

4-1-2004

# In Defense of Democracy

Enrique Lagos

Timothy D. Rudy

Follow this and additional works at: <http://repository.law.miami.edu/umialr>



Part of the [Comparative and Foreign Law Commons](#)

---

## Recommended Citation

Enrique Lagos and Timothy D. Rudy, *In Defense of Democracy*, 35 U. Miami Inter-Am. L. Rev. 283 (2004)

Available at: <http://repository.law.miami.edu/umialr/vol35/iss2/3>

This Article is brought to you for free and open access by Institutional Repository. It has been accepted for inclusion in University of Miami Inter-American Law Review by an authorized administrator of Institutional Repository. For more information, please contact [library@law.miami.edu](mailto:library@law.miami.edu).

# IN DEFENSE OF DEMOCRACY

ENRIQUE LAGOS AND TIMOTHY D. RUDY\*

## I. INTRODUCTION

Democracy is now the required form of government for nations in the Americas. This may sound odd to students and voters in many nations of the Western Hemisphere who were taught about democracy in school and have been voting in elections for years. In one of the most interesting developments in public international law in the early twenty-first century, their internal domestic right has now likewise been established as an external collective right. The first article of the Inter-American Democratic Charter, adopted by the Organization of American States (OAS) in 2001, clearly states that it is “[t]he peoples of the Americas [who] have a right to democracy and *their governments have an obligation to promote and defend it.*”<sup>1</sup> From the legal point of view, the Democratic Charter represents another, and an important, expression of the progressive development of international law.

Although all active member states of the OAS, the intergovernmental international organization for the Americas, were democracies when the Democratic Charter was adopted, democratic traditions in the Americas differ widely throughout the hemisphere.<sup>2</sup> Since September 2001, political actors have been able to refer to this new instrument during political crises, but governments and OAS bodies may be reluctant at first to go beyond rhetorical references and invoke its specific mechanisms to defend and enforce democracy in the nations of the region. This is in spite of the fact that the drafters of the Inter-American Demo-

---

\* Enrique Lagos is the OAS Assistant Secretary for Legal Affairs. Timothy D. Rudy is a Legal Officer in the Secretariat for Legal Affairs. The views expressed in this article are solely those of the authors and are not attributable to the Organization of American States, the Secretariat for Legal Affairs, or any of the organs and bodies of the international organization.

1. Inter-American Democratic Charter, 28th Spec. Sess. of the OAS General Assembly, OAS Doc. OEA/Ser.P/AG/RES.1 (XXVIII-E/01), Sept. 11, 2001 [hereinafter Democratic Charter], art. 1(1) (emphasis added), available at [http://www.oas.org/OAS/page/eng/Documents/Democratic\\_Charter.htm](http://www.oas.org/OAS/page/eng/Documents/Democratic_Charter.htm).

2. Peter Hakim, *The Uneasy American*, 80 FOREIGN AFFAIRS 46, 50 (March/April 2001). Cuba was the only government in the hemisphere that did not pass this test in 2001, but its government has been excluded from participation in OAS meetings since 1962. See 8th Mtg. of Consultation of Ministers of Foreign Affairs, OAS Doc. OEA/Ser.X.12, Resolution VI, operative para. 3, at 14 (1962).

cratic Charter devoted twenty paragraphs to a long preamble emphasizing OAS and regional statements, policies, and mechanisms which, over the years, promoted and consolidated representative democracy.<sup>3</sup> There are references in this preamble to the American Declaration on the Rights and Duties of Man,<sup>4</sup> the American Convention on Human Rights and the Protocol of San Salvador on Economic, Social, and Cultural Rights,<sup>5</sup> the Santiago Commitment to Democracy and the Renewal of the Inter-American System,<sup>6</sup> General Assembly Resolution 1080,<sup>7</sup> the Declaration of Nassau,<sup>8</sup> the Declaration of Managua for the Promotion of Democracy and Development,<sup>9</sup> and the Democracy Clause adopted by the Heads of State and Government at the Third Summit of the Americas in Quebec City only five months before.<sup>10</sup>

In this article, the authors focus particularly on the workings of Chapter IV of the Democratic Charter. Chapter IV, entitled "Strengthening and Preservation of Democratic Institutions," outlines the specific mechanisms to be used to defend and enforce democracy in the region. This is the legally operative section of the document, as it gives muscle and meaning to the Democracy Clause adopted at the Third Summit of the Americas.

3. Democratic Charter, *supra* note 1, preamble.

4. *American Declaration of the Rights and Duties of Man*, Resolution XXX of the Final Act of the Ninth International Conference of American States, *found in* Novena Conferencia Internacional Americana, *Actas y Documentos*, vol. VI, 297 (adopted in Bogota, Colombia, March 30, 1948), *available at* <http://www.cidh.oas.org/Basicos/basic2.htm>.

5. American Convention on Human Rights "Pact of San Jose, Costa Rica," Treaty Ser. No. 36, OEA/Ser.A/16, (signed at the Inter-American Specialized Conference on Human Rights, San Jose, Costa Rica, Nov. 7 to 22, 1969); Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social, and Cultural Rights "Protocol of San Salvador," Treaty Ser. No. 69, OEA/Ser.A/44, (signed at the Eighteenth Regular Session of the General Assembly, San Salvador, El Salvador Nov. 17, 1988), *available at* <http://www.oas.org/juridico/english/Treaties/b-32.htm>.

6. The Santiago Commitment to Democracy and the Renewal of the Inter-American System, OAS 3d plenary sess., June 4, 1991.

7. Representative Democracy, OEA/Ser.P AG/RES. 1080 (XXI-0/91), 5 June 1991, (adopted at the Fifth Plenary Session, held on June 5, 1991), *available at* <http://www.oas.org/juridico/english/Agres1080.htm>.

8. Declaration of Nassau, OEA/Ser.P AG/DEC. 1 (XXII-092), 19 May 1992, (adopted at the Third Plenary Session, held May 19, 1992), *available at* <http://www.oas.org/juridico/Spanish/tratados/a-58.html>.

9. Declaration of Managua for the Promotion of Democracy and Development, OEA/Ser.P AG/DEC. 4 (XXIII-093), 8 June 1993, (adopted at the Fourth Plenary Session, held on June 8, 1993).

10. Declaration of Quebec City *available at* <http://www.summit-americas.org>; OAS Office of Summit Follow-up, 3 Official Documents From the Summits of the Americas Process From Miami To Quebec City 313 (2002).

Chapter IV consists of five separate articles. Aside from these operative provisions, there is, of course, other language in the inter-American agreement which outlines the concept that a democracy encompasses much more than free and fair elections. These other provisions are available means political actors can cite in arguing that the Democratic Charter should apply to their nation's situation. For example, opposition groups or other member states may criticize a government for not meeting the "essential elements of representative democracy" found in Articles 3 and 4.<sup>11</sup> OAS political organs, such as the General Assembly and the Permanent Council, are free to invoke the spirit as well as the elements of the document without necessarily resorting to its institutional pro-democracy mechanisms found in Chapter IV.<sup>12</sup>

---

11. The General Assembly adopted this approach in the resolution it adopted in the wake of the failed coup against President Hugo Chavez in Venezuela in April 2002. The General Assembly requested that all sectors of society "tak[e] into account the essential elements of representative democracy set forth in Articles 3 and 4 of the Inter-American Democratic Charter." "Support For Democracy in Venezuela," AG/RES. 1 (XXIX-E/02), 29th Spec. Sess. OAS Gen. Assembly, OAS Doc. OEA/Ser.P/XXIX-E.2, Apr. 18, 2002, at 67 oper. para. 3, available at [http://www.oas.org/OAS/page/Press2002/sp/resoluc%C3%B3nAGreng\\_1.htm](http://www.oas.org/OAS/page/Press2002/sp/resoluc%C3%B3nAGreng_1.htm).

