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PERMANENT FORUM OF ARAB-AFRICAN DIALOGUE ON DEMOCRACY AND HUMAN RIGHTS



THE AFRICAN CHARTER ON DEMOCRACY, ELECTIONS AND GOVERNANCE: THE ROLE OF NATIONAL HUMAN RIGHTS INSTITUTIONS

Cairo, Egypt



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Abstract

After a brief analysis of the scope and structure of the African Charter on Democracy, Elections and Governance, this brochure recalls the mandate of an independent national institution for the promotion and protection of human rights, which abides by the Paris Principles. One section analyses the potential role such an institution can play in the implementation of the Charter, as it naturally has an important function in promoting the respect of its clauses, and mainly in stimulating the signature and the ratification process, the possible transposition of the Charter's relevant clauses into domestic law, or in observing the functioning of mechanisms set by the Charter. Lastly, an analytical table provides an overview of the different chapters of the mechanism as well as an Action Plan for National Human Rights Institutions (NHRIs) for the implementation of the provisions of each of these chapters.

INTRODUCTION

The Permanent Forum of Arab-African Dialogue on Democracy and Human Rights, launched in 2008 by UNESCO and the Egyptian National Council for Human Rights, is a platform for permanent dialogue for civil societies, parliamentarians, relevant State actors, regional organizations, as well as specialized UN agencies, to review, exchange on and rethink the conditions of democracy and human rights in Africa and in the Arab world.

The enclosed Action Plan for the implementation of the African Charter on Democracy, Elections and Governance was adopted at the Forum's annual meeting of December 2009 in Cairo, Egypt, which was organized with the support of the International Organisation of La Francophonie and the League of Arab States.

The present brochure was elaborated on the basis of contributions by the African Union Commission as well as by the National Human Rights Institutions (NHRIs) from the following countries: Algeria, Burkina Faso, Cameroon, Chad, Kenya, Malawi, Mauritania, Mauritius, Niger, Togo, Tunisia, United Republic of Tanzania and Zambia. The initial summary of the contributions was produced by Michel Forst, Secretary-General of the French National Commission on Human Rights. The brochure is also based on discussions during the 2007 International Conference on 'Democracy and Human Rights in Africa: Role of Human Rights Institutions', and the 2009 meeting of the Forum, both of which took place in Cairo.



THE AFRICAN CHARTER ON DEMOCRACY, ELECTIONS AND GOVERNANCE

The African Charter on Democracy, Elections and Governance (the Charter) was adopted on 30 January 2007 during the 8th ordinary session of the Assembly of the African Union. It aims to reinforce the commitment of the States Parties of the African Union towards the protection of democracy and the rule of law, as well as human rights.

The Charter takes its inspiration and roots from several UN resolutions, as well as in a number of Declarations and Decisions of the Organization of African Unity (OAU) / African Union (AU):

- Since the beginning of the 1990s, several UN resolutions called on Member States to establish and reinforce the promotion and consolidation of democracy.
- The 1990 Declaration on the Political and Socio-Economic Situation in Africa and the Fundamental Changes Taking Place in the World.¹
- The 1995 Cairo Agenda for Action for Relaunching Africa's Economic and Social Development.²
- The 1999 Algiers Decision on Unconstitutional Changes of Government in Africa.³
- The 2000 Lomé Declaration on the Framework for an OAU Response to Unconstitutional Changes of Government.⁴

1 Available on the following web page: http://www.chr.up.ac.za/hr_docs/african/docs/ahsg/ahsg33.doc [Accessed: 13 April 2010]

2 Available on the following web page: http://www.chr.up.ac.za/hr_docs/african/docs/ahsg/ahsg40.doc [Accessed: 13 April 2010]

3 Available on the following web page: http://www.africa-union.org/Special_Programs/CSSDCA/cssdca-solemndeclaration.pdf [Accessed: 13 April 2010]

4 Available on the following web page: http://www.chr.up.ac.za/hr_docs/african/docs/ahsg/ahsg32.doc [Accessed: 13 April 2010]

- The 2002 OAU/AU Declaration on the Principles Governing Democratic Elections in Africa.⁵
- The 2003 Protocol Relating to the Establishment of the Peace and Security Council of the African Union.⁶

In adopting the African Charter on Democracy, Elections and Governance, the African Union sought to consolidate all past commitments made within the ambits of the declarations and decisions relating to democracy and governance. A careful reading of the Charter reflects that it firmly and unequivocally seeks to establish a political culture of change, based on the holding of regular, free, fair, and transparent elections conducted by competent, independent, and impartial national electoral bodies.

