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**Kaliningrad Transit:
Why to Facilitate?**

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Summary

Kaliningrad transit: Why to facilitate? As well as the title, this study is divided into two parts: the first one is about Kaliningrad transit assessed against the wide historic and socio-economic background, and the second one presents reasoning of general international law, as well as of international human rights law in favour of Kaliningrad transit facilitation. Here the Kaliningrad transit stands for the regulation of private passenger movement by rail between the Kaliningrad region and the rest of Russia via Lithuania and Belarus.

Kaliningrad is one of 89 federal units of the Russian Federation. It is situated on the coast of the Baltic Sea, separated from the rest of the country with territories of two sovereign states (Lithuania and Latvia, Lithuania and Belarus, or Poland and Belarus depending of the route of transit).

Kaliningrad is subject to undisputed sovereignty of Russia.

In the regulation of rail passenger connection between the region and the rest of the state, three periods are singled out: soviet, post-soviet and European.

During the first one, *de facto* restrictions on freedom of intrastate movement based on peculiarities of soviet passport system were gradually lifted by 1974. Since that time, access to the region was free of any formalities.

Independence of Lithuania in 1991 (the post-soviet period) did not change the regime of freedom. Bilateral agreements between Lithuania and Russia prescribed for the liberal mode of transit even when in 1995 Lithuania introduced visas for visits and road transit transportation.

However, in the view of Lithuania's accession to the European Union (the European period) the future of the liberal Kaliningrad transit was questioned and caused hot debates, primarily, between Russia and the EU (whom Lithuania delegated its sovereign rights to legislate on short-term border crossing). The EU demanded establishment of a visa transit mode, while Russia insisted on preservation of the existing visa-free scheme.

The compromise was reached and took the form of the Facilitated Transit Documents. Also, a feasibility study regarding a visa-free transit by high-speed non-stop transit train was launched.

So, the question was solved, and solved first and foremost on the basis of the European Communities' law. Russia accepted the scheme.

But the general international law (in contradistinction to regulations, mainly in the framework of the European Union) could strengthen the position of

Russia and help her to carry her point regarding freedom of Kaliningrad transit. The arguments of general international law are threefold. Firstly, free access to exclaves exists as a general principle of law. Secondly, doctrine of servitudes can be applied to the transit issue at hand. Finally, non-stop transit train can be implemented as a practical mechanism of solution.

Exclave is defined in political geography as a part of the state, which does not have direct land connection with its mainland.

State practice witnessed different solutions of enclaves' access problems. The European experience is the most positive one in this regard. It is suggested that the fate of Kaliningrad should be decided according to the best traditions of Europe.

General principles of law, as stated in para. 1 (c) Art. 38 of the Statute of the International Court of Justice, do cover the right to freedom of connection between an exclave and its motherland, be they understood as either principles of international law itself, or provisions common to all municipal legal systems, or principles embracing both international and domestic law alike.

Further, the concept of international or state servitudes can be used in addition or in alternative to the proposition of the general principles.

The doctrine and results of contentions between states throughout the twentieth century where the theory of servitudes was used as a ground for claims shows that, if applied cautiously, servitudes can substantiate the demands for the facilitation of transit at hand.

The specific situation of Kaliningrad complies with the requirements of servitudes applicability. The servitude existed, not being named, in the consecutive agreements between Russia and Lithuania and implied the minimum of sovereignty abstention on the part of Lithuania.

The freedom of Kaliningrad transit can also be secured through the high-speed non-stop transit train. Against the background of the previous use of similar scheme, high-speed non-stop transit train is being proved to fulfil the criteria of feasibility and legal appropriateness.

As for the human rights dimension two elements are put forward. On the one hand, the Constitution of the Russian Federation is not a proper authority to appeal to. On the other hand, international standards regarding the freedom of movement, while not in unison, provide arguments against barriers on the way between Kaliningrad and mainland Russia.¹

¹ On basis of this thesis the author thereof has published an article: *Kiseleva E. Visa access to an exclave from the point of international law // Human Rights Law Review. Vol. 2. 2007 (October). P. 121-153. Beijing: Peking University Press, 2007.*

Abbreviations

ETS	European Treaty Series
EU	European Union
FRTD	Facilitated Rail Transit document
FTD	Facilitated Transit Document
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
LNTS	League of Nations Treaty Series
PCIJ	Permanent Court of International Justice
RF	Russian Federation
RSFSR	Russian Soviet Federative Socialist Republic
UDHR	Universal Declaration of Human Rights
UNTS	United Nations Treaty Series
USSR	Union of Soviet Socialist Republics

1 Introduction

“Exclaves are not important phenomena in political geography. They are rare and mostly small. But their special status is of value in illustrating the relations of states in difficult geographic circumstances...”²

G.W.S. Robinson

Let's imagine that an entrepreneur, for conducting his business, has bought a couple of rooms in the office-building, which belongs to a certain company. Due to security reasons that company established a pass regime for entering into its territory. Although the entrepreneur's property rights are not questioned, the company informed him that he might be forbidden to come into the building in case a guard suspected him of presenting a threat. Well, can the entrepreneur be sure in the stability of his business affairs under these circumstances? The situation with enclaves is the same when the surrounding state imposes a visa requirement for communication between an enclave and its mainland.

1.1 Objective of the study

The objective of this study is to contribute with the case of Kaliningrad to understanding of the variety of potentialities available in the general international law for solving the exclaves' problems of access that are, on the one hand, ordinary for the specific position of exclaves and, on the other hand, essential for the existence of those exclaves.

Assessed from the advocate-judge perspective, this study is rather partial than neutral. However, it is neither former, nor latter in a strict sense. The argumentation itself is definitely pro-Russian, but weak points of reasoning are not circumvented.

In order to fulfil the task, variety of materials was engaged, both of practical and academic character. International instruments, national regulations and scholarly opinions formed the foundation of the legal analysis, while the news information helped to depict recent events.

1.2 Novelty of the study

Around 2000 the problems that Kaliningrad would face with the enlargement of the EU were lively debated, international conferences on this topic were organized not once. As a result some important books and reports

² Robinson, G.W.S. 'Exclaves', 49:3, part 1 *Annals of the Association of American Geographers* (1959) p. 283.

appeared.³ Authors tackled various aspects of, then, the future of the Kaliningrad as a region surrounded by the EU member-states. Issues of travel regime also came to the field of their vision. But usually it was a Schengen-centred approach. It focused primarily on the analysis of the flexibility of Schengen and/or the effects of introducing Schengen rules for the Lithuanian segment of the 'Kaliningrad – Russia proper' route.

The novelty of the approach in this study is bringing into consideration the general international law responses to the challenge that freedom of communication between the exclave and its mainland through the territory of a sovereign state presents.

This paper is, partly, a retrospect regarding the problem of the Kaliningrad transit. The transit mode on the issue was agreed upon in 2002 and put into practice from the 1 July 2003. However, a part of the solution, namely the possibility of introduction of the high-speed non-stop transit train, is still debated. Moreover, this year the operation of the scheme will be reviewed. Therefore the outcomes of the present research are up to date and valuable for the Kaliningrad issue, not to mention other enclaves whose similar problems have not yet been settled sufficiently.

All data is given as of March 30, 2005.

1.3 Scope of the study

Previously the regime of Kaliningrad transit was liberal. It was visa-free since the independence of Lithuania and Russia in 1991, when Kaliningrad turned into an exclave. The problem occurred when Lithuania opted for the membership in the European Union and undertook the obligation to bring its internal legislation, as well as external treaty responsibilities, in compliance with the EC law, *inter alia* with the requirement of the Schengen system of border control.

Schengen rules gave millions of people opportunities to move visa-free within the member states and not only, while on short-term visit. But they are neither the only rules in the field of international law, nor the top priority rules in the dialogue with non-parties to the Schengen *acquis*. This work concentrates on the arguments that the general international law provides for

³ See, e.g., books: Joenniemi, Pertti *et al.*, *The Kaliningrad Puzzle: A Russian Region within the European Union*, Baltic Institute of Sweden, Karlskrona, Mariefhamn, 2000, Joenniemi, Pertti and Jan Prawits (eds.), *Kaliningrad: The European Amber Region*, Ashgate, England, 1998. Baxendale, James *et al.*, *The EU & Kaliningrad: Kaliningrad and the Impact of the EU Enlargement*, Federal Trust for Education and Research, 2000, Fairlie, Lindelle D. and Alexander Sergounin *Are Borders Barriers: EU Enlargement and the Russian Region of Kaliningrad*, The Finnish Institute of International Affairs, 2001; reports: Huisman, Sander, 'A New European Union Policy for Kaliningrad', *Occasional Papers* No. 33 (March 2002), EU Institute for Security Studies, Paris, Oldberg, Ingmar, *Kaliningrad: Russian Exclave, European Enclave*, Scientific report to Swedish Defence Research Agency, Stockholm, June 2001.

the unhindered connection between the Kaliningrad region and the rest of Russia.

From the geographical point of view, this work is limited to the railway route through Belarus and Lithuania, because the territory of the latter offers the most convenient and used path from the main territory of Russia to the Kaliningrad region, and there is a visa-free passage between Russia and Belarus.

1.4 Composition of the study

This paper consists of two parts elaborating upon a subject, each divided into chapters and subchapters, includes introduction, conclusion, two maps and a sample of the Facilitated Rail Transit Document (FRTD).

The first part presents the background. It starts with basic information about the region as a unit on the map of Europe and continues by a historical essay (first chapter). History occupies an important place in this part. Historical analysis is given for deeper understanding of current population composition, for highlighting the grounds of the Russian sovereignty over the region and also for the sake of pure academic interest in the subject under consideration. The sketch of the current state of affairs in the region aims to highlight the reasons of the EU's interest in the wellbeing of the region and its 'soft' security fears, which underlie the EU's strong opposition to any visa-free solutions.

The second chapter follows the history of the regulation of movement between the Kaliningrad region and its homeland, and covers the soviet and post-soviet periods. The witnessed direction of the development is asserted as a facilitation of the communication, starting from the restrictive, based of the soviet passport system, indirect mechanism of regulation and proceeding to the relaxing of passport limitations, their abandonment and, finally establishment of a liberalized regime in the time of co-existence of Russia and Lithuania as separate sovereign states.

The negotiations of the current mode and the result thereof are separated in the third chapter. They form a new, latest stage of access regulation and are described in greater detail.

The second part of the study elaborates upon the arguments of the general international law in favour of the facilitation. In the first small chapter the similarity of the FTD and visas is asserted.

The following chapter clarifies the notion of enclaves as a phenomenon of the political geography and goes through the examples of state practice illustrating successful and sad experience of access problems solutions. It is suggested that the fate of Kaliningrad should be decided according to the best traditions of Europe in this respect. Further the proposition is forwarded

that the freedom of movement between the mainland and an exclave exists as a matter of general principle of law.

The third chapter revives the concept of international or state servitudes that can be used in addition or in alternative to the proposition of the general principles above. The doctrine and results of contentions between states throughout the twentieth century where the theory of servitudes was used as a ground for claims shows that, if applied cautiously, servitudes can substantiate the demands for the facilitation of transit at hand. The specific situation of Kaliningrad is tested for the compliance with these requirements, with the conclusion of servitudes' applicability to the situation, in favour of Kaliningrad.

The practical way of implementation of the theoretical constructions above is described in the chapter four. Against the background of the previous use of similar scheme, high-speed non-stop transit train is being proved to fulfil the criteria of feasibility and legal appropriateness.

The final chapter of this part elucidates the aspects of human rights affected by the current transit regime. Though the Constitution of the Russian Federation is not a proper authority to appeal to, international standards regarding the freedom of movement, while not in unison, provides arguments against barriers on the way between Kaliningrad and mainland Russia.

Outcomes of the study are summarised in Conclusion.

2 KALININGRAD: FACTS

2.1 Kaliningrad Region: Background Information and Historical Overview

2.1.1 Geography

As the present paper is a case study and one of the arguments being put forward relies on the premise that facts make law, it is important to give the reader a picture of the most relevant factual issues: peculiarities of location and the composition of the population of the Kaliningrad region.

Kaliningrad is the youngest and most Western region of Russia. It lies on the coast of the Baltic Sea in the basin of the Pregolya River and its tributaries, detached from the rest part of the state with the territories of the foreign countries.⁴ (See Supplement 1. Map 1.) Its total area is approximately 15,100 square kilometres⁵, or half size of Belgium,⁶ and its population is 955,3 thousand people⁷, what is more than that of Malta, Luxemburg and Liechtenstein put together.⁸

Kaliningrad has borders with Lithuania in the East and in the North (approximately 280,5 kilometres⁹) and Poland in the South (231,98 kilometres). The closest Russian regional city (Pskov) is situated 800 kilometres from Kaliningrad, and the distance to Moscow is 1289 kilometres. Many of the European capitals are not that far (four of them are twice as near – Vilnius, Riga, Warsaw, Berlin).¹⁰ Travelling between the Kaliningrad Region and other territory of Russia is thus possible only through the Baltic Sea, by air, or across the international land borders and the sovereign territories of Belarus and Lithuania, Belarus and Poland, or Latvia and Lithuania, each being about 700 kilometres.¹¹

⁴ 'Kaliningrad', Encyclopaedia Britannica, <<http://search.eb.com/eb/article?tocId=9044412>>, visited on 12 November 2004.

⁵ 'Kaliningrad Region', Official site of the Kaliningrad region Administration, <http://www.gov.kaliningrad.ru/en_region.php3>, visited on 12 November 2004.

⁶ Baxendale, James, 'EU-Russia Relations: Is a 2001 a Turning point for Kaliningrad?', 6 *European Foreign Affairs Review* (2001) p. 437.

⁷ 'Kaliningrad Region', Official site of the Kaliningrad region Administration, *supra* note 4.

⁸ See The World Factbook, Central Intelligence agency, Director of Central Intelligence, <<http://www.cia.gov/cia/publications/factbook/index.html>>, visited on 2 February 2005.

⁹ Approximately as the demarcation has not been finished yet.

¹⁰ 'Kaliningradskaya oblast' [Kaliningrad Region], Official site of the Kaliningrad region Administration, <<http://www.gov.kaliningrad.ru/rintro.php3>>, visited on 12 November 2004.

¹¹ As estimated in Ragnarsdottir, Lara M., Rapporteur, Political Affairs Committee, Parliamentary Assembly, Council of Europe, Report 'The Enlargement of the European Union and the Kaliningrad Region', Doc. 9560, 22 September 2002, para. 5.

Using air or sea routes does not require visas or any similar formalities, but is either much longer or more expensive. Here are some figures to compare.¹²

There are four transit *trains* from Kaliningrad to Russia, their destinations being Moscow, Saint Petersburg, Anapa (South of Russia) and Chelyabinsk (East of Russia, the Urals area). It takes 21-22 hours to reach Moscow, and cost approximately 700 rubles (25,5 USD or 19,1 EUR).

Kaliningrad – Saint Petersburg trip by *ferry* takes 47 hours and approximately 1 300 rubles (46,5 USD or 35,8 EUR). From the four *airlines* operating from Kaliningrad to mainland Russia, the cheapest Aeroflot will bring to Moscow in two hours for 2 000 rubles (71,5 USD or 55,1 EUR).

This work concentrates over the issue of railway route through Belarus and Lithuania, and, more narrowly, negotiations with Lithuania, because its territory offers the most convenient and used path from the main territory of Russia to the Kaliningrad region¹³, and there is a visa-free passage between Russia and Belarus.¹⁴

2.1.2 Historical overview

It is aimed to highlight the grounds for the Russian sovereignty over the region and current situation in the area. Being founded and developed as a German city, Königsberg was an exclave three times throughout its history. It passed to the sovereignty of the Soviet Union as a result of the World War II and was renamed Kaliningrad. Its belonging to Russia (formerly the Russian Soviet Federative Socialist Republic), though debated in the 1990s, has never been officially challenged. At present, the Kaliningrad region falls behind its neighbours in the rate of economic growth significantly. This fact, coupled with problems in the fields of ecology, healthcare and crime prevention, is perceived by the European Union as a ‘soft’ security threat,

¹² Except the prices for the railway, this information is available (in Russian) at the Internet site of the Project for information of Russian citizens on the rules of transit to Kaliningrad by railway, airway, road and ferry, <www.dokaliningrada.ru>, visited on 2 December 2004.

¹³ It is estimated that railway transport secures up to 80 per cent of passenger transit between Kaliningrad and Moscow. See *Kaliningradskaya Zheleznaya Doroga I Komissia Evrosoyuza Sporyat iz-za Kolei* [Kaliningrad Railway and Commission of the European Union Fight about the Track], *Information Agency Regnum*, 28 April 2004, <<http://www.regnum.ru/news/253976.html>>, visited on 25 November 2004; see also Sokov, Nikolai, *Russian Policy Towards the Baltics: What the West Can Expect and What It Could Do*, Occasional paper, the Atlantic Council of the United States, July 1999, <<http://unpan1.un.org/intradoc/groups/public/documents/UNTC/UNPAN016470.pdf>>, visited on 8 February 2005, p. 27.

¹⁴ The visa-free regime was established by the Agreement between the Government of the Republic of Belarus, the Government of the Republic of Kazakhstan, the Government of the Republic of Kyrgyzstan, the Government of the Russian Federation and the Government of the Republic of Tajikistan, Minsk, 30 November 2000 (entered into force 7 June 2002).

which, in its turn, allegedly justifies the tightening of control over the expanded borders.

The first historically recorded (in the I century A.D.) population of today's Kaliningrad area were the Prussians, the third major Baltic people after the Latvians and Lithuanians.¹⁵ They were a distinct ethnic group, neither Germanic nor Slavic, who spoke the Old Prussian language that belonged to the Baltic group of the Indo-European language family. They populated the area between the lower Vistula and Niemen rivers, were mainly hunters and cattle breeders, lived in tribes and were pagans.¹⁶

Early attempts to convert the Prussians to Christianity, held at the edge of the 10th and 11th centuries, were unsuccessful. However, in the 13th century the Teutonic Knights managed to Christianize the aborigines. For that the Order was granted with all Prussian lands by the Polish duke, as a token of appreciation for saving him from the pagans' incursions.¹⁷ "Since the Germanic occupation, 'Prussian' has become for many a synonym of German."¹⁸

The citadel of Königsberg (translated as "King's Mountain") was established in 1255 by the Teutonic Knights and named after the respected crusading Bohemian king Otakar II.¹⁹ Eventually it developed as a regional centre of trade, commerce and culture.²⁰ At a time Königsberg was a member of the Hanseatic League²¹ and the residence of the grand master of the Teutonic Order (1457-1525).²²

With the secularization of the Order's territories in 1525, Königsberg became the capital of the newly established Lutheran duchy under the Polish

¹⁵ See Oldberg, Ingmar, 'Kaliningrad: Problems and Prospects', in Joenniemi, Pertti and Jan Prawits (eds.), *Kaliningrad: The European Amber Region*, *supra* note 2, p. 11.

¹⁶ 'Prussian people', TutorGig Encyclopedia, <http://www.tutorgig.com/ed/Old_Prussians>, visited on 16 December 2004; 'Prussia', Encyclopaedia Britannica, <<http://search.eb.com/eb/article?tocId=9061665>>, visited on 16 December 2004.

¹⁷ 'Prussia', Encyclopaedia Britannica, *supra* note 28.

¹⁸ Burbienne, Sigita, Rapporteur, Committee on Economic Affairs and Development, Parliamentary Assembly, Council of Europe, Report 'Ensuring a Prosperous Future for the Kaliningrad Region: Need for European Solidarity', Doc. 9524, 12 July 2002, para. 6.

¹⁹ 'Ottakar II', Encyclopædia Britannica, <<http://search.eb.com/eb/article?tocId=9057641>>, visited on 15 December 2004.

