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# THE OAS AND CONSTITUTIONALISM: LESSONS FROM RECENT WEST AFRICAN EXPERIENCE

Stephen J. Schnably\*

The Organization of American States (OAS) has long been committed to two fundamental principles not easily reconciled. The OAS Charter requires member states to adopt “representative democracy.”<sup>1</sup> Building on earlier resolutions, the General Assembly declared in the Inter-American Democratic Charter of 2001 that “[t]he peoples of the Americas have a right to democracy.”<sup>2</sup> Yet the Inter-American Democratic Charter also requires “due respect for the principle of non-intervention.”<sup>3</sup> Similarly, the OAS Charter gives each member state the “right to choose, without external interference, its political . . . system and to organize itself in the way best suited to it.”<sup>4</sup>

In responding to classic military coups against elected governments since 1991, the OAS has resolved the tension between democracy and non-intervention in favor of the former. For example, the OAS condemned a coup in Haiti in 1991 and a military-supported ouster of Ecuador’s President in 2000.<sup>5</sup> Its response has been varied in

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1. Charter of the Organization of American States, art. 3(d), Apr. 30, 1948, O.A.S.T.S. No. 1, as amended by the Protocol of Buenos Aires, Feb. 27, 1967, O.A.S.T.S. No. 1-A, OEA/Ser. A/2(SEPF)Add., by the Protocol of Cartagena de Indias, Dec. 5, 1985, O.A.S.T.S. No. 66, OEA/Ser.A/41 (SEPF), by the Protocol of Washington, Dec. 14, 1992, 1-E Rev. OEA Documentos Oficiales OEA/Ser.A/2 Add. 3 (SEPF), and by the Protocol of Managua, June 10, 1993, 1-F Rev. OEA Documentos Oficiales OEA/Ser.A/2 Add.4 (SEPF), the integrated text reflecting all four amendments available at <http://www.oas.org/main/main.asp?sLang=E&sLink=http://www.oas.org/juridico/english/chart.html> (last visited February 6, 2006) [hereinafter OAS Charter]. See *id.* pmbl. para. 3.

2. Organization of American States, Inter-American Democratic Charter, Sept. 11, 2001, OAS Doc. OEA/Ser.P/AG/Res.1 (2001), 28th Spec. Sess., OAS Doc. OEA/Ser.P/AG?Res.1 (XXVIII-E/01) (OAS General Assembly) (Sept. 11, 2001), 40 I.L.M. 1289 (2001) [hereinafter Democratic Charter], available at <http://www.oas.org> (follow “Welcome” hyperlink; then follow “Documents & Reports” hyperlink and choose “Democratic Charter”) (last visited Dec. 30, 2005). See Enrique Lagos & Timothy D. Rudy, *In Defense of Democracy*, 35 U. MIAMI INTER-AM. L. REV. 283 (2004).

3. Democratic Charter, *supra* note 2, pmbl., para. 1.

4. OAS Charter, *supra* note 1, art. 3(e).

5. Stephen J. Schnably, *Constitutionalism and Democratic Government in the Inter-American System*, in DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW 155, 168-71 (Gregory H. Fox & Brad R. Roth eds., 2000) [hereinafter Schnably, *Constitutionalism*]; Support for the Democratic Government of the Constitutional President of the Republic of Ecuador, OAS Perm. Council Res. OEA/Ser.G CP/RES. 764 (1221/00) (Jan. 26, 2000), available at <http://www.oas.org> (last visited Dec. 30, 2005); Support for the Democratic

more ambiguous situations. The OAS condemned the *autogolpes* in Peru in 1992 and Guatemala in 1993, in which civilian presidents suspended the constitution and other branches of government, but it reacted passively to Peruvian President Alberto Fujimori's subsequent success in building on the *autogolpe* to bring into force a new constitution that greatly increased his powers.<sup>6</sup> It condemned the attempted removal of Venezuelan President Hugo Chavez in 2002, in which he was asserted to have resigned,<sup>7</sup> but it remained silent in 2004, when former Haitian President Jean-Bertrand Aristide asserted that he had not resigned but had been forced out by armed militias and U.S. duplicity.

Judging when intense political struggle between branches of government crosses the line into a coup or unconstitutional rupture can be exceedingly difficult, as can be determining when the military has coerced apparently voluntary resignations. One way to deal with ambiguous threats, which are likely to recur, might be to define democracy more concretely. The Inter-American Democratic Charter defines democracy to encompass not only free elections and human rights but also "the rule of law" together with "the separation of powers and independence of the branches of government."<sup>8</sup> Addressing the OAS in January 2005, former U.S. President Jimmy Carter listed eight factors he said could help determine when representative democracy has been disrupted, such as "[v]iolation of the integrity of central institutions, including constitutional checks and balances providing for the separation of powers."<sup>9</sup> The Declaration of Florida, adopted by the OAS General Assembly in June 2005, presents "full respect for human rights and fundamental freedoms, the rule of law, [and] the separation of

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Government of the Constitutional President of the Republic of Ecuador, Jamil Mahuad Witt, and for the Institutions Under the Rule of Law, OAS Perm. Council Res. OEA/Ser.G CP/RES. 763 (1220/00) (Jan. 21, 2000), available at <http://www.oas.org> (last visited Dec. 30, 2005).

