THE POWERS AND FUNCTIONS OF THE
SECURITY COUNCILS OF UNITED NATIONS AND
AFRICAN UNION: A COMPARATIVE STUDY

BY: NIGUS ALEMU

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BY: NIGUS ALEMU

ADVISOR: ZEMELAK AYTENEW (Ata)

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Acronyms

AU — AFRICAN UNION

AU PSC — AFRICAN UNION PEACE AND SECURITY COUNCIL

PSC — PEACE AND SECURITY COUNCIL

SC — SECURITY COUNCIL

UN — UNITED NATIONS

UNSC — UNITED NATIONS SECURITY COUNCIL
INTRODUCTION

People all over the world being the victims of the two wars, have realize that it is a necessity to establish an international organization to maintain future international peace. This conviction of peace loving states resulted in establishing the United Nations, which is now a nearly universal organization, on October 24, 1945. The United Nations Organization is thus an organizing of nations, evolved as a result of the failure of the Leagues of Nations to function in accordance with its purposes, which works for world peace and security and the betterment of humanity.

The primary purpose of UN, the maintenance of international peace and security, is entrusted on the Security Council as its primary responsibility by the charter. The charter, in ordered to achieve international peace and security, also allows the establishment of different regional arrangements on the assumption that such regional arrangements or agencies have a vast opportunity to avert a dispute in the region promptly. AU is one of such regional arrangements established based on this legal ground to facilitate good governance, protection of human right and to maintain the peace and security of the continent through its different organs, particularly the peace and security council. The AU Act and the Establishing protocol of the PSC grant the PSC various powers to maintain the peace and security of the continent so that to avoid the inactions of UN Security Council.

Nevertheless, this responsibility of the council can hardly be fulfilled, as practice witnessed, for the UN charter puts stringent and adverse voting procedures to pass a resolution concerning a given situation or dispute that may endanger international peace and security.
AU, in particular the AU peace and Security Council, and UN Security Council have concurrent authority in the peaceful settlement of disputes. However, with regards to enforcement measures, the UN charter states that no regional organization can take enforcement action without prior authorization of the Security Council. But what will happen if the UNSC is unwilling or unable to authorize appropriate action in a timely manner as happened in the case of Rwanda in 1994? Is one of the issues this paper will try to adders.

Generally, the theme of this thesis is to explore whether or not the powers and functions of the newly established African Union Peace and Security Council are compatible with the powers and function of the UN Security Council. To state it differently, the paper aims at digging to find answer as to whether there is conflict or collaboration between the powers and functions of the UNSC and AU peace and Security Council by examining their respective sources of powers and functions and comparing these powers and functions.

This paper comprises of four chapters. Chapter one deals with the establishment, composition and voting procedures of the UN Security Council. Chapter two is devoted with examining the powers and functions of the UN Security Council. Under chapter three the writer tries to discuss on the establishment, composition, voting procedures, and objectives and principles of AU Peace and Security Council. In the last chapter, comparisons will be made between the UN Security Council and AU peace and Security Council based on their powers, functions, composition and voting procedures.
CHAPTER ONE

ESTABLISHMENT, COMPOSITION AND VOTING PROCEDURES
OF UNITED NATIONS SECURITY COUNCIL

1.1 ESTABLISHMENT OF UN SECURITY COUNCIL

United Nation is an organization of nations that works for world peace and security and the betterment of humanity. It was established on October 24, 1945. The main ground for the evolution of UN is the failure of the League of Nations to function in accordance with its purposes. The failure of the league to avert a second world war did not, however, destroy the conviction, shared by many, that only by some form of general organization of states could a system of collective security be achieved which would protect the international community from the scourge of war.¹

People all over the world, being the victims of the two world wars, have developed the need for establishing international organization to maintain future international peace. The United Nations is "sharing in the name of solidarity" Dag Hammerskjold used this phrase and said that it is a necessity of the mankind; it is not a matter of choice.² The mankind's hope and involvement is reflected in the preamble itself. It says "we the peoples of the united nations determined to save succeeding generations from the scourge of war, which twice in our life time has brought untold sorrow to mankind...do hereby establish an international organization to be known as the united Nations." Thus unlike the league of nations, which was not a universal organization, peoples of the world are sources of power of the united nations.

¹ D.W Bowet, the law of international organization, (3rd ed., 1975), p.25
The plan of the post-war organization of peace had its inception in the wartime declaration of the allied powers. In order to establish such an international organization, several conferences have been conducted since the beginning of the 19th century. Though one cannot deny the contribution of all these conferences to the establishment of the United Nations, it is the Moscow declaration, which served as a springboard to that effect. Indicating that fact Saksena maintained that:

"... no important statement of the UN policy with respect to establishment of an international organization to maintain peace and security was made until the Moscow conference (October, 1943). In the Moscow declaration, the four major powers- china, Soviet Union, the UK and the United States- recognize "necessity of establishing, at the earliest possible date, a general international organization ..."  

The creation of the league of Nation in 1919 and the establishment of the United Nation in 1945 were the two remarkable developments achieved by peace loving statesmen to save succeeding generations from the scourge of war. In order to achieve its objectives and carries out its functions effectively, the United Nations established six principal organs, namely: the general assembly, the Security Council, the ICJ, the Economic and social council, the trusty ship council and the secretariat.

The SC as one of the principal organs of the UN, its creation and development is completely inseparable with the establishment of the latter. In objectives and methods the United Nations is the League in disguise. The

4 Ibid
5 UN Charter,(adopted on 26 of June1945,San Francisco,USA), Article 7
relationship between the League of Nations and the UN is pointed out by Edwin Tetlow as follows:

"The United Nation is, of course, the child of the League of Nations. Its features and limbs, and its very heart, bear witness to the relationship."\(^6\)

Though, in many respects, the United Nation is identical with that of the League system, the differences between the two are markedly visible. According to Saksena:

"Unlike the league system, where both the league assembly and the council were empowered to deal with any matter within the sphere of action of the league or affecting the peace of the world, the UN charter explicitly defines the function of the two and the primary responsibility of maintaining peace and security is entrusted to the Security Council."\(^7\)

Initially, the council was established to consist eleven members: five permanent and the other non-permanent members. Some time later, with the increase in the number of the UN members, a desire to increase the participants of non-permanent members of the council has been developed. To this end, in 1963 the general assembly voted to increase the number of non-permanent members from six to ten, and in 1965 article 23 and 27 of the charter was amended to put the increase in membership into effect.\(^8\)

\(^7\) Supra note 3,p.43  
\(^8\) UN Charter, Article 23
The primary purpose, for which UN has established, pursuant to article 1 of the charter, is the maintenance of international peace and security. This purpose is to be carried out by the Security Council as its primary function. According to Pavithran, “The Security Council is the most important organ of the UN which reflects very largely the charter of the UN as a means for preserving international peace and security.”

All in all, at present, UN has the primary responsibility for world peace and security, and is the only available nearly universal organization, which can deal with peace and disarmament.

1.2. COMPOSITION AND VOTING PROCIDURES OF UN SECURITY COUNCIL

Like its predecessor, the covenant of the League of Nations, the charter of the UN has kept the distinction between greater power and other states. Article 4(1) of the covenant had provide for permanent representation in the council of “the principal allied and associated powers” namely USA, the British, France, Italy, and Japan, together with, initially, four non permanent representatives that shall be selected by the General Assembly. This trend of classifying states as big power and other states persist and is embodied under article 23(1), which reads as:

The Security Council shall consist of fifteen members of the United Nations. The Republic of China, France, the Union of Soviet Socialist, the United Kingdom of Great Britain and Northern Ireland and the United States of America shall be the permanent members of the Security Council. The General Assembly shall

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elect ten other members of the United Nations to be non-permanent members of the Security Council...

Having this general remark about the composition of the SC, we shall proceed to deal with what “permanent members” and “non-permanent members” are about, respectively.

1.2.1. THE PERMANENT MEMBERS

Being permanent member of the Security Council means many things. Among other things it grants that state a special privilege over other non-permanent members of the council. Under article 27 of the charter, on all but procedural matters, decisions of the council must be made by an affirmative vote of nine members, including the concurring vote of the permanent members.

The effect of article 27 (3) is that each permanent members of the Security Council has a veto on non-procedural (substantive) questions. The veto does not apply to procedural questions. But, how can one decide whether or not a question is procedural? At the San Francisco conference, the four powers which had convened the conference (USA, USSR, UK and China) listed certain questions which would be regarded as procedural (for example, decisions under articles 28-32 of the charter, and questions relating to the agenda) and certain other questions which would be regarded as non-procedural(for example recommendations for the peaceful settlement of disputes, and decisions to take enforcement action) ; in cases of doubt, which were expected to be rare, the preliminary question (that is, the question whether or not a particular question (that is, the question whether or not a particular question was procedural) would it self be a non-procedural question. 11 This lead to the “double veto”; a permanent member of the security council veto any attempt to treat a

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10 UN Charter, Article 23
11 Peter Melanczuk, Anhreest’s Modern introduction to International Law,(17th ed.,1997), P. 374
question as procedural, and then proceed to veto any draft resolution dealing with that question.  

Thus, though the classification mode at the San Francisco conference can be used as a base to identify which question would be regarded as procedural and which is a non-procedural, a permanent member could convert a question, which was clearly listed as procedural in the four-power statement, into a non-procedural question. Pointing out a solution to such problem of abuse of double veto by the permanent members, Peter Malanczuk maintained that:

The device of the presidential ruling can be used to prevent such abuse of the double veto. The post of president of the SC is held in turn by each member of the security council for a period of one month; if the president reacted to an attempted abuse of the double veto by ruling that the preliminary question is itself procedural, his ruling is final unless it is reversed by a (procedural) vote of the security council.  

The provision of article 27 of the charter relating to voting in the Security Council were, in their essential, worked out at the summit of the United States, the United Kingdom, and the Soviet Union held in the Crimea in February 1945, and usually known as “the Yalta formula.”  

Bowett points out the special privilege accorded to the permanent member by article 27 as follows:

“...The five permanent members’ enjoy an exceptional status not only by virtue of permanency but also by reason of

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12 Ibid  
13 Ibid  
special voting rights amongst which the most important is the power of ‘Veto’."

Accordingly, a permanent member state has not only an eternal membership in the Security Council but also the right to veto, which we shall presently see. The justification for granting this exceptional status to five members was that “there ought to be a definite relationship between the obligation imposed on certain states and their capacity to influence the decisions of the organization.”

In other words, the reason to give the permanent members a special position in the SC was their contribution and responsibility to maintain international peace and security. The problem is that the charter, during its inception, could not foresee that the then ‘big powers’ might become small ones and, contrarily, other states might become ‘big powers’. Indicating this problem of the charter Good rich pointed out as follows:

“There is a static element in this arrangement. It may be that these are the “great powers” to day, but doesn’t of necessity mean that they will always continue to be.”

The other consequence of the formulation of the charter regarding the voting procedure is that the right to veto has the effect of preventing the adoption of affirmative vote, i.e. any one of the permanent members can prevent a decision from being taken on all substantive matters. The smaller nations are always against this privilege as the veto appeared to give the five permanent members of the Security Council unchangeable control on the United Nations. In addition, this

17 Ibid
18 UN Charter, Article 23(3)
formula of veto power has often been criticized by many writers, as crippling limitation on the powers of the Security Council. This is well explained by Show in the following manner:

The council has generally not fulfilled the expectations held of it in the years following the inception of the organization. This has basically been because of the super power rivalry, which prevented the council from taking action on any matter regarded as of importance by any of the five members, and the veto was the means by which this was achieved.¹⁹

Edwin Tetlow has also further criticized the voting procedure saying “...of the many weaknesses in the structure of the United Nations one of the most damaging to its fulfillment and to its prestige has been the vulnerability of the veto to abuse.”²⁰ Accordingly, the veto has often been criticized as crippling limitation on the powers of the Security Council because it is vulnerable to abuse, especially in armed conflicts in which the permanent members are involved directly or indirectly.

It is not only the voting procedure of the council which is labeled as a defect of the formulation of the charter that resulted in the failure of the UN to fulfill its duties but its composition as a whole is at a continuous attack. Ramesh Thakur mentioned that:

“The security council risks a similar loss of legitimacy and a corresponding erosion of effectiveness and efficacy if it fails ones again to implement significant structural and procedural reforms. International stratification is never rigid. States are upwardly and downwardly mobile. A static permanent

²⁰ Edwin Tetlow, supra note 6, p.74
membership of the Security Council undermines the logic of the status and diminished the authority of the organization.”

One major explanation for the continuing stalemate on a new formula for SC membership is that ‘representation’ can have many different meanings. According to Ramesh Thakur:

“Representation could refer to the need for the council to reflect the major cultures, religions and civilization of the world. There is, for example, no Islamic permanent member. Egypt, Indonesia, Nigeria and Pakistan become major contenders on this criterion.”

