LEGAL OPINION


PART I: INTRODUCTION

Request by the African Union Peace and Security Council (AUPSC)


Mandate of AUCIL under its Statute

2. The AUCIL was seized of the aforementioned request from the AUPSC bearing in mind the terms of its mandate stipulated in its Statute, in particular, Articles 1, 4 and 7 thereof. Article 1 establishes AUCIL as an independent advisory organ of the African Union, while Article 4 stipulates that the AUCIL shall act at the instance of the Policy and other organs of the African Union, and spells out five key objectives of AUCIL, including: to conduct studies on legal matters of interest to the African Union and its Member States; to encourage respect for international law, the peaceful resolution of conflicts, as well as, respect for the Union and recourse to its organs, when necessary. Under Article 7 entitled 'contribution to objectives and purposes of the Union', the AUCIL is required, in carrying out its functions, to contribute to the objectives and principles of the African Union, as enshrined in Articles 3 and 4 of the AU Constitutive Act, and in particular, to study all legal matters related to the promotion of peace and security on the African continent.

PART II. BACKGROUND AND CONTEXT OF LIBYAN CONFLICT

3. Available reports suggest that the Libyan crisis began on 15 February 2011 when the Libyan government armed forces violently suppressed peaceful protests by Libyan citizens demanding political reforms. The Chairperson of the AU Commission, in his report on the activities of the AU High-Level Ad Hoc Committee on the Situation in Libya, recalled that the AU Peace and Security was first seized with the situation in Libya at its 261st meeting held on 23 February 2011 when the AUPSC,
among other things, expressed deep concern with the situation in Libya, and strongly condemned the indiscriminate and excessive use of force and lethal weapons against peaceful protestors in violation of human rights and International Humanitarian Law involving the loss of human life and the destruction property. The AUPSC called on the Libyan authorities to ensure the protection and security of the citizens of Libya, as well as the delivery and provision of humanitarian assistance to the injured and other persons in need. The AUPSC also underscored that the aspirations of the people of Libya for democracy, political reform, justice, and socio-economic development are legitimate, while stressing the need to preserve the territorial integrity and unity of Libya. The AUPSC, at the level of Heads of State and Government at its meeting on 10 March 2011 to address the situation in Libya, issued a communiqué in which the AUPSC, inter alia, expressed deep concern at the prevailing situation in Libya which ‘poses a serious threat to peace and security in that country and in the region as a whole, and to the safety and dignity of Libyans and of migrant workers, notably African migrants living in Libya as well as the resulting humanitarian situation’.

4. On 21 February 2011, prior to the statement by AUPSC on 23 February, the Arab League Secretary-General called for an end to violence in Libya asserting that the demands of the Arab people for change are legitimate and that the Arab League had suspended Libya. Shortly after the statements by the AUPSC and the Arab League expressing concerns about the situation in Libya, the United Nations Security Council, on 26th February, 2011, adopted its resolution 1970 denouncing what the resolution described as the ‘gross and systematic violations of human rights, including the repression of peaceful demonstrators’. The resolution also notes that the attacks which were then taking place, may amount to crimes against humanity, and decided to refer the situation in Libya since 15 February 2011, to the Prosecutor of the International Criminal Court (ICC). The Security Council subsequently passed its resolution 1973 on 17 March 2011 which, inter alia, imposed a no-fly zone and a flight ban over Libya partly as a result of the failure of the Libyan authorities to heed the demand under resolution 1970 for cessation of hostilities and the attacks on civilian populations and partly, apparently, in response to an escalation of the conflict caused by a reported threat or incitement by the Libyan authorities to massacre the people of Benghazi ‘street by street’ like ‘cockroaches’.

5. The AUCIL notes that on 25 March 2011, the African Court on Human and People’s Rights took the view that the situation in Libya was of extreme gravity and urgency posing a risk of irreparable harm to persons who were the subject of the application in relation to their right to life and to physical integrity of persons, as guaranteed under the African Charter on Human and People’s Rights. The Court, therefore, unanimously ordered provisional measures calling on Libya to immediately refrain from any action that would result in loss of life or violation of physical integrity of persons which could be a breach of the provisions of the African Charter or of other international human rights instruments to which Libya is a party (vide application entitled In the matter of the African Commission on Human and People’s Rights v. The Great Socialist Arab Jamahiriya. Application No. 004/2011). In its response to the Court dated 9 April 2011, the Libyan Government has denied these claims and expressed its willingness to subject itself to criminal investigations by the Court if deemed necessary. It appears the African Court on Human and People’s Rights at present does not have the competence to exercise criminal jurisdiction. It is understood that an amendment to the Court’s Statute, is being contemplated within the African Union to clothe the Court with criminal jurisdiction for future cases. But that should not prevent any appropriate organ of the AU, including the African Commission and or the Court from conducting the necessary investigations into the Libyan situation to establish the facts.

