

A System of Collective Defense of Democracy: The Case of the Inter-American Democratic Charter

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Abstract

In the years that followed the end of the Cold War, the international community showed a growing interest in the democratic legitimacy of governments. With regard to the Western Hemisphere, the Organization of American States has been particularly pioneering in this respect, since it initiated a mechanism of intervention by peaceful means, once the democratic stability in a state was threatened, a process which culminated with the approval of the Inter-American Democratic Charter.

The present article will evaluate the developments on democratization at the universal and regional level with particular focus on the Americas, as well as studying the effectiveness of the Inter-American Democratic Charter using as case study the constitutional turmoil in Honduras (2009) and will purport to formulate suggestions for other international institutions building on OAS best practices. The protection, promotion, consolidation, and ultimately the collective defense of democracy as an important feature of the OAS could serve as a helpful paradigm for other regional institutions as well as for the United Nations in conflict prevention and in the operationalization of the “responsibility to protect” doctrine.

A. Introduction

In the years that followed the end of the Cold War, the international community showed a growing interest in the democratic legitimacy of governments. With regard to the Western Hemisphere, the Organization of American States (hereinafter OAS) has been particularly pioneering in this respect, since it initiated a mechanism of intervention by peaceful means, once the democratic stability in a state was threatened, a process which culminated with the approval of the Inter-American Democratic Charter (hereinafter IADC).

The present article will evaluate the developments on democratization at the universal and regional level with particular focus on the Americas, as well as studying the effectiveness of the IADC using as case study the constitutional turmoil in Honduras (2009) and will purport to formulate suggestions for other international institutions building on the OAS best practices. The protection, promotion, consolidation, and ultimately the collective defense of democracy as an important feature of the OAS could

serve as a helpful paradigm for other regional institutions as well as for the United Nations in conflict prevention and in the operationalization of the “responsibility to protect” doctrine.

B. The Emergence of a Right to Democracy in the Post-Cold War Era

The effective protection of democracy in the domestic legal order was neither a priority, nor even a matter of concern for the international community when the UN was established. In the aftermath of the Second World War, the primary concern of the members of the international community was to defend their territorial integrity and sovereignty from outside threats, thus conferring particular importance to the establishment of systems of collective defense and security. Hence, the UN Charter does not make any reference to the notion of the democratic state, for instance as a condition for UN membership.¹ On the other hand, the principle of non-intervention in the domestic affairs of states (Art. 2 para. 7 Charter of the United Nations)² would hinder any qualitative evaluation of the regime or the form of government of a state.

Similarly, the legality of a regime at the international level was not an object of study for international law. A governmental structure that was exercising effective control of a state, whether it was recognized or not and irrespective of the means it used to seize power, would enjoy legal standing in the international fora. Unlike the observance of human rights, which exited early enough from the ambit of the *domaine réservé*, the legitimacy

¹ Art. 4 para. 1 Charter of the United Nations: “Membership in the United Nations is open to all other peace-loving States which accept the obligations contained in the present Charter and, in the judgment of the Organization, are able and willing to carry out these obligations”. See, also, the report of the former UN Secretary-General B. Boutros-Ghali, Supplement to reports on democratization, UN Doc A/51/761, 20 December 1996, paras 26-60.

² See also the Declaration on Principles of International Law concerning friendly relations and cooperation among States in accordance with the Charter of the UN, GA Res. 2625 (XXV), 24 October 1970. The said principle forms part of customary law, see the judgement of the ICJ in the case concerning *Military and paramilitary activities in and against Nicaragua (Nicaragua v. United States)*, Jurisdiction of the Court, Judgment, ICJ Reports 1986, 14, paras 184, 203 [Nicaragua Case].

of a government was a matter essentially within the domestic jurisdiction of states.³

This approach has been upheld by the international justice. In its advisory opinion on Western Sahara, the International Court of Justice has noted that: “No rule of international law, in the view of the Court, requires the structure of a State to follow any particular pattern, as is evident from the diversity of the forms of State found in the world today”⁴. Furthermore, in the *Nicaragua* Case, exploring the extent of the fundamental principle of non-intervention in domestic affairs, it stressed the following:

“A prohibited intervention must accordingly be one bearing on matters in which each State is permitted, by the principle of State sovereignty, to decide freely. One of these is the choice of a political, economic, social and cultural system, and the formulation of foreign policy⁵ [...] A State's domestic policy falls within its exclusive jurisdiction, provided of course that it does not violate any obligation of international law⁶ [...] adherence by a State to any particular doctrine does not constitute a violation of customary international law; to hold otherwise would make nonsense of the fundamental principle of State sovereignty on which the whole of international law rests, and

³ For the relationship between the principle of non-intervention and the legality of national governments at the international level see B. Roth, *Government Illegitimacy in International Law* (2000). For an in-depth analysis of the legitimacy of governments in international law see J. d'Aspremont, *L'Etat non Démocratique en Droit International. Etude Critique du Droit International Positif et de la Pratique Contemporaine* (2008); J. d'Aspremont, 'Legitimacy of Governments in the Age of Democracy', 38 *New York University Journal of International Law and Politics* (2006) 4, 877-917; A. Mahiou, 'Droit International et Droit Constitutionnel: de la Non-Intervention à la Bonne Gouvernance', in A. Amor (ed.), *Droit Constitutionnel et Mutations de la Société Internationale*, Académie Internationale de droit constitutionnel, XVIIe session, 6-21 July 2001, 157-228; S. Murphy, 'Democratic Legitimacy and the Recognition of States and Governments', 48 *International and Comparative Law Quarterly* (1999) 3, 545-581; N. Petersen, *Demokratie als teleologisches Prinzip: zur Legitimität von Staatsgewalt im Völkerrecht* (2009); A. Rosas, 'International Legitimacy of Governments', in G. Alfredsson & P. Macalister-Smith, *The Living Law of Nations: Essays on Refugees, Minorities, Indigenous Peoples and the Human Rights of other Vulnerable Groups: in Memory of Atle Grahl-Madsen* (1996), 201-217.

⁴ *Western Sahara*, Advisory Opinion, ICJ Reports 1975, 12, para. 94.

⁵ *Nicaragua Case*, *supra* note 2, para. 205.

⁶ *Id.*, para. 258.

the freedom of choice of the political, social, economic and cultural system of a State⁷”.

However, after the end of the Cold War and the democratization processes initiated in many states we witness the gradual emergence of the right to democracy as a rule of international law.⁸ International organizations declare in every occasion that the principle of democratic governance is indispensable for the guarantee of institutional and effective protection of human rights. Democracy is propounded as the means to prevent international and internal armed conflicts, to establish the rule of law and to achieve in general the regional and international stability.⁹

The growing importance of democratization is further demonstrated by the electoral observation missions organized by the UN, the EU (European Commission), the OSCE (ODIHR), the OAS (Department for the Promotion of Democracy),¹⁰ the Council of Europe etc. The change in the

⁷ *Id.*, para. 263.

⁸ On these developments see in particular R. Ben-Achour, ‘Le Droit International de la Démocratie’, *Cours Euro-Méditerranéens Bancaja de Droit International*, Volume 4 (2000), 359; B. Boutros-Ghali, ‘Pour un Droit International de la Démocratie’, in *Theory of International Law at the Threshold of the 21st Century. Essays in Honour of Krzysztof Skubiszewski* (1996), 99-108; G. Fox & B. Roth (eds), *Democratic Governance and International Law* (2000); T. M. Franck, ‘The Emerging Right to Democratic Governance’, 86 *American Journal of International Law* (1992) 1, 46-91; L.-A. Sicilianos, *L’ONU et la Démocratisation de l’Etat: Systemes Regionaux et Ordre Juridique Universel* (2000); Société Française pour le Droit International, *L’Etat de Droit en Droit International* (2009). G. Fox maintains that it remains uncertain whether the practice of international organizations has coalesced into a “right” to democratic governance, see G. Fox, ‘The International Protection of the Right to Democracy’, *Max Planck Encyclopedia of Public International Law* (March 2008) available at <http://www.mpepil.com/> (last visited 23 August 2011).

⁹ See the relevant references in the report of the former UN Secretary-General B. Boutros-Ghali, *An Agenda for Peace. Preventive diplomacy, peacemaking and peace-keeping*, UN Doc. A/47/277-S/24111, 17 June 1992, the Vienna Declaration and Programme of Action: Report of the World Conference on Human rights, UN Doc. A/CONF.157/23, 12 July 1993 and the Document of the Moscow Meeting of the Conference on the human dimension of the CSCE, 4 October 1991. See also, R. Ben-Achour, ‘La Contribution de B. Boutros-Ghali à l’Emergence d’un Droit International Positif de la Démocratie’, in *Boutros Boutros-Ghali Amicorum Discipulorumque Liber. Paix, Développement, Démocratie* (1998), 909-923.

¹⁰ The Department for the Promotion of Democracy is an important mechanism for conflict prevention in the OAS and has developed various special missions in this field, including the first joint UN-OAS mission in Haiti in 1993 for the verification of

regional democratization process refers both to the engagement of international actors, particularly international organizations, therein, and the influence they can exercise in the outcomes of this process. Furthermore, in rare cases the Security Council has even proceeded to the adoption of coercive measures in order to ensure respect for the democratic order, demonstrating thereby that it is not a matter of exclusive domestic jurisdiction but that it concerns the international community as a whole, especially the neighboring states. The coups d'état in Haiti (1991) and Sierra Leone (1997), following elections that were monitored by international observers, led to the immediate reaction of the UN Security Council and the invocation of Chapter VII of the UN Charter.¹¹ However, this reaction is fragmentary, since other serious disturbances of the democratic order have not attracted the attention of the Security Council

the respect for human rights and institution building (MICIVIH-International Civilian Mission in Haiti).

¹¹ In the case of Haiti the UN Security Council: “deplored the fact that, despite the efforts of the international community, the legitimate government of Jean-Bertrand Aristide has not been reinstated” and stated that: “the continuation of this situation threatens international peace and security in the region” thus deciding to adopt sanctions against the “de facto authorities” of the country (SC Res. 841, 16 June 1993). By virtue of Res. 940 it authorized a multinational force under unified command and control: “to restore the legitimately elected President and authorities of the Government of Haiti” (SC Res. 940, 31 July 1994). In the case of Sierra Leone it was even more explicit demanding: “that the military junta take immediate steps to relinquish power in Sierra Leone and make way for the restoration of the democratically elected Government and a return to constitutional order” (SC Res. 1132, 8 October 1997). During the political crisis of November 2010 in Côte d’Ivoire, following the refusal of former President L. Gbagbo to step down, the UN Security Council adopted Res. 1962 (2010) under Chapter VII urging: “all the Ivorian parties and stakeholders to respect the will of the people and the outcome of the election in view of ECOWAS and African Union’s recognition of Alassane Dramane Ouattara as President-elect of Côte d’Ivoire and representative of the freely expressed voice of the Ivorian people as proclaimed by the Independent Electoral Commission” and renewing the mandate of UNOCI as it was set out in Res. 1933 (2010). According to the latter, UNOCI has been mandated, amongst others, to “support the organization of open, free, fair and transparent elections”. In subsequent resolutions it has been even more explicit as to the need of state institutions to yield to the authority vested by the people in President A. Ouattara (SC Res. 1975, 2011) albeit it did not expressly mandate UNOCI to use force in order to reinstate him in power.