The council could be so composed as to reflect population distributions, in which case India’s claim to permanent membership would be greater than any other, save China. The other meaning of the term representation is pointed out by Thakur as follows:

“The most common meaning given to representation is in terms of the different region of the world. Asia, the UN group that accounts for more than half the world’s people in an organization that supposedly supports human security and popular sovereignty as well as national security and state sovereignty, is vastly under-represented”.

In sum, there is no criteria that could satisfy the keen of members of the UN to get the permanent seats of the council in an equal basis. But it is said that:

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21 Infra, note 24, p.71
22 Ibid
23 Ibid
Countries should be permanent members based on their representational credentials and contribution of human, financial, military and other resources to attaining UN goals. On these criteria, there is surprisingly broad agreement already on the leading candidates.25

The UN runs the risk of losing the trust of the members unless it adopts a more balanced representation. Secretary General Kofi Anan appears to back the position of those who advocate enlarging the council to make it more representative. He explained his stance in the following manner:

“I have always maintained that the Security Council is in need of reform and that we should bring it in line with today’s realities. So what I have said in the report is consistent with my long held view, and I hope member states will move forward and reform the Security Council. The argument that the council should remain small in order to be effective is one group’s position but the position of the others that the council should be expanded to be more democratic and therefore, gain greater legitimacy is also important. I believe it ought to be possible to reform the council and give it greater representation while keeping its effectiveness.”

The other and the worst consequence of granting veto power to five supreme powers only is that it pushes small states towards having, by any expense, a friend among these veto concursing states. Because as it is stated by Kelsen “a permanent member may exercise this veto right not only in its own affairs but also in the interest of another state; hence the members which have no such right may

25 Id. P. 73
be induced to secure for themselves the friendship and protection of one of the ‘five great powers’.”

Though many writers, including the aforementioned ones, have tried to show the negative consequence of the formulation of the charter with regards to the voting procedures and composition of the council, it is found hardly possible to change it, particularly to make a change, which might in anyway affect the right to veto of the supreme powers. This is so, interalia, because of the complicated amendment procedure provided for by the charter. Pursuant to article 108 and 109 of the charter an amendment of the charter, as substantive matter, can not become effective unless ratified by all permanent members.

However, despite the charter, by making the consent of all the permanent members a requirement to its alteration or amendment, seems to close any change on it or is regarded as ‘Pandora–box’, “the question of equitable representation and increase in the membership of the SC had already been raised by the non allied and developing countries in 1979.” It is to this effect, as it is cited by M.Shaw, that “the General Assembly has been considering the question of the ‘equitable representation of and increase in the membership of the SC’ and an open-ended working group was established to consider the matter further.”

Generally, as M.Smith has mentioned it, recently the composition of the SC, as well as its voting procedure, has come more fiercely under attack because the system does not reflect the changes in the international systems since 1945. Therefore, a remarkable step to save the UN in general and the SC in particular, from failure to fulfill the expectation held on them resulted from the arbitrary use of the right to vote by the supreme power, shall be made.

28 Peter Malanczuk, Akhrest’s Modern Introduction to International Law, (17th ed., 1997), P.376
29 M.N.Shaw, supra note 15, p.1085,note 11
30 M.Smith, Expanding permanent membership in the UN Security Council: Opening a Pandora’s Box or needed change? Cited by Peter Malanczuk, supra note 15, p.376
1.2.2 NON-PERMANENT MEMBERS OF UN SECURITY COUNCIL

As it is clearly depicted under article 23(1) of the charter out of the 15 members of the Security Council 10 are non-permanent members to be elected by the General Assembly for a term of two years. This provision was in the Dumbarton Oaks proposals and was kept in the charter after considerable discussion and after several proposals to increase the number had been defeated.31

The criteria to be applied in electing the non-permanent members are two as provided under article 23 of the charter. These are contribution to the international peace and security and to the purpose of the organization; and equitable geographical distribution.

Unlike the charter, which sets forth criteria in order not to put all members of the organization on equal basis "the Dumbarton Oaks proposals had set forth no special criteria to be taken in to account in the election of non-permanent members."32

However, setting forth criteria was not a simple task, though it is a necessary step to put all members of the UN on equal footing. D.W.Bowett pointed out the difficulty associated with setting the criteria as follows:

“A part from the question of which states shall be seated on the Council; there is a further question of whether a given government is to be recognized as entitled to represent a particular state. This question arises when two rival governments exists, both claiming

31 supra, note 16, p.200
32 ld, p.201
to represent the state concerned, or objection is taken to the circumstances in which a government achieved power.\(^{33}\)

These problems are, however, inevitable whatever other criteria is designed. The allocation formula under the ‘gentleman’s agreement’ of the 1946, that is the pattern established at the first session of the General Assembly for the distribution of the six non-permanent seats of the council was as follows: two from Latin America, one each from the common wealth, western Europe, the middle east and eastern Europe.\(^{34}\) Hence, according to this formula Africa had no representative in non-permanent seats of the council.

The current practice is that five of the non permanent places are filled by African and Asian states, two by Latin American states, one by eastern European state, and two by western European and other states (the ‘other states’ being principally the ‘white member of the common wealth’-Canada, Australia and Netherlands.)\(^{35}\)

Moreover, practically the two criteria set forth under article 23(1) to be applied in electing states for the non-permanent seats are not followed up duly. The decision as to whether these criteria are followed or not are left to the assembly which has determined its selections more on the basis of geographical and ideological representation in recent years than the character of the members contribution to international security.\(^{36}\) This trend is a good opportunity for developing countries to get the chance to be represented in the council. But there is a further problem even with the criteria of geographical representation. Ramesh Thakur noted that one major explanation for the continuing stalemate on new

\(^{33}\) D.W. Bowett, supra note 1, p.26
\(^{35}\) Supra, note 22, p.373
formula for Security Council membership is that ‘representation’ can have many different meanings.\footnote{Supra note 26 p. 71}

\section*{CHAPTER TWO
POWERS AND FUNCTIONS OF THE UNITED NATIONS
SECURITY COUNCIL
2.1 ‘POWER’ AND ‘FUNCTION’ DISTINGUISHED

In most cases the terms “function” and “power” are used interchangeably. But this does not mean that they are identical. Under the Blacks law dictionary, the word function is defined as follows:

“Function. Derived from Latin function: the past participle of the verb fungor, which means to perform, execute, administer. The nature and proper action of any thing; activity appropriate to any business or profession; office; duty”.

Accordingly, by “function”, we understand the execution or performance or administration of any thing. Thus, the primary function of the UNSC is performing activities that are necessary towards the achievement of international peace and security.

Blacks, on the other hand, define the word “power”, as follows:

“Power. The right, ability, authority or faculty of doing something. Authority to do any act. A power is an
ability on the part of a person to produce a change in a
given legal relation by doing or not doing a given act.”

Thus, “power” is a right of a person that can be exercised with the
exclusion of others. It is the right to decide or authority over others.

Therefore, while the word “function” refers to a duty, a day-to-day activity,
“power” refers to a right or authority to do something. So, the powers of the
UNSC are its authority derived from chapter VI, VII, VIII & XII of the charter to
exercise its primary function, the maintenance of international peace and security.

2.2 POWERS AND FUNCTIONS OF THE UN SECURITY
COUNCIL

As it have been seen in chapter one above, the creation of the United Nation
in 1945 was the second attempt, next to League of Nations, at establishing a
universal organization with the main purpose of maintaining peace by system of
collective security. Pursuant to article 24(1) of the charter members of the UN
confer upon the Security Council primary responsibility for the maintenance of
international peace and security. The reason for placing the primary responsibility
upon SC was that that organ, by virtue of its size and composition was regarded as
best fitted to secure prompt and effective action.¹

Maintenance of international peace and security, which is entrusted as a
primary function on the SC, is the very purpose of the UN. Article 1 paragraph 1
of the charter declares the first purpose of the organization to be the maintenance
of international peace and security.

Though, in strict sense of the terms, ‘power’ and ‘function’ have completely different meaning, it is so difficult to discuss the powers of the SC without discussing on its functions, particularly its primary function. The council’s primary function, the maintenance of international peace and security, is to be exercised by two means: the first is the pacific settlement of such international disputes as are likely to be endangering international peace and security, and the second (which presupposes the failure or inapplicability of the first) is the taking of enforcement action. Stated otherwise, the powers of the council are the means by which its functions are to be exercised. Article 24(2) provides:

In discharging these duties the Security Council shall act in accordance with the purposes and principles of the United Nation. The specific powers granted to the Security Council for the discharge of these duties are laid down in chapters Vi, VII, VIII and XII.

The question that should be raised here is that, is this provision to be interpreted to mean that the Security Council has only these powers, or is the more liberal interpretation to be accepted according to which the Security Council may exercise such powers, consistent with the purpose and principle of the charter, as are necessary to the discharge of its responsibility? D.W Bowett maintained that:

“Although article 24(2) refers to “the specific powers granted … in chapters Vi, VII, VIII and XII”, practice has now confirmed the view that this enumeration is not exhaustive. There exists such other

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“implied” powers as may be required in the execution of its overall responsibility”.

By the same token, in a memorandum submitted by the Secretary-General, majority of the members of the council reached the conclusion that:

“The members of the United Nations had conferred upon the Security Council power commensurate with its responsibility for the maintenance of the peace and security. The only limitations are the fundamental principles and purpose found in the chapter 1 of the charter.

Thus, to discharge its duty, the council has unlimited powers so long as it exercised them following the basic principles and purpose of the organization. Therefore, in the following section I will confine my self to discuss on only the two basic powers of the SC: pacific settlement of disputes and enforcement action.

2.2.1 Pacific settlement of international disputes

One of the powers of the Security Council by which its primary function is to be exercised is the one that is provided for under chapter VI of the charter by the title ‘pacific settlement of disputes’. The need to use peaceful means of settling disputes than the use of force, which is the sign of development, has been developed since the beginning of the 20th century. The Heague conference of 1899 and 1907 were the first to consider the question of peaceful settlement of disputes as a whole. Article 1 of the 1908 Heague convention for peaceful settlement of international disputes provides:

3 Id. P.30
4 Goodrich, supra note 1,p.206
With the view of obviating as far as possible recourse to force in the relation between states the king parties agree to use their efforts to ensure the pacific settlement of international disputes.\textsuperscript{5}

Under the League Covenant states were, pursuant to article 12, obliged to submit any dispute between them to three methods of peaceful settlement: arbitration, judicial settlement or inquiry by the council. The strongest adherence to pacific settlement of disputes was made under the 1928 Kellogg- Braind peace pact which provides for the renunciation of war as an instrument of national power and by which parties agreed that the settlement of their disputes should never be sought except by pacific means.\textsuperscript{6}

Under the UN charter one of the principles provided by it is that all members of the UN are under the obligation to settle international disputes by peaceful means in such a manner that international peace and security and justice are not endangered.\textsuperscript{7}

Article 33(1) is an application of the principles laid down in article 1(1) and article 2(2) because both articles lay the foundation for pacific settlements of disputes by the parties themselves. Article 33(1) states that:

"The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by

\textsuperscript{5} Heague Peace conference, Jun and April, 1908, conviction for the peaceful settlement of international disputes, AJIL, vol.2,1908.p 43
\textsuperscript{6} Article 1 of The Paris Treaty for the Renunciation of War as an Instrument of National Policy(the Kellog-Braund Peace Pact),1928
\textsuperscript{7} Article 2(3)of the UN Charter
negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice'.

Thus the methods provided under this article for settling disputes are supplementary to those methods traditionally established in international law and which the parties must ‘first of all’ utilize, as appropriate. One of the basic ideas of chapter VI is to encourage pacific settlement of disputes by the parties themselves to induce them to exhaust all possible means of their own choice and to allow interference of the security council only after it is clear that the first way does not lead to settlement.  

Goodrich maintains that “unlike article 1 of the Paris treaty for the renunciation of war as an instrument of national policy (Kellogg-Braind peace pact) by which the parties agreed that the settlement of their disputes shall ‘never be sought except by pacific means’, this paragraph of article 33 and article 2(3) positively obligates members of the United Nations to seek a solution for their serious disputes by pacific means.’

Furthermore, article 33(1) applies not to all disputes rather only to disputes the continuance of which is likely to endanger the maintenance of international peace and security.

