THE POST-SOVIET ENABLERS OF BORDER INSTABILITY

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ABSTRACT:

In international relations, the last three decades have been marked by national and institutional fragmentation. The fate of Yugoslavia and of the Soviet Union, and the regrettable way in played out (especially in the former case) can happen to other federative entities as well. Canada, and Belgium come to mind, as do countries, like Spain, which operate nearly as a federation. But whereas federations usually have dispute settlement and mechanisms for secession embedded in their constitutions, sub-constitutive territories are often excluded from such considerations. Territories such as Kosovo, Sandjak, Abkhazia, South Ossetia, etc. have this in common that they share a desire for independent autonomy from their parent country, but doing so presents risks to the territorial integrity of other countries (what can be termed separation contagion), and also risks to the endurance of flexible international law. The cases we have alluded to above have culminated into the Crimean crisis.

The controversy between Estonia and the Russian Federation has to do with the choice of precedent and founding text on which to base the former's re-independence. While Estonia was founded after the First World War (after its own, and Russia's) civil war based on the 1920 Tartu Peace Treaty, its experience as a Soviet Republic added another legislative filter in the form of the 1977 Soviet Constitution. Meanwhile, however, the principle of *uti possidetis* had evolved to apply to more than cases of colonialism. Thus, when Estonia seceded from the USSR with the borders it had occupied since 1945, it was doing so under the principle of *uti possidetis*. The current dispute has to do with the fact that Estonian political elite seek to have the 1920 Tartu Peace Treaty as foundational document for re-independence. Under that Treaty, Estonian sovereignty applied over a much larger territory. By insisting on making reference to that Treaty for the formalization of any new border arrangement with Russia, Estonia is invalidating the principle of *uti possidetis* and the validity of the Soviet Constitution as vehicle for independence. It implies a latent Art. 5 situation between NATO and Russia, and threatens the legitimacy of other post-Soviet secessions.

Key Words*: Uti possidetis, Crimea, Ukraine, Estonia, post-Soviet dissolution, Soviet Constitution, Tartu Peace Treaty, hegemony*

INTRODUCTION

On November 19, 2019 Henn Polluaas, speaker of the Estonian Riigikogu (parliament) and member of the Eesti Konservatiline Rahvaerakond (EKRE) party suggested that the Russian Federation should return the portion of territory east of the Narva River and Petseri to Estonian sovereignty, as called for by the treaty between independent Estonia and the then-nascent Soviet Union in the city of Tartu, in 1920.

Such a statement poses many policy problems. The first is that it has been uttered at a moment when NATO forces deployed in the Baltic States at the request of Baltic governments are attempting to maintain a fragile deterrent against Russia. The second is tensions between opposing forces on the contact line in the Donbas were loosening, as, by November 2019, units there had begun a partial withdrawal under OSCE supervision. Third, Mr. Polluaas' musings are contrary to the principle encapsulated by Art. 2 of the North Atlantic Treaty requiring Alliance members to practice good-neighbourly relations.

More alarmingly, however, this statement was then the latest example of the erosion of international law, on which small powers like Estonia rely for their security, and the predictability of their relations with neighbours. Perhaps it is in consequence of this that Russian president Vladimir V. Putin suggested in a recent interview that, upon the dissolution of the USSR in 1991, seceding SSRs had made out with Russian lands.

NATO-Russia relations are tense at the best of times and Mr. Polluaas' statement has become indistinguishable from official Estonian policy. What has permitted this statement to be made *now*? A combination of factors provides a workable hypothesis. First; the decline of American influence and credibility acts as a double lever; it encourages border revisionism and redefinition from all sides with impunity.[1] Second; the inability of sustaining the norms-based international system set up by the West in the wake of the Second World War. This has meant, in particular, that the

[1] This has been exemplified by the recent American support of Benjamin Netanyahu's pronouncements on border revisions during the latest election campaign in Israel.

principle of *uti possidetis*, and the respect of the Soviet Constitution of 1977, which, jointly applied, should offer the prospect of a peaceable, predictable and legitimate dissolution, is being called into question.

The first part of this article briefly reviews the literature on the principle of *uti possidetis*, as it has been applied historically and as an enduring principle of conflict management and state-building. The second part looks at how an SSR like Estonia applied the principles discussed in part 1 to secure its exit from the Soviet Union thanks to the Soviet Constitution of 1977, and the application of *uti possidetis* as a principle of conflict management during secessions. The third part looks at how Estonia's insistence at having the Tartu Treaty prevail over uti possidetis threatens international law and stability. The fourth part looks at how the erosion of American power has enabled smaller powers to become risk-prone with impunity.

PART 1 : UTI POSSIDETIS : A REVIEW

« Uti possidetis, ita possideatis » is an expression found in Roman law meaning that « as one uses, one shall possess ». By it, one's possession is derived by use. The application and respect of this principle has provided the international community with an objective doctrine to manage and prevent potential conflict arising from post-colonial secessions. Not only has it helped international diplomacy navigate post-World War II decolonization in South America, Asia and Africa, but it has evolved to also support the dissolution of the Soviet Union.

