



Addis Ababa, Ethiopia

P. O. Box 3243

Telephone: 5517 700

Fax: 5517844

Website: [www.africa-union.org](http://www.africa-union.org)

Fifth Ordinary Session of the African Union

Commission on International Law (AUCIL)

26 November – 5 December 2012

Addis Ababa, Ethiopia

AUCIL/Legal/ Rpt (V)

Original: English

## Report of The Fifth Ordinary Session of The African Union Commission on International Law

### I. INTRODUCTION

1. The Fifth Ordinary Session of the African Union Commission on International Law (AUCIL) was held at the Headquarters of the African Union Commission in Addis Ababa, Ethiopia from 26 November to 5 December 2012. The Fifth Ordinary Session was preceded by the meeting of the Bureau which also took place on 24 and 25 November 2012 at the Headquarters of the Union.

### II. ATTENDANCE

2. The following members of the AUCIL were in attendance:

Name	Position
1 Mr. Adelardus KILANGI	Chairperson
2 Mr. Kamel FILALI	Vice – Chairperson
3 Mr. Bonaventure Makenga MPASI (the name is Changed to Mr. Daniel Ma kiese MWANAWANZAMBI)	General Rapporteur
4 Mr. BlaiseTCHIKAYA	Member
5 Mr. Amb. Cheikh Tidiane THIAM	Member
6 Mr. Ebenezer APPREKU	Member
7 Mr. Kholisani SOLO	Member
8 Amb. MinelikAlemuGETAHUN	Member
9 Mr. Rafâa BEN ACHOUR	Member

The following member was absent due to unforeseen circumstances:

Mr. Atanazio Kayafa TEMBO

3. The Office of Legal Counsel which acts as the Secretariat to the AUCIL was represented by the following officers during the session:

- |                         |                              |
|-------------------------|------------------------------|
| 1. Mr. Mourad Ben DHIAB | Executive Secretary to AUCIL |
| 2. Mr. Adewale IYANDA   | Legal Officer                |
| 3. Ms. Bethelhem AYALEW | Legal Intern                 |
| 4. Mr. Israel TIBEBU    | Legal Intern                 |

### III. OPENING OF THE MEETING

#### *Opening Remarks by Mr. Adelardus KILANGI, Chairperson of the African Union Commission on International Law (AUCIL)*

4. In his opening remarks, the Chairperson, Mr. Adelardus KILANGI, welcomed the members to the Fifth Ordinary Session of AUCIL in Addis Ababa, Ethiopia.
5. He indicated the current development of the AUCIL and the great expectation that is placed on it and in sum, he appreciated the challenges faced and the commitments of the commissioners towards its achievement.
6. As is customary, the Chairperson Mr. Adelardus KILANGI invited members to express themselves on contemporary issues of international law affecting the continent in accordance with AUCIL mandate.
7. Most of the interventions focused on the need to improve the work methods/practices of AUCIL in order to facilitate an efficient implementation of its mandate.
8. In his conclusion, the Chairperson thanked the members for attending the Fifth Ordinary Session despite their busy schedules and wished the members very successful deliberations.

### IV. CONSIDERATION AND ADOPTION OF THE DRAFT AGENDA

9. The Members adopted the following Agenda Items:
  1. Opening of the meeting
  2. Consideration and Adoption of the Draft Agenda
  3. Organization of Work
  4. Consideration and adoption of the Draft report of the 4th Ordinary Session
  5. Report of the working group on the 1st Edition of the AUCIL Forum of Experts of International Law and African Union law
  6. Inter-sessional secretariat activities between the 4th and the 5th ordinary session
  7. Report on the inter-sessional activities of the bureau – Mr. Adelardus Kilangi, Chairperson of AUCIL
  8. Methods of work
  9. Publication – Yearbook
  10. Programme of activities for 2013
  11. Presentation and consideration of the reports of the Special Rapporteurs:
    - i) Presentation of the Report of the Working Group on Unconstitutional Change of Government;
    - ii) Presentation of the Report on the Harmonization of Ratification Procedures in AU Member States – Mr. Rafâa Ben Achour;
    - iii) Presentation of the third Preliminary Report on the Research and Appropriate Studies on the Juridical Basis for Reparation for Slavery – Mr. Blaise Tchikaya;
    - iv) Presentation and Consideration of the Study Report and Draft Model Law on the Internally Displaced Persons (IDPs) – The Kampala Convention – Mr. Minelik Alemu Getahun;
    - v) Presentation and consideration of the Preliminary Report on the ‘study and recommendations on “Teaching, Study and Dissemination of International Law and African Union Law”’ – Mr. Atanazio Kayafa Tambo;
    - vi) Preliminary Study on Working Methods, Competences, Future Programmes of Work and Strengthening the Capacity of AUCIL – Mr. Kholisani Solo;
    - vii) The Preliminary Report of the Special Rapporteur on Piracy in Africa, Mr. Kamel Filali;
    - viii) Report of the Working group on “Research, Information and Publication”;
    - ix) Study, findings and recommendations on international environmental law in Africa – Mr. Minelik Alemu Getahun.
  12. Other issues related to Reports by the Special Rapporteurs
  13. Finalization of the Provisional Rules of Procedures
  14. Date and Venue of the Sixth Ordinary Session
  15. Closing Ceremony

