

## **THE AFRICAN CHARTER ON DEMOCRACY, ELECTIONS AND GOVERNANCE: A POSITIVE STEP ON A LONG PATH**

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### **Introduction**

The African Charter on Democracy, Elections and Governance (ACDEG) was adopted by the 8<sup>th</sup> Ordinary Session of the African Union (AU) Assembly, held in Addis Ababa on January 30, 2007. The document must be ratified by 15 states before it actually enters into effect. It was developed as part of the African Union's stated emphasis on promoting democracy and good governance in member states.<sup>1</sup> In a more historical sense, it also draws reference from the 1981 African Charter on Human and People's Rights.<sup>2</sup> As such, it has the potential to serve as a guide and reference point for sustained and ongoing political reform on the continent. Care must be taken however, to ensure effective implementation of the Charter's language. Otherwise, the AU and member states could avoid exercising the needed political will for this Charter to become a meaningful and respected document.

This paper, which provides an independent perspective on the ACDEG, is divided into 2 parts. It first provides several general observations on the Charter, especially the key Chapters 7 and 8, which address democracy definition and enforcement issues, as well as elections. Second, in order to provide perspective on the merits of the draft Charter, this paper presents some observations comparing it and a peer document prepared for the Organization of American States (OAS), the Inter-American Democratic Charter (IADC).<sup>3</sup> This document was issued at Lima, Peru on September 11, 2001. In recent decades the OAS has devoted considerable attention to the question of how it can help promote democratic governance in member states. Its policies in this regard have evolved considerably, especially as the number of democracies in the OAS has increased over the past three decades. As such, it can be instructive to the African Union, which could be said to be at an earlier stage of a potentially similar trajectory.<sup>4</sup>

### **General observations**

There are some positive and some negative elements to the ACDEG. That such a document exists represents in and of itself forward progress. It keeps focus and attention on democratization, a process that by definition is universally long-term in nature throughout the world; this certainly includes Africa. The Charter contains many clauses that are very good and require little comment; they urge member states to take a wide range of measures to promote democracy in member states. For these the important issue is that they be enforced and respected in their spirit as well as fact. This paper, however, focuses primarily on Chapters 7 and 8 containing Articles 17-26 of the Charter. These chapters constitute the core

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<sup>1</sup> This falls within the general category of NEPAD-related initiatives, including the African Peer Review Mechanism (APRM).

<sup>2</sup> The full ACHPR charter is available at <http://www.hrcr.org/docs/Banjul/afhr7.html>.

<sup>3</sup> The full IADC text is available at [http://www.oas.org/charter/docs/resolution1\\_en\\_p4.htm](http://www.oas.org/charter/docs/resolution1_en_p4.htm).

<sup>4</sup> For a detailed discussion of regional organization policies regarding democratic development in member states see *Piecing a Democratic Quilt: Universal Norms and Regional Organizations* by this author and Scott Baker. Bloomfield: Kumerian Press, 2006.

of the document in that they deal specifically with elections and threats to democracy and the constitutional order, and what can be done to deter or reverse such actions.

Article 17 states that State Parties should “establish and strengthen independent and impartial national election bodies”. There is a potential contradiction in the notion that a government has the responsibility to “establish” an “independent” electoral body. It is important to emphasize the autonomous and self-managing nature of these bodies. It would be also helpful for such bodies to be permanent, rather than ad hoc in character.

Article 18 states that The Commission may, “in consultation” with the State Party concerned, send special advisory missions to strengthen election processes. This language was strengthened in comparison with the draft version of the Charter, which stated “with the consent” of the State party. Also, the final version emphasizes the importance of pre-election assessment missions; language that was not in the draft.

Article 19 establishes a requirement that State Parties invite the Commission to send electoral observer missions. Article 20 usefully emphasizes the importance of pre-election observation missions, a key point given that the conditions under which the legitimacy of elections is determined do not relate simply to the immediate period around election day; they are often set in advance of this period, and continue through the dispute resolution process subsequent to elections.<sup>5</sup> Nothing is said, however, about how long such missions should be in country. The possibility therefore exists of such missions being superficial in nature, as has occurred in the past.

