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## Towards a People-Driven African Union

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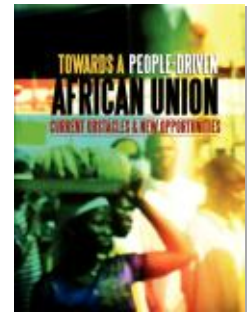
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## 9. KEY DECISIONS AT SUMMITS IN 2006

By way of illustration of some aspects of summit decision-making processes, this section of the report outlines some of the issues arising out of some of the key debates at summits in 2006: the Draft Charter on Democracy, Elections and Governance; the Hissène Habré case; the decision on the chair of the African Union; the decision on the Annual Activity Report of the African Commission on Human and Peoples' Rights; the decision on the Draft Single Legal Instrument on the merger of the African Court on Human and Peoples' Rights and the Court of Justice of the African Union; and the decision on the seat of the African Court on Human and Peoples' Rights.

### **The Draft Charter on Democracy, Elections and Governance**

The Draft Charter on Democracy, Elections and Governance, which was on the agenda of the Executive Council of Ministers meeting at the Banjul summit (and is scheduled to be considered again at the January 2007 summit in Addis Ababa), has its roots in the Declaration on Unconstitutional Changes of Governance in Africa adopted at the Lomé summit of the OAU in 2000.<sup>229</sup> In 2002, heads of state at the Durban summit (the last of the OAU and first of the AU) adopted a further declaration on the principles governing democratic elections.<sup>230</sup> Following this summit, which also saw the adoption of the NEPAD Declaration on Democracy, Political, Economic and Corporate Governance, the AU hosted, with the South African Independent Electoral Commission and the African Association of Electoral Authorities, a continental conference on elections, democracy and governance in April 2003.<sup>231</sup> In 2004, a meeting of government experts discussed these issues, and recommended that the declaration be developed into a new Charter on Democracy, Elections and Governance; the initial draft of this text was debated at an independent experts' meeting held in November 2005. In April 2006, a further experts meeting was held to discuss the draft, immediately followed by a ministerial meeting to provide input from a political rather than technical perspective.<sup>232</sup>

The draft text emerging from these discussions was presented to the AU summit in Banjul, but not adopted. Among the reasons were management of time in the Executive Council meetings, such that there was not a quorum when the text came to be debated, but above all the lack of a real process of political consensus building – among both member states and African citizens – in the period leading up to the summit. The adoption of United Nations documents of similar importance are typically preceded by a series of meetings of several weeks each, attended by both technical experts and government representatives, so that the final draft text debated at a summit will contain only a few 'bracketed' items whose significance is clearly understood. But as in the case of many similar AU texts, the preparatory discussions of the draft charter were of no more than two days each, with documents distributed to participants only a few days before the meetings, making preparation and consultation all but impossible. Meanwhile, although a select few civil society organisations were invited to the meetings of independent experts, there was no attempt to make the draft text more widely

available, even by publishing it in full on the AU website. The failure to come to a decision on the Charter in Banjul is thus illustrative of wider problems in the system for drafting and adoption of such texts.<sup>233</sup>

## The Hissène Habré case

One of the key decisions considered at both the Khartoum and Banjul summits in 2006 was the position of the African Union in relation to the request of Belgium for extradition from Senegal of the former president of Chad, Hissène Habré, after a Belgian judge delivered, on 19 September 2005, an international warrant to arrest Hissène Habré for crimes against humanity, war crimes, acts of torture and serious violations of international humanitarian law.<sup>234</sup> Senegal's highest court, the Cour de Cassation, had ruled in 2001 that Senegal did not have the jurisdiction to try Habré; and in November 2005 the Indictments Chamber of the Court of Appeal refused jurisdiction to rule on the extradition request.

