19.12.2023

Report on the special status of Åland under international law and on the legal issues related to the Russian Consulate in Mariehamn

Ministry for Foreign Affairs of Finland

Publications of the Ministry for Foreign Affairs 2023:22

Report on the special status of Åland under international law and on the legal issues related to the Russian Consulate in Mariehamn

Ministry for Foreign Affairs of Finland Helsinki 2023

Publication distribution

Institutional Repository for the Government of Finland Valto

julkaisut.valtioneuvosto.fi

Ministry for Foreign Affairs of Finland

ISBN pdf: 978-952-281-790-7
ISSN pdf: 2737-0844

Layout: Government Administration Department, Publications

Helsinki 2023 Finland

Description sheet
19 December 2023

Report on the special status of Åland under international law and on the legal issues related to the Russian Consulate in Mariehamn

Publications of the Ministry for Foreign Affairs 2023:22

Publisher	Ministry for Foreign Affairs of Finland		
Group author	Ministry for Foreign Affairs of Finland		
Language	English	**Pages**	38

Abstract

The first part of the report discusses the special status of Åland under international law. This status is based on several treaties in force and references in other treaties as well as long-established consistent State practice. Of particular relevance is that Åland's special status was reaffirmed after the World Wars and other major political upheavals. This status is also considered to have been established as regional European customary law. In addition to these aspects, the first part of the report contains an evaluation of the grounds in the law of treaties for unilaterally denouncing a treaty and the applicability of those grounds to the treaties concerning the demilitarisation and neutralisation of Åland.

The second part of the report focuses on international law issues pertaining to the Russian Consulate in Mariehamn, discussing first the grounds in the law of treaties for denouncing or suspending the Article concerning the Consulate in the bilateral treaty between Finland and Russia. In this context, particular attention is paid to the Vienna Convention on the Law of Treaties, Article 62 (a fundamental change of circumstances) and Article 60 (a material breach of a treaty). Moreover, the second part of the report discusses countermeasures under general international law and conditions for closing down the Consulate as a countermeasure.

Keywords	Åland, international law, demilitarisation, demilitarised zones		
ISBN PDF	978-952-281-790-7	**ISSN PDF**	2737-0844
URN address	https://urn.fi/URN:ISBN:978-952-281-790-7		

Kuvailulehti
19.12.2023

Kansainvälisoikeudellinen selvitys Ahvenanmaan kansainvälisestä erityisasemasta ja Venäjän Maarianhaminan-konsulinvirastoon liittyvistä oikeudellisista kysymyksistä

Ulkoministeriön julkaisuja 2023:22

Julkaisija	Ulkoministeriö		
Yhteisötekijä	Ulkoministeriö		
Kieli	englanti	**Sivumäärä**	38

Tiivistelmä

Selvityksen ensimmäinen osa tarkastelee Ahvenanmaan kansainvälisoikeudellista erityisasemaa, joka rakentuu useiden voimassa olevien valtiosopimusten ja sopimusviittausten sekä pitkäaikaisen johdonmukaisen valtiokäytännön varaan. Erityistä merkitystä on sillä, että Ahvenanmaan erityisasema on vahvistettu uudelleen maailmansotien ja muiden merkittävien poliittisten muutosten jälkeen. Alueen erityisaseman katsotaan vakiintuneen myös alueelliseksi eurooppalaiseksi tapaoikeudeksi. Näiden näkökohtien lisäksi selvityksen ensimmäisessä osassa arvioidaan valtiosopimusoikeudellisia perusteita valtiosopimuksen yksipuoliseen irtisanomiseen samoin kuin niiden soveltuvuutta Ahvenanmaan demilitarisointia ja neutralisointia koskeviin sopimuksiin.

Selvityksen toinen osa keskittyy Venäjän Maarianhaminan konsulinvirastoa koskeviin kansainvälisoikeudellisiin kysymyksiin. Ensiksi arvioidaan valtiosopimusoikeudellisia edellytyksiä konsulinvirastoa koskevan, Suomen ja Venäjän kahdenväliseen valtiosopimukseen sisältyvän artiklan irtisanomiseen tai sen soveltamisen keskeyttämiseen. Tässä yhteydessä kiinnitetään erityistä huomiota valtiosopimusoikeutta koskevan Wienin sopimuksen 62 artiklaan (olosuhteiden olennainen muutos) ja 60 artiklaan (olennainen sopimusrikkomus). Lisäksi tarkastellaan yleisen kansainvälisen oikeuden mukaisia vastatoimia ja edellytyksiä konsulaatin sulkemiselle vastatoimena.

Asiasanat	Ahvenanmaa, kansainvälinen oikeus, demilitarisointi, demilitarisoidut alueet		
ISBN PDF	978-952-281-790-7	**ISSN PDF**	2737-0844
Julkaisun osoite	https://urn.fi/URN:ISBN:978-952-281-790-7		

Presentationsblad
19.12.2023

Folkrättslig utredning om Ålands internationella särställning och rättsliga frågor som gäller Rysslands konsulat i Mariehamn

Utrikesministeriets publikationer 2023:22

Utgivare	Utrikesministeriet		
Utarbetad av	Utrikesministeriet		
Språk	engelska	**Sidantal**	38

Referat

I den första delen av utredningen granskas Ålands folkrättsliga särställning som bygger på flera gällande internationella fördrag och hänvisningar till sådana samt på långvarig och konsekvent statspraxis. Av särskild vikt är att Ålands särställning har bekräftats efter världskrigen och andra stora politiska förändringar. Särställningen anses också ha etablerad regional europeisk sedvanerättslig status. Därutöver bedöms i utredningens första del de traktaträttsliga grunderna för ensidig uppsägning av fördrag och deras tillämplighet på avtalen om demilitarisering och neutralisering av Åland.

I den senare delen granskas de folkrättsliga aspekterna gällande Rysslands konsulat i Mariehamn. Först bedöms de traktaträttsliga förutsättningarna att säga upp eller suspendera den relevanta artikeln i det bilaterala fördraget mellan Finland och Ryssland. Särskild uppmärksamhet ägnas åt artikel 62 (fundamental förändring av omständigheter) och artikel 60 (väsentligt brott mot traktat) i Wienkonventionen om traktaträtten. Vidare granskas folkrättsliga motåtgärder samt förutsättningarna att som motåtgärd stänga konsulatet.

Nyckelord	Åland, internationell rätt, demilitarisering, demilitariserade områden		
ISBN PDF	978-952-281-790-7	**ISSN PDF**	2737-0844
URN-adress	https://urn.fi/URN:ISBN:978-952-281-790-7		

Contents

INTRODUCTION

The Åland Islands (hereinafter Åland) have a recognized status under international law as a demilitarised and neutralised area. This status is based on treaties binding upon Finland and on regional European customary international law. No State is known to ever have questioned the special status of Åland, which includes regional autonomy of the province and the constitutionally safeguarded language rights and cultural rights of its residents. The Åland decision taken by the League of Nations, which also formed the basis for the Åland Convention of 1921 (Finnish Treaty Series (FTS) 1/1922), is often held up as a textbook example of how disputes between States can be settled peacefully and sustainably.

Clarifying the legal obligations concerning Åland has been considered necessary in the changed security situation in Europe, particularly in view of the full-scale war of aggression Russia has waged against Ukraine since 24 February 2022 and of Finland's accession to the North Atlantic Treaty Organization (NATO) in spring 2023. In addition, questions have been raised in the public as to whether Finland could unilaterally denounce its treaty obligations concerning the demilitarisation and neutralisation of Åland.

The first part of the present report discusses the special status enjoyed by Åland under international law. Åland has been a demilitarised area continuously since 1856. The special status of Åland under international law is based on several treaties in force and references in other treaties as well as long-established consistent State practice. Of particular relevance is that Åland's special status was reaffirmed after the World Wars and other major political upheavals. This status is also considered to have been established as regional European customary law. These aspects are discussed below in section 1.1, while section 1.2 contains an evaluation of the grounds in the law of treaties for unilaterally denouncing a treaty and the applicability of those grounds to the treaties concerning the demilitarisation and neutralisation of Åland.

The second part of the report focuses on international law issues pertaining to the Russian Consulate in Mariehamn. Section 2.1 contains a discussion of the grounds in the law of treaties for denouncing or suspending the Article concerning the Consulate in the bilateral treaty between Finland and Russia, with particular reference to the Vienna Convention on the Law of Treaties, Article 62 ('Fundamental change of circumstances') and Article 60 ('Termination or suspension of the operation of a treaty as a consequence of its breach'). Section 2.2 discusses countermeasures under general international law and conditions for closing down the Consulate as a countermeasure.

