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Informal meeting and exchange of views with the Legal Advisers of African Union Member States

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Excellencies,
Ladies and Gentlemen Legal Advisers of the African Union Member States,
Colleagues and Friends,

[Introduction]

This is my first official visit to the African Union in my capacity as Legal Counsel of the United Nations. It is also the first visit ever of a UN Legal Counsel to the African Union. Allow me to extend my sincere gratitude to you for the warm and cordial welcome that you have extended to me here at the Headquarters of the African Union in Addis Ababa.

It is a great honour to address you today.

Earlier today I met with the President of the African Union Commission on International Law, Professor Adelardus Kilangi. I also met with the Legal Counsel of the African Union, Mr. Ben Kioko, and had an opportunity to have a discussion with his staff of the Legal Office of the African Union Commission. I told all of them that the purpose of my visit to the African Union is to listen to their suggestions on how we can strengthen the relationship and cooperation between the United Nations and the African Union, also and in particular with regard to legal matters. I will convey the same message to the Chairperson of the African Union Commission, H.E. Dr. Jean Ping, who I will have to pleasure of meeting with later today.

The idea of visiting the African Union in my capacity as Legal Counsel of the United Nations emerged in a conversation with Ben Kioko in June 2010 in Kampala. During this conversation we discovered a wide range of legal

issues that our respective Offices were confronted with in a similar way. Our meeting ended with both of us deeply convinced that the dialogue that we began at Kampala must continue.

While there is an ever growing cooperation between the UN and the AU in a variety of areas, there is very little cooperation in the legal field.

Colleagues, this we must change!

I firmly believe that both the UN and the AU could greatly benefit from the strengthening of a UN-AU dialogue on legal matters. This dialogue has the potential of having a positive impact on UN-AU cooperation in other areas.

The issue of cooperation between the United Nations and the African Union features very high on the strategic priority agenda of all major Secretariat units, including in particular DPKO, DFS, DPA and OCHA. Since about a year and a half the UN has a dedicated Office to the African Union – UNOAU. I had the great pleasure of meeting with SRSG Mr. Muburi-Muita, the Head of UNOAU this morning. Africa is and remains a top priority for the Secretary-General who conducted a number of missions to all parts of the continent. The UN-AU relationship is also a top priority for the DSG.

Against this background, Ben Kioko and I resolved to continue our dialogue on legal matters and to strengthen our cooperation for the benefit of both our organizations. It is in the spirit of this dialogue and cooperation that I stand before you here today. And I stand before you to solicit your support for the strengthening of this cooperation.

We must realize the great potential that lies in an ever closer cooperation between the UN and the AU also and in particular in the legal field.

So to start our discussion, let me say a few words about the role of my Office, the Office of Legal Affairs, in the United Nations and then speak about two topical issues that might be of interest to you: (1) the emerging doctrine

of the “responsibility to protect” with a particular focus on the Arab Spring; and (2) challenges in addressing the scourge of piracy.

[The role of OLA]

Regarding OLA, you will find that I and my colleagues are not often directly associated with the public face of the United Nations. The Office of Legal Affairs of the United Nations employs about 200 staff on a full-time basis and acts as in-house Counsel to the Secretary-General, to the senior management and to the wider UN system. Much of our work is, understandably, carried out quietly and behind the scenes. We cover a range of issues of international public law which many people would associate with the UN – for example, advice on the law applicable to war, Peacekeeping Operations, Oceans & the Law of the Sea, international criminal justice, contracts of over $4 billion annually, procurement matters, Treaty Law, privileges and immunities, International Trade Law and the system of administration of justice for a staff of more than 60,000. Being a lawyer in a political environment such as the UN brings with it a distinct role, where the provision of objective legal advice is essential for political decision-making. It is critical for decision makers to understand the legal implications of their choices, and to arrive at legally sound decisions. What I can also say is that I find that decision makers very much want to understand the legal context, even though this might sometimes complicate their lives in the short-term.

Over the years, the UN has seen periods of great advancement in international law and jurisprudence, just as there have been times when our function as guardian of the global legal architecture has seemed more peripheral. Since joining the United Nations, it has become clear to me that international law is central to the work of the UN and to the Secretary-General and his team.

We - as lawyers - are at the Secretary-General’s table on many issues. I think it is only fair to say that it is the Secretary-General himself with his wish to see international law at the centre of UN work – who provides us with our seat at the table.