## V. ORGANIZATION OF WORK

10. The Members adopted the following working hours:

- Morning: 10h00 – 13h00
- Afternoon: 15h00 – 17h30

## VI. CONSIDERATION AND ADOPTION OF THE DRAFT REPORT OF THE 4TH ORDINARY SESSION

11. The General Rapporteur presented the draft Report of the 4th ordinary session. After the presentation, the following comments/observations were made:

- i) The French version of the Report should reflect exactly the English one.
- ii) Need to improve the drafting method of the Report. A first draft should be prepared by the Secretariat which will be considered and improved by the General Rapporteur who shall then submit the amended draft to all AUCIL members for comment. The draft with the comments of AUCIL members should be the final draft Report to be submitted to AUCIL session for consideration and adoption.
- iii) A Conventional and standard Report writing style should be followed by AUCIL.
- iv) The presentations, including those made by Special Rapporteurs shall be reported in a manner that depicts their substance and the comments made thereon shall be mentioned as well. Every Special Rapporteur should submit in writing a summary of his presentation with the comments made by other AUCIL members to the Secretariat to be inserted in the report.
- v) The report should be a synthesis and should include annexes.
- vi) After the debate, it was decided that the Consideration of the Draft Report of the 4th Ordinary Session be suspended. An Ad Hoc Working Team was established to study the draft report in depth and improve its drafting. It is composed of Mr. Daniel Makiese Mwanawanzambi and Mr. Kholisani SOLO. The reviewed report should be submitted to the present session for consideration and final adoption.

## VII. REPORT OF THE WORKING GROUP ON THE 1st EDITION OF THE AUCIL FORUM OF EXPERTS ON INTERNATIONAL LAW AND AFRICAN UNION LAW

12. The Secretariat made a presentation on the actions so far taken to hold the 1st Edition of this important event. The Working Group 1 on AUCIL Forum of Experts on International Law and African Union law in charge of the preparation of this event is composed of the following members:

- i) Mr. Blaise Tchikaya, and
- ii) Mr. Minelik Alemu Getahun

13. After a short debate on the difficulties encountered during the preparation of the 1st edition of the Forum the following points were raised:

- i) The 1st edition of AUCIL Forum should reflect the real image of AUCIL and should contribute to making AUCIL more known inside and outside Africa,
- ii) AUCIL Forum should be held on a periodic basis,
- iii) AUCIL Forum should be a platform for African scholars working on international law and international relations to interact on matters of interest for Africa through yearly meetings.
- iv) AUCIL Forum should be used to develop and disseminate African Union law.
- v) The following decisions were made with regard to the 1st Edition of AUCIL Forum
  - (a) The theme of the 1st Edition of AUCIL Forum should be **“Africa and International Law”**,
  - (b) The leading Team of the Forum is composed as follows:
    - Mr. Rafâa BEN ACHOUR: President of the Forum;
    - Mr. Kamel FILALI: General Rapporteur;
    - Mr. Minelik Alemu GETAHUN: Moderator, Round Table 1;
    - Mr. Cheikh Tidiane THIAM: Rapporteur, Round Table 1;
    - Mr. Daniel Makiese MWANAWANZAMBI: Moderator, Round Table 2;
    - Mr. Cheikh Tidiane THIAM: Rapporteur, Round Table 2;

vi) The Programme of work of the 1st Edition of AUCIL Forum is in Annex 2 to this Report.

### **VIII. INTER-SESSIONAL SECRETARIAL ACTIVITIES BETWEEN THE 4TH AND THE 5TH ORDINARY SESSION**

1. The Secretariat made a presentation on its activities undertaken between the Fourth and the Fifth ordinary Sessions. It was highlighted that the funds allocated to the studies scheduled in the 2012 Programme Budget were released by partners only in June 2012.
2. The activities undertaken by the Secretariat are divided into two categories:
  - (a) Administrative and financial actions for the implementation of the various activities under 2012 Programme Budget
  - (b) Research activities in particular the preparation of bibliography for the studies of the Special rapporteurs.
  - (c) The Secretariat also updated AUCIL on the issue of the Harmonization of the AU Organs Emoluments. Following the Executive Council decision on the matter an Ad-Hoc Committee chaired by the Director of Administrative Affairs was established. The Committee met twice and adopted a comprehensive report and recommendations on harmonizing the AU Organs Emoluments to be submitted to the AU policy organs for consideration. However, a decision was not yet made on when this report and recommendations would be submitted to the policy organs.
  - (d) Following the presentation of the Secretariat, the following comments/observations were made:
    - I. The need to strengthen the Secretariat Structure by recruiting full time staff members.
    - II. The need to have a meeting with the Chairperson of the African Union Commission to discuss the challenges faced by AUCIL mainly the funding of activities lacking funds for implementation and the issue of Emoluments.

