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Editorial

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Exiting International Organizations
A Brief Introduction

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1 Introduction

Recent years have seen an extraordinary crisis of confidence in international institutions. From the United Kingdom's decision to leave the European Union to the mooted exodus of African States from the International Criminal Court ('ICC'), states are reconsidering their membership in international institutions in ways that were unthinkable a short time ago. This gives rise to multiple challenges in international law, in terms of both the immediate legal issues which arise from the process of state withdrawal and the deeper questions about what international cooperation will look like in the coming years.

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As alluded to earlier in the present journal,[1] it is generally accepted that Member States may leave an international organization, despite the fact that the organization's procedures do not always expressly provide for it.[2] It has even been argued that an 'inherent right of withdrawal' exists, based on a state's sovereignty.[3] Yet, examples of permanently withdrawing Member States are hard to find and in most situations withdrawal ultimately proved to be merely a temporary cessation of cooperation.[4] In other cases, states later re-joined the organization, or its successor.[5] Besides, political rather than legal reasons are behind the (intended) withdrawal—as clearly exemplified by the cases of the African states (planning) to withdraw from the ICC.[6]

These and other considerations give rise to a range of unresolved questions surrounding the question of exiting institutions. In particular, the present Forum seeks to explore three identified themes: the rights and duties of exiting members, including the fact that these exist on the cutting face between the law of treaties and international institutional law; the legal position of individuals following the withdrawal of their state of nationality or residence; and the future of multilateralism more broadly in light of the exit phenomenon. Each of the contributions that follow will consider one or more of these themes from different, compelling and insightful perspectives. The Forum is based on a collaborative effort of the Interest Group on International Organizations and the Interest Group on the EU as a Global Actor, both of the European Society

1 R A Wessel, 'You Can Check Out Any Time You Like, But Can You Really Leave? On 'Brexit' and Leaving International Organizations' (2016) 13 *International Organizations Law Review* 197.

2 See H G Schermers and N M Blokker, *International Institutional Law* (Martinus Nijhoff, 5th ed, 2011) 98–110.

3 N Singh, *Termination of Membership of International Organisations* (Praeger, 1958) 27. The general rule is formulated in article 56 of the 1969 *Vienna Convention in the Law of Treaties*:

(1) 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.

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

Vienna Convention on the Law of Treaties, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) ('*VCLT*').

4 Singh, above n 3, 110.

5 See Schermers and Blokker, above n 2, 99.

6 See, in this Forum, J P Perez-Leon-Acevedo, 'Why Retain Membership of the International Criminal Court? Victim-Oriented Considerations' (2018) 15(2) *International Organizations Law Review*.

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of International Law ('ESIL'). First drafts of the assembled contributions were presented at the 2017 ESIL Annual Meeting, held in Naples. To properly frame the debate that ensues, we will briefly deal with each of these challenges in the subsequent sections.

2 The Rights and Duties of Exiting Members

One of the most interesting international legal issues to arise from states exiting institutions is whether exiting states have, in effect, a blank slate regarding the obligations of the institution of which they were a member. This is particularly important in the case of the EU, as the Union is party to a huge range of international instruments.

2.1 *The Case of the European Union*

As has recently been argued, the Brexit case reveals the UK will have to start from scratch in re-developing its international relations, as large parts of these relations were regulated on the basis of EU external relations law. At the same time, EU rules on the division of competences as well as the principles of sincere cooperation and primacy make it difficult for the UK to fully prepare future relations with third states prior to exit day. A special transition arrangement for the UK, either during or after the negotiation period, is being negotiated to solve this problem.[7]

Brexit also shows that with regard to all existing international agreements that were concluded by the international organization (in this case the EU) there are legal obstacles preventing the former Member State from simply 'taking over'. In most cases renegotiations are in order, or—as in the case of multilateral mixed agreements—at least notifications to inform the other parties of a change in the division of competences. One could perhaps argue that, in the case of the EU, the organization merely concluded the agreements 'on behalf of' its Member States and that the UK would thus remain bound once the competences are returned to it. Thus, it has for instance been argued in relation to the 2014 *WTO Government Procurement Agreement* ('*GPA*')—to which the EU is a party, but the UK is not—that "on leaving the EU, the UK will succeed to the *GPA* in its own right, in accordance with rules of customary international law on the succession of states to treaties, and practice under the *GATT 1947*, which

7 R A Wessel, 'Consequences of Brexit for International Agreements Concluded by the EU and its Member States' (2018) 55(2–3) *Common Market Law Review* 101–132.

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'guides' the WTO".[8] Yet, this is not self-evident in all cases. First of all, with regard to the idea that the EU acted 'on behalf of' its Member States, this idea seems contradictory to the organization's separate international legal status and its autonomous position as a global actor. As is the case with most international organizations, the EU is to be seen as a separate international actor, and over the years it has been accepted as such (and alongside its Member States) by almost all countries in the world. Moreover, the text of the agreements that were concluded by the EU only (so called 'EU-only' agreements, rather than 'mixed agreements') does not indicate the UK (or any other Member State) as a contracting party.[9] Finally, as also held by Odermatt in this Forum,[10] with regard to the idea of 'succession', it is far from clear that international law accepts the succession of international organizations by former Member States. The *VCLT*, for example, applies only "to the effects of a succession of states in respect of treaties between states" and it is clear that the EU is not a state.[11]

Even in cases in which a Member State is or was a party to an agreement in its own right, its actions may have been in the context of its membership of an international organization. One might argue that it simply regains its status as a full party in a practical sense once it becomes responsible again in substantive terms. Again, using the EU as an example, the implementation of many agreements to which the UK is a party was basically done on the basis of EU rules and in close alignment with EU law and policies. One may think of multilateral international agreements in the maritime or fisheries area, on the basis of which the UK is a member of international organizations (such as the ILO or the IMO) in which it, so far, mainly or partly acted as an agent of the Union. A recent statement of the International Tribunal for the Law of the Sea ('ITLOS') is illustrative in that respect:

> In cases where an international organization, in the exercise of its exclusive competence in fisheries matters, concludes a fisheries access agreement

8 L Bartels, 'The UK's Status in the WTO after Brexit' in R Schütze and S Tierney (eds), *The United Kingdom: 'Federalism' Within and Without* (online) 2018 (forthcoming) <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2841747>.