So - what is the vision of my office? One answer is the focus on promoting respect for the rule of law by the UN itself as an actor.

As the Legal Counsel, my task is to support the Secretary-General's commitment to the strengthening of the rule of law, the pursuit of justice and the determination to end impunity for war crimes, crimes against humanity, genocide and other serious violations of international human rights law. This topic, in one way or another, permeates my activities on a daily basis.

My office plays a key role in promoting the rule of law at the national and international levels and this is at the heart of the UN's mission. Establishing respect for the rule of law is fundamental and essential for a number of reasons, including firstly: prevention of conflict; secondly, achieving a durable peace in the aftermath of conflict; thirdly, the effective protection of human rights; and also, of course, sustainable economic progress and development.

It is my mission to help the UN to act in accordance with the rule of law. My Office plays a role – to help with the concrete and practical application and implementation of the rule of law. It is my Office's job to ensure that UN departments and offices develop and implement policies in accordance with the law.

Let me now briefly turn to the first topical issue, I wish to raise with you: the concept of the "Responsibility to Protect" (R2P) in the context of current work at the United Nations, and its implementation in the situations in Libya and Syria.

[R2P]

2005 World Summit

In 2005, more than 150 Heads of State and Government unanimously embraced the "Responsibility to Protect" (R2P). They declared that "each individual State has the responsibility to protect its populations from

genocide, war crimes, ethnic cleansing and crimes against humanity", and that "the international community, through the United Nations, also has the responsibility … to help protect populations" from those crimes.

The three pillars of R2P

In addressing the challenge of "operationalizing" R2P, the Secretary-General has identified three pillars of action. Pillar I is the enduring responsibility of States to protect their populations. Pillar II is the role of the international community to assist States to protect their populations before crises and conflicts escalate to the level of the commission of R2P crimes.

And Pillar III involves a commitment that States "are prepared to take collective action in a timely and decisive manner, through the Security Council, in accordance with the Charter … where national authorities are manifestly failing to protect their populations". The commitment also includes action under Chapters VI and VIII, as well as under Chapter VII, and includes cooperation with relevant regional organisations, as appropriate. And of course, the concept is necessarily limited by the legal framework provided under the Charter. Any decision of the Security Council to take action would require the concurring votes of each permanent member. This underscores that R2P does not create any additional exceptions to the prohibition on the use of force under the Charter, - the exceptions being acts in self-defence, and acts authorized by the Security Council.

Most States have agreed that the UN's role should focus, at the outset, on prevention. The challenge for giving true practical meaning to the concept is thus to work out how the UN can best assist States to protect their populations before crisis situations occur, particularly as there will be situations in which the Security Council will not authorize enforcement action under Chapter VII. This challenge has yet to be met, and of course differs with each unique situation.

R2P gives expression to important international developments

R2P gives expression to what had become a global-wide conviction that it is immoral and unacceptable for States to allow gross violations of the

human rights of their populations, and that the international community has a responsibility to prevent these crimes. In this light, R2P has grown out of a number of important developments: it reflects a recognition of the changing nature of conflict since the drafting of the Charter in 1945 – today most conflicts occur within States rather than between them. It signifies a broad acceptance of fundamental principles of human rights, and reinforces the normative content of the crimes of genocide, war crimes, [ethnic cleansing], and crimes against humanity. And it affirms States' obligations under international law to prevent, prosecute and punish these crimes.

At the heart of R2P is the recognition that state sovereignty – the cornerstone of international relations – entails responsibility. States have a responsibility to protect their populations from the R2P crimes. Building upon this responsibility is the positive obligation which is placed upon the international community to assist States to meet their responsibilities and to take action where these responsibilities are not met. This notion of sovereignty as responsibility underscores that sovereignty is the basis for a certain status and authority under international law, as well as for enduring obligations towards one's people.

Importantly, rather than detracting from the principle of State sovereignty, R2P reinforces it. It drives home the role of the State as a protector of its nationals. As stated by the Secretary-General, R2P is "an ally of sovereignty, not an adversary". As one of the defining attributes of statehood and sovereignty is the protection of populations; prevention of atrocity crimes begins at home. R2P reinforces the collective security mechanism established by the Charter with its emphasis on prevention, and that enforcement measures may only be taken in accordance with the legal framework prescribed by the Charter.