²⁰ Huisman, Sander, *supra* note 2, p. 9.

²¹ Defined in Britannica as an "organization founded by north German towns and German merchant communities abroad to protect their mutual trading interests." This league dominated commercial activity in northern Europe from the 13th to the 15th century. See 'Hanseatic League', Encyclopaedia Britannica, <<http://search.eb.com/eb/article?tocId=9039167&query=hanseatics&ct=eb>>, visited on 16 December 2004.

²² 'Kaliningrad', Encyclopaedia Britannica, *supra* note 3.

(catholic) sovereignty – first protestant state Ducal Prussia.²³ This was the first time of the reported exclivity of the area.²⁴

The 18th century (1701) was marked by the final independence of Prussia. In 1795 Prussia left the Holy Roman Empire of German nation and was incorporated in the German Empire in 1871.²⁵

In the second half of the 18th century Königsberg used to be a part of the Russian Empire.²⁶ It happened in the course of the Seven Years war (1756-1763), when France, Austria, Saxony, Sweden, and Russia allied themselves against Prussia, Hanover, and Great Britain.²⁷ In 1758 Russian troops successfully entered into East Prussia. Unfortunately for the war achievements, after the death of the Russian empress Elizabeth in 1762 Tsar Peter III, an admirer of Prussia, came into power. He made peace and relinquished the territory.²⁸ But the fact is, Kant (1724-1804) used to be a Russian subject, though it sounds anecdotic to the fullest extent.

After the defeat of Germany in the World War I the region became severed from the rest part of the state; in accordance with the Treaty of Versailles of 1919, the so-called ‘Polish Corridor’ was established²⁹ (See Supplement 3. Map 2), because the territory of East Prussia remained German (as a result of a plebiscite).³⁰ The experience of the “corridor solution” is discussed elsewhere in this work.

2.1.2.1 The outcomes of the World War II – Königsberg turns into Kaliningrad

The results of the World War II deserve special attention, as they form the legal basis for the Russian sovereignty over the region and the claim of the unhindered movement between the two parts of the state.

²³ ‘Prussia (province)’, TutorGig Encyclopedia, <http://www.tutorgig.com/ed/Prussia_%28province%29>, visited on 16 December.

²⁴ Ducal Prussia was not contiguous with Royal Prussia, though the status of the two was not equal. The former was a Polish fief, while the latter was directly held by the Polish King.

²⁵ ‘Kaliningrad’, TutorGig Encyclopedia, <<http://www.tutorgig.com/ed/Kaliningrad>>, visited on 25 November 2004.

²⁶ Burbiene, Sigita, *supra* note 17, p.6

²⁷ “The war arose out of the attempt of the Austrian Habsburgs to win back the rich province of Silesia, which had been wrested from them by Frederick II the Great of Prussia during the War of the Austrian Succession (1740-48)”. See ‘Seven Years’ War’, Encyclopaedia Britannica, <<http://search.eb.com/eb/article?tocId=9066946>>, visited on 16 December 2004.

²⁸ *Ibid.*

²⁹ See, Vali, Ferenc A., *Servitudes of International Law: A Study of Rights in Foreign Territory*, 2nd ed., Littleton: Fred B. Rothman & Co., 1986. Originally published: 2nd ed., London: Stevens, 1958, p. 108.

³⁰ Oldberg, Ingmar, *supra* note 14, p.2-3

During the World War II the city suffered severely from bombings by the British Royal Air Forces in 1944³¹ and in 1945 the Soviet Army seized it.³² More or less at all major conferences during and after the war Stalin demanded the Königsberg area to be ceded to the USSR. Records to that effect can be traced to negotiations between British Foreign secretary Eden and Stalin in Moscow in December 1941.³³

Mentioned also at the Yalta conference of February 1945, the issue was brokered and solved during the Teheran and Potsdam conferences, respectively.³⁴ Potsdam conference confirmed the reached agreement about the cession of the part of East Prussia to the USSR.

It is worth to cite the whole text of the document, which concerns the fate of the Northern part of East Prussia.

“V. City of Koenigsberg and the Adjacent Area

The conference examined a proposal by the Soviet Government to the effect that, *pending the final determination of territorial questions* at the peace settlement, the section of the western frontier of the Union of Soviet Socialist Republics which is adjacent to the Baltic Sea should pass from a point on the eastern shore of the Bay of Danzig to the east, north of Braunsberg-Goldap, to the meeting point of the frontiers of Lithuania, the Polish Republic and East Prussia.

The conference has agreed in principle to the proposal of the Soviet Government concerning the ultimate transfer to the Soviet Union of the City of Koenigsberg and the area adjacent to it as described above, *subject to expert examination* of the actual frontier.

The President of the United States and the British Prime Minister have declared that they will support the proposal of the conference at the forthcoming peace settlement.”³⁵

It is common among the authors who write on Kaliningrad to refer to the results of the Potsdam conference alone for the purpose of assertion of USSR's rights over the Kaliningrad's area in general, without any specifications.³⁶ At the same time, making a reference only to this text

³¹ ‘Kaliningrad’, TutorGig Encyclopedia, <<http://www.tutorgig.com/ed/Kaliningrad>>, visited on 25 November 2004.

³² Strauss, Kilian *The Regional Integration of Kaliningrad*, 1998, <<http://www.kaliningradexpert.org/stuff/pubs/The%20Regional%20Integration%20of%20Kaliningrad.pdf>>, visited on 4 February 2005, p. 4.

³³ Furmonavičius, Darius ‘European Enlargement: The Koenigsberg/Karaliaučius/Kaliningrad question – Stalin’s legacy within an Enlarged Europe’ <<http://www.ecsa.dk/2004%20papers/Furmonavicius.DOC>>, visited on 15 December 2004.

³⁴ Feis, Herbert, *Churchill, Roosevelt, Stalin: The War They Waged and the Peace They Sought*, Princeton: Princeton University Press, 1957, p. 271.

³⁵ *Protocol of Proceedings of the Berlin Conference*, *supra* note 20, p. 347 (emphasis added).

³⁶ See e.g., Oldberg, Ingmar, *supra* note 14, p. 3.

some authors and politicians³⁷ consider themselves entitled to question the belongingness of the Kaliningrad region to Russia, claiming that the desired final peace settlement was never reached.³⁸

But such proposition is not correct, since the actual settlement did take place and its results are reflected in the Helsinki Final Act of 1975.³⁹ Professor Shaw put it this way, “[t]he Final Act ... was seen as the method by which the post-war European territorial settlement would be finally accepted.”⁴⁰

Final Act included the principle of inviolability of frontiers, which is read as follows:

“The participating States regard as inviolable all one another's frontiers as well as the frontiers of all States in Europe and therefore they will refrain now and in the future from assaulting these frontiers.”⁴¹

Provisions to the same effect, sometimes specifying the absence of any territorial claims, were incorporated also in the bilateral treaties between the Soviet Union, Poland and Germany, and also in the Treaty on the Final Settlement with respect to Germany.⁴² That is why “[t]he governments in

³⁷ See, e.g., overview of them made in Joenniemi, Pertti *et al.*, *The Kaliningrad Puzzle*, *supra* note 2, p.5.

³⁸ E.g., Dr. Darius Furmonavičius wrote:

“When the German frontiers were redrawn after 1945, the Allies agreed to assign the Southern part of East Prussia to Poland, but the Northern part was annexed by the Soviet Union, despite the agreement of the Soviet delegation at Potsdam ... not to mark the Western borders of the USSR and not to incorporate Königsberg and the adjacent area into the Soviet Union in advance of a peace settlement, which in fact never took place. Thus, it is important to emphasise that though the region is currently administered by Russia, it can be argued that it is not a *legal* part of Russia.’

[‘. See Richard J. Krickus, *The Kaliningrad Question* (Lanham: Rowman & Littlefield, 2002), pp. 172-174. Professor Richard Krickus argues that the United States should now recognize Kaliningrad as a *de jure* part of Russia, while the author of this paper argues that it is now the right time for the United States to emphasize the policy of non-recognition of the incorporation of this region into the USSR and to raise the issue of the illegality of Russian presence in the region internationally.].” Furmonavičius, Darius, *supra* note 32. And the author has not yet paid sufficient attention to the fact that even an expert assessment of the border, though being provided for, has never been carried out.

³⁹ Conference on Security and Co-operation in Europe, Final Act, August 1, 1975, *International Legal Materials*, vol. XIV (1975), p. 1292.

⁴⁰ Shaw, Malcolm N., *International Law*, 5th ed., Cambridge: Cambridge University Press, 2003, p. 347.

⁴¹ “In the Western view, the Final Act constituted a political statement and accordingly could not be regarded as a binding treaty. Nonetheless, the impact of the Final Act on the developments in Europe has far exceeded the impact of most legally binding treaties.” *Ibid*

⁴² See Art. 1. Treaty on the Final Settlement with respect to Germany, 12 September 1990, Moscow, 1696 UNTS 115; Art. 2. Treaty on Good-Neighbourliness, Partnership and Cooperation between the Federal Republic of Germany and the Union of Soviet Socialist Republics, Bonn, 9 November 1990, 1707 UNTS 387; Art. 2. Treaty concerning the demarcation of the established and existing Polish-German frontier, 14 November 1990, Warsaw, 1708 UNTS 397; see also Treaty (with annexed maps) concerning the demarcation of the existing Soviet-Polish State frontier in the sector adjoining the Baltic Sea, 5 March 1957, Moscow, 274 UNTS 133; Treaty concerning the Polish-Soviet State

Vilnius and Warsaw refrained from taking part in the debate and refused to raise the issue, although suspicions prevailed that the questioning of Kaliningrad's status was not altogether without official support. The German government repeatedly disavowed any interest in trying to reclaim the territory.

... Pushing such claims would have buried a number of European treaties premised on the territorial *status quo*...⁴³ Moreover, the expansion of the NATO and EU worked for Russia in this regard, as conditions of accession (to the NATO, for example) explicitly demanded, *inter alia* the resolution of all territorial disputes.⁴⁴ And thus, in fact “cemented the Baltic states' borders, minimizing Russian anxiety over competing claims to post-Soviet peripheral territory in the Baltic region.”⁴⁵

2.1.3 Current security threats

Since the soviet time Kaliningrad changed its image radically.⁴⁶ While initially it was an important military base of the Soviet Union, headquarter of the Baltic fleet and a closed area⁴⁷, from the 1990s on, the government strove to use its unique geographic location to develop the region into a prosperous economy. In 1990 the Kaliningrad region was included in the list of the first zones of the free entrepreneurship⁴⁸, in 1991 it received a status of the free economic zone⁴⁹, changed in 1996 into the special economic zone.⁵⁰

Frontier, 16 August 1945, Moscow, 11 UNTS 61; Agreement concerning the demarcation of the established and existing Polish-German State frontier, 6 July 1950, Zgorzelec, 319 UNTS 93.

⁴³ Joenniemi, Pertti *et al.* *The Kaliningrad Puzzle*, *supra* note 2, p.5.

⁴⁴ See Para. 6, Chapter 1. Purposes and Principles of Enlargement, Study on NATO Enlargement issued by the Heads of State and Government participating in the Meeting of the North Atlantic Council, Brussels, 3 September 1995, <<http://www.nato.int/docu/basicxt/enl-9502.htm>>, visited on 3 February 2005. It reads:

“States which have ethnic disputes or external territorial disputes, including irredentist claims, or internal jurisdictional disputes must settle those disputes by peaceful means in accordance with OSCE principles. Resolution of such disputes would be a factor in determining whether to invite a state to join the Alliance.”

⁴⁵ Vitunic, Brian, ‘Kaliningrad: No Easy Answers’, *EurActiv*, 21 October 2002 <<http://www.euractiv.com/Article?tcmuri=tcm:29-118198-16&type=Analysis>>, visited on 27 January 2005.

⁴⁶ The post-soviet period is well researched. See e.g., Huisman, Sander, *supra* note 2, pp. 9-12.

⁴⁷ See e.g., Strauss, Kilian *The Regional Integration of Kaliningrad*, *supra* note 31, p. 6.

⁴⁸ Decree of the Supreme Soviet of the RSFSR On the creation of zones of free entrepreneurship, No. 106-1, 14 July, 1990.

⁴⁹ Decree of the Supreme Soviet of the RSFSR On the economic and legal status of the Free Economic Zone in the Kaliningrad region, 3 June 1991; Decree of the Council of Ministers of the RSFSR adopted the Regulation On the Free economic zone in the Kaliningrad region (FEZ Yantar' [Amber]), No. 497, 25 September 1991.

⁵⁰ Federal Law On the Special Economic Zone in the Kaliningrad region, No. 13, 22 January 1996 (as amended by 22 August 2004).

But those steps did not give the expected effect.⁵¹ By now, Kaliningrad's GDP per capita is 35% lower than the Russian average⁵², and about 30% of the population lives below the poverty line.⁵³ An import-led economy, accompanied by high macroeconomic risks⁵⁴, legal uncertainty and weak administration resulted in chronic under-investment and, in turn, economic stagnation.⁵⁵ Living standards are lower than in the neighbouring countries (they are estimated as 90 percent of the level of Lithuania, or 75 per cent of the level of Poland)⁵⁶ and the development lag is likely to grow.

Besides that Kaliningrad is considered to have one of the highest AIDS and tuberculosis rates in Russia and Europe⁵⁷, and, along with Saint Petersburg, it is one of the Baltic Sea's main polluters.⁵⁸

⁵¹ See Zverev, Yu. M. *Kaliningradskaya Oblast': Portret na Fone Vyborov* [The Kaliningrad Region: The Portrait against the Background of Elections], <<http://www.carnegie.ru/ru/news/248208zverev.doc>>, visited on 25 November 2004.

⁵² *EU-Russia relations special meeting in Kaliningrad*, Brussels, 16 May 2002, <<http://www.kaliningradexpert.org/stuff/docs/EU%20and%20K-d.doc>>, visited on 4 February 2005.

⁵³ The data is of 2000. United Nations Economic and Social Council, 'Implementation of the International Covenant on Economic, Social and Cultural Rights: Fourth Periodic Reports Submitted by States Parties in Accordance with Articles 16 and 17 of the Covenant. Addendum. Russian Federation.' Annex 7. Proportion of the population whose income falls below the minimum subsistence level, p.83, <[http://www.unhcr.ch/TBS/doc.nsf/0/21cf71f27782a6d3c1256bfb00350ec5/\\$FILE/G0240184.pdf](http://www.unhcr.ch/TBS/doc.nsf/0/21cf71f27782a6d3c1256bfb00350ec5/$FILE/G0240184.pdf)>, visited on 8 February 2005.

⁵⁴ See, Smorodinskaya, Natalia *Kaliningrad Region: Towards Sustainable Development*, 10 May 2003, <http://kaliningradexpert.org/index.php?member_id=11&doc=343&lng=eng>, visited on 4 February 2005.

⁵⁵ *EU-Russia relations special meeting in Kaliningrad*, *supra* note 63. The so-called "Shuvalov's group" elaborated the export-oriented program for the development of the region, but it is under the discussion currently. See Gusher, Anatoly, *Informatsionno-Analiticheskaya Podborka Vazhneishih Sobytiy, Faktov I Otsenok Politicheskoi I Ekonomicheskoi Zhizni Rossii* [Informational-Analytical Selection of the Most Important Events, Facts and Economic Life of Russia], Center of the Strategic Development, <http://www.rus-ua.ru/show.html?eid=news_list_0&pid=4630>, visited on 18 January 2005, *Novye L'goty dlya Kaliningrada Razrabotala Gruppy Igorya Shuvalova* [New Privileges for Kaliningrad were Elaborated by the Group of Igor Shuvalov], <<http://www.barrit.ru/cgi-bin/arts.cgi?c=v&id=1749>>, visited on 18 January 2005.

⁵⁶ Strauss, Kilian *Pilot without a Plane: The Uncertain Future of the Russian Region of Kaliningrad*, 22 March 2002, <http://www.europe2020.org/en/section_enlargis/220304>, visited on 22 September 2004.

⁵⁷ The highest HIV prevalence (total number of HIV cases per 100,000) was registered in Irkutsk oblast (301), Kaliningrad oblast (286.5) and Moscow oblast (106.5). Kapitsa, Larissa, 'HIV/AIDS Epidemic in the UNECE Region: Are We Heading for a Catastrophe?', in United Nations Economic Commission for Europe, Series: Entrepreneurship and SMEs, *Youth in the UNECE Region: Realities, Challenges and Opportunities*, Geneva and New York, 2003, p. 279 (citing the Ministry of Health of the Russian Federation), <<http://www.unece.org/ie/wp8/documents/youthfin.pdf>>, visited on 27 January 2005.

⁵⁸ Lambroschini, Sophie 'Russia: EU's Commissioner Discusses Kaliningrad's Future', *Radio Free Europe/Radio Liberty*, 18 January 2001, <<http://www.rferl.org/features/2001/01/18012001105114.asp>>, visited on 27 January 2005.

The European Union becomes more and more concerned with these features of Kaliningrad's present (growing economic gap, communicable diseases, pollution, general instability). The accession of Finland and Sweden to the EU formulated the new approach towards such issues, the so-called 'soft' security approach.⁵⁹ While 'hard' security tackles demilitarization, nuclear threat and so on, 'soft' security is meant to be about crime prevention, ecology and other trans-border evils.

That is why, though underlining that the primary responsibility for the region is on Russia⁶⁰, the European Union engages itself in helping her to deal with this situation. The EU has already provided technical assistance for 40 million euro and, of course, does not do that out of any "altruism", as stressed again by Christopher Patten, the EU Commissioner for External Affairs.⁶¹ "Kaliningrad's problems with illegal activities, environmental pollution and the spread of AIDS and tuberculosis pose a threat to the security of the whole Baltic region"⁶², they have obvious cross-border implications for the EU.⁶³ "The EU wants to export stability and safety and at the same avoid importing crime, contraband and other negative economical and social phenomena. The questions of transit and visas cannot be considered separately from these issues."⁶⁴ The fundamental question, however, remains "whether or not the introduction of Schengen visas for Kaliningraders and transit participants will accomplish the EU's objective of keeping out soft security risks originating from Russia to a degree significantly higher than at present."⁶⁵

Having now the background of the situation, we pass to the examination of the land rail transit regime between the Kaliningrad region and the rest of Russia, as it existed and was transformed.

⁵⁹ Huisman, Sander, *supra* note 2, p. 17.

⁶⁰ See, e.g., Hoff, Magdalene, Rapporteur, Committee on Foreign Affairs, Human Rights, Common Security and Defence Policy, European Parliament, Report on the communication from the Commission to the Council on the EU and Kaliningrad (COM(2001) 26 . C5-0099/2001 . 2001/2046(COS)), 25 April 2002, Final A5-0156/2002.

⁶¹ Lambroschini, Sophie, *supra* note 57.

⁶² Patten states *EU enlargement offers opportunities for Kaliningrad*, 7 March 2002, <<http://www.euractiv.com/Article?tcmuri=tcm:29-110975-16&type=News>>, visited on 27 January 2005.

⁶³ Lambroschini, Sophie, *supra* note 57.

⁶⁴ Biernat, Jakub *et al.*, 'Not Just the Question of Visas. Kaliningrad Region in Light of the EU Enlargement', *Migration and Eastern Policy Programme*, a report, Warsaw: Institute of Public Affairs, February 2003, p. 7, <http://www.kaliningradexpert.org/stuff/pubs/ISP_Kaliningrad_ENG.pdf>, visited on 27 January 2005.

⁶⁵ Kaliningrad in Focus: Policy Recommendations in the Perspective of Problem-Solving, *SCHIFF-texte No. 67/English, The Kiel International Ad-Hoc Group Of Experts On Kaliningrad*, Kiel, October 2002, p. 14.

