

2017

Democracy Clauses in the Americas: The Challenge of Venezuela's Withdrawal from the OAS

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Antonio F. Perez, Democracy Clauses in the Americas: The Challenge of Venezuela's Withdrawal from the OAS, 33 AM. U. INT'L L. REV. 391 (2017).

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DEMOCRACY CLAUSES IN THE AMERICAS: THE CHALLENGE OF VENEZUELA’S WITHDRAWAL FROM THE OAS

ANTONIO F. PEREZ*

I.	THE POLITICAL <i>MISE-EN-SCENE</i> AND ITS RELATION TO THE LEGALITY OF VENEZUELA’S WITHDRAWAL – A PRELIMINARY APPRAISAL	392
II.	THE LAW OF THE OAS WITHDRAWAL CLAUSE	401
A.	THE NATURE OF THE WITHDRAWAL CLAUSE UNDER THE 1948 CHARTER	404
1.	The Legal Structure of the Inter-American System.....	406
2.	The Right of Withdrawal in the Context of the Inter- American System.....	409
B.	THE LAW OF OAS WITHDRAWAL – THE RISE OF DEMOCRACY AS AN OBLIGATION ARISING FROM THE OAS CHARTER	417
1.	The Charter and Subsequent Agreements	419
2.	Subsequent Practice	426
a.	The Democratic Charter	426
b.	Subsequent Practice Under the Democratic Charter	432
3.	Relevant Rules of International Law: The Democratic Entitlement and Security Council Decisions Supporting the View that All Assaults on Democracy Endanger International Peace and Security	439
a.	The Democratic Entitlement and Democratic	

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Peace Theory	439
b. Security Council Determinations—Haiti.....	441
C. SYNTHESIZING THE OAS DEMOCRACY CLAUSE AND THE OAS WITHDRAWAL CLAUSE – DISCRETION IN INTERPRETATION	445
III. THE LEGAL NATURE OF DEMOCRACY CLAUSES.....	447
A. THE LEGALIZATION OF DEMOCRACY – OBLIGATORY, PRECISE AND ENFORCEABLE	447
B. TWO U.S. DEMOCRACY CLAUSES —FROM “SOFT” TO “HARD” DEMOCRACY LAW	450
1. Soft Semi-International Law	451
2. Hard Domestic Constitutional Law	453
IV. A RATIONAL CHOICE ACCOUNT OF WITHDRAWAL CLAUSES	457
A. NPT WITHDRAWAL AND ITS LEGAL EFFECTS FOR DPRK RIGHTS AND DUTIES.....	459
B. RATIONAL CHOICE AND VENEZUELA’S WITHDRAWAL FROM THE OAS	468
V. CODA: RISKING THE GOV’S MEMBERSHIP TO SAVE THE OAS DEMOCRACY CLAUSE	474

I. THE POLITICAL *MISE-EN-SCENE* AND ITS RELATION TO THE LEGALITY OF VENEZUELA’S WITHDRAWAL – A PRELIMINARY APPRAISAL

The legal issues arising from the Government of Venezuela’s (GOV) withdrawal from the Organization of American States (OAS) are complex and unprecedented. The political context, however, is strikingly familiar since the promotion of democracy has been arguably the most debated issue in international politics during the last quarter-century.¹ On the other hand, this very typical political conflict is also premised on a *sui generis* legal debate, for the political conflict in the eyes of many is, at root, over the fundamental issue of Venezuela’s internal governance and whether or not

1. See generally CONDOLEEZZA RICE, DEMOCRACY: STORIES FROM THE LONG ROAD TO FREEDOM 6-7 (2017) (discussing case studies of democratic advance, and some studies of retrenchment, albeit without discussing Venezuela).

democracy can be an enforceable international legal obligation. Sovereignty and non-intervention, based on a history of European and U.S. interference in the internal affairs of Latin American states, raise issues of fundamental concern freighted by history and memory. Venezuela's potential non-compliance with the provisions of the Inter-American Democratic Charter (Democratic Charter), a resolution adopted on September 11, 2001, by the General Assembly of the OAS,² and the OAS response was an invitation to crises.

A brief statement of the most recent events that eroded democracy in Venezuela is in order. Leading the Bolivarian Revolutionary Party, President Hugo Chavez took measures to expand the powers of the executive branch of the GOV, including sponsoring a successful referendum in 2009 ending presidential term limits and reducing the powers of other branches of the GOV, including seizing control of the Supreme Court by increasing its size and packing its membership with supporters. Increasing resistance to this consolidation of power on January 16, 2016, coupled with the less charismatic leadership of Chavez's successor, Nicolas Maduro, culminated in the ruling party's loss of its majority in the Venezuelan legislature, further increasing tensions between the opposition and the GOV.³ In response to these anti-democratic measures, on May 30, 2016, the OAS Secretary General, Uruguayan Luis Almagro, submitted an extensive report to the OAS Permanent Council detailing the threat to democracy in Venezuela and requesting a special meeting of the OAS Permanent Council pursuant to the terms of the Democratic Charter.⁴ As requested, the meeting was held on June 23, 2016, but no actions were taken⁵ since the proposed

2. See Organization of American States, Inter-American Democratic Charter, Sept. 11, 2000, 40 I.L.M. 1289 (establishing the provisions of the OAS Democratic Charter).

3. See Claire Felter & Daniella Renwick, *Venezuela in Crisis*, COUNCIL ON FOREIGN REL., <https://www.cfr.org/background/venezuela-crisis> (last updated Aug. 1, 2017) (explaining Venezuela's political crisis and tensions within the country under the leadership of Nicolas Maduro).

4. Organization of American States Secretary-General, *Report to the Permanent Council*, OSG/243-16 (May 30, 2016) (stating concerns regarding democracy in Venezuela and requesting a meeting of the Permanent Council on this regard).

5. Carol Morello, *OAS Head Calls for Recall of Maduro to Restore Democracy in Spiraling Venezuela*, WASH. POST (June 23, 2016),

activation of the provisions of the Democratic Charter fell three votes short of the required three-fourths majority.⁶ On December 2, 2016, the Foreign Ministers of Argentina, Brazil, Uruguay, and Paraguay, in a joint letter from Mercado Común del Sur (MERCOSUR), suspended Venezuela, a MERCOSUR member since 2012, for failure to implement MERCOSUR obligations,⁷ including commitments to democracy in language similar to that of the Democratic Charter.⁸ However, on February 21, 2017, MERCOSUR's Parliament of the South (PARLASUR) rejected this determination and appealed to MERCOSUR's Permanent Review Tribunal.⁹ But then, on March 29, the Venezuelan Supreme Court briefly dissolved the National Assembly, an order revoked days later after international outcry.¹⁰ On March 14, Secretary General Almagro submitted another detailed report calling for a special meeting to consider Venezuela's suspension from the OAS, again

https://www.washingtonpost.com/world/national-security/oas-head-calls-for-recall-of-maduro-to-restore-democracy-in-spiraling-venezuela/2016/06/23/1568edcc-3974-11e6-a254-2b336e293a3c_story.html?utm_term=.c1131819cdd8.

6. See Luis Alonso Lugo & Joshua Goodman, *OAS Head Urges Bloc Suspend Venezuela Over Elections*, ASSOCIATED PRESS (Mar. 15, 2017), <https://apnews.com/fa4dd75d8cfb4472a54114d80f93536a/oas-head-urges-bloc-suspend-venezuela-over-elections> (explaining that the suspension of a state from the OAS requires the support of two-thirds of 34 member states and that the Venezuela vote was just shy of this requirement).

7. *Mercosur Suspends Venezuela Over Trade and Human Rights*, BBC WORLD NEWS (Dec. 2, 2016), <http://www.bbc.com/news/world-latin-america-38181198> (stating that the founding members suspended Venezuela's membership for not meeting basic standards).

8. See Protocol De Montevideo Sobre Compromiso Con La Democracia En El Mercosur [Protocol of Montevideo on the Commitment to Democracy in Mercosur] art. 11 (Dec. 20, 2011), http://www.mercosur.int/innovaportal/file/2485/1/ushuaia_ii.pdf (expressing the requirements of democracy similar to the OAS Democratic Charter).

9. Lucas Koerner, *MERCOSUR Parliament Rejects Suspension of Venezuela*, VENEZUELA ANALYSIS, <https://venezuelanalysis.com/news/12941> (last updated Feb. 22, 2017, 3:33 PM) (explaining that PARLASUR rejected the decision on the assumption that it had no legal basis).

10. See Michael Shifter, *Venezuela's Bad Neighbor Policy: Why It Quit the Organization of American States*, FOREIGN AFF. (May 5, 2017), <https://www.foreignaffairs.com/articles/venezuela/2017-05-05/venezuelas-bad-neighbor-policy> (explaining how a Venezuelan Supreme Court decision closed down the National Assembly, which was dominated by the opposition, leading to massive protests).

pursuant to the provisions of the Democratic Charter.¹¹ In the view of some, Venezuela beat the OAS to the punch by withdrawing before it could be suspended.¹²

This brief description establishes the political centrality of the Democratic Charter to the legal issues that have been raised by Venezuela's withdrawal. While it may appear that the GOV's compliance with the Democratic Charter is no longer at issue, the better view, as this Essay will argue, is that the GOV's withdrawal from the OAS, if anything, now exacerbates the tension between the OAS and the GOV over Venezuela's compliance with the Democratic Charter. This is because the escalation or de-escalation of the continuing legal and political dispute between the OAS and the GOV over the next two years, the earliest time the withdrawal can take effect, turns on the interpretation the Charter of the Organization of American States (OAS Charter)¹³ and whether or not compliance with the Democratic Charter remains relevant to the withdrawal process.

A close reading of the text reveals why this is so. The OAS Charter's withdrawal clause, Article 143, provides:

The present Charter shall remain in force indefinitely, but may be denounced by any Member State upon written notification to the General Secretariat, which shall communicate to all the others each notice of denunciation received. After two years from the date on which the General Secretariat receives a notice of denunciation, the present Charter shall cease to be in force with respect to the denouncing State, which shall cease to belong to the Organization after it has fulfilled the obligations arising from the present Charter.¹⁴

While the clause confusingly uses the term "denunciation," the

11. See Organization of American States Secretary-General, *Report to the Organization of American States*, OSG/128-17, at 5 (Mar. 14, 2017) [hereinafter OAS 2017 Report] (stating that Article 20 of the Charter calls for a Special Session of the General Assembly and Article 21 authorizes possible suspension of a state when the diplomatic interventions to restore democracy described in Articles 17-19 have failed).

12. Shifter, *supra* note 10.

13. Charter of the Organization of American States, Apr. 30, 1948, 2 U.S.T. 2394.

14. *Id.* at 2436.

term in its context is essentially equivalent to the term “withdrawal,” which will be used henceforth in this discussion.¹⁵ What is clear, however, is that the clause specifically provides that the withdrawing state shall “cease to belong” to the OAS “after it has fulfilled the obligations arising from the present Charter.” This raises the question of whether the Democratic Charter is included among “the obligations arising from the present Charter,” and, if so, questions further whether or not Venezuela’s purported withdrawal can be effective if the GOV has not complied with the Democratic Charter. To this end, these questions also consider any possible effects of a finding of noncompliance by the OAS itself.

OAS has not made findings under the Democratic Charter, although the Secretary General’s position is clear. His views, however, raise a number of questions. Does the Democratic Charter’s provisions *ex proprio vigore* operate to permit a legal conclusion that Venezuela is not now in compliance and must take remedial measures in order to satisfy the terms of the withdrawal clause? If not, could the political organs of OAS during the two-year contemplated by the withdrawal clause make determinations and impose additional specific obligations on Venezuela, which at present remains a member of OAS and bound by OAS laws, that the GOV would be required to perform before withdrawal can take effect? Would the GOV instead have the self-judging authority to determine the obligations it needs to perform and whether or not they have been performed for the purpose of the withdrawal’s effectiveness albeit, perhaps, not for other purposes? Even if the GOV were the final judge of the scope of the withdrawal clause and whether or not those obligations had been performed, would a suspension of the GOV, pursuant to the Democratic Charter, render ineffective, tolled, or in some way operate as an estoppel against the GOV’s actual implementation of its withdrawal? While theoretically engaging, each of these questions turn on the threshold question of

15. See Vienna Convention on the Law of Treaties art. 56, May 23, 1969, 1155 U.N.T.S. 332 (relying on Article 56 concerning “Denunciation of or withdrawal from a treaty containing no provision regarding termination, denunciation or withdrawal” which treats the two terms as equivalent); ANTHONY AUST, MODERN TREATY LAW AND PRACTICE 277 (2d ed. 2007) (explaining the uses of both “denunciation” and “withdrawal” in relation to multilateral treaties).

whether, within the meaning of Article 143, the Democratic Charter is an obligation “arising from” the Charter.¹⁶

Arguably, however, Venezuela appears to imply that the question does not arise since its withdrawal might be deemed a remedial measure responding to an OAS breach of legal obligation. To begin with, on April 27 and 28, 2017, when the GOV purported to give notice of its intent to withdraw by means of a diplomatic note from its Permanent Representative to the OAS with an attached letter from Venezuelan President Maduro to OAS Secretary General Almagro,¹⁷ it characterized OAS’s behavior in strident terms.¹⁸ The true reasons for the decision will remain a matter of debate in diplomatic history. However, the letter from Venezuelan President Maduro drew special attention to the April 26 special meeting of the OAS Permanent Council. Held in response to the Secretary General’s request for Venezuela’s suspension in his March 14 report to the Permanent Council, this meeting, in Maduro’s view:,

was held to effect a reprise, this time with Bolivarian Venezuela, of the Organization’s immorally orchestrated persecution of the worthy Cuban Revolution, using the self-same [sic] mechanism of calling a Meeting of Consultation of Ministers of Foreign Affairs as that which, in 1962, led to Cuba’s expulsion from the OAS and prompted Commander Fidel Castro to coin his now famous expression, dubbing the Organization the “Ministry of the Colonies.”¹⁹

President Maduro claims that the GOV is simply responding defensively to some prior threat or unlawful act by the OAS, perhaps even acting as a proxy for the United States.

President Maduro’s characterization of what occurred in the “Cuban Case” is, however, contestable on at least two grounds. First, while a special Meeting of Consultation of Minister of Foreign

16. Charter of the Organization of American States, *supra* note 13, at 2436.

17. OEA/Ser.G CP/INF. 7707/17 (Apr. 28, 2017) [hereinafter Venezuela Letter Denouncing the OAS].

18. *Id.*

19. *Id.*; see also Mark Weisbrot, *Venezuela and the OAS: The Logic of Withdrawal*, HUFFINGTON POST (Apr. 28, 2017), http://www.huffingtonpost.com/entry/venezuela-and-the-oas-the-logic-of-withdrawal_us_590389c8e4b084f59b49f8b5 (“The OAS intervention is difficult to see as anything other than a partisan, Washington-driven initiative.”).

Affairs occurred in 1962, addressing Cuba, it is not clear that the effect of that meeting resulted in Cuba's "expulsion."²⁰ Instead it was the Eighth Meeting of Consultation of Foreign Ministers at Punta del Este, Uruguay that "suspended" Cuba's participation in OAS activities.²¹ Second, the formal decision to suspend Cuba occurred by request of the Colombian Government which claimed, not that Cuba had violated OAS norms with respect to democracy, but rather that Cuba had violated its collective security obligations under the OAS Charter by encouraging and supporting subversive guerilla activities in Latin American countries including Colombia.²² By contrast, as the timing of its notice of withdrawal suggests, the GOV's rationale for seeking to withdraw from OAS may be in order to avoid sanctions under the Democratic Charter, rather than sanctions, at least at present, for current violations of collective security obligations. The GOV beat OAS to the punch, so to speak, by initiating withdrawal before suspension. At the same time, the threat of withdrawal through the giving of notice may serve to deter OAS from exercising any rights it may have to sanction the GOV during the period in which the GOV could, following negotiations with the OAS, still revoke or suspend its notice of withdrawal.²³

In sum, Venezuela's withdrawal is not a justified response to some prior unlawful aggressive act by OAS. Thus, for purposes of analysis, this Essay proceeds on two assumptions. First, that OAS, both prior to the GOV's notice of withdrawal and thereafter, could have determined that the GOV was not in compliance with the terms of the Democratic Charter. Second, that the effectiveness of the

20. *Contra* RUBÉN M. PERINA, THE ORGANIZATION OF AMERICAN STATES AS THE ADVOCATE AND GUARDIAN OF DEMOCRACY: AN INSIDER'S CRITICAL ASSESSMENT OF ITS ROLE IN PROMOTING AND DEFENDING DEMOCRACY 39 (2015) (finding that the 8th meeting actually resulted in Cuba's suspension from the OAS).

21. *Id.* (stating that the Eighth Meeting of Consultation suspended Cuba from the OAS due to the Cuban government's support of subversive activities by communist guerillas in other Latin American countries).

22. *See id.* at 39-40 (reporting also the decision of the Ninth Consultative Meeting of Foreign Ministers in 1964, condemning Cuba's aggression and intervention, confirming Cuba's suspension, and agreeing to break diplomatic relations between OAS Member States (with the exception of Mexico and Cuba)).

23. *See infra* Part IV (analogizing to the case of North Korea's withdrawal from the NPT).

GOV's withdrawal, therefore, depends exclusively on the meaning of Article 143. More precisely, in terms of the language of the OAS Charter, now that the GOV has given the notice required under Article 143, and Article 143's two-year clock has therefore begun to tick, the question arises of what exactly are the "obligations arising from the present Charter" that the GOV must "fulfill" before its withdrawal can take effect. Do these obligations include the Democratic Charter?

Already the GOV explicitly, and elements of the OAS implicitly, have taken conflicting positions on this threshold issue. The GOV's initial position appears to be that it must merely pay its delinquent dues,²⁴ while at least some elements of the Venezuelan internal opposition hold otherwise.²⁵ Also, statements by the OAS Legal Advisor, which may reflect the OAS Secretariat's position generally,²⁶ suggest the OAS General Assembly or Permanent Council, the organs that represent the Member States, may eventually feel legally authorized to take the position that the GOV must do more than pay off its debts to effect withdrawal. The matter is not free from doubt,²⁷ and the wisdom of the OAS's taking such a

24. Orlando Avendaño, *Venezuela Announces Withdrawal from Pro-Democracy Organization of American States*, PANAM POST (Apr. 27, 2017, 10:31 AM), <https://panampost.com/orlando-avendano/2017/04/27/venezuela-announces-withdrawal-from-pro-democracy-organization-of-american-states/>.

25. *Id.* ("Despite Rodriguez's threats, opposition Congressman Delsa Solorzano stated: 'The only way we can no longer be part of these multilateral organizations would be through a constitutional reform,' which is why 'Venezuela's eventual withdrawal from the OAS does not seem valid.'").

26. See *Venezuela necesitaría dos años y pagar la deuda de 8,7 millones de dólares para dejar la OEA* [*Venezuela Would Need Two Years and to Pay the Debt of 8.7 Million Dollars to Leave the OAS*], EFE (Apr. 26, 2017), <http://www.efe.com/efe/america/portada/venezuela-necesitaria-dos-anos-y-pagar-la-deuda-de-8-7-millones-dolares-para-dejar-oea/20000064-3249317> (reporting on a statement by OAS Legal Adviser Jean Michel Arrighi that "Esas obligaciones no son solo económicas, ya que la Carta de la OEA estipula que los países miembros deben respetar la democracia representativa, los derechos humanos, la separación de poderes y la libertad de expresión" ["These obligations are not only economic, since the Charter provides that members must respect representative democracy, human rights, separation of powers, liberty of expression"]).

27. See Alonso Illueca, *The Venezuela Crisis at the Organization of American States: Between Withdrawal and Suspension*, OPINIO JURIS BLOG (May 29, 2017, 4:19 AM), <http://opiniojuris.org/2017/05/29/the-venezuela-crisis-at-the-organization-of-american-states-between-withdrawal-and-suspension/> ("[It] could be

legal position as a matter of legal-policy to the extent it has legal discretion to interpret the withdrawal clause broadly or narrowly is also a matter that requires serious reflection in light of the range of options for promoting democracy in the Americas.

Part II of this Essay now turns to an exhaustive analysis of the scope of the withdrawal clause in three phases. First, it analyzes the text and negotiating history of the withdrawal clause in the original OAS Charter of 1948 in light of the Charter's overall structure. Second, it analyzes the rise of democracy as a legal obligation under the OAS Charter, culminating in the Democratic Charter as arguably an authoritative interpretation of the current OAS Charter. Third, it synthesizes the original withdrawal clause and the subsequent OAS law on democracy to provide narrow and broad interpretations of the scope of the current withdrawal clause suggesting there is room for discretion in interpretation based on policy considerations. Part III, drawing on scholarship in international law and international relations theory, then analyzes the relevant criteria for characterizing competing models for institutionalizing commitments to democracy, and, in light of these criteria, it explores case studies of both "soft" and "hard" commitments to democracy drawing on examples from U.S. constitutional history which are of special relevance in explaining the shift from the OAS Charter's initially "soft" commitment to its current arguably "harder," commitment to democracy. Part IV then draws on rational choice theory to examine the purpose and effects of moving along the continuum of legalization described in Part III. It offers a general account of the role of withdrawal clauses, both *ex ante* and *ex post*, in encouraging and preserving international commitments, and it draws on the case study of North Korea's withdrawal from the Nuclear Non-Proliferation Treaty (NPT).²⁸ It uses the response of NPT member states to illustrate the counter-intuitive argument that excessively "strong" institutionalization of a commitment, and the correlative

argued that among the obligations for Venezuela arising from the [OAS] Charter are the ones supporting representative democracy. Nonetheless, considering that this is the first time that a State withdraws from the OAS, there are no factual precedents on which to draw upon.").

28. See Treaty on the Non-Proliferation of Nuclear Weapons, *opened for signature* July 1968, 21 U.S.T. 483, [hereinafter NPT].

assertion of an expansive legal position can ultimately erode the quality of, and degree of adherence to, the challenged norm - in that case, continuing international supervision of the nuclear activities of North Korea, and, moreover, other potentially withdrawing states in the future. This Essay applies these insights to the legal-policy choice now facing the OAS and its Member States in connection with Venezuela's notice of withdrawal. Part V concludes with a plea for restraint and prudence to avoid further harm to democratic norms in the Americas.

II. THE LAW OF THE OAS WITHDRAWAL CLAUSE

In accordance with the Vienna Convention on the Law of Treaties (VCLT), all treaty interpretation begins with the text.²⁹ The OAS withdrawal clause contains a unique formulation nominally conditioning the effectiveness of withdrawal to a Member State having also "fulfilled the obligations arising from the present Charter."³⁰ Unlike the American Convention on Human Rights, it does not merely preserve rights that accrued from a breach of obligation through acts of the withdrawing state that occurred while the treaty was still in force for the withdrawing state,³¹ a rule that simply confirms the default rule under the law of state responsibility.³² Nor does it cut back on the protection of accrued

29. See Vienna Convention on the Law of Treaties, *supra* note 15, at 340 (stating in Article 31 that "a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose").