In establishing shared values on democracy and governance, the Charter is significant to the established African Peer Review Mechanism (APRM) process and is seen as a complementary instrument. The Charter goes beyond the confines of 'peer review and support' by embodying within it the ability for the Peace and Security Council of the African Union to act positively when there are deep lapses in governance, as may be reflected in, for example, an unconstitutional change of government. The Charter also provides positive incentives and empowers the Electoral Assistance Fund to support efforts at improving the conduct of elections in Member States.

This Charter, which requires ratification by 15 States to become effective⁷, is one of the rare instruments in international law that establishes democracy and people's participation as individual fundamental rights. This Charter "...not only is important but also opportune, allowing indeed the African Union to carry on more rigorously its continental project in the field of democracy, participative development and peace."⁸

5 Available on the following web page: <http://www.pogar.org/publications/other/elections/declaration-africa-02.pdf> [Accessed: 13 April 2010]

6 Available on the following web page: http://www.africa-union.org/rule_prot/PROTOCOL-%20PEACE%20AND%20SECURITY%20COUNCIL%20OF%20THE%20AFRICAN%20UNION.pdf [Accessed: 13 April 2010]

7 To this day, the Charter has been signed by 35 countries and ratified by 3. For the current state of signatures and ratifications: http://www.africa-union.org/root/au/Documents/Treaties/list/Charter_on_Democracy_and_Governance.pdf [Accessed: 13 April 2010]

8 Ministerial Meeting of the African Union [6–7 April 2006]. http://www.africa-union.org/root/au/conferences/past/2006/april/pa/apr7/meeting_fr.htm (Only in French) [Accessed: 15 April 2010]

Implementation takes place successively at national, regional, and continental levels with, at each level, an actor identified as a focal point in charge of particular responsibilities: the State at national level, the regional economic communities at sub-regional level, and the African Union at the level of the entire African continent.

The Charter emphasizes that it is foremost the States themselves with the duty to apply its stated objectives by making efforts to guarantee the conformity of their legislations with the Charter, by translating the Charter's relevant clauses into domestic law, by ensuring the dissemination of the Charter at national level, and by integrating the objectives and principles stated in the Charter into national policies and strategies.

As regards regional economic communities, they are requested to encourage States to become Parties to the Charter, and they shall, "designate focal points for coordination, evaluation and monitoring of the implementation of the commitments and principles enshrined in this Charter" (Article 44).

The African Union Commission is at the core of the system of safeguard as it, "shall develop benchmarks for implementation of the commitments and principles of this Charter and evaluate compliance by State Parties" (Article 44). The Commission is also the authorized instance to receive reports that States Parties submit every two years concerning, "the legislative or other relevant measures taken with a view to giving effect to the principles and commitments of the Charter" (Article 49).

As part of the process of popularizing the Charter and its contents, the African Union Commission has convened a number of meetings with States Parties and civil society organizations. Collectively these meetings served to widen ownership over the Charter and re-establish the strategic role of all State and non-state institutions for the Charter. Through its own processes, the Commission encouraged the establishment of wider and more far reaching initiatives for promoting the Charter and facilitating its entry into force.

Given the importance of the Charter, the African Commission on Human and Peoples' Rights is considering the possibility of including the Charter as a standing agenda item in all of its sessions. It is anticipated that its inclusion as an agenda item would serve to further facilitate the process of Member State ratification of this document.