2.2 Regulation of movement between the Kaliningrad Region and mainland Russia before 1 July 2003

Currently Kaliningraders have travel needs differing depending on their destination. These needs can be divided into “four categories including travel between “big Russia” and Kaliningrad, travel to the former Soviet Union, travel to the immediate neighbours, Poland and Lithuania, and travel to other countries.”⁶⁶ This paper concerns the first type of travel, i.e. between the mainland and its exclave.

The question here is to what extent the freedom of transit between the Kaliningrad Region and the mainland Russia existed throughout the post-war time, and how and in what direction it has been transformed. Three comparative periods are singled out: soviet, post-soviet and European. The first one touches upon the possibilities to reach Kaliningrad that existed since the end of the World War II and up until the demise of the USSR, the second one highlights the evolution of the link with the independence of Lithuania, and the third one covers the negotiations, which led to the present scheme, having been undertaken by Russia, the EU and Lithuania in the view of the latter’s accession to the EU. This part deals with first two, while the third one is set aside, as it concentrates not on the regulation of movement itself (it remained untouched), but on the elaboration of the new solution and is inseparable from the latter.

2.2.1 Soviet period

It is generally argued that between 1945 and 1991⁶⁷ there was no problem in rail or other connection between Kaliningrad and the rest part of, then, the Russian Soviet Federative Socialist Republic.⁶⁸ The detailed analysis, however, requires us to split this interval in three by two dates: 1953 and 1974. Only after 1974 the proposition above becomes true. The main factor that limited the access to the Region before that was the passport system, coupled with the status of Kaliningrad as a regime and, since 1952, a closed city.

Kaliningrad fell under soviet passport regulations since the inclusion of the area into the jurisdiction of the Soviet Union. The passport system effectively precluded the freedom of movement within the USSR for certain groups of persons.⁶⁹ The system was formed in the 1930s, reviewed in 1953

⁶⁶ Fairlie, Lindelle D., ‘Kaliningrad Borders in Regional Context’, in Fairlie, Lindelle D. and Alexander Sergounin, *supra* note 2, p. 30.

⁶⁷ Dates of acquisition of, then, Königsberg and the collapse of the USSR, consecutively.

⁶⁸ Because both parts of Russia were in the frames of a single state of the USSR.

⁶⁹ Namely, for peasants of kolkhozes and kulaks, i.e. the majority of the rural population, as the number of kolkhozes was 50 times higher than that of sovkhoses, with individual farmers being exceptional solitary cases. Barbusse estimates the number of kolkhozes as 240 000 in comparison with 5 000 sovkhoses in 1934. *See* Barbusse, Henri *Stalin*.

and abolished in 1974. Taking into account the correlation between the number of rural and urban citizens in the Soviet Union, and thus the number of persons deprived legally of the possibility to move within the country, one can hardly state that the situation with passage to Kaliningrad was that bright throughout the whole of the soviet time.⁷⁰

Early prescriptions. The Bolsheviks came to power aiming at giving the class of the exploited all rights the latter have been denied of previously.⁷¹ In relation to the freedom of movement the most urgent step was to abolish the tsarist passport system, which allegedly restricted the right of internal travel.⁷²

The first steps of the new Government were consequent. The former passport regulations were announced null and void⁷³, full freedom of movement was granted to the Kazaks⁷⁴, etc.

The above trend of policy resulted in the adoption of the Decree of the All-Russian Central Executive Committee On entitlement of all citizens to move freely throughout the whole territory of the RSFSR of 24 January 1922, provisions of which were confirmed in the Art. 5 of the Civil code of the RSFSR, being read as follows:

“In accordance with stated hereby, every citizen of the RSFSR and soviet socialist republics is entitled to move and reside freely on the territory of the RSFSR.”⁷⁵

Chelovek, cherez kotorogo Raskryvaetsya Novyi Mir [Staline. Un monde nouveau vu a travers un homme]. Moscow, 1935.

<<http://www.geocities.com/CapitolHill/Parliament/7231/barbius/barbius6.htm>>, visited on 24 January 2005, Part VI. 1928-1034.

⁷⁰ In 1940 more than two thirds of the population of the USSR was rural, in 1960s urban and rural population equalized, and only by the demise of the Soviet Union the ratio became reverse. See ‘The Union of the Soviet Socialist Republics. Urbanization’, Encyclopedia ‘Krugosvet [Round- the-World],

<<http://www.krugosvet.ru/articles/61/1006114/1006114a3.htm>>, visited 23 January 2005.

⁷¹ See, e.g., the Declaration on the Rights of the Labouring and Exploited People, 13 January 1918, later incorporated into the Constitution of the RSFSR of 10 July 1918, available in Russian at <http://www.hrono.ru/dokum/191_dok/cnst1918.html>, visited on 3 February 2005.

⁷² “What does it mean – freedom of movement?.. It means that in Russia, too, the passports are to be abolished”. This is the quotation from the article by V.Lenin “Addressing the poor: Explanation for Peasants of what social democrats want” (1903). Cited in Lyubarskii, Kronid, ‘Paspornaia sistema i sistema propiski v Rossii’ [The Passport System and System of *Propiska* in Russia] <<http://www.hrighs.ru/text/b2/Chapter5.htm>>, visited on 21 January 2005 (translated by the author thereof).

⁷³ See, Lyubarskii, Kronid, *ibid.*, Dibel, Vasilii, ‘Paspornaia sistema Rossii’ [The Passport System of Russia], 5 *Obozrevatel’-Observer* (2003), <http://www.nasledie.ru/oboz/05_03/5_15.HTM>, visited on 21 January 2005.

⁷⁴ Para. 4, Appeal of the Council of People’s Commissars of the RSFSR On abolition of obligatory conscription and on establishment of complete freedom of movement for Kazaks, 12 December 1917.

⁷⁵ Decree of the All-Russian Central Executive Committee On entitlement of all citizens to move freely throughout the whole territory of the RSFSR, 24 January 1922; Civil Code of the RSFSR, 11 November 1922 (translated by the author thereof).

The Decree On the identification document of 20 June 1923 explicitly bound the freedom of internal movement with abolition of the obligation to be in possession of a passport:

“It is prohibited for executive bodies to make demands that the citizens of the RSFSR present their passports or other residence permits, being considered as limiting the right to move and reside in the territory of the RSFSR.”⁷⁶

However, only the short time lapse of New Economic Policy in the 1920s witnessed the promised freedom. However, even at this early period the right to move around was linked to the duty to present any permission.

1945-1953. The following forced industrialization and collectivization met fierce resistance of the peasantry, who comprised more than four fifth of the country population in the early soviet time.⁷⁷ The government had to tie them to their places of residence, their villages and regions.⁷⁸ That was the background for the introduction of the strict passport system of 1932.

On the 27 December 1932, Regulation No. 57/1917 On the establishment of the united passport system for the Union of the SSR and the obligatory *propiska* [registration] of passports was signed. It prescribed for a duty to possess a passport for all citizens of the USSR, whose permanent residence was in cities, towns, industrial communities, who worked on transport, in sovkhozes and on new building projects.⁷⁹ Members of kolkhozes⁸⁰ were not eligible for passports and, as all individuals were required to present their passports for internal travel⁸¹, they were deprived of the possibility to move around freely. In accordance with the cited Regulation, their intrastate mobility was subject to administrative fine and the repeated commission made a person liable to criminal punishment.⁸²

Acts introduced for the exercise and clarification of the Passport regulation provided that “persons living in rural area where passports were not introduced, independent on the where they go [were] obliged to obtain passports prior to the departure.”⁸³ At the same time the corresponding

⁷⁶ Para. 1 Decree of the All-Russian Central Executive Committee On the identification document, 20 June 1923 (translated by the author thereof).

⁷⁷ The data is of 1926. ‘The Union of the Soviet Socialist Republics. Urbanization’, Encyclopedia ‘Krugosvet [Round- the-World], <<http://www.krugosvet.ru/articles/61/1006114/1006114a3.htm>>, visited 23 January 2005.

⁷⁸ Lyubarsky, Kronid, *supra* note 71.

⁷⁹ Popov, V., ‘Pasportnaya Sistema Sovetskogo Krepostnichestva’ [The Passport System of the Soviet Serfdom], 6 *Novyi Mir* [The New World] (1996), <http://magazines.russ.ru/novyi_mi/1996/6/popov-pr.html>, visited on 21 January 2005.

⁸⁰ Sovkhoz is different from kolkhoz. Sovkhoz is a form of a state agricultural enterprise, while the latter is primarily the union of peasants. See ‘Istoria Otechestva’ [The History of the Fatherland], the on-line encyclopedic dictionary at yandex.ru.

⁸¹ Brazier, Susan ‘Propiska’, <<http://www.nelegal.net/articles/propiska.htm>>, visited on 22 January 2005.

⁸² Lyubarsky, Kronid, *supra* note 71.

⁸³ Popov, V., *supra* note 78, citing the document (translated by the author thereof).

provisions of law were so, and purposefully, unclear⁸⁴ that they created the perfect system for fixing the illegal status for all leaving the village. Besides that, large part of the instructions, etc., remained unpublished, known only to the relevant executives, and the announced provisions left the executives wide discretion.⁸⁵ Hence, this helped to reach the goal of the Government, i.e. industrialization through the serf-like linking of peasantry to their villages.

Thus, the population of the USSR was divided into two unequal parts: those who had passports and those who did not.⁸⁶ The former could travel within the country, but the latter, when detected, were subject to the deportation to their respective places of settlement.⁸⁷ V. Popov who had carried out a thorough work with archive legal materials in the State Archive of the Russian Federation estimates the number of only kulaks on special settlements as 2,5 million.⁸⁸

Such system was in force when Kaliningrad joined the RSFSR, and existed up to the amendments of 1953, exacerbated by the special status of the Region.

1953-1974. In 1953 a new Regulation on passports extended a list of areas where citizens were obliged to have passports, it included the whole territory of the Baltic republics, the USSR's border areas, Moscow region and parts of the Leningrad region. Residents of rural area got the right to leave for up to 30 days without a passport, but with the certificate of the Soviet of the respective village.⁸⁹

1974-1991. The new regulation On the Passport System in the USSR of 1974 finally assigned the duty of possession of a passport to every person aged 16 (Para. 1).⁹⁰

Taken together, the restrictive permission-based passport system and the specific status of Kaliningrad represented a huge legal obstacle for the passage to the Region from the mainland Russia for the residents of the latter. As Kaliningrad was a closed/regime city, its residents were *all* entitled to passports, and, thus, did not suffer to the same extent from the restriction.

Summarizing, “[i]t was not until 1993 ... that the federal government decisively established the right to free movement within the Russian

⁸⁴ Popov, V., *supra* note 78.

⁸⁵ Kartashkin, Vladimir A., ‘Human Rights and the Emergence of the State of the Rule of Law in the USSR’, 40 *Emory Law Journal* (1991), 889, available at the WestLaw database.

⁸⁶ Popov, V., *supra* note 78.

⁸⁷ Lyubarsky, Kronid, *supra* note 71

⁸⁸ The data are of middle 50s. Popov, V., *supra* note 78.

⁸⁹ Lyubarsky, Kronid, *supra* note 71.

⁹⁰ Regulation on the Passport System in the USSR, adopted by Regulation of the Council of Ministers of the USSR, No. 677, 28 August 1974 (as amended by 28 January 1983).

Federation.”⁹¹ However, with time passing, strict formal deprivation of this freedom for groups of citizens was gradually lifted and in 1974 replaced by the *de facto* possibility of unhindered movement within the country for all.

2.2.2 Post-Soviet period

With the collapse of the Soviet Union the Kaliningrad region turned into an exclave of the Russian Federation. Since that time travelling between the region and the rest of the country involves crossing three international borders. But has anything changed with transformation of pure “lines on the map”, as borders between the soviet republics are sometimes called⁹², into real international borders? Yes, but to the better. The following citations give a perfect description of the situation.

“In the 1990’s, the walls ceased to exist, which had divided Europe for several decades after the Second World War. One of those was the boundary between the bloc of socialist states and Western Europe. The other, far less frequently mentioned, was the strictly guarded border between the USSR and Moscow’s satellite countries.

As a result of these processes, a unique area of liberalised movement of persons emerged in Central Europe.”⁹³

“Due to the lack of visa requirements, the region of Kaliningrad and its neighbors has become what the Russian Foreign Ministry Representative in Kaliningrad, Mr. Kuznetsov, likes to call “our regional Russian- Lithuanian-Polish *acquis communautaire*”.”⁹⁴

In the treaty between Lithuania and Russia on the basis for mutual relations⁹⁵, the RSFSR expressed its special interest, while Lithuania assumed the obligation to contribute to the preservation of favourable conditions for the economic and national-cultural development of the Kaliningrad region. The parties stated that the conditions thereof would be regulated by special agreement⁹⁶, as well as particular issues of passenger and cargo transit through their sea and river ports and airports, by railway and motorway.⁹⁷ The agreement took the form of the treaty between Lithuania and Russia on cooperation in the economic and socio-cultural development of the Kaliningrad region.

⁹¹ Schaible, Damian S., *Life in Russia’s “Closed City”: Moscow’s Movement Restrictions and the Rule of Law*, p. 349, <<http://www.nelegal.net/articles/schaible.pdf>>, visited on 22 January 2005.

⁹² Fairlie, Lindelle D., ‘Kaliningrad Borders in Regional Context’, *supra* note 65, p. 9.

⁹³ Boratynsky, Jakub and Grzegorz Gromadzki, ‘The Half-Open Door: The Eastern Border of the Enlarged European Union’, *On the Future of Europe, Policy Papers 2* (March 2001), Stefan Batory Foundation, Warsaw, p. 7.

⁹⁴ Fairlie, Lindelle D., ‘Kaliningrad Borders in Regional Context’, *supra* note 65, p. 10 (footnote omitted). The words by Kuznetsov are the response to the personal inquiry of Professor Fairlie.

⁹⁵ Treaty between the Republic of Lithuania and the Russian Soviet Federated Socialist Republic on the Basis for Relations between States, 29 July 1991, Moscow, 1787 UNTS 5.

⁹⁶ *Ibid.* Art. 11.

⁹⁷ *Ibid.* Art. 14.

In addition to the declared in the latter treaty freedom of Kaliningrad transit, general principles of transit across the territories of Lithuania and Russia, which were also applicable to the Russian transit to and from the Kaliningrad region, were formulated⁹⁸ in agreements between the Government of Lithuania and the Government of the Russian Federation on the principles of cooperation and the conditions of mutual relations in the sphere of transportation, on international auto-vehicle communication as well as on air communication.⁹⁹ In sum, these principles are: favourable terms for operation of all forms of transport, promotion of the development of direct economic relations between transport enterprises, economic, scientific and technical cooperation, etc.

Protocol to the agreement on international road transport prescribed unhindered transportation of passengers by Lithuanian transport vehicles on transit through the Lithuanian territory to and from the Kaliningrad region.¹⁰⁰

Further temporary provisions for regulation of mutual travel of citizens of Russia and Lithuania were elaborated in a separate agreement.¹⁰¹ The agreement provided for a transit visa regime, although it was not applicable to certain categories of persons engaged in transportation, who worked under the permission issued according to the Agreement on International Road Transport between the Governments of Lithuania and Russia.

On the basis of Art. 15 of the Interim Agreement, a separate regime applicable primarily to Kaliningrad was detailed in the protocol to the agreement. It left a visa-free regime for the Kaliningrad region residents who were Russian citizens. They were entitled to travel to Lithuania and stay there for 30 days without visas. The same rules applied to Lithuanian citizens travelling to the Kaliningrad region as a realization of the principle of reciprocity.

⁹⁸ Relations between the Republic of Lithuania and the Russian Federation. Transit issues. *Ministry for foreign Affairs of the Republic of Lithuania* official site, <http://www.urm.lt/data/5/EF2284527_russia.htm>, visited on 12 November 2004.

⁹⁹ See Agreement between the Government of the Republic of Lithuania and the Government of the Russian Federation on the Principles of Cooperation and the Terms for Reciprocal Relations in the Field of Transport, Moscow, 12 February 1992, 1831 UNTS 53; Air Transport Agreement between the Government of the Republic of Lithuania and the Government of the Russian Federation, Vilnius, 18 November 1993, 1831 UNTS 85; Agreement between the Government of the Republic of Lithuania and the Government of the Russian Federation concerning International Road transport (with annexes), Vilnius, 18 November 1993, 1831 UNTS 133.

¹⁰⁰ Protocol on the Procedure and Terms for the Transportation of Goods and Passengers between the Kaliningrad region and the Other Regions of the Russian Federation in Transit through the Territory of the Republic of Lithuania, Vilnius, 18 November 1993, 1831 UNTS 151.

¹⁰¹ Interim Agreement between the Government of the Republic of Lithuania and the Government of the Russian Federation on Reciprocal Travel by Nationals, 24 February 1995, Moscow, 1900 UNTS 203, and a Protocol thereto.

In para. 3 of the Protocol Lithuania undertook not to prevent direct travel in transit without a visa through its territory by rail passenger transport from the Russian Federation to the Kaliningrad region and vice versa. Identity documents or documents valid for travel abroad were recognized as sufficient for the purpose of such transit. Not only Kaliningraders or Russian nationals in general could benefit from the scheme. Any person was entitled to travel by direct train between Kaliningrad and 'big' Russia with the only condition of not disembarking in the territory of the Republic of Lithuania.¹⁰²

Thus, negotiations on altering the rail transit regime happened at the time when, after the closeness of the soviet time (from both the rest population and outside world), the liberalised regime of cross-border movement prevailed, when the visa-free Kaliningrad transit was consecutively separated from other questions of mutual travels of citizens and upheld irrespective of changes in the latter.

As a result of the solution found in 2002 (see below), the Interim Agreement was superseded by the Agreement on Mutual Travel of Citizens of 2002, and the Protocol to the former in respect of Kaliningrad was substituted by the Agreement specifying the procedure of issue of the Facilitated Rail Transit Document of 2003.¹⁰³

2.3 The hard way to present scheme

2.3.1 Negotiations

In assessing this period the emphasis passes to the European Union, as it was due to the accession of Lithuania to this international organization that the previous regime for Kaliningrad transit was changed. This subparagraph gives summary of initial positions of the parties and then follows the negotiation process, which has led to the establishment of the current solution.¹⁰⁴

2.3.1.1 Initial neglect

On 9 December 1995 Lithuania applied for the membership in the European Union¹⁰⁵ and undertook the obligation to bring its legislation in compliance

¹⁰² Para. 3 of the Protocol, *ibid.*

¹⁰³ Agreement between the Government of the Russian Federation and the Government of the Republic of Lithuania on Mutual Travel of Citizens, Moscow, 30 December 2002, Agreement between the Government of the Russian Federation and the Government of the Republic of Lithuania Specifying the Procedure of Issue of the Facilitated Rail Transit Document, Moscow, 20 June 2003.

¹⁰⁴ These negotiations attracted much attention of the scholars, *see e.g.*, Huisman, Sander, *supra* note 2, Strauss, Kilian, *supra* note 55.

¹⁰⁵ *See* Agenda 2000 - Commission Opinion on Lithuania's Application for Membership of the European Union, Brussels, 15 July 1997, DOC/97/15, <<http://europa.eu.int/comm/enlargement/dwn/opinions/lithuania/li-op-en.pdf>>, visited on 6 February 2005.

with the EC law as provided for by the Copenhagen criteria of the European Council of June 1993.¹⁰⁶ As a part of it, Lithuania had to “take measures to ensure that international treaties or agreements incompatible with the *acquis* are renegotiated or terminated on accession,”¹⁰⁷ as stressed in the 2001 Regular report on Lithuania’s Progress towards Accession.¹⁰⁸

The Schengen *acquis*, comprised of the two initial conventions (the Schengen Agreement of 1985 and the Schengen Convention of 1990¹⁰⁹) and all rules and regulations grown out of them, incorporated into the EU law by the way of the Amsterdam Treaty¹¹⁰, provides that the member states have the common rules and practices in respect of external border controls.