30. Charter of the Organization of American States, *supra* note 13, at 2436.

31. See Organization of American States, American Convention on Human Rights art. 78, Nov. 22, 1969, 1144 U.N.T.S. 144 ("Such a denunciation shall not have the effect of releasing the State Party concerned from the obligations contained in this Convention with respect to any act that may constitute a violation of those obligations and that has been taken by that state prior to the effective date of denunciation."); see also *Roodal v. Trinidad & Tobago*, Case 12.342, Inter-Am. Comm'n H.R., Report No. 89/01, OEA/Ser./L/V/II.114 Doc. 5 rev. ¶¶ 13-15 (2001) (applying the Article 78(2) provision by the Inter-American Commission to the case of Trinidad and Tobago).

32. Vienna Convention on the Law of Treaties, *supra* note 15, at 349; see *infra* Part IV (discussing Art. 70 further regarding the withdrawal and denunciation of states from treaties); see also INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT, AND COMMENTARIES

rights, unlike the typical investment treaty which protects rights that have accrued under a treaty for a specified period after withdrawal, sometimes extending investor rights for decades.³³ And, unlike Article 317(2) of the Law of the Sea Convention, it does not preserve only “financial and contractual obligations.”³⁴ Rather, the text does not refer to dues alone or any other subset of obligations. Instead, it refers to “the obligations,”—i.e. a plurality of obligations—“arising from” the “present Charter,”³⁵ In short, the text alone suggests that the relevant obligations are not limited by subject matter. Thus, limiting the scope of the clause to unpaid dues, or any other subject matter limitation or temporal limitation, would seem to be inconsistent with the text.

However, the text does insist that the obligations must arise from the instrument itself (and not, perhaps, some other body of law such as customary international law). One might say the “present” Charter means only the Charter of 1948. That, however, would eliminate the right to withdraw from subsequent amendments, which is implausible. The focus should be on whether the “arising from” requirement must be limited to the precise text of the OAS Charter, as amended, or does it include instruments such as resolutions or other statements authoritatively interpreting the Charter, such as the Democratic Charter? A matter that must be explained in light of the history of the withdrawal clause and the implications of OAS Charter amendments, such as the Protocol of Washington,³⁶ strengthening the

194 (James Crawford ed., 2002) (explaining Article 29 of its articles on state responsibility by relying on Article 70 of the Vienna Convention on the Law of Treaties to take an even stronger position protecting “accrued” rights with respect to non-treaty obligations).

33. See generally J.W. Salacuse, *The Emerging Global Regime for Investment*, 51 HARV. INT'L L.J. 427, 471-72 (2010) (citing examples of when accrued rights were protected following withdraw).

34. United Nations Convention on the Law of the Sea art. 317(2), Dec. 10, 1982, (“A State shall not be discharged by reason of the denunciation from the financial and contractual obligations which accrued while it was a Party to this Convention, nor shall the denunciation affect any right, obligation or legal situation of that State created through the execution of this Convention prior to its termination for that State.”).

35. Charter of the Organization of American States, *supra* note 13, at 2436.

36. Protocol of Amendments to the Charter of the Organization of American States art. I, Dec. 14, 1992, 33 I.L.M. 1005 [hereinafter Protocol of Washington] (entered into at the Sixteenth Special Session of the General Assembly of the

OAS's commitment to democracy. While eight Member States have not deposited instruments of ratification to the Protocol of Washington, Venezuela is not among them and is therefore bound by its terms pending withdrawal from OAS.³⁷

To begin to fill these lacunae, this Section examines the origins of the withdrawal clause. Next, it explicates the process through which democracy was institutionalized within OAS. Finally, it identifies the range of discretion available to legal-policy makers for synthesizing the Charter's law of withdrawal with its law of democracy.

Organization of American States) (The following new article 9 is being added to Chapter III of the Charter of the Organization of American states:

A Member of the whose democratically constituted government has been overthrown by force may be suspended from the exercise of the right to participate in the sessions of the General Assembly, the Meeting of Consultation, the Councils of the Organization and the Specialized Conference as well as in the commissions, working groups and any other bodies established. (a) The power to suspend shall be exercised only when such diplomatic initiatives undertaken by the Organization for the purpose of prompting the restoration of representative democracy in the affected Member State have been unsuccessful; (b) The decision to suspend shall be adopted at a special session of the General Assembly by an affirmative vote of two-thirds of the Member States; (c) The suspension shall take effect immediately following its approval by the General Assembly; (d) The suspension notwithstanding, the Organization shall endeavor to undertake additional diplomatic initiatives to contribute to the re-establishment of representative democracy in the affected Member State; (e) The Member which has been subject to suspension shall continue to fulfill its obligations to the Organization; (f) The General Assembly may lift the suspension by a decision adopted with the approval of two-thirds of Member States; (g) The powers referred to in this article shall be exercised in accordance with this Charter.)

37. See *General Information of the Treaty*, ORG. AMERICAN STATES [hereinafter *Protocol of Washington: General Information of the Treaty*], https://www.oas.org/dil/treaties_A-56_Protocol_of_Washington_sign.htm (last visited Oct. 6, 2017).

A. THE NATURE OF THE WITHDRAWAL CLAUSE UNDER THE 1948 CHARTER

The reason behind the withdrawal clause sets the context for explaining the precise form the withdrawal clause took. Consistent with the Vienna Convention on the Law of Treaties (VCLT) guidance, treaty language should be interpreted in light of its “context.”³⁸ Also, where a treaty’s meaning is “ambiguous or obscure,” the VCLT provides that “recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion.”³⁹ In this connection, two related circumstances for the original OAS Charter’s drafting are critical. First, the radical break from past Inter-American practice represented by the decision to produce and organic instrument for the Inter-American system, and second, the relationship between the Charter and the UN. The UN Charter of 1945, of course, has no withdrawal clause, which resulted in some dispute when Indonesia attempted to withdraw in 1965 only to return in 1966.⁴⁰ For the Latin Americans meeting in Bogota, Colombia in 1948, the absence of a withdrawal clause in the UN Charter was an anomaly made necessary only by a political imperative.⁴¹

More importantly, the debate over the withdrawal clause was ultimately related to the decision, which was a radical departure from the previously less formal Inter-American system, to create an organic instrument - the OAS Charter. Because the proposed Charter was conceived as, and by its own terms became, a “regional organization” contemplated by Chapter VIII of the UN Charter,⁴² the

38. Vienna Convention on the Law of Treaties, *supra* note 15, at 340 (stating also, in Article 31(1), terms should be interpreted “[i]n light of [the terms’] context and in light of [the treaty’s] object and purpose”).

39. *Id.* (Article 32).

40. See Egon Schwelb, *Withdrawal from the United Nations: The Indonesian Intermezzo*, 61 AM. J. INT’L L. 661, 661 (1967) (discussing the confusion and controversy resulting from the absence of a withdrawal provision in the Charter of the United Nations).

41. See *infra* Section II.A.2.

42. Compare U.N. Charter arts. 52-54 [hereinafter UN Charter] (providing for the existence of regional arrangements as authorized and overseen by the United Nations Security Council); with Charter of the Organization of American States, *supra* note 13, arts. 1-2. (specifically contemplating the OAS’s role as a Chapter

question of withdrawal assumed greater significance. The original design of the proposed comprehensive constitutive instrument for what became the OAS and its nexus with the UN are thus relevant to understanding the content of the “obligations” of Member States under the withdrawal clause.

In light of this preliminary background, this Section now describes the debate over the structure of the Inter-American legal system and then locates the drafting of the withdrawal clause in the context of that debate.

VIII “regional” organization inextricably linked to the UN - Art. 1:

The American States establish by this Charter the international organization that they have developed to achieve an order of peace and justice, to promote their solidarity, to strengthen their collaboration, and to defend their sovereignty, their territorial integrity, and their independence. Within the United Nations, the Organization of American States is a regional agency. The Organization of American States has no powers other than those expressly conferred upon it by this Charter, none of whose provisions authorizes it to intervene in matters that are within the internal jurisdictions of the Member States.

Art. 2:

The Organization of American States, in order to put into practice the principles on which it is founded and to fulfill its regional obligations under the Charter of the United Nations, proclaims the following essential purposes: (a) To strengthen the peace and security of the continent; (b) To promote and consolidate representative democracy, with due respect for the principle of nonintervention; (c) To prevent possible causes of difficulties and to ensure the pacific settlement of disputes that may arise among the Member States; (d) To provide for common action on the part of those States in the event of aggression; (e) To seek the solution of political, juridical, and economic problems that may arise among them; (f) To promote, by cooperative action, their economic, social, and cultural development; (g) To eradicate extreme poverty, which constitutes an obstacle to the full democratic development of the peoples of the hemisphere; and (h) To achieve an effective limitation of conventional weapons that will make it possible to devote the largest amount of resources to the economic and social development of the Member States.)

1. *The Legal Structure of the Inter-American System*

Previously, the Inter-American system operated through a series of conferences meeting within the umbrella of an overarching informal concept of a Pan American Union. Beginning with a conference convened in Washington in 1890, this so-called Pan American Union operated, much like the pre-WTO General Agreement on Tariffs and Trade, without a constitutive document establishing any organization. Various bodies, such as the Inter-American Juridical Committee emerged through this process to perform particular functions but never within the context of a constitutive instrument. It was only with the meeting of the Ninth Conference in 1948 in Bogota, implementing Resolution IX of the Mexico City Conference of 1945, which was in turn held in the shadow of the San Francisco Conference drafting the UN Charter, that the Latin American states turned to the task of drafting a constitutive instrument.⁴³ Following the instruction of the Mexico Conference, the states met in Rio de Janeiro in 1947 to conclude a treaty implementing collective security commitments, known as the Rio Treaty. The then Director of the Department of International Law of the Pan American Union, Charles Fenwick, noted that the Rio Treaty's preamble contemplated a further treaty on an "Inter-American Peace System."⁴⁴ Among documents submitted to the negotiators at Bogota were proposals prepared by the Inter-American Juridical Committee for a draft Charter⁴⁵ and for the treaty contemplated by the Rio Treaty's preamble that would provide mechanisms for the peaceful resolution of disputes in the Inter-American system, which came to be known as the Pact of Bogota.⁴⁶

Significantly, the draft Charter did not contain a provision for withdrawal. The draft dispute resolution treaty did provide for

43. See Josef L. Kunz, *The Bogota Charter of the Organization of American States*, 42 AM. J. INT'L L. 568, 569 (1948).

44. Charles G. Fenwick, *The Ninth International Conference of American States*, 42 AM. J. INT'L L. 553, 554 (1948).

45. *Proyecto De Pacto Constitutivo Del Sistema Interamericano [Constitutive Pact of the Inter-American System]*, in DOCUMENTOS PRESENTADOS A LA NOVENA CONFERENCIA INTERNACIONAL AMERICANA 237 (1948).

46. *Proyecto De Sistema Interamericano De Paz [Inter-American Peace System Project]*, in DOCUMENTOS PRESENTADOS A LA NOVENA CONFERENCIA INTERNACIONAL AMERICANA 153 (1948).

withdrawal upon a year's notice but the withdrawal would have no effect on pending proceedings commenced prior to the giving of notice of withdrawal.⁴⁷ Most importantly, as initially contemplated, each of the subsidiary agreements, even including the already concluded Rio Treaty, were to be annexed into the OAS Charter thus linking all the elements of the Inter-American legal system into a single constitution. According to U.S. delegate William Sanders, the Mexican delegation, which later played a key role in the ultimate negotiation of the OAS Charter withdrawal clause, was the foremost advocate of this approach.⁴⁸ Indeed, the U.S. delegate spoke of the problems remaining in the same breadth as concerns about the precise status of the Pact of Bogota and "establishing the relationship of a withdrawing state in relation to" the dispute resolution commitments and procedures of the Pact of Bogota.⁴⁹ In other words, withdrawal from the OAS Charter could have implications for rights and duties under the related instruments, such as the dispute resolution instrument. The conference, however, fearing the risk that the organic pact would be subject to reservations because of objections to the related agreements, decided that the OAS Charter would be "self-contained," a separate instrument free as possible of problematic language that might give rise to treaty reservations.⁵⁰

47. *Id.* at 167.

48. See William Sanders, *The Organization of American States: Summary of the Conclusions of the Ninth International Conference of American States, Bogota, Colombia, March 30- May 2, 1948*, 26 INT'L CONCILIATION 383, 386 (1948) (explaining that the Mexican government advocated for a "single comprehensive document that would be self-contained and not have to rely on subsidiary documents.").

49. See *Acta de la Primera Parte de la Cuarta Sesión de la Comisión de la Coordinación* [*Minutes of the First Part of the Fourth Session of the Committee on Coordination*], in 2 ACTAS Y DOCUMENTOS 507, 513 (1953) ("Primero, aclarar la situación del Pacto de Bogotá, mientras entra en vigor la Carta de la Organización de los Estados Americanos; segundo, establecer la situación del Estado que denuncie la Carta, en cuanto a ese Pacto; y otro problema . . . en cuanto a la nota que se refiere al Comité de Redacción.").

50. *Id.* at 512-13 (highlighting the Uruguayan representative's explanation calling the Pact of Bogota for dispute resolution a separate agreement independent of the Charter: "Fue eliminada porque en la Comisión de Trabajo no quisimos hacer de este Tratado un instrumento anexo ala Carta de la Organización de los Estados Americanos; para evitar reservas a esta ultima por razón del Tratado de Soluciones Pacificas. Este es un tratado especial, independiente de la Carta." The Uruguayan representative added that the details would be resolved by the "Comité

Much of this history seems to have been forgotten or concealed. When President Truman submitted the OAS Charter to the U.S. Senate for its advice and consent to ratification, his communication to the Senate contained only shards of evidence suggesting some degree of linkage between the various instruments. Oddly, President Truman's transmittal letter to the Senate did claim that the Mexican delegate's objective to integrating all elements of the Inter-American system had actually prevailed, but the President noted only the inclusion of a number of articles relating to "economic, social and cultural cooperation, as well as provisions on security matters and on the pacific settlement of disputes."⁵¹ The Report of the Committee on Foreign Relations also made clear that the OAS Council, under the proposed Charter, could act as a "provisional organ of consultation under the Rio Treaty,"⁵² thus partially linking the two treaties in the form contemplated by the Mexican delegate's agenda. But there appears to be no other references in the U.S. ratification history to the debate between those who wanted to avoid complicating ratification and those, like the Mexican delegation, who wanted to link the treaties formally into a unified system of regional law.

de Redacción" -- that is to say, the Committee on Style or Editing -- which would put the articles in final form. This approach was met with some resistance from the U.S. Delegate, William Sanders, who suggested that the issue, which he described as a "problem," merited further consideration: "De este artículo surgen problemas que, aunque son de orden puramente técnico, si complican un poco el Tratado." Sanders later observed: "The extent to which the principles, obligations, and procedures of pacific settlement and collective machinery should be incorporated in the pact or should be left for treatment in separate treaties was also debated in this same connection. On this question it was decided to incorporate by reference in the draft Pact [on pacific settlement] the Rio de Janeiro Treaty on Reciprocal Assistance and to include in the Pact only the collective or consultative aspects of pacific settlement, leaving the procedures or machinery for development in a separate treaty."); see also *Texto Del Sistema Interamericano de Soluciones Pacificas* [Text of the Inter-American System of Pacific Solutions], in 6 ACTAS Y DOCUMENTOS 83, 83, 91 (1953) (finding that the drafting committee did make the changes adopted by the drafting body, eliminating language that would have made the Pact of Bogota an annex of the OAS Charter).

51. Harry S. Truman, Special Message to the Senate Transmitting Charter of the Organization of American States, in PUBLIC PAPERS OF THE PRESIDENTS 1, 97 (1949) [hereinafter President's Letter of Transmittal of OAS Charter].

52. COMM. ON FOREIGN RELATIONS, 81ST CONG., REP. ON EX. A, THE CHARTER OF THE ORGANIZATION OF AMERICAN STATES 8 (1950).

Yet, this larger debate sheds light on the purpose behind the precise wording of the withdrawal clause, in which the Mexican delegation arguably sought to regain to some degree what it had lost in the larger debate. That said, the only reference to the withdrawal clause in the U.S. ratification debate merely quoted its language, stating it was based on an Argentine proposal but without reference to the role, as described in the next section below, of the Mexican delegation in fundamentally transforming the Argentine proposal into the *sui generis* language of the adopted clause.⁵³

2. *The Right of Withdrawal in the Context of the Inter-American System*

None of the eighty-seven articles in the preparatory document submitted to the conference provided for a right to withdraw from the proposed OAS Charter.⁵⁴ The Argentine representative then proposed an eighty-eighth article, providing, in pertinent part, that “one year after the [Pan American Union] receives notice of denunciation from any of the High Contracting Parties, the present Pact [the future OAS Charter] shall cease to apply with respect to such a state, remaining in effect with respect to all other High Contracting Parties.”⁵⁵ Then, on April 23, the Mexican delegate,

53. See President’s Letter of Transmittal of OAS Charter, *supra* note 51, at 97 (referencing the Argentine proposal that became Article 122 of the original Charter).

54. See *Proyecto de Pacto Constitutivo Del Sistema Interamericano: Informe De La Comisión Sobre La Organización Del Sistema Interamericano [Draft Pact: Report of the Commission on the Organization of the Inter-American System]*, in 3 ACTAS Y DOCUMENTOS 6, 6 n.1, 7-10 (1953) (submitted by the Pan American Union); see also *infra* Section 2.A.2 (stating that it is reasonable to assume that U.S. policy in conforming the draft Charter to the UN was a major influence in its drafting especially because U.S. legal expert Charles Fenwick was the Director of the Pan American Union’s Department of International Law).

55. *Propuesta De Enmiendas Al Título, Al Preamble Y A Los Capítulos I, VIII Y IX Del Proyecto De Pacto Constitutivo [Proposal of Amendments to the Title, Preamble and to Chapters I, VIII and IX of the Draft Constitutive Pact]*, in 3 ACTAS Y DOCUMENTOS 83, 86-87 (1953) (Argentine proposed draft article 88) (translation by author; original Spanish: “Transcurrido un año a partir de la fecha en que la Unión Panamericana reciba una notificación de denuncia de cualquiera de las Altas Pares Contratantes, el presente Pacto cesara en sus efectos respecto a dicho Estado, quedando subsistente para todas las demás Altas Partes Contratantes”); see also *Comision Primera, Segunda Sesion [First Commission*

who had argued for a comprehensive regime linking all the proposed instruments of the Inter-American system with the proposed new constitutive instrument, resisted. He argued that silence on the question, following the precedent of the UN Charter, would be best. But, in the alternative, he judged that it would be necessary to follow the precedent of the League of Nations and establish "certain requirements" to permit withdrawal.⁵⁶ Presumably, what he had in mind was the third paragraph of Article 1 of the League Covenant, which provides: "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."⁵⁷

Some scholars have viewed the OAS language as comparable.⁵⁸ It may be that the linguistic difference with withdrawal from the League being subject to it being "provided that all its international obligations and all its obligations under this Covenant shall have been fulfilled"; whereas under the OAS a state will "cease to belong to the [OAS] after it has fulfilled its obligations arising from the present Charter," is a distinction without a difference.⁵⁹ In one respect, the Covenant's requirement is more strenuous since it refers also to international obligations in addition to those imposed by the instrument. Indeed, the difficulty of withdrawal under the Covenant's language promoted the U.S. Senate to insist on a reservation to U.S. ratification of the League Covenant which would have assured, had the treaty come into force for the U.S., that the U.S. would have been the "sole judge" of whether or not it would

Second Session], in 3 ACTAS Y DOCUMENTOS 146, 163 (1953) (statements given by Argentine representative regarding reasons for the proposed amendment).

56. See *Minuta De La Tercera Sesión De La Subcomisión C* [*Minutes of the Third Session of Subcommittee C*], in 3 ACTAS Y DOCUMENTOS 311, 312 (1953) ("[a] la Delegación de México le parecía muy conveniente que se establecieran ciertos requisitos para abandonar la organización, como estaba estipulado en la Sociedad de las Naciones.").

57. League of Nations Covenant art. 1. ¶ 3.

58. See Kunz, *supra* note 43, at 572 (asserting that the final formula, "after having fulfilled the obligations arising from the present Charter," is a "norm clearly taken from the [League of Nations] Covenant").

59. See, e.g., Josephine Joan Burns, *Conditions of Withdrawal from the League of Nations*, 29 AM. J. INT'L L. 40, 40-49 (1935) (discussing the purpose of the withdraw clause, its meaning, and who is authorized to determine its fulfillment).

have complied with its obligations in the case of its own withdrawal.⁶⁰ On the other hand, the Covenant's language makes withdrawal subject to a proviso which presumably can be excused or otherwise rendered inoperative; meanwhile, the language of the OAS Charter makes effectiveness expressly conditional on compliance, which arguably makes it even more restrictive than the Covenant's language.

Surely, the Mexican delegation was also aware that, while its invocation by Japan, Germany, and Italy generated some debate, any theoretical burdens the language may have imposed did not, in fact, prevent the dissolution of the League. Presumably, therefore, without regard to any similarities to the text of the League of Nations Covenant, the Mexican representative could not have viewed the clause as a way to prevent dissolution of the OAS, which the comparable language in the League Covenant had failed to accomplish. Rather, the Mexican delegate's intentions become clear in the next sentence of his submission in which he stated "similarly . . . [he] thought it necessary to establish measures in the case of a state that was violating the provisions of the Charter."⁶¹ In short, his focus was primarily on linking review of state compliance

60. See *id.* at 48 (explaining that by reciprocity the U.S. would have conceded the same right to any other state seeking to withdraw from the League of Nations. No similar "self-judging" reservation was included by the U.S. in its instrument of ratification of the OAS Charter); see also *infra* section II.A.1 (discussing the absence of any discussion of the OAS Charter withdrawal clause in U.S. ratification history. It is possible that the U.S. has ceded that right with respect to its own withdrawal from the OAS. If so, the U.S. could argue that the GOV's withdrawal is not self-judging. Logically, if the U.S. now argued that the GOV's withdrawal is not self-judging, given the absence of an express reservation by the U.S., the U.S. would in turn be in a weak position to argue that the GOV's withdrawal is not self-judging. Under this line of reasoning, many of the questions considered in this article disappear. However, predicated analysis on the assumption that a treaty without express language providing for self-judging withdrawal is self-judging would render surplus such language in other treaty contexts); see also, e.g., *infra* section IV.A (discussing the NPT and how it would be in conflict with international law's central principles of *pacta sunt servanda* and good faith); see generally Vienna Convention on the Law of Treaties, *supra* note 15, at 339 (stating, under Article 26, that "[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith").

