Institutionalizing Democracy in Africa: A Comment on the African Charter on Democracy, Elections and Governance

Patrick J. Glen^{a,b,*}

^a Georgetown University Law Center, 600 New Jersey Avenue NW, Washington, DC 20001, USA

^b Office of Immigration Litigation, Civil Division, U.S. Department of Justice,
P.O. Box 878, Ben Franklin Station, Washington, DC 20044, USA

Abstract

This article provides an exegesis of the recently entered-into-force African Charter on Democracy, Elections and Governance. Democracy has a decidedly mixed history in Africa and, despite a concerted effort by the African Union (AU), it has made only halting inroads in those states that are nondemocratic or struggling to consolidate democracy. That may change as more states ratify and implement the Charter, a comprehensive regional attempt to promote, protect, and consolidate democracy that entered into force in February 2012. This Charter, the culmination of two decades of African thinking on how democracy should develop on the continent, represents the AU's attempt to institutionalize principles of good governance and democratic ideals. Although hurdles remain on Africa's road to democratic development, including poverty, illiteracy, and corruption, the Charter provides a means to address these stubborn problems. Whether it will succeed will depend on state implementation of the obligations undertaken by ratification of the Charter, as well as the AU's own commitment to ensuring observation of the Charter's key provisions. If the AU and its member states do fully implement and practically observe the Charter's obligations, then the prospects for democratic governance in Africa have a bright future.

Keywords

African Charter on Democracy, Elections and Governance; African Union; democracy; democratization; development; good governance; human rights

1. Introduction

On January 16, 2012, Cameroon deposited its instrument of ratification of the African Charter on Democracy, Elections and Governance ("Charter") with the Chairperson of the Commission of the African Union (AU), becoming the

*) E-mail: pjg32@law.georgetown.edu. Mr. Glen is an adjunct law professor at Georgetown University and also a Senior Litigation Counsel with the U.S. Department of Justice. The views in this article are the author's own, and do not represent those of the U.S. government or Department of Justice. His writing on democracy and human rights has appeared in the *Wall Street Journal* and *Washington Post*, as well as numerous academic journals in the USA and Africa.

fifteenth state to ratify the Charter.¹ Per the terms of the Charter, it thus entered into force on February 15, 2012, thirty days after its ratification by fifteen states.² Thus far, of the 54 member states of the African Union (AU), 39 have signed and fifteen have ratified the Charter.³

Africa provides the perfect laboratory in which to pursue this institutionalization of democracy and democratic ideals, as its governments span all shades along the democracy spectrum. Despite advances on the continent since the end of the Cold War, “the degree of democracy among African states continues to vary considerably, with authoritarian regimes at one extreme, functional multiparty systems at the other, and many forms of imperfect democracy in the middle.”⁴ This range encompasses failed or disintegrating states, such as Somalia and Congo, countries in a state of flux or transition, like Tunisia, Egypt, and Libya, following the revolutions in those countries, as well as Nigeria, where the aptly named Goodluck Jonathan is seeking to consolidate democratic gains in the midst of an increasingly violent religious insurgency, dictatorial regimes, including those in Zimbabwe, Sudan, Chad and Rwanda, and consolidated, functioning democracies, including South Africa, Cape Verde, Botswana, Ghana and Mali.

It is far too early to offer any claim as to whether the Charter will successfully discharge its primary mission of consolidating, promoting, and protecting democracy. Yet beyond this consideration, the text itself represents a distinct contribution to regional attempts at democratic institutionalization. Although inspired by the Inter-American Democratic Charter, the African Charter advances a distinctly African conception of how a regional organization can promote, protect, and advance democratic ideals, and constitutes an important contribution to the evolving right-to-democracy discourse. This fact should come as little surprise to many Africa watchers, as the continent has evinced a clear ability to adapt accepted and emerging international political and legal norms to the specific circumstances prevailing in Africa. The clearest example of this ingenuity is the African Charter on Human and Peoples’ Rights,⁵ which advanced a conception of collective peoples’ rights in conjunction with a traditional focus on individual human rights,⁶ while also recognizing that individuals not only enjoy rights but

¹ African Charter on Democracy, Elections and Good Governance, entered into force Feb. 15, 2012, available at <http://www.un.org/democracyfund/Docs/AfricanCharterDemocracy.pdf>.

² *Ibid.*, Article 48.

³ See, *Electoral Institute for Sustainable Democracy in Africa, AU: Ratification status of the African Charter on Democracy, Elections and Governance*, available online at <http://www.eisa.org/za/EISA/aucharter.htm> (last visited 23 February 2012).

⁴ E. Y. Omorogbe, ‘A Club of Incumbents? The African Union and Coups d’Etat’ (2011) 44(1) *Vanderbilt Journal of Transnational Law* 123–154 at 124 (2011).

⁵ African [Banjul] Charter on Human and Peoples’ Rights, adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev.5, 21 I.L.M. 58 (1982), entered into force Oct. 21, 1986.

⁶ *Ibid.*, Articles 19–24; see Richard N. Kiwanuka, ‘The Meaning of “People” in the African Charter on Human and Peoples’ Rights’ (1988) 82(1) *American Journal of International Law* 80–101.

also have duties within society that must be observed.⁷ The Charter follows in this tradition by absorbing lessons on democracy promotion and consolidation from other regions, most notably the Americas, and transforming the received wisdom into a framework specifically targeted at the problems and issues prevailing in Africa.

The goal of the instant article is to place the African Charter in its historical context by noting its antecedents in prior regional declarations and resolutions, as well as the international collaboration, spearheaded by the Community of Democracies and then-U.S. Undersecretary of State Paula Dobriansky, that led to the “birth” of the Charter at the 2003 Dialogue for Democracy. Accordingly, Section I reviews Africa’s history in promoting democracy, consolidating democratic gains, and protecting democratic regimes from coups d’état and other unconstitutional or extra-constitutional changes in government. Section 2 traces the roots of the African Charter to the 2003 Dialogue for Democracy, an outgrowth of the 2002 Seoul Ministerial of the Community of Democracies that brought leaders from Africa and Latin America together in order to share experiences relating to protecting and promoting democracy. This Dialogue, which also included the leadership of the Organization of American States, the AU, and several prominent civil society and other non-governmental organizations, served as a significant catalyst to the development of the African Charter, and is important as an example of the inter-regional and public-private sharing of expertise on democratic practices that has come to characterize democracy advocacy in the twenty-first century.

Moving beyond the history of the Charter, Section 3 reviews the main provisions of the Charter, while concluding with observations on how the Charter has advanced a very specific conception of how democracy should be promoted and safeguarded in Africa. Finally, Section 4 is forward looking, and seeks to address oft-repeated concerns about whether democracy can really take root, on a continent-wide scale, in Africa. The final judgment on this issue must wait the test of time, but the provisions of the Charter, if faithfully and fully implemented and observed by states, give the continent a fantastic opportunity to move more countries into the democratic column while permanently relegating the proverbial African “Strong Man” to the annals of history.

⁷ *Ibid.*, Articles 27–29; see, U. O. Umzurike, ‘The African Charter on Human and Peoples’ Rights’ (1983) 77(4) *American Journal of International Law* 902–912 at 907 (“The Charter breaks new ground by including individual duties in an international instrument. Hitherto, rights were usually enumerated that, by implication, imposed duties on states. The Charter, on the other hand, recognizes the duty of the individual to the family, society, the state, and the international African community.”); M. Wa Mutua, ‘The Banjul Charter and the African Cultural Fingerprint: An Evaluation of the Language of Duties’ (1995) 35(2) *Virginia Journal of International Law* 339–380.

2. Democracy and Good Governance in Africa, Pre-Charter

The Charter represents the culmination of over two decades of thinking on democracy promotion and consolidation within the institutions of the AU and its predecessor, the Organization of African Unity (OAU). Democracy, and the striving for democratic governance, has long played a central role in how the OAU and AU have sought to address the problematic issues in African society, ranging from economic development and poverty alleviation, to increasing literacy and encouraging environmentalism. Although the history of democracy promotion in Africa spans the entirety of the OAU's existence, this article recounts only that recent history, beginning with the end of the Cold War.

