the 'Big Zone',” 9-14.

<sup>672</sup> Anušauskas et al., *Lietuva 1940-1990*, 422-424; Olaf Mertelsmann and Aigi Rahi-Tamm, “Soviet mass violence in Estonia revisited,” *Journal of Genocide Research* 11, no. 2-3, (2009): 316, doi: 10.1080/14623520903119001; Applebaum, *Geležinė uždanga*, 301-302.

<sup>673</sup> Nuzov, "Role of Political Elite in Transitional Justice in Russia," 287, 290-292; Smith, „Destalinization in Former Soviet Union,“ 123.

<sup>674</sup> To explain the reasons Ilya Nuzov particularly states that exposing Stalinist crimes was politically dangerous to all of the leading members of communist party [including Khrushchev himself] ‘as each one was directly implicated in the mass violence wrought by the Stalinist regime.’ Thus report of the so called Shatunovskaya and the Shvernik commission, created by N. Khrushchev after the 20<sup>th</sup> Congress to evaluate the scale of repressions under stalinist regime, was never published, ‘64 volumes of materials Shatunovskaya had collected were buried in party archives and subsequently disappeared.’ See Nuzov, "Role of Political Elite in Transitional Justice in Russia," 285, 290, 292.

knowledge of them until the end of the 1980s.<sup>675</sup> The whole process itself was not open—no information was publicly provided regarding the possibility of rehabilitation, and many revisions of cases were carried out without participation of the victims.<sup>676</sup> The secrecy of the process effectively precluded measures of satisfaction such as verification of the facts and full and public disclosure of the truth, commemoration of victims and other related measures.

Taking everything into account, the reparations under the rule of Nikita Khrushchev generally included only restoration of liberty for former prisoners with no visible positive outcomes to the victims and to society as a whole. The main reason for such a limited remedial policy was a lack of political will that resulted in unclear procedures of rehabilitation of innocent people and an unsatisfactory scope of reparation measures. The only positive aspect of this early attempt of reparations in the USSR is that there was at least a partial admission at the state level that crimes severely violating fundamental human rights were committed in the name of the state, although that admission clearly lacked confirmation through almost non-existent redress of many victims.

Under the rule of Leonid Brezhnev and subsequent leaders, the whole process concerning redress of the victims of abuse of state power in the USSR stopped, and repressions re-emerged—although not to the same degree; however, the issue again became part of the agenda of the Soviet government under policies of *glasnost* and *perestroika* implemented by Mikhail Gorbachev.<sup>677</sup> The redress of victims who suffered repressions because of former policies of the USSR was shaped through these legal acts:

- edict of the Presidium of the USSR Supreme Soviet of 16 January 1989 ‘On additional measures to restore justice as regard the victims of repression which took place in the period of the 1930s to the 1940s and in the beginning of the 1950s’
- edict of the President of the USSR of 13 August 1990 ‘On restoring the rights of all victims of political repression of the 1920s through the 1950s’
- declaration of the USSR Supreme Soviet of 14 November 1989 ‘On the recognition as illegal and criminal the repressive acts against peoples who were subject to forced resettlement and on securing their rights’<sup>678</sup>
- decision of the USSR Supreme Soviet of 7 March 1991 ‘On cancellation of legislation in accordance with declaration of the USSR Supreme Soviet of 14 November 1989

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<sup>675</sup> Nuzov, "Role of Political Elite in Transitional Justice in Russia," 289.

<sup>676</sup> Smith, „Destalinization in Former Soviet Union,“ 116.

<sup>677</sup> Nuzov, "Role of Political Elite in Transitional Justice in Russia," 298-299; Smith, „Destalinization in Former Soviet Union,“ 115.

<sup>678</sup> Moskal'Kova, "Rehabilitation of the Innocent,“ 477-478.

“On the recognition as illegal and criminal the repressive acts against peoples who were subject to forced resettlement and on securing their rights”<sup>679</sup>

Edicts made general provisions on who should be considered to be a victim, what a victim is entitled to and who is responsible for the implementation of the given provisions, i.e. addressed political repressions. Meanwhile the previous repressive policy of forced resettlement was addressed separately in the declaration of 14 November 1989 and decision of 7 March 1991. In addition, the edict of the President of the USSR of 13 August 1990 states that restoration of justice began with the 20<sup>th</sup> Congress of the Communist Party of the Soviet Union and generally stopped during the second half of the 1960s.<sup>680</sup> Thus, such a provision could be considered as a continuous obligation undertaken by the USSR to redress those who suffered because of the government’s repressive policies.

Initially, the edict of 16 January 1989 recognized victims as persons who were convicted by extrajudicial organs, i.e. the ‘troika’ formed by the People’s Commissariat for Internal Affairs (NKVD) or the collegium of joint State Political Directorate under the Council of People’s Commissars of the USSR (OGPU) or ‘special meetings’ of the NKVD - Ministry for State Security (MGB) – Ministry of Internal Affairs of the USSR (MVD), in the 1930s, 1940s and early 1950s if the decisions of these institutions were not cancelled by previous regulations. These persons were considered innocent, including those who were convicted for escape from special settlements by these enumerated organizations.<sup>681</sup> Thus, the criterion for a person to be considered as innocent was the conviction by particular institution in the particular period, and other instances of repressions were not taken into account.

The scope of persons who should be recognized as victims was broadened with the edict of 13 August 1990. The edict recognized as illegal and contrary to the basic civil, social and economic human rights the repressions conducted against peasants in the period of collectivization

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<sup>679</sup> Постановление Верховного Совета СССР „Об отмене законодательных актов в связи с декларацией Верховного Совета СССР от 14 ноября 1989 года "О признании незаконными и преступными репрессивных актов против народов, подвергшихся насильственному переселению, и обеспечении их прав"“ [Decision of the USSR Supreme Soviet ‘On cancellation of legislation in accordance with declaration of the USSR Supreme Soviet of 14 November 1989 “On the recognition as illegal and criminal the repressive acts against peoples who where subject to forced resettlement and on securing their rights”], "Ведомости СНД СССР и ВС СССР", 1991, N 11, ст. 302, <http://www.migimo.ru/razdel/74/>.

<sup>680</sup> Указ Президента СССР “О восстановлении прав всех жертв политических репрессий 20-50-х годов” [Edict of the President “On restoring the rights of all victims of political repression of the 1920s through the 1950s”], pmbi., “Ведомости СНД и ВС СССР”, 1990, N 34, ст. 647, <http://www.alexanderyakovlev.org/fond/issues-doc/68188>. Translation of title provided in Moskal’Kova, "Rehabilitation of the Innocent," 477-478.

<sup>681</sup> Указ Президиума ВС СССР “О дополнительных мерах по восстановлению справедливости в отношении жертв репрессий, имевших место в период 30 40-х и начала 50-х годов” [Edict of the Presidium of the USSR Supreme Soviet ‘On additional measures to restore justice as regard the victims of repression which took place in the period of the 1930s to the 1940s and in the beginning of the 1950s’], art. 1, “Ведомости Верховного Совета СССР”, 1989, N 3, ст. 194, as last amended on July 31, 1989, <http://pravo.levonevsky.org/baza/soviet/sssr/1394.htm>. Translation of title provided in Moskal’Kova, "Rehabilitation of the Innocent," 477.

and against other citizens of the USSR on political, social, national, religious or other grounds in the period from the 1920s through the 1950s.<sup>682</sup> However, persons who faced repression in earlier or later periods were not recognized until enactment of the RSFSR law ‘On the rehabilitation of the victims of political repression’ of 18 October 1991.<sup>683</sup> The implications of the latter legislation to the case of the Baltic states will be discussed later.<sup>684</sup> In summary, initial redress for the victims of political persecution in the USSR was only available mainly to the victims of Stalinism.

Additionally, any recognition of innocence and restoration of full rights was conditional. Under edict of 16 January 1989, the innocence of a person was recognized if the conviction was not based on treason during the Great Patriotic War (Second World War), crimes committed in the name of Nazism, or criminal crimes including but not limited to murder. The same was applicable to members of gangs and their supporters (rus. участников бандформирований и их пособников).<sup>685</sup> In the edict of 13 August 1990, the condition denying restoration of rights and recognition as a victim was applied to those who were reasonably convicted for state crimes and crimes against the Soviet society during the Great Patriotic War (Second World War) and pre-war and post-war periods.<sup>686</sup> The actual list of such crimes had to be prepared by the Council of Ministers of the USSR.<sup>687</sup>

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<sup>682</sup> Указ Президента СССР “О восстановлении прав всех жертв политических репрессий 20-50-х годов” [Edict of the President “On restoring the rights of all victims of political repression of the 1920s through the 1950s”], art. 1, “Ведомости СНД и ВС СССР”, 1990, N 34, ст. 647, <http://www.alexanderyakovlev.org/fond/issues-doc/68188>.

<sup>683</sup> Moskal'Кова, "Rehabilitation of the Innocent," 482-482.

<sup>684</sup> See sub-chapter 4.2.3.2.1 “Judicial settlement”.

<sup>685</sup> Указ Президиума ВС СССР “О дополнительных мерах по восстановлению справедливости в отношении жертв репрессий, имевших место в период 30 40-х и начала 50-х годов” [Edict of the Presidium of the USSR Supreme Soviet ‘On additional measures to restore justice as regard the victims of repression which took place in the period of the 1930s to the 1940s and in the beginning of the 1950s’], art. 1, para. 2, “Ведомости Верховного Совета СССР“, 1989, N 3, ст. 194, as last amended on July 31, 1989, <http://pravo.levonevsky.org/baza/soviet/sssr1394.htm>.

<sup>686</sup> Указ Президента СССР “О восстановлении прав всех жертв политических репрессий 20-50-х годов” [Edict of the President “On restoring the rights of all victims of political repression of the 1920s through the 1950s”], art. 2, “Ведомости СНД и ВС СССР”, 1990, N 34, ст. 647, <http://www.alexanderyakovlev.org/fond/issues-doc/68188>.

<sup>687</sup> Such list was prepared and submitted to the Supreme Soviet of the USSR. Nevertheless this did not appear as a separate regulation but was reflected later in the RSFSR law “On the rehabilitation of the victims of political repression” of 18 October 1991. Under draft decision it was provided that treason of motherland, armed rebellion or invasion having counterrevolutionary purposes on the territory of the USSR by armed gangs, espionage, acts of terrorism, diversion, sabotage, aid for traitors and fascist occupiers during Great Patriotic War (World War II), crimes against peace and humanity, crimes related to the organization of gangs who committed murder, rape and looting and the participation in the activities of such gangs are crimes, those commitment denies the ability to be rehabilitated. Thus crimes were defined without naming particular article in the relevant criminal codes. This would enable institutions in charge of the decision whether a person committed these particular crimes to evaluate circumstances of each case. On the other hand this would open the door for various manipulations and recognition of innocence would be subject to a particular person judging the case, especially as in draft decision additionally it was stated that a person cannot be rehabilitated if he or she committed a crime against justice or flagrant violation of the rule of law regardless of the qualification of the offense. The institutions responsible for the evaluation of the previously mentioned conditions denying recognition of innocence for a person would be judicial and the court judging the case could take one of the following decisions:

- to recognize that a person was convicted reasonably of these crimes and is not eligible for the rehabilitation according to the edict of 13 August 1990
- to recognize that a person was convicted unreasonably and eligible for the rehabilitation according to the edict of 13 August 1990

The described regulation is particularly relevant for the case of the Baltic states because of denied rehabilitation for persons who were convicted for state crimes and crimes against the Soviet society or, according to the edict of 16 January 1989, members of gangs and their supporters. Taking into account the fact that freedom fighters in the Baltic states were described as bandits forming gangs under the Soviet regime and usually convicted for counterrevolutionary activities,<sup>688</sup> this once again confirms that the USSR, even under policies of *glasnost* and *perestroika*, did not consider the Baltic states as sovereign states after their incorporation and that it considered the whole incorporation illegal. As a result, freedom fighters of the Baltic states would be considered rightly repressed, although under the edict of 16 January 1989 the possibility existed to apply for the revision of procedure to check impartiality and justice of the process.<sup>689</sup>

The next group of victims, which was dealt with through separate regulation, is native ethnic groups that lived in the territory of the USSR and were entirely deported using force under inhumane conditions, i.e. the Karachays, the Balkars, the Ingush, the Chechens, the Kalmyks, the Crimean Tatars, the Meskhetian Turks, the Khemshils, the Kurds, the Koreans, the Greeks, the Bulgarians, the Armenians, the Daghestanis and Volga Germans and other groups. With the declaration of 14 November 1989, the previous governmental acts against these ethnic groups were recognized as a grave offense, contrary to the fundamental principles of international law as well as the humanistic nature of the socialist system.<sup>690</sup> The enactment of the decision of 7 March

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- make changes to the previous judgment.

See: Постановление Совета Министров СССР о внесении на рассмотрение Верховного Совета СССР проекта постановления Верховного Совета СССР «О порядке признания лиц, совершивших преступления в 20-50-е годы, не подлежащими реабилитации» [Ruling of the Council of Ministers of the USSR on introduction of the draft ruling "On the procedure of denying rehabilitation for individuals who have committed crimes in the 20-50s" for the review for the Supreme Soviet of the USSR], October 11, 1990, <http://www.alexanderyakovlev.org/fond/issues-doc/68213>; “Записка Н.И. Рыжкова в Верховный Совет СССР с приложением проекта постановления Верховного Совета СССР «О порядке признания лиц, совершивших преступления в 20-50-е годы, не подлежащими реабилитации»,” *Фонд Александра Н. Яковлева*, accessed January 10, 2017, <http://www.alexanderyakovlev.org/fond/issues-doc/68212>

<sup>688</sup> Bernardas Gailius, „1944-1953 m. partizanų karas šiuolaikinėje Lietuvos istorinėje, politinėje ir teisinėje kultūroje“ (PhD diss., Vilnius University, 2009), <http://talpykla.elaba.lt/elaba-fedora/objects/elaba:1785200/datastreams/MAIN/content>, 96-116; Nollendorfs et al., *Three Occupations of Latvia 1940-1991*, 34; Mälksoo, "Soviet Genocide?" 765.

<sup>689</sup> Указ Президиума ВС СССР “О дополнительных мерах по восстановлению справедливости в отношении жертв репрессий, имевших место в период 30 40-х и начала 50-х годов” [Edict of the Presidium of the USSR Supreme Soviet ‘On additional measures to restore justice as regard the victims of repression which took place in the period of the 1930s to the 1940s and in the beginning of the 1950s’], art. 1, “Ведомости Верховного Совета СССР“, 1989, N 3, ст. 194, as last amended on July 31, 1989, <http://pravo.levonevsky.org/baza/soviet/sssr1394.htm>.

<sup>690</sup> Декларация Верховного Совета СССР “О признании незаконными и преступными репрессивных актов против народов, подвергшихся насильственному переселению, и обеспечении их прав” [Declaration of the USSR Supreme Soviet “On the recognition as illegal and criminal the repressive acts against peoples who where subject to forced resettlement and on securing their rights”], “Ведомости СНД СССР и ВС СССР”, 1989, N 23, ст. 449, <http://www.migimo.ru/razdel/74/>. Translation of title provided in Moskal'Kova, "Rehabilitation of the Innocent," 477.

1991 cancelled the previous legislation of the USSR that was the basis for the forced resettlement of these ethnic groups.<sup>691</sup>

However, it is noteworthy that forced resettlement of Lithuanians, Latvians and Estonians from the occupied territories, i.e. the Baltic states, is not mentioned. Although under the declaration of 14 November 1989 a presumption could be made that the case of nationals from the Baltic states falls within the category of other groups that were subject to the forced relocation policy, the later decision of 7 March 1991 did not cancel any of the legislation that was particularly aimed at forced deportation of people from the Baltic states. Taking into account that forced resettlement of nationals from the Baltic states was performed in a similar manner as other ethnic groups within the territory of the USSR, such regulation might be defined as discriminatory.

Taking everything into account, persons eligible for status of a victim under the previously described regulation can be divided into two main groups:

- ethnic groups that were entirely deported from their native lands in the territory of the USSR using force under inhumane conditions
- persons that were repressed on political, social, national, religious or other grounds in the period from the 1920s through the 1950's

The latter division was addressed later in the enactment of two different acts: the RSFSR laws of 26 April 1991 'On the rehabilitation of suppressed people' and of 18 October 1991 'On the rehabilitation of victims of political suppression'.<sup>692</sup> Due to political changes and the collapse of the USSR, these legal acts should be considered applicable only within the territory of the RSFSR. Nevertheless, previously described legislation remains relevant for the case analysed here and the questions of the scope of reparation applicable for the victims and responsibility of the implementation of the given provisions must be addressed.

Neither edicts nor declaration and decision specified particular measures of reparation for the victims of repressions. In the case of the persons that were repressed on political, social, national, religious or other grounds in the period from the 1920s through the 1950s, it was stated that the Council of Ministers of the USSR is obligated to review existing regulation on reparation for the victims naming pension rights, housing in particular. Other possible support had to be specified later by the Council of Ministers of the USSR and governments of union republics taking

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<sup>691</sup> Постановление Верховного Совета СССР „Об отмене законодательных актов в связи с декларацией Верховного Совета СССР от 14 ноября 1989 года "О признании незаконными и преступными репрессивных актов против народов, подвергшихся насильственному переселению, и обеспечении их прав"“ [Decision of the USSR Supreme Soviet 'On cancellation of legislation in accordance with declaration of the USSR Supreme Soviet of 14 November 1989 "On the recognition as illegal and criminal the repressive acts against peoples who where subject to forced resettlement and on securing their rights"'], arts. 1-2, "Ведомости СНД СССР и ВС СССР", 1991, N 11, ст. 302, <http://www.migimo.ru/razdel/74/>.

<sup>692</sup> Moskal'Kova, "Rehabilitation of the Innocent," 478.



into account the aim to restore the rights of victims who suffered from repressions. In addition, the edict of 16 January 1989 specifically obligated local councils in union and autonomous republics, autonomous provinces and regions along with existing non-governmental organizations and public institutions to ensure that victims had the necessary assistance to implement their rights and to create monuments for victims.<sup>693</sup>

This regulation enabled application of reparatory measures that were created under the rule of Nikita Khrushchev for all who were recognized as victims under the rule of Mikhail Gorbachev. According to Kathleen E. Smith, the existing regulation ‘stipulated revision of pension status and awarded two months’ pay at the rate prior to arrest’. Such reparatory measures were generally viewed as unsatisfactory. Therefore, certain additional measures were implemented on a local and republic level, i.e. victims were granted ‘privileges that veterans of World War II received, including the right to shop in special stores, free passage on local transport, and priority access to better housing and medical care.’<sup>694</sup> The clear framework of reparatory measures for persons that were repressed on political, social, national, religious or other grounds was established only after the enactment of the RSFSR law of 18 October 1991 ‘On the rehabilitation of victims of political suppression’, which was promulgated after major political changes concerning the collapse of the USSR.<sup>695</sup>

Attention should also be given to the provision creating certain measures of satisfaction, i.e. commemorations and tributes to the victims, that had to be fulfilled through the creation of monuments.<sup>696</sup> Here the initiatives of ‘Memorial’, ‘a nation-wide organization created in 1987 under civic initiative’ to commemorate victims of the repressive past of the USSR as well as to perform research and provide assistance, were particularly important. This organization has not only initiated the creation of monuments but also has done historical research, ‘including identifying mass execution and burial sites, compiling documentary archives’, organizing

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<sup>693</sup> Указ Президиума ВС СССР “О дополнительных мерах по восстановлению справедливости в отношении жертв репрессий, имевших место в период 30 40-х и начала 50-х годов” [Edict of the Presidium of the USSR Supreme Soviet ‘On additional measures to restore justice as regard the victims of repression which took place in the period of the 1930s to the 1940s and in the beginning of the 1950s’], arts. 2, 4, “Ведомости Верховного Совета СССР“, 1989, N 3, ст. 194, as last amended on July 31, 1989, <http://pravo.levonevsky.org/baza/soviet/sssr1394.htm>; Указ Президента СССР “О восстановлении прав всех жертв политических репрессий 20-50-х годов” [Edict of the President “On restoring the rights of all victims of political repression of the 1920s through the 1950s”], art. 1, “Ведомости СНД и ВС СССР”, 1990, N 34, ст. 647, <http://www.alexanderyakovlev.org/fond/issues-doc/68188>.

<sup>694</sup> Smith, „Destalinization in Former Soviet Union,“ 117.

<sup>695</sup> Complaint presented before the president of the USSR is eloquent. “Депутатский запрос народного депутата СССР И.Б. Шамшева М.С. Горбачеву о невыполнении Указа Президента СССР «О восстановлении прав всех жертв политических репрессий 20-50 гг.»,” *Фонд Александра Н. Яковлева*, accessed January 10, 2017, <http://www.alexanderyakovlev.org/fond/issues-doc/68218>.

<sup>696</sup> Указ Президиума ВС СССР “О дополнительных мерах по восстановлению справедливости в отношении жертв репрессий, имевших место в период 30 40-х и начала 50-х годов” [Edict of the Presidium of the USSR Supreme Soviet ‘On additional measures to restore justice as regard the victims of repression which took place in the period of the 1930s to the 1940s and in the beginning of the 1950s’], art. 4, “Ведомости Верховного Совета СССР“, 1989, N 3, ст. 194, as last amended on July 31, 1989, <http://pravo.levonevsky.org/baza/soviet/sssr1394.htm>.

educative initiatives and lobbying for victims' rights.<sup>697</sup> Due to the activities of 'Memorial', various measures of satisfaction have been initiated or implemented not only before the enactment of the RSFSR law of 18 October 1991 'On the rehabilitation of victims of political suppression' but also through the present time.<sup>698</sup>

The case of reparatory measures for ethnic groups that were entirely deported from their native lands in the territory of the USSR using force under inhumane conditions could be considered as new obligations assumed by the USSR, because the case of this group of victims was previously almost not addressed by the government of the USSR. The declaration of 14 November 1989 only required the government of the USSR to adopt appropriate legislative measures for the unconditional restoration of the rights of all peoples subjected to forced resettlement.<sup>699</sup> However, under the decision of 7 March 1991, obligations placed on the government were expanded to include restoration of legitimate rights, creation of economic and social conditions for the benefit of these ethnic groups and creation of a mechanism for material compensation.<sup>700</sup> Particular reparatory measures were established under the RSFSR law of 26 April 1991 'On the rehabilitation of suppressed peoples'.

In summary, the reparation policy implemented by Mikhail Gorbachev started with the public admission of the great abuses of power in the name of the state and thus could be regarded as the true beginning of cessation of continuing violations and restoration of the enjoyment of human rights for most of the victims of repressions under the Soviet regime. Despite the policy's deficiencies regarding actual reparatory measures, it had quite clear guidelines concerning the criteria to be recognized as a victim and the available reparatory measures.

Compared to the regulation implemented under the rule of Nikita Khrushchev, the reparatory measures for those who suffered on political, social, national, religious or other grounds were expanded to include true restoration of such intangible values as enjoyment of human rights and measures of satisfaction, i.e. an official declaration restoring the dignity, reputation and rights

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<sup>697</sup> Nuzov, "Role of Political Elite in Transitional Justice in Russia," 300; Smith, „Destalinization in Former Soviet Union," 122-123.

<sup>698</sup> International Memorial, "Memorial History. A Timeline," *International Memorial*, accessed January 8, 2018, <https://www.memo.ru/en-us/memorial/memorial-history-timeline/>.

<sup>699</sup> Декларация Верховного Совета СССР "О признании незаконными и преступными репрессивных актов против народов, подвергшихся насильственному переселению, и обеспечении их прав" [Declaration of the USSR Supreme Soviet "On the recognition as illegal and criminal the repressive acts against peoples who where subject to forced resettlement and on securing their rights"], "Ведомости СНД СССР и ВС СССР", 1989, N 23, ст. 449, <http://www.migimo.ru/razdel/74/>.

<sup>700</sup> Постановление Верховного Совета СССР „Об отмене законодательных актов в связи с декларацией Верховного Совета СССР от 14 ноября 1989 года "О признании незаконными и преступными репрессивных актов против народов, подвергшихся насильственному переселению, и обеспечении их прав"“ [Decision of the USSR Supreme Soviet 'On cancellation of legislation in accordance with declaration of the USSR Supreme Soviet of 14 November 1989 "On the recognition as illegal and criminal the repressive acts against peoples who where subject to forced resettlement and on securing their rights"'], art. 5, "Ведомости СНД СССР и ВС СССР", 1991, N 11, ст. 302, <http://www.migimo.ru/razdel/74/>.

of the victims and of persons closely connected with the victims; verification of the facts; assistance in the recovery, identification and reburial of the bodies and commemorations and tributes to the victims. The fixed amount of compensation, i.e. two months' pay at the rate prior to arrest, was left unchanged, although due to the expanded scope of persons eligible for status of a victim, the compensation was due to larger number of recipients. The initiatives to remedy ethnic groups that were entirely deported from their native lands in the territory of the USSR using force under inhumane conditions were completely new and were shaped under such reparatory measures as rehabilitation through social services and compensation.

It is also noteworthy that redress of the victims was initially intended within the whole territory of the USSR irrespective of status of the administrative unit by placing certain obligations on the governments of union and autonomous republics, autonomous provinces and regions. However, analysis of particular provisions revealed that reparatory policy addressed only victims of the Stalinist regime, other victims left out; additionally, these provisions did not address the illegal nature of incorporation of the Baltic states, as freedom fighters of the Baltic states were not considered to be eligible for status of a victim and the position towards forced deportation of part of population of the Baltic states was not clearly expressed.

Therefore, reparatory measures at the union level have given relief to the victims of the Soviet regime in the Baltic states in quite a reserved manner. Nevertheless, for the full disclosure of the obligations assumed by the USSR to remedy the victims of the Soviet regime, the measures implemented in the territories of the Baltic states administered by institutions of the occupant also must be discussed.

### **3.2.2. Measures in the territories of the Baltic states administered by institutions of the occupant**

The policies of *glasnost* and *perestroika* towards the victims of repressive policies of the USSR resulted in the application of particular reparatory measures in the territories of the Baltic states administered by institutions of the occupant and in other former union republics. Such measures were established in each Baltic State and were administered by institutions of the occupant, i.e. until re-establishment of previous statehood in the form of a declaration of full independence.