61. See *Minutes of the Third Session of Subcommittee C*, *supra* note 56, at 312 ("Asimismo, dijo que México creía necesario se estipularan medidas para el caso de que un Estado estuviera violando las disposiciones de la Carta.").

at the stage of withdrawal with observance of all the substantive obligations of OAS law rather than merely to prevent a state from withdrawing per se. Under this view, the Mexican delegation directed its efforts toward realizing the goal of an overarching system integrating all the substantive rights and duties of OAS membership, consistent with its original strategy of linking all the agreements of the OAS system; in other words, the Mexican strategy privileged depth and breadth of obligation over universality of adherence, even if instrumentally it was prepared to constrain withdrawal. If so, the President's communication to the Senate obliquely hinted at the Mexican delegation larger project of treaty-linkage in its reference to the inclusion of substantive obligations in the OAS Charter.⁶²

Argentina's view, in contrast, was to privilege the sovereignty of the withdrawing state. Replying to the Mexican delegation, the Argentine representative emphasized the withdrawal clause's basis in the *clausula rebus sic stantibus*, which (when submitting the proposed withdrawal clause) he had defined as the right of every state to withdraw from a treaty because of a fundamental change in the circumstances.⁶³ The representative also made clear his view that even the UN Charter could not deviate from this inherent right of states, even if the Charter itself did not contain a withdrawal clause; when initially submitting proposed Article 88, he had stated that the UN Charter's failure to include such a clause was a result only of the need not to convey a message of "undue pessimism" and that the right of withdrawal was recognized by the San Francisco Conference drafting the UN Charter although he offered no details for the basis for his description of that common understanding.⁶⁴ Now, in his response to the objections of the Mexican delegation, the Argentine

62. See President's Letter of Transmittal of OAS Charter, *supra* note 51, at 97.

63. See *Minutes of the Third Session of Subcommittee C*, *supra* note 56, at 313.

64. *First Commission Second Session*, *supra* note 55, at 163 (Argentine statement of reasons for proposed amendment; "[N]o se quiso dar un nota de pesimismo y debilitar el organismo en el momento mismo en que se creaba— aunque la Asamblea reconoció el derecho de todo Estado de retirarse."); see also Antonio F. Perez, *On the Way to the Forum: The Reconstruction of Article 2(7) and the Rise of Federalism Under the United Nations Charter*, 31 TEX. INT'L L.J. 353, 448 (1996) (arguing that the record revealed a common understanding that the Charter permitted withdrawal if it fundamentally failed to preserve international peace and security).

delegate explicitly stated it was through “informal conversations” in the corridors of the conference that states decided they did not need to make explicit what was deemed implicit.⁶⁵ He added that the Argentine proposal did ensure respect for “contractual” obligations and would “impede denunciation” of the treaty, since the proposal thus eschewed automatic withdrawal upon notice and, instead, required that a state giving notice of withdrawal continue to respect its obligations until the withdrawal had taken effect.⁶⁶ He suggested the Argentine proposal was “practically identical” to the Rio Treaty’s withdrawal clause, although it should be noted that this formula, as reported in the discussion, made express reference to the *clausula rebus sic stantibus* as its rationale and, implicitly, as its criterion for withdrawal.⁶⁷ Finally, he asserted that Argentina’s insistence on a right to withdraw was grounded on its own constitutional requirements.⁶⁸

While this particular debate was witnessed by delegates from only five states, including the two protagonists,⁶⁹ it cannot be doubted a clear division of perspective emerged with the Argentine delegate speaking primarily in terms of limited contractual obligations, the fundamental rights of sovereign states, and constitutional supremacy, and the Mexican delegate speaking primarily in terms of supra-national constitutionalism and functional necessity. When the parties returned to the issue two days later the current language of Article

65. *Minutes of the Third Session of Subcommittee C*, *supra* note 56, at 313 (“[S]e acordó por medio de conversaciones informales no fijar la consagración expresa de la clausula de denuncia.”).

66. *Id.* (“[E]s precisamente de la impedir que el Estado denuncie el tratado por el cual se ha ligado automáticamente y de establecer, al contrario, que durante un tiempo determinado quede en la obligación de cumplir los compromisos contraídos.”).

67. *Id.* (stating “La forma que presento ahora es prácticamente idéntica a la discutida y aprobada en el Tratado de Asistencia Reciproca,” then quoting the Rio Treaty as describing the right to withdraw as a recognition -- “reconociendo el principio doctrinario” -- of *rebus sic stantibus*).

68. *See id.* at 314 (“[T]odo esto esta exigido por lo que es, en mi país, un principio de derecho publico, reconocido y consagrado en nuestra Ley Suprema.” [“Everything is required by what is, in my country, a principle of public law recognized and enshrined in our Supreme Law.”]).

69. *See id.* at 311 (recording that delegates from Costa Rica, Uruguay, Dominican Republic, Mexico, and Argentina were in attendance).

143 was adopted with only stylistic differences.⁷⁰ After, Argentina reiterated its position that the clause was based upon the doctrine of *rebus sic stantibus*, as understood in the Rio Treaty, but that a state would be required to continue to perform its obligations during the notice period.⁷¹ The Mexican delegate then proposed two amendments, which were adopted. First, again referring to the League of Nations Covenant, he suggested that a two-year period for notice of withdrawal, “for a constitutive treaty, would appear to be the minimum.”⁷² Second, purporting to draw on “customary clauses of this kind found in international organizations,” he proposed the formula,⁷³ that when restated by the presiding officer as a separate sentence, became what is now part of Article 143 – providing that the withdrawal would take effect “after” the withdrawing state had “fulfilled the obligations arising from the present Charter.”⁷⁴

There was no discussion of the precedents relied upon. There was no discussion of the difference between the original Argentine proposal (which, as explained by Argentina, did not condition withdrawal on performance of obligations but simply confirmed that a withdrawing state remained bound until its withdrawal was effective) and the Mexican language (which expressly conditions the

70. See *Acta de la Cuarta Sesión de la Comisión Primera* [Minutes of the Fourth Session of the First Committee], in 3 ACTAS Y DOCUMENTOS 205, 291-92 (1953).

71. See *id.* at 291-92 (“[C]onsagra una obligación: la de permanecer atado a las obligaciones de la misma Carta durante un lapso que en el artículo esta fijado en un año.” [It “consecrates one obligation: that of remaining bound by the obligations of the Charter during the one year period the article specifies.”]).

72. *Id.* at 292 (“[Q]ue pongamos dos años (que es el plazo que ponía la Sociedad de las Naciones) como plazo que realmente, tratándose de un Pacto Constitutivo, parece el mínimo.” “[T]hat we insert 2 years (which is the length put by the League of Nations) as the length that really, in the context of a constitutive agreement, appears to be the minimum.”]).

73. *Id.* (“Quisiera poner, también, otra cosa, que es costumbre en esta clase de cláusulas referentes a organismos internacionales. Agreguemos que el Estado que denuncie el pacto se retirara después de haber cumplido con las obligaciones pendientes dentro de la organización.” [“I would also like to propose another thing, that is customary in these types of clauses in international organizations. It shall be added that the State denouncing the pact shall withdraw after having complied with its pending obligations within the organization.”]).

74. *Id.* (“El Estado que haga la denuncia quedara desligado de la Organización, después de haber cumplido con las obligaciones emanadas de la presente Carta.”).

effectiveness of withdrawal on the withdrawing state's continued performance of its obligations). Unlike the subgroup's meeting of April 23, attended by only a handful of parties, the more broadly attended meeting of the Drafting Commission itself on Sunday, April 25, debated very little, if anything, of substance. Yet the amendments were accepted and the final language as amended was ultimately adopted with only the immaterial stylistic change that the last sentence became a final clause.⁷⁵

Indeed, immediately after the adoption of Argentina's proposed withdrawal clause with the Mexican amendments, the Mexican delegate made a further observation that may shed light on the potential breadth of the amended language. He proposed an additional article providing that, unless inconsistent with the Charter, all other existing Inter-American treaties remain in force.⁷⁶ The effect of such a clause may have been to incorporate the full range of treaties in the Charter, transforming them too into "obligations" that could be deemed to "arise" from the Charter and therefore within the scope of the withdrawal clause. This seems consistent with the Mexican Delegations ultimately failed effort to incorporate all the proposed treaties, including the Pact of Bogota and the Rio Treaty, into the Charter system.⁷⁷ Notwithstanding the failure of this effort, the Mexican proposal does seem to suggest that, looking forward, it was connected with the larger project of creating a system of interlocking obligations that would increase the price of withdrawal from the Charter by burdening a state seeking to withdraw with a larger set of obligations, much like a penalty clause or a tying arrangement.⁷⁸

75. See Charter of the Organization of American States, *supra* note 13, at 2436 ("After two years from the date on which the General Secretariat receives a notice of denunciation, the present Charter shall cease to be in force with respect to the denouncing State, which shall cease to belong to the Organization after it has fulfilled the obligations arising from the present Charter.").

76. *Comision Primera –Tercera y Cuarta Sesiones* [*First Commission – Third and Fourth Sessions*], in 3 ACTAS Y DOCUMENTOS 173 (1953).

77. See *supra* Section II.A.1 (discussing the effect of the Mexican Delegation on the OAS charter).

78. Cf. RESTATEMENT (SECOND) OF CONTRACTS § 356 (Am. Law Inst. 1981) (explaining that damages for a breach by either party may be liquidated in the agreement at an amount that is reasonable in the light of the loss caused by the breach and the difficulties of proof of loss); Herbert Hovenkamp, FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE 534-76 (5th ed.

Indeed, a later reference at the conference to the agreed language construed it to include obligations “derived” from the Charter,⁷⁹ perhaps looking forward to the continued evolution and augmentation of the Charter as a system of law; much as, for those looking backward, the Pan American Union had evolved through a series of incremental reforms and initiatives.

Thus, on the surface, because of the Mexican amendment’s potential breadth, the Argentine delegate’s acquiescence seems inexplicable. Perhaps it reflected an artful compromise, as is so often the case in negotiations, in which the parties found a verbal formula in which both sides could simply agree to disagree? But, perhaps, the better view, particularly in light of the Mexican representative’s concern on April 23 that noncompliance not be facilitated by withdrawal without consequence, is that the Mexican amendment of April 25 was calculated to permit the OAS to take the position that no state could fail to comply with its obligations and then invoke the withdrawal clause to escape legal responsibility for its noncompliance? In short, while the Mexican delegation’s original goal may have been linkage across substantive obligations of the OAS system, thus tying regional security to democracy and social welfare, the consequence of its efforts may have been to constrain withdrawal as a response to sanctions for noncompliance.

Yet, in the immediate aftermath of the Charter’s adoption it would have been difficult, though not impossible, to argue that “obligations arising” under the Charter clearly implied a correlative right for the Organization to require a withdrawing state to re-establish democracy before implementing its withdrawal. While it was clearly a foundational principle of the OAS to “promote and consolidate representative democracy,” this was “with due respect for the principle of nonintervention.”⁸⁰ Moreover, according to Charles Fenwick, Director of the Pan American Union’s Department of

2016) (analyzing the anti-competitive, coercive effects of tying devices).

79. *First Commission – Third and Fourth Sessions*, *supra* note 76, at 173 (discussing that the Mexican amendment to the Argentine withdrawal clause by making it clear that the clause is a necessary condition for withdrawal and that the set of Charter obligations referenced is comprehensive including not only those expressly stated, but also “derived” in some way from the Charter).

80. Charter of the Organization of American States, *supra* note 13, at 2395.

International Law, at the Mexico City Conference of 1945 leading to the Ninth International Conference at Bogota in 1948, the Government of Guatemala proposed non-recognition of anti-democratic regimes, especially regimes resulting from a coup d'état against established democratic governments. When the proposal was referred to the Inter-American Juridical Committee, according to Fenwick, the Juridical Committee reported against the proposal "chiefly on the ground of the vagueness of the term 'anti-democratic.'"⁸¹ The OAS's concept of democracy would have to evolve to become more precise if it could ever be deemed an "obligation" arising, or perhaps "derived," from the Charter.

B. THE LAW OF OAS WITHDRAWAL – THE RISE OF DEMOCRACY AS AN OBLIGATION ARISING FROM THE OAS CHARTER

The withdrawal clause's meaning is almost certainly not limited by the range of the text, context, object and purpose, and supplementary means of interpretation as of 1948. Rather, the Charter system subsequently evolved through amendments (principally the Protocol of Washington); through the Democratic Charter as arguably an authoritative interpretation of the amended Charter; and perhaps also through larger contextual developments in international law, especially the UN Security Council's recognition of the absence of democracy as a threat to international peace and security. This expansive mode of interpretation is consistent with the VCLT's command that interpretation of treaty text must also "take into account" subsequent agreements, subsequent practice, and any relevant rules of international law.⁸²

81. Fenwick, *supra* note 44, at 564 (stating that the Juridical Committee's report was never really considered by the Ninth International Conference, because "a series of riots" in the city of Bogota turned the focus of the conference to the adoption of a resolution addressing the disruptive effects on democracy of international communism rather than the anti-coups issue, however, not simply because of the interruption at the negotiation conference, substantive concerns reflected in the report of the American delegation made clear that democracy would not factor into recognition policy for purposes of the OAS Charter); *see also* U.S. DEP'T OF STATE, NINTH INTERNATIONAL CONFERENCE OF AMERICAN STATES, BOGOTA, COLOMBIA, MARCH 30 – MAY 2, 1948 82-84 (1948) (discussing a resolution proposed to the Committee using references to "any form of totalitarianism" and communism as anti-democratic regimes).

82. Vienna Convention on the Law of Treaties, *supra* note 15, at 340.

Any inquiry into the existence, scope, and content of obligations relating to democracy under the OAS, however, must draw on the historic tension between democracy and non-intervention, both of which served as cardinal principles in the formation of the Inter-American system. The American States were, with limited exception, founded as “republics” – truly things of the people rather than possessions of monarchs. But they were also formed with a heritage of anti-colonial sentiment that was only strengthened in the period leading to the drafting of the OAS Charter in reaction to European and U.S. intervention in the internal affairs of the Latin American republics to promote paternalistic democracy or maintain economic control, especially during the last third of the 19th century and the first third of the 20th century.⁸³ At the same time, pro-democratic intervention was an emerging, countervailing tendency in the Americas. There is simply no other way to understand the emergence of the Tobar Doctrine of non-recognition of governments installed by *golpes de estado* and the Wilson Administration’s parallel policy of non-recognition of revolutionary governments taking power without reflecting democratic elections.⁸⁴ It was not surprising, therefore, that the Government of Guatemala effectively sought to revive the Tobar Doctrine of non-recognition during the Ninth International Conference negotiating the OAS Charter, although its effort failed.⁸⁵ But the seed was planted for further developments in OAS law with potential implications for the law of OAS withdrawal.⁸⁶

83. See, e.g., GEORGE C. HERRING, FROM COLONY TO SUPERPOWER: U.S. FOREIGN RELATIONS SINCE 1776 386-97 (2008) (discussing how the United States asserted control over the republics “not to conquer them, but to help restore peace and order” while also systematically eliminating German economic interests).

84. See generally LORI FISLER DAMROSCH ET AL., INTERNATIONAL LAW: CASES AND MATERIALS 293-94 (4th ed. 2001); H. LAUTERPACHT, RECOGNITION IN INTERNATIONAL LAW 127-29 (AMS Press 1978) (discussing how the United States followed the Tobar Doctrine by declining to recognize any other government that came into power in the five Republics as a consequence of a revolution against the recognized government as long as the freely elected representatives of the people had not constitutionally reorganized the country).

85. See *supra* Section II.A.

86. See Antonio F. Pérez, *Mechanisms for the Protection of Democracy in the Inter-American System and the Competing Lockean and Aristotelian Constitutions*, in XXXIII CURSO DE DERECHO INTERNACIONAL 217, 219-27 (OAS Secretary-

1. *The Charter and Subsequent Agreements*

The OAS Charter of 1948, as amended in 1967 and 1986,⁸⁷ provides that democracy is a central value in the Inter-American legal system. Article 2(b) of the Charter provides that it is the “central purpose” of the OAS “to promote and consolidate democracy, with due respect for the principle of nonintervention.”⁸⁸ The Charter does not explain, however, what level of respect is due. Article 3(d) further provides that all states party to the Charter reaffirm the “principle” that “the solidarity of the American States and the high aims which are sought through it require the political organization of those states on the basis of the effective exercise of representative democracy.”⁸⁹ A purposive or teleological interpretation of the Charter might then suggest that performance in good faith would entail, as an impliedly necessary means, the maintenance of domestic democracy. Yet, Article 3(e) simultaneously provides that “every State has the right to choose, without external interference, its political, economic and social system and to organize itself in the way best suited to it, and has the duty to abstain from intervening in the affairs of another State.”⁹⁰ Still, reading the two provisions together would suggest that the right to choose a “political system” within the terms of the original OAS Charter is not an absolute right but rather merely a right to choose a particular form of democracy. That said, enforcement of that right is left open and no state member of the OAS could assert the right to intervene to enforce the duty of good faith performance in fulfilling the purposes of the OAS by maintaining internal democracy.

General ed., 2006) (discussing the legal developments within the OAS system concerning democracy).

87. Protocol of Amendment to the Charter of the Organization of American States: Protocol of Cartagena De Indias art. 2(b), Feb. 26, 1986, O.A.S.T.S. No. 66 [hereinafter Protocol of Cartagena] (“Convinced that representative democracy is an indispensable condition for the stability, peace and development of the region.”); *see generally* ANDREW F. COOPER & THOMAS LEGLER, INTERVENTION WITHOUT INTERVENING? THE OAS DEFENSE AND PROMOTION OF DEMOCRACY IN THE AMERICAS 25 (2006) (discussing the role of Cartagena amendments in initiating the process of enhanced protection of democracy in the OAS community).

88. Charter of the Organization of American States, *supra* note 13, at 2395.

89. *Id.*

90. *Id.*

In 1991, OAS Resolution 1080 purported to establish a procedural mechanism for enforcement of the Charter's obligations relating to democracy. If a "sudden or irregular interruption of the democratic institutional political process or of the legitimate exercise of power by the democratically elected government" of a Member State occurred – arguably a traditional "golpe de estado," but perhaps more – the OAS Secretary General would take the matter to the political organs of the OAS which in turn would adopt such measures as they deemed "appropriate."⁹¹ Without specifically providing for the sanction of suspension, the text seemed to open the door to this possibility by including "an ad hoc meeting of the Ministers of Foreign Affairs" among the relevant political organs which might take such appropriate action.⁹² The significance of the reference to the Ministers of Foreign Affairs is that the exclusion of Cuba was the only precedent for suspension, and it was effected through an Ad Hoc Meeting of the Foreign Ministers rather than through the other political organs of the OAS.⁹³ As such, legal authority for suspension or exclusion of a state was not grounded clearly on a violation of the pro-democracy provisions of the OAS Charter. Rather, it appears to have been more connected to complaints concerning Cuban support for subversive activities contrary to the non-intervention principle and the OAS Charter and Rio Treaty's collective security commitments.⁹⁴

Perhaps to clarify this uncertain legal situation, paragraph 3 of Resolution 1080 initiated a process of further legal reform. This

91. Org. of Am. States [OAS], General Assembly Res. 1080 (XXI-O/91) (June 5, 1991).

92. *Id.* ¶¶ 1-2.

93. See General Secretariat of the Org. of Am. States, *Eighth Meeting of Consultation of Ministers of Foreign Affairs Serving as Organ of Consultation in Application of the Inter-American Treaty of Reciprocal Assistance*, OAS Doc. OEA/Ser.C./11.8, at 14 (Jan. 22-31, 1962) [hereinafter OAS Eighth Meeting of Foreign Ministers] (stating that this incompatibility excludes the present government of Cuba from participation in the inter-American system); Enrique Lagos & Timothy D. Rudy, *In Defense of Democracy*, 35 U. MIAMI INTER-AM. L. REV. 283, 302 (2004) (discussing the Cuba precedent or how the Cuban government was not excluded for its lack of democratic credentials per se).

94. See *supra* Part I (discussing how the decision to suspend Cuba was not because Cuba had violated OAS norms with respect to democracy but rather that Cuba had violated its collective security obligations under the OAS Charter).

process resulted in the Protocol of Washington of 1992, entering into force in 1997, which added Article 9 of the current Charter.⁹⁵ That provision established clearly, as a matter of positive OAS Charter law, that a Member State's privilege of membership could be suspended by a two-thirds vote of the OAS General Assembly when its "democratically elected government has been overthrown by force."⁹⁶ The Ad Hoc Meeting of Foreign Ministers contemplated under Resolution 1080, however, was not included in the Protocol of Washington. This reflected the desire of some states, which had seen the Cuba precedent as problematic, to distance the new mechanism for suspension and exclusion from that precedent. Accordingly, states that have not accepted the Protocol of Washington could argue that, as a non-party to the new Article 9, they could not have their privileges of membership suspended pursuant to this new enforcement mechanism or, if the provision were construed to be applicable only on the basis of reciprocity, they could not exercise any right to seek the suspension of another member.⁹⁷

Mexico was the only country that refused to sign and ratify the Protocol and agreed to sever diplomatic relations with Cuba, and, after Cuba's suspension from OAS,⁹⁸ issued a Declaration at the time of its adoption articulating a principled objection. It stated:

Mexico is categorically opposed to any attempt to disrupt the constitutional order in any country and further expresses a deep commitment to democracy and the amelioration of our political systems . . . [yet] it is unacceptable to give to regional organizations *supra*-national powers and instruments for intervening in the internal

95. Protocol of Amendments to the Charter of the Organization of American States, *supra* note 36, at 1005.

96. *Id.* (stating that suspension shall take effect immediately, the Organization shall undertake additional initiatives to reestablish democracy in the member state, the member shall continue to fulfill its obligations, and the suspension can be revoked with the approval of two-thirds of the member states).

97. *Cf.* Vienna Convention on the Law of Treaties, *supra* note 15, at 341 ("A treaty does not create either obligations or rights for a third State without its consent.").

98. *See* PERINA, *supra* note 20, at 39 (stating that some of the most important Latin American countries, including Argentina, Brazil, and Mexico abstained or opposed signing the Protocol).

affairs of our states.⁹⁹

However, while the Protocol of Washington only addresses the case of when a “democratically constituted government has been overthrown by force,” the Mexican declaration evidences an even stronger commitment to democracy in that it expresses opposition to “any attempt to disrupt the constitutional order in any country,” and not merely those that are accompanied by “force.”¹⁰⁰ Its objection was not to the substantive duty of states, but rather to the remedy for non-compliance. As already noted, however, Venezuela, having accepted the Charter amendments relating to the protection of democracy, is in no position to make this argument.¹⁰¹ In light of Mexico’s strong public objections, moreover, it might be reasonable to infer that other states have accepted the view that the Protocol of Washington made new law.

Yet, the Protocol of Washington did not mark a radical departure and, instead, merely elaborated existing provisions of substantive character. Mexico’s objections arguably would have been equally vociferous if the Protocol merely represented the codification of an existing authoritative interpretation of the amended OAS Charter’s substantive obligations in respect of democracy in the original Charter, as amended by the 1986 Protocol of Cartagena.¹⁰² This latter view is a plausible reading of the terms of U.S. ratification. The Secretary of State’s “Letter of Submittal” of the treaty to the President stated that the treaty would “upon entering into force . . . provide for either suspension or the lifting of a suspension of a Member of the Organization whose democratically constituted government has been overthrown by force.”¹⁰³ However, the President’s “Letter of Transmittal” to the Senate said only that the relevant provisions merely “incorporate a procedure” for suspension when a state’s “democratically elected” government has been

99. *General Information of the Treaty*, *supra* note 37 (taking issue with the punitive character of the proposal).

100. Protocol of Amendments to the Charter of the Organization of American States, *supra* note 36, at 1005; *General Information of the Treaty*, *supra* note 37.

101. *See supra* Part II (stating that Venezuela has ratified all the relevant amendments to the OAS Charter including Article 9).

102. *See* Protocol of Cartagena, *supra* note 87.

