

1-1-2008

## Emerging International Law Constraints on Constitutional Structure and Revision: A Preliminary Appraisal

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### Recommended Citation

Stephen J. Schnably, *Emerging International Law Constraints on Constitutional Structure and Revision: A Preliminary Appraisal*, 62 U. Miami L. Rev. 417 (2008)  
Available at: <https://repository.law.miami.edu/umlr/vol62/iss2/9>

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# Emerging International Law Constraints on Constitutional Structure and Revision: A Preliminary Appraisal

STEPHEN J. SCHNABLY\*

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*International law prescribes rules for states on a wide variety of matters. Some rules may limit states' discretion on constitutional questions; for example, constitutions must be consistent with international human rights law. But international law has been widely understood to leave to each state how its government is to be structured and its constitution revised. Recent developments challenge this division. Increasingly there are signs of emerging international legal norms addressing matters such as the separation of powers and constitutional amendment. This article describes these developments and their background, evaluates their application to constitutional crises in Nicaragua and Togo, and discusses their relevance for U.S. constitutional law, including limits on executive power. Situating these developments in the context of other international constraints on states, the article concludes that while the apparent movement toward treating constitutional structure and revision as proper subjects of international law may be unavoidable, the trend carries significant risks to democracy as well as possible benefits for it.*

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\* Professor of Law, University of Miami School of Law. I would like to thank Elizabeth Iglesias for organizing the symposium of which this article is a part, and for thoughtful comments on the importance of an international dimension to consideration of Article II issues. I would also like to thank my research assistant, Morella L. Aguado Montealegre, for her valuable assistance in preparing this article.

## INTRODUCTION

Ordinary constitutional practice has its own familiar vocabulary. Constitutions are drafted, applied, interpreted, or amended; they are affirmed, reshaped, or revised. They are understood in light of a changing (or unchanging) social consensus; construed according to the framers' intent; or read in keeping with structural or functional considerations.

A less familiar vocabulary highlights seemingly exceptional circumstances. Constitutions can be broken, disrupted, or cast aside. They can be suspended—or “ripped to shreds”—by a president intent on preserving his own power.<sup>1</sup> They might even be amended by referendum to effect a virtual coup d'état.<sup>2</sup>

The notion that a constitution may be broken rests on two premises. First, there are characteristics so fundamental to a given constitutional order that changing them would disrupt it. Second, changes to a constitution are illegitimate if they do not conform to some set of rules or requirements—procedural, substantive, or both—governing changes. An irregular alteration of the constitution that seriously impaired some basic characteristic would surely constitute a breakdown in the constitutional order.

The real difficulty, of course, lies in determining when such a breakdown has occurred in particular circumstances. For any given constitution—or perhaps for any constitution as such—many characteristics or provisions might plausibly qualify as fundamental: some limit on executive power, some set of basic rights and freedoms, or an independent judiciary, to name a few possibilities. Unfortunately, constitutional texts do not themselves necessarily specify these characteristics in full, if at all. In any event, whether a constitution could itself determine what aspects are fundamental is likely to be no less controversial than whether a constitution could prescribe the appropriate method of interpreting it. Beyond these quandaries lies the inevitable uncertainty over whether any particular interpretation or action is in fact inconsistent with the fun-

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1. See David Rohde, *Pakistani Sets Emergency Rule, Defying the U.S.*, N.Y. TIMES, Nov. 4, 2007, at A1; see also Emily Wax, *In the Heart of Pakistan, a Deep Sense of Anxiety*, WASH. POST, Nov. 7, 2007, at A01 (quoting ousted chief justice of Supreme Court as saying that Pakistan's constitution had been “ripped to shreds”).

2. This charge was made by President Hugo Chávez's former defense minister Raúl Isafas Baduel, who characterized sweeping constitutional amendments that Chávez's government had put to a referendum as a “coup d'etat.” Andres Oppenheimer, *Vote May Turn Venezuela into 'Elected Dictatorship,'* MIAMIHERALD.COM, Nov. 29, 2007, [http://www.miamiherald.com/news/columnists/andres\\_oppenheimer/story/324829.html](http://www.miamiherald.com/news/columnists/andres_oppenheimer/story/324829.html). The amendments were defeated in the referendum. See Juan Forero, *Venezuelans Deny Chávez Additional Authority; President Concedes Defeat in 51-49 Vote*, WASH. POST, Dec. 3, 2007, at A01.

damental characteristic.<sup>3</sup>

As for constitutional revisions, here, too, the difficulties are great. The text of a constitution may not exhaustively describe the proper means for revising it. Perhaps it does not even include everything that might be deemed a part of the constitution.<sup>4</sup> Any procedural and substantive limits a constitution does place on changes may not necessarily be binding simply because they were set out in the text. Even deciding whether a constitution has been amended may not be simple, given the multitude of ways in which a constitution can be reshaped and modified over time apart from formal processes.

However elusive resolution of these questions about constitutional rupture may be, broad assertions about the scope of executive authority since September 11 have made them highly pertinent in the U.S. context. In *Hamdi v. Rumsfeld*, Justice O'Connor described fundamental constitutional values as being "severely tested"<sup>5</sup> by the "temptation to dispense with fundamental constitutional guarantees."<sup>6</sup> Dissenting in *Rumsfeld v. Padilla*,<sup>7</sup> Justice Stevens remarked that "[a]t stake in this case is nothing less than the essence of a free society," with the prospect of "[e]xecutive detention of subversive citizens" creating the specter of the "Star Chamber."<sup>8</sup>

Few if any judges grappling with questions of executive authority

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3. Indeed, it may even be difficult to tell if what has been broken or interrupted is a constitution in a meaningful sense. To take one example, President Musharraf was widely said to have suspended Pakistan's constitution in November 2007. See, e.g., Rohde, *supra* note 1; Griff Witte, *Musharraf Declares Emergency Rule in Pakistan; Constitution Suspended; Chief Judge Fired*, WASH. POST, Nov. 4, 2007, at A01; cf. Pakistani President General Pervez Musharraf, Text of Pakistan Emergency Declaration (Nov. 3, 2007), in BBC NEWS, Nov. 3, 2007, available at [http://news.bbc.co.uk/2/hi/south\\_asia/7077136.stm](http://news.bbc.co.uk/2/hi/south_asia/7077136.stm) (referring to decision that constitution "shall remain in abeyance"). Yet he took power through a military coup in 1999 and subsequently promulgated major changes to Pakistan's constitution that greatly expanded his presidential powers. See Osama Siddique, *The Jurisprudence of Dissolutions: Presidential Power To Dissolve Assemblies Under the Pakistani Constitution and Its Discontents*, 23 ARIZ. J. INT'L & COMP. L. 615, 622, 700 (2006). This history might suggest that it makes no sense to treat the document as a genuine constitution; the opposition of many Pakistani lawyers to Musharraf's order might equally imply otherwise. See Griff Witte, *Lawyers Take on Musharraf; Thousands Demonstrate in Cities Across Pakistan*, WASH. POST, Nov. 6, 2007, at A01.

4. See Matthew S. R. Palmer, *Using Constitutional Realism To Identify the Complete Constitution: Lessons from an Unwritten Constitution*, 54 AM. J. COMP. L. 587 (2006); Ernest A. Young, *The Constitution Outside the Constitution*, 117 YALE L.J. 408 (2007); cf. 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 59 (1991) (referring to the "constitutional regime, the matrix of institutional relationships and fundamental values that are usually taken as the constitutional baseline in normal political life").

5. *Hamdi v. Rumsfeld*, 542 U.S. 507, 532 (2004) (O'Connor, J., announcing the judgment of the Court).

6. *Id.* (quoting *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 165 (1963)).

7. *Rumsfeld v. Padilla*, 542 U.S. 426 (2004).

8. *Id.* at 465 (Stevens, J., dissenting).

have given more trenchant expression to this sense of potential breakdown than Judge Diana Gribbon Motz. Writing for a panel of the U.S. Court of Appeals for the Fourth Circuit (in a case the Fourth Circuit subsequently decided to hear *en banc*),<sup>9</sup> she rejected the President's claim of "inherent constitutional authority" to seize a civilian within the United States as an enemy combatant and detain him or her indefinitely.<sup>10</sup> Accepting that claim, she wrote, would "alter the constitutional foundations of our Republic,"<sup>11</sup> with "disastrous consequences for the Constitution—and the country."<sup>12</sup> This language seems to reflect a sense that something more than ordinary constitutional interpretation is at stake in at least some of the issues raised by broad assertions of executive power: Incorrect resolution of some constitutional questions might lead "the government itself to go to pieces."<sup>13</sup>

What I want to analyze here is not the correct resolution of the many issues regarding executive power raised since September 11, but an unspoken assumption that courts facing what they regard as highly fraught constitutional determinations typically make. This assumption concerns the relevance of international law to what I will call "structural constitutional issues"—issues such as the allocation of powers within the government and fidelity to the constitution.<sup>14</sup> The largely unspoken premise is that these issues are to be analyzed and decided as purely domestic matters, and that international law has nothing to say about the separation of powers or the process of constitutional amendment.<sup>15</sup>

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9. *Al-Marri v. Wright*, 487 F.3d 160 (4th Cir. 2007), *reh'g en banc granted*, No. 06-7427 (4th Cir. argued Oct. 31, 2007); see also Tom Campbell, *Enemy-Combatant Case Returns to U.S. Appeals Court*, RICHMOND TIMES-DISPATCH, Nov. 1, 2007, at A-7.

10. 487 F.3d at 189–95.

11. *Id.* at 195.

12. *Id.*

13. *Id.* (quoting Abraham Lincoln, Message to Congress in Special Session (July 4, 1861), in ABRAHAM LINCOLN: SPEECHES AND WRITINGS 1859–1865, at 246, 254 (Don E. Fehrenbacher ed., 1989)).

14. The question of what the "allocation of powers" or the "separation of powers" encompasses is itself an important and complex one. See generally Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 633 (2000). As will be evident, the emerging norms certainly encompass what is most traditionally thought to be the subject of separation of powers—such as the independence of the judiciary and the balance of power between executive and legislative branches. But they are consistent with a broader conception of the separation of powers that considers, for example, the degree of independence of the administrative branch of government or the role of political parties. By "fidelity to the constitution," I refer not only to adherence to the constitution at any given time, but also the rules governing the processes by which it is revised—such as formal amendment, reinterpretation, and glosses added over time by commonly accepted practices.

15. Even one recent effort to link international human rights treaties to structural considerations reflects this premise as well. See David Sloss, *Using International Law To Enhance Democracy*, 47 VA. J. INT'L L. 1 (2006). Noting that treaty-based rulings are subject to congressional override as a matter of domestic law, whereas constitutional rulings can be

To assert this as a premise is not to claim that the courts utterly deny the relevance of international law when deciding questions like the President's power to seize civilians at will. The Supreme Court has treated international humanitarian law as a potential constraint on (or source of authority for) the government as a whole—a constraint that takes the form of individual rights. In *Hamdi v. Rumsfeld*,<sup>16</sup> for example, the plurality ruled that “[t]here is no bar to *this Nation’s* holding one of its own citizens as an enemy combatant.”<sup>17</sup> In *Hamdan v. Rumsfeld*, the Court ruled that Congress had mandated compliance with Common Article 3 of the Geneva Conventions in the creation of tribunals to try enemy combatants.<sup>18</sup>

International legal limitations on government power—or even, more controversially, obligations on the government to take action—do not necessarily specify which parts of the government are constrained or required to act. Indeed, international law generally leaves that to each state. Typical in this regard is the question of the right to participate in public affairs. Article 25 of the International Covenant on Civil and Political Rights guarantees each citizen the opportunity to “take part in the conduct of public affairs,”<sup>19</sup> to “vote and to be elected,”<sup>20</sup> and to “have access . . . to public service.”<sup>21</sup> The U.N. Human Rights Committee (charged with overseeing implementation of the Covenant) interprets Article 25 strictly as a right of the citizen vis-à-vis the government as a whole. That is, while the right “covers all aspects of public administration, and the formulation and implementation of policy at international, national, regional and local levels,” the Committee reads Article 25 to say nothing about the internal structure of the government, leaving that to be determined by each country’s “constitution and other laws.”<sup>22</sup>

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overridden only by amendment or subsequent overruling. Sloss argues that making human rights treaties self-executing would enhance democracy. *See id.* at 8 (“By encouraging direct application of treaties as a substitute for constitutional decision-making, the legislation would enhance Congress’ role in the decision-making process, because Congress would retain the power to change the law if it was dissatisfied with the results of judicial decisions.”). Still, the argument assumes that international law norms address individual rights, as opposed to the structure of government. *See id.* at 29 (referring to allocation of authority to decide “the scope and content of legal protection afforded for fundamental human rights”).

16. 542 U.S. 507 (2004).

17. *Id.* at 519 (emphasis added).

18. 126 S. Ct. 2749, 2802 (2006); *see also* Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135. The other three Geneva Conventions of 1949 contain the same obligation.

19. International Covenant on Civil and Political Rights art. 25(a), Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

20. *Id.* art. 25(b).

21. *Id.* art. 25(c).

22. U.N. High Comm’r for Human Rights, Human Rights Comm., GENERAL COMMENT 25 (57), GENERAL COMMENTS UNDER ARTICLE 40, PARAGRAPH 4, OF THE INTERNATIONAL COVENANT

Moreover, in at least two important senses international law itself proclaims the irrelevance of constitutional law. As the Restatement (Third) of Foreign Relations Law notes, under international law states are bound by their international legal obligations regardless of what their domestic law may provide. Thus, “[a] state cannot adduce its constitution or its laws as a defense for failure to carry out its international obligation.”<sup>23</sup> If a federal state took on an international obligation in a subject matter reserved under the state’s constitution to constituent units, it might find itself in a bind if a constituent unit violated the obligation and the national government lacked the power to override the constituent unit’s action. Nevertheless, the state would still be responsible under international law.<sup>24</sup> The same would be true if the constitutional allocation of power among branches of government within a unitary state, or at the national level in a federal state, precluded it from fulfilling an obligation. A state’s desire to adhere to its own constitution is, in this sense, a matter of indifference to international law. It is not important whether the state breaches, amends, or reinterprets its own constitution in order to give itself the ability to fulfill its international obligations; what is important is that it perform its international legal obligations.

The obverse of states’ inability to plead their own constitutional and other domestic law as a basis for violating international law is the wide degree of discretion that states enjoy in choosing the internal governmental processes by which they fulfill obligations they take on by treaty. In some states, a treaty is more or less automatically incorporated into domestic law; in other states, an act of the legislature is required for

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ON CIVIL AND POLITICAL RIGHTS, ¶ 5, U.N. Doc. CCPR/C/21/Rev.1/Add.7 (Dec. 7, 1996), available at <http://www1.umn.edu/humanrts/gencomm/hrcom25.htm> (last visited Feb. 9, 2008); see also *id.* (“The allocation of powers and the means by which individual citizens exercise the right to participate in the conduct of public affairs protected by article 25 should be established by the constitution and other laws.”).

23. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, § 155 cmt. b (1987) [hereinafter RESTATEMENT]; see also Vienna Convention on the Law of Treaties art. 27, May 23, 1969, 1155 U.N.T.S. 331 (“A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.”). See generally IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 34–35 (6th ed. 2003). The principle sometimes arises in related contexts. For example, Finland and Portugal both objected to a reservation to the International Covenant on Civil and Political Rights taken by the United States. That reservation stated that the United States was bound by Article 7 (prohibiting “cruel, inhuman or degrading treatment or punishment”) only to the extent that that prohibition coincided with the U.S. Constitution’s ban on cruel and unusual treatment or punishment. 138 CONG. REC. S4781-01, S4783 (daily ed. Apr. 2, 1992). Finland objected that under the law of treaties, “a party may not invoke the provisions of its internal law as justification for failure to perform a treaty.” International Covenant on Civil and Political Rights, Objections, available at <http://www2.ohchr.org/english/bodies/ratification/docs/ObjectionsICCP.pdf>. Portugal objected for similar reasons. *Id.* (“[I]nvoing general principles of National Law may . . . contribute to undermining the basis of International Law.”).

24. See RESTATEMENT, *supra* note 23, § 321 cmt. b.

the treaty to have effect as part of domestic law.<sup>25</sup> The “fundamental principle,” as one commentator puts it, “is that the application of treaties is governed by domestic constitutional law.”<sup>26</sup> In addition, states may choose to put certain international law issues beyond the reach of courts through doctrines of justiciability.<sup>27</sup> These choices have obvious implications for the internal balance of powers among the executive, legislative, and judicial branches, and they are essentially left to each state to determine.

In short, international law might seem most naturally to place obligations on states, but to leave structures of government and adherence to the constitution entirely on the domestic plane. This approach, in turn, would lend a great deal of plausibility to the unspoken premise of the irrelevance of international law to structural constitutional questions. Indeed, it might raise the question whether the premise is even worth articulating. Some assumptions, after all, are left unspoken because they are so reasonable. Is this one such premise? Before answering this question, it may be useful to dwell briefly on what it might mean for international law to govern structural constitutional matters. It may also be useful to point out that the prospect of such an undertaking is not entirely without precedent in our own constitutional tradition.

As for what it might mean, suppose the President wished to take an action that would not in itself violate a human right or other international legal constraint on government action. Suppose, further, that the Constitution recognized executive power to take the action without congressional authorization (or even in the face of congressional disapproval). Even so, the Constitution would not necessarily *require* the executive to take that action; it simply would not disable the President from acting. Might there be international law norms concerning executive power or the maintenance of checks and balances, however, that could make it a violation of international law for the President to exercise the authority left open by the Constitution? One might take it even further. Where international norms relating to executive power somehow conflicted with the Constitution—say, by requiring legislative approval for an action over which the Constitution granted the President exclusive authority—we would expect domestic courts to follow the Constitution. But might the international norms provide a legitimate basis for criticism by other countries or international bodies of the way in which powers were allocated within the federal government?

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25. See BROWNLIE, *supra* note 23, at 40–48.

26. Francis G. Jacobs, *Introduction*, in 7 *THE EFFECT OF TREATIES IN DOMESTIC LAW* xxiii, xxiv (Francis G. Jacobs & Shelley Roberts eds., 1987).

27. See BROWNLIE, *supra* note 23, at 49–50 (discussing “relation of executive and judiciary and issues of non-justiciability”).



Second, let us assume for the sake of argument that the U.S. Constitution places no constraints on amendment beyond those set out in Article V. Article V prescribes procedures for adoption of amendments and bans use of the amendment power to deprive a state of its equal representation in the Senate.<sup>28</sup> Suppose, then, that an amendment stripping Congress of most of its powers and handing them over to the President would be valid as long as it was adopted in conformity with the procedures set out in Article V. Once again, the absence of constitutional norms ruling out this conclusion would not necessarily be sufficient for the full validity of the amendment if international law imposed certain binding constraints on the amendment of constitutions that ruled out a change of this sort. Here, too, even if we might reasonably predict that U.S. courts would follow domestic rather than international law in case of a perceived conflict or difference, there might seem to be a legitimate basis for criticism by other states or international bodies as to how the matter was handled.

The idea that international law might bear on questions of separation of powers and amendment of constitutions may not seem wise at first glance. Simply as a matter of description, constitutions are very much tied up with each country's particular history and establish a wide range of different governmental structures. Their meanings are heavily influenced by the particular practices of judicial interpretation associated with them.<sup>29</sup> Any comparative examination of different countries' constitutions and governmental structures makes clear how wide is the scope for variation.<sup>30</sup> The very conception of the role of a constitution in the life of a nation may not be the same for all countries.<sup>31</sup> Thus, achieving even the degree of concreteness manifested in the language of human rights treaties (which are themselves typically phrased in rather broad language) might be difficult.

It might also be undemocratic. If the U.S. Constitution is, as Corwin put it, an "invitation to struggle"—a characterization he applied

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28. U.S. CONST. art. V.

29. For a useful discussion in a comparative context, see David Robertson, *Thick Constitutional Readings: When Classic Distinctions Are Irrelevant*, 35 GA. J. INT'L & COMP. L. 277 (2007).

30. See, e.g., Ackerman, *supra* note 14. See generally Vicki C. Jackson, *Narratives of Federalism: Of Continuities and Comparative Constitutional Experience*, 51 DUKE L.J. 223 (2001) (discussing the use of comparative constitutional law in U.S. federalism decisions); Jenny S. Martinez, *Inherent Executive Power: A Comparative Perspective*, 115 YALE L.J. 2480 (2006) (comparing executive power in five democracies).

31. See, e.g., Jed Rubenfeld, *Commentary, Unilateralism and Constitutionalism*, 79 N.Y.U. L. REV. 1971, 1991–99 (2004) (contrasting constitution as embodiment of self-government with constitution as embodiment of universal rights-based constraints on government, and identifying the former with the United States and the latter with Europe).

to the Constitution's allocation of foreign affairs powers between Congress and the President, but which could be applied to many parts of many constitutions—perhaps it is most consistent with democratic governance that the struggle be resolved by elected actors and their constituents within each state.<sup>32</sup> The relatively broad language of many other countries' constitutions and their amenability to changing interpretations over time might suggest similar concerns in those cases. This concern is all the more pointed because the institutional struggles always take place within the context of struggles over policy directions and profoundly influence those struggles.<sup>33</sup> Perhaps, as well, the fundamental rules governing the creation and amendment—the two are not always easy to distinguish—of a nation's basic legal text should be left to each state to decide. All of these concerns are magnified by the fact that neither international institutions nor other states are subject to any accountability to a given national electorate.

These concerns are real, and not easily dismissed. But the same may be said of the emerging signs of international law norms addressing structures of government and fidelity to the constitution. In their most currently developed form, these emerging norms have been propounded or suggested by regional international organizations, but they may also presage a more global trend.

The trend, moreover, is well worth examining. On the one hand, as noted, there are valid bases for concern about whether such norms could ever move from away from a breadth capable of encompassing a wide variety of constitutional arrangements—a breadth purchased at the cost of any hope of meaningful practical application—without also imposing a straitjacket on democratic choice of the forms of government. On the other hand, the protection of human rights does constitute a legitimate concern of international law, and while democracies can certainly violate human rights, it is not implausible to suppose that the prospects for holding a government to account are greater in a democracy than in a dictatorship. If maintenance of democracy is therefore a plausible concern for international law, it is no longer obvious that the structure of any state's government and its respect for its own constitution are purely domestic concerns. For while there are undoubtedly many ways of

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32. EDWARD S. CORWIN, *THE PRESIDENT: OFFICE AND POWERS, 1787–1984*, at 201 (5th rev. ed. 1984) (“[T]he Constitution, considered only for its affirmative grants of powers capable of affecting the issue, is an invitation to struggle for the privilege of directing American foreign policy.”).

33. Corwin himself linked the overall trend of the struggle in favor of the presidency during the twentieth century to a substantive policy choice the nation made in replacing “the *laissez-faire* theory of government with the idea that government should make itself an *active, reforming* force in the field of economic enterprise.” *Id.* at 357.

structuring democratic governance, the thought that some allocations of powers or approaches to constitutional fidelity might be incompatible with democracy is at least worth taking seriously.

The legitimacy and practicality of this trend can be neither condemned nor vindicated solely by reference to any one country's law. In that sense, it is neither here nor there that the idea that international law bears on these questions is not entirely without support in our own constitutional tradition. But it may make the idea seem less foreign.

I am not referring here to the Supreme Court's practice of sometimes taking the experience of other countries or systems into account when deciding constitutional questions. In his dissent in *Printz v. United States*,<sup>34</sup> for example, Justice Breyer used a comparative analysis to argue that a power on the part of the central government to order constituent units to carry out federal regulations is compatible with a federal structure of government. A comparative analysis is not the same as application of international law; in any event, Justice Breyer was careful to make clear that he invoked comparative constitutional law solely to help "interpret[ ] our own Constitution."<sup>35</sup> Of course, more ambitious conceptions of international human rights law might see it moving toward convergence with some kind of transnational constitutional law, creating a new global constitutional order in which "[t]he sense of distinctive sovereignties is diminished, as is the strong distinction between domestic constitutional law and international legal norms in areas of human rights."<sup>36</sup> The Court, however, has not taken this approach.

Nor am I referring to Chief Justice Marshall's well-known admonition in *Murray v. Schooner Charming Betsy* that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains."<sup>37</sup> This admonition may bear on constitutional interpretation as well, particularly if the concern is to avoid placing the United States in breach of its international law obligations,<sup>38</sup>

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34. 521 U.S. 898 (1997).

35. *Id.* at 977 (Breyer, J., dissenting).

36. Vicki C. Jackson, *Transnational Discourse, Relational Authority, and the U.S. Court: Gender Equality*, 37 *LOY. L.A. L. REV.* 271, 309 (2003); see also Lorraine E. Weinrib, *Constitutional Conceptions and Constitutional Comparativism*, in *DEFINING THE FIELD OF COMPARATIVE CONSTITUTIONAL LAW* 3, 21, 22–23 (Vicki C. Jackson & Mark Tushnet eds., 2002) (an emerging transnational constitutionalism may "dictate[ ] certain institutional arrangements and, in particular, a special mode of judicial analysis").

37. 6 U.S. (2 Cranch) 64, 118 (1804).