6. The AUCIL further notes that on 1st March 2011 the General Assembly, upon the recommendation of the Human Rights Council, unanimously adopted a resolution to suspend membership of Libya on the Human Rights Council which is undertaking its own investigations into the situation in Libya expected to be completed by June 2011. Recently on 10 May 2011, during the open debate of the Security Council on the theme Protection of Civilians, the UN Coordinator for Humanitarian Assistance informed the Council that the humanitarian situation in Libya was still dire as humanitarian access was impeded by the ongoing conflict in Libya, especially in the city of Misrata which is said to be under siege by government forces. The Council was also informed by the Secretary-General that the parties to the conflict had not heeded calls for cessation of hostilities as demanded by resolutions 1970 and 1973.
7. The intersection between a non-international armed conflict involving pro-government and anti-government forces who started as peaceful demonstrators calling for political reforms, and the use of force by the international community on the authority granted by the Security Council to use all necessary measures to protect civilians and civilian populated areas from attacks pursuant to resolutions 1970 and 1973, makes the situation in the Libyan Arab Jamahiriya, a complex politico-legal issue.

PART III: ISSUES ARISING FROM IMPLEMENTATION OF RESOLUTIONS 1970 AND 1973

7. The AUPSC has on many occasions expressed support and respect for resolutions 1970 and 1973 but seems to have motivated its request for the opinion of the AUCIL from concerns expressed – not only by the AU but also by some Members of the Arab League, as well as in some cases, by leading politicians, including lawmakers in some of the countries involved in the coalition of States – regarding the means and methods used and certain measures taken or being contemplated to achieve the ends of resolutions 1970 and 1973; measures considered to be neither consistent with international law nor with the letter and spirit of the two resolutions. These concerns include the following:

a) Deployment of military advisers at the invitation of or to assist one of the parties to the conflict;
b) Supply of lethal and non-lethal weapons to one side of the conflict;
c) The degree of force and other methods being applied to enforce the no-fly zone and ban on flights;
d) The possible use of oil proceeds and other frozen assets to address the needs of some segments of the population of Libya;
e) Intentions and decisions by some member States of the coalition of the willing to pursue their national goals of desiring regime change and to recognize the TNC as the sole representatives of the people of Libya;
f) The extent to which measures taken are consistent with provisions of resolutions 1970 and 1973 regarding need to respect the territorial integrity sovereignty and political independence of Libya as a State

g) The effectiveness of the monitoring mechanism established under the two resolutions.

8. In addressing these concerns or issues raised in the preceding paragraph, the AUCIL took cognizance of the fact that some of the concerns are founded on public statements attributable to some high-ranking representatives of State, while other concerns expressed are based on allegations or claims yet to be proven or substantiated or are allegations and claims that have been denied by those against whom they have been made. Therefore, the various opinions of Members of AUCIL on these questions have been informed by the need, not only to promote respect for international law and the rule of law, but also the need to avoid the temptation or pitfalls of entering into the arena of conjecture and or tendering an advice in abstract terms or based on hypothetical scenarios. Be that as it may some of the concerns articulated merit due consideration.

PART IV: APPLICABLE LAW

9. In considering the AUPSC request, the AUCIL members took cognizance of the following sources of international and continental legality, among others, which are germane to examining the scope of resolutions 1970 and 1973 and the obligations of States arising from those resolutions and issues concerning their effective implementation, namely:

a) The Charter of the United Nations, Chapter VII of the UN Charter under which resolution 1970 and 1973 were adopted, exempts enforcement measures taken under Chapter VII from the ambit of Article 2 (7) prohibiting the United Nations or States from intervening in matters which are essentially within the domestic jurisdiction of any or another State. Domestic jurisdiction in this sense refers to all matters in which a State's discretion is not limited by its obligations under general international law or a treaty to which it is party. The combined effect of Article 2(7), 39, and 94 of the UN Charter is that where the conduct or behaviour of State is determined to be a threat to international peace and security, a breach of the peace, or an act of aggression, or a failure to observe the decision of the ICJ, those matters are not considered within the domestic
jurisdiction or domain reserve of the State in question. Thus, the United Nations is entitled to take all necessary but effective measures against or within a State or to authorize its members to take such action, if it is determined by the Security Council as a situation of civil unrest, characterized by gross and massive violations of human rights, ethnic cleansing, suppression of the population which are of such a gravity as to constitute a 'threat' to international peace and security. The situation of massive violations of human rights as reportedly occurred since 15 February 2011 in Libya, will, therefore, not qualify as matters essentially within the domestic jurisdiction of Libya.

b) **The Security Council Resolutions 1970 and 1973** which calls all Member States to take all necessary measures to protect civilians and enforce the various sanctions regime against Libya.

c) **Other relevant Resolutions and Declarations of the UN** in particular by the Security Council whose decisions are legally-binding on all States and those of the General Assembly and the Secretary-General insofar as such resolutions, declarations, as well as statements by the General Assembly and the Secretary-General and, in some cases, of the Security Council might fall in the realm of 'soft law'.

d) **General Principles of International Law** including the rules of customary international law relating to the non-use of force and the pacific or peaceful settlement of disputes as well as treaties.

e) **International Humanitarian Law** (also known as the laws of war) as a *lex specialis* applicable to armed conflict, including the following treaties: the Hague Conventions; the Four Geneva Conventions of 1949 and its two Additional Protocols I and II of 1977, Convention.

f) **The Constitutive Act of the African Union:** Under the AU Constitutive Act, Member States undertake to respect the Charter and the principles of international law. Article 4 of the Constitutive Act of the AU confers a right on the African Union to intervene at the request of any Member states to intervene in grave circumstances, namely genocide, war crimes and crimes against humanity and Articles 3 and 4, emphasize the significance of good governance, popular participation, the rule of law and human rights.