At the 1990 meeting of the OAU in Addis Ababa, Ethiopia, the assembled heads of government issued a Declaration on the Political and Socio-Economic Situation in Africa and the Fundamental Changes Taking Place in the World.⁸ The context of this declaration was the end of the Cold War, the disintegration of the political union of the Soviet Union and Soviet Bloc, and the recognition that African states would no longer serve proxy roles as hot war zones for the competing ideologies of the United States and Soviet Union.⁹ Taking center-stage in the OAU's concerns was the increasing economic marginalization of Africa and its need to develop, economically and socially.¹⁰ The declaration recognized that democratic institutions and good governance were a necessary precondition to the type of economic and societal evolution that was needed if Africa was to take part in the then-emerging phenomenon of globalization:

We are fully aware that in order to facilitate this process of socio-economic transformation and integration, it is necessary to promote popular participation of our peoples in the processes of government and development. A permitting political environment which guarantees human rights and the observance of the rule of law, would ensure high standards of probity and accountability, particularly on the part of those who hold public office. In addition, popular-based political processes would ensure the involvement of all including in particular women and youth in the development efforts. We accordingly recommit ourselves to the further democratization of our societies and to the consolidation of democratic institutions in our countries. We reaffirm the right of our countries to determine, in all sovereignty, their system of democracy on the basis of their socio-cultural values, taking into account the realities of each of our countries and the necessity to ensure development and satisfy the basic needs of our peoples. We therefore assert that democracy and development should go together and should be mutually reinforcing.¹¹

⁸) OAU, Declaration of the Assembly of Heads of State and Government of the Organization of African Unity on the Political and Socio-Economic Situation in Africa and the Fundamental Changes Taking Place in the World, OAU Doc. AHG/Decl. 1 (XXVI) (1990).

⁹) *Ibid*, at para. 2.

¹⁰) *Ibid*, at paras 5–7.

¹¹) *Ibid*, at para. 10.

This declaration served as the basis, five years later, of the 1995 Cairo Agenda for Action, an attempt to “relaunch” Africa’s economic and social development.¹² Democracy and governance issues again were the central focus in the resolution establishing the agenda: “We recognize and resolve that democracy, good governance, peace, security, stability, and justice are among the most essential factors in African socio-economic development. Without democracy and peace, development is not possible; and, without development, peace is not durable.”¹³ The Agenda contemplated specific actions under the rubric of developing democracy and increasing the levels of good governance, including “launch[ing] programmes to promote national unity . . . based on the principles of respect for human rights and dignity, free and fair elections, as well as respect of the freedom of the press, speech, association and conscience,” and “ensur[ing] the speedy promotion of good governance, characterized by accountability, probity, transparency, equal application of the rule of law, and a clear separation of powers, as an objective and a condition for rapid and sustainable development in African societies.”¹⁴

The Cairo Agenda was followed, in 1999, by the so-called Algiers Declaration.¹⁵ This declaration reviewed the history of Africa since the end of colonialism, taking stock of what had been accomplished, what remained to be accomplished, and how best to reach those remaining goals of democratization and development. As with the prior declarations of the OAU, democracy and governance again play a focal point in determining how to achieve sustainable and permanent levels of development and how best to create lasting and viable states in Africa:

We are convinced that the increase in, and expansion of the spaces of freedom and the establishment of democratic institutions that are representative of our peoples and receiving their active participation, would further contribute to the consolidation of modern African States underpinned by the rule of respect for the fundamental rights and freedom of the citizens and the democratic management of public affairs.¹⁶

The declaration also recalled the 1997 Harare Summit, held in the wake of the overthrow of the elected government in Sierra Leone, where the OAU called for the return of constitutional government in that country and called on African states and the international community to deny recognition to the usurping government.¹⁷ At Algiers, the OAU “declared that several governments that had come to power through unconstitutional means since the Harare summit should restore constitutional legality by the next annual summit in 2000.”¹⁸

¹² *Relaunching Africa’s Economic and Social Development: The Cairo Agenda for Action*, OAU Doc. AHG/Res. 236 (XXXI) (1995).

¹³ *Ibid.*, at para. 10.

¹⁴ *Ibid.*, at para. 10(a) and 10(b).

¹⁵ Algiers Declaration, OAU Doc. AHG/Decl. 1 (XXXV) (1999).

¹⁶ *Ibid.*, at 5.

¹⁷ Omorogbe, *supra* note 4, at 127.

¹⁸ *Ibid.*

This concern with coups d'état and other unconstitutional changes in government led to the adoption of the Declaration on the Framework for an OAU Response to Unconstitutional Changes in Government at the 2000 meeting of the OAU in Lomé, Togo.¹⁹ This declaration was precipitated by the “resurgence of coup d'état in Africa[,] ... a very disturbing trend and serious setback to the ongoing process of democratization in the Continent.” The declaration set out a framework for how the OAU would address an unconstitutional change of government in one of its member states. As a first step, the declaration listed a common set of values and principles for democratic governance, including a democratic constitution, separation of powers and an independent judiciary, respect for human rights and fundamental freedoms, including freedoms of speech, press, and expression, political pluralism, and respect for democratic processes.²⁰ It then proceeded to a non-exhaustive definition of what would constitute an unconstitutional change in government:

military coup d'état against a democratically elected Government; intervention by mercenaries to replace a democratically elected Government; replacement of democratically elected Governments by armed dissident groups and rebel movements; the refusal by an incumbent government to relinquish power to the winning party after free, fair and regular elections.²¹

If a member state suffered an unconstitutional change of government, as contemplated by the declaration, then the OAU was charged with taking certain actions, ranging from the initial condemnation of the change and an urging to restore constitutional government, a six-month suspension from the policy organs of the OAU coupled with other potential sanctions, and additional targeted sanctions should the constitutional government not be restored within six months.²²

The year 2000 was also the year that the AU took the mantle from the OAU: “in 2000 OAU member states... adopted the Constitutive Act of the African Union, intended to replace the OAU with a more effective organization.”²³ The Constitutive Act,²⁴ concerned mainly with establishing the new organizational structure and its authorities, contained numerous economic and development goals, as well as objectives related to promoting good governance and the consolidation and promotion of democracy. The new AU should promote “peace, security, and stability on the continent,” “democratic principles and institutions,

¹⁹) OAU Doc. AHG/Decl. 5 (XXXVI) (2000).

²⁰) *Ibid.*

²¹) *Ibid.*

²²) *Ibid.*; see generally N. J. Udombana, ‘Articulating the Right to Democratic Governance in Africa’ (2003) 24(4) *Michigan Journal of International Law* 1209–1287, at 1260–1261.

²³) See, S. J. Schnably, ‘Emerging International Law Constraints on Constitutional Structure and Revision: A Preliminary Appraisal’ (2008) 62(2) *University of Miami Law Review* 417–490, at 452.

²⁴) Constitutive Act of the African Union, July 11, 2000, available at http://www.africa-union.org/root/au/AboutAu/Constitutive_Act_en.htm.

popular participation and good governance,” and the protection of “human and peoples’ rights in accordance with the African Charter on Human and Peoples’ Rights and other relevant human rights instruments.”²⁵ The principles of the AU’s operation also included respect “for democratic principles, human rights, the rule of law and good governance; . . . Respect for the sanctity of human life, condemnation and rejection of impunity and political assassination, acts of terrorism and subversive activities; Condemnation and rejection of unconstitutional changes of governments.”²⁶ Article 30 of the Act also contained a provision regarding the suspension of governments from the activities of the AU, if those governments have “come to power through unconstitutional means.”

The AU quickly took steps to advance the democratization and development agenda contained in its Constitutive Act. In 2002, the AU issued its Declaration on the Principles Governing Democratic Elections in Africa, a response to a report that recommended “strengthening the role of the AU in election observation and monitoring and the advancement of the democratization process.”²⁷ This declaration highlighted the importance of free and fair democratic elections to the legitimacy of representative government and the avoidance of conflicts.²⁸ Through it, the member states of the AU undertook to enact the necessary measures to ensure democratic elections, including adequate election monitoring, women’s suffrage, national electoral bodies to oversee the domestic electoral process, the guarantee of those basic rights necessary to exercise democratic processes, i.e., assembly, speech, and press, and transparency in the electoral process.²⁹ Beyond these pledges, the declaration also guaranteed the rights of citizens to participate in democratic elections, as well as to exercise those freedoms necessary to truly realize a participatory democratic process.³⁰ The declaration is also notable for requesting a role for the AU in the domestic electoral processes of its member states through observation and monitoring missions in national elections.³¹

In 2002 the New Partnership for Africa’s Development also contributed to this debate, by promulgating its Declaration on Democracy, Political, Economic and Corporate Governance.³² This multifaceted declaration “affirmed member states’ commitment to eliminate poverty and promote economic development through democracy and good governance,” and “committed member states to observe the

²⁵ *Ibid.*, Articles 3(f)–3(h).