38. In *Estelle v. Gamble*, 429 U.S. 97, 103–04 & n.8 (1976), the Supreme Court took the U.N. Standard Minimum Rules for the Treatment of Prisoners into account to help determine rights under the due process and cruel and unusual punishment provisions of the Constitution. *Cf. Roper v. Simmons*, 543 U.S. 551, 575–78 (2005) (interpreting the Eighth Amendment to be consistent with international law prohibiting execution of juvenile offenders). *Roper* did not hold that

though its application to constitutional interpretation is not without controversy.<sup>39</sup> In any event, an interpretive guide or influence is not the same as a binding authority.<sup>40</sup>

Rather, I have in mind the way that glimpses of the potential relevance of international law to structural constitutional issues can be found in both the Court's case law and positions taken by the executive. I call them "glimpses" because they amount to less than a well-worked doctrine. Indeed, they are subject to alternative interpretations that keep structural constitutional issues firmly within the domestic arena. But they also provide a window on the way even a constitutional practice that is as domestically oriented as ours can partially acknowledge the relevance of international law.

*United States v. Curtiss-Wright Export Corp.*<sup>41</sup> is best known for its vigorous conception of executive power in foreign affairs. There the Court stated that sovereignty passed directly from Great Britain to the United States upon independence, and ruled that "the investment of the federal government with the powers of external sovereignty did not depend upon the affirmative grants of the Constitution."<sup>42</sup> In other words, it was the international legal rules governing the community that the United States joined upon independence that gave the federal government these powers. The Court held, as well, that in the realm of foreign affairs, "the President alone has the power to speak or listen as a representative of the nation."<sup>43</sup>

It is worth dwelling on *Curtiss-Wright's* implications for a moment. The Court in effect identified an essential element of our internal governmental structure and traced it to a source other than the Constitution: international law. The element was essential because, in the Court's view, "[s]overeignty is never held in suspense."<sup>44</sup> The moment the

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execution would violate the *United States'* obligations, and the practice of other countries played at least as great a role as international law. See *id.* at 578. But international law was relevant at least indirectly as an expression of the view of most countries regarding the legality of executing juveniles. See *id.*

39. See, e.g., Roger P. Alford, *Foreign Relations as a Matter of Interpretation: The Use and Abuse of Charming Betsy*, 67 OHIO ST. L.J. 1339, 1341–42 (2006); see also David T. Hutt & Lisa K. Parshall, *Divergent Views on the Use of International and Foreign Law: Congress and the Executive Versus the Court*, 33 OHIO N.U. L. REV. 113, 124–40 (2007) (describing congressional and executive hostility to the use of international and foreign law in constitutional interpretation).

40. For an interesting discussion that highlights the potential for a strong version of the *Charming Betsy* approach to internationalizing constitutional law, see Melissa A. Waters, *Creeping Monism: The Judicial Trend Toward Interpretive Incorporation of Human Rights Treaties*, 107 COLUM. L. REV. 628, 679–86 (2007).

41. 299 U.S. 304 (1936).

42. *Id.* at 318.

43. *Id.* at 319.

44. *Id.* at 317.

United States became independent, the government acquired certain powers without regard to the silence of the Articles of Confederation or (later) the Constitution regarding them; to say otherwise, the Court remarked, would be to assert that “the United States is not completely sovereign.”<sup>45</sup>

The force of the Court’s language attributing the foreign affairs powers to the President might even raise questions about constitutional amendments limiting executive power. Only the executive, the Court said, is suited to exercising the powers that international law gives the federal government; and effective membership in the international community requires the President to exercise these powers exclusively.<sup>46</sup> If that is so, could an amendment taking important parts of those powers from the President and giving them to Congress be any more legitimate than an amendment reducing the Senate representation of the smallest states to one member each? The idea that the rules governing amendments might not be exhaustively stated in Article V has received scholarly attention in recent years.<sup>47</sup> Perhaps international law might constitute another source of rules governing fidelity to the Constitution—one that is not only outside Article V (or at least the text of Article V), but outside the Constitution itself.

There is no doubt that these readings take the role of international law further than the Court would do. *Curtiss-Wright* itself was careful to note that the plenary power the President was said to enjoy “must be exercised in subordination to the applicable provisions of the Constitution.”<sup>48</sup> Even in *Ex Parte Quirin*, the Court made the cautionary point that “Congress and the President, like the courts, possess no power not derived from the Constitution.”<sup>49</sup> And of course, *Curtiss-Wright*’s account of history has been heavily criticized.<sup>50</sup>

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45. *Id.* at 318.

46. *Id.* at 319–22.

47. See, e.g., Gary Jeffrey Jacobsohn, *An Unconstitutional Constitution? A Comparative Perspective*, 4 INT’L J. CONST. L. 460, 461 (2006) (discussing substantive limits on permissible constitutional amendments); Jeff Rosen, *Was the Flag Burning Amendment Unconstitutional?*, 100 YALE L.J. 1073, 1086 (1991) (“[R]etained natural rights are an implicit limitation on amendments inside or outside of Article V.”); cf. Akhil Reed Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 COLUM. L. REV. 457, 458 (1994) (discussing the possibility of formal amendments outside the Article V procedure).

48. 299 U.S. at 320; see also *Medellín v. Texas*, No. 06-984, 2008 U.S. LEXIS 2912, at \*59 (Mar. 25, 2008) (same).

49. 317 U.S. 1, 25 (1942); cf. *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2823 (2006) (Thomas, J., dissenting) (“Congress, to be sure, has a substantial and essential role in both foreign affairs and national security.”).

50. See, e.g., David M. Levitan, *The Foreign Relations Power: An Analysis of Mr. Justice Sutherland’s Theory*, 55 YALE L.J. 467, 489 (1946) (account of sovereignty “does not harmonize with the facts”); *id.* at 493 (“extreme interpretation” of the constitution incompatible with democracy); Charles A. Lofgren, *United States v. Curtiss-Wright Export Corporation: An*

Still, if one were to find in the Constitution an inherent executive power to undertake actions the scope of which is defined by international law, the President would have powers not too different from those derived from the most ambitious reading of *Curtiss-Wright*. There are intimations of just such an approach on the government's part in the cases concerning the President's power to capture, detain, and try enemy combatants. In *Hamdi*, the government argued that the President's war powers did not depend on congressional authority, at least in cases where the United States was attacked: The President, in this view, has inherent authority under the Constitution as commander in chief to capture and detain enemy combatants to the full extent that the law of war permits.<sup>51</sup> In *Hamdan*, the government argued that the President had inherent authority as commander in chief to establish military commissions to try individuals "who violated the law of war."<sup>52</sup> The phrase "law of war" may refer in part to U.S. rules that have evolved in the course of fighting, but it at least includes international rules developed through treaty and customary law processes.<sup>53</sup> While this position ultimately grounds the President's authority in the Constitution, as a practical matter it traces the scope of that power to international law. Because any recognition of inherent executive authority affects the President's position vis-à-vis Congress, the government's position amounts to determining the allocation of power, at least in part, by international law.<sup>54</sup>

If nothing else, both *Curtiss-Wright* and the government's position in *Hamdi* and *Hamdan* make clear that introducing international law into structural constitutional issues is not necessarily synonymous with

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*Historical Reassessment*, 83 YALE L.J. 1, 28–32 (1973) (Court's historical account inaccurate). Nor does its account of sovereignty being transferred directly to the United States as a whole square easily with characterizations by the Court in other contexts of the states as having surrendered sovereignty in ratifying the Constitution. *E.g.*, *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 803 (1995); *Reynolds v. Sims*, 377 U.S. 533, 574 (1964).

51. Brief for the Respondents at 12–21, *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (No. 03-6696); *see also Hamdan*, 126 S. Ct. at 2825 n.2 (suggesting that the President has "inherent authority to try unlawful combatants for violations of the law of war before military commissions"); *Hamdi*, 542 U.S. at 542 (Souter & Ginsburg, JJ., concurring in part, dissenting in part, and concurring in the judgment) (noting the government's argument that the President's Article II role as commander in chief brings with it "authority under the accepted customary rules for waging war").

52. Brief for Respondents at 16, *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006) (No. 05-184) (quoting *Hirota v. MacArthur*, 338 U.S. 197, 208 (1949) (Douglas, J., concurring)).

53. *Hamdan*, 126 S. Ct. at 2829 (Thomas, J., dissenting) ("The common law of war as it pertains to offenses triable by military commission is derived from the experience of our wars and our wartime tribunals and the laws and usages of war as understood and practiced by the civilized nations of the world.") (citations and internal quotation marks omitted).

54. The Court did not rule one way or the other on the government's position in *Hamdi* because it found that the power to capture and detain enemy combatants on the battlefield in Afghanistan was implicit in Congress's post-September 11 authorization of the use of military force. *Hamdi*, 542 U.S. at 518.

developing new sources of restraint on executive power or even reinforcing existing domestic constraints. The government's appeal to the law of war also shows how it may be particularly tempting in the right circumstances for presidents to appeal to international law as an expansive source of authority. In this respect, the Bush administration's approach bears some resemblance to an appeal by the Nicaraguan president to international standards in 2004 to 2005 as he sought to prevent his powers from being limited by constitutional amendments.<sup>55</sup>

One can also see in the Court's post-September 11 cases glimpses of a very different role for international law in structural constitutional issues, one that focuses on judicial independence. In *Hamdan* the Court determined that the military commissions the President had created could be upheld only if they complied with the requirements of Common Article 3 of the Geneva Conventions, because the Uniform Code of Military Justice ("UCMJ") required conformity not only with the UCMJ itself and the "American common law of war,"<sup>56</sup> but also with international humanitarian law. Common Article 3 prohibits the "passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples."<sup>57</sup>

Both the plurality and Justice Kennedy's opinions read Common Article 3 to impose two basic requirements. One was, in effect, fidelity to the state's own constitution. The Court agreed with the Red Cross commentary that "regularly constituted" means "established and organized in accordance with the laws and procedures already in force in a country."<sup>58</sup> The Court interpreted this requirement to mandate conformity as far as practicable with the congressionally established military justice system.<sup>59</sup> But Common Article 3 also functioned in practice as a requirement of constitutional fidelity; the reason that the deviations from the UCMJ by the rules and procedures governing the military commissions were fatal was that the Constitution (as read by the Court) made the congressionally approved system binding on the executive. Tribunals established by an exercise of executive power that violated constitutional constraints on that power could hardly be "regularly constituted."

The other requirement is, potentially, an international separation of

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55. See *infra* Part II.A.

56. *Hamdan*, 126 S. Ct. at 2786.

57. Geneva Convention Relative to the Treatment of Prisoners of War art. 3(1)(d), Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

58. *Hamdan*, 126 S. Ct. at 2797 (quoting INT'L COMM. OF RED CROSS, 1 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 355 (2005)) (internal quotation marks omitted).

59. *Id.*; see also *id.* at 2804 (Kennedy, J., concurring in part).

powers standard. Both the plurality and Justice Kennedy took note of the fact that, as the plurality put it, the “rules and procedures [of the military commissions] are subject to change midtrial, at the whim of the Executive.”<sup>60</sup> The plurality seemed to fault this provision mainly for its deviation from the UCMJ, though its reference to the “whim of the Executive” implicitly suggests separation of powers concerns. Justice Kennedy made these concerns explicit, noting that Common Article 3 requires “an acceptable degree of independence [on the part of the tribunal] from the Executive.”<sup>61</sup> The military commissions suffered from a number of structural defects that concentrated power in the executive and undermined their independence from the executive branch.<sup>62</sup> Because judicial independence is easily understood as an important aspect of the separation of powers, Justice Kennedy’s interpretation effectively amounts to a recognition of a particular separation of powers requirement mandated by international law.<sup>63</sup>

It would not be hard to exaggerate the significance of these glimpses of a role for international law in structural constitutional questions. Even *Hamdan*, with its extensive and necessary discussion of international law, is ultimately read most straightforwardly as a holding based on the U.S. constitutional requirements of the separation of powers: To create the kind of military commissions he had established, the President would at least need approval by Congress.<sup>64</sup>

In this article I would like to explore what it would mean to imagine a world in which the President’s claims of inherent authority to detain civilians might be tested against, for example, the provisions of the Inter-American Democratic Charter, adopted by the Organization of American States in 2001. The Charter pronounces maintenance of “the rule of law” and “the separation of powers and independence of the branches of government” essential to any democracy, and prohibits any “unconstitutional alteration of the constitutional regime that seriously

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60. *Id.* at 2797 n.65 (majority opinion); *see also id.* at 2804 (Kennedy, J., concurring in part).

61. *Id.* at 2804 (Kennedy, J., concurring in part).

62. *Id.* at 2807.

63. To be sure, in Justice Kennedy’s view it was up to Congress to determine in the first instance what it would take to achieve that “acceptable degree of independence from the Executive.” *Id.* at 2804. Congress, in his view, had done so through the UCMJ. Thus, he conducted his analysis of whether the procedures governing the military commissions complied with Common Article 3 by means of a careful comparison of those procedures to the UCMJ and regulations under it. *See id.* at 2804–08; *see also id.* at 2084 (referring to “the standards of our Nation’s system of justice”). But the essential question was still the same: Did the tribunals have the independence mandated by Common Article 3?

64. I say “at least” because *Hamdan* left open the possibility that even with congressional approval some procedures—for example, not permitting the accused to be present during the proceedings—might violate individual rights. *See id.* at 2808–09.



impairs the democratic order in a member state.”<sup>65</sup>

The Charter was adopted on September 11, 2001, shortly after the attacks on the World Trade Center and the Pentagon.<sup>66</sup> The timing was coincidental. The Charter had been under development and consideration for a long period before September 11. Indeed, in some respects it represents the culmination of the first foray into the area by the Organization of American States (“OAS”) in 1991, with the Santiago Commitment to Democracy and the Renewal of the Inter-American System, which committed the OAS to oppose military coups. But it is striking that the most comprehensive attempt to internationalize the separation of powers and adherence to the Charter was adopted on the same day as the events that have been the occasion in recent years for dramatic assertions of executive power that, if accepted, could reshape the U.S. Constitution.

To imagine a world in which the constitutional questions and the international norms were intertwined by more than the coincidence of a date is not necessarily to seek its creation. Indeed, I do not aim to provide a definitive judgment as the desirability of these emerging norms. Rather, I seek to accomplish three aims. First, in Part I, I will set out the indications that separation of powers and fidelity to the constitution are moving toward becoming subjects of international concern. As the description will make clear, there is some ground for arguing that there currently are binding rules of *global* international law governing these subjects—and even more evidence of fairly strongly stated regional norms, together with some reason to think they might become more global.

Second, in Part II, I will recount and analyze the way in these emerging norms have been applied in two countries’ constitutional crises—Nicaragua and Togo. The focus of this part on action by regional and international actors is deliberate; I do not intend to address the question of the role these emerging norms might play in domestic courts’ resolution of constitutional questions. Instead, the analysis will highlight how quickly such norms—no matter how broadly phrased—draw international actors into detailed analyses of other countries’ constitutions. That these two countries are decidedly not powerful actors on the international scene gives some indication of the concern these emerging norms may raise: Will they simply legitimize a new basis for more powerful countries to intervene in the affairs of the less powerful?

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65. Organization of American States, Inter-American Democratic Charter art. 19, Sept. 11, 2001, 40 I.L.M. 1289 (2001) [hereinafter Inter-American Democratic Charter].

66. See Abraham Lama & Federico Ferber, *Rallying Behind Democracy in Face of Terrorism*, IPS-INTER-PRESS SERV., Sept. 11, 2001.

Finally, in Part III, I will briefly attempt to situate these emerging norms within a broader international context. There are already, as I will point out, many aspects of international law that influence and bear on structural questions and adherence to constitutions, even though they do not, by their own terms, address constitutional law. At the very least, this fact raises the question whether defending the purely domestic nature of constitutional questions may simply divert attention from a variety of formal and informal ways in which they are being internationalized, at least in part.

## I. THE EMERGING INTERNATIONAL LAW NORMS REGARDING STRUCTURAL CONSTITUTIONAL ISSUES

### A. *Antecedents*

As noted earlier,<sup>67</sup> with respect to compliance the basic approach of international law toward domestic law is studied indifference to the latter: A state may not cite its own domestic law (including its constitutional law) to justify violating an international law norm. But there is an exception. Under Article 46 of the Vienna Convention on the Law of Treaties, a state may cite violation of its own domestic law limitations regarding capacity to consent to a treaty as a basis for invalidating its consent.<sup>68</sup> The state may invoke these limitations only if the violation is “manifest” and “concerned a rule of its internal law of fundamental importance.”<sup>69</sup> Because these limitations are typically (though not necessarily) embodied in its constitutional law, this issue is one area where international law and constitutional law intersect.

The intersection poses a dilemma. Allowing a state to rely on its internal law in this area not only is inconsistent with the general rule holding a state to its treaty obligations regardless of its domestic law, but also might undermine the interests of other parties to the treaty. Yet the prospect that a state could be deemed a party to a treaty even though the fundamental instrument structuring and legitimizing the state’s existence—its constitution—had been violated in the process of becoming a party hardly seems consistent with the idea that state parties are bound to treaties because they have consented to them.

The rule ultimately adopted in the Vienna Convention does make reference to constitutional law (that is, to violations of “internal law of fundamental importance”) but in a fairly restrictive way. The violation of the internal law must have been “manifest,” and the law that was

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67. See *supra* text accompanying notes 23–27.

68. Vienna Convention on the Law of Treaties, *supra* note 23, art. 46(1).

69. *Id.*

violated must have been of "fundamental importance." The former requirement is essentially a question of objective notice.<sup>70</sup> More interesting is the requirement that the rule be of "fundamental importance." If that requirement is judged by an international standard, then it could effectively involve an *international* determination of which parts of a state's constitution are "fundamental" and which are not. Yet what is fundamental to a constitution is obviously also a matter of domestic constitutional law.

While it may not provide a definitive guide to interpreting Article 46,<sup>71</sup> the discussion of this provision at the United Nations Conference on the Law of Treaties in 1968 and 1969 sheds interesting light on the quandaries posed by this exception. At the Forty-Third Meeting of the Committee of the Whole in 1968, the Iranian delegate proposed that international law should flatly recognize that a head of state could bind a state through a treaty. This, he asserted, was what "the great majority of constitutions" provide, and it would be preferable to importing vague terms like "manifest" and "fundamental" into treaty law.<sup>72</sup> The Polish delegate replied, in effect, that the Iranian proposal would unacceptably commit international law to executive power by "suggest[ing] that a Head of State could never [be deemed to] act in contravention of the constitution of the State." This approach, he added, would overlook cases in the past cited by the International Law Commission in which "a Head of State had concluded a treaty in contravention of an unequivocal provision of the constitution."<sup>73</sup>

Also the subject of discussion was whether one state could productively interpret another state's constitution in order to tell whether the other state's government was in fact adhering to provisions in its constitution concerning capacity to consent to treaties. The delegate from Pakistan expressed the concern that it would be "difficult to expect one contracting party to know in detail the constitutional provisions of another State regarding capacity to express its consent to be bound by a treaty."<sup>74</sup> The delegate from Venezuela replied that the United Nations published collections of member states' written constitutions, so it

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70. *Report of the International Law Commission to the Attorney General*, [1966] 2 Y.B. Int'l L. Comm'n 169, 242, U.N. Doc. A/CN.4/SER.A/1966/Add.1 [hereinafter *International Law Commission Report*] (violation is "manifest" if it "would be *objectively evident to any State dealing with the matter normally and in good faith*").

71. The Vienna Convention relegates the *travaux préparatoires* to a secondary status in interpretation. See Vienna Convention on the Law of Treaties, *supra* note 23, art. 32.

72. United Nations Conference on the Law of Treaties, G.A. Res. 2166 (XXI), ¶¶ 20-21, U.N. GAOR, 1st Sess., 43d mtg., U.N. Doc. A/Conf.39/11 (Apr. 29, 1968) [hereinafter UNCLT, 1st Sess.].

73. *Id.* ¶ 83. The Iranian proposal was withdrawn. *Id.* ¶ 87.

74. *Id.* ¶ 4.

would be “easy” for one state to see whether another had acted consistently with its internal law concerning consent to be bound.<sup>75</sup> The Swedish delegate echoed the comments of Pakistan:

[H]ow could a State know the internal law of another State? The best method would be to ask the government of the other State, but the latter, by showing its readiness to conclude the treaty, had already indicated[ ] that it considered itself competent to do so. An alternative would be to seek the opinion of lawyers of the country with which the State intended to conclude a treaty. If the lawyers decided that the projected treaty or the manner of its conclusion conflicted with the internal law, it would seem difficult for one government to point out to another that in virtue of certain provisions of its internal law it was not empowered to conclude the treaty. A rule requiring such interference in the internal politics of other States did not seem feasible.<sup>76</sup>

The Swiss delegate added that requiring a state to “examine in detail the constitution of States with which it was negotiating” could “become a source of endless complications and disputes.”<sup>77</sup>

Despite these qualms, the requirement that the provision violated be “fundamental” was approved.<sup>78</sup> At the Eighteenth Plenary Meeting in 1969, Cameroon raised the issue again, moving to delete the requirement on the ground that “[i]n order to apply that provision, a State party to a treaty would have to consider the provisions of the internal law of another State and determine which were of ‘fundamental importance’.”<sup>79</sup> The delegate from the Soviet Union spoke against the motion on the ground that the phrase was needed to preclude “the possibility that even secondary rules of internal law might be invoked” to free a state of its

75. *Id.* ¶ 10.

76. *Id.* ¶ 37. The Swedish delegate went on to note that most states recognized that “*de facto* governments, in other words governments effectively exercising power but disregarding constitutional rules, could bind their States by treaty.” *Id.* ¶ 39; see also United Nations Conference on the Law of Treaties, G.A. Res. 2166 (XXI), ¶ 43, 2nd Sess., 18th plenary mtg., U.N. Doc. A/CONF.39/11/Add.1 (May 9, 1969) (similar argument by Swedish delegate in subsequent meeting). The concern about interference echoed the earlier commentary by the International Law Commission, which had drafted the article. The Commission noted that “any questioning on constitutional grounds of the internal handling of the treaty by another Government would certainly be regarded as an inadmissible interference in its affairs.” *International Law Commission Report, supra* note 70, at 242.

77. UNCLT, 1st Sess., *supra* note 72, ¶ 75.

78. *Id.* at 246; see also United Nations Conference on the Law of Treaties, First and Second Sessions, Mar. 26–May 24, 1968, and Apr. 9–May 22, 1969, Vienna, *Report of the Committee of the Whole on Its Work at the First Session of the Conference*, at 95, 165–66, U.N. Doc. A/CONF.39/14 (May 1, 1969); United Nations Conference on the Law of Treaties, G.A. Res. 2166 (XXI), at 463–65, U.N. GAOR, 1st Sess., 78th mtg., U.N. Doc. A/Conf.39/11 (May 20, 1968).

79. United Nations Conference on the Law of Treaties, G.A. Res. 2166 (XXI), ¶ 18, 2nd Sess., 18th plenary mtg., U.N. Doc. A/CONF.39/11/Add.1 (May 9, 1969).

treaty obligations.<sup>80</sup> The motion was defeated and the requirement that the violation be of a “fundamental” internal law remained.<sup>81</sup>

Of course, this discussion of the relationship between international law and constitutional law concerned a relatively narrow question. It is interesting, however, in the way that it reveals a strong hesitance to make constitutional law questions a subject of international law. This hesitance was expressed partly in terms of concerns about how a state could interpret another’s constitution, and partly in terms of concern that attempting to do so would constitute “interference” in that state’s affairs. While the provision adopted effectively does make some reference to constitutional law, it is quite limited in scope.

The drafting of the Vienna Convention on the Law of Treaties took place over a number of years, but the time of this discussion (in 1968 and 1969) roughly coincided with the advent of a new era in human rights. In 1966 the General Assembly approved the texts of the International Covenant on Civil and Political Rights (“ICCPR”)<sup>82</sup> and the International Covenant on Economic, Social and Cultural Rights (“ESC Covenant”)<sup>83</sup> and sent them out for ratification. The treaties entered into force ten years later, in 1976.<sup>84</sup> Today the ICCPR has 160 parties, and the ESC Covenant, 157.<sup>85</sup> The widespread commitment by states to these and other human rights treaties has carved out a significant exception to sovereignty—in areas that are typically covered by constitutions.

Developments in the decades following the drafting of the Vienna Convention, in other words, significantly undercut the basis for the hesitation shown at the conference to put states in the position of having to interpret other states’ constitutions. In particular, two human rights that have been increasingly widely recognized implicate structural constitutional issues fairly easily. One is the right to a judicial remedy for violation of human rights; the other is the right to democracy or representative governance. While they do not necessarily entail the emergence of separation of powers and constitutional fidelity as subjects of international law, they do lay the groundwork for it.

International law recognizes not only a wide range of human rights

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80. *Id.* ¶ 37.

81. *Id.* at 88.

82. ICCPR, *supra* note 19.

83. International Covenant on Economic, Social and Cultural Rights, Dec. 19, 1966, 993 U.N.T.S. 3, 6 I.L.M. 360 [hereinafter ICESC].

