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Withdrawing from International Custom: Terrible Food, Small Portions

Curtis A. Bradley and Mitu Gulati’s *Withdrawing from International Custom* brings to mind the old joke recounted by Woody Allen in *Annie Hall*: “Two elderly women are at a Catskill mountain resort, and one of ’em says, ‘Boy, the food at this place is really terrible.’ The other one says, ‘Yeah, I know; and such small portions.’” Similarly, while Bradley and Gulati attack international law’s current prohibition of unilateral withdrawal from custom, they propose an alternative that differs only modestly from it (small portions). At the same time, the doctrinal change they propose would take customary international law in the wrong direction, diminishing its value to states as a mechanism to address common problems (terrible food). If the goal is, as the authors say, to strengthen rather than bury customary international law, the authors have come up with the wrong recipe.

Under the prevailing approach to withdrawal from custom, which the authors denominate the “Mandatory View,” states may exempt themselves from a rule of customary international law by persistently objecting to the rule while it is in the process of forming. Once the rule has come into being, however, states that have not persistently objected are bound until the rule dissolves through a multilateral process. Bradley and Gulati propose to replace the Mandatory View with the “Default View,” which would recognize a limited right of states to withdraw unilaterally from some rules of customary international law.

Part I of this Essay considers how the Mandatory View actually differs from the authors’ proposed Default View. Section I.A examines the limitations of the Default View: some that Bradley and Gulati accept, some that they are willing to entertain and seem necessary, and some that they do not address but seem implicit in their proposal. Section I.B considers some aspects of the Mandatory View, as it actually operates, that render it less unlike the Default View than the authors suggest. Part I concludes that, taking account of the limitations of the Default View and the aspects of the Mandatory View discussed below, the doctrinal change the authors propose is less dramatic than they suggest.

Part II offers two reasons for believing that the modest doctrinal change that Bradley and Gulati propose would significantly diminish the value of customary international law as a mechanism for regulating state behavior. First, adoption of the Default View would weaken customary international law by increasing its indeterminacy and complexity. Because customary international law is unwritten and lacks a centralized mechanism of enforcement and dispute resolution, it depends to a significant degree on the clarity and simplicity of its rules for its efficacy. Customary international law already fares poorly in this respect, but the Default View would make a bad situation worse by making the applicability of its rules subject to indeterminate limitations and qualifications. If exercised, moreover, the right to unilateral withdrawal would produce an extremely complex web of relationships among the nations of the world. This added indeterminacy and complexity would weaken the norms’ pull toward compliance and in turn reduce the norms’ value to states.

Second, the Default View would reduce any given state’s incentive to comply with norms of customary international law by introducing uncertainty about how long other states will be bound by the norm. Acceptance of a norm of customary international law has value to states as a form of precommitment. Adding an option of unilateral withdrawal reduces the value of the norm to states by weakening the level of other states’ commitment. A state that acquiesces in a new norm of customary international law agrees to subordinate its own short-term interest in deviating from the norm because it believes it will benefit over the long term if other states do the same. Each state’s compliance is thus an investment that it expects to pay off over the long term. Giving states the option of unilateral withdrawal would reduce the expected long-term payoff, which in turn would make states less likely to make the investment in the first place. Thus, under the Default View, new norms of customary international law are less likely to get off the ground.
Bradley and Gulati express the hope that their proposal will prompt useful reflection about this particular feature of modern customary international law. They have clearly achieved this goal, but, for this reader, reflection has confirmed the wisdom of the prevailing view.

I. SMALL PORTIONS

The proposed Default View differs less from the Mandatory View, as it actually operates, than Bradley and Gulati suggest. The authors recognize that the Default View must be subject to certain restrictions of both a procedural and substantive nature, and additional limitations seem implicit in their defense of the proposal. At the same time, the Mandatory View is less mandatory than the authors suggest.

A. Limitations of the Default View

Current international law regards states as formally bound by all customary international law rules unless they persistently objected to a rule while it was in the process of crystallizing. Bradley and Gulati propose to give states a limited right to withdraw from some rules of customary international law after they have crystallized. This Section examines some of the respects in which Bradley and Gulati cabin their proposal and additional limitations that would appear to be implicit in their proposal. This examination shows that the authors’ proposal, though highly uncertain in its scope, is likely applicable to only a small subset of customary international law.

1. Procedural Limitations

Bradley and Gulati propose that states be granted the right to withdraw unilaterally from norms of customary international law, but only prospectively. States would remain bound by customary international law rules until they have provided public notice of their intent not to be bound, and they would remain responsible for violations that occurred before their repudiation of the norm. As Bradley and Gulati recognize, without this restriction, allowing withdrawal from customary norms would deny such

3. Id. at 208, 275.
4. Id. at 258.
5. Id.
norms any legal effect. The limitation is also supported by the analogy between treaties and custom that drives the authors’ proposal, as general international law permits only prospective withdrawal from treaties.

In addition, Bradley and Gulati are open to a requirement of reasonable notice, which would delay the effect of a repudiation of a customary norm until the expiration of an unspecified but “reasonable” period of time. This limitation is likewise supported by the analogy to treaties. Where a right to withdraw from a treaty exists by inference, the Vienna Convention on the Law of Treaties (VCLT) provides for a notice period of twelve months. Although the authors do not commit to a notice requirement, for reasons discussed below, this requirement is essential.

2. Substantive Limitations

Bradley and Gulati recognize that a right to withdraw may not be appropriate for all customary norms. In fact, after considering potential objections to their proposal, the authors carefully limit their claim to the proposition that the Mandatory View is not appropriate for all norms of customary international law. They recognize the need to develop a typology of norms, distinguishing those for which withdrawal rights are appropriate from the rest. This Subsection considers some substantive limitations that the authors address and some that they do not consider but seem implicit in their argument.