The Charter is very significant to both NHRIs and the implementation of the Paris Principles, as Article 15 of the Charter provides that “State Parties shall establish public institutions that promote and support democracy and constitutional order.” It further provides that such institutions’ autonomy should be guaranteed by the Constitution and should be provided with resources to perform their work.



NATIONAL HUMAN RIGHTS INSTITUTIONS (NHRIs)

In 1992, the UN Commission on Human Rights approved a set of principles that have been internationally acknowledged and concern the status, powers, and functioning of national institutions for human rights. These principles are known as the Paris Principles, and were recognized by the UN General Assembly in 1993.⁹ They lay out the fundamental axes recommended by the UN for the creation of a national institution for human rights. The UN defines the latter as a governmental instance created on the basis of a legal or constitutional text whose functions aim specifically at promoting and protecting human rights.

The UN generally classifies national human rights institutions in three categories: commissions for human rights, ombudsmen, and specialized national institutions aimed at protecting the rights of particularly vulnerable groups such as ethnic minorities, indigenous peoples, refugees, women and children. The Paris Principles underscore essential characteristics necessary to maintain the independence of these institutions and include: a legal or constitutional founding text, a mandate that is as wide as possible, independent nomination procedures, the duration of the mandate (which must be stated in an official act), a pluralist and representative composition, a regular and effective functioning, independence regarding the executive power, and sufficient funding.

While recommending methods of operation, the Paris Principles call on governments to create institutions that could freely examine all issues related to human rights whether on their own initiative, on the government's proposition, or upon the demand of "any petitioner". In particular, it has been foreseen that these institutions could:

- promote harmonization of national laws and practices in accordance with international human rights norms, in particular through the ratification of international treaties on human rights;

9 The Paris Principles were defined at the first International Workshop on National Institutions for the Promotion and Protection of Human Rights on 7–9 October 1991 in Paris, and adopted by the United Nations Commission on Human Rights Resolution 1992/54 of 1992 and General Assembly Resolution 48/134 of 1993. Available on the following web page: <http://www2.ohchr.org/english/law/parisprinciples.htm> [Accessed: 13 April 2010]

- provide governments with reports and recommendations concerning human rights issues (including recommendations concerning the adoption or modification of national legislation and reports concerning cases of human rights violations);
- cooperate with national, regional and UN human rights organisms, by contributing, among other tasks, to the country's reports that would be presented to instances and supervising committees of UN treaties; and
- contribute to programmes of human rights education.

Above all, human rights commissions are authorized to make public declarations concerning their work, directly or through the press. The Paris Principles call on human rights commissions to cooperate and maintain consultation with other bodies responsible for the promotion and protection of human rights, and they particularly underscore the importance of effectively collaborating with NGOs devoted to protecting and promoting human rights, trade unions, concerned socio-professional organizations, eminent scientists, philosophers, religious leaders, academics and qualified experts, parliaments, as well as other administrations (only for consultation). Based on the Paris Principles, functions assigned to a human rights commission should include the capacity to find amicable settlement through "conciliation", "binding decisions" or, "where necessary, on the basis of confidentiality", and to make recommendations on human rights related issues to the competent authorities, especially by proposing amendments or reforms of laws and practices.

In this regard, NHRIs have an important role to play in promoting the respect of the Charter's clauses and mainly in stimulating the signature and the ratification process as well as the possible transposition of the Charter's relevant clauses into domestic law, or in observing the functioning of mechanisms set by the Charter.

THE ROLE OF NHRIs IN THE IMPLEMENTATION OF THE CHARTER

In accordance with the commitments taken up by States in the Paris Principles, national institutions do have an important global and specific role to play with regard to international human rights instruments at both universal and regional levels. It is for this reason that NHRIs, with regard to the Charter, have to focus on the different clauses of the Charter, and must orient their work in three directions:

- (1) Lobbying for ratification: Up to now, only a few States have signed and ratified the Charter, yet ratification by 15 States is necessary for the Charter to become effective. The first task for NHRIs is therefore to lobby for ratification at the national level.
- (2) From the Charter to national legislation: The second task of NHRIs with regard to international human rights instruments is that they operate at a strictly national level consisting of incorporating relevant clauses of the Charter into national law. In this regard, NHRIs have to carry out important tasks, which involve the dissemination of information and sensitization of NGOs and civil society, members of parliament, lawyers and magistrates, political parties and other actors at the national level.
- (3) Monitoring/reporting: In accordance with the Paris Principles, the function of the NHRIs is to vigilantly supervise States Parties' implementation of international commitments. Furthermore, they have a duty to publish an annual report on the human rights situation in their respective countries, with mention of relevant observations and possible State failure in implementing these obligations. These reports, which would be regularly sent to intergovernmental organizations, also serve as a means to ensure that States Parties respect their commitments.

AN ACTION PLAN FOR NHRIs FOR THE IMPLEMENTATION OF THE CHARTER

Chapter of the Charter	Content of the Charter	Possible role of the NHRI
Chapter 1: Definitions	Explanation of terms used in the text	
Chapter 2: Objectives	<p>Several objectives have been proclaimed:</p> <ul style="list-style-type: none"> • Promoting the rule of law • Ensuring free and transparent elections • Condamning and sanctioning any unconstitutional change of government • Ensuring judicial independence • Promoting good governance: culture of democracy, political pluralism... • Reinforcing regional and continental integration • Promoting people's participation • Promoting equity men/women. 	<ul style="list-style-type: none"> • To insert a chapter on the implementation of the Charter into the NHRI's work plan with a view of helping States Parties to reach these objectives • To ensure regional meetings insert this point into their agenda • To ensure that the Charter remains a standing agenda item of the African Commission on Human and Peoples' Rights • To ensure that secretariats of African regional NHRI groups have a database of information and good practices.

Chapter of the Charter	Content of the Charter	Possible role of the NHRI
Chapter 3: Principles	<p>Several principles have been proclaimed:</p> <ul style="list-style-type: none"> • Human rights • Rule of law • Democratic principles • Good governance. 	<ul style="list-style-type: none"> • To insert these principles into the internal rules of NHRIs so that they ensure these are respected in their country • To insert these principles into the founding texts of African regional NHRI groups • To ensure that a link is always established between democratic principles and individual rights.
Chapter 4: On democracy, rule of law and human rights	<ul style="list-style-type: none"> • Article 4¹⁰: Democracy and rule of law are established as being one of the fundamental rights • Respect for constitutional order and constitutional transfer of power • Elimination of forms of discrimination • Struggle against impunity • Article 10¹¹: Supremacy of the Constitution, amendment or revision of the constitution based on the people's will, the principle of equality of all before the law. 	<ul style="list-style-type: none"> • To provide expertise for the drafting of texts of Constitutions, so that the latter could guarantee fundamental principles which are universally, regionally and nationally acknowledged • To highlight possible contradictions to States Parties between national laws and the provisions of the Charter • To assist the government to abide by these principles

10 Article 4 of the Charter: "1. State Parties shall commit themselves to promote democracy, the principle of the rule of law and human rights. 2. State Parties shall recognize popular participation through universal suffrage as the inalienable right of the people."

11 Article 10 of the Charter: "1. State Parties shall entrench the principle of the supremacy of the Constitution in the political organization of the State. 2. State Parties shall ensure that the process of amendment or revision of their Constitution reposes on national consensus, obtained if need be, through referendum. 3. State Parties shall protect the right to equality before the law and equal protection by the law as a fundamental precondition for a just and democratic society."

Chapter of the Charter	Content of the Charter	Possible role of the NHRI
		<ul style="list-style-type: none"> • To ensure that there is transposition of international instruments into internal order • To ensure regional coordination in the struggle against forms of discrimination • To publish an annual report concerning human rights, taking stock of the recommendations of international instances • To guarantee democratic values, and to use the faculty of giving opinion, recommendations, propositions, or reports on points of the agenda, which are an infringement on human rights.
Chapter 5: On the culture of democracy and peace	<ul style="list-style-type: none"> • Strengthening the legal framework that reinforces culture, democracy and peace • Promoting transparency of the administration, reinforcement of political institutions, legal conditions favourable to a healthy civil society, civic education in school programmes • Establishing a political and social dialogue. 	<ul style="list-style-type: none"> • To encourage States Parties to ensure and maintain political and social dialogue on an ongoing basis • To facilitate the transparency of the administration through powers assigned to the NHRI, such as the power to give opinions, recommendations, reports • To involve NGOs in the work of the NHRI

