

Follow-up on the application of the Inter-American Democratic Charter

Reports and Resolutions:

CJI/RES.64 (LXIII-O/03) Application of the Inter-American Democratic Charter

CJI/doc.127/03 Democracy in the Inter-American System: follow-up report on applying the Inter-American Democratic Charter (presented by Dr. Eduardo Vío Grossi)

CJI/RES.80 (LXV-O/04) Application of the Inter-American Democratic Charter

CJI/RES.132 (LXXI-O/07) Follow-up on the application of the Inter-American Democratic Charter

CJI/doc.281/07 Reasoned vote. Follow-up on the application of the Inter-American Democratic Charter (CJI/doc.274/07 rev.2) (presented by Dr. Eduardo Vío Grossi)

CJI/doc. 284/07 - Explanation of dissenting vote on the follow-up on the application of the Inter-American Democratic Charter resolution (presented by Dr. Antonio Fidel Pérez)

CJI/doc.264/07 Report concerning the Report of the Secretary General of the Organization of American States on Implementation of the Inter-American Democratic Charter (presented by Dr. Antonio Fidel Pérez)

[CP/INF.5898/09](#) NOTE FROM THE CHAIR OF THE INTER-AMERICAN JURIDICAL COMMITTEE FORWARDING TO THE PERMANENT COUNCIL RESOLUTION [CJI/RES. 159 \(LXXV-O/09\)](#), "THE ESSENTIAL AND FUNDAMENTAL ELEMENTS OF REPRESENTATIVE DEMOCRACY AND THEIR RELATION TO COLLECTIVE ACTION WITHIN THE FRAMEWORK OF THE INTER-AMERICAN DEMOCRATIC CHARTER"

[CP/INF.5899/09](#) NOTE FROM THE CHAIR OF THE INTER-AMERICAN JURIDICAL COMMITTEE FORWARDING TO THE PERMANENT COUNCIL RESOLUTION [CJI/RES. 160 \(LXXV-O/09\)](#), "FOLLOW-UP ON THE APPLICATION OF THE INTER-AMERICAN DEMOCRATIC CHARTER"

PRESS RELEASE [\(E-282-09\)](#) INTER-AMERICAN JURIDICAL COMMITTEE ASSERTS THAT DEMOCRACY IS NOT LIMITED TO THE ELECTORAL PROCESS

The Inter-American Democratic Charter. Report of the Secretary General pursuant to resolutions AG/RES. 2154 (XXXV-O/05) and AG/RES. 2251 (XXXVI-O/06)] (CP/doc. 4184/07, 4 April 2007)

At its 62nd regular session (Rio de Janeiro, March 2003), the Inter-American Juridical Committee decided to include in its agenda the item on the implementation of the Inter-American Democratic Charter. Dr. Eduardo Vío Grossi introduced document CJI/doc.127/03, entitled *Democracy in the Inter-American System: Follow-up Report on applying the Inter-American Democratic Charter* and was appointed rapporteur on the

topic. The Committee decided to consider the document at its next regular session.

At its 63rd regular session (Rio de Janeiro, August 2003), the Inter-American Juridical Committee adopted resolution CJI/RES.64 (LXIII-O/03), entitled *Application of the Inter-American Democratic Charter*, in which it noted that, to date, the agenda of the competent organs of the Organization did not contain any request for the implementation of the mechanisms provided for in the Inter-American Democratic Charter and decided that the item should remain on its agenda as a follow-up item. Lastly, it requested the rapporteur, Dr. Eduardo Vío, to submit a new report on the topic at the Committee's 64th regular session.

The Inter-American Juridical Committee did not discuss this topic at the 64th regular session (Rio de Janeiro, March 2004).

At its XXXIV regular session (Quito, June 2004) the General Assembly, through resolution AG/RES.2042 (XXXIV-O/04), requested the Inter-American Juridical Committee, within the framework of this topic, to analyze, in light of the provisions in Chapter III of the *Inter-American Democratic Charter*, the legal aspects of interdependence between democracy and economic and social development, bearing in mind, for example, *Recommendations of the High Level Meeting on Poverty, Equality and Social Inclusion* in the *Declaration of Margarita, Monterrey Consensus*, declarations of action plans issued by Summits of the Americas, and the objectives in the *United Nations Millennium Declaration*.

