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AFRICAN UNION PEACE AND SECURITY COUNCIL: TO COMPETE OR COMPLEMENT THE UN SECURITY COUNCIL?

A Thesis Submitted in Partial Fulfillment of the Requirements of LL.M. Degree in Public International Law

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Plagiarism Declaration

I ZEKARIAS BESHAH ABEBE, do hereby declare that the thesis 'AFRICAN UNION PEACE AND SECURITY COUNCIL: TO COMPETE OR COMPLEMENT THE UN SECURITY COUNCIL?' is my original work and that it has not been submitted for any degree or examination in any other university. Whenever other sources are used or quoted, they have been duly acknowledged.

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Date……

This thesis has been submitted for examination with my approval as Supervisor.

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Acronyms

AMIB- African Union Mission in Burundi
AMIS- African Union Mission in Sudan
AMISOM- African Union Mission in Somalia
ASF- African Standby Force
AU- African Union
AUC- African Union Commission
AUPSC/PSC- African Union Peace and Security Council/Peace and Security Council
CA- Constitutive Act
CEWS- Continental Early Warning System
CFA- Ceasefire Agreement
CFC- Ceasefire Commission
CMD- Conflict Management Division
CPA- Comprehensive Peace Agreement
DPA- Darfur Peace Agreement
ECOWAS- Economic Community of West African States
GoS- Government of Sudan
HCFA- Humanitarian Ceasefire Agreement
ICC- International Criminal Court
ICU- Islamic Court of Union
IGAD- Intergovernmental Authority on Development
IPA- International Peace Academy
JEM- Justice and Equality Movement
JSR- Joint Special Representative
MILOBs- Military Observers
OAU- Organization of African Unity
PSC Protocol- The Protocol Relating to the Establishment of the Peace and Security Council of the African Union
PSCS- Peace and Security Council Secretariat
PSD- Peace and Security Directorate
PSOD- Peace Support Operations Division
RECs- Regional Economic Communities
ROEs- Rules of Engagements
ROs- Regional Organizations
SADC- Southern African Development Community
SLM/A- Sudan Liberation Movement/Army
SOFA- Status of Force Agreement
SOMA- Status of Mission Agreement

TFG- Transitional Federal Government
UN- United Nations
UNAMID- UN/AU Hybrid Mission in Darfur
UNMIS- United Nations Mission in Sudan
UNSC/SC- United Nations Security Council/Security Council

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ABSTRACT

Since the transition of Organization of African Unity (OAU) in to an African Union (AU), Africans have taken laudable measures towards creating a comprehensive system to manage their own conflicts. One of such measure is the establishment of Peace and Security Council of African Union (AUPSC) which closely simulates the United Nations Security Council (UNSC). The establishment of PSC has created some sort of anxiety as it has become confusing whether this organ is a meant to take over the primacy conferred up on the UNSC for the maintenance of international peace and security. The anxiety is evident when one considers legal documents of the Union and the practice so far.

In an attempt to clear out the above confusion, the paper investigates whether African leaders by establishing their own Peace and Security Council (PSC) have intended to reserve the primacy for their own PSC or leave such primacy to the UNSC. To this end, the paper first analyzes the genesis of PSC to spot the factors that motivated African leaders to establish their own PSC. Then the paper critically scrutinizes the provisions of the Constitutive Act and the PSC protocol which are the two most important legal instruments of the Union on the area of peace and security. Finally, the paper studies the practice to observe how Africans have perceived their involvement in resolving conflicts of Africa, through the PSC.

After a deep analysis on the above three areas, the paper argues that AUPSC is established to take primacy over UNSC on matters related to the maintenance of peace, security and stability on the continent of Africa. And, this paper argues that the general consensus reached by Africans to establish AUPSC in a way that usurp the power of the UNSC will make the nature of the relationship between these two counterparts of AU and UN more of competitive and will bring the laws of AU in a direct conflict with the Charter system. Accordingly, the paper urges the two councils to reach on a common understanding on the respective power and responsibilities and further calls for a more harmonized partnership between these two organs.

CHAPTER ONE

INTRODUCTION

1.1. Background

The problem of the relationship between regional and universal system for the maintenance of international peace and security dates from much earlier time.[1] It is conceived as a reflection of the old dilemma between centralism and local governance at the domestic level.[2] The local approach of problem solving is taken to be more efficient as they have a better opportunity to understand the specific circumstances, cultures or other peculiarities of the locality.[3] On the other hand, the centralists hold the view that a more homogeneous, effective and uniform method of government should be developed.[4] As a compromise, different models of federalism have emerged within the domestic system.[5] With the emergence of international organizations, the same issue has transposed in to international arena. When international organizations with a universal nature began to develop, those organizations which have more of homogenous members began to be described as Regional organizations which gave rise to the issue of compatibility.[6]

On the issue of the relationship between these two systems, two conflicting approaches have developed so far: the Universalists and Regionalists. The Universalists advocate that systems not conceived on a world-wide basis would necessarily create rivalries, thus containing within themselves the seeds of future conflicts.[7] Thus, they argue that, these conflicts could only be avoided by a universal organization invested with far-reaching powers.[8] Accordingly, they held

[1] Hummer and Schweitzer, "Art. 52, 807-853" in Bruno Simma (ed.), *The Charter of the United Nations. A Commentary* (2nd edition, 2002). P.812.
[2] Christoph Schreuer, "Regionalism V. Universalism", *European Journal of International Law* 6 (1995): 1-23, p.1
[3] Ibid
[4] Ibid
[5] Ibid, Schreuer has further indicated that the diversity and ongoing evolution of domestic solutions for the allocation of functions between central and local decision-makers is a clear sign that there is no simple answer to this basic antithesis
[6] Hummer and Schweitzer, Art. 52, 807-853. P.813
[7] Ibid
[8] Ibid

the opinion that Universal Organizations like the UN would be the primarily responsible body for the maintenance of international peace and security while the role of Regional arrangements should be limited to implement the decisions and policies of the Universal Organizations.[9] This seems to create a master-servant relationship between the Universal and Regional system. On the contrary, Regionalists view that due to the size and heterogeneity of the world, regional systems are better situated to deal matters that arise within their confines and should be lead actors in dealing these matters. [10] To this view, regional organizations are not mere servants of the Multilateral system rather have essential role to play in the maintenance of international peace and security.

In the drafting of the UN Charter, the same issue of universalism and regionalism in the maintenance of international peace and security had inhibited the process. Though the major powers including US supported the Universalists approach, Latin Americans, who have already concluded regional agreements for the maintenance of peace and security of the region, strongly supported the regionalists approach. The final compromise was made through the insertion of Chapter VIII under the Charter which recognizes the role of RO in the maintenance of international peace and security.

Though the Chapter recognizes the role of ROs in the maintenance of international peace and security, it still predominantly reflects the Universalist approach as the Chapter definitely established the subordination of ROs to the UN.[11] Article 52 establishes the legality of such arrangements if consistent with the purposes and principles of the United Nations. Article 53 stipulates that regional enforcement action is subject to the prior approval of the Security Council. Article 54 obliges regional arrangements to keep the Security Council informed of any action they may contemplate for the maintenance of peace and security. However, the most important Universalist feature of the Charter is found under its article 23 and 103. Article 23

[9] Bjorne Hettne and Fredrick soderbaum, "the UN and Regional Organizations in The Global Security: Competing or Complimentary Logics?", *Global Governance* 12 (2006):227-232, p.227

[10] Ibid

[11] Ronald J. Yalem, "Regionalism and World Order", *Royal Institute of International Affairs* 38(1962): 460-471, p.462http://www.jstor.org/stable/2609570 (accessed on July 15, 2010). See also Gerhard Bebr, "Regional Organizations a United Nations Problem", *American Journal of International Law* 49 (1955): 166-184. see Ugo Villani, "the Security Council's authorization of enforcement action by Regional Organizations", *Max Planck Yearbook of United Nations Law* 6(2002): 535-557, p.536

confers the primacy of the UNSC on the maintenance of international peace and security and article 103 stipulates the prevalence of the Charter obligation over any other international agreements. Therefore, it is not as such doubtful that the Charter has a Universalists feature as it concretely stipulated that the UN is supreme to ROs in the maintenance of international peace and security.

The tension between Regionalist and Universalist approach on the maintenance of international peace and security has resurfaced since the end of the cold war. Since the 1990's there seem to be a reversal towards regionalism regardless of the UN Charter which reflects a predominantly Universalists approach.[12] Schreuer has identified some of the factors for such move towards regionalism. According to him, the failure of the UN to live up to its tasks entrusted to it, strong resurgence of group solidarity among Member States, the desire to tackle certain problems in a smaller arena which seemed better adapted to cooperation for these specific purposes and the attempt to escape the involvement of outside powers with their global strategies contributed to this trend.[13]

The tension between Regionalism and Universalism seem to be more manifested in the relationship between AU and UN on matters related to the maintenance of peace and security. In 1993, the Organization of African Unity (OAU) established its own conflict management mechanism to resolve conflicts within itself. However, as the mechanism is devised to play primarily preventive and peaceful settlement role, there does not seem to be as such a conflict between the OAU and the UN. In 2000, African Nations changed the OAU in to AU. The Constitutive Act which established the Union, under its article 4 (h), empowered the Union to intervene forcibly in a member state to halt grave circumstances.[14] The Union then in 2004 launched its own security council as an organ to be a permanent decision-making, collective security and early-warning arrangement to facilitate timely and efficient response to conflict and

[12] See Hélène Gandois, "Regionalism, A Solution For The Weak? A Case Study On Africa". http://oxford.academia.edu/HeleneGandois/Papers/10813/Regionalism_a_solution_for_the_weak_A_case_study_on_Africa (accessed on July 20, 2010).
[13] Scheuruer, "Regionalism V. Universalism", p. 3. see also Muthiah Alagappa, "Regional Institutions, the UN and International Security: A Framework For Analysis", *Third World Quarterly* 18 (1997): 421-441.pp. 421-2
[14] See African Union. Constitutive Act, Lomé, Togo, July 2000, art. 4(h). http://www.au2002.gov.za/docs/key_oau/au_act.htm (accessed on October 15, 2009).

other crisis in Africa.[15] Since its establishment the organ began to proactively involve in the conflicts of Africa to find out both military and political solutions for the conflicts.[16] In some cases, the organ, specifically and the AU in general insisted not to comply with the decision taken by the UNSC, exercising its Chapter VII.[17] The Union has also moved far in establishing its own Standby Force (ASF) which could be deployed up on the authorization of AUPSC or the General Assembly of the Union itself.

The decision of African Nations in empowering the Union or its concerned specific organ, the PSC to intervene in a member states plus with the growing active involvement of this organ in the maintenance of African peace, security and stability seem to complicate its relation with the UNSC, an organ empowered to play a primary role in the maintenance of international peace and security. In this regard, whether the framers have intended to confer the primacy of maintaining peace and security of Africa to their own Organizations thereby shifted to a regional approach or whether they have intended the PSC to work in complement with the UNSC as dictated by the Universalist approach is not clear enough. The paper therefore tries to seek an answer to this question.

1.2. Statement of the problem

The supremacy of the UNSC over ROs is established beyond doubt by the Charter system.[18] However, with the radical move from the AU to establish its own Peace and Security Council, it has become very ambiguous whether such move is with the intention to maintain the supremacy of the UNSC or to take over such supremacy from the UNSC. The ambiguity arises from the mere resemblance of the name between AU Peace and Security Council and the UN Security Council (there is no any other RO which has an organ with the same name that closely resembles the UNSC) to the legal documents of the Union and the practices so far. The Constitutive Act of

[15] African Union, Protocol Relating to the Establishment of the Peace and Security Council of the African Union (July 9, 2002), Durban, Art. 2(1)

[16] The Council has either convened meetings or deployed missions on the crisis of Burundi, Central African Republic, Chad, Comoros, Darfur, Cote d'Ivoire, Democratic Republic of the Congo, Eritrea-Djibouti, Guinea, Kenya, Madagascar, Somalia, Zimbabwe and etc. it was actively seized of the matters.

[17] The AU summit as well as the Peace Security Council of the AU, have opposed the referral of AL Bashir's case to the ICC by the UNSC in 2005. This will be discussed in detail under Chapter 4 of this paper.

[18] Berhanykun Andemicael, *the OAU and the UN: Relations between the Organization of African Unity and the United Nations* (New York; NY, African Publishing Company, 1976). P.3

the AU empowered the Union through its organ the PSC to forcefully intervene in one of its member states. To date, there is no Regional treaty which permits the same action to be undertaken by the RO. Further, the CA does not say anything whether such right of intervention should be exercised in accordance with the provisions of the Charter (the requirement of prior authorization from the UNSC). Above all the coming in to force of the protocol which established the PSC aggravated the ambiguity on whether the AUPSC is a meant to takeover or support the primacy of the UNSC. Article 16 of the PSC protocol expressly states that the AU or its PSC have the primary responsibility for the maintenance of peace, security and stability in Africa. Surprisingly enough, the same protocol under its preamble and article 17 acknowledges the primacy of the UNSC over the maintenance of international peace and security. These contradictory provisions at least facially seem to be enough to confuse on the intended motive of Africans on the role of their PSC and its hierarchical relation with the UNSC. It is also observed that the AUPSC may be involved in formal controversy with the UNSC as it has been observed in the conflicting stance on the referral of Al Bashir's case to the ICC. Therefore, the issue that whether the establishment of the AUPSC is a meant to take over the long time established primacy of the UNSC or whether it is a meant to support and maintain the primacy of the UNSC is not clear, thus needs a close scrutiny. The paper is therefore an endeavor to unpack the confusion over the above issue.

1.3. Objectives

The general objectives of the paper are:

1. To examine the motive of the African leaders in establishing the AUPSC. Here, the paper endeavors to find out whether African states have intended to replace the UNSC which is primarily tasked with role of maintaining international peace and security or whether they have intended to merely support the UNSC.
2. To make appropriate recommendations.

Under these general objectives there are other specific objectives that the paper aimed to achieve. These include:

I. To explore the reason for the establishment of AUPSC;
II. To analyze the relevant documents of the AU which are related to peace and security of Africa;
III. To ascertain what the practices tell us about the intended motive of African States on the issue of primacy. In this regard, the paper makes case review and analyzes the facts involved.

1.4. Research Questions

The paper seeks to address one basic question: is the AUPSC a meant to reject the primary role attributed to the UNSC by the UN Charter? Or is that simply to support or complement the UNSC as a subordinate organ? Under this broad embrace, several other questions are addressed. These include:

I. Why Africans found it necessary to establish their own PSC?
II. What does the legal documents of the AU, like the CA and the PSC protocol tell us about the intended role given to the PSC? To take primacy or to complement the UNSC?
III. What does the practice say on the issue of primacy? Did the AUPSC act within the UNSC framework or through go- it- alone strategies?

1.5. Significances of the study

Though the move of the AU in establishing its own PSC has some unique features, the area has got little attention. Academic writings on the AUPSC as a whole and the issue of relationship between this newly emerged organ and the UNSC specifically, remain highly under-studied despite the fact that it is one of the major spot which needs critical reflection. To the best of my Knowledge very few scholars have focused in dealing the PSC. These include, Jeremy Levitt, Paul D. Williams, Cilliers and Sturman. However the leitmotiv of this paper, whether the establishment of this new organ is a meant to take primacy, is not addressed though a pioneer attempt was made by Jean Allian (This paper has also benefited from this work in particular for the analysis part under Chapter three). However, this paper is different from any other previous works because the paper has dealt the issue for the first time in a comprehensive and detail

manner. Therefore, I am hopeful that the paper will have an immense contribution in addressing the issue properly and filling the existing gaps in the academic sphere.

The thesis further serves as an important input for students, researchers and policy makers who are interested in the AUPSC and its relation with the UN counterpart. It is not also doubtful that the thesis will motivate others to conduct further research on the area so that enticing issues related to the AUPSC will get the proper attention from researchers.

1.6. Scope

The research only focuses on discovering whether the establishment of AUPSC is a meant to take primacy over the maintenance of African peace and security, by inferring from- the genesis of the establishment of the AUPSC, the Legal documents of AU and the practices. It does not attempt to discuss whether the legal documents or the practices are in conformity with the UN Charter and if not how it could be reconciled. Even though in some cases the paper attempts to show how the legal documents or the practices are in derogation with the Charter system, it is with the intention to serve the main theme of the paper which is to find out whether the AUPSC is a meant to take over or mere complement to the primacy of the UNSC.

1.7. Methodology

The thesis is based on Desk research and interviews. Desk research involves examining a variety of sources, including publications, reports and official documents issued by the AUC and the UN, non-governmental organizations and think-tanks as well as relevant academic literatures. The researcher also conducts interviews with officials from the concerned organs of the AUC and in particular with the Head of Peace and Security Council Secretariat (PSCS) and an officer from the Legal Council of AUC.

1.8. Structure of the study

This proposal forms Chapter one of the paper and introduces the research. Chapter two gives general highlight about the institutional design and structure of the AUPSC. Under this chapter the paper discusses the mandates, membership, formal rules, scope and Norms of the AUPSC. In addition, the chapter discusses those of the organs which support the function of the AUPSC. Chapter three of the paper is divided into two broad sections. The first section of this chapter examines the reason that necessitated the establishment of the PSC as inferred from its genesis. The second section of the chapter analyzes the relevant provisions of the CA and the PSC protocol which are the two most important instruments of the AU on the area of peace and security. The fourth chapter then probes the practice by reviewing three peacekeeping operations undertaken by the AU (PSC) with the intent to observe how Africans practically viewed the role of their PSC in resolving the conflicts of the continent. The conclusion and recommendation of the paper finalizes the work.

CHAPTER TWO

INISTITUTIONAL DESIGN AND STRUCTURE OF AUPSC

Introduction

AUPSC was established in May 2004 with a great hope that the organ will solve the chronic conflicts of the continent.[19] Though the establishment of this organ is a new addition to the world system, it has attracted little attention from the outside world which as a result, the organ remained an under-studied.[20] In addition to the fact that the organ has attracted little attention in academic writings, the life-time it has spanned is also very short. Due to these facts, the AUPSC is not a well popularized and awareness about the institution is not adequately created. With this understanding, Chapter two of this paper is allotted to deal the institutional design and structure of the PSC with the aim to give a general highlight about the institution. To achieve this purpose, the paper employs Acharya and Johnston's framework[21] to study the institution of AUPSC. Five elements are identified by Acharya and Johnson to study the institutional design of certain institution. These include: organ's Membership, Mandates, Scope, Formal rules and Norms.[22] However, the paper, in addition to Acharya and Johnson's framework, discusses the structure of the AUPSC and the bodies around it.

[19] Paul D. Williams, "The Peace and Security Council of the African Union: Evaluating an embryonic international institution", *Journal of Modern African Studies*, 47, 4 (2009): 603–626. P.603, http://users.polisci.wisc.edu/schatzberg/ps362/Williams2009.pdf (accessed on June 10, 2010).

[20] Ibid

[21] Achary and Johnson have identified five major features of institutional design which differentiates one Regional arrangement with others. These are: membership (i.e. the number of actors allowed to participate); scope (i.e. the range of issues that the institution is designed to handle); formal rules (i.e. regulations governing how decisions are made); norms (i.e. the formal and informal ideology of the institution); and mandate (i.e. the institution's overall purpose). See Amitav Acharya and Alastair Iain Johnston, 'Comparing regional institutions' in Amitav Acharya and Alastair Iain Johnston (eds.), *Crafting Cooperation: Regional Institutions in Comparative Perspective* (Cambridge: Cambridge University Press, 2007), pp.15-16, Cited in Williams, "An Embroyonic International Institution", 603-626.

[22] The idea of Acharya Johnston's framework is originally taken from Williams, "An Embryonic International Institution": 603-626.

