

**A Critical Analysis of Resolution 1117/19 of the Organization of  
American States Permanent Council Declaring Illegitimate the  
Presidency of Nicolás Maduro of Venezuela**

by

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## **ABSTRACT**

The purpose of this mini-dissertation is to critically analyse Resolution 1117/19 issued by the Permanent Council of the Organization of American States (OAS) on 10 January 2019, in which it declared illegitimate the second presidential term of Nicolás Maduro, the President of Venezuela. The decision of the OAS Permanent Council merits attention as it represents a significant development for the role of the OAS in the protection of democracy in Latin America and for the application of the Inter-American Democratic Charter, 2001. This study involves an interdisciplinary approach to desktop research, drawing from the disciplines of both law and political philosophy.

Through the lens of political legitimacy theory this study considers two justifications underpinning OAS Resolution 1117/19. Each justification is rooted in a legal framework. The basis of the first justification is the Inter-American Democratic Charter, and the second is the Constitution of the Bolivarian Republic of Venezuela, 1999. Pursuant to the analysis of these justifications, this study examines the implications emanating from Resolution 1117/19 within the context of the OAS.

Based on the justifications and implications of Resolution 1117/19, this study asserts that democratic governance is an emerging norm for the recognition of governments and that the decision to declare Maduro illegitimate constitutes a positive step in the evolution of the Inter-American system. This study concludes by asserting that the decision of the OAS to issue Resolution 1117/19 has set a formidable precedent for the application of the Democratic Charter going forward.

**Key Words:** Democratic Charter, Illegitimate, Maduro, OAS, Venezuela.

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*‘El derecho de recordar no figura entre los derechos humanos consagrados por las Naciones Unidas, pero hoy es más que nunca necesario reivindicarlo y ponerlo en práctica: no para repetir el pasado, sino para evitar que se repita; no para que los vivos seamos ventrílocuos de los muertos, sino para que seamos capaces de hablar con voces no condenadas al eco perpetuo de la estupidez y la desgracia. Cuando está de veras viva, la memoria no contempla la historia, sino que invita a hacerla.’*

*‘The right to remember does not figure among the human rights consecrated by the United Nations, but now more than ever we must insist on it and act on it. Not to repeat the past but to keep it from being repeated. Not to make us ventriloquists for the dead but to allow us to speak with voices that are not condemned to perpetually echo stupidity and misfortune. When it is truly alive, memory does not contemplate history; it invites us to make it.’*

Eduardo Galeano, *Patas Arriba el Mundo al Revés* (Siglo XXI 1998)

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# CHAPTER ONE: INTRODUCTION

## 1.1 Title

A critical analysis of Resolution 1117/19 of the Organization of American States Permanent Council declaring the presidency of Nicolás Maduro of Venezuela illegitimate.<sup>1</sup>

## 1.2 Research question

In response to the crisis in Venezuela, what are the legal justifications and implications of Resolution 1117/19?

## 1.3 Background

Under the leadership of President Nicolás Maduro, the Bolivarian Republic of Venezuela has been devastated by one of the worst economic catastrophes in modern history.<sup>2</sup> The economy is now collapsing and unemployment is above 40%.<sup>3</sup> Inflation is rampant and, as of mid 2019, nearing 500,000%.<sup>4</sup> Venezuela endures persistent food and medicine shortages, electricity outages, and political repression.<sup>5</sup> In the past six years over four million people have left the country, about 12% of the population.<sup>6</sup>

Adding to the economic and humanitarian crisis, President Maduro instigated a constitutional crisis in 2017 when he revoked the legislative power of the opposition-led National Assembly and packed the judiciary and electoral commission with loyalists.<sup>7</sup> The General Assembly of the Organization of American States (OAS) deemed the May 2018 presidential election fraudulent and issued a resolution to this effect a month later.<sup>8</sup> As the exodus of people from Venezuela continued and the international community became more involved in the humanitarian crisis, with the United States of America (USA) and Russia on opposing sides, the OAS Permanent

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<sup>1</sup> Organization of American States Permanent Council, 'Resolution on the Situation in Venezuela' CP/RES 1117/19 (Washington D.C. 10 January 2019).

<sup>2</sup> 'The Battle for Venezuela' *The Economist* (London, 15 December 2019) 11.

<sup>3</sup> 'Coup Data: Where's Next?' *The Economist* (London, 20 April 2019) 56.

<sup>4</sup> 'A Bloody Stalemate' *The Economist* (London, 13 July 2019) 43.

<sup>5</sup> 'The Battle for Venezuela' *The Economist* (n 2) 11.

<sup>6</sup> 'A Bloody Stalemate' *The Economist* (n 4) 42.

<sup>7</sup> 'The Battle for Venezuela' (n 2) 11.

<sup>8</sup> Organization of American States General Assembly, 'Resolution on the Situation in Venezuela' AG/RES 2929/18 (XLVIII-018) (Washington D.C. 5 June 2018).

Council responded by issuing a resolution in January 2019 in which it declared the second presidential term of President Maduro illegitimate due to election rigging, and called for new presidential elections to be held immediately.<sup>9</sup>

#### **1.4 Problematization and relevance**

A consequence of globalization is the widespread international repercussions of a breakdown of democratic processes in a state.<sup>10</sup> Through cooperative strategies contained in its legal framework the OAS aims to reduce the international cost of the collapse of democracy in Member States, and to protect representative democracy in the region.<sup>11</sup> In a move towards legalizing norms on democratic governance, the OAS adopted the Inter-American Democratic Charter in 2001 (hereafter the Democratic Charter).<sup>12</sup>

This study posits that the OAS, by its adoption of Resolution 1117/19, demonstrated its commitment to upholding the principles of democracy contained in the Democratic Charter, specifically the obligation on states to hold free and fair elections in Article 3.<sup>13</sup> Resolution 1117/19 also refers to the breakdown of the democratic order in Venezuela, and the need for the restoration of democracy. This implies a reliance on Article 20 as justification for the resolution itself. This Article allows for collective action in the event of an unconstitutional alteration of the constitutional order that seriously impairs the democratic order of a member state.<sup>14</sup> The OAS Permanent Council engagement with these articles is an important step in the development of their practical use against authoritarian regimes.

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<sup>9</sup> Organization of American States Permanent Council, 'Resolution on the Situation in Venezuela' CP/RES 1117/19 (n 1).

<sup>10</sup> Antonio F. Pérez, 'Mechanisms for the Protection of Democracy in the Inter-American System and the Competing Lockean and Aristotelian Constitutions' (2006) 33 *Curso de Derecho Internacional* 240.

<sup>11</sup> *ibid.*

<sup>12</sup> Organization of American States General Assembly, Inter-American Democratic Charter (hereafter Democratic Charter) (adopted 11 September 2001) (2001) 40 *ILM* 1289.

<sup>13</sup> Democratic Charter (n 12) Article 3. It states, 'Essential elements of representative democracy include, inter alia, respect for human rights and fundamental freedoms, access to and the exercise of power in accordance with the rule of law, the holding of periodic, free, and fair elections based on secret balloting and universal suffrage as an expression of the sovereignty of the people, the pluralistic system of political parties and organizations, and the separation of powers and independence of the branches of government.'

<sup>14</sup> Democratic Charter (n 12) Article 20.

A further implication of Resolution 1117/19 is that it raises the question as to whether Juan Guaidó, president of the National Assembly, should be recognised as the interim president of Venezuela by the OAS. The countries with the largest economies in the Americas have backed Guaidó.<sup>15</sup> Others have found that Maduro lacks the requisite democratic legitimacy to be president, but have simultaneously not recognised Guaidó as the legitimate interim president. The recognition by the OAS of Guaidó as interim president would have significant legal consequences as he may request intervention from the OAS under Article 17 of the Democratic Charter.<sup>16</sup> While the whole issue of recognizing Guaidó is a worthwhile study in itself, it is beyond the scope of this study.

The slow response of the OAS to the crisis in Venezuela, and the questions that have arisen due to Resolution 1117/19, are linked to the inconsistent application of the Democratic Charter in practice, which indicates that further measures need to be undertaken in order for the OAS to effectively carry out the objectives of the Democratic Charter. This study contributes to the scholarship on the OAS and is particularly relevant to the protection of democracy and human rights in Latin America as it considers the application of the Democratic Charter to an escalating political and humanitarian crisis that requires urgent attention.

## **1.5 Methodology**

This study is based on desktop research and involves a multidisciplinary approach drawing from political philosophy, law, history, and international relations. By utilizing political legitimacy theory as a lens for the identification of two justifications, based on legal instruments at national and regional level, this study critiques the OAS decision to issue Resolution 1117/19.

Primary sources consulted include treaties, regional agreements, OAS resolutions, legislation and case law from Venezuelan courts, and the Inter-American Court of Human Rights (hereafter I/A Court). Secondary sources consist of journal articles, books, policy papers, and reports from NGOs and regional organizations. This study relies on primary and secondary material written in Spanish and Portuguese by Latin American authors to ensure that a diversity of perspectives informs its direction. Due

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<sup>15</sup> 'One Republic, Two Presidents' *The Economist* (London, 26 January 2019) 41.

<sup>16</sup> Democratic Charter (n 12) Article 17.



to the limited space available, this study does not attempt to engage in all of the complex issues related to the topic, such as the law of recognition of governments in international law, or the role of the USA in the matter.

## **1.6 Chapter outline**

Chapter One introduces the topic and outlines the structure of this study. It provides the context for the research question, and explains the relevance of this study.

Chapter Two provides an overview of political legitimacy theory, beginning with the notion of consent and the social contract. The distinction between the legitimacy of origin of power and the legitimacy of exercise of power is then considered in the context of the Maduro regime.

Chapter Three discusses the origin of the Democratic Charter and its status as a legally binding instrument. It then closely examines the key term in Article 20 of the Democratic Charter, an ‘unconditional alteration of the constitutional regime that seriously impairs the democratic order’, in order to argue that Maduro’s illegitimate exercise of power pursuant to Article 20 provides a justificatory ground for Resolution 1117/19.

Chapter Four provides an overview of the efforts of the National Assembly to restore democracy in Venezuela since 2016, and analyses the constitutional grounds justifying the decision of the National Assembly to declare Maduro an illegitimate president.

Chapter Five discusses the implications of Resolution 1117/19 within the context of the OAS. It examines the withdrawal of Venezuela from the OAS and the accreditation of the representative of the National Assembly of Venezuela to the OAS. It argues that Resolution 1117/19 sets a positive precedent for the application of the Democratic Charter going forward, and for the evolution of the Inter-American system.

Chapter Six concludes this study. It presents the principal deductions reached in answering the research question as well as the significance of Resolution 1117/19 for the Democratic Charter and the protection of democracy in Latin America.

## CHAPTER TWO: POLITICAL LEGITIMACY THEORY

The theory of political legitimacy provides the guiding principles for this study. While political philosophy is not able to formulate a precise method for critiquing the legitimacy of the decision of the OAS to declare Maduro an illegitimate president, it provides a lens for interpreting the underlying justifications of Resolution 117/19. Two particular concepts within the theory of political legitimacy, the legitimacy of origin of power and the legitimacy of exercise of power, inform the direction of this study. These concepts are based on the fundamental principle in political legitimacy theory that the recognition of the right to govern is based on the consent of the people.<sup>17</sup> It is this principle that is considered in the first half of this Chapter. The second half discusses the conceptual definitions of the origin of power and the exercise of power with reference to the current situation in Venezuela.

### 2.1 Consent of the governed

The relationship between the people and their government is best elucidated by the notion of the social contract. Free, equal, and reasonable persons consent to the establishment of a legitimate government and, as the governed, enter into a social contract with the governors.<sup>18</sup> The social contract serves two objectives: it specifies the form of government that yields political legitimacy, and determines the political obligations that citizens have to their government.<sup>19</sup> On entering this social contract the governors and the governed are political equals.<sup>20</sup> Once the governors are in power the relationship becomes asymmetric since the act of consenting involves renouncing a degree of autonomy to obey the governors.<sup>21</sup> In exchange, the governors are expected to preserve the pre-existing rights and freedoms of the governed.<sup>22</sup> The rule of law provides some stability for the relationship by imposing constraints on the exercise of power of the governors, which collectively constitute the political authority.<sup>23</sup>

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<sup>17</sup> Jean-Marc Coicaud, *Legitimacy and Politics: a contribution to the Study of Political Right and Political Responsibility* (David Ames Curtis tr, Cambridge University Press 2002) 10-11.

<sup>18</sup> John Rawls, *Lectures on the History of Political Philosophy* (Samuel Freeman tr, Harvard University Press 2008) 107.

<sup>19</sup> Rawls (n 18) 15.

<sup>20</sup> Rawls (n 18) 15.

