Treaty Exit and Intrabranch Conflict at the Interface of International and Domestic Law

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Abstract and Keywords

This chapter considers two important and unresolved issues raised by the unilateral withdrawal from or denunciation of treaties. The first issue concerns whether treaty obligations end in both international and domestic law after a state leaves a treaty. Exit often produces the same effects in both legal systems, but some withdrawals bifurcate a treaty's status, ending its obligations in domestic law but continuing to bind the state internationally, or vice versa. The second issue concerns denunciations initiated by different branches of government. The decision to withdraw from a treaty is usually carried out by the executive acting unilaterally. Less well known, but potentially more fraught from a foreign relations perspective, are instances in which the impetus for exit originates with legislators or judges. Conflicts involving both dimensions of treaty exit stem from a common source—the different domestic and international rules governing how states enter into and leave treaties and the divergent policies that underlie those rules. The chapter develops a typology to categorize these conflicts, drawing upon examples of actual and potential treaty denunciations in several countries.

Keywords: treaty withdrawal, treaty denunciation, treaty exit, treaty survival, domestic status of treaties, intrabranch conflicts

THE rise of nationalist populism around the world has triggered a range of backlashes against existing laws and institutions. Included among these are calls for states to unilaterally withdraw from treaties and international organizations. The legal and political stakes of exit are especially high when a state leaves a treaty that is deeply embedded in its national legal system (such as the United Kingdom's "Brexit" from the European Union), that creates a multilateral institution (such as African states withdrawing from the Rome Statute creating the International Criminal Court (ICC)), or that is widely viewed as a pillar of the global legal order (such as the United States' notice of intent to withdraw from the Paris Agreement on Climate Change and statements by President Donald Trump that he may consider withdrawing from the World Trade Organization (WTO),

North American Free Trade Agreement (NAFTA), and North Atlantic Treaty Organization (NATO)).[1]

These and other treaty denunciations raise important and unresolved questions of foreign relations and international law. These legal issues can be charted along two distinct axes. The first concerns whether treaty obligations end or continue under international and domestic law. In many instances, a state's withdrawal affects the treaty's status in both legal systems in the same way. For example, Parliament's approval of Brexit following the U.K. Supreme Court's decision in *R (Miller) v. Secretary* (p. 356) *of State for Exiting the European Union*,[2] and the legislation to be enacted prior to the United Kingdom's departure from the European Union, together mean that the Treaty on European Union will no longer have legal force—under either international or domestic law—on the date that the withdrawal takes effect. Conversely, *Democratic Alliance v. Minister of International Relations and Cooperation*,[3] the South African High Court ruling abrogating the executive's notice of withdrawal from the ICC, resulted in the continuation of South Africa's obligations under both the Rome Statute and its domestic implementing legislation.

The domestic and international status of a treaty do not always shift in tandem as a result of exit. As examples discussed in this chapter reveal, withdrawal can bifurcate a treaty's legal status, abrogating obligations in domestic law that continue to bind the state under international law. And the converse situation—in which a state validly quits a treaty according to its terms but remains bound as a matter of domestic law—is also plausible.

A second dimension of treaty exit concerns the relationship among the branches of government. In most instances, the executive decides whether to denounce a treaty. But the impetus for withdrawal—or actions that make exit more likely—can also originate with judges and legislators. In several cases, courts have invalidated the executive's prior accession to a treaty, or a declaration relating to it, forcing the political branches to choose between exiting the treaty, curing the violation, or breaching its international obligations. In other instances, the legislature has enacted laws that require or pressure the executive to leave a treaty.

Conflicts involving both dimensions of treaty exit stem from a common source—the different objectives underlying domestic and international rules governing how states enter into and leave treaties. In domestic law, these rules balance multiple policy goals, such as enhancing democratic deliberation and preserving flexibility to make or unmake compacts to achieve national interests or in response to changes in international affairs.[4] One indicator of the diversity of these goals is the wide variation in the constitutional texts, legislation, and historical practices that determine how different countries enter into and leave international agreements.

The rationales that inform international rules governing treaty entry and exit are categorically different. These rules aim to prescribe clear, stable, and objective rules to determine whether a state is or is not a party to a treaty on a particular date. These rules also reinforce sovereignty by making it unnecessary for government officials to evaluate the

constitutional details of how other nations enter into or terminate their international obligations.[5]

The remainder of this chapter analyzes the different types of conflicts that arise from mismatches between international and domestic rules governing treaty exit and the (p. 357) divergent policies that underlie them. Section I summarizes international and domestic law governing treaty withdrawals. Section II draws on a wide range of contemporary examples to explain how treaty withdrawal can produce convergent or divergent outcomes in domestic and international law. Section III explores different contestations among the branches of government that can arise over treaty exit. Section IV explains that international law takes little if any account of violations of domestic treaty-making procedures, generating the controversies described in the previous two sections. A brief conclusion follows.

I. Treaty Exit Rules in International and Domestic Law

A brief primer on the international and domestic rules governing treaty withdrawals is necessary in order to set the stage for analyzing the full spectrum of conflicts that exit can engender.

The vast majority of treaties contain withdrawal or denunciation clauses that authorize a state to exit simply by announcing its intention to leave and providing the advance notice—often six months or one year—indicated in those clauses.[6] A relatively small number of treaties are silent regarding the possibility of exit.[7] The Vienna Convention on the Law of Treaties (VCLT) creates a presumption against leaving these agreements unless it is "established that the parties intended to admit the possibility of denunciation or withdrawal; or [a] right of denunciation or withdrawal may be implied by the nature of the treaty."[8]

The formal mechanics of exit are simple. A high-level executive official—usually the foreign minister—sends a brief statement notifying the treaty depository that the state will no longer be a party to the agreement as of a specified future date. Most notices do not explain the decision to withdraw, and the handful of treaties that require an explanation are easily satisfied. If no action is taken to abrogate the denunciation during the notice period, the withdrawal takes effect on the date indicated. This ends the state's prospective legal obligations under the treaty as well as its membership in any institutions that the treaty creates.

In contrast to international law, the domestic procedures governing exit are more complex, uncertain, and vary widely from country to country. According to the Comparative Constitutions Project, 43 out of 190 written constitutions currently in (p. 358) force contain provisions on treaty withdrawal, denunciation, or termination.[9] All but four[10] of these 43 constitutions require the national legislature to approve exit from at least some treaties. In several countries, the legislature authorizes withdrawal from all international

agreements.[11] In others, the constitution lists the subject matter of treaties for which exit requires parliamentary assent,[12] or provides that ratification and denunciation are governed by the same procedures.[13] Statutes or administrative rules in approximately a dozen countries specify the domestic procedures governing treaty exit, often clarifying the executive's powers vis-à-vis the legislature.[14]

The remaining 140 or so nations lack constitutional or subconstitutional rules governing exit. In these states, it is unclear which actors can withdraw from international agreements, although in most countries the executive alone has exercised this function.[15] Some courts and commentators have argued, however, that the rules governing ratification are equally applicable to denunciation and, as a result, that both political branches must agree to withdraw from treaties whose ratification requires legislative assent.[16]

(p. 359) The extent to which this "mirror image" analogy is followed in practice is uncertain, however. In authoritarian states, the executive is likely to make all decisions relating to treaty withdrawal regardless of the constitution's formal rules. Executive withdrawals also appear to be common even in democracies whose constitutions require legislative approval of treaties.[17] Functional considerations also militate in favor of unilateral executive exit. The executive is often better placed to determine whether exit is factually or legally justified, it can act quickly in response to rapidly evolving events, and it can weigh the risks and benefits of withdrawal in light of other foreign relations concerns.

In sum, whereas the international law of treaty exit is simple, uniform, and objectively well defined, the domestic rules governing the topic vary widely from state to state and often do not indicate which actors have the power to withdraw. The divergence between the two legal systems creates a range of actual and potential conflicts over treaty exit.

II. A Typology of Treaty Exit Conflicts in International and Domestic Law

This section sets forth a typology of conflicts that can arise from differences in how international and domestic law regulate treaty exit. The analysis begins with exits that are valid in both legal systems, then considers withdrawals that are valid internationally but contrary to domestic law, and then turns to treaty exits that comply with domestic law but are ineffective internationally. The final section discusses withdrawals that are invalid under both legal systems. Table 1 provides an overview of this typology and several real and hypothetical examples in each category.

A few words of caution are in order before turning to this analysis. I selected the examples discussed below to illuminate the basic features of the typology and the types of legal conflicts that can arise in each category. I omitted other examples that were less suited to these goals and glossed over details that may interest scholars, such as when a conflict arises or how procedures governing exit evolve over time. In addition, some cases emphasize the enhanced potential for exit, even if the state did not in fact quit a treaty.

Finally, the typology does not address all of the ways that a treaty's status can be bifurcated in international and domestic law. In particular, it does not consider bifurcations unrelated to exit, such as when a state enacts legislation that is inconsistent with its treaty obligations.

Table 1

	Treaty exit valid under domestic law	**Treaty exit invalid under domestic law**
Treaty exit valid under int'l law (State no longer a party; prospective obligations end)	**Actual examples:** • Ecuador and Romania: denunciation of multiple BITS (2017) • Bolivia: denunciation of 1961 Single Convention on Narcotic Drugs (2011) • US: unilateral executive termination of mutual defense treaty with Taiwan following *Goldwater* (1978) • UK: Notice of withdrawal from the EU following *Miller* and parliamentary approval of Brexit (2017)	**Actual and hypothetical examples:** • US: If President Trump attempts to unilaterally exit from NAFTA and negate the NAFTA Implementation Act • South Africa: aborted attempt to withdraw from the ICC, abrogated after *Democratic Alliance* (2016–2017) • Venezuela: denunciation of American Convention on Human Rights contrary to the constitution (2012–2013)
Treaty exit invalid under int'l law (State remains a party; obligations continue)	**Actual and hypothetical examples:** • North Korea: purported denunciation of the ICCPR (1997) • Dominican Republic: if executive seeks to withdraw declaration accepting jurisdiction of IACtHR following 2014 Constitutional Tribunal ruling finding declaration unconstitutional • Peru: legislative resolution approves president's withdrawal from IACtHR jurisdiction (1999)	**Hypothetical examples:** • Poland: if executive had attempted to withdraw unilaterally from the EU (prior to the 2009 Treaty of Lisbon) contrary to legislative approval requirement in the constitution • US: if president unilaterally attempts to denounce one of the four Geneva Conventions during an ongoing armed conflict with a terrorist organization

(p. 360) Treaty Exits Valid under International and Domestic law

Several types of treaty exit are effective both internationally and domestically. Perhaps the least controversial pattern involves the executive receiving legislative assent before filing a notice of withdrawal. Such approval may be mandated by the constitution or sought as a matter of political expediency. In either case, when the notice period expires, so too does the treaty's status as a legal instrument that binds the state under domestic and international law. Examples of this type of exit include 2017 approvals by the legislatures of Ecuador and Romania to terminate bilateral investment treaties,[18] (p. 361) and the Bolivian parliament's 2011 authorization to the president to denounce the UN Single Convention on Narcotic Drugs.[19]

Another common pattern involves treaties incorporated into domestic law via implementing legislation. Such statutes may include a "self-destruct" clause that abrogates the statute when the executive terminates the treaty, such as the U.S.-Korea Free Trade Agreement Implementation Act.[20] Some constitutions appear to require a similar result.[21] Absent such provisions, the executive may ask the legislature to abrogate the implementing statute before the notice of withdrawal is filed or takes effect.[22]

Another straightforward scenario involves unilateral executive exit from an international agreement adopted without legislative approval. President Trump's announced intention to withdraw from the Paris Agreement on Climate Change arguably falls into this category.[23] If the executive can enter into these commitments on its own authority, it seems plausible that it can also exit from those same obligations unilaterally.[24]

The situation is somewhat more complicated when the executive files a notice of withdrawal without involving the country's legislature, engendering opposition from that institution, from some of its members, or from interest groups. Where such objections trigger litigation, the consequences of withdrawal may depend on timing.

Consider President Jimmy Carter's termination of a mutual defense treaty between the United States and Taiwan. Carter filed a notice of termination on December 15, 1978, triggering a lawsuit that the U.S. Supreme Court dismissed as nonjusticiable on December 13, 1979—two days before the termination's effective date.[25] With the federal litigation over, the end of the notice period abrogated the treaty as a matter of both international and domestic law.

With regard to Brexit, a referendum endorsing the United Kingdom's withdrawal from the European Union was held in June 2016. The next month, Prime Minister Teresa May announced that she would unilaterally pull the country out of the Treaty (p. 362) on European Union (TEU), triggering a lawsuit. The U.K. Supreme Court held that parliamentary approval was constitutionally required in January 2017. Parliament then approved the withdrawal, and the prime minister filed the formal notice of withdrawal on March 29, 2017.[26]

In both examples, the executive's power to exit unilaterally from the treaties was uncertain. Litigation challenging that authority led to opposite results. In the United States, judicial refusal to adjudicate the president's action resulted in de facto approval of unilateral withdrawal authority. In the United Kingdom, the courts reviewed the constitutional claims on the merits and ruled against the executive. Yet in both countries, the litigation ended prior to the effective date of withdrawal, allowing each state to resolve the domestic legal issues before the withdrawal took effect at the international level. The timing of these events is not always so felicitous, however, creating conflicts between international and domestic law.

Treaty Exits Valid under International Law But Invalid under Domestic Law

The VCLT identifies heads of state, heads of government, ministers for foreign affairs, and officials with full powers as authorized to bind the state to international commitments and to withdraw from those same commitments.[27] As Section IV explains, this authority exists as a matter of international law regardless of whether domestic law empowers those officials to make or unmake treaties. Thus, if the executive files a notice of withdrawal in contravention of the constitution, a statute, or a judicial ruling, and if the executive does not cure the violation—for example, by securing legislative approval or deciding not to withdraw[28]—the state will no longer be a party to the treaty under international law, but it will remain bound by the treaty or by its implementing legislation as a matter of domestic law.

Such bifurcations can arise in a number of ways. Perhaps the most obvious involves treaties incorporated into domestic law via implementing statutes. In most countries, it is axiomatic that the executive does not possess legislative power. As a result, even if the executive has the authority to withdraw from a treaty unilaterally, he or she cannot abrogate the statute that gives domestic effect to the treaty without agreement of the legislature. Debates over the continuation of the NAFTA Implementation Act (p. 363) following a possible future decision by President Trump to withdraw from NAFTA focus on precisely this issue.[29]

South Africa's aborted exit from the ICC illustrates a different type of bifurcation. The government filed a notice of withdrawal on October 19, 2016. The High Court judgment of February 22, 2017 held the notice unconstitutional, and the executive complied with the court's order to revoke the notice.[30] But what if the government had chosen a different course? If the executive had defied the High Court (or the Constitutional Court, after an unsuccessful appeal) and refused to revoke the notice, South Africa would have no longer been a party to the Rome Statute as of October 19, 2017. Yet the treaty would not have been abrogated in domestic law, and the ICC implementation statute would have remained in effect. A similar outcome would occur in countries where the executive unilaterally quits a treaty in contravention of a constitutional requirement that the legislature approve withdrawal.

A more fundamental conflict can arise where a treaty is embedded in the constitution. Such a possibility arose following Venezuela's 2013 withdrawal from the American Convention on Human Rights—a treaty that includes an express denunciation clause.[31] Like several Latin American countries, Venezuela considers ratified human rights treaties as part of a "constitutional block" that national courts are authorized to enforce.[32] According to a lawsuit challenging the withdrawal, the hierarchically superior status of these international agreements means that "any act of public power that violates or impairs the rights guaranteed in those treaties is void."[33] According to (p. 364) the complainants, it follows that the executive's "denunciation, which disregarded the constitutional hierarchy of the American Convention and arbitrarily dis-incorporated the treaty from the constitutional block," is invalid.[34] Although the fate of this litigation is unknown, the case illustrates how a withdrawal expressly permitted by a treaty and carried out by a state's authorized representative can be fully effective on the international level but have no effect in the domestic legal order.

Treaty Exits Valid under Domestic Law But Invalid under International Law

As previously explained, most treaties expressly authorize denunciation or withdrawal. However, a small number of treaties lack such clauses and have been interpreted, under VCLT Article 56, as presumptively prohibiting exit.[35] When a state nonetheless attempts to quit the agreement in conformity with national law, the result may bifurcate the treaty's legal status, with the state's obligations continuing in international law but not in domestic law.

