
**TREATY EXIT AND INTRA-BRANCH CONFLICT AT THE INTERFACE OF
INTERNATIONAL AND DOMESTIC LAW**

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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. Recent treaty exits, both actual and proposed, span the length and breadth of international law, including agreements regulating trade, regional integration, foreign investment, criminal law, and human rights.

The legal and political stakes of exit are especially high when a state leaves or threatens to withdraw from a treaty that is deeply embedded in its national legal systems (such as the UK’s “Brexit” from the European Union), that creates a multilateral institution (such as calls by African states to withdraw from the Rome Statute creating the 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 Trump indicating a desire to leave the WTO, NAFTA, and 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 UK Supreme Court’s decision in *R (Miller) v. Secretary of State for Exiting the European Union*,² and the legislation to be enacted prior to the UK’s departure from the EU, 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

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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).

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 the examples mentioned above, the decision to withdraw originated with the executive. As illustrations later in this chapter reveal, however, the impetus for withdrawal – or actions that make exit more likely – 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, on constitutional grounds, forcing the political branches to choose between exiting the treaty, curing the violation, or breaching its international obligations. In other instances, exit proposals have originated in the legislature, mandating or pressuring the executive to leave a treaty.

Conflicts involving both dimensions of treaty exit stem from a common source – the different objectives underlying the domestic and international rules governing how states enter into and leave treaties. In domestic law, these rules balance multiple policy goals, such as pursuing national interests, enhancing democratic deliberation over whether to join or leave a treaty, and preserving flexibility to make or unmake compacts with other nations 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 together determine how different countries enter into and leave international agreements.

The rationales that inform the 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 particular date. These rules also reinforce state sovereignty by making it unnecessary for the government of one country 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 from the divergent policies that underlie them. Part II summarizes international and domestic law governing treaty withdrawals. Part III draws on a wide range of contemporary examples to

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).

explain how withdrawing from a treaty can produce convergent or divergent outcomes in domestic and international law. Part IV explores different contestations among the branches of government that can arise over treaty exit. Part V explains that international law takes little if any account of violations of domestic treaty-making procedures, generating the controversies describe 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 to set the stage for analyzing the full spectrum of conflicts that exit can engender.

The vast majority of treaties contain express withdrawal or denunciation clauses that authorize a state to exit simply by announcing its intention to leave and providing the advance notice – most often six months or one year – indicated in those clauses.⁶ A few 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.⁹

In contrast to the international law of treaty withdrawal, the domestic procedures governing exit are far more complex, uncertain, and vary widely from country to country. According to the Comparative Constitutions Project, 43 out of 190 written constitutions currently in force contain provisions on treaty withdrawal, denunciation or termination.¹⁰ All but four¹¹ of

⁶ BARBARA KOREMENOS, *THE CONTINENT OF INTERNATIONAL LAW: EXPLAINING AGREEMENT DESIGN* 140-144 (2016); Laurence R. Helfer, *Exiting Treaties*, 91 VA. L. REV. 1579, 1592-95 (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 The VCLT provides that the withdrawing state is released “from any obligation further to perform” the treaty “from the date when such denunciation or withdrawal takes effect.” *Id.* art. 70.

¹⁰ Comparative Constitutions Project, at <http://comparativeconstitutionsproject.org/>.

¹¹ 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,

these 43 constitutions require the national legislature to approve exit from at least some treaties. In several countries, the legislature must approve all international agreements.¹² In others, the constitution lists the subject matter of treaties for which exit requires parliamentary assent,¹³ or provides that ratification and denunciation are governed by the same procedures.¹⁴ Statutes or administrative rules in approximately a dozen states specify the domestic procedures governing treaty exit, often clarifying the executive's powers vis-à-vis the legislature.¹⁵

The remaining 140 or so countries lack constitutional or sub-constitutional rules governing exit. In these states, it is unclear which actors are authorized to withdraw from international agreements. Faced with this lacuna, some courts and commentators have argued 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

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

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, Sep. 11, 1980 (rev. 2015), ch. V, art. 54.

¹² *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”).

¹³ *E.g.* CONST. OF ESTONIA, Jun. 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”).

¹⁴ *E.g.*, CONST. OF KOSOVO, Jun. 15, 2008 (rev. 2016), ch. I, art. 18 (“withdrawal from international agreements follows the same decision-making process as the ratification of international agreements”).

