Pride and perseverance: Strategic use of *Rebus sic Stantibus* in Russian foreign policy 1870-1950

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ABSTRACT:

The paper examines the use of rebus sic stantibus, a claim that a fundamental change of circumstances warrants withdrawal or termination of a treaty, by Russia in three key episodes in Russian foreign policy. These episodes have not been examined together by scholars and have not all been analysed from the perspective of rebus sic stantibus. First, it examines the situation in 1870 when Russia used this approach to obtain the London Declaration, which revised unfavourable terms in the 1856 Treaty of Paris following the Crimean War. Second, it examines the Soviet attempt to terminate or renegotiate the Montreux Convention during and in the aftermath of the Second World War through the use of rebus sic stantibus and, third, it examines the Soviet attempt to renegotiate the Svalbard Treaty through the use of this legal approach. Notably, the analysis shows that these attempts took place during shifts in Russia's relative power. Given the design of the treaties in question, rebus sic stantibus was one of the only ways to achieve these goals. In addition to providing a thorough study of episodes unexamined from an international legal perspective, the paper may therefore shed light on when rebus sic stantibus is useful and why it is relied on less and less by states today.

I. Introduction

In public international law, *'rebus sic stantibus'* is a principle according to which, following a fundamental change of circumstances, a party to an international agreement may claim that it is no longer bound by the terms of that agreement. Thus, it has been referred to as 'the popular plaything of Realpolitiker'.[1] Rebus sic stantibus can be a powerful strategic tool that allows – or tempts – States to seek to adapt their international legal commitments over time. This is the topic of this

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[1] Jan Klabbers, *International Law* (2013), at 64.

paper. The paper explores this topic by examining certain key episodes in Russian foreign policy where this principle directly or indirectly was relied on and it shows that the operation of the doctrine in State practice is nuanced.

The episodes in question span a long time period – from the 1870s to the 1950s and concern vastly different areas, which nonetheless are closely connected from the perspective of Russian foreign policy; Russia's borders, its geography, and its ability to project power globally through its navy. Thus, the episodes all relate to what has always been Russia's strategic Achilles heel: the lack of warm-water ports with direct access to the oceans.[2]

The first episode analysed in depth is the most well examined and concerns the 1870 London Declaration, whereby Russia in a period of a shifting balance of power sought to remove obligations limiting its freedom of manoeuvre and security interests in the Black Sea and the Mediterranean pursuant to the Paris Treaty of 1856, which concluded the Crimean War. The second episode concerns the same region and similar issues, but at a later time period, during the Second World War, when the Soviet Union sought to rely on a strengthened power position and renegotiate the Montreux Convention.[3] The third episode concerns a similar time period, but the scene is set in the high North, where the Soviet Union again relied on its increase in power and changing strategic interests to try and renegotiate the Svalbard Treaty.[4]

The Montreux Convention and the Svalbard Treaty still regulate these areas. Their geopolitical importance has not diminished. The only major warm-water port which Russia controls is the Port of Sevastopol in occupied Crimea, from which its Black Sea Fleet operates.[5] Access out of the Black Sea and into the Mediterranean is still restricted by the Montreux Convention, through which

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[2] Tim Marshall, *Prisoners of Geography: Ten Maps That Tell You Everything You Need To Know About Global Politics* (2015), at 27.

[3] The Montreux Convention Regarding the Regime of the Straits, 173 *LNTS* 213 (Montreux Convention).

[4] Treaty Concerning the Archipelago of Spitsbergen, (Svalbard Treaty). (League of Nations (historical) [LoN]) 1920, 2 LNTS 7, 9 February 1920.

[5] Prior to Russia's annexation of Crimea, Russian access and use of this Port facility was regulated by a set of leasing agreements between Ukraine and Russia. See Thomas D. Grant, 'Annexation of Crimea', 109 *American Journal of International Law* (2015) 68, at 78-80. After the annexation, Russia purported to unilaterally terminate these agreements. See President of Russia Press Release, 'Termination of agreements on the presence of Russia's Black Sea Fleet in Ukraine', 2 April 2014, available at http://en.kremlin.ru/acts/news/20673; prior to this, on 21 March 2014, the Russian Prime Minister Medvedev made a reference to rebus sic stantibus in a meeting in the Security Council of Russia: 'taking into account the changed circumstances and the fact that now Crimea is a part of the territory of the Russian federation there are no grounds for continuation of this treaty. There is an international legal principle according to which a treaty is in force until the circumstances that generated it exist.', available at http://kremlin.ru/events/president/news/20623. The translation is by Olga Butkevych, 'The Operation of International Treaties and Contracts in the Event of Armed Conflict: Problems Reopened by Russian Aggression Against Ukraine' in Sergey Sayapin and Evhen Tsybulenko (eds.), *The Use of Force against Ukraine and International Law: Jus ad Bellum, Jus in Bello, Jus post Bellum* (2018) 185, at 203.

the NATO power Turkey controls the Bosporus.[6] This area is key in the current looming conflict between Turkey and neighbouring countries, which ostensibly is about gas projects in the Eastern Mediterranean,[7] but which also concerns regional rivalry and is tied to the war in Libya. There, the 'civil war has morphed into a proxy struggle between rival international powers', which include Turkey and Russia.[8] Indeed, Russia is supposedly again considering trying to seek renegotiation of this treaty, especially following the occupation of Crimea.[9]

The Svalbard Treaty operates in a less threatening political climate, but its operation should also not be taken for granted. For instance, right after its centennial in February 2020, Russia sought to have bilateral talks with Norway about its dissatisfaction concerning the Norwegian treaty practice.[10] This, too, may be seen in light of access to natural resources in the area, but also as part of larger security competition and a quest for Arctic dominance. An ever more accessible Arctic is increasingly an important issue in Russian national security considerations,[11] where the modernised Northern Fleet plays a vital role.[12] Indeed, in Russia's Arctic Strategy, set out in the fall of 2020, 'the archipelago of Svalbard is highlighted as a place where Russian presence is to be strengthened'.[13]

In so far as what is examined here represents a Russian treaty strategy the approach taken in historical studies may also provide some inspiration for international legal analysis of current foreign policy and national security issues. For instance, the United States and Russia are presently engaged in heated discussion over arms control agreements, which to a large extent takes place

[6] Marshall, *supra* note 2, at 30.
[7] William Mallinson, 'Britain, Greece, Turkey and The Aegean: Does Anything Change?', *Modern Diplomacy*, 28 September 2020, available at https://moderndiplomacy.eu/2020/09/28/britain-greece-turkey-and-the-aegean-does-anything-change/.
[8] David Sheppard, Laura Pitel, and Michael Peel, 'What is at stake in the eastern Mediterranean crisis?', *Financial Times*, 8 September 2020, available at https://www.ft.com/content/e872ed5d-1f64-48ae-8b8d-d6b49476e749.
[9] Paul Goble, 'Moscow Mulls Revising Montreux Convention in Response to NATO Presence in Black Sea', 16 *Eurasia Daily Monitor*, 2 April 2019, available at https://jamestown.org/program/moscow-mulls-revising-montreux-convention-in-response-to-nato-presence-in-black-sea/.
[10] Maritime Executive, 'Norway Clarifies Svalbard Treaty After Russian Complaint', 17 February 2020, available at https://www.maritime-executive.com/article/norway-clarifies-svalbard-treaty-after-russian-complaint.
[11] Atle Staalesen, 'Behind Putin's new Arctic Strategy lies a rude quest for natural resources', *The Barents Observer*, 30 October 2020, available at https://thebarentsobserver.com/en/climate-crisis/2020/10/behind-putins-new-arctic-strategy-lies-rude-quest-natural-resources.
[12] Matthew Melino, Heather A. Conley, and Joseph S. Bermudez Jr., 'The Ice Curtain: Modernization on the Kola Peninsula', *CSIS Briefs*, 23 March 2020, available at https://www.csis.org/analysis/ice-curtain-modernization-kola-peninsula.
[13] Staalesen, *supra* note 11.

through renegotiation and withdrawal (or threats thereof), whether in accordance with the terms of the specific treaty in question, the law of treaties, or not in accordance with the law at all.

More broadly, this study, about the survival of these treaties following Russian attempts to renegotiate through the use of rebus sic stantibus shows the surprising endurance of international agreements, even when constraining the exercise of foreign policy preferences and the national security interests of great powers engaged in international rivalry in times of turmoil. Perhaps most of all, it shows the surprising endurance of international agreements, even when constraining the exercise of foreign policy and the national security interests of great powers engaged in international rivalry in times of turmoil.

II. *Rebus sic Stantibus*: A Legal and Historical Overview

A. Introduction

Today, rebus sic stantibus is, for most practical purposes, governed by the very narrow rule expressed in Article 62 of the Vienna Convention of the Law of Treaties (VCLT).[14] While a principle of long historical roots,[15] which has 'moved in and out of fashion',[16] including a sudden appearance in the Brexit deliberations in the United Kingdom Parliament,[17] today it seems to be playing a very modest role in international law,[18] both in the contemporary jurisprudence of

[14] Vienna Convention of the Law of Treaties (VCLT) 1980, 1155 UNTS 331*,* entered into force on 27 January 1980. As the International Court of Justice (ICJ) has held, 'Article 62 (…) may in many respects be considered as a codification of existing customary law on the subject of the termination of a treaty relationship on account of change of circumstances', ICJ, *Fisheries Jurisdiction Case (United Kingdom of Great Britain and Northern Ireland v. Iceland),* Jurisdiction, Judgment*,* 2 February 1973, ICJ Reports 1973, 3, at para. 36 (*Fisheries Jurisdiction*).'

[15] On historical practice and theory, see e.g., György Haraszti, 'Treaties and the Fundamental Change of Circumstances', 146 *Recueil des Cours* (1975) 1, at 10-14 with further references and David J. Bederman, 'The 1871 London Declaration, Rebus Sic Stantibus and the Primitivist View of International Law', 92 *The American Journal of International Law* (1988) 1, at 8.

[16] *Bederman*, *supra* note 15, at 3.

[17] See Marko Milanovic, 'Brexit, the Northern Irish Backstop, and Fundamental Change of Circumstances', *EJIL Talk*, 18 March 2019, available at https://www.ejiltalk.org/brexit-the-northern-irish-backstop-and-fundamental-change-of-circumstances/.

[18] In part, this is no doubt due to the very high burden upon the State making the claim. See e.g., *Fisheries Jurisdiction supra* note 1414, at para. 36 and ICJ, *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, 25 September 1997, ICJ Report 1997, 7, at para. 104. On the minor relevance of Art. 62 compared to the doctrine in earlier times, see generally e.g., Robert Kolb, *The Law of Treaties* (2016), at 226-235.'

international courts and tribunals,[19] and among scholars.[20] For this reason, Helfer has argued that scholars have either mostly ignored the decline of the doctrine or 'attributed it to a renewed faith in the competing legal norm that treaty commitments must be obeyed.'[21]

However that may be, the rebus sic stantibus principle allows for a flexible alternative to treaty exit by use of either the negotiated terms of the treaty or the default terms of the VCLT.[22] At the very least, this may be true *politically* when a reference is made to the broader principle rather than to the strict terms of Article 62 VCLT.[23]

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[19] *Fisheries Jurisdiction,* supra note 1414, at para. 40 (. For a rare example of a major international court or tribunal accepting the principle in practice, see the European Court of Justice, Case C-162/96, *Racke v. Hauptzollamt Mainz*, Judgment of 16 June 1998, at para. 49.
Even if international arbitral practice is included, there are not many major cases. However, examples exist. For instance, in *The Oriental Navigation Company (U.S.A.) v. United Mexican States* the dissenting arbitrator appears to have thought the majority relied on some form of rebus sic stantibus when absolving Mexico of responsibility. *The Oriental Navigation Company (U.S.A.) v. United Mexican States*, 3 October 1928, 4 *RIAA* (1928), at 341, and esp. at 352. Rebus sic stantibus has even been recognised in tribunal practice as a general principle of law. See e.g. Iran-US Claims Tribunal (IUSCT), *Questech Inc. v. The Ministry of National Defence of the Islamic Republic of Iran*, IUSCT Case No. 59, 20 September 1985, Award No. 191-59-1, at 20-22; See also *Aminoil v. Kuwait*, Final Award, 24 March 1982, 21, at paras. 6 and 22 discussing a contractual provision in which the government claimed was similar to rebus sic stantibus, applicable as 'established public international law is necessarily a part of the law of Kuwait'). See also. ICSID, *Burlington Resources Inc. v Ecuador*, Decision on Liability, 14 December 2012, ICSID Case No. ARB/08/5, esp. at para. 408. In *Rosinvest,* it was relied on by Claimant for interpretative purposes rather than for termination of a treaty, an 'invocation' which, in the view of the Tribunal, 'in the present context is therefore misplaced and (…) entirely without merit.' Arbitration Institute of the Stockholm Chamber of Commerce (SCC), *RosInvestCo UK Ltd. v. The Russian Federation*, Award on Jurisdiction, 1 October 2007, SCC Case No. 079/2005, at para. 43. *Sanum* is a recent example where specific circumstances were recognised. However, the Tribunal did not find that this was demonstrated in the specific case. Permanent Court of Arbitration (PCA), *Sanum Investments Limited v. Lao People's Democratic Republic*, Award on Jurisdiction, 13 December 2013, UNCITRAL, PCA Case No. 2013-13, at para. 243.
See also Guillaume in his Declaration in the *Rhine Clorides* arbitration See *Case Concerning the Auditing of Accounts Between the Kingdom of the Netherlands and the French Republic pursuant to the Additional Protocol of 25 September 1991 to the Convention on the Protection of the Rhine Against Pollution by Chlorides of 3 December 1976, Netherlands v France*, Arbitral Award, 12 March 2004, 25 *RIAA* (2004) 267, Declaration of Mr. Gilbert Guillaume, at 343-344.