The Inter-American Juridical Committee examined the General Assembly resolution AG/RES.2042 (XXXIV-O/04) at its 65th regular session (Rio de Janeiro, August 2004).

Dr. Eduardo Vío, rapporteur of the topic, said that the documents reviewed in the resolution should be analyzed before the Committee gives its opinion on the General Assembly mandate, bearing in mind that they are documents of a different nature and issued by different agencies and organizations.

Dr. Luis Herrera expressed his doubts that the topic is evidently juridical, by which, from analyzing the relation between democracy and social development, certain legal consequences may arise. Dr. Felipe Paolillo stressed that what the resolution asks for is precisely to analyze the *legal* aspects of the interdependence between democracy and economic and social development. He asked to bear in mind the twofold meaning established by the *Inter-American Democratic Charter* in its article 1, in the sense that democracy is essential for economic, political and social development of the peoples of the Americas and vice versa. Dr. João Grandino Rodas, in turn, said that it might be a hard task, but that the Committee could give an answer at the next regular session. He suggested that it is possible for the Committee to propose a binding instrument on this matter, as it did on the occasion of the *Inter-American Democratic Charter*. Dr. Luis Marchand commented that what the General Assembly is requesting is already outlined in the *OAS Charter* itself and in the *Inter-American Democratic Charter*. Latin America is the worst in the world for social inequality and the topic of abject poverty is crucial within the OAS, he said. He proposed to take as a working model the *Inter-American Democratic Charter*, proceeding to find a link between the documents mentioned in the General Assembly resolution. At this point, Dr. Marchand said that it was important in the Juridical Committee report to study the elements against economic and social development. He said that, with the sole statement on the legal aspects of interdependence as the resolution states, the Committee will lose a wonderful opportunity to give a valuable contribution to the Organization on this topic. He finally

said that the Achilles heel of democracy is poverty, and that this is an item that must not be ignored. Lastly, he proposed that one of the conclusions of the Juridical Committee is the preparation of an Inter-American Charter for Economic and Social Development within the framework of democracy.

Dr. Eduardo Vio asked to consider that not necessarily in all cases under study is it possible to determine a legal obligation whose non-compliance entails international responsibility, such as, for example, the obligations of the States to promote economic and social development, an obligation of behavior with which it is difficult to determine non-compliance. He also suggested stating that the mechanism of non-compliance included in the *Inter-American Democratic Charter* (break in democracy) does not relate to non-compliance with the obligation to the aforementioned development.

Dr. Luis Herrera referred to articles 3 and 4 of the *Inter-American Democratic Charter*, listing the essential components of representative democracy and the basic items for exercising democracy. In his opinion, there is no mention of economic and social development being essential or of the basic components for the existence of democracy, but it establishes their interdependence. Therefore, the absence of economic and social development would not mean the start of using mechanisms to establish the *Democratic Charter*. Nor did the *Monterrey Consensus* or *Declaration of Margarita* apparently conclude anything else. The key question is then what happens if it determines that a State is not doing what it could do to promote economic and social development. In Dr. Herrera's opinion, in this case, there would not necessarily be legal consequences.

Dr. Mauricio Herdocia said that it was important to again summarize what has already been acknowledged in the *OAS Charter*, which has an entire chapter on integral development. The Charter includes commitments to developing the entire link between democracy and full development, he said. He also recalled that, at the last General Assembly, it adopted a resolution on a Draft Social Charter of the Americas, and that it should be borne in mind. Dr. Herdocia suggested also that any progress on the topic within the Inter-American Juridical Committee should be restricted to the mandate of the resolution. He commented that although legal interdependence between peace and development has not been highlighted, there has been progress on the matter. He said that the *OAS Charter* stipulates such connections and it should be discussed further. He also suggested taking as a logical basis resolution AG/RES.2056 (XXXIV-O/04) that requests CIDI to prepare documents on the matter. He also recommended a study of the minutes in which the discussion led to adopting the resolution, such as that which originated the mandate of the Juridical Committee.