¹⁵ *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-Hughes Verdier and Mila Versteeg for sharing their research on national laws governing treaty withdrawal.

¹⁶ *E.g.*, *Democratic Alliance*, *supra* note __, para. 56; GIULIANA ZICCARDI CAPALDO, LA COMPETENZA A DENUNCIARE I TRATTATI INTERNAZIONALI 63 (1983). Some constitutions recognize international agreements that the executive alone can make and unmake. *E.g.*, CONST. OF ARMENIA, Jul. 5, 1995 (rev. 2015), ch. 3, art. 55 (7) (the President shall “approve, suspend or annul the international agreements for which no ratification is required”).

¹⁷ *See, e.g.*, Giovanni Boggetti, *The Role of Italian Parliament in the Treaty-Making Process – Europe*, 67 CHI. KENT. L. REV. 391, 404 (1991) (discussing Italian practice); Curtis A. Bradley, *Treaty Termination and Historical Gloss*, 92 TEX. L. REV. 773, 788 (2014) (analyzing U.S. historical practice); 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) (explaining procedures in Switzerland).

Functional considerations also militate in favor of unilateral executive exit. For example, 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 legal conflicts over treaty exit.

II. A TYPOLOGY OF TREATY EXIT CONFLICTS IN INTERNATIONAL AND DOMESTIC LAW

This part 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, 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 the 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 common types of legal conflicts that can arise in each category. I omitted other instances of treaty exit that were less well-suited to these goals, and the examples I chose gloss over some details that may interest scholars, such 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 quit the treaty in that particular instance. 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 <u>valid</u> under domestic law	Treaty exit <u>invalid</u> under domestic law
Treaty exit <u>valid</u> under int'l law (State no longer a party; prospective obligations end)	<p><u>Actual examples:</u></p> <ul style="list-style-type: none"> • 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 <i>Goldwater v. Carter</i> (1978) • UK: Notice of withdrawal from the EU following <i>Miller</i> and parliamentary approval of Brexit (2017) 	<p><u>Actual and hypothetical examples:</u></p> <ul style="list-style-type: none"> • 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 <i>Democratic Alliance</i> (2016-2017) • Venezuela: denunciation of American Convention on Human Rights contrary to the constitution (2012-2013)
Treaty exit <u>invalid</u> under int'l law (State remains a party; obligations continue)	<p><u>Actual and hypothetical examples:</u></p> <ul style="list-style-type: none"> • 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) 	<p><u>Hypothetical examples:</u></p> <ul style="list-style-type: none"> • 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

A. *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 requesting and 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 an legal instrument that binds the state under domestic and international law. Examples of this type of exit include 2017 approvals by legislatures of Ecuador and Romania to terminate bilateral investment treaties,¹⁸ and the Bolivian parliament's 2011 authorization to the president to denounce the UN Single Convention on Narcotic Drugs.¹⁹

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* (March 27, 2017), at <https://www.lexology.com/library/detail.aspx?g=89abdc5f-4749-4f27-9edb-a4714c09dfc4>.

¹⁹ 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).

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 United States-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

A different 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 somewhat is 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, leading to a lawsuit that the U.S. Supreme Court dismissed as non-justiciable 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, the key events occurred earlier in time. A referendum endorsing the UK’s withdrawal from the EU was held in June 2016. The next month, Prime Minister Theresa May announced that she would unilaterally pull the country out of the TEU, triggering a lawsuit. The U.K. Supreme Court held that parliamentary approval was constitutionally required

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, Sep. 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 Democratic Alliance*, *supra* note __, 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).

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 U.S., judicial refusal to adjudicate the President's action resulted in de facto approval of unilateral withdrawal authority. In the U.K., 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 Part V 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 – the state will no longer be a party to the treaty under international law but will remain bound by the treaty or 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 the agreement of the legislature. Debates over the continuation of the NAFTA Implementation Act in the wake of a future decision by President Trump to withdraw from NAFTA focus on precisely this issue.²⁸

South Africa's aborted exit from the ICC illustrates a different type of bifurcation. The government filed a notice of withdrawal from the Rome Statute on October 19, 2016. The High Court judgment of February 22, 2017 held the notice unconstitutional, and the executive swiftly

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

²⁷ VCLT, arts. 7, 67(2).