#### **3.2.2.1. Measures in the territory of Lithuania administered by institutions of the occupant**

While under belligerent occupation of the USSR, the institutions of the occupant in the territory of Lithuania enacted the following legal acts concerning persons who were repressed under the Soviet regime:

- Decision No. 274 of the Council of Ministers of the Lithuanian SSR of 20 September 1988 ‘On abolition of the Decision No. 176 of 19 March 1949 and of the Decision No. 865 of 29 September 1951 of the Council of Ministers of the Lithuanian SSR’<sup>701</sup>
- Decree of the Lithuanian SSR Supreme Soviet Presidium of 21 October 1988 ‘On the Rehabilitation of the Citizens Deported from the Territory of the Lithuanian SSR from 1941 till 1952’<sup>702</sup>

The wording of these acts suggest that they addressed only the forced deportation of Lithuanians, while people who faced other forms of repressions, e.g. extrajudicial convictions, were not covered by the acts. The decision of 20 September 1988 abolished two previous decisions concerning forced deportations that were carried out on 25–28 March 1949 and 2–3 October 1951. These decisions, as well as other decisions on forced resettlement, were adopted after the required legislation was actually enacted by the highest authorities of the USSR.<sup>703</sup> Because of the decision of 20 September 1988, these deportations were declared as groundless and illegitimate. As a result, people who were victims of these illegitimate decisions were declared as rehabilitated.

It is noteworthy that only deportations that were carried out on 25–28 March 1949 and 2–3 October 1951, considered to be the biggest operations, were covered by the decision of 20 September 1988, while other deportations that were carried out in the same manner were not taken into account. They were addressed by the next decision of 21 October 1988, where forced resettlements carried out in the period of 1941–1952 were also declared as groundless and illegitimate. Further amendment of decision of 21 October 1988 also covered cases when people were deported from or not allowed to come back to Lithuania as a result of supplementary punishments of exile or banishment. However the actual scope of victims under the decision of 21 October 1988 is not sufficiently clear because it does not address cases of political prisoners who were not deported.

Some guidance on eligibility for status as a victim can be found in the decision of the Council of Ministers of the Lithuanian SSR of 27 November 1989 providing for certain benefits

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<sup>701</sup> Lietuvos TSR Ministrų Tarybos nutarimas “Dėl Lietuvos TSR Ministrų Tarybos 1949 m. kovo 19 d. nutarimo Nr. 176 ir 1951 m. rugsėjo 29 d. nutarimo Nr. 865 panaikinimo” [Decision On abolition of the Decision No. 176 of 19 March 1949 and of the Decision No. 865 of 29 September 1951 of the Council of Ministers of the Lithuanian SSR], Vyriausybės žinios, 1988-01-01, Nr. 28-295, <https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/43c26d70501c11e5a4ad9dd3e7d17706?positionInSearchResults=53&searchModelUUID=833d5fb2-22ee-42bb-a7d6-395eaf3d2aa5>.

<sup>702</sup> Lietuvos TSR Aukščiausiosios Tarybos Prezidiumo įsakas “Dėl asmenų, iškeldintų iš Lietuvos TSR teritorijos 1941-1952 metais, reabilitavimo” [Decree On the Rehabilitation of the Citizens Deported from the Territory of the Lithuanian SSR from 1941 till 1952], Vyriausybės žinios, 1988-01-01, Nr. 31-324, as last amended on June 21, 1989, <https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/6e09a4d06d8211e5b316b7e07d98304b?positionInSearchResults=52&searchModelUUID=833d5fb2-22ee-42bb-a7d6-395eaf3d2aa5>.

<sup>703</sup> Anušauskas et al., *Lietuva 1940-1990*, 303, 305-307.

concerning pension rights and accommodation supply. Under this act, rehabilitated persons are considered those who were deported by force and those who were arrested or convicted from 15 June 1940 through 1 June 1981 for commission of crimes against the state, crimes against the system of administration and other crimes in accordance with criminal codes of LSSR or RSFSR while applicable in the territory of LSSR and who were not allowed to come back to LSSR after serving the prescribed sentence.<sup>704</sup> It is clear that actual scope of rehabilitated persons was wider compared to the wording of the decisions of 20 September 1988 and 21 October 1988.

The latter decisions required respective institution to inform peoples affected by these decisions on their rehabilitation and available reparatory measures. The people who were considered to be victims were also entitled to the following reparatory measures:

- restoration of confiscated property or supply with accommodations (restitution in the form of restoration of property)<sup>705</sup>
- fixed payment (50 rubles) for each month spent imprisoned and in exile or banishment for loss of earnings (compensation for loss of earnings)<sup>706</sup>

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<sup>704</sup> Lietuvos TSR Ministrų Tarybos nutarimas “Dėl asmenų, kurių nuteisimas ar iškeldinimas pripažintas neteisėtu ir nepagrįstu ir kurie pripažinti reabilituotais, darbo stažo ir butų įskaitos” [Decision On Accounting of Work Experience and Inclusion to Registers for Accommodations of Rehabilitated Persons Whose Conviction or Deportation is Declared Illegal and Groundless], art. 1, Vyriausybės žinios, 1989-01-01, Nr. 35-526, <https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/3b095e50572e11e5a9129f08109b20ec?positionInSearchResults=41&searchModelUUID=833d5fb2-22ee-42bb-a7d6-395eaf3d2aa5>.

<sup>705</sup> Lietuvos TSR Ministrų Tarybos nutarimas “Dėl Lietuvos TSR Ministrų Tarybos 1949 m. kovo 19 d. nutarimo Nr. 176 ir 1951 m. rugsėjo 29 d. nutarimo Nr. 865 panaikinimo” [Decision On abolition of the Decision No. 176 of 19 March 1949 and of the Decision No. 865 of 29 September 1951 of the Council of Ministers of the Lithuanian SSR], art. 2, Vyriausybės žinios, 1988-01-01, Nr. 28-295, <https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/43c26d70501c11e5a4ad9dd3e7d17706?positionInSearchResults=53&searchModelUUID=833d5fb2-22ee-42bb-a7d6-395eaf3d2aa5>; Lietuvos TSR Ministrų Tarybos nutarimas “Dėl asmenų, kurių iškeldinimas pripažintas neteisėtu ir nepagrįstu ir kurie pripažinti reabilituotais, turtiniu ir asmeniniu neturtinių teisių, taip pat dėl jų pilietinės garbės ir orumo gynimo” [Decision On Defense of Civil Rights, Honour and Reputation of Rehabilitated Persons Whose Conviction or Deportation is Declared Illegal and Groundless], arts. 1-6, Valstybės žinios, 1989-01-10, Nr. 1-4, as last amended on November 27, 1989, <https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/9aaab4204f7311e5a4ad9dd3e7d17706?positionInSearchResults=1&searchModelUUID=68490f6f-113a-41bc-a99d-91cad941922f>; Lietuvos TSR Ministrų Tarybos nutarimas “Dėl žalos atlyginimo reabilituotiems asmenims, suimtiems arba nuteistiems nuo 1940 m. birželio 15 d. iki 1981 m. birželio 1 d.” [Decision on Remuneration of Damages for Rehabilitated Persons Who Were Arrested or Convicted from 15 June 1940 till 1 June 1981], art. 1 para. b), Valstybės žinios, 1989-08-10, Nr. 22-299, <https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/330e24006c0111e5b316b7e07d98304b?positionInSearchResults=110&searchModelUUID=833d5fb2-22ee-42bb-a7d6-395eaf3d2aa5>.

<sup>706</sup> Lietuvos TSR Ministrų Tarybos nutarimas “Dėl žalos atlyginimo reabilituotiems asmenims, suimtiems arba nuteistiems nuo 1940 m. birželio 15 d. iki 1981 m. birželio 1 d.” [Decision on Remuneration of Damages for Rehabilitated Persons Who Were Arrested or Convicted from 15 June 1940 till 1 June 1981], art. 1 para. a), Valstybės žinios, 1989-08-10, Nr. 22-299, <https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/330e24006c0111e5b316b7e07d98304b?positionInSearchResults=110&searchModelUUID=833d5fb2-22ee-42bb-a7d6-395eaf3d2aa5>.

- restoration of pension rights, allowing the time spent imprisoned and in exile or banishment to be counted as a work experience for pension rights (restitution in the form of restoration of employment)<sup>707</sup>
- obligation for institutions with whom a victim was ever connected through employment to assist the victim in the recovery and reburial of the bodies of repressed family members from the places of exile (satisfaction in the form of assistance in the recovery, identification and reburial of the bodies)<sup>708</sup>
- certain medical services (rehabilitation through medical services)<sup>709</sup>

These reparatory measures were established under different legal acts enacted by the Council of Ministers of the Lithuanian SSR. It is important to note that fixed payment was not available only for those who were deported by force.

In summary, the reparatory policy implemented by the institution of occupant in the territory of Lithuania highly resembles the reparatory policy shaped by the highest authorities of the USSR, although certain reparatory measures could be considered as better than or going beyond those provided under the regulation of the USSR. Differences are noticeable in regulations—specifically who is eligible for status of a victim in Lithuania, despite certain ambiguities, as victims were defined not only those who had been repressed during the Stalinist regime but also those who had been repressed because of subsequent policies of the USSR. In addition, conditions denying the status of a victim were not specified.

### 3.2.2.2. *Measures in the territory of Latvia administered by institutions of the occupant*

Until the restoration of independence on 21 August 1991, the following legislation was enacted by the institutions of the occupant in the territory of Latvia:

- resolution No. 350 of the Council of Ministers of the Latvian SSR of 2 November 1988 ‘On the Groundless Administrative Deportation of Citizens from the Latvian SSR in 1949’

<sup>707</sup> Lietuvos TSR Ministrų Tarybos nutarimas “Dėl asmenų, kurių nuteisimas ar iškeldinimas pripažintas neteisėtu ir nepagrįstu ir kurie pripažinti reabilituotais, darbo stažo ir butų įskaitos” [Decision On Accounting of Work Experience and Inclusion to Registers for Accommodations of Rehabilitated Persons Whose Conviction or Deportation is Declared Illegal and Groundless], art. 1, Vyriausybės žinios, 1989-01-01, Nr. 35-526, <https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/3b095e50572e11e5a9129f08109b20ec?positionInSearchResults=41&searchModelUID=833d5fb2-22ee-42bb-a7d6-395eaf3d2aa5>.

<sup>708</sup> Lietuvos TSR Ministrų Tarybos nutarimas “Dėl asmenų, kurių iškeldinimas pripažintas neteisėtu ir nepagrįstu ir kurie pripažinti reabilituotais, turtinių ir asmeninių neturtinių teisių, taip pat dėl jų pilietinės garbės ir orumo gynimo” [Decision On Defense of Civil Rights, Honour and Reputation of Rehabilitated Persons Whose Conviction or Deportation is Declared Illegal and Groundless], art. 6, Valstybės žinios, 1989-01-10, Nr. 1-4, as last amended on November 27, 1989, <https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/9aaab4204f7311e5a4ad9dd3e7d17706?positionInSearchResults=1&searchModelUID=68490f6f-113a-41bc-a99d-91cad941922f>

<sup>709</sup> Ibid., art. 7.

- decree of the Latvian SSR Supreme Soviet Presidium of 8 June 1989 ‘On the Rehabilitation of the Citizens Deported from the Territory of the Latvian SSR in the Forties and Fifties’<sup>710</sup>
- Law Concerning the Rehabilitation of Illegally Repressed People of 3 August 1990 (enacted by the Supreme Council of the Republic of Latvia)<sup>711</sup>

The first resolution is the same as that enacted by the Council of Ministers of the Lithuanian SSR; it abolished decisions concerning forced deportation that was carried out on 25–28 March 1949 and related property confiscation, declaring the decisions null and void, deportation as unfounded and the deported people rehabilitated and having a right to claim restitution for confiscated property. A separate decision established the procedure by which such property is restituted or its value is compensated.<sup>712</sup> With the decree of 8 June 1989, all forced deportations from the territory of Latvia in the 1940s and 1950s were taken into account, declaring them illegitimate and groundless.<sup>713</sup> The wording of the previously described legislation also suggests that only persons deported by force in the 1940s and 1950s were recognized as victims of Soviet repressions.

With enactment of the law ‘On the Rehabilitation of Persons Unlawfully Subjected to Repressions’ of 3 August 1990, the scope of victims was significantly broadened, taking into account persons who were convicted or against whom criminal proceedings terminated on the basis of non-rehabilitating conditions:

- for crimes under the criminal code of the RSFSR applied in the territory of Latvia since 26 November 1940 if the activities were not recognized as crimes under Latvian criminal law as it was before the introduction of the criminal code of the RSFSR
- for crimes defined in articles 58<sup>1</sup>–58<sup>14</sup> of the criminal code of the RSFSR if the activities do not constitute international crimes

<sup>710</sup> For English titles see: Satversmes tiesa [Constitutional Court of the Republic of Latvia], June 10, 1998, judgement, case No. 04 - 03(98), [http://www.satv.tiesa.gov.lv/wp-content/uploads/1998/04/04-0398\\_spriedums\\_ENG.pdf](http://www.satv.tiesa.gov.lv/wp-content/uploads/1998/04/04-0398_spriedums_ENG.pdf), 2,3.

<sup>711</sup> Latvijas Republikas Likums „Par nelikumīgi represēto personu rehabilitāciju“ [Law Concerning the Rehabilitation of Illegally Repressed People], "Ziņotājs", 34, 23.08.1990, <http://m.likumi.lv/doc.php?id=76105>, translation of title provided in Montero, *Study on how the memory of crimes committed by totalitarian regimes in Europe is dealt with*, 417; Švarca, „Transitional Justice Mechanisms Applied by Latvia,” 81.

<sup>712</sup> Satversmes tiesa [Constitutional Court of the Republic of Latvia], June 10, 1998, judgement, case No. 04 - 03(98), [http://www.satv.tiesa.gov.lv/wp-content/uploads/1998/04/04-0398\\_spriedums\\_ENG.pdf](http://www.satv.tiesa.gov.lv/wp-content/uploads/1998/04/04-0398_spriedums_ENG.pdf), 3-4.

<sup>713</sup> LPSR Augstākās Padomes Prezidija dekrēts “Par četrdesmitajos un piecdesmitajos gados no Latvijas PSR teritorijas izsūtīto pilsoņu rehabilitāciju” [Decree On the Rehabilitation of the Citizens Deported from the Territory of the Latvian SSR in the Forties and Fifties], June 8, 1989, <http://www.archiv.org.lv/LVA/skolam/aizvestie/51.htm>.

- for crimes defined in articles 59<sup>4</sup>–59<sup>6</sup>, 59<sup>10</sup>, 59<sup>13</sup>, 60–62, 64, 66, 68–70, 79<sup>1</sup>–79<sup>4</sup>, 81, 82, 84, 84.a, 87.a, 121, 122, 182, 192.a, 193<sup>10</sup>.a and point d Article 193<sup>7</sup> of the criminal code of RSFSR
- for activities under Article 7 of the law of the USSR of 25 December 1958 ‘On criminal responsibility for crimes against the state’ and articles 65, 183<sup>1</sup> of the Latvian SSR Criminal Code (1961)<sup>714</sup>

Thus, persons repressed on political, social, national, religious or other grounds eligible for status as a victim were clearly described, making the whole process of redress speedy and without ambiguities.

Reparatory measures available for persons rehabilitated under the decision of 2 November 1988 and decree of 8 June 1989 were established under resolution No. 190 of the Council of Ministers of the Latvian SSR adopted on 29 August 1989. This resolution mainly addressed procedures for the restitution of property and provision of compensation in cases where restitution is impossible.<sup>715</sup> The same reparatory measures were applied to persons recognized as victims under law ‘On the Rehabilitation of Persons Unlawfully Subjected to Repressions’ of 3 August 1990.<sup>716</sup>

To sum up, initial reparatory measures and the class of persons eligible for status of a victim under the regulations of institutions of the occupant in the territory of Latvia were very reserved and encompassed only victims who faced forced transfer on a particular date. Later, the scope of persons eligible for status of a victim was broadened. Nevertheless, reparatory measures were limited mainly to the restitution of property and compensation for lost property and have remained unchanged since their first introduction. However, recognition of status as a victim can be considered as restoration of enjoyment of human rights and as an official declaration restoring the dignity, reputation and rights of a victim, and as a result a certain measure of satisfaction.

### **3.2.2.3. Measures in the territory of Estonia administered by institutions of the occupant**

The institutions of the occupant in the territory of Estonia enacted the following legislation:

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<sup>714</sup> Latvijas Republikas Likums „Par nelikumīgi represēto personu rehabilitāciju“ [Law Concerning the Rehabilitation of Illegally Repressed People], arts. 1-3, "Ziņotājs", 34, 23.08.1990, <http://m.likumi.lv/doc.php?id=76105>.

<sup>715</sup> Satversmes tiesa [Constitutional Court of the Republic of Latvia], June 10, 1998, judgement, case No. 04 - 03(98), [http://www.satv.tiesa.gov.lv/wp-content/uploads/1998/04/04-0398\\_spridums\\_ENG.pdf](http://www.satv.tiesa.gov.lv/wp-content/uploads/1998/04/04-0398_spridums_ENG.pdf).

<sup>716</sup> Par Latvijas Republikas likuma "Par nelikumīgi represēto personu rehabilitāciju" spēkā stāšanās kārtību [Law On the effect of the law “On the Rehabilitation of Persons Unlawfully Subjected to Repressions”], art. 6, "Ziņotājs", 34, 23.08.1990, <http://likumi.lv/doc.php?id=76106>.



- law of the Supreme Soviet of the ESSR of 7 December 1988 ‘On the Extrajudicial Mass Repressions in Soviet Estonia During the 1940s and 1950s’<sup>717</sup>
- decree of the Presidium of the Estonian SSR Supreme Soviet of 19 February 1990 ‘On rehabilitation of extra judicially repressed and unjustly convicted persons’<sup>718</sup>

Although Estonia was the last to enact legislation concerning victims of the Soviet regime, its legislation can be considered as advanced, compared to similar legal acts of institutions of the occupied territory of Lithuania and Latvia.<sup>719</sup> First, the law of the Supreme Soviet of the ESSR of 7 December 1988 condemned repressions committed in the territory of Estonia in the 1940s and 1950s as crimes against humanity, recognizing in the preamble that previous actions of the USSR and ESSR were not enough to address the horrors of Stalinism. This law was among the first of similar legal acts of the Baltic states that referenced previously implemented reparatory policies within the whole USSR. Moreover, Stalinist repressions were not only recognized as illegitimate and groundless but their criminal nature was also evaluated. As for victims of these repressions, self-acting rehabilitation was granted only to deportees within a prescribed period. Meanwhile other cases were recognized as requiring review by respective institutions.

The decree of 19 February 1990 defined the victims under the Soviet regime more precisely, without reference to a particular period. Victims were recognized as persons who were convicted or extrajudicially repressed under the criminal code of the RSFSR in the territory of Estonia or against whom criminal proceedings terminated on the basis of non-rehabilitating conditions:

- for acts committed that were not considered crimes under the legislation of the Republic of Estonia
- for crimes defined in articles 58<sup>1</sup>–58<sup>14</sup> of the criminal code of the RSFSR if the activities do not constitute international crimes
- for crimes defined in articles 59<sup>2</sup>, 593a, 59<sup>4</sup>–59<sup>6</sup>, 59<sup>10</sup>, 59<sup>13</sup>, 60–62, 64, 66, 68–70, 79<sup>1</sup>–79<sup>4</sup>, 81, 82, 84, 121, 122, 166a, 182, 192.a, 193<sup>10</sup>.a and point d article 193<sup>7</sup> of the criminal code of the RSFSR
- for crimes defined in articles 68, 194<sup>1</sup> of the Estonian SSR Criminal Code (1961)<sup>720</sup>

<sup>717</sup> Kohtuväliste massirepressioonide kohta Nõukogude Eestis 1940–1950-il aastail [Law On the Extrajudicial Mass Repressions in Soviet Estonia During the 1940s and 1950s], December 7, 1988, <https://www.riigiteataja.ee/akt/23991>. See also Tamm, „In search of lost time,” 653.

<sup>718</sup> Kohtuväliselt represseeritud ja alusetult süüdimõistetud isikute rehabiliteerimisest [Decree On rehabilitation of extrajudicially repressed and unjustly convicted persons], RT 1990, 7, 85, <https://www.riigiteataja.ee/akt/28230>.

<sup>719</sup> Pettai and Pettai, *Transitional and Retrospective Justice in the Baltic States*, 173.

<sup>720</sup> Kohtuväliselt represseeritud ja alusetult süüdimõistetud isikute rehabiliteerimisest [Decree On rehabilitation of extrajudicially repressed and unjustly convicted persons], arts. 1-2, RT 1990, 7, 85, <https://www.riigiteataja.ee/akt/28230>.

Such regulation concerning the status of a victim is similar to the one established under the law of the Supreme Council of the Republic of Latvia of 3 August 1990, but it was actually Latvia who ‘mirrored Estonia’s practice of formally listing all of the different paragraphs of the RSFSR Criminal Code.’<sup>721</sup> Thus, Estonia also took advantage of elaborate and clear criteria on the procedures of rehabilitation.

The guidelines for reparatory measures available for the victims were already established in the previously mentioned law of the Supreme Soviet of the ESSR of 7 December 1988. Respective institutions were obligated to develop the reparatory measures concerning:

- compensation for any damages suffered because of repressions
- assistance in commemoration programmes and preservation of relevant documentation on repressions committed (satisfaction in the forms of verification of the facts and commemorations and tributes to the victims)
- prosecution of those responsible for the repressions committed in the territory of Estonia in the 1940s and 1950s (satisfaction in the form of judicial sanctions against persons liable for the violations)<sup>722</sup>

It is noteworthy that the law of the Supreme Soviet of the ESSR of 7 December 1988 ‘was the first in the Baltic states to call for criminal investigations into mass killings and crimes against humanity, and for trials against possible perpetrators.’<sup>723</sup> However, restitution of property was not named as a part of these reparatory measures.

In summary, the legislation on the reparatory measures for the victims of the Soviet regime enacted by the institutions of the occupant in the territory of Estonia could be regarded as distinct compared to legislation enacted by the institutions of the occupant in Lithuania and Latvia. This uniqueness is visible in the approach taken towards the definition of victims as well as in reparatory measures, because there was no intention to limit compensation to loss of earnings and suggested satisfaction measures included prosecution of those responsible for violations.

Taking this into account, the reparations implemented in the territory of Estonia administered by the institutions of the occupant are the closest to the concept of reparation as established by Basic Principles and Guidelines. In addition, such high deviation from the reparatory policy as established in the territories of the Baltic states administered by the institutions of the occupant could invoke invalidation of these legal acts, but no actions were taken by the presidium of the Supreme Soviet. Thus, for victims of Estonian, obligations assumed by

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<sup>721</sup> Pettai and Pettai, *Transitional and Retrospective Justice in the Baltic States*, 177.

<sup>722</sup> Kohtuväliste massirepressioonide kohta Nõukogude Eestis 1940–1950-il aastail [Law On the Extrajudicial Mass Repressions in Soviet Estonia During the 1940s and 1950s], arts. 3-4, December 7, 1988, <https://www.riigiteataja.ee/akt/23991>.

<sup>723</sup> Pettai and Pettai, *Transitional and Retrospective Justice in the Baltic States*, 173.

the USSR could be considered as the greatest as compared with those related to victims in Lithuania and Latvia.

### **3.2.3. Summary of the obligations assumed by the USSR**

To sum up, the USSR recognized that its policies resulted in the abuse of power and repressions against innocent people, although such recognition was not unconditional. This is especially true taking into account that only pre-Stalinist and Stalinist policies were declared as contrary to the values of the USSR. In addition, policies implemented towards the occupied Baltic states, e.g. punishment of freedom fighters of the Baltic states as criminals, was considered as legitimate. The situation of deported Lithuanians, Latvians and Estonians was also not adequately clear at union level. Under these circumstances it is possible to conclude that the USSR treated repressions as gross violations of human rights within the whole territory of the USSR and not as serious violations of international humanitarian law, especially when it came to the case of the Baltic states.

Moreover, eligibility for status as a victim under the enacted legislation suggests that the reparatory policy, although implemented more fairly than during the rule of Nikita Khrushchev, was still affected by the political interests of the USSR and its historical narrative of the Great Patriotic War. This is not in compliance with Article 25 of Basic Principles and Guidelines, which stresses the importance of prohibiting ‘any discrimination of any kind or on any ground’.<sup>724</sup> If the USSR recognized the abusiveness of its former policies, such recognition should be in line with international human rights law and international humanitarian law prohibiting discrimination.

Concerning available reparatory measures, the USSR provided restoration of liberty and enjoyment of human rights, restoration of employment rights in limited cases, pension rights, provision of accommodation (because there was no private property in the USSR), compensation for material damages and satisfaction in the form of commemoration of victims. Thus, such elements of reparation as restitution, compensation for material damages and satisfaction in accordance with concept of reparation under Basic Principles and Guidelines is visible in the reparatory policy of the USSR. However, due to the scale of repressions and their gravity, such reparatory measures could not be considered as corresponding to the duty to provide effective remedies to victims, including reparation under human rights law and Article 8 of Universal Declaration of Human Rights in particular.<sup>725</sup>

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<sup>724</sup> UN General Assembly, Resolution 60/147, annex, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, art. 25 (December 16, 2005).

<sup>725</sup> *Ibid.*, art. 3.

Gross human rights violations that were committed under the Soviet regime left everlasting consequences<sup>726</sup> that necessitated a sensitive approach to employ the broadest possible scope of reparatory measures, especially those of a non-material nature such as a public apology, including acknowledgement of the facts and acceptance of responsibility. Nevertheless, this was not suggested for victims of the Soviet regime in the whole USSR. Additionally, commemoration of victims was not an initiative of the USSR as a state but an initiative of the non-governmental organization ‘Memorial’.<sup>727</sup>

It is noteworthy that initially policies in the Baltic states administered by institutions of the occupant, except in Estonia, have followed the same reserved view towards reparation for victims of the Soviet regime in their legislation concerning both the scope of victims eligible for reparation and remedies for those who suffered under the Stalinist regime. However, the institutions of the occupant in Lithuania and Latvia, with the enactment of further legislation, shaped reparatory policy in a broader manner; in certain cases all of the Baltic states clearly deviated from the policy established by the highest authorities of the USSR. This is particularly visible in legislation establishing the status of a victim. Moreover, legislation of the institutions of the occupant in Estonia was unique in suggesting broad application of compensation and judicial sanctions against perpetrators of repressions.