Fittingly, the doctrine of *uti possidetis* is buttressed by the definition of what is a « state » according to the 1933 Montevideo Conventions on the Rights and Duties of States.[2] Art. 1 of the Montevideo Convention defines a state as possessing the following qualifications; « (a) A permanent population; (b) a defined territory; (c) government, and; (d) capacity to enter into relations with

[2] Some readers will be alert to the fact that only states in North, Central and South America (except Canada) were the original signatories of this Convention. Nevertheless, the Montevideo Convention was absorbed by the cannon of international law in 1945 upon the creation of the Charter of the United Nations' Art. 102, paragraph 1, therefore applying universally.

other states ». Thus a state may have a *de facto* and/or *de jure* existence.[3] But a state is a state *because* there is a permanent population over a defined territory, over which a government exercises sovereignty. In addition, when it comes to matters of secession from a larger political construct – national, imperial or colonial – the territorial legacy must be unambiguous.[4] This characterization does not define the term "population", and how it stipulates that territory and population should be administered by a corresponding authority. That, in effect, is the application of the doctrine of *uti possidetis,* i.e. to impose an administrative status quo which would preserve the inviolability of borders. The purpose was to prevent the independence (as in territorial integrity) and stability of new states from being endangered by fratricidal struggles, without having an impact on customary law.[5] Lalonde has shown that, although the application of *uti possidetis* has evolved, its successful utilization in the Latin American case was meant to be limited to that particular regional context.[6]

Uti possidetis is used by the international community to freeze the new states into their habitual borders; it is a sort of administrative *status quo* designed to ensure a peaceful transition from one status to the next. This characteristic makes the doctrine a useful tool for conflict prevention and management, but it does not follow that international law (and indeed international society) condones secessionism. On the contrary, the principles of territorial integrity will always have precedence over the rights of peoples to self-determination.[7] Neither the Helsinki Final Act of 1975 nor the Charter of Paris of 1990 authorize secessionism; merely self-determination. Self-determination can be either internal or external, and while the latter effectively means secession (usually permitted owing to gross violations of a minority's human rights), *internal* self-

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[3] Duursma, Jorri. *Fragmentation and International Relations of Micro-States.* Cambridge: Cambridge University Press, 1996, 119, and Fabry, Mikulas. *Recognizing States: International Society and the Establishment of New States since 1776.* Oxford: Oxford University Press, 2010, 1-2.

[4] Ghebrewebet, Helen. *Identifying Units of Statehood and Determining International Boundaries: A Revised Look at the Doctrine of Uti Possidetis and the Principle of Self-Determination.* Frankfurt-am-Main: Peter Lang, 2006, 43.

[5] Ghebrewebet 2006, 86.

[6] Lalonde, Suzanne. *Determining Borders in Conflict: The Role of Uti Possidetis.* Kingston: McGill/Queen's University Press, 2002, 55.

[7] Saxer, Urs W. «The Transformation of the Soviet Union from Socialist Federation to a Community of Independent States.» *Loyola of Los Angeles International Law Review*, 14, 1992, 635.

determination can *never* be the object of *uti possidetis*[8] *unless the national legislation devolves the right of a constitutive or administrative unit to secede*.[9]

Whereas internal self-determination concerns the way peoples govern themselves, external self-determination concerns the status of that new arrangement, i.e. international recognition predicated upon independence.

The principle of *uti possidetis* threatened territorial integrity of states for now every conceivable groupuscule could invoke this principle to fragment an existing state, or even a new state that would have been recently recognized under that same principle of *uti possidetis*. Therefore, it was vital to limit the application of self-determination to peoples as opposed to nations, or ethnic groups and/or cultural minorities.

In order to protect the principle of territorial integrity, United Nations General Assembly resolution 2625 (XXV) (Declaration of Friendly Relations) of 1970 sought to distinguish between central authority and colonial possessions while it extended the right of self-determination to all peoples (not just colonial peoples). Colonies can separate from the metropolitan power, but minorities thus created by this independence cannot necessarily separate from the newly independent state, and this principle cannot be advocated to fragment the metropolitan power.[10] In other words, the principle of *uti possidetis* was being protected by the respect for territorial integrity while simultaneously being modified by the evolutionary nature of the concept of self-determination.[11]

Recognition of such situations therefore becomes injurious to territorial integrity and self-determination, because it fragments a recognized political entity further by recognizing the will of a minority over that of the majority.[12]

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[8] Lalonde 2002, 189-197.
[9] Ghebrewebet, 2006, 97.
[10] Duursma 1996, 17-25.
[11] Ghebrewebet 2006, 118, quoting Jimenez de Archaga.
[12] Duursma 1996, 20.