Chapter of the Charter	Content of the Charter	Possible role of the NHRI
		<ul style="list-style-type: none"> • To participate to the elaboration and monitoring of the World Plan of Action on Education for Human Rights and Democracy • To ensure topics on human rights education are included in school programmes • To ensure human rights education programmes also include topics on international humanitarian law • To make the Charter accessible by facilitating its translation into local languages.
Chapter 6: On democratic institutions	<ul style="list-style-type: none"> • Strengthening constitutional civilian control over the armed and security forces • Taking individual sanction against all individuals attempting to overthrow a democratically elected regime by unconstitutional means; cooperation of the justice in that matter • Creating independent and autonomous institutions that support the promotion of democracy and constitutional order • Ensuring States' cooperation for the consolidation of democracy. 	<ul style="list-style-type: none"> • To ensure conformity of the NHRI with regard to the Paris Principles • To conform the NHRI to the requirements of the International Coordinating Committee of NHRIs • To ensure relevant clauses of international engagements are transposed and incorporated into the penal code • To ensure equitable trials and procedures of appeal in accordance with international law are guaranteed • To fully exert the NHRI's observer status in regional, inter-regional, and international meetings.

Chapter of the Charter	Content of the Charter	Possible role of the NHRI
Chapter 7: On democratic elections	<ul style="list-style-type: none"> • States' commitment to regularly hold transparent, free and fair elections • Establishing and strengthening independent and impartial national electoral bodies responsible for the management of elections • Establishing and strengthening national mechanisms that redress election related disputes. • Ensuring fair and equitable access to the media by the different legally recognised political parties, governments, and other actors of the political scene, through a code of conduct • A system of assistance set up by the African Union Commission • Electoral observer mission: each State Party shall guarantee conditions of security, free access to information, freedom of movement and non-interference in the mission's activities 	<ul style="list-style-type: none"> • To provide government with expertise concerning the conditions for holding transparent, fair and free elections • To provide assistance with the creation and development of national electoral institutions • To assist the electoral observer mission during the preparatory period of or during elections • To assist the follow-up of the electoral observer mission's recommendations • To assist electoral bodies in developing binding codes of conduct on pre- and post electoral processes.

Chapter of the Charter	Content of the Charter	Possible role of the NHRI
	<ul style="list-style-type: none"> An exploratory mission shall be sent during the period prior to elections. This mission shall obtain any useful information and documentation on whether the necessary conditions have been established, and if the environment is conducive to the holding of transparent, free and fair elections. The mission shall be realized within a reasonable time. 	
Chapter 8: On sanctions in cases of unconstitutional changes of government	<ul style="list-style-type: none"> Condemning unconstitutional change of democratically elected government (putsch, coup d'état, intervention by mercenaries, by armed dissidents or rebels) Condemning any refusal by an incumbent government to relinquish power to the winning party or candidate after free, fair and regular elections Condemning any amendment or revision of the Constitution or legal instruments that is an infringement on the principles of democratic change of government The Peace and Security Council shall exercise its responsibilities in order to maintain the constitutional order in accordance with relevant provisions of its Protocol. 	<ul style="list-style-type: none"> To condemn any unconstitutional change of government as a contravention of human rights To guarantee the good application of democratic values and, more particularly, the principle of democratic change of government under conditions that respect the Constitution To guarantee the respect of human rights, and international humanitarian rights in situations of conflict or internal disturbance.