Article 22 raises a concern. It commits State Parties to creating a “conducive environment” to “independent and impartial” domestic NGO monitoring, which in and of itself is positive. This presumably leaves it to the member state government, however, to determine the independence and impartiality of the monitoring effort. If, in the host government’s view, this is seen as lacking the draft charter’s wording permits the government to forbid the functioning of host country NGO observation efforts. Such a decision could potentially be based solely on a government’s own subjective, and potentially biased, interpretation of NGO impartiality. To help ensure uniformity and adherence to commonly accepted criteria it would be useful to emphasize existing internationally accepted norms regarding the functioning of domestic NGO monitoring efforts.<sup>6</sup>

Article 23 is critically important in that it specifies that “illegal means of accessing or maintaining power constitute an unconstitutional change of government”. It further defines what is meant by such “illegal means”. This article is clearly based on African experiences and realities, although they have not all been played out in the context of unseating democratically elected governments. The history of military coups in Africa needs little elaboration here. The fear or reality of mercenaries overthrowing governments has a long

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<sup>5</sup> An excellent book on this topic is *Beyond Free and Fair: Monitoring Elections and Building Democracy* by Eric C. Bjornlund. Washington, DC: Woodrow Wilson Center Press, and Baltimore, MD: The Johns Hopkins University Press, 2004.

<sup>6</sup> Perhaps the most relevant and recent documents in the regard are the 2005 “Declaration of Principles for International Election Observers” and the related “Code of Conduct for International Election Observation” issued by the United Nations and endorsed by 25 leading NGO election monitoring groups. Also important in the regional context are the Southern African Development Community (SADC) “Principles and Guidelines Governing Democratic Elections”.

track record in the Congo, Sao Tomé, Comoros and Benin, to cite a few examples. Similarly, there are many examples of governments being overthrown by armed rebels. Indeed, a number of current governments have come to power in these ways. It should be noted here that this article is not retroactive. Similarly, there is a long history of elections lacking legitimacy being accepted by the OAU and the AU, notwithstanding the 2000 Declaration on Unconstitutional Changes of Government and advocacy efforts by NGOs and other actors.

Specifically, Article 23 defines “illegal means” to include a) military coups; b) intervention by mercenaries to replace a democratically elected government; c) the replacement of a democratically elected government by armed rebels and dissidents; and d) the refusal of an incumbent to surrender power after a free, fair and regular election.

Article 23 also includes an additional definition of unconstitutional changes of government i.e. “any amendment or revision of the constitution or legal instruments, which is an infringement on the principles of democratic change of government”. This could be interpreted more broadly than the draft language, which only referred specifically to changes designed to “prolong the tenure of office for the incumbent”.

Some might argue that by broadening this provision, it was in effect being watered down (the draft provision had clearly targeted attempts to lift term limitations). However, it can definitely also be interpreted as a step ahead as it would appear to cover possible scenarios of what has come to be known as “democratic backsliding”.<sup>7</sup> While not as blatant as military coups, this refers to actions which have the effect of chipping away at democratic freedoms, with the cumulative effect of maintaining government in power illegitimately. To cite just a few, these can include limitations on freedom of speech, provisions designed to sideline potential opposition candidates and/or parties, or limitations on the legislature to act as a meaningful check or balance on the executive branch. They can include situations in which a democratically elected government which is engaging in these anti-democratic actions.

Article 25 explains steps to be taken when a determination is made by the AU’s Peace and Security Council that there has been an unconstitutional change of government. This would appear, according to the definition of unconstitutional changes of government in Article 23, to include actions cited above by a sitting, democratically elected government that limit the possibility of alternance in power.

In such situations, according the ACDEG, the offending government would be suspended from its activities in the AU. The AU would have authorization to impose sanctions on the perpetrators of the unconstitutional measures and member states that support them. The types of sanctions are not specified. Thus, the charter is ambiguous, purposely or not, on the details of how to deal with challenges to democratic governance.

### **Comparing the ACDEG with the IADC**

Although it clearly has been drafted in response to African context and realities, the ACDEG appears to have drawn inspiration from the IADC, in much the same way as the 2000 Declaration on the Framework for an Organization of African Unity (OAU) Response to

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<sup>7</sup> This concept is closely related to the “illiberal democracy” phenomenon first articulated by Fareed Zakaria in “The Rise of Illiberal Democracy”, published in the November/December 1997 issue of *Foreign Affairs*.

Unconstitutional Changes of Government reflected a similar OAS provision. In fact, Malian President Alpha Oumar Konaré, at the time also President of the Organization of African Unity, attended the “Emerging Democracies Forum” in Sana’a, Yemen in June of 1999. He there learned about the OAS provision on suspending governments which came to power through undemocratic means. He then asked his embassy in Washington D.C. to procure the exact language of the document from the OAS headquarters, from which he then drew in proposing the relevant OAU language.<sup>8</sup>

While the ACDEG contains twice as many individual Articles as the IADC, the substantive structure of both documents is very similar. Each document contains chapters under the general headings of human rights, elections/electoral observation, democratic institutions, and democracy and development. Both documents emphasize that democracy is a basic human right and emphasize the representative nature of democracy, as opposed to a more populist or plebiscitary definition.