By that time, the basis for mutual relations between the Russian Federation and the European Union was formed by the Partnership and Cooperation Agreement of 1994¹¹¹ and mutual strategy papers.¹¹² Neither of the documents provided sufficient basis to deal with Kaliningrad¹¹³, they treated the region as merely one of Russia’s borders.

A step forward, made with bringing up the Northern Dimension concept, introduced by Finland in Lapland in 1997, was not a breakthrough in understanding of the problems of the region’s nearest future. The reason behind the Northern Dimension was to create a “form of positive interdependence between the EU, its direct neighbour Russia and other states in the Baltic Sea region that enhances regional security and stability.”¹¹⁴ Kaliningrad was set as one of priorities, but the consequences

¹⁰⁶ I could not find the text itself.

¹⁰⁷ Huisman, Sander, *supra* note 2, p. 26.

¹⁰⁸ Chapter 26. External relations. Commission’s Regular Report on Lithuania, Brussels, 13 November 2001, SEC (2001) 1750, <http://europa.eu.int/comm/enlargement/report2001/lt_en.pdf>, visited on 6 February 2005, p. 99, *see also* ‘The EU and Kaliningrad’, Communication from the Commission to the Council, COM(2001)26 final, Brussels, 17 January 2001, p. 1.

¹⁰⁹ Schengen agreement between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the Gradual Abolition of Checks at Their Common Borders, 14 June 1985, Convention applying the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the Gradual Abolition of Checks at Their Common Borders, 19 June 1990.

¹¹⁰ Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts - Protocol annexed to the Treaty on European Union and to the Treaty establishing the European Community - Protocol integrating the Schengen *acquis* into the framework of the European Union, OJ C 340, 10/11/1997, p. 93

¹¹¹ Agreement on Partnership and Cooperation Establishing a Partnership between the European Communities and their Member States, of one part, and the Russian Federation, of the other part, OJ L 327, 28/11/1997 p. 3.

¹¹² Common Strategy of the European Union of 4 June 1999 on Russia, OJ L 157 26/06/1999, p. 1, The Russian Federation Middle Term Strategy towards the EU (2000-2010), <http://www.delrus.cec.eu.int/en/p_245.htm>, visited on 27 November 2004.

¹¹³ Huisman, Sander, ‘A Viable Future for Kaliningrad after EU Enlargement’, *EurActive*, 18 April, 2002, <<http://www.euractiv.com/Article?tcmuri=tcm:29-110195-16&type=Analysis>>, visited on 27 January 2005.

¹¹⁴ Huisman, Sander, *supra* note 2, p. 17.

of the prospective enlargement were not touched upon. Later the Northern Dimension initiative was included in the EU Common strategy on Russia.”¹¹⁵

The fact that EU Enlargement would one-day pose a problem to the Kaliningrad’s communication with Russia only appeared round the year 2000. For the EU it was a result of “massive lobbying from the region’s policymakers”¹¹⁶, Lithuania in the first place. Until then, the dominating opinion in Brussels had been that “Enlargement is good for everyone, so it must be good for Kaliningrad as well”¹¹⁷ and Russia seemed not to care about the coming changes.¹¹⁸ So, in the year 2000, Kaliningrad moved from the academic circles to political.

2.3.1.2 Formulation of positions

In September 2000 the deputy prime minister of Russia Viktor Khristenko handed over to the Commission of the EU a brief Russian position - letter under the title ‘EU Enlargement and Kaliningrad Region: Russian concerns’.¹¹⁹ Among fifteen concerns named, three were connected to the future transit regime: (a) ‘Access and transportation’ designated the need to facilitate the access and transportation of goods and people; (b) ‘Visas’ claimed for a visa-free regime between Kaliningrad and Lithuania, Poland and Latvia, and between Kaliningrad and mainland Russia; (h) ‘EU-Russia dialogue’ called for a binding agreement to formalize the special status of Kaliningrad.

On the part of the EU, the first comprehensive document on the situation with regard to Kaliningrad in the view of the future EU enlargement was prepared by the Commission and appeared on 17 January 2001. It was the Communication to the Council, entitled ‘the EU and Kaliningrad’.¹²⁰ The paper did not set out Commission’s formal proposals for any decision, but rather outlined ideas and options for a discussion between the parties.¹²¹

The position of the EU was presented fully within the limits of the Schengen *acquis*. The Commission noted that travel, for whatever purpose, to or through EU Member States would require possession of a visa; visa-free transit would no longer be possible; citizens will be obliged to be in possession of a passport valid for international travel.¹²² The Commission was not of the opinion that new requirements would impede the movement

¹¹⁵ Biernat, Jakub *et al.*, *supra* note 63, p. 23.

¹¹⁶ Strauss, Kilian, *Pilot without a Plane...*, *supra* note 55.

¹¹⁷ *Ibid.*

¹¹⁸ Abramov, Vladimir and Vladimir Kuzin ‘Seeking Answers to a Dual Challenge: Kaliningrad Region and EU Expansion’, 8:1 *Pro et Contra* (2003), pp. 77-79. – In Russian.

¹¹⁹ For the analysis of the Letter *see* Baxendale, James, *supra* note 5, pp. 439-440.

¹²⁰ ‘The EU and Kaliningrad’, Communication from the Commission to the Council, *supra* note 119.

¹²¹ *Ibid.*, p.1.

¹²² *Ibid.*, p. 3-4.

of people between Kaliningrad and the rest of Russia, though it admitted that the impact on the population of Kaliningrad may be greater there than on other parts of Russia due to the geographic location of the region.¹²³ The emphasis was put on the efficient operation of border crossings, through the upgrading of facilities and procedures and exchange of best practice¹²⁴ and on the need for the readmission agreement between the parties.¹²⁵

Lithuania tried at the beginning of 2001 to acquire intermediate status within the Schengen agreement, but when rejected, it adopted the common European position.¹²⁶ The speaker of the Lithuanian parliament Arturas Paulauskas said that Lithuania was not against continuance of a visa-free transit for Kaliningrad, but it also had obligations before the EU. If the latter gave its approval, Lithuania would consider the preservation of the previous regime.¹²⁷

Thus, in the beginning of the 2001 positions of all counterparts became clear: Russia claimed visa-free transit, the EU insisted on the introduction of visas, and Lithuania accepted the leading role of the EU in this question.

2.3.1.3 Opposition and different proposals

By 2002 nothing changed.

The European Commissioner for External Affairs Chris Patten stated that the EU could not “override its basic rules, including the so-called 'Schengen' regulations imposing strict border controls on non-members of the EU.”¹²⁸ Russia coupled its earlier demands with new – for the creation of two land corridors, through which the Russian nationals could travel using their domestic passports with the transit time limited to 12 hours (normally it takes two hours to cross the Lithuanian territory). Additionally, simplified procedures for issuing Lithuanian, Polish and “Schengen” visas were asked for.¹²⁹

The EU refused the demands, but took steps forward, proposing multilateral agreements on the recognition of transit visas of Russian residents by Poland and three Baltic republics. This solution would have meant in practice that a Russian citizen with a Latvian visa could freely travel through both Latvia and Lithuania *en route* to Kaliningrad or Russia and inside the states of this group.¹³⁰

¹²³ *Ibid.*

¹²⁴ *Ibid.*, p. 4.

¹²⁵ *Ibid.*, p. 5.

¹²⁶ Huisman, Sander, *supra* note 2, p. 32.

¹²⁷ Markushin, Vadim ‘Readmissiei – po Evrocomissii’ [Beat the Commission with Readmission], *Red Star Daily*, 17 October 2002, <http://www.redstar.ru/2002/10/17_10/3_01.html>, visited on 14 September 2004.

¹²⁸ Vitunic, Brian, *supra* note 44.

¹²⁹ Biernat, Jakub *et al.*, *supra* note 63, pp. 25-26.

¹³⁰ *Ibid.*

Russia steadily confirmed unacceptability of any solution where the right of its nationals to go from one part of the country to another would be decided by a foreign bureaucrat. It perceived initiatives of such kind as infringing the sovereignty of Russia over Kaliningrad and violating the right of the Russian citizens to move freely within their country of nationality.¹³¹

As it was evaluated later, the negotiations came to the deadlock. Moscow even threatened to boycott the EU-Russia summit in November 2002.¹³² However, the break-through took place.

The Russian President Vladimir Putin appointed in July 2002 Dmitry Rogozin as a Special Envoy for Kaliningrad Matters, and in August 2002 a working group under Rogozin elaborated a new state strategy for negotiations with the EU on the Kaliningrad transit issue, which set the abolition of all visa limitations as its ultimate goal and the “conceptual basis of the Russian tactics and strategy”.¹³³ Further, Russia relaxed some of its previous *condition sine qua non*. It has agreed to the introduction of visas for transit via Poland and car passengers following through Lithuania. But Moscow was adamant that the Russians travelling by train or bus via Lithuania would not be required visas.¹³⁴

The European Union, in its turn, accepted “with interest” the Russian proposal to open the discussion on prospect of establishing a visa-free regime between the EU and Russia in the long-term. The Commission went on with a special transit document to be issued for Russian nationals frequently travelling between Kaliningrad and the rest of Russia and declaring its readiness begin a study on the feasibility of visa-exempted non-stop high-speed trains.¹³⁵ Lithuania was assured that its accession to the Schengen zone would not be hampered by any outcome of the negotiations.¹³⁶

¹³¹ *Russia-EU Summit Opens No Doors for Kaliningrad*, 31 May 2002, <http://www.tol.cz/look/TOL/printf.pl?IdLanguage=1&IdPublication=10&NrIssue=361&NrSection=1&NrArticle=4615&ST1=body&ST_T1=tolwire&ST_AS1=1&ST_max=1>, visited on 23 November 2004.

¹³² Dempsey, Judy ‘Russia threatens to boycott EU summit’ *Financial times*, 4 September 2002, <<http://news.ft.com/servlet/ContentServer?pagename=FT.com/StoryFT/FullStory&c=StoryFT&cid=1031119052573&p=1012571727166>>, visited on 27 January 2005.

¹³³ See the Internet site of the Project for information of Russian citizens, *supra* note 11. The proclamation to that effect was made by the Russian President on 28 August 2002, see ‘On Russian President Vladimir Putin’s Message to the President of the Commission of the European Communities and Heads of the Member States of the European Union’, *Daily News Bulletin*, Information and Press Department, Ministry of Foreign Affairs of the Russian Federation, 28 August 2002.

¹³⁴ Dempsey, Judy, *supra* note 131.

¹³⁵ ‘Kaliningrad: Transit’, Communication from the Commission to the Council, COM(2002)510 final, Brussels, 18 September 2002, <http://www.delrus.cec.eu.int/en/images/iText_pict/8/Communication_2002.doc>, visited on 5 December 2004.

¹³⁶ Biernat, Jakub *et al.*, *supra* note 63, pp. 26-27.

2.3.1.4 Final compromise

The EU-Russia summit in Brussels finally brought the “face-saving compromise”. Both sides signed the Joint Statement on transit between the Kaliningrad region and the rest of the Russian Federation, which provided for implementation of the Facilitated Transit Documents scheme.¹³⁷

The Joint Statement includes three main ideas.¹³⁸ The first one is the acknowledgement of the unique situation of the Kaliningrad region as part of Russia but separated from the rest of the country by other states.¹³⁹ This recognition underlies the flexibility of the Lithuania’s implementation of the visa-regime towards Russia¹⁴⁰ while ensuring sovereign rights of Lithuania to control and refuse entry into its territory¹⁴¹, and compliance with the European Community legislation.¹⁴²

Secondly, the Joint statement sets in principle the Facilitated Transit Document (FTD) scheme itself, noting the intention of the EU to review its operation no later than in 2005.¹⁴³ As from the 1 July 2003 two types of FTD are issued. For multiple entry direct transit via all forms of transport by land to and from Kaliningrad a person needs an FTD, issued by the Lithuanian consulate.¹⁴⁴ For a single return trip by train a Facilitated Rail Transit document is to be issued on the basis of personal data submitted at the time of the ticket purchase.¹⁴⁵

Finally, the Joint Statement contains provisions on the further elaboration of the problem.¹⁴⁶

The most common evaluation of the compromise by all official entities concerned is its characterization as “mutually acceptable”.¹⁴⁷ On the one hand, “it showed that the Schengen agreement could be interpreted more flexibly than the EU had originally pretended”¹⁴⁸, but on the other hand,

¹³⁷ Joint Statement of the Russian Federation and the European Union on Transit between the Kaliningrad Region and the Rest of the Russian Federation, Brussels, 11 November 2002.

¹³⁸ This division is not reflected in the document itself, but seems to this author to be rather adequate to the substance of the Statement.

¹³⁹ Para. 1 of the Joint Statement, *supra* note 136.

¹⁴⁰ Para. 2 of the Joint Statement, *supra* note 136.

¹⁴¹ Para. 2. of the Joint Statement, *supra* note 136.

¹⁴² To be introduced by the EU in accordance with Para. 5 of the Joint Statement, *supra* note 136.

¹⁴³ Para. 9 (in respect of the review) of the Joint Statement, *supra* note 136.

¹⁴⁴ Para. 6 of the Joint Statement, *supra* note 136.

¹⁴⁵ Para. 7 of the Joint Statement, *supra* note 136.

¹⁴⁶ Para. 3 is about the comprehensive package of measures, para. 10 anticipates the possibility of the visa free transit by high speed non-stop train, and para. 12 is devoted to the intention of the Russian Federation to enter into a readmission treaty with Lithuania; with all provisions being mutually complementary and considered as a single package (para. 14).

¹⁴⁷ See, e.g., Vitunic, Brian, *supra* note 44.

¹⁴⁸ Strauss, Kilian, *Pilot without a Plane...*, *supra* note 55.

notwithstanding the victorious speeches of the Russian representatives¹⁴⁹, Russian demands of unacceptability of any solution that preserve the discretionary power of Lithuania to forbid a transit passage for an individual were left unheard, and the implemented regime was made to suit the EU side.¹⁵⁰

As for the public attitude towards the reached understanding, the results of public polls, conducted shortly before and after the implementation of the Joint Statement, are illustrative. In May 2003, on the question “Are you personally satisfied with the order of crossing the border, which has been agreed upon?” 7 per cent of the interviewees gave an affirmative answer, they were satisfied, 6 per cent feared a worse solution, and 30 per cent were definitely dissatisfied.¹⁵¹ The rest respondents lacked clear vision of scheme’s operation. Half a year later (in winter 2004) the picture reportedly changed, groups of those satisfied and dissatisfied reached equal level of about 40 per cent with the rest 20 being partially satisfied.¹⁵²

After reaching the agreement, Russia, Lithuania and the EU worked out operational modalities of the FTD. A final step was taken in June 2003, allowing the FTD scheme to come into force on 1 July 2003.

2.3.2 Current solution

The legal basis of the scheme currently employed for the facilitation of transit between Kaliningrad and mainland Russia is compounded of five main documents. They are the Joint Statement of the Russian Federation and the European Union on transit between the Kaliningrad region and the rest of the Russian Federation¹⁵³, two bilateral treaties between Russia and Lithuania¹⁵⁴, and two Council regulations¹⁵⁵. The Joint Statement

¹⁴⁹ See, e.g., the Internet site of the Project for information of Russian citizens, *supra* note 11, which, according to the information of the face page, was “created under the support of Rogozin Dmitrii Olegovich, the Russian President’s Special Envoy for the Kaliningrad Matters”.

¹⁵⁰ Lynch, Dov, ‘Russia’s Strategic Partnership with Europe’, *The Washington Quarterly* (Spring 2004), p. 104.

¹⁵¹ Kaliningrad: Yes, We are Europeans 20 May 2003, Association of the regional sociological centers “Group 789”, <<http://www.789.ru/portal/modules.php?name=News&file=print&sid=1747>>, visited on 8 December 2004.

¹⁵² See Naumkin, Sergei ‘Possibility of Kaliningrad Integration onto the Single European Space’ Master thesis in Baltic Sea Region Studies, Berlin, 18 January 2004, <<http://etdindividuals.dlib.vt.edu:9090/archive/00000108/01/65791.pdf>>, visited on 27 January 2005.

¹⁵³ The Joint Statement, *supra* note 136.

¹⁵⁴ Agreement between the Government of the Russian Federation and the Government of the Republic of Lithuania on Mutual Travel of Citizens, Moscow, 30 December 2002; Agreement between the Government of the Russian Federation and the Government of the Republic of Lithuania Specifying the Procedure of Issue of the Facilitated Rail Transit Document, Moscow, 20 June 2003 (hereinafter FRTD Agreement).

¹⁵⁵ Council Regulation (EC) No 693/2003 of 14 April 2003 establishing a specific Facilitated Transit Document (FTD), a Facilitated Rail Transit Document (FRTD) and

formulated the principal compromise, whereas the other documents conditioned the internal legislation compliance.

The precise operation of the scheme is as follows.

*The FTD*¹⁵⁶, a specific authorization allowing for a facilitated transit for multiple entries by whatever means of land transport¹⁵⁷, is issued by consular offices on the basis of application for a maximum period of three years at a price of 5 EUR.¹⁵⁸ Individuals are advised to apply 7 days before the planned trip.¹⁵⁹ It has the same value as a transit visa¹⁶⁰ and provisions of the Schengen *acquis* relating to visas are applicable to the FTD, subject to the specific rules set out in the respective regulations¹⁶¹, as for example the maximum transit time allowed with an FTD is 24 hours¹⁶², while with ordinary Schengen transit visa it is five days.¹⁶³

Though the Russian official information site on the regime of transit states (in very careful words) that no obligation exists to provide documents supporting the need to travel frequently¹⁶⁴, the Council Regulation No 693 explicitly conditions obtaining an FTD with presence of valid reasons therefore¹⁶⁵ and contains a corresponding column in the form of application for an FTD.¹⁶⁶

For the first half a year of implementation, two thousand FTDs were reportedly issued.¹⁶⁷

The FRTD (see an example in Supplement 2) is issued for a single trip by specified rail routes. A person when buying a ticket gives prescribed information, which includes name (family name, middle name and first

amending the Common Consular Instructions and the Common Manual, OJ L 99, 17/04/2003, p. 8; Council Regulation (EC) No 694/2003 of 14 April 2003 on uniform formats for Facilitated Transit Documents (FTD) and Facilitated Rail Transit Documents (FRTD) provided for in Regulation (EC) No 693/2003, OJ L 99, 17/04/2003, p. 15.

¹⁵⁶ Rules governing issuance of the FTD are to be found in the two Council regulations, *supra* note 154.

¹⁵⁷ Art. 2 Council Regulation No 693, *supra* note 154.

¹⁵⁸ Art. 3 (2) and Art. 7 (1) Council Regulation No 693, *supra* note 154, respectively.

¹⁵⁹ See the Internet site of the Project for information of Russian citizens, *supra* note 11.

¹⁶⁰ Para. 1 Art. 3 Council Regulation No 693, *supra* note 154.

¹⁶¹ Art. 10 Council Regulation No 693, *supra* note 154.

¹⁶² Para. 2 Art. 3 Council Regulation No 693, *supra* note 154.

¹⁶³ Para 1 (b) Art. 11 of the Convention applying the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the Gradual Abolition of Checks at Their Common Borders, 19 June 1990, Common Manual, OJ C 313, 16/12/2002, p. 97.

¹⁶⁴ See the Internet site of the Project for information of Russian citizens, *supra* note 11, <<http://www.dokaliningrada.ru/stages.php>>.

