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THE UNIVERSITY OF TEXAS SCHOOL OF LAW

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1. E. Ernest Goldstein, *Thank You Fidel! Or How the International Law Society and the* Texas International Law Journal *Were Born*, 30 TEX. INT'L L.J. 223 (1995).

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The British Withdrawal from the European Union and the Construction of a New Relationship

ERIK LAGERLOF*

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INTRODUCTION

Following a long, acrimonious, and occasionally harsh campaign, the United Kingdom voted to leave the European Union on 23 June 2016. The period immediately after the referendum could perhaps best be described as relatively calm, although initially colored by domestic political turmoil in the UK. This waiting period ended on 29 March 2017 when the United Kingdom formally notified the European Union of its intention to withdraw from the EU. With the clock ticking and the British departure rapidly approaching, the Brexit process is reaching a critical stage. The parties produced a joint report on 8 December 2017 (hereinafter "the joint report") which recorded what had been agreed during the first phase of the negotiations and also marked that sufficient progress had been achieved in order to move on to the second phase. Moreover, a draft version of a withdrawal agreement was published on 23 March 2018 and the parties seem to have agreed on transitional arrangements meant to cover the period between the British departure and the establishment of future relations. However, there are a number of important issues related to the withdrawal still outstanding and the parties have not yet begun discussing a future relationship in any detail. Accordingly, what is to come of the British intention to withdraw from the EU remains uncertain.

In view of the United Kingdom's momentous decision to leave the EU, it is of course not unexpected that there are speculations concerning its consequences. However, while comments on divorce related issues and what the content of future relations between the UK and the EU will consist of appear frequently, it is striking that relatively little is said about what the *procedure* of leaving the EU actually entails. This is surprising, particularly in view of the unprecedented road ahead and the procedural complications the withdrawal could entail. It is the procedural framework that sets the parameters of the negotiations; and, the conclusion of any agreement between the parties must fit into what the procedural requirements demand.

The purpose of this Article is to shed light on what the decision of an EU Member State to leave the EU entails from a procedural perspective, and to unpick what the withdrawal process requires as a matter of EU law. Rather than focusing on the current exit of the UK specifically, this Article instead considers the process from a general perspective. However, it is of course difficult to escape the realities of the ongoing events related to the United Kingdom, and those realities are accordingly referred to where it is appropriate to do so.[1]

I. A DECISION TO WITHDRAW FROM THE EU

A. *The Right to Exit*

Article 50 of the Treaty on European Union (TEU) has quickly become one of the most famous, or indeed notorious, provisions of the EU Treaties. It was introduced by the Lisbon Treaty,[2] and it is meant to regulate the departure of any Member State

1. Events up until 1 April 2018 have been taken into account.

2. Treaty of Lisbon Amending the Treaty on the European Union and the Treaty Establishing the European Community, Dec. 12, 2007 O.J. (C 306) (entered into force Dec. 1 2009).

that wishes to leave the European Union.[3] Prior to the introduction of Article 50 TEU, the absence of a specific exit provision had generated doubts amongst some commentators concerning the existence of a unilateral right to leave the EU.[4] However, the validity of those doubts appears uncertain in light of the constitutional foundation of the European Union. Article 56(1)(b) of the Vienna Convention on the Law of Treaties (VCLT) provides that a right of withdrawal may be implied by the nature of the treaty to which the State is a party.[5] It may be argued that it would be impossible for an organization committed to democracy and liberty, with a clear obligation to respect the identities of the different Member States, to deny the right of a Member State to withdraw.[6] This seems to have been the assumption at least when the United Kingdom joined the European Economic Community (EEC) in 1973.[7] The UK referendum on continuing membership of the Common Market in 1975 was also based on an assumption that the UK was entitled to withdraw from the EEC if it wished to do so.[8]

Moreover, while Article 50 TEU provides a *unilateral* right to a Member State that wishes to withdraw from the EU, it does not, from an international law perspective, appear to be the only legally acceptable exit from the EU. As provided for by Article 54 of the VCLT, the withdrawal of a party may take place either (a) in conformity with the provisions of the treaty, or (b) at any time by consent of all the parties after consultation with the other contracting states.[9] It is unlikely that Article 54(a) of the VCLT is capable of preventing Article 54(b) from producing effects. A Member State could therefore, in theory at least, leave the European Union simply with the consent of all other Member States.[10] Of course, a constitutionalist reading of the EU Treaties might not recognise this alternative route of departure.

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3. Treaty on European Union art. 50, Oct. 26, 2012, 2012 O.J. (C 322636) 13, 43 [hereinafter TEU].

4. *See generally* Case 7/71, Comm'n v. France, 1971 E.C.R. 1003, paras 19–20. *See generally* Joseph H. H. Weiler, *Alternatives to Withdrawal from an International Organisation: The Case of the European Economic Community*, 20 ISR. L. REV. 282 (1985); Jochen Herbst, *Observations on the Right to Withdraw from the European Union: Who are the "Masters of the Treaties"?* 6 GERMAN L. J. 1755 (2005); Clemens M. Rieder, *The Withdrawal Clause of the Lisbon Treaty in the Light of EU Citizenship (Between Disintegration and Integration)*, 37 FORDHAM INT'L L. J. 146 (2013); Hannes Hofmeister, *'Should I Stay or Should I Go?' – A Critical Analysis of the Right to Withdraw from the EU,* 16(5) EUR. L. J. 589 (2010); *See also* KOEN LENAERTS & PIET VAN NUFFEL, CONSTITUTIONAL LAW OF THE EUROPEAN UNION 363 (Robert Bray eds., 2nd ed. 2005) (discussing current and future EU withdrawal policies).

5. Vienna Convention on the Law of Treaties art. 56(1)(b), May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT].

6. The Amsterdam Treaty amended the Treaty on European Union and added a direct reference to the principles of liberty and democracy as principles upon which the Union is founded and this reference has subsequently been maintained. Treaty of Amsterdam Amending the Treaty on European Union, the treaties establishing the European Communities and certain related acts art. 9, Oct. 2, 1997 O.J. (C 340). An express requirement of the EU to respect national identities of the Member States was included already in the original Treaty on European Union (see further Article F of the original Treaty on European Union). Further, as explained by Hillion, the very absence of a withdrawal clause prior to the Lisbon Treaty could in itself be considered to lend further support to the existence of a unilateral right to leave the EU. Christophe Hillion, *Leaving the European Union, the Union way – A legal analysis of Article 50 TEU*, SWED. INST. EUR. STUD. 1, 7–8, European Policy Analysis 2016:8.

7. *See id.*

8. European Union Committee, THE PROCESS OF WITHDRAWING FROM THE EUROPEAN UNION, 2015-16, HL 138, at 4 (UK).

9. VCLT, *supra* note 5, at art. 54.

10. *See Report of the International Law Commission on the work of its Eighteenth Session*, A/CN.4/191

B. *The Adoption and Notification of the Decision to Withdraw*

As provided for in Article 50(1) TEU, a decision by a Member State to withdraw shall be adopted in accordance with the constitutional requirements of that particular Member State. Hence, as already touched upon, the decision to depart is of unilateral character and rests exclusively with the Member State concerned.[11] However, by requiring the withdrawal decision to be taken according to its constitutional requirements, the validity of any exit initiative under Article 50 TEU depends not only on the Member State's intention, but also on fulfilling the particular domestic rules and procedures related to such a decision. Consequently, although there is no need for a withdrawal decision to be approved by the other Member States, the European Court of Justice (hereinafter CJEU) may arguably have to consider whether a decision has been taken in accordance with the national constitutional requirements of the withdrawing Member State as a matter of EU law. Uncertainty may arise if national political actors or different branches of government express conflicting views as to the requirements that must be satisfied or if the notification is otherwise without adequate legal authority.[12] The consequences of such a scenario are difficult to predict, but the involvement of the CJEU cannot be excluded.[13] However, to what extent the Court would consider the internal constitutional arrangements of a Member State in this regard is a highly sensitive issue which would put the CJEU in a delicate position.[14]

After a decision has been adopted in accordance with its constitutional requirements to exit the EU, the withdrawing Member State may formally start the withdrawal procedure and the negotiation of a withdrawal agreement by giving notice of its intention to depart to the European Council.[15] The notification also means that the EU Treaties shall cease to apply to the withdrawing State two years after the notification has been made.[16] This means that there is a two year negotiating period that does not start to run until the withdrawing Member State actually notifies the European Council of its intention. Accordingly, the importance of the notification to withdraw should not be underestimated. It is therefore odd that there is nothing in Article 50 TEU that specifies the form or timing of a notification to withdraw to the

(1966), *reprinted in* 1966 2 Y.B. Int'l L. Comm'n 249, para. 5, A/CN.4/SER. A/1966/Add. 1 (outlining thew way that a treaty may be terminated or a party may terminate its participation in the treaty under art. 51, which is now art. 54).

11. *Id. See also* Jean-Claude Piris, *Which Options Would Be Available to the United Kingdom in Case of a Withdrawal from the EU?* BRITAIN ALONE! THE IMPLICATIONS AND CONSEQUENCES OF UNITED KINGDOM EXIT FROM THE EU 113 (Patrick Birkinshaw & Andrea Biondi eds., 2016).

12. *See* Hillion, *supra* note 6, at 2. (noting that a domestic court's challenge and/or a notification without adequate legal authority could cause a delay in the formal acknowledgment of the notification).

13. Takis Tridimas, *BREXIT Means BREXIT: Article 50: An Endgame without an End?*, 27 KING'S L.J. 297, 302–03 (2016). (analyzing compliance requirements with national constitution requirements).

14. *Id.*

15. TEU, *supra* note 3, art. 50(2).

16. *Id.*; art 50(3). Notably, the obligation to negotiate a withdrawal agreement under TEU art. 50(2) is only directed towards the Union and not at the withdrawing Member State. However, the departing Member State is still subject to a duty of loyalty during the withdrawal process under TEU art. 4(3) and is therefore required to carry out the negotiations in the best spirit possible in order to conclude a withdrawal agreement. What this means in practice is not evident, but at a minimum it requires the departing Member State to at least attempt to negotiate an exit rather than simply wait until the end of the two-year period. *See* Hillion, *supra* note 6 at 3(arguing that a state should not be allowed to use a threat of withdrawal to increase its bargaining power in the EU decision-making process).

European Council.[17] While the lack of formality seems to allow the departing Member State some discretion in the manner it wishes to notify the European Council, it is, as argued by Hillion, necessary for the notification to be unequivocal and not delayed once the decision to leave the EU has formally been taken.[18]

Following months of speculation and legal proceedings, the United Kingdom's notification to the European Council to leave the EU was delivered on 29 March 2017.[19] It was handed over by the UK's Permanent Representative to the European Union in the form of a formal letter signed by the Prime Minister.[20] The British government's initial decision to not involve the British Parliament in the Article 50 process had by then been successfully challenged in the High Court.[21] This judgment was subsequently upheld by the British Supreme Court.[22] While these cases are highly significant in a domestic perspective and will be the subject of intense scrutiny for many years to come, the British notification to the European Council has not (of yet) been subject to any legal challenge on the basis of EU law. In an official statement released immediately after the letter had been handed over, the European Council accepted the British notification as the start of the UK's withdrawal process from the Union.[23]

C. *A Right to Rescind*

Whether it is possible to rescind a notification to leave the EU has proven controversial. The wording of Article 50 TEU could be seen to indicate that it would not be possible to do so and that there is no turning back once notification is given.[24] However, to allow a departing Member State to reverse its decision to withdraw and remain within the Union would be more in line with the general aims of the EU.[25] This latter view is also arguably in line with international law. Under Article 68 of the VCLT, a contracting party — who gives notice of withdrawal or denounces an international agreement under its terms — may withdraw the notice at any time before it takes effect.[26]

In addition, Article 50(5) TEU provides that a State that has withdrawn from the EU and asks to rejoin is required to apply in accordance with the normal application procedure.[27] However, this provision is not drafted in such a manner as to cover a

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17. *See generally* TEU, *supra* note 3, art. 50(3).

18. Hillion, *supra* note 6, at 3–4.

19. Council of the EU Press Release 159/17, Statement by the European Council (Art. 50) on the UK notification (March, 29, 2017), http://www.consilium.europa.eu/en/press/press-releases/2017/03/29-euco-50-statement-uk-notification/ [https://perma.cc/9667-5DXX]

20. *Id.*

21. *See generally* R (Miller) v. Secretary of State for Exiting the European Union [2016] EWHC 2768.

22. *See generally* R (Miller) v Secretary of State for Exiting the European Union [2017] UKSC 5.

23. Council of the EU Press Release 159/17, *supra* note 19.

24. *See* TEU, *supra* note 3, Art. 50(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 . . .").

25. *See id.* at art. 2 (stating that one value upon which the Union is founded is respect for democracy); *see also id.* at art. 3(1) (stating that one aim of the Union is to promote the well-being of its peoples).

26. Vienna Convention of the Law of Treaties, art. 68, May 23, 1969, 1155 U.N.T.S. 331.

27. TEU, *supra* note 3, art. 50(5).

Member State that has activated Article 50 TEU, but then changed its mind.[28] It appears unreasonable in these circumstances that a Member State that has provided notification of its intention to withdraw could not alter its decision to leave. If such a route was not available, it would mean that the withdrawing Member State would still have to conclude a withdrawal agreement, or await the lapse of two years, and then start the process of re-applying to the EU.[29] Moreover, if it were not possible to rescind a notification to withdraw, it would also foreclose the possibility of all Member States agreeing to amend the EU Treaties in a way that would make it acceptable for the Member State that wished to withdraw to remain.[30]

However, the option to reverse a notification to leave the EU does not mean that the withdrawing Member State could activate and deactivate Article 50 TEU at will in order to increase its bargaining leverage in the EU decision-making process, or otherwise delay a notification to strengthen its future negotiating position.[31] To do so would be considered contrary to Article 4(3) TEU (which imposes a duty of loyal cooperation on the Member States of the EU and its institutions in their dealings with one another), and Article 26 of the VCLT (according to which, parties to treaties must act in good faith).[32]

II. THE ONGOING AND FORTHCOMING NEGOTIATIONS

A. *Negotiating Two Agreements*

Article 50 TEU envisions a withdrawal agreement with the exiting Member State that sets out the arrangements for that State's withdrawal and it is accordingly meant to include the terms and conditions for leaving the EU.[33] However, while providing for a divorce settlement, Article 50(2) TEU also foresees the interconnection between this settlement and future arrangements. The provision states that an agreement with the departing State shall be negotiated and concluded, "setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union."[34] The reference to the future framework assumes that it will be known and that it could therefore be agreed upon at least in outline during the negotiations of the withdrawal settlement. However, it is less obvious to read Article 50(2) TEU as conferring competence on the EU to regulate, in the withdrawal agreement, both the terms of withdrawal and the full organization of the future relationship. To do so would appear to go beyond merely "taking account of the framework for [the departing State's] future relationship with the Union."[35]

28. *See generally id.*

29. *See* EUROPEAN UNION COMMITTEE, THE PROCESS OF WITHDRAWING FROM THE EUROPEAN UNION, 2015-16, HL 138, at 5 (UK). (citing Professor Derrick Wyatt regarding the process of reapplying to the EU).

30. Tridimas, *supra* note 13, at 304.

31. *Id.* at 305–6.

32. TEU art. 4(3), *supra* note 3, at 13; VCLT, *supra* note 5, art. 26.

33. TEU art. 50, *supra* note 3.

34. *Id.* art 50(2).

35. *See* Piet Eeckhout & Eleni Frantziou, *Brexit and Article 50 TEU: A Constitutional Reading* 23 (UCL European Institute, Working Paper No. 1, 2016). (expounding on whether the EU regulates the terms of

In addition to a withdrawal agreement, another agreement is accordingly expected to be required in order to regulate the future relationship between the parties.[36] However, in light of the wording of Article 50(2) TEU as referred to above, these separate arrangements are likely to be interlinked to some extent. That does not mean that the conclusion of a withdrawal agreement is made conditional on having reached an agreement on the future relationship, nor does it require the parties to reach an understanding on a broad outline on an agreement that is meant to govern future relations.[37] Accordingly, failure to reach a second agreement does not affect automatic exit at the end of the two-year period in the event the withdrawal negotiations prove fruitless.[38] Moreover, the withdrawal agreement as a separate arrangement that is not intended to settle a future relationship has additional implications. While a withdrawal agreement is concluded on the basis of Article 50 TEU, the second agreement will be concluded as an international agreement on a different legal basis in accordance with the procedure in Article 218 of the Treaty on the Functioning of the European Union (TFEU).[39] In order for the latter type of international agreement to be concluded, the contracting party opposite the EU must be a non-EU entity, such as a third country or another international organization. Consequently, the withdrawal arrangement must be agreed on before the parties can decide upon the second agreement.[40] However, there is nothing in Article 50 TEU that prevents the withdrawal agreement to be negotiated in parallel with the agreement that is meant to regulate future relations. Accordingly, it would be legally possible to conclude the agreements in rapid succession.

The withdrawal agreement and an agreement that is meant to regulate future relations between the EU and the departing Member State, as distinct arrangements with different legal bases, means that there are, to some extent, separate procedures to take into account for the two agreements. Article 50(2) TEU refers specifically only to Article 218(3) TFEU and the other provisions in Article 218 TFEU, normally used in relation to the negotiation and conclusion of international agreements, are not mentioned.[41] Accordingly, in contrast to an agreement that is meant to regulate the future relationship between the EU and the departing Member State, the negotiating procedure of the withdrawal agreement is not regulated in the same fashion as the negotiation of other international agreements. One notable difference between Article 50(2) TEU and the normal procedure for international agreements under Article 218 TFEU is that the negotiations and conclusion of the withdrawal agreement will be conducted "in the light of guidelines provided by the European Council."[42] The European Council, as opposed to the *Council*, does not have a role in the negotiation

withdrawal and the framework of the future relationship).

36. Tridimas, *supra* note 13, at 311–13.

37. *Id* at 308.

38. *Id.*

39. Treaty on the Functioning of the European Union, art. 218 (1), May 9, 2008, 2008 O.J. (C 115) [hereinafter TFEU].

40. *Id.; see also* E.U. Committee, supra note 8, at 10-11 (stating that negotiations of a withdrawal agreement must account for a future relationship agreement, but the two agreements must be separate because the former cannot accommodate the details of the latter).

41. Treaty of Lisbon, *supra* note 2, at art. 50.

42. *Compare id. with* TFEU, *supra* note 39, at art. 218(2) ("The Council shall authorise the opening of negotiations, adopt negotiating directives, authorise the signing of agreements and conclude them.").

and conclusion of international agreements. It is normally the *Council* that is involved during negotiations by adopting negotiating directives and addressing them to the negotiator.[43] Further, noticeable differences between the procedures related to the withdrawal agreement and the agreement regulating future relations are apparent at the stage of conclusion; these will be addressed below.

While the two agreements between the EU and the departing Member State are different legal instruments and, to some extent, subject to different considerations, there are also overlapping characteristics between both the negotiations and the conclusion of the different agreements. The reference in Article 50(2) TEU to Article 218(3) TFEU requires that the same procedure used to negotiate international agreements to which the EU intends to enter into will also be used for negotiations regarding a withdrawal agreement.[44] It is accordingly the responsibility of the Council, upon the recommendation of the Commission, to adopt a decision to authorize the opening of negotiations of a withdrawal agreement with the departing Member State and to nominate the negotiator or the head of the negotiating team.[45] Under the procedure for international agreements, the Council will normally instruct the Commission to negotiate and to provide continuing instructions to the negotiator by issuing updated negotiating directives when required to do so in accordance with Articles 218(2) and 218(4) TFEU.[46] Neither of these provisions is referred to in Article 50(2) TEU and, in a strictly literary interpretation of the latter, the status of Articles 218(2) and 218(4) TFEU may be considered uncertain in relation to the withdrawal agreement.[47] However, it would be possible to argue differently in the context of a more purposeful interpretation of Article 50(2) TEU.

In the context of the British withdrawal from the EU, the UK accordingly triggered Article 50 TEU on March 29, 2017.[48] The European Council responded to the British notification by adopting its guidelines on April 29, 2017,[49] which in turn were followed by a recommendation from the Commission to open negotiations on May 3, 2017.[50] The Council adopted the formal decision to open negotiations for a withdrawal agreement with the UK on May 22, 2017 and appointed the Commission

43. TFEU, *supra* note 39, at art. 218(2), (4) ("The Council shall authorise the opening of negotiations, adopt negotiating directives . . . [and] may address directives to the negotiator . . . .") (emphasis added).

44. Treaty of Lisbon, *supra* note 2, art. 50 (stating that International agreements that fall within the scope of the Common Commercial Policy must be negotiated and concluded with due regard to Article 218(3) of TFEU); TFEU, *supra* note 39, art. 218(1).

45. TFEU, *supra* note 39, art. 218(3) ("The Commission . . . shall submit recommendations to the Council, which shall adopt a decision authorising the opening of negotiations and . . . nominating the Union negotiator or the head of the Union's negotiating team.").

46. *Id.* art. 218(2), (4) ("The Council shall authorise the opening of negotiations, adopt negotiating directives . . . [and] may address directives to the negotiator . . . .").

47. TEU, *supra* note 3, at art. 50(2) (requiring that a withdrawing State negotiate and conclude an agreement with the Union, pursuant to guidelines provided by the European Council and in accordance with Article 218(3) of the TFEU).

48. Anushka Asthana, Heather Stewart, & Peter Walker, *May Triggers Article 50 with Warning of Consequence for UK* (Mar. 29, 2017, 10:13 AM), https://www.theguardian.com/politics/2017/mar/29/theresa-may-triggers-article-50-with-warning-of-consequences-for-uk [https://perma.cc/7WN8-T35X].

49. Council of the European Union Press Release 286/17, Council (Art. 50) Authorises the Start of Brexit Talks and Adopts Negotiating Directives (May 22, 2017).

50. *Recommendation for a Council Decision Authorising the Commission to Open Negotiations on an Agreement with the United Kingdom of Great Britain and Northern Ireland Setting Out the Arrangement for its Withdrawal from the European Union*, COM (2017) 218 final (May 3, 2017).

to conduct the negotiations.[51] Due to the procedure in Articles 50 TEU and 218 TFEU and the now ongoing negotiations between the UK and the EU, opinions initially differed over the need for separate agreements to regulate a departing Member State's divorce from the EU and its future relationship with the Union. The UK did not explicitly recognize the need for two agreements in its notification to the European Council of its intention to withdraw from the European Union, although an implicit acknowledgement thereof could possibly be read into the notification[52]

While the British position appears legally acceptable, as long as the withdrawal agreement is concluded prior to the agreement regulating the future relationship between the UK and the EU, it conflicts with the' position of the EU. In the EU's guidelines following the UK's notification to withdraw under Article 50 TEU, the EU has underlined that an agreement on a future relationship between the EU and the UK can only be finalized and concluded once the UK has become a third country.[53]

Moreover, it follows from the European Council's guidelines as well as the Council's negotiating directives addressed to the Commission that the EU has decided to divide the withdrawal negotiations in different phases. The first phase of the negotiations was aimed at providing clarity to the immediate effects of the UK's withdrawal and to settle the disentanglement of the UK from the EU in respect of commitments derived from its status as a Member State.[54] It was made clear that talks would move on to a second phase, including discussions concerning a future framework, only when sufficient progress had been achieved during the first phase of negotiations.[55]

The parties published a joint report on 8 December 2017 which concluded the first phase of the negotiations and signaled that sufficient progress had been achieved to allow for the second phase to start. Subsequently, on 23 March 2018, the European Council adopted guidelines concerning the second phase of the negotiations.[56] Although the EU is willing to discuss "the overall understanding of the framework for the future relationship[,]" it is clear that the EU is not ready to discuss details of future relations or to make an agreement on the framework for future relations legally binding on the basis of Article 50 TEU.[57] This approach adopted by the EU is in accordance with the boundaries of Article 50 TEU and consistent with the need to keep the withdrawal agreement separate from an agreement on future relations.

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51. Council of the European Union Press Release 286/17, *supra* note 49.

52. *Prime Minister's letter to Donald Tusk triggering Article 50*, GOV.UK (Mar. 29, 2017), https://www.gov.uk/government/publications/prime-ministers-letter-to-donald-tusk-triggering-article-50/prime-ministers-letter-to-donald-tusk-triggering-article-50.

53. Council of the European Union Press Release 220/17, European Council (Art. 50) Guidelines for Brexit Negotiations para. 5 (Apr. 29, 2017), http://www.consilium.europa.eu/en/press/press-releases/2017/04/29/euco-brexit-guidelines/ (using a "third country" as a term of art for a country that is not a member of the European Union) [hereinafter April Guidelines].

54. *Id* para 4; Council of the European Union, Directives for the Negotiation of an Agreement with the United Kingdom of Great Britain and Northern Ireland Setting out the Arrangements for its Withdrawal from the European Union, para. 9 (May 22, 2017), https://www.consilium.europa.eu/media/21766/directives-for-the-negotiation-xt21016-ad01re02en17.pdf.

55. April Guidelines, *supra* note 53, at para. 5.

56. Council for the European Union, European Council (Art. 50) Guidelines for Brexit Negotiations para 5. (Mar. 23, 2018), http://www.consilium.europa.eu/media/33458/23-euco-art50-guidelines.pdf.

57. *Id.*

B. *The Role of the European Parliament*

According to Article 50(2) TEU, the European Parliament is required to consent to the conclusion of a withdrawal agreement.[58] This veto power instills the European Parliament with significant influence during negotiations and forces the EU and its Member States, as well as the departing Member State, to take its views seriously.[59] However, it is not clear to what extent the European Parliament can rely on the other provisions in Article 218 TFEU, which regulate the negotiations of international agreements, in order to ensure its rights. The exclusive reference to Article 218(3) TFEU in Article 50(2) TEU seems to indicate that the exit negotiations are not subject to Article 218(10) TFEU, which requires the European Parliament to be immediately and fully informed at all stages of the procedure, including during the negotiating stage.[60] But in the perspective of withdrawal negotiations, this may well be more of an academic issue rather than a practical one. In the context of the withdrawal negotiations between the EU and the UK, the European Parliament has underlined that its full involvement in the negotiations is a necessary precondition for it to give its consent to any agreement reached between the EU and the United Kingdom.[61] This is also a position that has been endorsed by both the European Council[62] and by the Commission.[63]

A second agreement that would regulate the future relationship between the withdrawing State and the EU will be negotiated as an international agreement as described above and would therefore be subject to the full procedure set out in Article 218 TFEU, including the obligation to keep the European Parliament informed in accordance with Article 218(10) TFEU.[64] The rights of the European Parliament under

58. TEU, *supra* note 3, art. 50(2).

59. The role of the European Parliament should also be taken seriously for other reasons. The potential for confidentiality problems, arising from the interaction between the European Parliament and the Commission, is a risk to consider. However, issues concerning confidentiality have been addressed to some extent by the Bureau of the European Parliament. *See generally* Decision of the Bureau of the European Parliament of 6 June 2011 Concerning the Rules Governing the Treatment of Confidential Information by the European Parliament, 2011 OJ (C 190) 2. The Bureau of the Parliament is a body entrusted to lay down rules that govern the Parliament's conduct. It comprises the President and the Vice President and represents the majority of the political groups. In addition, classified information has been addressed by agreement between the European Parliament and the European Council. *See generally* Interinstitutional Agreement of 12 March 2014 Between the European Parliament and the Council Concerning the Forwarding to and Handling by the European Parliament of Classified Information Held by the Council on Matters Other than Those in the Area of the Common Foreign and Security Policy, 2014 OJ (C 95) 1.'

60. *See* TEU, *supra* note 3, at art. 50(2) (providing that agreements to withdraw from the EU "shall be negotiated in accordance with Article 218(3)" of the TFEU).

61. European Parliament Resolution of 5 Apr. 2017 on Negotiations with the United Kingdom Following its Notification that it Intends to Withdraw from the European Union, 2017/2593 (RSP) art. 12.

62. *See* European Council Press Release 220/17, European Council (Art. 50) Guidelines for Brexit Negotiations (Apr. 29, 2017), art. 2 (declaring the EU's negotiating authority with the UK regarding its withdrawal and directing that no separate negotiations occur between the UK and individual Member States.

63. *See Recommendation for a Council Decision Authorising the Commission to Open Negotiations on an Agreement with the United Kingdom of Great Britain and Northern Ireland Setting out the Arrangements for its Withdrawal from the European Union*, at 2, COM (2017) 218 final (May 3, 2017) (recommending that negotiations with the UK follow European Council guidelines).

64. The consent of the European Parliament is also likely to be required for an agreement that will regulate the future relationship between the EU and the UK (this is considered further below). TFEU, *supra*

Article 218(10) TFEU are extensive and have been further enforced by the Framework Agreement adopted by the Parliament and the Commission in 2010.[65] This framework agreement makes it clear that the duty of the Commission, to the extent it runs the negotiations, to keep the European Parliament fully informed at all stages of the procedure applies not only to the process of the negotiations of the agreement, but also to the definition of negotiating directives.[66] The Commission is required to provide the information to the European Parliament "in sufficient time for it to be able to express its point of view if appropriate, and for the Commission to be able to take the Parliament's views as far as possible into account."[67]

C. The Participation of the Member States During the Negotiations

Article 50 TEU regulates the negotiation and conclusion of a withdrawal agreement on behalf of the European Union. In the negotiations between the EU and the UK, the priorities of the Member States are expressed primarily through their participation in the European Council and the guidelines provided by this institution in accordance with Article 50(2) TEU.[68] However, to what extent Article 50 TEU grants the European Union the necessary legal competence to negotiate and conclude a withdrawal agreement is uncertain. The competence issue will be dealt with more extensively below, but it is relevant to note already at this stage that it cannot be excluded that the EU does not have the competence required to conclude the entire withdrawal agreement on its own. Under such circumstances, the participation of the Member States in their own right in the withdrawal negotiations cannot be disregarded.

If the Member States were to play a formal role in the withdrawal negotiations, the situation could be compared with how the negotiations of the agreement concerning the future relations of the withdrawing Member State and the EU are likely to proceed. As the negotiation and conclusion of recent large trade agreements demonstrate, it is far from certain that the EU will have the necessary legal competence to cover all areas involved in this agreement on its own. In the event that the EU cannot conclude an international agreement on its own, it would be necessary to formally involve the Member States and conclude the agreement as a mixed agreement.[69] For example, the CJEU's recent opinion concerning the legal competence of the EU to conclude the Free Trade Agreement with Singapore ("EUSFTA") indicated that there are key aspects of that agreement that requires the formal

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note 39, art. 218. In addition to the express requirements under Article 218 TFEU to involve the European Parliament during the negotiations of such an agreement, the required consent of this institution is another reason why this institution will have an import role also in the negotiations of the future relationship between the EU and the UK. *Id.*

65. *See generally* Framework Agreement on relations between the European Parliament and the European Commission 2010 O.J. (L 304) 47.

66. *Id.* art 23.

67. *Id art.* 24. The Framework Agreement provides that the Commission shall explain "whether and how Parliament's comments were incorporated in the texts under the negotiation and if not why" *Id* at Annex III para. 4.

68. TEU, *supra* note 3, art. 50(2)

69. A mixed agreement is an international agreement whereby the EU and the Member States jointly accept the rights and obligations involved.

participation of the Member States and that it accordingly has to be concluded as a mixed agreement.[70]

There are no established treaty rules on how the EU and the Member States should negotiate or conclude a mixed agreement. Article 218 TFEU deals only with the internal EU procedure and is of general application to most international agreements.[71] There are two features in particular that have characterized the negotiation procedure of these instruments. First, the division between EU and Member State competence has not been associated with the process of the actual negotiation of a particular agreement.[72] Second, the Member States and the EU have avoided firm commitments concerning the allocation of competence.[73] Moreover, a pragmatic approach has often been adopted where the Commission has presented positions of both the Union and the Member States.[74] For example, the Commission appeared as the only negotiator on behalf of both the EU and the Member States during the WTO negotiations in order to ensure maximum consistency in the negotiations.[75] This more amiable approach is in accordance with EU law, where mixed negotiations are required to be coordinated.[76]

However, during the negotiations of a mixed agreement, the Member States remain entitled to express and protect their interests, and have on occasion been known to make their presence clear and distinct.[77] In light of what is at stake in the negotiations between a withdrawing Member State and the EU, there is at least a real possibility that the Member States may want to be well represented in their own right in the negotiations and this could lead to additional difficulties and a sticky negotiation climate. This is particularly relevant in relation to the agreement concerning future relations—an agreement more likely to be of mixed character. For example, while Sweden, Spain, Portugal, the Netherlands, Belgium and Denmark would have a great interest in ensuring an attractive deal concerning fisheries, many others would not.[78]

70. Opinion 2/15, Free Trade Agreement between the European Union and the Republic of Singapore, ECLI:EU:C:2017:376. The Commission has also suggested that the new trade agreement between the EU and Canada ("CETA") should be concluded as a mixed agreement. *Proposal for a Council Decision on the signing of the Comprehensive Economic and Trade Agreement between Canada and the European Union*, at 4, COM (2016) 444 final (July 5, 2016).

71. TFEU, *supra* note 39, art. 218; *see also id.* arts. 207, 219 (showing that certain types of agreements related to the common commercial policy and the monetary policy respectively are specifically catered for in these latter provisions).

72. *See generally* TEU, *supra* note 3. *See also* TFEU, *supra* note 39, art. 218 (noting that the division of competencies has not been associated with the process of negotiation).

73. PANOS KOUTRAKOS, EU INTERNATIONAL RELATIONS LAW 170 (2015).

74. For an overview of how mixed agreements are negotiated, see Lagerlöf E. (2013*), Practical considerations of negotiating, concluding and implementing mixed agreements*, Europarättslig Tidskrift no. 4 2013.

75. *Id.*

76. Opinion 1/94 of the Court, Competence of the Community to Conclude International Agreements Concerning Services and the Protection of Intellectual Property–Article 228 (6) of the EC Treaty, 1994 E.C.R. I-5389, ¶ 108.

77. *See* Alan Beesley, *The Negotiating Strategy of UNCLOS III: Developing and Developed Countries as Partners—a Pattern for Future Multilateral International Conferences?*, 46 L. & CONTEMP. PROBS. 183, 186–88 (1983) (describing the formation of interest groups to represent countries' varying opinions on different issues during the negotiations of UNCLOS). *See also* KOUTRAKOS, *supra* note 73, at 173.

78. EUROPEAN UNION SELECT COMMITTEE, CHAPTER 7: ACCESS AND NEGOTIATING QUOTAS, 2016-17, HL 78 para. 132 (UK).

However, some of the Member States not interested in fisheries, possibly a hypothetical eastern European country, may want to block a deal concerning fisheries unless said country is ensured support for appropriate transitional measures and future access to the withdrawing Member State for its nationals (this is not an entirely unlikely scenario in the context of the British exit). Accordingly, the negotiating position of the EU and the Member States may easily become inflexible which could cause further delay and generate difficulties to agree.

III. CONCLUDING THE AGREEMENTS

A. *Conclusion of Two Different Agreements*

The conclusion of the withdrawal agreement is regulated by Article 50 TEU, where it is decided that the Council will conclude the agreement by a (super) qualified majority.[79] This does not include the withdrawing Member State, which does not take part in any discussions or in any vote in the European Council or the Council concerning matters of withdrawal.[80] By contrast, the Members of the European Parliament ("MEPs") of the withdrawing Member State are entitled to vote when the European Parliament is called upon to give its consent.[81] Moreover, the approval by the Member States of the withdrawal agreement does not appear to be needed.[82] Since the EU Treaties are generally explicit about where Member States must ratify specific agreements (e.g., accession treaties under Article 49 TEU, or an accession agreement to the ECHR under Article 218(8) TFEU[83]), the silence of Article 50 TEU could be considered as precluding the participation of the Member States. However, the competence of the EU to conclude a withdrawal agreement alone, without the Member States as joint contracting parties, is not entirely uncontroversial.[84] Article 50

79. TEU art. 50(2), *supra* note 3, at 39. (According to Article 50(4)(2), "a qualified majority shall be defined in accordance with Article 238(3)(b) of the Treaty on the Functioning of the European Union.") TEU art. 50(4)(2). This means that at least 72% of the members of the Council representing the participating Member States, comprising at least 65% of the population of these States, must agree. The 72% condition requires a majority of 20 Member States instead of 15 that would be required if the Council was acting by a qualified majority of the remaining 27 Member States.

80. *Id.* at art. 50(4).

81. Tridimas, *supra* note 13, at 307. *See also* Michael Dougan, *The Treaty of Lisbon 2007: Winning Minds, Not Hearts*, 45 COMMON MKT. L. REV. 617, 688 (2008) (explaining that there is no express bar on MEPs from the withdrawing state taking part in the European Parliament's vote to approve the withdrawal agreement).

82. *See* TEU art. 50, *supra* note 3 (noting the lack of a provision requiring member states' approval of withdrawal agreements. A withdrawal agreement could not in itself modify EU primary law. Yet, a withdrawal agreement would inevitably have to be accompanied by some changes to the EU Treaties, *inter alia* to Article 52 of the TEU, which lists the names of the Member States. It could, however, be argued that any required changes to the EU Treaties would constitute a housekeeping exercise to be dealt with by the EU and its remaining Member States *after* the conclusion of a withdrawal agreement in a separate agreement amongst the remaining Member States. This exercise would in such circumstances not affect the conclusion of the withdrawal agreement between the withdrawing Member State and the EU.

83. *Id.* at art. 49; TFEU, *supra* note 39, art. 218(8).

84. *See also* JESÚS CARMONA, CARMEN-CRISTINA CÎRLIG & GIANLUCA SGUEO, EUROPEAN PARLIAMENTARY RESEARCH SERVICE, U.K. WITHDRAWAL FROM THE EUROPEAN UNION: LEGAL AND PROCEDURAL ISSUES, 11, (Mar. 2017) ("However, the fact that Article 50 TEU does not require ratification of the withdrawal agreement by the Member States has led some experts to conclude that the withdrawal

TEU confers competence on the EU to conclude an agreement "setting out the arrangements for [the Member State's] withdrawal,"[85] but how do these arrangements relate to the existence of exclusive and shared competence awarded to the Union by the EU Treaties?

The exclusive competences of the European Union are listed in Article 3 TFEU and may be of either explicit or implicit character as provided for in Articles 3(1) and 3(2) TFEU respectively.[86] The implied competence in Article 3(2) TFEU is only relevant in relation to the conclusion of international agreements.[87] International agreements are specifically dealt with in Title V of the TFEU and it follows from Article 216 TFEU that such an instrument involves the conclusion of an agreement "with one or more third countries or international organizations."[88] A withdrawing Member State will not constitute either prior to its withdrawal from the Union and the relevance of Article 3(2) TFEU in the context the conclusion of a withdrawal agreement is therefore uncertain. However, Article 3(2) TFEU is the result of a long history of CJEU case law expressing a rationale that is arguably to a large extent relevant to a withdrawal agreement. For example, according to one of the three principles confined in Article 3(2) TFEU, the EU is awarded exclusive competence for the conclusion of an international agreement in so far as its conclusion may affect common rules or alter their scope.[89] This particular source of exclusive EU competence can be traced back to the so-called ERTA case law, whereby the CJEU has held that the extent to which EU rules are promulgated for the attainment of the objectives of the EU Treaties, the Member States cannot, outside the framework of the EU institutions, assume obligations which might affect those rules or alter their scope.[90] As an expression of the principle of primacy of EU law, the raison d'être of the ERTA case law is to avoid any adverse impact on measures adopted by the EU.[91] This logic is arguably applicable also in relation to the conclusion of a withdrawal agreement. However, the principles expressed in Article 3(2) TFEU and the exclusive competence they confer on the EU are limited.[92] Similarly, the explicit exclusive competence generated by Article 3(1) TFEU is confined to the areas listed in that provision and a withdrawal agreement as such is not specifically referred to among these categories of competence.[93]

Competence conferred to the EU by the EU Treaties that is not exclusive is shared with the Member States according to Article 4(1) TFEU, while Article 4(2) TFEU sets out the designated areas of shared competence.[94] This raises the question

agreement should contain only provisions falling under the EU's exclusive competence (Article 3 TEU)").

85. TEU art. 50(2), *supra* note 3.

86. TFEU, *supra* note 39, arts. 3(1), 3(2).

87. *Id.* at art. 3(2).

88. *Id.* at art. 216(1).

89. TFEU, *supra* note 39, art. 3(2).

90. *See generally* Case C-22/70 Commission v Council [1971] ECLI:EU:C:1971:32, at para. 22.

91. *Id.*

92. *See* TFEU, *supra* note 39, art. 3(2).

93. *Id.* art. 3(1) (according to this provision, the EU has exclusive competence in the following areas; "(a) customs union; (b) the establishing of the competition rules necessary for the functioning of the internal market; (c) monetary policy for the Member States whose currency is the euro; (d) the conservation of marine biological resources under the common fisheries policy; and (e) common commercial policy.").

94. *Id.* art 4(1)–(2).

whether the EU can conclude a withdrawal agreement on the basis of exclusive and shared competence to the extent the agreement requires both categories of competence. The existence of shared competence between the EU and the Member States has previously been considered to mean that there was a *political choice* as to who would exercise this competence—the EU or the Member States.[95] However, with its Opinion 2/15 the CJEU appears to have rejected this theory of "facultative mixity" and now—*as a matter of law*—Member States would be required to participate in all areas of shared competence and the EU would be prevented form single-handedly concluding international agreements containing areas of shared competence.[96]

Despite the unanswered questions raised by the constitutional requirements of the EU Treaties and the law on EU treaty-making competence, these issues have not yet been raised as concerns in the ongoing British withdrawal from the EU. In the annex to its recommendation for a Council decision authorizing the Commission to open negotiations on an agreement with the UK, the Commission took the view that Article 50 TEU confers on the Union an "exceptional horizontal competence" to cover in the withdrawal agreement all matters necessary to arrange the withdrawal.[97] This competence was described as of an exceptional "one-off nature" and strictly for the purposes of arranging the withdrawal from the Union.[98] This interpretation of the competence conferred upon the EU under Article 50 TEU was later endorsed by the Council in its authorization of the recommended directives.[99] While the position of the Commission and the Council may be considered to be a practical approach to the negotiation and conclusion of the withdrawal agreement with the UK, this broad view of EU competence in the context of Article 50 TEU could become problematic depending on the extent of the withdrawal agreement and the areas of competence it would include.

In contrast to the withdrawal settlement and Article 50 TEU, an agreement meant to cover the future relationship between a withdrawing Member State and the EU will be concluded as an international agreement in accordance with Article 218 TFEU.[100] While a qualified majority in the Council is sufficient to conclude a withdrawal agreement, Article 218 TFEU provides different voting requirements for an international agreement, and thus for an agreement covering the future relations of the withdrawing Member State and the EU, depending on its character.[101] While the presumptive rule for all international agreements is qualified majority voting under

95. *See* Allan Rosas, *The European Union and Mixed Agreements*, *in* THE GENERAL LAW OF E.C. EXTERNAL RELATIONS 200, 205–6 (Alan Dashwood & Christophe Hillion eds., 2000) (Rosas notes that where the competence of the EU is non-exclusive, but no competences are reserved for Member States, there is "facultative," or optional, mixity).

96. Opinion 2/15 of 16 May 2017 ECLI:EU:C:2017:376, paras. 243-244.

97. *Id.*

98. *Annex to the Recommendation for a Council Decision authorising the opening of the negotiations for an agreement with the United Kingdom of Great Britain and Northern Ireland setting out the arrangements for its withdrawal from the European Union*, at para. 2, COM (2017) 218 final (May 3, 2017).

99. *Directives for the negotiation of an agreement with the United Kingdom of Great Britain and Northern Ireland setting out the arrangements for its withdrawal from the European Union*, at para. 3, SEC 21009/17 BXT 16 ADD 1 (May 22, 2017).

100. TFEU, *supra* note 39, art. 207. The agreement would have to be concluded with due regard to the specific provisions under Article 207 TFEU if it would be considered to fall within the Common Commercial Policy.

101. *See id.* art. 218.

Article 218(8) TFEU, unanimity is provided for as an exception in certain cases according to the same provision.[102] In the context of an agreement that will cover future relations between a Member State that is leaving the EU and the Union, the most relevant of these exceptions is the requirement of unanimity when an international agreement is characterized as an association agreement.[103] Governed by Article 217 TFEU, an association agreement is concluded with third countries or international organizations in order to establish "an association involving reciprocal rights and obligations, common action and special procedure."[104] The wording of this legal basis is less than clear and the CJEU has not clarified it considerably. In *Demirel*, the Court defined association agreements by reference to the establishment of special and privileged links and the participation of the associated State, at least to a certain extent, in the EU legal system.[105] In practice, association agreements have proved to be a popular instrument and their content varies depending on the associated country.[106]

In addition to the EU procedure to conclude an international agreement, it might also be necessary to consider the national procedures for each Member State. The Member States are legally prevented from participating only if the EU is exclusively competent to conclude the agreement. For example, an EU exclusive agreement would be possible if it in its entirety would fall within the parameters of the common commercial policy, over which the EU has exclusive competence according to Article 3(1)(e) TFEU. However, as discussed above, it appears more likely that the EU will not be able to conclude an agreement that is meant to regulate its future relationship with a departing Member State alone and that a mixed agreement will be needed. In addition to the EU, the remaining Member States would in such circumstances be required to sign and ratify this agreement in their own right in accordance with their respective constitutional requirements. This would in many cases involve the ratification of a signed agreement by not only national, but also by regional parliaments within the remaining Member States. This procedure can become a problem of some dignity due to the sometimes long period between signature and conclusion of an agreement.[107] There is no legal instrument of general application to force the Member States to submit their ratification instruments, although it is sometimes argued that the duty of loyal cooperation could require such steps to be taken by the Member States. However, the possibility of such an obligation has thus far not been put before the CJEU. Due to difficulties with Member State ratification, the EU has occasionally been required to become party to an international convention with only a limited number of Member States.[108] Consequently, not only may the negotiations of the required agreements with a withdrawing Member State risk running on for a lengthy period, but the need for a mixed agreement might well mean

102. *Id.*

103. *Id.*

104. TFEU, *supra* note 39, art. 217.

105. Case C-12/86, Demirel v. Stadt Schwäbisch Gmünd, 1987 E.C.R., 3739.

106. KOUTRAKOS, *supra* note 73, at 148.

107. *See, e.g.*, KOUTRAKOS, *supra* note 73, at 174–75 (Koutrakos highlights an infamous example of such delay: The Cooperation and Customs Union Agreement with San Marino entered into force on March 28, 2002, more than ten years after it was approved by the parties (2002 OJ L84/43)).

108. Frank Hoffmeister, *Curse or Blessing? Mixed Agreements in the Recent Practice of the European Union and its Member States*, *in* MIXED AGREEMENTS REVISITED—THE EU AND ITS MEMBER STATES IN THE WORLD 256–57 (Christopher Hillion & Panos Koutrakos eds., 2010).

that an agreed arrangement could be difficult to put into effect and therefore cause significant delay.

B. The Role of the European Parliament

As already noted above, the conclusion of the withdrawal agreement is dependent on the consent of the European Parliament. However, the European Parliament's exact role may become a matter of controversy. In particular, the exclusive reference to Article 218(3) TFEU in Article 50(2) TEU seems to indicate that the other provisions in Article 218 TFEU do not apply to the withdrawal agreement.[109] Consequently, there is some uncertainty concerning the extent to which the consent of the European Parliament is subject to requirements it otherwise must comply with in relation to international agreements concluded by the EU. For example, Article 218(6)(b) TFEU provides that the European Parliament shall deliver its consent within a time-limit which the Council may set depending on the urgency of the matter.[110] In the absence of consent by the European Parliament within that time-limit, the Council may act.[111] If the European Parliament is not bound by Article 218(6)(b) TFEU in relation to the withdrawal agreement, questions may arise to what extent the European Parliament is expected to deliver its views expediently.[112] In view of the sensitive nature of a withdrawal agreement, this may well not be a wholly academic issue. However, it would be entirely unreasonable for the European Parliament to illegitimately withhold its consent merely because there is no reference to Article 218(6)(b) TFEU in Article 50 TEU. The European Parliament is subject to the duty of loyalty in Article 4(3) TEU and is arguably required to not deliberately obstruct the conclusion process and possibly also required to consent to a withdrawal agreement within an agreed time-limit.[113]

Further, as an international agreement subject to the full procedure in Article 218 TFEU, an agreement concerning future relations between the EU and the UK will likely need the European Parliament's consent.[114] Although there is no dispute concerning the possibility of subjecting the European Parliament to a time limit for consent in these circumstances,[115] previous experience related to the conclusion of international agreements underlines the need to take the European Parliament's

109. TEU, *supra* note 3, art. 50.

110. TFEU, *supra* note 39, art. 218(6)(b).

111. *Id.*

112. *Id.*, art. 218(6)(a).