This possibility is illustrated by a 2014 ruling of the Constitutional Tribunal of the Dominican Republic (DR) invalidating the acceptance of the jurisdiction of the Inter-American Court of Human Rights (IACtHR).[36] In the DR, the national congress must assent to treaties negotiated by the executive. In 1978, the congress ratified the American Convention on Human Rights, which does not require states parties to accept the IACtHR's jurisdiction. Such recognition can occur later by filing a declaration, which the DR's president did in 1999.

Inter-American case law was subsequently incorporated into the DR legal system by legislation, executive action, and judicial decisions.[37] This deep domestication of regional human rights norms ruptured following an IACtHR judgment condemning a Constitutional Tribunal ruling that upheld the decision to abrogate the citizenship of thousands of Dominicans of Haitian descent. After the government rejected the regional court's judgment, the Tribunal received a petition challenging the (p. 365) president's acceptance of the IACtHR's jurisdiction without congressional approval. Interpreting the declaration as equivalent to a treaty, the Tribunal held the executive's action unconstitutional. Yet the judges also acknowledged that the government could not lawfully withdraw the declaration while remaining a party to the American Convention—a conclusion the IACtHR had reached in an earlier case against Peru.[38]

The Constitutional Tribunal did not order the DR to denounce the American Convention. However, its ruling, which scholars have labeled as a "court-led treaty exit,"[39] produced similar bifurcated effects: "Under international law, the Dominican Republic remains subject to the Inter-American Court's jurisdiction, bound to appear before the Court and to comply with its rulings. Internally, however, the effect of the judgment may be to bar authorities…from domestic actions to implement the Court's judgments."[40]

Whether compelled by the judiciary or authorized by the political branches, domestically-valid-but-internationally-prohibited withdrawals have a distinctive foreign relations valence. From the perspective of other member states, international secretariats, and monitoring bodies, the exiting nation remains a member of the treaty or organization. These actors continue to communicate with the state and invite it to resume full participation. Such was the response to purported withdrawals from the World Health Organization (WHO) by the Soviet Union, China, and several Eastern European countries in the late 1940s and early 1950s, and from UNESCO by Czechoslovakia, Hungary, and Poland a few years later. All of these states soon returned to full membership, but only after settling their arrears for contributions not paid during periods of nonparticipation.[41]

Negotiating a return to a treaty or international organization raises unresolved questions. Can the executive recharacterize a denunciation as a temporary cessation of participation? Or is a fresh ratification required? And must the legislature approve the payment of overdue financial contributions for years when the state had purportedly exited? The examples discussed above do not shed much light on these questions, since they involve socialist regimes in which executive decisions and communist party policy were tightly aligned and legislative approval of such decisions, even if required, was rarely if ever withheld.

Treaty Exits Invalid under International and Domestic Law

(p. 366) The final category of the typology concerns treaty exits that contravene both domestic and international law. I am unaware of any real-world examples of such withdrawals, although one can imagine a range of plausible hypotheticals.

A straightforward illustration of dual invalidity would be a unilateral attempt by the executive to denounce, in contravention of a legislative approval requirement, a treaty from which exit is presumptively barred under VCLT Article 56. Prior to entry into force of the Treaty of Lisbon in 2009, it was widely accepted that EU treaties "did not permit unilateral withdrawals, in view of express provisions stating that these treaties were concluded for unlimited periods."[42] In Poland, an EU member since 2004, the constitution requires legislation to join or leave treaties involving "membership in an international organization."[43] Thus, a 2007 executive decree purporting to pull Poland out of the European Union would have been invalid under domestic and international law.

Executive withdrawals from treaties approved by the U.S. Senate present a more complex scenario. Commentators generally agree that the president's unilateral authority to quit such agreements applies only to withdrawals consistent with the treaty's terms or other-

wise justified in international law, such as in response to another state's breach.[44] The Geneva Conventions of 1949 provide a plausible example of a unilateral executive exit that would be doubly illegal.

Common Article 63 provides that a denunciation of one of the conventions takes effect one year after notification. However, when notice is "made at a time when the denouncing Power is involved in a conflict," the denunciation "shall not take effect until peace has been concluded, and until after operations connected with the release and repatriation of the persons protected by the present Convention have been terminated."[45] Given the U.S. Supreme Court's conclusion that a core provision of the Geneva Conventions applies to armed conflicts between the United States and nonstate terrorist groups,[46] and that the threat of terrorist attacks from such groups is unlikely to end soon,[47] the president would likely be precluded under U.S. and international law from exiting one of the conventions unilaterally.

(p. 367) III. Intrabranch Conflicts over Treaty Exit

Given the executive's preeminent role in foreign relations, it is unsurprising that most treaty exit decisions are initiated by the executive. But the other branches of government sometimes push for withdrawal. For example, the legislature may adopt a law or resolution that purports to exit from a treaty or demands that the executive do so. Or a judicial ruling may invalidate a ratification, making withdrawal a plausible response. Such legislatively and judicially compelled treaty exits have received little attention from scholars.

Legislatively Compelled Exit

There are two distinct but interrelated facets of legislative efforts to compel a state to exit from a treaty. The first relates to whether the legislature can force a withdrawal over the executive's objection. The second concerns the rationales that animate legislative exit.

None of the thirty-nine constitutions (discussed in Section II) that expressly require legislative approval of exit appears to give that body the power to initiate a withdrawal.[48] Rather, the issue appears to be regulated by historical practice and by ordinary legislation. The United States and Kenya provide contrasting illustrations.

There is a longstanding debate in the United States over whether Congress can compel the president to denounce a treaty. The competing constitutional arguments have never been conclusively settled, but the weight of historical practice and commentary suggests that Congress cannot itself abrogate a treaty but can direct the executive to do so by enacting legislation over the president's veto.[49] The most recent example involved the imposition of sanctions against South Africa. As part of the Comprehensive Anti-Apartheid Act of 1986, Congress directed President Ronald Reagan to terminate a tax treaty and an air

services agreement with South Africa. The president promptly terminated both treaties notwithstanding his prior veto of the legislation.[50]

(p. 368) In Kenya, the legislature's role in treaty withdrawals is regulated by statute. The Treaty Making and Ratification Act (2012), sets forth procedures for negotiating, ratifying, and denouncing treaties. In essence, these procedures authorize the executive to initiate the treaty making process and the National Assembly to approve or deny ratification of treaties submitted to it. With regard to denunciation, the Act requires the preparation of a memorandum indicating the reasons for withdrawal, but expressly excludes any role for the Assembly in initiating or objecting to such withdrawal.[51]

Notwithstanding these statutory provisions, in 2013 the parliament adopted a motion urging Kenya's immediate withdrawal from the Rome Statute and resolving to introduce a bill to repeal the International Crimes Act. President Uhuru Kenyatta, then under indictment by the ICC, did not act on the motion. As a result, Kenya continues to be a member of the Rome Statute and the legislation implementing its ICC obligations remains in force.[52]

Turning from de jure authority to justification, why might the legislature seek to denounce a treaty when the executive opposes such a move? In some instances, the political branches may have different substantive views regarding the treaty and its obligations. In others, the executive and legislature may share the same goals but disagree about the propriety of using exit to achieve them. In still other cases, the parliament may call for withdrawal to contribute to ongoing political debates with little hope—or even desire—that the executive will actually quit the treaty.

The apartheid legislation is an example of the second rationale while the ICC withdrawal motion provides an illustration of the third. Both the U.S. Congress and president disfavored South Africa's practice of systematic racial segregation but differed over how (and how hard) to pressure the country's white minority government to abandon it. Terminating bilateral tax and air services treaties added little to this disagreement, but was a symbolic way to isolate South Africa and demonstrate solidarity with other nations that had cut legal ties to the country.

The Kenyan parliament's withdrawal motion contributed to a wider backlash against the ICC, a strategy that included urging all African states to withdraw from the Rome Statute and enabling Kenya's political leaders to feign cooperation with the criminal prosecutions while shoring up domestic political support for blocking the trials from proceeding. Seen in this light, the National Assembly's motion "facilitated the generation of regional support for the [executive's] masse withdrawal proposal and also allowed the two officials to simultaneously mobilize—but divorce themselves from—other anti-ICC lobbying efforts."[53]

(p. 369) Judicially Compelled Exit

In two recent rulings, high courts in Ghana and Sri Lanka invalidated international agreements that contravened constitutional treaty-making procedures. Although neither court ordered the government to denounce the constitutionally invalid treaty, the decisions highlight the possibility of judicially compelled exit in future cases, as well as the different approaches to treaty invalidity in international and domestic law.[54]

In 2017, the Supreme Court of Ghana invalidated a bilateral agreement between the United States and Ghana to resettle two Yemeni detainees from the Guantánamo Bay detention camp.[55] The president did not submit the agreement to Parliament for ratification pursuant to Article 75 of the Ghanaian Constitution.[56] In response to a suit challenging the resettlement deal, the government characterized the agreement as a note verbale, a type of executive agreement that, as shown by the practice of other states, does not require legislative approval. Alternatively, the government claimed that international law "estopped Ghana from resiling" (i.e., pulling out from or abrogating) a previously concluded agreement.[57]

The Supreme Court held the agreement unconstitutional. The court concluded that Article 75 does not distinguish between international agreements based upon their formality or their designation as executive or nonexecutive. And it reasoned that the practice of entering into executive agreements in other countries—including the United States and South Africa—had no bearing on the interpretation of Ghana's constitution. Finally, the court rejected the estoppel argument, contending that other states are "duty bound to conduct the necessary due diligence when entering into international agreements with Ghana to ensure that such agreements are in consonance with our Constitution."[58]

Subsequently, the Supreme Court ordered the executive to submit the resettlement agreement to Parliament within three months or return the detainees to the United States. The legislature ratified the agreement in August 2017, avoiding the abrogation of the note verbale.[59]

A 2006 ruling of the Supreme Court of Sri Lanka invalidating the state's accession to the First Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR) reached a similar conclusion.[60] The Optional Protocol creates a mechanism (p. 370) for individuals to file complaints with a quasi-judicial treaty body, the UN Human Rights Committee, against states that have accepted the Protocol, which Sri Lanka's president did in a 1997 declaration.[61]

The petitioner in the case sought to overturn a criminal conviction, relying on a decision of the Committee finding that his rights had been violated.[62] The government opposed the petition, arguing that the president's declaration was unconstitutional. The Supreme Court interpreted the declaration as usurping both a legislative power—conferring on individuals the rights recognized in the ICCPR and the right to submit complaints to the Committee—and a judicial function—recognizing the Committee's authority to review complaints alleging violations of those rights.[63] Since the executive was not authorized to

exercise these powers, the court held that Sri Lanka's accession to the Optional Protocol was unconstitutional and "does not bind the Republic qua state and has no legal effect within the Republic."[64]

Notwithstanding this ruling, the government has not sought to withdraw the declaration and individuals continue to file complaints against Sri Lanka alleging violations of the ICCPR. The government has, however, refused to respond to any of these cases, relying on the 2006 ruling. In 2014, the Committee chastised this "lack of cooperation" and urged the state to establish a procedure to implement its decisions.[65]

IV. The Mismatch between Domestic and International Treaty Procedures and Their Consequences

This chapter illustrates the wide cross-national variation in how states make and unmake treaties. This variation is partly the result of different views about the appropriate functions of, and relationship between, the political branches of government. Although there are compelling justifications for executive primacy in foreign affairs, these are counterbalanced by the desire to bolster the democratic legitimacy of international commitments. The widespread inclusion of national legislatures in the approval and domestication of treaties reflects this democratic impulse. At the same time, many states recognize the executive's sole authority to make (and unmake) at least some international agreements. These two categories of international agreements coexist uneasily in many countries, even as the precise boundary between them varies from state to state.

(p. 371) How does international law take account of the diversity of domestic procedures governing how states enter into and leave treaties? The short and perhaps surprising answer is hardly at all. The VCLT makes it exceptionally difficult for a state to invoke a violation of its internal treaty-making rules to invalidate its consent to be bound. Article 46 precludes a state from raising this issue "unless that violation was manifest and concerned a rule of its internal law of fundamental importance."[66] The article further provides that "[a] violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith."[67]

On its face, Article 46 applies only to the act of joining a treaty. Yet the policy rationales underlying the VCLT, as articulated in the ICJ's 2002 judgment in *Land and Maritime Boundary (Cameroon v. Nigeria)*,[68] favor applying the same approach to treaty withdrawals. A key instrument in that case was a declaration signed by both heads of state. Nigeria challenged the binding status of the declaration, arguing that it should have been "objectively evident" to Cameroon that, under the Nigerian constitution then in force, the head of state did not have authority to enter into a treaty without the approval of the Supreme Military Council.[69]

The ICJ rejected Nigeria's argument. The Court first explained that while some treaties specify "a two-step procedure consisting of signature and ratification," others "enter[] into force immediately upon signature," and states are free to choose "which procedure they want to follow."[70] As for domestic law limitations on the executive's authority to bind the state, the ICJ accepted that such limits were of "fundamental importance" under Article 46. They were not, however, "manifest" for two reasons—first, "because Heads of State belong to the group of persons who…'[i]n virtue of their functions and without having to produce full powers' are considered as representing their State,"[71] and second, because "there is no general legal obligation for States to keep themselves informed of legislative and constitutional developments in other States which are or may become important for the international relations of these States."[72]

The ICJ's reasoning applies with equal force to treaty withdrawals. As the International Law Commission commentary on the draft articles of the VCLT explains, "the rule concerning evidence of authority to denounce, terminate, etc., should be analogous to that governing 'full powers' to express the consent of a State to be bound by a treaty."[73] The VCLT thus recognizes that the same high-level executive officials are authorized both to bind the state and to effectuate treaty withdrawals.[74] In addition, functional rationales for permitting other nations to rely on the apparent authority of state agents and not imposing on those nations a duty to investigate internal treaty-making procedures are equally applicable to facially valid exit notices. As a result, just (p. 372) as a treaty entered into by an authorized executive official in violation of a constitution does not invalidate the state's consent to be bound,[75] so too a notice of withdrawal by that same official will end the state's status as a treaty party, even if the withdrawal is contrary to the constitution.

V. Conclusion

International and domestic law adopt different rules for how states enter into and exit from treaties. These rules, their interrelationship, and the divergent policies underlying them have received inadequate attention from scholars. The rules also create the possibility of bifurcating the status of treaties in international and domestic law. This chapter develops a typology to categorize these divergences, drawing upon recent examples of exit and actions by the executive, legislature, and judiciary that make such withdrawals more likely.

The chapter also suggests several topics for future research. First, national courts are quite willing to invalidate treaty ratification and treaty withdrawal decisions by the executive that contravene legislative approval requirements. This is hardly surprising, since national judges regularly review other constitutional provisions that allocate authority between the political branches. Yet these courts have given insufficient attention to the foreign relations implications of their decisions, presuming—incorrectly, as this chapter shows—that abrogating a treaty on constitutional grounds is also effective in international law. Once apprised of how a treaty's legal status can be bifurcated, national judges may

consider whether new doctrines are needed to take account of these foreign relations concerns.

Second, the VCLT lacks a bespoke provision identifying when, if at all, violations of domestic law may be invoked to abrogate a facially valid notice of withdrawal. The VCLT's drafting history and a key ICJ judgment support a strong presumption against invoking such domestic violations to invalidate denunciations. This interpretation of existing law is premised on the belief that recognizing the executive's apparent authority to bind or unbind the state is the same in both contexts. That assumption merits further investigation and need not control how international law evolves in the future.[76]

Finally, governments and scholars may wish to consider whether it is desirable to narrow the divergence between domestic and international rules governing treaty entry and treaty exit. The bifurcation of a treaty's legal status that these divergent rules engenders creates foreign relations frictions for governments that might be avoided, or at least mitigated, if the two sets of rules were more closely aligned.

Notes:

([1]) Laurence R. Helfer, *Introduction to Symposium on Treaty Exit at the Interface of Domestic and International Law*, 111 AJIL UNBOUND 425 (2017).

([2]) [2017] UKSC 5 (Jan. 24, 2017).

([3]) 2017 (3) SA 212 (G.P).

([4]) Michael Bothe, *Article 46, Convention of 1969*, *in* THE VIENNA CONVENTIONS ON THE LAW OF TREATIES: A COMMENTARY 1090, 1091 (Olivier Corten & Pierre Klein eds., 2011).

([5]) *Id*. at 1097; MARK E. VILLIGER, COMMENTARY ON THE 1969 VIENNA CONVENTION ON THE LAW OF TREATIES 591 (2009).