(see e.g. Burma/Myanmar in 1990, Pakistan in 1999, Thailand in 2006, Bangladesh in 2007).¹²

The culmination of this process, regarding the importance of democratic governance, which developed rapidly but in an uneven way after the Cold War, was the report of the High-level Panel on Threats, Challenges and Change that proposed a mechanism: “to protect democratically elected governments from unconstitutional overthrows”¹³. However, such a reference has not been included in the 2005 World Summit Outcome. This document contains only the well-known references on the interrelationship between human rights, democracy and the rule of law but avoids establishing particular mechanisms to cope with interruptions of the democratic order in the UN member states.¹⁴

C. The Protection of Democracy in the Framework of the Organization of American States

I. Introductory Remarks

In the Western Hemisphere, the member states of the OAS displayed always a particular “sensitivity” regarding the strict compliance with the principle of non-intervention. In the OAS framework, one of the first instruments that were adopted was the Rio Treaty which established a system of reciprocal assistance in case of attack against a state-party.¹⁵ Nevertheless, the concept of democratic governance is present in the OAS charter adopted on 30 April 1948. Since its establishment, the OAS declared that representative democracy constituted one of the fundamental principles

¹² T. Christakis, ‘La violation du droit interne en tant que menace contre la paix?’, in Société Française pour le Droit International, *L’Etat de Droit en Droit International* (2009).

For an analysis see Christakis, *supra* note 3, 107-122. On the other hand, d’Aspremont maintains that the disruption of the democratic order as such does not constitute violation of an international rule, see J. d’Aspremont, ‘La Licéité des Coups d’Etat en Droit International’, in Société Française pour le Droit International, *supra* note 8, 123-142.

¹³ Report of the Secretary-General’s High-level Panel on Threats, Challenges and Change, *A more secure world: our shared responsibility*, 2004, para. 94.

¹⁴ UN Doc. A/60/L.1, 15 September 2005, see in particular paras 119, 135-137.

¹⁵ Inter-American Treaty of Reciprocal Assistance (Rio Treaty), 9 February 1947, OAS Treaty Series No 9 and 61, 324 U.N.T.S 21.

of the organization,¹⁶ an “indispensable condition for the stability, peace and development of the region” (Preamble). However, these references were to a certain extent only rhetorical, since they were not endowed with a specific implementation mechanism.¹⁷

II. The First Attempt: the Declaration of Santiago de Chile

The American states made a first – albeit incomplete – effort to establish a mechanism of defense of the right to democracy during the 5th Meeting of Consultation of Ministers of Foreign Affairs,¹⁸ held in Santiago de Chile (12-18 August 1959). Among the agenda items was the study of the juridical relation between the effective respect for human rights and the exercise of representative democracy, taking into account the strict observance of the principle of non-intervention. The meeting ended with the adoption, *inter alia*, of two important documents: a) *Resolution IX*, whereby the OAS Council was requested to prepare, in cooperation with the technical organs of the Organization and in consultation with the governments of the American states, a draft Convention on the effective exercise of representative democracy, that would determine the procedure and the measures to be applied in that respect, and b) the *Declaration of Santiago*,

¹⁶ Art. 3d OAS Charter (OAS, Treaty Series, nos. 1-C and 61, 1609 U.N.T.S 119): “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”. The Council of Europe followed one year later (5 May 1949) with a reference to: “the principles of individual freedom, political liberty and the rule of law, which form the basis of all genuine democracy” in the Preamble of its statute. In Africa, similar efforts begin to take place only the last decade, see the Declaration on the framework for an OAU response to unconstitutional changes of government (2000), the Constitutive Act of the African Union (2000, Arts 3 and 4) and the Protocol relating to the establishment of the Peace and Security Council of the African Union (2002, Arts 3f and 7 para. 1m). In 2007, the African Charter on democracy, elections and governance was adopted, but it is ratified only by three countries and has not yet entered into force. See also Protocol A/SP1/12/01 on Democracy and Good Governance Supplementary to the Protocol relating to the mechanism for conflict prevention, management, resolution, peacekeeping and security, adopted by the Economic Community of West African States (ECOWAS) in Dakar, in December 2001. At the EU level see the Treaty of Lisbon (2007), especially Art. 1a, Title II “Provisions on democratic principles”, Art. 8A, 8B, 8C and Art. 10A.

¹⁷ E. Spehar, ‘Democracy in our Hemisphere and the Role of the Organization of American States’, 11 *Revue Québécoise de Droit International* (1998) 1, 35, 35-46.

¹⁸ The Meeting of Consultation of Ministers of Foreign Affairs is a decision-making organ of the OAS of major importance, see Chapter X of the OAS Charter.

an instrument that referred, *inter alia*, to the “desire of the American peoples to live under democratic institutions, to their “faith in the effective exercise of representative democracy as the best mean to promote their political and social progress” and affirmed that the existence of antidemocratic regimes amounted to a violation of the principles on which the OAS was founded.¹⁹ Although a draft Convention that would have had a binding effect to that end was never prepared, the Declaration of Santiago is seen as the predecessor of all efforts aiming at the stabilization of democracy in the Western Hemisphere which culminated after the end of the Cold War.

However, the years that followed the 5th Meeting of Consultation of Ministers of Foreign Affairs could in no way foster the right to democracy in the Americas. Cold war, harsh dictatorial regimes, military coups, violent and long-lasting armed conflicts ravaged the Hemisphere. Democracy seemed elusive in the majority of the American states, with the exception of Costa Rica and, of course, Canada and the United States. It is characteristic that the only state that was expelled for having violated the democratic principles was Cuba, a move that was due to political reasons more so rather than as a result of the strict implementation of the principles of the Santiago Declaration.²⁰ The OAS was still lacking the procedural mechanisms that would allow it to react properly against the violent disruptions of the constitutional order in the member states.

III. The Interplay between Democracy and Human Rights: the Multifaceted Activities of the Inter-American Commission on Human Rights

In the same 5th Meeting, the Ministers of Foreign Affairs of the OAS member states decided the establishment of an Inter-American Commission on Human Rights (IACHR).²¹ Since the 1960s, the IACHR has

¹⁹ Both documents are included in the Final Act of the meeting, available at <http://www.oas.org/CONSEJO/SP/RC/Actas/Acta%205.pdf> (last visited 23 August 2011).

²⁰ The 8th Meeting of Consultation of Ministers of Foreign Affairs (Punta del Este, Uruguay, January 1962) suspended the Cuban government from participation in the OAS, although this punitive measure was not provided for at the time in the OAS Charter and precedes the first regular session of the General Assembly (1971).

²¹ Res. VIII, OEA/Ser.L/V/1.4, included in the Final Act, *supra* note 19. The mandate and activities of this organ is not the object of this study. For a thorough analysis see,

demonstrated a remarkable proficiency in the field of human rights promotion and protection. It embarked upon a wide range of activities during internal disturbances, non-international armed conflicts, military regimes in all OAS member states, parties or not to the American Convention on Human Rights (ACHR).²² The activity of the IACHR was further fostered by the retreat of the principle of non-intervention in the field of human rights protection. Human rights are no more within the *domaine réservé* of states.²³ However, its conclusions on the reported human rights violations had no consequence as to the right of the *de facto* governments²⁴

amongst others, K. Vasak, *La Commission Interaméricaine des Droits de l'Homme* (1968); D. Padilla, 'The Inter-American Commission on Human Rights of the Organization of American States: a Case-Study', 9 *American University Journal of International Law and Policy* (1993), 95.

²² In case a State has not ratified the ACHR, the instrument of reference is the American Declaration of the Rights and Duties of Man. The IACHR conducts onsite visits on its own initiative, following a request by an OAS organ or a NGO or at the invitation of the respective government. Its findings are included in special reports, while it also submits an annual report to the OAS General Assembly. At a later stage and more systematically after the adoption of the ACHR it acquired the power to receive individual petitions. For more information consult the site <http://www.cidh.org>.

²³ Particularly groundbreaking in this respect was the so-called "Greek Case". When the colonels seized power in Greece in 1967, Denmark, Sweden, Norway and the Netherlands filed an interstate application against the Greek government with the former European Commission on Human Rights. The perpetrated gross human rights violations that were reported led Greece to withdraw from the Council of Europe. For a comprehensive analysis see (*in greek*) S. Perrakis, *The "Greek Case" before the International Organizations (1967-1974). Law and Politics of the International Protection of Human Rights*, (1997). Also, T. Buergenthal, 'Proceedings against Greece under the European Law of Human Rights', 62 *American Journal of International Law* (1968) 2, 441-450. This firm reaction of the Council of Europe has considerably influenced all international institutions when faced with similar cases. For instance, in the OAS framework, after the invasion of the Presidential Palace, the murder of Salvador Allende and the introduction of military rule in Chile, the IACHR conducted an on site visit, drafted a particularly critical report for the flagrant human rights violations by the military regime and forwarded it to the UN Human Rights Commission, thereby internationalizing the dire situation in the country. For further reactions at the UN level see, J. Fitzpatrick, *Human Rights in Crisis. The International System for Protecting Human Rights during States of Emergency* (1994), 127. See also the mobilization of the IACHR in the cases of Nicaragua, Paraguay etc. *id.* 178.

