

## Under what circumstances may the OAS apply the democracy clause against a member state?

*Working paper on International Democracy Law*  
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Below, we present, first, the specific events that turn an OAS member state into an anti-democratic state; and, second, the procedure the OAS must follow to apply the democracy clause against that state.

### a. Specific events that should trigger the application of the democracy clause

After decades of progressive development of international democracy law in the Americas—also called inter-american system for the protection of democracy—the Charter of the OAS and the Inter-American Democratic Charter<sup>1</sup> put forth a set of legal provisions referred to as “democracy clause.”<sup>2</sup> Under these provisions, the three

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<sup>1</sup> According to general international law, the Charter of the OAS is a treaty, thus, its democracy clause is binding. Conversely, the Inter-American Democratic Charter being a general assembly resolution, its democracy clause would be considered a recommendation. However, there are at least three solid arguments that support the binding character of the Democratic Charter’s democracy clause. First, pursuant to the preamble of the Democratic Charter (“[b]earing 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) (emphasis added), signatory OAS States in 2001 seem to have approved it as an interpretation of the OAS Charter’s democracy clause. Following the Vienna Convention on the Law of Treaties (Art. 31), this general assembly resolution would then have the same binding status as the treaty it interprets. See Hubert, Jean-Paul (ed.), *Follow-up on the Application of the Inter-American Democratic Charter*, CJI/doc.317/09 corr.1 (Inter-American Juridical Committee), at 16-19 (quoting drafters of the Democratic Charter supporting this thesis at the time of its approval); EL-HAGE, Javier, *LÍMITES DE DERECHO INTERNACIONAL PARA LA ASAMBLEA CONSTITUYENTE: DEMOCRACIA, DERECHOS HUMANOS, INVERSIONES EXTRANJERAS Y CONTROL DE DROGAS*, 2006, 181ff (putting forth further arguments in favor of this thesis). See also Vio Grossi, Eduardo, in Inter-American Juridical Committee, *Follow-up on the Application of the Inter-American Democratic Charter*, 2007 ANNUAL REPORT, at 94, 95. [hereinafter CJI 2007] Second, even if its binding status was debatable, the Democratic Charter would still be binding on the organs of the OAS, called upon to apply the democracy clause. See Vio Grossi, *id.*, at 94. Third, the democracy clause may also be considered regional customary international law on democracy (*opinio iuris* and *consuetudo*). See EL-HAGE, *id.*, at 154 (citing Lagos & Rudy); Hubert, *id.*, at 12, 17 (citing Graham, the Inter-American Juridical Committee and Rodríguez Cuadros); and Vio Grossi, *id.*

<sup>2</sup> See EL-HAGE, *id.*, at 163 (In general, a democracy clause is a provision or set of provisions in an international conventional instrument, which subjects the admission, participation or permanence in certain organization, and/or the maintenance of diplomatic, economic or cooperation relations among signatory parties, to the obligation that each state party has a democratic system of government in place. [Unpublished translation by the author]); and Theodore J. Piccone, *International Mechanisms for Protecting Democracy*, in *PROTECTING DEMOCRACY. INTERNATIONAL RESPONSES* 101 (Morton H. Halperin

categories of events that should grant the activation of the democracy clause and, eventually, lead to the suspension of a member state from its participation in the various organs of the OAS are: (1) the forcible *overthrow* of a democratically constituted government;<sup>3</sup> (2) the unconstitutional *interruption* of the democratic order; or (3) the unconstitutional *alteration* of the constitutional regime that *seriously impairs* the democratic order in a member state<sup>4, 5</sup>.

Although both the Charter of the OAS and the Inter-American Democratic Charter fail to explicitly define the circumstances that qualify as a “forcible overthrow,” an “interruption of the democratic order,” or an “alteration that seriously impairs the democratic order,” academic studies by international law experts and scholars in the field of the inter-american system for the protection of democracy provide insight into specific events that fit within the scopes of these phrases.

Drawing from these academic works, the events that can lead to the suspension of a government from the OAS can be divided into three subcategories within a continuous spectrum. On one end of this spectrum, we find the circumstances constituting those scenarios that can be classified as a “coup-d’état;” next, we find the circumstances resembling coups, called “coup-like situations;” and thirdly, at the other end of the spectrum, we find the circumstances constituting gradual, sustained, or systematic erosions of the essential elements of democracy.

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& Mirna Galic eds., 2005) (“democracy clauses: multilateral mechanisms for protecting democracy when it is unconstitutionally interrupted or threatened by autocratic rulers.”).

<sup>3</sup> Charter of the Organization of American States Art. 9, April 30, 1948, as amended by the Washington Protocol of 1992, in force since 1997 [hereinafter OAS Charter] (“A Member of the Organization *whose democratically constituted government has been overthrown by force may be suspended* from the exercise of the right to participate in the sessions of the General Assembly, the Meeting of Consultation, the Councils of the Organization and the Specialized Conferences as well as in the commissions, working groups and any other bodies established. a) The power to suspend shall be exercised only when such diplomatic initiatives undertaken by the Organization for the purpose of promoting the restoration of representative democracy in the affected Member State have been unsuccessful; b) The decision to suspend shall be adopted at a special session of the General Assembly by an affirmative vote of two-thirds of the Member States; c) The suspension shall take effect immediately following its approval by the General Assembly; d) The suspension notwithstanding, the Organization shall endeavor to undertake additional diplomatic initiatives to contribute to the re-establishment of representative democracy in the affected Member State; e) The Member which has been subject to suspension shall continue to fulfill its obligations to the Organization; f) The General Assembly may lift the suspension by a decision adopted with the approval of two-thirds of the Member States; g) The powers referred to in this article shall be exercised in accordance with this Charter.”) (Emphasis added).