The international community was always very keen to elevate the principle of territorial integrity over that of self-determination, since *uti possidetis* manifested itself as if it were an application of international customary law, "once the colonial people had asserted its right to self-determination through the attainment of independent statehood (author: external self-determination), the stability imperative reasserts itself."[13] And so it is not surprising to see the Helsinki Final Act (1975) and the Charter of Paris (1990) prohibiting secession. Following that same logic the USSR was declared to have collapsed through "dissolution" as opposed to "secession". Yet, Duursma refutes the utility of this distinction;

> Considering the fact that the disruption of territorial integrity of an existing state can be either partial or total, and that the same international rules apply to the either of those effects, it serves no legal purpose to distinguish between secession, dissolution, separation or disintegration.[14]

The continuing evolution of the concept of self-determination seems to bear witness to this conclusion. In 1970, the International Court of Justice had allowed the term to be equated with independence by defining self-determination as a dynamic concept.[15]

By 1993, the Vienna Declaration and Programme of Action had confirmed that self-determination was a *right* that applied to people "subjected to alien subjugation."[16] The Human Rights Covenant, which extended the right of self-determination to all peoples, was careful not to define the meaning of "peoples"[17] enabling the doctrine of *uti possidetis* as "internal" to "external" self-determination nearly without skipping a beat. Lalonde sustains the notion that *uti possidetis* cannot apply to internal borders.[18] Unless, of course, the central authority devolves the right to secede to its administrative units based on mutual consent.[19]

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[13] Lalonde 2002, 162.
[14] Duursma 1996, 89.
[15] Duursma 1996, 60.
[16] Duursma 1996, 26. See also Ghebrewebet 2006, 124, quoting Brilmayer; secession is an appropriate remedy in case of wrongful annexation, and 133, states have a duty to comply with UN principles.
[17] Duursma 1996, 33-34.
[18] Lalonde 2002, 189. Although Lalonde says that "*uti possidetis* does not itself provide any criteria for deciding which administrative units should benefit from international legal protection" (and therefore recognition) on p. 193.
[19] Here the cases of the USSR and Czechoslovakia come to mind. Fabry 2010, 69, and Ghebrewebet 2006, 97.

> If a secession leads to total disruption of a state's territorial integrity and thus the recognition of the newly established state will be given more easily than if the secession implies only partial disruption.[20]

This means that the application of *uti possidetis* appears to be valid for minorities to secede on the territory they occupy within a larger political unit, the very outcome which the doctrine was designed to prevent.

The application of the principle of *uti possidetis* to the dissolution of the USSR helped make the secession of constitutive republics peaceful because the 1977 Soviet constitution provided the right to secede to all the constitutive republics, in addition to declaratory rights of sovereignty over their respective territories and borders *as they stood at dissolution*.

PART 2 : THE 1977 SOVIET CONSTITUTION AND THE CONSTITUTIVE REPUBLICS

It is therefore the conjunction of the 1977 Soviet constitution *and* the application of *uti possidetis* which has ensured a peaceful dissolution of the USSR. This section explores the role played by the constitution – the drafting of which SSRs like Russia and Estonia participated in. First, it must be underlined that many scholars agree that Soviet legislative habits never resembled those of the West; Party policy, not law, reigned supreme.[21] Yet, even this statement requires qualification. According to Towe, constitutional amendments usually (writing in 1967) follow policy changes implemented by the authorities. In the Soviet tradition, constitutional amendments required two-thirds of the voices to pass, but the Presidium « is empowered to decide such questions independently, subject to subsequent confirmation by the Supreme Soviet of the USSR ».[22] While constitutional drafting can be a very personal affair, once passed, the amendment applied to all SSRs equally – even in the breach.[23]

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[20] Duursma 1996, 96. Evidently total disruption implies that there is no central authority anymore, or that fragmentation is occurring from mutual agreement between the administrative units. This clearly applies to the Soviet case, but is emphatically rejected/denied in the Yugoslav case.

[21] Towe, Thomas E. «Fundamental Rights in the Soviet Union: A Comparative Approach.» *University of Pennsylvania Law Review*, Vol. 115, 1967, 1257-1258.

[22] Towe 1967, 1260.

[23] Mond, Georges H. «Les nouvelles constitutions de l'U.R.S.S. et la Chine comparées aux récentes lois fondamentales de la Pologne et de l'Albanie.» *Revue comparative Est-Ouest*, 3 :9, 1978, 170.

The legal tradition of the Soviet Union is contradictory in nature; there is « one Soviet nation » but Art. 72 of the Constitution still allows for secession.[24] The big question motivating scholars at the time of the unveiling of the 1977 Constitution was whether continuity would prevail or whether the new legislation would be effectively put in application, especially as pertained to Art. 6, so that « all organisations of the Party operate within the Constitutional framework of the USSR ».[25] This would apply not only to the Communist Party of the Soviet Union, but also to the organs and agencies of constitutive SSRs as well, such as the Supreme Soviet of the Estonian SSR, and that of the Russian Federated SSR.

This is of crucial importance in view of what the 1977 Constitution stipulated with regards to jurisdictional privileges of the Union and its SSRs. For instance, Art. 73, para. 2 basically codifies the granting of Crimea to the Ukrainian SSR, for it is within the jurisdiction of the USSR to determine boundaries of the Union and approve the changes of boundaries between SSRs. Even more pertinently, Art. 76 states that a Union Republic « is a sovereign soviet socialist state that has united with other Soviet Republics in the USSR. Outside the spheres listed in Art. 73 of the Constitution of the USSR, a Union Republic exercises independent authority on its territory… » This is a clear example of a figment of legislative fantasy that bore no relation to reality. But such inaccuracies nevertheless intermingle with fact; Art. 77 states – which is true – that « Union Republics take part in the decision-making in the Supreme Soviet of the USSR, the Presidium of the Supreme Soviet of the USSR, the government of the USSR, and other bodies of the USSR. » What's more, a serious attempt was made to include nation-wide popular consultation in the drafting of the new Constitution.[26] Whereas the sovereignty of SSRs was admittedly partial at best, boundary alterations could be mutually agreed, as stipulated by Art. 78.

