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Which Continuity:

The Tartu Peace Treaty of 2 February 1920, the Estonian–Russian Border Treaties of 18 May 2005, and the Legal Debate about Estonia’s Status in International Law

1. Introduction

On 18 May 2005 in Moscow, the foreign ministers of the Republic of Estonia and the Russian Federation signed the treaties establishing the mutual state borders at land and at sea. Except for slight modifications to the current control line, the treaties essentially recognise the current Estonian–Russian control line as the state border. The substance of the treaties had been negotiated during the mid-1990s, but the signing had been postponed by the Russian Federation. Russia claimed that it would not sign the border treaties until other contested political issues between the Russian Federation and the Republic of Estonia were resolved in a satisfactory manner. Political analysts have suggested that Moscow’s willingness to sign the treaties was enhanced by the accession of the Republic of Estonia to the EU on 1 May 2004. On the one hand, the absence of the border treaties did not become an obstacle to Estonian accession to the EU, since Estonia could claim that it had been ready to sign the treaties since, at the latest, their initialling in Saint Petersburg on 5 March 1999. On the other hand, it has grown more urgent for Russia to have its western borders officially recognised, as Russia has expressed its interest in achieving visa freedom for its citizens within the EU and Brussels insisted that resolution of the border issues with Estonia and Latvia be one of the inevitable preconditions for this.

The Estonian parliament, the Riigikogu, ratified the border treaties on 20 June 2005 — i.e., approximately one month after their signing.¹ The law of ratification, as adopted by the Riigikogu, contains an introductory declaration² that has been mistakenly termed a ‘preamble’ by various of the media. The introductory

¹ Eesti Vabariigi ja Vene Föderatsiooni vahelise Eesti–Vene riigipiiri lepingu ning Eesti Vabariigi ja Vene Föderatsiooni vahelise Narva ja Soome lahe merealade piiritlemise lepingu ratifitseerimise seadus (Estonian–Russian State Border Treaty between the Republic of Estonia and Russian Federation and Narva and Gulf of Finland Sea Territory Delimitation Treaty between the Republic of Estonia and Russian Federation Ratification Act). – RT II 2005, 18, 59.

² The general idea of the necessity of such a declaration was, it seems, first suggested by this author in the op-ed article ‘Tartu rahuleping: kehtiv või kehtetu (Tartu Peace Treaty: valid or invalid)?’ – Eesti Päevaleht, 7 February 2005 (in Estonian).

declaration states that the treaties were ratified ‘proceeding from the legal continuity of the Republic of Estonia proclaimed on 24 February 1918, as it is established in the Constitution of the Republic of Estonia, in the 20 August 1991 decision of the Supreme Council of the Republic of Estonia “On the Independence of Estonia” and in the 7 October 1992 declaration of the Riigikogu “On the Restoration of the Constitutional State Power”’. The declaration adopted by the Riigikogu in connection with the ratification of the border treaties goes on to say that the land border treaty concluded with Russia ‘partially changes the line of the state border established in article III, para. 1 of the Tartu Peace Treaty of 2 February 1920, does not have impact on the rest of the [Tartu Peace] Treaty, and does not determine the treatment of other bilateral questions that are not connected to the border treaty’.

The Russian reaction to the outcome of the ratification procedure in the Riigikogu was negative. Mikhail Margelov, a leading Russian foreign policy maker, expressed his dissatisfaction about the fact that Estonia ‘reduced us to 1918 in the final version’ while ‘the treaty’s architects used the 1944 borders as a basis’.³ Margelov argued that this would leave it open for the Republic of Estonia to present ‘territorial claims’ in the future. Moreover, Russian foreign policy officials argued that the Estonian foreign minister, Urmas Paet, had promised in Moscow on 18 May 2005 that Estonia would not add any additional declaration to the law of ratification (a claim that was rebuffed by the Estonian minister of foreign affairs). As the parliamentarians were quick to point out, would a promise indeed have been made, it would have had to be regarded as non-binding for the legislative body.

On 27 June 2005, the Russian ministry of foreign affairs delivered a note to the Estonian ambassador in Moscow, informing Estonia about Russia’s decision to start its domestic procedures to free itself from legal obligations stemming from the signing of the border treaties. On 1 September 2005, President of the Russian Federation Vladimir Putin signed an order rescinding Russia’s signature of the border treaties with Estonia.

