
From Joining to Leaving: Domestic Law's Role in the International Legal Validity of Treaty Withdrawal

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Abstract

If a state withdraws from a treaty in a manner that violates its own domestic law, will this withdrawal take effect in international law? The decisions to join and withdraw from treaties are both aspects of the state's treaty-making capacity. Logically, international law must therefore consider the relationship between domestic and international rules on states' treaty consent both in relation to treaty entry and exit. However, while international law provides a role for domestic legal requirements in the international validity of a state's consent when joining a treaty, it is silent on this question in relation to treaty withdrawal. Further, there has been little scholarly or judicial consideration of this question. This contribution addresses this gap. Given recent controversies concerning treaty withdrawal – including the United Kingdom's exit from the European Union, South Africa's possible withdrawal from the International Criminal Court, and the threatened US denunciation of the Paris Agreement – and the principles underlying this body of law, it is proposed that the law of treaties should be interpreted so as to develop international legal recognition for domestic rules on treaty withdrawal equivalent to that when states join treaties, such that a manifest violation of domestic law may invalidate a state's treaty withdrawal in international law.

1 Introduction

Contemporary international society depends on states' engagement with international organizations and other treaty regimes. Such engagements are growing at an astonishing rate.¹ Simultaneously, international organizations seemingly assert

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¹ See Peters, 'The Growth of International Law between Globalization and the Great Power', 8 *Austrian Review of International and European Law Online* (2005) 109, at 109.

ever-growing competence and claim jurisdiction over areas that would once have been firmly within the core *domaine réservé* of the state, such as immigration, the structure of the national economy and national prosecutorial policies. In parallel, populist movements have increasingly called for a ‘restoration of national sovereignty’ by demanding that their governments withdraw from international treaties, including those once thought to be part of the bedrock of the modern international legal system. States are only bound by those treaties to which they consent. However, questions have arisen as to who is able to express the state’s consent – is it only the voice of the state’s international representatives that bears weight for international legal purposes or do internal actors such as the legislature, or perhaps even the populace directly, have a role to play? These questions have come to the fore in relation to a number of high-profile controversies around the globe concerning the legality of states’ withdrawal from significant treaties.

This is an important juncture at which to consider the domestic and international law of treaties in relation to the state’s decision to exit treaty regimes. In particular, these controversies require consideration of a previously neglected question: if a state withdraws from a treaty in a manner that violates its own domestic law – for instance, if the executive fails to obtain the constitutionally required legislative approval of treaty withdrawal – will this withdrawal take effect in international law? Both domestic and international law separately, but concurrently, regulate the state’s withdrawal from treaties. Further, both the decision to join and the decision to withdraw from international treaties are aspects of the state’s expression of consent to a treaty. Logically, the relationship between domestic and international rules on the state’s treaty consent must therefore consider both the state’s entry to, and exit from, the treaty. However, while international law establishes that a violation of domestic law when a state joins a treaty may invalidate its treaty consent, it is silent on this question in relation to the state’s treaty withdrawal. Furthermore, many domestic constitutional systems do not clearly regulate the power to withdraw from treaties. As there has been little judicial and scholarly discussion of the role of domestic legal requirements in the international legal validity of treaty withdrawal,² this contribution will seek to address this gap.

This article will proceed in three parts. First, domestic legal approaches to the regulation of treaty withdrawal will be considered, including discussion of three case studies: the United Kingdom’s (UK) withdrawal from the European Union (EU), South Africa’s failed departure from the International Criminal Court (ICC), and the proposed denunciation of the Paris Agreement by the USA.³ Second, the role of these

² Though see recent brief discussion in Crawford, ‘The Current Political Discourse Concerning International Law’, 81(1) *Modern Law Review* (2018) 1, at 14; earlier discussions in Ciampi, ‘Invalidity and Termination of Treaties and Rules of Procedure’, in E. Cannizzaro (ed.), *The Law of Treaties beyond the Vienna Convention* (2011); Frankowska, ‘Competence of State Organs to Denounce a Treaty: Some Internal and International Legal Problems’, 7 *Polish Year Book of International Law* (1975) 277; Tyagi, ‘The Denunciation of Human Rights Treaties’, 79 *British Yearbook of International Law (BYIL)* (2008) 86; C. Rousseau, *Droit International Public* (1970); G. Haraszti, *Some Fundamental Problems of the Law of Treaties* (1973).

³ Paris Agreement on Climate Change (Paris Agreement), UN Doc. FCCC/CP/2015/L.9/Rev.1, 12 December 2015.

domestic law rules in the international legal effectiveness of the state's treaty withdrawal will be assessed, comparing and contrasting the rules on joining and leaving treaties in international law. The article concludes by proposing that the law of treaties should be interpreted so as to develop international legal recognition for domestic rules on treaty withdrawal equivalent to that when states join treaties, such that a manifest violation of domestic law may vitiate a state's treaty withdrawal in international law. In this way, domestic legal developments extending democratic principles and the separation of power controls to treaty withdrawal decisions may be given international legal force.

2 Treaty Withdrawal in Domestic Law

All states have a treaty-making capacity as an aspect of their fundamental right to sovereign equality, which includes both the competence to join treaties and to withdraw from them.⁴ As put by Humphrey Waldock, '[t]he 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'.⁵ While it is clear that, from the perspective of international law, binding treaty obligations (like all rules of international law) take precedence over domestic law,⁶ this does not address the question of who can validly consent to, or revoke consent from, such obligations on behalf of the state. The state's determination of who can express its will in relation to treaty membership, as with all questions of the constitutional system adopted by a state, is an expression of the state's sovereignty protected within its domestic jurisdiction.⁷ Given the variety of constitutional systems around the world, it is unsurprising that, as discussed in the following section, different states adopt different domestic legal approaches to the regulation of the power to withdraw from treaties.⁸

A Domestic Law Approaches to Leaving Treaties

As noted above, the state's power to terminate or withdraw from a treaty is an important aspect of its treaty-making capacity. The power to end its agreement to be bound by treaty provisions is as essential to this capacity as the power to join treaties. However, while most states have provisions regulating the domestic authority to join treaties, most states do not have explicit rules on the power to withdraw from treaties. A recent study found that only 43 out of 190 domestic constitutions surveyed

⁴ See *Case of the S.S. Wimbledon*, 1923 PCIJ Series A, No. 1, at 35; Vienna Convention on the Law of Treaties (VCLT) 1969, 1155 UNTS 331, Art. 6.

⁵ Waldock, 'Second Report on the Law of Treaties by Sir Humphrey Waldock', 2 *ILC Yearbook* (1963) 36, at 85.

⁶ VCLT, *supra* note 4, Art. 27.

⁷ See *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Judgment, 27 June 1986, ICJ Reports (1986) 14, para. 263.

⁸ For further discussion of these varying approaches, see chapters by Helfer and Woolaver in C. Bradley, *Oxford Handbook on Comparative Foreign Relations Law* (forthcoming).

contained provisions concerning treaty exit, while 168 countries had rules on signing and/or ratifying treaties.⁹ While some commentators have explained this disparity by assuming that states simply apply the same rules for leaving a treaty as for joining a treaty – what is known as the ‘*acte contraire* theory’, meaning that the requirements for making and unmaking a rule should be identical – this is not borne out in practice.¹⁰ When states have adopted rules on treaty exit, as discussed below, they often differ from those on becoming a party to treaties.

In those states that have adopted explicit rules on treaty withdrawal, the approaches vary significantly. Some jurisdictions give authority to the executive to end all treaty commitments;¹¹ others require legislative approval of withdrawal from all,¹² or certain,¹³ treaties. Most of these countries apply distinct rules to joining and leaving treaties, often requiring legislative approval for joining some or all treaties but allowing the executive to withdraw without legislative involvement.¹⁴ Only a small number of states explicitly apply the same rules to both.¹⁵ As noted above, though, states with such explicit constitutional regulation of treaty withdrawal are in the minority. Despite (or perhaps due to) the widespread absence of explicit textual regulation of the domestic requirements for treaty withdrawal, there are an increasing number of jurisdictions that are grappling with clarifying these requirements. This has recently led to significant judicial decisions examining the relevant domestic law as well as ongoing debates and controversies concerning the respective roles of the legislative, judicial, and executive branches of government in treaty withdrawal. Three case studies will be examined here to demonstrate the variety of procedural and substantive approaches to domestic legal regulation of treaty withdrawal that have developed in the absence of textual provision: the UK’s exit from the EU; South Africa’s possible departure from the ICC; and the USA’s possible denunciation of the Paris Agreement.

1 *The UK’s Exit from the EU*

The UK’s exit from the EU is likely the most prominent controversy arising from a state’s withdrawal from an international treaty. After a majority of voters supported ending the UK’s membership in the EU, the UK executive announced its intention to trigger the withdrawal provision – Article 50 – of the Treaty on European Union (TEU).¹⁶

⁹ See *Comparative Constitutions Project*, available at <http://comparativeconstitutionsproject.org/>. All subsequently cited domestic constitutions are available at this source.

¹⁰ See, e.g., Ciampi, *supra* note 2, at 369

¹¹ E.g., Art. 81 of the Constitution of the People’s Republic of China (1982, rev. 2004); Art. 183 of the Constitution of Guatemala (1985, rev. 1993).

¹² E.g., Art. 161 of the Constitution of Angola (2010); Art. 90 of the Constitution of Cambodia (2008); Art. 65(1) of the Constitution of Georgia (2013, rev. 1995).

¹³ E.g., Art. 121 of the Constitution of Estonia (1992, rev. 2015).

¹⁴ E.g., Art. 26 of the Constitution of Norway (1814, rev. 2016); Arts 171 and 183 of the Constitution of Guatemala (1985, rev. 1993).

¹⁵ E.g., Art. 22 of the Constitution of Argentina (1994).

¹⁶ Treaty of Lisbon amending the Treaty on European Union and the Treaty Establishing the European Community (TEU) 2007, 2702 UNTS 3.

However, this decision was challenged in a judicial review proceeding, in which the applicants argued that legislative approval was necessary to empower the executive to do so. In a landmark judgment – *Miller v. Secretary of State*, the first concerning the power of treaty withdrawal in the UK – the Supreme Court of the United Kingdom held that the executive did not have the unilateral power to withdraw from the TEU.¹⁷ Rather, domestic law required Parliament to pass legislation authorizing the initiation of the UK's withdrawal.