<sup>21</sup> Rawls (n 18) 15.

<sup>22</sup> Brad R. Roth, *Governmental Illegitimacy in International Law* (Oxford University Press 1999) 79.

<sup>23</sup> Coicaud (n 17) 25.

The political authority must continuously justify itself and its exercise of power or risk losing the consent of the governed.<sup>24</sup> The governed have the corresponding obligation to ensure the political authority safeguards the interests of the citizenry through its exercise of power.<sup>25</sup> When the political authority fails to carry out its responsibilities the governed are entitled to evaluate its performance and seek alternative means of preserving the integrity of the citizenry.<sup>26</sup> The process of evaluating the political authority involves a political judgment as to whether the political situation, and the exercise of power by the political authority, is legitimate or illegitimate.<sup>27</sup> If the exercise of power is found to be illegitimate the governed have the right to withdraw their consent and establish a different government.<sup>28</sup> Accordingly, for the political authority to be legitimate it must have its origin of power rooted in the consent of the governed, and exercise its power in accordance with the will of the people.<sup>29</sup>

## **2.2 Origin and exercise of power**

In order to determine whether a government has legitimacy it is first necessary to distinguish between the legitimacy of origin of power and the legitimacy of exercise of power.<sup>30</sup> Together, these two dimensions of legitimacy constitute the procedural and substantive elements of democracy.<sup>31</sup> First, the legitimacy of origin test relates to the source of power.<sup>32</sup> This test is a tool used to assess the procedural aspect of how a government came about. In modern democracies, the will of the people is expressed through free and fair elections, which provides the originating source of legitimacy for governmental power.<sup>33</sup> A government that has come about through force, or through

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<sup>24</sup> Coicaud (n 17) 34.

<sup>25</sup> Coicaud (n 17) 42.

<sup>26</sup> Coicaud (n 17) 39.

<sup>27</sup> Coicaud (n 17) 40.

<sup>28</sup> Coicaud (n 17) 14.

<sup>29</sup> Coicaud (n 17) 14.

<sup>30</sup> Jean D'Aspermont, 'Legitimacy of Government in the Age of Democracy' (2006) 38 N.Y.U. J. Int'l L. & Pol. 899. At 882 D'Aspermont makes clear that for the purposes of his article the distinction between the origin and exercise of power pertains only to the external legitimacy of a government, meaning how other governments perceive it. However, this author has applied the distinction in determining the internal legitimacy of a government, meaning how it is perceived by the people subject to it.

<sup>31</sup> *ibid.*

<sup>32</sup> *ibid.*

<sup>33</sup> *ibid.* See the Inter-American Court of Human Rights: *Yatama vs. Nicaragua*. Judgment of 23 June 2005. Series C, N°27. Yatama, a political party, successfully sued Nicaragua for denying indigenous communities the right to participate in regional elections. The Court held that in addition to the established legitimacy of origin principle, the Democratic Charter in Article 3 explicitly recognises the legitimacy of exercise of power as an Inter-American principle; see Democratic Charter (n 12).

fraudulent elections, would not be deemed legitimate, as it would have compromised the required originating consent of the governed.<sup>34</sup> The second concept to consider is the exercise of power. A government is deemed legitimate when it uses its power in a manner consistent with the rule of law and political liberties.<sup>35</sup> When the government subverts the rule of law, or violates the rights and freedoms of the populace, then its exercise of power may be deemed illegitimate.<sup>36</sup>

The legitimacy of a government is comparable to a reservoir of water, whereby ‘in new regimes, these reservoirs are low or even empty; in old regimes with a record of considerable achievement, the reservoirs are likely to be high.’<sup>37</sup> Hugo Chávez, the eloquent populist president of Venezuela from 1999 to 2013, was a 21<sup>st</sup> century *caudillo* (a charismatic strongman).<sup>38</sup> As a military officer backed by the national army, Chávez intertwined *caudillo* populism with electoral politics, implementing popular socialist reforms.<sup>39</sup> Despite its flaws, the Chávez government built up a modest reservoir of confident expectations.<sup>40</sup> This study demonstrates that Maduro, the authoritarian successor of Chávez, has through the illegitimate origin of his power and illegitimate exercise of power, completely emptied the reservoir.

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<sup>34</sup> *ibid.*

<sup>35</sup> *ibid.*

<sup>36</sup> *ibid.*

<sup>37</sup> Robert A. Dahl, *Polyarchy: Participation and Opposition* (Yale University Press 1971) 149.

<sup>38</sup> The *caudillo* emerged in the 19<sup>th</sup> and 20<sup>th</sup> century in the struggle for independence in Latin America from the Spanish empire. A *caudillo* is generally described as a strongman who tolerates little or no opposition and often relies on armed strength to maintain his power. He could be defined as a populist for his charismatic qualities. In Latin America, some *caudillos* were inclined to authoritarianism while others were reformists. For an extensive definition of the *caudillo* and historical examples see Teresa A. Meade, *A History of Modern Latin America: 1800 to Present* (Wiley-Blackwell 2010) 86 -93; ‘Six More Years?’ *The Economist* (London, 12 January 2019) 39.

<sup>39</sup> Edwin Williamson, *The Penguin History of Latin America* (Penguin Books 2009) 597; ‘Six More Years’ *The Economist* (n 38) 39.

<sup>40</sup> Chávez enjoyed widespread support for much of his time in office. See Williamson (n 39) 597.

## CHAPTER THREE: INTER-AMERICAN DEMOCRATIC CHARTER

In 2001 the OAS took a progressive step to develop the Inter-American system by adopting the Inter-American Democratic Charter (hereafter the Democratic Charter).<sup>41</sup> Its adoption reflects a hemispheric commitment to the collective protection of democracy.<sup>42</sup> Unlike previous OAS instruments, it vests the OAS with the authority to address both the illegitimate origin of power of a political authority, and its illegitimate exercise of power, through Article 20, which provides for collective action in response to an ‘unconstitutional alteration of the constitutional regime that seriously impairs the democratic order.’<sup>43</sup> This phrase, or rather term, in conjunction with the expansive definition of representative democracy in Articles 3 and 4 of the Democratic Charter, forms the basis of this Chapter.

Prior to examining these Articles, this Chapter begins by discussing the origin of the Democratic Charter and its status as a legally binding instrument. The second section then considers what actions constitute an ‘unconstitutional alteration to the constitutional regime’ warranting the invocation of the mechanisms for collective action in Article 20 of the Democratic Charter. The analysis of this term is used in the

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<sup>41</sup> Democratic Charter (n 12).

<sup>42</sup> Alison Duxbury, *The Participation of States in International Organisations: The Role of Human Rights and Democracy* (Cambridge University Press 2011) 179. In 1991 the OAS adopted Resolution 1080, the predecessor to the Democratic Charter. It refers to ‘any occurrences giving rise to the sudden or irregular interruption of the democratic political institutional process or of the legitimate exercise of power by the democratically elected government in any of the Organization’s Member States.’ Resolution 1080 essentially provided authority for collective action in respect of *golpes de estado* (coup d’états). Resolution 1080 has been considered on eight occasions, although the procedures in Resolution 1080 were fully employed only in the cases of Haiti (1991), Peru (1992), Guatemala (1993) and Paraguay (1996), see Duxbury (n 42) 180 and see also Organization of American States General Assembly ‘Representative Democracy’ AG/RES 1080. Pursuant to Resolution 1080, the OAS adopted the Washington Protocol in 1992 to amend Article 9 of the 1948 Charter of the Organization of American States to read, ‘a Member of the Organization whose democratically constituted government has been overthrown by force may be suspended from the exercise of the right to participation.’ The Washington Protocol addresses a narrower set of circumstances than Resolution 1080 in that it only refers to the overthrow of a government, not to an interruption of its exercise of power. It stipulates the OAS may suspend any Member State in the event of an overthrow of its democratically elected government. See Organization of American States, Charter of the Organization of American States as amended by the Protocol of Washington, adopted by the 16th Special Session of the OAS General Assembly (Washington D.C. 14 December 1992).

<sup>43</sup> Michael M. McCarthy ‘The Venezuela Crisis and Latin America’s Future: Toward a Robust Hemispheric Agenda on Democratic Stability’ (*Woodrow Wilson Center Latin America Program*, 22 March 2017) <[https://www.wilsoncenter.org/sites/default/files/mccarthy\\_venezuela\\_crisis\\_final.pdf](https://www.wilsoncenter.org/sites/default/files/mccarthy_venezuela_crisis_final.pdf)> accessed 15 May 2019.

final section to demonstrate how Maduro has exercised power illegitimately, causing an unconstitutional alteration of the constitutional regime. The analysis concludes by arguing that Maduro's illegitimate exercise of power justifies the decision of the OAS Permanent Council to issue Resolution 1117/19, in which it declared the presidency of Maduro illegitimate.

### 3.1 Origin of the Democratic Charter

This first section provides an outline of the events leading to the adoption of the Democratic Charter. It commences with an overview of the political crisis in Peru from 1992 to 2000 under the Fujimori government. This contextual background is relevant as it was the Peruvian crisis that provided the impetus for the OAS to produce the Democratic Charter, an endeavour spearheaded by Peruvian delegates at an OAS conference in 2000.<sup>44</sup> This section then examines the drafting process of the Democratic Charter and its status as a binding legal instrument in the Inter-American system.

In 1990 Alberto Fujimori, the newly elected president of Peru, began implementing economic reforms to boost the failing economy.<sup>45</sup> While Fujimori's austerity measures stabilized the economy, his increasingly authoritarian mode of governance resulted in a belligerent Congress and an obstructionist judiciary.<sup>46</sup> Fujimori reacted by orchestrating an *autogolpe* (self-coup)<sup>47</sup> with the assistance of the military in 1992 whereby he abruptly dissolved Congress, dismissed members of the judiciary, and suspended the constitution.<sup>48</sup> Fujimori's brazenly undemocratic actions unequivocally characterized an *autogolpe*, prompting the OAS to take action.<sup>49</sup>

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<sup>44</sup> John W. Graham, 'Policy Paper: a Magna Carta for the Americas, the Inter-American Democratic Charter: Genesis, Challenges and Canadian Connections' (Canadian Foundation for the Americas, Ontario 2002) 3 <[http://channellingreality.com/nau/magna\\_carta\\_of\\_Americas.pdf](http://channellingreality.com/nau/magna_carta_of_Americas.pdf)> accessed 12 March 2019.

<sup>45</sup> George Philip, *Democracy in Latin America* (Polity Press 2003) 62.

<sup>46</sup> Philip (n 45) 165.

<sup>47</sup> Carlos J. El-Hage, 'Under what Circumstances may the OAS Apply the Democracy Clause Against a Member State?' in Human Rights Foundation *The Facts and the Law behind the Democratic Crisis in Honduras, 2009* (Human Rights Foundation 2010) <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2480086](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2480086)> accessed 13 March 2019 7-8, see footnotes at 52 and 57 for a definition of the *autogolpe*.

<sup>48</sup> McCarthy (n 43) 21; Sally Bowen and Jane Holligan *The Imperfect Spy: the Many Lives of Vladimiro Montesinos* (PEISA 2003) 125-126.

<sup>49</sup> El-Hage (n 47) 7; McCarthy (n 43) 21.

The OAS Permanent Council held an urgent meeting where it condemned Fujimori's consolidation of power and considered the applicability of OAS Resolution 1080 of 1991.<sup>50</sup> Resolution 1080 grants the OAS the power to take 'any decisions deemed appropriate' against any Member State in the event of a sudden or irregular interruption of the democratic institutional process or interruption of the legitimate exercise of power by the democratically elected government.<sup>51</sup> Resolution 1080 was adopted following decades of military-led *golpes de estado* (coup d'états) in the region, in which Member States with dictatorial governments continued participating in the activities of the OAS, despite a commitment in the 1948 founding Charter of the OAS to uphold representative democracy.<sup>52</sup> Even so, when the Member States gathered to discuss the crisis in Peru, there was a lack of consensus as to the applicability of Resolution 1080.<sup>53</sup> Although Resolution 1080 was eventually invoked it did not result in any sanctions or in the suspension of Peru from the OAS.<sup>54</sup> Despite subverting the constitutional order and dismantling the separation of powers, Fujimori continued his presidential term unimpeded by the OAS.<sup>55</sup>

Fujimori won a second presidential term in 1995 and ran for a third in 2000, although by 2000 the popularity of the Fujimori government was in steep decline.<sup>56</sup> In the May presidential elections that year the OAS electoral observer mission detected fraud and deemed the election too close to call.<sup>57</sup> Nevertheless, Fujimori declared himself the winner and, amidst popular protests, commenced his third term in office.<sup>58</sup> In order to assuage political unrest, the OAS facilitated a *mesa de dialogo* (dialogue roundtable) in June that year, where the Fujimori government, opposition parties, and civil society actors discussed political reform.<sup>59</sup> In spite of initial scepticism from the international community, the *mesa de dialogo* led to the implementation of some reforms and laid

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<sup>50</sup> Organization of American States General Assembly 'Representative Democracy' AG/RES 1080 (n 42).