2.1. Members- who are allowed to participate?

Various options were considered on the composition of the PSC before its establishment. One of such option was to simulate the composition of the UNSC which introduces permanent membership with a veto power.[23] However, this option was firmly rejected by the delegations who were deliberating on the draft protocol of the PSC.[24] Some of the delegates criticized the option of introducing the concept of permanent membership as a violation of the principle of sovereign equality of member states which is enshrined under the CA.[25] it was rather proposed to uphold the principle of equitable regional representation and rotation and ensure that all member states participate in the efforts to promote peace and security of the continent.[26] Finally it was agreed that the Council shall be composed of 15 members, 10 members elected for the term of 2 years and the rest of 5 members to be elected for the term of 3 years.[27]

Election of membership is also based on several criteria as provided under the PSC protocol and the Modalities for the Election of Members of the Peace and Security Council. The first criterion is equitable regional representation and rotation.[28] Accordingly, the Central part of Africa will be represented by 3 members, the East by 3, the North by 2, the South by 3 and the West by 4.[29] Article 5 (2) of the PSC protocol also puts 9 substantive requirements that candidate countries should fulfill in order to be eligible for election which among others include respect for

[23] AU doc., Report of the Special Session of the Council of Ministers on the African Union, Council of Ministers, Special Session on the African Union, SP/CM/AU/RPT, (1 - 2 July 2002, Durban), para. 64 & 68. http://mirror.undp.org/african_union_en/reports/report-special-session-council-ministers.pdf (accessed on June 15, 2010).
[24] Ibid, para. 68
[25] Ibid
[26] Ibid
[27] PSC protocol, art. 5 (1); Modalities for the Election of Members of the Peace and Security Council, art. 2
[28] PSC Protocol, art. 5 (2); Modalities For Election of PSC Members, art. 3
[29] Modalities For Election of PSC Members, Art. 3 (a). The current members of the PSC are: Burundi and Chad (for the term of 2 years) and Equatorial Guinea (for the term of 3 years)from the Central Africa, Djibouti and Rwanda (for the term of two years) and Kenya (for the term of 3 years) from Eastern Africa, Mauritania (for the term of 2 years) and Libya (for the term of 3 years)from Northern Africa , Namibia and South Africa (for the term of 2 years) and Zimbabwe (for the term of 3 years) from Southern Africa and Benin, Cote D'ivoir and Mali (for the term of 2 years) and Nigeria (for the term of 3 years) from the Western Africa. the mandate of 2 Years-Term is from 1 April 2010 to 31 March 2012 while the three years term is from 1 April 2010 to 31 March 2013. The information is available at: http://www.africa-union.org/root/au/AUC/Departments/PSC/PSC.htm**. see also AU doc.,**The Decision On Election Of The Members Of The Peace And Security Council Of The African Union, **Doc. EX .CL/578(XVI),** Assembly/AU/Dec.280(XIV), Adopted by the Fourteenth Ordinary Session of the Assembly in Addis Ababa, Ethiopia on 2 February 2010

constitutional governance as well as the rule of law and human rights, commitment to uphold the principles of the Union and commitment to honor financial obligations to the Union.[30] However, these substantive requirements are not being strictly complied as some of them experienced violent conflicts during their membership in the Council and some others dictators were allowed to take the seat.[31]

The PSC protocol also allows retiring members of the Council to be eligible for immediate re-election.[32] Each of the 5 regions will submit a list of candidate countries which shall represent their regions in the Council.[33]

2.2. Mandates- What is the overall purpose of the PSC?

Article 3 of the PSC protocol outlines six objectives for the PSC. These are: to promote peace, security and stability in Africa; anticipate and prevent conflicts; promote and implement peace-building and post-conflict reconstruction activities; coordinate and harmonize continental efforts in the prevention and combating of international terrorism in all its aspects; develop a common defense policy for the Union; and encourage democratic practices, good governance and the rule of law, as well as protect human rights and fundamental freedoms.[34]

[30] PSC Protocol, Art. 5 (2) The full requirements set out under this article are: a. commitment to uphold the principles of the Union; b. contribution to the promotion and maintenance of peace and security in Africa – in this respect, experience in peace support operations would be an added advantage; c. capacity and commitment to shoulder the responsibilities entailed in membership; d. participation in conflict resolution, peace-making and peacebuilding at regional and continental levels; e. willingness and ability to take up responsibility for regional and continental conflict resolution initiatives; f. contribution to the Peace Fund and/or Special Fund created for specific purpose; g. respect for constitutional governance, in accordance with the Lomé Declaration, as well as the rule of law and human rights; h. having sufficiently staffed and equipped Permanent Missions at the Headquarters of the Union and the United Nations, to be able to shoulder the responsibilities which go with the membership; and j. commitment to honor financial obligations to the Union. In addition to these requirements, the modalities for membership of election of the PSC requires that candidates need to be parties to the establishing protocol and should not be affected by sanction in terms of article 23 of the Constitutive Act.

[31] Williams, "An Embryonic International Institution": 603-626, p.608. See Williams, "Autocrats United? The Peace and Security Council of African Union", (March 16, 2010). http://csis.org/blog/autocrats-united-peace-and-security-council-african-union (accessed on September 2, 2010).

[32] PSC Protocol, art. 5 (3); Modalities For Election of PSC Members, art.12

[33] See part IV of Modalities For Election Of PSC Members

[34] PSC Protocol, art. 3

2.3. Scope- What are the range of issues that the institution is designed to handle?

The PSC, the central institution for the day-to-day management of peace and security issues, is conferred with multiple tasks to perform which ranges from prevention to military intervention.[35] As provided under 7, the PSC assesses potential crisis situations, sends fact-finding missions to trouble spots, authorizes peacekeeping operations under mission scenario 5, recommends intervention in respect of grave circumstances like genocide, war crimes and crimes against humanity and approves the modalities of intervention following a decision by the General Assembly.[36]

2.4. Norms- What are the guiding principles of PSC?

As provided under article 4 of the PSC Protocol, the PSC shall be guided by the principles enshrined under the Constitutive Act, the Charter of the UN and the Universal Declaration of Human Rights.[37] The PSC Protocol then lists eleven principles in which the Council should be particularly guided. As Williams correctly observed, "Principles (a) up to (i) cover the usual bases of pluralist international society and much the same ground as its predecessor, the OAU".[38] However, Principles (j) and (k) are new paradigm to the AU. These principles recognize "the right of the Union to intervene in a member state pursuant to a decision of the Assembly in respect of grave circumstances, namely war crimes, genocide and crimes against humanity, in accordance with article 4 (h) of the Constitutive Act"[39] and "the right of member states to request intervention from the Union in order to restore peace and security, in accordance with article 4(j) of the Constitutive Act".[40] The principle of intervention as enshrined under 4(h) and (j) of the Constitutive Act is a shift from "the cardinal principles" of non-interference and non-intervention

[35] See Williams, "Autocrats united?"
[36] See PSC Protocol, art. 7
[37] Ibid, art.4
[38] Williams, "An Embryonic International Institution", 603-626.; these principles include, among others, the principle of the peaceful and early settlement of disputes, principles of respect for the sovereignty and territorial integrity of Member States, principles of non interference by any Member State in the internal affairs of another.
[39] PSC Protocol, art. 4(j)
[40] Ibid, art. 4(K)

to the doctrine of "non-indifference".[41] However, whether this norm of intervention is in line with the UN Charter is somehow controversial.[42]

2.5. Formal Rules- How decision is made?

The PSC meet at the level of Permanent Representatives (PR), Ministers and Heads of State and Government.[43] The PR convene as often as required but should meet at least twice a month.[44] On the other hand, the Ministers and Heads of State and Government are required to meet at least once a year.[45] Concerning the venue of the meeting, it shall be conducted at the AU headquarter in Addis Ababa.[46] However, it is possible for the Council to conduct its meeting at the place other than the headquarters when a member state invites the Council, provided that such invitation is accepted by two-thirds of votes by the members of the Council.[47]

The agenda that the Council is going to deal is determined by the Chairperson of the Council on the basis of proposals submitted by the Chairperson of the Commission, the Chairperson of the AU and members of the Council or the Commission.[48] Once the agenda is determined, the PSC may hold a meeting in three forms.[49] The first kind of meeting is Formal meetings when it wants to examine a report from the AU Commission.[50] In this case, the PSC may invite the concerned party.[51] If the member of the Council is party to a conflict or a situation under consideration by the Council, then the State will be invited to present its case the Council and will be required to withdraw from the proceedings.[52] Therefore, the party member state will not participate both in

[41] Ben Kioko, "The Right Of Intervention Under The African Union's Constitutive Act: From Non-Interference To Non-Intervention", *International Review of The Red Cross* 85 (December 2003): 807-825, p.819
[42] The issue of whether the norm of intervention created under article 4 (h) usurps the power of UNSC will be dealt under the third Chapter of this paper.
[43] PSC Protocol, Art. 8 (2); Rules of Procedure of the Peace and Security Council of the African Union, Rule 2
[44] Ibid
[45] Ibid
[46] PSC Protocol, Art. 8 (3); Rules of Procedure of the PSC, Rule 3
[47] PSC Protocol, Art. 8 (4); Rules of Procedure of the PSC, Rule 3
[48] PSC Protocol, art. 10 (2(a)); Rules of Procedure of the PSC, Rule 6; Williams, "An Embryonic International Institution", 603-626.
[49] Williams, "An Embryonic International Institution", 603-626.
[50] Ibid
[51] Ibid
[52] PSC Protocol, art. 9

the discussion and decision making process relating to the conflict or situation.[53]The second type of meeting is Briefing Sessions. In such meeting, Commission staff present talking points to update the PSC about specific issues rather than a full report.[54] After considering the briefing, the members of the Council may decide to produce a statement or a communiqué if the Council finds the matter extremely important.[55] This could be equated with the UN Security Council's debate over different matters which may result either a presidential statements or a resolution. The third kind of meeting in the Council is Consultations. In this kind of meeting, the members of the Council will conduct closed consultations with the intention to develop an understanding of a certain issue, which could be on conflict situations, without taking a decision. The Council may also conduct informal consultations with parties concerned by or interested in a conflict or situation under its consideration.[56] It may also conduct the same kind of consultations with Regional Mechanisms, International Organizations and Civil Society Organizations as may be needed for the discharge of its responsibilities.[57]

The other important point worth to discuss is the voting procedure of the Council. The PSC Protocol provides that each member of the Council shall have one vote.[58] Furthermore, decisions are generally guided by the principle of consensus, and in case consensus cannot be reached, decisions shall be made by simple majority on procedural matters and by two-thirds majority on all other matters.[59]

2.6. Structure of PSC- Who assists the PSC?

As it has been discussed so far, the Council is tasked with various functions. To perform these functions, the Council is to be supported by the Commission of the AU (AUC) via its Chairperson, a Panel of the Wise, a Continental Early Warning System (CEWS), an African

[53] Ibid
[54] Ibid
[55] Ibid
[56] PSC Protocol, art. 8(11); Rules of Procedure of the PSC, Rule16
[57] Ibid
[58] PSC Protocol, art. 8 (12); Rules of Procedure of the PSC, Rule27
[59] PSC Protocol, art. 8 (12); Rules of Procedure of the PSC, Rule 28. The question of whether the matter is procedural or substantive is determined by a simple majority vote.

Standby Force (ASF), a Special Fund Trust and a Military Staff Committee. Each of these bodies will be discussed separately.

2.6.1. Commission of the AU (AUC)

The Commission of the Union, hereinafter the Commission, is one of the organ established by the Constitutive Act. The Commission which is composed of the Chairman, his or her deputy or deputies and the Commissioners is the Secretariat of the Union.[60] The PSC Protocol endows the Chairperson of the Commission with various critical tasks under its article 10. One of such task is to bring to the attention of the PSC matters he/she deemed is a threat to peace, security and stability in the continent.[61] He/she also has the duty to bring to the attention of the panel of the wise any matter he/she deemed deserves of their attention.[62]

The Chairperson is also responsible and thereby assists the Council by ensuring the implementation and follow-up of the decisions of the Council[63], the decisions of the Assembly in conformity with article 4 (h) and (j) of the Constitutive Act[64] and by preparing comprehensive and periodic reports and documents in order to enable the Council perform its function effectively[65]. In addition to this, the chairperson is also given power to perform negotiations to resolve or prevent conflicts through his good office, either when requested by the PSC or by his own initiative.[66] As the duties of the Chairperson are so critical and vast, the establishing Protocol requires the Chairperson to be assisted by the Commissioner of the PSC, who is responsible for the affairs of the PSC.[67] The Commissioner of the PSC in turn is to be assisted by

[60] Constitutive Act of AU, art. 20(1)
[61] PSC Protocol, art. 10(2)(a); Rules of Procedure, Rule 26 (2(a))
[62] PSC Protocol, art. 10 (2) (b); Rules of Procedure, Rule 26 (2(b))
[63] PSC Protocol, art. 10 (3(a)), Rules of Procedure, Rule 26 (3(a)) the Chairperson assist the PSC, among other things, by implementing and reporting the developments about the mounting and deploying Peace Support Missions authorized by the Council.
[64] PSC Protocol, art. 10 (3(b)); Rules of Procedure, Rule 26 (3(b))
[65]PSC Protocol, art. 10 (3(c)); Rules of Procedure, Rule 26 (3(c))
[66] PSC Protocol, art. 10 (2) (c)
[67] Ibid, art. 10 (4)

the Peace and Security Directorate (PSD). Director of the PSD acts as a chief operating officer and play a central role in the day-to-day management of the Directorate.[68]

The PSD contain a Conflict Management Division (CMD), a Peace Support Operations Division (PSOD) and Peace and Security Council Secretariat (PSCS). The CMD is taken as the operational arm of the Council and it is comprised of two units: Early Warning Unit and Conflict Management and Resolution and Post Conflict Unit.[69] These Units develop policy options and coordinate activities to support the prevention, management and resolution of African inter and intra-state conflicts.[70] On the other hand, the PSOD comprises two other unites: Operations and Support Unit and an African Standby Force and Military Staff Committee Unit.[71] The PSOD undertakes, facilitates and mediates in peace support operations in conflict situation, establishes liaison offices, deploys facilitators and special envoys, supports regional peace efforts, assists in post-conflict reconstruction and deploys observers.[72]

2.6.2. The Panel of the Wise

The panel of the wise is made up of five highly respected African personalities from various parts of the society and who have contributed to the efforts in bringing about 'peace, security and development to the continent'.[73] These persons are elected by the chairperson of the commission after consulting member states of the union concerned and in the selection regional representation will be taken into account.[74] The members of the panel are elected for term of

[68] "Peace and Security Directorate", http://www.africa-union.org/Structure_of_the_Commission/depPEACE%20AND%20SECURITY%20DIRECTORATE.htm (accessed on June 10, 2010).
[69] "Peace and Security Directorate"; "African Union Peace and Security Framework", available at: http://aros.trustafrica.org/index.php/African_Union_Peace_&_Security_Framework_and_Mechanisms (accessed on June 10, 2010).
[70] "Peace and Security Directorate"
[71] Ibid
[72] Ibid
[73] Ibid, Art. 11 (2); AU doc., Modalities for the Functioning of the Panel of the Wise as Adopted by the Peace and Security Council at its 100th Meeting Held on 12 November 2007, Part I, para. 2&3. Panel members cannot hold active political office at the time of their appointment and during their tenure as member of the panel.
[74] Ibid; Modalities for the Functioning of the Panel of the Wise, Part I, para., 4. The current members of the Panel of Wise are: Salim Ahmed Salim of Tanzania, former OAU Secretary-General, from the East; Ahmed Ben Bella, former Algerian President, from the North; Elisabeth K. Pognon, Benin's Constitutional Court President, from the West; Miguel Trovoada, former President of Sao Tome, representing Central Africa and Brigalia Bam, South Africa's Independent Electoral Commission, from the South. See AU Launches 'Panel of the Wise', *VOA news*, 18

three years.[75] It is established with the aim to support the works of the PSC and those of the Chairperson on the area of conflict prevention.[76]

The panel assists the PSC as well as the Chairperson by making advice all matters of African peace, stability and security promotion and maintenance.[77] It also take actions deemed appropriate for the support of the work of the PSC and the chairperson of the commission for the prevention of conflicts and to pronounce itself on issues relating to the promotion and maintenance of peace, security and stability in Africa.[78] The Panel reports to the PSC and through the latter to the Assembly.[79]

2.6.3. Continental Early Warning System (CEWS)

CEWS is established with the view of facilitating the anticipation and prevention of conflicts.[80] It is consisted of two units: the situation room and Observation and Monitoring Units of Regional Mechanisms. The former is tasked with the collection of data and analysis of such data and that will be a basis for an early warning indicator module.[81] The latter on the other hand will collect and process data at their level and transmit it to the former, i.e., Continental Situation Room.[82]

The CEWS functions by developing an Early Warning Module which should be based on 'clearly defined and accepted political, economic, social, military and humanitarian indicators'.[83] These factors should be used to analyze developments within the continent and to recommend the best course of action.'[84] This analyzed information will be used by the Chairperson to advice

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December 2007, http://www.voanews.com/english/news/a-13-2007-12-18-voa47-66814662.html (accessed on July 20, 2010).

[75] Ibid

[76] PSC Protocol, Art. 11 (1)

[77] Ibid, Art. 11 (3)

[78] Ibid, Art. 11 (4). For the detail on the mandate of the Panel of the Wise, see Modalities for the Functioning of the Panel of the Wise, Part II and III.

[79] Ibid, Art. 11 (5)

[80] Ibid, Art. 12 (1)

[81] Ibid, Art. 12 (2(a))

[82] Ibid, Art. 12 (2(b))

[83] Ibid, Art. 12 (4)

[84] Ibid, Art. 12 (4)

the PSC on potential conflicts and threats to the peace and security in the continent[85] so that enables the Council to take timely action before conflicts erupt.[86]

As far as concerning the sources of information in which the CEWS may depend, it is an "open-source system" where information could be gathered from sources like governmental and inter-governmental actors, international and non-governmental organizations, the media, think thanks and academia.[87] However, the system mainly collects information from three sources: electronic newspapers and news services, "*News Monitoring",* reports from the AU Field Missions / Liaison Offices in countries experiencing conflicts or emerging from conflicts "*Mission Reporting*", and reports from the RECs, referred to as "*RECs Reporting"* which later are fed into a database in turn, to be structured in different layers of aggregated data.[88] This information will be analyzed and will be arranged as reports which finally serve as a primary tool for decision-makers.

2.6.4. The African Standby Force (ASF)

ASF is the Military Wing of the council, established with the aim of assisting the PSC perform its duties relating to the deployment of peace support missions and interventions as per Article 4(h) and (j) of the constitutive act.[89] The force will be composed of standby multidisciplinary contingents with both civilian and military components.[90] The ASF is composed of five sub-regional contingents with each composed of a maximum of 5,000 troops (a brigade level), a total of 25,000 troops, excluding the civilian staff and Military observers.[91] These troops, however, will be based in their country of origin to be ready for deployment at the appropriate notice.[92] However, these countries will have an obligation to release the standby contingents together with

[85] Ibid, Art. 12 (5)
[86] For detail discussion on the CEWS, see El-Ghassim Wane, Charles Mwaura, Shewit Hailu, Simon Kopfmuller, Doug Bond, Ulf Engel, and Joao Gomes Porto, "The continental Early Warning System: Methodology and Approach," in *Africa's New Peace and Security Architecture: Promoting Norms, Institutionalizing Solutions,* ed. Ulf Engel and Joao Gomes Porto, 91-110 (Burlington: VT 05401-4405, Ashgate Publishing Company, 2010
[87] Ibid, p.93
[88] "Continental Early Warning System (CEWS)", http://www.au.int/?q=node/435 (accessed on September 20, 2010)
[89] PSC Protocol, Art. 13 (1)
[90] Ibid
[91] Girmachew Alemu, "The African Standby Force: Major Issues Under 'Mission Scenario Six'", *Political Perspectives* 2(1)(2008): 1-22, pp. 5-6
[92] PSC Protocol, art. 13(1)

the necessary equipments for the operation, whenever they are requested by the commission as a result of an authorization by the PSC or the Assembly.[93]

The ASF is Mandated to perform the Military functions of the PSC which ranges from a military advice to interventions under article 4 (h) and (j) of the Constitutive Act. In this regard, the Policy Framework of the ASF provides six potential crisis management scenarios.[94] Scenario 1 is AU/Regional military advice to a political, Scenario 2, AU/Regional observer mission co-deployed, Scenario 3, Stand-alone AU/Regional Observer Mission, Scenario 4, AU/Regional Peacekeeping Force for Chapter VI and Preventive Deployment Missions and Peace-building, Scenario 5, AU Peacekeeping force for complex multidimensional peacekeeping missions and Scenario 6 is AU intervention like in case of genocide.[95] The Policy Framework also specifies the time of deployment for above Scenarios. Accordingly, Scenarios 1 up to 4 requires deployment of the contingents within 30 days, Scenario 5 within 90 days and Scenario 6 within 14 days from the decisions of the AU Assembly and the PSC.[96]

The operationalization of the ASF is also agreed to be conducted in two phases. Under phase one, which has to be completed by June 30, 2005, the AU plans to establish a strategic level management capacity for the management of Scenarios 1-2 missions while Regional Economic Communities (RECs)/ Regions should establish the brigades for Scenarios 1-4 missions.[97] On the other hand, under the second phase, which has to be completed from 1 July 2005 up to 30 June 2010, the AU plans to develop the capacity to manage complex peacekeeping operations (mission scenario 5) while the RECs/Regions will continue to develop the capacity to deploy a mission Headquarters for scenario 4, involving AU/Regional peacekeeping forces.[98] Though

[93] Ibid, art. 13 (17) (a)
[94] See AU doc., *Policy Framework for the establishment of the African Standby Force and the Military Staff Committee* (Part I)(Exp/ASF-MSC/2 (1), Addis Ababa, 15-16 May, 2003, para. 1.6 and. AU doc., *Roadmap for the operationalization of the African Standby Force*. Experts' meeting on the relationship between the AU and the Regional Mechanisms for Conflict Prevention, Management and Resolution, Addis Ababa, 22–23 March 2005, EXP/AU RECS/ASF/4(i), para. A-1
[95] ASF Policy Framework (2003)k, p.3
[96] ASF Policy Framework (2003), pp-6-7; See also Girmachew, "African Standby Force": 1-22, pp.5-6
[97] ASF Road Map (2005), p.1
[98] Ibid

some difficulties are being noticed in complying the timetable, encouraging progresses are being undertaken in the realization of the ASF.[99]

2.6.5. Military Staff Committee

The Military Staff Committee is established to advise and assist the PSC in the military aspects.[100] The Committee is composed of senior Military officers of the PSC members.[101] The Committee is also obliged to meet 'as often as required to deliberate on matters referred to it by the PSC'.[102] Besides, the Committee may also be required to meet at the level of the Chief of Defense Staff of the members of the Council in order to 'discuss questions relating to the military and security requirements for the promotion and maintenance of peace and security in Africa'.[103]

2.6.6. The Peace fund

The Peace Fund is a special fund established with the aim of providing the financial resources for the work of the PSC in particular peace support missions and other operational activities.[104] It is made up of financial appropriations from the regular budget of the Union (General Peace Fund), voluntary contributions from member states and other sources in Africa which includes the private sector, civil society and individuals and from other appropriate fund raising activities.[105] It is also possible for the Chairperson of the Commission to raise and accept voluntary contributions from outside sources however should be in conformity with the objectives and principles of the Union.[106] The establishing Protocol further established a 'Revolving Trust

[99] See Girmachew, "African Standby Force": 1-22, pp.10-11. For a comprehensive understanding about ASF, see further, Jaccie Cilliers and Johann Pottgieter, "The African Standby Force", in *Africa's New Peace and Security Architecture: Promoting Norms, Institutionalizing Solutions*, ed. Ulf Engel and Joao Gomes Porto, 111-142 (Burlington: VT 05401-4405, Ashgate Publishing Company, 2010)
[100] PSC Protocol, art. 13 (8)
[101] Ibid, art. 13 (9)
[102] Ibid, art. 13 (10)
[103] Ibid, art. 13 (11)
[104] Ibid, art. 21(1)
[105] Ibid, art. 21 (2)
[106] Ibid, art. 21 (3)

Fund' within the Peace Fund whose amount shall be determined upon the recommendation of the Council.[107]

Currently, the Peace Fund receives 6 % transfer from the regular budget of the Union. However, the member states with the conviction that they should increase their contribution substantially in order to 'truly own the ongoing efforts to promote peace, security and stability in the continent', requested the Chairperson of the Commission to take the necessary preparatory steps for the increase of the statutory transfer from 6 to 12 %, at Tripoli in 2009.[108] Accordingly, the General Assembly of Heads of States and Government decided to gradually implement this increase over a period of three years starting from 2011.[109]

[107] Ibid, art. 21 (4)

[108] AU Doc., Tripoli Declaration On The Elimination Of Conflicts In Africa And The Promotion Of Sustainable Peace, Special Session Of The Assembly Of The Union On The Consideration And Resolution Of Conflicts In Africa, SP/ASSEMBLY/PS/DECL.(I), 31 August 2009, para. 18.