It would be naive to think that the 1977 Soviet Constitution was meant to supersede the power of the Party. Nevertheless, the leading caste tried to adapt ideological irrealities with modernity. Thus, Communist ideological markers were dropped in favour of more « mainstream » national and state

[24] Mond 1978, 192.
[25] Mond 1978, 193.
[26] Lutwikowski, Rett R. «Soviet Constitutional Changes of the Glasnost Era: A Historical Perspective.» *New York Law School Journal of International and Comparative Law*, 2 :10, 1989, 137.

features in the Constitution.[27] The law was not meant to rule until… the law started ruling. In a belated attempt to inject vitality into a gerontocratic system, Mikhail Gorbachev launched a series of constitutional amendments designed to open up elections to diversity and plurality.[28] The legitimacy of those changes were not visible at the time, or if they were, they were taken with a healthy dose of suspicion.[29]

However, later research showed that the attempt not only worked, but it consecrated the legitimacy of the secession for SSRs. In the case of the Estonian SSR, the Estonian Supreme Soviet re-wrote its own constitution challenging the leading role of the CPSU, in direct contravention to Art. 78 of the Soviet Constitution of 1977. Soviet authorities remained silent to this breach of « custom », and, in remaining silent, became acceptant of constitutive SSRs' widening jurisdiction.

Second, the 1990 elections of the Estonian SSR Supreme Soviet were the first (and last) undertaken under Gorbachev's 1988 constitutional amendments. Freer, more transparent campaigns are measurable by the more credible level of participation (71 percent, as opposed to the usual 99 percent) for the first multi-candidate election in the Estonian SSR.[30] Elections were no longer a « charade »; they were a means of revolution by law throughout the Soviet Union, and more particularly at SSR level.[31]

> In effect the law – specifically constitutional law – has been the foremost vector of the revolution which began in 1990 at the level of the Soviet Union, allowing for the overthrow of the Soviet system and its transition towards a system not founded on single-party ideology. The real revolution in the USSR emanates from a revision of the Constitution which has led to the repeal of Art. 6 of the 1977 Constitution relative to the leading role of the Communist Party.[32]

The Party tried to put the toothpaste back into the tube, but it was too little, too late; subsequent secession laws were deemed contrary to the 1977 Soviet Constitution[33] but only helped to

[27] Lutwikowski 1989, 138.
[28] Lutwikowski 1989, 147.
[29] Liivik, Olev. «Formation of the Supreme Soviet of the ESSR: Elections and Principles of Assembling.» 2010.
[30] Liivik, 2010, 4-5.
[31] Lutwikowski, 1989, 149.
[32] Baudoin, Marie-Élisabeth. «Droit et révolution dans l'espace post-soviétique: Les lendemains de la révolution par le droit.» *Siècles*, 27, 2008, 98. Authors' translation.
[33] Treiman, Jaak. «The New Soviet Secession Law is a Sham.» *The Wall Street Journal Europe*, July 3 July 1990, and Saxer 1992, 637,

consolidate secessionist sentiment. If the secession of the Baltic States was aimed at righting the wrongs of illegal annexation, and of recovering the independence and sovereignty they had won at the end of the First World War, they could only do so with what the 1977 Soviet Constitution provided, and within the practice of *uti possidetis*.

PART 3 : HOW THE TARTU TREATY ENABLES THE EROSION OF UTI POSSIDETIS

Upon asserting its independence from the Soviet Union, Estonia quickly claimed continuity of the Tartu Treaty of 2 February 1920, which the Russian government immediately countered. Estonia was unable to garner further diplomatic support to buttress its position. Factually speaking, therefore, the international community, and Russia in particular, seemed perfectly happy with the results; Estonia and Russia would separate from their larger entity, but keep to the territory they'd administered for the longest period of time.

> In 1995… (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 is 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.[34]

International law views the Baltic States as successions rather than continuities because they were released from the Soviet Union, because their period of pre-annexation independence had been too brief (especially compared to the Baltic States' enduring periods of domination under Danish, Russian and German rule), and because most of the former centres' powers were turned over to them (as sufficiently demonstrated by Liivik and Lutwikowski, above).[35] Thus, the matter of reversion of sovereignty based on pre-USSR independence has weak foundations and « clouded by… more than fifty years of Soviet domination ».[36] Relying on the Tartu Treaty is fraught with difficulties and other contradictions.

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[34] Mälksoo, Lauri. «Which Continuity: The Tartu Peace Treaty of 2 February 1920, the Estonian-Russian Border Treaties of 18 May 2005, and the Legal Debate of Estonia's Status in International Law.» *Juridica International*, X 2005, 145-146. Italics from the author.

[35] Saxer 1992, 609-691.

[36] Saxer 1992, 633.