1 Special status of Åland under international law

1.1 International regulation on Åland

Treaties

Demilitarisation of the Åland archipelago was originally agreed between France, Russia and the United Kingdom in the Åland Convention of 1856, which was subsequently incorporated into the 1856 Treaty of Paris that ended the Crimean War. Although Finland did not acknowledge succession to treaties in respect of Russia after becoming independent in 1917 and did not accept being bound by the Åland Convention of 1856, the Finnish Government did, in connection with the Åland decision of the League of Nations in 1921, confirm that it would respect the special status of Åland under international law. The International Committee of Jurists appointed by the League of Nations had already the year before concluded that the Åland Convention of 1856 remained in force and stressed its significance for general European interests.[1]

Today, the most important treaty concerning the demilitarisation of Åland is the aforementioned Åland Convention of 1921, formally the *Convention Relating to the Non-fortification and Neutralisation of the Aaland Islands*. In this context, non-fortification, i.e. demilitarisation, means that no permanent fortifications shall be erected on the islands.[2] Neutralisation, or neutral status, means that the area of Åland shall be excluded from all military action.[3]

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1 Report of the Committee of Jurists, League of Nations Official Journal, Supplement Special, no. 3 (1920), pp. 18–19.

2 Article 3 of the 1921 Convention: 'No military or naval establishment or base of operation, no military aircraft establishment or base of operations, and no other installation used for war purposes shall be maintained or set up in the zone described in Article 2.' The concept of a 'demilitarised zone' as it is understood today is broader and includes the neutral status element. See e.g. Article 60 of the Protocol Additional to the Geneva Conventions of 12 August 1949, relating to the Protection of Victims of International Armed Conflicts (Protocol 1) (FTS 82/1980).

3 Article 6 paragraph 1 of the 1921 Convention: 'In time of war, the zone described in Article 2 shall be considered as a neutral zone and shall not, directly or indirectly, be used for any purpose connected with military operations.'

The Åland area defined in the Convention includes not only the islands themselves but also territorial waters to a distance of 3 nautical miles from shore and the airspace above the islands and their territorial waters.[4] The Convention provides for several exceptions that allow Finland, as the territorial State, to monitor the security of Åland in time of peace and to take the strictly necessary measures in the case of an armed attack.[5] The Convention was concluded among the coastal States of the Baltic Sea, France, Italy and the United Kingdom as per the decision of the League of Nations. The Soviet Union, not being a member State of the League of Nations, remained outside the Convention. In addition to Finland, the current States parties of the Convention are Denmark, Estonia, France, Germany, Iceland, Italy, Latvia, Poland, Sweden and the United Kingdom.

The third treaty in respect of the demilitarisation of Åland was concluded between Finland and the Soviet Union in 1940 (FTS 24/1940). In this *Agreement between the Union of Soviet Socialist Republics and Finland concerning the Åland Islands*, the Åland area was defined in the same way as in the 1921 Convention but the Agreement does not contain provisions on neutralisation. The Agreement gave the Soviet Union the right to maintain a Consulate in Åland which, in addition to the usual consular functions, had the competence to verify the fulfilment of 'the obligations undertaken [...] with regard to the demilitarisation and non-fortification of the Åland Islands'.[6] In 1992, Finland and Russia confirmed that this Agreement remains in force in their bilateral relations. [7]

4 Article 2 of the 1921 Convention. Regarding the limits of the demilitarised and neutralised zone of Åland, see also the relevant notification of the Ministry for Foreign Affairs (FTS 31/2013).

5 Articles 4 and 6 of the 1921 Convention contain exceptions pertaining to Finland in time of peace and in time of war, respectively. Moreover, Article 7 paragraph 2 stipulates: 'If the neutrality of the zone should be imperilled by a sudden attack either against the Aaland Islands or across them against the Finnish mainland, Finland shall take the necessary measures in the zone to check and repulse the aggressor until such time as the High Contracting Parties shall, in conformity with the provisions of this Convention, be in a position to intervene to enforce respect for the neutrality of the islands.'

6 Article 3 of the 1940 Agreement.

7 It was announced on the same occasion that certain treaties that had been in place between Finland and the Soviet Union would lapse. See FTS 102/92.

The treaties concerning the demilitarisation of Åland constitute a long-established treaty regime that has been repeatedly confirmed in State practice. The 1920 report by the League of Nations' Committee of Jurists already stated that the significance of the 1856 Convention extended beyond its original signatory States. The special status of Åland was considered to be consistent with broader European interests and to form part of 'European law'. The report concluded that the nature of the Convention as a 'settlement regulating European interests' meant that it could not be terminated or amended either by the acts of one particular party or by several parties together, adding that the Convention was still in force.[8] The new Convention signed in 1921 continued the special status of Åland enshrined in the 1856 Convention, expanded it to include neutralisation and further specified the limits of the area. The 1921 Convention also provided for exceptions in respect of the defence of the islands and for the supervisory function, in which the Council of the League of Nations played a key role.

What is also important in respect of the 1921 Convention is the context in which it was concluded: the decision issued by the League of Nations in that same year in the dispute between Sweden and Finland in which Sweden claimed Åland, referring to the right of self-determination of the Swedish-speaking population of the islands. The crucial element for Finland in the Åland decision of the League of Nations was the ruling that the islands were to remain part of Finland's territory. The second element was the conclusion of a European convention to continue the demilitarised status of the islands, which responded to Sweden's long-standing security concern of a potential threat from Åland directed at Stockholm. The third element had to do with the autonomy of Åland and the safeguarding of the language rights and cultural rights of its residents. Provisions on these rights were included in a resolution adopted by the Council of the League of Nations.[9] The Åland decision was a balanced deal where every party to the dispute gained something and whose elements were interconnected. The nature of the 1921 Convention as part of this broader context is reflected in the unusual provision in Article 8, which states that '[t]he provisions of this Convention shall remain in force in spite of any changes that may take place in the present *status quo* in the Baltic Sea'. This can be taken to mean that the parties to the Convention intended the arrangement to be permanent, and their subsequent practice in applying the Convention supports this interpretation.

8 Report of the Committee of Jurists, pp. 18–19.

9 Resolution of the Council of the League of Nations on the Aaland (Åland) Islands, 24 June 1921.

The 1940 Agreement further reinforced the special status of Åland, given that the Soviet Union was not a party to the 1921 Convention, nor had it recognised the Convention. After the Second World War, the special status of Åland was confirmed in the 1947 Treaty of Paris (FTS 20/1947), where it was stated that the Åland Islands 'shall remain demilitarised in accordance with the situation as at present existing'.[10] The special status of Åland under international law was also acknowledged in 1995, when Finland joined the European Union (EU). This special status was referred to in the Åland Protocol appended to the Act of Accession.[11] The relevance of the 1921 Convention for the autonomy of Åland was cited in the declaration given by Finland in the same context, referring both to the resolution of the League of Nations and the treaties on the demilitarisation of Åland as grounds for Åland's special status recognised under international law.[12]

Finland has also referred to the special status of Åland under international law in the context of certain other treaties. In the government proposal concerning the approval of the Treaty of Lisbon of the EU, it is noted that the amendments made to the provisions on the Common Foreign and Security Policy of the EU with the Treaty of Lisbon have no bearing on the status of Åland under international law.[13] The demilitarised zone of Åland was also taken into account in the NEFAB State Level Agreement (FTS 94/2012) with Estonia, Latvia and Norway establishing the North European Functional Airspace Block.[14] In the government proposal concerning Finland's accession to the North Atlantic Treaty Organization (NATO) adopted in 2022, it was noted that the special status of Åland under international law would remain valid.[15]

The long-established status of the demilitarisation of Åland is also of importance in the context of the 1982 UN Convention on the Law of the Sea (FTS 50/1996), for passage through the South Quark [Finnish: Ahvenanrauma], where the territorial seas of Finland and Sweden meet. Under the general rule of Article 35 of the Convention on the Law of the Sea concerning straits used for international navigation between one and another part of the high seas or an exclusive

10 Article 5 of the Treaty of Paris (1947). This Treaty was signed on the one part by Finland and on the other part by Australia, Belarus, Canada, Czechoslovakia, India, New Zealand, South Africa, the Soviet Union, Ukraine and the United Kingdom.

11 Official Journal of the European Communities, 29 August 1994, Protocol no. 2 – on the Åland Islands.

12 EU doc. CONF-SF 20/94, para b-4.

13 HE 23/2008 vp.

14 HE 84/2012 vp.

15 HE 315/2022 vp, p. 73.

economic zone, all ships and aircraft enjoy the right of transit passage even in areas of territorial sea. In order to avoid this state of affairs, Finland and Sweden, when signing and ratifying the Convention, deposited declarations in which they stated that the regime of *innocent passage* would remain in force in the South Quark.[16] The differences between the concepts of 'transit passage' and 'innocent passage' concern particularly military craft. In innocent passage, foreign submarines must navigate on the surface, and passage of military aircraft is not permitted. In transit passage, no such restrictions exist. Finland and Sweden referred in their declarations to Article 35(c) of the Convention on the Law of the Sea, which allows an exception to the general rule if passage in a strait 'is regulated in whole or in part by long-standing international conventions in force specifically relating to such straits'. In the case of the South Quark, the 1921 Convention regulates passage in part, i.e. in that portion of the strait which falls within the demilitarised area of Åland[17] but it is of relevance as described above to international navigation in the Swedish side of the strait.