Article 3 of the Democratic Charter lists the "essential elements of representative democracy" as

. . . respect for human rights and fundamental freedoms, access to and the exercise of power in accordance with the rule of law, the holding of periodic, free, and fair elections based on secret balloting and universal suffrage as an expression of the sovereignty of the people, the pluralistic system of political parties and organizations, and the separation of powers and independence of the branches of government.

Democratic Charter, *supra* note 1, art. 3.

Article 4 reads:

Transparency in government activities, probity, responsible public administration on the part of governments, respect for social rights, and freedom of expression and of the press are essential components of the exercise of democracy.

The constitutional subordination of all state institutions to the legally constituted civilian authority and respect for the rule of law on the part of all institutions and sectors of society are equally essential to democracy.

Democratic Charter, *supra* note 1, art. 4.

12. This is true of the OAS General Secretariat as well. For example, the OAS Special Mission to Haiti invoked the Democratic Charter in a November 2002 communiqué on recent events. The press release noted that "OAS Conventions and the Inter-American Democratic Charter apply alike to all member states and to each individual within the member states. . . ." "Communique of the OAS Special Mission on Recent Events in Haiti," OAS press release HAI112502E, Nov. 25, 2002 available at [http://www.oas.org/library/mant\\_press/press\\_release.asp?sCodigo=HAI112502E](http://www.oas.org/library/mant_press/press_release.asp?sCodigo=HAI112502E). Note that the current crisis in Haiti originated in the disputed legislative and municipal elections of May 2000. The OAS Permanent Council began addressing that

In many respects the instrument merely tweaks existing mechanisms for responding multilaterally to anti-democratic interruptions in a member state's constitutional order. The document is organized into six chapters and twenty-eight articles devoted to: Democracy and the Inter-American System (Chapter I); Democracy and Human Rights (Chapter II); Democracy, Integral Development, and Combating Poverty (Chapter III); Strengthening and Preservation of Democratic Institutions (Chapter IV); Democracy and Electoral Observation Missions (Chapter V); and Promotion of a Democratic Culture (Chapter VI).

The main outlines of the Democratic Charter were approved in principle by the Thirty-first Session of the OAS General Assembly held in Costa Rica in June 2001. However, formal adoption of the inter-American agreement was then postponed, as the Caribbean states and Venezuela raised concerns ranging from a lack of consultation and the definition of democracy to whether or not it was prudent to impose sanctions when a government lost its democratic character.<sup>13</sup>

For more than two weeks in August 2001, negotiators in the OAS Permanent Council's Working Group edited and revised a draft of the Democratic Charter.<sup>14</sup> This revision was prepared for a special session of the OAS General Assembly, scheduled for Lima, Peru, on September 11, 2001. Foreign ministers adopted the document for the new inter-American democratic system just after hearing the news that terrorists had flown planes into the World Trade Center in Manhattan and into the Pentagon outside Washington, D.C.<sup>15</sup>

---

issue in August 2000, more than a year before the adoption of the Inter-American Democratic Charter. See "Dispatch of an OAS Mission to Haiti," CP/RES. 772 (1247/00), Aug. 4, 2000. Resolutions devoted to the Haitian issue, subsequent to the adoption of the democratic charter, make references to that document, but are not adopted pursuant to Chapter IV. See AG/RES. 1841, "The Situation in Haiti," 32nd OAS Gen. Assembly, June 4, 2002; CP/RES. 822 (1331/02), "Support For Strengthening Democracy in Haiti," OAS Permanent Council, Sept. 4, 2002; and CP/RES. 806, "The Situation in Haiti," OAS Permanent Council, Jan. 16, 2002. [As this article was being sent to the printers, 12 Caribbean states requested a special session of the OAS Permanent Council in May 2004 to invoke Article 20 of the Democratic Charter. OEA/Ser.G CP/INF. 4996/04, May 14, 2004.]

13. Enrique Lagos and Timothy D. Rudy, *The Third Summit of the Americas and the Thirty-first Session of the OAS General Assembly*, 96 AM. J. INT'L L. 173, 174 (2002). Revision 7, the draft recognized at the General Assembly in Costa Rica, contained 22 articles in five chapters. The final version of the Democratic Charter adopted three months later contained 28 articles in six chapters.

14. See *id.* This is a discussion of an earlier draft of the Inter-American Democratic Charter.

15. The ministers met for two days and adopted the Inter-American Democratic

The emerging international law norm of democratic governance is noted and placed in context in Section II of this article. In Section III, the authors review the mechanisms of the Inter-American Democratic Charter, which the inter-American community can utilize when anti-democratic situations arise in one of the member states. In Section IV, the authors investigate and critique the pro-democracy mechanisms contained in Chapter IV of the Democratic Charter. First, the authors examine the competencies and roles of various OAS organs and suggest a possible additional role for another OAS organ in the future. Second, the authors comment on the ambiguous legal relationship between the Democratic Charter and the OAS Charter. Third, the authors discuss whether the scheme of Chapter IV has abrogated pro-democracy Resolution 1080 mechanisms adopted ten years before. Fourth, the authors briefly note how the OAS Charter can be amended in the future to overcome any perceived contradiction between the Organization's norms of representative democracy and nonintervention in the internal affairs of member states. In Section V, the authors conclude that the Democratic Charter represents an important step forward in the progressive development of public international law, and offers the OAS a new tool to strengthen democracy and oppose the region's all-too-frequent experience with the coup d'état.

## II. THE EMERGING NORM OF DEMOCRATIC GOVERNANCE

The Inter-American Democratic Charter is perhaps the most recent example of an emerging international law norm of democratic governance.<sup>16</sup> The purpose of the document is to promote and consolidate representative democracy in the inter-American system, and to provide appropriate mechanisms with which to do so.<sup>17</sup> The instrument is the "principal hemispheric benchmark for the promotion and defense" of democratic values in the hemisphere, but its "effective implementation poses an ongoing challenge to both peoples and governments of the Americas," according to the "Declaration of Santiago on Democracy and Pub-

---

Charter on September 11, 2001. See Vigésimo Octavo Período Extraordinario de Sesiones: Actas y Documentos, OEA/Ser.P/XXVIII-E.2, Dec. 7, 2001; OEA/Ser.P/AG/ACTA AG/doc., Sept. 10, 2001, available at [http://www.oas.org/charter/docs/Resolution1\\_en\\_p4.htm](http://www.oas.org/charter/docs/Resolution1_en_p4.htm).

16. Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT'L L. 46 (1992).

17. See preamble, Democratic Charter, *supra* note 1.

lic Trust."<sup>18</sup> The 33rd session of the OAS General Assembly recently adopted that Declaration while examining the theme of democratic governance. All the countries of the hemisphere were encouraged to promote and publicize the Democratic Charter, as well as to implement it.<sup>19</sup> Every future OAS General Assembly will "follow up" as the Democratic Charter has now become a permanent agenda item for the international organization's highest organ.<sup>20</sup>

However, democracy is not a brand new theme to the halls of the OAS in particular, or to international lawyers in general. Democracy as an international law norm has been "emerging" for some time, especially in the Western Hemisphere.<sup>21</sup> Democratic governance is emerging as a norm of public international law for several reasons. International organizations are embracing the view that the principles underlining political democracy appear essential "to securing an institutionalized protection of other human rights;" democracy increasingly is viewed as a means to prevent both civil wars and interstate wars; and true state sovereignty is thought of in terms of the people rather than a king or state bureaucracy.<sup>22</sup> To be effective, this entitlement to democracy is thought of as a collective, rather than individual, human right.<sup>23</sup>

---

18. AG/DEC. 31 (XXXIII-0/03), 10 June 2003 *found in* Declarations and Resolutions Adopted by the General Assembly at its Thirty-Third Regular Session, OEA/Ser.P/AG/doc. 4238/03, at 2.