### **XIV. REPORT ON THE INTER-SESSIONAL ACTIVITIES OF THE BUREAU – MR. ADELARDUS KILANGI, CHAIRPERSON OF AUCIL**

16. The chairperson, Mr. Adelardus Kilangi, presented a brief report on inter-sessional activities of the Bureau. The following meetings were attended by the Bureau:

- i) The AU summit held on July 2012;
- ii) Meeting with the Office of the Legal Counsel;
- iii) Meeting with the Legal Advisor Seconded to the Peace and Security Department of the African Union at the Permanent Mission of International Committee of Red Cross;
- iv) Meeting with the United Nations Under- Secretary General for Legal Affairs;
- v) Meeting with the UNHCR Permanent Representative to the African Union
- vi) The 18th and the 16th Ordinary Sessions of the Executive Council and the Assembly of the Union held on 27 to 29 and 30 to 31 January 2011 was attended by the chairperson ;
- vii) The chairperson made presentations on the AUCIL Activity report for the period from July 2011 to June 2012 before the Permanent Representative Committee (PRC), Executive Council and the Assembly;
- viii) With sideline events during the summit, the Chairperson conducted a meeting with: the delegation of Georgia, the representative of ICRC, institute of security studies and meeting with the UN family of Organizations and International NGOs.

### **X. METHODS OF WORK**

17. An important debate was held on the need to improve AUCIL Methods of work. The following issues were discussed:

- i) Methods of work should be codified clearly in the Rules of procedure of AUCIL,
- ii) Communication within AUCIL should be streamlined,
- iii) Adoption of a standard and clear procedure as well as a format for the preparation of Reports by the Special Rapporteurs,

- iv) The Reports of the Special Rapporteurs should contain:
  - Origin of the proposal of the issue to be studied,
  - Methodologies of proceeding with the proposal,
  - Main ideas raised in the proposal,
  - Follow up on discussions and comments made thereon,
  - Plenary conclusions on the proposal.
- v) Adoption of a Resolution on every issue discussed during AUCIL sessions to be submitted to the Policy organs for adoption,
- vi) Translation and distribution of working documents should be handled in a timely manner, before the sessions,
- vii) The decision making procedures should be rationalized and more participatory,
- viii) A monthly Newsletter on AUCIL activities should be circulated to all members,
- ix) Methods of work should be a permanent item on the Agenda of every AUCIL Ordinary Session,
- x) Impact assessment on the Methods of work should be made on regular basis.
- xi) In concluding discussion on this agenda item, it was decided to establish a Working Group on the Methods of Work of AUCIL composed as follows:
  - a) Mr. Cheikh Tidiane THIAM,
  - b) Mr. Daniel Makiese MWANAWANZAMBI,
  - c) Mr. KAMEL FILALI,
  - d) Mr. Kholisani SOLO, and
  - e) Mr. Minelik Alemu GETAHUN.
- xii) The Working Group on the Methods of Work of AUCIL was mandated to prepare a draft paper on AUCIL Methods of work taking into account the various comments made on this issue during the present session.

## **XI. PUBLICATION – YEARBOOK**

18. The Secretariat made a presentation on this item recalling in particular the debate held on this matter during the 4th Ordinary Session as well as the composition of the Working Group 2 on AUCIL Publications created during that session. The composition of the Working Group is as follows:

- i) Mr. Kamel Filali, and
- ii) Mr. Ebenezer Appreku.

19. Following the presentation, the following comments/observations were made:

- i) AUCIL should publish the AUCIL Yearbook and AUCIL Journal,
- ii) The upcoming OAU/AU 50th Anniversary could be used as an opportunity to launch the Yearbook
- iii) AUCIL publications should be handled seriously because they will have a direct impact on its credibility,
- iv) AUCIL has adequate materials for the Yearbook. The latter should contain the work and the activities undertaken by AUCIL, i.e. the Sessions' Reports, the Reports of the Special Rapporteurs, the activities of cooperation with partners, opinions provided by AUCIL, etc.,
- v) AUCIL Yearbook may contain an analytic chapter reflecting the proceedings of the sessions
- vi) AUCIL needs to decide on which Reports of the Special Rapporteurs should be published in the Yearbook,
- vii) AUCIL should establish an editorial Board for AUCIL Journal,
- viii) AUCIL needs to identify a publisher for the yearbook and the Journal,
- ix) AUCIL Yearbook and Journal can be printed in house by the Directorate of Conference Services of the African Union Commission,
- x) It would be very difficult to publish AUCIL Journal. Publishing a scientific journal requires thorough preparation of at least four editions in advance. Publishers are no more interested in journals because they are not financially interesting,

- xi) The desired scale of dissemination is a challenge to publishers in Africa, and therefore an e-journal is a wise way to tackle the challenge,
- xii) AUCIL should establish a Working Group to reflect on all issues related to publication (finance, publishers, etc.)