²⁴ A *de facto* government is a government "wherein all the attributes of sovereignty have, by usurpation, been transferred from those who had been legally invested with them to others, who, sustained by a power above the forms of law, claim to act and do really act in their stead", J. Ballentine, *Law Dictionary*, 2nd ed. (1948), 345. The Encyclopedia of Public International Law differentiates between a "*de facto* regime"

and dictatorial regimes to participate in the OAS, with one notable exception: the application of Article 27 ACHR.²⁵

Indeed, in the framework of Article 27 ACHR, regarding the legality of derogation measures adopted during states of emergency,²⁶ the IACHR does not hesitate to control in a way the legality of the government itself that adopts the derogation measures. These conclusions are sometimes followed by the activation of the other organs of the inter-American system.²⁷ For instance, the systematic control of the Somoza regime in

which is defined as: “entities that claim to be States or governments, which control more or less clearly defined territories without being recognized – at least by many States – as States or governments (e.g. Taiwan)” [J. Frowein, ‘De Facto Regime’, in R. Bernhardt (ed.), *Encyclopedia of Public International Law*, Volume I (1992), 966-968 (1987)] and “*de facto* government” which is used: “for the non-recognised government” (*id.*, 966). Despite this differentiation, the terms “*de facto* government”, “*de facto* regime” and “*de facto* authorities” may be used with the same meaning interchangeably in the present article. For a general overview of the *de facto* regimes in international law see J. A. Frowein, *Das de facto-Regime im Völkerrecht: eine Untersuchung zur Rechtsstellung "Nichtanerkannter Staaten" und Ähnlicher Gebilde*, (1968).

²⁵ Art. 27 ACHR, under the title “Suspension of Guarantees”, reads as follows: “1. In time of war, public danger, or other emergency that threatens the independence or security of a State Party, it may take measures derogating from its obligations under the present Convention to the extent and for the period of time strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law and do not involve discrimination on the ground of race, color, sex, language, religion, or social origin. 2. The foregoing provision does not authorize any suspension of the following articles: Art. 3 (Right to Juridical Personality), Art. 4 (Right to Life), Art. 5 (Right to Humane Treatment), Article 6 (Freedom from Slavery), Art. 9 (Freedom from Ex Post Facto Laws), Art. 12 (Freedom of Conscience and Religion), Art. 17 (Rights of the Family), Art. 18 (Right to a Name), Art. 19 (Rights of the Child), Art. 20 (Right to Nationality), and Art. 23 (Right to Participate in Government), or of the judicial guarantees essential for the protection of such rights. 3. Any State Party availing itself of the right of suspension shall immediately inform the other States Parties, through the Secretary General of the Organization of American States, of the provisions the application of which it has suspended, the reasons that gave rise to the suspension, and the date set for the termination of such suspension”.

²⁶ For the so-called “Derogation Clause” of the major human rights treaties (ICCPR, ECHR, ACHR) see J. Oraá, *Human rights in States of Emergency in International Law* (1992).

²⁷ According to the Resolution on the protection of human rights in connection with the suspension of constitutional guarantees or “state of siege”, adopted by the IACHR in 1968 (OEA/Ser.L/V/II.19, Doc. 32, 16 May 1968), when the States do not comply with the requirements of Art. 27 ACHR, the IACHR has the power to report to the

Nicaragua by the IACHR has contributed to its eventual overthrow, since it led to the adoption of a historical and pioneering resolution by the Meeting of Consultation. Indeed, the IACHR, after it had conducted onsite visits and prepared a special report on Nicaragua,²⁸ referred the situation to the Meeting of Consultation of Ministers of Foreign Affairs. The latter in a resolution, adopted on 23 June 1979, questioned, *inter alia*, the legality of a government that had perpetrated gross human rights violations and asked for its immediate replacement by a democratic regime that would respect human rights:

“The Seventeenth Meeting of Consultation of Ministers of Foreign Affairs, declares: That the solution of the serious problem, is exclusively within the jurisdiction of the people of Nicaragua; that [...] this solution should be arrived at on the basis of the following: 1. Immediate and definitive replacement of the Somoza regime. 2. Installation in Nicaraguan territory of a democratic government, the composition of which should include the principal representative groups, which oppose the Somoza regime and which reflects the free will of the people of Nicaragua. 3. Guarantee of the respect for human rights of all Nicaraguan, without exception. 4. The holding of free elections as soon as possible, that will lead to the establishment of a truly democratic government that guarantees peace, freedom, and justice”²⁹.

In this way, the IACHR gradually incorporated into the substantive conditions of the legality of derogation measures that they are adopted by the legitimate government, the one that is democratically elected.³⁰

Inter-American Conference or the Meeting of Consultation of Ministers of Foreign Affairs, see in general Oraá, *supra* note 26, 53.

²⁸ OEA/Ser.L/V/II.45, Doc. 18 rev. 1, 17 November 1978.

²⁹ 17th Meeting of Consultation of Ministers of Foreign Affairs, Res/2, Ser/FII.17, Doc. 49/79 Rev. 2, 23 June 1979. Excerpts are included in the IACHR Special Report on Nicaragua (1981), OEA/Ser.L/V/II.53, Doc. 25, 30 June 1981, ‘Introduction’.

³⁰ See also Res.OEA/Ser.L/V/II.19, Doc. 32, *supra* note 27, which stipulates that the declaration of a state of emergency should not entail the overthrow of the constitutional order. Furthermore, the Inter-American Court of Human Rights, in its advisory opinion *Habeas Corpus in emergency situations* (Arts 27 para. 2, 25 para. 1 and 7 para. 6 ACHR) has stated that: “the suspension of guarantees cannot be disassociated from the ‘effective exercise of representative democracy’ referred to in Article 3 of the OAS Charter”, 30 January 1987, Serie A, No 8, para. 20. The same

IV. The Changes Brought About with the End of the Cold War: Resolution 1080 and the Washington Protocol

After the end of the Cold War, the American states decided to alter their strict stance regarding the principle of non-intervention.³¹ At the same time, the decay and eventual dissolution of the Union of Soviet Socialist Republics eased United States interventionism. The OAS was relieved of strategic concerns and was free to emphasize on its mission to promote democracy. The American states began to develop a system of mediation and facilitated dialogue among domestic political actors, a move that was described as “intervention without intervening”³².

After the gradual collapse of the military regimes in Latin America, the concept of democracy emerges as a *conditio sine qua non* for the achievement of regional security and stability.³³ The OAS member states search for ways to bolster democracy and establish it as a prerequisite and condition of participation in the activities of the organization. In 1985, “as enthusiasm for democracy spread through the region”³⁴, the American states amended the OAS Charter so as to include in its purposes the promotion and establishment of representative democracy. Thus, the Cartagena Protocol added Article 2b to the OAS Charter: “The OAS in order to put into practice the principles on which it is founded and to fulfill its regional obligations under the Charter of the UN, proclaims the following essential purposes: b) to promote and consolidate representative democracy, with due respect for

approach is followed by the IACHR in the case of Honduras. In its preliminary observations after its visit in the country it concluded that: “for a suspension of guarantees to be legitimate, it must meet a series of requirements established in the Convention. The first of these requirements is that the suspension of guarantees be adopted by a government that exercises public power legitimately, within the context of a democratic society”, IACHR, Preliminary observations on the visit in Honduras, 21 August 2009, available at <http://www.cidh.org/comunicados/English/2009/60-09eng.Preliminary.Observations.htm> (last visited 25 August 2011).

³¹ D. E. Acevedo & C. Grossman, ‘The OAS and the Protection of Democracy’, in T. Farer (ed.), *Beyond Sovereignty: Collectively Defending Democracy in the Americas* (1996), 132, 137.

³² A. Cooper & T. Legler, *Intervention without Intervening? The OAS Defense and Promotion of Democracy in the Americas* (2006). See, also, T. Farer (ed.), *supra* note 31; T. Legler *et al.* (eds), *Promoting Democracy in the Americas* (2007).

³³ See C. Shaw, ‘Conflict Management in Latin America’, in P. Diehl & J. Lepgold (eds), *Regional Conflict Management* (2003), 123.

³⁴ The expression belongs to D. Hawkins & C. Shaw, ‘The OAS and Legalizing Norms of Democracy’, in T. Legler *et al.*, *supra* note 32, 21, 21.

the principle of non-intervention”³⁵. But still the Protocol, apart from its explicit reference to the principle of non-intervention, did not specify the type of action to be taken in order to achieve the described purposes. This shortcoming was fully demonstrated during the 1989 crisis in Panama.³⁶

Meanwhile, the Rio Group, which was created in 1986 and contains the majority of Latin American countries without US participation,³⁷ had already established democracy as a criterion of participation. In two cases (Panama-1989 and Peru-1992) suspension was adopted as sanction for the interruption of democratic order³⁸. The Rio Group essentially compressed the whole philosophy that penetrates all the subsequent efforts to defend democracy in the region, from Resolution 1080 to the Inter-American Democratic Charter: rejection of the use of military force and activation of all possible diplomatic channels to restore democracy – the peaceful

³⁵ Protocol of Amendment to the Charter of the Organization of American States “Protocol of Cartagena de Indias”, 14th Special Session of the OAS General Assembly, 5 December 1985, OAS Treaty Series No 66.

³⁶ See Cooper & Legler, *supra* note 32, 25.

³⁷ The Rio Group is an international organization created on 18 December 1986 by means of the Declaration of Rio de Janeiro. During the Cold War, it was perceived as an alternative body to the OAS, since the latter was dominated by the United States. The Rio Group does not have a secretariat or permanent body, and instead relies on yearly summits of heads of States. Its Member States are Argentina, Belize, Bolivia, Brazil, Chile, Colombia, Costa Rica, Cuba, Dominican Republic, Ecuador, El Salvador, Guatemala, Guyana, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Uruguay and Venezuela. The major objectives of the organization, as were described in the Declaration of Rio de Janeiro, include: to expand and systematize political cooperation among the Member States; to examine international issues which may be of interest and coordinate common positions on these issues; to promote more efficient operation and coordination of Latin American cooperation and integration organizations; to present appropriate solutions to the problems and conflicts affecting the region; to provide momentum, through dialogue and cooperation, to the initiatives and actions undertaken to improve inter-American relations; and to explore jointly new fields of cooperation which enhance economic, social, scientific and technological development, see <http://www.iccnw.org/?mod=riogroup> (last visited 25 August 2011). The Community of Latin American and Caribbean States, a regional bloc created on 23 February 2010, is seen as the successor of the Rio Group.

³⁸ See A. Frohmann, ‘Regional Initiatives for Peace and Democracy: the Collective Diplomacy of the Rio Group’, in C. Kaysen *et al.* (eds), *Collective Responses to Regional Problems: the Case of Latin America and the Caribbean* (1994), 129-141. See also similar activities by the Andean Group, MERCOSUR and CARICOM in Cooper & Legler, *supra* note 32, 31-32.

settlement of inter-state disputes has been, after all, a *modus vivendi* and *operandi* deeply rooted in the political history of Latin American states.