84. *See* ICCPR, *supra* note 19; ICESC, *supra* note 83.

85. *See* Office of the United Nations High Commissioner for Human Rights, International Covenant on Civil and Political Rights, <http://www2.ohchr.org/english/bodies/ratification/4.htm> (last visited Feb. 5, 2008); Office of the United Nations High Commissioner for Human Rights, International Covenant on Economic, Social and Cultural Rights, <http://www2.ohchr.org/english/bodies/ratification/3.htm> (last visited Feb. 5, 2008).

but also a right to effective access to a court or other independent tribunal in case of their violation.<sup>86</sup> As the Inter-American Court of Human Rights has noted, this right may be violated if “the Judicial Power lacks the necessary independence to render impartial decisions or the means to carry out its judgments.”<sup>87</sup> Once one moves from a right to an effective remedy to the independence of the judiciary, it is not difficult to promulgate relatively specific constraints on states regarding how they structure their judiciary and its relation to other branches of government. In 1985, for example, the U.N. General Assembly endorsed seven principles on the independence of the judiciary that, among other things, called on states to give their judiciaries “jurisdiction over all issues of a judicial nature”; grant the judiciary exclusive competence to determine which matters are judicial; provide courts with “adequate resources” to perform their functions; and shield judges and courts from “inappropriate or unwarranted interference.”<sup>88</sup> In 2000, while noting that “there is no one universal model of democracy,”<sup>89</sup> the U.N. General Assembly called on states to promote democracy by developing “effective public institutions, including an independent judiciary.”<sup>90</sup>

To be sure, the implications of mandating judicial independence for a more general international law requirement of separation of powers might be limited. The very concept of judicial independence is capable of many interpretations, as is evident from the variety of ways that states claiming to respect it structure their judiciaries.<sup>91</sup> Moreover, a norm requiring an independent judiciary would not, at least at first glance, appear to have anything to say about the balance of power among the political branches. Perhaps it could simply be limited to specifying a role for the judiciary in protecting individual and group human rights.

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86. See Organization of American States, American Convention on Human Rights art. 25, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 [hereinafter American Convention on Human Rights] (“right to judicial protection”); ICCPR, *supra* note 19, art. 2(3); see also Convention for the Protection of Human Rights and Fundamental Freedoms arts. 5, 6, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter European Convention].

87. Judicial Guarantees in States of Emergency (Arts. 27(2), 25 and 8 of the American Convention on Human Rights), Advisory Opinion OC-9/87, Inter-Am. Ct. H.R. (ser. A) No. 9, ¶ 24 (Oct. 6, 1987).

88. Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Milan, Aug. 26–Sept. 6, 1985, *Basic Principles on the Independence of the Judiciary*, ¶¶ 3, 4, 7 A/CONF.121/22/rev.1; see also Conference on Security and Co-operation in Europe: The Moscow Meeting on the Human Dimension, Moscow, Russ., Oct. 3, 1991, ¶ 19.2, *reprinted in* 30 I.L.M. 1670, 1678 (1991) (endorsing the same principles) [hereinafter CSCE, Moscow Meeting].

89. Promoting and Consolidating Democracy, G.A. Res. 55/96, pmb. l. at 2, U.N. Doc. A/RES/55/96 (Dec. 4, 2000).

90. *Id.* ¶ 1(a), at 2; see also *id.* ¶ 1(c)(v), at 4.

91. See, e.g., Sanford Levinson, *Identifying “Independence,”* 86 B.U. L. REV. 1297, 1297 (2006).

Even so, more general formulations of the obligation to provide effective remedies are suggestive. In an advisory opinion in 1990, the Inter-American Court of Human Rights concluded that states have an obligation to provide indigents with free legal counsel where necessary to effectuate a fair hearing. In reaching its conclusion, the Court spoke broadly of a "duty to organize the governmental apparatus and to create the structures necessary to guarantee human rights."<sup>92</sup> This broader formulation shows how difficult it might be to confine any given mandate that affects the internal allocation of powers to one branch alone. As noted earlier, for example, states may have doctrines of justiciability that restrict courts' ability to reach certain issues. In some cases these doctrines reflect deference to the executive branch in particular; they not only may set a balance between the judiciary and the executive, but also reflect executive predominance in that area vis-à-vis the legislature. Any change in these doctrines could thus also affect the relationship between the executive and legislative branches. If international law were to address doctrines of justiciability as part of the norm requiring states to guarantee judicial independence (as the U.N. General Assembly's seven principles might suggest), it is not hard to conceive how it might affect more than the powers of the courts alone.

The other human right with implications for constitutional issues is the right to democracy and representative government.<sup>93</sup> The principal focus of the major human rights treaties, to be sure, concerns the protection of individual and group rights against the government. But they all contain provisions that support the idea of a right to democracy. The Charter of the Organization of American States ("OAS") and the American Convention on Human Rights are perhaps the most explicit. The OAS Charter, adopted in 1948, commits member states to "representative democracy."<sup>94</sup> The American Convention speaks of protecting "personal liberty and social justice" within a "framework of democratic institutions,"<sup>95</sup> and provides that it does not preclude "other rights or guarantees that are . . . derived from representative democracy as a form of government."<sup>96</sup>

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92. Exceptions to the Exhaustion of Domestic Remedies (Arts. 46(1), 46(2)(a) and 46(2)(b) of the American Convention on Human Rights), Advisory Opinion OC-11/90, Inter-Am. Ct. H.R. (ser. A) No. 11, ¶ 24 (Aug. 10, 1990).

93. Charter of the Organization of American States art. 3(d), Apr. 30, 1948, 2 U.S.T. 2394, 119 U.N.T.S. 48, amended by the Protocol of Buenos Aires, Feb. 27, 1967, 21 U.S.T. 607, 721 U.N.T.S. 324 [hereinafter OAS Charter]; see also *id.* pmb. ¶ 3.

94. *Id.* pmb. ¶ 3.

95. American Convention on Human Rights, *supra* note 86, pmb. para. 2.

96. *Id.* art. 29(c). The European Convention on Human Rights refers to "an effective political democracy" as the foundation of the rights it protects. European Convention, *supra* note 86, pmb.

In addition, several human rights treaties guarantee a right of citizens to have the opportunity to take part in public affairs, vote, and run for office.<sup>97</sup> Moreover, human rights treaties typically condition certain limitations on rights on the compatibility of those restrictions with “democratic society.”<sup>98</sup> Finally, they all protect specific rights, such as the right to self-determination or freedom of speech, which can be seen as the essential elements of democracy.<sup>99</sup>

Other non-treaty documents are even more emphatic. The Inter-American Democratic Charter states: “The peoples of the Americas have a right to democracy and their governments have an obligation to promote and defend it. Democracy is essential for the social, political, and economic development of the peoples of the Americas.”<sup>100</sup>

The Charter of Paris was adopted in 1990 at the end of the Cold War by the Conference on Security and Co-operation in Europe (“CSCE”), the predecessor to the Organization for Security and Co-operation in Europe (“OSCE”). The OSCE has fifty-six member states, including the United States, Canada, and states in Europe and the former Soviet Union. Member states proclaimed their commitment to “[d]emocratic government . . . based on the will of the people, expressed regularly through free and fair elections.”<sup>101</sup> They further asserted that democracy and human rights are inextricably intertwined: “Democracy has as its foundation respect for the human person and the rule of law. Democracy is the best safeguard of freedom of expression, tolerance of all groups of society, and equality of opportunity for each person.”<sup>102</sup>

As with the right to a judicial remedy, the right to democracy might appear at first to have limited implications for constitutional questions. There are many ways to structure a democratic government and to handle changes to constitutions. But for two reasons it may not be so easy to leave these issues entirely to domestic law once a right to democracy is recognized.

97. See Universal Declaration of Human Rights art. 21, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 10, 1948); ICCPR, *supra* note 19, art. 2(3); American Convention on Human Rights, *supra* note 86, art. 23.

98. Universal Declaration of Human Rights, *supra* note 97, art. 29; see also ICCPR, *supra* note 19, arts. 14, 21, 22; European Convention, *supra* note 86, arts. 6, 8, 9, 10, 11; American Convention on Human Rights, *supra* note 86, arts. 15, 16, 22; cf. American Declaration of the Rights and Duties of Man art. XXVIII, O.A.S. Res. XXX, OEA/Ser.L.V/II.82 (1948) (referring to democracy).

99. See Reginald Ezetah, *The Right to Democracy: A Qualitative Inquiry*, 22 BROOK. J. INT'L L. 495, 503–14 (1997); Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT'L L. 46, 52–63 (1992).

100. Inter-American Democratic Charter, *supra* note 65, art. 1.

101. Charter of Paris for a New Europe, Nov. 21, 1990, 30 I.L.M. 190, 194; see also *id.* at 93 (“Human Rights, Democracy and Rule of Law”).

102. *Id.* at 194.



One is that it is certainly plausible that democracy requires some kind of separation of powers. It is not difficult to imagine an argument, for example, that a state cannot truly fulfill its obligation to respect democracy if all power is concentrated in one person. Similarly, one could be concerned that major imbalances—for example, the absence of any effective constraint on elected executives—might coexist for a period with democracy, but is so likely to undermine it that the international legal right to democracy requires respect for separation of powers. Indeed, the link between democracy and separation of powers is often mentioned as a virtual given.<sup>103</sup>

The other reason lies in the tendency to link democracy with the rule of law, and the close relationship between the rule of law and constitutionalism. The Charter of Paris expressly links the first two: “Democracy, with its representative and pluralist character, entails accountability to the electorate, the obligation of public authorities to comply with the law and justice administered impartially. No one will be above the law.”<sup>104</sup>

Similarly, the Universal Declaration and the European Convention link the protection of human rights and freedom to the rule of law.<sup>105</sup> The Inter-American Democratic Charter calls both “the rule of law” and “the constitutional regimes of the member states” the basis for representative democracy.<sup>106</sup>

Written or unwritten, a constitution is a state’s fundamental law. Of course, it is logically possible that a state might have a written constitution that was largely ignored in practice, yet the state still exhibited many of the characteristics that one might associate with concepts as broad and vague as democracy and the rule of law. But it is also highly plausible to suppose that in many instances in which a state systemati-

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103. For example, the U.N. Commission on Human Rights, predecessor to the Human Rights Council, has repeatedly approved resolutions defining democracy to include the separation of powers, along with other features such as respect for human rights and the rule of law, elections and multiparty systems, and a free press. See Office of the U.N. High Comm’r for Human Rights, Comm. on Human Rights, *Democracy and the Rule of Law*, ¶ 1, U.N. Doc. E/CN.4/2005/32 (Apr. 19, 2005), available at [http://ap.ohchr.org/documents/E/CHR/resolutions/E-CN\\_4-RES-2005-32.doc](http://ap.ohchr.org/documents/E/CHR/resolutions/E-CN_4-RES-2005-32.doc); Office of the U.N. High Comm’r on Human Rights, Comm. on Human Rights, *Enhancing the Role of Regional, Subregional and Other Organizations and Arrangements in Promoting and Consolidating Democracy*, ¶ 1, U.N. Doc. E/CN.4/2004/30 (Apr. 19, 2004), available at [http://ap.ohchr.org/documents/E/CHR/resolutions/E-CN\\_4-RES-2004-30.doc](http://ap.ohchr.org/documents/E/CHR/resolutions/E-CN_4-RES-2004-30.doc); Office of the U.N. High Comm’r for Human Rights, Comm. on Human Rights, *Interdependence Between Democracy and Human Rights*, ¶ 1, U.N. Doc. E/CN.4/2003/36 (Apr. 23, 2003), available at [http://ap.ohchr.org/documents/E/CHR/resolutions/E-CN\\_4-RES-2003-36.doc](http://ap.ohchr.org/documents/E/CHR/resolutions/E-CN_4-RES-2003-36.doc).

104. Charter of Paris for a New Europe, *supra* note 101, at 194.

105. See Universal Declaration of Human Rights, *supra* note 97, pmbl. para. 3; European Convention, *supra* note 86, pmbl. para. 5.

106. Inter-American Democratic Charter, *supra* note 65, art. 2.

cally failed to follow its own constitution, the kinds of substantive and procedural values and structures we might associate with democracy and the rule of law were not being respected as well. My only point is that if a state's adherence to the rule of law—whatever exactly that may mean—constitutes a proper subject of international law, it may not be easy to draw a bright line between that issue and the question of compliance with the state's own constitution.

I call the rights to a judicial remedy and to democracy “antecedents” because they represent international legal rights that easily implicate constitutional issues of separation of powers and constitutional fidelity. If it were simply a matter of these two rights and no more, however, there would be little basis for seeing any actual trend in a direction. Moreover, many different implications can be drawn from either of these two rights. A right to an independent judiciary might be conceived as prohibiting a relatively narrow set of actions (such as political pressure on judges in individual cases). A right to democracy might focus exclusively on elections, corruption, and coups.<sup>107</sup> A number of developments in the last decade or so, however, seem to move international law toward bringing separation of powers and adherence to constitutions within its ambit.

### B. *Regional Formulations*

There is an increasing tendency to accord structural constitutional questions a place in international law. According something a place is not the same as defining it concretely or making it binding. But for a matter that might seem purely internal, it is striking that there should be as many references as there are in regional resolutions and other documents (including some global texts) to a requirement that states maintain some degree of separation of powers or checks and balances. What makes it even more striking are commitments by some regional organizations to take action in response to disruptions of a state's constitutional order. I will examine the three principal bodies that have been active in this respect: the Organization of American States, the Organization for Security and Co-operation in Europe, and the African Union.

#### 1. THE ORGANIZATION OF AMERICAN STATES

The OAS's adoption of the Inter-American Democratic Charter in 2001 is noteworthy in several respects. As mentioned earlier, it forthrightly declares a “right to democracy.”<sup>108</sup> Of course, the Charter is not a treaty. It is a resolution adopted by the OAS's General Assembly.

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107. See Ezetah, *supra* note 99, at 529–34.

108. Inter-American Democratic Charter, *supra* note 65, art. 1.

Some of the language in the Charter can best be understood as making assertions about the conditions of democracy, rather than articulating legal obligations.<sup>109</sup> But many of the provisions are framed in relatively specific language that, to use Thomas Franck's characterization of the Charter of Paris, "is weighted with the terminology of *opinio juris*" and is "deliberately norm creating."<sup>110</sup> My aim is not to argue that every aspect of it currently represents some kind of regional customary law, but to point out that in approving the Charter, the OAS's member states did not adopt language that was purely exhortatory.

The Charter ties "representative democracy" to respect for member states' "constitutional regimes."<sup>111</sup> The Charter does not spell out everything that constitutions must include, but Article 3 does state that both the rule of law and "the separation of powers and independence of the branches of government" constitute one of the "[e]ssential elements of representative democracy."<sup>112</sup> In addition, Article 4 requires the "constitutional subordination of all state institutions to the legally constituted civilian authority."<sup>113</sup> The OAS reiterated this commitment in 2005 with the Declaration of Florida, stating that "the rule of law [and] the separation of powers and independence of the judiciary" are inextricably bound up with "democratic institutions."<sup>114</sup>

Article 19 of the Charter also proclaims that "an unconstitutional interruption of the democratic order or an unconstitutional alteration of the constitutional regime that seriously impairs the democratic order in a member state, constitutes, while it persists, an insurmountable obstacle to its government's participation" in OAS organs.<sup>115</sup> The General Assembly may, by a two-thirds vote of the members, suspend the member state whose constitutional order has been disrupted.<sup>116</sup> Equally important, if not more so, is the fact that before such a step may be

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109. For example, Article 9 states that eliminating discrimination, protecting the rights of indigenous peoples, and respecting diversity will "contribute to strengthening democracy and citizen participation." *Id.* art. 9.

110. Franck, *supra* note 99, at 67.

111. Inter-American Democratic Charter, *supra* note 65, art. 2.

112. *Id.* art. 3.

113. *Id.* art. 4. It also has provisions that might be regarded as relating to the separation of powers in a more expansive sense. Article 3 lists as essential to democracy a "pluralistic system of political parties and organizations." *Id.* art. 3.

114. Organization of American States, Declaration of Florida, Delivering the Benefits of Democracy, AG/DEC. 41 (XXXV-O/05), pmb. para. 18 (June 7, 2005). The OAS has subsequently reiterated this on a number of occasions. *See, e.g.*, Organization of American States, Permanent Council, Support for Nicaragua in the Fight Against Corruption, CP/RES. 824 (1337/02), pmb. OEA/Ser.G. (Sept. 25, 2002) ("the separation of powers and independence of the branches of government are essential elements of representative democracy").

115. Inter-American Democratic Charter, *supra* note 65, art. 19.

116. *Id.* art. 21.

taken, the OAS Secretary General or its Permanent Council may offer its good offices to help resolve the constitutional crisis.<sup>117</sup>

What might constitute a disruption of constitutional democracy? By the terms of Article 19, there would need to be either an “interruption” of the constitutional order or an “alteration” of it that “seriously impair[ed] the democratic order.”<sup>118</sup> In addition, the interruption or the alteration would have to have come about through “unconstitutional” means.<sup>119</sup> The OAS has not defined any of these terms. Addressing the OAS in January 2005, former President Jimmy Carter “call[ed] on all governments of the hemisphere to make the Democratic Charter more than empty pieces of paper.”<sup>120</sup> The Charter is “weak,” he said, “because it is vague in defining conditions that would constitute . . . [an] ‘unconstitutional alteration or interruption’ of the democratic order.”<sup>121</sup> He went on to list eight factors that he said could help determine when representative democracy has been disrupted. These included “[v]iolation of the integrity of central institutions, including constitutional checks and balances providing for the separation of powers,” “[a]rbitrary or illegal removal or interference in the appointment or deliberations of members of the judiciary or electoral bodies,” and “[i]nterference by non-elected officials, such as military officers, in the jurisdiction of elected officials.”<sup>122</sup>

The generality of the language used in the Charter makes its application to particular circumstances more difficult. Even the proposals that former President Carter offered fall well short of the “clear definition of ‘unconstitutional alteration or interruption’” he thought was necessary. One might wonder whether the Charter was intended to provide any clear definitions. Presidential regimes are common throughout

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117. *Id.* arts. 17–20.

118. *Id.* art. 19.

119. *Id.*

120. *Jimmy Carter Reviews Progress, Challenges in Western Hemisphere*, AMERICA.GOV, Jan. 26, 2005, <http://www.america.gov/st/washfile-english/2005/January/20050126142038ASrelliMO.6626245.html>.

121. *Id.*

122. *Id.* The Peruvian Ambassador to the OAS made a similar argument when the Charter was being drafted. The conception of an “alteration of the democratic order,” he said, needed to be made more concrete. In this regard, we could mention the unconstitutional dissolution of the congress or parliament, failure to recognize a free and fair election, the holding of elections in the presence of clear signs of fraud or inequitable conditions that can alter the outcome, the elimination of the balance of powers, or the existence of a situation of massive human rights violations and suppression or restriction of individual liberties.

Manuel Rodríguez Cuadros, Ambassador of Peru, Address at the Regular Meeting of the Permanent Council of the OAS on the Subject of the Inter-American Democratic Charter (July 11, 2001), available at <http://www.oas.org/charter/docs/Peru.htm>.

Latin America, but Canada and other states, including many in the Caribbean, have parliamentary regimes. Could one international (or regional) norm requiring separation of powers apply to all these countries? The same question could be asked about a norm that attempted to gauge the validity of changes to a wide variety of constitutions.

One response to these questions might be to read the Charter simply to rule out certain extremes—an interpretation that might explain its broad language as something other than empty rhetoric while still being realistic about the differences involved. It might accord a wide range of discretion to states in the allocation of powers so long as there is some separation of powers. As one group of experts convened by the U.N.'s Office of the High Commissioner for Human Rights concluded, “[i]t is important that no power remains unchecked and that there is a separation of powers between the different functions of the State.”<sup>123</sup> What would trigger the ban on the extreme case—that is, what would constitute an “unchecked” power—might be subject to interpretation, but it is clearly less demanding than any particular allocation of power. Similarly, perhaps the commitment to respond to unconstitutional interruptions or alterations of a constitution simply refers to military coups or other situations in which the constitution is simply discarded or amended without even any pretense of legality.

For reasons that I will set out in Part II, this reading of the Charter may be too modest. But it is worth considering the other possibility—that this reading is naively ambitious. The breadth and vagueness of the Charter's language might suggest that member states adopting the Charter intended to address these issues only at the level of exhortation. If that were true, it would be much more difficult to claim that it represents any movement at all toward making separation of powers and constitutional fidelity subjects of international law. There are, however, two reasons for thinking that even with their broad and vague articulations, the commitments in the Charter may amount to more than “empty pieces of paper.”

First, the Charter is not an isolated document. It embodies a larger evolution in the OAS's perspective, which formerly emphasized the principle of non-intervention to a much greater degree. The major change took place in June 1991, when the OAS General Assembly adopted the Santiago Commitment to Democracy and Renewal of the

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123. Office of the U.N. High Comm'r for Human Rights, *Conclusions and Recommendations of the Expert Seminar on Democracy and the Rule of Law*, ¶ 14 (Mar. 2, 2005), available at <http://www2.ohchr.org/english/issues/democracy/docs/finalconclusions.doc>; cf. THE FEDERALIST No. 47, at 324 (James Madison) (Jacob E. Cooke ed., 1961) (“The accumulation of all powers legislative, executive and judiciary in the same hands . . . may justly be pronounced the very definition of tyranny.”).

Inter-American System.<sup>124</sup> With this document, the OAS committed itself to “adopt efficacious, timely, and expeditious procedures to ensure the promotion and defense of representative democracy.” The General Assembly also adopted Resolution 1080, “Representative Democracy,” the next day, committing the OAS to respond to “any occurrences giving rise to the sudden or irregular interruption of the democratic political institutional process or of the legitimate exercise of power by the democratically elected government in any of the Organization’s member states.”<sup>125</sup> In 1992 the General Assembly approved an amendment to the OAS Charter (which entered into force in 1997), providing that a state “whose democratically constituted government has been overthrown by force may be suspended” from participation in the OAS by a two-thirds vote of the member states.<sup>126</sup> The Inter-American Democratic Charter also reflects a commitment made by the Third Summit of the Americas in Québec City in 2001, in which the heads of state of American states proclaimed that the “unconstitutional alteration or interruption of the democratic order in a state of the Hemisphere constitutes an insurmountable obstacle to the participation of that state’s government in the Summit of the Americas process.”<sup>127</sup>

A second important consideration is that this change in perspective has been accompanied by significant OAS responses to a variety of threats to the member states’ constitutional order. Since 1991 the OAS has taken actions in response to the 1991 coup in Haiti and the *autogolpes* in Peru and Guatemala in 1992 and 1993, and has become involved in diplomatic efforts to help resolve constitutional crises in other Latin American countries.<sup>128</sup> Of course, the efficacy of the OAS’s efforts is debatable. In a global economy, one of the more potentially powerful measures available to the OAS—economic sanctions—may tend to be less effective when applied on a regional basis. But the record of action makes the generality of the language in which the OAS’s commitments are expressed appear less as a signal of an intention not to take the commitments seriously. Indeed, general commit-

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124. AG/Res. (XXI-0/91), 3d plen. Sess., OAS doc. 2734/91 (June 4, 1991).

125. Representative Democracy, ¶ 1, AG/RES. 1080 (XXI-0/91) (June 5, 1991).

126. See Texts Approved by the General Assembly at its Sixteenth Special Session in Connection with the Amendments to the Charter of the Organization arts. 8–9, AG/doc.11 (XVI-E/92) (Dec. 14, 1992).

127. Third Summit of the Americas, Quebec City, Can., Apr. 22, 2001, *Declaration of Quebec City*, available at <http://www.state.gov/p/wha/rls/59660.htm>.

128. See Stephen J. Schnably, *Constitutionalism and Democratic Government in the Inter-American System*, in *DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW* 155, 159–60 (Gregory H. Fox & Brad R. Roth eds., 2000); Andrew F. Cooper & Thomas Legler, *The OAS Democratic Solidarity Paradigm: Questions of Collective and National Leadership*, 43 *LATIN AM. POL. & Soc’y* 103, 103 (2001).

ments can be more conducive to success than specific prohibitions where what is being protected or promoted is subject to threats that could be varied and hard to list comprehensively in advance. Confining the commitments to military coups, for example, would mean that they could not have applied beyond the military coup in Haiti in 1991.

The Inter-American Democratic Charter, then, is significant for the way in which it takes issues that might have been thought to be purely domestic constitutional issues and stakes out a claim on them on the part of international (or regional) law. The movement in the OAS in this direction is the most comprehensive, but it is worth examining developments in other arenas as well.

## 2. THE OSCE

The OSCE has addressed constitutional issues for some time. In many respects the commitments it has made are similar to those adopted by OAS members. The OSCE has not, however, adopted a formal commitment to action of the sort the Inter-American Democratic Charter envisages.