<sup>51</sup> Barry Levitt, 'A Desultory Defense of Democracy: OAS Resolution 1080 and the Inter-American Democratic Charter' (2006) 48 *Latin American Politics and Society* 109.

<sup>52</sup> Lawrence J. LeBlanc, *The OAS and the Promotion and Protection of Human Rights* (Martinus Nijhoff 1977) 11.

<sup>53</sup> Levitt (n 51) 109.

<sup>54</sup> McCarthy (n 43) 29

<sup>55</sup> *ibid.*

<sup>56</sup> Levitt (n 51) 109.

<sup>57</sup> *ibid.*

<sup>58</sup> Philip (n 45) 171.

<sup>59</sup> Andrew F. Cooper, 'The Making of the Inter-American Democratic Charter: a Case of Complex Multilateralism' (2004) 5 *International Studies Perspectives* 98.

the foundation for fresh presidential elections to be held in April 2001.<sup>60</sup> Then unexpectedly, in November 2000, just a few months into his third term, a corruption scandal caused Fujimori to flee the country and resign the presidency.<sup>61</sup> With Fujimori's resignation the political crisis was soon resolved.<sup>62</sup>

The *autogolpe* in Peru revealed the inadequacy of the OAS to timeously address the illegitimate exercise of power by an elected leader turned elected autocrat.<sup>63</sup> Although the *mesa de dialogo* was lauded as a novel form of soft intervention, the inability of the OAS to prevent Fujimori from causing structural damage to Peru's democracy instigated an examination of the limitations of Resolution 1080.<sup>64</sup> Following the debacle in Peru, the OAS decided to implement measures to deter potentially undemocratic leaders.<sup>65</sup> In December 2000, Peruvian Prime Minister Javier Pérez de Cuellar proposed that the OAS adopt a regional document to merge existing mechanisms for the protection of democracy, with effective rules for addressing diverse forms of disruption to the democratic order.<sup>66</sup> Less than a year later, on 11 September 2001, the OAS General Assembly unanimously adopted a resolution titled the 'Inter-American Democratic Charter'.<sup>67</sup>

Whether the Democratic Charter is a legally binding document is debatable.<sup>68</sup> As a resolution of the General Assembly it may be considered a mere recommendation, or a

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<sup>60</sup> *ibid.*

<sup>61</sup> Philip (n 45) 171.

<sup>62</sup> McCarthy (n 43) 22.

<sup>63</sup> *ibid.*

<sup>64</sup> Cooper (n 59) 98-99; Andrew F. Cooper and Thomas Legler *Intervention without Intervening? The OAS Defense and Promotion of Democracy in the Americas* (Palgrave Macmillan 2006) 141. Intervention by external actors to restore democracy in a State can take three forms: soft intervention is comprised of diplomatic initiatives, discussions and recommendations; hard intervention entails coercive diplomatic measures, including economic sanctions; forcible intervention refers to the use of force, often through military action, see Cooper (n 59) 3. The Democratic Charter (n 12) only provides authority for intervention in respect of the first two forms, see generally Articles 17-22. On the principle of non-intervention see also, United Nations General Assembly 'Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations' UN Doc A/RES/2625(XXV) (24 October 1970). The principle of non-intervention was affirmed by the OAS General Assembly in Resolution 78 of 1972, which obligates states to refrain from intervening in the civil strife or internal struggles of another state, see Organization of American States General Assembly, 'Strengthening of the Principles of Non-Intervention and the Self-Determination of People's and Measures to Guarantee their Observance' AG/RES 78 (II-0/72) (Washington D.C 21 April 1972).

<sup>65</sup> Cooper (n 59) 62.

<sup>66</sup> Graham (n 44) 3.

<sup>67</sup> El-Hage (n 47) 1.

<sup>68</sup> El-Hage (n 47) 1.



non-binding instrument expressing a political commitment to undertake multilateral efforts to protect democracy.<sup>69</sup> Alternatively, since the Democratic Charter is intended to clarify the provisions in the OAS Charter, pursuant to Article 31 of the Vienna Convention on the Law of Treaties, it has the same binding status as the treaty it interprets.<sup>70</sup> Notwithstanding the aforesaid, the speed with which the Democratic Charter was negotiated and finalized is mostly due to the drafters not pushing for a legally binding instrument.<sup>71</sup> Had it been touted as binding, the Democratic Charter would have faced innumerable objections and risked not being ratified.<sup>72</sup> The drafters reasoned a non-binding status would give the Democratic Charter the opportunity to emerge as a norm of regional customary law.<sup>73</sup> It remains dubious whether the Democratic Charter has yet become customary law, although each invocation of the Democracy Clause confirms a move in that direction.<sup>74</sup>

### **3.2 Defining an ‘unconstitutional alteration to the constitutional regime’**

The centrepiece of the Democratic Charter is undoubtedly the Democracy Clause, comprised of Articles 17 to 22.<sup>75</sup> Article 20 provides authority for collective action in response to ‘an unconstitutional interruption of the democratic order’ or an ‘unconstitutional alteration of the constitutional regime that seriously impairs the democratic order’.<sup>76</sup> Although these terms are not defined in the Democratic Charter, leaving Article 20 vulnerable to contestation, specific actions that violate norms regulating the democratic exercise of power have been identified that indicate an ‘unconstitutional interruption’ or ‘unconstitutional alteration’.<sup>77</sup> This section of the Chapter analyses the actions that warrant the application of these terms, particularly the latter, with reference to the definition of representative democracy in Articles 3 and 4 of the Democratic Charter.

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<sup>69</sup> El-Hage (n 47) 8.

<sup>70</sup> El-Hage (n 47) 1. See also the preamble of the Democratic Charter (n 12) and Articles 31(2) and (3)(a) of the Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 332.

<sup>71</sup> Graham (n 44) 7.

<sup>72</sup> Jean M. Arrighi, ‘El Papel de la Organización de los Estados Americanos en la Defensa de la Democracia’ (2008) Organization of American States 27 <[https://www.oas.org/es/democraticcharter-/pdf/OEA\\_en\\_Defensa\\_de\\_la\\_Democracia\\_Jean\\_Michel\\_Arrighi.pdf](https://www.oas.org/es/democraticcharter-/pdf/OEA_en_Defensa_de_la_Democracia_Jean_Michel_Arrighi.pdf)> accessed 8 March 2019.

<sup>73</sup> Arrighi (n 72) 27.

<sup>74</sup> Graham (n 44) 4.

<sup>75</sup> *ibid*; Democratic Charter (n 12) Articles 17-22.

<sup>76</sup> Democratic Charter (n 12) Article 20.

<sup>77</sup> This summary of actions is primarily based on the list enumerated by former USA President Jimmy Carter in a speech to the OAS in 2005, see Timothy D. Rudy, ‘A Quick Look at the Inter-American Democratic Charter of the OAS: What is it and is it Legal?’ (2005) 33 *Syracuse J. Int’l. L. & Com.* 246; and McCarthy (n 43) 26.

The broad consensus amongst scholars is that an ‘unconstitutional interruption of the democratic order’ refers to the forcible overthrow of a democratically elected government.<sup>78</sup> This scenario is characterized by four elements: the victim is the president or the authority that wields executive power; the perpetrator has used violence or coercion to remove the victim from their office; the act of removal was sudden; and the act was in violation of the constitutional processes underpinning the removal of the president or executive authority from office.<sup>79</sup> An unconstitutional interruption is always marked by an abrupt event that ruptures the democratic order, and is commonly referred to as a *golpe de estado* or coup d’état.<sup>80</sup>

An ‘unconstitutional alteration’ on the other hand is more challenging to delineate as it generally involves the gradual and systematic erosion of democracy.<sup>81</sup> It is brought about by a political authority that exercises power contrary to domestic law and in violation of the democratic norms enshrined in Articles 3 and 4 of the Democratic Charter.<sup>82</sup> These Articles set out the essential elements and fundamental components of representative democracy, and which include the holding of periodic, free and fair elections; the exercise of power in accordance with the rule of law; respect for human rights; the separation of powers; and the independence of the branches of government.<sup>83</sup> Articles 3 and 4 provide the guiding principles for determining when a subversion of the democratic order has taken place for the purpose of invoking Article 20.<sup>84</sup>

Based on Articles 3 and 4, the actions that constitute an ‘unconstitutional alteration’ include the failure to hold elections that meet minimal internationally established democratic standards; the use of public office to silence, harass, or disrupt the political opposition, the press or dissenting civil society members; the violation of the integrity of central institutions, including constitutional checks and balances providing for the

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<sup>78</sup> El-Hage (n 47) 6.

<sup>79</sup> El-Hage (n 47) 4.

<sup>80</sup> *ibid.*

<sup>81</sup> El-Hage (n 47) 8.

<sup>82</sup> Pedro Nikken, ‘Collective Defense of Democracy: Concepts and Procedures’ in *Diffusion of the Inter-American Democratic Charter* (Andean Commission of Jurists/ Carter Centre, Lima 2006) <<https://www.cartercenter.org/documents/collectivedefenseofdemocracy.pdf>> accessed 13 March 2019 4 and 66.

<sup>83</sup> Democratic Charter (n 12) Articles 3 and 4.

<sup>84</sup> Nikken (n 82) 40.

separation and independence of powers; and the arbitrary appointment or removal of members of the judiciary and electoral bodies.<sup>85</sup>

In addition to these actions, certain conditions must be met to justify the application of the mechanisms for collective action in Article 20.<sup>86</sup> The most paramount of these conditions is the existence of a manifest violation of the constitution of the Member State in question, without which there would be no alteration of the constitutional regime.<sup>87</sup> Secondly, the violation must have seriously impaired one of the elements or components of democracy set out in Articles 3 and 4.<sup>88</sup> Thirdly, the violation of democratic norms must be of a degree of seriousness that breaches the democratic order.<sup>89</sup> This latter condition manifests when, for example, a government policy debilitates the system of political pluralism by manipulating the electoral process,<sup>90</sup> or when one branch of government is subjugated to another, thereby undermining the essence of the legitimate exercise of power.<sup>91</sup>

In attempting to define the term ‘unconstitutional alteration’ it is necessary to consider the concept of the *autogolpe*, which scholars have debated may constitute an ‘unconstitutional interruption’ or an ‘unconstitutional alteration’.<sup>92</sup> An *autogolpe* is characterized by the overthrow of a democratically elected legislature by a democratically elected president, as occurred in Peru in 1992, and should invariably lead to the invocation of the Democracy Clause.<sup>93</sup> This concept is particularly salient due to the fact that in March 2017 the highest court in Venezuela, the *Tribunal Supremo de Justicia* (the Supreme Tribunal of Justice, hereafter the TSJ), ordered the dissolution of the National Assembly and declared the TSJ would take over all its

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<sup>85</sup> This summary of actions is primarily based on the list enumerated by former USA President Jimmy Carter in a speech to the OAS in 2005, see Rudy (n 77) 246; McCarthy (n 43) 26; and El-Hage (n 47) 9, El-Hage refers to the “gradual stacking of the judiciary and other crucial watchdog bodies with cronies who subsequently rubber stamp their benefactors’ unconstitutional actions.” This action is particularly salient to this study and is discussed extensively in the subsequent chapter; see also El-Hage (n 47) 10 on declarations of a state of emergency.

<sup>86</sup> Nikken (n 82) 66.

<sup>87</sup> *ibid.*

<sup>88</sup> *ibid.*

<sup>89</sup> Nikken (n 82) 67.

<sup>90</sup> Nikken (n 82) 66-67.

<sup>91</sup> Nikken (n 82) 48.

<sup>92</sup> El-Hage (n 47) 7-8.

<sup>93</sup> El-Hage (n 47) 7; McCarthy (n 43) 21.

powers, effectively usurping the legislative branch of government.<sup>94</sup> In response, the OAS Permanent Council issued Resolution 1078, in which it condemned the TSJ for its decision and declared an ‘unconstitutional alteration of the democratic order’ had taken place in Venezuela.<sup>95</sup> Following an international outcry the TSJ hastily rescinded its order, though it continued to frustrate the National Assembly by invalidating many of its legislative acts.<sup>96</sup>

### **3.3 The unconstitutional alteration of the constitutional regime in Venezuela**

In considering the multidimensional crisis in Venezuela, together with the actions and conditions that signify an unconstitutional alteration of the constitutional regime, it is evident the Maduro regime has seriously impaired the democratic order:<sup>97</sup> As mentioned above, a determination of whether an alteration to the constitutional regime has occurred is primarily conditional on the existence of a clear violation of the constitution of the Member State concerned.<sup>98</sup> The numerous ways in which the Maduro regime has transgressed the Constitution and violated democratic norms since 2016 is examined at length in the subsequent Chapter and is thus not discussed in detail in this section.