Why then did such a declaration on the part of the Riigikogu turn out to be so disturbing for the Russian Federation that its president went so far as to rescind Russia’s signature? And what explains the adoption of such a declaration by the Riigikogu in the first place? Are not Russia and Estonia interested in the establishment of an undisputed common border under international law? Is there some rationality in the adoption of such a declaration by the Riigikogu, in its rejection by Moscow, or in both?

These questions have both legal and political aspects, and it is hardly possible to understand the legal issues without understanding the different political positions of the parties. Therefore, before the law can be addressed, relevant diplomatic and political exposition has to be provided.

2. The diplomacy of legal positions during Estonian–Russian border negotiations in 1991–2005

In order to understand the meaning and context of the declaration made at the ratification of the border treaties by the Estonian parliament, one needs to look back at the history of the Russian–Estonian border negotiations of the 1990s. On 20 August 1991, the Supreme Soviet of the Republic of Estonia⁴ proclaimed the restoration of the Republic of Estonia. Due to the illegality of the Soviet occupation and annexation of 1940, the Republic of Estonia proclaimed legal identity and continuity with its pre-World-War-II namesake.⁵ Soviet Russia had recognised the independence of the Republic of Estonia in the Tartu Peace Treaty of 2 February 1920. Since this treaty⁶ was signed following the Estonian War of Independence (1918–1920), the borders established by it reflected Estonia’s military and diplomatic success. Several villages beyond the river of Narva and in Setumaa (Pechorski rayon) that were inhabited by a predominantly Russian-speaking population became part of the territory of the Republic of Estonia.

It lies in the logic of wars that the winners try to benefit from them. The same is true when what could otherwise be achieved only through a successful war can be achieved through other forms of pressure and

³ See ‘Russia Against Border Treaty Ratified by Estonia — Top Lawmaker’. – MosNews, 20 June 2005. Available at: www.mosnews.com.

⁴ In the self-contradictory and question-begging name of this elected body are reflected the legal complexities of the process of the separation of Estonia from the USSR.

⁵ See, further, L. Mälksoo, *Illegal Annexation and State Continuity: The Case of the Incorporation of the Baltic States by the USSR — A Study of the Tension Between Normativity and Power in International Law*. Leiden, Boston: Martinus Nijhoff 2003. Translations of this book in the Estonian and Russian languages were published in 2005 by Tartu University Press.

⁶ There is also another Tartu Peace Treaty from the same year, concluded between Finland and Soviet Russia on 14 October 1920 in the house of the Estonian Students’ Society in Tartu. This treaty is not discussed in the present article.

force short of war. In 1940, the USSR was able, through a chain of ultimata and broken treaties, to incorporate the republics of Estonia, Latvia, and Lithuania in its composition, as Soviet republics. In 1941–1944, the Baltic States were occupied by Germany. The Red Army returned victorious in September 1944.

In 1944 and 1945, the USSR, ‘responding to the demands of the local people’, unilaterally ‘corrected’ the inner-Soviet border of the Russian SSFR with the Estonian and the Latvian SSRs. Approximately 5% of the pre-WWII territory of the Republic of Estonia was ‘returned’ to Soviet Russia. The Soviet-imposed Russian–Estonian border was as ethnically purist in nature as was the border established by the Tartu Peace Treaty — a number of villages of the Setu people, who consider themselves to belong to Estonia rather than Russia, were claimed as part of the Russian SSFR.

This was the situation when the independence of Estonia was restored in August 1991. When the new, constitutionally elected Estonian government became operational in 1992, it followed the logic of a policy of state restorationism and put forward to the Russian Federation a claim to the state borders as established in the 1920 Tartu Peace Treaty. However, Yeltsin’s Russian Federation rejected this claim, and Estonia was unable to gather significant diplomatic support for its demands. In 1994, the Estonian foreign minister hinted that it is unrealistic to expect the restoration of the borders as set forth in the Tartu Peace Treaty *in toto*. Instead, Estonian diplomacy was aiming at the return of ethnic Setu villages to the composition of the Republic of Estonia, or, as one commentator put it, ‘a dignified compromise’. However, Yeltsin’s Russian Federation’s ‘nyet’ remained unchanged. The Russian Federation has maintained that the Tartu Peace Treaty ceased to be a legally relevant treaty between two independent states in 1940 when the Republic of Estonia ‘entered’ the USSR and was transformed into a Soviet republic.

