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SOVIET-GERMAN AGREEMENTS OF 1939 IN THE LIGHT OF INTERNATIONAL LAW

Intending to present a juridical, internationally legal assay of agreements of 1939, I cannot help taking into account their historically political and militarily strategic context. Law, being a system of norms, has always a social, political, economic, or some other content, it always takes effect in the context of a concrete historical situation. Therefore, the juridical assay of agreements between the USSR and Germany calls also for political and militarily strategic problems to be taken into account coupled with the state of international relations at the end of the 1930s as well as the characters of the main *dramatis personae* on the international arena — first and foremost the states and parties involved in the deal. However, my main task being the legal appraisal of those developments, other factors will be presented as the necessity arises, figuring as it were behind the scenes, though constantly present, implicitly.

It is no easy task to give even as little as a purely political appraisal to e. g. Non-Aggression Treaty between the USSR and Germany of Aug. 23, 1939, taken as an isolated fact. Has the Treaty been necessary for the USSR? What would have happened if there had been no such Treaty? To answer but these questions one has to bear in mind not only Stalin's foreign policy, and not only that of 1939. One has to study the internal policy of the USSR both of that period and that of the preceding one.

It is the assay of the internal policy of the Stalinist regime of Stalin's terrorist dictatorship inside this country, his spurning of democracy — be it Socialist of bourgeois — his aversion towards social democracy as to the main enemy, that account for the "Leader's of the World Proletariat" falling into the embrace of the Führer of National-Socialism.

It was in the autumn of 1939 that the ultra-right terrorist dictatorship of bourgeoisie linked with the leftist terrorist dictatorship of the totalitarian State of barrack Socialism. Political regimes of the two States diametrically opposed as to their class character, assumed a self-contained, dominant value as their characteristic feature, while the methods of executing power aimed at achieving their ends, seemingly diametrically opposed, began to coincide in their main features. Hence such mutual understanding though mixed with mutual distrust.

That is why the Non-Aggression Treaty became a logical step of Stalin's foreign policy.

However, one should not ignore another fact, namely that the Soviet foreign policy was pushed towards the Treaty not only by the politically moral readiness of the then Soviet leadership for the deal with fascism, but also by the diplomatic moves of the Western countries (first and foremost England and France), who, in their attempt to appease Hitler and to direct his appetites towards the East, sold Czechoslovakia to Germany and condoned other revanchist aspirations of German fascism (e. g. English-German Naval Agreement of June 18, 1935). Another factor conducive to the conclusion of the Non-Aggression Treaty between the USSR and Germany was also the inconsistent position of England and France at the negotiation table with the Soviet Union in the summer of 1939, though their conduct was undoubtedly affected by the character of the Stalinist

regime. One must admit that no side of that political game (powers of the Axis, Western Democracies, the USSR) trusted the others and they all had valid reasons for such distrust.

The Soviet historical science has suggested various historical and political estimations of the Non-Aggression Treaty. The traditional and, one can say, official point of view has long presented the Treaty as a necessity in the then situation, as a treaty that helped the USSR put off the beginning of the unavoidable war. There is yet another point of view which has gained ground only recently. In its basic postulates it amounts to the assertion of its being likely that without that treaty "Germany would not have dared get involved in the military adventure against Poland"[1] and although the war for the USSR began not in 1939 but in 1940, Hitler had put that respite to a much more effective use than did the then Soviet leadership.

The second politically historic treatment of the Non-Aggression Treaty seems to me to be more convincing and more in line with the historic facts. And I think it necessary to emphasize once more that such estimation of that document is based on the assay of not only the developments of the summer and autumn of 1939 but also of the whole preceding development of Stalin's regime.

Nevertheless, estimating the Treaty of Aug. 23, 1939 as politically untenable and erroneous, one should not automatically draw the conclusion of its being juridically null and void. I am speaking here only about the Treaty, not about the Secret Protocol signed by Molotov and Ribbentrop on the same day.

The text of the Treaty of Aug. 23, 1939 does not include any clauses unlawful or unusual for treaties of such kind, as a matter of fact, Germany had Non-Aggression Treaties with other states too, also with Estonia and Latvia of June 7, 1939. Therefore the Non-Aggression Treaty of Aug. 23, 1939 is to be recognized as legal from the point of view of international law.

The said Treaty stopped to exist juridically and was abrogated as a source of norms of international law with the beginning of war between Germany and the USSR.