6. See Schnably, *Constitutionalism*, *supra* note 5, at 171-75.

7. Situation in Venezuela, OAS Perm. Council Res. OEA/Ser.G, CP/RES. 811 (1315/02) (Apr. 13, 2002), available at <http://www.oas.org> (last visited Dec. 30, 2005).

8. Democratic Charter, *supra* note 2, art. 1(3).

9. Jimmy Carter, Former President of the United States, The Promise and Peril of Democracy, Speech at the OAS Inaugural Lecture Series of the Americas (Jan. 25, 2005), available at <http://www.cartercenter.org/doc1995.htm> (last visited Dec. 30, 2005) (discussing eight conditions of democracy). See Maxwell A. Cameron, *Strengthening Checks and Balances: Democracy Defense and Promotion in the Americas*, 10 CANADIAN FOREIGN POL'Y 101, 101-16 (2003) (discussing five challenges to democracy in Latin America). See, e.g., Economic Community of West African States (ECOWAS), *Protocol on Democracy and Good Governance*, A/SP1/12/01, art. 1 (Dec. 21, 2001) [hereinafter *ECOWAS Good Governance*].

powers and independence of the judiciary” as inextricably bound up with “democratic institutions.”<sup>10</sup>

Any sustained effort to create a regional or transnational constitutional law would, however, deeply implicate the OAS and member states in constitutional design and interpretation. What does “separation of powers” mean in parliamentary systems? Does judicial independence require judicial review? Do term limits make presidents too independent? Does constitutional amendment by popular plebiscite give voice to the will of the people or undermine the rule of law by subjecting basic structures to the passions of the moment?

Answering these questions concretely on a regional basis would involve a far greater turn away from non-intervention than the OAS has undertaken to date. Most recently, the OAS General Assembly declined to adopt a proposal, reportedly offered by the U.S., to create a permanent body to monitor democracy in member states. The monitoring body would have been empowered to hear from labor unions and civic groups who thought the government was not governing democratically.<sup>11</sup> The OAS General Assembly did, however, instruct the Secretary General to develop proposals for mechanisms to “address[] situations that might affect the workings of the political process of democratic institutions or the legitimate exercise of power.”<sup>12</sup>

The reluctance to accept the initial U.S. proposal cannot be

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10. Declaration of Florida, Delivering the Benefits of Democracy pmb. para. 18, AG/DEC. 41 (XXXV-O/05) (June 7, 2005) [hereinafter Declaration of Florida].

11. See Joel Brinkley, *U.S. Proposal in the O.A.S. Draws Fire as an Attack on Venezuela*, N.Y. TIMES, May 22, 2005, § 1, at 10; Joel Brinkley, *Latin States Shun U.S. Plan To Watch Over Democracy*, N.Y. TIMES, June 9, 2005, at A8. The initial U.S. proposal was not made public. A subsequent U.S. proposal without the monitoring body asserted that “governments that do not [govern democratically] should be held accountable,” and would have directed the Secretary General to “propos[e] specific measures to strengthen the effectiveness and application of the Inter-American Democratic Charter.” It also would have directed the Permanent Council to “develop a process to assess, as appropriate, situations that may affect the development of a Member State’s democratic political institutional process or the legitimate exercise of power; and to make concrete recommendations, using the Inter-American Democratic Charter as its guide and with input from civil society, on how the Permanent Council should address threats to democracy in a timely fashion, anticipating crises that might undermine democracy.” Draft Declaration of Florida—Delivering the Benefits of Democracy, paras. 7, 17, and 18, reprinted in MIAMI HERALD, June 5, 2005, available at <http://www.miami.com/mld/miamiherald/11822010.htm> (last visited Dec. 30, 2005).

12. The final version of the Declaration of Florida adopted by the General Assembly eliminated the language in the earlier draft about holding governments accountable, made the instructions to the Secretary General and Permanent Council more general, and added a reference to nonintervention. Declaration of Florida, *supra* note 10, pmb. para., 18, and paras. 3, 5.

dismissed as a simple desire by member states to escape scrutiny. Paradoxically, if the OAS were to try to define democracy in detail, the very effort would violate the right to democracy. Democracy requires a high degree of internal domestic choice in the form of government. The commitment to non-intervention is in part an expression of the right to democracy.

Perhaps, then, states should be free to adopt any plausibly democratic constitutional structure, but having done so should be required to respect that structure, including rules governing change. The OAS's emphasis on responding to interruptions of constitutional government might be explained as an attempt to ensure constitutional fidelity. In 1991, it promised to respond immediately 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" of an OAS member.<sup>13</sup> The Protocol of Washington, which amended the OAS Charter, provides for suspension of a state "whose democratically constituted government has been overthrown by force."<sup>14</sup> The Inter-American Democratic Charter commits the OAS to respond to "an unconstitutional alteration of the constitutional regime that seriously impairs the democratic order in a member state."<sup>15</sup> The Declaration of Florida envisions the possibility of an OAS mechanism to "address[] situations that might affect the workings of the political process of democratic institutions or the legitimate exercise of power."<sup>16</sup>

Other organizations have similar commitments. MERCOSUR, a free trade association among several South American nations, agreed in 1996 to respond to any "interruption in the democratic order" of its members or associates.<sup>17</sup> The Organization of African Unity formally bound itself in 2000 to protect democracy against "unconstitutional changes of government."<sup>18</sup> The Economic Community of West African

13. Representative Democracy, para. 1, OEA/Ser.P, OAS Doc. AG/RES. 1080 (XXI-O/91) (June 5, 1991).

14. Texts Approved by the General Assembly at its Sixteenth Special Session in Connection with the Amendments to the Charter of the Organization, OEA/Ser.P, OAS Doc. AG/doc.11 (XVI-E/92) (1992) (Article 8 *bis*) (Article 9 of the amended Charter).

