

THE INTER-AMERICAN DEMOCRATIC CHARTER: AN ASSESSMENT AND WAYS TO STRENGTHEN IT

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Executive Summary

- As the consensus on representative democracy and the commitment to exercise and protect it appear to be declining in many Latin American states, it is important to consider how best to strengthen the Inter-American Democratic Charter (IADC or “Charter”), the principal multilateral diplomatic instrument for the collective promotion and defense of democracy in the Western Hemisphere.
- The IADC incorporates several democracy promotion instruments developed since the early 1990s, as part of a historical effort to return to democratic governance after a long period of military rule.
- This paper identifies some of the strengths and shortcomings of the IADC, assesses its effectiveness, and proposes a series of measures to strengthen it. These include specifying some of the terminology that remains unclear; allowing other branches of government (e.g., the legislature or the judiciary) to express before the Organization of American States (OAS) their views on violations of the Charter in their respective countries; setting up automatic invitation to electoral observation; enabling the secretary general to engage more proactively in member countries; installing an inter-American commission to observe compliance with the Charter; and finally, making the Charter legally binding and a part of the constitutional framework of member nations.
- It concludes with the caveat that implementation of reforms, which requires consensus amongst the member states—and the leadership to build that consensus—is improbable in the short run because of existing political and ideological divisions in the hemisphere.

The Context

Strengthening democracy and respect for human rights throughout the Americas have become cardinal principles of the inter-American system. After decades of authoritarian rule in the hemisphere, at times aided and abetted by the United States, the region’s governments have adopted and continue to embrace a democracy and human rights vocation. This commitment has been translated into legal and political instruments that, in principle and in practice, have helped create an environment conducive to building and sustaining democratic institutions and the rule of law.¹ The IADC and the American Convention on Human Rights, with its Inter-American Court of Human Rights and the Inter-American Commission on Human Rights (IACHR), are the most visible manifestations of this commitment.

And yet, there is mounting evidence that the 10th anniversary of the IADC in September 2011 marked not only a celebration of progress but also a recognition that these commitments are increasingly threatened by steady erosion and even attack by several Latin American countries. Political will for collective action in the promotion and defense of democracy in all but the most obvious cases of democratic rupture is waning. A number of developments demonstrate this trend and the resulting tension in the hemisphere:

- The flagrant disruption of democratic governance in Honduras in 2009 revealed both the disregard for and violation of the rule of law and fundamental democratic values and practices, as well as the strong rejection of such actions by all governments in the region. But it also unveiled their persistent inability to construct a useful mechanism to prevent such disruptions.
- The unwillingness of the secretary general or member states to invoke Article 20 of the IADC to convene the

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Permanent Council to undertake a collective assessment of a situation that involves an unconstitutional alteration of the democratic order. One example is Nicaragua's decision to allow the incumbent president to run for a third term in violation of the constitution.

- The demand of some states to permit the unconditional return of Cuba as a member of the OAS, despite it not meeting the democratic criteria of the OAS Charter and the IADC.
- The hostile actions by Brazil, Bolivia, Venezuela and Ecuador, among others, to reject decisions of the Inter-American Court and the IACHR and to restrict its autonomy and independence. Venezuela and Ecuador are even considering withdrawing from the IACHR.
- The unwillingness of countries such as Venezuela and Nicaragua to invite OAS observers to monitor elections (though Nicaragua reluctantly—and belatedly—invited the OAS and the European Union to observe the latest presidential and legislative election).

It is true that much progress has been made toward free and fair elections in most of the region, thanks in part to OAS efforts to monitor elections and provide technical assistance to electoral authorities. However, some incumbents twist electoral processes in their favor through manipulation of electoral laws and the constitution, use and abuse of state resources, and patronage, intimidation, media bias and interference in judicial processes. Although democratic consolidation continues in most countries in the region, some Latin American states are moving slowly away from bedrock principles of the IADC—such as the separation of powers, freedom of the press and respect for political pluralism.

With regard to human rights, the growing demands of traditionally marginalized indigenous peoples to be consulted before governments take decisions that affect their well-being are proving highly contentious. Political persecution and attacks on the freedom of expression are on the rise in several countries. And the challenges of transnational organized crime and trafficking-related violence are generating pressure for hard-line approaches to public security, including an increasing reliance on the military in internal policing with an attendant spike in human rights violations. Taken together, these trends suggest that the democracy

and human rights agenda remains as relevant as ever to inter-American stability and cooperation.

The political context for addressing these challenges, however, has turned particularly hostile in the recent past. A group of states, mostly under the banner of the *Alianza Bolivariana para los Pueblos de Nuestra América* (ALBA), is challenging the authority and legitimacy of the OAS as an institution, while promoting the creation of competing sub-regional organizations such as the *Unión de Naciones Suramericanas* (UNASUR) and *Comunidad de Estados Latinoamericanos y del Caribe* (CELAC), with scant attention paid to questions of democracy and human rights. Several Latin American and Caribbean countries are prepared to go their own way without the United States and Canada when it is convenient to do so, particularly on sensitive issues such as political reform or electoral observation.²

Within this framework, efforts to defend or strengthen the inter-American system's capacities to respond to erosions of democracy and the observance of human rights can fall victim to a propaganda battle between countries opposed to any external interference in internal affairs and those seeking to uphold the core values of the inter-American system. This was most recently seen in the working group created "to strengthen the Inter-American Commission on Human Rights"—and the subsequent battle at the OAS General Assembly in June 2012—which has become bogged down in efforts by some states to actually weaken the independence of the body.