Senegal decided to refer the case to the January 2006 African Union summit in order for it to indicate 'the competent jurisdiction to try this case'.<sup>235</sup> In the note presenting the case to the African Union, the Senegalese authorities affirmed that 'the case relating to the request to extradite Hissène Habré is closed in Senegal'.<sup>236</sup> However, it appears that Senegal did not circulate documents sufficiently in advance of the summit to allow other delegations to take an informed decision: one west African minister of foreign affairs complained in late December, just weeks before the summit, that he had unsuccessfully sent requests to his Senegalese counterpart asking to be briefed about the particulars of the case.<sup>237</sup>

At Khartoum, heads of state dodged the need for an immediate decision by requesting the chair of the AU Commission to 'set up a committee of eminent African jurists to consider all aspects and implications of the Hissène Habré case as well as the options available for his trial' and report to the July 2006 summit.<sup>238</sup> The committee appointed by Chairperson Konaré met in Addis Ababa in May 2006 and decided to recommend that there should be a preference for an African solution to the matter and that Senegal was the most suitable country to hold the trial although an ad hoc tribunal could also be established.<sup>239</sup> The Assembly accordingly decided to mandate Senegal to prosecute and ensure that Hissène Habré be tried, on behalf of Africa, by a competent Senegalese court with guarantees for fair trial.<sup>240</sup>

This decision by the Assembly is the first intervention by the African Union to implement the principles of the Constitutive Act establishing the Union's 'right ... to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity' as well as its 'condemnation and rejection of impunity and political assassination'.<sup>241</sup> However, the decision can be criticised on legal grounds, since there is an ongoing legal proceeding, and Senegal has not officially responded to the Belgian request for the extradition of Hissène Habré, which was based on the relevant provisions of the United Nations Convention Against Torture.

The decision to refer the case to the AU Assembly was an effort by Senegal to escape the political consequences of a legal proceeding in its domestic courts. There was no widespread debate of the case at sub-regional level in advance of the decision to refer, though President Wade of Senegal did meet with President Obasanjo of Nigeria to discuss the case.

The Habré case is interesting from the point of view of civil society engagement with the African Union because of the important role played by a coalition of African (mostly Senegalese and Chadian) and international human rights organisations in bringing the initial complaint against Habré in Senegal. It illustrates both the success and the risks that can arise from confrontational tactics. The prominent role of US-based Human Rights Watch in the case brought resources and media exposure to the victims of President Habré that they would have been unlikely to obtain independently, and was key to the decision of Belgian prosecutors to bring a case against

Habré under the torture convention. The coalition distributed a 15-page document to foreign ministers and diplomatic advisers as well as AU Commission officials in advance of the Khartoum summit summarising the case and presenting different possible options for the AU; a more detailed document was prepared for the Committee of Eminent Jurists and clearly influenced their reasoning. But the international advocacy and especially the Belgian indictment also generated resistance from African states, including Senegal, to non-African involvement in an African legal case, and may have made more difficult the efforts of African human rights groups to advocate for the Senegalese courts to take jurisdiction; and subsequently, when the *Cour de Cassation* (Senegal's highest court) refused to do so, for Senegal to extradite Habré to Belgium.

## Decision on the presidency of the African Union

Under the OAU the presidency of the organisation was a largely symbolic role, held by the head of state of the host of the last annual summit. The creation of the African Union and the increased responsibilities now given to the presidency in inter-African relations and conflict resolution has also increased the competition for the post.

In principle, the president of the Union is elected by the Assembly at the January summit (usually held in Addis Ababa), 'after consultations among the member states',<sup>242</sup> for a period of one year. In the event that the Assembly takes place in one of the other member states, the head of state of the host country has the right to chair the session of the Assembly.<sup>243</sup>

It is the Union's practice that the presidency should rotate across the regions of Africa. Thus the presidency of the AU for 2006 was due to be assumed by a member state in the eastern region. Between 2001, when the Constitutive Act entered into force, and 2004, the determination of the acting chairmanship did not pose any real problems. President Thabo Mbeki, whose country, South Africa, organised the first summit of the African Union in Durban, succeeded the president of Zambia, who was the last chairman of the OAU. The following year, President Joaquim Chissano, whose country, Mozambique, hosted the second AU summit, took over the leadership of the Union from his South African colleague.