In the 1990s the OAS entered a renewal phase. One of the basic items that were incorporated in the inter-american agenda was the defence and promotion of democracy. In 1991, with the “Santiago Commitment to Democracy and the Renewal of the Inter-American System”, the member states declared that democracy was an indispensable condition for the stability, peace and development of the region³⁹. It was soon followed by Resolution 1080 of the OAS General Assembly on “Representative Democracy”, whereby the member states of the OAS agreed to intervene collectively, with diplomatic means, in the domestic affairs of a member state in order to protect the democratic order.⁴⁰

Hence, the governments become for the first time accountable towards the member states of the Organization for the means and methods they employ in order to rise to power. Res. 1080 requests the OAS Secretary General to convene immediately:

“a meeting of the Permanent Council in the event of 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, in order, within the framework of the [OAS] Charter, to examine the situation, decide on and convene and ad hoc meeting of the Ministers of Foreign Affairs, or a special session of the General Assembly, all of which must take place within a ten-day period”.

The purpose of the meeting of the foreign ministers or of the special session of the General Assembly would be to look into the events collectively and adopt any decisions deemed appropriate in accordance with the OAS Charter and international law.

The Res. 1080 mechanism was invoked in four cases:⁴¹ Haiti (1991-96)⁴², Peru (1992)⁴³, Guatemala (1993)⁴⁴ and Paraguay (1996)⁴⁵. However, it

³⁹ OAS GAOR, 21st Reg. Sess., OEA/Ser.P/AG, Doc. 2734/91 (4 June 1991).

⁴⁰ AG/RES.1080 (XXI-O/91), 5 June 1991, in Proceedings of the 21st Regular Session, OEA/Ser.P/XXI.O.2, Volume I, 20 August 1991.

⁴¹ See in general for the implementation of this resolution H. Caminos, ‘The Role of the OAS in the Promotion and Protection of Democratic Governance’, 273 *Recueil des Cours de l’Académie de Droit International* (1998), 103, 141-176.

remained largely a mechanism of consultation. In those cases the initiatives included the dispatch of fact-finding missions and other diplomatic delegations, but the OAS General Assembly never proceeded to the suspension of a member state.

In 1992 the threat of sanction, in the form of suspension of membership, is for the first time put forward. According to the Protocol of Washington, which amended the OAS Charter (Art. 9):

“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”⁴⁶.

⁴² On 30 September 1991, the very day on which the coup d'état had taken place in Haiti, the Permanent Council, in the exercise of the powers conferred on it by Res. 1080, convened an ad hoc Meeting of Ministers of Foreign Affairs to assess the seriousness of the events that had occurred and had caused the sudden and violent interruption of the democratic process in that country, see references in AG/RES. 1373 (XXVI-O/96), 6 June 1996. The foreign ministers decided to adopt any appropriate measure in order to restore the constitutional order, including the imposition of an economic embargo, a process that eventually led to the involvement of the UN for the restoration of democracy. Moreover, the OAS Secretary General mediated for the restitution of the elected President Jean-Bertrand Aristide, Fitzpatrick, *supra* note 23, 189.

⁴³ On 4 April 1992 the Peruvian President, Alberto Fujimori, dissolved Congress, shut down the courts, suspended the Constitution and vested himself with emergency powers. OAS Permanent Council passed Resolution CP/RES. 579 (897/92), declaring thereby that Fujimori's actions constituted an interruption of the democratic order and invoking Res. 1080 to call an emergency meeting of foreign ministers. Although the response was timely and crucial it, failed to restore the democratic *status quo ante*, a failure that was demonstrated during the 1990s, marred by manipulated elections and gross human rights violations, until the final exodus of Fujimori in 2000.

⁴⁴ With the adoption of Resolution 605 (1993), the Permanent Council condemned the attempted “self-coup”, leading to the restoration of constitutional government.

⁴⁵ See the references in A. Valenzuela, *The Collective Defense of Democracy. Lessons from the Paraguayan Crisis of 1996*, Report to the Carnegie Commission on Preventing deadly conflict, December 1999. Also, A. Valenzuela, ‘Paraguay: the Coup that didn't Happen’, 8 *Journal of Democracy* (1997) 1, 43, 43-55.

⁴⁶ Protocol of Amendments to the Charter of the Organization of American States “Protocol of Washington”, approved on December 14, 1992, at the Sixteenth Special Session of the General Assembly (A-56), 1-E Rev. OEA Documentos Oficiales OEA/Ser.A/2 Add. 3 (SEPF).

The power to suspend was to be exercised only when such diplomatic initiatives undertaken by the OAS for the purpose of promoting the restoration of representative democracy in the affected member state have been unsuccessful and the decision to suspend was to be adopted at a special session of the General Assembly by an affirmative vote of two-thirds of the member states. The Protocol of Washington entered into force in 1997, but Article 9 has never been invoked, whilst the instrument has not yet been ratified by all member states.⁴⁷

V. On the Way to the Adoption of the Inter-American Democratic Charter

Even though this approach to defending democracy was unprecedented at the international level, it remained limited in many respects. Thus, Res. 1080 limited explicitly the OAS action only in cases of “sudden or irregular interruption of the democratic political institutional process”, leaving out of its scope of application eventual cases of slow institutional erosion or minor offences to the democratic principles and institutions that did not necessitate the activation of the Organization’s mechanisms. On the other hand, the Washington Protocol was even more limited, since it called for action only in case the democratic order was overthrown by violent means. Therefore, if for instance the president of a state invited the military to participate in the government, then this case would not trigger the mobilization of the Washington Protocol mechanism. Moreover, this instrument was not ratified by all member states.⁴⁸

⁴⁷ See the status of signatures and ratifications in http://www.oas.org/dil/treaties_A-56_Protocol_of_Washington_sign.htm (last visited 25 August 2011). The doubts about its usefulness in handling this kind of crises are clearly expressed by Mexico. In its declaration at the time of the adoption it expressed its opposition to the amendment, stating that, notwithstanding the fact that it “has reacted swiftly and firmly to disruptions of the constitutional order on numerous occasions in the past”, nonetheless it remained: “convinced that democracy is a process which comes from the sovereign will of the people, and cannot be imposed from outside”, while “it insists that it is unacceptable to give to regional organizations supra-national powers and instruments for intervening in the internal affairs of the states”. Finally, it opposed strongly to the punitive character of the amendment and maintained that “the preservation and strengthening of democracy in the region cannot be enhanced through isolation, suspension or exclusion”, see http://www.oas.org/dil/treaties_A-56_Protocol_of_Washington_sign.htm#Mexico (last visited 25 August 2011).

⁴⁸ States parties include Antigua and Barbuda, Argentina, Bahamas, Barbados, Belize, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador,

In recent years, the Latin American region in particular is witnessing the emergence of new ways of disrupting the democratic order that are more sophisticated than the traditional military coups of the former decades. For instance, they could come from the democratically elected government, the so-called *autogolpes*, when the elected president dissolves the legislature, suspends the national constitution and governs by means of decrees, or when the executive reorganizes the judiciary under the pretext of “purification”, but in reality in order to protect the executive and promote impunity for crimes that may have been committed. The system that had been developed during the 1990s, proved to be insufficient for these situations.

As with Panama in 1989, which revealed the dysfunction of the Cartagena Protocol, the Inter-American Democratic Charter was precipitated by the failure of Res. 1080 in the Peru crisis (2000), when the Peruvian president, Alberto Fujimori, attempted to win a third term of office by means of fraudulent elections.⁴⁹ At the same time, the political crisis in Peru has proved a unique opportunity to develop decisively the insufficient consultation mechanism of Res. 1080, since it was during this crisis that the insufficiency of the mechanism was clearly demonstrated.

The initial call for a democratic charter was made on 11 December 2000 by Javier Pérez de Cuéllar, former UN Secretary General and by that time Foreign Minister of Peru in the transitional government after the Fujimori expulsion, during a speech in the Peruvian Congress.⁵⁰ His proposal was repeated during the 3rd Summit of the Americas that took place in Quebec City, Canada, from 20-22 April 2001.⁵¹ The Declaration of Quebec, adopted by the Heads of States and Governments of 34 nations, contained a democracy clause which stated that: “any unconstitutional alteration or interruption of a state’s democratic order constitutes an

El Salvador, Guatemala, Guyana, Honduras, Nicaragua, Panama, Paraguay, Peru, St Vincent and Grenadines, United States, Uruguay, Venezuela, see http://www.oas.org/dil/treaties_A-56_Protocol_of_Washington_sign.htm (last visited 25 August 2011).

⁴⁹ For the discrepancies between the OAS Member States as to the applicability of Res. 1080 in this situation, see Cooper & Legler, *supra* note 32, 65.

⁵⁰ Cooper & Legler, *supra* note 32, 87. See also the resolution of the OAS General Assembly “Vote of thanks to the government of the Republic of Peru”. GA-Res. 2 (XXVIII-E/01), 11 September 2001.

⁵¹ The Summit of the Americas is a process that was initiated after the end of the Cold War. The first one was held in Miami (1994) and the second in Santiago de Chile (1998).

insurmountable obstacle to a state's further participation in the Summit of the Americas process"⁵². The Declaration also instructed the foreign ministers to adopt an Inter-American Democratic Charter at the next regular session of the OAS General Assembly, so as to reinforce OAS instruments for the active defence of representative democracy.⁵³

Indeed, the OAS General Assembly, in its 31st session held in San José de Costa Rica from 3-5 June 2001, recommended, by Resolution 1838,⁵⁴ that the Permanent Council schedule a special session of the OAS General Assembly with the purpose to adopt the Democratic Charter. The Permanent Council took up the torch, and through Resolution 793,⁵⁵ scheduled the 28th special session of the General Assembly to begin on 10 September 2001 in Lima, Peru. The Inter-American Democratic Charter was adopted on 11 September 2001,⁵⁶ coinciding tragically with the terrorist attacks that same day in the United States. Thenceforth, democracy in the Americas is no longer an act of internal or domestic jurisdiction or exclusive to the state.⁵⁷

⁵² See the text of the Declaration available at http://www.summit-americas.org/iii_summit/iii_summit_dec_en.pdf (last visited 25 August 2011).

⁵³ For a description of the 3rd Summit and the approach of the various delegations to the prospect of a democratic charter see E. Lagos & T. Rudy, 'The Third Summit of the Americas and the 31st Session of the OAS General Assembly', 96 *American Journal of International Law* (2002) 2, 173.

⁵⁴ AG/RES.1838 (XXXI-O/01) in Proceedings of the OAS General Assembly's 31st Regular Session, Volume I.

⁵⁵ OEA/Ser.G, CP/RES.793 (1283/01), 27 June 2001.

⁵⁶ AG/RES.1 (XXVIII-E/01).