103. S. TREATY DOC. NO. 103-22, at 5 (1994).

overthrown by force.”¹⁰⁴ Finally, the Report of the Senate Foreign Relations Committee (SFRC) stated that the “amendment merely formalizes procedures already in practice based upon a decision taken by the OAS General Assembly in 1991 in the so-called Santiago Declaration,”¹⁰⁵ thus implying that the procedures were already lawful under the OAS Charter without benefit of the amendment. The SFRC Report also stated that, in protecting democracy from forcible overthrow, it was “appropriate to suspend any government or junta,” thus employing a disjunctive formula to describe the alleged wrongdoer “which insists on violating that principle” and thereby implying that the scope of the sanction applied to forcible overthrows resulting, unlike the typical coup d’état or *golpe de estado*, in a government not formed by a military junta.¹⁰⁶ This too would suggest that the scope of the provision extended beyond the specific circumstances governed by the Santiago Declaration concerning military overthrow of governments to any threat to democratic government contemplated by the OAS Charter as previously amended by earlier protocols.

However, the Senate’s resolution of ratification of the Protocol of Washington did not contain a federalism reservation¹⁰⁷ unlike its resolution of ratification for the original OAS Charter.¹⁰⁸ That reservation provided that “none of [the OAS Charter’s] provisions shall be considered as enlarging the powers of the Federal Government of the United States or limiting the powers of the several States of the Federal Union with respect to any matters recognized under the Constitution as being within the reserved powers of the several States.”¹⁰⁹ The significance of this reservation is revealed in the colloquies before the then Committee on Foreign Relations in its hearing on August 1, 1950,¹¹⁰ but it is also part of a larger story of U.S. resistance to human rights treaties that would

104. *Id.* at 3.

105. S. TREATY DOC. NO. 103-28, at 1-2 (1994).

106. *Id.* at 2.

107. See 140 CONG. REC. 10484 (1994) (enacted).

108. See 96 CONG. REC. 13608 (1950).

109. *Id.*

110. See generally *The Charter of the Organization of American States: Hearing Before the Comm. on Foreign Relations*, 81st Cong. 1-2 (1950) [hereinafter OAS Charter Senate Hearing].

shortly call into question U.S. domestic practices of disenfranchising and otherwise subordinating African-Americans to Jim Crow laws in the South and elsewhere.¹¹¹ This so-called Bricker Amendment controversy related to the possibility imagined by the Supreme Court in *Missouri v. Holland*,¹¹² often called the Migratory Birds Treaty Case, that an Article II Treaty may enable Congress to enact legislation that might reach beyond enumerated federal powers into the reserved powers of the states.¹¹³ The proposed Bricker Amendment to the Constitution would have eliminated that possibility;¹¹⁴ and, in the meantime, the Senate initiated the practice of conditioning its advice and consent to ratification on reservations that would confirm that any treaty capable of being interpreted to upset existing U.S. "racial relations" would not, as ratified by the U.S. at least, have such domestic effects under U.S. law or place the U.S. in breach of an international obligation.¹¹⁵

The question was whether the treaty was capable of such an interpretation, a matter that troubled the Senators during the hearing. The Chairman, Senator Connally, drew attention to Article 29 of the

111. See *infra* Part III (discussing the internal shift in the US "Democracy Clause" from a largely political form of "soft law" when the OAS Charter was adopted to a form of hard law).

112. 252 U.S. 416 (1920).

113. *Id.* at 433 ("It is obvious that there may be matters of the sharpest exigency for the national well being that an act of Congress could not deal with but that a treaty followed by such an act could.").

114. See 99 CONG. REC. 143, 160 (1953) (proposing an amendment to the US constitution which would prevent an international treaty from controlling or denying any of the constitutional rights of US citizens, and requiring an international treaty to become effective US law only through congressional enactment); Louis Henkin, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 AM. J. INT'L L. 341, 348 (1995) ("Between 1950 and 1955 Senator Bricker of Ohio led a movement to amend the Constitution in ways designed to make it impossible for the United States to adhere to human rights treaties. The campaign for the Bricker Amendment apparently represented a move by anti-civil-rights and "states' rights" forces to seek to prevent--in particular--bringing an end to racial discrimination and segregation by international treaty.").

115. Henkin, *supra* note 114, at 348-49 ("To help defeat the amendment, the Eisenhower administration promised [in 1953] that the United States would not accede to international human rights covenants or conventions."); see generally *id.* at 345-46 (discussing how US "federalism" clauses attached to the ratifications of human rights conventions have no legal purpose but may instead be intended to alert other parties of the United States' intent in its implementation).

proposed Charter, and to Article 45 of the current Charter,¹¹⁶ which “caused some disturbance” because it included nondiscrimination requirements relating to, among other things, race.¹¹⁷ Article 30, current Article 46,¹¹⁸ was feared to be a possible wedge for the federalization of the U.S. educational system.¹¹⁹ There were multiple references to the dangers suggested by the so-called “Migratory Birds” case.¹²⁰ It was thought, therefore, that a reservation preserving the constitutional allocation of authority between the federation and the states would be necessary. But Senator Green’s proposed reservation not only had a federalism component but also provided that certain problematic provisions of the treaty would not be self-executing, meaning they would not be enforceable as part of U.S. law.¹²¹ Yet, Senator Lodge had earlier raised the fear of unintended adverse international political consequences for the U.S. from a possible reservation when he asked: “Has the State Department considered the possibility of a reservation of this kind being used by Communist propaganda in countries where there are large numbers of colored people to show that the United States is not sympathetic with the aims of colored people in general.”¹²² Thus, the final version adopted as proposed by Senator Smith deleted references to particular provisions so as not to draw attention to the

116. Charter of the Organization of American States, *supra* note 13, 2 U.S.T. at 2395 (“All human beings, without distinction as to race, sex, nationality, creed or social condition, have a right to material well-being and to their spiritual development, under circumstances of liberty, dignity, equality of opportunity, and economic security.”); see OAS Charter Senate Hearing, *supra* note 110, at 19 (questioning whether Congressional advisors were with the American delegation when Article 29 was drafted in Bogota and discussing the Committee’s specific concerns about the implications of the term “worker dignity”).

117. OAS Charter Senate Hearing, *supra* note 110, at 18-19.

118. Charter of the Organization of American States, *supra* note 13, 2 U.S.T. at 2395 (“The Member States will exert the greatest efforts . . . to ensure the effective exercise of the right to education.”).

119. See OAS Charter Senate Hearing, *supra* note 110, at 24-25 (discussing how elementary education in the US cannot be guaranteed to be provided by the federal government without cost under the treaty because constitutionally elementary education is delegated to the states).

120. *Id.* at 13-15.

121. *Id.* at 40.

122. *Id.* at 8-9.

substantive U.S. concerns.¹²³ This seemed to have the virtue of reducing the risk of creating the propaganda weapon that would have troubled Senator Lodge but at the same time would have preserved the status quo in the U.S. with respect to race relations, particularly as to state-run schools.

While the original OAS Charter's provisions that might have stimulated effective democracy in the U.S. states were stillborn under the terms of U.S. ratification, the ratification of the Protocol of Washington occurred in an entirely different legal universe for the U.S., domestically as well as internationally. U.S. ratification of the Protocol of Washington did not require a federalism clause allowing the U.S. to advance internationally within the corridors of OAS a much more robust understanding of the substantive obligation concerning democracy "arising from" the OAS Charter as amended. In light of Mexico's strong objections, this may well have been the view that was shared by other OAS Member States and the subsequent practice of the political organs of the OAS seem to support this possible inference.

2. *Subsequent Practice*

Analysis of subsequent practice under the OAS Charter as amended by the Protocol of Washington proceeds in two steps: First, OAS practice giving rise to the Democratic Charter; second, OAS practice under the Democratic Charter.

a. *The Democratic Charter*

With both the legal status of the Protocol of Washington for non-parties and the precise meaning of the triggering mechanism, whether a true *golpe* or any "unconstitutional interruption" in doubt, an effort was launched to cure these legal deficits through a new source of law that might achieve unanimous consent. That source was found in the new Democratic Charter, adopted by a special General Assembly of the OAS on September 11, 2001.¹²⁴ This

123. *Id.* at 43.

124. Inter-American Democratic Charter, *supra* note 2, at 1289 (creating a new instrument with its central goal being the strengthening and protecting of democratic institutions in the Americas).

unanimously adopted resolution provides a more comprehensive scheme for the protection and furtherance of democracy in the hemisphere than the less detailed scheme in Resolution 1080 or the Protocol of Washington. The Democratic Charter provides for three distinct mechanisms. The first, under Article 17, provides for a Member State's request for OAS assistance in protecting its democratic order.¹²⁵ The second, under Article 18, provides a vehicle for OAS's initiative in providing such assistance with the consent of the threatened state.¹²⁶ There is nothing new here since these provisions provide for nothing more than consensual activities that cannot be construed to be in tension with the non-intervention clauses of the OAS Charter.

Articles 19 to 22 of the Democratic Charter, however, do establish a scheme that is in tension with the non-intervention principle because they provide a roadmap leading to suspension, the ultimate sanction. Article 19 defines the scope of these provisions as covering two classes of cases in a member state: First, "an unconstitutional interruption of the democratic order;" and, second, "an unconstitutional alteration of the constitutional regime that seriously impairs the democratic order."¹²⁷ While Article 19 is merely declaratory of the scope and policy of the new mechanism, it contemplates two cases of increasing severity. One case involves an actual "unconstitutional interruption" of the "democratic order" of a Member State; the other involves a lesser threat, "an unconstitutional alternation of the constitutional regime" that merely "seriously impairs" but does not "interrupt" that democratic order. Admittedly, the language leaves open the question of whether a democratic order can be interrupted without a violation or unconstitutional alteration of the constitutional regime of the state.

That said, Article 20 provides that "an unconstitutional alteration of the constitutional regime that seriously impairs the democratic order in a member state" may yield the invocation of the procedures contemplated in that provision.¹²⁸ The third paragraph of the

125. *Id.* at 1292.

126. *Id.* at 1293.

127. *Id.*

128. *Id.*

provision increases the pressure on the target state when it provides that a special session of the General Assembly “shall” be convened by the Permanent Counsel and “will” take “decisions” when the “diplomatic initiatives” undertaken pursuant to the second paragraph of Article 20 “prove unsuccessful.”¹²⁹ It should be clear that these “decisions,” which address the case of unconstitutional conduct, necessarily fall short of suspension and merely escalate the level of pressure on the target state. The “suspension” sanction is reserved under Article 21 only for when “the General Assembly determines that there has been an unconstitutional interruption of the democratic order of a member state” and “diplomatic initiatives have failed.” But in such a case, Article 21 leaves no room for discretion providing that the “General Assembly shall take the decision to suspend,” albeit by a two-thirds vote.¹³⁰ Of course, the General Assembly could evade this responsibility by simply refusing to draw the quasi-legal, quasi-political conclusion that there had been an “unconstitutional interruption of the democratic order of a member state.” The General Assembly could continue, instead, to operate within the confines of Article 20, taking such other decisions and imposing such other sanctions as it felt authorized to do under the Charter¹³¹ particularly since Article 22 would require another supermajority vote, again by two-thirds, to terminate the suspension, thus giving a mere plurality of states the power to continue to block lifting a suspension even in the case of serious debate over whether “the situation that led to suspension has been revolved.”¹³² In short, even in the most unproblematic case, the terms of the Democratic Charter yield a hornet’s nest of difficult legal questions.

Given the risk of interpretive overreach and, therefore, the

129. *Id.*

130. Inter-American Democratic Charter, *supra* note 2, at 1293.

131. See, e.g., David S. Berry, *Non-Democratic Transitions: Reactions of the OAS and Caricom to Aristide’s Departure*, 33 SYRACUSE J. INT’L L. & COM. 249, 251-56 (2005) (criticizing the muted OAS response to Aristide’s departure and the organization’s failure to suspend Haiti as required under Articles 20-21); see generally Timothy D. Rudy, *A Quick Look at the Inter-American Democratic Charter of the OAS: What Is It and Is It “Legal”?*, 33 SYRACUSE J. INT’L L. & COM. 237, 240 (2005) (describing the Democratic Charter as a political rather than a legal document which functions as a non-binding resolution of soft law).

132. Inter-American Democratic Charter, *supra* note 2, at 1289.

potential for a substantial conflict with the non-intervention norm, the precise legal status of the Democratic Charter becomes a pressing legal question. Not surprisingly, to confirm its legitimacy, the Democratic Charter itself offers a theory about its own status as law. To begin with, according to Article 19, it is “[b]ased on the principles of the Charter of the OAS and subject to its norms, and in accordance with the democracy clause contained in the Declaration of Quebec City,” that “an unconstitutional interruption of the democratic order or an unconstitutional alternation of the constitutional regime that seriously impairs the democratic order in a member state, constitutes, while it persists, an insurmountable obstacle to the government’s participation” in the political organs of the OAS.¹³³ Preambular paragraph 18 also affirms that the Member States recognize that “all the rights and obligations of member states under the OAS Charter represent the foundation on which democratic principles in the Hemisphere are built. . . .”¹³⁴ In Preambular paragraph 19, the Member States affirmed “the progressive development of international law and the advisability of clarifying the provision set forth in the OAS Charter and related basic instruments on the preservation and defense of democratic institutions, according to established practice. . . .”¹³⁵ According to Enrique Lagos, Legal Counsel to the OAS when the Democratic Charter was adopted, this language taken together signifies the intention of the Member States to rely on Article 31 of the provisions of the Vienna Convention on the Law of Treaties relating to subsequent agreements and subsequent practice under an agreement.¹³⁶ In short, the Preambular language offers a theory of the origins for the Democratic Charter, its own creation myth.

The substance of these clauses appears to have been included at the suggestion of the Inter-American Juridical Committee of the OAS (IJC). The IJC focused on the question of whether Article 9 of the Protocol of Washington could be interpreted beyond its letter which appeared to address only the case of the classic military coup, also, to cover the other cases contemplated by the draft Democratic

133. *Id.*

134. *Id.*

135. *Id.*

136. Lagos & Rudy, *supra* note 93, at 304-05.

Charter involving “any other rupture that violates basic constitutional principles and is so grave and not easily rectifiable through domestic measures as to prevent the government in question from being considered democratically constituted.”¹³⁷ The Juridical Committee opined that “it would be unnecessary to amend the OAS Charter, provided that the text of the Democratic Charter explicitly states that it is setting forth an interpretation of the OAS Charter, and assuming, of course, that the Democratic Charter is adopted by consensus.”¹³⁸

Yet, notwithstanding the IJC’s suggestion, the precise language of Article 19 and Preambular paragraphs 18 and 19 do not refer to Article 9 of the Charter, as amended by the Protocol of Washington. Rather, they refer simply to the “OAS Charter,” a term of ambiguous meaning when some states had ratified Article 9 and others had not. If the term “OAS Charter” were construed to refer to the only OAS Charter that would have been common to the community of states adhering unanimously to the Democratic Charter, then the object of the reference would have been the Charter without the Protocol of Washington. Under this view, the Democratic Charter would constitute an authoritative interpretation of the power of suspension under the original Charter, which had been exercised against Cuba ostensibly on grounds that related to Cuba’s intervention in the affairs of other Member States rather than its compliance with democratic norms of governance.

But such a technical parsing of the precise language of the Democratic Charter concerning its source of authority seems inconsistent with international practice concerning the interpretation of resolutions of this character. A former president of the Inter-American Juridical Committee, Mauricio Herdocia Sacasa, took the view that because of its unanimous adoption by the OAS General Assembly and its origins as an initiative of Quebec Summit of the Heads of State of the Americas, the Democratic Charter is more than a mere recommendation of the OAS General Assembly. Rather, like the Friendly Relations Declaration of the United Nations General

137. Observations and Comments of the Inter-Am. Jurid. Comm. on the Draft Inter-Am. Democratic Charter, Ann. Rep. of the Inter-Am. Jurid. Comm. to the Gen. Assemb., ¶ 38, OAS/Ser.Q/VI.32, CJI/doc.76/01 (2001), <http://www.oas.org/en/sla/iajc/docs/INFOANUAL.CJI.2001.ING.pdf>.

138. *Id.* ¶ 40.

Assembly, it might be an authoritative interpretation of the constitutive instrument of the organization.¹³⁹ Such UN resolutions have also been regarded as evidence of customary international law. Accordingly, one leading scholar argued that the Democratic Charter could reflect the articulation or codification of supervening regional custom.¹⁴⁰ Under these theories, as a matter of the special law of the Inter-American system. Either the theory of authoritative interpretation, crystallizing possibilities that may have seemed only latent in light of the early practice of the OAS, or supervening regional custom, the Democratic Charter would then serve as positive international law binding on all Member States of the OAS (and perhaps even non-member states subject to an emerging regional custom). Yet, these views have not received universal assent, as others appear to take the view that the Democratic Charter is merely a resolution of the General Assembly, which, albeit binding on the organs of the OAS such as its Secretariat, serves merely as recommendations to the member states themselves.¹⁴¹ In sum, the precise legal status of the Democratic Charter is, and until there is a new treaty instrument universally adopted by all OAS member states, probably will remain a matter of dispute.

It is not surprising that, even though the Member States took such care in establishing the legal basis for the enforcement mechanisms of the Democratic Charter, there would remain considerable doubt as to their legal nature and status. Articles 19-22 would appear to expand the grounds for intervention made available under the

139. MAURICIO HERDOCIA SACASA, *SOBERANÍA CLÁSICA, UN PRINCIPIO DESAFIADO . . . ¿HASTA DÓNDE?* (2005).

140. JOSÉ A. PASTOR RIDRUEJO, *CURSO DE DERECHO INTERNACIONAL PÚBLICO Y ORGANIZACIONES INTERNACIONALES* (2001); see *Asylum Case* (Colombia v. Peru), Judgment, 1950 I.C.J. 266, 274, 276-77 (Nov. 20) (presenting a case where Colombia based their submission partly on rules resulting from agreement and on an alleged custom); see also Inter-Am. Jurid. Comm. Res. I-3/95, *Democracy in the Inter-American System* (Mar. 23, 1995), Ann. Rep. of the Inter-Am. Jurid. Comm. to the Gen. Assemb., CJI/ISO/doc.3/96 rev. 1, at 25-36 (1996), <http://www.oas.org/en/sla/iajc/docs/INFOANUAL.CJI.1995.ING.pdf> (asserting that democracy is a binding norm in the Inter-American regional system).

141. See Jean-Michel Arrighi, *L'Organisation des États Américains et le droit International* 355 RECUEIL DES COURS LECTURES 238 (2012); see also *supra* notes 24-26 and accompanying text (showing Arrighi's initial comments on the Venezuelan withdrawal from the OAS).

Protocol of Washington. And, even assuming that these provisions are in fact legally binding as authoritative interpretations of the OAS Charter, it may still be true that their actual implementation is entirely a “political question,” as has been suggested by the OAS Secretariat’s Legal Counsel at the time the Democratic Charter was adopted.¹⁴² The difficulty of identifying the precise meaning of the Democratic Charter’s detailed terms might reveal why this should be so, since any inquiry into whether an alteration of a state’s constitution has occurred will inevitably raise enormously difficult questions of constitutional law and constitutional fact requiring the services of comparative constitutional law experts, as well as other disciplines. Doubts about the dangers that would arise by setting sail on this sea have caused at least one author to go so far as to suggest that the very inquiry would require the OAS to purport to be the authoritative interpreter not only of the OAS Charter but also of the internal constitutional law of a member state, a proposition fundamentally at war with support for democracy in the Member States.¹⁴³ Of course, such a broad view of the reach of the non-intervention norm, if taken to its logical extreme, would in turn eviscerate the Democratic Charter.

That said, doubt about the legal status of the Democratic Charter, factual uncertainties and risk of overreaching that attend the application of any extremely complex legal norm to real life situations, and the inevitably political character of implementation, may argue for restrained interpretation of the Democratic Charter. Subsequent practice seems to confirm this intuition.

b. Subsequent Practice Under the Democratic Charter

In general, subsequent practice under the Democratic Charter suggests that the OAS and its Member States have adopted a restrained interpretation of their powers and rights under Resolution 1080, the Protocol of Washington, and even the Democratic Charter. The principal case applying Resolution 1080 of 1991 before the

142. See Lagos & Rudy, *supra* note 93, at 294.

143. See Stephen J. Schnably, *The OAS and Constitutionalism: Lessons from Recent West African Experience*, 33 SYRACUSE J. INT’L L. & COM. 263, 265 (2005).

adoption of the Democratic Charter was the so-called “auto-coup” of Peruvian President Alberto Fujimori on April 5, 1992, in which the President dissolved the legislature unconstitutionally, leading to repeated OAS condemnation.¹⁴⁴ In the years following and before the adoption of the Democratic Charter, the OAS was presented with a number of cases that it deemed to be within Resolution 1080’s the scope: yet another “auto-coup” in Guatemala in 1993¹⁴⁵; and a near coup in Paraguay in the form of the near resignation of the President in the face of the failure of the Chief of Staff of the military to resign follow the President’s order that he do so.¹⁴⁶ On the other hand, in the face of an arguable congressional coup -- Ecuadorian President Abdala Bucaram’s removal from office by deposed by the Ecuadorian National Congress through what appeared to be unconstitutional procedures, the Permanent Council Resolution did not invoke Resolution 1080.¹⁴⁷

Ironically, however, the first case to present itself after the adoption of the Democratic Charter was Venezuela, when forces resisting President Hugo Chavez temporarily removed him from office with military support and the OAS Permanent Council adopted a resolution condemning his overthrow. Chavez was immediately re-installed, and there ultimately was no suspension of Venezuela.¹⁴⁸ In 2005 Ecuador’s President Gutierrez removed the members of the Supreme Court, the Constitutional Court and the Electoral Court. After the army refused to obey the President’s order to suppress demonstrators, the Congress, not following constitutional procedures, removed the President, installing Alfredo Palacio as President with the support of the Ecuadorean army. As in the earlier Ecuadoran case involving President Bucaram under Resolution 1080,

144. See PERINA, *supra* note 20, at 69-71 (showing that after an emergency meeting, the Permanent Council of the OAS invoked Resolution 1080, and urged the Peruvian authorities to immediately facilitate the full functioning of democratic institutions and to release the detained legislators, political leaders, and trade union leaders).

145. *Id.* at 71-72.

146. *Id.* at 72-74 (articulating that the Argentine, Uruguayan, and Brazilian Ambassadors on behalf of the MERCOSUR regional free trade organization and its own Democracy Clause, strongly encouraging the President not to resign).

147. *Id.* at 74-75.

148. *Id.* at 99-100.

neither the Permanent Assembly of the OAS nor the Government of Ecuador at any point invoked the Democratic Charter.¹⁴⁹ It was only in the Honduran political crisis of 2009 that the Permanent Council finally suspended a state from OAS membership under the Democratic Charter. The circumstances are worth recounting.