¹⁶⁵ Art. 4 Council Regulation No 693, *supra* note 154.

¹⁶⁶ Column 19 of the Application for an FTD. Annex I Council Regulation No 693, *supra* note 154.

¹⁶⁷ Vinokurov, Evgeny 'Transit is just a Part of it: Kaliningrad and the Free Movement of People', <<http://www.vinokurov.info/downloads/Vinokurov%20Paper%20on%20Kaliningrad%20and%20the%20movement%20of%20people.doc>>, visited of 5 December 2004.

name), date of birth, passport's particulars, number of the train and the date of the departure of the train.¹⁶⁸ The information is transferred to the Lithuanian consular authorities via specific system 'Express'.¹⁶⁹ The minimum time period for the purchase of a ticket is 28 hours before the departure of a train.¹⁷⁰ Not later than 27 hours before the departure the information is transmitted to the Lithuanian party¹⁷¹ which, in its turn, is obliged to respond maximum in 24 hours after receiving the information.¹⁷² Finally, a traveller can find out whether the permission for his/her transit is given two hours before the trip, or after 26 hours since buying a ticket.¹⁷³ If a person is forbidden to transit, the full price of the ticket is compensated to him.¹⁷⁴

In the train, before approaching the territory of the Lithuanian Republic, the consular officials (guarded by the executives of the Russian Interior Ministry) distribute the FRTD's.¹⁷⁵

The Joint Statement envisaged two stages of the scheme operation, which can be named as transitional and normal.¹⁷⁶ The first period has taken place since 1 July 2003 until 31 December 2004, and the second one is going on since 1 January 2005. This timeline was provided for by the Para. 8 of the Joint Statement. The major difference between the stages is the range of identification documents considered valid for the transit travel, mainly the possibility of use of Russian domestic passports to cross Lithuanian territory.

The passport issue was a heavily debated item.¹⁷⁷ The core is that there are two kinds of passports in Russia: domestic and national (translation is not stable). While all Russians have domestic passports since 14 years, where the address of residence is shown, they apply for a national one only in the case of travelling internationally.¹⁷⁸ A domestic passport is mainly used

¹⁶⁸ Art. 4 (2) Protocol Specifying Procedure of Transmission of the Data necessary for Taking the Decision on Issuance of the Facilitated Rail Transit Document to the FRTD Agreement, *supra* note 153 (hereinafter Protocol to the FRTD Agreement).

¹⁶⁹ *Ibid.*, Art. 1.

¹⁷⁰ Para. 8 Rules on Issuance of Travel Documents (Tickets) to the Passengers and Passengers' Boarding the Train on the Way to the Kaliningrad Region from the Rest of the Russian Federation in Transit through the Territory of the Lithuanian Republic and Back by Rail Transport, adopted by Regulation of the Government of the Russian Federation on the Measures Securing the Fulfilment of Obligations Undertaken by the Russian Federation in the Joint Statement of the Russian Federation and the European Union on Transit between the Kaliningrad Region and the Rest of the Russian Federation, No. 361, 23 June 2003 (as amended on 28 October 2003) (hereinafter Rule on Issuance of the Tickets).

¹⁷¹ Art. 4 (3) Protocol to the FRTD Agreement, *supra* note 167.

¹⁷² *Ibid.*, Art. 5 (1)

¹⁷³ Para. 11 Rules on Issuance of the Tickets, *supra* note 169.

¹⁷⁴ *Ibid.*, Para. 15.

¹⁷⁵ Arts. 2 (1), 3 (1), (3) FRTD Agreement, *supra* note 165.

¹⁷⁶ *New Transit Regulations for Kaliningrad Region*, RIA Novosti, 5 January 2005, <<http://kaliningradexpert.org/index.php?doc=839&lng=eng>>, visited 18 January 2005.

¹⁷⁷ See Fairlie, Lindelle D., 'Kaliningrad Borders in Regional Context', *supra* note 65, p. 38, Burbienne, Sigita, *supra* note 17, para. 49.

¹⁷⁸ Fairlie, Lindelle D., 'Kaliningrad Borders in Regional Context', *supra* note 65, p. 38.

inside the country, but also for travelling between states, which established a visa-free regime with Russia and agreed on the use of this internal document for the purpose of crossing interstate frontiers.

The FTD scheme caused this otherwise optional administrative procedure into obligatory for movement within the single state, exacerbated further by questions of costs and time.

Reportedly, the formalization of a national passport cost 25-30 USD¹⁷⁹, which is a lot for Kaliningraders taking into account the economic situation in the region and the necessity to renew the passport every five years. In fact, the mentioned price (and ever higher ones) must be paid for commercial structures, usually engaged in travel business, for a speed-up procedure.¹⁸⁰ In accordance with Russian internal legislation proved by personal experience the price of obtaining a passport is 250 rubles (equivalent to approximately 9 USD or 7 EUR)¹⁸¹. Additionally, Russia subsidize issuance of national passports to individuals with low income.¹⁸²

Time as an obstacle in this regard existed generally in the fear of Russian officials not to be able to provide all the interested citizens with passports by the 1 January 2005. Passport sections guaranteed that only minor will 100 per cent obtain these documents.¹⁸³ But by the end of the 2004 454,700 Kaliningraders (47,5 per cent) were reported to obtain passports, while the others did not show interest, as the extended opening hours of passport sections were used sparsely.¹⁸⁴

Initially, Lithuanian authorities planned that Border control officers would place permission stamps in Russian domestic passports.¹⁸⁵ Russia objected to that on the grounds that according to the internal legislation¹⁸⁶ this stamp

¹⁷⁹ Burbiene, Sigita, *supra* note 17, para. 49.

¹⁸⁰ Anyone can easily get a list of them through any web-based search system, like Google.

¹⁸¹ The main authority for that are Art. 9 Federal Law of Russia On Procedure of Leaving the Russian Federation and Entering the Russian Federation, para. 1 Art. 8 Law of Russia On State Toll, Art. 25 Federal Law of Russia On Federal Budget for 2004 (the data is of 2004).

¹⁸² Though it takes time in practice for money to reach the target-group. *See Pasportno-vizovaya rabotaet I noch'u* [Passport and visa <section> works even at night], *Kaliningradka.ru (Informational Daily "Kaliningradskaya Pravda")*, 25 December 2004, <<http://kaliningradka.ru/printnews.php?newsid=10192>>, visited on 25 December 2004.

¹⁸³ *K 2005 godu zagranpasporta poluchit polovina kaliningradtsev* [By 2005 Half of Kaliningraders Obtain National Passports], *Rosbalt*, 30 September 2004, <<http://www.rosbalt.ru/2004/09/30/179705.html>>, visited on 12 October 2004.

¹⁸⁴ *Pasportno-vizovaya rabotaet I noch'u* [Passport and visa <section> works even at night], *supra* note 193.

¹⁸⁵ *ES, Rossia I Litva obsudyat problemu Kaliningrada* [The EU, Russia and Lithuania will Discuss the Problem of Kaliningrad], *RIA Novosti*, 5 February 2003, <<http://www.globalaffairs.ru/news/250.html>>, visited on 9 January 2005.

¹⁸⁶ Regulation On a passport of the citizen of the Russian Federation, adopted by the Regulation of the Government of the RF On Adoption of the Regulation On a passport of the citizen of the Russian Federation, Model Form and Description of a Passport of the Citizen of the Russian Federation, 8 July 1997 (as amended by 23 January 2004).

or insignia, as well as any other, which are not specifically prescribed for, would invalidate the domestic passports.¹⁸⁷

Though the first reaction of Lithuania was to propose amending the relative legislation of Russia¹⁸⁸, Lithuania took this request into account and made use of the EC Council Regulation No 333/2002¹⁸⁹, designed for similar circumstances. The Regulation describes the model for the uniform format for forms that are used by the states members for affixing visas issued to holders of a travel document which is not recognized by that state.¹⁹⁰ These forms have been used for a year and a half, when the domestic passports of Russians were recognized as valid for their transit between Kaliningrad and the rest of Russia.

As a positive intermediate result, the figure of 0,2 per cent rate of those prohibited from transit is accepted by the parties (or 196 individuals for a year and a half).¹⁹¹ At the same time, the parties differ in estimation of the numerical effect of the new rules for the passenger flow between Kaliningrad and mainland Russia. The Lithuanian figures of increase of the flow are not supported by the information of the Russian Railways.¹⁹²

But was Russia entitled to a totally free Kaliningrad transit without any schemes? A notification-based, rather than permission-based mechanism? What arguments of general international law (in contradistinction to regional European law) could back the Russian title to free rail passenger connection with Kaliningrad? That is the substance of the second part of this thesis.

¹⁸⁷ *Ibid.*, Para. 6: "It is prohibited to insert and data, notes or insignia, not prescribed for by this Regulation. A passport bearing any data, notes or insignia, not prescribed for by this Regulation, is void." (Translated by the author thereof).

¹⁸⁸ See *Lithuanian and Russian Delegations Hold Consultations on Transit of Russian Citizens Via Lithuanian Territory to and from Kaliningrad*, <http://www.urm.lt/view.php?cat_id=6&msg_id=1759>, visited on 12 November 2004.

¹⁸⁹ Council Regulation (EC) No 333/2002 of 18 February 2002 on a uniform format for forms for affixing the visa issued by Member States to persons holding travel documents not recognized by the Member State drawing up the form, OJ L 53, 23/02/2002, p. 4.

¹⁹⁰ *Ibid.*, Art. 1.

¹⁹¹ *Ezdit' v Kaliningrad I obratno po zheleznoi doroge teper' mozjno tol'ko pri nalichii zagranpasporta* [From Now on, It Is Possible to Go to Kaliningrad and Reverse by Railway only Being in Possession of a Passport Valid for International Travel], 1 January 2005, <http://www.interfax.ru/r/B/0/2.html?id_issue=10737343>, visited on 2 January 2005.

¹⁹² Russian officials report 16 per cent decline in the total number of passengers. *Za god Litva Otkazala Vsego 10 Passazhiram vo V'ezde v Kaliningradskuyu oblast'* [During a Year Lithuania has Refused only 10 Passengers from Going to Kaliningrad], *Information Agency Regnum*, 30 June 2004, <<http://www.regnum.ru/news/285670.html>>, visited on 25 November 2004.

3 ARGUMENTS FOR FACILITATION

After the examination of the facts we proceed now to the analysis of them on the theoretical basis. It presupposes generalization and scrutinizing from the point of applicable law. The central question is: what arguments does general international law provide to back the Russian title to free rail passenger connection with Kaliningrad (in contradistinction to regional European law understood primarily, but not exclusively, as a complex of legal rules adopted in the framework of the European Union)? Two theoretical constructions are put forward and one possible way of their practical implementation. Firstly, enclaves enjoy freedom of passage to and from their homeland as a general principle of law, and on the other hand, international (or state) servitudes lead to the same effect. Secondly, the tool for the implementation can well take form of a high-speed transit train, which is to be considered as a positive transformation of the notorious corridor practice used at least twice in similar circumstances during the 20th century. Hence, three main chapters build this part after preliminary remarks about FTD/visas as a barrier. The first one is about legal implications of the political geography phenomenon of enclave. Second one elaborates on the institution of international servitudes, and the third one analyzes the practical and theoretical possibilities of use of a high-speed transit train through Lithuania. An assessment of the allowed level of control from human rights prospective concludes the part.

Regional law, especially the Schengen *acquis*, was deliberately left beyond the scope of this thesis for three reasons. On the one hand, the firm belief of this author is that the Schengen system is flexible enough to be adjusted to the situation to the maximum, which was not exhausted. The positions of Denmark, the United Kingdom and Ireland (members who opted out) and Norway and Iceland (not members, but included in the system) are just one example of the pliability of the *acquis*.¹⁹³ The possibility for Lithuania only to accept the *acquis* as a whole cannot be regarded as an absolute hindrance, as the difficulty arose not only between Lithuania and the EU, but affected Russia, as well.

On the other hand, a long-term goal of establishing visa-free relations between the EU and Russia has been already agreed upon and declared by both sides, and the parties report they're moving in that direction.¹⁹⁴ The biggest obstacle is the absence of the readmission agreement between the

¹⁹³ The best summary of this approach, brilliant in its simplicity, can be found in McNamara, Kevin, Rapporteur, Committee on Legal Affairs and Human Rights, Parliamentary Assembly, Council of Europe, Opinion 'The Enlargement of the European Union and the Kaliningrad Region', Doc. 9570, 24 September 2002.

¹⁹⁴ See *Russia and Germany: The Core Tenet for Cooperation*, 4 *Russia in Global Affairs* (October-December 2004), <<http://eng.globalaffairs.ru/numbers/9/708.html>>, visited on 6 March 2005.

parties, which is designed to significantly decrease the EU's fear of illegal migration from Russia (more correct passing through Russia), securing that all persons who entered into or stayed on the territory of a Schengen state illegally will be taken back by Russia, if it is proved that they came from the RF.¹⁹⁵

Finally, this aspect of the Kaliningrad transit is the best discussed of all, and the separate dissertation can be written on the topic.

3.1 FTD/visa as a barrier

FTD was characterised by the Russian side as “a visa in disguise”.¹⁹⁶ The difference with visa is minor and mainly in name and real facilitation of distribution procedure in comparison with an ordinary one.¹⁹⁷

A visa (from the Latin *carta visa*, literary meaning "the document has been seen")¹⁹⁸ is an authorisation to enter into the state's territory issued by the competent authority of that state, implying the possibility of denial. In literature and legislation it is defined alike:

“an entry permit issued by the authorities of a state to foreign citizens. An alien must have such permission from the immigration authorities before he is allowed to cross the border, unless he is a national of a country which is exempted from the general visa requirement.”¹⁹⁹

“[A] 'visa' shall mean an authorization given by or a decision taken by a Member State which is required for entry into its territory with a view to:

- an intended stay in that Member State or in several Member States of no more than three months in all,
- transit through the territory or airport transit zone of that Member State or several Member States.”²⁰⁰

Visa is a natural means of control by which states realize their discretionary right to allow foreigners into its territory. In the present case, transit as a specific form of movement is at issue. In the Statute on Freedom of Transit we can find that,

¹⁹⁵ For Russia prior to conclude a readmission treaty with the EU, the similar agreement should be entered with the CIS members on its Southern borders where the border control is particularly weak.

¹⁹⁶ Vitunic, Brian, *supra* note 44, quoting, then, the Prime Minister of Russia Mikhail Kasyanov.

¹⁹⁷ Though it is argued officially that a solution has core differences from visa. See the Internet site of the Project for information of Russian citizens, *supra* note 11.

¹⁹⁸ ‘Visa (document)’, <http://www.tutorgig.com/ed/visa_%28document%29>, visited on 17 December 2004.

¹⁹⁹ Bo, Bente Puntervold, *Immigration Control, Law and Morality: Visa Policies towards Visitors and Asylum Seekers: An Evaluation of the Norwegian Visa Policies within a Legal and Moral Frame of Reference*, Oslo: Unipub, 2001, p. 79.

²⁰⁰ Art. 5. Council Regulation (EC) No 1693/95 of 29 May 1995 laying down a uniform format for visas, OJ L 164, 14/07/1995, p. 1.

“[p]ersons, baggage and goods, and also vessels, coaching and good stock, and other means of transport, shall be deemed to be in transit across territory under the sovereignty or authority of one of the Contracting States, when the passage across such territory, with or without transshipment, warehousing, breaking bulk, or change in the mode of transport, is only a portion of a complete journey, beginning and terminating beyond the frontier of the State across whose territory the transit takes place.”²⁰¹

So entering the territory of any state, besides the state of departure and state of destination, that coincide in our case, is only a collateral of movement. Transit from one state to another is not the same as transit from one part of the state to another part of the same state; the latter kind of transit is intertwined with the right to move freely *within* one’s country.

A dissenting Judge Fernandes in the *Passage* case, which is discussed in more detail further, wrote, “necessity of authorization cannot be assimilated to the absence of right.”²⁰² But for such statement to be made, he explains that “authorization implies a power of appraisal, but not a discretionary power”²⁰³, as we have in case of visas or FTD here. The dissenting Judge Moreno Quintana maintains the similar position:

“a right that is on each occasion made conditional upon the judgment of the local authority in the place where it is exercised is a right in name only. It does not constitute a legal right; rather it is a faculty tolerated by the territorial sovereign.”²⁰⁴

According to the FRTD Agreement and the Protocol to the FRTD Agreement granting of a FRTD is completely discretionary on the part of Lithuania. Para. 3 Art. 1 of the FRTD Agreement stipulates that,

The diplomatic representatives or consular offices of the Republic of Lithuania in the Russian Federation take a decision on the issuance or refusal of the issuance of the FRTD.

The Protocol to the FRTD Agreement specifies that the response of the Lithuanian side contains the results of the check of the possibility for a passenger to proceed through the territory of Lithuania.²⁰⁵

Arguments in this part deal with facilitation in general, not against visas in particular.

²⁰¹ Convention and Statute on Freedom of Transit, Barcelona, 20 April 1921, 7 LNTS 11, <http://www.jurisint.org/pub/01/en/doc/249_1.htm>, visited on 24 February 2005.

²⁰² *Case concerning Right of Passage over Indian Territory* (Portugal v. India), Merits (1960), ICJ (hereinafter the *Passage* case), dissenting opinion of Judge Fernandes, para. 18.

²⁰³ *Ibid.*, para. 23.

²⁰⁴ *Passage* case, *supra* note 201, dissenting opinion of Judge Moreno Quintana, p.89.

²⁰⁵ Para. 2 (3) Art. 5 Protocol to the FRTD Agreement, *supra* note 167.

3.2 Enclaves

There is no unity in referring to Kaliningrad from the point of its separated location. It seems that the term semi-enclave is the most correct one as Kaliningrad has an access to the sea; but the region is treated as a complete enclave with the acquiescence of the EU. For mainland Russia Kaliningrad is an exclave.

Though enclaves were typical for the medieval time of feudal rights over the soil, they are not rare currently. And all of them face similar problems, especially of access. There are examples of both successful solutions of transit question and of complete isolation of enclaves due to unfriendly relations of states concerned. In Europe one of the most favourable practices was elaborated. There are no reasons to derogate from it in the present case.

Moreover, enclave presupposes free access on the part of its motherland as a matter of general principle of law in any meaning of the latter in accordance with the Statute of the International Court of Justice.

3.2.1 General observations

The unique location of the Kaliningrad region, which is acknowledged by the parties in the Joint Statement²⁰⁶, is characterized in political geography as that of an enclave. Specialized literature about this geographical curiosity is lacked for in general²⁰⁷, and in particular, it seems that in the contemporary literature about the problems of Kaliningrad the only paper directly concerned with the enclave position is one by Pertti Joenniemi.²⁰⁸ However, this contribution cannot be evaluated as satisfactory. To the descriptive science of geography, which is alien to any appraisals by its very nature, the author brings in and presses upon the emphasis on the undesirability of the notions “enclave” and “exclave”. He argues for a neutral “region”. That seems to be as reasonable as abandonment of words “exit” and “entrance” as superfluous to the term “door”.

Etymology of the notion “enclave” goes back to the old French verb “*enclaver*” and further to the Vulgar Latin “*inclavare*”, which means either “to lock in” and derives from the Latin “*clavis*” (a door key), or alternatively “to nail down” from the Latin “*clavus*” (a nail).²⁰⁹ “Exclave” is allegedly the later transformation.²¹⁰

²⁰⁶ Para. 1 of the Joint Statement, *supra* note 136.

²⁰⁷ As noticed, *e.g.*, in Schendel, Willem van, ‘Stateless in South Asia: The Making of the India – Bangladesh Enclaves’, 61:1 *The Journal of Asian Studies* (2002), p. 116.