9 See, more extensively, Wessel, above n 7; as well as G Van der Loo and R A Wessel, 'The Non-Ratification of Mixed Agreements: Legal Consequences and Options' (2017) 54(3) *Common Market Law Review* 735.

10 J Odermatt, 'How to Resolve Disputes Arising from Brexit: Comparing International Models' (2018) 15(2) *International Organizations Law Review*.

11 J Odermatt, 'Brexit and International Law: Disentangling Legal Orders' (2017) 31 *Emory International Law Review* 1051, 1059. The non-state nature of the EU was confirmed by *Opinion 2/13* (European Court of Justice, EU:C:2014:2454, 18 December 2014) [156].

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> with an SRFC [Sub-Regional Fisheries Commission] Member State, which provides for access by vessels flying the flag of its member states to fish in the exclusive economic zone of that state, *the obligations of the flag state become the obligations of the international organization*.[12]

While the status of agreements concluded by the Union may be clear, the question may be raised to what extent agreements concluded by Member States are (also) part of the Union's legal order,[13] in which case disentanglement from that order may be more complex than a withdrawal of a Member State would suggest.[14]

Whereas the EU obviously is a special case because of the extent of integration and the close entanglement of the EU legal order and the legal orders of its Members,[15] the contributions to this Forum underline that the issue is more general, raising a particular question over the relation between and interaction of the specific law of the organization and the broader international law of treaties.

2.2 *Exiting at the Intersection of the Law of Treaties and the Law of the Organization*

Generally, legal thinking about international organizations proceeds from an institutional (law) perspective. That said, the scenario of a member state *leaving* the organization leads back to the preliminary level, that of 'contractual' relations between states (organizations as members of other organizations for the present are left out of account).

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12 *Request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission* (*SRFC*) (Advisory Opinion) (ITLOS, Case No 21, 2 April 2015) [172] (emphasis added). Compare also H Tuerk, 'Liability of international organizations for illegal, unreported and unregulated fishing' (2015) *Indian Journal of International Law* 161–176.

13 A Rosas, 'The Status in EU Law of International Agreements Concluded by EU Member States' (2011) 34 *Fordham International Law Journal* 1333, pointed to some Council decisions authorizing Member States to conclude international agreements "in the interest of the Union".

14 See, more extensively, Wessel, above n 7.

15 See Schermers and Blokker, above n 2, 99, "Withdrawal will be particularly harmful to an international organization with a supranational character, since the members of such an organization are more closely linked than is the case for other organizations. Withdrawal by one member may have serious consequences for the entire organization. The transfer of sovereign powers to the organization by all members should not be rendered meaningless by the unilateral act of one member, neglecting the interest of the others and of the organization as a whole".

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This entails that in a situation such as Brexit, IOs and member states are not just dealing with the law of treaties *and* institutional law, as has come to the fore in the previous section. It also means—as emerges also from the contributions to this Forum—that the exiting IO member state moves at the *cutting face of* the law of treaties and institutional law.[16] This somewhat complicates the legal landscape. A few general observations on the formal-legal framework may be helpful for an appreciation of the topic of exiting institutions.

Member States of an organization are at the same time party to a constitutive treaty. This means that at least as a starting point the applicable law is the international law of treaties, as enshrined in the *VCLT*, or in international custom, which has largely the same normative content. States' freedom of contract in the creation of specific institutional regimes then is expressly safeguarded by article 5 of the *VCLT*, which contains a general reservation clause for constitutive treaties of IOs.[17] Thus, the *VCLT* applies to a constitutive treaty by default, reserving however to the organization the ability to have its specific rules govern that same constitutive treaty on issues such as amendment, reservations, and withdrawal.[18]

Most IO constitutive instruments contain a provision on withdrawal from the organization, but some do not. The UN, the WHO and—until 1954—UNESCO are three prominent examples of organizations with constitutive instruments that lack such a provision. Still, the UN in 1965 received a declaration of withdrawal from Indonesia;[19] in 1949 the USSR had given notice of withdrawal to the WHO, followed by a number of countries in the Soviet political sphere;[20] and in the years preceding the insertion of a withdrawal clause in its *Constitution* in 1954, UNESCO received withdrawal notifications from Czechoslovakia,

16 C Brölmann, 'Specialized Rules of Treaty Interpretation: International Organizations' in D Hollis (ed), *The Oxford Guide to Treaties* (Oxford University Press, 2012) 507.

17 Article 5 of the *VCLT* affirms that constitutive treaties are a distinct class: "The Present Convention applies to any treaty which is the constituent instrument of an international organization and to any treaty adopted within an international organization *without prejudice to any relevant rules of the organization*" (emphasis added).

18 Cf D H Anderson, 'Article 5 Convention of 1969' in O Corten and P Klein (eds), *The Vienna Conventions on the Law of Treaties* (Oxford University Press, 2011) vol 1, 94.

19 *Letter dated 20 January 1956 from the First Deputy Prime Minister and Minister for Foreign Affairs of Indonesia to the Secretary-*General, UN Doc S/6157 (20 January 1965); Indonesia resumed collaboration in 1966.

20 Cf J Siddiqi, *World Health and World Politics: The World Health Organization and the UN System* (University of South Carolina Press, 1995) 104.