In early June 2009 President Zelaya asked the OAS Secretary General to send an electoral observer mission for a proposed referendum scheduled for June 28 on whether or not to convene a Constituent Assembly to amend the Honduran constitution to permit Zelaya to run for re-election or extend his term of office. This effort followed the precedent of the referendum already orchestrated in Venezuela by President Hugo Chavez to eliminate presidential term limits. The annual OAS General Conference meeting in San Pedro Sula, Honduras on June 2-3, as it happened, provided a forum for meetings between the Secretary General, the Honduran President, and the President of the Honduran Supreme Court. But, as tensions in Honduras mounted, on June 25, the Honduran representative at the OAS Permanent Council requested the assistance of OAS, and the Permanent Council. On June 26 the Permanent Council instructed the Secretary General to send a mission to support President Zelaya, although in the course of its deliberation the Permanent Council, unlike the Secretary General, never consulted with the National Assembly or Supreme Court of Honduras, perhaps dealing only with the Executive Branch as the “government” of Honduras entitled to request assistance under the Democratic Charter. Even though President Zelaya decided not to proceed with the referendum on June 28, the Honduran military on June 29 removed President Zelaya from office and put him on a plane to Costa Rica. The National Congress then appointed its own President, Robert Micheletti, as President of Honduras. Responding immediately on June 30, a special session of the OAS General Assembly convened and withdrew recognition of the Micheletti government and demanded the restoration of the Zelaya government. When this demand was ignored, on July 4 the General Assembly suspended Honduras from OAS in accordance with the Democratic Charter and the Protocol of Washington. Eventually, after free and fair elections in Honduras on

149. *Id.* at 93-94.

November 29, 2009 and further assurances of the return of regular democratic order, Honduras's suspension was lifted on June 1, 2011.¹⁵⁰ This, the first suspension of an OAS Member State since Cuba's suspension in the 1960's,¹⁵¹ ironically occurring on the heels of the OAS decision to lift Cuba's suspension, subject to conditions implying Cuba's commitment to observe the "practices, purposes, and principles of the OAS,"¹⁵² which presumably include its commitment to democracy in an as-yet to be determined level of compliance.

In the light of this subsequent practice, the organs of OAS, including both the OAS Juridical Committee and the Secretary General himself, have pointed to certain inadequacies in the Democratic Charter. Secretary General Insulza by summer 2007 had already expressed concerns about the lack of legal clarity concerning the term "government" under the Democratic Charter.¹⁵³ Based on its authority as the OAS's "advisory body on juridical matters" to

150. See PERINA, *supra* note 20, at 96-97, 101-03 (describing Venezuela's failed referendum in 2007 followed by a successful effort in 2009, removing the constitutional ban against more than two terms).

151. See *id.* at 39.

152. See Org. Am. States, AG/Res. 2438 (XXXIX-O/09), *Resolution on Cuba*, ¶ 2 (2009), <http://www.oas.org/en/sla/docs/AG04688E08.pdf> (providing that "the participation of the Republic of Cuba in the OAS will be the result of a process of dialogue initiated at the request of the Government of Cuba, and in accordance with the practices, purposes, and principles of the OAS"); see also Mauricio Vincent, *Cuba rechaza entrar en la OEA después de 47 años*, EL PAÍS (June 3, 2009),

https://elpais.com/internacional/2009/06/04/actualidad/1244066404_850215.html (showing that the Government of Cuba has yet to take up the OAS offer to return); Franco Ordoñez, *Is OAS move on Venezuela another effect of U.S.-Cuba détente?*, MIAMI HERALD (May 31, 2016), <http://www.miamiherald.com/news/nation-world/world/article81009017.html> (demonstrating that the OAS's approach toward the application of the Democratic Charter in Venezuela could also have implications for Cuba's willingness to return to the OAS).

153. See OAS Secretary General, *The Inter-American Democratic Charter: Report of the Secretary General pursuant to resolutions AG/RES. 2154 (XXXV-O/05) and AG/RES. 2251 (XXXVI-O/06)*, OEA/Ser.Q/VII.38, CP/doc.4184/07, annex, at 102 (2007), <http://www.oas.org/en/sla/iajc/docs/INFOANUAL.CJL2007.ING.pdf> [hereinafter OAS Secretary General Report] (raising the question to the Permanent Council whether the interpretation of the term "government" should be resolved to strengthen the implementation of the Democratic Charter).

take up issues “on its own initiative,”¹⁵⁴ the Juridical Committee then adopted a resolution suggesting it would study the issue.¹⁵⁵ While the Committee did not ultimately advance an interpretation of the meaning of “government” for purposes of the Democratic Charter, in early 2009, before the Honduran case came to a crisis, a rapporteur for the Inter-American Juridical Committee had already opined that the Democratic Charter suffered from three main inadequacies: first, it lacked “precise criteria” for determining when it applied; second, it did not resolve the ongoing “tension” between the principle of non-intervention and the “possibility of protecting democracy through collective mechanisms”; and, third, “access” to those “collective mechanisms,” meaning the right of governmental organs, such as legislatures or the judiciary, to request OAS assistance under the Democratic Charter was not clearly available.¹⁵⁶ The first and third

154. See Org. Am. States Charter arts. 99-100, *opened for signature* April 30, 1948, O.A.S.T.S. Nos. 1-C and 61 (entered into force Dec. 13, 1951) [hereinafter OAS Charter], http://www.oas.org/en/sla/dil/docs/inter_american_treaties_A-41_charter_OAS.pdf (authorizing that the Committee may undertake studies and preparatory work as it considers advisable, and may suggest the holding of specialized juridical conferences).

155. See Inter-Am. Jurid. Comm., Follow-up on the Application of the Inter-Am. Democratic Charter, ¶ 2, Ann. Rep. of the Inter-Am. Jurid. Comm. to the Gen. Assemb., OEA/Ser/Q/VII.38, CJI/RES. 132 (LXXI-O/07) (2007), <http://www.oas.org/en/sla/iajc/docs/INFOANUAL.CJI.2007.ING.pdf> (resolving to “conduct an interpretation of the conditions and access routes to the applicability” of the Charter); see also Eduardo Vio Grossi, Reasoned Vote, Follow-up on the Application of the Inter-Am. Democratic Charter, Ann. Rep. of the Inter-Am. Jurid. Comm. to the Gen. Assemb., OEA/Ser/Q/VII.38, CJI/doc.2740/07 rev. 2, at 88 (2007), <http://www.oas.org/en/sla/iajc/docs/INFOANUAL.CJI.2007.ING.pdf> (allowing the Judicial Committee “to interpret the following terms and/or concepts used in the text: a) Government”). But see Antonio Fidel Pérez, Explanation of Dissenting Vote on the Follow-up on the Application of the Inter-Am. Democratic Charter, Ann. Rep. of the Inter-Am. Jurid. Comm. to the Gen. Assemb., OEA/Ser/Q/VII.38, CJI/doc.284/07, at 88 (2007), <http://www.oas.org/en/sla/iajc/docs/INFOANUAL.CJI.2007.ING.pdf> (rejecting the undertaking because, first, the SYG’s report was directed towards the Permanent Council and, thus, the request for a legal opinion had not been formally and explicitly requested by the Secretary General or the Permanent Council, and, second, such a political and legal question was better undertaken by the organs of the OAS that were competent to address these questions).

156. See Jean-Paul Hubert, Follow-up on the Application of the Inter-Am. Democratic Charter, Ann. Rep. of the Inter-Am. Jurid. Comm. to the Gen. Assemb., OEA/Ser.Q/XIX.40, CJI/doc.317/09 corr. 1, at 46-7 (2009), <http://www.oas.org/en/sla/iajc/docs/INFOANUAL.CJI.2009.ENG.pdf>; see also

features have received considerable attention among critics of OAS efforts under the Democratic Charter,¹⁵⁷ particularly in the U.S. Congress where financial support for OAS is tentative at best.¹⁵⁸

The IJC rapporteur's analysis, did not result in a substantive resolution either at the IJC or at the political organs of OAS, does merit consideration for pointing to some of the intractable elements of the interpretive problem. The first feature, the lack of precise criteria, is problematic even under the narrower definition of Resolution 1080, as evidenced in the experience of the U.S. executive branch since the early 1980's in implementing the condition in annual U.S. appropriations legislation requiring the Executive Branch to terminate funding to a country when "a duly elected head of government has been overthrown by military coup or decree."¹⁵⁹ Indeed, even in the Honduran case, the U.S. never made a formal public determination that President Zelaya had been overthrown by a military coup; although, it did as a matter of policy suspend aid that would have been barred had it made such a determination.¹⁶⁰ The second difficulty identified by the rapporteur appears merely to re-state the question of the relation between two competing rights and duties, non-intervention and democracy,

Inter-Am. Jurid. Comm., Follow-up on the Application of the Inter-Am. Democratic Charter, Ann. Rep. of the Inter-Am. Jurid. Comm. to the Gen. Assemb., OEA/Ser.Q/XIX.40, CJI/RES. 160 (LXXV-O/09), at 46 (2009), <http://www.oas.org/en/sla/iajc/docs/INFOANUAL.CJI.2009.ENG.pdf> (showing that the report was, by resolution of the full IJC, forwarded to the Permanent Council of the OAS for its information).

157. See, e.g., PERINA, *supra* note 20, at 86 ("It seems odd, if not undemocratic and anachronistic, that the executive should be the only branch that can speak in defense of democracy" and "there is no consensus among member states as to what exactly is an 'unconstitutional alternation,' beyond the obvious military coup or auto-coup.").

158. See PETER J. MEYER, CONG. RESEARCH SERV., R42639, ORGANIZATION OF AMERICAN STATES: BACKGROUND AND ISSUES FOR CONGRESS, 15-17 (2016).

159. See Note, *Congressional Control of Foreign Assistance to Post-Coup States*, 127 HARV. L. REV. 2499, 2499-502 (2014) (providing extensive reports on the implementation of these provisions); Kelley Powell, *The History, Constitutionality, and Applicability of the Military Coup Provision in Appropriations Bills* (April 2017) (independent research paper, Catholic University of America, Columbus School of Law) (on file with author).

160. See PETER J. MEYER, CONG. RESEARCH SERV., R41064, HONDURAN POLITICAL CRISIS, JUNE 2009-JANUARY 2010, 13 (2010).

without making an analytic advance. However, the third difficulty concerning identifying the governmental entity entitled to receive OAS assistance under the Democratic Charter merits much closer consideration. In the Honduran case, there was military involvement, but the impetus to limit alleged executive branch usurpation came from the National Assembly. In the Venezuelan case, the applicability of the Democratic Charter also may turn on whether the legislative body is entitled to international protection and whether the cognizable threat to democracy can come from judicial aggrandizement, albeit at the behind of the executive branch.¹⁶¹

These cases and the IJC report thus raise the question of whether the Democratic Charter should be read in light of the broader international developments and principles that gave rise to its adoption, rather than a traditional international conception that only organs of a government with constitutional authority to speak for a government internationally can exercise those functions.¹⁶² Can these broader developments in the international legal system serve as a purposive gloss on the Democratic Charter, opening the door to OAS efforts to act on behalf of domestic organs that do not have ordinarily the capacity to request that assistance?

To address these kinds of foundational questions concerning the international capacity of domestic organs and their possible relationship to international organizations, it seems appropriate to consult as "the relevant rules" of international law the larger foundational principles that govern the law and practice of international organizations. Moreover, in considering the meaning of the Democratic Charter as an authoritative interpretation of the OAS Charter, as amended, the relevant temporal context is the seminal change in the international system that occurred in the last decade of the last century and accompanied the adoption of the Protocol of

161. See Felter & Renwick, *supra* note 3 (describing recent developments in Venezuela).

162. Cf. Vienna Convention on the Law of Treaties, *supra* note 15, at 334 (identifying, in Article 7, the members of a "government" that are capable of representing a state in its treaty-making capacity, none of which include members of a legislative body or court); *id.* (describing, in Article 8, an act relating to the conclusion of a treaty performed by a person not authorized is considered "without legal effect").

Washington and the Democratic Charter.

3. *Relevant Rules of International Law:*

*The Democratic Entitlement and Security Council Decisions
Supporting the View that All Assaults on Democracy Endanger
International Peace and Security*

It is fair to say that the subsequent practice reveals restrained interpretation, either because of the legal doubts described above or merely in the exercise of political discretion (even in the case of Venezuela). However, this restrained interpretation does not appear to accord with the original ambitions of Resolution 1080, the Santiago Declaration, the Protocol of Washington, and the Democratic Charter. Rather, the context for these instruments would argue for a much more robust understanding of the OAS rights and duties with respect to the protection of democracy. Such a reading doctrinally would unify earlier OAS practice suspending Cuba on the ground of collective security and potentially suspending Venezuela on the immediate ground of protecting democracy, turning on its head President Maduro's analogy in his letter of withdrawal to the earlier OAS suspension of Cuba¹⁶³; and, practically, it would serve the larger objective of avoiding a threat to the peace the dissolution of democracy in Venezuela might engender.

a. *The Democratic Entitlement and Democratic Peace Theory*

It might be argued that the OAS developments, namely ranging from Resolution 1080, the Protocol of Washington, and the Democratic Charter, must be viewed in a larger legal context; one establishing a democratic entitlement of peoples, a correlative duty to protect and advance democracy through robust implementation of regional democracy clauses, and a keen appreciation of the relationship between these rights and duties and the furthering of international peace and security. The democratic entitlement thesis emerged in the aftermath of the fall of the Berlin Wall and the dissolution of the Soviet Union, both among leading international lawyers¹⁶⁴ and political scientists.¹⁶⁵ At roughly the same time, so-

163. See Venezuela Letter Denouncing the OAS, *supra* note 17.

164. Compare Thomas M. Franck, *The Emerging Right to Democratic*

called democratic peace theory was advanced, drawing on traditional Kantian claims,¹⁶⁶ yet establishing a new “conventional wisdom” that democratic governments do not go to war against each other.¹⁶⁷ For this and other reasons, the new Clinton Administration articulated as its grand strategy so-called “Democratic Enlargement,”¹⁶⁸ a set of

Governance, 86 AM. J. INT'L L. 46, 46 (1992) (making largely empirical claim by stating that “[i]ncreasingly, governments recognize that their legitimacy depends on meeting a normative expectation of the community of states”), with W. Michael Reisman, *Sovereignty and Human Rights in Contemporary International Law*, 84 AM. J. INT'L L. 866, 867 (1990) (making a so-called Yale School of Public International Law’s teleological approach by relying on Article 1 of the Charter’s statement of “purpose” to develop friendly relations “based on respect for the principles of equal rights and self-determination of peoples”). See generally Myres S. McDougal & Florentino P. Feliciano, *LAW AND MINIMUM WORLD PUBLIC ORDER: THE LEGAL REGULATION OF INTERNATIONAL COERCION* (1961) (assessing whether decisions conform with an implicit calculus measuring conformity with certain postulated values critical to world order).

165. See FRANCIS FUKUYAMA, *THE END OF HISTORY AND THE LAST MAN* (1992) (generally arguing that the fall of the Berlin Wall and defeat of communism signaled the endpoint of humanity’s political evolution, with Western liberal democracy as the final form of human government); see also Francis Fukuyama, *The End of History?*, 16 NAT’L INTEREST 3 (1989) (articulating Fukuyama’s first publication of his ideas that were later implemented in his book, while he was serving as Director of the State Department’s Policy Planning Staff); see, e.g., SAMUEL P. HUNTINGTON, *THE CLASH OF CIVILIZATIONS AND THE REMAKING OF WORD ORDER* 31 (1996) (showing criticisms of Fukuyama’s work by his own teacher when he received his doctorate in Government from Harvard’s doctorate, who argued that continuing global cultural competition falsified Fukuyama’s thesis); FRANCIS FUKUYAMA, *OUR POSTHUMAN FUTURE: CONSEQUENCES OF THE BIOTECHNOLOGY REVOLUTION* (2002) (clarifying his original thesis by raising the danger that humanity’s control of its own evolution may well undermine liberal democracy); Francis Fukuyama, *At the ‘End of History’ Still Stands Democracy*, WALL STREET J. (June 6, 2014), <https://www.wsj.com/articles/at-the-end-of-history-still-stands-democracy-1402080661> (admitting that while liberal democracy still had no real competition from more authoritarian systems of government “in the realm of ideas,” nevertheless he was less idealistic than he had been “during the heady days of 1989”).

166. See Michael W. Doyle, *Kant, Liberal Legacies, and Foreign Affairs, Part I*, 12 PHIL. & PUB. AFF. 205, 213 (1983) (drawing on Kantian theory that democracies do not go to war against each other).

167. See Editors’ Note, 19 INT’L SECURITY 3 (Steven E. Miller et al. eds., 1994) (proposing a new “conventional wisdom” but suggesting that too it would now be critiqued).

168. See Anthony Lake, Assistant to the President for National Security Affairs, *From Containment to Enlargement*, Address at the School of Advanced International Studies, Johns Hopkins University (Sept. 21, 1993) in DEP’T ST.

ideas that carried even into the foreign policy agenda of the Bush administration in the decade that followed.¹⁶⁹ In short, the common assumption by the early 1990's and the two decades that followed was that democracy is intimately connected to the preservation of peace, at least empirically. This perceived fact had implications for the law of international organizations, such as the UN and OAS.

b. Security Council Determinations—Haiti

The requirements for peace were built into the DNA of OAS, given its connection to the Rio Treaty¹⁷⁰ and its status as a “regional organization” Chapter VIII of the UN Charter.¹⁷¹ In fact, the U.S. legal rationale for the blockading Cuba, described then as a “quarantine,” to interdict further Soviet deliveries for nuclear-

DISPATCH, 1993, <http://dosfan.lib.uic.edu/ERC/briefing/dispatch/1993/html/Dispatchv4no39.html> (describing the strategy of enlargement as including four features: (1) reinforce the community of major market democracies, (2) nurture and consolidate new democracies and market economies, (3) counter aggression by states hostile to democracy and markets, and support their liberation when possible, and (4) pursue a humanitarian agenda by encouraging democracy and market economies in regions of humanitarian concern).

169. See George W. Bush, U.S. President, Second Inaugural Address (Jan. 20, 2005), in THE AVALON PROJECT AT YALE LAW SCHOOL, http://avalon.law.yale.edu/21st_century/gbush2.asp (showing that the “Democratic Enlargement” strategy was continually characterized in the goals of U.S. foreign policy); see *supra* notes 107-23 and accompanying text (discussing the insertion of a federalism reservation in the ratification of the initial OAS Charter); see *infra* notes 196-201 and accompanying text (discussing the realization of the Civil Rights Amendments following the U.S. Civil War only in the period between the adoption of the OAS Charter and the Protocol of Washington); see also William Safire, *Bush's 'Freedom Speech'*, N.Y. TIMES (Jan. 21, 2005), <http://www.nytimes.com/2005/01/21/opinion/bushs-freedom-speech.html?mcubz=3> (asserting that President Bush's used his inauguration speech to expound his basic reason for the war and his vision of America's mission in the world and referenced the word “freedom” forty-nine times).

170. See Sanders, *supra* note 48, at 382 (explaining how the organic pact of the Inter-American System was designed to improve and strengthen the system and to bring into formal relationship the disparate bodies that previously existed).

171. See Charter of the Organization of American States, *supra* note 13, 2 U.S.T. at 2396 (declaring the Organization of American States, within the United States, as a “regional agency” in order to put into practice the principles on which it is founded and to full its regional obligations under the Charter of the United States).

weapons-capable missiles, was based on authorization granted by a decision of the OAS Permanent Council meeting as the "Provisional Organ of Consultation" under the Rio Treaty.¹⁷² These measures were unrelated, at least in law, to the question of democracy in Cuba. Given the Cold War struggle between democratic capitalism and communism, it would have been implausible to assert that Cuba's internal governance could serve as the ground for an OAS authorization of a blockade or of Cuba's suspension from OAS. But beginning in the 1990's, the Security Council began to examine issues previously thought to be within the "domestic jurisdiction" of states, which the organization had been bound to respect.¹⁷³ It even went so far as to enable it to make factual determinations concerning the implications of threats to democracy for its authority to act under Chapter VII of the UN Charter in the face of threats to the peace. As a "regional" organization of the UN under Chapter VIII of the UN Charter, OAS could not be indifferent to this development in UN law and practice.

The case of Haiti demonstrates the factual and legal consequences for OAS and its Member States and the Security Council's increasing appreciation of the connection between democracy and peace. Almost contemporaneously with the Santiago Declaration and the adoption and ratification of the Protocol of Washington, in Resolution 940 (1994) the Security Council for the first time drew the conclusion that the overthrow of a democratically-elected government could serve as a basis for a Security Council determination of the "threat to the peace," as was required under Chapter VII for its decision to authorize military force to reverse the coup that had overthrown the democratically elected government of Jean-Bertrand Aristide.¹⁷⁴ Indeed, the UN was acting here to support a regional consensus reflected in an OAS-approved regional embargo on trade with Haiti, which, even after earlier U.N.-imposed

172. See Marjorie Whiteman, *The Cuban Missile Crisis, 1962*, in DIGEST OF INTERNATIONAL LAW 523-24 (1965).

173. See U.N. Charter, *supra* note 42, art. 2(7) ("Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state.").

174. See S.C. Res. 940, U.N. Doc S/RES/940, ¶ 4 (July 31, 1994) (authorizing collective action to depose de facto authorities in Haiti).

sanctions,¹⁷⁵ had not been able to force the military government to return power to civilian authorities.¹⁷⁶ Admittedly, the Security Council's determination that the situation in Haiti was a "threat to the peace" under Chapter VII turned also on an empirical finding that the democratic rupture was accompanied by "the incidence of humanitarian crises, including mass displacements of population, becoming or aggravating threats to international peace and security."¹⁷⁷ Yet, the Security Council's assertion of authority to act based on its appreciation of the particular facts of the situation turned necessarily on the theory that the rupture of democracy could, directly (through the external behavior of non-democratic governments under the Democratic Peace hypothesis) or indirectly (through the disorder, including refugees flows, that can result from democratic rupture), constitute a threat to international peace and

175. See S.C. Res. 841, U.N. Doc. S/RES/841, at 2, ¶ 4 (June 16, 1993) [hereinafter S.C. Res. 841] ("Recalling . . . the provisions of Chapter VIII . . . and stressing the need for effective cooperation between regional organizations and the United Nations."); see also Rep. of the S.C., at 17, U.N. Doc. S/PV.3238 (1993) [hereinafter Rep. of the S.C.] (highlighting the statement of Brazilian representative Ambassador Sardenberg, including as a crucial factor that made the Haiti Chapter VII determination unique that "action ha[d] already been taken in the same direction by the OAS and by the General Assembly [and] [t]hat prior action provides a framework which warrants the extraordinary consideration of the matter by the Security Council and the equally extraordinary application of measures provide for in Chapter VII of the United Nations Charter").

176. See Rep. of the S.C., *supra* note 175, at 7 (including the statement of Canadian representative Ambassador Frechette that "the OAS found it necessary to seek the support of the United Nations"); Rep. of the S.C., *supra* note 175, at 17 (restating Brazilian representative Ambassador Sardenberg who described "the request by the legitimate Government of Haiti that the Security Council make universal and mandatory" sanctions since OAS sanctions were only "recommended"); see also Charter of the Organization of American States, *supra* note 13, art. 72 ("The Councils may, within the limits of the Charter and other interAmerican instruments, make recommendations on matters within their authority.").