The Inter-American Juridical Committee decided finally to add another topic to the Committee agenda with the title *Legal aspects of interdependence between democracy and economic and social development* for consideration with Dr. Jean-Paul Hubert as rapporteur. The topic on implementation of the *Inter-American Democratic Charter* continues with doctor Eduardo Vío as rapporteur.

At its 66th regular session (Managua, February 28–March 11, 2005), the Inter-American Juridical Committee decided to add Dr. Antonio Pérez as one of the topic's rapporteurs. Dr. Luis Herrera recalled that the Juridical Committee had kept this topic on the agenda as a follow-up topic, should a new mandate from the General Assembly be

given, or should the need arise for the Committee to review some specific topic.

At its 35th regular session (Fort Lauderdale, June 2005), the General Assembly did not assign any tasks on this topic to the Inter-American Juridical Committee.

During the 67th regular session of the Inter-American Juridical Committee (Rio de Janeiro, August 2005), the co-rapporteur of the theme, Dr. Eduardo Vio Grossi, expressed his doubts on the role played by the Juridical Committee on this matter, since it corresponded basically to the Permanent Council to bear the responsibility for the application of this instrument. Both he and the other co-rapporteur, Dr. Antonio Fidel Pérez, felt the need to wait for some juridical consultation on the part of the Permanent Council before returning to the study of the theme.

Dr. Galo Leoro Franco also considered that the follow-up of this theme on the part of the Juridical Committee was not opportune at the present moment. Furthermore, he indicated that the primordial responsibility for this follow-up of the Democratic Charter belonged to the Permanent Council and the Secretary-General.

Dr. Jean-Paul Hubert was of the opinion that the theme should remain in the agenda of the Juridical Committee as a follow-up theme to convey the message to the political sectors of the OAS that the Committee is interested in the matter. The same opinion was shared by Drs. Ana Elizabeth Villalta Vizcarra and João Grandino Rodas.

The Director of the Department of International Legal Affairs declared that in the future the Inter-American Juridical Committee might be consulted on a specific problem, that is, whether the *Inter-American Democratic Charter* should be extended, changed or updated for those cases in which a situation arise that does not correspond to article 20, but where an international crisis exists nonetheless, and the government does not resort to applying articles 17 or 18, since the very Executive Power is the destabilizing element.

The Inter-American Juridical Committee decided to keep this theme in its agenda as a follow-up theme and to change the title of the theme to "Follow-up of the application of the Inter-American Democratic Charter".

At its 68th regular session (Washington, D.C., March 2006), the Inter-American Juridical Committee did not consider the topic.

At its 69th regular session (Rio de Janeiro, August 2006), the Inter-American Juridical Committee did not consider the topic either.

At the 70th regular session of the Inter-American Juridical Committee (San Salvador, February-March 2007), the Inter-American Juridical Committee decided to keep this item on its agenda as a topic for follow-up. On 10 April 2007, the Office of International Law sent IAJC members document CP/doc. 4184/07, "The Inter-American Democratic Charter: report of the Secretary General pursuant to with resolutions AG/RES. 2154 (XXXV-O/05) and AG/RES. 2251 (XXXVI-O/06)".

On July 12, 2007, the Office of International Law sent the members of the Inter-American Juridical Committee a copy of document CJI/doc. 264/07, "Report concerning the Report of the Secretary General of the Organization of American States on Implementation of the Inter-American Democratic Charter", submitted by Dr. Antonio Fidel Pérez, who made a presentation of its content at the Inter-American Juridical Committee's 71st regular session (Rio de Janeiro, August 2007).