Origin and Evolution of the Democratic Charter

As the consensus on representative democracy and the commitment to exercise and protect it appear to be declining in many Latin American states, it is time to consider how best to strengthen the IADC as the principal multilateral diplomatic instrument for the collective promotion and defense of democracy in the Western Hemisphere. The IADC was adopted at the OAS General Assembly held in Lima, Peru, on September 11, 2001.³

The IADC is actually the culmination of a historical effort that gained traction in the early eighties, as the great majority of member states returned to democratic governance after long years of military rule, and was determined to consolidate and protect it collectively.

The process began with modifications of the Founding Charter in 1985, establishing that one of the main purposes of the organization from then on was “to promote and consolidate representative democracy...with due respect for the principle of non-intervention...” The 1989 OAS General Assembly followed with a resolution that instructed the secretary general to organize electoral observations for members that request them. Then, in 1991, the Santiago General Assembly approved Resolution 1080, “Representative Democracy,” which reaffirmed the members’ commitment to protect democracy collectively when it is threatened in one of them. Significantly, it also gave the secretary general the power to convoke a meeting of the OAS Permanent Council to analyze the situation in case of an irregular or abrupt interruption of the democratic order in a member state.

True to their commitment, members applied the resolution successfully to restore democracy in several instances: in Haiti in 1991, after the military overthrew President Aristide; in Peru in 1992, following President Fujimori’s auto-coup; in Guatemala in 1993, in the aftermath of President Serrano’s auto-coup; and to prevent a military coup against President Wasmosy of Paraguay in 1996.⁴

In 1992, members also approved the Washington Protocol, which provides for the possibility of suspending from the organization a member “whose democratically constituted government has been overthrown by force.”⁵

For the next few years, ministers of foreign affairs at the OAS General Assemblies, diplomats at the OAS Permanent Council and heads of state at the Miami (1994), Santiago (1998) and Quebec (April 2001) summits sought to consolidate these achievements and strengthen the organization’s capacity to respond to threats to the democratic order in Latin America and the Caribbean.

To that effect, the Quebec Summit instructed foreign ministries to prepare a charter that would reinforce the existing instruments to promote and defend democracy. Arduous, tense and complex debate and negotiations followed, centering around fundamental inter-American principles such as sovereignty and intervention in internal affairs, and the very definition of democracy (i.e., representative vs. participatory). Nevertheless, under the leadership of Javier Perez de Cuellar, head of Peru’s transitional government,

and Humberto de la Calle, Colombian Ambassador to the OAS, member states finally reached a consensus with the *Declaration of San José*, at the OAS General Assembly held in Costa Rica (June 2001). This was then adopted as the Charter at an extraordinary OAS General Assembly in September of that year in Lima, Peru.

The IADC incorporates all of the diplomatic instruments mentioned above, both as preventive mechanisms (red light) against auto-coups or military *coup d’etats*, and as reactive or restorative ones, which get activated when the first measures fail to stop transgressors. But it also adds provisions that expand the reach of those mechanisms in significant ways, as shown below.

The Added Value of the Democratic Charter

The IADC breaks new ground in promoting democracy by proclaiming that the “peoples of the Americas have a right to democracy, and their governments have the obligation to promote and defend it.”⁶ Similarly, member states chose representative democracy as the preferred form of government, and reached consensus on what constitutes its essential elements. These include: respect for the rule of law; human rights and fundamental freedoms; periodic, free and fair elections; a pluralistic system of political parties; the separation and independence of powers; fundamental democratic core values and practices, such as probity and transparency in government activities; respect for diversity; citizen participation; and others.⁷

Another new feature of the IADC is its trigger function for collective action, as stipulated in Article 20. “In the event of an unconstitutional alteration of the constitutional regime that seriously impairs the democratic order in a member state,” the IADC makes it now possible for any member—not just the state affected—or the secretary general to request a meeting of the Permanent Council, in order to collectively assess the situation and, if necessary and accepted by the government involved, to “undertake diplomatic initiatives” to restore democracy. This is an important improvement that allows a process of institutional engagement and decision making to restore democracy. Before this, a quick reaction from OAS was impossible to activate without the consent of the government affected.

The response to a coup usually consists of the Permanent Council's condemnation, a call for a return to the *status quo ante* and the sending of a diplomatic mission to convince the coup makers to restore the democratic order. If this fails, members may decide to proceed with "new diplomatic initiatives and eventually the suspension of the member from the OAS."⁸ The latter is the ultimate and strongest diplomatic sanction allowed by the IADC against a transgressor. Members applied it against the coup makers in Honduras in 2009, and suspended its subsequent governments from the organization until former President Zelaya was allowed to return without being politically persecuted.

Furthermore, Articles 19 and 20 of the IADC now allow OAS "intervention" not just in cases of unconstitutional "interruption" but also in cases of unconstitutional "alterations." Note here, however, a subtle and fundamental distinction in what constitutes a break in the democratic order: While the term "unconstitutional interruption" clearly refers to a traditional military coup and/or auto-coup (easily detectable and condemnable events), the concept of "unconstitutional alteration" seems to connote a different type of interruption of the democratic order. Undoubtedly, this includes, amongst others: (a) rigged elections; or (b) an illegal challenge by the legislative or judicial branch, or the military against the legitimate government in place. These two "alterations" are relatively easy to detect, to agree upon and to condemn collectively, particularly when the government (the executive branch) requests OAS solidarity and support.

