



KFG Working Paper Series • No. 28 • February 2019

Campbell McLachlan

The assault on international adjudication and the limits of withdrawal

Berlin Potsdam Research Group „The International Rule of Law – Rise or Decline?“

A decorative graphic at the bottom of the page features three thick, parallel diagonal bars. The top bar is dark blue, the middle bar is light green, and the bottom bar is grey. They overlap and cross each other, creating a dynamic, layered effect.

KFG Working Paper Series

Edited by Heike Krieger, Georg Nolte and Andreas Zimmermann

All KFG Working Papers are available on the KFG website at www.kfg-intlaw.de.

Copyright remains with the authors.

McLachlan, Campbell, The assault on international adjudication and the limits of withdrawal, KFG Working Paper Series, No. 28, Berlin Potsdam Research Group “The International Rule of Law – Rise or Decline?”, Berlin, February 2019.

ISSN 2509-3770 (Internet)

ISSN 2509-3762 (Print)

This publication has been funded by the German Research Foundation (DFG)

Product of Humboldt-Universität zu Berlin
Commercial use is not permitted



Berlin Potsdam Research Group
International Law – Rise or Decline?
Unter den Linden 9
10099 Berlin, Germany
info@kfg-intlaw.de
+49 (0)30 2093-3322
www.kfg-intlaw.de

DFG Deutsche
Forschungsgemeinschaft

The assault on international adjudication and the limits of withdrawal

Campbell McLachlan^{*}

Abstract:

International adjudication is currently under assault, encouraging a number of States to withdraw, or to consider withdrawing, from treaties providing for international dispute settlement. This Working Paper argues that the act of treaty withdrawal is not merely as the unilateral executive exercise of the individual sovereign prerogative of a State. International law places checks upon the exercise of withdrawal, recognising that it is an act that of its nature affects the interests of other States parties, which have a collective interest in constraining withdrawal. National courts have a complementary function in restraining unilateral withdrawal in order to support the domestic constitution. The arguments advanced against international adjudication in the name of popular democracy at the national level can serve as a cloak for the exercise of executive power unrestrained by law. The submission by States of their disputes to peaceful settlement through international adjudication is central, not incidental, to the successful operation of the international legal system.

^{*} QC; Professor of Law, Victoria University of Wellington; *Associé, Institut de Droit International*; Senior Research Fellow, KFG 'International Rule of Law: Rise or Decline?' Berlin 2019. The author is a member of the ICSID Panel of Arbitrators on the nomination of New Zealand. The author thanks Helmut Aust, Eirik Bjorge, Laurence Boisson de Chazournes, James Crawford, Felix Lange, Geun-Kwan Lee, Georg Nolte, Guy Sinclair and Andreas Zimmermann for comments on earlier drafts and Julian Kulaga for research assistance in the preparation of this article for publication. Any errors are the author's sole responsibility.

Contents:

- 1. Introduction5
- 2. Evidence of withdrawal.....8
 - a) Brexit and the European Court of Justice 8
 - b) European Court of Human Rights..... 9
 - c) International Criminal Court..... 10
 - d) Investment treaty arbitration 11
 - e) Other modes of avoidance 14
- 3. Critiques of international adjudication 15
 - a) The burdens of enlargement..... 15
 - b) The alleged democratic deficit..... 16
 - c) State sovereignty and *raison d'état* 17
 - d) Excess of judicial power..... 18
- 4. The approach of international law to withdrawal 19
 - a) Continuity v voluntarism in treaty relations 19
 - b) Express provision 20
 - c) An implied right of withdrawal?..... 21
 - d) Treaties providing for judicial settlement..... 24
- 5. Systematic Implications.....26
 - a) The legal limits of the exercise of State power 27
 - b) The collective interest of the mandate providers..... 28
 - c) The role of national courts 29
 - aa) National courts and international adjudication..... 30
 - bb) Constitutional limits on withdrawal 31
 - d) Extra-national institutional design..... 33
- 6. Conclusion.....35

Chorus: Where will it end? When will it all
be lulled back into sleep, and cease,
the bloody hatred, the destruction?

Athena: I'll choose
a panel of judges to preside at ...
trials like this, and put them under oath,
and so set up a court to last forever.
Now call your witnesses, prepare your proofs,
bring forth whatever evidence you have
that best supports your case. Meanwhile, I'll pick
my ablest citizens, and then return
to deal with this matter fairly, once and for all.

-- Aeschylus, *The Oresteia*¹

'...the decisive test is whether there exists a judge competent to decide upon disputed
rights and to command peace.'

-- Hersch Lauterpacht, *The Function of Law in the International Community*²

'There is no inevitable march of progress in history or law. Everything that has been
achieved can be rescinded, forgotten, tossed away...'

-- Isabel Hull³

1. Introduction

At the outset of the early modern period, it could hardly be said that the adjudication of disputes according to law was an integral part of the system of international law. Grotius reached the value of arbitration as a way to prevent war only in chapter 23 of Book II after a book and a half substantially devoted to the determination of when war may be pursued as a lawful instrument of foreign policy.⁴ Despite such unpromising beginnings, it has been possible until recently to present the development of the peaceful settlement of disputes by third party adjudication as a progressive development: from the burgeoning of arbitration in the late Eighteenth and Nineteenth Centuries;⁵ to the creation of the Permanent Court of International Justice (PCIJ); and the

¹ Aeschylus, *The Oresteia* (Peter Burian and Alan Shapiro ed and tr, OUP 2011) lines 1215-17, 'Eumenides' lines 570-8.

² Hersch Lauterpacht, *The Function of Law in the International Community* (Oxford UP, 1933, rev edn 2011) 432.

³ Isabel Hull, 'Anything can be rescinded' (2018) 40(2) *London Rev of Books* 25, 26.

⁴ Hugo Grotius, *The Rights of War and Peace*, vol. 2 (first published 1625, Richard Tuck ed, John Morris tr, Liberty Fund, 2005) ch. XXIII, s. VIII, 1123.

⁵ A M Stuyt, *Survey of International Arbitrations 1794-1938* (Martinus Nijhoff 1939); J Crawford, 'Continuity and discontinuity in international dispute settlement: an inaugural lecture' (2010) 1 *JIDS* 3.

commitment to peaceful settlement of international disputes under Article 33 of the United Nations Charter;⁶ to the proliferation of new international tribunals in our times.⁷ Yet in 2019 international adjudication faces a new and existential risk: a chorus of criticism by States and some academic commentators together with threats, some of which have materialised, of withdrawal from the jurisdiction of international tribunals.

The purpose of this paper is to argue that withdrawal from international adjudication cannot be understood merely as the unilateral executive exercise of the individual sovereign prerogative of a State. International law by deliberate design places checks upon the exercise of withdrawal, recognising that it is an act that of its nature affects the interests of other States parties. Moreover national courts have a critical complementary function to international courts in safeguarding the international rule of law. This includes supporting the jurisdiction of international courts and restraining precipitate acts of withdrawal that are not in conformity with the State's foreign relations law. On the international level, the Contracting States as mandate providers may exercise a collective interest in constraining withdrawal, particularly where the constituent instrument for the court or tribunal provides a forum through which that collective interest may be expressed.

Although many of the arguments advanced against international adjudication are couched as a reassertion of popular democracy at the national level, such arguments can serve as a cloak for the exercise of executive power unrestrained by law. Despite the shortcomings of international adjudication, the submission by States of their disputes to peaceful settlement through international adjudication is central, not incidental, to the international legal system governed by the rule of law.

The problem of withdrawal from international adjudication is part of a larger challenge to the international legal system. We have witnessed in our lifetime an unprecedented period of growth in the ambition of international law and in the depth of its realisation. The development of the international legal system accelerated particularly sharply after the end of the Cold War.⁸ The progressive development of international law bore fruit particularly in the development of international adjudication.⁹ The World Trade Organisation Dispute Settlement Understanding (WTO DSU),¹⁰ the International Tribunal for the Law of the Sea (ITLOS),¹¹ the International Criminal Court (ICC)¹² and the specialised international criminal tribunals are all children of the 1990's and so too (though the framework for it was created three decades earlier) is investment treaty arbitration.

But suddenly withdrawal from international law engagements and a return to unilateral acts of State seem to be omnipresent. The 'Brexit' withdrawal of the United Kingdom from the

⁶ Charter of the United Nations (signed 26 June 1945, entered into force 24 October 1945) 1 UNTS 16, art 33.

⁷ Campbell McLachlan, *Lis Pendens in International Litigation* (Martinus Nijhoff 2009) ch IV; Cesare PR Romano, 'The proliferation of international judicial bodies: the pieces of the puzzle' (1999) 31 NYUJILP 709.

⁸ Heike Krieger and Georg Nolte, 'The international rule of law—rise or decline? points of departure' (2016) KFG Working Paper Series, No 1, <http://www.kfg-intlaw.de/Publications/working_papers.php?ID=1> accessed 15 January 2019.

⁹ Karen Alter, *The New Terrain of International Law* (Princeton UP, 2014).

¹⁰ Dispute Settlement Understanding, Annex 2 to Marrakesh Agreement establishing the World Trade Organisation (signed 15 April 1994, entered into force 1 January 2002) 1869 UNTS 401.

¹¹ United Nations Convention on the Law of the Sea (signed 10 December 1982, entered into force 16 November 1994) 1833 UNTS 396, Annex VI.

¹² Rome Statute of the International Criminal Court (signed 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90.

European Union and the United States President's announcement of intent to withdraw from the Paris Agreement presage a larger question: Is the very concept of a world order based upon the international rule of law imperilled as a result of the espousal of nativist policies by States that have traditionally supported the international legal order? James Crawford posed this question, pointing out that:

'[r]eading current statements of world leaders on subjects relevant to international law is liable to cause confusion even distress to those for whom the 1945 regulatory arrangements, as completed in the post-Cold War era, have become the norm...international law is invoked, but in what seems an increasingly antagonistic way, amounting often to a dialogue of the deaf.'¹³

International lawyers are not always so good at defending the very system that they study. Those who work within the system and are committed to it are nevertheless bound, by the logic of international law's own rules of recognition, to the acts of States. It is primarily the collectivity of individual acts of State practice that gives life to custom and individual acts of State ratification that confer binding force on treaty engagements.

International law as a discipline has also faced a sustained assault by a vocal group of neo-Realist scholars, particularly in the United States, that dispute its very existence and would seek to replace its normative force with the self-interest of States and at the same time to erect walls around national legal systems through rewriting the rules of foreign relations law in order to reduce the normative force of international law at the domestic level.¹⁴ But the scholarly assault on international law has not, as Thomas Franck recognised in one of his last articles, been limited only to one end of the political spectrum. As he pointed out, the approach of the critical movement to international law may also be more devoted 'to deconstruct laws, legal regimes, and legal institutions, not to conserve them.'¹⁵ Directions in scholarship may have a wider impact, since 'generally held expectations and aspirations are not merely academic but of immense practical importance, since they have a direct impact on the legal practices of the pertinent actors.'¹⁶ Over time arguments of this kind can in turn influence the decisions of courts and policy makers.

This paper unpacks the phenomenon of withdrawal from adjudication and the law's response in five steps. Part II examines the evidence for withdrawal from international adjudication as a larger trend with common elements and not merely a set of isolated and unrelated decisions of individual States. Part III then analyses some of the principal criticisms of international adjudication that are currently advanced. Against this background it is possible to examine the law's response. Part IV first considers international law's own formal constraints on withdrawal from international adjudication. Part V then moves to consider the wider normative response of the law to these challenges. The purpose here is not to focus on the actions of any one State, but rather to examine the evidence for, implications of, and response to a broader phenomenon. In such a survey, it will inevitably not be possible to capture all of the dimensions of the controversy

¹³ James Crawford, 'The current political discourse concerning international law' (2018) 81 MLR 1.

¹⁴ Jack L Goldsmith and Eric A Posner, *The Limits of International Law* (OUP 2007). For a broad critique of these approaches see: Jens David Ohlin, *The Assault on International Law* (OUP 2015).

¹⁵ Thomas M Franck, 'Is anything "left" in international law?' (2005) 1 Unbound: Harvard Journal of the Legal Left 59, 62.

¹⁶ Above n 6, 6.

affecting each of the adjudicatory institutions. Rather, the objective is to see what common themes and responses emerge from a comparison of the issues across the range of courts and tribunals.

2. Evidence of withdrawal

There is widespread evidence of a trend towards withdrawal from international adjudication. This Part briefly considers this in the context of the European Court of Justice (ECJ), the European Court of Human Rights (ECtHR), the ICC and investment arbitration. It concludes with some observations concerning other forms of the avoidance of international adjudication.

a) Brexit and the European Court of Justice

A key tenet of the ‘Brexit’ campaign in Britain was to take back control over law in the United Kingdom (UK) from the ECJ. The ‘Leave’ campaigners and their supporters in the press singled out the Court—branded ‘Europe’s imperial court’—for particular criticism amongst the European institutions.