In 1995, Estonian foreign policy took a more conciliatory approach, partly because a certain soberness and realism regarding the prospects for restoration of the borders of the Tartu Peace Treaty reached Estonian public opinion, and partly because the EU insisted that it would not take up accession negotiations with Estonia unless the latter were to resolve its border issues with the Russian Federation. The essence of the 1995 ‘Tarand initiative’ (named after Andres Tarand, then prime minister of the Estonian cabinet) was the separation of the issue of the Estonian–Russian border from the general question of whether the Tartu Peace Treaty is in force or not. The Estonian government gave in to the extent that it agreed that the 1944–1945 Soviet-created *status quo* would be transformed into the mutually recognised border between the Russian Federation and the Republic of Estonia. However, Estonia insisted that it considers the 1920 Tartu Peace Treaty to have been, and remain, continuously valid, with the exception of its borders being modified by the new border treaties essentially recognising the Soviet *fait accompli* of 1944–1945.

To ‘give up’ the Tartu Peace Treaty altogether would not have been a constitutionally available option for the Estonian government. Article 122 of the Constitution of the Republic of Estonia, adopted with the popular referendum of 28 June 1992, states that ‘the land border of the Republic of Estonia shall be determined by the Tartu Peace Treaty of 2 February 1920, and other international border treaties’. A constitutional debate ensued during the 1990s as to whether this stipulation in the constitution permits the Estonian government in any way to conclude other border treaties that diverge from the lines of the Tartu Peace Treaty. While the hardline interpretation denied such a possibility, the then legal chancellor of the Republic of Estonia, Professor Eerik-Juhan Truuväli, suggested that as long as the new border treaties would reflect the border of the Tartu Peace Treaty in some (symbolic) areas, the requirements of the constitution would be formally fulfilled. Thus, the Estonian delegation during border negotiations suggested that the new border treaties would have to go back to the border line of the Tartu Peace Treaty — at least in symbolic yet formally significant part. It was then agreed that the border at Pskov lake between Russia and Estonia would reflect the pre-WWII border. This was an inventive solution offered by legal imagination in order ‘to satisfy the needs of both parties’ — while the uncompromising minority opinion in Estonia criticised this solution as a cheap trick.

Initially, Estonia insisted that, as *quid pro quo* for its ‘territorial concessions’ to Russia, the new border treaties mention the general applicability of the Tartu Peace Treaty; i.e., Russia should explicitly recognise the peace treaty’s continued legal validity as such. Since Russia, being afraid of the consequences of acknowledgement of the Soviet occupation as such, refused to do so, the Estonian side took the view that the Tartu Peace Treaty — never having been invalidated or suspended — would continue to be in force anyway (i.e., even without explicit mention in the new treaties). In that case, Estonia maintained, the Tartu Peace Treaty would only be implicitly modified through another treaty (the new border treaties). This position — that the modified Tartu Peace Treaty would continue to be in force notwithstanding the fact that a newer border treaty made no explicit reference to it — was the Estonian position when the new border treaties were signed on 18 May 2005.

It is also interesting to note that in 2004, when Russia signalled to Estonia that obstacles in the way of signing the border treaties had finally faded away, it first suggested accompanying the border treaties with a declaration concerning the shared history of the two countries. The draft of the declaration suggested by the Russian Federation was soon leaked to the Estonian media and published in the daily *Eesti Päevaleht*. It was harshly criticised by Estonian public opinion since its wording was quite unanimously considered Russia’s

attempt to impose on Estonia, in connection with the conclusion of the new border treaties, the official Russian view of the history of the 20th century, denying the internationally wrongful acts committed against the Republic of Estonia by the USSR and pushing aside the occupation claim. Thus, by rejecting the draft of the common declaration first offered by the Russian ministry of foreign affairs, Estonia rejected Russia's claim about its preferred interpretation of Estonia's international legal status. In its turn, by expressing its dissatisfaction over the declaration unilaterally adopted by the parliament of the Republic of Estonia (even to the extent of suggesting a restart to the border negotiations), the Russian foreign ministry made it clear that it was not prepared to accept Estonia's claim of illegal Soviet occupation in 1940–1991.