However, article 33, apart from enumerating the different methods to settle disputes, fails to state whether or not the parties to the dispute shall apply all the means one after another. But one can infer from the provision that the parties are expected just to make a real effort to reach an agreed solution before coming to the council. It is more likely that the article doesn’t provide for the parties to exhaust

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8 H.Kelsen , international law , (2nd ed,1958), at note 14,p.189
9 Googrich, supra note 1, p.237
all possible means of pacific settlement. They shall seek a solution by one or the other means. But the means of resolving the dispute should be chosen by the consent of all parties to the dispute. In pointing out this kelsen says:

"If one party suggests one of these means the other is not obliged to accept it. There must be agreement between the parties with respect to the means of settlement and there can be no legal obligation to come to an agreement"\textsuperscript{10}

What is expected from the states in dispute is, as indicated above, to try their best to alleviate the dispute peacefully by whatever means they agreed upon. However, as it is provided under article 37(1), if the parties fail to settle the dispute by the means listed under article 33(1), they shall refer the dispute to the Security Council.

The controversy arises if only one party alleges that the case is a dispute, and that the continuance is likely to endanger international peace, where as the other party does not, and hence, refuses to refer the case to the Security Council under article 37(1). According to Kelsen:

"The Security Council shall first decide whether the continuance of it is likely in fact to endanger the maintenance of international peace and security. If it deems dangerous it shall decide one of the two recommendations referred to under article 37(2)."\textsuperscript{11}

\textsuperscript{10}H.Kelsen,\textit{supra} note 8, p.174
\textsuperscript{11}Id, p.175
The other issue that might be raised with respect to the power of the Security Council under article 37(2) is that whether there shall not be any claim, by one of the parties, to another means of settling the dispute which that state thinks to be successful while the other refuses and refers the case to the Security Council. Pursuant to the cumulative reading of article 37(1) and (2) before the Security Council decide whether to take action under article 36 or to recommend such terms of settlement it may consider appropriate, it shall decide whether reference to it is made after the appropriate means indicated under article 33 has been tried. In addition to this the Security Council may make recommendations to a dispute only when all the parties to the dispute so requested.\textsuperscript{12} According to D.W.Bowett:

\begin{quote}
The council may even go further, and under article 37(2) recommend those actual terms of a settlement in addition to the means or procedure for settlement; this is tantamount to assuming a quasi-judicial function where the dispute affects the legal rights of the parties. This way of proceeding is available only where the dispute considered by the council to endanger international peace and security; otherwise the council could only so act, under article 38, with the consent of all the parties.\textsuperscript{13}
\end{quote}

However, considering the power of the council under chapter VI, it is mention worthy that its power is only to make ‘recommendations’. These are not binding on the states to which they are addressed, for article 25 relates only to “decision”.\textsuperscript{14}

Though, in principle at least, the council should intervene after the parties have failed to settle their disputes, it is empowered by different provisions of the

\begin{footnotes}
\item[12] Article 38 of the UN Charter
\item[13] D.W.Bowett, supra note 2, p.32
\item[14] Id, p.33
\end{footnotes}
charter to deal with settlement of disputes by peaceful means in the in trim of the efforts made by the parties to resolve the disputes. Accordingly, in pursuance of its primary function, the Security Council may, by article 34, investigate any dispute or any situation which might lead to international friction or give rise to dispute, in order to determine whether the continuance of the dispute or situation is likely to endanger the maintenance of international peace and security.

But when could this investigative power of the Security Council be exercised is not made clear by this provision. So, the council may call upon the parties to carry out their obligation under article 33(1), with or without determining the parties' effort has failed and that continuance of the dispute is likely to endanger peace and security. Therefore, pursuant to article 34, the council can investigate on its own motion, any dispute or a situation, which might give rise to a dispute.

If the Security Council, applying its investigative power provided under article 34, determines the dispute as having the character disclosed under the same article, i.e. if it might lead to international friction, the council may exercise its powers under article 33(2) or article 36.

Under article 33(2) the Security Council shall, when it deems necessary, call upon the parties to settle their disputes by such means. Pursuant to article 36(1), on the other hand, the Security Council may recommend the way which according to its opinion, might lead to the settlement of a dispute the adjustment of another situation which it thinks appropriate. According to H.Kelsen, as far as disputes are concerned, recommending appropriate procedure or methods of adjustments; as provided by article 36(1), seems to be the same as calling upon the parties to settle their dispute by peaceful means of their own choice as provided by article 33(1).\textsuperscript{15}

\textsuperscript{15} H.Kelsen, supra note 8, p.190
This is just what the law says. In practice, as Goodrich pointed out, council procedure has not followed this pattern at all closely. Taking a very free view of its powers under chapter VI and buttressing these by liberal interpretation of its residuary powers under article 24, the council has acted with about the same freedom in the choice of means and the timing of acts as did the Hague council under the more flexibly drawn provisions of the covenant.\textsuperscript{16}

All in all, the absence of clear procedures to be applied in pacific settlement of disputes, lack of formal procedure to be followed for the investigation, and disagreements between members of the council to determine the existence of a dispute or a situation that endangers international friction are major problems facing the security council in carrying out its power under chapter VI.

2.2.2 Enforcement Measures

Under the covenant, pursuant to article 16, members of the league were obliged to preserve as against external aggression the territorial integrity and existing political independence of all members and to take immediately enumerated economic & financial measures against a member once it had resorted to war in violation of its obligation without waiting for decision by any organ of the league. Unlike the covenant, however, while member states of UN agree under article 2(4) to refrain from the threat or use of force against the territorial integrity or political independence of any other state, they are not obliged to take any action against a state violating this understanding until the security council has taken a decision.

The lack of authority in the League of Nations for a police force has thought by many to be one of its weaknesses. The use of force to stop aggression was therefore set out in no uncertain terms in the UN charter. Such essential

\textsuperscript{16} Goodrich, Supra note 1, p.251
difference between the covenant and the charter as to the organ by which, and the
condition under which, the enforcement actions are to be taken is pointed out by
H. Kelsen as follows:

"...the enforcement action under article 16 of the covenant was
almost completely decentralized, where as the enforcement measure
to be taken under article 39 of the charter strictly centralized."\(^{17}\)

Further more, the charter lays particular stress on enforcement measures in
proclaiming in article 1(1) as the first purpose of the UN to take effective
collective measures for the prevention and removal of threats to the pace, and for
the suppression of acts of aggression and other breaches of the peace. To this
effect, the Security Council is given the power to take measures under article 39,
which gives it an effective base for maintenance of peace and security. Art 39 runs
as follows:

The security council shall determine the Existence of any threat to
the peace, breach of the peace, or acts of aggression and shall
make recommendations, or decide what measures shall be taken in
accordance with Articles 41 and 42, to maintain or restore
international peace and security.

While actions adopted by the Security Council in pursuance of chapter VI
of the charter, dealing with pacific settlement of disputes, are purely
recommendatory, matters concerning threats to, or breaches of, the peace or acts
of aggression. Under chapter VII gives rise to the decision making powers of the
council according, as it is suggested by M. show, once the council has determined
the existence of a threat to, or a breach of the peace or acts of aggression, it may

\(^{17}\) H.kelsen, the law of the UN, (5th ed., 1966), P.726
make decision which are binding upon members states of the UN under chapter VII, but until that point it can under chapter VI issue recommendation only.\textsuperscript{18}

The manner, when and in what conditions the SC is going to decide whether a dispute or situation constitutes a threat to, or a breach of, the peace is not clearly specified under the charter. According to Kelsen:

"The security council is free within the purposes and principles of the organization to determine whether a situation is a threat to the peace in the sense of article 39. The charter does not demand that such a situation, in order to be recognized as a threat to the peace, be an immediate danger of a breach of peace or act of aggression within the next few days, weeks or even months. Potential as well as immediate dangers can be constructed as a threat to the peace in the sense of article 39."\textsuperscript{19}

The council may take enforcement measures without regard to whether the parties to a dispute have or have not complied with the provision of article 33(1). The only criteria to be taken into account by the council, as stated by Kelsen, is that a decision by which the existence of a threat to, or breach of the peace is determined, must be taken in order to establish the competence of the security council to take the measures referred to in article 39 and 40 of the charter.\textsuperscript{20}

The charter is silent as to whether the scope of applicability of article 39 can be extended to touch non member states of the UN. The charter simply authorizes the Security Council to take enforcement measures after having determined the existence of any threat to, or breach of the peace, without binding

\textsuperscript{18} M.N Show, \textit{International Law}, (5\textsuperscript{th} ed., 2004), P.1103
\textsuperscript{19} H.Kelsen, supra note 17, p.728, at note 6
\textsuperscript{20} Id, pp.439-440
the council with respect to the person against whom these measures shall be
directed.21

The determination of existence of a threat to the peace, breach of the
peace or act of aggression under article 39 must precede the use of the council’s
power under articles 41, i.e. enforcement actions not involving forces and those
described in article 42 which involve the use of force. The question to be raised at
this juncture is thus as to the definition of a threat to, or breach of peace or acts of
aggression. The answer to this question that has emerged in practice is that it
depends upon the circumstances of the case. It also depends on the relationship of
the five permanent members of the council to the issue under consideration, for a
negative vote by any of the permanent members is sufficient to block all but
procedural resolutions of the council.22 Accordingly, as to the definition of threat
to the peace, M.N. Show pointed out that:

“Threat to peace is the broadest category provided for in article 39 and the
one least susceptible to precise definition. In a sense it constitutes a safety
net for Security Council action where the conditions needed for a breach of
the peace or act of aggression do not appear to be present. It is also the
category which has marked a rapid evolution as the perception as to what
amounts to a threat to international peace and security has broadened. In
particular, the concept has been used to cover internal situations that would
once have been shield from UN action by article 2(7) of the charter.”23

From this it follows that the scope of definition of threat to the peace is not
limited to international peace rather it extends to any threat to peace with in a state
which is in turn, an exception to article 2(7) that prohibit intervention in matters
which are essentially with in the domestic judgment of any state. Thus, the clause

21 Id, p.729
22 Article 27 of the UN Charter
23 M.N.Shaw, supra note 18, p. 1120
“threat to the peace” has no constant definition by which all members abide. A state may consider a certain act as a threat to the peace while the other may not.

The phrase “breach of the peace” on the other hand refers to any resort to armed force, or it is a military operation against another state. The Soviet Union representative on the Indonesian question remarked that if military operations by one country against another can not be called a breach of international peace, then I am at a loss to know what could be called a breach of the peace.24

To define the phrase ‘act of aggression’ has been a matter of controversy since the establishment of the League of Nations. Art 10 of the League covenant had used the term ‘aggression’ for members were obligated to respect and preserve against external aggression. But under the UN Charter the concept of aggression is defined nowhere. After several decades of discussion and deliberation, a definition of aggression was finally stipulated, in 1974 by general assembly resolution 3314(XXIX). Article 1 provides that aggression is the use of armed force by a state against the sovereignty, territorial integrity or political independence of another state or in any other manner inconsistent with the UN charter.25 Basically, the definition is designed for the guidance of the Security Council should it chooses to refer to it; the council retains full discretion as to whether it will do so....26

The charter of the UN authorize the security council to make recommendations during pacific settlement under article 36 which are non-binding or to take enforcement action or binding recommendation under article 39. However, it fails to describe the steps to be followed to resolve a dispute, i.e. nowhere in the charter is stipulated to the effect that enforcement measures are to

25 Malcolm N. Shaw, supra note 18, p.1123
26 J.F. Murphy, The UN and the control of international violence, (1982), p.87
2.2.2.1 PROVISIONAL MEASURES

Enforcement measures under article 39 may be preceded by provisional measure. The idea of provisional measures which was included in the charter at San Francisco conference is the objective of empowering the Security Council to take an initial action in dealing with threats to the peace, breaches of the peace, and act of aggression. Article 40 runs as following:

In order to prevent an aggravation of the situation, the Security Council may, before making the recommendation or deciding upon the measures provided for in article 39, call upon the parties concerned to comply with such provisional measures as it deems necessary or desirable. Such provisional measures shall be without prejudice to the rights, claims, or position of the parties concerned. The Security Council shall duly take account of failure to comply with such provisional measure.

According to the provision, the SC is specifically authorized to call upon the parties concerned to comply with such provisional measures as it deems necessary to the maintenance or restoration of peace only before making the recommendation or deciding upon the measures provided for in article 39.

The other requirement the SC should apply for calling upon the parties to comply with provisional measures is that it shall first determine, in accordance with article 39, the existence of a threat to the peace, breach of peace, or act of aggression. This is inferred from the fact that the article is placed between article 39 and other articles of charter VII dealing “with action with respect to threat to
the peace, breaches of the peace, and acts of aggression”. The practice is, however, in the contrary. H. Kelsen explained that:

There are cases where the Security Council has called upon the parties to comply with measures, such as to cease hostilities, or to achieve a truce, which could be understood only as provisional measures with in the meaning of article 40, without having previously determined the existence of a threat to, or breach of, the peace, and without expressly referring to article 40.29

Furthermore, apart stating the requirement that the provisional measures to be complied shall be made by the SC without prejudice to the rights, claims, or position of the parties concerned, the provision fails to indicate the kind of provisional measures to be taken by members and what the phrase provisional measures includes. However, Goodrich maintained that:

Provisional members envisaged by this article may include the cessation of hostilities, withdrawal of armed forces from specified area, the acceptance of some form of international policing arrangement with a specified area, and the termination of retaliatory measures, which have been taken in connection with particular dispute or situation.30

29 H. Kelsen, supra note 27, pp. 739-40
30 Goodrich, supra note 24, p. 273
The other issue that must be raised in relation to article 40 is whether the words “call upon”, used in this article, are an act constituting an obligation of the parties concerned or a simple recommendation. According to Kelsen, it depends on the intention of the SC and especially on the consequences which it attaches to a failure to comply with the call, that is, the council may make the call without intending to bind legally the parties concerned, and especially without intending to react against non compliance with an enforcement action. Thus, if the “call upon” is in the nature of recommendation, that is, upon the calling no consequence to be taken upon failure is attached, obviously, it is the parties themselves which are expected to take the provisional measures, not the security council, in accordance with the call.