When the electorate voted by a narrow margin on 23 June 2016 in favour of leaving the European Union (EU), the Government immediately announced that it intended to give notice of withdrawal under Article 50 TEU in the exercise of its prerogative power in foreign affairs.¹⁷ It would be an act of State on the international plane that it did not need statutory authority from Parliament.¹⁸

On 3 November 2016, the Divisional Court demurred. It said that directly effective rights under EU law, including the right of recourse to the European Court, had been given effect in the UK by Parliament and only Parliament could take them away.¹⁹ The response from the press was immediate and furious: The *Daily Mail* branded the Court ‘Enemies of the People.’²⁰ Yet on 24 January 2017, the UK Supreme Court, by a majority of 8:3, upheld the Divisional Court holding that only Parliament could authorise withdrawal.²¹

Some of the criticism of the ECJ was focused on a perceived growth in its power since the Treaty of Lisbon, with its enlarged competence for the EU and adoption of the European Charter. But much of it stems simply from the direct binding effect of its judgments on EU law applicable in the domestic jurisdictions of the Member States, leading to what the *Economist* aptly described as an atmosphere of ‘contempt of court’²² in the UK. Yet, whatever form the arrangements between the UK and the EU may take, it is inevitable that some form of court or tribunal, with power to bind the parties will be required for the system to operate.²³

¹⁷ Treaty on European Union (TEU) (signed 7 February 1992, entered into force 1 November 1993) 1757 UNTS 3, [2010] OJ C 83/01, art 50(1).

¹⁸ Chancellor of the Duchy of Lancaster, HC Deb 11 July 2016, vol 613, col 23.

¹⁹ *R (ex p Miller) v Secretary of State for Exiting the European Union* [2016] EWHC 2768 (Admin), [2018] AC 61.

²⁰ James Slack, ‘Enemies of the People’ *Daily Mail* (4 November 2016).

²¹ *R (ex p Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, [2018] AC 61; as to which see: Campbell McLachlan, ‘The foreign relations power in the Supreme Court’ (2018) 134 LQR 380.

²² ‘Contempt of Court’ *The Economist* (2 March 2011).

²³ Draft Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Agency (14 November 2018) TF (2018) 55, art 171, provides for the establishment of an arbitration panel to resolve disputes between the Parties under the Agreement. Provision is made for the International Bureau of the Permanent Court of Arbitration to administer the arbitration. Art 174 provides for the arbitral panel to refer to the ECJ any questions of EU law that arise.

b) European Court of Human Rights

If the ECJ has come in for criticism, the ECtHR, the judicial institution that applies the European Convention on Human Rights,²⁴ has become a *bête noire*, with the press in the UK referring to ‘meddling unelected European judges’ who are ‘wrecking British law.’²⁵ The ECtHR has had to face criticism from a much wider range of its member States—not least the charge of being a ‘Western imposition’ from the easternmost member States of the Council of Europe who still occupy the majority of the Court’s caseload, despite the fact that all of those States freely chose to join the Council and the Court after the end of the Cold War.²⁶

But the criticism of the Court in the UK, as a foundation member of the Court, is particularly serious. In part this criticism has focused on particular judgments, such as the issue of prisoner voting rights.²⁷ There is a more general wish to exclude British engagement in military operations abroad from the purview of the Court’s review, following the *Al-Skeini*²⁸ and *Al-Jedda*²⁹ judgments of the Grand Chamber in 2011, such that it is now part of the Conservative Party Manifesto to state that: ‘British troops will in the future be subject to the international law of armed conflict...not the European Court of Human Rights.’³⁰ The Manifesto stops just short of complete withdrawal, leaving the question open until the completion of Brexit.

Noel Malcolm, the noted authority on Thomas Hobbes,³¹ in a 150 page pamphlet published in 2017 for the Judicial Power Project, concludes that ‘the current system under the European Convention is so dysfunctional and counter-productive that it should be abandoned’ and replaced by domestic protections alone.³²

Such an approach gives adequate weight neither to the historical reasons for the creation of the Convention and its Court nor to Britain’s formative role in it. But the Convention is not simply an abstract creation of the Council of Europe. As Brian Simpson showed in his magisterial study *Human rights and the end of empire*,³³ the UK played a pivotal role in the framing of the ECHR, which it saw as an expression of the fundamental values of the English legal system and as a key foreign policy objective of ensuring that Europe did not again return to the mass atrocities of World

²⁴ Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) (signed 4 November 1950, entered into force 3 September 1953) 213 UNTS 221.

²⁵ For an analysis of the Press coverage see: Jon Henley, ‘Meddler or miracle? Inside a Tory *bête noire*: The European Court of human rights is a whipping boy for the UK right. But why?’ *The Guardian* (23 December 2013).

²⁶ Matthew Saul, Andreas Follesdal and Geir Ulfstein (eds), *The International Human Rights Judiciary and National Parliaments: Europe and Beyond* (Studies on Human Rights Conventions) (CUP 2017); Bill Bowring, ‘Russia’s cases in the ECtHR and the question of implementation’ in Lauri Mälksoo and Wolfgang Benedek (eds), *Russia and the European Court of Human Rights* (CUP 2017).

²⁷ *Hirst v United Kingdom (No 2)* (App no 74025/01, 6 October 2005) 16 BHRC 409.

²⁸ *Al-Skeini v United Kingdom* (App no 55721/07, 7 July 2011) 147 ILR 181 (ECtHR GC).

²⁹ *Al-Jedda v United Kingdom* (App no 27021/08, 7 July 2011) 147 ILR 107 (ECtHR GC).

³⁰ Conservative and Unionist Party, ‘Forward together: our plan for a stronger Britain and a prosperous future’ (2017), 37, < <https://www.conservatives.com/manifesto> > accessed 16 January 2019.

³¹ Noel Malcolm (ed), *Thomas Hobbes: Leviathan* (Oxford UP, 2014).

³² Noel Malcolm, *Human Rights and Political Wrongs: A New Approach to Human Rights Law* (Policy Exchange 2017), 139.

³³ Alfred W Brian Simpson, *Human Rights and the End of Empire: Britain and the Genesis of the European Convention* (OUP 2004).

War II. The text was derived in no small measure from Sir Hersch Lauterpacht's *An International Bill of the Rights of Man*;³⁴ and promoted by the Foreign Office and by the former British Prime Minister Winston Churchill, who said: '[i]n the centre of our movement stands the idea of a Charter of Human Rights, guarded by freedom and sustained by law.'³⁵

In other words, the ECtHR stands not merely as a bulwark of international rights; it is also a key part of the architecture to ensure peace and justice across Europe. Lord Phillips, sometime President of the UK Supreme Court, suggested in a debate on Malcolm's book that, given that 'others might be only too keen to follow our example...it would be lamentable to withdraw our support from the Convention and the Court.'³⁶

c) International Criminal Court

Moving away from the European judicial institutions, there is currently a serious movement to withdraw from the ICC, focussed primarily but not solely in Africa.³⁷ African States were formative supporters of the Court. Thirty-four African States chose to become parties to the Rome Statute—the largest single regional grouping. Yet the fact that to date the investigations opened by the Office of the Prosecutor have been largely focused on African States has led to charges of a neo-colonial agenda,³⁸ despite the appointment of an African, Fatou Bensouda, as the second prosecutor.³⁹ These criticisms tend to obscure the fact that of the eight investigations to date, six were the result of voluntary reference by the relevant State (or were tantamount to a national reference) and two (Sudan⁴⁰ and Libya⁴¹) were references by the Security Council, supported by its African members. The Office of the Prosecutor has in any event more recently significantly broadened the geographical scope of the situations subject to preliminary examination.⁴²

³⁴ Hersch Lauterpacht, *An International Bill of the Rights of Man* (Columbia UP 1945) and see further Hersch Lauterpacht, 'The proposed European Court of Human Rights' (1949) 35 *Transactions of the Grotius Society* 25.

³⁵ Winston Churchill, 'Address to the Congress of Europe' (7 May 1948, The Hague) <https://www.cvce.eu/content/publication/1999/1/1/58118da1-af22-48c0-bc88-93cda974f42c/publishable_en.pdf> accessed 9 January 2019.

³⁶ Lord Phillips, 'Strasbourg overreach and ECHR membership' (7 March 2018) <<https://judicialpowerproject.org.uk/lord-phillips-strasbourg-overreach-and-echr-membership>> accessed 9 January 2019.

³⁷ The Philippines also notified its withdrawal from the Rome Statute on 17 March 2018: Depository Notification C.N.138.2018.TREATIES-XVIII.10. At the time of writing, the only African State that has withdrawn is Burundi, with effect from 27 October 2017: C.N.805.2016.TREATIES-XVIII.10. Both South Africa and The Gambia, which had notified withdrawal, subsequently withdrew their notices.

³⁸ Manisuli Ssenyonjo, 'State Withdrawals from the Rome Statute of the International Criminal Court South Africa, Burundi, and The Gambia' in Charles Jalloh and Ilias Bantekas (eds) *The International Criminal Court and Africa* (Oxford University Press, 2017) Ch. 9.

³⁹ Election of the Prosecutor of the International Criminal Court/Addendum (ICC-ASP/10/38, 12 December 2011) <https://asp.icc-cpi.int/iccdocs/asp_docs/ASP10/ICC-ASP-10-38-ENG.pdf> accessed 16 January 2019.

⁴⁰ UN SC Res 1593 (31 March 2005), UN Doc S/RES/1593 (2005), adopted with 11 votes in favour (including Tanzania and Benin), no votes against and 4 abstentions (including Algeria).

⁴¹ UN SC Res 1970 (26 February 2011), UN Doc S/RES/1970 (2011), adopted unanimously (including Gabon, Nigeria and South Africa).

⁴² For details see: <https://www.icc-cpi.int/#> (last accessed 5 February 2019).

Yet the objections of African heads of State have been such as to lead to the withdrawal of Burundi;⁴³ abortive withdrawals by South Africa⁴⁴ and The Gambia⁴⁵ (of which more later); and a proposal brought forward to the most recent meeting of the African Union in January 2017 for a possible collective withdrawal by African States from the Court. The Collective Withdrawal proposal was promoted by an Open-ended Ministerial Committee of the Union as a last resort solution to address what it saw as necessary institutional and legal reforms of the ICC; to enhance African solutions for African problems and to '[p]reserve the dignity, sovereignty and integrity of Member States.'⁴⁶ The Strategy was endorsed by a majority of States at the Assembly of the Union.⁴⁷ But it appears at this stage to be largely a bargaining chip for the Union's mission to reform the Court.⁴⁸ The alternative of a regional court with competence in the field of international crimes, envisaged by African States in 2014, has not yet come into force.⁴⁹

Scholars have also questioned the Court's fundamental mission. Gerry Simpson used his Kirby Lecture in 2015 to characterise the nascent system of international criminal justice as 'human rights with a vengeance' or 'a system of injustice'. He concludes that it 'might now be one of the less auspicious ways to do good in the world.'⁵⁰ Such an approach equates international criminal justice with retribution, when a principal purpose of the system is to break the cycle of retribution by replacing it with adjudication according to law. It is the international legal system's most direct application of the ideas that motivated Aeschylus in *The Oresteia* which preface this article.

d) Investment treaty arbitration

A further example is the case of investment treaty arbitration. Following an extraordinary period of development in the adoption of treaties containing clauses in which States agreed to submit to the

⁴³ Depository Notification C.N.805.2016.TREATIES-XVIII.10 (28 October 2016) <<https://treaties.un.org/doc/Publication/CN/2016/CN.805.2016-Eng.pdf>> accessed 16 January 2019.

⁴⁴ Depository Notification C.N.786.2016.TREATIES-XVIII.10 (19 October 2016) <<https://treaties.un.org/doc/Publication/CN/2016/CN.786.2016-Eng.pdf>> accessed 16 January 2019.

⁴⁵ Depository Notification C.N.862.2016.TREATIES-XVIII.10 (10 October 2016) <<https://treaties.un.org/doc/Publication/CN/2016/CN.862.2016-Eng.pdf>> accessed 16 January 2019.

⁴⁶ African Union, 'Withdrawal Strategy Document – Draft 2' (12 January 2017), 2 <https://www.hrw.org/sites/default/files/supporting_resources/icc_withdrawal_strategy_jan._2017.pdf> accessed 16 January 2019.

⁴⁷ Ordinary Session of the Assembly of the Union, 'Decision on the International Criminal Court', (Doc. EX.CL/1006(XXX), 30 - 31 January 2017, Addis Ababa), 2 <https://au.int/sites/default/files/decisions/32520-sc19553_e_original_-_assembly_decisions_621-641_-_xxviii.pdf> accessed 16 January 2019. Benin, Botswana, Burkina Faso, Cabo Verde, Cote d'Ivoire, The Gambia, Lesotho, Liberia, Madagascar, Malawi, Mozambique, Nigeria, Senegal, Tanzania, Tunisia and Zambia entered reservations, while Liberia entered reservations specifically to the study on the Withdrawal Strategy.

⁴⁸ The Assembly's Decision on the International Criminal Court of January 2018 omits mention of collective withdrawal; focuses on the strengthening of international criminal justice in Africa and on clarification of the relationship between art 27 (irrelevance of official capacity) and art 98 (cooperation with respect to immunity and consent to surrender) of the Rome Statute: African Union 30th Sess. 28-29 January 2018, Assembly/AU/Dec.672(XXX).

⁴⁹ Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (signed Malabo, 27 June 2014). Art 46A bis of the Statute of the Court confers immunity on serving African Union Heads of State.

⁵⁰ Gerry Simpson, 'Human rights with a vengeance: one hundred of retributive humanitarianism' (2015) 33 AYBIL 1, 14.

arbitration of investment disputes, there are now about 3,300 such treaties⁵¹ and the total number of registered cases now totals more than 850.⁵²

At the same time, there has been a growing opposition to investor–State arbitration. This became a major subject of civil society dissent in the negotiation of the (now renamed) Comprehensive and Progressive Agreement for Trans-Pacific Partnership 2018⁵³ and the Transatlantic Trade and Investment Partnership, yet to be concluded.