In addition to fulfilling the first condition, the Maduro regime damaged the pluralist system of political parties, an integral element of democracy listed in Article 3 of the

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<sup>94</sup> Tribunal Supremo de Justicia de Venezuela (hereafter TSJ), sentence No. 156/2017 29 March 2017 1.

<sup>95</sup> Organization of American States Permanent Council, ‘Resolution on the Recent Events in Venezuela’ CP/RES 1078 (2108/17) (Washington D.C. 3 April 2017). This Resolution was passed with 17 votes, and not the requisite majority of 18 votes. Jean Michel Arrighi, the legal advisor to the OAS, explains this was permissible as 12 Member States were present at the meeting, constituting a quorum. See ‘Alteración Inconstitucional del Orden Democrático en Venezuela: la Resolución de la OEA tras una Turbulenta Reunión que Bolivia Acusó de Ilegal’ (*BBC Mundo*, 4 April 2017) <<https://www.bbc.com/mundo/noticias-america-latina-39487179>> accessed 9 June 2019.

<sup>96</sup> Organization of American States Secretary General, *Report of the General Secretariat of the Organization of American States and the Panel of Independent International Experts on the Possible Commission of Crimes against Humanity in Venezuela* OEA/Ser.D/XV.19 (29 May 2018) 440. The International Commission of Jurists declared that the decision of the TSJ demonstrated the rupture of the constitutional regime and the total lack of independence of the judiciary. In addition, the Inter-American Commission on Human Rights and the United Nations High Commissioner for Human Rights Zeid Ra’ad Al Hussein expressed concern that the decision undermined the separation of powers and jeopardized democratic principles.

<sup>97</sup> Organization of American States Secretary General, *Report of the General Secretariat of the Organization of American States and the Panel of Independent International Experts on the Possible Commission of Crimes against Humanity in Venezuela* (n 96) 14. The day after the elections the Lima Group issued a statement declaring the illegitimacy of the electoral process for its failure to comply with international standards for democratic, free, fair and transparent elections. The European Union issued a similar statement declaring the elections did not respect political pluralism, transparency, and the rule of law, see page 12 of the aforementioned report.

<sup>98</sup> Nikken (n 82) 66.

Democratic Charter, by using the courts to ban opposition candidates from participating in elections.<sup>99</sup> This action thereby undermined the integrity of the judiciary as well as of the electoral commission, in contravention of the Constitution of Venezuela, which guarantees electoral and judicial independence.<sup>100</sup> Then, when the Maduro regime replaced the National Assembly with a Constituent National Assembly comprised entirely of pro-Maduro members in May 2017, it effectively engineered an *autogolpe*.<sup>101</sup> The Maduro regime's alteration to the constitutional regime culminated in the fraudulent elections of May 2018, undeniably breaching the democratic order by violating the quintessential element of democracy, the holding of free and fair elections.<sup>102</sup>

It is notable that, already in May 2016, the OAS Secretary General Luis Almagro declared an alteration of the constitutional regime in Venezuela and requested that the OAS Permanent Council activate Article 20 of the Democratic Charter.<sup>103</sup> Unsurprisingly, a lack of consensus amongst Member States resulted in no action being taken.<sup>104</sup> Then, in March 2017, Almagro again tried to persuade the OAS Permanent Council to invoke the Democratic Charter by asserting that an *autogolpe* had taken place in Venezuela, again to no avail.<sup>105</sup> The OAS Permanent Council finally took action on 10 January 2019 by issuing Resolution 1117/19, in which it

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<sup>99</sup> Organization of American States Secretary General, *Report of the General Secretariat of the Organization of American States and the Panel of Independent International Experts on the Possible Commission of Crimes against Humanity in Venezuela* (n 96) 12.

<sup>100</sup> Constitution of the Bolivarian Republic of Venezuela, 1999 (hereafter Constitution of Venezuela), see Articles 256 and 294.

<sup>101</sup> In practice, the National Constituent Assembly, which is comprised of Maduro supporters, has replaced the National Assembly, see Human Rights Watch, *Human Rights Watch World Report 2017/18: State of the World's Human Rights* (Human Rights Watch, January 2019) 650;

<sup>102</sup> Organization of American States Permanent Council, 'Resolution on the Situation in Venezuela' CP/RES 1117/19 (n 1); Samuel P. Huntington, *The Third Wave: Democratization in the Late Twentieth Century* (University of Oklahoma University Press 1991) 12.

<sup>103</sup> Organization of American States Secretary General, *Report of the General Secretariat of the Organization of American States to the Permanent Council on the Situation in Venezuela* OSG/243-16 (30 May 2016) 8.

<sup>104</sup> Alfredo S. Mancilla and others, 'Los Intentos Fallidos de la OEA contra Venezuela' (*CELAG*, 28 January 2019) <<https://www.celag.org/intentos-fallidos-oea-venezuela/>> accessed 10 June 2019.

<sup>105</sup> Organization of American States Secretary General, 'Press Release C-09/17 on Venezuela: Secretario General de la OEA Denuncia Auto Golpe de Estado' (Organization of American States, 30 March 2017) <[http://www.oas.org/es/centro\\_noticias/comunicado\\_prensa.asp?s-Codigo=C-019/17](http://www.oas.org/es/centro_noticias/comunicado_prensa.asp?s-Codigo=C-019/17)> accessed 5 May 2019.

declared Maduro an illegitimate president based on the ‘illegitimate electoral process’ of May 2018.<sup>106</sup>

Even though it is unlikely that a state whose government attained power through means other than free and fair elections would be permitted to participate in the OAS,<sup>107</sup> it is plausible that, had the Maduro regime had not exercised power so egregiously, producing a humanitarian crisis that disrupted the stability and economy of the region, the fraudulent elections may have been overlooked.<sup>108</sup> This is because, despite the pre-eminence of democracy, the undemocratic character of a government may be disregarded due to geopolitical strategies and interests.<sup>109</sup> In Venezuela, Maduro’s undemocratic form of governance could not continue unaddressed by the OAS, particularly given the persistent exodus of Venezuelans into neighbouring countries and intense international scrutiny.<sup>110</sup>

This Chapter contends that Maduro’s illegitimate exercise of power in terms of Article 20 justifies Resolution 1117/19. In order to arrive at this conclusion this Chapter considered the events that led to the Democratic Charter and the meaning of the term ‘unconstitutional alteration’, together with the definition of representative democracy in Articles 3 and 4 of the Democratic Charter. It then applied this term to the crisis in Venezuela to show the OAS Permanent Council decision to declare Maduro an illegitimate president in Resolution 1117/19 is justifiable, based not only on Maduro’s illegitimate origin of power through fraudulent elections, but also on Maduro’s illegitimate exercise of power, which has led to the unconstitutional alteration of the constitutional regime of Venezuela.

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<sup>106</sup> Organization of American States Permanent Council, ‘Resolution on the Situation in Venezuela’ CP/RES 1117/19 (n 1); Democratic Charter (n 12) Article 3.

<sup>107</sup> Duxbury (n 42) 171; The Democratic Charter (n 12) Article 3.

<sup>108</sup> On the crisis in Venezuela disrupting the continent see McCarthy (n 43) 30. Regarding the issue of the OAS overlooking fraudulent elections consider the situation in Nicaragua, where the suspicious presidential elections of President Daniel Ortega in November 2016, and subsequent political repression, have not resulted in him being declared illegitimate by the OAS. See Organization of American States Permanent Council ‘The Situation in Nicaragua’ CP/RES 1108 (2172/18) (Washington D.C 19 July 2018) and footnote 9 therein.

<sup>109</sup> D’Aspermont (n 30) 888.

<sup>110</sup> ‘The Battle for Venezuela’ *The Economist* (n 2) 11.

## CHAPTER FOUR: CONSTITUTION OF VENEZUELA

The Democratic Charter sets international standards that demand each Member State comply with its domestic law. Accordingly, compliance with the Democratic Charter turns on a determination of a Member State's compliance with its own constitution.<sup>111</sup> This Chapter therefore examines the Constitution of the Bolivarian Republic of Venezuela (hereafter the Constitution)<sup>112</sup> as a justification underpinning Resolution 1117/19. The first part is an overview of the actions taken by the National Assembly to restore the constitutional order in Venezuela from 2016 to January 2019. This contextual background is necessary because the Maduro regime has accused the National Assembly and Guaidó of attempting a *golpe de estado*.<sup>113</sup> By outlining the salient events leading to January 2019 this Chapter demonstrates that the accusation is erroneous and that the Maduro regime has in fact carried out an *autogolpe*.<sup>114</sup> The second half of this Chapter argues the case that Maduro is an illegitimate president based on an analysis of the constitutional provisions advanced by the National Assembly to validate its actions, namely Articles 233, 333 and 350.<sup>115</sup>

### 4.1 National Assembly efforts to restore democracy

On 10 January 2019, the first day of Maduro's disputed second presidential term, the OAS Permanent Council issued Resolution 1117/19, in which it declared Maduro's second presidential term illegitimate due to election rigging.<sup>116</sup> That same day the National Assembly, led by the opposition coalition known as the *Mesa de la Unidad Democrática* (hereafter MUD), proclaimed the president of the National Assembly, Guaidó, the *de jure* interim president until elections are held.<sup>117</sup> Two weeks later, at a

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<sup>111</sup> Brad R. Roth, 'Secessions, Coups and the International Rule of Law: Assessing the Decline of the Effective Control Doctrine' (2010) 11 *Melb. J. Int'l. L.* 436.

<sup>112</sup> Constitution of Venezuela (n 100).

<sup>113</sup> 'Venezuela Refuerza el Trabajo Conjunto con la ONU y Advierte Amenaza de Golpe de Estado' (*ONU Noticias*, 16 January 2019) <<https://news.un.org/es/story/2019/01/1449512>> accessed 5 May 2019.

<sup>114</sup> Organization of American States Secretary General, 'Press Release C-09/17 on Venezuela: Secretario General de la OEA Denuncia Auto Golpe de Estado' (n 105). See El-Hage (n 47) 7-9 on actions that constitute unconstitutional alterations to the democratic order.

<sup>115</sup> National Assembly of the Bolivarian Republic of Venezuela, *Acuerdo sobre la Declaratoria de Usurpación de la Presidencia de la Republica por parte de Nicolás Maduro Moros y el Restablecimiento de la vigencia de la Constitución* 15 January 2019.

<sup>116</sup> Organization of American States Permanent Council, 'Resolution on the Situation in Venezuela' CP/RES 1117/19 (n 1).

<sup>117</sup> 'The Battle for Venezuela' *The Economist* (n 2).

demonstration attended by thousands in Caracas, Guaidó stood on a platform and took the presidential oath of office.<sup>118</sup> The National Assembly had attempted several courses of action before resorting to the dramatic street inauguration of Guaidó, starting with its request for help from the OAS three years prior to this action.

In March 2016, amidst an intensifying multidimensional crisis, the National Assembly requested that the OAS Secretary General, Luis Almagro, investigate the rupture of the democratic order in Venezuela.<sup>119</sup> In accordance with Article 18 of the Democratic Charter, the Secretary General convened a meeting of the OAS Permanent Council on 23 June 2016 to consider the situation in Venezuela.<sup>120</sup> At the meeting, the Secretary General presented an extensive report detailing human rights violations and the subversion of the separation of powers by the Maduro regime.<sup>121</sup> Despite the presentation of this evidence of unconstitutional alterations to the democratic order, the Permanent Council vote fell short of the quorum required to activate the provisions for collective action in the Democratic Charter.<sup>122</sup>

On 20 October 2016 the National Assembly passed an agreement calling for the restitution of the constitutional order in Venezuela based on Article 333 of the Constitution.<sup>123</sup> Article 333 stipulates that when the Constitution ceases to be observed every citizen has the right and the duty to defend and re-establish the constitutional order.<sup>124</sup> The agreement described how the executive branch of government, under the command of Maduro, had systematically infringed on human rights and altered the constitutional order by subjugating the judiciary through the irregular appointment of

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<sup>118</sup> Brian Ellsworth ‘Venezuela’s Guaidó Calls for New Protests as Pressure on Maduro Rises’ (*Reuters*, 28 January 2019) <<https://www.reuters.com/article/us-venezuela-politics/venezuelas-Guaidó-calls-for-new-protests-as-pressure-on-maduro-rises-idUSKCN1PM1IM>> accessed 5 May 2019.