In 2005 Russia and Estonia agreed to a border settlement (ERR). This border agreement was ratified by the Estonian Riigikogu on 20 June 2005. However, the text of the law on ratification (not the treaty itself) declared that ratification;

> …proceeded from the legal continuity of the Republic of Estonia proclaimed on 24 February 1918, as it is established in the Constitution of Estonia, in the 20 August 1991 decision of the Supreme Council (Soviet) 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… *partially changes the line of the state border* established in Art. 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 ».[37]

Russian authorities reacted by rescinding their signature to the border treaty on 1 September 2005, arguing that the text of the Estonian law on ratification called into question the chronological baseline of the negotiations – which had been the 1944 situation – thus leaving the possibility open that Estonia might one day make territorial claims against Russia in the future.[38]

Fast forward another decade, and the Estonian-Russian border is once again signed (but not ratified) on 18 February 2014.[39] Within a year, the newly-elected Eesti Konservatiiline Rahvaerakond (EKRE), upon being pressed to give its assent to ratify the new Russo-Estonian border treaty, began pushing for an additional preamble, which reads practically the same as that of the ratification law of a decade earlier, with the exception that the line starting with « partially changes » is modified by « in accordance with Art. 122 of the Estonian Constitution ».[40] This preamble is therefore added *after the negotiations have been concluded*. Predictably, Russian authorities have refrained from ratifying the new border treaty.

The preamble was put forward by Henn Polluaas, deputy party chairman of EKRE, ostensibly because reference to the Tartu Treaty of 1920 was necessary to solidify the philosophical and

[37] Mälksoo 2005, 145. Italics from the author.
[38] Mälksoo 2005, 145.
[39] Turovski, Markus. *Polluas on Border Treaty Sparks Reactions from Kremlin and State Duma.* 21 11 2019. https://news.err.ee/1005079/polluaas-on-border-treaty-sparks-reactions-from-kremlin-and-state-duma.
[40] Laats, J. M. *EKRE Pushing for Treaty of Tartu Mention in Border Treaty.* 10 12 2015. https://news.err.ee/117354/ekre-pushing-for-treaty-of-tartu-mention-in-border-treaty.

psychological bases for Estonia's claims to legal continuity.[41] Otherwise, Polluaas added, there was no « political, economic or other reasons to sign the Estonian-Russian border treaty », suggesting that relying on the 1944-1945 border demarcations of the two former SSRs (Russian and Estonian) was sufficient.[42] In other words, Polluaas seemed to agree that an operative doctrine of *uti possidetis* provided a workable foundation for the two countries.

There was no way to that Russia could accept a mention of the Tartu Peace Treaty of 1920 in this context. Mainly because although the preamble seemed to accept the border modification that the 1944 position caused on Art. III of the Tartu Treaty, reference to Art. 122 of the Estonian Constitution re-introduced the sanctity of that very Art. III indirectly; as « ratification of international treaties which alter the state borders of Estonia require a two-thirds majority of the membership of the Riigikogu ». However, it could be eventually argued that this is not an international, but, rather, a *bilateral* treaty. Taken this way, there is no disposition in the Estonian Constitution to modify the border bilaterally. Art. III, para. 1 of the Tartu Peace Treaty of 1920, unless parts thereof are invalidated by bilateral convention, *must* take precedence.

And even if the Russia-Estonia border treaty of 2015 *is deemed* to be an international treaty, Art. 123 of the Estonian Constitution intervenes by stating that the Republic of Estonia « shall not enter into international treaties which are in conflict with the Constitution. » In other words, if Art. 122 is mentioned, the whole notion of a preamble modifying Art. III, para 1 of the 1920 Tartu Treaty could make a border treaty between Russia and Estonia unconstitutional.

If the issue were merely symbolic[43] the matter should still be acceptable to Russia. However, statements made since May 2019 by EKRE members indicate the contrary. On 6 May, Ruuben Kaalep (EKRE), part of the new coalition following Estonian legislative elections in 2019, said the government intended not to go ahead with ratification.[44] Foreign minister Urmas Reinsalu (Fatherland Party) specified on the following day that the question of bringing ratification to a vote

[41] Laats 2015.
[42] Laats 2015.
[43] Mälksoo, 2005, 148.
[44] Whyte, Andrew. *Agreement in place not to ratify border treaty says Ruuben Kaalep.* 6 5 2019. https://news.err.ee/936832/agreement-in-place-not-to-ratify-border-treaty-says-ruuben-kaalep. Hereafter Whyte (a), 2019.

had not been a condition to the forming of a coalition.[45] Then on 9 May, EKRE's leader and Estonian Interior minister Mart Helme, expressed the view that « … ratification of the border treaty was contingent on Russia recognizing the much-earlier Tartu Peace Treaty of 1920, signed between the newly-independent Estonia and the fledgling Soviet Russian state ».[46]

Helme argued that the territory granted to Estonia under the 1920 Tartu Treaty was occupied in the same manner that Georgian and Ukrainian territory have been occupied since 2008 and 2014 respectively.[47] Predictably, this drew sharp condemnation from Russia, which equated it to making a claim on its territory.[48] The issue was not symbolic anymore, but material. In November, Russian agreement became contingent upon Estonia dropping what Russian Foreign Ministry spokesman Sergei Belyaev called « territorial claims on Russia ».[49] On November 20, Henn Polluaas (EKRE), speaker of the Riigokogu, was quoted by ERR as saying that