To some extent the objections that have been raised engage specific perceived inequities in the operation of investment arbitration, which critics claim evidences systemic bias in favour of investors; is open to abuse; is insufficiently transparent given the public issues involved; and lacks procedures that might build consistency. The larger critique is more basic to the present theme. It is simply that investment arbitration undermines domestic sovereignty by empowering international tribunals to sit in judgment on the choices of democratically elected governments at the suit of private claimants.

This backlash against investment arbitration has begun to have an impact on State practice. Only three States have withdrawn from the ICSID Convention 1965,⁵⁴ which, with 153 States parties⁵⁵ is still on a par with the New York Convention 1958⁵⁶ (with 157 parties) as the world’s most widely ratified arbitration treaty. But membership of the ICSID Convention does not itself confer jurisdiction—the State must do so by instrument of consent. In modern times the most frequent such instrument has been standing consent given by bilateral treaty.

This is where the change in State practice is becoming more readily apparent. As recently as 2010, an author of a prominent treatise found ‘no reported case of a country actually terminating an investment treaty to which it had agreed.’⁵⁷ But recently a number of States have moved to terminate their investment treaties, usually in accordance with their terms.⁵⁸

Within the group of States that seek what has been called a ‘paradigmatic reform of investor–State arbitration’⁵⁹ there is a spectrum of different proposed approaches, not all of which involve outright rejection of international dispute settlement under treaty.⁶⁰

⁵¹ UNCTAD, ‘Investment Policy Monitor’ Issue 20 (December 2018)

<https://unctad.org/en/PublicationsLibrary/diaepcb2018d5_en.pdf> accessed 14 January 2019.

⁵² UNCTAD ‘Investor-state Dispute Settlement: Review of Developments in 2017’ (June 2018)

<https://unctad.org/en/PublicationsLibrary/diaepcbinf2018d2_en.pdf> accessed 14 January 2019.

⁵³ Comprehensive and Progressive Trans-Pacific Partnership Agreement (signed 8 March 2018, not yet in force).

⁵⁴ Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention) (signed 18 March 1965, entered into force 14 October 1966) 575 UNTS 159. Art 71 provides: ‘Any Contracting State may denounce this Convention by written notice to the depositary of this Convention. The denunciation shall take effect six months after receipt of such notice.’

⁵⁵ ICSID, ‘Database of ICSID Member States’ <<https://icsid.worldbank.org/en/Pages/about/Database-of-Member-States.aspx>> accessed 9 January 2019, notes the withdrawal of: Bolivia with effect from 3 November 2007; Ecuador with effect from 7 January 2010; and Venezuela with effect from 25 July 2012.

⁵⁶ Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) (signed 10 June 1958, entered into force 7 June 1959) 33 UNTS 38.

⁵⁷ Jeswald Salacuse, *The Law of Investment Treaties* (OUP 2010), 352.

⁵⁸ See generally: Tania Voon and Andrew D Mitchell, ‘Denunciation, termination and survival: the interplay of treaty law and international investment law’ (2016) 31 *ICSID Rev-FILJ* 413. The States notifying termination include Indonesia, India and South Africa. For details of treaties terminated see: <<https://investmentpolicyhub.unctad.org/IIA>> accessed 14 January 2019.

⁵⁹ Anthea Roberts, ‘Incremental, systemic, and paradigmatic reform of investor–state arbitration’ (2018) 112 *AJIL* 410.

In the United States, the President has threatened to give notice of withdrawal from the North American Free Trade Agreement (NAFTA) on more than one occasion.⁶¹ The renegotiated agreement that is intended to replace NAFTA does not reject the international arbitration of investment disputes altogether, but radically reduces the permissible scope of such claims.⁶²

In Europe, systemic reform not rejection of international dispute settlement is the order of the day. Exclusive competence for concluding investment agreements with third States was transferred to the Union under the Treaty of Lisbon.⁶³ More recently, the ECJ has confirmed that the provisions for the international arbitration of disputes in intra-European bilateral investment treaties are precluded by the EU Treaties.⁶⁴ These two steps will lead to a significant contraction of the existing stock of bilateral investment treaties concluded by EU Member States.⁶⁵

In formulating its new approach, the European Commission has rejected arbitration as its preferred model for the resolution of investment disputes. The EU's two most recent Free Trade Agreements—with Canada and Vietnam (neither of which are yet in force)—adopt a proposed Investment Court (and Appeals Chamber) rather than arbitration.⁶⁶ Cecilia Malmström (EU Trade Commissioner) has now adopted a broader policy that critiques investment arbitration for its lack of legitimacy, unpredictability and propensity for error.⁶⁷ The EU Council aims to replace investment arbitration generally with a Multilateral Investment Court.⁶⁸

⁶⁰ See, e.g. the draft India Model BIT 2015, art 15(1) of which would require the exhaustion of local remedies as a precondition of resort to international arbitration.

<<https://investmentpolicyhub.unctad.org/Download/TreatyFile/3560>> accessed 14 January 2019; Aniruddha Rajput, 'Protection of foreign investment in India and international rule of law: rise or decline?' (2017) KFG Working Paper Series, No 10, <http://www.kfg-intlaw.de/Publications/working_papers.php?ID=1> accessed 15 January 2019

⁶¹ Ana Swanson, 'Trump's Tough Talk on Nafta Raises Prospects of Pact's Demise' *The New York Times* (Washington, 11 October 2017) <<https://www.nytimes.com/2017/10/11/business/economy/nafta-trump.html>> accessed 16 January 2019; Glenn Thrush, 'Trump Says He Plans to Withdraw From Nafta' *The New York Times* (Washington, 2 December 2018) <<https://www.nytimes.com/2018/12/02/us/politics/trump-withdraw-nafta.html>> accessed 16 January 2019;

⁶² Canada-United States-Mexico Agreement (signed 30 November 2018, not yet in force), art 14.2(4) and Annex 14-C – 14-E <<https://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cusma-aceum/text-texte/toc-tdm.aspx?lang=eng>> accessed 14 January 2019.

⁶³ Treaty on the Functioning of the European Union (TFEU), as amended and renamed by the Treaty of Lisbon (signed 13 December 2007, entered into force 1 December 2009), arts 3(1), 206 and 207.

⁶⁴ Case C-284/16 *Slovak Republic v Achmea* ECLI:EU:C:2018:158.

⁶⁵ 'Declaration of the Representatives of the Governments of the Member States of 15 January 2019 on the Legal Consequences of the Judgment of the Court of the Justice in *Achmea* and on Investment Protection in the European Union' available at:

https://ec.europa.eu/info/sites/info/files/business_economy_euro/banking_and_finance/documents/190117-bilateral-investment-treaties_en.pdf (last accessed 5 February 2019).

⁶⁶ Canada–EU Comprehensive Economic and Trade Agreement (CETA) (signed 30 October 2016, entered into force provisionally 21 September 2017), art 8.27; Final Text of EU–Vietnam Investment Protection Agreement (not yet signed) <<http://trade.ec.europa.eu/doclib/press/index.cfm?id=1437>> accessed 6 October 2018, ch 3, arts 3.38--3.57.

⁶⁷ Cecilia Malmström (European Commissioner for Trade), 'Reforming investment dispute settlement' (27 February 2017) <http://trade.ec.europa.eu/doclib/docs/2017/february/tradoc_155393.pdf> accessed 7 October 2018.

⁶⁸ EU Council, 'Negotiating directives for a Convention establishing a multilateral court for the settlement of investment disputes' (20 March 2018), 12981/17 ADD 1 DCL 1 <https://isds.bilaterals.org/IMG/pdf/st_12981_2017_add_1_dcl_1_en.pdf> accessed 16 January 2019.

All of these possibilities: incremental reform; a more major systemic reform, such as the replacement of arbitration with a standing international investment court; and a complete paradigm shift that would return such disputes to an earlier world of domestic remedies and possible diplomatic protection vindicated through inter-State claims are now on the table in UNCITRAL, which has bravely taken up a mandate on the reform of investor-State dispute settlement.⁶⁹

e) Other modes of avoidance

States may also adopt other modes of avoidance of international litigation short of outright withdrawal.

A State may decide not to enter an appearance in a case brought against it under a treaty provision.⁷⁰ Such an approach is neither unique to States as defendants nor to the present day. The International Court of Justice (ICJ) was confronted with several cases in the 1970s where respondent States did not appear and there are some indications that this practice may again be re-emerging.⁷¹ Non-appearance does not relieve the court or tribunal from the power and duty to decide the claim brought before it. Nor does it deprive the tribunal of the competence and obligation to determine its own jurisdiction (the principle of *Kompetenz-Kompetenz*); nor does it deprive the resulting judgment or award of its binding force. These are general principles of law, applicable to the international judicial process whether or not (as is often the case) they are spelled out expressly.⁷²

However, a decision not to appear does carry with it particular procedural consequences in international litigation. In common with a default of appearance before a national court, it deprives the tribunal of the benefit of the respondent's evidence and submissions, including when the tribunal is determining its jurisdiction. In the specific context of international litigation and arbitration, it deprives the respondent State of the opportunity to participate in the constitution of the tribunal, through the appointment of arbitrators or judges *ad hoc* as the case may be.⁷³

A State may also inhibit the operation of a judicial process without withdrawal through a decision not to cooperate in the appointment of judicial officers. This is the case at present in relation to appointments to the Appellate Body of the WTO.⁷⁴ Such action, though taken unilaterally, may have a much wider negative effect than the withdrawal one State alone. It affects the ability of all other States to access and enjoy the benefits of third party adjudication.⁷⁵ The actions of such a State would have to be judged against its general duty to perform its international law obligations in good faith.

⁶⁹ Ibid, [4]; UNCITRAL, 'Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-fifth session (New York, 23-27 April 2018)' UN Doc A/CN.9/935.

⁷⁰ Recent examples include *Arctic Sunrise (The Netherlands v Russia)* PCA Case No 2014-2; *South China Sea (Philippines v China)* PCA Case No 2013-19; *Arbitration under the Arbitration Agreement between Croatia and Slovenia (Croatia v Slovenia)* PCA No Case 2012-04.

⁷¹ Kenneth J Keith, 'Reflections on the South China Sea arbitration rulings' (2017) 42 NZIR 5, 7.

⁷² See e.g. UNCLOS, arts 288(4) & 296 and Annex VII art 9.

⁷³ Keith *op cit*, 7-8.

⁷⁴ 'United States blocks reappointment of WTO Appellate Body member' (2016) 110 AJIL 573; WTO Secretariat's Information and External Relations Division, WTO Dispute Settlement Body, Summary of Meeting, 22 June 2018 <https://www.wto.org/english/news_e/news18_e/dsb_22jun18_e.htm> accessed 15 January 2019.

⁷⁵ Pieter Jan Kuijper,

3. Critiques of international adjudication

What may be learned from States' reasons for withdrawal or threats to withdraw from treaties providing for international adjudication? Understanding these dynamics is important for the law's response. Four broad strands in the contemporary dynamics of withdrawal may be identified. This section considers in turn: the implications of the great enlargement in the scope and ambition of international adjudication in the modern era; the alleged democratic deficit of international courts; the claim of State sovereignty and reasons of state; and allegations of excess of judicial power.

a) The burdens of enlargement

The first proposition is that the current phenomenon of withdrawal is in part a consequence of the success of the international law project, which affects both the juridical source of State consent and the scope of disputes. The trajectory of international adjudication has moved from isolated cases, dealt with by means of arbitration that States agreed to on an *ad hoc* basis to a proliferation of standing international courts and tribunals, on whom States have conferred standing jurisdiction by treaty.

A further aspect of the development of international adjudication has been its density and reach *ratione personae* and *ratione materiae*. The extension of international adjudication to cover claims by private persons against States is one of its most distinctive contemporary elements: applied in both human rights and investment treaties. In both instances this has been a deliberate design of the contracting States to admit direct claims rather than to require, as in the paradigm of diplomatic protection, the translation of all claims to the inter-State level. Both human rights and investment treaties by design reach deep into the internal governance of States parties *ratione materiae*. That is their purpose: to place international law limits on what States may permissibly do, whether 'to everyone within their jurisdiction'⁷⁶ or in respect of foreign nationals (in the case of investment treaties). At the same time, the development of international criminal law embodied in the Rome Statute of the ICC involves the direct application of international adjudication to the conduct of individuals, regardless of their official capacity,⁷⁷ exacting the responsibility of commanders as much as of foot soldiers.⁷⁸ Immunities do not operate as a bar to the jurisdiction of the Court.⁷⁹

This expansion in the ambition of States for the competence of the international legal system assumes an unwavering acceptance by each of them that the higher objectives of the international rule of law justify the voluntary subjection of the State to the application of the law by the judgment of an international tribunal. In hindsight, it should not be a matter of surprise that, as the decisions of such tribunals multiply, and the results exposed to political debate at home, some States would become restive under a yoke of their own creation.

⁷⁶ Art 1 ECHR.

⁷⁷ Art 27(1) Rome Statute.

⁷⁸ Ibid, art 28.

⁷⁹ Ibid, art 27(2).

b) The alleged democratic deficit

A consequence of the enhanced ambitions of international adjudication has been the argument that international courts and tribunals contribute to a democratic deficit.⁸⁰ Their judges or members are not (directly) elected or directly accountable to the national societies affected by their decisions. Yet their decisions may directly constrain the policy choices of nationally elected legislatures, who have been democratically elected.