[20] In 1975, David would observe that 'no major work has been published on the [doctrine] since the 1930s', see Arie E. David, *The Strategy of Treaty Termination* (1975), at xi.

[21] Laurence Helfer, 'Exiting Treaties', 91 *Virginia Law Review* (2004) 1579, at 1644.

[22] Detlev F. Vagts, 'Rebus Revisited: Changed Circumstances in Treaty Law,' 43 *Columbia Journal of Transnational Law* (2005) 459, at 475; Kolb, *Exceptions in International Law*, *supra* note 16, at 283.The principle has also been relied upon in the context of unilateral commitments, such as declarations on jurisdiction. See e.g., and *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States of America), Jurisdiction and Admissibility, Dissenting Opinion of Judge Schwebel, *ICJ Reports* 1984, 558, at paras. 99-101.

[23] Kolb notes that in the earlier times we discuss here, the doctrine was 'mainly political' and not limited by clear and objective legal criteria. He contrasts this with the VCLT, which 'seeks to establish a legal doctrine of fundamental change of circumstances.' Kolb, *The Law of Treaties*, *supra* note 1818, at 227. But compare Garner, writing contemporaneously that '[t]here is a difference of opinion among text writers as to whether the principle of rebus sic stantibus is a recognized rule of international law'. James W. Garner, 'The Doctrine of Rebus Sic Stantibus and the Termination of Treaties', 21 *The American Journal of International Law* (1927) 509, at 511. On rebus sic stantibus and the distinction between politically and legally binding obligations, see e.g., Jan Klabbers, *The Concept of Treaty in International Law* (1996), at 115.

For this reason, we will examine briefly how the doctrine has evolved and how States have tried to use it in earlier times, when the perspective of States regarding the binding nature of international law, as Bederman famously put it, was more 'primitive'.[24] To Bederman, this perspective simply entails that States considered the legal order created by the comprehensive European peace treaties as permanent, by virtue of pacta sunt servanda.[25] In the same vein, Abbenhuis notes that '[t]he Congress of Vienna set the tone for international co-operation and respect for public law that permeated throughout the following century.'[26]

This cooperative spirit was fundamentally undermined with the introduction of rebus sic stantibus. From the perspective of the law of treaties, this was an era where the systematic reliance upon standard treaty terms among negotiators was much less developed than today.[27] Indeed, as Wood has recently observed, such '[e]arly attempts to codify and develop rules concerning treaty negotiation were made' only around 'the time of the League of Nations.'[28] Earlier treaties, less systematically negotiated, to a much lesser extent included termination and renegotiation clauses, self-judging clauses and other formal clauses which provide for flexibility in substantive performance or a lawful manner (as opposed to a mere breach of treaty) by which a State could avoid its legal obligations altogether as circumstances change.[29]

This has also been confirmed by recent studies, which show a significant increase in the use of such clauses, especially post VCLT.[30] Indeed, Barbara Koremenos, a leading scholar on the 'rational design' of treaties, has shown that the design of international agreements becomes more 'rational' over time.[31] In contrast, this study examines treaties which largely do not contain such elements, but which nonetheless endure. In short, therefore, before the present 'rational design' of

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[24] Bederman, *supra* note 15.

[25] See today Art. 26 VCLT. On the development of the doctrine of pacta sunt servanda in this period, see e.g., Kolb, *The Law of Treaties*, *supra* note 18, at 8-12.

[26] Maartje Abbenhuis, *An Age of Neutrals: Great Power Politics 1815 - 1914* (2014), at 145.

[27] For an overview of treaty law developments in this period, see e.g., Randall Lesaffer, 'Treaties within the History of International Law' in Michael J. Bowman and Dino Kritsiotis (eds.), *Conceptual and Contextual Perspectives on the Modern Law of Treaties* (2018) 43, at 61-63. The first such systematic attempt that I am aware of is in the context of the International Labour Organization which at its first session in 1919 voted over five draft treaties which had 'been drafted along uniform lines', see ILO: *Record of Proceedings, International Labour Conference*, First Session, Washington, 1919, at 178.

[28] Michael Wood, 'The Negotiation of Multilateral Treaties at the United Nations: a negotiator's view', in Simon Chesterman, David M. Malone, and Santiago Villalpando (eds.), *The Oxford Handbook of United Nations Treaties* (2019) 615, at 616.

[29] For a modern example equating rebus sic stantibus and such treaty clauses, see e.g., ITLOS, *The M/V 'SAIGA' (No 2) Case (Saint Vincent and the Grenadines v Guinea)*, Merits, Judgment, 1 July 1999, ITLOS Reports 1999, 10, Separate Opinion of Judge Laing, at para. 61.

[30] Malgosia Fitzmaurice and Panos Merkouris, *Treaties in Motion The Evolution of Treaties from Formation to Termination* (2020)at 236-238 and Barbara Koremenos, *The Continent of International Law: Explaining Agreement Design* (2016).

[31] Koremenos, *supra* note 30, at 327-329.

international agreements,[32] rebus sic stantibus was the key mechanism through which States could manage substantive legal obligations in treaties over time. As will be examined further in of III.A, this does not mean that legal and historical analysis of such older treaties cannot inform rational design studies.

B. Rebus sic Stantibus in Historic Perspective

With respect to its contemporaneous relevance, close to one of the time-periods we are interested here, the 1866 edition of Wheaton's *Elements* would merely observe rather briefly:

> In case of a change of circumstances, on which the validity of the treaty is made to depend, either by an express stipulation, (*clausula rebus sic stantibus*), or by the nature of the treaty itself. As such a change of circumstances would avoid the treaty, even after ratification, so if it take place previous to the ratification it will afford a strong and solid reason for withholding that sanction.[33]

In Atlay's 1904 edition this text is merely reproduced unaltered.[34] This was despite the book having been published after the famous 1871 London Declaration, which was even referred to in the preface.[35]

By 1927, Lauterpacht would conclude that '[t]here are only a few problems of international law which have caused more embarrassment to international publicists, or which are more unsettled, than the doctrine [of rebus sic stantibus]'[36] He even argued that

> [t]he doctrine has not become a rule of positive international law; not only because the instances of its application are highly infrequent, but also because in those rare cases in which it has been invoked it has been rejected by the other contracting party against whose interests the denunciation of the treaty was directed.[37]

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[32] See the overview in III.A below.

[33] Henry Wheaton with Richard Henry Dana (ed.), *Elements of International Law* (8th ed., 1866), at § 263.3. See also *ibid*, § 276, where it states that '[t]reaties expire by their own limitations ... or when their stipulations are fulfilled by the respective parties, or when a total change of circumstance renders them obligatory."

[34] *Ibid*., at §§ 263, 275.

[35] Henry Wheaton with J. Beresford Atlay (ed.), *Elements of International Law* (4th ed., 1904), at vii-viii.

[36] Hersch Lauterpacht, *Private Law Sources and Analogies of International Law (with Special Reference to International Arbitration)* (1927), at 167. The principle would seem to be recognised Permanent Court of International Justice (PCIJ), *Case of the Free Zones of Upper Savoy and the District of Gex*, Judgment, 7 June 1932, Series A/B, No. 46, esp. at para. 77. (*Free Zones Case*). See also PCIJ, *Nationality Decrees Issued in Tunis and Morocco*, Advisory Opinion, 7 February 1923, Series B, No 4, at 29, where no conclusive pronouncement was made.

[37] Lauterpacht, *supra* note 3636, at 170.

After the Second World War, it is useful to recall the approach taken by the International Law Commission (ILC) in connection with the drafting of the VCLT. As rapporteur Fitzmaurice noted:

> Post-war experience on the other hand, would seem to suggest an increasing tendency for States to found themselves on such a principle – in fact, if not in so many words. At the same time, there are virtually no cases in which the other parties to a treaty thus called in question have been willing to admit that the doctrine of rebus sic stantibus, as such, was applicable, although they have often been quite ready to agree in practice to revise the treaty in question or to accept its termination.[38]

In this period, there are also interesting examples of the applications of the doctrine in individual opinions of ICJ judges. For instance, Judge Alvarez noted in his powerful Separate Opinion in *Corfu Channel* that rebus sic stantibus was a 'doctrine so just' that it was 'a principle of social justice. The Court is therefore confronted with this dilemma: should it strictly apply the rules of the existing law, even if they are obsolete and might lead to injustices or to settlements which might be found unacceptable, or should it review these rules, as has just been explained'.[39] However, this understanding is not easily squared with actual State practice.

[38] Gerald G. Fitzmaurice, 'Second Report on the Law of Treaties', A/CN.4/107, *Yearbook of the International Law Commission* (*YBILC*), vol. II (1957), at 56.

[39] ICJ, *The Corfu Channel Case (United Kingdom of Great Britain and Northern Ireland v. Albania)*, Judgment, 9 April 1949, ICJ Reports 1949, 4, Separate Opinion by Judge Alvarez, at paras. 39 and 41. Judge Winiarski referred to the principle in ICJ, *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, First Phase, Advisory Opinion, 30 March 1950, ICJ Reports 1950, 65, Separate Opinion of Judge Winiarski, at paras. 94 and 95.

C. A Contemporary Overview

The inclusion by the ILC of the doctrine in a strict, narrow, and negative legal form in Article 62 VCLT has, as already indicated, transformed its role.[40] As the ILC noted, the definition provided in Article 62 'contains a series of limiting conditions': (1) the change must concern circumstances existing at the time of the conclusion of the treaty; (2) the change must be fundamental; (3) it cannot have been foreseen by the parties; (4) the circumstances 'must have constituted an essential basis of the consent of the parties'; and (5) the consequence 'of the change must be radically to transform the scope of obligations still to be performed under the treaty.'[41]

These conditions are exceptions, and as such, subject to a strict interpretation.[42] As already indicated, this has been followed by the ICJ in its practice,[43] namely in the *Fisheries Jurisdiction* case and in the *Gabčíkovo-Nagymaros* case.[44] On the whole, following this jurisprudence, the conditions which must be met in order to successfully invoke a fundamental change of circumstances before the ICJ 'are exacting'.[45]

In addition to the strictness of the criteria, when applying Article 62, the ICJ aims to identify the intention of the parties in the form of 'fundamental change in the circumstances which determined the parties to accept' the treaty.[46] For this, the object and purpose of a treaty serves as a useful reference point.[47] This is quite different from the changes typically invoked by earlier practice, as well as in the three case studies examined here.

Finally, we should note that the effect of Article 62 in practice is not necessarily very helpful. The Tribunal in Amoco explained it well:

> As Article 62 clarifies, change of circumstances never automatically terminates a treaty. It is always up to the parties to evaluate the consequences of the change and, if one or both

[40] See *supra* note 18.
[41] ILC, 'Draft Articles on the Law of Treaties with Commentaries', *YBILC*, vol. II (1966) 259, at para. 9.
[42] Kolb, *The Law of Treaties*, *supra* note 1818, at 229.
[43] E.g. Malgosia Fitzmaurice, 'Exceptional Circumstances and Treaty Commitments' in Duncan B. Hollis (ed.), *The Oxford Guide to Treaties* (2nd ed., 2020) 595, at 612. 7.
[44] See, respectively, *supra* note 4 and 188.
[45] Kolb, *The Law of Treaties*, supra note 18, at 228.
[46] *Fisheries Jurisdiction*, *supra* note 1414, at para. 36.
[47] Julian Kulaga 'A Renaissance of the Doctrine of Rebus Sic Stantibus?', 69 *International and Comparative Law Quarterly* (2020) 477, at 480.

> of them arrive at the conclusion that these consequences legally justify termination of a treaty, to take the necessary steps to this effect.[48]

According to Kolb, Article 62 'should give rise to negotiation and conciliation. A good option is to adapt the treaty by common consent'.[49]

If so, there would perhaps not be much to be gained by invoking Article 62 in the modern world. However, just like in the three case studies examined here, States even today occasionally invoke rebus sic stantibus. As Kulaga has shown in a valuable recent study, sometimes this is even successful.[50] However, it seems that with the possible exception of Russia,[51] while occasionally alluded to,[52] States today rarely invoke it at the highest level of the State or with respect to its more important international treaties. Also for that reason it is important to examine in depth when that has taken place in a historical setting.