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Poland, and Hungary.[21] Practice is not entirely conclusive as to the consequences of these notifications, but arguably suggests that such withdrawal is unlawful,[22] or in any case without legal effect. In this case the legal relations bounce back to the sphere of the law of treaties, where especially article 56 (*Denunciation of or withdrawal from a treaty containing no provision regarding termination, denunciation or withdrawal*) of the *VCLT* is relevant.[23] If no consensual basis can be found, withdrawal from an organization amounts to unilateral withdrawal from the constitutive treaty, that is, treaty denunciation without the consent of the co-contracting parties. Such would be lawful only in the—unlikely—case that articles 60–62 of the *VCLT*[24] are successfully invoked and therewith trump the foundational rule of *pacta sunt servanda*.

This said, many constitutive treaties *do* contain provisions on withdrawal. The withdrawals from the ICC serve as an example.[25] Furthermore, in December 2017 both the US and Israel gave UNESCO notification of withdrawal[26] on the terms of article II(6) of the (in 1954 amended) *UNESCO Constitution*. With a withdrawal clause in the constitutive instrument, withdrawal comes to fall under the remit of institutional law. A question that may arise in these cases, however, is *to what extent* the law of the organization then covers the withdrawal and its legal consequences. What is the scope and reach of the pertinent institutional rules—in the pertinent case, are all general law of treaties rules subsumed in the rules of the organization, or only some? The more complex and

21 Cf M van Rij, *Withdrawing from international organizations in the absence of a withdrawal clause* (LLM Thesis, University of Amsterdam, 28 June 2018) <http://www.scriptiesonline.uba.uva.nl> 28.

22 For a careful account of episodes of (attempted) withdrawal by member states from these three organizations see ibid.

23 *VCLT* art 56 reads:

> 1. 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 …

24 Ie the three provisions in the *VCLT* regime which exhaustively cover unilateral termination of treaties: respectively on 'Termination or suspension of the operation of a treaty as a consequence of its breach' (art 60), 'Supervening impossibility of performance' (art 61) and 'Fundamental change of circumstances' (art 62).

25 Leon-Perez-Acevedo, above n 6.

26 United Nations Education, Scientific and Cultural Organisation, *Member States* (2017) <http://www.unesco.org/new/en/member-states/member-states-information/>.

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densely regulated the organization, the more perplexing this question may become. This is illustrated in the Brexit processes, when discussion focused on pending debt and outstanding payments in case of a hard Brexit. In 2017, when the general political mood was perhaps more categorical than it is now ("no deal is better than a bad deal"),[27] the House of Lords (European Union Committee) published *Brexit and the EU Budget*, in which it held that "Article 50 [of the] *TEU* allows the UK to leave the EU without being liable for outstanding financial obligations under the EU budget and related financial instruments, unless a withdrawal agreement is concluded which resolves this issue" and that "[t]he ultimate possibility of the UK walking away from negotiations without incurring financial commitments provides an important context".[28]

The report, and the UK Government, relied on article 70 (*Consequences of the termination of a treaty*) of the *VCLT*, or its customary pendant, which stipulates the residual rule that:

> *unless the treaty otherwise provides* or the parties otherwise agree, the termination of a treaty under its provisions or in accordance with the present *Convention*:
>
> (a) releases the parties from any obligation further to perform the treaty;
> (b) does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination … [emphasis added].

The question is whether article 50 of the *TEU*[29] satisfies the requirement of *lex specialis* also with regard to the issues mentioned in paragraph (b).

27 L Elliott, 'Theresa May's election victory will prove pyrrhic indeed', *The Guardian* (online), 11 June 2017, <https://www.theguardian.com/politics/2017/jun/11/theresa-mays-election-victory-will-prove-pyrrhic-indeed>.

28 European Union Committee, *Brexit and EU Budget* (House of Lords Paper 125, Session 2016–17 (2017)) [135] and 3.

29 The relevant provisions of article 50 of the *TEU* read:

1. Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements.
2. A Member State which decides to withdraw shall notify the European Council of its intention. In the light of the guidelines provided by the European Council, the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union. That agreement shall be negotiated in accordance with article 218(3) of the *Treaty on the Functioning of the European Union*. It shall be concluded on behalf of the Union by the Council, acting by a qualified majority, after obtaining the consent of the European Parliament.

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The Lords deemed this to be the case, even if article 50 of the *TEU* mainly refers to time periods and procedures for negotiation and does not make mention of outstanding payments. Yet for various commentators this was not a convincing conclusion, while the interaction of article 70 of the *VCLT* and article 50 of the *TEU* was felt to be of a subtler nature.[30] Of course, if and when a separation agreement is reached (a third normative layer) under article 50 of the *TEU*, this residual rule of article 70(1)(b) of the *VCLT* would no longer be applicable.

The cutting face between 'treaty law' (with its *parties*) and the 'law of the organization' (with its *members*) creates a particular juridical space, where in the blink of an eye actors and stakeholders may move from the contractual inter-state sphere to the sphere of 'rules of the organization', and back again. In a practical sense the most important trait of the institutional sphere is arguably the capacity to create new rules, with a different scope *ratione materiae* and *personae* than the original treaty. This can be highly relevant for individuals under the remit of an organization, as is illustrated by the case of Brexit, where issues of citizenship or acquired individual rights will typically arise within the institutional discourse and not in the inter-state treaty discourse.[31]

3 The Legal Position of Individuals

Complex organizations such as the EU and the ICC have had a significant impact on the legal position of individuals within the territories of member states. Withdrawal from these organizations entails the wholly unprecedented possibility that it could result in the loss of the rights of citizenship or a relaxation in the enforcement of individual criminal liability. Two contributions in this Forum address the implications that the withdrawal from these international organizations may have for the legal position of the individual.[32] Here, we wish to place these contributions in a broader framework—by contrasting the accounted effects that the move *towards* international institutions have

3. The *Treaties* shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in paragraph 2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period.