²⁶ *Ibid.*, articles 4(m), 4(o) and 4(p).

²⁷ AU Doc. AHG/Decl. 1 at 1 (XXXVIII) (2002).

²⁸ *Ibid.*, at 2.

²⁹ *Ibid.*, at 2–3.

³⁰ *Ibid.*, at 3–4.

³¹ *Ibid.*, at 4–5.

³² New Partnership for Africa’s Development, Declaration on Democracy, Political, Economic and Corporate Governance, NEPAD Doc. AHG/235 (XXXVIII), Annex 1 (2002).

rule of law and maintain strict adherence to the AU's ban on unconstitutional changes of government."³³

Finally, again in 2002, the AU adopted the Protocol Relating to the Establishment of the Peace and Security Council of the African Union.³⁴ This protocol was generally concerned with the security and peace of the AU, coordinating a Union-wide response to internal and external threats, and managing and, where possible, defusing conflicts. Yet democracy and rule of law issues are also presented as objectives and tasks for the Council. Under Article 3, the objectives for which the Council is established include the promotion and encouragement of "democratic practices, good governance and the rule of law," the protection of "human rights and fundamental freedoms, [and the] respect for the sanctity of life and international humanitarian law."³⁵ The protocol contemplates the pursuance of these objectives as furthering the goal of preventing conflicts. The Council was also granted a continuing role in monitoring the pursuit of these objectives. Article 7 mandates that "the Peace and Security Council shall: . . . (m) follow-up, within the framework of its conflict prevention responsibilities, the progress towards the promotion of democratic practices, good governance, the rule of law, protection of human rights and fundamental freedoms, respect for the sanctity of human life and international humanitarian law by Member States."³⁶

This cursory review of Africa's history in promoting the furtherance of democratic governance on the continent makes clear the central focus that the OAU and AU have placed on developing democratic institutions and governments in its member states. The application of this framework, however, has not always led to positive results, and it has not always been applied evenly throughout like-situations. For instance, coups have been treated differently at different times, even following the adoption of the Lomé Declaration on Unconstitutional Changes in Government. Coups have been denounced by the AU, with an ostensible restoration of constitutional government with little or no further action taken, such as in Côte d'Ivoire in 1999, Guinea-Bissau in 2003, Sao Tome and Principe in 2003, and Niger in 2010.³⁷ Coups have led to the suspension of governments from participation in the AU and the restoration of rights upon the holding of elections, including in the Central African Republic in 2003, Togo in 2005, and Mauritania in 2005 and 2008.³⁸ Certain unconstitutional changes have also been hit with sanctions beyond suspension, in Guinea in 2008, Madagascar in 2009, and Côte

³³) Schnably, *supra* note 23, at 454–455.

³⁴) *Protocol Relating to the Establishment of the Peace and Security Council of the African Union*, July 10, 2002, available online at http://www.africa-union.org/root/au/Documents/Treaties/Text/Protocol_peace_and_security.pdf.

³⁵) *Ibid.*, Article 3(f).

³⁶) *Ibid.*, Article 7(m).

³⁷) See Omorogbe, *supra* note 4, at 129, 151–153; N. Petersen, "The Principle of Democratic Teleology in International Law" (2008) 34(1) *Brooklyn Journal of International Law* 33–84 at 70.

³⁸) Omorogbe, *supra* note 4, at 138–142, 142–146, 151–153; Petersen, *supra* note 37, at 68, 69–70.

d'Ivoire in 2010.³⁹ And in certain cases, such as the Mauritanian coup in 2005, coups have been actively denounced and governments suspended, even where the overthrown government was widely seen as illegitimate or dictatorial, i.e., where the coup arguably provided an opportunity to advance democratic goals.⁴⁰

These situations establish that “African regional diplomacy has evolved from the OAU’s policy of noninterference in the heyday of the Cold War. It is now demonstrating an increasing willingness to condemn and take action against illegal seizures of power” and “may now be taking a more principled stand on democratically held elections.”⁴¹ Nonetheless, the AU has not taken any definitive or muscular action in other circumstances, such as the continued rule of Robert Mugabe in Zimbabwe or the fraudulent and violent elections of 2007 in Kenya, situations where democracy has been threatened as gravely as in those circumstances where the AU has acted. These contradictions have led one commentator to conclude that despite a willingness to act in coup situations, “the AU has been very reluctant to act when it comes to other constitutional infringements such as falsifying elections, amending constitutions to consolidate more power, or permitting additional terms in office.”⁴² Of course, this shortcoming must be taken in context. The AU, despite continuing discrepancies in how and where it takes a stand on the protection of democratic governance, has greatly advanced the goals of good governance and democracy on the continent since the end of the Cold War. Success is a cumulative process and, despite setbacks or missed opportunities for action, the AU continues to slowly build towards that final success of a completely democratic continent.

3. The Latin America–Africa Democracy Connection

By 2003, the AU had developed a relatively comprehensive patchwork of declarations, Charters, and other Acts regarding the protection, promotion, and consolidation of democracy in Africa. These acts noted the interconnectedness of democratic governance, economic development, and sustainability, provided for institutional support in furtherance of the goals of democracy and development, and instituted certain procedures that the Union could take when democracy was threatened in any of its member states. There was, however, no unitary Charter or Act that addressed all these discrete issues in one text. The push for what would become the African Democracy Charter developed only in 2003,

³⁹ Omorogbe, *supra* note 4, at 146–48, 149–51; T. J. Bassett and S. Straus, ‘Defending Democracy in Cote d’Ivoire: Africa Takes a Stand’ (2011) 90(4) *Foreign Affairs* 130–140 at 130.

⁴⁰ See Omorogbe, *supra* note 4 at 142–143; Petersen, *supra* note 37, at 69–70.

⁴¹ Bassett and Straus, *supra* note 39, at 140.

⁴² Petersen, *supra* note 37, at 70.

after an innovative gathering in Coral Gables under the auspices of the Community of Democracies' Seoul Plan of Action.

The Community of Democracies, an inter-governmental organization composed of democratic countries throughout the world,⁴³ was established in 1999 at the end of the Clinton Administration.⁴⁴ At its 2002 Ministerial meeting in Seoul, the Community issued its "Seoul Plan of Action."⁴⁵ This plan dedicated the Community to promoting democratic ideals and transitions through regional and extra-regional engagements of democratic and transitioning countries.⁴⁶ The engagement contemplated by the Plan of Action was meant to take the form of dialogues, institution building, democracy education, and the development of regional monitoring and institutional mechanisms to protect and further the aims of democracy.⁴⁷

In furtherance of the goals contained in the Plan of Action, a Dialogue for Democracy was instituted in 2003 in Coral Gables, spearheaded by the efforts of then-Undersecretary of State for Global Affairs Paula Dobriansky. This conference, the first meeting of an ongoing dialogue between the OAS and the AU, included representatives from the AU and the Organization of American States, representatives from specific African and American states, including Cape Verde, Mali, Botswana, Senegal, Kenya, Ghana, Mozambique, Jamaica, Brazil, Chile, Nicaragua, El Salvador, Peru and the Dominican Republic, and prominent civil society and other nongovernmental organizations.⁴⁸ The discussions of the Dialogue focused on the role the OAS had taken in promoting democracy through the Inter-American Democratic Charter, and how the AU might be able to undertake a similar role in Africa. Thus, the overarching discussion of the participants was on how best to promote democratic institutions and practices within regional frameworks, with a specific focus on "how regional organizations and coordinated efforts can strengthen democracy, and overcome obstacles and threats to its development."⁴⁹ Yet the broad range of participants also permitted significant discussion on other issues, including good governance, anti-corruption measures, electoral systems and monitoring, how to bolster civil society, and political party development.⁵⁰

⁴³ See <http://www.community-democracies.org>.

⁴⁴ See M. Albright, *Madam Secretary: A Memoir* (Hyperion, New York, NY, 2003) 443–447 (noting the role of then-Secretary of State Albright in the push to create the Community of Democracies).

