



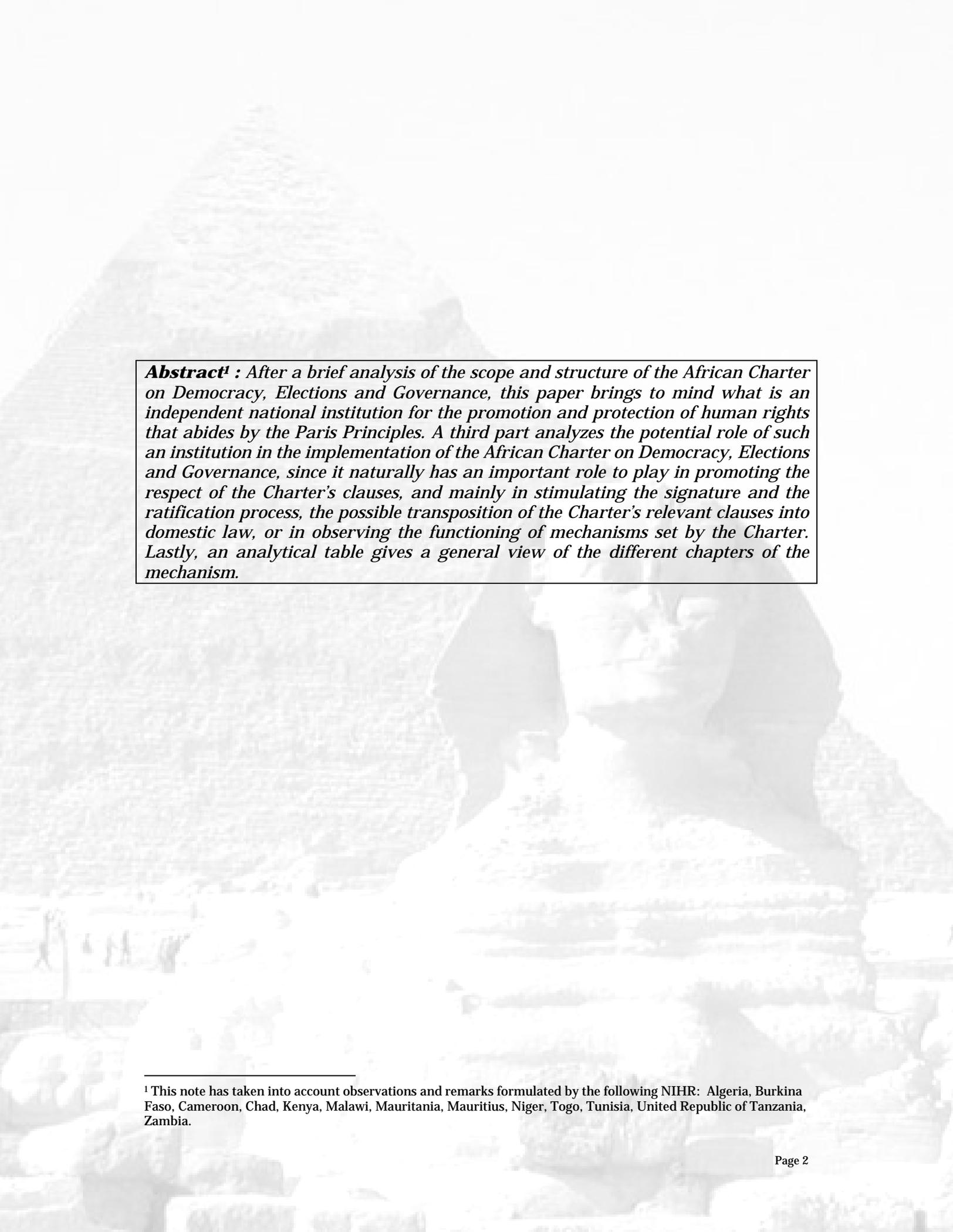
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***The role of National Rights Human Institutions (NHRI) in States
Parties of the African Union in the implementation by their
government of the African Charter on Democracy, Elections and
Governance***

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Abstract¹ : *After a brief analysis of the scope and structure of the African Charter on Democracy, Elections and Governance, this paper brings to mind what is an independent national institution for the promotion and protection of human rights that abides by the Paris Principles. A third part analyzes the potential role of such an institution in the implementation of the African Charter on Democracy, Elections and Governance, since it naturally has an important role to play in promoting the respect of the Charter's 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 gives a general view of the different chapters of the mechanism.*

¹ This note has taken into account observations and remarks formulated by the following NIHR: Algeria, Burkina Faso, Cameroon, Chad, Kenya, Malawi, Mauritania, Mauritius, Niger, Togo, Tunisia, United Republic of Tanzania, Zambia.

1. 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. Its aim is to reinforce the engagement of the States Parties of the African Union for the protection of democracy and rule of law, as well as of Human Rights.