[109] AU doc., Decision On The Budget Of The African Union For The 2010 Financial Year Assembly/AU/13(XIV), Assembly/AU/Dec.287(XIV), Adopted By The Fourteenth Ordinary Session Of The Assembly In Addis Ababa, Ethiopia On 2 February 2010. See also AU Doc., Progress Report Of The Chairperson Of The Commission On The Implementation Of The Tripoli Declaration On The Elimination Of Conflicts In Africa And The Promotion Of Sustainable Peace And On The Tripoli Plan Of Action, Peace and Security Council of the AU, 250th meeting, PSC/AHG/2(CCL), 30 November 2010. Para. 15.

CHAPTER THREE

AUPSC: HISTORICAL AND LEGAL ANALYSIS

Introduction

The African Union's move towards establishing its own Security Council has created some sort of anxiety on the relationship between this Council and the UNSC. The anxiety is clear when one considers the background for the establishment the PSC and the legal documents of the Union. The CA under its article 4 (h) confers the right to forcibly intervene in a member state when grave circumstances such as genocide, war crimes and crimes against humanity occur. It further gives member states the right to request the Union to intervene in order to restore peace and security in that country. At least facially, this mandate of the AU which would be implemented through its PSC creates doubt on whether it is challenging the primacy of the UNSC which is 'the only body to decide and implement on matters of forcible intervention to maintain international peace and security'[110]. The water is further muddied when the PSC protocol adopted a 'somehow contradictory stances' on the relationship between the two Security Councils of the AU and UN.[111] The protocol under its Article 16 (1) states that the AU (PSC) 'had the primary responsibility for promoting peace, security and stability in Africa'[112], at the same time article 17 (1) acknowledges the primary responsibility of the UNSC for the maintenance of international peace and security.[113] Therefore, it is not clear that whether the AU has assumed primacy over the maintenance of peace and security of the continent. This chapter wants to clarify such confusion introduced by the legal documents of the Union. To this end, the chapter will analyze the genesis of the PSC and the legal documents of AU in to two main sections.

[110] See "ISS/APSTA Seminar Report on 'the developments and challenges in the operationalization of ASF: An insider's perspective'", Addis Ababa, April 2009, p.9, http://www.apsta-africa.org/events/asfapr09.php (accessed on June 10, 2010).
[111] Williams, "An Embroyonic International Institution": 603-625.
[112] See PSC Protocol, art. 16 (1)
[113] See PSC Protocol, art.17 (1)

The first section examines the history of the establishment of the PSC and questions what factors motivated African leaders to establish their own PSC. Second, the writer examines the CA and the PSC Protocol which are the two most important instruments of the Commission on the area of peace and security. Under this part, the writer critically analyzes the provisions of these documents with the intention to find out the consensus reached by African States.

The first section of this Chapter argues that the main factor that necessitated the establishment of AUPSC was African's internalization of the long time neglect from the UNSC and the latter's gross indifference to resolve the mass atrocities committed in the continent. As a result, the paper argues, African States have found it necessary to take the primary ownership of its own problems in the area of peace, security and stability and take their destiny on the peace and security of the continent by themselves. This factor has ignited the AU's need to establish its own PSC. Under the second section, the paper argues that the more interventionist provisions of the Constitutive Act and the protocol's statement of AU's primary responsibility for the maintenance of peace, security and stability in Africa reveals member states' intention to confer the AUPSC primary responsibility over the UNSC on matters related to the conflicts of Africa. Finally, the chapter ends by concluding its discussions.

3.1. The genesis of AUPSC

Under this section of the paper, I will examine the history of the establishment of the PSC with the aim to find out the intended motive of African leaders in establishing their own Security Council. To this end, the paper explores the activities undertaken from the establishment of the OAU Mechanism for Conflict, Management and Resolution in 1993 to the establishment of the AUPSC in 2004. In doing so, the paper seeks to know the factors that motivated Africans to establish the PSC and the implication it has on the theme of the paper.

The AUPSC is an outcome of an ad hoc process to reform the OAU's Mechanism for Conflict Prevention, Management and Resolution (hereinafter the mechanism) which was adopted in Cairo in June 1993.[114] Therefore, the proper understanding of the genesis of this organ and its

[114] Williams, "An Embryonic International Institution": 603-625, p.604

intended purpose requires a close scrutiny to the establishment of the mechanism and the efforts thereof being undertaken to facilitate its effectiveness.

The late 1980's and the beginning of 1990's marked a dramatic change in the international arena. The east-west relation changed. In Africa, the security landscape deteriorated, internal conflicts intensified and western interest diminished dramatically.[115] The internal conflicts fermented throughout the continent causing the loss of millions of life and displaced persons. Despite this, The UN Security Council showed less interest, responsibility and commitment towards their resolution.[116] These realities compelled the OAU summit in 1990 to re-examine its peace and security agenda which resulted in the adoption of a landmark declaration known as "Declaration of the Assembly of Heads of State and Government of the Organization of African Unity on the Political and Socio-Economic Situation in Africa and the Fundamental Changes Taking Place in the World" at the 26th Ordinary Session that took place in Addis Ababa, in July 1990.[117] The document revealed the consensus emerged among African leaders on the need to rely on their own resources and traditions in resolving regional conflicts.

Following the declaration, in June/July 1992, the OAU secretary-general submitted to the 56th Ordinary Session of the Council of Ministers and the 28th Ordinary Session of the Assembly of Heads of State and Government in Dakar, a document entitled ''Report of the Secretary-General on conflicts in Africa: Proposals for an OAU Mechanism for conflict Prevention, Management and Resolution,'' outlining a number of options for such a mechanism. The assembly then adopted, in principle, the ideas in the report.

At its July 1993 meeting, the secretary-general submitted to the 58th Ordinary Session of the Council of Ministers and the 29th Ordinary Session of the Assembly of Heads of State and Government in Cairo, a further report, which covered all aspects of the Mechanism, including

[115] Monde Muyangwa and Margaret A. Vogt, "An Assessment Of The OAU Mechanism For Conflict Prevention, Management And Resolution, 1993-2000", (New York, 2000), p.8
[116] See the ASF Policy Framework (2003)
[117] See also OAU doc., "Report of the Secretary General on the Fundamental changes taking place in the world and their implications for Africa: proposals for an African Response", AHG/169(XXVI), 9 July, 1990, pp.23-24. This Report emphasized the need to involve the OAU to play a more active role in conflict prevention, management and resolution and recommended that "African solutions to African problems must be given a new momentum in African politics and international relations

ideas for its institutional and operational details and financing. Then, at the Twenty-ninth Ordinary Session of the OAU Assembly of Heads of State and Government, held in Cairo, Egypt, in June 1993, the assembly adopted Declaration on the Establishing within the OAU of a Mechanism for Conflict Prevention, Management and Resolution.

The Mechanism institutionalized conflict resolution at the centre of the OAU's being, and established the Central Organ, a committee of member states, to take charge of the process.[118] The establishment of the mechanism signaled one basic motive that Africa should play a central role in resolving conflicts and fostering peace, security and stability on the continent[119], while acknowledging the primary responsibility of the UN for the maintenance of international peace and security.[120] Therefore, by establishing the mechanism, the Heads of States and Governments clearly wanted to bring a new institutional dynamism to the process of dealing with conflicts in African continent.[121]

The mechanism is built around a central organ with the Secretary General and the Secretariat as its operational arm. The central organ is like the UNSC in the sense that it has become the heart of the OAU's decision-making process on security issues, however differing fundamentally from the Security Council in that it has no permanent membership and no veto powers.[122]

As per the Cairo Declaration, the primary purpose of the mechanism was anticipation and prevention of conflicts.[123] It was thought that the focus on the prevention of conflicts instead of addressing full blown conflicts would obviate the need for OAU to resort to the complex and resource-demanding peacekeeping operations, which it will find difficult to finance.[124] Accordingly, they limited the role of the organization in case where the conflicts have already

[118] Cedric de Coning, "The Role of the OAU in Conflict Management in Africa", *Monograph No. 10, Conflict Management, Peacekeeping and Peace building*, (1997). http://www.iss.co.za/pubs/monographs/No10/DeConing.html (accessed on September 2, 2010).
[119] See "1993 Cairo Declaration On The Occasion Of The Thirtieth Anniversary Of The Organization Of African Unity", AHG/Decl.1 (XXIX), 28 - 30 June, 1993, para. 11
[120] "About the Peace and Security Department of the AU, history and background", (n.d.), www.africa-union.org/root/au/AUC/Departments/PSC/About_US.htm (accessed on May 17, 2009).
[121] AU doc., "Background Document on the Review of Structures, Procedures and working methods of the Central Organ", (2002) p.3.
[122] Coning, " The role of OAU in Conflict Management"
[123] See "Cairo declaration", para. 15
[124] See "Cairo declaration", para.15

erupted.[125] In such case, which demands peacekeeping and enforcement actions, the organization shall resort to the multilateral institution, i.e. the UN while its role be limited in examining ways and means in which member countries will contribute to this multilateral institution. [126]

However, the subsequent years after the establishment of the mechanism demonstrated that the consensus that the organization should not play a more active role in the management of conflicts in particular in peacekeeping activities proved them wrong. The new dynamism of the OAU in conflict prevention and management has not resulted into a more peaceful continent.[127] Since the establishment of the mechanism, new conflicts have arisen and in such situations the "role of OAU remains peripheral if not non-existent".[128] On the other hand, the premises of the Africans that conflicts which have already erupted to the level of demanding peacekeeping and peace enforcement missions shall be dealt by the UN also proved them wrong. After the "Black Hawk Down" debacle in Mogadishu, influential members of the UNSC become wary of contributing to missions headed for Africa's civil war. [129] This was confirmed by the Presidential Decision Directive 25 of President Clinton stating that America will not participate in Peace Support Operations in Africa.[130] The unwillingness of members of the SC to loss a single life for the protection of the life of Africans were very evident from the disengagement of these members in some of the most deadly African wars: in Southern Sudan, the DRC, Liberia, Rwanda and Sierra Leone. The report of the Panel of Eminent Personalities to investigate the 1994 Rwandan Genocide[131] and the commander of UNAMIR[132]- Romeo Dallaire, stressed how

[125] The idea of the OAU preparing itself for peace-keeping was part of the Secretary-General's Report which was submitted to the fifty-sixth ordinary session of the Assembly of Heads of State and Government in Dakar, Senegal, when these two bodies were discussing the Secretary-General's proposal for the establishment of the Mechanism. This proposal was debated and at the conclusion, it was agreed that while peacekeeping will be desirable in the long run, OAU in the short run should focus on conflict prevention and peace-making. It was thus decided that peacekeeping should not constitute a priority activity of the OAU at least at present. See "Report of the Secretary-General on the various initiatives on conflict management: enhancing OAU's capacity in preventive diplomacy, conflict resolution and peacekeeping, Council of Ministers(CM/1883(LXII))", Addis Ababa, June 1995, para.27

[126] See "Cairo declaration", para. 16

[127]" Background document" ,p.16, para.44

[128] Ibid

[129] Gerry Cleaver and Roy May, "Peace keeping: The African Dimension", *Review of African Political Economy* 22, (1995), p. 485

[130] "Peace Support Operations: UN/AU: Implications For SADC", FOPRISA Annual Conference, Centurion, 18-19 (November 2008), P.10, http://www.foprisa.net/publications/documents/PeaceSupportOperations-UN-AU.pdf (accessed on May 20, 2010).

[131] The International Panel of Eminent Personalities to Investigate the 1994 Genocide in Rwanda and Surrounding Events (IPEP) was set up by decision of the Council of Ministers of the OAU (CM/Dec.409 (LXVIII)), and

the international community as a whole and the permanent members of the UNSC in particular were selective in their commitment of protecting humans from suffering. The great powers in the SC clearly failed to put the interest of the people of Rwanda a head of their political interest.[133] With this understanding, both the Report and Dallaire recommended that the African continent should re-think its intervention readiness and not to rely on the international community to come to the rescue in times of crisis and accordingly the continent should 'establish appropriate structures to enable it to respond effectively to enforce the peace in conflict situations'.[134]

Acknowledging the weakness of the OAU in particular its failure to react in face of an impending crisis and taking note of the deep reluctance of UNSC members to take risks or commit resources to African conflicts led the organization to began convene series of debates on how to enhance their own mechanism through enhancing the effectiveness of the existing conflict management mechanism within themselves.

Accordingly, from 26 to 27 November 1994, the Political Affairs and Department of the OAU Secretariat met in Debrezeit to brainstorm on enhancing the effectiveness of the mechanism. The session had identified some of the key problems facing the mechanism. In this regard, the session noted the reluctance and hesitation of member states to make the OAU a first point of call when conflicts occur which is understood to show their lack of faith in the efficiency of the OAU.[135] On the other hand, the active involvement of sub-regional organizations like ECOWAS and SADC in resolving conflicts within their respective regions was viewed as problematic to the OAU as the sub-regions were projecting and strengthening distinct entities and undertaking

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endorsed by the Assembly of Heads of State and Government at its 34th Ordinary Session, Ouagadougou, June 1998, at the proposal of Meles Zenawi of Ethiopia

[132] UNAMIR is a United Nations Assistance Mission for Rwanda which was established with Security Council resolution 872 (1993) to contribute for the establishment and maintenance of climate conducive to the secure and subsequent operation of the transitional government in accordance with the Arusha peace agreement.

[133] See the International Panel of Eminent Personalities to investigate the 1994 Genocide in Rwanda and the Surrounding Events, Rwanda: "The Preventable Genocide" (Report) (2000); Romeo Dallaire, *Shake Hands with the Devil: the Failure of Humanity in Rwanda* (UK, arrow books, 2003).

[134] See "the Preventable Genocide", chapter 24, para.22; Tim Murthi, "the African Union's Transition from Non-Intervention to Non-Indifference: An Ad-hoc approach to the Responsibility to Protect" (2009): 90-106, http://library.fes.de/pdf-files/ipg/ipg-2009-1/08_a_murithi_us.pdf (accessed on June 15, 2010).

[135] "The Debrezeit brainstorming session on enhancing the effectiveness of the mechanism", cited in "Background document", para.58-61

unilateral action in matters of conflict resolution, thus marginalizing collective continental action.[136] The session then made important recommendations in order to enhance the effectiveness of the mechanism. Among others, it recommended the need to define the clear entry points for the OAU to be involved in conflict situations and with respect to peacekeeping the session stressed the need to establish and train "ready contingents"[137] which was later endorsed in the OAU summit held in Addis Ababa in 1995.

On the other hand, the Report of the Secretary-General on the various initiatives on conflict management submitted to the sixty-second ordinary session of the Council of Ministers, stressed the continuing indifference of the international community in particular the responsible organ of the UN, UNSC, and the major powers and advanced the view that Africa could not afford to remain indifferent to an African problem however formidable it could be in terms of financial or material resources.[138](15 years after, the same was reiterated by the Chairperson of the Commission in his address to the council of Union)[139] The report recommended that Africa should take some degree of responsibility in peacekeeping.[140]

The central organ, on the other hand, also considered the effectiveness of the organ and to deliberate on the issue of the enhancement of the effectiveness of the organ from February to May of 1998. In the discussion, one of the central issues was related to the provision of paragraph 14 of the Cairo Declaration[141] on non-interference in internal affairs of members States and the respect of their sovereignty. In the discussion, concerns were expressed on the whole issue of entry points by the OAU into conflict situations within and between Member

[136] Ibid
[137] Ibid
[138] "Report of SG on Various Initiatives", para.31
[139] Jean Ping has spoken to the Kampala meeting of AU ministers that we [the AU] have decided to help our brother country [Somalia] despite lack of means. See Billie O'kadameri, "African Union Head Blasts Lack of Somalia Response", *allafrica.com*, 23 July, 2010, http://allafrica.com/stories/201007231108.html (accessed on November 12, 2010).
[140] "Report of SG on Various Initiatives", para.32
[141] The full paragraph of this declaration read as "The Mechanism will be guided by the objectives and principles of the OAU Charter; in particular, the sovereign equality of Member States, non-interference in the internal affairs of States, the respect of the sovereignty and territorial integrity of Member States, their inalienable right to independent existence, the peaceful settlement of disputes as well as the inviolability of borders inherited from colonialism. It will also function on the basis of the consent and the co-operation of the parties to a conflict."

States. The issue of the permanent linkage between the Central Organ and the UN Security Council was also another issue that has got the attention of the meeting.[142]

The International Peace Academy (IPA) also conducted seminars and prepared a study to assess the mechanism and make recommendations. One of the major outcomes was the IPA Report of November 2000 on the assessment of the OAU mechanism (1993-2000). The report has observed the fact that though the OAU was placed at the center of the conflict management activities in Africa; the reality is that the OAU was still a peripheral actor in most of the conflicts.[143]The IPA then urged the OAU to actively be involved in conflict management and to make better coordination with the UN and Sub regional organizations.[144]

Finally, at the 37th ordinary session of the General Assembly held in Lusaka, Zambia in 2001, it was decided to incorporate the Central Organ of the Mechanism as one of the Organs of the Union in accordance with Article 5 (2) of the CA of the AU and requested the Secretary-General to undertake a review of the structures, procedures and working methods of the Central Organ, including the possibility of changing its name.[145] Then the Secretary General produced a report with a title "Background Document on the Review, structure, procedures and working methods of the central organ" which has "served as the conceptual starting point for the drafting of the PSC protocol."[146]

The report took note of the failure of the UN to forestall African conflict and the bold intervention provisions in the AU Constitutive act and recommended the mandate of the mechanism to be enlarged to provide for the deployment of peacekeeping forces and peace enforcement in circumstances provided under article 4(h) and (j) of the CA.[147]

[142] See the discussion within the central organ and the Council of Ministers, mentioned in "Background Document",para 62-66
[143] Muyangwa and Vogt, "assessment of OAU Mechanism", p.32
[144] Ibid
[145] AU doc., "Decision on the Implementation of the Sirte Summit Decision on the African Union", Adopted by Assembly of Heads of State and Government at the 37th ordinary Session in Lusaka, Zambia, 11 July, 2001. para. 8
[146] Jeremy Levitt, "The Peace and Security Council of the African Union, the Known Unknowns", *Transnational Law & Contemporary Problems* 13 (2003): 109-137, p-114
[147] See "Background Document", pp.36-39

Furthermore, the background document was circulated for different groups to debate on it. [148] The Secretary General also organized other meetings to deliberate on the draft protocol of the PSC.[149] As the Secretary General observed from these informal consultations, the delegations emphasized the fact that

> *while it was important to harmonize the powers and functions of the Peace and Security Council with those of the United Nations Security Council, it was equally important to bear in mind that* ***Africa should address more decisively the issue of peace and security in the Continent in view of the fact that the international community and the United Nations Security Council had not always displayed the commitment that Africa had expected from them in this domain****.*[150] *[Emphasis mine]*

The above facts clearly show that the reluctance of the UNSC towards discharging its responsibilities in Africa has been highly internalized by Africans and motivated them to establish their own system which could fill the gap of the UNSC. The same motive could be inferred from the then Chairman of the AU up on its establishment, Thabo Mbeki stated that "recent international events have confirmed the need for us Africans to do everything we can to rely on our own capacities to secure our continent's renaissance."[151] The statement of Thabo Mbeki, who is regarded as one of the designer of AU[152], reflects the determination of Africans to

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[148] For instance, the document was presented to the Permanent Representatives and Government Experts during their second meeting on the African Union, held in Addis Ababa, Ethiopia, in February 2002. Subsequently, an informal brainstorming session on the background document was also held in George, South Africa, in March 2002, followed by a consultative meeting involving the representatives of the regional organizations and other international cooperating partners in May 2002.