30 Eg M Waibel, 'The Brexit Bill and the Law of Treaties' on *EJIL: Talk!* (4 May 2017) <https://www.ejiltalk.org/the-brexit-bill-and-the-law-of-treaties/>; and C Brölmann, 'Brexit en bestaande verdragsverplichtingen' (2017) 92(25) *Nederlands Juristenblad* 1748.

31 W T Worster, 'Brexit and the International Law Prohibitions on the Loss of EU Citizenship' (2018) 15(2) *International Organizations Law Review*.

32 Perez-Leon-Acevedo, above n 6; Worster, above n 31.

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had, with the not-yet-clear effects that the move *away* from them may have on the individual at different levels of governance. The interrelation between the legal position of the individual and the legitimacy of institutions—an aspect that the two contributions address to different degrees—is also brought to the fore.

In the first decades of the twentieth century, international organizations were crucial in the affirmation of certain rights and obligations with the objective of breaking the circle between human suffering and international conflicts. Examples include the League of Nations,[33] the International Labour Organization,[34] and the International Military Tribunals.[35] The adoption of the *Charter of the United Nations* marks the transition to a new stage that culminated in the pervasiveness of human rights. This stage is marked by an uneven but progressive institutionalisation of human rights at the universal, regional, and domestic levels.[36] Importantly, decolonisation, and the move towards international organizations that resulted therefrom, was vital in this process.[37] Crucially, international institutions, supported by non-governmental organizations ('NGOs'), have carried out significant efforts to instil human

33 The League was fundamental eg in the adoption of the *Slavery Convention* ('Suppression of Slave Trade and Slavery' (1968) 2 *Treaties and Other International Agreements of the United States of America 1776–1949* ('*Bevans*') 607) and the development of the law on minorities (Mark Mazower, 'Minorities and the League of Nations in Interwar Europe' (1997) 126 *Daedalus* 47).

34 The ILO was established in 1919 to promote, *inter alia*, "the regulation of the hours of work … the protection of the worker against sickness … the protection of children … and women" in order to prevent social injustice becoming so "great that the peace and harmony of the world are imperilled": *Charter of the International Labour Organisation*, Preamble and Article 387, *in* 'International Labour Organisation' (1968) 2 *Bevans* 241.

35 *Charter of the International Military Tribunal* article 6, in 'Prosecution and Punishment of Major War Criminals of European Axis' (1968) 3 *Bevans* 1238; and *Charter of the International Tribunal for the Far East*, article 5, in 'International Military Tribunal for the Far East' (1968) 4 *Bevans* 20.

36 C R Kumar, 'National Human Rights Institutions and Economic, Social, and Cultural Rights: Toward the Institutionalization and Developmentalization of Human Rights' (2006) 28 *Human Rights Quarterly* 755; E Lutz and K Sikkink, 'The Justice Cascade: The Evolution and Impact of Foreign Human Rights Trials in Latin America' (2001) 2 *Chicago Journal of International Law* 1; F Schimmelfennig, 'Competition and Community: Constitutional Courts, Rhetorical Action, and the Institutionalization of Human Rights in the European Union' (2006) 13 *Journal of European Public Policy* 1247.

37 A A Cançado Trindade, *International Law for Humankind* (Martinus Nijhoff, 2010) 150.

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rights in international practice,[38] and ingrain them into individuals.[39] Ultimately, human rights have grown to provide standards for a new concept of peace;[40] as well as standards of legality and legitimacy for the relationship between the State and the individual,[41] and among individuals.[42] Arguably, the strengthening of human rights norms has likely affected how individuals define themselves.[43]

In the 1990s, institutionalisation in human rights and other fields gained renewed momentum—as two examples illustrate. Mass atrocities laid bare the need to strengthen international criminal law. From the Military Tribunals, to UN resolutions,[44] to International Criminal Tribunals,[45] to ICJ decisions[46]—there has been a non-linear progression that gained consistency in the 1990s

38 *Charter of the United Nations* article 71 (arrangements for consultation with non-governmental organisations); A M Clark, *Diplomacy of Conscience : Amnesty International and Changing Human Rights Norms* (Princeton University Press, 2001); R Falk, 'The Nuclear Weapons Advisory Opinion and the New Jurisprudence of Global Civil Society' (1997) 7 *Transnational Law and Contemporary Problems* 333.

39 A Clapham, *Human Rights : A Very Short Introduction* (Oxford University Press, 2nd ed, 2015).

40 *S C Note by the President of the Security Council*, UN Doc S/23500 (31 January 1992) 3; L Henkin, 'Human Rights and State Sovereignty' (1995) 25(31) *Georgia Journal of International and Comparative Law* 31, 43.

41 D Levy and N Sznaider, 'Sovereignty Transformed: A Sociology of Human Rights' (2006) 57 *The British Journal of Sociology* 657 ("while states retain most of their sovereign functions, their legitimacy … is mediated by how willing states are to engage with 'judicial memories' of human rights abuses and their articulation in cosmopolitan legal frames").

42 As the debates prompted by the UN actions on business and human rights illustrate, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, UN Doc A/HRC/17/31 (21 March 2011).

43 For instance, T Risse, S C Ropp, and K Sikkink (eds), *The Power of Human Rights* (Cambridge University Press, 1999), and *The Persistent Power of Human Rights* (Cambridge University Press, 2013); C Douzinas, 'Identity, Recognition, Rights or What Can Hegel Teach Us about Human Rights?' (2002) 29 *Journal of Law and Society* 379.

44 *Convention on the Prevention and Punishment of the Crime of Genocide*, opened for signature 9 December 1948, 78 UNTS 277 (entered into force 12 January 1951); *Definition of Aggression*, GA Res 3314 (XXIX), UN Doc A/RES/3314 (14 December 1974).