All in all, provisional measures are characterized as preventive; they are designed to prevent a threat to the peace from developing into an armed conflict. However if provisional measures lack the capacity to prevent a situation or dispute as intended, the council will take enforcement measures which we shall discuss subsequently.

2.2.2.2 MEASURES NOT INVOLVING FORCE

One of the actions that might be adopted by the Security Council, once it has decided that there exists, with regard to a situation, a threat to a peace, breach of the peace or an act of aggression pursuant to article 39, is taking measures not involving the use of armed force which are provided for under article 41. It runs as follows:

31 H.Kelsen, supranote 29, p. 740
The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the member of the United Nation to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio and other means of communication, and the severance of diplomatic relation.

This article gives the SC the discretionary power to decide what measures not involving the use of the armed force are to be used to give effect to its decisions under article 39. The council is free to decide, first, weather such measures shall be used, and secondly, if so, what especially these measures are to be. The problem is that the Security Council may found difficult to reach at such decision for such substantial matters, pursuant to article 27(3), shall be made by an affirmative vote of 7 members including the concurring votes of the permanent members. Thus the enforcement actions taken under article 41 are purely political for such are measures, which the SC may apply at its discretion for the purpose to maintain or restore international peace. Decision of the SC taken under article 41 on measures not involving the use of armed force, such as to apply economic sanctions, are binding for the member states called upon.32

The provision lists certain measures, which are included in the measures not involving the use of armed force. However the listing is not one of exhaustive. According to Goodrich:

"This enumeration is not to be regarded as a limitation upon the powers of the SC. It dose not exclude the possibility of using other

measures not here enumerated so long as they fall within the category of 'measures not involving the use of armed force.'

According to the wording of art 39, as it is pointed out above, the SC may take enforcement measures not only against a member of the United Nation but also against state or even non-state group which is not a member and hence subject to the charter only in so far as article 2(6) applies.

Further more, the member who by a call of the Security Council is obliged to participate in an enforcement measure may not be a member of the Security Council. In this respect the question arises whether such non-member states may or shall be invited to participate in the discussion or decision of the Security Council with regard to enforcement measures. According to Kelsen:

"...incase the Security Council has decided to employ measures not involving the use of armed force, article 31 applies [i.e. participation of non members of the council without vote in the discussion of the later]. Incase, the council decides to employ measures involving the use of armed force, article 44 applies [that is inviting that member if the member so desires to participate in the decision of the Security Council concerning the employment of contingents of that members armed forces]." (Emphasis added)

As pointed out by Goodrich, Hambro & Simon, article 41 was first discussed in the council in connection with Spanish question on polish proposal calling upon members to sever diplomatic relationship with Franco Spanish. This

33 Goodrich, Supra note 24, p. 293
34 H.Kelsen, supra note 31, p. 740
was opposed by the majority of members but finally the assembly recommended the withdrawal of ambassadors from Spain.\textsuperscript{35}

In general the council called for the application of the kind of measures listed in article 41 on a number of occasions without citing that article and without determining that the situation was of the nature requiring action under chapter VII. Above all, actions against South Africa are the best illustration for the application of article 41 in which the council called upon all states to boycott South African goods, to refrain from exporting strategic materials to the country, and to cease the sole and shipment of arms, ammunition and all types of military vehicles.\textsuperscript{36}

Having mentioned these points concerning the power of the SC to decide what measures not involving armed force are to be employed, under article 41, the next sub topic will deal with the power of the council to take enforcement measures involving armed force.

\textbf{2.2.2.3 MEASURES INVOLVING ARMED FORCE}

Enforcement measures involving armed forces for the exercise of the authority conferred upon the Security Council under article 39 is provided for under article 42. It read as:

\begin{quote}
Should the Security Council consider measures provided for in article 41 would be in adequate or have proved to be in adequate, it may take such action by air, sea, or land forces as may be necessary to maintain
\end{quote}

\textsuperscript{35} GA Resolution39(1), Dec12, 1946, cited by Goodrich, p. 312

\textsuperscript{36} SCOR18th yaer, 1056\textsuperscript{th} Mtg./Aug. 7, 1963, and 1078\textsuperscript{th} Mtg./Doc. 4, 1963, cited by Goodrich, p. 313
or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of members of the United Nations.

This article together with article 41 leaves to the SC a wide measure of discretion in the exercise of the responsibility and power that is vested in it by article 39. Accordingly, the Security Council may decide in a particular case that measures not involving the use of armed force will be adequate.

In that case it will be only after such measures have been tried and have been proven by experience to be inadequate that the SC will decide to use military measures under this article. But it doesn’t follow that the council has to wait for such proof. To this end, it was unanimously agreed at the San Francisco conference that in case of flagrant aggression imperiling the existence of a member of the organization, enforcement measures should be taken without delay and to the full extent required by the circumstances.37

However, sometimes the SC may decide that measures not involving the use of armed force will be inadequate. In that case it may decide without first trying a case with measures not involving armed force, that the use of armed force is necessary. To this effect article 43(1) provides that:

All members of the United Nations, in order to contribute to the maintenance of international peace and security, under take to make available to the Security Council, on its request in accordance with

37 Goodrich, Supra note 30, p. 314
special agreement or agreements, armed forces, assistance, and facilities, including rights of passage, necessary for the purpose of maintaining international peace and security.

The question that should be raised at this juncture is as to whether the Security Council pursuant to provisions of article 39 & 42, requires members to provide “armed force, assistance and facilities” in excess of those specified in the special agreement or agreements. According to Goodrich, this question was raised in the course of the discussion committee III/3 at the United Nations conference in San Francisco and, speaking on behalf of the sponsoring governments, the delegate of the United Kingdom gave assurance that the Security Council would not have that authority [authority given under article 42]. Therefore, no member of the organization is obliged under article 42 to employ armed forces, assistance and facilities in excess of those specifically provided for in the special agreement or agreements mentioned in the article 43. This in other words, implies that until a member has concluded a special agreement with the Security Council, it is under no obligation to take military action pursuant to article 42. Goodrich maintained that:

“Article 42, by it self dose not specify from where the air, sea or land forces in question are to be come. By the terms of article 43, provision is made for their provision by members in accordance with the terms of “special agreement or agreements”. However, there is nothing in article 42, as it

stands, which would prevent the establishment and use of an independent international armed force under SC direction”. 39

Thus, the security council can not order a state to take part in a military enforcement action in the same way that it can order a state to take part in non military enforcement action for a state is not obliged to take part in military operations under article 42 unless it had concluded a special agreement under article 43. Peter Malaczuk pointed out the fact that member states have never made any of the special agreements envisaged in article 43 and the military staff committee established under article 47 has remained a dead body which only holds regular ritual meetings. 40 However, he also pointed out that:

"The security council can authorize a state to use force, even in circumstances where force would normally be illegal, if the conditions of article 39 and 42 are met. Article 42 empowers the SC to use force in such circumstances and therefore may be interpreted a fortiori as enabling the SC authorize states to do the same”. 41

From this it follows that the Security council is empowered not only to take collective enforcement action but also to allow a state to use force if the conditions of article 39 and 42 are met and especially in the absence of special agreement or agreements by states under article 43 of the charter to the provision of the forces needed to avert a situation.

To conclude with this chapter, we have to note that enforcement action will take place, practically and as a rule, only when a dispute or situation could not be

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39 Goodrich, supra note 24, p. 281
40 Peter Malaczuk, Supra note 32, p. 389
41 Id., pp. 389-90
resolved by peace full means. Enforcement measures, as noted above, can also be classified as one, which involve armed force and which is not.

Having seen the main powers and functions of the UN Security Council, in the earlier chapters, next we shall deal with the powers and functions of the Peace and Security Council of AU in order to compare the powers and functions of the two councils plainly.

CHAPTER THREE
THE PEACE AND SECURITY COUNCIL OF AFRICAN UNION

3.1 Establishment of AU PSC

To deal with the development of AU PSC, it is wise ness to deal first with the establishment and development of AU whose historical background is, in turn, based on that of OAU. The OAU, which was one of the regional organization established pursuant to article 52 of the UN Charter, had remain in life for about 30 year. Since its inception the OAU has played a determining and invaluable role in the liberation of the continents and in the process of attainment of unity of the continent. But through time African leaders have shown their desire and accept the initiative taken by the Libyan leader col. Gaddefi that the OAU should be changed in to another organization. The establishment of the AU can be seen as the product of the Libyan- driven initiative intended to enable the north African state to break out of the prolonged diplomatic isolation brought about by its poor relations with the US, UK and most of the Arab world.  

On 9/9/1999 the heads of state and government of African country, on the declaration, which adopted on the 4th extraordinary session in Sirte, Libya decide

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to establish the AU. ² Then at the Durban submit of 2000, the assembly of OAU has adopted the constitutive act of AU and opened for signature and ratification of the constitutive act of AU by 50 heads of states and governments. ³

The need for establishing AU mainly arises from the fact that the scourge of conflicts in Africa constitutes a major impediment to the socio-economic development of the continent and of the need to promote peace, security and stability as a prerequisite for the implementation of the development and integration of Africa. ⁴

The other ground for the establishment of AU is pointed out by Jakkie Cilliers as follows:

In the past commitments made by heads of state and government to peace and security, respect for democracy, human rights and the rule of law, were often broken with impunity. The perceived weakness of the organization of African union (OAU) was that it lacked both the will and the means to uphold its decisions. The legal architectures of the AU provided plans for a number of mechanisms to change this tradition, including the groundbreaking intervention clause of the AU act: article 4(h) and article 23(2) on sanctions. ⁵

² Constructive Act of the AU (adopted on 11 of July 2000, Lome, Togo) preamble, Para. 11
⁴ supra note 2, para. 8
In order to ensure the observance of the basic principles and objectives of the union enumerated under article 3 and 4 of the AU constitutive act the union has established many organs. One of these organs that the AU Assembly has established is the Peace and Security Council which it established pursuant to its power under article 5(2) of the constitutive act of the OAU. Indicating the fact that the establishment of peace and Security Council is a remarkable stage for the realization of objectives of the AU, Kathryn Sturman summarized as follows:

The ambitious design of the African union, setout in the constitutive act of 2000, is taking shape at a remarkable pace. Less than two years after the inauguration of the AU in Durban, South Africa, member states are ready to move from the paper work and ratification process, to the launch of two key organs: the Peace and Security Council (PSC) and the Pan African Parliament (PAP).  

Thus, it is the constitutive act of AU, which empowers the assembly of heads of state and government of the union to establish any organ it deems necessary.  pursuant to this power the protocol establishing the peace and Security Council of AU was adopted by the first ordinary session of the assembly of the AU in Durban on July 9,2002 and entered in to force on 26 December 2003 after ratification by the required 27 of the AU’s 53 member countries .This protocol thus in effect replaced the Cairo Declaration and its provisions supercede the resolution and decision of the OAU relating to the Mechanism for Conflict Prevention, Management and Resolution in Africa. 

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6 Ibid
7 Art.5 (2) and 9(1)(d), AU Constitutive Act
The Peace and Security Council is a standing decision making organ of the union on areas of prevention, management and resolution of conflicts. It is also established to serve as a collective security and early warning arrangement and facilitate timely and efficient response to conflicts and crises situations in the continent.\textsuperscript{9}

3.2 compositions and voting procedure of the AU PSC

The peace and Security Council, whose establishment is necessitated, interalia, to serve as a collective security and early warning arrangement and facilitate timely and efficient response to conflicts and crises situations in the continent as provided under article 2(1) of the protocol, is composed of fifteen members of the AU, ten of whom are elected for a term of two years while the five members would work for an extra one year to ensure continuity.\textsuperscript{10}

Member states of the AU would be eligible to the membership of the peace and Security Council, provided that they fulfill the criteria stated under article 5(2) of the protocol. Commitment to uphold the principles, equitable regional representation, contribution to the maintenance of peace and security in Africa, participation in conflict resolution, contribution to Peace Fund as well as to honor financial obligation to the union are some of the criteria provided under the protocol that would enhance for election.\textsuperscript{11}

The criteria stated under article 5(2) (a) to (i) are cumulative for sub article (h) has employed the conjunctive word “and”. Accordingly, a member state of the union who wants to be elected as member of the PSC should clearly show that she

\textsuperscript{9} Id, article 2(1)  
\textsuperscript{10} The Protocol, Article 5(1)(a) and (b)  
\textsuperscript{11} supra note 8, Article 5(2)(a),(b),(c),(f) and (i)
has complied with the requirements enshrined under article 5(2) of the protocol. Though it can be said that this requirements do have either direct or indirect relationship with the maintenance of peace, security and stability of the continent, they tend to be redundant. For example, a member state contributes to the promotion and maintenance of peace and security in Africa through participation in conflict resolution, peace making and peace building efforts at regional and continental level. It can also attain the same objective by showing willingness and ability to take up responsibility of regional and continental conflict resolution initiatives and/or through financial contribution. Therefore, the reason behind putting these sets of criteria separately is not clear.