Chapter of the Charter	Content of the Charter	Possible role of the NHRI
<p>Chapter 9: On political, economic and social governance</p>	<ul style="list-style-type: none"> • Strengthening the capacity of national parliaments • Fostering popular participation • Undertaking regular reforms of the legal and justice systems • Promoting the development of the private sector through dialogue between the government, civil society and the private sector • Promoting freedom of expression, in particular, freedom of the press, and fostering professional media • Preventing the spread of disease and combating their impact • Creating favourable conditions to promote women's role and participation in political life • Promoting citizens' full participation to development processes • Protecting social groups with special needs • Ensuring good political, economic and corporate governance • Promoting decentralization in favour of local authorities • Protecting the environment, improving access to basic social services, ensuring education and literacy. 	<ul style="list-style-type: none"> • To provide the government with expertise concerning the functioning of institutions • To provide the national parliament's relevant commissions with accurate reports and studies • To observe the functioning of tribunals and to ensure that procedures of appeal are respected • To ensure the dissemination of information about international procedures of appeal and the dissemination of acts adopted by international justice institutions (African Court, International Court of Justice...) • To organize dialogue between different relevant instances in the field of human rights protection and promotion, as well as between the different actors involved in the implementation of measures adopted for the application of the Charter • To develop tools to facilitate dissemination of human rights standards and human rights training and education for citizens and civil society actors • To ensure that local actors receive appropriate training about good governance and the fight against corruption.

Chapter of the Charter	Content of the Charter	Possible role of the NHRI
Chapter 10: On mechanisms for application	<p>1. <u>Individual State Party level</u>: Undertaking all appropriate actions (legislative, executive, administrative), and appropriate and necessary measures for a larger dissemination of the Charter</p> <p>2. <u>Commission level</u>: At continental level:</p> <ul style="list-style-type: none"> • Fostering the implementation of measures adopted by the Charter • Facilitating the harmonization of policies and laws of States Parties in the African continent • Ensuring that States Parties are provided with the needed assistance and resources for the support of electoral processes <p>At regional level:</p> <ul style="list-style-type: none"> • Encouraging Member States to ratify or adhere to the Charter • Designating focal points for coordination, evaluation and monitoring of the implementation of the commitments. 	<ul style="list-style-type: none"> • To encourage Member States to ratify or adhere to this Charter, through adoption of necessary legislative, administrative and judiciary measures • To ensure a possible transposition of relevant clauses of the Charter into domestic law • To develop cooperation between existing NHRIs in the African continent in order to allow a better dissemination of the measures adopted in different States and the development of methods and common criteria of evaluation • To designate focal points • To engage with the African Union Commission on the development of benchmarks for the implementation of the commitments and principles of the Charter.

Chapter of the Charter	Content of the Charter	Possible role of the NHRI
Chapter 11: Final clauses	<ul style="list-style-type: none"> • The Charter shall enter into force thirty days following the deposit of fifteen Instruments of Ratification • States Parties shall submit every two years a report to the Commission on the legislative or other relevant measures taken with a view to giving effect to the principles and commitments of the Charter • Any State Party may submit proposals for the amendment or revision of this Charter, adoption by two-thirds majority • Article 52: None of the provisions of the present Charter shall affect more favourable provisions relating to democracy, elections and governance contained in the national legislation of States Parties. 	<ul style="list-style-type: none"> • To encourage ratification of this instrument by all States Parties that have still not done so • To assist the drafting of annual reports concerning the efficiency and the implementation of commitments taken by the States Parties relative to the Charter • To evaluate, within the African NHRI network, the efficiency of the ratification process by the States Parties concerned • To evaluate, within the African NHRI network, the efficiency of the functioning of procedures of control envisaged by the Charter.

CONCLUSION

Democracy and the rule of law, fair elections, and ethical governance are indispensable for the protection of human rights in Africa; human rights are crucial for the empowerment of people, positive social transformations, and sustainable development on the continent. All actors concerned with the betterment of Africa should therefore involve themselves in making the Charter a reality. In this undertaking, NHRIs are on the frontline. This work should therefore be central to their mission. The Permanent Forum of Arab-African Dialogue on Democracy and Human Rights calls upon the NHRIs to report regularly to the Executive Secretariat of the Forum on the implementation of their Action Plans relative to the Charter.



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