The Charter takes its inspirations and roots from several UN resolutions, as well as in few existing regional tools:

- Since the beginning of the 1990’s, several UN resolutions called on States Parties to establish and reinforce the promotion and consolidation of democracy;
- The 2001 additional Protocol on democracy and good governance of the Economic Community of West African States (ECOWAS)² is the first tool that tries to give to respect of democracy a constraining frame;
- On another continent, the 11 September 2001 Inter-American Democratic Charter of the Organization American States³ clearly states that “[t]he peoples of the Americas have a right to democracy and their governments have an obligation to promote and defend it”. Furthermore, it reminds that respect of human rights, transparency of governmental activities and constitutional subordination of all State institutions to civil authorities constitute fundamental elements of democracy.

This Charter, which needs to be ratified by 15 States to become effective⁴, is one of the rare instruments in international law that establish democracy and people’s participation as individual fundamental rights, and also takes into account governance problems that several States of the African continent have confronted or are still confronting today. 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”⁵.

The Charter envisages two types of mechanisms to implement the principles that it proclaims. For the text in its whole, there is a relatively smooth mechanism, and also another, a more constraining one, in the form of sanctions in the case of non-constitutional change of government, as this is one of the strong elements of this Charter.

Implementation takes place successively at national, regional, and continental levels with, at each level, an actor 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 whole African continent.

² <http://www.ecowas.int/>

³ The Charter of the Organization of American States was adopted in September 2001 in Lima, Peru, by Ministers of Foreign Affairs during an extraordinary session of the General Assembly of the OAS. It was ratified by all States Parties during the 34th Assembly. http://www.oas.org/OASpage/eng/Documents/Democratic_Charter.htm

⁴ To this day (end November 2009), the Charter has been signed by 29 countries and ratified by 2. For the current state of signatures and ratifications, see http://www.africa-union.org/root/au/Documents/Treaties/list/Charter_on_Democracy_and_Governance.pdf

⁵ Ministerial Meeting of the African Union (6th and 7th of April 2006).

http://www.africa-union.org/root/au/conferences/past/2006/april/pa/apr7/meeting_fr.htm (Only in French)

The Charter emphasizes that it is foremost the States themselves which have the duty to apply its stated objectives in the Charter, 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 principles enshrined in this Charter”.

The Commission of the African Union is the core of the system of safeguard since it “shall develop benchmarks for implementation of the commitments and principles of this Charter and evaluate compliance by State Parties”. The Commission is also the authorized instance to receive reports that States Parties would 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”.

Lastly, the issue of an unconstitutional change of government has been given special attention. The Charter sets out sanctions both against the individuals responsible of such possible changes, and all regimes that would emerge from these changes.

2. National Human Rights Institutions (NHRI)

In 1992, the UN Commission for 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 Principles⁶, and were recognized by UN General Assembly in 1993. 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 aiming at protecting the rights of particular 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: a legal or constitutional founding text, a mandate that is as wide as possible, independent nomination procedures, the duration of the mandate that must be stated in an official act, a pluralist and representative composition, a regular and effective functioning, independence regarding the executive power and a 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, either 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:

⁶ See the Paris Principles enclosed in your files

- Promote harmonization of national laws and practices in accordance with international human rights norms, in particular through ratification of international treaties on human rights ;
- 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 of 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 organisations, eminent scientists, philosophers, religious leaders, academics and qualified experts, parliaments, as well as with 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”; to make recommendations on human rights related issues to the competent authorities, especially by proposing amendments or reforms of the laws and practices.

With this regard, NHRIs naturally 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, the possible transposition of the Charter's relevant clauses into domestic law, or in observing the functioning of mechanisms set by the Charter.

3. 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 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, while ratification by 15 states is necessary for the Charter to become effective. What is, thus, the role of the NHRIs?
- (2) From the Charter to national legislation: The second task of NHRIs with regard to international human rights instruments operates at a strictly national level, consisting in incorporating relevant clauses of the Charter into national law. With this regard, NHRIs have to carry out an important action which concerns 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, NHRIs' function is to vigilantly supervise the implementation of states'

international commitments. Besides, they have the duty to publish an annual report on the human rights situation in their respective countries, with mention of relevant observation and possible State failure in implementing these obligations. These reports, which would be regularly sent to intergovernmental organizations, also serve as a means of pressure upon States for their respect their commitments.

Each point mentioned above is detailed in the table in the Annex 1 of this document which will be complemented, at the outcome of this meeting, by amendments and additions from the participants themselves.