15. Democratic Charter, *supra* note 2, art. 19. *See id.* art. 20.

16. Declaration of Florida, *supra* note 10, para. 3.

17. Protocolo de Ushuaia Sobre Compromiso Democrático en el Mercosur, la República de Bolivia y la República de Chile, art. 4 (1996), [http://www.mercosur.org.uy/espanol/snor/varios/protocolo\\_ushuaia.htm](http://www.mercosur.org.uy/espanol/snor/varios/protocolo_ushuaia.htm) (last visited Dec. 30, 2005).

18. Declaration on the Framework for an Organization of African Unity (OAU), Response to Unconstitutional Changes of Government, 36th Sess. of the Assembly of Heads

States (ECOWAS) agreed in 2001 to respond to situations where “democracy is abruptly brought to an end by any means” in member states.<sup>19</sup>

Emphasis on constitutional fidelity does less to resolve the paradox than one might hope, for the practice of responding to coups or other interruptions in democratic government requires surprisingly intrusive and contestable interpretations of other countries’ constitutions. A recent example from the West African Republic of Togo vividly illustrates this problem—and suggests that it may be common to any regional effort to protect constitutional democracy.

Gnassingbé Eyadéma, Togo’s President since 1967, died on February 5, 2005.<sup>20</sup> Within hours the military declared his son Faure Gnassingbé the new President. Article 65 of Togo’s Constitution, however, provided that if the President died the Speaker of the legislature—the President of the National Assembly—was to exercise the functions of the presidency for sixty days, at which time an election would be held.<sup>21</sup> In Paris when the President died, the Speaker subsequently asserted from Benin that he was the true constitutional successor.<sup>22</sup>

ECOWAS called Faure Gnassingbé’s accession a “violation of the [Togolese] Constitution.”<sup>23</sup> The African Union (AU) deemed it “a blatant and unacceptable violation of the Togolese Constitution.”<sup>24</sup> The

of State and Government, Lomé, OAU Doc. AHG/Decl.5 (XXXVI) (July 10-12, 2000), available at <http://www.africa-union.org> (follow the “Welcome” hyperlink; then follow the “Special Programs” hyperlink to the “The Conference on Security, Stability Development and Co-operation in Africa (CSSDCA)” hyperlink and choose the title of the cited declaration) (last visited Dec. 30, 2005).

19. See ECOWAS *Good Governance*, *supra* note 9, art. 45; see also Declaration of Political Principles of the Economic Community of West African States, 14th Sess. of the Authority of Heads of States and Government, Abuja, ECOWAS Doc. A/DCL. 1/7/91 (July 4-6, 1991).

20. *Gnassingbe Eyadema, 69, Togo Ruler, Dies*, N.Y. TIMES, Feb. 7, 2005, at B8. See Lydia Polgreen, *Ruling Dynasty Seems to Start, Leaving Many in Togo Resentful*, N.Y. TIMES, Feb. 9, 2005, at A11.

21. TOGO CONST. art. 65, reprinted in XVIII CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (Gisbert H. Flanz & Patricie H. Ward eds., 2004) [hereinafter Togo Const.].

22. *Fambaré Natchaba Veut Toujours Assurer l’interim au Togo* [Fambaré Natchaba claims leadership in Togo], article in L’ACTUALITÉ DU TOGO, Feb. 28, 2005, <http://www.izf.net/izf/index.htm> (follow “Actualité” hyperlink; then follow “Togo” hyperlink and search for the date of article cited) (last visited Dec. 30, 2005).

23. Press Release, ECOWAS Salutes the Memory of President Eyadema, Condemns the Violation of the Constitution and Calls for a Return to Constitutional Order (Feb. 5, 2005); Communiqué, ECOWAS, On the Situation in Togo, Cotonou (Feb. 11, 2005).

24. Communiqué of the Twenty-Fourth Meeting of the African Union, Peace and Security Council (Part B), *On the Situation in Togo*, AU PSC/PR/Comm. (XXIV), Addis

U.N. Secretary General said the transfer of power had “not been done in full respect of the provisions of the Constitution.”<sup>25</sup> The U.S. State Department called it “an unconstitutional move.”<sup>26</sup> France, Togo’s former colonial ruler, took the same position.<sup>27</sup>

Was the accession of Gnassingbé Eyadéma’s son constitutional? At first the government rested its defense of his accession on a sweeping claim of inherent power in a national emergency. The military asserted that the speaker’s absence from the country at the moment the president died created a power vacuum that called for swift action to ensure stability and security. The military undercut its argument, however, by announcing the suspension of the constitution and closing the country’s borders, preventing the Speaker’s return.<sup>28</sup>

The government soon presented a constitutional case less easily dismissed. On February 6, the Togolese legislature elected Fauré Eyadéma its new speaker. By unanimous vote it also exercised its power under Article 144 to amend the constitution with the concurrence of at least four-fifths of the members, changing Article 65 to allow the son to serve out the remainder of his father’s term.<sup>29</sup> Fauré Gnassingbé

Ababa, Ethiopia (Feb. 7, 2005) [hereinafter Communiqué, *On the Situation in Togo*].