h) **Protocol Establishing the AU Peace and Security Council** which African States, among other things expresses concern about the continued prevalence of armed conflicts in Africa and the fact that no single internal factor has contributed more to socio-economic decline on the Continent and the suffering of the civilian population than the scourge of conflicts within and between our States; and concern also by the fact that conflicts have forced millions of our people, including women and children, into a drifting life as refugees and internally displaced persons, deprived of their means of livelihood, human dignity and hope; The protocol also express a determination to enhance our capacity to address the scourge of conflicts on the Continent and to ensure that Africa, through the African Union, plays a central role in bringing about peace, security and stability on the Continent; and is mindful of the provisions of the Charter of the United Nations, conferring on the Security Council primary responsibility for the maintenance of international peace and security, as well as the provisions of the Charter on the role of regional arrangements or agencies in the maintenance of international peace and security, and the need to forge closer cooperation and partnership between the United Nations, other international organizations and the African Union, in the promotion and maintenance of peace, security and stability in Africa.

i) **The OAU Convention for the Elimination of Mercenarism in Africa** of 3 July 1977. Article 6 entitled 'Obligation of States' provides inter alia, that State parties undertake to take all necessary measures to eradicate all mercenary activities in Africa and to prevent their nationals and foreigners on their territories from engaging in any of mercenary activities as well as forbid on their territories, the recruitment, training, financing and equipment of mercenaries and any other form of activities likely to promote mercenarism.

j) **African Charter on Human and People’s Rights, 1981** aimed at promoting the principles of the Charter of the Organization of African Unity/AU, that ‘freedom, equality, justice and dignity are essential objectives for the achievement of the legitimate aspirations of the African peoples’; and also reaffirm adherence by African States to the principles of human and peoples’ rights and freedoms contained in the declarations, conventions and other instruments adopted by the OAU, the Movement of Non-Aligned Countries and the United Nations.
Africa Union Charter on Democracy, Elections and Governance (2007), aimed promoting and strengthening good governance through the institutionalization of transparency, accountability and participatory democracy.

African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention) (2009) which establishes a legal framework for preventing internal displacement relating to the protection and assistance to internally-displaced persons and also provide for the respective obligations, responsibilities and roles of armed groups, non-state actors and other relevant actors, including civil society organizations, with respect to the prevention of internal displacement and protection of, and assistance to, internally-displaced persons.

Opinions of Jurists with recognized competence in the field of international law.

PART V: SCOPE AND LEGAL OBLIGATIONS ARISING FROM RESOLUTIONS 1970 AND 1973

(The full texts of the resolution are annexed to this opinion to facilitate reference)

10. To begin with, the two resolutions were adopted under Chapter VII of the UN Charter and by virtue of Article 25 are legally-binding on all States. The Charter confers on the Security Council the primary responsibility for the maintenance of international peace and security, and its decisions are binding on all Member States of the United Nations. Article 24 provides that when the Security Council decides, it does so, on behalf of the international community, including all Member States and non-Member States alike.

11. The following broad normative concepts or terms used in resolutions 1970 and 1973, require some elaboration for a better appreciation of the scope, essence, and implications of the two resolutions, namely: a) Protection of Civilians; b) Responsibility to protect; and c) All Necessary Measures.

‘PROTECTION OF CIVILIANS’

12. Both resolutions 1970 and 1973 have as their ultimate and overarching objective, the protection of civilians in Libya. Paragraph 1 of resolution 1970 demand an immediate end to the violence and calls for steps to fulfil the legitimate demands of the population while paragraph 1 of resolution 1973 demands the immediate establishment of a ceasefire and a complete end to violence and all attacks against, and abuses of, civilians. Paragraph 4 of resolution 1973 ‘authorizes Member States that have notified the Secretary-General, acting nationally or through regional organizations or arrangements, and acting in cooperation with the Secretary-General, to take all necessary measures, notwithstanding paragraph 9 of resolution 1970 (2011) to protect civilians and civilian populated areas under threat of attack in the Libyan Arab Jamahiriya, including Benghazi, while excluding a foreign occupation force of any form on any part of Libyan territory, and requests the Member States concerned to inform the Secretary-General immediately of the measures they take pursuant to the authorization conferred by this paragraph which shall be immediately reported to the Security Council’.

13. Protection of civilians usually entails measures that may be taken to protect life and limb as well as the safety and dignity of civilians in times of armed conflict in order to enhance respect for obligations under international humanitarian law. States have the primary responsibility to protect civilians. Non-State armed groups also have obligations to protect civilians. The Protection of Civilians has been a thematic item on the agenda of the Security Council since 1999; and over the course of the past ten years, the Security Council has progressively adopted resolutions and issued statements aimed at strengthening the regime for the protection of civilians either in a thematic format or in the context
of specific armed conflicts such as the case of Libya. Various UN reports note that the protection of civilians is considered to be a humanitarian imperative because of the deplorable deterioration in adherence to humanitarian norms in crisis situations over the past decades. Some Governments have often treated armed – and sometimes, even unarmed – opponents and their supporters with ‘indiscriminate and ruthless ferocity’. Anti-government forces are often willing to employ any and all means that might advance their end. Instead of being indirect victims as the case in classical warfare, today civilian populations are often the main targets of attacks.