⁴⁵ Community of Democracies, Seoul Plan of Action, Democracy: Investing for Peace and Prosperity (Nov. 12, 2002).

⁴⁶ *Ibid.*

⁴⁷ *Ibid.*

⁴⁸ U.S. State Department, Office of the Spokesman, *Fact Sheet, Dialogue on Democracy* (June 3, 2003), available online at <http://statelists.state.gov/script/wa.exe?A2=ind0306aandL=dosfactsandD=1andP=205>.

⁴⁹ *Ibid.*

⁵⁰ *Ibid.*

The decision to hold a Dialogue where the OAS could share its experiences was particularly apropos, as the OAS has a strong institutional dedication to promoting, developing, and protecting democratic norms in the Western Hemisphere. The OAS juridical framework recognizes a “right to democracy,” which has been enunciated in, *inter alia*, the Santiago Commitment to Democracy and the Renewal of the Inter-American System and the General Assembly’s statement on Representative Democracy.⁵¹ The OAS had also adopted its own Inter-American Democratic Charter.⁵² This document recognized a right of democracy within the OAS system and that democracy grounds the legitimacy of the Organization, noted the inextricable link between the promotion and realization of democracy and the protection of human rights, and the interdependence of democratic development with socio and economic advancements. The Inter-American Charter also pledged the OAS to strengthen and preserve the democracies of its member states through election monitoring and observation, and provided a mechanism to address unconstitutional or undemocratic changes in government. Finally, it also explicitly contemplated a role for civil society and nongovernmental organizations, and mandated that all concerned partners, public and private, would advance educational programs in civic and democratic values. Accordingly, the OAS experience provided a rich resource of experience to the AU and its member states.

The 2003 Dialogue, coupled with the regional impetus created by the Pretoria Conference on Elections, Democracy and Governance, held in April 2003 in South Africa, led to the push to create an African Charter on democracy, modeled on the Inter-American experience.⁵³ A commission of “Experts on Elections, Democracy and Governance” was formed, and, in 2004, was called upon to draft the African Charter.⁵⁴ The Charter was adopted three years later in 2007, at the Ninth AU Summit in Addis Ababa.⁵⁵ Signatures and ratifications of the Charter were not, however, forthcoming, and the AU Commission had to issue a resolution calling upon states to ratify later that year.⁵⁶ Even by “July 2010, only three states (Ethiopia, Mauritania and Sierra Leone) had” ratified the Charter.⁵⁷ The Charter only entered into force in February 2012, upon the

⁵¹ See *The Santiago Commitment to Democracy and the Renewal of The Inter-American System*, OAS General Assembly, 3rd Plenary Session (adopted June 4, 1991), OAS Doc. OEA/Ser.P/XXI.O.2 (1991); Representative Democracy, OAS General Assembly, 5th Plenary Session (adopted June 5, 1991), AG/Res.1080 (XXI-0/91), OAS Doc. OEA/Ser.P/XXI.O.2 (1991); see also, P. J. Glen, ‘The ADVANCE Democracy Act and the Future of United States Democracy Promotion Efforts’ (2011) 9(2) *Santa Clara Journal of International Law*, 273–308 at 302.

⁵² Inter-American Democratic Charter, OAS Doc. OEA/Ser.P/AG/Res.1 (Sept. 11, 2001).

⁵³ See AU Doc. EX.CL/Dec. 31 (III) (2003).

⁵⁴ See AU Doc. EX.CL/124 (V) (2004).

⁵⁵ See, R. Murray, ‘Recent Developments in the African Human Rights System 2007’ (2008) 8(2) *Human Rights Law Review* 356–376 at 361–362.

⁵⁶ *Ibid.*, at 362.

⁵⁷ Omorogbe, *supra* note 4, at 135.

ratification of the fifteenth state, Cameroon, a delay of nearly five years from adoption to entry into force.

4. The African Charter on Democracy, Elections and Governance

This section has two purposes. First, it reviews the text of the African Charter chapter by chapter, in order to give a comprehensive picture of the obligations undertaken by member states and the mechanisms the Charter puts into place for dealing with elections, unconstitutional changes in government, and other related issues. Second, following this exegesis of the Charter, the section concludes by noting how the text has advanced an important conception of how a regional body can promote, protect, and consolidate democracy. Although rooted, in some ways, in the Inter-American Charter, the African Charter stands alone in its final conception as a text specific to Africa. Nonetheless, the ideas and concepts contained therein should have wide circulation within the democracy promotion community, as the Charter represents a very robust ideal of what is necessary to truly realize democracy within both autocratic and transitioning countries.

4.1. *Preliminary Considerations: The Objective and Principles of the Charter*

As Section 1 of this article established, there is a strong institutional history of protecting and promoting democracy within the African regional system. The Preamble of the Charter recognizes this and grounds itself in the existing human rights and democracy order by reference to this history, including the Algiers and Lomé Declarations, the Cairo Agenda, and the relevant articles of the Constitutive Act.⁵⁸ The Preamble also notes its goals with specific choices in language related to the institutionalization and entrenchment of democratic principles. It seeks to “*entrench* in the Continent a political culture of change of power based on the holding of regular, free, fair and transparent elections conducted by competent, independent and impartial national electoral bodies.”⁵⁹ It is determined “to promote and strengthen good governance through the *institutionalization* of transparency, accountability and participatory democracy.”⁶⁰ Most importantly, perhaps, the ideals contained in the Charter are deemed universal, and thus as wholly applicable in Africa as they are in any existing Western democracy.⁶¹

The substantive portion of the Charter begins with twin articles on the “Objectives” sought to be advanced and the “Principles” that should guide state implementation of the obligations under the Charter. The second article lists thirteen

⁵⁸) African Charter, preamble.

⁵⁹) *Ibid* (emphasis added).

⁶⁰) *Ibid* (emphasis added).

⁶¹) *Ibid* (“Committed to promote the universal values and principles of democracy, good governance, human rights and the right to development”).

discrete objectives which address not only the building and consolidation of democracy, but other hoped-for benefits that would flow from that institution building, including objectives related to development and the harmonization of law and policy across different states. The objectives are:

- 1) Promote adherence . . . to the universal values and principles of democracy and respect for human rights.
- 2) Promote and enhance adherence to the principle of the rule of law premised upon the respect for, and the supremacy of, the Constitution and constitutional order in the political arrangements of the State Parties.
- 3) Promote the holding of regular free and fair elections to institutionalize legitimate authority of representative government as well as democratic change of governments.
- 4) Prohibit, reject and condemn unconstitutional change of government in any Member State as a serious threat to stability, peace, security and development.
- 5) Promote and protect the independence of the judiciary.
- 6) Nurture, support and consolidate good governance by promoting democratic culture and practice, building and strengthening governance institutions and inculcating political pluralism and tolerance.
- 7) Encourage effective coordination and harmonization of governance policies amongst State Parties with the aim of promoting regional and continental integration.
- 8) Promote State Parties' sustainable development and human security.
- 9) Promote the fight against corruption [].
- 10) Promote the establishment of the necessary conditions to foster citizen participation, transparency, access to information, freedom of the press and accountability in the management of public affairs.
- 11) Promote gender balance and equality in the governance and development processes.
- 12) Enhance cooperation between the Union, Regional Economic Communities and the International Community on democracy, elections and governance.
- 13) Promote best practices in the management of elections for purposes of political stability and good governance.⁶²

Article 3 contains eleven principles that should guide pursuance of the Charter's objectives and the state's implementation of its obligations, and these enumerated principles constitute the bedrock of the liberal democratic order:

⁶² *Ibid*, Article 2.