However, a more controversial "alteration" is a process that involves increasing autocracy and monopoly of power by the executive branch, which slowly undermines the democratic process—all in the name of participatory democracy, socialism or anti-imperialism, and while using democratic means such as elections or referenda. This process of alteration by erosion commonly eviscerates and suppresses essential democratic institutions, values, and practices such as checks and balances, limits on power, respect for political opposition, the rule of law and fundamental freedoms, amongst others. More specifically, it could involve removing judges who are not politically aligned with the government, disobeying courts' rulings or legislation passed by a legislature controlled by the opposition, ignoring or manipulating the other branches of government, closing or attacking the independent media, or persecuting political opponents—as

occurs today in various and differentiated ways in Bolivia, Ecuador, Nicaragua and Venezuela. The nature of this political phenomenon, however, is not so easy to agree on and condemn—a fact that hinders a collective defense of democracy.

The IADC also reinforces the OAS role in preventing the interruption of a democratic order. Article 17 allows the government of a member state to request OAS assistance for the "strengthening and preservation of its democratic system," when it considers that its democratic process or its "legitimate exercise of power is at risk." In such cases, "the Secretary General or the Permanent Council, *may*, with the prior approval of the government concerned, arrange for visits or other actions to analyze the situation."⁹ Notice here, however, that the assistance can be provided *only* at the request of the executive branch, and that without its consent, no direct Permanent Council action can take place to strengthen the democratic order or prevent its collapse.

Under this provision, at the request of the governments of Nicaragua (2005), Ecuador (2005 and 2010), Bolivia (2008), Guatemala (2009), Honduras (2009) and Haiti (2010–11), the Permanent Council and the secretary general acted diligently and effectively, by approving the corresponding resolutions and sending political missions that successfully prevented a political crisis from rupturing the democratic order.¹⁰

It is also worth noting that when the executive branch requests OAS assistance during a political crisis, no one thinks of it as foreign intervention, even though other branches involved in it might consider it so—as in the case of Ecuador in 1997 and in Honduras in 2009. In both cases, OAS "intervention" did not prevent a coup.

In the case of Ecuador, in February 1997, President Abadalá Bucaram requested OAS support in view of mounting socio-political unrest and calls for his resignation. However, as Secretary General César Gaviria arrived in Quito, congressional leaders and the mainstream media rejected his visit in support of Bucaram, denouncing it as undue interference in the internal affairs of the country. Upon Gaviria's departure, Congress removed Bucaram from office and appointed its leader as head of the country on February 6.¹¹

A little over 12 years later in Honduras, at the request of President Zelaya, Secretary General José Miguel Insulza sent an emissary to discuss plans for “observing” a referendum on a constituent assembly that would change the constitution to allow presidential reelection. Its implementation had already been rejected as unconstitutional by the National Congress, the Supreme Court and by the president’s own political party. In view of the opposition to the referendum, the emissary publicly suggested that it was just a non-binding poll with no significant legal consequences. Those opposed to the referendum interpreted the OAS presence as legitimizing a process that the president would later use to engineer his reelection. Congress asked the observer to leave the country. Shortly thereafter, as the president insisted on proceeding with the poll, he was ousted by military force.¹²

The Challenge of Full Application and Reform

Despite the significant progress made by the IADC as a collective mechanism for the promotion and defense of democracy, it nevertheless faces certain challenges that need to be addressed creatively and forcefully. There are at least two ways for the IADC to become an even more useful and effective multilateral diplomatic and juridical instrument for preventing military coups and the erosion of democracy. One way is for member states and/or the secretary general to apply its provisions to the fullest extent possible; the other, more complex and difficult way, is for members states to proceed with reforms to its text.

The Challenge of Applying It to the Fullest

In terms of the IADC’s preventive function, there are five existing provisions that can and should be applied to their maximum extent. They do not require modification of the Charter.

1. Invoke Article 20

The first has to do with invoking, in a timely manner, Article 20 of the Charter. This could prove to be a mechanism to prevent an institutional breakdown.

Article 20 establishes that in “the event that an unconstitutional alteration of the constitutional regime....*any* Member State or the Secretary General may request the immediate convocation of the Permanent Council to undertake a *collective assessment* of the situation...”

This provision unequivocally empowers the secretary general and/or any member state to act when events in another member state indicate that an unconstitutional alteration is taking place. The move would certainly be controversial, given the ambivalence of the term and the probable lack of consensus among members about the real nature of the political situation. Still, it is a mandate and it would be reasonable for the secretary general or any member state to call for a collective assessment of the situation in the Permanent Council, without necessarily having the consent of the government affected.

Such a proactive initiative may be crucial when it is the executive branch that may be “altering” the democratic order. The presidency may be assuming that just because it won an election and holds a legislative majority, it can more readily violate the rule of law and the separation and independence of powers, limit freedom of the press and association, manipulate electoral processes, or persecute the opposition. President Correa has recently said that since he is the head of state, he presides over all the branches of government. President Chávez acts as if he were the State itself. In cases like these, a collective analysis would clarify the situation for all, and would provide the starting point for a process of dialogue, negotiation and consensus building amongst the institutional contenders—which could prevent an eventual institutional rupture, as happened in Honduras.¹³

Would a multilateral assessment of a situation that threatens democracy in a member state be considered interference in its internal affairs? Not really, since *all* members committed themselves to promote and defend democracy and all agreed voluntarily to respect the Charter’s provisions. On the other hand, a collective assessment would be imperative in cases in which the threat to democracy in one member is likely to become a threat to its neighbors’ democracy.¹⁴

2. Use IACHR Reports to Provoke a Collective Assessment

A related, but more controversial way to improve the effectiveness of the Charter, without reforming it, would be to use the reports of the IACHR to provoke a collective assessment of violations of core democratic principles,

institutions, values and practices consecrated in the Charter, wherever they might occur.