25. Press Release, U.N., Secretary-General Concerned Togo’s Power Transfer Not Done ‘In Full Respect’ of Constitution, U.N. Doc. SB/SM9711, AFR/1106 (Feb. 7, 2005).

26. U.S. DEP’T OF STATE, BUREAU OF AFRICAN AFFAIRS, Background Note: Togo, <http://www.state.gov/t/pa/ei/bgn/5430.htm> (last visited Dec. 30, 2005) [hereinafter U.S. DEP’T OF STATE].

27. *France Insists on Respect for Togo’s Constitution*, PANAFRICAN NEWS AGENCY (PANA) DAILY NEWSWIRE, Feb. 7, 2005. See also *Francophonie Threatens Togo with Suspension*, PANA DAILY NEWSWIRE, Feb. 8, 2005 (criticism from Francophonie Parliamentary Assembly regarding the violation of the Togolese constitution).

28. *Togo: Military Suspend Constitution, Eyadema’s Son Takes Power*, INTEGRATED REGIONAL INFORMATION NETWORKS (IRIN NEWS), Feb. 5, 2005, <http://www.irinnews.org> (follow “West Africa” hyperlink; then follow “Togo” hyperlink and search for date of article) (last visited Dec. 30, 2005). See also Kwadwo Appiagyei-Atua, *Post-Eyadema Togo—A Military Coup or Unconstitutional Government?* DIASTODE (Feb. 2005), <http://www.diaistode.org/Nouvelles/usnews235.html> (last visited Dec. 30, 2005); *Togo Sees Sense*, ACCRA MAIL, reprinted in AFR. NEWS, Feb. 22, 2005 [hereinafter *Togo Sees Sense*], <http://lexis-nexis.com> (follow “News & Business,” “By Country & Region,” “Middle East & Africa” hyperlinks, then choose “Africa News” database and search title and date of article) (last visited Dec. 30, 2005).

29. Loi No. 2005-002 de 6 Fevrier 2005 portant modification des articles 65 et 144 de la Constitution [Law No. 2005-002 of Feb. 6, 2005 amending articles 65 and 144 of the Constitution], reprinted in J. OFFICIEL DE LA REPUBLIQUE TOGOALISE, NUMERO SPECIAL, Feb. 6, 2005 [hereinafter Loi No. 2005-002] (amending art. 65 to provide, “Le nouveau Président de la République exerce ses fonctions jusqu’au terme du mandat de son prédécesseur” [“The new President of the Republic will perform his duties until the end of his predecessor’s term.”]). See also *Togo: La Regime de Faure Gnassingbe Sanctionne* [Togo: Fauré Gnassingbé’s Regime Sanctioned], BBC AFRIQUE.COM, Feb. 20, 2005 [hereinafter BBC AFRIQUE.COM, *Togo*],

was sworn in the next day. These after-the-fact changes were not entirely unlike Peru's retroactive regularization of the *autogolpe* through the promulgation of a new constitution by a relatively powerless constituent assembly in 1992 and 1993.

ECOWAS condemned the "illegal amendment" of the constitution,<sup>30</sup> calling it nothing more than pure and simple "manipulations of the Constitution by the National Assembly"—a "cover-up" for a "coup d'état."<sup>31</sup> It proceeded to impose sanctions.<sup>32</sup> The AU "firmly condemn[ed] the revision of the Togolese Constitution made by the de facto authorities, in violation of the relevant provisions of the Togolese Constitution,"<sup>33</sup> and suspended Togo's participation in the AU.<sup>34</sup>

To assert that constitutional amendments are unconstitutional is to venture into interpretive territory more often explored by scholars than by regional political bodies. To be sure, there was ample ground in Article 144 to question the amendments' validity. Article 144 provides that amendments may not be adopted when the presidency is vacant.<sup>35</sup> (It also prohibits amendments that would revise the "Republican form

[http://www.bbc.co.uk/french/highlights/story/2005/02/050220\\_togosanctions.shtml](http://www.bbc.co.uk/french/highlights/story/2005/02/050220_togosanctions.shtml) (last visited Dec. 30, 2005); *Vacance du Pouvoir: Les Députés Votent la Révision de la Constitution* [Vacant Powers: Members of Parliament vote on the revision of the Constitution], *article in L'ACTUALITÉ DU TOGO* (Feb. 6, 2005) [hereinafter *Vacance du Pouvoir*], <http://www.izf.net/izf/index.htm> (follow "Actualité" hyperlink; then follow "Togo" hyperlink and search for the date of article cited) (last visited Dec. 30, 2005).