What is noteworthy about the demilitarisation of Åland is that it was reaffirmed after both World Wars and has never been interrupted. All treaties concluded in respect of Åland have reinforced the special status of the islands under international law. As described above, this status was further affirmed in the context of subsequent treaty arrangements entered into by Finland with the European Union and NATO. As the territorial State, Finland has regularly informed the States parties of the 1921 Convention and Russia of issues concerning the interpretation and application of the Convention.[18] It is also of major relevance that no State either in the Baltic Sea region or more generally, for instance in the context of the UN Convention on the Law of the Sea, has ever disputed the special status of Åland under international law.

16 Available online at https://www.un.org/depts/los/convention_agreements/convention_declarations.htm.

17 Article 5 of the 1921 Convention provides for innocent passage through the demilitarised zone of Åland.

18 Such cases include interpretation of Article 4(c) of the 1921 Convention regarding the use of military helicopters in search and rescue operations (1969), the demarcation of the border between Finland and Sweden on the islet of Märket (1984) and the accession of Finland to the North Atlantic Treaty (2022).

Status under customary international law

The consistent and representative State practice in respect of the demilitarisation and neutralisation of Åland has also broader legal significance in that the special status of Åland is considered to be established as regional European customary law.[19] 'Customary international law' is understood to mean general State practice that is accepted as law. For such general practice to be accepted as customary international law, it must be widespread, representative and consistent.[20] International law also recognises particular customary law, where a rule or regime under customary law only applies to a limited number of States. In such cases, each of these States must have accepted the rule or regime as law among themselves.[21] As described above, the demilitarisation of Åland applies as a treaty obligation on all States in the region, and the neutralisation applies to the States parties to the 1921 Convention. The demilitarisation and neutralisation have also been more widely accepted, in the context of both the European Union and the UN Convention on the Law of the Sea. It should be noted in this regard that the Soviet Union did not react in any way to the declarations deposited by Finland and Sweden when signing the UN Convention in 1982, nor did Russia when the declarations were reaffirmed on the occasion of the ratification of the Convention in 1996.

Treaties may play a significant role in the formation of customary international law, for instance by facilitating the emergence of general and consistent State practice.[22] The multiple treaties concerning Åland have in this way contributed to the establishment of customary international law through long-standing, representative and consistent State practice.[23] This principle was affirmed in the Vienna Convention on the Law of Treaties (1969) (FTS 32–34/1980), Article 38 , which provides that a treaty rule may become binding upon a third State as a

19 See *e.g*. HE 84/2012 vp.

20 International Law Commission, Draft Conclusions on the Identification of Customary International Law, with commentaries (2018), UN Doc. A/73/10, para 66, conclusion 8.

21 *Ibid*., conclusion 17, commentary para 7.

22 *Ibid*., conclusion 11. See also *Continental Shelf (Libyan Arab Jamahiriya/Malta*, Judgment, I.C.J. Reports 1985, p. 13, para 27.

23 Holger Rotkirch, The Demilitarization and Neutralization of the Åland Islands: A Regime 'in European Interests' Withstanding Changing Circumstances, Journal of Peace Research, Vol. 23(1986), no. 4, pp. 357–376, p. 373; Lauri Hannikainen, 'The Continued Validity of the Demilitarised and Neutralised Status of the Åland Islands', *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (1994), pp. 614–651, p. 626; Allan Rosas, 'The Åland Islands as a Demilitarised and Neutralised Zone', in Lauri Hannikainen and Frank Horn (eds.), *Autonomy and Demilitarisation in International Law: The Åland Islands in a Changing Europe*, Kluwer Law International, Dordrecht 1997, pp. 23–40, p. 29.

customary rule of international law. The customary law regime applying to Åland may be considered to comprise the core principles of the 1921 Convention. According to some analyses, it could extend beyond demilitarisation to cover at least the core principle of neutralisation. [24]

To the extent that demilitarisation and neutralisation are established as customary law, the related essential obligations would remain in force for Finland even if the 1921 Convention were to be denounced. It is a general principle in international law that sources of law are independent and separate. The termination of an obligation under a specific treaty would thus have no impact on the identical obligation existing under customary law. This principle is enshrined in Article 43 of the Vienna Convention on the Law of Treaties, where it is stated that '[the] invalidity, termination or denunciation of a treaty, the withdrawal of a party from it, or the suspension of its operation, as a result of the application of the present Convention or of the provisions of the treaty, shall not in any way impair the duty of any State to fulfil any obligation embodied in the treaty to which it would be subject under international law independently of the treaty'.

In the case at hand, the customary law regime is considered to cover the core principles of the 1921 Convention. Insofar as the provisions of the 1921 Convention cannot be considered to be based on provisions of customary international law, as possibly in the case of the exceptions in respect of strictly necessary defensive measures, it could be construed that the States parties could, if necessary, agree on further specifying these provisions or amending them as per Article 54(b) of the Vienna Convention on the Law of Treaties. This would nevertheless require the unanimous consent of the States parties, and any amendments agreed upon should not impact the object and purpose of the Convention. Another view of the matter is that the treaties concerning Åland constitute an 'objective regime' that is binding upon all States – not just the States parties to the relevant treaties. This would, by default, preclude any amendment to the Convention.[25] It may also be asked whether, in contemplating such amendments, consideration should be given to non-States parties whose interests are affected by the demilitarisation and neutralisation as a matter of customary international law.

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24 Rosas (see footnote 23), p. 29.

25 For more on the concept of objective regime as it relates to Åland, see Cedric Ryngaert, 'Objective Regime', *Max Planck Encyclopedia of Public International Law*, https://www.mpepil.com. See also: Marja Lehto, 'Restrictions on Military Activities in the Baltic Sea – A Basis for a Regional Regime?', *Finnish Yearbook of International Law* (1991), Vol. II, pp. 38–65, p. 60; Hannikainen (see footnote 23), p. 625; Rosas (see footnote 23), p. 28.

1.2 Aspects of the law of treaties

Grounds for denouncing the Convention

Although denouncing the 1921 Convention would in practice have little impact in view of the customary law nature of the obligations involved, the question must be addressed whether such denunciation would be possible under the law of treaties. The 1921 Convention contains no provision on a procedure for terminating or unilaterally denouncing the Convention. The question of the grounds on which denunciation might be possible and how this should proceed must thus be evaluated on the basis of the general law of treaties. According to Article 4 of the Vienna Convention on the Law of Treaties, the Convention applies only to treaties which have been concluded after its entry into force. The provisions of the Vienna Convention are nevertheless regarded as largely reflecting established customary international law and therefore as universally binding. This also applies to many of the grounds on which a State may denounce a treaty.

The principal rule concerning unilateral denunciation of a treaty is given in Article 56 of the Vienna Convention on the Law of Treaties. According to this provision, a treaty which contains no provision regarding its termination and which does not provide for denunciation or withdrawal cannot be denounced or withdrawn from unless it is established that the parties intended to admit the possibility of denunciation or withdrawal or unless a right of denunciation or withdrawal can be implied by the nature of the treaty. The wording of the Article makes it clear that denouncing a treaty is considered an exceptional occurrence, stressing the principle of good faith observance of the treaty. In the 1921 Convention, Article 8 may be considered particularly significant, as it mandates that the 'provisions of this Convention shall remain in force in spite of any changes that may take place in the present status quo of the Baltic Sea'. This exceptional provision indicates that it was not the intent of the States parties to allow for denunciation of the 1921 Convention. The nature of the Convention as a component of the broader decision made by the League of Nations in respect of Åland also does not support the idea that a State party could simply denounce the Convention without any special grounds.

Of the special grounds cited in the Vienna Convention on which it might be possible to denounce a treaty even when the treaty itself contains no provisions on denunciation, it is important in the case at hand to note particularly the 'fundamental change of circumstances' provided for in Article 62. This Article codifies the general principle of *clausula rebus sic stantibus* but imposes several conditions on invoking it. According to Article 62, invoking a fundamental change

of circumstances as a ground for terminating or withdrawing from a treaty requires that the change was not foreseen by the parties, the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty and the effect of the change is radically to transform the extent of obligations still to be performed under the treaty. These conditions have been interpreted restrictively in international case law.