So, for example, criticism of the ECtHR has been made on the grounds that: it involves decisions being made about the rights of citizens by a body that is not exclusively accountable to them; international tribunals generally involve decisions being made by unaccountable international elites; the State has transferred constitutional powers of decision that ought to have remained within the domestic polity; and that the judiciary has an insufficiently controlled discretionary power, which can lead to an overreaching of its jurisdiction in ways that are unduly intrusive on State's decision-making powers and beyond the scope of the original mandate that States granted to the court.⁸¹ Similar arguments have been advanced in democratic States against other international courts and tribunals, notably the ECJ⁸² and investment arbitral tribunals.

It will be necessary to return to these arguments later.⁸³ At a fundamental level they misconstrue the relation between democracy and the judicial function, which is to maintain the rule of law. As Baroness O'Neill recently pointed out:⁸⁴

Democracy is a fine thing provided it is combined with *order*, with the *rule of law* and with the *elementary rights of the person*. But where any of these is lacking, it may be problematic. Democracies without order and the rule of law may offer no more than mob rule—as Plato pointed out long ago. Democracies that achieve order but not the rule of law may be—and often are—dominated by corrupt elites. Democracies that secure order and the rule of law, but not the elementary rights of the person may pursue harsh and unfair policies that harm their citizens.

This point also applies at the international level, since, as the German Constitutional Court memorably put it:⁸⁵

The constitutional state commits itself to other states with the same foundation of values of freedom and equal rights and which, like itself, make human dignity and the principles of equal entitlement to personal freedom the focal point of their legal order. Democratic constitutional states can only gain a formative influence on an increasingly mobile society, which is increasingly linked across borders, through sensible cooperation which takes

⁸⁰ Armin von Bogdandy and Ingo Venzke, 'In whose name? An investigation of international courts' public authority and its democratic justification' (2012) 23 EJIL 7.

⁸¹ Richard Bellamy, 'The democratic legitimacy of international human rights conventions: political constitutionalism and the European Convention on Human Rights' (2014) 25 EJIL 1019.

⁸² Jan-Werner Müller, *What is populism?* (Penguin 2017), 95-6.

⁸³ Section V 1 below.

⁸⁴ Baroness O'Neill, 'The importance of justifying rights' (6 March 2018)

<<https://judicialpowerproject.org.uk/baroness-oneill-the-importance-of-justifying-rights/>> accessed 16 January 2019.

⁸⁵ BVerfG 2 BvE 2/08 (30 June 2009) para. 221.

account of their own interest as well as of their common interest. Only those who commit themselves because they realise the need for a peaceful balancing of interests and the possibilities provided by joint concepts gain the measure of possibilities of action required for any future ability to responsibly shape the conditions for a free society.

c) State sovereignty and *raison d'état*

Another objection that is taken to international adjudication is simply that it cannot apply when it trenches upon the vital interests of the State in the maintenance of its sovereignty. There has been an element of this in British objections to the decisions of the ECtHR; in the reactions of China to the jurisdiction of the UNCLOS tribunal in relation to the South China Sea dispute;⁸⁶ and in the statement of African States that collective withdrawal from the ICC is needed to '[p]reserve the dignity, sovereignty and integrity of Member States.'⁸⁷

A more specific aspect of this argument is the intrusion into States' discretion in the field of foreign affairs. This has been a specific feature of the African Union debate. A focus of much of the recent dissent amongst African States has been the attempts of the ICC to achieve the surrender of President Al-Bashir of Sudan in the course of his diplomatic visits to other African States, a matter currently under consideration by the Appeals Chamber on the application of Jordan.⁸⁸

This more general appeal to the siren call of sovereignty seems sometimes to be treated as if it were a self-explanatory and complete answer to submission to international adjudication. But at least when expressed in absolute terms, this is a misconception. States are sovereign and independent of each other, but they do not exist in splendid isolation. Sovereignty has both an internal aspect in the governance of the State and its people, and an external aspect in the State's relations with others. In the case of international adjudication, this means that the decision of a State to submit to international adjudication is an expression of its sovereignty on the international plane and is not in derogation from it.⁸⁹ It is not, a 'submission to alien powers. Instead, it is a voluntary, mutual *pari passu* commitment.'⁹⁰ Since '[t]he empowerment to exercise supranational powers...comes from the Member States...[t]hey therefore remain the masters of the Treaties....'⁹¹

States have important choices to make about when they consent to the jurisdiction of international tribunals. But these choices require a balancing of internal domestic interests with the interests that States share with other States in the maintenance of an international order bounded by law.

⁸⁶ China, 'Position paper of the People's Republic of China on the Matter of Jurisdiction in the South China Sea arbitration initiated by the Republic of the Philippines' (7 December 2014) (2018) 17 Chinese JIL 207, 655.

⁸⁷ African Union, 'Withdrawal strategy document' (Draft 2, 12 January 2017), [8](e), <https://www.hrw.org/sites/default/files/supporting_resources/icc_withdrawal_strategy_jan._2017.pdf> accessed 14 January 2019.

⁸⁸ *Prosecutor v Al-Bashir* ICC Case No ICC-02/05-01/09 (Jordan, Notice of Appeal, 18 December 2017) <<https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-02/05-01/09-312>> accessed 15 January 2019.

⁸⁹ *The SS Wimbledon* (1923) PCIJ Series A No 1, 25

⁹⁰ BVerfG 2 BvE 2/08 (30 June 2009) para. 220.

⁹¹ *Ibid*,

d) Excess of judicial power

Finally, international courts and tribunals face the criticism that they are insufficiently judicial, lacking the indicia of due process that a national judicial system can achieve, and insufficiently constrained by the limitations and corrections that such a system can impose.

Investment arbitration has come under particular criticism on this ground. It is claimed that: arbitrator selection by the parties institutionalises the biases of particular arbitrators towards those who appoint them; the process is insufficiently transparent, given the public interests engaged by such cases; arbitrators are insufficiently independent since they are influenced by their concern about re-appointment and, not being full time may have other roles that give rise to conflicts of interest; and the system as a whole is prone to decisional incoherence, in view of the lack of a doctrine of precedent and of a right of appeal.⁹² Judicial activism and excess of mandate is also a charge levelled at human rights courts both in Europe⁹³ and in the Americas.⁹⁴

These criticisms have to be taken seriously. But their validity cannot be determined on the basis of individual cases. Judges and arbitrators cannot expect to find their decisions universally endorsed—especially not by the unsuccessful party. They must work within a system that States, not judges, created. It follows that it is States that can reform the system, should they wish to do so. But, in the present author's experience, international judges and arbitrators are very much concerned to work within the limits of the power conferred upon them; to decide according to the applicable law; and according to a demonstrably fair process. Those are the very qualities that lend legitimacy to the decision of States to refer their dispute to third party adjudication and the matters on which their decisions are otherwise vulnerable to attack.

Where an international arbitral tribunal exceeds the scope of the jurisdiction granted to it by the Parties, its award is liable to be avoided for excess of power.⁹⁵ At the same time a tribunal's *failure* to exercise a jurisdiction that the parties have conferred upon it may be just as much open to criticism as an excess of power as a decision that goes beyond the scope of consent.⁹⁶ Commissioner Gore observed as long ago as the decision in *The Betsey* in 1794 that:⁹⁷

To refrain from acting, when our duty calls us to act, is as wrong as to act where we have no authority. We owe it to the respective governments to refuse a decision in cases not submitted to us—we are under equal obligation to decide on those cases that are within the submission.

⁹² UNCITRAL, 'Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-fifth session (New York, 23-27 April 2018)' UN Doc A/CN.9/935.

⁹³ Noel Malcolm, *Human Rights and Political Wrongs: A New Approach to Human Rights Law* (Policy Exchange 2017).

⁹⁴ For a general discussion of these challenges see Georg Nolte, 'Treaties and their practice—symptoms of their rise or decline' (2018) 392 *Recueil des Cours* 205, 284-7.

⁹⁵ International Law Commission, Model Rules on Arbitral Procedure art 35(a) [1958] II YBILC 83, 86; ICSID Convention art 52(1)(b); Bin Cheng, *General Principles of Law as applied by International Courts and Tribunals* (Cambridge UP, 1953, repr 2006) 261.

⁹⁶ See, in the case of the ICSID Convention: *Compañía de Aguas del Aconquija SA v Vivendi Universal v Argentina* (Decision on Annulment) ICSID Case No ARB/97/3 (2002) 6 ICSID Rep 340, [86]; *Soufraki v United Arab Emirates* (Decision on Annulment) ICSID Case No ARB/02/7 (2007); Christoph Schreuer et al, *The ICSID Convention: a Commentary* (2nd edn, Cambridge UP, 2009), 947.

⁹⁷ *The Betsey* (1794) 4 Int Adj MS 179, 193.

The International Court of Justice has also observed that: ‘The Court must not exceed the jurisdiction conferred upon it by the Parties, but it must also exercise that jurisdiction to its full extent.’⁹⁸

The duty of an international court or tribunal in jurisdictional matters is simply to determine, as a matter of law, the scope of its jurisdiction as conferred upon it by the parties. Its decision would be as much open to criticism for an under exercise of jurisdiction as for an excess of jurisdiction, since its decision always affects the rights of both parties to the dispute. Adjudication, at national as well as international levels, especially where it concerns constraints on the exercise of State power, is inevitably driven by the facts as presented in the evidence before the tribunal. Courts have to decide the cases presented to them in light of that evidence. They cannot avoid that responsibility because it might be politically inconvenient.

These four critiques taken together suggest that the objections to international adjudication are not specific to the work of particular tribunals. Rather they go to the heart of the exercise of the adjudicatory function at the international level. The assault on international adjudication also exposes the fragility of the system of international courts and tribunals that States have created, a system created by a myriad of acts of consent by individual States. In these circumstances, it is of some importance to determine the limits that international law places on the withdrawal of such consent. It is to this issue that the paper now turns.

4. The approach of international law to withdrawal

What then are the implications for international law of this current phenomenon of withdrawal from international adjudication, and what is the law’s response? It is first necessary to consider the general rules of international law applicable to withdrawal from treaties, before examining the broader implication of the phenomenon of withdrawal.

a) Continuity v voluntarism in treaty relations

Modern international law has had an uneasy relationship with withdrawal from treaties, which engages a tension between, on the one hand, the maintenance of stability in treaty relations that underlies the general principle of *pacta sunt servanda*⁹⁹ and, on the other hand, the default rule enunciated in the *Lotus* that ‘[t]he rules of law binding upon States therefore emanate from their own free will..[such that] [r]estrictions upon the independence of States cannot therefore be presumed.’¹⁰⁰ The *Lotus* principle has a particular application in the case of international adjudication. States are not subject to compulsory international process, jurisdiction or settlement without their consent, given either generally or in the specific case.¹⁰¹

The general phenomenon of treaty withdrawal cannot be dismissed as a marginal practice. One study identified 1547 instances of State withdrawals from multilateral treaties registered with the United Nations from 1945 to 2004.¹⁰² In the majority of cases, treaties make express provision for withdrawal, but such provision is not universal.

⁹⁸ *Continental Shelf (Libya v Malta)* [1985] ICJ Rep 23, [19].

⁹⁹ Vienna Convention on the Law of Treaties (VCLT) (signed 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, art 26,.

¹⁰⁰ *The Lotus (France v Turkey)* [1927] PCIJ Ser A No 9, 18.

¹⁰¹ *Monetary Gold removed from Rome in 1943 (Italy v France)* [1954] ICJ Rep 19, 20.

¹⁰² Laurence R Helfer, ‘Exiting treaties’ (2005) 91 Virginia LR 1579.

The framers of the VCLT had well in mind the baleful experience of the Covenant of the League of Nations, from which 17 members withdrew in the 1930s under the express provisions of Article 1(3).¹⁰³ That experience no doubt explains the omission from the UN Charter of any provision for withdrawal.¹⁰⁴ At the same time, the voluntarist premise, which would imply a right of withdrawal from any treaty, irrespective of express provision, has not been entirely erased from the practice of States. In the result, the provisions of the VCLT on termination or withdrawal proved to be of pivotal importance to the adoption of the Convention as a whole.¹⁰⁵ These provisions, which are collected in Section 3 of Part IV of the Convention, deal both with the substantive circumstances in which a State may withdraw from a treaty and with the procedural safeguards applicable to the act of withdrawal.

b) Express provision

Articles 54 and 56 provide the substantive conditions for withdrawal. Article 54 deals with withdrawal by agreement:

The termination of a treaty or the withdrawal of a party may take place:

- (a) in conformity with the provisions of the treaty: or
- (b) at any time by consent of all the parties after consultation with the other contracting States.

The majority of treaties do in fact make express provision for withdrawal. But it is always a difficult diplomatic decision. Article 50 Treaty on the European Union (TEU) was included in Lisbon as it was felt better to clarify whether withdrawal from the EU was possible, and, if so, under what conditions. It is those conditions that have shaped the course of the Brexit negotiations, in particular by setting a deadline of two years from notification of an intention to withdraw for the EU Treaties to cease to apply to that State unless either a withdrawal agreement has been concluded or the European Council, in agreement with the Member State concerned, unanimously agrees to extend the date.¹⁰⁶

A notification of withdrawal may be revoked ‘at any time before it takes effect.’¹⁰⁷ In *Wightman*, the ECJ confirmed that such a unilateral right of revocation also applies within the context of Article 50 TEU.¹⁰⁸ Highlighting ‘the considerable impact on the rights of all Union citizens,’¹⁰⁹ the Court held the right to revoke a decision to withdraw had to be one for the Member State concerned, since otherwise ‘it could be forced to leave the European Union despite its wish—

¹⁰³ art 1(3) Covenant of the League of Nations (signed 28 June 1919, entered into force 10 January 1920) 225 Con TS 195, art 1(3).