20. After the debate it was decided to enlarge the composition of the Working Group 2 on AUCIL Publications to include Mr. Blaise Tchikaya. The new composition Working Group 2 is as follows:

- i) Mr. Balise TCHIKAYA: Chairperson,
- ii) Mr. Kamel FILALI: Vice-Chairperson,
- iii) Mr. Ebenezer APPREKU, Member.

21. The working Group was mandated to make proposals for the Yearbook, particularly on: Contents, contributions of academicians, Editorial Work, time and manner of publication and dissemination.

## **XII. PROGRAMME OF ACTIVITIES FOR 2013**

22. The Chairperson, Mr. Adelardus Kilangi made a presentation on this item and indicated the debate on this matter should be done globally given that it was discussed exhaustively during the 4th Ordinary Session.

23. Following the presentation made by the Chairperson, the following comments/observations were made:

- i) Given the importance of this item, it should be discussed in detail,
- ii) The funds allocated to AUCIL activities in the Programme Budget should be allotted fairly to the studies to be prepared by AUCIL members,
- iii) AUCIL should identify an agreed method to allocate studies to its members,
- iv) AUCIL Programme Budget should be prepared two or three years in advance and written in two languages: English and French,
- v) All AUCIL members should participate in the preparation of the Programme Budget,
- vi) Studies may be handled by more than one Special Rapporteur depending of the nature of the topic,
- vii) The budget allocated to a study should cover more than one year,

24. There was an exchange of views on the meaning of the titles of the studies in 2013 Programme of Activities and the method of allocation of studies to AUCIL members. Following that, the meeting went through the 2013 Programme of Activities and made decisions.

### **(1) Codification of International Law in the African Continent:**

#### **(1.1) Comparative study of the developed jurisprudence of regional integration among the 8 Regional Economic Communities (RECs) in Africa (ECOWAS, EAC, COMESA, SADC, CEN-SAD, ECCAS, IGAD, and UMA) – to be undertaken by AUCIL members located closer to the headquarters of the respective RECs**

It was decided as follows:

- i) In the title of 1.1 the term "Jurisprudence" should be replaced by the term "Law and practice" to avoid confusion between AUCIL members coming from common law and civil law systems
- ii) The study should cover the eight (8) Regional Economic Communities (RECs) recognized by the African Union
- iii) The following members were mandated to work each on one REC:
  - a) CEN-SAD: Mr. Rafâa BEN ACHOUR;
  - b) COMESA: Mr. Daniel Makiese MWANAWANZAMBI;
  - c) EAC: Mr. Adelardus KILANGI;
  - d) ECCAS: Mr. Blaise TCHIKAYA;
  - e) ECOWAS: Mr. Cheikh Tidiane THIAM;
  - f) IGAD: Mr. Minelik Alemu GETAHUN;

- g) SADC: Mr. Kholisani SOLO; and
  - h) UMA: Mr. Kamel FILALI.
- iv) Method of work: each member should submit a Preliminary Report on his assigned REC at the 6th Ordinary Session, and thereafter during the same session a decision will be made on how to compile these Preliminary Reports in order to have one comprehensive Report of Study.

**(1.2) Study on an area of law with extensive state practice, precedent and doctrine among member states in Africa for codification – preliminary research and later meeting with legal advisors representing member states to the AU in Addis**

It was decided that AUCIL Members should submit proposals on topics falling under this item to the Secretariat who will compile and submit them to the 6th Ordinary Session for consideration and decision. It is noted that Mr. Cheikh Tidiane THIAM proposed to undertake a Study on the Principle of intangibility of borders in Africa.

**(2) Activities related to revision of OAU/AU treaties**

**(2.1) Study, Findings and Recommendations on the Revision of OAU/AU Treaties - preliminary research at home and further research in Addis**

It was decided that Mr. Ebenezer APPREKU will be preparing this Study. A preliminary Report should be submitted to the 6th Ordinary Session.

**(2.2) Reviewing 2 OAU/AU Treaties – preliminary study at home and later a meeting between the Special Rapporteurs and the legal advisors representing member states to the AU in Addis**

A decision will be made on this item after submission of the Preliminary Report by Mr. Ebenezer APPREKU on the Study, Findings and Recommendations on the Revision of OAU/AU Treaties (2.1).