19. "Promotion and Strengthening of Democracy. Follow-up to the Inter-American Democratic Charter," AG/RES. 1957 (XXXIII-0/03), 10 June 2003, at oper. para. 2. *found in id.* at 152.

20. *Id.* at oper. para. 4. A special meeting of the OAS Permanent Council became the unlikely venue for a book launching in April 2003 when representatives of the member states gathered in Washington, D.C. to praise the Democratic Charter and the recently completed book "Carta Democrática Interamericana: Documentos e Interpretaciones," (ed. Humberto de la Calle) OAS doc. No. OEA/Ser.G/CP-1 (2003). The Permanent Council also held a special session a week later devoted to promoting and consolidating representative democracy. See "Former Costa Rican President Lauds Democratic Charter at OAS Meeting (sic) to Review Efforts to Promote and Consolidate Democracy," OAS press release E-094/03, Apr. 29, 2003.

21. Franck, *supra* note 16, at 47; see generally DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW, ed. Gregory Fox & Brad Roth (Cambridge U. Press, 2000) [hereinafter Fox & Roth]; BEYOND SOVEREIGNTY: COLLECTIVELY DEFENDING DEMOCRACY IN THE AMERICAS, ed. Tom Farer (Johns Hopkins U. Press, 1996) [hereinafter Farer]; Report on Democracy in the Inter-American System (presented by Dr. Eduardo Vio Grossi), OAS Inter-American Juridical Committee, CJI/SO/II/doc.37/94 rev. 1 corr.2, Aug. 23, 1994 (original in Spanish).

22. Fox & Roth, *supra* note 21, introduction at 6-8, 11.

23. *Id.* at 10. "Yet the right to political participation, at least as interpreted through the lens of the democratic entitlement, is unlike other human rights, for its individual enjoyment is inseparable from its collective effect. One participates in politics not solely (and usually not principally) for the fulfillment derived from the

Some commentators believe that state practice does support a norm of democratic governance:

There can be little doubt that a principle of democratic rule is today part of international law. While in a universal context the recognition of the principle has had, perhaps, only the effect of subtracting the question of democratic rule from the exclusive jurisdiction of states, the nations in Europe and the Americas have elevated the principle of democracy to the category of a rule that is fully enforceable through appropriate regional collective mechanisms.<sup>24</sup>

Any international law "right" to democracy is, at present, a minimal "floor" requirement for fair and free elections.<sup>25</sup> This legal right, or norm, is bound up with procedure as opposed to the other attributes, or, in other words, those which might constitute the "ceiling" of the democratic government model. Some of the attributes of the more successful democracies, such as the rule of law, civilian control over the military, and an independent judiciary, are mentioned in the Inter-American Democratic Charter and go beyond election watching.<sup>26</sup>

"That the will of the people is to be the basis of the authority of government is as good a summary as any of the basic democratic idea," according to one writer who summarizes democracy as an international legal norm.<sup>27</sup> But other rights are arguably necessary to make the government of a free people into a liberal democracy; rights such as freedom of speech, freedom of assembly, the opportunity to organize political parties, and the chance to participate in public life.<sup>28</sup> The writer who may best articulate the

---

activity, but for the opportunity to affect the exercise of power in the polity. From the liberal-democratic perspective, to have the individual right to political participation is to have the collective right to oust a political leadership that fails to garner the support of at least a plurality of one's fellows." *Id.*

24. Fernando R. Tesón, "Changing Perceptions of Domestic Jurisdiction and Intervention," in Farer, *supra* note 21, at 35.

25. Gregory H. Fox, "The Right to Political Participation in International Law," in Fox & Roth, *supra* note 21, at 49; James Crawford, "Democracy and the Body of International Law," in Fox & Roth, at 103.

26. *Cf.* "As difficult as it sometimes is to reach the point of free and fair elections, it is almost always more difficult to move beyond elections to the real consolidation of democracy." David P. Forsythe, "The United Nations, Democracy, and the Americas," in Farer, *supra* note 21, at 125.

27. James Crawford, "Democracy and the Body of International Law," in Fox & Roth, *supra* note 21, at 92.

28. *Id.* at 95. Susan Marks, "International Law, Democracy and the End of History," in Fox & Roth, *supra* note 21, at 547-48 ("[Certain] scholars take free and fair elections to be the decisive criterion of democracy, though they in no way underestimate the extent to which the right to such elections presupposes other



difference between requiring elections and developing a functioning liberal democracy is Fareed Zakaria. In both an article and a new book, the international journalist defines liberal democracy as “a political system marked not only by free and fair elections, but also by the rule of law, a separation of powers, and the protection of basic liberties of speech, assembly, religion, and property.”<sup>29</sup> Zakaria calls the model with these freedoms “constitutional liberalism.”<sup>30</sup> The provisions of Articles 3 and 4 of the Inter-American Democratic Charter noted above bear some resemblance to the “constitutional liberalism” model of democracy.<sup>31</sup> That is important in as much as Zakaria argues that today while “[d]emocracy is flourishing; constitutional liberalism is not.”<sup>32</sup>

If democracy is a legal right under international law, no matter how narrowly or broadly construed, then the future could see the use of unilateral or collective coercive measures to institute, reform, or prevent the establishment of certain governments in other nation states.<sup>33</sup> On the first two occasions in which the OAS contemplated invoking its new instrument, in Haiti in December 2001 and in Venezuela in April 2002, the collective measures never rose to the level of coercion.<sup>34</sup> The Democratic Charter does not even hint at the use of force to restore democratic government. The drafters built other mechanisms into the agreement through which an international regional organization of states might be able to “enforce” this democratic right by diplomatic means.<sup>35</sup>

### III. CHAPTER IV OF THE DEMOCRATIC CHARTER

If a problem arises under the Democratic Charter, the

---

rights, especially freedoms of expression, thought, assembly, and association. Elections are in this perspective decisive because they legitimate governance. . . . [Professor] Franck acknowledges that this is a limited conception of democracy.”)

29. Fareed Zakaria, “The Rise of Illiberal Democracy,” 76 *FOREIGN AFFAIRS* 22, 22 (Nov./Dec. 1997); Fareed Zakaria, *THE FUTURE OF FREEDOM: ILLIBERAL DEMOCRACY AT HOME AND ABROAD* (W.W. Norton & Co. 2003).

30. *Id.* at 22.

31. See *supra* note 11.

32. Zakaria, *supra* note 29, at 23.

33. Fox & Roth, *supra* note 21, at 12. See Marks, *supra* note 28, at 549 (“[Professor Franck] strongly rejects as a means of enforcement unilateral intervention to install or reinstate elected governments, though he finds acceptable collective action at UN or regional level, even, in extreme cases, involving the use of force.”)

34. “Carta Democrática Interamericana: Documentos e interpretaciones,” OAS doc. OEA/Ser. G/CP-1, Apr. 29, 2003, at 254-55.

35. See generally discussion, *infra*, Section III(B) & IV(B).

response of the OAS will depend to some degree on the attitude of the government facing an anti-democratic or unconstitutional situation. If that government consents to the relevance and applicability of the new inter-American agreement, then the OAS Permanent Council can adopt decisions to preserve democracy there pursuant to Articles 17 or 18. Such actions by the Permanent Council to preserve democracy do not reach the level of punitive sanctions.