The UK does not have written regulation on treaty withdrawal, nor had conventional regulation developed through practice. Traditionally, treaty-making capacity has been considered to be part of the executive prerogative and, thus, can be exercised without legislative approval,¹⁸ though it is limited by the conventional requirement of parliamentary notice prior to treaty ratification.¹⁹ The Supreme Court held that treaty withdrawal is equally part of the prerogative, and therefore in principle can be exercised unilaterally by the executive.²⁰ However, the Court held that this did not include instances where treaty withdrawal would result in a change to the constitutional framework in the UK, as it would here. After the UK joined the EU, Parliament had enacted legislation establishing EU law as a source of domestic law with overriding status. Withdrawing from the TEU would remove this source of domestic law. Such a 'fundamental change in the constitutional arrangements of the United Kingdom' required parliamentary approval, rather than enactment through the exercise of the prerogative by the executive alone.²¹ In addition, the Supreme Court supported the reasoning of the lower courts, which had focused on the loss of certain individual rights vested in domestic law that would be removed by virtue of the withdrawal from the treaties in question. Both courts held that such alterations could not be enacted unilaterally through ministerial prerogative.²² Notably, neither the lower courts nor the Supreme Court resorted to the *acte contraire* theory; the requirement of parliamentary approval of withdrawal did not turn on the fact that Parliament had ratified the relevant treaties but, rather, on the impact that withdrawal would have on the content of domestic law.

Interestingly, Article 50(1) of the TEU provides that '[a]ny Member State may decide to withdraw from the Union in accordance with its own constitutional requirements'. This indicates that a state's withdrawal from the EU be executed in a manner that complies with the state's domestic constitutional rules and, thus, perhaps, that a failure to obtain parliamentary approval of the UK's withdrawal would have been

¹⁷ *R. (on the Application of Miller and Another) (Respondents) v. Secretary of State for Exiting the European Union (Appellant)*, [2017] UKSC 5.

¹⁸ See, e.g., *Rustomjee v. The Queen* (1876) 2 QBD 69, at 74, Lord Coleridge.

¹⁹ See *Miller*, *supra* note 16, para. 58. The Ponsonby Convention is now codified in the Constitutional Reform and Governance Act 2010, c. 25, s. 20.

²⁰ *Miller*, *supra* note 17, para. 5.

²¹ *Ibid.*, paras 80–81.

²² *Ibid.*, para. 83. In addition, the Court addressed issues of devolution, which will not be addressed here.

ineffective in international law under Article 50.²³ However, the international law significance of this provision was not considered by the Supreme Court, nor by the lower courts, and did not appear to have influenced the interpretation of the requirement of parliamentary approval. The Court's decision turned solely on domestic UK law, rather than on any international legal requirements for treaty withdrawal or the effectiveness of the UK's withdrawal in international law.

In light of the Supreme Court's decision, the UK government obtained legislative approval in the European Union (Notification of Withdrawal) Act 2017 before triggering the UK's withdrawal from the EU via Article 50 of the TEU.²⁴ It can be seen that the reasoning in the *Miller* case can apply to withdrawal from treaties other than the TEU, though the range of such treaties will likely be narrow, comprising treaties the withdrawal from which will result in a 'fundamental change' to domestic law or the removal of 'vested rights' of individuals.²⁵ Withdrawal from such treaties will require parliamentary approval. Otherwise, the executive can, according to domestic law, exit treaties without the involvement of the legislature. In principle, this is not a *sui generis* rule concerning only withdrawal from the EU, but its application is likely to be limited given the high threshold established by the Court for the need for parliamentary approval of treaty withdrawal. Further, it is likely that the judiciary will have a significant role to play in future cases defining the boundaries of this rule.

2 South Africa's Failed Withdrawal from the ICC

Like the UK Supreme Court in the *Miller* case, the South African High Court was recently tasked with determining the domestic constitutional requirements for withdrawal from a treaty that had been ratified by Parliament.²⁶ This arose from the unexpected announcement of South Africa's withdrawal from the Rome Statute of the International Criminal Court (Rome Statute)²⁷ in October 2016.²⁸ South Africa's notification of withdrawal from the Rome Statute was sent by the executive without prior approval of the South African Parliament, which had previously both ratified and domesticated the Rome Statute.²⁹ Article 127(1) of the Rome Statute provides that

²³ See, e.g., Wyrozumska, 'Article 50', in H.-J. Blanke and S. Mangiameli (eds), *The Treaty on European Union: A Commentary* (2013) 1406; Friel, 'Providing a Constitutional Framework for Withdrawal from the EU: Article 59 of the Draft European Constitution', 53 *International and Comparative Law Quarterly* (2004) 407; Case C-621/18, *Wightman and Others v. Secretary of State for Exiting the European Union* (EU:C:2018:999), at 50. The Court of Justice of the European Union also held in *Wightman* that a member state may unilaterally revoke its Art. 50 notification of withdrawal from the European Union only if done in accordance with the state's own constitutional requirements (at para. 58).

²⁴ European Union (Notification of Withdrawal) Act 2017, 2017, c. 9.

²⁵ See Young, 'Brexit, *Miller* and the Regulation of Treaty Withdrawal: One Step Forward, Two Steps Back?', 111 *AJIL Unbound* (2017) 434.

²⁶ High Court (South Africa), *Democratic Alliance v. Minister of International Relations and Cooperation and Others (Council for the Advancement of the South African Constitution Intervening)*, [2017] ZAGPPHC (83145/2016), at 53.

²⁷ Rome Statute of the International Criminal Court (Rome Statute) 1998, 2187 UNTS 3.

²⁸ See South Africa, *South Africa: Withdrawal of Notification of Withdrawal*, UN Doc. C.N.121.2017.TREATIES-XVIII.10, 7 March 2017.

²⁹ *Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002* (2002) (South Africa).

upon a state party sending its instrument of withdrawal, a 12-month waiting period is initiated, after which withdrawal will take effect. A judicial review was launched during this waiting period before the effective date of withdrawal.

While the South African Constitution expressly establishes domestic requirements to join treaties, it contains no explicit provision on treaty withdrawal, and judicial attention had not yet been given to the question.³⁰ Like the UK Supreme Court, the South African High Court held that the executive did not have the power to withdraw unilaterally from the treaty in question.³¹ It held that since section 231(2) of the South African Constitution requires parliamentary approval for treaties subject to ratification, this section also by implication requires the consent of Parliament to withdraw from such treaties. According to the Court, ‘there is a glaring difficulty in accepting that the process of withdrawal should not be subject to the same parliamentary process [as ratification]’.³² As such, the Court adopted the *acte contraire* theory to interpret the domestic requirements for treaty withdrawal. The Court emphasized that the process for withdrawal ‘is a domestic issue in which international law does not and cannot prescribe’. In addition, the Court held that the decision to withdraw without prior parliamentary approval was ‘procedurally irrational’ since the domesticating legislation remained in place and might continue in force after South Africa’s withdrawal from the international treaty. Thus, the executive must wait for Parliament both to approve withdrawal from the ICC and to successfully repeal the domesticating legislation before valid notice of withdrawal from the Rome Statute can be given.³³

Further, the High Court declined to address substantive challenges that had been made to the withdrawal. The applicants argued that withdrawal from the ICC by South Africa would be unconstitutional because doing so would constitute a retrogressive step in the protection of human rights, therefore violating the obligation to respect, protect, promote, and fulfil constitutional rights in section 7(2) of the Constitution. Had such a challenge been upheld, short of constitutional amendment, this would effectively bar South Africa from withdrawing from the ICC at any stage, with or without parliamentary approval, along with prohibiting withdrawal from any other treaty that the courts determine would have a ‘retrogressive effect’ on the protection of human rights in South Africa.³⁴ The Court declined to address these substantive grounds, unless and until further challenges were brought to legislation passed by Parliament authorizing withdrawal from the ICC.³⁵ These substantive challenges may then be resurrected in future proceedings.³⁶

³⁰ In South Africa, treaties of a ‘technical, executive, or administrative nature’ require only signature by the executive to be binding on the state, while all other treaties require the approval of Parliament. See Section 231 of the Constitution of the Republic of South Africa (1996).

³¹ *Democratic Alliance*, *supra* note 26.

³² *Ibid.*, para. 51.

³³ *Ibid.*, para. 70; Rome Statute, *supra* note 27.

³⁴ See Woolaver, ‘Domestic and International Limitations on Treaty Withdrawal: Lessons from South Africa’s Attempted Departure from the International Criminal Court’, 111 *AJIL Unbound* (2017) 450, at 452–453.

³⁵ *Democratic Alliance*, *supra* note 26, at para. 74.

³⁶ For further discussion, see Woolaver, *supra* note 34.

Given the procedural challenges, the High Court concluded that the notice of withdrawal was unconstitutional and therefore invalid. As such, the government was ordered to revoke the notice of withdrawal that had been sent to the UN Secretary-General. The government complied with this order by issuing a withdrawal of its notification of withdrawal.³⁷ However, in December 2017, at the annual meeting of the ICC Assembly of States Parties, the South African executive announced its renewed intention to leave the ICC.³⁸ Legislation authorizing withdrawal from the ICC and repealing the implementing legislation was tabled in the South African Parliament in May 2018.³⁹

3 *The USA's Threatened Denunciation of the Paris Agreement*

In May 2017, the US government announced its intention to withdraw from the Paris Agreement.⁴⁰ However, according to the terms of the treaty, parties are only able to trigger the withdrawal provision from November 2019,⁴¹ initiating a 12-month withdrawal period.⁴² Thus, the US written notification to the treaty depository is only an expression of its future intention to trigger withdrawal as regulated by the terms of the treaty. US exit from the Paris Agreement would therefore take effect in November 2020 at the earliest, presuming a formal instrument of withdrawal is issued in November 2019.

Despite the delay before the possibility of a formal withdrawal from the Paris Agreement, there has been much debate and disagreement over the domestic procedures that would be necessary for the USA to withdraw from the treaty. Indeed, there has long been controversy in the USA over the domestic requirements for treaty withdrawal. As with the South African Constitution, the US Constitution regulates the power to join treaties⁴³ but is silent on treaty exit.⁴⁴ While the Constitution requires that 'treaties' be signed by the executive and approved by two-thirds of the Senate, US domestic law has developed separate categories of international agreements – 'executive agreements' and 'congressional-executive agreements' – which are nonetheless treaties under international law but may be entered by the executive alone or with congressional majority approval, depending on the agreement in question.⁴⁵

³⁷ See South Africa, *supra* note 28.

³⁸ See Fabricius, 'South Africa Confirms Withdrawal from the ICC', *Daily Maverick* (7 December 2017), www.dailymaverick.co.za/article/2017-12-07-south-africa-confirms-withdrawal-from-icc/#.WjgzvcbMyu4.

³⁹ *International Crimes Bill 37 of 2017* (2017) (South Africa).

⁴⁰ 54113 UNTC (2015). See 'Trump Will Withdraw from Paris Climate Agreement', *New York Times* (1 June 2017), www.nytimes.com%2F2017%2F06%2F01%2Fclimate%2Ftrump-paris-climate-agreement.html&usg=AOvVaw2oW66zGKR1W4xHdZnyrSyo.

⁴¹ Paris Agreement, *supra* note 3, Art. 28(1).

⁴² *Ibid.*, Art. 28(2).

⁴³ Constitution of the United States of America (1787), Art. 2, s. 2.

⁴⁴ See Bradley and Helfer, 'Treaty Exit in the United States: Insights from the United Kingdom or South Africa?', 111 *AJIL Unbound* (2017) 428.

⁴⁵ Restatement of the Law (Third), Foreign Relations Law of the United States (1987), paras 301–303; see Bradley and Goldsmith, 'Presidential Control over International Law', 131 *Harvard Law Review* (2018) 1201, at 1207–1220.