([6]) BARBARA KOREMENOS, THE CONTINENT OF INTERNATIONAL LAW: EXPLAINING AGREEMENT DESIGN 140–144 (2016); Laurence R. Helfer, *Exiting Treaties*, 91 VA. L. REV. 1579, 1592–1595 (2005).

([7]) Several treaties protecting human rights and creating international organizations are prominent examples.

([8]) Vienna Convention on the Law of Treaties [VCLT], art. 56 (1), *opened for signature* May 23, 1969, 1155 U.N.T.S. 331.

([9]) Comparative Constitutions Project, *available at* http://comparativeconstitutionsproject.org/.

([10]) Three countries appear to authorize unilateral executive withdrawal. CONST. OF BOSNIA AND HERZEGOVINA, Dec. 14, 1995 (rev. 2005), art. V; CONST. OF GUATEMALA, Jan. 14, 1986 (rev. 1993), tit. IV, ch. III, art. 183; CONST. OF THE SYRIAN ARAB REPUBLIC, Feb. 26, 2012, tit. II, ch. II, art. 107. Chile requires the executive to consult with the legislature. CONST. OF CHILE, Sept. 11, 1980 (rev. 2015), ch. V, art. 54.

([11]) E.g., CONST. OF MOLDOVA, tit. III, Aug. 27, 1994 (rev. 2016), ch. IV, § 1 (66) (granting the Parliament the power "to ratify, terminate, suspend and repeal…international treaties").

([12]) E.g., CONST. OF ESTONIA, June 28, 1992 (rev. 2015), ch. IX, art. 121 ("Riigikogu [Parliament] shall ratify and denounce treaties…which alter state borders; the implementation of which requires the passage, amendment or repeal of Estonian laws; by which the Republic of Estonia joins international organizations or unions; by which the Republic of Estonia assumes military or proprietary obligations; in which ratification is prescribed").

([13]) E.g., CONST. OF KOSOVO, June 15, 2008 (rev. 2016), ch. I, art. 18 ("withdrawal from international agreements follows the same decision-making process as the ratification of international agreements").

([14]) E.g., Law No. 421-Z on Treaties of the Republic of Belarus (July 23, 2008), art. 41 (listing different categories of treaties whose denunciation may be carried out by, respectively, the National Assembly, the President, and the Council of Ministers); Treaty-Making Procedures Proclamation 25/1988, art. 11(2) (Eth.) (providing that the Council of State approved the denunciation or termination of political and economic agreements, while other treaties were denounced or terminated by the Council of Ministers). I am grateful to Pierre-Hugues Verdier and Mila Versteeg for sharing their research on national laws governing treaty withdrawal.

([15]) In this *Handbook*, Verdier and Versteeg analyze a data set on international law in domestic legal systems that covers 101 countries between 1815 and 2013 and includes treaty withdrawal rules in both constitutions and legislation. The authors find that treaty exit has "long [been] considered a purely executive power in virtually all jurisdictions," but that "the proportion of countries in which the executive can withdraw from treaties unilaterally has declined significantly since the 1970s, from a high of 89% to the current level of 72%." Pierre-Hugues Verdier & Mila Versteeg, *Separation of Powers, Treaty-Making, and Treaty Withdrawal: A Global Survey*, ch. 8 in this volume, at pp.138, 149.

([16]) E.g., Democratic All. v. Minister of Int'l Relations and Cooperation 2017 (3) SA 212 (G.P), at para. 56; GIULIANA ZICCARDI CAPALDO, LA COMPETENZA A DENUNCIARE I TRATTATI INTERNAZIONALI 63 (1983). Some constitutions expressly recognize international agreements that the executive alone can make and unmake. E.g., CONST. OF ARMENIA, July 5, 1995 (rev. 2015), art. 132 (2) (the president shall "by proposal of the Government, approve, suspend or renounce international treaties not requiring ratification").

([17]) *See*, e.g., Giovanni Bognetti, *The Role of Italian Parliament in the Treaty-Making Process—Europe*, 67 CHI. KENT. L. REV. 391, 404 (1991); Curtis A. Bradley, *Treaty Termination and Historical Gloss*, 92 TEX. L. REV. 773, 788 (2014); Luzius Wildhaber, *Parliamentary Participation in Treaty-Making: Report on Swiss Law*, *in* PARLIAMENTARY PARTICIPATION IN THE MAKING AND OPERATION OF TREATIES: A COMPARATIVE STUDY 131, 139 (Stefan A. Riesenfeld & Frederick M. Abbott eds., 1994).

([18]) Kate Cervantes-Knox & Elinor Thomas, *Ecuador terminates 12 BITs—a growing trend of reconsideration of traditional investment treaties?*, INT'L ARB. ALERT (May 15, 2017); Volterra Fietta, *Romania set to terminate its intra-EU BITs* (Mar. 27, 2017), *available at* https://www.lexology.com/library/detail.aspx?g=89abdc5f-4749-4f27-9edb-a4714c09dfc4.

([19]) *See* Sven Pfeiffer, *Rights of Indigenous Peoples and the International Drug Control Regime: The Case of Traditional Coca Leaf Chewing*, 5 GOETTINGEN J. INT'L L. 287, 304 (2013).

([20]) Section 107(c) of the statute provides: "On the date on which the [United States-Korea Free Trade Agreement] terminates, this Act…shall cease to have effect."

([21]) E.g., CONST. OF CHILE, Sept. 11, 1980 (rev. 2015), ch. V, art. 54 ("Once [a] denunciation or withdrawal has produced its effects in conformity with the provisions of the international treaty, it shall cease to have effect in the Chilean legal system.").

([22]) *See*, e.g., Democratic All. v. Minister of Int'l Relations and Cooperation 2017 (3) SA 212 (G.P), at para. 5.

([23]) Michael D. Shear, *Trump Will Withdraw U.S. from Paris Climate Agreement*, N.Y. TIMES (June 1, 2017). It is uncertain, however, whether President Trump has the constitutional authority to withdraw the United States from the Paris Agreement in contravention of its notice and waiting periods.

([24]) *See*, e.g., CONG. RESEARCH SERV., 106th Cong., TREATIES AND OTHER INTERNATIONAL AGREEMENTS: THE ROLE OF THE UNITED STATES SENATE 208 (Comm. Print 2001) ("the President's authority to terminate executive agreements, in particular sole executive agreements, has not been seriously questioned").

([25]) Goldwater v. Carter, 444 U.S. 996 (1979).

([26]) Simon Kennedy, *Brexit Timeline: From the Referendum to Article 50*, BLOOMBERG NEWS (Mar. 20, 2017).

([27]) VCLT, arts. 7, 67(2).

([28]) The VCLT permits unilateral revocation of notices of withdrawal. *Id.* art. 68. It is unsettled whether treaty parties can contract around the VCLT and make withdrawal notifications irrevocable, an issue the CJEU addressed in the context of Brexit. *See* CJEU, Judgment in Wightman v. Secretary of State for Exiting the European Union [2018], C-621/18,

EU:C:2018:999 (ruling that a Member State may unilaterally revoke its notice of withdrawal from the TEU at any time before the withdrawal enters into force).

([29]) *See* Brandon J. Murrill, *U.S. Withdrawal from Free Trade Agreements: Frequently Asked Legal Questions*, CONG. RESEARCH SERV., 13–17 (2016). For a recent example involving Australia, *compare* Maria O'Sullivan, *Nauru's Renunciation of Appeals to the High Court—Lawfulness and Implications*, Castan Centre for Human Rights Law (Apr. 5, 2018) (arguing that the Nauru Appeals Act, which implements a 1976 agreement between Australia and Nauru authorizing appeals from the Nauru Supreme Court to the Australian High Court, continues in force following the Nauru executive's denunciation of the agreement), *with* Ben Ye, *Can once valid legislation 'become' invalid? A case study of the High Court's (now-lost) Nauru jurisdiction*, AUSPUBLAW (Nov. 28, 2018), *available at* https://auspublaw.org/2018/11/can-once-valid-legislation-become-invalid (arguing that Nauru Appeals Act is no longer in force following denunciation of 1976 agreement).

([30]) Democratic All. v. Minister of Int'l Relations and Cooperation 2017 (3) SA 212 (G.P), at para. 84. In a similar constitutional challenge to Philippine President Duterte's withdrawal from the ICC, the Supreme Court of the Philippines declined to block the withdrawal from taking effect on March 17, 2019, although the suit challenging the withdrawal remains pending. *See* Edu Punay, *Sans Supreme Court action, withdrawal from ICC to take effect*, The Philippine Star (Mar. 13, 2019), *available at* https://www.philstar.com/headlines/2019/03/13/1901025/sans-supreme-court-action-withdrawal-icc-take-effect.

([31]) Diego Germán Mejìa-Lemos, *Venezuela's Denunciation of the American Convention on Human Rights*, 17:1 ASIL INSIGHTS (Jan. 9, 2013).

([32]) CONST. OF THE BOLIVARIAN REPUBLIC OF VENEZUELA, Dec., 1999 (rev. 2009), tit. III, ch. 1, art. 23 (ratified human rights treaties "have a constitutional rank…and shall be immediately and directly applied by the courts").

([33]) Carlos Ayala Corao, *Inconstitucionalidad de la Denuncia de la Convención Americana Sobre Derechos Humanos por Venezuela*, 10 ESTUDIOS CONSTITUCIONALES 643, 650 (2012) (author's unofficial translation).

([34]) *Id.* at 654 (author's unofficial translation).

([35]) A prominent example is North Korea's purported denunciation of the International Covenant on Civil and Political Rights (ICCPR).

([36]) Relativo a la acción directa de inconstitucionalidad incoada contra el Instrumento de Aceptación de la Competencia de la Corte Interamericana de Derechos Humanos, Judgment No. TC/0256/14 (Trib. Const. Dom. Rep. Nov. 4, 2014), *available at* https://www.tribunalconstitucional.gob.do/consultas/secretar%C3%ADa/sentencias/.

([37]) Dinah Shelton & Alexandrea Huneeus, *In re Direct Action of Unconstitutionality Initiated Against the Declaration of Acceptance of the Jurisdiction of the Inter-American Court of Human Rights*, 109 AM. J. INT'L L. 866, 869 (2015).

([38]) Constitutional Court v. Peru, Inter-Am. Ct. H.R. (ser. C) No. 55, paras. 49–50 (1999).

([39]) Alexandra Hunneus & Renè Ureña, *Treaty Exit and Latin America's Constitutional Courts*, 111 AJIL UNBOUND 456, 458 (2017).

([40]) Shelton & Huneeus, *supra* note 37, at 868.

([41]) N. Feinberg, *Unilateral Withdrawal from an International Organization*, 39 BRIT. Y.B. INT'L L. 189, 204–211 (1963).

([42]) OLIVER DO¨RR & KIRSTEN SCHMALENBACH, VIENNA CONVENTION ON THE LAW OF TREATIES: A COMMENTARY 985 (2011).

([43]) CONST. OF POLAND, Oct. 17, 1997 (rev. 2009), ch. III, art. 89 (1) (3).

([44]) *See*, e.g., RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 313 (2018); *see also* Bradley, *supra* note 17, at 823–824 (discussing Office of Legal Counsel memoranda and other materials relating to whether the president can unilaterally suspend or exit from an Article II treaty in contravention of international law).

([45]) E.g., Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, art. 63, Aug. 12, 1949.

([46]) Hamdan v. Rumsfeld, 548 U.S. 557, 630 (2006) (concluding that common Article 3 of the Geneva Conventions applies to armed conflict between the United States and al Qaeda).

([47]) Boumediene v. Bush, 553 U.S. 723, 793 (2008) ("The real risks, the real threats, of terrorist attacks are constant and not likely soon to abate.").

([48]) Several constitutions require the executive to submit a proposal to the legislature to withdraw from a treaty. E.g., CONST. OF ARMENIA, July 5, 1995 (rev. 2015), art. 116 (2). Others authorize the legislature to ratify and denounce treaties without indicating which branch initiates withdrawal. E.g., CONST. OF ESTONIA, June 28, 1992 (rev. 2015), ch. IX, art. 121.

([49]) James J. Moriarty, *Congressional Claims for Treaty Termination Powers in the Age of the Diminished Presidency*, 14 CONN. J. INT'L L. 123 (1999).

([50]) David "Dj" Wolff, *Reasserting Its Constitutional Role: Congress' Power to Independently Terminate a Treaty*, 46 U.S.F. L. REV. 953, 983–986 (2012).

([51]) Treaty Making and Ratification Act (2012) Sec. 17. An earlier draft of the Act authorized the Assembly to approve or deny withdrawal. The Treaties Bill (2011) Sec. 9 (on file with author).

([52]) *See* Laurence R. Helfer & Anne E. Showalter, *Opposing International Justice: Kenya's Integrated Backlash Strategy Against the ICC*, 17 INT'L CRIM. L. REV. 1, 18–21 (2017).

([53]) *Id*. at 21.

([54]) *See also* Namah v. Pato [2016] PGSC 13, para. 39 (Papua N.G.) (holding unconstitutional the detention of asylum seekers and refugees pursuant to a memorandum of understanding between PNG and Australia and ordering the government to cease the illegal detention, in effect rendering the memorandum domestically unenforceable).

([55]) Banful v. Att'y Gen. [2017] Accra–A.D. 1 (Ghana).

([56]) CONST. OF GHANA, Apr. 28, 1992 (rev. 1996), ch. VII, art. 75(2) ("A treaty, agreement or convention executed by or under the authority of the President shall be subject to ratification by (a) Act of Parliament; or (b) a [majority] resolution of Parliament.").

([57]) *Banful*, [2017] Accra–A.D., at 7–12.

([58]) *Id*. at 13–15. This statement conflicts with a 2002 ICJ judgment, discussed in Section IV, *infra*.

([59]) Press release, *Ghana: Parliament Extends Stay of Gitmo* 2 (Aug. 2, 2017), *available at* http://allafrica.com.proxy.lib.duke.edu/stories/201708020865.html.

([60]) Singarasa v. Att'y Gen., No. 182/99 (2006), 138 I.L.R. 451.

([61]) *See* Office of the High Commissioner for Human Rights, Human Rights Committee, *available at* https://www.ohchr.org/EN/HRBodies/CCPR/Pages/CCPRIndex.aspx.

([62]) Singarasa, No. 182/99 (2006), at 1–2.

([63]) *Id*. at 8.

([64]) *Id*.

([65]) U.N. Human Rights Committee, Concluding observations on the fifth periodic report of Sri Lanka, CCPR/C/LKA/CO/5 (Nov. 21, 2014), at 2.

([66]) VCLT, art. 46(1).

([67]) *Id*. art. 46(2).

([68]) 2002 ICJ Reports 303.

([69]) *Id*. para. 258.

([70]) *Id*. para. 264.

([71]) *Id*. para. 265 (*quoting* VCLT Article 7(2)).

([72]) *Id*. para. 266.

([73]) *Draft Articles on the Law of Treaties with Commentaries*, II Y.B. INT'L L. COMM'N (1966), at 264; *see also Second Report on the Law of Treaties by Sir Humphrey Waldock*, II Y.B. INT'L L. COMM'N (1963), at 85 ("The power to annul, terminate, withdraw from or suspend treaties, no less than the power to conclude treaties, forms part of the treaty-making power of the State.").

([74]) VCLT, art. 67(2).

([75]) VILLIGER, *supra* note 5, at 589.

([76]) *See* Hannah Woolaver, *State Engagement with Treaties: Interactions between International and Domestic Law*, ch. 24 in this volume; Hannah Woolaver, *From Joining to Leaving: Domestic Law's Role in the International Legal Validity of Treaty Withdrawal*, 30 EUR. J. INT'L L. (forthcoming 2019).

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ANEXO 2

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Taking Stock of Three Generations of Research on Treaty Exit

Masterclass
European Society of International Law (ESIL) Research Forum
Hebrew University of Jerusalem Faculty of Law, Jerusalem, Israel
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It is a pleasure and an honour to give a masterclass on treaty withdrawal. This is an especially appropriate topic for an ESIL Research Forum focused on international law in times of disorder and contestation. I am grateful to Professor Yuval Shany and the other organisers for inviting me to share with you my long-standing interest in exit in international law and politics.

In my remarks today I will discuss one important way in which states contest the authority of international organisations, international courts and international agreements – by formally withdrawing from those organisations, courts and agreements. I will provide an overview of the literature, identify different phases or generations of scholarship, and connect them with the broader themes of the conference. I will conclude by identifying a few unsettled legal issues that scholars might examine in future research.