¹⁰⁴ But see the Interpretative Declaration adopted at the UN founding conference concerning the right of withdrawal in the context of amendments to the Charter: United Nations Conference on International Organization I, 616, 631.

¹⁰⁵ Theodore Christakis ‘Article 56’ and Mario Prost ‘Article 65’ in Olivier Corten and Pierre Klein (eds), *The Vienna Convention on the Law of Treaties: A Commentary* (OUP 2011), 1251, 1483.

¹⁰⁶ Art 50(3) TEU.

¹⁰⁷ Art 68 VCLT.

¹⁰⁸ Case 621/18 *Wightman v Secretary of State for Exiting the European Union* Case [2018] ECLI:EU:C:2018:999; Opinion of AG-Campos Sánchez-Bordona.

¹⁰⁹ *Ibid*, para 64.

as expressed through its democratic process in accordance with its constitutional requirements—to reverse its decision to withdraw.’¹¹⁰ This, thought the Court, would be inconsistent with the objective of the EU to promote an ever-closer Union.¹¹¹ As a result, a Member State is free at any time to revoke its decision to withdraw until the period specified in Article 50 has expired, provided that such revocation is:¹¹²

... unequivocal and unconditional, that is to say that the purpose of that revocation is to confirm the EU membership of the Member State concerned under the terms that are unchanged as regards its status as a Member State, and that revocation brings the withdrawal procedure to an end.

A consequence of the inclusion of such an express provision for withdrawal is that, precisely because it brings the option of withdrawal out into the open, it presents itself as an option that States may take in compliance with international law, rather than placing the State in a position where it might be said to be in breach. Yet an express provision for withdrawal from a treaty providing for third party dispute resolution may also have the valuable effect of limiting the impact of precipitate acts of withdrawal by imposing a time period before withdrawal takes effect.¹¹³

c) An implied right of withdrawal?

Article 56 deals with the more difficult case of a right of unilateral withdrawal on the basis of the parties’ intention or by implication. It contains both a substantive and a procedural condition. Article 56(1) requires substantively that:

A treaty which contains no provision regarding its termination and which does not provide for denunciation or withdrawal is not subject to denunciation or withdrawal unless:

- (a) it is established that the parties intended to admit the possibility of denunciation or withdrawal; or
- (b) a right of denunciation or withdrawal may be implied by the nature of the treaty.

This provision recognises a presumption *against* a right of withdrawal in cases of treaties with no express provision. It then adds two possible exceptions: a subjective exception where the parties’ common intention was to permit withdrawal and an objective exception where such a right may be implied from the nature of the treaty.

Article 56(2) adds a procedural condition in its requirement that:

A party shall give not less than twelve months’ notice of its intention to denounce or withdraw from a treaty under paragraph 1.

¹¹⁰ Ibid, para 66.

¹¹¹ Ibid, para 67.

¹¹² Ibid, para 74.

¹¹³ See *e.g.* Art LVI Pact of Bogota (signed 30 April 1948, entered into force 6 May 1949) 30 UNTS 55, considered in *Delimitation of the Continental Shelf (Nicaragua v Colombia)* (Preliminary Objections) [2006] ICJ Rep 100, 115, [31]; Art 127 Rome Statute, considered in *Burundi* (Decision on Authorization of an Investigation) ICC-01/17-X (Pre-Trial Chamber, 25 October 2017) [24]-[26].

In addition to this specific notice rule, the general provisions of Article 65 also apply to the '[p]rocedure to be followed with respect to...withdrawal from...a treaty.' Article 65 mandates a staged procedure that provides for:

A party proposing to withdraw to notify the other parties of its claim 'and the reasons therefor' (para.1);

A moratorium, which 'except in cases of special urgency' shall not be less than three months within which any other party may raise an objection before any proposed withdrawal may take place (para.2);

A requirement to seek a peaceful solution to a disputed withdrawal 'through the means indicated in Article 33 of the UN Charter (para.3).

Article 66 adds a specific dispute resolution procedure (provided under the Annex to the Convention) applicable to disputes under art 65(3) that are still unresolved after twelve months enabling reference to conciliation.¹¹⁴

For present purposes, three points need to be made about the application of these provisions to withdrawal from third party dispute settlement: (a) the essential link between the substantive and the procedural requirements for withdrawal; (b) the customary status of the VCLT's requirements; and (c) their application to the specific case of treaty provisions for dispute settlement.

In stressing the indivisible link between substance and procedure, both the International Law Commission and States were:

'at one in endorsing the general object of the article [65], namely the surrounding of the various grounds of invalidity, termination and suspension with procedural safeguards against their arbitrary application for the purpose of getting rid of inconvenient treaty obligations.'¹¹⁵

The Commission pointed out that only the provision of a procedure for notification and dispute resolution would ensure that neither the claimant nor the objecting State could be subordinated to the will of the other in circumstances in which 'the parties by negotiating and concluding the treaty have brought themselves into a relationship in which there are particular obligations of good faith.'¹¹⁶ Withdrawal is not merely a unilateral act. It produces consequences for other States parties to the treaty, who must in good faith be given an opportunity to engage with the State proposing withdrawal.

What is the status of these provisions as a matter of customary international law? Here a distinction needs to be drawn between the general principles underlying Articles 56 and 65 and the more particular elements of the procedure there specified.

The existence of a general presumption in customary international law *against* the existence of an implied right of withdrawal was well established before VCLT.¹¹⁷ The ICJ has on more than one occasion emphasised the general obligation of good faith that attends withdrawal from

¹¹⁴ Where the dispute is in relation to the termination of a treaty for conflict with a peremptory norm under Arts 53 or 64 VCLT, a party submit the dispute to the ICJ for decision unless the parties by common consent submit the dispute to arbitration: Art 66(a).

¹¹⁵ International Law Commission, 'Draft Articles on the Law of Treaties with commentaries' [1966] II YBILC 262.

¹¹⁶ *Ibid.*

¹¹⁷ A McNair, *The Law of Treaties* (Clarendon Press, Oxford, 1961) 493-4.

treaties. In its Advisory Opinion on Egypt's membership of the WHO, the Court elaborated on the content of this obligation in the following way:¹¹⁸

A further general indication as to what those obligations may entail is to be found in the second paragraph of Article 56 of the Vienna Convention on the Law of Treaties and the corresponding provision in the International Law Commission's draft articles on treaties between States and international organizations or between international organizations. Those provisions, as has been mentioned earlier, specifically provide that, when a right of denunciation is implied in a treaty by reason of its nature, the exercise of that right is conditional upon notice, and that of not less than twelve months. Clearly, these provisions also are based on an obligation to act in good faith and have reasonable regard to the interests of the other party to the treaty.

It added, so far as concerns the length of the notice periods, that 'what is reasonable and equitable in any given case must depend on its particular circumstances.'¹¹⁹

In *Military and Paramilitary Activities in Nicaragua*,¹²⁰ the Court, dealing with the United States' withdrawal of its declaration under the Optional Clause, drew 'from the requirements of good faith' an analogy with the law of treaties, which 'requires a reasonable time for withdrawal from or termination of treaties that contain no provision regarding the duration of their validity.'¹²¹

The Court turned to the customary status of Article 65 in *Gabčíkovo-Nagymaros*.¹²² It rejected Hungary's claim that it was entitled to terminate the treaty on six days' notice and prior to suffering any injury. Citing in this context its earlier holding in the *WHO Egypt Opinion*, it emphasised the obligation on parties to consult and negotiate in good faith, noting that:¹²³

Both Parties agreed that Article 65 to 67 of the [VCLT], if not codifying international law, at least generally reflect customary international law and contain certain procedural principles which are based on an obligation to act in good faith.

The United States, though not a party to the VCLT, has stated that it regards its provisions on withdrawal as generally consistent with accepted principles of international law.¹²⁴

The conclusion to be drawn is that the requirement upon a party that wishes to withdraw from a treaty containing no express provision for withdrawal to notify and consult the other parties to the treaty, which arises from the general duty of good faith, is a rule of customary international

¹¹⁸ *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt* (Advisory Opinion) [1980] ICJ Rep 73, 94, [46].

¹¹⁹ *Ibid* 96, [49].

¹²⁰ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Jurisdiction and Admissibility) [1984] ICJ Rep 392.

¹²¹ *Ibid*, 420, [63].

¹²² *Gabčíkovo-Nagymaros Project (Hungary v Slovakia)* [1997] ICJ Rep 7.

¹²³ *Ibid*, 66, [109].

¹²⁴ Letter of Submittal from Rogers, US Sect'y of State to President Nixon (19 October 1971) 65 Dep't State Bull 684, 687-8; US Senate Committee on Foreign Relations, Hearings on Treaty Termination, 96th Congress [1979] *Digest of United States Practice in International Law* 769; American Law Institute, *Restatement 4th Foreign Relations Law* (Tentative Draft No 2, 20 March 2017) Part III 'Status of Treaties in US Law,' 129, s 313 Reporters' Note 1.

law, though the precise period of notice and other procedures to be adopted must, in cases where the VCLT is not applicable between the parties, be determined in light of the particular context.¹²⁵

d) Treaties providing for judicial settlement

Does the VCLT's presumption of continuity apply to agreements to submit to international adjudication where no express provision for withdrawal is made? Put another way, is a treaty providing for binding judicial settlement one in respect of which 'a right of denunciation or withdrawal may be implied by the nature of the treaty.'¹²⁶ Waldock proposed that treaties for arbitration and judicial settlement were by their nature subject to an implied right of withdrawal.¹²⁷ But this was not accepted in the deliberations in the Commission, which feared that a unilateral right of withdrawal from international adjudication could be subject to abuse.¹²⁸ The Commission rejected any express enumeration of the categories of treaties that might of their nature imply a right of withdrawal.

Nevertheless, the view that treaties providing for binding judicial settlement are of their nature always capable of an implied right of withdrawal has persisted in the views of some publicists.¹²⁹ This proposition is not borne out by the State practice that is cited in its support. Nor are the arguments advanced in its favour compelling.

The State practice that is generally invoked in support of an implied right of unilateral withdrawal from dispute settlement treaties is the United States' withdrawal from the Optional Protocols to the Vienna Conventions on Diplomatic and Consular Relations.¹³⁰ Both Protocols provide for the submission of disputes to the ICJ (or, by agreement, to arbitration).¹³¹ Neither of the Protocols (nor the Conventions to which they relate) contains a withdrawal clause. Yet, on 7 March 2005, the United States purported to notify the UN Secretary-General that it 'hereby withdraws' from the Consular Relations Protocol.¹³² On 12 October 2018, the United States gave the same notification in respect of the Diplomatic Relations Protocol.¹³³ In neither case is there a record of objections by other States parties.

¹²⁵ The doubts expressed by the ECJ as to the customary status of art 65 relate to the specific notice periods there specified, not the principle of notice (which was given in that case): Case C-162/96 *A Racke & Co v Hauptzollamt Mainz* Case C-162/96 [1998] ECR I-3688, paras 58-59; [1998] ECR I-3659 Opinion of AG Jacobs, para 96.

¹²⁶ Art 56(1)(b) VCLT.

¹²⁷ International Law Commission, Second Report on the Law of Treaties (Waldock, Rapporteur) [1963] II YBILC 64, 67, 71.

¹²⁸ International Law Commission, 'Summary Records of the fifteenth session, 6 May–12 July 1963' [1963] I YBILC 99, 100 (Castrén), 101 (Amado), 101-2 (Verdross), 102 (Bartoš), 106 (Jiménez de Aréchaga).

¹²⁹ Anthony Aust, *Modern Treaty Law and Practice* (3rd edn, CUP 2013), 257; Giegerich 'Article 56' in Oliver Dörr and Kirsten Schmalenbach (eds), *Vienna Convention on the Law of Treaties* (2nd edn, Springer 2018), 1055, [45].

¹³⁰ Optional Protocol to the Vienna Convention on Diplomatic Relations concerning the Compulsory Settlement of Disputes (signed 18 April 1961, entered into force 24 April 1964) 500 UNTS 241; Optional Protocol to the Vienna Convention on Consular Relations concerning the Compulsory Settlement of Disputes (signed 24 April 1963, entered into force 19 March 1967) 596 UNTS 487. This practice is cited by Aust, *ibid*, n 54 and by Dörr and Schmalenbach, *ibid*, 1054-1055.

¹³¹ Arts I & II.

¹³² See United Nations Treaty Collection, Multilateral Treaties deposited with the Secretary General, Status of Treaties, Ch.III.8, note 1 <<https://treaties.un.org>> accessed 14 January 2019.

¹³³ See United Nations Treaty Collection, Multilateral Treaties deposited with the Secretary General, Status of Treaties, Ch III.5, note 10 <<https://treaties.un.org>> last accessed 14 January 2019.