In addition, the executive can enter into ‘political commitments’ with foreign states without the approval of any other branch of government, although these agreements have no binding force in international law and, therefore, do not constitute treaties for the purposes of the international legal system.⁴⁶ The boundaries between these different categories remain contested.⁴⁷ The confusion surrounding the domestic requirements to enter treaties compounds the lack of clarity concerning the requirements for treaty exit.

While some have argued that the domestic US procedural requirements for treaty exit should mirror those taken when joining the treaty, the US courts generally have not accepted this rule, and historical practice has been inconsistent.⁴⁸ It is generally agreed that a treaty that was joined by unilateral authority of the executive – such as the Paris Agreement⁴⁹ – can be exited by the executive without participation of any other branch of government.⁵⁰ Further, academic opinion also supports the executive’s unilateral authority to withdraw from treaties approved by Senate or Congress without their input.⁵¹ Judicial opinion on withdrawal from these latter treaties, however, is less clear. The leading precedent is the case of *Goldwater v. Carter*, in which members of Congress sought to stop President Jimmy Carter from unilaterally withdrawing from a treaty with Taiwan to facilitate US recognition of the Peoples’ Republic of China. Members of Congress argued that the president could not withdraw unilaterally from the treaty without congressional approval. The district court agreed, holding that since treaty making was a shared competence between the executive and Congress, requirements for withdrawal must follow the procedure taken to enter the treaty,⁵² applying the *acte contraire* theory. However, the Court of Appeals and the Supreme Court of the United States did not confirm this decision. The Court of Appeals held that the president had a unilateral power of withdrawal, regardless of the procedure followed when joining a treaty because the US executive was solely responsible to communicate the country’s foreign relations externally.⁵³ Subsequently, the US Supreme Court dismissed the complaint and vacated the appellate court’s decision, holding that this was a non-justiciable political question.⁵⁴

⁴⁶ Bradley and Goldsmith, *supra* note 45.

⁴⁷ *Ibid.*

⁴⁸ See, e.g., Wolff, ‘Reasserting Its Constitutional Role: Congress’ Power to Independently Terminate a Treaty’, 46 *University of San Francisco Law Review* (2012) 953, at 966; Riesenfeld, ‘Tribute: The Power of Congress and the President in International Relations: Three Recent Supreme Court Decisions’, 87 *California Law Review* (1999) 786, at 802.

⁴⁹ Bradley and Goldsmith, *supra* note 45, at 1204.

⁵⁰ Bradley, ‘Treaty Termination and Historical Gloss’, 92 *Texas Law Review* (2014) 773.

⁵¹ See Bradley and Goldsmith, *supra* note 45, at 1224; Restatement of the Law (Third), *supra* note 45, para. 339; Restatement of the Law (Fourth), Foreign Relations Law of the United States, Draft no. 2 (2016), para. 113.

⁵² *Goldwater v. Carter*, 481 F. Supp. 949, 964 (DDC 1979), rev’d 617 F.2d 697 (DC Cir. 1979) (en banc) (*per curiam*).

⁵³ See *Goldwater*, DC Cir., *supra* note 52.

⁵⁴ *Goldwater v. Carter*, 444 US 996 (1979) (plurality opinion).

Subsequent lower court decisions have followed the US Supreme Court's precedent in the *Goldwater* case, dismissing challenges against the legality of unilateral executive treaty withdrawal, but declining to define the relative powers of the executive and the legislature in treaty withdrawal due to the political question doctrine.⁵⁵ Consequently, the constitutional requirements for treaty withdrawal in the USA remain uncertain despite fairly extensive judicial attention having been given to the matter. In relation to the Paris Agreement, however, it seems likely that unilateral withdrawal would be permitted, given that it was consented to by the power of the executive alone. Nonetheless, considerable domestic controversy on the matter continues. Furthermore, the USA's mooted withdrawal from other treaties that were the subject of Senate or congressional approval, such as the North American Free Trade Agreement, may give rise to a need for judicial clarification of the respective powers of the different bodies in treaty withdrawal.⁵⁶

4 Lessons from the Case Studies

The cases above indicate that domestic requirements on treaty withdrawal are playing an important part in states' decisions about their international engagements. Domestic courts in the UK and South Africa have asserted a key role for legislative and judicial branches in treaty withdrawal, limiting the executive's authority to unilaterally decide whether the state will remain a party to international treaties, despite the fact that in neither jurisdiction was explicit constitutional provision made empowering the judicial and legislative branches in this way. Given the number of states in which explicit constitutional provision has not been made, it is likely that similar judicial developments will be observed in other jurisdictions. In both the UK and South African instances, these developments were justified on the basis of protecting legislative autonomy and the separation of powers and, therefore, also a means for democratic participation in decisions on the state's treaty commitments.

The judicial decisions also demonstrate that states take divergent approaches to the domestic legal requirements to withdraw from treaties and that the *acte contraire* doctrine is not universally applied. The cases illustrate that requirements even within a single state may vary depending on several factors, including the nature of the treaty in question, the effect withdrawal will have on domestic law and the procedure followed when joining the treaty. For instance, the UK Supreme Court restricted the role of the legislature to cases where a significant constitutional change would result from the treaty withdrawal, whereas the South African High Court required parliamentary approval for withdrawal from any ratified treaty. Further, the South African example has raised the possibility of the preclusion of treaty withdrawal on the basis of substantive challenges protecting constitutional rights, regardless of what procedure is followed and even if the treaty

⁵⁵ See, e.g., *Kucinich v Bush*, 236 F. Supp. 2d (2002), at 12–18.

⁵⁶ See Allen-Ebrahimian, 'Can Congress Block Trump If He Pulls Out of NAFTA?', *Foreign Policy* (17 October 2017), <https://foreignpolicy.com/2017/10/17/can-congress-block-trump-if-he-pulls-out-of-nafta/>.
North American Free Trade Agreement 1992, 32 ILM 289, 605 (1993).

itself provides a right of withdrawal. The US Supreme Court, in contrast, has thus far declined to rule on the question, despite conflicting decisions of lower courts, holding that this is a dispute for resolution by the political branches. As such, it may be difficult to predict what will be constitutionally required in individual cases of treaty withdrawal in different jurisdictions, particularly given the judicial basis of the development of these rules.

Finally, the case studies illustrate that domestic courts examining the domestic legality of treaty withdrawal do not consider the relationship thereof with the international law on treaty withdrawal. None of the courts indicated that a domestic finding of invalidity might result in the international invalidity of withdrawal. The South African court decision, by ordering the executive to revoke the instrument of withdrawal sent to the UN Secretary-General, could be interpreted to mean that domestic invalidity would have no effect on the international legal effectiveness since revocation would not be necessary if the instrument was simply ineffective in international law. It is interesting that, despite the obvious and intimate relationship between domestic and international legal rules on treaty withdrawal, even domestic courts that assert legislative or judicial checks on the executive's domestic authority to withdraw from treaties do not consider whether these also limit the executive's international legal authority to do so.

3 The Role of Domestic Law in the International Effectiveness of Treaty Acts

We can now ask, then, whether international law recognizes any role for these domestic rules on treaty withdrawal. The pressing question is: what happens if a state withdraws from an international treaty in a manner that complies with the applicable international legal requirements, but violates its domestic rules on treaty withdrawal? Will such a treaty withdrawal still take effect in international law?

The drafters of the Vienna Convention on the Law of Treaties (VCLT) discussed at length which body of law – domestic or international – determines who can effectively exercise the state's treaty-making capacity in the international sphere. As outlined below, strong disagreement arose between those who suggested that international legal authority was vested solely in the executive, regardless of domestic constitutional rules, and those who insisted that international law must protect domestic – and, particularly, democratic – allocation of internal treaty-making authority. However, the discussion only addressed this question in relation to the joining of a treaty, neglecting the context of treaty withdrawal. We will therefore begin with an analysis of the VCLT approach to joining treaties in this regard, as this provides valuable insight into the appropriate role of domestic legal requirements in the international effectiveness of treaty-making acts generally. We shall then apply this insight to the exercise of the state's treaty-making capacity to withdraw from treaties.

A *The Role of Domestic Law in Joining Treaties*

The proper relationship between international and domestic legal requirements when joining a treaty has been the subject of debate and disagreement for many years. Indeed, Theodor Meron described this as ‘amongst the most difficult questions in international law’.⁵⁷ The debate became acute during the drafting of the VCLT, in which the views of the main rival theories – the ‘constitutionalist theory’, favouring a determinative role for domestic law, and the ‘internationalist theory’, insisting that international law itself allocates treaty-making authority – were expressed in stark opposition. In relation to joining a treaty, the VCLT drafters considered that international law must effectively balance two key imperatives in relation to states’ consent to join treaties: the security and efficiency of treaties and state sovereignty.⁵⁸ The principle of treaty security emphasizes the need for clarity in the international legal requirements for treaty making so that states may know when they have undertaken binding obligations. Hersch Lauterpacht writes:

The requirement of security of international transactions... would be jeopardized if parties to treaties were to be unable to rely on the ostensible authority of the organs accepting binding obligations on behalf of their state and if they were compelled to probe into the often uncertain and obscure provisions of constitutional law of the other contracting party or parties on the subject.⁵⁹

The sovereignty principle, meanwhile, requires respect for the state’s internal allocation of treaty-making authority and, as put by Lauterpacht, ‘forbid[s] the acceptance of the view that a state may become bound, in matters affecting its vital interests and in others, by acts for which there is no warrant or authority in its own law’.⁶⁰ There are different ways in which the balance between these two principles can be struck. While both constitutionalist and internationalist theories featured prominently in the International Law Commission (ILC) and state delegations’ debates during the drafting of the VCLT, neither state practice nor judicial decisions were sufficiently uniform to clearly indicate which approach, if either, was established in international law. Indeed, the four successive ILC special rapporteurs on the law of treaties each proposed fundamentally different approaches to the regulation of this question: James Brierly supported a strict constitutionalist approach; Lauterpacht suggested a qualified constitutionalist approach; Gerald Fitzmaurice’s proposals were purely internationalist; and the final formulation of Humphrey Waldock was one that favoured the internationalist view but with important exceptions. Ultimately, the VCLT adopted an intermediary approach: that international law gives power to

⁵⁷ Meron, ‘Article 46 of the Vienna Convention on the Law of Treaties (Ultra Vires Treaties): Some Recent Cases’, 29 *BYIL* (1979) 175, at 175.

⁵⁸ See Rensmann, ‘Article 46: Provisions of Internal Law Regarding Competence to Conclude Treaties’, in O. Dörr and K. Schmalenbach (eds), *Vienna Convention on the Law of Treaties: A Commentary* (2012) 775; Bothe, ‘Article 46 Convention of 1969’, in O. Corten and P. Klein (eds), *The Vienna Conventions on the Law of Treaties: A Commentary* (2011) 1091.