First, Bradley and Gulati recognize that some human rights norms should not be subject to unilateral withdrawal. They accept this exception because of agency concerns, although, as discussed below, there are additional justifications for excluding these norms from any right of withdrawal.

6. In responding to the argument that the Default View deprives norms of legal effect, the authors point to the fact that states would be responsible for violations occurring before they withdrew. Id. at 258-59.
8. Bradley & Gulati, supra note 2, at 258-59.
9. VCLT, supra note 7, art. 56(2), at 345.
10. Bradley & Gulati, supra note 2, at 259.
11. Id. at 273.
12. Id. at 254.
13. Id. at 273.
14. Id.

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Although the authors do not specify which human rights norms should be exempt from withdrawal, scholars sympathetic to their proposal have argued that the exception should extend to all customary norms that “recognize[] private actors as rights holders or third party beneficiaries of international obligations, including in areas as diverse as humanitarian law, protection of aliens, and preservation of the environment.” If so, the exception would apply to norms not traditionally regarded as human rights norms.

The authors’ analysis supports an additional exception for norms not grounded on state consent. In their article, Bradley and Gulati allude to a conceptual link between the consent-based character of international law and the proposed right of unilateral withdrawal. The authors rightly do not claim that the consent-based character of international law requires a right of unilateral withdrawal. But the right of withdrawal would seem to depend on the consent-based character of its rules. If so, then the right of withdrawal cannot extend to norms that apply without regard to consent. This may be an additional reason for exempting some human rights norms from the right of withdrawal, as it is widely believed, though contested, that some nontreaty human rights norms are not grounded on state consent. This exception might also cover some non-human-rights norms, such as structural or background principles that, despite not being treaty-based, the authors agree are “not ‘customary law’ in any meaningful sense.”

16. See, e.g., Bradley & Gulati, supra note 2, at 205 (noting that “if the persistent objector doctrine is needed in order to ensure that [customary international law] is consensual,” it is unclear why a right of unilateral withdrawal is not also necessary).
17. The consent-based character of customary international law is not incompatible with an approach whereby the states’ consent is inferred from their silence during the period of a norm’s formation. Nor is it incompatible with a prohibition of prospective unilateral withdrawal: if a prohibition of such withdrawal is itself an accepted rule of international law, then by remaining silent during a rule’s formation, the state consents to be bound by such a rule until the rule dissolves or is superseded by another rule formed in the same way.
18. The authors seem to gesture toward this conclusion when they cite the strength of the moral considerations in human rights law as a reason for exempting such law from the right of withdrawal. Bradley & Gulati, supra note 2, at 267.
20. Bradley & Gulati, supra note 2, at 274 (quoting LOUIS HENKIN, INTERNATIONAL LAW: POLITICS AND VALUES 32 (1995)). Presumably, the authors do not regard these norms as customary in a meaningful sense because they are not based on state consent.
Bradley and Gulati also seem to accept that a right of withdrawal may not be appropriate for norms whose violation would produce significant externalities. Their primary response to the objection that unilateral withdrawal could produce such externalities is to note that problems implicating significant externalities are unlikely to be resolvable through customary rules. This seems like a backhanded concession that a right to withdraw in such contexts would gut the underlying rule. The authors note that “[t]he problem of externalities helps explain why some treaty regimes explicitly or implicitly restrict withdrawal.” It may or may not be true that custom is less likely to be useful than treaties to address situations implicating the problem of externalities, but the authors’ analysis suggests that customary norms that do emerge to address such situations should not be subject to withdrawal.

It would also make sense to prohibit unilateral withdrawal from customary rules that have value to states only if all or most other states adhere to them. (Bradley and Gulati do not explicitly address this category, but it would appear to overlap with the one just considered.) A rational choice analysis suggests that states will be willing to accept a rule when, over the long term, they expect to gain more from other states’ adherence to the rule than from their own deviations from it. Much of international law—or at least that subset of it that is consent-based—consists of norms to which states are willing to adhere for precisely this reason. Some such rules might be of value to states even if only some other states adhere to them. The immunity rules that the authors use to illustrate their thesis might fall in this category. A state may find it of value to exempt officials of particular countries from arrest if those countries reciprocally exempt its officials from arrest, regardless of how many other states adhere to the rule. Such rules might plausibly be conceptualized as a web of bilateral arrangements. Other rules, however, might have value to individual states only if all or most states adhere to them. An example would be a rule limiting the killing of an endangered species of fish. Withdrawal from such a rule by a small number of states would deprive the rule of value for all states. It would accordingly make sense to exclude rules of this type from the right of unilateral withdrawal.

A final category of substantive limitation seems implicit in the very concept of a right of withdrawal. The terms “withdrawal” and “opting out” suggest that the authors are arguing that a state may unilaterally move from a state of

21. Id. at 263-66.
22. Id. at 264-66.
23. Id. at 266.
being bound by a norm vis-à-vis other states (with other states being bound vis-à-vis it) to a state of not being bound, but not in the other direction. Thus, Bradley and Gulati would permit a state to withdraw from a rule exempting diplomatic pouches from search, freeing itself to search other nations’ pouches and freeing other nations to search its pouches, but presumably they would not permit states to “withdraw” from a rule permitting the search of diplomatic pouches, leaving such pouches immune from search. This is presumably because they would regard an immunity from search as a restraint on state freedom, whereas they would regard an absence of immunity as a manifestation of state freedom. Their argument seems to be that states should be able unilaterally to increase state freedom but not decrease it.