<sup>4</sup> Inter-American Democratic Charter Arts. 19-21, G.A. Res. Sept., 11, 2001 [hereinafter Democratic Charter].

<sup>5</sup> Before the entry into force of the Washington Protocol (which incorporated a democracy clause into the OAS Charter), and the passing of the Democratic Charter in 2001 (widening the scope of the OAS Charter’s democracy clause), the General Assembly had the power, pursuant to Resolution 1080 (2001), to “adopt any decisions deemed appropriate” against any member state “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 .” (Emphasis added).

**Table 1: Bibliographical references to events fitting within the legal terms that must trigger the activation of the democracy clause of the OAS**

	<i>Coup d'état</i>	<i>Coup d'état –like situations (self-coups, impeachment coups)</i>	<i>Erosions</i>
<i>Overthrow</i>	Seven authors <sup>6</sup>	One author <sup>7</sup>	
<i>Interruption</i>	Five authors <sup>8</sup>	Three authors <sup>9</sup>	Four authors <sup>10</sup>
<i>Alteration</i>	Three authors <sup>11</sup>	Three authors <sup>12</sup>	Four authors <sup>13</sup>

Table 1 illustrates that, among the authors cited, it is common to find coup d'états, coup d'état-like situations, and erosions of democracy explicitly categorized under the legal concepts of “forcible overthrow,” “interruption of the democratic order,” and “alteration that seriously impairs the democratic order,” or defined and referenced in a way that such categorization can be reasonably inferred. Passages from seven authors either explicitly

<sup>6</sup> EDWARD R. MCMAHON & SCOTT H. BAKER, *PIECING A DEMOCRATIC QUILT? REGIONAL ORGANIZATIONS AND UNIVERSAL NORMS*, 94 (2006); Jean-Paul Hubert, in *CJI 2007, id.*, at 94; Pedro Nikken Bellshaw-Hogg, *Analysis of the Basic Conceptual Definitions for the Application of Mechanisms for the Collective Defense of Democracy provided for in the Inter-American Democratic Charter*, in *COLLECTIVE DEFENSE OF DEMOCRACY: CONCEPTS AND PROCEDURES* 33 (Carlos Ayala Corao & Pedro Nikken Bellshaw-Hogg, 2006); Esther Brimmer, *Vigilance: Recognizing the Erosion of Democracy*, in *PROTECTING DEMOCRACY. INTERNATIONAL RESPONSES* 233 (Morton H. Halperin & Mirna Galic eds., 2005); Peter A. Ferguson, *The Inter-American Democratic Charter: Challenges and Opportunities*, Conference held in Vancouver, BC, Canada (April 2003), 1 <http://www.focal.ca/pdf/report.pdf>.; and EL-HAGE, *supra* note 1, at 166, 177ff.

<sup>7</sup> Hubert, in *CJI 2007, id.*; *Contra* Nikken, *id.* (“‘overthrow’ does not include ‘self-coups’”).

<sup>8</sup> Dexter S. Boniface, *The OAS’s Mixed Record*, in *PROMOTING DEMOCRACY IN THE AMERICAS* 47 (Thomas Legler et al eds., 2007); Ferguson, *id.*; MADELEINE K. ALBRIGHT ET AL, *THREATS TO DEMOCRACY: PREVENTION AND RESPONSE. REPORT OF AN INDEPENDENT TASK FORCE SPONSORED BY THE COUNCIL ON FOREIGN RELATIONS*, at 177 (2003); Brimmer, *id.*; Rubén M. Perina, *The Role of the Organization of American States*, in *PROTECTING DEMOCRACY. INTERNATIONAL RESPONSES* 101 (Morton H. Halperin & Mirna Galic eds., 2005).

<sup>9</sup> Boniface, *id.*; ALBRIGHT ET AL, *id.*; Cameron cited by Ferguson, *supra* note 6, at 8.

<sup>10</sup> Boniface, *id.* (citing “civil-military crises”); Nikken, *supra* note 6, at 43-48; Brimmer, *supra* note 6; MCMAHON & BAKER, *supra* note 6, at 99; Cameron cited by Ferguson, *id.*

<sup>11</sup> Carlos Ayala Corao, *International Mechanisms for the Collective Defense of Democracy in the Inter-American Democratic Charter*, in *COLLECTIVE DEFENSE OF DEMOCRACY: CONCEPTS AND PROCEDURES* 107 (Carlos Ayala Corao & Pedro Nikken Bellshaw-Hogg, 2006); Boniface, *id.*; Cameron cited by Ferguson, *id.*

<sup>12</sup> Ayala, *id.*; Boniface, *id.*; Cameron cited by Ferguson, *id.*

<sup>13</sup> Carter Center cited by Shelley A. McConnell & Jennifer McCoy, *Analytical Review and Recommendations of/from CARLOS AYALA CORAO & PEDRO NIKKEN BELLSHAW-HOGG, COLLECTIVE DEFENSE OF DEMOCRACY: CONCEPTS AND PROCEDURES* (2006), at 26; Boniface, *id.* (citing “civil-military crises”); ALBRIGHT ET AL, *supra* note 8; MCMAHON & BAKER, *supra* note 6; Cameron cited by Ferguson, *id.*

state or suggest that the legal term “overthrow” includes coup d’états; five include coup d’états under the category of “interruption;” and three include them under “alteration.” One author includes “coup d’état-like situations” in the category of “overthrows;” three authors include them under “interruptions;” and three beneath “alterations.” Finally, four authors indicate “erosions” can be included under “interruptions;” and four include “erosions” as “alterations.” It should be noted that these legal categories are not mutually exclusive, as one or more of each can include the same type of democratic crisis.