In June 2004, the third ordinary session of the Assembly was held in Addis Ababa, the headquarters of the Union, and President Olusegun Obasanjo of Nigeria was elected chair. During this summit, some voices were raised among the state delegations in attendance as well as within civil society organisations to protest against the decision to host the fifth summit of the Union in Khartoum and the possible accession of Sudan to the chair of the African Union, particularly in light of the massive human rights violations in the Darfur region and the continuing civil war in the southern part of the country. How could the African Union be chaired by a country whose leaders had been investigated and accused of being implicated in violations of humanitarian law by a United Nations commission of inquiry? International opposition to the presidency of Sudan, both from non-governmental organisations and states, was also strong. The summit condemned the human rights violations in the Darfur region and decided to hold the fourth summit of the African Union in Nigeria, pending the resolution of the situation in Darfur.<sup>244</sup> The summit also decided to increase the frequency of the meetings of the Heads of State and Government to two ordinary sessions annually.<sup>245</sup>

The January 2005 fourth summit, held in Abuja, noted some progress in the situation in Sudan, with the signing of a general peace treaty between the government and the Sudan People's Liberation Movement/Army, and decided that the fifth summit, later that year, would be in Sirte, Libya, and the sixth summit would exceptionally be held in Sudan.<sup>246</sup> The summit also extended the mandate of President Obasanjo as president of the AU to January 2006.<sup>247</sup>

The 6<sup>th</sup> summit took place from 16–24 January 2006 in Khartoum, and its agenda included the election of the president of the Union, presumed (though not required) to be due to come to Sudan. But although

eastern Africa supported the Sudanese candidacy,<sup>248</sup> west and southern African states opposed the election of Sudan and its president as chair of the African Union, because of continuing human rights violations in Darfur and the decision of the International Criminal Court to open an investigation into Sudanese officials named in the UN investigation.<sup>249</sup>

The government of Botswana in particular played a key role, taking a principled decision that a Sudanese presidency would be inappropriate.<sup>250</sup> Botswanan president Festus Mogae, 'presumably because of the apparent absence of a vested interest in the Eastern region', chaired intensive discussions to resolve the matter among a committee of seven heads of government.<sup>251</sup> Finally, a compromise was reached by which the Republic of Congo, representing central Africa, assumed the chair.<sup>252</sup>

Civil society organisations again played an important role in keeping the violations in Darfur in the forefront of the considerations of member states. Representatives of the Darfur Consortium (a coalition of several tens of organisations) issued a press release at the summit asserting that 'the Darfur peace process would be jeopardized if African leaders elect a President for the African Union who is a party to the conflict'.<sup>253</sup> A meeting held by the Darfur Consortium in Khartoum to discuss this position was disrupted by the Sudanese authorities and all the participants arrested: the international publicity for this event ended any remaining chance that Sudan might get the presidency.

## **Annual Activity Report of the African Commission on Human and Peoples' Rights**

Article 54 of the African Charter on Human and Peoples' Rights provides that 'the Commission [on Human and Peoples' Rights] shall submit to each ordinary session of the Assembly of Heads of State and Government a report on its activities'. In practice, the session in which the report is reviewed begins with a preliminary presentation of some fifteen minutes by the chairperson of the African Commission on Human and Peoples' Rights, followed by a debate on all the subjects addressed in the report and a decision to adopt it. The report and the decisions on individual communications that it contains only becomes public after this decision. In 2003, the Assembly decided to mandate the Executive Council to assess the work of the Commission.<sup>254</sup> Since that decision, the session of the Executive Council dedicated to the review of the report of the African Commission has become one of the highlights of the African Union summits: while the heads of state and government often adopted the reports without a debate, the ministers of foreign affairs have made a habit of devoting an average of three hours to the report.