⁵⁷ The IADC was the "peak of multilateralism", compared by some commentators to campaigns such as the ban of landmines, the adoption of the International Criminal Court Statute or the cluster munitions ban, see Cooper & Legler, *supra* note 32, 100.

D. The Inter-American Democratic Charter: Legal Nature and Content

I. The Legal Position of the Inter-American Democratic Charter in the OAS System

A basic question that arises, before proceeding to any further examination of the IADC, is its legal nature and validity.⁵⁸ The IADC is a soft law instrument, approved unanimously by the Ministers and Ambassadors of the OAS member states during a special session of the OAS General Assembly. The IADC does not amend the OAS Charter⁵⁹ nor does it have to be ratified in order to be implemented. Finally, the states are not obliged to amend their respective national legislations in order to incorporate the provisions of the IADC.

Despite its soft law nature, it is generally accepted that the IADC is legally binding, since it is considered as an authoritative interpretation of the OAS Charter, according to Art. 31 para. 3a of the Vienna Convention on the Law of Treaties.⁶⁰ Indeed, prior to the approval of the instrument, the delegates of the OAS member states sought advice from the Inter-American Juridical Committee, an OAS advisory body entrusted, *inter alia*, with the promotion of the progressive development and the codification of international law. According to its opinion on the legal status of the IADC,

⁵⁸ See for an in depth analysis, T. Rudy, 'A Quick Look at the Inter-American Democratic Charter of the OAS: what is it and is it 'Legal'?', 33 *Syracuse Journal of International Law and Commerce* (2005) 1, 237, 237-248.

⁵⁹ However, there is a question whether it amends in particular Art. 9 OAS Charter, introduced by the Washington Protocol.

⁶⁰ The IADC is considered a "subsequent agreement" according to the wording of Art. 31 para. 3a of the Vienna Convention: "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". For the position of the Inter-American Court of Human Rights as to the legal effect of instruments that constitute authoritative interpretations of the OAS Charter, see *Interpretación de la Declaración Americana de los Derechos y Deberes del Hombre en el marco del artículo 64 de la Convención Americana sobre derechos humanos*, Advisory Opinion OC-10/89, 14 July 1989, paras 43, 45. See, also, AG/RES.1957 (XXXIII-O/03), whereby Member States are encouraged: "to promote and publicize the Democratic Charter as well as to implement it". However, according to certain commentators the binding character of the IADC is not certain, d'Aspremont, *supra* note 12, 129.

actually on the legal nature of the resolutions of the OAS General Assembly,⁶¹ since the IADC was approved by such a resolution:

“[...] the provisions of resolutions of this nature generally have as their purpose the interpretation of treaty provisions, the provision of evidence of the existence of customary norms [...]. The provisions of some resolutions of an organ of an international organization may have an obligatory effect”⁶².

In the same document, the Inter-American Juridical Committee stresses that:

“it would be unnecessary to amend the OAS Charter, provided that the text of the Democratic Charter explicitly states that it is setting forth an interpretation of the OAS Charter and assuming of course that the IADC is adopted by consensus”⁶³.

To that end a paragraph was inserted in the preamble of the IADC in order to clarify that the resolution adopting the document was the unanimous interpretation of Article 9 of the OAS Charter: “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”. It is true, however, that the legal impediments persist, in case the OAS decides to suspend a government of a state that has not ratified the Washington Protocol.⁶⁴

⁶¹ The resolution approving the IADC can be described as an “operational act” of the OAS General Assembly since it is “done in the course of the direct and substantive operations of the organization”, see C. F. Amerasinghe, *Principles of the Institutional Law of International Organizations*, 2nd ed. (2005), 168. The legal effects of such acts depend on the constitution of the organization, see *id.* Since the OAS General Assembly is described as the “supreme organ of the OAS”, competent to decide the general action of the organization (Art. 54 OAS Charter), it goes without saying that its acts are binding upon Member States. Of course the wording of each resolution adopted in each different case has to be taken also into account.

⁶² CJI Res. 32, LIX O/01, 24 August 2001, para. 5 in the Annual Report of the Inter-American Juridical Committee to the General Assembly, OEA/Ser.Q/VI.32, Doc. 79 (2001).

⁶³ *Id.* para. 40.

⁶⁴ Rudy, *supra* note 58, 242.

Furthermore, the IADC, although it constitutes a secondary source of law and this type of resolution does not feature among the sources of law listed under Article 38 of the International Court of Justice Statute, could be crystallized in customary law provided that both elements of the creation of customary rules are fulfilled namely general practice and *opinio juris*, i.e. conviction that such practice reflects or amounts to law (*opinio juris*) or is required by social, economic or political exigencies (*opinio necessitatis*).⁶⁵ To date, no state in the hemisphere has questioned the applicability and application of the IADC in specific circumstances. To the contrary, they have accepted as duly and appropriate the multilateral intervention of the organization. Should this *opinio juris* be followed by a consistent practice, then in a few years this multilateral mechanism of defending democracy could become a local customary rule in the Americas.

What is the content of the instrument? The IADC contains both soft and hard provisions. In a large part it refers to notions such as human rights, development etc., trying to describe and define the meaning of democracy. The fact that the success of the IADC depends largely on the political will of governments may allow some to conclude that it is more a political rather than legal document.⁶⁶ However, it does not lack legal provisions. In fact, the six articles contained in Chapter IV of the IADC, which outline the mechanisms to defend democracy, is the legal section of the document.⁶⁷

With the IADC, matters that were exclusively of domestic jurisdiction acquire international or at least regional interest. In other words, it is an instrument that purports the establishment of a regional system of defence of democracy, since it requires from each member state to respect its national

⁶⁵ See in general about the formation of the customary rule A. Cassese, *International law*, 2nd ed. (2005), 163-165. The ICJ in the *Nicaragua* Case, having to decide on the legal validity of the UN Declaration on principles of international law concerning friendly relations and cooperation among States, adopted by a UN General Assembly resolution has held that: “the effect of consent to the text of such resolutions cannot be understood as merely that of a ‘reiteration or elucidation’ of the treaty commitment undertaken in the Charter. To the contrary, it may be understood as an acceptance of the validity of the rule or set of rules declared by the resolution by themselves”, *Nicaragua* Case, *supra* note 2, para. 188. The same stands for OAS General Assembly resolutions at the regional level. Indeed, the Court referred to a resolution of the OAS General Assembly to prove the *opinio juris* as to the customary rule on the prohibition of the use of force, *id.* para. 192.

⁶⁶ Arts 17 and 18 of the IADC are activated only following an invitation of the government.

⁶⁷ Rudy, *supra* note 58, 239.

constitution. Thus, in this framework, the IADC is a challenge for international law, since it integrates issues of national constitutional law (e.g. interpretation of constitutional provisions), that are matters of clearly domestic jurisdiction, into the framework of the international obligations of states. Is there truly an actionable right to democratic governance in international law or is it just a matter of internal jurisdiction? Is it a matter of law or of politics? The important feature of the IADC is that it establishes for the first time a system of automatic activation, as soon as the democratic stability in a member state is threatened. The member states of the OAS are allowed to intervene multilaterally in order to preserve and restore democracy in a state having at their disposal as the strongest sanction the suspension of a government from participation in the OAS.⁶⁸ In this way, through the establishment of an international mechanism, the growth of the right to democratic governance is further favored.⁶⁹

In other words, the aim and aspirations of the authors of the IADC was to reconcile two contradictory notions: on the one hand the principle of non-intervention in matters of the domestic jurisdiction of states, in an area, let us not forget, that endured a lot of suffering due to the interventionism of the USA, and on the other hand the principle of “collective intervention” with diplomatic means, once the democratic process is disrupted. The extent to which these two notions can be reconciled will be decisive for the eventual success or failure of this system of collective defence of democracy.

II. The Inter-American Democratic Charter’s Provisions

1. The Preventive Mechanism

The IADC establishes at the international level and as a collective right, the internal right to democratic governance. Article 1 stipulates:

“The peoples of the Americas have a right to democracy and their governments have an obligation to promote and defend it”.

The IADC contains also various provisions on the relationship between democracy and human rights, democracy and economic and social

⁶⁸ Rudy, *supra* note 58, 240.

⁶⁹ See Franck, *supra* note 8, 47.

development, and election observation missions, all of which actually define the term democracy. But the part that we will focus on is Chapter IV (Arts 17-22), under the title: “Strengthening and Preservation of Democratic Institutions”. This chapter is the operative part of the IADC, giving impetus to the democracy clause that was adopted by the 3rd Summit of the Americas.

Articles 17 and 18 establish, in the first place, a preventive mechanism of guaranteeing the democratic institutions, the main characteristic of which is the consent of the state for any kind of action that the OAS organs will undertake. The use and the eventual effectiveness of the preventive mechanism are somewhat questionable, since it requires the consent of the respective state, which is not very often the case.⁷⁰ It is not impossible, though, as we will see later on in the case of Honduras.

According to 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”.

Hence, in order to bring this article into operation, the government has to accept, even implicitly, that its democratic institutions are somehow in peril. This formal acceptance does not occur very often. Venezuela is a characteristic example thereof. In December 2002, when the opposition called for a general strike for two weeks, just eight months after the failed political-military coup, the government of President Hugo Chávez requested the convocation of a special session of the Permanent Council but it refrained from referring to Chapter IV of the IADC or particularly to Article 17. Instead, it presented a draft resolution stating that the OAS expressed its full support for the constitutionally elected government of Venezuela. According to the state’s representative to the Permanent Council, the invocation of Article 17 would actually mean that the government is incompetent or incapable of managing the crisis.

⁷⁰ See also the doubts of E. Lagos & T. Rudy, ‘In Defense of Democracy’, 35 *Inter-American Law Review* (2004) 2, 283, 291-292.

According to 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”.

Hence, even though the consent of the state is required for the initial OAS reaction, the subsequent initiatives are taken by the Secretary General and the Permanent Council.

2. The Sanctions

The rest of Chapter IV (Arts 19-22) refers to the sanctions that shall be adopted if the state does not comply with the democratic principles. This part is actually a combination of Res. 1080 and the Washington Protocol, containing both the consultation and the punitive mechanism.

Article 19 reiterates the democratic clause as it was adopted in the 3rd Summit of the Americas. According to it:

“the unconstitutional interruption of the democratic order or the 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”.

Article 20 resembles Res. 1080, since it establishes a consultation mechanism before the actual coup: “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”⁷¹. In this phase, the action is limited to diplomatic initiatives, for instance good offices by the Permanent Council or the General Assembly.