The authors’ analysis thus appears to assume a default rule of state freedom similar to that which the Permanent Court of International Justice described in the famous *Lotus* case. Some scholars would dispute this background assumption as incoherent or unreflective of modern international law. In my view, the assumption is plausible, but only if understood in a particular way. Specifically, the author cannot be arguing that states should be able to withdraw all the way to a state of nature. In a state of nature, states would have the power to search diplomatic pouches within their territory, but they would also be able to take retaliatory action against states that searched their pouches, such as invading the searching state. If the authors are arguing that the withdrawing state has a right to search pouches within its territory, they must be rejecting the freedom of states to retaliate against states that search pouches. In a state of nature, legal rights do not exist. Thus, if the authors are advocating a legal right to withdraw from custom, their argument must presuppose some basic legal limits on state behavior from which states cannot withdraw. Without certain fundamental legal restrictions on state conduct, the very concept of a “right to withdraw” from certain rules would be unintelligible.

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24. *Id.* at 255-56, 260-61.
25. A state could unilaterally commit not to search other states’ pouches, but it could not unilaterally render its own pouches immune from search.
26. S.S. *Lotus* (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 9, at 19 (Sept. 7); *see also* Bradley & Gulati, supra note 2, at 272 (discussing the *Lotus* case).
27. *See, e.g.,* Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, 2010 I.C.J. 141, declaration of Judge Simma, slip op. at 1, ¶ 3 (July 22, 2010), available at http://www.icj-cij.org/docket/files/141/15993.pdf ("[B]y upholding the *Lotus* principle, the Court fails to seize a chance to move beyond this anachronistic, extremely consensualist vision of international law.").
Thus, the concept of state freedom implicit in the concept of “withdrawal” must assume the existence of such basic norms of international law as the prohibition of the use of force against the territorial integrity of another state in the absence of a permissive rule to the contrary and the related obligation of a state not to exercise police power in the territory of another state without the consent of the second state. 28 Bradley and Gulati seem to accept some such limitation when they write that “[i]t probably . . . makes sense to treat certain structural or background principles as mandatory.” 29 As examples, they give the concept of pacta sunt servanda and the concept of the nation-state. 30 I would add to the list (in addition to the norms mentioned above) the concept of sovereign equality of nations. Exclusion of such rules from the right of withdrawal seems implicit in the very concept of right of withdrawal. 31

The foregoing are just some of the categories of norms that would not be subject to the right of unilateral withdrawal proposed by Bradley and Gulati. 32 While the authors insist that the prevailing approach is unjustified insofar as it prohibits prospective unilateral withdrawal from any norms of customary international law, they tell us very little about which norms would be subject to withdrawal and which would not be. Further reflection may well lead the authors to conclude that the list of norms subject to withdrawal, based on their own assumptions and analysis, is quite short.

28. Without the latter rule, a state would be able to search diplomatic pouches outside its territory, something that the authors do not advocate.
29. Bradley & Gulati, supra note 2, at 274.
30. Id.
31. An exception for the rules concerning jurisdiction and the use of force may also follow from the authors’ concern about externalities. See id. at 266 (suggesting that “since intrusion on a nation’s territory has long been viewed as a justification for war, the externalities associated with unilateral withdrawal are high,” and thus boundary treaties are presumed not to be subject to unilateral withdrawal). As the discussion in the text shows, the rationales for excluding norms from any right of unilateral withdrawal often overlap.
32. Yet another candidate for exemption from the right to withdraw would be rules of customary international law that satisfy the traditional requirements of norm formation under international law. The authors defend the Default View in part as a response to the recent loosening of these requirements, and they appear to recognize that their argument for a right to withdraw would be weaker in the absence of these developments. Id. at 242-45. Many norms of customary international law predate these developments or would be recognized even under more traditional approaches to norm formation. The authors’ analysis would support an exclusion of such norms from the proposed right of unilateral withdrawal.
B. The Limitations of the Mandatory View

Certain features of the Mandatory View, as it actually operates, reveal it to be closer to the Default View than Bradley and Gulati suggest. I do not refer to the aspects of customary international law, such as its indeterminacy, that enable states to disguise their breaches of such law. The authors rightly note that this argument for retaining the Mandatory View is in tension with rule-of-law values. I refer instead to certain formal or quasi-formal features of the prevailing regime that limit the negative consequences of a state’s open repudiation of an existing norm of customary international law. For the reasons discussed here, the problems that the authors ascribe to the Mandatory View are not as severe as they suggest, and the corresponding benefits of adopting the Default View are not as significant.

1. The Quasi-Legitimacy of Open Repudiations

As Bradley and Gulati acknowledge, current international law recognizes that customary international law evolves through states’ violation of existing norms. Thus, paradoxically, a state’s open violation of an existing norm, if framed as a proposal for a change in the law, is simultaneously an (illegitimate) violation of an existing norm and a (legitimate) step towards the creation of a new norm. An open repudiation of an existing norm thus has a dual effect, producing far less stigma for the repudiating state than would a naked violation of the norm.

Bradley and Gulati note that open repudiations do not convey a clear signal that the violating state is a bad actor. They argue that the Default View is preferable because it would permit other states to distinguish more clearly between good and bad actors. This argument seems overstated. Under both the Default View and the Mandatory View, a state’s naked violation of a norm will reveal it to be a bad actor. Under the Mandatory View, the open repudiation of a norm, if framed as a proposal for a change in the law, would initially convey an ambiguous signal. If a sufficient number of other states were to join in the repudiation, the violation would be retroactively validated. If the requisite number of states do not follow suit within a reasonable time, the repudiating state’s continued violation of the norm would reveal it to be a bad

33. Id. at 259.
34. Id. at 259.
35. Id. at 260.
36. Id. at 260.
actor. Under the Default View, a repudiation framed as a withdrawal would be formally valid from the start, but Bradley and Gulati acknowledge that such withdrawals would nevertheless sometimes be perceived by other states as uncooperative moves and hence would have negative reputational consequences.\(^{37}\) (For this reason, they argue, norms will continue to be sticky even under the Default View.\(^{38}\)) If so, adoption of the Default View would not bring appreciably more clarity to the actions of states that openly repudiate existing norms. In any event, the dual effect of an open repudiation would mean that, in the short term, the effect of a state’s open repudiation of an existing norm under the Default View would not be dramatically different from its effect under the Mandatory View.