**i. The coup d’état**

The first subcategory of events that can trigger the application of the OAS democracy clause contains the facts constituting a coup d’état. Within the aforementioned literature, the coup d’état is the most clear and agreed upon cause for the suspension of a government from the OAS; however, the vast majority of these studies do not clearly define what a “coup d’état” is, and fail to identify its specific characteristics.<sup>14</sup>

Moreover, because the coup d’état is not a legal concept—i.e. it is not defined neither by any valid source of international law nor by any domestic legal order—there are as many definitions as authors have sought to define it. However, judging from the context in which the term is used in the books dealing exclusively with the phenomenon of coups, and in some specialized dictionaries, a coup d’état would refer to a scenario with the following four concurring elements: first, that the *victim* of the coup is the *president* or other civil authority with full control of *executive power* in that country; second, that the perpetrator of the coup has used *violence or coercion* to remove the victim from his post; third, that the action or actions that constitute the coup are *abrupt* or *sudden* and *rapid*; and fourth, that this action occurs in clear violation of the *constitutional procedure* to remove the president, or chief executive.

**Table 2: Characteristics displayed by the coup according to the definitions provided by literature devoted exclusively to that subject, in addition to specialized dictionaries**

	<i>Victim</i>	<i>Violence</i>	<i>Abrupt and expedient action</i>	<i>Violation of Legal Procedure for Executive Power</i>	<i>Involvement of the Military</i>

<sup>14</sup> See Boniface, *supra* note 8, at 47 (refers to “military coups” but does not define the term); Piccone, *supra* note 6, at 102 (refers to “outright coups” but does not define the term); Ferguson, *supra* note 6, at 1 & 8 (refers to “conventional or traditional military coups” but does not define the term); MCMAHON & BAKER, *supra* note 6, at 94 (refers to “traditional type of coup” but does not define the term. However, it gives an example: “the military’s overthrow of Allende government by General Pinochet”); Perina, *supra* note 8, at 101 (refers to “coup d’état” but does not define the term); ALBRIGHT ET AL, *supra* note 8 (refers to “coups” but does not define the term. However it cites Haiti 1991, Ecuador 2000 and Venezuela 2002, as examples); Ayala, *supra* note 11, at 107 (refers to “coup d’état” but does not define the term); Brimmer, *supra* note 6, at 233 (refers to “coups” but does not define the term); El-Hage, *supra* note 1, at 166 (refers to “traditional coup d’état” but does not define the term).

				<i>Succession</i>	
<i>Naudé</i> (according to <i>Juan Carlos Rey</i> )	...	Yes <sup>15</sup>	Yes <sup>16</sup>	Yes <sup>17</sup>	
<i>Malaparte</i>	President, or chief executive <sup>18</sup>	Yes <sup>19</sup>	Yes <sup>20</sup>	Yes, but not always <sup>21</sup>	Yes, but not always <sup>22</sup>
<i>Luttwak</i>	<i>Idem</i> <sup>23</sup>			Yes <sup>24</sup>	Yes, but not always <sup>25</sup>
<i>Hebditch &amp; Connor</i>	<i>Idem</i> <sup>26</sup>	Yes, but not always <sup>27</sup>	Yes <sup>28</sup>		Yes, but not always <sup>29</sup>
<i>Ferguson</i>	<i>Idem</i> <sup>30</sup>		Yes <sup>31</sup>	Yes <sup>32</sup>	
<i>Goodspeed</i>	<i>Idem</i> <sup>33</sup>	Yes <sup>34</sup>	Yes <sup>35</sup>	Yes <sup>36</sup>	
<i>Oxford Companion to Military History</i> <sup>37</sup>	<i>Idem</i>				Yes, but not always
<i>Concise Oxford Dictionary of Politics</i> <sup>38</sup>	<i>Idem</i>		Yes	Yes	Yes, but not always
<i>Oxford Essential Dictionary of the US Military</i> <sup>39</sup>	<i>Idem</i>	Yes	Yes	Yes	

<sup>15</sup> Juan Carlos Rey, *Introducción a GABRIEL NAUDÉ, CONSIDERACIONES POLÍTICAS SOBRE LOS GOLPES DE ESTADO*, 31, 50 (1964)

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> CURZIO MALAPARTE, *TÉCNICA DEL GOLPE DE ESTADO*, (2008).

<sup>19</sup> *Id.*, at 20, 36, 50, 88, 90.

<sup>20</sup> *Id.*, at 20, 83.

<sup>21</sup> *Id.*, at 55, 83, 85, 91.

<sup>22</sup> *Id.*, at 21, 29, 83.

<sup>23</sup> EDWARD N. LUTTWAK, *COUP D'ÉTAT. A PRACTICAL HANDBOOK*, 113, 115 (1979).