3. The debate about the validity of the Tartu Peace Treaty: historical symbolism and the pursuit of recognition

The Estonian–Russian debate about common state borders (in the legal sense almost identical to the Latvian–Russian border debate) has a link to the more general problematique of state identity, state status in international law.⁷ Thus, the Republic of Estonia and the Russian Federation do not disagree about their mutual borders any longer; rather, they disagree about their 'stories' (history) and international legal status as states.

The core of the debate is the refusal of the Kremlin to recognise the illegality of the Soviet occupation and annexation of the three Baltic republics in 1940. Almost all countries, historians, and international law scholars confirm the Baltic view that the Soviet 'incorporation' of these republics violated international law in force at that time. But the government of the Russian Federation continues to deny this view.

The Russian government has done so in part because the debate about the international legal status of the Republic of Estonia has more than just symbolic-historical connotations. Many of the practical issues involved here are, from the legal point of view, related to the Tartu Peace Treaty border issue. Consider the issue of the citizenship rights of the Russian-speaking minority in Estonia. Russia and Estonia have two quite different legal starting points or benchmarks for discussing this important question. After 1991, Estonia did not grant citizenship automatically to the Soviet-era settlers, insisting on the restoration of citizenship and the possibility for naturalisation and integration through learning of the Estonian language. Moscow has criticised this approach as discriminatory and blamed Estonia for 'using the events of 1940' in order to discriminate against the ethnic Russians. If the birth date of the Republic of Estonia was indeed 20 August 1991, the citizenship policy would have no doubt been discriminatory and unacceptable from the point of view of international law. On the other hand, however, the continuator state of the former occupying power would hardly have any legal or moral right to present itself as the defender of the human rights of the settlers who were transplanted in contravention of international law in the first place (and who could have been automatically given Russian citizenship upon the dissolution of the USSR). Luckily, the intensity surrounding the issue seems to be fading away, as there has recently been considerable progress in the integration of the Russian-speaking minority in Estonia.

Another issue of the same general nature is whether the Republic of Estonia would be entitled to compensation for the repression and crimes carried out against its citizens during the Soviet era. The politically motivated arrests, imprisonments, and mass deportations during the 1940s and 1950s, in particular, have been singled out as crimes against humanity by Baltic courts and commissions concerned with international history, such as the Estonian International Commission for the Investigation of Crimes Against Humanity, chaired by former Finnish diplomat Max Jakobson.⁸ One of the reasons that Russia has been so reluctant to recognise Estonia's claim of state continuity (and, in connection therewith, the Tartu Peace Treaty) has been its fear of compensation claims from Estonia and the other two Baltic States.

Some of the more complex issues are the fate of the Tartu (Iur'ev) University museological collection that was removed in 1918 to Voronezh, Russia, which according to the Tartu Peace Treaty had to be returned to the university in Tartu, Estonia. Russia did not fulfil this obligation in the 1920s–1930s, and the valuable collection remained in Voronezh. Were Russia now to recognise the validity of the Tartu Peace Treaty, it would have no argument for the collection not being returned to Tartu or an explanation as to why it was not

⁷ See, on issues of state identity/continuity in the context of the three Baltic States (Estonia, Latvia, and Lithuania), e.g., B. Meissner. *Die Sowjetunion, die baltischen Staaten und das Völkerrecht*. Köln: Verlag für Politik und Wirtschaft 1956; W.J.H. Hough III. *The Annexation of the Baltic States and Its Effect on the Development of Law Prohibiting Forcible Seizure of Territory*. – *New York Law School Journal of International and Comparative Law* 1985 (6), pp. 301–533.

⁸ See further material at www.historycommission.ee.

returned to Tartu in the first place. A related issue is the fate of the festive insignia of pre-WWII Estonian president Konstantin Päts that Moscow keeps in its state archives as a form of ‘booty’. Estonia has demanded that the insignia of President Päts be returned, and Moscow has hinted that it is in principle prepared to do so; however, the return has to wait for ‘politically better times’. Again, it makes a difference whether the Republic of Estonia has a legal right to the return of these state symbols or it would be simply an act of friendliness and grace on Russia’s part, in the anticipation of reciprocity in the form of gifts from Estonia.