The length of debate does not, however, reflect a new interest of member states in ensuring respect for human rights on the continent, but rather a new determination by several states criticised in resolutions by the African Commission to defend their image. Eritrea, Ethiopia, Sudan, Uganda and especially Zimbabwe have complained that the African Commission has adopted resolutions on the human rights situation in their respective countries based on information allegedly obtained from non-governmental organisations without verifying its accuracy with the states in question.<sup>255</sup>

At the Khartoum summit, Sudan accused the Commission of bias because it did not, in the disputed resolution, condemn the rebels of Darfur for the human rights violations that they also allegedly committed; while Uganda pointed out that the text of the resolution did not mention the source of the information of the African Commission and that, as a state party to the African Charter, it had the right to be heard by the African Commission before the adoption of the resolution. Zimbabwe, for its part, was much more virulent towards the continental organ, which it accused of spreading false information conveyed by its enemies, particularly Amnesty International and the British government.

After a debate lasting over three hours, the Executive Council requested the concerned member states to make their views available to the African Commission and the Commission to submit a report at the next summit in Banjul.<sup>256</sup> At its next session, the African Commission heard, in a private session, the representatives from Ethiopia, Uganda and Zimbabwe and considered written comments from these states and from Sudan, which it appended to the 20<sup>th</sup> activity report submitted to the Banjul summit.<sup>257</sup>

During the review of the 20<sup>th</sup> Activity Report of the African Commission by the Executive Council at Banjul, Ethiopia, Uganda, Sudan and Zimbabwe complained that the African Commission had not changed its opinion on the human rights situation in their respective countries despite their submissions. In their view, that raised a serious issue regarding the independence of the continental institution.<sup>258</sup> Other states, including Namibia, Swaziland and (more disappointingly) Botswana, supported these assertions. On the strength of this sub-regional solidarity, Zimbabwe accused the Commission of not having respected the decision made by the Assembly by not submitting to the state for comment a decision on an individual communication brought by the Zimbabwe Human Rights NGO Forum.<sup>259</sup>

In her response, the chairperson of the African Commission noted that Zimbabwe had been represented and argued its case before the Commission throughout the hearing of the communication, in accordance with the Commission's rules of procedure and the African Charter.<sup>260</sup> The Commission also asserted that the practice whereby the Union authorises the adoption of its Activity Report is not in conformity with the letter of Article 59 of the Charter, which operates a very clear distinction between decisions on individual communications, which must be approved by the Assembly of the Union, and other decisions which it may take in the context of its mandate and of which it only informs the Assembly.<sup>261</sup>

The Executive Council decided to authorise the publication of the 20<sup>th</sup> Activity Report of the African Commission and its appendices 'with the exception of that containing Decision 245 concerning Zimbabwe'. At the same time, it invited Zimbabwe to submit its observations on the disputed decision to the African Commission within two months, and the African Commission to submit a report to the Executive Council at its next ordinary session. In addition, the Executive Council requested the states to 'communicate their comments on the Decisions to be submitted to the Executive Council and/or the Assembly within two months of the notification by the African Commission on Human and Peoples' Rights'.<sup>262</sup>

The open challenges to the African Commission's mandate, independence and working methods have brought a response from the Commission, which organised a joint 'brainstorming session' with the AU Commission following the Khartoum summit in January 2006, attended by all of the AU structures concerned by human rights issues. Following the Banjul summit, the Commission decided to revise its Rules of Procedure; prepare a paper for submission to the African Union on its relations with the different AU organs; review the issue of the independence of its own members; and take initiatives towards closer collaboration with NGOs, national human rights institutions and international organisations involved in human rights issues. A special meeting between the African Commission and the AU Permanent Representatives Committee was scheduled for October 2006 with a view to raising the awareness of PRC members of the problems of the human rights body.