In November 1990 the heads of state of the CSCE members adopted the Charter of Paris for a New Europe, committing member states to "Human Rights, Democracy and [the] Rule of Law."<sup>129</sup> Earlier that year, the Copenhagen Meeting on the Human Dimension of the CSCE had proclaimed as essential to human rights and human dignity "a form of government that is representative in character, in which the executive is accountable to the elected legislature or the electorate."<sup>130</sup> Equally important was maintenance of "a clear separation between the State and political parties."<sup>131</sup>

When they approved the Charter of Paris, the Heads of State also appointed a study group to examine "[c]onstitutional reforms, [t]he rule of law and independent courts[,] [and the] [d]ivision of power between legislative, executive and judicial."<sup>132</sup> The product of this initiative was the CSCE's Moscow Meeting on the Human Dimension of the CSCE, held in 1991. At that meeting, the CSCE member states approved a document with extensive commitments concerning each state's internal separation of powers. The member states committed to protect the independence of the judiciary and to provide for it in each state's constitu-

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129. Charter of Paris for a New Europe, *supra* note 101, at 193.

130. Conference on the Human Dimension of the CSCE, Copenhagen, Den. June 5–29, 1990, *Document of the Copenhagen Meeting*, ¶ 5.2 (June 29, 1990) [hereinafter *Document of the Copenhagen Meeting*].

131. *Id.* ¶ 5.4.

132. Charter of Paris for a New Europe, *supra* note 101, at 223.

tion.<sup>133</sup> Interestingly, they also committed themselves to a number of checks and balances that went beyond the traditional balancing of executive, legislative, and judicial powers.<sup>134</sup> The member states undertook to provide opportunities to seek redress against administrative decisions, through judicial review and other means,<sup>135</sup> and to ensure civilian control of “their military and paramilitary forces, internal security and intelligence services, and the police.”<sup>136</sup>

More extensive requirements regarding separation of powers have been under consideration. In December 2005 the OSCE’s Ministerial Council—the OSCE’s highest governing body apart from periodic summits of heads of state or government—adopted a “road map” to reform and strengthen the OSCE.<sup>137</sup> Among other things, it asked the OSCE’s Office for Democratic Institutions and Human Rights (“ODIHR”) to submit a report to the Ministerial Council to be held in December 2006 regarding not only the “[i]mplementation of existing commitments” but also the development of “[p]ossible supplementary commitments.”<sup>138</sup>

Issued in November 2006, the ODIHR report discussed possible supplementary commitments regarding the holding of elections, countering terrorism, preventing torture, and protecting against discrimination.<sup>139</sup> It also discussed possible supplementary commitments regarding democracy and the rule of law. The ODIHR noted that elections alone could not “make a genuine democracy.”<sup>140</sup> What it called “democratic governance,” something it deemed to “reach far beyond the periodic vote,” was also needed.<sup>141</sup> While taking note of the pitfalls of a “‘democracy template’” that insufficiently recognized the “enormous diversity of models and systems of government that exist across the OSCE region,” the ODIHR asserted that “the basic ingredients for successful democratic systems remain the same.”<sup>142</sup> It identified one ingre-

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133. CSCE, Moscow Meeting, *supra* note 88, ¶¶ 19–19.2; *see also* Vienna Follow-up Meeting of Representatives of the Participating States of the Conference on Security and Co-operation in Europe, Nov. 4, 1986–Jan. 19, 1989, *Concluding Document*, principle 13.9 (1989). [http://findarticles.com/p/articles/mi\\_m1079/is\\_n2144\\_v89/ai\\_7537751/pg\\_5](http://findarticles.com/p/articles/mi_m1079/is_n2144_v89/ai_7537751/pg_5) (last visited Feb. 10, 2008).

134. *Cf.* Ackerman, *supra* note 14, at 635–40.

135. CSCE, Moscow Meeting, *supra* note 88, ¶¶ 18.2–18.4.

136. *Id.* ¶ 25.1.

137. Organization for Security and Co-operation in Europe, Ministerial Council, *Strengthening the Effectiveness of the OSCE*, MC.DEC/17/05 (Dec. 6, 2005); *see also* OSCE Meeting Adopts Reform Road Map, KYODO NEWS INT’L, Dec. 12, 2005.

138. *Strengthening the Effectiveness of the OSCE*, *supra* note 137, ¶ 2.

139. ORG. FOR SEC. & CO-OPERATION IN EUR., OFFICE FOR DEMOCRATIC INSTS. & HUMAN RIGHTS, COMMON RESPONSIBILITY: COMMITMENTS AND IMPLEMENTATION (2006), <http://www.osce.org/item/22321.html?ch=761> [hereinafter ODIHR, COMMON RESPONSIBILITY].

140. *Id.* ¶ 81, at 29.

141. *Id.*

142. *Id.* ¶ 82, at 29.



dient as “the separation of powers of government. The system of checks and balances between the legislative, executive, and judicial branches . . . should be viewed as an essential component of a functioning democratic system.”<sup>143</sup> The ODIHR said that it would seek to formulate commitments for member states to “clarify the role of the executive branch, including heads of state, vis-à-vis other branches in a democratic system of government.”<sup>144</sup> The report recommended consideration of some relatively concrete constraints on executive power:

Constitutional arrangements that place the executive above other branches of government, without effective checks and balances on this power, are incompatible with the participating States’ commitment to democracy and the rule of law. Similarly, changing constitutional terms of the executive through referenda raises legitimate questions about the “*regularity and consistency in the achievement and enforcement of democratic order.*”<sup>145</sup>

In addition, the report recommended consideration of new commitments regarding the judiciary. As the report noted, the need for an independent judiciary to protect human rights is already “widely recognized.”<sup>146</sup> The ODIHR seemed to have more in mind, however: “[The] importance [of an independent judiciary] for the functioning of a democratic system of government should be underlined and further spelled out. In particular, the *judicial review* of executive and legislative acts deserves special attention as an essential cog in the machinery of checks and balances.”<sup>147</sup>

Finally, the ODIHR noted the need for possible additional commitments regarding “law-making.” It called for consideration of additional commitments regarding transparency of the legislature’s operations and the unimpeded operation of political parties.<sup>148</sup> It also called for an emphasis on legislatures’ “oversight functions.”<sup>149</sup> Focusing solely on the legislature, the discussion implicitly viewed lawmaking as a function exclusively or primarily of the legislature—a view that in itself constitutes a position on separation of powers.

Since the issuance of the ODIHR report the OSCE has continued to explore the possibility of new commitments regarding the rule of law and separation of powers.<sup>150</sup> At the OSCE’s annual “Human Dimension

143. *Id.* ¶ 83, at 29 & n.52 (citing Inter-American Democratic Charter, *supra* note 65, art. 3).

144. *Id.* ¶ 84, at 29.

145. *Id.* ¶ 84 & n.53, at 30 (citing *Document of the Copenhagen Meeting*, *supra* note 130, ¶ 2).

146. *Id.* ¶ 85, at 30.

147. *Id.* ¶ 85, at 30; *see also id.* ¶ 88, at 30.

148. *Id.* ¶¶ 86–87, at 30.

149. *Id.* ¶ 87, at 30.

150. *See Strengthening the Effectiveness of the OSCE*, *supra* note 137, § 2, ¶ 6 (requesting

Implementation Meeting” in 2007, the “separation of powers” and “democratic law-making” were among the topics discussed.<sup>151</sup> Noting the importance to democracy of the rule of law, checks and balances, and the separation of powers, the U.S. Ambassador placed particular emphasis on exploring possible new commitments limiting executive power and strengthening legislative and judicial power.<sup>152</sup>

Focusing on possible new commitments, the ODIHR report had much less to say about the issue of constitutional fidelity than about separation of powers. But the former is an issue the OSCE has long addressed in some detail, taking the position that a member state’s adherence to its constitution is a matter of international—or at least regional—concern. In 1990 the Copenhagen Document declared “the duty of the government and public authorities to comply with the constitution and to act in a manner consistent with the law.”<sup>153</sup> The CSCE went beyond this generality at the Moscow Meeting, discussed earlier; member states said that they would support the “legitimately elected government” of a member state if it were overthrown “by undemocratic means.”<sup>154</sup> They also adopted commitments regarding states of emergency—commitments that effectively internationalized adherence to member states’ constitutions. The Moscow Document provides that “[a] state of public emergency may not be used to subvert the democratic constitutional order,”<sup>155</sup> that it must be proclaimed “only by a constitutionally lawful body,”<sup>156</sup> that a “*de facto* imposition . . . of a state of public emergency [that is] not in accordance with provisions laid down

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report by OSCE Permanent Council on possible new commitments on the rule of law before the next ministerial meeting).

151. Organization for Security and Co-operation in Europe, Permanent Council, *Agenda for the 2007 Human Dimension Implementation Meeting*, PC.DEC/801, July 12, 2007, at 2 (placing separation of powers on agenda); see also Organization for Security and Co-operation in Europe, *Human Dimension Implementation Meeting (Sept. 24–Oct. 5, 2007) (Warsaw, Poland): Annotated Agenda*, CIO.GAL/124/07/Corr.2, at 14–16 (Aug. 1, 2007).

152. United States Mission to the OSCE, *Section 8: Rule of Law I: Separation of Powers; Democratic Law-making*, HDIM.DEL/269/07, at 1, 2 (Sept. 28, 2007); see also Organization for Security and Co-operation in Europe, Permanent Council, *Address by Ambassador Christian Strohal, Director of the OSCE Office for Democratic Institutions and Human Rights (ODIHR), 685th Session of the Permanent Council*, ODIHR.GAL/88/07, at 3 (Oct. 30, 2007) (noting that emphasis at the 2007 Human Dimension Meeting was given to “preventing an over-concentration of powers in the executive branch and granting national legislatures the authority to effectively represent the citizenry and oversee the executive”); United States Mission to the OSCE, *Response to the Report by ODIHR Director Ambassador Strohal*, PC.DEL/1042/07, at 1 (Nov. 1, 2007) (noting support for continued focus in 2008 on “the separation of powers and . . . ensuring that power not be concentrated in one branch of government”).

153. *Document of the Copenhagen Meeting*, *supra* note 130, ¶ 5.3.

154. CSCE, *Moscow Meeting*, *supra* note 88, ¶ 17.2.

155. *Id.* ¶ 28.1.

156. *Id.* ¶ 28.2.

by law is not permissible,"<sup>157</sup> and that "the normal functioning of the legislative bodies" must be guaranteed.<sup>158</sup>

The OSCE's position on states of emergency bears a strong resemblance to views expressed by the U.N. Human Rights Committee, the body charged with overseeing implementation of the International Covenant on Civil and Political Rights. Article 4 of the Covenant permits states to derogate from certain human rights obligations in time of "public emergency which threatens the life of the nation."<sup>159</sup> The Article expressly limits such measures to those that are "strictly required by the exigencies of the situation," do not involve discrimination based on race or other prohibited grounds, and are consistent with the state's other international obligations.<sup>160</sup> While the text itself mentions nothing about constitutional law, the Human Rights Committee has interpreted Article 4 to require states that proclaim an emergency to "act within their consti-

157. *Id.* ¶ 28.4.

158. *Id.* ¶ 28.5. Compare the provisions of the Paris Minimum Standards of Human Rights Norms in a State of Emergency:

3. While assuming or exercising emergency powers every state shall respect the following principles:
  - (a) The fundamental functions of the legislature shall remain intact despite the relative expansion of the authority of the executive. Thus, the legislature shall provide general guidelines to regulate executive discretion in respect of permissible measures of delegated legislation.
  - (b) The prerogatives, immunities and privileges of the legislature shall remain intact.
  - (c) The guarantees of the independence of the judiciary and of the legal profession shall remain intact. In particular, the use of emergency powers to remove judges or to alter the structure of the judicial branch or otherwise to restrict the independence of the judiciary shall be prohibited by the constitution.

5. The judiciary shall have the power and jurisdiction to decide: firstly, whether or not an emergency legislation is in conformity with the constitution of the state; secondly, whether or not any particular exercise of emergency power is in conformity with the emergency legislation; thirdly, to ensure that there is no encroachment upon the non-derogable rights and that derogatory measures derogating from other rights are in compliance with the rule of proportionality; and fourthly, where existing municipal laws and orders are not specifically rescinded or suspended, the judiciary shall continue to regard them as being in effect. A court of law shall have full powers to declare null and void any emergency measure (legislative or executive) or any act of application of any emergency measure which does not satisfy the aforesaid tests.

Richard B. Lillich, Current Developments, *The Paris Minimum Standards of Human Rights Norms in a State of Emergency*, 79 AM. J. INT'L L. 1072, 1075 (1985). These standards were developed as a nongovernmental project of the International Law Association. *Id.* at 1072.

159. U.N. High Comm'r for Human Rights, HUMAN RIGHTS COMM., *General Comment 29, States of Emergency (Article 4)*, ¶ 3, U.N. DOC. CCPR/C/21/REV.1/ADD.11 (AUG. 31, 2001), available at [http://www.unhchr.ch/tbs/doc.nsf/0/71eba4be3974b4f7c1256ae200517361/\\$FILE/GO144470.pdf](http://www.unhchr.ch/tbs/doc.nsf/0/71eba4be3974b4f7c1256ae200517361/$FILE/GO144470.pdf).

160. *Id.* ¶¶ 4, 8, 9.

tutional and other provisions of law that govern such proclamation and the exercise of emergency powers.”<sup>161</sup>

Finally, as noted earlier,<sup>162</sup> the ODIHR’s November 2006 report also made reference to concerns about “changing constitutional terms of the executive through referenda.”<sup>163</sup> Read most expansively, this might be taken to encompass even situations in which the referendum was conducted in accordance with the constitution’s amending procedures and asked the voters to endorse a change that was not blatantly contradictory to any substantive limits on amendments that the constitution might purport to impose.

The OSCE encompasses perhaps a wider range of types of government than does the OAS. While the issue of new commitments remains under review,<sup>164</sup> there is no guarantee that the OSCE will emulate the OAS’s adoption of the Inter-American Democratic Charter. Still, the ODIHR’s willingness to propose fairly specific recommendations—mandating judicial review, ruling out particular kinds of constitutional amendments on substantive or procedural grounds (or both), enhancing legislatures’ oversight of the executive branch—is a striking development in itself.

### 3. AFRICAN UNION

The African (Banjul) Charter on Human and Peoples’ Rights,<sup>165</sup> which entered into force in 1986, does not protect a right to democracy as such. But it does contain a provision similar to Article 25 of the International Covenant on Civil and Political Rights recognizing the right of individuals to participate in government, “either directly or through freely chosen representatives in accordance with the provisions of the law.”<sup>166</sup> Subsequently, the African Union (“AU”) has recognized a right to democracy and tied it to constitutional fidelity and respect for separation of powers.

In response to the end of the Cold War, the Organization of African Unity (“OAU”) (the predecessor to the African Union) adopted in 1990 a Declaration of the Assembly of Heads of State and Government of the Organization of African Unity on the Political and Socio-Economic Situation in Africa and the Fundamental Changes Taking Place in the

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161. *Id.* ¶ 2.

162. *See supra* text accompanying note 145.

163. ODIHR, COMMON RESPONSIBILITY, *supra* note 139, ¶ 84, at 30.

164. *See supra* text accompanying notes 150–52.

165. African [Banjul] Charter on Human Rights and People’s Rights, June 27, 1981, 21 I.L.M. 58.

166. *Id.* art. 13.

World.<sup>167</sup> Much of the Declaration concentrated on the urgent need to “arrest and reverse the steady decline in Africa’s economic performance.”<sup>168</sup> But the OAU also linked economic development to the promotion of popular participation in government, human rights, and the rule of law.<sup>169</sup>

Meeting in Algiers in 1999 as they prepared to transform the OAU, the heads of state declared that “Member States whose Governments came to power through unconstitutional means after the Harare Summit, should restore constitutional legality before the next Summit.”<sup>170</sup> This declaration followed on a condemnation two years earlier of a coup that had taken place in Sierra Leone as OAU members met in Harare, Zimbabwe. At that time, the OAU called for “the immediate restoration of constitutional order” in Sierra Leone.<sup>171</sup> The Algiers meeting also reaffirmed the OAU’s commitment to “the establishment of democratic institutions that are representative of our peoples” in all the member states.<sup>172</sup>

In 2000 OAU member states meeting in Lomé, Togo, adopted the Constitutive Act of the African Union, intended to replace the OAU with a more effective organization.<sup>173</sup> The Constitutive Act stated the commitment of the member states and the AU to “promote and protect human and peoples’ rights, consolidate democratic institutions and culture, and . . . ensure good governance and the rule of law.”<sup>174</sup> At that same meeting, the heads of state issued a “Solemn Declaration” that “[d]emocracy, good governance, respect for human and peoples’ rights

167. Org. of African Unity [OAU], *Declaration of the Assembly of Heads of State and Government of the Organization of African Unity on the Political and Socio-Economic Situation in Africa and the Fundamental Changes Taking Place in the World*, AHG Res. Decl. 1 (XXVI) (July 11, 1990), available at <http://www.africa-union.org/root/au/Documents/Decisions/hog/zHoGAssembly1990.pdf>.

168. *Id.* ¶ 6.

169. *Id.* ¶ 10.

170. OAU, *Algiers Declaration*, AHG Decl. 142 (XXXV) (July 12–14, 1999), available at <http://www.africa-union.org/root/au/Documents/Decisions/hog/9HoGAssembly1999.pdf> [hereinafter *Algiers Declaration*].

171. OAU, *Decisions Adopted by the Sixty-sixth Ordinary Session of the Council of Ministers*, ¶ (a), OAU Doc. CM Dec. 357 (LXVI) (May 28–31, 1997), available at [http://www.africa-union.org/root/au/Documents/Decisions/com/47CoM\\_1997b.pdf](http://www.africa-union.org/root/au/Documents/Decisions/com/47CoM_1997b.pdf); see also OAU, *Decision on the Comoros*, ¶ 4, OAU Doc. CM/2164 (LXXII-c) (July 6–8, 2000), available at [www.africa-union.org/root/au/Documents/Decisions/com/52CoM\\_2000b.pdf](http://www.africa-union.org/root/au/Documents/Decisions/com/52CoM_2000b.pdf) (calling for “the return of Comoros to constitutional order”). For useful background, see African Union, Political Affairs Department, [http://www.africa-union.org/Structure\\_of\\_the\\_Commission/depPOLITICAL%20AFFAIRS%20DIRECTORATE.htm#DEMOCRACY](http://www.africa-union.org/Structure_of_the_Commission/depPOLITICAL%20AFFAIRS%20DIRECTORATE.htm#DEMOCRACY) (last visited Feb. 8, 2008).

172. *Algiers Declaration*, *supra* note 170, para. 19.

173. Constitutive Act of the African Union, July 11, 2000, available at [http://www.africa-union.org/root/au/AboutAu/Constitutive\\_Act\\_en.htm](http://www.africa-union.org/root/au/AboutAu/Constitutive_Act_en.htm) (last visited Feb. 8, 2008).

174. *Id.* pmbl; see also *id.* arts. 3(g), 4(m).

and the rule of law are prerequisites for the security, stability and development of the Continent,”<sup>175</sup> and affirmed their commitment to “a strict adherence to the rule of law, good governance, peoples['] participation in public affairs, respect for human rights and fundamental freedoms, the establishment of political organizations devoid of sectarian, religious, ethnic, regional and racial extremism.”<sup>176</sup> Finally, they specifically affirmed that “[t]he Executive, legislative and judicial branches of government must respect their national constitutions and adhere to the provisions of the law and other legislative enactment promulgated by National Assemblies. No one should be exempted from accountability.”<sup>177</sup>

These declarations engaged the issue of constitutional law at least to the extent of constitutional fidelity, requiring member states to adhere to their own constitutions. Putting the duty to respect the constitution not on the state but on the executive, legislative, and judicial branches did, however, implicitly also make the separation of powers something of a regional issue. The true significance of this engagement, however, is revealed in more specific actions taken at the Lomé meeting and subsequently.

One of the resolutions approved in Lomé was the Declaration on the Framework for an OAU Response to Unconstitutional Changes of Government (Lomé Declaration).<sup>178</sup> Noting that the “phenomenon of coup d’etat has resulted in flagrant violations of the basic principles” of the OAU and UN, the heads of state proclaimed their commitment “common values and principles for democratic governance.”<sup>179</sup> In addition to requiring respect for human rights, the values and principles included:

- i) adoption of a democratic Constitution: its preparation, content and method of revision should be in conformity with generally acceptable principles of democracy;
- ii) respect for the Constitution and adherence to the provisions of the law and other legislative enactments adopted by Parliament;
- iii) separation of powers and independence of the judiciary;
- iv) promotion of political pluralism or any other form of par-

175. OAU, *CSSDCA Solemn Declaration*, ¶ 9(н), OAU Doc. AHG/Decl. 4 (XXXVI) (July 10–12, 2000), available at [www.africa-union.org/Special\\_Programs/CSSDCA/cssdca-solemn-declaration.pdf](http://www.africa-union.org/Special_Programs/CSSDCA/cssdca-solemn-declaration.pdf).

176. *Id.* ¶ 11.

177. *Id.* ¶ 11(a).

178. OAU, *Declaration on the Framework for an OAU Response to Unconstitutional Changes of Government*, OAU Doc. AHG/Decl.5 (XXXVI) (July 10–12, 2000), available at [http://www.afriamap.org/english/images/treaty/OAU-Dec1\\_Framework\\_Unconst\\_change\\_govt.pdf](http://www.afriamap.org/english/images/treaty/OAU-Dec1_Framework_Unconst_change_govt.pdf) [hereinafter Lomé Declaration].

179. *Id.*

- icipatory democracy and the role of the African civil society, including enhancing and ensuring gender balance in the political process;
- v) the principle of democratic change and recognition of a role for the opposition;
  - vi) organization of free and regular elections, in conformity with existing texts.<sup>180</sup>

The member states further agreed on a “definition of situations that could be considered as situations of unconstitutional change of government”:

- i) military coup d’etat against a democratically elected Government;
- ii) intervention by mercenaries to replace a democratically elected Government;
- iii) replacement of democratically elected Governments by armed dissident groups and rebel movements;
- iv) the refusal by an incumbent government to relinquish power to the winning party after free, fair and regular elections.<sup>181</sup>

In the event of an unconstitutional change of government, the members pledged to press for a return to constitutional order through means including suspension of the state’s membership and the imposition of sanctions.

Like the Inter-American Democratic Charter, the Lomé Declaration makes the maintenance of separation of powers and the independence of the judiciary a subject of regional concern, though in fairly general terms. Its provisions on constitutional fidelity are both narrower and wider than those in the Inter-American Democratic Charter. On the one hand, the Lomé Declaration goes beyond the Charter by requiring that adoption and revision of constitutions be made—both in form and content—“in conformity with generally acceptable principles of democracy.”<sup>182</sup> On the other hand, its definition of what constitutes an unconstitutional change of government is relatively specific. It focuses almost exclusively on the overthrow of a government by force, though it also includes an incumbent government’s refusal to acknowledge an election loss.

In 2002 the AU took two additional steps. The AU adopted a Declaration on Democracy, Political, Economic and Corporate Governance in connection with its New Partnership for Africa’s Development (“NEPAD”). The NEPAD Declaration affirmed member states’ commitment to eliminate poverty and promote economic development

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180. *Id.*

181. *Id.*

182. *Id.*

“through democracy and good governance.”<sup>183</sup> It committed member states to observe the rule of law and maintain “strict adherence” to the AU’s ban on unconstitutional changes of government.<sup>184</sup> It also included a number of provisions on the separation of powers, mentioning not only the requirement of an independent judiciary,<sup>185</sup> but also development of an “accountable, efficient and effective civil service” and promotion of the “effective functioning of parliaments and other accountability institutions . . . including parliamentary committees and anti-corruption bodies.”<sup>186</sup>

Also in 2002 the AU adopted a plan for a Peace and Security Council within the AU “as a standing decision-making organ for the prevention, management and resolution of conflicts.”<sup>187</sup> The Protocol directed the Council (in conjunction with the Chair of the AU’s Commission) to “institute sanctions whenever an unconstitutional change of Government” as defined in the Lomé Declaration took place in a member State.<sup>188</sup> As will be discussed below, however, the AU soon discovered during Togo’s constitutional crisis in 2005 that confining constitutional fidelity to a relatively narrow class of blatant violations is not easy.<sup>189</sup>

In January 2007 the AU promulgated an African Charter on Democracy, Elections, and Governance (“African Charter”).<sup>190</sup> This treaty, which incorporates the NEPAD Declaration of 2002,<sup>191</sup> will enter into force after fifteen states have ratified it.<sup>192</sup> The treaty requires states to follow a number of specific guidelines to fulfill its general commitment to respect the separation of powers.<sup>193</sup> These include requirements

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183. New Partnership for Africa’s Development [NEPAD], *Declaration on Democracy, Political, Economic and Corporate Governance*, ¶ 5, NEPAD Doc. AHG/235 (XXXVIII), Annex 1 (June 18, 2002), available at [www.nepad.org/2005/files/documents/2.pdf](http://www.nepad.org/2005/files/documents/2.pdf) [hereinafter NEPAD Declaration].

184. *Id.* arts. 7, 13.

185. *Id.* arts. 7, 14.