Nevertheless, the most important aspect of the question of state identity/continuity for the Republic of Estonia remains the symbolic one, the fact that it affects the fundamental and constitutionally enshrined self-understanding of the Republic of Estonia. It was not so much because of old museological collections or probably even hopes for compensation for persecution by the Soviet regime (most Estonians consider it unlikely that the Russian government would ever pay such damages) that the general validity of the Tartu Peace Treaty (minus borders) was reconfirmed by the Estonian parliament. Lawyers and historians have unanimously called the Tartu Peace Treaty of 2 February 1920 the ‘birth certificate’ of the Republic of Estonia. This treaty was the first treaty in the history of international law in which secession was *expressis verbis* recognised on the basis of the right of peoples to self-determination.

Article II of the Tartu Peace Treaty states:

‘On the basis of the right of all peoples freely to decide their destinies, and even to separate themselves completely from the state of which they form a part, a right proclaimed by the Federal Socialist Republic of Soviet Russia, Russia unreservedly recognises the independence and autonomy of the State of Estonia and renounces voluntarily and forever all rights of sovereignty formerly held by Russia over the Estonian people and territory of Estonia by virtue of the former legal situation, and by virtue of international treaties, which, in respect of such rights, shall henceforth lose their force.

No obligation to Russia devolves upon the Estonian people and territory from the fact that Estonia was formerly part of Russia.’⁹

Seen in this light, the debate about the continued validity of the Tartu Peace Treaty is in the first place a symbolic one, one about the recognition already given. The recognition that Estonia sought from Russia and achieved in 1920 was unconditional and ‘forever’. The Estonian negotiators insisted at the Tartu Peace Conference that the treaty contain references to Estonia and Russia as states and not to their respective and potentially fluctuating forms of government (‘bourgeois’ republic, Soviet republic, etc.).¹⁰ Yet in 1939–1940 Stalin’s Soviet Russia grossly violated the Soviet Russian recognition granted in 1920. It is now very difficult for Russia to prove convincingly what exactly in international law terminated, in 1940 or subsequently, the applicability of Article II of the Tartu Peace Treaty. Since today’s Russia has been incapable of and/or unwilling to apologise concerning the Soviet aggression of 1940, it was the forward-looking *raison d’état* of the Republic of Estonia to make it clear that the Estonian acquiescence to the Soviet-imposed borders did not imply the retrospective legalisation of the Soviet occupation and annexation.

4. Legal questions concerning future solutions

Taking into account the fact that the Russian Federation maintains that the Tartu Peace Treaty became invalid more than sixty years ago (in 1940), can the Republic of Estonia seriously maintain that the 1920 peace treaty continuously remains valid and applicable?

International treaties can be terminated either by *ad hoc* mutual consent of the parties or by using provisions explicitly contained either in the relevant treaties or more generally in the Vienna Convention on the Law of Treaties.¹¹ The Tartu Peace Treaty, being a *traité-loi* and creating a new international legal status for Estonia, was such a fundamental and groundbreaking treaty that it, obviously, did not contain any provisions for its termination. Of the general principles contained in the Vienna Convention, Russia cannot invoke the principle of fundamental change of circumstances, *clausula rebus sic stantibus*, since the USSR not only ‘contributed’ through internationally wrongful acts to the circumstances that could now be invoked but through its wrongful acts brought such circumstances into being. Therefore, Russia has from the legal standpoint a quite weak case in favour of the argument that the Tartu Peace Treaty was terminated in 1940. No other state seems to share Russia’s officially represented view that the Baltic States ‘joined the USSR voluntarily’ and did so in accordance with international law.

⁹ Peace Treaty of Tartu, 2 February 1920. League of Nations Treaty Series. Vol. XI, pp. 51–52.

¹⁰ A. Piip. Mälestused iseseisvuse võitluspäevilt. II köide. Vabadussõda 1918–1920 (Recollections of independence fight. Vol. II. War of Independence 1918–1920). Tallinn: ‘Rahvaülikooli’ kirjastus 1930, p. 391 (in Estonian).

¹¹ Adopted on 22 May 1969, United Nations Treaty Series, Vol. 1155, p. 331.