113. *See also* Case 65/93, Parliament v. Council, 1995 E.C.R. I-643, para. 27-28 (holding that Parliament's obligation to cooperate with the Council had not been discharged).

114. TFEU, *supra* note 39, art. 218. The strengthening of the Parliament's role in EU external relations was one of the Lisbon Treaty's main novelties. The European Parliament's consent is required, for example: (1) if the agreement is characterized as an association agreement; (2) if it established a specific institutional framework by organizing cooperation procedures; (3) if it has important budgetary implications for the Union; or (4) if the agreement covers fields to which the ordinary legislative procedure applies, or the special legislative procedure where the consent of the European Parliament is required." *Id.* art. 218(6)(a)(i) and (iii)-(v) TFEU.

115. *See id.* art. 218(6(b). (establishing that parliament must deliver its opinion within a time limit, which the "Council may set depending on the urgency of the matter";. should no opinion be put forward within this time limit, the Council may act).

involvement seriously. For example, concerning the Agreements on Passenger Name Records (PNR) with the United States, Australia and Canada, the European Parliament was asked to give its consent to their conclusion in May 2010 (the latter two agreements had been applied provisionally since 2006).[116] However, the European Parliament required that they be renegotiated as it felt that their provisions did not provide sufficient guarantees for the protection of fundamental human rights.[117] The Commission started negotiations in January 2011 which, in the case of Australia and the United States, were concluded in September 2011.[118] The European Parliament gave its consent to the conclusion of the EU–Australia Agreement,[119] but required changes in the case of the EU–USA Agreement.[120] Once these changes had been agreed upon, the new version of the Agreement was given the Parliament's consent in April 2012 and entered into force on 1 July 2012.[121]

C. The Role of the CJEU

Although the CJEU does not have a direct part to play in the conclusion of either the withdrawal agreement or the agreement concerning the future relations between the EU and the withdrawing State, this institution may well be awarded a decisive role in determining the legality of both. Prior to its conclusion, the European Parliament, the Council or the Commission has a right based on Article 218(11) TFEU to obtain the opinion of the CJEU as to whether an envisaged international agreement is compatible with the Treaties.[122] In the event the CJEU should answer in negative terms, the envisaged agreement may not enter into force unless it is amended or the EU Treaties are revised.[123] The proposed accession by the EU to the European Convention on Human Rights is a relatively recent example of when the Court found an envisaged agreement to be incompatible with the EU Treaties.[124]

The explicit reference to only Article 218(3) TFEU in Article 50 TEU generates some uncertainty as to whether the Member States and the EU institutions have a right to ask for an advisory opinion in relation to the withdrawal agreement or if this right is available only in relation to an agreement concerning future relations between the EU and the withdrawing State. However, the purpose of Article 218(11) TFEU is to foreclose difficulties which would ensue if, after an international agreement came into force, it was found to be incompatible with EU law.The same rationale is applicable in relation to the withdrawal agreement and legal certainty would arguably require

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116. European Parliament resolution of 5 May 2010 on the launch of negotiations for Passenger Name Record (PNR) agreements with the United States, Australia and Canada, EUR. PARL. DOC. P7_TA(2010)0144 (2010).

117. KOUTRAKOS, *supra* note 73, at 153–54.

118. *Id.* at 154

119. *Id.*

120. *Id.*

121. Agreement between the United States of America and the European Union on the use and transfer of passenger name records to the United States Department of Homeland Security 2012 OJ (L215). *See also* KOUTRAKOS, *supra* note 73, at 153–54.

122. TFEU, *supra* note 39, art. 218.

123. *Id.*

124. Opinion 2/13 on the accession of the European Union to the ECHR [2014] ECLI:EU:C:2014:2454.

that the process of *ex ante* review of compatibility is also open to the withdrawal agreement.[125]

While an advisory opinion allows the CJEU to intervene before the agreements have been concluded, the Court may also become involved *after* the conclusion of either of the two agreements. Accordingly, unlike an accession treaty based on Article 49 TEU,[126] the jurisdiction of the Court over the withdrawal agreement does not seem to be restricted in any way. The withdrawal agreement and an agreement on future relations constitute acts of the Council and they may be subject to an annulment action based on Article 263 TFEU and a plea of illegality in accordance with Article 277 TFEU.[127] In addition, the CJEU could also become involved indirectly by the preliminary ruling mechanism provided for in Article 267 TFEU.[128]

IV. TIME CONSIDERATIONS

A time frame within which the withdrawal agreement must be concluded is provided by Article 50(3) TEU.[129] According to this provision, the EU Treaties cease to apply to the withdrawing Member State from the date of entry into force of the withdrawal agreement or, failing that, two years after the European Council has been notified by the withdrawing State of its intention to leave the EU.[130] Article 50 TEU is accordingly not designed to take into account whether it is actually possible to negotiate and conclude a withdrawal agreement during the designated two year period. The withdrawing State will in any event cease to be a member of the EU even if such an agreement has not been agreed to at the end of this period.[131] It is possible to extend the negotiation period but only by unanimous agreement of the European Council.[132] It is far from certain that all remaining twenty-seven Member States would agree to do so. Accordingly, the threat of forced exit from the EU without a withdrawal agreement settling essential aspects of the withdrawal creates considerable pressure to reach a deal prior to the expiration of the negotiation period. The risks attached to the limited time available are accentuated by the procedure involved; even if an agreement between the parties can be reached prior to the two-year deadline, the actual conclusion of a withdrawal agreement may take longer. For example, consent of the European Parliament may not be readily forthcoming, and the need for an opinion by the CJEU on the legality of the proposed agreement cannot be ruled out.

In light of the procedural aspects and the range of topics to be negotiated in the context of a withdrawal from the EU, a speedy exit appears far from straightforward. Greenland's departure from the EEC in 1985, despite the many distinguishing features of that particular case, provides perspective as to the time considerations required for

125. *See* Tridimas, *supra* note 13, at 306–307.

126. Acts relating to the accession of new Member States adopted pursuant to Article 49 TEU are not acts of Union institutions and therefore fall outside the scope of Article 263 TFEU. Case C-313/89 *Commission v Spain* [1991] ECR, para. 10.

127. TFEU, *supra* note 39, arts. 263, 277.

128. *Id.* art. 267.

129. TEU, *supra* note 3, art. 50(3).

130. *Id.*

131. *Id.*

132. *Id.*

a withdrawal agreement.[133] Greenland cared principally about one issue only—namely fish—and had only ten Member States to negotiate with.[134] Yet it took Greenland three years to leave the EEC after its vote to withdraw in 1982.[135] The EU Treaties, with their remaining twenty-seven Member States, are far more complex, and Member States worry about far more than fish. Thus, it is not farfetched to describe the two-year withdrawal period set out in Article 50 TEU as an ambitious target. However, to what extent it is possible to conclude a withdrawal agreement within the two-year period also depends on what the parties attempt to settle within such an agreement. The draft withdrawal agreement between the EU and the UK is rather limited in scope and has left a number of difficult issues to be discussed and decided upon during subsequent negotiations concerning future relations between the parties.[136]

While the negotiation and conclusion of a withdrawal agreement have a fixed deadline of two years, unless extended by a unanimous decision, there is no fixed deadline for the negotiation of an international agreement governing future relations between the EU and the withdrawing Member State.[137] The relevance of previous experience from other concluded international agreements by the EU, with or without the Member States, as a comparative factor to consider is perhaps debatable. A Member State that has withdrawn, or that is in the process of withdrawing, from the EU would enter the negotiations with a domestic regulatory framework built on EU law. Moreover, participation in or cooperation with EU institutions could be facilitated by the that State's previous direct involvement in these institutions. The previous, or expiring, membership status of that State could be used in order to identify the contours of a new relationship. Thus, it might be argued that the negotiations and conclusion of an agreement between the EU and the withdrawn, or indeed withdrawing, State is different in character from other trade agreements entered into by the EU. A new relationship could therefore be agreed upon more quickly. On the other hand, in contrast to other international agreements negotiated and concluded by the EU, the purpose of the negotiations between the EU and a withdrawn or withdrawing Member State is to agree on a relationship which is less integrated than what has existed previously. Therefore, it might also be argued that the negotiations are in danger of becoming particularly hostile and more complicated.

In any event, international agreements previously concluded by the EU, either as exclusive EU agreements or as mixed agreements, generate at least an impression of how long the EU and the withdrawing Member State might take to negotiate and to

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133. Greenland was a constituent part of Denmark, not a Member State, and its departure therefore entailed a change in the territorial scope of EU law. Such territorial changes have also occurred in other cases. Algeria had joined the European Communities as part of France but left upon independence in 1962. The reverse occurred with German reunification when the territorial scope of EU law was extended. *See generally* Jean-Paul Jacqué, *German Unification and the European Community*, 2 EUR. J. INT'L L. (1991); Frederik Harhoff, *Greenland's Withdrawal from the European Communities*, 20 COMMON MARKET L. REV. 13 (1983).

134. Harhoff, *supra* note 133.

135. *Id.*

136. European Commission, Task Force for the Preparation and Conduct of the Negotiations with the United Kingdom under Article 50 TEU, Draft Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (Mar. 19, 2018), https://ec.europa.eu/commission/sites/beta-political/files/draft_agreement_coloured.pdf

137. TEU, *supra* note 3, art. 50.

conclude an agreement. An example of a comprehensive international agreement is the free trade agreement between the EU and South Korea, which is considered to be one of the more extensive agreements of that nature entered into by the EU.[138] Negotiations were launched during the spring of 2007, and the agreement was signed in 2010 as a mixed agreement with the Member States as co-signatories.[139] Once the European Parliament had its say, most aspects of the agreement were provisionally applied by the EU after July 2011.[140] However, it was not until October 1, 2015, after all Member States had ratified the agreement under their national procedures, that the Council finally adopted a decision to conclude the agreement, establishing its full application.[141]

Another topical extensive arrangement is the Free Trade Agreement between the EU and Singapore (EUSFTA), where negotiations were launched in early 2010 and completed in October 2014.[142] However, because of the Commission's suggestion to conclude the EUSFTA as an exclusive EU agreement and doubts raised with regard to the extent and the nature of the EU's competence to do so, the Commission requested an opinion under Article 218(11) TFEU from the CJEU in July 2015.[143] In its fairly recent Opinion, the Court held that while large parts of EUSFTA fell within the exclusive competence of the EU, certain areas of the agreement were within the scope of shared competence between the Member States and the EU.[144] According to the CJEU, the existence of shared competence requires the participation of the Member States and meant that the agreement had to be concluded as a mixed agreement.[145] The EUSFTA now awaits signing and ratification by the EU, as well as by the Member States in their own right.[146]

A third example is the new trade agreement between the EU and Canada (CETA). Negotiations began in May 2009 and it was proposed for signature in July 2016, when the Commission suggested that CETA should be concluded as a mixed agreement.[147] As a mixed agreement, CETA accordingly requires the ratification of all Member States in order to be fully effective.[148] Last minute objections by a regional

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138. EUROPEAN COMMISSION, EU-SOUTH KOREA FREE TRADE AGREEMENT: A QUICK READING GUIDE 1 (2010).

139. Council Decision 2011/265 2011 O.J. (L 127) 1 (EU).

140. Council of the EU Press Release 691/15, EU-South Korea Free Trade Agreement Concluded (Jan. 10, 2015).

141. *Id.*

142. *See* European Commission Countries and Regions: Singapore, European Commission, (Sept. 8, 2017) http://ec.europa.eu/trade/policy/countries-and-regions/countries/singapore/ (regarding the negotiations and the relationship between the EU and Singapore) [hereinafter *Commission Information: Singapore*] [https://perma.cc/DF9M-GC4N].

143. *Id.*; Opinion 2/15 of 16 May 2017 ECLI:EU:C:2017:376.

144. *See generally* Opinion 2/15 of 16 May 2017 ECLI:EU:C:2017:376, paras. 243-244.

145. *Id.*

146. *See* European Commission, Singapore, *supra* note 142 (providing further information by the European Commission concerning EUSFTA)

147. *See generally Commission Proposal for a Council Decision on the conclusion of the Comprehensive Economic and Trade Agreement between Canada of the one part, and the European Union and its Member States, of the other part*, at 4, COM (2016) 443 final (July 5, 2016), http://ec.europa.eu/transparency/regdoc/rep/1/2016/EN/1-2016-443-EN-F1-1.PDF [https://perma.cc/UMV5-A7WF].

148. *See generally* European Commission, CETA Explained (Sept. 21, 2017), http://ec.europa.eu/trade/policy/in-focus/ceta/ceta-explained/ [https://perma.cc/793N-MLA7].

parliament in Belgium during autumn 2016 almost derailed the entire agreement, but these objections were eventually successfully dealt with and all Member States have now agreed to ratify CETA. The agreement was officially signed by the EU on October 30, 2016, and the European Parliament gave its approval on February 15, 2017, but it still awaits the formal ratification by the national parliaments of the Member States.[149]

A fourth example is the vast trade agreement between the EU and the US, the Transatlantic Trade and Investment Partnership ("TTIP"), which is currently being negotiated.[150] Negotiations began in July 2013, but it is—at the time of writing—uncertain whether the parties will be able to agree on a final text.[151]

V. PROVISIONAL APPLICATION OR AN INTERIM AGREEMENT

The different time considerations surrounding the withdrawal agreement and an agreement that will settle the future relationship between the EU and the withdrawing Member State could present difficulties. The two-year period prescribed for the negotiation and conclusion of the withdrawal agreement may well mean that this agreement could enter into force before an agreement meant to govern future relations has been decided upon. This asymmetry could cause a scenario in which a State has left the EU, but where no agreement exists to regulate the future relationship between it and the EU. A similar problem could occur if the withdrawing Member State notifies its intention to leave in accordance with Article 50 TEU, but where the parties are not able to come to an agreement or an extension of the negotiating period.

A provisional application of an international agreement that has been agreed upon, but which has not been possible to conclude, is available to the EU according to Article 218(5) TFEU and could remedy some of the problems experienced with the ratification of an agreement covering future relations.[152] Previous EU practice has meant that decisions to apply an agreement provisionally have sometimes been accompanied by citation of the legal basis necessary for the conclusion of the relevant agreement. The voting majority needed for the decision to conclude will also guide the Council in terms of its decision to apply an agreement provisionally. The assent or opinion of the Parliament has in the past not been sought before a decision on provisional application,[153] but it is doubtful if this institution would acquiesce to such a

149. *See generally* European Commission Press Release, EU-Canada trade agreement enters into force (Sept. 20, 2017), http://trade.ec.europa.eu/doclib/press/index.cfm?id=1723 [https://perma.cc/RYX4-2VVS].

150. *See generally European Commission Services' Position Paper on the Sustainability Impact Assessment in Support of Negotiations of the Transatlantic Trade & Investment Partnership Between the European Union and the United States of America*, at 1, COM (2016), http://trade.ec.europa.eu/doclib/docs/2017/march/tradoc_155462.pdf.

151. *Id.*

152. One example of where the provisional application has been put to use in relevance to mixed agreements is the Europe-Mediterranean Agreement between the EU and its Member States and Lebanon where provisions concerning trade and trade related matters was the subject of an Interim Agreement between the two sides (Council Decision 2002/761/EC [2002] OJ L 262/1).

153. *See* I. MACLEOD, I.D. HENDRY & STEPHEN HYETT, THE EXTERNAL RELATIONS OF THE EUROPEAN COMMUNITIES 91 (1996) (stating that the European Energy Charter is an example of where the opinion of the European Parliament was sought; however, this seems to have been an exception rather than a general practice).

practice today. In any event, a provisional application is not a long term solution, nor is it a fully satisfactory temporary answer either. As far as provisional application by the EU is concerned, the agreement is only provisionally applied in relation to those elements that fall within EU competence. To determine what areas fall within EU competence and what aspects that must be dealt with under the competence of the Member States could in itself become a complicated matter; the Member States often dispute competence claims by the Commission. To what extent the Member States would apply an agreement provisionally in their own right is uncertain and any reluctance to do so enhances the ratification problem.[154]

Concerning the asymmetry caused by a withdrawal agreement that may be concluded long before it is possible to agree on an agreement that will govern the future relationship between the EU and the withdrawing Member State, it might be possible to bridge the two agreements by way of an interim solution. However, how this may be done in circumstances of a withdrawing Member State is not without doubt. An interim agreement can be concluded by the EU with a third country on the legal basis normally used to enter into an international agreement. In the perspective of the EU, an interim agreement would therefore allow for the provisions related to EU competence to enter into force immediately.[155] However, an interim agreement concluded in such fashion would face the same challenges as a provisional application and the Member States will not be a party to such an agreement, unless they agree to this solution in their own right. It might also be cumbersome and too time consuming to negotiate a separate interim agreement in addition to a withdrawal agreement and an agreement on the future relationship between the parties.

Another possibility to organize a transitional arrangement covering the period between the entry into force of a withdrawal agreement and an agreement meant to formalize future relations between the parties is to use Article 50 TEU. As also discussed above, it provides the legal basis for "setting out the arrangements of [the Member State's] withdrawal, taking account of the framework of its future relationship with the Union." Accordingly, the wording of Article 50 TEU suggests that an agreement based on this provision can provide transitory measures. However, this interpretation does not give unlimited powers to the EU to conclude a transition arrangement based on Article 50 TEU. For example, it would be legally doubtful to provide an excessively long or unlimited transition period. The use of Article 50 TEU as legal basis for a transitional arrangement has been used by the EU and the UK in the ongoing negotiations. As set out in the draft withdrawal agreement between them, the parties have signalled that a transition period will start to run on the date of entry

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154. *Editorial Comments* 41, COMMON MKT. L. REV. 631, 631 (2004). The constitutions of some Member States do not even accept a provisional application of an international agreement. At least Portugal, Austria and Poland in the EU have in the past had difficulties with provisional application. *See* Frank Hofmeister, *Curse or Blessing? Mixed Agreements in the Recent Practice of the European Union and its Member States*, *in* MIXED AGREEMENTS REVISITED – THE EU AND ITS MEMBER STATES IN THE WORLD 249, 258 (Christophe Hillion & Panos Koutrakos eds., 2010).

155. *See* Ivan Smyth, *Mixity in Practice – A Member State Practitioner's Perspective*, in MIXED AGREEMENTS REVISITED – THE EU AND ITS MEMBER STATES IN THE WORLD 304, 313–314 (Christophe Hillion and Panos Koutrakos eds., 2010) (discussing techniques that the Council uses to immediately apply agreements between Contracting States).

into force of the withdrawal agreement and end on 31 December 2020.[156] To what extent this transition period will prove sufficient remains uncertain.

VI. STILL A MEMBER STATE DURING THE WITHDRAWAL

During the negotiation period, and until a withdrawal agreement has been concluded, the withdrawing Member State remains part of the EU and it therefore retains rights as well as obligations as an EU Member State.[157] The only legal exception to this continuation of rights and obligations is that the withdrawing Member State's representative in the European Council and in the Council is not allowed to participate in any discussion or decision making in these bodies concerning the withdrawal.[158] However, in practice it is highly probable, for political and psychological reasons, that the actual capacity of the departing Member State to exercise an influence on the functioning of the EU and on decisions taken by the institutions will be seriously affected, including on matters unconnected with its withdrawal."[159] In addition, the continuing participation by officials of the withdrawing Member State in a vast part of the work within the EU could generate tensions and give rise to conflicts of interests. It is not entirely unforeseeable that some of the departing officials may want to pursue other interests than that of the EU.[160]

The continuing EU membership of the Member State that has decided to withdraw may be a comfort to some, but it could be considered as quite the opposite as well. Once Article 50 TEU has been invoked, the EU membership also carries with it serious implications. One obvious example is the continued contribution by the withdrawing Member State to the EU budget, despite the expressed intention by the withdrawing Member State to no longer be part of the club.[161] However, there are also less obvious implications of continued membership of the EU. The British decision to leave the EU and the ongoing process of withdrawal illustrate this well. For example, in the perspective of the new generation of British trade agreements envisaged by many on the Leave side, it is striking that issues related to legal competence in the context of EU and British external relations respectively have not attracted greater attention. Why does this matter? As considered above, the EU Treaties set out areas

156. Article 121 of the draft withdrawal agreement (available here; https://ec.europa.eu/commission/sites/beta-political/files/draft_agreement_coloured.pdf).

157. *See* TEU, *supra* note 3, art. 50(3) (stipulating when withdrawal from the EU has effect).

158. *Id.* art. 50(4).

159. Jean-Claude Piris, *Which Options Would Be Available for the United Kingdom in the Case of Withdrawal from the EU?*, *in* BRITAIN ALONE!, 111, 114 (Andrea Biondi and Patrick J. Birkinshaw eds., 2016).

160. *See* Tridimas, *supra* note 13, at 308 ("[I]t is difficult to see how the withdrawing Member State can be expected to pursue the interests of the EU in preference to its own interests . . . .").

161. The rules in the EU Treaties related to the EU budget are set out in TFEU arts. 310–24. The British public's reservations about contributing to the EU budget were at the heart of the successful Leave campaign, whose election broadcasts and posters told voters that Brexit would allow Britain to stop giving £350 million a week to Brussels and suggested the money could go to the National Health Service instead. According to a report by the House of Commons Library, the UK's contribution to the EU budget, after the rebate was applied, was an estimated £12.9 billion in 2015. The UK received total public sector receipts from the EU budget of £4.4 billion, making an estimated net contribution of £8.5 billion in 2015. *See* HOUSE OF COMMONS, A GUIDE TO THE EU BUDGET (Oct. 11, 2017), http://researchbriefings.parliament.uk/ResearchBriefing/Summary/SN06455 (detailing the European Union's spending).

where the EU enjoys exclusive or shared competence, which means that the freedom of the Member States to act externally is also curtailed to a greater or lesser degree.[162] Exactly where the lines of demarcation between the EU and the Member States in this respect should be drawn may in itself not be a straightforward exercise.[163] Still, only once such an analysis has been conducted is it possible to assess to what extent EU competence could limit the Member States' freedom of action.

Accordingly, whether the UK is actually permitted to act in an individual capacity at all, outside its obligations to the EU, during the withdrawal procedure may well be controversial to start with. Perhaps the most obvious example of the constraints upon the Member States is the EU Common Commercial Policy ("CCP"), which falls within the exclusive competence of the EU according to Article 3(1)(e) TFEU.[164] Its core is set out in Article 207 TFEU and its first provision reads as follows:

> The common commercial policy shall be based on uniform principles, particularly with regard to changes in tariff rates, the conclusion of tariff and trade agreements relating to trade in goods and services, and the commercial aspects of intellectual property, foreign direct investment, the achievement of uniformity in measures of liberalization, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies. The common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action.[165]

Although it is beyond the scope of this contribution to consider the CCP in greater detail, it is still possible to point towards Article 207(1) TFEU in order to illustrate the width of the exclusive competence enjoyed by the EU to act externally in relation to third parties.[166] The CCP covers a wide range of trade related matters, including services, where the Member States are accordingly prohibited from acting internationally.[167] Put differently, trade belongs broadly to the EU and the EU institutions and the Member States cannot negotiate any trade related agreements with countries in or outside the EU on their own. Consequently, since the UK remains an EU Member State during the withdrawal process, the UK is not legally competent to negotiate, or conclude, trade deals with third countries and organizations while the Article 50 procedure is still ongoing. To continue with such unilateral trade negotiations would be a violation of EU, as well as international law, and an attempt by the UK to surpass these rules would be illegal and seriously damage its relationship with the EU, upon which the UK is dependent in order to get a good exit deal. It is also questionable whether third countries would want to jeopardize their relationship with the EU and conclude an international agreement with the UK during the withdrawal process.

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162. *See supra* Part III.A.

163. *See, e.g.*, CJEU Case 1/13 European Commission, et. al, 2014 ECLI:EU:C:2014:2303 at paragraph 74 (discussing that any competence, but particularly exclusive competences, must be based around conclusions drawn from a detailed analysis of a proposed international agreement and EU law).

164. TFEU, *supra* note 39, art. 3(1)e.

165. *Id.* art. 207(1).

166. *See id* (describing the basis of the common commercial policy).

167. *See id.* art. 207(4) (stipulating instances where the Council must act by a qualified majority in some cases and unanimously in others).

The constraints upon the Member States and consequently upon the UK are not limited to the exclusive competence of the EU; the Member States are also restricted in areas of competence shared between the EU and the Member States.[168] The so called duty of cooperation, which stems (partly) from the loyalty provision in Article 4(3) TEU, entails an obligation of the Member States to facilitate the achievement of the tasks of the EU and abstain from any measure that could jeopardize the attainment of the objectives of the EU Treaties.[169] The UK must accordingly refrain from exercising their full powers which otherwise would be available to them as sovereign. This is a far reaching duty. For example, the CJEU has declared that the Member States and the EU institutions have an obligation of close cooperation in fulfilling the commitments undertaken by them under shared competence when they conclude a mixed agreement.[170] In practical terms, this means that the UK could not even negotiate parts of mixed international agreements concluded by the EU and the Member States together that belong to the sphere of shared competence.

The restraints upon the UK to act externally outside the EU during the withdrawal process are of course problematic in light of the consequences of the British withdrawal from the EU and the British ambitions to forge new trade relationships with countries outside the EU. A number of international trade agreements have been concluded by the EU alone, without the UK a party, and they are consequently only binding on the UK as a matter of EU law.[171] The UK must therefore negotiate new agreements with all those countries and international organizations with which the EU has entered into such agreements. There are also a significant number of mixed agreements concluded by the EU and the Member States together. As also addressed above, these agreements are both signed and ratified by the EU as well as by the Member States. The participation in these agreements by the UK as a sovereign state, alongside that of the EU and other Member States, has prompted many to assume that the UK will continue to enjoy the rights they have under these agreements once they leave the EU. However, in legal terms, the application of mixed agreements to the UK following Brexit will not be automatic. The UK has not had the necessary legal competence to conclude these agreements on its own and has accordingly not been able to assume all rights and obligations of the mixed agreements as a sovereign state. Rather, the UK has concluded all mixed agreements as an EU Member State alongside the EU and the other Member States as a joint contracting party. In other words, they have collectively assumed all rights and obligations in every mixed agreement entered into. If the UK would extricate itself from this joint contracting party it could not thereby assume rights and obligations that were never entered into by it as a co-contractor in the first place.

In addition, to what extent the UK will be able to hold a third party to rights and obligations vested in a particular mixed agreement and assumed by the UK as a co-contractor and sovereign State may also prove to be controversial after a British exit from the Union. To determine the delineation of competences and what rights and obligations have been assumed by the UK and the EU respectively *as a matter of EU*

168. Case C-459/03, Comm'n v. Ireland, 2006 E.C.R. I-4635, at para. 175.

169. Ruling 1/78, 1978 E.C.R. 2151, at para. 33.

170. Case C-459/03, *supra* note 168, at para. 175. For an overview of what the duty of cooperation entails, *see also*, KOUTRAKOS, *supra* note 73, at 182–96.

171. TFEU, *supra* note 39, art. 3(1)(e).

law in relation to each and every mixed agreement will be complicated enough,[172] but this will not settle how third parties will consider the departure of the UK from what they may have legitimately considered to be a joint contracting party. Indeed, *as a matter of international law*, the internal arrangements of one contracting party can in normal circumstances not justify failure to perform an international agreement or affect the validity of that agreement.[173] Accordingly, a third party would not necessarily have to accept a modification of the contracting entity, which here is represented by the EU and its Member States *jointly*. While this is an issue relevant for the UK as well as the EU, the situation may well be considered more precarious for the UK. The UK might find it difficult to argue that it will be able to continue to rely on rights and obligations for which it has assumed responsibility as an *EU Member State* in a mixed agreement that was concluded *alongside* the EU and the other Member States as co-contractors.[174]

One mixed agreement of particular importance is the WTO agreement.[175] When this agreement was entered into in 1994, the EU had exclusive competence to conclude, for example, the General Agreement on Tariffs and Trade 1994 (GATT 1994), and the scope of the exclusive competence of the EU within the WTO framework has since then expanded to cover, amongst others, services (a move signaled by the Lisbon Treaty).[176] Consequently, there are areas of the WTO agreement that the UK was not competent to conclude in the first place and other areas where the UK has not had any legal competence to act for some time. The existing WTO arrangements constitute part of a package deal between the EU and the Member States on the one hand and the WTO members on the other hand. As explained above, the UK will not be able to automatically rely on the same rights and

172. A number of battles have been fought in the CJEU concerning the delineation of competence between the EU and the Member States. *See generally* Opinion 1/94, 1994 E.C.R. I-5267; Case C-476/98, Comm'n v. Germany, 2002 E.C.R. I-9855; Opinion 1/08, 2009 I-11129. A declaration of competence, which is a reflection of the division of EU and Member State competence in relation to the context of the specific agreement to which they are to be parties, has occasionally been used in order to inform third parties to the particular mixed agreement which obligations the Union and the Member States are responsible for respectively. However, the practical relevance of such a declaration—in particular in the third-party perspective—is questionable. Renewals of declarations of competence have often been disregarded despite shifts in competence. Declarations of competence that have been submitted will sometimes merely refer to the relevant Treaty Articles and the principle of implied powers. *See generally* Council Decision 98/392, art. 1(3), 1998 O.J. (L 179) 1, 2 (EC) ; Council Decision 2003/822, annex II, 2003 O.J. (L 309) 14, 17. The declaration submitted in relevance to the Cartagena Protocol on Biosafety, in accordance with Article 34(3) of the Convention on Biological Diversity, was of very broad nature. It read "[t]he exercise of Community competence is, by its nature, subject to continuous development." Council Decision 2002/628, annex b, 2002 O.J. (L 201) 48, 65.

173. VCLT, *supra* note 5, arts. 27 and 46.

174. The EU and the remaining Member States are in a better position to rely on the international law principle of presumption of continuity and be considered as successor of all rights and obligations in a particular mixed agreement despite its modified form in the event of a UK departure. For example, the Russian Federation was generally considered as the successor of the former Soviet Union. *See e.g.*, GERHARD VON GLAHN & JAMES LARRY TAULBEE, LAW AMONG NATIONS: AN INTRODUCTION TO PUBLIC INTERNATIONAL LAW 174–75 (Routledge, Revised 2015) (describing the Russian Federation's adoption of Soviet Union Agreements).

175. *See* Opinion 1/94, 1994 E.C.R. I-5267 (concerning the competence involved when the WTO agreement was concluded).

176. Youri Devuysti, *The European Union's Competence in International Trade After the Treaty of Lisbon*, 39 GA. J. INT'L & COMP. L. 639, 654-55 (2011).

obligations as it currently has under that agreement if it leaves the EU. Any future arrangement between the other WTO members and the UK is therefore likely to involve a process of negotiations where any deal would depend on the political will of the other WTO parties.[177]

The potential difficulties surrounding the WTO are of course underlined by the role played by this agreement in the discussions concerning the British exit from the EU. For example, the Treasury relied upon the WTO option as the worst alternative to EU membership in its analysis of what would happen to the UK economy in the event of a vote to leave the EU in the referendum.[178] It is questionable if they were right in doing so, or at least to what extent such an analysis was correct. Rather, as with other mixed agreements, when the UK leaves the EU and loses its status as a Member State, its status within the WTO becomes a complicated one.[179]

In light of the complications related to exclusive EU agreements as well as mixed agreements and the time considerations involved in the negotiations of international trade agreements, there may well be quite a gap between the British exit from the EU and the moment in time when the UK has secured new formal relations with countries outside the EU. These difficulties are of course complicated further by the fact that the UK has not negotiated trade agreements for over 40 years due to the exclusive competence of the EU to deal with these matters.[180]

CONCLUSION

Article 50 TEU appears seemingly simple and straightforward in its design, but to any Member State attempting to leave the European Union this provision may well be considered a wolf in sheep's clothing. It is designed to deal primarily with a Member State's withdrawal from the European Union, but it is unclear to what extent such an agreement is meant to take account of future relations between the withdrawing Member State and the EU. If a withdrawing Member State intends to have more than minimal relations with the EU, it is likely that they will have to negotiate at least one

177. *See generally* Marise Cremona, *Negotiating Trade Deals Before Brexit?*, SOCIAL EUROPE (July 25, 2016), https://www.socialeurope.eu/2016/07/negotiating-trade-deals-brexit [https://perma.cc/QUK6-W39Q].

178. The UK is not suggesting however that they would remain a party to the EEA agreement, another mixed agreement and as such a legal instrument of the same character as the WTO agreement. *See* Rowena Mason, *Cross-party group of MPs hope to force a vote on UK staying in* EEA, Guardian, Aug. 1, 2017 (describing political consequences of a vote to remain in EEA during Brexit transition). It is difficult to legally reconcile the seemingly contradictory positions adopted by the British government. If the UK does continue to be a party to the mixed agreements concluded by the EU and its Member States together, it would accordingly have to withdraw from the EEA agreement in accordance with Article 127 of that agreement in order not to continue to be bound by it. Agreement on the European Economic Area art. 127, May 2, 1992, 1801 U.N.T.S. 3, 44. According to Article 127 of the EEA agreement, the UK would have to give at least twelve months' notice in writing to the other Contracting Parties in order to withdraw. *Id.* Immediately after the notification of the intended withdrawal, the other Contracting Parties will then convene a diplomatic conference in order to envisage the necessary modifications to bring to the EEA agreement. *Id.*

179. Even if the UK would retain a status as party to the WTO agreement in its own right, it would be very difficult for the British government to simply agree with third countries on a "rolling over" of the provisions of the existing arrangements. *See* Cremona, *supra* note 177.

180. Paul McClean, *After Brexit: the UK will need to renegotiate at least 759 treaties*, FIN. TIMES (May 30, 2017), https://www.ft.com/content/f1435a8e-372b-11e7-bce4-9023f8c0fd2e [https://perma.cc/S7LS-S577].

other agreement. It is far from inconceivable that such a second agreement will have to be concluded with the remaining Member States in their own right as well, but such a mixed agreement adds a range of parameters that will inevitably complicate matters further. The involvement of the European Parliament is another factor to consider. This institution will play an important role during the negotiations and conclusion of both a withdrawal agreement and a second agreement that will regulate the future relationship between the EU and the withdrawing Member State. One must not forget the potential involvement of the CJEU in the process and whether the Court will have to consider the compatibility of any potential agreement with the EU Treaties. It is in this sticky climate that difficult issues of considerable political importance will have to be discussed and decided on.

The British notification to leave the EU submitted on 29 March 2017 means that the British exit is scheduled for late March 2019. In view of the number of difficult issues to discuss and agree on prior to that date and the procedure involved that must be observed, this objective may justifiably be described as ambitious. Regardless of whether a withdrawal agreement can be concluded by 29 March 2019, it will not settle the future relationship between the EU and the UK. However, an agreement that is meant to determine the parties' future relations is expected to take longer to negotiate and conclude than the withdrawal agreement. While this asymmetry could to some extent be mitigated by an interim agreement, or a transitional arrangement, one must not get the impression that such a solution is automatic. This asymmetry could also be addressed by extending the withdrawal period, thereby allowing for an agreement that will govern a future relationship to be negotiated and ready to be concluded immediately after the conclusion of the withdrawal agreement. The availability of this latter option is however questionable from a political perspective. The implications outlined above present a number of challenges that must be considered and prepared for. There is still a risk that the UK will leave the EU without any deal at all or indeed with a withdrawal agreement in place, but nothing to govern the road ahead.

Moreover, it is of course difficult to predict what the outcome of the negotiations between the European Union and the United Kingdom will result in. Few had predicted the outcome of the British referendum to be in favor of leaving the EU; what the politics of the future may give rise to is equally difficult to forecast. Although the ongoing negotiations will be determined by politics, the legal framework may present both obstacles and opportunities. Article 50 TEU is not a direct route to exit, it is better described as a long and winding road ahead. The dust will not settle for some time and the relations between the UK and the EU may yet take a few twists and turns. We ought to keep this well in mind and adopt a pragmatic approach as we move forward.

Does Brexit Normalize Secession?

VICTOR FERRERES COMELLA[*]

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INTRODUCTION: THE PROBLEM

On June 23, 2016, the people of the United Kingdom expressed their wish to exit from the European Union (Union). They did so in a referendum that was held in accordance with the constitutional rules of the United Kingdom. The turnout in the referendum was 72.2 percent.[1] The percentage of voters who supported the "Leave" option was 51.9 percent, while the percentage of those who supported the "Remain" option was 48.1 percent.[2] The government and Parliament were not legally bound to

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1. *EU Referendum Results*, BBC NEWS (June 24, 2016), http://www.bbc.com/news/politics/eu_referendum/results.

2. *Id.*

implement the outcome of the referendum.[3] The principle of parliamentary sovereignty that is central to the British constitutional order speaks against the idea that a referendum is legally binding.[4] It is politically difficult, however, for popularly elected representatives to ignore a direct expression of public opinion.[5] The government decided, therefore, to trigger the procedure of article 50 of the Treaty on the European Union that will make it possible for the United Kingdom to leave the Union.[6] On March 29, 2017, Prime Minister Theresa May, having obtained the pertinent parliamentary authorization that the United Kingdom Supreme Court considered to be constitutionally required,[7] formally notified the European Council of the United Kingdom's intention to withdraw.[8]

The other Member States of the European Union may dislike the result. Their judgment, however, is utterly irrelevant. Withdrawal is ultimately a unilateral move. It is only for the United Kingdom to decide whether or not to get out of the Union. Thus, participation in the referendum was limited to the citizens of the United Kingdom; only their votes mattered.[9]

It is uncontroversial that the unilateral character of Brexit is perfectly legal under European Union law.[10] The Lisbon Treaty, which entered into force in 2009, removed any doubts that may have previously existed about this issue.[11] As a result of the Lisbon Treaty, article 50 of the Treaty on the European Union explicitly provides that a Member State can decide to withdraw from the Union.[12] The Union has a say when it comes to negotiating the many technical details that need to be worked out in order to implement the withdrawal. Indeed, article 50 establishes that the Union and the exiting Member State shall negotiate a treaty to regulate the terms of the separation.[13] For these purposes, the provision fixes a deadline of two years, after which the European Union treaties no longer apply to the exiting state.[14] The important point, however, is that the decision to abandon the Union is for only the concerned Member State to make, in accordance with its own constitutional arrangements.

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3. *See* SELECT COMMITTEE ON THE CONSTITUTION, REFERENDUMS IN THE UNITED KINGDOM, HL 99, at 138–39 (UK) (referencing the advisory nature of parliamentary referendums and the implementation of their results).

4. *See id.* at 29 (discussing the principle of parliamentary sovereignty and its effects on the Brexit vote).

5. *Id.* at 46.

6. Angela Dewan & Bryony Jones, *Brexit Begins: UK triggers Article 50 to Begin EU Divorce*, CNN (Mar. 29, 2017), http://www.cnn.com/2017/03/29/europe/article-50-brexit-theresa-may-eu/index.html.

7. R v. Secretary of State for Exiting the European Union [2017] UKSC 5 (appeal taken from Eng.).

8. Letter from Theresa May, Prime Minister of the United Kingdom, to Donald Tusk, President of the European Council, Prime Minister's Letter to Donald Tusk Triggering Article 50 (Mar. 29, 2017), https://www.gov.uk/government/publications/prime-ministers-letter-to-donald-tusk-triggering-article-50

9. Alice Foster, *EU Referendum 2016: Who Was Allowed to Vote on Brexit?* (June 27, 2016), http://www.express.co.uk/news/politics/649517/EU-referendum-2016-Voting-Voters-Allowed-British-Irish-Commonwealth-Citizens-European (British, Irish and Commonwealth citizens aged 18 or over who were resident in the United Kingdom or Gibraltar were eligible to vote. United Kingdom citizens resident overseas were excluded, however, if they had not been registered to vote at a United Kingdom address in the previous 15 years.).

10. EUR. PARL. DOC. (EPRS 577.971) 1 (2016).

11. *Id.*

12. *Id.* at 2.

13. *Id.*

14. *Id.* at 3–4. (noting that this deadline can be extended, with the consent of the withdrawing state, by a unanimous decision of the European Council).

Withdrawal from the European Union should be viewed as a modality of secession, even if it is not called such. After all, as a result of this process, a political community (the United Kingdom in the case of Brexit) that has been part of a larger political community (the European Union) for a long time becomes independent from it. Article 50 thus legalizes a form of unilateral secession.

The Brexit precedent, therefore, is likely to have an impact on normative discussions concerning the legitimacy of unilateral secession at the domestic level. In particular, the secessionist movements that have emerged in the past decades in various European countries[15] can easily appeal to article 50 by way of analogy. They are prone to argue that, if British citizens are allowed to use democratic means to unilaterally decide to exit from the Union, then, since it would be undemocratic to force the people to be part of a larger political community they no longer want to be associated with, it follows that the Catalans, for example, should also be empowered to decide to withdraw from Spain, provided that democratic means are chosen. This same reasoning would extend to the Scots in the United Kingdom, to the Flemish in Belgium, and to other territorial groups that may wish to sever their links with the states to which they currently belong. Brexit sets a precedent that secessionists might point to when elaborating their justificatory discourses.[16] Thus, Brexit seems to "normalize" democratically chosen unilateral secession.

But is this normative move that secessionists are tempted to make a plausible one? This Article argues that the answer is no.

I. THE CONSTITUTIONAL LANDSCAPE: THE EXCEPTIONAL CHARACTER OF THE UNILATERAL RIGHT TO SECEDE

In order to confront the question of the unilateral right to secede, it is important, first of all, to highlight the exceptional nature of the right to withdraw from the European Union in comparison to other types of secession. If we examine the various institutional answers that domestic jurisdictions have designed with regard to secession, we can distinguish several models. Because the laws of different countries vary in rigidity with respect to the possibility of a territory to exit from its larger political community, these models can be ordered along a spectrum based on the degree to which they set barriers to regional independence.

a) A first model, located on one extreme of the spectrum, is the most rigid. It establishes an absolute ban on secession. Under this model, the national constitution does not allow regions to sever their ties with the existing state. Nor is it possible to amend the constitution in order to facilitate secession. The territorial integrity of the state is an intangible principle that is beyond the reach of the power to amend the constitution.[17]

15. *See generally* Brian Beary, *Seperatist Movements: Should nations have a right to self-determination?*, 2 CQ GLOBAL RES. 85 (Apr. 2008), http://library.cqpress.com/cqresearcher/cqrglobal2008040000.

16. *See generally* PAU BOSSACOMA BUSQUETS, SECESIÓN E INTEGRACIÓN EN LA UNIÓN EUROPEA: CATALUÑA, ¿NUEVO ESTADO DE LA UNIÓN? (2017) [hereinafter BOSSACOMA, SECESIÓN]; *see also* PAU BOSSACOMA I BUSQUETS, JUSTÍCIA I LEGALITAT DE LA SECESSIÓ: UNA TEORIA DE L'AUTODETERMINACIÓ NACIONAL DES DE CATALUNYA 58, 267 (2015) (explaining that article 50 of the Treaty on European Union envisages the right to secede from the European Union).

17. *See* CONSTITUIÇÃO POLÍTICA DA REPÚBLICA PORTUGUESA, SÉTIMA REVISÃO [CONSTITUTION]

b) A second model is less restrictive. Although the constitution does not permit secession, it is possible to modify it in the future in order to allow for it. The principle of the territorial unity of the state is not deemed to be a substantive limit to constitutional revisions.[18]

c) Under a third model, the principle of the territorial integrity of the state is not a constitutional norm that constrains what the ordinary legislature may do. The legislature at the national level may thus pass a law that empowers a particular region to choose whether or not to secede. That region, however, is not constitutionally entitled to organize a referendum on its own. In order to hold a referendum on independence, the region needs to obtain the central legislature's green light.[19]

d) A fourth model offers a more complex combination. On one hand, regions are directly empowered by the Constitution to hold referendums on independence. Authorization by the central government is not required for these purposes. On the other hand, even if a majority of voters express their preference for secession, it does not follow that the central government and the other regions must accept it. Instead, a good-faith negotiation is to be undertaken to work out a new institutional arrangement to resolve the political crisis. Secession is not necessarily the only way out of the crisis.[20]

e) Finally, under a fifth model, it is possible for a constitution to go further to reach maximum flexibility. Each region is constitutionally entitled to secede, and citizens are allowed to express their will at the regional level through democratic decisions that the federal government cannot block.[21]

Aug. 12, 2005, art. 288 (Port.) (stipulating explicitly that the "unity of the state" is a substantive limit that constitutional amendments must respect). *See generally* MONITORUL OFICIAL AL ROMÂNIEI [CONSTITUTION] Nov. 21, 1991, art 152(1) (Rom.) (listing "the indivisible character of the Romanian State" and "territorial integrity" as limits to constitutional revisions).

18. *See generally* S.T.C., Mar. 25, 2013 (B.O.E., No. 87) (Spain) (asserting that secessionist movements can achieve their goals in a legal manner because the Constitution does not place the unity of Spain as an unamendable constitutional principle; in fact, if a region triggers the procedure of constitutional amendment for these purposes, the central government is expected to take this initiative into account, according to the Court). *See also* Víctor Ferreres Comella, *The Spanish Constitutional Court Confronts Catalonia's 'Right to Decide' (Comment on the Judgment 42/2014)*, 10 EUR. CONST. L. REV. 571, 582 (2014) (explaining how the Spanish Constitutional Court left open the possibility that the right to decide may be used to modify the constitution).

19. The United Kingdom seems to instantiate this type of constitutional arrangement, although there has been discussion on this matter. In any event, the referendum on Scotland's independence that was held on September 18, 2014, was based on a statutory authorization granted by the United Kingdom parliament. The Scotland Act 1998, c. 46, sch. 5A (Eng.).

20. Canada exemplifies this approach, which the Supreme Court elaborated in its opinion of August 20, 1998, concerning Quebec's secession. Reference re Secession of Quebec, [1998] S.C.R. 217 (Can.).

21. Ethiopia illustrates this institutional choice. Article 39 of the Constitution grants each "Nation, Nationality or People" in Ethiopia the right to secession. CONSTITUTION OF THE FEDERAL DEMOCRATIC REPUBLIC OF ETHIOPIA, Dec. 8, 1994, art. 39. A supermajority of 2/3 of the members of the legislative council of that Nation, Nationality or People must vote in favor of secession. *Id.* The federal government must then organize a referendum, which must take place within three years from the time it receives the council's decision for secession. *Id.* A majority vote in the referendum is sufficient. *Id.* In its turn, the Constitution of Saint Kitts and Nevis contains a provision (Section 113) allowing the island of Nevis to secede. CONSTITUTION OF ST. KITTS AND NEVIS, June 23, 1983, art. 113. For this purpose, a supermajority of 2/3 of the members of the Nevis Assembly and a supermajority of 2/3 of the voters in a referendum must support independence. In 1998, a referendum was held in the island. REUTERS, *Nevis Vote Fails to End Link to St. Kitts*, N. Y. TIMES (Aug. 12, 1998), http://www.nytimes.com/1998/08/12/world/nevis-vote-fails-to-end-link-to-st-kitts.html. Although 62% of the voters favored independence, they did not reach the required supermajority of 2/3. *Id.*

It is noteworthy that this latter model, under which a unilateral right to secede is fully recognized as part of the constitutional order, is extremely rare in the world.[22] The combination of a unilateral referendum with a unilateral secession under the law is clearly exceptional.