30. Press Release, ECOWAS Holds Extraordinary Meeting on the Situation in Togo (Feb. 8, 2005). "In violation of the Togolese Constitution, following its illegal amendment, Faure Gnassingbé, son of the late president, was designated to succeed his father." *Id.*

31. Final Communiqué, ECOWAS, Extraordinary Summit of the Heads of State and Government, Niamey (Feb. 9, 2005), para. 5.

32. *Id.* para. 6; *see also* Communiqué Issued by the Current Chairman ECOWAS (Mamadou Tandja, President of the Republic of Niger and Chairman of the Authority of Heads of State and Government of ECOWAS) (Feb. 18, 2005).

33. Communiqué, *On the Situation in Togo*, *supra* note 24.

34. Communiqué of the Twenty-Fifth Meeting of the Peace and Security Council of the African Union Peace and Security/Permanent Representatives/Committee (AU PSC/PR/Comm.) XXV (Feb. 25 2005); *see* Press Release No. 02/2005, Addis Ababa, (Feb. 19, 2005), *available at* [www.africa-union.org/News\\_Events/Press\\_Releases/19%202005%20Togo%20-%20%20eng.pdf](http://www.africa-union.org/News_Events/Press_Releases/19%202005%20Togo%20-%20%20eng.pdf) (last visited Dec. 30, 2005) (statement by Alpha Oumar Konaré, Chairperson, Commission of the African Union, that Faure Gnassingbé's continuation as President, even pending elections would violate the Togolese Constitution); *see also* Communiqué of the Thirtieth Meeting of the Peace and Security Council of the AU PSC/PR/Comm. XXX, Addis Ababa, Ethiopia (May 27, 2005) (the AU sanctions were eventually lifted after the presidential election conducted under ECOWAS auspices in April 2005).

35. Togo Const., *supra* note 21, art. 144.



of the State.”)<sup>36</sup> The presidency may well have been vacant on February 6, when the legislature adopted the amendments. The military’s initial recognition of Gnassingbé Eyadéma’s son as President was questionable, to say the least, and his election as Speaker would not clearly have made him President as opposed to simply entitling him to exercise presidential powers pending elections.

As U.S. constitutional scholars have pondered whether Article V’s own amendment procedures could be employed to eliminate its prohibition against depriving a U.S. state of equal suffrage in the Senate without its consent,<sup>37</sup> so too did the Togolese legislature recognize that a constitutional limitation on the amendment power might itself be amended out of existence. Thus at the same time it elected Gnassingbé Eyadéma’s son as Speaker and amended Article 65, the Togolese legislature also amended Article 144 to remove the prohibition of constitutional amendments when the presidency was vacant.<sup>38</sup>

ECOWAS and the AU were unmoved, and their steadfastness pressured Togo to back down. On February 21, the National Assembly amended the constitution yet again to provide for elections within sixty days, essentially reversing the previous amendments.<sup>39</sup> Four days later Fauré Gnassingbé resigned, paving the way for a new Speaker and Interim President, Abass Bonfoh.<sup>40</sup>

There is much to be said for a judgment that something other than the spirit of democracy infused Togo’s hasty constitutional revisions. What is striking, however, is that the condemnations were expressed so strongly in constitutional terms, given the potential complexity of the legal argument. Similar complexities arose in the conduct of the

36. *Id.*

37. U.S. Const. art. V. See, e.g., Scott J. Bowman, Note, *Wild Political Dreaming: Constitutional Reformation of the United States Senate*, 72 *FORDHAM L. REV.* 1017 (2004).

38. Loi No. 2005-002, *supra* note 29 (removing reference to vacancy of the presidency); see BBC AFRIQUE.COM, *Togo, supra* note 29; see also *Vacance du Pouvoir, supra* note 29.

39. Loi No. 2005-006 de 24 Février 2005 modifiant les articles 65 et 144 de la Constitution [Law No. 2005-006 of Feb. 24, 2005 amending articles 65 and 144 of the Constitution], reprinted in *J. OFFICIEL DE LA REPUBLIQUE TOGOLAISE, NUMERO SPECIAL*, Feb. 24, 2005 (restoring the Togolese Constitution, arts. 65 and 144, to its former text).

40. Lydia Polgreen, *Togo Ruler, Succumbing to Pressure, Steps Down*, *N.Y. TIMES*, Feb. 26, 2005, at A6; see *Togo Sees Sense, supra* note 28; Press Release, ECOWAS, Faure Gnassingbe Steps Down, ECOWAS Lifts Sanctions (Feb. 26, 2005), <http://www.sec.ecowas>; Emmanuel Goujon, *Nouvelle Réforme Constitutionnelle Que Ne Change Rien au Fond [New Constitutional Reform Which Ultimately Changes Nothing]*, article in *L'ACTUALITÉ DU TOGO*, Feb. 21, 2005, <http://www.izf.net/izf/index.htm> (follow “Actualité” hyperlink; then follow “Togo” hyperlink and search for the date of article cited) (last visited Dec. 30, 2005).

presidential election that followed, and in each case ECOWAS and other international actors showed little hesitancy in interpreting the Constitution.