<sup>24</sup> *Id.*, at 23.

<sup>25</sup> *Id.*, at 26.

<sup>26</sup> DAVID HEBDITCH & KEN CONNOR, *HOW TO STAGE A MILITARY COUP. FROM PLANNING TO EXECUTION*, 199-206 (2009).

<sup>27</sup> *Id.*, at 32.

<sup>28</sup> *Id.*, at 9.

<sup>29</sup> *Id.*, at 36, 37.

<sup>30</sup> GREGOR FERGUSON, *COUP D'ÉTAT. A PRACTICAL MANUAL*, 15 (1987)

<sup>31</sup> *Id.*, at 13.

<sup>32</sup> *Id.*, at 11.

<sup>33</sup> D. J. GOODSPEED, *THE CONSPIRATORS. A STUDY OF THE COUP D'ÉTAT*, 1, 60, 144 (1962).

<sup>34</sup> *Id.*, at xi.

<sup>35</sup> *Id.*, ix.

<sup>36</sup> *Id.*, at xi.

<sup>37</sup> "Coup d'état." *The Oxford Companion to Military History*. Oxford University Press, 2001, 2004. *Answers.com* 24 Aug. 2009. <http://www.answers.com/topic/coup-d-tat>

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<i>Britannica Concise Encyclopedia</i> <sup>40</sup>	<i>Idem</i>	Yes, but not always	Yes		
<i>New Dictionary of Cultural Literacy</i> <sup>41</sup>	<i>Idem</i>		Yes		Yes, but not always
<i>Diccionario Ideológico de la Lengua Española</i> <sup>42</sup>	Any branch of government	Yes		Yes	
<i>Diccionario de Uso del Español</i> <sup>43</sup>	<i>Idem</i>	Yes		Yes	Yes, but not always
<i>Diccionario Espasa Calpe</i> <sup>44</sup>		Yes		Yes	
<i>Enciclopedia Microsoft Encarta</i> <sup>45</sup>	<i>Idem</i>	Yes		Yes	Yes, but not always

As illustrated in Table 2, the involvement of military forces is not necessary for an event to be considered a coup; however, the participation of the military helps distinguish the “military coup” as a special variety within the general category of “coups.” Indeed, most studies concerning the inter-american system for protection of democracy refer to the “military coup,”<sup>46</sup> “conventional military coup,”<sup>47</sup> “classic coup,”<sup>48</sup> “traditional military coup,”<sup>49</sup> “traditional type of coup”<sup>50</sup> or “outright coup,”<sup>51</sup> as a kind of coup that may unequivocally be categorized under the international legal terms of “forcible overthrow” or “interruption of the democratic order,” according to international democracy law applicable in the Americas.

But the ambiguity inherent to the non-legal nature of the term “coup” is also found in the legal term “forcible overthrow of a democratically constituted *government*,” as it appears in Article 9 of the OAS Charter. To some jurists, if the interpretation of this term is not to be too “narrow,” Article 9 of the OAS Charter should also apply to the cases where a forcible overthrow is perpetrated by a democratically elected president against a

<sup>40</sup> *Id.*

<sup>41</sup> “coup d’état.” *The American Heritage® New Dictionary of Cultural Literacy, Third Edition*. Houghton Mifflin Company, 2005. 23 Nov. 2009. <Dictionary.com [http://dictionary.reference.com/browse/coup d’etat](http://dictionary.reference.com/browse/coup+d'etat)>.

<sup>42</sup> *Diccionario Ideológico de la lengua española*, Julio Casares de la Real Academia Española, Editorial Gustavo Gili S.A.- Barcelona, 1985. Available at <http://www.me.gov.ar/efeme/24demarzo/quees1.html> [last accessed 15 February 2010].

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> Boniface, *supra* note 8, at 47 (“military coup”).

<sup>47</sup> Ferguson, *supra* note 6 (“conventional military coup”).

<sup>48</sup> Ayala, *supra* note 11 (“classic case of coups d’état”).

<sup>49</sup> Ferguson, *id.*, at 8 (“traditional military coup”).

<sup>50</sup> McMAHON & BAKER, *supra* note 6 (citing the forcible overthrow of the Allende government by General Pinochet and the military, as an example of a “traditional type of coup”).

<sup>51</sup> Piccone, *supra* note 2, at 102 (“outright coup”).

democratically elected legislature.<sup>52</sup> In any case, all the studies consulted agree that the act or series of acts that produce the overthrow of a democratically elected legislature, though they do not necessarily fall into the category of coup, they unequivocally fall into the one of “self-coup” and, therefore, should also cause the application of the democracy clause.

## ii. Coup d’état-like situations

The second category of events that can trigger the application of the democracy clause contains the facts constituting “coup d’état-like situations.”<sup>53</sup> The defining feature of this subcategory is that, as in the coup d’état, here the interruption of the democratic order occurs abruptly or suddenly. Within these situations, we find the so-called *auto-coups*<sup>54</sup> and *impeachment coups*.<sup>55</sup>

Although, as in the case of the coup d’état, the studies consulted do not always provide general definitions for these cases, most agree in identifying a few specific characteristics of “coup d’état-like situations.” On the one hand, the term *auto-coup* would refer to the abrupt action aimed at the forcible removal of a democratically-elected legislature, and would include the cases of closure or dismissal of parliament by the executive branch,<sup>56</sup>

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<sup>52</sup> See Hubert, in CJI 2007, *id.* (saying that “any concept of government,” as in OAS Charter’s “forcible overthrow of a democratically elected government,” should include both the President and Congress, if not to be deemed “a narrow one”). See also Charles Sampford and Margaret Palmer, *The Theory of Collective Response*, in PROTECTING DEMOCRACY. INTERNATIONAL RESPONSES 23 (Morton H. Halperin & Mirna Galic eds., 2005). (“[In a coup d’état, the military—and occasionally a president—uses power constitutionally endowed for the purposes of protecting the state to take over that state by seizing power from other institutions—including the legislature and the courts”). But see Nikken, *supra* note 6, at 33 (saying that the concept of “overthrow” does not include “self-coups”).