**(3) Promoting the teaching, study and dissemination of international law and African Union Law in the African Continent**

**(3.1) Second edition of AUCIL Forum 2013:**

It was decided to establish a Working group on AUCIL Forum as follows:

- i) Pro. Amb. Cheikh Tidiane THIAM: Chairperson,
- ii) Mr. Kamel FILALI: Member, and
- iii) Mr. Rafâa BEN ACHOUR: Member.

The working Group was mandated to prepare a framework for the Second Edition of AUCIL Forum to be held in 2013, for submission to the 6th Ordinary Session. An Anglophone member (Mr. Ebenezer APPREKU or Mr. Kholisani SOLO) should join the Working Group.

The theme identified for the Second Edition of AUCIL Forum is "*Law of Regional Integration*".

**a. Publication of jurisprudence on African Union law and regional integration law in Africa (the African Year Book of International Law – to be written and published by the AUCIL)**

It was decided to enlarge the Working Group 2 on AUCIL Publication initially established in 2012 and composed of Mr. Ebenezer APPREKU and Mr. Kamel FILALI to two new members. The new composition of this Working Group is as follows:

- i) Mr. Blaise TCHIKAYA: Chairperson,
- ii) Pro. Amb. Cheikh Tidiane THIAM: Member,
- iii) Mr. Ebenezer APPREKU: Member, and
- iv) Mr. Kamel FILALI: Member.

**b. The United Nations Regional Course on International law for Africa**

The United Nations Regional Course on International Law for Africa is organized every year in Addis Ababa by the Codification Division of the Office of Legal Affairs of the United Nations. This course is dedicated mainly to African diplomats, public service agents, and lawyers, and aims at contributing to the dissemination of international law in Africa.

The meeting recommended that courses on African Union Law and African Law should be included in the programme of the United Nations Regional Course on International Law for Africa, and that members of AUCIL should give lectures

**(4) Capacity Building for AUCIL**

**a. Building AUCIL database with materials on African Union law, regional integration law in Africa, and general international law**

It was decided to establish a Working Group on AUCIL Database as follows:

- i) Mr. Daniel Makiese MWANAWANZAMBI
- ii) Mr. Ebenezer APPREKU

The working Group was mandated to prepare guidelines for the creation of AUCIL database on African Union law, regional integration law in Africa, and general international law, in collaboration with the Secretariat and the IT Expert in charge of providing the technical support for the Database.

**b. AUCIL 2014–2018 Strategic Plan**

It was decided to establish a working Group on AUCIL Strategic Plan whose composition is as follows:

- i) Mr. Adelardus KILANGI: Chairperson
- ii) Mr. Blaise TCHIKAYA: Member
- iii) Amb. Minelik Alemu GETAHUN: Member

With regard to the methodology to be followed in the preparation of AUCIL 2014–2018 Strategic Plan, it was decided to use the same one used for the 2011–2013 Strategic Plan, and that all the members should provide contribution in writing to the Working Group. It was also decided to submit the first draft of AUCIL 2014–2018 Strategic Plan to the 6th Ordinary Session.

**XIII. PRESENTATION AND CONSIDERATION OF THE REPORTS OF THE SPECIAL RAPPORTEURS**

**(i) Presentation of the Report of the Working Group on Unconstitutional Change of Government**

25. Mr. Blaise TCHIKAYA made a presentation on this item.

26. He indicated that the 19th Ordinary Session of Heads of State and Government, held in Addis Ababa, Ethiopia, from 15 to 16 July 2012, vide Decision Assembly/AU/Dec.427(XIX) requested the African Union Commission in collaboration with the African Court on Human and Peoples' Rights (AfCHPR) and the African Union Commission on International Law to prepare a definition of the crime of unconstitutional change of government. The decision reads as follows:

*STRESSES the need for the AU to adopt a definition of the crime of unconstitutional change of government and, in this regard, request the Commission in collaboration with the AU Commission on International Law and the African Court on Human and Peoples' Rights to submit this definition for consideration by the policy organs at the next Summit to be held in January 2013.*

Following the adoption of this decision, the Office of the Legal Counsel (OLC) acting on behalf of the African Union Commission invited AfCHPR and AUCIL to prepare each a draft definition of



unconstitutional change. AUCIL established a Working Group to work on the preparation of a draft paper on the matter. The Working Group is composed as follows:

- i) Mr. Blaise TCHIKAYA,
- ii) Mr. Daniel Makiese MWANAWANZAMBI, and
- iii) Mr. Rafâa BEN ACHOUR.

27. The Working Group prepared and circulated the requested draft paper to all AUCIL members. The OLC planned a validation workshop in Arusha, Tanzania from 19 to 20 December 2012, gathering the African Union Commission, AfCHPR and AUCIL to consider the papers prepared by these two organs and adopt a draft definition of the crime of unconstitutional change of power to be submitted to the 20th Ordinary Session of the Heads of State and Government in January 2013.