Interestingly, the withdrawal of a Member State from the European Union is an example—at the supranational level—of this very exceptional model. As noted above, Member States are free to call referenda to decide whether to leave the European Union, and the decision to exit is unilateral—the consent of the European Union is not required.[23] Even if the Union and the withdrawing state fail to agree upon the terms of the separation, separation will eventually take place: two years after the withdrawal process was initiated, European Union law will no longer apply to the state concerned (or later, if the European Council, by a unanimous decision, agrees with the state concerned to extend this period).[24]

It bears emphasizing that the European Union exit clause is not based on a remedial theory under which secession is justified if it is proven to be a necessary and proportional means to protect a group of territorially based people against grave injustices.[25] Some scholars have advocated such a theory to justify secession in certain cases.[26] Others have instead advanced non-remedial theories of secession, according to which there is no need for a territorial group to invoke a serious injustice before it can decide to secede from a larger group.[27] The European Union seems to rest on this latter view. Member States are not required to provide a reason for withdrawal.[28] It is utterly irrelevant whether the Member State concerned can plausibly argue that the Union (or another Member State) has infringed their obligations under the treaties, or have committed any injustices. It is the pure will of the exiting state that matters.

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22. *See* Glen Anderson, *Succession in International Law and Relations: What Are We Talking About*, 35 LOY. L.A. INT'L & COMP. L. REV. 343, 351–52 (2013) (listing nations with constitutionally prescribed procedures for secession).

23. Consolidated Version of the Treaty on European Union art. 50, Oct. 26, 2012, 2012 O.J. (C 326) 43 [hereinafter TEU].

24. *Id.*

25. *See* Susanna Mancini, *Secession and Self-Determination*, *in* THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW 481, 483–87 (Michel Rosenfeld & András Sajó eds., 2012) (discussing the different theories of secession).

26. *See, e.g.*, ALLEN BUCHANAN, JUSTICE, LEGITIMACY, AND SELF-DETERMINATION: MORAL FOUNDATIONS FOR INTERNATIONAL LAW 11 (2007) (questioning the practice of labeling secessionists as terrorists on the basis that secession may be justified); ALLEN BUCHANAN, SECESSION: THE MORALITY OF POLITICAL DIVORCE FROM FORT SUMTER TO LITHUANIA AND QUEBEC 38–45 (1991) (arguing that a group that has been victim to a state's "discriminatory redistribution" is justified in secession).

27. Within the set of non-remedial theories, two main approaches should be distinguished. One approach is based on a theory of association. *See generally* CHRISTOPHER HEATH WELLMAN, A THEORY OF SECESSION: THE CASE FOR POLITICAL SELF-DETERMINATION (2005). Another approach is tied to nationalist political conceptions. *See generally* Joseph Raz & Avishai Margalit, *National Self-Determination*, 87 J. PHIL. 439 (1990).

28. *See* Eva-Maria Poptcheva, *Article 50 TEU: Withdrawal of a Member State from the EU*, EUR. PARL. RES. BLOG (Feb. 19, 2016), http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/577971/EPRS_BRI(2016)577971_EN.pdf (stating that article 50 of the Lisbon Treaty does not establish any substantive conditions for a Member State to withdraw from the European Union).

II. THE OFFICIAL MESSAGE: THE RIGHT TO WITHDRAW FROM THE EUROPEAN UNION HAS NOTHING TO DO WITH INTERNAL SECESSION

The framers of the European Union treaties must have been aware of the risk that the explicit recognition of the right of Member States to withdraw from the Union may be used by secessionist movements at the regional level in their justificatory strategies. As already indicated, it was the Lisbon Treaty, which went into force in 2009, that introduced for the first time a provision that explicitly permits Member States to leave the Union per article 50 of the Treaty of the European Union.[29] Interestingly, it was the Libson Treaty that, also for the first time, included a provision requiring the Union to respect the constitutional structures of Member States and their territorial integrity: article 4(2) of the Treaty on the European Union stipulates that the Union shall respect the essential functions of Member States, "including ensuring the territorial integrity" of such States.[30]

Arguably, because of this provision, the European Union cannot be indifferent to the constitutional identity of Member States. European Union law has primacy over national law, but interpretive efforts must be made to ensure a basic harmony between European Union law and the distinctive constitutional principles of Member States.[31] In this context, it is important to stress that Member States have designed different institutional arrangements when it comes to the issue of secession. Whether or not secession is constitutionally legal, and under what conditions it can be legal, are questions that the various Member States have answered differently. In the United Kingdom, for example, the British Parliament can authorize the holding of a referendum on Scotland's independence, and it can also authorize Scotland's independence itself.[32] By contrast, in many other countries, there are important constitutional obstacles to the validity of a parliamentary decision of that sort in the name of territorial integrity.[33] It is plausible to maintain that the European Union must give indirect support to the particular constitutional structures that each country has erected in this field. The Union cannot ignore that secession is constitutionally prohibited under the existing laws of many Member States.

Indeed, Jean-Claude Piris, who was the Legal Counsel of the Council of the European Union for many years, stated that if a territory within a Member State secedes in a manner that breaches the pertinent national constitutional rules, the other Member States of the Union ought not to recognize the new state, and should not open the doors of the Union for it to become a new member.[34] His argument is that one of

29. TEU, *supra* note 23, art. 50.

30. TEU, *supra* note 23, art. 4(2).

31. *See generally* ALEJANDRO SAIZ ARNAIZ & CARINA ALCOBERRO LLIVINA, NATIONAL CONSTITUTIONAL IDENTITY AND EUROPEAN INTEGRATION (2013).

32. Charles Livingston & Douglas Waddell, *A Guide to UK Referendums*, BRODIES LLP (Feb. 12, 2016) http://www.brodies.com/news/eu-membership-scotlands-constitutional-future/a-guide-to-uk-referendums.

33. *See, e.g.*, Emma Anderson, *Bavaria Must Remain Part of Germany, Says Top Court*, LOCAL (Jan. 3, 2017, 10:02 AM), https://www.thelocal.de/20170103/bavaria-must-remain-part-of-germany-says-top-court (stating that a Brexit type vote for Bavaria is against the German Constitutional Order).

34. *Troubled Membership: Dealing with Secession from a Member State and Withdrawal from the EU* 19–23 (Euro. Univ. Inst., Robert Schuman Ctr. for Advanced Studies Glob. Governance Programme, Working Paper No. RSCAS 2014/91, Carlos Closa ed., 2014),

the conditions of membership in the Union is respect for the values that the Union was founded upon (as article 49 of the Treaty on the European Union provides), and one of these values is the rule of law (which article 2 of the Treaty of the European Union proclaims).[35]

The implied message that European Union law conveys is straightforward: "Don't get confused. The fact that Member States are empowered to secede from the Union does not mean that internal secession may be acceptable. Quite the contrary—the Union embraces the unity and territorial integrity of Member States as constitutional values to be protected under European Union law, to the extent that national constitutional norms embrace them."

The next question, then, is: Why is a Member State exiting from the Union treated differently from a region seceding from a Member State? We need a theory to make normative sense of this contrast.

We can, of course, craft doctrinal categories to mark the difference. In a recent decision by the German Constitutional Court concerning Bavaria, for example, an implicit distinction is drawn between the nature of the European Union treaties, on one hand, and the nature of the federal Constitution of Germany, on the other.[36] In previous decisions, the German Constitutional Court had held that the Member States of the European Union are the "masters of the Treaties" ("Herren der Verträge").[37] Because there is no European demos, the Member States are the subjects that have the power to create the Union and to amend it.[38] In contrast, in its recent decision on Bavaria, the German Constitutional Court held that it is not possible to conduct a Bavarian referendum to allow citizens to express their view about secession from Germany.[39] It is not constitutionally valid, the Court reasoned, for a "Land" (a region) to leave the federation, since the federal Constitution of Germany is the expression of

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https://www.researchgate.net/publication/305044432_Troubled_Membership_Dealing_with_secession_from_a_member_state_and_withdrawal_from_the_EU (examining how a seceding state may seek admittance to the Union if its "main birth" violates the value of the rule of law).

35. *See, e.g.*, Piris's reflections on the independence of Catalonia and Scotland in light of European Union law, Jean-Claude Piris, *La Unión Europea, Cataluña y Escocia (Cuestiones jurídicas sobre las recientes tendencias secesionistas en los Estados Miembros de la UE)*, 37 TEORÍA Y REALIDAD CONSTITUCIONAL 101, 118 (2016) (hypothesizing that if Catalonia seceded from Spain and joined the European union it would have to respect the values the Union was founded upon, found in article 49). For a similar position, *see generally* Carlos Closa, *Secession from a Member State and EU Membership: The View from the Union*, 12 EUR. CONST. L. REV. 240, 262-264 (2016). Joseph Weiler, in turn, has been even more critical of secessionist movements within Member States of the European Union. He argues that even when those movements comply with internal constitutional norms, the European Union should not be friendly to them. *See* Joesph Weiler, *Scottish Independence and the European Union*, 12 INT'L J. CONST. L. 507, 507-509 (2014).

36. Bundesverfassungsgericht [BVERFG] [Federal Constitutional Court], 2 BvR 349/16, Dec. 16, 2016 (Ger.), https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2016/12/rk20161216_2bvr034916.htm.

37. *See generally* Bundesverfassungsgericht [BVERFGE] [Federal Constitutional Court] Oct. 12, 1993, 89 ENGSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 155 (171) (Ger.).

38. *Id.*

39. BVerfG, 2 BvR 349/16, Dec. 16, 2016; Emma Anderson, *Bavaria Must Remain Part of Germany, Says Top Court*, LOCAL (Jan. 3, 2017, 10:02 AM), https://www.thelocal.de/20170103/bavaria-must-remain-part-of-germany-says-top-court.

the will of the German people as a whole. The Länder (the regions), the Court has said, are not the "masters of the Constitution" ("Herren des Grundgesetzes").[40]

This is an interesting doctrinal construction that can be used to convey the general idea advanced in this Article: the Member States are the "masters of the treaties," and it is therefore possible for each of them to leave the European Union. The regions or states that are part of a federation, in contrast, are not "masters of the federal Constitution" and are therefore not granted a right to unilaterally secede.

This construction is plausible, but it needs to be supported by stronger normative reasons. It is a conclusion of an argument, rather than the argument itself.

III. A WRONG PATH: APPEALING TO THE PRINCIPLE OF CONSENSUALITY UNDER INTERNATIONAL LAW

There seems to be an easy way to rationalize the contrast between withdrawal from the European Union, on one hand, and internal secession, on the other. It is simply a matter of noting that the European Union is ultimately an international organization. Because Member States are sovereign, they are as free to enter international organizations as they are to exit from them.[41] Their consent to be members of a particular organization is necessary to justify the obligations they acquire as a result of membership. Unilateral exit must always be an option. In contrast, the different regions that form part of a state, even if that state has a federal character, are not sovereign.[42] Their consent to remain in the state is irrelevant.

This argumentative strategy is not convincing, however. It is not clear why consent should play out in the way that this theory suggests. On the contrary, one could argue that because states are free to enter an international organization, there is significantly more normative room for that organization to establish that withdrawal is not possible. Because states cannot be forced to become members of an organization, it is perfectly legitimate for an organization to prohibit unilateral exit.[43] If a state chooses to enter such an organization, it has fully consented to this consequence. The principle of *pacta sunt servanda* fully applies.[44] In contrast, most states in the world have the territorial shape they have, which usually includes a variety of different cultural or national groups, as the accidental result of royal marriages, international pacts, wars, etc.[45] A regional territory may thus find itself under the

40. BVerfG, 2 BvR 349/16, Dec. 16, 2016.

41. *See, e.g.*, Treaty of Lisbon Amending the Treaty on the European Union and the Treaty Establishing the European Community art. 50, Dec. 13, 2007, 2007 O.J. (C 306) (explicitly allowing Member States to leave the European Union).

42. *See, e.g.*, BVerfG 2BvR 349/16, Dec. 16, 2016 (Ger.) (holding that the Federal State of Bavaria could not secede).

43. *See* Laurence R. Helfer, *Exiting Treaties*, 91 VA. L. REV. 1579, 1594–95 (2005) (summarizing whether express or implied unilateral exit is legal or desirable); *see also* HENRY M. SCHERMERS & NIELS M. BLOKKER, INTERNATIONAL INSTITUTIONAL LAW: UNITY WITHIN DIVERSITY 98–109 (5th rev. ed. 2011) (explaining that withdrawal may be detrimental to international organizations and that it has been precluded in some instances).

44. *See* Helfer, *supra* note 43, at 1580 ("The international legal system is grounded on a fundamental principle: pacta sunt servanda—treaties must be obeyed."); John K. Setear, *An Iterative Perspective on Treaties: A Synthesis of International Relations Theory and International Law*, 37 HARV. INT'L L.J. 139, 159 (1996) (explaining the theory of *pacta sunt servanda*).

45. *See* Robert L. Carneiro, *A Theory of the Origin of the State*, 169 SCI. 717, 733–34 (1970) (explaining

jurisdiction of a state without its population ever having consented to this situation.[46] If we think that consent matters, therefore, it seems that it speaks more in favor of allowing some forms of internal secession than in favor of international organizations having to permit unilateral exit.

Here, one can recall Alexis de Tocqueville's provocative discussion about why novels were not popular in America.[47] According to de Tocqueville, because women in America were raised to enjoy freedom and thus make their own decisions about marriage, public opinion was not very sympathetic to the plight of women who felt unable to honor the duties they acquired as spouses.[48] By contrast, in Europe, the more accidental or forced nature of marriage made illegitimate love during marriage more understandable.[49] Novels that tried to excite the reader's sympathy in this regard were more successful in Europe than in America.[50]

Similarly, we could maintain that the situation of a particular community that was forced to become part of a more extended state should inspire our sympathies when the people of that community insist on secession, while the state that freely took the step to become a member of an international organization that does not permit free exit should not attract our sympathies when it claims that it is entitled to leave that organization.[51]

Indeed, it is not unprecedented for an international organization to deny an unqualified right to leave.[52] The Charter of the United Nations, notably, does not include a provision that explicitly allows for withdrawal.[53] This is in contrast to the Covenant of the League of Nations, which did include such a clause.[54] At the United Nations' founding moment, an interpretive declaration was adopted that disfavored withdrawal.[55] It stated that the organization would not compel a state to continue its membership, if that state felt constrained to withdraw "because of exceptional circumstances."[56] Nor would the United Nations compel a Member to remain in the organization if the Member's rights and obligations were changed by Charter amendment to which the Member had not concurred and which it found unable to

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several theories for historical state organization, including coercive theories that merge different cultural gaps).

46. *See id.* (illustrating a coercive theory of state expansion).

47. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 666-67 (Henry Reeve trans., Pa. St. U. 2002).

48. *Id.* at 660-65

49. *Id.* at 666-67.

50. *Id.* at 667.

51. Interestingly, when political federations are constructed from below, so that states are really free to join the new federation, it should be easier to deny them the right to secede, once they are in. The United States of America exemplifies this dynamic.

52. *See* HENRY G. SCHERMERS & NIELS M. BLOKKER, INTERNATIONAL INSTITUTIONAL LAW: UNITY WITHIN DIVERSITY 96-110 (5th ed., Martinus Nijhoff 2011) (discussing the example of WHO and UNESCO's failure to recognize the withdrawals of Czechoslovakia, Poland, and Hungary).

53. *See generally* U.N. Charter ch. II.

54. *See* League of Nations Covenant art. 1 ("Any Member of the League may, after two years' notice of its intention so to do, withdraw from the League, provided that all its international obligations and all its obligations under this Covenant shall have been fulfilled at the time of its withdrawal").

55. *See* Hans Kelsen, *Withdrawal from the United Nations*, 1 W. POL. Q. 29, 29-43 (1948) (citing charter of the United Nations).

56. *Id.* at 29.

accept, or if an amendment duly accepted by the necessary majority in the Assembly or in a general conference failed to secure the ratification necessary to bring such an amendment into effect.[57] The right to exit that emerged from this interpretive declaration was thus a qualified one.[58]

Similarly, according to many experts, before article 50 of the Treaty on the European Union was adopted, Member States did not have an unqualified legal right to exit.[59] This Article will later argue that there are good institutional and pragmatic reasons for European Union law to grant Member States the right to withdraw. The important point at this juncture, however, is that given the principle of consensuality, it would not have been illegitimate for the Union to deny such a right, for no state was ever forced to become part of the Union.[60]

IV. THE EUROPEAN UNION WITHDRAWAL CLAUSE AS AN INSTRUMENT OF SUPRANATIONAL INTEGRATION

So we must dig more deeply in order to construct an argument that justifies the contrast between Member States leaving the European Union, on one hand, and domestic secession, on the other.

A plausible argument is as follows: The European Union is a work in progress. It aims to achieve an ever closer union among the European peoples. In contrast, at the domestic level, states have already attained a strong internal unity. The European Union exit clause makes it possible for the Union to march along an ambitious integrationist path, while allowing for the possibility that a Member State will feel unable to follow along. Because the Treaties can only be amended by the unanimous consent of all Member States,[61] there is the risk that one of them will disagree with an important amendment and thus block the proposed change. In some circumstances, the recalcitrant state may come to the conclusion that it is better to abandon the Union, so that the other states may continue their common project.

As Christophe Hillion wrote, "somewhat paradoxically, the recognition of a right to leave can contribute to the pursuit of an 'ever closer union among the peoples of

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57. *Id.* at 30.

58. *See id.* at 42 (discussing the legal ramifications of having no clear provision in UN charter highlighting ability to withdraw).

59. *See generally* LUIS MARÍA DÍEZ-PICAZO, LA NATURALEZA DE LA UNIÓN EUROPEA 87-90 (2009); KOEN LENAERTS & PIET VAN NUFFEL, CONSTITUTIONAL LAW OF THE EUROPEAN UNION 363 (2005) (discussing the grounds for withdrawal of a Member State from the European Community [source written prior to the signing of the Lisbon Treaty in 2007]); and Raymond J. Friel, *Secession From the European Union: Checking Out of the Proverbial "Cockroach Motel,"* 27 FORDHAM INT'L L. J., 590, 600-609 (2003) (discussing the possibility of secession from the European Union and federations generally [source written prior to the signing of the Lisbon Treaty in 2007]). A referendum, however, was held in the United Kingdom in June 1975, to ask voters whether the United Kingdom should leave the European Community. JOHN TODD, THE UK'S RELATIONSHIP WITH EUROPE: STRUGGLING OVER SOVEREIGNTY 33 (2016). The British authorities assumed, therefore, that Member States were free to exit, even if, at that time, there was no explicit clause in the Treaties granting a right to withdraw.

60. Admittedly, the absence of an explicit rule on the question of withdrawal made it problematic to hold the view that states had consented to irreversible membership. For a discussion on the potential advantages and disadvantages of constitutional silences on the issue of secession, *see generally* Vicki C. Jackson, *"Secession, Transnational Precedents, and Constitutional Silences"*, *in* NULLIFICATION AND SECESSION IN MODERN CONSTITUTIONAL THOUGHT 314, 314-342 (Sanford Levinson ed., 2016).

61. *See* Treaty on the European Union, art. 48 (4).

Europe' precisely by making it possible for a state to step out of, rather than hold up the integration process."[62] It is important to recall that the withdrawal clause derives from the defunct Treaty establishing a Constitution for Europe, which was part of an effort to build a stronger Union.[63] The President of the European Convention that drafted the Treaty went so far as to suggest that states that were not ready to ratify the Constitution might want to opt for withdrawal, so as not to block the Constitution's entry into force.[64]

Not surprisingly, the introduction of an explicit exit clause has often been invoked to justify the primacy of European Union law over national law.[65] In different academic and judicial quarters, it has been argued that it is possible to accept that European Union law has primacy over national law, including national constitutions, to the extent that Member States can always decide to withdraw from the Union, thus restoring the full applicability of their national constitutions.[66] The Spanish Constitutional Court, for example, reasoned along these lines when it upheld the constitutionality of the primacy clause that figured in the failed Treaty establishing a Constitution for Europe.[67] In a similar vein, the French Constitutional Council made a reference to the possibility to denounce the treaties when it reasoned that the primacy clause was consistent with the French Constitution.[68]

So the exit clause is instrumentally linked to the goal of integration.[69] Whether things will develop as envisioned by the framers is another matter. Whether Brexit will mark the beginning of the weakening, or even the dissolution, of the European Union, or will instead trigger a process of stronger political union, remains to be seen.[70] Even if the former scenario materialized, it would still be true that the European Union's exit clause has a specific rationale connected to the process of integration, a rationale that does not apply in the domestic sphere.

This does not mean, however, that the withdrawing state has the burden of justifying its decision to terminate membership on the grounds that it is unable to embrace a particular European integrationist plan. The fact that the withdrawal clause of article 50 is ultimately tied to the ambitious project of building a stronger European Union does not entail the consequence that the state concerned must prove that its choice to leave is a reaction against a move toward stronger centralization. The rationale of article 50 is implicit and abstract—there is no requirement that the general rationale applies in each and every case where a state invokes it. Brexit, for example, is the upshot of a complicated set of domestic events. Arguably, tactical political

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62. CHRISTOPHE HILLION, LEAVING THE EUROPEAN UNION, THE UNION WAY: A LEGAL ANALYSIS OF ARTICLE 50 TEU 1 (2016).

63. *Id.* at 9.

64. *Id.* at 9-10.

65. *See generally* Pavelas Ravluševičius, *The Enforcement of the Primacy of the European Union Law: Legal Doctrine and Practice*, 18 Jurisprudencija 1369 (2011).

66. *Id.*

67. *See generally* Declaration 1/2004, Dec. 13, 2004, T.C. (Spain).

68. Conseil constitutionnel [CC] [Constitutional Court] decision No. 2004-505 DC, Nov. 19, 2004, Rec. 173 3-4 (Fr.).

69. *See* BOSSACOMA, SECESIÓN, *supra* note 16, at 31 (2017) (extrapolating that a clause allowing for peaceful and democratic exit from the EU helps move towards greater integration).

70. For a very skeptical position on the viability of the European Union, *see* JOHN R. GILLINGHAM, THE EUROPEAN UNION: AN OBITUARY 236-243 (2016).

considerations played a critical role in the decision by the Cameron government to call a referendum on Brexit.

There is a danger, of course, that the right to withdraw will be abused—a Member State may threaten to abandon the European Union if the other Member States do not give it what it wants. Cass Sunstein, for example, has argued against constitutionalizing a right to secede, on the grounds, among others, that the processes of political deliberation and negotiation cannot develop in the right way if each of the regions forming the political community can make a threat to withdraw.[71] In the context of the European Union, this risk cannot be eliminated, though only in rather extreme cases is it likely for a Member State to be prepared to act upon the threat to withdraw if it does not achieve the goal it seeks.

In this connection, it is important to emphasize that article 50 of the Treaty on the European Union does not expressly grant the withdrawing state the right to "withdraw the withdrawal" during the negotiations that take place once the procedure of article 50 has been triggered. It is debated whether or not a Member State can change its mind and revoke its decision to exit.[72] In order to reduce the risk that the right to leave the European Union is invoked in an abusive manner, the better argument is that there is no right to "withdraw the withdrawal" in a unilateral way: Only a unanimous agreement of the European Council can give effect to such a change of mind.[73]

An objection might be made that the link between secession and integration processes could also be defended at the domestic level, in the context of federations that may still transform themselves in a centralizing direction. If, for example, a strong political movement wants to transfer more powers to the federation, but some Member States are reluctant to take that road and are in the position to block the proposed constitutional amendments, would it not be possible to argue that secession might be a way out of the impasse?

There are important differences of degree, however, between the European Union and federal policies. To begin with, the unanimous consent of all Member States is required to modify the European Union treaties.[74] Each state has a veto power.[75] In most federations, in contrast, unanimity is normally not required to pass a constitutional amendment—a super-majority of Member States is sufficient.[76] So the

71. Cass R. Sunstein, *Constitutionalism and Secession*, 58 U. CHI. L. REV. 633, 634 (1991).

72. In the *Miller* case referred to earlier, for example, the Supreme Court of the United Kingdom proceeded on the assumption that notice under article 50 cannot be withdrawn. That was the common understanding of the contending parties to that case. Nevertheless, the issue remains open to debate. *See* Daniel Sarmiento, *Miller, Brexit and the (Maybe Not So Evil) Court of Justice*, VERFBLOG (Nov. 8, 2016), http://verfassungsblog.de/miller-brexit-and-the-maybe-not-to-so-evil-court-of-justice/ (arguing that a notice of withdrawal is not definitively irrevocable).

73. *See* Poptcheva, *supra* note 28, at 5 (2016) (noting that it is "impossible or at least doubtful" from a legal standpoint that a notice of withdrawal can be unilaterally revoked).

74. *See* TEU, *supra* note 24, art. 48 (noting the requirement of unanimous Member State consent to pass an amendment).

75. *Id.*

76. *See generally* Richard Albert, *The Structure of Constitutional Amendment Rules*, 49 WAKE FOREST L. REV. 913, 949 (2014) (describing multiple countries using a majority rather than unanimity requirement for constitutional amendments).

capacity of a few states to block transformative changes in favor of a stronger union is smaller.[77]

Sometimes, however, the unanimous agreement of Member States is required to modify the federal Constitution.[78] Even when that is the case, there is still an important difference between the European Union and such federations: the latter have already attained a high level of centralization.[79] If a proposal to expand the powers of the federal government fails because of the opposition of a few states (or of one state), the situation is not as serious as in the case of the European Union. A political federation is already a very centralized form of government, which possesses sufficient tools to do some important things that need to be done at the federal level.[80] In contrast, the European Union is at a very primitive stage of "federalist" development, so that if important changes towards a stronger political union are frustrated, there are serious reasons for concern. The future of the Union depends on its capacity to deal with certain problems in an effective way. The institutional architecture of the Euro, for example, may have to be significantly reformed for it to survive a future financial crisis. The very existence of the European Union may be in danger if the necessary steps towards a deeper integration in certain fields cannot be taken.

In other words, the withdrawal clause that figures in article 50 of the Treaty on the European Union is there in order to facilitate the strengthening of a Union that is still too weak as a federation. Political federations, in contrast, do not need to incorporate secession as an integrationist mechanism, since they are already strong enough to carry out their tasks effectively and thus guarantee their future existence.

If the argument sketched in this Article is correct, one can conclude that secessionist movements at the domestic level have no good normative reason to invoke the Brexit case as a precedent that renders legitimate their goal to achieve unilateral secession after an affirmative vote is casted in a regional referendum.

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77. It may be contended that in order to promote a stronger European Union, it would have been better to eliminate the unanimity rule to change the treaties. This may very well be true. The important point, however, for purposes of our discussion, is that the aim of the withdrawal clause was to advance European integration.

78. *See* Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c. 11 (U.K.) (noting the requirement of the unanimous consent of all the provinces for certain amendments to be enacted in the Constitution of Canada).

79. *See* D. Bruce Shine, *An Analysis of the Terms and Level of Implementation of the European Union's Collective Dismissal Directive and the United States' Warn Act. Another Example for the European Union on the Relative Merits of Political Federation over Confederation?*, 12 FLA. J. INT'L L. 183, 227 (1998) (quoting the former U.K. Foreign Secretary explaining that the EU is not a federation because it is not the union that gave power to the states, but rather the states that pooled their power into a central authority); Armin von Bogdandy, *The European Union as a Supranatural Federation: A Conceptual Attempt in Light of the Amsterdam Treaty*, 6 COLUM. J. EUR. L. 27, 41 (2000) (arguing that the EU is a supranatural federation because its form of government is more fragmented than a federation).

80. *See* von Bogdandy, *supra* note 79, at 33 (noting the powers of the EU, and what it is capable of accomplishing).

A Little Bit Brexit? An Analysis of the Rules Governing Post-Withdrawal Treaties

JENS C. DAMMANN[*]

ABSTRACT

On March 29, 2017, the United Kingdom formally notified the European Council of its intention to withdraw from the European Union. The United Kingdom's government and the European Union now face the difficult task of negotiating their future relationship. If these negotiations fail, the United Kingdom will be forced to trade with the European Union under the rules of the World Trade Organization, an outcome that many economists expect to have profoundly negative consequences for the economy of the United Kingdom, as well as for some of its European trading partners.

As a practical matter, the prospects for reaching a compromise on these matters between the United Kingdom and the European Union depend greatly on the applicable voting requirements on the side of the European Union. Under the general rules of European Union law, a comprehensive treaty may well require a unanimous decision in the Council where the Member States are represented. Such a unanimity requirement would make it very difficult to attain a deal: at least some Member States are bitterly opposed to granting privileged access to markets in the European Union without full recognition of the Free Movement of Workers, yet the United Kingdom's government has put the rejection of the principle of Free Movement at the core of its Brexit agenda.

It is important to note, therefore, that the Treaty on European Union contains special majority rules governing withdrawal agreements. Such agreements, aside from needing the consent of the European Parliament, require a mere qualified majority in the Council. The decisive question, then, is whether the withdrawal agreement is limited to governing the withdrawal as such, or whether it may also stipulate the withdrawing country's future status vis-à-vis the European Union. In the latter case, a comprehensive deal on the future relationship could avoid the sword of Damocles in the form of a unanimity requirement.

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This Article, however, argues that such an extensive understanding of the potential coverage of the withdrawal agreement must be rejected. Withdrawing Member States are perfectly free to negotiate their future relationship with the European Union. But there are compelling doctrinal and policy reasons to demand that any deal regarding the future relationship must satisfy the general rules of European Union law, including any unanimity requirement that these rules may impose.

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I. INTRODUCTION

On March 29, 2017, the United Kingdom formally notified the European Council of its intention to withdraw from the European Union.[1] Under Article 50 of the Treaty on European Union (TEU), this simple step marks the beginning of the UK's exit from the European Union.[2] The United Kingdom and the European Union now have two

1. Stephen Castle, *U.K. Initiates 'Brexit' and Wades Into a Thorny Thicket*, N.Y. TIMES (Mar. 29, 2017), https://www.nytimes.com/2017/03/29/world/europe/brexit-uk-eu-article-50.html.

2. *See generally* Consolidated Version of the Treaty on European Union art. 50(2), Mar. 30, 2010, 2010 O.J. (C 83) 13, 43–44 [hereinafter TEU]. Note that the question of whether a Member State can withdraw from the European Union—a question that is answered in the affirmative by Article 50(2) of the Treaty on

years to negotiate a withdrawal agreement and, in particular, the terms governing the United Kingdom's future access to the European Union's market for goods and services.[3] With the consent of all Member States, that two-year period can be extended if need arises.[4] If the parties fail to reach an agreement, the United Kingdom's membership terminates automatically at the end of the two years.[5] In terms of trade in goods and services, the United Kingdom then attains the status of any third country, such as China or Argentina.[6] The applicable trade rules would be those of the World Trade Organization.[7]

Many economists believe that such an outcome would be very damaging to the interests of the United Kingdom, as well as to those of its European trading partners.[8] Early studies estimating the impact of Brexit on the UK economy project substantial welfare losses from reduced trade.[9] This is hardly surprising. Given that more than

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European Union—is strictly distinct from the question of whether a Member State can withdraw—or even be expelled from—the Eurozone while staying in the European Union. According to the prevailing view, a Member State has no unilateral right to leave the Eurozone while staying in the European Union. *E.g.*, Phoebus Athanassiou, *Withdrawal and Expulsion from the EU and EMU: Some Reflections* 4 (Eur. Cent. Bank, Legal Working Paper No. 10, 2009) (concluding that "that a Member State's exit from EMU, without a parallel withdrawal from the EU, would be legally inconceivable"). However, as the author of this article has argued in recent work, this view is misguided. Jens Dammann, *The Right to Leave the Eurozone*, 48 TEX. INT'L L.J. 125, 155 (2013). Similarly, according to the traditionally prevailing view, no Member State can be expelled from the Eurozone. *E.g.*, René Smits, *The Crisis Response in Europe's Economic and Monetary Union: Overview of Legal Developments*, 38 FORDHAM INT'L L.J. 1135, 1139–140 (2015). However, this position, too, is unpersuasive. *See* Jens Dammann, *Paradise Lost: Can the European Union Expel Countries from the Eurozone?*, 49 VAND. J. TRANSNAT'L L. 693, 700–747 (2016) (arguing that expulsion from the Eurozone should be possible as an ultima ratio). *Cf.* Joseph Blocher, Mitu Gulati & Laurence R. Helfer, *Can Greece Be Expelled from the Eurozone? Toward a Default Rule on Expulsion from International Organizations*, *in* FILLING THE GAPS IN GOVERNANCE: THE CASE OF EUROPE 127, 129–30 (Franklin Allen et al. eds., 2016) (noting that the Lisbon Treaty does not explicitly prohibit the expulsion of Member States from the Eurozone and arguing that "[t]he question . . . is not whether expulsion should be permitted at all, but under what circumstances"); Joseph Blocher & Mitu Gulati, *Markets and Sovereignty*, 54 OSGOODE HALL L.J. 465, 486 (2017) (questioning "why an absolute rule against expulsion should prevail" with respect to international organizations, citing Greece and the Eurozone as an example).

3. *See* TEU, *supra* note 2, art. 50(3) (stating when treaties cease to apply to a previous Member State after notification as described in Article 50(2) has occurred).

4. *Id.*

5. *See id.* ("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 . . . unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period.").

6. *See* Alan Beattie, *Brexit and the WTO Option: Key Questions about a Looming Challenge*, FIN. TIMES (July 11, 2016), http://www.ft.com/content/5741129a-4510-11e6-b22f-79eb4891c97d (discussing the WTO Option as a possible post-Brexit relationship between the UK and the EU, where "the UK would rely on its membership of the WTO for access to European markets and as a first step towards full-blown free trade agreements with other blocs and countries—including the EU.").

7. Jens C. Dammann, *Revoking Brexit: Can Member States Rescind Their Declaration of Withdrawal from the European Union?*, 23 COLUM. J. EUR. L. 265, 268 (2017) [hereinafter Dammann, *Revoking Brexit*].

8. N. Gregory Mankiw, *Why Voters Don't Buy it When Economists Say Trade is Good*, N.Y. TIMES (July 29, 2016), https://www.nytimes.com/2016/07/31/upshot/why-voters-don't-buy-it-when-economists-say-global-trade-is-good.html (noting that an "overwhelming number of leading economists agreed that Brexit would most likely lower incomes both in Britain and in the rest of the European Union.").

9. Gianmarco Ottaviano et al., *The Costs and Benefits of Leaving the EU* 2 (Ctr. for Fin. Studies, Working Paper No. 472, 2014), http://dx.doi.org/10.2139/ssrn.2506664 (predicting welfare losses between 1.13% and 3.09% of GDP). *Cf.* Martin Rhodes, *Brexit—A Disaster for Britain and for the European Union*, *in* KEY CONTROVERSIES IN EUROPEAN INTEGRATION 252, 257 (Hubert Zimmermann & Andreas Dür eds.,

forty percent of the UK's exports in goods and services are directed to EU countries,[10] it is hard to imagine that introducing regular tariffs would leave no scars on the UK economy.

Despite the anticipated economic consequences, it is rather difficult to predict the outcome of the UK's negotiations with the European Union. On the one hand, both sides stand to lose if trade in goods and services between the European Union and the United Kingdom collapses.[11] On the other hand, the obstacles to a compromise seem formidable.[12] Perhaps most crucially, many in Europe believe that the European Union simply cannot afford to let the United Kingdom leave the European Union on favorable terms.[13] Out of fear that other Member States may follow, ultimately leading to the Union's collapse, European negotiators may drive a hard bargain, accepting a reduction in mutually beneficial trade rather than jeopardizing the continued existence of the European Union. Indeed, powerful voices on the European side have made it clear that the European Union will not make life easy for the United Kingdom.[14]

2016) (surveying various research papers predicting dire economic consequences as a result of Brexit). *But see* Graham Gudgin, Ken Coutts & Neil Gibson, *The Macro-Economic Impact of Brexit: Using the CBR Macroeconomic Model of the UK Economy (UKMOD)* 44 (Ctr. for Bus. Research, U. Cambridge, Working Paper No. 483, 2016), https://www.cbr.cam.ac.uk/fileadmin/user_upload/centre-for-business-research/downloads/working-papers/wp483revised.pdf (finding that under "pessimistic assumptions about (temporary) uncertainty and trade losses, the path of GDP is projected to be only a little lower than it might have been in the absence of a Leave vote\").

10. Mike Bird, *Pound at Weakest Level in History Against Currency Basket*, WALL ST. J. (Oct. 12, 2016), https://www.wsj.com/articles/pound-at-weakest-level-in-history-against-currency-basket-1476264024.

11. *See* Castle, *supra* note 1 (stating that "both sides stand to lose economically in the event of a breakdown").

12. *See id.*

13. *Cf.* Peter S. Goodman, *'Brexit' Imperils London's Claim as Banker to the Planet*, N.Y. TIMES (May 11, 2017), https://www.nytimes.com/2017/05/11/business/dealbook/brexit-uk-london-banking.html ("[European] [l]eaders are intent on ensuring that Britain absorbs a blow to discourage other countries that might leave."); Peter S. Goodman, *'Brexit' Plan for Financial World? Cross Your Fingers*, N.Y. TIMES (June 15, 2016), https://www.nytimes.com/2016/06/16/business/international/the-financial-plan-for-a-brexit-cross-your-fingers.html (noting that Europe, "[e]ager to discourage other members from considering an exit, . . . would seek to ensure that Britain paid a price"); Rick Gladstone, *The Questions that Could Reshape a Worried Europe in 2017*, N.Y. TIMES (Jan. 28, 2017), https://www.nytimes.com/2017/01/28/world/europe/europe-worries-populism-trump.html (noting that "leaders [of other European Members] . . . have suggested that Britain must be penalized economically to discourage further defections from the bloc"); Peter S. Goodman, *For Britain's 'Brexit' Bunch, the Party Just Ended*, N.Y. TIMES (Oct. 7, 2016), https://www.nytimes.com/2016/10/08/world/europe/for-britains-brexit-bunch-the-party- just-ended.html (noting that former President of France François Hollande had given a speech embracing the idea "that Britain must be forced to swallow unpalatable terms of departure to discourage other European Union members from eyeing the exits").

14. Jonathan Petre, *French Minister's 'Guernsey' Taunt: Politician Warns Britain's Standing will be the same as Channel Island's if Country Votes for Brexit*, DAILY MAIL (June 18, 2016), http://www/dailymail.co.uk/news/articles-3648546/French-Minister-s-Guernsey-taunt-Politicians-warns-Britain-s-standing-Channel-Island-s-country-votes-Brexit.html (reporting that Emmanuel Macron, Finance Minister of France at the time, said Britons would have to keep paying financial contributions or accept a total exit from the EU); Patience Wheatcroft, *Pushing Remain Cause Has Exposed Empty Vitriol of Brexiteers*, EVENING STANDARD (June 15, 2016), https://www.standard.co.uk/business/comment-pushing-remain-cause-has-exposed-empty-vitriol-of-brexiteers-a3272626.html (reporting that Wolfgang Schäuble, Germany's Finance Minister at the time and currently President of the Bundestag, had warned that "out is out").

Even setting aside these broader political considerations, the negotiating positions of the United Kingdom and the European Union are miles apart on important issues. Perhaps the most crucial issue is the relationship between access to the European market for goods and services on the one hand and the free movement of persons on the other hand.[15] Both EU officials and representatives of other Member States have made it clear that the United Kingdom cannot enjoy one without the other: if the UK wants access to the EU markets, then it cannot bar the immigration of workers from other Member States.[16] Most recently, German chancellor Angela Merkel, viewed by many as Europe's de facto leader, ominously warned that the United Kingdom will "pay a price" if it ends the free movement of people.[17]

All else equal, the UK government would like to preserve the United Kingdom's access to the common market.[18] In fact, the Secretary of State for Exiting the European Union David Davis has indicated that the United Kingdom might even be willing to make financial contributions to the EU budget in return for such access.[19] Yet accepting the free movement of persons appears to be anathema to the UK government. Prime Minister Theresa May has stated unequivocally that the UK government will not accept any status that guarantees the free movement of workers enshrined in the Treaty on the Functioning of the European Union.[20] Indeed, the UK government may feel it has little political wiggle room on the latter issue. Misgivings among UK voters over immigration appear to have been the single most important factor behind the referendum victory of the "Leave" camp.[21] The crucial question, therefore, is whether both sides can compromise on these and other matters.

The ease of such a compromise depends in no small part on the applicable voting rules on the side of the European Union. A post-Brexit treaty could take several different forms, and depending on the type of agreement, different voting rules may

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15. *See generally* Justin Huggler, *Angela Merkel Says UK Will 'Pay a Price' if EU Immigration Restricted*, TELEGRAPH (May 17, 2017), http://www.telegraph.co.uk/news/2017/05/17/angela-merkel-says-uk-will-pay-price-eu-immigration-restricted/.

16. *See, e.g.*, Patrick Wintour, *Mandelson Says UK Could Broaden Brexit Negotiating Strategy*, GUARDIAN (Dec. 21, 2016), https://www.theguardian.com/politics/2016/dec/21/mandelson-says-uk-could-broaden-brexit-negotiating-strategy (reporting on European leaders' resistance to any attempts by the UK to "cherry-pick those aspects of the EU that it likes"); Heather Stewart & Jennifer Rankin, *EU Leaders Spend '20 Minutes' on Brexit, After May Returns to UK*, GUARDIAN (Dec. 16, 2016), https://www.theguardian.com/politics/2016/dec/15/theresa-may-returns-to-uk-as-eu-leaders-prepare-for-brexit-battle (noting European leaders' hardline stance that market access must go hand in hand with acceptance of the free movement of persons).

17. Huggler, *supra* note 15.

18. Jenny Gross, *UK Would Consider Paying for EU Market Access After Brexit, Minister* Says, WALL ST. J. (Dec. 1, 2016), https://www.wsj.com/articles/u-k-would-consider-paying-for-eu-market-access-following-brexit-1480598639 (noting that "the government's goal was to get the best possible access for goods and services to the European market").

19. *Id.*

20. *See* Sebastian Mallaby, *Britain's Post-Brexit Warning for Americans*, WASH. POST (Sept. 4, 2016), https://www.washingtonpost.com/opinions/global-opinions/britains-post-brexit-warning-for-americans-seduced-by-trump/2016/09/01/829f7770-704d-11e6-9705-23e51a2f424d_story.html?utm_term=.0f60f1f21242 (discussing the difficulties imposed by the Brexit process for the United Kingdom with juggling the issues of the free movement of people and the goal of maintaining economic ties with the European Union).

21. Stephen Castle, *2 Months After 'Brexit' Vote, Britain's Push to Leave E.U. Is a Muddle*, N.Y. TIMES (Aug. 31, 2016), https://www.nytimes.com/2016/09/01/world/europe/britain-brexit-eu.html?_r=0; Mallaby, *supra* note 20.

apply.[22] Perhaps the most obvious choice of treaty type would be an association agreement. Association agreements can be comprehensive in scope but require a unanimous decision in the Council where the Member States are represented.[23] By contrast, for mere trade agreements, a qualified majority in the Council can be sufficient.[24] However, depending on their scope, even trade agreements may trigger a unanimity requirement,[25] and a post-Brexit trade agreement between the United Kingdom and the EU would in all likelihood be sufficiently broad to do so.[26]

The crucial question, therefore, is whether a post-Brexit EU-UK treaty could possibly avoid the general EU rules on international treaties and the unanimity requirement that these rules often impose. In the case of a Member State's withdrawal from the European Union, the TEU explicitly calls for the conclusion of a so-called "withdrawal agreement" between the withdrawing Member State and the European Union.[27] The Council, where the Member States are represented, only has to approve this withdrawal agreement with a qualified majority rather than with unanimous consent.[28]

However, the permissible scope of the withdrawal agreement is by no means obvious. If one takes the view that the withdrawal agreement may cover the future relationship between the withdrawing Member State and the European Union, the consequences will be far- reaching. Such an interpretation will effectively allow Member States to engineer a partial withdrawal from the European Union without the unanimous consent of all the remaining Member States. By contrast, under a narrow interpretation of Article 50 TEU,[29] the withdrawal agreement can govern only the withdrawal itself and not the post-withdrawal relationship between the European Union and the withdrawing Member State.

In the literature, the legally permissible scope for the withdrawal agreement has received little attention. Some scholars address the issue briefly, but their views diverge. Whereas most voices seem to embrace the prospect of a withdrawal agreement that governs the withdrawing Member State's future status,[30] others flatly reject this solution and assert that a treaty governing the post-withdrawal relationship must be based on the general rules of European Union law.[31]

22. *See* EVA-MARIA POPTCHEVA, ARTICLE 50 TEU: WITHDRAWAL OF A MEMBER STATE FROM THE EU, EUROPEAN PARLIAMENT THINK TANK 4 (Feb. 18, 2016), http://www.europarl.europa.eu /RegData/etudes/BRIE/2016/577971/EPRS_BRI(2016)577971_EN.pdf (discussing the various forms that a Brexit withdrawal could take under the provisions of the TEU and TFEU).

23. *Infra* Part III A.

24. *Infra* Part III B.

25. TEU, *supra* note 2, art. 207(4).

26. *Infra* Part III B.

27. TEU, *supra* note 2, art. 50(2), (3).

28. POPTCHEVA, *supra* note 22, at 4.

29. *See generally* TEU, *supra* note 2, art. 50.

30. Oliver Dörr, *Art. 50 EUV: Austritt aus der Union* [*Article 50 TEU: Withdrawal from the European Union*], *in* GRABITZ/HILF/NETTESHEIM: DAS RECHT DER EUROPÄISCHEN UNION [THE LAW OF THE EUROPEAN UNION] para. 31 (Martin Nettesheim ed., 56th ed. 2015); Dirk Hanschel, *Der Rechtsrahmen für den Beitritt, Austritt zu bzw. aus der Europäischen Union und Währungsunion [The Legal Framework for Accession, Withdrawal to or from the European Union and Currency Union]*, 31 NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT [NVwZ] 995, 997 (2012).

31. Christian Calliess, *Artikel 50 EUV*, in EUV/AEUV 465 (Christian Calliess & Matthias Ruffert eds., 5th ed. 2016); Gavin Barrett, *The Era Of Article 50: How the UK Will Leave the EU If It Opts for Brexit in*

This Article argues that the latter view is indeed correct as a matter of both law and policy. Allowing the withdrawal agreement to govern the withdrawing Member State's future status would conflict with established principles of European Union law. Moreover, while such an approach would potentially reduce hold-up problems arising from a withdrawal, it also has severe downsides that make it undesirable *de lege ferenda.*

The structure of this Article is as follows: Part II provides some general background on the choices facing the United Kingdom following its withdrawal from the European Union and the procedural rules governing the withdrawal process. Part III then argues that there are compelling doctrinal reasons not to allow the withdrawal agreement to regulate the future relationship with the withdrawing state. Part IV shows that such an interpretation of EU law is also supported by important policy considerations.

II. BACKGROUND

On March 29, 2017, the United Kingdom formally notified the European Council of its intention to withdraw from the European Union.[32]

Under Article 50 of the Treaty on European Union, the European Union and the United Kingdom have two years to negotiate a withdrawal agreement.[33] If the deadline is not extended and no agreement is reached, the United Kingdom's membership in the European Union terminates automatically at the end of the two years.[34] What are the alternatives?

A. No Brexit

To begin, it is conceivable that the current or a future UK government could change its mind and decide that the United Kingdom should remain part of the European Union after all. The legal implications of such a reversal may depend on whether it occurs before or after the two-year negotiation period has elapsed.

To the extent that such a change of course occurs *before* the United Kingdom's membership in the European Union has terminated, its legal relevance is controversial. In a related work, the author of this Article argues that as long as the United Kingdom is still a Member of the European Union, a unilateral revocation of the notification of withdrawal is indeed possible.[35] Other scholars maintain that the

Its 23 June, 2016 Vote (Univ. Coll. Dublin, UCD Working Papers in Law, Criminology & Socio-Legal Studies Paper, No. 02, 2016), https://dx.doi.org/10.2139/ssrn.2784214 (asserting that a separate agreement governing the future relationship between the EU and the UK will likely be negotiated in parallel or after the withdrawal agreement).