* * * * * * *

The study of when, how, and why states exit from treaties and international organisations has been surprisingly fruitful for academics – although only relatively recently. When I first started researching this area nearly twenty years ago, however, very little had been written on the subject of exit. The major treatises on public international law published in the 1990s – including those authored by scholars from the United States, the United Kingdom, and Europe – contained a page or two on the topic, at most; and even specialised studies of treaty practice included only abbreviated discussions of denunciation and withdrawal.[1]

The only question that had been considered in any depth during this first generation of research was whether international law prohibits a state from leaving an international organisation if its charter lacks an express withdrawal or denunciation clause.[2] That question attracted

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[1] For additional discussion, see Laurence R Helfer, 'Exiting Treaties' (2005) 91 *Virginia Law Review* 1579, 1592.

[2] I am unaware of any international instrument that expressly prohibits withdrawal. However, several important multilateral treaties and charters of international organisations have no provision for exit. The Vienna

the attention of legal scholars from the 1950s to the 1980s, with no definitive resolution of whether a state has an inherent right to quit an international organisation whose founding legal instrument lacks an express exit clause. Examples of the first generation of research on this topic included studies of Indonesia's purported withdrawal from the United Nations (UN) in the 1960s, withdrawals by Soviet bloc states from UN specialised agencies such as the International Labour Organization (ILO), the World Health Organization, and the UN Educational, Scientific and Cultural Organization, and the withdrawal and expulsion of South Africa from those agencies during the apartheid era.[3]

When I became interested in treaty exit in the 1990s, a few senior international law colleagues tried to warn me off of the topic. They said, in effect, 'Larry, why are you interested in talking about the divorce when you should be celebrating the wedding?' To understand this advice, you need to recall how international law and institutions were perceived at the time compared with how they are sometimes viewed today.

The 1990s was a heady decade for international law. The Cold War had recently ended, liberal democracy was ascendant, and supranational legal orders were expanding. There was a widely shared belief – or at least the hope – that states were becoming increasingly enmeshed in cooperation through international laws and institutions. In this environment, the idea that a country would simply decide to walk away from a treaty or an international organisation seemed unworthy of serious consideration. Exit simply was not going to happen in practice. States were enmeshed in the international system and they were going to remain part of that system.

The advice of my senior colleagues not to examine why or how states and international institutions 'get divorced' also masked a deeper underlying anxiety. Many international lawyers and legal scholars have long sought to demonstrate that international laws and institutions matter. They want to show – to paraphrase the famous words of Louis Henkin – that almost all countries follow almost all of international law almost all of the time.[4] For those who share this normative bent, it is bad form to talk about unilateral exit. This is especially true because if one reviews the withdrawal and denunciation provisions buried in the back of most multilateral and bilateral treaties, one discovers few substantive or procedural constraints on exit, and no formal sanctions for doing so. The reality that exit is relatively easy is not, however, a fact to which many proponents of international law want to give serious attention.

Convention on the Law of Treaties ((entered into force 27 January 1980) 1155 UNTS 331), art 56(1), creates a presumption against denunciation or withdrawal, which may be overcome by 'establish[ing] that the parties intended to admit the possibility of denunciation or withdrawal' or that a 'right of denunciation or withdrawal may be implied by the nature of the treaty'. For additional discussion, see Laurence R Helfer, 'Terminating Treaties' in Duncan B Hollis (ed), *The Oxford Guide to Treaties* (Oxford University Press 2012) 634; Vassilis Pergantis, *The Paradigm of State Consent in the Law of Treaties*: *Challenges and Perspectives* (Edward Elgar 2017) 154–88.

[3] Nathan Feinberg, 'Unilateral Withdrawal from an International Organization' (1963) 39 *British Yearbook of International Law* 189; Egon Schwelb, 'Withdrawal from the United Nations: The Indonesian Intermezzo' (1967) 61 *American Journal of International Law* 661.

[4] Louis Henkin, *How Nations Behave* (Columbia University Press 1979) 47 ('It is probably the case that almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time').

My entry point for researching exit came not from theories of international law or empirical analyses of state compliance but instead from a more mundane and practical source – the treaty handbooks prepared by and for the officials and diplomats who negotiate international legal instruments.[5] These handbooks give treaty negotiators a range of options to 'manage the risks of international agreement', to quote the title of Richard Bilder's prescient 1981 book.[6] According to the authors of these how-to guides, withdrawal and denunciation clauses are not to be feared or avoided. On the contrary, they are one among several risk management tools that states consistently include in treaties to enable them to respond to problems with cooperation or compliance that may arise in the future.

When I examined these treaty handbooks, I discovered quite a lot of variation in the clauses that authorise states to withdraw. This includes the length of the 'waiting period' during which states are precluded from withdrawing after a treaty enters into force. Many international agreements have waiting periods of between one year and three years. I also found variations in the 'notice period' – how much advance warning a state must give before exit takes effect. The most common notice periods are six or twelve months, although some treaties recognise the ability to leave immediately while others provide a notice period of as long as two years.[7]

Finally, there are differences in whether a denouncing state must explain or justify its decision to leave a treaty. The vast majority of international agreements require no explanation or justification. In my research on exit, I visited the offices of several international organisations and treaty depositories to examine notices of denunciation they had received. I hoped to find gold in the archives, but I was quite disappointed.[8] Most notices of withdrawal are simple one-page letters from a foreign minister or other high government official announcing the state's decision to withdraw and the date on which exit will take effect.

If you think issues involving the notice and waiting periods of withdrawal clauses are technical or even boring, you are right! However, these details can also be politically consequential. For a recent example, look no further than the Trump administration's announcement[9] that it intends to withdraw from the Paris Agreement on Climate Change, a treaty that entered into force for the United States on 4 November 2016.[10] Under Article 28 of the Paris Agreement, the United States cannot submit a notice of withdrawal until 4 November 2019, three years after the date of coming into force, and its membership in the climate accord does not end

[5] See, eg, United Nations Treaty Section, *Final Clauses of Multilateral Treaties: Handbook* (United Nations Publications 2003).
[6] Richard B Bilder, *Managing the Risks of International Agreement* (The University of Wisconsin Press 1981).
[7] Barbara Koremenos and Allison Nau, 'Exit, No Exit' (2010) 21 *Duke Journal of Comparative International Law* 81, 95–100 (reviewing examples of waiting and notice periods in treaty exit clauses).
[8] States sometimes volunteer an explanation for their decision to exit, such as where a treaty conflicts with the state's constitution or other international law obligations: see, eg, Declaratory Statement by the Republic of South Africa on the Decision to Withdraw from the Rome Statute of the International Criminal Court, 19 October 2016, C.N.786.2016.TREATIES-XVIII.10 (Depositary Notification 2016), 2 (describing the 'conflicting international law obligations' that precipitated South Africa's notice of withdrawal from the Rome Statute).
[9] The White House, 'Statement by President Trump on the Paris Climate Accord', 1 June 2017, https://www.whitehouse.gov/the-press-office/2017/06/01/statement-president-trump-paris-climate-accord.
[10] Paris Agreement (entered into force 4 November 2016), http://unfccc.int/paris_agreement/items/9485.php.

until 4 November 2020.[11] That happens to be one day after the presidential election in the United States, when a different president-elect might have pledged to adopt a significantly different climate change policy that includes remaining as a party to the Paris Agreement.

Treaty exit also featured prominently in debates within the Trump administration over whether there was a way to get around the waiting and notice periods in the Paris Agreement. Could the United States, for example, denounce the UN Framework Convention on Climate Change[12] – which provides the legal foundation for later multilateral climate change agreements – thereby indirectly pulling the United States out of Paris (since all members of the latter treaty must also be parties to the Framework Convention)?[13] In the end, the administration did not pursue that approach. The United States remains a party to the Framework Convention and it continues to participate in Conferences of the Parties to the Paris Agreement.[14]

* * * * * * *

The foregoing examples reveal that technical treaty exit rules can have interesting and important real-world consequences. For that reason I disagree with scholars who argue that exit clauses are merely boilerplate provisions. Rather, I view these clauses as purposefully selected by states to achieve particular goals or objectives. This approach marks the beginning of the second generation of scholarship on exit, which views withdrawal as one component of the overall design of a treaty. Researchers who study institutional design investigate how different types of flexibility mechanism, their relationship with each other, and their interaction with substantive treaty commitments help to address different types of international cooperation problem.[15]

An institutional design perspective illuminates why many actors in the international community seek to discourage withdrawal. These actors focus on the period after a treaty has entered into force. The concern at this point in time is that states may engage in an opportunistic exit. That is, they may withdraw or threaten to do so after having captured the benefits of treaty membership, leaving the burdens of cooperation to the remaining member countries.[16] State parties who fear

[11] Stephen P Mulligan, 'Withdrawal from International Agreements: Legal Framework, the Paris Agreement, and the Iran Nuclear Agreement', *Congressional Research Service*, 4 May 2018, 19, https://fas.org/sgp/crs/row/R44761.pdf.

[12] (entered into force 21 March 1994) 1771 UNTS 107.

[13] Paris Agreement (n 10) art 28(3) ('Any Party that withdraws from the [Framework] Convention shall be considered as also having withdrawn from this Agreement.').

[14] Mulligan (n 11) 19–20; Jonathan B Wiener, 'Climate Policy in the New US Administration', Climate Economics Chair Policy Brief No 2017-02, 5 June 2017, 3–4, https://www.chaireeconomieduclimat.org/wp-content/uploads/2017/06/17-06-06-Policy-Brief-2017-02-Wiener-Climate-Policy-in-the-new-US-administration.pdf.

[15] See, eg, Andrew T Guzman, 'The Design of International Agreements' (2005) 16 *European Journal of International Law* 579; Andrew T Guzman, 'International Tribunals: A Rational Choice Analysis' (2008) 157 *University of Pennsylvania Law Review* 171; Kal Raustiala, 'Form and Substance in International Agreements' (2005) 99 *American Journal of International Law* 581.

[16] Not all exit threats are opportunistic. Sometimes states threaten exit to refocus the organisation on its primary mandate. For example, the United States gave notice of its intention to leave the ILO in the late 1970s, arguing that the organisation had become unduly politicised. Had the US in fact withdrawn, the organisation would have lost a significant percentage of its funding. Partly in response to this threat, the ILO changed its policies before the two-year notice period expired and the US remained a member of the organization: see Mark F Imber, *The USA, ILO,*

that other countries will leave opportunistically have less incentive to invest in treaty implementation and compliance. This is especially true for treaties that address collective action problems that require significant changes in state behaviour. In extreme situations, the incentive to underinvest may cause the entire agreement to unravel.

Institutional design offers a way to address these concerns. To reduce the risk of opportunism, negotiators can make exit legally or politically costly, thereby deterring withdrawal, or at least making a state think twice before leaving a treaty or international organisation. This may explain why some multilateral agreements prohibit denunciation during their early years, require lengthy notice periods, specify that a withdrawing state remains responsible for treaty obligations prior to the effective date of withdrawal, or encourage all parties to negotiate the terms of the exiting state's departure. An important book by Barbara Koremenos, *The Continent of International Law*, analyses these design variations in depth based on a random sample of nearly 200 international agreements.[17] Koremenos finds strong support for the rational design hypothesis and her book includes some very interesting findings about the different cooperation problems that treaty flexibility mechanisms are intended to address.[18]

In addition to analysing how exit clauses affect state behaviour after a treaty enters into force, an institutional design perspective also considers a second vantage point: when negotiations are contemplated or under way. During this earlier period, a capacious exit clause functions as a kind of insurance policy, giving states some comfort that they can cease treaty-based cooperation if an agreement turns out badly. Since uncertainty is pervasive in international affairs – including uncertainty about the preferences of other states, uncertainty about information, and uncertainty about future changes of government policy – all other things being equal, a broad exit option can enhance cooperation by facilitating the negotiation of deeper and broader international commitments than might otherwise be possible, and inducing a larger number of countries to join the agreement.

Considering the *ex ante* and *ex post* perspectives together provides a more balanced and nuanced way to analyse denunciation and withdrawal clauses. *Ex ante*, exit clauses can be cooperation enhancing. *Ex post*, however, the very same clauses create a risk of opportunistic withdrawal, enabling a state to leave whenever it concludes that a treaty conflicts with or constrains its national laws and policies. The challenge, then, is how to balance these asynchronous benefits and costs to maximise the gains of international cooperation.[19]

UNESCO and IAEA: Politicization and Withdrawal in the Specialized Agencies (Palgrave Macmillan 1989); Richard A Melanson, 'Human Rights and the American Withdrawal from the ILO' (1979) 1 *Universal Human Rights* 43.

[17] Barbara Koremenos, *The Continent of International Law: Explaining Agreement Design* (Cambridge University Press 2016).

[18] Koremenos finds that treaties that address 'enforcement problems' are more likely to include longer notice periods than other types of international agreement, while treaties that address underlying 'commitment problems' are more likely to have longer waiting periods: ibid 145.

[19] Helfer (n 1) 1599–601; Timothy Meyer, 'Power, Exit Costs, and Renegotiation in International Law' (2010) 51 *Harvard International Law Journal* 379.

Another hallmark of the second generation of scholarship on exit is how flexibility mechanisms actually influence state behaviour. From a design perspective, it is important to study not only variations in the form of flexibility tools – such as waiting and notice periods – but also how these tools are actually utilised in practice. In *Exiting Treaties*, published in 2005, I reviewed a comprehensive database maintained by the UN Treaty Section and concluded that 'denunciations and withdrawals are a regularised component of modern treaty practice – acts that are infrequent but hardly the isolated or aberrant events that the conventional wisdom suggests'.[20]

This empirical finding was based on information from the end of the Second World War through to 2004. I updated this research in a chapter titled 'Flexibility in International Agreements', published in 2013.[21] I identified several types of withdrawal from treaties and international organisations, which can be arranged along a spectrum in terms of their potentially problematic consequences for the international legal system.[22]

The first and perhaps least controversial category is what might be labelled 'cooperative exit'. Denunciations of this type often occur within nested treaty regimes – related international agreements such as a framework convention and protocols that states revise in response to changes in technology or scientific knowledge. Cooperative exit tends to occur in nested treaties that regulate technical or low-politics issue areas. ILO conventions regulating workplace conditions are a good example. Several such conventions, adopted before the Second World War, prohibited what at the time was viewed as inappropriate work for women, such as night work. Governments have since recognised that sex-based workplace restrictions are inconsistent with gender equality norms. When the ILO later adopted new conventions to reflect this conceptual evolution, states joined these treaties while, at the same time, denouncing the earlier, outdated conventions.[23] Similar patterns are found in international maritime agreements and some intellectual property treaties.[24]

By linking ratifications and denunciations in this way, states can collectively update or enhance their international commitments. This kind of cooperative exit tends to occur in waves as groups of states move to a new equilibrium. Once the later agreement takes hold among a critical mass of countries, all or nearly all state parties migrate to the new treaty and leave the old agreement. On paper, these mass withdrawals may give the impression that treaty-based cooperation is unravelling. When viewed from a wider perspective, however, this type of exit in fact reflects the continuation of such cooperation.[25]

[20] Helfer (n 1) 1602.
[21] Laurence R Helfer, 'Flexibility in International Agreements' in Jeffrey Dunoff and Mark A Pollack (eds), *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (Cambridge University Press 2013) 175.
[22] For a discussion of the reputational consequences of exit, see Helfer (n 1) 1590, 1621–29; Rachel Brewster, 'Exit from Trade Agreements: A Reputational Analysis of Cooperation and Fairness' (2018) 21 *Journal of International Economic Law* 379.
[23] George P Politakis, 'Night Work of Women in Industry: Standards and Sensibility' (2001) 140 *International Labour Review* 403.
[24] Helfer (n 21) 185.
[25] Helfer (n 1) 1645–47.

A second and somewhat more controversial category involves exit in response to a discrete dispute that is politically sensitive in one state or a small number of countries. The trigger for these withdrawals is often a ruling of an international court or a decision by an international organisation, which expands the competence of that institution or its interpretation of international law. Among the most well-known examples are the withdrawal by three Commonwealth Caribbean states – Trinidad and Tobago, Jamaica, and Guyana – from the First Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR)[26] and (in the case of Trinidad and Tobago) the American Convention on Human Rights (ACHR)[27] in the late 1990s. These countries denounced the treaties to withdraw from the jurisdiction of the UN Human Rights Committee and the Inter-American Commission and Court of Human Rights, which they viewed as an impediment to executing criminal defendants convicted of capital offences.

