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ENDOGENOUS AND EXOGENOUS LIMITS OF THE AFRICAN CHARTER ON DEMOCRACY, ELECTIONS AND GOVERNANCE

Abstract:

This article analyses the capacity of the African Charter on Democracy, Elections and Governance to counteract the democratic governance shortfall. It argues that the tangible impact of the treaty on the states' practice has been limited by various endogenous and exogenous factors. The former are identified as directly linked to content of the document and refer to the accuracy of the drafting. The latter are rooted outside the text and beyond the character of the Charter and include issues relating to the states' reluctance to ratify the document, certain constitutional constraints undermining implementation on the national level, and the weak international guarantees of enforcement.

Keywords: The African Charter on Democracy, Elections and Governance; rule of law; interpretation of treaties

INTRODUCTION

The rationale behind the following analysis rests upon two general observations. Both are well proven and uncontested in principle. First, Africa is affected by the overall democratic governance shortfall.¹ In particular, the deficit relates to widespread manipulations in order to extend tenures by incumbent officials, common rejections of election results, and frequent violations of fundamental human rights.² Taking into consideration

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¹ United Nations Economic Commission for Africa, *African Governance Report III. Elections and the Management of Diversity*, Oxford University Press, Oxford: 2013, pp. 1-3.

² These challenges were identified in 2017 by the Chairperson of the African Union Commission as limiting the realisation of the promises of democracy, AU, Press Release No. 011/2017. The African Commission on Human and Peoples' Rights periodically expresses its concern about the deteriorating human rights situation in African States before, during and after elections, as well as about the irregularities surrounding electoral processes, ACHPR/Res.331(EXT.OS/XIX)2016, Preamble, tiret 6 and tiret 8; see also S.M. Burchard, *Electoral Violence in Sub-Saharan Africa: Causes and Consequences*, First Forum Press, Boulder: 2015; H.A.A. Miezah, *Elections in African Developing Democracies*, Palgrave Macmillan, London: 2018.

that these situations *prima facie* involve constitutional infringements, it is legitimate to qualify them as undermining the principle of the rule of law on the continent.³

The second observation justifies a view that the African citizenry and the African Union (AU) – which is the Pan-African international organization promoting democratic principles and institutions⁴ – share ambitions to counteract the rule of law deficit by fostering good governance, democracy, justice, and respect for human rights. In particular, the joint aspiration expressed in the Agenda 2063⁵ is to ensure that: (a) elections at all levels are free, fair and transparent; (b) freedom of expression and freedom of association are guaranteed; (c) constitutional changes of government are the norm.⁶ As the Agenda 2063 constitutes a long-term scheme for socio-economic and integrative transformation, the blueprint has required delineation of shorter ten-year plans to reach the relevant aspirations over the fifty-year horizon. Therefore, the AU Commission prepared the First Implementation Plan,⁷ adopted by the AU Assembly in June 2015.⁸ This document covers the period 2013-2023, setting relevant milestones within priority areas of democratic values and human rights. The first short-term targets have been determined mostly by reference to measurable criteria. Namely, a test of the public perception of the governance status has been applied, alongside with setting thresholds for adoption and the domestication of certain treaties. Thus, on the national level the established goals for the period 2013-2023 include the following: (a) at least 70 per cent of the people perceive that the free access to information and freedom of expression is guaranteed; (b) at least 70 per cent of the public perceive elections to be free, fair and transparent by 2020; (c) there is zero tolerance for unconstitutional changes in government; (d) the African Charter on Democracy, Elections and Governance (the Charter)⁹ is signed, ratified and domesticated by 2020; (e) at least 70 per cent of the people perceive the entrenchment of a culture of respect for human rights, the rule of law and due process.

³ E. de Wet points out that the poor domestic records of African States in relation to human rights protection and judicial independence evidences an endemic disregard for the rule of law as such, *The Rise and Fall of the Tribunal of the Southern African Development Community: Implications for Dispute Settlement in Southern Africa*, 28(1) ICSID Review 45 (2013), p. 62.

⁴ Art. 3(g) of the Constitutive Act of the African Union (Constitutive Act, adopted 11 July 2000, entered into force 26 May 2001).

⁵ In 2013 the AU decided to develop the Agenda 2063 as a road map for structural transformation of the continent, Assembly/AU/Decl.3(XXI), p. 6. While the AU Commission was tasked with preparing draft agenda documents, the civil society was also involved through an extensive consultative process, see e.g. AU Commission, *Agenda 2063. Framework Document*, p. 26, available at: https://au.int/sites/default/files/documents/33126-doc-framework_document_book.pdf (accessed 30 May 2019). See also K. De Ghetto, J.R. Gray, M.N. Kiggundu, *The African Union's Agenda 2063: Aspirations, Challenges, and Opportunities for Management Research*, 2(1) Africa Journal of Management 93 (2016).

⁶ AU Commission, *Agenda 2063*, p. 151 (Aspiration 3).

⁷ Available at: https://au.int/sites/default/files/documents/33126-doc-ten_year_implementation_book.pdf (accessed 30 May 2019).

⁸ Assembly/AU/Decl.5(XXV).

⁹ Adopted 30 January 2007, entered into force 15 February 2012. Unless otherwise indicated, all treaties cited in this article are available at: <https://au.int/en/treaties>.

The foregoing background raises the issue of how the prevailing democratic governance and the rule of law predicaments are going to be treated by the African states and the AU in order to overcome the quandary and achieve the goals over both the short- and in the long-term. This matter has been addressed broadly by the AU Commission in the First Implementation Plan. This document has indicated strategies to be introduced separately on both the national and on the continental levels in order to achieve the relevant aims.¹⁰ In particular, on the national plane two distinct lists of strategies, designated as priority areas in terms of democratic values and human rights, have been drawn up. While each establishes slightly different remedies to be followed, there is a substantive correlation between them on at least one point. They recommend that the states should implement both the Charter and the African Charter on Human and Peoples' Rights (the HR Charter).¹¹ The role of the Charter as a tool to promote democratic values has been also impliedly envisaged on the continental plane, inasmuch as the First Implementation Plan has stressed the need to employ the African Governance Architecture (AGA)¹² in order to achieve the aspirations within the priority area of democratic values. The AGA constitutes the overall political, normative and institutional framework for the promotion of good governance in Africa,¹³ thus contributing to realization of the substantive vision of governance, grounded on, *inter alia*, the Charter.¹⁴ Thus it is evident that the AU perceives the treaty as a significant

¹⁰ *Supra* note 7, pp. 73-75.

¹¹ Adopted 27 June 1981, entered into force 21 October 1986.

¹² The AGA has been developed as a policy approach within the AU to coordinate the promotion of democracy, good governance, and human rights in Africa. Historically, the AGA is a product of the problem-solving attitude adopted by AU. It is traceable to the Strategic Plans developed since 2004 by the AU Commission in order to harmonize activities undertaken by the organization. In particular the plans helped to identify certain values to be promoted at the individual, national and regional levels, such as, *inter alia*, human rights, the rule of law, and democracy; AU Commission, *Strategic Plan 2009-2012*, Assembly/AU/3(XII), pp. 30-31. Next, in 2010 the AU Executive Council recommended to the AU Assembly to identify obstacles and the measures to be adopted in order to facilitate continental integration based on such values, suggesting that "a pan-African Architecture on Governance" could form "a platform for dialogue between the various stakeholders"; EX.CL/Dec.525(XVI). Finally, in 2011 the AU Executive Council endorsed the strengthening of the process focusing on shared values through launching the Governance Platform as an informal mechanism to advance the AGA; EX.CL/Dec.635(XVIII). The AGA Platform was initiated in June 2012; AU, Press Release No. 053/2012. Its Rules of Procedure forms the only document procedurally streamlining the activities of the Platform; Assembly/AU/Dec.589(XXVI) at para. 2(xiv).

¹³ The policy approach embodied by the AGA is composed of four different components. They embrace already-existing substantive standards (Pan-African treaties and the soft-law) and institutional mechanisms developed within the AU and RECs, as well as the AGA Platform and the Africa Governance Facility located within the AU Commission.

¹⁴ The Charter is one of 23 international instruments covering five substantive clusters, namely: democracy, human rights and transitional justice, socio-economic issues, constitutionalism and the rule of law, and humanitarian affairs. The role of the Charter for the promotion of the shared values was highlighted in 2015 by the AU Assembly, which called upon States to ratify, domesticate, and implement the treaty; Assembly/AU/Dec.585(XXV), para. 4.

instrument to be applied on both the national and on the continental levels to foster a reduction of the democratic deficit.

Taking into consideration the omnipresence of the Charter in the First Implementation Plan, a more detailed question arises concerning the capacity of the Charter to produce the desired output. On the whole, it may be assumed that the document has a “civilizing effect”.¹⁵ It is sufficient to point out that the treaty has already become a reference standard declared by the AU organs as an instrument which sets parameters for member states’ behaviour.¹⁶ Such an introduction of the treaty into the narrative of the AU agenda serves as a *prima facie* evidence that the Charter has been used to proclaim an important shift on the continental level. This means that the international agreement has contributed to the declaratory replacement of the principle of sovereign constitutional autonomy, once prevailing in Africa,¹⁷ with the requirement for states to establish democratic legitimacy of governments through their adherence to the notions of democracy, the rule of law and human rights.¹⁸ Yet, the changed rhetoric of AU

¹⁵ While the phrase may carry a sinister meaning in Africa, it was used by the International Court of Justice (ICJ) outside the colonial context in the *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, 28 May 1951, ICJ Rep 1951, p. 23.

¹⁶ See e.g. AU, Declaration on the Commemoration of the Fifteenth Anniversary of the African Peer Review Mechanism, Assembly/AU/Decl.4(XXX), Preamble, tiret 10-11; Decision on the Inaugural Report of the Peace and Security Council of the African Union on the Implementation of the African Union Master Roadmap of Practical Steps for Silencing the Guns in Africa by the Year 2020, para. 10; Decision on the Outcome of the 5th Retreat of the Executive Council held in Addis Ababa, Ethiopia on 8 and 9 December 2016, para. 2(vi).

¹⁷ Symbolically, the Charter of the Organization of African Unity (OAU), which was the predecessor of the AU, did not contain any provision substantively prefiguring Arts. 3(g) and 4(m) of the Constitutive Act. For nearly three decades the OAU operated as a forum for heads of state who were convinced that principle of non-interference in the internal affairs of States forecloses any discussion on what a government had a right to do within the limits of the State’s internal sovereignty (C.E. Welch, *Protecting Human Rights in Africa: Strategies and Roles of Non-governmental Organizations*, University of Pennsylvania Press, Philadelphia: 1995, p. 151; C. Clapham, *Africa and the International System. The Politics of State Survival*, Cambridge University Press, Cambridge: 1996, p. 115). Only at the end of 1980s and the beginning of 1990s did a series of geopolitical processes call for joint efforts to protect human rights and for the closer economic integration of African States; see e.g. Declaration on the Political and Socio-Economic Situation in Africa and the Fundamental Changes Taking Place in the World, AHG/Decl.1(XXVI)1990. See also G.K. Kieh, *Africa and the New Globalization*, Routledge, Aldershot: 2008, p. 164.