Finally, according to Art. 21 IADC, the Special Session of the General Assembly shall take the decision to suspend said member state from the exercise of its right to participate in the OAS if there has been an unconstitutional interruption of the democratic order.

It is obvious that in the phase of the sanctions, the consent of the state is not needed. But, up until the time of this writing, the punitive mechanism has not been resorted to without the prior use of the preventive mechanism. In the case of Venezuela, the Permanent Council invoked Article 20 IADC in April 2002, when the coup against President Chávez had already begun to falling apart.⁷² Accordingly, it convened a special session of the General Assembly (the 29th), but it took place after the failure of the coup and, consequently, it did not adopt sanctions.⁷³

⁷¹ According to some commentators, whether the facts will correspond to this criterion will be a matter of political rather than legal interpretation, Lagos & Rudy, *supra* note 70, 296. See, however, the case of Honduras *infra*.

⁷² OEA/Ser.G CP/RES.811 (1315/02), 13 April 2002. It’s worth noting that the request for the activation of Art. 20 IADC came from the Rio Group. The OAS Permanent Council initiated a consultation procedure through a tripartite mission – comprised of the OAS, the Carter Center and the United Nations Development Programme – in order to facilitate dialogue between the government of Hugo Chávez and the “Coordinadora Democrática”, an opposition umbrella organization, but its next resolution [OEA/Ser.G CP/RES.821 (1329/02), 14 August 2002] does not refer at all to the IADC. This is not strange, if we bear in mind that by the time the diplomatic mission reached Venezuela on 15 April, Chavez had regained power, see T. Legler *et al.*, ‘The international and transnational dimensions of democracy in the Americas’, in T. Legler (ed.), *Promoting Democracy in the Americas* (2007), 2. Extensive references to the IADC appear again in Res. 833 “Support for the democratic institutional structure in Venezuela and the facilitation efforts of the OAS Secretary General”, [OEA/Ser.G CP/RES.833 (1349/02) corr.1, 16 December 2002].

⁷³ The OAS General Assembly [AG/RES.1 (XXIX-E/02), 18 April 2002] expressed: “satisfaction at the restoration of the constitutional order and the democratically elected government of President Hugo Chávez”, reaffirmed the: “determination of the Member States to continue applying the mechanisms provided for in the IADC for the preservation and defense of representative democracy, rejecting the use of violence to replace any democratic government”, urged: “all sectors of the society to devote their most determined efforts to bringing about the full exercise of democracy [...] abiding fully by the Constitution and taking into account the essential elements of representative democracy set forth in Arts 3 and 4 IADC” and instructed the Permanent Council to present a comprehensive report on the situation in Venezuela to

When the IADC was adopted, it purported to have a deterrent effect against possible future disruptions of the democratic order. Hence, initially, the states were unwilling to invoke the special mechanisms of the IADC for the defence of democracy and they limited their reactions only to verbal references.⁷⁴ The OAS has cited the IADC in various occasions: Haiti (2001-2004),⁷⁵ Venezuela (2002), Ecuador (2005),⁷⁶ Belize (2005),⁷⁷ Bolivia (2005),⁷⁸ Nicaragua (2005)⁷⁹. In these cases the means that were used were par excellence diplomatic, even though in the case of Nicaragua the possibility of sanctions was left open.⁸⁰ The first case of suspension of a

the next regular session of the General Assembly. See also Res. 821 and 833 of the Permanent Council.

⁷⁴ See also the references of the Inter-American Court of Human Rights in cases *Herrera-Ulloa v. Costa Rica*, Serie C-107, 2 July 2004, para. 115 and *Yatama v. Nicaragua*, Serie C-127, paras 193, 207, 215 and concurring opinion of judge Garcia-Sayán, paras 15-17.

⁷⁵ See the references in OEA/Ser.G CP/RES.806 (1303/02) corr. 1, 15 January 2002. A more explicit reference was included in Res. 822 [OEA/Ser.G CP/RES.822 (1331/02), 4 September 2002].

⁷⁶ The OAS Permanent Council decided, in accordance with Art. 18 IADC and in keeping with the invitation issued by the delegation of Ecuador at its meeting, to send a mission, comprising the Chair of the Permanent Council, the acting Secretary-General and representatives of sub-regional groups, to work with officials of the country and with all sectors of Ecuadorian society in their effort to strengthen democracy [OEA/Ser. G CP/RES.880 (1478/05), 22 April 2005]. For a follow-up see "Support to the Republic of Ecuador", OEA/Ser.G CP/RES.883 (1484/05), 20 May 2005.

⁷⁷ "Support for the constitutional government of Belize", OEA/Ser.G CP/RES.881 (1479/05), 27 April 2005.

⁷⁸ "Support for democracy in Bolivia", OEA/Ser.G CP/RES.885 (1499/05), 26 July 2005; "Support for the process of dialogue, peace and for democratic institutions in Bolivia", OEA/Ser.G CP/RES.935 (1648/08), 3 May 2008.

⁷⁹ Following a General Assembly resolution [Res. AG/DEC.43 (XXXV-O/05), OEA/Ser.P/AG, Doc.4496/05, 13 June 2005] a Special Diplomatic Mission was established led by the Secretary General José Miguel Insulza to promote dialogue between the rival parties. Parallely, the "Friends of the Democratic Charter", an alliance comprised by former political figures, undertook several mediation activities. All these activities helped the political compromise that was reached by October 2005, Legler *et al.*, *supra* note 72, 2-3.

⁸⁰ See OEA/Ser.G CP/RES.892 (1507/05), 9 September 2005: "[...] to continue its direct attention to the unfolding of events in Nicaragua and should the urgency of the situation so warrant, to convene without delay a special session of the General Assembly".

member state from the OAS activities, by virtue of the IADC, was the case of Honduras in the summer of 2009.

E. The Inter-American Democratic Charter in Action: the Constitutional Crisis in Honduras

I. The Facts

The case of Honduras is *sui generis*.⁸¹ It is not about the classic military coup d'état, as we know it from recent Latin American history, i.e. overthrow of a democratic government by violent means and takeover by the military, actions that may even lead to the jeopardy of regional stability. To the contrary, the coup d'état had a semblance of legitimacy, a kind of "constitutional clothing"⁸². Before proceeding to the legal issues that were raised, an exposition of the facts is necessary.

At dawn of 28 June 2009, the Honduran President, José Manuel Zelaya Rosales, was arrested on charges of treason, abuse of authority and usurpation of functions and was deported to Costa Rica. The alleged *ratio* behind his arrest was that he attempted to conduct a referendum to amend the national constitution, so that he could claim a second term in the presidency of the state. The evening of the same day of the President's deportation, the Congress convened and, based on a false letter of resignation for Zelaya, it substituted him with the President of the Congress, Rigoberto Micheletti. His removal was based afterwards on Art. 239 of the Honduran Constitution, which states firstly that a president cannot run for a second term and secondly that: "any official who proposes the reform of this provision, as well as those who support its alteration directly or indirectly, cease immediately in the performance of their respective positions and will be disqualified by ten years from the exercise of public office"⁸³. However, this provision does not explicitly authorize the Congress to proceed to the replacement of the President.

⁸¹ For an analysis of the crisis from a comparative perspective see D. Nölte, 'Verfassungsreformen und Verfassungskrise in Honduras in vergleichender Perspektive', 43 *Verfassung und Recht in Übersee* (2010) 1, 28.

⁸² The expression belongs to D. Cassel, 'Coup d'état in constitutional clothing?', 13 *ASIL Insights* (2009) 9, 1, 1.

⁸³ 'Constitution De La Republica de Honduras, 1982, Title V, Chapter VI, Article 239', available in Spanish at http://www.honduras.net/honduras_constitution2.html (last visited 25 August 2011).

The procedure that was followed subsequently was in conformity with the Constitution of the state: the military did not meddle in the exercise of power, the Congress did not dissolve, the judiciary continued to function normally, the independent authorities remained in their position and, most importantly, the state's Supreme Court welcomed unanimously Zelaya's removal as consistent with the Honduran Constitution.⁸⁴

Even though it was not the traditional coup d'état, there is no doubt that it was an irregular alteration of the democratic order, enough to activate the mechanisms of the IADC (the president of the state and the members of the government are arrested and deported with summary procedures, while the new authorities declare martial law).⁸⁵ The removal of the head of the state in such a way, without a prior legal procedure, without clear indications in the national constitution regarding who has the power to remove him, the deportation of himself and his government from the country, constitute violations of fundamental provisions of the national Constitution, almost in every part of the world as well as in Honduras.⁸⁶ To expel a president from his country, to prohibit his return and to substitute him under the pretext that he is absent was exactly the kind of constitutional irregularity for which the IADC was adopted. Whether Zelaya is guilty of treason or not, is a question that must be answered by the Supreme Court or by the competent judicial authority, following a procedure that will comply with all the guarantees of a fair trial, and not by the Congress.⁸⁷

At the same time, the repression exercised by the authorities was intense. The *de facto* government declared a state of emergency, mobilized the army to control the demonstrations, the police and military forces were accused of arbitrary and excessive use of force, thousands of civilians were trapped between the roadblocks that the army set up along the border with Nicaragua, the arbitrary arrests and detentions rose to hundreds, freedom of expression was limited, and there were complaints of ill-treatment of the

⁸⁴ See Corte Suprema de Justicia, 'Comunicado especial' (29 June 2009) available at <http://www.cidh.org/comunicados/English/2009/60-09eng.Preliminary.Observations.htm> (last visited 25 August 2011).

⁸⁵ The only element that is missing is the dissolution of the Parliament, see Sicilianos, *supra* note 8, 149.

⁸⁶ See in particular Art. 102 of the Honduran Constitution: "No Honduran can be expatriated or delivered by the authorities to a foreign state", *supra* note 83.

⁸⁷ According to Art. 242 of the Honduran Constitution the Congress has the power to replace the president only if his absence is absolute. But in the case of Zelaya his absence was involuntary.

detainees. All of which were confirmed almost in their entirety by the IACHR during its on site visit.⁸⁸

II. The International Reaction

Honduras' political crisis has provoked an unprecedented international mobilization. Foreign governments and international organizations, including the UN General Assembly⁸⁹ and the European Union⁹⁰, have condemned the disruption of the constitutional order and expressed their support for the ousted president. At the same time, the punitive mechanism of the IADC has been activated in its entirety.