This means that the secretary general or a member state, in the framework of Article 20 of the Charter, in coordination with the IACHR and without contravening its independence, would utilize the Commission or its Freedom of the Press Rapporteur's reports to express their concern publicly in cases where violations of political rights or fundamental freedoms constitute or result from "an alteration of the constitutional regime." Throughout the years, the Commission's reports have observed such violations in various member states, making explicit the connection between democracy and the observance of human rights.¹⁵

According to Article 91(f) of the Founding OAS Charter, it is the Permanent Council's responsibility "to consider the Commission's reports and present to the General Assembly whatever observations and recommendations it may have." Unfortunately, the council has not always exercised this responsibility fully, as it frequently fails to examine the reports thoroughly in public sessions.

Because of their independence, the IAHR and the Rapporteur's reports can be useful instruments to promote a public debate about presumed or proven violations of political rights and democratic institutions, values and practices—a debate that may prevent further violations and possible interruption of the democratic order.

Furthermore, appropriate utilization of the Commission's reports would strengthen its role in protecting human and political rights in the hemisphere. In fact, bolstering the role of the IAHR system has become imperative in view of the recent politically motivated attacks it has received from the governments of Bolivia, Brazil, Ecuador and Venezuela.¹⁶

3. Strengthen the Secretary General's Missions

A third possible action to fully apply the IADC and improve its effectiveness, without reforming it, would be to institutionalize and strengthen the secretary general's missions of political observations and good offices.

When a government requests the assistance of the organization because it considers that its institutional order is being threatened by an emerging political crisis,

as allowed in Article 18, the collective bodies normally would instruct the secretary general to send a political/diplomatic mission to analyze the situation and to offer its good offices to help preserve the democratic order and report to back to them (Bolivia, 2005 and 2008; Ecuador, 2005; Nicaragua, 2005 and 2008; Guatemala, 2009; Honduras, 2009).

The role of these political missions is twofold. First, to promote and facilitate political dialogue, negotiation and consensus building amongst the contending forces. Second, to observe, with appropriate follow-up, their compliance with the accords they reached to preserve or restore the democratic order.

Because of their critical function, these missions should be prepared to remain in the country long enough to generate confidence amongst the political forces, should be led by an OAS secretary general's representative who is politically savvy and well-versed on the nature and history of the inter-American system and the IADC, and should be well staffed with experts in negotiation and mediation. Recent missions of this type have not met all of these requirements, as exemplified by the secretary general's failed mission to support President Zelaya's effort to hold a referendum.

4. Support Technical Cooperation, Political Institutions and Democratic Governance

A fourth way to improve the effectiveness of the IADC would be to adequately support, politically and financially, the implementation of technical cooperation programs designed to promote democratic values and practices, and also support the strengthening of political institutions and democratic governance, as stated in Articles 26 and 27 of the Charter. Thus, member states and the secretary general *should reinstate* the medium and long-term democracy programs eliminated in 2005, which the now-defunct Unit for the Promotion of Democracy (UPD) had successfully implemented since 1992. Those programs, mandated by the governing bodies, included support for modernization and strengthening of legislatures, electoral bodies, and political parties and local governments. They also supported the promotion of democratic values and practices through the education system and training programs for young leaders.

5. Respect and Apply the IADC Regarding Cuba

Finally, member states and the secretary general should indeed respect and apply fully the IADC (as well as the 2001 and 2009 summits' commitments to democracy and human rights, and the 2009 Honduras General Assembly Resolution on Cuba), to prevent the present government of Cuba from participating in the activities of the organization and in the presidential summits—*unless* the Cuban authorities are willing to comply with the provisions of the Charter. In other words, Cuba should be welcome to attend the inter-American gatherings, but only as a democratic state. The fact that the exercise of democracy and protection of human rights are a precondition for participation in the inter-American system is in no small way the result of Latin American countries' proposals and historical aspirations for a democratic hemisphere—as many of them had suffered through long, harsh dictatorships in the 1970s and 1980s. Democracy and human rights are not impositions from the United States. Their predominance today as supreme political values of the inter-American system is a Latin American as much as a hemispheric achievement, one that must not be relinquished because of anachronistic (and currently unwarranted) anti-U.S. prejudices. If the IADC is ignored in the case of Cuba, it would be irremediably devalued and consigned to irrelevance.¹⁷

The Challenge of Reforming the Charter

If applying the IADC to the fullest is a daunting challenge for the secretary general and the member states, an even more challenging and complicated task is to *reform* it. Nevertheless, there are a few reforms that appear necessary to make the Charter a stronger, more effective instrument, particularly in terms of their impact on its preventive functions.

1. Clarify the Meaning of an “Unconstitutional Interruption”

One reform would be to clarify and define what exactly member states consider “an unconstitutional alteration” of the democratic order to be, as differentiated from an “unconstitutional interruption” by a coup, for example. This would facilitate the secretary general or member states' ability to call attention to events that fit the definition. Just as important, it would make it easier for

them, based on Article 20, to convoke the Permanent Council for a collective assessment of the situation. This in turn may serve as the basis for early preventive actions against the actual interruption of democratic governance.

Up to now, the secretary general and member states have not been able to agree on a definition of an “unconstitutional alteration.” Thus, they have been reluctant to condemn or even to call attention to a regime which, despite having emerged from democratic elections, nevertheless shows clear signs of increasing authoritarianism and intolerance, not to mention violating democratic institutions, values and practices enshrined in the Charter. Such alteration by erosion is by nature more ambiguous and does not provoke automatic agreement or collective condemnation by the member states. For some, it constitutes a process that uses democratic means to establish an authoritarian regime, which violates democratic institutions, values and practices. For others (such as those who support governments that make those “alterations”), it is a process that represents democratic, constitutional and legitimate political changes in favor of a previously excluded majority.