III, Understanding when States use Rebus sic Stantibus: A Dynamic Relational Approach

A. Introduction

As we shall subsequently examine, Russia (or the Soviet Union)[53] has invoked rebus sic stantibus in key moments of its foreign policy.[54] In many of the examples assessed here, similar to other examples of the use of the doctrine,[55] Russia did not explicitly refer to the doctrine by name or

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[48] IUSCT, *Amoco International Finance Corporation* v. *The Government of the Islamic Republic of Iran, National Iranian Oil Company, National Petrochemical Company and Kharg Chemical Company Limited*, Partial Award (Award No. 310-56-3), 14 July 1987, IUSCT Case No. 56, at para. 95.

[49] Kolb, *The Law of Treaties*, *supra* note 1818, at 232.

[50] Kulaga, *supra* note 4847, at 480-482, referring to Hungarian termination of five bilateral treaties on cultural and scientific cooperation with reference to Art. 62.

[51] See the discussion in *supra* note 5 and *infra* Section IV.

[52] See also *supra* note 52.

[53] For ease of reference, I will refer to the entity for the whole time-period as 'Russia', but as 'Soviet' when it is referred to in a specific time period in which the Soviet Union existed.

[54] For an interesting overview of earlier Soviet legal theory relating to rebus sic stantibus, see Jan F. Triska and Robert M. Slusser, *The Theory, Law, and Policy of Soviet Treaties* (1962), at 131-141.

[55] See e.g., Malgosia Fitzmaurice and Olufemi Elias, *Contemporary Issues in the Law of Treaties* (2005), at 173, and at 185 *et seq* (discussing the withdrawal of the United States from the 1972 ABM treaty) and Fitzmaurice, *supra* note 4243, at 609-612. See similarly the notification of withdrawal of the United States from the Open Skies Treaty of 22 May 2020, which will take effect on 22 November 2020 (Noting that '[a]s a result of Russia's actions, today's security environment is no longer what it was when the Treaty on Open Skies was signed in 1992, in an era of hope.'). Thomas Dinnano, 'United States Withdrawal from the Treaty on Open Skies', *Statement on the Open Skies Conference of the States Parties*, 6 July 2020, available at https://2017-2021.state.gov/united-states-withdrawal-from-the-treaty-on-open-skies/index.html.

even as a legal concept. The responses by the other parties have varied along the lines indicated by rapporteur Fitzmaurice. Usually, Russia's approach seems to have occurred in connection with major shifts in the balance of power in its relations with such other States with which it was engaged in cooperation, competition, and conflict.

In II.A, I briefly introduced the rational design approach to treaty making. As Pollack recently put it,

> [w]ith respect to the making of international law, the dominant approach has been the so-called rational-design tradition, which has focused on identifying the conditions under which states adopt specific types of legal understandings, including treaties and customary international law, exit clauses, safeguard clauses, reservations, and […] third-party dispute settlement.[56]

Helfer has explained this school of thought more narrowly, noting that international law and international relations scholars have for the last twenty years 'devoted growing attention to formal flexibility mechanisms'.[57] Helfer has moreover underlined the importance in focusing also on 'how flexibility mechanisms actually influence state behaviour' in practice.'[58] The analytical approach I take here is inspired by and builds upon this burgeoning legal and social science scholarship on treaty flexibility.[59] However it looks at an earlier set of treaties, which largely does not include key features that the rational design literature focuses on. In itself, this shows that rational design is not an inherent feature and should not serve as an unquestioned assumption of treaty design.

Thus, historical analyses such as the one I undertake here may also serve as an important way in which to test and critically examine key elements of contemporary treaty research. Indeed, future scholarship may well want to examine why this shift toward rational design occurred in the first place. However, the influence can certainly go both ways. For instance, combining historical analyses with rational choice-inspired methodology may also allow us to get a richer understanding

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[56] Mark Pollack, 'International Relations Theory and International Courts and Tribunals', Draft entry prepared for publication in the *Max Planck Encyclopedia of International Procedural Law*, 26 March 2020, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3634791, at 6 (internal references omitted).

[57] Laurence R. Helfer, 'Flexibility in International Agreements', in Jeffrey L. Dunoff and Mark A. Pollack (eds.), *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (2012) 175, at 177.

[58] Laurence R. Helfer, 'Taking Stock of Three Generations of Research on Treaty Exit', 52 *Israel Law Review* (2019) 103, at 108.

[59] See e.g., Koremenos, *supra* note 30; Pollack, *supra* note 5756; Helfer, *supra* note 58 and 5958; and Timothy Meyer, 'Power, Exit Costs, and Renegotiation in International Law', 51 *Harvard International Law Journal* (2010) 379, all with further references.

of familiar episodes of international legal history, such as the 1871 London Declaration (which will be examined in III.B).

In a sophisticated study which serves as a prime example of rational design literature, Timothy Meyer has explored the effect of the rise and fall of nations on international law.[60] More specifically, Meyer has examined how 'states bargain over the design of international agreements when they believe that they or their cooperative partners might become stronger (or weaker) down the road'.[61] Put differently, Meyer examines how shifts in power, and States' expectation thereof, shape the design ex ante of contemporary international agreements, with the law of treaties working in the background.

Shifts in relative power affect 'the trade-off between form and substance', and thereby explains the design of treaties. That is because shifts of this kind 'can allow a state to credibly threaten to exit an agreement. A credible threat to exit an international agreement confers power on a state by allowing the state to demand a greater share of the gains from cooperation in exchange for participating'. [62] For Meyer, dynamic bargaining power means that during the initial treaty negotiation 'states must be cognizant of their expectations about how bargaining power may shift in the future' and must seek to control exit options, such as by including 'a variety of different formal provisions that can raise or lower the cost of exiting an agreement, including withdrawal provisions, sunset or duration provisions, and provisions affecting the legality of an agreement'.[63] The argument advanced in this paper is that rebus sic stantibus played a similar role in earlier times.[64]

Meyer's argument offers much insight into the design ex ante of modern agreements, and because it takes shifts in power into account, it explains why non-Pareto-improving renegotiation may occur.[65] When a State's bargaining power increases, it will be able to refer to these credible exit options, such as by withdrawing in accordance with the terms of the treaty, in order to 'demand a

[60] Meyer, *ibid.*
[61] *Ibid.*, at 380.
[62] *Ibid.*, at 382.
[63] *Ibid.* For an overview of this kind of provisions, see *ibid.*, at 394-397.
[64] See the comparison between such clauses and rebus sic stantibus in the Separate Opinion of Judge Laing, *supra* note 2729, at para. 61.
[65] *Ibid.* By non-Pareto-improving renegotiation, I mean here renegotiation outcomes which are not Pareto improving, i.e., they do not conform to the requirement of being a change in distribution which harms no one and benefits at least one state. It will of course not always be the case that non-Pareto improving renegotiations will take place during such shifts in power. In addition to the analyses below, see e.g., Yoram Z. Haftel and Alexander Thompson, 'When Do States Renegotiate Investment Agreements? The Impact of Arbitration' 13 *Review of International Organizations* (2018) 25, at 43 (finding that 'changes in a country's relative economic position have no effect on renegotiation' of bilateral investment treaties).

greater share of the benefits from cooperation', i.e. that it will require renegotiation which entails substantive rules that are more favourable to it.[66] Conversely, a State that has seen its relative bargaining power decline 'will be willing to make concessions to the ascendant state up to the point at which the declining state's outside option is better for it than conceding enough to keep the ascendant state in the existing agreement'.[67] It is precisely this kind of State interaction I seek to examine through case studies. In parts III B. to D., therefore, the paper will follow this approach and examine whether renegotiation attempts by virtue of rebus sic stantibus arguments resulted in non-Pareto-improving outcomes.

As indicated earlier, the theoretical argument explored in this paper examines international legal behaviour in an age where treaties did not contain carefully designed exit clauses and the same variety of formal provisions that affect exit costs today.[68] Rather than affecting treaty design ex *ante*, during this earlier time, shifts in the balance of power had instead led to the development of outside options for the ascending power, which allowed that State *ex post* to rely upon the principle of rebus sic stantibus to achieve largely the same effect: a credible exit in order to renegotiate more favourable terms.

The argument is explored through three case studies of Russian practice in periods after the Crimean war, the First World War, and the Second World War.[69] This practice is chosen because Russia seems to be the most frequent invoker of the principle,[70] and because during these historical periods, it had been comparatively weak but would soon thereafter grow to become a dominant power once more. As such, they represent separate periods of dynamic shifts in the relative power of one single State. Moreover, Russia is particularly interesting to examine in these periods, because not only did its relative power shift considerably, but from the perspective of the rise and fall of nations, its relative gains and losses the last 150 years or so would seem to exceed that of any other State by far. Thus, it is a very useful subject for an inquiry into the relevance of the fragility of power in international relations upon international legal behaviour.

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[66] Meyer, *supra* note 60, at 383.

[67] *Ibid.*, at 400.

[68] The Montreux Convention does contain certain final provisions, see especially Art. 28 and Art. 29. Art. 29 in particular opens up for revision, but the relevant provisions for our purposes require unanimity. In other words, it would not seem to add much beyond a default consent rule.

[69] I have relied much on primary sources, many of which do not appear to have been examined by international lawyers previously. I have not been able to rely on Russian or Turkish primary sources. However, much of the secondary literature I refer to is based on such sources to the extent they are available.

[70] Admittedly, this is my impression on the basis of an extensive study of the literature, state practice case law, but is not based on the existence of any comprehensive empirical study of all relevant practice.

Thus, taking a cue from Meyer, I am interested in the effect on international law of Russia's rise and fall and rise over this period. Indeed, the three episodes examined in depth here all concern situations where Russia found itself having become more powerful since it entered into the treaties in question, meaning that it (according to Meyer) may 'seek to renegotiate or revise that agreement to reflect the new underlying power distribution.'[71] In that manner, these historical analyses serve as a direct way of testing this general rational design assumption.

More generally, Russia became in this period, at least some of the time, what international relations scholars refer to as a 'revisionist State',[72] which refers to States that seek to upend the prevailing order or balance of power. One of the theoretical contributions of this paper is therefore to combine Meyer's general approach to power shifts and treaty design with historical analyses and different conceptions of State power.

Moreover, these case studies have not, to my knowledge, been examined together, whether by international lawyers,[73] political scientists, or historians.[74] Two of them have not, as far as I am aware, been examined in-depth from the perspective of international law. When I do so here, it allows us to draw parallels, identify clear common patterns, and perhaps discern elements of a Russian treaty strategy. It is also submitted that my approach here to the case studies as such also brings new elements not previously considered by scholars, such as the suggested link between the Soviet attitude to the Svalbard/Spitzbergen island in the Arctic Ocean, and the Svalbard treaty to the presence of the United States on Jan Mayen in the same period.

The paper proceeds as follows. In III.B, the paper examines the background of how rebus sic stantibus was invoked in perhaps the most famous episode, culminating with the 1871 London Declaration, and which concerned a crucial, complex long-term treaty exit strategy seeking to uproot the legal order established at the end of the Crimean war. III.C surveys developments from the aftermath of the 1871 London Declaration up to the Interwar period.

III.D examines in some depth two key episodes concerning multilateral treaties, signed by Russia/Soviet following the First World War in a period, during the Second World War when its

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[71] Meyer, *supra* note 60, at 380.

[72] See e.g., Jason W. Davidson, *The Origins of Revisionist and Status-Quo States* (2006), at 5 (discussing the Soviet Union as a revisionist state).

[73] Indeed, while the 1871 London Declaration episode has been examined in depth by international lawyers from the perspective of rebus sic stantibus, the two other episodes have as far as I am aware rarely been examined from this perspective. For instance, they are not mentioned in the overview of diplomatic practice by Haraszti, *supra* note 15, in Triska and Slusser, *supra* note 5554, or in Kolb, *The Law of Treaties*, *supra* note 18.

[74] However, brief suggestions about links between some of the episodes exist. See e.g., Patrick Salmon, *Scandinavia and the great powers 1890-1940* (1997), at 367.

relative power had grown and the bargaining over relative influence following the end of the war was reaching a key phase. The first of these episodes concerns Turkey and the Montreux Convention and the second concerns Norway and the Svalbard Treaty. In IV I draw conclusions based on the three case studies in light of an adapted version of the theoretical framework developed by Meyer.