186. *Id.* art. 14; see also *id.* art. 7. The AU also adopted a mechanism enabling member states voluntarily to submit to periodic AU reviews of their implementation of the NEPAD Declaration. NEPAD, *The African Peer Review Mechanism (APRM)* (Sept. 16, 2003), available at [www.nepad.org/2005/files/documents/49.pdf](http://www.nepad.org/2005/files/documents/49.pdf).

187. Protocol Relating to the Establishment of the Peace and Security Council of the African Union art. 2(1), July 10, 2002, available at [http://www.africa-union.org/root/au/Documents/Treaties/Text/Protocol\\_peace\\_and\\_security.pdf](http://www.africa-union.org/root/au/Documents/Treaties/Text/Protocol_peace_and_security.pdf).

188. *Id.* art. 7(g).

189. See *infra* Part II.B.

190. African Charter on Democracy, Elections and Governance, Jan. 30, 2007, available at [http://www.africa-union.org/root/au/Documents/Treaties/text/Charter\\_on\\_Democracy.pdf](http://www.africa-union.org/root/au/Documents/Treaties/text/Charter_on_Democracy.pdf).

191. *Id.* art. 36.

192. *Id.* art. 48. Since 2007 seventeen AU members have signed it; none have ratified it. See STATUS LIST, AFRICAN CHARTER ON DEMOCRACY, ELECTIONS AND GOVERNANCE, available at [http://www.africa-union.org/root/au/Documents/Treaties/list/Charter\\_on\\_Democracy\\_and\\_Governance.pdf](http://www.africa-union.org/root/au/Documents/Treaties/list/Charter_on_Democracy_and_Governance.pdf) (last visited Mar. 23, 2008).

193. African Charter on Democracy, Elections and Governance, *supra* note 190, art. 3(5).



to “strengthen and institutionalize constitutional civilian control over the armed and security forces”;<sup>194</sup> establish independent “public institutions that promote and support democracy and constitutional order” that are “accountable to competent national organs”;<sup>195</sup> establish “independent and impartial national electoral bodies responsible for the management of elections”;<sup>196</sup> enhance “functioning and effectiveness of parliaments”;<sup>197</sup> and guarantee an independent judiciary.<sup>198</sup> The treaty also requires states to “decentralize power to democratically elected local authorities,” though it qualifies this obligation by adding “as provided in national laws.”<sup>199</sup>

With respect to the issue of constitutional fidelity, the African Charter essentially adopts the definition of an unconstitutional change of government put forth in the Lomé Declaration,<sup>200</sup> but adds one other instance: “Any amendment or revision of the constitution or legal instruments, which is an infringement on the principles of democratic change of government.”<sup>201</sup> This broad prohibition encompasses far more than military coups. Moreover, the Charter will also commit the AU to “exercise its responsibilities in order to maintain the constitutional order” in any situation that “arises in a State Party that may affect its democratic political institutional arrangements or the legitimate exercise of power.”<sup>202</sup>

The breadth of this last provision is consistent with the extent to which the African Charter makes questions of adherence to the constitution a subject of regional concern. The African Charter sets out enforcement mechanisms in case of unconstitutional changes of government including the imposition of sanctions,<sup>203</sup> and requires states to punish perpetrators of any unconstitutional change of government and ban them from “elections held to restore the democratic order.”<sup>204</sup> In two ways it also addresses issues of constitutional fidelity that go beyond unconstitutional changes of government. It attempts to specify the fundamental role of a constitution within a state, requiring AU members to “entrench

194. *Id.* art. 14(1).

195. *Id.* arts. 15(1), 15(3).

196. *Id.* art. 17(1).

197. *Id.* art. 32(2); *see also id.* art. 27(1).

198. *See id.* arts. 2(5), 27(3), 32(3).

199. *Id.* art. 34.

200. *See id.* art. 23(1)–(4); *see also* Lomé Declaration, *supra* note 178.

201. African Charter on Democracy, Governance and Elections, *supra* note 190, art. 23(5).

202. *Id.* art. 24.

203. *Id.* art. 25(7) (“The Assembly may decide to apply other forms of sanctions on perpetrators of unconstitutional change of government including punitive economic measures.”). *See generally id.* art. 25.

204. *Id.* arts. 25(4); *see also id.* arts. 14(2), 25(9).

the principle of the supremacy of the constitution in the political organization of the State.”<sup>205</sup> And it requires that no amendment or revision of a constitution be made except on the basis of “consensus,” and places special emphasis on referenda as the vehicle for amendment.<sup>206</sup>

#### 4. OTHER REGIONAL GROUPS

A variety of other regional groups, including some directed toward regional economic integration, have also made commitments concerning constitutional structure. Meeting in Harare, Zimbabwe, in 1991, the heads of government of the Commonwealth adopted a declaration pledging to work toward “democracy, democratic processes and institutions which reflect national circumstances, the rule of law and the independence of the judiciary, [and] just and honest government.”<sup>207</sup> In 1995 they pledged to take diplomatic and other actions whenever “a member country is perceived to be clearly in violation of the Harare Commonwealth Declaration, and particularly in the event of an unconstitutional overthrow of a democratically elected government.”<sup>208</sup>

In 2000 the Community of Democracies (“CD”), an intergovernmental organization of more than a hundred states claiming adherence to democratic principles, first convened in Warsaw at the initiative of then U.S. Secretary of State Madeleine Albright.<sup>209</sup> The foreign ministers approved a Warsaw Declaration that expressed their commitment to the protection of human rights and democratic elections. Among the specific principles they endorsed as “core democratic principles and practices” were a “competent, independent and impartial judiciary,” elected legislatures, and “civilian, democratic control over the military.”<sup>210</sup> They also called on elected leaders to “uphold the law and function

205. *Id.* art. 10(1).

206. *Id.* art. 10(2) (“State Parties shall ensure that the process of amendment or revision of their constitution reposes on national consensus, obtained if need be, through referendum.”).

207. Harare Commonwealth Declaration ¶ 9, Oct. 20, 1991, available at [http://www.thecommonwealth.org/shared\\_asp\\_files/uploadedfiles/%7B7F83FE73-6E7D-45FB-BFBC-FA519E255E72%7D\\_Harare%20Declaration.pdf](http://www.thecommonwealth.org/shared_asp_files/uploadedfiles/%7B7F83FE73-6E7D-45FB-BFBC-FA519E255E72%7D_Harare%20Declaration.pdf).

208. Millbrook Commonwealth Action Programme on the Harare Declaration ¶ 3, Nov. 12, 1995, available at [http://www.thecommonwealth.org/shared\\_asp\\_files/uploadedfiles/%7B914BFD2A-097E-445F-B954-FB2E4812D6E7%7D\\_MillbrookDeclaration.pdf](http://www.thecommonwealth.org/shared_asp_files/uploadedfiles/%7B914BFD2A-097E-445F-B954-FB2E4812D6E7%7D_MillbrookDeclaration.pdf). In 2006 the Commonwealth suspended Fiji’s membership over a military coup, and in 2007 suspended Pakistan’s membership in response to the declaration of a state of emergency. See 2007 Commonwealth Heads of Government Meeting: The Kampala Communiqué, ¶¶ 9, 10 (Nov. 25, 2007), available at [http://www.thecommonwealth.org/shared\\_asp\\_files/GFSR.asp?NodeID=174528](http://www.thecommonwealth.org/shared_asp_files/GFSR.asp?NodeID=174528).

209. For the organization’s own official history, see Council for a Community of Democracies, Community of Democracies: The Evolution of a Movement, <http://www.ccd21.org/team/index.htm> (last visited Feb. 8, 2008).

210. Final Warsaw Declaration: Toward a Community of Democracies, June 27, 2000, available at [http://www.ccd21.org/articles/warsaw\\_declaration.htm](http://www.ccd21.org/articles/warsaw_declaration.htm) (last visited Feb. 8, 2008).

strictly in accordance with the constitution of the country concerned” and to “refrain from extra-constitutional actions.”<sup>211</sup>

Complementing the AU’s Lomé Declaration was the adoption in 2001 of a Protocol on Democracy and Good Governance by the Economic Community of West African States (“ECOWAS”), a trade group of fifteen West African States.<sup>212</sup> Proclaiming “[z]ero tolerance for power obtained or maintained by unconstitutional means,”<sup>213</sup> ECOWAS agreed to respond to situations where “democracy is abruptly brought to an end by any means” in member states.<sup>214</sup> Its declaration committed member states to a set of what it called “constitutional convergence principles,”<sup>215</sup> “[e]mpowerment and strengthening of parliaments and guarantee of parliamentary immunity,”<sup>216</sup> the “[i]ndependence of the [j]udiciary,”<sup>217</sup> “decentralization of power at all levels of governance,”<sup>218</sup> and the subjection of the military and police forces to “legally constituted civilian authorities.”<sup>219</sup>

Regional groups within Central and South America have made similar commitments. In 1995, the Central American Integration System (“SICA”), a regional organization dedicated to integration of Central American states,<sup>220</sup> adopted a Treaty Framework for Democratic Secur-

211. *Id.*

212. See Protocol A/SP1/12/01 on Democracy and Good Governance, Dec. 21, 2001, available at [www.oecd.org/dataoecd/56/39/38873556.pdf](http://www.oecd.org/dataoecd/56/39/38873556.pdf) [hereinafter Protocol on Democracy and Good Governance]. The Protocol on Democracy and Good Governance was intended to build on ECOWAS’s commitment two years earlier to “promot[e] and consolidat[e] . . . a democratic government as well as democratic institutions in each Member State.” Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peace-keeping and Security art. 2, Dec. 10, 1999, available at [http://www.issafrica.org/af/RegOrg/unity\\_to\\_union/pdfs/ecowas/ConflictMech.pdf](http://www.issafrica.org/af/RegOrg/unity_to_union/pdfs/ecowas/ConflictMech.pdf); see also OAU, Assembly of Heads of State & Gov’t, *Declaration of Political Principles of the Economic Community of West African States*, ECOWAS Doc. A/DCL. 1/7/91 (July 4–6, 1991).

213. Protocol on Democracy and Good Governance, *supra* note 212, art. 1(c).

214. *Id.* art. 45(1).

215. *Id.* ch. 1, § 1.

216. *Id.* art. 1(a).

217. *Id.*

218. *Id.* art. 1(d).

219. *Id.* art. 20(1); see also Pact on Security, Stability and Development in the Great Lakes Region art. 6(b), Dec. 15–16, 2006, available at [http://www.internal-displacement.org/8025708F004BE3B1/\(httpInfoFiles\)/60ECE277A8EDA2DDC12572FB002BBDA7/\\$file/Great%20Lakes%20pact\\_en.pdf](http://www.internal-displacement.org/8025708F004BE3B1/(httpInfoFiles)/60ECE277A8EDA2DDC12572FB002BBDA7/$file/Great%20Lakes%20pact_en.pdf) (2007) (commitment of eleven African states to “promote good governance, the rule of law and the respect for human rights through constitutional systems based on the separation of powers, political pluralism,” free elections, and transparency in government).

220. See generally Thomas Andrew O’Keefe, *The Central American Integration System (SICA) at the Dawn of a New Century: Will the Central American Isthmus Finally Be Able To Achieve Economic and Political Unity?*, 13 FLA. J. INT’L L. 243 (2001); Mauricio Baquero-Herrera, *Open Regionalism in Latin America: An Appraisal*, 11 LAW & BUS. REV. AM. 139, 161 (2005).

ity in Central America.<sup>221</sup> The Treaty committed the member states to respect for human rights, political pluralism, the rule of law, and “the limitation of the role of the armed forces and of the public security to their constitutional roles.”<sup>222</sup> The Protocol of Ushuaia, adopted in 1996 under the auspices of the Southern Common Market (“MERCOSUR”), requires MERCOSUR to respond to any “interruption in the democratic order” of its members or associates.<sup>223</sup> In 2000 the Andean Community approved a text affirming that “[d]emocratic institutions and a constitutional state that are fully effective” in each member state are essential to further “economic, social, and cultural integration.”<sup>224</sup> The text calls for the Andean Community to take measures including suspension from the Community “if the democratic order is disrupted in any of the Member Countries.”<sup>225</sup> In 2002 the Andean Council of Foreign Ministers adopted a resolution entitled Andean Charter for the Promotion and Protection of Human Rights.<sup>226</sup> In this Charter they reaffirmed their 1998 commitment,<sup>227</sup> and deemed “essential elements of democracy” the rule of law and the “separation and independence of powers,” among other things.<sup>228</sup>

## II. INTERPRETIVE PRACTICES: NICARAGUA AND TOGO

The degree to which international organizations—especially regional ones—have made issues of a constitutional structure more than a purely national concern is impressive. The commitments, resolutions, and treaties address with a fair degree of consistency two basic points. The first is a requirement of separation of powers. Typically this includes references to an independent judiciary and often to some balance between legislative and executive powers; references to civilian control over the military and to political pluralism also relate to the notions of checks and balances. The other is a requirement that states

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221. Tratado Marco de Seguridad Democrática en Centroamérica, Dec. 15, 1995, available at [www.sieca.org.gt/cache/17990000001105/17990000001105.pdf](http://www.sieca.org.gt/cache/17990000001105/17990000001105.pdf).

222. *Id.* arts. 1, 2(a), 2(b) (author’s translation); see also *id.* arts. 2(c), 4.

223. Protocolo de Ushuaia Sobre Compromiso Democrático en el Mercosur, la República de Bolivia y la República de Chile, art. 4, July 24, 1998, available at [http://www.mercosur.int/msweb/portal\\_intermediario/Normas/Tratado e Protocolos/1998\\_ProtocoloUshuaia-CompromisoDemocrático\\_ES.pdf](http://www.mercosur.int/msweb/portal_intermediario/Normas/Tratado_e_Protocolos/1998_ProtocoloUshuaia-CompromisoDemocrático_ES.pdf) (author’s translation).

224. Additional Protocol to the Cartagena Agreement, Andean Community Commitment to Democracy art. 1, Oct. 27, 1998, available at <http://www.comunidadandina.org/ingles/normativa/democracy.htm>.

225. *Id.* art. 2.

226. Andean Charter for the Promotion and Protection of Human Rights, July 26, 2002, available at [http://www.comunidadandina.org/ingles/documentos/documents/andean\\_charter.htm](http://www.comunidadandina.org/ingles/documentos/documents/andean_charter.htm).

227. *Id.* art. 15.

228. *Id.* art. 14.

respect and observe their own constitutions. The strongest exhortations are against coups, but they are by no means limited to such extremes.

Of course, evaluating the legal and practical significance of any one of the instruments in which these commitments are found would require a careful attention to its provenance and authority. The instruments range from treaties to non-binding resolutions. Some have commitments to particular enforcement mechanisms; others are essentially declaratory. The context matters as well. Commitments adopted by relatively small regional trade organizations seeking economic integration of the members may well have greater intrinsic significance than those adopted by organizations that encompass a wide range of states.

My aim in this Part is not to evaluate the precise legal standing of any of these instruments, nor to analyze their potential significance as evidence of new emerging customary law norms. Rather, I would like to examine how states and international organizations have handled the issues of separation of powers and constitutional fidelity in two specific cases. What these two cases strongly suggest is that once issues of constitutional structure become subjects of international or regional attention, it is very hard—perhaps impossible—to confine that attention to broad principles while scrupulously avoiding a level of detail that one might think could be left to each country to work out in light of its particular history and tradition. Any international or regional commitment even just to broadly stated principles of constitutional structure is likely to elevate (or plunge) all of constitutional law to the level of international or regional law.

In part this tendency stems from the multitude of ways in which constitutions can be at least arguably disrespected. General language may be best for covering a variety of situations, but concerns about whether general commitments are meaningful or effective can easily lead to pressure to expand the commitments and make them more specific. For example, the Lomé Declaration went beyond a commitment to oppose military coups to include a commitment to oppose an elected government's refusal to turn over power to a party that defeats it.<sup>229</sup> As noted earlier, the African Charter subsequently added to this list constitutional amendments that infringe on "the principles of democratic change of government."<sup>230</sup> It is not hard to see how one might then propose that the list should also include specific provisions for term limits,<sup>231</sup> or limitations on using constitutional amendments to extend or

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229. See *supra* text accompanying note 181.

230. See *supra* text accompanying note 201.

231. See Nadjita F. Ngarhodjim, *African Charter on Democracy, Elections and Governance: A Critical Analysis*, AFR. GOVERNANCE MONITORING & ADVOC. PROJECT, May 2007, at 5, available

change the term of the executive.<sup>232</sup>

The tendency toward greater detail is not simply a theoretical possibility. It is evident in commitments adopted by governments. Equally important, if there is a stable middle ground between proclamations of near-meaningless breadth and engagement with constitutional issues at a fairly deep—and potentially intrusive—level, the experiences of Nicaragua and Togo do not make it immediately evident.

A. *The Nicaraguan Constitutional Crisis of 2004 and 2005: Separation of Powers and Constitutional Amendment*

This constitutional crisis owed its origins to a political alliance formed in 1999 during the presidency of Arnaldo Alemán, leader of the Constitutional Liberal Party (“PLC”). The Pact, as it was called in Nicaragua, allied the Sandinistas (“FSLN”)—the party that had ruled Nicaragua from the revolution in 1979 through 1990—with the PLC, which had been a member of the coalition that had defeated Daniel Ortega’s bid for reelection in 1990. The Pact was a controversial development for members of both parties, though not without precedent in Nicaraguan politics.<sup>233</sup> Explanations and justifications for it varied. Defenders portrayed the Pact as an effort to limit party fragmentation and create a more stable two-party system. Many observers traced it to other factors: a desire on the part of both Alemán and Ortega (still the leader of the FSLN) to immunize themselves from possible prosecution,<sup>234</sup> and an

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at [http://www.afrimap.org/English/images/paper/ACDEGNgarhodjim\\_EN.pdf](http://www.afrimap.org/English/images/paper/ACDEGNgarhodjim_EN.pdf) (“[W]e could legitimately expect the African Charter on Democracy to opt clearly for a limitation of the number of successive presidential terms that may be held. As surprising as it may seem, the expression ‘term in office’ is completely absent from the text.”). But see Edward R. McMahon, *The African Charter on Democracy, Elections and Governance: A Positive Step on a Long Path*, AFR. GOVERNANCE MONITORING & ADVOC. PROJECT, May 2007, at 3, available at [http://afrimap.org/english/images/paper/ACDEG&IADC\\_McMahon.pdf](http://afrimap.org/english/images/paper/ACDEG&IADC_McMahon.pdf) (arguing that substitution of more general language in final version of the Charter for an earlier draft provision focusing specifically on term limits was an improvement because more general language will encompass more “anti-democratic actions”).

232. See *supra* text accompanying note 145.

233. See David Close, *Undoing Democracy in Nicaragua*, in UNDOING DEMOCRACY: THE POLITICS OF ELECTORAL CAUDILLISMO 1, 11 (David Close & Kalowatie Deonandan eds., 2004) (noting history of pacts in Nicaragua between government and main opposition) [hereinafter UNDOING DEMOCRACY]; see also ALAIN ROUQUIÉ, *THE MILITARY AND THE STATE IN LATIN AMERICA* 156–65 (Paul E. Sigmund trans., 1987) (same).

234. Alemán faced allegations of corruption during his presidency and his earlier service as mayor Managua. See, e.g., Kalowatie Deonandan, *The Assault on Pluralism*, in UNDOING DEMOCRACY, *supra* note 233, at 43, 59–60. See generally Andrés Pérez-Baltodano, *Nicaragua: actores nacionales y fuerzas externas en las elecciones de 2006*, NUEVA SOCIEDAD, July–Aug. 2006, at 14, 15–16. Ortega’s stepdaughter charged in 1998 that he had abused her over many years, and sought criminal prosecution. See DAVID CLOSE, *NICARAGUA: THE CHAMORRO YEARS* 201 n.45 (1999); KATHERINE ISBESTER, *STILL FIGHTING: THE NICARAGUAN WOMEN’S MOVEMENT, 1977–2000*, at 205–07 (2001).

effort to ensure the two parties' dominance and shut out other competitors.<sup>235</sup> It likely also represented a calculated gamble on the part of each of the two leaders that it would be his own party that benefited most from the deal.

The Pact called for a number of changes to the constitution and the electoral laws.<sup>236</sup> These changes had the potential for effecting a serious transformation of Nicaragua's constitutional order into one less pluralistic and participatory, by constitutionally entrenching two parties and reducing checks on the executive. The Pact called for the constitution to be amended to increase the number of seats on the Supreme Court and the Supreme Electoral Council, permitting the appointment of new members who would ensure the parties' dominance in those bodies through appointment of partisans.<sup>237</sup> Another constitutional change would lower the percentage of the vote a presidential candidate would need to avoid a run-off, a change sought by the FSLN.<sup>238</sup> Several other

235. See MANUEL OROZCO, INTERNATIONAL NORMS AND MOBILIZATION OF DEMOCRACY: NICARAGUA IN THE WORLD 113 (2002) ("The pact . . . was designed to exclude other political forces from electoral competition or at least make participation extremely difficult."); David Close, *President Bolaños Runs a Reverse, or How Arnoldo Alemán Wound Up in Prison*, in UNDOING DEMOCRACY, *supra* note 233, at 167, 179 ("[T]he Pact sets the institutional framework for electoral caudillismo . . ."); Elvira Cuadra, *Violence and Personal Insecurity: The Alemán Administration's Authoritarian Response*, in UNDOING DEMOCRACY, *supra* note 233, at 103, 107 ("Th[e] pact . . . was mainly about creating a Liberal-Sandinista political duopoly that would exclude all other political forces"). On the loosening of checks on the executive, see Deonandan, *supra* note 234, at 183, 187–88.

236. For descriptions of the Pact, see OROZCO, *supra* note 235, at 113–15, and Katherine Hoyt, *Parties and Pacts in Contemporary Nicaragua*, in UNDOING DEMOCRACY, *supra* note 233, at 17–42, and see also CRS REPORT FOR CONGRESS, CENTRAL AMERICA AND THE DOMINICAN REPUBLIC IN THE CONTEXT OF THE FREE TRADE AGREEMENT (DR-CAFTA) WITH THE UNITED STATES 65–66 (2005), <http://www.house.gov/spratt/crs/RL32322.pdf> [hereinafter DR-CAFTA REPORT].

237. See Ley No. 330, 18 Jan. 2000, *Ley de Reforma Parcial a la Constitución Política de la República de Nicaragua* [Partial Reform Law to the Political Constitution of the Republic of Nicaragua], art. 6, *La Gaceta* [L.G.], 19 Jan. 2000 (Nicar.) (expanding the number of Supreme Court magistrates from twelve to sixteen); *id.* art. 7 (expanding the Supreme Electoral Council from five to seven magistrates, with three alternates). On the reforms and their effect, see OROZCO, *supra* note 235, at 115–16; CENTRO NICARAGÜENSE DE DERECHOS HUMANOS, INFORME SOBRE DERECHOS HUMANOS EN NICARAGUA 2004–2005, at 12, <http://www.cenidh.org/files/Informe%20sobre%20Situacion%20de%20Derechos%20Humanos%202004%20y%202005.pdf> [hereinafter CENIDH REPORT].

238. Previously a run-off was required if no candidate received at least 45% of the vote. Constitución Política de la República de Nicaragua [Cn.] [Constitution], tit. VIII, ch. III, art. 147, *La Gaceta* [L.G.], 9 January 1987, as amended by Ley No. 192, *Reforma Parcial a la Constitución Política de la República de Nicaragua*, Feb. 1, 1995, L.G. July 4, 1995. With the constitutional amendments, this figure was reduced to 40% (or 35% if one candidate led the runner-up by at least 5%). Constitución Política de la República de Nicaragua [Cn.] [Constitution] tit. VIII, ch. II, art. 147, *La Gaceta* [L.G.], 9 January 1987, as amended by Ley No. 330, *Reforma Parcial a la Constitución Política de la República de Nicaragua*, Jan. 18, 2000, L.G. Jan. 19, 2000. See generally ISBESTER, *supra* note 234, at 208 (regarding the Pact's changes to electoral laws); Walter Lacayo Guerra, *Nicaragua: Alternativas electorales*, NUEVA SOCIEDAD, May–June 2001,

changes were to be made as well. The Office of Comptroller General would no longer be occupied by one head and a deputy but by a panel of five,<sup>239</sup> undercutting the power of a Comptroller General who had undertaken a serious investigation of corruption charges against Alemán.<sup>240</sup> Former presidents and vice-presidents would automatically be given seats in the Assembly,<sup>241</sup> and the margin needed for the Assembly to strip a sitting president of immunity would be raised from an absolute majority to two-thirds.<sup>242</sup>

The Nicaraguan Constitution provides for “partial” and “total” reforms through amendment. In the case of partial reforms, the constitution permits the National Assembly to make revisions on its own, by a sixty percent majority, so long as the amendments are approved in two successive sessions.<sup>243</sup> In the case of a total revision of the constitution, on the other hand, the Assembly must give two-thirds approval, with final approval granted by a specially elected Constituent Assembly.<sup>244</sup> It is not surprising, then, that while the constitutional amendments had a potentially sweeping effect, the two parties—which held more than sixty percent of the seats in the Assembly—treated them as partial rather total, and approved them through votes in two successive sessions.<sup>245</sup>

Alemán’s successor was Enrique Bolaños, a Liberal elected in 2001.<sup>246</sup> He had served as Alemán’s vice-president and was nominated

at 12, 17–18. For the 1987 Constitution, the 1987 Constitution with the 1995 reforms, and the 1987 Constitution with the 1995, 2000, and 2005 reforms, see Georgetown University, Political Database of the Americas, <http://pdba.georgetown.edu/Constitutions/Nica/nica.html> (last visited Feb. 10, 2008).