²⁸ See Brandon J. Murrill, *U.S. Withdrawal from Free Trade Agreements: Frequently Asked Legal Questions* Cong. Research Serv., 13-17 (2016).

complied with the court's order to revoke the notice.²⁹ 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 have not been abrogated in domestic law, and the ICC implementation statute would have remained in effect. A similar outcome would result in countries where the executive unilaterally quits a treaty in contravention of a constitutional requirement that the legislature approval such withdrawals.

A more fundamental conflict can arise where a treaty is embedded in the constitution itself. Such a possibility arose following Venezuela's 2013 withdrawal from the American Convention on Human Rights – a treaty that includes an express denunciation clause.³⁰ Like several Latin American countries, Venezuela considers ratified human rights treaties as part of a “constitutional block” that national courts are authorized to enforce.³¹ 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.”³² It follows, according to the complainants, that the executive's “denunciation, which disregarded the constitutional hierarchy of the American Convention and arbitrarily disincorporated the treaty from the constitutional block,” is invalid.³³ Although the status of this litigation is unknown, the case illustrates how a withdrawal that is 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, the overwhelming majority of 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.³⁴ When a state nonetheless attempts to quit the agreement in conformity with national law, the result may

²⁹ *Democratic Alliance*, *supra* note ___, at para. 84.

³⁰ Diego Germán Mejía-Lemos, *Venezuela's Denunciation of the American Convention on Human Rights*, 17:1 ASIL INSIGHTS (Jan. 9, 2013).

³¹ 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”).

³² 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).

³³ *Id.* at 654 (author's unofficial translation).

³⁴ A prominent example is North Korea's purported denunciation of the International Covenant on Civil and Political Rights (ICCPR). Yogesh Tyagi, *The Denunciation of Human Rights Treaties*, 79 BRIT. Y.B. INT'L L. 86, 167-70 (2009).

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).³⁵ 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, a treaty that permits states to become parties without recognizing the IACtHR's jurisdiction. Such recognition can occur later by the filing of 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.³⁶ This deep domestication of regional human rights norms ruptured following an IACtHR judgment condemning a Constitutional Tribunal ruling that upheld the decision to abrogate citizenship of thousands of Dominicans of Haitian descent. After the government rejected the regional court's judgment, the Tribunal received a petition challenging the president's acceptance of the IACtHR's jurisdiction without congressional approval. Interpreting the declaration as equivalent to a treaty, the Tribunal ruled that the executive's action was 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 that the IACtHR itself had reached in an earlier case against Peru.³⁷

The Constitutional Tribunal did not order the DR to denounce the American Convention. However, its ruling, which scholars have characterized as a “court-led treaty exit,”³⁸ 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.”³⁹

³⁵ 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), at <http://www.tribunalconstitucional.gob.do/Sentencias>.

³⁶ Dinah Shelton & Alexandria 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).

³⁷ Constitutional Court v. Peru, Inter-Am. Ct. H.R. (ser. C) No. 55, ¶ 49-50 (1999).

³⁸ Alexandra Huneeus & Renè Ureña, *Treaty Exit and Latin America's Constitutional Courts*, 111 AJIL UNBOUND 456, 458 (2017).

³⁹ *Id.* at 868.

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 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.⁴⁰

Negotiating a return to a treaty or international organization raises unresolved questions. Can the executive re-characterize 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

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.”⁴¹ In Poland, an EU member since 2004, the constitution requires legislation to join or leave treaties involving “membership in an international organization.”⁴² Thus, a 2007 executive decree purporting to pull Poland out of the EU would have been invalid under domestic and international law.

Executive withdrawals from treaties approved by U.S. Senate present a more complex scenario. Commentators generally agree that the president’s unilateral authority to quit such

⁴⁰ N. Feinberg, *Unilateral Withdrawal from an International Organization*, 39 BRIT. Y.B. INT’L L. 189, 204-11 (1963).

⁴¹ OLIVER DÖRR & KIRSTEN SCHMALENBACH, VIENNA CONVENTION ON THE LAW OF TREATIES: A COMMENTARY 985 (2011).

⁴² CONST. OF POLAND, Oct. 17, 1997 (rev. 2009), ch. III, art. 89(c).

agreements applies only to withdrawals consistent with the treaty's terms or otherwise justified in international law, such as in response to another state's breach.⁴³ 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."⁴⁴ 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 non-state terrorist groups,⁴⁵ and that the threat of terrorist attacks from such groups is unlikely to end soon,⁴⁶ the president would likely be precluded under U.S. and international law from exiting one of the conventions unilaterally.