Furthermore, some of the criteria are very general and could include the others. For instance, up holding the principles of the union under article 5(2)(a) includes not only respect for constitutional governance, rule of law and human rights in article 5(2)(g) but also other equally important principles that are not mentioned under article 5 but mentioned in article 4 of the Protocol and the Constitutive Act. This could include respect of boarders, non-interference in internal affairs of other states, etc.

But, the reason why respect for constitutional governance, rule of law and human rights is singled out from the rest of the principles may be to put as separate criteria for eligibility in election for the peace and Security Council. Moreover, it may also be to show the commitment of the union to give effect to the Lome Declaration, which provides a frame work for dealing with unconstitutional change of governments in Africa.  

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12 Declaration AHR/Dec/5/((XXXVI) on the Frame work for an OAU Response to Unconstitutional Change of Gov’t, adopted by 36th Ordinary Session Held in Lome, Togo, on 10-12 July 2000
Undoubtedly, the criteria that all members of the PSC should reflect a respect for constitutional governance, rule of law and human rights is the most important and contentious one. But most of the members of AU could not meet this requirement. Jakkie Cilliers and Kathryn Sturman pointed out that:

“Depending on how this requirement is interpreted, of the 28 known ratifications of the PSC, probably only Ghana, Kenya, Lesotho, Mali, Malawi, Mozambique, Mauritius, Namibia, Niger, Rwanda, South Africa, Senegal, Sierra Leone, Tanzania and Zambia would qualify. Key African states such as Algeria, Ethiopia, Libya, Nigeria and Zimbabwe could all fail the test in respect for human rights—although the relative size or contribution to peace keeping for some such as Nigeria would probably ensure their candidature.”

Contribution to the Peace Fund and/or the special Fund created for specific purpose is another criterion. Since peace keeping missions are undertaken for and on behalf of all member states, expenses for it could be considered as that of the organization. Contribution to its operation should primarily be the duty of all states. With respect of a member state that defaults in the payment of its contribution to the budget of the union, it is provided under article 23(1) of the Constitutive Act that:

“The assembly shall determine the appropriate sanctions to be imposed on any member state that defaults in the payment of its contributions to the budget of the union in the following manner: denial of the right to speak at meetings, to vote, present candidates

13 Supra, note 5, p.100
14 Supra note 8, Article 5(2)(f)
15 Article 17(2) and ICJ Decision on Advisory opinion on Certain Expenses case of the UN (ICJ Report (1962)p.151)
for any position or post with in the union or benefit from any activity or commitments, there from;”

But the question that should be raised at this juncture is as to whether this sanction of non eligibility to be a member of the peace and Security Council due to failure to contribute to the Peace Fund is additional sanction which is not mentioned under this provision or it is provided just to force states to fulfill there obligations. Because it seems that only member states, which are not affected by sanctions provided under article 23 of the Constitutive Act are eligible for appointment as members of the peace and Security Council. In fact, in light of the financial constraints that might be faced and failure of many states to pay their arrears, it could be necessary to take measures to force states to fulfill the obligation to make financial contribution.

However, over emphasis on states’ capacity and financial contribution could eventually lead to hostaging the whole activity to few states that have better economic powers than the others. This in turn could adversely affect poor states that may have the willingness but not the capacity to pay for peace support activities.

Moreover, the financial capacity of states is less relevant to the post they will assume by being a member of the Peace and Security Council. What is required of them is the ability to appreciate issues that require collective action and decide on behalf of all states. Therefore, discrimination from election on the basis of capacity, ability and financial contribution as stated under article 5(2) (c), (e), (f) and (j) of the protocol tends to contradict with the principle of equity and sovereign equality which is provided under article 4(2) of the Constitutive Act.

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16 Modalities for the Election of Members of the PSC, para.5
All in all, the criteria to be taken into consideration during the election of members of the Peace and Security Council can be categorized into two: equitable regional representation and rotation, and member state’s qualifications which are listed under article 5(2). Unlike member state’s qualification criteria, how member states can be elected based on the first category is clearly depicted under paragraph 4 of the Modalities for the Election of Members of the PSC. It says, the regional representation of members in the council shall be as follows: Central: 3, East: 3, North: 2, South: 3 and West: 4. Moreover, paragraph 9 of the Modalities for the election of members of the PSC provide that:

In order to ensure the principle of equitable regional representation and rotation, the selection of members shall be conducted at the regional level. In this regard, the selection process shall be based on modalities to be determined by each region.

Concerning voting procedure in the Peace and Security Council, Rule 27 of Rules of Procedure of the PSC provides that each member of the council shall have one vote. The council shall take all its decisions by consensus, failing which, in procedural matters, by a simple majority of members eligible to vote. Substantive matters, however, require a two-thirds majority of eligible members to vote. But neither under the protocol nor under the Constitutive Act of AU has been defined what procedural and Substantive matters might constitute.

17 Id, para. 3 and 4
18 Rule 28(1), Rules of procedures of the PSC
19 Id, Rule 28(2)
3.3 The objectives, principles and functions of the PSC

The peace and Security Council, which is established by the assembly of the AU, has its own objectives, principles and functions, which it is expected to achieve. The council should in one way or another accomplish its functions in accordance with the principles and objectives of the union. Stated otherwise, the council is established to achieve the union's objectives and principles towards the maintenance of peace and security in the continent. It is the standing and the highest authority of the union in this regard. Promoting peace, security and stability on the continent so as to guarantee the protection and preservation of life and property, the well-being of African people and creating conducive conditions to sustainable development are some of the objectives which the council is required to achieve. It shall anticipate and prevent potential conflicts. In addition, in the case of actual conflict, the council is responsible to undertake peace-making and peace-building functions and the resolution of conflicts.

International terrorism has nowadays become one of the major problems which place the maintenance of international peace and security in danger. To this end, the PSC is established to co-ordinate and harmonize continental efforts in the prevention and combating of international terrorism in all its aspects. Africa has suffered from terrorism. So including prevention of terrorism in the objective of the council is necessary consequence of the seriousness of the problem. Developing a common defense policy of the union in accordance with the constructive act, and promoting and encouraging democratic human rights and fundamental freedoms, respecting the sanctity of human life and international humanitarian law, are other objectives which the council is expected to achieve.

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20 The Protocol, Article 3(a)
21 Id, Article 3(d)
22 Id, Article 3(e) and (f)
The PSC, which is established so as to promote these objectives, has been given so many functions. Here again the council is expected to perform in the area of promotion of peace, security and stability.\(^{23}\) It is also expected to give early warnings and prevent the occurrence of dispute through diplomacy. But if the conflict has already occurred, it is entitled to make peace by using its good offices, mediation, conciliation and enquiry.\(^{24}\) Peace building and post conflict reconstruction, humanitarian action and disaster management are other functions of the PSC.\(^{25}\)

The protocol doesn’t list the functions of the council exclusively rather article 6 has left the functions of the council to remain open-ended. As a result, the assembly may decide that other functions will be performed by the PSC, as it deems necessarily.

The PSC which is established to achieve the objectives enumerated under article 3 and to perform functions provided under article 6 of the protocol is expected to be guided by certain principles. Accordingly, article 4 of the protocol has been devoted in stating the principles, which the PSC should respect in discharging its obligations. Stated generally, the PSC shall be guided by the principles enshrined in the constitutive act, the charter of the UN and the UDHR.\(^{26}\)

Under article 7(2) of the protocol member states agree that in carrying out its duties under the protocol, the PSC acts on their behalf. The council may hold informal consultation with parties concerned by or interested in a conflict or

\(^{23}\) Supra note 8, Article 6(a)  
\(^{24}\) Id ,Article 6(b)and (c)  
\(^{25}\) Id, Article 6(e)and (f)  
\(^{26}\) Id, Article 4
situation, as well as with regional mechanisms, international organizations and civil society organizations may be needed for the discharge of its responsibilities.\textsuperscript{27}

In order to exercise these functions based on the principles and objectives of the AU, the PSC has given a wide range of powers. In the next sub section we shall deal with the powers of the PSC.

3.4 Powers of the PSC of AU

As the PSC is the highest authority of the continent on the area of conflict prevention, the council is empowered to exercise all powers, which have direct or indirect relationship with attaining the objectives for which it is established. Accordingly, pursuant to article 7(1)(a) of the protocol, the council is entrusted with the power of anticipating and preventing disputes and conflicts, as well as policies that may led to genocide and crimes against humanity. By doing so, the council will be able to halt potential conflicts before they grow into full-blown conflicts. When conflicts start peace making and peace keeping operate to resolve it. Once it is resolved post conflict peace building commission comes in play. In post conflict situations, the PSC shall assist in the restoration of the rule of law, establishment and development of democratic institutions and the participation, organization and supervision of elections in the concerned member state.\textsuperscript{28}

Peace building power of the council is formulated to be used not only at the end of hostilities but also during hostilities. This can be inferred from article 14(2) of the protocol which provides that in the area of relative peace activities to reduce the degradation of social and economic situations arising from conflicts need to be undertaken.

\textsuperscript{27} Rules of procedure of the PSC, Rule 16
\textsuperscript{28} The Protocol, Article 14(2)
The PSC is, under article 7(1)(c) of the protocol also empowered to authorize the mounting and deployment of peace support mission and expected to lay down general guide lines on how such operations shall be undertaken as well as delimit the mandate of the operation. Moreover the council is empowered to recommend to the assembly, pursuant to article 4(h) of the constructive act, intervention, on behalf of the union and to implement the common defense policy of the union, which we shall deal in detail in the subsequent subsections.

3.4.1 Power of the PSC to recommend collective action

In the past as African governments have been conscious, of sovereignty the right to exercise internal and external public authority has been exclusively guarded by them. They create the OAU to defend the sovereignty and territorial integrity as well as independence of each member states with the principle of non interference in internal affairs of any state. Stated otherwise, the Act of AU moves beyond the OAU charter’s designation of the internal affairs of member states being off-limits to the organization. This change is an expected one for the AU Act emphasized on good governance, respect for human rights and regional integration across a range of areas.

In June 1993 they established with in the OAU a mechanism for conflict management and resolution but still the possibility of collective intervention for peace keeping or peace enforcement was put as only a field of cooperation with the UN. However, since 2002 Durban submit, the OAU gave way to AU, and the older peace and security instrument now replaced by the newly established

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29 Id, Article 7(e) and (h)
30 Declaration of Heads of States and Gov’t on the Establishment, with in the AU, of a Mechanism for Conflict Prevention, Management and Resolution, Adopted by 29th Ordinary session in Cairo, Egypt, June 1993,para.3

49
The PSC is created by the protocol relating to its establishment not only to be a standing decision making organ for the prevention, management and resolution of conflict, but it is also a collective security and early warning arrangement to facilitate timely and efficient response to conflict and crises situations in Africa. 32

To this end, article 7(h) empowers the PSC to take action in implementing the common defense policy of the union. Moreover, article 3 of the protocol relating to the establishment of the PSC of the AU provides that the objectives for which the PSC was established shall include the development of a common defense policy for the union, in accordance with article 4(d) of the constitutive act.

Accordingly, the council is entitled to recommend on intervention in a member state in respect of grave circumstance, namely war crimes, genocide and crimes against humanity. 33 But the controversy arises as to whether this power of the council is to be exercised without securing the consent of UNSC to that effect and whether this power is legitimate in light of UN charter.

Non-interference in matters, which are essentially with in the domestic jurisdiction of any state, is a well founded principle enshrined under article 2(7) of the UN charter. The principle prohibits the UN itself from interfering in domestic affairs except in line with the decision of the SC for application of enforcement measures under chapter VII. According to the stipulation of article 2(7) of the UN charter regional arrangements such as AU in particular PSC of AU, are also prohibited from exercising any enforcement action without authorization from the

31 Supra note 28, article 14(3)
32 Id, Article 2(1)
33 Id, Article 7(1)(e)
UNSC. This is because enforcement action is used according to article 39 of the UN Charter, only when there is, in the eyes of the SC, a threat to international peace and security. Practice here recently appears to suggest rather controversially not only is prior approval not required, but that Security Council authorization need not occur until substantially after the action has commenced.  