Just two days before the coup, the OAS Permanent Council had received a request for assistance from the government of Zelaya, pursuant to Art. 17 IADC. The Permanent Council had accepted the request: "of the constitutional and democratic government of Honduras" and decided: "to provide support to preserve and strengthen the democratic institutions of the state"⁹¹. This fact may have facilitated the subsequent invocation of Art. 21 IADC, regarding the suspension of Honduras and the request of the immediate reinstatement of Zelaya. It also demonstrates that the intervention of the OAS member states did not come out of the blue and cannot be considered as an unacceptable intervention in the internal affairs of the state, since it was the legitimate government of the state that had actually requested this intervention.

Indeed, when the coup occurred, the OAS Permanent Council convened immediately, vehemently condemned the coup, demanded the immediate, safe and unconditional return of President Zelaya, declared that no government arising from this unconstitutional interruption would be recognised, instructed the OAS Secretary General, according to Art. 20 IADC, to carry out necessary consultations and convened a special session of the OAS General Assembly: "to take whatever decisions it considered

⁸⁸ See the Preliminary Observations on the IACHR visit to Honduras <http://www.cidh.org/comunicados/English/2009/60-09eng.Preliminary.Observations.htm> (last visited 25 August 2011), as well as the final report IACHR, 'Honduras: human rights and the coup d'état', OEA/Ser.L/V/II. Doc.55, 30 December 2009.

⁸⁹ GA Res. 63/301, 1 July 2009, 'Situation in Honduras: democracy breakdown'.

⁹⁰ Council of the European Union, PESC/09/84, 24 July 2009 "Declaration by the Presidency on behalf of the EU on the political situation in Honduras", available at <http://europa.eu/rapid/pressReleasesAction.do?reference=PESC/09/84&format=HTML&aged=1&language=EN&guiLanguage=en> (last visited 25 July 2011).

⁹¹ OEA/Ser.G CP/RES.952 (1699/09), 26 June 2009.

appropriate in accordance with the OAS Charter, international law and the provisions of the IADC⁹². No one could doubt about what would follow, unless the situation returned to normalcy.

The OAS General Assembly in its Special Session of 30 June 2009, reiterated substantially the condemnatory wording of the Permanent Council, characterized the coup as “an unconstitutional alteration of the democratic order”, set a time limit of 72 hours to the *de facto* government for the restoration of Zelaya,⁹³ and when the deadline had expired without reaction by the *de facto* authorities, it decided, at the close of the session (4 July 2009), to suspend Honduras from participation in the Organization. In the resolution,⁹⁴ the OAS General Assembly instructs the Secretary General to: “step up all diplomatic initiatives and to promote other initiatives for the restoration of democracy and the rule of law in the Republic of Honduras and the reinstatement of President José Manuel Zelaya Rosales so that he may fulfill the mandate for which he was democratically elected, and to report immediately to the Permanent Council”, encourages the member states and international organizations: “to review their relations with the Republic of Honduras during the period of the diplomatic initiatives for the restoration of democracy” and reaffirms that the *de facto* government: “must continue to fulfil its obligations as a member of the Organization, in particular with regard to human rights”. In this framework the Inter-American Commission on Human Rights is urged: “to continue to take all necessary measures to protect and defend human rights and fundamental freedoms in Honduras”.

The IACHR was indeed activated from the very first day of the crisis, by adopting precautionary measures, following multiple requests by NGOs and also on its own initiative based on information it had gathered.⁹⁵ At the

⁹² OEA/Ser.G CP/RES.953 (1700/09), 28 June 2009.

⁹³ OEA/Ser.P AG/RES.1 (XXXVII-E/09) rev. 1, 1 July 2009.

⁹⁴ OEA/Ser.P AG/RES. 2 (XXXVII-E/09) rev. 1.

⁹⁵ The first precautionary measures were ordered at the day of the coup and concerned the Minister of Foreign Affairs, Patricia Rodas, who was also arrested by the *de facto* authorities, as well as other officials of the government, leaders of indigenous groups and NGOs and relatives of the ousted president. As the days passed by and the crisis persisted, the content of the precautionary measures was gradually broadened (on 29 June 2009, 2, 10, 15, 24, 25 and 30 July 2009 and 7 August 2009) in order to include other individuals whose lives were at risk (prosecutors, members of the local administration, journalists, political leaders etc.). The *de facto* authorities responded only partially to the precautionary measures (3 July 2009) indicating that many of the victims had requested refuge to foreign embassies without disclosing names.

same time, it submitted to the de facto authorities, swiftly after the coup (on 30 June 2009), a formal request for an on site visit that was accepted on 13 July 2009. The visit took place from 17-21 August 2009 with the aim to gather information about human rights violations and to verify the observance of human rights by the de facto authorities. The IACHR met with representatives of the de facto government and members of the civil society and received complaints and testimonies on human rights violations from over 100 persons. In its preliminary observations, as well as in the final report,⁹⁶ the IACHR records a series of violations due to the abuse of emergency powers: the deployment of the army to control the demonstrations and to preserve public order (Decree No 011-2009), the arbitrary use of force during peaceful demonstrations in Tegucigalpa and other cities, the arbitrary detentions of thousands of individuals (according to estimations 3.500-4.000) by military and police authorities, the lack of judicial guarantees to challenge the legality of detentions, the violation of the fundamental rights of the detained (lack of official records, secret detentions etc.), the ill-treatment during detention, the attacks against the mass media and journalists, the disappearances, the lack of judicial protection etc. The IACHR continues up until today to monitor closely the situation.⁹⁷

III. A New Aspect: the – Withdrawn – Application before the International Court of Justice

On 21 September 2009, Zelaya returned, incognito, to Honduras and found refuge in the Brazilian embassy in Tegucigalpa. Once the news spread, the followers of President Zelaya crowded the area around the embassy and the Teachers Union of Honduras ordered an indefinite nationwide strike in show of support for the ousted president.

In the early hours of 22 September 2009, the army and police forces launched an operation against and around the Brazilian embassy, throwing

⁹⁶ IACHR, 'Honduras: human rights and the coup d'état', *supra* note 88.

⁹⁷ See the press releases No. 4/2010 (26 January 2010) "IACHR concerned about the ambiguity of the amnesty decree approved by the National Congress of Honduras"; 26/10 (8 March 2010) "IACHR deplores murders, kidnappings and attacks in Honduras"; 31/10 (16 March 2010) "IACHR deplores murder of journalist in Honduras". The Commission carried out a follow-up visit in the country from 16-18 May 2010, see the Preliminary Observations of the IACHR on its visit to Honduras, OEA/Ser.L/V/II, Doc. 68, 3 June 2010.

tear gas grenades, firing both rubber and live rounds, and beating demonstrators with batons.⁹⁸ The use of force provoked serious physical injuries to many individuals, while the army prohibited initially the access to the premises for medical personnel and delegates of the ICRC.⁹⁹ The operation was condemned by the OAS Permanent Council, which called on the *de facto* regime: “to put an immediate end to these actions, to respect the Vienna Convention on Diplomatic Relations and international instruments on human rights and to withdraw from the areas surrounding the embassy” and issued a strong appeal: “for continuation of the dialogue under the terms of the proposal of the San José Agreement, without any attempt to open topics other than those contained in said proposal”¹⁰⁰.

However, the *de facto* government did not follow the latter instruction. On 28 October 2009, the Ambassador of Honduras to the Netherlands filed at the International Court of Justice an “Application instituting proceedings by the Republic of Honduras against the Federative Republic of Brazil”. The application indicated that Zelaya and “an indeterminable number of Honduran citizens” were using the embassy’s premises to conduct political propaganda and that the Brazilian diplomatic staff allowed the group to use the facilities and other resources in order to evade justice in Honduras. Accordingly, the applicant requested the ICJ to declare that Brazil had breached its obligations under Art. 2 para. 7 of the UN Charter (principle of non-intervention) and those under the *Vienna Convention on Diplomatic Relations* and reserved the right to file a request for the indication of provisional measures should Brazil not immediately put an end to the disturbance caused.¹⁰¹

Ironically, by filing the application, the *de facto* government of Honduras “internationalised” what in fact it was claiming to be an issue of internal affairs. Thus, it is of no surprise that the application was

⁹⁸ See for an account of the events, IACHR, ‘Honduras: human rights and the coup d’état’, *supra* note 88, para. 101.

⁹⁹ See press release No 68/09, 25 September 2009 of the IACHR. The ICRC delegate entered only on 25 September 2009, see their press release No 09/191, 26 September 2009 available at <http://www.icrc.org/Web/por/sitepor0.nsf/html/honduras-news-260909> (last visited 25 August 2011).

¹⁰⁰ OEA/Ser. G CP/DEC.43 (1723/09), 21 October 2009.

¹⁰¹ ICJ Press Release No 2009/30, 29 October 2009. For a brief account of the procedural and substantial issues raised see D. Akande, ‘Dispute Concerning Honduran Government Crisis Heads to the International Court of Justice’, (30 October 2009) available at <http://www.ejiltalk.org/dispute-concerning-honduran-government-crisis-heads-to-the-international-court-of-justice/> (last visited 25 August 2011).

subsequently withdrawn,¹⁰² leaving certain questions unanswered: How should Brazil have reacted, since the implementation of the IADC was actually requested by President Zelaya, just before the coup, and the OAS General Assembly urged the members states to review their relations with the *de facto* regime until the legitimate president was reinstated to power? On the other hand, insofar as the multilateral mechanisms of the OAS had been activated, was Brazil authorized to react unilaterally in such a way? And, last but not least, what should prevail? The IADC – if we assume it reflects customary law (Art. 38 para. 1b ICJ Statute) because otherwise the IADC as soft law instrument is not applicable before the ICJ – or the principle of non-intervention?

IV. The Current Situation in the Country

Honduras has finally exited the crisis in May 2011 after a long process of political dialogue between all implicated actors and stakeholders. The dialogue has been initiated in the first place between the two parties – the ousted and the *de facto* president – thanks to the mediation of the OAS Secretary General. After the initial failure of the San José Agreement (22 July 2009),¹⁰³ a new round of talks began. The so-called “Guaymuras dialogue” was facilitated by the President of Costa Rica, Oscar Arias, and led to a mutual understanding, known as the Agreement of Tegucigalpa and San José (29 October 2009). Pursuant to the agreement, Zelaya could return to power to serve out the remaining months of his term, following an approval by the Supreme Court and the National Congress and on condition that he would not run for president in the elections of 29 November 2009. It also provided for the immediate institution of a national reconciliation and unity government and of a truth commission in the first half of 2010. The implementation of the agreement would be monitored by a Commission of Verification, composed of two members of the international community, and two members of the national community and would be coordinated by the OAS.