B. The Beginning: The 1871 London Conference

In the mid-1860s, the 'sudden explosion of American and Prusso-German power' would have a 'profound impact on grand strategy and domestic politics in Europe'.[75] For Russia, the gradual unification of Germany, which culminated in 1871, had in particular led to a new threat in the Baltic Sea. This was its main theatre of maritime operations (the two others were the Black Sea and the Pacific), and where it had been a dominant power.[76] If the powerful German fleet were to operate in combination with its army, 'Europe's most formidable land forces', it could as noted by Afonin, 'pose a major threat to the security of Russia's capital and her Baltic provinces'.[77]

In the Black Sea, Russian trade and security were highly dependent on access through the straits. Security-wise, this access was crucial both for its defence, but also for its ability to project power on the European continent.[78] It had accordingly been the subject of extensive treaty relations between the powers throughout the centuries. A key lesson from the Crimean war was that Russian Black Sea ports were subject to risks from foreign fleets operating together with the Ottomans,[79] which at that time was 'an empire very much in decline'.[80]

The Crimean War was formally ended by the signing of the 1856 Treaty of Paris. It had been fought between the Ottoman Empire, France, Great Britain, and Sardinia on the one hand, and Russia on the other.[81] The Treaty sought to establish and regulate a political order of the Balkans through extensive territorial settlements as well as to formally admit the Ottoman Empire into the Concert

[75] Brendan Simms, *Europe: The Struggle for Supremacy, 1453 to the Present* (2013), at 222.
[76] Nikolai Afonin, 'The navy in 1900: imperialism, technology and class war', in Dominic Lieven (ed.), *The Cambridge History of Russia: Imperial Russia 1689-1917* (2006) 575, at 575.
[77] *Ibid.*
[78] Orlando Figes, *The Crimean War* (2010), at 22.
[79] Afonin, *supra* note 77, at 576.
[80] David van der Oye, 'Russian foreign policy, 1815–1917', in Lieven (ed.), *supra* note 75, 544, at 555.
[81] On this war see e.g Figes, *supra* note 79.

of Europe.[82] In a particularly bitter blow for Russian ambitions, it also provided for neutralisation of the Black Sea and stipulated that an additional convention be signed between Russia and the Ottoman Empire, limiting their naval forces in the Black Sea.[83] As a result, 'until the Montreux agreement of 1936 warships had no right of passage through the Straits at Constantinople. The Black Sea fleet was therefore entirely isolated. When Russia wished to send ships even to the Mediterranean they had to come from the Baltic fleet.'[84]

Additionally, France and Great Britain had been joined by Austria (which saw the Ottoman Empire as a bulwark against Russia) by creating a separate guarantee treaty, which would ensure that Russia abided by the peace treaty.[85] Failure to do so would be casus belli.

The prevailing Russian view had been that Bismarck's advance in Germany would be 'the best method of weakening France'.[86] Because of France's long relationship with the Sublime Porte,[87] this would allow Russia to gain relative strength and move toward a position from which to revise 'the hated Black Sea clauses'.[88] In a period which also saw the unification of Italy, the unification of Germany took place after the Franco-Prussian War, which weakened France, as Russia had expected. According to Simms, it was the French defeat that 'provided an opening for a renewed push south towards Constantinople.'[89]

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[82] General Treaty of Peace between Great Britain, Austria, France, Prussia, Russia, Sardinia and Turkey. Signed at Paris, 30 March 1856 (Treaty of Paris). Art. VII states in part that the parties declared the Ottoman Empire 'admitted to participated in the advantages of the Public Law and System (Concert) of Europe.' See Edward Hertslet, *The map of Europe by treaty: showing the various political and territorial changes which have taken place since the general peace of 1814*, vol. II (1875), at 1250, 1254-155.

[83] See in particular, Art. XI and Art. XIV. See Hertslet, *supra* note 83, at 1256-1257 and the annexed, Separate Convention, at 1270-1271.

[84] Afonin, *supra* note 77, at 577.

[85] A French minister had during the war been concerned that if a favorable peace agreement was reached, 'Russia would thereafter have but one object in view: to get rid of the restrictions imposed upon her at the earliest possible moment. He had, therefore, asked himself, if it would not be a wise measure to make Austria … a party to a treaty, obliging her to take up arms if, after the conclusion of peace, Russia should violate its terms in the near future.' W.E. Mosse, *The Rise and Fall of the Crimean System 1855-71* (1963), at 35.

[86] Simms, *supra* note 76, at 240.

[87] Ronald P. Bobroff, 'Squabbling over the Spoils: Late Imperial Russia's Rivalry with France in the Near East' in Lucien J. Frary, Mara Kozelsky (eds.), *Russian-Ottoman Borderlands: The Eastern Question Reconsidered* (University of Wisconsin Press 2014) 281, 283-284.

[88] Simms, *supra* note 76, at 240.

[89] *Ibid.*

This was the context when, in 1870, Russia presented 'the first case in history that reference was made by a great power to the rebus sic stantibus clause in public'.[90] It did so by announcing in diplomatic notes that it no longer regarded as binding the hated provisions of the Treaty of Paris concerning demilitarisation of the Black Sea.[91] As discussed above, these announcements on the issue of neutralisation of the Black Sea and access through the straits, known as 'the Straits question', were made in light of major changes in the European balance of power.

By invoking rebus sic stantibus Russia had also denounced the separate treaty with the Ottoman Empire that it had been required to sign at the same time as the Treaty of Paris.[92] Russia denounced these treaties, 'egged on by Bismarck',[93] by virtue of the so-called Gorchakov circular.[94] These were diplomatic notes that the Russian Foreign Minister had sent to the foreign representations of Russia in the matter. They began: 'The successive alterations which the transactions considered as the foundation of the European Balance of Power have undergone during late years, have rendered it necessary for the Imperial Cabinet to inquire how fair their results affect the political position of Russia.' [95]

The notes emphasised further the violation of certain provisions of the Treaty of 1856 by some of the powers, that Russia was being prevented from exercising her sovereign rights, and pointed to certain changed circumstances. They then concluded:

> Confiding in the feelings of justice of the Powers who have signed the Treaty of 1856, as well as in their consciousness of their own dignity, The Emperor commands you do declare that His Imperial Majesty cannot any longer hold himself bound by the stipulations of the [1856 Treaty], as far as they restrict his Sovereign Rights in the Black Sea;
>
> That His Imperial Majesty deems himself both entitled and obliged to denounce to His Majesty the Sultan the Special and Additional Convention appended to the said Treaty,

[90] Haraszti, *supra* note 1515, at 19.
[91] Cf. especially Art. XI. Hertslet, *supra* note 83, at 1256.
[92] The Convention respecting the Straits of the Dardanelles and the Bosphorus, which was concluded in Paris the same day as the Treaty of Paris, 30 March 1856 and included as an appendix to the Treaty of Paris. The text is reproduced in Hertslet, *supra* note 83, at 1266. Some 70 years later, Russia would again seek to get rid of a treaty governing these straits, namely the Montreux Convention. See III.D.1 below.
[93] Roy Bridge and Roger Bullen, *The Great Powers and the European States System 1814-1914* (2nd ed., 2013), at 172.
[94] See e.g., Russian Note denouncing the Stipulations of the General Treaty of 30th March, 1856, and the Separate Convention with Turkey of the same date, relative to the Limitation of the Naval Force s in the Black Sea. 31 October, 1870. Reprinted in in the translation as laid before Parliament, in Hertslet, *supra* note 81, at 1892.
[95] *Ibid.*

> which fixes the number and size of the Vessels of War which the to Powers bordering on the Black Sea shall keep in that Sea.[96]

As the historian M.S. Anderson observed, through these notes, Gorchakov achieved 'what had for nearly fifteen years been the greatest political objective of Russia'.[97]

In a move which would later be repeated by Molotov (discussed in 1III.D.2 below), Russia tried to avoid an international conference by suggesting a bilateral treaty with Turkey. The Ottoman Ambassador to London told the British Foreign Secretary Lord Granville that 'Turkey would never submit to these pretentions [sic]' and that if 'Russia thought fit to denounce any portion of the Treaties of 1856, Turkey on her part would at once denounce all her engagements with Russia and that she was perfectly prepared for the consequences which might ensue'.[98]

From the perspective of the approach set out in III.A above, this move by Russia would be meaningful because, as Meyer puts it, '[b]ilateral agreements are the easiest place to see the effect of shifts in power on the initial design of an agreement'.[99] An attempt to 'bilateralise' renegotiations about an existing multilateral treaty would thus have allowed Russia as an ascendant State to focus its increased bargaining power solely against the declining Ottoman Empire in order to obtain more favourable substantive provisions.[100]

In the end, the result was the London conference between the great powers in January 1871. Here, Russia explained its arguments in greater detail. Though in reality the fundamental change of circumstances it referred to may mostly have concerned changes in the balance of power, the other powers did not, presumably for their own, good reasons, question this claim in any detail.

The negotiations, which took place in light of the more fundamental developments such as the rise of Italy and Prussia, and the fall of France as a great power, involved both some adjustment of the

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[96] *Ibid.*, at 1894-1895.
[97] Matthew S. Anderson, *The Eastern Question: 1774-1923: A Study in International Relations* (1966), at 172.
[98] Barbara Jelavich, *The Ottoman Empire: The Great Powers, and the Straits Question, 1870-1887* (1973), at 28.
[99] Meyer, *supra* note 6060, at 420.
[100] Of course, this does not answer whether such a bilateral agreement between those two states would have been accepted by the other powers.

straits, access to the Black Sea, and 'the consideration of a principal tenet of the international legal order, the sanctity of treaties'

The Declaration stated that the parties 'recognize that it is an essential principle of the Law of Nations that no Power can liberate itself from the engagements of a Treaty, nor modify the stipulations thereof, unless with the consent of the Contracting Powers by means of an amicable arrangement'.[101] The effect was that Russia withdrew the claim put forward in the Gorchakov circular.

Having made this declaration about the sanctity of treaties and the importance of consent, the parties signed the Treaty of London.[102] This treaty removed (by consent) the provisions of the Treaty of Paris, which Russia had found the most problematic, i.e. the provisions concerning the neutralisation of the Black sea.[103] As Simma summed up the episode, 'The gulf between claim and reality in "political" treaties could hardly be illustrated better'.[104]

From the perspective set out in III.A , the substantive changes effectively enacted upon the Treaty of Paris by virtue of the Treaty of London would clearly seem to be non-Pareto-improving,[105] i.e., while they clearly improved the situation for Russia, they made other powers worse off. Thus, this would seem like a situation which effectively tests Meyer's framework set out in III.A. The plausible explanation suggested by that framework is that it was Russia's increased bargaining power which allowed for a non-Pareto-improving renegotiation of the Treaty of Paris to occur in the form of the Treaty of London.

C. The Aftermath of the London Conference to the Russian revolution and the Interwar Period

[101] Declaration between Great Britain, Austria, France, Italy, North Germany, Russia, and Turkey as to non-Alteration of Treaties without consent of Contracting Parties. London, 17th January, 1871. Reprinted in Edward Hertslet, *The map of Europe by treaty: showing the various political and territorial changes which have taken place since the general peace of 1814*, vol. III (1875), at 1901.

[102] Treaty between Her Majesty, the Emperor of Germany, King of Prussia, the Emperor of Austria, the French Republic, the King of Italy, the Emperor of Russia, and the Sultan, for the Revision of certain Stipulations of the Treaty of March 30, 1856. Signed at London, March 13, 1871. Reprinted in Thomas Erskine Holland, *The European Concert in the Eastern Question: A Collection of Treaties and Other Public Acts* (1885), at 272, see especially Articles 1-3.

[103] Charles R. Cruttwell, 'Neutrality 1866-1874', in Adolphus W. Ward and George P. Gooch (eds.), *The Cambridge History of British Foreign Policy 1783-1919*, vol. III (1923) 3, at 52.

[104] Bruno Simma, 'Consent: Strains in the Treaty System', in Ronald S. Macdonald and Douglas M. Johnston (eds.), *The Structure and Process of International Law: Essays in Legal Philosophy, Doctrine and Theory* (1983) 485, at 598.

[105] See *supra* note 66.

The region continued to be at the forefront of European power politics, and indeed crucial for Russian interests, but here we can only provide a brief sketch. Less than a decade after the signing of the London Declaration, as the weakening of the Ottoman Empire continued and uprisings ensued in the Balkans, war between Russia and Turkey broke out again. When Russia emerged victorious in January 1878,[106] it experienced, 'a tremendous increase in power as a result'.[107] In international legal terms, this was expressed by the Preliminary Treaty of Peace, known as the Peace of San Stefano.[108] As Van den Bogaert argues, this treaty 'could be considered as a revision of the [1856] Paris Peace Treaty between two of its parties', but insofar as it touched upon territorial settlements agreed upon in the Paris Treaty, the consent of those parties as well was necessary.[109]

If we follow Van den Bogaert's view, it is in accordance with the prediction that renegotiation may occur when the bargaining power of one party has increased. Indeed, winning a war tends to give an improved bargaining position. However, it is notable that this took place bilaterally in the background of a multilateral treaty such as the Treaty of Paris. Again then, this may be seen as an attempt by Russia to maximise its relative bargaining position through the bilateralisation of a multilateral issue. In accordance with the perspective set out in III.A, the substantive changes to the Treaty of Paris in effect required by Russia were clearly non-Pareto-improving for the other parties to that Treaty. If such an approach is taken too far, it may be unstable. And the demands made by Russia, although accepted by the Ottomans, seem to be have been too far reaching with respect to the other powers.