¹⁸ In particular, the Charter was adopted as the first Pan-African treaty completing a standard-setting process that had been continuing since 1990s, as evidenced by the affirmation of democratic principles in several non-binding documents: Intergovernmental Conference of Ministers on Language Policies in Africa; The Harare Declaration, available at: https://unesdoc.unesco.org/ark:/48223/pf0000145746_eng (accessed 30 May 2019); OAU; The Algiers Declaration, AHG/Decl.1(XXXV) and the Algiers Decision, AHG/Dec.142(XXXV); OAU; Solemn Declaration of the Conference on Security, Stability, Development and Cooperation in Africa, AHG/Decl.4(XXXVI); OAU; Lomé Declaration on the Framework for an OAU Response to Unconstitutional Changes of Government, AHG/Decl.5(XXXVI); OAU/AU; The Durban Declaration on the Principles Governing Democratic Elections in Africa, AHG/Decl.1(XXXVIII); AU, Declaration on Democracy, Political, Economic and Corporate Governance, AHG/235(XXXVIII), Annex I. The Preamble to the Charter confirms that the treaty was not written in a vacuum and enumerates the relevant preceding documents (paras. 12-13). It also reveals the commitment of the Member States

documents cannot be employed to support a far-reaching argument that the Charter has constituted a factor actually influencing a transition in states' practice.

Methodological problems with measuring such an impact aside, this article deals with a related question of a more fundamental character. The problem discussed here is whether the Charter has any legal capacity to change patterns of states' behaviour that potentially could be detected using African Governance Indicators (AGIs)¹⁹ or other instruments of sociological enquiry.²⁰ The problem and the following analysis starts from two salient premises. First, the Charter is an international instrument that sets standards for states' conduct. Hence, it potentially possesses the capacity to stimulate the transition between the declaratory shift towards democratization discernible in AU documents and the tangible democratization shift, subject to e.g. AGIs testing.²¹ Second, the tangible impact of international documents on states' practice may be limited by various legal (both substantive and procedural) as well as political constraints, further labelled as the endogenous and exogenous limits of treaties.

This article examines the constraints in four sections. Following this introduction, section 2 identifies and examines the endogenous limits of the Charter as directly linked to the content of the document and referring to its legal character, as well as to the accuracy of the drafting. Section 3 deals with the exogenous limits of the instrument,

of the AU to further promote the universal values and principles of democracy, good governance, human rights and the right to development (paras. 6-7).

¹⁹ In 1999, the United Nations Economic Commission for Africa launched the project titled "Assessing and Monitoring the Progress towards Good Governance in Africa". This has resulted in the periodic African Governance Reports (AGR) based upon AGIs and aimed at monitoring political, economic and corporate governance trends on the African continent. AGIs rest on a methodology combining three principal research instruments: desk research, expert surveys, and household surveys; see *supra* note 1.

²⁰ See e.g. F. Viljoen, L. Louw, *State Compliance with the Recommendations of the African Commission On Human and Peoples' Rights, 1994–2004*, 101(1) American Journal of International Law 1 (2007); J.E. Alvarez, *Measuring Compliance*, 96 Proceedings of the Annual Meeting (American Society of International Law) 209 (2002); R. Goodman, D. Jinks, *Measuring Effects of Human Rights Treaties*, 14(1) European Journal of International Law 171 (2003); S. Nyambi, *Progress and Challenges of Consolidating the African State: 'Consolidation Indicators' and the African Charter on Democracy, Elections and Governance*, 12(1) International Journal of African Renaissance Studies – Multi-, Inter- and Transdisciplinarity 22 (2017).

²¹ This premise is based on two more specific arguments. The normative one is the elementary principle that binding treaties must be performed (*pacta sunt servanda*), see e.g. ICJ, *Gabčíkovo-Nagymaros Case (Hungary v. Slovakia)*, Judgment, 25 September 1997, ICJ Rep. 1997, paras. 114 and 142. The empirical argument was roughly and imprecisely stated by L. Henkin, who noted that "almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time", L. Henkin, *How Nations Behave: Law and Foreign Policy*, Columbia University Press, New York: 1979, p. 47. Yet, the modern doctrine underlines that "to get an accurate sense of the impact of law requires more than an observation that states comply most of the time. It is necessary to determine if and when international law changes the behavior of states" (A.T. Guzman, *How International Law Works: A Rational Choice Theory*, Oxford University Press, Oxford: 2008, p. 22). While there are numerous theories explaining why States decide to change (or not to change) their behaviour to come into compliance with international law, it is generally undisputed that there are examples of treaties influencing states' practice on the domestic and on international level. A relevant bibliography can be found in M. Bothe, *Compliance*, in: R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law*.

understood as rooted outside its text and beyond its legal nature. These include problems relating to the states' reluctance to ratify the document, to certain constitutional constraints undermining implementation on the national level, and finally to relevant international guarantees of enforcement. Concluding remarks summarize the key points of the analysis.

1. THE ENDOGENOUS LIMITS OF THE CHARTER

In this section we begin with a brief review of the Charter in order to identify the standard-setting parts of the text. Against this background two specific factors are diagnosed and discussed as possibly impairing the capacity of the document to influence states' practice, and thus to generate tangible progress in democratic governance. The issues examined here relate to the character of the Charter and to the quality of the drafting.

1.1. General overview of the document

The text starts with a Preamble and contains 53 articles, divided into 11 chapters. The parts have different focuses and may be classified as: definitional (chapter 1); teleological (chapters 2-3); substantive (chapters 4-6 and chapter 9); procedural (chapter 8, chapter 10); and mixed (chapter 7, chapter 11).

The definitional part merely explains the abbreviations used in the document and does not clarify the substantive terms used in the Charter.²² Thus this chapter is patently irrelevant to the problem discussed here as it does not contribute to the establishment of a pattern of the required conduct. The procedural parts establish a triple mechanism for application of the Charter: by individual states; on regional levels; and on the continental level. Further, they provide for a sanctions mechanism to be employed against any state that violates the Charter and set out actions in cases of unconstitutional change of government. Finally, they form a framework for cooperation between the AU organs and states to strengthen democratic elections and to monitor implementation of the document. The procedural provisions will be examined in section 3 below in the context of the exogenous limits of the Charter.

The remaining parts of the text (except the administrative and procedural provisions in chapters 7 and 11) are strongly intertwined as they specify substantive commitments to implement the Charter according to enumerated underlying principles (Art. 3) in order to achieve the objectives of the document (Art. 2). The extensive list of the objectives is reducible to four interdependent core aims which permeate the Charter, i.e. adherence to the values of democracy, human rights, the rule of law, and good governance.²³

²² Cf. Art. 1 of the African Nuclear-Weapon-Free Zone Treaty (adopted 11 April 1996, entered into force 15 July 2009).

²³ Arts. 2(1), 2(2) and 2(6). Unless otherwise indicated, all provisions cited in the footnotes refer to the Charter.

Consequently, both the teleological (Arts. 2-3) and substantive parts of the document (chapters 4-6, chapter 9 and relevant provisions of chapter 7) should be taken into account jointly when discussing endogenous constraints impairing the capacity of the Charter to generate tangible progress of the democratic governance. Accordingly, 81 units of the document – that is articles or sections of articles (if separated) – can be identified as establishing substantive patterns of the states' conduct.

1.2. Character of the Charter

At the outset, a fundamental distinction must be made between international instruments advancing moral or political commitments and instruments creating legal obligations. While the former are not entirely deprived of their standard setting potential,²⁴ only the latter are enforceable and, if breached, can result in international responsibility of a state for an internationally wrongful act,²⁵ possibly coupled with a loss of reputation in the eyes of other states. From this point of view the legally non-binding commitments seem less credible and more easily violated. As a result, the legally binding obligations are potentially more conducive to change the states' practice.

The terminology and formal structure are not decisive factors in determining the character of international instruments,²⁶ but the relevant indicators help to identify the intention of the parties.²⁷ Against this background one must take into account chapter 11 of the document. This part identifies measures against states violating the Charter (Art. 46); contains provisions on the entry into force of the document (Arts. 47-48); on amendments thereto (Art. 50); on its registration in accordance with Art. 102(1) of the UN Charter (Art. 51(3)) as well as specifies the functions of the depositary (Art. 51). Considering the relevant clauses as typical for treaties, it may be concluded that the Charter was designed as a binding agreement within the meaning of Art. 2(1)(a) of the Vienna Convention on the Law of Treaties (VCLT).²⁸ This assumption is further strengthened by the wording of certain substantive provisions, which use phrases typical for legal obligations.²⁹

However, there are also three circumstances which could possibly distort the above straight forward observation. First, the adoption of the Charter by the AU Assembly

²⁴ E.g. the African Court on Human and Peoples' Rights has confirmed that the Universal Declaration of Human Rights, a formally non-binding resolution of the UN General Assembly of 10 December 1948, "is recognized as forming part of Customary International Laws"; *Anudo Ochieng Anudo v. United Republic of Tanzania* (App. No. 012/2015), Judgment, 22 March 2018, para. 76.

²⁵ ICJ, *United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)*, Judgment, 24 May 1980, ICJ Rep 1980, para. 56.

²⁶ ICJ, *South West Africa Case (Ethiopia v. South Africa)*, Preliminary Objections, Judgment, 21 December 1962, ICJ Rep 1962, p. 331.

²⁷ ICJ, *Frontier Dispute (Burkina Faso v. Republic of Mali)*, Judgment, 22 December 1986, ICJ Rep 1986, para. 40.

²⁸ Adopted 23 May 1969, entered into force 27 January 1980, 1155 UNTS 331.