14. AUCIL notes that the Geneva Conventions provide the legal framework for the protection of civilians and enjoins States and non-State armed groups to protect populations in armed conflict. Parties to armed conflicts are under an obligation not to use civilians as human shields or misuse Red Cross or Red Crescent emblems to support military operations or use ambulances to transport arms and weapons. All parties to armed conflicts are to refrain from harming injured people or medical personnel. States enforcing the resolutions have a duty under international humanitarian law to take adequate and efficient precautionary measures to protect the civilian population. An end to the violence and the establishment of a ceasefire by the parties to the Libyan conflict will no doubt provide the most conducive atmosphere for the protection of civilians.

‘SIGNIFICANCE OF ‘RESPONSIBILITY TO PROTECT’’

15. Both resolutions 1970 and 1973 recall the responsibility of the government of Libya to protect its own populations against violent attacks. By referring to Libya’s responsibility to protect its own populations, the Security Council apparently was invoking, in a robust manner, the ‘new’ norm of Responsibility to Protect adopted in paragraphs 138 and 139 of the 2005 World Summit Outcome Document in which political leaders of UN Member States pledged to uphold their responsibility to protect their own populations (citizens and foreign alike) from genocide, war crimes, crimes against humanity and ethnic cleansing as well as the incitement to commit these crimes. The norm stipulates that where a State manifestly fails or is unwilling or incapable of protecting its own populations, the responsibility falls on the international community to intervene, acting under the auspices of the UN, and in accordance with the Charter. The General Assembly is currently involved in debates to clarify the parameters for the application of this principle in order to check its potential abuse, including clarifying the relationship between the General Assembly and the Security Council in determining when a responsibility to protect situation has occurred.

16. Nonetheless, the mere fact that this norm, like any principle of law, may be potentially subject to abuse or misapplication, does not take away its intrinsic value, aimed at protecting human lives and property. Indeed, under the Constitutive Act of the African Union, this norm is elevated into a treaty principle which finds expression in Article 4 providing for the right of the African Union, at the request of any Member State, to intervene in grave circumstances such as genocide, war crimes and crimes against humanity. The principle is repeated in the protocol establishing the AUPSC and the Kampala Convention on the Assistance to and Protection of Internally-Displaced Persons. The Constitutive Act and Protocol Establishing the AU PSC envisages that the Assembly of the AU will decide upon when to intervene upon the recommendation of the AU PSC. In fact, because of their experience with violent conflicts and the mass atrocities witnessed on the continent, African countries contributed significantly to the attainment of a consensus on the 138 and 139 of the 2005 Summit Outcome which was adopted by the General Assembly when the current Chairperson of the AUC was President of the UN General Assembly.

17. Resolutions 1970 and 1973 impose an obligation on States to respect this principle in the implementation of the resolutions which were adopted under Chapter VII of the UN Charter. Unlike humanitarian intervention where military force is the only option, the R2P does regard use of force as only a continuum of choices including diplomacy and conflict prevention through early warning mechanisms. But the principle thus gives equal priority all pacific means of settlement although it does not rule out the use of force when necessary provided the use of force is in accordance with the Charter of the UN, and in the case of Article 4 of the AU Constitutive Act, in accordance with procedures outlined under the Constitutive Act and the Protocol establishing the AUPSC.
is unwilling or unable to protect its citizens or populations including foreigners, or is even targeting them, the responsibility - not just right – to protect is transferred to the international community. However, the responsibility to protect, as a tool for the protection of civilians, is narrowly limited only to cases of genocide, war crimes, crimes against humanity and ethnic cleansing, as a paradigm for conflict prevention, intervention and post-conflict rebuilding.

**‘ALL NECESSARY MEASURES’**

18. Much of the controversy surrounding the application or implementation of resolutions 1970 and 1973 turns on the interpretation to be given to the term *all necessary measures* used in the two resolutions as the term or phrase lacks precise definition. The increasing use of this undefined term in Security Council resolutions partly stems from the failure to establish a collective security arrangement as envisaged under the Charter requiring the creation of a Military Staff Committee to serve as a command and control mechanism to monitor and oversee any enforcement measures authorized by the Security Council under Chapter VII. In the absence of such a mechanism as envisaged under the UN Charter, the practice or trend is for the UN to rely on what has become known as the *coalition of States* or the *coalition of the willing*.

19. Striking a balance between the exercise of discretion inherent in the authorization to use *all necessary measures* given to States under resolutions 1970 and 1973, and respecting international humanitarian law is central to addressing the issues raised. Given its ambiguity, Member States are inclined to resort to certain controversial measures which they justify as necessary to achieve the objective of protecting civilians and facilitating the cessation of hostilities, while others on the contrary contend that some of these measures are not consistent with the letter and spirit of the relevant resolutions, raising issues about the proportionality or necessity of the measures employed. The United Nations recognizes the potential for misapplication of the broad term *all necessary measures*, implying in practice, leaving operational decisions to the discretion of Member States, regional arrangements or groups or coalition of States, and has, therefore, proposed certain safeguards not all of which have been fully observed in reality.