Dr. Pérez stressed that had he been made aware sooner of the comments that the Secretary General made on this topic during his visit to that session of the Juridical Committee, his own report would have been prepared from a different angle. His document consisted of a brief analysis of the Secretary General's report, in which he identified some of the questions raised by the Secretary General concerning the Inter-American Democratic Charter. In Dr. Pérez' opinion, the questions raised fell into two categories: first, how to correct any flaws or ambiguities in the Inter-American Democratic Charter; and second, how to achieve the Charter's objective and what types of conclusions can be drawn from it.

Dr. Pérez noted that the Secretary General had raised two substantive legal questions. The first question, originally raised by President Jimmy Carter, concerned the legal definition of democracy which, in Dr. Pérez' opinion, was not altogether clear should a Member State ever have to invoke application of the Charter. The second question concerned the following: absent any decision on the part of the Member States, what mechanism could the Secretary General use to initiate dialogue with a Member State in which democratic order was seriously impaired. He observed that at the present time, the provisions of the Inter-American Democratic Charter did not require a decision on the part of the Permanent Council or the General Assembly; they did, however, give the Secretary General the authority to handle the matter with the consent of the government of the Member State in which democratic order is threatened. Dr. Pérez also made the point that still a third question would be the interpretation of the term "government." The Secretary General's report suggested that one possibility might be that a branch of "government" –other than the executive branch- could invoke the Inter-American Democratic Charter with the Secretary General, without going through the Permanent Council.

Dr. Pérez noted that his report did not examine these questions; instead it looked at how the meaning of the term "government" might be clarified; it also provided a more precise definition of the term "government" and the term "democracy" with a view to implementation of the Inter-American Democratic Charter in a case in which democratic order was threatened. He observed that he had a further objective, which was to try to identify issues that concerned the methodology of international law, since the Secretary General's report had raised some doubt as to the legal *status* of the "Inter-American Democratic Charter" as an international instrument and how the legal questions it raised could be solved through consensus. Dr. Pérez suggested that before embarking upon the process of amending the Inter-American Democratic Charter, an interpretation could be sought from the political bodies of the OAS concerning the ambiguities identified in the Secretary General's report.

Dr. Jean-Paul Hubert summarized the three questions raised in the Secretary General's report and those raised by Dr. Pérez: first, the definition of democracy; second, the absence of a definition of what constitutes a serious threat to democratic order; and third, what can or cannot be called 'government.' He observed that any concept of 'government' that would confine it to the executive branch was a narrow one.

Dr. Hubert recalled that during his visit the Secretary General had made plain that some had reacted to his report by pointing out that the political will of the Member States when the Inter-American Democratic Charter was adopted was to interpret it on a case-by-case basis. That being the case, how, then, could any effort be undertaken to amend the Charter or ascribe to it a specific interpretation? Dr. Hubert suggested that the Inter-American Juridical Committee should keep this topic on its agenda, which would signal the Committee's interest in pursuing the matter. It might even exercise its own initiative and issue an opinion on the legal *status* of the Charter and/or other questions raised by the Secretary General in his report.

The Director of the Department of International Legal Affairs, Dr. Jean-Michel Arrighi, recalled that when the text of the Inter-American Democratic Charter was being negotiated, an opinion was requested from the Inter-American Juridical Committee. The latter presented a report in 2000 in which it stated, in no uncertain terms, that it was working from the premise that the document to be approved would be a resolution of the General Assembly. The States operated on that basis and did not prepare a Protocol. He said that the term "resolution" did not imply that the document was nonbinding upon the Member States. A General Assembly resolution, he said, was binding upon the organs of the Organization; the nonbinding part of a resolution was the recommendatory section. Dr. Arrighi emphasized, then, that the nonbinding nature of a resolution was not across-the-board. At the time, the States did not want a repeat of the situation that the Protocol of Washington created, which was ratified by only 24 States. One Member State had issued a declaration expressing its opposition to the amendments introduced by the Protocol.