> Estonia does not have any territorial claims against Russia. We do not want a single square meter of Russian soil. We just want ours returned. Russia has annexed ca. 5 percent of the territory of Estonia (…) De facto are Russia's illegal claims against Estonia that are in violation of international law. The annexation of Estonian territories is in no way different from the occupation and annexation of Crimea. One simply happened decades before the other. The Estonia-Russia border is fixed in the Treaty of Tartu that is included in the UN's list of valid international agreements. Those are the borders in which countries recognized Estonia's restoration of independence. The border treaty can only be taken forward insofar as it includes Russia recognizing the Treaty of Tartu and the border marked therein.[50]

According to Chairman of the Foreign Affairs Committee Marko Mihkelson (Reform Party), the intention until today had been to abide by the *uti possidetis* principle; « without territorial claims from either side ».[51] Mihkelson confirms that this had been the foundation of the draft border treaty

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[45] —. *Foreign Minister: Estonia cannot back down on Tartu Peace Treaty principles.* 19 11 2019D. https://news.err.ee/1004589/foreign-minister-estonia-cannot-back-down-on-tartu-peace-treaty-principles. Hereafter Whyte (b), 2019.

[46] Whyte (b) 2019.

[47] Whyte (b) 2019.

[48] —. *Prime Minister: We have to be realistic about border ratification.* 10 5 2019. https://news.err.ee/938396/prime-minister-we-have-to-be-realistic-about-border-ratification. Hereafter Whyte (c), 2019.

[49] —. *Russia Foreign Ministry, Embassy, Attack border treaty comments.* 16 5 2019. https://news.err.ee/939966/russian-foreign-ministry-embassy-attack-border-treaty-comments. Hereafter Whyte (d), 2019.

[50] Turovski, 2019.

[51] Turovski, 2019.

that had been agreed on 18 February 2014.[52] Yet the EKRE narrative is the answer to Russia's recognition of Abkhazia and South Ossetia (Georgian breakaway regions after the Russo-Georgian war of 2008) and of the fusion of Crimea to Russia. Both the Georgian and Ukrainian crises have been inspired by the Kosovo unilateral declaration of independence.[53]

This cascade of recognitions – all of them, from Kosovo to Crimea, partial – invalidates the principle of *uti possidetis*, a fundamental norm of international law. Rather, Estonian-Russian relations, and, in a wider context, NATO-Russia relations, reflect typical tit-for-tat diplomacy and border revisionism claims. So it is no surprise that media outlets surmised that Mr. Putin's accused former Soviet Republics of « making out » with Russian lands when the Soviet Union dissolved. Mr. Putin made the comment during a documentaty interview carried out 12 June 2020 and broadcast on 21 June 2020 by Pavel Zarubin in the Rossiya 1 multi-segment documentary *Russia. Putin. Kremlin.* Few mainstream media fastened on those comments, save for UAWire, an online news platform of unknown reach, and Kanat Altunbayev, from the Kazakh online news site CaravanSerai. Altunbayev, in particular, presumed that Mr. Putin suggested therefore that these lands should be returned. Radio Free Europe/Radio Liberty can be credited for more accurately stressing Mr. Putin's point, which was that when the USSR was created, the right to opt out was written in the original union treaty, but not the procedure for carrying out such a decision.

The right of withdrawal was spelled out in the Treaty[54], but not the procedure. Then, the question arises, if this or that Republic has joined the USSR, received its baggage and a lot of Russia's lands – traditional, historical territories – and then suddenly decided to leave the Union. It should leave with what it came with and not drag out gifts from the Russian people.[55]

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[52] Turovski, 2019.

[53] Jolicoeur, Pierre, and Frédéric Labarre. «The Kosovo Model: A (Bad) Precedent for Conflict Management in the South Caucasus?» *Connections Quarterly*, Summer 2014, 46.

[54] According to Altunbayev (2020) Mr. Putin here refers to the 1922 Union Treaty, not the 1977 Soviet Constitution, which also allows republican separation.

[55] Author's translation. This section of the interview is available in Russian language on YouTube as « Podarka ot Russkogo Naroda » published 21 June 2020 at https://www.youtube.com/watch?v=GcNEb9VZvzw&feature=youtu.be (retrieved 1 September 2020). Pavel Zarubin's documentary is the culmination of several interviews carried out between 18 September 2019 and 12 June 2020 on behalf of Channel Rossiya 1. See Rossiya 1 Channel website at https://russia.tv/brand/show/brand_id/64871/

Mr. Putin never mentioned that Russia might seek return of territories, or that certain former Republics should return « stolen » land. Rather, that such transfers should be carried out under some form of legal procedure precisely to avoid misunderstandings further down the road. This is what the Soviet Constitution of 1977 and the practice of *uti possidetis* provided in the case of Estonian secession; recognition, but within the borders it had occupied under that particular legal regime.