20. The Security Council has on previous occasions considered recommendations by the Secretary-General aimed at limiting the abuse of the term *all necessary measures* in situations where the UN authorizes Member States to use *all necessary measures* to act on behalf of the UN. These include spelling out clear guidelines to States or the coalition of States as to what is possible, permissible or not permissible and to regularly brief the Security Council through the Secretary-General on measures taken in order to monitor compliance with the terms of the resolution in question, the Charter and international law. These recommendations include ensuring that the objectives for taking *all necessary measures* are clearly set out, the means of executing the mandate is agreed to and a time table is set to end the operations as well as introducing a system of regular reporting to enable the Security Council to evaluate the state of implementation based on reports from the Secretary-General. The Security Council Committee established under resolution 1970 to evaluate the sanctions regime and the Panel of Experts envisaged under resolution 1973 are intended to achieve the goal of monitoring performance and must be made to work effectively in practice through good faith compliance with these monitoring mechanisms.

21. As currently formulated, it would appear that the resolutions do not require that the prior approval of the Security Council before necessary measures are taken as it only states that the Secretary-General and Security Council be informed of measures taken *ex post facto*. As a safeguard against abuse, *all necessary measures* must of necessity imply or be interpreted to mean that the Security Council must, after receiving a report from the Secretary-General, approve the measures contemplated to enhance both their legality and legitimacy.

**Cessation of hostilities**

22. Both resolutions call for cessation of hostilities and calls on the Libyan authorities to halt attacks on civilians. Therefore, observing a ceasefire by both parties will surely enhance the conditions for the protection of civilians. An end to hostilities resulting from a ceasefire will make it unnecessary for
the coalition of States to resort to the use of force and other measures they have employed so far to attain the objectives of the resolutions. Resolution 1973 also encourages the AU High Level Ad Hoc Committee to promote dialogue between the parties in pursuit of the demands of the people of Libya for political reforms. This is self-explanatory.

Arms Embargo

23. Under paragraph 9 of Resolution 1970, all states are prohibited from supplying arms in any form to Libya which is also prohibited from transporting arms and further provides that Member States shall immediately take necessary measures to prevent the direct or indirect sale or supply of arms to Libya. However, there is a controversy about the legal effect of paragraph 4 of the resolution 1973 which authorizes Member States that have notified the Secretary-General, acting nationally or through regional organizations or arrangements and acting in cooperation with the Secretary-General, to take all necessary measures, notwithstanding paragraph 9 of resolution 1970 (2011) to protect civilians and civilian populated areas under threat of attack in the Libyan Arab Jamahiriya. Perhaps, the better view is that both paragraph 4 of 1973, and paragraph 9 of resolution 1970 insofar as the latter paragraph has not expressly been abrogated by the former, must both be equally adhered to as appropriate. As observed by the UN Secretary-General in his previous report (2008) on the Causes of Conflict and the Promotion of Durable Peace and Sustainable Development in Africa, the imposition of arms embargo and other sanctions is to diminish the capacity for the protagonists to sustain a prolonged fight. The arms embargo in particular, if strictly adhered to, can help diminish the availability of arms with which the parties can wage the war in Libya. The report reminds States of their obligation to ensure that when an arms embargo is imposed, it is imperative for them not only to discourage their nationals and enterprises from violating such sanctions but also to refrain from any official transactions that would undermine the embargo in whatever shape or form.

24. Resolutions 1970 and 1973 do not expressly authorize the presence of foreign military personnel to support any faction to the conflict. Some have argued that the dispatch of military advisers to assist the anti-government forces would, therefore, contravene resolutions 1970 and 1973, while others have argued that the resolution did not expressly exclude the deployment of military advisers. However, in accordance with both the letter and spirit of the resolutions, any deployment of military advisers could be done not at the request of any particular faction to the conflict but rather under the auspices of the UN, for example, to monitor a ceasefire when the parties cease hostilities as called for in both resolutions. In situations of a non-international armed conflict or ‘civil war’, any foreign military assistance to one side of the conflict tends to fuel or escalate the conflict as the other side also seeks to obtain military help from clandestine or overt sources. It would, thus, be more permissible under international law and consistent with the letter and spirit of the UN Resolutions 1970 and 1973 that any deployment of military advisers to Libya – as a means to achieve the objective of protecting civilians and facilitating an end to the hostilities in Libya – be sent under the auspices of the UN Security Council, if only to monitor the ceasefire.

25. Paragraph 9 of resolution 1973 provides an exception to the ban on arms embargo namely, in respect of a) non-lethal weapons. b) protective clothing and c) sales of supply of arms as approved by the Committee set up to monitor the implementation for the sanctions regime. The exceptions regime under resolution 1973 did not make any distinction between government and anti-government forces which means all sides may benefit from the exceptions.