It must also be noted that Article 62 of the Vienna Convention does not grant States a blanket right to unilaterally withdraw from their treaty obligations; a consultation procedure between the States parties is required. According to Article 65 of the Vienna Convention, a party which invokes a ground for terminating a treaty or suspending its operation must notify the other parties of its claim as well as the reasons which support it. If, after the expiry of a period of not less than three months, no party has raised any objection, the party making the notification may carry out the measure which it has proposed. If an objection is raised, attempts must be made to resolve the matter using means for peaceful settlement of disputes. Ultimately, any of the parties may submit the matter to the International Court of Justice for a ruling.[26] These provisions also apply to States invoking a fundamental change of circumstances.

Finland made use of the possibility offered by Article 62 in 1990 when declaring that the provisions concerning Germany and other provisions restricting Finland's sovereignty in Part III of the 1947 Treaty of Paris had become irrelevant. [27] Part III of the Treaty of Paris prohibited Finland from acquiring any military material of German origin. Following the reunification of Germany and the elimination of restrictions on Germany's sovereignty, the Finnish Government adopted a decision on 21 September 1990 declaring that the provisions in the Treaty of Paris concerning Germany and other provisions restricting Finland's sovereignty had become irrelevant and were no longer consistent with Finland's status as a Member State of the UN and of the OSCE. Finland notified the United Kingdom and the Soviet Union of the decision, and they did not object. Known as 'Operation PAX',[28] this procedure has subsequently been cited as a possible precedent in discussions about the treaties concerning Åland.

26 Article 66 of the Vienna Convention on the Law of Treaties. Also, a compulsory conciliation procedure is provided for in the Annex to the Convention.

27 Neither Article 62 nor the principle of clausula rebus sic stantibus were specifically referenced in this context.

28 Ministry for Foreign Affairs memorandum no. 1195 (12 December 1990).

1921 Convention

In contemplating the invoking of a fundamental change of circumstances in respect of the 1921 Convention, it must be noted that this is an exceptional procedure with multiple restrictions; it may only be applied if the conditions described above are satisfied. There must have been a fundamental change of the circumstances because of which the treaty was concluded in the first place, and because of this change the obligations incumbent upon Finland under the treaty must have increased significantly. This might have been the case when the League of Nations ceased to exist due to the outbreak of the Second World War, considering that the 1921 Convention specifically gave the Council of the League of Nations the significant role of a guarantor of the Convention. Indeed, the principle of *clausula rebus sic stantibus*, concerning fundamental changes of circumstances, was referred to in discussions among Finnish legal experts during the Second World War, and it was concluded that the principle could be applied to the 1921 Convention.[29] However, the Finnish Government did not see any reason to plead a fundamental change of circumstances at that time.

When V. Molotov, Foreign Minister of the Soviet Union, observed in the talks leading to the 1940 Agreement that the 1921 Convention had become irrelevant and proposed to Finland's Ambassador J.K. Paasikivi that the new bilateral treaty being negotiated should replace it, Paasikivi disputed Molotov's interpretation. Finland's counter-proposal was that the continued validity of the 1921 Convention should be enshrined in the 1940 Agreement. This did not happen, but it was noted in the Finnish government proposal concerning the 1940 Agreement that the new agreement would have no impact on the continuing validity of the 1921 Convention.[30]

It is an established interpretation that the 1947 Treaty of Paris, according to which the Åland Islands would remain demilitarised according to the 'situation as at present existing', reinforced the continuing validity of both the 1921 Convention and the 1940 Agreement. The Treaty of Paris may also be considered to have dispelled the issue of wartime militarisation actions and of whether those actions could have allowed for denouncing the 1921 Convention on the basis of a fundamental change of circumstances.[31] It should also be noted in this context that Article 8 of the 1921 Convention may be interpreted to exclude the possibility of denouncing the Convention by claiming a fundamental change of circumstances.[32]

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29 Rafael Erich, 'Åland under krigsåren', *Statsvetenskaplig Tidskrift*, Häft 2–3 (1942), p. 156.

30 HE 105/1940 vp.

31 Rosas (see footnote 23) notes on p. 27 that in any case it would have been too late to invoke this claim decades later.

32 Rotkirch (see footnote 23), p. 370; Hannikainen (see footnote 23), p. 636.

As already described, the special status of Åland under international law has been reaffirmed time and again in connection with other significant changes that have affected Finland as the territorial State or the situation in the Baltic Sea region in general, most recently in the context of Finland's accession to NATO. As appears above, Finland has consistently and constantly, by its own action, affirmed the continuing validity and meaning of the 1921 Convention, for instance by sending notifications to other States parties and Russia concerning the area to which the Convention applies and activities therein and by relying on the treaty arrangements pertaining to Åland in the declarations deposited on the occasion of the signature and ratification of the UN Convention on the Law of the Sea. It is also noteworthy that when Finland declared, in the aforementioned PAX procedure in 1990, that certain provisions of the 1947 Treaty of Paris had become irrelevant, this did not extend to Article 5 of that Treaty, which confirmed the demilitarisation of the Åland Islands. It must further be noted here that Article 45 of the Vienna Convention on the Law of Treaties states that a fundamental change of circumstances may not be invoked as a ground for terminating or suspending the operation of a treaty if a State, after becoming aware of the change, has expressly agreed that the treaty remains in force or it must by reason of its conduct be considered as having acquiesced in the maintenance in force of the treaty. This provision reflects the *estoppel* principle in general international law, under which a State may not retract any statements or actions that have fostered legitimate expectations in other States.

1940 Agreement

The provisions of the Vienna Convention on the Law of Treaties cited above make no distinction between bilateral and multilateral treaties. Therefore, what was discussed above concerning the requirements and procedure for unilateral denunciation of a treaty also applies to the bilateral Agreement signed with the Soviet Union in 1940. This Agreement also does not contain provisions on its denunciation or suspension. The 1940 Agreement includes certain special features, which warrant it being discussed separately.

The demilitarisation requirement is formulated in basically the same way in the 1940 Agreement as in the 1921 Convention. However, the 1940 Agreement further requires Finland not to make the Åland Islands available to the armed forces of any other State. This means 'that neither Finland nor any other Power shall establish or maintain in the Åland Islands region any military or naval establishment or operational base, any establishment or operational base for military aviation,

or any other installation which might be used for military purposes.'[33] The most significant new obligation in the 1940 Agreement concerns the right of the Soviet Union to maintain a Consulate in Åland, the duties of which include verifying the fulfilment of the obligations under the Agreement. According to the memoirs of President Paasikivi, the proposals of the Soviet Union on how this supervision was to be executed included sending military inspection delegations to the islands and having consultations between the parties.[34] In the 1940 Agreement, however, the duties of the Consulate were limited to notifying the Åland government of any deviations and, if necessary, instituting a joint investigation with the Finnish authorities.

While bilateral treaties generally contain reciprocal rights and obligations, the 1940 Agreement mainly specifies obligations for Finland. It is thus an unequal treaty. It was referred to as 'Molotov's diktat' in its time, and a contemporary commentator, Rafael Erich, described it as a *pactum leoninum*, meaning an unfairly imposed arrangement – even though Finland managed to stave off some of the maximalist demands made by the Soviet Union in the treaty negotiations. The Agreement was based on a proposal made by the Soviet Union, and in the historical context it is obvious that after a lost war and in the absence of a permanent peace treaty it would have been hard for Finland to refuse.

Inequality is not recognised in the Vienna Convention on the Law of Treaties as a ground for denouncing a treaty. On the other hand, the Convention does contain a provision under which a treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations.[35] However, this provision is of marginal relevance to the 1940 Agreement for several reasons, including that the provision as it is cannot apply to a treaty concluded before the Charter of the United Nations entered into force. It is also possible that the actions of a State in implementing a treaty will, over time, rectify its shortcomings apparent at the time when it was signed. Reference can in this regard be made to relevant case law, also concerning a treaty signed before 1945. In 2007, the International Court of Justice rejected the claim by Nicaragua that the Managua Treaty (1928) between Nicaragua and Colombia had been forced upon it. The Court pointed out that Nicaragua had

33 Article 1 of the 1940 Agreement.

34 The passage about Åland in J.K. Paasikivi's memoir *Toimintani Moskovassa ja välirauhan aikana* [My work in Moscow and during the interim peace] is available (in Finnish) at: https://jkpaasikivi.fi/book/toimintani-moskovassa-ii-valirauhan-aika/vi-ahvenanmaa/

35 Article 52 of the Vienna Convention on the Law of Treaties.

at no time, even after it became a Member of the United Nations and even after it joined the Organization of American States, contended that the Treaty had been concluded under foreign coercion but had in all respects acted as if it was valid.[36] Finland may be considered to have acted similarly in respect of the 1940 Agreement. This Agreement was reinstated between Finland and the Soviet Union when an armistice was reached during the Second World War (FTS 4/1944) and by a separate exchange of notes in 1948 (FTS 9/1948). In 1992, Finland and Russia affirmed that, except for certain specified treaties considered outdated, the treaties concluded between Finland and the Soviet Union would remain in force between Finland and Russia (FTS 102/1992). The 1940 Agreement concerning Åland was one of the treaties that remained in force. It is noteworthy that this happened after the Agreement of Friendship, Cooperation and Mutual Assistance ('YYA Agreement') had been repealed[37] and it had been declared that the restrictions imposed on Finland in Part III of the 1947 Treaty of Paris had become irrelevant.