Wider publicity about these issues would help the African Commission to refocus the current debate on the responsibilities of the states to promote and protect human rights. Human rights organisations should organise to defend the premier continental institution responsible for defence of human rights.

## **The Draft Single Legal Instrument on the Merger of the African Court on Human and Peoples' Rights and the Court of Justice of the African Union**

The AU Assembly of Heads of State and Government decided to merge the African Court on Human and Peoples' Rights (established by a protocol to the African Charter on Human and Peoples' Rights to complement the African Commission on Human and Peoples' Rights) and the Court of Justice of the AU (provided for in the Constitutive Act) at the June 2004 summit in Addis Ababa, Ethiopia. The AU Commission was instructed to explore the modalities for the merger of the two courts.<sup>263</sup>

Deliberations on the Draft Single Legal Instrument on the Merger of the African Court on Human and Peoples' Rights and the Court of Justice of the African Union began in Algiers in November 2005, where a draft text prepared by the Algerian minister of foreign affairs, a former president of the International Court of Justice, was considered by a working group of PRC. The PRC presented its report on these deliberations to the Khartoum summit in January 2006 and was instructed to hold further deliberations. Civil society initiatives such as the Coalition for an Effective African Court on Human and Peoples' Rights were able to play an influential role in monitoring and engaging with delegations during the preparatory stages ahead of the summit, including by proposing a draft text for the merger protocol.

The AU Commission, under the auspices of the Office of Legal Counsel, convened on 16–19 May 2006 a meeting of ambassadors and representatives from the capitals. Some government delegations, notably Kenya and Uganda, included experts outside of government agencies to participate in deliberations on the merger document at the meeting from. During the meeting, Algeria, South Africa, Nigeria, Kenya and Egypt were active in articulating their views on the document. Algeria was keen to see the passage of draft by consensus. Nigeria, one of the backers of the establishment of an integrated court, was also favourable to agreement of the draft by consensus.

However, failure to reach consensus on geographical representation in the composition of the court and on a right of direct access to the court by individuals, meant that the document was referred to the AU summit in Banjul for resolution. The fact that many state delegates had also participated in the preparatory meetings in Algiers and Addis Ababa facilitated the debate at the summit, despite the usual lack of timely documentation. However, eventually, the Banjul summit mandated the AU Commission to convene a ministerial meeting to consider the draft protocol and present recommendations in January 2007 in Addis Ababa.<sup>264</sup> As of November 2006, the AU Commission legal directorate was facing difficulties in scheduling a preparatory meeting in advance of the summit, because of the pressure of competing meetings.

## **The seat of the African Court on Human and Peoples' Rights**

The Assembly decided in January 2005 that the headquarters of the Court of Justice would be in the eastern region.<sup>265</sup> This decision was maintained for the merged court. Mauritius had offered to host the Court of Justice and remained the main contender for the merged court. Towards the end of 2005, Kenya and Tanzania also indicated that they were willing to host the court, but by the time of the January 2006 summit, only Mauritius and Tanzania were still contenders. Without an undisputed host country emerging, the AU requested members of the eastern region to decide which of these countries would host the court. During the Khartoum summit, the delegates of the eastern region met and the matter was put to a vote: Tanzania won the majority of the votes by a narrow margin. Ethiopia, which chaired the meeting as current dean of the region, submitted its report to the AU Commission in which it recorded its discussions and recommended that Tanzania should become the seat of the new court.



However, Tanzania had not yet deposited its instrument of ratification of the protocol establishing the African Court on Human and Peoples' Rights; only states that have ratified the protocols establishing both courts are eligible to host the merged court. Thus, no decision was taken in Khartoum. Since those discussions, Tanzania ratified the protocol establishing the Court in February 2006. The AU finally confirmed Tanzania as the host of the Court at the swearing-in ceremony for the judges on 2 July 2006 at the Banjul summit.<sup>266</sup>