Denunciation of human rights agreements is always controversial. As I explain in a 2002 article, however, the Caribbean governments were not wrong in claiming that these treaties did not expressly prohibit the imposition of the death sentence on those convicted of the most serious crimes.[28] Later human rights instruments do prohibit capital punishment, but Caribbean states never ratified those instruments. Instead, the de facto prohibition on carrying out death sentences resulted from expansive interpretations of the prohibition on inhuman or degrading treatment or punishment found in the basic human rights treaties and in national constitutions. In particular, the Judicial Committee of the Privy Council – the highest court for most Commonwealth Caribbean states – held that governments could not execute defendants held on death row for more than five years.[29] Yet the Privy Council also ruled that the governments could not carry out death sentences while petitions challenging the defendants' convictions or sentences were pending before domestic courts and international and regional human rights bodies. Since it was all but impossible to exhaust all domestic and international appeals within five years, the effect of the Privy Council's decision was a de facto abolition of the death penalty in the region.

This result rankled the Caribbean governments, whose citizens strongly supported the death penalty as a response to the region's high rate of violent crime. The governments felt squeezed between, on the one hand, providing the meaningful review of capital cases that international human rights law and national constitutional law required and, on the other, being unable to carry out a death sentence even if that review revealed no significant legal errors. Although capital punishment as such was not expressly proscribed, the effect of the expansive and evolutionary interpretation of the rights of death row defendants achieved the same practical result. Caught between a rock and a hard place, Jamaica and Trinidad – the two Caribbean countries with the region's largest death rows – as well as Guyana, attempted to convince the Privy Council and international human rights bodies to expedite their review of petitions in capital cases. When

[26] (entered into force 23 March 1976) 999 UNTS 171.
[27] Pact of San José, Costa Rica (entered into force 18 July 1978) 1144 UNTS 123.
[28] Laurence R Helfer, 'Overlegalizing Human Rights: International Relations Theory and the Commonwealth Caribbean Backlash against Human Rights Regimes' (2002) 102 *Columbia Law Review* 1832.
[29] *Pratt v The Attorney General for Jamaica* [1993] UKPC 1; [1993] 2 AC 1 (Jamaica).

that failed, Trinidad denounced the ICCPR's First Optional Protocol but immediately re-ratified it with a reservation limited to the death penalty. When the UN Human Rights Committee subsequently found the reservation to be incompatible with the treaty's object and purpose, Trinidad denounced the Optional Protocol altogether, as did Jamaica and Guyana. Trinidad also withdrew from the ACHR, and all Commonwealth Caribbean states supported a proposal to create a regional judicial body – the Caribbean Court of Justice – to replace appeals to the Privy Council.[30]

The third and most controversial type of exit involves a state that uses withdrawal to demonstrate its overt opposition to an international institution created by a treaty or organisation that the state previously joined. Unlike the Caribbean example just discussed, in which exit is precipitated by a relatively discrete conflict between national and international law, these withdrawals involve 'systematic and consistent criticism' of an international institution accompanied by 'calls for the abandonment of' the institution and 'severe instances of non-compliance'. The goal of exit in this context is 'not to undo a particular ruling … or to change a particular norm, but rather to undermine the institution' itself.[31]

A salient example is the decade-long conflict between Venezuela and the Inter-American human rights system. In a series of rulings and reports beginning in the mid-2000s, the Inter-American Court and Commission of Human Rights chastised the government of President Hugo Chávez for persecuting political opponents, restricting freedom of expression, and undermining judicial independence.[32] In September 2012, the foreign affairs minister at the time, Nicolás Maduro, notified the Organization of American States (OAS) that Venezuela was leaving the ACHR. In the notice of denunciation, Maduro levelled a broadside against the Court and the Commission.[33] 'A common thread running through all of those allegations was the perception of a bias of the Inter-American human rights organs against Venezuela's Bolivarian regime'.[34] The conflict continued following the country's withdrawal from the ACHR in 2013. Facing mounting criticism of its descent into authoritarian rule, the Maduro government announced in April 2017 that it would leave the OAS after the required two-year notice period had elapsed.[35]

[30] Helfer (n 28) 1882–84.

[31] Ximena Soley and Silvia Steininger, 'Parting Ways or Lashing Back? Withdrawals, Backlash and the Inter-American Court of Human Rights' (2018) 14 *International Journal of Law in Context* 237, 241 (internal quotations omitted); see also Mikael Rask Madsen, Pola Cebulak and Micha Wiebusch, 'Backlash Against International Courts: Explaining the Forms and Patterns of Resistance to International Courts' (2018) 14 *International Journal of Law in Context* 5.

[32] Jorge Contesse, 'Resisting Inter-American Human Rights Law' (2019) 44 *Yale Journal of International Law* (forthcoming).

[33] Ministry of Foreign Affairs (Venezuela), 'Notificación de Denuncia' and 'Fundamentación que sustenta la denuncia de la República Bolivariana de Venezuela de la Convención Americana sobre Derechos Humanos presentada a la Secretaría General de la OEA', 10 September 2012, http://www.minci.gob.ve/wp-content/uploads/2013/09/Carta-Retiro-CIDH-Firmada-y-sello.pdf.

[34] Soley and Steininger (n 31) 252.

[35] 'Venezuela Delivers Letter Formalizing Exit from "Coercive" OAS', *Telesur*, 28 April 2017, https://www.telesurtv.net/english/news/Venezuela-Delivers-Letter-Formalizing-Exit-From-Coercive-OAS-20170428-0019.html.

The political fallout from Venezuela's use of exit to discredit the Inter-American human rights system was relatively contained, as it involved a single state that was already isolated in the region. Other recent examples of proposed or actual exits that seek to undermine an international institution are not so limited. These include proposals for a mass withdrawal by African states from the International Criminal Court (ICC),[36] and denunciation of numerous bilateral investment treaties by Ecuador, India, Indonesia and South Africa.[37] In both instances, exit is rooted in opposition to existing international institutions and a desire to create alternatives, the substantive rules and dispute settlement procedures of which more closely align with the interests of the withdrawing countries.[38]

These and other high-profile examples of actual and threatened exit have generated considerable media attention and scholarly interest.[39] We do not know, in fact, whether exit is more common today than in previous years. However, such examples – which also include the United Kingdom's 'Brexit' from the European Union,[40] and statements by President Trump indicating a desire to pull the United States out of the World Trade Organization, NAFTA, and NATO[41] – suggest that the legal and political stakes of withdrawal are especially high in three situations:

- when a state leaves or threatens to quit a treaty that is deeply embedded in its national legal order;
- when it seeks to withdraw from an important multilateral institution; or

[36] Graeme Smith, 'African Leaders Plan Mass Withdrawal from International Criminal Court', *The Guardian*, 31 May 2017. To date, only Burundi has withdrawn from the Rome Statute; notices of withdrawal filed by the Gambia and South Africa were later withdrawn: Manisuli Ssenyonjo, 'State Withdrawal Notifications from the Rome Statute of the International Criminal Court: South Africa, Burundi and the Gambia' (2018) 29 *Criminal Law Forum* 63. The situation in South Africa is discussed below.

[37] Clint Peinhardt and Rachel L Wellhausen, 'Withdrawing from Investment Treaties but Protecting Investment' (2016) 7 *Global Policy* 571, 572; Nicholas Peacock and Nihal Joseph, 'Mixed Messages to Investors as India Quietly Terminates Bilateral Investment Treaties with 58 countries, Arbitration Notes', Herbert Smith Freehills, 16 March 2017, https://hsfnotes.com/arbitration/2017/03/16/mixed-messages-to-investors-as-india-quietly-terminates-bilateral-investment-treaties-with-58-countries.

[38] Laurence R Helfer and Anne E Showalter, 'Opposing International Justice: Kenya's Integrated Backlash Strategy Against the ICC' (2017) 17 *International Criminal Law Review* 1; Anthea Roberts, 'Incremental, Systemic, and Paradigmatic Reform of Investor-State Arbitration' (2018) 112 *American Journal of International Law* 410.

[39] See, eg, Dapo Akande, 'Withdrawal from the United Nations: Would It Have Been Lawful for the Philippines?', *EJIL: Talk!*, 19 September 2016, https://www.ejiltalk.org/can-the-philippines-withdraw-from-the-un; Inken von Borzyskowski and Felicity Vabulas, 'The Costs of Membership Withdrawal from Intergovernmental Organizations', paper prepared for the Political Economy of International Organizations Conference, University of Wisconsin, 8–10 February 2018, http://wp.peio.me/wp-content/uploads/2018/02/Borzyskowski-and-Vabulas_Consequences-of-Withdrawal-paper-53.pdf; Jennifer Trahan, 'Reflections on Burundi's Withdrawal from the International Criminal Court', *Opinio Juris*, 31 October 2017, http://opiniojuris.org/2017/10/31/reflections-on-burundis-withdrawal-from-the-international-criminal-court.

[40] Jed Odermatt, 'Brexit and International Law', *EJIL: Talk!*, 4 July 2016, https://www.ejiltalk.org/brexit-and-international-law.

[41] Rachel Ansley, 'Are Trump's Tariffs Aimed at the WTO?', *Atlantic Council*, 6 March 2018, http://www.atlanticcouncil.org/blogs/new-atlanticist/are-trump-s-tariffs-aimed-at-the-wto; Philip Crowther, 'Trump Threatens to Quit NATO: White House Official', *France 24*, 19 May 2017, http://www.france24.com/en/20170518-white-house-official-trump-threatens-leave-nato-usa-g7-russia; Ana Swanson and Kevin Granville, 'What Would Happen if the U.S. Withdrew from Nafta', *The New York Times*, 12 October 2017, https://www.nytimes.com/2017/10/12/business/economy/what-would-happen-if-the-us-withdrew-from-nafta.html.

- when it backs out of an international agreement that is widely seen as one of the pillars upholding the global legal order.

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The consequential nature of many recent withdrawals provides the backdrop to the third generation of scholarship on exit, which focuses on the intersection between public international law and domestic foreign relations law. Although the executive branch is generally responsible for a state's treaty practice at the international level, the elevated stakes of withdrawal sometimes attract the attention of legislatures and courts. When the executive files a notice of withdrawal without seeking the legislature's approval, that body, a minority political party, or a domestic interest group may challenge the executive's action, leading to important judicial rulings clarifying the constitutional allocation of authority over exiting treaties. Such cases also expose significant differences in how treaty withdrawals are regulated in international and domestic law, differences that scholars have only recently begun to explore.[42]

In most countries, authority over foreign relations – including the power to negotiate and enter into treaties – is entrusted to the executive branch.[43] Extensive state practice suggests that the executive's authority extends to the decision to depart from an international agreement or organisation. Notices of denunciation and withdrawal are drafted by high-level government officials, usually ministers of foreign affairs but occasionally heads of state or government.[44] The treaty depositories who receive exit notifications rarely question their legal bona fides. The Vienna Convention on the Law of Treaties (VCLT) recognises that these high-level officials are empowered to bind the state without producing full powers.[45] According to commentary by the International Law Commission, 'the rule concerning evidence of authority to denounce, terminate, etc. should be analogous to that governing "full powers" to express the consent of a State to be bound by a treaty'.[46] The VCLT thus recognises that the same high-level officials who can bind a state to a treaty can also withdraw the state from a treaty.[47]

As a matter of international law, then, what matters for exit are the actions and statements of the executive branch. The domestic regulation of treaty withdrawal is far more complicated. As I

[42] See, eg, Laurence R Helfer, 'Introduction to Symposium on Treaty Exit at the Interface of Domestic and International Law' (2017) 111 *AJIL Unbound* 425.
[43] Michael Bothe, 'Article 46, Convention of 1969' in Olivier Corten and Pierre Klein (eds), *The Vienna Convention on the Law of Treaties: A Commentary* (Oxford University Press 2011) 1090, 1091 ('From the point of view of efficiency, it is essential that international cooperation, at least to a large extent, constitutes a prerogative of the executive').
[44] Hans Blix and Jirina H Emerson, *The Treaty Maker's Handbook* (Dag Hammarskjoeld Foundation 1973) 114–16.
[45] VCLT (n 2) art 7; see also Robert Kolb, *The Law of Treaties: An Introduction* (Edward Elgar 2016) 38.
[46] International Law Commission, Draft Articles on the Law of Treaties with Commentaries, 1966(II) *Yearbook of the International Law Commission* 264; see also 'Second Report on the Law of Treaties by Sir Humphrey Waldock', 1963(II) *Yearbook of the International Law Commission* 85 ('The power to annul, terminate, withdraw from or suspend treaties, no less than the power to conclude treaties, forms part of the treaty-making power of the State').
[47] VCLT (n 2) art 67(2).

explain in a chapter in the *Oxford Handbook of Comparative Foreign Relations Law*,[48] most of the 190 written constitutions currently in force allocate the authority to *make* treaties between the executive and the legislature, but only 43 constitutions specify which government actors are responsible for *unmaking* international agreements. Of these 43, all but four[49] require the legislature to approve exit from at least some treaties.[50] In several other countries, statutes or administrative regulations specify the domestic procedures that govern exit, often clarifying the executive's authority vis-à-vis the legislature.[51]

The remaining 140 or so countries lack any constitutional or sub-constitutional rules governing treaty denunciation or withdrawal. In these states it is uncertain which government actors must approve the decision to exit. This ambiguity has persisted because executive withdrawal actions are rarely questioned. In two recent cases, however, judicial challenges to the executive's withdrawal plans have resulted in important rulings that have clarified some aspects of this unsettled area of foreign relations law.

In *R (Miller) v Secretary of State for Exiting the European Union*,[52] the United Kingdom Supreme Court held that the Prime Minister could not unilaterally withdraw the UK from the Treaty on European Union. In reaching this result, the court emphasised the distinctive constitutional character of the European Communities Act 1972 – the statute Parliament had adopted prior to the country's accession to the European Union. According to the court, the Act not only gives domestic effect to EU law, but also 'authorises a dynamic process by which … EU law not only becomes a source of UK law, but actually takes precedence over all domestic sources of UK law, including statutes'.[53] The Supreme Court also emphasised that EU treaties are 'a source of domestic legal rights many of which are inextricably linked with domestic law from other sources'.[54] In light of these features, leaving the EU would result in 'a

[48] Laurence R Helfer, 'Treaty Exit and Intra-Branch Conflict at the Interface of International and Domestic Law' in Curtis A Bradley (ed), *Oxford Handbook of Comparative Foreign Relations Law* (Oxford University Press 2019) (forthcoming).

[49] The constitutions of Bosnia and Herzegovina, Guatemala and Syria appear to authorise unilateral executive withdrawal. Chile's constitution requires the executive to consult with the legislature.

[50] In several of the 39 countries, the legislature must approve exit from all international agreements: eg, Constitution of Moldova, Title III, 27 August 1994 (rev 2016), Ch IV, s 1(66) (granting the Parliament the power 'to ratify, terminate, suspend and repeal … international treaties'). In others, the constitution indicates the subject matter of treaties for which withdrawal requires parliamentary assent or provides that ratification and denunciation are governed by the same procedures: see, eg, Constitution of Estonia, 28 June 1992 (rev 2015), Ch IX, art 121 (Parliament 'shall ratify and denounce treaties … which alter state borders; the implementation of which requires the passage, amendment or repeal of Estonian laws; by which the Republic of Estonia joins international organizations or unions; by which the Republic of Estonia assumes military or proprietary obligations; in which ratification is prescribed'); Constitution of Kosovo, 15 June 2008 (rev 2016), Ch I, art 18 ('withdrawal from international agreements follows the same decision-making process as the ratification of international agreements').

[51] See, eg, Law No 421-Z on Treaties of the Republic of Belarus, 23 July 2008, art 41 (listing categories of treaties that may be denounced by, respectively, the National Assembly, the President, and the Council of Ministers).

[52] *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5; [2017] 2 WLR 583.

[53] ibid [60].