It should further be noted in this regard that the 1940 Agreement is a part of the treaty regime governing the special status of Åland under international law and complements it, considering that Russia is not a State party of the 1921 Convention. The ramifications of denouncing the 1940 Agreement might extend beyond the bilateral relations between Finland and Russia. This broader impact is highlighted by the fact that the provision in the 1947 Treaty of Paris concerning the demilitarisation of the Åland Islands is considered to apply to both the 1921 Convention and the 1940 Agreement. Also, in its multiple statements concerning the special status of Åland under international law which, as described above, have legal effect, Finland has never made a distinction between the 1921 Convention and the 1940 Agreement. It may also be asked what the point would be of denouncing the demilitarisation with respect to only one other State, as it would still be binding upon Finland under the 1921 Convention. As explained above, the denunciation would have no impact on the demilitarised and neutralised status of Åland insofar as it has become established under regional European customary law.

36 ICJ, *Territorial and Maritime Dispute (Nicaragua v Colombia)* (Preliminary Objections), 2007, I.C.J. Reports 832, para 79.

37 For more, see below, incl. footnotes 54 and 55.

2 Issues of international law concerning the Russian Consulate in Mariehamn

The most significant new obligation imposed on Finland in the 1940 Agreement concerned the right given to the Soviet Union to supervise the implementation of demilitarisation and to maintain a Consulate in Mariehamn for this purpose. Under Article 3 of the 1940 Agreement:

> 'The USSR is granted right to maintain an own consulate on the Åland Islands that beyond usual consular functions supervises the fulfilment of the commitments stated in Article 1 in this treaty concerning the non-fortification and demilitarization of the Åland Islands.
>
> In case this consular representative would observe anything that according to his views stands in conflict with the stipulations in this treaty about the demilitarization and non-fortification, he is authorized to report this to the Finnish authorities with the Governmental office in the Province of Åland as intermediary for steps to be taken for a joint investigation thereof.
>
> This investigation is to be made by a representative of the Finnish government and of the consular representative of the USSR as soon as possible.
>
> The results of the joint investigation are to be written down in a protocol in quadruple in Finnish and Russian and reported to the governments of the two signing parties for the taking of necessary steps.'[38]

No joint investigations as per Article 3 of the 1940 Agreement have been undertaken in the past few decades.

38 Ålands kulturstiftelse *n.d., Internationella avtal och dokument rörande Åland*, p. 16–17, https://kulturstiftelsen.ax/app/uploads/2020/07/english-3-3-1.pdf. (last visited 29 November 2023).

2.1 Separability of a treaty provision

Denouncing or suspending the operation of Article 3 of the 1940 Agreement, which concerns the Consulate in Åland, would require that provision to be separable from the remainder of the Agreement. According to Article 44 of the Vienna Convention on the Law of Treaties, the point of departure with regard to denouncing a treaty is that it can only be done in respect of the whole treaty unless the parties have otherwise agreed. In exceptional cases, denunciation may apply to individual specific provisions, if the ground for denunciation relates solely to those provisions. In addition, it is required that the provisions are separable from the remainder of the treaty, that their acceptance was not an essential basis of the consent of the other party or parties to be bound by the treaty and that the continued performance of the remainder of the treaty would not be unjust.

In assessing the separability of treaty provisions, it must be considered how essential they are to the continuation in force of the remainder of the treaty. Article 3 of the 1940 Agreement, which concerns the Consulate, authorises the Consulate, in addition to ordinary consular duties, to verify compliance with the provisions on the demilitarisation and non-fortification of the Åland Islands in Article 1. Although the consular functions are not specifically relevant for the entirety of the Agreement, the supervisory duty of the Consulate is unarguably bound to the principal purpose of the Agreement. However, in view of the significant decrease of the relevance of on-site supervision over the decades, the continuation of the operation of the Consulate may not necessarily be essential for the continued validity of the Agreement. The 1921 Convention has no such supervisory mechanism, yet it has served its purpose well.[39]

With regard to a bilateral treaty, it is easiest to evaluate whether certain provisions constituted an essential ground for the other party to agree to the treaty, if this is apparent from the treaty itself. Insofar as this is not the case, it can be difficult to evaluate such a subjective criterion. As for the 1940 Agreement, it may nevertheless be assumed that Article 3 was the principal reason for the Soviet Union to conclude the Agreement in the first place. At the same time, it may also be assumed that the role of the Consulate in Mariehamn has changed over the decades as the relevance of on-site supervision has decreased. One indication of this is that the size of the Consulate staff has declined since the first years. Moreover, no joint investigations as provided for in Article 3 have been conducted. In 1998, the Russian Government

39 The duties ascribed to the Council of the League of Nations in Article 7 of the 1921 Convention became null and void when the League of Nations was disbanded.

indicated that it was considering closing down the Consulate and transferring its functions to the Russian Consulate General in Turku.[40] In the light of its recent statements, however, the Russian Government is insisting that the Agreement continue to be complied with scrupulously.[41]

In some cases, continuation in force of a treaty without the unilaterally separable provisions may be unfair to the other State party. This, again, is a subjective criterion, and the views of the States parties may differ widely.

Even if it were to be ruled that Article 3 is separable from the remainder of the 1940 Agreement, it must be separately evaluated whether legal grounds can be found for its denunciation or suspension. In discussions on this point, reference has been made to technological advancements on the one hand, and to the status of Russia as an aggressor State in Ukraine on the other.

The supervisory duty of the Consulate in Mariehamn may justifiably be considered outdated due to advancements in surveillance technology. A treaty that has become outdated or ceased to have practical meaning is often described with the term *'desuetudo'*, which, however, is not included in the Vienna Convention on the Law of Treaties and is not a legal ground for denouncing a treaty. In case a treaty or certain provisions therein are clearly outdated and the States parties no longer comply with them, the situation will have legal effect only if the parties agree to terminate the treaty and can take measures to that end. Under the law of treaties, a fundamental change of circumstances and a material breach of a treaty, if the criteria for these are satisfied, are independent grounds for terminating the treaty.

Fundamental change of circumstances

As described above, invoking a fundamental change of circumstances as a ground for denouncing or suspending the operation of a treaty requires that the changes were not foreseen by the parties, that the change concerns circumstances that constituted an essential basis of the consent of the parties to be bound by the treaty, and the effect of the change is radically to transform the extent of the

40 Ministry for Foreign Affairs document HELD792-93 (20.4.1998). See also 'Talouselämän tietoja: Venäjä halusi sulkea Ahvenanmaan konsulaatin – Salainen suunnitelma kariutui Suomen vastustukseen' [Russia wished to close down the Åland Consulate – Secret plan abandoned due to Finland's objection], *Taloussanomat* 25 April 2023. More on this below.

41 Maria Zakharova at a press conference on 26 July 2023: https://mid.ru/ru/press_service/spokesman/briefings/1898513/#30.

obligations still to be performed under the treaty. The International Court of Justice has ruled that these criteria codify customary law and are therefore retroactively applicable to treaties concluded before the entry into force of the Vienna Convention on the Law of Treaties.

The said criteria set the threshold for invoking a fundamental change of circumstances rather high. The possibility of invoking a fundamental change of circumstances has been considered necessary particularly in the case of treaties that remain in force indefinitely and contain no provision for termination. The provisions of such a treaty may over time come to place an undue burden on one of the parties.[42] This exception has nevertheless been narrowly defined and can only be invoked under strict criteria, so as to avoid jeopardising the entire system of international treaties. All the aforementioned criteria must be satisfied simultaneously. What is important in practice is that in international case law the argument for a fundamental change of circumstances has never been accepted against a State that has disputed it. [43]

It is also noteworthy that the criteria are general and subjective in nature, which makes it difficult to apply them in practice. Determining when a change has been 'fundamental', which circumstances formed the 'essential basis' of the consent of the parties to be bound by the treaty and whether the extent of obligations under the treaty have increased 'radically' requires subjective deliberation. State practice has shown that invoking a fundamental change of circumstances is the most likely to succeed in cases where the States parties agree on the interpretation of the criteria. In the two cases involving these criteria that have ended up before the International Court of Justice, the arguments for a fundamental change of circumstances were rejected.