- 1) Respect for human rights and democratic principles.
- 2) Access to and exercise of state power in accordance with the constitution of the State Party and the principle of the rule of law.
- 3) Promotion of a system of government that is representative.
- 4) Holding of regular, transparent, free and fair elections.
- 5) Separation of powers.
- 6) Promotion of gender equality in public and private institutions
- 7) Effective participation of citizens in democratic and development processes and in governance of public affairs;
- 8) Transparency and fairness in the management of public affairs.
- 9) Condemnation and rejection of acts of corruption, related offenses and impunity.
- 10) Condemnation and total rejection of unconstitutional changes of government.
- 11) Strengthening political pluralism and recognizing the role, rights and responsibilities of legally constituted political parties, including opposition political parties, which should be given a status under national law.⁶³

4.2. *Promoting Democracy by Protecting Human Rights, and Vice Versa*

Chapter 4 of the Charter, captioned “Democracy, Rule of Law and Human Rights,” focuses on constitutionalism and the protection of certain human rights deemed necessary for the full enjoyment of democracy. Linking democracy and human rights in this manner has roots in the Inter-American Charter and the African instruments noted in Section I,⁶⁴ yet the African Charter’s adoption of this stance still constitutes an important institutionalization of this view. The justification for this linkage is succinctly stated in the Charter itself, which obligates the state parties to “protect the right to equality before the law and equal protection by the law as a fundamental precondition for a just and democratic society.”⁶⁵ In essence, the Charter recognizes that the protection of certain rights and freedoms must ground any stable democracy, and that stable democracy is necessary for the enjoyment of the full panoply of human rights and freedoms. Regarding the principle of constitutionalism, the Charter mandates constitutional rule and constitutional transfers of power,⁶⁶ the “entrench[ment of] the principle of the supremacy of the constitution in the political organization of the States,”⁶⁷ and that any constitutional revisions or amendments should be by national consensus, preferably by referenda.⁶⁸

⁶³ *Ibid*, Article 3.

⁶⁴ *See, e.g.*, Inter-American Charter, Articles 7–10.

⁶⁵ African Charter, Article 10(3).

⁶⁶ *Ibid*, Article 5.

⁶⁷ *Ibid*, Article 10(1).

⁶⁸ *Ibid*, Article 10(2).

On the issue of human rights, Article 4 obligates states to promote not only democracy, but also the rule of law and human rights, while mandating universal suffrage.⁶⁹ States must also eliminate discrimination while promoting equality and diversity in political and public life,⁷⁰ and guarantee to the populace its fundamental rights and freedoms.⁷¹ The Charter also encourages the AU States to strengthen and support those AU institutions charged with protecting and promoting human rights.⁷²

4.3. *Institutional and Societal Reforms*

Along with its linkage of democracy promotion and consolidation with respect for and protection of human rights, the Charter also advances a broad conception of institutional and societal reforms which it contemplates as the foundation for healthy democratic governance. To this end, Chapters 5 and 6 of the Charter address the underlying conditions that must prevail in order for democracy to flourish, the measures needed to develop a societal culture that is conducive to democratic governance, and how to ensure that there are institutional supports to the conduct and promotion of democracy. Article 11 broadly mandates states to implement legislative and policy initiatives to “strengthen a culture of democracy and peace,” while Articles 12 and 13 more specifically require programs and policies to ensure transparency in governance, create political space for civil society, and encourage civic education, and obligates states to implement measures that would create consistent dialogue between political leaders and the people in furtherance of the goal of transparency.

Institutionally, Article 14 requires African states to adopt what is a hallmark of Western democracies, civilian control over military and security forces. This article also obligates states to enact domestic mechanisms to hold accountable those who attempt to take political power through unconstitutional means, and to cooperate amongst other AU members to forestall, where possible, such unconstitutional changes.⁷³ Article 15 directs states to create public institutions to promote and advance democracy and constitutional order, while Article 16 encourages cooperation between states through the sharing of their experiences in building and consolidating democracy.

4.4. *Guaranteeing Free, Fair and Transparent Elections*

The electoral process is the focus of the Charter’s following Chapter. The Charter “reaffirms” the commitment of African countries to hold free, fair, transparent,

⁶⁹) *Ibid*, Article 4.

⁷⁰) *Ibid*, Article 8.

⁷¹) *Ibid*, Article 6.

⁷²) *Ibid*, Article 7.

⁷³) *Ibid*, Article 14.

and regular elections,⁷⁴ while seeking the establishment or strengthening of national electoral bodies, mechanisms to settle contested elections, free and equal access for all candidates to media outlets, and a code to govern the conduct of elections, including processes for post-election issue.⁷⁵ This chapter also requires states to provide “a conducive environment for independent and impartial national monitoring or observation mechanisms.”⁷⁶

Beyond the steps that state parties must undertake domestically, the Charter also envisions a potentially prominent role for the African Commission in national electoral processes. AU members may appeal to the Commission for expertise and financial assistance in strengthening and developing the requesting state’s electoral-related institutions.⁷⁷ The Commission also must be informed of scheduled elections and invited to send an observer mission, which must enjoy “conditions of security, free access to information, non-interference, freedom of movement and full cooperation.”⁷⁸ An “exploratory mission” under the auspices of the Commission should also pre-date any election, and should deduce “whether the necessary conditions have been established and if the environment is conducive to the holding of transparent, free and fair elections in conformity with the principles of the Union governing democratic elections.”⁷⁹ The Charter also endows the Commission with certain responsibilities in relation to its electoral monitoring role, designed to enhance its legitimacy in acting as an observer of domestic elections. Its missions must be impartial and endowed with sufficient resources to discharge their functions,⁸⁰ they must be comprised of relevant experts drawn from national electoral bodies, regional bodies, and Pan-African institutions, with concerns of gender and regional equality of representation taken into account,⁸¹ they “shall be conducted in an objective, impartial and transparent manner,”⁸² and shall timely submit a report to the Commission and the concerned state of its findings.⁸³

4.5. *Protecting Democracy: The Charter’s Provisions on Unconstitutional Changes in Government*

The Charter also institutionalizes the framework for addressing unconstitutional changes in government first enunciated in the Lomé Declaration. First, the Charter lists those circumstances that will constitute an “actionable” unconstitutional

⁷⁴) *Ibid*, Article 17.

⁷⁵) *Ibid*, Article 17(1)–17(4).

⁷⁶) *Ibid*, Article 22.

⁷⁷) *Ibid*, Article 18.

⁷⁸) *Ibid*, Article 19.

⁷⁹) *Ibid*, Article 20.

⁸⁰) *Ibid*, Article 21(1).

⁸¹) *Ibid*, Article 21(2).

⁸²) *Ibid*, Article 21(3).

⁸³) *Ibid*, Article 21(4) and 21(5).

change of government.⁸⁴ This list substantially duplicates the four scenarios that are contained in the Lomé Declaration, but also adds a fifth situation: “Any amendment or revision of the constitution or legal instruments, which is an infringement on the principles of democratic change of government.”⁸⁵ The text of Article 23 also makes clear that the scenarios explicitly mentioned are not exhaustive of what could constitute an unconstitutional change of government.⁸⁶

Articles 24–26 focus on the mechanisms of sanction and suspension, and place the primary AU response in the hands of the Peace and Security Council, a body created after the Lomé Declaration. Article 24 permits the Peace and Security Council to act, consistent with its functions and establishing protocol, “[w]hen a situation arises in a State Party that may affect its democratic political institutional arrangements or the legitimate exercise of power[.]” Article 25 is specifically concerned with the escalating course of sanctions that the AU may undertake against an illegal regime that proves recalcitrant. First, if diplomatic initiatives for the restoration of constitutional government fail, the illegal regime will be suspended from participation in the organs and activities of the Union, although this suspension will not relieve the suspended state from its obligations to fulfill its commitments to the Union, including the protection of human rights.⁸⁷ Moreover, the AU and other states will maintain diplomatic contact with the offending state in order to further pursue a peaceable resolution to the situation.⁸⁸ Beyond suspension, the Charter permits additional sanctions to be imposed upon the illegal government, including economic sanctions,⁸⁹ and also contemplates the extension of sanctions to third-party states that encourage or assist in an unconstitutional change in another government.⁹⁰ Subsection 4 also institutionalizes a practice that had begun to be common in applying the Lomé Declaration, by disallowing the perpetrators of unconstitutional changes in government to stand in the elections to be held upon the subsequent restoration of democracy.⁹¹ The inclusion of this provision makes clear that there will be no rewards for instituting unconstitutional changes in government.

Beyond the sanctions mechanism of Article 25, the Charter also breaks new ground by contemplating a juridical response to an unconstitutional change in government. The “[p]erpetrators of unconstitutional change of government may also be tried before the competent court of the Union,”⁹² domestic governments have an obligation to bring those perpetrators to justice or extradite them to a

⁸⁴ See, *ibid*, Article 23.

⁸⁵ *Ibid*, Article 23(5).

⁸⁶ See, *ibid*, Article 23 (“State Parties agree that the use of, *inter alia*, the following illegal means...”).