So some might ask, what is new? The "added-value" so to speak of R2P, is that it encapsulates the moral and legal imperatives of the international community in relation to the four "R2P crimes ". It is a potentially powerful vehicle for an important political process, where political pressure, as well as tangible technical and material assistance, may be brought to assist States to exercise their responsibilities. It places pressure

not only on national Governments, but also on actors in the international community. It reflects a marked shift in perspective. While some would argue that R2P has no normative effect, others argue that R2P is an enabling new norm, and, while it is not an obligatory new norm and does not impose binding new duties, it does confer additional responsibility and that additional responsibility includes taking action.

Invocation of R2P regarding Libya

This brings me to the invocation of R2P regarding Libya. In its resolution 1970 (2011), the Security Council recalled Libya's "responsibility to protect its population". The international community, both via the UN and other multilateral and bilateral efforts, took a series of measures under pillars II and III to help protect the civilian population from what were described by the Security Council as "widespread and systematic attacks … which may amount to crimes against humanity" – thus framing the attacks within the R2P crimes.

These ranged from diplomatic measures, to the imposition of sanctions and referral of the situation to the ICC, to the Security Council's authorization under Security Council resolution 1973 "to take all necessary measures to protect civilians and civilian populated areas under attack". In the case of Libya, action by the international community was swift, multifaceted and targeted. This was the most explicit and robust application of R2P to date.

R2P in Libya – success or otherwise?

It is arguably premature to pass judgment on the success or otherwise of actions by the international community under "R2P" in the context of Libya. The NATO intervention has been criticized for going beyond the limits of the Security Council authorization, and has fed concerns that R2P was and might be used for "political considerations" – to accomplish "regime change" and to legitimize interference in the internal affairs of States.

At the same time, others have argued that: the limits of authorization were not exceeded; the protection of the civilians in Libya required the

drastic action taken; and that many thousands of lives have been saved by the intervention.

Responsibility While Protecting

In an interesting development, in order to address some of the concerns raised in connection with R2P in Libya, last year Brazil circulated a proposal to supplement the concept by a set of principles and procedures on the theme of "Responsibility while Protecting" (RWP). In essence, RWP can be refined into two criteria. First, the Security Council, before authorizing any military force, would be required to take into account considerations of proportionality, last resort, and balance of consequences. Second, the Council would establish a "monitoring and review mechanism" with respect to the implementation of the use of force under these criteria. We are, of course, following this discussion with a lot of interest.

Syria

Today, with thousands dead and many more injured, the grave situation in Syria is at the top of the international agenda.

While the concept is very much at the forefront of efforts by the international community to address the current tragedy in Syria, the current humanitarian situation and stalemate in the Security Council is of great concern. Syria is a true test of R2P.

Of course, States and the international community through the League of Arab States and the machinery of the United Nations, have sought to provide assistance and apply pressure via efforts under Pillars II and III.

The Secretary-General has repeatedly called upon the Syrian authorities to stop the violence, and continues to remind Syria of its responsibilities.

- The League of Arab States has adopted a Plan of Action and is highly engaged with regional actors to try to promote a "Syrian led political transition to a democratic, pluralistic political system".

- The General Assembly has strongly condemned what it has referred to as “widespread and systematic violations of human rights and fundamental freedoms”, and has called upon the Government to immediately halt the violence.
- The UN Human Rights Council has established an independent commission of inquiry to conduct an investigation into violations of human rights law since March 2011.
- States have imposed sanctions.
- The Security Council has condemned the violations against civilians, called for an end to the violence, and for accountability.
- A Joint Special Envoy of the UN and the League of Arab States, Kofi Annan, was appointed to focus international pressure to stop the violence, and to facilitate humanitarian access. These are all important efforts to persuade and assist the Syrian authorities to assume their responsibilities.
- The Security Council issued a Presidential Statement supporting the Envoy’s 6 point proposal to Syrian authorities, which includes a commitment to ensure sustained cessation of violence; to ensure provision of humanitarian assistance; and to establish a political process to address legitimate concerns of the Syrian people. This has been accepted by the Syrian Government.

