

AFRICAN UNION

الاتحاد الأفريقي



UNION AFRICAINE

UNIÃO AFRICANA

Addis Ababa, Ethiopia

P. O. Box 3243

Telephone: 5517 700

Fax: 5517844

Website: www.au.int

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**CONCEPT NOTE
AMENDMENTS
TO THE STATUTE
OF THE
AFRICAN UNION COMMISSION
ON INTERNATIONAL LAW**

CONCEPT NOTE AMENDMENTS TO THE STATUTE OF THE AFRICAN UNION COMMISSION ON INTERNATIONAL LAW

A. BACKGROUND

1. The Statute of the African Union Commission on International Law (AUCIL) was adopted in February 2009 by the Assembly of Heads of State and Government of the African Union (Assembly);
2. The Executive Council, vide Decision EX.CL/Dec.1019(XXXIII) adopted in July 2018 in Nouakchott (Mauritania), recommended that the Statute of the AUCIL be amended to submit the findings of its Studies to the Specialized Technical Committee (STC) on Justice and Legal Affairs;
3. Also, the Government of Equatorial Guinea has offered to host the AUCIL, including its Secretariat. The Executive Council, vide Decision EX.CL/Dec.1047 (XXXIV) adopted in February 2019 in Addis Ababa (Ethiopia), took note of the offer by Equatorial Guinea to host the Secretariat of the AUCIL and requested the Commission to formally inform the Government of Equatorial Guinea of the procedure on hosting AU Organs and the conditions for the relocation of the Secretariat of AUCIL;
4. Following the above Decision of the Executive Council, the Commission (Office of the Legal Counsel) informed all AU Member States of the procedure and conditions for the relocation of the Secretariat of AUCIL, including the need to amend the Statute.

B. RATIONALE

5. The proposed amendments to the Statute of the AUCIL relate to two points: the submission of the findings of the AUCIL studies to the STC on Justice and Legal Affairs and the provision of a permanent and independent Secretariat for AUCIL.
 - i. ***Submission of the findings of the AUCIL studies to the STC on Justice and Legal Affairs***
6. Article 5 (1) (g) of the Constitutive Act of the AU established STCs as Organs of the Union responsible to the Executive Council. The STCs are, *inter alia*, competent for preparing, coordinating and harmonizing the projects and programs of the Union, in accordance with Article 15 of the Constitutive Act.

7. In accordance with Rule 5 of its Rules of Procedure, the functions of the STC on Justice and Legal Affairs shall be to, *inter alia* :
 - (a) consider AU draft Treaties and submit them to the Executive Council and the Assembly for their consideration;
 - (b) survey the field of international law with a view to selecting topics for codification within African Union legal framework and submit its recommendations to the Executive Council;
 - (c) consider and report on special legal issues at the request of the Executive Council or the Assembly of the Union;
 - (d) consider studies and draft legal instruments developed by the African Union Commission on International Law (AUCIL) before submission to the Executive Council;
 - (e) carry out studies on African legal systems and submit recommendations to the Executive Council on how to harmonize them and to develop cooperation between Member States in the areas of justice and legal affairs;
 - (f) consider and follow up on legal issues concerning human rights, constitutionalism and the Rule of Law on the continent;
 - (g) follow-up on issues concerning the signature, ratification/accession, domestication and implementation of the OAU/AU Treaties by AU Member States.
8. As such, the functions of the STC on Justice and Legal Affairs inevitably entail regular interaction between this Organ and AUCIL, which, it should be recalled, has been set up as an AU advisory organ on International Law;
9. However, unlike AUCIL made up of eleven (11) elected members serving in their personal capacity, the STC on Justice and Legal Affairs is composed of all AU Member States, represented at an earlier stage by Legal Experts from governments, and at a final instance by Ministers of Justice/Attorneys General, Ministers in charge of Human Rights, Constitutional Affairs and the Rule of Law or such other Ministers or authorities duly accredited by the Governments of Member States;
10. In terms of procedures established within the AU, legal documents cannot be considered by the Policy Organs (Executive Council and Assembly) without prior consideration by the STC on Justice and Legal Affairs;

11. Accordingly, the Executive Council requested that the results of the studies conducted by AUCIL be submitted to the STC on Justice and Legal Affairs for consideration and recommendations to the Policy Organs.