²⁹ E.g. "State Parties shall" (Art. 17). However, the doctrine also stresses ambiguity of the modal verb "shall" pointing at its complex deontic and epistemic functions, see generally L. Bartels, *Human Rights Conditionality in the EU's International Agreements*, Oxford University Press, Oxford: 2005, p. 95.

was preceded by several regional documents on democratic governance which merely recommended the implementation of relevant values in domestic constitutional systems.³⁰ Therefore, the historical context of the Charter may support a presupposition as to its non-binding character. Second, a comparative perspective reveals that international standard setting on the democratic governance frequently materializes in non-binding recommendations and declarations.³¹ Consequently, a finding that the Charter contains binding commitments would appear to be an extraordinary solution in Africa.³² Finally, the wording of the Charter, discussed below in subsection 2.3, allows to interpret the document not as a set of legal commitments but (partly, at least) as a wish list of values to be merely promoted. This in turn may serve as an indirect proof of the non-binding character of the instrument as a whole.³³

Considering the circumstances mentioned above, it is necessary to corroborate the tentative assumption on the binding character of the instrument by referring to the subsequent international practice. Interestingly, this analysis reveals that the AU political bodies do not explicitly articulate the binding character of the Charter. Although such pronouncements are not uncommon in the rhetoric of the AU in different contexts,³⁴ the AU Assembly and the AU Executive Council prefer to declare the principal objective of Charter merely as the “promotion” of the universal values of democracy.³⁵ Moreover, even if the AU organs decide to emphasize the importance of implementation of the Charter³⁶ or to reiterate its significance in the consolidation of commitments collectively undertaken by member states to promote democracy and good governance,³⁷ the legally binding nature of the instrument is usually not exposed. On the contrary, provisions of the Charter and other non-binding documents are sometimes presented jointly as mutually reinforcing, without making a distinction between the Charter and the earlier recommendations.³⁸

Judicial and quasi-judicial organs of the AU are less restrained in articulating the binding character of the document. In particular, although the African Commission of

³⁰ On pre-Charter efforts to promote democracy in Africa see generally S.-A. Elvy, *Towards a New Democratic Africa: The African Charter on Democracy, Elections and Governance*, 27 *Emory International Law Review* 41 (2013).

³¹ E.g. UN Doc. A/RES/45/150.

³² But see Protocol A/SP.1/12/01 on Democracy and Good Governance Supplementary to the Protocol relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security, adopted 21 December 2001, entered into force 20 February 2008, available at: <http://documentation.ecowas.int/legal-documents/protocols/> (accessed 30 May 2019).

³³ A similar argument was initially advanced by some authors in respect of the African Charter on Human and Peoples' Rights, see e.g. R. Gittleman, *The African Charter on Human and Peoples' Rights: A Legal Analysis*, 22(4) *Virginia Journal of International Law* 667 (1982).

³⁴ E.g. EX.CL/502(XV) *in fine* on the African Union Convention on the Protection and Assistance to Internally Displaced Persons in Africa.

³⁵ Assembly/AU/Decl.4(XXX), Preamble, tiret 10.

³⁶ Assembly/AU/Dec.645(XXIX), para. 10; PSC/PR/COMM.2(CDXLII), para. 7(iii).

³⁷ Assembly/AU/Dec.147 (VIII), para. 2; Assembly/AU/Dec.324(XV), para. 3; EX.CL/Dec.320(X), para. 2.

³⁸ Assembly/AU/Dec.188 (X), para. 2.

Human and Peoples' Rights (ACHPR) is not competent *ratione materiae* to decide on violation of the Charter,³⁹ the organ has invoked⁴⁰ several provisions of the instrument to delineate parameters of the right to vote under the HR Charter. The African Court on Human and Peoples' Rights (ACtHPR), which is a judicial organ enjoying a definitively broader *ratione materiae* jurisdiction than the ACHPR,⁴¹ has explicitly recognized the binding character of the Charter. The Court stated that the Charter had been adopted in order to implement certain rights proscribed in the HR Charter⁴² and constitutes a legally binding instrument which is to be interpreted and applied by ACtHPR.⁴³ Having examined the facts of the case in question, the Court found that the respondent had violated its obligation to establish an independent and impartial electoral body in breach of Art. 17 of the Charter.⁴⁴

Therefore, the survey justifies the conclusion that the AU practice corresponds with the formal indicators and confirms the legally binding character of the Charter.

1.3. Quality of the drafting

Treaties as sources of legal obligations may have different coercive and persuasive forces. Suffice it to point out that this quality is primarily, although not exclusively, determined by the practice of their enforcement as well as by the degree of precision and cogency of the legal text.⁴⁵ While the former issue is discussed in section 3, the present subsection focuses on the latter problem.

To put this overview in its proper perspective it is necessary to make a preliminary point. The application of legal norms always entails, by the very nature of the legal syllogism, a requirement to give substance to a text in order to establish rights and duties. During this process, an interpreting entity cannot rationally conclude that an operative interpretation (that is a technical act governed by relevant secondary rules) is not required because a legal text under scrutiny is completely clear. On the contrary, the true meaning of a norm should always be established through a proper interpretative method employed consciously or, if a text is plainly unequivocal, subconsciously. The secondary rules governing the interpretation of treaties are contained in Arts. 31-32 of the VCLT and in many respects are considered as reflecting pre-existing customary international

³⁹ Art. 47 in conjunction with Arts. 55 and 56(2) of the HR Charter.

⁴⁰ ACHPR, *Open Society Justice Initiative v. Côte d'Ivoire* (App. No. 318/06), Decision, 28 February 2015, para. 164; decisions of the Commission are available at: <http://www.achpr.org/communications/> (accessed 30 May 2019).

⁴¹ Art. 3(1) of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, adopted 10 June 1998, entered into force 25 January 2004.

⁴² ACtHPR, *APDH v. Côte d'Ivoire* (App. No. 001/2014), Judgment, 18 November 2016, paras. 61-63.

⁴³ *Ibidem*, para. 65. This position was also affirmed by the AU Commission presenting its opinion before the Court, *ibidem*, paras. 50-52.

⁴⁴ *Ibidem*, para. 153(5).

⁴⁵ R.R. Baxter, *International Law in 'Her Infinite Variety'*, 29(4) *International and Comparative Law Quarterly* 549 (1980).

law.⁴⁶ Their hermeneutics is based on two principles. The first is that treaties must be interpreted in good faith, in accordance with the ordinary meaning of the text, in their context and in light of their object and purpose. Furthermore, the second principle states that recourse may be had, if needed, to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion.

When an interpreting entity performs the operation in order to understand a provision, it may find certain elements of the text objectively blurred to a lesser or to a greater extent. In particular, the complexity of the comprehension process is increased where exceptionally vague terms or excessively general phrases are used. As a result, it may be difficult or impossible to establish the sense of a norm considering merely the ordinary meaning of the relevant words.⁴⁷ In such circumstances an interpreting body needs to rely more on the teleological method, necessitating certain interpretational choices as to, e.g., the dominant hermeneutic (party intent versus underlying objective); timing (original versus evolutionary interpretation); and activism (the work-to rule approach versus the gap-filling approach).⁴⁸ Consequently, teleological analyses frequently produce incompatible outcomes depending on who makes the interpretation,⁴⁹ and hence diminish the persuasive force of a norm the content of which remains uncertain and unclear. In other words, as the field for reasonable interpretation is reduced by precision in drafting, vagueness in this respect expands the perimeter of a rational understanding and thus may blur the sense of what is required.

The line between these two limits, namely between what is a clear text and what requires interpretative choices, is a seamless continuum. Yet, the difference between them is evidently discernible. In particular, there are hortatory provisions representing ideals, aspirations or principles⁵⁰ in such a general and nebulous way that they are virtually impossible to be breached⁵¹ and hence their standard-setting capacity is negligible.⁵² To take an example – the Treaty of the Southern African Development Community (SADC Treaty)⁵³ proclaims in Art. 4(c) that the organization and its member states act in accord-

⁴⁶ ICJ, *Arbitral Award of 31 July 1989 (Guinea Bissau v. Senegal)*, Judgment, 12 November 1991, ICJ Rep 1991, p. 70.

⁴⁷ See ICJ, *Kasikili/Sedudu Island (Botswana v. Namibia)*, Judgment, 13 December 1999, ICJ Rep 1999, para. 30.

⁴⁸ See generally J. Pauwelyn, M. Elsig, *The Politics of Treaty Interpretation: Variations and Explanations across International Tribunals*, in: J.L. Dunoff, M.A. Pollack (eds.) *Interdisciplinary Perspectives on International Law and International Relations Variations and Explanations across International Tribunals*, Cambridge University Press, Cambridge: 2012, pp. 449-459.

⁴⁹ E.g. E. Posner, M.F.P. de Figueiredo, *Is the International Court of Justice Biased?*, 34(2) *Journal of Legal Studies* 599 (2005), p. 624.

⁵⁰ E.g. ICJ, *Appeal Relating to the Jurisdiction of the ICAO Council (India v. Pakistan)*, Judgment, 18 August 1972, ICJ Rep 1972, Separate Opinion of Judge Dillard, p. 92, fn 1.

⁵¹ E.g. A. Boyle, C. Chinkin *The Making of International Law*, Oxford Scholarly Authorities on International Law: 2007, p. 221.

⁵² E.g. ICJ, *North Sea Continental Shelf (Federal Republic of Germany v. Denmark)*, Judgment, 20 February 1969, ICJ Rep 1969, para. 72.

⁵³ Adopted 17 August 1992, entered into force 5 October 1992, available at: <https://www.sadc.int/documents-publications/sadc-treaty/> (accessed 30 May 2019).

ance with the principles of “human rights, democracy and the rule of law.” Indubitably, good faith requires an assumption that the phrase was drafted to mean something, rather than nothing.⁵⁴ Therefore, it may be argued that the provision sets out the said values as objects of international concern on the regional level. Moreover, considering the plentiful judicial and doctrinal attempts to define all the elements of the triad and to interpret them in the various contexts surrounding the numerous international documents in which they appear, the ensuing norm cannot be deemed to be entirely devoid of substantive content. Hence, it is both legally required and technically possible to decode a detailed standard embedded therein. However, on the other hand the exhortations of the SADC Treaty do not give any guidelines for determining, *inter alia*, the substantive scope of: human rights and their limitations; the organization of elections; the role of military forces in a democracy; or the management of national resources. Moreover, provisions of the kind are not considered as self-executing by domestic courts, which may refuse to directly apply relevant stipulations.⁵⁵ Consequently, the standard-setting capacity of the provision remains purely prospective in nature, at least until activated by subsequent international practice constituting objective evidence on how state parties to the SADC Treaty and the SADC understand the ensuing norms.⁵⁶

Bearing in mind that certain imprecise provisions may result in an extremely restricted capacity to practically configure states’ behaviour, the following part of this subsection attempts to map out the substantive units of the Charter in order to identify such vague provisions. This aim is accomplished in three stages. First, the index quantifying legal precision (IQLP) and factors constituting indicators of a limited quality in the drafting are introduced. Next, the relevant factors are detected in the substantive units of the Charter. Finally, the distribution of the IQLP throughout the document is discussed. For the purposes of this analysis⁵⁷ three major variables are recognized as affecting the precision of legal stipulations. They refer to: the clarity of phrases used to indicate goals established under the treaty; the accuracy of wording applied to formulate measures required to achieve the goals; and finally the character of relevant obligations chosen between obligations of conduct and those of result.