If the government in question opposes invocation of the Democratic Charter, then in order for Article 20 to apply, the factual situation must rise to the level of an "unconstitutional alteration of the constitutional regime that seriously impairs the democratic order."<sup>36</sup> If the Permanent Council takes action under Article 20, as it did in April 2002 when reviewing a coup in Venezuela, its decisions and initiatives in this initial phase do not automatically amount to the imposition of sanctions or the invocation of the Democracy Clause found at Article 19.

### A. *Prevention*

#### **Article 17**

When the government of a member state considers that its democratic political institutional process or its legitimate exercise of power is at risk, it may request assistance from the Secretary General or the Permanent Council for the strengthening and preservation of its democratic system.<sup>37</sup>

This provision of the Democratic Charter applies when the government of an OAS member state asserts that its democratic political institutional process or its legitimate exercise of power is "at risk." A request must come from the state to either the OAS Secretary General or the OAS Permanent Council. The purpose behind the request from the member state and the decision taken by the Secretary General or the Permanent Council is to preserve or strengthen the democratic system of the member state in question. Under this article, the Democratic Charter would automatically apply *if or when* the government of the member state in question makes a request for assistance from the OAS.

Because of the reluctance of the government in power to invoke Article 17, the Democratic Charter may not be utilized in some crises where observers naturally would assume it might. In

---

36. Democratic Charter, *supra* note 1, art. 20.

37. *Id.* art. 17.

order for Article 17 to apply, that government would have to admit, at least implicitly, that its democratic political institutional process or the legitimate exercise of its power was "at risk" in some fashion. The recent crisis in Venezuela is instructive in this regard. In December 2002, after the opposition staged a general strike for two weeks demanding a vote on the presidency, only eight months after an unsuccessful military-civilian coup, the government of President Hugo Chavez requested a special meeting of the Permanent Council, but avoided referring to Chapter IV of the democratic charter in general, or Article 17 in particular.<sup>38</sup> Rather than requesting that the OAS invoke the Democratic Charter, the incumbent government of Venezuela presented a draft resolution in which the OAS would express "full and absolute support to the constitutionally-elected government of the Bolivarian Republic of Venezuela, headed by President Hugo Chavez Frias."<sup>39</sup>

#### Article 18

When situations arise in a member state that may affect the development of its democratic political institutional process or the legitimate exercise of power, the Secretary General or the Permanent Council may, with prior consent of the government concerned, arrange for visits or other actions in order to analyze the situation. The Secretary General will submit a report to the Permanent Council, which will undertake a collective assessment of the situation and, where necessary, may adopt decisions for the preservation of the democratic system and its strengthening.<sup>40</sup>

This provision likewise applies when the development of a member state's democratic political institutional process or the legitimate exercise of its power are affected by "situations" in the member state. OAS member states can collectively attempt to preserve or strengthen democracy within that member state

---

38. Note From the Permanent Mission of the Bolivarian Republic of Venezuela Requesting a Special Meeting of the Permanent Council, OEA/Ser.G/CP/doc.3674/02, Dec. 12, 2002 (requesting meeting "to report to the members of the Council on the plan to overthrow the Government of the Constitutional President of Venezuela"). "Gobierno solicitará sesión extraordinaria del Consejo Permanente de la OEA," *El Nacional*, Dec. 12, 2002 ("Sin embargo, Valero descartó la invocación del artículo 17 de la Carta Interamericana, pues eso sería reconocer que el Gobierno es incompetente para manejar la crisis.") ("Nevertheless, Venezuelan Ambassador Valero dismissed invoking article 17 of the Inter-American Charter, since that would be admitting that the government is incompetent to manage the crisis.")

39. OAS Doc. OEA/Ser.G/CP/doc. 3676/02, Dec. 12, 2002, at oper. para. 1.

40. Democratic Charter, *supra* note 1, art. 18.

under the provisions of Article 18. However, as when an attempt to preserve democracy is made under Article 17, the consent of the state is required prior to certain actions being taken by the Secretary General or the Permanent Council. The current government of the country in question would need to consent, in advance, to what the document refers to as “visits” by the Secretary General or “other actions” by the Permanent Council. Regardless of what initial action, visit, or diplomatic initiative is undertaken when Article 18 is utilized, the Democratic Charter requires that the Secretary General subsequently report to the Permanent Council before that body can “undertake a collective assessment” and perhaps “adopt decisions” necessary for preserving democracy in the affected state. Note that Article 18 assigns the initiative not to the affected member state, but to the Secretary General or the Permanent Council, even though the consent of the affected state is ultimately required for the initial phase.

Only subsequent history will reveal whether this division of roles will prove useful to invoking the Democratic Charter when serious “situations arise.” The Secretary General visited Venezuela for months in late 2002 and 2003, attempting to mediate between the government and the opposition, but his mission was not initiated under the explicit terms of Article 18.<sup>41</sup> However, the government consented to participate in the talks and the Secretary General did report via videoconference to a special closed session of the Permanent Council in December 2002.<sup>42</sup>

### *B. Sanction*

The remainder of Chapter IV can be considered as the sanction section of the inter-American instrument, though often the same language is used in both the prevention section and the sanction section. While Articles 17 and 18 are essentially preventive measures for defending democracy in a particular OAS member state, the Democratic Charter offers another mechanism for restoring democracy under the provisions of Article 20.

While many of the terms and standards found in this agreement are not specifically defined in the document, Articles 17 and 18 do contain clear-cut provisions that relate to preserving demo-

---

41. See “Support For the Process of Dialogue in Venezuela,” CP/RES. 821, Aug. 14, 2002 (referring to the Inter-American Democratic Charter neither in the preamble nor the operative section).

42. Barry Schweid, Associated Press, “U.S. Prods Chavez For Early Elections,” Wash. Times, (Dec. 14, 2002).

cratic institutions. Their utilization appears problematical where the consent of the affected member state is required and unlikely to be granted. Otherwise, the standard permitting the OAS to take action under the Democratic Charter is found in Article 20. That standard is the “unconstitutional alteration of the constitutional regime that seriously impairs the democratic order in a member state.”<sup>43</sup> Whether the factual situation on the ground can be sufficiently characterized to meet this standard in the opinion of a majority of the member states is probably more of a political question than a legal argument.

### Article 19

Based on the principles of the Charter of the OAS and subject to its norms, and in accordance with the democracy clause contained in the Declaration of Quebec City, *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 sessions of the General Assembly, the Meeting of Consultation, the Councils of the Organization, the specialized conferences, the commissions, working groups, and other bodies of the Organization.<sup>44</sup>

Article 19 of the instrument reflects the Democracy Clause adopted at the Third Summit of the Americas in Quebec City in April 2001. The Democracy Clause of the Democratic Charter states the policy of the inter-American system that an “unconstitutional interruption of the democratic order” or an “unconstitutional alteration of the constitutional regime” that rises to the level of a serious impairment of the democratic order in an OAS member state is an “insurmountable obstacle” to the participation of that member state’s government in official hemispheric bodies and meetings.

The Democracy Clause in the Declaration of Quebec City, adopted by heads of state and government in a Summit of the Americas five months before the adoption of the Democratic Charter, reads as follows: “Any 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>45</sup>

---

43. Democratic Charter, *supra* note 1, art 20.

44. *Id.* at art. 19 (emphasis added).

45. Declaration of Quebec City, *supra* note 10, at 313.

In the future, policymakers in the hemisphere must be alert to the possibility that Democracy Clause sanctions found in Article 19 might apply to cases of political instability. However, under Article 21 of the Democratic Charter<sup>46</sup> (and Article 9 of the OAS Charter),<sup>47</sup> only the OAS General Assembly can suspend a member state's participation in OAS bodies.