In the *Fisheries jurisdiction* case, the United Kingdom instituted proceedings against Iceland before the International Court of Justice in 1972 pursuant to the bilateral treaty on fisheries jurisdiction between the States. Iceland claimed that the treaty had become null and void due to a fundamental change of circumstances and that the Court therefore had no jurisdiction in the matter. The crux of the dispute was Iceland's unilateral decision to extend its fisheries jurisdiction, which the United Kingdom considered a violation of the bilateral treaty. The Court ruled that

42 Draft articles on the Law of Treaties, *Yearbook of the International Law Commission* (1966), vol. 1 Part II, paras 257–258.

43 Olivier Corten & Pierre Klein, *The Vienna Convention on the Law of Treaties*, Oxford University Press, 2013, part II/V, pp. 1411–1433.

the arguments brought by Iceland – vital national interests on the one hand and advancements in fishing methods on the other – did not satisfy the criteria for a fundamental change of circumstances such as would be required for terminating a treaty. Above all, it was difficult to demonstrate that Iceland's obligations under the treaty had radically increased.[44]

The value of the *Fisheries jurisdiction* case as a legal precedent is limited by the fact that the issue at hand was about the jurisdiction of the Court and that the Court thus did not need to return an opinion on the legal status of Iceland's fisheries zone. One of the judges commented on this matter in a dissenting opinion, noting that rapid developments in the law of the sea might have lent support to the claim of a fundamental change of circumstances.[45] It is nevertheless noteworthy that the Court defined in this judgment the limits of and criteria for the principle of *clausula rebus sic stantibus*, which it later applied in the *Gabčíkovo-Nagymaros* case in 1997.

The *Gabčíkovo-Nagymaros* case involved a treaty between Hungary and Czechoslovakia concluded in 1977, concerning the construction of a barrage system in the River Danube, on which both countries bordered. Hungary presented multiple arguments for withdrawing from the 1977 Treaty, which it considered outdated, including the argument of a fundamental change of circumstances. Hungary claimed that several factors should be cumulatively considered in evaluating the change in circumstances: the changing of the political context with the end of the Cold War, the declining economic profitability of the project, and the increasing environmental awareness and international environmental regulation.[46]

The Court admitted in its judgment in the *Gabčíkovo-Nagymaros* case that the political situation had changed since 1977 but did not consider the change decisive for a treaty that concerned economic cooperation. The Court pointed out that the political conditions in 1977 were not so closely linked to the object and purpose of the treaty, which were related to the production of energy, the control of floods and the improvement of navigation on the Danube, that they would have constituted an essential basis of the consent of the parties. Nor did the Court consider that the changes in the economic profitability of the barrage project had radically transformed the treaty obligations of the parties. Moreover, new developments in the state of environmental knowledge and of environmental law were not completely unforeseen changes. The formulation of certain provisions

44 *Fisheries Jurisdiction (United Kingdom v. Iceland)*, Jurisdiction of the Court, Judgment, I.C.J. Reports 1973, p. 3, para 43.

45 *Ibid*., Dissenting Opinion by Judge Padilla Nervo.

46 *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, 1. C. J. Reports 1997, p. 7, para 104.

in the 1977 Treaty also made it possible for the parties to take account of such developments when implementing those provisions. In its conclusion, the Court rejected Hungary's argument that the changed circumstances, either individually or collectively, would have radically transformed the extent of the obligations that remained to be performed by Hungary. [47]

In both cases referred to above, the International Court of Justice emphasised the importance of stability in treaty relationships. The reservations expressed by the Court in respect of the principle of *clausula rebus sic stantibus* reflect the view that this principle should only be exercised in especially exceptional cases. It is also significant in the aforementioned cases that the Court examined the subjective and potentially controversial notion of 'essential basis for consent' in the light of the object and purpose of the treaty. This approach allows for a more objective analysis of this criterion, while also placing emphasis on the shared vision of the parties to the treaty.

As far as Article 3 of the 1940 Agreement between Finland and Russia is concerned, it may be noted that circumstances have changed since the signing of the Agreement in at least three ways:

1. As pointed out above, technological advancements have reduced the relevance of on-site supervision of demilitarisation. Reference may also be made to the size of the staff in the Russian Consulate in Mariehamn and to the fact that no joint investigations have been undertaken in recent decades.
2. The Agreement was concluded after the Winter War, in a situation in which Finland had had to cede territories to the Soviet Union, and it was reaffirmed between Finland and the Soviet Union in the interim Treaty of Moscow (1944) and in an exchange of notes in 1948, as well as in the Treaty of Paris (1947). The supervisory function thus parallels the other legal actions taken against 'enemy states' after the Second World War. It is indicative of the comprehensive change in the political context that the Enemy State Clauses in the UN Charter were considered to have fallen into *desuetude* by the UN General Assembly in 1995[48] and by the UN World Summit of 2005.[49] It may also be assumed that the political context was of greater relevance for the object and purpose of the 1940 Agreement than it was in the *Gabčíkovo-Nagymaros* case.

47 *Ibid*.

48 UN Doc. A/RES/50/52.

49 UN Doc. A/RES/60/1.

3. Russia's actions as an aggressor State in Ukraine since 2014 and the full-scale war of invasion it launched on 24 February 2022 have fundamentally changed the security situation in Europe. Russia's actions are in flagrant violation of the provisions of the Charter of the United Nations and the principles of the Organisation for Security and Cooperation in Europe (OSCE). Russia has threatened to take 'countermeasures' against Finland because of its NATO accession, even though joining a military alliance is a decision within the sovereign powers of any State, and announced that it is considering Finland an 'unfriendly State'. These actions can be considered to have eroded the credibility of Russia as a supervisor of demilitarised status.

In light of Article 62 of the Vienna Convention on the Law of Treaties, the first question is, whether these changes were foreseen by the States parties when the 1940 Agreement was concluded. In 1940 – or in 1947 – it could scarcely have been possible to anticipate such profound upheavals. By contrast, it is conceivable that both technological advancements and changes in political circumstances were evident in 1992 when the continued validity of the 1940 Agreement was affirmed by Finland and Russia.

The impact of Russia's full-scale war of aggression could possibly be described as a 'fundamental change of circumstances'. It is nevertheless clear that the decline of the security situation in Europe affects all European States, not just Finland. Here, reference may be made to the *Gabčíkovo-Nagymaros* case, in which the International Court of Justice expressed reservations in respect of the argument that the political context had changed, presumably because accepting this argument would have opened the gates for terminating numerous other European treaties dating from the Cold War era. In addition, it may be pointed out that the Soviet Union was an aggressor State at the time when the 1940 Agreement was concluded.

Should Russia's war of aggression against Ukraine be described as a fundamental change of circumstances in the sense of the law of treaties, the baseline should probably be set at the year 1992, when Finland and Russia reaffirmed the continued validity of the 1940 Agreement, considering that in the early 1990s, estimates of the threat of Russian aggression were lower than they had been previously or would subsequently be. At the same time, it should be noted that in case law, armed conflict has in general not been considered to constitute a fundamental

change of circumstances, unless the criteria cited in Article 62 are satisfied.[50] Reference can practically only be made to the decision of the Court of Justice of the European Union in the Racke case, which concerned suspension of the Cooperation Agreement between the European Economic Community and Yugoslavia. The Court ruled that the EC Council had not made a manifest error of assessment in determining that the Yugoslav Wars that began in 1991 had caused a fundamental change of the circumstances in which the Cooperation Agreement had been concluded.[51] However, even here the fundamental change was not only due to the armed conflict but also to the resulting breakup of Yugoslavia.

A further question concerns the relationship of Article 3 of the 1940 Agreement, regarding the Consulate in Mariehamn, to the object and scope of the Agreement. The International Court of Justice has stressed that a change can be considered to have affected the circumstances forming the essential basis for the consent of the States parties only if it is closely related to the object and purpose of the treaty. The object and purpose of the 1940 Agreement have to do with the demilitarisation of the Åland area. In this respect, the obligations enshrined therein are basically the same as the relevant obligations in the 1921 Convention. As argued above, the role of the Consulate in the supervision of the demilitarisation has diminished. The issue is more complex than that, however, because it also involves the question of the independent existence of the supervisory function in itself, on which the parties have disagreed. As noted above, Russia indicated to Finland in 1998 that it was considering closing down its Consulate but held that the duties of the Consulate, including its supervisory right, should be transferred to the Russian Consulate General in Turku. What is noteworthy here is that Russia, at least at that juncture, saw no reason for discontinuing the supervisory right even if the Consulate in Mariehamn were to be closed down. Finland, on its part, considered that the supervisory function was specifically bound to that Consulate and could not be relocated elsewhere. [52]

The third criterion for invoking a fundamental change of circumstances is that the State so doing must demonstrate that its remaining obligations have radically changed. On this point, the International Court of Justice has required that the obligations remaining for the State party invoking a fundamental change of circumstances must have increased to such a degree that complying with them

50 International Law Commission, Effects of armed conflicts on treaties, Secretariat Memorandum, U.N. Doc. A/CN:4/550, Corr. 1 and Corr. 2, paras 121–126.