1.3.1. Clarity of goals

The first variable results from the assumption that if the ordinary meaning of terms used in a provision to establish a goal or an underlying value protected by a norm is plainly unequivocal or its meaning has been already explained in the case law of

⁵⁴ *E.g. Ad Hoc Tribunal (UNCITRAL), Eureko BV v. Poland*, Award, 19 August 2005, Oxford Reports on International Law: International Investment Claims 2005, para. 249.

⁵⁵ *E.g. Cour de Cassation (Sénégal), Habré Case*, Judgment, 20 March 2001, African Human Rights Law Reports 183 (2002), paras. 37-40.

⁵⁶ *E.g. ICJ, Kasikili/Sedudu Island*, para. 50.

⁵⁷ Another advanced calculation of the index, in the context of international investment law, is presented by M.S. Manger and C. Peinhardt, *Learning and the Precision of International Investment Agreements*, 43(6) International Interaction 920 (2017).

the judicial and quasi-judicial organs of the AU, then precision reduces the field for reasonable interpretation. In this case, one point should be added to the total count of the IQLP – otherwise, no point is scored.

For example, Art. 4(2) of the Charter provides that states “shall recognize popular participation through universal suffrage as the inalienable right of the people.” The goal of the relevant norm can be identified as ensuring popular participation through universal suffrage. Taking into account the natural and ordinary meaning of the words,⁵⁸ the phrase is plainly unequivocal and the intention of the parties is clearly discernible, “above all upon the text of the treaty.”⁵⁹ In particular, it explicitly refers to the right of every citizen to elect representatives or entities empowered to make and to abolish national laws. Moreover, the goal of the provision is relatively easy to grasp against the backdrop of Art. 13(1) of the HR Charter and taking into account relevant case law of the ACHPR and the ACtHPR.⁶⁰ Thus, the provision scores a point to the total count of the IQLP.

On the other hand, there are also provisions of the Charter which raise serious doubts in this respect. For example, Art. 9 proclaims that states “undertake to design and implement social and economic policies and programmes that promote sustainable development and human security.” The goal of the ensuing norm can be determined as safeguarding sustainable development and human security. Although this goal has recently attracted widespread doctrinal attention,⁶¹ its meaning is still far from clear.⁶² In particular, while the term “sustainable development” is also present in the regional political discourse,⁶³ it has been predominantly exploited as a catchword to denote the highly nebulous idea of an equitable balance between development and the environmental needs of present and future generations. A notable manifestation of this approach can be found in the single decision of the ACHPR invoking sustainable development. The organ, discussing the right to a general satisfactory environment under Art. 24 of the HR Charter, noted that sustainable development constitutes one from among several values to be secured through the said right. The organ pointed out that in order to promote sustainable development states are required “to take reasonable and other measures to prevent pollution and ecological degradation.”⁶⁴ Still, although the

⁵⁸ E.g. ICJ, *Legality of Use of Force (Serbia and Montenegro v. Belgium)*, Judgment, 15 December 2004, ICJ Rep 2004, para. 101.

⁵⁹ ICJ, *Territorial Dispute (Libyan Arab Jamahiriya v. Chad)*, Judgment, 3 February 1994, ICJ Rep 1994, para. 41.

⁶⁰ E.g. ACHPR, *Constitutional Rights Project v. Nigeria* (App. No. 102/93), Decision, 31 October 1998, para. 50.

⁶¹ E.g. N. Schrijver, *The Evolution of Sustainable Development in International Law: Inception, Meaning and Status*, 329(1) *Recueil des Cours* 217 (2007).

⁶² E.g. U. Beyerlin, *Sustainable Development*, in: Wolfrum (ed.), *supra* note 21.

⁶³ E.g. AHG/Decl. 1(XXXVII), paras. 3 and 8; *The NEPAD Strategic Plan for the period 2014-2017*, *passim*, available at: <http://www.nepad.org/resource/nepad-strategic-plan-period-2014-2017> (accessed 30 May 2019).

⁶⁴ ACHPR, *SERAC and CESR v. Nigeria* (App. No.155/96), Decision, 27 October 2001, para. 52.

ACHPR generally identified actions which contribute to the promotion of sustainable development, the reasoning hardly assists in determining the content of the guaranteed value. Therefore, the provision scores no point in the total count of the IQLP.

Having surveyed 81 substantive units of the treaty, 18 of them (22.82 per cent) have been categorized as stipulating their goals using vague phrases and hence virtually excluding any consistent interpretation.⁶⁵

1.3.2. Precision of required measures

The next variable has been introduced because norms may vary in terms of the measures required to achieve their goals. In this respect, two categories are discernible. On one hand, there are norms which establish parameters of a specific conduct and hence either leave no room for reasonable divergent interpretations or significantly reducing the field thereof. On the other hand, one may encounter directives merely setting out goals that must be achieved by the parties, while granting them broad discretion on how to reach these aims.

A norm is qualified into the former category if either of the two following conditions are met: First, a disposition of a norm uses a verb (e.g. “shall adopt”) and an object (e.g. “legislative and administrative measures”) which obliges states to undertake precisely defined actions. As a result, the compliance with the disposition is objectively and quantitatively measurable. This means that relevant actions of the legislature can be specified and examined with respect to their capacity to secure the relevant values. For example, Art. 14(2) of the Charter provides that states “shall take legislative and regulatory measures to ensure that those who attempt to remove an elected government through unconstitutional means are dealt with in accordance with the law.” The goal of the provision is to guarantee transfers of power accomplished through the means envisaged in relevant constitutions. It is true that the ensuing norm leaves some room for manoeuvre as to which appropriate legal mechanisms are to be applied, but the crucial parameters of the mandatory baseline behaviour are accurately set out. In particular, the pattern of the action required is established with a precision that realistically enables one to decode what the disposition of the norm indicates (“to take legislative and regulatory measures”) and, as a result, the practical monitoring of compliance is possible.⁶⁶ Therefore one point should be added to the total count of the IQLP.

⁶⁵ Art. 4(1) (“democracy, the principle of the rule of law and human rights”); Art. 9 (“sustainable development and human security”); Art. 11 (“culture of democracy and peace”); Art. 12(1)-(4) (“democratic principles and practices as well a culture of democracy and peace”); Art. 13 (“democracy and peace”); Art. 16 (“democracy”); Art. 27(9) (“democratic values of traditional institutions”); Art. 28 (“strong partnerships and dialogue between government, civil society and private sector”); Art. 29(1) (“development and strengthening of democracy”); Art. 30 (“citizen participation in the development”); Art. 32(8) (“the rule of law”); Art. 35 (“democratic system”); Art. 36 (“democratic governance”); Art. 37 (“sustainable development and human security”); and Art. 39 (“a culture of respect, compromise, consensus and tolerance”).

⁶⁶ Cf. ACHPR, *Concluding observations on Initial Report of Cameroon (2001-2003) adopted at 31st Ordinary Session, 2-16 May 2002, Pretoria, South Africa*, paras. 257-259, available at: <https://bit.ly/2vDJKon> (accessed 30 May 2019).

Second, while substantive norms in the Charter are generally drafted in positive terms, which means obligation to act in order to guarantee or pursue certain goals and values; there are also provisions with negative obligations explicitly or impliedly embedded. Such provisions advance the duty to take no action(s) which would have the effect of violating or eviscerating protected values.⁶⁷ For example, Art. 8(1) obliges states to “eliminate all forms of discrimination”. The provision accurately implies a states’ duty to abstain from employing discriminatory measures,⁶⁸ and thus one point should be added to a total count of the IQLP.

In turn, Art. 9(2) of the Charter on “fostering popular participation and partnership with civil society organizations” contains a norm which satisfies neither of the two conditions. First of all, the obligation is determined only by a nebulous verb referring to the conduct required. In particular, there are countless ways to *foster* citizens’ participation.⁶⁹ For example, it may be argued that a mere declaratory acknowledgment of the role played by civil organizations⁷⁰ suffices to comply with the treaty. Therefore, as the norm does not establish any specific parameters of the conduct required, the scope of reasonable interpretation is nearly unlimited. Second, if attempts are made to define “popular participation” it emerges as a principle encompassing several more specific goals, namely basic education, freedom of association, representation of citizens in national bodies etc.⁷¹ Therefore, the principle has no autonomous standard-setting capacity and serves only for the systematization of the international discourse, for the progressive development of international law, and for guiding the interpretation of more specific pertinent rules. Consequently, even if the provision implies a negative obligation (i.e. to not hamper citizens’ participation), it has to be decoded against the background of the more specific norms of international law and not in the light of Art. 9(2) of the Charter itself. In this case, as the pattern of a necessary behaviour is not established with a precision that realistically allows one to understand what is required, no point is added to a total count of the IQLP.

Accordingly, upon analysis of the 81 substantive units of the Charter, 34 of them (41.9 per cent) have been categorized as not providing any guidance on how to reach an established goal.⁷²

⁶⁷ E.g. ACHPR, *Association of Victims of Post Electoral Violence & Interights v. Cameroon* (App. No. 272/03), Decision, 25 November 2009, para. 88.

⁶⁸ E.g. ACtHPR, *ACHPR v. Republic of Kenya* (App. 006/2012), Judgment, 26 May 2017, paras. 138-146.

⁶⁹ See generally K. Callahan, *Citizen Participation: Models and Methods*, 30 International Journal of Public Administration 1179 (2007).

⁷⁰ E.g. *President embraces civil society*, The Herald, 06.02.2018, available at: <https://www.herald.co.zw/president-embraces-civil-society/> (accessed 30 May 2019).

⁷¹ E.g. UN Economic and Social Council, Economic Commission for Africa, *Progress in the Promotion of Popular Participation and Governance in Africa*, UN Doc. E/ECA/CGPP/3/3.

⁷² Art. 4(1) (“to promote democracy”); Art. 10(1) (“entrench the principle of the supremacy of the constitution in the political organization of the State”); Art. 12(1) (“promote good governance”); Art. 12(2) (“strengthen political institutions”); Art. 12(3) (“create conducive conditions”); Art. 13 (“shall take meas-

1.3.3. Character of legal obligations

The last variable is based on the observation that international obligations are implemented in various ways. In particular, there are two main types of undertakings, i.e. obligations of conduct and obligations of result.

The former requires states to adopt a particular course of action notwithstanding the outcome. For example, under Art. 6(1) of the African Charter on Maritime Security and Safety and Development in Africa⁷³ every state undertakes “to provide assistance to other States Parties and third States as may be required.” Under this provision a state does not incur responsibility because the objective of the assistance needed (that is prevention and combating a crime at sea) is not achieved in a particular case.⁷⁴ Instead, a state may be held responsible for a breach if it refuses to provide the prescribed assistance irrespective of whether the assistance prevents or combats a crime at sea.