⁵⁹ Lauterpacht, ‘Report on the Law of Treaties by Mr H Lauterpacht, Special Rapporteur’, 2 *ILC Yearbook* (1953) 142.

⁶⁰ *Ibid.*, at 143

the executive to join treaties, regardless of the domestic allocation of authority, but that a 'manifest violation' of an 'internal rule of fundamental importance regarding competence to conclude treaties' will make that treaty's consent voidable at the invocation of the state itself.

1 *The Constitutionalist: Brierly and Lauterpacht*

The constitutionalist theory, also known as the theory of international relevance, asserts that only domestic law can determine which state representative has the authority to bind the state to international treaty obligations and, therefore, favours the principle of sovereignty.⁶¹ If an actor other than that empowered by domestic law attempts to undertake international obligations on behalf of the state, this cannot be of any legal effect, as that actor has no authority to represent the state. As such, these rules of internal law are argued to be incorporated into the international law of treaties by *renvoi*.⁶² The Norwegian delegate at the Vienna Conference, for instance, stated:

[I]nternational law left it to the internal law of each state to determine the organs and procedures by which the will of a state to be bound by a treaty should be formed and expressed. From that point of view, internal laws limiting the power of state organs to enter into treaties were to be considered as part of international law, if it was desired to consider as void, or at least voidable, consent to a treaty given on the international plane in violation of a constitutional limitation.⁶³

As argued by Lauterpacht in his second report on the law of treaties,⁶⁴ the constitutionalist theory protects the state's sovereign determination of the allocation of treaty-making competence and encourages democratic decision-making within the sphere of the state's international relations.⁶⁵ In addition, this approach supports international respect for the rule of law by both holding the state to its own internal procedures and requiring other states to respect those procedures in order validly conclude treaties.

The primary result of the constitutionalist theory would be the international invalidity of a treaty consented to in violation of domestic rules – for instance, if the executive failed to obtain the constitutionally required legislative authorization for ratification. As a result, states would be required to investigate the domestic law on treaty consent of each foreign state to be confident that consent was given in compliance with such rules and that the treaty is binding on that foreign state. Clearly,

⁶¹ See, e.g., authors cited by Waldock in his second report on the law of treaties. Waldock, *supra* note 5, at 41.

⁶² R. Kolb, *Good Faith in International Law* (2017), at 54.

⁶³ 'United Nations Conference on the Law of Treaties Conference Proceedings, Part I', 6 *ILC Yearbook* (1970) 243.

⁶⁴ Lauterpacht, *supra* note 59, at 142.

⁶⁵ See, e.g., Italian representative at the Vienna Conference who said that to ignore domestic limitations on the executive's treaty-making capacity 'would revert to the stage of international law when Heads of State had absolute power'. 'United Nations Conference on the Law of Treaties Proceedings', *supra* note 63, at 244.

this approach prioritizes state sovereignty, with possible detrimental consequences for treaty security, and it was supported by the first two special rapporteurs, Brierly and Lauterpacht. Brierly had recognized that there was a ‘division of opinion as to the international legal effect of restriction of capacity to make treaties or of regulation of its exercise in the constitutions of states’,⁶⁶ a view with which Lauterpacht subsequently agreed.⁶⁷ Both argued that this division meant there was no established rule of international law on the subject, leaving drafters free to choose to support the approach they preferred. However, while Brierly’s proposal, which was subsequently supported by a majority of the ILC,⁶⁸ was purely constitutionalist,⁶⁹ Lauterpacht was of the view that the constitutionalist theory must be tempered by the ‘weighty character’ of considerations in favour of the security of treaties.⁷⁰

Lauterpacht proposed what he described as a compromise between the constitutionalist and internationalist positions, with the constitutionalist approach being the default, subject to (perhaps characteristically) elaborate exceptions: first, the treaty undertaken in violation of constitutional limitations would be voidable (not void) upon invocation only by the state whose consent was unconstitutionally obtained; second, the contracting state would be estopped from invoking the invalidity of its consent if it had failed to do so over a ‘prolonged period’ or had ‘acted upon or obtained an advantage from’ the treaty; third, a state that successfully invoked the invalidity of its consent on this basis must compensate other treaty parties for any damage resulting from the invalidity of the treaty, if the other parties were not aware of the relevant constitutional limitation. And, in cases where the unconstitutionality was the subject of a dispute, this must be submitted to the International Court of Justice (ICJ) or other international court for resolution.⁷¹

⁶⁶ Brierly, ‘Report on the Law of Treaties by J.L. Brierly, Special Rapporteur’, 2 *ILC Yearbook* (1950) 222, at 231.

⁶⁷ See Lauterpacht’s summary of the limited and mixed historical state and judicial practice on the question. Lauterpacht, *supra* note 59, at 142–144.

⁶⁸ See Art. 4 of the articles ‘tentatively adopted’ by the International Law Commission (ILC) in 1952, Brierly, ‘Third Report on the Law of Treaties by Mr J.L. Brierly, Special Rapporteur’, 2 *ILC Yearbook* (1952) 50, at 51.

⁶⁹ See Art. 4(1) of Brierly’s draft convention: ‘The capacity of a state or international organization to make treaties may be exercised by whatever organ or organs of that state or organization its constitution may provide.’ Brierly argued that the ‘prevalence and notoriety’ of constitutional limitations of the executive’s treaty-making power should reasonably induce states to examine the constitutional requirements of their treaty partners. Brierly, *supra* note 68, at 231.

⁷⁰ ‘Undoubtedly, the fundamental [*sic*] rule of nullity of acts done in excess of authority as well as compelling claims of the democratic principle forbid the acceptance of the view that a state may become bound, in matters affecting its vital interests and in others, by acts for which there is no warrant or authority in its own law. But these considerations must not be allowed to enable governments to conduct themselves in a manner prejudicial to the sanctity of treaties and violative of dictates of good faith; to derive benefits from a treaty and then, in reliance upon a controversial or obscure constitutional doctrine, to repudiate their obligations; and to assert the right to do so without compensating the other contracting party which relied, in good faith and without any fault of its own, on the ostensible authority of the regular constitutional organs of the state in question. There are indications in international practice, amply endorsed by writers, that these factors cannot be left out of account.’ Lauterpacht, *supra* note 59, at 143.

⁷¹ See Art. 11 of Lauterpacht’s draft convention on the law of treaties. *Ibid.*, at 141.

Thus, according to Lauterpacht's proposals, only a violation of a constitutional provision, not of other domestic law provisions, could lead to invalidity of treaty consent and only if the state had acted promptly and in good faith in invoking such a violation. Furthermore, the requirements of compulsory dispute resolution and responsibility for damages would, presumably, limit the frequency and opportunism in states' invocation of this rule. Importantly for Lauterpacht, as noted above, this approach enabled international law to act as a bulwark for democratic domestic decision-making. For international law to give absolute authority to the executive in treaty making, regardless of the internal allocation of authority, would be 'totally out of harmony with modern conceptions of representative government and principles of democracy'.⁷²

2 *The Internationalists: Fitzmaurice and Waldock*

In contrast, the internationalist theory claims that international law itself establishes uniform rules determining the state authority that can validly exercise the state's consent for the purposes of international law, favouring the principle of treaty security.⁷³ If consent to a treaty is expressed by that authority – namely, the state executive – in compliance with the rules of international law, the state cannot invalidate that consent by pointing to a violation of its domestic law rules. The domestic rules are simply irrelevant to the binding force of a treaty on the international plane. This is also referred to as the 'evidence theory' of international law. Thus, for example, if international law determines that the head of state can bind the state to a treaty, consent of the head of state is all that is required, and it is of no consequence if domestic law requires that the head of state receive legislative approval before joining a treaty. As put by the Swedish representative at the Vienna Conference, when concluding treaties, 'States placed their confidence in the other government, provided that it was effectively exercising power. In so doing, they applied the rule of international law that a state could not invoke its internal law to establish the invalidity of a treaty'.⁷⁴

The internationalist theory is defended on the basis of both principle and practicality. First, as explained above, is the need to protect the security of treaty relations. The Swiss representative at the Vienna Conference stated:

It was inconsistent with the stability of law to hold that a state must examine in detail the constitution of states with which it was negotiating. That was true even if such an analysis was limited to the basic rules, as it was not possible to know where to draw the line in complying with the requirement to make such an examination. [Any exception to this rule] might become a source of endless complications and disputes.⁷⁵

Second, it is argued that states are obliged to act in good faith in their treaty relations. It is therefore the responsibility of state representatives themselves to ensure that they

⁷² *Ibid.*, at 142.

⁷³ See, e.g., Geck, 'The Conclusion of Treaties in Violation of the Internal Law of a Party: Comments on Arts. 6, 46', 27 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (1967) 429; Fitzmaurice, 'Do Treaties Need Ratification', 15 *BYIL* (1934) 113; H. Blix, *Treaty-Making Power* (1960).

⁷⁴ 'United Nations Conference on the Law of Treaties Proceedings', *supra* note 63, at 241.

⁷⁵ *Ibid.*, at 245.

are acting in compliance with their own domestic law; if they fail to do so, that is a matter for internal resolution, not a matter for international law. As Fitzmaurice argued, ‘no state which has purported to become bound by an international engagement, through the due performance of all that is necessary from the international point of view to achieve that object, ought to be permitted to deny the validity of its own action by pleading a failure to observe its own constitutional requirements’.⁷⁶ International law should encourage states’ trust in their treaty partners and confidence in their treaty obligations by assuming, and enforcing, the authority to undertake the treaty obligations that state actors represent themselves as having. Third, it was argued to be too onerous to expect states to obtain the knowledge of foreign constitutional law that would be necessary to know whether treaty consent has been validly exercised should the constitutionalist approach be taken.⁷⁷ Fourth, it is suggested that it would constitute unlawful interference in the state’s domestic jurisdiction to query whether the state’s representatives have acted in compliance with domestic law in purporting to join a treaty.⁷⁸ Finally, the constitutionalist theory would allow states to knowingly enter treaties in violation of their domestic law and later opportunistically deny the validity of their obligations, relying on this violation of domestic law.

As noted above, the penultimate and final special rapporteurs supported an internationalist approach. Fitzmaurice’s four reports on the law of treaties represented an explicit departure from his predecessors,⁷⁹ suggesting instead an unrestricted internationalist formulation. In his view, the ‘internationally correct position’, even if contrary to public opinion, was that international law alone determined that the executive was vested with the state’s treaty-making capacity.⁸⁰ As such, ‘treaty-making and all other acts connected with treaties are, *on the international plane*, executive acts, and the function of the executive authority’.⁸¹ Therefore, according to Fitzmaurice’s draft articles, any treaty consented to by, or with the approval of, the state executive was binding on the state in the international sphere, regardless of domestic rules on treaty making, without exception.⁸²

⁷⁶ Fitzmaurice, *supra* note 73, at 132–133; see also Swiss representative: ‘A state might, of course, undertake commitments *ultra vires*; but that fell outside the scope of the law of treaties and came within the sphere of the international responsibility of the state assuming the obligation.’ ‘United Nations Conference on the Law of Treaties Proceedings’, *supra* note 63, at 245.