51 *A. Racke GmbH&Co v Hauptzollamt Mainz*, C-162/96, 16.6.1998, para 56.

52 See footnote 40 above.

differs substantially from what was required by the original obligations. On the one hand, the decline in the relevance of on-site supervision and the changes in the number of staff at the Consulate in Mariehamn have alleviated the burden on Finland caused by the Consulate. On the other hand, it is obvious that Russia's full-scale war of aggression against Ukraine, Russia's aims to annex extensive territories of a neighbouring country and Russia's policy of seeking to undermine the European security order have rendered the Consulate and its supervisory function awkward for Finland. To what extent this may be estimated to have increased the burden on Finland also depends on the security situation in the Baltic Sea and whether the Consulate can be assessed to be used for purposes detrimental to Finland.

It should also be recalled that Article 62 of the Vienna Convention on the Law of Treaties does not give States the right to withdraw from their treaty obligations unilaterally; instead, a consultation procedure must be initiated among the States parties. Agreement of the States parties also allows the criteria for a 'fundamental change of circumstances' to be interpreted with more leeway. As an example of State practice, it may be pointed out that in the 1990s Poland pleaded a fundamental change of political circumstances in order to denounce its bilateral treaties on cultural and scientific cooperation with Belarus, Cambodia, Cuba, Laos, Mongolia and the Soviet Union. According to information released by the Polish Ministry of Foreign Affairs, these countries (except for Cuba) either announced that they approved this procedure or refrained from objecting to it. Cuba considered the denunciation unnecessary, because it held that the treaty had already expired.[53] Similarly, as noted above, Finland informed the key States parties of the 1947 Treaty of Paris of the PAX decision in 1990, and did not meet any objection. Another relevant example is the YYA Agreement between Finland and the Soviet Union, which was repealed by unilateral action[54] but in agreement with Russia.[55]

53 Julian Kulaga, 'A Renaissance of the Doctrine of Rebus Sic Stantibus?', *International and Comparative Law Quarterly*, vol. 69 (2020), no. 2, pp. 477–497.

54 Statement entered by the President of the Republic in the minutes of the Finnish Government on 17 January 1992.

55 The termination of the YYA Agreement was confirmed with an exchange of notes between Finland and Russia on the occasion of signing the Treaty between the Republic of Finland and the Russian Federation on the Basis for Relations (FTS 63/1992) on 20 January 1992.

Breach of treaty

A State party also has the right to terminate or suspend the operation of a treaty in case of a material breach of that treaty. Article 60 of the Vienna Convention on the Law of Treaties defines a material breach as a repudiation of a treaty in violation of the Vienna Convention, or the violation of a provision that is essential to the accomplishment of the object or purpose of the treaty. A material breach may be invoked as a ground for terminating the treaty or suspending its operation in whole or in part. Thus, the conditions for the separability of a treaty provision do not apply to a case of a breach of treaty.

A treaty may be denounced or its operation suspended pursuant to Article 60 of the Vienna Convention only in response to a material breach of that treaty. In other words, denouncing or suspending the operation of Article 3 of the 1940 Agreement pursuant to Article 60 would require a material breach of that treaty by Russia. This argument may not be invoked in the case of violations of other treaties or general international law. Also, a certain temporal connection is expected between the material breach of a treaty and a response to it. A breach of a treaty cannot be invoked years later.

According to the Vienna Convention on Consular Relations (FTS 50/1980), consular officers must respect the laws and regulations of the receiving State. They also have a duty not to interfere in the internal affairs of the receiving State.[56] Criminal proceedings against a consular officer may only be instituted as specified in the Vienna Convention on Consular Relations,[57] but a consular officer may be declared *persona non grata* and expelled without giving any reason for this.[58] As regards the Consulate in Mariehamn, however, it must be recalled that its supervisory function is derived solely from the 1940 Agreement. What is relevant in this respect is that the provisions of the Vienna Convention on Consular Relations, according to its Article 73, shall not affect other international agreements in force as between States parties to them. A breach of treaty in respect of the supervisory function should therefore be assessed in the context of the 1940 Agreement. Nevertheless, even the supervisory function does not justify actions contrary to Finnish legislation. It should also be noted that consular officers are protected by the immunity enshrined in the Vienna Convention on Consular Relations even when performing duties under the supervisory function.

56 Article 55 of the Vienna Convention on Consular Relations.

57 *Ibid*., Articles 41–43.

58 *Ibid*., Article 23.

In any case, it is clear that Article 60 of the Vienna Convention on the Law of Treaties could only be invoked in case of a material breach of the 1940 Agreement. In practice, this would mean (1) the Agreement or a part thereof being unilaterally and unjustifiably denounced or its operation suspended by one of the parties, or (2) a breach related to the object and purpose of the Agreement, i.e. the demilitarisation of Åland or its supervision.

In addition to all of the above, it must be noted that the consultation procedure provided for in Article 65 of the Vienna Convention on the Law of Treaties must also be observed in case of a material breach of a treaty. Thus, recognising a material breach of a treaty does not in and of itself allow for the treaty to be unilaterally denounced with immediate legal effect.

Impact of armed conflict on treaty relations

No international regulation exists on the impact of armed conflicts on treaty relations between States. State practice in this respect is contradictory, and no rules based on it have emerged as customary international law, whether regarding treaty relations between parties to an armed conflict or their treaty relations with third countries. [59]

The provisions of the Vienna Convention on the Law of Treaties, according to Article 73, shall not prejudge any question that may arise in regard to a treaty from the outbreak of hostilities between States. However, Article 75 of the Vienna Convention does include a specific provision in respect of an aggressor State, the scope of application of which is fairly limited. According to this provision, '[t]he provisions of the present Convention are without prejudice to any obligation in relation to a treaty which may arise for an aggressor State in consequence of measures taken in conformity with the Charter of the United Nations with reference to that State's aggression.' The obvious scenarios in which this Article might apply have to do with peace treaties and the actions of the Security Council and General Assembly of the UN. Case law on applying this provision is practically non-existent.

In 2011, the International Law Commission of the UN adopted Draft articles on the effects of armed conflicts on treaties, which in some respects reflect widely accepted principles. One of such principles is that an armed conflict does not *ipso facto* terminate or suspend the operation of treaties. The draft articles also deal with the impact on the law of treaties of the prohibition of the use of force in the

59 UN Secretariat Memorandum (see footnote 49).

UN Charter. According to draft article 14, a State exercising its inherent right of individual or collective self-defence is entitled to suspend in whole or in part the operation of a treaty insofar as it is incompatible with the exercise of the right of self-defence.[60] According to the commentary to this draft article, the provision primarily envisages the suspension of treaties between the aggressor and the victim. At the same time, the article does not exclude cases of treaties between the State that is the victim of the aggression and third States, even though they may be less likely to occur.'[61] Therefore, any State exercising its right of individual or collective self-defence is by default entitled to suspend the operation of any treaties that are inconsistent with actions taken in self-defence, whether these be bilateral treaties with the aggressor State or treaties with third States. The draft article is consistent with the rules on State responsibility, under which self-defence constitutes a circumstance precluding wrongfulness.

Although the draft articles generally apply both to treaty relations between States parties to an armed conflict and to their treaty relations with third States[62] the right referred to in draft article 14 only applies to States exercising their individual or collective right of self-defence. No right that would apply to third States in their treaty relations with the aggressor State can be derived from it.

In summary of the current section, it may be noted that the law of treaties, in the prevailing circumstances, does not provide a legally secure and indisputable means for denouncing or suspending the operation of Article 3 of the 1940 Agreement.

2.2 Countermeasures pursuant to general international law

According to customary international law regarding State responsibility, a State subject to a wrongful act has, under certain circumstances, the right to respond to an ongoing wrongful act with measures that in any other context would themselves be wrongful. Countermeasures must always be justifiable as a response to a wrongful act by another State.

60 Draft articles on the effects of armed conflicts on treaties, with commentaries 2011, *Yearbook of the International Law Commission* (2011), vol. II, Part Two, Article 14.

61 *Ibid*., Commentary to draft article 14, para 3.

62 *Ibid*., Draft article 2, Commentary, para 5.