32. Castle, *supra* note 1.

33. TEU, *supra* note 2, art. 50(3).

34. *See id.* ("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 . . . unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period.").

35. Dammann, *Revoking Brexit*, *supra* note 7, at 302. Other scholars supporting such a right to rescind the formal notification of intent to withdraw include Barrett, *supra* note 31, and Alexander Thiele, *Der*

Treaty on European Union does not address the issue[36] or claim that the Treaty prohibits a unilateral revocation of the notification of withdrawal.[37] According to these scholars, even if the United Kingdom changes its mind, it might not be able to change the course of the withdrawal proceedings.[38]

By contrast, if the UK government experiences a change of mind *after* the United Kingdom's withdrawal has taken effect, then the situation is clear, at least from a legal perspective. Under Article 50 of the Treaty on European Union, a Member State that has withdrawn from the European Union, but wants to rejoin, must reapply for membership.[39] Like any other country seeking EU membership, the former member can only join the European Union if all other Member States consent.[40] Whether such consent would be forthcoming is not entirely obvious. Jean-Claude Juncker, the President of the European Commission, has made it clear that "deserters will not be welcomed back with open arms."[41] However, that statement was made before the Brexit referendum and may have been a merely strategic threat aimed at preventing a victory of the Leave camp. Expressing the exact opposite view, the President of the European Parliament, Antonio Tajani, has more recently made it clear that the United Kingdom would be welcome in the European Union again.[42]

In the end, whether the Member States would consent to the United Kingdom's readmission may depend on its revised terms of membership. Over the years, the United Kingdom has managed to obtain various special deals from the European Union, including, most notably, the "British rebate" arrangement that limits the United Kingdom's financial contributions to the European Union,[43] as well as an exemption from the duty to join the Eurozone.[44] It is entirely possible that some, or all, of the other Member States might condition their approval of the United Kingdom's readmission on the absence of any such special deals for the future.

Austritt aus der EU – Hintergründe und rechtliche Rahmenbedingungen eines Brexit [Leaving the EU – Background and Legal Framework for a Brexit], 51 EUROPARECHT [EUR. LAW] 281, 286 (2016).

36. Hannes Hofmeister, *'Should I Stay or Should I Go?'—A Critical Analysis of the Right to Withdraw from the EU*, 16 EUR. L.J. 589, 594 (2010); Raymond J. Friel, *Providing a Constitutional Framework for Withdrawal from the EU: Article 59 of the Draft European Constitution*, 53 INT'L & COMP. L.Q. 407, 426 (2004).

37. Steve Peers, *Article 50 TEU: The Uses and Abuses of the Process of Withdrawing from the EU*, EU LAW ANALYSIS (Dec. 8, 2014), http://eulawanalysis.blogspot.com/2014/12/article-50-teu-uses-and-abuses-of.html. *See generally* The (ir-)revocability of the withdrawal notification under Article 50 TEU, EUR. PARL. DOC. PE 596.820 (2018).

38. *Id.*

39. TEU, *supra* note 2, art. 50(5).

40. *Id.* art. 49.

41. Griff Witte, *Brits Look to Norway for Post-Brexit Model. Norwegians Urge Brits to Look Again.*, WASH. POST (June 12, 2016), https://www.washingtonpost.com/world/europe/britain-looks-to-norway-for-post-brexit-model-norwegians-urge-britons-to-look-more-closely/2016/06/12/6ca0f568-2839-11e6-8329-6104954928d2_story.html?utm_term=.ece3c733ba7a.

42. John Bynorth, *Dugdale Claims It Suits SNP to Keep the Tories in Power*, HERALD (Apr. 21, 2017), https://www.highbeam.com/doc/1P4-1901653170.html.

43. Council Decision 85/257, art. 2 1985 O.J. (L 128) 15–17.

44. Protocol (No. 15) on Certain Provisions Relating to the United Kingdom of Great Britain and Northern Ireland, 2008 O.J. (C 115) 284.

B. A Special Relationship

The alternative to a hard Brexit or no Brexit is some version of a "soft" Brexit in which the United Kingdom leaves but maintains a special relationship with the European Union. Other countries offer examples of this type of relationship. Before the Brexit referendum, as well as during its immediate aftermath, much attention was lavished on the so-called "Swiss" and "Norwegian" models.[45] Switzerland has concluded a network of bilateral agreements with the European Union that allow Swiss citizens and firms to access European markets even though Switzerland is not a Member State.[46] Norway, together with Liechtenstein, Iceland, and the EU Member States, is a member of the European Economic Area (EEA)[47] and thereby also enjoys access to the European Union's internal market.[48]

For purposes of replicating these relationships, discussion of the "Norwegian model" and the "Swiss model" has exhausted its usefulness. As a practical matter, neither of these options may be on the table anymore. Both the Swiss model and the Norwegian model require full recognition of the free movement of persons,[49] an outcome that Theresa May has categorically rejected.[50] Moreover, as a legal matter, the process for obtaining consent for these models might be different. Both the Norwegian model and, in large part, the Swiss model were implemented via treaties that required and obtained the unanimous support of all Member States.[51] By contrast, in the case of the United Kingdom, the crucial question—and the one that is the subject of this Article—is whether the future relationship between the European Union and the United Kingdom can be negotiated in a way that does not necessitate the unanimous consent of all the Member States. Answering this question turns out to be complicated for two reasons.

45. *E.g.*, Mallaby, *supra* note 20; Hannes Hofmeister, *Splendid Isolation or Continued Cooperation? Options for a State After Withdrawal from the EU*, 21 COLUM. J. EUR. L. 249, 272–287 (2015); Catherine Dixon, *Brexit Brainstorming*, New L. J. (Apr. 7, 2016, 9:42 AM), https://www.newlawjournal.co.uk/content/brexit-brainstorming.

46. *See* Stephan Breitenmoser & Robert Weyeneth, *Die Abkommen zwischen der Schweiz und der EU [The Convention between Switzerland and the EU]*, 23 EUROPÄISCHE ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT [EuZW] 854, 854–58 (2007) (providing a survey of the various bilateral treaties between the European Union and Switzerland).

47. Agreement on the European Economic Area, Jan. 3, 1994, O.J. (L 1) [hereinafter EEA Agreement]. An exception applies to Croatia which has joined the EU but has not yet joined the EEA only because its accession to the EEA has not yet been ratified by all of the EEA members. *Id.*

48. *Id.*

49. Hofmeister, *supra* note 45, at 254, 278.

50. *See* Rebecca Perring, *EU Free Movement Will End by 2019: Theresa May Slaps Down Hammond's Soft Brexit Plot*, EXPRESS (July 31, 2017), https://www.express.co.uk/news/uk/835070/Theresa-May-eu-citizens-freedom-movement-Philip-Hammond-Brexit-news-EU (noting that May is a proponent of ending the UK's recognition of the Free Movement doctrine).

51. In the case of Norway, the crucial treaty is the EEA Agreement. EEA Agreement, *supra* note 47. Because the EEA Agreement constitutes a so-called "mixed agreement," the parties to this agreement include both the European Union and the various Member States. *Id.* In the case of Switzerland, the situation is more complicated because Swiss-EU relations are governed by a multitude of different treaties. Crucially, however, several of these treaties were concluded as association agreements under section 317 of the Treaty on the Functioning of the European Union and therefore required a unanimous decision in the council in which the Member States are represented. *See* Consolidated Version of the Treaty on the Functioning of the European Union art. 218(8), Oct. 26, 2012, 2012 O.J. (C 326) 47 [hereinafter TFEU] (outlining the unanimity requirement).

First, the general EU rules on foreign treaties are of substantial complexity. As a general principle, the European Union can only conclude international treaties if it has competence to do so.[52] European Union law provides for different types of competences, and the question of who must approve a treaty on the side of the European Union depends both on the content of the treaty and on the specific competence on which it is based. Additionally, some types of treaties qualify as so-called mixed treaties that fall partly within the competence of the European Union and partly within the competence of the Member States.[53] In the case of mixed treaties, both the European Union and the Member States are parties to the treaty.[54]

Second, the ability to conclude a comprehensive treaty that governs the post-withdrawal relationship is further complicated by Article 50.[55] Under this provision, the European Union and the Member State have the opportunity to negotiate a withdrawal agreement, and this agreement requires only a qualified majority in the Council and the consent of the European Parliament, meaning that not all Member State representatives have to consent.[56] Hence, it is of critical importance whether the withdrawal agreement must be limited to the withdrawal itself or whether the agreement can also cover the future relationship between the European Union and the withdrawing Member State.

III. THE GENERAL RULES ON TREATIES

This part of the Article addresses the general rules governing treaties between the European Union and third countries, whereas the special role of the withdrawal agreement will be covered in Part IV. There are four relevant types of agreements with third countries: association agreements, trade agreements, neighborhood treaties, and mixed agreements. These types of agreements could be relied on to create a special relationship between the United Kingdom and the European Union after the UK's withdrawal. The crucial question, in each case, is whether the available rules under each Treaty make it possible to conclude a comprehensive treaty (or set of treaties) between the United Kingdom and the EU (hereinafter EU-UK Treaty) without having to obtain the consent of every single Member State (or its representative in the Council).

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52. TEU, *supra* note 2, art. 216(1).

53. *E.g.*, Youri Devuyst, *The European Union's Competence in International Trade After the Treaty of Lisbon*, 39 GA. J. INT'L & COMP. L. 639, 643 (2011); Sean McClay, *Can It Lead from Behind? The European Union's Struggle to Catch Up in International Investment Policy Making in the Wake of the Lisbon Treaty*, 51 TEX. INT'L L.J. 259, 262 (2016). *See generally* Frank Hoffmeister, *Curse or Blessing? Mixed Agreements in the Recent Practice of the European Union and Its Member States*, *in* MIXED AGREEMENTS REVISITED: THE EU AND ITS MEMBER STATES IN THE WORLD 249 (Christophe Hillion & Panos Koutrakos eds., 2010) [hereinafter *Mixed Agreements*] (giving a survey of the actual practice on mixed agreements).

54. *See, e.g.*, McClay, *supra* note 53, at 261–62; Allan Rosas, *EU External Relations: Exclusive Competence Revisited*, FORDHAM INT'L L.J. 1073, 1074 (2015).

55. TEU, *supra* note 2, art. 50.

56. *Id.* art. 50(2).

A. Association Agreements

Under the general rules of European Union law, the most straightforward basis for a comprehensive EU-UK Treaty would be to enter into an association agreement under Article 217 of the Treaty on the Functioning of the European Union (TFEU).[57] According to this provision "[t]he Union may conclude with one or more third countries or international organizations agreements establishing an association involving reciprocal rights and obligations, common action and special procedure."[58]

Despite a seemingly simple definition, determining whether a treaty satisfies the necessary elements of an association agreement is difficult in practice.

One of the main purposes of Article 217 is to allow for the conclusion of Treaties with countries that ultimately plan to join the European Union but, for some reason or other, are not yet ready or permitted to join.[59] However, the provision is not limited to treaties with aspiring EU members. Rather, it can be, and has been, used to conclude treaties with countries that do not seek to join the European Union.[60]

In order for a treaty to qualify as an association agreement, it must create "common action and special procedure."[61] The meaning of this requirement is not entirely clear. In its landmark *Demirel* decision, the European Court of Justice referred to an association agreement as "creating special, privileged links with a non-member country which must, at least to a certain extent, take part in the Community system."[62] However, the decision is ambiguous as to whether taking part in the Community system was meant to be a necessary requirement for finding an association agreement or simply happened to be an attribute of the association agreement at issue in the case.[63] As a practical matter, the answer to this question may not matter much in the case of the United Kingdom. Even if an association agreement requires taking part in the EU system, the United Kingdom's participation, to a greater or lesser extent,[64] in the internal market, would presumably satisfy this requirement.

Alternatively, some voices in the literature interpret the "common action and special procedure" requirement to mean that the parties to the treaty must be subject

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57. *Association Agreements*, INST. FOR GOV'T (June 22, 2017), https://www.instituteforgovernment.org.uk/explainers/association-agreements.

58. TFEU, *supra* note 51, art. 217.

59. Silja Vöneky & Britta Beylage-Haarmann, *AEUV Art. 217: Assoziierungsabkommen [AEUV Art. 217: Treaty of Association]*, *in* GRABITZ/HILF/NETTESHEIM: DAS RECHT DER EUROPÄISCHEN UNION art. 217, para. 1 (Eberhard Grabitz, Meinhard Hilf & Martin Nettesheim eds., 60th ed. 2016).

60. *Cf.* Kirsten Schmalenbach, *AEUV Art. 217 (ex-Art. 310 EGV)*, *in* EUV/AEUV para. 9 (Christian Calliess & Matthias Ruffert eds., 5th ed. 2016) (noting that association agreements can cover a broad spectrum of agreements ranging from economic and development cooperation to a far-reaching acceptance of European Union law).

61. TFEU, *supra* note 51, art. 217.

62. ECJ, Case 121/86, Sept. 30, 1987, Meryem Demirel v. Stadt Schwäbisch Gmünd, 1987 E.C.R. 3719, para. 9 [hereinafter *Demirel*].

63. *Cf.* Vöneky & Beylage-Haarmann, *supra* note 59, para. 8.

64. The TFEU defines the internal market as "an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties." TFEU, *supra* note 51, art. 26. It must be kept in mind that the U.K. government strenuously objects to the idea of being subject to the free movement of persons guaranteed by the Treaty. However, in its *Demirel* decision, the Court of Justice only refers to partially taking part in the Community system. *Demirel*, *supra* note 62, para. 9.

to binding decisions by common institutions.[65] However, such a requirement should not present any challenges for the United Kingdom either. Given the volume and depth of the economic relationship between the United Kingdom and the European Union, it is clear that any comprehensive EU-UK Treaty would require the establishment of a court or other governing body to adjudicate legal issues arising under the contract. In fact, another European agreement has already established a court for a similar purpose: the Court of Justice of the European Free Trade Association States was created to adjudicate disputes arising under the EEA Agreement.[66] The EEA agreement includes Norway, Iceland, and Liechtenstein in the so-called internal market.[67] To ensure the proper application of the pertinent rules, the EEA Agreement of 2 May 1992 requires those EFTA states that take part in the EEA agreement—namely Norway, Iceland, and Liechtenstein—to establish a court of Justice.[68] A future EU-UK Treaty could create a similar institution, thereby subjecting the parties to the binding authority of a common institution.

Crucially, though, an association agreement requires not just the consent of the European Parliament, but also the unanimous decision in the Council where the Member States are represented.[69] Hence, while an association agreement within the meaning of Article 217 may well constitute an appropriate way of fashioning the future EU-UK relationship, it does not help to solve the problem that individual Member States may block the agreement.

B. Trade Agreements

A second option for a comprehensive Brexit Treaty is a trade agreement under Article 207 of the Treaty on European Union. This is a less ambitious approach because, as a general rule, the Council acts with a so-called qualified majority when negotiating and concluding such trade agreements.[70] However, there are various important exceptions to this principle when unanimity is required.

For example, the Council has to act unanimously if the agreement contains "provisions for [which] unanimity is required for the adoption of internal rules"[71] and the agreement is to cover trade in services, commercial aspects of intellectual property rights, or foreign direct investment.[72] For rules governing the trade in services or commercial aspects of intellectual property rights, unanimity will rarely be required because EU law generally embraces decisions by qualified majority in these areas.[73]

65. Vöneky & Beylage-Haarmann, *supra* note 59, para. 8; Schmalenbach, *supra* note 60, para. 4.

66. *EFTA Through the Years*, EUR. FREE TRADE ASS'N, http://www.efta.int/About-EFTA/EFTA-through-years-747 (last visited Nov. 16, 2017).

67. *Free Movement of Goods*, EUR. FREE TRADE ASS'N (Aug. 2014), http://www.efta.int/media/publications/fact-sheets/EEA-factsheets/GoodsFactSheet.pdf.

68. *See The Basic Features of the EEA Agreement*, EUR. FREE TRADE ASS'N, http://www.efta.int/eea/eea-agreement/eea-basic-features (last visited Nov. 16, 2017) (citing the two-pillar structure of the EEA to include judicial control).

69. TFEU, *supra* note 51, art. 108(2).

70. *Id.* art. 207(4).

71. *Id.*

72. *Id.*

73. *Cf.* TFEU, *supra* note 51, art. 62, 53(1) (discussing traded-in services). *See id.* art. 118 (regarding intellectual property rights). *But see id.* art. 262 (providing that the Council "acting unanimously . . . may

However, the issue of direct investments is trickier, and the rules needed to implement trade agreements in this area can much more easily trigger a unanimity requirement.[74] Furthermore, unanimity is required, under certain conditions, for trade agreements in the fields of cultural and audiovisual services as well as in the fields of social, education, and health services.[75] It is likely that some, if not all, of these types of provisions would be included in a post-Brexit agreement. In practice, therefore, it would be difficult to conclude a comprehensive post-Brexit agreement as a trade agreement under Article 207 TFEU without a unanimous decision in the Council.

C. *Neighborhood Treaties*

Another potential basis for a post-Brexit treaty is a neighborhood treaty based on Article 8 TEU.[76] The provision states that the European Union will "develop a special relationship with neighboring countries" and that the EU "may conclude specific agreements with the countries concerned."[77] The permissible scope of such neighborhood agreements is relatively broad. The Treaty only provides that the agreements "may contain reciprocal rights and obligations as well as the possibility of undertaking activities jointly."[78] In other words, Article 8 creates a very open-ended competence for EU agreements with neighboring countries.

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adopt provisions to confer jurisdiction, to the extent that it shall determine, on the Court of Justice of the European Union in disputes relating to the application of acts adopted on the basis of the Treaties which create European intellectual property rights").

74. Thus, it has been argued that the Comprehensive Economic and Trade Agreement (CETA) between the European Union and Canada triggers the unanimity requirement of Article 207(4) because of its provisions on foreign direct investments. *See* TFEU *supra* note 51, art. 207(4), 64(3); Björn Schiffbauer, *Mehrheitserfordernisse für Abstimmungen im Rat über TTIP, CETA & Co.* [Majority Requirements for Votes in the Council on TTIP, CETA & Co.], 19 EUROPÄISCHE ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT [EuZW] 252, 255 (2016). In the case of Brexit, a particular complication arises because of Article 64(3) TFEU. Under this provision, "only the Council, acting in accordance with a special legislative procedure, may unanimously, and after consulting the European Parliament, adopt measures which constitute a step backwards in Union law as regards the liberalization of the movement of capital to or from third countries." Given that the United Kingdom has hitherto been a Member of the European Union, one could attempt to argue that any post-Brexit treaty that fails to grant the same protections for the free movement of capital that full EU membership does amounts to a "step backwards" within the Meaning of Article 64(3). Of course, the justification of such an argument seems dubious. The clear purpose of Article 64(3) is to make it more difficult to conclude Treaties that reduce protections for foreign investment. However, in the case of the withdrawal of a Member State from the European Union, it is that withdrawal itself which makes foreign investments more difficult. To apply Article 64(3) to Treaties that seek to mitigate the withdrawal's impact by creating at least some protections for foreign investment would thus run directly counter to the purpose of Article 64(3). Furthermore, even under a literal reading of Article 64(3), such a treaty should not trigger the unanimity requirement simply because it fails to grant the same protections for foreign investments as full EU Membership. That is because, as previously noted, it is the United Kingdom's withdrawal from the European Union, rather than the post-Brexit treaty that reduces existing protections for foreign investments.

75. TFEU, *supra* note 51, art. 207(4).

76. TEU, *supra* note 2, art. 8.

77. *Cf.* TEU, *supra* note 2, art. 8(2) ("For the purposes of paragraph 1, the Union may conclude specific agreements with the countries concerned. These agreements may contain reciprocal rights and obligations as well as the possibility of undertaking activities jointly. Their implementation shall be the subject of periodic consultation.").

78. *Id.*

Despite the broad scope of neighborhood agreements, questions remain about how to conclude these agreements in practice. Article 8 is a relatively recent addition to the competence arsenal of the European Union and only found its way into the TEU via the Treaty of Lisbon, which entered into force in 2009.[79] To date, the EU has not made use of Article 8.[80] Tellingly, rather than rely on Article 8, a recent treaty between the European Union and the Ukraine was instead framed as an association agreement under Article 217 TFEU.[81]

One of the reasons for Article 8's lack of popularity may lie in the fact that the procedural aspects of this norm remain unclear.[82] Article 8 does not specify the procedure for concluding a neighborhood agreement,[83] and it remains unclear how this gap should be filled. One possibility would be to invoke the general rule of Article 216 TFEU, according to which treaties require the consent of the European Parliament and a qualified majority in the Council.[84] However, owing to the structural similarities between association agreements and neighborhood agreements, it has also been suggested that neighborhood treaties should be subject to the unanimity requirement imposed by Article 217.[85] In fact, there are persuasive reasons to believe that this view is correct. First, Article 8(2) TEU was modeled on Article 217(4) TFEU, so it makes sense to subject it to the same procedural rules.[86] Second, Article 218(8) TFEU imposes the unanimity agreement not only for association agreements, but also for Treaties with those countries that are candidates for accession to the European Union.[87] This suggests a general policy according to which "integration treaties" are meant to be carried by the unanimous consent of the Member States.[88]

D. Mixed Agreements

A comprehensive post-Brexit treaty might qualify as a so-called mixed agreement that includes both provisions falling into the European Union's competence and provisions falling into the competence of the Member States. If a treaty falls partly within the competence of the EU and partly within the competence of the Member

79. *Cf.* Schmalenbach, *supra* note 60, para. 1 (noting that until the Treaty of Lisbon, the EU's policy towards neighboring countries had no special basis in the TEU).

80. *Id.* (noting that Article 8 does not currently play any role as an independent basis for international treaties).

81. Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part, art.1, Mar. 22, 20142014 O.J. (L 161) 6.

82. *Schmalenbach*, *supra* note 60, para 11.

83. *Id.*; *cf.* Carsten Nowak, *Art. 8 EUV [Nachbarschaftspolitik] [Neighborhood Policy]*, *in* 1 EUROPÄISCHES UNIONSRECHT [European Union Law] para. 12 (Dr. Hans von der Groeben et al. eds, 7th ed. 2015) (noting that this provision raises difficult questions regarding the decision-making process in the Council).

84. TFEU, *supra* note 51, art. 218.

85. Daniel Thym, *EUV Art. 8: Nachbarschaftspolitik [Neighborhood Policy]*, *in* GRABITZ/HILF/NETTESHEIM: DAS RECHT DER EUROPÄISCHEN UNION 8 EUV para. 20 (Martin Nettesheim ed., 60th ed. 2016); *Cf.* Frank Emmert & Siniša Petrović, *The Past, Present, and Future of EU Enlargement*, 37 FORDHAM INT'L L.J. 1349, 1412 (2014) (noting that bilateral treaties require the unanimous consent of the Member States but do not mention which treaty basis they are referring to).

86. Thym, *supra* note 85, at para. 20.

87. TFEU, *supra* note 51, art. 218(8).

88. *Id.*

States, it must be concluded as a "mixed agreement" to which both the EU and the Member States accede.[89] In other words both the European Union and the Member States must be parties to a mixed treaty.

Investments provide an example of the practical need for mixed agreements. European law traditionally distinguishes between direct investments and portfolio investments.[90] The TFEU grants the European Union the exclusive competence to conclude treaties governing direct foreign investments.[91] By contrast, a recent decision by the Court of Justice on a trade agreement between the European Union and Singapore holds that a trade agreement governing non-direct investments cannot be approved by the European Union alone.[92] However, trade agreements such as the recently negotiated trade agreement between Canada and the European Union typically govern both types of investments.[93]

The mixed nature of an agreement may not necessarily imply a need for unanimity. Rather, it is conceivable that some Member States either fail to become parties to the agreement or are given the right to opt out of certain parts of the agreement. This phenomenon is generally referred to as an "incomplete" mixed agreement.[94] By contrast, "complete" mixed agreements are those to which all the Member states have acceded.[95]

The legal implications of incomplete mixed agreements are, in many respects, unclear.[96] Even though incomplete mixed agreements are feasible in principle and

89. *E.g.*, *id.*; Björn Schiffbauer, *Mehrheitserfordernisse für Abstimmungen im Rat über TTIP, CETA & Co.* [Majority Requirements for Votes in the Council on TTIP, CETA & Co.], 19 EUROPÄISCHE ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT [EuZW] 252, 255 (2016).

90. *Investment*, EUR. COMM'N (Sept. 14, 2017), http://ec.europa.eu/trade/policy/accessing-markets/investment/.

91. TFEU, *supra* note 51, art. 207(1).

92. ECJ, Case 2/15, March 16, 2017, at para. 244. From a doctrinal perspective, this part of the holding is somewhat surprising. That is because the Court of Justice also held that non-direct investments fall within the shared competence of the European Union and the Member States. *Id.* at 243. According to the traditional view in EU law scholarship, treaties falling within the shared competence of the EU and the Member States can, but do not need to be, concluded as mixed agreements. *E.g.*, Rafael Leal-Arcas, *Polycephalous Anatomy of the EC in the WTO: An Analysis of Law and Practice*, 19 FLA. J. INT'L L. 569, 638–39 (2007); Guillaume Van Der Loo & Ramses A. Wessel, *The Non-Ratification of Mixed Agreements: Legal Consequences And Solutions*, 53 COMMON MKT. L. REV. 735, 737 (2017).

93. Comprehensive Economic and Trade Agreement, Can.-E.U., art. 8.1, Oct. 30, 2016, Gov. of Can., http://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/ceta-aecg/text-texte/08.aspx?lang=eng (not distinguishing between types of investments).

94. *See, e.g.*, Rafael Leal-Arcas, *Polycephalous Anatomy of the EC in the WTO: An Analysis of Law and Practice*, 19 FLA. J. INT'L L. 569, 621 (2007) (defining incomplete mixed agreements).

95. *See, e.g.*, *id.* at 642 (defining "complete" mixed agreements). *Cf.* Allan Rosas, *The Status in EU Law Of International Agreements Concluded by EU Member States*, 34 FORDHAM INT'L L.J. 1304, 1309 (2011) (raising questions about "incomplete mixity"); Henrik Ringbom, *EU Regulation 44/2001 and Its Implications for the International Maritime Liability Conventions*, 35 J. MAR. L. & COM. 1, 16 (2004) (discussing incomplete participation in mixed agreements).

96. *See* Leal-Arcas, *supra* note 94, at 642. (explaining what happens if one or more Member States fail to ratify a mixed agreement); Rosas, *supra* note 95, at 1309 (noting that "mixed agreements present a number of problems with regard to the division of competence and responsibility between the Union and its Member States."). *See generally* Van Der Loo & Wessel, *supra* note 92 (noting that little is known about the consequences of non-ratification).

have been used in the past,[97] such agreements can be complicated in practice. To the extent that the different parts of the treaty complement each other, an agreement in which not all the Member States join in its entirety may not be a practical option. Such a treaty would also carry some long-term risks for the European Union. As the case of the United Kingdom demonstrates, special deals and exemptions may well prove to be political fault lines that harbor the seeds of future fractions.[98]

IV. THE WITHDRAWAL AGREEMENT

The question remains whether Article 50 of the Treaty on European Union provides a basis for concluding a comprehensive EU-UK Treaty or set of treaties without making it necessary to obtain the support of all the Member States. Article 50(2) TEU explicitly calls for a withdrawal agreement to be concluded between the European Union and the withdrawing Member State.[99] Under said provision, all that is needed, on the European side, for the withdrawal agreement is a qualified majority in the Council and the consent of the European Parliament.[100] The crucial issue, though, is whether the withdrawal agreement can only cover the withdrawal itself, or whether Article 50(2) also provides the basis for a treaty governing the future relationship between the European Union and the United Kingdom.

The reason that the answer to this question is not immediately obvious lies in the somewhat ambiguous wording of this provision. Article 50(2) describes the withdrawal agreement as "an agreement with [the withdrawing Member State] setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union."[101] Some voices in the literature stress that this wording includes an explicit reference to the future relationship with the European Union, from which they deduce that this relationship is meant to be covered by the withdrawal agreement.[102] Other scholars reject such a broad role for the withdrawal agreement, some of them noting that Article 50(2) merely calls for the withdrawal agreement to "take into account," rather than define, the future relationship between the European Union and the withdrawing Member State.[103] According to this latter view, Article

97. *See* Ringbom, *supra* note 95, at 17 (highlighting that there may well be precedents).

98. *See* Fiona de Londras, *This Is How the UK Could Rejoin the EU—And the Sacrifices They Would Probably Demand from Us*, INDEP. (Mar. 29, 2017), http://www.independent.co.uk/voices/brexit-article-50-leave-eu- europe-rejoin-join-again-how-sacrifices-we-would-make-a7656571.html (discussing the UK's initial advantages and the challenges in potentially rejoining the EU).

99. TEU, *supra* note 2, art 50(2).

100. *Id.*

101. *Id.*

102. Dörr, *supra* note 30, para. 31; Werner Meng, *Artikel 50 EUV: Austritt aus der Europäischen Union [Article 50 TEU: Withdrawal from the European Union]*, *in* VON DER GROEBEN/SCHWARZE/HATJE, EUROPAISCHES UNIONSRECHT para. 5 (Jürgen Schwarze & Armin Hatje eds., 7th ed. 2015); *cf.* Dirk Hanschel, *Der Rechtsrahmen für den Beitritt, Austritt zu bzw. aus der Europäischen Union und Währungsunion [The Legal Framework for Accession, Withdrawal to or from the European Union and Currency Union]*, 31 NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT [NVwZ] 995, 997 (2012) (arguing that the withdrawal agreement can cover the future relationship between the United Kingdom and the European Union); Simon Wieduwilt, *Article 50 TEU–The Legal Framework of a Withdrawal from the European Union*, 18 ZEITSCHRIFT EUROPARECHTLICHE STUDIENT [ZEuS] 169, 180 (2015) (arguing that the withdrawal agreement can cover the future relationship).

103. *See* Barrett, *supra* note 31, at 9 (maintaining that "Article 50 does not say anything about what the

50(2) only provides a special basis for a treaty covering the withdrawal itself, whereas any comprehensive deal regarding the future relationship between the United Kingdom and the European Union must be based on other provisions of the Treaty.[104] In fact, while the wording of Article 50 is ambiguous, there are compelling reasons to embrace this latter interpretation.

A. *Systematic Considerations*

To begin, systematic considerations suggest that the withdrawal agreement cannot cover the future relationship. Perhaps most obviously, the two-year default would be far too short if the withdrawal agreement to be negotiated in this two-year frame was meant to cover the future relationship with the withdrawing state. Admittedly, the UK government has repeatedly claimed that it expects the withdrawal negotiations to be completed within two years.[105] However, most observers consider this outlook to be completely unrealistic,[106] and for good reason. Up to today, the only country to have exited the European Union by way of a negotiated treaty is Greenland, which left in 1985.[107] In Greenland's case, the preconditions for reaching an agreement were very favorable. Greenland's population only numbers about 57,000;[108] and the negotiations focused mostly on fishing rights.[109] Moreover, at the time, the European Community had far fewer Member States than it does today. Despite these rather auspicious conditions, the negotiations between the European Union and Greenland lasted more than four years.[110] Given that the United Kingdom is a far larger country with a much more complex economy, and considering that the number of Member States has more than doubled since Greenland left the European Union, it seems safe to say that for the UK, negotiating a future relationship will take much longer than two years. This suggests very strongly that the two-year period is not meant to cover the future relationship, but simply the withdrawal itself.

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withdrawal agreement should say about the future relationship between the European Union and the UK" and that a separately negotiated agreement will define the relationship). *Cf.* Hofmeister, *supra* note 36, at 593 (suggesting that "the future relationship. . .is only cursorily addressed in the [withdrawal] agreement" so that it will be necessary to conclude another agreement addressing the details of the future relationship).

104. *See* Christian Calliess, *Artikel 50 EUV*, *in* EUV/AEUV 465 (Christian Calliess & Matthias Ruffert eds., 5th ed. 2016) (contending that the withdrawal agreement may not include widespread changes to European law, much less the European Treaties); Barrett, *supra* note 31, at 9.

105. Barrett, *supra* note 31, at 8.

106. *See* Stephen Booth, *Don't Assume All of Britain is United Against Europe*, TELEGRAPH (June 29, 2016), www.telegraph.co.uk/news/2016/06/29/dont-assume-all-of-britain-is-united-against-europe/ (discussing the "seemingly intractable impasse" among negotiating states due to diverging interests); Noah Barkin, *Tight Brexit Timeline is 'Mission Impossible'*, SYDNEY MORNING HERALD (July 25, 2016), http://www.smh.com.au/world/tight-brexit-timeline-is-mission-impossible-20160722-gqbs94.html ("Diplomats think a quick exit may be too much to ask.").

107. *See* Dammann, *Revoking Brexit*, *supra* note 7, at 273 (discussing Greenland's exit from "the EEC via multilateral Treaty rather than by unilateral withdrawal"); *see also* Raymond J. Friel, *Providing a Constitutional Framework for Withdrawal from the EU: Article 59 of the Draft European Constitution*, 53 INT'L & COMP. L.Q. 407, 409–11 (2004) (providing a more detailed description of Greenland's withdrawal from the European Union).

108. Cecile Pelaudeix, *EU-Greenland Relations and Sustainable Development in the Arctic*, *in* GLOBAL CHALLENGES IN THE ARCTIC REGION 306, 306 (Elena Conde & Sara Iglesias Sanchez eds., 2016).

109. Barkin, *supra* note 106.

110. Dammann, *Revoking Brexit*, *supra* note 7, at 284.

Moreover, one cannot help but notice that a broad interpretation of the withdrawal agreement would create substantial tension between Article 50 and Article 217 of the Treaty on the Functioning of the European Union.[111] Article 217 imposes an unanimity requirement for association treaties.[112] Why should the Treaty make association agreements harder to conclude than withdrawal agreements? If anything, one should expect the opposite. After all, the Treaties are explicitly committed to the goal of an "ever closer union" of the Member States.[113] Against that background, it would make little sense for the Treaties to privilege withdrawal agreements that, in essence, facilitate a Member State's departure from the European Union over association agreements, which typically advance the cause of European integration. Consequently, systematic considerations suggest that a withdrawal agreement cannot define the United Kingdom's future relationship with the European Union.

B. Sovereignty and Reciprocity

A further argument for a narrow withdrawal agreement flows from the principle of reciprocity as understood by the European Court of Justice. The TEU and the TFEU impose far-reaching duties on the Member States. Each Member State accepts broad restrictions on its own sovereignty based upon the understanding that the other Member States accept the same. The Court of Justice stressed the importance of reciprocity early on in its jurisprudence: one of the core principles of European Union law, namely the supremacy of EU law over Member State law, is based in large part on a reciprocity argument.[114] Consider the Court's reasoning in its landmark decision *Flaminio Costa v. E.N.E.L.*:

> The integration into the laws of each member state of provisions which derive from the Community, and more generally the terms and the spirit of the Treaty, make it impossible for the states, as a corollary, to accord precedence to a unilateral and subsequent measure over a legal system accepted by them on a basis of reciprocity. Such a measure cannot therefore be inconsistent with that legal system. The executive force of Community law cannot vary from one state to another in deference to subsequent domestic laws, without jeopardizing the attainment of the objectives of the

111. "Foundational Treaties" mean the TEU and the TFEU. These Treaties could also be called the "European Union's Constitutional Treaties." *Cf.* Case C-72/15, Rosneft Oil Co. OJSC v. HM's Treasury, ECLJ: EU: C: 2016: 381 para. 36 (Op. of Advocate Gen. Wathelet 2016), http://curia.europa.eu/juris/celex.jsf?celex=62015CC0072&lang1=en&type=TXT&ancre= (referring to the TEU and the TFEU as the "basic constitutional charter"). Of course, the question of whether the foundational Treaties actually constitute a Constitution remains somewhat controversial. For an excellent analysis of this question *see generally* Mattias Kumm, *Beyond Golf Clubs and the Judicialization of Politics: Why Europe Has a Constitution Properly so Called*, 54 AM. J. COMP. L. 505 (2006).

112. TFEU, *supra* note 51, art. 217 ("The Union may conclude with one or more third countries or international organizations agreements establishing an association involving reciprocal rights and obligations, common action and special procedure.").

113. *See* TEU, *supra* note 2, art. 1 (providing that "[t]his Treaty marks a new stage in the process of creating an ever closer union"), pmbl. (stressing the Member States' resolution "to continue the process of creating an ever closer union among the peoples of Europe. . ."); *see also* TFEU, *supra* note 51, pmbl. (stressing the Member State's determination to create "an ever closer union among the peoples of Europe. . .").

114. *See generally* TEU, *supra* note 2; TFEU, *supra* note 51.

> Treaty set out in Article 5 (2) [now Article 3 TEU] and giving rise to the discrimination prohibited by Article 7 [now Article 18 TFEU].[115]

In *Costa*, the Court used the principle of reciprocity to justify the supremacy of European law over Member State law: each Member State obeys European law so that other Member States will do the same.[116] Without the supremacy of European law, the Court reasons, not all Member States would apply EU law to the same extent and thus the reciprocity underlying the European legal system would be undermined.[117] Indeed, the Court even goes so far as to categorize such an outcome as discriminatory, presumably because European law would no longer apply equally to all EU citizens.[118]

It is easy to see that the reciprocity argument is just as relevant to the problem at hand. If the withdrawal agreement could cover the post-withdrawal relationship between the European Union and the withdrawing Member State, then it could allow the withdrawing Member State to attain a reduced set of rights and duties without the consent of all the other Member States. But replacing full membership in the European Union with some other bundle of rights and duties invariably changes the original bargain struck between the Member States: they are forced to obey whatever duties the pertinent treaty imposes but may no longer enjoy rights that they valued. For example, in the case of the UK, Prime Minister Theresa May has already made it clear that the UK will not, or at least not fully, accept the free movement of persons.[119] If the treaty governing the future relationship between the EU and the UK could be concluded based on a mere qualified majority in the Council, countries like Germany or Hungary might be forced to open their markets to goods and services from the UK, while, at the same time, their citizens might lose the right to access the UK's labor markets. Thus, the transition from full membership to a post-withdrawal partnership raises the very reciprocity issue discussed in *Costa*.[120] And it would be squarely contrary to the spirit of *Costa* to allow the departing Member State to pick and choose rights and duties without the consent of all the other Member States.

C. Legislative History

The legislative history of Article 50 TEU also suggests a narrow role for the withdrawal agreement.[121] The founding Treaties did not originally contain an explicit withdrawal right.[122] However, when the so-called European Convention, chaired by Giscard d'Estaing, developed the draft for a European Constitution between 2002 and 2003,[123] the draft Constitution explicitly allowed Member States to withdraw from the

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115. Case 6/64, Costa v. ENEL, 1964 E.C.R. 587, 593–94 [hereinafter *Costa*].

116. *Id.*

117. *Id.*

118. *Id.*

119. Castle, *supra* note 21.

120. *See generally Costa*, *supra* note 115.

121. Wieduwilt, *supra* note 102, at 171.

122. *Id.*

123. The European Convention was established in 2001 but did not meet until 2002. Andrew C. Snavely, Note, *Should We Leave the Backdoor Open? Does an Agreement Uniting States Need a Withdrawal Provision: The European Union Draft Constitution*, 73 UMKC L. REV. 213, 215 (2004).

European Union.[124] And while the European Constitution never entered into force, many of its provisions, including the withdrawal right, found its way into the Treaty of Lisbon,[125] which took effect in 2009.[126]

The official reason that the Praesidium of the European Convention offered for including the withdrawal right was that such a right would prevent the European Union from being seen as a "rigid entity which it is impossible to leave."[127] As a practical matter, the withdrawal right owed its inclusion in the final draft to the support of the Eastern European Member States.[128] Having only recently shaken off the yoke of Soviet rule, the Eastern European Member States were reluctant to once again part with their sovereignty without the option of regaining it.[129] Moreover, many observers thought it extremely unlikely that the withdrawal right would ever be exercised.[130] Thus, the inclusion of a withdrawal right seemed a small price to pay for allaying concerns about an irreversible loss of sovereignty.[131]

Given this peculiar history, it is clear that the withdrawal right must be interpreted in such a way that it allows Member States to regain their national sovereignty. By contrast, the intended function of the withdrawal right does not support the idea that it should enable States to take a shortcut towards an intermediate status that allows them to cherry-pick rights and duties. Quite on the contrary, if the withdrawal right was meant to be a last resort for States to regain their national sovereignty, then, in the words of the President of the German Bundestag, Wolfgang Schäuble, who at the time was Germany's Minister of Finance, "out means out."[132]

D. Legal Policy Considerations

As a policy matter, there are also good reasons not to adopt a broad understanding of withdrawal agreements. Most importantly, such a wide interpretation would increase incentives to withdraw from the European Union. The case of the United Kingdom may serve to illustrate this point. Even before the Brexit referendum, the UK government sought something that it could not get under the Treaty; namely, full access to the European market for goods and services without full

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124. *See id.* at 216 (noting that the Draft Constitution contains a withdrawal clause in the form of Article I-60).

125. Wieduwilt, *supra* note 102, at 171.

126. Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, Dec. 13, 2007, 2007 O.J. (C 306) 1, 134 [hereinafter Treaty of Lisbon].

127. Eur. Convention, Draft Constitution, Vol. I, CONV 724/1/03 (May 28, 2003), http://register.consilium.europa.eu/doc/srv?l=EN&f=CV%20724%202003%20REV%201.

128. Juli Zeh, *Recht auf Austritt* [The Right to Withdraw], 7 ZEITSCHRIFT FÜR EUROPARECHTLICHE STUDIEN [ZEuS] 173, 196 (2004); Dammann, *Revoking Brexit*, *supra* note 7, at 276.

129. Dammann, *Revoking Brexit*, *supra* note 7, at 276.

130. *See id.* at 301 (noting that even though Member States created the ability to withdraw, this did not mean they would be incentivized to exercise the option); Alexander Thiele, *Der Austritt aus der EU—Hintergründe und rechtliche Rahmenbedingungen eines „Brexit" [Leaving the EU—Background and Legal Framework for a "Brexit"]*, 51 EUROPARECHT [EUROPEAN LAW] 281, 290 (2016).

131. Dammann, *Revoking Brexit*, *supra* note 7, at 301.

132. Daniel Hannan, *Remoaners Are Determined to Find Bad News*, TELEGRAPH (July 29, 2016), http://www.telegraph.co.uk/news/2016/07/29/remoaners-are-determined-to-find-bad-news/.

recognition of the free movement of workers.[133] For example, during the negotiations preceding the Brexit referendum, one of the UK Prime Minister's key demands was to be able to restrict social benefits to immigrants from other Member States, even though the free movement of persons includes access to such benefits.[134] This demand was met with forceful opposition, particularly from Central European Member States such as Poland,[135] which are among the main countries of origin for intra-European migration,[136] and are thus particularly sensitive to attempts to limit such migration.[137]

If Article 50 TEU is interpreted to allow a comprehensive post-withdrawal relationship without the unanimous consent of all the Member States, then Member States would have a powerful incentive to withdraw from the European Union. That is because such an interpretation would allow Member States like the United Kingdom to obtain concessions that they cannot gain while remaining in the European Union. Admittedly, even a narrow interpretation of Article 50 does not entirely eliminate this problem. After all, trade agreements can also be concluded with a mere qualified majority in the Council.[138] But trade agreements that seek to avoid the unanimity requirement have to be limited in scope.[139] By contrast, allowing the withdrawal agreement to cover the future relationship between the withdrawing Member State and the European Union, would leave nothing to constrain the parties from engineering a quasi-membership in the European Union.

As a possible counterargument, one may be tempted to reason that a broad understanding of the withdrawal agreement makes the best out of a bad situation—that it prevents an economic disaster once a Member State has declared its withdrawal. After all, to the extent that an unanimity requirement governs the post-withdrawal relationship, any Member State, however small, can sabotage an agreement and thereby inflict economic damage on both the withdrawing Member State and the other countries.[140] However, this line of reasoning is unpersuasive. Even under the general

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133. *See* Lee A. Sheppard, *What Would Happen Upon Brexit,* 81 TAX NOTES INT'L 903, 903 (2016) (noting that recent UK demands of the EU emphasize economic concessions and restricted immigration).

134. Griff Witte, *Europe Setting Limits on Retaining Britain in E.U.*, WASH. POST (Feb. 18, 2016), http://www.sbs.com.au/news/article/2016/02/18/europe-setting-limits-retaining-britain-eu; Dammann, *Revoking Brexit, supra* note 7, at 282.

135. Karla Adam, *Europe Offers Britain a Deal to Stay in the E.U.*, WASH. POST (Feb. 2, 2016), https://www.washingtonpost.com/world/europe/europe-offers-britain-plan-to-stay-amid-debate-over-to-be-or-not-be-together/2016/02/02/643d6792-267c-48f8-8f08-da9a3323b39d_story.html?utm_term=.6c705c8caf72.

136. *See* Teresa Castro-Martín & Clara Cortina, *Demographic Issues of Intra-European Migration: Destinations, Family and Settlement*, 31 EUR. J. POP. 109, 112 fig. 1 (2015) https://link.springer.com/content/pdf/10.1007%2Fs10680-015-9348-y.pdf (detailing intra-European migration flows).

137. *See id.* at 111–12 (noting that the right of free movement was predominantly exercised by Central and Eastern European countries migrating to their western neighbors and was motivated by large differences in the labor market opportunities and earnings).

138. TEU, *supra* note 2, art. 50(2).

139. *See* Stephen C. Sieberson, *Inching Toward EU Supernationalism? Qualified Majority Voting and Unanimity Under the Treaty of Lisbon*, 50 VA. J. INT'L L. 919, 978 (2010) (noting that restrictive trade measures at the EU or Member State level are de facto subject to unanimous approval because they are seen as contrary to the EU's broader common commercial policy).

140. Moreover, history shows that Member States are by no means shy in putting their national interests ahead of European integration. Unforgotten is the fact that Charles de Gaulle vetoed the UK's attempts to join the European Economic Community twice, allegedly out of concern that the UK's membership might

rules, the European Union and the withdrawing Member State can conclude certain trade agreements without a unanimous decision in the Council. Such agreements may not cover all desirable issues, but they can certainly be broad enough to prevent economic disaster. Moreover, the withdrawing State itself has the power to avoid economic calamity. To do so, it only needs to abstain from withdrawing in the first place. Finally, even if the withdrawing Member State has already given its formal notification of intention to withdraw, it can reverse course. That is true, at least if one accepts, as the author has argued elsewhere,[141] that the withdrawing Member State can revoke its notification of intention to withdraw until the withdrawal takes effect. In the worst case, the withdrawing Member State can always reapply for membership in the European Union.[142]

In sum, therefore, it does not seem justified to extend the procedure in Article 50(2) to treaties that govern the future relationship between the European Union and the withdrawing Member States. Rather, any such treaty has to be based on the general rules on governing international treaties between the European Union and third countries, even if that means that the unanimous consent of all the Member States is needed.

V. CONCLUSION

The European Union and the United Kingdom now face the challenging task of negotiating both the terms of the United Kingdom's withdrawal and the future relationship between the European Union and the United Kingdom.

Article 50(2) of the Treaty on European Union makes that task a little easier by providing a special procedure for the conclusion of the withdrawal agreement. On the European Union's side, that agreement is concluded by the Council after obtaining the consent of the European Parliament, but the Council acts with a qualified majority rather than unanimously. In other words, the withdrawal agreement does not require the unanimous consent of all the Member States' representatives.

The crucial question is whether one can also apply this rule to an agreement that covers the future relationship between the European Union and the United Kingdom. This Article argues that the answer must be "no." Instead, any agreement regarding the future relationship between the European Union and the withdrawing Member State must abide by the general rules on international treaties contained in the Treaty on European Union and the Treaty on the Functioning of the European Union. Depending on the exact content of the agreement, those rules may well require the unanimous consent of the Member States and may even require the Member States to be parties to the post-withdrawal treaty.