⁷⁷ See Lauterpacht, *supra* note 59, at 142.

⁷⁸ ‘[A]ny questioning on constitutional grounds of the internal handling of the treaty by another Government would certainly be regarded as inadmissible interference in its affairs.’ ILC, ‘Draft Articles on the Law of Treaties with Commentaries’, *ILC Yearbook* (1966) 187, at 242 (ILC Draft Articles); see also the Swiss representative: ‘It would not only be unjustified in law but contrary to the *comitas gentium*. It was normal and necessary to examine the full powers of the representative of another contracting state, but plenipotentiaries could not be obliged to furnish proofs of their state’s capacity to enter into contracts.’ ‘United Nations Conference on the Law of Treaties Proceedings’, *supra* note 63, at 245

⁷⁹ Fitzmaurice, ‘Third Report on the Law of Treaties by Mr G.G. Fitzmaurice, Special Rapporteur’, 2 *ILC Yearbook* (1958) 20 at 33–34.

⁸⁰ *Ibid.*, at 34.

⁸¹ Fitzmaurice, ‘Report on the Law of Treaties by Mr G.G. Fitzmaurice’, 2 *ILC Yearbook* (1956) 104, at 108, draft Art. 9 (emphasis in original).

⁸² While Fitzmaurice’s articles are unqualified, he does cite the writings of Hyde in support of his approach, who appears to accept an exception to the absolute rule of the internationally valid treaty consent of the executive in cases of violations of ‘published and notorious’ constitutional provisions. Fitzmaurice, *supra* note 81, at 35.

Waldock's reports as special rapporteur formed the basis for the draft articles ultimately adopted by the ILC as the draft Convention on the Law of Treaties and subsequently adopted as the VCLT in 1969, subject to states' amendments at the Vienna Convention. Waldock proposed a less strident version of the internationalist theory than that of Fitzmaurice, conceding 'the importance of constitutional limitations on treaty-making power'. He argued, though, that the larger concern was the risk to the security of treaties should the constitutionalist position be adopted in international law:

On balance ... greater importance should be attached by the Commission to the need to safeguard the security of international agreements. The complexity of constitutional provisions and the uncertain application even of apparently clear provisions appear to create too substantial a risk to the security of treaties, if constitutional provisions are accepted as governing the scope of the international authority of a state's agents to enter into treaties on its behalf. In drafting the present article, therefore, he has taken as his starting point the principle that a state is bound by the acts of its agents done within the scope of their ostensible authority under international law.⁸³

His first draft articles established an assumption that treaties concluded by certain state representatives – namely, the head of state, head of government, and foreign minister, or other representatives authorized by full powers – were internationally valid, regardless of the provisions of domestic law.⁸⁴ Thus, according to Waldock, international law imbued these representatives with 'ostensible authority' to bind their states to treaty commitments. Waldock argued that his approach was based on the 'weight' of state practice and international jurisprudence – unlike the constitutionalists who he said based their approach on theory rather than practice.

Nonetheless, in a concession to the constitutionalist view, Waldock proposed that a state that had joined a treaty in a manner that violated its constitutional law be entitled to revoke its consent with agreement of the other treaty party/parties, if the treaty was already in force. If the treaty was not in force, it was proposed that the state be entitled to retract its consent simply upon notification to the depositary or other treaty party/parties.⁸⁵

3 *The VCLT Compromise*

Waldock's moderated internationalist position found majority agreement in the ILC's position, though significant changes to his formulation resulted from subsequent discussions in the commission. Draft Article 43 was proposed by the ILC: 'A state may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation of its internal law was manifest.' This was subjected to further extensive debate and criticism by state delegates, some pressing

⁸³ Waldock, *supra* note 5, at 45.

⁸⁴ *Ibid.*, at 41, draft Art. 5.

⁸⁵ *Ibid.*, at 43.

for the constitutionalist proposals of Waldock's predecessors and others preferring a strictly internationalist solution. Nonetheless, the majority of states voted in favour of the provision and accepted the compromise between the constitutionalist and internationalist positions, and the principles of treaty security and state sovereignty, it represented.⁸⁶ Two amendments were approved by the state delegations, further narrowing the exception to the default rule of the international validity of consent: first, the category of relevant domestic law was restricted to include only internal laws 'of fundamental importance', indicating that violations of rules of minor importance, such as technical formalities of ratification, did not vitiate treaty consent.⁸⁷ Second, to allay concerns about the vagueness of the manifest violation exception, a definition of the concept was included.

The final text was adopted as Article 46 of the VCLT, which reads:

1. A state may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.
2. 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.

Thus, Article 46 establishes the internationalist approach as the default position in international law, assuming the validity of treaty consent given by a state representative with ostensible authority to do so. Such ostensible authority is regulated by a separate provision on 'full powers', ultimately Article 7 of the VCLT, which asserts the authority of heads of state, heads of government, and foreign ministers to bind their state to a treaty without exception 'by virtue of their functions', and other representatives to do so upon production of full powers.⁸⁸ States are therefore entitled to rely on consent given by these representatives, regardless of any consideration of domestic legal requirements, favouring the principle of treaty security. This is subject to the limited exception, recognizing the importance of constitutionalist concerns, that if the consent was given in 'manifest violation' of an internal rule of fundamental importance concerning the competence to conclude treaties, it was voidable. In order to be 'manifest', the violation must be 'objectively evident' to any state acting normally and in good faith – circumstances in which the ILC agreed that a 'State could not legitimately claim to have relied upon a consent given'.⁸⁹ The negative phrasing

⁸⁶ The United Kingdom (UK) representative, for instance, said that 'although his delegation was in favour of the doctrine that international law was concerned only with the external manifestation of a State's consent to be bound by a treaty and that violations of a provision of internal law regarding competence to conclude treaties might not be invoked as invalidating consent to be bound, it recognized that the present text of article 43 represented a delicate compromise between opposing tendencies within the International Law Commission.' 'United Nations Conference on the Law of Treaties Proceedings', *supra* note 63, at 239.

⁸⁷ See, e.g., ICSID, *Sistem Miithendislik Insaat Sanayi Ve Ticaret A.S. v. Kyrgyz Republic – Award*, 9 September 2009, ICSID Case no. ARB(AF)/06/1, paras 83–85, President Lowe, Members Elaraby and Patocchi.

⁸⁸ VCLT, *supra* note 4, Art. 7.

⁸⁹ ILC Draft Articles, *supra* note 78, at 242.

emphasized the exceptional nature of the circumstances in which repudiation of the state's treaty consent would be lawful.⁹⁰ Finally, Article 46(1) makes clear that it is only the state whose domestic law was violated that can invoke this basis for invalidity. As discussed below, this establishes a high threshold, which in practice will apply in limited circumstances.

4 What Is a 'Manifest Violation of a Rule of Internal Law of Fundamental Importance'?

While the ILC, under Waldock's leadership, was of the view that 'it would be impracticable and inadvisable to try to specify in advance the cases in which a violation of internal law may be held to be 'manifest', since the question must depend to a large extent on the particular circumstances of each case',⁹¹ the existing practice and case law, though limited, reveals certain key considerations in assessing whether a violation of domestic law will vitiate a state's treaty consent.

Clearly, a mere failure to comply with internal law when joining a treaty will not invalidate the state's treaty consent. To constitute a sufficiently serious violation, there are two basic elements in Article 46 that are considered: the nature of the violation of domestic law and the character of the violated rule. First, the violation of domestic law must be 'manifest'. Given the strong presumption of the validity of the state's consent, particularly when expressed by a representative vested with ostensible authority per Article 7 of the VCLT,⁹² the violation must be one that is so obvious as to make it impossible for another state to rely on the given consent in good faith. The violation must therefore be 'manifest' from the perspective of the other treaty parties that are relying on the state's given consent.

Much therefore turns on what is considered to be 'normal practice' such that the state ought to have known of the violation of domestic law. Simply having a requirement in legal text or in a judicial decision will be insufficient,⁹³ as, per the ICJ, there is no duty on states to be aware of other states' internal requirements for joining treaties.⁹⁴ Furthermore, as noted above, it was considered that questioning the

⁹⁰ *Ibid.*, at 242.

⁹¹ *Ibid.*

⁹² A. Aust, *Modern Treaty Law and Practice* (2013), at 78, argues that if treaty consent is expressed by the head of state, head of government, or minister of foreign affairs, then the state's treaty consent can never be invalidated under Art. 46 of the VCLT, *supra* note 4. It is submitted, however, that this cannot be correct. Art. 46 operates as a limitation on the assumed authority of those representatives listed in Art. 7. There is no support in the text or *travaux préparatoires* to support Aust's interpretation. Furthermore, in *Cameroon v. Nigeria*, the International Court of Justice (ICJ) considered a claim that the president's treaty consent did not bind the state due to a manifest violation of domestic law. While the ICJ rejected the claim, it indicated that such claims may succeed in cases where the limitations on the president's treaty-making authority was clear and well publicized. See *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria; Equatorial Guinea Intervening)*, Judgment, 10 October 2002, ICJ Reports (2002) 303, at 430.

⁹³ *Contra* Rensmann, *supra* note 58, at 792.

⁹⁴ *Cameroon v. Nigeria*, *supra* note 92, para. 266; *Maritime Delimitation in the Indian Ocean (Somalia v. Kenya)*, Preliminary Objections, Judgment, 2 February 2017, ICJ Reports (2017) 3, para. 49.

constitutional authority of a state representative to conclude a treaty on behalf of her state would constitute unlawful interference in the state's domestic affairs. As such, the rule must be 'publicized' so as to be able to be known by other states – particularly in relation to the limitations on the authority of those with ostensible authority to conclude treaties under Article 7 of the VCLT. The ICJ has recently rejected an invocation of Article 46 by Somalia on the basis that 'there is no reason to suppose that [the other treaty party] was aware that the signature of the Minister may not have been sufficient under Somali law to express, on behalf of Somalia, consent to a binding international agreement'.⁹⁵ The rule will be considered to be sufficiently publicized if other treaties parties have been given a 'specific warning' of the domestic limitations on treaty-making capacity.⁹⁶ Otherwise, the domestic rule limiting the authority to conclude treaties must be the subject of common knowledge,⁹⁷ possibly as a result of media coverage.⁹⁸ In addition, in order for it to be reasonable to expect other states to be aware of the violation, the rule in question must be clear at the time that the state gave its consent to be bound to the treaty. Both US⁹⁹ and EU¹⁰⁰ law requirements for joining treaties have been cited as examples of rules that are insufficiently clear to result in a manifest violation, given the debate about the content thereof.

The second consideration is the character of the rule; the rule violated must be 'of fundamental importance' and concern the capacity to conclude treaties. While the drafting history indicates this category is wider than the state's constitutional rules,¹⁰¹ it is not clear which rules other than constitutional rules are qualified as being of fundamental importance to the domestic legal system in question.¹⁰² Nonetheless, rules concerning parliamentary participation in concluding treaties¹⁰³ – those in question in all of the case studies discussed above – as well as the allocation of treaty-making capacity within federal states have been cited as clear cases of such fundamental

⁹⁵ *Somalia v. Kenya*, *supra* note 94, para. 49.