177. S.C. Res. 841, *supra* note 175, ¶ 9 (recalling the February 26, 1993 statement, in which the Council expressed concern over the "the incidence of humanitarian crises, including mass displacements of population, becoming or aggravating threats to international peace and security"); see generally *Peru Calls for Regional Action to Avoid Venezuela 'Sea of Blood'*, REUTERS, June 12, 2017, <http://ca.reuters.com/article/topNews/idCAKBN1932FJ-OCATP> [hereinafter *Sea of Blood*] (arguing that Latin America must take action to aid Venezuela in resolving its political crisis or risk the country turning into a "sea of blood").

security with the meaning of Chapter VII.¹⁷⁸ Given the close cooperation of the UN and OAS in coordinated economic sanctions regimes, ultimately leading a Security Council authorization to use force to restore democracy in Haiti, it seems plausible to argue that OAS legal competence as an organization includes the authority to take coercive measures, such as the suspension provisions of the Democratic Charter, to protect democracy in an OAS Member State.

In sum, the Protocol of Washington of 1992, and the Democratic Charter which arguably authoritatively interprets it, were adopted precisely at the confluence of several waves of ideas – the democratic entitlement as a human right; the empirically and normatively-based belief that democracies do not go to war against each other; and the international community's willingness, through a united Security Council, to authorize forcible intervention to protect democracy in a UN member state (when the Council judged that the threat to democracy directly or indirectly would also entail a threat to international security).

This confluence of ideas arguably serves as the set of fundamental assumptions for interpreting the meaning of the Protocol of Washington and the subsequent practice of the OAS and its Member States under the Protocol. In this context, it would seem reasonable to argue that the "legal" inadequacies identified by the Secretary General and the Inter-American Juridical Committee are better understood as political reasons for restrained application rather than restrained interpretation. If so, the Democratic Charter could be construed to address challenges to non-executive organs of government and to all forms of creeping authoritarianism. Together, the OAS Charter, its resolutions including the Democratic Charter, and OAS and member state practice under them could comprise an OAS Democracy Clause, forming an "obligation arising from" the Charter. However, that this strong version of an OAS Democracy Clause is a permissible interpretation does not render it a necessary, or even a necessarily desirable, interpretation of current law in the light of the full legal context and particular factual circumstances in which it might be applied.

178. See U.N. Charter, *supra* note 42, art. 39.

C. SYNTHESIZING THE OAS DEMOCRACY CLAUSE AND THE OAS
WITHDRAWAL CLAUSE – DISCRETION IN INTERPRETATION

To review, because of the particular wording of the OAS withdrawal clause, the meaning of the OAS Democracy Clause is a threshold question in determining the range of permissible interpretations of the OAS withdrawal clause. This is especially the case if the withdrawal, as appears to be the case in GOV's attempt to withdraw, is triggered by the withdrawing state's arguable failure to comply with the OAS Democracy Clause. It is useful to consider the two extreme possibilities for synthesizing the OAS rules governing state withdrawal with OAS law concerning democracy.

In general, a narrow view of the OAS Democracy Clause would give priority to the original text of the OAS Charter as the only universally binding conventional norm in the Western Hemisphere. Even in treating the Democratic Charter as an authoritative interpretation of the Protocol of Washington, broadening the scope of Article 9 to those states to which it is applicable, one would still need to take into account the restrained interpretation OAS has given to both the Protocol and the Democratic Charter, limiting it to the classic case of military coups overthrowing elected heads of government. Meanwhile, a broader conception of the Democracy Clause could rely on the context in which the Protocol of Washington and Democratic Charter were negotiated. It would look to the acquiescence in this emerging norm expressly or impliedly manifested by all OAS member states through the unanimous adoption of Democratic Charter at the OAS General Assembly. It might even construe the language of the Democratic Charter to address all cases of unconstitutional threats to democratic order of a Member State. Finally, it would treat any contrary subsequent practice and restraint in the imposition of sanctions merely as evidence of politically motivated caution.

In the case of Venezuela, a narrow reading of the obligations "arising" from the OAS Charter might therefore exclude any obligations or sanctions imposed by the OAS pursuant to the Democratic Charter, if the case is not deemed to fall within the

technical ambit of a classic *golpe de estado*.¹⁷⁹ Moreover, it would exercise restraint in asserting any claims under the Democratic Charter based on new facts that will arise during the remaining period of the GOV's membership, when dues are fully paid and the required two-year notice period expires. Meanwhile, a broad reading of the "arising" requirement might be deemed to include those obligations or sanctions imposed by the OAS under the Democratic Charter against Venezuela if it is deemed to fall within the larger ambit of an unconstitutional "interruption" or "alteration" of the Venezuelan regime. Moreover, the GOV would continue to be bound under this broader view during the period of withdrawal and would continue to have its rights of participation in the OAS policed by the OAS pursuant to the Democratic Charter with respect even to facts that arise during the period of withdrawal.

If, then, the OAS as an organization and its Member States have legal-policy discretion in developing a position on the synthesis of its law of democracy and law of withdrawal, two questions arise. First, if the question of the best interpretation is informed by the best current understanding of the OAS legal system's capacities for protecting democracy, it should be important to consider the range of options for a legally effective Democracy Clause, in light of the varying institutional capacities and contexts that have given rise to varying degrees of legal obligation. In short, a general consideration of the range of Democracy Clauses is a preliminary question to legal-policy choice situating the OAS system within that range. Second, if the question of the best interpretation must be informed by policy-based criteria concerning the efficacy of varying interpretations of the withdrawal clause in actually serving the goal of promoting democracy, both now and in the future, the best interpretation ought to take into account recent advances in the study of treaty compliance, most notably in the scholarship developed under rational choice theory. These two questions are considered in turn in Parts III and IV.

179. See OAS Res. 1080, *supra* note 91.

III. THE LEGAL NATURE OF DEMOCRACY CLAUSES

Viewing democratization in the context of the OAS as a species of legal obligations does not do justice to the full range of considerations and preconditions for democracy, some of which may well be eroding in recent years.¹⁸⁰ The focus here is on the theory identifying criteria for determining whether, and the extent to which, democracy has become a “legal” norm. Law and political science scholarship in the last generation have developed a language to describe the ongoing process of democracy’s “legalization.” With an understanding of the component parts of this legalization, it becomes possible to consider the potential range of options in interpreting the OAS Democracy Clause. A case study of the shifting internal U.S. “Democracy Clause” from a largely political device at the time of the adoption of the Charter of 1948 to a highly legalized norm when the Protocol and Democratic Charter were adopted may provide useful potential boundary points in the interpretation of the OAS Democracy Clause. The U.S. case study also confirms that the OAS Democracy Clause moved during that period from its origins in “soft” law to some version of “harder” law, even if it does not reveal the precise extent of that shift.

A. THE LEGALIZATION OF DEMOCRACY – OBLIGATORY, PRECISE AND ENFORCEABLE

Much as international lawyers seem to have rediscovered political science and other disciplines,¹⁸¹ political scientists of the last generation have rediscovered law.¹⁸² In exploring “variation” in the

180. See, e.g., Larry Diamond, *Facing Up to the Democratic Recession*, 26 J. DEMOCRACY 141, 144 (2015).

181. See Anne-Marie Slaughter, Andrews S. Tulumello & Stepan Wood, *International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship*, 92 AM. J. INT’L L. 367, 367 (1998) (explaining how international lawyers seem to be rediscovering political science and other disciplines); see also INTERDISCIPLINARY PERSPECTIVES ON INTERNATIONAL LAW AND INTERNATIONAL RELATIONS: THE STATE OF THE ART (Jeffrey L. Dunoff & Mark A. Pollack eds., 2013) (providing thematic and substantive issue-area exemplars of inter-disciplinary analysis of international law).

182. See Judith Goldstein et al., *Introduction: Legalization and World Politics*, 54 INT’L ORG. 385 (2000) (noting how the last generation of political scientists

“use and consequences of law in international politics,” and defining law as “a particular form of institutionalization,”¹⁸³ international relations scholars have developed formal criteria: “the degree to which rules are obligatory, the precision of those rules, and the delegation of some functions of interpretation, monitoring, and implementation of a third party.”¹⁸⁴ These criteria receive parallel attention from international lawyers when they assess whether or not a norm is deemed “legally-binding,” rather than a merely political commitment¹⁸⁵; whether the norm is sufficiently “determinate” to be enforced¹⁸⁶; and whether or not the norm is actually subject to “compliance” through collective review and enforcement mechanisms, such as courts and other third parties.¹⁸⁷ In sum, the legalization of democracy as a domestic condition required by international law can thus be viewed through the three prisms of legalization, tools that from a political science standpoint can cut across domestic and international analysis.

There is some convergence, moreover, between international lawyers and political scientists in viewing democracy as a set of institutions performing a set of functions that cut across the national-international (isn't national-international divide oxymoronic) AFP: I have chosen not to make comments except in response to comments.

have rediscovered law).

183. *Id.* at 386.

184. *Id.* at 387.

185. See Prosper Weil, *Towards Relative Normativity in International Law?*, 77 AM. J. INT'L L. 413, 414-15 (1983) (meditating on the so-called “hard law” and “soft law” divide in international law and calling for restraint in the development of low-quality “soft law” that might undercut the efficacy of international law in performing its functions).

186. See THOMAS FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* 74-75 (1990) (distinguishing between so-called “Sophist” norms, which entail such complexity that their determinacy is questionable in many applications and so-called “[i]diot” norms, which are so apparently simple that their application is suspect without further norm-elaboration through interpretation or precedent).

187. See, e.g., Karen J. Alter, Lawrence R. Helfer & Jacqueline McAllister, *A New International Human Rights Court for West Africa: The Ecowas Community Court of Justice*, 107 AM. J. INT'L L. 737, 737-38 (2013) (describing the effectiveness of one regional human rights organization). But see Ingrid Wuerth, *International Law in the Post-Human Rights Era*, 96 TEX. L. REV. 6 (forthcoming 2017) (observing that “widespread violations of some international law rules likely make it more difficult to enforce others”).

I generally don't trouble myself with happy-to-glad editorial changes. But really? The idiom used in the text is rather conventional. It hardly seems appropriate to call it oxymoronic, thereby insinuating the usage is moronic. divide. This idea is potentially important as one considers the continuum of levels of integration from state, to federation, to a free trade area, or a confederation of states. Thus, international relations scholars tend to focus on democracy's benefits in the effects of democracy at one level to cooperation at other levels; for example, in facilitating international cooperation by democratic regimes through international organizations,¹⁸⁸ and in the role of international organizations in supporting domestic democratic development.¹⁸⁹ That said, rather than focusing on causality and variation, international law scholars continue to identify "democracy," in normative terms, as the fundamental basis for legitimacy, both domestically and internationally.¹⁹⁰

Given the potential for bi-directional flows of international and domestic effects, the very issue raised by the OAS Democracy Clause, it might be useful to focus on extreme cases that can illustrate these bi-directional flows. And given the critical role the U.S. played in both efforts at international legalization, U.S. democratic development can offer two important cases that can show this potential range for these bi-directional flows. At one end of the spectrum, the U.S. internal democracy clause at the time the U.S. adhered to the original OAS Charter. At the other, the revised internal U.S. democracy clause when the U.S. adhered to the Protocol of Washington and Democratic Charter. Briefly stated, it

188. See, e.g., Edward D. Mansfield, Helen V. Milner & B. Peter Rosendorff, *Why Democracies Cooperate More: Electoral Control and International Trade Agreements*, 56 INT'L ORG. 477 (2002).

189. See, e.g., John C. Pevehouse, *Democracy from the Outside-In? International Organization and Democratization*, 57 INT'L ORG. 515 (2002).

190. See Daniel Bodansky, *Legitimacy in International Law and International Relations*, in INTERDISCIPLINARY PERSPECTIVES ON INTERNATIONAL LAW AND INTERNATIONAL RELATIONS: THE STATE OF THE ART 330 (2013). But see Jean d'Aspremont, *1989-2010, The Rise and Fall of Democratic Governance in International Law*, in SELECT PROCEEDINGS OF THE EUROPEAN SOCIETY OF INTERNATIONAL LAW 549-50 (J. Crawford ed., 2011) (noting weakening of the position that international law requires states to be democratic).

can be argued that limitations on the U.S. commitment to democracy at the time of the founding of OAS precluded a strong OAS commitment to democracy and in turn limited the influence OAS could have in promoting democracy in its Member States, including the U.S. As already noted, resistance to racial equality in U.S. domestic law motivated the federalism reservation to the initial U.S. ratification of OAS Charter, whereas U.S. democracy promotion efforts in the 1990s were facilitated by the domestic transformation of U.S. democracy, leaving the U.S. less susceptible to the charge of hypocrisy. Arguably, therefore, the more robust U.S. commitment to democracy a half-century after the creation of the OAS enabled the U.S. to promote a stronger commitment to democracy in OAS, which thereby enabled OAS itself to become more strongly committed to democracy within its Member States.

Observing these changing relationships between domestic law and international law does not establish causality, of course. Yet, at a minimum, the two different U.S. domestic conceptions of democracy, as well as the two different U.S. approaches to international democracy promotion and its legalization in OAS, evidence correlations that provide a paired set of alternatives for OAS. More importantly, however, recognition of the significance of the social, economic and political changes in the U.S. that were required for this transformation should serve as a cautionary reminder of difficulty involved in the legalization of a strong commitment to democracy.

B. TWO U.S. DEMOCRACY CLAUSES —FROM “SOFT” TO “HARD” DEMOCRACY LAW

In effect, two different sets of constitutional provisions have served as the Democracy Clauses of the U.S. Constitution. First the Guarantee Clause, under which the federal government “guaranteed” the “republican” character of the states,¹⁹¹ was interpreted in a way so as not to compel the federal government to intervene in southern

191. See U.S. CONST. art. 4, § 4 (“The United States shall guarantee to every state in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.”).

states to terminate slavery. Later, the Equal Protection Clause of the 14th amendment served as the primary vehicle for the protection democracy in the states.

1. *Soft Semi-International Law*

The pre-Civil War U.S. Constitution was as much akin to a treaty organization as it was to a nation-state.¹⁹² The Guarantee Clause, from that perspective, was more like a Democracy Clause in an international or regional organization. In *Luther v. Borden*¹⁹³, which was superficially a simple trespass case, rebels against the lawful government of the State of Rhode Island claimed that because the defendant government was unlawful, its imprisonment of the plaintiffs for insurrection was unlawful as well. Yet the Supreme Court determined that the Guarantee Clause was a political question committed to the political branches of the federal government for its enforcement, rather than a matter fit for judicial determination.¹⁹⁴ *Luther* reflected precisely the conception of state sovereignty that accorded with the rights of states under international law against intervention by a supra-national authority.¹⁹⁵

Thus, if the Supreme Court could not determine whether a state government satisfied the requirements of the Guarantee Clause for

192. See, e.g., DAVID HENDRICKSON, *PEACE PACT: THE LOST WORLD OF THE AMERICAN FOUNDING* 266 (2003).

193. See *Luther v. Borden*, 48 U.S. 1, 1 (1948) (addressing the issue of whether the Court had the constitutional authority to declare which dissident group, protesting Rhode Island operating under an archaic system of government established by a 1663 royal charter, and the old charter group—constituted the official government of Rhode Island).

194. See *id.* at 1-2 (holding that “the power of determining that a state government has not been lawfully established” did not belong to federal courts, and that the creation of republican forms of government and the control of domestic violence were essentially political matters that the Constitution commits to other branches of government).

195. See *id.* at 47 (1948) (writing for the Court, Chief Justice Taney stated, “No one, we believe, has ever doubted the proposition, that, according to the institutions of this country, the sovereignty in every State resides in the people of the State, and that they may alter and change their form of government at their own pleasure. But whether they have changed it or not, by abolishing an old government, and establishing a new one in its place, is a question to be settled by the political power. And when that power has decided, the courts are bound to take notice of its decision, and to follow it.”).

the narrow purposes of deciding a trespass case, it certainly could not look into the nature of the state's system of representation or the quality of its protection for political parties. *A fortiori*, the Supreme Court certainly could not look into the nature of the state's political economy for the purpose of determining how substantive dimensions of democracy, such as the slavery question, were being addressed. The political organs of the Federal Government never judged the credentials or the southern states to be invalid or otherwise suspended their participation in the Federal Government.

Of course, it took a Civil War and amendments to the Constitution to make the fundamental breakthrough in political economy required for the end of slavery in the United States.¹⁹⁶ Yet the promise of those amendments was never realized, as the political control exercised by the slave-holding class in the American South, for nearly a century, was reconstituted through a sharecropping system, including debt peonage and other instruments,¹⁹⁷ while educational access was denied through the separate-but-equal doctrine,¹⁹⁸ and voting rights were compromised through disqualifying requirements.¹⁹⁹ Thus, a century later, at the time of the adoption of the OAS Charter, post-Civil War Reconstruction's failure resulted in a legacy of repression for African Americans through limits on voting rights and inferior education in segregated schools.²⁰⁰ It is not surprising that the Senate Foreign Relations Committee insisted on an elliptical federalism clause to disguise its fear that the OAS Charter's commitment to democracy and equality might de-stabilize

196. See U.S. CONST. amend. XIII (abolishing slavery); see also U.S. CONST. amend. XIV (guaranteeing due process and equal protection rights to all legal persons); U.S. CONST. amend. XV (conditionally assuring voting rights to all persons).

197. See generally ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877 (1988) [hereinafter FONER, AMERICA'S UNFINISHED REVOLUTION].

198. See *Plessy v. Ferguson*, 163 U.S. 537, 548-49 (1896) (announcing the "separate but equal" doctrine, later applied to schools, in the context of separate accommodations for railroad passengers).

199. See, e.g., *Breedlove v. Shuttles*, 302 U.S. 277, 281-82 (1937) (rejecting an Equal Protection Clause challenge to a Georgia poll tax).

200. See FONER, AMERICA'S UNFINISHED REVOLUTION, *supra* note 197, at 575-612 (detailing the end of Reconstruction and its effects for African-American economic, educational and political participation).

the anti-democratic *status quo* in the U.S. states.²⁰¹

2. *Hard Domestic Constitutional Law*

A century later after *Luther v. Borden*, African-Americans continued to be denied the effective exercise of their right to vote when state and federal legislative districts were designed in ways that were not equi-populous or otherwise shaped in ways that had the effect of diluting the voting power of African-American constituencies. Though bound by precedent not to rely on the Guarantee Clause, in 1962 in *Baker v. Carr*, the U.S. Supreme Court decided that the structure of state governments – namely, whether their voting rules comported with the Equal Protection Clause of the Fourteenth Amendment to the Federal Constitution – were fit for judicial, rather than merely political, review.²⁰² The U.S. Supreme Court said:

Clearly, several factors were thought by the Court in *Luther* to make the question there ‘political’: the commitment to the other branches of the decision as to which is the lawful state government; the unambiguous action by the President, in recognizing the charter government as the lawful authority; the need for finality in the executive’s decision; and the lack of criteria by which a court could determine which form of government was republican. . . . Even though the Court wrote of unrestrained legislative and executive authority under this Guaranty, thus making its enforcement a political question, the Court plainly implied that the political question barrier was no absolute: “Unquestionably a *military government*, established as the permanent government of the State, would not be a republican government, and it would be the duty of Congress to overthrow it.” Of course, it does not necessarily follow that if Congress did not act, the Court would. For while the judiciary might be able to decide the limits of the meaning of ‘republican form,’ and thus the factor of lack of criteria might fall away, there would remain other possible barriers to decision because of primary commitment to another branch, which would have to be considered in the particular fact setting presented. That was not the only occasion on which this Court indicated that lack of criteria does not obliterate the Guaranty’s extreme limits: ‘The guaranty is of a republican form of government. No particular government is designated as republican, neither is the exact form to be guaranteed, in

201. See OAS Charter, Resolution of Ratification, 96 CONG. REC. 13608 (Aug. 28, 1950) (reporting debate of the Senate Foreign Relations Committee).

202. *Baker v. Carr*, 369 U.S. 186, 237 (1962).

any manner especially designated. Here, as in other parts of the instrument, we are compelled to resort elsewhere to ascertain what was intended.²⁰³

Translated to the OAS Democracy Clause, the possible significance of this passage is the Guarantee Clause could have been determinate enough to decide whether a classical coup has occurred, although it remains unclear whether it could reach other forms of “unconstitutional alteration.” But this question ultimately never needed to be reached or resolved. For the Supreme Court then decided that certain aspects of the question whether a state government was “republican” in character could be subject to judicial review under a separate provision of the U.S. Constitution relating to individual rights. It found in the Equal Protection Clause of the Fourteenth Amendment to the Constitution a substantive individual right in the form of a legally enforceable guarantee that electoral districts must be configured in accordance with the one-man, one-vote principle.²⁰⁴

It was no accident then that the Supreme Court's intervention in state politics in *Baker* followed almost inexorably from the new view announced in its *Brown v. Board of Education* decision in 1954, post-dating the adoption of the OAS Charter, that separate but equal education between blacks and whites was no longer tolerable under the Equal Protection Clause.²⁰⁵ The ripple effects of *Brown* and

203. *Id.* at 222 n.48 (emphasis added) (citations omitted) (providing past examples in which the Court had intervened to correct constitutional violations in matters pertaining to state administration and the officers through whom state affairs are conducted).

204. See U.S. CONST. amend. XIV, § 1 (“No State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws.”).

205. See *Brown v. Board of Educ.*, 347 U.S. 483, 483 (1954) (rejecting earlier precedent under the Fourteenth Amendment and holding that “separate but equal” school districts based on racial classification violated the constitutional guarantee of equality of treatment); see also MARY L. DUDZIAK, *COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY* 95-96, 100 (2000) (suggesting that racial segregation frustrated the Government's pursuit of its Cold War aims because “[r]acial discrimination furnishes grist for the Communist propaganda mills, and it raises doubts even among friendly nations as to the intensity of our devotion to the democratic faith”); Mary L. Dudziak, *Brown as a Cold War Case*, 91 J. AM. HIST. 32, 32 (2004) (explaining that “the American concept and practice

Baker later enabled the U.S. Congress to enact, and for the Supreme Court subsequently to affirm, that racial integration in commerce was necessary for the fashioning of an inter-state market,²⁰⁶ and that voting rights could not be denied on impermissible grounds (such as the ability to pay poll taxes).²⁰⁷ Beneath the surface of this legal doctrine, which included expansive interpretations of the long dormant congressional authority to “enforce” the Reconstruction Amendments to the Constitution,²⁰⁸ the Supreme Court’s justification for intervening in the political process in *Brown*, *Baker*, and later cases was that judicial enforcement had now become politically possible; the Court, without serious risk of loss of legitimacy, could now determine that political techniques, such as the distorting (the so-called “gerrymandering”) of electoral districts, could no longer be employed to defeat democratic outcomes in the states.

Thus, by the time the Protocol of Washington was submitted to the U.S. Senate, the pro-democratic implications of this new OAS law appeared to pose no threat to domestic arrangements. So, unlike the original Charter, the Protocol did not require a federalism reservation. The daunting social, economic, and political conflict that had transformed the United States over the course of two generations enabled the Supreme Court to legalize democracy in a fundamentally new way based on new interpretations of long dormant texts. It goes without saying that, if it took the U.S. two generations of struggle to turn its Democracy Clause from a relatively soft transnational instrument into a hard domestic

of democracy within its own territories should acknowledge the necessity of equal opportunity for all citizens”).