28. Following the presentation made by Mr. Blaise TCHIKAYA, the following comments/observations were made:

- i) The request made by the Assembly of Heads of State and Government to the African Union Commission to prepare in collaboration with the AfCHPR and the AUCIL a definition of the crime of unconstitutional change of government is part of the process of the draft Protocol on the African Court on Mr. and Human and Peoples' Rights granting the African Court on Human and Peoples' Rights criminal jurisdiction to try international crimes.
- ii) When considering the above-mentioned draft Protocol, the member States of the African Union could not reach a consensus on the definition of the crime of unconstitutional change of government in Africa. Hence, they decided to have inputs from the AfCHPR and AUCIL.
- iii) One of the main difficulties raised by the definition of the crime of unconstitutional change of government consisted in determining whether or not peoples' uprisings should be considered/qualified as such. This issue emerged after the events that occurred in North Africa particularly in Tunisia, Egypt and Libya.
- iv) Although several legal instruments, Declaration and Decisions of the African Union address unconstitutional change of power, it is always considered as a crime not engaging the responsibility of individuals, but rather a State behavior governed by international law. The African Charter on Democracy, Governance and Elections, the Protocol Relating to the Establishment of the Peace and Security Council of the African Union, the Lomé Declaration 2000 all contain provisions on unconstitutional change of government.
- v) The definition of the crime of unconstitutional change of government should refer to a combination of criminal law and constitutional law. Facts produced and governed by constitutional law should be qualified in accordance with criminal law.
- vi) Definition must contain criminalizing elements such as; the mental (*mens rea*) and the material (*actus reus*) elements, Plotting, Conspiracy, Formation of Armed Groups and Destabilization of Government, and Refusal to relinquish power through election, etc.
- vii) The crime of unconstitutional change of government is a great shift from classical responsibility of states to individual responsibility.
- viii) It builds a link between human rights and the Rule of law,
- ix) The basis upon which the act constitutes a crime should be differentiated and clearly stated whereas overthrowing non- democratically elected governments should not suffice to be a crime.
- x) The definition of the crime of unconstitutional change of government raises the problem of the link between international law and the concept of the Legitimacy of Government. Legitimacy of governments depends on how they gain access to power and how they maintain it.
- xi) Some concepts should be clarified before trying to give definition to this crime.
  - 'Unconstitutional' (What standards constitute unconstitutionality)
  - 'Change' (What must happen to bring change)
  - 'Government' (Meaning of Government in different systems)

- xii) Changing democratically elected Governments must be considered as a crime of unconstitutional change. But there should be a common understanding of democratically elected Government.
- xiii) Elements of the crime of unconstitutional changes of government should include “Any fact or act perpetrated by a person, alone or in a group, contrary to the relevant constitutional provisions, democracy and the rule of law, which results in the overthrowing of a democratically elected government.” Punishments and Grounds for exemption or mitigation of responsibility for the crime were also incorporated.

29. Following the discussion on this item, it was decided to accept the Report and request the Working Group to amend it in accordance with the comments made.

30. Following a proposal made by the Working Group, the meeting decided the Elements of the crime of unconstitutional changes of government are defined as; “Any fact or act perpetrated by a person, alone or in a group, contrary to the relevant constitutional provisions, democracy and the rule of law, from which results the overthrow of a democratically elected government.” Punishments and Grounds for exemption or mitigation of responsibility for the crime were also incorporated.

**(ii) Presentation of the Report on the Harmonization of Ratification Procedures in AU Member States – Mr. Rafâa Ben Achour**

31. Mr. Rafâa Ben ACHOUR presented the Report on the ratification of the OAU/AU Treaties, harmonization of the ratification procedures and their acceleration. Among various editorial suggestions, the following reflections were made thereon:

- i) Treaties focusing on the Integration of Africa need to be categorized as priorities,
- ii) AUCIL must define and refine legal procedures to fast track the ratification of treaties,
- iii) Internal practices of states and their methods of work must be revised to achieve harmonization of procedures,
- iv) Encouraging Member States to ratify treaties without undermining their sovereignty by developing appropriate guidelines to be put at the disposal of States.

32. Following these comments, the meeting decided as follows:

- i) The report in principle is accepted but should include the additional recommendations and comments from AUCIL members,
- ii) The draft Report should be submitted to the Policy organs of the African Union and member States for comments and inputs through the Chairperson of AUCIL,
- iii) AUCIL members should send their comments on this report in writing to Mr. Rafâa Ben Achour by 20 December 2012 latest,
- iv) Mr. Rafâa Ben Achour should submit his final report, containing the comments of AUCIL members by 20 January 2013 latest.
- v) Comments by the Policy Organs and member States should be made through the chairperson of AUCIL by 15 March 2013 latest.
- vi) The final text, containing the comments from member states, will be presented at the 6th session.
- vii) Establish a Drafting Committee to harmonize the French and English versions. It should be composed of Mr. Kamel FILALI, and Mr. Ebenezer Appreku.