ii. Provision of an Independent and Permanent Secretariat for the AUCIL

12. Article 21 of the Statute of the AUCIL (Human and Material Resources) provides as follows: “The Commission shall provide the necessary means, staff and infrastructure to the AUCIL Secretariat to enable it carry out its duties effectively”.
13. Following the proposal of the Government of Equatorial Guinea to host the Secretariat of the AUCIL and the subsequent Decision of the Executive Council (EX.CL/Dec.1047 (XXXIV)), the Commission sent a Note Verbal to all AU Member States, dated 20 May 2019. The Note Verbal informed the Member States inter alia of the need to amend Article 21 of the Statute in order to relocate the AUCIL Secretariat to a Member State, as well as the need, after amendment, for any Member State wishing to host the Secretariat to fulfill the criteria for hosting the AU organs as set out in Decision EX.CL/195(VII) Rev.1 of the Executive Council, adopted in July 2005 (Syrte, Libya).

C. AMENDMENT PROCEDURE

14. The amendment procedure of the Statute of the AUCIL is provided for in Article 26 of the same, which reads as follows:
- “ 1. *The present Statute may be amended by the Assembly:*
- (i.) Upon recommendation of the Executive Council after it has obtained the opinion of the AUCIL; or*
- (ii.) Upon the recommendation of the AUCIL.*
2. *The amendments shall come into effect upon their adoption by the Assembly.”*
15. Two important elements emerge from this Article: the motion to amend the Statute as well as the nature of the Organ adopting it. As far as the initiative is concerned, it belongs on the one hand to the AUCIL and on the other hand to the Executive Council upon the opinion of the AUCIL. With regard to the Organ responsible for the adoption of the proposed amendment (s), it is the Assembly;
16. However, the procedure for the adoption of Legal Instruments within the AU requires the intervention of various Organs. The subsequent procedure for the amendment of the Statute of AUCIL will thus involve several steps as follows:

- (a) Draft amendments to be adopted by the AUCIL plenary ;
 - (b) Draft amendments to be considered by the relevant Subcommittees of the Permanent Representatives Committee of (PRC);
 - (c) Draft amendments to be submitted to the STC on Justice and Legal Affairs;
 - (d) Draft amendments to be considered by the STC on Justice and Legal Affairs. During this review, the STC may defer proposed amendment(s) or adopt them by making recommendations to the Executive Council;
 - (e) Draft amendments to be considered by the Executive Council which will make recommendations to the Assembly;
 - (f) Draft amendments to be adopted by the Assembly and will enter into force upon their adoption.
17. It is important to note that, in accordance with Rule 20 (3) of the Rules of Procedure of the Executive Council and Rule 19 (3) of the Rules of Procedure of the Assembly, the draft decisions are adopted only after presentation of their financial implications by the Commission. Also, the structural implications must have been previously determined.
18. Thus, with specific reference to the relocation of the AUCIL Secretariat, the matter should be referred to the relevant Subcommittees of the PRC for consideration, prior to the transmission of the draft amendment to the STC on Justice and Legal Affairs. These are namely the Subcommittee on Structural Reforms and the Subcommittee on General Supervision and Coordination on Budget, Financial and Administrative Matters.

D. PROPOSALS FOR WORDING / REWORDING

19. The following proposals are made with regard to the amendments:
- i. Submission of the findings of the AUCIL studies to the STC on Justice and Legal Affairs***
20. It is proposed to amend the following articles:
- (a) Article 1 : Definitions

Define: "STC" Specialized Technical Committee on Justice and Legal Affairs;

(b) Article 5 : Progressive Development of International Law

Current wording:

“4. The AUCIL shall submit the final draft with its recommendations to the Assembly, through the Executive Council, and may on its own motion or at the request of the Organ or Institution of the Union make an interim report to the Organ or Institution that submitted the proposal or draft.”

Proposed wording:

*“4. The AUCIL shall submit the final draft with its recommendations to **the STC for consideration. The STC in turn shall submit its recommendations for decision to the Executive Council and/or the Assembly, as applicable.**”*

5. The AUCIL may on its own motion or at the request of the Organ or Institution of the Union make an interim report to the Organ or Institution that submitted the proposal or draft.”

[The number of the old paragraph 5 to be changed to 6.]

(c) Article 6(2) : Codification of International Law

Current wording:

“When the AUCIL considers that codification of a particular area of international law is necessary, it shall study the area and shall submit its recommendations to the Assembly, through the Executive Council.”