Although the 1969 Vienna Convention on Law of Treaties does not touch upon the question of the effect of war on the fate of international treaties (Art. 73 of Convention stipulating straightforwardly that its provisions do not decide the questions concerning the beginning of the actions of war between the states in advance), there exists a universally recognized conventional rule that with the beginning of war between the states, the bilateral treaties stop being in force. Only such treaties may serve as exceptions which create the so-called "objective regime". So, Lord McNair, the former Judge of the International Court of Justice of the UNO, wrote that a treaty on borders or a concession of part of the territory is not abrogated *ipso facto* with the beginning of war between those states.[2] Whereas all other bilateral treaties cease being in force (i. e. they are not simply suspended for the period of hostilities) from the start of the war between the parties. As an instant to this point can be taken Art. 289 of the Versailles Peace Treaty requesting the Allied Powers to point out the bilateral treaties concluded between themselves and Germany before the start of WWI and the validity whereof they would like to resume. "Only such bilateral treaties and conventions", says the article, "which will be so indicated, will resume their validity between the Allied Powers on the one hand and Germany on the other. All others will remain abrogat-

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[1] *Семиряга М.* 23 августа 1939 года. Советско-германский договор о ненападении: была ли альтернатива? // Литературная газета, 1988, 5 авг.

[2] *McNair, A.* The Law of Treaties. N. Y.; Oxford, 1988, 542.

ed."[3] Analogous provisions are included in Art. 241 of the Saint-Germaine Treaty, Art. 224 of the Trianon Treaty, Art. 168 of the Neuilly Treaty.[4]

Another example or proof of there being such a conventional rule is the exchange of notes between Great Britain and Venezuela of Feb. 13, 1903, saying that the blocade of Venezuelan ports by His Majesty's Navy has created the state of war between the parties hence bringing about "abrogation of all treaties existing between the two countries". Therefore Great Britain and Venezuela deemed it necessary to indicate in this exchange of notes such treaties which they wanted to be resumed.[5]

Consequently, the Non-Aggression Treaty between the USSR and Germany ceased being valid on June 22, 1941, i. e. from the moment of Germany's attacking the Soviet Union.

In the given case there is no need to refer to any other grounds for stopping the validity of the Treaty — to the material violation of a bilateral treaty by one of the parties (Pt. 1, Art. 60 of Vienna Convention of 1969), though, as to this particular ground, it is also clear that the attack by one of the parties of the Non-Aggression Treaty is doubtless a material violation of such a treaty and serves as a basis of its cessation.

The above internationally legal assay concerns, naturally, only the Non-Aggression Treaty of Aug. 23, 1939, and not the secret protocol on the division of spheres of interest between the USSR and Germany signed on the same day, nor the analogous protocol concluded on Sept. 28, determining the line of division of those spheres more precisely.

Here I would like to point out that while having no doubts as to the fact that in autumn 1939 there were signed the texts of Secret Protocols the original copies of which have heretofore failed to be found, this fact in itself has no decisive juridical significance. The notion of there being no dependence of the juridical validity of a treaty on its form has become axiomatic in international law. Oral agreement has the same juridical value as the corresponding written deed. The ensuing developments as well as diplomatic correspondence between Moscow and Berlin testify to the agreement on spheres of interest having taken place.

Those two Secret Protocols on the division of spheres of interest have an illegal objective. They include the territories of the third countries into the spheres of interest of contracting parties. Regardless of what the parties to the Protocols considered to be their interests or whether those interests and their realization were understood by the parties in a similar fashion, no treaty concerning the interests, rights or commitments of third states grants any rights to the principal parties to that treaty. No commitments can arise from it either to the parties to the treaty or to any third state. Declaring the territory of third states to be the sphere of interest of contracting countries is a violation of the universally recognized principle of law of treaties *pacta tertiis nec nocent nec prosunt* — a treaty does not grant rights in regard to the third party nor does it create obligations to it.

Moreover, such a treaty violates the principle of sovereign equality of states and therefore, contradicting the imperative norm of international law, it is null and void *ab initio.*

A Polish scholar, Judge to the UNO International Court of Justice M. Ljachs writes that in case of treaties dealing with matters of vital interest to some states, concluded without their participation or consent, one is to question not only the binding force of such treaties as regards such a third state but also their very validity from the legal point of view.[6] This clause refers as it is to Molotov-Ribbentrop Secret Protocols.