Taking into account the actual competence of union republics under both constitutions of the USSR, such deviations by the Baltic states while under belligerent occupation should not be taken into account, as all legislative acts of the USSR had supremacy over legislative acts of union republics, and the Presidium of the Supreme Soviet had the power to annul legislation of the union republics that failed to conform with the legislation of the union. However, it is widely recognized that since 1988 the USSR faced a constitutional crisis when union republics, due to the policies of *glasnost* and *perestroika*, started to demand actual application of their declaratory rights within the Constitution of 1977 of the USSR.<sup>728</sup>

This resulted in so-called ‘dual sovereignty’. According to Urs W. Saxer, two rivals—the union government and union republics—‘claimed sovereignty and supremacy over the other, while neither was able to exercise complete state authority.’ As ‘[s]overeignty means supreme authority’, such a scenario was unsustainable. As the international community did not initially recognize the Baltic states as independent states, even after their declarations of intention to act as sovereign states, ‘the union government and the Soviet republics had a relationship of

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<sup>726</sup> Adler, “Life in the ‘Big Zone’”; Nanci Adler, “The future of the soviet past remains unpredictable: The resurrection of stalinist symbols amidst the exhumation of mass graves,” *Europe-Asia Studies* 57, no. 8 (2005): 1093-1119, doi: 10.1080/09668130500351100.

<sup>727</sup> Adler, “The future of the soviet past remains unpredictable,” 1096.

<sup>728</sup> See footnote 664.

involuntary mutual dependence.’<sup>729</sup> That is exactly the circumstances when legislation of the institutions of the occupant in the Baltic states concerning the remedial policy of previous repressions started to deviate.

This antagonism was particularly visible in the relations between the authorities of the USSR and the institutions of the occupant in the territory of Estonia. It was correctly named as ‘the period of “war of laws”’.<sup>730</sup> Estonia was the first among the Baltics to declare its legislative supremacy over the union legislation and took gradual steps in establishing its independence.<sup>731</sup> However, Lithuania was the first to declare full independence, while Latvia and Estonia allowed transitional periods. The primary measures used by the USSR against the desires of the Baltic states for independence were economical pressure, although military force was used against Lithuania on 13 January 1991.<sup>732</sup> In the case of Estonia, the presidium of the Supreme Soviet implemented its rights to declare supremacy over the legislation of the institutions of the occupant in the territory of Estonia, i.e. the presidium of Supreme Soviet ruled that several articles of the Estonian SSR election law were unconstitutional.<sup>733</sup>

Despite its ability to declare supremacy of the union legislation, even in light of the constitutional crisis there is no data that the USSR used such power against legislation of the institutions of the occupant in the territories of the Baltic states concerning their policy of redress towards the victims of the Soviet regime. This means that the USSR assumed the obligation to remedy victims of the Soviet regime in the Baltic states, not only with legislation at the union level, but it can be also presumed that it assumed obligations of remedies in a way that was established under legislation of the institutions of the occupant in the respective Baltic state.

Taking everything into account, next to a previously established duty to provide remedies for the victims of the Soviet regime under international humanitarian law, the USSR also assumed the latter obligation as a result of its human rights obligations towards its former citizens. According to Nika Bruskina, if a state assumes an obligation to provide a remedy for victims of human rights violations and fails to abide by it, there is a possibility for a victim to defend his/her

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<sup>729</sup> Saxer, "Transformation of Soviet Union," 643.

<sup>730</sup> Kerikmäe and Särav, "Estonian experience," 632.

<sup>731</sup> Igor Grazin, "A New Old Constitution for Estonia: Genetic Aspects and Parliamentarianism v. Presidentialism," *Journal of International Law and Practice* 2, no. 3 (1993): 486-493, [https://heinonline.org.ezproxy.vdu.lt:2443/HOL/Page?handle=hein\\_journals/mistjintl2&div=74&start\\_page=471&collection=journals&set\\_as\\_cursor=0&men\\_tab=srchresults#](https://heinonline.org.ezproxy.vdu.lt:2443/HOL/Page?handle=hein_journals/mistjintl2&div=74&start_page=471&collection=journals&set_as_cursor=0&men_tab=srchresults#); Kerikmäe and Särav, "Estonian experience," 632-633.

<sup>732</sup> Gleason, "Soviet Federalism and Republican Rights," 19-40; Mullerson, "Continuity and Succession of States," 481; Darius Mereckis and Rimantas Morkvėnas, "The 1991 Treaty as a Basis for Lithuanian-Russian Relations," *Lithuanian Foreign Policy Review* 1 (1998): 2, [http://lfpr.lt/issues/1/attachment/lfpr-1-mereckis\\_morkvenas/](http://lfpr.lt/issues/1/attachment/lfpr-1-mereckis_morkvenas/).

<sup>733</sup> Ronald L. Kuby, "The Supreme Soviet and the Supreme Law," *Advocate (Vancouver Bar Association)* 48, no. 2 (March 1990): 207-208, [https://heinonline.org.ezproxy.vdu.lt:2443/HOL/Page?handle=hein\\_barjournals/advvba0048&div=19&start\\_page=207&collection=journals&set\\_as\\_cursor=0&men\\_tab=srchresults#](https://heinonline.org.ezproxy.vdu.lt:2443/HOL/Page?handle=hein_barjournals/advvba0048&div=19&start_page=207&collection=journals&set_as_cursor=0&men_tab=srchresults#).

right to receive remedies under article 2 of the ICCPR before the Human Rights Committee if a state has ratified the Optional Protocol to the ICCPR (1966) or Article 1 of the Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms.<sup>734</sup> In addition, under Article 41 a state party to the ICCPR can claim ‘that another State Party is not fulfilling its obligations under the present Covenant.’<sup>735</sup> The possibility to defend a right to a remedy for a victim of the Soviet regime under Article 1 of the Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms is not relevant here, because the USSR has never been the party to the European Convention of Human Rights. Thus, the only possibility to defend this right is under Article 2 of the ICCPR and will be examined because it was mentioned previously that the USSR ratified ICCPR in 1973.

In order for a state or individual to invoke the responsibility of a state due to its failure to comply with Article 2(3)(a) of the ICCPR, the competence of the Human Rights Committee must have been accepted by that state. Unfortunately, the USSR only did so on 1 October 1991, after all the Baltic states had declared their independence; in doing so the USSR declared ‘that, pursuant to article 41 of the International Covenant on Civil and Political Rights, it recognizes the competence of the Human Rights Committee to receive and consider communications submitted by another State Party’<sup>736</sup> and ratified the Optional Protocol to the ICCPR.<sup>737</sup> Recognition of the committee’s competence was made only for events occurring after the adoption of the declaration on recognition of jurisdiction of the Human Rights Committee pursuant to Article 41 of the ICCPR and after the date on which the Optional Protocol to the ICCPR entered into force for the USSR. As obligations assumed by a state under the ICCPR encompass only individuals subject to jurisdiction of a state concerned,<sup>738</sup> the USSR accepted competence of the Human Rights Committee after victims of soviet regime were no more under its jurisdiction.

Due to these circumstances it is impossible for either the Baltic states or the victims of the Soviet regime to invoke responsibility of the USSR under the ICCPR based on its failure to provide remedies on the assumed obligations.<sup>739</sup> Nevertheless, the revelation of remedial

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<sup>734</sup> Bruskina, „Valstybės kompensacija nacių ir komunistinių režimų nusikaltimų aukoms,“ 326-327.

<sup>735</sup> International Covenant on Civil and Political Rights, art. 41, *adopted* December 16, 1966, 999 *UN Treaty Series* 171 (entered into force March 23, 1976).

<sup>736</sup> Declaration of the USSR under article 41 recognizing the competence of the Human Rights Committee, October 1, 1991, 1651 *UN Treaty Series* 565.

<sup>737</sup> *United Nations Treaty Collection*, Depository, Status of Treaties, CHAPTER IV: Human Rights, 5. Optional Protocol to the International Covenant on Civil and Political Rights, accessed October 11, 2017, <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&msgid=IV-5&chapter=4&clang=en>.

<sup>738</sup> International Covenant on Civil and Political Rights, art. 2, para. 1, *adopted* December 16, 1966, 999 *UN Treaty Series* 171 (entered into force March 23, 1976).

<sup>739</sup> Additional reservations made on the part of the USSR on its recognition of the competence of the Human Rights Committee will not be considered because it was established that application of the ICCPR in order to invoke responsibility of the USSR for failure to comply with its obligations to provide remedy is not possible in case of victims of soviet regime in the Baltic states.

measures whose provision was undertaken by the USSR as human rights obligations still could serve as additional impetus to take actions on responsibility of the USSR for reparation to victims of the Soviet regime in the Baltic states. Since the USSR ceased to exist, it is important to establish who should undertake this obligation, the Baltic states or the Russian Federation, although neither of them assumes such obligation to the scope that was already discussed.

## 4. SUBJECTS RESPONSIBLE FOR THE PROVISION OF REPARATION FOR THE VICTIMS IN THE BALTIC STATES

### 4.1. INTERNATIONAL RESPONSIBILITY OF THE RUSSIAN FEDERATION

#### 4.1.1. The Russian Federation as the continuator of the USSR

The USSR as the name of a state formally ceased to exist in December of 1991 when the Declaration of Alma Ata and Belavezha Accords were signed, establishing the Commonwealth of Independent States.<sup>740</sup> This definitely affected not only states that were legally or illegally in the composition of the USSR but the whole international community. According to Patrick Dumberry, there is no common agreement on the actual form of state succession in the case of the USSR after its cessation.<sup>741</sup> Therefore, this question requires elaboration from the perspectives of statehood and state succession. Scholars analysing the case of the USSR tend to view the question from two different angles:

- perception of its continuity of statehood by a state itself under domestic law
- acts of the state at the international level and response of the international community<sup>742</sup>

Both angles on continuity of identity of the USSR by the Russian Federation will be discussed below.

##### 4.1.1.1. *Perception on state continuity by a state itself*

To decide whether the Russian Federation is the continuing state of the USSR, the position of the Russian Federation itself matters because the ability of third states to impose their view on state succession is limited, although ‘third States can withhold recognition, and thus undermine a State’s claim to succession.’<sup>743</sup> The position to start with is the previously mentioned constitutional crisis of the USSR when its union republics started to claim supremacy of their legislation over the legislation of the USSR or declared their sovereignty.<sup>744</sup> In light of these changes, it became clear that the USSR could not continue anymore as a unitary state, and in order to preserve the USSR as a state, union republics should be granted with true powers on its

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<sup>740</sup> Sergei A. Voitovich, “The Commonwealth of Independent States: An Emerging Institutional Model,” *European Journal of International Law* 4, no. 1 (1993): 404, <http://www.ejil.org/article.php?article=1211&issue=67>; Dumberry, *State Succession to International Responsibility*, 150.

<sup>741</sup> Dumberry, *State Succession to International Responsibility*, 151-152.

<sup>742</sup> See Beemelmans, “State Succession in International Law,” 71-124; Saxer, “Transformation of Soviet Union,” 581-716; Ineta Ziemele, *State Continuity and Nationality: The Baltic States and Russia: Past, Present and Future as Defined by International Law* (Leiden: Brill – Nijhoff, 2005), 45-62.

<sup>743</sup> Beemelmans, “State Succession in International Law,” 77.

<sup>744</sup> Saxer, “Transformation of Soviet Union,” 626-629.



governance. Subsequently, preparation of the new treaty of the USSR started,<sup>745</sup> and the RSFSR itself had to shape its status within the USSR as a true federal state.

This was done with the Declaration on the Sovereign Statehood of the RSFSR. However, Ineta Ziemele observes that text of the declaration was rather ambiguous, and changing factual circumstances after its adoption later allowed a different interpretation of its actual meaning to the statehood of the Russian Federation. Nevertheless, she correctly states that with the declaration the RSFSR declared that it continued the rights and obligations as a union republic, shaping its role not with the constitution of the USSR but within the new emerging concept of the USSR as a federal state that would be established in the new union treaty.<sup>746</sup> This is particularly apparent in the preamble of the Declaration, stating that ‘[t]he First Congress of People’s Deputies of the RSFSR ... declares its resolve to create a democratic rule-of-law State within a renewed USSR’ and Article 5, which provided that part of the jurisdiction of the RSFSR will be voluntarily transferred to the jurisdiction of the USSR and that disagreements between the RSFSR and the USSR will be ‘settled in the procedure established by the Treaty of the Union.’<sup>747</sup>

However, efforts to establish a new union treaty failed. The collapse of the USSR was a gradual crumbling that started with the reestablishment of the Baltic states that were not considered to be successors of the USSR.<sup>748</sup> The Baltic states and other former union republics before the coup in August 1991, or later, declared their independence from the USSR.<sup>749</sup> This demonstrates that the RSFSR was the only union republic interested in further existence of the USSR. It also was the heart of the USSR, as all the highest authorities responsible for the whole policy of the USSR were situated in Moscow.<sup>750</sup> In addition, Russia was largest in territory and in population within the former USSR, and after the collapse of the USSR it remains one of the largest states in the world. This reflects the unequal position of other union republics compared to the RSFSR.<sup>751</sup> It is also clear that the RSFSR only tried to imitate its equality among other union republics and statehood in order to preserve the USSR, but the chain of events renders these efforts meaningless.

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<sup>745</sup> Saxer, "Transformation of Soviet Union," 644-652; Ziemele, *State Continuity and Nationality*, 50-55.

<sup>746</sup> Ziemele, *State Continuity and Nationality*, 45-50, 54.

<sup>747</sup> Декларация о государственном суверенитете Российской Советской Федеративной Социалистической Республики [Declaration on the State Sovereignty of the Russian Soviet Federative Socialist Republic], "Ведомости СНД СССР и ВС СССР", 1990, N 2, ст. 22, <http://vedomosti.rsfsr-rf.ru/1990/2/#22>. Translation of tile provided in "Russian State Sovereignty," *Seventeen Moments in Soviet History*, accessed May 19, 2018, <http://soviethistory.msu.edu/1991-2/eltsin-and-russian-sovereignty/eltsin-and-russian-sovereignty-texts/russian-state-sovereignty/>.

<sup>748</sup> See footnote 173.

<sup>749</sup> Saxer, "Transformation of Soviet Union," 685.

<sup>750</sup> Shaw, "State Succession Revisited," 47; Mullerson, "Continuity and Succession of States," 476; Fahmi, "Succession of States," 96; Saxer, "Transformation of Soviet Union," 689.

<sup>751</sup> See also Fahmi, "Succession of States," 96.

At the end of 1993, the Russian Federation adopted a new Constitution due to the collapse of the USSR and the need to adopt ‘a living legal act’<sup>752</sup> instead of the Constitution of 1977, which was ‘part of the Soviet constitutional system.’<sup>753</sup> It is noteworthy that the Russian Federation continued its existence as a state under the Constitution of 1977, representing the former Soviet constitutional system, and under the Declaration on the Sovereign Statehood of the RSFSR, representing a future Soviet constitutional system, which never became a reality, for almost two years until adoption of the new constitution.<sup>754</sup> This means that the constitutional and political system of the Russian Federation was transformed within the framework of the Soviet constitutional and political system, and this also reflects continuity of the identity of the USSR. In addition, according to Ineta Ziemele ‘the present wording of the 1993 Constitution is not to be interpreted to exclude, in fact, both the constitutional and international continuity of the Soviet Union by the Russian Federation.’<sup>755</sup>

The next important issue concerning continuity of the identity of the USSR by the Russian Federation is provisions on acquisition of citizenship of the Russian Federation. Under Article 13 of Law on Citizenship, adopted on 28 November 1991, it was stated that all citizens of the former USSR who permanently resided in the territory of the RSFSR on the effective date of the law and who have not declared their unwillingness to be citizens of the RSFSR within one year shall be recognized as citizens of the RSFSR.<sup>756</sup> The core of this provision remained unchanged through the present day, and the article was amended only to reflect the change from the RSFSR to the Russian Federation.<sup>757</sup> Thus, the Russian Federation itself considers as citizens those who had citizenship of the USSR at the time of the adoption of its own law, and it has assisted those who had citizenship of the former USSR in the past in becoming Russian citizens.<sup>758</sup>

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<sup>752</sup> Ziemele, *State Continuity and Nationality*, 60.

<sup>753</sup> *Ibid.*, 59.

<sup>754</sup> *Ibid.*, 53.

<sup>755</sup> *Ibid.*, 59.

<sup>756</sup> Закон Российской Советской Федеративной Социалистической Республики „О гражданстве РСФСР“ [Law on citizenship of the RSFSR], art. 13, Ведомости Съезда народных депутатов Российской Федерации и Верховного Совета Российской Федерации от 1992 г., N 6, ст. 243, <http://pravo.gov.ru/proxy/ips/?searchres=&bpas=cd00000&a3=102000484&a3type=1&a3value=&a6=&a6type=1&a6value=&a15=&a15type=1&a15value=&a7type=1&a7from=&a7to=&a7date=&a8=&a8type=1&a1=%CE+%E3%F0%E0%E6%E4%E0%ED%F1%F2%E2%E5+%a0=&a16=&a16type=1&a16value=&a17=&a17type=1&a17value=&a4=&a4type=1&a4value=&a23=&a23type=1&a23value=&textpres=&sort=7&x=62&y=9>.

<sup>757</sup> Закон Российской Федерации “О Гражданстве Российской Федерации” [Law on Citizenship of the Russian Federation], art. 13, Ведомости Съезда народных депутатов Российской Федерации и Верховного Совета Российской Федерации от 1992 г., N 6, ст. 243, as last amended on May 31, 2002, <http://pravo.gov.ru/proxy/ips/?searchres=&bpas=cd00000&a3=102000484&a3type=1&a3value=&a6=&a6type=1&a6value=&a15=&a15type=1&a15value=&a7type=1&a7from=&a7to=&a7date=&a8=&a8type=1&a1=%CE+%E3%F0%E0%E6%E4%E0%ED%F1%F2%E2%E5+%a0=&a16=&a16type=1&a16value=&a17=&a17type=1&a17value=&a4=&a4type=1&a4value=&a23=&a23type=1&a23value=&textpres=&sort=7&x=62&y=9>.

<sup>758</sup> Закон Российской Федерации “О Гражданстве Российской Федерации” [Law on Citizenship of the Russian Federation], arts. 18, 19, Ведомости Съезда народных депутатов Российской Федерации и Верховного Совета Российской Федерации от 1992 г., N 6, ст. 243, as last amended on May 31, 2002,

A final significant issue that needs to be addressed is the approach of the Russian Federation on international treaties concluded or acceded by the USSR. Here provisions of the Law on International Treaties of the Russian Federation give some guidance. It is stated under Article 1 paragraph 3 that this law applies to international treaties in which the Russian Federation is a party as a continuing state of the USSR (rus. государства - продолжателя СССР).<sup>759</sup> One example is the provision of Article 49 of the Law on Citizenship, which confirms application of the international treaties on citizenship issues that the USSR was party to in the territory of the Russian Federation. Thus, the approach of the Russian Federation towards international treaties that the USSR was party to also tends to show that the Russian Federation perceives its statehood as a continuation of the previous statehood of the USSR.

Additional issues regarding acts of the Russian Federation as a continuing state of the USSR are its assumption of responsibility for the armed forces of the USSR that were outside the territory of the Russian Federation, and this was relevant for the Baltic states in particular in dealing with the withdrawal of Soviet troops from their territories after their re-establishment of independence.<sup>760</sup> Further, the policy of the Russian Federation concerning the restoration of Soviet anthem as Russia's national anthem, although with different wording,<sup>761</sup> seems to confirm its desire to identify itself with the USSR as a continuing state.

Thus, the Russian Federation has chosen to be tightly connected with Soviet legacy by applying continuity to the former Soviet constitutional, administrative and legal system as much as possible to reconcile it with changes of political regime. Since it was established that the Russian Federation shapes itself as a state continuing the identity of the USSR, it is important to

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<http://pravo.gov.ru/proxy/ips/?searchres=&bpas=cd00000&a3=102000484&a3type=1&a3value=&a6=&a6type=1&a6value=&a15=&a15type=1&a15value=&a7type=1&a7from=&a7to=&a7date=&a8=&a8type=1&a1=%CE+%E3%F0%E0%E6%E4%E0%ED%F1%F2%E2%E5+%a0=&a16=&a16type=1&a16value=&a17=&a17type=1&a17value=&a4=&a4type=1&a4value=&a23=&a23type=1&a23value=&textpres=&sort=7&x=62&y=9>.

<sup>759</sup> Федеральный Закон „О международных договорах Российской Федерации“ [Federal Law on International Treaties of the Russian Federation], art. 1, para. 3, Собрание законодательства Российской Федерации от 1995 г., N 29, ст. 2757, as last amended on March 12, 2014,

<http://www.pravo.gov.ru/proxy/ips/?searchres=&bpas=cd00000&a3=&a3type=1&a3value=&a6=&a6type=1&a6value=&a15=&a15type=1&a15value=&a7type=1&a7from=&a7to=&a7date=&a8=&a8type=1&a1=%CE+%E5%E6%E4%F3%ED%E0%F0%EE%E4%ED%FB%F5+%E4%EE%E3%EE%E2%EE%F0%E0%F5+%D0%EE%F1%F1%E8%E9%F1%EA%EE%E9+%D4%E5%E4%E5%F0%E0%F6%E8%E8&a0=%CD%E0%F1%F2%EE%F1%F9%E8%E9+%D4%E5%E4%E5%F0%E0%EB%FC%ED%FB%F9+%E7%E0%EA%EE%ED+%EE%EF%F0%E5%E4%E5%EB%FF%E5%F2+%EF%EE%F0%FF%E4%EE%EA+%E7%E0%EA%EB%FE%F7%E5%ED%E8%FF%2C+%E2%FB%EF%EE%EB%ED%E5%ED%E8%FF+%E8+%EF%F0%E5%EA%F0%E0%F9%E5%ED%E8%FF+%EC%E5%E6%E4%F3%ED%E0%F0%EE%E4%ED%FB%F5+%E4%EE%E3%EE%E2%EE%F0%EE%E2+%D0%EE%F1%F1%E8%E9%F1%EA%EE%E9+%D4%E5%E4%E5%F0%E0%F6%E8%E8&a16=&a16type=1&a16value=&a17=&a17type=1&a17value=&a4=&a4type=1&a4value=&a23=&a23type=1&a23value=&textpres=&sort=7&x=59&y=19>.

<sup>760</sup> Mullerson, "Continuity and Succession of States," 478.

<sup>761</sup> Marcus Warren, „Putin revives Soviet national anthem,“ *The Telegraph*, published December 9, 2000, <http://www.telegraph.co.uk/news/worldnews/europe/russia/1377685/Putin-revives-Soviet-national-anthem.html>.

discuss the approach of the international community and behaviour of the Russian Federation itself at the international level.

#### **4.1.1.2. State continuity at the international level**

While the Russian Federation perceives itself as a new state after the collapse of the USSR<sup>762</sup> and the USSR seems to be dissolved (dismembered) according to the Belovezha Accords and Declaration of Alma Ata, which could preclude continuity,<sup>763</sup> this position lacks credibility due to factual circumstances surrounding the cessation of the USSR and subsequent behaviour of the Russian Federation at the international level. The main feature of dissolution or dismemberment is extinction of predecessor states and foundation of new ones that have a new international identity. On the other hand, succession means that the predecessor state continues to exist, although reduced in territory as 'successor states are established out of a part of the territory of a predecessor State.'<sup>764</sup> Taking this into account, a legal evaluation of the Belovezha Accords and Declaration of Alma Ata, i.e. documents that are considered as ending existence of the USSR, must be discussed.

According to Ineta Ziemele, 'Minsk decisions explicitly declared that they were the outcome of the failure to agree on the draft new Union Treaty and that such a Treaty, therefore, had no future.'<sup>765</sup> Subsequently, it was declared that the USSR 'as a subject of international law and a geopolitical reality no longer exists.'<sup>766</sup> Thus, the incapacity of the USSR was interpreted as its dissolution and extinction. Nevertheless, it is important to note that the Belovezha Accords have not been signed by all union republics that constituted the USSR when they were written, and their compliance with domestic Soviet law also was questioned.<sup>767</sup> The Declaration of Alma Ata should have solved some of these deficiencies.

First, the Declaration was signed by all union republics that constituted the USSR when it was written. At the same time, the Protocol to the Agreement establishing the Commonwealth of Independent States (CIS), signed at Minsk on 8 December 1991 by the Republic of Belarus, the Russian Federation (RSFSR) and Ukraine, was also signed stating the composition of CIS. In the Declaration of Alma Ata, it was declared that '[w]ith the establishment of the Commonwealth of

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<sup>762</sup> Fahmi, "Succession of States," 93.

<sup>763</sup> Shaw, "State Succession Revisited," 49.

<sup>764</sup> Degan, "State Succession," 134-135.

<sup>765</sup> Ziemele, *State Continuity and Nationality*, 51.

<sup>766</sup> "Text of Minsk Agreement," *International Legal Materials* 31, no. 1 (January 1992): 143-146,

[http://heinonline.org.ezproxy.vdu.lt/HOL/Page?handle=hein.journals/intlm31&div=93&start\\_page=495&collection=journals&set\\_as\\_cursor=0&men\\_tab=srchresults#](http://heinonline.org.ezproxy.vdu.lt/HOL/Page?handle=hein.journals/intlm31&div=93&start_page=495&collection=journals&set_as_cursor=0&men_tab=srchresults#).

<sup>767</sup> Ziemele, *State Continuity and Nationality*, 51-52.

Independent States, the Union of Soviet Socialist Republics ceases to exist.<sup>768</sup> Thus, although extinction of the USSR was declared in the Belovezha Accords, due to previously established flaws it appears that the USSR retained its status as an international legal subject until the Decision by the Council of Heads of State of the Commonwealth of Independent States was adopted declaring that '[t]he States of the Commonwealth support Russia's continuance of the membership of the Union of Soviet Socialist Republics in the United Nations, including permanent membership of the Security Council, and other international organizations.'<sup>769</sup> Ineta Ziemele explains these changed attitudes as changes from the Russian claim of a new state to an actual claim of continuity of identity of the USSR.<sup>770</sup>

In the light of these facts, it should be stated that the Russian Federation was actually interested in the continuity of the identity of the USSR, and this is reflected by its subsequent behaviour. As state succession is considered to have an effect mainly on treaties, state debt and property, other obligations and membership in international organizations and boundaries, cessation of the USSR and further continuity of its statehood needs to be evaluated because the Belovezha Accords and Declaration of Alma Ata do unequivocally solve the issue of continuity.

First of all, most of the rights and obligations imposed by multilateral and bilateral treaties on the USSR were assumed by the Russian Federation, especially those concerning military issues and nuclear weapons.<sup>771</sup> This is particularly visible in the Treaty on the Non-Proliferation of Nuclear Weapons of 1 July 1968. This treaty provided for a limited number of states defined as the nuclear weapon states, with the USSR among them. After the cessation of the USSR, only the Russian Federation was allowed assume the rights and obligations of the former USSR, while the Ukraine, Belarus and Kazakhstan, who also possessed nuclear weapons, were invited only 'to accede to the treaty as non-nuclear weapon States.'<sup>772</sup> Thus, it is a clear example of state continuity from the USSR to the Russian Federation.