⁸⁷ *Ibid*, Article 25(1) and 25(2).

⁸⁸ *Ibid*, Article 25(3).

⁸⁹ *Ibid*, Article 25(7).

⁹⁰ *Ibid*, Article 25(6).

⁹¹ *Ibid*, Article 25(4).

⁹² *Ibid*, Article 25(5).

willing prosecutor,⁹³ and, to further this goal, bilateral treaties on extradition and mutual legal assistance should be pursued.⁹⁴

4.6. *Implementing Good Political, Economic and Social Governance*

One of the most innovative aspects of the Charter is its attempt to ground democracy in a solid social, political and economic order. As with its linkage of democracy and human rights, the Charter contemplates broad reforms on economic and social issues as necessary to the full protection and institutionalization of democratic governance on the continent. The Charter's Chapter on these issues begins by addressing a broad array of concerns at the foundation of society that must be addressed in order "to advance political, economic and social governance."⁹⁵ States must commit themselves to:

- 1) Strengthening the capacity of parliaments and legally recognized political parties to perform their core functions.
- 2) Fostering popular participation and partnership with civil society organizations.
- 3) Undertaking regular reforms of the legal and justice systems.
- 4) Improving public sector management.
- 5) Improving efficiency and effectiveness of public services and combating corruption.
- 6) Promoting the development of the private sector through, inter alia, enabling legislative and regulatory framework.
- 7) Development and utilization [sic] of information and communication technologies.
- 8) Promoting freedom of expression, in particular freedom of the press and fostering a professional media.
- 9) Harnessing the democratic values of the traditional institutions.
- 10) Preventing the spread and combating the impact of diseases such as Malaria, Tuberculosis, HIV/AIDS, Ebola fever, and Avian Flu.⁹⁶

The Charter also recognizes the importance of dialogue and partnerships between all components of society, including between public and private sectors, and civil society, and encourages interactions between these different groups as a way to further the goals of democratic governance.⁹⁷ A broad inclusion within this dialogue is also important, and the Charter contains specific provisions mandating

⁹³ *Ibid*, Article 25(9).

⁹⁴ *Ibid*, Article 25(10).

⁹⁵ *Ibid*, Article 27.

⁹⁶ *Ibid*.

⁹⁷ *Ibid*, Article 28.

the inclusion within the political sphere of groups traditionally left on the outside looking in, including women, youth, and the disabled.⁹⁸

Beyond general principles, the Charter focuses specifically on those areas that must undergird responsible and just governance, both political and economic. States must institutionalize principles of good governance, including:

- 1) Accountable, efficient and effective public administration.
- 2) Strengthening the functioning and effectiveness of parliaments.
- 3) An independent judiciary.
- 4) Relevant reforms of public institutions including the security sector.
- 5) Harmonious relationships in society including civil-military relations.
- 6) Consolidating sustainable multiparty political systems.
- 7) Organising [sic] regular, free and fair elections.
- 8) Entrenching and respecting the principle of the rule of law.⁹⁹

Economic and corporate governance also must be reformed consistent with certain guiding principles, including:

- 1) Effective and efficient public sector management.
- 2) Promoting transparency in public finance management.
- 3) Preventing and combating corruption and related offences.
- 4) Efficient management of public debt.
- 5) Prudent and sustainable utilization of public resources.
- 6) Equitable allocation of the nation's wealth and natural resources.
- 7) Poverty alleviation.
- 8) Enabling legislative and regulatory framework for private sector development.
- 9) Providing a conducive environment for foreign capital inflows.
- 10) Developing tax policies that encourage investment.
- 11) Preventing and combating crime.
- 12) Elaborating and implementing economic development strategies including private-public sector partnerships.
- 13) An efficient and effective tax system premised upon transparency and accountability.¹⁰⁰

The national government and AU will certainly have a role in the institutionalization of these principles, but the Charter also seeks to intimately involve local governments and other sub-national government bodies in this process. To this end, the Charter seeks a decentralization of authority and political power to

⁹⁸) See, *ibid*, Articles 29–31.

⁹⁹) *Ibid*, Article 32.

¹⁰⁰) *Ibid*, Article 33.

“democratically elected local authorities,” which will, in turn, grant them a significant stake in ensuring the success of these provisions.¹⁰¹ Likewise, the Charter also recognizes the ongoing importance of traditional governance and judicial mechanisms in Africa, and the role they might be able to play in developing and promoting democratic governance within states: “Given the enduring and vital role of traditional authorities, particularly in rural communities, the State Parties shall strive to find appropriate ways and means to increase their integration and effectiveness within the larger democratic society.”¹⁰²

The Charter further obligates states to take measures on other social issues, including the promotion of free, universal, and compulsory primary education,¹⁰³ improving literacy rates,¹⁰⁴ increasing access to basic social services,¹⁰⁵ the protection of the environment,¹⁰⁶ alleviation of poverty,¹⁰⁷ and the implementation of health programs to combat the scourges of disease in Africa.¹⁰⁸ The Charter also recommit its signatories to the United Nation’s Millennium Development Goals, sustainable development, and the NEPAD’s Declaration on Development and Democracy.¹⁰⁹

4.7. *Provisions on Application, Implementation and Mechanics*

The concluding provisions of the Charter address issues relating to the implementation of its obligations and how those provisions should be applied. State parties to the Charter undertake to implement the necessary domestic legislation and regulation to fulfill the objectives, principles, and commitments contained in the text.¹¹⁰ The African Commission is also charged with a primary role in seeing that the Charter is fully implemented and observed,¹¹¹ undertakes the responsibility to offer any necessary support to states in implementing the Charter’s provision,¹¹² and is required to establish a framework for coordination and cooperation on democracy issues with the Regional Economic Communities.¹¹³ Violations of the Charter, and what actions to be taken against violators, is to be determined by the AU Assembly in coordination with the Peace and Security Council.¹¹⁴

¹⁰¹ See, *ibid*, Article 34.

¹⁰² *Ibid*, Article 35.

¹⁰³ *Ibid*, Article 43.

¹⁰⁴ *Ibid*.

¹⁰⁵ *Ibid*, Article 41.

¹⁰⁶ *Ibid*, Article 42.

¹⁰⁷ *Ibid*, Article 40.

¹⁰⁸ *Ibid*.

¹⁰⁹ *Ibid*, Articles 36 and 37.

¹¹⁰ *Ibid*, Article 44(1).

¹¹¹ *Ibid*, Article 45.

¹¹² *Ibid*, Article 44(a)(2)(A).

¹¹³ *Ibid*, Article 44(a)(2)(B).

¹¹⁴ *Ibid*, Article 46.

State parties are obligated to provide periodic reports to the African Commission detailing their progress towards their implementation of the Charter's obligations, and the Commission itself will assess the progress made and determine what additional steps could be taken.¹¹⁵ On an evolutionary note, the Charter also contains a mechanism by which amendments or revisions to the Charter can be proposed, ratified, and implemented.¹¹⁶ Finally, the Charter itself recognizes that the obligations contained therein are only a baseline of obligations, and that states may more fully guarantee or protect democratic ideals, i.e., existing provisions that are more favorable to democracy or more fully advance economic, social, and political goals, will not be displaced by a state's obligations under the Charter.¹¹⁷

4.8. *Assessing the Import of the Charter: A Step Forward for Africa and the International Democracy Community*

This section began by noting that the African Charter on Democracy is firmly grounded in the long-standing commitment to democratic governance evidenced by the various declarations and resolutions the OAU and AU have advanced in the preceding two decades. The Charter is, to an extent, an institutionalization of those antecedents, but it is also an advancement beyond the terms of those prior instruments. It is also firmly rooted in the exchange of experiences and views at the 2003 Dialogue for Democracy, yet the Charter is also more than an adaptation of the Inter-American Charter to the prevailing situation in Africa. Thus, despite its historical grounding, the African Charter is a text that stands alone in its comprehensive approach to the promotion, protection and consolidation of democracy.

First, the Charter contains a broader conception of what will constitute an "unconstitutional change" in government, and this language hopefully signals an intent to more actively pursue autocrats that hold power through unconstitutional means, such as by the elimination of term limits or the manipulation of elections, not just those who come to power through coups d'état. Moreover, with the advent of the Peace and Security Council, the Charter wisely places determinations of the actions to be taken in the hands of that body. This furthers the institutional goals of both the Council and the Charter, by endowing that institution with real authority to craft sanctions and other coercive actions to forestall an unconstitutional change in government or to restore democratic governance.