[149] This includes a meeting of Permanent Representatives and Government Experts in Addis Ababa, Ethiopia, to examine a draft Protocol on the establishment of a Peace and Security Council within the African Union.

[150] AU doc., Report of the Special Session of the Council of Ministers on the African Union, AHG/232 (XXXVIII) – b, 8 July 2002 , http://www.au2002.gov.za/docs/summit_council/minsprep.htm (accessed on June 10, 2010).

[151] Agence France-Presse (AFP), "Mbeki Wants Standby Force Prioritized," Business Day, 23 May 2003, cited in Captain Abubakar Sadiq Aliyu, "Regional Dimensions Of Peace Support Operations In The 21st Century: A Case Study Of The African Standby Force Concept", (Thesis Presented in Partial Completion of the Requirement of The Certificate-of-Training in United Nations Peace Support Operations, n.d.), pp.1-2

[152] Mbeki is taken as powerful figure in the African politics. He is regarded as one of the main proponents of African solution for Africans problem and he headed the formation of both the New Partnership for Africa's Development (NEPAD) and the African Union (AU). He also strongly resists foreign intervention on African matters and sees the formation of AU as a part of the process in which Africa solves its own problems without relying on outside

rely on themselves in resolving their own conflicts. This was also confirmed by Dr. Salim Ahmed Salim, the then Secretary General of OAU, in his address to the 2nd meeting of the Chief of Defense Staff of Members States of the Central Organ in Harare saying, "…….OAU member states can no longer afford to stand aloof and expect the international community to care more for our problems than we do, or indeed to find solutions to those problems which in many instances, have been of our own making…….we must remain in the forefront of efforts to act and act speedily……"[153]

It was against this background that the AU, pursuant to art. 5 (2) of its CA decided to establish the AUPSC as a collective security and early warning arrangement to facilitate timely and efficient response to conflict and crisis situations in Africa[154] and that could act as the decision-making institution and the sole authority for deploying, managing and terminating AU-led peace operations.[155] It is also important to note that such laudable mandates to the PSC are the reflection of the unique experience of Africa in which the response of the UNSC, the organ which has the primary responsibility to guarantee international peace and security, to the security needs of the continent was poor.[156]

The intention of African states to establish their own Security Council therefore should be understood against the background that they reacted towards their perception as neglect from the international community in particular from the Security Council and their strong desire to come up with their own mechanism to resolve their own problems as reflected in their motto of

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assistance. See the information on http://en.wikipedia.org/wiki/Thabo_Mbeki#Role_in_African_politics (accessed on June 12, 2010).

[153] Address by HE Dr Salim Ahmed Salim, Secretary General of the OAU at the Second Meeting of the Chiefs of Defense Staff of Member States of the OAU Central Organ, Harare, 25 October 1997, cited in Aliyu, "Regional Dimension of Peace Support Operations", p.1

[154] PSC Protocol, Art.2(1)

[155] Vanessa Kent and Mark Malan, "The African Standby Force: Progress and Prospects", *African Security Review* 12(3) (2003): 71-81, p.71

[156] "Address of the President of South Africa, Thabo Mbeki, at The National War College", (Abuja, Nigeria, 8 December 2003), http://www.info.gov.za/speeches/2003/03120909461002.htm (accessed on August 4, 2010). the full speech of Mbeki reads as: "The mandate that is given to the Peace and Security Council is informed in large measure by our experiences as Africans, especially as regards the response of the world to our security needs. While we are aware that the UN, primarily through the Security Council, has the primary responsibility to guarantee international peace and security, our experience of the discharge of their responsibilities in regard to conflicts on the continent has not always been positive."

"African Solution for African Problems". Hence, the analysis of the genesis of the PSC offers a conclusion that the PSC was established with African leaders' resolve to solve their problem by themselves, caused by frustration on the UNSC as responsible organ for the maintenance of international peace and security. This lends support to the view that, the PSC is intended to play a primary role in the maintenance of peace, security and stability in Africa, which seem to challenge the primacy of UNSC over the maintenance of international peace and security.

3.2. Legal Framework

Since the 1945 there is a general consensus that the UNSC is the primary organ for the maintenance of international peace and security of the world. However, the coming into force of the PSC protocol which has established the AUPSC and the CA of the AU is viewed by some as "a first true blow to the constitutional framework of the international system" which has vested the ultimate power of controlling international peace and security to the UNSC.[157] Under this part of the paper, I will critically examine the two legal documents of the AU: the CA and the PSC protocol (two basic documents which defines the principles and objectives of the AU's Security Policy) with the intention to find out how the African States perceived the relationship between their organization and its specific organ with the UNSC and whether such relationship is designed to be a subsidiary, complementary or competitive in nature. However, it should be noted that the CA and the establishing protocol are not the only legal documents of the Union which clarified the peace and security agenda of the Union. It is rather possible to mention the Common African Defense and Security Policy which defines the concepts of defense and security, lays out common security threats, and states the objectives and goals of a common defense and security policy. But, this document is not made part of the discussion as its relevant provisions for the discussion of this part are the verbatim copy of the PSC protocol. On the other hand, the other relevant documents like the Policy Framework for the establishment of the ASF and the Road map for the operationalization of ASF are made part of the discussion under the section which deals the CA.

[157] Jean Allain, "The True Challenge to the United Nations System of the Use of Force: The Failures of Kosovo and Iraq and the Emergency of the African Union", *Max Planck, UNYB* 8 (2004): 237-289, p.238

3.2.1. The Constitutive Act (CA)

Article 4 (h) of the CA grants the AU the right of intervention against the commission of grave crimes like war crimes, genocide and crimes against humanity.[158] This makes the CA the first and the only international instrument which provides RO the right to intervene by force in a member state to halt grave circumstances like genocide, crimes against humanity and war crimes.[159] The subsequent amendment of the CA also incorporated another situation to constitute a grave circumstance thereby empowering the AU the right of intervention. I.e. a serious threat to legitimate order to restore peace and stability in the member states of the Union.[160] Furthermore, the CA grants member states the right of requesting intervention from the Union in order to restore peace and security.[161] The AUPSC make recommendation on intervention while the final say is entrusted to the General Assembly of the Union.[162]

Under this part the paper examines whether the African States, by inserting the clause of the right of intervention under the CA, intended to appropriate themselves the role which the UNSC is meant to play on a universal basis and accordingly denied the UNSC its primacy over the maintenance of international peace and security, and as a result make the nature of their relationship more of competitive.

The right of intervention may range from the use of economic and political sanctions to the use of military force.[163] Though it is not clear that which of these measures are included under article 4 (h) or (j) of the CA,[164]it has been affirmed that such right of intervention will include military

[158] The Constitutive Act of AU, art. 4(h)
[159] See "ISS/APSTA Seminar Report on ASF", p.9
[160]See Protocol on Amendments to the Constitutive Act of the African Union. Adopted by the 1st Extraordinary Session of the Assembly of the Union in Addis Ababa, Ethiopia on 3 February 2003 and by the 2nd Ordinary Session of the Assembly of the Union in Maputo, Mozambique on 11 July 2003.
[161] See The Constitutive Act of AU, art. 4(j)
[162] See The Constitutive Act of AU, art. 4(h); PSC Protocol, art.7 (e)
[163]. "The Responsibility to Protect", *International Development Research Centre* (ICISS. 2001), cited in Girmachew, "The African Standby Force": 1-22, p.3; even though interventions may include economic sanctions, severance of diplomatic or trade relations and other measures which are short of use of force, scholarly opinion submits that economic sanctions or severance of diplomatic relations do not as such constitute intervention. Therefore, the discussion of intervention under this paper is with the understanding of use of military force as intervention.
[164] Girmachew, "The African Standby Force": 1-22, p.3

measures against member states.[165] However, the UN Charter, under its article 2(4) prohibits any use of force against member state except in cases of self defense pursuant to article 51[166], the decision of the SC in its power of Chapter VII[167] and SC's authorization of use of force by ROs in accordance with Chapter VIII.[168] In addition to these exceptions, states can use force in a territory of another state provided that the later state has given its contemporaneous consent to such use of force. Therefore, except in case of self-defense and intervention up on consent, the UNSC remains the only body to decide on matters of forcible intervention to maintain international peace and security and other entities like the AU needs the prior authorization of the SC if they decide to intervene in another state.

So, under this section, the paper will first probes whether the right of intervention under the CA falls within the exception of intervention by consent and if not whether this right of intervention is in accordance with Chapter VIII of the Charter which requires the prior authorization of the SC. It has to be noted that the primary aim of the discussion under this section is not to examine whether the right of intervention under the CA is in conformity with the Charter system and if not how to reconcile the two systems. The main aim rather remains to investigate whether the CA is apportioning the power of UNSC to the Union/PSC or whether it is intended to operate within the above exception (intervention by consent).

3.2.1.1. "Treaty-Based Intervention" under International Law

The issue of whether the right of intervention under regional treaty is in compliance with the international law is a highly debated issue among scholars.[169] Three different positions have emerged in this regard. The first position argues that states have an inherent right to accept

[165] Ademola Abass, *Regional Organisations and the Development of Collective Security: Beyond Chapter VIII of the UN Charter*, (Oxford: Hart Publishing, 2004), p.165

[166] See The UN Charter, art.51. The article empowers member states to exercise their inherent right of individual or collective self defense in response to an armed attack.

[167] See The UN Charter, art.39 & 42. Article 39 of the Charter entitles the Security Council to determine the existence of any threat to the peace, breach of the peace and it is the same organ which is empowered to take any measures including use of force in order to maintain peace and security of the world for the purpose of restoring international peace and security.

[168] See The UN Charter, art. 53. It provides that no enforcement action shall be taken by ROs without the authorization of the UNSC.

[169] David Wippman, "Treaty- Based Intervention: Who Can Say No?", *The University of Chicago Law Review* 62 ,No. 2 (Spring, 1995): 607-687, p.607

treaty-based restriction on the future exercise of its sovereignty because a state is free to extinguish its sovereignty altogether by merging with another state and for stronger reason a state may accept a lesser infringement of its sovereignty in the form of a treaty-based right of intervention.[170] The second position on the other hand argues that a treaty which confers a right of intervention in the internal affairs of another sovereign state is void *ab initio* since it violates the peremptory norm on the prohibition of use of force.[171] Wippman calls the first approach as 'freedom-to-contract' approach while the latter '*jus cogens* model' approach. As Wippman critically analyzed, both approaches agree on the point that states may authorize external intervention by contemporaneous consent however differs on the question of whether a state may bind itself to permit external intervention in the future.[172] In other words, the basic difference arises on how they answer the question "who can give consent for forcible intervention?: The government at the time of the treaty making or the government at the time of intervention? The first approach contends that the decision making authority of a state at the time of the moment of treaty formation may allow intervention and binds the future authority. On the contrary, the *jus cogens* model holds the view that a government cannot put restraint on a state's future freedom of action and it is the existing government at the time of intervention that could validly give consent for the intervention.[173]

The third approach, concurrent consent approach which is advocated by Wippman, reconciles these two positions by incorporating some elements from both and at the same time brings additional element alien to both approaches. This third approach, which the researcher supports, argue that "the validity of treaties authorizing forcible intervention depends on whether, in a particular case, a state has validly consented to the treaty at issue and whether the state may later lawfully revoke that consent."[174] Therefore, the validity of regional treaty which confers the right of intervention depends on whether such intervention is to be implemented with the contemporaneous consent of the state or not.

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[170] See Wippman, "Treaty-Based Intervention": 607-687, p.610. This approach emanates from a 'freedom-to-contract model of state sovereignty'. This position is for instance supported by Ian Brownlie who asserts that the right of forcible intervention on the territory of a state may still be lawfully conferred by treaty. See Ian Brownlie, *International Law and the Use of Force by States* (London, UK, Oxford University Press, 1963), p.321.
[171] See Wippman, "Treaty-Based Intervention": 607-687, pp. 610-611.
[172] Ibid, p.615
[173] Ibid, p.623
[174] Ibid, p.611

Though it is acceptable that states have the right to conclude a binding international agreements, agreements authorizing use of force are treated differently as they have implication on the international peace and security. It is with this context that the UN Charter and customary international law prohibits forcible intervention. The UN Charter under its article 2 (4) expressly obliges member states to refrain from use of force in their relation and further under its article 103 stipulates that obligations under the Charter shall prevail over obligations that arises from any other international agreement in case contradiction arises between the two. Similarly, customary international law not only prohibits forcible intervention but also regarded as *jus cogense* where derogation is not permitted. Therefore, the position of 'free-to-contract' approach can be easily inverted because states are not allowed to agree freely like other kinds of international agreements.

On the other hand, forcible intervention which secured the contemporaneous consent of a state is permitted under international law and this is not as such a controversial issue. It is equally established that a state/states may lawfully use force in the territory of another state provided that the first state/s act/s with the consent of the other state.[175] Therefore, as the concurrent consent approach argues, a treaty which allows forcible intervention in one of member state to the party can be lawful provided that such intervention is based on the contemporaneous consent of that

[175] If the intervention is with the consent of a state then it is difficult to say that it violates article 2 (4). Article 2 (4) could be violated if it is against the will of the state. Therefore, intervention by consent is another exception like self defense from the prohibition of use of force. In support of this view, Wippman has mentioned the security Council Resolution 387 (1976) in which the SC expressly stated that it is an inherent right of every state to request assistance from any other state or group of states as it falls within the exercise of its sovereignty (See UN doc., Security Council Resolution 387, S/RES/387, 31 March 1976). Similarly, the International Law Commission holds that 'the entry of foreign troops into the territory of a State, for example, is normally considered a serious violation of State sovereignty and often, indeed, an act of aggression. But it is clear that such action ceases to be so characterized and becomes perfectly lawful if it occurred at the request or with the agreement of the State' (UN doc., *Year Book of the International Law Commission*, Report of the Commission to the General Assembly on the Work of its thirty-first session, A/CN.4/SER.A/1979/Add.l (Part 2) (1979), art. 29, p.110), Dr. Girmachew has also mentioned 1956 Soviet intervention in Hungary and the 1958 US intervention in Lebanon where objections were not raised as to the legality of the use of force by consent rather as to the validity of the consent given. He also noted that ECOMOG intervention in Liberia, SADC intervention in Lesotho and the intervention by Australia, Fiji, Papua New Guinea, Samoa and Tonga in the Solomon Islands in July of 2003 were based on the consent of the states. Such kinds of interventions have got strong support from the international community in particular, UNSC, cited in Kibrom and Raji, "compatibility of article 4 (h) of the AU Constitutive Act with the UN charter", (a term paper submitted to AU Law course, Addis Ababa University, 2009):1-33. See further Elsina Wainwright, "Responding to state failure—the case of Australia and Solomon Islands", *Australian Journal of International Affairs* 57 (November 2003): 486-499; Derek Mcdougall, "Intervention in Solomon Islands", *The Round Table* 93 (April 2004): 213–223.

state. This approach is different from the *jus cogens* approach because the later makes treaties which authorizes intervention void, in the absence of a state's contemporaneous consent while the former convincingly contend that such agreements remain valid until such time that the affected state exercises its right of revocation. Thus, states can conclude treaty which permits forcible intervention provided that such agreement can be exercised with the contemporaneous consent of the host state.

When we consider the CA of AU which confers the right of intervention to the Union within the above theoretical framework, the CA will remain valid provided that such right of intervention requires consent at the time of intervention in addition to the consent given at the time of the formation of the CA. otherwise, it necessarily violates article 2 (4) and in turn article 103 of the Charter and the peremptory norm against the prohibition of use of force. This renders the treaty void.

The CA of the Union however does not expressly provide such requirement. The condition of contemporaneous consent is not included in both the CA and the PSC protocol which conferred such right of forcible intervention. The non-inclusion of contemporaneous consent to exercise the right of intervention seems to be an intentional move of the Union as the interviews with the higher officials of the Union reveals. For instance, the researcher has asked the Head of the PSC Secretariat, Dr. Kambudzi, whether the right of intervention under article 4 (h) requires the consent of member state up on intervention. His answer was a categorical 'no'.[176] He explained that neither the CA nor the PSC protocol provided such requirement.[177] He further made a striking statement that the Union may even goes to the extent of ousting a government which commits those crimes mentioned under article 4 (h).[178] The researcher has put the same question to the Legal Officer of Union, Mr. Fafre Camara. The answer was again 'no'.[179] Interestingly, the Legal Officer mentioned the same fact that both the CA and the PSC protocol do not put such

[176] Interview with Dr. Admore Kambudzi, Head, Peace and Security Counsel Secretariat, Peace and Security Directorate, December 10, 2010.
[177] Ibid
[178] Ibid
[179] Interview with Mr. Fafre Camara, Legal Officer (Treaty Matters in the Office of the Legal Counsel, African Union Commission), December 15, 2010.

condition on the right of the Union to intervene.[180] Therefore, from the wording of the intervention as a right, the non-inclusion of the requirement of contemporaneous consent as a condition to exercise such right and the understanding of the provision by the Union, it is safe to conclude that the right of intervention as envisaged under the CA is an intervention without contemporaneous consent. Therefore, if the CA does not require the contemporaneous consent of the member state up on intervention, then the right of such forcible intervention falls under the exclusive authority of the UNSC. And, other ROs like the AU/PSC can exercise this right only up on authorization from the SC. If that is the case, the next question is whether the right of intervention under the CA requires authorization from the SC? If the answer is in the negative, then the paper asserts that the Union is circumventing the authority of UNSC and in turn suggests the intention of Africans to act independently from the SC.

3.2.1.2. The right of intervention under the CA- with or without SC's authorization?

If the AU through its PSC, can military intervene without the concurrent consent of a state, can this be exercised without circumventing the power of the UNSC?. This sub-section will endeavor to answer this question with the intent to find out whether African leaders have inserted the right of intervention in a way that turns down the power of the UNSC.

Chapter VII of the Charter authorizes the UNSC to determine the existence of threats or breaches to international peace and security and further authorizes the use of force to address such threats or breaches.[181] In addition, under Chapter VIII it clearly prohibits ROs from engaging in an enforcement action without the authorization of the Council.[182] Some tends to argue that the CA does not empower the Union to intervene in situations that are threats or breaches to the peace and security rather empowers it to act in case of grave situations like genocide, war crimes and crimes against humanity. Therefore, they argue, the CA could not contradict with the Charter as the latter talks about threats or breaches of peace and security. However, this argument does not hold water for a simple reason that the UNSC in several occasions have regarded the occurrence

[180] Ibid
[181] See UN charter, art. 39.
[182] See UN charter, art. 53

of gross human right violations which are mentioned under article 4 (h) of the CA as a threat or breach to peace and security of the world.[183] Thus, it is absolutely untenable to argue that the Union and the SC operates on different sphere.

The right of intervention under article 4 (h) could be solely exercised with the prior authorization of the UNSC. If the AU or its PSC decided to militarily intervene in one of the member state then the UNSC should first determine the existence of threats to or breaches of international peace and security and it should subsequently decide to authorize such ROs to use force in order to address the threats or breaches. Hence, if AU is to exercise its right of intervention without the prior authorization of the SC then the Union is usurping the power of UNSC and acting independently. To reach on this conclusion, it has to be examined whether the right of intervention under article 4 (h) requires prior authorization of the SC.

The CA does not require the AU or its PSC to seek a prior authorization from the SC before authorizing or launching interventions.[184] Even though some delegations in the debate held at the ministerial deliberations both in Tripoli and Lome on the draft of the CA raised their concern on the problem of reconciling such right of intervention with the requirement for prior authorization by the UNSC under article 53 of the Charter, the issue as such was not properly addressed in these debates.[185] The Policy Framework for the Establishment of the African Standby Force and the Military Staff Committee as well as the Road Map for the Operationalization of the African Standby Force differs with the CA and the PSC Protocol as the formers indicated that the AU will seek the authorization of the UNSC for its enforcement actions and in the same way, RECs will need the authorization of AU for their interventions while the latter two documents, binding

[183] Since the 1990's the UNSC is regarding gross human right violations as a threat to peace and security. In number of circumstances, the Council even authorized force to be used in order to halt the human sufferings. For instance, on April 1991, the SC has authorized the use of force against Iraq to protect Kurdish minorities from atrocities. Under its resolution 794 (1992), the SC also regarded the humanitarian crisis in Somalia as a threat to peace and security and subsequently authorized force. See further the Security Council resolutions no. 1132, 1076, 841, 924, 788 and 688 in which the SC regarded the mass atrocities as threat to peace and security.