239. Ley No. 330, 18 Jan. 2000, Ley de Reforma Parcial a la Constitución Política de la República de Nicaragua [Partial Reform Law to the Political Constitution of the Republic of Nicaragua], art. 5, La Gaceta [L.G.], 19 Jan. 2000 (Nicar.) (amending Art. 154 of the 1995 Constitution).

240. On the Comptroller’s investigation and Alemán’s reaction, see Hoyt, *supra* note 236, at 21–24.

241. Ley No. 330, 18 Jan. 2000, Ley de Reforma Parcial a la Constitución Política de la República de Nicaragua [Partial Reform Law to the Political Constitution of the Republic of Nicaragua], art. 3, La Gaceta [L.G.], 19 Jan. 2000 (Nicar.) (amending Art. 133 of the 1995 Constitution).

242. *Id.* (amending Art. 130 of the 1995 Constitution); see also Michael E. Allison, *The Transition from Armed Opposition to Electoral Opposition in Central America*, LATIN AM. POL. & SOC’Y, Winter 2006, at 137, 143.

243. Constitución Política de la República de Nicaragua [Cn.] [Constitution], arts. 192, 194, La Gaceta [L.G.], 9 January 1987, as amended by Ley No. 527, Reforma Parcial a la Constitución Política de la República de Nicaragua, Apr. 5, 2005, L.G., Apr. 8, 2005. Unless otherwise specified, references to the constitution are to the constitution as currently in force.

244. *Id.* art. 193.

245. The introduction of a seemingly technical change to the revisions before the second vote (which had the practical effect of barring a potential candidate for mayor of Nicaragua) proved no impediment to approval, though some commentators asserted that it rendered the amendments unconstitutional. See Hoyt, *supra* note 236, at 41 n.53.

246. See Orozco, *supra* note 235, at 119–21.



on the expectation of continued loyalty to Alemán. Facing a serious challenge from Ortega's candidacy, though, he campaigned on an anti-corruption platform and distanced himself somewhat from Alemán, ultimately winning by a wide margin (an outcome the United States openly favored).<sup>247</sup> Now holding a seat in the Assembly as a former president, Alemán was elected president of the Assembly. With the expected complicity of Bolaños, Alemán sought to exercise effective control from the legislative branch, becoming "Nicaragua's unofficial prime minister"<sup>248</sup>—a notable ambition for someone who had sought to strengthen the executive during his presidency.<sup>249</sup>

The plan did not work out as Alemán expected. In August 2002 Bolaños announced corruption charges against Alemán for embezzling \$100 million.<sup>250</sup> The next month the Assembly dismissed Alemán as speaker and stripped him of his parliamentary immunity.<sup>251</sup> In December 2003 Alemán was convicted and sentenced to twenty years in prison.<sup>252</sup> Still, most PLC members in the Assembly remained loyal to Alemán.<sup>253</sup>

Over roughly the same period, the United States took an active role in Nicaraguan affairs. It supported Alemán's dismissal from his post as speaker of the Assembly. It pressed the PLC to reconcile with Bolaños and sought to put an end to the Pact. It denounced an order that had released Alemán from detention before his trial and conviction as the politically motivated product of a "corrupt and politicized" judiciary, suspending \$49 million in aid to reform the judiciary.<sup>254</sup> It also expressed concerns about the stock of Soviet-era shoulder-launched anti-aircraft missiles the Sandinista government had acquired during the conflict with the contras; after September 11, 2001, the United States pressed the government to destroy these SAM-7 missiles to avoid having them fall into the wrong hands. The success of the FSLN in municipal elections in November 2004, with its possible signs of what might happen in the next presidential election, heightened U.S. concern.<sup>255</sup>

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247. *Id.* at 120–22.

248. Close, *supra* note 235, at 171; *see also id.* at 168–72.

249. *Id.* at 168; *cf.* Clifford J. Levy, *Putin's Choice Moves To Keep Putin in Power*, N.Y. TIMES, Dec. 12, 2007, at A1 (reporting declaration by prospective presidential successor to Vladimir Putin that he wants Putin to be prime minister, with the prospect of a shift from a presidential to a parliamentary form of government).

250. Close, *supra* note 235, at 167.

251. *See id.* at 177–78; *Nicaraguan Ex-President Faces Judge on Corruption Charge*, MIAMI HERALD, Dec. 14, 2002, at 10A.

252. Close, *supra* note 235, at 168 & 181 n.3; *see also* Pérez-Baltodano, *supra* note 234, at 17.

253. *See Alemán Gets 20 Years After Sandinista Pact Spurs U.S. Intervention*, CARIBBEAN & CENT. AM. REP., Dec. 16, 2003.

254. *Id.*; *see also* DR-CAFTA REPORT, *supra* note 236, at 65–66.

255. *See* CENIDH REPORT, *supra* note 237, at 4–5; *see also* *Nicaragua: Alemán Thrown in*

These efforts had limited effect. The effort to spur the PLC into an alliance with Bolaños failed,<sup>256</sup> and Bolaños remained an isolated figure. Azul y Blanco, the new party that Bolaños formed after his split with the PLC, had only a handful of members in the Assembly.<sup>257</sup> The FSLN and the PLC increasingly used their alliance to challenge Bolaños. For example, in February 2005, reacting to an earlier commitment by Bolaños to the gradual destruction of the military's SAM-7 missiles, the Assembly approved a law that forbade the president from destruction of the missiles without prior legislative authorization.<sup>258</sup> In June 2005 the National Assembly stripped some cabinet members of immunity for alleged campaign finance violations.<sup>259</sup> In October 2004 the Office of the Comptroller General issued a report charging Bolaños with having benefited from Alemán's illegal use of public money to support Bolaños's 2001 campaign and calling on the Assembly to impeach him.

Bolaños struck back, charging that the five comptrollers (three members from the PLC and two from the FSLN) were acting on a partisan basis, a charge he leveled against the judiciary as well.<sup>260</sup> Weakened politically at home, he actively sought support in the international arena.<sup>261</sup> The United States denounced the threat of impeachment as one of a number of "politically motivated attempts, based on dubious legal precedent, to undermine the constitutional order in Nicaragua."<sup>262</sup> The threat also prompted SICA's Council of Presidents to make an emergency request to the OAS to send a mission to Nicaragua.<sup>263</sup> After

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*Prison Again*, CARIBBEAN & CENT. AM. REP., Mar. 23, 2004; *Nicaragua: Liberals Abandon Bid To Free Alemán*, LATIN AM. WKLY. REP., Mar. 16, 2004.

256. *Liberals Rule Out Electoral Alliance with Bolaños*, CARIBBEAN & CENT. AM. REP., July 20, 2004.

257. In 2005 the FSLN held 38 seats, the Liberals, 43, and Azul y Blanco, 8. Four other seats were held by another party. See DR-CAFTA REPORT, *supra* note 236, at 66; see also Manuel Ortega Hegg, *Nicaragua 2001: Un gobierno sin partido*, NUEVA SOCIEDAD, Mar.-Apr. 2002, at 4, 11-12.

258. CENIDH REPORT, *supra* note 237, at 5.

259. Ludwin Loáisiga López, *Carcabelos no reconocerá desafueros*, LA PRENSA (Nicar.), July 13, 2005, <http://www-usa.laprensa.com.ni/archivo/2005/julio/13/politica/politica-20050713-02.html>.

260. See *Nicaragua: Assembly Takes First Step Towards Impeachment*, LATIN AM. WKLY. REP., Oct. 19, 2004; José Adán Silva, *Cinco cheques recibió Bolaños*, LA PRENSA (Nicar.), Oct. 16, 2004, <http://www-ni.laprensa.com.ni/archivo/2004/octubre/16/nacionales/nacionales-20041016-11.html>; see also DR-CAFTA REPORT, *supra* note 236, at 65.

261. See CENIDH REPORT, *supra* note 237, at 6 (noting that his political weakness and isolation at home prompted Bolaños to adopt "un estilo de gobierno que propició el entreguismo y el constante injerencismo extranjero y, particularmente estadounidense, en los asuntos internos de Nicaragua").

262. DR-CAFTA REPORT, *supra* note 236, at 66 (quoting Press Statement, Richard Boucher, U.S. Dep't of State, Statement on the Situation in Nicaragua (Oct. 16, 2004)) (internal quotation marks omitted).

263. See Press Release, OAS, OAS To Monitor Developments in Nicaragua (Oct. 22, 2004);

mediation by the OAS the FSLN agreed not to move on the charges until after local elections scheduled for the following month.<sup>264</sup> The OAS's efforts eventually led to the OAS's announcement in January 2005 of an agreement to initiate a "national dialogue" on a wide range of institutional issues.<sup>265</sup> This effort, the Acting Secretary General said, would "give new life to the democratic values and practices affirmed in the Inter-American Democratic Charter."<sup>266</sup>

While the impeachment effort ultimately went nowhere, the FSLN and the PLC also enacted a new round of constitutional amendments.<sup>267</sup> It seems likely that these amendments represented a further attempt to pressure Bolaños to accept the political alliance represented by the Pact.<sup>268</sup> In November 2004 the Assembly gave first approval to a set of constitutional amendments covering a variety of issues.<sup>269</sup> As it stood at the time, the constitution gave the president the power to veto a bill in full or in part, subject to an override by an absolute majority; the proposed amendments expressly provided for the Assembly to use this override power for each partial veto.<sup>270</sup> The other amendments related mainly to the appointment and removal of ministers and other high officials. One amendment would require confirmation by the Assembly of the president's appointment of individuals to a number of positions for

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see also Luis Felipe Palacios, *Respaldo regional a Bolaños*, LA PRENSA (Nicar.), Oct. 17, 2004, <http://www-usa.laprensa.com.ni/archivo/2004/octubre/17/nacionales/nacionales-20041017-07.html>. On SICA, see *supra* text accompanying note 220.

264. See *Nicaragua: Bolaños Staves Off Threat*, LATINNEWS DAILY, Oct. 20, 2004; *Nicaragua: Bolaños Seeks OAS Backing*, LATINNEWS DAILY, Oct. 18, 2004.

265. Press Release, OAS, Support for a National Dialogue in Nicaragua (Jan. 13, 2005). The issues to be covered included

the professionalization of the Supreme Court, the Supreme Electoral Court and the Office of the Comptroller General; electoral reform; the institutionalization of political parties' internal democratic practices; legislation on the financing of political parties; the availability of free advertising space in the media; and the tax system applied to the communications media.

*Id.*; see also Hazel Godoy Z., *OEA amenaza*, EL NUEVO DIARIO (Nicar.), Jan. 8, 2005, <http://archivo.elnuevodiario.com.ni/2005/enero/08-enero-2005/>.

266. Press Release, OAS, Support for a National Dialogue in Nicaragua, *supra* note 265.

267. See Stephen Temple, *Controversial Constitutional Reforms Entered onto Nicaragua's Statute Books*, WORLD MARKETS ANALYSIS, Jan. 19, 2005.

268. See CENIDH REPORT, *supra* note 237, at 12.

269. See generally Luis Felipe Palacios, *Reformas van con todo*, LA PRENSA (Nicar.), Nov. 16, 2004, <http://www-usa.laprensa.com.ni/archivo/2004/noviembre/16/politica/politica-20041116-08.html>; María José Uriarte R., *Quitán poder a Bolaños*, LA PRENSA (Nicar.), Nov. 26, 2004, <http://www-usa.laprensa.com.ni/archivo/2004/noviembre/26/nacionales/nacionales-20041126-18.html>.

270. See Ley No. 520, 18 Feb. 2005, Ley de Reforma Parcial a la Constitución Política de la República de Nicaragua [Partial Reform Law to the Political Constitution of the Republic of Nicaragua], art. 2, La Gaceta [L.G.], 18 Feb. 2005 (Nicar.) (amending art. 143 of the constitution); *id.* art. 5 (amending art. 150(6) of the constitution).

which no confirmation had previously been required.<sup>271</sup> Another amendment would expand the Assembly's ability to appoint certain officials, such as the Superintendent of Banks, from lists proposed by the deputies as well as lists proposed by the president—essentially placing the appointment decision entirely in the hands of the legislature.<sup>272</sup> The amendments would also strengthen certain reporting requirements that ministers and other officials owed the Assembly, and obligate the president to fire certain high officials if the Assembly so decided by a sixty percent vote.<sup>273</sup> As in 2000, the Assembly deemed these amendments to be partial reforms.

Taken together, these amendments would certainly have limited the president's power. They might even be viewed as formalizing Alemán's apparent earlier ambitions to create a powerful speakership that could supplant executive power. Or they might be seen as another manifestation of a disturbing trend toward instability in the executive branch, with elected presidents across Latin America being driven out of office before their terms expired.

On the other hand, it is hard to see the amendments as unthinkable in the abstract. Presidential systems do not necessarily vest absolute discretion in the executive on the retention of important officials; executive officials are subject to impeachment under the U.S. Constitution, for example.<sup>274</sup> Shifting some power from the executive to the legislature might be viewed as an attempt to adjust the balance of powers, particularly in light of Nicaragua's recent history. Nicaragua had experienced a political crisis in 1995 over attempts to amend its Sandinista-era constitution to strengthen the legislature vis-à-vis the executive—attempts that, ironically, were strongly opposed by then President Violetta Chamorro, who had defeated Daniel Ortega's bid for re-election as president.<sup>275</sup> Alemán had done much to strengthen the presidency during his term and limit the effect of the 1995 amendments.<sup>276</sup> Even acknowledging the kind of political advantage that the PLC and FSLN plainly sought in proposing the amendments, one might view them as further

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271. *Id.* art. 4 (amending art. 138(30) of the constitution).

272. *Id.* art. 3 (amending art. 138(9) of the constitution).

273. *Id.* art. 1 (amending art. 138(4) of the constitution); *id.* art. 5 (amending art. 150(6) of the constitution).

274. See U.S. CONST. art. II, § 4 ("The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.").

275. See Close, *supra* note 233, at 9. Only after mediation by a "Group of Friends" (Spain, Mexico, Canada, Sweden, and Holland) was the crisis resolved and amendments adopted. OROZCO, *supra* note 235, at 92–94.

276. See ISBESTER, *supra* note 234, at 207–08; OROZCO, *supra* note 235, at 113; Close, *supra* note 235, at 168.

efforts to create a less executive-oriented balance of power within the government.

Bolaños's reaction was, not surprisingly, one of strong opposition. What is perhaps more surprising is his designation of the efforts to limit his powers as a "rolling coup d'état."<sup>277</sup> He made two claims in support of his opposition to the amendments. First, he said, the amendments severely upset the balance of powers, an essential requirement of democracy.<sup>278</sup> Second, he asserted that the Assembly had acted in contravention of the constitution's amending procedures. Such thoroughgoing reforms, he said, would not qualify as partial revisions or amendments—something within the Assembly's power to accomplish on its own—but total reform. And a complete overhaul of the form of government, essentially changing it from a presidential to a parliamentary form of government, could be accomplished constitutionally only by means of national elections for a constituent assembly.<sup>279</sup>

In December 2004 Bolaños filed petitions with the Central American Court of Justice ("CCJ"), SICA's judicial organ,<sup>280</sup> and the Nicaraguan Supreme Court.<sup>281</sup> Bolaños asserted that the proposed amendments, which so far had had only their first reading, were unconstitutional. In a provisional ruling on January 6, 2005, the CCJ accepted jurisdiction of the dispute, citing Article 22(f) of the Court's statute.<sup>282</sup>

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277. *Constitutional Crisis in Nicaragua Worsens Amid Charges of a 'Rolling Coup D'Etat,'* U.S. NEWSWIRE, Sept. 30, 2005. This particular charge referred to the Assembly's decision in September 2005 to strip seven government officials of their immunity as part of an investigation of the alleged campaign-finance violations in the 2001 presidential election. But it captures the tenor of his complaint against all the efforts to limit his powers. See Ludwin Loáisiga López, *Bolaños acepta irse antes*, LA PRENSA (Nicar.), June 21, 2005, <http://www-usa.laprensa.com.ni/archivo/2005/junio/21/nacionales/nacionales-20050621-13.html>; see also Press Release, OAS, Nicaraguan President Tells OAS of Need for a National Referendum (July 14, 2005) (assertion by President to OAS in July 2005 that the FSLN and Liberal Party had "concentrated hegemonic power in the legislative branch"); Stephen Temple, *Nicaraguan President Calls for Referendum on Reforms Seeking To End His Mandate*, WORLD MARKETS ANALYSIS, July 15, 2005 (quoting Bolaños as characterizing amendments as creation of a "legislative dictatorship").

278. See CENIDH REPORT, *supra* note 237, at 18 (noting president's characterization of the proposed amendments as an attempt to impose on the country "una dictadura bicéfala de carácter parlamentarista" (internal quotation marks omitted)).

279. See *supra* text accompanying notes 243–45.

280. See Statute of the Central American Court of Justice, 34 I.L.M. 921, 923–34 (1995) [hereinafter "CCJ Statute"]. See generally O'Keefe, *supra* note 220, at 251–54 (concerning the creation and the functions of the CCJ); Cesare P.R. Romano, *The Proliferation of International Judicial Bodies: The Pieces of the Puzzle*, 31 N.Y.U. J. INT'L L. & POL. 709, 732–33 (1999) (same).

281. See Eloísa Ibarra A., *Guerra de las Cortes*, EL NUEVO DIARIO (Nicar.), Mar. 30, 2005, <http://archivo.elnuevodiario.com.ni/2005/marzo/30-marzo-2005/nacional/nacional-20050330-12.html>; María José Uriarte R. & Ludwin Loáisiga López, *CCJ ordena parar reformas*, LA PRENSA (Nicar.), Jan. 7, 2005, <http://www-usa.laprensa.com.ni/archivo/2005/enero/07/nacionales/nacionales-20050107-13.html>.

282. Resolución VI, de las 3:00 p.m., 6 Jan. 2005, Gaceta Oficial [Corte Centroamericana de

That article gives the Court the power to “resolve conflicts that may arise among the fundamental powers or organs” of SICA members.<sup>283</sup> The CCJ called on the National Assembly to suspend the process of amending the constitution, pending a final decision.<sup>284</sup> The OAS’s Acting Secretary General, citing the Inter-American Democratic Charter, took special note of the decision the next day and essentially called on the Assembly to respect it.<sup>285</sup>

Also on January 7, however, the Nicaraguan Supreme Court ruled that under Nicaragua’s constitution it, not the CCJ, had jurisdiction to resolve the question of the constitutionality of the proposed amendments.<sup>286</sup> The court held that the CCJ’s interim order was without effect.<sup>287</sup> Shortly thereafter the Assembly ignored the CCJ’s order and approved the amendments in a second reading.<sup>288</sup>

On March 29, 2005, the CCJ issued its final decision on the merits, ruling that in giving final approval to the amendments the Assembly had violated the constitution, and that the amendments would undermine the independence of the executive.<sup>289</sup> These concerns were within the court’s purview, it concluded, because stability and peace in the region,

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Justicia], No. 18, 1 Feb. 2005, p. 35, Cons. III, Res. I, available at <http://www.ccej.org.ni/press/gacetas/GacetaNo18.pdf>.

283. CCJ Statute, *supra* note 280, art. 22(f), at 931 (“The Court’s competence includes [the power] [t]o hear and resolve, at the request of aggrieved parties, conflicts that may arise among the fundamental powers or organs of the Member States, and disputes which may arise when judicial verdicts are not respected[.]”).

284. Resolución VI, de las 3:00 p.m., 6 Jan. 2005, Gaceta Oficial [Corte Centroamericana de Justicia], No. 18, 1 Feb. 2005, pp. 35–36, Cons. III, Res. II.

285. Press Release, OAS, Statement by the Secretary General on Nicaragua and the Decision of the Central American Court (Jan. 7, 2005); Hazel Godoy Z., *supra* note 265.

286. Resolución, de las 12:30 p.m., 7 Jan. 2005, Gaceta Oficial [Supreme Court of Justice] No. 19, 24 May 2005, pp. 37, 38, Res. I (Nicar.), available at <http://www.ccej.org.ni/press/gacetas/GacetaNo19.pdf>; see Eloisa Ibarra A., *Choque de Cortes*, EL NUEVO DIARIO (Nicar.), Jan. 8, 2005, <http://archivo.elnuevodiario.com.ni/2005/enero/08-enero-2005/nacional/nacional-20050108-01.html>.

287. Resolución, de las 12:30 p.m., 7 Jan. 2005, Gaceta Oficial [Supreme Court of Justice] No. 19, 24 May 2005, pp. 38–39, Res. II (Nicar.).

288. Esteban Solís R., *Asamblea no acatará*, EL NUEVO DIARIO (Nicar.), Jan. 7, 2005, <http://archivo.elnuevodiario.com.ni/2005/enero/07-enero-2005/nacional/nacional-20050107-08.html>; Esteban Solís R. y Edgard Barberena, *Acuerdo se tambalea*, EL NUEVO DIARIO (Nicar.), Jan. 14, 2005, <http://archivo.elnuevodiario.com.ni/2005/enero/14-enero-2005/nacional/nacional-20050114-11.html>.

289. Resolución I, de las 5:00 p.m., 29 Mar. 2005, Gaceta Oficial [Corte Centroamericana de Justicia], No. 19, 24 May 2005, pp. 5, 24, Res. Seg., Ter. The Court also condemned the Assembly’s having appointed a commission to consider Bolaños’s impeachment at the behest of the Comptroller General, who, the Court held, had no power to initiate impeachment proceedings. *Id.* pp. 20–21, Cons. XVII; *id.* p. 24, Cons. XXII, Res. Seg.; see also *Nicaragua: ‘Regional’ Court Backs Bolaños Against Assembly*, LATIN AM. WKLY. REP., Apr. 5, 2005; *supra* text accompanying notes 259–60.

one of the aims of the creation of the court,<sup>290</sup> depended on the maintenance of the rule of law in member countries; moreover, SICA itself was aimed in part at consolidating democratic institutions.<sup>291</sup> Nicaragua's constitution prescribes separation of powers in a presidential system, the court concluded.<sup>292</sup> The amendments represented an attempted transformation of Nicaragua's system from a presidential one to a parliamentary regime.<sup>293</sup> Because such a change could be accomplished only through the process prescribed for total revision of the constitution, the amendments were invalid, the CCJ concluded.<sup>294</sup>

That same day the Nicaraguan Supreme Court issued its own ruling in response to the petition that Bolaños had filed before it.<sup>295</sup> The Court ruled that Article 22(f) of the CCJ statute was unconstitutional to the extent that it purported to vest in the CCJ the power to determine disputes among the different branches of Nicaragua's government. The CCJ's rulings were, according to the Nicaraguan Supreme Court, without legal effect.<sup>296</sup> While the court's ruling did not specifically uphold the validity of the amendments, the practical effect was dramatic. Nicaragua was left with "two constitutions: one approved by the executive; and the other approved by the legislature," as one observer put it.<sup>297</sup>

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290. Resolución I, de las 5:00 p.m., 29 Mar. 2005, *Gaceta Oficial* [Corte Centroamericana de Justicia], No. 19, 24 May 2005, p. 15, Cons. II, III.

291. *Id.* pp. 16, 22–23, Cons. VI, XXII. The Court also cited the Inter-American Democratic Charter. *See id.* p. 23, Cons. XXII.

292. *Id.* pp. 16–19, Cons. VIII–X.

293. *Id.* pp. 19–20, Cons. XI, XV.

294. *Id.* p. 24, Res. Ter. The Nicaraguan members dissented. One member dissented principally on the ground that the dispute over the nature of the amendments was a matter internal to Nicaragua, though he also faulted the majority for not condemning the Assembly's consideration of the impeachment of Bolaños in response to the Comptroller General's report as an attempted coup. *Id.* pp. 24–25, 27 (Rafael Chamorro Mora, J., dissenting). Another disagreed with the majority's interpretation of Art. 22(f) and also disputed its conclusion as to the amendment process, noting that the Nicaraguan constitution incorporates a very flexible amendment procedure. *Id.* pp. 28–29 (Orlando Trejos Somarriba, J., dissenting).

295. Sentencia [S.] No. 15, de las 12:00 p.m., 29 Mar. 2005 [Supreme Court of Justice], No. 19, 24 May 2005, pp. 51–52, Por Tanto, Punto IV (Nicar.). Bolaños had attempted to withdraw the petition but the court ruled that it had a responsibility to resolve the conflict between the Assembly and the President. *Id.* p. 49, Cons. IV. The court also rejected Bolaños's suggestion that the judges recuse themselves.