In the medium term, there would be an important difference: the Default View would always validate the repudiation, while the Mandatory View would validate it only if a sufficient number of other states followed suit. In other words, the Mandatory View requires the repudiating state to fall into line if its proposal for a change in the law has not borne fruit. A state’s failure to do so would reveal it to be a bad actor. But the clarity that such a rule would bring to the signal sent by a state’s repudiation in the medium term is hardly a strong reason for adopting the Default View. The authors’ proposal largely reduces itself to the claim that states should be able to continue to deviate even if most other states would prefer to retain the rule.\(^{39}\) That conclusion should stand or

\(^{37}\) Id. at 248.

\(^{38}\) Id.

\(^{39}\) In one respect, the authors’ proposal is potentially more restrictive than the prevailing approach. The authors are open to the requirement of a notice period, before the expiration of which no withdrawal would be permitted. Under the prevailing approach, a state’s open repudiation of a norm, if framed as the proposal of a new norm, would produce minimal stigma in the short term even without a notice period. The reasons for a notice period suggest that such a period should be required for open repudiations even under the Mandatory View. The imposition of a notice period might be awkward because an open repudiation is technically a violation of the law under the Mandatory View. But international law frequently regulates conduct that is illegal. \textit{Jus in bello}, as a class, falls in this category insofar as it regulates the conduct of wars that may themselves be illegal.

If a notice period were adopted for open repudiations under the Mandatory View, and if that period were equivalent in length to the period of time accorded to the repudiating state to convince other states to follow the repudiating state’s lead, after which continued violation would be regarded as unreasonable, then the resulting regime would be one in which the repudiating state would be required to comply with the rule unless and until a sufficient number of other states “accept” their proposal for a change in the law. Deviation from the norm would be allowed only when and if the norm loses its legal force. This change in the mandatory regime would have the benefit of regularizing the process for establishing new customary norms, eliminating the “dual effect” paradox. It is supported by the authors’ argument for requiring a notice period for unilateral withdrawals, and it should
fall on its merits. If states conclude that other states should not be able to continue to deviate in such circumstances, then continued deviation should be regarded as a bad act.

2. The Less Demanding Requirements for Unmaking Norms

As noted, under the Mandatory View, a state will be bound by a rule of customary international law as long as the rule retains its legal force, and the rule will retain its legal force until a sufficient number of states join in repudiating the norm. But the Mandatory View’s requirement that the repudiating state convince a sufficient number of other states to follow suit is less onerous than Bradley and Gulati suggest. The authors argue that the Mandatory View gives excessive power to one or two holdout states, which can unilaterally prevent a new norm from forming.\textsuperscript{40} But, as the authors elsewhere recognize, a new norm can form even over the dissent of one or two states.\textsuperscript{41} Indeed, as the authors explain, the persistent objector doctrine developed precisely to facilitate the emergence of new norms over the dissent of a few states.\textsuperscript{42} A single state, or even a few, would not be able to hold up the others; rather, they would be regarded as persistent objectors.

In any event, escaping from an existing rule of customary international law does not necessarily require the creation of a new rule of customary international law; it merely requires the dissolution of the existing rule.\textsuperscript{43} Because the unmaking of a customary rule requires the agreement of fewer states than its making, even a large number of states would not be able to prevent a rule of customary international law from dissolving.\textsuperscript{44} To use a stylized example, assume that the formation of a rule of customary international law requires the agreement (either express or tacit) of a minimum

\textsuperscript{40.} Bradley & Gulati, supra note 2, at 249–50.
\textsuperscript{41.} Id. at 234 (discussing current acceptance of the persistent objector doctrine).
\textsuperscript{42.} Id.
\textsuperscript{43.} Cf. id. at 249–50. This passage, particularly note 202, appears to assume that the only way to escape from an existing rule is to succeed in creating a new one.
\textsuperscript{44.} The distinction between making (or extending) a rule and unmaking one is parallel to the distinction drawn above between a change in the law that reduces state freedom and a change that enhances state freedom. The distinction is thus subject to the objections and qualifications discussed above. See supra text accompanying notes 27–31. The premise of the argument in the text would undoubtedly be challenged by some, but, as discussed above, the authors’ argument for a right to withdraw seems to depend on acceptance of it.
of 80% of the world’s states. Thus, if 95% of states are in accord with a given norm, the norm exists and binds the 95% of states that accept it, the remaining 5% being persistent objectors not subject to the norm. An attempt to extend the norm would require the agreement of 80% of states. But an attempt to loosen the norm, making it less restrictive of state freedom, would require the agreement of only enough states to bring the number of states accepting the norm below the 80% threshold. Of course, the requirements for making and unmaking norms of customary international law are far more complex and contested than in this highly stylized example, but the complexities do not negate the basic point that it takes significantly less state practice and *opinio juris* to unmake a norm than to make or extend one.\textsuperscript{45}

If the foregoing analysis is correct, then the problem with the prevailing regime is not that it permits a few states to hold up the states that seek a change in the law but rather that it empowers a minority of states to dissolve an existing rule of customary international law for all states. But the same would be true even under the Default View. Adoption of the Default View could perhaps be coupled with a modification of the prevailing approach for unmaking rules of customary international law, so that such rules would remain in place for nonwithdrawing states even if they comprised less than 80% of all states. This would indeed be an appealing change, and it is perhaps the strongest argument for the Default View. But this would not be a radical change from current practice, as, even under the Mandatory View, a minority or small majority of states that continue to support the rule are free to agree to it by treaty or, under certain circumstances, to retain it as regional custom.\textsuperscript{46}