[184] Levitt, "the known unknowns": 109-137, p.125

[185] Tiyanjana Maluwa, "The OAU/African Union and International Law: Mapping New Boundaries or Revising Old Terrain?", *American Society of International Law* 98, (March 31-April 3, 2004) , p.236, http://www.jstor.org/stable/25659924 (accessed on June 27, 2010).

documents of the AU, don't provide the same conditions as the ASF Policy Framework or its Roadmap.[186]

The decision of Africans not to include authorization of the UNSC to exercise the right of intervention does not arise out of negligence or with the simple understanding that the requirement of authorization from the UNSC goes without saying, as my Interview with the Head of PSC Secretariat and the Legal Officer of the Union reveals.

In this regard, the answer of the Head of PSC Secretariat, Dr. Kambudzi, to my question 'does the right of intervention under the CA require authorization from the SC?' was a categorical, 'no'.[187] He stated that neither the CA nor the PSC Protocol put such requirements.[188] In his explanation, Dr. Kambudzi stated that 'the UNSC is not responding actively to African conflicts and this has been witnessed from Rwanda. We [AU] cannot allow the same to happen while waiting authorization from the Security Council. We [AU] will act by ourselves.'[189] The Head of the PSC Secretariat could not see the need of seeking authorization because of his claim that the UNSC system is '*aroge'* (outdated) and a 'finished system' and 'still far from reform'.[190] He further stated how the AUPSC has created a better system in managing African conflicts and accordingly argued that there is no need to seek authorization or direction from 'a finished system'.[191]

What is more striking is the fact that the same opinion was delivered by the Legal Officer of the union. For the same question which I have forwarded to the Head of PSC Secretariat, the Legal Officer, Mr. Fafre Camara, responded that 'the CA does not require so'.[192] It seems therefore evident that the decision not to include the requirement of authorization from the SC is an intentional one.

[186] See ASF Roadmap at p-.5, para. 10; ASF Policy Framework, p. 4, para. 2
[187] Interview with Dr. Kambudzi
[188] Ibid
[189] Interview with Dr. Kambudzi
[190] Ibid
[191] Ibid
[192] Interview with Mr. Camara

The discussion between Jeremy Levitt and the Office of the Legal Counsel of the AU on the point of the decision not to include the requirement of authorization disclose the same understanding. According to a Senior Official from the Legal Counsel of the Union, the decision of not to include such language [to seek prior authorization from the UNSC] in the CA or the PSC Protocol "was taken as a conscious decision by the AU leaders due to debacles in Somalia and Rwanda so the Assembly decided not to bind by themselves to rules and systems that have failed Africa, or the policy prescriptions of certain powers."[193] This indicates that the intention of African leaders while conferring the right of intervention to their own organization is not to be bound by the UN Charter which emanates from lack of trust on the UNSC.

The discussion between Professor Ademola Abass and Ambassador Sam Ibok, the former Director of the Peace and Security Directorate, lends additional support to the view that the right of intervention under the CA was not intended to be conditioned on the prior authorization from the UNSC. The response of Ambassador Sam Ibok to the question whether the right of intervention conferred up on the Union needs the prior authorization of the UNSC was:

> *"We [the AU] are not an arm of the United Nations. We accept the UN's global authority but we will not for the UN to authorize an action that we intend to take. You [the Interviewer] yourself know the politics associated with the Security Council's authorization."……"we [AU] are in a tacit agreement with the United Nations on this and there is an understanding to that effect."*[194]

Another senior official at the AU Commission also asserted the same that the Union cannot wait until the authorization of the UNSC claiming that 'if we have to wait for the UN, people will die'.[195]

[193] cited in Levitt, "the known unknowns": 109-137, pp.125 – 126 ; see also Kioko, "From Non-Interference to Non-Intervention": 807-825, p.812
[194] Cited in Abass *Regional Organizations*, p.166
[195] Kristina Powell, "The African Union's Emerging Peace and Security Regime: Opportunities and Challenges for Delivering on the Responsibility to Protect", *ISS monograph Series199* (2005): 1-75, p.24

Similarly, Ben Kioko, the legal advisor of the Union, expressed that the right of intervention by the AU is assumed because of the frustration caused by the international community to forestall African conflicts and as a result the leaders are not willing to be bound by the legal limits provided by the Charter system. He stated this point as follows:

> *When questions were raised as to whether the Union could possibly have an inherent right to intervene other than through the Security Council, they were dismissed out of hand. This decision reflected a sense of frustration with the slow pace of reform of the international order, and with instances in which the international community tended to focus attention on other parts of the world at the expense of more pressing problems in Africa. Furthermore, the process of drawing up the Constitutive Act took place not long after the OAU Assembly of Heads of State and Government had adopted the Ouagadougou decision defying the sanctions imposed by the UN Security Council on Libya in connection with the Lockerbie crisis……, the leaders have shown themselves willing to push the frontiers of collective stability and security to the limit without any regard for legal niceties such as the authorization of the Security Council.*[196]

Even in the Ezulwini consensus which could be taken as a more moderate position towards the need to SC's authorization, it stressed the fact that

> *Since the General Assembly and the Security Council are often far from the scenes of conflicts and may not be in a position to undertake effectively a proper appreciation of the nature and development of conflict situations, it is imperative that Regional Organisations, in areas of proximity to conflicts, are empowered to take actions in this regard.*[197]

[196] Kioko, "From Non-Interference to Non-Intervention": 807-825, p-821

[197] AU doc., *The Common African Position on the Proposed Reform of the United Nations: 'The Ezulwini Consensus',* Executive Council 7th Extraordinary Session, Ext/EX.CL/2(vii), 7-8 March 2005, p.6

Though the consensus agreed that intervention by the Organization needs the approval of the SC, it still challenges the need of the prior authorization of the Council in certain situation which demands urgent action.[198] It rather proposed authorization "after the fact" which is not what the charter so provided.[199]

The understanding of AU on the right of intervention by the Union is made clear from the words of higher officials from both the Office of the Legal Counsel of the Union and the PSC. African leaders while inserting the right of forcible intervention have intended to take over the role that the UNSC should have played solely. Though it was perceived that such decision may contradict with the Charter system, the 'shameful peacemaking record of the SC'[200] towards African conflicts justified them to take over the exclusive power of the UNSC in disregard of the provisions of the Charter. As the interviews with these officials confirmed, the organization is claiming primacy over the UNSC even if it contravenes the Charter rule.[201]

3.2.2. The PSC Protocol

The PSC protocol, which spells out the AU Peace and Security framework,[202] was adopted at the Assembly of heads of state and government meeting in Durban, South Africa in July 2002. The protocol came into force on 26 December, 2003.

[198] Ezulwini Consensus, p.6

[199] On the point of prior or subsequent authorization, see Ress and Brohmer, "Article 53, para. 1-93" in B Simma (ed), The Charter of the United Nations (2nd edition, 2002), para. 13-19.. It is argued that the SC's power under article 53 go beyond merely reviewing whether such actions are within the scope if the Charter's framework for securing international peace and security. Effective control requires the means and possibility to exert influence over the concrete enforcement actions planned by the regional arrangements and this is only possible if article 53 is read as demanding prior authorization.

[200] See Levitt, " The known Unknowns": 109-137, p.126

[201] This is clearly evidenced from the observation made by the Legal advisor of the union that "the leaders have shown themselves willing to push the frontiers of collective stability and security to the limit without any regard for legal niceties such as the authorization of the Security Council".

[202] "African Union Peace and Security Framework Mechanism", http://aros.trustafrica.org/index.php/African_Union_Peace_%26_Security_Framework_and_Mechanisms (accessed on November 21, 2010).

The protocol has established the PSC as a standing decision making organ for the prevention, management and resolution of conflicts.[203] It is a collective security and early warning arrangement to facilitate timely and efficient response to conflict and crisis situation in Africa.[204] However, the protocol does not clearly stipulate the relationship between this organ and its UN counterpart. It rather brings further confusion on the relationship between these organs and conflict of laws between the AU and the UN. Therefore, under this section, the writer will examine the provisions of the protocol with the objective of identifying the intended relationship between the AUPSC and the UNSC and whether African states have intended to take over the role of the UNSC as a primary organ to maintain international peace and security.

The PSC protocol under its preamble acknowledges the primary role of the UNSC in the maintenance of international peace and security in the following words:

> *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;*[205]

Furthermore, under article 17 of the protocol which regulates the relationship between AU and UN, it reaffirms its acknowledgement to the primary role of the UNSC. However, within the same document under its Article 16 which is designed to govern the PSC and its relation with the regional mechanisms for conflict prevention, management and resolution stipulates that "Regional Mechanisms are part of the *overall security architecture of the Union, which has the primary responsibility for promoting peace, security and stability in Africa".*[206]These provisions seem to be self-contradictory and as Jeremy Levitt correctly observed "it is not clear whether the

[203] See PSC Protocol, art. 2 (1)
[204] Ibid
[205] PSC Protocol, Para. 5 of the preamble.
[206] PSC Protocol, art.16 (1), emphasis mine

AU or its PSC has reserved for itself primary responsibility for peace and security in Africa rather than leaving it for UNSC."[207]

Article 16 of the protocol could be understand to mean that the AU intended to take the primary role over the sub-regional organizations instead of the UN as the article itself is regulating the relationship between the AU and the sub-regional organizations.[208] However, the subsequent article of the protocol as well as the dominant scholar opinion on the area does not seem to support this understanding. [209] They rather argue that article 16 of the protocol talks about the primary role of AU (AUPSC) in the maintenance of *African* peace and security while article 17 talks about the primary role of the UNSC in the maintenance of *international* peace and security.[210] As a result, they argue that, article 16 has made it clear that "the UNSC is dislodged from its primary responsibility for the maintenance of peace, security and stability in the continent of Africa and the AUPSC thereby subtly staking its claim of primacy over the continent".[211] Similarly, the discussion between Ademola Abass and Ambassador Sam Ibok, reveals that article 16 of the protocol is intended to give the AUPSC a primacy over the UNSC.[212] Above all, the Report of the Chairperson of the Commission on the Establishment of a Continental Peace and Security Architecture and the Status of Peace Processes in Africa, 2004 seem to give a concrete evidence to show the intention of making the PSC a primary organ. In his report, the Chairperson stated that:

[207] Levitt, "The known Unknowns": 109-137, p.125
[208] See PSC Protocol, art. 16
[209] Levitt, "The known Unknowns": 109-137, p.125–26; Suyashi Paliwall, "The Primacy of Regional Organizations In International Peacekeeping: The African Example", *Virginia Journal Of International Law* 51 (2010):185-230. p.197
[210] Here it is important to take note that article 17 of the PSC Protocol acknowledges the primacy of the UNSC over the maintenance of international peace and security while the same protocol under its article 16 confers primacy over the AU for the maintenance of African peace and security.
[211] The same position is adopted by Levitt, "The known Unknowns" : 109-137, p.125, Allian, "The True Challenges": 237-289, p- 275, powell, "The African Union's Regime": 1-75, p.18, Abass, *Regional Organizations*
[212] See the discussion under 3.2.1 of this paper. Ambassador Sam Ibok stated that the AU is not an arm of the UNSC.

Undisputedly, the PSC Protocol endowed this organ [the PSC] with all the necessary powers to play a ***primary role in promoting peace and security****.*[213] *[Emphasis mine]*

The report then calls upon the member states to assume full responsibility to enable the PSC play its *supremacy,* again claiming that the organ is the supreme in promoting the peace and security of the continent.[214] The report even calls the member states to 'affirm *the leadership of the AU* in the management of all crises affecting the Continent, including when it is a question of condemning massive human rights violations and other acts of violence perpetrated against civilian populations'.[215]

The intention of African States to take over the role of the UNSC is further reflected under article 17 (2) (3) and (4) of the Protocol. Article 17 (2) of the protocol while outlining the relationship between AU and the UN in the promotion and maintenance of peace, security and stability in Africa, states that

> ***Where necessary****, recourse will be made to the United Nations to provide the necessary financial, logistical and military support for the African Unions' activities in the promotion and maintenance of peace, security and stability in Africa, in keeping with the provisions of Chapter VIII of the UN Charter on the role of Regional Organizations in the maintenance of international peace and security.*[216] *[Emphasis mine]*

This provision of the protocol seeks the involvement of the UN or its Security Council "where necessary". And it further gives a highlight on when such involvement of the UN will be necessary and why it is needed. The AUPSC seem to find the UNSC necessary not for the purpose of authority rather for the purpose of financial, logistical and military assistance.[217] Further, though the provision clearly acknowledges Chapter VIII of the Charter, it does so as a

[213] Report of the Chairperson of the Commission on the Establishment of a Continental Peace and Security Architecture and the Status of Peace Processes in Africa (PSC/AHG/3(IX)), Solemn Launching of the Peace and Security Council, 9th session, Addis Ababa, 25 May 2004, para. 18
[214] Ibid
[215] Ibid
[216] PSC Protocol, art.(2)
[217] Ibid, art. 17 (2)

whole and not in its specific terms of article 53 which compels regional organizations to seek authorization from the UNSC before taking any enforcement actions.[218] In this respect, the provision of the protocol is in "stark contrast" with other security mechanisms like SADC which specifically requires the authorization of the UNSC and acknowledges article 53.[219]

The intention of taking over of the primacy of the UNSC is also further reflected under the rest of the sub-articles. These sub-articles, sub-article (1), (3) and (4), outline some of the organs in which the AUPSC may cooperate for the latter to successfully discharge its obligations, i.e. promoting and maintaining peace and security in Africa. Interestingly, the UNSC is included as one of these organs in which the AUPSC shall cooperate and work together and no special treatment is designed for the UNSC to play more than the rest like the UN Secretary General, or other organs of the UN. As Jean Allain correctly observed, it rather put the UNSC on the same footing with UN Secretary General, African members of the Security Council and other bodies and by doing so, the Protocol seems to dilute the primacy of the UNSC.[220]

Hence, even though the protocol gives "a lip-service"[221] to the primacy of the UNSC, the close look at the provisions of the protocol like article 16 (1), article 17(1), (2), (3) and (4) reveal the fact that African states have intended the AUPSC to take over the primacy from the UNSC and considered the latter as an organ whose assistance may be sought in case the demand arises and not as an organ whose authority has to be sought first (the practices which the paper is going to deal in Chapter four seem to support the same conclusion). [222] Affirming the same conclusion, Jean Allain succinctly concluded that

> *the diffusion of the primary role of the Security Council over the issue of international peace and security as developed under article 17 of the protocol, in*

[218] For the same kind of interpretation see Levitt, "The Known Unknowns": 109-137, p.126

[219] Levitt, "The known Unknowns": 109-137, p.125, see also Protocol on Politics, Defense and Security Cooperation of SADC (Blantyre, Malawi 14 August, 2001), http://www.sadc.int/index/browse/page/157 (accessed on September 14 2010). , art.3 which provides that "The Summit shall resort to enforcement action only as a matter of last resort and, *in accordance with Article 53* of the United Nations Charter, *only with the authorization* of the United Nations Security Council.", emphasis mine

[220] See Allian, "The True Challenges": 237-289, p.287

[221] The words are borrowed from Allian, "The True Challenges": 237-289

[222] For the same conclusion, see Levitt, "The Known Unknowns": 109-137, p.126; Allian, "The True Challenges": 237-289, p.287. See also Kwesi Aning, "The UN and the African Union's security architecture: Defining an emerging partnership?", *Critical Currents* no. 5 (2005): 9-23, p.18.

essence, turns the UN system on its head, as the UNSC is meant to assist the AUPSC not the vice versa.[223]

Conclusion

Under this chapter two central points are discussed. First the paper has analyzed the genesis of the AUPSC and then has proceeded to critically examine the two basic legal documents of AU which are related to the peace and security issue of Africa, with the attempt to discover the intended motive of Africans in establishing the AUPSC. Accordingly, the analysis of the genesis of AUPSC suggests that African leaders have resorted to establish their own PSC because of their frustration and mistrust on the UNSC as an organ that could play its primary responsibility in maintaining international peace and security. They have internalized the neglect of UNSC's from discharging its obligation in resolving African conflicts. Thus, they have decided to establish the AUPSC with the perception that Africans should be the primarily responsible to solve their own problems. This background of the PSC seems to suggest that African leaders have intended to take primacy over the management of African conflicts because the one (UNSC) which should have played such role is not living up to its responsibilities.

The subsequent discussion on the legal documents of the AU also confirms the view that AU seem to intend the establishment of AUPSC as a meant to take primacy over the UNSC. This intention is reflected under article 4 (h) of the CA and article 16 & 17 of the protocol. Article 4 (h) of the CA empowers the AU to intervene in a member state to halt grave circumstances like genocide, war crimes and crimes against humanity.

As stipulated under the UN charter, the UNSC is primary organ on the maintenance of international peace and security and in particular the organ is empowered to have a final say on the use of force save for self defense and intervention up on concurrent consent. Contrary to this, the CA has empowered AU or its PSC to militarily intervene in one of the member states as of right. While conferring such right, the CA does not insert a language which requires the authorization of the UNSC which has the ultimate power to decide on such intervention. The

[223] Allian, " The True Challenges": 237-289, p.287

non-inclusion of such terms is also an intentional decision by African leaders as interviews with concerned officials confirmed. Interviews with the Head of the PSC Secretariat, the legal officer and advisor of AU, former Director of the PSC Directorate and many other officials from both the Legal office and PSC agree that the right of intervention under 4 (h) of the CA does not require authorization from the SC claiming the reluctance of the SC on matters of peace and security of Africa. They further made it clear that the Union or its PSC is not an arm of the UNSC rather has a capability and mandate to act independent of the UNSC, without giving due regard to the legal requirements of the Charter. With this understanding of the Union, African leaders have conferred their Union and the PSC the right of intervention which could be exercised without seal of approval from the UNSC; thereby arrogate the sole power of UNSC to themselves.

The AU intention to take primacy over the maintenance of peace and security of the continent through its PSC is further reflected under article 16(1) of the protocol which established the PSC. Under that article, the primacy is conferred on the Union itself despite the fact that the subsequent article seem to acknowledge the primary role of the UNSC. The first glance at article 17 (1) of the PSC protocol seem to suggest that the PSC admits the primacy of UNSC. However, the close looks at the subsequent sub-articles of article 17 expose the contrary. These sub-articles understated the primacy of the UNSC by putting it on equal footing with bodies like the Secretary-General of the UN, African members of the UNSC and further diffused the primacy by treating the UNSC as an organ whose assistance may be reverted where necessary. As a whole both the CA and the Protocol seem to turn the UNSC on its head and give the AUPSC primacy on matters related to the maintenance of African peace and security.

CHAPTER FOUR

THE PRACTICE

Introduction

It is clear that African States have played a more proactive role in the maintenance of peace, security and stability in Africa since the transition of OAU into AU and with the subsequent establishment of its own Security Council in 2004. The AUPSC is taking laudable and immediate responses to the conflicts of Africa with the back of the more interventionist provisions of the CA and the PSC protocol. This chapter investigates whether such proactive involvement, in particular the Peace Support Operations undertaken by the PSC is the reflection of African leaders' intention to arrogate the primacy of maintaining peace, security and stability of Africa for its own Security Council. To this end, the paper looks at the perception of African towards the deployment of the mission and examines whether such actions were with the intended purpose of supporting the UNSC or with the intent to take ownership.

The paper makes case review on three of the Peace Support Operations undertaken in response to the crisis in Burundi (AMIB), Darfur (AMIS) and Somalia (AMISOM). AMIB is selected as a case study because it is AU's first full peacekeeping operation so that give a good insight to the fresh motive of the Union. AMIS is selected because it will shed lights on the AU and its PSC's response for gross atrocities committed in one of its member state and it is a good case to show the possible relationship that could exist between the PSC and the UNSC. On the other hand, AMISOM is selected because the crisis in Somalia has a unique feature in which there is no strong central government and could be taken as crisis in a failed state. Therefore, it is a good opportunity to see the determination of the PSC to resolve conflicts in such situations. Furthermore, it's an ongoing mission.

4.1. Case Reviews

4.1.1. African Union Mission in Burundi (AMIB)

The detonator of the crises of Burundi was the assassination of President Melchior Ndadaye, Burundi's first democratically elected president and leader of the Hutu Front pour la Démocratie au Burundi (FRODEBU), by the Tutsi-dominated army, in 1993 which has resulted in open warfare between Hutu rebels and the military.[224]Like the case of Rwandan Genocide the manipulation of ethnicity remained at the heart of Burundi's violence.[225] The violence has claimed the life of around 300,000 people.

Upon the wake of the violence, a number of African leaders, including former Tanzanian president Julius Nyerere, former South African president Nelson Mandela and former South African deputy president, now the President of Republic of South Africa, Jacob Zuma, have sought a resolution to the conflict.[226] After serious of negotiations, in 2000, the Arusha Peace and Reconciliation Agreement was signed. The agreement was, however, not comprehensive as it did not include the major warring factions, the CNDD-FDD and PALIPEHUTU-FNL and also failed to provide a ceasefire agreement.[227] Subsequently, in October and December 2002, ceasefire agreements were negotiated between the Transitional Government of Burundi and the CNDD-FDD of Jean Bosco Ndayikengurukiye and the PALIPEHUTU-FNL of Alain Mugabarabona and the CNDD-FDD (Pierre Nkurunziza's faction) respectively however still the Rwasa faction of PALIPEHUTU-FNL.[228]

[224] Powell, "The African Union's Regime": 1-75, p.33
[225] Dr. Stephen Jackson, "The United Nations Operation In Burundi (ONUB) Political And Strategic Lessons Learned", *Conflict Prevention and Peace Forum*, (New York, July 2006), p.5
[226] Powell, "African Union's Regime": 1-75, p.33
[227] Ibid
[228] AU doc., Report Of the Interim Chairperson Of The Commission Of The African Union On The Situation In Burundi, the Central Organ of the Mechanism for Conflict Prevention, Management and Resolution, 88th Ordinary Session, Central Organ/MEC/AMB/2(LXXVIII, 14 January 2003. Note also that at the inception of the conflict, there were two armed fighting groups against the government of Burundi: the CNDD-FDD and Palipehutu-FNL. However, they latter split into four armed movements with the same name but with different leaders.