On 14 April 2012, the Security Council unanimously adopted resolution 2042. In this resolution the Council reaffirmed its full support for and called for the urgent, comprehensive and immediate implementation of all elements of the Envoy’s six-point proposal aimed at bringing an immediate end to all violence and human rights violations, securing humanitarian access and facilitating a Syrian-led political transition leading to a democratic, plural political system, in which citizens are equal regardless of their affiliations, ethnicities or beliefs, including through commencing a comprehensive political dialogue between the Syrian government and the whole spectrum of the Syrian opposition.

The Council further decided to authorize an advance team of up to 30 unarmed military observers to liaise with the parties and to begin to report on the implementation of a full cessation of armed violence in all its forms by

all parties and called upon the Syrian government and all other parties to ensure that the advance team is able to carry out its functions.

The advance observer mission has been dispatched immediately and the Secretary-General is scheduled to brief the Council on 18 April.

With regard to the ongoing situation in Syria, it is now too late to prevent the current bloodshed. The challenge for the international community is to find ways to prevent further escalation of the conflict. R2P's contribution is to underscore the responsibilities of States *vis-à-vis* their populations, and to pressure and mobilize the international community to help States meet those obligations, - including the taking of collective action where States fail to do so. For a very long time the Syrian authorities have disregarded their responsibilities to date. But the international community has not. It is mobilized, and, while much remains to be done, the doctrine of R2P is very much engaged.

On this note, I'd like to leave you with the thought that the doctrine of R2P continues to generate immense pressure not only on the Government of Syria, but also on the international community to take effective action to ensure that the Syrian authorities desist from the violence. It has increased the moral and political pressure on the permanent members of the Security Council. It continues to place moral and political pressure on States and the entire machinery of the United Nations to find a way to end the bloodshed.

It is my hope that the Special Envoy Kofi Annan's six point proposal will be fully implemented.

[Piracy]

Now – for a wholly different flavour of our work, yet connected to the issue of the rule of law – I will speak briefly about piracy.

Ocean and sea transport have for centuries been used for carrying people and goods. The earliest accounts of this transportation method date

back to 3000 BC. Technology has critically advanced since these ancient times, yet seaborne commerce remains the cornerstone of the global economy. According to the International Maritime Organization (IMO) "more than 90 % of global trade is carried by sea". About 50 % of the total volume of oil transported by sea passes through the Strait of Malacca on around 50.000 vessels annually and through the Gulf of Aden and about 22.000 vessels annually coming from or sailing through the Suez Canal, carrying more than 12 % of that volume.

Piracy, commonly understood as armed robbery at sea, has existed for thousands of years. It diminished substantially in the end of the 19th century and seemed to have become one of the legends of the past. The crime of piracy thus started to disappear from the criminal law legislation. A few decades ago the "pirate phoenix" appeared to be rising again to become a regional, if not a global, scourge by the end of the last century. The emergence of Somalia as the main piracy hotspot of the world is relatively recent. South-Asia, especially the Malacca Strait between Singapore, Malaysia and Indonesia, and the South China Sea were the first regions to draw international attention to the crime of piracy. However, since the mid-2000s Somalia has become the primary source of piracy attacks.

For my Office, the piracy file is an active and important one. The human cost of piracy off the coast of Somalia is incalculable, with killings and widespread hostage-taking of sailors whose daily jobs are already filled with risk. The commercial cost, given the statistics above, is also very high. In Somalia, deep poverty, endemic corruption, political instability and lack of effective and legitimate justice and security institutions have brought the country to virtual collapse. Crime and piracy are widespread there principally as a symptom of the lack of institutions and the existence of a conflict that has persisted in the country for 20 years.

Another alarming development in Somali piracy is its extending scope – it has spread from the Horn of Africa across the Indian Ocean. Previously, piracy in this region was mainly concentrated within about 50 nautical miles of the coast of Somalia, gradually pirates have expanded the focus of their activities on the Indian Ocean and they are now regularly operating over

1000 nautical miles from the coast of Somalia. Places as distant as the Seychelles and the coast of India are vulnerable to Somali pirates, who have begun to use hijacked merchant vessels to serve as mobile bases for their attacks.