45 SC Res 827, UN Doc S/RES/827 (25 May 1993) (the International Criminal Tribunal for the former Yugoslavia); SC Res 955, UN Doc S/RES/955 (8 November 1994) (International Criminal Tribunal for Rwanda).

46 *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Bosnia-Herzegovina v Serbia and Montenegro*) (*Judgment*) [1996] ICJ Rep 43.

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with the adoption of the *Rome Statute*.[47] Besides, the international context favoured regional integration in Europe,[48] South America,[49] and later in Africa.[50] Derived from early efforts towards economic integration, these regional institutions—notably, the EU—acquired a new dimension as they opened up new environments for the individual.[51] These are environments where individual socialisation (cooperation, conflicts) occurs through the mediation of rights and obligations, many of which are established at the regional level.

This brings us to the current wave of dissatisfaction with international institutions. States have resisted the strengthening of international organizations,[52] but what we now witness goes beyond the traditional strategies of resistance as many states seek to withdraw from international institutions entirely. This recent trend perhaps throws into question the future of multilateralism—an issue to which we will turn our attention imminently—but from an individual perspective it seems clear that populations remain divided on these issues—as the cases of Brexit and the ICC lay bare.[53] Brexit shows how 'remainers' and 'leavers' have antithetical attitudes towards losses of rights—to some, serious if not unsurmountable disruption to their lives; to others, a reasonable price to pay for reclaiming sovereignty. Whenever conflict between these individuals

47 *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002).

48 *Treaty on European Union* (*Consolidated Version*), opened for signature 7 February 1992, [2012] OJ C 326/13 (entered into force 1 November 1993) ('*TEU*').

49 *Treaty for the establishment of a Common Market* (*Asunción Treaty*) *between the Argentine Republic, the Federative Republic of Brazil, the Republic of Paraguay and the Eastern Republic of Uruguay* (*with annexes*), adopted 26 March 1991, 2140 UNTS 257 (entered in force 29 November 1991).

50 *Constitutive Act of the African Union*, adopted 11 July 2000, 2158 UNTS 3 (entered into force 26 May 2001).

51 See, eg, *Acuerdo sobre Residencia para Nacionales de Los Estados Partes del Mercosur*, adopted 6 December 2002, Mercosur/CMC/Decisión No 28/02 (entered in force 28 July 2009) (residence agreement); *TEU* article 3(2) (declaring the EU as an area of freedom etc. to its citizens), and *Treaty on the Functioning of the European Union* (*Consolidated Version*), opened for signature 7 February 1992, [2012] OJ C 326/7 (entered into force 1 November 1993) ('*TFEU*') article 20 (establishing European citizenship).

52 Eg, S Droubi, *Resisting United Nations Security Council Resolutions.* (Routledge, 2016); A Tzanakopoulos, *Disobeying the Security Council: Countermeasures against Wrongful Sanctions* (Oxford University Press, 2011).

53 J Elgot and others, '"We're Not Morons": Brexit Divisions Harden across Britain' *The Guardian* (online), 26 January 2018 <https://www.theguardian.com/politics/2018/jan/26/uk-brexit-voters-mansfield-bristol-torbay-leeds-post-referendum>.

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erupt, the relevant rights and obligations, many of which are internalised to a point of being taken for granted, are fundamental—to paraphrase Douzinas—in their negotiating their response to each other, and their response to their own selves.[54] As the move towards international institutions seems to have promoted standards of legitimacy against which domestic and international institutions are assessed, and affected human identity—the move away from them might have implications on both counts, which may affect both sides of the debate indistinctly.

In his contribution to this Forum, Leon-Perez-Acevedo provides victim-oriented arguments for not leaving the ICC. He shows that the definition of *victims* of mass atrocities and the legitimacy of criminal justice derive from international human rights standards and procedures, which the ICC epitomises.[55] One may be justified to ask what may be the effects of threats of mass withdrawal from the ICC on sovereignty grounds in terms of the status of these victims, as well as the legitimacy of international and domestic criminal institutions. On his part, Worster argues that while acquisition of EU citizenship depends on national citizenship,[56] loss of EU citizenship entails a whole set of different considerations—notably, what to make of the legal bond ("fundamental status") that arises between the individual and the Union.[57] In the path to Brexit, a whole category of individuals, who built their lives as EU citizens, lament what they see as a fundamental status being reduced to mere rights in negotiation tables.[58] Arguably, the clash of attitudes, and the threats and effective withdrawals, might force domestic and international institutions to evolve, and identities to mature. Interestingly, Perez-Leon-Acevedo emphasises that, in the midst of conflicting attitudes, the AU threat of mass withdrawal from the ICC has not materialised. Worster argues that "Brexit may be forcing a rapid maturity of EU citizenship".[59] While the implications of all this to the standing of the individual *vis-à-vis* domestic and international institutions, *vis-à-vis* other individuals, is unclear—the contributions in the Forum certainly move the debate forward.

54 Douzinas, above n 43, 403.

55 Leon-Perez-Acevedo, above n 6, notably sections 3 and 4.

56 *TFEU* article 20.

57 Worster, above n 31, section 3.

58 A Menden, 'Auf Wiedersehen, Britain: Brexit Is Forcing My German Family to Leave the Country We Call Home', *The Guardian* (online), 2 August 2018 <https://www.theguardian.com/global/2018/aug/02/auf-wedersehen-britain-brexit-forcing-my-german-family-leave-home>.