2. Allow Other Branches of Government to Speak to the Permanent Council

Another reform to consider is to allow the possibility that other branches of government (e.g., the legislature or the judiciary) be permitted to express before the Permanent Council their views on violations of the Charter and threats to the democratic order in their respective countries.

The IADC does not permit the legislative or the judicial branches to ask the Permanent Council to convoke a meeting to discuss, for example, threats to their independence or their very existence. In theory, in an international organization such as the OAS, presidential democracies—which supposedly embrace the principles of independence and separation of powers—should allow other branches of government the opportunity to bring attention to alleged breaches of democratic order.

In contemporary practice of international relations, the executive branch, through its ministry of foreign affairs,

monopolizes the representation of the state at inter-governmental organizations. Thus, no other branch of government at the OAS is permitted to invite the secretary general to observe the political situation in its country. Nor can the secretary general or a member state invite a branch of government from another member state to speak at the Permanent Council, without the consent of the executive branch. If this were to happen, it would be denounced as intervention in its internal affairs.

The problem, however, is that many times it is the executive branch itself that undermines democracy by abusing power, persecuting political opponents or rigging elections. The OAS mission, sent by the secretary general to support President Zelaya's ill-advised attempt to change the constitution so that he might be reelected, essentially ignored the other branches' opposition to the *consulta*. Moreover, it had neither the capacity nor the time to promote dialogue, negotiation and consensus building amongst the protagonists. Similarly, member states in the Permanent Council could not—or were not willing to—invite the other branches of government to hear their grievances. Their participation in the Permanent Council meetings to analyze the Honduras crisis might have prevented the military coup that removed President Zelaya.

Thus, to contribute to democratic governance and prevent its erosion, other branches of government should be permitted to request a visit by the secretary general to observe *in situ* the political situation in their country, without necessarily having the prior consent of the executive. Or they should be allowed to express their perspectives on a political crisis in the Permanent Council, particularly when they feel their independence is at risk. Their voices would enrich the member states' understanding and discussion of critical political situations and would provide the basis for a well-substantiated collective decision to protect democracy. Moreover, their inclusion would strengthen the OAS capacity as a forum for political dialogue and conflict management to prevent the collapse of the democratic order in a member state. And one might argue also that a greater involvement of the legislative branch, for example, would even help democratize and strengthen the inter-American system.¹⁸

3. Automatic Invitations for Electoral Observation Missions

Yet another related reform would be to establish the principle of an automatic invitation for electoral observation missions. That is, the secretary general, in consultation with the Permanent Council, should have the faculty to decide where and when to send an electoral observation mission, without the required previous invitation by the government, when he considers it pertinent to do so within the framework of the Charter.

An alternative or complementary reform could be to establish the possibility that a mission be sent at the request of any branch of government, or a significant opposition political party or media institution. This would reinforce the role of electoral observation missions and the IADC in promoting and defending democracy.¹⁹

4. Allow Interventions Beyond the Permanent Council Assessment

Another reform would allow the possibility of proactive engagement or “interventions” by the secretary general or a member state, beyond the mere convocation of the Permanent Council to assess a situation threatening a democracy (theoretically allowed in Article 20).²⁰ As it is now, the IADC does not allow even a visit by the secretary general to analyze the situation without a request or prior consent from the executive branch. Nor can the secretary general send an electoral observation mission without the request from the executive branch.²¹

5. Create an Inter-American Commission to Observe IADC Compliance

A more complex reform would involve creating an inter-American Commission to observe member states' compliance with the Charter. This Commission would be similar to the IAHRC. It would be independent and composed of five to seven experts elected by the member states. Its function would be to observe, with appropriate and rigorous methodology, the members' compliance with the Charter. This could be done by establishing a *mutual* evaluation mechanism similar to the one utilized to assess implementation of the Inter-American Convention against Corruption.²² The Commission would present periodic reports to the Permanent Council on the state of democracy in the hemisphere, and could advise or pro-

vide political or technical assistance, in collaboration with the General Secretariat, to any branch of government that requests help to strengthen democratic institutions.

6. Convert the IADC into a Treaty

There is one last reform that appears necessary: To convert the IADC, with its reforms, into a treaty or an inter-American convention. As such, the IADC would become a legally binding instrument, which would commit and compel member states to comply with its provisions. This would imply, however, opening a wide and much-needed debate, at all levels, about the Charter's relevance and effectiveness. As the discussion would have to involve the legislative branch in the approval and ratification process, the IADC would become a better known and valued instrument throughout the hemisphere.

Furthermore, as a treaty that promotes and defends democratic rights and guarantees, the IADC could become a part of the legal constitutional framework of member states, as the Argentine Constitution of 1994 permits with some international human rights conventions.²³ As such, the Charter would constitute one more legal domestic safeguard against the breakdown of the democratic constitutional order, as well as reinforcement of the national commitment to promote, exercise and defend democratic institutions at the inter-American level.²⁴

A Final Caveat

The implementation of the above suggestions will require consensus amongst the member states—and the political will and leadership needed to build consensus—something improbable at this time.

Consider, for example, the suggestion that the secretary general or a member state invoke Article 20 to collectively “assess the situation” of a country that may be undergoing a political or institutional crisis that threatens the democratic order. Assuming that a Permanent Council session is held for such a purpose, it would be a considerable challenge just to reach a consensus on a resolution. This would be particularly relevant if the affected state and its allies are opposed to it—even if it would, minimally, call on the contenders in the crisis to start a process of dialogue to resolve their political differences, and/or permit a secretary general's mission of good offices.²⁵

More substantially, the lack of consensus to collectively analyze a situation in which an “unconstitutional alteration of the democratic order” occurs is based on a profound disagreement as to what exactly constitutes an “unconstitutional alteration,” as discussed earlier.