One issue related to the timing of the election. On February 28, 2005, shortly after Fauré Gnassingbé had resigned, ECOWAS met with the government and opposition parties and announced that “transparent, free and fair elections” for President would need to be held “within 60 days as required by the Constitution of Togo.”<sup>41</sup> Sixty days after Gnassingbé Eyadéma died would have been April 6, 2005, but ECOWAS declared two days later that “the 60 days Interim period prescribed by the Constitution of Togo in article 65 shall be deemed to have started on the 26th February, 2005 with the coming into office of Mr. Abass Bonfoh as Interim President.”<sup>42</sup> In dating the vacancy in relation to the resignation of Fauré Gnassingbé, rather than in relation to the death of his father, Gnassingbé Eyadéma, ECOWAS might appear to have contradicted its view that Fauré Gnassingbé had never legitimately occupied the office in the first place. On the other hand, opposition parties claimed that holding an election quickly after years of dictatorship would give them insufficient time to organize,<sup>43</sup> and the slightly later date did provide somewhat more time to prepare for the election.

A second issue related to eligibility. Long-time opposition leader Gilchrist Olympio, son of Togo’s first president (who had been assassinated in 1963), had been in exile in France since 1992, when government forces nearly assassinated him.<sup>44</sup> In 2002, Parliament—dominated then as in February 2005 by the ruling party—amended the Constitution to prohibit the candidacy of anyone who “does not reside in the national territory for at least twelve (12) months.”<sup>45</sup> Olympio was thereby eliminated as a candidate in the 2003 presidential election. Nearly two years later, Fauré Gnassingbé—whom ECOWAS had just thwarted from what it deemed an attempted coup d’etat—qualified as a

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41. *Togo: Government and Opposition Agree on Major Contentious Electoral Issues*, WORLD NEWS NETWORK, LOMÉ, (Feb. 28, 2005), available at <http://www.lome.com>.

42. Press Release, ECOWAS Calls for Commencement of Progress Towards Holding Presidential Elections (Mar. 2, 2005); see also *Togolese Political [Leaders] Sign Agreement on Upcoming Presidential Polls*, BBC, Mar. 30, 2005 (text of agreement signed government, opposition parties, and ECOWAS concerning April 24 election).

43. See *Togo: Clashes Break Out as People Complain of Being Denied Voters’ Cards for Presidential Poll*, IRIN NEWS, Apr. 1, 2005, <http://www.irinnews.org> (follow “West Africa” hyperlink; then follow “Togo” hyperlink and search for date of article) (last visited Dec. 30, 2005).

44. See U.S. DEP’T OF STATE, *supra* note 26.

45. *Id.*

candidate in the April 2005 election, while Olympio was again barred from running. (With Olympio's endorsement the opposition nominated instead Emmanuel Bob-Akitani, widely viewed as a stand-in for Olympio.)<sup>46</sup>

On April 26, 2005, Togo's electoral commission reported Fauré Gnassingbé the winner with sixty percent of the vote, with Bob-Akitani receiving thirty-eight percent. Claiming that the election was tainted by ballot fraud, restrictions on the press, and insufficient time to organize, opposition figures publicly rejected the outcome.<sup>47</sup> ECOWAS, which had sent 150 observers shortly before the election, pronounced the election in accord with international standards.<sup>48</sup> The U.S. expressed serious concerns about the fairness of the election.<sup>49</sup> There were signs

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46. See, e.g., *Togo: Opposition Calls for Postponement of Presidential Election*, IRIN NEWS, Mar. 28, 2005, <http://www.irinnews.org> (follow "West Africa" hyperlink; then follow "Togo" hyperlink and search for date of article) (last visited Dec. 30, 2005).

47. On April 27, Emmanuel Bob-Akitani declared himself the president of Togo and called on supporters to "fight with our lives if necessary." *Togo: Poll Chaos Spreads, Hundreds Flee, Opposition Leader Declares Himself President*, IRIN NEWS, Apr. 27, 2005, <http://www.irinnews.org> (follow "West Africa" hyperlink; then follow "Togo" hyperlink and search for date of article) (last visited Dec. 30, 2005). ECOWAS's Executive Secretary quickly rejected the declaration, deeming it "very similar to action of the military in declaring a successor for President Eyadema," and called on all parties to "work within the Constitution and the law of the country." *Togo: Togo's Opposition Candidate Declares Self President*, THIS DAY, reprinted in AFR. NEWS, Apr. 28, 2005, <http://lexis-nexis.com> (follow "News & Business," "By Country & Region," "Middle East & Africa" hyperlinks, then choose "Africa News" database and search title and date of article) (last visited Dec. 30, 2005). The U.S. condemned what it deemed "calls for violent protests." *U.S. Condemns Violence in Togo*, XINHUA GENERAL NEWS SERVICE, Apr. 28, 2005 (remarks of U.S. State Dep't spokesperson, Adam Ereli), <http://lexis-nexis.com> (follow "News & Business," "By Country & Region," "Middle East & Africa" hyperlinks, then choose "Xinhua General News Service" database and search title and date of article) (last visited Dec. 30, 2005) [hereinafter *U.S. Condemns Violence in Togo*]; see also *Togo; IFJ Condemns 'Media Blockade' in Togo Ahead of Presidential Elections*, INTERNATIONAL FEDERATION OF JOURNALISTS, reprinted in AFR. NEWS, Apr. 22, 2005, <http://lexis-nexis.com> (follow "News & Business," "By Country & Region," "Middle East & Africa" hyperlinks, then choose "Africa News" database and search title and date of article) (last visited Dec. 30, 2005).