59 Leon-Perez-Acevedo, above n 6.

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4 The Future of Multilateralism

Finally, considerable increase in the phenomenon of institutional exits—or, at the very least, threatened exits—throws into question the health of multilateral institutions more broadly. Indeed, events such as Brexit, threatened withdrawals from the ICC, and the US's recent withdrawals from both the *Paris Climate Change Agreement* and UN Human Rights Council have occurred against a backdrop of rising populist, isolationist, and anti-globalist political sentiment from many quarters across the globe. In this environment, narratives that once had been used to justify the move towards international institutions, like decolonisation, re-emerge to justify the opposite movement.[60] Worse, many individuals across the globe and, critically, in Western democracies, voice their dissatisfaction with international institutions,[61] which reflect worldviews that these individuals see as out of kilter with their reality;[62] which have procedures that they find obscure;[63] and which impose solutions that they deem unfair.[64] On their part, international institutions seem to have provided ammunition to their discontents,[65] and may have acted in ways that jeopardise each other's legitimacy.[66]

60 Ibid, Introduction.

61 M Howard and R Aikens, 'The EU's Court Is Picking Apart Our Laws', *The Telegraph* (online), 22 June 2016 <https://www.telegraph.co.uk/news/2016/06/22/the-eus-court-is-picking-apart-our-laws/> (reflecting popular dissatisfaction in the UK towards the European Court of Human Rights).

62 A Hunt and B Wheeler, 'Brexit: All You Need to Know about the UK Leaving the EU', *BBC News* (online), 12 December 2016 <https://www.bbc.co.uk/news/uk-politics-32810887>.

63 Ibid (on the confusion in respect to the European Court of Justice and the European Court of Human Rights).

64 M Simiti, 'Rage and Protest' (2015) 3 *Contention* 33; N Sotirakopoulos and G Sotiropoulos, '"Direct Democracy Now!": The Greek Indignados and the Present Cycle of Struggles' (2013) 61 *Current Sociology* 443 (both on popular frustration towards the troika formed by European Central Bank, European Commission and the International Monetary Fund).

65 See, eg, the literature on UN peacekeepers involvement with sexual abuse (E F Defeis, 'U.N. Peacekeepers and Sexual Abuse and Exploitation: An End to Impunity' (2008) 7 *Washington University Global Studies Law Review* 185)); on international financial institutions (J E Stiglitz, *Globalization and Its Discontents* (Penguin Random House UK, 2002)); and on investor-state dispute resolution (H S Edwards, *Shadow Courts: The Tribunals That Rule Global Trade* (Columbia Global Reports, 2016)).

66 An early example was the threat by the Organisation of the African States of non-compliance with UNSC resolutions imposing sanctions on Libya (*The Crisis Between The Great Socialist People's Libyan Arab Jamahiriya And The United States Of America And The United Kingdom*, AU Doc AHG/Dec.127 (XXXIV) (8–11 June, 1998)). In the 2000s, the issue became

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Certainly, these developments can at least in part be related to more long-standing concerns surrounding the ideological neutrality, fairness, and accountability of many multilateral institutions—concerns which have not always been unjustified. Since the end of the Cold War, in fact, there have been growing anxieties surrounding the proliferation, normative 'over-reach' and seeming unaccountability of the regimes, organizations, and institutional processes that we have come to know in terms of 'global governance'. In this respect, one might say that the entire post-Cold War period has been witness to a certain 'crisis of multilateralism'.[67] In 2001, Jan Klabbers expressed this concern in terms of a 'changing image of international institutions', reflected not only, he claimed, in an increasingly less deferential approach from institutional dispute settlement bodies, but also a growing policy and academic focus on questions of institutional legitimacy, accountability, and responsibility.[68] It is hardly a coincidence therefore that the International Law Commission began to address the topic of the responsibility of international organizations in that same year,[69] and also at the start of the new millennium that the International Law Association decided to establish a study group on the accountability of international organizations.[70] From the early 2000s onwards, a range of academic publications has emerged addressing questions related to, *inter alia,* the

far more complex (*Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities* (C-402/05 P and C-415/05 P) [2008] ECR I-06351). More recently, the African Union threatened the ICC with mass withdrawals (*Decision on the International Criminal Court*, AU Doc Assembly/AU/Dec. 622 (XXVIII) (31 January 2017); and *Annex-Withdrawal Strategy Document* to the *Decision on the International Criminal Court*, AU Doc Assembly/AU/Dec.672 (XXX) (29 January 2018)).

67 See, eg, T Moss, 'The Crisis of Multilateralism', *The Diplomat* (online), 26 July 2012 <https://thediplomat.com/2012/07/the-crisis-of-multilateralism/>. For a very useful study on the crisis of multilateralism in this respect, see European Parliament Briefing, *The Future of Multilateralism: crisis or opportunity?* (May 2017) <http://www.europarl.europa.eu/RegData/etudes/BRIE/2017/603922/EPRS_BRI(2017)603922_EN.pdf.

68 J Klabbers 'The Changing Image of International Institutions' in J-M Coicaud and V Heiskanen (eds), *The Legitimacy of International Organizations* (United Nations University Press, 2001) 221.

69 See 'Report of the International Law Commission on the Work of its Sixty-First Session, 4 May to 5 June and 6 July to 7 August 2009', UN Doc A/64/10, 2009, ch IV, [31]–[51] <http://legal.un.org/ilc/documentation/english/reports/a_64_10.pdf>.

70 See, eg, International Law Association, *Accountability of International Organisations* (*Final Report of Committee on Accountability of International Organizations, Berlin Conference* (2014) <www.ila-hq.org/download.cfm/docid/6B708C25–4D6D–42E2–8385DADA752815E8>.