Indeed, strong opposition to the Treaty of San Stefano from the United Kingdom in particular, but also from Austria 'which feared she might be next',[110] 'conjured up the danger of a general war.'[111] In order to counter this opposition, Bismarck convened the Congress of Berlin of 1878, by Anderson memorably, albeit outmodedly, described as 'the last great international gathering of the "old diplomacy", the last to be held before democracy and small-state nationalism transformed international relations so much for the worse.'[112] The Treaty of Berlin was signed on 13 July 1878

[106] See on this conflict and the subsequent peace negotiations, e.g., Anderson, *supra* note 9897, at 194-206.
[107] Wilhelm Grewe, *Epochs of International Law* (2000), at 438.
[108] The Preliminary Treaty of Peace, signed at San Stefano, 17 March 1878, reprinted in Holland, *supra* note 106102, at 335.
[109] Sine Van den Bogaert, 'Berlin Congress 1878', *Max Planck Encyclopedia of Public International Law* (2011), at para. 16.
[110] Simms, *supra* note 76, at 360.
[111] Grewe, *supra* note 114.
[112] Anderson, *supra* note 98.

and replaced most of the provisions of the Treaty of San Stefano,[113] to a large extent nullifying its relative gains.

Here we shall only examine one provision of the Berlin Treaty, namely Article LIX, which 'concerned the Russian demand most unpopular in England'.[114] It stated: 'His Majesty the Emperor of Russia declares that it is his intention to constitute Batoum a free port essentially commercial.' The United Kingdom feared that Batoum, situated on the Eastern coast of the Black Sea, might become a Russian naval base which would entail a threat to the freedom of the Black Sea.[115] It therefore sought to have its demilitarisation expressed specifically in the terms of the treaty.[116] Lord Salisbury, the British Foreign Secretary, had worked hard to introduce the phrase 'exclusively commercial' in the provision. However, Prime Minister Disraeli, 'old, deaf and in poor health' and 'who had never seen a map of Asia Minor', was in the end 'outwitted on this point by Gorchakov', who on his part 'could not indicate even approximately the positions of Kars and Batum'.[117]

In 1886, Russia acted upon whatever discretion Article LIX might have given it and combined that with another invocation of rebus sic stantibus, declaring the whole provision ineffective.[118] One of the circumstances that in its view had changed fundamentally since the signing of the treaty was the value of the city of Batoum, which had been diminished with respect to trade with Persia.

Russia defined its position in the 1899 Peace Conference of The Hague in a manner which appears largely compatible with these views.[119] Here, it emphasised that any treaty adopted by the conference could restrain the freedom of action of the parties only as long as practical

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113 Treaty between Great Britain, Germany, Austria, France, Italy, Russia, and Turkey, for the Settlement of Affairs in the East. Signed at Berlin, July 13, 1878, reprinted in Holland, *supra* note 106, at 277. See on this comprehensive treaty e.g., the excellent overview provided by Van den Bogaert, *supra* note 114, with further references.

114 *Ibid*., at 138.

115 *Ibid*., at 184.

116 Anderson, *supra* note 98, at 212-213.

117 *Ibid*., at 214.

118 Oukase de S. M. l'Empereur de Russie concernant la suppression de la franchise du port de Batoum: signe le 23 juni 1886 suivi d'un memorandum du Gouvernement russe adresse aux pussances signataires du traite de Berlin. Contained in Georg F. von Martens, continued by Felix Stoerk, *Nouveau recueil général de traités et autres actes relatifs aux rapports de droit international*, vol. XIV (1889) 169, at 171. In its observations in the *Free Zones case*, *supra* note 36, the French Government would refer to both this Russian declaration as well as the 1871 declaration as examples of State practice on rebus sic stantibus.

119 Haraszti, *supra* note 15, at 21.

circumstances under which they were concluded remained unchanged. If those circumstances were to change, the rights and obligations deriving from the treaties would also have to be modified.[120]

The Straits question would continue to reverberate in the great power politics of the region, require treaty making and subsequent abrogation. Throughout the 19th Century and well into the next, the Ottoman Empire remained 'committed to keep[ing] the Straits open for commercial vessels of all states in time[s] of peace, and in principle, to close them to the war vessels of third states', and it 'reserved the right to determine the passage regime in time[s] of war'.[121] At the outbreak of the First World War, it would prove decisive for some of the most profound geopolitical developments of the century, which still cast their long shadow into our time. As Turkey entered the War, it closed off the straits to Russian commerce for years, 'a major cause of the economic upheaval which led to the Russian Revolution'.[122]

In 1924, after the First World War and the Russian Revolution, the Soviet Union expressed that the continued effect of all the treaties of the former Russian Government 'must be considered from the viewpoint of the rebus sic stantibus clause for each State and each treaty individually'.[123]

This was the same year as Norway recognised the Soviet Union government de jure after the Revolution. This happened after considerable negotiations between the two States, where the Soviets were successful in tying their position on the Svalbard treaty, and Norwegian sovereignty on Svalbard, to Norway's de jure recognition of the Soviet Union government .[124]

The Soviet Union's approach to the Svalbard treaty would later be cast in light of rebus sic stantibus, precisely because of the conditions surrounding this acceptance. First, however, it was Norway that, apparently successfully, invoked rebus sic stantibus with respect to the denunciation

120 Ministère des Affaires étrangères, *Conférence internationale de la paix, La Haye, 18 mai-29 juillet 1899* (1899). Annexes au rapport de la convention pour le règlement pacifique des conflits internationaux. Annexe 1D, Note explicative, se rapportant à l'article 10 du Projet russe, at 300.

121 Yüksel Inan, 'The Turkish straits and the legal regime of passage', in David D. Caron and Nilufer Oral (eds.), *Navigating Straits: Challenges for International Law* (2014) 199, at 202.

122 Sean McMeekin, *The Berlin-Baghdad Express: The Ottoman Empire and Germany's Bid for World Power* (2012), at 100.

123 Letter of the Soviet Government to the Director of the Institute of International Law, the Hague, 2 April 1924. Reprinted in William E. Butler, *The Law of Treaties in Russia and the Commonwealth of Independent States: Text and Commentary* (2002), at 211.

124 Briefing by Foreign Minister Michelet to Parliament concerning the Russia question, 12 February 1924. Stortinget, *Møter for lukkede dører 1920-1929*, 12 February 1924. See generally the thorough discussion in Patrick Salmon, 'Foreign policy and national identity The Norwegian integrity treaty 1907-24', *Forsvarsstudier* (1993) 1, at 52-53.

of a guarantee treaty, to which Russia had been one of the signatories.[125] That treaty, prompted by Norwegian independence from Sweden in 1905, which had necessitated a new treaty to replace its 1855 predecessor,[126] was designed 'to prevent the western extension of Russia'.[127]

The Norwegian argument referred to changes caused by the signing of the Covenant of the League of Nations, but also added changes of circumstances brought about by the First World War, the Versailles Treaty, and the Russian Revolution.[128] Haraszti observes that '[t]he interested powers, without any objection, admitted the Norwegian position and agreed to the termination of the treaty.'[129] However, like other writers,[130] he has apparently overlooked that the note did not refer to Soviet acceptance.

Indeed, confidential deliberations in the Norwegian parliament reveal that Norway considered denouncing the treaty at least as early as in 1916.[131]

During confidential deliberations in 1923, the Minister of Foreign Affairs informed parliament that the Soviet Union had in fact responded negatively in a note dated 25 October 1922.[132] First, it had informed Norway that since it was not party to the Versailles treaty, this development was not relevant. Second, it noted that

> while it did not deny that the developments over the last three years, especially the fall of the Tsar government and the taking of power in Russia by workers and peasants, has entailed changes of considerable importance for the status quo of global politics, it has to make it clear that from a formal point of view it is not possible for it now to accept that

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125 Treaty between the United Kingdom, France, Germany, Norway, and Russia respecting the Independence and Territorial Integrity of Norway (1907), by the governments of the United Kingdom, France, Germany, Norway, Russia, Signed at Oslo on November 2, 1907 and reprinted in 2 *The American Journal of International Law Supplement: Official Documents* (1908) 267.

126 According to a contemporaneous editorial in the American Journal of International Law, the rationale of the earlier treaty, which had been signed between the united Kingdoms of Norway and Sweden, France and Great Britain, had been very much tied to Russia's naval ambitions, namely to 'prevent Russia from acquiring a foothold in Norway and Sweden, and thus to confine it to the East of the Baltic'; Edvard H. Strobel, 'The Integrity of Norway Guaranteed', 2 *The American Journal of International Law* (1908) 176.

127 *Ibid*., at 178.

128 See Norvège, "Dènonciation du traité relatif à l'intègritè de la Norvège du 2 novembre 1907", *Revue générale de droit international public*, 2e série (1924) 299, at 301.

129 Haraszti, *supra* note 155, at 27. According to the Norwegian Foreign Minister, one response by France had contained 'considerable polemics' against the reasons Norway provided. As if to illustrate how states in that period employed rebus sic stantibus, France nonetheless referred to Norway and the 1907 treaty as an example of state practice in the *Free zones case*, *supra* note 6.

130 E.g., Garner, *supra* note 233, at 509.

131 The parliamentary minutes of this meeting has supposedly been lost. I have my analysis on what is available in the National Archives of Norway, *Riksarkivet, Utenriksdepartementet*, P12-A, Boks 5543, at 23.

132 Briefing by Foreign Minister Michelet concerning the denunciation of the integrity treaty, 9 June 1923, Stortinget, *Møter for lukkede dører*, 1900-1924, 9 June 1923 (my translation from Norwegian).

those principles have seized to operate which the treaty of 1907 contains regarding the relationship between Russia and Norway.[133]

As we shall later see, this Soviet Union view may not be compatible with its subsequent positions, but the Norwegian approach may perhaps also not be easily squared with what it expressed later.

Going back to the straits, the Greek-Turkish war was settled by the Lausanne treaty of 1923. Hereinafter, the straits question became regulated by the separate Lausanne Straits Convention, which included demilitarisation. Following inter alia increased militarisation by Italy in the South Aegean Sea, it was then Turkey, in April 1936, which successfully invoked rebus sic stantibus in diplomatic notes to the other treaty parties.[134] On 22 June 1936, a conference convened in Montreux, and a new treaty, the Montreux Convention, was signed on 20 July 1936 and came into force on 9 November 1936.[135] In D below, I will first discuss the Soviet Union's approach to this Treaty and the straits question. I will then return to the high North and the Soviet Union approach to the Svalbard Treaty.

D. Revolutionary Rags to Riches: Renegotiating the Montreux Convention and the Svalbard Treaty

1. Soviet and the Montreux Convention

At the beginning of the Second World War, the friendship of neutral Turkey, had been sought by both the Soviet Union, Germany, and the Allied Powers.[136] At least from 1943, the Soviets 'engaged in different tactics to raise the Straits question in inter-allied conferences and tried to convince Britain and the United States that there was a need to change the Montreux Convention for a new regime which would satisfy Moscow.'[137] While Turkey would decide in February 1945 to declare war on Germany and Japan, key meetings concerning its affairs had already been held without its involvement.[138]

[133] The note was read (in Norwegian, my translation). See Briefing by Foreign Minister Michelet concerning the denunciation of the integrity treaty, 9 June 1923, Stortinget, *supra* note 145.
[134] Inan, *supra* note 133, at 204.
[135] Montreux Convention.
[136] Bulent Gokay, *Soviet Eastern Policy and Turkey, 1920-1991: Soviet foreign policy, Turkey and communism* (2006), at 51.
[137] Mustafa Sitki Bilgin and Steven Morewood, 'Turkey's reliance on Britain: British political and diplomatic support for Turkey against Soviet demands, 1943–47', 40 *Middle Eastern Studies* (2004) 24, at 29.
[138] Gokay, *supra* note 149, at 56.

Thus, one of the most important talks for the future course of post-war international order had taken place in secrecy in the Kremlin on 9 October 1944 between Churchill and Stalin.[139] The former spoke at length while Stalin mostly listened. When he finally took the initiative, what he had on his mind was the termination of the Montreux Convention, which gave Turkey control over the two narrow straits, the Bosporus and the Dardanelles, which provide access to the Mediterranean and the Aegean Sea from the Black Sea. Just like we have seen in the previous century, gaining control over these straits was of fundamental importance for the Soviet Union. Now, it furthered the Soviet defensive policy of deterring 'the United States and Britain from taking any advantage from their enormous maritime superiority' as well as to project the image of a new superpower.[140]

However, Stalin agreed that 'Turkey had to be brought along gradually',[141] meaning that what he sought may have been agreement in accordance with international legal principles such as consent, though not necessarily with the terms of the treaty. Stalin repeated this claim at Yalta, specifying that the Montreux Convention was 'now out of date', partly because Japan was one of the parties to it, and because it 'was made at a time when relations between Britain and Russia were not very good. Now that is all changed. I do not think that Great Britain would with the help of the Japanese want to strangle Russia.'[142] Roosevelt apparently did not refuse this,[143] and Churchill expressly supported the revision of the treaty both at Yalta and at Potsdam.[144]

While it later became clear that Anthony Eden had argued forcefully that it was unwise to accept the Soviet claim without getting something in return, Churchill did not listen to this advice. In fact, Eden had probably made this argument on the basis of information from the British ambassador to Turkey, Sir Hughe Knatchbull-Hugessen. He had indicated in a diplomatic cable that the Montreux Convention was 'moribund and would require revision'.[145] That said, Churchill was perhaps not so much 'under Stalin's Spell', as Eden later wrote, but rather, he was of the opinion

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[139] This was the so-called 'percentages' agreement, where Churchill and Stalin allegedly divided spheres of interest between the two countries on a napkin. See e.g., Albert Resis, 'The Churchill-Stalin Secret 'Percentages' Agreement on the Balkans, Moscow, October 1944', 83 *The American Historical Review* (1978) 368.