III. INTRA-BRANCH CONFLICTS OVER TREATY EXIT

Given the executive's preeminent role in foreign relations, it is hardly surprising that most treaty exit decisions, including the examples discussed above, are initiated by the executive. But there are situations in which the other branches of government push for withdrawal. For example, the legislature may adopt a law or resolution that purports to exit from a treaty or demand that the executive do so. Or a judicial ruling may invalidate a treaty 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 has the authority to force a withdrawal over the executive's objection. The second concerns the different rationales that animate legislative exit.

⁴³ RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES: TREATIES § 113 (Tentative Draft No. 2); *see also* Bradley, *supra* note __, at 815-16 (discussing Office of Legal Counsel memoranda concluding that the president cannot unilaterally suspend or exit from an Article II treaty in contravention of international law).

⁴⁴ *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.

⁴⁵ 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).

⁴⁶ 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").

With regard to authority, none of the 39 constitutions (discussed in Part II) that expressly require legislative approval of treaty exit appears to give that body the power to initiate a withdrawal.⁴⁷ 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 long and rich 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.⁴⁸ The most recent example involved the imposition of sanctions against the apartheid regime in 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.⁴⁹

In Kenya, the legislature's role in treaty ratification and denunciation is regulated by statute. The Treaty Making and Ratification Act, 2012 sets forth procedures for negotiating, ratifying, and denouncing treaties. Distilled to their 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 a withdrawal.⁵⁰

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 of the International Crimes Act. President Uhuru Kenyatta, who was 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.⁵¹

⁴⁷ Several constitutions require the executive to refer a treaty to the legislature to approve a withdrawal. *E.g.*, CONST. OF ARMENIA, Jul. 5, 1995 (rev. 2015), ch. IV, art. 81.2. Others authorize the legislature to ratify and denounce treaties without indicating which branch initiates withdrawal. *E.g.*, CONST. OF ESTONIA, Jun. 28, 1992 (rev. 2015), ch. IX, art. 121.

⁴⁸ James J. Moriarty, *Congressional Claims for Treaty Termination Powers in the Age of the Diminished Presidency*, 14 CONN. J. INT'L L. 123 (1999).

⁴⁹ David "Dj" Wolff, *Reasserting its Constitutional Role: Congress' Power to Independently Terminate a Treaty*, 46 U.S.F. L. REV. 953, 983-86 (2012).

⁵⁰ Treaty Making and Ratification Act (2012) Sec. 17. A draft of the Act authorized the Assembly to approve or deny withdrawal. The Treaties Bill (2011) Sec. 9 (on file with author).

⁵¹ *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, 16-17 (2017).

Turning from de jure authority to justification, why might the legislature seek to denounce a treaty when the executive opposes such a move? Perhaps the most obvious answer is that the political branches have different substantive views regarding the treaty and its obligations. In other instances, 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 as a smoke screen to contribute to ongoing political disputes 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 apt illustration of the third. Both the U.S. Congress and president disfavored South Africa’s system of systematic racial segregation but differed over how (and how hard) to pressure the white minority government to abandon it. Terminating bilateral tax and air services agreements added little to this disagreement, but was a symbolic way to isolate South Africa and demonstrate solidarity with other nations that had cut formal 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 leaders to withdraw from the Rome Statute and enabling the Kenya’s President and Deputy President to feign cooperation with their criminal prosecutions while shoring up domestic political support for blocking the trials from proceeding. Seen in this light, the 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.”⁵²

Judicially compelled exit

In two recent rulings, national 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 international instrument, 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.

In 2017, the Supreme Court of Ghana invalidated an a bilateral agreement between the United States and Ghana to transfer two Yemeni detainees from the Guantanamo Bay detention camp for resettlement in Ghana.⁵³ The President of Ghana did not submit the agreement to Parliament for ratification pursuant to Article 75 of the Ghanaian Constitution.⁵⁴ In response to a suit challenging the resettlement deal, the government characterized the agreement as a note

⁵² *Id.* at 18.

⁵³ *Banful v. Att’y Gen.* [2017] Accra–A.D. 1 (Ghana).