3. *The Limited Responsibility Attending a State’s Repudiation of (Some) Existing Norms*

There is yet another respect in which the Mandatory View is less mandatory than it at first appears. If a repudiating state does not succeed at disestablishing the norm and yet refuses after a reasonable period of time to comply with it, the secondary rules of international law will in many cases significantly limit the extent of that state’s responsibility. Consider the customary international law rule regarding the immunity of heads of state. Formally, states cannot opt out of this rule, even prospectively. But, if State A


\textsuperscript{46}. See \textbf{VILLIGER}, supra note 45, at 55.
announces that it will no longer adhere to the rule, what is the result under the secondary rules of international law? First, of course, State A’s head of state will be subject to arrest and prosecution in other states if he commits a crime, and he will be subject to suit on civil claims. (Reciprocal noncompliance is an uncontroversial countermeasure.\(^{47}\) Second, because other states are on notice that State A may arrest their heads of state, they will likely refrain from sending their heads of state to State A.

If State B does send its head of state to State A and State A subjects her to criminal prosecution or civil suit, State B would likely be entitled to limited compensation, if any. According to the International Court of Justice (ICJ), “it would follow [from the duty to mitigate] that an injured state which has failed to take the necessary measures to limit the damage sustained would not be entitled to claim compensation for that damage which could have been avoided.”\(^{48}\) To be sure, as the ICJ went on to note, “[w]hile this principle might thus provide a basis for the calculation of damages, it could not . . . justify an otherwise wrongful act.”\(^{49}\) Because State A’s violation of the rule would be wrongful under the Mandatory View notwithstanding State B’s failure to mitigate, State A would be under an obligation to cease the violation,\(^{50}\) and a tribunal with jurisdiction could order the release of the head of state. But presumably State A’s repudiation of head-of-state immunity would be accompanied by its exclusion of such cases from any existing consent to jurisdiction.\(^{51}\) State B could impose countermeasures, but they must be proportional.\(^{52}\) Presumably, the injured state’s failure to mitigate would be relevant to the proportionality calculus. In sum, even though State A’s withdrawal from the norm of customary international law would be wrongful, the secondary rules of international law accord a significant degree of legal


\(^{48}\) Gabčíkovo-Nagymaros Project (Hung. v. Slovk.), 1997 I.C.J. at 7, at 55 (Sept. 25); see ILC Draft Articles and Commentary, supra note 47, at 93.

\(^{49}\) Gabčíkovo-Nagymaros Project, 1997 I.C.J. at 55.

\(^{50}\) See ILC Draft Articles and Commentary, supra note 47, at 88.

\(^{51}\) If the U.S. withdrawal from the Optional Protocol to the Vienna Convention on Consular Relations is any indication, such a withdrawal would be accepted even if the initial consent to jurisdiction did not reserve a right of withdrawal. Depositary Notification, U.N. Secretary-General, United States of America: Notification of Withdrawal, U.N. Doc. CN.186.2005.TREATIES-1 (Mar. 11, 2005).

\(^{52}\) ILC Draft Articles and Commentary, supra note 47, art. 22, at 76.
effectiveness to State A’s wrongful act. There is, in other words, a gap between the primary rules of international law, which prohibit unilateral withdrawal, and the remedial rules, which limit or deny remedies for (some) such withdrawals.

The secondary rules of international law may not reduce the repudiating state’s international responsibility with respect to all rules of customary international law. For example, if State A were to announce that it will no longer recognize the norm of customary international law forbidding states from exercising police power on the territory of other states without their consent, there would be little that other states could do in advance to mitigate damages. If State A acts in contravention of that norm by sending its police across the border to arrest a citizen of State B, State B would be entitled to full reparations. But, for a variety of reasons, this is likely a norm that would not be subject to withdrawal even if the Default View were adopted. First, an abduction of the sort posited may well violate human rights norms and would in any event fall within the possible exemption for norms as to which individuals are third party beneficiaries. More importantly, the rule prohibiting the extraterritorial exercise of police power is an instantiation of the principle that states have exclusive and plenary jurisdiction over their territory in the absence of an accepted limitation of that power, a principle that, as discussed above, would likely not be subject to withdrawal even under the

53. The possible result—the head of state’s continued detention—may seem harsh, but it bears noting that the head of state may be detained only according to laws that satisfy international human rights standards. Thus, she can be detained pursuant to criminal prosecution, and her continued detention would be subject to conviction of a crime according to procedures that satisfy due process. International Covenant on Civil and Political Rights, arts. 7, 9-11, 14-15, Dec. 19, 1966, S. Exec. Doc. E, 95-2 (1978), 999 U.N.T.S. 171, 175-77. As the authors recognize, withdrawal from human rights provisions would likely be impermissible even if the Default View were adopted.

54. I am indebted to Anthea Roberts for suggesting the counterarguments discussed in this paragraph and the next.

55. State B could not, however, respond by sending police into State A to arrest fugitives there, as the ILC Draft Articles on State Responsibility specifies that countermeasures may not include violations of “the obligation to refrain from the threat or use of force as embodied in the Charter of the United Nations.” ILC Draft Articles and Commentary, supra note 47, art. 50(1)(a), at 131. For reasons discussed above, this would almost certainly be a rule from which withdrawal would not be permissible.