Generally, we can point to two views on the legal ground of armed intervention to put an end massive violation of human rights and humanitarian principles such as genocide and war crimes. The first could be that in intervention that can not be justified by the existence a threat to the peace, breach of the peace or act of aggression as provided by article 39 and following of the charter is unlawful. Thus, intervention on grave circumstances on human right grounds is unjustified unless prior decision is achieved as to whether a threat to international peace and security has been posed by the violation.  

On the other hand, one may argue that serious breaches of human rights like genocide always create a threat to international peace and security. But, the question that may be raised at this juncture is that, even in this case whether the PSC of AU can recommend intervention to the assembly of the union without securing the decision of the UNSC to that effect. One writer maintained that, jurisdiction of regional arrangements is one of the areas, which brought about differences among member states of the UN. In most cases, regional arrangements do not show their jurisdiction in a clear manner.

The AU is one of such regional arrangements, which doesn’t clearly state whether the Jurisdiction it has on its member states is compulsory or not. That is, unlike the

36 Brhnykun Andermichael, The OAU and the UN: Relations Between the OAU and the UN, (1976), P.46
Organization of American States (OAS) Charter which prevented its member states from lodging their disputes to the Security Council of the UN without presenting them to the peace committee set for this under the charter, neither the AU constitutive Act nor the protocol establishing the PSC states the issue.

To conclude the council is entitled to several powers under article 7, 14, p 15 of the protocol so that to discharge its responsibilities effectively. Moreover, Member states are, pursuant to article 7(4) under obligation to extend assistance to the PSC while discharging its duty of prevention, Management and Resolution of conflicts in accordance with the protocol and the constitutive Act of the union.

3.4.2 GROUNDS OF INTERVENTION

Initially, the union, in particular the PSC, has the right to intervene not on any situations that threatens the peace, security and stability of the continent. Rather this discretion of the council is limited only to grave circumstances, namely war crimes, genocide and crimes against humanity. Thus, at the beginning the right of intervention of the council was limited to situations which are threat to the human rights of African people. But later on the heads of state and government of the AU meeting in their first extraordinary session on 3 Feb 2003 adopted without any debate a number of changes to the Constitutive Act. The changes to the Act include, interalia, three novel principles related to the right of the union to intervene in situations where legitimate order is under threat, restraint of member states to enter into agreements which are in compatible with the principles of the AU as well as prohibition of the use of territory of member state to subvert other states.

37 Article 4(j), AU Constitutive Act and Article 7(1)(e) of Protocol Relating to the Establishment of AU PSC
The question that should be raised at this juncture is as to what may constitute legitimate order. That is, unlike the grounds of war crimes, crimes against humanity and genocide whose definitions are provided for in the statutes of the international criminal tribunal for Rwanda and Yugoslavia and have been further clarified by the jurisprudence of these two tribunals, the ground of serious threat to legitimate order is not defined anywhere. It is, thus, unclear what criteria the Peace and Security Council of AU will use to determine whether the regime in power in an African state, being considered for intervention, is legitimate. One may, however, assume that a legitimate order can only result from a free and fair election which allows the majority to determine whom they wish to govern them. Even holding this assumption, another question might be raised as to what constitutes threat to legitimate order and whether peaceful demonstrations by people demanding political changes to be considered a threat and could justify intervention by the AU, particularly by the PSC, or not.

But, it can be strongly argued that since peaceful demonstrations are not one of those means which are identified as an unconstitutional change of government under the Lome declaration, they are excluded from the amendment to article 4 (h). That is peaceful demonstration could never serve as coherent ground of intervention by the PSC.

The AU Act is the first international treaty to recognize the right to intervene for humanitarian purpose (humanitarian intervention). However, the act does not indicate whether the definition of intervention is to be restricted to the use of force or it is to be viewed broadly as to including mediation, peacekeeping missions, sanctions and any other non forcible measures. 

39 Article 3,4,5 and 7 of the statute of the international tribunal for former Yugoslavia,(1996), and Article 2,3 and 4 of the statute of the international criminal tribunal for Rwanda ,(1994) 
The Other point that is worth mentioning is that there is no contradiction between the right of the council to intervene and the principle prohibiting interference by any member state in the internal affairs of another envisaged in article 4(g) of the Act, though it might appear at first glance. This is because on closer examination it is clear that what article 4(g) prohibits is intervention by a member state and not intervention by the AU. Thus, what the Act specifically prohibits is interference in the internal affairs of a state by another state i.e., unilateral intervention not to the right of the union to intervene in member states.

Though the AU Act is the first international treaty to recognize humanitarian intervention and intervention in situations of serious threat to legitimate order, the intervention power is stipulated as being the discretion of the PSC. Kindki has proffered the view that:

The couching of intervention by the AU as a right is unfortunate since it could be viewed as giving the AU or particularly the PSC discretion to decide whether or not to intervene. The provision should have required the AU to intervene as a matter of duty since the sense of obligation to intervene is more likely to move the AU in to action. 41

Finally, it should be noted that the Peace and Security Council Protocol provides that the PSC shall operate under guidance of the principle that 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. This is clearly provided under article 4(j) of the PSC Protocol. In addition article 6(d) of the protocol identifies peace support operations and intervention, pursuant to article

41 Supra, note 38,p.40
4(h), which is amended as it is mentioned above, and 4(j) of the Constitutive Act as one of the functions of the PSC.

CHAPTER FOUR

THE POWERS AND FUNCTIONS OF UN SECURITY COUNCIL vis-à-vis AU PEACE AND SECURITY COUNCIL

4.1 COMPARISON BETWEEN THE FUNCTIONS OF UNSC AND AU PSC

Peacekeeping activities in Africa have been largely the domain of the UNSC for pursuant to article 24 of the charter, member states of the UN confer the Security Council primary responsibility for the maintenance of international peace and security. However, although Africa is host to the vast majority (and the most deadly) of conflicts in the world, it would appear that there is distinct lack of genuine interest in African affairs shown by the UN Security Council and its key members.\(^1\)

To this effect AU has established the peace and Security Council as one of its organs with a function, among other things, to promote peace, security and stability in Africa. To this end the peace and Security Council is empowered to develop policies and action required to ensure that any external initiative in the field of peace and security on the continent takes place with in the frame work of the union’s objectives and priorities.\(^2\)

Generally, the principles enshrined in the UN are part of the rules that would guide the Peace and Security Council pursuant to article 24(1) of the UN

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\(^2\) Protocol Establishing the PSC of AU, Article 7(1)(i)
genuine interest in African affairs shown by the UN Security Council and its key members.  

To this effect AU has established the peace and Security Council as one of its organs with a function, among other things, to promote peace, security and stability in Africa. To this end the peace and Security Council is empowered to develop policies and action required to insure that any external initiative in the field of peace and security on the continent takes place with in the frame work of the union’s objectives and priorities.  

Generally, the principles enshrined in the UN are part of the rules that would guide the Peace and Security Council pursuant to article 24(1) of the UN charter, as it is pointed out here in above, member states of the UN confer primary responsibility for the maintenance of international peace and security to the Security Council. The PSC of AU accepts this primary responsibility of UNSC for the maintenance of peace and security of the continent. The main justification why the UNSC grants its primary function to regional arrangements, such as the AU, is that regional forces could have a better understanding of history of the region and the root causes of local conflicts. In addition to this Parties to the conflict some times could view outsider forces as strangers to their conflict. In respect to this, chapter eight of the UN Charter is dedicated to providing principles, in accordance with which regional arrangements are to set up.  

Regional arrangements are not precluded by the charter to involve in the maintenance of international peace and security, so far as they are consistence with the purposes and principles of the UN.  

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2 Protocol Establishing the PSC of AU, Article 7(1)(i)  
3 UN Charter, article 53(1)
Regional organizations possessed a potential that could be utilized in the fields of preventive diplomacy, peace keeping, peace making and post-conflict peace building. In addition, regional action as a matter of decentralization, designation and co-operation with United Nations efforts could not only lighten the burden of the council but also contribute to a deeper sense of participation, consensus and democratization in international affairs.  

That having been said, article 52(4) stresses that the application of articles 34 and 35 of the UN charter relation to the roles of the Security Council remains unaffected. The charter thus gives a certain constitutional role to regional arrangements. The supposition is that these organizations will have a role which is complementary to that the Security Council, both in respect of peaceful settlement of disputes and in respect of enforcement action under the authority of the Security Council. In practice the Security Council has been pragmatic in accepting the status of organizations as regional arrangements for the purpose of using its powers to authorize enforcement action.

The question that must be raised here is that as to what will happen if a regional agency is taking action it considers appropriate and is inline with the purposes and principles of the UN while the UNSC recognized such action unconstitutional in light of the Charter. M.N show pointed out that:

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although reference where appropriate is to regional organization or arrangements should take place, this does not
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affect the comprehensive role of UN through the security council or general assembly in dealing in various ways with disputes between states. While provisions contained in regional instruments may prevent or restrict resort to mechanisms outside those instruments, this doesn’t constrain in any way the authority or competence of the UN.  

Moreover, in many cases, a matter may be simultaneously before both the UN and a regional organization. The question that must be raised at this juncture is that what will happen if both the UN Security Council and a regional organization, say Au, pass two contradictory resolution independently taking the purposes and principles of UN in to account M.N show emphasized that.

Such concurrent jurisdiction does not constitute jurisdictional problem for the UN. In practice and in relation to adoption of active measures, the UN is likely to refer to appropriate regional mechanisms while realistic chance exists for a regional settlement.

Thus, though the issue of when regional action may be denied to be appropriate, i.e., when regional action is to be consistent with UN purposes and principles is not clearly provided under the charter it can be inferred from article 103 of the charter, which assigns priority to charter obligations over obligations contained in other international agreements, that any member of the UN, incase of concurrence

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7 M.N.Shaw, Supra note 5,p.929  
8 Ibid
of decisions over a particular situation, shall react with the decisions of
the UN disregarding a decision made by a regional agency.

But taking in to account the reluctance of UNSC with respect to situations
in Africa, what will happen if UNSC invokes to act against a particular situation
which normally and appropriately being handled by the AU Peace and Security? Is
an issue addressed neither by the UN Charter nor by the Protocol establishing the
AU PSC.

Thus, the AU is duty bound to work in conformity with the purpose and
principles and in this regard, it recognized this duty and it set out the UN charter
as one of the guiding principles of its activities under article 3 of the protocol
relating to the establishment of the peace and Security Council of the AU.

Hence, the peace and Security Council of AU is expected to cooperate and
work closely with it so that it could develop a strong “partnership for peace and
security between the AU and the UN pursuant to its mandates.”

All in all, the AU peace and Security Council is responsible only to
maintain peace, security and stability of the continent respecting the purposes and
principles of both the UN and AU where as the UN Security Council’s primary
responsibility is the maintenance of international peace and security, one of which
is the maintenance of peace in Africa.

\(^9\) supra note 2, Article 7(k)
4.2 COMPARISON BETWEEN THE POWERS OF UNSC AND AU PSC

Among the major powers assumed by the peace and Security Council of AU is the power to recommend intervention to the assembly on behalf of the union in a member state in respect of grave circumstances, or in respect of serious threat to legitimate order as amended on Feb. 2003.

Accordingly, the peace and Security Council is empowered to recommend on the necessity of intervention but the decision as to whether intervention is necessary or not is left to the assembly of the union. Moreover, the peace and Security Council’s power is limited to approval of the modalities for intervention in a member state, following a decision by the assembly, pursuant to article 4(h) of the constitutive act. Thus, the Peace and Security Council of AU has neither the power to determine the modalities of intervention nor the power to decide on the necessity of intervention in a member state. On the other hand, however, it seems, at least practically, that the PSC is empowered to determine the modalities of intervention since the power to approve modalities of intervention in effect means the power to decide on appropriate modalities of intervention.

This is one limitation imposed on the power of the Peace and Security Council of AU, which in effect makes the council handicapped to perform its functions as expected. In particular, it is hardly possible for the council to perform its function in the area of peace support operations and intervention, pursuant to article 4(h) and (i) of the of the constitutive act, which is provided under article 6(d) of the protocol.

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10 Id, article 7(e)and 4 (h)
12 The protocol, Art. 7(1)(f)
Unlike the peace and security council of AU, the UN security council shall not only determine the existence of any threat to the peace, breach of the peace, or act of aggression and make recommendations, but it shall also decide what measures shall be taken in accordance with article 41 and 42 to maintain or restore international peace and security.  