[140] Bryan Ranft and Geoffrey Till, *The Sea in Soviet Strategy* (2nd ed., 1989), at 99.

[141] Resis, *supra* note 153, at 374.

[142] Serhii M. Plokhy, *Yalta: The Price of Peace* (2010), at 281.

[143] However, the American Secretary of State, Edvard Stettinius, had in a prior meeting with Anthony Eden said that Montreux 'has worked well' and that changing it substantially 'would violate Turkish sovereignty and affect adversely the strategic and political balance in the Balkans and the Near East.' Nicholas Tamkin, *Britain, Turkey and the Soviet Union, 1940–45: Strategy, Diplomacy and Intelligence in the Eastern Mediterranean* (2009), at 170.

[144] Plokhy, *ibid.* See also Tamkin, *ibid.*, at 182 and Diana Preston, *Eight Days at Yalta: How Churchill, Roosevelt and Stalin Shaped the Post-War World* (2019), at 182.

[145] Tamkin, *supra* note 159, at 167.

that refusing the Soviets the legitimate rights of a great power would have been 'like breeding pestilence.'[146]

What Stalin did, instead, was what a contemporary participant who went by the name of Josef Goebbels in his diary entry on 22 March 1945 deemed 'ausserordentlich interessant'.[147] This was written when Goebbels heard the news that the Soviet Union two days before had revoked its Treaty of Friendship and Neutrality with Turkey.[148] In particular, like us, he was interested in the reason given for this termination. He observed that the Kremlin declared that it was interested in keeping a 'solid relationship of friendship with Turkey', but as the circumstances had changed during the war, the relationship between the two States had to 'be revised accordingly.'

In Goebbels' opinion, this meant

> that Stalin thinks that the moment has now come to lay hands on the Dardanelles. Turkey has therefore reaped no advantage from declaring war on us at the Anglo-American behest and consequently appearing as a belligerent power. The Kremlin has not allowed itself to be affected by this at all.[149]

As the historian S. M. Plokhy put it, 'Goebbels was able to read Stalin's mind to a degree that few Western leaders could match.'[150]

Again from the theoretical approach of III.A above, and similar to the attempt to directly bilateralise the renegotiation of the Treaty of Paris of 1856, as discussed in III.B above, this move by Russia can be seen as an attempt to terminate the bilateral treaty in order to obtain a better bargaining position in the multilateral treaty. Again, it took place following a considerable shift in its favour in the relative power between Turkey and Russia. As a declining power, Turkey would in Meyer's approach theoretically be willing to make concessions. Its improved bargaining position

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146 *Ibid*., at 182.

147 Joseph Goebbels with an introduction by Rolf Hochhuth, *Tagebücher 1945: die letzten Aufzeichnungen* (1977), at 337. See also Plokhy, *supra* note 158, at 282 and at 424, who, with a reference to the English translation of the diaries states that this was written in the diary entry of 21 March, cf. Joseph Goebbels and edited, introduced and annotated by Hugh Trevor-Roper, *The Goebbels diaries: the last days* (1978), at 191, which for some reason, as far as I can see, differs from the German original in this respect.

148 Süleyman Seydi, *The Turkish Straits and the Great Powers: From the Montreux Convention to the Early Cold War, 1936-1947* (2019), at 188.

149 Goebbels, *The Goebbels diaries: the last days, supra* note 161, at 191.

150 Plokhy, *supra* note 158, at 282. That may be true, but Molotov later argued that the larger strategy to get access to the Dardanelles was an overreach by Stalin, who '[i]n his last years got puffed up a bit'. Feliks Ivanovich Chuev*, Molotov Remembers: Inside Kremlin Politics* (1993), at 73, cited *ibid*., at 283.

allowed Russia to pressure Turkey to afford Russia more favourable substantial provisions in the multilateral Montreux Convention.

However, the bilateral treaty would have expired on 7 November that same year anyway, so 'the premature termination of the treaty was meant to threaten' Turkey,[151] and reportedly greatly surprised Ankara.[152] This signal was apparently understood because on 21 March the American Ambassador to Turkey, Laurence Steinhardt, wrote to Secretary of State James F. Byrnes, based on information from 'a certain senior official of the Turkish Foreign Ministry' that the Soviet Union would use this withdrawal to get Turkey to accept a revision of the Montreux Convention.[153]

On 7 June, Turkey learned the 'price that would be extorted for the renewal which they desired' of a new treaty on friendship and neutrality.[154] In addition to ceding certain territories to the Russians, Molotov demanded a revision of the Montreux Convention, which included Soviet Union bases in the straits.[155] As we have seen above, control of this area had been a key Russian foreign policy goal for a long time.

From the perspective set out in III.A, the substantive changes to the Montreux Convention required by Russia were clearly non-Pareto-improving for the other parties to the Convention. This would be the case even if Turkey for security reasons had been willing to accept the broader fait accompli. The approach taken by Russia in itself seems to be clearly in accordance with the prediction that renegotiation may occur when the bargaining power of one party has increased.

However, history shows us why renegotiation did not take place in that particular instance, despite improved bargaining power. Instead of intimidating Turkey, the ultimatum given by the Soviet Union 'created a nationalist backlash', causing Turkey to refuse the Soviet Union's demands.[156] As Zubok puts it, '[t]he ultimatum to Turkey revealed the limits of Stalin's power his Napoleonic hubris prevailed over caution.'[157]

Following the death of Stalin, on 31 May 1953, the Soviet government sent a diplomatic note to Turkey, whereby it officially withdrew the demands of 7 June 1945.[158] Ankara responded on

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151 Jamil Hasanli, *Stalin and the Turkish Crisis of the Cold War, 1945-1953* (2011), at 45.
152 *Ibid*., at 47. Contra, Tamkin, *supra* note 159, at 174.
153 *Ibid.*
154 George C. McGhee, 'Turkey Joins the West', 32 *Foreign Affairs* (1954) 617, at 620.
155 Seydi, *supra* note 4, at 191.
156 Vladislav M. Zubok, *A failed empire: the Soviet Union in the Cold War from Stalin to Gorbachev* (2007), at 39. See also Melvyn P. Leffler, 'Strategy, Diplomacy, and the Cold War: The United States, Turkey, and NATO, 1945-1952', 71 *The Journal of American History* (1985) 807, who emphasises Soviet restraint vis-à-vis Turkey.
157 *Ibid.*
158 McGhee, *supra* note 1170, at note i.

18 July, 'after a calculated delay', and expressed its 'satisfaction' that the Soviet Union considered it had no claims on Turkey. It added that the Turkish Government 'considers it necessary to underline' that the Black Sea straits was 'regulated by the provisions of the Montreux Convention', which is still in force today.[159]

2. Soviet and the Svalbard Treaty

The Soviet actors were involved in similar discussions elsewhere, though under relatively different political considerations. However, it is difficult not to see connections between the situations and the Soviet strategic behaviour. While others have pointed to similarities with respect to Soviet foreign policy objectives,[160] I have not seen discussions whether in the about the similarities in the Soviet treaty strategies, specifically as concerns rebus sic stantibus, but also as concerns threats of termination in order to get the other party to accept renegotiation.

The 1920 Svalbard Treaty governs legal relations surrounding the archipelago of Svalbard in the Arctic Ocean.[161] This multilateral treaty, with currently 40 signatories, was the result of the Paris Peace Conference the year before. It recognises 'full and absolute' Norwegian sovereignty over the archipelago, but limits the ways in which Norway can exercise this sovereignty, such as requiring non-discrimination with respect to nationals of the other parties and restricting the military use of the governed area.[162] The Soviet Government had originally not been party to the treaty, primarily because it was not recognised by the most important parties to the treaty at the time of its entry into force.[163] Partly for this reason, it dispatched several diplomatic notes to the Norwegian government to protest both the treaty and its application in the early 1920s.[164]

In 1924, however, as indicated above in III.C, it informed Norway that it had no objection to the treaty and that it accepted Norwegian sovereignty over the archipelago on the condition of recognition by Norway.[165] It was not until December 1934, after the United States had recognised

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[159] *Ibid.*

[160] E.g., Jacob Sverdrup, *Norges utenrikspolitiske historie Bind 4: Inn i Storpolitikken 1940-1949* (1996), at 263.

[161]. On the treaty in general, see e.g., Geir Ulfstein, 'Spitsbergen/Svalbard', *Max Planck Encyclopedia of International Law* (2019); and Geir Ulfstein, *The Svalbard Treaty: From Terra Nullius to Norwegian Sovereignty* (1995) and on its creation, see e.g., Trygve Mathisen, *Svalbard in International Politics 1871-1925: The Solution of a Unique International Problem* (1954).

[162] For the former, see e.g., Art. 2, 3 and 7. For the latter, see in particular Art. 9.

[163] Mathisen, *supra* note, 178161, at 155. Art. 10 of the treaty addresses this fact.

[164] *Ibid.*, at 155-160.

[165] *Ibid.*, at 168.

the Soviet Russian government, that it was invited to join the Svalbard treaty, which it did the year after.[166]

Some ten years thereafter, in November 1944, Trygve Lie (then Norwegian Foreign Minister, later to become the first Secretary-General of the United Nations) was invited to Moscow. There, he had discussions with the Russian Deputy Foreign Minister, Vladimir Dekanozov, concerning inter alia a possible agreement about making Norwegian ships available for the Soviets.[167] Afterwards, they had lunch with Molotov in 'beautiful surroundings' where the Soviet foreign minister came across as most amiable, and later that evening Molotov also attended a reception at the Norwegian embassy.[168] The next night, however, late on Saturday, Lie and Rolf Andvord, the Norwegian ambassador to Moscow, were called into the Kremlin for yet another meeting, this time with both Molotov and Dekanozov.

First, the Russians went over the same topics that had been discussed the day before. Molotov said that he agreed with most of the Norwegian perspectives. Then, as the meeting was nearing its end, at between two and three in the morning, he suddenly said '[b]ut we have a problem I would like to discuss'.[169]

Just as the Soviet Government would inform Turkey a few months later, (which so greatly would interest Goebbels, III.D.1 above), Molotov now said that things had changed during the war and that the role of the Soviet Union in that respect was well known. While first mentioning the Svalbard and Bear Island,[170] he then stated that the Svalbard treaty had been agreed upon without their participation and was contrary to, and discriminated against, Russian interests. He added that such an unfair treaty could no longer be tolerated and had to be denunciated, and that Norway and the Soviet Union would share sovereignty over Svalbard through a condominium, while Bear Island would go back to the Soviet Union.

The discussion went back and forth a bit, until Molotov added that the Soviet Union had been forced to accept the treaty in 1935. To this, Lie replied, 'By whom? By that small Norwegian nation of about 3 million inhabitants? – or by whom?'[171] Molotov did not respond to this but insisted that it was only the Soviet Union and Norway that had interests on Svalbard, if one did not include

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166 *Ibid*., at 171.
167 Sverdrup, *supra* note 176, at 124.
168 Trygve Lie, *Hjemover* (1958), at 153-154.
169 *Ibid*., at 155.
170 This was revealed in a closed-door briefing by Foreign Minister Lie to Parliament 30 June 1945, made public in 1995 in Stortinget, *Møter for lukkede dører 1939-1945* (1995), at 416.
171 *Ibid*., at 156.

Japan and Italy, again touching a similar argument that would be made towards Turkey about how Japanese involvement in the Montreux convention displayed its obsolete character.[172]

Again, the Russian move can be analysed in accordance with the theoretical approach of III.A above: As Russia had tried to do with the Ottoman Empire in the context of the London Declaration,[173] and which it would repeat a few months later with respect to Turkey and the Montreux Convention,[174] the Russian Svalbard strategy seems to have been to take advantage of its relative increase in bargaining power vis-à-vis Norway. It would do this through an attempt to bilateralise the amendment or denunciation process so that the Soviet-Norwegian agreement, as key stakeholders, could pressure or persuade the other parties to the treaty to accept their proposal.