⁹⁶ *Cameroon v. Nigeria*, *supra* note 92, para. 266.

⁹⁷ Aust, *supra* note 92, at 274, provides an example of when a violation of internal law may be manifest: when a state purports to enter into a treaty with an overseas territory subject to the authority of its parent state, despite its parent state only having treaty-making capacity. He argues that this would be a manifest violation given widespread knowledge that overseas territories do not in general bear independent treaty-making capacity.

⁹⁸ Rensmann, *supra* note 58, at 792.

⁹⁹ See, e.g., Meron, *supra* note 57, at 191–192, citing Henkin, who also agrees with this view.

¹⁰⁰ Case 7/71, *Commission of the European Communities v. France* (EU:C:1971:121), paras 19–20.

¹⁰¹ Waldock's 1963 draft Art. 5(2) referred to violations of constitutional law; this was widened in later drafts to be any provision of internal law of 'fundamental importance'. See Waldock, *supra* note 5.

¹⁰² The International Court of Justice (ICJ) has held that 'rules concerning the authority to sign treaties for a state are constitutional rules of fundamental importance'. See *Cameroon v. Nigeria*, *supra* note 92, para. 265. However, given that Art. 46 already provides that the internal rule in question must concern the capacity to conclude treaties, this statement seems to negate any restrictive effect of the requirement that the rule must also be 'of fundamental importance'. As noted above, the qualification was introduced by states at the Vienna Conference with the sole purpose of narrowing the category of domestic rules that could give rise to manifest violation; it must therefore be the case that some rules concerning the capacity to conclude treaties will not be 'fundamental'.

¹⁰³ *Ibid.*, para. 265.

rules.¹⁰⁴ These fundamental rules can be procedural¹⁰⁵ or substantive¹⁰⁶ and can be codified or based on practice.¹⁰⁷

While the division of opinion in practice and commentary prior to the coming into force of the VCLT has indicated that Article 46 represents the progressive development of the law rather than codification, it is largely accepted that this provision now represents customary international law.¹⁰⁸ As such, it has been accepted that, in the context of joining treaties, the violation of domestic law can invalidate treaty consent under international law, upon invocation by the state, even if given by representatives with ostensible authority to bind their state under international law. Thus, Article 46 of the VCLT provides a role – albeit limited – for domestic law in the international validity of treaty consent in the context of joining treaties and provides an opening for democratic input through legislative and/or judicial checks on the executive’s power to join treaties. As this regulates the state’s treaty-making capacity, it ought to be taken as the presumptive starting point when regulating all aspects of this capacity, including the withdrawal from treaties.

B *The Role of Domestic Law in the International Law of Treaty Withdrawal*

It has been established that there is a narrowly defined, but significant, requirement in international law to comply with domestic law when joining treaties in the form of the ‘manifest violation’ exception to the validity of treaty consent. In contrast, in the following section, it will be shown that international law currently does not explicitly provide such a role for domestic legal requirements when states withdraw from treaties. Rather, it appears that a strictly internationalist approach is applicable in the context of treaty withdrawal. This approach would deny international legal consequence to the domestic legal developments discussed in Part 1, in which states have asserted legal checks on the executive’s authority to withdraw from treaties in constitutional text or judicial decision.

1 *Established International Law Requirements for Valid Treaty Withdrawal*

The VCLT sets out several grounds on which states are entitled to exercise a right of withdrawal from a treaty, which are subject to procedural requirements set out in

¹⁰⁴ See Bothe, *supra* note 58, at 1094; Rensmann, *supra* note 58, at 790.

¹⁰⁵ Such as the requirement of parliamentary approval for treaty ratification.

¹⁰⁶ Such as the allocation of treaty-making capacity on particular subject matter to states or provinces within a federal state. See Rensmann, *supra* note 58, at 788; though see Bothe, *supra* note 58, at 1094, arguing that only procedural limitations are relevant to the Art. 46 exception.

¹⁰⁷ Rensmann, *supra* note 58, at 785–786; ILC, ‘Summary Records of the Fifteenth Session’, 1 *ILC Yearbook* (1963); Rosenne (at 14); de Luna (at 4); Ago (at 12); Pal (at 13); see also H. Kelsen, *Principles of International Law* (1952), at 323–324.

¹⁰⁸ *Cameroon v. Nigeria*, *supra* note 92, para. 258 (applying Art. 46 despite the dispute in question pre-dating the coming into force of the VCLT); *Somalia v. Kenya*, *supra* note 94, paras 42–50 (applying Art. 46 as customary international law, as parties not bound by the VCLT); Rensmann, *supra* note 58, at 785; Bothe, *supra* note 58, at 1092. This is despite the fact that, to my knowledge, no state has successfully relied on this provision to free itself from otherwise validly taken international treaty obligations.

Articles 65–68 of the VCLT.¹⁰⁹ According to Article 67, the most significant for present purposes, an instrument of withdrawal must be in writing and must be signed by the head of state, head of government, or minister of foreign affairs. If signed by another state representative, that representative may be requested to produce full powers. Therefore, as with the authority to bind the state to a treaty in Article 7 of the VCLT, certain designated classes of state representatives are vested with the authority to conclude an internationally valid instrument of withdrawal. If these procedural requirements are not satisfied, the instrument of withdrawal will not take effect under international law.¹¹⁰

However, unlike the provisions on joining treaties, these procedural requirements do not contain an equivalent to the manifest violation exception in Article 46 of the VCLT nor any other reference to domestic legal allocation of treaty withdrawal authority. Indeed, during the drafting of the VCLT, there seems to have been only fleeting discussion of the relevance of this,¹¹¹ in contrast to the extended discussions concerning the domestic authority to join treaties. Of the four special rapporteurs, only Fitzmaurice addressed the issue (briefly), unsurprisingly presenting a strictly internationalist view on the validity of treaty withdrawal.¹¹² The only discussion of the matter during the ILC's deliberations arose when Shabtai Rosenne suggested linking the provision on internal limitations of constitutional authority to join treaties to the provisions on treaty withdrawal or for the VCLT provisions on authority to join and withdraw from treaties to be merged into a single provision 'governing the formal authority to perform various acts connected with the conclusion and termination of treaties'.¹¹³ Commissioner Antonio de Luna supported this view:

[A]nything related to the procedure for amendment, denunciation, termination, withdrawal from, or suspension of, a treaty raised exactly the same problem as the constitutionality of treaty-making powers and the international effects of a breach of internal law on that subject. Accordingly, either the article itself or the commentary should say what were the international effects of the national authority exercised by the organs in question.¹¹⁴

Rosenne and de Luna's approach would have applied the Article 46 manifest violation exception to treaty withdrawal as well as to the conclusion of treaties, enabling domestic legal checks on the executive's authority to withdraw from treaties to have some international legal effect. Waldock replied that the issue 'would require some thought'.¹¹⁵ However, no further consideration appears to have been given to the matter by the ILC nor by state delegations during the Vienna Conference.

¹⁰⁹ VCLT, *supra* note 4, ss 2–4.

¹¹⁰ ILC, *supra* note 107, at 165–166; Tzanakopoulos, 'Article 67', in O. Corten and P. Klein, *The Vienna Conventions on the Law of Treaties: A Commentary* (2011), at 1552.

¹¹¹ See Frankowska, *supra* note 2, at 309.

¹¹² Fitzmaurice, 'Second Report on the Law of Treaties by Mr G.G. Fitzmaurice, Special Rapporteur,' 2 *ILC Yearbook* (1957), draft Art. 25.

¹¹³ ILC, *supra* note 107, at 164.

¹¹⁴ *Ibid.*, at 164.

¹¹⁵ *Ibid.*

Furthermore, state practice thus far appears to be silent on this question. As noted above in the case studies, court decisions examining the domestic requirements for treaty withdrawal do not consider whether domestic violations will negate the international legal effect of withdrawal. In addition, no mention of the domestic authority to withdraw from treaties appears to be made in states' instruments of withdrawal, nor do treaty depositaries appear to inquire into such authority. This absence of consideration is echoed in academic commentary. Only a very few number of commentators address the question of the international legal impact of domestic legal restrictions on the executive's authority to withdraw from treaties, and, among those who do, there is nearly universal agreement that domestic legal requirements are irrelevant to the international validity of a state's treaty withdrawal.¹¹⁶ There appear to be two outlying commentators who support the constitutionalist approach to the validity of treaty withdrawal in international law, though they wrote prior to the VCLT, and even they concede that their view was not supported by practice.¹¹⁷ James Crawford has also hinted recently at support for the possible relevance in international law of constitutional limitations on treaty withdrawal powers, though without giving detail as to the form or source of the possible rule.¹¹⁸ Apart from these few authors, the widespread state practice and commentary apparently assumes the international validity of instruments of withdrawal duly signed by authorized state representatives.

There is therefore no basis on which to conclude that it was the express intention of the drafters for Article 46 to apply to the validity of a state's withdrawal from a treaty as well as its joining a treaty, nor evidence in practice to argue that customary international law now provides for such a rule. Rather, in contrast to international law powers to join treaties, the authority of the executive to withdraw the state from treaties in Article 67 of the VCLT is, *prima facie*, absolute in international law, unlimited by any checks that may exist in domestic law. Such absolute authority would mean that, while a violation by the state's executive of the requirement to obtain legislative approval when joining a treaty may invalidate the state's treaty consent, the very same violation would be irrelevant in the case of treaty withdrawal. If so, the recent landmark judgments in the UK and South Africa establishing parliamentary control over the power of treaty withdrawal have no effect on their executives' treaty withdrawal powers in international law.

2 Analogical Application of the Manifest Violation Exception to Treaty Withdrawal

As illustrated above, in contrast to the rules on joining treaties, the VCLT provisions do not expressly contain any limit on the authority of the state's international representatives to withdraw from treaties. Such unqualified authority would enable the executive to ignore any domestic limitations on its treaty withdrawal powers.

¹¹⁶ See, e.g., Ciampi, *supra* note 2, at 368; Tyagi, *supra* note 2, at 94; Frankowska, *supra* note 2, at 311–312.

¹¹⁷ See Rousseau, *supra* note 2, at 210; Haraszti, *supra* note 2, at 250–252.

¹¹⁸ Crawford, 'The Current Political Discourse Concerning International Law', 81(1) *Modern Law Review* (2018) 1, at 14.