PART 4 : HOW LOST US HEGEMONY EMPOWERS SMALL STATES

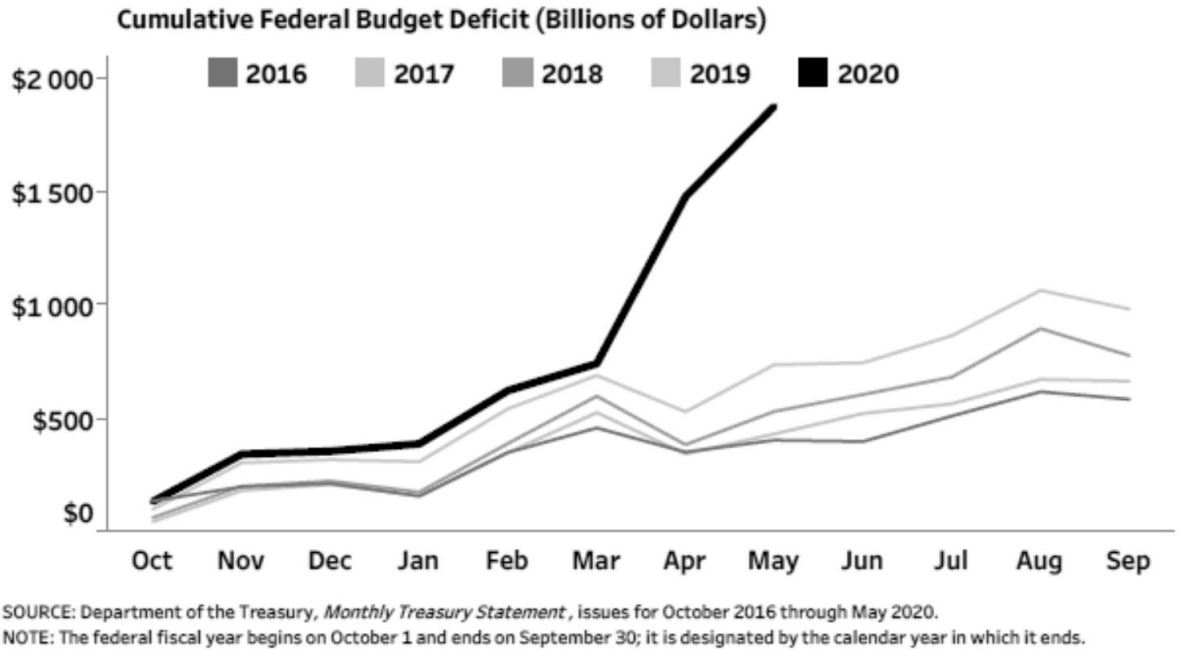
Another enabler of tension is the erosion of American hegemonic power. The worsening standoff between Estonia and Russia over the codification of the border has attracted regional media attention, but, apparently, no overt interest from NATO leaders. This is an ominous sign; for the implications of Mr. Polluaas' statement and Estonian policy in general over the validity of the 1920 Tartu Treaty would mean that Russia is already occupying Estonian – that is NATO – territory. In other words, there is a latent Art. 4 and Art. 5 situation between Estonia and Russia. This should be of priority interest to major NATO powers for two reasons; first, they are the primary norm builders of the post-war and post-Cold War era, and it should be in their interest that these norms should be sustained. Second, it is the burden of major powers to discipline weaker Alliance members to avoid drifting into war.[56]

Estonia has been able to avoid opprobrium from NATO's major powers ostensibly because of the United States' declining influence in world affairs. The same decline has made it impossible for the United States to apply its leadership for the sustainment of the international legal order.

Great power decline is empirically measurable as Paul Kennedy reminds us.[57] More recently, the Peter G. Peterson Foundation, which monitors US government spending and debt treatment has calculated that for the next several years, the US deficit would amount to a minimum of 1 trillion dollars per year, and that the total debt of the United States would surpass 23 trillion USD in 2020. Evidently, much of this year's debt has been generated by counter-pandemic funding.

[56] Wolfers, Arnold. *Discord and Collaboration.* Baltimore, MD: Johns Hopkins Prress, 1962.
[57] Kennedy, Paul. *The Rise and Fall of Great Powers*. New York : Random House, 1988.

Figure 1 : Cumulative U. S. Federal Budget Deficit in billions USD[58]



SOURCE: Department of the Treasury, *Monthly Treasury Statement*, issues for October 2016 through May 2020.
NOTE: The federal fiscal year begins on October 1 and ends on September 30; it is designated by the calendar year in which it ends.

Since 2008, mainly owing to partisan divisions, the United States has been unable to pass a regular budget, proceeding instead with « continuing resolutions », tantamount to someone signing on to an ever-increasing credit margin. With no plan as to how to spend money, the most expeditious method to serve the debt and reduce the deficit is to cut spending, in effect reducing the administrative and sometimes operational capacity of the country.