Dr. Eduardo Vio Grossi recalled that resolutions adopted by international organizations could be in the nature of *opinio juris* (interpretative), or they could be binding, depending on two factors: the party to whom the resolution is addressed and the hierarchy of the body that approves it. He said that the legal effect of the Organization's Inter-American Democratic Charter was inwardly directed, as it was addressed to the Secretary General and to the Councils. It had legal effect because it was based on general principles of law. He maintained that when the General Assembly adopted this resolution, it knew what it was doing. In other words, the Inter-American Democratic Charter was not simply inwardly directed; it also embodied principles and customary law. This, he said, was what made this resolution important, as it constituted a secondary source of law, despite the fact that resolutions of this type did not figure among the sources of law listed in Article 38 of the Statute of the International Court of Justice.

Dr. Antonio Fidel Pérez remarked that the Secretary General's report did not make clear what the legal nature of the Inter-American Democratic Charter was. He observed that it could be interpreted as a regular resolution adopted by an international organization, or as a special resolution that enlightens the interpretation of the OAS Charter and is binding upon all Member States, including those that are not party to the Protocol of Washington; or it could also be seen as an interpretation of the amended OAS Charter, binding only upon those States Parties to the "Protocol of Washington". Dr. Pérez observed that the Secretary General's report provided multiple interpretations. He said that should the Juridical Committee choose to answer the Secretary General's report and pursue the topic further, the first step he would suggest would be to ask the kinds of questions that would clear up some of these basic issues.

Dr. Mauricio Herdocia Sacasa observed that in light of the Secretary General's visit and given the importance of the topic of the Inter-American Democratic Charter and of the report that the Secretary General presented to the Permanent Council, the Juridical Committee continued to revisit this topic because of its relevance to a number of other topics. He underscored the basic difference between the United Nations' concept of democracy as a universal right, and the inter-American system's model where democracy has been enshrined in the Organization's founding Charter; in the Inter-American Democratic Charter, the American States agreed upon the essential elements of representative democracy, and undertook a common and shared responsibility in the event of interruption or alteration of the legitimate exercise of power. He said that it was possible to visualize an interpretation of the essential elements of democracy as defined in Article 3 of the Charter. Dr. Herdocia Sacasa went on to say that given the current composition of the OAS and the prevailing ideological leaning within the Organization, a technical body would be needed in order to settle that difference. The Juridical Committee would play an important role because of its competence and by virtue of its advisory function. As for the interpretation of the Inter-American Democratic Charter, Dr. Herdocia Sacasa concurred with Dr. Eduardo Vio Grossi: in its advisory opinion the Juridical Committee had already made the case for the importance of certain resolutions, arguing that they reflected the applicable law at a given point in time. This was one of the fundamental characteristics of the Inter-American Democratic Charter, he observed, as it reflected the current applicable law on the defense and promotion of representative democracy. He went on to say that this was not a question of a one-time initiative; instead, it represented a series of measures taken by the Organization that culminated with the adoption of the Inter-American Democratic Charter".

Dr. Galo Leoro Franco stated that the Inter-American Democratic Charter may encounter problems in any country; not being a treaty it did not have the force of a treaty. Dr. Leoro Franco was of the view that its legal *status* might change if it were applied in a consistent, uniform manner, which would be a tacit acknowledgment of its binding nature. That would be a gradual process, he observed, that should be allowed to evolve. The Inter-American Juridical Committee should weigh all these considerations carefully to avoid transforming declarations like these or others into real international law. In this respect, he disagreed with the view that the Inter-American Democratic Charter was binding upon the States. In some States, the legislative branch must give its approval before an instrument can become law. He was concerned that the Juridical Committee might issue an opinion to the effect that a declaration –although not an international convention- had the same legal force as an international convention.

Dr. Eduardo Vio Grossi observed that some international acts did not require congressional approval or ratification to be valid. On the subject of democracy, he recalled that the Committee had already concluded that it was an inter-American legal obligation. Even before the Inter-American Democratic Charter existed, the Committee had declared that democracy was an obligation; violation of that obligation would have to be redressed in order to re-establish government by law. Dr. Vio Grossi observed that the Inter-American Democratic Charter was not a perfect document and that it allowed for interpretation, as with the term "government," the definition of democracy, the Charter itself as a source of law, the way the mechanisms operate and, finally, the ambiguity as regards the essential and basic elements.