Conversely, obligations of result are focused on the realization of particular changes of facts (e.g., on the “elimination of all forms of discrimination” within the meaning of Art. 8(1) of the Charter), and not on how states should act in order to accomplish such change.⁷⁵ Therefore states entail international responsibility when a situation is, at a given relevant time, different than that prescribed.

However, international practice justifies distinguishing another category beyond the strict lines drawn above.⁷⁶ For example, Art. 39 of the Charter provides that states “shall promote a culture of respect, compromise, consensus and tolerance as a means to mitigate conflicts.” On one hand, considering that no particular desired result is specified, the provision appears to be an obligation of conduct. On the other hand, a state party is not obliged to carry out a specific and accurately described conduct (such as, e.g., the cooperation prescribed under Art. 14 of the Charter in order to prosecute

ures to ensure and maintain political and social dialogue”; Art. 14(3) (“shall cooperate”); Art. 16 (“shall cooperate at regional and continental levels”); Art. 27(1) (“strengthening the capacity of parliaments”); Art. 27(2) (“fostering popular participation”); Art. 27(4) (“improving public sector management”); Art. 27(5) (“improving efficiency and effectiveness”); Art. 27(6) (“promoting the development”); Art. 27(7) (“development and utilisation”); Art. 27(8) (“promoting freedom of expression”); Art. 27(9) (“harnessing the democratic values”); Art. 28 (“shall ensure and promote strong partnerships and dialogue”); Art. 30 (“shall promote”); Art. 31(1) (“shall promote participation”); Art. 32(1)-(8) (“to institutionalize good political governance”); Art. 33 (1) (“effective and efficient public sector management”); Art. 33(2) (“promoting transparency in public finance management”); Art. 33(4) (“efficient management of public debt”); Art. 33(5) (“prudent and sustainable utilization of public resources”); Art. 33(7) (“poverty alleviation”); Art. 33(9) (“providing a conducive environment for foreign capital inflows”); and Art. 39 (“shall promote a culture of respect, compromise, consensus and tolerance”).

⁷³ Adopted 15 October 2016, not in force at the time of writing.

⁷⁴ E.g. ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Merits, Judgment, 26 February 2007, ICJ Rep 2007, para. 430.

⁷⁵ E.g. ICJ, *Legality of the Threat or Use Nuclear Weapons*, Advisory Opinion, 8 July 1996, ICJ Rep 1996, para. 99.

⁷⁶ See generally R. Wolfrum, *Obligation of Result Versus Obligation of Conduct: Some Thoughts About the Implementation of International Obligations*, in: M.H. Arsanjani et al. (eds.), *Essays on International Law in Honor of W. Michael Reisman*, Martinus Nijhoff Publishers, Leiden, Boston: 2011, pp. 365-383.

a person organizing coup d'état) but rather to undertake indefinite actions towards a direction roughly sketched out by a desired goal.⁷⁷ Therefore, the ensuing obligation falls outside the established dichotomy. Where the goal of the conduct is the sole parameter of what is actually needed, one should distinguish another category, i.e. that of the goal-orientated obligations.⁷⁸ Such undertakings refer to the evolutionary realization of certain aspirations in the indefinite future, and while "not bereft of legal content", they are of a "broad and general nature"⁷⁹ to an extent that significantly undermines their standard-setting capacity. Consequently, goal-oriented obligations constitute less apt measures for changing states' behaviour than obligations of result or obligations of conduct, and provisions of the Charter identified as belonging in this category receive no point to the total count of the IQLP. Otherwise, one point is added.

Accordingly, the Charter has been surveyed in search for goal-oriented obligations, that is obligations "focused on an objective without requesting a specifically defined or definable result to be achieved and without requiring a particular procedure to be set up."⁸⁰ Having examined 81 substantive units of the Charter, 21 of them (25.9 per cent) have been classified as lacking a sufficiently defined result to be achieved or requiring a particular procedure to be set up.⁸¹

1.3.4. Conclusions to section 1

Before proceeding with a discussion of the IQLP distribution throughout the document, two methodological caveats are warranted. First, bearing in mind that the three variables have been identified as influencing the standard-setting capacity of the treaty provisions, the value of the IQLP ranges from 0 (in case of highly imprecise, hortatory provisions possessing a very limited standard-setting quality) to 3 (that is, stipulations revealing significant standard-setting attributes). The relatively narrow range between the minimum and the maximum value means that the IQLP serves as an elementary tool suitable for detecting and confirming particularly clear features in the text. Further,

⁷⁷ *Ibidem*, p. 368.

⁷⁸ *Ibidem*, pp. 376-378.

⁷⁹ ICJ, *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, Judgment, 4 June 2008, ICJ Rep. 2008, para. 104.

⁸⁰ Wolfrum, *supra* note 76, p. 368.

⁸¹ Art. 4(1) ("shall commit themselves to promote democracy"); Art. 5 ("shall take all appropriate measures to ensure constitutional rule"); Art. 7 ("shall take all necessary measures to strengthen the Organs of the Union"); Art. 12(2) ("strengthen political institutions to entrench a culture of democracy and peace"); Art. 13 ("shall take measures to ensure and maintain political and social dialogue"); Art. 27(1)-(9) (obligations to advance political, economic and social governance described as, e.g., "strengthening", "fostering" and "improving"); Art. 30 ("shall promote citizen participation in the development process"); Art. 33(2) ("promoting transparency in public finance management"); Art. 35 ("shall strive to find appropriate ways and means to increase [...] integration and effectiveness [of traditional authorities]"); Art. 36 ("shall promote and deepen democratic governance by implementing the principles and core values of the NEPAD Declaration"); Art. 38(1) ("shall promote peace, security and stability"); Art. 39 ("shall promote a culture of respect, compromise, consensus and tolerance"); Art. 43(1) ("shall endeavour to provide free and compulsory basic education").

for the sake of simplicity, the variables have been applied in the binary mode, i.e. only 0 and 1 have been used to represent the relevant attributes of an examined stipulation. A side effect is thereby produced where the binary count cannot reflect a more nuanced reality.⁸² As a result, one must discuss the map of the IQLP distribution in the text adjusting for these caveats. Hence, to minimize their impact on the final findings, a particular emphasis is placed on the distribution of provisions revealing extreme IQLP values, that is 0 or 3. In this way, the intrinsic imprecision of the research instrument has been taken into consideration and its impact on observations and final findings has been reduced.

There are four principal observations on the distribution of substantive provisions possessing extreme IQLP values. First, stipulations attaining the maximum value (IQLP=3) are predominant in chapter 6 (six out of eight, that is 75 per cent of the provisions on “Democratic Institutions”)⁸³ and in chapter 7 (all five substantive units on “Democratic Elections”).⁸⁴ Neither of them includes any units where IQLP=0, and the arithmetical mean values of these chapters are 2.6 and 3 respectively. Further, stipulations resulting in IQLP=3 are also present, although to a lesser extent, in chapter 4 (7 out of 12, i.e. 58.3 per cent of the provisions on “Democracy, Rule of Law and Human Rights”);⁸⁵ and in chapter 9 (16 out of 50, that is 32 per cent of the provisions on “Political, Economic and Social Governance”).⁸⁶ These parts of the treaty also include provisions with an IQLP=0, that is one (out of 12, i.e. 8.3 per cent),⁸⁷ and five (out of 50, i.e. 10 per cent)⁸⁸ respectively. The arithmetical mean values of these chapters are 2.41 and 1.8 respectively. Next, chapter 5 on “The Culture of Democracy and Peace” contains no unit attaining a maximum IQLP and includes two provisions with IQLP=0 (out of six, i.e. 33.3 per cent).⁸⁹ The arithmetical mean value of the chapter is 1.0. Finally, eight provisions of the Charter (9.8 per cent) attained an IQLP=0 and 34 provisions of the treaty (41.9 per cent) attained an IQLP=3. Thus the arithmetical mean values of the substantive provisions of the Charter is 2.0.

The above observations warrant the conclusion that the treaty cannot be categorized as a hortatory international instrument. On the contrary, a considerable part of its substantive stipulations display a relatively high standard-setting capacity. The distri-

⁸² *E.g.* Art. 12(1) provides that states “shall promote good governance by ensuring transparent and accountable administration.” The provision has scored no point under the second variable because the action required, described by the verb (“to ensure”) and by the object (“transparent and accountable administration”), has been categorized as not defined with sufficient precision. However, this assessment is saddled with a certain amount of subjectivity necessitated by the binary mode of counting, which overlooks the complexity involved.

⁸³ Arts. 14(1)-(2), 15(1)-(4).

⁸⁴ Arts. 17(1)-(4), 22.

⁸⁵ Arts. 4(2), 6, 8(1)-(3); 10(2)-(3).

⁸⁶ Arts. 27(10), 29(2)-(3), 31(2), 33(3), 33(6), 33(8), 33(10)-(13), 34, 38(2), 40, 41 and 42.

⁸⁷ Art. 4(1).

⁸⁸ Arts. 27(1)-(2), 27(9), 30 and 39.

⁸⁹ Arts. 12(2) and 13.

bution of the provisions attaining IQLP=3 shows that robust and precise standards of behaviour have been established to prevent unconstitutional changes of governments; to establish institutional instruments supporting the constitutional transfer of power (chapter 6); and to ensure fair elections (chapter 7). At the same time, the parts of the Charter dealing with the promotion of democracy and peace (chapter 5) as well as advancing good governance (chapter 9) are on the other side of the range. Their provisions, though formally binding, are largely vague, indeterminate, and general to the extent of “depriving them of the character of hard law in any meaningful sense,”⁹⁰ hence nullifying their standard-setting capacity. While chapter 9 includes several stipulations attaining an IQLP=3, this should not be overestimated in the present context. In particular, their autonomous role as original minimum standard-setting matrixes is limited insofar as they mostly corroborate equally detailed or more detailed obligations under other regional treaties.⁹¹ Against this background, only four isolated units of the chapter stand out as establishing particular duties – i.e. those regarding development of the private sector, encouragement of investments, and transparent tax systems.⁹²

2. THE EXOGENOUS LIMITS OF THE CHARTER

A state bound by the Charter is obliged to implement relevant commitments and ensure that the state practice at the national level corresponds to the agreed standards. In particular, states should bring their laws and regulations into conformity with the treaty.⁹³ Against this backdrop, it is argued that the capacity of the treaty to produce tangible progress in democratic governance is constrained by factors originating from its application in practice. The three such issues examined in this section are: ratification challenges; problems in the application of the Charter before domestic courts; and securing compliance at the international level.

⁹⁰ Boyle, Chinkin, *supra* note 51, p. 220.