But, one thing is not clear with regards the power of the peace and Security Council to recommend intervention to the assembly. This is as to whether the recommendations of the council have binding nature or are mere recommendations. In fact it can be inferred from the formulation of the provision that the recommendation will have no binding effect for there is no ground to make the council subject to assembly of the union had its recommendations be final.

To the contrary, the UNSC has the power to make recommendations as well as decisions taking in to account the action to be taken to resolve a situation. M.N Show pointed out that:

While actions adopted by the Security Council in pursuance of chapter VI of the charter, dealing with pacific settlement of disputes, are purely recommendatory matters concerning threats to, or breaches of, the peace or acts of aggression, under chapter 7, give rise to decision-making powers on the part of the council. This is an important distinction and emphasizes the priority accorded with in the system to the preservation of

13 UN Charter, Art.39
peace and the degree of authority awarded to the Security Council to achieve this.  

The peace and Security Council, unlike the UN SC, can not made decision, at least theoretically, concerning the necessity of intervention, which in effect implies that the AU system, unlike the UN, does not accord the peace and Security Council the priority to preserve peace and security of the continent.

Article 4(h) of the AU constitutive act, therefore, is a pertinent provision to hinder the commission of the mentioned crimes by the peace and Security Council in earlier possible time than measures that may come from the UN Security Council. This is because the regional agency being closer to the circumstances that may exist in region is in a better position to know and evaluate and to take appropriate and effective measure rapidly.

In order to enable the peace and Security Council perform its responsibilities with respect to the deployment of peace support missions and intervention pursuant to article 4(h) and (j) of the constitutive act, an African standby force has been established. Articles 2(7) of the UN charter precluded the UN, save the Security Council, to conduct intervention in matters that are essentially the domestic jurisdiction of a state. This provision similarly applies to the AU since, under article 3 of the protocol, the principles of UN are guiding principles of its works. The question that may raised at this juncture is as to whether article 2(7) of the UN charter and article 4(h) of the AU constitutive act are consistent with each other or not. However, it can be said, based on the nature of the circumstances for which intervention is possible, that article 4(h) is not

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15 Supra note 12, Art.13(1)
circumstances’ envisaged under article 7(1)(e) of the protocol are in there nature international crimes.

According to article 53(1) no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the SC. In terms of this provision the PSC of AU, in order to under take enforcement action, must seek the prior authorization of the UNSC. This article, therefore, seems to serve the UNSC to play its supreme and central power to supervise enforcement actions conducted in the international arena. If we uphold this provision of the charter as it is, article 4(l) of the constitutive act of AU would be come meaningless which in effect makes the PSC powerless for AU may intervene in member states in the case of article 4(h) with out and other threats of the continent upon the authorization of the UNSC with out the need of such provision.

However, it seems appropriate to argue that a regional arrangement so far as it enshrined a certain provision which permits to take measures in some specific cases and such provision is ratified by virtue of the free will of member states of a certain regional body, the possible measures that would be exercised by such arrangements upon the occurrence of specified cases, dose not need authorization. This view seems more tenable as it may resolve the question as to what may happens if the UNSC is unwilling or unable to authorize appropriate action in a timely manner as happened in the case of Rwanda in 1994.Cilliers maintained that:

“Neither the act nor the protocol of the PSC are clear in this regard [in the issue of the need of prior authorization from the UNSC] leaving leeway for the AU to sanction intervention with out prior UNSC approval. Article 17(2) of the protocol of the PSC refers to “… in keeping with provisions of chapter VIII of the UN charter…..” Regional organization can, of course, act and seek post
facto approval as the North Atlantic treaty organization (NATO) did in Kosovo.”

As it has been noted in chapter one, a slow process to reach at consensus for peacekeeping operations and when consensus is attained, delay in dispatching forces characterized one of the drawback of the UN peacekeeping experience in Africa. This poor and inefficient handling of conflicts by the UN in Africa has been witnessed in the Rwanda, Liberia and presently in the Darfur crisis. This is unfortunately, due to states wielding the veto privilege that make it impossible for the UNSC to act even in case of serious and wide spread situations. Thus, it would be appropriate, taking in to account among other things the obstacle of the veto power in front of the UNSC, to confer the PSC of AU the power to made humanitarian intervention envisaged under article 7(1)(e) of the protocol.

The other difference between the powers of AUPSC and UNSC is based on the nature of intervention while exercising that power. Accordingly, as it has been pointed out under chapter two that intervention by the UNSC may have two features. The 1st feature is non-military type of intervention that is provided under article 41 of the charter. The second feature of the intervention, which the UNSC empowered under article 42, is armed intervention.

Unlike, the UN charter, which clearly depicts the type of intervention to be taken by the SC, article 4(h) of the constitutive act of AU does not vividly put to which type of intervention it is contemplating and on which kind of intervention does the PSC is empowered to recommend intervention pursuant to article 7(1)(e). But if one considers the nature of the crimes covered by this provision, it

gives a clue to which type of intervention is intended to refer. The mentioned grave circumstances – genocide, war crime and crimes against humanity are very much sensitive and they require a prompt action to stop the commission of such crimes. The application of non military measures in such cases would not be effective as such actions could not be fruit full in the required speed to check the possible damage that would be sustained by such crimes. Hence, the use of armed force seems a proper measure in such crimes. On top of this, the establishment of African stand by force to ensure the application of article 4(h) by the peace and Security Council ¹⁷ is an important implication that the power which is given to the PSC is to recommend armed intervention.

Moreover, the duty of the peace and Security Council to recommend the assembly of heads of state and government in seeking authorization departs the AU system from that of the UN charter. In the later case, the Security Council, per article 39 of the charter, makes a decision on the existence of an international threat and applies the appropriate measure that it thinks fit to challenge such threats by itself. ¹⁸

This facilitates to effectively manage any threat timely before it escalates. If authorization were necessary from the general assembly, however, the international peace and security would be endangered until the assembly meets (which takes place once in a year), and makes a decision on the authorization.

Contrarily, making recommendation to the assembly, pursuant to 4(h) of the constitutive act, to make intervention in respect of grave circumstances is the duty of the PSC. That is, the Peace and Security Council shall, recommend to the

¹⁷ Supra, note 2, Art 13(1)

¹⁸ Id, Art 7(1)(e) and Art 39 of UN Charter
assembly whenever the listed grave circumstances have occurred. ¹⁹But its recommendations, in most cases, may not be successful for pursuant to article 4(h) of the constitutive act it is the discretion of the AU assembly to decide whether or not to intervene.

Thus, it will be appropriate to empower the peace and Security Council, like the UN Security Council, to decide on the necessity of intervention independently. In other words, the requirement of authorization from the AU Assembly to decide on intervention is a paralyzing imposition on the peace and Security Council not to carry out its duties that are laid down under its establishing protocol.

Unlike the AU system, however, the UNSC has the duty to determine the existence of any threat to the peace, breach of the peace, or act of aggression but also it shall make recommendations or decide what measures shall be taken in accordance with article 41 or 42, to maintain or restore international peace and security. ²⁰Hence, it was appropriate if article 4(h) of AU constitutive act put the duty of AU to intervene than conferring right to do same as the sense of obligation to intervene, as pointed out here in above, is more likely to move AU in to action.

The UN Security Council may investigate any dispute or situation, which might lead to international friction or give rise to a dispute, in order to determine whether the continuance of the dispute or the situation is likely to endanger the maintenance of peace and security. ²¹Thus, pursuant to article 52(4) and 34 of the charter, the UNSC can investigate a dispute even while the dispute is being handled by the AU Peace and Security Council. This, however, could have the effect of undermining the power of the Peace and Security Council to resolve

¹⁹ Protocol Establishing AU PSC, Art 7 (1)(e)
²⁰ UN Charter, Article 39
²¹ Id., Art.34
conflicts with in the continent with out undue interference from the UN Security Council. Hence, although a state may have the right to refer the matter to the UNSC while it is in the hands of the PSC, the former should give a chance to the result of efforts made by the later.  

In fulfillment of its mandate in the promotion and maintenance of peace, security and stability in Africa, the Peace and Security Council shall cooperate and work closely with the UNSC, which has primary responsibility for the maintenance of international peace and security. But, what if a state which is a member to both councils and which is party to a dispute or situation become only willing to be subject to the regional security council, the PSC, considering and firmly objecting the UNSC for it is dominated by the five super powers and will in effect result in colonialism? In this regard, the refusal of Sudan, to the deployment of armed forces by the UNSC in Darfur could be cited as best example.

However, nothing is said both under the charter and the protocol concerning the right of a state to object to the power of UN Security Council as long as a dispute or a situation can be handled well by the Peace and Security Council.

The other point of comparison which is mention worthy is that, unlike the UNSC which can intervene or take enforcement action in any situation that might threaten international peace and security, the AU Peace and security council can, if its recommendation is accepted by the assembly, intervene only in respect of grave circumstances namely war crimes, genocide and crimes against humanity.

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22 Id, Art.52(3)
23 Supra note 2, Art 17(1)
24 ETV News, Released on 23/9/2006
25 Art.39 of UN Charter and Art 7(1)(e) of the Protocol
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Accordingly, while the UNSC can consider a situation as one which threatens international peace and security since its power to interpret the terms is unlimited and decides what measures shall be taken in accordance with articles 41 and 42, the AU PSC can recommend intervention only with respect to the specified grave circumstances. Hence, the Peace and Security Council cannot recommend intervention in any other circumstances even if it believes that the situation threatens the peace and security of the continent. Therefore, intervention other than the named circumstances by the protocol is an exclusive jurisdiction left to the UNSC.

Indicating the practice of the UN Security Council in applying its power to decide what situations might constitute a threat to the peace, Virgil Hawkins maintained that:

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25 Art.39 of UN Charter and Art 7(1)(e) of the Protocol
"The practice of the council in the 1990s shows a significant broadening of the range within which a threat to the peace could be found, and chapter VII invoked. Not only did the council find the existence of a threat to the peace in the case of international conflicts, but it also found threat to the peace in cases of almost entirely internal conflicts and situations any of which where relatively minor in terms of the level of human suffering. Furthermore, the council also broadened its interpretation of a threat to the peace to include acts of terrorism, the failure to hand over suspects in terrorist acts to certain countries for trial, and the failure to restore democracy in accordance with an international agreement.26

The other difference between the powers of the two councils lies on the fact that under the UN system, as pointed out under chapter two, no member of the organization is obliged under article 42 to employ armed forces, assistance and facilities in excess of those specifically mentioned in article 43. Accordingly, the UNSC, in absence of special agreement or agreements to the effect of making available armed forces to it, would not have the means to uphold its power to take action by air, sea, or land forces it deems necessary to maintain international peace and security under article 42 of the charter.

On the contrary, however, the AU has established the African Standby Force in order to enable the Peace and Security Council perform its responsibilities with respect to the deployment of peace support missions and intervention pursuant to article 4(h) and (j) of the constitutive act.

26Virgil Hawkins, Supra note 1, p. 65
By and large, though both councils have been empowered with the power of intervention, they may not exercise this power timely and effectively. This is precisely because regarding the peace and Security Council of Africa; however the grounds for intervention needs an immediate response, the procedures, which are set out under the constitutive act and the protocol, are not easier to do so promptly. The idea is that the recommendation, which is given to the PSC with out the power to decide intervention, has its own effect on the timely response to a situation by the council. On the other hand, the intervention power which is given to the UN Security Council may not meet its purpose due to the veto power the permanent member states of the council.

4.3 comparisons in their composition and voting procedures

Both the UN Security Council and AU Peace and Security Council are composed of 15 members of the UN and AU, respectively. Out of the 15 members of the PSC ten are elected for a term of two years, while 5 members would work for an extra one year to ensure continuity. But while in the UN system there is trend of classifying members in to permanent and non-permanent all member of the AUPSC are elected with out classifying them as a permanent and non permanent members. As it has been tried to show in chapter one, by classifying member states as being permanent and non permanent, the UN charter is in a frequent criticism for no permanent member will continue being great power eternally and vice versa. Thus, the formulation of the protocol seems a wise formulation for putting all members of the PSC on equal basis. This is also Justifiable when it is seen in light of the UN charter since one of the basic principles of UN is pursuant to article 2(1), the principle of sovereign equality. So, categorizing the member states of the UN as permanent and non permanent

27 Supra, note 2, Art. 5(1) and Art. 23 of UN Charter
members is against this basic principle of the charter though it might be justified by the fact of the permanent members' contribution and responsibility to the maintenance of peace and security.

Some of the criteria that would be considered in electing the members of the PSC of AU are similar to those of the UNSC. Both councils consider equitable regional representation, contribution to the maintenance of peace and security and commitment to uphold the purpose and principles of the organization as factors that would enhance the chance for election. But unlike the protocol of the PSC which orders the assembly to make a periodic review to assess the extent to which the members of the peace and Security Council continue to meet the requirement and to take action as appropriate, nothing is said under the UN charter as to whether or not the criteria would be reviewed or not after election.