However, the national unity government was formed without participation from the camp of President Zelaya and the latter declared the

¹⁰² *Certain questions concerning diplomatic relations, Honduras v. Brazil*, ICJ Order of 12 May 2010. In the meantime, the Tegucigalpa/San José agreement has been signed, elections have taken place and Porfirio Lobo has been elected president, see *infra* IV.

¹⁰³ See the references in the report of the IACHR, ‘Honduras: human rights and the coup d’état’, *supra* note 88, paras 140-146.

agreement “dead” on 6 November 2009, refusing to recognize the anticipated elections of 29 November 2009. Moreover, the Supreme Court insisted on its refusal. On 25 November 2009, it decided that Zelaya could not be reinstated, since he had violated the Constitution.¹⁰⁴ And finally, on 2 December 2009, the National Congress voted against Zelaya’s reinstatement and supported the victory of Porfirio Lobo Sosa, who was elected President in the elections of 29 November, a procedure boycotted by Zelaya.

Even though Zelaya declared the Tegucigalpa/San José Agreement void, its provisions have been fully executed by the new government, by virtue of the Agreement for national reconciliation and strengthening of democracy in Honduras,¹⁰⁵ signed on 20 January 2010 between the President of the Dominican Republic, Leonel Fernández, and President-elect of Honduras Porfirio Lobo. According to the Agreement Zelaya was relocated from the Brazilian embassy to the Dominican Republic, while the Truth and Reconciliation Commission was formed on 5 May 2010. Moreover, the OAS General Assembly, at its 40th regular session (6-8 June 2010), decided to dispatch to the country a High-Level Commission composed of persons appointed by the Secretary-General to “analyze the evolution of the situation” and submit its recommendations no later than 30 July 2010.¹⁰⁶

The Commission presented its conclusions on 12 July 2010,¹⁰⁷ highlighting six points that would function as a basis for the OAS General Assembly to adopt the resolutions it deemed pertinent:

- a) end lawsuits against former President Zelaya
- b) provide him with protection, as former President of the country, once he returns home

¹⁰⁴ The Supreme Court insisted on the principles of internal self-determination and non-intervention, see IACHR, ‘Honduras: human rights and the coup d’état’, *supra* note 88, 34, fn. 145. It’s worth noting, however, that the IACHR has criticized the function of the judiciary during the crisis, indicating that it has been unable to control the emergency measures adopted by the executive, while the Supreme Court had from the very first moment supported the removal of President Zelaya. Furthermore, Honduran citizens and civil officers question the impartiality of the Supreme Court, see in particular the complaint of judges that were dismissed from their posts by the Supreme Court, after having criticized the coup, IACHR, press release No 54/10.

¹⁰⁵ OEA/Ser.G CP/INF.5967/10, 22 January 2010.

¹⁰⁶ AG/RES.2531 (XL-O/10), 8 June 2010.

¹⁰⁷ See <http://hondurashumanrights.wordpress.com/2010/07/12/report-of-the-commission-on-high-level-on-the-situation-in-honduras/> (last visited 25 August 2011).

- c) that former President Zelaya joins the Board of PARLACEN,¹⁰⁸ as Constitutional President of the Republic of Honduras prior to President Porfirio Lobo
- d) concrete actions to comply with recommendations of the IACHR (clarify the murder of several people, put an end to threats and harassment, put an end to impunity for human rights violations etc.)
- e) full support and collaboration of all sectors of Honduran society with the Commission of Truth and Reconciliation
- f) convene a national dialogue among all political sectors.

The abovementioned recommendations, along with some other provisions such as the registration of the National Front for Popular Resistance as a political party and its participation in the electoral political process, the amendment of Art. 5 of the Honduran Constitution which regulated the call for a referendum, the creation of the Ministry of Justice and Human Rights following the recommendations made to Honduras during the Universal Periodic Review process of the UN Human Rights Council etc. have been incorporated in the Agreement for the National Reconciliation and Consolidation of the Democratic System of the Republic of Honduras,¹⁰⁹ signed on 22 May 2011 between the President Porfirio Lobo and the former President José Manuel Zelaya Rosales, which paved the way for the full participation of Honduras in OAS activities.

The OAS reaction was swift. Indeed, on 24 May 2011, the Permanent Council, by virtue of resolution 986 (1806/11), decided to convene a special session of the OAS General Assembly. Accordingly, the latter decided on 1 June 2011: “to lift the suspension, with immediate effect, of the right of the state of Honduras to participate in the OAS”¹¹⁰.

¹⁰⁸ Central American Parliament, a political institution devoted to the integration of the Central American countries, available at http://www.parlacen.org.gt/documentos/PPT_english.pdf/ (last visited 25 August 2011).

¹⁰⁹ See <http://www.hondurasweekly.com/component/content/article/163-agreements/3737-accord-for-the-national-reconciliation-and-consolidation-of-the-democratic-system-of-the-republic-of-honduras/> (last visited 25 August 2011).

¹¹⁰ OEA/Ser.P AG/RES. 1 (XLI-E/11) rev. 1, 22 June 2011.

F. Conclusions

Undoubtedly, there is still a long way to go until the international community achieves the effective implementation and protection of the right to democracy, a notion with no definition, extending from the respect of the national constitution to the effective protection of human rights and the rule of law. There is also no doubt that the OAS intervention averted a worse outcome in the case of Honduras.

However, the stalemate that persisted nearly for two years in the internal political scene, indicated in a way the limits of international intervention. When a state's Supreme Court, that is par excellence competent to interpret the domestic constitution, refuses to allow the ousted president to return to power because he has violated the constitution of the state, what should be the proper reaction of the international community? It is unfortunate that the ICJ will not proceed on the merits of the *Honduras v. Brazil* case, since it could provide us very useful answers to a series of questions, such as the exact content of the principle of non-intervention and the limits (if any) of the international community's intervention, by diplomatic means, to restore the democratic order in a state. This was certainly a missed opportunity to determinate about the range of the principle of non-intervention and draw a line between matters that are exclusively of domestic jurisdiction and matters of international concern. Perhaps the time has not yet arrived for such a judgment.¹¹¹

Likewise, only future practice will demonstrate whether the IADC can be used effectively in the political and diplomatic sphere to prevent the unconstitutional alterations of the democratic order. Certainly, democracy cannot be imposed by outside actors, that can only function as facilitators of the dialogue. It is rather a process that requires the political will of all parties involved at the national level. In any case, the OAS has proven that its contribution – initially in the form of sanction (suspension of membership) and subsequently through mediation – has been a catalyst for

¹¹¹ Especially if we bear in mind that some scholars caution about the long-term implications of “the shift in foundational norms governing the relationship between international and domestic legal authority” inaugurated by the international reaction to the Honduras coup, see B. Roth, ‘The Honduran Crisis and the Turn to Constitutional Legitimism, Part II: the Pitfalls of Constitutional Legitimism’, (5 October 2009) available at <http://www.ejiltalk.org/the-honduran-crisis-and-the-turn-to-constitutional-legitimism-part-ii-the-pitfalls-of-constitutional-legitimism/> (last visited 25 August 2011).

the peaceful settlement of the political impasse. The positive resolution to the Honduras case, in a way that is not considered as a retreat from the OAS principles, has been a crucial test and will surely contribute to the efforts of other international organizations, particularly at the regional level. Democracy is essential for conflict prevention¹¹² and a system of collective and effective defence of democratic principles is an important preventive mechanism that should be included in UN policy. It is equally important in order to operationalize the “responsibility to protect” doctrine.¹¹³ Indeed, one of the components of the doctrine is the responsibility to prevent. The institutional preparedness of the various actors in areas such as the protection and promotion of democracy, as well as the economic and social development, is essential for the prevention of crises that could eventually escalate, especially in fragile states, in open conflicts. The recent turmoil in Cote d’Ivoire, where the outgoing president, Laurent Gbagbo, refused to recognize Alassane Ouattara as the winner of the elections demonstrated that in fragile states democracy is an essential component of security and ultimately of peace. The multilateral intervention with diplomatic means initiated by the OAS could also serve as a useful precedent for the regional African organizations, especially the ECOWAS, and replace its background of forcible intervention to protect democracy.¹¹⁴ Indeed, Cote d’Ivoire had been suspended in December 2010 from participation in the decision-making bodies of ECOWAS and in all activities of the African Union, until the democratically elected president effectively assumed power.¹¹⁵ After months of serious clashes between the two rival factions that brought the country on the brink of civil conflict,¹¹⁶ A. Ouattara was finally sworn into

¹¹² E. Spehar, ‘The Role of the Organization of American States in Conflict Prevention’, 8 *International Journal on Minority and Group Rights* (2001), 61-70. Also E. Spehar, ‘Hemispheric Security and the OAS: towards a New Regional Approach’, *XXX Curso de Derecho Internacional organizado por el Comité Jurídico Interamericano y la Secretaría General de la OEA en agosto de 2003* (2004), 335-347.

¹¹³ G. Evans, *The Responsibility to Protect. Ending Mass Atrocity Crimes once and for all* (2008), 79.

¹¹⁴ E.g. Sierra Leone in 1997. For this background see C. Gray, *International Law and the Use of Force*, 3rd ed. (2008), 418.

¹¹⁵ See the references in UN Security Council res. 1962, 20 December 2010. The decision of ECOWAS was taken on 7 December 2010, by virtue of Art. 45 of the ECOWAS Protocol on Democracy and Good Governance, *supra* note 16, 22. The suspension from the AU was decided by the Peace and Security Council on 9 December 2010.

¹¹⁶ The war crimes and crimes against humanity allegedly committed in Côte d’Ivoire since 28 November 2010 have led ICC Prosecutor Luis Moreno Ocampo to request

office as President of Cote d'Ivoire on 6 May 2011. Just a few days earlier, on 21 April 2011, the Peace and Security Council of the AU had lifted the suspension.¹¹⁷

Lastly, the effective implementation of the IADC will favour to a great extent the emergence of an actionable right to democracy. As it has already been stated by L. Condorelli nearly twenty years ago, “[t]he resolutions of international organizations represent a remarkable enrichment and acceleration of the law-making process in the present-day international community”¹¹⁸. In the same way the bolstering of democratic principles through the activities of international organizations, including the creation of systems of collective defence of democracy, will certainly contribute and may eventually also lead to the formation of a legally actionable right to democracy before international institutions.

the ICC judges for authorisation of an investigation pursuant to Art. 15 of the ICC Statute, see ICC-02/11, 23 June 2011.

¹¹⁷ PSC/PR/COMM.1(CCLXXIII).

¹¹⁸ L. Condorelli, ‘The Role of General Assembly Resolutions’, in A. Cassese & J. Weiler (eds), *Change and Stability in International Law-Making* (1988), 43.