⁹¹ Art. 29(2)-(3) on the role women in democracy reaffirms already existing obligations under Art. 9 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, adopted 1 July 2003, entered into force 25 November 2005; Art. 33(3) on combating corruption generally recapitulates detailed obligations expressed under African Union Convention on Preventing and Combating Corruption, adopted 1 July 2003, entered into force 5 August 2006; Art. 34 on the decentralization of power encapsulates duties imposed under African Charter on the Values and Principles of Decentralisation, Local Governance and Local Development, adopted 27 June 2014, not in force at the time of writing. Several provisions of the Charter refer to commitments already established under the HR Charter. In particular, Art. 33(6) of the Charter on equitable allocation of natural resources mirrors Art. 21 of the HR Charter; Art. 27(10) of the Charter on prevention and combating diseases reflects general obligation under Art. 16 of the HR Charter; Art. 40 of the Charter dealing with employment, diseases, poverty and illiteracy corresponds to Arts. 15, 16 and 17 of the HR Charter; and Art. 42 of the Charter on protection of environment affirms stipulations of Art. 24 of the HR Charter.

⁹² Arts. 33(8), 33(10), 33(12) and 33(13).

⁹³ Art. 44(1).

2.1. Ratification challenges

The standard-setting role of a treaty is inherently restricted by its subjective scope and by the geographical scope of its application.

The parameters of the former are established according to a fundamental axiom that a treaty must be performed by the parties only. Although international agreements may, under certain conditions, produce effects influencing non-parties and actually modifying their behaviour these issues, although relevant, will not be discussed here as they are either negligible in the present context⁹⁴ or obviously exceed the scope of the research.⁹⁵ Therefore, it is assumed that a lack of ratification practically nullifies the role of a treaty in shaping conduct of a non-party state. The parameters of the latter are established pursuant to Art. 29 of the VCLT, which states that “[u]nless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory.” In the case of the Charter under discussion, this norm has to be considered taking into account that no intention to allow exceptions to the general rule can be inferred either from the *travaux préparatoires*, the text of the treaty, nor from the subsequent practice of the parties. Therefore, the treaty is binding upon each party in respect of its entire territory.

Against the presented normative background, this subsection depicts the ratification status of the Charter in order to determine the territorial range of its standard-setting impact seen in the context of the democratic governance deficit. The goal of the subsection is to identify a specific non-ratification pattern which, if proven, evidences another limit of the Charter. Namely, if the pattern reveals that states with poor democracy and human rights records are over-represented among non-parties, the value of the treaty in the accomplishment of tangible progress in terms of democratic governance is significantly restricted.

The Charter has not been applied provisionally and the progress of the ratification process has been perceived by the AU as a key factor in promoting adherence to the values of democracy.⁹⁶ This concern has been justified, as the statistics demonstrate general restraint on the part of the African states in ratification of multilateral agreements adopted under the OAU/AU aegis. The policy organs of the OAU and the AU have adopted 60 treaties, but only half of them have entered into force as of May 2018.⁹⁷ The Charter has been opened for signature, ratification, and accession by all member states of the AU.⁹⁸ The treaty entered into force on 15 February 2012, i.e. five years

⁹⁴ This includes: the third-party effect based on consent, *see e.g.* PCIJ, *Free Zones of Upper Savoy and the District of Gex (France v. Switzerland)*, Judgment, 7 June 1932, PCIJ Publications, Series A/B, No. 46, p. 49; the third-party effect of most-favoured-nation clauses, *see e.g.* ICJ, *Anglo-Iranian Oil Co. (United Kingdom v. Iran)*, Judgment, 22 July 1952, ICJ Rep. 1952, pp. 18-20; and the third-party effect envisaged in Art. 75 of the VCLT.

⁹⁵ Art. 44(2)(B)(a) of the Charter explicitly encourages “adherence” to the treaty by non-party states.

⁹⁶ *See e.g.* Assembly/AU/Dec.585(XXV), para. 4; EX.CL/Dec.627(XVIII), para. 3(vi); EX.CL/Dec.685(XX), para. 7(iii).

⁹⁷ Records available at <https://au.int/en/treaties>.

⁹⁸ Art. 47(1).

after its adoption and 30 days following Cameroon becoming the 15th member state to complete its ratification.⁹⁹ The pace of the process must be deemed moderate bearing in mind that 18 out of 29 regionally binding treaties under consideration (62 per cent) have taken less time to enter into force. At the time of this writing, the Charter has been ratified by 30 of the 55 members of the AU, thus being ranked 17th – based on the number of ratifications – out of the total number of regionally binding treaties.

The fact that the standard-setting effect of the treaty has been excluded in relation to territories constituting more than 45 per cent of the African states should be further examined taking into account the actual deficits in democratic governance. One can ascertain the geographical limits of the Charter's impact bearing in mind where tangible progress in democratization is particularly needed. To do this, the 2017 Ibrahim Index of African Governance (IIAG) has been applied¹⁰⁰ in order to prove (or disprove) the non-ratification pattern. The instrument, providing an evaluation of 54 African States (except for the Sahrawi Arab Democratic Republic) for the years 2000-2016, has been chosen as a credible and advanced apparatus already used in scientific researches.¹⁰¹ The IIAG defines "Safety & Rule of Law" and "Participation & Human Rights" as key components of good governance. The index of "Safety & Rule of Law" is based on 26 indicators combined to form four sub-categories (Rule of Law, Accountability, Personal Safety, and National Security). The Index of "Participation & Human Rights" is based on 19 indicators combined to form three sub-categories (Participation, Rights, Gender). The results, referring separately to both indexes, are classified into three main types: score, rank, and trend.¹⁰²

Seven out of the bottom ten states in the category of "Safety & Rule of Law" have not ratified the Charter.¹⁰³ The same number of non-party states have been classified in the top ten most deteriorated countries in the period 2012-2016.¹⁰⁴ On the other hand, four non-party states reached the top ten states¹⁰⁵ and four non-party states have been classified in the top ten most improved countries in the period 2012-2016.¹⁰⁶ With respect to the average score in this category in 2016,¹⁰⁷ 13 non-party states received scores below the average, while 12 non-party states received scores above the average.¹⁰⁸ Furthermore, an average deterioration trend has been observed in the period 2012-2016, with 18 non-party states performing better than the average trend and seven non-party states performing worse than the average trend.¹⁰⁹

⁹⁹ Art. 48.

¹⁰⁰ Available at <http://mo.ibrahim.foundation/iiag/>.

¹⁰¹ See S.O. Afolabi, *Interrogating the Credibility of Elections in Africa: Implications for Democracy, Good Governance and Peace?*, 10(1) Journal of Pan African Studies 3 (2017), pp. 14-18.

¹⁰² 2017 IIAG Report, pp. 9-12.

¹⁰³ Equatorial Guinea, Eritrea, DRC, Burundi, Libya, CAR, Somalia (*ibidem*, p. 99).

¹⁰⁴ Burundi, Libya, Gambia, Mozambique, CAR, Eritrea and Congo (*ibidem*).

¹⁰⁵ Mauritius, Botswana, Cabo Verde and Senegal (*ibidem*).

¹⁰⁶ Kenya, Tanzania, Zimbabwe, Senegal (*ibidem*).

¹⁰⁷ *Ibidem*, p. 104.

¹⁰⁸ *Ibidem*, pp. 106-161.

¹⁰⁹ *Ibidem*, pp. 104-161.

In the category of “Participation & Human Rights”, seven out of the bottom ten states have not ratified the Charter¹¹⁰ and six non-party states have been classified in the ten most deteriorated countries in the period 2012-2016.¹¹¹ On the other hand, five non-party states reached the top ten in that category¹¹² and two non-party states have been classified in the top ten most improved countries in the period 2012-2016.¹¹³ With respect to the average score in this category in 2016, 15 non-party states received scores below the average and ten non-party states received scores above the average. Furthermore, an average improvement trend has been observed in the period 2012-2016¹¹⁴ with only three non-party states (Morocco, Tunisia and Zimbabwe) performing better than the average trend and as many as 22 non-party states performing worse than the average trend.¹¹⁵

The data warrant three observations. First, the non-party states statistically perform worse than the states bound by the Charter. Notably, the former constitute the majority of the bottom scores and the majority of the most deteriorated countries in both categories. At the same time, they never form the majority of the top scores and the majority of the most improved countries. Furthermore, most of the non-party states received scores below the average in both categories. Second, when classifying the bottom scoring and the most deteriorated countries in both categories the percentage ratio of the non-party states to the state parties is 70-30 and 60-40 respectively. When categorizing the top scoring and the most improved countries in both categories the percentage ratio of the non-party states to the state parties is 50-50 and 20-80 respectively. Third, the average trends vary drastically between both categories. While the majority of the non-party states (72 per cent) perform better than the African average trend in the category “Safety & Rule of Law”, as many as 88 per cent of them perform worse than the average continental trend in the category “Participation & Human Rights”.

In conclusion, the particularly high ratio of non-party states performing worse than the average continental trend in the category “Participation & Human Rights” may suggest that non-ratification and poor records with respect to the participatory aspects of good governance in a democratic society (e.g., civil and political participation, free and fair elections, legitimacy of the political process, and civil liberties) are interrelated. Therefore, the role of the treaty in the attainment of tangible progress for societies in need (that is, the societies in states with a poor record) is significantly restricted.

2.2. The Charter in domestic legal systems

The treaty needs to be implemented at the national level in order to actually influence the state practice with respect to various aspects of democratic governance. Its implementation is a multi-faceted process involving, e.g., accommodation of interna-

¹¹⁰ DRC, Libya, Egypt, Swaziland, Equatorial Guinea, Eritrea, Somalia (*ibidem*, p. 100).

¹¹¹ Libya, Egypt, Burundi, Swaziland, DRC, Cabo Verde (*ibidem*).

¹¹² Cabo Verde, Mauritius, Tunisia, Senegal and Botswana (*ibidem*).

¹¹³ Tunisia and Zimbabwe (*ibidem*).

¹¹⁴ *Ibidem*, p. 104.

¹¹⁵ *Ibidem*, pp. 106-161.

tional standards into national strategies, undertaking legislative actions to bring national laws into conformity with the international agreement, and the introduction of amendments to education curricula. However, under certain circumstances a lack of good will or a range of political hurdles practically disable the executive and the legislative branches of a government as vehicles of implementation of the treaty. In such cases, the independent judiciary remains the only channel for streamlining domestic practice according to the agreed-upon international standards. This subsection briefly presents constitutional provisions of the African states in order to identify patterns of relevant limits preventing domestic courts from the direct application of the Charter. Given that nearly every domestic system contains provisions for the making, ratification, and application of treaties by the judiciary, the following analysis separately deals with two fundamental and distinguishable approaches to the issue.

The analysis proves that a combination of various factors prevents domestic courts in Africa from direct application of the Charter, thus radically impairing the role of the judiciary in shaping domestic practice pursuant to the international standards contained in the treaty.