²⁰⁸ Joenniemi, Pertti, ‘Annex. Kaliningrad – Enclave or Exclave?’, in P.Joenniemi and J.Prawits (eds.), *Kaliningrad: The European Amber Region*, Ashgate, England, 1998, pp. 261-265.

²⁰⁹ *Cf.* the modern French (*enclaver*) and Spanish (*enclavar*) translations for the first and second version, respectively, as well as Nies, Susanne, ‘Kaliningrad: A Not Very Unique Enclave’, 8:1 *Pro et Contra* (2003) p. 91, and Vinokurov, Evgeny, *Enclaves and Exclaves of the World*, <<http://www.vinokurov.info/downloads/enclaves.pdf>>, visited on 5 December

Currently an enclave can be defined as a territory (a state or a part of a state) encircled by foreign states. An exclave is a part of a state surrounded by other states, seen from the motherland.

There is no unity in definition of either pure enclave or exclave, and multiple classifications of both exist.²¹¹ The criteria can be different: the extent of separation²¹², jurisdictional or political connection with the rest of the state²¹³, etc. What is for sure, it is that an exclave cannot be sovereign. It presupposes some entity that governs the area, being itself dispatched from it geographically.²¹⁴

Kaliningrad is not a clear enclave, it has access to the sea, and thus the correct name should be a semi-enclave or *pene-enclave*. But having a two-fold reason, explained below, it is acceptable to refer to the region as to an enclave. One of the grounds is theoretical, and the other is practical. Firstly, at present the ease of the access to other states cannot serve as a criterion of enclavity, because nowadays any enclave can be reached by air (if not by plain, than by helicopter). But, as noticed by d'Olivier Farran, "the essential fact about an exclave is its lack of free communication without *passing over the enclaving state's territory*."²¹⁵ Secondly, and even more importantly, neither Lithuania, nor the European Union claimed the air or sea facilities to be mitigating circumstances for solving the question of rail passenger traffic with a less degree of flexibility that it was possible.

The above arguments allowed the liberty of referring to the geographic position of the Kaliningrad region in this paper. It is simply not self-valuable, what is decisive in this case is the range of legal consequences that follows from this phenomenon characterized in terms of political geography.

3.2.2 Some examples of inter-state practice

Scholars recall that history witnessed not a hundred percent positive solution of enclaves' problems.²¹⁶ In a moment of need blockade was used

2004, p. 4. The Webster's Encyclopaedia proves the former variant, *see Webster's Encyclopedic Unabridged Dictionary of the English Language*, New York/Avenel: Gramercy Books, 1994.

²¹⁰ Vinokurov, Evgeny, *Enclaves and Exclaves*, *ibid*.

²¹¹ See Robinson, G.W.S., 'Exclaves', 49:3, part 1 *Annals of the Association of American Geographers* (1959), p. 283-287, *see also* Verzijl, J.H.W., *International Law in Historical Perspective*, part III. State Territory, A.W.Sijthoff-Leiden, 1970, p. 443, D'Olivier Farran, C., 'International Enclaves and the Question of State Servitudes', 4 *International and Comparative Law Quarterly* (April 1955), p. 295.

²¹² As inferred from Verzijl, J.H.W., *ibid*.

²¹³ As in Robinson, G.W.S., *supra* note 210.

²¹⁴ Nies, Susanne, *supra* note 208, p. 91.

²¹⁵ D'Olivier Farran, C., *supra* note 210, p. 296 (emphasis added).

²¹⁶ Verzijl, J.H.W., *supra* note 210, p. 447.

as a natural weapon of the surrounding state²¹⁷, but there can hardly be found an instance where such treatment was considered as an *opinion iuris*, vice versa, parties always tried to settle the matter. Treaties regulated such questions since early times²¹⁸ and freedom of movement for civilians was usually granted.²¹⁹ Rheinstein showed the practice of 62 states that successfully solved problems of passage to enclaves.²²⁰

Kaliningrad is one of several hundreds of enclaves that survived till present. There are up to 250 of them currently²²¹, and there are even enclaves located in enclaves.²²² How different they can be, it is generally accepted that communication with mainland is crucial and essential for all of them.²²³

The existence of enclaves offers examples of both success and failure in saving enclaves from isolation. Generally speaking, Europe is a model of the former, while Asia and post-Soviet states of the latter experience.

Majority of enclaves (estimated as 197 in 2002)²²⁴ are concentrated between India and Bangladesh, formerly East Pakistan. Treatment of communication reflected uneasy bilateral relations. Before the first agreement was reached in 1952 between India and, then, Pakistan, people could move through the area relatively free. Neither visa, nor passport was demanded. Afterwards however citizens of enclaves were locked in as the treaty on mutual travel omitted any mentioning of enclaves, but prescribed for passports and visas for border-crossings.²²⁵ Similar picture is observed in the Armenian enclave Nagorny Karabakh in Azerbaijan.²²⁶

Europe, on the other hand, serves the best example of the enclave-friendly situation. There are three solitary enclaves there and a group of enclaves in the region²²⁷, and none suffers the lack or difficulty of connection with mainland. Currently, it is thanks to the Schengen space, but even previously, in the middle ages, parties managed to find a common language.²²⁸

The opinion of the author is that it is the European practice that should guide the solution of the Kaliningrad transit puzzle. Firstly, the European Union itself is involved in the case. Secondly, the European approach is clearly a leading one. Finally, as mentioned by the Rapporteur of the Committee on Legal Affairs and Human Rights (Parliamentary Assembly,

²¹⁷ Robinson, G.W.S., *supra* note 210, p. 290.

²¹⁸ See Verzijl, J.H.W., *supra* note 210, p. 453-454.

²¹⁹ Koroscil, Paul M., 'The Exclave Problem Of Western Europe', 85-3 *American Historical Review* (June 1980), p. 620.

²²⁰ Reported in Mosler, Hermann 'General Principles of Law', in 2 *EPIL* (1995), p. 521.

²²¹ Schendel, Willem van, *supra* note 206, p. 117.

²²² *Ibid.*, p. 125.

²²³ Koroscil, Paul M., *supra* note 218, Robinson, G.W.S., *supra* note 210, p. 290.

²²⁴ Schendel, Willem van, *supra* note 206, p. 117.

²²⁵ *Ibid.* p. 124.

²²⁶ Nies, Susanne, *supra* note 208, p. 103.

²²⁷ Schendel, Willem van, *supra* note 206, p. 117.

²²⁸ As traced by Section 2 to middle ages.

Council of Europe) in his opinion ‘The Enlargement of the European Union and the Kaliningrad Region’, it is not profitable for the EU to damage its image as a promoter of all best Western values by decreasing its standard of level of rights accessibility by treating Kaliningrad far less favourably than the enclaves which are fully inside the Union (both geographically and jurisdictionally).²²⁹

3.2.3 Free exclave-mainland connection as a general principle of law

General principles of law recognized by civilized nations are stipulated in para. 1(c) Art. 38 of the Statute of the International Court of Justice. This part of the article is the most ambiguous one and caused very lively discussions among scholars.²³⁰ Martti Koskenniemi states that both PCIJ and ICJ used the principles in their argumentation, but never really applied them.²³¹

The principles can be understood as either principles embracing both international and domestic law, or provisions common to all municipal legal systems, or principles of international law itself.²³² Right to passage to an exclave is a general principle of law in all these meanings.²³³ It is a legal idea implied both in national and international law (there can be no right without possibility to exercise it), it is a principle common to domestic systems (in the form of access to enclosed property), and, finally, a principle of international law, which follows from the first mentioned understanding against the background of territorial sovereignty of the mainland over the exclave. All these aspects were pinpointed in the separate opinions to the *Passage* case.²³⁴

Passage case was the instance when the International Court of Justice had the opportunity to deliver its opinion on the problem of access to enclaves. Portugal claimed the right against India who obstructed the passage of Portuguese subjects from Portuguese coastal territory Daman to two enclaves (Dadra and Nagar-Aveli) before and when the riot in the two enclaves occurred. The Court did not use the chance in full.

The ICJ has found a right to passage to an exclave, but on the basis of the local custom and only in favour of private citizens and goods, not armed

²²⁹ McNamara, Kevin, *supra* note 192, para. 6.

²³⁰ For the discussion on the topic *see e.g.* Tunkin, G.I., *Theory of International Law* (William E. Butler trans.), Cambridge, Massachusetts: Harvard University Press, 1974, pp. 190-203.

²³¹ Koskenniemi, Martti (1985) ‘General Principles: Reflections on Constructivist Thinking in International Law’, *Oikeustiede-Jurisprudentia*, 18, in Koskenniemi, Martti (ed.) *Sources of International Law*, 2000, p. 362.

²³² *See* Tunkin, G.I., *supra* note 229.

²³³ This is supported, for example, by Mosler. *See* Mosler, Hermann, *supra* note 219, p. 521.

²³⁴ *Passage* case, *supra* note 201.

forces, armed police or arms and ammunition. It refused to address such ground for the right as a general principle of law or general international custom on a two-fold reason. On the one hand, because it dealt with “a concrete case having its special features”, the case, which referred to relations and period of relations of states governed “largely by practice”. Therefore, on the other hand, having found the answer to the question before it of the basis of such practice recognized as law as between the parties, i.e. having established a local custom, the Court considered it unnecessary to go into further general discussions.²³⁵

However, the judges in their separate and dissenting opinions did pay significant attention to other grounds of the right. The fact that the decision in regard the second group of subjects was taken with a shaky majority of eight against seven confers additional weight to the dissents.

Firstly, judge Fernandes inferred the right of unimpeded contact with exclave from the very essence of this tripartite relationship. The minimum possibility to exercise a right must be implied, even if it serves a restriction for another subject.

“What has to be determined is whether there is not a reason deeply rooted in the legal consciousness of all peoples for admitting, as a logical and practical necessity, the recognition of a right of passage to one who has a certain legal capacity to exercise in an area to which he cannot have access without using an area reserved for another. If that is not a general principle of law, valid alike in municipal and international law, within the meaning of Article 38 of the Statute of the Court, then no principles will meet the conditions of that Article”.²³⁶

The other part of his argument rests upon the proposition, which combines pure legal thinking with international law. It is based on the *Reparations for Injuries Suffered in the Service of the United Nations* case: “he who sanctions an act sanctions also the foreseen and necessary consequences which logically flow therefrom.”²³⁷ “An act” here is the specific location of the region, and “sanctioning” is the recognition of the sovereignty of another state over the enclave.²³⁸

Secondly, the analogy with domestic legislation on the access to the enclaved property is brought into. Usually, internal legislation prescribes certain rights in the property of another as a matter of servitude, whatever the name can be. The applicability of servitudes is discussed separately in this thesis, however, certain notices should be made in this part.

Servitudes are particular restrictions that rest on peculiar circumstances of the specific situations. They are never universal in spite of the fact that some

²³⁵ *Passage case*, *supra* note 201, p. 41.

²³⁶ *Passage case*, *supra* note 201, dissenting opinion of Judge Fernandes, para. 34.

²³⁷ *Ibid.*, para. 41.

²³⁸ *Ibid.*, paras. 41-44.

authors do single out “natural” servitudes as those, for example, that are “founded on the natural laws of politico-economic co-existence of states”.²³⁹

This institution, originating from the Roman law and, hence, inherent to the civil law system, has its analogy in the Anglo-Saxon legal tradition under the name of “easement”. Moreover, similar relationships were reported to be socialist, Islamic, Scandinavian and Asian law.²⁴⁰

As to the third variation, the right to access enclave follows from the title of territorial sovereign. The two sovereigns meet in the situation of an enclave, and both are entitled to existence. The surrounding state cannot obstruct the other’s access to the enclave, as the communication is essential for exercising the sovereignty over the layout territory.

“If the State in possession of the surrounding territory were permitted to obstruct the communications necessary for the exercise of a sovereignty over enclaves, it would mean that that State was free to suppress that sovereignty at its own discretion. Such action would be technically different from conquest by arms, but it would have exactly the same results. If international law forbids the latter, it cannot permit the former.”²⁴¹

The conclusion from above is that the passage between the mainland and its exclave is a general principle of law in any meaning of the para. 1 (c) Art. 36 of the ICJ Statute.

On the other hand, two approaches towards the character of the general principles of law as legal rules are defended. One view is to admit normative character of general principles²⁴², the other one is to oppose it and deem principles as subsidiary non-binding provisions helpful in applying norms of law.²⁴³ Both are in favour of freedom of transit. Acceptance of a former point leads to immediate result, but even if only a role of a back-up theory for general principles is recognized, it would “act as conceptual aids through which any totality of legal phenomena may be grasped as a system”.²⁴⁴

3.3 Servitudes

During the preceding century arguments both in favour of and against international servitudes have not changed. The doctrine is disputable, but it

²³⁹ Potter, Pitman B., ‘The Doctrine of Servitudes in International Law’, 9-3 *American Journal of International Law* (July 1915), p. 635.

²⁴⁰ Treatise by Rheinstejn, prepared for the support of Portuguese claim in the *Passage* case, see Mosler, Hermann, *supra* note 219, p. 521.

²⁴¹ *Passage* case, *supra* note 201, dissenting opinion of Judge Fernandes, para. 38.

²⁴² As inferred from Brownlie, Ian, *Principles of Public International Law*, 6th ed., New York: Oxford University Press, 2003, pp. 3, 5.

²⁴³ As is, for example, the opinion of prof. Tunkin himself, see Tunkin, G.I., *supra* note 229, p. 202.

²⁴⁴ Koskenniemi, Martti, *supra* note 230, p. 396.

is used. This minor right in the foreign territory is claimed to be enjoyed by Russia in the Lithuanian soil, and pass to the European Union after the handing over to it a sovereign right of Lithuania to legislate on short-term border crossing.

3.3.1 The doctrine

Servitudes can well serve an illustration of the continuity of the international law. Appeal to international or state servitudes is far from new. It was debated throughout the 20th century, as well as at its turn on both sides; it was appealed to before different courts and arbitrations during the same period. This author traced the concept through the dozen of international law textbooks and publications starting from the work by Hall of 1895 and finishing in the latest edition of the Brownlie's treatise of 2003²⁴⁵, and from the North Atlantic Fishery Arbitration of 1910 up to the Eritrea-Yemen Arbitration Award of the 1998²⁴⁶. Actually, the doctrine has never served the basis for the decision *per se*. The tribunals usually opted to avoid the terminology, accepting the argument.

An international servitude derives from the Roman law institution, which gave the name for this legal relationship. In Roman law, servitudes were "...classified among *iura in re aliena* (= rights over another's property) since their substance consisted in a right of a person, other than the owner, primarily the proprietor of a neighbourly immovable, to make a certain use

²⁴⁵ See Hall, William Edward, *A Treatise on International Law*, 4 ed., Oxford: Clarendon Press, 1895, p. 166, Hyde, Charles Cheney, *International Law Chiefly as Interpreted and Applied by the United States*, in two vol., vol. 1, Boston: Little, Brown, and Company, 1922, pp. 272-277, Oppenheim, L. (Arnold McNair 4th ed.), *International Law: A Treatise*, vol. 1, Peace, 4th ed., 1928, pp. 429-436, Möller, Axel, *International Law in Peace and War. Part 1. Normal International Relations* (Pratt, H.M. trans.), London, Stevens and Sons, Limited, 1931, pp. 152-154, Briggs, Herbert W. (ed.), *The Law of Nations: Cases, Documents and Notes*, 2nd ed., New York: Appleton-Century-Crofts, Inc., 1952, p. 319, Brierly, J.L. (Sir Humphrey Waldock ed.), *The Law of Nations: An Introduction to the International Law of Peace*, 6th ed., New York: Oxford University Press, 1963, pp. 190-194, Sørensen, Max (ed.), *Manual of Public International Law*, New York: St. Martin's Press, 1968, pp. 318-319, Bishop, William W. (Jr.), *International Law: Cases and Materials*, 3rd ed., Boston and Toronto: Little, Brown, and Company, 1971, pp. 458-459, Delupis, Ingrid, *International Law and Independent State*, Essex: Gower Press Limited, 1974, pp. 180-186, Malanczuk, Peter, *Akehurst's Modern Introduction to International Law*, 7th ed., rev., New York: Routledge, 1997, pp. 158-159, Brownlie, Ian, *supra* note 241, pp. 366-368.

²⁴⁶ *North Atlantic Coast Fishery* case (1910), Permanent Court of Arbitration, in Castel, J.-G. *International Law: Chiefly as Interpreted and Applied in Canada*, Toronto: Batterworths, 1976, *Case of the S.S. Wimbledon* (1923), PCIJ, Ser. A, no. 01, *Eritrea v. Yemen Arbitration*, the Award on Territorial Sovereignty, Permanent Court of Arbitration, 9 October 1998, <<http://pca-cpa.org/ENGLISH/RPC/#Eritrea>>, visited on 15 February 2005, *Eritrea v. Yemen Arbitration*, the Award on Maritime Delimitation, Permanent Court of Arbitration, 17 December 1999, <<http://pca-cpa.org/ENGLISH/RPC/#Eritrea>>, visited on 15 February 2005.

of another's land.”²⁴⁷ Servitude burdened the land rather than the ownership, and it was “an independent *ius* which must be thought of rather as parallel to ownership than as a burden on it.”²⁴⁸

The “transplantation” into the international law took place through the interim reception by the feudal public law.²⁴⁹ Vali, who is the author of one of the two existing monographs on international servitudes²⁵⁰, reports that the notion was first implemented in the international field by the German lawyer Christian Wolf in 1749 with the meaning analogous to that of the Roman law.²⁵¹

It is agreed now that this institution has been used in resolving boundary problems in the post-war Europe²⁵², to compensate the objective geographical disadvantages between states²⁵³, etc. But the negative perception of the notion has not been overcome yet. Ugly sounding for states' sensitiveness in questions of sovereignty makes obvious analogy in the relationships ‘non-existing’.²⁵⁴ That is why a big part of work by proponents of international servitudes is directed to devaluation of sovereignty-related concerns.²⁵⁵

What does usually discourage scholars from the institution of servitudes? The main criticism concentrates over the impossibility to think of servitude beyond categories of ownership (*praedium*), which are intrinsic to the Roman law, but not to the international law (where state possesses power of *imperium*, rather than *dominium* over its territory).²⁵⁶

However, it should be kept in mind that it is only an analogy, not the identity of the two concepts what is claimed. “The reasonableness of adopting the notion of servitudes also in inter-State relations is no means dependent upon a complete identity between the two concepts, provided that there are sufficient similarities between them in their operation of either domain...”²⁵⁷ It is the notion for the phenomenon of the international relations, analogous to the institution of the private law that is adopted.²⁵⁸

²⁴⁷ Berger, Adolf, *Encyclopedic Dictionary of Roman Law*, Transactions of the American Philosophical Society, New Series, New York, Vol. 43, Part 2, 1953. p. 702.

²⁴⁸ Buckland, W.W. (Peter Stein rev.), *A Text-Book of Roman Law from Augustus to Justinian*, 3rd ed., Cambridge: Cambridge University Press, 1963, p. 268.

²⁴⁹ For the detailed historical note see Vali, Ferenc A., *supra* note 28.

²⁵⁰ The other one is Reid, Helen Dwight, *International Servitudes in Law and Practice*, Chicago: The University of Chicago Press, 1932.

²⁵¹ Vali, Ferenc A., *supra* note 28, p. 41.

²⁵² Jaeger, Walter H.E., ‘Servitudes of International Law’, 53 *The American Journal of International Law* (1959), Book Reviews, pp. 713-714.

²⁵³ Potter, Pitman B., *supra* note 238, p. 628.

²⁵⁴ See McNair, Arnold D., ‘So-Called State Servitudes’, 6 *British Yearbook of International Law*, p. 121.

²⁵⁵ See, e.g., Oppenheim, L., *supra* note 244, p.431, Sørensen, Max (ed.), *supra* note 244, p. 318.