296. *Id.* Further complicating matters were charges by critics of the Nicaraguan Supreme Court's decision that it lacked a proper quorum. *See, e.g.,* Eduardo Marengo Tercero, *Una tercia jurídica con trasfondo político*, LA PRENSA (Nicar.), Apr. 5, 2005, <http://www-usa.laprensa.com.ni/archivo/2005/abril/05/enfoque/enfoque-20050405-01.html> (quoting "constitutional expert").

297. Kate Joynes, *President's Isolation Increases as Nicaragua's Vice-President Steps Down*, WORLD MARKETS ANALYSIS, Sept. 28, 2005; *see also* Decreto No. 43-2005, 23 June 2005, Decreto de Ejecución y Cumplimiento de la Sentencia Dictada por la Corte Centroamericana de Justicia, La Gaceta [L.G.], 24 June 2005 (stating that in light of CCJ ruling, the executive would not recognize the constitutional amendments), available at <http://legislacion.asamblea.gob.ni/Normaweb.nsf/d0c69e291d9955906256a400077164a/2273e490647f3dc3062570a10058540b?>

Over the next few months, armed with the CCJ's rulings, Bolaños proved quite successful in internationalizing not only the issue of separation of powers and checks and balances, but also the entire process of amending the Nicaraguan constitution. Citing the Inter-American Democratic Charter, he made a request to the OAS for mediation.<sup>298</sup> The OAS General Assembly approved the request in June 2005.<sup>299</sup> Also referring to the Inter-American Charter, the General Assembly stated that developments in Nicaragua posed a "grave threat to the separation of powers and independence of the branches of government, an essential element of representative democracy."<sup>300</sup> It approved a mission to Nicaragua headed by the Secretary General to "establish a broad national dialogue, with a view to finding democratic solutions to the serious problems that exist, with strict observance of the principle of the separation of powers and independence of the branches of government in the country."<sup>301</sup> It also called on the Permanent Council to continue to monitor developments in Nicaragua.<sup>302</sup> The Secretary General went to Nicaragua to meet with Nicaraguan officials, and subsequently appointed the former Argentinean former minister, Dante Caputo, as a representative to help mediate a solution.<sup>303</sup>

Other expressions of international concern were soon forthcoming.

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OpenDocument. *See generally* Ibarra, *supra* note 281; Marengo, *supra* note 296; *Torn Between Two Courts in Tangled Dispute*, LATIN AM. SPECIAL REP., Sept. 6, 2005. The Court subsequently upheld the validity of the amendments, *see* Kate Joynes, *Supreme Court Frees Accused Ex-President of Nicaragua, Upholds Constitutional Reform*, WORLD MARKETS ANALYSIS, Aug. 31, 2005, despite press reports that it might find fault with them because of a variance between the text adopted in 2004 and approved on second reading in 2005. *See* Mirna Velázquez Sevilla & María José Uriarte R., *Fallarán contra reformas*, LA PRENSA (Nicar.), July 3, 2005, <http://www-usa.laprensa.com.ni/archivo/2005/julio/03/nacionales/nacionales-20050703-18.html>; *see also* Stephen Temple, *Nicaraguan Judicial Sources Suggest Controversial Constitutional Reform May Be Annulled*, WORLD MARKETS ANALYSIS, July 4, 2005.

298. *See* María José Uriarte & Luis F. Palacios, *OEA intentará resucitar diálogo*, LA PRENSA (Nicar.), June 29, 2005, <http://www-usa.laprensa.com.ni/archivo/2005/junio/29/politica/politica-20050629-01.html>.

299. OAS, Support for Nicaragua, AG/DEC. 43 (XXV-O/05) (June 7, 2005). That same month, the National Assembly replaced government-appointed directors of some public-service organizations with its own selections; Bolaños responded by refusing to let them take their positions. *See Nicaragua President Rejects OAS Proposal on Political Crisis*, PEOPLE'S DAILY ONLINE (P.R.C.), June 19, 2005, [http://english.people.com.cn/200506/19/eng20050619\\_191091.html](http://english.people.com.cn/200506/19/eng20050619_191091.html).

300. Support for Nicaragua, *supra* note 299, pmb1; *see also id.* ¶ 1 ("[The General Assembly declares] [i]ts concern regarding the situation that gravely affects the democratic system in Nicaragua.").

301. *Id.* ¶ 3; *see also* Velázquez Sevilla & Uriarte, *supra* note 297.

302. Support for Nicaragua, *supra* note 299, ¶ 4.

303. *See* Press Release, OAS, OAS Names Former Argentinean Foreign Minister To Lead Special Mission to Nicaragua (June 28, 2005); Press Release, OAS, OAS Reiterates Need for Broad Dialogue in Nicaragua (June 21, 2005); Press Release, OAS, OAS Secretary General Goes to Nicaragua Wednesday (June 14, 2005); *see also* Velázquez Sevilla & Uriarte, *supra* note 297.



A summit of the Central American Presidents issued a statement in July 2005 condemning what they called actions by the legislature that seriously undermined democracy in Nicaragua.<sup>304</sup> The Central American presidents simply ignored the Nicaraguan Supreme Court's ruling and called for the prompt reinstatement of the balance of powers by complying with the CCJ's judgment.<sup>305</sup> The European Union also issued a statement in July 2005 expressing concern about the institutional crisis in Nicaragua and its effect on "the rule of law . . . and the balance and independence of the powers of the state."<sup>306</sup>

In September 2005 the Assembly took further action against Bolaños's presidency, stripping the Interior Minister and six other officials of their legal immunity, based on claims that they had been involved in campaign finance violations in the 2001 election.<sup>307</sup> Bolaños's government characterized the Assembly's actions as a "threat to democracy . . . coming from an unholy alliance of a legislature and a judiciary trying to overthrow a freely and democratically elected president."<sup>308</sup> It described this "new paradigm"—the legislative and judicial branches attacking the presidency—as calling for the same kind of vigorous response that the international community would have to a president shutting down the courts and the legislature.<sup>309</sup> The OAS Secretary-General deplored what he called "the judicialization of politics," which, he said, "inevitably makes a country ungovernable, by generating endless conflicts."<sup>310</sup> Citing the Inter-American Democratic Charter, the OAS Permanent Council issued a resolution in September 2005 saying that "the country's democratic governance, the legitimate exercise of power, and the rule of law" were under threat.<sup>311</sup> That same month the Nicaraguan Foreign Minister appeared before the UN General Assembly to reiterate the

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304. See Luis Felipe Palacios, *Presidentes demandan cumplir fallo de la CCJ*, LA PRENSA (Nicar.), July 1, 2005, <http://www-usa.laprensa.com.ni/archivo/2005/julio/01/politica/politica-20050701-01.html>.

305. See *id.*

306. Press Release, UK Presidency of the EU 2005, Declaration by the Presidency on Behalf of the European Union Concerning the Situation in Nicaragua (July 8, 2005), available at <http://www.eu2005.gov.uk/servlet/Front?pagename=OpenMarket/Xcelerate/ShowPage&c=Page&cid=1107293561746&a=KArticle&aid=1119520253175&date=2005-07-08>. Conservatives in the United States adopted the cause as well. See, e.g., *Help Nicaraguan Democrats Block "Creeping Coup"*, HERITAGE FOUND. REP., Nov. 7, 2005 (depicting proposed constitutional amendments as attempt to install one-party Sandinista rule).

307. *Constitutional Crisis in Nicaragua Worsens Amid Charges of a 'Rolling Coup D'Etat'*, *supra* note 277.

308. *Id.*

309. *Id.*

310. Press Release, OAS, OAS Secretary General Reiterates Need for Dialogue in Nicaragua (Sept. 29, 2005); see also Press Release, OAS, Statement of OAS Secretary General on Developments in Nicaragua (Sept. 23, 2005).

311. Press Release, OAS, OAS Adopts Resolution in Support of Nicaragua (Sept. 9, 2005).

claim that the FSLN-Liberal leaders were attempting to “upset the balance of power, an essential principal [sic] of representative democracy in the Inter-American system.” This effort, he said, was being made by “joint forces opposing democracy,” who had “escalat[ed] the breakdown of constitutional order.”<sup>312</sup>

The United States issued its own condemnations as well. In October 2005 the United States threatened to suspend \$175 million in aid and revoke \$4 billion in debt forgiveness, saying that what it called a “creeping coup” was threatening democracy in Nicaragua.<sup>313</sup> In its Country Reports on Human Rights for 2005 (released in March 2006) the U.S. Department of State accused the Nicaraguan Supreme Court of simply “ignor[ing] the constitutional principle of separation of powers” when it ruled in favor of the Assembly.<sup>314</sup>

In the end, the president and the Assembly reached an agreement on a “framework law” providing that the constitutional amendments limiting the president’s power would not become effective until after the next election, at which point the government would have the opportunity to reconsider them.<sup>315</sup> The Sandinista candidate and former President Daniel Ortega subsequently won office by a plurality.<sup>316</sup> Early on, the new government exercised its power to suspend implementation of the amendments pending further study.<sup>317</sup> Ironically, the immediate outcome—preserving the president’s power—was precisely the result toward which international pressure was directed, though it worked in favor of a new president whose candidacy had been anathema to the United States.<sup>318</sup>

312. Norman Caldera Cardenal, Minister of Foreign Affairs of the Republic of Nicaragua, Statement at the General Debate of the 60th Session of the United Nations General Assembly (Sept. 19, 2005), available at <http://www.un.org/webcast/ga/60/statements/nic050919eng.pdf>. Alleging a “coup d’etat in slow motion,” two ministers who were stripped of their immunity also filed a petition with the Inter-American Court of Human Rights. See Kate Joynes, *Ousted Nicaraguan Ministers Appeal for OAS Support*, WORLD MARKETS ANALYSIS, Sept. 30, 2005.

313. Duncan Campbell, *U.S. Warns Millions in Aid at Risk if Nicaragua Ousts President*, GUARDIAN (UK), Oct. 6, 2005, <http://www.guardian.co.uk/international/story/0,,1585703,00.html>.

314. U.S. Dep’t of State, *Nicaragua: Country Reports on Human Rights Practices—2005*, §1(e) (Mar. 8, 2006), available at <http://www.state.gov/g/drl/rls/hrrpt/2005/61734.htm>.

315. *Postergan Ley Marco por un Año*, EL NUEVO DIARIO (Nicar.), Jan. 19, 2007, <http://impreso.elnuevodiario.com.ni/2007/01/19/politica/39202>; see also Marion Barbel, *Congress Delays Presidential Power-Reduction Reform in Nicaragua*, GLOBAL INSIGHT, Jan. 22, 2007; Kate Joynes, *Congress of Nicaragua Prepares Constitutional Reform*, GLOBAL INSIGHT, Feb. 19, 2007.

316. *Daniel Ortega es el vencedor, según Ética y Transparencia*, EL NUEVO DIARIO (Nicar.), Nov. 6, 2006, <http://impreso.elnuevodiario.com.ni/2006/11/06/politica/33222>; see also James C. McKinley Jr., *Rival’s Concession Clears Way for Ortega, Once and Future President of Nicaragua*, N.Y. TIMES, Nov. 8, 2006, at A10.

317. See *Postergan Ley Marco por un Año*, supra note 315.

318. The Pact had varied fortunes after Ortega’s election. One constant was efforts to reshape the form of the government. See, e.g., *Nicaragua: Proposals To Change Style of Government*,

### B. *The Togolese Constitutional Crisis of 2005: Limits on Constitutional Amendment*

On February 5, 2005, Gnassingbé Eyadéma, who had been president of Togo since 1967, died.<sup>319</sup> His son Faure Gnassingbé was sworn in two days later as president with the backing of the military.<sup>320</sup> This action did not appear particularly consistent with the Togo's Constitution. Article 65 of the Togolese Constitution called for the president of the National Assembly to exercise the functions of the presidency for sixty days, at the end of which there should be an election for president.<sup>321</sup>

Whether the incident was one in which democracy was "abruptly brought to an end,"<sup>322</sup> in the terms used by ECOWAS's Protocol on Democracy and Good Governance, might be open to question. President Gnassingbé had ruled for some years under democratic form, but only after taking power decades earlier in a coup. His government, moreover, was widely considered undemocratic. The son's accession was generally viewed as either the start of a family dynasty or the effort by the military to rule from behind the scenes or both.

What is interesting is the characterization that regional and international actors employed in objecting to the son's accession. The U.S. Department of State called it "an unconstitutional move."<sup>323</sup> ECOWAS called it a "violation of the [Togolese] Constitution"<sup>324</sup> and imposed sanctions. The OAU termed it a "blatant and unacceptable violation of

CARIBBEAN & CENT. AM. REP., Oct. 18, 2007 (noting talks between FSLN and PLC over possible constitutional amendments to create a parliamentary form of government with a prime minister). In January 2008, after another ruling by the Nicaraguan Supreme Court—this one invalidating the framework law that had suspended the constitutional amendments—President Ortega stated that the resulting reduction in presidential power was a useful "step towards creating a parliamentary system." *New Laws Suggest Revival of Pact*, LAT. AM. REGIONAL REP., Jan. 2008, at 7 (quoting Ortega); see also *id.* (noting critics' assertions that Ortega's interest in parliamentary government stems from a desire to stay in power after his presidential term expires).

319. For more detailed accounts of the crisis, see Stephen J. Schnably, *The OAS and Constitutionalism: Lessons from Recent West African Experience*, 33 SYR. J. INT'L L. & COM. 263, 267–74 (2005), and see also KANIYE S.A. EBOKU, *THE SUCCESSION OF FAURE GNASSINGBE TO THE TOGOLESE PRESIDENCY: AN INTERNATIONAL LAW PERSPECTIVE* (2005), and Muthoni Kamuyu, *Togo*, in STRATEGIES FOR DEMOCRATIC CHANGE 49–76 (Ted Piccone & Richard Youngs eds., 2006).

320. Schnably, *supra* note 319, at 267–69.

321. TOGO CONST. art. 65 ("In case of a vacancy of the Presidency of the Republic due to death, resignation or definitive incapacity, the presidential function shall be temporarily exercised by the President of the National Assembly."); see also *id.* ("The Government shall convoke the electorate within sixty (60) days of the opening of the vacancy for the election of a new President of the Republic.").

322. See Protocol on Democracy and Good Governance, *supra* note 212, art. 45(1).

323. U.S. Dep't of State, Background Note: Togo, <http://www.state.gov/r/pa/ei/bgn/5430.htm> (last visited Jan. 27, 2008).

324. Press Release, ECOWAS Salutes the Memory of President Eyadema, Condemns the

the Togolese Constitution,<sup>325</sup> citing the Lomé Declaration, and suspended participation of the government in OAU proceedings.

ECOWAS, as noted earlier, had already proclaimed its intolerance for “power obtained or maintained by unconstitutional means.”<sup>326</sup> And the AU had made a commitment to take action in response to “an unconstitutional change” of government.<sup>327</sup> Still, the charge that Togo’s government had acted unconstitutionally is striking precisely because it so firmly rejects the notion that interpretation of the constitution is a matter for domestic legal authorities. It is a long way from the concern expressed nearly four decades earlier when Article 46 of the Vienna Convention was drafted that interpretation of one state’s constitution by another would constitute interference in the former’s domestic affairs.<sup>328</sup>

It might be thought relevant that the disregard for the constitution was particularly blatant. It is worth noting, however, that the military asserted that the imperative security needs made the son’s accession as president consistent with the constitution. The president of the National Assembly was in France when Gnassingbé Eyadéma died, and was unable to return to Togo immediately. To respond that this argument is obviously wrong in light of the text of Article 65 (or even to point out that the military’s decision to seal the country’s borders upon the president’s death prevented the Assembly’s president from returning) is already to venture into the realm of constitutional interpretation. It is not entirely implausible that a state of emergency would arise when a president who has ruled autocratically for decades dies in office.<sup>329</sup> My point is not that application of some kind of state necessity doctrine to the circumstances would necessarily be a correct interpretation of the Togolese constitution. It is simply that whether to apply it amounts to an interpretation—one not that is necessarily different in principle from claims made by U.S. presidents of inherent executive power.

In any case, the Togolese government quickly made matters more interesting—and difficult for the international actors condemning the move. The son resigned and was immediately elected by the National

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Violation of the Constitution and Calls for a Return to Constitutional Order (Feb. 5, 2005); see also Communiqué, ECOWAS, On the Situation in Togo, Cotonou (Feb. 11, 2005).

325. Communiqué of the Twenty-fourth Meeting of the African Union, Peace and Security Council (Part B), *On the Situation in Togo*, AU PSC/PR/Comm. (XXIV), Addis Ababa, Ethiopia (Feb. 7, 2005) [hereinafter Communiqué, *On the Situation in Togo*].

326. Protocol on Democracy and Good Governance, *supra* note 212, art. 1(c).

327. Lomé Declaration, *supra* note 178.

328. See *supra* text accompanying notes 71–81.

329. See EBOKU, *supra* note 319, at 18–21 (discussing Nigerian, Cypriot, and Pakistani judicial rulings applying doctrines of state necessity to justify extraordinary action when the state’s basic security is threatened).

Assembly (firmly in the control of the ruling party) as its president.<sup>330</sup> His election as the Assembly's president now made him eligible at least to exercise the powers of the presidency for sixty days. But the Assembly did not stop with this move. It also used its power under Article 144 of the constitution to amend Article 65 to provide that in the case of a vacancy, the Assembly's president would simply become president and complete the late president's term (due to end in 2008). With this amendment, it might appear that the succession now avoided the prohibition on unconstitutional changes in government.

Nevertheless, ECOWAS called the action an "illegal amendment" to the constitution.<sup>331</sup> The actions that led to the son's second accession to the presidency were, in ECOWAS's terms, pure and simple "manipulations of the Constitution by the National Assembly," a "cover-up" for a "coup d'état."<sup>332</sup> ECOWAS proceeded to impose sanctions, even when the new President said he would call elections in sixty days.<sup>333</sup> On what basis could an international organization reach such a conclusion?

Not surprisingly, ECOWAS did not provide the kind of detailed reasoning one would expect from a court. But certain factors stand out. One is a sense that the legislature simply rubber-stamped the military initiative. This concern could lead one to conclude that the amendment may have been valid in form, but was still somehow a sham. The other is the text of the Togo Constitution itself. Article 144 does provide for amendment if four-fifths of the members of the National Assembly approve the proposed amendment, as happened here.<sup>334</sup> But it also places two limitations on the amendment power. The first relates to timing and procedure. The President must co-sponsor any proposed amendment, which is not possible when there is a vacancy in the presidency, and in fact Article 144 expressly states, "No procedure for revision can

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330. Schnably, *supra* note 319, at 267–70.

331. Press Release, ECOWAS Holds Extraordinary Meeting on the Situation in Togo (Feb. 8, 2005) ("In violation of the Togolese Constitution, following its illegal amendment, Faure Gnassingbé, son of the late president, was designated to succeed his father.").

332. Final Communiqué, ECOWAS, Extraordinary Summit of the Heads of State and Government, Niamey (Feb. 9, 2005), para. 5.

333. *Id.* para. 6; *see also* Communiqué Issued by the Current Chairman ECOWAS (Mamadou Tandja, President of the Republic of Niger and Chairman of the Authority of Heads of State and Government of ECOWAS) (Feb. 18, 2005); Communiqué, *On the Situation in Togo*, *supra* note 325; Press Release, Org. of African Unity, Press Release No. 02/2005 (Feb. 19, 2005), available at [www.africa-union.org/News\\_Events/Press\\_Releases/19%202005%20Togo%20-%20%20eng.pdf](http://www.africa-union.org/News_Events/Press_Releases/19%202005%20Togo%20-%20%20eng.pdf) ("The Chairperson of the Commission of the African Union (AU), Alpha Oumar Konaré, continues to follow developments in the situation in Togo, particularly in the light of the declaration by Mr. Fauré Gnassingbé confirming his decision to remain in power, and this in violation of the Togolese Constitution and the pertinent AU and ECOWAS decisions.").

334. Alternatively, a proposed amendment may be submitted to a referendum under certain circumstances.

be engaged in or pursued during an interim period or a vacancy or when the integrity of the territory is being violated.” The presidency was of course vacant upon Gnassingbé Eyadéma’s death. Even the election of his son as president of the Assembly would not seem to have changed this: the original Article 65 merely called on the president of the assembly to exercise the functions of the presidency.

The second limitation is substantive. Article 144 limits the kinds of uses to which the amending power can be put. In particular, it prohibits any amendments that would revise the “Republican form of the State.” Perhaps this means that an amendment that legitimized a family dynasty would be incompatible with a republican form of the state. If so, there would be a substantive irregularity even though the amendment received the necessary four-fifths vote of the Assembly.

A judgment that the use of the amendment power to change the Togolese constitution was itself inconsistent with the Constitution is thus by no means difficult to understand. The AU Peace & Security Council could be read as taking this approach, since it “firmly condemn[ed] the revision of the Togolese Constitution made by the de facto authorities, in violation of the relevant provisions of the Togolese Constitution.”<sup>335</sup> But the simple fact that the amendments to the constitution were done in a manner inconsistent with the text of Article 144 does not settle the question, for two reasons. First, there is always the question whether a constitution may be amended in ways not contemplated by—or even prohibited by—its textual provisions on amendment. Second, and more to the point, the Togolese legislature also amended Article 144 to eliminate the prohibition on amendments while the presidency is vacant.<sup>336</sup>

Was the elimination on this prohibition valid? The question is not unique to Togo. Article V of the U.S. Constitution prohibits the use of the amending power to deprive a state of its equal suffrage in the Senate without its consent. An amendment limiting representation of small states in the Senate to one each would be inconsistent with this substantive limit, even though its enactment followed all the proper procedures. But does Article V prohibit the use of the amending power to eliminate this restriction on the amending power, in the same or an earlier amendment?

The lack of any real commitment to democracy and the rule of law in Togo for many decades is obvious ground for suspecting that the mili-

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335. Communiqué, *On the Situation in Togo*, *supra* note 325.

336. This change would not address the issue of the republican form of government, but the legislature’s action could be understood as representing a judgment that a son’s accession to the presidency through constitutional means is not in itself contrary to republicanism.

tary and its allies in the Togolese National Assembly were engaging in careful lawyering aimed at the international community rather than seeking to revise the Constitution in good faith to respond to a pressing problem. Still, when other states and international organizations dismiss as manipulation the utmost attention to the basic legal text—including its provisions for amendment—they have taken a particularly strong (and contestable) stance on the relevance of motivation to constitutional interpretation. What might seem a simple command to a state—that it be faithful to whatever constitutional text it has (including its provisions for amendment)—turns out almost immediately to enmesh international actors in deeply substantive questions of constitutional interpretation and methodology.

In any case, with the United States, France, the U.N. Secretary General, ECOWAS, and AU all condemning the son's accession, and with ECOWAS and AU threatening isolation and sanctions, the Togolese authorities backed down. The new president resigned and the amendments were nullified. The vice-president of the Assembly, Abass Bonfoh, was named its president, and thus qualified to exercise the powers of the presidency. Subsequently there was a presidential election, which the former president's son won amid widespread claims of voter fraud and violent suppression of demonstrations.<sup>337</sup>

Interestingly, even in the period between the resignation of the president's son and his subsequent election to the presidency international actors found themselves deeply enmeshed in constitutional questions. After meeting with government and opposition figures soon after the president's son resigned, ECOWAS announced that the election would be held within the sixty-day time period mandated by the constitution. The date it announced, however, was not sixty days after February 5, 2005, when Gnassingbé Eyadéma had died, but sixty days after February 26, 2005, when Bonfoh assumed the powers of the presidency after Fauré Gnassingbé's resignation under international pressure. By treating the vacancy as having begun at this point, ECOWAS might appear to have accorded some legitimacy to Fauré Gnassingbé's brief period in office under the amended constitution. ECOWAS's action may have been reasonable, of course; the opposition wanted as much time as possible to organize for the upcoming election. But by specifically referring to "the 60 days Interim period prescribed by the Constitution of Togo in article 65," ECOWAS engaged in constitutional interpretation in a very concrete way.

Second, Article 62 of the Constitution bans anyone from running for the presidency if he or she "does not reside in the national territory

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337. Schnably, *supra* note 319, at 270.

for at least twelve (12) months.” Added in 2002, this provision eliminated Gilchrist Olympio from the contest. The son of Togo’s first president, Olympio had been in exile in France since 1992 when he escaped an attempt by the government to assassinate him. It was striking that Fauré Gnassingbé, who had just been deeply enmeshed in what might have seemed an unconstitutional change of government, was not barred from running, whereas an opposition candidate could be banned by an amendment approved by a National Assembly thoroughly dominated by government forces and, one would suspect, fully aware of the effect of their action. On this matter, ECOWAS took no action, and Olympio was barred from running. Once again, ECOWAS’s stance may have been reasonable. My point is simply that a choice to treat such a provision as fully binding is to take a deeply substantive stance on the validity of constitutional amendments.

### III. EVALUATING THE APPLICATION OF INTERNATIONAL LAW NORMS TO STRUCTURAL CONSTITUTIONAL ISSUES

In the end, some internationalization of structural constitutional issues may be both unavoidable and even desirable. The ultimate violation of a constitution is a military coup, and one might think twice about returning to the days when coups were considered purely internal matters. While Togo’s crisis ended with a questionable election putting the president’s son in power, the fact that the government encountered some limits on its ability to shape the constitution to its immediate needs might prove useful to democracy over the long run.