ANNEX 1

Detailed table outlining the possible role of NHRIs concerning each of the Chapters of the Charter

Chapter of the Charter	Content of the Charter	Possible role of the NIHR
Chapter 1: Definition	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 independence of justice • 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 to reach these objectives • To make sure regional meetings insert this point into their agenda • To make sure the secretariats of African regional NHRI groups have a database of information and of good practices
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 the same principles into the internal rules of NHRIs so that they make sure these principles are respected in their country • To insert the same principles onto the founding texts of African regional NHRI groups
Chapter 4: About democracy, rule of law and human rights	<p>- Article 4⁷ : democracy and rule of law are established as being one of the fundamental rights</p> <ul style="list-style-type: none"> • Respect for constitutional order and constitutional transfer of power • Elimination of discriminations • Struggling against impunity • Article 10⁸ : supremacy of the Constitution, amendment or revision of the Constitution based on the people’s will, the principle of 	<ul style="list-style-type: none"> • To provide expertise for the drafting of texts of Constitutions, so that the latter could guarantee the fundamental principles which are universally, regionally and nationally acknowledged • To assist the government to abide by these principles • To make sure that there is transposition of international tools into internal order • To ensure regional coordination in

⁷ Article 4 of African 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”.

⁸ Article 10 of the African 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”.

	equity of all before the law.	<p>the struggle against discriminations</p> <ul style="list-style-type: none"> • 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: About the culture of democracy and of 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 facilitate the transparency of the administration through powers assigned to NHRIs, such as the power to give opinions, recommendations, reports ; • To involve NGOs in the work of the NIHR • To participate to the elaboration and monitoring of the World Plan for Human Rights Education • To make sure topics on human rights education are included in school programmes • To make sure human rights education programmes also include topics on international humanitarian law
Chapter 6: About democratic institutions	<ul style="list-style-type: none"> • Strengthening constitutional civilian control over the armed and security forces • Taking individual sanction against all individual attempting to overthrow a democratically elected regime by an unconstitutional means ; cooperation of the justice in that matter • Creating independent and autonomous institutions that support the promotion of democracy and constitutional order • States' cooperation for the consolidation of democracy 	<ul style="list-style-type: none"> • To make sure that there is conformity of the NHRI with regard to the Paris Principles • To conform the NHRI to the exigencies of the International Committee for the National Institutions' Coordination • To make sure relevant clauses of international engagements are transposed and incorporated into penal code • To make sure 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 7: About 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 	<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

	<p>national mechanisms that redress election related disputes</p> <ul style="list-style-type: none"> • 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 Commission of the African Union • Electoral observer mission: each State Party shall guarantee conditions of security, free access to information, freedom of movement and non-interference into the mission's activities • 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. 	<p>mission during the preparatory period of or during elections</p> <ul style="list-style-type: none"> • To assist the follow-up of the electoral observer mission's recommendations
<p>Chapter 8: About the sanctions in cases of unconstitutional changes of government</p>	<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 of 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 this Protocol 	<ul style="list-style-type: none"> • To condemn any unconstitutional change of government • To guarantee the good application of democratic values, and more particularly of the principle of democratic change of government in conditions which respect the Constitution • To guarantee the respect of human rights, and international humanitarian rights in situations of conflicts or internal disturbance
<p>Chapter 9 : About 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 • Improving public sector management and combating 	<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

	<p>corruption</p> <ul style="list-style-type: none"> • 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 a professional media • Preventing the spread and combating the impact of diseases • Creating favourable conditions to promote women's role and participation in the 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 	<p>tribunals and to make sure that procedures of appeal are respected</p> <ul style="list-style-type: none"> • 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 make sure local actors receive appropriate training about good governance and the fight against corruption
<p>Chapter 10: About mechanisms for application</p>	<ol style="list-style-type: none"> 1. Individual State Party level: All appropriate actions (legislative, executive, administrative), and appropriate and necessary measures for a larger dissemination of the Charter 2. Commission level: <ul style="list-style-type: none"> • At continental level: <ul style="list-style-type: none"> • Fostering the implementation of measures adopted by the Charter • Facilitating the harmonization of policies and laws of State Parties in the African continent • Ensuring that State Parties are provided with the needed assistance and resources for the support of electoral processes • At regional level: <ul style="list-style-type: none"> • Encouraging Member States to ratify or adhere to this Charter • Designating a 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 make sure that there is a possible transposition of relevant clauses of the Charter into domestic law • To develop cooperation between the 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

<p>Chapter 11: Final clauses</p>	<p>- This Charter shall enter into force thirty days after the deposit of fifteen Instruments of Ratification</p> <p>- State 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</p> <p>- Any State Party may submit proposals for the amendment or revision of this Charter, adoption by two-thirds majority</p> <p>- 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 State Parties</p>	<ul style="list-style-type: none">• To encourage ratification of this tool by all States 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 relative to the Charter• To evaluate, within the African NIHR network, the efficiency of the ratification process by the States• To evaluate, within the African NIHR network, the efficiency of the functioning of procedures of control envisaged by the Charter
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