These assertions of a right of unilateral withdrawal cannot on their own carry much weight. In both cases, the notifications were given in the context of pending cases against the United States before the ICJ.¹³⁴ Such a notification can have no effect on the instant proceeding as the Court's jurisdiction is determined on the basis of the parties' consent at the time of the application instituting the proceeding.¹³⁵ This is the application to judicial settlement of the more general rule of treaty law that an act of withdrawal 'does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to [withdrawal].'¹³⁶ At the same time, other States parties to the Protocol might understandably have been hesitant to register their objection, lest it be seen as an intervention in the course of a contentious dispute before the Court.

The arguments advanced in favour of an implied right of withdrawal from such a treaty are not convincing. The Consular and Diplomatic Protocols are not integral to the Conventions, though they are designed to resolve disputes arising under them. On the contrary, States have a choice as to whether to accede to Protocol or to become party to the Convention alone. The plain text of both omits any reference to withdrawal, so the nature of the commitment that a State makes when it enters into the Protocol is clear. This is not surprising in view of the subject matter of the underlying Conventions. They deal with some of the most basic rules of intercourse between States. Such rules do not have a merely unilateral effect. They create a network of mutual rights and obligations between States parties that must endure over time.

The jurisdiction of international courts and tribunals is, to be sure, always founded upon the consent of States. But consent may be given on a standing basis by treaty.¹³⁷ Such consent is of a different character to that given by way of a declaration under Article 36(2) of the Statute of the ICJ, which, though made within the framework of a treaty, is nevertheless the unilateral act of a State. Nor can such consent, when given by treaty, be reduced to the equivalent of a submission by *ad hoc* agreement, taken only in the light of the particular dispute, which consent might be given or withheld at the election of either State.

These considerations all suggest that an *implied* unilateral right of withdrawal from a dispute resolution convention cannot be presumed. Nor is it in the interest of States generally that it should be. In any event, all implied withdrawals require notice and the opportunity for other States to dispute the proposed action.

Laurence Helfer argues that, when viewed in a wider perspective, not all instances of withdrawal have produced irrevocable or negative effects on the stability of international

¹³⁴ Consular Relations Protocol: *LaGrand (Germany v United States of America)* [2001] ICJ Rep 466; *Avena (Mexico v United States of America)* [2004] ICJ Rep 12; Diplomatic Relations Protocol: *Relocation of the United States Embassy to Jerusalem (Palestine v United States of America)* (Application instituting proceedings, 28 September 2018) <<https://www.icj-cij.org/files/case-related/176/176-20180928-APP-01-00-EN.pdf>> accessed 14 January 2019.

¹³⁵ *Nottebohm (Liechtenstein v. Guatemala)* (Preliminary Objections) [1953] ICJ Rep 123; *Right of Passage over Indian Territory (Portugal v. India)* (Preliminary Objections) [1957] ICJ Rep 125; *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, [2002] ICJ Rep 12-13; *Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom)*, (Preliminary Objections) [1998] ICJ Rep 9, [38]; *Delimitation of the Continental Shelf (Nicaragua v Colombia)* (Preliminary Objections) [2006] ICJ Rep 100, 115, [31].

¹³⁶ Art 70(1)(b) VCLT.

¹³⁷ Art 36(1) Statute of the International Court of Justice (signed 26 June 1945, entered into force 24 October 1945) 59 Stat 1055, UKTS 67 (1946).

relations.¹³⁸ He submits that exit may sometimes enhance international cooperation by promoting newer and deeper forms of treaty engagement; that the inclusion of an express provision for withdrawal may actually encourage States to ratify multilateral treaty engagements in the first place;¹³⁹ and that negotiators should tailor exit clauses to seek to condition the behaviour of States in entering such engagements.¹⁴⁰

These propositions are of doubtful validity. There is no evidence that States' positive decisions to bind themselves to multilateral treaty obligations are motivated by the opportunity to avoid such obligations by unilateral decision in the future. The multilateral context is quite different from that of a bilateral trade or investment treaty, where both contracting States might well provide for a time-limited duration with a right of withdrawal thereafter. In any event, the VCLT itself contains, as has been seen, a rather detailed set of procedures of general application that are designed to constrain the impetuous unilateral behaviour of States by requiring notice and consultation with other affected States. There are dangers in an approach that takes game theory as if it were applicable to a legal rule. Helfer's concept of 'group exit' as a 'coordination game'¹⁴¹—never a term of art in international law—has been invoked in the African Union position paper vis-à-vis the strategy for withdrawal from the Rome Statute.¹⁴²

Pausing at this point, the above analysis demonstrates that unilateral withdrawal from treaty engagements to submit disputes to international adjudication cannot be presumed to be an inalienable and automatic right of States. The presumption is to the contrary: that a binding treaty obligation to settle subsequent disputes by third party adjudication cannot, once assumed, be rescinded unilaterally and without the consent of other States Parties, unless the treaty so provides, and then only in accordance with its terms. In any event, withdrawal requires reasonable notice to the other States parties so as to provide them with the opportunity to negotiate. This rule is not only in accordance with the VCLT, but also finds a more general basis in customary international law, in light of the general obligations of *pacta sunt servanda* and good faith. Beyond the formal constraints that international law places upon withdrawal from international adjudication, lies a wider question about the systemic implications of withdrawal and the response of the law. It is to this question that Part V now turns.

5. Systematic Implications

The argument that has been addressed in this article is that international courts and tribunals are subject to a much more generalised assault on the very notion of that the conduct of states and state officials might be subject to international adjudication.¹⁴³ This requires a response in principle. This Part advances four propositions: one about the implications of the motivation for

¹³⁸ Laurence R Helfer, 'Exiting Treaties' (2005) 91 Virginia LR 1579, 1595, citing *e.g.* instances of withdrawal and reaccession to membership of international organisations designed in part to prompt their reform and accountability.

¹³⁹ *Ibid* 1640-2.

¹⁴⁰ *Ibid* 1633-9.

¹⁴¹ *Ibid* 1633-6, 1645-7.

¹⁴² African Union, 'Withdrawal strategy document' (Draft 2, 12 January 2017), [19] <https://www.hrw.org/sites/default/files/supporting_resources/icc_withdrawal_strategy_jan._2017.pdf> accessed 14 January 2019.

¹⁴³ See. *e.g.*, Remarks by President Trump to the 73rd Session of the United Nations General Assembly, New York, 25 September 2018: 'We will never surrender America's sovereignty to an unelected, unaccountable, global bureaucracy' UN Doc A/73/PV.6, 17.

the assault for the response; two points concerning the key actors in any response, the Contracting States and national courts; and one about the distinction between function and form.

Section 1 argues that it is necessary to take care to ensure that arguments advanced by States against international adjudication, though couched in populist terms, are not in fact a cloak for the exercise of executive power unrestrained by law. A key function of the rule of law, at the international as well as the national level, is to constrain unfettered executive power.¹⁴⁴

Section 2 submits that, as a strategic matter, international judicial institutions may fare better when supported by the *collective* interest of the Contracting States as mandate providers, particularly where the constituent instrument for the court or tribunal provides a forum through which that collective interest may be expressed. At the same time, section 3 develops the proposition that national courts have an important function in supporting international courts, which stems from their common mandate to uphold the rule of law. This function takes on a particular significance in the constraint of the executive in the context of withdrawal from international adjudication.

Section 4 argues that international judicial institutions have an enduring role that is complementary to, and cannot be substituted by, national courts acting alone. The purpose here is not to defend any particular court or tribunal, still less specific decisions. An international tribunal is a human institution, and, like any human institution, is fallible. There is no special sacrosanctity in the structure or procedures of an *international* court or tribunal that immunises it from criticism or from reform. The question is always what type of international court or tribunal is best adapted to supply the adjudicatory function needed for the type of dispute.

a) The legal limits of the exercise of State power

The first point is that we should not take at face value the arguments raised by some governments for restricting the jurisdiction of international courts and tribunals. The control of the exercise of executive power in order to ensure its compliance with the norms of international law is a primary function of international adjudication. It is a function that is unlikely always to garner popularity with the officials whose conduct is under review.

The point is well illustrated by the recent study of Karen Alter and others into the backlash against international courts in Africa.¹⁴⁵ The authors cite three cogent examples: The Gambia's opposition to the human rights jurisdiction of the Court of the Economic Community of West African States when it upheld allegations of torture of journalists;¹⁴⁶ Kenya's opposition to the jurisdiction of the East African Court of Justice following its ruling on the constitutional procedures for election to the East African Legislative Assembly;¹⁴⁷ and Zimbabwe's opposition to the Southern

¹⁴⁴ UN Secretary-General, 'Delivering justice: programme of action to strengthen the rule of law at the national and international levels' UN Doc A/66/749 (16 March 2012), [2]: 'The United Nations defines the rule of law as a principle of governance in which all persons, institutions and entities, public and private, *including the State itself*, are accountable to laws that are publicly promulgated, equally enforced *and independently adjudicated*, and which are consistent with international human rights norms and standards.' [emphasis added and internal references omitted].

¹⁴⁵ Karen J Alter, James T Gathii and Laurence R Helfer, 'Backlash against international courts in West, East and Southern Africa: causes and consequences' (2016) 27 EJIL 293.

¹⁴⁶ *Manneh v The Gambia* ECW/CCJ/JUD/03/08, 5 June 2008.

¹⁴⁷ *Nyong'o v A G Kenya* Ref No 1 of 2006, 27 November 2006.

African Development Community Tribunal following its decision on Zimbabwe's land confiscation and redistribution programme.¹⁴⁸

The same point may be made about the jurisdiction of the ICC, particularly vis-à-vis currently serving high officers of State. It is more generally true for the human rights courts and tribunals. Relatively few human rights cases concern exercises of legislative competence. The primary purpose of human rights is to protect the individual against the abuse of state power.

Finally, though this has been much obscured by the tenor of recent debates, this is the primary function of investment treaties. There are cases in which the treaty protections have been held engaged vis-à-vis the legislative and branch of a State, though the situations in which this will be found are always exceptional. The great majority of cases concern abuses of executive power that result in unfair and inequitable treatment or the expropriation of property.¹⁴⁹

In democratic States, the function of human rights is to act as a counter-majoritarian set of principles for the protection of the individual and of minorities, such that invoking the democratic principle cannot always supply the trump card. It is no accident that some of the decisions of the ECtHR that have provoked the most controversy in Member States concern the right of marginalised groups in society to participate in the democratic process.¹⁵⁰

b) The collective interest of the mandate providers

The second proposition is that the primary defenders of international courts and tribunals are the States that endowed the Court or tribunal with its mandate acting as a collectivity.

Yuval Shany in his recent study identifies the States and international organisations that are the mandate providers for the Court as its key constituency.¹⁵¹ It is those States and organisations acting together that endow the Court with its mandate or goals and which supervise its operation. At the same time, the participation of the Contracting States in the governance of a Court or Tribunal maintains their stake in the operation and in the success of the judicial institution itself. This collective stake, if sufficiently strongly maintained, can withstand opportunistic criticism from individual States and constrain withdrawal. The experience of the African regional courts bears this out. In both West and East Africa, the supervising institution and the other member States, acting together, forestalled attempts at the subversion of the Court by an individual State. Only in Southern Africa was this collective action unavailing after determined political pressure.¹⁵²

This leads to a further observation. Courts and tribunals that have a strong institutional structure around them, that maintains the support of its member States, generally fare better in withstanding the efforts of individual States at denunciation. The costs of withdrawal are higher if the State must engage directly with other member States that remain committed to the objectives of the court. So, the ECtHR is supported by the deep institutional structure of the Council of

¹⁴⁸ *Campbell v Zimbabwe* Case No SADC (T) 2/2007, 28 November 2008.

¹⁴⁹ Campbell McLachlan, Laurence Shore and Matthew Weiniger, *International Investment Arbitration; Substantive Principles* (2nd edn, OUP 2017), [7.153]-[7.226].

¹⁵⁰ *Hirst v United Kingdom (No 2)* (App no 74025/01, 6 October 2005) 16 BHRC 409; *Sejdić v Bosnia and Herzegovina* (App nos 27996/06 & 34836/06, 22 December 2009, GC).

¹⁵¹ Yuval Shany, *Assessing the Effectiveness of International Courts* (OUP 2014).

¹⁵² *Alter op cit.*

Europe, which consists of both the Committee of Ministers and the Parliamentary Assembly.¹⁵³ The ECJ is supported by the equally deep institutional structure of the EU. The Panels and Appellate Body of the WTO DSU are closely tied to the Dispute Settlement Body, composed of member States, which considers and adopts panel reports and Appellate Body decisions.¹⁵⁴ The Rome Statute created an Assembly of States Parties to provide management oversight of the Court and also to adopt legislative texts.¹⁵⁵

By contrast, no international organisation of general competence supervises the operation of dispute resolution under the Law of the Sea Convention. ITLOS and *a fortiori* Annex VII arbitral tribunals must fend for themselves. They each have the benefit of administrative support: from the Registry and the Bureau of the PCA respectively. The PCA is itself supervised by an Administrative Council of Member States. But this is not the equivalent of general support for the work of a court or standing tribunal.

So too investment arbitration, by its decentralised design, lacks a close relationship with its mandate providers collectively. The closest analogue is the Administrative Council of ICSID. This has provided a suitable forum for the initiation of procedural reviews.¹⁵⁶ But ICSID has no monopoly on investment arbitration. The PCA and other arbitral institutions are also active in the promotion of arbitration for the settlement of disputes. UNCITRAL (rather than UNCTAD) has also provided a forum for procedural reform. In any event, none of the arbitral institutions has a mandate to tackle the substantive rules of international law found in investment treaties and applied by tribunals.