Second, the Charter is heavily focused on constitutionalism, grounding state authority in written constitutions and binding future action by that constitution.

¹¹⁵ *Ibid*, Article 49.

¹¹⁶ *Ibid*, Article 50.

¹¹⁷ *Ibid*, Article 52.

This goes beyond simply prohibiting unconstitutional changes in government. As one commentator has written, “[i]n two ways [the Charter] addresses issues of constitutional fidelity that go beyond unconstitutional changes of government. It attempts to specify the fundamental role of a constitution within a state, requiring AU members to ‘entrench the principle of the supremacy of the constitution in the political organization of the State.’ And it requires that no amendment or revision of a constitution be made except on the basis of ‘consensus,’ and places special emphasis on referenda as the vehicle for amendment.”¹¹⁸ This ensures that the fundamental law of the state is known, and that it can only be changed in accordance with agreed upon terms. The whims of a sitting autocrat are insufficient to effect this change, and if the attempt is made to alter the constitutional scheme of the state, that will provide grounds for suspension or sanctions by the AU against the offender.

Third, both of these preceding observations support the assertion that the AU and its member states are increasingly moving away from a conception of sovereignty that will bar outside intervention in all circumstances.¹¹⁹ For instance, the Charter contemplates an activist role for the Peace and Security Council in not only restoring democratic governance, but also in ceasing any moves towards an unconstitutional change in government. Additionally, the African Commission is granted a significant role in observing and monitoring elections, as well as in determining whether the pre-conditions for a democratic election have been met even prior to the holding of a domestic election. These provisions, and others like them, indicate that the domestic governance of African states is a matter of continent-wide concern, and because of this conception of the importance of governance all African states, including the super-national institutions of the AU, have a real interest with whether democracy prevails in a given member state.

Fourth, in contemplating legal and judicial action against individuals who incite or effectuate an unconstitutional change in government, the Charter moves boldly forward in the area of international criminal law. The Charter specifically envisions the referral to the appropriate AU judicial tribunal, likely the African Court of Justice and Human Rights, of the perpetrators of an unconstitutional change in government. The Charter does not state what the crime would be, or on what charges the individual could be indicted, but there are stirrings in the international justice community of establishing a “crime against democracy” or a “crime of dictatorship.”¹²⁰ By conceiving of infringements of constitutional

¹¹⁸) Schnably, *supra* note 23, at 456–457.

¹¹⁹) See, e.g., Bassett and Straus, *supra* note 39, at 140 (noting the shift of the AU away from the principle of noninterference).

¹²⁰) See P. J. Glen, ‘Towards the Criminalization of Dictatorship: A Draft Proposal for an International Convention on Dictatorship’ (2008) 14(1) *Buffalo Human Rights Law Review* 15–49; Glen, *supra* note 51, at 303–304; see also M. Palmer and P. Glen, ‘The Crime of Dictatorship’ (28 Sept. 2011) *The Washington Post* A15.

governance as crimes or legal violations, the Charter thus lays the groundwork for pursuing autocrats and dictators for the political crimes they commit, not merely the human rights abuses and crimes against humanity that they are well-known for perpetrating.

Fifth, by linking the promotion and consolidation of democracy with the protection of human rights, and by seeking to ground democratic governance in a reformed economic, social and political space, the Charter innovatively advances the thinking on the interrelatedness of these pressing issues. Literature linking democracy with certain levels of development has a chicken-and-the-egg feel – does development lead to democracy, or does democracy contribute to development – but the Charter ignores this question in favor of policies advancing both. This is a practical application of the realization that there is some link between economic development and democracy, and, whatever that link is, both goals may be realized and pursued simultaneously. If democratic governance is realized, development can more easily ensue, and if development is advanced, democratic governance can begin to grow. The Charter also and importantly advances purely social issues, including poverty alleviation, education and literacy, and health care, based on the assumption that democratic governance can only be pursued when certain social conditions prevail. The population must be educated on how democracy works and what rights and obligations they share, they must be well-fed in order to care about political participation rather than simply where the next meal is coming from, and they must not be decimated by disease. These social, cultural, and economic conditions are at the root of the question of good governance, and unless progress is made along those lines, democratic governance cannot be realized on a broad scale.

The Charter's linkage of democracy with human rights has firm roots in the Inter-American Charter,¹²¹ yet it is important for democracy advocates to keep pushing this idea. There is a prevailing view that governance issues and human rights are two distinct problems meant to be addressed separately. Where democracy and governance organizations pour money into institutional fixes, election monitoring, or strengthening civil society groups, human rights groups seek redress on an ad hoc basis of violations of human rights and other fundamental freedoms. Yet democracy and human rights *are* intimately linked, as the Charter recognizes. Democratic countries do, concededly, have their fair share of problems, and no country has an absolutely perfect record on the protection of human rights, but those rights and freedoms that have become sacrosanct in international law are far more fully protected and guaranteed in countries with good governance. It is autocrats and dictators that commit human rights abuses, not democracies, and so by sowing the seeds of good governance and democratic reform the Charter, and other instruments like it, seeks to create an environment

¹²¹) See, Inter-American Charter, Articles 7–10.

where human rights can be more fully enjoyed. Likewise, the progressive enjoyment of human rights, including the freedoms of association and speech, contribute to situations where democratic governance can emerge from within closed societies, a fact to which the Arab Spring clearly testifies. In short, linking human rights with democracy is a necessary shift in thinking and one that will advance the goals of both programs more fully than if each continues to take its own road independent of the other.

Finally, the Charter's focus on traditional political authority is important and demonstrates an ability to synthesize prevailing conceptions of how democracy should work with emerging democratic thinking in parts of the world that share a different social and political heritage. The Charter guarantees all the bedrocks of liberal democratic order, but also encourages states to include other traditions within the finally realized democracy of that state. These could range from tribal councils or networks of families, to socio-juridical institutions, such as the *gacaca* in Rwanda,¹²² the palaver huts of Liberia,¹²³ or the use of *curandeiros* in Mozambique.¹²⁴ This attempt at synthesis exposes the lie that democracy must be a one size fits all proposition, and could represent a framework for how other currently non-democratic states or regions approach the question of democratization. In any event, by placing the democratization process within the specifically African historical and social experience, the Charter increases the likelihood that good governance and inclusive democracy can arise.

5. The Future of Democracy in Africa

The true measure of success is not a pure innovativeness in thinking or the endless proliferation of hortatory statements on democracy, but whether a stated course of action has borne fruit. Has the democracy agenda done that in Africa? The results are mixed. Democracy has made inroads in several countries, and the continent is freer and more democratic one decade into the 21st century than it was at the close of the Cold War, but it is also still a haven of instability and autocracy.

¹²² See E. Daly, 'Between Punitive and Reconstructive Justice: The Gacaca Courts in Rwanda' (2002) 34(2) *N.Y.U. Journal of International Law and Politics* 355–396; M. Goldstein-Bolocan, 'Rwandan Gacaca: An Experiment in Transitional Justice' (2005) 2004(2) *Journal of Dispute Resolution* 355–400; J. Fierens, 'Gacaca Courts: Between Fantasy and Reality' (2005) 3(4) *Journal of International Criminal Justice* 896–919; P. Clark, 'Hybridity, Holism, and "Traditional" Justice: The Case of the Gacaca Courts in Post-Genocide Rwanda' (2007) 39(4) *George Washington International Law Review* 765–838; C. J. Le Mon, 'Rwanda's Troubled Gacaca Courts' (2007) 14(2) *Human Rights Brief* 16–20.

¹²³ See A. E. Gerencser, 'Family Mediation: Screening for Domestic Abuse' (1995) 23(1) *Florida State University Law Review* 43–70 at 48, n. 22.

¹²⁴ See P. Hayner, *Unspeakable Truths: Confronting State Terror and Atrocity* (Routledge, New York, NY, 2001) 192–195; L. Waldorf, 'Mass Justice for Mass Atrocity: Rethinking Local Justice as Transitional Justice' (2006) 79(1) *Temple Law Review* 1–88 at 18.