The position advocated in this Article may make it substantially harder for the European Union and the United Kingdom to negotiate their future relationship. However, it protects the remaining Member States against having to abide by a post-

reduce French political influence. PHILIP THODY, AN HISTORICAL INTRODUCTION TO THE EUROPEAN UNION 16–17 (1997); *see also* Emmert & Petrović, *supra* note 85, at 1410–11 (describing a more recent display of nationalism whereby Greece objected to tiny Macedonia joining the European Union, in part to protest Macedonia's name).

141. Dammann, *Revoking Brexit*, *supra* note 7, at 300.

142. TEU, *supra* note 2, art. 50(2).

withdrawal treaty to which they did not consent and that could potentially amount to some form of quasi-membership in the European Union.

Brexit Human Rights Issues: It's Time to Play E.U. Hardball

DAVID ARONOFSKY, PH.D., J.D.*

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INTRODUCTION

The June 23, 2016 Brexit vote shocked the world, and much of the United Kingdom (U.K.), reflecting the first time a country had ever voted to leave the European Union (EU). Viewed externally as U.K. voter hostility toward the free movement of citizens from other EU member nations into the U.K. labor market and overall U.K. societal fabric,[1] lurking barely beneath the surface is the U.K. attack on Europe's longstanding and well-developed human rights law framework. Intense Brexit negotiations remain underway to determine whether the U.K. and the EU can agree on the terms of the U.K.'s EU departure. Until these negotiations conclude, there is no way presently to know how, or whether, human rights will factor into any final agreement, if there is one. However, current U.K. political leaders have not masked their antipathy toward continental Europe's human rights approach in a country with a problematic history of human rights law compliance. The EU may have, and should exercise, the leverage to strike a heavy blow in defense of human rights by requiring specific human rights safeguards in any EU-U.K. Brexit agreement as a non-negotiable condition for U.K. access to the single EU market. Even if this EU effort fails because the U.K. refuses to accept such an agreement, it is an effort well worth making.

This article first reviews the current state of U.K. human rights laws within the overall framework of the U.K. legal system and how Brexit could affect them. It then describes the U.K.'s European Convention on Human Rights (ECHR) litigation history in the European Court of Human Rights (ECtHR) to suggest the basis for U.K. political leaders' ECHR antagonism. It then identifies other human rights issues currently affecting, and affected by, the ongoing Brexit negotiations. It concludes with specific recommendations on how human rights laws should be protected in any final

1. *See, e.g.*, Nic Robertson, *A Look at Brexit: Why Are the Brits Thumbing Their Noses at Europe?*, CNN (June 24, 2016), http://www.cnn.com/2016/06/24/europe/brexit-aftermath-robertson/index.html (Describing the U.K.'s shift in attitude towards immigration).

Brexit agreement between the U.K. and the EU. This article assumes that the U.K. will in fact exit the EU, despite rumblings of another Brexit vote.[2]

I. THE CURRENT STATE OF U.K. HUMAN RIGHTS LAW[3]

U.K. human rights laws rest on three fundamental pillars. These include the EU Charter of Fundamental Rights;[4] the ECHR[5] and the HRA,[6] which makes the ECHR part of U.K. domestic law enforceable in U.K. courts; and individual rights aspects of the overall collection of U.K. statutes, court decisions, and historical documents such as the Magna Carta. Brexit affects, and is effected by, all three.

A. E.U. Charter of Fundamental Rights, Scheduled to Disappear with Brexit

Although Brexit has generated many complex legal issues unlikely to be resolved for years to come, it creates one legal certainty: "Brexit presents a clear reduction in formal protection of fundamental rights in the U.K. through discontinued application of the EU Charter of Fundamental Rights and Freedoms."[7] Experts doubt whether current U.K. domestic laws and legislation can or will ever replace certain Charter rights and protections.[8]

The Charter establishes express rights to human dignity (art. 1); life (art. 2); integrity of the person (art. 3); freedom from torture and degrading punishment (art. 4); freedom from slavery and forced labor (art. 5); liberty and security of person (art. 6); respect for family and private life (art. 7); personal data protection (Art. 8); marriage and family (art. 9); freedom of thought, conscience, and religion (art. 10); freedom of expression and association (art. 11); freedom of assembly and association

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2. Chris Baynes, *Brexit: British People Have Changed Their Minds on Leaving the EU, Poll Finds*, INDEP. (June 18, 2017), http://www.independent.co.uk/news/uk/politics/british-people-changed-minds-brexit-second-referendum-poll-finds-a7795591.html.

3. For purposes of this article, the term "human rights laws" refers to the individual rights provisions contained in the following collective sources, all of which afford individuals judicial enforcement rights: (i) the EU Charter of Fundamental Rights (Charter); (ii) the European Convention on Human Rights (ECHR), which has been part of UK law since 1975, although enforceable only in the Court itself until October 2000; (iii) the UK 1998 Human Rights Act (HRA), which explicitly makes ECHR provisions part of UK domestic law and creates individual enforcement rights in UK courts; and (iv) the body of UK statutes and court decisions dating back to the 1215 Magna Carta, much of which is now often referred to as part of the UK Constitution. Other human rights law sources applicable to the UK, based upon United Nations agreements such as the Universal Declaration on Human Rights, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights, fall outside the scope of this article because they are not enforceable by individuals in UK courts.

4. *See generally* Charter of Fundamental Rights of the European Union, Oct. 26, 2012, 2012 O.J. (C 326) 1 [hereinafter The Charter].

5. *See generally* Convention for the Protection of Human Rights and Fundamental Freedoms, Sept. 3, 1953, 213 U.N.T.S. 222 (this convention is most commonly referred to as the European Convention on Human Rights) [hereinafter ECHR]

6. *See generally* Human Rights Act 1998, 46 Eliz. ch. 42 (Eng.).

7. Tobias Lock, et al., *Brexit and the British Bill of Rights* 5 (Tobias Lock & John Gerald Daly eds., Feb. 6, 2017) (unpublished research paper), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2913566.

8. *Id.*

(art. 12); academic freedom (art. 13); education (art. 14); employment (art. 15); property (art. 17); asylum (art. 18); freedom from extradition or removal to countries where the death penalty, torture, or degrading punishment will occur (art. 19); non-discrimination (art. 21); gender equality (art. 23); child protections based on a child's best interests (art. 24); elderly protection (art. 25); integration of persons with disabilities into society (art. 26); health care (art. 35); environmental protection (art. 37); freedom of movement (art. 45); political participation (Arts. 39-42); comprehensive judicial process protections (Arts. 47-50); and good, transparent government (art. 41).[9]

Other Charter rights, as determined under EU court decisions, include the EU's sweeping comprehensive data protection laws, which restrict data collection and use without consent by the individuals subject to the data at issue.[10] This includes an individual's "right to be forgotten" established in EU case law.[11] Although ECHR article 8 also establishes data privacy protections, which are incorporated into U.K. domestic law so long as the U.K. remains an ECHR party and Council member, these provisions have not enjoyed the same prominence because the EU is Europe's main data use and transfer enforcement body.[12]

The Charter also establishes the "right of access to preventive health care and the right to benefit from medical treatment under the conditions established by national laws and practices. A high level of human health protection shall be ensured in the definition and implementation of all the Union's policies and activities."[13]

The above Charter provisions create substantive EU rights, obligating EU states to adopt and protect them in their domestic laws. Brexit eliminates these rights in the U.K., at least as EU mandated rights. Although several of these rights enjoy parallel ECHR treatment presently binding on the U.K., the ECHR is not nearly as specific as the Charter. If the U.K. ever withdraws from the ECHR, one would be hard-pressed to find many of these rights present in U.K. domestic law. Moreover, when the Charter was approved the U.K. sought to opt out of its domestic application because of concerns that the Charter's broad approach to defining rights would clash with narrower U.K. legal approaches regarding these same rights.[14] U.K. leaders retain this view.[15]

Theresa May's government is proposing legislation, referred to as both the Great Repeal Bill and the Withdrawal Bill, to determine which EU laws, including those reflected in the Charter, will become part of U.K. domestic law after Brexit.[16]

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9. The Charter, *supra* note 4.

10. *See generally* Judith Townsend, *Data Protection and the 'Right to Be Forgotten' in Practice: A UK Perspective*, 45 INT'L J. LEGAL INFORMATION 28, 29-31 (2017).

11. *See id.* at 31-32 (discussing the CJEU's decision in *Google Spain v. Costeja Gonzalez*, which applied article 12, and granted the defendant erasure rights).

12. *See id.* at 29-32 (describing a pertinent Belgian domestic court decision applying ECHR article 8 to require deletion of party identity in an archived online news article about an accident because of concern about stigma attached to persons involved in the accident, and noting this would likely not be followed in UK courts).

13. The Charter, art. 35, *supra* note 4.

14. Vaughne Miller, *Effects of the EU Charter of Rights in the UK* 6 (House of Commons Library, Standard Note SN/IA/6765, Mar. 17, 2014), *available at* http://researchbriefings.files.parliament.uk/documents/SN06765/SN06765.pdf.

15. *Id.*

16. *EU Withdrawal Bill: A Guide to the Brexit Repeal Legislation*, BBC (Nov. 13, 2017),

Recognizing that EU approval of an exit favorable to the U.K. may depend in part on how well this legislation incorporates Charter principles, the May government has indicated a tentative willingness to keep certain, albeit so far undefined, Charter rights.[17] The legislation has faced sharp criticism, however, from those skeptical of the May government's commitment to worker rights, environmental protection, and individual rights, especially those barring torture and protecting privacy.[18] More significantly, the legislation, introduced on July 13, 2017 states that: "[t]he charter of fundamental rights is not part of domestic law on or after exit day."[19] Both the Labour and Liberal Democratic Parties oppose this and will apparently seek to incorporate the whole Charter into U.K. law.[20]

The EU can end this political ruckus and legal uncertainty by insisting upon incorporation of all Charter rights into U.K. domestic law. Although violations of Charter rights would no longer be subject to EU court review once the U.K. withdraws, U.K. courts would have to enforce them. Section V of this Article proposes how to do this.

B. The ECHR and the HRA, Now Under Political Attack

The U.K. has been an ECHR party since the ECHR was entered into force in 1953. As a treaty, the ECHR requires the U.K. to apply and enforce its provisions. Current U.K. Conservative leadership hostility to the ECHR[21] has more than a touch of irony, in that two of the most prominent Conservatives in U.K. history had major leadership roles in creating the ECHR. In the aftermath of World War II, Winston Churchill, "called for a European charter of rights and freedoms to be drafted, alongside his calls for a united Europe and the pacification of the relations between France and Germany."[22] He believed that at the center of the movement unifying post-war Europe would be a "Charter of Human Rights, guarded by freedom and sustained

http://www.bbc.com/news/uk-politics-39266723.

17. Steve Williams, *What Does the Brexit Repeal Mean for Human Rights?*, CARE2 (July 16, 2017), http://www.care2.com/causes/what-does-the-brexit-repeal-bill-mean-for-human-rights.html.

18. *See* Sam Fowles, *Decimating Rights: The Consequences of the Great Repeal Bill*, GLOBAL JUSTICE NOW (June 2017), http://www.globaljustice.org.uk/sites/default/files/files/resources/decimating_rights_-_grb_briefing.pdf (claiming that repeal would leave "key rights and protections . . . vulnerable to repeal without scrutiny"); Clive Baldwin, *Will Human Rights Still Be Protected After UK Brexit? Government's 'Repeal Bill' Fails to Guarantee Rights Contained in EU Law*, HUMAN RIGHTS WATCH (July 18, 2017, 12:00 AM EDT), https://www.hrw.org/news/2017/07/18/will-human-rights-still-be-protected-after-uk-brexit (noting that leaving the Charter "could mean British citizens and residents will lose some basic rights protections").

19. Heather Stewart, *'Great Repeal Bill' Human Rights Clause Sets Up Clash with Labour*, GUARDIAN (July 13, 2017), https://www.theguardian.com/politics/2017/jul/13/great-repeal-bill-human-rights-clause-sets-up-brexit-clash-with-labour (quoting European Union (Withdrawal) Bill 2017-8, HC Bill [5] cl. 5(4) (Gr. Brit.)).

20. *Id.*

21. *See infra* discussion Section III.

22. Andrej Stefanovic, *BREXIT Vol. 2: Britain's Withdrawal from the European Convention on Human Rights*, POLITHEOR: EUROPEAN POLICY NETWORK (July 11, 2016), http://politheor.net/brexit-vol-2-britains-withdrawal-from-the-european-convention-on-human-rights/; *see also* Karina Weller, *How British is the European Convention on Human Rights?*, HUMAN RIGHTS NEWS, VIEWS, & INFO (Sept. 3, 2016), https://rightsinfo.org/wrote-european-convention-human-rights/ (crediting Churchill with creating the idea for a "Council of Europe").

by law."[23] David Maxwell-Fyfe, a leading Conservative Member of Parliament and distinguished legal expert, played such a significant role in drafting the ECHR and negotiating its content that he became known as "the doctor who brought the child to birth."[24] Because Great Britain was the most powerful and influential country in the negotiations that created the Council of Europe and the ECHR, it is likely that British objection to the ECHR would have killed it.[25]

The ECHR's substantive provisions did not become a part of U.K. domestic law, enforceable in U.K. courts, until 1998 with the HRA's adoption by Parliament.[26] The HRA does what it was intended to do in making the ECHR part of U.K. law and requiring U.K. courts to interpret and apply all U.K. laws in a manner consistent with the ECHR and its ECtHR interpretations.[27] The HRA allows U.K. courts, under limited circumstances, to declare domestic legislation incompatible with the ECHR.[28] The HRA further allows U.K. ministers to remediate an incompatibility by amending the domestic legislation.[29] But, even so, individuals adversely affected by whatever the U.K. does maintain their ECHR appeal rights.[30] One commentator notes that the human rights laws reflected in the HRA are exceptionally vulnerable because they can be modified by Parliament, as the U.K. legal system grants the legislative branch primacy over all laws.[31] This poses serious concerns to the extent U.K. governments manifest hostility toward the ECHR and its application domestically. One renowned U.K. jurist has stated that ECHR case decisions do not bind U.K. courts at all because the U.K. courts need merely take these decisions "into consideration."[32] Given the U.K.'s negative U.K. ECtHR history, there is ample reason for human rights advocates to question U.K. political commitment to human rights laws. Moreover, the complexity of the U.K. legal system and lack of transparency to U.K. citizens in the individual rights area reinforces these concerns as seen further below.

The May government has indicated its intent to replace the HRA with a British Bill of Rights defining human rights based upon U.K., rather than ECHR (and

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23. Winston Churchill, Address before the Congress of Europe (May 7, 1948) (transcript available at http://www.churchill-society-london.org.uk/WSCHague.html).

24. Weller, *supra* note 22; *see also* Michael Torrance, *Maxwell Fyfe and the Origins of the ECHR*, THE J. OF THE L. SOC'Y OF SCOT. (Sept. 19, 2011), http://www.journalonline.co.uk/Magazine/56-9/1010095.aspx (providing a general overview of Maxwell Fyfe's life and role as one of the "principal authors" of the ECHR).

25. *See* A.W. Brian Simpson, *Britain and the European Convention*, 34 CORNELL INT'L L.J. 523, 553 (2001) ("During the negotiation of the ECHR the U.K. was, far and away, the most powerful Western European state. . . .").

26. HRA, *supra* note 6, § 6 (making it unlawful for a public authority to act in a way incompatibile with a Convention right)

27. *See Id.* § 3.

28. *Id.* § 4.

29. *Id.* § 10.

30. *Id.* § 10.

31. C. R. G. Murray, *Magna Carta's Tainted Legacy: Historic Justifications for a British Bill of Rights and the Case Against the Human Rights Act*, in THE CASE AGAINST THE 1998 HUMAN RIGHTS ACT: A CRITICAL ASSESSMENT 5 (F. Cowell ed., 2017), https://ssrn.com/abstract=2898751(discussing the difficulty of applying the HRA under a system of parliamentary primacy); see *infra* p. 29, for discussion of parliamentary sovereignty.

32. Jessica Elgot, *British Judges Not Bound by European Court of Human Rights, Says Leveson*, THE GUARDIAN (May 24, 2015), https://www.theguardian.com/law/2015/may/24/british-courts-echr-leveson.

Charter) principles.[33] This has generated so much concern and controversy in the midst of complicated Brexit negotiations that Prime Minister May suspended the effort and pledged in the Conservative Manifesto, the party's platform, that the U.K. will remain an ECHR party in all respects until Brexit negotiations conclude and through the end of the Parliament elected last June.[34] Any Conservative politician's mention of the HRA worries human rights experts, who make a compelling case for leaving it in place because repeal (i) is unnecessary and reflects gratuitous hostility toward Europe; (ii) will alienate Scotland, which strongly favors the ECHR; (iii) would likely be replaced by a British Bill of Rights with no current substance and likely to be forced top-down on the U.K. by individual cabinet ministers; and (iv) allows U.K. courts to depart from ECHR case law under certain circumstances when the ECtHR ignores evidence in the U.K. case at issue.[35] They also argue that U.K. domestic law offers relatively little protections to accused terrorists, prisoners, and asylum seekers, as well as the U.K. population as a whole.[36]

In theory Brexit should have no impact on U.K. human rights laws established in the ECHR and the HRA as long as the U.K. remains an ECHR party and as long as the Act remains in effect.[37] Concerns over what could happen after Brexit, absent human rights safeguards in a Brexit agreement, continue to arise because these rights are neither clearly defined nor easily accessible elsewhere in U.K. law.

C. *Other U.K. Domestic Laws Related to Human Rights and Why They Fall Short*

The third U.K. human rights legal pillar stems from the various U.K. statutes, court decisions and historical legal documents addressing individual rights. Unlike almost every other nation, the U.K. has no sole constitution document that defines individual rights, and instead utilizes multiple legal sources not well-connected to each other.[38] This poses exceptional difficulty to U.K. citizens and residents, because there is no single clear source of U.K. law (other than the HRA) that defines what these rights are, or how they can be enforced. The U.K. legal system itself seems exceptionally complex with regard to individual rights.[39] This is perhaps

33. Stefanovic, *supra* note 22; Michael Wilkinson, *Human Rights Act Will Be Scrapped in Favour of British Bill of Rights, Liz Truss Pledges,* THE TELEGRAPH (Aug. 22, 2016), http://www.telegraph.co.uk/news/2016/08/22/new-british-bill-of-rights-will-not-be-scrapped-insists-liz-trus/.

34. Christopher Hope, *Britain to Be Bound by European Human Rights Laws for at Least Another Five Years Even if Tories Win the Election,* THE TELEGRAPH (May 18, 2017), http://www.telegraph.co.uk/news/2017/05/18/britain-bound-european-human-rights-laws-least-another-five/.

35. Conor Gearty, *The Human Rights Act Should Not Be Repealed* 2-3 (London Sch. of Econ. Law Dep't, Policy Briefing Paper No. 16, 2016), http://ssrn.com/abstract=2836074.

36. *Id.* at 2-3.

37. Steven Greer, *Implications of Brexit for the European Convention on Human Rights,* E-INTERNATIONAL RELATIONS (July 27, 2017), http://www.e-ir.info/2017/07/27/implications-of-brexit-for-the-european-convention-on-human-rights/.

38. MARK RYAN & STEVE FOSTER, UNLOCKING CONSTITUTIONAL AND ADMINISTRATIVE LAW 36 (3rd ed. 2014).

39. *See* Lock & Daly, *supra* note 7, at 28 ("The existing legal and institutional framework for the protection of human rights in the UK is a multi-layered system that cuts across both devolved and reserved competences in the context of devolution, and which is based on, and affected by, international treaties

understandable in that the U.K. had no Supreme Court until 2009 and the country's top judicial appellate court was a House of Lords body subject to Parliamentary control and oversight.[40] Even now that there is one, U.K. courts generally exercise only limited judicial review of the validity of parliamentary legislation.[41] This seems to limit what U.K. courts can actually do to protect individual rights that run afoul of U.K. statutes, their only options being to apply either the HRA or—as long as the U.K. remains in the EU—the Charter. This may well change over time;[42] but until it does, human rights advocates must necessarily worry about the relative weakness of the U.K. judiciary vis-à-vis Parliament.

As already noted, the U.K. Constitution is no single document, but rather a compilation of common law court decisions and statutory provisions. Although this gives U.K. courts potentially significant powers, the U.K. individual rights jurisprudence has never matched the protections afforded by the Charter and the ECHR. The fact that the U.K. has lost well over half its ECtHR cases reinforces this point.[43] The most graphic example of U.K. common law shortcomings in this regard is seen in the judicial refusal or inability to protect individuals from egregious abuses in Northern Ireland.[44]

Most individual rights at a national level flow from written constitutions which enumerate these rights expressly in a single document. The U.K. presents a notable exception as one of only three nations with no written constitution per se. As Professor Blackburn writes, "in Britain we certainly say that we have a constitution, but it is one that exists in an abstract sense, comprising a host of diverse laws, practices and conventions that have evolved over a long period of time."[45]

This is not to suggest the absence of written U.K. laws related to individual rights. Numerous acts of Parliament and published court decisions establish, and to a certain extent, protect, these rights. This U.K. legal framework nonetheless grants legal supremacy to the U.K. Parliament and its legislative enactments, while precluding U.K. courts from invalidating legislation as unconstitutional.[46]

> Another characteristic of the unwritten constitution is the special significance of political customs known as 'conventions', which oil the wheels of the relationship between the ancient institutions of state. These are unwritten rules of constitutional practice, vital to our politics, the

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which the United Kingdom has ratified, particularly the ECHR and the EU Charter of Fundamental Rights, and the Good Friday Agreement.").

40. History of the Supreme Court, THE SUPREME COURT (Nov. 7, 2009, 10:47 PM), https://www.supremecourt.uk/about/history.html

41. René Reyes, *Legislative Sovereignty, Executive Power, and Judicial Review: Comparative Insights from Brexit*, 115 MICH. L. REV. 91, 96 (2017).

42. *See* Gavin Drewry, *The UK Supreme Court – A Fine New Vintage, or Just a Smart New Label on a Dusty Bottle?*, 3 INT'L J. COURT ADMIN. 1, 13 (2011) (discussing the Court's history and comparing the Court to judicial counterparts in other countries).

43. Between 1975 and the end of 2015, in 305 of 526 cases heard by the ECtHR regarding the UK, the court found at least one violation of the ECHR. Julie Gill and Arabella Lang, *UK Cases at the European Court of Human Rights Since 1975* 3 (House of Commons Library, Briefing Paper No. 8049, 2017), *available at* http://researchbriefings.files.parliament.uk/documents/CBP-8049/CBP-8049.pdf.

44. Lock & Daly, *supra* note 7, at 14-16 (with emphasis placed on No. 5).

45. Robert Blackburn, *Britain's Unwritten Constitution*, THE BRITISH LIBRARY, (Mar. 13, 2015), https://www.bl.uk/magna-carta/articles/britains-unwritten-constitution.

46. *Id.*

> workings of government, but not committed into law or any written form at all.[47]

An inherent problem with this approach is that most members of the U.K. public have no ready access to what their constitution is and says regarding individual rights and what these rights are.

Historical legal documents which do address individual rights and related issues include:[48]

- 1215 Magna Carta: subjecting kings to the authority of written laws adopted by the nobles and protecting nobles from arbitrary arrest (generally ignoring common people's rights).

- 1258 Provisions of Oxford: creating a council of nobles through which kings should govern, subject to oversight by parliaments yet to be created.

- 1628 Petition of Rights: protecting subjects from arbitrary arrest and punishment.

- 1689 Bill of Rights: establishing individual rights to freedom from excessive bail, cruel and unusual punishment, and pre-conviction fines and forfeitures, as well as the right of Protestants to bear arms for self-defense (while primarily focusing on strengthening Parliament and weakening royal powers).

- 1701 Act of Settlement: creating judicial independence.

Although often cited by U.K. political leaders as evidence of the U.K.'s longstanding commitment to human rights, these legal documents focus primarily on defining government powers and establishing governmental authority, and give far less attention to individual rights. The U.K. has historically shied away from adopting a domestic equivalent of the U.S.'s Bill of Rights for various reasons. One might logically conclude that one such reason that many U.K. political leaders disfavor having a bill of rights is because it could tie Parliamentary hands to legislate such rights by majority vote based on the political whim of the moment.[49] It is generally conceded that U.K. domestic laws other than the HRA provide weaker human rights protections.[50]

The U.K. did purport to incorporate human rights into its constitutional legal framework when Parliament enacted the HRA, which incorporated the ECHR and its body of case law into U.K. domestic law and created individual causes of action to

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47. *Id.*

48. *Id.*

49. Douglas W. Vick, *The Human Rights Act and the British Constitution*, 37 TEX. INT'L L.J. 329, 329-30 (2002).

50. SIR MICHAEL TUGENDHAT, FIGHTING FOR FREEDOM? THE HISTORIC AND FUTURE RELATIONSHIP BETWEEN CONSERVATISM AND HUMAN RIGHTS 20, 49 (2017), http://www.brightblue.org.uk/images/Fightingforfreedom.pdf.

enforce those rights in U.K. courts.[51] However, U.K. political leaders have a 20-year history of criticizing continental Europe's detailed, expansive human rights approach.[52] The U.K. did negotiate an ECHR opt-out under certain circumstances, the validity and application of which are subject to significant debate, out of concern that the continental approach posed too many potential conflicts with British legal authority, including the above historical documents.[53] This overall muddled state of U.K. law and the U.K. judicial system helps explain why the U.K. has fared so poorly in ECHR human rights cases. It also strengthens the argument for requiring the U.K. to protect human rights laws by permanently integrating them into U.K. domestic law. Ironically, the EU and ECHR courts have provided a legal framework of case law, which a common-law system like the U.K. has utilized to simplify this complex system by aligning U.K. human rights law and its application with the rest of Europe. The U.K. Supreme Court President observed that the HRA has resulted in national courts "developing a UK human rights jurisprudence . . . [which] is in general very beneficial."[54]

Legal complexity and confusion will likely increase in the U.K. if the Withdrawal Bill becomes law as proposed because it provides that a U.K. "court or tribunal need not have regard to anything done on or after exit day by the European Court, another EU entity or the EU but may do so if it considers it appropriate to do so."[55] Allowing U.K. courts to pick and choose which EU laws it will and will not apply with no specific criteria seems especially problematic in a common law jurisdiction like the U.K., where judicial precedent is the basis for legal predictability. As seen below, U.K. courts have all too often failed to apply ECHR human rights laws in favor of individuals, and at times U.K. domestic court anarchy has characterized many of these cases.

II. THE U.K. ECHR LITIGATION TRACK RECORD: A GLASS HALF EMPTY

The U.K. House of Commons compiles reports once or more a year summarizing U.K. ECtHRcases reaching judgments on the merits, making access to these case results readily available. According to the most recent report issued in August 2017, "there have been 526 judgments concerning the U.K. up to the end of 2015. Of these, over half (305) found at least one violation of the European Convention on Human Rights, and about a quarter (132) found no violation."[56] Between January 2016 and June 22, 2017, seven of 15 decisions found ECHR violations;[57] and as of the date this Article concluded, no other U.K. cases had been decided on the merits.[58]

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51. Blackburn, *supra* note 45.

52. *See Why the UK Needs Human Rights*, HUMAN RIGHTS WATCH (Sept. 13, 2017, 12:44 PM EDT), https://www.hrw.org/news/2017/09/13/why-uk-needs-human-rights (criticizing the U.K.'s adoption of the HRA, which incorporates the ECHR).

53. *See infra* pp. 21-23 (referencing multiple ECHR violations in the UK).

54. Lord Neuberger, Conkerton Lecture 2014 at the Liverpool Law Society: The Supreme Court and the Rule of Law (Oct. 9, 2014), https://www.supremecourt.uk/docs/speech-141009-lord-neuberger.pdf.

55. European Union (Withdrawal) Bill 2017, HC Bill [5] cl.6(2) (UK).

56. Gill & Lang, *supra* note 43, at 3 (emphasis added). The rest of the cases reaching the Court settled before decisions were reached. *Id.*

57. *Id.* at 4-5.

58. The ECtHRwebsite contains all Court judgments by country and date. EUROPEAN COURT OF HUMAN RIGHTS, https://hudoc.echr.coe.int/eng# (last visited Aug. 26, 2017).

The litigation summarized below includes only cases resulting in final judgments on the merits, and findings of one or more ECHR violations. These cases do not reflect all U.K. ECHR cases decided on the merits, but instead were selected because they involve the most significant ECHR rights such as liberty, law enforcement activity, judicial fairness and impartiality, alien rights, freedom of speech and press, and freedom from discrimination, among others. The summarized litigation also excludes cases focusing solely on monetary award disputes after the U.K. conceded ECHR violations.

It is important to note that ECHR applicants, or plaintiffs, must exhaust all local judicial remedies before they can get a case to the European Court, which means that a country's domestic court system has failed the party claiming ECHR violations.[59] Plainly stated, a country's laws must permit plaintiffs to sue national and sub-national governments and obtain meaningful judicial review of administrative decisions in response to alleged ECHR violations. In addition, ECHR parties must provide meaningful legal remedies for proven violations.[60] Governments often lose ECHR cases because their national laws afford no viable legal basis for plaintiffs to challenge alleged ECHR violations in national courts even when no ECHR substantive violations have occurred. The U.K. is no exception. The large number of violations speak for themselves.

A. *ECHR Litigation Finding U.K. Violations by Case Categories*

The easiest way to illustrate the U.K. ECHR case decisions is by case category. This author has opted to use somewhat generic categorization and sub-categorization for clarity reasons.

1. U.K. Northern Ireland Conflict ECHR Violations

For a number of years, Northern Ireland experienced extreme violence between the Protestant majority and large Catholic minority, requiring British armed forces to intervene in support of Northern Ireland law enforcement officials.[61] These developments resulted in numerous arrests and long term detentions for indefinite time periods, often accompanied by interrogations in violation of ECHR provisions. Many cases reached the ECtHR, and virtually all of them resulted in findings of U.K. violations, including:

(1) use of "enhanced" interrogation techniques that constituted a practice of inhumane treatment and torture;[62]

(2) failure to bring several persons arrested under anti-terrorism law before a judge;[63]

59. ECHR, *supra* note 5, art. 35.

60. *Id.* art. 13.

61. Lock & Daly, *supra* note 7, at 14 (noting that the ECHR applies to Northern Ireland as part of the UK, and that commentators have noted the seriousness of ECHR violations reflected in these cases).

62. *See* Ireland v. United Kingdom, App. No. 5310/71 (Eur. Ct. H.R., Jan. 18, 1978), *available at* http://hudoc.echr.coe.int/eng?i=001-57506 (finding an art. 3 violation).

63. *See* Brogan and Others v. United Kingdom, App. No. 11209/84; 11234/84; 11266/84; 11386/85 (Eur.

(3) failure to inform arrestees why they were arrested as suspected terrorists and what criminal acts they allegedly committed;[64]

(4) lack of access to an attorney promptly after anti-terrorism arrests;[65]

(5) unjustified military killing of suspected terrorists as excessive use of force;[66]

(6) numerous failures to conduct prompt, independent and effective investigations of military killing of multiple terrorists;[67] and

(7) police filing of an ethics complaint against shooting victims' lawyer for communicating investigation information to relatives.[68]

2. U.K. Alien Detention and Deportation ECHR Violations

Another ECHR litigation hotbed in the U.K. has been alien detention and deportations, where the U.K. has fared poorly. ECHR violations to date include:

(1) attempted extradition of an alien to the U.S. to face capital murder charges and the possible death penalty, resulting in the landmark ECHR *Soering* decision barring such extraditions altogether as inhumane and degrading punishment;[69]

(2) attempted deportation of a Sikh asylum seeker to India where he would likely face torture and persecution, with no U.K. judicial control or legal remedy over the decision;[70]

(3) attempted deportation of aliens convicted of criminal offenses to countries where they would face persecution and likely death;[71]

Ct. H.R., Nov. 29, 1988), *available at* http://hudoc.echr.coe.int/eng?i=001-57449 (finding an art. 5 violation).

64. *See* Fox, Campbell and Hartley v. United Kingdom, App. No. 12244/86; 12245/86; 12383/8613 (Eur. Ct. H.R., Aug. 30, 1990), *available at* http://hudoc.echr.coe.int/eng?i=001-57721 (finding an art. 5 violation).

65. *See, e.g.*, John Murray v. United Kingdom, App. No. 18731/91 (Eur. Ct. H.R., Feb. 8, 1996), *available at* http://hudoc.echr.coe.int/eng?i=001-104024; Averill v. United Kingdom, App. No. 36408/97 (Eur. Ct. H.R., Jun. 6, 2000) (finding art. 6 violations).

66. *See* McCann and Others v. United Kingdom, App. No. 18984/91 (Eur. Ct. H.R., Sept. 27, 1995), *available at* http://hudoc.echr.coe.int/eng?i=001-57943 (finding an art. 2 violation).

67. *See, e.g.*, Kelly and Others v. United Kingdom, App. No. 30054/96 (Eur. Ct. H.R., Apr. 8, 2001), *available at* http://hudoc.echr.coe.int/eng?i=001-59453; McKerr v. United Kingdom, 2001-III Eur. Ct. H.R. 47; Finucane v. United Kingdom, 2003-VIII Eur. Ct. H.R. 1; McGrath v. United Kingdom, App. No. 34651/04 (Eur. Ct. H.R., Nov. 27, 2007), *available at* http://hudoc.echr.coe.int/eng?i=001-83482; McCartney v. United Kingdom, App. No. 34575/04 (Eur. Ct. H.R., Nov. 27, 2007), *available at* http://hudoc.echr.coe.int/eng?i=001-83480; Brecknell v. United Kingdom, App. No. 32457/04, 46 Eur. H.R. Rep. 42 (2008); O'Dowd v. United Kingdom, App. No. 7390/07 (Eur. Ct. H.R., Nov. 27, 2007), *available at* http://hudoc.echr.coe.int/eng?i=001-83472; Reavey v. United Kingdom, App. No. 34622/04 (Eur. Ct. H.R., Nov. 27, 2007), *available at* http://hudoc.echr.coe.int/eng?i=001-83462; McCaughey and Others v. United Kingdom, 2013-IV Eur. Ct. H.R. 335; Hemsworth v. United Kingdom, App. No. 58559/09 (Eur. Ct. H.R., July 16, 2013), *available at* http://hudoc.echr.coe.int/eng?i=001-122371 (finding art. 2 violations).

68. *See* McShane v. United Kingdom, 35 Eur. Ct. H.R. at 23 (2002) (finding an art. 2 violation).

69. *See* Soering v. United Kingdom, 161 Eur. Ct. H.R. (ser. A) at 4 (1989) (finding an art. 3 violation).

70. *See* Chahal v. United Kingdom, App. No. 22414/93, 23 Eur. H.R. Rep. 413 (1997) (finding arts. 3, 5para.4 and 13 violations).

71. *See* Sufi and Elmi v. United Kingdom, App. No. 8319/07, 54 Eur. H.R. Rep. 9 (2012) (finding an art. 3 violation).

(4) attempted expulsion of asylum seekers to other countries where they would likely face persecution;[72]

(5) deportation of aliens with extensive immediate U.K. family members;[73]

(6) deportation of an alien likely to face an unfair trial based on torture-induced evidence even though persecution and mistreatment may not be likely;[74]

(7) excessive length of detention during deportation proceedings;[75] and

(8) attempted extradition of a mentally ill detainee to a country (the U.S.) with unacceptable detention and sentencing criteria because the detainee is a suspected terrorist there.[76]

3. Post-9/11 Detention ECHR Violations

One of the most important ECHR alien rights cases involved the U.K. anti-terrorism law enacted following the September 11, 2001 New York City attacks.[77] The essence of the litigation was whether the U.K. derogation from various ECHR provisions, authorized in ECHR art. 15 in national emergencies, was valid; and also whether the U.K. law, which created a special court governed by national security evidentiary and procedural criteria, as well as restrictions on detainee counsel, met ECHR requirements if the derogation was not valid. The ECtHR and U.K. Law Lords acting as the country's highest appeals court found the derogation legally infirm as too broad and the U.K. law discriminatory because it treated nonresident aliens differently from U.K. nationals from the same countries. The case did not turn on derogation, however. Instead, the Court found that certain plaintiffs were denied the right to effective counsel because the U.K. law precluded attorney-client consultations; that certain plaintiffs suffered due process violations because national security requirements restricted their access to secret evidence used against them; and that certain plaintiffs lacked a viable remedy or means to challenge the legality of their detentions.[78] This case sets strict limits on how derogation applies and domestic anti-terrorism laws. Interestingly, the U.K. domestic court derogation rejection represents one of the relatively few instances when a U.K. domestic court and the ECtHR reached the same results.

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72. *See* Hilal v. United Kingdom, 33 Eur. H.R. Rep. 31 (2001); S.H. v. United Kingdom, App. No. 19956/06, 54 Eur. H.R. Rep. 4 (2012) (finding art. 3 violations).

73. *See, e.g.*, Omojudi v. United Kingdom, App. No. 1820/08, 51 Eur. H.R. Rep. 10 (2009); Khan A.W. v. United Kingdom, App. No. 47486/06, 50 Eur. H.R. Rep. 47 (2010); A.A. v. United Kingdom, App. No. 8000/08 (2011), http://hudoc.echr.coe.int/eng?i=001-106282 (finding art. 8 violations).

74. *See* Othman (Abu Qatada) v. United Kingdom, 2012-I Eur. Ct. H.R. 159 (finding an art. 6 violation).

75. *See* Abdi v. United Kingdom, App. No. 27770/08, 57 Eur. H.R. Rep. 16 (2013) (finding an art. 5para.1 violation).

76. *See, e.g.*, Aswat v. United Kingdom, App. No. 17299/12 (Apr. 16, 2013), http://hudoc.echr.coe.int/eng?i=001-118583 (finding art. 3 violations).

77. *A and Others v. United Kingdom*, 2009-II Eur. Ct. H.R. 137. See Marko Milanovic, *European Court Decides A and Others v. United Kingdom*, BLOG OF THE EUR. J. OF INT'L L. (Feb. 19, 2009), https://www.ejiltalk.org/european-court-decides-a-and-others-v-united-kingdom, for a concise description of the decision.

78. A and Others v. United Kingdom, *supra* note 77, at 141-44 (finding art. 5 paras. 1, 4 & 5 violations).

4. U.K. Overseas Military Operations ECHR Violations

U.K. military activities in Iraq and Afghanistan have resulted in the following ECHR violations:

(1) wrongful transfer of Iraqi detainees from U.K. military custody to Iraqi authorities without receiving required assurances that they would not receive death penalty, and failure to preserve detainees' U.K. appellate rights once the transfers were made;[79]

(2) failure to investigate Iraqi civilian deaths during military security operations;[80] and

(3) excessive military detention length.[81]

5. Other ECHR Alien Rights ECHR Violations

The U.K. has faced successful ECHR challenges from aliens in other types of cases, including:

(1) illegal discrimination arising in U.K. immigration laws making it easier for alien males to bring female spouses into the country than vice versa;[82]

(2) deportation of alien with AIDS;[83]

(3) failure to inform detainee about the reasons for detention;[84]

(4) excessive fees and religious ceremony criteria for nonresident alien marriages in U.K.;[85]

(5) inability of refugees to be joined by post-flight spouses;[86] and

(6) forfeiture of wages earned by alien unauthorized to work.[87]

6. U.K. Criminal Justice ECHR Violations

U.K. criminal court cases have resulted in numerous ECHR violations, including:

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79. Al-Saadoon and Mufdhi v. United Kingdom, 2010-IV Eur. Ct. H.R. 59 (finding arts. 3, 13 & 14 violations).

80. Al-Skeini and Others v. United Kingdom, 53 Eur. Ct. H.R. 589 (2011) (finding art. 2 violation).

81. Al-Jedda v. United Kingdom, 2011-IV Eur. Ct. H.R. 305 (finding art. 5, para. 1 violation).

82. Abdulaziz, Cabales and Balkandali v. United Kingdom, 94 Eur. Ct. H.R. (ser. A) at 36 (1985) (finding art. 14 violation).

83. *See generally* D. v. United Kingdom, 24 Eur. Ct. H.R. 423 (1997) (finding art. 3 violation).

84. Saadi v. United Kingdom, 2008-I Eur. Ct. H.R. 31, 65 (finding art. 5, para. 2 violation).

85. *See, e.g.*, Thynne, Wilson and Gunnell v. United Kingdom, App. Nos. 11787/85, 11978/86 and 12009/86., 13 Eur. H.R. Rep. 666 (1991) (finding art. 5 violation); Oldham v. United Kingdom, 2000-X Eur. Ct. H.R. 1 (finding art. 5 para. 4 violation); O'Donoghue and Others v. United Kingdom, 2010-VI Eur. Ct. H.R. 397 (finding arts. 12 and 14 violations).

86. *See* Hode and Abdi v. United Kingdom, App. No. 22341/09, 56 Eur. H.R. Rep. 27, 36 (2013) (finding art. 14 violation when read together with art. 8).

87. *See* Paulet v. United Kingdom, App. No. 6219/08, 61 Eur. H.R. Rep. 39, 51 (2015) (finding art. 1 of Protocol No. 1 violation).

(1) failure to provide judicial hearings and adequate judicial review for rearrested parolees and lack of viable remedy for violations;[88]

(2) denial of appointed attorney for indigent arrests for not paying fines, taxes restitution, etc;[89]

(3) denial of appointed attorney in indigent appeals;[90]

(4) flawed jury instructions regarding self-incrimination and right to remain silent;[91]

(5) wrongful bail denials, flawed U.K. bail laws and excessive pre-bail detention;[92]

(6) excessive criminal arraignment, trial and appeal delays;[93]

(7) prosecutorial failure to disclose material evidence (including entrapment evidence);[94]

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88. *See, e.g.*, Waite v. United Kingdom, App. No. 53236/99, 36 Eur. H.R. Rep. 54 (2003) (finding art.5 para. 4 violation); Weeks v. United Kingdom, App. No. 9787/82, 10 Eur. H.R. Rep. 293, 316 (1987) (finding art. 5 para. 4 violation).

89. *See, e.g.*, Perks and Others v. United Kingdom, App. Nos. 25277/94, 25279/94, 30 Eur. H.R. Rep. 33 (2000) (other App. Nos. omitted) (finding art. 6 paras. 1 and 3(c) violations); Benham v. United Kingdom, 1996-III Eur. Ct. H.R. 738, 756 (finding art. 6 paras. 1 and 3(c) violations); Lloyd and Others v. United Kingdom, App. Nos. 29798/96, 30395/96 (Eur. Ct. H.R., 2005) (other App. Nos. omitted), *available at* http://hudoc.echr.coe.int/eng?i=001-68423 (finding art. 6 paras. 1 and 3(c) violations); Beet and Others v. United Kingdom, App. Nos. 47676/99, 58923/00 (Eur. Ct. H.R., 2005) (other App. Nos. omitted), *available at* http://hudoc.echr.coe.int/eng?i=001-68421 (finding art. 5 para. 1 violation).

90. *See, e.g.*, Boner v. United Kingdom, 300 Eur. Ct. H.R. (Ser. A) at 66 (1994) (finding art. 6 para. 3(c) violation); Maxwell v. United Kingdom, 300 Eur. Ct. H.R. (Ser. A) at 97-98 (1994) (finding art. 6 para. 3(c) violation).

91. *See, e.g.*, Saunders v. United Kingdom, 24 Eur. Ct. H.R. 2044 (1996); Condron v. United Kingdom, 2000-V Eur. Ct. H.R. 1; I.J.L. and Others v. United Kingdom, 2000-IX Eur. Ct. H.R. 323; Beckles v. United Kingdom, App. No. 44652/98, 36 Eur. H.R. Rep. 13 (2003); Kansal v. United Kingdom, App. No. 21413/02, 39 Eur. H.R. Rep. 31 (2004); Shannon v. United Kingdom, App. No. 6563/03, 42 Eur. H.R. Rep. 31 (2006) (finding art. 6 violations).

92. *See, e.g.*, Caballero v. United Kingdom, 2000-II Eur. Ct. H.R. 45 (finding violations of art. 5 paras. 3 and 5); S.B.C. v. United Kingdom, App. No. 39360/98, 34 Eur. H.R. Rep. 619 (2001) (finding violations of art. 5 paras. 3 and 5); Gault v. United Kingdom, App. No. 1271/05, 46 Eur. H.R. Rep. 5 (2008) (finding violations of art. 5 para. 3).

93. *See, e.g.*, Mellors v. United Kingdom, App. No. 57836/00, 38 Eur. H.R. Rep. 11 (2003) (finding the unreasonable length of the proceedings in applicant's trial and appeal constituted an art. 6 para.1 violation); Thompson v. United Kingdom, App. No. 36256/97, 40 Eur. H.R. Rep. 11 (2004) (finding that applicant's pre-trial detention violated art. 5 paras. 3 and 5, and that his summary trial before his Commanding Officer violated art. 6 paras. 1 and 3); Massey v. United Kingdom, App. No. 14399/02 (Eur. Ct. H.R., Nov. 16, 2004), *available at* http://hudoc.echr.coe.int/eng?i=001-67470 (finding that the delay of criminal proceedings constituted a violation of art. 6 para. 1); Yetkinsekerci v. United Kingdom, App. No. 71841/01, 43 Eur. H.R. Rep. 4 (2005) (finding that the length of applicant's legal proceedings was in violation of the "reasonable time" requirement of art. 6 para.1); Bullen & Soneji v. United Kingdom, App. No. 3383/06 (Eur. Ct. H.R., Jan. 8, 2009), *available at* http://hudoc.echr.coe.int/eng?i=001-90398 (finding that the delay of the confiscation and money-laundering proceedings taken against applicants was in violation of art. 6 para.1); Beggs v. United Kingdom, App. No. 25133/06, 56 Eur. H.R. Rep. 26 (2013), *available at* http://hudoc.echr.coe.int/eng?i=001-114250 (finding that the length of the complainant's appeal proceedings violated art. 6 para. 1); O'Neill and Lauchlan v. United Kingdom, App. Nos. 41516/10, 75702/13, 64 Eur. H.R. Rep. 16 (2016) (finding that applicants' nine-year proceedings constituted a violation of art. 6para.1 of the Convention).

94. *See, e.g.*, Atlan v. United Kingdom, App. No. 36533/97, 34 Eur. H.R. Rep. 33 (2002); Dowsett v.

(8) wrongful hearsay-based convictions;[95]

(9) wrongful asset forfeitures and flawed or excessively long forfeiture procedures;[96]

(10) juror race discrimination;[97]

(11) wrongful inclusion of police officer as juror when case turns on police conduct evidence;[98]

(12) inadequate judicial review of life sentences with discretionary release;[99] and

(13) unlawful government refusal to grant release recommended by parole board because there were no criteria to support it.[100]

7. U.K. Law Enforcement ECHR Violations

The U.K. has seen a number of ECHR violations committed by U.K. law enforcement agencies, seemingly with impunity in the U.K. courts. These violations include:

(1) unlawful suspect interrogations by denying suspects access to attorneys and covertly monitoring attorney-client consultations;[101]

United Kingdom, 2003-VII Eur. Ct. H.R. 259; Edwards and Lewis v. United Kingdom, 2004-X Eur. Ct. H.R. 61; Rowe and Davis v. United Kingdom, 2000-II Eur. Ct. H.R. 287 (finding art. 6 para. 1 violations).

95. *See* Al-Khawaja and Tahery v. United Kingdom, 2011-VI Eur. Ct. H.R. 191 (finding art. 6 para.1 violation).

96. *See, e.g.*, Welch v. United Kingdom, App. No. 17440/90 (Eur. Ct. H.R., Feb. 9, 1995), *availalable at* http://hudoc.echr.coe.int/eng?i=001-57927 (finding art. 7 violation); Crowther v. United Kingdom, App. No. 53741/00 (Eur. Ct. H.R., Feb. 1, 2005), *available at* http://hudoc.echr.coe.int/eng?i=001-68112; Piper v. United Kingdom, App. No. 44547/10 (Eur. Ct. H.R., Apr. 21, 2014), *available at* http://hudoc.echr.coe.int/eng?i=001-153922 (finding art. 6 violations); Minshall v. United Kingdom, App. No. 7350/06 (Eur. Ct. H.R., Mar. 20, 2012), *availalable at* http://hudoc.echr.coe.int/eng?i=001-108203 (finding arts. 6 & 7 violations).