Regarding state debt and property, initial attempts to divide debts and assets of the USSR failed, and the Russian Federation finally assumed payment of all foreign debts of the USSR.<sup>773</sup> As a result, the Russian Federation claimed for 'all the assets abroad of the former USSR,

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<sup>768</sup> "Text of Alma Ata Agreements," *International Legal Materials* 31, no. 1 (January 1992): 147-154, [http://heinonline.org.ezproxy.vdu.lt/HOL/Page?handle=hein\\_journals/intlm31&div=93&start\\_page=495&collection=journals&set\\_as\\_cursor=0&men\\_tab=srchresults#](http://heinonline.org.ezproxy.vdu.lt/HOL/Page?handle=hein_journals/intlm31&div=93&start_page=495&collection=journals&set_as_cursor=0&men_tab=srchresults#).

<sup>769</sup> *Ibid.*, 151.

<sup>770</sup> Ziemele, *State Continuity and Nationality*, 54, 58-59.

<sup>771</sup> Ziemele, *State Continuity and Nationality*, 82-84; Shaw, "State Succession Revisited," 72-73, Fahmi, "Succession of States," 94-96; Mullerson, "Continuity and Succession of States," 488, Beemelmans, "State Succession in International Law," 85-87, 94-96.

<sup>772</sup> Beemelmans, "State Succession in International Law," 85.

<sup>773</sup> Beemelmans, "State Succession in International Law," 111-113; Mullerson, "Continuity and Succession of States," 479-480.

including property of diplomatic missions.<sup>774</sup> On the other hand, the Baltic states explicitly refused to participate in any of the agreements concerning payment of foreign debt, and they did not claim for any foreign assets of the USSR.<sup>775</sup> This also confirms the non-succession of the Baltic states from the USSR and the desire of the Russian Federation to act as the continuing state of the USSR.

Concerning other international obligations, the case of responsibility of internationally wrongful acts requires special attention. Patrick Dumberry notes that the Russian Federation continued its responsibility for the pillage of works of art and cultural property in Germany committed by the USSR during and after the Second World War and ‘continued its responsibility for measures of expropriation of bonds issued in France which were taken by newly Soviet Russia after the 1917 Revolution.’ However issues of responsibility were clarified by special agreements concluded, respectively, between Germany and France with the Russian Federation.<sup>776</sup> This could be explained by the lapse of time, as the first case was addressed after almost fifty years and the second after ninety years.

The continuation of membership in the United Nations and Security Council and all other organs and organizations of the United Nations system, by the Russian Federation in place of the USSR, is the most visible example of continuity, as it expressly stated that it is acting as a continuing state of the USSR within the whole system of the United Nations.<sup>777</sup> The international community accepted this position, and ‘Russia as a continuing State of the Soviet Union was not obliged to apply for membership of these organisations, while other former Soviet republics, considered to be successor States, had to go through the usual procedures of application for membership.’<sup>778</sup> The latter step of the Russian Federation could be seen as one of the strongest arguments in support of continuity of identity of the USSR, as the UN is the main international organization and membership in the UN is possible only if a state has capacity as a state, ‘including the capacity to become members of international organizations, conclude treaties with other countries, and contribute to the creation and further development of international law.’<sup>779</sup>

The issue of boundaries in a case of state succession is governed by the principle of territorial integrity and the inviolability of existing borders.<sup>780</sup> Here, the majority of scholars

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<sup>774</sup> Degan, "State Succession," 146.

<sup>775</sup> Mullerson, "Continuity and Succession of States," 483.

<sup>776</sup> Dumberry, *State Succession to International Responsibility*, 152-156.

<sup>777</sup> Mullerson, "Continuity and Succession of States," 477.

<sup>778</sup> Mullerson, "Continuity and Succession of States," 477. See also Shaw, "State Succession Revisited," 47-50; Fahmi, "Succession of States," 94-95; Degan, "State Succession," 145.

<sup>779</sup> Saxer, "Transformation of Soviet Union," 694-695.

<sup>780</sup> Beemelmans, "State Succession in International Law," 118; Degan, "State Succession," 137-139.

support the application of the doctrine of *uti possidetis* as the most reasonable solution.<sup>781</sup> At the same time, it is admitted that application of this doctrine generated problems in the case of the Baltic states, and for Latvia and Estonia in particular because their administrative boundaries within the USSR, especially the boundary with the RSFSR, resulted in a loss of territory that belonged to them before the illegal annexation.<sup>782</sup> Moreover, pre-war boundaries were set by bilateral treaties concluded between the USSR and the respective Baltic state, and Article 11 of the Vienna Convention on Succession of States in respect of Treaties (1978) particularly states that '[a] succession of States does not as such affect a boundary established by a treaty or obligations and rights established by a treaty and relating to the regime of a boundary.'<sup>783</sup>

The solution suggested by Hubert Beemelmans for such cases is to look at the length of time that passed since the illegal act; and the longer the time period, the stronger prevalence of the doctrine of *uti possidetis*. However, states are always free to renegotiate existing boundaries.<sup>784</sup> Unfortunately, restoration of pre-war boundaries according to pre-war treaties was unsuccessful, and due to aspirations of Latvia and Estonia to join the North Atlantic Treaty Organization and the European Union, these states renegotiated with the Russian Federation on their administrative boundaries within the USSR in new agreements (technical border treaties) without reference to pre-war treaties.<sup>785</sup> Of particular importance is the proposition that territorial changes, i.e. reduction or enlargement of territory, do not automatically result in loss of statehood.<sup>786</sup> Thus, even the borders of the Baltic states were established according to their administrative boundaries within the USSR, and this does not affect treatment of the Russian Federation as continuator of the USSR due to previously established factual circumstances.

An additional theory somewhat contrary to the position laid out above is the theory that the Russian Federation was forced to act as a continuing state in order to bring stability to the international landscape and further agreements related to international peace.<sup>787</sup> Nevertheless, it is undeniable that the Russian Federation has voluntarily fallen into the position of continuator to the USSR because of its dominance in the USSR and its initiative to create and maintain it. In addition, there is no evidence that the Russian Federation continued the identity of the USSR at

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<sup>781</sup> Doctrine of *uti possidetis* means 'respect for the territorial boundaries at the moment when independence is achieved.' Malcolm N. Shaw, *International Law* (Cambridge: Cambridge University Press, 1997), eBook Collection (EBSCOhost), 357.

<sup>782</sup> Beemelmans, "State Succession in International Law," 485; Degan, "State Succession," 144; Vallikivi and Kerikmäe, "State Continuity," 32-33.

<sup>783</sup> Vienna Convention on succession of States in respect of treaties, art. 11, August 23, 1978, 1946 *UN Treaty Series* 3 (entered into force November 6, 1996). See also Vallikivi and Kerikmäe, "State Continuity," 32-33.

<sup>784</sup> Beemelmans, "State Succession in International Law," 87.

<sup>785</sup> Elsuwege, "State Continuity and its Consequences," 385-386.

<sup>786</sup> Shaw, "State Succession Revisited," 44-45.

<sup>787</sup> Saxer, "Transformation of Soviet Union," 689.

international level in violation of international law. The fact that the ‘international community, for the most part, did not consider any need to accord recognition to the Russian Federation’<sup>788</sup> is also relevant.

Thus, in the light of the ambiguity on the type of state succession after the collapse of the USSR, the point of view of international law that takes into account objective as well as subjective factors<sup>789</sup> must prevail. The position of Patrick Dumberry could be said as describing situation the best: ‘From a logical point of view, the break-up of the U.S.S.R. should be regarded as a case of State dissolution rather than a series of secessions by the former Republics [(except for the Baltic states)]. The fact remains, however, that all States concerned [(including Russia itself)] viewed Russia as the continuing State of the U.S.S.R.’<sup>790</sup> As a result, the Russian Federation should be considered as the continuing state of the USSR, due to its own statements and behaviour as the continuing state for former obligations under international treaties concluded by the USSR, assumption of state debt and property of the USSR and continuity of the membership of the USSR in international organizations, especially the UN. In addition, responsibility for certain internationally wrongful acts of the USSR was also assumed by the Russian Federation. Therefore, continuation of the identity of the USSR by the Russian Federation is established at international level.

## ***4.2. EVALUATION OF THE ROLE OF THE OCCUPIED STATE IN THE PROVISION OF REPARATION***

### **4.2.1. International responsibility of the continuing state**

According to Patrick Dumberry:

when the predecessor State continues to exist after the creation of the new State (such as in case of secession), it should remain, in principle, responsible for the consequence of its own internationally wrongful acts committed before the date of succession. The continuing State should therefore continue its previous responsibility for these acts notwithstanding the transformation affecting its territory.<sup>791</sup>

After it was established that the Russian Federation is the continuing state of the USSR and the USSR was responsible for repressions against the people of the Baltic states that constituted internationally wrongful acts, i.e. serious violations of international humanitarian law or gross human rights violations,<sup>792</sup> the framework of responsibility of the Russian Federation must be

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<sup>788</sup> Ziemele, *State Continuity and Nationality*, 75.

<sup>789</sup> Saxer, "Transformation of Soviet Union," 476.

<sup>790</sup> Dumberry, *State Succession to International Responsibility*, 323.

<sup>791</sup> *Ibid.*, 142.

<sup>792</sup> See chapter 1.3 “ACTS AGAINST THE PEOPLE OF THE BALTIC STATES UNDER SOVIET RULE AS INTERNATIONAL CRIMES” and *Report of the International Law Commission to the General Assembly*, 56 U.N.



established. Unfortunately there is no legally binding international treaty establishing the responsibility of states for their internationally wrongful acts. However Draft articles on Responsibility of States for Internationally Wrongful Acts (hereinafter ‘Draft articles on Responsibility of States’) prepared by the International Law Commission (ILC) can provide useful guidance for the responsibility of a state and will be applied here as a basic framework to evaluate responsibility of the Russian Federation in the case analysed.

According to the Commentary on Draft articles on Responsibility of States, these articles ‘are concerned with the whole field of State responsibility’ and ‘apply to the whole field of the international obligations of States, whether the obligation is owed to one or several States, to an individual or group, or to the international community as a whole.’ Also no difference is made on the source of international obligation, i.e. it can be both either a treaty or non-treaty international obligation.<sup>793</sup> Because of their common nature, the applicability of Draft articles on Responsibility of States is considered to be of general character and as such is subject to non-application in cases where special rules exist. This is stated in Article 55 of Draft articles on Responsibility of States.<sup>794</sup>

Taking into account that for the case of the Baltic states under the Soviet regime it was established that international humanitarian law is applicable as *lex specialis* together with human rights law, it is important to address whether the Hague Regulations and Geneva Conventions have special application for when a state violates international humanitarian law. In addition, the status of international humanitarian law as *lex specialis* compared to general international law does not mean that it precludes applicability of general norms governing responsibility of a state for internationally wrongful act, especially as norms governing responsibility of a state are considered to be secondary rules and norms establishing particular international obligations primary rules.<sup>795</sup> According to Marco Sassoli, ‘[to] hold that international humanitarian law may be implemented only by its own mechanisms would leave it as a branch of law of a less compulsory character and with large gaps.’<sup>796</sup>

The Commentary on Article 55 of Draft articles on Responsibility of States suggests that these articles ‘do not apply where and to the extent that the conditions for the existence of an

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GAOR Supp. No. 10 and Corr.1, at 133-150, U.N. Doc. A/56/10 (2001), *reprinted in* [2001] Yearbook of the International Law Commission, vol. II, Part Two, U.N. Doc. A/CN.4/SER.A/2001/Add.1 (Part 2).

<sup>793</sup> *Report of the International Law Commission to the General Assembly*, 56 U.N. GAOR Supp. No. 10 and Corr.1, at 43, 50, 62, 71-72, U.N. Doc. A/56/10 (2001), *reprinted in* [2001] Yearbook of the International Law Commission, vol. II, Part Two, U.N. Doc. A/CN.4/SER.A/2001/Add.1 (Part 2).

<sup>794</sup> *Ibid.*, at 58.

<sup>795</sup> *Ibid.*, at 51.

<sup>796</sup> Marco Sassoli, “State Responsibility for Violations of International Humanitarian Law,” *International Review of the Red Cross*, no. 846, (2002): 404, <https://archive-ouverte.unige.ch/unige:6416>.

internationally wrongful act or its legal consequences are determined by special rules of international law.’<sup>797</sup> However, such a rule must qualify certain criteria:

- it must have at least the same legal rank as those expressed in Draft articles on Responsibility of States
- there must be some actual inconsistency between the special rule and general rule, or it is possible to reasonably conclude that one provision is to exclude the other<sup>798</sup>

It is also important to establish which norm has this special character because even one aspect of the general law may be modified, other aspects of the general law are still applicable.<sup>799</sup>

Marco Sassoli suggests that Article 3 of the Hague Convention (IV) respecting the Laws and Customs of War on Land and Article 91 of Protocol I should be considered as *lex specialis* to Article 7 of Draft articles on Responsibility of States because Article 3 of the Hague Convention (IV) and Article 91 of Protocol I encompass a broader scope of acts attributable to a state in the case of a violation of international humanitarian law.<sup>800</sup> However, this broader interpretation is possible only for the actions of armed forces of a particular state and does not include actions of officials of civil institutions established to administer occupied territory, especially in cases of prolonged occupation, e.g. the situation of the Baltic states under the Soviet regime. Thus, for the case of the Baltic states, the general rules as drafted regarding conduct of an organ of a state or of a person or entity empowered to exercise elements of the governmental authority that could be considered as an act of the state under international law causing international responsibility of a state should be applied, meaning articles 4–8 of Draft articles on Responsibility of States. Nevertheless, where the case concerns violations of international humanitarian law committed by the armed forces of the USSR, the broader meaning of ‘armed forces’ under Regulations Respecting the Laws and Customs of War on Land annexed to Hague Convention (IV) should govern the case.

The next rules of *lex specialis* nature can be considered rules governing legal consequences of an internationally wrongful act. Article 34 of Draft articles on Responsibility of States provides that reparation can be in a form of restitution, compensation and satisfaction, either singularly or in combination.<sup>801</sup> Additionally, Article 3 of the Hague Convention (IV) respecting the Laws and

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<sup>797</sup> *Report of the International Law Commission to the General Assembly*, 56 U.N. GAOR Supp. No. 10 and Corr.1, at 356-357, U.N. Doc. A/56/10 (2001), reprinted in [2001] Yearbook of the International Law Commission, vol. II, Part Two, U.N. Doc. A/CN.4/SER.A/2001/Add.1 (Part 2).

<sup>798</sup> *Ibid.*, at 356-357, 358.

<sup>799</sup> *Ibid.*, at 357-358.

<sup>800</sup> Sassoli, “State Responsibility for Violations of International Humanitarian Law,” 405-406.

<sup>801</sup> *Report of the International Law Commission to the General Assembly*, 56 U.N. GAOR Supp. No. 10 and Corr.1, at 52, U.N. Doc. A/56/10 (2001), reprinted in [2001] Yearbook of the International Law Commission, vol. II, Part Two, U.N. Doc. A/CN.4/SER.A/2001/Add.1 (Part 2).

Customs of War on Land and Article 91 of Protocol I provides that a state violating international humanitarian law is liable to pay compensation. However, it was already established that the word ‘compensation’ in the latter articles is not limited to compensation as the only form of reparation and has a broader sense of reparation. As a result, there is no inconsistency in general and special rule and reparation for the victims of the Soviet regime in the Baltic states should be provided under the scope that was already established. Moreover, under Article 33 it is also recognized that ‘reparation does not necessarily accrue to that State’s benefit’, and ‘the individuals concerned should be regarded as the ultimate beneficiaries and in that sense as the holders of the relevant rights.’<sup>802</sup>

In addition, it must be noted that cessation of internationally wrongful acts and guarantees of non-repetition are viewed as a separate obligations from an obligation to provide reparations.<sup>803</sup> Cessation of internationally wrongful acts is viewed in a quite broad sense, as it not only requires a state to cease internationally wrongful act but also requires assurances and guarantees of non-repetition because of a of the duty to comply with the primary obligation.<sup>804</sup> However, this should not be treated as inconsistency with an established reparation concept where cessation of a violation is considered as a measure of satisfaction,<sup>805</sup> as forms of satisfaction listed in Paragraph 2 of Article 37 of Draft articles on Responsibility of States are no more than examples, and ‘[a]n appropriate form of satisfaction will depend on the circumstances and cannot be prescribed in advance.’<sup>806</sup> It is also recognized that a particular obligation established in Article 30 also could serve as a measure of satisfaction.<sup>807</sup>

The criterion governing reparations is provided in Article 31 of Draft articles on Responsibility of States. A responsible state must provide ‘full reparation for the injury caused by the internationally wrongful act’ for ‘any damage, whether material or moral’.<sup>808</sup> It is also stressed that under Article 31 the general obligation to provide reparation is an obligation of the responsible state resulting from the breach, rather than as a right of an injured state or states and ‘arises automatically upon commission of an internationally wrongful act’.<sup>809</sup> In addition, actual forms of reparation should correspond to the remedy for damages caused by a particular

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<sup>802</sup> Ibid., at 234.

<sup>803</sup> Ibid., at 51.

<sup>804</sup> Ibid., at 218.

<sup>805</sup> See also sub-chapter 2.3.3 „Satisfaction”.

<sup>806</sup> *Report of the International Law Commission to the General Assembly*, 56 U.N. GAOR Supp. No. 10 and Corr.1, at 265-266, U.N. Doc. A/56/10 (2001), reprinted in [2001] Yearbook of the International Law Commission, vol. II, Part Two, U.N. Doc. A/CN.4/SER.A/2001/Add.1 (Part 2).

<sup>807</sup> Ibid.

<sup>808</sup> Ibid., at 51.

<sup>809</sup> Ibid., at 224.

internationally wrongful act, and this does not mean that all possible forms must be applied.<sup>810</sup> The criteria for their application are provided in Articles 35–37 of Draft articles on Responsibility of States. Previous findings on the scope of reparations to which victims of the Soviet regime are entitled to under Article 3 of the Hague Convention (IV) respecting the Laws and Customs of War on Land reflect the legal obligation of the Russian Federation, as the continuing state identity of the USSR, for its internationally wrongful acts constituting serious violations of international humanitarian law or gross human rights violations.

After establishing the relationship between general rules and special rules governing responsibility of a state and possible consequences, it is important to establish who can invoke responsibility of a state under Draft articles on Responsibility of States. The clear rule is established under Articles 42 and 48 stating that responsibility can be invoked by an injured state and any other state if the circumstances provided in Article 48 are satisfied.<sup>811</sup> Thus, despite the fact that an internationally wrongful act might result from obligations owed to an individual or other entity not having status of a state, the responsibility for that act can still be invoked only by a state if there is no special rule providing for the possibility of the injured individual invoking international responsibility.<sup>812</sup> As international humanitarian law does not provide for the possibility of individual action for violations of international humanitarian law, the Baltic states are the only possible subjects to invoke responsibility of the Russian Federation in the name of the victims of the Soviet regime.

To sum up, international humanitarian law is applicable as *lex specialis* on the responsibility of the Russian Federation for serious violations of international humanitarian law that resulted in harm or loss for the victims of the Soviet regime in the Baltic states. However, international humanitarian law does not have special rules governing application of responsibility of a state for its violations; only Article 3 of the Hague Convention (IV) respecting the Laws and Customs of War on Land is applicable here. Thus, general rules as enumerated under Draft Articles on Responsibility of States should be applied to determine the responsibility of the Russian Federation as long as they reflect customary international law. This is even more apparent in the case of prolonged belligerent occupations, as international humanitarian law is not capable of dealing with situations when an occupying power occupies territory of a state not because of a military need in a continued warfare but because of an interest to acquire that territory.

However, Rüdiger Wolfrum and Dieter Fleck note that ‘in practice, state responsibility for breaches of international humanitarian law has widely been neglected’ because ‘usually, victor

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<sup>810</sup> Ibid., at 235-236, 237.

<sup>811</sup> Ibid., at 54, 56.

<sup>812</sup> Ibid., at 214, 233.

states have demanded reparation without ensuring compensation for each individual violation.<sup>813</sup> More typical is application of international criminal responsibility for those responsible for the commitment of war crimes. This phenomenon might also be explained by fact that hostilities resulting in application of international humanitarian law are usually ended by so-called peace treaties.<sup>814</sup> Yet the case of the Baltic states is not that of the classical notion of war between two rivals, with one a victor and other a loser; therefore, it might require a different solution. Taking everything into account, it must be evaluated how the Baltic states established their interstate relations with the Russian Federation after the end of belligerent occupation and what measures the Baltic states undertook to invoke responsibility of the Russian Federation, as this is the only way to ensure full reparation for the victims of the Soviet regime.

#### **4.2.2. Impact of the ending of the belligerent occupation of the Baltic states to reparation for victims**

Since it was established that the Baltic states were under belligerent occupation that invoked application of international humanitarian law, it is important to determine when the belligerent occupation and, accordingly, when the application of international humanitarian law ended. Peace treaties are usually considered to end the state of war and as a result application of international humanitarian law.<sup>815</sup> It is expected that they should deal with territorial, political, economic, financial and juridical questions to resolve past conflicts and ‘contribute to a new order of stability and security’, i.e. to finalize the conflict.<sup>816</sup>

However, after the Second World War this practice has changed, and according to Christopher J. Greenwood, ‘[m]ost of the other conflicts since 1945 in which a state of war was said to have existed have been terminated by agreements which do not deal expressly with the existence of a state of war.’<sup>817</sup> While Rudolf Dolzer explains that this is due to differences of historical circumstances of each war and of each peace,<sup>818</sup> Christopher J. Greenwood particularly notes that after cessation of hostilities in Falklands War, Argentina has not given a formal confirmation, sought by the UK, that the conflict was ended. Instead, an agreement to restore normal relations was concluded.<sup>819</sup> Such a practice could also be explained by the fact that under

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<sup>813</sup> Rüdiger Wolfrum and Dieter Fleck, “Enforcement of International Humanitarian Law,” in *The Handbook of International Humanitarian Law*, ed. Dieter Fleck (Oxford: Oxford University Press, 2009), 707. See also Sassoli, “State Responsibility for Violations of International Humanitarian Law,” 419.

<sup>814</sup> Dolzer, “Settlement of War-Related Claims,” 300, 301.

<sup>815</sup> Greenwood, “Scope of Application of Humanitarian Law,” 62; Dolzer, “Settlement of War-Related Claims,” 300, 301.

<sup>816</sup> Dolzer, “Settlement of War-Related Claims,” 300, 301.

<sup>817</sup> Greenwood, “Scope of Application of Humanitarian Law,” 71.

<sup>818</sup> Dolzer, “Settlement of War-Related Claims,” 300, 301.

<sup>819</sup> Greenwood, “Scope of Application of Humanitarian Law,” 72.

the UN Charter war was declared as illegal means of solving the interstate disputes. Hence, it might be presumed that states are reluctant to admit any circumstances that will show their involvement in armed conflict.

This does not diminish the need for comprehensive agreements in cases of adverse interests of different states. According to Rudolf Dolzer 'the central lesson from the long belated end of the World War II peacemaking process is that governments must more effectively, promptly and carefully incorporate the legitimate concerns of groups and individuals particularly affected by a war into the inter-governmental process of making peace.'<sup>820</sup> Thus, the role of a state in addressing legitimate claims of victims who suffered from violations of international humanitarian law, particularly serious ones, is clearly emphasized.

After the Baltic states declared their independence, the initial attempts to establish mutual relationships with the RSFSR were accomplished by these bilateral agreements:

- the Treaty on the Fundamentals of Inter-State Relations between the Republic of Estonia and the RSFSR (signed on 12 January 1991, entered into force 14 January 1992)<sup>821</sup>
- the Treaty on the Fundamentals of Inter-State Relations between the Republic of Latvia and the RSFSR (signed on 13 January 1991)<sup>822</sup>
- the Treaty on the Foundations of Inter-State Relations between the Republic of Lithuania and the RSFSR<sup>823</sup> (signed on 29 July 1991, entered into force 4 May 1992)<sup>824</sup>

While all those treaties definitely have similarities, as they are generally forward looking on future interstate relations (treaties with Latvia and Estonia are almost identical), they have different stories concerning their application.

Before the analysis of the contents of the treaties to understand the scope of the agreements, it is important to note that only treaties with Lithuania and Estonia were subsequently ratified by

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<sup>820</sup> Dolzer, "Settlement of War-Related Claims," 341.

<sup>821</sup> Vene Nõukogude Föderatiivse Sotsialistliku Vabariigi ja Eesti Vabariigi riikidevaheliste suhete aluste leping [Treaty on the Fundamentals of Inter-State Relations between the Republic of Estonia and the Russian Soviet Federative Socialist Republic], Republic of Estonia – Russian Federation, January 12, 1991, RT 1991, 2, 19, <https://www.riigiteataja.ee/akt/13068080>; Mullerson, "Continuity and Succession of States," 481.

<sup>822</sup> Par Latvijas Republikas un Krievijas Padomju Federatīvās Sociālistiskās Republikas starpvalstu attiecību pamatiem [Treaty On the Fundamentals of Inter-State Relations between the Republic of Latvia and the Russian Soviet Federative Socialist Republic], Republic of Latvia – Russian Federation, January 13, 1991, "Ziņotājs", 17/18, 09.05.1991, <http://likumi.lv/ta/lv/starptautiskie-ligumi/id/525>.

<sup>823</sup> Sutartis tarp Rusijos Tarybų Federacinės Socialistinės Respublikos ir Lietuvos Respublikos "Dėl tarpvalstybinių santykių pagrindų" [Treaty between the Republic of Lithuania and the Russian Soviet Federated Socialist Republic on the basis for relations between States], Republic of Lithuania – Russian Federation, July 29, 1991, 1787 *UN Treaty Series* 5, <https://treaties.un.org/Pages/showDetails.aspx?objid=08000002800b0df0>.

<sup>824</sup> Lietuvos Respublikos užsienio reikalų ministerija, „Rusija“, *Lietuvos Respublikos užsienio reikalų ministerija*, last amended May 15, 2018, <https://www.urm.lt/default/lt/rusija>.

the Russian Federation, while ratification of the treaty concluded with Latvia was withheld<sup>825</sup> despite its identicality to the treaty with Estonia. The reason why the Russian Federation withheld ratification of the treaty on the Fundamentals of Inter-State Relations concluded with Latvia is not clear. As a result, the effects of these agreements can only be analysed as they relate to Lithuania and Estonia.