²⁵⁶ See Shaw, Malcolm N., *supra* note 39, p. 412.

²⁵⁷ Verzijl, J.H.W., *supra* note 210, p.413.

²⁵⁸ *Ibid.*, p.414.

So, in international law the concept never got the universal formulation and the scope of operation was not agreed once and for all. But servitudes inherited the main characteristics of the classical ancient notion. Following are the some definitions taken from the different treatises on public international law and representing the twentieth century from beginning to the end.

“State Servitudes are those exceptional restrictions made by treaty on the territorial supremacy of a State by which a part or the whole of its territory is in a limited way made perpetually to serve a certain purpose or interest of another State.”²⁵⁹

“[A]n institution under which a state accepts a stipulated limitation of its sovereignty over a part or the whole of its territory, on behalf and in the interest of another state.”²⁶⁰

“A servitude is said to arise when territory belonging to one state is, in some peculiar way, made to serve the interests of territory belonging to another state.”²⁶¹

Actually no common denominator can be drawn from the definitions. To every point there is an opponent. There is also no feasible test at hand to check whether this or that inter-state relationship is servitude. The majority of scholars studied servitudes *ex post facto*. The most common suggestion was and is to make the fact of surviving the succession of states concerned by the servitude relation on one or both side, the crucial fact in their ascription to servitudes.²⁶² But the opinion of this author is that in such case a consequence substitutes the reason.²⁶³

That is why the correct order of illations should be as follows. The most important feature of servitudes is its character of a real right, i.e. right that runs with the land and, thus, not susceptible to the change of the sovereign. In order to be able to distinguish the relationship as a servitude, it was proposed to establish the will of the state to create a permanent obligation. Prof. Lauterpacht put forward four symptoms of such will. They are:

- use of the term ‘servitude’ in the treaty;
- presence of “clear provisions of the treaty; for instance, to the effect that the restriction should last for all times”;
- character of the treaty as “creating a rule of universal international law”;

²⁵⁹ Oppenheim, L., *supra* note 244, p.429.

²⁶⁰ Sørensen, Max (ed.), *supra* note 244, p. 318.

²⁶¹ Malanczuk, Peter, *supra* note 244, p. 158.

²⁶² Brierly, J.L. (Sir Humphrey Waldock ed.), *supra* note 244, p. 191, McNair, Arnold D., *supra* note 265, p. 123.

²⁶³ See also Delupis, Ingrid, *supra* note 244, p. 181.

- the fact that a certain restriction has been repeatedly taken over and its real character is deduced from actual observance”²⁶⁴

It is unlikely possible to claim ‘clear’ provisions of the treaty in the Case of Kaliningrad transit, but the last indicator of servitudes above does exist in the successive treaties between Lithuania and Russia. Further analysis thereof is below.

3.3.2 The practice

Many times states in various circumstances based their claims in front of different international tribunals on the doctrine of servitudes. In the majority of such cases decisions were in favour of the claiming parties. But the deciding bodies mostly opted for circumvention of the concept itself.

The most detailed decision of this point was in the *North Atlantic Fishery* case of 1910²⁶⁵, where the Permanent Court of Arbitration considered the dispute between the United States of America and the United Kingdom in respect of certain liberties of fishery granted to the former by the latter. The Court refused to apply the doctrine of servitudes on several reasons (however holding in favour of the claimant), *inter alia* because the parties to the dispute were not conversant with the doctrine as of 1818 where the dispute was rooted, because the dispute was over the pure economic right, etc. But the Court adopted the view that the concept of servitude would receive full legal protection given the express evidence of the treaty.²⁶⁶

In 1920 question of servitudes arose over demilitarized status of the Aaland Islands. Aaland Islands were subjects to Russian sovereignty when they were demilitarised as a result of the convention between Britain, France and Russia in 1856, notably known as the Aaland Servitude.²⁶⁷ When in 1917 the sovereignty over the Islands passed to newly independent Finland, which made attempts to the change the status of the Islands, the dispute arose between Sweden and Finland as to the effects of the treaty, to which none of them was a party.

The Committee of Jurists appointed by the Council of the League of Nations to resolve the dispute over the fortification by Finland of the Aaland Islands found in favour of ‘objective law’ designed for regulation of European interests. That was what the proponents of the servitude concept were

²⁶⁴ Lauterpacht, H., *Private Law Sources and Analogies of International Law (with Special Reference to International Arbitration)*, New Jersey: The Lawbook Exchange, Ltd, Union, 2002 (originally published 1927), p. 123.

²⁶⁵ *North Atlantic Coast Fishery* case (1910), *supra* note 245.

²⁶⁶ Lauterpacht, H., *supra* note 263, p. 120.

²⁶⁷ Jansson, Gunnar, ‘Introduction’, in Hannikainen, L. and F. Horn (eds.), *Autonomy and Demilitarization in International Law: The Aaland Islands in a Changing Europe*, The Hague: Kluwer Law International, 1997, p. 2.

seeking for, but the Committee did not apply the notion of servitudes as not generally admitted in a ‘technical sense of term’.²⁶⁸

In the *Wimbledon* case of 1923 the PCIJ refused to go into consideration of a ‘controversial’ question of existence of servitudes in international law²⁶⁹, considering the question of the scope of restriction upon the sovereignty of Germany provided by the Treaty of Versailles of 1919 in respect of the passage through the Kiel Canal. The dissenting judge Schücking elaborated the point, but tying it down to the article of the Treaty of Versailles of 1919.²⁷⁰

In the *Eritrea-Yemen Arbitration* of 1998 the question arose over the sovereignty over certain Red Sea islands (First Award) and delimitation of maritime boundary (Second Award).²⁷¹ The Tribunal explicitly admitted ‘a sort of “*servitude internationale*”’²⁷² existing “for the benefit of the inter-State community of the Red Sea fishermen”.²⁷³ As it was explained further, the sovereignty over the islands belonged to Yemen, but fishermen of both states remained “entitled freely to use these islands”.²⁷⁴ Thus, the Tribunal reached the same conclusion as the Committee of Jurists in 1920, but did not refuse to name the doctrine. And this might be considered a breakthrough in the attitude towards the doctrine; rigidity might be overcome soon.

3.3.3 Applicability to the current case

An introductory remark: the case was salvaged by the mutual consent, thus Russia accepted the termination of the servitude that she enjoyed. It happened *mutatis mutandi* as in the example of Brownlie: if A cedes to B a part of its territory (in our case, Lithuania delegates a sovereign right to legislate on short-term border crossings), and C had previously an interest secured in that part (Kaliningrad visa-free transit exception from the general visa regime), it is for the A to be responsible to C, if B terminates the favourable towards C regime.²⁷⁵

The claim of the Russian Federation is directed at obtaining the free rail passenger connection with Kaliningrad. Its elements are the specific

²⁶⁸ See Verzijl, J.H.W., *supra* note 210, p. 417, McNair, Arnold D., *supra* note 265, p. 114.

²⁶⁹ *Case of the S.S. Wimbledon* (1923), *supra* note 245, p. 24.

²⁷⁰ See *ibid.*, dissenting opinion by M. Schücking, p. 43.

²⁷¹ *Eritrea v. Yemen Arbitration*, the Award on Territorial Sovereignty, 9 October 1998 (First Award), <<http://pca-cpa.org/ENGLISH/RPC/#Eritrea>>, visited on 15 February 2005, *Eritrea v. Yemen Arbitration*, the Award on Maritime Delimitation, 17 December 1999 (Second Award), <<http://pca-cpa.org/ENGLISH/RPC/#Eritrea>>, visited on 15 February 2005.

²⁷² Para. 126 First Award, *ibid.*

²⁷³ Antunes, Nuno Sergio Marques, ‘The 1999 *Eritrea-Yemen* Maritime Delimitation Award and the Development of International Law’, 50 *International Comparative Law Quarterly* (April 2001), p. 310.

²⁷⁴ Para. 103 Second Award, *supra* note 282.

²⁷⁵ Brownlie, Ian, *supra* note 241, p. 368.

geographic location of the two parts of Russia²⁷⁶, existence of previous agreements providing for unimpeded traffic, minimum of pleaded abstention of sovereignty for Lithuania.

As to the last point, it is difficult to measure the sovereignty and restrictions on it. Sovereignty of a state can be explained as a supreme power over the subjects within a certain territory, which is independent of any other state.²⁷⁷

In case of the Kaliningrad transit Lithuania is called for abstention of its right to reject entry into its territory for the purpose of transit (which is the core of the visa regime) on the part of a Russian citizen following from one part of Russia to another via a prescribed train route.

The minimum of the restriction is a sort of quantitative.

Firstly, though the connection between Kaliningrad and the rest of Russia is carried out via three main routes: via Latvia and Lithuania, via Belarus and Lithuania, and via Belarus and Poland. Only the Lithuania-Belarus direction is at stake.

Secondly, this land route can be carried out by a car, bus, and train. Only the latter is claimed.

Finally, the free rail transit connection is claimed only for the fixed with the acceptance of Lithuania train routes.

Moreover, throughout roughly 15 years of independent co-existence of Lithuania and Russia several treaties standardized travel regime between the two states. In all three stages Kaliningrad issue was dealt with separately. See (1) Treaty on the basis of inter-state relations and agreement on the cooperation in the economic and socio-cultural development of the Kaliningrad region, (2) Interim agreement of 1995 on mutual travel by citizens and protocol regulating Kaliningrad passenger transit, (3) agreement of mutual travel of 2002 in parallel with the FTD scheme.

Hence, the regime was never common with that of Russia proper, it was always special and easier. Dumbauld agrees with Vali that a servitude, “once duly established, does not depend for its continuance upon the treaty which created it.”²⁷⁸ In the question at hand it means that even if the agreement of 1995 was interim it did not invalidate the separate treatment of the Kaliningrad transit.

Even if *clausula rebus sic stantibus* may be applied to servitudes in general, in this particular case it does not fulfil the necessary criteria of the Vienna

²⁷⁶ That was argued above.

²⁷⁷ Malanczuk, Peter, *supra* note 244, p. 17.

²⁷⁸ Dumbauld, Edward, ‘Servitudes of International Law: A Study of Rights in Foreign Territory’, 27-4 *American Journal of International Law* (October 1933), Book Reviews, p. 805.

Convention on the Law of Treaties which provides that the fundamental change of circumstances must be unforeseen.²⁷⁹ But Lithuania right after declaring independence²⁸⁰ declared the membership in the European Union among its top foreign policy priorities.²⁸¹

3.4 High-speed train

How can the above theory be applied? A high-speed non-stop transit train is a very moderate solution. It is based on the international law and is feasible to the full extent; it respects Lithuanian sovereignty and cares about Russian citizens.

The example, which is studied first, is a concession of sovereign rights. It is notorious. Why is it – the Polish Corridor experience – chosen? The practice of good will relationship of European states needs no illustration. Schengen area made questions of freedom of movement axioms. But the instance at hand shows that even not in such bright atmosphere, under the burden of conditions of the post-war settlement or the Cold War going on as in case of West Berlin, the parties were able to find a suitable way-out, visa-free for the private individuals who were far from politics. Their compromise was a corridor, a special regime that had a sort of extraterritorial effects. The one lobbied currently – high-speed non-stop train – is as different in the extent of intrusion in another state's sovereignty (it is claimed to be none) as the whole situation of 2000 is different from that of 1930 or 1970.

3.4.1 Practice of the past: The Polish Corridor

At the outset we shall mention that the reasons for the so-called 'political undesirability' of reference to the example of the Polish Corridor (as well as West Berlin)²⁸² is rooted in the connection between the Corridor and the beginning of the World War II. It is alleged that a claim for the Corridor served an issue, or at least a pretext, over which the World War II began.²⁸³ However, even if so, that was a question of the territory that used to be both Polish and German for long time, not of transit mode employed. Hence, the practical issue can be separated from a political one, as there is no similarity in context, while it is in the fact of transit need.

²⁷⁹ Para. 1 Art. 62 Vienna Convention of the Law of Treaties, 24 May 1969, 1155 UNTS 331.

²⁸⁰ That took place on 27 August 1991, see *Background of the European Union and Lithuanian Relations*, <http://www.urm.lt/data/3/EF219125834_eida1.htm>, visited on 26 February 2005.

²⁸¹ See e.g., Speech by H. E. Mr. Artūras Paulauskas, Acting President of the Republic of Lithuania, at Vilnius University, on Lithuania's New Foreign Policy, 24 May 2004, <http://www.urm.lt/data/2/EF51153536_Paulauskasspeech.htm>, visited on 26 February 2005.

²⁸² E.g., para. 29, Ragnarsdottir, Lara M., *supra* note 10.

²⁸³ 'Polish Corridor', Encyclopaedia Britannica, <<http://search.eb.com/eb/article?tocId=9060624>>, visited on 27 December 2004.

The Polish Corridor was a strip of land between East Prussia and the rest of Germany, which was transferred from Germany to Poland by the Treaty of Versailles of 1919, in order to give the latter access to the sea. Its width was approximately 30 to 110 kilometers.²⁸⁴

The border was drawn in a way that existing railway lines connecting German or Polish cities crossed the territory of another state. Moreover East Prussia was completely separated by land. To mitigate the situation the Treaty of Versailles included Art. 98, which explicitly obliged the two states to enter into agreement to secure full and adequate facilities, *inter alia* for the railroad transportation through the Corridor.²⁸⁵ In pursuance of this provision two treaties were concluded in 1921 and 1922 in respect of freedom of the transit through the Corridor and privileged traffic in the area of Upper Silesia, respectively.²⁸⁶

The Paris Convention set up freedom of transit (Art. 1) to be put into practice through two kinds of traffic, ordinary and privileged (Art. 4), distinguished by the conditions, in which the transit was to be carried out and the consequences thereof.

Passengers in privileged transit were to be conveyed in trains or portions of trains that ruled out the possibility of contact with anything or anybody belonging to the territory/state being passed. In accordance with Art. 4 they were not entitled to deliver or receive any object whatsoever, nor to alight from the train. On the other hand, they were exempt of a duty to have any identification documents.²⁸⁷ This regime covered all passengers irrespective of the nationality.

The system could be slightly altered only in case of 'war in Europe', when the nationals of the state enjoying the right of transit were required to possess identification papers (and only Ids), and nationals of all other states were prescribed to comply with general regulations for passports in force.²⁸⁸

Passengers in ordinary transit had to bear both identification papers and transit visas.²⁸⁹

²⁸⁴ *Ibid.*

²⁸⁵ Cited in Vali, Ferenc A., *supra* note 28, p. 109.

²⁸⁶ Convention between Germany and Poland and the Free City of Danzig, concerning Freedom of Transit between East Prussia and the Rest of Germany, Paris, 21 April 1921, 12 LNTS 61 (hereinafter the Paris Convention); German-Polish Agreement regarding Privileged Transit Traffic between Polish Upper Silesia and the Remainder of Poland through German Upper Silesia, Breslau, 24 June 1922, 26 LNTS 271 (hereinafter the Breslau Convention). Actually, there was a Supplementary Convention to the latter, naming the rail route for the privileged transit (Art. 1). *See* German-Polish Convention, Supplementary to the Paris Convention of April 21, 1921, concerning Freedom of Transit between East Prussia and the Rest of Germany, Berlin, 15 July 1922.

²⁸⁷ Art. 97 Paris Convention.

²⁸⁸ Art. 98 Paris Convention.

²⁸⁹ Art. 99, 100 Paris Convention.

The Breslau Convention contained more details on the regime of the privileged traffic. The principle of the distinction between two kinds of passage was the same, but the regulations slightly differed. Under the Breslau Convention all passengers of whatever nationality were required to possess identification documents, not visas²⁹⁰, further facilitation was anticipated in Art. 65, and the inspections of the documents were inscribed in Art. 70.

The scheme under operation currently between the Kaliningrad Region and the rest of Russia seems to be very much alike with the above, except that no privileged traffic exist in our case. Also, Germany and Poland were obliged to enter into an agreement on the freedom of transit movement by the Treaty of Versailles of 1919, whereas Lithuania and Russia concluded the successive treaties on their free will.

Development in transportation facilities is sufficient nowadays to lift any question of infringement on human dignity by closing or sealing carriages, as with a speed of 150-200 kilometers per hour and only two hours in transit, the train is sufficiently secure from any possible escapes or intrusions into the Lithuanian territory by the passengers jumping out the wagons, as feared by Lithuania. The experience of the FTD scheme operation for more than 15 months shows groundlessness of such suspicions, no case was recorded by Lithuania. Vice versa, in incident at Kena a group of persons fixed themselves with hand-cuffs to the wagon equipment in protest against the introduction of the scheme.²⁹¹

3.4.2 Proposal for present

On 10 September 2004 the Lithuanian Seimas (parliament), showing “a very consolidated opposition to the Russian proposal”, bluntly rejected any idea of a corridor through the Lithuanian territory, which would be carried out under Russian laws and considered Russia’s internal transit.²⁹² In the resolution “On the cooperation with the Kaliningrad Region of the Russian Federation” the deputies declared such possibility as contradicting the national interests of Lithuania.²⁹³ But a corridor was not equalized with a high-speed non-stop transit train.

²⁹⁰ Art. 64 Breslau Convention.

²⁹¹ *Nizhegorodskim natsbolam grozit do dvuh let tyur'my* [National Bolsheviks from Novgorod Face Two Years of Imprisonment], 18 September 2003, <<http://www.nta-nn.ru/?id=32070>>, visited on 15 November 2004.

²⁹² ‘Lithuania’ 1-13 *Select Briefing. Europe East* 17 September 2004, Center for Strategic and International Studies, <http://www.csis.org/ee/sb/sb_v1_n13.pdf>, visited on 2 March 2005.

²⁹³ *Litovskii Seim Otverg Predlozhenia Rossii o Sozdanii Svobodnogo Tranzitnogo Koridora v Kaliningrad* [The Lithuanian Parliament Refuse Creation of a Free Transit Corridor to Kaliningrad] *Russina Information Agency ‘Novosti’*, 10 September 2004, <http://www.rian.ru/rian/intro.cfm?nms_id=678196>, visited on 25 November 2004.

Under the pressure from Russia and a range of the EU members²⁹⁴ Joint Statement of 11 November 2002 provided for a feasibility study of a visa-free transit by high-speed non-stop train to be carried out.²⁹⁵ The final decision is to be taken after Lithuania's accession to the EU (that has already happened on 1 May 2004) on the basis of thorough evaluation of political and legal aspects and once the technical problems have been overcome.²⁹⁶

A feasibility study, centred on the technical and economic sides, was entrusted to an independent Danish firm Cowi, and was finished in summer 2004. Two rounds of negotiations have taken place by now, in March and April 2004.

The main technicalities concern the size of the track and hence the speed of the non-stop train, and the cost of modernization if needed (and it is needed). Current Lithuanian and Russian, as well as Belarusian, rail-web employs the track of 1520 mm width. It can be developed for the trains going 140-160 km per hour, what represents the Russian standard of the high-speed engine. The Western Europe utilizes 1435 mm tracks and has 200 km per hour as a line for high-speed rate. But introduction of a transit on the latter conditions will demand restructuring whole Lithuanian rail system on the 240 km of the Kaliningrad direction.²⁹⁷ At the same time, the Russian proposal for gradual modernization will cause change of only 35 per cent of Lithuanian railways.²⁹⁸

On both rounds of negotiations Russia confirmed the principal necessity and importance of the non-stop passage for her citizens, and her adherence to the second way of solution.²⁹⁹ By December Russian specialists started examination of the Cowi's report.

But the European Union currently tends to distort the core substance of the prospective high-speed transit train, as it offers that the train makes stops in Vilnius and Kaunas.³⁰⁰

²⁹⁴ Vitunic, Brian, *supra* note 44.