Some of the language is very similar i.e. election observation missions must present findings in a “timely” manner and both organizations officially commit themselves to undertaking diplomatic initiatives to restore democracy in backsliding member states. In that regard, both documents expand their organization’s commitment to rein in anti-democratic leaders and what circumstances would warrant action. The last clause on the ACDEG’s Article 23 is similar to that in the IADC which states that the “unconstitutional alteration of the constitutional regime that seriously impairs the democratic order in a member state constitutes an insurmountable obstacle to government participation in OAS.” This scenario includes what is referred to in Latin America as an “autogolpe”, or self-coup.<sup>9</sup>

Article 17 of the IADC stipulates that a member state government can request assistance from the Secretary General or Permanent Council when it feels its democracy to be at risk. This scenario is not clearly spelled out in the ACDEG. OAS missions can visit countries “when situations arise in a member state that may effect the development of its democratic political institutional process or the legitimate exercise of power”. This is similar to Article 18 of the ACDEG, although the later could be interpreted more narrowly as it refers to missions being undertaken in the context of “strengthening and developing electoral institutions and processes”.

Article 20 of the IADC permits any member state or the Secretary General to convoke the Permanent Council in the wake of an “unconstitutional alteration of the constitutional regime that seriously impairs the democratic order in a member state.” The Permanent Council may authorize measures to foster the restoration of democracy. If they are unsuccessful the Permanent Council may convene a special session of the General Assembly which can, according to Article 21, suspend the offending member state from the exercise of its right to participate in the OAS by a two-thirds vote.

By contrast, as noted above, Articles 24-26 of the ACDEG address issues of sanctions and suspension of member states in which there has been an unconstitutional change of government. Article 24 assigns to the AU’s Peace and Security Commission action

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<sup>8</sup> See *Piecing a Democratic Quilt*, op cit, p. 134.

<sup>9</sup> Prototypical examples of this were the eventually unsuccessful actions taken in the 1990s by then-President Alberto Fujimori of Peru to undermine democratic institutions in Peru and perpetuate himself in power.

responsibility for redressing the situation. Article 25 gives the Peace and Security Commission the power to suspend a member state government “from its right to participate in the activities of the Union”.

In one crucial sense the IADC went much further than previous OAS documents. It provides that if any member country’s government, even one that is democratically elected, attempts to subvert the democratic process and institutions in that country, then the OAS has the right to take action to ensure that democratic principles are restored and followed, as well as to suspend the country’s right to vote in the OAS.

It is challenging to assess the effectiveness of the IADC because it is dissuasive in nature, and proving the negative – that something didn’t happen – is always more difficult than the opposite. Despite this, in 2005-6 the OAS acted effectively through the IADC framework to address challenges to democracy through the facilitation of dialogue in Nicaragua, Bolivia and Ecuador. By way of contrast, the OAS has been challenged in its recent efforts promote democratic development in Venezuela and Haiti. The IADC’s future utility will depend in large part on the OAS’ willingness to invoke it in situations where democracy is under threat.

## **Conclusion**

The similarities in the two documents suggest that the drafters of the AU Charter have taken inspiration from the IADC document. This south-south cross-regional adoption and adaptation of institutional knowledge is a positive step, but obviously the crucial test of the effectiveness of the ACDEG will be whether the member states and the AU will display the political courage and backbone necessary to actually enforce the Charter. On this point there are grounds for skepticism. There is a higher percentage of member state governments of questionable democratic credentials in the AU. The more democratic member states that exist, the more the organization as a whole has a vested interest in strengthening democracy promotion mechanisms; the converse is also true.

In addition, as evidenced in the APRM structure and function and actual cases such as Zimbabwe, the overall AU approach towards democracy promotion appears to be more oriented toward the carrot rather than the stick. Some critics would suggest that this demonstrates a fundamental lack of political will to address challenges to democratic development head on. An alternative interpretation would emphasize the legitimacy of a more gradualist approach based on African traditions of consensus and compromise rather than more “western” notions of rapid progress based on conflict and a merely zero-sum winner-loser exercise of democracy. The problem with the latter approach, of course, is that it can take a long time before it becomes clear whether this is a legitimate approach or simply window dressing developed by governments that have little vested interest in promoting meaningful and credible democratization processes. This is an issue that is likely to play out within the AU over the short to medium term future.

Overall, while the ACDEG is in and of itself is a move in a positive direction, the proof of the pudding will be in its implementation, as is the case with the IADC. In this way it should currently not be viewed as a panacea, but more modestly as an initial encouraging first step.