97. *See* Sander v. United Kingdom, 2000-V Eur. Ct. H.R. 243 (finding art. 6 para. 1 violation).

98. *See* Hanif and Khan v. United Kingdom, App. No. 52999/08, 55 Eur. H.R. Rep. 16 (2012) (finding art. 6 para. 1 violation).

99. *See, e.g.*, Thynne, Wilson and Gunnell v. United Kingdom, App. Nos. 11787/85, 11978/86 and 12009/86, 13 Eur. H.R. Rep. 666 (1991) (finding art. 5 violation); Von Bulow v. United Kingdom, App. No. 75362/01 (Eur. Ct. H.R., Oct. 7, 2003), *available at* http://hudoc.echr.coe.int/eng?i=001-61332; Wynne v. United Kingdom (No. 2), App. No. 67385/01 (Eur. Ct. H.R., Oct. 16, 2003), *available at* http://hudoc.echr.coe.int/eng?i=001-61376; Benjamin and Wilson v. United Kingdom, App. No. 28212/95 (Eur. Ct. H.R., Sept. 26, 2002), *available at* http://hudoc.echr.coe.int/eng?i=001-60649; Vinter and others v. United Kingdom, 2013-III Eur. Ct. H.R.317; Doherty v. United Kingdom, App. No. 76874/11 (Eur. Ct. H.R., Feb. 18, 2016); Hussain v. United Kingdom, App. No. 21928/93 (Eur. Ct. H.R., Feb. 21, 1996), *available at* http://hudoc.echr.coe.int/eng?i=001-57976; Stafford v. United Kingdom, 2002-IV Eur. Ct. H.R. 115; Hirst v. United Kingdom, App. No. 40787/98 (Eur. Ct. H.R., July 24, 2001), *available at* http://hudoc.echr.coe.int/eng?i=001-59607; Hill v. United Kingdom, App. No. 19365/02 (Eur. Ct. H.R., July 27, 2004), *available at* http://hudoc.echr.coe.int/eng?i=001-61744; Blackstock v. United Kingdom, App. No. 59512/00, 42 Eur. H.R. Rep. 2 (2005); Singh v. United Kingdom, App. No. 23389/94 (Eur. Ct. H.R., Feb. 21, 1996), *available at* http://hudoc.echr.coe.int/eng?i=001-57984 (finding an art. 5 violations); Easterbrook v. United Kingdom, App. No. 48015/99, 37 Eur. H.R. Rep. 40 (2003) (finding art. 5 & 6 violations).

100. *See* Clift v. United Kingdom, App. No. 7205/07 (Eur. Ct. H.R., July 13, 2010), *available at* http://hudoc.echr.coe.int/eng?i=001-99913 (finding art. 14 violation).

101. *See* Magee v. United Kingdom, 2000-VI Eur. Ct. H.R. 159; Brennan v. United Kingdom, 2001-X Eur. Ct. H.R. 211; R.E. v. United Kingdom, App. No. 62498/11 (Eur. Ct. H.R., Oct. 27, 2015), *available at* http://hudoc.echr.coe.int/eng?i=001-158159; Ibrahim and Others v. United Kingdom, App. Nos. 50541/08 &

(2) failure to bring arrestee promptly before a judge and no remedy to challenge it;[102]

(3) covert suspect filming and taping in police station;[103]

(4) unlawful search and seizure;[104]

(5) failure to exercise proper care of detainee in custody and failure to conduct adequate investigation into the detainee's death;[105]

(6) failure to conduct adequate investigation into police shooting death;[106]

(7) prolonged detention of mentally ill arrestee without appropriate treatment;[107] and

(8) failure to maintain neutrality required by circumstances in domestic relations dispute.[108]

8. U.K. Electronic Surveillance and DNA RCHR Violations

One major clash between ECHR requirements and U.K. practice has been in the area of electronic surveillance, primarily because privacy rights have traditionally enjoyed more legal protection in continental Europe than in the U.K., and U.K. privacy laws offer inadequate safeguards.[109] The U.K. recently adopted a law described as "giving the UK intelligence agencies and police the most sweeping surveillance in the western world."[110] This combination of weak privacy laws generally, and the broad surveillance powers enjoyed by the government, all but guarantees major ECHR litigation, given the ECHR violations already committed by the U.K.. Those violations include:

50571/08 (Eur. Ct. H.R., Sept. 13, 2016) *available at* http://hudoc.echr.coe.int/eng?i=001-166680 (various art. 6 violations).

102. *See* O'Hara v. United Kingdom, 2001-X Eur. Ct. H.R. 121, *available at* http://hudoc.echr.coe.int/eng?i=001-59721 (Article 5 §§ 3, 5 violations).

103. *See, e.g.*, Perry v. United Kingdom, 2003-IX Eur. Ct. H.R. 141 (finding art. 8 violation; Wood v. United Kingdom, App. No. 234124/02, 36 Eur. H.R. Rep. 12 (2004), *available at* http://hudoc.echr.coe.int/eng?i=001-67472; Allan v. United Kingdom, 2002-IX Eur. Ct. H.R. 41, *available at* http://hudoc.echr.coe.int/eng?i=001-60713 (finding art. 8 and 13 violations)

104. *See, e.g.* Keegan v. United Kingdom, 2006-X Eur. Ct. H.R. 37; Gillan and Quinton v. United Kingdom, 2010-I Eur. Ct. H.R. 223 (finding art. 8 violations).

105. *See* McDonnell v. United Kingdom, App. No. 19563/11 (Eur. Ct. H.R., Dec. 9, 2014), *available at* http://hudoc.echr.coe.int/eng?i=001-148669 (finding art. 2 violation).

106. *See* Bubbins v. United Kingdom, 2005-II Eur. Ct. H.R. 169 (finding art. 13 violation).

107. *See* M.S. v. United Kingdom, App. No. 24527/08, 55 Eur. H.R. Rep. 23 (2012) (finding art. 3 violation).

108. *See* McLeod v. United Kingdom, App. No. 24755/94, 27 Eur. H.R. Rep. 493 (1999) (finding art. 8 violation).

109. *See* CHARLES RAAB & BENJAMIN GOOLD, PROTECTING INFORMATION PRIVACY 25–46 (Equal. & Hum. Rts. Comm'n, Res. Rep. 69, 2011), https://www.equalityhumanrights.com/sites/default/files/research-report-69-protecting-information-privacy.pdf (explaining the weaknesses of UK legislation regarding privacy rights).

110. Ewan MacAskill, *'Extreme Surveillance' Becomes UK Law with Barely a Whimper*, THE GUARDIAN (Nov. 19, 2016), https://www.theguardian.com/world/2016/nov/19/extreme-surveillance-becomes-uk-law-with-barely-a-whimper (describing the UK Investigatory Powers Act).

(1) illegal police telephone and mail interceptions;[111]

(2) unlawful U.K. national security agency electronic data gathering, examination and retention;[112]

(3) unauthorized monitoring of public employee emails;[113]

(4) unlawful government DNA and fingerprint retention after penal case acquittals and dismissals.[114]

9. U.K. Prisoner Rights ECHR Violations

In addition to the above re-arrest and parole revocation cases, the U.K. has lost a sizable number of ECHR prisoner rights cases involving:

(1) unauthorized prisoner mail interference;[115]

(2) unfair prison disciplinary hearings based on lack of independent decision-maker and denial of attorneys at hearings;[116]

(3) mistreatment of mentally ill prisoners resulting in suicide;[117]

(4) inadequate prisoner medical treatment and care;[118]

(5) failure to protect prisoner safety, resulting in death;[119]

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111. *See, e.g.,* Malone v. United Kingdom, App. No. 8691/79, 7 Eur. H.R. Rep. 14 (1985); Halford v. United Kingdom (No. 39), 1997-III Eur. Ct. H.R. 1004; Khan v. United Kingdom, 2000-V Eur. Ct. H.R. 279; P.G. and J.H. v. United Kingdom, 2001-IX Eur. Ct. H.R. 195; Armstrong v. United Kingdom, App. No. 65282/89, 36 Eur. H.R. Rep. 30, 515 (2003); Taylor-Sabori v. United Kingdom (2002), App. No. 47114/99, 36 Eur. H.R. Rep. 17 (2003); Hewitson v. United Kingdom, 37 Eur. H.R. Rep. 31 (2003); Chalkley v. United Kingdom, App. No. 63831/00, 37 Eur. H.R. Rep 30 (2003); Lewis v. United Kingdom, App. No. 1303/02, 39 Eur. H.R. Rep. 9 (2004); Elahi v. United Kingdom, App. No. 30034/04 (Eur. Ct. H.R., 2006), http://hudoc.echr.coe.int/eng?i=001-75894 (finding art. 8 violations).

112. *See, e.g.,* Liberty and Others v. United Kingdom, App. No. 58243/00, 48 Eur. H.R. Rep. 1 (2009), (finding art. 8 violation).

113. *See, e.g.,* Copland v. United Kingdom, 2007-I Eur. Ct. H.R. 317, 329 (finding art. 8 violation).

114. *See, e.g.,* S. & Marper v. United Kingdom, 2008-V Eur. Ct. H.R. 167, 208–09 (finding art. 8 violation).

115. *See, e.g.,* Szuluk v. United Kingdom, 2009-III Eur. Ct. H.R. 65, 82; Faulkner v. United Kingdom, App. No. 37471/9 (Eur. Ct. H.R., Sept. 4, 2002), *available at* http://hudoc.echr.coe.int/eng?i=001-6049; McCallum v. United Kingdom, App. No. 9511/81, 13 Eur. H.R. Rep. 597, 597 (1991); Boyle and Rice v. United Kingdom, App. Nos. 9658/82 and 9659/82, 10 Eur. H.R. Rep. 425, 441–42 (1988); Silver and Others v. United Kingdom, App. Nos. 5947/72 6205/73, 7052/75, 7061/75 7107/75, 7113/75, 7136/75, 5 Eur. H.R. Rep. 347, 347–48 (1983); Golder v. United Kingdom, 1 Eur. H.R. Rep. 524, 540 (1975) (finding art. 8 violations).

116. *See, e.g.,* Silver and Others v. United Kingdom, App. Nos. 5947/72 6205/73, 7052/75, 7061/75 7107/75, 7113/75, 7136/75, 5 Eur. H.R. Rep. 347, 347–48 (1983); Ezeh and Connors v. United Kingdom, 2003-X Eur. Ct. H.R. 101; Whitfield and Others v. United Kingdom, App. No. 46387/99, 41 Eur. H.R. Rep. 44 (2005); Black v. United Kingdom, App. No. 56745/00, 45 Eur. H.R. Rep. 25 (2007); Young, James and Webster v. United Kingdom, App. Nos. 7601/76 and 7806/77 (Eur. Ct. H.R., Oct. 18, 1982), *available at* http://hudoc.echr.coe.int/eng?i=001-57608; Campbell and Fell v. United Kingdom, App. Nos. 7819/77 and 7878/77 (Eur. Ct. H.R., June 28, 1984), *available at* http://hudoc.echr.coe.int/eng?i=001-57456 (finding art. 6, paras. 1 and 3, violations).

117. *See, e.g.,* Keenan v. United Kingdom, 2001-III Eur. Ct. H.R. 93 (finding art. 3 violation).

118. *See, e.g.,* Price v. United Kingdom, 2001-VII Eur. Ct. H.R. 153; McGlinchey and Others v. United Kingdom, 2003-V Eur. Ct. H.R. 183 (finding art. 3 violation).

119. *See, e.g.,* Paul and Audrey Edwards v. United Kingdom, 2002-II Eur. Ct. H.R. 137 (finding art. 2 violation).

(6) failure to provide training courses necessary for rehabilitation and release;[120]

(7) denial of artificial insemination facilities access to exercise right to have children;[121] and

(8) denial of prisoner voter rights.[122]

10. U.K. Non-criminal Mental Illness ECHR Violations

The U.K. has fared poorly in ECHR mental illness litigation. In addition to the above cases involving prisoners, the European Court has found violations in non-criminal case, including:

(1) continued psychiatric hospital detention length even after mental illness ceased;[123]

(2) illegally placing burden of proof on detainee to show mental illness was no longer present and excessive delay in the case legal proceedings while plaintiff remained detained;[124]

(3) wrongful detention of mentally ill person who lacked capacity to exercise legal rights and therefore had no reasonable attorney access;[125]

(4) no means to challenge mental illness detention in court;[126]

(5) psychiatric hospital detention despite absence of mental illness and lack of detention review;[127] and

(6) lack of automatic judicial review of mental illness detention legality.[128]

11. U.K. Child Rights ECHR Violations

U.K. child and family rights have been another active ECHR litigation area resulting in violations, including:

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120. *See, e.g.*, James, Wells & Lee v. United Kingdom, App. No. 25119/09 (Eur. Ct. H.R., Sept. 18, 2013), *available at* http://hudoc.echr.coe.int/eng?i=001-113127 (finding art. 5 para. 1 violation).

121. *See, e.g.*, Dickson v. United Kingdom, 2007-V Eur. Ct. H.R. 99 (finding art. 8 violation).

122. *See, e.g.*, Hirst (no. 2) v. United Kingdom, 2005-IX Eur. Ct. H.R. 187; Greens and M.T. v. United Kingdom, 2010-VI Eur. Ct. H.R. 57; Firth and Others v. United Kingdom, App. No. 47784/09, 63 Eur. H.R. Rep. 25 (2016); Millbank and Others v. United Kingdom, App. No. 44473/14 (Eur. Ct. H.R., June 30, 2016), *available at* http://hudoc.echr.coe.int/eng?i=001-163919 (finding art. 3 violations).

123. *See, e.g.*, Johnson v. United Kingdom, App. No. 22520/93, 27 Eur. H.R. Rep. 196 (1997) (finding art. 5, para. 1 violation).

124. *See, e.g.*, Hutchison Reid v. United Kingdom, 2003-IV Eur. Ct. H.R. 1 (finding art. 5, para. 4 violation).

125. *See, e.g.*, M.H. v. United Kingdom, App. No. 11577/06, 58 Eur. H.R. Rep. 35 (2014) (finding art. 5, para. 4 violation).

126. *See, e.g.*, X v. United Kingdom, 55 Eur. Ct. H.R. (ser. A) at 505 (1982) (finding art. 5, para. 4 violation).

127. *See, e.g.*, H.L. v. United Kingdom, 2004-IX Eur. Ct. H.R. 191 (finding art. 5, paras. 1 and 4, violations).

128. *See, e.g.*, Kolanis v. United Kingdom, 2005-V Eur. Ct. H.R. 261 (finding art. 5, para. 4 violation).

(1) U.K. health authorities' failure to obtain court approval for terminally ill medical treatment objected to by parents;[129]

(2) involuntary separation of child from parent in hospital during treatment and lack of viable remedy to challenge removal and treatment decisions;[130]

(3) lack of access to one's own child custodial care records and no viable challenge remedy;[131]

(4) lack of parental right to challenge denial of access to children;[132]

(5) lack of fair trial based on juveniles tried for murder to work effectively with their attorneys because of age and maturity and lack of judicial role in juvenile sentencing;[133]

(6) lack of fair trial generally for juveniles charged with crimes to participate effectively because of young age;[134]

(7) failure to protect child from step-father physical abuse by not charging correct crime;[135]

(8) lack of parent access to institutional custody records needed to contest the custody decision;[136]

(9) unlawful corporal punishment;[137]

(10)failure to involve parents in care decisions of child in institutional custody;[138]

(11)failure of state to remove children from parental custody despite knowledge of abuse;[139]

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129. *See* Glass v. United Kingdom, 2004-II Eur. Ct. H.R. 25 (finding art. 8 violation). The UK health officials and courts followed this ECtHR decision in the recent Charlie Gard litigation, which arrived at the European Court on an emergency appeal basis and, citing *Glass*, the ECtHR opted not to hear the case. Gard and Others v. United Kingdom, App. No. 39793/17 (Eur. Ct. H.R., June 27, 2017), *available at* http://hudoc.echr.coe.int/eng?i=001-175359.

130. *See, e.g.,* M.A.K. and R.K. v. United Kingdom, App. No. 45901/05, 51 Eur. H.R. Rep. 8 (2010); A.D. and O.D. v. United Kingdom, App. No. 28689/06, 51 Eur. H.R. Rep. 8 (2010) (finding art. 8 and 13 violations).

131. *See* Gaskin v. United Kingdom, 160 Eur. Ct. H.R. (ser. A) at 21 (1989); M.G. v. United Kingdom, App. No. 39393/98, 36 Eur. H.R. Rep. 22 (2003) (finding art. 8 violations).

132. *See, e.g.,* O. v. United Kingdom, App. No. 9276/81, 13 Eur. H.R. Rep. 578 (1988); H. v United Kingdom, App. No. 9580/81, 10 Eur. H.R. Rep. 95 (1988); B. v. United Kingdom, 121 Eur. Ct. H.R. (ser. A) at 61 (1987); W v. United Kingdom, App. No. 9749/82, 121 Eur. Ct. H.R. (ser. A) at 43 (1987); R. v. United Kingdom, App. No. 10496/83, 121 Eur. Ct. H.R. (ser. A) at 105 (1987) (finding arts. 6 para. 1, and 8 violations).

133. *See* T. and V. v. United Kingdom, App. Nos. 24724/94 and 24888/94, 30 Eur. H.R. Rep. 121 (2000) (finding art. 5 para. 4, and art. 6 para. 1, violations).

134. *See* S.C. v. United Kingdom, 2004-IV Eur. Ct. H.R. 281 (finding art. 6 para. 1 violation).

135. *See* A. v. United Kingdom, App. No. 25599/94, 22 Eur. H.R. Rep. 190 (1996) (finding art. 3 violation).

136. *See* McMichael v. United Kingdom, App. No. 16424/90, 20 Eur. H.R. Rep. 205 (1995) (finding art. 6 para. 1 and art. 8 violations).

137. *See, e.g.* Tyrer v. United Kingdom, App. No. 5856/72, 2 Eur. H.R. Rep. 1 (1978); Campbell and Cosans v. United Kingdom, App. Nos. 7511/76 and 7743/76, 4 Eur. H.R. Rep. 243 (1982) (finding art. 3 and Protocol1 art. 2 violations, respectively).

138. *See* T.P. and K.M. v. United Kingdom, 2001-V Eur. Ct. H.R. 119, 121–23 (finding arts. 6, 8, and 13 violations).

139. *See* Z. and Others v. United Kingdom, 2001-V Eur. Ct. H.R. 1, 3–5 (finding art. 3 violation).

(12) lack of viable remedy for children alleging abuse to challenge decision not to remove them from parental custody;[140]

(13) wrongful state removal of child at birth to permit adoption absent mother's consent;[141] and

(14) absence of legal counsel at child care and custody hearing.[142]

12. Parent Rights ECHR Violations

ECHR violations have also been found in other family cases, including:

(1) discriminating against unmarried fathers in child support tax laws;[143] and

(2) illegal ban against father-in-law marriage to daughter-in-law.[144]

13. U.K. LGBTQ Rights ECHR Violations

The U.K. has committed multiple ECHR lesbian, gay and transgender rights violations, including:

(1) unlawful sodomy laws;[145]

(2) unlawful ban on gays in armed forces;[146]

(3) unlawful failure to recognize gender change legality for pension rate purposes;[147]

(4) unlawful restrictions on transgender marriage rights;[148]

(5) unlawful age of consent differences between heterosexual and homosexual acts;[149] and

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140. *See, e.g.*, D.P. & J.C. v. United Kingdom, App. No. 38719/97, 36 Eur. H.R. Rep. 143, 143 (2002); E. v. United Kingdom, App. No. 33218/96, 36 Eur. H.R. Rep. 519, 519 (2002) (finding arts. 3 and 13 violations).

141. *See* P., C. and S. v. United Kingdom, 2002-VI Eur. Ct. H.R. 197, 199 (finding art. 8 violations).

142. *See Id.* (finding art. 6 para. 1 violation).

143. P.M. v. United Kingdom, App. No. 6638/03, 42 Eur. H.R. Rep. 1015, 1015 (2006) (finding art. 14 and Protocol 1, art. 1 violations).

144. B. & L. v. United Kingdom, App. No. 36536/02, 42 Eur, H.R. Rep. 195, 195 (2006) (finding art. 12 violation).

145. Dudgeon v. United Kingdom, App. No. 7525/76, 3 Eur. H.R. Rep. 40 (1981); A.D.T. v. United Kingdom, 2000-IX Eur. Ct. H.R. 295, 297 (finding art. 8 violations).

146. Lustig-Prean & Beckett v. United Kingdom, App. Nos. 31417/96 & 32377/96, 29 Eur. H.R. Rep. 548, 548 (1999); Smith & Grady v. United Kingdom, App. Nos. 33985/96 & 33986/96, 29 Eur. H.R. Rep. 493, 493 (1999); Beck, Copp and Bazeley v. United Kingdom, App. Nos. 48535/37, 58536/99 & 48537/99 (Eur. Ct. H.R., Oct. 22, 2002), *available at* http://hudoc.echr.coe.int/eng?i=001-60697; Perkins & R. v. United Kingdom, App. Nos. 43208/98 & 44875/98 (Eur. Ct. H.R., Oct. 22, 2002), *available at* http://hudoc.echr.coe.int/eng?i=001-60695 (finding art. 8 violations).

147. Grant v. United Kingdom, 2006-VII Eur. Ct. H.R. 1, 3 (finding art. 8 violation).

148. Goodwin v. United Kingdom, 2002-VI Eur. Ct. H.R. 1, 1 (finding arts. 8 and 12 violations).

149. B.B. v. United Kingdom, App. No. 53760/00, 39 Eur. H.R. Rep. 635, 635 (2004) (finding art. 8, in conjunction with art. 14, violation).

(6) unlawful discrimination in child support requirement based on sexual orientation.[150]

14. U.K. Civil Court and Litigation ECHR Violations

The U.K. has seen two primary areas of incompatibility between its judicial procedures and civil laws, on the one hand, and ECHR on the other, resulting in the following ECHR violations:

(1) excessive length in U.K. legal proceedings of all kinds, contrary to the requirements of article 6, paragraph 1 that "all stages of legal proceedings for the 'determination of . . . civil rights and obligations,' not excluding stages subsequent to judgment on the merits, be resolved within a reasonable time"[151]; and

(2) difficulties and barriers U.K. law has historically imposed to preclude ECHR challenges in U.K. courts; which, as already seen in a number of the above cases, as well as various cases discussed below, constitute an ECHR violation.[152]

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150. J.M. v. United Kingdom, App. No.37060/06, 53 Eur. H.R. Rep. 6 (2010) (finding art. 14 with Protocol 1, art. 1 violation).

151. Robins v. United Kingdom, App. No. 22410/93, 26 Eur. H.R. Rep. 527, 537 (1997) (quoting art. 6 para. 1 of the Convention, and holding that it was a violation of art. 6 para. 1 to take several years to finalize costs and address issues regarding attorney fees in litigation); *see also* Darnell v. United Kingdom, App. No. 15058/89, 18 Eur. H.R. Rep. 205, 211 (1993) (finding that taking nine years to conclude an employment litigation case constituted a breach of art. 6 para. 1); Somjee v. United Kingdom, App. No. 42116/98, 36 Eur. H.R. Rep. 228, 245 (2002) (determining that taking six years to conclude employment discrimination claims violated art. 6 para. 1); Foley v. United Kingdom, App. No. 39197/98, 36 Eur. H.R. Rep. 217, 217 (2002) (holding that taking 15 years to conclude a breach of contract case constituted a violation of art. 6 para. 1); Mitchell and Holloway v. United Kingdom, App. No. 44808/98, 36 Eur. H.R. Rep. 951, 963 (2003) (holding that taking nearly 10 years to conclude litigation on a stock purchase agreement was a violation of art. 6 para. 1); Obasa v. United Kingdom, App. No. 50034/99 (Eur. Ct. H.R., Jan. 16, 2003), *available at* http://hudoc.echr.coe.int/eng?i=001-60886 (determining that taking over seven years to conclude an employment discrimination case was a violation of art. 6 para. 1, despite the delay being partially attributable to all the domestic appeal levels having no internal docket policing); Price and Lowe v. United Kingdom, App. Nos. 43185/98 and 43186/98 (Eur. Ct. H.R., July 29, 2003) *available at* http://hudoc.echr.coe.int/eng?i=001-61253 (finding that taking twelve years to conclude real estate litigation violated the Convention); Eastaway v. United Kingdom, App. No. 74976/01, 40 Eur. H.R. Rep. 405, 414-15 (2004) (holding that corporate fraud litigation initiated by the government lasting nine years violated art. 6 para. 1); King v. United Kingdom, App. No. 13881/02, 41 Eur. H.R. Rep. 2, 20 (2005) (determining that a period of over 13 years to conclude government tax litigation was a violation of art. 6 para. 1); Blake v. United Kingdom, App. No. 68890/01, 44 Eur. H.R. Rep. 633, 641-42 (2006) (holding that a period of nine years to conclude an author's right to publish a book containing alleged state secrets violated art. 6 para. 1); Bhandari v. United Kingdom, App. No. 42341/04 (Eur. Ct. H.R., Oct. 2, 2007), *available at* http://hudoc.echr.coe.int/eng?i=001-82501 (holding that taking over 8 years to conclude a legal malpractice case violated art. 6 para. 1); Crompton v. United Kingdom, App. No. 42509/05, 50 Eur. H.R. Rep. 36, 36 (2010) (finding that eleven years to conclude a military layoff challenge was a violation art. 6 para. 1).

152. There are other UK cases resulting in art. 13 violations for failure to provide viable ECHR remedies. *See, e.g.*, Hammerton v. United Kingdom, App. No. 6287/10, 63 Eur. H.R. Rep. 23, 1126-27 (2016) (finding no viable remedy to challenge lack of attorney in a family law contempt hearing); Reynolds v. United Kingdom, App. No. 2694/08, 55 Eur. H.R. Rep. 35, 1050-51 (2012) (finding lack of parent ability to sue in tort over psychiatric patient death); Wainwright v. United Kingdom, 2006-X Eur. Ct. H.R. 223, 244-45 (finding lack of remedy for prison visitor strip searches); Hatton and Others v. United Kingdom, 2003-VIII Eur. Ct. H.R. 189, 191 (finding inadequate judicial procedures to challenge airport noise increases affecting property rights).

15. U.K. Military Justice System ECHR Violations

The U.K. military justice system has seen a surprising number of ECHR cases not involving Northern Ireland and other anti-terrorism activities or overseas missions, including cases concerning:

(1) defective structure resulting in lack of impartiality and fairness in cases brought before the U.K. Armed Forces Act of 1996 took effect;[153]

(2) defective structure under the 1996 Armed Forces Act based on court composition and decisional review;[154]

(3) excessive delays in military justice cases;[155]

(4) trying civilians in military courts;[156] and

(5) improper role of unit commanding officer in military arrests.[157]

16. U.K. Free Speech and Media ECHR Violations

Another ECHR litigation hotbed has involved freedom of speech and media, with violations including:

(1) illegal injunctions preventing the press from publishing controversial court proceedings with no viable challenge remedy;[158]

(2) improper court-ordered disclosure of journalist source;[159]

(3) government media invasion of privacy with no viable challenge remedy;[160]

(4) denial of defamation defendant's right to court-appointed counsel;[161]

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153. *See* Findlay v. United Kingdom, App. No. 22107/93, 24 Eur. H.R. Rep. 221, 232-33, 243-46 (1997) (discussing the Armed Forces Act of 1996 and finding doubts about tribunal independence under art. 6 para. 1 were objectively justified).

154. *See, e.g.* Morris v. United Kingdom, 2002-I Eur. Ct. H.R. 387, 390 (finding that, based upon complaints about the general structure of the court-martial system, there was an art. 6 para. 1 violation); *Grieves v. United Kingdom*, 2003-XII Eur. Ct. H.R. 247, 267 (finding that the applicant's justified objections to the independence and impartiality of the decision resulted in a violation of art. 6 para. 1).

155. *See* Jordan v. United Kingdom (No. 2), App. No. 49771/99 (Eur. Ct. H.R., Dec. 10, 2002), *available at* http://hudoc.echr.coe.int/eng?i=001-60807 (finding an art. 6 para. 1 violation).

156. *See* Martin v. United Kingdom, App. No. 40426/98 (Eur. Ct. H.R., Oct. 24, 2006), *available at* http://hudoc.echr.coe.int/eng?i=001-60807 (finding an art. 6 para. 1 violation).

157. *See* Boyle v. United Kingdom, App. No. 55434/00, 47 Eur. H.R. Rep. 19, 495 (2008) (finding an art. 5 para. 3 violation).

158. *See, e.g.*, MacKay & BBC Scotland v. United Kingdom, App. No. 10734/05 (Eur. Ct. H.R. Dec. 7, 2010),*available at* http://hudoc.echr.coe.int/eng?i=001-102141; Observer and Guardian v. United Kingdom, App. No. 13585/88, (Eur. Ct. H.R. Nov. 26, 1991), *available at* http://hudoc.echr.coe.int/eng?i=001-57705; Sunday Times v. United Kingdom, App. No. 6538/74, (Eur. Ct. H.R. Apr. 26, 1979), *available at* http://hudoc.echr.coe.int/eng?i=001-57584 (finding art. 6 para. 1 violations).

159. *See* Financial Times LTD v. United Kingdom, App. No. 821/03, 50 Eur. H.R. Rep. 46 (2010) (finding an art. 10 violation).

160. *See* Peck v. United Kingdom, 2003-I Eur. Ct. H.R. 123 (finding art. 8 and 13 violations).

161. *See* Steel and Morris v. United Kingdom, 2005-II Eur. Ct. H.R. 403 (finding art. 6 para. 1 fair trial, and art. 6 para. 10 freedom of expression violations).

(5) illegal contingency fee award to plaintiff in media privacy invasion case because of free press chilling effect;[162]

(6) illegal domestic law ban against election campaign anti-abortion literature;[163]

(7) vague and overly broad public order laws and procedures used against animal rights protests;[164] and

(8) failure of domestic law to protect against employee termination based on political belief.[165]

17. U.K. Religious Discrimination ECHR Violations

The U.K. has seen several significant religious discrimination cases resulting in ECHR violations, including:

(1) inability of Catholic-owned companies to challenge Northern Ireland public contracting exclusion because of alleged national security concerns;[166] and

(2) failure to protect employee rights to wear religious jewelry at work.[167]

B. Human Rights Law Concerns Arising from the Above Cases

The ECHR cases noted above have one common theme—they all found one or more substantive ECHR violations. For a country that prides itself on championing rule of law and protecting individual rights, these cases reflect a troubling pattern because they do not involve mere technical violations. The Northern Ireland article 2 investigations cases depict an especially serious ECHR problem because they span thirteen years after the 1998 Human Rights Act became effective in the U.K., providing ample notice for the U.K. to reform its inquest procedures in all suspicious civilian deaths caused by military, law enforcement and other state institutional personnel with custodial responsibilities. Article 2 arguably encompasses the most essential human right of all, namely the right to life; and the Court has continuously found non-illusory investigations as essential to protect this right. The *McCaughey* opinion admonished the U.K. about the country's defective inquest procedures and

162. *See* MGN Ltd. v. United Kingdom, App. No. 39401/04, 53 Eur. H.R. Rep. 5 (2011) (finding an art. 10 violation).

163. *See* Bowman v. United Kingdom, App. No. 24839/94, 26 Eur. H.R. Rep. 1 (1998) (finding an art. 10 violation).

164. *See, e.g.*, Hashman and Harrup v. United Kingdom, 1999-VIII Eur. Ct. H.R. 1; Steel v. United Kingdom, 28 Eur. H.R. Rep. 603 (1998) (finding art. 5 paras. 1 & 10 violations).

165. *See, e.g.*, Redfearn v. United Kingdom, App. No. 47335/06, 57 Eur. H.R. Rep. 2 para. 57 (2013); Associated Society of Locomotive Engineers and Firemen (ASLEF) v. United Kingdom, App. No. 11002/05, 45 Eur. H.R. Rep. 34 para. 53 (2007) (art. 11 violations).

166. *See* Tinnelly & Sons Ltd. v. United Kingdom, App. No. 20390/92, 27 Eur. H.R. Rep. 249 para. 79 (1998); Devlin v. United Kingdom, App. No. 29545/95, 34 Eur. H.R. Rep. 43 para. 32 (2002) (art. 6 para. 1 violations).

167. *See* Eweida v. United Kingdom, App. Nos. 48420/10, 36516/10, 51671/10 and 59842/10, 57 Eur. H.R. Rep. 8 (2013) (finding art. 9 violations). Interestingly, this ruling conflicts with European Court of Justice decisions allowing the ban of headscarves and other religious expressions in the EU country workplaces, as discussed in Steven Peers, *Headscarf Bans at Work: Explaining the ECJ Rulings*, EU LAW ANALYSIS (Mar. 14, 2017), http://eulawanalysis.blogspot.com/2017/03/headscarf-bans-at-work-explaining-ecj.html.

strongly counseled the U.K. to reform them.[168] There is little evidence such a reform has occurred institutionally or systematically at a national level, as seen below in other case contexts.

Alien rights violations pose another major ECHR concern, especially in light of Brexit which could, in essence, make all U.K. residents who are citizens of EU countries aliens subject to these same kinds of ECHR abuses. Although the UK appears to have resolved some judicial review and meaningful remedy issues affecting this population after the 1996 *Chahal* decision, the rest of the UK alien deportation and detention laws and procedures do not appear to meet ECHR standards.

The U.K. criminal justice system, including the courts that form part of that system, leaves much to be desired from an ECHR perspective. Based on the ECHR cases, U.K. sentencing, including sentence reviews and prisoner rights, fall well short of ECHR requirements; and law enforcement activities likewise fail to meet ECHR standards. The U.K. civil courts also contribute to this troubling pattern of ECHR non-compliance by failing to curtail excessive delays in moving cases; and U.K. laws often make it hard, if not impossible, to obtain judicial review or viable remedies to challenge ECHR violations despite HRA requirements that the U.K. courts apply the ECHR (including European Court decisions) in the U.K. legal system. The military justice system also seems to follow this pattern.

Because the HRA did not take full effect in the U.K. until October 2, 2000,[169] it is perhaps understandable that U.K. laws have afforded few remedies to persons aggrieved by ECHR violations before that date. However, this does not explain why U.K. laws afforded persons no ECHR article 13 protections as the U.K. has been a party to the ECHR, bound to follow its obligations, for many decades. Moreover, it likewise does not explain why so many article 13, and other, ECHR violations have been found since the October 2, 2000 effective date. In one legal expert's particularly telling comment, "in part because the Human Righyts Act is in its *relative infancy*, there are few firm remedies for breach."[170] Depending upon when one starts the ECHR running in the U.K., this infant is either now geriatric based upon when the U.K. became a party; or at the very least a growing teenager born October 2, 2000.

Among the most troubling ECHR cases in the U.K. are those related to the country's most vulnerable populations—children, parents, homosexual, lesbian and transgender individuals, and the mentally ill—whenever these populations confront the government. Although Parliament addressed the overt discrimination faced by the U.K. homosexual community in the 2004 Gender Recognition Act,[171] after the U.K. had lost a number of ECHR cases this law has been criticized as inadequate since its approval and now faces major reform efforts after years of controversy.[172] Tory leaders

168. *See* McCaughey and Others v. United Kingdom, 2013-IV Eur. Ct. H.R. 335 para. 140 (finding art. 2 violation).

169. JOHN WADHAM AND HELEN MOUNTFIELD, BLACKSTONE'S GUIDE TO THE HUMAN RIGHTS ACT OF 1998, at xiii (2d ed. 2000).

170. Liz Lennox, *Human Rights Legal Remedies*, ABOUT HUMAN RIGHTS (Jan. 27, 2016), http://www.abouthumanrights.co.uk/human-rights-legal-remedies.html (emphasis added)

171. Gender Recognition Act 2004, c. 7 (UK).

172. *See* Nick Levine, *The UK's Invasive and Outdated Gender Recognition Laws Are Finally Going to Be Improved*, REFINERY 29 (July 23, 2017, 7:40 AM), http://www.refinery29.uk/2017/07/164698/gender-recognition-act-reform (describing proposals to modernize the 2004 Gender Recognition Act).

acknowledge major flaws in U.K. mental health laws.[173] The real problem with the vulnerable populations generally comes back to delays inherent in the U.K. judicial system whenever these populations seek to enforce their ECHR rights.

Finally, the U.K. laws related to freedom of expression by citizens and the media, as well as those related to privacy, stand out as major ECHR problem areas unlikely to be resolved any time soon. Recent U.K. terrorism attacks have necessarily heightened government concerns about protecting the population by enhancing national security, but it is always worth recalling the ECHR history designed to prevent European governments from sacrificing individual human rights in the name of securing the state. The U.K. has long been a country known to be hostile to free press because of the country's sweeping libel and media invasion of privacy laws; and freedom of speech has likewise enjoyed less protection in the U.K. than in a number of other countries.[174]

One can be easily tempted to view the U.K.'s ECHR litigation in a more global perspective, because compared with many other countries in Europe and elsewhere, the U.K. has a relatively good record of respecting rule of law and individual rights, especially when compared to other ECHR signatories like Russia and Turkey. One recent report describing U.K. litigation history in the ECtHR cites an "excellent record [even] among Western European countries."[175] However, the U.K. has always held itself to the highest standard in these areas, making the Russia-Turkey comparator a false dichotomy and even the Western European comparator problematic because of the U.K.'s professed human rights ideals. Several years ago, Conservative Prime Minister David Cameron, urging the ECtHR to focus more on countries like Russia, told the Council of Europe that "Human Rights is a cause that runs deep in the British heart and long in British history."[176] These Cameron remarks, as well as others in his same speech, reinforced the notion that the U.K. knows best how to protect human rights, and that continental Europe should leave countries like Britain alone on the human rights front. Professor Rodley, a leading U.K. human rights law expert stated, in a somewhat muted response to Prime Minister Cameron: "Just because the UK is

173. *See* Francesca Gillett, *General Election 2017: Theresa May Promises "Sweeping" Reforms to UK's Mental Health Laws*, EVENING STANDARD (May 7, 2017, 8:12 AM), https://www.standard.co.uk/news/politics/general-election-2017-theresa-may-promises-sweeping-reforms-to-uks-mental-health-laws-a3532541.html (discussing the Tory Prime Minister's promise to introduce sweeping reform to mental health law).

174. *See* Alexander J. Martin, *UK Drops in World Press Freedom Index Following Surveillance and Anti-espionage Threats*, THE REGISTER (Apr. 26, 2017, 11:02 AM), https://www.theregister.co.uk/2017/04/26/uk_drops_in_world_press_freedom_index_following_gov_surveillance_and_antiespionage_threats/; Alex Newman, *In U.K., Freedom of Speech and Press Hang in the Balance*, THE NEW AMERICAN (Dec. 26, 2012), https://www.thenewamerican.com/world-news/europe/item/14029-in-uk-freedom-of-speech-and-press-hang-in-the-balance; Daphne Caruana Galizia, *The Media and Defamation Bill Is an Act of Aggression Against Journalists*, THE MALTA INDEPENDENT (Mar. 2, 2017, 10:51 AM), http://www.independent.com.mt/articles/2017-03-02/blogs-opinions/The-Media-and-Defamation-Bill-is-an-act-of-aggression-by-politicians-against-journalists-6736171122; *Does the UK Have Freedom of Speech?*, BRITTMANIA (Sept. 11, 2016), https://britmannia.com/2016/09/11/does-the-uk-have-freedom-of-speech/ (examining the restrictive nature of free speech laws in the UK)..

175. Tugendhat, *supra* note 50, at 72.

176. Nicholas Watt, *David Cameron Calls for Reform of European Court of Human Rights*, THE GUARDIAN (Jan. 24, 2012, 7:05 PM), https://www.theguardian.com/law/2012/jan/25/david-cameron-reform-european-court.

not the worst offender when it comes to human rights abuse does not mean it is not an offender"; and further observed:

> At times the British legal system, like any, can be found wanting. The European Convention on Human Rights, which was written in part by the UK, has certain ideas in it and our legal system does not always fall squarely within those. We cannot say our system is perfect and everyone else's is open to attack."[177]

He reminds all of us "[it]t is governments at national level that violate human rights, so it is at international level that we then need to hold them to account."[178] On balance and at best, the U.K. history with the ECHR cases looks indeed like a glass half full, with some cracks.

III. CONSERVATIVE LEADERSHIP HOSTILITY TOWARD ECHR

Theresa May's disdain toward ECHR is well documented.[179] She has publicly railed against an ECHR system which "can bind the hands of parliament, adds nothing to our prosperity, makes us less secure by preventing the deportation of dangerous foreign nationals—and does nothing to change the attitudes of governments like Russia's when it comes to human rights."[180] During the Brexit campaign, while she was Home Secretary and supported keeping the U.K. in the EU, May stated "So regardless of the EU referendum, my view is this: if we want to reform human rights laws in this country, it isn't the EU we should leave but the ECHR and the jurisdiction of its court."[181] Although she did state during her 2016 campaign for Prime Minister that she had no intent to seek withdrawal from the Council of Europe and the ECHR regimen in "this Parliament,"[182] after becoming Prime Minister she soon called foe elections to create the "next Parliament" projected to be under her tight political control.[183] This in turn fueled the belief, which she did little to dispel, that once Brexit negotiations were concluded she intended to withdraw by 2020.[184]

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177. Maeve McClenaghan, *Analysis: Judging the European Court of Human Rights*, THE BUREAU OF INVESTIGATIVE JOURNALISM (Jan. 30, 2012), https://www.thebureauinvestigates.com/opinion/2012-01-30/analysis-judging-the-european-court-of-human-rights.

178. *Id.*

179. *See* Gearty, *supra* note 35, at 2 (asserting that May has long disliked the Human Rights Act and has led the charge for its removal).

180. Anushka Asthana & Rowena Mason, *UK Must Leave European Convention on Human Rights, Says Theresa May*, THE GUARDIAN (Apr. 25, 2016, 2:54 PM), https://www.theguardian.com/politics/2016/apr/25/uk-must-leave-european-convention-on-human-rights-theresa-may-eu-referendum.

181. *Id.*

182. Jason N. Parkinson, *The Human Rights Act Helps Us Hold Power to Account. We Must Defend It*, THE GUARDIAN (July 26, 2016), https://www.theguardian.com/commentisfree/2016/jul/26/theresa-may-repeal-human-rights-act-defend-it.

183. *See* Anushka Asthana & Peter Walker, *Theresa May Calls for General Election to Secure Brexit Mandate*, THE GUARDIAN (Apr. 19, 2017), https://www.theguardian.com/politics/2017/apr/18/theresa-may-calls-for-general-election-in-bid-to-secure-brexit-mandate_(stating that the Tories had a clear lead in the opinion polls).

184. *See* C .R. G Murray, Aoife O'Donoghue & Ben Warwick, *The Implications of the Good Friday Agreement for UK Human-Rights Reform*, IR. Y.B. OF INT'L L, JAN. 26, 2017, at 24, *available at*

In fairness to Prime Minister May, however, many in her Conservative Party have opposed the concept of specifically enumerated human rights in U.K. domestic law for at least twenty years.[185] Instead, these Conservatives appear to favor limiting human rights laws to the handful of basic principles reflected in the Magna Carta (habeas corpus, jury trials, right to confrontation, bail), while jettisoning the numerous express rights reflected in the ECHR and the Charter.[186]

In his same remarks extolling the U.K. human rights commitment noted above, Prime Minister Cameron launched what some viewed as a frontal assault on the Court by describing it as a "small claims court" in the making and objecting to any overruling of national courts on key human rights decisions.[187] According to one commentator, the Court "could reasonably lay claim to being one of the most maligned institutions in Britain."[188] This is not surprising, given the long history of Tory government opposition to applying Court decisions in U.K. court cases involving the Convention which blocked adoption of the Human Rights Act for many years.[189] Another commentator has noted:

> [M]any politicians remain hostile to the HRA, on the basis that it confers too significant a role on the judiciary. Elements of the right-wing media have also attacked the Act regularly, on the basis that the HRA grants excessive protection to asylum-seekers, illegal immigrants and other unpopular groups. (This of course is a point in its favour in the eyes of others.) [*sic*] These debates have also extended to the influence exerted by the ECtHR over UK law.[190]

This same commentator has written that:

> "[I]n recent years, there has been a ramping-up of political hostility toward the Strasbourg Court, and also against the HRA. In particular, the decision in *Hirst v UK (No. 2)* that the automatic denial of voting rights to all convicted prisoners violated Article 2 of the First Protocol to the

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https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2906314 ("Theresa May has already flagged up withdrawal from the ECHR as a priority once the legislative heavy-lifting of disentangling the UK from EU law is at least under way").

185. *See* Murray, *supra* note 31, at 5 ("[The HRA] 1997 manifesto described the introduction of any enumerated list of human rights in domestic law as a 'radical' change which 'could unravel what generations of our predecessors have created.'").

186. *See id.* at 12-14 (describing the Conservative Party's approach to human rights and the Party's reliance on the principles of the Magna Carta).

187. Watt, *supra* note 176.

188. Jon Henley, *Why is the European Court of Human Rights Hated by the UK Right?*, THE GUARDIAN (Dec. 22, 2013, 5:00 PM), https://www.theguardian.com/law/2013/dec/22/britain-european-court-human-rights.

189. *See* Terry Kirby, *The Human Rights Act: 800 Years in the Making*, THE GUARDIAN (July 2, 2009, 11:56 PM), https://www.theguardian.com/humanrightsandwrongs/800-years-making (describing the history and the opposition to the Human Rights Act).

190. Colm O'cinneide, *The Human Rights Act and the Slow Transformation of the UK's 'Political Constitution'* 53 ANNALES U. SCI. BUDAPESTINENSIS ROLANDO DE EÖTVÖS NOMINATAE 239, 255 (2012).

Convention has triggered a strong reaction, which has been deeper and more sustained than any previous outbreak."[191]

Not all Tories share the May-Cameron antipathy toward human rights. A group of prominent Tory leaders are embracing an initiative to make the U.K. a human rights leader by calling for substantial legislative reforms contained in a July 2017 liberal conservative think tank report.[192] This report suggests the difficulty in achieving conservative political consensus by noting the large number of conservative voters (thirty-seven percent) who do not believe in the existence of human rights and who think that "no particular rights should be given to all people at all times."[193] Although the report calls for some far-reaching anti-discrimination reforms—as well as an overhaul of U.K. refugee and asylum laws with the objective of curtailing indefinite detentions—the report tellingly does not mention the Charter or any of the Charter rights to be lost when Brexit concludes.[194] The report does endorse the U.K. remaining an ECHR party, but makes no mention of the HRA, which creates doubt about how strongly even conservative human rights proponents favor the broad range of Charter and Convention rights.[195] A month after this report was published, the same conservative think tank published a second one urging the U.K. to keep the HRA instead of pursuing a separate British Bill of Rights, in essence arguing that its application has improved U.K. law generally.[196]

Although for the time being the U.K. seems likely to remain an ECHR party subject to the Court, the overall Conservative hostility will not likely go away. With the Charter scheduled to disappear when Brexit becomes final, this hostility bodes ill for human rights advocates committed to ECHR principles. For this reason alone, the EU Brexit negotiators should hold firm in insisting upon guarantees of human rights law protections like those recommended further below.

IV. OTHER BREXIT HUMAN RIGHTS LAW ISSUES

Brexit raises several other major human rights law issues and concerns, including those related to Scotland, the Northern Ireland-Ireland relationship, and, the most important issue of all, the human rights of non-U.K. citizens from EU countries who choose to reside in the U.K. when Brexit begins.