**(iii) Presentation of the third Preliminary Report on the Research and Appropriate Studies on the Juridical Basis for Reparation for Slavery – Mr. Blaise Tchikaya**

33. Mr. Blaise TCHIKAYA presented the 3rd preliminary report on the Research and Appropriate Studies on the Juridical Basis for Reparation for Slavery. He summarized that various Historians have differing opinions on the subject. The Study was accompanied by nine (9) recommendations submitted to AUCIL for consideration. He noted that it is a very important topic and that two (2) reports focusing on key issues posed by reparation claims by the African states have already been submitted.

34. He further recalled that transatlantic slave trade is very important, noting that although other historical events like the Apartheid, Rwandan and Turkish genocides might have the same effects, they cannot be compared to the slave trade suffered by Africa for 400 years. In sum, the other events might not have solutions while Slave trade does and for that reason Africa is asking for reparations.

35. International liability law has been progressively developed and new main principles have been laid in terms of codification, in 1964 by UN international law Commission. But prior to seeking reparation there is a need to ascertain legal foundation by proving that international law has been violated and that liability has been established.

36. On the issue regarding the imputability, it was recalled that slavery can also be practiced by individuals or private companies. To whom should the damages arising from slavery be attributable? It was concluded that, at this point, the question was not to consider on which of the States concerned, slave trade companies or individuals, would devolve the liability for compensation, but rather to establish that there is a legal breach and damage requiring compensation.

37. In addition, he cited a case; where an ECOWAS court decision rendered on 27th October 2008 condemned Niger and held it liable for its omission to condemn slavery in its territories.

38. He noted the diverse views African historians held, stating that some are in favor and others against and also acknowledged those that sit on the fence towards the issue of claiming for reparation.

39. After the presentation of his report, Mr. Tchikaya, came to the following conclusions:

- i) The Member States of the African Union should first reach a diplomatic consensus and unify their position on the subject the AU and African states should adhere to the principle of compensation, and no form of compensation should be excluded. All forms of reparation should be taken into account;
- ii) Organization by AUCIL of a continental conference on the history of the slave in order to determine compensation and harm suffered by the African continent;
- iii) The AUCIL has to be sufficiently provided with resources and special administration for the proper undertaking of this conference.

40. Following the above presentation, the following comments/observations were made:

- i) There need to be clear and detailed information in the report as to who shall be entitled to compensation;
- ii) The form of reparation and the establishment of indirect and direct responsibility. States should be held directly responsible for this crime;
- iii) Slave trade, which qualifies as a crime against humanity, is an issue of criminal law while reparation is a concept of civil law. The report should bring more clarifications on this issue;
- iv) Identification of the text condemning slavery, recognizing attribution of international responsibility, and a specific reference on reparation within the context of historical misdeeds and misdemeanors and identify forms of reparation;
- v) What kind of reparation due to the victim from the point of international law;
- vi) Need to clarify the form of liability, between individual criminal liability and international liability of state; and
- vii) Before holding any general conference there has to be closed meeting of African International lawyers who have worked on these issues.

41. After comments were made, the following was decided:

- i) AUCIL accepts in principle the report which should, in its revised version, incorporate the various comments made by AUCIL members; and
- ii) The Report should be submitted to the AU Organs as well as to member states for comment and inputs.

**(iv) Presentation and Consideration of the Study Report and Draft Model Law on the Internally Displaced Persons (IDPs) – The Kampala Convention – Mr. Minelik Alemu Getahun**

42. Amb. Menelik started his presentation by noting that the question of IDP's is getting attention in Africa since OAU and the establishment of AU. There was a great concern placed on this issue.

43. He added that the term Displaced persons was introduced in 1980s and stated that in its historical development, there was an attempt made to equate it with the term refugee. The causes however could be the same:

- i) Conflict (inter-state conflict)
- ii) Insurrection within the state; and
- iii) Natural disaster

44. He cited the finding of a special Rapporteur to UN, Mr. Francis Deng whereby in his findings he stated, Human rights law applies to IDPs. However, since they are not in their localities there should be another set of principles to guide states in providing particular treatments for these peoples and in preventing arbitrary displacement. He mentioned the 2005 principle to be an important guiding principle. It encompasses the following principles:

- i) Prevention of internal displacement;
- ii) Protection during displacement; and
- iii) Finding a solution (in the form of local integration, compensation or returning to their places)

45. In sum, he stated a number of instruments and decisions on IDP including the Kampala Convention which he acknowledged to be the first regulation and binding instrument along with the Great Lakes Act. He pointed out the peculiar nature of the Kampala Convention as it laid far-reaching obligations on states, included all existing instruments including generic terms of international humanitarian law, laid an obligation on AU to work with Member states and civil society, laid an obligation also on International and local organizations and state monitoring mechanisms through the establishment of a conference.