⁵⁴ 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.”).

verbal, 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. pull out from or abrogating) a previously-concluded agreement.⁵⁵

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 non-executive. And it reasoned that the executive agreements entered into by 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.”⁵⁶

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 verbal.⁵⁷

A 2006 ruling of the Supreme Court of Sri Lanka invalidating the state’s accession to the First Optional Protocol to the ICCPR reached a similar conclusion.⁵⁸ The Optional Protocol creates a mechanism for individuals to file complaints with a quasi-judicial body, the UN Human Rights Committee (UNHRC), against states that have accepted the Protocol, which Sri Lanka’s president did in a 1997 declaration.

The petitioner in the case sought to overturn a criminal conviction, relying on a decision of the UNHRC finding that his rights had been violated.⁵⁹ 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 UNHRC – and a judicial function – recognizing the UNHRC’s authority to review complaints alleging violations of those rights.⁶⁰ Since the executive was not authorized to exercise these powers, the court held that Sri Lanka’s

⁵⁵ *Id.* at 7-12.

⁵⁶ *Id.* at 13-15. The recognition of such an obligation directly conflicts with the reasoning of a 2002 ICJ judgment, discussed in Part V, *infra*.

⁵⁷ Press release, *Ghana: Parliament Extends Stay of Gtimo 2* (Aug. 2, 2017), at <http://allafrica.com.proxy.lib.duke.edu/stories/201708020865.html>.

⁵⁸ *Singarasa v. Att’y Gen.*, No. 182/99 (2006), 138 I.L.R. 451.

⁵⁹ *Id.*, at 1-2.

⁶⁰ *Id.* at 8.

accession to the Optional Protocol was unconstitutional and “does not bind the Republic qua state and has no legal effect within the Republic.”⁶¹

Notwithstanding the Supreme Court’s ruling, the government has not sought to withdraw the declaration and individuals continue to file complaints raising violations of the ICCPR. Sri Lanka has, however, refused to respond to any of these cases, relying on the 2006 ruling. In 2014, the UNHRC chastised this “lack of cooperation” and urged the state to establish a procedure to implement its decisions.⁶²

IV. THE MISMATCH BETWEEN DOMESTIC AND INTERNATIONAL TREATY PROCEDURES AND THEIR CONSEQUENCES

This chapter has illustrated 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 negotiated by the executive 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.

How does international law take account of the wide range 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 procedures 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.”⁶³ 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.”⁶⁴

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)*,⁶⁵ favor applying the same approach to treaty withdrawals. A key

⁶¹ *Id.* at 9.

⁶² 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.

⁶³ VCLT, art. 46(1).

⁶⁴ *Id.* art. 46(2).

⁶⁵ 2002 ICJ Reports 303.

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.⁶⁶

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.”⁶⁷ 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,”⁶⁸ 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.”⁶⁹

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.”⁷⁰ The VCLT thus recognizes that the same high-level executive officials are authorized both to bind the state and to effectuate treaty withdrawals.⁷¹ In addition, the functional rationales for permitting reliance on the apparent authority of state agents and not imposing a duty to investigate internal treaty making procedures are equally applicable to facially valid exit notices. As a result, just 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,⁷² 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.

⁶⁶ *Id.* para. 258.

⁶⁷ *Id.* para. 264.

⁶⁸ *Id.* para. 265 (quoting VCLT Article 7(2)).

⁶⁹ *Id.* para. 66.

⁷⁰ *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.”).

⁷¹ VCLT, art. 67(2).

⁷² Villiger, *supra* note ___, at 589.

V. CONCLUSION

International and domestic law adopt different rules for how states enter into and exit from treaties. These rules, and the divergent policies underlying them, create opportunities to bifurcate the status of treaties in international and domestic law. This chapter develops a typology to categorize these conflicts, drawing upon recent examples of treaty withdrawals and actions by the executive, legislature, and judiciary that make such withdrawals more likely.

The chapter also suggests several understudied topics for future research. First, national courts are quite willing to invalidate treaty joinder 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 developing new doctrines 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. I read the VCLT’s drafting history and a key ICJ judgment as supporting a strong presumption against invoking such domestic violations to invalidate denunciations. Yet this interpretation of existing law, even if accurate, 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.⁷³

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

⁷³ [cite Hannah Woolaver Handbook chapter]