<sup>53</sup> See Boniface, *supra* note 8, at 49 (using the term “near-coup crises”).

<sup>54</sup> See Boniface, *id.*, at 47 (using the term “self-coups”); Nikken, *supra* note 6, at 33 (using the term “self-coup”); and Ayala, *supra* note 11 at 107 (using the term “self-coups d’état”). Compare with ALBRIGHT ET AL, *supra* note 8, at 177 (using the term “auto-coups”).

<sup>55</sup> See Boniface, *id.*, at 43 (coining the term *impeachment coup* for the first time and defining it as the “illegal—and often violent—acts by a disloyal opposition that unseat elected presidents and effect a quasi-legal transfer of power to a constitutionally designated successor. Examples can be found in countries as diverse as Argentina, Bolivia and Ecuador. The blending of illegality and constitutionality in these crises is a particular challenge for the OAS because they combine both democratic and antidemocratic practices. This challenge is made all the more daunting by the very real possibility that those who seek to undermine democratic governments in the region—whether from within or from without—have increasingly learned to ‘cloak’ their undemocratic activities under constitutional banners in order to shield themselves from international criticism.”).

<sup>56</sup> The non-abrupt actions by “agents of the executive branch” aimed at getting rid of opposition-controlled legislatures or congress members are included under the concept of “erosion” of democracy. Recent examples of these acts can be seen in Venezuela (2001) and Ecuador (2007), where Constituent Assemblies were used to shut down legislatures controlled by the opposition, and in Bolivia (2007, 2008), where *cercos* (“fences”) have been repeatedly used to encircle the Congress building in order to prevent opposition congress members from entering and voting on measures championed by the executive. For a more detailed description of these actions, see HRF Letter No. 4 to the Secretary General of the OAS. Available at: <http://thehrf.org/InsulzaLetterFeb26.pdf>. See also ALBRIGHT ET AL, *supra* note 8, at 177 (defining *auto-coup* as a process that includes actions that fall in the notion of democratic *erosion*: “by which democratically elected leaders override the democratic process, amend constitutions extra-legally, or annul democratic institutions.”).

as well as the abrupt dismissal of members of the supreme court or the constitutional court.<sup>57</sup> On the other hand, the term *impeachment coup* would refer to any sudden action by a legislature to remove a democratically-elected president, with disregard for the constitutional procedures for the removal of the president, and presidential succession.<sup>58</sup>

### iii. Gradual, sustained and systematic erosion of democracy, or the “creeping coup”

The third category of events that may cause the application of the OAS democracy clause contains the facts constituting the *gradual, sustained, and systematic erosion* of certain essential elements of democracy.<sup>59</sup> The main characteristic of this set of facts is that, unlike coup d'états and coup d'état-like situations, in these instances the interruption or alteration that impairs the democratic order does not occur abruptly or suddenly, but in a gradual, sustained, and systematic manner.<sup>60</sup>

Based on all the studies analyzed, the following are examples of actions that, when gradual, sustained, and systematic, should cause the application of the democracy clause of the OAS, either preventively to avoid the interruption or serious impairment of the democratic order, or correctively once the interruption or serious impairment of the democratic order is a *fait accompli*:

1. Use of public office to silence, harass, or disrupt the association, and activities of members of the political opposition, labor unions, minority groups, or [dissenting] civil society members.<sup>61</sup>
2. Use of public office to silence, harass, or disrupt the legal association and activities of members of the press.<sup>62</sup>

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<sup>57</sup> See HRF Letter No. 2 to the Secretary General of the OAS (addressing recent instances of court stacking in Venezuela, Ecuador and Bolivia). Available at: <http://thehrf.org/InsulzaLetterOct17.pdf>. See also Ayala, *supra* note 11, at 107 (defining a *self-coup* as that which “suspend or shutdown democratic institutions”).

<sup>58</sup> See *supra* text accompanying note 55.

<sup>59</sup> See Democratic Charter Art. 3 (setting forth the *five essential elements* of democracy); Nikken, *supra* note 6, at 44, 45, 48 (addressing the specific standards of scrutiny to assess the violation of each essential element of democracy in art. 3 of the Democratic Charter); Piccone, *supra* note 2, at 101; McMAHON & BAKER, *supra* note 6, at 97, 98; Brimmer, *supra* note 6, at 243 (talking about the “core institutions of democracy”). See also Ayala *supra* note 11, at 94 (describing the importance of the “essential components” of democracy in the application of the democratic charter).