Additionally, if a member decides to convoke a Permanent Council session to assess the situation in a fellow member state, without its consent, the affected government and its allies may consider such an action not only interventionist but even an act of aggression. This could then result in a breaking of diplomatic and commercial relations, and in polarizing the region and the organization—a possibility that makes members very reluctant to proceed.²⁶

Similar difficulties would arise if a group of member states were to propose opening a process to reform the IADC based on the suggestions made above. A consensus to start such a process would be hard to reach, as several countries would consider such reforms tantamount to violating the principle of non-intervention and giving the organization supranational competencies, which most members oppose.

This absence of consensus in the organization reflects the various political and ideological divisions existing in the hemisphere today. This reality is in marked contrast to the regime congruence of the 1980's and 1990's, when the first inter-American instruments for the promotion and defense of democracy were designed and applied, and also to 2001, when the Charter was adopted. This fragmentation became clear in the recent Summit of the Americas held in Cartagena, Colombia, when the heads of state could not agree on a final declaration because of differences concerning Cuba's future participation, among others.²⁷ Consensus—and the leadership needed to build it—were absent. These differences and divisions are the principal obstacles to a renewed commitment to collectively protect and defend representative democracy in the hemisphere.

Nevertheless, the suggestions advanced here to improve the IADC's effectiveness can serve as a starting point to generate a debate that could help revitalize and strengthen the role of the OAS and the Charter in promoting and protecting democracy in the hemisphere. Otherwise, as *The Economist* has put it, “the danger is that not just the charter but the OAS itself will sink into irrelevance.”²⁸

As a final note, Cuba's apparent interest in attending the summits is a potentially important opportunity to begin a process for bringing the hemisphere's only non-democratically elected government back to full participation. However, that desired end result should *not* come at the expense of undermining or weakening the fundamental conditions of democracy and human rights that are the hallmarks of the region's institutions.

Endnotes

¹ Figures for Latin America taken from ECLAC, *Time for Equality: Closing Gaps, Opening Trails* (Santiago, Chile: ECLAC, 2010), p. 229. Available at: http://www.eclac.org/publicaciones/xml/1/39711/100604_2010-115-SES-33-3-Time_for_equality_doc_completo.pdf. OECD figures taken from OECD Tax Database. Available at: www.oecd.org/document/60/0,3746,en_2649_34897_1942460_1_1_1_1,00.html#A_RevenueStatistics.

² At the Summit of the Americas meeting in Port of Spain in 2009, the heads of state and government agreed, *inter alia*, that "[o]ur aspirations and goals for the Americas depend on strong democracies, good governance, the rule of law and respect for human rights and fundamental freedoms. We believe that democracy is essential for the social, political and economic development of the peoples of the Americas... [W]e will uphold the principles of and fully implement the Inter-American Democratic Charter." They also re-stated their "commitment to protect and promote human rights in our Hemisphere, and to the strengthening of the inter-American human rights system, with due respect for its autonomy and independence. We express our support to continue furthering the constructive dialogue with the participation of all actors, including the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights, in the framework of the reflection process which contributes to enhancing its effectiveness, universalisation, and the adequate financing of the bodies of the system."

³ On May 8, 2012, the III Meeting of UNASUR Electoral authorities approved the statutes for an Electoral Council, which would provide technical assistance and electoral observations or "accompaniment" to member states that so request. http://www.unasursg.org/index.php?option=com_content&view=article&id=637:venezuela-solicita-acompanamiento-electoral-de-unasur-en-elecciones-generales-en-octubre&catid=66:noticias-unasur.

⁴ In this vein, see inaugural address by President Mauricio Funes of El Salvador, at the XXXXI OAS General Assembly in San Salvador on June 6, 2011. Similarly, at a conference on democracy in Central America, OAS Secretary General José Miguel Insulza recently expressed that "an update of the Charter is necessary in view of the challenges and risks facing the consolidation and the very essence of democracy." *El Universal* (Caracas, Venezuela), May 12, 2011. In February 2012, Insulza also presented to the Permanent Council his *New Strategic Vision* of the OAS, proposing that it focus

on the fundamentals: "protection and expansion of democracy...and human rights, partnership for development and regional security."

⁵ See detailed descriptions of these applications in Rubén M. Perina, "The Role of the Organization of American States," and in M. H. Halperin and M. Galic (eds.), *Protecting Democracy: International Responses* (New York: Lexington Books, 2002).

⁶ Article 9 of the OAS Charter.

⁷ Article 1 of the OAS Charter.

⁸ Articles 3-6 of the OAS Charter.

⁹ Article 21 of the OAS Charter.

¹⁰ Article 18 of the OAS Charter.

¹¹ See Report of the Secretary General Concerning Compliance with Operative Paragraph 3 of Resolution AG/RES. 2480 (XXX-IX-O/09), entitled "Promotion and Strengthening of Democracy: Follow-up to the Inter-American Democratic Charter," OEA/Ser.G; CP/doc 4487/10, (Washington, D.C.: May 4, 2010); D. Boniface, "The OAS's Mixed Record," in T. Legler et al. (eds.), *Promoting Democracy in the Americas* (Baltimore: The Johns Hopkins University Press, 2007). In 1996, pursuant to Resolution 1080, a swift reaction by the Permanent Council and Secretary General Gaviria prevented a coup in Paraguay. See also a somewhat self-serving and uncritical report by the Secretariat for Political Affairs of the OAS entitled *The Tenth Anniversary of the Inter-American Democratic Charter: A Hemispheric Commitment to Democracy* (Washington, D.C., OEA/Ser.D/XX. SG/SAP/III.21, 2011).