#### **Article 20**

In the event of an unconstitutional alteration of the constitutional regime that seriously impairs the democratic order in a member state, any member state or the Secretary General may request the immediate convocation of the Permanent Council to undertake a collective assessment of the situation and to take such decisions as it deems appropriate.

The Permanent Council, depending on the situation, may undertake the necessary diplomatic initiatives, including good offices, to foster the restoration of democracy.

If such diplomatic initiatives prove unsuccessful, or if the urgency of the situation so warrants, the Permanent Council shall immediately convene a special session of the General Assembly. The General Assembly will adopt the decisions it deems appropriate, including the undertaking of diplomatic initiatives, in accordance with the Charter of the Organization, international law, and the provisions of this Democratic Charter.

The necessary diplomatic initiatives, including good offices, to foster the restoration of democracy, will continue during the process.<sup>48</sup>

The Secretary General or the Permanent Council is not required to obtain the consent of the affected member state when invoking the Democratic Charter under Article 20. The grant of authority to the Permanent Council in the first paragraph of this provision appears to be plenary. The Council is permitted to make a "collective assessment" of the anti-democratic tendencies in the affected member state and is empowered "to take such decisions as [the Permanent Council] deems appropriate." The Permanent Council proceeded under Article 20 in April 2002 as the coup against Venezuelan President Hugo Chavez began to collapse.<sup>49</sup>

---

46. Democratic Charter, *supra* note 1, art. 21.

47. OAS Charter, *opened for signature* April 30, 1948, 2 UST 2394, OASTS 1-C & 61, art. 9 (entered into force Dec. 13, 1951) [hereinafter OAS Charter]. The full text of the OAS Charter, as amended by four protocols, can be found at 33 ILM 989 (1994).

48. Democratic Charter, *supra* note 1, art. 20.

49. "Situation in Venezuela," CP/RES. 811 (1315/02), Apr. 13, 2002.

Pursuant to Article 20, any OAS member state, or even the Secretary General, can request the immediate convocation of the Permanent Council when the factual situation in the affected member state rises to the level of an “unconstitutional alteration of the constitutional regime that seriously impairs the democratic order.”

While defining what factual situation meets this standard is beyond the scope of this paper, it is clear that political actors in early twenty-first century Haiti and Venezuela (and in similarly politically troubled states in the future) will want to interpret the factual situations in their countries as meeting this standard if they want the Inter-American Democratic Charter to apply. The authors venture to guess that many political actors in succeeding years will be petitioning for OAS action under the umbrella of the Democratic Charter when the factual situation does *not* rise to the level of this standard. Chapter IV is silent as to the meaning of this threshold standard. Certainly the military-civilian coup in Venezuela against President Hugo Chavez in April 2002 satisfied this standard. The Permanent Council found that “an alteration of the constitutional regime has occurred in Venezuela, which seriously impairs the democratic order and justifies the application of the mechanisms” in Article 20.<sup>50</sup> Chapter IV implicitly suggests that the Secretary General, or the collective assessment of the member states, will determine whether any situation rises to the level of this standard.

The remainder of the article deals with “unsuccessful” outcomes, in which case the Democratic Charter empowers the OAS General Assembly, and not the Permanent Council, to impose punitive sanctions pursuant to Articles 19, 20, and 21. In April 2002, the Permanent Council did convene a special session of the General Assembly, which then met after the coup in Venezuela had been thwarted. The special session of the General Assembly did not adopt sanctions, but asked the restored government to “tak[e] into account the essential elements of representative democracy set forth in Articles 3 and 4 of the Inter-American Democratic Charter.”<sup>51</sup>

### Article 21

---

50. *Id.* at preamble para. 6. [As this article was being sent to the printers, 12 Caribbean states requested a special session of the OAS Permanent Council in May 2004 to invoke Article 20 of the Democratic Charter. OEA/Ser.G CP/INF. 4996/04, May 14, 2004.]

51. AG/RES. 1, *supra* note 11, at oper. para. 3.

When the special session of the General Assembly determines that there has been an unconstitutional interruption of the democratic order of a member state, and that diplomatic initiatives have failed, the special session shall take the decision to suspend said member state from the exercise of its right to participate in the OAS by an affirmative vote of two thirds of the member states in accordance with the Charter of the OAS. The suspension shall take effect immediately.

The suspended member state shall continue to fulfill its obligations to the Organization, in particular its human rights obligations.

Notwithstanding the suspension of the member state, the Organization will maintain diplomatic initiatives to restore democracy in that state.<sup>52</sup>

This provision addresses the adoption of the Democracy Clause sanction. The General Assembly is granted competence to impose sanctions and to suspend a member state's participation in the OAS by a two-thirds vote. Even if a government is suspended from participating in the inter-American system, the OAS will continue diplomatic efforts to restore democracy in the sanctioned state.

#### **Article 22**

Once the situation that led to suspension has been resolved, any member state or the Secretary General may propose to the General Assembly that suspension be lifted.

This decision shall require the vote of two thirds of the member states in accordance with the OAS Charter.<sup>53</sup>

This provision clarifies that the Secretary General, or any member state, can propose to the foreign ministers that a suspension sanction be removed from the affected state by a two-thirds vote in accordance with Article 9 of the OAS Charter.

### **IV. INVOKING THE MECHANISMS OF THE DEMOCRATIC CHARTER**

There is little legislative history to explain the drafting and intent of Chapter IV of this new inter-American agreement. Delegates from each member state of the OAS negotiated several drafts of the Democratic Charter in 2001. When a working group of the Permanent Council considered Chapter IV provisions in

---

52. Democratic Charter, *supra* note 1, art. 21.

53. *Id.* at art. 22.



August 2001, most of the consultations took place in private meetings of regional interest groups rather than in an open session. As of this writing, the OAS has had limited experience with a Chapter IV exercise. At this point, the pro-democracy mechanisms of the instrument must be understood principally from the actual text of Chapter IV.

### A. *Competencies of the Various OAS Organs*

#### 1. General Assembly

The General Assembly of the OAS is the highest organ of the Organization.<sup>54</sup> The drafters of the Democratic Charter did not assign the General Assembly any direct role in the prevention section of Chapter IV. This organ is given a greater role in the sanction section of Chapter IV. Special sessions of the General Assembly are provided for when "diplomatic initiatives prove unsuccessful, or if the urgency of the situation so warrants."<sup>55</sup> When those events occur, however, it is actually the Permanent Council that convenes the special session of the General Assembly. At these special sessions, the General Assembly is granted the competence to adopt appropriate decisions and to undertake diplomatic initiatives to strengthen, defend, or foster democratic government, except that the General Assembly will be limited by the provisions of the OAS Charter, international law, and the Democratic Charter itself. The Permanent Council, pursuant to Chapter IV of the document, convened the Twenty-Ninth Special Session of the General Assembly held in April 2002 in Washington, D.C. to consider post-coup Venezuela.<sup>56</sup>

The General Assembly's power to suspend member states from participation in the Organization and its bodies is also reaffirmed in the sanction section of the instrument.<sup>57</sup> Here, the special session of the General Assembly must act by a two-thirds vote as required by the OAS Charter,<sup>58</sup> but only after the special session has made the determination that (1) "there has been an unconstitutional interruption of the democratic order of a member state," and (2) "that diplomatic initiatives have failed." Such a

---

54. The General Assembly is noted in Chapter IX of the OAS Charter. It usually meets in regular session in June of every year at the foreign minister level. See OAS Charter, *supra* note 47, arts. 54-60.