The other noticeable issue is that treaties were concluded not between the USSR and the respective Baltic state but between the RSFSR and the respective Baltic state. As it was already established that Russian Federation is considered to be the continuing state of the USSR, the question of how to deal with treaties that were actually concluded only with the RSFSR as the union republic might arise. This is particularly apparent in the preamble of the treaty on the Foundations of Inter-State Relations between the Republic of Lithuania and the RSFSR, where the USSR and not the RSFSR is declared as being responsible for the consequences of the 1940 annexation that violated Lithuania's sovereignty,<sup>826</sup> it is also apparent with respect to Estonia, as Article 12 of the treaty on the Fundamentals of Inter-State Relations, which recognizes separate regimes for property that is considered to be the property of Estonia, the RSFSR and the USSR.<sup>827</sup> Ineta Ziemele notes that 'neither of the Contracting Parties had independent treaty-making capacity or at least such a capacity was highly disputed at the time.'<sup>828</sup>

Any ambiguity was clearly removed when the Russian Federation ratified treaties with Lithuania and Estonia. While the treaty with Latvia, which had similar a provision to Article 12 of treaty with Estonia, was not ratified by the Russian Federation, this does not affect the position holding the Russian Federation as the continuing state of the USSR, and there are several reasons for this. First, the concept of the RSFSR as a union republic itself appeared only in the peak of the policies of *glasnost* and *perestroika* because previously there were no such things as separate government authorities or legislation of the RSFSR and everything was subject to dominance of russification and extinction of national differences.<sup>829</sup> In addition, treaties were concluded when

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<sup>825</sup> „Vešņakovs: Līgumu ar iespējamo pilsonības nulles variantu neratificējām mēs, bet nepilsoņus radījāt jūs,“ *Latvijas Sabiedriskie Mediji*, published November 2, 2016, <http://www.lsm.lv/lv/raksts/latvija/zinas/vesnakovs-ligumu-ar-iespejamo-pilsonibas-nulles-variantu-neratificenam-mes-bet-nepilsonus-radijat-jus.a208421/>.

<sup>826</sup> Sutartis tarp Rusijos Tarybų Federacinės Socialistinės Respublikos ir Lietuvos Respublikos "Dėl tarpvalstybinių santykių pagrindų" [Treaty between the Republic of Lithuania and the Russian Soviet Federated Socialist Republic on the basis for relations between States], Republic of Lithuania – Russian Federation, pmb1., July 29, 1991, 1787 *UN Treaty Series* 5, <https://treaties.un.org/Pages/showDetails.aspx?objid=08000002800b0df0>.

<sup>827</sup> Vene Nõukogude Föderatiivse Sotsialistliku Vabariigi ja Eesti Vabariigi riikidevaheliste suhete aluste leping [Treaty on the Fundamentals of Inter-State Relations between the Republic of Estonia and the Russian Soviet Federative Socialist Republic], Republic of Estonia – Russian Federation, art. 12, January 12, 1991, RT 1991, 2, 19, <https://www.riigiteataja.ee/akt/13068080>.

<sup>828</sup> Ziemele, *State Continuity and Nationality*, 47.

<sup>829</sup> Gail W. Lapidus, "Gorbachev's Nationalities Problem," *Foreign Affairs* 68, no. 4 (Fall 1989): 96-97, 100, [https://heinonline-org.ezproxy.vdu.lt:2443/HOL/Page?handle=hein.journals/fora68&div=55&start\\_page=92&collection=journals&set\\_as\\_cursor=0&men\\_tab=srchresults#](https://heinonline-org.ezproxy.vdu.lt:2443/HOL/Page?handle=hein.journals/fora68&div=55&start_page=92&collection=journals&set_as_cursor=0&men_tab=srchresults#).

the actual future of the USSR and its final collapse was not clearly visible. Taking into account the overall factual circumstances, previously described provisions of treaties do not challenge the previous conclusion that the Russian Federation is a continuing state of the USSR.

The most important feature of these treaties could be considered the intent of mutual recognition of each of the contracting parties as a sovereign state and having the full-fledged support of international law.<sup>830</sup> References are given to particular documents defining the status of each state, i.e. the act of 12 June 1990 for the RSFSR in both treaties, the acts of 30 March 1990 and 7 August 1990 for Estonia and the act of 11 March 1990 for Lithuania.<sup>831</sup>

However, the texts of all treaties suggest that there is no clear definition of the previous situation that resulted in the loss of the sovereignty of the Baltic states. While the treaty with Estonia only gives a brief reference to previous historical experience without any elaboration,<sup>832</sup> the treaty with Lithuania elaborates a little bit more on the details; in the preamble of the treaty it is stated that

‘the High Contracting Parties’,

Assigning to the past events and actions that hindered each High Contracting Party from fully and freely realising their state sovereignty,

And being convinced that once the Union of Soviet Socialist Republics annuls the consequences of the 1940 annexation violating Lithuania’s sovereignty, created will be additional conditions for mutual trust between the High Contracting Parties and their peoples,

...

Have agreed as follows<sup>833</sup>

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<sup>830</sup> Sutartis tarp Rusijos Tarybų Federacinės Socialistinės Respublikos ir Lietuvos Respublikos "Dėl tarpvalstybinių santykių pagrindų" [Treaty between the Republic of Lithuania and the Russian Soviet Federated Socialist Republic on the basis for relations between States], Republic of Lithuania – Russian Federation, art. 1, July 29, 1991, 1787 *UN Treaty Series* 5, <https://treaties.un.org/Pages/showDetails.aspx?objid=08000002800b0df0>; Vene Nõukogude Föderatiivse Sotsialistliku Vabariigi ja Eesti Vabariigi riikidevaheliste suhete aluste leping [Treaty on the Fundamentals of Inter-State Relations between the Republic of Estonia and the Russian Soviet Federative Socialist Republic], Republic of Estonia – Russian Federation, art. 1, January 12, 1991, RT 1991, 2, 19, <https://www.riigiteataja.ee/akt/13068080>.

<sup>831</sup> Vene Nõukogude Föderatiivse Sotsialistliku Vabariigi ja Eesti Vabariigi riikidevaheliste suhete aluste leping [Treaty on the Fundamentals of Inter-State Relations between the Republic of Estonia and the Russian Soviet Federative Socialist Republic], Republic of Estonia – Russian Federation, pmb., January 12, 1991, RT 1991, 2, 19, <https://www.riigiteataja.ee/akt/13068080>; Sutartis tarp Rusijos Tarybų Federacinės Socialistinės Respublikos ir Lietuvos Respublikos "Dėl tarpvalstybinių santykių pagrindų" [Treaty between the Republic of Lithuania and the Russian Soviet Federated Socialist Republic on the basis for relations between States], Republic of Lithuania – Russian Federation, art. 1, July 29, 1991, 1787 *UN Treaty Series* 5, <https://treaties.un.org/Pages/showDetails.aspx?objid=08000002800b0df0>.

<sup>832</sup> Vene Nõukogude Föderatiivse Sotsialistliku Vabariigi ja Eesti Vabariigi riikidevaheliste suhete aluste leping [Treaty on the Fundamentals of Inter-State Relations between the Republic of Estonia and the Russian Soviet Federative Socialist Republic], Republic of Estonia – Russian Federation, art. 1, January 12, 1991, RT 1991, 2, 19, <https://www.riigiteataja.ee/akt/13068080>.

<sup>833</sup> Sutartis tarp Rusijos Tarybų Federacinės Socialistinės Respublikos ir Lietuvos Respublikos "Dėl tarpvalstybinių santykių pagrindų" [Treaty between the Republic of Lithuania and the Russian Soviet Federated Socialist Republic on the basis for relations between States], Republic of Lithuania – Russian Federation, pmb., July 29, 1991, 1787 *UN Treaty Series* 5, <https://treaties.un.org/Pages/showDetails.aspx?objid=08000002800b0df0>.



Here Rytis Satkauskas suggests interpreting not only the wording of the particular treaty but also taking into account references in the treaties to the documents defining the status of each participating subject. For the case of the RSFSR, the reference is given to the act of 12 June 1990 of the RSFSR, which was already discussed in previous chapter.<sup>834</sup> The case of Lithuania and Estonia is complicated as well.

The treaty with Lithuania references the Act on the Reestablishment of State Independence of 11 March 1990, which confirms ‘the Soviet aggression against the Republic of Lithuania in 1940, the continuity of statehood during the occupation, the identity of the re-established republic of the state that had been created in 1918 [and] independence as of 11 March 1990, with no transition or conditions.’<sup>835</sup> As a result, Rytis Satkauskas considers that, with this treaty, the Russian Federation recognized the illegality of the annexation of Lithuania and its status as the occupied state.<sup>836</sup>

Following the same logic, it is important to note that under the act of 30 March 1990 Estonia declared not only the restoration of the independence of Estonia during the transitional period but also stated that ‘the occupation of the Republic of Estonia by the Soviet Union on June 17, 1940 has not suspended the existence of the Republic of Estonia de jure’ and ‘[t]he territory of the Republic of Estonia is occupied to this day.’<sup>837</sup> Under this latter expression, it can be implied that, with the treaty on the Fundamentals of Inter-State Relations, the Russian Federation directly recognized the status of Estonia as an occupied state under the power of the USSR. The subsequent act of 7 August 1990, which is mentioned in the treaty on the Fundamentals of Inter-State Relations, can be viewed as confirming the illegal nature of the relationship of Estonia with the USSR as a union republic.<sup>838</sup>

Thus, it can be implied that by ratification of treaties on the Fundamentals of Inter-State Relations, the Russian Federation recognized the illegality of its actions towards the Baltic states—Lithuania and Estonia in particular. Following similar factual circumstances of the loss of independence of Latvia, it must be implied that the same recognition of illegality of actions towards Latvia should be granted by the Russian Federation.

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<sup>834</sup> See 4.1.1.1 “Perception on state continuity by a state itself”.

<sup>835</sup> Rytis Satkauskas, „Expired Friendship? Some Aspects of Validity of Treaties,” *Lithuanian Foreign Policy Review* 28 (2012): 109-110, <http://lfpr.lt/issues/28/attachment/lfpr-28-satkauskas/>.

<sup>836</sup> *Ibid.*, 108-111.

<sup>837</sup> Risto Pullat, "Restauration of the Independence of Estonia 1991 - Part I, The," *Finnish Yearbook of International Law* 2 (1991): 523, [https://heinonline-org.ezproxy.vdu.lt:2443/HOL/Page?handle=hein.intyb/finnybki0002&div=15&start\\_page=512&collection=intyb&set\\_as\\_cursor=0&men\\_tab=srchresults#](https://heinonline-org.ezproxy.vdu.lt:2443/HOL/Page?handle=hein.intyb/finnybki0002&div=15&start_page=512&collection=intyb&set_as_cursor=0&men_tab=srchresults#).

<sup>838</sup> Eesti Vabariigi ja NSV Liidu suhete kohta [Decree on Relations with the USSR], RT 1990, 5, 64, <https://vp2001-2006.president.ee/et/ametitegevus/?gid=72937>. Translation of title provided in „Estonian Relations with the USSR,” *Seventeen Moments in Soviet History*, accessed January 19, 2017, <http://soviethistory.msu.edu/1991-2/baltic-independence/baltic-independence-text/estonian-relations-with-the-ussr/>

However, it is also noteworthy that only the Estonian treaty on the Fundamentals of Inter-State Relations gives reference to its legal acts directly defining the status of Estonia as a state under occupation of the USSR. The Act on the Reestablishment of State Independence of 11 March 1990, in its original text, does not use the term ‘occupation’, and the status of Lithuania is limited to the statement that ‘the execution of the sovereign powers of the State of Lithuania, abolished by foreign forces in 1940, is re-established.’<sup>839</sup> Thus, the interpretation of Rytis Satkauskas that the Russian Federation recognized the status of Lithuania as an occupied state can only be implied, as there is no direct reference to the state of occupation in documents mentioned in Lithuania’s Treaty on the Foundations of Inter-State Relations as compared to the case of Estonia. Nevertheless, this does not challenge the previous conclusion that by ratification of treaties on the Fundamentals of Inter-State Relations, it can be implied that the Russian Federation recognized the illegality of its actions towards the Baltic states, but the problem of ambiguous interpretation of the status of the Baltic states under the power of the USSR in the treaties on the Fundamentals of Inter-State Relations remains.

Taking into account the problem analysed in this thesis, only these provisions that could be interpreted as defining the status of the Baltic states as occupied under treaties on the Fundamentals of Inter-State Relations are relevant to the issue of reparation for the victims of the Soviet regime in the Baltic states because this confirms the previously established applicability of international humanitarian law as *lex specialis* to solve the issue of reparation. As a result, the validity of these treaties concluded with Lithuania and Estonia is of special importance. A deeper analysis of the issue must be performed, especially taking into account that validity of treaty on the Foundations of Inter-State Relations between the Republic of Lithuania and the RSFSR is questioned by representatives of the Russian Federation.<sup>840</sup>

According to Paragraph 2 Article 42 of the Vienna Convention on the Law of Treaties, ‘[t]he 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.’<sup>841</sup> Both treaties have special articles concerning their validity and termination. Similar provisions contain a rules that treaties ‘shall be valid for ten years’ and ‘the validity of [the treaty] shall at that time be automatically renewed for the same term, if neither of the High Contracting Parties, no later than six months before its expiration, informs in writing of its desire to not renew the Treaty’ or

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<sup>839</sup> See Lietuvos Respublikos Aukščiausiosios Tarybos aktas “Dėl Lietuvos nepriklausomos valstybės atstatymo“ [Supreme Council of the Republic of Lithuania Act on the Re-establishment of the State of Lithuania], Lietuvos aidas, 1990-03-16, Nr. 11-0, <https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/TAIS.50850>.

<sup>840</sup> Satkauskas, „Expired Friendship?“ 106.

<sup>841</sup> Vienna Convention on the law of treaties, art. 42, para. 2, May 23, 1969, 1155 *UN Treaty Series* 331 (entered into force January 27, 1980).

to denounce it.<sup>842</sup> The treaty with Lithuania has an additional condition concerning validity of Article 1, which governs recognition of the status of states under international law to each participating state; it provides that ‘[a]rticle 1 of this Treaty... shall be valid indefinitely.’<sup>843</sup> Thus, provisions of the treaties govern their validity and termination.

As there is no data that either of the parties have used their right to inform the other, in writing, of a desire to denounce the treaty, they must be considered to be valid.<sup>844</sup> Moreover, under the commentary of Vienna Convention on the Law of Treaties, if a state claims that the treaty has terminated or is invalid ‘it is up to a State to demonstrate a ground of invalidity, termination etc. of a treaty, rather than for the other State to show that the treaty remains valid and in force.’<sup>845</sup> This is to protect the principle of customary international law, embodied in Article 26 of the Vienna Convention on the Law of Treaties, *pacta sunt servanda* and against ‘unilateral assertion by a State that a treaty is invalid or no longer binding has no effect.’<sup>846</sup> As a result, the validity of these treaties at the moment cannot be challenged, and they must be considered as valid.

Unfortunately, as it was stated previously the treaties establishing mutual relations do not consider problems of past legacy. Moreover, they are not classical peace treaties and can only be

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<sup>842</sup> Vene Nõukogude Föderatiivse Sotsialistliku Vabariigi ja Eesti Vabariigi riikidevaheliste suhete aluste leping [Treaty on the Fundamentals of Inter-State Relations between the Republic of Estonia and the Russian Soviet Federative Socialist Republic], Republic of Estonia – Russian Federation, art. 21, January 12, 1991, RT 1991, 2, 19, <https://www.riigiteataja.ee/akt/13068080>; Sutartis tarp Rusijos Tarybų Federacinės Socialistinės Respublikos ir Lietuvos Respublikos "Dėl tarpvalstybinių santykių pagrindų" [Treaty between the Republic of Lithuania and the Russian Soviet Federated Socialist Republic on the basis for relations between States], Republic of Lithuania – Russian Federation, art. 20, July 29, 1991, 1787 UN Treaty Series 5, <https://treaties.un.org/Pages/showDetails.aspx?objid=08000002800b0df0>.

<sup>843</sup> Sutartis tarp Rusijos Tarybų Federacinės Socialistinės Respublikos ir Lietuvos Respublikos "Dėl tarpvalstybinių santykių pagrindų" [Treaty between the Republic of Lithuania and the Russian Soviet Federated Socialist Republic on the basis for relations between States], Republic of Lithuania – Russian Federation, art. 20, July 29, 1991, 1787 UN Treaty Series 5, <https://treaties.un.org/Pages/showDetails.aspx?objid=08000002800b0df0>.

<sup>844</sup> Both Lithuania and Estonia list these treaties as valid, See: Lietuvos Respublikos užsienio reikalų ministerija, „Rusija“, *Lietuvos Respublikos užsienio reikalų ministerija*, last amended May 15, 2018, <https://www.urm.lt/default/lt/rusija>; Vene Nõukogude Föderatiivse Sotsialistliku Vabariigi ja Eesti Vabariigi riikidevaheliste suhete aluste leping [Treaty on the Fundamentals of Inter-State Relations between the Republic of Estonia and the Russian Soviet Federative Socialist Republic], Republic of Estonia – Russian Federation, art. 21, January 12, 1991, RT 1991, 2, 19, <https://www.riigiteataja.ee/akt/13068080>. Meanwhile in the official website of The Ministry of Foreign Affairs of the Russian Federation only treaty with Estonia is marked as being in force (rus. Действует) and on treaty with Lithuania notification is given as no data (rus. Нет данных) on the status of the treaty Министерство иностранных дел Российской Федерации, “Двусторонние договоры,” *Министерство иностранных дел Российской Федерации*, accessed February 14, 2017, [http://www.mid.ru/ru/foreign\\_policy/international\\_contracts/2\\_contract/-/storage-viewer/bilateral/page-359/48830](http://www.mid.ru/ru/foreign_policy/international_contracts/2_contract/-/storage-viewer/bilateral/page-359/48830) Министерство иностранных дел Российской Федерации, “Двусторонние договоры,” *Министерство иностранных дел Российской Федерации*, accessed February 14, 2017, [http://www.mid.ru/ru/foreign\\_policy/international\\_contracts/2\\_contract/-/storage-viewer/bilateral/page-358/48827](http://www.mid.ru/ru/foreign_policy/international_contracts/2_contract/-/storage-viewer/bilateral/page-358/48827). Thus the treaty of Lithuania is not marked either „in force“ (rus. Действует) or „not in force“ (rus. Не действует). More on the validity of Treaty on the Foundations of Inter-State Relations between the Republic of Lithuania and the Russian Soviet Federal Socialist Republic see: Satkauskas, „Expired Friendship?”; Dainius Žalimas, “1991 metų Lietuvos sutarties su Rusija dėl tarpvalstybinių santykių pagrindų reikšmė,” *Parlamento studijos* 24 (2018): 23-53, <http://www.parlamentostudijos.lt/Nr24/Nr24.htm>.

<sup>845</sup> Mark Eugen Villiger, *Commentary On The 1969 Vienna Convention On The Law Of Treaties* (Leiden: Brill, 2009), eBook Collection (EBSCOhost), 545.

<sup>846</sup> Ibid.

regarded as agreements restoring normal relations, i.e. ending application of international humanitarian law, and confirming applicability of international humanitarian law as *lex specialis* to solve the issue of reparation for victims of the Soviet regime in the Baltic states. However, the history of the relationships between the Baltic states and the Russian Federation since the collapse of the USSR does not demonstrate that these treaties were enough to resolve issues of past legacy. The issue of reparations is a salient example of this, and further agreements concerning any attempts to solve this issue have not been adopted as of this date. Consequently, other possible solutions must be identified, especially taking into account that the Baltic states, implementing particular measures aimed at reparations for the victims of Soviet regime, have assumed an obligation to provide remedies for these victims as an obligation stemming from human rights law.

#### **4.2.3. Peaceful resolution of dispute**

The reparation issue concerning the victims of the Soviet regime in the Baltic states is evidence that an international dispute between the respective Baltic state and the Russian Federation exists, because the parties have been incapable of solving the issue. The possible means for a solution to this dispute must be evaluated. The main methods for peaceful resolution of disputes are enumerated in Article 33 of the Charter of United Nations,<sup>847</sup> and they can be grouped in two categories:

- diplomatic methods, such as negotiation, enquiry, mediation, conciliation, resort to regional agencies or arrangements
- adjudication of dispute by arbitration or judicial settlement

The applicability of each possible method for claims for reparations for victims of the Soviet regime in the Baltic states needs to be discussed.

##### **4.2.3.1. Diplomatic methods for interstate dispute**

This group of methods can be described as methods mutually agreed upon by states involved in the dispute. Thus, they are particularly sensitive to the good will of the states involved and their willingness to find mutually acceptable solution.

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<sup>847</sup> Charter of the United Nations, June 26, 1945, available from <https://treaties.un.org/Pages/showDetails.aspx?objid=080000028017ebb8&clang=en>.

#### 4.2.3.1.1. Negotiation

Negotiation is described as the most frequently used method because it ‘allows the parties to retain control of a dispute without involving third parties.’<sup>848</sup> This method is also promoted in paragraph 10 of the Manila Declaration.<sup>849</sup> However, crucial for its success is willingness of the parties to communicate and to solve disputes; negotiation usually fails if the positions of the parties are ‘too far apart’,<sup>850</sup> which is the case for the Russian Federation and the Baltic states. Thus, successful application of this method is hardly probable. Nevertheless, this method is required if the decision to invoke responsibility of the Russian Federation is taken under paragraph 1 of Article 14 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment before the ICJ,<sup>851</sup> because paragraph 1 of Article 30 of this convention requires attempts to settle a dispute on the application of the convention by negotiation and arbitration before referring it to the ICJ.<sup>852</sup> Moreover, negotiations can be facilitated by the method of ‘good offices’, where a third party ‘acts as a channel of communication’ and encourages resuming negotiations if they are deadlocked.<sup>853</sup>

German reparations to the Jews after the Second World War is the most widely known example of reparations for massive human rights abuses and possibly the only example of negotiated reparations between states (Germany and Israel);<sup>854</sup> as other examples of reparations for human rights abuses usually include reparations for human rights abuses performed by the state against its own citizens.<sup>855</sup>

While negotiations can be carried out in different ways, Sapir Handelman suggests two models of negotiations: the Political Elite and Public Assembly. While the Political Elite model is important to reach agreement on complicated questions, the Public Assembly model, i.e. conduction of negotiations in public before an audience of people representing states that are parties to the dispute, ensures the effective implementation of the agreement reached.<sup>856</sup> Thus, the

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<sup>848</sup> Villiger, *Commentary On 1969 Vienna Convention*, 531.

<sup>849</sup> UN General Assembly, Resolution 37/10, annex, Manila Declaration on the Peaceful Settlement of International Disputes (November 15, 1982).

<sup>850</sup> John Merrills, „The means of dispute settlement,“ in *International law*, ed. Malcolm D. Evans (New York: Oxford University Press, 2003), 532.

<sup>851</sup> See sub-chapter 4.2.3.2.1 “Judicial settlement”.

<sup>852</sup> Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *adopted* December 10, 1984, 1465 *UN Treaty Series* 85 (entered into force June 26, 1987).

<sup>853</sup> Merrills, „Means of dispute settlement,“ 533

<sup>854</sup> Ariel Colonomos and Andrea Armstrong, “German Reparations to the Jews After World War II: A Turning Point in the History of Reparations,“ in *The Handbook of Reparations*, ed. Pablo de Greiff (New York: Oxford University Press, 2006), 390- 419.

<sup>855</sup> Pablo de Greiff, ed., *The Handbook of Reparations* (New York: Oxford University Press, 2006), 22-283

<sup>856</sup> Sapir Handelman, "The Minds of Peace Experiment: A Simulation of a Potential Palestinian-Israeli Public Assembly," *International Negotiation* 15, no. 3 (2010): 513, [https://heinonline-org.ezproxy.vdu.lt:2443/HOL/Page?handle=hein.intyb/intnegb0015&div=31&start\\_page=511&collection=intyb&set\\_as\\_cursor=0&men\\_tab=srchresults#](https://heinonline-org.ezproxy.vdu.lt:2443/HOL/Page?handle=hein.intyb/intnegb0015&div=31&start_page=511&collection=intyb&set_as_cursor=0&men_tab=srchresults#).

Public Assembly model, despite its complexity, should be considered as the model ensuring a greater degree of compliance within the agreement reached, although this position seems somewhat utopian due to the current position of the Russian Federation towards the Baltic states.

#### 4.2.3.1.2. *Enquiry and other related methods*

Enquiry as a method of dispute settlement is usually used where there is disagreement on the factual circumstances of the dispute, and a special commission is created to perform fact finding.<sup>857</sup> For the case of reparation for victims of the Soviet regime in the Baltic states, this method would be desirable, as disagreement exists on various factual circumstances, e.g. the legitimacy of elections that resulted in incorporation of the Baltic states into the USSR, the factual organizers and executors of repressions, etc. However, the prerequisite for the work of such a special commission is agreement on its composition. Additionally, it is rarely used method by the states themselves<sup>858</sup> but a popularly employed method of the organs of the United Nations when certain conflict falls within the UN's attention.<sup>859</sup> Unfortunately, it would be difficult to draw the United Nations' attention to the issue of reparation for victims of the Soviet regime in the Baltic states, as a prerequisite is that the issue must threaten international peace and security,<sup>860</sup> and such is not the case at the moment.

Conciliation as a method of resolving the dispute discussed here would be more appropriate because of the independent inquiry that would be made by the commission set up by the parties to the dispute. However, this method is currently not popular between states. The main drawback of this method is that the decision of the commission is not binding.<sup>861</sup> In addition, there have been no instances where this method was used to solve an interstate dispute on reparations for victims of human rights abuses or serious violations of international humanitarian law.

It is noteworthy that under the Geneva Conventions, and Article 90 of Protocol I in particular, an international body, the International Humanitarian Fact-Finding Commission (IHFFC), was established. The commission is responsible for the investigation of allegations of grave breaches and serious violations of international humanitarian law within states that have recognized the competence of the commission. Its competence covers only an impartial

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<sup>857</sup> Merrills, „Means of dispute settlement,“ 535.

<sup>858</sup> Ibid.

<sup>859</sup> Office of the United Nations High Commissioner for Human Rights. *Commissions of Inquiry and Fact-Finding Missions on International Human Rights and Humanitarian Law: Guidance and Practice* (New York and Geneva: United Nations, 2015), [http://www.ohchr.org/Documents/Publications/Col\\_Guidance\\_and\\_Practice.pdf](http://www.ohchr.org/Documents/Publications/Col_Guidance_and_Practice.pdf).