¹² Gaviria carried out this mission in the framework of Resolution 1080, although, strangely enough, it was not invoked after Bucaram was basically overthrown, mainly because the removal took place under a constitutional façade. One wonders, however, if today, under the Charter, this would not be a cause for suspension.

¹³ *La Tribuna*, "Congreso pide a la OEA retirar misión," June 24, 2009.

¹⁴ In Honduras, those opposed to the referendum viewed President Zelaya's manipulation of the state media, his disrespect for the rule of law, and his disregard and contempt for the opposition as suffocating and eroding the fundamental principles of democracy, and as the causes for his removal.

¹⁵ If a guerrilla group is about to overthrow a democratic government in a member state, would its neighbors stand by idly because of the non-intervention principle? Or would they see it as a threat to their own democracy and to the democratic community, and react collectively in ways that may even include a military response to prevent the collapse of the neighbor's democratic government?

¹⁶ See, for example, reports on Honduras, 2009 and 2010; Venezuela, 2009; Bolivia, 2009; Peru, 2000; Haiti, 1991-1993; and Nicaragua,

1978. For the criteria used in determining if human rights violations do occur in a member state, see the introduction to Chapter IV in the Commission's *Annual Report*, available at: <http://www.cidh.oas.org/annualrep/2010eng/TOC.htm>. See also R. K. Goldman, "History and Action: The Inter-American Human Rights system and the Role of the Inter-American Commission on Human Rights," *Human Rights Quarterly*, Vol. 31, pp. 856–887, 2009.

¹⁷ Presidents Correa, Morales and Chávez have taken lately to strongly criticizing the performance and decisions of the IACHR and the Inter-American Court of Human Rights, the pillars of the Inter-American Human Rights system, along with the Inter-American Convention on Human Rights of 1969. Their main argument is that they are instruments of U.S. imperialism or manipulated by the State Department. As recently as May 3, 2012, Venezuelan Foreign Minister Nicolás Maduro, at a UNASUR meeting of Foreign Ministers in Colombia, echoed this position, declaring that "it is time to dismantle this decadent Court and Commission because they intervene in our internal judicial affairs." President Correa has recently commented that the OAS and the IACHR are "totally dominated by the influence of the United States and they have only served the foreign policy interest of that country." (*Telesur*, May 9, 2012.) The fact is, however, the Commission has issued reports demanding that the U.S. government adopt urgent measures to have a competent tribunal to try the Guantanamo prisoners accused of terrorism, has held public hearings on the subject, and has asked the U.S. government to close the prisoners' camp. Similarly, the IACHR has strongly criticized the U.S. government's detention practices of illegal immigrants. Paradoxically, the criticism and attacks against the Commission and the Court, and the OAS in general, is similar to complaints by U.S. legislators and some high-ranking State Department officials who think the OAS is useless because it is dominated by anti-American populist governments. Others see U.S. passivity and disinterest in the organization and the region as beginning after Latin America rejected the U.S. proposal for a free trade zone for the Americas in Mar del Plata, Argentina, in 2006. Anyone who has studied or observed the functioning of these inter-American institutions, or has served in them, knows full well that U.S. dominance is no longer operative, as might have been during the Cold War years. The reasons are many, but the fact is that the U.S. government can no longer impose its will in these bodies, just as it cannot do so in its bilateral relations with Latin American countries (although perhaps with a few exceptions). We are in a different era of inter-American relations. To pretend or claim otherwise is to ignore this new reality. And one may suspect that governments that make such denunciations are using them as smokescreens to cover their own violations of human rights and the democratic principles, values and practices established in the IADC. Strangely enough, though, Argentina—a country whose people have greatly benefitted from the Commission and the Court's defense of human rights, and whose democratic governments have always praised them—has remained silent and has not come publicly to the defense of the system.

¹⁸ To accept a non-democratic Cuba's participation in the activities of the hemispheric community of democracies would require a change in the rules for participating in the OAS and the presidential summits. Also, if the illegal Micheletti government in Honduras, which replaced Zelaya's government after his ouster by the military in 2009, *was correctly suspended* from the OAS (even though programmed presidential elections were already on course), it stands to reason that the Cuban dictatorship would remain suspended from the OAS until it decides to abide by the Charter. If Cuba is accepted without complying with the Charter's principles, the hemispheric community would also have to accept the participation of any future government that emerges out of a coup.

¹⁹ For example, the OAS would benefit from a voice or involvement of the legislative branch in the decision-making process of the organization. It is this branch, after all, that eventually has to ratify or internalize international agreements reached by representatives of the executive branch, and has to approve the national budget, which contains payments or contributions to the organization. See again Rubén M. Perina, "The Role of the Organization of American States."

²⁰ See a critical view of the OAS electoral monitoring in Rubén M. Perina, "The Future of Electoral Observations," *Americas Quarterly*, Spring 2010.

²¹ I say theoretically because even the assessment could be stopped if there is no consensus on the agenda of the meeting.

²² See Articles 18 and 24 of the Charter.

²³ Known in Spanish as MESICIC: Mecanismo de Seguimiento e Implementación de la Convención Inter Americana contra la Corrupción.

²⁴ For example, Article 75 includes the Inter-American Convention on Human Rights and others.

²⁵ There are those who argue, however, that as a treaty, it would become a less flexible and more difficult to modify as circumstances change. And if the treaty is not ratified by a two-thirds majority of members, it would not enter into force nor would it be applicable to those who do not ratify it.