One recent review of piracy attacks for the year 2011 reported a record 237 attacks – up from 212 in 2010. However, the proportion of successful attacks fell – 28 vessels were captured, compared with 44 in 2010. The human cost is terrible. Twenty-four seafarers died as a result of piracy last year and it is estimated that there are approximately 700 people currently held hostage. Only last week, two hostages were killed during an attempt to rescue 18 who were being held off the Gulf of Aden. Financially, it is estimated that Somali pirates imposed costs of between $6.6bn and $6.9bn on the world during 2011. More broadly, one organization which monitors piracy very closely estimates that the economic impact of piracy all around Africa – including the growing problem off Nigeria and Benin in West Africa – could have been as high as $12bn during 2011. It is worth noting that last week the Security Council met to discuss piracy developments in west Africa - in particular in the Gulf of Guinea – and urged the States of the region to convene a summit to develop a common maritime security strategy that includes a legal framework for prosecution of persons engaged in piracy.

Now, let us look at the international instruments dealing with piracy. The notion of piracy was first codified by the 1958 Geneva Convention on the High Seas and later by the 1982 United Nations Convention on the Law of the Sea (UNCLOS). The latter treaty provides for a quite technical definition which essentially includes violence or detention for private ends by the crew of a private ship against another ship. It is not a complex crime. Some refer to it colloquially as “robbery at sea”, although, of course it is broader than this, and includes hostage–taking.

As piracy is a crime which, by definition, takes place on the high seas, beyond the territorial jurisdiction of any State, UNCLOS and customary international law provide for universal jurisdiction over it. Any State may seize a pirate ship, arrest and detain the perpetrators, and prosecute them. There is no lack of international law for dealing with piracy, but rather a lack

of implementation. The seizing States seem to be reluctant to exercise the broad powers they have with respect to prosecuting the pirates arrested due to legal complexities, in particular human rights implications. States parties to human rights treaties are concerned that pirates might request asylum in the respective countries in light of the risk of torture or the death penalty if returned to Somalia to serve a sentence. Additionally, once they had served a sentence and been granted asylum they might seek family reunion. Due to these concerns pirates often have been released. I believe the questions surrounding the dearth of requests for transfers for prosecution from navies detaining suspected pirates will be the subject of increased discussion in the period ahead. It is a question that my Office raised in a report of the Secretary-General to the Security Council – and I will touch on our reports to the Security Council in a moment.

Preferably, pirates should be prosecuted in the country of their origin but, in the case of a failed state like Somalia, this is not a realistic option. The alternative would be to conclude bilateral agreements with a country in the region. The efforts of Kenya and the Seychelles in particular to conduct prosecutions is commendable. One of our key efforts must be to try to encourage and assist an increase in the number of such regional States to play an active role. My Office, together with the UN Office on Drugs and Crime represents the UN in the legal discussions of the concerned states in the so-called “Contact Group” and has provided input on the international legal regime applicable to acts of piracy, including with respect to the transfer and detention of persons suspected of piracy.

The Secretary-General has over the past 18 months alone submitted three reports to the Security Council in which he reviewed possible options to further the aim of prosecuting and imprisoning those responsible. The knowledge and experience that the Office of Legal Affairs has developed of international tribunals over the past two decades has been a solid foundation for the preparation of these reports on behalf of the Secretary-General.

In the first of these reports, we identified seven options, including the creation of special domestic chambers in regional States, possibly with participation by international judges and prosecutors; a regional tribunal; or

an international tribunal established by the Security Council on the lines of the former Yugoslavia and Rwanda tribunals. The report underlined the pressing need to ensure sufficient prison arrangements complying with international standards for those convicted. The second report examined the "modalities" for the establishment of specialised Somali anti-piracy courts, either within Somalia, or extraterritorially in a third State in the region. The third report, which I mentioned a few moments ago - and which deals with increasing the capacity of specialised anti-piracy courts in Somalia and other regional States to prosecute suspected pirates is currently being considered by the Security Council.

The Secretary-General's reports have been welcomed as an important and timely contribution, as well as food for thought for the Security Council. It is critical that the international community does not tolerate impunity for crimes of piracy. However, as my Office also recognises, piracy is a symptom of the instability that has persisted in Somalia for nearly two decades. Prosecution of those responsible must therefore form part of an integrated international response which aims to help rebuild the rule of law, and economic and social stability on land in Somalia.

[Conclusion]

Ladies and Gentlemen,

This brings me to the end of my introductory remarks today. I look forward to hearing your comments on the issues I touched upon or on other legal issues that you may wish to discuss with me. Also, I will be happy to answer any questions that you might have.

Thank you for your kind attention.