46. He further introduced the model law as a tool book that lays a ground to have a policy and draw a strategy. It has 63 Articles and 12 chapters and provides a mechanism of preventing, protecting, providing sustainable and durable solutions and incorporates the penal aspect. He added, the Model Law further provides two mechanisms:

- i) Coordinating mechanisms – early warning and response mechanism;
- ii) Consultation mechanism

47. Following the above presentation, the following comments/observations were made:

- i) When a Model Law is drafted, a convention should be incorporated in the national law, with the possibility, however, for a state to retain its national law in case it is more favorable than the standards provided in the draft model law;
- ii) The combined reading of Article 4(3) and (6) suggests that not enough priority is given to the sick and wounded which should come before the subjects of gender, language, etc.;
- iii) Article 4(4) makes reference only to regional and international laws. What if national laws have more favorable conditions?;
- iv) Article 4(7) is not clear;
- v) In Article 4(9), the last sentence is not clear;
- vi) Regarding Article 6(2), the more favorable standard should be adhered to.
- vii) In Article 7(2) '...shall take adoptive measures' 'adaptation is controversial, therefore, the appropriate wording should be '...appropriate measures';
- viii) Article 7(2) contains typing errors;
- ix) Article 5(4) is not clear as to what 'the later' makes reference to;
- x) In Article 12(4), 'should' should be replaced by 'shall';
- xi) In sum, it was noted that African states are not active and that the work is still ongoing. It was also mentioned that the Kampala Convention gives the right to the Union to assist the

Member States which derogates from the Constitutive act. But what about right of Member State to request assistance from the Union when the situation affects peace and security? Furthermore it does not address the situation where a Member State is the cause of the problem;

- xii) Can the model law take place with the continuing process of Kampala andisit going to be binding?;
- xiii) The text should also address the right to education and the prohibition of children trafficking;
- xiv) Article 63 deemed inappropriate for model law;
- xv) Article 60 the word 'clause' deleted;
- xvi) The sub-Articles (3,4,5) of Article 58 be made paragraphs under sub-Article (2);
- xvii) To add 'access to water' on Article 57(1) when drafting a model law special attention should be paid to the sensitivity of member states at the regional level regarding their national laws.

48. After comments were made, the meeting decided as follows:

- i) The Draft Report and the Draft Model law are in principle adopted,
- ii) AUCIL members should submit their comments in writing to the Special Rapporteur not later than 20 December 2012,
- iii) The enriched draft Report should be submitted to the Department of Political Affairs of the African Union Commission, for circulation to member States and AU Organs for inputs. Thereon the Special Rapporteur should finalize his draft Report.

49. It is noted that the following items of the Agenda were not considered because of constraint of time:

- i) Presentation and consideration of the Preliminary Report on the 'study and recommendations on "Teaching, Study and Dissemination of International Law and African Union Law" – Mr. Atanzio Kayafa Tambo;
- ii) Preliminary Study on Working Methods, Competences, Future Programmes of Work and Strengthening the Capacity of AUCIL – Mr. Kholisani Solo;
- iii) (The Preliminary Report of the Special Rapporteur on Piracy in Africa – Mr. Kamel Filali;
- iv) Study, findings and recommendations on international environmental law in Africa – Amb. Minelik Alemu Getahun;
- v) Other issues related to Reports by the Special Rapporteurs;
- vi) Finalization of the Provisional Rules of Procedures

#### **XIV. DATE AND VENUE OF THE SIXTH ORDINARY SESSION**

50. AUCIL decided to hold its 6th Ordinary Session in Addis Ababa, from 16 to 26 April 2013.

#### **XV. ANY OTHER BUSINESS**

51. There were no matters raised under this item.

#### **XVI. CLOSING**

52. In his closing remarks, the Chairperson, Mr. Adelardus Kilangi thanked all Members for their contributions and for the spirit of cooperation that had enabled the Session to deliver on its mandate. He thanked all the members for the commitment and dedication exhibited during the entire duration of the session.

53. He thanked the Secretariat, the interpreters and all other departments for the services placed at their disposal throughout the duration of the session.

54. He concluded by wishing members a safe journey back to their homes after which he declared the session closed.

## **ANNEX 1**

### **Decisions adopted by the AUCIL during the 5th Ordinary Session**

**Decision 1:** On the Methods of work

**Decision 2:** On AUCIL Publications (Yearbook, Journal)

**Decision 3:** On the Report of the Working Group on "Unconstitutional Change of Government"

**Decision 4:** On the Study Report on the Harmonization of Ratification Procedures in AU Member States

**Decision 5:** On the third Preliminary Report on the Research and appropriate Studies on the Juridical Basis for Reparation for Slavery

**Decision 6:** on the Study, findings and recommendations on international environmental law in Africa

**Decision 7:** On drafting the Rules of procedure of AUCIL

**Decision 8:** On the distribution of Studies among AUCIL members

**Decision 9:** On the list of Studies to be finalized