Article 8 of Protocol V of the Arusha Agreement provided that 'immediately following the signature of the Agreement, the Burundian Government shall submit to the UN a request for an international peacekeeping force'.[229] Under the subsequent October and December 2002 ceasefire agreements, the signatories shifted their support for the UN mission to AU mission. Under the October agreement, the signatories agreed that the international mission could be either form the UN or AU.[230] On the other hand, the December ceasefire agreement stated that African Mission shall be responsible for the monitoring and verifying the ceasefire agreement.[231]

Two days after the signing of this important ceasefire agreement, the facilitator of the ceasefire negotiations, Jacob Zuma, held a meeting with the UNSC. In his address to the SC, Zuma briefed the Council as to the uniqueness to the peace process[232] and the difficulties in the direct involvement by the UNSC and called the SC to play a backstop role behind the AU.[233]

The UNSC also made it clear that it will not authorize a UN Pease Operations until a comprehensive Ceasefire Agreement is reached.[234] It rather limited its role in supporting the efforts being undertaken by the AU.[235] On the contrary to UNSC's hesitance to peacekeeping

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[229] Arusha Peace and Reconciliation Agreement for Burundi, http://en.wikisource.org/wiki/Arusha_Peace_and_Reconciliation_Agreement_for_Burundi (accessed on September 12, 2010)

[230] Festus Agoagye, "The African Mission in Burundi Lessons learned from the first African Union Peacekeeping Operations", *conflict trends*(2004): 9-15, p-9

[231] Ceasefire Agreement Between the Transitional Government of Burundi and the National Council for the Defense of Democracy forces for The Defense Of Democracy (CNDD-FDD), December 2002, art. III, http://www.transitionaljustice.ulster.ac.uk/current%20projects/documents/documents/Post-1325PAswithreferencestowomenandgender.pdf (accessed on July 11, 2010).

[232] Zuma has referred the peace process unique because at the time a comprehensive peace agreement was not reached between the parties as one of the warring party, PALIPEHUTU-FNL of Agathon Rwasa was not still part of the December agreement. See The Report of the Interim Chairperson Of The Commission Of The African Union On The Situation In Burundi, Central Organ/MEC/AMB/2(LXXVIII)), Addis Ababa, 14 January 2003

[233] Address By HE Jacob Zuma, Deputy President Of The Republic Of South Africa And Facilitator Of The Burundi Ceasefire Negotiations, To The United Nations Security Council, New York, 4 December 2002. http://www.polity.org.za/article/zuma-un-security-council-on-burundi-ceasefire-negotiations-04122002-2002-12-04 (accessed on September 12, 2010) See also Statement On The Visit Of Deputy President Jacob Zuma To The Headquarters Of The African Union In Addis Ababa, Ethiopia, 14 January 2003. http://www.au2002.gov.za/docs/releases/dpzu030115a.html (accessed on September 12, 2010).

[234] At the time there was no all-inclusive cease-fire agreement yet as Agathon Rwasa's Palipehutu FNL was still outside the process

[235] Jackson, "ONUB – Lessons Learned" (2006), see also the Security Council's resolutions like UN doc., Security Council Resolution 1040, S/RES/1040, 29 January 1996, UN doc., Security Council Resolution 1049, S/RES/1049, 5 March 1996, UN doc., Security Council Resolution 1072, S/RES/1072, 30 August 1996 which the Council preferred to impose arm embargo and supporting the peace efforts of OAU instead of deploying a mission to Burundi.

deployment until a Comprehensive Peace Agreement (CPA) is concluded, there was a high eagerness on the side of AU in the deployment of Peacekeeping Operations even in the absence of CPA.[236] These factors coupled with the total shift of the signatories from UN mission to AU mission as evidenced in the December agreement led the Central Organ, which was the core decision-making body within the AU's Mechanism for Conflict Prevention, Management and Resolution at the time, to decide on the deployment of African Mission in Burundi (AMIB). Accordingly, the Central organ decided the deployment of an African mission in Burundi (AMIB) held on 2 April 2003 upon the conclusion of Status of Force Agreement (SOFA) between AU and the transitional government of Burundi.[237] The mission was mandated, among others, to monitor and verify the implementation of the Ceasefire agreement, secure identified assembly and disengagement area, facilitate the movement of the combatants towards the assembly area and the delivery of humanitarian assistance, facilitate and provide technical assistance to the disarmament, demobilization and reintegration (DDR) process.[238] This mission was not mandated to protect civilians. Therefore, the mission was initially a traditional peacekeeping deployed to enforce the Arusha peace accords and the rules of engagement (ROEs) was based on use of force in case of self-defense. This was however changed when senior AMIB officials drafted ROEs which specifically granted troops of AMIB the mandate to intervene with force to protect civilians under imminent danger of serious injury or death with prior authorization from military and civilian officers.[239]

The deployment of AMIB was seen within the context of the Union's Constitutive Act in the sense that the deployment was decided with the acknowledgement of its responsibility for the management and resolution of conflicts on the continent and with the recognition that the Union should act in situations where the international community is unwilling or unable to provide robust peace support.[240] This mission is also one reflection of African leaders to make the Union

[236] Jackson, "ONUB-Lessons Learned" (2006)
[237] AU doc., Central Organ of the Mechanism for Conflict Prevention, Management and Resolution communiqué, 91st Ordinary Session, Central Organ/MEC/AMB/Comm. (XCI), 2 April 2003. The objectives assigned to the mission were to oversee the implementation of the Ceasefire Agreements, Support disarmament and demobilization initiatives and advise on reintegration of combatants. Strive towards ensuring that conditions favorable for the establishment of a UN Peacekeeping mission, Contribute to political and economic stability in Burundi.
[238] April 2003 communiqué, p.2
[239] Powell, "African Union's Emerging Regime": 1-75, p.35
[240] cited in Powell, "The African Union's emerging Regime": 1-75, p.35

the first actor in resolving African conflicts. For instance, the then Chairperson of the AU, South African President Thabo Mbeki and other African leaders saw the deployment of the mission as a crucial opportunity to show AU's departure from its predecessor and to assign itself a prominent role in delivering on a peace and security agenda in Africa.[241]

AMIB was also taken as "the first operation wholly initiated, planned and executed by AU members".[242] The mission was also deployed without the SC's authorization. It was after the deployment of the mission that the SC welcomed the efforts of Union.[243] Furthermore, the fact that AU's appeal for UN and the international community to provide financial and logistical support to the mission after it has taken the decision of deployment seem to support the argument advocated under Chapter three that on matters of peace and security in Africa, the Union or its organ take the primary responsibility and the UNSC is considered as an organ whose financial and logistical support could be appealed.

Though the organization has showed its courage and determination to act in a situation where peace is sporadic and at the time where a comprehensive peace agreement is not concluded, the Union has suffered a stiff financial and logistical problem to sustain the mission it has deployed for longer period of time.[244] As a result of these serious financial and logistical difficulties it encountered, the Union requested the assistance of the UN in taking over the peacekeeping

[241] Ibid, p.35

[242] Tim Murithi, "The African Union's evolving role in peace operations: the African Union Mission in Burundi, the African Union Mission in Sudan and the African Union Mission in Somalia", *African Security Review* 17.1 (n.d.): 70-82, p.75

[243] Under the presidential statement of the UNSC, it was stated that the UNSC supports the speedy deployment of the African Mission to Burundi to facilitate the continuing implementation of the ceasefire agreement. See Statement by the President of the Security Council, S/PRST/2003/4, May 2003. See also UN doc., Security Council Resolutions 1545, S/RES/1545, 21 May 2004.

[244] Different papers have been worked to assess AU's involvement in Burundi. For instance, look at: Agoagye, "the African Mission in Burundi": 9-15 and Emma Svensson, "The African Mission in Burundi: Lessons learned from the African Union's first Peace Support Operation", FOI Report, FOI-R-2561-SE, (Stockholm, 2008). These assessments on the mission find out that though the mission showed the willingness and determination of the Union to engage militarily in a dangerous situation where there is no peace to keep at all, the mission was seriously underfunded and wouldn't have been able to sustain the mission had it not been for the limited support granted from the international community, which was not even enough to implement the mandate of the mission. For instance, the budget for the deployment, operations and sustainment for the first year was estimated to amount US $110 Million. The AU had no resource to fund the mission and depended on the pledges from traditional partners. Surprisingly, the amount obtained from such partners was only US $50 million which fell far short from the estimated budget. Even, the contingents from Ethiopia and Mozambique were lifted by US and UK. This has seriously jeopardized the effectiveness of the mission. As the Secretary-General in his Report on Burundi (S/2004/210) stated, "the financial and logistical constraints under which AMIB is operating prevent the force from fully implementing its mandate".

mission in Burundi.[245] The UNSC, accordingly, with the consideration of the report of the Secretary-General and after making sure that a conducive environment is created by the AU, decided to authorize the deployment of a peacekeeping operations in Burundi (ONUB) under its resolution 1545 (2004), as a Chapter VII action.[246] The Council further decided the mission to consist of a maximum of 5,650 military personnel, including 200 observers and 125 staff officers, up to 120 civilian police personnel, as well as the appropriate civilian personnel.[247]

Analysis

AU's involvement in the crisis of Burundi demonstrates its determination to remain non indifferent to its conflicts which could be taken as one big departure from the experience of its predecessor. The Union in this case did not let the UNSC seat and watch another Rwanda to happen until a Comprehensive Peace Agreement is reached. The Union rather acted promptly to stop further atrocities. In this regard, AU decided, planned and effected its own decision for the deployment of Peace Support Mission and took the primacy in managing the conflict. On the contrary, the UNSC played not a primary role in this case rather a backstop role to the efforts of the Union.

4.1.2. African Union Mission in Sudan (AMIS) and UN-AU Hybrid Mission in Darfur (UNAMID)

The eruption of the conflict in Darfur since February 2003 has been considered as the biggest challenge posed to the AU since its establishment. The conflict was perceived as a test of the Union's capacity to resolve its own conflicts and its determination to fully implement the relevant principles stipulated in its Constitutive Act.[248] African leaders have taken the conflict as an opportunity to show the international community that the continent is capable of solving its

[245] UN doc., Report of the Secretary General on Burundi, S/2004/210, 16 March 2004, p.22. See also AU doc., AU Peace and Security Council Communiqué, 2nd Ordinary Session, PSC/PR/Communiqué (II), 25 March 2004. See also AU doc., AU Peace and Security Council Communiqué , 7th session, PSC/PR/Communiqué (VII), 3 May 2004.
[246] See Security Council Resolution 1545
[247] Ibid
[248] See AU doc., " The African Union and the Conflict in the Darfur Region of the Sudan: Meeting the Challenges of Peace, Security and Stability", CONF/PLG/2(I), compilation of the reports on Darfur submitted to the Peace and Security Council (PSC) of the African Union (AU) by the Chairperson of the AU Commission, 26 May, 2005.

own problem.[249]In this regard, the then AUC Chairperson, Konare stressed the importance of the AU showcasing its ability as an actor in international peace and security: 'Africa must not only act in Darfur, Africa must be seen to act.'[250]

Furthermore, there was a strong support from the members that AU should take the lead in the management of the conflict claiming that the issue is an African issue and as a result demands the involvement of Africans and not any other foreign intervention. In support of this view, the presidents of Libya, Nigeria, Sudan, Egypt and Chad, as well as the AUC Chairperson, Konaré met in Tripoli in October 2004 and rejected, 'any foreign intervention by any country …..in this pure African issue'.[251] The mini-summit rather calls the international community to support the efforts being played by AU.[252] Similarly, President Mbeki of South Africa stated in a June 2005 meeting with US President Bush on Darfur that 'It's critically important that Africa deals with these conflict situations on the continent ..... We have not asked for anybody outside of the African continent to deploy troops in Darfur. It's an African responsibility, and we can do it.'[253] This was the reflection of many other African governments to chart their own future by themselves and their laudable desire for self-reliance.[254] The intention of the AU to take the primary role in solving the Darfur conflict was further reflected under the official documents of the Union. The September and July communiqués of the PSC stressed the need for the AU to continue to play its leading role in the efforts to find a solution to the conflict.[255] These facts affirm the argument that African leaders by establishing their own PSC have intended to make it the first actor and take primacy and take ownership over the conflicts of Africa.

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[249] AU's special Representative to Darfur, Nigerian Ambassador Baba Gana Kingibe, has put the importance of this conflict for the legitimacy of the Union stating 'We stand or fall in Darfur'.
[250] Cited in Alex de Waal and Julie Flint, *Darfur: A Short History of a Long War* (London: Zed Books, 2005), p.119
[251] African Mini-Summit on Darfur, Final Communiqué, Tripoli, 17 October 2004. http://www.darfurconsortium.org/member_publications/2004/DRDC.BP2.102504.pdf (accessed on September 18, 2010).
[252] Ibid
[253] Susan E. Rice, "Why Darfur Can't Be Left to Africa", *Washington Post*, 7 August 2005, B4. Available at: http://www.brookings.edu/articles/2005/0807africa_rice.aspx
[254] Ibid
[255] See AU doc., AU Peace and Security Council Communique, 16th meeting, PSC/PR/Comm.(XVI), September 2004 and AU doc., AU Peace and Security Council communiqué, 13th meeting, PSC/PR/Comm.(XIII), 27 July, 2004

With this understanding that the Union or its PSC should take the lead role in solving the crisis of Darfur, the Union had devised a two-prong strategy: an operational aspect and a political aspect.[256] The former centered on the deployment of AU Mission in Sudan (AMIS) while the latter aimed at finding a durable political settlement to the conflict.[257]

Efforts to resolve the conflict were initially conducted by Chad as it has become the primary victim of the conflict due to a mass move of displaced persons. The first outcome was a ceasefire agreement between the Government of Sudan (GoS) and the Sudan Liberation Movement/Army (SLM/A) on September 3, 2003 in Abeche.[258] However, a more comprehensive Humanitarian Ceasefire Agreement (HCFA) was reached on April 8, 2004 among the GoS, the SLM/A and the Sudan Justice and Equality Movement (JEM), the major actors in the conflict, under the auspices of President of the Republic of Chad, and the Chairperson of the AUC.[259] The agreement has established a cease-fire commission (CFC) composed of 2 high ranking officers from the Parties, the Chadian mediation and the international community.[260]The AUPSC at its 10th meeting held on 25 May 2004, authorized the Chairperson of the Commission to take all necessary steps to ensure the effective monitoring of the HCFA through the deployment of an AU Observer Mission.[261]

The Commission then convened a meeting in Addis Ababa from 27 to 28 May 2004 which brought all of the signatories to the N'djamena HCFA together. The meeting resulted in the Agreement on the Modalities for the Establishment of the CFC and the Deployment of Observers in Darfur. The agreement stipulated that the operational arm of the CFC be the AU Monitoring Mission with a protection force.[262] The Chairperson of the AUC then established an AU assessment Mission to identify camp sites for the CFC and the protection force and other related

[256] See "Meeting the Challenges of Peace, Security and Stability", p.1
[257] Ibid
[258] Appiah Mensah, "AU's Critical Assignment In Darfur: Challenges And Constraints", *African Security Review* 14(2) (2005): 7-21, p.7
[259] April 2004 Humanitarian Ceasefire Agreement on the Conflict in Darfur, April 2004 http://www.darfurinformation.com/cf_ceasefire_agreement.asp (accessed on September 18, 2010).
[260] Humanitarian Ceasefire Agreement, art. 3
[261] AU doc., AU Peace and Security Council communiqué, 10th meeting, PSC/AHG/Comm.(X), 25 May 2004.
[262] Agreement with the Sudanese Parties on the Modalities for the Establishment of the Ceasefire Commission and the Deployment of Observers in the Darfur, African Union, May 28, 2004, Addis Ababa. http://www.sudanembassy.ca/Docs/Agreement_sudanese_parties_on_darfur.pdf (accessed on September 24, 2010).

tasks. Accordingly, the assessment mission visited Darfur from May 7 to 13 and negotiated a Status of Mission Agreement (SOMA) with the GoS. In accordance with the assessment, the PSC decided that a mission (AMIS) should be made up of an unspecified number of MILOBS) with a limited mandate of monitoring the ceasefire agreement and protect the monitors as well as themselves.[263] The mission was then decided to strengthen with force of 300 soldiers composed from Nigeria and Rwanda.[264] It is agreeable that the initial mission of AMIS is a MILOBS and its mandate does not include protection of civilians as such.[265] Here, it is worthy to reiterate the statement of Rwandan Army Spokesman, Colonel Patrick Karegeya which clearly shows the Africans belief that they should be the care taker for themselves. He stated that 'We know the international community isn't always there for Africans, so we have to be there for ourselves'.[266]

The effort of the Union in deploying a Ceasefire Monitors with the protection force was supported and endorsed by the UNSC through its resolution 1556 (2004) after the facts.[267]Under this resolution, the UNSC also decided that the situation in Darfur constitutes a threat to international peace and security.[268] However, the leading role in finding political as well as military solutions to solve the problem was left to the Union and the SC in this regard supported such role being played by AU.[269]

The AUPSC taking note of the continuing breach of the CFA by both parties, has found a much expanded peacekeeping mission with a larger force and stronger mandate necessary. As a result, on July 27, 2004 the AUPSC "requested the Chairperson of the Commission to prepare and submit to it, for consideration, a comprehensive plan on how best to enhance the effectiveness of the AU Mission on the ground, including the possibility of transforming the said Mission into a

[263] Arvid Ekengard, "The African Union Mission in Sudan (AMIS): Expriences and Lessons Learned", Defense analysis (Stockholm, 2008), p.17, http://www.foi.se/upload/projects/Africa/foir2559.pdf (accessed on September 18, 2010).
[264] Ibid
[265] However, even in this case, the President of Rwanda and his army spokesman give some insight that even without authorization and proper mandate, his army may intervene forcefully to protect civilians. On the date of the deployment of Rwandan forces in Darfur, the president stated that his soldiers would intervene to protect civilians in danger and will not stand by and watch innocent civilians being hacked to death like the case in Rwanda in 1994. (See William G. O'Neill and Violette Cassis, *Protecting Two Million Displaced: The Successes and Shortcomings of the African Union in Darfur.* Brookings-Bern Project on Internal Displacement, (November 2005), p. 28). Similarly,
[266] *ABC News*, 'Rwanda troops start AU mission in Darfur', 15 August 2004.
[267] See UN doc., Security Council Resolution 1556, S/RES/1556, 30 July 2004
[268] Ibid
[269]Ibid

full-fledged peacekeeping mission."[270] This communiqué of the PSC was welcomed by the UNSC under its resolution 1556 and 1564.[271] What is striking in these resolutions is the fact that the SC clearly asserted the leadership role of the AU in solving the conflict and sorted to play a supportive role to the efforts of the Union through its own PSC.[272] This exactly fits with the statement of the Head of the PSC Secretariat who claimed that 'AUPSC leads and the UNSC follows'.[273]

Based on the report by the Chairperson, the 17th meeting of the PSC held On October 20, 2004, decided to strengthen AMIS. It was decided that the enhanced mission shall consist of 3,320 personnel, including 2,341 military personnel, among them 450 observers, up to 815 civilian police personnel, as well as the appropriate civilian personnel[274]. The enhanced mission was mandated, among others, to monitor and observe compliance with HCFA, contribute to a secure environment for the delivery of humanitarian relief and most importantly protection of civilians who are under imminent threat within the immediate vicinity and returning internally displaced persons to their home.[275] Here, it is clear that AMIS has been changed from a mere MILOBS into a robust and multidimensional peacekeeping mission with a strong mandate of civilian protection. Though the lead was taken by AUPSC, the UNSC has supported the decisions of such decisions of the AUPSC which even goes to the extent of threatening the GoS to impose sanction if it fails to cooperate with AUPSC.[276]

[270] AU doc., AU Peace and Security Council Communiqué on the Crisis in Darfur region, 13th meeting, PSC/PR/Comm.(XIII), 27 July 2004 , para. 9
[271] See Security Council Resolution 1556 and Security Council Resolution 1564
[272] In both Security Council Resolution 1556 and 1564. The SC welcomed the leadership role and the engagement of the AU to address the situation in Darfur and expressing its readiness to support fully these efforts.
[273]Interview with Dr. Kambudzi.
[274] AU doc., AU Peace and Security Council Communiqué, 17th meeting, PSC/PR /comm./XVII), 20 Oct. 2004, para. 4
[275] See, the October 20, 2004 Communiqué
[276] UN doc., Security Council Resolution 1574, S/RES/1574, 19 Nov. 2004, para.2 and 13; under this resolution the SC under its paragraph 13stated its strong support to the 'decisions of the African Union to increase its mission in Darfur to 3,320 personnel and to enhance its mandate to include the tasks listed in paragraph 6 of October 20,2004 communiqué , and further *urged* Member States to provide the required equipment, logistical, financial, material, and other necessary resources.' It also threatened the GoS to fully cooperate with the AU.