Target Travel Ban

26. In accordance with resolution 1970 which imposes a travel ban on 17 presumed ‘loyalists’ of the Libyan Leader and the Leader himself, all States are duty bound to respect the travel ban. Article 2(5) of the UN Charter specifically provides that ‘all Member States shall give the United Nations every assistance in any action it takes in accordance with the Charter, and shall refrain from assistance to any State against which the United Nations is taking preventive or enforcement action’. Member States are required to take necessary measures to prevent entry into or transiting through their territories of the targeted individuals listed in the annex to the resolution.
Assets freeze

27. Both resolutions 1970 and 1973 imposed an assets freeze on Libya although the resolutions envisage that the frozen assets will, at a later stage, be used for the benefit of the people of Libya, including meeting critical humanitarian and essential needs. In a war situation, assets frozen are sometimes intended to prevent the use of the frozen assets by parties to the conflict to prosecute or prolong the conflict. The resolutions designate ‘relevant Member States’ that are to determine how those frozen assets may be used. However, to be consistent with the letter and spirit of resolutions 1970 and 1973, the frozen assets must not be used to aid the supporters or the war effort of one side to the conflict, because all the citizens of Libya are entitled to benefit from the frozen assets at a later stage, under the auspices of the UN with safeguards to ensure transparency and equity in the distribution of these assets. For proper monitoring, it is up to the Security Council to unblock the funds frozen under paragraph 19 of resolution 1973 through a transparent process.

No-fly-zone and ban on flights

28. Paragraph 8 enjoins states to take all necessary measures to enforce the flight ban imposed by paragraph 6 of resolution 1973. While the resolution does not expressly provide for attacks on the air defences of Libya, a no-fly-zone and a flight ban entail, by necessary implication, taking measures to prevent Libya, the target State, Libya, from undermining the no-fly zone, including degrading its ability to control the airspace or to attack the planes which are enforcing the no-fly-zone. In enforcing these measures, the relevant States must distinguish between civilian populations and combatants, and between civilian objects and military objectives. The Security Council must reserve the right to monitor all necessary measures taken to enforce this sanction and the methods employed must be consistent with international law. The rules of international humanitarian law require that States enforcing the no-fly zone and the flight ban are under an obligation not to use indiscriminate weapons, the use of which in populated areas will be incompatible with the principle of military necessity, proportionality or the necessary degree of precaution to be expected in enforcing the sanctions regime under the resolution 1973, as well as commensurate with the overall objective of protecting civilians in Libya.

Mercenaries

29. Mercenary activity is also prohibited under resolution 1973. Under paragraph 14 States are to discourage their citizens from travelling to Libya to carry out mercenary activities. African states are not only prohibited by resolution 1973 but are also enjoined under the OAU Convention on the Elimination of Mercenarism in Africa to refrain from aiding or supporting mercenary activities. Article 6 OAU Convention outlines obligations of African States to prevent, deter and punish acts of mercenarism.

Humanitarian assistance

30. The two resolutions, enjoin all parties to the conflict are under obligation to refrain hindering the work of humanitarian agencies and all states to support the return to Libya of humanitarian agencies. All protagonists or combatants are required to abide by the universal humanitarian principle not to hinder humanitarian assistance to the needy and vulnerable populations such as the elderly, the sick, women and children.

Referral to the International Criminal Court (ICC)

31. Under resolution 1970, the Security Council referred the Libyan situation to the Prosecutor of the ICC. The prosecutor is to investigate and report regularly to the Security Council. Although Libya is not party to the Rome Statute, the referral has been made in accordance with Chapter VII of the UN Charter as well as Article 13 of the Rome Statute. Therefore, States and non-State parties are bound to cooperate with the ICC pursuant to Chapter VII of the UN Charter.

32. The Prosecutor may open an investigation only if the requirements of Article 53 (1) of the Rome Statute are met, namely a) the alleged crimes committed must fall within the ambit of the Court’s
The AUCIL is mindful that the question of referrals to the Security Council in the context of situation in Sudan (Darfur) sparked a lot of controversy about the application of the Rome Statute vis-à-vis the immunity of High-ranking State officials including Heads of State under international law especially in light of the ICJ decision in DRC v. Belgium. The AUCIL is also cognizant of the question of referrals of States which are not parties to the Rome Statute to the ICC by the Security Council. The Review Conference of States Parties in Kampala did not take any conclusive decisions on these questions are expected to reconsidered by a working group of the Assembly of States Parties to the Rome Statute.

33. Until the Rome Statute is amended, the referrals made by the Security Council under Chapter VII of the UN Charter in conformity with Article 13 of Rome Statute are bound by the unanimous of Security Council decision which was supported by all three African Member States on Council namely, Gabon, Nigeria and South Africa. Under Article 16 of the Rome Statute, interested States may however, request a deferral or suspension of the referral if the Pre-Trial Chamber agrees with the Prosecutor’s request for indictment and the issuance of an arrest warrant.

Recognition or non-recognition of Parties to the Libyan Conflict as Legitimate Government or Representatives of the People of Libya

35. In the Libyan case, the question is about the recognition or non-recognition of ‘government’ or the opposition as ‘the legitimate representatives of the people of Libya’ by some States involved in implementing the two resolutions. Both resolutions 1970 and 1973 are silent on the issue of recognition though they both underscore the need to respect the sovereignty, territorial integrity and political independence of Libya. Recognition of States or governments is a term with various meanings under international law. The principles or theories applicable to recognition of Governments as distinct from recognition of State differ. Under international law, a State must meet all the international legal criteria for Statehood before recognition could be properly founded. The recognition of government usually connotes an acceptance by the recognizing State or Government, of individuals or groups as competent to represent a State in its foreign relations. Recognition is usually a unilateral act on the part of the recognizing Government or State and may be an express or implicit indication of the recognizing government’s willingness to enter into official relations with a new State or government. However, recognition of government is not an entirely discretionary political act without any legal limits. Some scholars have observed that there appears to be no rule of general or regional customary international law that a de facto government, to be recognized as such must be democratically elected. However, under the Constitutive Act of the African Union, the African Charter on Democracy, Elections and Governance, as well as the various AU Declarations Against Unconstitutional Changes in Government OR Coup d’états, African States have made a commitment and are indeed are under an obligation not to recognize a government which comes to power through unconstitutional means, such as by use of force or coup d’état.