<sup>60</sup> See Piccone, *supra* note 2, at 102, 104 (talking about “erosions of democratic rule” or “creeping coup”); McMAHON & BAKER, *supra* note 6, at 94; Charles Sampford and Margaret Palmer, *Strengthening Domestic Responses*, in PROTECTING DEMOCRACY. INTERNATIONAL RESPONSES 221, 222 (Morton H. Halperin & Mirna Galic eds., 2005) [hereinafter Sampford & Palmer 2] (talking about “creeping coups”: “Just as a rhetorical attack on coups was suggested by drawing analogies to organized violent crime, corruption and terrorism, similarly tough words should be used about the erosion of democracy. Erosion should be seen as a form of creeping coup—with all the negative implications that brings. Both involve the abuse of power held in the name of a people to take away the people’s power.”).

<sup>61</sup> Carter Center cited by McConnell & McCoy *supra* note 13, at 26 (only author referring to minority groups); Piccone, *supra* note 2, at 104-107 (only author referring to labor unions). See Nikken, *supra* note 6, at 46; Brimmer, *supra* note 6, at 238.

<sup>62</sup> Carter Center, *id.*; Piccone, *id.*; Brimmer, *id.*

3. Use of public office to implement general human rights restricting policies.<sup>63</sup>
4. Use of public office to implement a single-party regime.<sup>64</sup>
5. Violation of the integrity of central institutions, including constitutional checks and balances providing for the separation and independence of powers.<sup>65</sup>
6. Arbitrary or illegal appointment or removal of members of the judiciary or electoral bodies;<sup>66</sup> in other words, “the gradual stacking of the judiciary and other crucial watchdog bodies with cronies who subsequently rubber-stamp their benefactors’ unconstitutional actions.”<sup>67</sup>
7. Arbitrary or illegal interference in the deliberations of members of the judiciary or electoral bodies.<sup>68</sup>
8. Arbitrary or illegal termination of a democratically-elected official by any other elected or non-elected official from quasi-autonomous agencies, prior to completion of an established term.<sup>69</sup>
9. Abuse of constitutional powers by elected officials in order to make constitutional amendments through unconstitutional means, or to temporarily or

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<sup>63</sup> See Nikken, *supra* note 6, at 43 (addressing the precise point when the violation of fundamental rights and liberties should be deemed to have violated the first essential element of democracy according to Art. 3 of the Democratic Charter: “In any case, the point that should be retained is that individual cases of human rights violations would not be enough to trigger the collective democracy-defense mechanisms, even if they are numerous and serious, as long as it cannot be established that due to their extent, connection, unity of purpose, the importance of the juridical goods encroached upon, and so on, they are the outcome of a government policy that is incompatible with the respect and guarantee owed to human rights in a democratic society, to the point of denaturing the government that practices such a policy and thus entirely distorting its character as a ‘democratic government’.”).

<sup>64</sup> See Nikken, *id.*, at 22, 71, 72 (deeming this outcome as an “interruption of democracy”), at 46 (addressing the precise point when the silencing or disrupting of political opposition should be deemed to have violated the fourth essential element of democracy in art. 3 of the Democratic Charter: “The ‘single party’ system is incompatible with the democratic form of government. While the preponderance or prolonged exercise of power by the same political organization may turn out to be an option exercised legitimately by voters, it may also be the outcome of wrongful manipulation or the abuse of power. These are matters on which it is not easy to draw an abstract line. Rather, they must be examined on a case-by-case basis, taking into account the seriousness and persistence of the phenomenon, in order to determine if together these add up to an assault on the *essence* of democracy.”).

<sup>65</sup> Carter Center cited by McConnell & McCoy *supra* note 13, at 26. See Boniface, *supra* note 8, at 47 (talking about the “nullification by an elected president of legislative and judicial checks and balances”); Nikken, *id.*, (deeming this outcome as an “interruption of democracy”), at 48 (addressing the precise point when the violation of the separation of powers should be deemed to have violated the fifth essential element of democracy according to Art. 3 of the Democratic Charter: “It can thus be said that, in a democratic concept of the state, a judicial system subjected to the executive or legislative branch undermines the essence of the legitimate exercise of power. However, in this case, too, it is difficult to define *a priori* a scenario of transgressions against the independence of the branches of government, or against the separation among them, that destroys the essence of democracy. This again is a matter that must be considered on a case-by-case basis, in order to determine if there has been a radical transgression against the democratic form of government.”).

<sup>66</sup> Carter Center, *id.*; Piccone, *supra* note 2, at 104-107. See Nikken, *id.*, at 48.

<sup>67</sup> Sampford & Palmer 2, *supra* note 60, at 196. See Brimmer, *supra* note 6, at 238 (“Stacking judiciary or other key offices with biased officials” and “stacking the judiciary against opponents”).

<sup>68</sup> Carter Center cited by McConnell & McCoy *supra* note 13, at 26; Piccone, *supra* note 2, at 104-107 (only author referring to quasi-autonomous agencies); Ferguson, *supra* note 6, at 8 (referring to non-elected leaders displacing elected leaders).