Thus, until the Russian Federation would come up with a serious legal argument as to why the Tartu Peace Treaty has been invalidated and why the USSR did not occupy Estonia (illegally) in 1940, the Republic of Estonia can in fact consider the Tartu Peace Treaty to be a continuously valid international treaty. The recognition given to Estonia's statehood in the Tartu Peace Treaty cannot be taken back — just as the historical fact cannot be taken back that in 1940 this recognition was violated.

Politically, the overreaction of the Russian government to the declaration added by the parliament of Estonia to the law of ratification of the 2005 border treaties seems to demonstrate that official Russia will continue to refuse to recognise the illegality of the Soviet occupation of the Baltic States in 1940 and afterwards. It will probably continue to do so until it feels that its own state identity is symbolically threatened. Possibly, it will be ready to recognise the fact of occupation and make formal apology only when it receives a guarantee to the effect that no practically harmful consequences for Russia are to follow from the acknowledgement of the occupation (for example, when all of the Baltic victims of Soviet repression are dead).

Retrospectively, we may conclude from the ensoubering ratification procedure that it was either naïve or wishful thinking to believe that conclusion of the Estonian–Russian border treaties would have been possible in a state of disagreement about fundamentals, especially the question of the illegality of the occupation and annexation of 1940 and the corresponding international legal status (in terms of state continuity) of the Baltic States.

To make the kind of declaration ('preamble' to the ratification law) that the Estonian parliament adopted when ratifying the border treaties on 18 May 2005 is in itself not uncommon practice for states. States ratify treaties yet consider it sometimes necessary to explain their interpretation stance with respect to certain aspects of the treaty in question. The Estonian unilateral declaration is not a reservation under the Vienna Convention (reservations are not allowed for bilateral treaties), nor is it a preamble to the treaty itself (since it is not the act of both parties). The Russian Federation could still have ratified the treaties and made a declaration of its own, setting forth **why** the Estonian interpretative declaration was unacceptable to Russia. The most striking feature of the Russian decision is, again, the lack of any serious legal argumentation as to why Russia disagrees with the Riigikogu about the question of occupation or the principle of Estonia's state continuity. It is misleading to say that it was wrong of the Estonian parliament to make such a declaration since doing so was not agreed upon during the negotiations. The Estonian position on those issues has been unchanged since 1991–1992; it was simply reconfirmed and re-communicated to the treaty partner. As far as the references to previous declarations made by the Estonian parliament are concerned, the earlier declarations of the Riigikogu are there in the legal field in any case; nothing and nobody has changed them since they were made in 1991–1992.

The foreign ministry of Estonia has taken the view that it has no intention to restart negotiations about the border since there is nothing left to discuss. Estonia has ratified the treaties and considers the case closed. A unilateral declaration added at the ratification of a bilateral treaty is not technically part of the treaty itself; it is the context in which a treaty partner sees the treaty. The other party may agree to this interpretation or disagree with it. Moreover, foreign policy analysts argue that, since the current demarcation line between Estonia and Russia has *de facto* functioned as a state border anyway, there is not even immediate need for ratification of the border treaty on both sides.

Nevertheless, the existing outcome of the border treaties debate should not satisfy either of the parties. In the future, the Russian Federation may still want to choose to ratify the treaties. Another possibility would be common revisiting of the issue and compromise that could be envisaged along the lines of adding the reconfirmation of Article II of the 1920 Tartu Peace Treaty as a general part of the text of the 2005 border treaties, as substantive content.

5. Summary

This article has tackled international law issues — or, rather, the central international law issue — related to recent diplomatic developments regarding the state border between the Republic of Estonia and the Russian Federation. On 18 May 2005, the foreign ministers of both countries signed border treaties in Moscow (one concerning the land border, the other the sea border) between their countries. One month later, the Estonian parliament, the Riigikogu, ratified both treaties — adding, however, to the ratification a legal-historical declaration that referred to the continuity of the Republic of Estonia. On 1 September 2005, President Putin of Russia signed an order rescinding Russia's signature of the border treaties.

The article has examined the role of the underlying issue, that being the different visions that Russia and Estonia have of the international legal status of the latter, the Estonian insistence on there having been Soviet occupation (1940–1941, 1944–1991), and the claim of the continuity of the Republic of Estonia.