Dr. Jaime Aparicio raised the question of whether the Inter-American Juridical Committee had any contribution to make to the Inter-American Democratic Charter. In his view, neither resolution 1080 nor the Charter was binding from the standpoint of application; nonetheless, they had been applied in certain cases. Haiti was one case in which resolution 1080 was applied, as was Peru. His view was that application of these instruments would depend on the circumstances and the political power of the State. Dr. Aparicio suggested that the Committee should concern itself with the questions raised by the Secretary General. In other words, it should determine what constitutes an interruption or alteration that seriously impairs the democratic order, and under what circumstances the Secretary General should intervene. Another issue would be the entities authorized to invoke the Charter; in other words, to determine whether the mechanism can be opened up to allow other branches of government to invoke the Inter-American Democratic Charter.

Dr. Freddy Castillo Castellanos, too, agreed that the issue was an important one to examine. He suggested that the Committee should agree upon certain specific points to address in the opinion it would issue. These would mainly have to do with ambiguities with respect to the Charter's application; the matter of cultivating the preventive nature of the Charter in preference to the nonpunitive nature, and the obstacles standing in the way of approval of the Social Charter, as the Secretary General pointed out in his report.

Dr. Ana Elizabeth Villalta Vizcarra was of the view that the Inter-American Juridical Committee had a contribution to make to the Inter-American Democratic Charter, as this topic was already on its agenda. As for the legal nature of the Charter, she felt that it was a special declaration, because it served to further a purpose and principle of the OAS' founding Charter.

Concerning the *status* of the Charter as a legal instrument, Dr. Antonio Fidel Pérez expressed the view that a plausible albeit mistaken argument could be made for the fact that the Inter-American Democratic Charter was a faithful interpretation of the OAS Charter, just as the International Court of Justice had concluded that the United Nations' "Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States" was a faithful interpretation of the United Nations Charter (according to the UN Charter, resolution 2625 (XXV)). Dr. Pérez said that he was not certain whether all the States, when they signed the Inter-American Democratic Charter, did so on the assumption that it was a faithful interpretation of the OAS Charter. As for the definition of democracy for purposes of the Charter, his view was that it would in all likelihood be impossible to arrive at an acceptable consensus interpretation based on the legal materials available at this time. Finally, on the definition of government contained in articles 17 and 18 of that instrument, he wanted to be very clear that the Inter-American Juridical Committee should not undertake such a delicate matter without first receiving a simultaneous request from the Secretary General and the Permanent Council.

Dr. Jean-Michel Arrighi, Director of the Department of International Legal Affairs, observed that in addition to the questions raised in the Secretary General's report, Article 23 of the Inter-American Democratic Charter implied that in practice, a political party could request an electoral observation mission. Another problem to be resolved was establishing the means to enable the legislative and judicial branches to invoke the Inter-American Democratic Charter when the executive branch itself was threatening

democratic institutions. He added that other inter-American instruments made express provision for civil society's participation, but no express provision allowed the judicial and legislative branches to participate. After an extended debate, the Inter-American Juridical Committee approved resolution CJI/RES.132 (LXXI-O/07), "Follow-up on the implementation of the Inter-American Democratic Charter", in which it resolved to revisit this item on its agenda. It also decided to interpret the conditions and the means by which the "Inter-American Democratic Charter" can be invoked, based on the OAS Charter and other basic legal instruments concerning the defense and promotion of democracy in the Americas. Finally, Drs. Ana Elizabeth Villalta Vizcarra, Jaime Aparicio, Mauricio Herdocia Sacasa, Ricardo Seitenfus, Eduardo Vio Grossi, Freddy Castillo Castellanos and Jean-Paul Hubert were named as rapporteurs for the topic. Dr. Eduardo Vio Grossi presented an explanation of his vote on this resolution, and Dr. Antonio Fidel Pérez presented an explanation of his dissenting vote.