[3] *McNair, A.* The Law of Treaties. 549.
[4] Ibid.
[5] Ibid., 336—537.
[6] *Ляхс М.* Многосторонние договоры. М., 1960, 186, 187.

Mention should be also made of another treaty — that of Friendship and Boundary between the USSR and Germany of Sept. 28, 1939. I am not going to dwell on the question of proclamation of relations of friendship between those two states. More important in the context of a juridical assay is the question of borders. Moreover, the very declaration of the Soviet leadership that because of the fall of Warsaw the Polish State had ceased to exist contradicts international law, since a military occupation does not eliminate a state as a subject of international law. And though this border ran along the so-called Curzon line coinciding, with some allowances, with the present line of the Soviet-Polish border and though the territories joined to the USSR were populated mainly by Ukrainians and Byelorussians, the Treaty resulting from the use of force against Poland not only on the part of Germany but also on the part of the Soviet Union, is null and void. This was also recognized in the Agreement between the Government of the USSR and the Government of the Polish Republic upon resuming diplomatic relations and setting up the Polish Army on the territory of the USSR, stating that "the Government of the USSR considers the Soviet-German Treaties of 1939 regarding the territorial changes in Poland as having become invalid . . ."[7]

The second point is the problem of circumstances arising from Secret Protocols being null and void *ab initio*. A treaty null and void *ab initio* does not give rise to any juridical consequences. This holds true as regards the Secret Protocols between the USSR and Germany as well.

There arises, however, a question — what were the juridical consequenses of those Protocols in general and what actual moves have been made on their basis. Sometimes they refer to the annexation of Estonia, Latvia and Lithuania by the Soviet Union as such a juridical consequence. Thus, in the Declaration on State Sovereignty of Lithuania adopted on May 18, 1989, by the Supreme Soviet of the Lithuanian SSR it is said that "in 1940, on the basis of the Pact and additional secret Protocols concluded by Germany and the USSR in 1939, the sovereign State of Lithuania was forcibly and unlawfully annexed to the Soviet Union".

As I have already mentioned, the Non-Aggression Treaty does not deal with any territorial questions. But was it on the basis of Secret Protocols, the Protocols signed by the USSR and Germany, that the annexation of Lithuania, Latvia and Estonia to the USSR took place? Firstly, the Secret Protocols mention only the spheres of interest, and on such vague formulations one cannot conceivably come to the conclusion that they meant annexation of these Republics by the Soviet Union.

Agreements on spheres of interest between the USSR and Germany may be compared in their essential features to the so-called Monroe Doctrine (in particular if one takes into consideration its subsequent interpretation in the note of State Secretary R. Olney of July 20, 1895, to the Government of Great Britain). The message of the President of the USA J. Monroe to the Congress of Nov. 2, 1823, expounding the idea of dividing the world into American and European systems, cannot serve as any legal ground either for any actions on the part of the USA, or on the part of any third states. Thus, illegality of actions of the United States against a number of States of Latin America (Guatemala, the Dominican Republic, Cuba, Nicaragua) does not result from Monroe (or Olney) Doctrine, but from the essence of these very actions. This is not to say that one cannot or should not appraise those doctrines as such in the light of international law their having been juridically fixed in official deeds of the Government of the USA.

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[7] Документы и материалы по истории советско-польских отношений. Т. VII. 1939—1943. М., 1973, 208.

Secondly, the Protocols were concluded between Germany and the USSR. On the part of the USSR the conclusion of such an Agreement meant USSR's refusal to counteract in any form any moves of Germany against Poland. This rendered it undoubtedly easier for Hitler to unleash WWII. Yet, however negatively we would regard those Protocols and the moves of the Stalinist diplomacy on the threshold of the War, we cannot deduce from the secret Agreement of the USSR with Germany the rights to annex the Baltic Republics by the Soviet Union.

Any suggestions concerning the legality or illegality of annexation of Estonia, Latvia and Lithuania by the USSR are to be made proceeding from the study of the processes of annexation themselves, of treaties concluded between these Republics on one side, and the USSR on the other, of internal processes in the Baltic States at the end of the 30s, of the international situation in general and of the threat of imminent WWII in particular which did not fail to affect the Baltic States. One should take into consideration the character of that war as regards the Allied Powers on the one hand and the Fascist Germany on the other, as well as its results. Nor can one ignore the categorical, flagrant demands of the Soviet foreign policy, masterminded by V. Molotov, as addressed to the governments of sovereign states, the said policy being an extension of Stalin's internal policy.