<sup>69</sup> Carter Center, *id.*; Piccone, *id.* See Nikken, *supra* note 6, at 48.

substantively extend said powers.<sup>70</sup>

10. Failure to hold periodic elections, to respect electoral outcomes; or the holding of elections that fail to meet minimal internationally established democratic standards.<sup>71</sup>

11. Unjustified declarations of a state of emergency.<sup>72</sup>

12. Interference by non-elected officials, such as military officers, in the jurisdiction of elected officials.<sup>73</sup>

13. Civil-military crisis in which there is a legitimate threat of a military coup.<sup>74</sup> This crisis may be caused by the manipulation of the military by civilian authorities.<sup>75</sup>

### 1. Preventive action of the OAS when facing “threats” to democracy

Since the erosion of democracy by definition occurs in a gradual, non-abrupt manner, the application of the democracy clause can also be initiated as a “preventive” action when the interruption or alteration that seriously impairs the democratic order is not yet a *fait accompli* but already a “threat.” This threat should be considered to be in place when any of the set of facts numbered above has happened in an isolated or even in a gradual manner, but not yet in a sustained and systematic way.<sup>76</sup>

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<sup>70</sup> Sampford & Palmer, *supra* note 51, at 23; ALBRIGHT ET AL, *supra* note 8, at 176, 177 (only author referring to “extra-legal amending of the Constitution,” in defining “self-coup”); MCMAHON & BAKER, *supra* note 6, at 97. See Nikken, *id.*, at 45 (citing Inter-American Court of Human Rights case law to state that these actions would violate the second element of democracy according to Art. 3 of the Democratic Charter: “In the light of the conceptual evolutions that the inter-american consensus has expressed in the Democratic Charter, a reading of the American Convention leads to the conclusion that *the free expression of the will of the voters would be affected if authorities elected in accordance with the rule of law (legitimacy of origin) were to exercise their functions in contravention to said rule of law.*”) (Emphasis added).

<sup>71</sup> Carter Center cited by McConnell & McCoy *supra* note 13, at 26; Nikken, *id.*, at 22, 71 & 72 (deeming the “steady erosion of the electoral system” or the “abolition of elections” as “interruptions of democracy”).

<sup>72</sup> Carter Center *id.*; Brimmer, *supra* note 6, at 238.

<sup>73</sup> Carter Center *id.*; Cameron cited by Ferguson, *supra* note 6, at 8.

<sup>74</sup> Boniface, *supra* note 8, at 47. See Nikken, *supra* note 6, at 44 (saying that these actions violate the third element of democracy according to Art. 3 of the Democratic Charter: “In these cases, the critical criterion is that the designation of the heads of [the executive and legislative branches] take place in strict compliance with constitutional and legal procedures, and that said procedures not restrict the independence that these bodies must enjoy in a democratic society, in accordance with generally accepted international standards.”).

<sup>75</sup> See Sampford & Palmer 2, *supra* note 60, at 222 (“[E]mphasis on loyalty to the constitution and legality is important in ensuring that the military also does not become a tool of politicians seeking to erode democracy. As noted, military ethics and training should emphasize legality—the army should not be able to be used to subvert the constitution. It should not be used against any part of the constitutional order or against the people except under law. This requirement is not just a matter of ‘civilian control.’ It is a matter of ensuring that civilian authorities who seek to use the military against institutions designed to ensure integrity on the part of the government are prevented from doing so. The military should never be seen as a tool of the civilian political authorities, but of lawful authority, ultimately interpreted by the courts rather than the politicians. This approach generally will neutralize the military forces in any attempt to turn them against those institutions designed to ensure the integrity of the government and will mean that orders from the supreme court about the use and abuse of official power will be enforced.”).

<sup>76</sup> See Brimmer, *supra* note 6, at 234, 237ff (explaining how the international community can tell “a democratic misstep” from a “descent into tyranny or totalitarianism.” According to Brimmer, four are the

Drawing from the language of Articles 17 and 18 of the Democratic Charter, democracy would be threatened when the OAS considers that “situations [have] arise[n] in a member state that may affect the development of its democratic political institutional process or the legitimate exercise of power,”<sup>77</sup> or when the state itself “considers that its democratic political institutional process or its legitimate exercise of power is at risk.”<sup>78</sup> In these cases, the Democratic Charter grants both the Secretary General and the Permanent Council of the OAS the power to undertake actions—“with prior consent of the government concerned”—aimed at “the preservation of the democratic system and its strengthening.”

It is important to underscore here that since the erosion of democracy is usually perpetrated by government entities, government officials, or their agents,<sup>79</sup> preventive action by the OAS could be easily avoided by an anti-democratic government, given that, at this stage, it would still have the power to simply not call for assistance, or to withhold consent to any OAS offer to assist. However, since these powers of the infringing government would cease immediately when the OAS *considers* that the erosion is not anymore a threat to democracy but has now produced an interruption or alteration that seriously impairs the democratic order, it is reasonable to assume that the power of the OAS to act preventively can play a significant role as a deterrent of further erosion.

## **2. Corrective action of the OAS when facing an “interruption” or “alteration that seriously impairs the democratic order”**

As seen above, when erosion is not anymore an isolated or gradual threat to democracy, but has become so sustained and systematic that it has produced an interruption or alteration that seriously impairs the democratic order, the OAS must act in a “corrective” manner by applying the democracy clause in view of fostering “the restoration of democracy.” As for the precise determination of when erosion turns from a threat into an interruption or alteration, the study by Professor Pedro Nikken, former president of the Inter-American Court of Human Rights, is probably the most significant. Following Nikken’s argument, the democracy clause should be applied when “a gradual

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main parameters to differentiate one from another: a) that the antidemocratic actions are conducted by government entities, identified *government agents or covert sympathizers*; b) that the actions are targeted against *core institutions* of democracy; c) that the actions are *sustained or augmented* over time; d) that the actions include the use of *violence*).