However, the AU PSC differs from that of UN Security Council in that it puts more criteria including the principle of rotation, experience in peace support operations and having sufficiently staffed and equipped permanent mission at the head quarters of the union and the UN. Moreover, unlike the UN charter which prohibits a retiring member to be eligible for immediate re-election, a retiring member of the PSC is eligible for immediate re-election. The PSC allow immediate re-election of a member may be because, taking in to account that the criteria depicted under article 5(2) of the protocol, might be fulfilled only by few members of the union. That is, since the criteria listed in article 5(2) are cumulatively to be satisfied by a state to be eligible for election by the PSC, it is hardly possible for most of African states to fulfill these criteria. So it is justifiable to allow immediate re election of member of the council.

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28 Id, Art.5(2)(a)(b)and Art 23of the UN Charter
29 Art.5(4) of the Protocol
30 Article 5(b),(h) of the protocol
31 UN Charter, Art 23(2) and art 5(3) of the Protocol
Voting in the UNSC differs not only from that of the AU PSC but also from other UN organs. The council can take action on some questions if any 9 members vote in favor of the action. But on many other questions the permanent members of the council have the right of veto on the ground that the responsibility for maintaining international peace and security will fall on these supreme powers. As it is pointed out in chapter one, the veto has often been criticized as a crippling limitation on the powers of the SC for it has undermined the role of the SC in armed conflicts in which the permanent members were directly or indirectly involved or had an interest. Unlike the UNSC system, however the PSC each member of the PSC has one equal vote. Article 8(13) provides that:

Decisions of the PSC shall generally be guided by the principle of consensus. In case where consensus can not be reached, the PSC shall adopt its decisions on procedural matters by simple majority, while decisions in all other matters shall be made by a two-thirds majority vote of its member voting.

Thus, by avoiding the concept of veto power, the AU Act has done a remarkable development which can help the PSC to make action against any situation that dangers the peace and security of the continent without waiting for the delayed action of the UN Security Council.
CONCLUSIONS AND RECOMMENDATIONS

The primary function of UNSC is to maintain international peace and security. AU PSC is established to hold part of this primary responsibility of the UN. The UNSC has generally not fulfilled the expectations held of it in the years following the inception of the organization. This is mainly because of some defects in the formulation of the charter with respect to the voting system and composition of the UN Security Council. Article 27 of the charter accorded to the five permanent members an exceptional status not only by virtue of permanency but also by reason of special voting right amongst which the most important is the veto power. Granting such veto power is the main reason for the failure of the UN Security council and is one of the most obstacles to its fulfillment for it is vulnerable to abuse, especially in armed conflicts in which the permanent members are involved. Moreover, granting veto power to five supreme powers has an effect in pushing small states towards having, by any expense, a friend among these veto concurring states.

Generally, recently the composition of the Security Council, as well as its voting procedure, has come more fiercely under attack because the system does not reflect the changes in the international systems since its inception.

But unlike in the UNSC, in the PSC of AU, there is no concept of veto power and members have equal voting right. Therefore, the AU PSC can pass a decision towards a situation it thinks it will endanger the peace and security of Africa that is ignored by the UNSC due to a negative vote of that situation by a veto concurring state. This may lead to jurisdictional conflicts. Therefore, to avoid such jurisdictional conflicts AU PSC should be given primary responsibility to
maintain the peace and security of Africa so that the UNSC would exercise its responsibility to maintain peace and security of Africa, as part of international peace, only when the AU PSC fails or deemed to be unable to avert a certain dispute in the continent.

Article 52 of the charter allows states to form regional organization for dealing with such matters of peace and security as are appropriate for regional actions. It is based on this legal ground that African heads of state and government established the AU. The need for establishing AU mainly arises from the fact that scourge of conflict in Africa constitutes a major impediment to the socio-economic development of the continent and of the need to promote peace, security and stability as a prerequisite for the implementation of the development and integration of Africa.

Like the UN Security Council the AU PSC is also composed of 15 members. However, unlike the UN system in which members of the Security Council have been classified in to permanent and non-permanent all members of the AU PSC are elected without classifying them into permanent and non-permanent having equal voting right both on procedural and substantive matters. Such formulation of the protocol is a wise one for it put all members of the PSC on equal basis and thereby avoids the frequent criticisms made on the composition and voting procedures of the UNSC. Moreover, by avoiding the veto power, the protocol relating to the establishment of the PSC has done a remarkable development which can help the PSC to make action against any situation that dangers the peace, stability and security of the continent with out waiting for the delayed action of the UNSC.
The UN Security Council’s primary function, the maintenance of international peace and security, is to be exercised by two means: the first is the pacific settlement of such international disputes as are likely to endanger international peace and security, and the second (which, at least practically, presupposes the inapplicability of the first) is taking of enforcement measures. To discharge its primary responsibility, the council has unlimited powers so long as it exercised them following the basic principles and purposes of the UN.

Under article 2(3) of the UN charter it is articulated that all members of the UN are under obligation to settle international disputes by peaceful means in such a manner that international peace and security and justice are not endangered. But, absence of clear producer to be applied, lack of formal procedures to be followed while the security council applies its investigative power provided for under article 34, and disagreements between member states of the council to determine the existence of a dispute or a situation that endangers international peace are problems facing the security council in carrying out its powers under chapter VI, which deals with pacific settlement of disputes.

Peaceful settlement of disputes and conflicts is also one of the principles of AU PSC. But nothing is provided in the protocol as to how and in what manner such principle is to be exercised.

Also, surprisingly, the charter fails to fix chronological order so that enforcement measures had to be preceded by pacific settlement. But it is logical that in settling international disputes preference has to be given to other means of settlement than use of force, save to imminent situations or disputes which could not allow making pacific settlement.

The UNSC can take enforcement measures only when it decides on the existence of threat to or breach of international peace or acts of aggression.
But the UN charter puts no constant definition as to what may the phrases “threat to the peace”, “breach of the peace” and “acts of aggression” denote. Practically, however, their definition depends up on the circumstances of the case and the relationship of the five permanent members of the council to the issue under consideration, for a negative vote by any of the permanent members is sufficient to block all but procedural resolutions of the council. Therefore, a state may consider certain act as a threat to the peace, acts of aggression or breach of the peace while others may not.

Unlike the UNSC, however, the powers of the PSC of AU to take enforcement action are clearly specified to be grave circumstances such as genocide, war crimes and crimes against humanity, whose definition are depicted in international instruments. This is also the other remarkable step taken by the PSC of AU.

The power of the UN Security council to take measures involving armed forces in article 42 presupposes the failure of not only peaceful settlement of a situation and provisional measures but also the inadequacy of measures not involving force provided for under article 41. But article 42 by itself does not specify from where the air, sea or land forces are to come. However, by the terms of article 43 provisions of such forces is to be made by member states in accordance with the terms of special agreement or agreements. Therefore no member of the UN is obliged under article 42 to employ armed forces, assistance and facilitates in excess of those specifically provided for in the special agreement or agreements mentioned in article 43.

Contrary to the UN system, however, the AU has an African Stand by Force (ASF) so that the PSC can use this force at any time when ever a grave circumstance that could endanger the peace, stability and security of the continent arises.
The peace and Security Council is a standing decision making organ of the union on areas of prevention, management and resolution of conflicts. It is also established to serve as a collective security and early warning arrangement to facilitate timely and efficient response to crisis situations in the continent. A member state of the union who wants to be elected as member of the PSC has to clearly show that she has complied with all the requirements enshrined in article 5(2) of the establishing protocol. Though it can be said that these requirements do have either direct or indirect relationship with the maintenance of peace and security of the continent, they tend to be redundant. For instance, a member state contributes to the promotion and maintenance of peace and security in Africa through participation in conflict resolution, peace making and peace building efforts at regional and continental level.

Article 4(h) of the constitutive act articulates the right of the PSC to intervene in a member state pursuant to a decision of the assembly of the union in respect of grave circumstances, namely war crimes, genocide and crimes against humanity. The Act, however, does not indicate whether the definition of intervention is to be restricted to the use of force or it is to be viewed broadly as including medication, peacekeeping missions, sanctions and any other non-forceful measures. It is also worth observing that the Act does not refer to the UN Security Council, which is the primary instrument for dealing with the type of emergencies referred to in article 4(h) of the constitutive act.

It cannot be denied, however, that the AU appreciates the contribution of the UN in the interconnected areas of peacekeeping and peace building in Africa. In the structures and mechanisms of the AU, obviously, there is a persistent suspicion that the UN, currently in the grip of the two dominant Anglophone powers (the US and the UK) pass only lip service to addressing peace and security challenges in Africa, as compared with crisis points else where. That is why the AU opts to have its own organ, the PSC, to keep peace, stability and security of
the continent by responding appropriately. Nevertheless, neither the AU constitutive act nor the protocol relating to the establishment of the PSC empowers the latter with all the powers it would expect to have. The peace and Security Council is empowered only to recommend on the necessity of intervention but the decision as to whether intervention is necessary or not is left to the Assembly of AU. It has neither the power to determine the modalities of intervention nor the power to decide on the necessity of intervention on a member state. This has the effect of making the PSC impotent as the general assembly of the AU meets only once in a year.

In the final analysis, since members of regional arrangements such as AU are also member of the UN, the PSC of AU is expected to co-operate with the UNSC in enforcing measures against either state or non-state entities, in order to achieve their common goal—the maintenance of peace and Security. Any enforcement measure taken by the PSC of AU to maintain the peace, stability and security of Africa can not reduce the power of the UNSC to take measures it thinks necessary to avert a dispute or situation in Africa.

On the basis of the analysis and conclusions made herein above the writer tries to recommend the following measures to be taken in order to enable the UN security council and the AU peace and security council function as expected by the Charter and the Protocol Relating to the Establishment of AU PSC, respectively.

➢ The UN must be restructured, together with its component bodies in general and the SC in particular, in order to be cable of confronting its various tasks. That is, the UN, which is emerged from the results and lessons of the Second World War, is still marked by the period of its creation.
This is true with respect to the make up of its subsidiary bodies and auxiliary institutions and with respects to its functions nothing, for instance, other than being victors and vanquished justifies why such countries as Germany and Japan do not figure among the permanent members of the security council. Such reformation might be achieved by increasing the numbers of permanent members and limiting their veto power to only very specific situations.

- The UNSC has no strong and well-organized armed force. While it is in need the SC should check whether a member state has entered into a special agreement or not. If there is no special agreement or agreements or inadequacy of force to be collected based on the special agreement, the SC will fail to react in a certain situation. Therefore, the SC will require better support, more effective and more numerous peace-keeping forces. Under certain circumstances, it will be desirable to put certain national armed forces at the disposal of the Security Council.

- The PSC has to have power to decide on the necessity of intervention with respect to grounds mentioned under article 4(h) of the constitutive act not only with out securing the consent of the AU general assembly but also with out securing the consent of UNSC. This is because, firstly, the listed grounds are grave in their nature and give no time to stop for thinking let alone to wait until the general assembly of AU meet once a year. So, leaving the power to determine the necessity of intervention to the AU General Assembly means ignoring the situation while unnecessary consequences are happening. Secondly, even though article 53(1) allows a regional arrangement to take enforcement measure only on condition that the UNSC authorize to do so, the
provision must be interpreted broadly so that regional organizations can take prompt enforcement action with respect to the grave circumstances without securing the UNSC on condition that they notify this act to the UNSC later, on a reasonable time.

- The extent of power of regional arrangements to take enforcement action should be clearly stated by the UN charter, so that there will not be jurisdictional concurrence by the UNSC and AU PSC.

- The AU PSC should be given primary responsibility concerning a dispute or situation that may endanger the peace and security of the continent so that the in actions of UNSC concerning disputes in Africa would be avoided.
BIBLIOGRAPHY

I. BOOKS

12. Murphy, J.F., *The UN and the Control of International Violence*, (St. paul Minn: west publishing, 1982)

**II. JOURNALS**

III Legislations and Conventions

2. The Covenant of the League of Nations, 1919
3. Declaration AHR (dec/5/ (XXXVI) on the framework for an OAU response to unconstitutional change of government, Adopted by the 36\textsuperscript{th} ordinary session held in Lome, Togo, on 10-12 July 2000
4. Declaration of Heads of State and Government of the establishment, within the AU, of a mechanism for conflict prevention, management and resolution, adopted by 29\textsuperscript{th} ordinary session in Cairo, Egypt, June 1993
5. General Assembly Resolution 39(1), Dec 12, 1946
7. The Protocol Relating to the Establishment of the Peace and Security Council of the African Union, Adopted by the 1\textsuperscript{st} Ordinary session of the Assembly of AU, Durban, South African, 9 July 2002
8. The Statute of the International Criminal Tribunal for Former Yugoslavia, 1996

IV. Internet sources