48. See *U.S. Condemns Violence in Togo*, supra note 47. For one analysis of ECOWAS's stance, see *Election 2005: Twenty-Two Dead So Far as Togo Post-Poll Violence Escalates*, WORLD MARKETS ANALYSIS, Apr. 28, 2005.

49. See *U.S. Challenges Election Results in Togo*, PANAFRICAN NEWS AGENCY (PANA) DAILY NEWswire, Apr. 28, 2005; *Togo: Diplomatic Documents Surface Citing Fraud in April Poll*, IRIN NEWS, May 6, 2005, <http://www.irinnews.org> (follow "West Africa" hyperlink; then follow "Togo" hyperlink and search for date of article) (last visited Dec. 30, 2005) (citing European Union briefing papers which reported nearly a million phantom voters); *Togo's Human Rights Leader Queries ECOWAS Monitors Over Togo*, PANA DAILY NEWswire, May 6, 2005, <http://papapress.com> (follow "Togo," then search for date of article) (reporting criticism from the Togolese League of Human Rights (LTDH) over what it termed ECOWAS's failure to acknowledge massive vote fraud).

of a systematic and brutal crackdown on dissent by the Togolese military; reports indicated that hundreds of people were killed and tens of thousands fled Togo.<sup>50</sup> Fauré Gnassingbé was sworn in as the new president on May 4, 2005.<sup>51</sup>

The positions ECOWAS took on Togo's Constitution in overseeing the election raise interesting questions. If the amendments that would have validated Fauré Gnassingbé's assumption of the presidency in February 2005 amounted to no more than invalid manipulations of the constitution, should the same be said for the ruling party's adoption of the residency requirement in 2002, apparently to exclude an exiled opposition leader from running for office? What legitimate leeway might there be in interpreting and applying a constitutional mandate for a quick election to fill a vacancy in a country that had not held a free or fair elections for decades?

More generally, how should such questions be approached? In dealing with the exclusion of former Guatemalan Dictator Rios Montt from running for President, the Inter-American Commission on Human Rights once suggested that there was a "customary constitutional rule with a strong tradition in Central America" excluding coup d'état participants from running for President.<sup>52</sup> Would ECOWAS have been justified in finding or asserting a similar rule of transnational constitutional law in West Africa, perhaps using it as a basis for interpreting Article 58 of the Togolese Constitution (stating that the President is to be "the guarantor of . . . the institutions of the Republic") to exclude a former coup participant from running? Using regional

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50. See *Togo: Human Rights Group Says 790 Killed in Election Violence*, IRIN NEWS, May 13, 2005, <http://www.irinnews.org> (follow "West Africa" hyperlink; then follow "Togo" hyperlink and search for date of article) (last visited Dec. 30, 2005) (noting the estimate of 100 dead by the government and 790 dead by LTDH estimates). The office of the U.N. High Commissioner for Refugees (UNHCR) reported that over 35,000 refugees fled Togo in the aftermath of the election. See Press Briefing, UNHCR, *Togo: Over 3,000 Fled to Benin and Ghana in June*, (July 1, 2005) (noting total of 38,492 refugees), <http://www.unhcr.ch/cgi-bin/texis/vtx/news/opendoc.htm?tbl=NEWS&page=home&id=42c515fc11> (last visited Dec. 30, 2005); see also Press Release, U.N. Human Rights High Commissioner to Send Mission to Togo to Assess Allegations of Violations Linked to Elections, U.N. Doc. HR/4855 (June 10, 2005), <http://www.un.org/News/Press/docs/2005/hr4855.doc.htm> (last visited Dec. 30, 2005).

51. *Faure Gnassingbé Sworn in as Togo's New President*, XINHUA GENERAL NEWS SERVICE, May 4, 2005, <http://lexis-nexis.com> (follow "News & Business," "By Country & Region," "Middle East & Africa" hyperlinks, then choose "Xinhua General News Service" database and search title and date of article) (last visited Dec. 30, 2005).

52. *Ríos Montt v. Guatemala*, Case No. 10,804, Int.-Am. C.H.R., Report No. 30/93, OEA/Ser.L/V/II.79 rev. 1, doc. 12, 22, ¶¶ 29, 38 (1993); see Schnably, *Constitutionalism*, *supra* note 5, at 185-86.

customary law would have been an assertive though not entirely implausible approach to interpreting the Constitution.

Alternatively, one could understand ECOWAS's approach in terms of constitutional fidelity. Perhaps it reflected a judgment that adherence to a constitutional text in a fairly literal manner, with little regard for its origins and context, is the best route over the long run to a creating a strong constitutional underpinning to democracy. The prospect of credible pressure by international bodies to adhere to the terms of the text might lend attractiveness to this vision of constitutional fidelity. Granted, the immediate outcome—installation of the late President's son after an election widely regarded as tainted by fraud and enforced by systematic violence—gives little sign of any advance towards democracy. But that outcome does not in itself settle the longer-run question of constitutionalism and democracy.