Scottish human rights groups have expressed serious concerns about the combination of the loss of the Charter and attacks by British political leaders on the ECHR. The Scottish Human Rights Commission has advocated for a number of post-Brexit human rights safeguards, including imposition of Charter rights in a final EU-

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191. *Id.* at 256

192. Ian Silvera, *Top Tories Push for Reforms to Make UK a Human Rights Leader After Brexit*, INTERNATIONAL BUSINESS TIMES (July 17, 2017, 11:45 PM), http://www.ibtimes.co.uk/top-tories-push-reforms-make-uk-human-rights-leader-after-brexit-1630623 (discussing JAMES DOBSON & RYAN SHORTHOUSE, BRITAIN BREAKING BARRIERS: STRENGTHENING HUMAN RIGHTS AND TACKLING DISCRIMINATION (2017), *available at* http://www.brightblue.org.uk/images/HumanRights.pdf [hereinafter *The Bright Blue Report*]).

193. *The Bright Blue Report*, *supra* note 192, at 7.

194. *Id.* at 49.

195. *Id.* at 9.

196. *See generally* Tugendhat, *supra* note 50.

U.K. Brexit agreement; incorporation of international human rights treaty provisions into Scottish and U.K. domestic law; and retention of ECHR party status.[197] Scotland may have some leverage to influence these concerns, because there remains an open question as to whether the U.K. can withdraw from the EU without Scottish Parliament consent, based upon the 1998 U.K. legislation which granted Scotland significant autonomy.[198] This seems to be an unusually sensitive issue because of the overwhelming Scottish anti-Brexit vote, and also because most observers have tied the defeat of the 2014 Scottish independence vote to the U.K.'s E.U. membership.[199] At a minimum, the human rights issues, if left unresolved with Brexit, could trigger another independence referendum.

The Northern Ireland-Ireland relationship poses more complicated Brexit human rights concerns than those apparent in Scotland. Commentators have expressed grave concerns about Brexit impact on the Northern Ireland-Ireland Good Friday Agreement, which has resulted in relative peace since its 1998 inception.

> Post-Brexit, Parliamentarians concerned about the threat to human rights protections in Northern Ireland have been fobbed off with condescending *bon mots* about the UK's glorious tradition of liberties stretching back to Magna Carta. But this tradition did little to curtail the litany of human-rights abuses perpetrated by the police, military and security agencies in the course of the conflict in Northern Ireland. The common law may well have moved on since 1998, with an increasing number of appellate judgments emphasising fundamental rights inherent within the common law, but this does not substitute for the ECHR's catalogue of enumerated rights."[200]

These same commentators note that Ireland views ECHR incorporation as a non-negotiable treaty obligation between Ireland and the U.K. based on this accord.[201] Unless this is resolved, Ireland has little or no incentive to approve any U.K. Brexit departure from the EU. Given the above-described history of ECHR violations involving Northern Ireland, these concerns are exceptionally well-founded.

The main Brexit human rights issue has been, and remains, how human rights of non-U.K. citizens from other EU countries will be protected post-Brexit in the U.K.. This same issue applies to U.K. citizens residing in EU countries. The opening U.K. negotiating position regarding this issue met resounding rejection by EU negotiators, by requiring EU nationals to have lived a minimum of five years in the U.K. to qualify for continued residence, employment, and benefits; requiring all EU nationals to seek individual permission to remain; and failing to specify the status of family members who do not meet the 5-year residency requirement.[202] Although not directly addressed

197. *Brexit: Protecting Human Rights in Scotland in a Changing Relationship with Europe*, SCOTTISH HUMAN RIGHTS COMMISSION 1-2 (Dec. 20, 2016), http://www.scottishhumanrights.com/media/1727/brexit-position-statement-december-20-dec-2016.pdf.

198. Lock & Daly, *supra* note 7, at 24.

199. Stephen Castle, *Scotland Votes to Demand a Post-'Brexit' Independence Referendum*, N.Y. TIMES, (Mar. 28, 2017), https://www.nytimes.com/2017/03/28/world/europe/scotland-britain-brexit-european-union.html?mcubz=0.

200. Murray, O'Donoghue & Warwick, *supra* note 184, at 23.

201. *Id.* at 24. *See also* Lock & Daly, *supra* note 7, at 6 (noting that the UK would not be free "from its obligations to comply with the judgments of the ECtHRffin cases where the UK is a respondent party").

202. Associated Press, *Britain and the E.U. Have Started Brexit Talks with Citizens' Rights Proving*

in these opening negotiations, there is an assumption that any reduction of EU citizen rights in the U.K. could trigger tit-for-tat treatment of U.K. citizens residing in the EU.[203] By eliminating the Charter from U.K. law, as proposed in the Withdrawal Bill, the U.K. necessarily eviscerates EU citizen rights in the U.K. with no guarantee they will be re-adopted in U.K. domestic law; and as one human rights group notes, Parliament can always change any domestic U.K. law it chooses after Brexit.[204] Although the ECHR may offer some relief in areas such as alien family member residency rights based on past ECHR cases,[205] the ECHR appears to offer little protection against a country's right to determine alien residence legal criteria.

V. U.K. HUMAN RIGHTS VULNERABILITY AND WHAT THE EU SHOULD DO ABOUT IT

At the core of the U.K. human rights vulnerability issues addressed in this argument is U.K. parliamentary sovereignty, a firmly entrenched legal doctrine which can effectively undermine laws protecting individuals. The U.K. Supreme Court recently recognized and applied parliamentary sovereignty in holding that Parliament must legislatively authorize the U.K. executive branch to proceed with Brexit negotiations, restating the doctrine's long established definition:

> Parliamentary sovereignty is a fundamental principle of the UK constitution . . . meaning that Parliament has "the right to make or unmake any law whatsoever; and further, no person or body is recognised by the law as having a right to override or set aside the legislation of Parliament."[206]

A number of years ago the U.K. Law Lords wrote, albeit in dicta:

> Respect for human rights requires that certain basic rights of individuals should not be capable in any circumstances of being overridden by the majority, even if they think that the public interest so requires. . . . These are rights which belong to individuals simply by virtue of their humanity, independent of any utilitarian calculation. The protection of these basic rights from majority decision requires that independent and impartial tribunals should have the power to decide whether legislation infringes hem and either (as in the United States) to declare such legislation invalid or (as in the United Kingdom) to declare that it is incompatible with the governing human rights instrument.[207]

Divisive, TIME (July 17, 2017), https://www.yahoo.com/news/britain-e-u-started-brexit-025413538.html.

203. Shehab Khan, *Brexit: British Citizens Living in Europe 'Could Have Their Rights Cut', Leading MEP Warns*, INDEPENDENT (July 4, 2017, 18:18 BST) http://www.independent.co.uk/news/uk/politics/brexit-uk-citizens-eu-rights-cut-warning-claude-moraes-mep-a7823621.html.

204. Baldwin, *supra* note 18.

205. *See* Hode & Abdi v. United Kingdom, App. No. 22341/09, 56 Eur. H.R. Rep. 27, 10 (2013) (finding that the different treatment accorded to refugees with respect to the reunification of post-flight spouses was in violation of Article 14 of the Convention read together with Article 8).

206. R (Miller) v. Secretary of State for Exiting the European Union [2016] UKSC 5, 15 (U.K.) (internal citation omitted).

207. R.v. Sec'y of State for the Env't, Transp. And the Regions, 2 All E.R. 929, 980 (H.L. 2001) (Lord

U.K. courts lack the power to invalidate parliamentary legislation, and although they can declare such acts incompatible with the ECHR, Parliament can modify this judicial authority power at any time by majority vote. Even bullish U.K. rule of law defenders recognize the perils of subjecting individual rights to majority rule.[208] If any U.K. parliamentary majority votes to leave the ECHR or diminish its U.K. application by weakening HRA judicial powers, all bets are off as to how well individual human rights will fare based on the U.K. ECHR litigation record.

The EU can and should seek to avert this risk by firmly demanding U.K. legal safeguards as a condition for U.K. single market access involving goods, services and capital, as well as the EU Customs Union. These conditions would include an EU "guillotine clause" requiring them all to be maintained as an ongoing free market access condition; and as with the Swiss, it would apply to all EU-U.K. bilateral agreements.[209]

First, the EU should require the U.K. to incorporate into U.K. domestic law, by parliamentary legislation, the EU Charter of Fundamental Rights. It should also make the rights set forth in the Charter fully enforceable in U.K. courts, which would apply European Court of Justice (ECJ) decisions interpreting Charter rights. U.K. Labour leaders have already endorsed this proposal and, given the June 2017 U.K. election results, the vote to implement it would likely be close.[210] In addition, the U.K. would have to consent to ECJ jurisdiction if its national court decisions applying Charter provisions were challenged by the EU.

Second, the EU should require the U.K. to remain an ECHR party, and to retain either the current HRA or a substantially identical U.K. law changing none of the HRA substantive provisions related to ECHR rights and remedies. The reasons for this insistence have been demonstrated above.

Third, the EU should insist upon allowing all EU citizens lawfully residing in the U.K. as of the date Brexit begins to remain, with the same rights they enjoy up to the time the U.K. leaves the EU. Once these rights are granted, the ECHR plus adoption of the Charter as part of U.K. domestic law should sufficiently protect these rights. In addition, the EU should grant reciprocal rights to U.K. citizens living in the EU. Again, any legal challenge arising over this requirement should be resolved in the ECJ with the EU and the U.K. as parties, allowing third party and non-party intervention at ECJ discretion by those affected.

Finally, the EU should insist upon free movement of EU and U.K. people into the U.K.-EU labor markets. This will undoubtedly receive close, and even heated,

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Hoffmann).

208. Keith Ewing, *Brexit and Parliamentary Sovereignty*, 80 THE MODERN L. REV. 711, 723-24 (2017); *See generally* George Letsas, *The Constitution and the Folly of Majoritarianism*, UK CONST. L. ASS'N (Feb. 20, 2017), https://ukconstitutionallaw.org/2017/02/20/george-letsas-the-constitution-and-the-folly-of-majoritarianism/.

209. For general discussion, see Michael James-Clifton, *UK QUO VADIS? The EEA as a Workable Framework* 7 (unpublished seminar paper at the University of Sheffield, Apr. 5, 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2946098; Catherine Bosley, *EU Playing Immigration 'Hardball' with Swiss, Posen Says*, BLOOMBERG (Sept. 6, 2016), https://www.bloomberg.com/news/articles/2016-09-06/eu-playing-immigration-hardball-with-switzerland-posen-says.

210. Anoosh Chakelian, *No, Jeremy Corbin's Euroscepticism Won't Put His Supporters Off*, NEW STATESMAN (July 31, 2017), http://www.newstatesman.com/politics/uk/2017/07/no-jeremy-corbyn-s-euroscepticism-won-t-put-his-supporters.

attention in the Brexit negotiations. However, the EU has already experienced this issue with Switzerland, a non-EU member with bilateral EU relations. Last year the EU took a similar position in requiring the Swiss to choose between their restricted labor market (backed by popular vote in a 2014 referendum) or continued single EU market goods, services and capital access.[211] The Swiss opted for the latter.[212]

Will the U.K. accept the above conditions? Professor Ewing recently wrote that "only a fool would make [Brexit] predictions in these febrile times," and this author concurs. The incentives for acceptance are substantial if the U.K. wants single market goods, services, capital and customs union access. If the recent Swiss-EU labor controversy is any indication, single market access proved too valuable to overall Swiss interests to honor the Swiss popular vote supporting immigration limits.

CONCLUSION

Human rights are far too important to leave to political chance and speculation. The U.K. record, British historical legacy pride notwithstanding, leaves much to be desired for a country identifying itself as a top-tier human rights protector. Moreover, the EU incentive to enforce U.K. human rights protection has never been stronger, with a substantial number of U.K. Parliament Members insisting upon this as part of any Brexit agreement and the U.K. business lobby demanding continued free market access. Allowing the U.K. government to attack the ECHR and threaten to water down HRA protections with a so-called British Bill of Rights unlikely to leave existing individual rights intact should be a non-starter with the EU as long as the EU has free market access leverage.

The current governmental approach to Brexit and a British Bill of Rights does not adequately appreciate, or address, the extraordinary complexity of human rights protection in the U.K., which enmeshes protections across the international, EU, State, devolved, and bilateral planes. Until, and unless, policy formation begins to fully grapple with this complexity, serious rule of law and legitimacy questions will hang over the solutions presented by the Conservative government to the current constitutional entanglement.[213]

Even if the EU fails in its demands and the U.K. has single market access no longer, the EU will have succeeded by making the fight for human rights protections greater than what U.K. law provides.

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211. Jon Henley, *Swiss Climbdown Over Free Movement May Deal Blow to UK Hopes*, THE GUARDIAN (Sept. 22, 2016), https://www.theguardian.com/world/2016/sep/22/switzerland-votes-for-compromise-to-preserve-relations-with-eu.

212. Jon Henley, *Switzerland Makes U-Turn Over EU Worker Quotas to Keep Single Market Access*, THE GUARDIAN (Dec. 16, 2016), https://www.theguardian.com/world/2016/dec/16/switzerland-u-turn-quotas-on-eu-workers-immigration.

213. Lock & Daly, *supra* note 7, at 7.

Is Nationalism the Most Serious Challenge to Human Rights? Warnings from BREXIT and Lessons from History

LAUREN FIELDER*

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INTRODUCTION

The United Kingdom's decision to exit the European Union is arguably the most momentous event in the European Union's history, and the human rights implications of the exit will be staggering. This Article is part of the important discussion organized around these emerging human rights issues. The decision of the United Kingdom to leave the European Union reflects a pattern of regression of human rights protection that has been happening around the world in recent years. This decision has given rise to a wave of xenophobia and racism, including a sharp increase in hate crimes in the UK since the exit vote.[1] The decision to leave the EU is also causing a tremendous amount of anxiety for individuals and families who are uncertain about their fate post-Brexit.[2] Furthermore, the United Kingdom's exit may hasten the weakening or breakup of the EU, destabilizing not just the region, but the entire world. This Article does not discuss how Brexit changes the UK's internal framework of human rights protections or how it will impact the UK's relationship with the European Court of Human Rights; rather, the discussion in this Article focuses on the broader human rights implications of a radically altered or non-existent European Union.

This Article will begin with a brie f overview of Brexit itself, as well as a deeper look at how Brexit is part of a larger spike in nationalism in Europe and the rest of the world. The article will then turn to the EU, beginning with a cursory discussion of the origins of the EU, recent problems the EU has been facing, and how Brexit might weaken or even destroy the EU. The article will then discuss the problems that are a byproduct of a weakened or completely broken EU, focusing on the possibility of violent conflict and examining the link between conflict and human rights violations. Finally, the Article will conclude with a discussion of what can be done by individual states and the EU to minimize the chances of the worst possible outcomes.

I. BREXIT

A. *Overview of Brexit*

Brexit is the result of a popular non-binding referendum, which took place on June 23, 2016, to decide whether the UK should leave the EU.[3] 52% of British voters voted for UK independence.[4] The British government had agreed beforehand not to interfere with the will of the people as expressed though the referendum,[5] and the

1. *See generally* Adam Bienkov, *Hate Crimes Have Surged in the UK Since the Brexit Referendum*, BUS. INSIDER (Oct. 17, 2017, 6:36 AM), http://www.businessinsider.com/hate-crimes-uk-brexit-referendum-2017-10; Alan Travis, *Lasting Rise in Hate Crime After EU Referendum, Figures Show*, GUARDIAN (Sept. 7, 2016, 5:00 PM), https://www.theguardian.com/society/2016/sep/07/hate-surged-after-eu-referendum-police-figures-show; Helen F. Wilson, *Brexit: On the Rise of '(In)tolerance'*, SOC'Y & SPACE (2016), http://societyandspace.org/2016/11/21/brexit-on-the-rise-of-intolerance/.

2. *See* HOUSE OF COMMONS AND HOUSE OF LORDS JOINT COMMITTEE ON HUMAN RIGHTS, THE HUMAN RIGHTS IMPLICATIONS OF BREXIT, 2016-7, HC 695, at 13 (UK) (discussing the Prime Minister's response to anxieties about residence rights).

3. *See* Gareth Davies, *Legal and Constitutional Aspects of Brexit*, 8 TIJDSCHRIFT VOOR CONSTITUTIONEEL RECHT 137, 137 (2017) (discussing the non-binding nature of the Brexit referendum).

4. Matthias Matthijs, *Europe after Brexit: A Less Perfect Union*, 96 FOREIGN AFF. 85, 85 (2017).

5. Davies, *supra* note 3, at 137.

House of Commons strongly approved the decision.[6] On March 29, 2017, Prime Minister Theresa May invoked Article 50 of the Treaty on the European Union (TEU), which triggered the process of the British exit from the EU.[7] As the situation currently stands, it will be nearly impossible to stop the UK's exit.[8]

Though the campaign to leave the EU was rife with dishonesty and centered around greatly exaggerated, worst-case scenarios, it had been preceded by "a genuine and long-standing alienation [of the UK] from the European Union as an institution."[9] The primary driving forces behind the British referendum were fears of loss of sovereignty, due to the Schengen requirement that the UK open its borders to citizens of other EU member states, and fears that Eastern Europeans would deprive Britons of jobs by migrating from counties with lower wages.[10] For example, the UK minimum wage is double that of some EU member states,[11] leading some to the belief that EU membership is a drag on the UK in the areas of finance, immigration, regulation, and power on the global stage.[12] Citizens of the UK were particularly wary of migration by Turks, since Turkey has formally applied for EU membership.[13] Brexit was also a rejection of the technocrats in Brussels, who are professional lawmakers, not democratically elected ones.[14] Technocrats are ministers who are experts in the fields under their purviews instead of being career politicians. They are problematic for representative democracy because they come between the representative EU nation-state for which citizens vote and the minister in the leadership position.[15]

While it is clear that a slight majority of voters voted to leave the EU, it is increasingly unclear whether they understood the implications of doing so and whether people who

6. Angela Dewan & Simon Cullen, *House of Commons OKs Brexit Bill*, CNN, (Feb. 8, 2017, 4:27 PM), https://www.cnn.com/2017/02/08/europe/brexit-bill-parliament-vote-article-50/index.html.

7. Anushka Asthana et al., *May Triggers Article 50 with Warning of Consequence for UK*, GUARDIAN (Mar. 29, 2017), https://www.theguardian.com/politics/2017/mar/29/theresa-may-triggers-article-50-with-warning-of-consequences-for-uk. See *id.* for a link to May's official letter to the EU.

8. *See* Matthijs, *supra* note 4, at 85.(stating that the United Kingdom will "almost certainly" leave the EU). RALPH H. FOLSOM, PRINCIPLES OF EUROPEAN UNION LAW 35 (5th ed. 2017) (explaining that twenty of twenty-seven remaining EU member states must approve any exit deal under Article 50 of the TEU, along with consent of both the EU and UK parliaments).

9. Davies, *supra* note 3, at 138.

10. Harlan Green, *Why Brexit Could Break Up the EU*, HUFFINGTON POST (Sept. 29, 2016), https://www.huffingtonpost.com/harlan-green/why-brexit_b_12246496.html.

11. Minimum Wage Statistics, EUROSTAT, http://ec.europa.eu/eurostat/statistics-explained/index.php?title=Minimum_wage_statistics (last visited April 24, 2018).

12. JAMES KIRCHICK, THE END OF EUROPE 167 (2017). Kirchick says this perception is likely to be false. *Id.*

13. Matthijs, *supra* note 4, at 93. It seems increasingly unlikely that Turkey will become a member of the EU in the near future as concerns about democracy, the rule of law, minority protection, and respect for human rights are growing under the regime of Turkey's President Erdogan. FOLSOM, *supra* note 8, at 32-33.

14. *See* Ntina Tzouvala, *Chronicle of a Death Foretold? Thinking About Sovereignty, Expertise and Neoliberalism in the Light of Brexit*, 17 GER. L. J. 117, 117 (2016) (discussing the causes of the Brexit referendum in the UK).

15. *See generally* Daniele Caramani, *Will vs. Reason: The Populist and Technocratic Forms of Political Representation and Their Critique to Party Government*, 111 AM. POL. SCI. REV. 54, 59–61 (2017). This is not altogether dissimilar from the U.S. electoral college.

voted to leave meant for the UK to leave the EU at any cost.[16] Major issues that have to be negotiated as part of Brexit include residency rights; business passport rights; investment; trade relations; the status of Northern Ireland, Scotland, and Gibraltar; the UK's debt to the EU (an astounding sum ranging from 25 to 75 billion Euros, which will likely be a shock to those whose motivation to vote to leave was based on economic concerns); and immigration.[17] The negotiation process will likely be concluded, and the UK exit final, in 2019.[18]

B. How Brexit Relates to Nationalism

Brexit is the result of a wave of nationalism sweeping around the world. Nationalism in the UK, as expressed through Brexit, can also be understood as *English* nationalism.[19] Support for Brexit in Northern Ireland and Scotland was low.[20] Part of this nationalism in the UK has manifested in the minds of some who voted to leave as a wistfulness for the past and for Victorian-era glory:[21]

> Much of this desire is driven by nostalgia for a past that never was. There is the right-wing nostalgia for a Britain that was not only powerful and prosperous but also, by and large, white. Some of this is nostalgia for Empire, a nostalgia both unrealistic and abhorrent.[22]

Indeed, myths and "memories" are central to nationalist ideology in the UK and almost everywhere else.[23]

Brexit has emboldened nationalists, inside and outside of the UK.[24] In a speech to the conservative U.S. Heritage Foundation, Nigel Farage (who some call the father of Brexit) predicted that Brexit will send ripples across the European continent, inspiring other nationalist movements, and even killing the whole EU project.[25] Some of these movements will be discussed below.

C. What is Nationalism?

There are many definitions of nationalism, but most center around the political idea that humanity naturally divides into nations that have ascertainable

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16. Davies, *supra* note 3, at 138.

17. FOLSOM, *supra* note 8, at 36–39.

18. *Id.* at 35 (stating that "[i]f no exit deal is reached and no additional time for negotiaton unanimously agreed, Britain will cease to be a member of the EU in March of 2019.").

19. Patrick Cockburn, *Brexit Unleashed an English Nationalism that Has Damaged the Union with Scotland for Good*, THE INDEPENDENT (Mar. 17, 2017), http://www.independent.co.uk/voices/brexit-scottish-referendum-english-nationalism-damaged-union-for-good-a7635796.html.

20. *Id.*

21. KIRCHICK, *supra* note 12, at 167.

22. Ralf Michaels, *Does Brexit Spell the Death of Transnational Law?*, 17 GER. L. J. 51, 54 (2016).

23. *See generally* ANTHONY SMITH, MYTHS AND MEMORIES OF THE NATION (1999).

24. *See, e.g.*, KIRCHICK, *supra* note 12, at 154 (describing how Brexit emboldened British nationalists, and citing a 50500 percent increase in hate crimes in Britain the first week after the' Brexit vote).

25. *Id.* at 162; GUY VERHOFSTADT, EUROPE'S LAST CHANCE: WHY THE EUROPEAN STATES MUST FORM A MORE PERFECT UNION 73 (2017).

characteristics.[26] Such characteristics vary, but may include a shared language, culture, values, religion, race or ethnicity, and/or common land.[27] The nation should be self-governed, politically sovereign, and as independent as possible.[28] Nationalism also includes a state of mind, whereby supreme loyalty should be to the nation state and its cultures and values, and the nation should exist inside of some national borders.[29] Nationalist movements do not require a connection to an existing nation state; rather, they occasionally focus on the potential of becoming one. [30] The Catalan independence movement is one example.[31]

The idea of nationalism, as described above, is based on the concept of the nation-state. While there are many opinions on when nationalism began,[32] in the European context, nationalism likely emerged during the rising prominence of the nation state. The concept of the nation state comes from the 1648 Peace of Westphalia, a series of treaties that ended decades of religious wars between Roman Catholics and Protestants.[33] The treaties established the Westphalian order, instituted the nation state as the primary political unit, and necessitated that states recognize each other as mutually independent and sovereign.[34] States agreed to respect the territorial integrity of other states and agreed to abide by an emerging law of nations.[35]

Between the establishment of the nation state and modern times, nationalist movements have ebbed and flowed in Europe. A surge in nationalism occurred during the 19th century as a result of changing ideas about the authority for law.[36] Enlightenment ideas, the French and American revolutions that put these ideas into practice, and Napoleon's rise to power changed how people thought about the legitimacy of law.[37] Instead of thinking that law emanated from God's chosen monarch, law began to be seen as deriving from the people.[38] Thus, ideas about nationalism came to center around the idea of popular sovereignty instead of monarchs with absolute power, and smaller states came to oppose the unequal

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26. JOEP LEERSSEN, NATIONAL THOUGHT IN EUROPE: A CULTURAL HISTORY 14–15 (2006).

27. *Id.* at 16.

28. *See id.* at 14–15 (discussing how John Breuilly in 1993 identified that under nationalism, "[t]he nation must be as independent as possible[,] usually requir[ing] at least the attainment of political sovereignty.").

29. *See id.* at 14 (defining nationalism as "a state of mind, in which the supreme loyalty of the individual is felt to be due the nation-state")..")

30. *Id.* at 14–15.

31. *See generally* David Frum, *Catalan Nationalism Means More European Division*, ATLANTIC (Sep. 30, 2017) https://www.theatlantic.com/international/archive/2017/09/trump-spain-catalonia-referendum-independence/541572/.

32. *See generally* THE OXFORD HANDBOOK OF THE HISTORY OF NATIONALISM (John Breuilly ed., 2013).

33. The Protestant Reformation had challenged Roman Catholic power in Europe. *See* James Mayall, *International Society, State Sovereignty, and National Self-Determination*, *in* THE OXFORD HANDBOOK OF THE HISTORY OF NATIONALISM 537, 538 (John Breuilly ed., 2013).

34. *Id.*

35. *Id.*

36. *See Id.* at 539–40 (describing the ways that the nationalist wave following the American and French Revolutions challenged the traditional conception of international society and traditional authority).

37. *Id.*

38. *Id.*

influence the great powers wielded.[39] Emphasis was on the *volk*,[40] or "folk," and the cult of the fallen soldier was central to the romantic ideals of nationalism in that era.[41] Another factor shaping nationalism at that time was a rising middle class that created a group of bourgeoisie that demanded a new order.[42]

The time between the Napoleonic wars and the beginning of World War I was the golden age of nationalism, dominated by imperialism.[43] Some large nation states divided into small nation states, while some small nation states (or other political groupings including city states) merged into larger nation states. Germany and Italy are examples of nation states created by merging smaller political entities.[44] Groups of people also sought to create independent states, breaking away from larger states that they were forced to be part of, such as the Austria-Hungarian Empire, the Ottoman Empire, and Russia.[45] The push behind these dramatic changes in statehood was the desire for the state to be more reflective of and representative of a group of people with common characteristics.[46] This movement of people to liberate themselves gave rise to World War I, as the process of nationalization undermined the legitimacy of the Austria-Hungarian Empire.[47]

The next surge of European nationalism came during the period between World Wars. Fascism flourished, and nationalism was part of a resurgence of extreme, right-wing ideologies.[48] Nationalism at this time contained a strong ethnic component.[49] Pseudo-science ideas of racial purity thrived.[50] The Nazi party sprung from this ideological framework, and the "cult of *völkisch* identity was an important contributing factor in the Third Reich's policy of genocide as an instrument of national

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39. *Id.*

40. German intellectuals comprised the "heartland" of romantic nationalism. *See* John Huchinson, *Cultural Nationalism*, *in* THE OXFORD HANDBOOK OF THE HISTORY OF NATIONALISM 75, 78 (John Breuilly ed., 2013).

41. *Id.* at 84–85.

42. Charles C. Tansill, *Nationalism: Historical Prelude*, 4 INT'L L. & REL. 1, 13 (1935).*See generally* MIROSLAV HROCH, SOCIAL PRECONDITIONS IN NATIONAL REVIVAL IN EUROPE: A COMPARATIVE ANALYSIS OF THE SOCIAL COMPOSITION OF PATRIOTIC GROUPS AMONG THE SMALLER EUROPEAN NATIONS (1985).

43. *See generally* HROCH, *supra* note 42.

44. John Paul Newman, *Nationalism*, INT'L ENCYC. OF THE FIRST WORLD WAR, https://encyclopedia.1914-1918-online.net/article/nationalism.

45. *See* LEERSSEN, *supra* note 26, at 129–44 (discussing 19th century nationalism and separatist movements).

46. One definition of nationalism that seems to capture the zeitgeist of nationalism in this time frame was that of Professor Ramsay Muir, who defined nationalists as a group of people "who feel themselves to be naturally linked together by certain affinities which are so strong and real for them that they can live happily together, are dissatisfied when disunited, and cannot tolerate subjection to peoples who do not share these ties." Tansill, *supra* note 42, at 3, (citing RAMSAY MUIR, NATIONALISM AND INTERNATIONALISM 38 (1917)).

47. Newman, *supra* note 44.

48. LEERSSEN, *supra* note 26, at 234.

49. *See id.* (noting that "In [the National-Socialist] view, the history of the *Volk* [the *Nation*] is thoroughly determined, in its larger patterns, by its innate and cultivated temperament and by its purity and collective solidarity. . . .").

50. *Id.*

purity and total control."[51] A paper written in 1935 highlights rising nationalism in the years leading up to World War II:

> It is very apparent even to the most casual observer that the outstanding force in present-day world politics is nationalism. It has produced the national rivalries that lead to serious international discord, and it has rendered impotent every effort to create a world organization which can effectively preserve world peace. The only way to arrest this rising tide of nationalism is to find a formula of political faith which will transcend national boundaries, and which will have such power of attraction that habitudes of thought will become international rather than national. The stage has been set and the audience is anxiously awaiting the appearance of a political Messiah.[52]

Post-nationalism defined the period following World War II, in which there was a huge push for international cooperation and respect for human rights.[53] Though nationalism was relatively dormant in Europe, nationalism was alive and well elsewhere in the world, as the post-war period was a time of rapid decolonization and independence.[54] Militant separatists were also active in some areas of Europe, such as Northern Ireland and the Basque Country.[55]

We are now in a period of neo–nationalism, which began at the end of the Cold War.[56] This wave of nationalism centers around far–right "ethnonationalists" who advocate for the interests of a specific ethnic group.[57] Euroscepticism, an opposition to the EU, is growing as a pushback against globalization.[58] Across Europe, nationalism is now coalescing around hatred toward Muslim immigrants and other immigrant groups, such as Africans.[59] Specific examples of rising nationalism in Europe are set forth in the next section.

D. Rise in Nationalism

1. Nationalism in the EU Today

Brexit may be the most visible example of the rise of nationalism in Europe, but it is not the only one. As Udo Di Fabio, a former judge of the Federal Constitutional Court of Germany, has observed, the populist movement appears to have "reached a fervor in nearly all the Member States that has not been seen for decades."[60] Populists

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51. *Id.*
52. Tansill, *supra* note 42, at 1.
53. Leerssen, *supra* note 26, at 234–35.
54. *Id.* at 236–37.
55. *Id.* at 238.
56. *Id.* at 242.
57. *Id.*
58. *Id.* at 243.
59. *Id.* at 244—46.
60. Udo Di Fabio, *On the Continent Alone*, 17 GERMAN LAW JOURNAL 21, 21 (2016).

around Europe have made steady electoral gains.[61] These populists tend to be strongly nationalist, and sometimes anti-American, racist, and anti-Semitic.[62] Populist Nationalist Parties have a foothold in Austria, the Czech Republic, Denmark, Finland, France, Germany, Hungary, Latvia, the Netherlands, and Sweden.[63] According to Di Fabio, "the anti-European sentiment runs the range from a not-totally-irrelevant marginal phenomenon as in Germany, to a hidden veto-power in France, to a movement that is already on the way to a majority in Italy."[64] In 2017 elections, Austria made a sharp turn to the right with a coalition of the two right-most parties gaining a majority in Parliament.[65] Additionally, over 10% of voters in the Czech Republic voted for far right-wing candidates, and as will be discussed more fully below, Marine Le Pen, the far-right candidate for president in France lost the election, but received one-third of the votes.[66] Angela Merkel was reelected Chancellor of Germany, but what is almost as important is that the far-right AfD party got 12.6% of the vote, up from 4.7% in the 2013 elections, which is the first time a Right party has sat in the Bundestag since 1961.[67] In the Netherlands, the PVV candidate for Prime Minister, Geert Wilder, came in second, but his strong showing in pre-election polls caused Prime Minister Mark Rutte to increase his resistance to migration, showing how the far-right is effectively pressuring moderates to radicalize their stances on issues.[68] Meanwhile, the PVV has a strong position in Parliament.[69]

Hungary is in the midst of an authoritarian drift.[70] Hungary's prime minister, Viktor Orbán, for example, has been no friend to immigrants, building a wall to keep Syrian refugees out.[71] Orbán made a speech in July of 2014 declaring that Hungary is no longer a liberal state; rather, it is a work-based state emulating Russia, China, and Turkey.[72] Orbán's vision for his country is to become a one-party state built on "ethnonationalist foundations."[73] He has also been no friend to the media, severely impinging on civil and political rights in Hungary.[74] Hungary has been harassing

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61. KIRCHICK, *supra* note 12, at 4.

62. *Id.*

63. Ashley Kirk, *How the Rise of the Populist Far-Right Has Swept Through Europe In 2017*, THE TELEGRAPH (Oct. 24, 2017, 12:01 PM), http://www.telegraph.co.uk/politics/2017/10/24/rise-populist-far-right-has-swept-europe-2017/. For the countries on this list, the far-right received greater than 10% vote share in recent European legislative elections. *Id.*

64. Di Fabio, *supra* note 60, at 21.

65. *See* KIRCHICK, *supra* note 12, at 121–22 (explaining that in Austria's most recent election, the far-right candidate from the Freedom Party (founded by former SS officers) was less than 1% away from election in the initial presidential runoff election). *See also* Kirk, *supra* note 63 (describing the rise of the People's Party and the Freedom Party).

66. Kirk, *supra* note 63. Support for elected leaders from Russia makes it no surprise that the Czechs did not protest Russia's invasion of Ukraine. KIRCHICK, *supra* note 12, at 225.

67. Kirk, *supra* note 63.

68. *Id.*

69. *Id.*

70. KIRCHICK, *supra* note 12, at 56.

71. *See* Michael Idov & Adam Weinstein, *The Trump Bump*, ESQUIRE, Feb. 2017, at 54, 57 (noting that Orbán "literally built a wall during the migrant crisis in 2015 to slow the stream of border crossers from Serbia").

72. KIRCHICK, *supra* note 12, at 59.

73. *Id.* at 60.

74. Idov & Weinstien, *supra* note 71, at 57; *see also* KIRCHICK, *supra* note 12, at 56–57 ("Since winning a landslide election in 2010, the Orbán government has rewritten the constitution centralized power in the

NGOs that support civil society projects.[75] As dismaying as Orbán's party is, its main political challenger is even further right.[76] Hungary's second-most popular party, Jobbik (the Movement for a Better Hungary) is on the extreme right of the political spectrum and friendly toward the Kremlin, with a history of extreme discrimination and harassment of the Roma.[77] Furthermore, Hungarian nationalist, revisionist historians have been actively trying to erase Hungary's responsibility for the murder of Hungarian Jews in the Holocaust in a program of "nationalist mythmaking."[78]

Since 2015, Poland has been ruled by President Andrzej Duda and the extremely conservative Law and Justice Party (PiS), and disharmony with the EU is growing.[79] Poland is strongly asserting claims to sovereignty, despite criticism and oversight from the EU about Poland's position on refugees, and its questionable infringements on the press and independent judiciary.[80] As a result, the EU triggered a mechanism for the first time in its history to strip Poland of its EU voting rights over concerns about the independence of the judiciary, a key component of EU membership.[81] The move by the EU sparked vocal criticism from right-wing leaders of other EU member states, including Marine Le Pen in France and Victor Orbán in Hungary.[82] A recent protest on Poland's independence day illustrates the virulence of Poland's particular brand of nationalism—"the figures who marched on . . . wore masks, flashed white-power insignia, and screamed 'Pure Poland, white Poland!' and 'Refugees get out!' One banner on display read *Pure blood, Clear mind*; another read *Europe will be white or uninhabited*." [83]

Nationalism is particularly strong and worrisome in France, where recent elections showed a strong backing for French nationalists. Marine Le Pen, from the far-right National Front party, made it to second place in the 2017 runoff election for

executive, weakened checks and balances, empowered the oligarchic class, dispensed state awards and ceded cultural policy to extreme right-wing figures, rendered parliament a rubber stamp, overhauled public media institutions into partisan outlets, harassed civil society, and reoriented Hungary's traditionally Atlanticist and pro-European foreign policy toward Russia and other authoritarian regimes.").

75. KIRCHICK, *supra* note 12, at 57–58.

76. Dalibor Rohac, *Hungary's Hard Right Turn*, POLITICO (July 27, 2015), https://www.politico.eu/article/hungarys-rising-right-wing/.

77. *Id.*

78. KIRCHICK, *supra* note 12, at 52–54.

79. *See* Natalie Nougayrède, *The EU isn't Punishing Poland. It's Protecting its Integrity as a Bloc*, GUARDIAN (Dec. 26, 2017), https://www.theguardian.com/commentisfree/2017/dec/26/brexiters-eu-poland-brussels-warsaw-trade-deals.https://www.theguardian.com/commentisfree/2017/dec/26/brexiters-eu-poland-brussels-warsaw-trade-deals (discussing increasing tesnsion between Poland and the EU). *But cf.* Paul Hockenos, *Poland and the Uncontrollable Fury of Europe's Far Right*, THE ATLANTIC (Nov. 15, 2017), https://www.theatlantic.com/international/archive/2017/11/europe-far-right-populist-nazi-poland/524559/ (noting that Poland's president is not a member of the ruling party and disavows the party's more extreme statements).

80. *See* Nougayrède, *supra* note 79 ("Brussels decided to move against Poland's democratic backsliding, namely the crushing of its independent judiciary – a process that had recently been accelerated by its populist government, elected in 2015.").

81. *Id.*

82. *Id.* Meanwhile, critics on the left argue that the EU is not going far enough in making sure member states are upholding the values they agreed to, such as Spain's treatment of Catalans in their vote for independence and Greece's imprisonment under miserable conditions of asylum seekers. *Id.*

83. Hockenos, *supra* note 79.

President. [84] While she lost to President Emmanuel Macron, she received one-third of the vote, which was approximately 11 million votes.[85] Nationalism in France is particularly disheartening, considering the strong and exemplary values that France has championed since the French Revolution.[86] More disturbing still is Le Pen's connection with Vladimir Putin. For instance, "[i]n 2014, a Russian bank loaned Le Pen's cash-strapped party 9 million euros. Le Pen, in turn, has amplified Putin's talking points, declaring Russia 'a natural ally of Europe.'"[87] Large numbers of Jews are leaving France because of the rising anti-Semitism,[88] which is tolerated in a way that other forms of racism are not.[89] In Paris, the population of Jews has decreased by half.[90] The outflow of Jews from France is at its highest point since World War II and is so extreme that Paris-area synagogues are closing.[91]

Nationalism is rising even in unexpected places. For example, in Sweden, which is normally pro-EU, and until recently, the European country with the most favorable record of refugee assistance, there is now a neo-Nazi backlash.[92] In addition, a Pew research study found that 88% of Swedes think the EU mishandled the migrant crisis.[93]

Not only are nationalist movements gaining influence in Europe, they are organizing. For example, far-right leaders met in Prague in December 2017 for a conference of the newly-formed Nationalist Europe and Freedom Coalition.[94] The agenda of the conference focused on harsh criticism of immigration of Muslims to Europe and shoring up cooperation between nationalist leaders.[95] In attendance were right-wing leaders Marine Le Pen, leader of the National Front in France; Geert Wilders, leader of the Dutch Party for Freedom, in the Netherlands; and Tomio

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84. *See* Angelique Chrisafis, *Marine Le Pen Defeated but France's Far Right is Far From Finished* THE GUARDIAN (May 7, 2017), https://www.theguardian.com/world/2017/may/07/marine-le-pen-defeated-front-national-far-from-finished (noting the strong support for Le Pen during the recent French election).

85. *See id.* (highlighting that La Pen was "projected to have won up to 11m votes" in the 2017 French runoff election).

86. VERHOFSTADT, *supra* note 25, at 78–79 (recalling the famous "liberty, equality, and fraternity").

87. Franklin Foer, *It's Putin's World: How the Russian President Became the Ideological Hero of Nationalists Everywhere*, ATLANTIC (Mar. 2017), https://www.theatlantic.com/magazine/archive/2017/03/its-putins-world/513848/.

88. *See* KIRCHICK, *supra* note 12, at 9 (noting "the exodus of Europe's largest Jewish community" from France)..

89. *See id.* at 137 (discussing recent anti-Semitism trends in France).

90. *Id.*

91. *See* Dale Herd, *French Synagogues Closing as Jews Flee Anti-Semitism*, CNBC<<CBN News>> (Dec. 15, 2017), https://www1.cbn.com/cbnnews/world/2017/december/paris-synagogues-closing-as-jews-flee-anti-semitism ("Agence France-Presse says more than 5,000 Jews left France last year on top of the record 7,900 who left in 2015 and 7,231 in 2014. At least 40-thousand have emigrated since 2006.").

92. KIRCHICK, *supra* note 12, at 121.

93. *Id.* at 122.

94. *See* Philip J. Heijmans & Hana de Goeij, *European Far-Right Leaders, Meeting to Condemn the E.U., Are Greeted With Boos*, N.Y. TIMES (Dec. 16, 2017), https://www.nytimes.com/2017/12/16/world/europe/prague-far-right-conference.html (discussing an early meeting of the Nationalist Europe and Freedom coalition, an EU political group that was launched on June 15, 2015). *See generally France's Le Pen Announces Far-Right Bloc of Anti-EU MEPs*, BBC NEWS (June 16, 2015), http://www.bbc.com/news/world-europe-33147247.

95. David W. Cerny, *Europe's Far-Right Leaders Vow to Create a Far-Right Europe Without the EU*, CBS NEWS (Dec. 16, 2017, 11:16 PM), https://www.cbsnews.com/news/europes-far-right-leaders-meet-in-prague/.

Okamura, leader of the Freedom and Direct Democracy Party in the Czech Republic.[96] Representatives from far-right parties in Austria, Britain, and Italy were also in attendance.[97] "The conference was hosted by the anti-Islam and anti-immigrant Freedom and Direct Democracy party, known as the SPD."[98] "The party emerged as a major force in Czech parliamentary elections in October, winning nearly 11 percent of the vote."[99] The SPD's leader, Mr. Okamura, whose party is vocally anti-Islam, demanded a reformed EU "without any dictate from Brussels."[100] During the proceedings, the group publicly praised United States President Donald Trump's strong (anti-Muslim) immigration policy.[101]

The Nationalist Europe and Freedom Coalition had met previously in Koblenz, Germany to kick off their partnership.[102] The meeting, referred to as a "European counter-summit" was made up of far-right nationalists from around Europe.[103] Present were Marine Le Pen of France (National Front), Geert Wilders of the Netherlands (Dutch anti-Islam Freedom Party), Harald Vilimsky of Austria (Freedom Party of Austria), Matteo Salvini of Italy (Anti-EU Northern League), and Frauke Petry of Germany (Alternative for Germany [AfG], Germany's anti-immigration party),[104] along with a projected 1,000 more European nationalists.[105] The Koblenz meeting served to set the agenda of the Coalition, which included national decision-making, controlled migration, and elimination of the Euro.[106] The core theme of the meeting was protecting the distinct cultural identities of European countries.[107] The recent election of Donald Trump in the United States and the Brexit vote were cited

96. Heijmans & Goeij, *supra* note 94.

97. Cerney, *supra* note 95. Marine Le Pen claimed at the gathering that the EU causes the degradation of traditional values and the suppression of patriotism, and described the EU as "a disastrous organization which is leading our continent to destruction through dilution by drowning it in migrants, by the negation of our respective countries, by the draining of our diversity." *Id.* Geert Wilders, in turn, stated that "In 30 or 50 years, the Czech Republic will be surrounded by countries with populations where 20 percent of people will be Muslimvs. . . . That is as if the Czech Republic became a Gaza Strip. We need to prevent mass migration even if we should build a wall." Heijmans & Goeij, *supra* note 94.

98. Heijmans & Goeij, *supra* note 94.

99. *Id.*

100. *Id.*

101. *See* Christina Pazzanese, *In Europe, Nationalism Rising*, HARV. GAZETTE (Feb. 27, 2017) https://news.harvard.edu/gazette/story/2017/02/in-europe-nationalisms-rising/ (discussing the similarities between the nationalist movements in the United States and Europe)).

102. Kate Brady, *EU's Right-Wing ENF Faction Unites to Fight for 'Patriotism, Sovereignty and Identity'*, DEUTSCHE WELLE (Jan. 21, 2017), http://www.dw.com/en/eus-right-wing-enf-faction-unites-to-fight-for-patriotism-sovereignty-and-identity/a-37224232.

103. *Id.*

104. *Id.* Another prominent leader of Germany's AfD, Björn Höcke, has recently made an inflammatory speech to a group of young people in Dresden. *Local AfD Leader's Holocaust Remarks Prompt Outrage*, DEUTSCHE WELLE (Jan. 18, 2017), http://www.dw.com/en/local-afd-leaders-holocaust-remarks-prompt-outrage/a-37173729 ("Jewish groups have reacted with anger and shock after a local leader of the right-wing populist party Alternative for Germany (AfD) attacked Germany's national Holocaust memorial and the country's devotion to teaching its citizens about Nazi genocide.").

105. *Leading European Right-Wing Populists Attend Koblenz Meeting*, DEUTSCHE WELLE (Jan. 21, 2017), http://www.dw.com/en/leading-european-right-wing-populists-attend-koblenz-meeting/a-37220481.

106. *See* Brady, *supra* note 102 (listing the policy goals of the coalition).

107. *Id.*

as giving momentum to the far right groups in Europe.[108] Marine Le Pen, in a speech at the meeting, made a statement to the effect that that "Britain's vote last year to leave the European Union would have a 'domino effect' across the bloc."[109]

It is not only nationalist leaders who are organizing. Other groups around Europe are also forming and activating around nationalist, particularly anti-immigrant, ideals. Far-right nationalism in Europe's youth is rising.[110] Many of these young people are vocal about their disenchantment with the EU.[111] What draws these young people to nationalism includes a desire to preserve national identity against outside influence, an opposition to multi-culturalism, and the view that these young people are a part of a collective identity that is against some "other" group, usually refugees, in today's political climate.[112]

For example, in 2017, a group of far-right millennials set to sea with the agenda of interfering with rescue ships assisting migrants who were attempting to come to Europe in life boats in a perilous journey across the Mediterranean.[113]

2. Rise in Nationalism Around the World

Europe is not alone in the rise of nationalism—it is on the rise around the world. There has been a ten-year spike in nationalism, but Brexit and the election of U.S. President Donald Trump have raised awareness and conversation around the phenomenon.[114] Along with the rise of nationalism comes new tolerance for the racist, xenophobic speech that supports and undergirds these movements.[115] One commentator interestingly observed that "[a]nti-immigration statements are the political fertilizer of the right."[116]

U.S. President Donald Trump, when speaking about Brexit, suggested that his campaign was about "the exact same thing."[117] Furthermore, his actions and statements as president have been controversial, inflammatory, and possibly

108. *Id* (citing Marine Le Pen, who proclaimed at the meeting that "2016 was the year the Anglo-Saxon world woke up.")

109. DEUTSCHE WELLE, *supra* note 105.

110. *See* Lili Bayer, *Why Central Europe's Youth Roll Right*, POLITICO (Oct. 24, 2016, 2:51 PM CET), https://www.politico.eu/article/why-central-europes-youth-roll-right-voting-politics-visegard/ ("[a]cross Central Europe, young voters are moving further right on the political spectrum. . . . .").

111. *Id.*

112. Madeliene Ingino, Europe's New Generation of Nationalists: Understanding the Appeal of Contemporary Radical Nationalism for European Youth 55–57 (Apr. 7, 2016) (unpublished B.A. honors thesis, University of Colorado Boulder) (on file with the University Libraries, University of Colorado Boulder, https://scholar.colorado.edu/honr_theses/1217).