<sup>860</sup> Rosalyn Higgins, "Peaceful Settlement of Disputes," *American Society of International Law Proceedings* 89 (1995): 293-296, [https://heinonline-org.ezproxy.vdu.lt:2443/HOL/Page?handle=hein.journals/asilp89&div=65&start\\_page=293&collection=journals&set\\_as\\_cursor=19&men\\_tab=srchresults#](https://heinonline-org.ezproxy.vdu.lt:2443/HOL/Page?handle=hein.journals/asilp89&div=65&start_page=293&collection=journals&set_as_cursor=19&men_tab=srchresults#). 293

<sup>861</sup> Merrills, „Means of dispute settlement,“ 537-539.

establishment of facts without their obligatory legal assessment. Inquiries of the commission can be made public only by the request of parties involved, as they are generally non-public.<sup>862</sup> Thus, its operation resembles the operation of a commission that might be set up if such methods as enquiry or conciliation are employed. Moreover, there would be no need to agree separately on the composition of a commission and procedures of the enquiry if the states concerned agree to refer their dispute to the IHFFC.

As actual establishment of this commission depended on recognition of its compulsory competence, it was not set up until 1991, when the required minimum of 20 states accepted its competence.<sup>863</sup> Although it is a non-judicial body, its operation would have had substantial effects for the case of the Baltic states if it had been established prior to the end of their belligerent occupation and a state that had accepted competence of the commission *ipso facto* had requested an inquiry on the case of the Baltic states sometime after 29 March 1990, when acceptance of the competence of the IHFFC by the USSR entered into force. Now only a theoretical possibility of bringing this question before the IHFFC exists, and that possibility is subject to many constraints that should be solved for the benefit of the Baltic states.

#### 4.2.3.1.3. *Mediation*

Mediation also requires a third party to resolve the dispute, and Secretary-General of the United Nations or International Committee of the Red Cross are in the position to perform this function.<sup>864</sup> However, this method is effective if the parties to the dispute are acting in good faith, as the mediator ‘usually makes proposals informally and on the basis of information supplied by the parties, rather than through independent investigations’.<sup>865</sup> The behaviour of the Russian Federation in the cases against it before the ECtHR when it fails to provide the required evidence<sup>866</sup> poses serious doubts as to the ability of the Russian Federation to act in good faith and present all required materials on contentious points of the dispute to the mediator. Therefore,

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<sup>862</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, art. 90, para. 5(c), June 8, 1977, *Treaties, States Parties and Commentaries Database of the International Committee of the Red Cross*, <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?action=openDocument&documentId=D9E6B6264D7723C3C12563CD002D6CE4>.

<sup>863</sup> International Fact-Finding Commission, “The IHFFC in a few words,” *International Fact-Finding Commission*, accessed February 19, 2017, [http://www.ihffc.org/index.asp?Language=EN&page=aboutus\\_general](http://www.ihffc.org/index.asp?Language=EN&page=aboutus_general); Wolfrum and Fleck, “Enforcement of International Humanitarian Law,” 711-712; Sandoz, Swinarski and Zimmermann, eds., *Commentary on the Additional Protocols*, 1037-1052; Kenneth Keith, “International Humanitarian Fact-finding Commission: its potential,” *Australian Journal of Human Rights* 5, no. 2 (1999): 103, 108, <https://www8.austlii.edu.au/cgi-bin/viewdoc/au/journals/AJHR/1999/26.html>.

<sup>864</sup> Merrills, „Means of dispute settlement,” 536-537.

<sup>865</sup> *Ibid.*

<sup>866</sup> See e.g. *Luluyev and others v. Russia*, no. 69480/01, 2006-XIII *Reports of Judgments and Decisions* (ECHR) 207; *Khashiyev and Akayeva v. Russia*, nos. 57942/00 57945/00, ECHR, HUDOC (February 24, 2005), <http://hudoc.echr.coe.int/eng?i=001-68419>.

the use of mediation to resolve the dispute between the Baltic states and the Russian Federation on the issue of reparations is not recommended, because principles of peaceful settlement of disputes, as they are stated in paragraph 2 of the Manila Declaration, might be violated.<sup>867</sup> Patricia E. Standaert is also of the position that this method should be applied very cautiously in cases of massive human rights abuses in order to not compromise the goals of international human rights law, where punishment of violators is perceived as a means of preventing reoccurrences.<sup>868</sup>

#### 4.2.3.1.4. *Resort to regional agencies or arrangements*

Resort to regional agencies or arrangements as a method of solving the dispute on reparations is also impractical for the case analysed here because there is no regional agency having an effective mechanism on peaceful dispute resolution and membership of all parties to the dispute,<sup>869</sup> i.e. the Russian Federation and the Baltic states. The only regional organization to which all of the involved parties belong is the Council of Europe, but it does not have an effective mechanism for peaceful dispute resolution, as the European Convention for the Peaceful Settlement of Disputes is ratified by only 14 countries, and the Baltic states and the Russian Federation are not among them.<sup>870</sup> Moreover, Rosalyn Higgins observes that regional agencies are usually incapable of suggesting a solution acceptable to the parties of a dispute, because ‘the very familiarity with the problem at hand of those who sit on the regional institutions has often meant that their positions are already fixed’ and a ‘more distant and dispassionate eye’ on the dispute is required.<sup>871</sup>

To sum up, negotiation, enquiry and conciliation are methods recommended that could be implemented in an attempt to resolve the dispute on reparation for victims of the Soviet regime in the Baltic states. However, if a bilateral agreement is not adopted on the outcomes of negotiation or enquiry, the implementation of any the result of the application of these methods, as well as implementation of the result of conciliation, would depend on the good faith of the Russian Federation and would require that the Russian Federation engage in the suggested diplomatic methods; that is hardly probable at the moment. Therefore, possibilities of adjudicating this

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<sup>867</sup> It is stated in paragraph 2 of Manila Declaration that every state shall settle its international disputes exclusively by peaceful means in such a manner that international peace and security and justice, are not endangered. UN General Assembly, Resolution 37/10, annex, Manila Declaration on the Peaceful Settlement of International Disputes (November 15, 1982), para. 2.

<sup>868</sup> Patricia E. Standaert, "The Friendly Settlement of Human Rights Abuses in the Americas," *Duke Journal of Comparative & International Law* 9, no. 2 (Spring 1999): 541, [https://heinonline-org.ezproxy.vdu.lt:2443/HOL/Page?handle=hein\\_journals/djcil9&div=34&start\\_page=519&collection=journals&set\\_as\\_cursor=0&men\\_tab=srchresults#](https://heinonline-org.ezproxy.vdu.lt:2443/HOL/Page?handle=hein_journals/djcil9&div=34&start_page=519&collection=journals&set_as_cursor=0&men_tab=srchresults#).

<sup>869</sup> Merrills, „Means of dispute settlement,” 547.

<sup>870</sup> Council of Europe, „Chart of signatures and ratifications of Treaty 023,” *Council of Europe*, last modified July 30, 2018, [http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/023/signatures?p\\_auth=dUrSWjOC](http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/023/signatures?p_auth=dUrSWjOC).

<sup>871</sup> Higgins, "Peaceful Settlement of Disputes," 294.



dispute must also be evaluated because, at the moment, it is unlikely that a solution can be reached using diplomatic methods.

#### 4.2.3.2. *Adjudication of interstate disputes*

Adjudication at the international level is possible by:

- submission of the dispute to arbitration
- submission of the dispute to judicial settlement

Each will be discussed to evaluate the possibility of solving the reparation issue of the victims of the Soviet regime in the Baltic states.

It is noteworthy that neither the Hague Regulations nor the Geneva Conventions have established any of the following legal means for disputes between states arising out of their application. In cases of international disputes arising because of the application of the Hague Regulations or the Geneva Conventions with a need to adjudicate it, the matter must be referred to the international judicial body of general jurisdiction.

##### 4.2.3.2.1. *Judicial settlement*

The ICJ is the only international judicial body of general competence,<sup>872</sup> established under the Charter of United Nations and as a successor to the Permanent Court of International Justice,<sup>873</sup> capable of adjudicating international disputes that require application of international humanitarian law. Nevertheless, the jurisdiction of the ICJ and its scope is subject to the consent of the states. According to Gilbert Guillaume, the international dispute between the states can be resolved if:

- a state declares that it recognizes the competence of the ICJ ‘as compulsory *ipso facto* and without special agreement, in relation to any other State accepting the same obligation’ in all legal disputes or in certain class of legal disputes<sup>874</sup>
- a jurisdiction of the Court over interpretation of a particular international treaty is granted by a treaty itself and states involved are parties to this treaty<sup>875</sup>

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<sup>872</sup> Merrills, „Means of dispute settlement,“ 541.

<sup>873</sup> Thirlway, „Sources of International Law,“ 560.

<sup>874</sup> Gilbert Guillaume, "The Future of International Judicial Institutions," *International and Comparative Law Quarterly* 44, no. 4 (October 1995): 850, [https://heinonline-org.ezproxy.vdu.lt:2443/HOL/Page?handle=hein.journals/incolq44&div=46&start\\_page=848&collection=journals&set\\_as\\_cursor=0&men\\_tab=srchresults#](https://heinonline-org.ezproxy.vdu.lt:2443/HOL/Page?handle=hein.journals/incolq44&div=46&start_page=848&collection=journals&set_as_cursor=0&men_tab=srchresults#).

<sup>875</sup> The list of such bilateral and multilateral treaties can be found here: International Court of Justice, “Treaties,” *International Court of Justice*, accessed July 30, 2018, <http://www.icj-cij.org/en/treaties>.

- a dispute is submitted to the ICJ by the consent of all parties involved in the dispute on an ad hoc basis<sup>876</sup>

This is an exhaustive list of the possibilities allowing for a dispute to be brought before the ICJ. The potential applicability of each to the case of the Baltic states will be discussed below.

The first available option is a remnant of a primary initiative at the international level envisaged as early as 1920 to create a ‘universal compulsory jurisdiction, in the sense that any State party to the Statute could bring before the [Permanent Court of international Justice], by unilateral application, any dispute whatever with another State party to the Statute.’<sup>877</sup> However, history reveals that states were not prepared for such a wide jurisdiction of an international judicial body and such measures as reservations to compulsory jurisdiction, reciprocity of accepted scope of the jurisdiction were also introduced, complicating the issue of jurisdiction.<sup>878</sup>

Today the situation has not changed. Out of 193 UN members less than a half, specifically 73 states, currently recognize compulsory jurisdiction of the ICJ, and only 21 states recognize jurisdiction of the ICJ as it is envisaged in paragraph 2 of Article 36 of The Statute of the ICJ, i.e. without reservations.<sup>879</sup> The application of reservations results in exclusion from the jurisdiction of the ICJ during ‘periods of hostilities, military occupation’ or ‘particular past periods of time (which often reflect sensitive events).’<sup>880</sup> However, the latter practice of states cannot be challenged, as all states are considered equal in exercising their sovereignty, and ‘since a State was free to decide to accept or not to accept the optional clause jurisdiction in its entirety, it was also free to accept it subject to whatever reservations it saw fit to make.’<sup>881</sup>

Thus application of reservations to compulsory jurisdiction limits the ability to address a particular international dispute for legally binding resolutions. Although the condition of reciprocity is required to prevent undermining the equality of states as subjects of international law, it is an additional means of restricting the jurisdiction of the ICJ because in case of a dispute among states accepting compulsory jurisdictions ‘the Court’s jurisdiction [is] defined by the narrower of the two acceptances’<sup>882</sup> and ‘each party can benefit from an exclusion provision of the other.’<sup>883</sup> Thus, under this option the ICJ is always required to solve the question of jurisdiction before dispute resolution.

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<sup>876</sup> Guillaume, "Future of International Judicial Institutions," 850.

<sup>877</sup> Thirlway „Sources of International law“, 569.

<sup>878</sup> Ibid., 569-571

<sup>879</sup> International Court of Justice, “Declarations recognizing the jurisdiction of the Court as compulsory,” *International Court of Justice*, accessed July 30, 2018, <http://www.icj-cij.org/en/declarations>.

<sup>880</sup> Rosalyn Higgins, “Time and the Law: International Perspectives on an Old Problem,” *International and Comparative Law Quarterly* 46, no. 3 (July 1997): 502, doi: 10.1017/S0020589300060784.

<sup>881</sup> Thirlway „Sources of International law“, 570.

<sup>882</sup> Ibid.

<sup>883</sup> Higgins, “Time and the Law,” 503.

Subject to the previous findings, the ability to apply compulsory jurisdiction of the ICJ on the case of the Baltic states depends not only on whether each of the Baltic states and the Russian Federation has accepted the jurisdiction of ICJ as compulsory, but also on what type of reservations are made by each state. Estonia and Lithuania have accepted the compulsory jurisdiction of the ICJ, while Estonia is the only state that accepted it without reservations for cases as early as 21 October 1991.<sup>884</sup> Lithuania limited the jurisdiction of the ICJ to situations or facts subsequent to the date of declaration, 26 September 2012.<sup>885</sup> Neither the Russian Federation nor Latvia has accepted the jurisdiction of the ICJ under the requirements of paragraph 2 of Article 36 of The Statute of the International Court of Justice.

The ability to present the dispute on reparations for the victims of the Soviet regime in the Baltic states under the option discussed here is not only limited by the failure of the Russian Federation to accept compulsory jurisdiction of the ICJ as envisaged in paragraph 2 of Article 36 of The Statute of the ICJ but also by the Baltic states themselves, either because of reservations made on the compulsory jurisdiction of the ICJ, as in the case of Lithuania, or because of non-acceptance of such jurisdiction, as in cases of Latvia, except Estonia. Taking into account the obligations the Baltic states assumed towards victims of the Soviet regime, the soundness of the position of Lithuania and Latvia must be compared with other available options to invoke jurisdiction of the ICJ to solve the dispute on reparations.

The next option is that jurisdiction of the ICJ could be established by an international treaty applicable to the dispute between the states. The situation of the Baltic states under the Soviet regime is clearly covered by international treaties that govern application of international humanitarian law in cases of a belligerent occupation. Unfortunately, as already established, neither the Hague Regulations nor the Geneva Conventions refers to a particular mechanism or any international judicial body to solve disputes between states arising out of the interpretation and application of the Hague Regulations or the Geneva Conventions.

However, it has already been established that human rights law is also applicable in cases of belligerent occupation. Therefore, the possibility of presenting a claim under a particular instrument of human rights law must be analysed, as the Baltic states and the Russian Federation, a continuing state of the USSR, assumed obligations to remedy victims of the Soviet regime for

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<sup>884</sup> Declaration by Estonia recognizing as compulsory the jurisdiction of the International Court of Justice, in conformity with Article 36, paragraph 2, of the Statute of the International Court of Justice, October 10, 1991, 1653 *UN Treaty Series* 59.

<sup>885</sup> "Jurisdiction of the Court," *International Court of Justice Yearbook* 67 (2012-2013): 14-15, [https://heinonline-org.ezproxy.vdu.lt:2443/HOL/Page?men\\_tab=srchresults&handle=hein.intyb/unicjy0067&id=26&size=2&collection=intyb&terms=LITHUANIA|Lithuania&termtype=phrase&set\\_as\\_cursor=0#](https://heinonline-org.ezproxy.vdu.lt:2443/HOL/Page?men_tab=srchresults&handle=hein.intyb/unicjy0067&id=26&size=2&collection=intyb&terms=LITHUANIA|Lithuania&termtype=phrase&set_as_cursor=0#).

gross human right violations, and certain instruments of human rights introduces the jurisdiction of the ICJ to solve disputes related to that treaty between states.

Out of human rights treaties establishing not only a victim's right to remedy but also conferring jurisdiction to the ICJ to interpret that particular treaty are:

- International Convention on the Elimination of All Forms of Racial Discrimination
- Convention Relating to the Status of Stateless Persons
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

The first two conventions mentioned will not be analysed here, as they are not applicable on actions towards victims of the Soviet regime in the Baltic states.<sup>886</sup> Thus, the only possibility of bringing the issue of reparations before the ICJ is under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment due to established facts of torture.<sup>887</sup> The possibility of its applications can also be based on paragraph 2 of article 2 of this convention, which states that '[n]o exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.'<sup>888</sup>

It is noteworthy that all of the Baltic states acceded to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and in particular paragraph 1 of Article 30, which confers jurisdiction to the ICJ to apply and interpret this convention under provided conditions without any reservations.<sup>889</sup> Meanwhile, the USSR upon signature of this convention made a reservation, stating that it 'does not consider itself bound by the provisions of paragraph 1 of article 30 of the Convention'.<sup>890</sup> This reservation was cancelled by a letter of 28 February 1989 to the Secretary-General from the Minister for Foreign Affairs of the USSR.

The acceptance of the compulsory jurisdiction of the ICJ by the USSR for this convention and five other human rights treaties was treated by Theodor Schweisfurth as a trend of change in

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<sup>886</sup> International Convention on the Elimination of All Forms of Racial Discrimination is not applicable here because victims of soviet regime in the Baltic States currently are not citizens of the Russian Federation and under Paragraph 2 of Article 1 of this Convention it 'shall not apply to distinctions, exclusions, restrictions or preferences made by a State Party to this Convention between citizens and non-citizens'. International Convention on the Elimination of All Forms of Racial Discrimination, March 7, 1966, 660 *UN Treaty Series* 195. Convention Relating to the Status of Stateless Persons is not applicable because victims of soviet regime in the Baltic States are not its subject matter.

<sup>887</sup> See sub-chapter 1.3.2 "Prosecution of acts committed against the people of the Baltic states under the Soviet regime".

<sup>888</sup> Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 2, para. 2, adopted December 10, 1984, 1465 *UN Treaty Series* 85 (entered into force June 26, 1987).

<sup>889</sup> Lithuania acceded on February 1, 1996, Latvia – on April 14, 1992, Estonia - on October 21, 1991. *United Nations Treaty Collection*, Depository, Status of Treaties, CHAPTER IV: Human Rights, 9. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, accessed October 11, 2017, [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-9&chapter=4&clang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9&chapter=4&clang=en).

<sup>890</sup> Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Reservation by the USSR made upon signature, March 15, 1985, 1465 *UN Treaty Series* 203.

the foreign policy of the USSR, and recognition of human rights as significant values whose protection is a primary goal of international law and precondition of peaceful co-existence between states.<sup>891</sup> However the jurisdiction of the ICJ in accordance with paragraph 1 of Article 30 of the Convention was recognized by the USSR only as to the interpretation and application of the Convention in cases that may arise after the date of the withdrawal of previous reservation, i.e. after 28 February 1989.<sup>892</sup>

Taking this into account, if the application to the ICJ on the issue of reparations was based on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Baltic states could refer only to acts committed by the USSR in violation of provisions of this convention that began or continued after 28 February 1989.<sup>893</sup> Moreover, paragraph 1 of Article 30 of this convention places additional limitations, as referral to the ICJ is possible only after unsuccessful negotiations are submitted to arbitration and ‘within six months from the date of the request for arbitration the Parties are unable to agree on the organization of the arbitration.’<sup>894</sup> Thus, not only negotiations but also arbitration must be unsuccessful to invoke jurisdiction of the ICJ.

The ICJ judgment in the case of Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal) is of particular importance on the interpretation of the Article 30. Under this decision the ICJ confirmed its former practice concerning similar requirements of negotiation and arbitration before referring case to the ICJ in international treaties. As to negotiations, it was stated that negotiations are considered to be unsuccessful if ‘no reasonable probability exists that further negotiations would lead to a settlement’, and this might be established under fact that the ‘basic positions [of states] have not subsequently evolved.’<sup>895</sup>

Regarding the requirement of inability to agree on the organization of the arbitration, the ICJ particularly stated that no response by one state to an explicit offer of the other state ‘to have recourse to arbitration, pursuant to Article 30, paragraph 1, of the Convention against Torture, in

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<sup>891</sup> Convention on the Prevention and Punishment of the Crime of Genocide also was among those treaties where previous reservation on compulsory jurisdiction of the ICJ was withdrawn but again only for the cases that might arise after the date of the withdrawal, i.e. after 28 February 1989. See: Theodor Schweisfurth, „The Acceptance by the Soviet Union of the Compulsory Jurisdiction of the ICJ for Six Human Rights Conventions,“ *European Journal of International Law* 2, no. 1 (1991): 110-117, doi: <https://doi.org/10.1093/ejil/2.1.110>.

<sup>892</sup> Withdrawal of a reservation by the USSR made upon ratification of Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in respect of article 30 (1), March 8, 1989, 1525 *UN Treaty Series* 405.

<sup>893</sup> In accordance with Article 28 of Vienna Convention on the Law of Treaties. Vienna Convention on the law of treaties, May 23, 1969, 1155 *UN Treaty Series* 331 (entered into force January 27, 1980).

<sup>894</sup> Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 30, para. 1, adopted December 10, 1984, 1465 *UN Treaty Series* 85 (entered into force June 26, 1987).

<sup>895</sup> Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Judgment, I.C.J. Reports 2012, p. 422, <http://www.icj-cij.org/files/case-related/144/144-20120720-JUD-01-00-EN.pdf>, paras. 58-59.

order to settle the dispute concerning the application of the Convention<sup>896</sup> within the given time limit is enough to conclude that ‘Parties are unable to agree on the organization of the arbitration’.<sup>897</sup> As a result there is no requirement ‘to make any detailed proposal for determining the issues to be submitted to arbitration and the organization of the arbitration proceedings.’<sup>898</sup> Thus, a requirement of recourse to arbitration is treated at a rather minimal level.

On the basis of established conditions of jurisdiction of the ICJ in accordance to provisions of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the possibility of addressing the issue of reparations under this convention will be evaluated. First, the question arises as to what provisions of this Convention the USSR has violated since 28 February 1989 in relation to reparations for victims of the Soviet regime in the Baltic states. Here particular attention must be given to the requirements of paragraph 1 of Article 14, which states that:

each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation.<sup>899</sup>

It was previously established that the USSR, under edicts of 16 January 1989 and 13 August 1990, undertook an obligation to provide reparation for the persons recognized as victims under this legislation. The initial reparatory measures were implemented at local levels of the USSR, i.e. from union republics to regions and even cities, due to delegation of these tasks to them by these edicts.<sup>900</sup> The comprehensive framework of reparation and procedure on its implementation was introduced only with the enactment of the RSFSR law of 18 October 1991 ‘On the rehabilitation of victims of political suppression’, i.e. after the Baltic states re-established their independence (See Figure 2).

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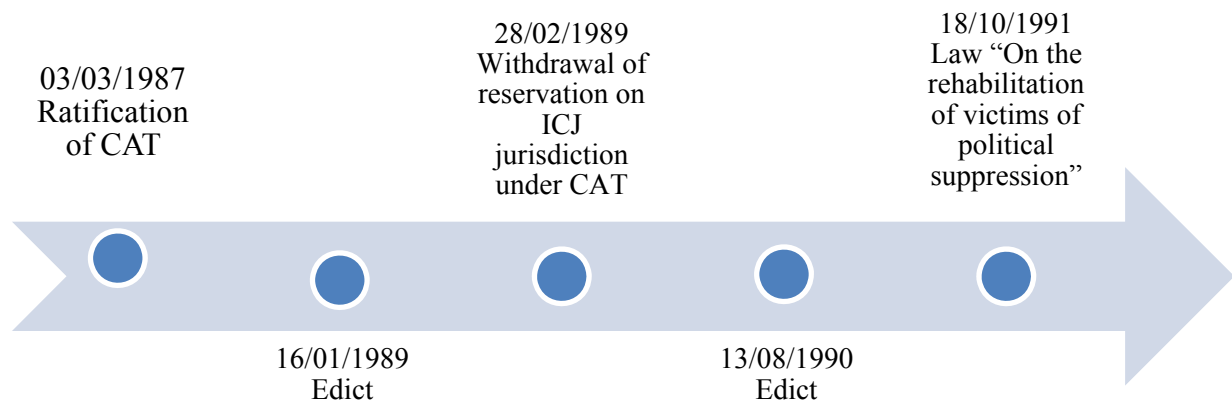
<sup>896</sup> Ibid., paras. 60-61.

<sup>897</sup> Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 30, para. 1, *adopted* December 10, 1984, 1465 *UN Treaty Series* 85 (entered into force June 26, 1987).

<sup>898</sup> Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Judgment, I.C.J. Reports 2012, p. 422, <http://www.icj-cij.org/files/case-related/144/144-20120720-JUD-01-00-EN.pdf>, para. 61.

<sup>899</sup> Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 14, para. 1, *adopted* December 10, 1984, 1465 *UN Treaty Series* 85 (entered into force June 26, 1987).

<sup>900</sup> See chapter 3.2 “OBLIGATIONS ASSUMED BY THE USSR”.



*Figure 2. Timetable of obligations of the Russian Federation on application of Paragraph 1 of Article 14 of the Convention against Torture, in order to settle the dispute concerning the application of the Convention*

Although under the initial provisions of Article 2 of the RSFSR law of 18 October 1991 ‘On the rehabilitation of victims of political suppression’ and its current version foreigners could be recognized as victims eligible for the reparatory measures under the regulation, such eligibility is subject to the condition that repressions were committed in the territory of the RSFSR (under current regulation, in the territory of the Russian Federation).<sup>901</sup> Thus, eligibility for status of a victim and reparatory measures depends on the boundaries of the state providing these measures.<sup>902</sup>

This condition concerning the territory of repressions is rather ambiguous; for example, if a person faced arbitrary arrest in the territory of the former USSR that is currently not under jurisdiction of the Russian Federation but was sentenced or executed in territory of the former USSR currently under jurisdiction of the Russian Federation, it is not clear whether he or she would be considered a victim under Article 2 of the law of the Russian Federation of 18 October 1991 ‘On the rehabilitation of victims of political suppression’. The particular experiences of victims of the Soviet regime in the Baltic states demonstrate that institutions responsible for the implementation of the provisions of the law of the Russian Federation of 18 October 1991 ‘On

<sup>901</sup> Закон Российской Советской Федеративной Социалистической Республики „О реабилитации жертв политических репрессий“ [RSFSR Law “On the rehabilitation of victims of political suppression”], art. 2, Ведомости Съезда народных депутатов РСФСР и Верховного Совета РСФСР от 1991 г., N 44, ст. 1428, <http://pravo.gov.ru/proxy/ips/?docbody=&nd=102012774&rdk=0>; Закон Российской Федерации „О реабилитации жертв политических репрессий“ [Law “On the rehabilitation of victims of political suppression”], art. 2, Ведомости Съезда народных депутатов РСФСР и Верховного Совета РСФСР от 1991 г., N 44, ст. 1428, as last amended on March 9, 2016, <http://pravo.gov.ru/proxy/ips/?docbody=&nd=102012774&rdk=17>. Translation of titles provided in Moskal’Kova, "Rehabilitation of the Innocent," 478.