36. It is also pertinent to recall the presidential statement of the Security Council adopted in 1998 which underscores the need for enforcement action and other activity carried out by regional organizations, arrangements and agencies in the field to be done in a manner consistent with the principles of territorial sovereignty, political independence and in accordance with articles 52, 53 and 54 of the UN Charter under Charter VIII (vide S/PRST/1998/35 of 30 November 1998). In the context of the Libyan crisis, therefore, any act of recognition must be consistent with the resolutions 1970 and 1973 providing that all parties must respect the territorial integrity, sovereignty, the political independence
and unity of Libya. Consistent with Charter VI and VIII of the Charter which encourage the peaceful settlement of disputes, the African Union is engaging all parties to the conflict to facilitate peaceful resolution to the conflict including the implementation of the Roadmap proposed by the AU which include the cessation of hostilities and the establishment of an inclusive transitional arrangement.

**Monitoring Mechanisms**

37. A Committee of the Security Council has been established under resolution 1970 to oversee compliance with the assets freeze. Resolution 1973 also provides the appointment of a panel of experts to be constituted by the Secretary-General in consultation with the Committee to monitor compliance with the resolution. Under paragraph 24 of resolution 1973, the Panel of Experts will, inter alia, gather information from interested States, or regional organizations regarding the implementation of the measures decided by resolution 1970 and 1973, in particular incidents of non-compliance. Both resolutions provide for review of the appropriateness of the measures. Resolution 1973 requires that actions of the Libyan authorities be kept under continuous review, which may include strengthening, suspending or lifting the measures depending on compliance with the terms of the resolution.

38. The Security Council in its statement of 30 November 1998, also recognized that the authorization by the Council of action by regional organizations or by Member States or coalition of States, can be one type of effective response to conflict situations. However, in order to enhance its ability to monitor any activities that it has authorized, the Council expressed it readiness to examine appropriate measures whenever such authorization is being considered. The Security Council must, therefore, ensure that all necessary measures contemplated by the coalition of States or regional arrangements involved implementing resolutions 1970 and 1973 act in appropriate manner consistent with the resolutions 1970 and 1973 as well as respect for international law including humanitarian, human rights and refugee law. Any State or groups of States or regional organizations which are not happy about any aspects of the implementation, may therefore, make their views known through the channels provided for under the resolutions backed by the necessary evidence.

**PART VI: LEGAL AND POLICY CONSIDERATIONS ON COOPERATION BETWEEN THE UNITED NATIONS AND AFRICAN UNION IN ADDRESSING SITUATION IN LIBYA**

39. The combined effect of the Charter and some resolutions adopted by the UN in respect of peace and security in Africa is that cooperation between the Security Council and AUPSC must take into account the following factors or guiding principles.

40. Resolution 1973 acknowledges and recognizes the role of the AU High-Level Ad Hoc Committee on the situation in Libya in its quest to promote dialogue with the view to meeting the aspirations of the people of Libya for democratic reforms. The resolution also recognizes in particular, the role of the Arab League in enforcing the no-fly-zone given that Libya belonged to the (Middle East) region. In the implementation of resolutions 1970 and 1973, a more prominent role ought to be given to the African Union and its organs, including the AU Peace and Security Council and the AU High-Level Ad Hoc Committee on the Situation in Libya. This will be in accordance with the UN Charter and decisions taken by the United Nations regarding the role of regional organizations and arrangements in resolving conflicts, in particular, on the African continent. In this respect, it is recalled that in his previous reports submitted to the Security Council and or the General Assembly, the UN Secretary General notes that regionalism as a component of multilateralism is necessary and feasible and, therefore, there was now a possibility of a shared role for maintaining international peace and security.

41. The report further notes that there is recognition of the need for greater involvement by regional organizations with the United Nations in conflict prevention, management and resolution in all regions in particular, the African Union. The Secretary-General’s report also recognized that 'Africa has come a long way in defining and refining its peace and security architecture since the end of the cold war, and has been playing a fundamental role in promoting peace and security'. Furthermore, this role and its relationships with the global role of the Security Council need to be defined. (vide document S/2008/186 of 1 April 2008, entitled Report of the Secretary-General on the relationship between the United Nations and regional organizations, in particular the African Union, in the maintenance of international

PART VII: CONCLUSIONS/RECOMMENDATIONS OF THE AUCIL

The following conclusions may be drawn from the observations and analysis made by AUCIL in the preceding paragraphs.

42. The Parties to the Libyan conflict must opt for a peaceful settlement to the dispute in accordance with the Charter of the United Nations and engage in a political dialogue to address the demands of the people of Libya for constitutional reforms, including respect for the rule of law, good governance and human rights as demanded under resolutions 1970 and 1973 and AU Roadmap.

43. The monitoring mechanisms established under the resolutions to evaluate performance must be allowed to function properly including seeking appropriate clearance under UN auspices of measures taken or contemplated and ensuring regular briefing of the Council through the Secretary-General.