Proposed wording:

*“When the AUCIL considers that codification of a particular area of international law is necessary, it shall study the area and shall submit its recommendations to **the STC for consideration. The STC in turn shall submit its recommendations for decision to the Executive Council and/or the Assembly, as applicable.**”*

(d) Article 6 (7):

Current wording:

“The AUCIL shall prepare its drafts in the form of Articles and shall submit them to the Assembly, through the Executive Council, together with a commentary containing:”

Proposed formulation:

- “7. The AUCIL shall prepare its drafts in the form of Articles and shall submit them to **the STC for consideration** together with a commentary containing:
- a) **Adequate presentation of precedents and other relevant data, including treaties, judicial decisions and doctrine;**
 - (b) **Conclusions defining:**
 - i) **the extent of agreement on each point in the practice of States and in doctrine;**
 - ii) **divergences and disagreements which exist, as well as arguments invoked in favour of each solution.**
8. **The STC in turn shall submit its recommendations for decision to the Executive Council and/or the Assembly, as applicable.**

[Numbering of the paragraphs coming after to be updated accordingly]

(e) Current Article 6(10) that will become 6(11):

Current wording:

“Taking into consideration the comments and observations of Member States, the AUCIL shall prepare a final draft document together with its recommendations and an explanatory report, which it shall submit to the Assembly through the Executive Council.”

Proposed wording:

“Taking into consideration the comments and observations of Member States, the AUCIL shall prepare a final draft document together with its recommendations and an explanatory report, which it shall submit to **the STC for consideration. The STC in turn shall submit its recommendations for decision to the Executive Council and/or the Assembly, as applicable.**”

(f) Current Article 6(11) that will become Article 6(12):

Current wording:

“The AUCIL may recommend that the Assembly, through the Executive Council.”

Proposed wording:

“The AUCIL may recommend, through the STC to the Executive Council and/or the Assembly, as applicable to:

- (a) take no action;
 - (b) take note of the report;
 - (c) adopt the report;
 - (d) recommend the draft to Member States with a view to the conclusion of a convention.
- (g) Current Article 6(12) that will become Article 6(13)
In the French version, replace the word "Assemblée" with "Conférence".
- (h) Current Article 6(13) that will become Article 6(14):

Current wording:

“The AUCIL shall consider mechanisms for making evidence of customary international law more readily available, through the collection and publication of documents concerning State practice and the decisions of national and international courts on questions of international law, and shall submit a report of its work in this regard to the Assembly through the Executive Council.”

Proposed wording:

“The AUCIL shall consider mechanisms for making evidence of customary international law more readily available, through the collection and publication of documents concerning State practice and the decisions of national and international courts on questions of international law, and shall submit a report of its work in this regard to the STC for consideration. The STC in turn shall submit its recommendations for decision to the Executive Council and/or the Assembly, as applicable.”

(i) Article 7:

1. *In carrying out its functions on the progressive development of international law and codification of international law, the AUCIL shall contribute to the objectives and principles of the Union as enshrined in Articles 3 and 4 of the Constitutive Act, and in particular to study all legal matters related to the promotion of peace and security in the African continent, the demarcation and delineation of African borders as well as legal matters relating to the political and socio-economic integration of the Continent.*
2. **The findings of the studies undertaken by the AUCIL shall be submitted to the STC for consideration by the Executive Council and / or the Assembly, as applicable.**

(j) Article 18 : Remuneration

In the French version, replace the word "Assemblée" with "Conference".

(k) Article 19 : Rules of Procedure

Current wording:

"The AUCIL shall determine its own rules of procedure for carrying out its functions and submit them to the Executive Council for approval."

Proposed wording:

*"The AUCIL shall determine its own rules of procedure for carrying out its functions and submit them to the Executive Council for approval, **through the STC.**"*

ii. Provision of an independent and permanent Secretariat for the AUCIL

21. It is proposed to redraft Article 21 in order to allow the relocation of the Secretariat and its possible transfer to a Member State. In addition to the rewording, it would be possible to move the article after the article on Composition.

Current wording:

"Article 21: Human and Material Resources

The Commission shall provide the necessary means, staff and infrastructure to the AUCIL Secretariat to enable it carry out its duties effectively."

Proposed wording:

“Article 21

Secretariat of the AUCIL

The AUCIL shall be provided with a Permanent Secretariat with the necessary means, staff and infrastructure to enable it carry out its duties effectively.”

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