There are several restrictions on the use of countermeasures, the most important being that countermeasures must be temporary in nature. A countermeasure must also be adjacent in time to the wrongful act perpetrated, and it may not be undertaken after the fact when the wrongful act has ceased. These restrictions seek to ensure that countermeasures cannot be used punitively; their only legitimate use is to persuade the State responsible for the wrongful act to cease its wrongdoing and, if necessary, to make reparations for the damage caused. Countermeasures must also be proportional to the gravity of the wrongful act, the right being infringed and the damage sustained. [63]

The legal rules concerning countermeasures complement the means available to a State under the law of treaties. While under the Vienna Convention on the Law of Treaties the denunciation or suspension of operation of a treaty or a part thereof requires a material breach of that treaty, countermeasures need not be related to the same or similar obligations as those whose infringement prompted the response. Within the requirements concerning countermeasures, the injured State is relatively free to choose how to respond to a wrongful act, although it may be easier to comply with the proportionality requirement if the obligations involved are similar to each other. In treaty relations, denouncing a treaty or a part thereof is a permanent measure and therefore does not qualify as a countermeasure. However, the operation of a treaty or a part thereof may be suspended as a countermeasure until such time as the wrongdoing State ceases the wrongful act. As a circumstance precluding wrongfulness a countermeasure has no bearing on treaty relations or on obligations based on them, and these will remain in force even though a party to the treaty is not complying with them.

Countermeasures must not involve the use of armed force and must not violate certain fundamental norms such as international humanitarian law, human rights or the core norms of diplomatic relations.[64] Even in diplomatic and consular relations, countermeasures are complementary to the Vienna Conventions.

63 Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries, *Yearbook of the International Law Commission* (2000), vol. II, Part Two.

64 *Ibid*., Article 50 and Commentary.

Sanctions provided for in the Conventions, such as declaring a diplomat or consular official *persona non grata*, recalling the head of a diplomatic or consular mission or discontinuing diplomatic relations are therefore not countermeasures in the sense discussed here. Countermeasures are limited by the specific regulation of diplomatic relations in that the inviolability of diplomatic representatives and missions and of diplomatic archives and documents may not be derogated from by invoking countermeasures. This is also true, as applicable, of consular relations.

The procedural rules for countermeasures are considerably less stringent than the corresponding rules in the law of treaties. However, the State against which countermeasures are to be taken must be notified of them in advance. This requirement further underscores the instrumental nature of countermeasures: they are not an end in themselves but rather a means for influencing the actions of the State responsible for the wrongful act. Countermeasures must not be initiated if the dispute concerning the original wrongful act has been brought before a court of law or submitted to other peaceful resolution proceedings. However, both of the above demands may be derogated from under special conditions: if the situation is so urgent that it does not allow for advance notification, or if the opposing party demonstrates bad faith in the dispute resolution proceedings.[65]

Temporarily closing down the Consulate in Mariehamn as a countermeasure would not be limited to situations where the 1940 Agreement was infringed or indeed require any connection to consular activities at all. A necessary requirement, however, would be an internationally wrongful act against Finland. An act that is not a wrongful act but merely an unfriendly act does not justify countermeasures.[66] There is broader discretion in the deployment of countermeasures than in recourse to treaty-based procedures, but the risk is also greater. The State deploying countermeasures bears sole responsibility for ensuring that all the requirements concerning countermeasures are satisfied.

65 *Ibid*., Article 52 and Commentary.

66 On the concept of an 'unfriendly act' in international law, see e.g. Dagmar Richter, 'Unfriendly acts', *Max Planck Encyclopedia of Public International Law*, https://www.mpepil.com.

As noted above, Russia considered closing down the Consulate in Mariehamn in 1998 and transferring its duties to the Russian Consulate General in Turku, which Finland did not consider a possibility. In view of this, there is reason to note that suspending the operation of Article 3 of the 1940 Agreement would also amount to the suspension of the supervisory function of the Consulate in Mariehamn, given that all the provisions pertaining to supervision are contained in that Article. The suspension could continue for as long as the wrongful act against Finland persists and until any eventual liability for reparation is established.

It may also be asked whether the temporary suspension of Article 3 of the 1940 Agreement pertaining to the Consulate could be justified on grounds of Russia's war of aggression in Ukraine and contingent on its ending, considering that it constitutes a flagrant violation of international law. This would be a case of collective countermeasures, while countermeasures in general are unilateral measures which an injured State may deploy in its bilateral relations with the State responsible for the wrongful act. There is some State practice in this respect, also in the context of treaty relations with Russia. Certain European countries have suspended the operation of various bilateral treaties with Russia because of Russia's war of aggression, e.g. treaties concerning scientific and cultural cooperation, transport or visa waivers. It is not clear, however, to what extent these actions are derived from specific provisions in the treaties concerned and to what extent they might be considered countermeasures. The European Union, as well, has imposed a variety of sanctions against Russia to compel it to abandon its actions that violate international law and acknowledge its international responsibility. Even though the EU has traditionally held that its restrictive measures are legal retorsions rather than countermeasures, this practice is conducive to promoting the establishment of collective countermeasures under international law. However, there is still legal uncertainty concerning this concept.

3 Summary

The treaties concerning the demilitarisation of Åland constitute a long-established treaty regime repeatedly reaffirmed in State practice. It is particularly relevant that the special status of Åland was reaffirmed after the World Wars and other significant political changes. The special status of Åland under international law is also considered part of regional European customary law. What is noteworthy about obligations under customary international law is that they would not be affected even if the 1921 Convention were to be denounced.

The customary law regime is considered to cover the essential principles of the 1921 Convention. Insofar as its provisions do not fall within customary law, as for instance in the case of the exceptions in respect of defensive actions, it might be plausible that the States parties could, if necessary, agree to further specify or to amend those provisions in accordance with Article 54(b) of the Vienna Convention on the Law of Treaties. This, however, would require the unanimous consent of all States parties, and the amendments could not affect the object and purpose of the treaty.

Denouncing the 1921 Convention does not seem possible. The Convention contains no provision on denunciation, and the provision in its Article 8, whereby the Convention shall remain in force in spite of any changes to the status quo in the Baltic Sea region, leads to the conclusion that it was not the intention of the States parties to allow for the Convention to be denounced. The role of the Convention in the context of the broader Åland decision of the League of Nations also disfavours the notion that a State party could denounce the Convention without any particular reason. Moreover, Article 8 can be interpreted to also exclude invoking a fundamental change of circumstances. It is also significant that Finland, by its own action, has consistently affirmed the continuing validity and importance of the 1921 Convention, both when implementing the Convention and when, for instance, acceding to the EU and NATO and signing and ratifying the UN Convention on the Law of the Sea.

The bilateral 1940 Agreement between Finland and Russia forms part of the regime of the demilitarisation of Åland, and the ramifications of denouncing it might extend beyond the bilateral relations between Finland and Russia. This is underlined by the fact that the demilitarised status of the Åland Islands was confirmed 'in accordance with the situation as at present existing' in the 1947 Treaty of Paris. This provision is considered to apply to both the 1921 Convention and the 1940 Agreement. In 1992, Finland and Russia affirmed the continuing validity of the Agreement in their mutual relations.

The legal status of the Russian Consulate in Mariehamn is derived from Article 3 of the 1940 Agreement. This Article also charged the Consulate with a supervisory function. Terminating or suspending the supervisory function would require denouncing Article 3 or suspending its operation. This, in turn, would require that Article 3, concerning the Consulate, is separable from the remainder of the 1940 Agreement – which is not clear – and that legal grounds exist for denouncing it or suspending its operation. Such grounds could include a fundamental change of circumstances or a material breach of the Convention, but it is not evident for either of these grounds that the stringent criteria for their applicability could be satisfied. It must also be noted that invoking these grounds does not allow a State to rescind its treaty obligations unilaterally; a consultation procedure among the States parties must be initiated. The conclusion of the present report is that under current circumstances there is no legally certain and indisputable means under the law of treaties for denouncing or suspending the operation of Article 3 of the 1940 Agreement concerning the Consulate.

Countermeasures as per general international law may be used as a response to a wrongful act against a State. There is more discretion available for deploying countermeasures than there is in recourse to treaty-based procedures, but the risk is also greater. A State deploying countermeasures bears sole responsibility for ensuring that all the requirements concerning countermeasures are satisfied.

The justification and essential condition for countermeasures is an internationally wrongful act. An act that is not wrongful but merely unfriendly does not justify countermeasures. Another essential condition is that countermeasures must be temporary in nature. Compliance with an obligation may only be suspended until such time as the State responsible for the wrongful act ceases such action and makes reparation for any damage caused. Suspending the operation of Article 3 of the 1940 Agreement, concerning the Consulate, as a countermeasure is only possible if the aforementioned and other requirements applicable to countermeasures are satisfied. Suspending the operation of the Article would also mean suspending the supervisory function of the Consulate. Such suspension could continue until the wrongful act against Finland is discontinued and any liability for reparation is established.

Publications of the Ministry for Foreign Affairs of Finland

2023:22

ISSN PDF 2737-0844
ISBN PDF 978-952-281-790-7