57. See Helfer, supra note 15, at 73. As to whether individuals are third-party beneficiaries of the rule prohibiting one nation to exercise police power on the territory of another state without the territorial state’s consent, see Carlos Manuel Vázquez, Treaty-Based Rights and Remedies of Individuals, 92 Colum. L. Rev. 1682, 1137-41 (1992).
Default View. Indeed, the posited act would appear to be a small-scale violation of the norm barring the use of force against the territorial integrity of other states, a norm that is embodied in a treaty\textsuperscript{58} that itself may not be subject to withdrawal\textsuperscript{59} and is indeed regarded as having the status of \textit{jus cogens}.\textsuperscript{60}

On the other hand, if we were to change the hypothetical to one involving the customary law rules regarding jurisdiction to prescribe (which may be subject to withdrawal under the authors’ theory), the mitigation principles discussed above would reduce the repudiating state’s international responsibility. Assume that State A announces that it will no longer adhere to the customary limitations on jurisdiction to prescribe and, accordingly, makes it a violation of its law for anyone anywhere in the world to chew gum. While State A’s enforcement of this law would violate customary international law, State A would not be able to enforce this law against persons not present in State A or possessing property there except by violating the customary international law rules prohibiting the exercise of police power on the territory of other states without the consent of the territorial state (rules that are not subject to withdrawal). In light of the latter limitations, a gum chewer could not be arrested by State A outside of State A’s territory, and his property outside of State A could not be seized by State A to recover a judgment against him. If the gum chewer were to enter the territory of State A or keep his property there after State A had announced its repudiation of the norm in question, presumably he would be deemed to have failed to mitigate, a failure that would presumably be attributable to his state and thus vitiate or at least reduce its entitlement to reparations. To be sure, the gum chewer’s failure to mitigate does not justify State A’s violation of the limitations on prescriptive jurisdiction, so its exorbitant exercise of jurisdiction would remain wrongful. But the secondary rules of international law would accord a significant degree of legal effectiveness to State A’s wrongful act.

Insofar as the existing secondary rules of international law would reduce or vitiate an injured state’s entitlement to reparations from the repudiating state, the Mandatory View, as it actually operates, differs less from the Default View than Bradley and Gulati suggest. Because the authors do not tell us which norms would be subject to withdrawal under the Default View, it is uncertain how many norms would both (a) be subject to withdrawal and (b) result in

\textsuperscript{58} U.N. Charter, art. 2, para. 4.
\textsuperscript{59} See Bradley & Gulati, supra note 2, at 274 ("Perhaps . . . systemic arguments can be made for restricting exit from foundational organizations such as the United Nations.").
\textsuperscript{60} Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, 100–01, ¶ 190 (June 27); Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1984 I.C.J. 392, 615, ¶ 88 (Nov. 26) (Schwebel, J., dissenting).
reduced international responsibility of the repudiating state for the reasons discussed above. The norms that the authors use as the principal examples of the Default View in action (those involving immunity) appear to fall within this set. In the end, there may be very few norms that would be subject to withdrawal yet whose violation would not result in diminished international responsibility as a result of the repudiation.

In sum, the difference between the Default View and the Mandatory View, as it actually operates, is not as stark as Bradley and Gulati suggest. Under the Default View, states would be able to withdraw unilaterally from a limited but unspecified set of norms of customary international law, but only prospectively, and subject to a notice period of unspecified length. Under the Mandatory View, a state’s repudiation and violation of an existing norm would formally be a wrongful act, but, because international law recognizes that custom often develops through violations of existing rules, a repudiation framed as a proposal of a new rule would not generate significant stigma for the repudiating state in the short term. In the longer term, the violation would be retroactively validated if a sufficient number of other states joined in repudiating the norm, but a smaller number than the authors appear to believe. Only if the requisite number of states do not follow suit within a reasonable period of time would the repudiating state’s continued violation of the rule be an unadulterated breach of its international obligations. Even then, the secondary rules of international law would often disentitle an injured state to much in the way of reparations for the breach.

The principal doctrinal change that adoption of the Default View would produce concerns the requirement that the repudiating state obtain the agreement of a certain number of other states to unmake a norm (likely far less than a majority). Under the Mandatory View, such agreement among a minority of states would result in the dissolution of the norm for all states rather than just for the repudiating state. Under the Default View a repudiating state would be exempt from the norm even without the agreement of other states, but the remaining states would remain subject to the norm. Adoption of the Default View might facilitate a shift towards a regime in which norms would remain in force for nonwithdrawing states even after a significant minority or small majority of states have repudiated the norm. The latter end result would in some respects be desirable. Nevertheless, as the next Part will explain, the Default View would weaken customary international law and should be rejected by states that value it.
II. TERRIBLE FOOD

Bradley and Gulati disclaim any hostility towards customary international law.61 Indeed, they argue that adoption of the Default View would strengthen it.62 This Part explains how adoption of the Default View would instead weaken customary international law, making it far less useful to states as a mechanism for addressing common problems. Presumably, states have refrained from advancing the Default View until now because they value customary international law and recognize that the Mandatory View is essential to its efficacy (such as it is). They are right to have done so.

The authors devote much of their article to arguing that the Mandatory View lacks a lengthy historical pedigree.63 The absence of such a pedigree, however, is a weak basis for rejecting a view that is accepted today. There is much about the international law of Vattel’s time that we do not accept today. Bradley and Gulati argue that this history shows that the Mandatory View is not the only conceivable or practicable approach to this issue.64 As David Luban and William Dodge have shown, however, even in its heyday, the Default View applied at best to a very limited range of norms.65 Moreover, the community of nations during this period looked very different than it does now. A regime that may have been workable for a world of very few states might well be unworkable for a world of many more states. In a world of numerous states, the Default View raises the prospect that the regime of customary international law would degenerate into an unfathomably complex patchwork of essentially bilateral legal relationships.