206. *Cf. Heart of Atl. Motel, Inc. v. United States*, 379 U.S. 241, 241 (1964) (upholding Congress’s reliance on its power to regulate commerce as the constitutional basis for the federal government to enact legislation forbidding racial discrimination in public conveniences that arguably are within the stream of inter-state commerce).

207. *See, e.g., Harper v. Va. Bd. of Elections*, 383 U.S. 663, 663 (1966) (invalidating a poll tax that was considered a denial of equal protection of law under the Fourteenth Amendment).

208. *See, e.g., Katzenbach v. Morgan*, 384 U.S. 641, 642 (1966) (approving the application congressionally-enacted voting rights legislation in a context that arguably did not involve “enforcement” of the Fourteenth and Fifteenth Amendments, as required by those grants of legislative authority, but rather the creation of new substantive rights).

constitutional mechanism for enforcing democracy, one should not expect more rapid legalization in OAS or among its Member States. Ironically, around this time, one leading U.S. constitutional scholar suggested that the time had finally come for the Supreme Court to apply the Guarantee Clause as an obligatory, determinate and enforceable test for democratic processes in the states,²⁰⁹ as if to suggest that recently-established “hard” concept of legalization of democracy now enabled the Supreme Court to wipe the legal slate clean of the evidence of its past accommodations with political necessity.

But the adoption of the Protocol in the context of the internal mechanisms for U.S. compliance, namely the Equal Protection Clause of the 14th Amendment, gives rise to an even greater irony. If the broad view of the application of the Democratic Charter advanced now in the case of Venezuela were adopted, it arguably could have given rise to questions concerning U.S. compliance had the Democratic Charter been in force during the 2000 presidential election. Of course, under a narrow theory, like the narrow theory of the Guarantee Clause to apply only to “military government,” the Democratic Charter would not have been applicable without a military coup. Yet, under the broader theory, was the decision of the Supreme Court in *Bush v. Gore* on Equal Protection grounds to terminate the Florida²¹⁰ recount an “unconstitutional” judicial “alteration” of the democratic order in the U.S. within the meaning of the Democratic Charter? But under such a broad theory, by what criterion would the OAS have determined that a U.S. legal decision - - applying the Equal Protection Clause, precisely the constitutional norm that had served as the modern Democracy Clause of the U.S. Constitution - was itself a violation of the OAS Democracy Clause? One wonders whether or not, had similar facts arisen in some hypothetical Latin American country, would the U.S. have asserted that international supervision was required to ensure that the

209. See Erwin Chermersky, *Cases Under the Guarantee Clause Should Be Justiciable*, 65 U. COLO. L. REV. 849, 869 (1994).

210. See *Bush v. Gore*, 531 U.S. 98, 98-99 (2000) (relying on the Equal Protection Clause of the Fourteenth Amendment to hold invalid the procedures imposed by the Florida Supreme Court for a recount in the State’s disputed election for electors to the Electoral College that would select the U.S. President).

judiciary was not unconstitutionally intervening in that state's electoral system to overturn a candidate elected with a majority of the popular vote (again, in accordance with the one-person, one-vote weighing principle)?

The hypothetical raises an important, cautionary question about Democracy Clauses in international instruments, such as the OAS Charter. Setting aside the legitimacy of exercising discretion to interpret the OAS withdrawal clause on the basis of a strong interpretation of the OAS Democracy Clause, one that incorporates most of achievements that took the better part of two generations in the United States, the effectiveness of doing so might still be in question. Surely, for the U.S. at least, any OAS intervention under the Democratic Charter would have delegitimized the OAS Democracy Clause and reduced U.S. support for both the OAS and its efforts to promote democracy. Would the U.S. have withdrawn from OAS, as it did from the International Court of Justice after the Court determined it had jurisdiction to adjudicate Nicaragua's claims against the U.S.²¹¹ Would a broad interpretation then actually have furthered democracy in the long run, since provoking withdrawal would not have been without costs to the legitimacy of the norm? Might not a narrower interpretation of the Democracy Clause in the short run have had better long run effects in promoting democracy?

Modern rational choice theory offers a potential line of analysis of this question; and that line of analysis suggests why restrained interpretation may be a better way to promote democracy rather than a legally plausible, but arguably illegitimate, expansive interpretation of the OAS Democracy Clause and its withdrawal clause that would make full compliance with the Democracy Clause an essential condition of withdrawal.

IV. A RATIONAL CHOICE ACCOUNT OF WITHDRAWAL CLAUSES

Traditionally, international law scholars have not given withdrawal clauses the attention they deserve, because (in the suggestive metaphor of one scholar) they considered it impolitic to

211. See generally Abram Chayes, *Nicaragua, the United States, and the World Court*, 85 COLUM. L. REV. 1445, 1445-46 (1985).

discuss terms for a possible future divorce on the wedding day.²¹² Rational choice theory now offers a new of thinking about withdrawal clauses that, while intuitively plausible to negotiators of all agreements, has only recently received serious attention in international law²¹³ and international relations scholarship.²¹⁴ Properly drafted withdrawal clauses, it is argued, increase adherence to treaties and the joint cooperative gains they supply by reducing the legal uncertainty costs that states perceive *ex ante* of the costs they will suffer *ex post* from changing circumstances that increase the costs of their compliance or reduce the benefits of their continued participation in a treaty or regime.²¹⁵ The concept draws on insights reached in related areas of international law not involving treaty termination.²¹⁶ But its logic extends to full-blown withdrawal

212. Lawrence Helfer, *Terminating Treaties*, in THE OXFORD GUIDE TO TREATIES 634, 634 (Duncan B. Hollis ed., 2012) [hereinafter Helfer, *Terminating Treaties*].

213. Laurence R. Helfer, *Exiting Treaties*, 91 VA. L. REV. 1579, 1581-83 (2005) [hereinafter Helfer, *Exiting Treaties*].

214. See BARBARA KOREMENOS, THE CONTINENT OF INTERNATIONAL LAW: EXPLAINING AGREEMENT DESIGN 140-57 (2016) [hereinafter KOREMENOS, COIL] (discussing withdrawal clauses, noting that the longer than usual duration of the OAS withdrawal clause); see also *id.* at 145-46 (noting there are two kinds of commitment problems that can encourage defections: the first is external, in the sense that a withdrawing state might seek to obtain an unjustified advantage of benefits previously received without compensating its treaty partners for cooperation; and the second in internal, in the sense that a longer period of withdrawal may give domestic forces seeking not to withdraw an opportunity to persuade domestic factions seeking withdrawal to reverse course).

215. See KOREMENOS, COIL, *supra* note 214, at 140-57 (observing that clauses “are generally incorporated as a protection from shocks that alter a state’s basic interest in cooperation”); see also Helfer, *Exiting Treaties*, *supra* note 213, at 1599-1601 (hypothesizing that foremost challenge that treaty negotiators face is setting optimal conditions on exit *ex ante* in order to deter opportunistic uses of an exit clause *ex post* after the treaty has entered into force); see generally Helfer, *Terminating Treaties*, *supra* note 212, at 634, 648 (suggesting that exit clauses that are lenient leave too much room for self-serving withdrawals and clauses that are strict may deter parties from entering the agreement).

216. See Alan O. Sykes, *Protectionism as a “Safeguard”: A Positive Analysis of the GATT “Escape Clause” with Normative Speculations*, 58 U. CHI. L. REV. 255, 284, 289 (1991) (asserting that the central insight of this new literature was developed in relation to the GATT “escape clause,” which, while not a withdrawal clause as such, in respect of allowing a state to free itself from legal obligations operates in the same way as a withdrawal clause, but rather promoted free trade commitments *ex ante* by reducing their costs *ex post*).

clauses, suggesting that a properly drafted “pre-nuptial” agreement can indeed increase the likelihood of a mutually satisfactory marriage.

This increased attention may also have been stimulated by the recent salient experience of North Korea’s (Democratic People’s Republic of Korea or DPRK).²¹⁷ Rational choice theory turns on a game-theoretic analysis of international cooperation and defection decisions played out over time, which for purposes of this discussion defining cooperation as adhering to a treaty (such as one, like the OAS, promoting democracy) and defection as withdrawing from such a treaty. (Of course, additional, more-nuanced forms of cooperation and defection would be relevant to a deeper rational choice analysis of a particular treaty or other regime.²¹⁸) It may be useful first to examine the case of the DPRK’s withdrawal, including the effects of the response of NPT parties to the DPRK threat of withdrawal and ultimate withdrawal on the NPT itself. Despite the obvious differences between the two cases, comparative analysis will to some extent inform a rational choice analysis of withdrawal from the OAS.

A. NPT WITHDRAWAL AND ITS LEGAL EFFECTS FOR DPRK RIGHTS AND DUTIES

The legal context for analyzing the comparative effects of the OAS Charter and NPT withdrawal clauses includes three important background concepts in the law of withdrawal, which are reflected in the VCLT.²¹⁹ First, including a withdrawal clause in a multilateral treaty remedies a defect under the law of breach that would impede a nation’s right to withdraw from a treaty. In a multilateral treaty, a

217. See Helfer, *Exiting Treaties*, *supra* note 213, at 1619-20 (exploring the “phenomenon” of unilateral exit from international agreements and particularly discussing the DPRK withdrawal from the NPT).

218. ALBERT HIRSCHMAN, *EXIT, VOICE AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES* 162 (1970).

219. See Richard D. Kearney & Robert E. Dalton, *The Treaty on Treaties*, 64 AM. J. INT’L L. 495, 539 (1970) (explaining that although the OAS Charter predated the VCLT by more than two decades, the NPT was drafted at roughly the same time the VCLT was concluded, but concepts in the VCLT are relevant because it is generally deemed to reflect the customary international law of treaties).

party must show that breach by a defaulting state “radically changes the position of every party with respect to the further performance of its obligations under the treaty” (although a “specially affected” states may withdraw without needing to satisfy this criterion).²²⁰ Second, *rebus sic stantibus*, by contrast, which appears to have been the primary rationale for the inclusion of a withdrawal clause in the OAS Charter under the Argentine proposal,²²¹ either in a bilateral or multilateral instrument permits withdrawal under stringent conditions relating to the occurrence of unforeseen events undercutting the essential basis for the party’s consent and that radically transforms the party’s executory obligations.²²² Third, Article 70 of the Vienna Convention provides:

Unless a treaty otherwise provides or the parties otherwise agree, the termination of a treaty under its provisions or in accordance with the present Convention: (a) Releases the parties from any obligation further to perform the treaty; [but] (b) Does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination.²²³

Application of Article 70’s principles does not turn on whether the treaty is bilateral or multilateral,²²⁴ or on whether its parties include an international organization.”²²⁵ In sum, the residual effects of

220. See Vienna Convention on the Law of Treaties, *supra* note 15, at 346, art. 60, ¶ 2(c).

221. ACTAS Y DOCUMENTOS, *supra* note 49, at 513 (discussing the Argentine proposal’s intent to rely on the doctrine of *rebus sic stantibus*).

222. See Vienna Convention on the Law of Treaties, *supra* note 15, at 347, art. 62.

223. See *id.* at 349, art. 70, ¶ 1 (discussing that the Article only address the case of rights derived from performance, thus leaving the question of rights that flow from breach by a defaulting state, including even a withdrawing state, to the the law of state responsibility).

224. See *id.* ¶ 2 (“If a State denounces or withdraws from a multilateral treaty, paragraph 1 applies in the relations between that State and each of the other parties to the treaty from the date when such denunciation or withdrawal takes effect.”).

225. See Agreement Between the Government of the Democratic People’s Republic of Korea and the International Atomic Energy Agency for the Application of Safeguards in Connection with the Treaty on the Non-Proliferation of Nuclear Weapons, IAEA Doc. INFCIRC/403 (Apr. 10, 1992), *reprinted in* 33 I.L.M. 319 (1994) [hereinafter DPRK/IAEA Safeguards Agreement] (stating that the IAEA-DPRK Safeguards Agreement pursuant to the NPT is not a treaty between states, but rather an agreement between a state and an international organization, although the DPRK under the NPT owes a duty to each NPT party to enter into such an agreement); see

treaty withdrawal in general are independent of whether it is pursuant to *rebus*, material breach, or a withdrawal clause that is conceptually dependent on either or both *rebus* and material breach rationales. Both bilateral and multilateral settings, withdrawal clauses contemplate a right to withdraw for good reason, but they also reflect some effort to stabilize expectations created, or rights that vested, while a withdrawing state was still a party to the treaty.

In the case of the DPRK's withdrawal from the NPT, it is notable that the NPT divided states into two groups: so called "Nuclear Weapon States" (NWS), which had already publicly detonated a nuclear explosive device prior to January 1, 1967 (the U.S., Great Britain, France, PRC, and Soviet Union, which eventually was succeeded in its NWS status by the Russian Federation); and so-called "Non-Nuclear Weapon States" (NNWS),²²⁶ which eventually came to include the DPRK.²²⁷ These NNWS's were required to accept an intrusive inspections regime under an International Atomic Energy Agency (IAEA) Safeguards Agreement.²²⁸ The NPT, unlike the OAS Charter, also expressly provides a party a "self-judging" right to withdraw upon notice when "it decides that extraordinary events, related to the subject matter of this Treaty, have jeopardized [its] supreme interest."²²⁹

In 1993, shortly after the IAEA Safeguards Agreement entered

also Vienna Convention on the Law of Treaties, *supra* note 15, at 333, arts. 1, 2(1)(a) (requiring that a treaty is technically a written agreement that is settled between "states"); U.N. GAOR, U.N. Doc. A/CONF.129/15 (1986), *reprinted in* 25 I.L.M. 543 (1986) (relying on the VCLT principles stated in article 70 does not turn on this fact because the parallel principles of the Vienna Convention on the Law of Treaties between States and international organizations, which might also be deemed to reflect customary international law, would yield the same analysis required by the VCLT).

226. See NPT, *supra* note 28, 21 U.S.T. at 483.

227. NPT, *supra* note 28, 21 U.S.T. at 487, art. III(4) (explaining that NNWS will arrange agreements with the IAEA to meet the requirements of Article III either individually or together with others states); see also *Fact Sheet on DPRK Nuclear Safeguards*, International Atomic Energy Agency, <https://www.iaea.org/newscenter/focus/dprk/fact-sheet-on-dprk-nuclear-safeguards> (last visited Sept. 30, 2017 [hereinafter IAEA Fact Sheet on DPRK Nuclear Safeguards]) (reporting the DPRK's adherence to the NPT in 1985 and its finally concluding in 1992 the NPT-required IAEA Safeguards Agreement).

228. See DPRK/IAEA Safeguards Agreement, *supra* note 225, at 322-23.

229. See NPT, *supra* note 28, 21 U.S.T. at 493, art. X(1).

into force and based on concerns that the DPRK was already in material breach of its obligations, the IAEA requested a "special inspections" under the DPRK/IAEA Safeguards Agreement.²³⁰ The DPRK then gave the required "three months" notice to the Security Council and all other NPT Parties of its intention to withdraw.²³¹ This raised at least two questions: whether the withdrawal clause was, as it appeared to be, truly "self-judging"; and, second, if it was self-judging, whether there would be any continuing effects under Article 70 of the VCLT notwithstanding the DPRK's withdrawal from the NPT, as well as the consequences for potential breach of the IAEA Safeguards Agreement and the NPT under the law of state responsibility.²³² Then, in the face of the implied threat of sanctions or worse when the UN Security Council called upon it to reverse course,²³³ the DPRK "suspended" its withdrawal the day before it was to have taken effect.²³⁴ Negotiations followed, leading to a politically binding "Framework Agreement" between the U.S. and the DPRK, which provided for negotiated partial compliance by the DPRK with its safeguards obligations in return for economic and civil nuclear aid.²³⁵ Although not a treaty creating obligations under

230. See IAEA, *supra* note 227.

231. See NPT, *supra* note 28, 21 U.S.T. at 493, art. X(1).

232. See generally Antonio F. Perez, *Survival of Rights Under the Nuclear Non-Proliferation Treaty: Withdrawal and the Continuing Right of International Atomic Energy Agency Safeguards*, 31 VA. J. INT'L L. 749, 777 (1994) (positing that if it were a fully self-judging clause, it would not render the whole agreement a nullity because there is still relevant legal value).

233. See S.C. Res. 825, U.N. Doc. S/RES/825, at 2 (1993).

234. Report by the Director General [of the IAEA] on the Implementation of the Agreement between the Government of the Democratic People's Republic of Korea and the International Atomic Energy Agency for the Application of Safeguards in Connection with the Treaty on the Non-Proliferation of Nuclear Weapons (Sept. 16, 1993), in Note by the Secretary General, U.N. Doc. S/26456, appendix ¶ 25 (Sept. 17, 1993) (stating that DPRK's decision with "to suspend, [will last] as long as it considers it necessary"); see *U.S.-North Korean Declaration of June 11, 1993*, ARTS CONTROL TODAY, Jul.-Aug. 1993, at 19 (elucidating that the announcement was contained in the first joint U.S.-North Korean statement, in which both countries restated "assurances against the threat and use of force, including nuclear weapons").

235. See The Agreed Framework to Negotiate Resolution of the Nuclear Issue on the Korean Peninsula (Oct. 20, 1994), *reprinted in* 34 I.L.M. 603, 604 (1995) (explaining that the United States undertook to make arrangements to provide North Korea with a light-water reactor power plant project having a total

international law, the Framework Agreement was structured so that the benefits provided to the DPRK could be linked to its eventual compliance with its safeguards obligations.²³⁶

Implementing the Agreed Framework, the U.S. then arranged for the establishment of the Korean Energy Development Corporation [KEDO] to build peaceful nuclear power reactors in the DPRK, under yet another politically binding instrument implementing the Agreed Framework, but now involving the other most directly affected NPT parties, South Korea and Japan, and enlisting the support of the European Union.²³⁷ Thus, with the situation appearing to be normalized, on the eve of a conference scheduled in 1995 to determine whether or not the NPT would terminate or continue in perpetuity,²³⁸ a central challenge to the continuation of the NPT appeared to have been averted, thus permitting its indefinite

generating capacity by a target date of 2003 of approximately 2,000 megawatts, and in exchange North Korea, upon receipt of assurances for the provision of light-water reactors and for arrangements for interim energy alternatives, would freeze its graphite-moderated reactors and related facilities and ultimately dismantle them); *see also* Marian Nash, *Contemporary Practice of the United States Relating to International Law: Peaceful Uses of Nuclear Energy*, 89 AM. J. INT'L L. 366, 374 (1995) (reporting testimony of Secretary of State Christopher Before the Senate Committee on Foreign Relations on January 24, 1995, in which Secretary Christopher maintained that North Korean compliance with the IAEA's earlier special inspection request was an essential part of the Agreed Framework).

236. *See generally* Testimony of Ambassador-at-Large Robert L. Gallucci Before the East Asian and Pacific Sub-Committee of the Senate Foreign Relations Committee on U.S.-North Korea Nuclear Agreement, Federal News Service (Dec. 1, 1994) (observing that the United States was therefore not legally obligated to make available funds for the provision of the light-water based reactors the Agreed Framework envisioned would ultimately be made available to North Korea or for interim energy supplies to substitute from nuclear energy North Korea claimed it had forborne through closing down its graphite-based reactors).

237. *See* Japan-Republic of Korea-United States Agreement on the Establishment of the Korean Peninsula Energy Development Organization (Mar. 9, 1995), *reprinted in* 34 I.L.M. 603, 604 (1995) [hereinafter KEDO Agreement].

238. *See* NPT, *supra* note 28, 21 U.S.T. at 494, art. X ("Twenty-five years after the entry into force of the Treaty, a conference shall be convened to decide whether the Treaty shall continue in force indefinitely, or shall be extended for an additional fixed period or periods. This decision shall be taken by a majority of the Parties to the Treaty."); *see also* Interview with Thomas Graham, General Counsel, Arms Control and Disarmament Agency (July/Aug. 1994) (explaining that the conference was the only chance for the international community to extend the NPT and that any decision taken would be binding on all parties).

extension pursuant to Article X(2).²³⁹ Thereafter, when the DPRK failed to comply with its “obligations” even under the Agreed Framework and when the benefits the DPRK had thought it secured through the Agreed Framework failed to materialize, the DPRK ultimately withdrew from the NPT by notice on January 10, 2003 -- with effect the following day, argued the DPRK, because (rather than providing a new notice of withdrawal) it had merely retracted its prior “suspension” of its nearly effective 1993 notice of withdrawal.²⁴⁰

Thus, the DPRK’s purported withdrawal finally raised the questions whether the withdrawal was, in fact, effective and, if so, whether or not NPT parties or the IAEA could continue to assert rights to the full implementation of the terms of the IAEA-DPRK Safeguards Agreement. In the immediate aftermath of the DPRK’s withdrawal from the NPT, the IAEA’s Director General, Mohammed El-Baradei, appeared to hesitate to find that the DPRK would be subject to continuing IAEA supervision, alluding instead to the role of the Security Council in enforcing compliance.²⁴¹ Under the NPT, even after its indefinite extension, the Parties continued to meet every five years to review the operation of the treaty,²⁴² thus affording them an institutional opportunity to reach consensus on an authoritative interpretation of the treaty. In the immediate aftermath of the DPRK’s withdrawal, there appears to have been some explicit support for a theory based on VCLT article 70.²⁴³ France, in

239. *Decisions and Resolution Adopted at the 1995 NPT Review and Extension Conference*, in 1995 NPT REVIEW AND EXTENSION CONFERENCE 364, 367 (1995), http://www.nti.org/media/pdfs/npt95rc.pdf?_=1316545320.

240. See IAEA Fact Sheet on DPRK Nuclear Safeguards, *supra* note 227; see also ANTHONY AUST, MODERN TREATY LAW AND PRACTICE 282 (2d ed. 2007) (noting the DPRK’s rationale for withdrawal as U.S. military exercises and hostile resolutions adopted by the IAEA).

241. Interview by Emma Belcher with Dr. Mohamed ElBaradei, Director General, International Atomic Energy Agency (Dec. 2, 2003) in 28 FLETCHER FORUM OF WORLD AFFAIRS, Winter 2004, at 29 (arguing that withdrawal from treaty obligations that can threaten the security of the international community requires Security Council intervention).

242. NPT, *supra* note 28, 21 U.S.T. at 492.

243. See Joint working paper submitted by the members of the Non-Proliferation and Disarmament Initiative, ¶ 3, NPT/CONF.2005/WP.16 (Apr. 28, 2005), <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N05/327/03/PDF/N0532703.pdf?OpenElement> (arguing that article 70 of the Vienna Convention on

addition, advanced a view that the DPRK was subject to continuing IAEA supervision that was consistent with a vested rights approach but arguably reached beyond it to imply a continuing IAEA right of supervision and control of nuclear activities in the DPRK.²⁴⁴ Later, the NWS's, which happen to be the same states that compose the Permanent Five of the UN Security Council, made a strong joint statement asserting their view that, while the right to withdraw should not be revised, "States should support measures to prevent its abuse" and they [the P-5] at the 2015 Review Conference "would make efforts to broaden consensus on . . . the consequences of withdrawal."²⁴⁵ That consensus did indeed conclude that the DPRK had an unquestioned right to withdraw in the exercise of its own sovereignty and judgment, stating:

The Conference reaffirms that each party shall in exercising its national sovereignty have the right to withdraw from the Treaty if it decides that extraordinary events related to the subject matter of the Treaty have jeopardized its supreme interests. The Conference also reaffirms that pursuant to article X notice of such withdrawal shall be given to all other parties to the Treaty and to the United Nations Security Council three months in advance, and that such notice shall include a statement of the extraordinary events the State party regards as having jeopardized its supreme interests.²⁴⁶

the Law of Treaties provides that withdrawal from a treaty does not absolve a party from performing any obligations that accrued prior to a valid exercise of its right to withdraw).