²⁶ Decisions at the OAS Permanent Council are traditionally made by consensus; and if this is not assured, a vote on a resolution would probably not even be called. A vote is considered a polarizing practice that breaks the multilateral body's harmony; but if it is called, the resolution would still need a simple majority of 18 members to pass, which may not be easy to obtain at this time in history.

²⁷ Imagine what would happen to its commercial relations if Colombia were to propose a collective assessment of the situation in Venezuela.

²⁸ Other issues they could not agreed on were Malvinas/Falklands and the fight against drug trafficking and consumption.

COMMENTARY BY TED PICCONE

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The ongoing and increasingly polarized debate around the region's shaky commitments to democracy and human rights are well addressed in Dr. Perina's thoughtful paper. In addition to the examples he offers, further evidence can be found in the decision of the OAS General Assembly in June to consider a raft of proposals to weaken the inter-American human rights system. These are important signals of change in regional politics and diplomacy. First, they connote a growing sense of self-confidence on the part of some leaders that they can handle their internal human rights problems on their own. Indeed, some even reject the basic principle of external scrutiny of their adherence to legal and political instruments they've endorsed. Second, they demonstrate the solidarity among the ALBA states to exploit certain decisions of the Inter-American Commission and Court on Human Rights as a wedge between Washington and the rest of the region. And third, it suggests the moral, if not always legally enforceable, power of these institutions to pressure governments to improve their human rights records remains effective.

Reforms to the Inter-American Democratic Charter are sorely needed. But as the paper explains, the current political and ideological stalemate around these issues will stymie any significant action. Similarly, advocates for an effective regional human rights system are on the defensive after years of progress. Considered by many experts as one of the strongest features of the inter-American architecture, the Inter-American Commission and Court on Human Rights have developed an important body of jurisprudence that has made a difference for victims of human rights violations throughout the region. Commissioners have tended to be well qualified and relatively independent of their governments, and more often than not, Court decisions are respected.

A series of troubling developments, however, has raised concern that this positive situation is changing due to some states' attempts to constrain the Commission's independence and to avoid implementing its decisions. Underfunding of the system also remains a chronic problem. The creation of an OAS working group in 2011 for the ostensible

purpose of recommending ways to strengthen the mechanism has become, instead, a forum for undermining it. The renewed commitment to increase financial resources to the human rights bodies from the OAS regular fund is the silver lining in an otherwise stormy sky that continues to threaten the future of the body.

Attempts to constrain the independence of commissioners are a particular concern. A proposal to establish a code of conduct to regulate the Commission's rapporteurs, a tactic borrowed from states seeking to hamstring the independent experts of the U.N. Human Rights Council, is one example. A plan to prevent the Commission from publishing its annual review of freedom of speech, which would directly undermine the Rapporteur for Freedom of Expression, is another. Secretary General Insulza proposed letting governments delay publication of the Commission's critical country reports for as long as a year, and allow them a right of reply.

The recent case of the Belo Monte hydroelectric plant in Brazil offers a dramatic illustration of the controversy sparked by the Commission's decisions. In April 2011, in response to a request by indigenous communities in Brazil, the Commission issued precautionary measures that included the immediate suspension of construction of the utility. Brazil's exaggerated response included the withdrawal of its ambassador to the OAS and its candidate to the Commission, and a refusal (since overturned) to pay its annual quota.

A similar attitude can be observed in other leaders who reject compliance with the Court's and Commission's decisions. President Chávez, upon learning of a Court decision against his government, stated that it was "worth nothing" and chose to ignore it. In a similar vein, the secretary general suggested that the Commission's precautionary measures "are simply recommendations that states can or cannot respect" and suggested the Belo Monte measures be revised, which some considered a political interference in the system's autonomy. Peru joined the chorus for reform in protest of a Commission suit regarding a botched hostage rescue in Lima in 1997. President Rafael Correa of Ecuador, upset over the Commission's decision to suspend a libel sentence against newspaper editors, has even suggested CELAC break with the Inter-American Commission on Human Rights in favor of a new one exclusively for Latin America.

While the current trend of inter-American politics is to turn away from controversial topics like the quality of democracy and respect for human rights in favor of less confrontational subjects like connectivity and education, the problems of democratic governance should remain a core area of concern for all states in the region. If it is to exist at all, the inter-American system must do more than just uphold its most fundamental principles. It must also seek the practical implementation of such principles through a system of open debate of the state of democracy and human rights in each of its member states, and an attitude of complete respect for the institutions created to protect them.

Proponents of a strong OAS, therefore, must first defend the gains made over decades to keep democracy and human rights at the heart of its identity and operations. It should, in particular, keep doing what it does well in such areas as elections monitoring, civic education, judicial exchange and training on the fight against corruption. It must also increase funding to allow the Inter-American Commission and Court on Human Rights to carry out its functions effectively and protect its independence.

Looking ahead, OAS governments should step back from the fight to weaken the inter-American human rights system and instead restate clearly their obligation to fully respect their decisions, autonomy and independence. They must also uphold their promise to increase funding, so as to allow these institutions to do the job they have been mandated to do, with the aim of increasing the amount of time devoted to their sessions or, in the long term, making them permanent full-time bodies. They must also recommit to presenting well-qualified candidates for positions on the Commission and the Court.

As a final note, Cuba's apparent interest in attending the summits is a potentially important opportunity to begin a process for bringing the hemisphere's only non-democratically elected government back to full participation. However, that desired end state should not come at the expense of undermining or weakening the fundamental conditions of democracy and human rights that are the hallmarks of the region's institutions.