Molotov then pointed to a map and showed how the Russians were closed off in the Dardanelles and Øresund between Sweden and Denmark. The only possible open sea lane was in the North.[175] Resources from Svalbard, including coal, had been important in the later part of the war in the north of Norway.[176]

However, the talks ended amicably, although as Lie would note in his memoirs, Molotov and Dekanozov were uncertain whether they had chosen the correct approach with the late-night meeting. Back at the hotel, the Norwegians worked for a few hours before they went to sleep for an early flight the next morning. Shortly after he fell asleep, Lie awoke when someone was in his hotel room, going through his jacket, where he had left the notes from the meeting. The man explained that he had to get it cleaned, though this had not been requested by Lie.[177]

After the meeting, Molotov immediately ordered his subordinates to find 'all documents' which might explain why in 1935 the Soviet Union had decided to sign the Svalbard Treaty under its then terms, 'the result [of the inquiry] to be reported *to me'*.[178] In making this request, Molotov was, as Holtsmark puts it, 'apparently unable to understand his predecessors' motivations'.[179] Whatever they were, in forgetting to inform their successor about their plans, they help us illuminate one of

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172 *Ibid*., at 158.
173 See *supra* note 10098 and accompanying text.
174 See III.D.1 above.
175 Lie, *supra* note 168, at 159.
176 Sverdrup, *supra* note 176167, at 136.
177 Lie, *supra* note 168, at 160.
178 Sven G. Holtsmark, 'A Soviet Grab for the High North USSR, Svalbard and Northern Norway 1920-1953', 7 *Institutt for forsvarsstudier* (1993) 64 (emphasis in the original).
179 *Ibid.* From the perspective of the present author, having spent some time as a ministry of foreign affairs lawyer, it is hopefully not improper to reveal concurrence in that full information of negotiation history and original strategy is not necessarily always available.

the weaknesses with the ex-ante power-shift calculating approach of Meyer.[180] States and other organisations may not excel in executing long-term strategies concerning anything more than a select few, highly prioritised areas.[181] The problem with this approach when it comes to a State's international agreements is that they are often relatively mundane, until they might become important decades later.

The Norwegian government established a high-level committee, including some of its leading international lawyers, Arnold Ræstad and Eric Colban. They contemplated several different responses, including not responding at all. However, the initial response was not only polite, but also positive, and the Soviet suggestion to bilateralise the treaty discussions was accepted, which the United Kingdom and the United States were informed of later. The Norwegian position included an acceptance of the Soviet demand to amend or remove Article 9 on the demilitarisation of the Archipelago, though this was conditioned on acceptance from the other parties.[182]

According to Lie, who was still foreign minister, the group was making its decision acutely aware of considerable Russian troop presence in the north of Norway and assumed that the Russians were acting out of security concerns.[183] When this offer was met with mostly the same demands from Molotov, Norway came up with a new proposal to amend the whole treaty.

Following discussions back and forth over a couple of months Molotov responded that they agreed to the Norwegian proposals and requested the denunciation of the Svalbard treaty altogether, which was not at all what Norway had suggested. Still, the months went without any decision being

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[180] Meyer, *supra* note 60. Quite different from the process of planning, successfully negotiating strategically optimal withdrawal or renegotiation provisions and decades later executing a renegotiation process from a better bargaining position is of course a state's ability to utilize treaty terms strategically ex post. In the latter case it is the state's improved bargaining power that allows it to revisit its agreements whereas in the former it is its expectation that it will improve in the future that informs its negotiation position.

[181] To dwell in the same area: As far as is known publicly, Russia has not tried to renegotiate the Svalbard agreement since the 1940s, even though it now must be aware of potential Norwegian bargaining willingness during times of stress.

[182] Sverdrup, *supra* note 176, at 142; Lie, *supra* note 185, at 163-165.

[183] See also Østreng, who notices that the Soviet government may have been acting under the misperception that the United Kingdom had stationed troops on Svalbard, making it important for the Soviet Union to improve its ability to project power in the area. His source for this is merely a conversation in 1947 between two relatively low level Soviet and Norwegian officials, however. Such occupation would possibly also have been a breach of Article 9 by the United Kingdom. Willy Østreng, *Det politiske Svalbard* (1975), at 70-71. President of Parliament, C.J. Hambro even confirmed such a breach by Norway in a closed session in parliament and that due to the war, some provisions of the treaty were no longer in accordance with the times. See Den utvidede utenriks- og konstitusjonskomite, meeting 26 juni 1945, at 6-7. Thus, the Soviet Union may have been responding to a perceived breach with an exit/renegotiation strategy. In a similar vein, it has been argued that Turkey may also have acted in breach of the Montreux convention, possibly prompting similar Soviet considerations. See Süleyman Seydi and Steven Morewood, 'Turkey's Application of the Montreux Convention in the Second World War', 41 *Middle Eastern Studies* (2005) 79.

made. On 31 March 1945, the Norwegian Ambassador to Moscow, Andvord, told Molotov that Norway was willing to negotiate about the defence of Svalbard and about annulling the Svalbard Treaty 'in observance of international law.'[184]

Andvord suggested that he might get the Norwegian government to accept a common declaration with the Russians, which Molotov agreed to. Such a declaration was then drafted by Norway 'to keep the initiative', rather than, as one could expect, trying to stall the agreement in the expectation that Norway would be in a better relative bargaining position after the war, and thereby possibly extract concessions they thought less harmful.[185]

This draft declaration was given to Molotov on 9 April 1945.[186]

Holtsmark has seen the internal Soviet discussions about this draft declaration. According to two Commissariat bureaucrats, he explains, 'the declaration should contain a statement to the effect that the Paris Treaty could no longer be considered valid, and that Norway and the Soviet Union should declare the Treaty abrogated.' [187] It is unclear whether this argument would be based on rebus sic stantibus, withdrawal of the two parties, or if the idea was that two parties to a multilateral treaty could consent to declare it abrogated with effect for the other parties well.[188]

From the perspective set out in III.A, the substantive changes proposed by the draft declaration upon the Svalbard Treaty would seem to be non-Pareto-improving, i.e., while they clearly improved the situation for Russia, they made other powers worse off. In particular, this would be the case with respect to the deletion of Article 9, the non-military clause, and the proposal for Norwegian-Russian defence cooperation.[189] However, the preamble to the declaration did emphasise that neutralisation was 'in direct conflict with the interests of the two countries', suggesting (or pretending) that the amendment would be Pareto-improving in the bilateral relationship between Norway and Russia. The approach taken by Russia and Norway's response seems to be clearly in

[184] Sverdrup, *supra* note 176, at 145.
[185] Meyer, *supra* note 60, at 380.
[186] Stortinget, Møte for lukkede dører i Stortinget, 13 June 1946, at, at 16.
[187] Holtsmark, *supra* note 195, at 75-76.
[188] Compare Art. 54 (b) VCLT, which provides: 'The termination of a treaty or the withdrawal of a party may take place (…) [a]t any time by consent of all the parties after consultation with the other contracting States.' Indeed, according to Lundestad, the State Department had indicated to Norway that Norway and the Soviet Union could not on their own change the Svalbard Treaty. Geir Lundestad, *America, Scandinavia and the Cold War 1945-1949* (1980), at 69.
[189] It may of course in principle be argued that Article 9 was contrary to broader strategic interests of the other parties and that removing it was therefore pareto-improving, though that argument will not be advanced here.

accordance with the prediction that renegotiation may occur when the bargaining power of one party has increased.

However, and in contrast to the claim that a prominent historian has recently made about Svalbard (Spitsbergen) and Bear Island having 'been ceded to the Soviets',[190] no response ever came from the Soviet Union. It is possible that the issue never had been that important. It could also have been a tactical approach, as the State department suggested in an internal memo from July 1945, to get a better position in case the United States or the United Kingdom would establish bases on Iceland or Greenland.[191]

It could also merely have been a way to test Norwegian responses for other purposes.[192] Of course, it could also be that the Soviet foreign policy apparatus had more important matters to attend to immediately after the end of the war, or that at the time it wanted to focus its negotiations with the United Kingdom and the United States on other matters, not alerting them to any ambitions in the Arctic.[193] Whatever it was, a few months later the Soviet Union troops withdrew from Norway.

The Soviet Union revisited the question in discussions in 1946 with the new Norwegian foreign minister Halvard Lange in Paris and New York. In June 1946, leading politicians argued in closed-door meetings in the Norwegian Parliament that

> The Soviet Union has raised the question about revision of the treaty, and it is evident that we, when this issue has arisen, must take a positive position. I believe, however, that we in this context must say that we cannot accept any revision which entails restricting or in any other way curtailing our current rights when it comes to the issue of sovereignty or the commercial exploitation of Svalbard, primarily the coal operations.[194]

In a letter to the British Prime Minister Clement Attlee, the British Ambassador to Norway, Lawrence Collier, considered the Soviet approach 'a remarkable interpretation of the doctrine of rebus sic stantibus'.[195] Exactly why it was considered so remarkable is not entirely clear. Indeed,

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[190] Norman M. Naimark, *Stalin and the Fate of Europe: The Postwar Struggle for Sovereignty* (2019), at 47, referring to (but possibly misinterpreting) a telegram from the Ambassador in Norway to the Secretary of State, 5 July 1945 contained in William Slany, *Foreign Relations of the United States: Diplomatic Papers 1945, Europe*, Vol. V, 91.

[191] Memorandum by the Acting Chairman, State-War-Navy Coordinating Committee (Hickerson) SWNCC 159, 13 July 1945, in Slany, *supra* note 208, at 94 (Memorandum Hickerson).

[192] Sverdrup, *supra* note 176, suggests several such possibilities.

[193] Holtsmark, *supra* note 153, at 75-76.

[194] Stortinget, *Møte for lukkede dører i Stortinget*, 13 June 1946, at 3 (my translation).

[195] Sir L. Collier (Oslo) to Mr Attlee, 26 November 1946 No. 416 Secret (FO 371/56287, N15346/220/30), reprinted in Tony Insall and Patrick Salmon (eds.), *The Nordic Countries: From War to Cold War, 1944–1951* (2011), at 147-150.

Norway had made an argument that was not entirely different with respect to the 1924 denunciation of the 1907 guarantee treaty, and this had been accepted by the United Kingdom. However, as discussed in III.D.1 above, the Soviet Union did make a rebus sic stantibus argument with reference to changed conditions after World War II. Had they made the same reference with respect to the Svalbard Treaty it might well have worked, albeit primarily from a political perspective rather than a legal one.

Now, the Norwegian calculations seem to have changed somewhat due to both international and domestic factors. In light of the approach of III.A, it is submitted that these factors may have increased Norway's relative bargaining power vis-à-vis the Soviet Union. First, the Soviet Union troops were no longer present in Norway, which meant that Norway no longer had to bargain so clearly in the shadow of the Soviet military might. Second, the negotiations became known to the wider public, which may have increased the domestic costs of the earlier strategy. Third, the United Kingdom and the United States both became more fully aware of the Soviet Union's demands,[196] but at least the former did not show that much interest. On the part of the United Kingdom, this was probably because it did not, somewhat surprisingly in my view, consider Svalbard to be of much strategic value.[197]

[196] The letter from Collier, to Attlee indicates that Collier, who had been the British Ambassador to Norway also while the Norwegian government was in exile in London during the war, was not aware of the Soviet attempts to persuade Norway to accept the renegotiation or denunciation of the Svalbard treaty during the war. When he was informed by Lange in 1946 of the renewed attempt from Soviet to persuade Norway to accept such changes, he appears to have believed that this was a new Soviet approach and that it was connected with or even caused by the failed Russian attempt to persuade Turkey to amend the Montreux convention rather than part of larger strategic considerations. He was also under the impression that the Soviet claims 'came as an unpleasant surprise not only to the Norwegian Government as a whole, but in particular to him in person.' Sir L. Collier (Oslo) to Mr Attlee, 26 November 1946, *ibid.* Lange was very much aware of the Russian requests prior to November 1946 and had in fact been engaged in thorough discussion with other members of the new Norwegian government as well as those of the earlier exile government, including Lie and others whom he met in New York to discuss the issue before he met with Molotov, see Sverdrup, *supra* note 176, at 268 *et seq*. Had Collier known that, or the extent to which, the Soviet Union had in fact sought to persuade Norway more than two years earlier, his analysis would likely have been quite different. This might again have influenced British pressure on Norway vis-à-vis Soviet from around 1947. However, parts of the British Government, and the United States, was informed by the Norwegians about the Soviet positions already in 1944/451945. See Letter from Mr Hankey to Group Captain Stapleton (Cabinet Office), 16 December 1946, Top Secret (FO 371/56287, N15346/220/G), reprinted in Insall and Salmon, *supra* note 218, at 152-153. The British Ambassador to Moscow, Archibald Clark Kerr, had been told about the matter by the Norwegian Ambassador Rolf Andvord in 1945, (contrary to Trygve Lie's instructions). Reportedly, Collier had been briefed on the matter later in 1945, but this knowledge does not seem to be reflected in his 1946 letter to Attlee. See Insall and Salmon, *supra* note 220. Further, the United States Ambassador to Norway informed the State Department about the Soviet demands on 6 July 1945. See Memorandum, *supra* note 2118. This is also corraborated by in camera information from the Norwegian Minister of Foreign Affairs to Parliament, see Stortinget, *Møte for lukkede dører, 16 J*anuary 1947, at 26.

[197] Sverdrup, *supra* note 176, at 268.