<sup>119</sup> ‘Venezuela: OAS Head Calls Emergency Meeting Over Crisis’ (*BBC*, 31 May 2016) <<https://www.bbc.com/news/world-latin-america-36416116>> accessed 3 April 2019.

<sup>120</sup> Antonio F. Pérez, ‘Democracy Clauses in the Americas: The Challenge of Venezuela’s Withdrawal from the OAS’ (2017) 33 *AM. U. Int’l. L. Rev.* 393-394.

<sup>121</sup> *ibid.*

<sup>122</sup> *ibid.*

<sup>123</sup> National Assembly of the Bolivarian Republic of Venezuela, *Acuerdo Para la Restitución del Orden Constitucional en Venezuela* 20 October 2016.

<sup>124</sup> Constitution of Venezuela (n 100) Article 333 states, ‘This Constitution shall not cease to be in effect if it ceases to be observed due to acts of force or because or repeal in any manner other than as provided for herein. In such eventuality, every citizen, whether or not vested with official authority, has a duty to assist in bringing it back into actual effect.’



judges and by commanding the armed forces to carry out political repression.<sup>125</sup> The agreement declared the existence of a *golpe de estado* by the Maduro regime, and asked the people of Venezuela and the international community to assist in the restoration of democracy.<sup>126</sup> A second agreement was passed a week later, also based on Article 333.<sup>127</sup> The agreement accused the Maduro regime of using successive state of emergency declarations, without the requisite approval from the National Assembly, to consolidate power and curb civil liberties.<sup>128</sup> It alleged the Maduro regime used the *Tribunal Supremo de Justicia de Venezuela* (the Supreme Tribunal of Venezuela, hereafter the TSJ) to obstruct the National Assembly from calling a presidential recall referendum and from enacting laws to resolve the economic crisis.<sup>129</sup> The agreement concluded by establishing a date for the commencement of impeachment proceedings.<sup>130</sup> Unsurprisingly, the TSJ held both agreements were unconstitutional and ordered the National Assembly to refrain from passing further agreements concerning the president.<sup>131</sup>

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<sup>125</sup> National Assembly of the Bolivarian Republic of Venezuela, *Acuerdo Para la Restitución del Orden Constitucional en Venezuela* (n 123) 2. The agreement called on the armed forces to act impartially and serve the interests of the country, not those of a particular political party.

<sup>126</sup> *ibid.*

<sup>127</sup> National Assembly of the Bolivarian Republic of Venezuela, *Acuerdo para Iniciar el Procedimiento de Declaratoria de Responsabilidad Política del Presidente de la República ante la Grave Ruptura del Orden Constitucional y Democrático y la Devastación de las Bases Económicas y Sociales de la Nación* 25 October 2016.

<sup>128</sup> National Assembly of the Bolivarian Republic of Venezuela, *Acuerdo para Iniciar el Procedimiento de Declaratoria de Responsabilidad Política del Presidente de la República ante la Grave Ruptura del Orden Constitucional y Democrático y la Devastación de las Bases Económicas y Sociales de la Nación* (n 127) 3. According to the Organization of American States Secretary General, *Report of the General Secretariat of the Organization of American States and the Panel of Independent International Experts on the Possible Commission of Crimes against Humanity in Venezuela* (n 96) 272, Maduro has repeatedly abused declarations of states of emergency. 'In August 2015, he declared a State of Emergency in 23 municipalities on the border with Colombia, suspending the constitutional requirement for authorities to obtain a warrant from the courts to enter the private residences of citizens or to violate individuals' private communications, among other rights. These states of emergency have been continually extended.' The relationship between emergency rule and dictatorship is discussed in Roth (n 22) 61-62, Roth states that the original meaning of the term 'dictatorship' harks back to Roman times when the concept of emergency rule required authorities to grant a dictator the right to exercise an unlimited amount of power for a certain period of time, thus dispensing with constitutional constraints and legalities. In modern constitutions this has been transformed into the right of the president to declare a state of emergency. The Maduro regime's continued application of emergency rule is yet another factor indicating it is a dictatorship.

<sup>129</sup> *ibid.*

<sup>130</sup> National Assembly of the Bolivarian Republic of Venezuela, *Acuerdo para Iniciar el Procedimiento de Declaratoria de Responsabilidad Política del Presidente de la República ante la Grave Ruptura del Orden Constitucional y Democrático y la Devastación de las Bases Económicas y Sociales de la Nación* (n 127) 4.

<sup>131</sup> Tribunal Supremo de Justicia de Venezuela, sentence No. 948/2016 15 November 2016 1.

On 9 January 2017 members of the National Assembly debated whether Maduro had abandoned the constitutional functions of the presidency based on Article 233 of the Constitution.<sup>132</sup> Article 233 stipulates that, when a president becomes permanently unavailable to serve, or when he abandons his position, pursuant to a determination by the National Assembly, the president of the National Assembly assumes the role of interim president pending presidential elections.<sup>133</sup> After extensive debate the National Assembly passed an agreement in which it declared Maduro had abandoned his presidential responsibilities and called for new presidential elections.<sup>134</sup> The agreement was subsequently declared unconstitutional by the TSJ.<sup>135</sup>

On 21 March 2017 the National Assembly again deliberated requesting assistance from the OAS to resolve the political crisis. Pursuant to Article 20 of the Democratic Charter, the OAS Permanent Council may undertake diplomatic initiatives to foster the restoration of democracy in a Member State that has experienced an unconstitutional alteration of the democratic order.<sup>136</sup> The National Assembly passed an agreement on the reactivation of the application process of the Democratic Charter as a mechanism for the peaceful restoration of the constitutional order.<sup>137</sup> A week later, the TSJ declared the National Assembly had committed a treasonous act in calling for the invocation of the Democratic Charter and declared the agreement invalid.<sup>138</sup>

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<sup>132</sup> National Assembly of the Bolivarian Republic of Venezuela, *Acuerdo sobre el Abandono de las Funciones Constitucionales de la Presidencia de la Republica en que Ha Incurrido el Ciudadano Nicolás Maduro Moros* 9 January 2017.

<sup>133</sup> Constitution of Venezuela (n 100) Article 233 states, ‘The President of the Republic shall become permanently unavailable to serve by reason of any of the following events: death; resignation; removal from office by decision of the Supreme Tribunal of Justice; permanent physical or mental disability certified by a medical board designated by the Supreme Tribunal of Justice with the approval of the National Assembly; abandonment of his position, duly declared by the National Assembly; and recall by popular vote. When an elected President becomes permanently unavailable to serve prior to his inauguration, a new election by universal suffrage and direct ballot shall be held within 30 consecutive days. Pending election and inauguration of the new President, the President of the National Assembly shall take charge of the Presidency of the Republic...’

<sup>134</sup> Tribunal Supremo de Justicia de Venezuela, sentence No. 2/2017 11 January 2017 1.

<sup>135</sup> *ibid.*

<sup>136</sup> Democratic Charter (n 12) Article 20.

<sup>137</sup> National Assembly of the Bolivarian Republic of Venezuela, *Acuerdo sobre la Reactivación del Proceso de Aplicación de la Carta Interamericana de la OEA, como mecanismo de resolución pacífica de conflictos para restituir el orden constitucional en Venezuela* 21 March 2017.

<sup>138</sup> Tribunal Supremo de Justicia de Venezuela, sentence No. 155/2017 28 March 2017 1. The TSJ conveniently ignored the fact that Venezuela was the first Member State to ever invoke the Democratic Charter when then-President Chávez was deposed in a *golpe de estado* in 2002. See Organization of American States Secretary General, ‘Press Release C-09/17 on Venezuela: Secretario General de la OEA Denuncia Auto Golpe de Estado’ (n 105).

On 29 March 2017 the TSJ attempted to effectively extinguish the separation of powers by ordering the dissolution of the National Assembly and declaring it would assume the legislative powers of the National Assembly.<sup>139</sup> However, widespread criticism caused the TSJ to hastily withdraw the order.<sup>140</sup> In May 2017 Maduro announced he would convene a National Constituent Assembly with the purported objective of drafting a new constitution.<sup>141</sup> In response, the then president of the National Assembly, Julio Borges, announced at a National Assembly session on 20 June 2017 that the National Assembly would no longer recognise the Maduro regime and would not recognise the National Constituent Assembly.<sup>142</sup> Borges declared the National Assembly in rebellion against the Maduro regime based on the activation of Article 350 of the Constitution.<sup>143</sup> Article 350, known as the ‘rebellion clause’, grants Venezuelans the right to defy any authority that undermines democratic values through civil disobedience.<sup>144</sup> Eventually, due to mounting international pressure and civil unrest, the Maduro regime agreed to hold talks with the MUD to resolve the constitutional crisis.<sup>145</sup>

In December 2017 representatives of the MUD and Maduro regime met in the Dominican Republic to hold a national dialogue in the presence of international guarantors and observers.<sup>146</sup> The key points for the MUD were electoral guarantees for the upcoming presidential elections, specifically the attendance of international

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<sup>139</sup> Tribunal Supremo de Justicia de Venezuela, sentence No. 156/2017 (n 94) 1.

<sup>140</sup> Pérez (n 120) 394. The decision of the TSJ to usurp the powers of the National Assembly was condemned by the OAS Permanent Council, see Organization of American States Permanent Council, ‘Resolution on the Recent Events in Venezuela’ CP/RES 1078 (2108/17) (n 95). As well as by numerous international organizations, see the Organization of American States Secretary General, *Report of the General Secretariat of the Organization of American States and the Panel of Independent International Experts on the Possible Commission of Crimes against Humanity in Venezuela* (n 96) 440.

<sup>141</sup> Organization of American States Secretary General, *Report of the General Secretariat of the Organization of American States and the Panel of Independent International Experts on the Possible Commission of Crimes against Humanity in Venezuela* (n 96) 12.

<sup>142</sup> ‘Artículo 350: Último Instancia para Frenar la Constituyente en Venezuela?’ (*CNN Español*, 23 June 2017) <<https://cnnespanol.cnn.com/2017/06/23/articulo-350-ultima-instancia-para-frenar-la-constituyen-te-en-venezuela/>> accessed 5 May 2019.

<sup>143</sup> *ibid.*

<sup>144</sup> Constitution of Venezuela (n 100) Article 350 states, ‘The people of Venezuela, true to their republican tradition and their for independence, peace and freedom, shall disown any regime, legislation or authority that violates democratic values, principles and guarantees or encroaches upon human rights.’

<sup>145</sup> Jorge Pineda and Diego Oré, ‘Gobierno y Oposición de Venezuela Retoman Dialogo en Republica Dominicana’ (*Reuters*, 1 December 2017) <<https://lta.reuters.com/articulo/topNews/idLTAKBN1DV4UA-OUJSLT>> accessed 20 March 2019.

<sup>146</sup> *ibid.*

observers; the opening of channels for humanitarian efforts to bring in food and medicine; the release of political prisoners;<sup>147</sup> and the restoration of legislative powers to the National Assembly.<sup>148</sup> After weeks of negotiations the parties had still not reached a consensus.<sup>149</sup> Then in January 2018, three months before the presidential elections, the TSJ disqualified the MUD, and other political actors, from participating in the elections.<sup>150</sup> This inevitably led to the complete collapse of the dialogue in February 2018.<sup>151</sup> Despite international criticism the presidential elections went ahead, and in May 2018 Maduro allegedly won his second term in office.<sup>152</sup> The following month the OAS General Assembly declared the electoral process to have lacked legitimacy for failing to comply with international standards and for excluding the participation of political parties.<sup>153</sup> The OAS Permanent Council declared the illegitimacy of Maduro's second presidential term on 10 January 2019.<sup>154</sup>

The events outlined above demonstrate the challenges faced by the National Assembly in its efforts to constrain the erosion of democracy by the Maduro regime. Whereas the National Assembly legitimized its actions through parliamentary acts, the Maduro regime endeavoured to legitimize its authoritarian exercise of power through the TSJ. The tactical use of the Constitution by the National Assembly and the Maduro regime to validate their actions reveals the susceptibility of the Constitution to being

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<sup>147</sup> Human Rights Watch, *Human Rights Watch World Report 2017/18: State of the World's Human Rights* (n 101) 647. The Maduro regime has jailed political opponents and disqualified them from running for office. Venezuelan prisons and intelligence services offices held more than 230 political prisoners.

<sup>148</sup> Pineda (n 145).

<sup>149</sup> Organization of American States Secretary General, *Report of the General Secretariat of the Organization of American States and the Panel of Independent International Experts on the Possible Commission of Crimes against Humanity in Venezuela* (n 96) 13.

<sup>150</sup> Organization of American States Secretary General, *Report of the General Secretariat of the Organization of American States and the Panel of Independent International Experts on the Possible Commission of Crimes against Humanity in Venezuela* (n 96) 208.