55. Democratic Charter, *supra* note 1, art. 20.

56. See Resolution 811, *supra* note 49.

57. Democratic Charter, *supra* note 1, art. 21.

58. OAS Charter, *supra* note 47, art. 9(b).

suspension is effective immediately.<sup>59</sup>

The General Assembly is also mentioned in the last article of Chapter IV, which provides that the highest organ will have the power to remove a state's suspension.<sup>60</sup> This action to remove the most important of sanctions requires another two-thirds vote by the members of the General Assembly as required by the OAS Charter.<sup>61</sup> Application to the General Assembly for such relief can be made by any of the member states or the OAS Secretary General "[o]nce the situation that led to suspension has been resolved."<sup>62</sup> Though the article is silent on the subject, apparently the affected state can apply for relief, but such applications can and should be considered out of order unless a fair assessment of the factual situation by others demonstrates that the underlying crisis situation has been resolved.

## 2. Permanent Council

The Permanent Council is the permanent political organ of the OAS. The Council meets several times a month at the ambassadorial level. Here, the permanent representatives from the member states conduct the day-to-day affairs of the regional body.<sup>63</sup> Chapter IV of the new instrument assigns the Permanent Council several roles in the mechanism to defend democracy.

For example, in the prevention section, a member state which considers that its institutional democracy "is at risk" is entitled to request assistance from the Permanent Council to strengthen and preserve its democratic system.<sup>64</sup> As previously mentioned, if it has the consent of the affected member state, this political body may "arrange visits or other actions" to analyze the situation in a state facing a political crisis. The Permanent Council will later receive the Secretary General's report and then "will undertake a collective assessment." Chapter IV states that the Permanent Council has the authority to adopt decisions for preserving and strengthening the democratic system in a state which requests such assistance.<sup>65</sup>

The sanction section of Chapter IV also provides a role for the

---

59. Democratic Charter, *supra* note 1, art. 21.

60. *Id.* at art. 22.

61. OAS Charter, *supra* note 47, art. 9(f).

62. Democratic Charter, *supra* note 1, art. 22.

63. The Permanent Council is noted in Chapter XII of the OAS Charter. *See* OAS Charter, *supra* note 47, arts. 80-92.

64. Democratic Charter, *supra* note 1, art. 17.

65. *Id.* at art. 18.

Permanent Council. Article 20 states that the Permanent Council can be convened immediately to assess a situation and make appropriate decisions when so requested by the Secretary General or any member state “[i]n the event of an unconstitutional alteration of the constitutional regime that seriously impairs the democratic order in a member state.”<sup>66</sup> The Permanent Council convened under this authority in April 2002 to consider a coup in progress against the president of Venezuela.<sup>67</sup> These decisions can include diplomatic initiatives, including offering the “good offices” of the OAS to facilitate political compromise among disputants in the affected state.<sup>68</sup> When these decisions are not successful, or the situation is urgent, this section of the document grants the Permanent Council the competence to convene a special session of the General Assembly. Another provision strongly implies that the Permanent Council may still play a diplomatic role here between the time it convenes a special session of the General Assembly and the time the General Assembly acts.<sup>69</sup>

### 3. Secretary General

The OAS Secretary General is the chief executive of the Organization’s secretariat and a major figure in the diplomacy of the Western Hemisphere.<sup>70</sup> The amended OAS Charter provides that the Secretary General “may bring to the attention of the General Assembly or the Permanent Council any matter which in his opinion might threaten the peace and security of the Hemisphere or the development of the Member States,” as long as he exercises that authority in conformity with the OAS Charter.<sup>71</sup> Chapter IV of the Democratic Charter recognizes this unique role of the Secretary General and makes specific mention of the role of this international civil servant in assisting the political organs and bodies of the international organization in defending democracy.

For example, a member state that considers its institutional

---

66. Democratic Charter, *supra* note 1, art. 20.

67. Resolution 811, *supra* note 49. [As this article was being sent to the printers, 12 Caribbean states requested a special session of the OAS Permanent Council in May 2004 to invoke Article 20 of the Democratic Charter. OEA/Ser.G CP/INF. 4996/04, May 14, 2004.]

68. Democratic Charter, *supra* note 1, art. 20.

69. *Id.* Paragraph four of Article 20 states that, “The necessary diplomatic initiatives, including good offices, to foster the restoration of democracy, will continue during the process.”

70. The Secretary General is the legal representative of the OAS General Secretariat. See OAS Charter, *supra* note 47, arts. 108, 109, 110, 113, 116-120.

71. *Id.* at art. 110.

democracy "at risk" is entitled to request assistance from the Secretary General to strengthen and preserve its democratic system.<sup>72</sup> If the affected member state consents, the Secretary General may "arrange visits or other actions" to analyze the situation in a state facing such a political crisis. The Secretary General must report to the Permanent Council on whatever actions the Secretary General takes. Article 18, which appears in the prevention section of the Democratic Charter, clearly states that it is the Permanent Council and not the Secretary General that makes the final decisions on how the Organization will preserve and strengthen the democratic system in a state that requested such assistance.<sup>73</sup>

In the sanction section of Chapter IV, the Secretary General also plays a potentially influential role at either the beginning or the end of the process. The Secretary General, on his or her own initiative, may request an immediate meeting of the Permanent Council when there is "an unconstitutional alteration of the constitutional regime that seriously impairs the democratic order in a member state."<sup>74</sup> As noted previously, Chapter IV is silent as to the meaning of this threshold standard and implicitly suggests that the Secretary General or the collective assessment of one of the political bodies of the OAS will determine whether any situation rises to the level of this standard that could trigger suspension from the OAS. Once the democratic crisis is over and "the situation that led to suspension has been resolved," the Secretary General is granted the discretionary authority to propose to the General Assembly that suspension be rescinded and full membership restored.<sup>75</sup> In this last case, the Secretary General is put on a level parallel with the member states, any of whom can also make the same proposal to the General Assembly.<sup>76</sup>

#### 4. Meetings of Consultation of Ministers of Foreign Affairs

Significantly, this new instrument on democracy makes no provision for another important OAS decision-making body known as the Meeting of Consultation of Ministers of Foreign Affairs.<sup>77</sup>

---

72. Democratic Charter, *supra* note 1, art. 17.

73. *Id.* at art. 18.

74. *Id.* at art. 20(1).

75. *Id.* at art. 22.

76. *Id.*

77. The Meeting of Consultation of Ministers of Foreign Affairs is noted in Chapter X of the OAS Charter. See OAS Charter, *supra* note 47, arts. 61-69.

Meetings of Consultation have often been convened at times of crisis, such as the bombing of the twin towers in New York. This highly political but potentially dynamic diplomatic tool can be a flexible instrument at times of tension. Perhaps it was not mentioned in Chapter IV because under the OAS Charter, only the General Assembly can suspend a member state's participation in OAS bodies.<sup>78</sup> However, the Eighth Meeting of Consultation of Ministers of Foreign Affairs in January 1962 excluded the Cuban government from participation in the OAS,<sup>79</sup> although that action was not explicitly provided for in the OAS Charter and predated the inauguration of the General Assembly. The Cuban government was not excluded for its lack of democratic credentials *per se*, but this sanction precedent still exists. If, and when, the text of the Democratic Charter is incorporated into the OAS Charter, member states might want to rectify this oversight and provide either a prevention or sanction role for the Meetings of Consultation, or for ad hoc meetings of foreign ministers.

### B. *The Democratic Charter and the OAS Charter*

The Inter-American Democratic Charter does not explicitly amend the Charter of the Organization of American States. The Democratic Charter was adopted in 2001 by a unanimous resolution of the ministers and ambassadors of the member states who were attending a special session of the OAS General Assembly.<sup>80</sup> However, the OAS Charter was ratified and amended in the twentieth century as a treaty by each of the member states according to the constitutional processes in each state.