At the same time the internationalization of matters of constitutional structure also poses significant risks to democracy itself. Nations are still the main arena in which democratic institutions are situated. And one major expression of democracy is the working out of the meaning of the country’s constitution in every day politics and even in key constitutional turning points or “moments.”<sup>338</sup> Precisely because constitutional issues *are* structural, they may in turn have a profound impact on the shape of politics in the future. External intervention into or influence on these matters, pervasive in both Nicaragua and Togo,<sup>339</sup> is not necessarily democratic.<sup>340</sup>

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338. See Bruce Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013, 1022–23 (1984); ACKERMAN, *supra* note 4.

339. See Pérez-Baltodano, *supra* note 234, at 18, 21–22; Ortega Hegg, *supra* note 257, at 9–10; Kamuyu, *supra* note 319.

340. Cf. Rubinfeld, *supra* note 31, at 2012 (“International constitutionalism . . . does damage to the prospects for variation, experimentation, and pluralism that national democracy opens up.”); see also, e.g., Kamuyu, *supra* note 319, at 70 (noting that “French interests are more in line with supporting the status quo rather than supporting Togo’s transition to democracy”).



To be sure, external intervention might help support internal democracy in some ways. One obvious parallel is international human rights law itself. It does involve some compromise of national autonomy and sovereignty, but this compromise is easier to accept because although it limits democracy it also supports it in important respects. For example, international pressure to respect freedom of expression and association may help preserve or open up space for domestic opposition groups. International election observers—in support of the right to vote—may help ensure that elections are not rigged. Even the very fact of the international community's espousal of human rights norms may give moral support to domestic groups seeking to end government abuses.

Similarly, international pressure to maintain a balance of powers and respect for the constitution could, in theory, help preserve the possibility of genuinely democratic politics in a particular country. One should not be too sanguine about this possibility, though. As between legislatures and executives, it is executives who participate most actively in the international arena. If there is any general bias here, it might be that internationalizing structural constitutional issues could generally favor the executive branch. The declaration of the heads of Central American states in support of Bolaños is one example. And of course in the domestic arena executives often play leading roles in interpreting and implementing international law.<sup>341</sup>

Another potential problem can be gleaned from the very fact that the events described in Part II related to two small countries with limited resources. While the norms, being general, would apply to all states, in practice genuine international enforcement pressure is likely to be exerted only on less powerful countries. Moreover, more powerful countries would seem unlikely to attempt to take principled stands on these issues. While the United States expressed strong concern about the shift toward legislature power embodied in the proposed Nicaraguan amendments, for example, it earlier took the opposite stand in dealing with Aristide after restoring him to power following the coup in 1991. The United States constantly pressed Aristide to work with the legislature. The claim was that a stronger legislature would be better for democracy, but it is hard not to imagine that the United States also welcomed any constraint on Aristide, with whom it had significant policy disagreements.<sup>342</sup> A complaint of hypocrisy, however, would assume

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341. See Michael Kirby, *International Law—The Impact on National Constitutions*, 21 AM. U. INT'L L. REV. 327, 350–51 (2006); Tom Ginsburg, *Locking in Democracy: Constitutions, Commitment, and International Law*, 38 N.Y.U. J. INT'L L. & POL. 707, 741–42 (2006). On the declaration of the heads of Central American states, see *supra* text accompanying note 304.

342. See Schnably, *supra* note 128, at 194–96.

that a consistent position was not only desirable but also possible. Yet questions of balance are highly contextual. The widespread perception that the FSLN had been given control of the courts in Nicaragua, for example, could have a major impact on one's assessment of the balance of powers. Questions about how soon the subsequent elections were required to be held under the Togolese constitution could depend, in part, on one's assessment of how realistic it would be for the opposition to mount a credible campaign within a short period of time.

Avoiding the risks simply by proclaiming constitutional matters to be purely internal—or by attempting to limit the application of the international norms only to the most extreme cases—may not be possible. States' participation in a larger international system is likely to make either alternative difficult. While there are obvious differences between the international order and a federal system, the example of the U.S. Constitution itself as an attempt to maintain at least somewhat autonomous units within a larger system may still be instructive. To a large extent, the Constitution does not specify the internal structure of state governments. There is no general requirement that states maintain the same kind of separation of powers laid out in the Constitution for the federal government.<sup>343</sup> Nor do standing or other Article III limitations on federal courts apply to state courts. The underlying premise is that choice in the structure of government flows from whatever degree of sovereignty states retained with the creation of the Union. As the Supreme Court put it in *Gregory v. Ashcroft*, “[t]hrough the structure of its government . . . a State defines itself as a sovereign.”<sup>344</sup>

Two things stand out about this arrangement. The first is that pristine separation turns out not to be possible even in the Constitution itself. One can see glimpses of a more robust role for the Constitution in matters of state constitutional structure. Most obviously, Article IV, Section 4 of the Constitution provides that “[t]he United States shall guarantee to every State in this Union a Republican Form of Government.” One could indeed analogize the international commitments to democracy, constitutionalism, and separation of powers to this clause.<sup>345</sup> But there other provisions that may be even more specific as well. Arti-

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343. See *Prentis v. Atlantic Coast Line Co.*, 211 U.S. 210, 225 (1908) (“[W]hen . . . a state Constitution sees fit to unite legislative and judicial powers in a single hand, there is nothing to hinder so far as the Constitution of the United States is concerned.”).

344. 501 U.S. 452, 460 (1991). There is also a functional aspect as well: If states are to be democratic, they should have the power to structure their own governments and create or revise their own constitutions. This power is, of course, subject to specific constitutional limitations—for example, the Fourteenth Amendment—but this constraint is not too different in principle from the binding character of human rights treaties on states that ratify them.

345. E.g., Morton H. Halperin & Kristen Lomasney, *Toward a Global “Guarantee Clause,”* J. DEMOC., July 1993, at 60, 60.

cle IV itself contains what looks like a very specific separation of powers requirement. The United States is obligated to protect states from “domestic Violence” upon “Application of the Legislature, or of the Executive (when the Legislature cannot be convened).”<sup>346</sup> This provision specifies a particular role for the legislative and executive branches on a particular issue. The same is true of state ratification of proposed amendments. If Congress does not specify the use of state conventions, then it is state legislatures—not state governors—that have the power to decide whether the state will approve the amendment.<sup>347</sup> Article II might be read to have its own state separation of powers requirements. In *Bush v. Gore* three justices of the Supreme Court read Article II, Section 1, Clause 2 to impose a specific separation of powers requirement on states in the exercise of their power to determine the manner in which electors were chosen—a requirement to be policed by the federal courts.<sup>348</sup> It was, the concurrence reasoned, for the Florida legislature to make that determination; in the view of the concurrence, the Florida Supreme Court had usurped that authority.<sup>349</sup>

The other notable feature of this arrangement is the way it veers so easily from practical insignificance to extreme intrusiveness. The Guarantee Clause is functionally a dead letter. The political question doctrine essentially precludes the courts from enforcing it,<sup>350</sup> and there is little if any sign that it plays any role in politics. As for Article V, in *Coleman v. Miller*,<sup>351</sup> the Court was evenly divided on the justiciability of the question whether Kansas’s lieutenant governor was part of the legislature under Article V. Had it ruled on the issue, it would appear to have had two choices: treat the Kansas Supreme Court’s ruling that the Kansas constitution permitted the lieutenant governor to cast a tie-breaking vote<sup>352</sup> as essentially determining the Article V question,<sup>353</sup> or engage in a detailed analysis of Kansas’s constitutional arrangements and their compatibility with Article V.

The same dichotomy can be seen in *Bush v. Gore*. The effort by Chief Justice Rehnquist to take on intra-state separation of powers issues was notable for the degree of its potential intrusiveness into state affairs. It amounted to a view that the federal courts should impose their own

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346. U.S. CONST. art. IV, § 4.

347. *Id.* art. V.

348. 531 U.S. 98, 112–13 (2000) (Rehnquist, C.J., Scalia & Thomas, JJ., concurring).

349. *Id.* at 114.

350. *Luther v. Borden*, 48 U.S. (7 How.) 1, 39–40 (1849).

351. 307 U.S. 433, 446–47 (1939).

352. *Coleman v. Miller*, 71 P.2d 518, 519–24 (Kan. 1937).

353. See Walter Dellinger, *The Legitimacy of Constitutional Change: Rethinking the Amendment Process*, 97 HARV. L. REV. 386, 426 n.196 (1983).

vision of the proper role of courts in interpreting statutes—their own stance on “judicial activism”—on states.<sup>354</sup> In sharp contrast was Justice Stevens’s view that no more than an assumption that the Florida Supreme Court had acted impartially was needed to eliminate any “colorable federal question.”<sup>355</sup> Similarly, Justice Ginsburg argued that there was no basis in Article II for “federal superintendence over the relationship between state courts and legislatures.”<sup>356</sup>

The absence of any obvious middle ground between complete deference and robust intervention is highly suggestive for the international level as well. Once we take the first step on the international level—treating the complete disruption of a constitutional structure as a proper subject of international intervention—we may be set on a path that poses its own dangers to the democratic governance the intervention seeks to protect. Almost any internationalization of these issues is likely to draw international actors into the most detailed and basic questions of constitutional law in particular countries—as the experience of the Togolese and Nicaraguan constitutional crises shows. One cannot easily confine the international law norms to questions about executive power; nor can one easily confine it to setting some broad parameters while allowing variation from country to country on details.

What makes it even more difficult is that one cannot even take for granted what the proper text is. In Nicaragua, from the perspective of the National Assembly and the Supreme Court, it was (before the Fall 2005 agreement) the text with the new amendments; to the President and a regional court with an arguable claim to jurisdiction, it was the text without the amendments. In Togo, the text was, from the perspective of the Assembly and the President, the text with the amendments; from the perspective of ECOWAS and the AU, it was the text without the amendments.

Nor are questions about what constitutes the text issues that arise only in less established constitutional systems, likely to disappear as a state gains more of a constitutional tradition. Is the Twenty-seventh Amendment—which bans Congress from “varying the compensation” for its members “until an election of Representatives shall have intervened”—part of the U.S. Constitution? With state ratifications spanning an interval of some two hundred years, did the amendment have the approval of the requisite number of states over a period that was “suffi-

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354. See Robert A. Schapiro, *Conceptions and Misconceptions of State Constitutional Law in Bush v. Gore*, 29 FLA. ST. U.L. REV. 661, 677–83 (2001).

355. *Bush v. Gore*, 531 U.S. 98, 128 (2000) (Stevens, J., dissenting).

356. *Id.* at 141 (Ginsburg, J., dissenting). She also concluded, however, that the reference in the Guarantee Clause itself to a “Republican Form of Government” specifically supported—one might wonder, required?—a role for state courts in the construction of state laws. *Id.*

ciently contemporaneous . . . to reflect the will of the people . . . at relatively the same period"?<sup>357</sup> Does the fact that the legislative branch approved resolutions accepting the amendment settle the matter?<sup>358</sup> Does the fact that the executive branch took the position that the amendment was valid settle it?<sup>359</sup> Is either fact even relevant?<sup>360</sup> Both standing limitations and the political question doctrine may well preclude the possibility of any definitive judicial holding on these and related questions.<sup>361</sup>

To summarize: The dilemma is that any international enforcement of constraints on structures of democracy—on issues like checks and balances and separation of powers—may both support and undermine democracy. There is no doubt that purely domestic political struggles can end with fatal results for a constitution or even the culture that supports constitutionalism; and just as international human rights norms and their enforcement can potentially tip the outcome in favor of respect for human rights, so international enforcement pressure might help preserve a country's commitment to constitutionalism. But these very enforcement pressures threaten, as a practical matter, to give other countries a new and fairly intrusive basis for intervening into other countries' affairs. This power to intervene is likely to be exercised in ways that are beneficial to the more powerful states. But even if that turned out not to be so, international pressures are not subject to democratic accountability.<sup>362</sup>

While this dilemma is real, it may be helpful to place it in more general perspective. First, in neither Togo nor Nicaragua does the degree of intervention appear to have been, as a practical matter, terribly

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357. *Dillon v. Gloss*, 256 U.S. 368, 375 (1921).

358. See 138 CONG. REC. S6948 (daily ed. May 20, 1992) (Senate); 138 CONG. REC. H3505 (daily ed. May 20, 1992) (House).

359. 16 Op. Off. Legal Counsel 87, 105 (1992).

360. For a useful history and analysis, see Michael Stokes Paulsen, *A General Theory of Article V: The Constitutional Lessons of the Twenty-seventh Amendment*, 103 YALE L.J. 677 (1993).

361. See *id.* at 680–81 (noting difficulties that standing doctrine may create for any judicial determination of the status of the amendment); *Coleman v. Miller*, 307 U.S. 433, 456 (1939) (rejecting challenge to Kansas's apparent ratification of the proposed Child Labor Amendment on political question grounds).

362. For one articulation of this concern, see Rubinfeld, *supra* note 31, at 2017–18. The OAU's 1999 *Algiers Declaration*, *supra* note 170, is notable for linking the internationalization of structural constitutional issues to a call for a "genuine democratisation of international relations based on the active participation and a balanced consideration of the legitimate concerns of all nations." But obviously this call only highlights the problem. At the level of the nation-state there is at least a possibility that struggles over the interpretation and revision of a constitution will take place within a democratic politics marked by some real accountability on the part of major actors. The same cannot currently be said about pressure exerted from the outside by other states and international organizations.

effective in changing anything. Fauré Gnassingbé ended up in the office to which the military had initially elevated him, following an election that was hardly a model for democracy. In Nicaragua the United States' expressed concerns about a creeping coup were part of a process that turned out to help preserve the powers of a presidency subsequently assumed by Daniel Ortega. The potential for greater intrusiveness may be real, but these two examples do not suggest that intervention into constitutional matters is the most attractive way for more powerful states to influence affairs in other states.<sup>363</sup>

Second, utter rejection of any move toward their internationalization of structural constitutional issues would not mean that determination of each country's governmental structure would be reserved to a domestic arena pristinely free of any international influences. There are many respects in which issues of governmental structure are already subject to transnational and international influences or even constraints. I will briefly discuss a few factors.

One factor is the trend toward the disaggregation of the state and the increasing tendency of officials and agencies of the government to interact with their counterparts in other governments. These interactions may take place through a state's membership in an international organization or through informal global or regional networks of interested officials.<sup>364</sup> Either way, regulatory officials, judges, and legislators from different states can meet, share concerns and information, and give each other formal and informal support.

One obvious impact of this trend relates to policy formation. Cross-border interaction of judges may, for example, promote "constitutional cross-fertilization."<sup>365</sup> Regulators may work with their counterparts from other countries to harmonize standards.<sup>366</sup> An international organization may influence the course of policy in a particular state by providing intellectual and technical resources to agencies or individuals within the government interested in promoting policies backed by the

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363. Nor, of course, do even powerful states have unlimited resources at their disposal to bring to bear on other states' politics. Cf. Ludwin Loáisiga López & Luis Felipe Palacios, *Fuerza pública apoyaría fallo CCJ*, LA PRENSA (Nicar.), Mar. 31, 2005, <http://laprensa.com.ni/archivo/2005/marzo/31/nacionales/nacionales-20050331-04.html> (noting Sandinista legislator's ironic inquiry into whether the United States was planning to withdraw forces from Iraq in order to invade Nicaragua in support of Bolaños).

364. See ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER 152–62 (2004) [hereinafter SLAUGHTER, NEW WORLD ORDER]; Anne-Marie Slaughter, *Government Networks: The Heart of the Liberal Democratic Order*, in DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW, *supra* note 128, at 199.

365. SLAUGHTER, NEW WORLD ORDER, *supra* note 364, at 69–79.

366. *Id.* at 59–61.

international organization.<sup>367</sup> Developments of this sort might herald one kind of impact on domestic governmental structures at a very basic level. If sovereignty is being transformed from something grounded in the individual autonomy of isolated states to an expression of their membership in a global order,<sup>368</sup> the very notion of constitutions as expressing a state's unique history, politics, values, and aspirations might be endangered (or rendered irrelevant). The structures set up by a constitution would need to conform to global technical and political imperatives; a state's fundamental governmental framework, that is, would need to be one that best facilitated its "participation in the various regimes that regulate and order the international system."<sup>369</sup> And that might turn out to look very much alike for all countries participating in the global arena. In the most extreme version, concern for any national structural constitutional issues would be relegated to a distinct second place after concern for how the global order and its organizations were structured.

At a less abstract (and more current) level, informal networking and interaction with international organizations may have a profound impact on any given country's governmental structure. International organizations may, for example, provide crucial assistance in helping interested regulators or policy makers to build up institutions within their own government to advocate, formulate, and implement policies that interest international organizations.<sup>370</sup> Judicial cross-fertilization might empower or embolden a judiciary in a particular country, shifting the balance of power away somewhat from the political branches. Harmonization efforts might promote the power of regulatory agencies at the expense of elected officials. The internationalization of certain areas of law (whether through treaty or other means) may shift power toward the executive, who tends to be the predominant actor in the international arena.<sup>371</sup> In turn, the ebb and flow of powers within a government may well have an impact over time on how constitutional structures are interpreted. The consistent exercise of powers by a branch of government may, for example, come to be taken as an historical gloss on the constitution.

The rise of disaggregation and informal networks is by no means

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367. See JOSÉ E. ALVAREZ, *INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS* 618–19 (2005).

368. See ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* (1995); see also SLAUGHTER, *NEW WORLD ORDER*, *supra* note 364, at 266–71; Bengt Jacobsson, *Regulated Regulators: Global Trends of State Transformation*, in *TRANSNATIONAL GOVERNANCE: INSTITUTIONAL DYNAMICS OF REGULATION* 205 (Marie-Laure Djelic & Kerstin Sahlin-Andersson eds., 2006).

369. CHAYES & CHAYES, *supra* note 368, at 27.

370. See ALVAREZ, *supra* note 367, at 618–20.

371. See *id.* at 619.

the only development on the international level that would likely continue to subject structural constitutional issues to some degree of internationalization even in the absence of any legal norms on the subject. Anti-corruption or transparency initiatives can easily be linked to democracy. The preamble to the Inter-American Convention Against Corruption asserts that “representative democracy . . . requires, by its nature, the combating of every form of corruption in the performance of public functions.”<sup>372</sup> As one commentator argues:

The principle of rule of law encompasses within its understanding a scrupulous adherence to law, rules and regulations of the legal system so that government remains accountable to the people. . . . Corruption violates the foundational principles of rule of law because government decisions are no longer based on law, but rather on factors extraneous to the law.<sup>373</sup>

Anti-corruption treaties may have an impact on issues of constitutional structure by requiring independence on the part of agencies dealing with it.<sup>374</sup> Requirements of public reporting and transparency<sup>375</sup> complement the notion of constitutional fidelity by committing states to use decision-making processes that follow stated laws and policies, potentially reinforcing the kind of respect for the rule of law that undergirds a commitment to constitutions. In addition, states may find themselves pressed to institute stronger guarantees of prosecutorial or judicial independence, or modify guarantees of parliamentary immunity, to put themselves in a position to comply with the obligations they take on.<sup>376</sup> They may also find themselves grappling with conflicts between their own existing separation of powers doctrines and efforts to fight corruption.<sup>377</sup> Changes

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372. Mar. 29 1996, 35 I.L.M. 724, 727 (1996).

373. C. Raj Kumar, *Human Rights Approaches of Corruption Control Mechanisms—Enhancing the Hong Kong Experience of Corruption Prevention Strategies*, 5 SAN DIEGO INT’L L.J. 323, 335 (2004); see also, e.g., Support for Nicaragua in the Fight Against Corruption, *supra* note 114, ¶ 1 (“[T]he fight against corruption is an essential component of the exercise of democracy, the consolidation of institutions, and the strengthening of the rule of law.”).

374. E.g., United Nations Convention Against Corruption art. 6(2), Dec. 11, 2003, 43 I.L.M. 37, 40 (2004); see also African Union (AU): Convention on Preventing and Combating Corruption art. 5(3), July 11, 2003, 43 I.L.M. 5, 8 (2004); James Thuo Gathii, *Corruption and Donor Reforms: Expanding the Promises and Possibilities of the Rule of Law as an Anti-Corruption Strategy in Kenya*, 14 CONN. J. INT’L L. 407, 436–37 (1999) (noting condition imposed by International Monetary Fund in structural adjustment loan that Kenya create independent agencies to fight corruption).

375. United Nations Convention Against Corruption, *supra* note 374, arts. 10, 13.

376. See, e.g., Peter W. Schroth & Ana Daniela Bostan, *International Constitutional Law and Anti-Corruption Measures in the European Union’s Accession Negotiations: Romania in Comparative Perspective*, 52 AM. J. COMP. L. 625, 674–87 (2004) (concerning prosecutorial and judicial independence); David Morrissey, Note, *The Fight Against Corruption by International Organizations*, 39 GEO. WASH. INT’L L. REV. 165, 192–95 (2007) (arguing for a reform in the Paraguayan judiciary to fight corruption and to ensure democracy).

377. See, e.g., Peter W. Schroth, *National and International Constitutional Law Aspects of*



of this sort can have a more general impact on the separation of powers.<sup>378</sup>

In short, international legal norms regarding separation of powers and constitutional fidelity should not be seen as treading on an area currently free of global influences. Indeed, they might simply be viewed as a legal manifestation of those influences, though like any legal norms they might in turn shape the forces that first gave rise to them. In any event, it would be premature to arrive at any definitive verdict on the desirability of the norms without placing them in this larger context.

Finally, does the apparent emergence of structural constitutional issues as a subject of international law have any bearing on U.S. courts' handling of the constitutional issues posed since September 11? As a purely predictive matter, the answer may well be no. The Supreme Court has shown little inclination in recent years to regard even treaties protecting individual rights as judicially enforceable, an attitude shared by the President and Congress.<sup>379</sup>

In one sense, there is little reason to fault the assumption that U.S. courts should resolve structural constitutional issues without serious engagement with any international legal rules or standards concerning them. The impressive depth and breadth of the international caselaw regarding individual human rights<sup>380</sup> offer insights and constructive contrasts that make it well worth consulting in any analysis of individual rights issues. The same cannot be said for the emerging international norms concerning structural constitutional issues. The United States has

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*African Treaties and Laws Against Corruption*, 13 *TRANSNAT'L L. & CONTEMP. PROBS.* 83, 91–95 (2003).

378. Governance programs initiated by international agencies or states as a condition of loans or aid may also have an impact. For a useful overview, see Ved P. Nanda, *The "Good Governance" Concept Revisited*, 603 *ANNALS AM. ACAD. POL. & SOC. SCI.* 269 (2006).

379. The consistent U.S. practice of providing that human rights treaties it ratifies are to be treated as non-self-executing by the courts is one example. See, e.g., Louis Henkin, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Brinker*, 89 *AMER. J. INT'L L.* 341 (1995). The Court's reluctance to hold the 1949 Geneva Conventions to be self-executing is equally striking. In *Hamdan v. Rumsfeld*, five members declined to reach the issue, 126 S. Ct. 2749, 2794 (2006), and three members concluded that the treaties are not self-executing, *id.* at 2844–45 (Thomas, Scalia & Alito, JJ., dissenting); see also *Hamdan v. Rumsfeld*, 415 F.3d 33, 38–40 (D.C. Cir. 2005) (opinion joined by then Judge Roberts) (holding Geneva Conventions non-self-executing), *rev'd on other grounds*, *Hamdan*, 126 S. Ct. at 2798. In its brief before the Supreme Court in *Hamdan* the government urged the Court not to "take the radical step of creating judicially enforceable rights" under the Conventions. Brief for Respondents at 9, *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006) (No. 05-184). For a more recent example of the Court's hesitance to find treaty obligations to be self-executing, see *Medellín v. Texas*, No. 06-984, 2008 U.S. LEXIS 2912, at \*23–57 (Mar. 25, 2008).

380. For one indication, see FRANCISCO FORREST MARTIN ET AL., *INTERNATIONAL HUMAN RIGHTS & HUMANITARIAN LAW* (2006), and compare SLAUGHTER, *NEW WORLD ORDER*, *supra* note 364, at 79–82 (arguing that rise of global jurisprudence is most advanced in human rights law).

a rich constitutional tradition in comparison to which the regional and international commitments to respect the separation of powers and adherence to the constitution can seem impoverished.

If the content of these emerging norms has little to say to U.S. courts, however, their existence tells another story. The international commitments and exhortations to maintain some appropriate separation of powers and fidelity to the constitution do not arise from nothing. Increasingly given prominence by governments in international forums, they represent a response to a real phenomenon: the undermining of constitutional order not by blatant overthrow but by government actors claiming to protect that order and the society of which it is a part. Faced with expansive assertions of executive power since September 11, courts might find it useful to consider the fundamental message of these emerging norms (or perhaps of the difficulties encountered in applying them). Ruptures, by whatever name—interruption, disruption, unconstitutional alteration—are not something entirely separate and apart from ordinary constitutional practice. In the course of being interpreted or amended, constitutions can be not only affirmed, reshaped, or revised. They can also be broken.