Contrast the vigor of the constitutional interpretation displayed in the West African regional response to Togo's succession crisis, notwithstanding fundamental ambiguities in both interpretation and method, with the regional response in the Americas to one of Ecuador's frequent constitutional upheavals some years earlier. In 1997, the Ecuadorian Congress removed the widely unpopular President Abdalá Bucaram. Instead of impeaching him under Article 82(g) of the Constitution, Congress removed him under Article 100 for "mental incapacity." With a show of institutional assertiveness echoing Fujimori's actions in Peru in 1992, the Ecuadorian Congress also removed the Attorney General, the Comptroller, and members of the Constitutional Court. Bucaram may have earned (indeed courted) the nickname "El Loco," but there was little question that Congress simply made a strategic and contestable choice to use the simpler of the two routes to remove him. Refusing to accept the legality of his removal, Bucaram called Congress' action an "attempted coup." Neither the OAS nor any member states took an official position on the constitutionality of Bucaram's removal or the competing claims of succession put forth by the Vice-President and the Head of Congress. One U.S. official was quoted as saying that "the law is ambiguous. . . . It's not for us to tell the Ecuadorian people how they should interpret their Constitution."<sup>53</sup> The Ecuadorian military resolved the struggle by withdrawing recognition of Bucaram and pressing civilian leaders to settle on a successor.

The Inter-American Democratic Charter was adopted four years

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53. Andres Oppenheimer, *Democracies Stay Out of Ecuador Controversy*, MIAMI HERALD, Feb. 8, 1997, at 20A; see Schnably, *Constitutionalism*, *supra* note 5, at 178-80.

later in 2001. In April 2005, Ecuador's Congress removed yet another president (one of four from 1997 to date), finding pursuant to Article 167(6) of the Ecuadorian Constitution that he had abandoned his post—a conclusion he disputed until the military announced it would no longer recognize him.<sup>54</sup> Even as the OAS General Assembly met in June 2005 amidst calls for more vigorous enforcement of the Charter's endorsement of the separation of powers, independence of the judiciary, and the rule of law, Bolivia experienced a crisis of succession. Its President and both the first and second in line to succeed him resigned in the face of widespread protests.<sup>55</sup>

Claims by the U.S. government and some non-governmental organizations that crises like these should meet with a more active OAS response in light of the adoption of the Charter appear to assume that the modesty displayed in the regional response to Ecuador's constitutional crisis in 1997 should now be discarded.<sup>56</sup> As the more assertive approach to constitutional interpretation displayed in the regional response to Togo's crisis makes clear, however, the blend of complexity and impact so distinctive to constitutional controversies cuts both ways. Governments' interpretations of their own constitutions are typically marked by a heavy dose of domestic self-interest; the events in Togo in February 2005 may show that some regional constraint on the process could be desirable. But those events, and the questions ECOWAS faced in overseeing the elections, also show how deeply international or regional organizations can be drawn into reasonably contestable issues of constitutional interpretation. And however marked by self-interest a government's interpretation of its own constitution may be, it would be unwise to assume that states' interpretations of other countries' constitutions will be free of their own foreign policy self-interest. The U.S. government's initial position (quickly withdrawn) that Chavez's apparent departure in the events of April

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54. See 'Constitutional Coup' by Congress Ousts Gutierrez on Wave of Popular Protests, *LATIN AMERICAN WEEKLY REPORT*, Apr. 26, 2005.

55. See Juan Forero, *Bolivia Installs New Leader With Very Long 'To Do' List*, *N.Y. TIMES*, June 11, 2005, at A7.

56. This is not to say that prior to the Charter, member states never took the occasion to pronounce on the proper interpretation of other countries' constitutions. The U.S., for example, took a very firm stance on a contestable point of interpretation of Haiti's Constitution when it returned Aristide to power in 1994, requiring him to accept that his first term would end in 1996, five years after he had been sworn in, even though a military coup had prevented him from serving most of his term. Schnably, *Constitutionalism*, *supra* note 5, at 190-91. However, it seems plausible that the Charter's references to constitutional concepts like the separation of powers, together with recent calls for the OAS to hold governments accountable for governing democratically, will produce more such occasions.

2002 represented the constitutionally valid resignation of an autocrat who needed to learn to “respect constitutional processes” was surely not unrelated to its hostility to his political positions and rhetoric.<sup>57</sup> It is equally hard to imagine that the U.S. initiative in the June 2005 OAS meeting was entirely unrelated to its consistent hostility to Chavez, even though the proposal cannot be dismissed simply as another diplomatic maneuver against a government not in favor with the U.S. If states and regional bodies become more deeply involved in interpreting other countries’ constitutions, there is a danger that they will have a new and substantially more intrusive means of pursuing their own foreign policy aims.

In short, whether it takes the form of transnational constitutional law or an emphasis on constitutional fidelity, a practice of regional interpretation of constitutions presents dangers as well as benefits. A keen appreciation of both is an essential guide to any further development of the OAS’s new involvement in constitutionalism.

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57. See *Meet the Press: Condoleezza Rice Discusses the Situation in the Middle East and the Venezuelan Presidential Crisis* (NBC television broadcast Apr. 14, 2002), (transcript available at LexisNexis); Press Statement, U.S. DEP’T OF STATE, Venezuela: Change of Government (Apr. 12, 2002), <http://www.state.gov/r/pa/prs/ps/2002/9316.html> (last visited Dec. 30, 2005).