It seems to me that of late one cannot help noticing a new bias in these matters, the said bias being as it is a reaction to the previous approaches. Earlier the Soviet historical science considered the developments in the Baltic States in the summer of 1940 as an overly voluntary subjoining to the Soviet Union, almost unanimously approved by the whole working people of these republics, as a socialist revolution called forth exclusively by inner causes, inner course of development of the Baltic peoples. Now, on the contrary, many people in the Baltic States regard the developments of the summer of 1940 as Soviet occupation, taking into consideration only those doubtless negative aspects of the Soviet foreign policy that have up to now been carefully hidden by our official science. Needless to say, all these problems still require more thorough and comprehensive investigation. But it is not too farfetched to say even now that the complete truth is contained, as it happens more often than not, in neither of these extreme points of view.

From the standpoint of international law and international relations one must point out that the proper assessment of the developments of 1939, as well as those of 1940 calls for comprehensive consideration of the whole complex of international factors, including militarily strategic position of the Baltic countries. Neither can one ignore, as has been said before, the war itself, its nature and its results.

The peoples of the Baltic states fought together with other peoples of the Soviet Union, with other united nations against fascist enslavement. This must be put to the credit of not only the united nations, but also to the credit of the peoples of the Baltic States. However, the fact that the Soviet Union used Stalinist methods while determining the destiny of these peoples and that the state to which these peoples were joined, and which bore the brunt of the fight for safeguarding the ideals of democracy in the world in the conflagration of the War, happened to be ruled by terrorist dictatorship, that the victory of the Soviet people — including the peoples of the Baltic States — over fascism, the victory of freedom and democracy over obscurantism happened, as if by irony of fate, to be consolidating the victory of Stalin over the people, of totalitarian state over the society — that was the calamity for these and not only for these peoples.

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NÕUKOGUDE—SAKSA 1939. AASTA LEPPED RAHVUSVAHELISE ÕIGUSE SEISUKOHAST

1939. aasta leppeid ei ole võimalik objektiivselt analüüsida väljaspool ajaloolis-poliitilist ja sõjalis-strateegilist konteksti, sest õigus funktsioneerib alati konkreetses ajaloolises situatsioonis.

Stalinliku režiimi sisepoliitika analüüs aitab mõista, miks fašistliku Saksamaa parempoolse terroridiktatuuri ja totalitaarse Nõukogude riigi pahempoolse terroridiktatuuri eesmärgid ühte langesid.

Praeguses nõukogude ajalooteaduses käibivad mittekallaletungilepingu erinevad ajaloolis-poliitilised hinnangud. Ametlik lähenemine peab lepingut Nõukogude poolele hädavajalikuks, et lükata edasi vältimatu sõja algust. Alternatiivne käsitlus leiab, et ilma selle lepinguta poleks Saksamaa riskinud alustada sõjalist avantüüri Poola vastu. Autori arvates on lepingu viimane ajaloolis-poliitiline hinnang veenvam.

Juriidilisest seisukohast ei sisalda 1939. aasta 23. augusti leping (silmas on peetud ainult lepingut, mitte selle salaprotokolli) õigusvastaseid sätteid. Seetõttu tuleb rahvusvahelise õiguse seisukohast tunnistada 23. augusti mittekallaletungileping õiguspäraseks. Nõukogude—Saksa mittekallaletungileping muutus tühiseks 1941. aasta 22. juunist, s. t. alates momendist, mil Saksamaa tungis Nõukogude Liidule kallale.

Eelnev rahvusvahelis-õiguslik analüüs puudutab üksnes 1939. aasta 23. augusti lepingut, mitte salaprotokolli, mis määras Nõukogude Liidu ja Saksamaa huvisfäärid ning millele kirjutati alla samal päeval. Faktil, et protokolli originaali pole leitud, ei ole otsustavat juriidilist tähtsust. Rahvusvahelise õiguse aksioom on ‚et lepingu vormist ei sõltu selle õigusjõud. Nagu näitavad järgnenud ajaloosündmused, asusid Moskva ja Berliin huvisfääride määramise kokkulepet rakendama.