244. Statement by the Head of the French Delegation, First Meeting of the Preparatory Committee for the 2010 NPT Review Conference, ¶ 18, (Apr. 30-May 11, 2017), http://www.un.org/en/conf/npt/2007/statements/France_E_01_05_am.pdf (affirming that "international responsibility of a State remains unimpaired for [violations] . . . committed prior to withdrawal," and "that any State withdrawing from the Treaty must freeze, under IAEA control, and then dismantle or return, all nuclear goods acquired for peaceful uses from third countries prior to withdrawal").

245. Statement by the People's Republic of China, France, the Russian Federation, the United Kingdom of Great Britain and Northern Ireland, and the United States of America to the 2015 Treaty on the Non-Proliferation of Nuclear Weapons Review Conference, ¶ 24, (May 5, 2015), http://www.un.org/en/conf/npt/2015/statements/pdf/P5_en.pdf (explaining that any withdrawal must be done in accordance with article X of the NPT).

246. 2010 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, NPT/CONF.2010/50 (Vol. I), 18, ¶ 118 (June

However, the consensus also appeared to fail to reach a continuing right of supervision under the general principles of Article 70 of the VCLT or under a theory based on the specific requirements of the NPT:

The Conference notes that numerous States recognize that the right of withdrawal is established in the provisions of the Treaty. There were divergent views regarding its interpretation with respect to other relevant international law. The Conference notes that many States underscore that under international law a withdrawing party is still responsible for violations of the Treaty committed prior to its withdrawal, and that if done in accordance with the provisions of the Treaty, such withdrawal would not affect any right, obligation or legal situation between the withdrawing State and each of the other States parties created through the execution of the Treaty prior to withdrawal, including those related to the required IAEA safeguards.²⁴⁷

Also, following the lead of the IAEA Director General, the Conference emphasized the role of the Security Council once a state withdrew.²⁴⁸ The role going forward for the parties supplying nuclear material, technology or equipment, the Conference concluded, was only to enter into new agreements or amend earlier agreements to ensure that that a withdrawing state would not gain an advantage from prior benefits received,²⁴⁹ permitting the negative inference that the DPRK could so benefit in the absence of new agreements.

What does this mean for the DPRK's perceived costs of withdrawal? Admittedly, whether or not the DPRK continues to be under a technical legal obligation to submit to IAEA inspections remains in dispute. Although the most recent NPT Review Conference statement seems to suggest otherwise. However, it is

2015), [http://www.un.org/ga/search/view_doc.asp?symbol=NPT/CONF.2010/50%20\(VOL.I\)](http://www.un.org/ga/search/view_doc.asp?symbol=NPT/CONF.2010/50%20(VOL.I)) [hereinafter 2010 Review Conference Final Document].

247. *Id.* at 18, ¶ 119.

248. *Id.* at 19, ¶ 120 (noting that many states affirmed the Security Council's responsibility pursuant to the United Nations Charter).

249. *Id.* ¶ 121 ("The Conference notes that numerous States acknowledge that nuclear supplying States can consider incorporating dismantling and/or return clauses in the event of withdrawal in arrangements or contracts concluded with other States parties as appropriate in accordance with international law and national legislation.").

possible that the DPRK's prior breach of its obligations under the law of state responsibility might, give the non-defaulting state parties or the IAEA the right to a remedy, under French theory, extending to continued inspections or some lesser remedy of restitution for benefits received while the DPRK was a party. Yet, such rights would be so lacking in legalization's characteristics – that they are binding, determinate, and enforceable – that it is hard to maintain that they would affect the DPRK's calculus in assessing the costs and benefits of withdrawal. Moreover, turning to strategic effects, the DPRK's larger expected cost from stimulating the withdrawal of other states would also seem relatively slight, at least as of the time it withdrew, since the DPRK may have been able to free ride on the U.S. security umbrella for Japan and South Korea to obtain the benefits of their continued membership in the NPT in NNWS status (namely, assurance that neither of its neighbors would acquire nuclear weapons).²⁵⁰ Finally, the DPRK's indifference to reputational costs in the international or regional community for its non-compliance, given the so-called Hermit Kingdom's isolation, perhaps makes the situation of the DPRK a special case.²⁵¹ The DPRK seems to have had little to lose and, through the potential acquisition of nuclear weapons, much to gain. When the limited gains the DPRK anticipated from the Agreed Framework did not materialize, rational choice theory seems to provide a compelling account for its decision to withdraw from the NPT.

More critically, the NPT parties offered the DPRK substantial benefits over a ten-year period under the Agreed Framework and KEDO, in a failed effort to induce the DPRK to reverse course and remain a NNWS under NPT, signaling to potentially withdrawing parties that threat of withdrawal could serve as bargaining leverage to secure ancillary benefits.²⁵² Perhaps even more importantly, the

250. See *infra* text accompanying notes 262-63.

251. See generally ANDREW T. GUZMAN, *HOW INTERNATIONAL LAW WORKS: A RATIONAL CHOICE THEORY* 81, 86-87 (2008) (focusing on reputational effects of reliability of compliance in future iterations of cooperative behavior).

252. Statement by the Head of the French Delegation, *supra* note 244, ¶ 18 ("It would be unacceptable for any State, after having benefited from the provisions and cooperation defined in Article IV, in order to acquire nuclear materials, facilities and technology, only to withdraw subsequently from the Treaty and use them for military purposes.").

NWS's and their allies at successive NPT Review Conferences launched a campaign to achieve consensus adoption of a broad right to continuing IAEA monitoring of nuclear activities in the DPRK,²⁵³ only to see their views rejected and a contrary consensus emerge. Although their legal position may have been more than plausible, their aggressive assertion of a maximalist interpretation of their legal rights rebounded against the NPT regime itself, resulting in a systemic dilution of perceived deterrence of noncompliance with NPT obligations by reducing the costs of withdrawal for all future noncomplying parties. This may have been an unnecessary and imprudent self-inflicted wound the NPT could not afford in the aftermath of the DPRK's withdrawal.

Admittedly, the OAS withdrawal clause contains language that could be construed to be more forceful than the NPT's requirements.²⁵⁴ At the same time, the resistance that the NNWS showed to accepting a strong interpretation of the DPRK's obligations upon withdrawal suggests an underlying dynamic that needs to be explored from a rational choice perspective, one that could inform analysis of whether or not the OAS and its Member States should advance a broad interpretation of Article 143 to require full compliance with the OAS Democracy Clause before the Government of Venezuela ("GOV") can implement its withdrawal from the OAS.²⁵⁵

B. RATIONAL CHOICE AND VENEZUELA'S WITHDRAWAL FROM THE OAS

There is one important similarity between the DPRK and Venezuelan cases: the possibility for what rational choice theory

253. 2010 Review Conference Final Document, *supra* note 246, at 18, ¶ 118 (noting that the conference urged the DPRK to fulfill its commitments, including abandonment of nuclear weapons).

254. Protocol of Amendment to the Charter of the Organization of American States "Protocol of Managua," Charter of the Organization of American States, art. 143, A-41 (June 10, 1993), http://www.oas.org/en/sla/dil/docs/inter_american_treaties_A-41_charter_OAS.pdf (affirming that only after two years from giving notice to the General Secretariat and after fulfilling its obligations under the charter that a state will cease to belong to the OAS).

255. See *infra* text accompanying notes 262-63.

would denominate “opportunistic” use of the right to withdraw, what the NWS/P-5 called “abuse” of the NPT withdrawal clause.²⁵⁶ Two branches of rational choice analysis, game theory and bargaining theory, offer compatible accounts of these characterizations.

From a rational choice, game-theoretic standpoint, “abuse” or “opportunism” essentially is a claim that the GOV has received the benefits of OAS cooperation, including but not limited to the benefits that exceed the value of the GOV’s unpaid dues. Now, in the language of game theory, it is defecting, with the effect of achieving opportunistic gains and imposing upon the OAS the so-called Sucker’s Payoff.²⁵⁷ Properly structured and implemented withdrawal clauses, by contrast, allow states to lawfully avoid compliance in response to unforeseeable changes of circumstances (the so-called *rebus sic stantibus* doctrine), without signaling that cooperation in general is about to unravel.²⁵⁸ Further negotiation with the GOV over the terms of continued cooperation will simply incentivize further gain-seeking behavior, if the GOV is pursuing an opportunistic strategy rather than responding to unanticipated costs of compliance.

Bargaining theory may well provide even greater insights in the OAS negotiation with the GOV over the terms of the GOV’s withdrawal. In general terms, in the language of bargaining theory, each party will have a best-alternative-to-a-negotiated-settlement (a so-called BATNA), which strongly influences the price at which a party will no longer enter into an agreement, its so-called “reservation price” -- the point at which not reaching an agreement is superior to reaching an agreement; thus, the value of a party’s BATNA determines the degree to which it is willing to make concessions in a negotiation, because a weak BATNA implies a greater willingness to pay to enter into an agreement, meaning a

256. See GUZMAN, *supra* note 251, at 81, 86-87 (explaining that for some states reputational consequences to withdrawal have little or no effect and as such direct sanctions must be applied).

257. See ROBERT AXELROD, *THE EVOLUTION OF COOPERATION* (1984) (discussing the Prisoner’s Dilemma and empirical results of different strategies in iterative games for surmounting the incentive to defect).

258. See KOREMENOS, COIL, *supra* note 214, at 133 (arguing that agreements that are depicted as having enforcement issues and uncertainty about the state of the world are more likely to include escape clauses).

higher reservation price; while a strong BATNA implies a greater ability to insist on concessions by the other party, meaning a lower willingness to pay and lower reservation price. In the language of negotiation theory, the quality of one's BATNA is a measure of negotiating power, meaning the power to obtain a greater share of the benefits, or "cooperative surplus," of an agreement.²⁵⁹

From the perspective of bargaining theory perspective, could view the underlying dispute between the OAS and the GOV as the negotiation of the terms of the GOV's compliance with the OAS Democracy Clause. But this may be equivalent to negotiating the very meaning of the OAS Democracy Clause, since OAS practice with respect to Venezuela will serve as a precedent for future cases. The OAS will bargain for increased compliance by Venezuela, and the GOV will bargain for a relaxation of the meaning of the Democracy Clause to validate the GOV's conduct. For the OAS, suspending the GOV is its BATNA to an agreement with the GOV relaxing the requirement of the OAS Democracy Clause; and, for the GOV, withdrawal from the OAS is its BATNA to an agreement with the OAS requiring it to increase its compliance with the OAS Democracy Clause. But the question is more complex than this first approximation, because the value of each BATNA depends on the precise consequences of suspension and withdrawal. Thus, by taking the position that only time and the payment of dues define its BATNA, and communicating its withdrawal in a manner that appears to suggest that it perceives as minimal its reputational costs among OAS states (and globally) for withdrawal, the GOV is attempting to increase the value of its BATNA. (The continuing debate with MERCOSUR countries over the legality of Venezuela's suspension from MERCOSUR is illustrative of this strategy.)²⁶⁰ In general, however, it seems fair to conclude that the GOV's notice of withdrawal has the effect of reducing the value of the GOV's BATNA as it seeks to negotiate the GOV's compliance with the OAS Democracy Clause during the period before that withdrawal

259. See generally Russell Korobkin, *A Positive Theory of Legal Negotiation*, 88 GEO. L.J. 1789, 1791-92 (2000) (describing a dichotomy of zone definition/surplus allocation that creates a new theoretical structure for viewing the legal negotiation process).

260. See *supra* notes 3-12.

will take effect.

In short, if the GOV perceives its BATNA as strong, and the OAS perceives its BATNA as weak, any negotiation between the OAS and GOV over the terms of the GOV's compliance with the OAS Democracy Clause (or, equivalently, the meaning of the OAS Democracy Clause itself and future precedential effects) will suffer from a dramatic shift in negotiating power from OAS towards the GOV. Like the case of the DPRK and NPT, this shift in negotiating power may inspire OAS to dilute the meaning of the OAS Democracy Clause in order to persuade GOV to suspend its withdrawal. Like Cuba, which was able to secure a commitment from OAS to negotiate terms of re-integration in OAS that implied a "negotiation" with Cuba about those terms,²⁶¹ Venezuela may well be pursuing a strategy of reducing OAS' own commitment to its Democracy Clause.

The dilution of the value of the OAS Democracy Clause may be permanent. Any subsequent efforts by OAS and OAS Member States to restore the value of the OAS Democracy Clause to counteract the effect of concessions made to the GOV to persuade it to revoke or suspend its withdrawal, if the case of the DPRK is illustrative, will meet with failure. Other states facing the same incentives that would lead them to seek a weaker version of the OAS Democracy Clause -- like NPT-NNWS, fearing the risk of dissolution of the NPT regime, a potentially-threatening post-dissolution environment, and their consequential interest in maximizing their freedom of action in the event of withdrawal -- may have a common incentive to seek to reduce the costs of withdrawal. These conclusions also seem to be consistent with a rational choice approach to withdrawal clauses in treaties, such as the NPT and other treaties that furnish "public goods," which are benefits from which a withdrawing state cannot be excluded even after withdrawal. If under the democratic peace hypothesis,²⁶² the non-threatening international environment the OAS Democracy Clause

261. Thirty-Ninth Regular Session of the General Assembly, OAS, Resolution on Cuba, ¶ 2, AG/RES. 2438 (June 3, 2009), <https://www.oas.org/columbus/Cuba.asp> (noting that Cuba's participation in the OAS is the result of process of dialogue).

262. See *supra* text accompanying notes 164-69.

secures in the region is such a public good, Venezuela will not perceive diminished external security as a potential cost of withdrawal. Repeated instances of this logic by other states will ultimately undermine the “public good” advanced by the OAS Democracy Clause. Indeed, rational theory foresees precisely these special challenges in constructing optimal withdrawal clauses in the case of treaties involving public goods, where withdrawing states can “free ride” on benefits provided by the treaty even after withdrawal and the private benefits that flow from withdrawal may be large, thus incentivizing “opportunistic” or “abusive” withdrawal.²⁶³

That said, admittedly, one ought to be cautious in comparing the public goods character of the NPT with that of OAS. First, the incentives for withdrawal may be substantially greater when the issue is state survival rather than survival of a particular kind of government. This is intuitively plausible in the case of the NPT, when the question of the possession of nuclear weapons, as is certainly the case for the NPT, is state survival and private incentives become infinite. Yet, the regime leadership might perceive as practically of infinite value the internal threat of regime termination, even if state survival were not actually in jeopardy. Mathematicians do sometimes conceive of values that are each infinite, yet not equal. Lawyers and political scientists need not deal with such abstractions, even under rational choice theory. It is simply enough to note that the incentives applicable to public goods treaties, such as the NPT, at least tend to move in the same direction in other public goods treaties, such as OAS. It is fair to conclude that the public goods character of the NPT and OAS suggest incentives that under rational choice theory make efforts to negotiate the continued membership of a state seeking withdrawal an unwise expenditure of resources, with greater expected costs and expected benefits.

Particular facts of the NPT and OAS cases indicate that efforts to

263. See KOREMENOS, COIL, *supra* note 214, at 146 n.28 (arguing that difficulties in excluding partners from treaties involving public goods stems from the impossibility of preventing withdrawing states from “free-riding” on the contributions of states that remain); see also Hefler, *Exiting Treaties*, *supra* note 213, at 1637-38 (arguing states that withdraw or fail to ratify a treaty involving a public good can still free ride on the cooperation of remaining states without facing sanctions).

maintain GOV membership would not yield greater benefits over costs. It is true that the degree a withdrawing state can free ride on the international security environment that flows from the continued existence of the NPT and the OAS Democracy Clause may be radically different, given the specific contexts of the two situations. Given U.S. security guarantees and other factors, such as Japan's cultural aversion to the possession of nuclear weapons, the NPT has proven stable in East Asia, notwithstanding the DPRK's withdrawal. On the other hand, it is not clear that Venezuela's security environment after its withdrawal from OAS will remain equally stable.²⁶⁴ That said, there is no immediate evidence that the dissolution of democracy in Venezuela will have cascading effects among other OAS Member States.

In sum, it is certainly reasonable to question whether the predictions suggested by rational choice theory of excessive withdrawal are not as robust as they appear at first inspection, and to doubt that analogies drawn from the case of the North Korea's withdrawal from NPT are only moderately persuasive. That said, both theory and practice identify no significant gains from efforts to maintain the membership of the withdrawing states, at least in terms of immediate de-stabilizing regional effects, but they do pose significant risk of regime dilution. Just as it was true for the NPT in the face of DPRK withdrawal, an OAS effort to advance an expansive view of the requirement for withdrawal so as to require complete compliance with a maximal interpretation of the requirements of the OAS Democracy Clause might well break consensus among OAS Member States, and an attempt to negotiate the GOV's continued membership would necessarily dilute the perceived requirements of the OAS Charter. Thus, even if the text, negotiating history, subsequent agreement, subsequent practice, and relevant rules of international law supply a context that could support such a broad interpretation, to either advancing such an interpretation or negotiating its relaxation would be counter-productive.

264. *Sea of Blood*, *supra* note 177 (noting recent Peruvian suggestions of the threat posed to the region by Venezuela's de-stabilization).

V. CODA: RISKING THE GOV'S MEMBERSHIP TO SAVE THE OAS DEMOCRACY CLAUSE

In general, recent scholarship draws attention to the risk that excessive claims based on weakly-establishing international law norms are now tending to reduce the legitimacy of international law, not only in the area of the weakly-established claims but also in international law as a whole.²⁶⁵ This may reflect larger structural considerations, as U.S. post-Cold War relative power declines. Hegemonic stability theory -- which posits that post-World War II international institution building reflected U.S. hegemonic interest in stabilizing the global environment of peace, security and free trade, since the U.S. gained a disproportionate share of its benefits²⁶⁶ -- might have explained the rise of the OAS. The post-Cold War resurgence of U.S. hegemony, together with the U.S.'s increasing commitment to democracy,²⁶⁷ might similarly have explained the strengthening of the OAS Democracy Clause as a means through which post-Cold War U.S. hegemony could be maintained. If so, one could expect declining U.S. interest and ability to invest in the creation and maintenance of institutions,²⁶⁸ such as the OAS and its Democracy Clause. Instead, U.S. attention will turn to the so-called "Thucydides trap," in which accommodation or resistance to China's rising power²⁶⁹ becomes a more salient question that continued

265. See Wuerth, *supra* note 187, at 36-37 (advancing a so-called "broken windows" theory of international law, in which repeated findings of low-level international-law breaking de-legitimizes international law generally).

266. ROBERT GILPIN, U.S. POWER AND MULTINATIONAL CORPORATIONS 138-39 (1979) (arguing that after WWII American corporate expansion around the world served the interests of the United States); Robert Gilpin, *The Theory of Hegemonic War*, 4 J. INTERDISC. HIST. 591, 610 (1988) (arguing that following WWII the breakdown of the European political order and the new order based on American-Soviet bipolarity maintained peace and undermined the concept of war as a means to settle conflicts).

267. See *supra* text accompanying note 209.

268. See ROBERT KEOHANE, AFTER HEGEMONY: COOPERATION AND DISCORD IN THE WORLD POLITICAL ECONOMY 183-84 (1984) (arguing that U.S.-sponsored international institutions will survive declining U.S. hegemony).

269. See GRAHAM ALLISON, DESTINED FOR WAR: CAN AMERICA AND CHINA ESCAPE THUCYDIDES'S TRAP xvi-xx (2017) (noting prescriptions for

universalization of Western democratic norms through the progressive development of international law based on those norms.

What, then, is to be done? In this age of withdrawal, most notably felt in Europe thorough Brexit,²⁷⁰ and perhaps also risked by increasing EU supervision of democracy in Central and Eastern Europe,²⁷¹ arguably the priority now ought to be avoid damage to international law norms, including democracy, rather than overreach and thereby reduce their legitimacy. In the context of promoting democracy in the Americas, one way to do unforeseeable damage to the Democracy Clause of the OAS would be to initiate a bargaining process that is likely to result in its dilution, just as NPT parties seeking to deter further withdrawals from the NPT after North Korean withdrawal ultimately succeeded only reducing the level of consensus of the remaining parties.²⁷² Instead, taking into account that prior to notice of withdrawal the GOV has not yet been the subject of sanctions under the Democracy Clause, the OAS and its Member States could reasonably take a narrow view of the requirements of withdrawal in this particular case, limiting its scope to duration and dues. The question of the broader implications of the withdrawal clause in the case in which a state has already been subject to sanctions would not arise; the question concerning the

accommodating China's rising power and avoiding war).

270. See Brendan Simms, *Managing Brexit: Leaving on Good Terms*, *Foreign Affairs*, (Oct 12, 2016), <https://www.foreignaffairs.com/articles/united-kingdom/2016-10-12/managing-brexite> (suggesting EU acceptance of UK withdrawal on reasonable terms).

271. See *EU warns Poland over court reforms*, RADIO POLAND (Jul. 19, 2017), <http://www.thenews.pl/1/9/Artykul/317047%2CEU-warns-Poland-over-court-reforms> (stating "European Commission Vice President Frans Timmermans told reporters in Brussels that the EU's executive arm was close to triggering the bloc's Article 7 against Poland, which could ultimately result in sanctions," but reporting that Poland's proposed judicial reforms are compatible with current arrangements in current EU member states). But see R. Daniel Keleman, *Poland's Constitutional Crisis: How the Law and Justice Party is Threatening Democracy*, *FOREIGN AFF.*, (Aug. 25, 2016), <https://www.foreignaffairs.com/articles/poland/2016-08-25/polands-constitutional-crisis> (suggesting that the Polish president ignored the EU commission's threat); Andrew Rettman, *Poland belittles EU action on judicial reform*, *EU OBSERVER* (July 31, 2017), <https://euobserver.com/justice/138646> (suggesting that The EU threat may have well influenced the Polish President to veto at least one of the problematic, proposed laws).

272. See *supra* text accompanying notes 226-36.

meaning of the withdrawal clause and whether or not the Democracy Clause, including the Democratic Charter, is an obligation that “arises from the present Charter” would not arise; the question, therefore, of whether the OAS or the withdrawing state determines which obligations are within the scope of the withdrawal clause would also not arise; and, last but not least, the consensus gradually emerging within the community of remaining OAS Member States concerning the indispensability of democracy would not be ruptured (and perhaps not even interrupted). In legal policy, as in so many things, the first, last, and constant obligation of legal-policy decision-makers ought to be to do no harm to pursue an ethic of responsibility for consequences rather than an obsession with ultimate ends.²⁷³

273. See generally Max Weber, *Politics as a Vocation*, in FROM MAX WEBER: ESSAYS IN SOCIOLOGY 77, 120-21 (H.H. Gerth & C. Wright Mills eds., 1946) (distinguishing these two modes of political activity).

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