This is a significant lacuna. As recent events discussed above demonstrate, domestic lawmakers and voters increasingly consider that treaty withdrawal decisions are just as central to their expression of national sovereignty as the joining of treaties. Further, as noted above, the power to join and leave treaties are two aspects of the same treaty-making capacity of the state. Thus, as international law considers that compliance with domestic legal requirements is relevant to the international validity of the expression of the state's consent to be bound by a treaty, this should also be the case for the decision to end that consent. The grant of such absolute authority is, to borrow Lauterpacht's already-quoted turn of phrase, 'totally out of harmony with modern conceptions of representative government and principles of democracy' – a statement that can only be more germane now than when written in 1953. This position is also incoherent with the larger framework of the law of treaties, given the conflicting approach in relation to joining treaties. In the following section, I suggest that, in order to give domestic checks on treaty-making powers the same international legal effect when both joining and leaving treaties, Article 46 of the VCLT should be interpreted to apply analogically to state representatives' power to withdraw from treaties in international law.¹¹⁹ Accordingly, a manifest violation of an internal rule of fundamental importance should potentially invalidate a state's treaty withdrawal internationally as well as domestically. As set out below, this proposed interpretation is supported by the principles that normatively underpin the law on treaty consent: state sovereignty and treaty security as well as the text.

(a) Textual interpretation

Despite the absence of an explicit requirement in the VCLT to comply with domestic law when withdrawing the state from treaties, the *travaux préparatoires* do provide some support for interpreting Article 46 of the VCLT to apply analogously to the rules governing treaty withdrawal. In its commentary on the final draft articles, the ILC 'considered that 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'.¹²⁰ This reflects Waldock's clarification, quoted above, that the power to terminate a treaty is just as much a part of the treaty-making power of the state as that of concluding treaties. As such, limitations on the authority to bind the state to a treaty should, per the ILC's understanding, apply analogously to the power to denounce or terminate a treaty, which includes the manifest violation of domestic law exception in Article 46. Thus, while Article 46 applies by its terms only to 'provisions of internal law regarding competence to conclude treaties', this should be interpreted to include domestic law rules on any treaty-making act, including treaty withdrawal.

¹¹⁹ This is consistent with Crawford's recent suggestion that 'a good argument can be advanced that the VCLT articles on treaty entry might be applied by analogy to treaty exit where there would otherwise be a gap in the withdrawal rules, for instance, on full powers', though he does not explore this idea further. *Ibid.*, at 11.

¹²⁰ ILC Draft Articles, *supra* note 78, at 242.

This interpretation is supported by the VCLT's definition of the treaty acts that those vested with full powers may carry out on behalf of their state. As noted above, Article 7 sets out the requirement of production of full powers in the context of joining treaties, while Article 67 does so in relation to treaty withdrawal. The definition of 'full powers' in Article 2, which applies equally to Articles 7 and 67, provides: "Full powers" means a document emanating from the competent authority of a state designating a person or persons to represent the state ... for expressing the consent of the state to be bound by a treaty, or *for accomplishing any other act with respect to a treaty*.¹²¹ This definition clearly includes acts concerning both the conclusion and termination of treaties.¹²² Thus, the restriction of the powers of those authorized to act on behalf of their state by the Article 46 manifest violation exception should apply to the full range of treaty acts that these representatives are potentially capable of executing, as defined by Article 2 of the VCLT.¹²³ As such, the authority of those empowered by Article 67 to withdraw from a treaty should be limited in the same manner by the Article 46 manifest violation exception as those empowered by Article 7 to join a treaty.

Supporting this putative textual interpretation, as discussed in the following section, I suggest that an analysis of the two principles underlying the VCLT compromise between internationalism and constitutionalism in the context of joining treaties favours a role for domestic law rules also in the international validity of treaty withdrawal.

(b) Normative principles justifying the application of the manifest violation exception to treaty withdrawal

As outlined in Part 2, the VCLT drafters sought to balance two key principles normatively underpinning the law on treaty consent: respect for state sovereignty and the security of treaties. In relation to the international law on concluding treaties, the balance was struck advancing the principle of treaty security, with a limited exception to ensure respect for the state's sovereign allocation of its treaty-making competence.¹²⁴ In the context of treaty withdrawal, however, the VCLT currently tips the scale in favour of the principle of treaty security, with no counterbalancing to account for sovereignty concerns. As noted above, these rules appear to have been drafted with very little consideration of the international legal impact of domestic limitations on treaty withdrawal powers.¹²⁵ This unjustified overemphasis on treaty security can be corrected through the proposed expansive interpretation of the manifest violation exception, bringing the two principles into appropriate balance in both joining and leaving treaties.

¹²¹ Emphasis added.

¹²² See Aust, *supra* note 92, at 72.

¹²³ As put in the ILC's commentary on the final draft articles, 'the motif of the formulation of [Art. 7, then draft Art. 6] is a statement of the conditions under which a person is considered in international law as representing his state for the purpose of performing acts relating to the conclusion of a treaty.' ILC Draft Articles, *supra* note 78, draft Art. 6.

¹²⁴ See discussion in Part 2 of this article of the constitutionalist versus internationalist debate in the drafting of the VCLT rules on joining treaties.

¹²⁵ See brief consideration by Rosenne and de Luna in ILC, *supra* note 107, at 111–113.

(i) State sovereignty in treaty withdrawal

It is apparent that the importance of respecting the state's exercise of its sovereign right to allocate treaty-making competence applies equally to the acts of joining and leaving treaties. As noted above, the acts of joining and withdrawing from treaties are both aspects of the state's treaty-making power.¹²⁶ Indeed, the decisions to join and leave a treaty are simply two parts of the same question: does the state wish to be a party to the treaty? Thus, there is no justification for giving international legal weight to the state's sovereign allocation of its treaty-making power to limit the executive's unilateral authority when a state joins a treaty, but ignoring the very same concerns when the state leaves the treaty. It is furthermore clear that a state's sovereign choice to determine its international and domestic legal and policy commitments is made just as much through leaving existing treaties as joining new ones – as is increasingly emphasized by referenda, judicial review actions and electoral campaigns focused on leaving treaties to which the state belongs.¹²⁷ Just as in the giving of treaty consent, then, these considerations of state sovereignty require international legal recognition of domestic rules on treaty-making competence when determining the validity of the revocation of that consent.

Moreover, when joining treaties, there are further mechanisms in addition to the 'manifest violation' exception through which the state's sovereign allocation of treaty-making power is protected by international law. Many treaties, particularly those that place onerous requirements on states, are made subject to procedures in addition to signature by the state representative vested with ostensible international law authority.¹²⁸ The ILC has argued that such procedures buttressed the rule requiring respect for treaty consent given by state representatives with ostensible authority:

The view that a failure to comply with constitutional provisions should not normally be regarded as vitiating a consent given in due form by an organ or agent ostensibly competent to give it, appears to derive support from ... further considerations. [I]nternational law has devised a number of treaty-making procedures – ratification, acceptance, approval and accession – specifically for the purpose of enabling Governments to reflect fully upon the treaty before deciding whether or not the state should become a party to it, and also of enabling them to take account of any domestic constitutional requirements. When a treaty has been made subject to ratification, acceptance or approval, the negotiating states would seem to have done all that can reasonably be demanded of them in the way of taking account of each other's constitutional requirements.¹²⁹

Thus, when joining treaties, constitutional rules are protected by a variety of procedural requirements that will ensure, or at least encourage, the state to go back to its own internal processes for approval of the act.¹³⁰ In contrast, when withdrawing from a treaty, international law has not established any such procedures.

¹²⁶ Waldock, *supra* note 5.

¹²⁷ See the case studies discussed in Part 1 of this article.

¹²⁸ VCLT, *supra* note 4, Art. 11 provides that a treaty may be binding on the basis of, *inter alia*, signature, ratification, accession or other agreed mechanism.

¹²⁹ ILC Draft Articles, *supra* note 78, at 241–242.

¹³⁰ See, e.g., Rome Statute, *supra* note 27, Art. 125; TEU, *supra* note 16, Art. 49, requiring ratification of the treaty, the latter explicitly ratification 'in accordance with constitutional requirements'.

The nearest equivalents to the requirement of ratification in the context of treaty exit are the notice periods established in certain treaties, including the TEU, Rome Statute, and the Paris Agreement.¹³¹ These treaties provide a waiting period that is initiated by the state's notice of withdrawal, after which the state's treaty membership formally ends. However, while these periods have provided opportunities for domestic contestation of the legality of withdrawal, as in the South Africa's withdrawal from the ICC, this is not required by the general law of treaties nor by the particular provisions.¹³² Rather, these notice periods simply prescribe an empty amount of time that must expire before withdrawal will take effect. Given the absence of alternative procedures protecting the state's constitutional allocation of authority, analogous extension of the principle established in Article 46 of VCLT to the international authority to withdraw from a treaty is an appropriate manner for international law to protect these principles of state sovereignty.

(ii) Security of treaties in treaty withdrawal

The drafters of the VCLT ultimately agreed that the principle of treaty security took precedence over the protection of the state's sovereign allocation of treaty-making competence and that the role of domestic law when joining treaties needed to be limited accordingly.¹³³ The lack of clarity of domestic legal requirements and the onerous burden it would impose on states to require that they know the treaty-making rules of foreign states 'might become a source of endless complications and disputes'.¹³⁴ Therefore, international law must establish, as the default position, that treaty consent given by those with ostensible authority under international law must have binding international legal force.¹³⁵ These same considerations hold true for the context of treaty withdrawal. As discussed in Part 1, the domestic requirements for treaty withdrawal are often unclear and are currently in flux in many jurisdictions. Thus, the default position should again be that a treaty withdrawal executed in due form by those vested with ostensible authority in Article 67 of the VCLT should take effect in international law. However, while the executive is given ostensible authority to bind their state when joining treaties, limited by the manifest violation exception, the executive is given absolute international legal authority to withdraw their state from treaties. This overemphasis on the principle of treaty security in relation to treaty withdrawal powers, when compared to powers to conclude treaties, cannot be justified. Indeed, the drafters of the VCLT did not appear to apply their minds to this incoherence in the rules between joining and leaving treaties.

Furthermore, there is a crucial difference between the context of joining and leaving treaties, indicating that limiting the executive's international legal power to withdraw

¹³¹ See TEU, *supra* note 16, Art. 50(3); Rome Statute, *supra* note 27, Art. 127; Paris Agreement, *supra* note 3, Art. 28(2).

¹³² *Democratic Alliance*, *supra* note 26.

¹³³ See discussion in Part 2 of this article.

¹³⁴ 'United Nations Conference on the Law of Treaties Proceedings', *supra* note 63, at 245.

¹³⁵ VCLT, *supra* note 4, Art. 7.

from treaties benefits the principle of treaty security. The *travaux préparatoires* of the VCLT repeatedly emphasize that an important aim of the principle of treaty security is to further treaty continuity and international law's preference for states to remain a party to treaties that they have joined.¹³⁶ Waldock, along with several state delegations, accordingly described the various grounds for termination or withdrawal from treaties as a threat to the principle of the security of treaties. Consequently, the grounds of withdrawal (including violations of internal law when joining the treaty) are defined narrowly, emphasizing their exceptional nature, with the addition of strict procedural requirements, and an assumption against a right of withdrawal in cases where there is no express provision in the treaty – all expressly done in order to protect treaty security.¹³⁷ International law's preference for encouraging and maintaining treaty membership is also seen in other aspects of the law of treaties, such as the provision for reservations to multilateral treaties, which are permitted to encourage treaty membership, and reduce the chance of treaty withdrawal, even at the cost of the complete integrity of the treaty.¹³⁸

Recognizing a requirement to comply with domestic law when withdrawing from treaties would favour this crucial aspect of the principle of treaty security since this would provide an additional barrier to withdrawal – the failure to comply with which would mean that the state's withdrawal could be invalidated, protecting the security of the treaty agreement. In the context of joining a treaty, in contrast, a requirement to comply with domestic law operates as a barrier to the state being bound by the treaty, undermining the internationally binding nature of the agreement reached between the parties to the treaty. This is a significant way in which the context of joining and withdrawing from treaties diverge. Thus, giving unrestricted international legal authority to the executive to withdraw from treaties does not best serve the principle of treaty security; if anything, appropriate limits on the executive's international authority to withdraw uphold the principle.