2.2.1. The dualist approach

The so-called “dualist approach” to international law has been followed in the constitutional regulations of the former British-influenced territories. If their constitutions refer to the problem,¹¹⁶ they establish a principle that the consent expressed by a state to be bound by treaties at the international level does not transform relevant commitments into the law of the land.¹¹⁷ As a result, domestic courts cannot apply treaties directly¹¹⁸ unless the process of incorporation is completed,¹¹⁹ and in general they refrain from doing so. Not surprisingly, there are only isolated reported judgments of domestic courts applying norms contained in human rights treaties as rules of decision.¹²⁰ It follows that the adoption of this approach makes the process of implementation of the Charter entirely dependent on the political reality and readiness of non-judicial branches of government to incorporate the treaty into law.

2.2.2. The monist approach

Other African states roughly follow the so-called “monist approach” as reflected in Art. 55 of the Constitution of 1958 of the French Republic providing that once a treaty

¹¹⁶ Several acts do not regulate the issue explicitly, *see e.g.* The Constitution of Botswana of 1966. Texts of all constitutions cited in the subsection from The African Library, available at: <http://www.africanlawlibrary.net> (accessed 30 May 2019).

¹¹⁷ *E.g.* Art. 12(1) of the Constitution of the Federal Republic of Nigeria of 1999.

¹¹⁸ *E.g.* The Court of Appeal (Swaziland), *Ray Gwebu and Lucky Nhlanhla Bhembe v. Rex*, Judgment, 22 November 2002, African Human Rights Law Reports 229 (2002), para. 17.

¹¹⁹ It is difficult to discuss the progress of incorporation as parties has not submitted periodic reports on the legislative measures taken to give effect to the treaty under art. 49(1) of the Charter. By the time of writing, only one report has been submitted by Togo, AU, Press Release, 27 March 2017, No. 044/2017.

¹²⁰ *E.g.* High Court of Zambia, *Longwe v. Intercontinental Hotels*, Judgment, 4 November 1992, 4 Law Reports of the Commonwealth [HC] (Zam.) 1992.

has been ratified it becomes a part of domestic law. Similar provisions were adopted in constitutions of various African states: Francophone,¹²¹ Lusophone,¹²² Arabophone¹²³ and others (e.g. Ethiopia).¹²⁴

Intuitively it would appear that the monist states are potentially more propitious in terms of the influence of the Charter than the dualist states. However, this intuition is not supported by the general survey on the reception of international agreements.¹²⁵ It can be observed that references to human rights treaties are scant in the relatively slim reported case law of domestic courts.¹²⁶ This fact may be explained with reference to three principal factors. First, in numerous states a treaty that enters into force internationally lacks domestic legal force until the executive branch publishes or promulgates the treaty.¹²⁷ However, the relevant practice has not been homogenous in this respect. For example, the HR Charter was either promulgated together with a pertinent act of ratification,¹²⁸ promulgated separately,¹²⁹ or has not been promulgated at all – thus preventing its application by domestic courts.¹³⁰ Second, although the constitutions of the monist states do not explicitly introduce a self-executing principle of direct application, domestic courts do so in practice by checking whether treaties' provisions possess a mandatory quality to be applied in the absence of domestic legislation (the *Habré Case*). Against this backdrop, there is considerable uncertainty concerning self-executing character of all the norms contained in the Charter. In particular, Art. 44(1)(a) of the treaty stipulates that states “shall initiate appropriate measures including legislative, executive and administrative actions to bring (...) national laws and regulations into conformity with this Charter.” It may be argued that as the provision clearly requires specific acts of a state to implement the treaty, its norms are not self-executing and cannot operate as domestic law. Finally, direct application of the Charter by domestic courts may be restricted by a confluence of several political factors. In particular, there is a growing

¹²¹ E.g. Art. 147 of the Constitution de la République du Bénin of 1990.

¹²² E.g. Art. 13(2) of the Constituição da República de Angola of 2010.

¹²³ E.g. Art. 80 of the Constitution de la République Islamique de Mauritanie of 2006.

¹²⁴ Art. 9(4) of the Constitution of the Federal Democratic Republic of Ethiopia of 1994.

¹²⁵ See generally F. Viljoen, *Application of the African Charter on Human and Peoples' Rights by Domestic Courts in Africa*, 43(1) Journal of African Law 1 (1999); M. Killander (ed.), *International Law and Domestic Human Rights Litigation in Africa*, Pretoria University Law Press, Pretoria: 2010; F. Viljoen, *International Human Rights Law in Africa*, Oxford University Press, Oxford: 2012, pp. 517 *et seq.*

¹²⁶ But cf. Constitutional Court of Benin, *Okpeitcha Case*, Judgment, 17 August 2001, African Human Rights Law Reports 33 (2002), paras. 8–11.

¹²⁷ E.g. Constitutional Court of Benin, *Contrôle de constitutionnalité l'arrêté no. 175/MFPTRA/DCI/DACAD/SAD de 24 juillet 2002*, Judgment, 19 February 2003, available at: http://www.cour-constitutionnelle-benin.org/doss_decisions/03029.pdf (accessed 30 May 2019).

¹²⁸ Décret no 87–37 du 3 février 1987, 6 Journal Officiel de la République Algérienne (1987), p. 126.

¹²⁹ Décret no 82–232 du 8 novembre 1982, Journal Officiel de la République Togolaise, 1er Janvier (1983), p. 2.

¹³⁰ In the Mauritanian practice, the act of ratification of 14 June 1986 was published in 664–665 Journal Officiel de la République Islamique de Mauritanie, p. 299. However, the text of the HR Charter has not been promulgated thereafter.

tendency in West and Central Africa to establish presidential systems with a dominant position reserved for the head of state. It is not infrequent that a head of state is empowered to apply disciplinary measures against members of constitutional courts or influence the election of judges.¹³¹ As a result, the judges tend to refrain from referring to treaties to delineate the scope of states' obligations with respect to democratic governance. At the same time, one must not underestimate the negative effect of the lack of a professional background as impairing the application of international law. Domestic judges who are not familiar with international law are not inclined to decide pending cases applying norms contained in international agreements. This, in turn, influences other lawyers appearing before such domestic courts, who must take into consideration the limited practical effectiveness of arguments referring to international law.¹³²

2.3. Enforcement at the international level

Any act incompatible with international obligations of a state entails state responsibility.¹³³ This means that a wrongful act gives rise to certain legal consequences including, above all, the duty to cease the breach and to offer appropriate assurances and guarantees of non-repetition in order to "wipe out all the consequences" of the violation.¹³⁴ Yet, given the decentralized nature of the international community of sovereign states, neither fact-finding bodies (necessary to establish a violation) nor effective enforcement are universally guaranteed. As a result, the system of international responsibility does not always entrench compliance with relevant obligations.

The starting point for this section refers to the theoretical assumption that where the implementation of international responsibility is governed by regulatory regimes established under applicable treaties, the process becomes institutionalized and hence more robust than in the absence of relevant procedural norms. In this way, such regimes potentially strengthen enforcement of treaties by, *inter alia*, facilitating fact-finding, assessment of compliance, reactions, and streamlining international dispute resolution.¹³⁵ The typology of the relevant mechanisms presented in this subsection distinguishes between modes explicitly envisaged in the Charter and the judicial control exercised by the ACtHPR under the Protocol to the HR Charter on the Establishment of the African Court on Human and Peoples' Rights (Protocol to the ACtHPR).¹³⁶

¹³¹ See S.D. Kanga, *An assessment of the possibilities for impact litigation in Francophone African countries*, 14(2) African Human Rights Law Journal 449 (2014), pp. 455–462.

¹³² See Republic of Rwanda – Ministry of Justice, *The 9th & 10th Periodic Report of the Republic of Rwanda (2005–2009)*, available at: <http://www.achpr.org/states/rwanda/reports/9th-10th-2005-2009/> (accessed 30 May 2019), para. 21; M. Killander, H. Adjolahoun, *International law and domestic human rights litigation in Africa: An introduction*, in: Killander (ed.), *supra* note 125, p. 18.

¹³³ E.g. PCIJ, *Phosphates in Morocco*, Judgment, 14 June 1938, PCIJ Publications, Series A/B, No. 74, p. 28.

¹³⁴ PCIJ, *Factory at Chorzów (Germany v. Poland)*, Merits, Judgment, 13 September 1928, PCIJ Publications, Series A, No. 17, p. 47.

¹³⁵ E.g. R.O. Keohane, *Cooperation and Discord in the World Political Economy. After Hegemony*, Princeton University Press, New Jersey: 1984, p. 244.

¹³⁶ Adopted 10 June 1998, entered into force 25 January 2004.

2.3.1. Enforcement under the Charter

The treaty envisages two sets of international mechanisms in order to ensure compliance. One of them is established on the continental level and the second is based on regional cooperation. Moreover, the Charter also provides additional guarantees to prevent an unconstitutional change of government.

On the continental level, the AU Commission is positioned as the central coordinating body (Art. 45(a)). In particular, it is entitled to develop benchmarks for the implementation of the commitments under the Charter and to evaluate compliance by the states (Art. 44(2)(a)), as they are required to submit reports every two years on measures taken to meet the obligations under the treaty (Art. 49(1)). In turn, two other organs, i.e. the Assembly and the Peace and Security Council, are vested with a mandate to determine the appropriate measures to be imposed on any state party that violates the Charter (Art. 46). The practice shows that neither the requirement of state reports nor the sanctions mechanism have been applied as fully fledged instruments advancing enforcement. As to the former, at the time of this writing as many as 23 state parties have never presented their reports due, with Togo being the only member state in compliance with this obligation. Yet, considering that the guidelines for the reports were adopted only in January 2016,¹³⁷ the realization of the reporting duty became practically viable only after that date. Unsurprisingly, the AU recognizes the mechanism as “developing”,¹³⁸ and has never decided on measures to be taken against states violating the self-reporting obligation. Instead, the organization merely has urged them to submit their reports.¹³⁹ As to the latter, Art. 46 of the Charter stipulates that disciplinary measures will be imposed on states in breach of the treaty. However, given that the treaty does not specify relevant sanctions in cases not involving an unconstitutional change of government (Arts. 24-26), it is argued that the resulting ambiguity undermines the enforcement mechanism and hence indirectly promotes non-compliance.¹⁴⁰ The practice supports this view, as so far the AU organs have never applied disciplinary measures under Art. 46 outside of the context of an unconstitutional change of government.