<sup>77</sup> Democratic Charter Art. 18 (“When situations arise in a member state that may affect the development of its democratic political institutional process or the legitimate exercise of power, the Secretary General or the Permanent Council may, with prior consent of the government concerned, arrange for visits or other actions in order to analyze the situation. The Secretary General will submit a report to the Permanent Council, which will undertake a collective assessment of the situation and, where necessary, may adopt decisions for the preservation of the democratic system and its strengthening.”).

<sup>78</sup> Democratic Charter Art. 17 (“When the government of a member state considers that its democratic political institutional process or its legitimate exercise of power is at risk, it may request assistance from the Secretary General or the Permanent Council for the strengthening and preservation of its democratic system.”).

<sup>79</sup> See Brimmer, *supra* note 6, at 237-243. See also *supra* text accompanying note 76.

accumulation of events passes a critical point and creates a situation in which the essence of democracy is radically damaged.” However, “the breach need not be total, affecting all aspects of the system.”<sup>80</sup>

Below, we set forth the international legal provisions outlining the “corrective” procedure of application of the democracy clause against an OAS member state, in reaction to an interruption of its democratic order or an alteration seriously impairing it—namely, in reaction to a coup, a coup-like situation, or the erosion of democracy.

## **b. Democracy clause application procedure**

Article 19. Based on the principles of the Charter of the OAS and subject to its norms, and in accordance with the democracy clause contained in the Declaration of Quebec City, *an unconstitutional interruption of the democratic order or an unconstitutional alteration of the constitutional regime that seriously impairs the democratic order in a member state, constitutes, while it persists, an insurmountable obstacle to its government’s participation* in sessions of the General Assembly, the Meeting of Consultation, the Councils of the Organization, the specialized conferences, the commissions, working groups, and other bodies of the Organization.<sup>81</sup>

### **i. The Secretary General or a member state convenes the Permanent Council**

Article 20. In the event of an *unconstitutional alteration of the constitutional regime that seriously impairs the democratic order* in a member state, any member state or the Secretary General *may request the immediate convocation of the Permanent Council* to undertake a collective assessment of the situation and to take such decisions as it deems appropriate...<sup>82</sup>

Once an alteration of the constitutional regime that seriously impairs the democratic order has been produced in any of the 34 OAS member states, the Secretary General, as well as any member state, has the authority to “request the immediate convocation of the Permanent Council.”<sup>83</sup>

### **ii. The Permanent Council convenes a special session of the General Assembly**

Article 20. ... The Permanent Council, depending on the situation, may undertake the necessary diplomatic initiatives, including good offices, to foster the restoration of democracy. ¶ If such diplomatic initiatives prove unsuccessful,

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<sup>80</sup> Nikken cited by McConnell & McCoy, *supra* note 13, at. 22.

<sup>81</sup> Democratic Charter Art. 19 (emphasis added).

<sup>82</sup> Democratic Charter Art. 20(¶2) (emphasis added).

<sup>83</sup> Perina, *supra* note 8, at 148 (“As we have seen, the Secretary-General also has the obligation to proceed almost automatically, pursuant to Res. 1080 and the Democratic Charter, to convene the Permanent Council in case of an interruption in the democratic process in any member state of the organization”).

or if the urgency of the situation so warrants, the Permanent Council shall immediately *convene a special session of the General Assembly. The General Assembly will adopt the decisions it deems appropriate*, including the undertaking of diplomatic initiatives, in accordance with the Charter of the Organization, international law, and the provisions of this Democratic Charter. ¶ The necessary diplomatic initiatives, including good offices, to foster the restoration of democracy, will continue during the process.<sup>84</sup>

**iii. The OAS General Assembly, by a vote of two thirds of its member states, suspends the anti-democratic state**

Article 21. When the special session of the General Assembly determines that there has been an unconstitutional interruption of the democratic order of a member state, and that diplomatic initiatives have failed, the special session shall *take the decision to suspend said member state* from the exercise of its right to participate in the OAS by an affirmative vote of *two thirds of the member states* in accordance with the Charter of the OAS. The suspension shall take effect immediately. ¶ The suspended member state shall continue to fulfill its obligations to the Organization, in particular its human rights obligations. ¶ Notwithstanding the suspension of the member state, the Organization will maintain diplomatic initiatives to restore democracy in that state.<sup>85</sup>

Once assembled at the special meeting convened at the request of the Permanent Council, the OAS General Assembly must mainly evaluate whether an interruption of the democratic order has occurred in the member state.<sup>86</sup> If the Assembly considers that this interruption has, in fact, occurred, and that diplomatic efforts have been proven to be fruitless, it should then suspend the infringing state, until democracy is restored.

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<sup>84</sup> Democratic Charter Art. 20(¶2-4) (emphasis added).

<sup>85</sup> Democratic Charter Art. 21 (emphasis added).

<sup>86</sup> See EL-HAGE, *supra* note 1, at 186 (“According to the Inter-American Juridical Committee, ‘the ... decision for the General Assembly is called after a mere factual evaluation of whether the interruption has occurred’ (OAS, 2003: 248)” [unpublished translation by the author]). See also McConnell & McCoy *supra* note 13, at 21 (“Ayala tackles the ... problem ... by arguing that the democracy clause cannot be applied automatically, [but] only after the diplomatic initiatives mentioned in article 20 have been undertaken and after an assessment has led to the conclusion that the situation has deteriorated to the point of “interruption.”).