It is also important to take note that the extended mission was deployed with the clear consent of the GoS and the other factions, JEM and SLM/A.[277] However, still the continuation of the violation of ceasefire agreement and abuses of human rights in Darfur initiated the dispatch of AU led assessment mission in March 2005.[278] In the same month while the AU was struggling to find out a political solution to the case, the UNSC followed a completely different path. The UNSC under its resolution 1593 (2005) reached on the conclusion to refer the matter in Darfur to the prosecutor of the ICC acting under its Chapter VII mandate.[279] Under this resolution, the Council obliges 'all states and concerned regional and other international organizations to cooperate fully' to the ICC and the prosecutor.[280]

On 14 July 2008, the Prosecutor of ICC recommended that a warrant of arrest be issued for Sudanese President Al Bashir for his involvement in the war crimes and crimes against humanity committed in Darfur between 2003 and 2008. On 4 March 2009, the ICC Pre-Trial Chamber decided to issue the warrant.[281] The PSC in this case, instead of complying with the decision of the SC as it was supposed to do; rejected the referral and on the contrary, the PSC requested the UNSC to suspend its decision.[282] This has further reflected the claim of PSC's ownership over the continent and further suggests that the PSC cannot remain a mere implementer to the decision of the SC on Africa's security concern, as the UN Charter stipulates.

Coming to the issue of strengthening the deployment of AMIS, the AUPSC, considering the report of the assessment mission and the report of the chairperson of the commission decided that AMIS strength be increased to a total of 6,171 military personnel, with an appropriate civilian component, including up to 1,560 civilian police personnel, by the end of September

[277] See the October, 2004 Communiqué, art. 2. Further, in a session on 26 October, the Sudanese Parliament endorsed the deployment of additional AU forces to Darfur. See Report of the Secretary-General on the Sudan Pursuant to Paragraph 15 of Security Council Resolution 1564 and Paragraphs 6, 13 and 16 of UN doc., Security Council Resolution 1556 , S/2004/8812,2 November 2004. See also the Protocol on the improvement of the humanitarian situation in Darfur in which the parties to the agreement agreed to strengthen AMIS on the ground.
[278] Ekengard, "African Union Mission in Sudan", p.20
[279] See UN doc., Security .Council Resolution 1593, S/RES/1593, 31 March 2005.
[280] Security Council Resolution 1593, p.1
[281] ICC, Pre-Trial Chamber I, Warrant of Arrest for Omar Hassan Ahmad Al Bashir, Doc. ICC-02/05-01/09 (4 March 2009), www.icc-cpi.int/iccdocs/doc/doc639078.pdf (accessed on September 23, 2010).
[282] See AU doc., AU Peace and Security Council Communiqué,142nd Meeting,, PSC/MIN/Comm(CXLII)Rev.1, 21 July 2008, annexed to Letter dated 21 July 2008 from the Permanent Observer of the African Union to the United Nations addressed to the President of the Security Council, UN Doc. S/2008/481, 23 July 2008; AU doc., AU Peace and Security Council Communiqué, 151st Meeting,, PSC/MIN/Comm.1(CLI), 22 September 2008.

2005.[283] Despite all these efforts by the AU, the situation in Darfur had shown no progress. Rather, let alone the AMIS protect the violation of the agreement and the human right abuse, the mission itself needed protection as the number of peacekeepers were not in proportion to a region with the size of France and the mission was under stiff financial and logistical problem.

At its 45th meeting held on 12 January 2006, the PSC considered the situation in Darfur, and expressed its support, in principle, to a transition from AMIS to a UN operation within the framework of the partnership between the AU and the UN in the promotion of peace, security and stability in Africa.[284] This intention of transition then faced a strong condemnation by the GoS. The first of such opposition came during the debate at the PSC meeting of 12 January 2006. The Sudanese Minister of Foreign Affairs, Lam Akol, in the debate, argued against any of such transition to the UN on the ground that "it would reflect badly on the desire of Africans to resolve their own problems, which the AMIS operation was indeed meant to showcase". [285] Sudan in this case seems to base its argument on the primacy of the PSC over the continent.

On 5 May 2006, African Union efforts to seek a political solution alongside with the military deployment, to the crisis in Darfur culminated in the signing of the Darfur Peace Agreement (DPA). Then, The Secretary-General of the UN urged the Government of the Sudan to accept a United Nations peacekeeping mission in Darfur, arguing that the peace in southern Sudan could be put in jeopardy.[286]

The Secretary-General in his report to the UNSC recommend that subject to the consent of the GoS and in concurrence with other parties to the DPA, an expansion of the unified United Nations Mission in the Sudan (UNMIS) into the Darfur region as from 1 January 2007 with the priority of protecting civilians.[287] The UNSC accordingly, decided the strengthening of the UNMIS up to 17,300 military personnel and an appropriate civilian component including up to

[283] AU doc., AU Peace and Security Council communiqué, 28th meeting, PSC/PR/Comm(XXVIII), 28 April 2005, para. 9
[284] See AU doc., AU Peace and Security Council communiqué, 45th meeting, PSC/PR/Comm.(XLV), 12 January 2006.
[285] AU doc., Report Of The Chairperson Of The Commission Pursuant To Paragraph 5 Of The PSC Communiqué PSC/PR/Comm (XLV) Of 12 January 2006 On The Situation In Darfur, PSC/MIN/2(XLVI), 10 March, 2006, p.1
[286] Ibid
[287] UN doc., Report of the Secretary-General on Darfur, S/2006/591, 28 July 2006, paras. 61-62

3,300 civilian police personnel and up to 16 Formed Police Units.[288] Furthermore, the Council taking note of the AUPSC decision to transfer the AMIS into a UN Peacekeeping operations, it requested the Secretary-General to consult jointly with the African Union on a plan and timetable for a transition from AMIS to a United Nations operation in Darfur.[289] However, the deployment of the mission was conditioned upon the explicit consent of the GoS which is unlikely to happen.

The idea of the deployment of UN peacekeeping was rejected by the GoS in strongest terms. President Bashir regarded the idea of UN peacekeeping mission as a colonialist attempt to subjugate the country and threatened that "his government would turn Sudan and Darfur into a graveyard for any foreign troops venturing to enter".[290] President Bashir rather suggested the strengthening of the AMIS with the backing of UN.[291] Therefore, the idea of a hybrid mission culminated as a compromise to the refusal of the GoS for UN Mission. In relation to this, President Bashir stated that 'we have accepted a hybrid operation,' but the 'the base of this force would be African forces'.[292] He added that 'with a strong logistical, human, technical and other support, the African Union can maintain peace'.[293] After an extensive negotiation, the GoS accepted the hybrid mission and the UNSC by its resolution 1769 (2007) authorized the establishment of the United Nations-African Union Hybrid Operation in Darfur (UNAMID) under as a Chapter VII action.

What is striking here is the transition of AMIS in to UNAMID has caused a serious disagreement and tension between AU and UN or their specific organs. The tension arose in the composition and command of the mission. As per Resolution 1769, the new mission shall consist of 19,555 military personnel including 360 military observers and civilian component including up to 3,772 personnel.[294] And, the mission will incorporate AMIS personnel on the ground and maintain a predominantly African character however filling the rest of the force from non-

[288] UN doc., Security Council Resolution 1706, S/RES/1706, 31 August 2006, para.3
[289] Ibid, para.7
[290] cited in Peter Kagwanja and Patrick Mutahi, "Protection of Civilians in African Missions: The Case of The African Union Mission is Sudan, Darfur", *ISS Paper* 139, (May 2007): 1-20, p.10
[291] Ibid
[292] cited in Kagwnaja and Mutahi, "Protection of Civilians": 1-20, p.11
[293] Ibid
[294] See See UN doc., Security Council Resolution 1769, S/RES/1769, 31 July 2007, para. 2

African countries.[295] Though the stance of the UNSC was to make the composition of UNAMID predominantly an African, the Chairperson of the Commission insisted to make UNAMID entirely an African suggesting that all uniformed personnel should come from Africa.[296] The AU determination to take the ownership on the UNAMID was further reflected on the issue of the chain of command. Though the Security Council resolution established a joint special representative, who still remains as African,[297] the Chairperson of the Commission again insisted that the force should be under AU control.[298] Even the final composition of the mission has predominantly reflected an African nature as the majority of peacekeepers have come from Africa[299] and the main posts like the Force Commander of the Mission[300], the joint AU-UN Special Representative for the Mission (JSR)[301], the Deputy JSR for the Operations[302] and Management and the Police Commissioner[303] are all Africans. These all facts clearly demonstrate the tendency of Africans to totally own the missions in Africa thereby affirming their claim of primacy over the matters of Africa.

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[295] Ibid, Preamble

[296] See "Finally…a UN Mission in Darfur: The First Step in a Long, Difficult Journey", (September 26, 2007), http://www.stimson.org/spotlight/finallya-un-mission-in-darfur-the-first-step-in-a-long-difficult-journey/ (accessed on October 2, 2010); John Prendergast, Colin Thomas-Jensen, and Julia Spiegel, "How to Get the UN/AU Hybrid Force Deployed to Darfur", *Enough Strategy Briefing* 6 (October 2007): 1-7, p.4, http://www.enoughproject.org/files/publications/darfurhybrid.pdf (accessed on October 2, 2010).

[297] Under Security Council Resolution 1769 (2006), Rodolphe Adada (from the Republic of Congo) was appointed as the AU-UN Joint Special Representative and the Force Commander of the Mission will report to this Joint representative.

[298] See "Finally…. a UN Mission in Darfur". See also Prendergast, Jensen and Spiegel, " How to get UN/AU Hybrid Force": 1-7.

[299] As of 30 August 2010, UNAMID was consisted of 22,007 total uniformed Personnel which is made up of 16,954 troops, 4,795 police officers and 258 military observers. Troop contributors of the mission include Bangladesh, Bolivia, Burkina Faso, Burundi, Cameroon, Canada, China, Egypt, Ethiopia, Gambia, Germany, Ghana, Indonesia, Italy, Jordan, Kenya, Malawi, Malaysia, Mali, Namibia, Nepal, Netherlands, Nigeria, Pakistan, Republic of Korea, Rwanda, Senegal, Sierra Leone, South Africa, Tanzania, Thailand, Togo, Uganda, Yemen, Zambia and Zimbabwe. See http://www.un.org/en/peacekeeping/missions/unamid/facts.shtml

[300] The first appointed Force Commander was General Martin Agwai from Nigeria. Since Sept. 1, 2009, Lieutenant General Patrick Nyamvumba of Republic of Rwanda is the Force Commander.

[301] Rodolphe Adada of the Republic of Congo had been appointed as a joint AU-UN Special representative for the mission (JSR).The current AU-UN Joint Special Representative of the mission is Ibrahim Gambari of Nigeria since January, 2010.

[302] The current deputy JSR for the mission is Mohamed Yonis from Somalia, see UNAMID leadership available at http://www.un.org/en/peacekeeping/missions/unamid/leadership.shtml

[303] The current Police Commissioner of the mission is James Oppong-Boanuh from Ghana, see http://www.un.org/en/peacekeeping/missions/unamid/leadership.shtml

Analysis

The argument that with the establishment of the AUPSC, the African leaders have intended to make the PSC the primary actor in the security of the continent is further evidenced by the response of the PSC in the Darfur crisis. From the inception of the conflict, the PSC was actively involved in finding both political as well as military solution for the conflict. The African states have made their intention very clear in this conflict that they want to deal their matter by themselves. In this regard, it is worth to notice the categorical declaration made by major African state actors like Nigeria, South Africa and Libya that the Darfur crisis is the internal problem of Africa and need to be solved by Africans through their own PSC and rejected any intervention from the outside world which seem to challenge the primacy of UNSC over peace and security of Africa. The AUPSC authorization of fully fledged peacekeeping operation in Darfur also signals the total shift from non-intervention principle of the OAU into non-indifference principle which in turn signifies the determination of the Union to assume full responsibility in resolving African crisis. The PSC in this case had expanded the size of troops and gave them an explicit mandate to protect civilians. As Dr. Peter Kagwanja observed, the decision to deploy such a large peacekeeping force in Sudan with an explicit mandate to protect civilians is derived from its own Constitutive Act.[304] Therefore, employing those of expansive mandates of the CA and the PSC Protocol, the PSC has taken a lead in responding to the Darfur conflict. As a whole, the involvement of the PSC in the Darfur crisis demonstrates the fact that the organ has taken a primary role in resolving the conflict both politically and militarily. Facts like the intention of some major African leaders to solve the Darfur crises by themselves, the strong resistance and objection of the Union or its members to the obligatory decision of the UNSC on Al Bashir and the move of the PSC to be the first in responding to the conflict seem to reflect the Africans motive of dealing their matter with their own PSC. Furthermore, even after the transition of the AU led mission in to a hybrid mission, the Union was insisting to make the mission under AU

[304] Dr. Peter Kagwanja, "Darfur: an African Union peace-keeping crucible?", Paper Presented at a conference Convened by the Center for International Political Studies, on: *Keeping Peace in Tough Neighborhood: The Challenges Confronting Peacekeepers* in Africa, or at the South African Defense College, John Rissik Avenue Waterkloof, Pretoria, 14 September 2004, http://www.cips.up.ac.za/old/Publications/KTP_Dr_Peter_Kagwanja_ICG.pdf (accessed on September 18, 2010).

control which turns out the motive of Africans claim of primacy. This lends additional support to the argument advocated so far.

4.1.3. African Union Mission in Somalia (AMISOM)

Since the end of 1970's, instability in Somalia became the realties and resulted in the culmination of civil strife and the collapse of the central authority in 1991.[305] Since then, Somalia has entered in the situation of statelessness and never breathed the air of peace. Serious human right abuses, indiscriminate killing of civilians, widespread rape and violence against women and children, arbitrary detention and others became the wide spread phenomenon.[306]

To avert the then going atrocities and serious human right violations, a United States-led humanitarian and nation-building intervention under the auspices of the UN (the Unified Task Force, UNITAF) was initiated in 1993. However, the mission was withdrawn in 1995 after a firefight in Mogadishu resulted in US troop casualties. Subsequently, the preceding UN Peacekeeping Operation in Somalia, UNOSOM I and II also withdrew in March 1995.[307] Following the withdrawal, warlords continue to ravage the country and its people.

IGAD on its part launched several peace processes to build a new Somalia Unity Government which has resulted in the election of Abdullahi Yusuf Ahmed as the transitional federal president of Somalia and the establishment of the Transitional Federal Government (TFG) and Transitional Federal Institutions (TFIs).[308]The TFG gained broad acceptance and recognition by the Somalis and made progress in institutionalizing the country.[309] However, the efforts of TFG were greatly hampered by the lack of institutional capacity and resources which as a result was not able to effectively control areas of Somalia beyond Baidoa.[310] On the other hand, the Islamic Court of Union (ICU) emerged as a major player in Somalia alongside the TFG.[311]

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[305] "Background and political developments", http://www.africa-union.org/root/AU/AUC/Departements/PSC/AMISOM/AMISOM_Background.htm (accessed on September 26, 2010).
[306] Ibid
[307] Ibid
[308] Ibid
[309] Ibid
[310] Ibid
[311] Ibid

Yesuf, in his visit to the AUC, requested a 15 to 20 thousand peacemaking force comprising the Frontline States, Africa at large, brotherly Arab States and the rest of the world, including Indian Ocean countries.[312] IGAD, on its part, issued a communiqué on the 31 January 2005 meeting in Abuja, Nigeria, on their intentions to deploy a Peace Support Mission to Somalia (IGASOM) to provide security support for the TFG.[313] The twenty-fourth meeting of the AUPSC held in Addis Ababa on February 7, 2005 Authorizes IGAD to deploy a Peace Support Mission in Somalia and at the same time the Council requested the commission to report in detail on the possibility of establishing an AU Peace Support Mission in Somalia.[314] The UNSC also authorized IGASOM under its resolution 1725 (2006) to protect and train the security forces of the TFG.[315]

However, the composition of the mission posed a big challenge for the deployment of the mission. For instance, members of parliament and ministers issued a press statement in Nairobi in which they welcomed AU troops, but categorically opposed the deployment of troops from the frontline states.[316] Further, the ICU made a significant military advancement in the spring of 2006 and by June 2006, they controlled Mogadishu and its environ.[317] In December 2006 Ethiopia intervened in support of the TFG which it was able to defeat the ICU swiftly.

The presence of Ethiopia in Somalia had renewed insurgency and decided to withdraw.[318] The international community recognized the danger of the withdrawal of Ethiopia's troops in that Somalia will relapse into a state of anarchy without a strong force replacing the Ethiopians to assist the TFG consolidate its position.[319] This condition reinforced the call for AU and IGAD to deploy troops. As above mentioned, because of the strong opposition that frontline states from IGAD should not be part of the mission, Sudan and Uganda were the only options left however practically Uganda was the only viable troop contributor as Sudan was indulged with its own

[312] See AU doc., The Report Of The Chairperson Of The Commission On The Support Of The African Union To The Transitional Institutions Of Somalia , PSC/PR/2(XXII), January 2005
[313] IGAD, "Communiqué on Somalia", 31 January 2005, cited in Hull and Emma Svensson, "African Union Mission in Somalia (AMISOM): Exemplifying African Union Peacekeeping Challenges", (Stockholm, 2008), p.18, http://www.foi.se/upload/projects/Africa/FOI-R--2596--SE.pdf (accessed on September 26, 2010).
[314] See AU doc., AU Peace and Security Council communiqué , 24th meeting, PSC/PR/Comm. (XXIV), 7 February 2005
[315] See UN doc., Security Council Resolution 1725, S/RES/1725, 6 December 2006, para. 3
[316] See UN doc., Report of the Secretary-General on the situation in Somalia, S/2005/392, 16 June 2005, para. 9
[317] Hull and Syensson, " African Union Mission in Somalia", p.18
[318] Ibid, p.19
[319] See "Background and Political Developments"

conflicts.[320] Therefore, it became necessary to shift from IGASOM into an AU Mission so that there will be a wider military contributors from the rest of AU members. Against this background, at the 69th meeting held in Addis Ababa, a decision was reached to deploy an African mission to Somalia (AMISOM).[321] This mission has got the *ex ante* authorization of the SC through resolution 1725. Under this resolution in which the SC is acting in its Chapter VII mandate it 'decided to authorize IGAD and Member States of the African Union to establish a protection and training mission in Somalia, to be reviewed after an initial period of six months by the Security Council with a briefing by IGAD'.[322] The PSC while deciding to deploy AMISOM also recalled Resolution 1725 (2006).[323] The UNSC also gave a "green light" to the PSC to establish AMISOM for six months under its resolution 1744 (2007).[324] This resolution further authorized the AMISOM' to take all measures, as appropriate,' to carry out its mandates.[325]

In this mission, the motive of the Union to take over the primacy is reflected on the commitments of the Union in resolving the most dangerous conflict and its firm conviction that the Union remains the primary responsible body to react against the conflict. This is showed in the Report of the Chairperson of the Commission, dated 19 January 2007. According to the report, the decision of the deployment of AMISOM was based on two considerations. At the one hand, the deployment is made with the recognition that AU is the primary responsible body for the maintenance of peace and security in the continent.[326] This idea was reflected in its clearest terms under the Report of the Chairperson which was submitted to the 69th meeting of the PSC. The report states that

[320] Hull and Svensson, African Union Mission in Somalia, p.24
[321] AU doc., AU Peace and Security Council communiqué, 69th meeting, PSC/PR/Comm(LXIX), 19 January 2007, para. 8. The mission is also endorsed by UN doc., Security Council Resolution 1744, S/RES/1744, 21 February 2007
[322] See UN doc., Security Council Resolution 1725, S/RES/1725 (2006), 6 December 2006
[323] AU doc., AU Peace and Security Council communiqué, 69th meeting, PSC/PR/Comm(LXIX), 19 January 2007.
[324] See Security Council Resolution 1744
[325] Ibid
[326] AU doc., Report Of The Chairperson Of The Commission On The Situation In Somalia, PSC/PR/2(LXIX), 19 January 2007, para.38

> *The African Union is the only Organization the Somali people could readily turn to as they strive to recover from decades of violence and untold suffering. We have a duty and an obligation of solidarity towards Somalia.*[327]

Despite the difficult situation in Somalia, a country that has been without central Government for almost two decades and a country where security remains largely precarious, and the strong limitations of the Organizations to oversee large scale Peace Support Operation (in terms of finance and logistics), the Union was determined to act with the cognizance of its responsibility towards Somalia and its people.[328] Its determination to conduct a military deployment without any ceasefire agreement and at the time when security is highly volatile is the reflection of the same commitment.