[54] ibid [86].

fundamental change in the [UK's] constitutional arrangements', a change that 'must be effected in the only way that the UK constitution recognises, namely by Parliamentary legislation'.[55]

Following the Supreme Court judgment, the Prime Minister sought and received legislative approval to file the notification that triggers at least two years of negotiations leading to the UK's withdrawal from the EU. A constitutional showdown at the start of the Brexit process was thus avoided, but it may have only been delayed. Parliament has insisted on approving the terms of any withdrawal agreement that the UK may eventually negotiate with the EU and its remaining member states.[56]

The second case concerned the unilateral decision by the President of South Africa to file a notice of withdrawal from the Rome Statute, the treaty that established the ICC.[57] In *Democratic Alliance v Minister of International Relations and Cooperation*[58] the High Court of South Africa upheld a challenge to the executive's unilateral action. The South African constitution sets forth detailed rules regarding how the state enters into treaties and incorporates them into domestic law, but it says nothing about exit.[59] The High Court reasoned that the filing of a notice of withdrawal is equivalent to ratifying a treaty, an act that requires the prior approval of the South African parliament.[60]

The court offered three rationales for this analogy. First, it underscored that 'the delivery of a notice of withdrawal has concrete legal effects in international law, as it terminates treaty obligations, albeit on a deferred basis in the present case'.[61] Second, because the constitution gives parliament the power to 'determine … whether an international agreement binds the country, it is constitutionally untenable that the national executive can unilaterally terminate such an agreement'.[62] Third and most expansively, the court suggested that treaty exit is an inherently legislative function and that the executive 'does not have and was never intended to have the power to terminate existing international agreements without prior approval of parliament'.[63]

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[55] ibid [78], [82].

[56] Alison L Young, 'Brexit, Miller, and the Regulation of Treaty Withdrawal: One Step Forward, Two Steps Back?' (2017) 111 *AJIL Unbound* 434.

[57] The government's decision to leave the ICC was triggered by fallout from the visit by Sudanese President Omar al-Bashir to South Africa in 2015. All state parties to the Rome Statute are under an obligation to arrest individuals, such as al-Bashir, who have been indicted by the ICC. Al-Bashir, however, claims immunity from prosecution as a sitting head of state under both treaties and customary international law. The government asserted that withdrawing from the ICC was intended to resolve these 'conflicting international law obligations': Depositary Notification 2016 (n 8) 2.

[58] *Democratic Alliance v Minister of International Relations and Cooperation* 2017 1 SACR 623 (GP).

[59] Constitution of South Africa, 1996, s 231. According to the first clause of s 231, '[t]he negotiating and signing of all international agreements is the responsibility of the national executive'. However, s 231(2) provides that treaties signed by the executive do not bind South Africa on the international plane until 'after [they have] been approved by resolution in both the National Assembly and the National Council of Provinces'.

[60] *Democratic Alliance* (n 58) 47.

[61] ibid.

[62] ibid [51].

[63] ibid [56]. For additional discussion, see Hannah Woolaver, 'Domestic and International Limitations on Treaty Withdrawal: Lessons from South Africa's Attempted Departure from the International Criminal Court' (2017) 111 *AJIL Unbound* 450.

For these reasons, the High Court held that the notice of withdrawal was unconstitutional. The court ordered the executive to revoke the notice, which it did in March 2017.[64] South Africa will thus remain a member of the ICC unless its parliament approves the country's exit from the Rome Statute – an action that appears increasingly unlikely following the results of recent elections in the country.[65]

In addition to highlighting the legal and political controversies that exit can engender, the UK and South African cases suggest a more far-reaching possibility: that withdrawal can bifurcate a treaty's status, ending its obligations in domestic law but continuing to bind the state internationally, or vice versa.[66] Exit usually produces the same effects in both legal systems on the date when a notice of withdrawal takes effect.[67] However, the near-conclusive validity given to the actions of high-level executive branch officials that purport to bind or unbind a state to a treaty at the international level,[68] coupled with a concomitantly strong presumption against other states evaluating the domestic validity of such treaty actions,[69] raise the possibility that a denunciation initiated by the executive in violation of the constitution or without legislative approval would be void at the domestic level but considered lawful by the treaty depositary or international organisation. Such a result would mean that the withdrawing country would no longer be a member of the treaty or organisation for purposes such as participating in meetings or submitting compliance reports, but the international instrument's obligations would continue domestically, either by virtue of the direct effect given to the agreement in the national legal order or as a result of implementing legislation.[70]

The UK and South Africa avoided bifurcation because the government in each country accepted court rulings requiring parliamentary approval for withdrawal. However, such a result may not be replicated in future inter-branch disputes involving treaty exit. Other recent examples

[64] Rome Statute of the International Criminal Court: South Africa: Withdrawal of Notification of Withdrawal, C.N.121.2017.TREATIES-XVIII.10 (Depositary Notification 2017), 7 March 2017.
[65] Theresa Reinold, 'African Union v International Criminal Court: Episode MLXIII (?)', *EJIL: Talk!*, 23 March 2018, https://www.ejiltalk.org/african-union-v-international-criminal-court-episode-mlxiii.
[66] For a more extensive discussion of the different types of bifurcation, see Helfer (n 48).
[67] The VCLT provides that an exiting state is released 'from any obligation further to perform' the treaty 'from the date when such denunciation or withdrawal takes effect': VCLT (n 2) art 70(1)(a), 70(2). Withdrawal does not, however, abrogate the state's obligations under customary international law: VCLT art 43; Laurence R Helfer, 'Exiting Custom: Analogies to Treaty Withdrawals' (2010) 21 *Duke Journal of Comparative & International Law* 65, 71.
[68] Helfer (n 48); see also Mark E Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Martinus Nijhoff 2009) 588 ('if a State representative who is competent under international law expresses the consent of the State to a treaty, that State is bound to its international obligations under the treaty').
[69] Villiger, ibid 591 ('When expressions of consent are exchanged, the other State will normally have to accept its partner's declaration as to competence … Any closer questioning of another State's internal handling of a treaty would, in fact, be regarded as interference in State affairs').
[70] See, eg, Maria O'Sullivan, 'Nauru's Renunciation of Appeals to the High Court – Lawfulness and Implications', *Castan Centre for Human Rights Law: The Official Blog*, 5 April 2018, https://castancentre.com/2018/04/05/naurus-renunciation-of-appeals-to-the-high-court-lawfulness-and-implications (arguing that the Nauru Appeals Act, which implements a 1976 agreement between Australia and Nauru authorising appeals from the Nauru Supreme Court to the Australian High Court, continued in force following the Nauru executive's denunciation of the agreement).

suggest that treaties entered into or denounced by the executive without legislative authorisation may be constitutionally suspect, creating the possibility that treaty obligations will continue internationally while their domestic effects are nullified.[71]

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I will conclude by identifying three unsettled topics concerning treaty exit, which I hope scholars will explore in the future. The first concerns legal rights and obligations that have vested or been executed prior to withdrawal. This issue has been a huge point of contention in negotiations over Brexit.[72] The UK initially resisted EU demands to pay a hefty 'divorce bill' of 60 billion euros for pension obligations, infrastructure projects, and other multi-year budget liabilities incurred when the UK was a member of the regional integration pact.[73] A key point of contention was whether the withdrawal clause in the Treaty on European Union takes precedence as *lex specialis* over the default rule in the VCLT, which provides that exit does not 'affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to' the effective date of withdrawal.[74] The UK later acceded to the EU's demands, but the broader legal question about vested or executed rights and obligations remains.

A second issue concerns the window after the state has filed a notice of withdrawal but before exit takes effect. It is settled that the withdrawing state's treaty obligations continue during this period, but what if the treaty confers jurisdiction on an international court or arbitral body to hear complaints against the withdrawing state? Is it possible for complaints or claims filed during the notice period to be adjudicated after the date on which withdrawal takes effect? International decisions are divided on this question, especially when the alleged violations began prior to the notice of denunciation and continued thereafter.[75] As with the previous issue, the answer

[71] See, eg, *Banful v Attorney-General* [2017] Accra-AD 1 (Ghana) (invalidating a bilateral agreement between the US and Ghana to resettle two Yemeni detainees from the Guantanamo Bay detention centre, where the agreement had not been approved by parliament in contravention of the constitution); *Namah v Pato* [2016] PJSC 13 (Papua New Guinea) (holding unconstitutional the detention of asylum seekers and refugees pursuant to a memorandum of understanding between Papua New Guinea and Australia and ordering the government to cease the illegal detention, in effect rendering the memorandum domestically unenforceable); *Relativo a la acción directa de inconstitucionalidad incoada contra el Instrumento de Aceptación de la Competencia de la Corte Interamericana de Derechos Humanos*, Judgment No TC/0256/14 (Constitutional Tribunal, Dominican Republic 2014) (the President's declaration accepting the jurisdiction of the Inter-American Court of Human Rights was unconstitutional and invalid because it lacked congressional approval).

[72] Michael Waibel, 'Brexit and Acquired Rights' (2017) 111 *AJIL Unbound* 440.

[73] Alex Barker, 'The €60 Billion Brexit Bill: How to Disentangle Britain from the EU Budget', Centre for European Reform, 6 February 2017.

[74] VCLT (n 2) art 70(1)(b). For further discussion, see Waibel (n 72) 440–41.

[75] Luke Eric Peterson, 'What Have We Learned from the First Wave of Post-denunciation ICSID Claims against Venezuela – and Why Do Investors Keep Suing Venezuela There?', *Investment Arbitration Reporter*, 30 November 2017, http://tinyurl.com/y7qtqkp2; Tania Voon and Andrew D Mitchell, 'Ending International Investment Agreements: Russia's Withdrawal from Participation in the Energy Charter Treaty' (2017) 111 *AJIL Unbound* 461; see also Helfer (n 67) 78–79 (discussing case law of the Inter-American Court and Commission on Human Rights following Trinidad and Tobago's withdrawal).

may depend on whether the treaty contains specialised rules governing post-withdrawal obligations.[76]

A third area for future research concerns the abrogation of notices of withdrawal. In the case of South Africa's aborted attempt to exit from the ICC, the executive filed both a notice of withdrawal and a 'withdrawal of notification of withdrawal'.[77] The VCLT authorises such changes of heart, which it contemplates will be carried out by the same high-level officials who expressed the state's consent to be bound to the treaty and filed the initial notice of withdrawal.[78] It is uncertain, however, whether the exiting country can be estopped from abrogating its decision to exit, such as where the remaining member states have relied to their detriment on the notification.[79] Equally unsettled is whether treaty parties can contract around the VCLT and make withdrawal notifications irrevocable – an issue that has divided government officials and commentators in the context of Brexit.[80] Finally, just as there are disputes concerning the need for legislative approval of denunciations and withdrawals in different countries, so too there are unresolved questions concerning which branches of government must authorise the abrogation of an exit notice.[81]

In sum, I hope I have persuaded you that denunciation of international agreements and withdrawal from international organisations raise interesting and provocative issues that are central to understanding how international law operates in times of disorder and contestation. Thank you very much for your attention.

[76] Perhaps the most well-known example of post-withdrawal obligations are the 'survival clauses' of investment treaties, which continue to protect existing investors and investments 'for ten to twenty years after either treaty party terminates': Anthea Roberts, 'Triangular Treaties: The Extent and Limits of Investment Treaty Rights' (2015) 56 *Harvard International Law Journal* 353, 386–87.

[77] Depositary Notification 2017 (n 64).

[78] VCLT (n 2) art 67(2) ('Any act … withdrawing from … a treaty … shall be carried out through an instrument communicated to the other parties. If the instrument is not signed by the Head of State, Head of Government or Minister for Foreign Affairs, the representative of the State communicating it may be called upon to produce full powers'); ibid art 68 (providing, inter alia, that an instrument or notification of withdrawal 'may be revoked at any time before it takes effect').

[79] See Antonios Tzanakopoulos, 'Article 68, Convention of 1969', in Corten and Klein (n 43) 1564.

[80] Paul Eden, 'Can a Notification under Article 50 TEU Be Unilaterally Withdrawn?', *UK Trade Policy Observatory Blog*, 17 March 2017, https://blogs.sussex.ac.uk/uktpo/2017/03/17/can-a-notification-under-article-50-teu-be-unilaterally-withdrawn; Jake W Rylatt, 'The Irrevocability of an Article 50 Notification: *Lex Specialis* and the Irrelevance of the Purported Customary Right to Unilaterally Revoke', *UK Constitutional Law Association Blog*, 27 July 2016, https://ukconstitutionallaw.org/2016/07/27/jake-rylatt-the-irrevocability-of-an-article-50-notification-lex-specialis-and-the-irrelevance-of-the-purported-customary-right-to-unilaterally-revoke.

[81] Charles Streeten, 'Putting the Toothpaste Back in the Tube: Can an Article 50 Notification Be Revoked?', *UK Constitutional Law Association Blog*, 13 July 2016, https://ukconstitutionallaw.org/2016/07/13/charles-streeten-putting-the-toothpaste-back-in-the-tube-can-an-article-50-notification-be-revoked.

ANEXO 3

EXITING CUSTOM: ANALOGIES TO TREATY WITHDRAWALS

LAURENCE R. HELFER*

INTRODUCTION

In *Withdrawing from International Custom*,[1] Professors Bradley and Gulati advance a pair of novel and thought-provoking arguments: first, that the conventional wisdom that states may never unilaterally withdraw from customary international law ("CIL") is not supported by historical practice or the writings of key international law publicists; and second, that permitting such withdrawals in certain circumstances is preferable to a categorical preclusion of unilateral exits. This Essay begins where the authors' second argument leaves off. It analyzes the rules governing unilateral withdrawals from and denunciations of multilateral treaties and considers the insights they offer for understanding how a "default view" that permits states to withdraw from CIL might function in practice.[2]

My objectives for undertaking this analysis are twofold. First, Bradley and Gulati rely heavily on the divergent treatment of treaties and custom in support of their second claim. Drawing upon *Exiting Treaties*, my previous study of the design and use of treaty denunciation and withdrawal clauses,[3] I shed additional light on this analogy by illustrating how the law of treaties regulates unilateral exit. Second, I hope to alleviate the concerns of

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1. Curtis A. Bradley & Mitu Gulati, *Withdrawing from International Custom*, 120 YALE L.J. 202 (2010) [hereinafter *Withdrawing from International Custom*].

2. This Essay does not, however, address an important antecedent question: is it appropriate to analogize between treaties and custom? The answer to this question depends, in part, on whether the two sources of international law serve similar or different functions. For a thoughtful argument that CIL serves distinctive communitarian functions that weigh against convergence with the law of treaties, see generally Anthea Roberts, *Who Killed Article 38(1)(b)? A Reply to Bradley and Gulati*, 21 DUKE J. COMP. & INT'L L. 173 (2010). A second issue this Essay does not consider is the transition costs of shifting from the mandatory view to the default view. These costs may be considerable, and uncertainty over the transition process may create incentives for opportunistic behavior. *See id.* (manuscript at 11) (on file with author). A fully developed proposal for a default view of CIL must address both of these topics. For a preliminary analysis, see generally Curtis A. Bradley & Mitu Gulati, *Customary International Law and Withdrawal Rights in an Age of Treaties*, 21 DUKE J. COMP. & INT'L L. 1 (2010).

3. Laurence R. Helfer, *Exiting Treaties*, 91 VA. L. REV. 1579 (2005).

commentators who oppose a default view of custom on the ground that it would allow states simply to walk away from preexisting legal commitments to other nations. As I explain below, if the rules governing unilateral withdrawal from CIL were to track those governing unilateral withdrawal from treaties, states would be subject to a wide array of procedural and substantive constraints on their ability to exit from international laws they no longer intend to follow.[4] My analysis of these constraints is based on the Vienna Convention on the Law of Treaties,[5] on reports of the International Law Commission leading to the Convention's adoption,[6] on state practice concerning treaty denunciations and withdrawals, and on relevant international judicial rulings.

The remainder of this Essay proceeds as follows. Part I reviews the procedural limitations on treaty denunciations, including the obligation to act in good faith, the requirement to provide reasonable notice of an intent to withdraw, and the possibility for a state to offer a justification for its decision to quit a treaty. Part I also considers how these procedural limitations might be transposed to CIL.

Part II analyzes the substantive constraints on treaty denunciations. The issues addressed include the presumption against partial exits and the possibility of withdrawing from treaties that contain no provisions governing denunciation or withdrawal. The latter issue is especially germane to identifying which subjects of CIL should be amenable to unilateral exit, and to fashioning a default rule for custom that permits withdrawal in some areas but not others.

Part III analyzes the legal consequences of exit. The denunciation of a multilateral treaty terminates the withdrawing state's legal obligations under the treaty. Such an action does not, however, affect the country's responsibility for violations that occurred before the denunciation takes effect. To the contrary, the withdrawing state remains responsible not only for those violations but also for their continuing effects.