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proliferation,[71] legitimacy,[72] and accountability of international organizations more broadly.[73]

Nevertheless, it is difficult not to note a distinctively more political shift amongst states, in part towards more informal means of inter-state cooperation, but also more recently in terms of disparaging and threatening withdrawal from certain regimes and institutions in order to advance particular policy preferences and normative agendas. This trend is well-illustrated, for instance, in Cowell's paper in this Forum,[74] addressing instances of denunciation and exit from international human rights treaties, but is also particularly evident in the foreign policy position taken recently by US President Trump, which has seen the US strategically denounce and pivot away from commitments under *inter alia* the *Paris Agreement*, or the rules of the world trading system.[75] Although the US is no stranger to exceptionalism in this respect, the kind of populist position adopted by Trump is a departure from the more strategic engagement with multilateral institutions taken by President Obama,[76] and in this respect clearly echoes the kind of ideological drive that is currently fuelling the Brexit process.

Although much of the recent political rhetoric denouncing political biases (eg threatened withdrawals from the ICC, the US withdrawal from the UN Human Rights Committee) or a perceived lack of transparency, accountability, and economic efficiency of global institutions (eg Brexit) clearly plays into populist sentiment—a felt public disaffection towards transnational political elites—many of these developments are equally explicable in terms of local and global powerplays by certain political actors. Certainly, the withdrawals and threatened withdrawals from the ICC by a number of African states can

71 See, eg, N M Blokker and H G Schermers (eds), *Proliferation of International Organizations: Legal Issues* (Kluwer Law International, 2001).

72 See, eg, Coicaud and Heiskanen, above n 68.

73 See, amongst a burgeoning literature, K Wellens, *Remedies against International Organizations* (Cambridge University Press, 2002); as well as the contributions to C de Cooker (ed), *Accountability, Investigation and Due Process in International Organizations* (Martinus Nijhoff, 2005) and J Wouters et al (eds), *Accountability for Human Rights Violations by International Organisations* (Intersentia, 2010).

74 F Cowell, 'Exit Clauses in Regional Human Rights Systems: the socialisation of human rights law at work?' (2018) 15(2) *International Organizations Law Review*.

75 See, *inter alia*, recently, D Boffey, 'EU says it is ready to wage trade war with US', *The Guardian* (online), 30 April 2018 <https://www.theguardian.com/business/2018/apr/30/eu-us-trade-war-donald-trump-tariffs>.

76 See, *inter alia*, J Goldberg, 'The Obama Doctrine', *The Atlantic* (online), April 2016 <http://www.theatlantic.com/magazine/archive/2016/04/the-obama-doctrine/471525/>.

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be explained in part as reflecting the changing strategic interests of African political elites rather than, necessarily, their populations at large.[77] Furthermore, focussing too much on the political rhetoric of state leaders leaves under-illuminated the extent to which significant sub-state actors and sections of local populations profess their allegiance to global institutions as a political weapon in the opposite direction: for instance, the Scottish National Party's drive to use continued membership of the EU as a 'carrot' towards Scottish independence,[78] or the alliance forged by certain US states to continue to fulfil their Paris climate targets—as neatly illustrated by Rosati and Kang-Riou in this Forum.[79]

In all, therefore, much of the recent growth in sovereigntist and isolationist sentiment can be explained in terms of discrete domestic political factors and forces, but it is not easy to generalise such causes and symptoms of discontent. Certainly, there is widespread dissatisfaction with the performance of many global institutions, or indeed the uneven impacts and benefits of institutional membership. As the world shifts from a unipolar to a multipolar power balance, it is very likely that institutional membership and exit will be used strategically as power dynamics readjust and new allegiances and enmities are formed.[80] What is equally clear, however, and as a number of the contributions to this Forum demonstrate, the effects of institutional exit are often more symbolic than substantive, as states are often unable to fully decouple themselves from the particular regime or wider impacts of globalising political forces. Perhaps the most positive impacts of the current crisis of multilateralism, then, is that it shines a light on the continued need to engage in global governance, but also—as noted recently by Ramesh Thakur—to adequately address the "fundamental social and political choices regarding the balance between the market and equity, human rights, governance, and democracy".[81]

77 See, *inter alia*, the insightful analysis of B J Cannon, D R Pkalya and B Maragia, 'The International Criminal Court and Africa: Contextualizing the Anti-ICC Narrative' (2016) 2 *African Journal of International Criminal Justice* 6.

78 See D Torrance, 'Scotland's (latest) Brexit Strategy', *Politico* (online), 15 January 2018 <https://www.politico.eu/article/scotlands-latest-brexit-strategy/>.

79 See Nicolas Kang-Riou and David Rossati, 'The Effects of Juridification on States Exiting International Institutions' (2018) 15(2) *International Organizations Law Review*.

80 Moss, above n 67.

81 R Thakur, 'The United Nations in Global Governance: Rebalancing Organized Multilateralism for Current and Future Challenges' <http://www.un.org/en/ga/president/65/initiatives/GlobalGovernance/Thakur_GA_Thematic_Debate_on_UN_in_GG.pdf>.

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5 Conclusion and Outline of the Forum

If one general conclusion could be drawn from the above short analysis as well as from the contributions to this Forum, it would be that exiting institutions is more difficult than it seems. While constitutive treaties may contain simple rules to leave the organization, practice reveals that a 'divorce' is usually complex, painful, and sad. Apart from budgetary settlements, there is the fact that many rules and customs defining the cooperation have been institutionalised and have been subsumed in the rules of the organization. After all, the whole idea of establishing an international organization in the first place was to create something that could partly operate in distinction from its members, and that would take over some of the (administrative, managerial) tasks that come with cooperation between states.

As for *legal* issues that arise, one central question that is not entirely resolved is whether exiting states have, in effect, a blank slate regarding the obligations of the institution of which they were a member. This is particularly important in the case of the EU, as the Union is party to a huge range of international instruments. But also in the case of the ICC, the involvement of the Security Council in the operation of the Court raises questions as to whether exiting states will truly be able to make a clean break.

Meanwhile, as we have seen, organizations—especially complex ones such as the EU and the ICC—have had a significant impact on the legal position of individuals within the territories of member states. Withdrawal from these organizations can have important consequences for these individuals: in the case of the EU the wholly unprecedented possibility that it could result in the loss of the rights of citizenship, and in the case of the ICC a relaxation in the enforcement of individual criminal liability.