To be sure, treaty relationships sometimes degenerate into complex patchworks, not just because treaties sometimes permit withdrawal, but also because many also permit reservations. The authors’ proposal is, indeed, largely driven by a comparison of the law of treaties with that of customary international law, and they parry many objections to their proposal by noting that treaties often permit withdrawal and the sky has not fallen.66 It is true that

61. Bradley & Gulati, supra note 2, at 208.
62. Id.
63. Id. at 215-40.
64. Id. at 241.
66. See, e.g., Bradley & Gulati, supra note 2, at 246.
many treaties permit unilateral withdrawal. But, as discussed below, there are important differences between treaties and custom that justify a flat rule prohibiting unilateral withdrawal from norms of customary international law.

A. Indeterminacy and Complexity

For a system of unwritten rules without centralized enforcement or adjudication, the clarity and simplicity of the systems’ rules are important to their efficacy. “Enforcement” of customary international law is decentralized, consisting largely of each state monitoring the behavior of other states and identifying violations so that violators can be exposed as bad actors. The less determinate the system’s norms, the greater the opportunities for evasion or contestation and the greater the difficulty of identifying violations. The greater the complexity of the system’s norms, or of the system of norms as a whole, the greater the resources that states must devote to monitoring behavior and exposing violations. For these and other reasons, simplicity and clarity are rightly regarded as important determinants of the “compliance pull” of international norms.

It is true that all of the foregoing problems potentially afflict treaties, which nevertheless often permit withdrawal. But states negotiating treaties have the opportunity to address the problems. They can articulate their respective obligations in clear and determinate language. If they are unable to agree to clear language, they can set up an institution to give greater precision to the obligations, or a tribunal to resolve treaty ambiguities. If they agree to complex norms, they can establish and fund an institution to provide central and efficient enforcement. If they are unable to agree to any such mechanism, they can either give up on the treaty or resign themselves to a weak agreement.

67. As Lea Brilmayer and Isaias Yemane Tesfalidet note, however, the background rule regarding withdrawal from treaties is not as dissimilar to the Mandatory View as the authors suggest. Lea Brilmayer & Isaias Yemane Tesfalidet, Treaty Denunciation and “Withdrawal” from Customary International Law: An Erroneous Analogy with Dangerous Consequences, 120 YALE L.J. ONLINE 217 (2011), http://yalelawjournal.org/2011/1/5/brilmayer-tesfalidet.html; see also Anthea Roberts, Who Killed Article 38(1)(b): A Reply to Bradley and Gulati, 21 DUKE J. COMP. & INT’L L. 173, 179 (2010). Unilateral withdrawal from treaties is permitted only if there is evidence that the parties intended to permit withdrawal. In the absence of a provision addressing withdrawal, withdrawal is permitted only if an intent to permit withdrawal is inferable from the context. VCLT, supra note 7, arts. 54, 56(1), at 344-45. The authors’ call for a typology of norms based on whether a right of withdrawal should exist might be understood as a call for the identification of norms as to which a right to withdraw would make sense and would thus have been favored by states had they considered the issue.

Since customary international law lacks all of these options, if states do not compensate with relatively clear and simple norms, they will be left with a system as inefficacious as the least efficacious treaty.

As Bradley and Gulati recognize, customary international law already fares poorly on the determinacy scale. Adoption of the Default View would make this bad situation worse. First, as discussed in Part I, the proposal as it stands is indeterminate in almost all of its key elements. It is unclear which norms are subject to unilateral withdrawal and under what circumstances. The default notice period that the authors suggest—“reasonable” notice—is itself indeterminate, providing ample opportunities for contestation.

These deficiencies might perhaps be ascribed to the preliminary nature of the proposal. Perhaps, over time, the uncertainties could be eliminated through state practice. As one state purports to withdraw from one particular norm, the reactions of other states will eventually clarify whether withdrawal from that norm is permissible. State practice might even coalesce around a determinate period of notice for withdrawal from each particular norm. If this were regarded as a reasonable possibility, the question for states would be whether the costs imposed by the proposal’s indeterminacy during the transition period would be worth the expected long-term benefit.

In answering the latter question, account would have to be taken of the problems that would result from the complexity of the web of obligations that would result if the Default View were adopted. Even if the indeterminacies could be eliminated, the resulting system would be considerably more complex than under the Mandatory View. When one or more states withdraw from a norm, the legal rights and obligations of the remaining states vis-à-vis the withdrawing states will of course differ from their rights and obligations vis-à-vis nonwithdrawing states. If the authors’ theory commits them to accepting partial withdrawals, then the possibility exists of numerous distinct levels of obligation among states with respect to the same issue. For example, some states might accept an obligation of prompt, adequate, and effective compensation, while other states might accept an obligation of effective and adequate but not prompt compensation, and others an obligation of prompt

69. The International Court of Justice is available to resolve disputes involving customary international law, but only for disputes between states that have submitted declarations under the Optional Clause agreeing to its compulsory jurisdiction in cases involving customary international law. As of December 14, 2010, sixty-six states had submitted (and not withdrawn) such declarations. Jurisdiction, I.C.J., http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1&p3=3.

70. Bradley & Gulati, supra note 2, at 261.

71. Id. at 258-59.
but not adequate or effective compensation, while yet other states accept no obligation to compensate at all.\textsuperscript{72} The resulting patchwork of obligations could be exceedingly complex, complicating significantly any monitoring of compliance and weakening the efficacy of the system accordingly.

Of course, the international community could create an institution to provide centralized and efficient enforcement, or a tribunal to resolve ambiguities in the norms. But a world with such an institution would be very different from the world we have. The lack of such an institution is a significant feature of modern customary international law and an important consideration in determining whether a right to withdraw would be appropriate for the customary international law of today. Given current conditions, the Default View would weaken customary international law in the short term, and probably in the long term as well, by introducing significant indeterminacies and complexities that would adversely affect the efficacy of its norms.