²⁹⁵ Para. 10 of the Joint Statement, *supra* note 136.

²⁹⁶ *Ibid.*

²⁹⁷ *Kaliningradskaya Zheleznaya Doroga I Komissia Evrosoyuza Sporyat iz-za Kolei* [Kaliningrad Railway and Commission of the European Union Fight about the Track] *Information Agency Regnum*, 28 April 2004, <<http://www.regnum.ru/news/253976.html>>, visited on 25 November 2004.

²⁹⁸ *V 2020 Godu ot Kaliningrada do Moskvy na Poezde Mozhno Budet Doehat' za 12 Chasov* [In 2020 It will Be possible to Reach Russia from Kaliningrad by Train in 2 Hours] *Information Agency Regnum*, 9 March 2004, <<http://www.regnum.ru/news/228166.html>>, visited on 25 November 2004.

²⁹⁹ *Kaliningradskaya Zheleznaya Doroga I Komissia Evrosoyuza Sporyat iz-za Kolei* [Kaliningrad Railway and Commission of the European Union Fight about the Track] *Information Agency Regnum*, 28 April 2004, <<http://www.regnum.ru/news/253976.html>>, visited on 25 November 2004.

³⁰⁰ *Rossii ne Ustraivaet Predlagaemy Proekt ES ob Organizatsii Skorostnogo Bevizovogo Passazhirskogo Tranzita iz Kaliningrada* [Russia is not Satisfied with the Proposed Project of the EU on the Organization of the High-Speed Visa-Free Passenger Transit from

In full compliance with the requisite of servitudes to cause the minimum trouble for the surrounding state, Russia gave up its demands to have rail connection on all routes between Kaliningrad and the rest of the state, Latvian and Polish directions were left for ordinary solutions. Road routes, i.e. by car and bus, were also turned to visa-regime. The railway possibility claimed does not include all trains bypassing Lithuania, they are limited to four (as of 2005). The only linkage claimed now is the non-stop train on fixed route.

In February this year Lithuanian Minister for Foreign Affairs Antanas Valionis 'confessed' to the Russian Minister of Transport Igor Levitin that there was no technical problem in implementation of a non-stop transit, but the problem was of a political character.³⁰¹

So the two-hours long passage through the territory of Lithuania, subject to Lithuanian regulation concerning routes and applicable in any case of emergency, with notification of all names of passengers is considered to be politically inappropriate.

3.5 Aspects of human rights

What is at stake here? – It is an answer to the question whether international human rights standards support claims of Russia for unhindered rail connection between Kaliningrad and mainland Russia, independent of any foreign discretionary power. Two arguments are considered in this regard, namely validity of the appeal to (1) the Constitution of Russia, and (2) international documents such as UDHR, ICCPR, ECHR.

3.5.1 Appeal to the Constitution of Russia

The first question to pose is whether the reasoning based of the Constitution of Russia is sustainable for the claim of freedom of movement in the situation of Kaliningrad. The Constitution contains Art. 27 stipulating the freedom of movement (detailed in further domestic legislation), which articulation is not different from internationally agreed texts:

1. Anyone who is legally staying on the territory of the Russian Federation has the right to move freely and to chose the place to stay or reside.

Kaliningrad], *Interfax*, 20 December 2004,

<http://www.interfax.ru/r/B/0/172.html?menu=32&id_issue=10732492>, visited on 21 December 2004.

³⁰¹ Fokina, Ksenia 'Litva Prepodneset Kaliningradu Pamyatnik Tevtontsu' [Lithuania will Present Kaliningrad with a Monument to a Teutonic Knight] *National Information Agency StranaRu*, 25 February 2005, <<http://www.strana.ru/stories/05/02/18/3593/241419.html>>, visited on 26 February 2005.

2. Everyone is free to leave the Russian Federation. Citizens of the Russian Federation have the right to freely return to the Russian Federation.³⁰²

The rapporteur of the Political Affairs Committee of the Council of Europe Parliamentary Assembly Ms. Ragnarsdottir noted in her report that “the Constitution of the Russian Federation could not grant the right to freedom of movement outside the territory of the Russian Federation.”³⁰³ Indeed, the indirect authority is to be found in the case law below.

It can be asserted that, at least in the practice of ICJ or its predecessor PCIJ, there has never been a case when a state invoked its own Constitution as a legal evidence of possession of rights in inter-state relations. A slightly different situation took place in the *Polish Nationals in Danzig* case, where Poland argued that the question of treatment of its nationals was to be decided, *inter alia* on the basis of the Constitution of the Free City of Danzig where the alleged violations took place. Then the PCIJ in his advisory opinion held, that

“... according to generally accepted principles, a State cannot rely, as against another State, on the provisions of the latter’s Constitution, but only on international law and international obligations duly accepted.”³⁰⁴

Though one can understand those individuals who appeal to their national Constitution to find international protection from the violation of their rights, it is highly regretful to find the same statements in the official position of a state.³⁰⁵

³⁰² See Flanz, Gisbert H. ‘The Russian Federation’, translation by the Inter-American Associates, Inc. In Flanz, Gisbert H. *Constitutions of the Countries of the World*, New York: Oceana Publications, Inc., March 2002.

³⁰³ Ragnarsdottir, Lara M., *supra* note 10, para. 20.

³⁰⁴ *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech on the Danzig Territory* (1931), PCIJ, Ser. A/B, no. 44, p. 24.

³⁰⁵ Wide circulation of such argument even among the experts was noticed in the analysis of the results of the public poll devoted to the consequences of the European enlargement on Russia, *inter alia*, to prospects and possibilities of the visa regime introduction. The Russian Constitution as a basis for the claim for the visa-free regime between “little” and “big” Russia turned to be the main argument among the respondents.

“The situation, when the interviewees (experts above all) while discussing the Kaliningrad problem, appeal to the norms of international rather than national law, is observed extremely rarely. It is likely that they simply don’t think that formally the Constitution of the nation-state (Russia in the present case) is of secondary importance when similar collisions emerge, and that taking into account its provisions is merely the good will of the states neighbouring the exclave.”

See Shamseeva, E. ‘Iz Rossii v Rossiyu po schengenskoj vize’ (‘From Russia to Russia on Schengen Visa’), a report, 13 June 2002, <<http://bd.fom.ru/report/map/d022331>>, visited on 12 December 2004 (translated by the author thereof).

3.5.2 International guarantees

Freedom of movement was proclaimed in the Universal Declaration of Human Rights in the following wording: “Everyone has the right to freedom of movement and residence *within the borders* of each state.”³⁰⁶ Protocol No. 4 to the ECHR of 1963, and ICCPR three years later, reiterated this provision having replaced the phrase “within the borders” with double stating “within the territory”: “Everyone lawfully *within the territory* of a State shall, *within that territory*, have the right to the liberty of movement and freedom to choose his residence.”³⁰⁷ In practice, the right to freedom of movement is restricted to the relation between a state and its own citizens, because outside this or that state’s borders other states’ sovereignties come into play, imposing their own controls on the admission of aliens into the respective territory.³⁰⁸

The proper bodies for the interpretation of the ECHR and ICCPR are the European Court of Human Rights and the Human Rights Committee. None of them had the opportunity to present an authoritative opinion on this very issue. The HRC’s General Comment No. 27³⁰⁹ is partially helpful. Para. 5 confirms that the freedom of movement relates to the “whole territory of a State, including all parts of federal States. ... The enjoyment of this right must not be made dependent on any particular purpose or reason for the person wanting to move or to stay in a place.”³¹⁰ This is crucial. From the angle of common sense it follows that the provision concerns the state of nationality, within which territory the movement takes place, as it is an average case, but the interpretation can differ. It can be considered to have a general application. The consequence, thus, will be to admit the violation of the right to freedom of movement by the provision of the Council Regulation No. 693, which in Art. 4 (d) para. requires support for proving the presence of the valid reason for obtaining an FTD (for multiple entries).³¹¹

The unique situation of the region was discussed thoroughly in reports of different committees of the Council of Europe Parliamentary Assembly. On the basis of the main *pros* and *contras* announced, two opposite evaluations can be crystallized, as presented below.

³⁰⁶ Para. 1 Art. 13 Universal Declaration of Human Rights, G.A. Res. 217A (III), 10 December 1948 (emphasis added).

³⁰⁷ Para. 1 Art. 1 Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Securing Certain Rights and Freedoms Other Than Those Already Included in the Convention and in the First Protocol Thereto, 16 September 1963, ETS No. 46, and Art. 12 (1) International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171, respectively (emphasis added).

³⁰⁸ Kupiszewski, Marek, ‘Consequences of EU Enlargement for Freedom of Movement between Council of Europe Member State’, Central European Forum for Migration Research Working Paper 1/2003, p.5-6.

³⁰⁹ General Comment No. 27 Freedom of movement, Article 12, U.N.Doc CCPR/C/21/Rev.1/Add.9 (1999).

³¹⁰ Para. 5 of the General comment No. 27, *ibid.*

³¹¹ Council Regulation (EC) No 693, *supra* note 154.

Main argument against the applicability of freedom of movement to the situation is that Art. 13 of the ECHR does not grant the right to move across borders³¹², enter into or transit through the territory of states other than the state of nationality.³¹³ It is considered to be the consequence of the general right of states to include restrictions on the entry of aliens³¹⁴, which cannot be overridden by the right to leave one's own country.³¹⁵ Thus, the visa issue does not concern the right to freedom of movement.³¹⁶

Arguments in favour are more multiple and different. Firstly, the interference with the right to freedom of movement is considered to exist as long as there is a risk of the denial of visa³¹⁷, which, in turn, exists as long as authorities have a discretionary power, rather than the right to be notified. It means that the right to freedom of movement is at the risk of infringement in case of any visa solution, because the visa itself is “an entry permit issued by the authorities of a state to foreign citizens”³¹⁸ or “an authorization given by or a decision taken by a Member State which is required for entry into its territory.”³¹⁹ The possibility of denial is at the core of the whole visa system.

Secondly, the right to free movement is a fundamental human right. Though states have right to restrict entry of aliens into their respective territories, it is not the only way to deal with the issue, instead bilateral cooperation should be increased in the first place.³²⁰

Finally, the Council of Europe welcomes the greater freedom of movement established among members of the Schengen group, but stresses that the extension of rights of one part of European citizens shouldn't reverse the position of others³²¹ and shouldn't be made at the expense of rights non-members' nationals.³²² Such solution, as a collateral, damages the image of the European Union itself.³²³

³¹² Severin, Adrian, Rapporteur, Political Affairs Committee, Parliamentary Assembly, Council of Europe, Report 'Consequences fo European Union Enlargement fro Freedom of Movement between Council of Europe Member States', Doc. 10025, 7 January 2004, para. 5.

³¹³ Shybko, Vitaliy, Rapporteur, Committee on Legal Affairs and Human Rights, Parliamentary Assembly, Council of Europe, Report 'Consequences of European Union Enlargement for Freedom of Movement between Council of Europe Member States', Doc. 9979 rev., 15 October 2003, para. 9.

³¹⁴ McNamara, Kevin, *supra* note 192, para. 2.

³¹⁵ Shybko, Vitaly, *supra* note 312, para. 9.

³¹⁶ Ragnarsdottir, Lara M., *supra* note 10, para. 20.

³¹⁷ Fairlie, Lindelle D., 'Kaliningrad Borders in Regional Context', *supra* note 65, p. 12.

³¹⁸ Bo, Bente Puntervold, *supra* note 198, p.79.

³¹⁹ Art. 5 Council Regulation (EC) No. 1683, *supra* note 211.

³²⁰ McNamara, Kevin, *supra* note 192, para. 3.

³²¹ Para. 9 Recommendation No 1579, 25 September 2002, 'The Enlargement of the European Union and the Kaliningrad Region', Parliamentary Assembly, Council of Europe.

³²² McNamara, Kevin, *supra* note 192, para. 5.

³²³ *Ibid.*, para. 6.

The diversity of opinions reflects that in this unclear situation everyone can put forward his or her own vision of the proper interpretation. However, “the existence of different approaches to the same legal situation allows States to choose to be guided by those principles which are least detrimental to themselves rather than to the individuals.”³²⁴

Besides, within the framework of the Council of Europe, the Agreement on Regulations governing the Movement of Persons between Member States of the Council of Europe was elaborated and is in force since 1958.³²⁵ It provides for the right of citizens of states parties to the Agreement to enter or leave the territory of another party by all frontiers on presentation of one of the documents declared by countries and stated in the appendix to the Agreement (mainly passports).³²⁶ It can be called a predecessor of the Schengen system.

However, only 15 states are parties to the Agreement currently, neither Lithuania, nor Russia. These two states did not enter the Agreement, because by the time of their independence Schengen had come into existence and turned to be a more rapid and effective tool in respect of securing the freedom of movement. The following proves this proposition.

Among the members of the Agreement, only three are not the members of the EU: Liechtenstein, Switzerland and Turkey. While the first two enjoy visa-free relations with the EU on the basis of respective bilateral agreements, the enforcement of the Agreement towards Turkey is suspended or delayed by other parties, reportedly, because of the primacy of the Schengen requirements.³²⁷

The study was conducted to explore the reasons of ineffectiveness of the Agreement and the main conclusion was that Schengen was drafted without due regard to the Agreement, *de facto* it replaced it, but *de jure* left them functioning in parallel. Yet there are still recommendations to make use of the Agreement in solution of Kaliningrad problem³²⁸

The right to leave one’s own country is not applicable to the Kaliningrad transit. ‘Leaving’ as a particular form of movement is largely characterized by the specific destination of the movement, which must be outside the state of the departure. In the case under consideration the ultimate goal is different, it is to reach another part of the same country.

³²⁴ Boutkevitch, Volodymyr, ‘Freedom of Movement’, Working paper prepared in implementation of Decision 1996/109 of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, ECOSOC, UN, 29 July 1997, E/CN.4/Sub.2/1997/22, para.18.

³²⁵ European Agreement on regulations governing the movement of persons between member states of the Council of Europe, ETS 25, Paris, 13 December 1957.

³²⁶ Art. 1 of the European Agreement, *ibid.*

³²⁷ Shybko, Vitaly, *supra* note 312, para 23-24.

³²⁸ *E.g.*, Recommendation No 1579, *supra* note 320.

But the obligation of the state to provide its citizens with documents valid for international travel, which is implied also in the current scheme is an effect of the right to leave the country, being its consecutive positive duty on the part of a state³²⁹, confirmed also in the practice of the HRC.³³⁰

A creative way to put the two above elements of the passage in harmony was outspoken by the experts who currently work over the concept of strategic development of the Kaliningrad region. They suggested that the region should be granted a status of the “abroad territory”.³³¹ The solution is likely to be perceived by central authorities as a step towards alienation of the area and therefore not feasible because of the fears of Russia to lose the area. And the negative reaction of Moscow has already followed.³³² For the purposes of the human rights dimension of the Kaliningrad transit that would be highly undesirable. It would cut the ground from under the whole argumentation based on the premise that the Kaliningrad transit is a movement ‘within the territory of Russia’.

³²⁹ Grahl-Madsen, Atle *et al.* ‘Article 13’. In Afredsson, Gudmundur and Aisbjorn Eide (eds.), *The Universal Declaration of Human Rights*, The Hague: Kluwer Law International, 1999, p. 274.

³³⁰ Nowak, Manfred, *U.N. Covenant on Civil and Political Rights. CCPR Commentary*, Kehl am Rhein: N.P. Publisher, 1993, p. 204-205.

³³¹ *Experty: Kaliningrad Dolzhen Byt’ “Zagranitsei”* [Experts: Kaliningrad Must Be an “Abroad”], *RosBiznesKonsulting*, 11 February 2005, <http://top.rbc.ru/index.shtml?/news/daythemes/2005/02/11/11185033_bod.shtml>, visited on 12 February 2005.

³³² *MID RF: Rasshirenie ES – ne Osnovanie dlya Peresmotra Statusa Kaliningradskoi Oblasti* [Ministry for Foreign Affairs of the Russian Federation: Enlargement of the EU is not a Reason for the Revision of the Kaliningrad Region Status], 14.02.2005, <<http://www.rbc.ru/rbcfreenews.shtml?/20050214191305.shtml>>, visited on 6 March 2005.

4 CONCLUSION

The Kaliningrad region is a typical enclave, from the point of the surrounding it European Union, and it is and exclave, as seen from Russia proper. It means that being an integral part and subject to the sovereignty of the Russian Federation Kaliningrad does not have a direct land connection with its mainland. It is separated by land with the territories of foreign states.

Previously, the peculiar location was not an obstacle for freedom of movement between the two parts of single Russia. Neither in soviet time nor after, the communication with Kaliningrad was burdened by any formalities. But the accession of Lithuania to the European Union threatened this freedom with the possibility of introduction of visas.

However the compromise was reached between the parties in November 2002 and in accordance with it, since the 1 July 2003, the scheme with the Facilitated Transit Documents at the centre started its operation.

In fact, it is a visa solution with simplified procedures and different designation. It was found primarily within the framework of Schengen *acquis*, which was not adjusted to the potential maximum understood as complete freedom of transit as it existed before.

But besides the EC law, general international law is useful for the facilitation of the access to enclaves from their mainland, both in general and in the specific case of Kaliningrad.

The arguments of the general international law are: free access to exclaves as a general principle of law, doctrine of servitudes, high-speed non-stop visa-free train as a practiced solution, and certain aspects of human rights.

Exclave, being a phenomenon of political geography presupposes a direct land connection with its mainland as a general principle of law.

Whatever meaning of the general principles we take interpreting para. 1(c) Art. 38 of the Statute of the International Court of Justice it will cover the right to freedom of connection between exclave and its motherland.

Principles embracing both international and domestic law alike, following from the very logic of legal thinking, assume that there can be no right without a possibility to exercise that right. Hence, a sovereign of an exclave must have right to access to the latter.

Provisions common to all municipal legal systems secure way to the enclaved property. The regulations to that effect can be found in civil and common law, Islamic Scandinavian and Asian legal traditions.

The principle of sovereignty, the core principle of international law itself, presupposes that the sovereignty of all states must be respected. In case of an enclave, two sovereign states meet, and the surrounding state cannot obstruct the other's access to the exclave, as it would be equal to the suppression of that sovereignty.

State practice witnessed different solutions of enclaves' problems of communication, and the European experience turns to be the most positive one in this regard. It is suggested that the fate of Kaliningrad should be decided according to the best traditions of Europe.

The concept of international or state servitudes can be used in addition or in alternative to the proposition of the general principles.

The doctrine and results of contentions between states throughout the twentieth century where the theory of servitudes was used as a ground for claims shows that, if applied cautiously, servitudes can substantiate the demands for the facilitation of transit at hand.

The specific situation of Kaliningrad complies with the requirements of servitudes applicability. The servitude existed, not being named, in the consecutive agreements between Russia and Lithuania and implied the minimum of sovereignty abstention on the part of Lithuania.

The freedom of Kaliningrad transit can also be secured through the high-speed non-stop transit train. Against the background of the previous use of similar scheme, high-speed non-stop transit train is argued to fulfil the criteria of feasibility and legal appropriateness.

The human rights dimension offers two elements. Firstly, the Constitution of the Russian Federation is not a proper authority to appeal to in case of interstate relations. Secondly, international standards regarding the freedom of movement, while not in unison, provide arguments against barriers on the way between Kaliningrad and mainland Russia, particularly against the necessity to prove the need in frequent travel between the two parts of one state.

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Supplement A

Map 1. Location of the Kaliningrad Region.³³³



³³³ Europe, the World Factbook, Central Intelligence agency, Director of Central Intelligence. http://www.cia.gov/cia/publications/factbook/reference_maps/europe.html, visited on 25 November 2004.

Supplement C

Map 2. Location of the Polish Corridor.