The collective support of the mandate providers is important to the survival of an international court or tribunal. It can ensure that the larger rule of law objectives that States collectively sought to enhance through the creation of the court cannot be subverted by the self-interest of any one particular State. At the same time, collective support invokes a political process. It requires the garnering of political support from a range of States, each with their own diverse interests. It also requires political resolve. These conditions may not always be present.¹⁵⁷ With these thoughts in mind, it is also valuable to consider the role that national courts can play in the support of international adjudication, especially in the constitutional restraint of withdrawal.

c) The role of national courts

The third systemic implication is that international adjudication depends for its successful operation on support by national courts that are themselves committed to upholding the

¹⁵³ See, e.g., the role of the Committee of Ministers in securing compliance with the ECtHR's judgment in *Mammadov v Azerbaijan* (App No 15172/13, 22 May 2014). Ilgar Mammadov was released on 13 August 2018 following the Committee's resolution (CM/ResDH(2017)429, 5 December 2017) to refer to the Court under art 46(4) ECHR the question whether Azerbaijan had failed to fulfil its obligation to comply with the judgment.

¹⁵⁴ The DSB operates by way of consensus. This has made its ability to appoint new members to the AB, and thus the survival of the AB and the system of dispute settlement that it supports, vulnerable to the blocking of appointments by the United States: Dispute Settlement Body, Summary of Meeting, 22 June 2018 <https://www.wto.org/english/news_e/news18_e/dsb_22jun18_e.htm> accessed 15 January 2019; Alan Wolff, 'The rule of law in an age of conflict' (29 June 2018), 9-111, <https://www.wti.org/media/filer_public/fd/08/fd087b42-ac5b-4df8-9e91-b76220c72953/bern_june_29_2018_final_july_1_corrected.pdf> accessed 15 January 2019.

¹⁵⁵ Art 112 Rome Statute.

¹⁵⁶ ICSID, 'Proposals for Amendment of the ICSID Rules' (3 vols, 2 August 2018).

¹⁵⁷ On the impasse in appointments to the WTO Appellate Body see: Ernst-Ulrich Petersmann, 'WTO diplomats-stand up to US power politics' *Financial Times* (16 October 2018); Wolf op cit.

international rule of law as a constraint on the misuse of State power. More specifically recent practice demonstrates the valuable role that national courts may play in applying constitutional law to constrain precipitate executive acts of withdrawal.

aa) National courts and international adjudication

In many contexts the role of national courts is built into the structure of the systems of international adjudication. The major multilateral treaties in the field of human rights and international criminal law make resort to the international level necessary only where the national court is unable or unwilling to remedy the wrong and thus leave national courts as the primary focus for the maintenance of the principle of legality in international affairs.

The requirement for the exhaustion of local remedies is hardwired into the exercise of individual complaints to the ECtHR and other international human rights bodies.¹⁵⁸ This in turn requires national courts to act as faithful trustees of the rights vouchsafed in the international convention.¹⁵⁹ As Hersch Lauterpacht put it in 1949, this requirement that national courts act as faithful trustees 'is not a mere symbolic gesture. Even in democratic countries, situations may arise where the individual is in danger of being crushed under the impact of reason of State.'¹⁶⁰ At the same time, the principle of complementarity is designed to make the International Criminal Court a court of last resort in the enforcement of international criminal law.¹⁶¹

National courts may also play a more fundamental role in supporting the right of resort to international courts. This function has not gone uncontested at the national level.¹⁶² In an important but controversial set of judgments of the Privy Council on appeal from Caribbean countries, the Judicial Committee considered whether the right not to be deprived of life without due process of law required the executive to await the decision of the Inter-American Commission of Human Rights before executing prisoners on death row.¹⁶³ The right claimed was formulated as 'the general right accorded to all litigants not to have the outcome of any pending appellate or other legal process pre-empted by executive action.'¹⁶⁴ This was a right protected by the Constitution. In *Thomas v Baptiste*, the Privy Council held that, by ratifying the treaty, the Government had made that process 'for the time being part of the domestic criminal justice

¹⁵⁸ Art 35(1) ECHR; and see also Optional Protocol to the International Covenant on Civil and Political Rights (signed 16 December 1966, entered into force 23 March 1976) 999 UNTS 171, art 5(2)(b).

¹⁵⁹ Hersch Lauterpacht, 'The Proposed European Court of Human Rights' (1949) 35 Transactions of the Grotius Society 25, 33. The implications of this concept are explored in Eirik Bjorge, *Domestic Application of the ECHR: Courts as Faithful Trustees* (OUP 2015).

¹⁶⁰ Hersch Lauterpacht, *ibid*, 35.

¹⁶¹ Rome Statute of the International Criminal Court (signed 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90, art 17.

¹⁶² Cf. the decisions of the US Supreme Court on the rights of foreign nationals on Death Row to consular assistance in light of the judgments of the ICJ: *Breard v Greene* 523 US 371, 118 S Ct 1352 (1998); *Medellin v Dretke* 544 US 660 (2005); *Sanchez-Llamas v Oregon* 548 US 331, 126 S Ct 2669 (2006); *Medellin v Texas* 128 S Ct 1346 (2008), discussed Campbell McLachlan, 'Lis Pendens in International Litigation' (2008) 336 *Recueil des Cours* 199, 471-489.

¹⁶³ McLachlan *ibid*, 489-499.

¹⁶⁴ *Thomas v Baptiste* [2000] 2 AC 1, 23.

system¹⁶⁵ and thus extended the protection of the due process clause to it. Lord Millett put the general principle in this way:¹⁶⁶

[D]ue process of law is a compendious expression in which the word ‘law’ does not refer to any particular law and is not a synonym for common law or statute. Rather it invokes the concept of the rule of law itself and the universally accepted standards of justice observed by civilised nations.

bb) Constitutional limits on withdrawal

Beyond the fundamental role of national courts as the first resort in the protection of an individual’s rights, such courts may also play a significant role in the context of proposed acts of withdrawal. In such cases, the court may protect the balance of power within the constitution, ensuring a proper role for Parliament as a check upon the executive and in the process recognise the significance of the individual’s rights of recourse before the international court.

Consideration of the legality of withdrawal requires an examination of national as much as international law. The pressures to withdraw are more likely to be created or felt at the national level and the ability of a State to withdraw will be shaped by the national constitutional provisions for withdrawal.¹⁶⁷ Here comparative enquiry suggests that even those States whose constitutions mandate a role for Parliament in the ratification of treaties have often in practice left a wider margin for the Executive to withdraw from treaties without prior Parliamentary approval.¹⁶⁸ Yet there is also a discernible trend towards providing a greater express constitutional role for the legislative branch in treaty withdrawal.¹⁶⁹

In the majority of States, the role of the legislative and judicial branches in the control of unilateral executive acts of withdrawal is not the subject of express provision. Three recent cases,

¹⁶⁵ *Idem*.

¹⁶⁶ [2000] 2 AC 1, 20 (PC), but cf. Lord Goff and Lord Hobhouse dissenting, 31-33 and *Higgs v Minister of National Security* [2000] 2 AC 228 (PC, Bahamas, Hoffmann, Hobhouse and Henry; Steyn and Cooke dissenting).

¹⁶⁷ *Symposium on Treaty Exit at the Interface of Domestic and International Law* (2017) 111 AJIL Unbound 425-466; Pierre-Hughes Verdier and Mila Versteeg, ‘Separation of powers, treaty-making, and treaty withdrawal: a global survey’ in Curtis Bradley (ed), *Oxford Handbook of Comparative Foreign Relations Law* (Oxford UP, 2019, pub. forthcoming) Ch. 8; Laurence Helfer, ‘Treaty exit and intra-branch conflict at the interface of international and domestic law’ in Bradley Ch. 20.

¹⁶⁸ Under the US Constitution the established doctrine is that, despite the requirement of Senate advice and consent for the conclusion of treaties, withdrawal is the prerogative of the President acting unilaterally: American Law Institute, *Restatement 4th Foreign Relations Law* (Tentative Draft No 2, 20 March 2017) Part III ‘Status of Treaties in US Law,’ 129, s 313 Reporters’ Notes 2-3 for a full review of the historical practice. The Supreme Court has ruled the question of the extent of such a power vis-à-vis the legislative branch to be non-justiciable: *Goldwater v Carter* 444 US 996 (1979). In Germany, the established position is that withdrawal from treaties does not require the prior approval of the Bundestag: BVerfGE 68, 1 (85-86); BVerfGE 141, 1 (23, para. 55), but this is increasingly questioned in doctrine: Felix Lange, ‘Art. 59 Abs. 2 S. 1 GG im Lichte von Brexit und IStGH-Austritt: Zur Parlamentarisierung der Kündigung völkerrechtlicher Verträge’ (2017) 142 *Archiv des öffentlichen Rechts* 442; Juliane Hettche, *Die Beteiligung der Legislative bei Vorbehalten zu und Kündigung von völkerrechtlichen Verträgen* (Mohr Siebeck, 2018); Andreas Paulus and Jan-Henrik Hinselmann, ‘International integration and its counter-limits: a German constitutional perspective’ in Bradley *ibid*, Ch. 23.

¹⁶⁹ Verdier and Versteeg *op cit* present the results of a global survey of constitutions showing that the number of States in which the executive can withdraw unilaterally has declined since the 1970s from a high of 89% to the current level of 72%. They point out that in a number of other states, provision for Parliamentary approval for withdrawal is made by statute.

however, demonstrate the potential for national courts to play an important role in this regard: (a) Panama's proposed withdrawal from the Central American Parliamentary system; (b) the UK's proposed withdrawal from the treaties constituting the European Union; and (c) South Africa's proposed withdrawal from the Rome Statute; and In each case, the national court decision held that the Executive was not entitled unilaterally to withdraw from a treaty providing for international adjudication.

In 2012, following a resolution of the Central American Court of Justice,¹⁷⁰ the Supreme Court of Panama held that an attempt on the part of the Panamanian Government to withdraw from the Treaty creating the Central American Parliament was invalid.¹⁷¹ The Panamanian Constitution provides that the Republic of Panama complies with international law.¹⁷² The Treaty itself does not provide for withdrawal.¹⁷³ The Court held, applying Article 56 VCLT, that no such right could be implied or inferred. Following this decision, the Government revoked its decision to withdraw.

More recently, the UK Supreme Court in *Miller* considered the proposed withdrawal of the UK from the Treaty on the European Union.¹⁷⁴ Article 50 contains a *renvoi* to national law. It requires a decision to withdraw to be made by a member State 'in accordance with its own constitutional requirements.'¹⁷⁵ The UK Supreme Court decided that the British Constitution required that the executive could not take that decision without the authority of an act of Parliament. The effect of withdrawal would be to change the law of the land and remove individual rights that currently form part of British law by virtue of Parliament's incorporation of directly effective rights under EU law. Those rights include the right to seek a reference to the ECJ.¹⁷⁶ So the judgment of the Supreme Court supported the international court—at least to the extent of requiring Parliamentary approval by statute for any removal of the right of recourse to it. But the decision turned on the specific ground of that withdrawal would effect a change to rights enjoyed under domestic law, something that only Parliament is competent to do. It did not challenge the competence of the executive to withdraw from treaties on a more general basis.

The decision of the South African High Court in *Democratic Alliance* is of wider significance beyond its national context. The Court decided that the notice of withdrawal from the Rome Statute that had been signed by the Minister and sent to the ICC without prior Parliamentary approval was unconstitutional and invalid.¹⁷⁷ The Court held that:¹⁷⁸

¹⁷⁰ CACJ 105-02-26-03-2010.

¹⁷¹ Supreme Court of Justice (Full Chamber) 2 February 2012, available at: <https://vlex.com.pa/vid/accion-inconstitucionalidad-sala-pleno-375091942> (last accessed 20 January 2019).

¹⁷² Art 4 Constitution of Panama.

¹⁷³ Treaty on the Establishment of the Central American Parliament (signed 2 October 1987, entered into force 1 May 1990) 1777 UNTS 172. Article 30 provided for amendment of the Treaty, when unanimously adopted by the Member States. It excluded the possibility of reservations.

¹⁷⁴ *R (ex p Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, [2018] AC 61.

¹⁷⁵ Treaty on European Union (signed 7 February 1992, entered into force 1 November 1993) 1757 UNTS 3, [2010] OJ C 83/01, art 50(1).

¹⁷⁶ *Ibid*, [61].

¹⁷⁷ *Democratic Alliance v Minister of International Relations and Cooperation* [2017] 2 All SA 123 (22 February 2017).

¹⁷⁸ *Ibid*, [44].

While the notice of withdrawal was signed and delivered in the conduct of international relations and treaty-making as an executive act, it still remained an exercise in public power, which must comply with the principle of legality and is subject to constitutional control.

The Court reasoned that, as the Constitution had conferred on Parliament the power to approve an international agreement that necessarily confers the power to undo such an agreement as well.¹⁷⁹ The Court added:¹⁸⁰

It would have been unwise if the Constitution had given power to the executive to terminate international agreements, and thus terminate existing rights and obligations, without first obtaining the authority of parliament. That would have conferred legislative powers on the executive: a clear breach of the separation of powers and the rule of law.

As a result of this judgment, the South African Government gave notice to the United Nations on 7 March 2017 that, on the basis of the Court's judgment, it was revoking its instrument of withdrawal.