<sup>902</sup> Bruskina, „Valstybės kompensacija nacių ir komunistinių režimų nusikaltimų aukoms,“ 141.

the rehabilitation of victims of political suppression' tend to limit the scope of possible victims and if repressions commenced in the territory of the former USSR that is currently not under jurisdiction of the Russian Federation, a person is not entitled to the status of a victim under this regulation.<sup>903</sup> Thus, all repressive acts faced by a person must have been committed in the territory of the RSFSR (under the current regulation, in the territory of the Russian Federation) in order to be recognized as a victim under Article 2 of the RSFSR law of 18 October 1991 'On the rehabilitation of victims of political suppression' (the law of the Russian Federation of 18 October 1991 'On the rehabilitation of victims of political suppression').

Another ambiguity can be found in the provision of Article 17 of the RSFSR law of 18 October 1991 'On the rehabilitation of victims of political suppression'. It is stated that persons who were rehabilitated before the enactment of the RSFSR law of 18 October 1991 'On the rehabilitation of victims of political suppression' are entitled to the reparatory measures as established in Articles 12–16 of that law.<sup>904</sup> As previous legislation granting rehabilitation is not enumerated, it is not clear whether legislation that was enacted by the institutions of the occupant in the territory of the Baltic states and by former union republics of the USSR was taken into

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<sup>903</sup> As an example is Vytautas Kluonius's case. His request for compensation was rejected by the special Presidential Commission for Rehabilitation of the Victims of Political Repression because he was not rehabilitated under procedures established by the Law "On the rehabilitation of victims of political suppression". Moreover it was particularly emphasized that Lithuania is in charge to pay compensation for him because he was arrested in Lithuania and lived in Lithuania after service of sentence (Letter dated May 27, 2003 from Presidential Commission for Rehabilitation of the Victims of Political Repression to Vytautas Kluonius, No. A19-3-286. Personal materials of Vytautas Kluonius received under his authorization from Stanislovas Sajauskas). The facts that he was imprisoned under the laws of the USSR and served sentence in the territory of the RSFSR were ignored despite of provision of documents proving these circumstances. On the story of Vytautas Kluonius see also series of articles: Eugenijus Ignatavičius, „Ištikimieji. Vytauto Kluoniaus Golgotos kelias,“ *Kultūra (Draugas) No. 42*, November 19, 2011; Eugenijus Ignatavičius, „Ištikimieji. Vytauto Kluoniaus Golgotos kelias,“ *Kultūra (Draugas) No. 43*, December 3, 2011; Eugenijus Ignatavičius, „Ištikimieji. Vytauto Kluoniaus Golgotos kelias,“ *Kultūra (Draugas) No. 44*, December 10, 2011; Eugenijus Ignatavičius, „Ištikimieji. Vytauto Kluoniaus Golgotos kelias,“ *Kultūra (Draugas) No. 45*, December 17, 2011; Eugenijus Ignatavičius, „Ištikimieji. Vytauto Kluoniaus Golgotos kelias,“ *Kultūra (Draugas) No. 46*, December 24, 2011; Eugenijus Ignatavičius, „Ištikimieji. Vytauto Kluoniaus Golgotos kelias,“ *Kultūra (Draugas) No. 47*, December 31, 2011. Another example is Algimantas Peleckas's case who sued the Russian Federation seeking compensation for his repressions in three regional courts of the Russian Federation. His lawsuit was rejected firstly on the ground that the court is not competent to provide compensation as the Ministry of Finance of the Russian Federation is in charge for this and the court has no territorial jurisdiction on the case as the lawsuit must be brought before the regional court having required territorial jurisdiction on lawsuits against the Ministry of Finance of the Russian Federation. The second attempt in the court having territorial jurisdiction due to place of residence of the Ministry of Finance of the Russian Federation was also unsuccessful and the lawsuit was declined because the Ministry of Finance of the Russian Federation is not a right defendant. The third attempt was rejected on the grounds that the Russian Federation is not a continuing state of the USSR and the applicant was also unable to prove that states of his origin and current residence, i.e. Lithuania and Latvia respectively, has any treaty with the Russian Federation where the debt by the Russian Federation towards Lithuania and Latvia on the case of compensation was recognized. Antanas Stasiškis, „Kaip paraginti Rusiją nepamiršti padarytos žalos,“ *Horizontai (XXI amžius)*, July 18, 2007, <http://www.xxiamzius.lt/archyvas/priedai/horizontai/20070718/8-2.html>.

<sup>904</sup> Закон Российской Советской Федеративной Социалистической Республики „О реабилитации жертв политических репрессий“ [RSFSR Law "On the rehabilitation of victims of political suppression"], art. 17, Ведомости Съезда народных депутатов РСФСР и Верховного Совета РСФСР от 1991 г., N 44, ст. 1428, <http://pravo.gov.ru/proxy/ips/?docbody=&nd=102012774&rdk=0>.



account. No clarification on the issue was provided with further amendments of Article 17.<sup>905</sup> Previously presented experiences of victims of the Soviet regime in the Baltic states suggest that Article 17 might also be interpreted in a reserved manner, taking into account legislation enacted only at the union level, i.e. the edicts of 16 January 1989 and of 13 August 1990.<sup>906</sup> Thus, if a person was previously not rehabilitated as a result of these acts in particular, he or she is not entitled to reparatory measures under the law of the Russian Federation ‘On the rehabilitation of victims of political suppression’.

It seems that the Russian Federation does not recognize the decisions of the institutions of the occupant in the territory of the Baltic states, i.e. its own former institutions, on the status as a victim for persons who were repressed under the Soviet regime in the Baltic states, although it was established that under the government system of the USSR they could not act independently in any field without the approval of the highest authorities of the USSR.<sup>907</sup> An additional restriction on the ability to receive reparatory measures is the requirement that one must apply for compensation in municipal institution in a place of residence; this was introduced with amendments of 22 December 1992 and 3 March 1993 of the RSFSR law of 18 October 1991 ‘On the rehabilitation of victims of political suppression’. In order to receive compensation, a person must have a place of residence within the territory of the Russian Federation; otherwise he or she will not be able to apply for compensation.<sup>908</sup> If a person eligible for reparatory measures, compensation in particular, under the law of the Russian Federation of 18 October 1991 ‘On the rehabilitation of victims of political suppression’ has received compensation in another former union republic, he or she is not entitled to compensation under this law.<sup>909</sup> However, this is not relevant for the victims of the Soviet regime in the Baltic states, because none of the Baltic states have granted compensation for victims of Soviet regime, but this still demonstrates that the Russian Federation tends to limit possible benefits for victims of the Soviet regime.

It is possible to conclude that the Russian Federation has reduced the scope of its initial obligation to provide reparation with further introduction of legislation on reparation measures under edicts of 16 January 1989 and of 13 August 1990; under those pieces of legislation, a

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<sup>905</sup> Закон Российской Федерации „О реабилитации жертв политических репрессий“ [Law “On the rehabilitation of victims of political suppression”], art. 17, Ведомости Съезда народных депутатов РСФСР и Верховного Совета РСФСР от 1991 г., N 44, ст. 1428, as last amended on March 9, 2016, <http://pravo.gov.ru/proxy/ips/?docbody=&nd=102012774&rdk=17>.

<sup>906</sup> See footnote 903.

<sup>907</sup> See chapter 3.2 “OBLIGATIONS ASSUMED BY THE USSR”.

<sup>908</sup> Закон Российской Федерации „О реабилитации жертв политических репрессий“ [Law “On the rehabilitation of victims of political suppression”], art. 15, Ведомости Съезда народных депутатов РСФСР и Верховного Совета РСФСР от 1991 г., N 44, ст. 1428, as last amended on March 9, 2016, <http://pravo.gov.ru/proxy/ips/?docbody=&nd=102012774&rdk=17>.

<sup>909</sup> Bruskina, „Valstybės kompensacija nacių ir komunistinių režimų nusikaltimų aukoms,“ 188-189.

foreigner is entitled to reparatory measures only if repressions were committed in the territory of the RSFSR (under current regulation, in the territory of the Russian Federation). Moreover, the obscure meaning of Article 17 of the law of the Russian Federation of 18 October 1991 ‘On the rehabilitation of victims of political suppression’ does not ensure that legislation enacted in conformity with edicts of 16 January 1989 and of 13 August 1990 by other institutions of the USSR, including institutions of the occupant in the Baltic states, can be interpreted as granting reparation for victims of the Soviet regime in the Baltic states in accordance with this law.

Such limitations are not in conformity with paragraph 1 of Article 14 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, as an obligation was assumed towards all persons defined as victims in previous edicts within the former territory of the USSR, including those of the Baltic states. In addition, Ellen L. Lutz is of the position that the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment imposes a duty on a state to provide redress to victims of torture and ‘[f]ailure to establish effective domestic procedures to redress abuses of human rights would place a state that has ratified such a treaty in violation of its international law obligations.’<sup>910</sup>

It is important to note that the Russian Federation itself is obligated to provide remedies in cases of torture, under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; this is a separate obligation applicable to the victims of soviet regime. This is visible from a report submitted during the second reporting cycle by the Russian Federation under Article 19, paragraph 1, of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. This document describes reparations for the victims as they are defined by the Law ‘On the rehabilitation of victims of political suppression’ as fulfilment of obligations under paragraph 1 of Article 14 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.<sup>911</sup>

After establishing a possible legal dispute between states, i.e. the respective Baltic state and the Russian Federation within the application of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, it must be verified whether the procedural requirements of paragraph 1 of article 30 on the jurisdiction of the ICJ are fulfilled. The history of unsuccessful attempts of negotiations on reparations issue in case of all Baltic states is easily established<sup>912</sup> and allows for the conclusion that basic positions of the Russian Federation and the

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<sup>910</sup> Ellen L. Lutz, “After the Elections,” I:554.

<sup>911</sup> Committee Against Torture, Consideration of Reports Submitted by States Parties under Article 19 of the Convention: Russian Federation, paras. 87-92, U.N. Doc. CAT/C/17/Add.15 (January 17, 1996).

<sup>912</sup> Žalimas, "Commentary," 118-122; Broks, „Loss of the Right to Invoke Responsibility,” 151, 154; Laas Leivat, “Who has the right to compensation for the Soviet occupation of the Baltics?” *Estonian World Review*, published November 3, 2011, <http://www.eesti.ca/who-has-the-right-to-compensation-for-the-soviet-occupation-of-the-baltics/article33967>; Laas Leivat, “Who has the right to compensation for the Soviet occupation of the Baltics? (II)”

respective Baltic state have not subsequently evolved. There is no evidence that any of the Baltic states have made an explicit offer to the Russian Federation on recourse to arbitration pursuant to paragraph 1 of Article 30 of the convention. Thus, without the fulfilment of this requirement none of the Baltic states are able to invoke the jurisdiction of the ICJ under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. It has been already established that the requirement of unsuccessful submission of the dispute to arbitration could easily be fulfilled, because no response on the explicit suggestion to bring the matter on arbitration is enough to bring the application before the ICJ under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

Other limitations on the possibility of implementing these options are based on the dates of accession to the Convention by the Baltic states. Although the Baltic states acceded to the convention without reservations, they acceded later than the Russian Federation and after the enactment of the Law 'On the rehabilitation of victims of political suppression' and after the edicts of 16 January 1989 and 13 August 1990 were no longer in force. Thus, the question arises whether the Baltic states and Russian Federation have accepted the same obligation concerning the jurisdiction of the ICJ for the purposes of the dispute concerning application of paragraph 1 of Article 14 of Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

First, certain insights must be given on the application of jurisdiction of ICJ. Rosalyn Higgins notes that under case law of the Permanent Court of International Justice and ICJ if the time of adjudication of the dispute is different from the time when the underlying situation occurred and a state has accepted jurisdiction of these judicial bodies ipso facto, when 'acceptance of the jurisdiction of the Court does have retrospective effect ... unless this is specifically excluded by a reservation to the general acceptance of jurisdiction.'<sup>913</sup> Article 30 of the Convention does not have any specific rules on retroactive effect; therefore, the general rule on jurisdiction of ICJ as having retroactive effect should prevail. Since the Baltic states acceded to the Convention without reservations, it is possible for the ICJ under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to adjudicate a dispute involving any of the Baltic states when the time of its appearance differs from the time when the situation occurred. Meanwhile, reservation made on the part of the Russian Federation that it

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*Estonian World Review*, published November 10, 2011, <http://www.eesti.ca/who-has-the-right-to-compensation-for-the-soviet-occupation-of-the-baltics-ii/article34021>; Anna Gromilova, "Resolving the Russo-Estonian Border Dispute in the Wake of the Ukrainian Crisis," *Revista de Stiinte Politice (RSP)* 51 (2016): 57, [http://cis01.central.ucv.ro/revistadestiintepolitice/files/numarul51\\_2016/5](http://cis01.central.ucv.ro/revistadestiintepolitice/files/numarul51_2016/5); Ministry of Foreign Affairs of the Republic of Lithuania [Lietuvos Respublikos užsienio reikalų ministerija], *Dėl SSRS okupacinės žalos atlyginimo*, July 17, 2007, No. (19-01)-3-19(a).

<sup>913</sup> Higgins, "Time and the Law," 502.

accepts the jurisdiction of the ICJ only to the interpretation and application of the Convention in cases that may arise after the date of the withdrawal of previous reservation, i.e. after 28 February 1989, limits the jurisdiction of the ICJ to events that occurred prior to this date. For the purposes of dispute under paragraph 1 of Article 14 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, it could be concluded that the Baltic states and the Russian Federation have accepted the same obligation concerning the jurisdiction of the ICJ as the Baltic states allow retrospective application of the jurisdiction of the ICJ.

An additional argument in favour of the possibility of adjudicating this dispute under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment is the fact that the Baltic states were under belligerent occupation of the USSR. The peculiarity of this situation is that one of the parties to the dispute is incapable of exercising its sovereign powers *de facto*, and this possibility is restored only after the end of the belligerent occupation. Thus, the date of accession to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of the Baltic states cannot be interpreted as limiting the scope of obligation concerning the jurisdiction of the ICJ compared to the obligation of the Russian Federation. Particular attention must be given to the fact that the Russian Federation, the continuing state of the USSR, has withdrawn reservation on jurisdiction of the ICJ under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment while the sovereign powers of Lithuania, Latvia and Estonia were *de facto* under its control, i.e. all the Baltic states were under belligerent occupation. This is especially true for Estonia, which acceded to the Convention only after two months since re-establishment of its independence, i.e. right after its abilities to exercise sovereign powers were restored. In the case of Latvia eight months passed between reestablishment of independence and accession. Thus, Latvia and Estonia have managed to accede to the Convention in less than one year after the restoration of their abilities to exercise sovereignty. Meanwhile, Lithuania acceded to the Convention six years after its reestablishment of independence.<sup>914</sup> Therefore, the ability for Lithuania to present this argument is more difficult, since Lithuania would have to explain this delay, as the argument that it was a state under belligerent occupation clearly would not be enough.

A final option that should be considered to adjudicate the issue of reparations for victims of the Soviet regime in the Baltic states before the ICJ is mutual consent to bring the matter before the ICJ. Taking into account the current state of affairs between the Baltic states and the Russian Federation, submission of a dispute to the ICJ on the consent by all states involved, i.e. the respective Baltic state and Russian Federation, is clearly only a theoretical assumption as

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<sup>914</sup> See footnote 889.

conclusion of special agreement between parties is required to initiate proceedings. Although earlier it was possible to start procedure at the ICJ without previous agreement of the respondent state where application to the ICJ was considered as suggestion for the other party to consent on legal resolution of the dispute by the ICJ, currently this option is restricted due to its previous use for political goals, i.e. where it was clear in advance that the respondent state would not give consent.<sup>915</sup> Although it is possible to submit application to the ICJ without consent of the other party, an application is simply transmitted to the respondent state, and no proceedings are initiated ‘unless and until the State against which such application is made consents to the Court’s jurisdiction for the purposes of the case.’<sup>916</sup> As the Russian Federation has clearly expressed its position towards the issue of reparation for the Baltic states, no further discussion on this option is necessary at the moment.

In summary, the possibility for any of the Baltic states to bring the matter of reparations for the victims of the Soviet regime for judicial settlement is only theoretical one. Such a possibility exists by claiming a violation on the part of the Russian Federation of paragraph 1 of Article 14 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to the extent that the Russian Federation, as a continuing state of the USSR, has not fulfilled its obligations under legislation of the USSR to provide reparations for victims of torture under the Soviet regime because this legislation was in force (edict of 16 January 1989) or established (edict of 13 August 1990) after the USSR has assumed compulsory jurisdiction of the ICJ under this convention since 28 February 1989.

Latvia and Estonia could be considered to have a stronger position because edict of 13 August 1990 was enacted while both states were under belligerent occupation of the USSR; however, at the time Lithuania has already pronounced its immediate independence and only effects of the edict of 16 January 1989 could be invoked to present a legal dispute on application of paragraph 1 of Article 14 of the convention. In addition, procedural requirements must also be fulfilled. While unsuccessful attempts of negotiation could be demonstrated by the Baltic states, the requirement of inability to agree on the organization of the arbitration still has to be met. The invocation of the latter option would not undermine the conclusion that the Baltic states were under belligerent occupation of the USSR, i.e. the USSR was a *de facto* sovereign of the Baltic states, as under Article 2 of the Convention torture cannot be justified by a state of war or a threat of war, internal political instability or any other public emergency, and a state is considered to be

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<sup>915</sup> Thirlway „Sources of International law“, 568-569.

<sup>916</sup> Rules of Court, art. 38, para. 5, I.C.J. Acts and Documents No. 6, p. 91.

responsible for ensuring that any person in its jurisdiction will not face activities amounting to torture.<sup>917</sup>

#### 4.2.3.2.2. *Arbitration*

Arbitration at the international level is regarded as the oldest of the legal methods for settling international disputes.<sup>918</sup> It is understood as mutual consent of state parties to a specific dispute to submit the dispute to an impartial tribunal to produce a binding decision on the basis of law. As a result, parties retain considerable control over the way the dispute is adjudicated.<sup>919</sup> Nevertheless, to start arbitration the mutual consent of the parties to the dispute is required and must be considered as essential premise to arbitration.

The Permanent Court of Arbitration (PCA) was the first permanent arbitral institution established by the Convention for the Pacific Settlement of International Disputes, concluded at The Hague in 1899 during the first Hague Peace Conference ‘to provide a forum for the resolution of international disputes through arbitration and other peaceful means’ and to strengthen the system of peaceful settlement of international disputes between states.<sup>920</sup> After the second peace conference in The Hague in 1907, the Convention for the Pacific Settlement of International Disputes was revisited, and under Article 41 the states, parties to the convention, agreed ‘to maintain the Permanent Court of Arbitration ... accessible at all times and operating, unless otherwise stipulated by the parties’.<sup>921</sup>

Due to particularities of arbitration procedure, establishment of the PCA cannot be considered as establishment of a compulsory tribunal for settlement of the all international disputes through arbitration, and this is clearly expressed in Article 42 of the convention stating that ‘[t]he Permanent Court is competent for all arbitration cases, unless the parties agree to institute a special Tribunal.’<sup>922</sup> As a result this provision should be interpreted to mean that states, parties to the Convention for the Pacific Settlement of International Disputes, will have a right to submit an international dispute to the PCA, which would be considered competent in advance

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<sup>917</sup> Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 2, *adopted* December 10, 1984, 1465 *UN Treaty Series* 85 (entered into force June 26, 1987). See also *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, I.C.J. Reports 2005, p. 168, <http://www.icj-cij.org/files/case-related/116/116-20051219-JUD-01-00-EN.pdf>, paras. 205-214.

<sup>918</sup> Merrills, „Means of dispute settlement,“ 537; Chittharanjan Felix Amerasinghe, *International Arbitral Jurisdiction* (Leiden: Brill - Nijhoff, 2011), eBook Collection (EBSCOhost), 4-7.

<sup>919</sup> Amerasinghe, *International Arbitral Jurisdiction*, 7-8.

<sup>920</sup> Permanent Court of Arbitration, “History,” *Permanent Court of Arbitration*, accessed February 26, 2017, <https://pca-cpa.org/en/about/introduction/history/>

<sup>921</sup> Convention for the Pacific Settlement of International Disputes, art. 41, October 18, 1907, *World Peace Foundation Pamphlet Series 1924* (1924): 459-479, [https://heinonline-org.ezproxy.vdu.lt:2443/HOL/Page?handle=hein.journals/wpfps9&div=46&start\\_page=459&collection=journals&set\\_as\\_cursor=1&men\\_tab=srchresults](https://heinonline-org.ezproxy.vdu.lt:2443/HOL/Page?handle=hein.journals/wpfps9&div=46&start_page=459&collection=journals&set_as_cursor=1&men_tab=srchresults).

<sup>922</sup> *Ibid.*, art. 42.

without additional agreement on its competence. Nevertheless, a general agreement on arbitration called a ‘Compromis’ is required for the PCA to accept competence in the dispute.<sup>923</sup>

Thus, creation and maintenance of the PCA can only be regarded as facilitation of arbitration procedure in cases where states decide to solve the dispute among them using this procedure. Taking into account that arbitration as a legal means of solving international disputes has wide recognition at the international level or is even sometimes required by international treaties,<sup>924</sup> the possibility of taking advantage of such facilitation must be analysed in the case of reparations for the victims of Soviet regime in the Baltic states.

The Russian Federation is listed as a party to Convention for the Pacific Settlement of International Disputes (1907) since 26 January 1910. All Baltic states have acceded to this convention only after reestablishment of their independence, i.e. Latvia since 12 August 2001, Estonia since 1 September 2003 and Lithuania since 9 January 2005. Thus, all states in the case of reparations for the victims of the Soviet regime in the Baltic states are parties to Convention for the Pacific Settlement of International Disputes (1907); and absence any special agreement on the issue, recourse through arbitration by the PCA can only be by mutual consent.<sup>925</sup>

Unfortunately, the previously established facts concerning unsuccessful negotiations between the Baltic states and the Russian Federation on the issue of reparations and current trends in the Russian Federation<sup>926</sup> make it hard to believe that establishment of the ‘Compromis’ on the matter under Article 52 of the Convention is possible. Nevertheless, participation in the Convention for the Pacific Settlement of International Disputes (1907) still can be considered useful for the Baltic states.

Paragraph 3 of Article 48 of the convention particularly states that ‘[i]n case of dispute between two Powers, one of them can always address to the International Bureau<sup>927</sup> a note containing a declaration that it would be ready to submit the dispute to arbitration.’ The International Bureau then has a duty to inform the other party of such a declaration.<sup>928</sup> By using

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<sup>923</sup> Ibid., art. 52.

<sup>924</sup> Merrils, „Means of dispute settlement,“ 540.

<sup>925</sup> Ibid., art. 42.

<sup>926</sup> Maria Smirnova, “Russian Constitutional Court Affirms Russian Constitution’s Supremacy over ECtHR Decisions,“ *EJIL: Talk*, published July 15, 2015, <http://www.ejiltalk.org/russian-constitutional-court-affirms-russian-constitutions-supremacy-over-ecthr-decisions/>; Peter Roudik, “Russian Federation: Constitutional Court Allows Country to Ignore ECHR Rulings,“ *Library of Congress*, published May 18, 2016, <http://www.loc.gov/law/foreign-news/article/russian-federation-constitutional-court-allows-country-to-ignore-echr-rulings/>.

<sup>927</sup> The International Bureau is the PCA’s Secretariat responsible for administrative support to tribunals and commissions conducting PCA dispute settlement proceedings. See Permanent Court of Arbitration, “International Bureau,“ *Permanent Court of Arbitration*, accessed February 26, 2017, <https://pca-cpa.org/en/about/structure/international-bureau/>.

<sup>928</sup> Convention for the Pacific Settlement of International Disputes, art. 48, paras. 3-4, October 18, 1907, *World Peace Foundation Pamphlet Series 1924* (1924): 459-479, [https://heinonline.org.ezproxy.vdu.lt:2443/HOL/Page?handle=hein.journals/wpfps9&div=46&start\\_page=459&collection=journals&set\\_as\\_cursor=1&men\\_tab=srchresults](https://heinonline.org.ezproxy.vdu.lt:2443/HOL/Page?handle=hein.journals/wpfps9&div=46&start_page=459&collection=journals&set_as_cursor=1&men_tab=srchresults).

this option each of the Baltic states would fulfil the requirement of inability to agree on the organization of arbitration under paragraph 1 of Article 30 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment if the Russian Federation failed to provide a response to such a declaration. Thus, if any of the Baltic states invoked responsibility of the Russian Federation for a violation of paragraph 1 of Article 14 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment before the ICJ, the previously mentioned procedural requirement for the ICJ to assume jurisdiction would clearly be fulfilled.

To sum up, the availability of legal means to solve the question of reparations for victims of the Soviet regime in the Baltic states is very limited due to required consent on any form of legal adjudication of an international dispute by all of the parties involved. The Russian Federation carefully avoids any possibility of being challenged before international bodies for this dispute by strictly limiting acceptance of the competence of particular international bodies to resolve the dispute or some part of it. Nevertheless, theoretical possibilities of a limited scope exist for the Baltic states to partly address the case of reparations for victims of the Soviet regime.

Of all available options to adjudicate this dispute by legal means, the only viable option is under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, as the Russian Federation has dropped its previous reservation on paragraph 1 of Article 30 granting jurisdiction to the ICJ to interpret this Convention for cases that may arise after 28 February 1989. However, certain procedural requirements concerning arbitration still have to be fulfilled by the Baltic states to invoke the option, and this is possible by using Article 48 of the Convention for the Pacific Settlement of International Disputes (1907). Nevertheless, this option will not reveal the actual scope of the legal dispute between the Baltic states and Russian Federation on the issue of reparation for the victims of the Soviet regime in the Baltic states, and further attempts to employ diplomatic methods would be desirable.

It is also important to note that among all the Baltic states only Estonia has accepted compulsory jurisdiction of the ICJ under paragraph 2 of Article 36 of The Statute of the ICJ without any reservations. Neither Latvia nor Lithuania has followed this path, as Latvia has not declared the acceptance of compulsory jurisdiction of the ICJ at all, and Lithuania accepted the compulsory jurisdiction of the ICJ with reservations. Both states should consider changing their positions in order open the option to adjudicating the claim of reparation for victims of the Soviet regime in case the Russian Federation also accepts compulsory jurisdiction of the ICJ under



paragraph 2 of Article 36 of The Statute of the International Court of Justice without any reservations.