4. *Cf.* Caesar v. Trinidad and Tobago, Inter-Am. Ct. H.R. (ser. C) No. 123 (2005), ¶ 56 (Mar. 11, 2005) (Trindade, Judge, concurring) ("[N]ot even the institution of denunciation of treaties is so absolute in effects as one might *prima facie* tend to assume.").

5. Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention].

6. *See, e.g.* Gerald Fitzmaurice, Special Rapporteur, Second Report on the Law of Treaties, U.N. Doc. A/CN.4/107 (1957), *reprinted in* [1957] 2 Y.B. INT'L L. COMM'N 16 [hereinafter Second Fitzmaurice Report]; Humphrey Waldock, Special Rapporteur, Second Report on the Law of Treaties, U.N. Doc. A/CN.4/156 (1963), *reprinted in* [1963] 2 Y.B. INT'L L. COMM'N 36 [hereinafter Second Waldock Report].

I. PROCEDURAL CONSTRAINTS ON EXIT FROM TREATIES AND CIL

Good faith is the fundamental ground norm upon which the entire law of treaties is constructed. It applies not only to the creation and performance of international legal obligations but also to their termination.[7] As applied to unilateral denunciations and withdrawals, however, the good faith principle raises a number of distinctive issues.

Most multilateral treaties contain broad and permissive withdrawal clauses that do not condition exit upon the consent of other states parties or review by international tribunals.[8] This creates difficulties where the parties' performances occur at different times. In particular, the clauses raise the possibility that the denouncing state could obtain the benefits of performance by other treaty members and then withdraw prior to carrying out its own performance. Many multilateral agreements address this risk by precluding exit during a designated number of years following a treaty's entry into force, and/or by providing that a notification of denunciation or withdrawal takes effect only after a specified number of months or years has passed.[9] The former provision allows all parties to incur the costs of implementing the agreement without fear that their treaty partners will "cut and run." The latter clause narrows the window for asynchronous performance and thereby diminishes the incentive for one state opportunistically to appropriate benefits that should accrue to all treaty parties.[10]

In the *Military and Paramilitary Activities in Nicaragua* case,[11] the International Court of Justice ("ICJ") applied the good faith principle to a closely analogous issue: whether the United States could revise its declaration recognizing the court's compulsory jurisdiction, which provided that it would "remain in force for a period of five years and thereafter until the expiration of six months after notice may be given to

7. Legality of Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J 226, 267 (July 8) (advisory opinion); MARK E. VILLIGER, COMMENTARY ON THE 1969 VIENNA CONVENTION ON THE LAW OF TREATIES 769 (2009).

8. *See* Helfer, *supra* note 3, at 1598-99; VILLIGER, *supra* note 7, at 703-04.

9. *See* Helfer, *supra* note 3, at 1596-99 (analyzing variation in treaty exit clauses).

10. *See* Paul B. Stephan, *The New International Law—Legitimacy, Accountability, Authority, and Freedom in the New Global Order*, 70 U. COLO. L. REV. 1555, 1583 (1999); Edward T. Swaine, *Unsigning*, 55 STAN. L. REV. 2061, 2074 (2003).

11. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S), 1984 I.C. J. 392 (Nov. 26).

terminate this declaration."[12] Three days before Nicaragua filed an application with the ICJ, the United States modified its declaration to exclude all disputes with Central American nations. The modification further provided that it "shall take effect immediately."[13] These revisions, the United States asserted, deprived the court of jurisdiction over a dispute involving Nicaragua. The ICJ rejected this argument. It reasoned that the United States had "assumed an inescapable obligation towards other States . . . by stating formally and solemnly that any [change to its declaration] should take effect only after six months have elapsed as from the date of notice."[14] The court also gave short shrift to the United States' attempt to invoke, on reciprocity grounds, Nicaragua's declaration recognizing the ICJ's compulsory jurisdiction. That declaration did not contain any notice period prior to withdrawal. It was therefore, according to the United States, "liable to immediate termination, without previous notice." Again, the ICJ disagreed:

> [T]he right of immediate termination of declarations with indefinite duration is far from established. It appears from the requirements of good faith that they should be treated, by analogy, according to the law of treaties, which requires a reasonable time for withdrawal from or termination of treaties that contain no provision regarding the duration of their validity. Since Nicaragua has in fact not manifested any intention to withdraw its own declaration, the question of what reasonable period of notice would legally be required does not need to be further examined: it need only be observed that from 6 to 9 April would not amount to a "reasonable time".[15]

The ICJ's reasoning implies that notice provisions and other procedural restrictions on treaty exits should be strictly construed. Such a result is fully consistent with the ground norm of good faith, with respect for the parties' bargain (which encompasses both the form of international agreements and their substance),[16] and with the goal of discouraging opportunistic defections that may cause treaty-based cooperation to unravel.

These same principles can be applied "by analogy" to withdrawals from international custom. But the translation of these principles raises conceptual challenges. The two canonical elements of CIL—state practice

12. *Id.* ¶ 13.

13. *Id.*

14. *Id.* ¶ 61.

15. *Id.* ¶ 63.

16. *See* Kal Raustiala, *Form and Substance in International Agreements*, 99 AM. J. INT'L L. 581 (2005).

and *opinio juris*—both relate to the substance of an evolving customary rule. Governments generally do not express their views concerning a rule's procedural aspects, including those relating to withdrawal. For this reason, CIL most closely resembles multilateral treaties that neither expressly provide for denunciation or withdrawal nor expressly preclude it. Exit from these agreements is governed by Article 56 of the Vienna Convention. I discuss the substantive dimension of Article 56 below. Here I focus on the article's procedural clause, which requires a state to "give not less than twelve months' notice of its intention to denounce or withdraw . . . ."[17]

The rationale for this provision, which purportedly reflects state practice, is to provide a notice period that "is sufficiently long to give adequate protection to the interests of the other parties and to enable further negotiations."[18] To this one might add the virtues of a bright line rule that enables all treaty members to plan their behavior in advance of any particular instance of exit.

Under the default view of CIL withdrawals that Bradley and Gulati propose, these same policies should inform both the length of the notice period and the procedures for providing notice. Multilateral agreements designate depositories to circulate notifications to other states parties. CIL contains no such institutional infrastructure. In earlier centuries, the absence of a formal mechanism for disseminating a state's notice of withdrawal might have supported a default notice period of more than one year. The twenty-first century's pervasive digital technologies make such an extension unnecessary. But those technologies also facilitate the ability of foreign ministry officials to inform their counterparts in countries bound by an existing custom, which in most instances include all or nearly all members of the international community. Thus, to satisfy the good faith requirement, a state seeking to absent itself from an existing rule of CIL should, at a minimum, expressly and directly notify every nation that may plausibly claim to be adversely affected by the withdrawal, and otherwise widely publicize its intent to withdraw on a date certain at least one year in the future.

There is weaker support for precluding unilateral withdrawal in the years immediately following the formation of a new custom. Prohibitions on denunciations during a treaty's early years are found in many multilateral agreements. But they are far less common than the requirement

17. Vienna Convention, *supra* note 5, art. 56(2).

18. VILLIGER, *supra* note 7, at 704; *cf. Withdrawing from International Custom*, *supra* note 1, at 258-59 ("[A] reasonable notice period might be imposed [prior to withdrawal from CIL] in situations in which reliance interest are at stake.").

to provide at least twelve months notice prior to exit. In addition, states may persistently object to an emerging custom to prevent its application to them. Given the widely acknowledged difficulty of identifying the precise moment when emerging state practice and *opinio juris* crystallize into legally binding custom,[19] a rule permitting withdrawal prior to that moment but categorically precluding it for a period of years thereafter would be impractical and difficult to enforce.

Does the good faith principle also require a withdrawing state to explain why it is opting out of CIL? The analogy to treaties suggests a negative answer. "The overwhelming majority of the denunciation and withdrawal clauses . . . do not require a state to provide any justification for its decision to quit a treaty."[20] As a practical matter, however, the benefits of giving reasons are considerable. Exit, whether from treaties or custom, creates a variety of institutional, legal, political, and reputational costs.[21] These costs can be reduced if the withdrawing state "uses the formal pre-exit notice period or informal statements to explain its decision to quit the treaty."[22] Such an explanation may, for example, identify unforeseen circumstances that make compliance with custom unduly costly. Or it may induce other countries to shift to a different equilibrium rule.[23] These benefits notwithstanding, there is insufficient state practice to compel a withdrawing state to issue an explanation as a condition of exit. In addition, even the few treaties that require such a justification make it self-judging.[24] Applying the same mandatory disclosure requirement to CIL would thus do little to deter opportunistic withdrawals.

19. *See generally* ANTHONY A. D'AMATO, THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW (1971); J. Patrick Kelly, *The Twilight of Customary International Law*, 40 VA. J. INT'L L. 449 (2000).

20. Helfer, *supra* note 3, at 1598. In addition, most notices of denunciation are "short, stylized letters of two or three paragraphs that simply inform the treaty depository that a state is withdrawing from a particular agreement as of a specified date." *Id.*

21. *Id.* at 1613-29; *see also* Timothy Meyer, *Power, Exit Costs, and Renegotiation in International Law*, 51 HARV. INT'L L.J. 379 (2010) (discussing the distributional implications of exit costs for powerful and weaker states).

22. Helfer, *supra* note 3, at 1627.

23. *Id.* at 1635-36 (explaining how threats of unilateral denunciation accompanied by justifications can help to move treaty parties to a more efficient multilateral treaty rules).

24. *See* Abram Chayes, *An Inquiry into the Workings of Arms Control Agreements*, 85 HARV. L. REV. 905, 957-58 (1972) (explaining that justifications for unilateral denunciation of arms control agreements are "referred exclusively to the unilateral decision of the withdrawing party").

II. SUBSTANTIVE CONSTRAINTS ON EXIT FROM TREATIES AND CIL

The law of treaties imposes a number of substantive limitations on the denunciation of multilateral agreements. These include presumptions against partial withdrawal and against exit from treaties that neither prohibit nor permit unilateral opt outs. A closely related issue concerns the types of treaties—and, by analogy, customary rules—whose subject matter implies a ban on denunciation or withdrawal unless states expressly agree to the contrary.

Vienna Convention Article 44 regulates partial denunciations.[25] It adopts a general rule of "indivisibility of treaty provisions while circumscribing . . . the conditions for the exceptional severance of individual provisions and clauses."[26] The result is a presumption that exit rights "may be exercised only with respect to the whole treaty."[27] This rule is entirely sensible. Multilateral agreements, both those regulating a single topic (such as the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families) and those that codify grand bargains (such as the WTO Agreements) are package deals that embody hard-fought compromises among government negotiators.[28] If a ratifying state could exit from only those provisions of the package that it disfavors, international cooperation would quickly degenerate into tit-for-tat retaliation.[29]

The presumption against severability applies with equal force to CIL. The presumption is easiest to apply to custom that is derived from widespread acceptance of multilateral agreements and whose content mirrors the provisions of those agreements.[30] Where treaties and custom

25. Vienna Convention, *supra* note 5, art. 44(1) ("A right of a party, provided for in a treaty or arising under article 56, to denounce, withdraw from or suspend the operation of the treaty may be exercised only with respect to the whole treaty unless the treaty otherwise provides or the parties otherwise agree.").

26. *See* VILLIGER, *supra* note 7, at 562, 654-67; Vienna Convention, *supra* note 5, art. 44, ¶¶ 2 -3 (describing the exceptions, which include partial withdrawals in response to another party's breach, and withdrawals whose grounds relate solely to particular, severable clauses of the treaty that were not an essential basis of the consent of the other parties).

27. VILLIGER, *supra* note 7, at 564.

28. *But see Withdrawing from International Custom*, *supra* note 1, at 270 ("[T]reaties vary substantially in the extent to which they involve a package of rules.").

29. *See generally* Reservations to Convention on Prevention and Punishment of Crime of Genocide, Advisory Opinion, 1951 I.C.J. 15 (May 28) (noting that this risk is most acute for treaties that prohibit reservations but that even treaties that expressly or implicitly permit reservations do so only for particular clauses or if reservations are consistent with the agreement's object and purpose).

30. *See, e.g.*, MALCOLM N. SHAW, INTERNATIONAL LAW 95 (6th ed. 2008); Bing Bing Jia, *The Relations between Treaties and Custom*, 9 CHINESE J. INT'L L. 81 (2010).

are coterminous, states should be precluded from partially withdrawing from CIL to the same extent as they would be barred from partially denouncing the underlying agreement upon which that custom is based.

The presumption may be more difficult to apply to other areas of CIL, in particular where it is uncertain whether state practice and *opinio juris* have created a single, indivisible custom or two or more discrete customary rules. Consider the two 1945 Truman Proclamations, issued on the same day and widely acknowledged as the trigger for new CIL relating to the law of the sea.[31] Each proclamation laid claim to a different resource—an exclusive economic zone in the high seas and the continental shelf that lies beneath them. Later assertions of control by other coastal nations varied in their content and scope. But their claims to both resources, like those asserted by the United States, tended to go hand in hand.[32] Were these distinct customary rules or a single omnibus custom? The codification of both practices in a comprehensive multilateral convention mooted this question.[33] For non-codified areas of CIL, however, government officials and commentators will need to reexamine historical sources to evaluate the severability issue. If two customary practices are distinct rather than interrelated, the state's withdrawal from one will not alter its continuing obligations with respect to the other.[34]

A second and more convoluted substantive limitation on exit arises for a treaty that contains no provisions for termination, denunciation or withdrawal. Article 56(1) of the Vienna Convention provides that such an agreement "is not subject to denunciation or withdrawal unless: (a) It is established that the parties intended to admit the possibility of denunciation or withdrawal; or (b) A right of denunciation or withdrawal may be implied by the nature of the treaty."[35]

In 1997, North Korea attempted to denounce the International Covenant on Civil and Political Rights (ICCPR), which is silent as to the

31. *See* Proclamation No. 2667, 3 C.F.R. 39-40 (1943-1948); Proclamation No. 2668, 3 C.F.R. 40-41 (1943-1948); Bernard H. Oxman, *The Territorial Temptation: A Siren Song at Sea*, 100 AM. J. INT'L L. 830, 832 (2006).

32. *See* Peter Prows, *Tough Love: The Dramatic Birth and Looming Demise of UNCLOS Property Law (And What Is to Be Done About It)*, 42 TEX. INT'L L.J. 241, 253-55 (2007).

33. *See* United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397.

34. *Cf.* Vienna Convention, *supra* note 5, art. 43 ("The invalidity, termination or denunciation of a treaty, the withdrawal of a party from it . . . shall not in any way impair the duty of any State to fulfil [sic] any obligation embodied in the treaty to which it would be subject under international law independently of the treaty.").

35. *Id.* art. 56(1).

possibility of exit.[36] In response, the U.N. Human Rights Committee, the expert body that monitors compliance with the treaty, issued a general comment concluding that the ICCPR was not capable of denunciation or withdrawal.[37] Tracking Article 56's two-part inquiry, the Committee first explained that the absence of an exit clause was not oversight, inasmuch as the ICCPR's First Optional Protocol and other contemporaneously-negotiated human rights conventions expressly provided for withdrawal.[38] It then reasoned that the rights protected by the ICCPR "belong to the people living in the territory of the State party" and cannot be divested by changes in government or state succession.[39] As a result, the treaty "does not have a temporary character typical of treaties where a right of denunciation is deemed to be admitted, notwithstanding the absence of a specific provision to that effect."[40]

The above reasoning suggests that customary human rights law should be exempt from unilateral withdrawal. Bradley and Gulati support this result, citing the Committee's general comment as an example of "agency problems" in which "governments will want to opt out even though it would be better for their populations if they did not."[41] The authors confine this justification for closing exit to "international law that is focused on certain fundamental rights of individuals (such as *jus cogens* norms), rather than on more traditional interstate issues."[42] But the line between these two types of custom is often difficult to draw in practice. In fact, agency problems can arise whenever CIL recognizes private actors as rights holders or third party beneficiaries of international obligations, including in areas as diverse as humanitarian law, protection of aliens, and preservation of the environment. Whether CIL should permit exit that adversely affects the rights and interests of private parties thus raises important normative questions that the authors do not fully address.

Bradley and Gulati also discuss other possible rationales supporting the mandatory view of custom, including the reliance interests of other nations, rule of law and legitimacy concerns, and externalities. They demonstrate, persuasively in my view, that these justifications do not support a categorical ban on CIL withdrawals. This is all that is necessary

36. U.N. Human Rights Comm., General Comment No. 26: Continuity of Obligations, U.N. Doc. CCPR/C/21/Rev.1/Add.8/Rev.1, ¶ 1 (Dec. 8, 1997).