Writing in 2011, Charles Fombad, a legal scholar at the University of Pretoria, took stock of this mixed heritage

[I]t can be said that the AU democracy agenda is today one of the boldest and most daring initiatives that the leaders of the continent have ever embarked on. The record so far has been neither good nor encouraging. Although the Constitutive Act and the various instruments provide a solid framework for peer pressure to be brought to influence constitutional developments on the continent, the inability of the AU to deal with the situations in Sudan, Somalia, and Zimbabwe raises serious doubts about the agenda's credibility. The AU agenda on democracy and good governance reminds one of the 'proverbial dog that danced on its hind legs, the significance of which lies less in how well it danced and more on the fact that it could dance at all.' The mere recognition by African leaders that democracy and good governance is critical to the continent's recovery and survival is a giant step in the right direction.¹²⁵

Whether the African Charter will represent a tipping point in the evolution of African democratization, past which greater and more significant gains can be realized, will depend on how the Charter is implemented and how specifically it addresses the systemic concerns that have hampered earlier attempts at democracy promotion and consolidation.

The challenges to democratization on the continent have been well-parsed. These include a lack of competent institutions, poverty and illiteracy, corruption, and a political culture of exclusivity. Each challenge poses discrete problems to the goal of democratization.

Institution and capacity building is a primary concern. African states must "develop and strengthen competent institutions of democracy, such as the media, judiciary, civil service, electoral systems, independent commissions, and educational institutions. These and similar institutions implement policies that are necessary to democracy and development."¹²⁶ In many African states these institutions are lacking and, where they do exist, they have become "dysfunctional... largely due to neglect."¹²⁷ Yet without a vibrant civil society, an independent judiciary, independent electoral bodies, and free and uncensored media outlets, democracy and development cannot advance and cannot be consolidated. Electoral monitoring ensures free and fair elections, while independent judiciaries can hold public figures accountable without fears of professional reprisals. An independent and free media must be realized to ensure informed voting, and civil society must be encouraged and nurtured so that democracy does not become simply the purview of a new elite. These and other institutions are indispensable to the enjoyment of a democratic culture, and until they are developed and strengthened democracy in Africa will be only a dream.

¹²⁵ C. M. Fombad, 'Constitutional Reforms and Constitutionalism in Africa: Reflections on Some Current Challenges and Future Prospects' (2011) 59(4) *Buffalo Law Review* 1007–1108 at 1098–1099.

¹²⁶ Udombana, *supra* note 22, at 1271–1272.

¹²⁷ *Ibid.*, at 1272.

Coupled with institution building is the need to eradicate public cultures of corruption. “Corruption is endemic in Africa and is the defining feature of its governance.”¹²⁸ Corruption undermines the independence of public institutions and makes governmental decisions depend not on the equal application of known standards, but on backroom deals made to benefit an already entrenched elite. Governmental decisions must be open, transparent, and made pursuant to scrupulously applied and generally known standards. Democracy requires this form of decision-making, and corruption can only undermine nascent democracies and contribute to a crisis of faith in whether the substance of a decision is based on relevant criteria or an impermissible quid pro quo. Thus, “[t]he democratization of the continent will be a mirage unless the AU wages a concerted crusade against corruption.”¹²⁹

Beneath both of these issues are rampant poverty, illiteracy, and lack of compulsory education. “[P]overty is a great hindrance to democracy and the enjoyment of human rights. Poverty leaves many people susceptible to manipulations by several forces and interests. Democracy will not thrive in instability or under conditions of excruciating and humiliating poverty.”¹³⁰ Beyond the opportunity to manipulate those in need, a lack of education and illiteracy means that citizens cannot meaningfully take part in those democratic processes that do exist. Choice cannot be exercised in a knowing and intelligent manner in circumstances where the populace does not understand or properly conceive of the ends to which the state should be working. This lack of civic education and literacy also leaves the populace open to the harangues of demagogues and the risks of a divisive populism. Most fundamentally, perhaps, is the old canard that nobody cares about democracy on an empty stomach. Until basic human needs have been met, it is an illusory expectation that people will desire to play a meaningful role in governance. Meeting those needs frees the citizens from that cycle of wants that have kept so many Africans outside the sphere of political participation.

The exclusion of broad swaths of African societies from governance is also a factor that impedes the full realization of democracy. Favoritism to tribe or ethnicity, or policies that bar distinct portions of the population from taking part in government, mean that the levers and institutions of government will be insular, self-serving, and undemocratic. Pluralism must replace the policies of exclusion that now prevail in too many African governmental structures:

African states must promote pluralism, protect human rights, and maximize the participation of individuals in decision-making. Democracy can thrive in plural societies where there is social justice, where the government in power seeks to advance the individual and collective well-being of all

¹²⁸) *Ibid.*, at 1281.

¹²⁹) *Ibid.*, at 1282.

¹³⁰) *Ibid.*, at 1277.

citizens. Democracy cannot thrive under exclusivism, where double standards or a 'divide and rule' strategy are instruments of government policy.¹³¹

The African Charter was drafted with all these concerns in mind, and it is well-placed to clear the hurdles posed by these and either traditional stumbling blocks to democratization. Beyond the provisions relating to elections and responses to unconstitutional changes in government, the Charter is overwhelmingly concerned with establishing a political, economic, and social environment in which democratic institutions can take root and grow. Its objectives and obligations mandate building, promoting, and protecting those institutions necessary for a functioning democracy, including an independent judiciary, electoral bodies, and transparent governmental bureaucracies. It links democratic institution building with economic and developmental goals, realizing that progress along one metric will induce progress along the other. It obligates states to create inclusive political environments where all stake-holders will have a place at the democracy table. It also seeks to ground democracy in an improved social condition through the extension of compulsory education, programs to alleviate poverty, hunger, disease, and illiteracy, and the provision of other basic social services. In short, the Charter recognizes the complex nature of democratic society and the comprehensive reforms states must undertake in order to create an environment conducive to democracy. In realizing this, and creating one central Charter with robust enforcement and monitoring mechanisms, the AU and its member states are well-positioned to advance democratic ideals and principles in sectors of the continent that have yet to enjoy these benefits.

Yet at bottom, the innovative and comprehensive nature of the Charter will not guarantee the success of its mission. First, more states must ratify the Charter. Those that have signed but not ratified, should be strongly encouraged by the AU to proceed apace with ratification, and those fifteen states that have yet to sign should be similarly encouraged to begin the process of ascension. The goal of democracy must be shared by all member states of the AU, as instability and autocracy are a disease that cannot help but infect surrounding states. So long as there are pockets of undemocratic states, the process of democratization in states willing to make the transition will be that much more difficult. Second, those states that have ratified the Charter must implement their obligations, and the AU should be vigilant in reviewing the progress reports submitted by states and taking whatever measures are necessary to ensure full compliance. Without implementation, the text and objectives of the Charter will become a dead letter. Finally, the AU and Peace and Security Council, along with other regional actors, must take a more active role in combating unconstitutional changes in government and undemocratic regressions, wherever they occur. The AU-response has been a

¹³¹) *Ibid*, at 1283.

guessing game of roulette, where suspensions and sanctions are applied in some cases but not others, with no clear line demarcating those state-situations where the AU has provided a muscular response and those where it has sat idly by while democracy has been rolled-back. Where democracy and constitutional government is threatened, the AU must begin the processes outlined by the Charter to restore constitutional government, and this must be true in all cases falling within the purview of Articles 24 and 25.

6. Conclusion

Democracy in Africa has come a long way since the end of the Cold War. The institutions of the AU have made democratization and the protection of democracy a priority, and the African Charter on Democracy, Elections and Governance is only the latest chapter in this unfolding narrative. Success has not, as yet, matched this commitment. Whether in the lawless reaches of central Africa or in the still existing autocracies and dictatorships on the continent, democracy is still only a vague dream for the large majority of Africa's population.

The comprehensive and holistic approach taken by the Charter is aimed at clearing those hurdles that have heretofore held back efforts to democratize Africa. Continent-wide ratification of the Charter, full implementation of the obligations contained therein, and an even-handed and consistent approach to situations posing a threat to democracy will go a long way in realizing the objectives embodied by the African Charter. The dream of democracy has long been a priority of the AU, and the Charter is its best attempt yet at crafting a framework that could culminate in the realization of that dream. Yet only time will tell whether the Charter will become simply one more document in a string of ineffectual pronouncements, or whether it will mark a true turning point in the democratization of Africa.