During the drafting of the Democratic Charter, delegates focused on whether the Organization would be implicitly amending its own Charter, especially provisions found in Article 9 of the OAS Charter.<sup>81</sup> That provision, introduced in the 1992 Protocol of

---

78. *Id.* at art. 9.

79. See 8th Meeting of Consultation of Ministers of Foreign Affairs, *supra* note 2, at 14, available at [http://www.oas.org/OASpage/eng/Documents/Democratic\\_Charter](http://www.oas.org/OASpage/eng/Documents/Democratic_Charter).

80. See *infra* notes 1, 15, 87.

81. Article 9 of the OAS Charter now reads:

A Member of the Organization whose democratically constituted government has been overthrown by force may be suspended from the exercise of the right to participate in the sessions of the General Assembly, the Meeting of Consultation, the Councils of the Organization and the Specialized Conferences as well as in the commissions, working groups and any other bodies established.

a) The power to suspend shall be exercised only when such diplomatic initiatives undertaken by the Organization for the purpose of promoting the restoration of representative

Washington and effective as of 1997,<sup>82</sup> established a mechanism for suspending a member state's participation in the OAS if the democratic government of that member state were to be overthrown by force. This provision has never been invoked and a number of OAS member states have yet to ratify and be bound by it.<sup>83</sup>

Nevertheless, drafters decided that in Chapter IV of the new instrument, it would feature this mechanism with a version of the Democracy Clause promulgated at the Third Summit of the Americas. Article 19 of the Democratic Charter prohibits anti-democratic governments from participating in meetings of various OAS organs—including the General Assembly, the Meeting of Consultation of Ministers of Foreign Affairs, and the Permanent Council—subject to the Charter of the OAS.<sup>84</sup> Such a provision appears to mandate that the governments of the hemisphere will utilize the suspension mechanism of Article 9 of the OAS Charter when invoking the Democracy Clause, though the scope of the Democracy Clause is broader than Article 9's limitation to situations of regime change by force. Article 9 also establishes the principles that only the General Assembly can sanction a member state for

---

democracy in the affected Member State have been unsuccessful;

- b) The decision to suspend shall be adopted at a special session of the General Assembly by an affirmative vote of two-thirds of the Member States;
- c) The suspension shall take effect immediately following its approval by the General Assembly;
- d) The suspension notwithstanding, the Organization shall endeavor to undertake additional diplomatic initiatives to contribute to the re-establishment of representative democracy in the affected Member State;
- e) The Member which has been subject to suspension shall continue to fulfill its obligations to the Organization;
- f) The General Assembly may lift the suspension by a decision adopted with the approval of two-thirds of the Member States;
- g) The powers referred to in this article shall be exercised in accordance with this Charter.

OAS Charter, *supra* note 47, art. 9.

82. Protocol of Washington to the Charter of the OAS, *opened for signature* Dec. 14, 1992, OAS Treaty Ser. 1-E Rev., OEA/Ser.A/2 Add. 3, 33 I.L.M. 1005 (1994) (*entered into force* Sept. 25, 1997), art. 9.

83. The OAS member states that have yet to ratify the Protocol of Washington, as of June 2003, include: Cuba; Dominica; the Dominican Republic; Grenada; Haiti; Jamaica; Mexico; Saint Lucia; St. Kitts and Nevis; Suriname; and Trinidad and Tobago. Article 9 does not bind these states until such time as they ratify the Protocol of Washington. *See* Protocol of Washington to the Charter of the OAS, *id.*, art. V; OAS Charter, *supra* note 47, arts. 140, 142.

84. *See* Democratic Charter, *supra* note 1, art. 19.

violating democratic norms, and that a member state that has been suspended and deprived of its OAS rights must continue to fulfill its obligations to the OAS.<sup>85</sup>

A draft of the Democratic Charter also suggested non-participation in the Summits of the Americas process as a sanction, but imposition of such a sanction by the vote of an OAS body would be *ultra vires*. Though the member states of the OAS attend both OAS meetings and the Summits of the Americas, a decision by an OAS political organ to suspend a member state from the Summit initiatives leaves the Organization open to a charge of acting *ultra vires* because the Summits of the Americas process is not formally part of the institutional legal framework of the OAS.<sup>86</sup>

The new OAS instrument poses the legal question of whether all of its provisions are consistent with the OAS Charter. The Democratic Charter was adopted as a resolution of an OAS political organ, but it could have been approved as an amendment to the OAS Charter. While a resolution provided immediate hemispheric "coverage" in a political sense, it is not as legally binding as a treaty.<sup>87</sup> Some delegates argued that a document as important as a democratic charter required the same legal footing as the OAS Charter. A significant problem with that approach was that it would have involved a long ratification process because the approval of at least two-thirds of the member states is required for amending the OAS Charter.<sup>88</sup> In the end, the OAS solution probably relied on Article 31 of the Vienna Convention on the Law of Treaties.<sup>89</sup> That treaty permits signatories to not only interpret

---

85. Lagos & Rudy, *supra* note 13, at 176 (citing Democracy in the Inter-American System, Inter-Am. Jur. Comm. Ann. Rep. to General Assembly, Eduardo Vio Grossi, Rapporteur, OAS Doc. OEA/Ser.G/CP/doc.2556/95, at 200-01).

86. *Id.* at 178.

87. The Democratic Charter was adopted by Resolution 1 of the 28th Special Session of the OAS General Assembly. See Democratic Charter, *supra* notes 1 and 15.

88. OAS Charter, *supra* note 47, arts. 140, 142.

89. The general rule for interpreting treaties is that:

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
  - (a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;
  - (b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

treaties in good faith, but to utilize subsequent written agreements among state parties and state practice related to applying the treaty in question, as evidence of the agreement of those countries on interpreting the disputed treaty. Negotiators added two paragraphs to the preamble of the Inter-American Democratic Charter as evidence of the unanimous intention of the OAS member states to interpret, but not to formally amend, Article 9 of the OAS Charter on suspending the participation of member states in OAS meetings and sessions.<sup>90</sup>

### C. Resolution 1080 and the Democratic Charter

As outlined above, the OAS Charter was amended less than 10 years ago to provide for the suspension of a member state's participation in the OAS if its democratic government was overthrown by force. Before that amendment, however, the General Assembly had adopted Resolution 1080 in 1991 as a means of facilitating democracy and thwarting coups. Resolution 1080 calls for an immediate meeting of the Permanent Council, and an emergency meeting of either the foreign ministers or a special session of the General Assembly, to decide on collective action when a democratic government's rule is suddenly or irregularly 'interrupted.'<sup>91</sup> The Organization has invoked Resolution 1080 on four

- 
3. There shall be taken into account, together with the context:
    - (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
    - (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
    - (c) any relevant rules of international law applicable in the relations between the parties.
  4. A special meaning shall be given to a term if it is established that the parties so intended.

Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, 1155 UNTS 331, art. 31.

90. Those two paragraphs read as follows:

RECOGNIZING that all the rights and obligations of member states under the OAS Charter represent the foundation on which democratic principles in the Hemisphere are built; and  
 BEARING IN MIND the progressive development of international law and the advisability of clarifying the provisions set forth in the OAS charter and related basic instruments on the preservation and defense of democratic institutions, according to established practice.

Democratic Charter, *supra* note 1, preamble paras. 19, 20.

91. Resolution 1080, *supra* note 7.



occasions: Haiti (1991), Peru (1992), Guatemala (1993), and Paraguay (1996).

