

EXITING CUSTOM: ANALOGIES TO TREATY WITHDRAWALS

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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 are

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).

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 negated 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 law⁴⁸

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. Tittmore, *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 HOOFF, *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.