\textbf{B. The Underinvestment Problem}

A related, though distinct, problem with the Default View results from the uncertainty that it would introduce regarding how long other states would be bound by any given norm. A long-term perspective is crucial with respect to customary international law. A state acting rationally in its self-interest is likely to acquiesce in a customary norm only if it stands to gain more in the long term from other states’ compliance with the norm than it stands to lose from its own compliance with the norm. This is why it is sometimes rational for a state to subordinate its short-term self-interest in violating a norm. The subordination of its short-term self-interest is an investment that will pay off over the long term when other states similarly forego the short-term benefits of violating the norm. The indeterminacy of norms affects this calculus by facilitating the evasion of the norm, thus reducing the expected payoff for other states and

\textsuperscript{72}. As discussed above, see \textit{supra} text accompanying notes 24-31, the authors maintain that states can, through their unilateral declarations, move from a state of greater legal restraint to one of lesser legal restraint. It would follow that, if there were a rule prohibiting expropriation unless accompanied by prompt, adequate, and effective compensation, the authors would permit states to withdraw from one, two, or all three requirements. Similarly, if current customary international law established an exclusive economic zone of 200 miles, cf. \textit{United Nations Convention on Law of the Sea}, arts. 56-57, Dec. 10, 1982, 1833 U.N.T.S. 561 (designating an exclusive economic zone (EEZ) of two hundred miles for each state), then, assuming this were otherwise a rule from which withdrawal were permitted, states would be able to “withdraw” in favor of a zone of any length less than two hundred miles. Thus, potentially, there could be any number of different rules on this question.
reducing every state’s incentive to make the initial investment in the first place. The Default View aggravates this problem by adding another layer of uncertainty—uncertainty about how long other nations will be bound. Bradley and Gulati recognize a potential underinvestment problem but argue that it would affect only a subset of customary norms.\(^73\) It seems to me that the underinvestment problem is pervasive and that consequently the Default View would weaken customary international law at its core.\(^74\)

A notice period would alleviate this problem but not cure it. Requiring advance notice would force states facing an immediate temptation to violate the norm to take a long-term perspective in deciding whether to withdraw. This is why a notice period would be essential if the Default View were adopted. A notice period would delay any violations and might forestall some withdrawals by extending the time horizon of states contemplating withdrawal, but it would not remove the possibility that some other states will cease to be bound. For states that have been subordinating their self-interest for many years based on an expected gain over the long term from other states’ compliance, the exit of other states from the group of those bound by the norm would be a raw deal. It is no answer that the withdrawing state has itself been complying for the same period of time. It is possible that the withdrawing state has never faced a temptation to violate the rule. For example, a state that has adhered to a norm of diplomatic immunity may never have had a diplomat commit a significant crime within its territory. If, during that period, its own diplomats committed crimes for which they were not prosecuted by other states, then the state obtained the benefit of other states’ compliance with the norm without cost for years. The notice requirement prevents such a state from backing out of the norm the moment it faces its first temptation to violate the norm, but it still enables it to deprive other states of their expected benefit over the longer term.\(^75\)

\(^73\) Bradley & Gulati, supra note 2, at 255.

\(^74\) The persistent objector doctrine does not present this problem because the persistent objector must make it known from the start that it will not be bound. Other states can thus take the nonparticipation of persistent objectors into account when calculating ex ante whether subordination of their short-term self-interest will be in their long-term self-interest.

\(^75\) For this reason, if there were to be a general rule permitting prospective withdrawal from certain categories of norms, perhaps that rule should itself be applicable only to norms formed in the future. Even a purely prospective rule permitting prospective unilateral withdrawal would be problematic insofar as it would make states less likely to make the initial investment in compliance, but at least it would not cheat states that have been complying all along of their expected benefit.
Acquiescing in a norm of customary international law is a form of precommitment, and so its value depends on the strength of the commitment it signals. Adding the option of unilateral withdrawal reduces the level of commitment that states would be signaling and thus diminishes the value of the norm to begin with. Because it would decrease the benefit that states could expect from compliance over the long term, the Default View would make it less likely that states would find it rational ex ante to make the investment represented by the subordination of their short-term interest in deviating from the norm. In this way, adoption of the Default View would make it more difficult for norms of customary international law to get off the ground in the first place.\footnote{It does not matter that the long-term costs to states of adhering to the norm are lower under the Default View if they know they can withdraw from it later. The relevant question is whether states will forego an immediate short-term benefit when they face a situation calling for application of the rule in order to enjoy the longer term benefits they expect to derive from other states’ compliance with the rule. The knowledge that other states are able to withdraw from the rule unilaterally will reduce any given state’s expected long-term benefit from other states’ compliance. The fact that states will be able to withdraw from the rule themselves at a later point will not make them more likely to comply now.}

CONCLUSION

The response of states to the proposal to add an option of unilateral withdrawal will be an accurate barometer of the value they place on customary international law. If the Default View would weaken the compliance pull of existing norms by multiplying indeterminacy and complexity and would reduce the value of such norms by diminishing the expected long-term payoff from compliance, then one would expect the proposal to be met with disfavor by states that value this form of precommitment. Since states control the formation of customary international law, presumably they would prefer to retain the option of having an effective regime of such law. If adding a withdrawal option significantly weakens the commitment represented by acceptance of a norm of customary international law, then it weakens the usefulness of this particular mechanism for advancing the mutual interests of states.

States have always had the ability to propose a shift to the Default View. Under the Mandatory View, they would do so by purporting to withdraw from a norm of customary international law, stating that in so doing they are seeking a change in the Mandatory View. Such a withdrawal would be technically a violation of the underlying norm, but in the short term the state’s action would
be regarded as quasi-legitimate. If other states agree, the Default View would be accepted with respect to the norm in question and the withdrawal would be validated retroactively. The fact that no state has initiated such a process may be due to their failure to have thought of it. More likely, it reflects their recognition of the dangers that would be posed to customary international law by allowing prospective unilateral withdrawal.

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