At the regional level, the Charter merely envisages, once again very vaguely, cooperation between the AU and RECs to monitor its implementation (Art. 44(2)(b)). Recent examples of the AU and RECs providing mediation and good offices in order to ameliorate crises of governance in Mali, Burundi, CAR, or Guinea Bissau¹⁴¹ demonstrate that the political cooperation between the continental and regional organizations in 2017 has been undertaken on an *ad hoc* basis, and not under Art. 44(2)(b) of the Charter. Therefore, the treaty has not evidenced any significant practical insti-

¹³⁷ R. Nassuna, *The State Reporting Mechanism under ACDEG*, 4(1) African Governance Newsletter 19 (2017), p. 20.

¹³⁸ AU, *Annual Report on the Activities of the African Union and its Organs* (2017), EX.CL/1061(XXXII), p. 11.

¹³⁹ E.g. Assembly/AU/Dec.645(XXIX), para. 10.

¹⁴⁰ Elvy, *supra* note 35, pp. 103-104.

¹⁴¹ *Annual Report*, *supra* note 138, pp. 12-13.

tutionalizing effect and cannot be regarded as actually bolstering enforcement through regional structures.¹⁴²

The provisions of the Charter addressing the issue of unconstitutional change of government, defined under Art. 23, are more detailed than those discussed in the context of general enforcement of the treaty. The measures provided are directed against both states experiencing, instigating or supporting an unconstitutional change of government, as well as against individuals involved. The enforcement against states is established with reference to provisions of other treaties constituting the AU and supplementing the Charter. Accordingly, a state experiencing an unconstitutional change of government faces mandatory suspension – decided upon by the AU Peace and Security Council – from participation in the activities of the AU if “diplomatic initiatives have failed.”¹⁴³ Other forms of sanctions may also be imposed by the AU Assembly. These include visa restrictions and interruption of communication links as well as economic or political relations.¹⁴⁴ The research on strategies employed by the AU in the period 2000-2015 shows that suspension from the AU was decided in 92 per cent of cases,¹⁴⁵ thus evidencing a considerable consistency in the AU’s political approach towards unconstitutional changes of government. Moreover, in 2014 the AU Peace and Security Council underlined the principal role of the Charter’s regime in dealing with an unconstitutional change of government upon lifting Egypt’s suspension, which had been decided upon earlier, following the overthrow of the first democratically-elected president by a military coup.¹⁴⁶ The organ stressed that the decision to resume the state’s participation in the activities of the AU does not constitute a precedent in terms of adherence to the relevant provisions of the Charter, which states in Art. 25(4) that perpetrators of unconstitutional changes of governments cannot participate in the elections held to restore constitutional order.¹⁴⁷ Given that Egypt has not been a party to the Charter, the decision obviously does not constitute subsequent practice in the application of the

¹⁴² Certainly, this finding refers solely to the position of the Charter as the instrument potentially institutionalizing enforcement through RECs and does not apply to the African peace and security architecture as a whole. RECs were also involved in the conflict resolution process in, e.g., Gambia, Guinea-Bissau, Chad Lake Basin and Lesotho. See the Institute for Peace and Security Studies, *APSA Impact Report 2016*, Addis Ababa University: 2017, pp. 26-31.

¹⁴³ Art. 25(1) of the Charter in conjunction with Art. 30 of the Constitutive Act and Art. 7(g) of the Protocol Relating to the Establishment of the Peace and Security Council of the AU, adopted 9 July 2002, entered into force 26 December 2003; see also PSC/PR/Comm.(CLIV), para. 3.

¹⁴⁴ Art. 25(6)(7) of the Charter in conjunction with Art. 23 of the Constitutive Act and Art. 37(5) of the Rules of Procedure of the Assembly of the Union, ASS/AU/2(I)-a. A prominent example of the AU practice in this respect constitutes decision of the Peace and Security Council PSC/PR/COMM.(DLXV) passed on 17 December 2015 in the context of the election crisis in Burundi. Given that the Charter was not applicable to the non-party state, the treaty was not invoked in the text of the decision.

¹⁴⁵ L. Nathan, *Trends in mediating in Africa coups 2000-2015* (paper presented at the International Studies Association Annual Convention, Atlanta, 16-19 March 2016), p. 8, available at: <https://bit.ly/2Ws7UV5> (accessed 30 May 2019).

¹⁴⁶ PSC/PR/COMM.(CCCLXXXIV).

¹⁴⁷ PSC/PR/COMM.2(CDXLII).

treaty. Yet the pronouncement indicates that the AU Peace and Security Council treats Arts. 25-26 of the Charter as a reference standard for dealing with unconstitutional changes of government in the non-party states. Finally, the responsibility of states for unconstitutional changes of government under the Charter is further complemented with the individual responsibility of perpetrators. The Charter provides that they may be tried before the competent court of the AU,¹⁴⁸ and this provision has prefigured Art. 22E of the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights.¹⁴⁹ However, the Protocol has not entered into force and the snail's pace of its ratification procedure seems ominous for actual activation of the mechanism.

2.3.2. Judicial control exercised by the ACtHPR

The ACtHPR is entitled to give final and binding judgments, enforceable by the organs of the AU. If it finds that there has been a breach of an international obligation, it shall issue appropriate orders to remedy the violation, including the payment of fair compensation or reparations.¹⁵⁰ At the time of writing, 20 states to the Charter are within the jurisdiction of the ACtHPR and the Court has already found that it has *ratione materiae* jurisdiction to interpret and to apply the Charter. However, the potential contribution of the Court to generate a tangible shift in democratic governance seems to be significantly diminished due to the ratification challenges and impediments concerning the execution of judgments.

First, there are two ways to access the Court in contentious cases, i.e. automatic and optional. Under the former, a case may be submitted to the ACtHPR by five entities: the ACHPR, a state party which has lodged a complaint to the ACHPR, a state party against which the complaint has been lodged at the ACHPR, a state party whose citizen is a victim of human rights violation, and an African intergovernmental organization.¹⁵¹ A non-governmental organization with observer status before the ACHPR and/or an individual have access to the ACtHPR only if a state party has made an optional declaration to this effect under Art. 34(6) of the Protocol to the ACtHPR.¹⁵² In the formative period of the Court it was expected that cases reaching its docket would begin as communications to the ACHPR,¹⁵³ but this turn out to not be the case. In February 2017 the ACtHPR finalized 33 cases and took seizure of 95 other litigations in contentious matters. Notably, in all but three cases NGOs and individuals (and not the ACHPR, states or intergovernmental organizations) sought judicial protection in the ACtHPR. In ten out of 32 finalized cases (approximately 30 per cent) the Court

¹⁴⁸ Art. 25(5).

¹⁴⁹ Adopted 27 June 2014, not in force at the time of writing.

¹⁵⁰ Art. 27 of the Protocol to the ACtHPR.

¹⁵¹ *Ibidem*, Art. 5(1).

¹⁵² *Ibidem*, Art. 5(3).

¹⁵³ F. Viljoen, *A Human Rights Court for Africa, and Africans*, 30(1) *The Brooklyn Journal of International Law* 1 (2004), p. 23.

decided individual applications inadmissible as respondent states had not deposited optional declarations. The ACHPR acted as the applicant in only three cases, which makes the optional declarations the principal basis of ACtHPR jurisdiction, even though at the time of writing only seven states have deposited their declarations to the AU Commission: Benin, Burkina Faso, Côte d'Ivoire, Ghana, Malawi, Mali, and Tanzania (however the latter is not a party to the Charter). This fact constitutes a major practical limitation of the positive impact the ACtHPR could have upon enforcement of the Charter.

Second, judgments of the Court are binding,¹⁵⁴ with the AU positioned as their guardian and guarantor. However, the relevant prerogatives of AU are put in very general terms, with the AU Executive Council performing the monitoring function.¹⁵⁵ Moreover, the monitoring activities of this organ are formally limited to the information provided by interested states.¹⁵⁶ Therefore if a state neglects the obligation to inform the Executive Council on steps taken to comply with a judgment, the only alternative sources of information are victims, entities acting on their behalf, or civil society. Additionally, the Protocol on the ACtHPR does not specify the consequences of non-compliance. In practice, the AU resorts solely to ineffective diplomatic measures, repeatedly calling upon states to respect their obligations.¹⁵⁷

CONCLUSIONS

This article has explored the capacity of the Charter to nudge African states towards desired patterns of behaviour and thus to produce the desired tangible shifts in democratic governance on the continent. Beginning with the character of the Charter, the contribution has shown that terminology used in the instrument and in the subsequent practice of AU confirms the legally binding nature of the document at the most elementary level. As a result, the Charter stands out as the first Pan-African treaty to comprehensively entrench fundamental principles on democracy and good governance. However, a more detailed analysis of the Charter leads to the identification of certain factors impairing the legal quality of the text. These factors refer to the (lack of) clarity of goals and precision of measures required, and the character of legal obligations under the Charter. The quantity and particular distribution of the factors evidence that the number of precise and applicable standards set by the treaty is limited. Such matrixes are established mainly to prevent unconstitutional changes of government, to introduce institutional instruments supporting the constitutional transfer of power, and to ensure fair elections. On the other hand, the provisions concerning the promotion of

¹⁵⁴ Art. 30 of the Protocol to the ACtHPR.

¹⁵⁵ *Ibidem*, Art. 29(2).

¹⁵⁶ ACtHPR, *Activity Report of the African Court on Human and Peoples' Rights for the Period 1 January to 31 December 2015*, EX.CL/939(XXVIII), paras. 1-21.

¹⁵⁷ *E.g.* AU Doc. EX.CL/Dec.903(XXVIII) Rev.1, para. 6.

democracy and peace as well as advancing good governance are substantively nebulous, imprecise, and general to an extent nullifying their standard-setting capacity. Therefore, from this perspective the treaty amounts to a one-dimensional document addressing merely a selected part of the overall governance deficit.

Furthermore, the analysis proves that the implementation of the Charter on the national plane and its enforcement on the international level are significantly constrained by three crucial issues rooted outside its text and beyond the legal nature of the document. First, building on a comparison between the ratification status of the Charter and data provided by IIAG, the paper has shown that the non-ratification pattern and the poor record pattern are symmetrical. In particular, non-party states statistically perform worse than states bound by the Charter. As a result, the value of the document adopted to address the democratic governance shortfall may be significantly restricted by the low ratio of ratifications. Second, the impact of the Charter on the domestic practice of state parties is politically double-conditioned. Once the treaty is ratified, application of the relevant standards still depends on their domestication by politically motivated organs of the executive and the legislative branches of government. Faced with the prevailing lack of domestication, domestic courts in Africa generally refrain from direct application of the Charter and abstain from referring to the treaty in delineating the scope of states' obligations with respect to democratic governance. Finally, the rudimentary framework for the international enforcement of the Charter is hardly conducive to international actions. Unsurprisingly, the AU political bodies responsible for its international enforcement predominantly adopt a passive stance and overlook cases of non-compliance. The relatively uniform practice of suspending members from the AU in cases of unconstitutional changes of government forms an isolated exception.