37. *Id.* ¶ 5.

38. *Id.* ¶ 2.

39. *Id.* ¶ 4.

40. *Id.* ¶ 3.

41. *Withdrawing from International Custom*, *supra* note 1, at 266.

42. *Id.* at 267.

for the authors to critique the conventional wisdom that CIL should never bar unilateral opt outs. But it leaves unresolved the much harder question of *when* to permit or preclude such opt outs under the default view of CIL that would replace it.

The analogy to treaties sheds additional light on this question, although it does not conclusively answer it. In the 1950s and 1960s, the International Law Commission prepared reports on the law of treaties that eventually resulted in the adoption of the Vienna Convention.[43] One issue that divided the special rapporteurs who drafted these studies was whether states could exit from a treaty that did not contain an express denunciation or withdrawal clause. In his 1957 report, Sir Gerald Fitzmaurice wrote that, in the absence of such a provision, it should be assumed that such a treaty is intended to be of "indefinite duration, and only terminable . . . by mutual agreement on the part of all the parties."[44] But Fitzmaurice also acknowledged, albeit somewhat grudgingly, the existence of several exceptions:

> This assumption, however, may be negatived in any case *(a)* by necessary inference to be derived from the terms of the treaty generally, indicating its expiry in certain events, or an intention to permit unilateral termination or withdrawal; *(b)* should the treaty belong to a class in respect of which, *ex naturae*, a faculty of unilateral termination or withdrawal must be deemed to exist for the parties if the contrary is not indicated—such as treaties of alliance, or treaties of a commercial character.[45]

Sir Humphrey Waldock revisited the issue six years later. His report included a detailed draft article on "treaties containing no provisions regarding their duration and termination."[46] Waldock disagreed with Fitzmaurice that there was a general presumption against exit from treaties that lack a withdrawal or denunciation clause, and he reviewed state practice to identify the types of agreements for which exit was or was not permitted. The former category included:

> (i) a commercial or trading treaty, other than one establishing an international regime for a particular area, river or waterway; (ii) a treaty of alliance or of military co-operation . . . ; (iii) a treaty for technical co-operation in economic, social, cultural, scientific,

43. International Law Commission, Law of Treaties, http://untreaty.un.org/ilc/texts/1_1.htm (last visited August 15, 2010) (listing texts, instruments and final reports adopted by the Commission).

44. Second Fitzmaurice Report, *supra* note 6, at 22.

45. *Id.*

46. Second Waldock Report, *supra* note 6, at 64.

> communications or any other such matters . . . ; (iv) a treaty of arbitration, conciliation or judicial settlement [and] "a treaty which is the constituent instrument of an international organization."[47]

In contrast, Waldock asserted that a treaty "shall continue in force indefinitely" if it:

> (a) is one establishing a boundary between two States, or effecting a cession of territory or a grant of rights in or over territory; (b) is one establishing a special international regime for a particular area, territory, river, waterway, or airspace; (c) is a treaty of peace, a treaty of disarmament, or for the maintenance of peace; (d) is one effecting a final settlement of an international dispute; (e) is a general multilateral treaty providing for the codification or progressive development of general international law . . . .[48]

Agreements not referenced in either list would be subject to a presumption against withdrawal "unless it clearly appears from the nature of the treaty or the circumstances of its conclusion that it was intended to have only a temporary application."[49]

Waldock's proposed typology was controversial and it divided the members of the International Law Commission and the Vienna Convention's drafters.[50] The result was the ambiguous compromise reflected in Article 56(1), quoted above, which refers to the parties' (often unwritten) intent and to the treaty's (undefined) nature. Nevertheless, many commentators continue to consult the Waldock report for guidance concerning the types of treaties that implicitly preclude or permit withdrawal, albeit with some modern adjustments.[51]

What insights do the two Commission reports and the drafting history of Article 56 offer for the issue of CIL withdrawal? One possibility would be to have exit rules for custom parallel the rules that Waldock proposed for treaties that contain no denunciation or withdrawal clause. This approach may appear to have the virtue of uniformly regulating all

47. *Id.*

48. *Id.*

49. *Id.*

50. MALGOSIA FITZMAURICE & OLUFEMI ELIAS, CONTEMPORARY ISSUES IN THE LAW OF TREATIES 357 (2005).

51. For example, Waldock does not list human rights treaties as not subject to denunciation or withdrawal in the absence of an express exit clause. This is unsurprising given that, at the time of his report in 1962, only a small number of multilateral agreements protecting fundamental rights had been adopted. Present-day commentators have remedied this omission. *See, e.g.*, ANTHONY AUST, MODERN TREATY LAW AND PRACTICE 290-91 (2d ed. 2007); VILLIGER, *supra* note 7, at 703.

international laws that govern a given issue area.[52] In reality, however, Waldock's treaty typology (or any other, for that matter) cannot be so easily transferred to the realm of state practice and *opinio juris*. The categories that Waldock proposed were residual rules to be applied only if the parties deviated from the far more common practice of including exit clauses in the agreements they negotiated.[53] Under the mandatory view of CIL that currently prevails, there is no analogous opportunity for states to indicate that a given custom permits unilateral withdrawal. Transposing Waldock's typology to CIL would therefore result in a far more radical restructuring of the international legal system, since the typology would have the practical effect of dictating which areas of custom are amenable to exit and which are not.

An alternative approach, applying Article 56(1) of the Vienna Convention to CIL, fairs little better. It is meaningless to ask whether states "intended to admit the possibility of denunciation or withdrawal," because, under the present mandatory view of CIL, they simply never considered that question. And it is equally futile to ask whether "the nature" of a particular custom implies a right of exit, since the nature of *all* modern CIL is that it binds all states except for persistent objectors, and that it continues to do so until it is abrogated by a new custom or by treaty.[54]

How, then, should one determine the substantive constraints on unilateral withdrawals from custom? Bradley and Gulati do not answer this question, reserving for a future project the development of "a typology that would match more or less permissive opt out rules to particular areas of CIL."[55] The authors do, however, offer a few "guidelines" for such a project. The most promising of these, in my view, are their suggestions (1) to "take account of the functional cooperation problems that different areas of CIL attempt to solve, some of which are likely to require more mandatory regimes than others;" (2) to consider agency problems for customary rules that protect the "fundamental rights of individuals;" and (3) "to treat certain structural or background principles as mandatory."[56] These guidelines, which implicate foundational principles of how to

52. *Cf.* Bradley & Gulati, *supra* note 1, at 271 (suggesting that "limitations and variations [on CIL withdrawal rights] might be drawn from treaties that address the same subject matter as the CIL rule").

53. Second Waldock Report, *supra* note 6, at 64-65 ("A large proportion of modern treaties, . . . especially multilateral treaties, do contain provisions . . . providing for a right of denunciation or withdrawal . . . .").

54. *See* Bradley & Gulati, *supra* note 1, at 211-13 (noting these canonical rules and citing authorities).

55. *Id.* at 273.

56. *Id.* at 273, 267, 274.

structure the international legal system, require more extended analysis than I can provide in this brief Essay. Scholars considering these important issues would do well to consult the International Law Commission reports on treaty withdrawals, less for their specific examples than to help identify the types of cooperation, agency, and structural problems that are appropriately regulated through mandatory rules of international custom.

III. THE LEGAL CONSEQUENCES OF EXIT FROM TREATIES AND CIL

In addition to imposing the substantive constraints on unilateral withdrawal, the law of treaties regulates the legal consequences of exit for the withdrawing state and for the countries that remain parties to a treaty following that state's departure. Article 70 of the Vienna Convention provides that a nation that denounces or withdraws from a multilateral treaty is released "from any obligation further to perform" the treaty "from the date when such denunciation or withdrawal takes effect."[57] Article 70 further provides, however, that the denunciation or withdrawal "does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to" the effective date.[58]

Commentators agree that these provisions, which predate the Vienna Convention and were adopted unanimously by its drafters, are declaratory of customary international law.[59] Nevertheless, a few multilateral treaties, in particular human rights and humanitarian law agreements, expressly reiterate that an exiting state's obligations continue until the date that its denunciation or withdrawal takes effect. Article 78(2) of the American Convention on Human Rights is illustrative.[60] It provides that a denunciation "shall not have the effect of releasing the State Party concerned from the obligations contained in this Convention with respect to any act that may constitute a violation of those obligations and that has been taken by that state prior to the effective date of denunciation."[61]

The Inter-American Commission and Court of Human Rights have issued several decisions interpreting and applying Article 78. On May 26, 1998, Trinidad and Tobago denounced the American Convention in

57. Vienna Convention, *supra* note 5, art. 70(1)(a), 70(2).

58. *Id.* art. 70(1)(b). These provisions apply "unless the treaty otherwise provides or the parties otherwise agree." *Id.* art. 70(1).

59. *See* VILLIGER, *supra* note 7, at 869, 875; *see also* AUST, *supra* note 51, at 303.

60. *See* American Convention on Human Rights art. 78(2), Nov. 22, 1969, 1144 U.N.T.S. 123, 144-63 (entered into force July 18, 1978).

61. *Id.*

response to domestic and international challenges to its application of the death penalty.[62] Pursuant to the one-year notice rule in Article 78(1), the denunciation was effective on May 26, 1999. Both during the twelve month window and thereafter, numerous defendants on death row in Trinidad filed complaints with the Inter-American Commission.[63] In addition, one day before the denunciation took effect, the Commission lodged an appeal with the Inter-American Court concerning other death row defendants whose cases the Commission had previously reviewed.[64]

In a 2001 decision, the Commission considered whether it had jurisdiction to review these complaints.[65] It first reiterated that, under the "plain terms of Article 78(2)," a denunciation does "not release the denouncing state from its obligations under the Convention with respect to acts taken by that state prior to the effective date of the denunciation that may constitute a violation of those obligations."[66] The Commission then defined the denouncing state's "obligations" as encompassing not only

> the substantive rights and freedoms guaranteed [by the American Convention, but also] provisions relating to the supervisory mechanisms under the Convention, including those . . . relating to the jurisdiction, functions and powers of the Inter-American Commission on Human Rights. Notwithstanding Trinidad and Tobago's denunciation of the Convention, therefore, *the Commission will retain jurisdiction over complaints of violations of the Convention by Trinidad and Tobago in respect of acts taken by that State prior to May 26, 1999*. Consistent with established jurisprudence, *this includes acts taken by the State prior to May 26, 1999, even if the effects of those acts continue or are not manifested until after that date*.[67]

In *Hilaire, Constantine and Benjamin v. Trinidad and Tobago*, the Inter-American Court accepted jurisdiction over complaints by death row

62. For additional analysis, see Laurence R. Helfer, *Overlegalizing Human Rights: International Relations Theory and the Commonwealth Caribbean Backlash Against Human Rights Regimes*, 102 COLUM. L. REV. 1832 (2002).

63. *See id.* at 1882.

64. *See* Richard J. Wilson & Jan Perlin, *The Inter-American Human Rights System: Activities from Late 2000 Through October 2002*, 18 AM. U. INT'L L. REV. 651, 688-89 (2003); Natasha Parassram Concepcion, Note, *The Legal Implications of Trinidad & Tobago's Withdrawal From the American Convention on Human Rights*, 16 AM. U. INT'L L. REV. 847, 872-73 (2001).

65. Roodal v. Trinidad & Tobago, Case 12.342, Inter-Am. Comm'n H.R., Report No. 89/01, OEA/Ser. L./V/II.114, doc. 5 rev. ¶ 4 (2001), *available at* http://cidh.org/annualrep/2001eng/TT12342.htm.

66. *Id.* ¶ 23.

67. *Id.* (emphasis added) (footnotes omitted).

defendants alleging violations that occurred prior to the denunciation.[68] Although the Court did not address the issue in depth, it "appears to have shared the Commission's interpretation of Article 78" inasmuch as its ruling involved "petitions [that] were lodged with the Commission after the effective date of Trinidad's denunciation."[69] Decisions by the ICJ and the European Commission of Human Rights have reached similar conclusions.[70]

These principles should also apply to an international legal regime in which a state can unilaterally exit from CIL. As proposed in Part I, such a state must provide at least one year notice to every other nation that may be adversely affected by its withdrawal. During this notice period, the exiting country's legal obligations continue unabated. In addition, the state remains responsible for breaches of CIL that occurred prior to or during the notice period—even after it has successfully opted out. Taken together, these rules prevent nations from using exit as a tactic to avoid accountability for past violations of CIL. They also deter precipitous and opportunistic withdrawals in which a state opts out and then immediately acts contrary to a custom that it had previously accepted as legally binding.

One issue that Vienna Convention Article 70 does not address is how nations injured by a withdrawing state's pre-exit breach are to obtain a remedy for that violation.[71] In the case of treaties that establish an international court or review body, aggrieved countries can file complaints against the exiting state even after it has quit the treaty.[72] For CIL violations, by contrast, no international tribunal may have jurisdiction to adjudicate the dispute.[73] The absence of an international judicial forum

68. *See* Hilaire v. Trinidad and Tobago, Case 11.816, Inter-Am. Ct. H.R. (ser. C) No. 80, ¶ 28 (Sep. 1, 2001); Hilaire, Constantine and Benjamin v. Trinidad and Tobago, Case 11.816, Inter-Am. Ct. H.R. (ser. C) No. 94, ¶¶ 12-20 (June 21, 2002).

69. Brian D. Tittemore, *The Mandatory Death Penalty in the Commonwealth Caribbean and the Inter-American Human Rights System: An Evolution in the Development and Implementation of International Human Rights Protections*, 13 WM. & MARY BILL RTS. J. 445, 474-75 n.129 (2004).

70. *See* P. VAN DIJK & G.J.H. VAN HOOF, THEORY AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 15 (3d ed. 1998) (discussing decisions of the European Commission); VILLIGER, *supra* note 7, at 869 n.4 (citing ICJ judgments).

71. *See* VILLIGER, *supra* note 7, at 873-74.

72. For example, the Inter-American Commission has continued to accept petitions alleging violations of the American Convention that occurred prior to May 26, 1999, the effective date of Trinidad & Tobago's denunciation. *See, e.g.*, Ramlogan v. Trinidad and Tobago, Case 12.355, Inter-Am. Comm'n H.R., Report No. 48/02, OEA/Ser.L./V/II.117, doc. 5 at 426 (2002), *available at* http://www.cidh.org/annualrep/2002eng/TT.12355.htm (last visited Nov. 5, 2010).

73. If both the complainant and respondent states have filed declarations recognizing the ICJ's compulsory jurisdiction without any applicable reservations, then that court will be empowered to adjudicate the dispute. However, only 66 countries have filed such declarations, often with expansive

does not, however, negate the breaching state's continuing obligation to make reparation, nor does it preclude the aggrieved nations from using diplomacy, negotiation or other forms of dispute settlement to pursue their legal claims.[74]

CONCLUSION

This Essay has analyzed the substantive and procedural constraints on unilateral exit from multilateral treaties and has argued that these restrictions should apply with equal force if the international legal system were revised to permit unilateral exit from CIL in certain circumstances. The Essay has also considered the continuing obligations that an exiting nation has to other states parties, even after it quits a treaty. These obligations should also apply to proposals to permit unilateral withdrawals from international custom. Taken together, this suite of legal constraints on exit should alleviate, at least in part, fears that a relaxation of the mandatory view of CIL will necessarily destabilize international law.

In addition to legal restrictions on treaty exit, numerous institutional, political, and reputational costs deter states from quitting treaties.[75] There is no reason to expect that these costs would be appreciably lower if states could withdraw from CIL. There is, however, a more important reason to reject a categorical ban on CIL withdrawals. An exit option may actually "enhance interstate cooperation" by "provid[ing] the security states need to negotiate more extensive international commitments or encourage ratification by a larger number of nations—outcomes that are often essential to resolving genuinely global transborder problems."[76] In identifying the cooperation-enhancing features of exiting custom, Bradley and Gulati have developed a thought-provoking proposal that, if appropriately cabined by constraints analogous to those that limit exiting treaties, may better serve the ends of world order.

reservations. *See Declarations Recognizing the Jurisdiction of the Court as Compulsory*, INT'L CT. OF JUSTICE, http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1&p3=3 (last visited Nov. 5, 2010).

74. *See* VILLIGER, *supra* note 7, at 873-74.

75. *See* Helfer, *supra* note 3, at 1613-29.

76. *Id.* at 1647.