44. The cessation of hostilities by the Libyan Parties to the conflict as called for under both resolutions 1970 and 1973 will create an enabling environment more conducive to the protection of civilians.

45. It is clear from paragraph 28 of resolution 1973 that the lifting of sanctions will largely depend on the behaviour and conduct of the Libyan parties to the conflict. A credible ceasefire by all the parties and a halt by the Libyan government forces of attacks on civilian populations as called for by resolutions 1970 and 1973 will make it unnecessary or unattractive for the international community to carry out or sustain some of the measures or sanctions already taken or being contemplated in favour of one side to the conflict.

46. The broad authorizing mandate provided for under resolutions 1970 and 1973 authorizing willing states to use all necessary measures to protect civilians and enforce the various sanctions regimes must be carried out in accordance with the UN Charter, the rules of international law, including international humanitarian, human rights and refugee law.

47. International law demands that both the end and the means of achieving the ends or objectives of Security Council resolutions 1970 and 1973 must be both lawful and permissible. Thus, the obligation of States must relate not only to the attainment of the objectives or results to be achieved under resolutions 1970 and 1973, but also the means and method by which these objectives are pursued.

48. While the Libyan conflict continues, the core challenges for the protection of civilians will include a) ensuring compliance by Libyan authorities and opposing forces as well as the international community with international law; b) strengthening the work of humanitarian agencies and improving humanitarian access to Internally displaced persons, refugees and other vulnerable groups in need of humanitarian assistance and c) enhancing accountability for violations of international law, including international humanitarian and human rights law.

49. The Libyan crisis offers an opportunity to define the regional-global security partnership with the UN through greater involvement of the AU in the forefront in dealing with the prevailing complex Libyan situation. The Libyan situation presents a possibility and an opportunity to fulfil the promise of giving a greater role for the AU in resolving conflicts on the continent in accordance with recent evolution of the partnership between the UN Security Council and the AU Peace and Security Council in resolving addressing issues of peace and security in Africa.
50. Following the previous observations (Points 31 and 32), the Libyan case should be seized for having a further reflection on Articles 1, 17 (principle of complementarity) and 16 (Suspension of investigation or prosecution by the Security Council) of the Rome Statute on ICC.

Opinion adopted and approved in plenary meeting of the African Union Commission on International Law
Addis Ababa
May 12, 2011, 17H45mn
Definition Du Crime De Changement Anticonstitutionnel De Gouvernement

I. Du contenu du Crime

Constitue un crime de changement anticonstitutionnel de gouvernement tout fait ou tout acte caractérisé, perpétré par une personne, seule ou en groupe, contrairement aux dispositions constitutionnelles pertinentes, à la démocratie et à l'État de droit et dont le résultat recherché ou atteint est le renversement d’un gouvernement en exercice.

Sont ainsi considérés :

1. Un coup d’État;
2. Un complot constitué par la résolution arrêtée entre plusieurs personnes de commettre un attentat lorsque cette résolution est concrétisée par un ou plusieurs actes matériels ;
3. une intervention armée de dissidents, de mercenaires ou de mouvements rebelles;
4. Un enlèvement, un assassinat ou une disparition criminelle de gouvernants;
5. Un refus du gouvernement en place de transmettre le pouvoir à la majorité ou au candidat sortis vainqueurs d'élections conformément aux principes constitutionnels pertinents ;
6. Une modification ou un détournement d’un texte fondamental ou constitutionnel applicable, à des fins politiques ou électorales, attentatoires au principe de l’alternance politique.

II. De la sanction du Crime

- Les coupables de ces crimes seront passibles des sanctions criminelles telles qu’elles figurent dans leur droit pénal national, à l’exception de la peine de mort ;
- Les coupables seront punis d’une peine de dix ans d'emprisonnement et de 40.000 dollars d'amende, lorsque lesdites sanctions ne sont pas prévues ou ne sont pas plus douces.
- Ces sanctions sont portées à vingt ans de détention criminelle et à 400.000 dollars d'amende lorsque le crime de changement anticonstitutionnelle de gouvernement est commis dépositaire de l’autorité publique au moment des faits.

III. Des causes d’exonération ou d’atténuation de la responsabilité de crime anticonstitutionnel de changement de gouvernement

1. N'est pas responsable du crime ci-dessus la personne qui est atteinte, au moment des faits, d’un trouble psychique ou neuropsychique ayant aboli son discernement ou le contrôle de ses actes.
2. N’est pas responsable dudit crime, la personne qui en est l'auteur sous l'empire d'une force ou d’une contrainte à laquelle elle n’a pu résister.
3. Les enfants, âgés de moins de 18 ans, impliqués dans la commission du crime ci-dessus mentionné ne sont passibles de jugement que devant les tribunaux pour enfants. Ils ne peuvent être reconnus pénalement responsables de crime de changements anticonstitutionnels de gouvernement que dans des conditions particulières de protection, d’assistance, de surveillance et d’éducation dont ils doivent faire l’objet, conformément à la Convention internationale des droits de l’enfant du 20 novembre 1989 et de la Charte africaine des droits et du bien être de l’enfant du 27 juillet 1990, outre l’atténuation de responsabilité dont ils doivent bénéficier.