<sup>151</sup> Organization of American States Secretary General, *Report of the General Secretariat of the Organization of American States and the Panel of Independent International Experts on the Possible Commission of Crimes against Humanity in Venezuela* (n 96) 13.

<sup>152</sup> Organization of American States Permanent Council, 'Resolution on the Situation in Venezuela' CP/RES 1117/19 (n 1); Organization of American States Secretary General, *Report of the General Secretariat of the Organization of American States and the Panel of Independent International Experts on the Possible Commission of Crimes against Humanity in Venezuela* (n 96) 12.

<sup>153</sup> Organization of American States General Assembly, 'Resolution on the Situation in Venezuela' AG/RES 2929/18 (n 8).

<sup>154</sup> Organization of American States Permanent Council, 'Resolution on the Situation in Venezuela' CP/RES 1117/19 (n 1).

employed as an instrument for self-preservation and the entrenchment of power.<sup>155</sup> What emerges from this spectacle, where each party denounces the other while playing the role of guardian of legality and of the Constitution, is a situation devoid of legality, a situation where the Constitution is employed not to prevent but to sharpen civil strife.<sup>156</sup> This leads to the second part of the Chapter: an examination of Articles 233, 333 and 350 of the Constitution based on the jurisprudence of the TSJ.

#### **4.2 Analysis of the constitutional grounds invalidating Maduro's regime**

Article 233 is undoubtedly the most contentious of the three articles advanced by the National Assembly. At a session in January 2017 the National Assembly heatedly debated its applicability.<sup>157</sup> Pro-Maduro members argued that Article 233 only applies when the president is physically absent, to which Juan Pablo Guanipa, a member of the MUD, responded, 'it is not a physical abandonment; on the contrary, it is an abandonment of his functions, his constitutional duties; it is in this desertion, in this abandonment, that he has submerged the people...'<sup>158</sup> In its adjudication of the issue, the TSJ concurred with the pro-Maduro camp and held that Article 233 implies that abandonment is a physical, voluntary, and arbitrary separation of the worker from the position of work, and not a presumed inefficiency in the performance of its function based on subjective considerations.<sup>159</sup>

The textualist approach of the TSJ warrants criticism because its interpretation is excessively formalistic in the context of a constitutional reading.<sup>160</sup> Nonetheless, it is arguable that the invocation of Article 233 by the National Assembly was misguided for another reason: Article 233 expressly states that, in the absence of an *elected* president, the president of the National Assembly may assume the role of interim

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<sup>155</sup> An example of the tactical use of the Constitution for partisan purposes is the following: in June 2017 National Assembly invoked Article 350 to de-recognise Maduro then in January 2019 the TSJ held that all decisions taken by the National Assembly from 2016 were invalid based, inter alia, on its interpretation of Article 350. See Tribunal Supremo de Justicia de Venezuela, sentence No. 0003/2019 21 January 2019 1.

<sup>156</sup> *ibid.*

<sup>157</sup> Tribunal Supremo de Justicia de Venezuela, sentence No. 3/2017 11 January 2017 18.

<sup>158</sup> *ibid.*

<sup>159</sup> Tribunal Supremo de Justicia de Venezuela, sentence No. 948/2016 (n 131) 10-11 & 15.

<sup>160</sup> Diego A. Zambrano, 'Guaidó, not Maduro, is the *de jure* President of Venezuela' (*Stanford Law School Blogs*, 1 February 2019) <<https://law.stanford.edu/2019/02/01/Guaidó-not-maduro-is-the-de-jure-presi-dent-of-venezuela/>> accessed 14 March 2019.

president.<sup>161</sup> In keeping with its stance that Maduro was never elected due to fraudulent elections, the invocation of Article 233 subsequent to the May 2018 elections is self-contradictory.<sup>162</sup> Prior to the elections Article 233 was an appropriate constitutional ground with which to challenge the Maduro regime. But in the wake of the elections it is Articles 333 and 350 that provide the strongest constitutional grounds for the National Assembly to defy Maduro's regime.<sup>163</sup>

Article 350 is a rather peculiar clause that did not appear in any prior constitutions (the current Constitution is the country's 26<sup>th</sup>).<sup>164</sup> In 1999, during the drafting process of the Constitution, the National Constituent Assembly debated the meaning and ambit of Article 350 but left it purposely vague and open to interpretation.<sup>165</sup> The TSJ eventually considered the precise meaning of Article 350 in 2003 when it was approached by applicants who considered 'that a consistent interpretation of this Chamber is necessary and urgent, in virtue of the ambiguous, imprecise and generic content of article 350 of the Constitution, which makes it inoperative.' The Applicants were not successful and the Court refused to determine the normative content of Article 350, although it did declare that all available procedures and judicial recourses must be exhausted prior to exercising the right to resist enshrined in Article 350.<sup>166</sup> However, in its attempt to clarify the procedural aspect of Article 350, the TSJ failed to consider a scenario where the judiciary itself is in collusion with the authority undermining the Constitution, thereby vitiating judicial authority and rendering due

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<sup>161</sup> Constitution of Venezuela (n 100) Article 350.

<sup>162</sup> Javier Lafuente and others, 'Los Argumentos Legales detras de la Batalla Politica' *El Pais* (Madrid, 24 January 2019) <[https://elpais.com/internacional/2019/01/24/actualidad/1548324278\\_362240.htm](https://elpais.com/internacional/2019/01/24/actualidad/1548324278_362240.htm) 13/> accessed 20 March 2019.

<sup>163</sup> *ibid.*

<sup>164</sup> Constitutional reform and replacement is a frequent phenomenon in Latin America. It is examined in Detlef Nolte and Almut Schilling-Vacaflor (eds), *New Constitutionalism in Latin America: Promises and Practices* (Routledge 2012). According to Nolte and Schilling-Vacaflor at 4-7, since the third wave of democratization in the 1970s every country in Latin America has either replaced or reformed its Constitution. In Latin America, constitutions are not anachronistic static documents, they are modifiable instruments viewed as mediums through which to reflect evolving notions of power, justice and culture in society. Venezuela in particular has a tradition of constitutional reform. As such, it is not surprising that Chávez repealed the Constitution of 1993 to make way for the current Constitution, which amplified the powers of the president and strengthened the executive, see Williamson (n 39) 596-597. In 2009 Chávez won a referendum to remove the presidential term limits in the Constitution, allowing him, and his chosen successor Maduro, to run for office indefinitely, see Williamson (n 39) 597.

<sup>165</sup> Tribunal Supremo de Justicia de Venezuela, sentence No. 24/2003 22 January 2002 1.

<sup>166</sup> Tribunal Supremo de Justicia de Venezuela, sentence No. 24/2003 (n 165) 6.

process futile.<sup>167</sup> The TSJ thus missed an opportunity to provide valuable guidance on what process to follow pursuant to the activation of article 350.

In that same judgment the TSJ considered the content of Article 333. The TSJ held that Article 333 provides for the defence of the constitutional order through civil disobedience in the event of an unconstitutional usurper regime.<sup>168</sup> The Maduro regime, by virtue of its exercise of power in systematically violating the constitution, and its origin of power, in choreographing the elections, is the usurper regime envisaged in Article 333. In addressing the usurpation of power by the Maduro regime the National Assembly pursued numerous legal processes. It fully adhered to the ruling of the TSJ to exhaust all recourse before it openly rebelled against the Maduro regime. In the absence of viable alternatives, the National Assembly's declaration of Guaidó as interim president in January 2019 is the manifestation of the right to resist enshrined in Articles 333 and 350. It constitutes an act of rebellion intended to dismantle the power structures that have led Venezuela into economic depression and political repression. With the degradation of daily life in Venezuela, and the persistent crises, there exists a moral imperative to revolt against the Maduro regime.<sup>169</sup>

### 4.3 Conclusion

This Chapter demonstrates how the Maduro regime has engineered a politically unsustainable system of governance through corruption and coercion.<sup>170</sup> Since the 2018 fraudulent elections clearly subverted the will of the people, the ultimate source of political legitimacy, the Maduro regime has looked to the judiciary as an alternative source of legitimacy.<sup>171</sup> Under Maduro's command, the Maduro regime continues to

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<sup>167</sup> Carmen L. Márquez, 'Interpretación de la Sala Constitucional del Tribunal Supremo de Justicia del Artículo 350 de la Constitución de la República Bolivariana de Venezuela' (2013) 29 *Provincia: Revista Venezolana de Estudios Territoriales* 67.

<sup>168</sup> Tribunal Supremo de Justicia de Venezuela, sentence No. 24/2003 (n 165) 6.

<sup>169</sup> See generally Chris Hedges, *Wages of Rebellion: The Moral Imperative of Revolt* (Nation Books 2015).

<sup>170</sup> Amnesty International, *Amnesty International Report 2017/18: The State of the World's Human Rights* (Amnesty International, February 2018) 393-395.

<sup>171</sup> Organization of American States Secretary General, *Report of the General Secretariat of the Organization of American States and the Panel of Independent International Experts on the Possible Commission of Crimes against Humanity in Venezuela* (n 96) 200, the Report describes how the TSJ has assisted the Maduro regime to subvert the Constitution: '...it issues rulings without a legal basis that serve to support the authoritarian and undemocratic policies of the Executive and have consistently prevented the democratically elected National Assembly (AN) from taking any constitutional measures to resolve the on-going political, economic and humanitarian crisis. In the first ten months of 2016, at least 30 judgments produced by the TSJ were issued against the National

purport to rule by law and to honour the Constitution, even as it manipulates the levers of power internally to ensure the judicial process is devoid of meaning.<sup>172</sup> To this end, so radically have the courts reinterpreted the Constitution in service to the Maduro regime, that its significance has been hollowed.

Yet the Maduro regime continues to feign compliance with the law in order to survive. It has used the TSJ as a judicial shield in its monopolization of state control, and in its endeavour to decimate the final check on its exercise of power, the National Assembly. The TSJ's brazen attempt to usurp the power of the National Assembly elucidates the extent to which the Maduro regime has betrayed the Constitution, and the people of Venezuela.

Thus, as expected, the numerous efforts of the National Assembly to address the constitutional crisis through due process have been frustrated by the machinations of the Maduro regime. However, although these efforts were not successful, what they do reveal is that the National Assembly did not attempt a *golpe de estado* but endeavoured to restore the democratic order through legal channels. As such, the fraudulent presidential elections, and the erosion of the separation of powers by the Maduro regime, substantiate the assertion that Maduro has usurped the office of the presidency and orchestrated an *autogolpe*.

Based on the events outlined above, the Maduro regime has undeniably caused an unconstitutional alteration to the democratic order, thus warranting the invocation of the right to resist enshrined in the Constitution and in Article 20 of the Democratic Charter. As the only remaining legitimate representative of the people, the National Assembly's determination that Maduro is an illegitimate president based on constitutional grounds is authoritative and should inform the actions of the OAS. Resolution 1117/19 thus finds justification in both the Democratic Charter and the Constitution of Venezuela.

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Assembly and, at least eight laws enacted by the parliament, were struck down. From June 2016 to February 2017, at least 32 cases or incidents are on record exposing the Court's systematic interpretation in favour of the Government's interests'.

<sup>172</sup> Human Rights Watch, *Human Rights Watch World Report 2017/18: State of the World's Human Rights* (n 101) 649. According to its recent report, 'Members of the Supreme Court have openly rejected the principle of separation of powers and publicly pledged their commitment to advancing the government's political agenda. The court has consistently upheld abusive policies and practices.'



## CHAPTER FIVE: IMPLICATIONS OF RESOLUTION 1117/19

Resolution 1117/19 shows the OAS has the capacity to take robust, albeit controversial, action based on the Inter-American Democratic Charter (hereafter Democratic Charter).<sup>173</sup> Resolution 1117/19 has stirred debate as to the role of the OAS in protecting and promoting democracy in the region, and has raised questions as to the consequences of declaring a sitting president illegitimate. While Resolution 1117/19 has numerous ramifications at national, regional, and international levels, this Chapter only considers those that are most salient within the context of the OAS.

This Chapter commences with an overview of certain events that occurred following Resolution 1117/19, and which best illustrate the complexities surrounding the declaration of illegitimacy. The subsequent section considers the withdrawal of Venezuela from the OAS, instigated in 2017 by the Maduro regime, in light of the OAS accreditation of the representative of the National Assembly, and the participation of National Assembly delegates at the OAS General Assembly session in June of 2019.<sup>174</sup> The third and last section considers the implications of Resolution 1117/19 for state recognition practices, and argues that, in the Inter-American system, democratic governance is emerging as a criterion for recognition. This Chapter concludes by positing that the implications of Resolution 1117/19 set a formidable precedent for the application of the Democratic Charter going forward.