The other consideration in the deployment of AMISOM was that the UNSC will take over the mission within short period.[329] This was with the acknowledgement that the Union has serious challenges of capacity to sustain a peace support operations for longer period of time as evidenced in the AMIB. Therefore, once a stabilization process is undertaken by AU and a more conducive environment is created, the UN shall replace the mission as the organization possesses a well established expertise and capacity for multi-dimensional peace Keeping Operations.[330]

It is with this understanding that AMISOM was deployed for the period of 6 months and with the clear intent that the mission will evolve to a UN peace keeping operations.[331] In accordance with this calculation, The AUPSC requested the UNSC to take over the mission.[332] However, The

[327] Ibid, para 37
[328] Ibid, para 37
[329] Ibid, para 38
[330] Ibid, para 38
[331] See Ibid, para. 9
[332]For instance, see AU doc., AU Peace and Security Council communiqué. 163rd meeting,, PSC/MIN/Comm.4(CLXIII), 22 December 2008. Paragraph 19 of this communiqué states that "[The council] reiterates the primary responsibility of the United Nations Security Council for the maintenance of international peace and security. Council, once again, calls on the Security Council to immediately and without any further delay take the steps expected of it, in particular by authorizing the deployment of an international stabilization force and, subsequently, that of a peace keeping operation to take over from AMISOM and support the long-term stabilization and reconstruction of Somalia."

UNSC could not respond to the demands of the AU for the transition of the mission. As a result, the AUPSC was obliged to extend the mandates of AMISOM several times.[333]

Though the UNSC under its resolution 1863 (2009) expresses its intent to establish a United Nations Peacekeeping Operation in Somalia as a follow-on force to AMISOM upon the decision of the Council on June 1, 2009, it has never decided so. The Security Council rather conditioned the deployment up on the existence of non practicable and mountains of conditions in Somalia.[334] The SC on the other hand affirmed its logistical support to the AMISOM despite its unwillingness to deploy UN peacekeeping mission.[335] The frustration of AU on the UNSC's effort to resolve Somalia's conflict and at the same time the determination of the organization to resolve the conflict by its own could be best captured in Jean Ping's speech on Kampala's meeting of AU ministers. He spoke that

> *"We have been requesting UN Security Council to intervene in Somalia, but have gotten no result……., so we have decided to help our brother country ourselves, despite a lack of means."*[336]

[333] See AU doc., AU Peace and Security Council Communiqué, 80th meeting, PSC/PR/Comm. (LXXX), 18 July 2007; UN doc., Security Council Resolution 1772, S/RES/1772, 20 August 2007; AU doc., AU Peace and Security Council, 'Report of the Chairperson', PSC/PR/2 (CV), 18 January 2008 , UN doc., Security Council Resolution 1801, S/RES/1801, 20 February 2008; AU doc., AU Peace and Security Council Communiqué, 139th meeting, PSC/HSG/Comm. (CXXXIX), 29 June 2008, UN doc., Security Council Resolution 1863, S/RES/1863,16 January 2009. AU doc., AU Peace and Security Council communiqué, (PSC/MIN/Comm.4(CLXIII)), 22 December 2008, UN doc., Security Council Resolution 1872, S/Res/1872, 26 May 2009, AU doc., AU peace and Security Council Communiqué, PSC/PR/COMM.(CXCIV), 15 June 2009, AU doc., AU Peace and Security Council communiqué, 214th meeting, PSC/PR/Comm.(CCXIV), 8 January 2010,UN doc., Security Council Resolution 1910, S/Res/1910, 28 January 2010.

[334] See Security Council Resolution 1872; UN doc., Report of the Secretary-General on the situation of Somalia to the Security Council, S/2009/132, 2009. The Report noted that the following conditions need to be in place in order to allow peacekeeping operations to operate effectively. These include: (a) the formation of a Government of national unity in Somalia, inclusive beyond those represented in the Djibouti process; (b) the establishment and initial operation of the Joint Security Force in Mogadishu; (c) the implementation of a credible ceasefire; (d) the lifting of illegal checkpoints; (e) active outreach by the parties to groups that remain outside the Djibouti process; (f) consent to the deployment by all the major parties; and (g) adequate pledges of troops and the required military capacities by Member States.

[335] See Security Council Resolution 1872

[336] O'kadameri, "African Union Head Blasts".

The further determination of the Union as a first actor to resolve the conflict in Somalia is further evidenced with its decision to augment the troop strength of AMISOM from its authorized level of 8,000 to 20,000[337] at the time where the situation in Somalia is very dangerous and at the time in which Troop Contributing Countries (TCC) and their soldiers are suffering from attacks almost on a daily basis.[338] In these instances even, the PSC has showed its firm commitment to working in a self-sacrificing and altruistic manner.[339]

Analysis

The AUPSC has become the first actor to respond for the conflict of Somalia as that of the conflicts in Burundi and Darfur. The intended motive of Africans to takeover primacy in case of Somalia is reflected in the firm commitments of the member state to act in a dire situation where the international community in particular the UNSC could never take the responsibility. The member states have showed their determination to act even in the environment in which peacekeepers may become real combatant. The intention of taking over primacy is further reflected in the fact that AMISOM is deployed with a strong conviction of the Union that it is the primarily responsible body for peace and security of Somalia and its people. These facts therefore seem to lend an additional support to the argument which I submit that the Union or its PSC have taken the first instance role in the maintenance of Peace and security in the continent.

[337] See AU doc., Report Of The Chairperson Of The Commission On The Situation In Somalia, PSC/MIN/1(CCLXLV)), 15 October 2010, para 68. See AU doc., AU Peace and Security Council communiqué, 245th meeting, PSC/MIN/1(CCXXXXV), 15 October 2010, para 15

[338] For instance on July 11, 2010 Al-Shabab bombed a rugby club and a restaurant in Kampala which claimed the life of at least 74 people in the attempt to force Uganda to withdraw its troops from their country. The attack on the mission is almost in a daily basis.

[339] At the time of the completion of this paper, the UNSC has passed a resolution in December 22, 2010 which extended the authorization of the AMISOM and lifted the mission's authorized troop strength from 8,000 to 12,000. The resolution partially responded to the request of AU which required a military strength up to 20,000. However, the UNSC required the Secretary-General to provide a logistical and financial support to the level of 12,000 from the UN assessed contribution. This seem to reflect a success for both organizations if work together.

4.2. Synthesis

The case studies so far made shows that African States have made their PSC the primary actor in resolving the conflicts. In all of the three cases, Africans have been the primary responder to solve the conflicts both in terms of diplomacy and military. Despite the fact that the PSC lacks the necessary financial and logistical capability, it has decided to authorize the deployment of missions in all of the three conflicts with the strong conviction that the PSC, as the former commissioner of the PSC (Ambassador Saïd Djinnit) noted, is the primarily concerned body for the sufferings of African people.[340] The UNSC on the other hand was playing a backstop role to the efforts of AUPSC which again lends support to the argument which the researcher submits that the establishment of the PSC was with the intention to take over primacy from the UNSC on the maintenance of peace, security and stability of Africa. The intended motive of Africans to take primacy can also be inferred from the AU leadership's perception towards their actions. In this regard, the involvement of AU in the Darfur crisis clearly shows the strong desire of Africans to solve the problem by themselves and their resolute resistance for external involvement except for the purpose of financial and logistical assistance. Even after the transition of AMIS in to UNAMID, the Union was very eager to make the mission under an absolute control of AU. In general, the intention of Africans to make PSC the primarily responsible organ for the maintenance of African peace, security and stability is revealed in the case reviews so far made and this will strengthen the arguments of chapter three.

[340] Ambassador Said Djinnit in his address to Africa Partnership Forum stated that "When the PSC took the decision to authorize missions in these countries [in Burundi, Sudan and Somalia], it was fully aware that the AU had neither the resources nor the technical capacity to sustain them over time. It did so with the conviction that the AU, regardless of how unprepared and ill-equipped it was, had a duty to act and to do whatever it could to end the violence and bring hope to communities in crisis. It is our conviction, in the AU, that the suffering of our people should primarily be the concern of Africa, of its peoples, its leaders and its institutions." See Keynote Address By Ambassador Saïd Djinnit, Commissioner For Peace and Security, Commission of the African Union, To Africa Partnership Forum, Berlin, Germany, 23 May 2007, p.6 http://www.africapartnershipforum.org/dataoecd/30/54/39464084.pdf (accessed on November 12, 2010).

CONCLUSION

This thesis has worked out primarily to investigate whether Africans have viewed the establishment of the AUPSC as a meant to replace the primary role of the UNSC on matters related to the maintenance of international peace and security or whether they have designed it to play a complementary role to the UNSC as stipulated under the Charter. In order to find out answer to this main theme of the thesis the paper has analyzed the genesis for the establishment of the AUPSC and provisions of the most pertinent legal documents of the AU (as discussed under chapter three of the paper) and the practices so far (as discussed under chapter four).

The discussion of the genesis of the AUPSC reveals the fact that the establishment of the AUPSC is not an incidental and emerges out of the blue. It rather emerged from the long time efforts of the OAU/AU to enhance the effectiveness of the organization's capability to manage conflicts of its own made. The approach of the OAU, since the time of its establishment in 1963, in managing the conflicts of Africa was focused on prevention through diplomatic means. However, the African States did not have a mechanism to handle those of conflicts which have developed into full-fledged and that need military actions like peacekeepers or peace enforcers. This was with the conviction that the role of peace-keeping and enforcement action that involves the use of force should be played by the UNSC which is the primary responsible organ for the maintenance of international peace and security. However, with the occurrence of the Rwandan Genocide in 1994, Africans came to question the capacity and willingness of the UNSC to discharge its responsibility towards Africa. African States were traumatized with the gross failure of the international community in particular with UNSC which was supposed to play a primary role to end the atrocity. In this conflict, around 800,000 people were killed within 100 days. The Genocide was highly internalized by Africans and as a result was convinced to make themselves the primarily responsible body instead of relying on the UNSC. Since then different efforts were undertaken in order to derive their own mechanism which would prevent conflicts before they arise and at the same time to effectively manage conflicts when they developed in to a full-fledged. It was against this backdrop that the AUPSC was launched in 2004. Hence, the genesis of the AUPSC seems to suggest that the organ is established with the resolve of African states to solve their problem by themselves and not to see another Rwanda happen again in the

continent. This seems to support the view that the PSC is a meant to take primacy from the UNSC for the maintenance of peace, security and stability of Africa.

The provisions of the Constitutive act (CA) of the AU and the Protocol which established the AUPSC also seem to support the same view that AUPSC is a meant to take primacy over maintenance of peace and security of Africa. This intention is reflected under article 4 (h) of the CA and article 16 & 17 of the protocol. Article 4 (h) of the CA empowers the AU to intervene in a member state up on the occurrence of grave circumstances like genocide, war crimes and crimes against humanity. The power to determine a forcible intervention on a member states falls within the exclusive authority of the UNSC except for the case of self-defense and intervention up on consent of the host state. However, the intervention introduced under the CA does not fall in any of the two exceptions as the intervention is not conditioned up on the consent of member state. AU through its PSC is empowered to militarily intervene in a member state where there grave circumstances like genocide, war crimes and crimes against humanity occur. And, the legal instruments which conferred such right do not require the prior authorization of the SC in accordance with article 53 of the UN charter. Therefore, it is possible to say that by inserting the right of intervention under the CA, Africans have intended their Union or PSC to play the role that the UNSC was exclusively to play and by doing so they have reflected their resolute to act independently of the UNSC system and dislodged the UNSC from its exclusive power which further suggests the intention to take primacy. At this point it is imperative to recapture the statement of Ambassador Sam Ibok who claimed that the 'Union is not an arm of the UNSC' which seem to claim the Union's capability to act independently.

The AU intention to take primacy over the maintenance of peace and security of the continent through its PSC is further reflected under article 16(1) of the PSC protocol. Under that article, the primacy is conferred on the Union itself despite the fact that the subsequent article seem to acknowledge the primary role of the UNSC. However, the two provisions seem to differ on the domain of primacy as article 16 (1) says AU is the primarily responsible body for the maintenance of peace, security and stability of *Africa* while article 17 (1) asserts the primacy of UNSC for the maintenance of *international* peace and security. The African States seem to claim the ownership of the continent while leaving the rest of the world for the UNSC. Furthermore,

the intention of African States to make the PSC a meant to take primacy over the maintenance of peace and security of Africa is evidenced from article 17 (2), (3) and (4) of the protocol. These sub-articles regarded the UNSC as one of the organs whose help could be resorted and no special treatment is offered to play different from the Secretary-General of the UN or African members in the UNSC. It is rather regarded as one of the organs whose assistance may be resorted *where necessary*. In genral, both the CA and the Protocol seem to turn the UNSC on its head and give the AUPSC primacy on matters related to the maintenance of African peace and security.

Similarly, the case reviews made under chapter four suggests the same conclusion that AUPSC is a meant to take primacy from the UNSC. This could be inferred from three facts. First, in all of the cases under review (conflict on Burundi, Conflict of Darfur and conflict of Somalia) the PSC was the first to respond both politically and militarily (with regards to AMIB, it was the central organ that decided military deployment). Second, the practice of becoming the first to react for the conflicts was with the understanding that the Union or its PSC remains the primarily concerned body for the sufferings of African people. Third, the missions were deployed with a high eagerness among Africans to resolve the conflicts by themselves. In some cases, the Union even goes to the extent of rejecting any external involvement in the matters and insisted to take ownership of both the military and political solution for the conflicts. On the contrary, in all of these missions the role of the UNSC was more of a backstop role to the efforts of the PSC instead of the vise-versa.

As a whole the thesis has showed that the establishment of AUPSC is intended to play a primary role in the maintenance of peace, security and stability of Africa which in turn seem to reveal the tendency of Africans to replace the UNSC. There is no doubt that such tendency of the AU will bring it in a direct confrontation with the UNSC as the latter is the one which is entrusted with the primary role in the maintenance of international peace and security. However, Africans do not seem to be that much concerned about how far the legal instruments which conferred primacy to the PSC are in compliance with the Charter system. This is because, under the UN Charter ROs are a meant to play complementary role to the efforts of the UNSC which is entrusted with the primary responsibility for the maintenance of international peace and security. Contrary to this, Africans have established their own PSC and mandated it with roles that the

UNSC was supposed to play exclusively. And, in the absence of a common understanding between the PSC and SC, confusion and tension is likely to arise between these two organs as the role of the UNSC in the maintenance of peace and security of Africa seem to be taken by the PSC. This will further make the relationship between these two organs more of a competitive than complimentary.

Recommendation

AUPSC has taken primacy from the UNSC over matters related to the maintenance of peace, security and stability of Africa. For such claim of primacy to remain valid and effective for a more secured, peaceful and stable Africa, the following recommendations should be given effect.

1. It is not doubtful that a relationship which is not regulated and formalized will be source of tension. The same applies to the relationship between the AUPSC and the UNSC. Both of these organs have power to exercise in the maintenance of peace, security and stability of the continent, Africa. The discussion under Chapter three and four of this paper reveals that AU seems to confer the primacy on the maintenance of African peace and security to its own organ, AUPSC. However, the UN Charter gives such primacy to the UNSC as reflected under its article 24. Claim of primacy, AUPSC's primacy as evidenced in the CA and PSC protocol and in the practice as well and UNSC primacy as evidenced in the UN Charter, over the same domain (the maintenance of peace and security of Africa) will bring these two organs in a direct conflict and make their relationship more complex and tensioned in the absence of common understanding on the respective powers and responsibilities. The AU with the understanding that confusion and overlap may arise, has concluded a Memorandum of Understanding with RECs and Coordinating Mechanisms of the Regional Standby Brigades of Eastern Africa and Northern Africa. However, the same approach is not followed to avoid the tension and confusion on the respective powers of AUPSC and UNSC. Therefore, this paper recommends that the AUPSC and its UN counterpart should engage in developing a comprehensive Memorandum of Understanding which deals about the respective powers and responsibilities between these two organs with the aim to avoid confusion that may arise

and tension thereof. The conclusion of Memorandum of Understanding will make the relationship smooth and ensure complementarity between the organs.

2. As it has been analyzed under this paper, the move of Africans to establish their own PSC is motivated because of the inability of the UNSC to play its primary role in resolving African conflicts. With this understanding, the PSC is established with mandates and powers that the UNSC was meant to play. Though such move seem to be justifiable from the perspective of the slow pace of UNSC in resolving African conflicts, AU does not seem to take a smart approach in reconciling its claim of primacy with the Charter system which is regarded as the constitution of the world. Africans do not seem to be that much worried about how far their claim of primacy remains valid in light of international law. Africans should be cautious about the importance of making their laws consistent with the Charter system because the Charter is source of legitimacy. Therefore, the laws of AU should be refined in a way that best complement the Charter system and at the same time that could enable them respond to the conflicts effectively.
3. The trend of the AU to make its PSC as the primarily responsible organ for the maintenance of African peace, security and stability should be met with the institutional capacity of the PSC. African leaders have intended their PSC to play a primary role in the conflict management of Africa and they accordingly have given the PSC a very expansive mandates. However, the resource capacity of the institution does not seem to be commensurate with such expansive mandate. For instance the total budget allocated to the PSC for the year 2010 was $695,000. But a single mission like AMISOM needs more than $800 Million for a single year. The gap between the financial need and capacity is so apparent. Further, the financial limitation of the institution to implement its own decisions has been witnessed as the case studies under chapter four highlighted. All of the missions were deployed with the generous help of external donors. The Council seems to be stuck if such generous help from donors are to stop or become late in responding to the calls of the institution. Therefore, when African leaders intend to entrust the PSC play the primary role in the maintenance of Africa's peace and security, they should also commit themselves in providing the necessary means for the institution. In this regard, member states of the Union should play the primary role by discharging their

responsibilities they owed towards the Union. For instance, they should pay assessed contributions on time (the PSC will be beneficiary if assessed contributions are paid as certain percent of such contribution will go to the Peace Fund which is the financial source of the organ), they should make an additional commitment to finance the PSC and should grant the necessary military and logistics when they are requested by the PSC. If the institutional capacity of the institution is not developed internally then the responsibilities that the PSC was intended to play cannot be materialized and will have a negative implication on the credibility and legitimacy of the institution.

4. This paper also recommends that the claim of ownership should not develop in a manner that excludes the UNSC. The PSC should exert its best effort to engage the UNSC in the promotion of peace, security and stability in Africa. The trend of taking actions in isolation through the PSC might give a wrong signal to the UNSC in the sense that the UNSC may abandon its responsibilities towards the maintenance of African peace and security. To engage the UNSC in the decisions over matters of peace and security of the continent has many fold benefits to the PSC.

   The first benefit is from the point of legitimacy. African leaders or the institution they created cannot avoid that the UNSC is the primary organ which is entrusted with the primary responsibility for the maintenance of international peace and security. This power is conferred on the UNSC by the UN Charter which is regarded as 'the constitution of the international community accepted by the great majority of the states' so that is the source of collective legitimization. Therefore, even though the AUPSC has a strong mandate for the maintenance of peace, security and stability, it seeks strong support from the UNSC in order to be perceived as acting in the interest of international peace and security and to get more credit from the international community. Therefore, the support and active involvement of the UNSC is necessary to make the policies, and decisions of the PSC more credible, persuasive and legitimate which as a result could be implemented smoothly and effectively. Here, it should be stressed that to be perceived as a legitimate on the face of the international community has great value in the application of policies and decisions. In international relations where there appears no central executive body, voluntary compliance and agreements are very crucial in executing

decisions or policies. This is very evident in case of deployment of Peacekeeping Operations in conflict areas. In most cases, such deployment requires the consent of parties to the conflict so that such decisions of military deployment depend on the will and compliance of parties. In this regard, if the decisions and policies are seen as socially beneficial and face lower levels of opposition if they are perceived as legitimate. Therefore, the AUPSC should work its best to engage the UNSC in African matters!

The second benefit is The PSC so far has showed its determination and commitment in resolving conflicts of Africa. However, it has also become very evident that the Resource capacity of the PSC is by far less than its expansive mandates. It is very clear that the budget allocated to the PSC in order to run its function can never meet the financial demands of the activities being undertaken. Though the resource capacity of the institution should develop internally as noted above, it is also very clear that such huge amount of money can never be covered by contribution from the poor members of the Union. On the other hand, the UN or its SC enjoys dedicated, sustainable and predictable funds from the assessed contribution of UN members and possess skilled and well experienced human resource. Therefore, as the success of the PSC to carry out its function needs the financial and logistical assistance of its UN counterpart and the rest of the international community, the UNSC should be made an active participant in the decisions of the PSC.

5. Finally, this paper recommends that the establishment of PSC shouldn't be perceived as a meant to take primacy from the UNSC rather should be taken as a meant to support and fill the gaps of the UNSC. The two organs should cooperate instead of compete by strengthening their partnership. In this regard, the annual meeting between these two organs should be further strengthened and developed so that both can contribute for the peace and security of Africa in accordance with their comparative advantages.

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5. Interviews

Interview with Dr. Ademora Kambudzi, Head, African Union Peace and Security Secretariat, Peace and Security Directorate, December 10, 2010.

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ANNEX

Interview with Dr. Ademora Kambudzi (Head of AU Peace and Security Secretariat) and Mr. Fafre Camara (Legal Officer, Treaty Matters in the Office of the Legal Council, AUC) on December 10 and December 15, 2010, respectively.

Interview questions

1. **Can you tell me the reason for the insertion of article 4 (h)?**

2. **Does the right of intervention under article 4 (h) require the consent of the host state up on entry? What measure could be taken if the grave circumstances like genocide, crimes against humanity and war crimes occur in a member state and that state refuses to give its consent for military intervention?**

3. **Does the right of intervention under this article require the prior authorization of the UNSC? If the answer is in the affirmative, what will happen if the UNSC is unwilling or unable to authorize as in the case of Rwanda?**