The judgment in *Democratic Alliance* has taken on a wider resonance beyond South Africa.¹⁸¹ It adopts *actus contrarius* reasoning in its finding that, where the authority of the legislative branch is required to enter into a treaty, it follows that this confers the power to withdraw as well. It does so in particular in cases where the rights and obligations of individuals are affected, in the application of the doctrines of the separation of powers and the rule of law. These are principles that may well be applicable in other States where Parliament has a constitutional role in the making of treaties, but no express provision is made for cases of withdrawal.

The point is not that national constitutional courts will always necessarily have the power under the domestic constitution to control the executive exercise of the power of withdrawal, nor that they have in practice invariably exercised their powers in support of international courts.¹⁸² The proposition is simply that national courts may, when they find that they do have the power to do so, play a complementary role by restraining precipitate action by the executive so as to enable proper consideration of the implications by Parliament.

d) Extra-national institutional design

The fourth point is that international courts and tribunals exist to serve particular purposes in the international legal system. But they are human institutions. There is no sacrosanctity in any particular institutional structure. Not every change in the design of a particular international adjudicatory system resulting from a critique of existing arrangements is necessarily evidence of a wider failure of international adjudication generally.

¹⁷⁹ *Ibid*, [53].

¹⁸⁰ *Ibid*, [56].

¹⁸¹ See e.g. the discussion in Lange, Hettche and Paulus and Hinselmann above n 168.

¹⁸² There are contrary examples of Latin American constitutional courts joining or leading efforts to escape from treaty obligations to submit to international adjudication: Alexandra Huneeus and René Urueña, 'Treaty exit and Latin America's constitutional courts' (2017) 111 *AJIL Unbound* 456.

As Cesare Romano demonstrates in his instructive study on ‘Trial and error in international judicialization’¹⁸³ international courts are fragile institutions, especially in their early days. For every successful international court or tribunal, there are many more that were envisaged by States and never started operating or fell into disuse. Equally, international systems of adjudication are on occasion capable of radical redesign if they are no longer fit for purpose. This was the case when, in 1994, the member States of the World Trade Organisation adopted a Dispute Settlement Understanding that enabled the creation of an Appellate Body to whom appeals from Panel decisions could be addressed, representing a judicialization of international trade disputes. There is a comparable development at present under consideration in the case of investment disputes with the proposal (discussed above¹⁸⁴) to create a new standing Multilateral Investment Tribunal with an Appellate Tribunal as an alternative to international arbitration.

At the same time, one should be wary of reading a requiem over those international courts and tribunals that are operating successfully. An empirical study published in 2018 examining the evidence of the effect of the backlash against international courts, concludes that ‘[t]here has been plenty of critique of ICs [international courts] both historically and contemporarily, but only rarely has it seriously challenged and changed the authority of ICs ... [which] do not appear to be in an existential crisis, neither are they generally disappearing from the map.’¹⁸⁵ Even in the present climate, relatively few threats of withdrawal from international adjudication have materialised, and fewer still have resulted in the demise of the court in question.

The question always must be whether the core purposes of the international legal system require an extra-national adjudicatory function. Taking the Asia-Pacific region by way of example, there are some significant gaps in the legal remedies available in particular to individuals. It has long been observed that Asia and the Pacific are ‘the only regions in the world which are yet to establish cooperative regional mechanisms for the promotion and protection of human rights.’¹⁸⁶ The remedy of individual petition to the UN Human Rights Committee is a relatively weak form of review. The result is that, for practical purposes, individuals have only such protections against executive power as national constitutions may afford them. Yet, as the cases concerning the detention on Nauru of persons arriving in Australia’s maritime migration zone demonstrate, national courts may encounter real limitations in achieving the domestic accountability of their own executive branch for its admitted involvement in extraterritorial detention in the region, once clothed with domestic legislative authority.¹⁸⁷

This Part has argued that international adjudication, precisely because it places some legal limits on the exercise of State power in the pursuit of the rule of law, is inherently vulnerable to denunciation. International courts and tribunals may best be supported by the collective interests of the mandate providers, but national courts may also play an important role in the constraint of withdrawal. A defence of international adjudication does not imply the sacrosanctity of any

¹⁸³ Cesare PR Romano, ‘Trial and error in international judicialization’ in Cesare PR Romano, Karen J Alter and Yuval Shany (eds), *The Oxford Handbook of International Adjudication* (OUP 2013), ch. 6.

¹⁸⁴ Above Part II (4).

¹⁸⁵ Mikael Rask Madsen, Pola Cebulak and Micha Wiebusch, ‘Backlash against International Courts: Explaining the Forms and Patterns of Resistance to International Courts’ (2018) 14 *International Journal of Law in Context* 197, 217.

¹⁸⁶ Ben Saul, Jacqueline Mowbray and Irene Baghoomians, ‘The last frontier of human rights protection: Interrogating resistance to regional cooperation in the Asia-Pacific’ (2011) 18 *Australian International Law Journal* 23.

¹⁸⁷ *Plaintiff M68/2015 v Minister for Immigration* [2016] HCA 1.

particular judicial structure, since the form of adjudication should be best attuned to the function that it has to perform. This leaves for consideration in the last concluding Part some observations on a larger question so far implicit but not directly confronted. Why should adjudication be accorded such an important role in the international legal system, such that withdrawal is not treated as a unilateral act of executive discretion, but rather is limited by law?

6. Conclusion

The submission of States to international adjudication of disputes cannot be seen as simply another incidental aspect of an elective international legal system. The decision to withdraw from a process of compulsory settlement of international disputes by adjudication has a much wider implication for the operation of international law as a whole. That is why Hersch Lauterpacht devoted the greater part of *The Function of Law in the International Community*¹⁸⁸—a book that Martti Koskenniemi describes as ‘the most significant English-language book on international law in the twentieth century’¹⁸⁹—to an analysis of the place of courts and their viability as a means of resolving international disputes.

Lauterpacht challenged what was then an orthodox doctrine: that there were limitations in the types of disputes that could be submitted to international adjudication; that international disputes were necessarily divided into two categories variously described as ‘legal’ and ‘political’, as ‘justiciable’ and ‘non-justiciable.’ He argued that ‘all international disputes are, irrespective of their gravity, disputes of a legal character in the sense that, so long as the rule of law is recognised, they are capable of an answer by the application of legal rules.’¹⁹⁰

In light of what was to happen in world events in and following 1933, the year of the book’s publication, Lauterpacht’s deeply reasoned attack on *raison d’état* was prophetic. The notion that certain issues are too political to be capable of settlement according to law is a dangerous one. It leaves States without the protection of an international order founded on law and exposed to the exercise of executive power by other States. Instead it makes States judges in their own cause ‘*omnis civitas judex in re sua.*’ Lauterpacht contested this notion in particular as applied to the refusal ‘to accord the other party the right, which Hobbes regarded as elementary, even in a state of nature, of impartial adjudication.’¹⁹¹ He argued that:¹⁹²

There is indeed a glaring contradiction in the idea that, in a society of States which are *ex hypothesi* independent of one another, and in a relation of equality to each other, one State may legally claim the right to remain judge in a dispute in which the rights of another State are involved....

His focus on international adjudication was also strikingly novel. The world had then only one standing international court, and it only had a decade of experience. Yet Lauterpacht insisted

¹⁸⁸ Hersch Lauterpacht, *The Function of Law in the International Community* (OUP 1933, rev edn 2011).

¹⁸⁹ Martti Koskenniemi, ‘The Function of Law in the International Community: Introduction’ in Hersch Lauterpacht *ibid*, xxix, xlvii.

¹⁹⁰ *Ibid*, 161, 166.

¹⁹¹ *Ibid*, 435.

¹⁹² *Ibid*, 437.

that ‘the decisive test [for the existence of law] is whether there exists a judge competent to decide upon disputed rights and to command peace.’¹⁹³

His observations are of compelling contemporary relevance. Humanity has succeeded in a comparatively short space of time in achieving a goal that Lauterpacht could not have imagined in the breadth of ambition of international courts and tribunals. In the same way as domestic courts need to be held accountable and have to be judged according to the respective rule of law standards, international courts and tribunals as well need to be held to the standards of the international rule of law and the functions that they serve. The particular court structures and processes that have been developed are not immutable. They must always be capable of being tested against the larger functions that they were created to perform and against the basic principles of the rule of law that govern the process of adjudication—international as well as national.

At the same time international lawyers must also be prepared to defend international adjudication against a tide of withdrawal that claims national self-determination as a ground for denunciation, obscuring the fact that the function of the international court is to protect other States and individuals from the unilateral exercise of State power. Scholars have a particular responsibility in this regard.¹⁹⁴ The truth that ‘law matters and that international cooperation is not a utopia but a functioning reality’ has, as the historian Isabel Hull has aptly put it, ‘has been hard to hear...above the din produced by bad actors...and by criticism of the neoliberal order from the left and the populist right, which obscures the positive effects of internationalism.’¹⁹⁵

In this context, it is important to go back to the fundamentals of the international legal order in assessing the limits of withdrawal. The submission by States to international adjudication is not incidental, but rather is central to the operation of international law. Withdrawal from treaties providing for consent to third party settlement, as the framers of the VCLT recognised, cannot be treated as a merely unilateral voluntarist act, but rather is bounded by law. This is so both as to the substantive conditions under which withdrawal is, or is not, permissible and as to the procedural requirements. In both cases, the simple point is that State consent to international adjudication by treaty is an act, the consequences of which are not unilateral. Of its nature such a submission produces effects that engage the interests of other Contracting States and of any other persons on whom a right of action is conferred: so too in the case of withdrawal. Further, a unilateral act of withdrawal may produce effects at the domestic level that infringes the powers of the other organs of government or the rights of the individual. For these reasons, the other Contracting States that confer the mandate of the court and national courts each have an important role in securing the adherence of States to their solemn commitments to submit their disputes to international adjudication under the rule of law.

¹⁹³ *Ibid*, 432.

¹⁹⁴ Philip Alston, ‘The populist challenge to human rights’ (2017) 9 *J Human Rights Practice* 1.

¹⁹⁵ Isabel Hull, ‘Anything can be rescinded’ (2018) 40(2) *London Rev of Books* 25, 26.

The Author



Campbell McLachlan QC is Professor of Law at Victoria University of Wellington. His principal publications include: *Foreign Relations Law* (Cambridge UP, 2014); *International Investment Arbitration: Substantive Principles* (with Weiniger & Shore, 2nd edition, Oxford UP, 2017) and *Lis Pendens in International Litigation* (Hague Academy of International Law, Nijhoff, 2008). He is a Specialist Editor of *Dicey, Morris & Collins on the Conflict of Laws* (15th edn 2012) and Joint Editor-in-Chief of *ICSID Review–Foreign Investment Law Journal*. In 2015, he was elected to the Institut de Droit International and is Rapporteur of its 18th Commission on Equality of Parties before International Investment Tribunals. He has held visiting fellowships at the Lauterpacht Research Centre for International Law in the University of Cambridge, All Souls College Oxford and New York University Law School. From 2006–9 he was President of the Australian and New Zealand Society of International Law.

His recent publications include: the edited special issue ‘The Dynamic Evolution of International Law’ (2018) 49 *VUWLR* No 4; ‘The Foreign Relations Power in the Supreme Court’ (2018) 134 *LQR* 380 and ‘Entre le conflit de lois, le droit international public et l’application internationale du droit public: le droit des relations externes des Etats’ [2018] *Rev crit DIP* 191. Forthcoming publications this year include: ‘Equality of Parties before International Investment Tribunals’ in *Session of The Hague, Yearbook of the Institute of International Law, Preparatory Works* (2018), vol. 79 (forthcoming 2019); and ‘Five conceptions of the function of foreign relations law’ in C Bradley (ed) *Oxford Handbook of Comparative Foreign Relations Law* (Oxford UP, forthcoming 2019) Ch. 2.

Campbell McLachlan also practises international law. He is an Associate Member of *Bankside Chambers* (Auckland & Singapore) & *Essex Court Chambers* (London). He is a member of the ICSID Panel of Arbitrators, serving as President or member of a number of international arbitral tribunals under the auspices of ICSID, the PCA and the ICC. He holds an LL B (Hons) degree from Victoria University of Wellington, a PhD from the University of London and the diploma cum laude of The Hague Academy of International Law.

During his senior research fellowship, Professor McLachlan is working on a new project on the Systemic Integration and Disintegration of International Law. In 2020, he will hold the Arthur Goodhart Visiting Professorship in Legal Science in the University of Cambridge.

The Kolleg-Forscherguppe “The International Rule of Law – Rise or Decline?” examines the role of international law in a changing global order. Can we, under the current significantly changing conditions, still observe an increasing juridification of international relations based on a universal understanding of values, or are we, to the contrary, rather facing a tendency towards an informalization or a reformalization of international law, or even an erosion of international legal norms? Would it be appropriate to revisit classical elements of international law in order to react to structural changes, which may give rise to a more polycentric or non-polar world order? Or are we simply observing a slump in the development towards an international rule of law based on a universal understanding of values?

The Research Group brings together international lawyers and political scientists from five institutions in the Berlin-Brandenburg region: Freie Universität Berlin, Hertie School of Governance, Humboldt-Universität zu Berlin, Universität Potsdam and Social Science Research Center Berlin (Wissenschaftszentrum Berlin). An important pillar of the Research Group consists of the fellow programme for international researchers who visit the Research Group for periods up to two years. Individual research projects pursued benefit from dense interdisciplinary exchanges among senior scholars, practitioners, postdoctoral fellows and doctoral students from diverse academic backgrounds.