In any case of invocation of state responsibility, the final question that must be answered is whether the Baltic states have lost the right to invoke responsibility of the Russian Federation on any grounds. Such grounds are provided in Article 45 of the Draft articles on Responsibility of States for Internationally Wrongful Acts.<sup>929</sup> As this question was already answered by previous legal research in academic literature, no additional analysis is required here and only a summary of the results will be provided.

Of all the Baltic states, Lithuania is considered to be the one who presents the strongest claim for reparation against the Russian Federation because of enactment of the Law on Compensation of Damage resulting from the Occupation by the USSR,<sup>930</sup> and it continues to maintain this position.<sup>931</sup> Neither waiver nor lapse of the claim can be considered as grounds for loss of the right of Lithuania to invoke responsibility of Russian Federation. That no such grounds exist in the case of Latvia was recently established by Edmunds Broks.<sup>932</sup> As for Estonia, great emphasis is given on the role of power politics concerning obstacles to invoke state responsibility to explain the reserved position of Estonia.<sup>933</sup> Nevertheless, it seems that Estonia has also not lost the right to invoke responsibility of the Russian Federation, as at least non-waiver of a claim was confirmed by the Estonian Minister of Justice Urmas Reinsalu in the end of 2015 during the meeting of the justice ministers of the Baltic states.<sup>934</sup>

As a result of this meeting, a joint declaration by the justice ministers of the Baltic states was adopted, asserting that the Baltic states should ‘prepare for international actions in accordance with International Law to claim legally and factually justified compensation from the Russian Federation.’<sup>935</sup> Thus, the position of the Baltic states remains within the same line of demanding reparation from the Russian Federation, as continuing state of the USSR, for belligerent occupation of their territory and for victims of the Soviet regime. The currently established means

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<sup>929</sup> Article 45. Loss of the right to invoke responsibility

The responsibility of a State may not be invoked if:

(a) the injured State has validly waived the claim;

(b) the injured State is to be considered as having, by reason of its conduct, validly acquiesced in the lapse of the claim. *Report of the International Law Commission to the General Assembly*, 56 U.N. GAOR Supp. No. 10 and Corr.1, at 55, U.N. Doc. A/56/10 (2001), reprinted in [2001] Yearbook of the International Law Commission, vol. II, Part Two, U.N. Doc. A/CN.4/SER.A/2001/Add.1 (Part 2).

<sup>930</sup> Mälksoo, *Illegal Annexation and State Continuity*, 259, 262; Broks, „Loss of the Right to Invoke Responsibility,” 159-160

<sup>931</sup> Dainius Žalimas, „SSRS okupācijas žalos atlyginimo įstatymas tarptautinės teisės normų kontekste,” *Jurisprudencija* 88, no. 10 (2006): 22–32, <https://www3.mruni.eu/ojs/jurisprudence/article/view/2808>.

<sup>932</sup> Broks, “Loss of the Right to Invoke Responsibility,” 150-163.

<sup>933</sup> Mälksoo, *Illegal Annexation and State Continuity*, 251-263.

<sup>934</sup> “Justice minister goes behind PM’s back to sign declaration about reparations for Soviet occupation,” *ERR*, published November 15, 2015, <http://www.jbanc.org/?page=blog&v=5&id=196>.

<sup>935</sup> Broks, „Loss of the Right to Invoke Responsibility,” 151.

at the international level to solve the dispute do not contradict this position, although they do not fully address it. Nevertheless, due to obligations assumed by the Baltic states towards victims of the Soviet regime, the established legal means should be invoked or continuous attempts to solve issue by diplomatic methods should be employed by the Baltic states.

## CONCLUSIONS AND SUGGESTIONS CONCERNING IMPROVEMENT OF REPARATIONS POLICY

**Task No. 1:** to identify the applicable set of rules of international law according to the legal status of the Baltic states in 1940–1991 under Soviet rule.

1. The occupation of the Baltic states does not fit the exact definition of the belligerent occupation under the Hague Regulations because at the time of the invasion by the USSR there was no international military conflict between the USSR and any of the Baltic states in accordance with the applicable rules of international humanitarian law. However, it was established that the Baltic states were under quasi-belligerent occupation under Soviet rule in 1940–1991, and international humanitarian law still applies to the case of the Baltic states. This proposition is supported by the fact that the USSR actually exercised effective control using military force over the territory of the Baltic states without sovereign title over it. The illegality of the sovereign power of the USSR over the territory of the Baltic states is established on both grounds: illegality of its acquisition because of aggression used against the Baltic states in violation of applicable international law at the time and inability to cure shortages of legality of title over the territory of the Baltic states, neither by prescription nor by recognition of international community.

2. Since the beginning of the belligerent occupation of the Baltic states, the USSR was bound by the Hague Regulations; due to the prolonged nature of occupation after the Second World War it was also bound by the Geneva Conventions since 1954. The Universal Declaration of Human Rights and, since 1973 the ICCPR, were the sources of applicable human rights law in the territory of the Baltic states. The analysis performed suggests that the applicability of international humanitarian law as *lex specialis* for the situation of the Baltic states does not eliminate the applicability of human rights law, especially if international humanitarian law is silent or incomplete on the particular issue. Nevertheless, protection of life; freedom from torture or cruel, inhuman or degrading treatment or punishment; freedom from slavery and servitude; prohibition of retrospective application of criminal law or heavier punishment; prohibition of arbitrary arrest, detention or exile; freedom of religion and respect to honour, reputation and family life are obligations common to both bodies of international law and as such they are primarily governed by international humanitarian law because of its status as *lex specialis*. This is especially true for protection of property because although this right appears in the Universal Declaration of Human Rights it does not appear in the ICCPR. Ensurance of the right to a fair trial until the adoption of the Geneva Conventions had to be guaranteed in accordance with human rights law instruments. Respect to privacy, home or correspondence; freedom of movement and

residence and freedom of thought and conscience are guaranteed through human rights instruments that the USSR had to apply in the territory of the Baltic states.

**Task No. 2:** in the case of the USSR's non-compliance with established international obligations, to evaluate effects of non-compliance for people of the Baltic states.

1. It was established that the USSR severely undermined obligations imposed on it due to provisions of international humanitarian law and human rights law. Thus, violations of international humanitarian law and human rights law committed against the people of the Baltic states constituted international crimes. Nevertheless, analysis of the case law of the courts of the Baltic states revealed that qualification of acts of the USSR as international crimes posed some difficulties, as not all elements of respective international crimes could be easily established in the acts committed against people of the Baltic states. For these reasons definitions of gross violations of human rights law and serious violations of international humanitarian law, established in Basic Principles and Guidelines, better accommodates the situation because the nature of these acts themselves is taken into consideration, i.e. torture, cruel, inhuman or degrading treatment, etc., to find the respective violation. Nevertheless, the general description of actions toward the people of the Baltic states under Soviet rule as international crimes is possible because of the decisions of the courts of the Baltic states, which basically sustained challenges before the European Court of Human Rights.<sup>936</sup> Under these decisions it is possible to conclude that the international crimes of genocide, crimes against humanity (in Latvia, Estonia and Lithuania) and war crimes (in Lithuania) were committed under Soviet rule in the Baltic states. Accordingly, the defensible proposition that the USSR, acting as occupant, breached its international obligations to protect people in its occupied territories of other states is confirmed.

2. Status of a victim is the precondition to acquire the right to a remedy; thus it must be clearly defined who could be considered a victim of an international crime. As international treaties applicable to the case of the Baltic states do not provide an explicit definition of a victim of international crimes, the definition established in Basic Principles and Guidelines serves as a yardstick to evaluate compliance of domestic law granting status of a victim with provisions of international law. In accordance with the definition in Basic Principles and Guidelines, all the Baltic states consider a victim to be any person against whom an act was committed if the act constitutes a gross violation of human rights law or a serious violation of international humanitarian law, regardless of whether the perpetrator is identified and whether the violation is an act or omission. The link between a violation and harm or loss suffered still needs to be established. All the Baltic states recognize persons whose harm or loss suffered is a result of a

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<sup>936</sup> Except convictions of genocide, although limited possibility to reverse case-law of the ECtHR exists.

violation committed against them as victims; the broadest recognition for indirect victims is granted under the domestic law of Lithuania. Additionally, under Lithuanian law the corpus of victims is very broad and the status of a victim is granted to persons who have not suffered from violations that constitute a gross violation of human rights law or a serious violation of international humanitarian law. Such a broad definition might undermine the general understanding of the gravity of repressions that were inflicted under the Soviet regime, and this peculiarity of Lithuanian law is not addressed in this thesis in the light of reparations.

**Task No. 3:** to identify an applicable legal concept of reparation to victims of the Soviet regime in the Baltic states.

1. As it was established that the Baltic states were under belligerent occupation of the USSR, the second defensible proposition was confirmed and there is an obligation for the USSR to provide reparations in accordance with Article 3 of the Hague Convention (IV) respecting the Laws and Customs of War on Land (1907) and human rights law as established in Article 8 of the Universal Declaration of Human rights and paragraph 3 of Article 2 of the ICCPR. Thus, reparations consist of such elements as restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition. They form a substantive part of the remedy provided for a victim in cases of gross violations of international human rights law or serious violations of international humanitarian law. This concept developed due to changes of international law after the Second World War because war was declared to be an illegal means of solving disputes between states and human rights law was highly developed at the international level. It was reflected in Basic Principles and Guidelines, which expanded existing legal obligations under international human rights law and international humanitarian law as established primarily in Article 3 of the Hague Convention (IV) respecting the Laws and Customs of War on Land (1907). Subsequent developments of international humanitarian law and human rights law altered the initial limitation of compensation as the only possible remedy for violations of international humanitarian law and the concept of reparation covered such elements as restitution, compensation and satisfaction as early as the belligerent occupation of the Baltic states had begun. Further developments of human rights law introduced such elements as rehabilitation and guarantees of non-repetition. Thus, the defensible proposition that only compensation as a form of reparation is possible for the victims of Soviet regime in the Baltic states was not confirmed.

2. The purified concept of reparations in Basic Principles and Guidelines revealed that constituent parts of reparations are the same irrespective of the violation type, i.e. gross human rights law violations or serious violations of international humanitarian law. Nevertheless, possibilities to implement the right to reparation are clearly affected by the particular body of international law, i.e. international humanitarian law or human rights law, since human rights law

is the only body of international law that grants rights for individuals at the international level, subject to particular treaty obligations of a state. Meanwhile, when natural persons of one state are harmed because of the actions of another state that violated international humanitarian law, especially if harm is done by activities of armed forces, the state's responsibility can be invoked only by the state whose nationals were hurt. Thus, the Baltic states are the only possible representatives of victims of the Soviet regime that have a right to demand state responsibility because of violations of international humanitarian law committed against people of the Baltic states.

**Task No. 4:** to reveal reparatory measures applied for the victims of the Soviet regime in the Baltic states.

1. It was established that remedial measures for the victims of the Soviet regime in the Baltic states were applied by both the occupied states (the Baltic states) and the occupying power (the USSR). This does not confirm the defensible proposition that the victims of the Soviet regime in the Baltic states have not received reparations. On the basis of the established applicable framework of reparations, it is noteworthy that the victims were entitled to such elements of reparation as restitution, compensation, satisfaction and rehabilitation. However, their actual application was affected by political circumstances, i.e. re-establishment of the independence of the Baltic states and the collapse of the USSR. Initial reparatory measures, established by the USSR, encompassed restitution in a form of restoration of liberty and in limited cases, i.e. generally only for repressed communist party members, restoration of employment rights, pension rights, property in a form of provision of accommodation. Fixed compensation for material damages was also established as well as rehabilitation in a form of medical services and satisfaction in a form of commemoration of victims. Union republics of the USSR, including the institutions of the occupant in the territory of the Baltic states, were obligated to take corresponding measures, but legislation enacted in the territory of the Baltic states was generally of a broader scope. Since the USSR had not used the power to annul legislation of the institutions of the occupant in the territory of the Baltic states that failed to conform with the legislation of the union in accordance with the Constitution of the USSR of 1977, it also assumed obligations of remedies towards the people of the Baltic states in a way that was established under legislation of the institutions of the occupant in the territory of the Baltic states.

2. The re-establishment of independence of the Baltic states and collapse of the USSR halted the reparatory policy of the USSR, and each of the Baltic states created their own reparatory policies. The Baltic states provided reparations generally of non-material character, i.e. restitution in the form of restoration of enjoyment of human rights, satisfaction and rehabilitation in a form of medical and social services. Restoration of property and citizenship cannot be regarded as

reparations for victims in a form of restitution, because they were not aimed particularly to remedy victims, but generally to overcome consequences of the Soviet regime. Satisfaction encompassed both groups of measures, i.e. measures aimed at recognition of victimization and acknowledgement of responsibility of guilty ones and measures aimed at disclosure of truth regarding injustices and preservation of memory. In the first group of satisfaction measures, it is noteworthy that victims have not received a public apology, because the occupied Baltic states were not those responsible for repressions; a public apology should be given by occupying state and its institutions. The Communist Party of Estonia was the only communist party to accept responsibility in all the Baltic states, and it did so for repressions that were faced by victims in Estonia under the Soviet regime and in such a manner that offered at least partial recognition of wrong by one of the subjects responsible of repressions. The second group of applicable measures that aimed at preservation of memory included not only creation of new symbols but also reinstatement of symbols of the previously independent state. Thus, their orientation towards victims is sometimes not clearly apparent, as memory is also connected with the loss of independence and not only repressions.

**Task No. 5:** to evaluate discrepancies between the applicable legal concept of reparation and its actual implementation in the case of the Baltic states in the light of legal obligations of states involved.

1. Taking everything into account, the reparatory policies implemented by the Baltic states are not enough because they can only be treated as obligations of the Baltic states resulting from the requirement to ensure protection of human rights of victims within their territory and not as their obligations resulting from serious violations of international humanitarian law because it was not the Baltic states that were responsible for these violations. The USSR itself has also limited its reparatory policy, and such limitations resulted not only in denied redress for all victims of the Soviet regime in the Baltic states but the USSR also has not provided compensation and satisfaction in the form of a public apology despite the fact that these are mandatory elements of reparation because of provisions of article 3 of the Hague Convention (IV) respecting the Laws and Customs of War on Land (1907), article 8 of the Universal Declaration of Human Rights and the obligations assumed by the USSR itself. Moreover, in order to implement the final element of reparation—guaranties of non-repetition—it is not enough to establish rule of law and to ensure respect for human rights within the Baltic states alone. Strong commitment of the international community towards such values as non-recognition of any kind of aggression as an allowable means of solving international disputes between states, a nation's right to self-determination and equal protection of basic human rights are also required because insufficient protection of these

values at the international level resulted in the loss of independence of the Baltic states and sufferings of their people.

2. Established discrepancies between applicable legal concepts of reparation and their actual implementation in the case of the Baltic states is visible because of two different reasons:

2.1. First is the difference in the perceived nature of violations by the Baltic states and the USSR. The USSR treated repressions as gross violations of human rights within the whole territory of the USSR and not as serious violations of international humanitarian law, especially concerning the case of the Baltic states. However, since it was established that the Baltic states were under belligerent occupation of the USSR, the position of treating actions toward the people of the Baltic states under the Soviet regime as serious violations of international humanitarian law would be more accurate and would impose a clear obligation on the USSR to provide reparations in accordance with Article 3 of the Hague Convention (IV) respecting the Laws and Customs of War on Land (1907). Meanwhile, treatment of these repressions by the USSR as gross human rights violations limits the scope of reparatory measures only to the obligations assumed by the USSR.

2.2. The next significant difference is in the perception of a victim of the Soviet regime by the USSR and the Baltic states. All the Baltic states granted status of a victim to a person who suffered harm or loss because of gross violations of human rights law or serious violations of international humanitarian law under the Soviet regime. However, in the USSR only pre-Stalinist and Stalinist policies was declared as contrary to the values of the USSR, while punishment of freedom fighters of the Baltic states and other former union republics as criminals was considered to be legitimate. In addition, if a person suffered from a gross violation or serious violation not only because of pre-Stalinist and Stalinist policies, he was not considered to be a victim. Thus, the USSR severely limited coverage of its reparatory policy, and this was not compatible with the obligations of the USSR as an occupying power.

**Task No. 6:** to identify subjects currently responsible for reparation for the victims of the Soviet regime in the Baltic states and a possible framework of application of responsibility.

1. Since the USSR ceased to exist, it is the Russian Federation as the continuing state of the USSR against which state responsibility can be invoked. The continuity of the statehood of the USSR by the Russian Federation can be established on both levels, domestic and international. First, the current constitutional and administrative order of the Russian Federation was based on the Soviet legacy visible in the Declaration on the Sovereign Statehood of the RSFSR. Domestic law, especially law concerning citizenship, also provides for continuity of the identity of the USSR, because the citizenship of the Russian Federation was granted or is available to former citizens of the USSR and international treaties on citizenship issues to which the USSR was party



are applicable in the territory of the Russian Federation. Although ambiguity exists on the actual form of cessation of the USSR under the Belovezha Accords and Declaration of Alma Ata, the continuity of the identity of the USSR by the Russian Federation was based on the facts that (1) most rights and obligations imposed by treaties on the USSR were assumed by the Russian Federation (especially those concerning military issues and nuclear weapons) and (2) after initial attempts to divide debts and assets of the USSR, the Russian Federation finally assumed payment of all foreign debts of the USSR and claimed all of the USSR's assets abroad. The Russian Federation also accepted, in a selective manner, responsibility for the USSR's internationally wrongful acts and continued membership in the United Nations and Security Council as well as in all other organs and organisations of the United Nations system. The defensible proposition that the Russian Federation is responsible for the remedies of victims of the Soviet regime in the Baltic states is confirmed.

2. Concerning a possible framework of application of responsibility, it was established that international humanitarian law does not have special rules governing application of responsibility of a state for its violations, and only the Baltic states can implement the right to reparation for victims of the Soviet regime. Article 3 of the Hague Convention (IV) respecting the Laws and Customs of War on Land is the only applicable rule of international humanitarian law for the problem analysed here, and general rules as enumerated under the Draft Articles on Responsibility of States should be applied to determine the responsibility of the Russian Federation as long as they reflect customary international law. This is even more apparent in the case of prolonged belligerent occupations, as international humanitarian law is not capable of dealing with situations when an occupying power occupies territory of a state not because of a military need in a continued state of warfare but because of an interest to acquire that territory.

**Task No. 7:** to suggest possible legal solutions for implementation of applicable legal concept of reparation for the victims of the Soviet regime in the Baltic states.

1. With the Baltic states being the only subjects that can demand responsibility of a state for repressions committed against victims of the Soviet regime, possible legal solutions to invoke responsibility of the Russian Federation were identified. The analysis of the bilateral treaties between the respective Baltic state and the Russian Federation revealed that they were generally future looking and established principles of future mutual relations recognizing the status of each other as sovereign states. Thus, they cannot be considered to solve the question of reparation between the Baltic states and the Russian Federation. In the case of Latvia, no such bilateral treaty has entered into force at all, as the Russian Federation has not ratified it. As no other bilateral treaties have been concluded on the issue, it can be concluded that states are currently incapable

of solving the issue themselves, and further diplomatic means are required; alternatively, the question should be brought for adjudication before international tribunals.

2. Analysis of the other available measures at the international level revealed that negotiation, enquiry and conciliation are methods that might be attempted to resolve the dispute on reparation for victims of the Soviet regime in the Baltic states. On the other hand, mediation and resort to regional agencies or arrangements would be hard to implement. In the case of mediation, it is hard not to compromise justice that needs to be restored in cases of massive abuses, and there is no regional agency having an effective mechanism on peaceful dispute resolution and membership of all parties to the dispute in order to handle the dispute effectively. In case of negotiation, the Public Assembly model is recommended despite its complexity, because this model ensures a greater degree of compliance within the agreement reached in case of successful negotiations. However, if a bilateral agreement is not adopted on the outcomes of negotiation or enquiry, the implementation of the result of their application and implementation of the result of conciliation would depend on the good faith of the Russian Federation on the condition that the Russian Federation will engage in the suggested diplomatic methods; that is hardly probable at the moment.

3. Another available option to adjudicate the dispute between the Baltic states and the Russian Federation is by claiming a violation on the part of the Russian Federation of paragraph 1 of Article 14 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in the ICJ to the extent that the Russian Federation, as a continuing state of the USSR, has not fulfilled its obligations to provide reparations for victims of torture in the USSR under legislation that was in force (edict of 16 January 1989) or established (edict of 13 August 1990) after the USSR assumed compulsory jurisdiction of the ICJ under the convention, i.e. after 28 February 1989. As restitution in general was already provided by the USSR, unfulfilled obligations would encompass fixed compensation for material damages, rehabilitation in the form of medical services and satisfaction in the form of commemoration of victims. This option would be available as soon as the procedural requirements under paragraph 1 of Article 30 of the Convention concerning arbitration are fulfilled by the Baltic states. This is possible by using Article 48 of the Convention for the Pacific Settlement of International Disputes (1907) before the PCA, as the Baltic states and the Russian Federation are participants of this convention. The fact that the Baltic states acceded to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and assumed ICJ jurisdiction on interpretation and application of this convention later than the Russian Federation should not be construed as eliminating this possibility, because the Baltic states accepted the jurisdiction of the ICJ under the Convention without reservations, meaning that retrospective application of jurisdiction of the ICJ

is possible while the Russian Federation made reservation on jurisdiction of ICJ only to the cases that appear after 28 February 1989. However, Lithuania's delay in acceding to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment after re-establishing independence might be interpreted as limiting its possibility to present a claim. In addition, it must be admitted that the option to invoke responsibility of the Russian Federation under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment will not reveal the actual scope of the legal dispute between the Baltic states and the Russian Federation on the issue of reparations for victims of the Soviet regime in the Baltic states. Nevertheless, its invocation would not undermine the conclusion that the Baltic states were under belligerent occupation of the USSR, as under Article 2 of the Convention, torture cannot be justified by a state of war or a threat of war, internal political instability or any other public emergency, and a state is considered to be responsible for ensuring that any person in its jurisdiction will not face activities amounting to torture under paragraph 1 of Article 1 of the Convention. In addition, further resolution of the dispute by diplomatic means would be possible to the scope that was not dealt with under this option. Accordingly, the final defensible proposition that there are no possible legal means to enforce right to reparation for the victims of Soviet regime in the Baltic states is confirmed in part.

Scheme on the main results of this research is provided in Figure 3.

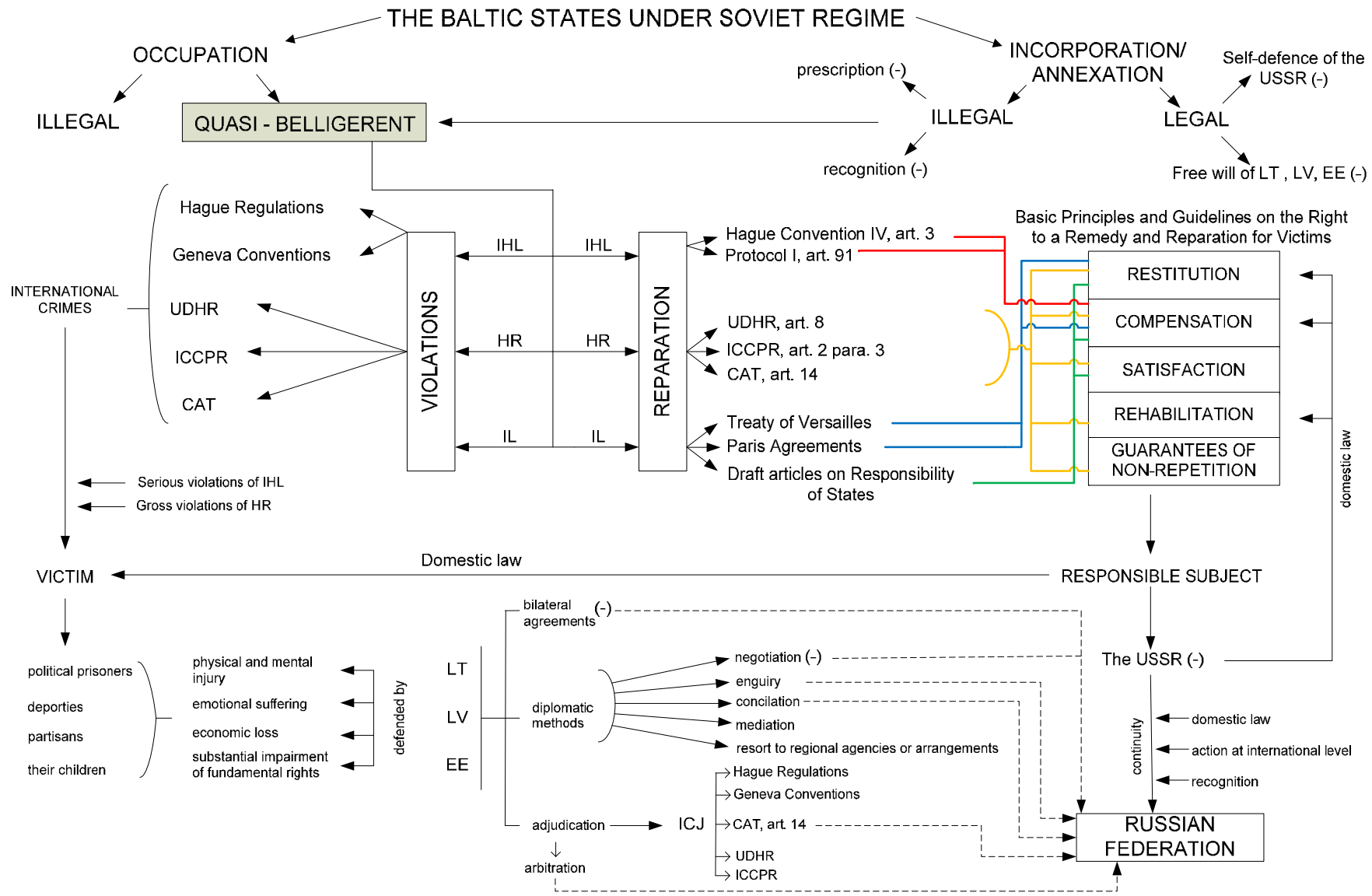


Figure 3. Scheme on the main results of research

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**REPARATION IN INTERNATIONAL LAW: REMEDIES FOR VICTIMS  
OF SOVIET OCCUPATION**

Doctoral Dissertation

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