113. Antonio Parrinello & Steve Scherer, *Far-Right Millennials Set Out to Sea to 'Defend EuropeEurope' From Migrants*, REUTERS (July 21, 2017, 7:49 AM), https://www.reuters.com/article/us-europe-migrants-farright-millennials/far-right-millennials-set-out-to-sea-to-defend-europe-from-migrants-idUSKBN1A61J6. Countless migrants have died in capsized lifeboats attempting to reach Europe's shores. *Id.*

114. Karoline Postel-Vinay, *How Neo-Nationalism Went Global*, U.S. NEWS (Mar. 15, 2017, 1:53 PM), https://www.usnews.com/news/best-countries/articles/2017-03-15/a-look-at-global-neo-nationalism-after-brexit-and-donald-trumps-election.

115. *Id.*

116. Alexander Somek, *Four Impious Points on Brexit*, 17 GER. L. J. 105, 105 (2016).

117. Michaels, *supra* note 22, at 51.

unconstitutional.[118] Russia is another example. Vladimir Putin seems increasingly emboldened to disregard human rights at home and abroad. Recent examples of this behavior include Russia's 2017 law decriminalizing many acts of domestic violence and Putin's efforts to further criminalize homosexuality.[119] Putin's actions abroad have become more menacing, threatening world peace. The most heinous examples include Russia's invasive, deadly action in the Ukraine annexation of Crimea, which left 10,000 dead and hundreds of thousands of people forced to flee their homes, and Russia's land grab in the disputed territory of South Ossetia.[120] Vladimir Putin's return to the presidency after a mandatory four-year hiatus was not without controversy in Russia.[121] To gain support, Putin catered to growing Russian populism and ideas about traditional values.[122] Putin seized the opportunity to become the "New World Leader of Conservatism."[123]

The United States and Russia are not alone. Nationalism is strong in Turkey under President Recep Tayyip Erdogan, in India under Prime Minister Narendra Modi, and in the Philippines under President Rodrgo Duterte.[124] While Japanese Prime Minister, Shinzo Abe, is not himself a virulent nationalist, the far-right movement is represented in his government by Defense Minister Tomomi Inada.[125] In Brazil, nationalism is quickly gaining ground.[126] The result of this rise in nationalism posits a terrifying erosion of human rights around the world.

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118. Recent examples include his stance on immigration from poor countries, calling for the U.S. to avoid accepting immigrants from El Salvador, Haiti, and Africa, calling them "shithole" countries. Danielle Campamor, *Trump's America is a Shithole Country*, NEWSWEEK (Jan. 15, 2018, 7:00 AM), http://www.newsweek.com/trump-america-shithole-country-78088815; Dylan Scott, *A Judge Just Ruled a Lawsuit Accusing Trump of Violating the Constitution Can go Forward*, VOX (Mar. 28, 2018), httpos://www.vox.com/policy-and-politica/2018/3/28/17173104/emoluments-clause-lawsuit-trump-international-hotel-maryland-de-standing.

119. *See Russia: Bill to Decriminalize Domestic Violence,* HUMAN RIGHTS WATCH (Jan. 23, 2017,), https://www.hrw.org/news/2017/01/23/russia-bill-decriminalize-domestic-violence (detailing efforts to weaken legal protections against domestic violence); Adam Maida, *Online and On All Fronts: Russia's Assault on Freedom of Expression,* HUM. RTS. WATCH (July 18, 2017), https://www.hrw.org/report/2017/07/18/online-and-all-fronts/russias-assault-freedom-expression (describing new government restrictions on freedom of expression, including speech normalizing homosexuality).

120. David Frum, *Trump's Plan to End Europe*, ATLANTIC (May 2017), https://www.theatlantic.com/magazine/archive/2017/05/the-plan-to-end-europe/521445/. Russia's actions in Crimea are the first violent annexation in Europe since World War II. KIRCHICK, *supra* note 12, at 1.

121. Foer, *supra* note 87.

122. *Id.* "("A 2013 paper from the Center for Strategic Communications, a pro-Kremlin think tank, observed that large patches of the West despised feminism and the gay-rights movement and, more generally, the progressive direction in which elites had pushed their societies. With the traditionalist masses ripe for revolt, the Russian president had an opportunity. He could become, as the paper's title blared, '"The New World Leader of Conservatism.""")

123. *Id.* "("He has achieved this prominence because he anticipated the global populist revolt and helped give it ideological shape. With his apocalyptic critique of the West—which also plays on anxieties about Christendom's supposedly limp response to Islamist terrorism—Putin has become a mascot of traditionalist resistance.".")

124. *See* Postel-Vinay, *supra* note 114 (noting that Erdogan, Modi, and Duterte are often referenced in discussions about the "new nationalist landscape").

125. *Id.*

126. *Id.*

3. Why Nationalism?

Why are these movements gaining traction, and what is the problem with them? Nationalist movements are growing due to anger at a perceived loss of national sovereignty, increases in economic inequality, and changes in cultural and demographic composition.[127] These nationalist movements sharply contrast with the internationalization that has occurred as a consequence of globalization. Indeed, they are a reaction to it. Globalization and the internationalization of law have increased human rights protections for people around the world.[128] Constitutionalism is increasing in some states where it was previously lacking.[129] However, rising nationalism can be described as a blowback from globalization and internationalization, and thus is why we are witnessing a regression in human rights in many parts of the world.[130]

The central question that states are currently facing is how to fulfill their obligations to protect their people from negative consequences of globalization. The consequences of globalization—such as economic, immigration/refugee, and security issues—are being weighed against the benefits to regional and world peace and stability that comes from cooperation on an international and regional level.[131] Where states find themselves on that scale delicate balancing sovereignty and cooperation seems to tilt back and forth. The Syrian refugee crisis has shifted the balance toward nationalism in many places,[132] and Brexit is major evidence of this shift.

II. A BROKEN EU

A. *Short intro to the EU*

The ideal vision of the EU, as 25 years of statesmen have declared, is a Europe that is "whole, free, and at peace,"[133] a political and economic cooperation shaped by

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127. Michael J. Mazarr, *The Once and Future Order: What Comes after Hegemony*, 96 FOREIGN AFF. 25, 28 (2017).

128. *See id.* at 25–26 (recognizing the contribution of international structures in promoting ideals, including respect for human rights).

129. *See* Christine E. J. Schwöbel, *Situating the Debate on Global Constitutionalism*, 8 INT'L J. CONST. L. 611, 611 (2010) (noting the increase in international cooperation and focus on global constitutionalism by states, which is leading to more discussions about how such global constitutionalism should look).

130. *See* Mazarr, *supra* note 127. ("The postwar order has driven global integration and liberalization by encouraging free-trade agreements, developing international law, and fostering global communications networks. Such developments strengthened the order in turn by cementing public support for liberal values. But the populist rebellion against globalization now imperils that virtuous circle").

131. *See* Herman E. Daly, *Population, Migration, and Globalization*, WORLDWATCH INSTITUTE (October 2004) *available at* http://www.worldwatch.org/node/559 (commenting on the economic and migratory issues resulting from globalization); *See also* Lynn E. Davis, *Globalization's Security Implications*, RAND CORP. (2003) (discussing current and potential future security issues resulting from globalization).

132. Phillip Heijmans, *Central Europe's Hard Turn to the Right*, U.S. NEWS (Sept. 29, 2016, 2:10 PM), *https://www.usnews.com/news/best-countries/articles/2016-09-29/in-central-europe-a-nationalist-turn-to-the-right* (noting that nationalist movements are sweeping across central Europe due to security fears and the influx of refugees from countries like Syria).

133. *See generally* KIRCHICK, *supra* note 12, at 12.

law.[134] The rehabilitation of the European nation state, and not its destruction, was the original goal of the EEC.[135] Thus, the purpose of the EEC was to promote the very survival of the nation state. European cooperation required "some surrender of sovereignty" by the nation-state, but not its "wholesale replacement. . . [by] supranational governance."[136] While the European institutions that preceded the EU primarily focused on economic cooperation, the primary purpose of the EU is and always has been to prevent war,[137] and to avoid repeating the horrific human rights abuses that were perpetrated in World War II.[138]

1. History and Structure of the EU

Post-World War II European cooperation began in 1950 with the creation of the European Convention on Human Rights, which has been signed and ratified by every EU member state.[139] In 1951, the European Coal and Steel Community (ECSC) was created by treaty, instituting regulations and a partnership for the production of coal and steel.[140] These regulations made it more difficult for any one state to pursue war.[141] The ECSC established four institutions that continue to be fundamental to the organization of the EU to this day—the Council of Ministers, the Commission, the Court of Justice, and the Parliament.[142] The Treaty of Rome establishing the European Economic Community, which was the predecessor to the EU, was established in 1957.[143] "As amended and renamed, it remains the penultimate source of European Union law."[144] The word "Economic" was dropped from the name in 1993, in recognition that the reach of the union extends far past economic cooperation.[145] In the same year, the Maastricht Treaty on European Union, which created the EU, was superimposed over the EEC treaty.[146]

The UK did not originally join the EEC, and began to seek membership in the EU in 1961. UK membership, however, was blocked by France under Charles De Gaulle.[147] In January of 1973, after De Gaulle's resignation, the UK became part of

134. Frank Schorkopf, *Three Nearly-Certain Conclusions We Can Draw from the Uncertainty*, 17 GERMAN L.J. 95, 95 (2016).

135. Matthijs, *supra* note 4, at 87 (crediting this idea to Alan Milward, THE EUROPEAN RESCUE OF THE NATION-STATE (1992)).

136. *Id.* at 87–88.

137. Pavel Seifter, *The Real Danger Isn't Brexit. It's EU Break-up*, THE GUARDIAN (May 26, 2016), https://www.theguardian.com/commentisfree/2016/may/26/danger-brexit-break-up-eu-europe-russia.

138. FOLSOM, *supra* note 8, Part A, preamble.

139. *Id.* (The European Convention and the jurisdiction of the European Court of Human Rights is broader than the EU, including Turkey and Russia as well).

140. *Id.*, Part A, sec. 1.1.

141. *Id.*

142. *Id.*

143. *Id.*

144. FOLSOM, *supra* note 8, Part A, sec. 1.2.

145. *Id.*

146. *Id.*

147. *Id.*, Part A, sec. 1.5 .

the EU.[148] Membership in the EU requires unanimous approval from all current member states and the applicant state's support for democratic government.[149] New members have to accept the entire, growing body of EU law.[150] The following membership criteria was set in 1993:[151]

> Stable democracies based upon a rule of law, human rights and protection of minorities;
>
> Market economies able to compete with the EU; and
>
> The ability to make full commitments to EU political, monetary and economic union[152]

2. Major Benefits of the EU

The EU reduces European border conflicts. It has always been difficult for Europeans (really, all people) to agree on where borders should be, and what territories should be recognized as states.[153] The EU's open border policy has promoted peace on this issue. One example is Alsace-Lorraine, an area of land over which Germany and France bitterly fought.[154] With the EU's open borders allowing for free movement, a German can easily live in the French-held Alsace-Lorraine with very little inconvenience.[155] The EU has also been a force for peace in places where certain groups of people wanted sovereignty, such as Scotland, Catalonia, Corsica, and the Flemish parts of Belgium.[156] Additionally, membership in the EU serves as an important check on hegemonic states, providing necessary balance in geopolitics. For example, the EU has counterbalanced Russian dominance by providing EU membership to post-communist countries, like Poland and the Baltic states.[157] The EU has always been a check on the dominance of the United States as well.[158]

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148. *Id.*

149. *Id.* This requirement for unanimity in the approval of new EU member states is how France, through De Gaulle's actions, was unilaterally able to block the UK's application. *Id.*, Part A, sec. 1.5.

150. *Id.* at 19.

151. *Id.*

152. *Id.*

153. Frum, *supra* note 120.

154. *See id.* (noting that the battle over Alsace-Lorraine, which spanned 75 years, resulted in much bloodshed for both France and Germany).

155. *Cf. Id.* (recounting how "a German government official . . . , noting the contemporary irrelevance of the Alsace-Lorraine dispute, . . . [once remarked to the author]: 'If a German wants a house in Alsace, he can buy one. Who cares which government delivers the mail?'").

156. *Id. See* Nougayrède, *supra* note 80 (criticizing how the EU turned a blind eye to Spain's civil rights violations during the recent Catalan vote for independence).

157. KIRCHICK, *supra* note 12, at 163.

158. *See generally id.* at 2. In fact, American conservatives view the end of the EU as advantageous for American hegemony. *Id.* at 228. This is shortsighted because the EU is an important ally in shouldering the defense of the world. Frum, *supra* note 120; *see also*, Jean-Pierre Cabestan, *European Union-China Relations and The United States*, 30 ASIAN PERSP. 11, 11 (2006) (discussing the counterbalance the EU promotes against the US).

One of the most important roles of the EU is to promote and protect human rights.[159] The laws of the EU have increasingly given a "central" place to human rights.[160] For example, when the Central and Eastern European states joined the EU post-Cold War, conditions were made to their accession in the Copenhagen Criteria.[161] These mandatory criteria consisted of "stable institutions guaranteeing democracy, the rule of law, human rights and respect for minorities."[162] To ensure continued compliance with human rights, all new member states must accept the jurisdiction of the European Court of Human Rights.[163] The result is that more Europeans are enjoying human rights protections under the European Union than before.[164]

B. *Was Europe Broken Before Brexit?*

The United Kingdom is not alone in its criticism of the European Union. There has been growing discontent with the EU among multiple EU member states for reasons that can be roughly grouped into the following categories: economic issues, migration, security issues related to migration, and democracy concerns centering around discontent over Brussel's elite being out-of-touch with the will of the people.[165] The combination of these crises, and the EU's seeming lack of tools for dealing with them, has fueled discontentment and has seemingly made the union fragile.

1. Economic Issues

The economic roots of the current dissatisfaction with the EU come from the single market created in 1986 and the euro—a single currency—that was created through the Treaty of Maastricht in 1992.[166] The EU became a monetary union without becoming a fiscal, economic, or political union, but monetary unions require political

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159. Giuseppe Balducci, *The Study of the EU Promotion of Human Rights: The Importance of International and Internal Factors* 21 (GARNET, Working Paper No. 61/08, 2008) (noting that "EU human rights promotion has thus assumed a more definite nature in particular after the end of the Cold War.").

160. Samantha Besson, *The Reception Process in Ireland and the United Kingdom*, *in* A EUROPE OF RIGHTS: THE IMPACT OF THE ECHR ON NATIONAL LEGAL SYSTEMS 31, 40 (Helen Keller & Alec Stone Sweet eds., 2008).

161. Balducci, *supra* note 159, at 11.

162. *Id.*

163. VAUGHNE MILLER, THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND THE COURT OF HUMAN RIGHTS: ISSUES AND REFORMS, 2011, SN/IA/5963 at 3 (UK)..

164. KIRCHICK, *supra* note 12, at 226 (comparing the violence of Europe prior to the foundation of the EU with the current period of EU dominance).

165. *See generally* CHATHAM HOUSE, ATTITUDES TOWARDS THE EU – GENERAL PUBLIC (2017), https://www.chathamhouse.org/sites/files/chathamhouse/publications/research/2017-06-20-future-europe-attitudes-general-public-tables.pdf (providing evidence that citizens of multiple member states have grown dissatisfied with the EU, due to economic issues, migration, democracy concerns, and discontent with those in power).

166. Matthijs, *supra* note 4, at 86.

and economic unions to be successful—and without this foundation a monetary union is dangerous,[167] and potentially disastrous.[168]

"[N]o government, no treasury, no budget, and no bonds were ever created."[169] The result was that Italy, Greece, and other member states were left vulnerable in the Great Recession of 2008.[170] This issue was compounded by tensions between debtor and creditor states.[171] Further economic problems in the EU stem from the erosion of European industry.[172] Europe's industrial base is lagging, and jobs in this sector are shrinking, dropping 20% over the past 15 years, while industrial jobs in the United States remained stable,[173] leading to a relinquishment of market share in industrial production.[174] These factors taken together are part of the reason that the EU has been experiencing slow economic growth.[175]

2. Migration and Security Issues

Free movement began to be a problem when the EU expanded its membership in 2004, and people from the former Eastern Bloc countries began internally migrating within the EU.[176] For example, in 2004, Poland's GDP per capita was around $6,600 while the UK's GDP per capita was around $38,300.[177] It should come as no surprise that, between 2004 and 2014, two million Poles migrated to the UK and Germany.[178]

The issues created by internal migration pale in comparison with the Great Migration of 2015–2016, which is one of the largest crises that the EU has had to face. The migrants were mostly people fleeing the conflict in Syria,[179] along with migrants

167. *See* VERHOFSTADT, *supra* note 25, at 69, 151 (noting that "[w]e pay scarcely any attention now to the actual cause of our difficulties: the fact that a monetary union cannot endure without a full-fledged economic and political union.".

168. *See id.* at 151 ("The economic integration of Europe in the absence of political unification has had tremendous negative consequences for us all: failure to keep us safe, failure to quell old nationalisms, failure to provide Europeans with tools to address the global problems of today.").

169. *Id.*

170. *See Id.* at 112 ("More than half of the young people in Greece and Spain are unemployed . . . Likewise, in other, mainly southern European countries, more than a third of young people [are] .] . . finding no work. Youth unemployment in the European Union averages around 25 percent.").

171. *See id.* at 143 ("Instead of a well-functioning whole, the eurozone has become the mere sum of irreconcilable national interests and camps, creditors and debtors, hard-liners and laxists, all strengthened by their ability and willingness to use their veto.").

172. VERHOFSTADT, *supra* note 25, at 97.

173. *Id.*

174. *Id.*

175. KIRCHICK, *supra* note 12, at 1. *See* Di Fabio, *supra* note 60, at 21 ("Growth is weak on the old continent and the ability to compete internationally varies significantly. Explicit fiscal specifications and the imminent pressure to improve competitiveness in the Monetary Union combine to form a kind of tightly-laced corset that both makes it hard to take a political breath but is also held responsible for maintaining an attractive figure.").

176. Matthijs, *supra* note 4, at 92.

177. *Id.* at 93.

178. *Id.*

179. *See* FRONTEX, RISK ANALYSIS FOR 2016, 40 (2016), http://frontex.europa.eu/assets/Publications/Risk_Analysis/Annula_Risk_Analysis_2016.pdf (discussing the conflicts in Iraq and Syria and their respective impacts on EU border crossings).

from Afghanistan, Iraq, and Africa.[180] The mass migration was first categorized as "demanding but manageable,"[181] and early support for the migrants can be explained by a post-imperialist, post-holocaust Europe conscious of making "historical restitution" by throwing open the floodgates to migrants.[182] However, it soon became clear that the migration was causing issues that were extremely hard to manage.[183] The sheer number of migrants was staggering. By the end of 2015, more than one million migrants had entered the EU.[184] Furthermore, the nature of the migration caused cultural problems.[185] In 2015, 73% of asylum seekers who came to Europe were male—even though the media portrayed the migrants as mostly women and children—nearly all of them were from Muslim majority countries, and many of the men were "young, low-skilled, [and] unattached."[186] Heavily male-dominated societies have been shown to be more prone to conflict, violence, and sexual assault, especially in countries where views on women, gender roles, and homosexuality are very different.[187] The inability to manage this rapid migration was made tragically clear in the mass sexual assaults in Cologne, Germany, and other German cities, on New Year's Eve 2015.[188] Terrorism is also on the rise in Europe, including numbers of fatal terrorist attacks.[189] In fact, a report from the Global Terrorism Database shows that:

> [T]here were 30 such attacks resulting in fatalities in western Europe in 2016 and 23 in 2015. This compares with two attacks across the region resulting in fatalities in 2014 and five in 2013. In addition, terrorist attacks have become more deadly, with 26.5 people on average being killed in 2015 and 2016, up from an average of four a year in the preceding three years. The deadliest incident recorded in western Europe was the series of coordinated attacks on Paris in November 2015 that resulted in the deaths of 130 people and was claimed by Islamic State.[190]

As sexual crimes and terrorism are rising, support for multiculturalism is dropping.[191]

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180. Matthijs, *supra* note 4, at 93.

181. KIRCHICK, *supra* note 12, at 120.

182. *Id.*

183. *Id.* at 110.

184. Matthijs, *supra* note 4, at 93.

185. KIRCHICK, *supra* note 12, at 111.

186. *Id.* at 111–12.

187. *Id.*

188. *See* Rick Noack, *Leaked Document Says 2,000 Men Allegedly Assaulted 1,200 German Women on New Year's Eve*, WASH. POST (July 11, 2016), https://www.washingtonpost.com/news/worldviews/wp/2016/07/10/leaked-document-says-2000-men-allegedly-assaulted-1200-german-women-on-new-years-eve/?utm_term=.4fb569825ada (among the 2,000 men allegedly involved, there were 120 suspects, of whom about half were foreign nationals who had recently arrived in Germany)..

189. Mark Hanrahan & Jessica Wang, *Number of Fatal Terrorist Attacks in Western Europe Increasing, Data Show*, REUTERS (July 12, 2017), https://www.reuters.com/article/us-europe-attacks/number-of-fatal-terrorist-attacks-in-western-europe-increasing-data-show-idUSKBN19X1QO.

190. *Id.* (citing a report from the Global Terrorism Database).

191. *See* KIRCHICK, *supra* note 12, at 3 (citing specific EU nations' aversion to taking on migrants).

In the face of increasing acts of fatal terrorism in Europe, there is not an adequate EU-wide solution for keeping people safe. Security in the EU is a problem because there is no coordinated anti-terrorism security mechanism for the effective sharing of information that could prevent attacks,[192] even after all the terrorist attacks in recent years.[193] There is also no central defense force capable of responding to threats to peace and security issues.[194] Rather, there are 28 (and soon to be 27) individual militaries'.[195] One has only to look at the horrific fallout from Europe's refusal to support secular opposition to Syria's Bashar al-Assad, and the manner in which ISIS filled that vacuum, to understand the necessity of having the ability to act in a concerted way.[196]

Even further, the growing threat from Russia poses serious security issues for Europe as it "forges on with a dizzying military buildup and casually talks about the use of battlefield nuclear weapons against NATO members."[197]

3. Democratic Deficit Issues

Brexit brought visibility to how people perceive EU leaders to be out-of-touch technocrats. Governance by experts is controversial because it seems to be undemocratic.[198] This is a result of some legislative power being transferred from national legislatures to the EU Parliament, where ministers are not directly elected by the citizens of member states.[199] The floods of migrants from the Great Migration, and the quotas imposed by the EU, caused citizens to believe that their own states are powerless, and that the EU does not represent their interests.[200] Interestingly, Hungary and Poland, member states whose citizens internally migrate in mass numbers, defend their citizen's rights to do so while refusing to meet their refugee quotas.[201] Despite much talk about the democratic deficit in the EU,

> [m]ost talk of such a deficit is wrong or exaggerated: EU lawmaking is in many ways more transparent than national lawmaking, and national governments usually have to approve EU laws in the Council of Ministers, although they may pretend otherwise. The place that may be suffering most from a democratic deficit is not the union as a whole but an increasingly integrated euro zone. As it penetrates more deeply into national fiscal and

192. VERHOFSTADT, *supra* note 25, at 17–19.

193. *Id.*

194. *See Id.* at 22 ("A 'United States of Europe' will be better able to stop the net terrorist attack, to respond to the next economic downturn, to listen to the voices of the people before it's too late. Fragmented as it is, Europe today can barely tread water as it fails to respond to [current crises]").].

195. *Id.* at 7.

196. *Id.* at 20.

197. KIRCHICK, *supra* note 12, at 1.

198. Michaels, *supra* note 22, at 58. Michaels points out that David Kennedy's new book sets forth arguments for how leadership by experts promotes injustice. *Id.*

199. Kubra Dilek Azman, *The Problem of Democratic Deficit in the European Union*, 1 (5) INT'L J. HUMAN. & SOC. SCI. 242, 245 (2011).

200. Matthijs, *supra* note 4, at 93.

201. *Id.*

other domestic policies, the case for a democratically elected chamber to keep it in check is becoming stronger.[202]

C. *Will Brexit Lead to a Weakened or Non-Existent EU?*

Brexit is the worst political crisis in the EU's history,[203] and its unraveling would be a foreign policy disaster for the United States.[204] Brexit has the potential to severely weaken the European Union and, in the worst-case scenario, could bring about its end. A weakened EU is likely an inevitable consequence of Brexit. As discussed above, the EU is already fragile, and distrust in the Union is high. Economic issues include low wages, high unemployment, and tensions between creditor and debtor states, especially concerning the government debts of Greece, Italy, Spain, Portugal, and Ireland.[205] The refugee crisis stems from a mass migration that poses the greatest threat to Europe's security since the Cold War, maybe even WWII, and which has caused a de facto suspension of the Schengen Agreement.[206] Serious attacks in Brussels and Paris, as well as in other places, have killed and injured hundreds of people, highlighting the seriousness of the security threat.[207] The situation in Greece illustrates the enormity of the problems. Greece is facing severe and long-standing financial crisis, and the country is unable to pay its debts.[208] The IMF is most likely unwilling to step in, passing on more of the burden to the EU.[209] Exacerbating this grave situation is the fact that Greece is the main gate for refugees pouring into the European Union from Syria.[210] The Greek situation is so dire that opinion is growing that Greece is in danger of becoming a failed state.[211]

Without the UK, the EU will lose its largest military power, one of its two nuclear states, one of its two member states with P5 UN Security Council veto power, its second-largest economy, and its most important global financial center.[212]

A weakened EU is dangerous because the EU promotes stability, and stability makes peace far more likely. Instability can easily blaze into violence, as the history

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202. *How to Address the EU's Democratic Deficit*, THE ECONOMIST (May 23, 2017), https://www.economist.com/news/special-report/21719196-institutions-need-reform-how-address-eus-democratic-deficit.

203. Matthijs, *supra* note 4, at 85.

204. KIRCHICK, *supra* note 12, at 10.

205. Matthijs, *supra* note 4, at 86(discussing economic crises leading to Brexit).

206. KRISTIN ARCHICK, CONG. RESEARCH SERV., R44249, THE EUROPEAN UNION: CURRENT CHALLENGES AND FUTURE PROSPECTS 10–12 (2017).

207. Hanrahan, *supra* note 189, at 2.

208. Doug Bandow, *Greece Heads Into Another Economic Crisis: Time to Finally Exit the European Union?*, FORBES (Jan 5, 2017), https://www.forbes.com/sites/dougbandow/2017/01/05/greece-heads-into-another-economic-crisis-time-to-finally-exit-the-european-union/#73843d04607b.

209. *Id.*

210. Steve Peers, *The Refugee Crisis: What Should the EU Do Next?*, EU LAW ANALYSIS (Sep 8, 2015), http://eulawanalysis.blogspot.be/2015/09/the-refugee-crisis-what-should-eu-do.html.

211. Paul Mason, *The Choice for Europe: Rescue Greece or Create a Failed State*, THE GUARDIAN (May 9, 2016), https://www.theguardian.com/commentisfree/2016/may/09/the-choice-for-europe-rescue-greece-or-create-a-failed-state.

212. Matthijs, *supra* note 4, at 85.

of Europe has taught us. The European identity is compromised.[213] This identity has centered around solidarity and community and is based on principles of democracy, rule of law, social justice, and the respect and promotion of human rights.[214] This regional identity is an enabling condition, serving as a platform for strengthening and ensuring human rights.[215] What will fill the gap that the loss of a European identity leaves? If there is less of a European identity, nationalist identities will grow, which are often a platform for xenophobia, racism, and actions that will severely impact 'human rights. Rhetoric begets action. The UN Committee on the Elimination of Racial Discrimination issued a periodic report in 2016 that noted its deep concern that the Brexit referendum campaign was marked by anti-immigrant rhetoric, which has emboldened individuals to carry out acts of intimidation and hate toward ethnic or ethno-religious minorities.[216]

A weakened European Union also has a negative impact on the effectiveness of regional human rights protection. Regional human rights protection is an important component of human rights protection worldwide. While domestic courts are still the primary site of human rights protection, and the UN overlay provides important guarantees and accountability,[217] the regional systems have an indispensable role to play. The European system of human rights is in some ways very similar and in some ways different from UN overlay, filling gaps and creating law that is sensitive to the culture and history of the region.[218] In addition, regional systems, particularly the European system help "harden international law."[219]

The breakup of the European Union is also a possibility.[220] Brexit has raised the question of whether there will be a domino effect, inspiring other members of the EU to seriously question leaving the European Union.[221] Examples include Sweden, where polls in the immediate aftermath of Brexit showed a majority of Swedes want to stay in the EU, but at least one poll shows a change if UK is out; France, where recent elections reflected a strong showing by the nationalist movement; Italy, where the populist Five Star Movement has demanded a referendum; and the Netherlands, where far right politicians called for a referendum.[222]

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213. *See generally*, Andrew Hammond, *Brexit Will Change the EU's Whole Identity – And We Need to Start Paying* Attention, NEWSWEEK (April 29, 2017, 2:30 AM), http://www.newsweek.com/brexit-identity-negotiations-summit-592054..

214. *See* Balducci, *supra* note 159, at 15 (identifying that the EU and its member states have developed a collective identity based on commonalities and distinctive characteristics vis-à-vis the international human rights regime).

215. *Id.* at 21–22.

216. UN Committee on the Elimination of Racial Discrimination (CERD), Concluding Observations on the Combined Twenty-first to Twenty-third Periodic Reports of the United Kingdom of Great Britain and Northern Ireland, CERD/C/GBR/CO/21-23 (Oct. 3, 2016).

217. *See generally* Balducci, *supra* note 159.

218. *Id.*

219. *Id.* at 14 (internal quotations omitted).

220. *See* Matthijs, *supra* note 4, at 86, 92 (citing the EU's fragile economy and the menace of a rising Russia, as well as the migration crisis).

221. Jake Wallis Simons, *Europe Will Fall Very Soon: Now Even MEPS Say EU Will Crumble Within Five Years After Shock Brexit Result*, DAILY MAIL (June 24, 2016 3:24 EST), http://www.dailymail.co.uk/news/article-3656634/Europe-fall-soon-MEPs-say-EU-CRUMBLE-five-years-shock-Brexit-result.html.

222. *Id.*

The end of the EU might also precipitate further financial crisis. Dissolving the RUO might usher in a grave set of problems. "Almost no modern monetary unions, built around fiat currencies, have broken up without the rise of some form of authoritarian or military government, not to mention the breakout of civil war or its equivalent along the way . . . At the very least escalating social unrest seems inevitable."[223]

The political might of the EU is essential for peace and stability in the world. Brexit "fractures the Western alliance and weakens NATO solidarity and resolve."[224] The politics of scale and multilateralism foster peace and human rights with regard to third countries.[225] This can be seen in the work that the EU currently doing, albeit imperfectly, in trying to de-escalate the tension between Iran and Saudi Arabia, a source of the conflict brewing in Yemen.[226] The clearest example of these politics of scale is the essential role of the EU in aiding the peaceful transition of former Eastern Bloc states into largely democratic and open societies upon the end of the Cold War.[227] The entry requirements into the EU reflected this European identity, including democracy, the rule of law, human rights, and respect for minorities.[228] However, the transition to democracy is not finished: "[I]t still could (with the enthusiastic support from Moscow) go into reverse."[229] Putin's Russia has a vital interest in the breakup of the EU,[230] and we see that the threat of nuclear war is not far behind us.[231] Further, current destabilization in parts of the Balkans is reminiscent of past patterns that preceded violence in the region.[232]

The end of the European Union could return Europe to, as one writer describes, the "dark days of poisonous tribal hatreds" in which destructive forces could unleash the undoing of 70 years of statesmanship.[233] Indeed, the last seven decades, the

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223. DK Matai, *What Would be the Consequences of a Eurozone Break-up?*, BUSINESS INSIDER (Nov. 21, 2011 3:27 PM), http://www.businessinsider.com/what-are-the-consequences-of-a-eurozone-break-up-2011-11.

224. KIRCHICK, *supra* note 12, at 164.

225. Balducci, *supra* note 159, at 23.

226. Andrew Rettman, *EU in Telephone Diplomacy on Saudi-Iran Crisis*, EUOBSERVER (Jan. 4, 2016), https://euobserver.com/foreign/131700.

227. John Lichfield, *EU Referendum: Would Brexit Destroy the European Union?*, INDEPENDENT (June 21, 2016), http://www.independent.co.uk/news/world/europe/brexit-eu-referendum-britain-leaves-effect-what-will-happen-to-europe-a7094111.html; *see generally* Ronald D. Asmus, *Europe's Eastern Promise - Rethinking NATO and EU Enlargement*, 87 Foreign AFFAIRS. 95 (2008).

228. EUROPEAN COMMISSION, *European Neighbourhood Policy and Enlargement Negotiations—Conditions for Membership*, https://ec.europa.eu/neighbourhood-enlargement/policy/conditions-membership_en.

229. Lichfield, *supra* note 227.

230. Seifter, *supra* note 137.

231. *See* Green, *supra* note 10 (recognizing Russia's use of the threat of nuclear war to act against European unity).

232. *See* Matthew Brunwasser, *Serbia's Brand of Reconciliation: Embracing Old War Criminals*, N.Y. TIMES (Nov. 23, 2017), https://www.nytimes.com/2017/11/23/world/europe/serbia-war-crimes-russia.html (pointing out the similarities between the current nationalist trend in Serbia and the nationalist sentiment felt in the lead up to the "1990's Balkan Wars");) Enver Hoxhaj, *Kosovo Feels Russia's Heavy Hand, via Serbia*, N.Y. TIMES (Apr. 13, 2017), https://www.nytimes.com/2017/04/13/opinion/kosovo-feels-russias-heavy-hand-via-serbia.html (detailing Russia's role in stirring up tensions between Serbia and Kosovo).

233. Lichfield, *supra* note 227.

European Union has largely been a "place of peace, stability, prosperity, cooperation, democracy, and social harmony."[234] However, "[we would] be wrong to assume the permanence of European political and economic stability .... Across the grand sweep of European history, countries and empires disintegrating into smaller governing units or being violently subsumed into larger empires is the norm."[235]

The EU is not just an international economic organization; it is an organization created from the destruction brought about by two World Wwwars and designed to promote peace and prevent conflict.[236] European integration is doubtless problematic but "the alternative is so much worse."[237] The history of Europe is fraught with violent conflict: "War, twice in the Twentieth Century and for ages previously, has plagued the European continent."[238] Conflict stretches back across the entire history of Europe. There has been an almost unbroken chain of war from the fifteenth century to World War II fought over family rivalries, religion, deep hatreds, and territorial expansion. In the fifteenth century, the War of the Roses was fought over a dispute over title to the English throne.[239] In the sixteenth century, there were religious wars in Austria, Germany, France, and Spain over Catholicism and Protestantism.[240] The seventeenth century included the Thirty Years' War—a war that started over religion, but expanded to include territorial acquisition—the English Civil War, France's Dutch wars that were fought over frontiers, and the War of the League of Augsburg, which was possibly the first war over the Alsace-Lorraine.[241] In the eighteenth century, European countries fought to block the coalition of France and Spain in the War of Spanish Succession; and, also fought in the War of Austrian Succession, the Seven Years' War, and the French Revolution.[242] In the nineteenth century, there were the Napoleonic Wars to build an Empire, the second and third French Revolutions, the Wars for Italian Unification, the Crimean War—which was the first modern war, with massive casualty rates, mechanized warfare, and modern weapons—and the wars for German unification.[243] Finally, in the twentieth century, there was the Russian Revolution, the First and Second Balkan Wars, World War I, and World War II.[244]

Since WWII and the formation of the European Union, there have been 70 years of peace within its member states. Contrast this with what happened in the 1990s to the former Yugoslavia, which is not a member of the EU, where competing

234. KIRCHICK, *supra* note 12, at 1.

235. *Id.* at 227.

236. FOLSOM, *supra* note 8, at 4.

237. KIRCHICK, *supra* note 12, at 226.

238. FOLSOM, *supra* note 8, at 4.

239. *See generally* Peter Brecke, *Conflict Catalog (Violent Conflicts 1400 A.D. to the Present in Different Regions of the World)*, Centre for Global Economic History, http://www.cgeh.nl/data#conflict (containing an excel spreadsheet listing 3708 conflicts, with data on parties, fatalities, date, and duration) [hereinafter Conflict Catalog]; *see generally* R.B. MOWAT, THE WARS OF THE ROSES 1377-1471 (1914).

240. Conflict Catalog, *supra* note 239. *See generally* RICHARD S. DUNN, THE AGE OF RELIGIOUS WARS, 1559-1715 (2d ed. 1979).

241. Conflict Catalog, *supra* note 239. *See generally* DUNN, *supra* note 240.

242. Conflict Catalog, *supra* note 239.

243. *Id.*

244. *See generally* THE OXFORD HANDBOOK OF THE HISTORY OF NATIONALISM, *supra* note 32 (providing a comprehensive chronology of important events in European history, including conflicts). *See alsogenerally* Conflict Catalog, *supra* note 239.

nationalisms ripped the country apart, resulting in the second genocide of the twentieth century.[245]

D. *Link Between Conflict and Human Rights Violations*

War has a huge impact on human rights. Human rights can predicate, intensify, and emanate from conflict; therefore, violation of human rights is both a cause and consequence of war. One cannot dispute that violent conflict causes human rights abuses. This reality was reflected in the Preamble to the UN Charter:

> We the peoples of the United Nations determined to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and to reaffirm our faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small. . . .[246]

Recent examples of places where violent conflict caused human rights violations include El Salvador and Argentina, where torture, arbitrary arrest, and disappearances are common.[247] Conflicts over access to resources in Sierra Leone (diamonds), Liberia, (timber), Democratic Republic of The Congo (coltan), and Sudan (oil) have all created massive human rights violations, including, in some cases, war crimes, crimes against humanity, and genocide.[248] In the recent conflicts in Liberia, Guatemala, and Sri Lanka, combatants and non-combatants were tortured, raped, mutilated, and summarily executed.[249] Civilians are suffering under new types of warfare: "The changing nature of conflict have brought about strategies and tactics that have made vulnerable groups in society the specific target of attack . . . [therefore] the protection of human rights faces unprecedented challenges and poses essential dilemmas."[250] Human rights violations against civilians are both a byproduct and an intentional strategy in violent conflicts.[251]

In the context of conflict resolution, peace is good for the protection of human rights:

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245. Frum, *supra note* 120. *See* Brunwasser, *supra* note 232 (expressing that nationalism is rising in Serbia and raising concerns that political sentiment is eerily like the early 1990s). *See also* Hoxhaj, *supra* note 232 (describing Serbia's current expansionist policy and its efforts to push for regional hegemony).

246. U.N. Charter Preamble.

247. *See generally* AMNESTY INTERNATIONAL, EL SALVADOR 2016/2017, ANNUAL REPORT,,https://www.amnesty.org/en/countries/americas/el-salvador/report-el-salvador/; ARGENTINA 2016/2017, ANNUAL REPORT, https://www.amnesty.org/en/countries/americas/argentina/report-argentina/.

248. CHANDRA LEKHA SRIRAM ET AL.,, WAR, CONFLICT AND HUMAN RIGHTS: THEORY AND PRACTICE 4–6 (2d ed. 2009). *See also* Maria Márquez Carrasco et al.,, *Human Rights Violations in Conflict Settings*, FOSTERING HUMAN RIGHTS AMONG EUROPEAN POLICIES, 102 (2014) (explaining that "[i]n exceptional circumstances, such of those of armed conflict, 'extreme' violations of all categories of human rights are committed by all those that take part in the hostilities. The whole catalogue of human rights may be significantly affected during armed conflict").

249. Carrasco et al., *supra* note 248, at 63.

250. *Id.* at 1.

251. JULIE MERTUA & JEFFREY HELSING, HUMAN RIGHTS AND CONFLICT 13 (2006).

> [V]iolent conflict invariably leads to severe violations of human rights – death, torture, imprisonment, destruction of livelihoods, deterioration of health, to name a few. Similarly violations of human rights, when people are imprisoned, tortured, discriminated against on the basis of class, ethnicity, or religion by the state, and excluded from political participation, can lead people to oppose the state, generating conflict. So protecting human rights is generally good for making peace and making peace is generally good for protecting human rights.[252]

Sometimes human rights violations are a more indirect consequence of violent conflict, such as when the environment is damaged or people cannot work.[253] "Cease-fires and peace agreements that ignore human rights often perpetuate inequities and denial of human rights, leading to greater suffering and violence. Sustainable peace depends on the assurance of human rights."[254]

CONCLUSION

Brexit is emblematic of the rising tide of nationalism in the world and should be heeded as a warning to the EU. Some EU reforms are badly needed, and Brexit presents the opportunity to undertake a "fundamental redesign" of the organization.[255] One of the founding principles of the EU was to shore up the nation state, and that idea should continue to be a primary mission. [256] Fulfilling that principle entails more deference to member states in some areas, while deepening cooperation in others. The EU should focus on the areas in which member states cannot be as effective on their own and must act as a powerful bloc, such as in the areas of trade, financial regulation, security, foreign policy, defense, and protection of the environment.[257] In particular, the EU should focus should be on issues that have the potential to make the EU fall apart, such as economic issues and terror attacks,.[258] Resolving these issues may necessitate "more union not less."[259] A single European intelligence and security force must be developed to operate in tandem with national security departments.[260] A coordinated EU defense force must be developed to allow Europe to hold its ground against authoritarian leaders who do not believe in freedom and human rights protection.[261] However, in all areas on which the EU acts, it must ensure that the

252. Ram Manikkalingam, *Is There a Tension Between Human Rights and Conflict Resolution? A Conflict Resolution Perspective* 1 (Univ. of Calgary Latin Am. Research Ctr., Working Paper No. 7, 2006), https://reliefweb.int/sites/reliefweb.int/files/resources/6B68B8DC96B4DFFDC12574A600328FFB-agp_Jun2006.pdf.

253. Carrasco et al.,, *supra* note 248, at 63.

254. *See id.* (citing the examples Sierra Leone (1991–2002), Israel-Palestine (1998—1999), and Kosovo (1998—1999)).

255. VERHOFSTADT, *supra* note 25, at 200.

256. Matthijs, *supra* note 4, at 87–88, 95.

257. *Id.* at 95.

258. Simons, *supra* note 221.

259. VERHOFSTADT, *supra* note 25, at 22.

260. *Id.* at 18–19.

261. *Id.* at 176.

proper foundation is in place before acting.[262] In recognition of the concern that the EU is too far removed from the people and out of touch with their needs, the EU must become more people-focused,[263] and the EU citizens should continue to cultivate a European identity. Forging a strong European identity does not mean forsaking national identity; rather, it means supplementing it by focusingfocusin on shared European values. [264]

Perhaps even more important than considering the changes that need to be made in the EU is the necessity of recognizing how dangerous nationalism is. There is too much hateful, racist, xenophobic speech happening in the world today. This speech, especially when it comes from the mouths of leaders, condones emotionally charged and violent actions, from hate crimes to acts of terrorism. Nationalist movements are a threat to a liberal world order because "if even a quarter or third of citizens turn decisively against liberal values in a critical mass of nations, it can destabilize the entire system."[265] The inward focus of nationalism also tragically keeps people from being outward-focused, empathetic, and responsive to the multitude of tragedies playing out in the world.[266]

With the future of the EU at stake, states and individuals must be even more vigilant about holding the line on human rights protections. In times of uncertainty and threat, in times of fear, it is easy to compromise on the protection of rights. Surely, it is these times that are the measure of how effective these protections are. We must not underestimate the importance of all levels of protection of human rights—domestic, international, and regional. In pursuit of these goals, we must shake off the tendency to look for and exploit superficial differences.[267] In 1935, nationalism was rising, and there was a call for faith in something that transcended nationalist divisions.[268] Certainly the world would have been a better place had these warnings been heeded. Reading these words today seems like déjà vu. The lesson of history is how easy it is for isolation and fragmentation to turn into instability, conflict, and mass human rights violation of the most serious degree.

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262. Lichfield, *supra* note 227 (quoting former Conservative leader, William Hague and former Irish Taoiseach, John Bruton).

263. Schorkopf, *supra* note 134, at 96.

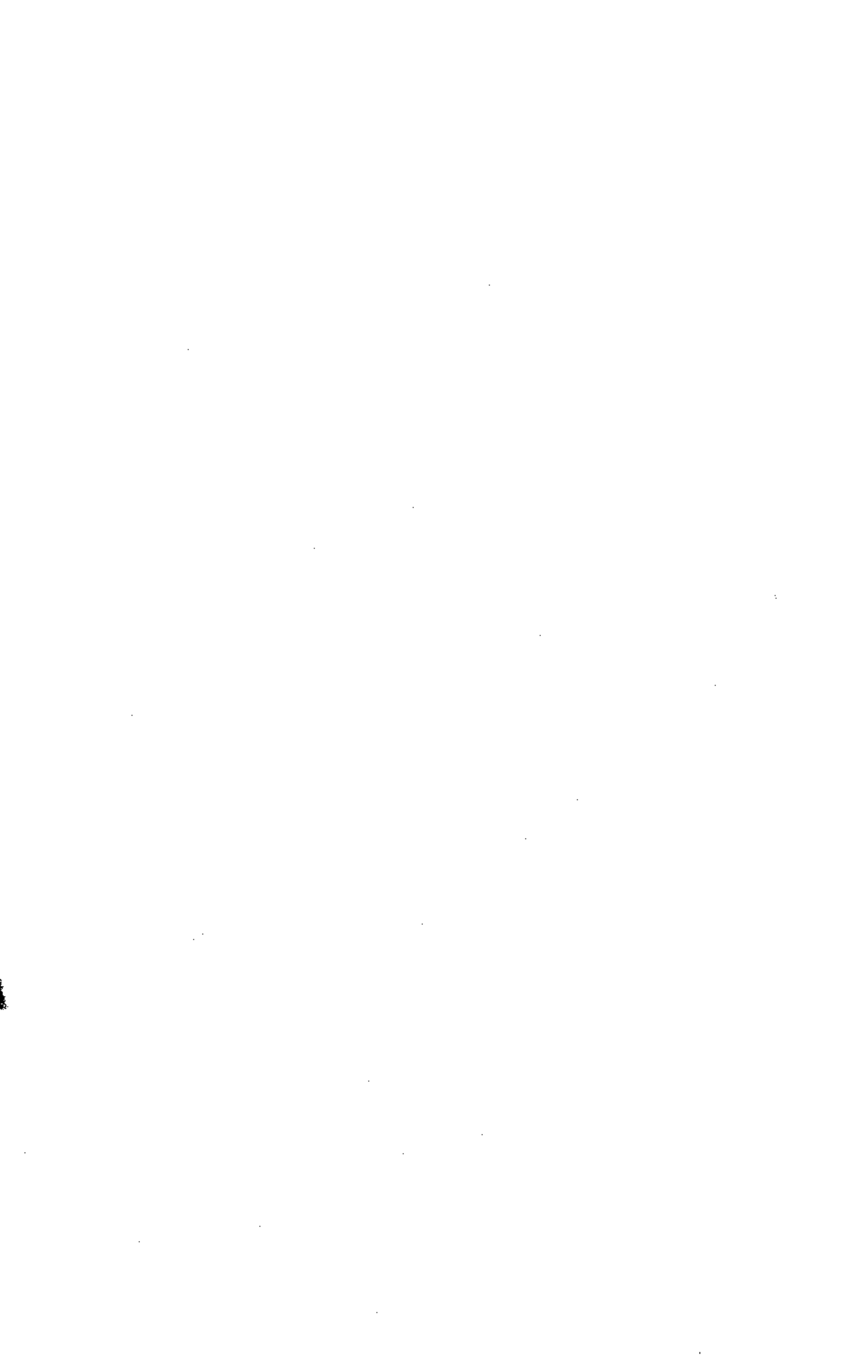
264. VERHOFSTADT, *supra* note 25, at 23–24.

265. Mazarr, *supra* note 127, at 28–29.

266. Graça Machel, *The Global Rise Of Nationalism Is a Threat to Nelson Mandela's Achievements*, GUARDIAN (July 21, 2017, 11:48 AM), https://www.theguardian.com/commentisfree/2017/jul/21/nationalism-threat-nelson-mandela-achievements-graca-machel.

267. VERHOFSTADT, *supra* note 25, at 178.

268. Tansill, *supra* note 42, at 1.



T I L J