The procedures under Resolution 1080 and Chapter IV of the Democratic Charter are very similar. Indeed, the convening of the Twenty-ninth Special Session of the OAS General Assembly in April 2002 to consider an unsuccessful military-civilian coup in Venezuela could have been called under either approach. In that meeting, foreign ministers expressed their satisfaction at the restoration of democratic constitutional government and supported that government's initiative for a national dialogue. The ministers also resolved to apply the Democratic Charter "without distinction, and in strict accordance with the letter and spirit" of the document.<sup>92</sup>

The mechanism of Resolution 1080 reinforced the principle of Article 3 of the OAS Charter that the solidarity of the American states required the political organization of those states to be based on "the effective exercise of representative democracy."<sup>93</sup> While the Resolution 1080 mechanism allows for intervention by the Permanent Council, an ad hoc meeting of foreign ministers, or a special session of the General Assembly, it is noteworthy that Resolution 1080 does not provide for prohibitions or sanctions when democratic governments stumble.<sup>94</sup>

The adoption of the Democratic Charter certainly raises questions concerning its impact on the mechanism adopted in Resolution 1080 and whether the Democratic Charter partially or totally abrogates current Resolution 1080 procedures. When a democratic government's rule is suddenly or irregularly "interrupted," Resolution 1080 calls for an immediate meeting of the OAS Permanent Council, followed by an ad hoc meeting of foreign ministers or a special session of the OAS General Assembly, to decide on collective action.<sup>95</sup> Collective action under Resolution 1080 is not mandatory.<sup>96</sup>

The procedures established under Articles 20 and 21 of the

---

92. AG/RES. 1 (XXIX-E/02), *supra* note 11, at oper. paras. 1, 2, 3.

93. "The American States reaffirm the following principles: . . . d) The solidarity of the American States and the high aims which are sought through it require the political organization of those States on the basis of the effective exercise of representative democracy; . . ." OAS Charter, *supra* note 47, art. 3(d).

94. ENRIQUE LAGOS, ORGANIZATION OF AMERICAN STATES 9, International Encyclopedia of Laws, Kluwer Law International, 2001.

95. Resolution 1080, *supra* note 7, art. 1.

96. See generally, Stephen J. Schnably, *The Santiago Commitment as a Call to Democracy in the United States: Evaluating the OAS Role in Haiti, Peru, and Guatemala*, 25 U. MIAMI INTER-AM. L. REV. 393 (1994).

Democratic Charter resemble those of Resolution 1080, but are subject to the additional proviso that OAS foreign ministers would be limited in their future use of the Resolution 1080 procedures by the provisions of the OAS Charter, international law, and the Democratic Charter itself. The Democratic Charter has a broader scope than Resolution 1080 or Article 9 of the OAS Charter; or at least appears to lower the threshold for multilateral action. Various actors are granted additional powers and discretion as well. At the time of this writing, the authors are of the view that the Democratic Charter has incorporated the mechanism of Resolution 1080 rather than abrogated it. The different approaches will only matter if the OAS confronts a "situation" and convenes an ad hoc meeting of foreign ministers, or the Democracy Clause is invoked and a member state is sanctioned because the Democratic Charter is silent on any role for the Meetings of Consultation or ad hoc meetings of foreign ministers and Resolution 1080 makes no reference to the issue of sanctions.

#### D. *Sovereignty and Nonintervention*

There is some tension both in the OAS and in the OAS Charter regarding support for representative democracy and the doctrine of nonintervention in a member state's internal affairs. The Latin republics, living in the same hemisphere as the powerful United States, traditionally have favored the nonintervention norm.<sup>97</sup> There are numerous references to nonintervention in the OAS Charter,<sup>98</sup> and little doubt that it remains a norm of inter-

---

97. See generally, Stephen J. Schnably, "Constitutionalism and Democratic Government in the Inter-American System," in Fox & Roth, *supra* note 21, at 155-60; Domingo E. Acevedo & Claudio Grossman, "The Organization of American States and the Protection of Democracy," in Farer, *supra* note 21, at 134-37. ("The failure to apply the Rio Treaty to protect democratically elected governments would suggest that the uppermost concern of the OAS member states was, for most of its history, to protect state sovereignty against external threats rather than to defend democracy.") *Id.* at 135. ("It was not until the end of the Cold War that Latin-American countries were prepared to start modifying their noninterventionist stance.") *Id.* at 136-37.

98. See OAS Charter, *supra* note 47, at arts. 1, 2(b), 3(e), 19, & 20. For example, Article 1 says, in part, that none of the provisions of the OAS Charter "authorizes it [the OAS] to intervene in matters that are within the internal jurisdiction of the Member States." "To promote and consolidate representative democracy, with due respect for the principle of nonintervention" is listed as one of the essential purposes of the OAS in Article 2(b). The following is reaffirmed as an OAS principle at Article 3(e):

Every State has the right to choose, without external interference, its political, economic, and social system and to organize itself in the way best suited to it, and has the duty to abstain from intervening in the affairs of another State. Subject to the

American law. However, the OAS Charter provides that nonintervention is no bar to measures taken "for the maintenance of peace and security in accordance with existing treaties."<sup>99</sup> The authors suggest that this provision in the OAS Charter could be amended in the future, if, and when, the member states decide to amend the OAS Charter, by incorporating the terms of the Inter-American Democratic Charter. Such an amendment of Article 23 would ensure that collective action by the OAS for the purpose of defending democracy is not considered a violation of the nonintervention norm.

## V. CONCLUSION

The countries of the Western Hemisphere took an extraordinary step forward in the development and codification of public international law when they adopted the Inter-American Democratic Charter in 2001. The member states of the OAS have long listed democracy as an aspiration. As military dictatorships disappeared from the hemisphere after the conclusion of the Cold War, the regional international organization began exploring a toughening of the democracy requirement with such mechanisms as Resolution 1080 and the amendment of the OAS Charter itself.<sup>100</sup> Now, in the twenty-first century, the member states have codified these aspirations and mechanisms into a legal charter that provides some remedies for coups and the rise of anti-democratic governments. The Democratic Charter defines democracy

---

foregoing, the American States shall cooperate fully among themselves, independently of the nature of their political, economic, and social systems.

Article 19 reads:

No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. The foregoing principle prohibits not only armed force but also any other form of interference or attempted threat against the personality of the state or against its political, economic, and cultural elements.

Article 20 reads:

No state may use or encourage the use of coercive measures of an economic or political character in order to force the sovereign will of another State and obtain from it advantages of any kind.

99. *Id.* at art. 23.

100. For an overview and discussion of the OAS standard—"the effective exercise of representative democracy"—see "Democracy in the Inter-American System," Resolution I-3/95, Inter-American Juridical Committee, Mar. 23, 1995 *found in* Observations and Comments of the Inter-American Juridical Committee on the Draft Inter-American Democratic Charter, OEA/Ser.G/ GT/CDI-7/01, Aug. 17, 2001, appendix at 13-19.

in terms of a collective right for the peoples who reside in the Americas. It thus attempts to empower the regional international intergovernmental organization with additional legal and diplomatic tools to thwart a coup d'état in a member state, or reverse unconstitutional interruptions of the democratic order or unconstitutional alterations of a constitutional regime.

While all OAS member states were nominally democratic at the time the OAS adopted the document in September 2001, political, social, and economic pressures since then have led to what some observers term "democratic fatigue" in the hemisphere.<sup>101</sup> Events of the next decade should reveal whether the Democratic Charter can be effectively utilized in the political and diplomatic sphere since its mechanism for preventing unconstitutional alterations or interruptions depends on the affected state's consent, and troubled governments appear reluctant to invoke the instrument. The Organization may have to take another step and formally amend the OAS Charter with provisions of the Democratic Charter to ensure democratic governance is not only the legal norm in the Americas, but that such a norm can be enforced with sufficient preventive measures and multilateral sanctions.

---

101. Andres Oppenheimer, *Latin America Suffering 'Democratic Fatigue'*, Miami Herald, Oct. 18, 2001.