### 5.1 Events following Resolution 1117/19

In January 2019, shortly after the OAS Permanent Council declared Maduro an illegitimate president, the National Assembly proclaimed Juan Guaidó the interim president until free and fair elections are held.<sup>175</sup> Over 50 countries around the world quickly recognized Guaidó as the interim president, including the governments of the Lima Group and the USA, on the basis that the National Assembly is the only

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<sup>173</sup> Democratic Charter (n 12); Organization of American States Permanent Council, ‘Resolution on the Situation in Venezuela’ CP/RES 1117/19 (n 1).

<sup>174</sup> Pérez (n 120) 392.

<sup>175</sup> Sebastian Mantilla Blanco, ‘Rival Governments in Venezuela: Democracy and the Question of Recognition’ (*Verfassungsblog*, 28 January 2019) <<https://verfassungsblog.de/rival-governments-in-venezuela-democracy-and-the-question-of-recognition/>> accessed 2 July 2019.

remaining democratic authority in Venezuela.<sup>176</sup> Although the majority of countries that recognized Guaidó as interim president did not expel the diplomats of the Maduro regime nor cut diplomatic ties with Venezuela, the widespread recognition of Guaidó was, and still is, symbolically powerful.<sup>177</sup> Notably absent from the group of countries supporting Guaidó are the governments of Russia and China, which have pledged allegiance to the Maduro regime.<sup>178</sup>

By June 2019 the USA and Canada had imposed severe economic sanctions on Venezuela and revoked the visas of diplomats and members of the Maduro regime.<sup>179</sup> Ambassadors designated by the National Assembly were officially accredited by Brazil and Costa Rica, and in the latter country even allowed to take control of the embassy.<sup>180</sup> Several European countries recognized Guaidó as interim president, but did not accredit his envoys as ambassadors.<sup>181</sup> In a meeting of the United Nations Security Council the USA proposed a resolution calling for new presidential elections to be held in Venezuela on the grounds that the May 2018 presidential elections had not been free and fair.<sup>182</sup> The resolution was, unsurprisingly, vetoed by Russia and China.<sup>183</sup>

In April 2019 the OAS Permanent Council took the contentious decision to recognize the envoy of the National Assembly to the OAS Permanent Council, Gustavo Tarre, as

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<sup>176</sup> The Lima Group is comprised of Argentina, Brazil, Canada, Chile, Colombia, Costa Rica, Guatemala, Honduras, Panama and Peru; Blanco (n 175).

<sup>177</sup> Anthony Faiola and Marissa J. Lang, 'Maduro vs. Guaidó: Venezuela's Dueling Diplomatic Corps in Tug of War for Embassies, Access' (*Washington Post*, 23 April 2019) <[https://www.washingtonpost.com/world/the\\_americas/maduro-vs-Guaidó-venezuelas-dueling-diplomatic-corps-in-tug-of-war-for-embassies-access/2019/04/23/61f0aade-65c911e9a6982a8f808c9cfb\\_story.html?noredirect=on&-utm\\_term=.6e7aac9d3053](https://www.washingtonpost.com/world/the_americas/maduro-vs-Guaidó-venezuelas-dueling-diplomatic-corps-in-tug-of-war-for-embassies-access/2019/04/23/61f0aade-65c911e9a6982a8f808c9cfb_story.html?noredirect=on&-utm_term=.6e7aac9d3053)> accessed 3 July 2019.

<sup>178</sup> *ibid.*

<sup>179</sup> Government of Canada, 'Canadian Sanctions Related to Venezuela' (*Government of Canada*, 25 June 2019) <[https://www.international.gc.ca/world-monde/international\\_relations\\_internationales/sanctions/venezuela.aspx?lang=eng](https://www.international.gc.ca/world-monde/international_relations_internationales/sanctions/venezuela.aspx?lang=eng)> accessed 3 July 2019.

<sup>180</sup> Alvaro Murillo and Julia Love, 'Venezuela's Opposition Ambassador Takes Control of Embassy in Costa Rica' (*Reuters*, 20 February 2019) <<https://www.reuters.com/article/us-venezuela-politics-costa-rica/venezuelas-opposition-ambassador-takes-control-of-embassy-in-costa-ricaidUSKCN1Q9-2RY>> accessed 3 July 2019; Luiz F. Barbieri, 'Bolsonaro Oficializa nova embaixadora Venezuelana no Brasil' (*O Globo*, 4 June 2019) <<https://g1.globo.com/politica/noticia/2019/06/04/bolsonaro-oficializa-nova-embaixadora-venezuelana-no-brasil.ghtml>> accessed 3 July 2019.

<sup>181</sup> Faiola (n 177).

<sup>182</sup> United Nations Security Council (UNSC), United States of America: Draft Resolution (28 February 2019), UN DOC S/2019/186.

<sup>183</sup> UNSC, Verbatim Record (28 February 2019), UN DOC S/PV.8476.

the legitimate representative of Venezuela.<sup>184</sup> Two months later, in June 2019, at the OAS General Assembly annual meeting, the General Assembly approved Tarre's appointment.<sup>185</sup> The meeting was mired in controversy.<sup>186</sup> In fact, the representative of Uruguay walked out of the General Assembly session in protest and several Member States vehemently objected to the vote, primarily on the grounds that the OAS was acting *ultra vires* and lacked the authority to recognize the representatives of a government not in effective control of the State.<sup>187</sup> The recognition of Tarre, first by the OAS Permanent Council, and then by the General Assembly, is unprecedented in the history of the operation of the OAS.<sup>188</sup>

Complicating matters further is that, in April 2019, Venezuela supposedly ceased to be a Member State of the OAS, as the two-year withdrawal process initiated by Maduro in April 2017 came to completion. At first glance, it would seem that the OAS recognition of Tarre implies that Venezuela continues to be a Member State, though the OAS has yet to issue a declaration as to the status of Venezuela's membership.<sup>189</sup> Whether the country is still a Member State hinges on a consideration of the implications of the withdrawal process by the Maduro regime. This process is examined in the subsequent section.

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<sup>184</sup> Organization of American States Permanent Council, 'Resolution on the Situation in Venezuela' CP/RES 1124 (2217/19) (Washington D.C. 11 April 2019).

<sup>185</sup> Organization of American States General Assembly, 'The Situation in Venezuela and the Migrant Crisis' AG/CG/doc.7/19 corr. 1 (Medellin 28 June 2019).

<sup>186</sup> LJ Acosta, 'OAS Meeting Ends in Disagreement over Venezuela Opposition Delegation' (*Reuters* 29 June 2019) <<https://www.reuters.com/article/us-venezuela-politics-oas-vote/oas-meeting-ends-in-dis-agreement-over-venezuela-opposition-delegation-idUSKCN1TU023>> accessed 20 July 2019.

<sup>187</sup> Acosta (n 186).

<sup>188</sup> Dylan Baddour, 'Uruguay Walks out of OAS Assembly over Guaidó Envoy Inclusion' (*Al Jazeera*, 27 June 2019) <<https://www.aljazeera.com/news/2019/06/uruguay-walks-oas-assembly-inclusion-guaid-6-envoy-190627191520096.html>> accessed 3 July 2019.

<sup>189</sup> It is worth noting that on 10 September 2013 the Maduro regime denounced the Organization of American States, American Convention on Human Rights "Pact of San José, Costa Rica", adopted 22 November 1969, entered into force 18 July 1978 (Costa Rica, 22 November 1969). The effect of the denunciation was that the Inter-American Court of Human Rights and the Inter-American Commission on Human Rights ceased to have jurisdiction to investigate human rights abuses in Venezuela. On 31 July 2019 the National Assembly deposited an instrument of ratification of the American Convention on Human Rights at the OAS headquarters in Washington D.C. reestablishing the jurisdiction of the aforementioned institutions and stipulating that the re-ratification is retroactive to 10 July 2013. See National Assembly of the Bolivarian Republic of Venezuela, *Acuerdo Para Restablecer la Vigencia de la Convención Americana sobre Derechos Humanos y la Protección Internacional que ofrecen la Corte Inter-Americana y la Comisión* 15 May 2019.

## 5.2 Venezuela's withdrawal from the OAS

In April 2017 Venezuela submitted its notice of withdrawal to the OAS.<sup>190</sup> Pursuant to Article 143 of the Charter of the Organization of American States (hereafter OAS Charter), the withdrawal would come into effect two years later, in April 2019.<sup>191</sup> The accompanying letter described the withdrawal of Venezuela as imperative, giving as the reason that the OAS had been transformed into a vehicle for imperialist aims and an 'executor of Monroe doctrine-inspired hegemonic interests' intent on overthrowing the Maduro regime.<sup>192</sup> The participation of National Assembly delegates at the recent OAS meeting in June 2019 makes it dubious whether the withdrawal of Venezuela is effective.<sup>193</sup> Neither the OAS General Assembly nor the OAS Permanent Council has issued a resolution clarifying Venezuela's membership status.<sup>194</sup> The issues surrounding Venezuela's withdrawal are complex and unprecedented; it is the first time a Member State has ever withdrawn from the OAS.<sup>195</sup> The unsettled issue of Venezuela's withdrawal warrants a brief mention of the earlier attempted withdrawal of Honduras from the OAS in 2009.

In June 2009 the Honduran military staged a *golpe de estado* and kidnapped President Jose Manuel Zelaya Rosales from the presidential palace.<sup>196</sup> Soldiers immediately put President Zelaya on a plane to Costa Rica, effectively expelling him from the country.<sup>197</sup> The OAS invoked the Democratic Charter in its condemnation of the *golpe de estado* and took diplomatic measures to resolve the political crisis.<sup>198</sup> However, unsuccessful efforts to restore democracy in the country indicated that Honduras would be suspended from the OAS.<sup>199</sup> To pre-empt the suspension, leaders of the *golpe de estado* attempted to withdraw Honduras from the OAS.<sup>200</sup> The OAS rejected

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<sup>190</sup> Organization of American States Permanent Council, 'Note from the Permanent Mission of the Bolivarian Republic of Venezuela Enclosing a Copy of the Letter Denouncing the Charter of the Organization of American States (OAS) pursuant to Article 143 and Initiating the Permanent Withdrawal of the Bolivarian Republic of Venezuela from the Organization. April 28, 2017' (hereafter Notice of Withdrawal) OEA/Ser.G, CP/INF.7707/17, 29 April 2017.

<sup>191</sup> Organization of American States, Charter of the Organization of American States (hereafter OAS Charter), adopted 30 April 1948, entered into force 13 December 1951, 2 U.S.T. 2394 Article 143.

<sup>192</sup> Notice of Withdrawal (n 190) 3.

<sup>193</sup> Baddour (n 188).

<sup>194</sup> Acosta (n 186).

<sup>195</sup> Pérez (n 10) 392.

<sup>196</sup> Duxbury (n 42) 181.

<sup>197</sup> *ibid.*

<sup>198</sup> *ibid.*

<sup>199</sup> Duxbury (n 42) 182.

<sup>200</sup> *ibid.*

the withdrawal on the basis that “only legitimate governments can withdraw from an entity such as the OAS.”<sup>201</sup> Honduras was subsequently suspended from its right to participate in the activities of the OAS under Article 21 of the Democratic Charter.<sup>202</sup> Only three years later, following free and fair presidential elections and the return of democratic order, did the OAS lift the suspension.<sup>203</sup>

The case of Honduras is similar to that of Venezuela as both demonstrate the willingness of the OAS to assess the legitimacy of the authority that is driving the withdrawal process of a country. In the case of Honduras the OAS considered the illegitimate origin of power of the authority instigating the withdrawal.<sup>204</sup> Regarding Venezuela, it is reasonable to view the OAS decision to accredit Tarre as a tacit rejection of the withdrawal process based on the declaration of Maduro’s illegitimacy in Resolution 1117/19. However, it is also arguable that the withdrawal notice is valid as the OAS still considered Maduro the legitimate president of Venezuela when he instigated the withdrawal process in 2017.<sup>205</sup>

This argument may then be countered by referring to the 2016 report by the OAS Secretary General on the situation in Venezuela.<sup>206</sup> The report documented the Maduro regime’s systematic violations of human rights and subversion of the rule of law.<sup>207</sup> The report implies that Maduro’s exercise of power was illegitimate at the time that he instigated the withdrawal, thereby invalidating the process.<sup>208</sup> Either way, the precedent set by the case of Honduras, along with the accreditation of Tarre, suggests the OAS may in future disregard the withdrawal notice of a Member State when the government behind the withdrawal process lacks legitimacy. It is thus reasonable to

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<sup>201</sup> *ibid.*

<sup>202</sup> Organization of American States General Assembly, ‘Suspension of the Right of Honduras to Participate in the Organization of American States’ AG/RES 2 (XXXVII-E/09) (Washington D.C 16 July 2009).