Whether due to increased bargaining power on the Norwegian side or something else, after closed-door discussions in parliament, the Norwegian government finally decided in 1947 not to continue the discussions with the Soviet Union regarding revision of the treaty to allow military cooperation on Svalbard. It did suggest in a letter to Moscow that it thought renegotiating the economic aspects would be a good idea. This letter elicited no response from Moscow and the treaty remained unchanged.[198] More than a hundred years after its entry into force, it has remained unaltered even faced with considerable changes in world politics.

IV. The Russian Exit and Renegotiation Strategy through Rebus sic Stantibus

This is not the place to consider the strategic implications and considerations of these three case studies in full depth.[199] Still, it should be mentioned that whatever the motivations, Russia's behaviour in these three episodes here seems from a more general perspective to be consistent with a sophisticated variant of seeking to maximise its relative gains. In international relations theory it is sometimes assumed that for insecure States 'faced with the possibility of cooperating for mutual gain' it is important to ask how the gain will be divided. Such States 'are compelled to ask not "Will both of us gain?" but "Who will gain more?"'[200]

In light of the approach introduced in of III.A, shifts in power and the resulting development of outside options in my view shed considerable light on Russian behaviour. The lack of useful treaty provisions may explain why it chose to rely on rebus sic stantibus ex post in order to obtain a renegotiation. This may also shed light on how States have relied on rebus sic stantibus when other formal treaty options are not available or not useful in order to exit or renegotiate. This is something which future scholarship on rebus sic stantibus could usefully look into. Moreover, it also shows that rebus sic stantibus is a mechanism which has largely been overlooked by the rational design scholarship.

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[198] Østreng, *supra* note 201, at 73 suggests that the lack of a response from the Soviet Union was due to their being informed after the war that there were not and had not been any military occupation there during the war, which again indicated that Norway was willing to uphold the Svalbard treaty even during an emergency and that, consequently, there was little reason to amend the treaty. This theory cannot be ruled out, but in my view there is little evidence that supports this. At any rate, seeing how quickly Norway gave in to Soviet demands during the war, however, one could reasonably question the solidity of such strategic analysis.

[199] I shall limit my observations to noting that it is in my view likely that Eriksen is correct in arguing that the Soviet Union in the Svalbard question 'undoubtedly' would have the chance to benefit from a tough foreign policy. See Knut E. Eriksen, 'Norge i det vestlige samarbeidet', in Trond Berg (ed.), *Vekst og velstand: Norsk politisk historie 1945-1965* (1989) 167, at 187. Perhaps an approach similar to that Soviet tried against Turkey would have fared better here.

[200] Kenneth Waltz, *Theory of International Politics* (1979), at 105.

Here, Russia voluntarily sought to withdraw from treaties and forfeit the cooperation benefits at a time when it was seeking to reposition itself after the wars. While this study has examined only one State, this focus has involved episodes in which the dynamics of power of that State has shifted considerably. While it is of course difficult to make general conclusions from this approach alone, it is illustrative in many respects.

First this may show not that States will not cooperate, but simply that they may stop doing so, or at least fundamentally amend the way in which they are doing it, when their calculations change about their relative power. It also shows how States do not have to respond with breach in order to achieve such benefits. Furthermore, it shows how cooperation can be beneficial in the short-term, closely resembling an absolute gain position, but when the relative strength and position of a State improves over time, its calculations change as well. In the examined episodes, this allowed Russia to manage the interaction between short-term and long-term incentives by cooperating when it was relatively weaker (it entered both the Svalbard Treaty and the Montreux Convention in the mid-1930s) and seek to defect or renegotiate when it had become stronger, without facing costs (or at least lower costs) from non-cooperation.[201]

Using a potential bilateral treaty with the Ottoman Empire, exit of the separate bilateral treaty of friendship and neutrality with Turkey, and the threat of exit with Norway to renegotiate rather than simply breaching the agreements when its preferences changed would have allowed Russia to bilateralise the renegotiation process of the Treaty of Paris, the Montreaux Convention, and the Svalbard Treaty respectively. In taking this approach, Russia could expect to achieve a better bargaining outcome because it could negotiate with Turkey and Norway individually instead of with all the parties to the respective treaties. Indeed, as referred in I above, Russia seemingly sought to bilateralise discussions with Norway over the Svalbard Treaty the 100th anniversary of the treaty. On the other hand, had Russia instead simply conducted a breach of either of these treaties in order to not comply with obligations at odds with its foreign policy preferences, this could have been signalled to all the other parties, making this strategy more difficult and noisy.[202] Furthermore, this strategy of bilateralisation would allow it to get a better bargaining outcome vis-à-vis some of its larger competitors, in particular France, the United Kingdom, and the United States.

Why neither of these strategies have worked effectively, or why they have not been tried again, at least in this form, in the many years which have passed with the treaties still in force, will have to

[201] This behaviour appears to be consistent with Meyer's predictions, see *supra* note 60.
[202] Especially as Norway decided to not inform the United States and the United Kingdom until at a later stage.

remain an open question. In Meyer's framework as explored in of III.A, it is mainly 'states with little to gain from existing rules' which are 'powerful'.[203] This is because their outside options 'present them with credible threats to walk away from existing rules of cooperation.' The conclusion that an ascending great power such as Russia was not powerful at the relevant time periods analysed with respect to the Montreux Convention and the Svalbard Treaty would seem to be counterintuitive.

However, this may indeed be the case in the specific sense that Russia considered, and still to this day considers, that it had no better outside options. First, for the State parties to the Montreux Convention and the Svalbard Treaty respectively, this would seem like very important insights indeed, especially given potential, recent interest of Russia in obtaining renegotiation. Second, on a general level, this would seem to indicate that it may be difficult to successfully employ the renegotiation technique which is examined by Meyer as well as in this paper, at least in the context of multilateral treaties. Again, even if the attempt to bilateralise the renegotiation discussions with the Ottoman Empire was unsuccessful, Russia did achieve what it wanted through the London Declaration. It would generally seem that this bilateralised approach to obtain renegotiation of multilateral agreements is a powerful technique that has received little scholarly attention. This is the case whether it is done as part of a rebus sic stantibus approach, as has been the case in the present case studies, or not. It is also the case regardless of whether it is done through an outside treaty such as was the case with the friendship and neutrality treaty between Turkey and Russia or directly targeting one relative declining power to a multilateral agreement in order to obtain renegotiation, such as was the case with Norway and the Svalbard treaty.

It is not clear exactly why Russia succeeded with its bilateralisation approach in the first instance but did not ultimately later succeed with respect to the two other treaties. Future research may therefore examine when and under what conditions renegotiation actually occurs, relying on Meyer's approach, but examining instances of both successful and failed renegotiation attempts by States. This illustrates that the richness and complexity of international relations are not easily predicted or analysed through rational choice scholarship alone. However, such approaches, in addition to providing a wealth of valuable insights in and of themselves, may also usefully provide

[203] Meyer, *supra* note 60, at 383. However, he notes elsewhere that 'bargaining power will also depend on a number of political and economic factors not directly accounted for in the formal provisions of an agreement.' *Ibid.*, at 405. This means that it may be difficult to discern the exact elements which contribute to bargaining power in his approach.

an important lens through which to conduct structured historical analyses of the international legal behaviour of States.

From a longer perspective than that examined directly here, it is striking how often the treaty relations in these important regions were challenged by great powers, but nonetheless endured. The Svalbard Treaty and the Montreux Convention are still good law. It is useful to contrast these surviving treaties with other treaties which govern even more essential security interests, namely arms control treaties.

Here, like in our historical case studies, bargaining typically often take place through exit or threats of exit. However, unlike in our historical examples, arms control treaties are hyper rationally designed. They contain highly specialised set of withdrawal clauses, which not only 'differ significantly from withdrawal provisions in treaties in other substantive areas of international law',[204] but these withdrawal clauses often operate in a similar (though not identical) manner to rebus sic stantibus.[205]

In this particular area, the United States and Russia have over the last years been engaged in a race to unravel the very legal regimes they put in place to avoid an arms race between them. For instance, in 2016, Russia suspended a treaty with the United States concerning the Management and Disposition of Plutonium ('PMDA').[206] According to Russia:

> [t]he first and most important reason is unilateral unfriendly actions of the United States, which have resulted in a fundamental change of circumstances compared to those existing at the time when the treaty was concluded and created a threat to strategic stability. This is the reason for the suspension of the PMDA in accordance with Article 62 of the [VCLT].[207]

[204] Daniel H. Joyner and Marco Roscini, 'Withdrawal from Nonproliferation Treaties', in Daniel H. Joyner and Marco Roscini (eds.), *Non-proliferation Law as a Special Regime* (2012) 151, at 168.
[205] For a comparison of such clauses and rebus sic stantibus, see e.g., *ibid.*, at 155-159.
[206] The Agreement between the Government of the United States of America and the Government of the Russian Federation Concerning the Management and Disposition of Plutonium Designated as No Longer Required for Defense Purposes and Related Cooperation, signed at Moscow and Washington on 29 August and 1 September 2000 and entered into force on 13 July 2011, available at https://2009-2017.state.gov/documents/organization/213493.pdf.
[207] Russia's assessment of the US Department of State's Report on Adherence to and Compliance with Arms Control, Nonproliferation, and Disarmament Agreements and Commitments, Press Statement 24 April 2018, available at https://www.mid.ru/en/web/guest/maps/us/-/asset_publisher/unVXBbj4Z6e8/content/id/3192916.

On 2 August 2019, following suspension by United States and then Russia of the so-called Intermediate-Range Nuclear Forces (INF) Treaty, the United States' subsequent withdrawal took effect. It came as a response to an alleged prior material breach by Russia, as stipulated by Article 60(1) VCLT.[208]

Moreover, United States submitted its notice of withdrawal the Opken Skies Treaty on 22 May 2020, again citing Russian non-compliance on a range of issues, which it is interesting to compare with our historical studies.[209]

The suspension of the CFE Treaty was enacted in 2007 following a decree by President Putin, which 'explained the decision to indefinitely suspend Russia's treaty obligations as caused by "extraordinary circumstances" that "affect the security of the Russian Federation and require immediate measures".' According to the *New York Times*, these 'extraordinary circumstances' (which is not casual phrasing but reflects the exit clause of the CFE Treaty),[210] relate to previous cases of non-compliance by NATO states.[211] Thus, while this seems to be an example of Russia trying at least in part to rely on the terms of the treaty to avoid performance of legal obligations when circumstances changed, the United States nonetheless responded with an exit of its own. Thus, also rationally designed treaties can lead to outcomes which are not as clean as their design should entail.

The New START (Strategic Arms Reduction Treaty) may offer a more positive outlook. Pursuant to its Article XVII that treaty were to expire in February 2021, but has been extended for five

[208] Michael R. Pompeo, *U.S. Withdrawal from the INF Treaty on August 2, 2019 (Press Statement)*, 2 August 2019, available at https://www.state.gov/u-s-withdrawal-from-the-inf-treaty-on-august-2-2019/, noting that 'Russia subsequently and systematically rebuffed six years of U.S. efforts seeking Russia's return to compliance. With the full support of our NATO Allies, the United States has determined Russia to be in material breach of the treaty.' For Russia's response, see RT, 'Russia suspends INF Treaty in 'mirror response' to US halting the agreement', 2 February 2019, available at https://www.rt.com/news/450395-russia-suspends-inf-treaty/.

[209] Dinnano, *supra* note56.

[210] Art. XIX (2) Treaty on Conventional Armed Forces in Europa 1990, (CFE Treaty), reads: 'Each State Party shall, in exercising its national sovereignty, have the right to withdraw from this Treaty if it decides that extraordinary events related to the subject matter of this Treaty have jeopardised its supreme interests.' The withdrawal provisions of arms control treaties often contain similar language.

[211] Andrew E. Kramer and Thom Shanker, 'Russia Steps Back From Key Arms Treaty', *The New York Times*, 14 July 2007.

years.[212] However, it seems clear that these arms control issues are not resolved in the longer term. How they and other great treaty games in international politics will play out remains to be seen. It is however to be expected that it will involve bargaining through sophisticated strategic use of international legal instruments, political arguments resembling legal argumentation as well as crude power politics.

As we have seen in the historical case studies examined here, when substantive treaty rules constitute an obstacle to the key foreign policy and national security interests of a great power over decades, the ingenuity and energy with which such states will bargain in order to overcome these obstacles or to obtain a relative advantage over adversaries and competitors is considerable. However, this ingenuity and energy is often employed in the form of formal discussions over international agreements, as diplomacy draped in legal argument, a threat veiled by a treaty. But this has not only been a study about how great powers use international legal arguments to further their preferences and interests. Underneath, given the raw might often at display in world politics, this is a study which also shows the durability, normative force, and relevance of a specific set of treaties in international relations, even as they have been subject to the notorious doctrine of rebus sic stantibus, that popular plaything of realpolitiker. Rather than being weak and vulnerable, mere scraps of paper, these treaties may yet survive us all.

[212] See Anthony J. Blinken, *On the Extension of the New START Treaty with the Russian Federation (Press Statement),* 3 February 2021, available at https://www.state.gov/on-the-extension-of-the-new-start-treaty-with-the-russian-federation/.