The phenomenon of withdrawal from institutions in our time it to be seen against the backdrop of at least two factors. One is the critical voices arguing that international organizations are unaccountable, serve the interests of global elites and too eagerly accumulate new competences. These voices have moved from the margins of academic debate to the centre of public discourse. At the same time, we have seen a renewed emphasis on national sovereignty in domestic politics, buoyed by the resurgence of nationalism across the globe. It is uncertain how this crisis of multilateralism will shape future attitudes towards and engagement with global institutions.

The following contributions raise many of these issues and, in doing so, each make a distinct and important contribution to future debates. To begin, the contribution by Odermatt considers the prospects for the future of dispute settlement and, in particular, the potential role of the Court of Justice of the

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EU ('CJEU'), in light of EU-UK relations post-Brexit. In this regard, he considers the possibility of establishing a new dispute settlement mechanism, or 'Brexit DSM', particularly in order to deal with the EU-UK partnership agreement and other Brexit-related issues. Odermatt discusses a raft of issues surrounding the design of such a body. Who could sit on such a body? What kinds of disputes would it hear? What would be its relationship to the CJEU and the UK courts? Who would be capable of bringing disputes before it, and what would be the legal effect of its decisions? In order to solve these puzzles, Odermatt looks at other forms of international dispute resolution that might provide a template, or ingredients for a template, for a Brexit DSM. While these precedents can provide some answers, Odermatt argues that designing a Brexit DSM specifically will require flexibility and innovation from both sides.

The next article, by Silvereke,[82] considers the legal effects of Member State withdrawal from the EU on new generation free trade agreements (New Generation FTAs), which are concluded as bilateral mixed agreements. These kinds of agreement cause particular complications in terms of the ongoing rights and obligations of the exiting state. The question posed, in particular is whether exit would lead to an automatic termination or renegotiation of the agreement, or whether the principle of continuity from the law of treaties might mitigate against this result. Furthermore, she questions, would it be possible to argue for a fundamental change in circumstances in such a scenario? Silvereke does not purport to resolve these issues completely, but instead to consider possible responses, both from the perspective of the responsibilities and obligations of the exiting Member State and in terms of the potential consequences that the EU might face as a global actor.

Worster's contribution considers the vexing question of whether the UK's termination of EU membership would also mean an end to EU citizenship for individuals.[83] Worster seeks to move beyond a law of treaties framing to place questions of EU citizenship in a human rights frame, considering in particular the extent to which international law might protect EU citizenship as akin to an individual's nationality. In doing so, Worster seeks to defend the proposition that international law prohibits arbitrary withdrawal of this legal bond with a person and, consequently, that this could well lead to the UK being prevented from unilaterally (and arbitrarily) terminating the EU citizenship of its own nationals.

82 S Silvereke, 'Withdrawal from the EU and Bilateral Free Trade Agreements: Being Divorced is Worse?' (2018) 15(2) *International Organizations Law Review*.

83 Worster, above n 31.

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Perez-Leon-Acevedo also seeks to consider the rights of individuals, but does so from the perspective of victims of international crimes that might lose rights of redress by the potential exit of certain African states.[84] Specifically, Perez-Leon-Acevedo seeks to argue against exit from the ICC on the basis of victim-oriented considerations, but also seeks to contextualise these concerns in the context of the rights that victims possess by reference to international human rights law as well as broader emerging principles of international law. In doing so, he argues that such rights are unlikely to be adequately protected by local and regional remedies, particularly considering the prospective International Criminal Law Section of the African Court of Justice and Human and Peoples' Rights and the reparation system of the Extraordinary African Chambers.

The contributions from Cowell and from Kang-Riou and Rossati both place the phenomenon of institutional exit in a broader explanatory frame, and in doing so shed some light on the current health of multilateral institutions.[85] Cowell, first of all, analyses the use of exit clauses in regional human rights mechanisms. Specifically, Cowell undertakes a comparative analysis of the *European Convention on Human Rights* ('*ECHR*') and the *American Convention on Human Rights* ('*ACHR*'), both of which contain exit clauses, and the *African Convention on Human and Peoples' Rights* ('*ACHPR*'), which does not. In doing so he aims to better understand the role that the presence or absence of an exit clause plays in the powers of a regional human rights organization. Ultimately, what deters states from using exit clauses, Cowell argues, is the broader regional framework within which a human rights treaty operates and the collateral consequences it is able to harness to underscore its authority. Drawing on constructivist scholarship, Cowell offers an outline of a broader theory about the role of exit clauses in encouraging compliance with tribunal decisions.

Finally, Kang-Riou and Rossati aim to challenge the framing of institutional exits within scholarship on the law of international organizations, which tends to consider this phenomenon as either an ill-conceived action undermining the (liberal) international legal order or as a legitimate strategy for state members to pursue their own specific interests in a multilateral context. Kang-Riou and Rossati aim to outline a 'third way' explanation, which seeks to show how the successful 'juridification' of international institutional regimes often generates depoliticisation and expert-rule. Accordingly, they argue, exits are not just a consequence of these phenomena, but also a structural feature of 'contested multilateralism', where states re-position themselves against

84 Perez-Leon-Acevedo, above n 6.

85 Cowell, above n 74; Kang-Riou and Rossati, above n 79.

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the world-view imposed by increasingly legalised international regimes. The authors outline three recent cases of exits (and intended exits) from, respectively, the Inter-American Court of Human Rights, the International Centre for the Settlement of International Disputes, and the *Paris Agreement* on climate change, in order to illustrate in more detail two manifestations of juridification: path-contingency by soft-regulation and normative expansion through either authoritative interpretation of existing treaty obligations or dispute settlement.

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