<sup>203</sup> Pérez (n 120) 435.

<sup>204</sup> Duxbury (n 42) 182.

<sup>205</sup> Pérez (n 120) 394-395.

<sup>206</sup> See generally, Organization of American States Secretary General, *Report of the General Secretariat of the Organization of American States to the Permanent Council on the Situation in Venezuela* (n 103).

<sup>207</sup> See generally, Organization of American States Secretary General, *Report of the General Secretariat of the Organization of American States to the Permanent Council on the Situation in Venezuela* (n 103).

<sup>208</sup> Pérez (n 120) 395 and Footnote 25.

presumable that such a judgment of legitimacy would involve an examination of both the origin of power and the exercise of power of the government in question.<sup>209</sup>

Beyond the question of Venezuela's withdrawal status, is the issue of the legality of Resolution 1117/19 in the context of the OAS Charter, and whether it was appropriate for the OAS Permanent Council to declare Maduro an illegitimate president, thereby stripping the *de facto* government of Venezuela of its *de jure* status.<sup>210</sup> This is an implication of Resolution 1117/19 that warrants in depth examination. The next section of this Chapter examines this implication with reference to the doctrine of effective control and the norms regulating the act of recognizing a government as legitimate. This analysis sustains the concluding argument that Resolution 1117/19 affirms the criterion of democratic governance as an emerging norm for recognition in the region, and recognises that Resolution 1117/19 constitutes a positive step in the development of the interpretation and application of the Democratic Charter.

### **5.3 Democratic governance as a criterion for recognition**

The OAS Permanent Council decision to declare Maduro an illegitimate president is inevitably a declaration of the non-recognition of the *de facto* government in Venezuela.<sup>211</sup> The decision is controversial for multiple reasons, but primarily because the act of recognizing a government is the individual and sovereign political act of an individual state.<sup>212</sup> The determination of recognition between states is predominantly based on the effective control test, which is administered by the recognizing State.<sup>213</sup> The test stipulates that a government should be recognized if it exercises effective control over all or nearly all of the national territory, and has the obedience of most of the population in a way that the control, authority, and obedience appear to be permanent.<sup>214</sup> And yet, despite the view that only a state may recognize a government, in practice an international organization can also, through the votes of its Member

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<sup>209</sup> D'Aspermont (n 30) 900.

<sup>210</sup> Zambrano (n 160).

<sup>211</sup> Zambrano (n 160).

<sup>212</sup> See the footnotes of different countries in the resolution recognizing Tarre as the representative of Venezuela to the OAS, Organization of American States Permanent Council, 'Resolution on the Situation in Venezuela' CP/RES 1124 (2217/19) (n 184).

<sup>213</sup> Roth (n 22) 27.

<sup>214</sup> *ibid.*

States, recognize or derecognize the government of a Member State.<sup>215</sup> Though the outcome of the vote would not have legal implications under international law, it would certainly have politically significant ramifications.<sup>216</sup>

In general, state practices concerning recognition rely on the effective control test and do not consider democratic governance as a criterion for recognition.<sup>217</sup> However, in the Inter-American system, the OAS Charter, and the plethora of legal instruments affirming the central value of democracy, indicates that democratic governance is emerging as a criterion for recognition, displacing the strict prescriptive approach of the effective control test.<sup>218</sup> Following the adoption of the Democratic Charter in 2001, it is justifiable to argue that Member States of the OAS are obligated to refrain from recognizing the undemocratic government of a Member State.

In a process involving the examination of whether the government of a Member State is undemocratic, the OAS would need to assess the government's conduct against the list of essential elements and components of democracy set out in Articles 3 and 4 of the Democratic Charter.<sup>219</sup> The violation of these Articles constitutes an insurmountable obstacle to the participation of the Member State in the activities of the OAS, and under Article 21 may lead to suspension.<sup>220</sup> The adoption of the Democratic Charter implies that democracy has become a yardstick used to evaluate the legitimacy of the government of an OAS Member State and its right to participate in the OAS.<sup>221</sup>

In Venezuela the Maduro regime is overtly undemocratic.<sup>222</sup> Its origin of power is a fraudulent electoral process and its exercise of power is by dictatorial means.<sup>223</sup> Hence the decision of the OAS Permanent Council to declare Maduro illegitimate, and

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<sup>215</sup> IL Claude, 'Collective Legitimization as a Political Function of the United Nations' (1966) 20 (3) International Organization 376.

<sup>216</sup> *ibid.*

<sup>217</sup> Blanco (n 175).

<sup>218</sup> Blanco (n 175).

<sup>219</sup> Democratic Charter (n 12) Articles 3 and 4.

<sup>220</sup> Democratic Charter (n 12) Article 21.

<sup>221</sup> Blanco (n 175).

<sup>222</sup> Blanco (n 175).

<sup>223</sup> See generally, Organization of American States Secretary General, *Report of the General Secretariat of the Organization of American States and the Panel of Independent International Experts on the Possible Commission of Crimes against Humanity in Venezuela* (n 96); 'Six More Years?' *The Economist* (n 38) 39.

therefore deprive his government of *de jure* status, is in accordance with the hemispheric consensus to protect and promote democracy. As a consequence, Resolution 1117/19 has opened the door for the OAS Member States to sidestep the effective control test by including democratic governance as a criterion for recognition. Such a development is in line with the OAS Charter and the Democratic Charter as both instruments obligate states to protect the right of the people of the Americas to democratic governance.<sup>224</sup>

#### 5.4 Conclusion

In closing, Resolution 1117/19 has brought into question whether it is appropriate for the OAS Member States to treat the National Assembly as the representative of Venezuela before the international community.<sup>225</sup> In principle, states deal with the *de facto* government of a state when that government has established a level of permanence and a reasonable assurance that it can fulfil its internal duties and external obligations.<sup>226</sup> In the case of Venezuela, the unrelenting international pressure on Maduro to step down, and the intensifying economic and humanitarian crisis reveal the impermanence of the Maduro regime. For now, whether the National Assembly should be considered the interim government and representative of Venezuela is a question that has not been definitely answered, as illustrated by the mixed response both of states around the world and within the OAS.

Despite the contentious implications of Resolution 1117/19, the OAS Permanent Council decision to declare Maduro illegitimate shows it can be the custodian of collective legitimacy and democratic governance in the region by applying the Democratic Charter. This deduction has been reached by examining the response of the OAS to the Maduro regime; the withdrawal of Venezuela from the OAS; the accreditation of the National Assembly representative; and the emerging norm of democratic governance in the Inter-American system. Pursuant to the OAS Charter, the mandate of the OAS is to protect and promote democratic governance in the region.<sup>227</sup> The OAS Permanent Council's condemnation of Maduro in Resolution

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<sup>224</sup> OAS Charter (n 191) Preamble; Democratic Charter (n 12) Preamble. See also Nikken (n 82) 116.

<sup>225</sup> For further reading on the subject of recognizing opposition groups see S Talmon, 'Recognition of Opposition Groups as the Legitimate Representative of a People' (2013) 12 (2) Chinese JIL 219.

<sup>226</sup> *Tinoco Arbitration (GB v. Costa Rica)* (1923) 1 RIAA 378.

<sup>227</sup> OAS Charter (n 191) Article 2.



1117/19, based on the Democratic Charter, corresponds to this mandate. It has set an extraordinary precedent for the application of the Democratic Charter. Resolution 1117/19 should therefore be seen in a positive light in terms of the preservation of democracy in the region, as it affirms the norm of democratic governance within the Inter-American system, and develops the capacity of the OAS in the protection of democracy.

## CHAPTER SIX: CONCLUSION

The objective of this study was to critically analyse Resolution 1117/19 of the Permanent Council of the OAS, in which it declared illegitimate the presidency of Nicolás Maduro.<sup>228</sup> The correlated research question asked which justifications underpinned Resolution 1117/19 and what implications flowed therefrom. This study limited itself to answering only one research question because the subject of Venezuela, its crisis of governance, and deterioration both of its economy and respect for human rights is broad and constantly developing. Answering a single research question allowed for the study to have a focused narrative leading to a nuanced conclusion.

This concluding Chapter consists of three parts. The first is an overview of the structure and prominent features of the study. The second part complements the overview with a summary of every Chapter and the deductions reached in each. The final part discusses the significance of Resolution 1117/19 in light of the ongoing crisis in Venezuela. It concludes by reiterating the importance of Resolution 1117/19 for the development of the Democratic Charter and the role of the OAS in the protection of democracy.

This study began by analysing two justifications underpinning Resolution 1117/19 through the prism of the theory of political legitimacy. Each justification is rooted in a legal instrument, at the regional and national levels respectively. The first justification is centred on Article 20 of the Inter-American Democratic Charter, 2001 (hereafter the Democratic Charter).<sup>229</sup> Article 20 vests the OAS with the authority to take collective action in the event of an unconstitutional alteration to the constitutional regime that seriously impairs the democratic order of a Member State.<sup>230</sup> In Venezuela the fraudulent presidential elections of 2018, together with the Maduro regime's dismantling of the separation of powers, unequivocally constitute an alteration of the

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<sup>228</sup> Organization of American States Permanent Council, 'Resolution on the Situation in Venezuela' CP/RES 1117/19 (n 1).

<sup>229</sup> Democratic Charter (n 12).

<sup>230</sup> Democratic Charter (n 12) Article 20.

constitutional regime, justifying collective action by the OAS pursuant to the Democratic Charter.

The application of Article 20 of the Democratic Charter turns on a determination of whether the government of a Member State has failed to comply with its own domestic law.<sup>231</sup> Hence, the second justification is grounded in Articles 333 and 350 of the Constitution of the Bolivarian Republic of Venezuela, 1999 (hereafter the Constitution).<sup>232</sup> These Articles enshrine the right to resist a usurper authority and obligate the people to defend the constitutional order.<sup>233</sup> According to the National Assembly of Venezuela, the Maduro regime is a usurper regime that has systematically violated the Constitution, thereby triggering the right to resist.<sup>234</sup> As the only remaining democratically elected institution, the National Assembly's interpretation of the Constitution establishes the Constitution as a justificatory ground of Resolution 1117/19.

Subsequent to examining these justifications, this study considered the implications of Resolution 1117/19 in the context of the OAS. It analysed the dubious withdrawal status of Venezuela from the OAS and the decision of the OAS Permanent Council to accredit the envoy of the National Assembly before the OAS. This study concluded that the declaration of Maduro as an illegitimate president by the OAS Permanent Council confirms democratic governance as an emerging norm for recognition in the Inter-American system, and that Resolution 1117/19 has set a positive precedent for the application of the Democratic Charter going forward. In the final analysis, the decision of the OAS Permanent Council to declare Maduro an illegitimate president is not unwarranted. Not only did Maduro come to power illegitimately, but his regime also maintains its power through force and repression.<sup>235</sup> As a result, more than 4 million people have left Venezuela since Maduro became president, causing an unprecedented migratory emergency on the continent.<sup>236</sup> The worsening crisis in

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<sup>231</sup> Roth (n 111) 436.

<sup>232</sup> Constitution of Venezuela (n 100).

<sup>233</sup> Constitution of Venezuela (n 100) Articles 333 and 350.

<sup>234</sup> National Assembly of the Bolivarian Republic of Venezuela, *Acuerdo sobre la Declaratoria de Usurpación de la Presidencia de la Republica por parte de Nicolás Maduro Moros y el Restablecimiento de la vigencia de la Constitución* (n 115).

<sup>235</sup> 'A Bloody Stalemate' (n 4) 42.

<sup>236</sup> *ibid.*

Venezuela made it imperative for the OAS to implement measures to restore democratic order. The OAS Permanent Council took robust action with its declaration that Maduro, and by implication his government, are illegitimate.

In general, the legitimacy of governments has become increasingly dependent on fulfilling the normative expectations of the community of states.<sup>237</sup> In the context of the Inter-American system and the OAS, the legitimacy of governments correlates with an expectation of democratic governance, an expectation that is captured in the Democratic Charter. In this context, the Maduro regime is an undemocratic government that has failed to meet the expectations of the community of states comprising the OAS Permanent Council. It was therefore appropriate for the OAS Permanent Council to issue Resolution 1117/19.

This study has found that Article 20 of the Democratic Charter, together with Articles 333 and 350 of the Constitution of Venezuela, justify Resolution 1117/19. Therefore, the OAS Permanent Council was justified in declaring Maduro illegitimate. Despite the immediate problematic implications of Resolution 1117/19, it will serve as a deterrent to potentially undemocratic governments in the long-term. Resolution 1117/19 has set a significant precedent for the application of the Democratic Charter and provided the impetus for the restoration of democracy in Venezuela.

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<sup>237</sup> Pérez (n 120) Footnote 164.

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