Huvisfääre piiritleval salaprotokollil ei olnud õiguslikku objekti, sest lepinguosaliste riikide huvisfääridesse olid lülitatud kolmandate riikide territooriumid. Nimetatud kokkulepe rikkus riikide suveräänset võrdsust ning järelikult on vastuolus rahvusvahelise õiguse normidega ja tühine *ab initio.*

Kuivõrd salaprotokoll oli kohe kehtetu, ei võinud sellel olla mitte mingisuguseid juriidilisi tagajärgi. Ei saa nõustuda arvamusega, et salaprotokolli põhjal toimus Leedu, Läti ja Eesti ühendamine Nõukogude Liiduga. Nimetatud riikide Nõukogude Liiduga ühendamise õiguspärasusest või mitteõiguspärasusest võib kõnelda üksnes siis, kui on põhjalikult uuritud ühendamist ennast ning nende riikide ja Nõukogude Liidu vahel sõlmitud lepinguid. Samal ajal ei saa tähelepanuta jätta Nõukogude välispoliitika ultimatiivseid ja jämedaid nõudmisi, mis oli otsene stalinliku sisepoliitika jätk.

Teaduse, rahvusvahelise õiguse ja rahvusvaheliste suhete aspektist nõuab 1939. ja 1940. aasta sündmuste hindamine rahvusvaheliste tegurite, sealhulgas Balti riikide sõjalis-strateegilise seisundi arvestamist.

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СОВЕТСКО-ГЕРМАНСКИЕ ДОГОВОРЕННОСТИ 1939 ГОДА В СВЕТЕ МЕЖДУНАРОДНОГО ПРАВА

Невозможно провести объективный юридический и международный анализ договоренностей 1939 г. в отрыве от историко-политического и военно-стратегического контекста. Право всегда действует в контексте конкретной исторической обстановки.

Анализ внутренней политики сталинского режима является ключом к тому, чтобы понять, почему совпали цели правой террористической диктатуры в фашистской Германии и левой террористической диктатуры в тоталитарном Советском государстве.

В настоящее время в советской исторической науке имеются различные историко-политические оценки договора о ненападении. Официальная заключается в оценке этого договора как необходимого, сумевшего отодвинуть для СССР начало неминуемой войны. Альтернативная заключается в том, что без этого договора Германия не рискнула бы ввязаться в военную авантюру против Польши.

По мнению автора, последняя историко-политическая характеристика договора о ненападении более убедительна.

Исходя из юридического анализа, текст договора от 23 августа 1939 г. (речь идет только о договоре, но не о секретном протоколе) не содержит никаких противоправных положений. Поэтому с точки зрения международного права договор о ненападении от 23 августа следует признать правомерным.

Договор о ненападении между СССР и Германией прекратил свое действие 22 июня 1941 г., т. е. с момента нападения Германии на Советский Союз.

Данный международно-правовой анализ, повторяем, касается только договора от 23 августа 1939 г., а не секретного протокола о разграничении сфер интересов между СССР и Германией, подписанного в тот же день. Тот факт, что оригинала не найти, не имеет решающего юридического значения. Аксиомой в международном праве является положение о том, что от формы договора не зависит его юридическая сила. А как показали последующие исторические события, договоренность о разграничении сфер интересов между Москвой и Берлином имела место.

Секретные протоколы о разграничении сфер интересов имели неправомерный объект, так как в сферы интересов договаривающихся государств были включены территории третьих стран. Такой договор нарушал принципы суверенного равенства государств и, следовательно, противоречил императивной норме международного права и являлся недействительным — *ab initio*.

Поскольку секретные протоколы являлись недействительными с самого начала, они не могли породить каких-либо юридических последствий. Нельзя согласиться с мнением, что на основе секретных протоколов произошло присоединение Литвы, Латвии и Эстонии к СССР.

О правомерности или неправомерности присоединения вышеназванных государств к СССР следует говорить лишь на основе изучения самих процессов присоединения, договоров, заключенных между этими государствами, с одной стороны, и СССР — с другой. Но в то же время нельзя игнорировать ультимативные, грубые требования советской внешней политики, что являлось естественным продолжением вовне сталинской внутренней политики.

С точки зрения науки, международного права и международных отношений следует отметить, что оценка событий как 39-го, так и 40-го годов требует учета всего комплекса международных факторов, в том числе и военно-стратегического положения Прибалтийских государств.