In considering the principles underlying treaty consent, then, the balance between treaty security and state sovereignty is most appropriately struck in the same way in both joining and leaving treaties. As noted previously, the efficiency of international relations requires that states can generally rely on the validity of acts done by foreign state representatives with ostensible authority under international law. Thus, not all violations of domestic law should invalidate treaty withdrawal, just as they do not invalidate the conclusion of treaties. Instead, international law, as in the case of joining treaties, should restrict the potential invalidation of a state's treaty withdrawal to instances when it is reasonable to expect other states parties to have known that there was a violation of the withdrawing state's domestic law of fundamental importance. This application of the manifest violation exception to the executive's international

¹³⁶ See, e.g., ILC, *supra* note 107, at 8, 10, 18, 42, 54, 86–87, 101, 123; Waldock, *supra* note 5, at 43–45, 52, 80, 87.

¹³⁷ *Ibid.*

¹³⁸ See *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide Convention*, Advisory Opinion, 28 May 1951, ICJ Reports (1951) 15; Redgwell, 'Universality or Integrity? Some Reflections on Reservations to General Multilateral Treaties', 64 *BYIL* (1993) 245.

legal authority to both join and leave treaties balances the relevant principles while also recognizing the value in adopting a coherent approach to joining and withdrawing from treaties, which in itself will benefit treaty security and stability.

(c) Application of the manifest violation exception to treaty exit

I have argued that a textual and principled interpretation of the VCLT should be adopted so as to establish an analogical application of the manifest violation exception to the executive representative's authority to validly withdraw the state from treaties in international law. Should this be accepted, a treaty withdrawal that is carried out by the state's executive, vested with representative authority under Article 67 of the VCLT and which complies with the applicable international legal requirements, may nonetheless be invalidated under international law if done in manifest violation of a rule of domestic law. It will be recalled that there are two key elements of this exception that must be satisfied: the domestic rule must be one of fundamental importance concerning the capacity to withdraw from treaties and the violation must be 'manifest' in the sense of being objectively obvious to other parties to the treaty acting in good faith and in accordance with normal practice.¹³⁹

Analogical application, however, does not necessarily entail identical application. There are relevant differences between the contexts of joining and leaving treaties that will modify how the exception will operate in relation to treaty withdrawal. Such differences may in fact make it more likely that a manifest violation of domestic law will be found in relation to treaty withdrawal than in the conclusion of a treaty. The most significant difference relates to the application of the requirement that the violation be 'objectively evident to any state conducting itself in the matter in accordance with normal practice and in good faith'. The ICJ held, as noted above, that according to normal practice when joining treaties there is no duty on states to familiarize themselves with the domestic law of others states, and so the 'fundamental rule of internal law' has to be the subject of a specific warning to other states or exceptionally well publicized in order to lead to a successful invocation of Article 46.¹⁴⁰ In the context of treaty withdrawal, however, the circumstances may make it more reasonable to expect a state to inquire into the domestic rules of its treaty partners and thus increase the likelihood of a violation of domestic law being objectively evident. In cases of treaty withdrawal, depending on the nature of the treaty in question, all treaty parties may have a significant interest in maintaining the treaty's membership. This would be particularly so in the case of treaties that rely heavily on domestic implementation, such as human rights treaties, or that result in substantial integration of national jurisdictions, such as the case of the EU (and perhaps also to a lesser extent the ICC and the Paris Agreement). In such cases, it would arguably be the normal practice for all states parties to enquire into the domestic legality of the act of treaty withdrawal, given the serious effect it may have on their own interests.

¹³⁹ *Cameroon v. Nigeria*, *supra* note 92; *Somalia v. Kenya*, *supra* note 94.

¹⁴⁰ *Cameroon v. Nigeria*, *supra* note 92, para. 266.

Since the manifest violation exception relies on a standard of ‘normal practice’, it naturally applies in a flexible manner depending on the particular case, including the type of treaty in question and the circumstances in which withdrawal is executed. What I suggest here is not that there is a general duty on states to know the domestic requirements of treaty withdrawal for their treaty partners. Rather, where the loss of an individual member state would have a significant impact on the interests of the other treaty parties – as in the UK’s withdrawal from the EU – it would be reasonable to expect states to examine the domestic legality of the state party’s withdrawal alongside the applicable international legal requirements. Thus, in the context of treaty withdrawal, a violation of an internal rule of fundamental importance may be objectively evident to the other state parties even without an explicit warning concerning the rule being given by the withdrawing state or exceptional publicity of the rule.

In addition, the other elements of the manifest violation exception would continue to apply to the rules on treaty withdrawal. The violation would still have to be of a domestic rule of fundamental importance concerning the state’s withdrawal from treaties, and the content of this rule would still need to be clear at the time of the purported violation – that is, when the state sought to withdraw from the treaty. Furthermore, the violation would make the withdrawal voidable, not void, on the invocation of the state itself.¹⁴¹ Many instances of violations of domestic rules on treaty withdrawal, then, will not result in the vitiation of the withdrawal on the international plane. The application of the manifest violation exception will be explored in relation to the three case studies noted above to assess how the exception can be operationalized in relation to treaty withdrawal in international law.

(i) Application to the case studies

It will be recalled that in each of the three case studies above there were controversies surrounding the legality of the executive’s unilateral withdrawal from treaties without prior approval of the state’s legislature. Further, in both the UK and South African case studies, the domestic courts found that the lack of legislative approval invalidated the executive’s withdrawal decisions in domestic law. In the UK, the decision was rendered prospectively to the executive’s triggering of withdrawal, while in South Africa the decision invalidated a treaty withdrawal that had already been initiated for the purposes of international law. These cases then provide an opportunity to explore the application of the manifest violation exception to the context of treaty withdrawal.

First, all three cases would satisfy the requirement of an ‘internal rule of fundamental importance’ concerning the capacity to withdraw from treaties. As noted above, the ICJ has held that the requirement of legislative involvement in treaty making constitutes such a rule.¹⁴² Thus, the possible requirement of Senate, congressional, or parliamentary approval to end treaty membership in the USA, UK, and South Africa would fall into this category. Nonetheless, only in the UK’s withdrawal from the EU is

¹⁴¹ See VCLT, *supra* note 4, Art. 46.

¹⁴² *Cameroon v. Nigeria*, *supra* note 92, para. 265.

it likely that the manifest violation exception may have been applicable. In particular, had the UK executive proceeded to trigger the withdrawal provision of the TEU without parliamentary approval, despite the UK Supreme Court judgment in the *Miller* case, it is at least arguable that this would have been a manifest violation of the domestic law of fundamental importance.¹⁴³ The rule in question was exceptionally well publicized, given the international political and media attention given to the UK Supreme Court's judgment, and the implications for other EU member states were very significant. Furthermore, the rule was clarified by the domestic court's decision prior to the withdrawal. Thus, an EU member state acting in good faith according to normal practice would have reasonably been expected to be aware of the violation of UK domestic law. All elements of the manifest violation exception would then be present. Consequently, had the UK executive proceeded without parliamentary approval, if the manifest violation exception was applied to the context of treaty withdrawal in international law, the UK's withdrawal would have been voidable under international law at the invocation of the UK government. Of course, as it was, parliamentary approval was obtained prior to withdrawal, and so any possible manifest violation was avoided.

In contrast, in the South African and US cases, it is unlikely that the domestic constitutional rules would be considered to be sufficiently clear at the time of withdrawal to constitute a manifest violation. Even if we might expect other ICC member states to be aware of the controversy surrounding South Africa's withdrawal from the Rome Statute, the South African requirement of parliamentary approval of withdrawal from ratified treaties was only clearly established in the *Democratic Alliance* decision, handed down after withdrawal was initiated.¹⁴⁴ The violation could then not be objectively obvious to other member states at the time of withdrawal. (However, if the South African executive triggers Article 127 of the Rome Statute again in the future, as it has threatened, without the necessary parliamentary approval, this would be a very plausible instance of a manifest violation.) In the case of the USA, the requirement of legislative approval of treaty withdrawal remains controversial and is unlikely to be settled before the executive officially issues its instrument of withdrawal from the Paris Agreement (if this is in fact done). Again, then, no manifest violation could best established.

It is apparent, then, that the analogical application of the manifest violation exception to the context of treaty withdrawal would not amount to a wholesale replacement of international rules on treaty making with each individual state's domestic law rules. Instead, this rule would operate to give an appropriate scope for domestic law rules, while nonetheless generally giving deference to the executive's international legal authority to end the state's treaty commitments.

¹⁴³ *Miller*, *supra* note 16.

¹⁴⁴ *Democratic Alliance*, *supra* note 26.

4 Conclusion

To conclude, the absence of a role for domestic constitutional rules in the international validity of a state's withdrawal from treaties is a significant gap in international law that should be filled. The case studies and other events around the world have demonstrated that treaty withdrawal decisions are equally as central to the expression of national sovereignty as the joining of treaties. There is no justification for the current position that a violation of domestic law may invalidate the consent given by a state representative when joining a treaty but that such violations are simply irrelevant in relation to treaty withdrawal. The drafters of the VCLT recognized more than 50 years ago that vesting the executive with absolute international legal authority to conclude treaties on behalf of their state, with no consideration of any domestic checks on that power, was irreconcilable with the expectations of modern international society. The inconsistent treatment of domestic limits on the executive's authority in these two aspects of the state's treaty-making power further creates incoherence in the international law of treaties. It is thus overdue for the law on treaty withdrawal to be brought into parallel with the law on joining treaties in this regard.

This can be accomplished through an analogical application of the 'manifest violation' exception from the rules on joining treaties to those on treaty withdrawal, through the interpretation of the relevant provisions of the VCLT. The constituent elements of this exception are sufficiently flexible to apply appropriately to both contexts, taking into account the nature of the treaty, the importance of the violation and the position of other treaty parties. This would not result in the invalidation of all instruments of withdrawal that violate domestic law but, rather, only such violations that are sufficiently serious and obvious to warrant displacement of the principle of treaty security. Such a development would therefore balance the key imperatives of treaty security and the fundamental right of states to sovereign equality and bring consistency to the overall relationship between the domestic and international law of treaties. Finally, and perhaps most importantly, this development would give suitable international legal recognition to the increasingly frequent domestic developments extending democratic principles and separation of power controls to treaty withdrawal decisions.