Evidence of such spending cuts have made the news recently, with Mr. Trump's administration furloughing between 50 and 70 percent of the workforce in the Citizenship and Immigration department[59], the decision to withdraw American forces from Germany[60], in addition to having

[58] Source : Peter G. Peterson Foundation (www.pgpf.org)

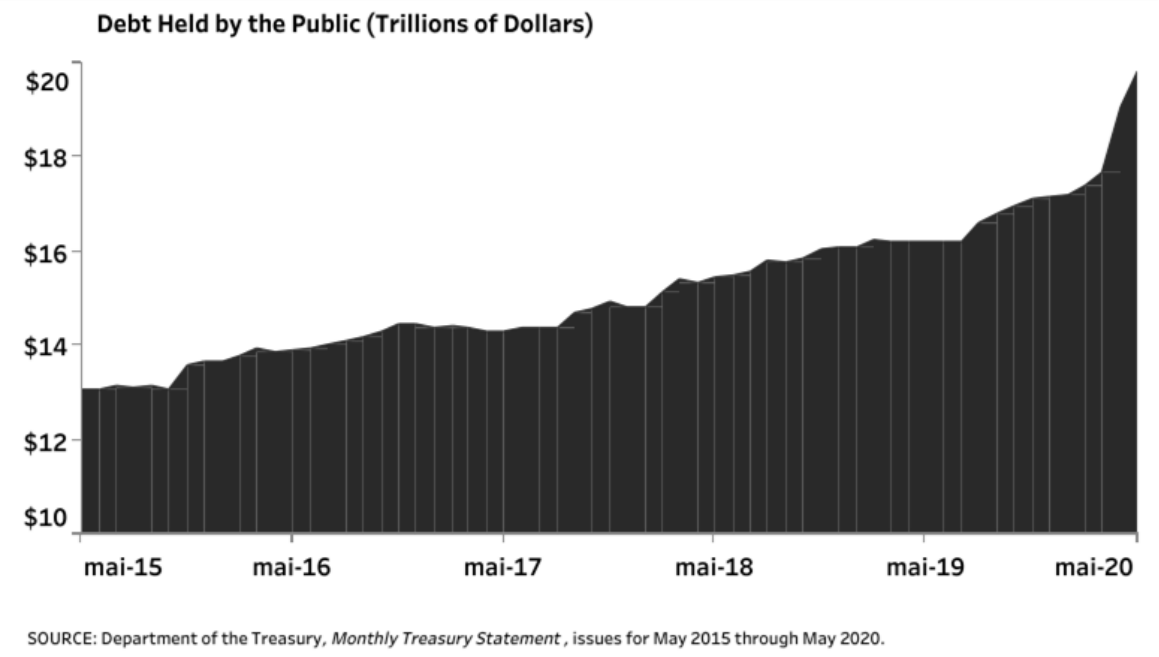
[59] USCIS. *Deputy Director for Policy Statement on USCIS Fiscal Outlook.* 25 June 2020. https://www.uscis.gov/news/news-releases/deputy-director-policy-statement-uscis-fiscal-outlook.

[60] Deutsche Welle. «Donald Trump Approves Plan to pull 9500 Troops from Germany.» *Deutsche Welle.* 1 July 2020. https://www.dw.com/en/donald-trump-approves-plan-to-pull-9500-troops-from-germany/a-54006399.

quit the Syrian theater of operations[61], among other fiscal news. Already, the US commitment to sustaining NATO's reassurance operations in the Baltic States since 2015 could be seen as half-hearted; US troops are deployed in Poland; not to the Baltic States themselves.

In addition, the US withdrawal from world affairs has been compounded by the US' departure from the very norms that it had championed during the Cold War. The abroggation of the Non-Proliferation Treaty and the Open Skies Treaty follows a trend begun in 2002 under George W. Bush's exit from the Ballistic Missile Defense Treaty, which had been followed by the Russian exit from the Conventional Forces in Europe agreement. It is doubtful that the recent election of Mr. Biden will reverse this trend in the short term.

Figure 2 : Public Debt in the United States in Trillion USD. Source : Peter G. Peterson Foundation (www.pgpf.org)



[61] Rhode, Benjamin. «The US Withdrawal from Syria.» *International Institute of Strategic Studies - Commentary*, 31 January 2019: 1-3.

The decline of American power also means a lot to NATO, as French President Emmanuel Macron has hinted in his now-famous November 2019 interview with *The Economist.* Simply put, without the United States, NATO is clinically dead. What's more is that France and Germany, the leading EU powers, are considering measures to make European defence more autonomous from US participation.

CONCLUSION

It is not surprising therefore that Estonia might feel buoyed by the example provided by the two great powers, and that it engage in some legal jettisoning of its own. There seems little to lose; with NATO troops on Estonian territory, this is the only Western testimony of deterrence credibility that Russia has to respect. Meanwhile, whatever policy Estonia may want to adopt to press its claim, the United States has put itself in a very delicate position to object.

The canon of international law exists to provide small states with the predictability they need to manage their relations in a way that outcomes (even if perceived to be unjust) may still have commonly-held legitimacy. The border between Russia and Estonia could be settled based on the latter's right to secede from the USSR under its 1945 borders, thanks to the Soviet Constitution, and the application of *uti possidetis* as permitted by international law. Instead, Estonia is now emphasizing the Tartu Peace Treaty of 1920. This argument, pushed to its logical conclusion, creates a territorial overlap between Estonia and Russia, latent source of trouble for NATO, but more to the point, threatening to the principle of *uti possidetis* and the validity of the Soviet Constitution as it then stood *for other SSR secessions as well*.

Estonia's position on the border issue has been only possible because of the erosion of international law since at least 2008, and with the negative example set by larger powers. Ironically, that very position, which is also a symptom of greater independence, may put her at the mercy of its adversaries, if her Allies decide not to fulfill their guarantees.

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